Internal Revenue Service
DEPARTMENT OF THE TREASURY

LB&I International Practice Service Transaction Unit

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Volume	1	Outbound Income Shifting	UIL Code	9411
Part	1.8	Gain Exportation (through contribution or reorg)	Level 2 UIL	9411.08
Chapter	1.8.1	Outbound Transfers of Property to Foreign Corporations – IRC 367	Level 3 UIL	N/A
Sub-Chapter	N/A	Outbound Transfer of Property		

Unit Name	Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

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Issue and Transaction Overview

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

U.S. corporations can transfer appreciated property in a wide variety of nonrecognition transactions such as capital contributions, corporate liquidations, and reorganizations (e.g. IRC 332, 351, 354, 356, or 361). However, when such normal nonrecognition transactions result in transfer of property to a Foreign Corporation (FC), U.S. tax law imposes restrictions on the tax free transfer of certain types of property by override of the normal nonrecognition rules. Without an override of the nonrecognition provisions, the gain on the appreciated property would permanently escape U.S. tax upon the outbound transfer of the property to a FC. IRC 367 restricts the ability to secure nonrecognition on outbound transfers of certain property to a FC, usually to a Controlled Foreign Corporation (CFC), and requires taxation of the gain. On the other hand, outbound transfers of certain property may continue to receive nonrecognition treatment, if certain criteria are met.

The general purpose of IRC 367(a)(1) is to tax the built-in gain on appreciated property that is transferred in an outbound transaction. Specifically, IRC 367(a)(1) imposes taxation on the outbound transfer of property by a U.S. person to a FC in what would otherwise be a nontaxable exchange (i.e., because a nonrecognition rule, such as IRC 351, normally would apply if both parties to the transaction were U.S. persons). Under this general rule, the FC that receives the property (the transferee) is not treated as a corporation for purposes of determining the extent to which the gain is recognized. Thus, the normal corporate nonrecognition provisions do not apply to the outbound transfer of the appreciated property. On the other hand, the U.S. government does not want to deter U.S. persons from investing outside of the U.S. for valid business reasons. Accordingly, if an exception to IRC 367(a)(1) is applicable, then the built-in gain on the appreciated property that is transferred in an outbound transaction will remain subject to the general nonrecognition rules.

An outbound transfer of intangible property within the meaning of IRC 936(h)(3)(B) ("IRC § 367(d) intangibles") to a FC in a IRC 351 or 361 transaction is not subject to IRC 367(a) but rather IRC 367(d) would apply. Unless otherwise noted, this Practice Unit does not address transfers of IRC 367(d) property.

Issue and Transaction Overview (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

This Practice Unit provides a general overview of potential tax effects on an outbound transfer of appreciated property and whether IRC 367 may be applicable to your transaction. The outbound transfer of property by a U.S. person to a FC may be accomplished in several different ways. The Practice Unit will illustrate the most common scenarios that a U.S. person may enter into in order to transfer property offshore to a FC in non-taxable exchanges, such as:

- Formation of a new CFC (or additional contribution of property to existing CFC)
- Incorporation of a foreign branch
- Check-the-Box (CTB) of an existing Disregarded Entity (DE) to be treated as a CFC
- Outbound asset reorganization

This Practice Unit addresses the basic rules of IRC 367(a) on the outbound transfer of appreciated property by a US person to a FC in an otherwise nontaxable exchange. Additionally, this Practice Unit provides general information on the exceptions to IRC 367(a)(1). The applicability of the exceptions to IRC 367(a)(1) taxation depends on the type of property being transferred. For example, if certain requirements are met, the appreciated gain on property that a domestic corporation transfers to a foreign corporation will not be recognized if the foreign corporation uses the property in the active conduct of a trade or business outside of the US.

The examiner should determine if an outbound transfer of property has occurred in some type of restructuring transaction and whether gain should be reported based upon the type of property transferred.

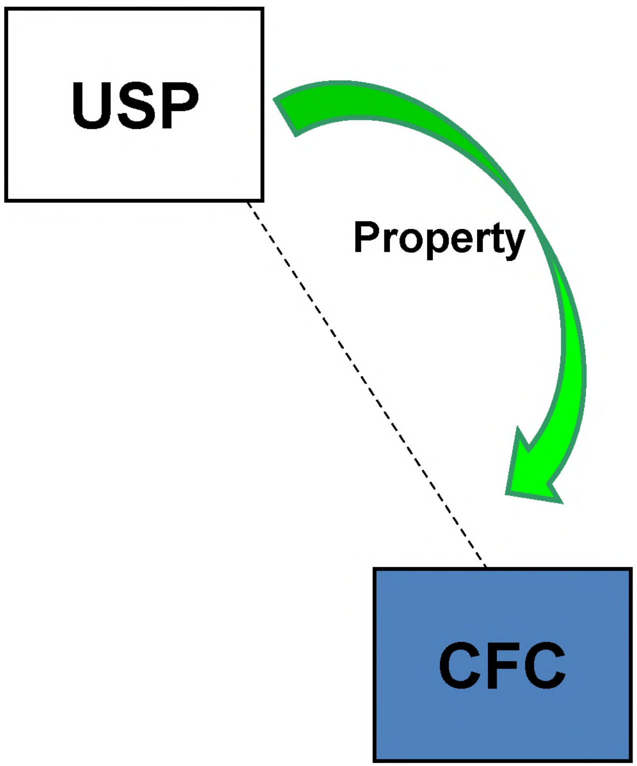
NOTE: In this Practice Unit, the reference to "property" may include stock, tangible, and/or intangible property. This Practice Unit will provide a general overview for the outbound transfer of each type of property.

Volume	Part	Chapter	Sub-Chapter
Outbound Income Shifting	Gain Exportation (through contribution or reorg)	Outbound Transfers of Property to Foreign Corporations – IRC 367	Outbound Transfer of Property

Transaction and Fact Pattern

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Diagram of Transaction



Facts

<u>Illustration #1 – Formation of new CFC</u>

<u>Facts:</u>

- U.S. Parent (USP) wants to create a presence in a foreign country in which it has no existing business.
- USP creates a new foreign corporation, CFC, in the foreign country.
- Upon formation of CFC, USP transfers property to the new foreign corporation in exchange for CFC stock under IRC 351.
- Property transferred to CFC consists of tangible and intangible property previously owned by USP in the U.S.

<u>Results</u>:

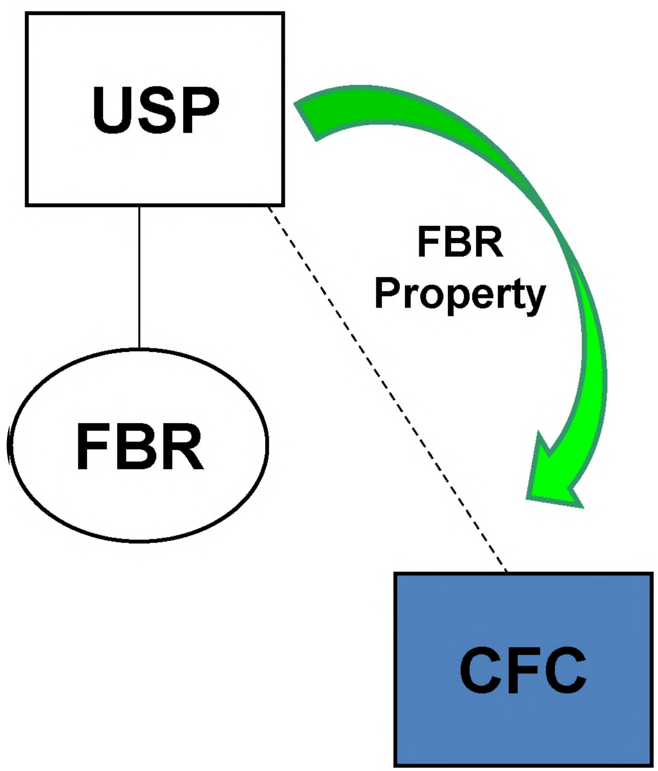
- The transfer of property to CFC in exchange for stock qualifies as a nonrecognition exchange under IRC 351.
- Since CFC is a foreign corporation, IRC 367(a) must be considered for the outbound transfer of any appreciated property by USP to new CFC.

<u>Variation</u>:

- If CFC already existed, USP may contribute additional property to CFC under IRC 351 and IRC 367(a) would also apply.

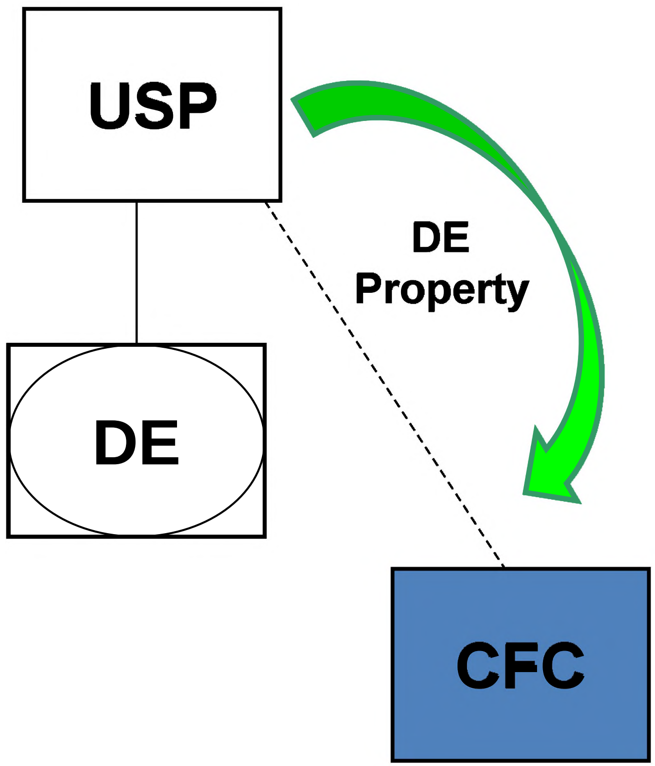
Transaction and Fact Pattern (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Diagram of Transaction	Facts
	**Illustration #2 - Incorporation of foreign branch** **Facts:** ▪ USP operates a Foreign Branch (FBR). ▪ FBR property consists of tangible and intangible property. ▪ USP wants to incorporate FBR in the same foreign country. ▪ USP transfers the FBR property to a new foreign corporation, CFC, in exchange for CFC stock under IRC 351. **Results**: ▪ The transfer of property to CFC in exchange for stock qualifies as a non-recognition exchange under IRC 351. ▪ Since CFC is a foreign corporation, IRC 367(a) must be considered on the outbound transfer of any appreciated property by USP to new CFC. ▪ NOTE: The physical location of the property may not have moved, but the ownership of such property changed from USP to CFC.

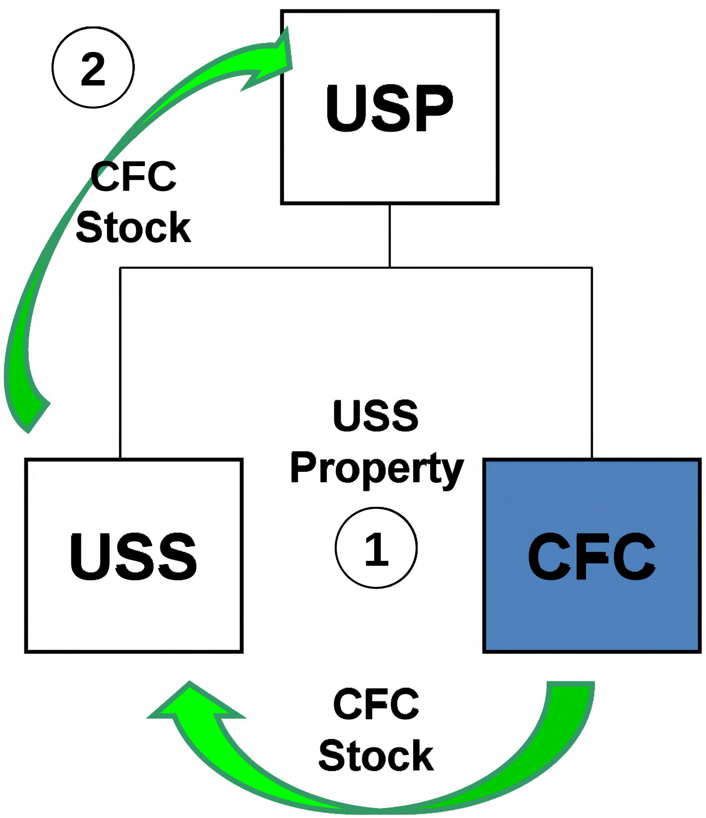
Transaction and Fact Pattern (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Diagram of Transaction	Facts
	**Illustration #3 – Existing DE Re-CTB to be treated as a foreign corporation for U.S. tax purposes** **Facts:** ▪ USP owns DE, a hybrid entity, located in a foreign country. ▪ Upon formation/creation of DE in year 1 by USP, an initial classification CTB election was made for DE to be treated as a disregarded entity of USP. ▪ In Year 3, USP makes a CTB election to treat DE as a corporation for U.S. tax purposes. Thereafter, DE is a CFC for U.S. tax. ▪ Due to the Yr 3 CTB election, USP is deemed to transfer DE's property to a new foreign corporation, CFC, in exchange for CFC stock under IRC 351. **Results:** ▪ The deemed transfer of DE property to CFC in exchange for CFC stock qualifies as a nonrecognition exchange under IRC 351. ▪ Since CFC is a foreign corporation, IRC 367(a) must be considered on the outbound transfer of any appreciated property by USP to new CFC.

Transaction and Fact Pattern (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Diagram of Transaction	Facts
	**<u>Illustration #4 – Outbound Asset Reorganization</u>** **<u>Facts:</u>** ▪ USP owns a U.S. Subsidiary (USS), and files a consolidated U.S. return with USS. ▪ USS owns both tangible and intangible property. ▪ USS completes an outbound asset "D" reorganization, pursuant to a plan of reorganization. ▪ <u>Step 1</u>: USS transfers all of its property outbound to CFC in exchange for CFC stock under IRC 361(a). In this exchange, CFC issues (or is deemed to issue) its stock to USS in exchange for USS's property. ▪ <u>Step 2</u>: USS distributes its CFC stock received (or deemed to be received) in step 1 to USP as a liquidating distribution pursuant to IRC 361(c) as part of the reorganization. USP, the shareholder, exchanges its USS stock (cancelled) for the CFC stock received from USS. USS ceases to exist. **<u>Results</u>:** ▪ The entire transaction qualifies as an outbound "D" reorganization under IRC 368(a)(1)(D). ▪ Due to the fact that the transferee (CFC) is foreign, IRC 367(a) must be considered on the outbound transfer of any appreciated property by USS to CFC.

Effective Tax Rate Overview

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

ETR of Company

- The ETR of the company may show an increase in the year of the outbound property transfer either due to current taxation of some portions of the transaction or due to a tax accrual created for an uncertain tax position(s) related to the transfer. In the subsequent years there may be a decline in the ETR as the beneficial tax effects of the transaction result in a shift of income to a lower tax jurisdiction.

ETR Impact of Adjustment

- Absent the application of the Subpart F rules, any transfer of appreciated property (other than certain transferred stock covered by a Gain Recognition Agreement (GRA)) to a FC located in a low-tax foreign country that meets an exception to IRC 367(a)(1) will successfully reduce any potential taxation on a subsequent disposition of such property by the CFC thereby resulting in a reduction to the ETR.
- A material amount of branch loss recapture which has previously offset U.S. taxable income may cause an increase to ETR.

Summary of Potential Issues

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview	
Issue 1	Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.
Issue 2	Whether the outbound transfer of **stock** requires gain recognition under the IRC 367(a)(1) general rule or meets the IRC 367(a)(2) "stock exception" to secure nonrecognition.
Issue 3	Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.
Issue 4	Whether the outbound transfer of intangible property requires income recognition under the IRC 367(d) general rule.

All Issues, Step 1: Initial Factual Development

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

The general purpose of IRC 367(a)(1) is to tax the built-in gain on appreciated property that is transferred in an outbound transaction. Specifically, IRC 367(a)(1) imposes taxation on the outbound transfer of property by a U.S. person to a FC in what would otherwise be a nontaxable exchange. If an exception to IRC 367(a)(1) is applicable, then the built-in gain on the appreciated property that is transferred in an outbound transaction will remain subject to the general nonrecognition rules. An outbound transfer of intangible property within the meaning of IRC 936(h)(3)(B) ("IRC 367(d) intangibles") to a FC in a IRC 351 or 361 transaction is not subject to IRC 367(a) but rather IRC 367(d) would apply. See also Slides 3 and 4 for a general overview of the transaction and issue.

Fact Element	Resources	6103 Protected Resources
▪ Determine the type of transaction that occurred that involved a transfer of property to a FC. Does this transaction look similar to one of the illustrations provided in this unit?		
▪ Illustration #1 – Formation of new foreign corporation or additional contribution of property to an existing FC ▪ Illustration #2 – Incorporation of foreign branch ▪ Qualifies as an outbound IRC § 351 exchange of property for stock in CFC	▪ Organizational Chart ▪ Step Plan, if any ▪ Tax Opinion, if any ▪ Form 5471 (initial filing) ▪ Form 5471, Schedule O, Section C ▪ Form 926, Part III and IV ▪ IRC 351 Disclosure ▪ IRC 6038B Disclosure ▪ GRA, if applicable	

All Issues, Step 1: Initial Factual Development (cont’d)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

The general purpose of IRC 367(a)(1) is to tax the built-in gain on appreciated property that is transferred in an outbound transaction. Specifically, IRC 367(a)(1) imposes taxation on the outbound transfer of property by a U.S. person to a FC in what would otherwise be a nontaxable exchange. If an exception to IRC 367(a)(1) is applicable, then the built-in gain on the appreciated property that is transferred in an outbound transaction will remain subject to the general nonrecognition rules. An outbound transfer of intangible property within the meaning of IRC 936(h)(3)(B) (“IRC 367(d) intangibles”) to a FC in a IRC 351 or 361 transaction is not subject to IRC 367(a) but rather IRC 367(d) would apply. See also Slides 3 and 4 for a general overview of the transaction and issue.

Fact Element	Resources	6103 Protected Resources
▪ Illustration #3 – Existing DE re-CTB to be treated as a FC. ▪ Qualifies as a “deemed” outbound IRC 351 exchange of property for stock in CFC.	▪ Organizational Chart ▪ Step Plan, if any ▪ Tax Opinion, if any ▪ Form 8832, Part 1, 1b, 2a, 2b, 3b, 6d ▪ Form 8858 (final filing – pre-CTB) ▪ Form 5471 (initial filing – post-CTB) ▪ Form 5471, Schedule O, Section C ▪ Form 926, Part III and IV ▪ IRC 351 Disclosure ▪ IRC 6038B Disclosure ▪ GRA, if applicable	

All Issues, Step 1: Initial Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

The general purpose of IRC 367(a)(1) is to tax the built-in gain on appreciated property that is transferred in an outbound transaction. Specifically, IRC 367(a)(1) imposes taxation on the outbound transfer of property by a U.S. person to a FC in what would otherwise be a nontaxable exchange. If an exception to IRC 367(a)(1) is applicable, then the built-in gain on the appreciated property that is transferred in an outbound transaction will remain subject to the general nonrecognition rules. An outbound transfer of intangible property within the meaning of IRC 936(h)(3)(B) ("IRC 367(d) intangibles") to a FC in a IRC 351 or 361 transaction is not subject to IRC 367(a) but rather IRC 367(d) would apply. See also Slides 3 and 4 for a general overview of the transaction and issue.

Fact Element	Resources	6103 Protected Resources
▪ Illustration #4 – Outbound asset reorganization – Transfer of property to a FC ▪ Qualifies as a IRC 368(a)(1)(D) reorganization if substantially all the property of USS was transferred to CFC in exchange for CFC stock and such stock was distributed to USP as a liquidating distribution by USS as part of the reorganization. ▪ NOTE: If property other than CFC stock was received in the exchange by USP, must consider boot tax consequences. ▪ NOTE: There are other types of reorganizations that could invoke IRC 367 such as: IRC 368(a)(1)(A), (C), (D), or (F). The Practice Unit illustrates a "D" reorg as the example.	▪ Organizational Chart ▪ Step Plan, if any ▪ Tax Opinion, if any ▪ Form 5471 (initial filing) ▪ Form 5471, Schedule O, Section C & E ▪ Form 926, Part III and IV ▪ IRC 368 Disclosure ▪ IRC 6038B Disclosure ▪ IRC 367(a)(5) election and agreement, if applicable ▪ GRA, if applicable	

All Issues, Step 1: Initial Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

The general purpose of IRC 367(a)(1) is to tax the built-in gain on appreciated property that is transferred in an outbound transaction. Specifically, IRC 367(a)(1) imposes taxation on the outbound transfer of property by a U.S. person to a FC in what would otherwise be a nontaxable exchange. If an exception to IRC 367(a)(1) is applicable, then the built-in gain on the appreciated property that is transferred in an outbound transaction will remain subject to the general nonrecognition rules. An outbound transfer of intangible property within the meaning of IRC 936(h)(3)(B) ("IRC 367(d) intangibles") to a FC in a IRC 351 or 361 transaction is not subject to IRC 367(a) but rather IRC 367(d) would apply. See also Slides 3 and 4 for a general overview of the transaction and issue.

Fact Element	Resources	6103 Protected Resources
▪ A review of the disclosures, Form 926 and Form 5471, Schedule O discloses that USP has transferred property outbound to a FC possibly subject to IRC 367(a). ▪ A review of such documents will provide a basic understanding of the transactions that have occurred. Several transactions may be part of a much larger restructuring transaction. ▪ Organizing the disclosures in a chronological order will assist in the analysis of the transaction. ▪ A clear understanding of the type of transaction is key in determining the tax consequences. When warranted, request the taxpayer to provide a step by step presentation of the transaction to the audit team.	Request: ▪ Organizational Charts (preferably step by step) ▪ Step Plan, if any ▪ Tax Opinion, if any ▪ Secure listing of property transferred (Fair Market Value (FMV) and basis) ▪ Review balance sheet information relating to property transfer – NOTE: Self created intangibles may not be reflected on balance sheet. ▪ Valuation Study, if applicable	

All Issues, Step 1: Initial Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

The general purpose of IRC 367(a)(1) is to tax the built-in gain on appreciated property that is transferred in an outbound transaction. Specifically, IRC 367(a)(1) imposes taxation on the outbound transfer of property by a U.S. person to a FC in what would otherwise be a nontaxable exchange. If an exception to IRC 367(a)(1) is applicable, then the built-in gain on the appreciated property that is transferred in an outbound transaction will remain subject to the general nonrecognition rules. An outbound transfer of intangible property within the meaning of IRC 936(h)(3)(B) ("IRC 367(d) intangibles") to a FC in a IRC 351 or 361 transaction is not subject to IRC 367(a) but rather IRC 367(d) would apply. See also Slides 3 and 4 for a general overview of the transaction and issue.

Fact Element	Resources	6103 Protected Resources
▪ Based upon the review of the documents, you have clearly identified what property was transferred. ▪ Does any of the transferred property have a potential gain? (Gain = FMV over inside basis of property). **DECISION POINT:** ▪ Taxation under IRC 367(a) is based upon a property by property determination. You are only concerned with built-in gain property for purposes of IRC 367(a). ▪ Categorize the built-in gain property into type of property categories – See Part III Form 926 for possible property classes ▪ Discard any transferred loss property from further analysis under IRC 367(a). IRC 367(a) does not operate to permit recognition of built-in loss on transferred property.	Request: ▪ Listing of property transferred (FMV and basis) ▪ Valuation study on the outbound transfer of property ▪ Balance sheet information relating to property transfer – NOTE: Self created intangibles are not normally reflected on a balance sheet. Review: ▪ Form 926, Part III attached to the return	

Issue 1, Step 2: Review Potential Issues

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Explanation of Issue	Resources	6103 Protected Resources
Generally, when a U.S. person transfers appreciated property outbound to a FC in an otherwise nontaxable exchange (such as IRC 332, 351, 354, 356, or 361) IRC 367(a)(1) trumps the nonrecognition provision and requires immediate taxation on the gain realized in the exchange. In order for an outbound transfer of property to be subject to IRC 367, three elements must exist: ▪ a U.S. person must be the transferor; ▪ a transfer of property to a FC; and ▪ an exchange described in a nonrecognition code section such as IRC 332, 351, 354, 356 or 361.	▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ IRC 7701(a)(30) ▪ IRC 332, 351, 354, 356 and/or 361 ▪ BNA 919-3rd - TMFEDPORT No. 919 s II – *Scope and General Operations of IRC 367(a)* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 10.02 (*USTIMAJV WGL Para. 10.02) – General IRC 367(a) Rules*	
<u>OUTBOUND ASSET REORGANIZATION</u>: Did the outbound transfer of property result from an outbound asset reorganization of a domestic corporation (such as a reorganization under IRC 368(a)(1)(A), (C), (D), or (F))?	▪ IRC 367(a)(5) ▪ IRC 361 ▪ Treas. Reg. 1.367(a)-7 – 367(a)(5) Rules on IRC 361(a) or (b) Transactions	

Issue 1, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Explanation of Issue	Resources	6103 Protected Resources
DECISION POINT: If so, you need to consider IRC 367(a)(5). Under IRC 367(a)(5), the ability to utilize the stock and/or trade or business exceptions under IRC 367(a)(2) and 367(a)(3), respectively, are limited in some IRC 361(a) or (b) outbound **transfers** of property pursuant to an outbound asset reorganization. Unless the U.S. transferor is controlled by 5 or fewer domestic corporations as well as certain basis adjustments and other conditions are met, the exceptions under IRC 367(a) are not available to the transaction requiring full gain recognition on the outbound transfer of all appreciated property. See Illustration #4 for an example of an IRC 361 exchange in an outbound asset reorganization. In this example, USS is owned by 5 or fewer domestic corporations, USP. Thus the stock and/or trade or business exceptions may apply.	▪ IRC 367(a)(5) ▪ IRC 361 ▪ Treas. Reg. 1.367(a)-7 – 367(a)(5) Rules on IRC 361(a) or (b) Transactions ▪ BNA 919-3rd TMFEDPORT No. 919 s IV – *Special Rules for U.S.-to-Foreign Reorganizations under 367(a)(5)* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 10.03 (*USTIMAJV WGL Para. 10.03) – Special Rules for Outbound Asset Reorganizations – IRC 367(a)(5)* ▪ See related Practice Unit – "IRC 367(a)(5) – Limits on Outbound Transfers of Property in Section 361 Transfers" (to be developed) for further details.	

Issue 1, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview		
Issue 1		
Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.		
Explanation of Issue	**Resources**	**6103 Protected Resources**
NOTE: An outbound asset reorganization is being mentioned in this unit only to illustrate that an outbound transfer of property may occur in a reorganization. See related Practice Unit – "Outbound Asset Reorganizations" (to be developed) for further analysis on outbound asset reorganizations and related issues as these issues are beyond the scope of this unit.		

Issue 1, Step 3: Additional Factual Development

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Fact Element	Resources	6103 Protected Resources
▪ Is the transferor, the person/entity that is transferring the property, a U.S. person? – Citizen or resident of the U.S. – Domestic partnership (P/S) with U.S. persons as partners – Domestic corporation – Certain estates (other than a foreign estate) – Certain trusts – Foreign P/S with U.S. persons as partners – DE with U.S. person as owner	▪ IRC 7701(a)(30) – Definition of U.S. person ▪ Treas. Reg. 1.367(a)-1T(c)(3) – Transfers involving partnership	
▪ Was there a transfer of property to a foreign corporation (FC)? ▪ Were the ownership and rights to the property transferred to a FC? – If not, a transfer of the property may not have occurred.	▪ IRC 7701(a)(5) ▪ Treas. Reg. 301.7701-2 ▪ Treas. Reg. 301.7701-3 ▪ *DuPont v. U.S. - 471 F.2d 1211 (Ct. Cl. 1973)*	

Issue 1, Step 3: Additional Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Fact Element	Resources	6103 Protected Resources
▪ In order for IRC 367(a) to apply to the transfer, the transferee must be a FC. ▪ Is the foreign entity receiving the property in the outbound transfer treated as a FC for U.S. tax purposes? – A FC or – A foreign business entity classified as a corporation for U.S. tax purposes, pursuant to a CTB election. **DECISION POINT:** If so, proceed with IRC 367(a) analysis. ▪ If not, IRC 367(a) does not apply: –If transferee is a DE or a branch of the transferor, the transfer is disregarded for U.S. tax purposes. –If transferee is a foreign partnership for U.S. tax purposes, you must consider Subchapter K of the code and the IRC 6038B rules for possible issues.	▪ IRC 7701(a)(5) ▪ Treas. Reg. 301.7701-2 ▪ Treas. Reg. 301.7701-3	

Issue 1, Step 3: Additional Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Fact Element	Resources	6103 Protected Resources
▪ Does the transfer qualify as a IRC 332, 351, 354, 356, or 361 exchange? **DECISION POINT:** One of these nonrecognition provisions must first apply to the outbound transfer of property in order to invoke IRC 367(a). ▪ Review the transaction steps and criteria for the appropriate nonrecognition provision. ▪ <u>NOTE:</u> If you determine that the transfer in not described in IRC 332, 351, 354, 356 or 361 then IRC 367(a)(1) is not applicable. ▪ <u>NOTE:</u> If the transaction is an outbound IRC 332 liquidation of a domestic corporation to a FC, the rules of IRC 367(e)(2) apply and not IRC 367(a) (despite the reference to 332 in 367(a)(1)). The rules of IRC 367(e)(2) differ from IRC 367(a). See related Practice Unit – "Outbound Liquidation of a U.S. Corp to Foreign Parent - IRC 367(e)(2) Overview" (Document Control Number (DCN) ISI/9422.10_01)	▪ IRC 332 ▪ IRC 351 ▪ IRC 354 ▪ IRC 356 ▪ IRC 361 ▪ IRC 368 - Reorganizations ▪ See related Practice Unit – "Outbound Liquidation of a U.S. Corp to Foreign Parent - IRC 367(e)(2) Overview" (Document Control Number (DCN) ISI/9422.10_01)	

Issue 1, Step 3: Additional Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Fact Element	Resources	6103 Protected Resources
▪ An understanding of the type of property transferred outbound under IRC 367(a) is key in determining whether gain is required to be recognized or whether certain property will meet one of the exceptions under IRC 367(a)(2) or (3). ▪ Determine the potential gain/loss of property transferred outbound to the FC. – Segregate property with built-in gains from built-in loss property – Remove loss property from further analysis – Loss property can not be used to offset potential gain on appreciated property. – Focus additional analysis on appreciated property for potential IRC 367(a) gain recognition – IRC 367(a)(1) applies on an asset-by-asset basis	In addition to the items requested during initial development, consider requesting copies of: ▪ Detailed listing of property transferred (including FMV and basis) – property by property – compare to property listed on Form 926 ▪ Valuation study of the property transferred, if any ▪ Verification of tax basis of property, if warranted ▪ Review Taxpayer's treatment of any reported gains on the U.S. tax return	

Issue 1, Step 3: Additional Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Fact Element	Resources	6103 Protected Resources
▪ Identification of appreciated property transferred outbound to FC by category: – Stocks/securities – Trade or business property – Tainted property – Special rule property – Intangibles ▪ Consider IRC 367(a) or (d) sections, as applicable, to each category. ▪ If an outbound asset reorganization has occurred, consider IRC 367(a)(5) restrictions to the ability to utilize the stock and/or trade or business property exceptions. See Illustration #4 for example of an outbound asset reorganization.	▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(a)-3 – Stock exception ▪ Treas. Reg. 1.367(a)-4T – Special rule property ▪ Treas. Reg. 1.367(a)-5T – Tainted property ▪ Treas. Reg. 1.367(d)-1T – Transfers of intangible property to foreign corporations	

Issue 1, Step 4: Develop Arguments

<table>
<tr><th colspan="3">Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview</th></tr>
<tr><td colspan="3">Issue 1</td></tr>
<tr><td colspan="3">Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.</td></tr>
<tr><th>Explanation of Approach</th><th>Resources</th><th>6103 Protected Resources</th></tr>
<tr><td>A determination must be made on whether the outbound transfer of property meets the requirement for the application of IRC § 367.

<u>Three Factors</u>:

▪ The transferor is a U.S. person.
▪ Transfer of property to a FC
▪ Transfer qualifies under IRC 332, 351, 354, 356, or 361.

DECISION POINT: If all of the above is true, the outbound transfer of property to the FC is subject to IRC 367(a) and you should continue with the analysis in this unit. If not, IRC 367 does not apply.</td><td>▪ IRC 367(a)
▪ Treas. Reg. 1.367(a)-1T
▪ Treas. Reg. 1.367(a)-1T(c)(3) – Transfers involving partnership
▪ IRC 7701(a)(5)
▪ IRC 7701(a)(30)
▪ Treas. Reg. 301.7701-2
▪ Treas. Reg. 301.7701-3
▪ IRC 332, 351, 354, 356 and/or 361</td><td></td></tr>
</table>

Issue 1, Step 4: Develop Arguments (cont’d)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Explanation of Approach	Resources	6103 Protected Resources
Based upon the analysis, you have determined that the outbound transfer of property is subject to IRC 367. At this point, you now must apply IRC 367(a) to the different types of property transferred offshore. Generally, when a U.S. person transfers appreciated property outbound to a FC in an otherwise nontaxable exchange (such as IRC 351, 354, 356, or 361) IRC 367(a)(1) trumps the nonrecognition provision and requires immediate taxation on the gain realized in the exchange. Under IRC 367(a)(1), the foreign transferee corporation is not treated as a corporation for purposes of determining the extent in which gain is recognized on the transfer, thus rendering the normal nonrecognition provision inapplicable. The general rule of IRC 367(a)(1) is taxation on the gain resulting from the outbound transfer of property to a FC. However, several exceptions to such general rule can be found in IRC 367(a) and its related regulations for transfers of certain types of property.	▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ IRC 332, 351, 354, 356 and/or 361 ▪ BNA 919-3rd - TMFEDPORT No. 919 s II – *Scope and General Operations of IRC 367(a)* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 10.02 (*USTIMAJV WGL Para. 10.02) – General IRC 367(a) Rules*	

Issue 1, Step 4: Develop Arguments (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Explanation of Approach	Resources	6103 Protected Resources
Any outbound transfer of built-in loss property is not taken into consideration. Per Treas. Reg. 1.367(a)-1T(b), no losses can be claimed as a result of IRC 367 nor can losses attributable to such property be used to offset the potential gain recognition on appreciated property. IRC 367(a) provides for nonrecognition of gain on transfers of certain property, if specific criteria and/or reporting requirements are met. Such property could include: ▪ stock and/or securities of domestic or foreign corporations (*IRC 367(a)(2)* – commonly known as the "stock exception") See Issue 2 ▪ certain property used in an active trade or business outside of the U.S. (IRC 367(a)(3) – commonly known as the "trade or business exception"). See Issue 3 Regardless of the use in an active trade or business, certain property requires immediate gain recognition and is commonly known as "tainted property" or property subject to special rules under IRC 367(a)(3)(B) and Treas. Reg. 1.367(a)-4T and -5T. See Issue 3	▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(a)-3 – Stock exception ▪ Treas. Reg. 1.367(a)-4T – Special rule property ▪ Treas. Reg. 1.367(a)-5T – Tainted property ▪ BNA 919-3rd - TMFEDPORT No. 919 s II – *Scope and General Operations of IRC 367(a)* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 10.02 (*USTIMAJV WGL Para. 10.02) – General IRC 367(a) Rules*	

Issue 1, Step 4: Develop Arguments (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 1

Whether the outbound transfer of property to a foreign corporation in what otherwise would be a nonrecognition exchange is subject to taxation under IRC 367.

Explanation of Approach	Resources	6103 Protected Resources
DECISION POINT: If one or more of the following applies, you should continue with analysis under IRC 367 with each applicable issue. You may need to review more than one of the following issues based upon the assets transferred. – Go to Issue # 2 - Gain on transferred stock/securities – Go to Issue # 3 - ▪ Gain on transferred tangible property ▪ Gain on transferred tainted property ▪ Gain on transferred special rule property ▪ Gain on trade or business property from a foreign branch that has previously deducted losses – Go to Issue # 4 - Outbound transfer of intangibles	▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(a)-3 – Stock exception ▪ Treas. Reg. 1.367(a)-4T – Special rule property ▪ Treas. Reg. 1.367(a)-5T – Tainted property ▪ Treas. Reg. 1.367(d)-1T – Transfers of intangibles property to foreign corporations ▪ Treas. Reg. 1.367(a)-7 – 367(a)(5) Rules on IRC 361(a) or (b) Transactions	

Issue 2, Step 2: Review Potential Issues

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 2

Whether the outbound transfer of **stock** requires gain recognition under the IRC 367(a)(1) general rule or meets the IRC 367(a)(2) "stock exception" to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
You have determined that one of the properties transferred by USP to CFC was stock in another CFC in a transaction similar to Illustration #3. As a result, you must determine if the taxpayer properly applied the rules for the stock exception in order to secure nonrecognition. The outbound transfer of certain stocks and/or securities may also qualify as an exception to the general rule of IRC 367(a)(1) if certain requirements are met pursuant to IRC 367(a)(2) and related regulations. Normally, an outbound transfer of foreign stock to a FC may avoid recognition of gain if the taxpayer timely files a valid GRA with its U.S. return for the year of transfer. An outbound transfer of domestic stock may also be transferred tax-free if a GRA is filed and additional factors are met. If the transaction involved an outbound transfer of stock, the taxpayer would be required to file a GRA and Form 8838 in order to secure nonrecognition treatment under IRC 367(a).	▪ Gain Recognition Agreement ▪ Form 926, Part III or Treas. Reg. 6038B-1(c)(4) Statement (as applicable) ▪ Treas. Reg. 1.6038B-1T(c)(4)(ii) ▪ IRC 367(a)(2) ▪ Treas. Reg. 1.367(a)-3 – Outbound transfer of stock/securities to a foreign corporation ▪ Treas. Reg. 1.367(a)-8 – GRA requirements	

Issue 2, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview		
Issue 2		
Whether the outbound transfer of **stock** requires gain recognition under the IRC 367(a)(1) general rule or meets the IRC 367(a)(2) "stock exception" to secure nonrecognition.		
Explanation of Issue	**Resources**	**6103 Protected Resources**
See related Practice Unit - "Outbound Transfer of Stock" (to be developed) for detailed rules and requirements in order to avoid taxation on the outbound transfer of stocks and/or securities and GRAs.	▪ BNA 919-3rd TMFEDPORT No. 919 s IV – *See Section B – Outbound Transfers of Stock or Securities – Basic Framework; See Section F – Gain Recognition Agreements* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 9.04 (*USTIMAJV WGL Para. 9.04) – Outbound Transfer of CFC Stock; Para.* 9.02 *(USTIMAJV WGL Para. 9.02) – Outbound Transfer of Domestic Stock;* Para. 9.05 *(USTIMAJV WGL Para. 9.05) – Indirect Stock Transfers*	

Issue 2, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 2

Whether the outbound transfer of **stock** requires gain recognition under the IRC 367(a)(1) general rule or meets the IRC 367(a)(2) "stock exception" to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
▪ Once you have identified that the taxpayer has transferred appreciated property that may require gain recognition under IRC 367(a), a separate determination must be made for each property. ▪ If stock or securities were transferred outbound, a determination must be made on whether the taxpayer properly complied with the reporting requirements (such as the filing of a GRA) in order to receive nonrecognition under IRC 367(a)(2) and its regulations. ▪ If there was an outbound IRC 361 exchange as part of an outbound asset reorganization where stock was transferred, a determination must be made on whether or not the exceptions to IRC 367(a)(2) or (3) are available in order to secure possible nonrecognition; otherwise, the transfer is fully taxable.	▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ Treas. Reg. 1.367(a)-3 – Stock exception ▪ Treas. Reg. 1.367(a)-7 – 367(a)(5) Rules on IRC 361(a) or (b) Transactions	

Issue 2, Step 3: Additional Factual Development

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 2

Whether the outbound transfer of **stock** requires gain recognition under the IRC 367(a)(1) general rule or meets the IRC 367(a)(2) “stock exception” to secure nonrecognition.

Fact Element	Resources	6103 Protected Resources
▪ Based upon your analysis of the facts, you have determined that an outbound transfer of appreciated stock has occurred. You should determine how the taxpayer reflected this transaction on the return. ▪ Did the taxpayer file a GRA on the U.S. return? ▪ Review return for the filing of: – Gain Recognition Agreement (GRA) – Form 8838 – Form 926, Part III, if filed. NOTE: A Form 926 is required for stock transfers that are not covered by a GRA. ▪ See Practice Unit - “Gain Recognition Agreements” (to be developed) for further assistance in examining transfers in which a GRA has been timely filed.	▪ Treas. Reg. 1.367(a)-3 – Stock transfers ▪ Treas. Reg. 1.367(a)-8 – GRA requirements ▪ Treas. Reg. 1.6038B-1(b)(2) ▪ Treas. Reg. 1.6038B-1T(c)(4)(ii) ▪ BNA 919-3rd TMFEDPORT No. 919 s IV – *See Section B – Outbound Transfers of Stock or Securities – Basic Framework; See Section F – Gain Recognition Agreements* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 9.04 (*USTIMAJV WGL Para. 9.04) – Outbound Transfer of CFC Stock;* Para. 9.02 (*USTIMAJV WGL Para. 9.02) – Outbound Transfer of Domestic Stock; Para.*9.05 (*USTIMAJV WGL Para. 9.05) – Indirect Stock Transfers*	

Issue 2, Step 4: Develop Arguments

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 2

Whether the outbound transfer of **stock** requires gain recognition under the IRC 367(a)(1) general rule or meets the IRC 367(a)(2) "stock exception" to secure nonrecognition.

Explanation of Approach	Resources	6103 Protected Resources
▪ If CFC stock was transferred and a GRA was filed, you must also consider IRC 367(b) and Treas. Reg. 1.367(b)-4 for possible immediate gain recognition under IRC 367(b), even though a timely filed GRA may have been filed. ▪ If the taxpayer has timely filed a valid GRA in order to secure nonrecognition for the initial transfer, you must ensure that no subsequent events occurred in the year of transfer or during the next 5 years of the GRA certification period that would trigger the gain on the GRA. After the 5-year certification period**,** the GRA is no longer in effect and the gain to USP is non-taxable. ▪ If an outbound transfer of stock occurs and the taxpayer files a GRA, then a Form 926 is not required for the stock transfer under IRC 6038B. The timely filing of the GRA will satisfy the reporting requirement for the transfer of stock covered by the GRA. ▪ If the stock transfer had a built-in loss, no GRA is required; however, a Form 926 is still required. No loss is allowed on the transfer.	▪ Treas. Reg. 1.367(a)-3 – Stock transfers ▪ Treas. Reg. 1.367(a)-8 – GRA requirements ▪ Treas. Reg. 1.6038B-1(b)(2) ▪ Treas. Reg. 1.6038B-1T(c)(4)(ii) ▪ BNA 919-3rd TMFEDPORT No. 919 s IV – *<u>See Section B</u> – Outbound Transfers of Stock or Securities – Basic Framework; <u>See Section F</u> – Gain Recognition Agreements* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 9.04 (*USTIMAJV WGL Para. 9.04) – Outbound Transfer of CFC Stock* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 9.02 (*USTIMAJV WGL Para. 9.02) – Outbound Transfer of Domestic Stock*	

Issue 2, Step 4: Develop Arguments (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 2

Whether the outbound transfer of **stock** requires gain recognition under the IRC 367(a)(1) general rule or meets the IRC 367(a)(2) "stock exception" to secure nonrecognition.

Explanation of Approach	Resources	6103 Protected Resources
DECISION POINT: ▪ If no GRA is filed on the outbound transfer of appreciated stock, you may have potential immediate gain recognition under IRC 367(a). ▪ You need to question the taxpayer on its position on why no gain was reported. ▪ An adjustment to increase taxable income by the amount of gain may be required. ▪ Taxpayer may have failed to file the required GRA. Keep in mind, the taxpayer may officially request reasonable cause for failure to file the GRA. If relief is requested, the examiner must make a determination on whether to grant reasonable cause. ▪ See Practice Units –DCN: ISO/9411.08-04(2014) - "Outbound Transfer of Stock - IRC 367(a) Overview" and "Gain Recognition Agreements" (to be developed) for further assistance in examining transfers of stock and GRA requirements.	▪ Treas. Reg. 1.367(a)-3 – Stock transfers ▪ Treas. Reg. 1.367(a)-8 – GRA requirements ▪ Proposed GRA and 6038B Regs - Jan-2013 - 78 FR 6772-01 – Change from reasonable cause to willful standard for failure to file GRA ▪ BNA 919-3rd TMFEDPORT No. 919 s IV – *See Section F – Gain Recognition Agreements* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 9.04 (*USTIMAJV WGL Para. 9.04) – Outbound Transfer of CFC Stock;* Para. 9.02 *(USTIMAJV WGL Para. 9.02) – Outbound Transfer of Domestic Stock*	

Issue 3, Step 2: Review Potential Issues

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
During your analysis, you have determined that USP transferred its branch's or DE's trade or business property, consisting of inventory, plant, and equipment to CFC similar to Illustration #2 or Illustration #3. In order to meet the "trade or business exception" under IRC 367(a)(3) and receive nonrecognition on the outbound transfer of property, such property must be: ▪ Used in the active conduct of a trade or business (T/B) ▪ By the transferee foreign corporation ▪ Outside of the U.S.	▪ Form 926, Part III or Treas. Reg. 1.6038B-1T(c)(4)(i) Statement ▪ Treas. Reg. 1.6038B-1T(c)(4)(i) ▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(a)-4T – Special rule property ▪ Treas. Reg. 1.367(a)-5T – Tainted property ▪ BNA 919-3rd TMFEDPORT No. 919 s III – *See Section A – The Foreign Business Asset Exception* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 10.02 (*USTIMAJV WGL Para. 10.02) – See Para. 10.02[3] – Active Trade or Business*	

Issue 3, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
DECISION POINT: The determination of the requirements for the "trade or business exception" is made on a property-by-property basis. If the property meets the criteria above, then the gain on the transfer of such property is nontaxable. However, you must determine if the property is "tainted property" (property that is subject to immediate taxation regardless of the use in the T/B) or if the property was from a foreign branch that previously deducted foreign branch losses. IRC 367(a)(1) does not apply to any property transferred that meets the "trade or business exception" under IRC 367(a)(3), and no exception to the "trade or business exception" applies. For any property that does not meet the criteria above, IRC 367(a)(1) taxation may apply.	▪ NOTE: See Practice Unit - "Trade or Business Exception to IRC 367(a)" (to be developed) for more in-depth analysis of the trade or business exception.	

Issue 3, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
Once you have identified that the taxpayer has transferred appreciated property that may require gain recognition under IRC 367(a), a separate determination must be made for each property. ▪ Regardless of the use in an active trade or business, certain property requires immediate gain recognition and is commonly known as "tainted property" or property subject to "special rules" under Treas. Reg. 1.367(a)-4T and -5T. ▪ If the transferred property meets the criteria as a "tainted property" or "special rule property", gain is immediately subject to taxation under IRC 367(a)(3)(B). ▪ If the transfer of foreign branch property occurred and the foreign branch previously deducted losses, branch losses must be recaptured. ▪ An outbound transfer of property by a U.S. person to a FC subject to IRC 367(a) must be reflected on a Form 926 pursuant to Treas. Reg. 1.6038B-1(b). If the outbound transfer of property occurred and the taxpayer did not timely file a Form 926, a penalty under IRC 6038B may be applicable.	▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(a)-3 – Stock transfers Treas. Reg. 1.367(a)-4T – Special rule property ▪ Treas. Reg. 1.367(a)-5T – Tainted property ▪ Treas. Reg. 1.367(d)-1T – Transfers of intangible property to foreign corporations ▪ Treas. Reg. 1.367(a)-7 – 367(a)(5) Rules on IRC 361(a) or (b) Transactions ▪ IRC 6038B ▪ Treas. Reg. 1.6038B-1(b)(1) – Filing of Form 926	

Issue 3, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
NOTE: If there was an outbound IRC 361 exchange as part of an outbound asset reorganization, a determination must be made on whether or not the exceptions to IRC 367(a)(2) or (3) are available in order to secure possible nonrecognition; **otherwise,** the transfer is fully taxable.		

Issue 3, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **<u>trade or business property</u>** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
Does any of the property meet the definitions below? **DECISION POINT:** <u>Tainted property</u> consists of: ▪ Inventory (described in IRC 1221(a)(1) or (3)) ▪ Installment obligations, account receivables or similar property ▪ Foreign currency or other property denominated in foreign currency ▪ Intangible property (defined in IRC 936(h)(3)(B) – subject to IRC 367(d)) ▪ Leased property Transfer of other property subject to <u>special rules</u> under Treas. Reg. 1.367(a)-4T may also require immediate taxation. Such property includes: ▪ Depreciated property used in the U.S. ▪ Property to be leased – leasing business of the transferee ▪ Property to be sold ▪ Certain oil and gas working interests	▪ Form 926, Part III or Treas. Reg. 1.6038B-1T(c)(4)(i) Statement ▪ Treas. Reg. 1.6038B-1T(c)(4)(vii) ▪ IRC 367(a) ▪ Treas. Reg. 1.367(a)-1T ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(a)-4T – Special rule property ▪ Treas. Reg. 1.367(a)-5T – Tainted property	

Issue 3, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview		
Issue 3		
Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.		
Explanation of Issue	**Resources**	**6103 Protected Resources**
NOTE: See Practice Unit – "Tainted Assets and Special Rule Assets" (to be developed) for more in-depth analysis of tainted property and special property transfers.	▪ BNA 919-3rd TMFEDPORT No. 919 s III – *See Section B – Property Ineligible for Foreign Business Asset Exception* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 10.02 (U*STIMAJV WGL Para. 10.02) – See Para. 10.02[4] – [5] – Tainted Assets and Depreciable Property*	

Issue 3, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
The outbound transfer of foreign branch property may invoke a foreign branch loss recapture under IRC 367(a)(3)(C) regardless of the "trade or business exception". Was the transferred property owned by a foreign branch or a DE that previously deducted losses on the U.S. return? **DECISION POINT:** If so, the outbound transfer of foreign branch property may invoke a foreign branch loss recapture inclusion under IRC 367(a)(3)(C) regardless of the "trade or business exception". If not, no foreign branch loss recapture is required. See Illustration #2 and Illustration #3 for possible scenarios to which IRC 367(a)(3)(C) may apply. Gain on the outbound transfer of trade or business property may be recognized to the extent of the foreign branch's previously deducted losses. An interplay of IRC 367(a)(3)(C) exists with the recapture of the "overall foreign loss" rules of IRC 904(f)(3) and Dual Consolidated Loss (DCL) rules of IRC 1503(d).	▪ Form 926, Part III or Treas. Reg. 1.6038B-1T(c)(4)(i) Statement ▪ Treas. Reg. 1.6038B-1T(c)(5) ▪ IRC 367(a)(3)(C) ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(a)-6T – Transfer of foreign branch with previously deducted losses ▪ BNA 919-3rd TMFEDPORT No. 919 s III – *See Section C – Branch Loss Recapture Rule* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 10.02 (*USTIMAJV WGL Para. 10.02) – See Para. 10.02[6] – Branch Loss Recapture*	

Issue 3, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Issue	Resources	6103 Protected Resources
See related Practice Unit – "Recapture of Foreign Branch Losses under IRC 367(a)" (to be developed) for further analysis of the recapture of foreign branch losses, if applicable.	▪ See related Practice Unit – "DCL Triggering Events" (to be developed) for further analysis on possible triggering events of prior DCLs resulting from the outbound transfer of foreign branch or DE property	

Issue 3, Step 3: Additional Factual Development

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Fact Element	Resources	6103 Protected Resources
▪ Based upon your analysis of the facts, you determined USP transferred inventory, for example, to CFC which qualifies as "tainted property". You must now determine if the taxpayer has properly reported the gain on the return. ▪ A review of the tax return is required to determine the amount of gain, if any, that has been reported. ▪ If unsure of whether gain was reported on the return, issue an Information Document Request (IDR) to taxpayer for confirmation.	Review: ▪ Form 926, Part III (column e) for indications that gain was to be reported by taxpayer. ▪ Form 926, Part IV, Question 13 & 14 ▪ Review return for proper inclusion of the gain on the outbound transfer of property (e.g. Other Income, Sch. D, Form 4797, etc.)	

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Issue 3, Step 3: Additional Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Fact Element	Resources	6103 Protected Resources
TRANSFER OF FOREIGN BRANCH PROPERTY WITH PREVIOUSLY DEDUCTED LOSSES: ▪ Based upon your analysis of the facts, you have determined that an outbound transfer of foreign branch property occurred. ▪ You need to determine if the foreign branch (or DE) has previously deducted losses on the U.S. return. ▪ You should request a historical income/loss calculation for the foreign branch to determine if there is a net loss. ▪ NOTE: A transfer of foreign branch property may occur in the transfer of property of a foreign branch or of a DE. The tax consequences under IRC 367 are the same. See Illustration #2 and Illustration #3.	▪ Review Form 926, Part IV, Questions 11 and 13 ▪ Review return for dual consolidated loss elections or annual certifications ▪ Request taxpayer's branch loss recapture calculations ▪ Request gain calculation on foreign branch property	

Issue 3, Step 4: Develop Arguments

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Approach	Resources	6103 Protected Resources
TAINTED PROPERTY and/or SPECIAL RULE PROPERTY TRANSFER: ▪ Based upon your analysis of the facts, you have determined that an outbound transfer of appreciated tainted property (inventory) and/or special rule property has occurred. You must now determine if the taxpayer has properly reported the gain on the return. **DECISION POINT:** ▪ Upon review of the return, USP reported gain relating to the outbound transfer of tainted/special rule property . Is the proper amount of gain reported? Adjustment may be needed. ▪ If gain has not been reported, you should discuss this potential issue with the taxpayer. A possible adjustment to report the gain may be required under IRC 367(a)(3)(B).	▪ Treas. Reg. 1.367(a)-4T – Special rule property ▪ Treas. Reg. 1.367(a)-5T – Tainted property Review: ▪ Form 926, Part III (column e) for indications that gain was to be reported by taxpayer. ▪ Form 926, Part IV, Questions 13 and 14 ▪ Review return for proper inclusion of the gain on the outbound transfer of property ▪ Review valuation study for FMV of property and computation of basis.	

Issue 3, Step 4: Develop Arguments (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 3

Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.

Explanation of Approach	Resources	6103 Protected Resources
TRANSFER OF FOREIGN BRANCH WITH PREVIOUSLY DEDUCTED LOSSES: Based upon your analysis of the facts, you have determined that: ▪ an outbound transfer of foreign branch property has occurred and ▪ the foreign branch (i.e., FBR in Illustration 2 or DE in Illustration 3) has previously deducted losses on the U.S. return. If the gain on the transfer of branch property exists, then a comparison must be made to the previously deducted net losses. Recapture of previously deducted losses may be required to the extent of gains under IRC 367(a)(3)(C).	Review: ▪ Form 926, Part IV, Questions 11 and 13 ▪ Historical income/loss calculation for the foreign branch to determine if there is a net previously deducted branch loss. Request taxpayer's branch loss recapture calculations ▪ Gain calculation on foreign branch property (property by property basis) ▪ DCL domestic use elections and/or annual certifications relating to the foreign branch (FBR or DE) attached to the U.S. return.	

Issue 3, Step 4: Develop Arguments (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview		
Issue 3		
Whether the outbound transfer of **trade or business property** requires gain recognition under the IRC 367(a)(1) general rule or meets the "trade or business exception" under IRC 367(a)(3) to secure nonrecognition.		
Explanation of Approach	**Resources**	**6103 Protected Resources**
If recapture of previously deducted losses is required, you must determine if the proper amount of losses have been recaptured under IRC 367(a)(3)(C). **DECISION POINT:** If the taxpayer has properly reported the amount, no further action is required. If the taxpayer has failed to report or reported an incorrect amount of foreign branch loss recapture, an adjustment may be required. See related Practice Unit – "Recapture of Foreign Branch Losses under IRC 367(a)" (to be developed) for further analysis of the recapture of foreign branch losses, if applicable.	▪ IRC 367(a)(3)(C) ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(a)-6T – Transfer of foreign branch with previously deducted losses ▪ BNA 919-3rd TMFEDPORT No. 919 s III – *See Section C – Branch Loss Recapture Rule* ▪ U.S. Tax. Int'l Mergers, Acquis. & Jt. Ventures Para. 10.02 (*USTIMAJV WGL Para. 10.02) – See Para.10.02[6] – Branch Loss Recapture*	

Issue 4, Step 2: Review Potential Issues

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 4

Whether the outbound transfer of **intangible property** requires income recognition under the IRC 367(d) general rule

Explanation of Issue	Resources	6103 Protected Resources
Once you have identified that the taxpayer has transferred appreciated property that may require gain recognition under IRC 367(a), a separate determination must be made for each property. If § 367(d) intangibles were transferred outbound under IRC 351 or 361, a deemed annual payment under IRC 367(d) should be reported. NOTE: Not all intangible property are reflected on the corporate balance sheet. You must secure an understanding of the corporation's business in order to determine the existence of valuable intangible property that may have been transferred offshore in the transaction. NOTE: A perpetual license of intangible property may constitute an IRC 367(d) transfer based on all the facts/circumstances. A license of intangible property that is not subject to IRC 367(d) may be addressed under IRC 482. If intangible property described in IRC 936(h)(3)(B) (IRC 367(d) intangibles) was transferred, the outbound transfer of certain intangible property under IRC 351 or 361 is not subject to IRC 367(a), but is subject to special rules in IRC 367(d). Any assets transferred that are not 367(d) intangibles are subject to 367(a).	▪ IRC 367(d) ▪ IRC 936(h)(3)(B) ▪ Treas. Reg. 1.367(a)-1T ▪ Treas. Reg. 1.367(a)-2T – Trade or business exception ▪ Treas. Reg. 1.367(d)-1T – Transfers of intangible property to foreign corporations ▪ Treas. Reg. 1.367(a)-7 – 367(a)(5) Rules on IRC 361(a) or (b) Transactions	

Issue 4, Step 2: Review Potential Issues (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 4

Whether the outbound transfer of **intangible property** requires income recognition under the IRC 367(d) general rule

Explanation of Issue	Resources	6103 Protected Resources
Is IRC 367(d) treatment required for any transferred intangible property to CFC? **DECISION POINT :** Outbound transfer of intangible property under IRC 351 or 361 generally requires an annual "royalty" payment over the useful life of the intangible property (not to exceed 20 years) pursuant to IRC 367(d) and not a one-time taxable gain on the outbound transfer. An outbound transfer of intangible property by a U.S. person to a FC must be reflected on a Form 926 pursuant to Treas. Reg. 1.6038B-1(b). If the outbound transfer of property occurred and the taxpayer did not timely file a Form 926, a penalty under IRC 6038B may be applicable. In addition, if intangible property is transferred, a disclosure is required under Treas. Reg. 1.6038B-1T(d).	▪ IRC 367(a)(3)(B)(iv) and 367(d) ▪ Treas. Reg. 1.367(a)-1T(d)(5) – Definition of intangible property ▪ Treas. Reg. 1.367(a)-5T(e) – Intangible property exclusion from trade or business exception. ▪ Treas. Reg. 1.367(d)-1T – Transfers of intangible property to foreign corporations ▪ Form 926, Part III or Treas. Reg. 1.6038B-1(c)(4) Statement (as applicable) ▪ IRC 6038B ▪ Treas. Reg. 1.6038B-1(b)(1) – Filing of Form 926 ▪ Treas. Reg. 1.6038B-1T(d) – Intangible transfers ▪ Form 926	

Issue 4, Step 3: Additional Factual Development

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 4

Whether the outbound transfer of **intangible property** requires income recognition under the IRC 367(d) general rule.

Fact Element	Resources	6103 Protected Resources
▪ Based upon your analysis of the facts, you have determined that an outbound transfer of intangible property has occurred including patents and know-how. You must now determine if the taxpayer has properly accounted for the IRC 367(d) income inclusion. ▪ You need to identify all of the intangible property transferred and the FMV of such intangible property. ▪ A clear understanding of the taxpayer's business, functional analysis, and the existence of self-created intangibles is needed. ▪ Taxpayers may not fully account for all of the intangibles transferred.	▪ Review Form 926, Part III , Part IV, Questions 15a and b, 17a and b ▪ Review return for IRC 6038B disclosures on outbound transfer of intangibles per Treas. Reg. 1.6038B-1T(d) ▪ Treas. Reg. 1.6038B-1(b)(1) – Filing of Form 926 ▪ Treas. Reg. 1.6038B-1T(d) ▪ Refer to related Practice Unit – "Deemed Annual Royalty Income Under IRC 367(d)" (DCN: ISO/9411.02_01(2013) for further analysis requirements for the outbound transfer of intangibles. ▪ BNA 920-3rd TMFEDPORT No. 920 s III –*Section 367(d) Transactions*	

Issue 4, Step 3: Additional Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 4

Whether the outbound transfer of **intangible property** requires income recognition under the IRC 367(d) general rule.

Fact Element	Resources	6103 Protected Resources
▪ You have determined that USP claims to have transferred foreign goodwill. You must determine if taxpayer excluded a substantial amount of FMV attributable to foreign goodwill or going concern (excluded from IRC 367(d) treatment). ▪ Analysis of the determination of the appropriate arms length royalty rate under IRC 482 principles. **CONSULTATION:** A consultation with the assigned local counsel, economist, engineer, and/or transfer pricing practice specialist may be needed in order to properly identify and value all of the transferred intangible property subject to 367(d) income recognition. See related Practice Unit – "Deemed Annual Royalty Income Under IRC 367(d)" (DCN: ISO/9411.02_01(2013)) on outbound transfers of intangibles for further analysis and computation of income inclusion under IRC 367(d). See related Practice Unit – "Identifying Foreign Goodwill or Going Concern" (DCN: ISO/CBB/V_1_01(2014) under development) for further analysis of "foreign goodwill or going concern".	▪ Review Form 926, Part III , Part IV, Questions 15a and b, 17a and b ▪ Review return for IRC 6038B disclosures on outbound transfer of intangibles per Treas. Reg. 1.6038B-1T(d) ▪ Treas. Reg. 1.6038B-1T(d) ▪ Refer to related Practice Unit – "Deemed Annual Royalty Income Under IRC 367(d)" (DCN: ISO/9411.02_01(2013) for further analysis requirements for the outbound transfer of intangibles. ▪ BNA 920-3rd TMFEDPORT No. 920 s III –*Section 367(d) Transactions*	

Issue 4, Step 3: Additional Factual Development (cont'd)

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview

Issue 4

Whether the outbound transfer of **intangible property** requires income recognition under the IRC 367(d) general rule.

Fact Element	Resources	6103 Protected Resources
CONSULTATION: A consultation with the assigned local counsel, economist, engineer, and/or transfer pricing practice specialist may be needed in order to properly identify and value all of the transferred intangible property subject to 367(d) income recognition. See related Practice Unit – "Deemed Annual Royalty Income Under IRC 367(d)" (DCN: ISO/9411.02_01(2013)) on outbound transfers of intangibles for further analysis and computation of income inclusion under IRC 367(d). See related Practice Unit – Identifying Foreign Goodwill or Going Concern" (DCN: ISO/CBB/V_1_01(2014) under development) for further analysis of "foreign goodwill or going concern".	▪ See related Practice Unit – Identifying Foreign Goodwill or Going Concern" (DCN: ISO/CBB/V_1_01(2014) under development) for further analysis of foreign goodwill or going concern ▪ Treas. Reg. 1.367(a)-1T(d)(5)(iii) – Definition of foreign goodwill ▪ Treas. Reg. 1.367(d)-1T(b) – Exclusion of foreign goodwill from IRC 367(d)	

Issue 4, Step 4: Develop Arguments

Outbound Transfers of Property to Foreign Corporation – IRC 367 Overview		
Issue 4		
Whether the outbound transfer of **intangible property** requires income recognition under the IRC 367(d) general rule.		
Explanation of Approach	**Resources**	**6103 Protected Resources**
▪ Based upon your analysis, you determined that some of the branch's or DE's property transferred by USP to CFC consisted of intangibles. You have identified that patents, know-how and foreign goodwill have been transferred. ▪ You must now determine if the taxpayer has properly accounted for the IRC 367(d) income inclusion for the transfer. ▪ A determination of the arm's length royalty rate must be made in consultation with the economist, counsel and other transfer pricing specialist. ▪ If USP has not properly reported the IRC 367(d) income inclusion, an adjustment should be proposed. ▪ NOTE: This Practice Unit provides only general principles to the outbound transfer of intangibles. See related Practice Unit – "Deemed Annual Royalty Income Under IRC 67(d)" (DCN: ISO/9411.02_01(2013) for further analysis for the outbound transfer of intangibles.	▪ Review: – Form 926, Part III , Part IV, Questions 15a and b, 17a and b – IRC 6038B disclosures on outbound transfer of intangibles – Taxpayer's computation of IRC 367(d) royalty income inclusion ▪ Treas. Reg. 1.367(d)-1T – Transfers of intangible property to foreign corporations ▪ Treas. Reg. 1.6038B-1T(d) ▪ BNA 920-3rd TMFEDPORT No. 920 s III –*Section 367(d) Transactions*	

Training and Additional Resources

Chapter 1.8.1 Outbound Transfers of Property to Foreign Corporations – IRC 367		
Type of Resource	**Description(s) and/or Instructions for Accessing**	**References**
CENTRA sessions	▪ (TPO) & (IBC) FY 2013 CPE CENTRA – Hot Topics of IRC 367 – Enter "IBC Hot Topics of 367" in search on CENTRA Enrollment Tab ▪ 367(d) CENTRA - # 44752 – Access Code 388910 ▪ (TPO) CENTRA - FY2011 CPE – Intangible Migration	

Glossary of Terms and Acronyms

Acronym	Definition
CFC	Controlled Foreign Corporation
CTB	Check-the-Box
DCL	Dual Consolidated Loss
DCN	Document Control Number (for Practice Unit)
DE	Disregarded Entity
FBR	Foreign Branch
FC	Foreign Corporation
FMV	Fair Market Value
GE/LU	Gain Exportation/Loss Utilization Focus Area of Income Shifting IPN
GRA	Gain Recognition Agreement
IDR	Information Document Request
O/B	Outbound
T/B	Trade or Business
USP	U.S. Parent
USS	U.S. Subsidiary

Index of Related Issues

Issue	Associated UIL(s)	References
Outbound Transfer of Intangibles	9411.02-02	See Practice Unit – "Deemed Annual Royalty Income Under IRC 367(d)" (DCN: ISO/9411.02_01(2013)) See O/B GE/LU SharePoint Site and Intangibles SharePoint Site
Outbound Transfer of Stock	9411.08	See Practice Unit – Outbound Transfer of Stock – IRC 367(a) Overview" (DCN: ISO/9411.08_04(2014) in progress See O/B Income Shifting (GE/LU) SharePoint Site.
Gain Recognition Agreements	9411.08	Practice Unit Coming Soon See O/B Income Shifting GE/LU SharePoint Site.
Trade or Business Exception to IRC 367(a)	9411.08	Practice Unit Coming Soon See O/B Income Shifting GE/LU SharePoint Site.
Recapture of Foreign Branch Losses under IRC 367(a)	9411.08	Practice Unit Coming Soon See O/B Income Shifting GE/LU SharePoint Site.
Limits on Outbound Transfers of Property in 361 Transfers – IRC 367(a)(5)	9411.08	Practice Unit Coming Soon See O/B Income Shifting GE/LU SharePoint Site.

Index of Related Issues (cont'd)

Issue	Associated UIL(s)	References
Outbound Transfer of Intangibles	9411.02-02	See Practice Unit – "Deemed Annual Royalty Income Under IRC 367(d)" (DCN: ISO/9411.02_01(2013)) See O/B GE/LU SharePoint Site and Intangibles SharePoint Site
Outbound Transfer of Stock	9411.08	See Practice Unit – Outbound Transfer of Stock – IRC 367(a) Overview" (DCN: ISO/9411.08_04(2014) in progress See O/B Income Shifting (GE/LU) SharePoint Site
Gain Recognition Agreements	9411.08	Practice Unit Coming Soon See O/B Income Shifting GE/LU SharePoint Site
Trade or Business Exception to IRC 367(a)	9411.08	Practice Unit Coming Soon See O/B Income Shifting GE/LU SharePoint Site
Recapture of Foreign Branch Losses under IRC 367(a)	9411.08	Practice Unit Coming Soon See O/B Income Shifting GE/LU SharePoint Site
Limits on Outbound Transfers of Property in 361 Transfers – IRC 367(a)(5)	9411.08	Practice Unit Coming Soon See O/B Income Shifting GE/LU SharePoint Site