

Department  
of the  
Treasury

Internal  
Revenue  
Service

Office of  
Chief Counsel

# Notice

CC-2002-027

UIL # 861.09-10

June 6, 2002

Subject: Change in Litigating Position Cancel Date: Cancel after one year

## Purpose

The purpose of this notice is to announce a change in the Service's litigating position concerning the application of the doctrine of election to preclude a taxpayer from amending past years' returns to elect retroactively to value assets according to their fair market values for purposes of apportioning interest expense under Temp. Treas. Reg. § 1.861-9T(g).

## Discussion

I.R.C. § 901 allows a credit for foreign income, war profits, and excess profits taxes paid or deemed paid by qualifying taxpayers that elect the foreign tax credit in lieu of a deduction under section 164(a)(3). Section 904(a) limits a taxpayer's foreign tax credit to an amount equal to the precredit U.S. tax on the taxpayer's foreign source taxable income.

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Sections 861(b), 862(b), and 863(a) provide that taxable income attributable to gross income from domestic or foreign sources shall be determined by deducting the expenses, losses, and other deductions properly apportioned or allocated thereto, and a ratable part of any expenses, losses, and other deductions that cannot be definitely allocated to some item or class of gross income. Treas. Reg. §§ 1.861-8 through 1.861-17 provide specific guidance regarding the allocation and apportionment of deductions.

Section 864(e)(2) provides that all allocations and apportionments of interest expense must be made on the basis of assets rather than gross income. Temp. Treas. Reg. § 1.861-9T(g)(1)(ii) provides that taxpayers may elect to value their assets based on their tax book value or fair market value. Once a taxpayer uses the fair market value method, the taxpayer and all related persons must use the fair market value method unless the Commissioner expressly authorizes a change in method. Temp. Treas. Reg. § 1.861-8T(c)(2).

A coordinated issue paper, dated October 22, 2001, concludes that the doctrine of election applies to prevent a taxpayer from amending past years' returns to elect retroactively the fair market value method of apportionment under Temp. Treas. Reg. § 1.861-9T(g)(1)(ii). After careful reconsideration, the Service will no longer argue that the doctrine of election applies to preclude a taxpayer from amending past years' returns to elect retroactively to value assets according to their fair market values for purposes of apportioning interest expense under Temp. Treas. Reg. § 1.861-9T(g).

Any questions concerning the foregoing may be directed to Lisa Shuman of the Office of the Large and Mid-Size Business Division Counsel at (202) 283-8621.

\_\_\_\_\_/s/  
LINDA BURKE  
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(Large and Mid-Size Business)