Department of the Treasury
Internal Revenue Service

APRIL 3, 2020

EFFECTIVE DATE

(04-03-2020)

PURPOSE

(1) This transmits revised IRM 4.61.11, International Examination Guidelines, Development of IRC 367 Transactions and Issues, formerly Transfers of Property by and to Foreign Corporations.

MATERIAL CHANGES

(1) Added IRM 4.61.11.1, Program Scope and Objectives, in accordance with the requirements described in IRM 1.11.2, Internal Management Documents System, IRM Process, and renumbered subsequent subsections accordingly.

(2) Revised, renumbered and renamed former IRM 4.61.11.1, Transfer of Property By and To Foreign Corporations, to IRM 4.61.11.1.6, Background and Introduction.

(3) Incorporated former IRM 4.61.11.2, Background, into new IRM 4.61.11.1.6, Background and Introduction.

(4) Revised IRM 4.61.11.3, IRC 367(a), to incorporate T.D. 9803 (December 16, 2016), which included final regulations issued under IRC 367(a).

(5) Revised IRM 4.61.11.5, IRC 367(d), to incorporate T.D. 9803 (December 16, 2016), which included final and temporary regulations issued under IRC 367(d).

(6) Renamed IRM 4.61.11.7, Steps to Consider When You Analyze an IRC Section 367 Transaction, to Preliminary Audit Steps to Consider in Identifying an IRC 367 Transaction.

(7) Renamed, revised and renumbered prior IRM 4.61.11.8, International Technical Advisor, to IRM 4.61.11.2.2, Other Resources for the Issue Team.

(8) The following new subsections were added:

IRM Subsection	Title
4.61.11.1	Program Scope and Objectives
4.61.11.1.1	Authority
4.61.11.1.2	Roles and Responsibilities
4.61.11.1.3	Program Objectives and Review
4.61.11.1.4	Acronyms
4.61.11.1.5	Related Resources
4.61.11.1.6	Background and Introduction
4.61.11.2	IRC 367 Issue Team
4.61.11.2.1	Assistance from Counsel
4.61.11.2.2	Other Resources for the Issue Team

(9) The following new exhibits were added:

IRM Subsection	Title
4.61.11-1	Acronyms
4.61.11-2	Development of IRC 367 Transactions - Audit Tools, References and Resources

EFFECT ON OTHER DOCUMENTS

This IRM supersedes IRM 4.61.11, Transfers of Property by and to Foreign Corporations, dated May 1, 2006.

AUDIENCE

All LB&I personnel

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4.61.11
Development of IRC 367 Transactions and Issues

Table of Contents

4.61.11.1
(04-03-2020)
Program Scope and Objectives

(1) This IRM provides general guidelines in the development of IRC 367 issues. The guidelines are intended to apply to both inbound and outbound transactions. Unless otherwise noted, this IRM has not yet been amended to reflect changes made by the 2017 Tax Cuts and Jobs Act (P.L. 115-97) (“2017 TCJA”) or regulations issued thereunder.

(2) **Purpose**: The purpose of this IRM is to provide an introduction to IRC 367 and preliminary techniques for IRC 367 examinations.

(3) **Audience**: The intended audience is all LB&I personnel.

(4) **Policy Owner**: TTPO, LB&I

(5) **Program Owner**: TTPO

(6) **Primary Stakeholders**: LB&I personnel

(7) **Program Goals**: The goal of this program is to provide processes to assist with the planning, execution and resolution of IRC 367 examinations.

4.61.11.1.1
(04-03-2020)
Authority

(1) See IRM 4.46.1.1.2, Authority.

4.61.11.1.2
(04-03-2020)
Roles and Responsibilities

(1) Personnel performing IRC 367 examinations, their managers and executives share an equal responsibility in the conduct of a quality IRC 367 examination. Also see IRM 4.46.1.1.3, Roles and Responsibilities.

(2) For case manager responsibilities, see IRM 4.46.1.1.3.1, Case Manager Roles and Responsibilities.

(3) For issue manager responsibilities, see IRM 4.46.1.1.3.2, Issue Manager Roles and Responsibilities.

(4) For responsibilities of managers other than the case manager or issue manager, see IRM 4.46.1.1.1.3.3, Managers of Team Members Who Are Not Designated as the Case Manager or Issue Manager.

4.61.11.1.3
(04-03-2020)
Program Objectives and Review

(1) The goal is to provide the process for conducting IRC 367 examinations focusing on best practices and examination techniques consistent with Publication 5125, LB&I Examination Process.

4.61.11.1.4
(04-03-2020)
Acronyms

(1) See Exhibit 4.61.11-1, Acronyms.

4.61.11.1.5
(04-03-2020)
Related Resources

(1) Related resources include the following:

- Publication 5125, LB&I Examination Process
- IRM 4.10.3, Examination Techniques
- IRM 4.46.3, Planning the Examination
- IRM 4.46.4, Executing the Examination
- IRM 4.46.5, Resolving the Examination
- IRM 4.46.6, Workpapers and Reports Resources

- IRM 4.60.8, International Examination and Processing Procedures
- IRM 4.61.3, Development of IRC 482 Cases
- IRM 4.61.13, Dual Consolidated Losses
- IRM 20.1.1, Penalty Handbook, Introduction and Penalty Relief
- IRM 25.5, Summons

4.61.11.1.6
(04-03-2020)
Background and Introduction

(1) In general, a sale or exchange of property by a taxpayer is a taxable event. IRC 1001. However, IRC 1001 generally does not apply when a taxpayer forms (IRC 351), reorganizes (IRC 354, 355 or 361) or liquidates (IRC 332) a corporation.

(2) IRC 367 was enacted to prevent the use of non-recognition provisions (IRC 332, 351, 354, 355, 361 or 332) to avoid U.S. taxation on the transfer of property by, or to, a CFC. IRC 367 serves two broad purposes:

- To prevent the tax-free removal of appreciated property from U.S. tax jurisdiction
- To preserve the ability to impose U.S. income tax currently, or at a later time, on the accumulated earnings and profits (E&P) of CFCs

4.61.11.2
(04-03-2020)
IRC 367 Issue Team

(1) See IRM 4.46.1.2.1.2 , Issue Teams. The IRC 367 issue team may include a:

- Senior revenue agent (SRA) and revenue agent (RA)
- Economist
- Tax law specialist

(2) In accordance with IRM 4.46.1.1.3, Roles and Responsibilities, there should be coordination and collaboration among team members, specialists and advisors, including the:

- Case manager
- Issue manager
- Team coordinator
- SRA and/or RA
- Computer audit specialist (CAS)
- Counsel
- Other specialists and advisors, as necessary

4.61.11.2.1
(04-03-2020)
Assistance from Counsel

(1) See Chief Counsel Directives Manual (CCDM) 33.1.1, Legal Advice, Roles and Responsibilities for Providing Legal Advice and IRM 4.61.3.3.7, Assistance from Counsel, for information on how Counsel can provide assistance to the issue team. LB&I Field Counsel should be consulted early and throughout the entire examination process. National Office Counsel, in coordination with LB&I Field Counsel, should be consulted on IRC 367 transactions that are very large, complex or involve controversial legal issues.

4.61.11.2.2
(04-03-2020)
Other Resources for the Issue Team

(1) The following TTPO and Cross Border Activities (CBA) Practice Networks are available to assist issue teams with case development and can connect issue teams to other personnel with relevant industry knowledge and expertise:

- The Transfer Pricing Practice Network
- Organization and Restructuring Practice Network

(2) Other specialists such as engineers, financial product specialists and a CAS may also be requested, as needed, following appropriate referral processes. It is important that, as appropriate, assigned specialists be consulted regarding internal meetings, information document request (IDR) issuances and responses, questionnaires, interviews, tours, and other audit steps. For example, an engineer may be helpful during interviews in a case in which software development processes are important.

(3) See Exhibit 4.61.11-2 – General IRC 367 Audit Tools, References and Resources.

4.61.11.3
(04-03-2020)
IRC 367(a)

(1) IRC 367(a) is intended to prevent a U.S. person from transferring appreciated property to a foreign corporation in a tax-free organization/contribution or reorganization, whereby the untaxed appreciation may escape the tax jurisdiction of the United States.

(2) IRC 332, 351, 354, 356 and 361 only apply if the transferee is a corporation. Subject to certain exceptions, IRC 367(a)(1) generally provides that if a U.S. person transfers appreciated property (including stock) to a foreign corporation (an “outbound transfer”) in connection with an exchange described in IRC 332, 351, 354, 356 or 361 the foreign corporation will not be treated as a corporation for purposes of determining the extent to which gain (but not loss) will be recognized. Consequently, by deeming the foreign corporation not to be a foreign corporation, IRC 367(a)(1) deprives the U.S. transferor of the tax-free treatment afforded under these provisions.

(3) An outbound transfer of intangible property in an exchange described in IRC 351 or 361 is subject to the rules of IRC 367(d) and not IRC 367(a).

Note: The definition of “intangible property” for purposes of IRC 367(d) was amended by the 2017 TCJA. For example, effective for transfers after December 31, 2017, “goodwill,” “going concern value” and “workforce in place” are expressly enumerated as intangible property.

(4) IRC 367(a)(3)(A) and Treas. Reg. 1.367(a)-2(a)(2) provide that IRC 367(a)(1) does not apply to “eligible” property transferred to a foreign corporation for use by the foreign corporation in the active conduct of a trade or business outside the United States (“active trade or business exception”). Treas. Reg. 1.367(a)-2(b) provides that “eligible” property for purpose of the active trade or business exception is limited to tangible property, a working interest in oil and gas property and a financial asset.

Note: The 2017 TCJA removed IRC 367(a)(3), eliminating the active trade or business exception for transfers after December 31, 2017.

(5) Treas. Reg. 1.367(a)-3 contains exceptions to the general rule of gain recognition under IRC 367(a) for certain outbound exchanges/transfers of stock or securities:

- Treas. Reg. 1.367(a)-3(a)(2) provides that certain exchanges of stock made pursuant to certain reorganizations may be excepted from gain recognition.
- Treas. Reg. 1.367(a)-3(b) sets forth the conditions under which a transfer of stock in a foreign corporation may be excepted from gain recognition. For example, the regulations generally provide that the U.S.

transferor may avoid current gain recognition on the transfer by properly entering into a gain recognition agreement (GRA).
- Treas. Reg. 1.367(a)-3(c) sets forth the conditions under which a transfer of stock in a domestic corporation may be excepted from gain recognition.

(6) IRC 367(a)(5), redesignated IRC 367(a)(4) by the 2017 TCJA, provides that in the case of an exchange described in IRC 361(a) or (b) (an exchange of property by a corporation that is a party to a reorganization of property solely for stock or securities in another corporation that is a party to the reorganization), the exceptions to IRC 367(a)(1) provided under IRC 367(a)(2) and (a)(3) are “turned off.” However, IRC 367(a)(5) (now IRC 367(a)(4)) also provides that if certain basis adjustments and other conditions provided in regulations are satisfied, the exceptions are not “turned off.”

(7) A taxpayer that makes an outbound transfer that is subject to IRC 367(a) may be required to report the transfer in accordance with IRC 6038B. Failure to properly report the transfer under IRC 6038B may subject the taxpayer to a penalty, as well as an extended statute of limitations under IRC 6501(c)(8). See IRC 6038B and Treas. Reg. 1.6038B-1.

4.61.11.4
(04-03-2020)
IRC 367(b)

(1) The primary purpose of IRC 367(b) is to preserve the U.S.’s ability to tax earnings accumulated by a CFC.

(2) IRC 367(b) provides that in the case of any exchange described in IRC 332, 351, 354, 355, 356 or 361 in connection with which there is no transfer of property described in IRC 367(a)(1), a foreign corporation shall be considered to be a corporation except to the extent provided in regulations which are necessary or appropriate to prevent the avoidance of federal income taxes.

(3) Regulations generally require the current recognition of all or a portion of a CFC’s E&P for exchanges subject to IRC 367(b).

- ***Example 1:*** In a reorganization described in IRC 368(a)(1)(B), a U.S. person may transfer stock in a CFC to a foreign corporation, which is not a CFC after the transfer, and enter into a GRA for the transfer. Since the U.S. person’s exchange is not subject to IRC 367(a)(1) because of the GRA, the exchange will be subject to IRC 367(b) and the regulations thereunder. Consequently, the U.S. person may be required to currently recognize the E&P attributable to the CFC stock it transferred (“section 1248 amount”). See Treas. Reg. 1.367(b)-4. See Treas. Reg. 1.367(b)-4.
- ***Example 2:*** When a CFC liquidates into its single domestic corporate owner under IRC 332, the regulations under IRC 367(b) generally require the domestic corporate owner to recognize in income the E&P attributable to the stock in the CFC (“all E&P amounts”). See Treas. Reg. 1.367(b)-3.

4.61.11.5
(04-03-2020)
IRC 367(d)

(1) If a U.S. person transfers intangible property to a foreign corporation in an exchange described in IRC 351 or 361, IRC 367(a) does not apply. Rather, IRC 367(d) provides that the U.S. person is treated as having sold such property in exchange for payments which are contingent upon the productivity, use or disposition of such property.

(2) The U.S. person shall, over the useful life of the intangible property, annually include in gross income an amount that represents an appropriate arm's-length charge for the property determined in accordance with IRC 482 and the accompanying regulations. Treas. Reg. 1.367(d)-1T(c)(1). If there is a direct or indirect disposition of intangible property following the outbound transfer, the U.S. person is treated as receiving the amount that would have been received upon a sale of the intangible property had the intangible property been sold at the time of the disposition. See IRC 367(d)(2)(A)(ii)(II).

(3) The useful life of the property is the entire period during which exploitation of the intangible property is reasonably anticipated to affect the determination of taxable income. In cases where the useful life is indefinite or reasonably anticipated to exceed 20 years, a taxpayer may choose to increase the annual inclusions during the 20-year period beginning with the first year in which the U.S. transferor takes into account income pursuant to IRC 367(d) to reflect amounts that otherwise would have been required to be included following the end of the 20-year period. Treas. Reg. 1.367(d)-1(c)(3).

(4) The amounts included in income must be commensurate with the income attributable to the intangible. IRC 367(d)(2) and Treas. Reg. 1.367(d)-1 and -1T.

(5) For rules regarding the coordination of IRC 367(d) and IRC 482, see Treas. Reg. 1.376(d)-1T(g)(4).

(6) A taxpayer that makes an outbound transfer of intangible property subject to IRC 367(d) must report the transfer in accordance with IRC 6038B. Failure to properly report the transfer may subject the taxpayer to a penalty and an extended statute of limitations under IRC 6501(c)(8).

4.61.11.6
(04-03-2020)
IRC 367(e)

(1) If a domestic corporation distributes the stock of a foreign corporation to a foreign person in a distribution described in IRC 355, the distributing corporation recognizes gain under IRC 367(e)(1) and Treas. Reg. 1.367(e)-1(b)(1).

(2) If a domestic corporation distributes the stock of a domestic corporation to a foreign person in a distribution described in IRC 355, the distributing corporation does not recognize gain under Treas. Reg. 1.367(e)-1. See Treas. Reg. 1.367(e)-1(c).

(3) If a domestic corporation is liquidated under IRC 332 into a foreign parent corporation, (an "80-percent distributee" as defined in IRC 337(c)), generally the domestic corporation will be treated as if it sold its assets in a taxable transaction (i.e., IRC 337(a) and (b)(1) are "turned off"). See IRC 367(e)(2) and Treas. Reg. 1.367(e)-2(b)(1). Treas. Reg. 1.367(e)-2(b)(2) contains exceptions to the general rule (e.g., if an exception applies IRC 337(a) and (b)(1) are not "turned off").

(4) If a foreign corporation is liquidated under IRC 332 into a foreign parent corporation, (an "80-percent distributee" as defined in IRC 337(c)), generally the foreign liquidating corporation shall not recognize gain or loss (i.e., IRC 337(a) and (b)(1) are not "turned off"). See IRC 367(e)(2) and Treas. Reg. 1.367(e)-2(c)(1). Treas. Reg. 1.367(e)-2(c)(2) contains exceptions to the general rule (i.e., if an exception applies, IRC 337(a) and (b)(1) are "turned off").

4.61.11.7 (04-03-2020) Preliminary Audit Steps to Consider in Identifying an IRC 367 Transaction

(1) Before a complete assessment of an IRC 367 transaction can be performed, it must first be determined whether the transaction itself falls within the scope of IRC 367. This will include identifying the specific parties involved, their classification for U.S. tax purposes both before and after the transaction and the nature of any property being transferred in the transaction. The following describes preliminary audit steps to consider in identifying an IRC 367 transaction.

(2) ***Step 1.*** Determine which transactions involve a transfer of property by or to a foreign corporation. As part of step 1, confirm for each transaction:

- The classification of the relevant entities for U.S. federal tax purposes (e.g., corporation, partnership or disregarded entity).
- Whether each such entity is considered to be domestic or foreign for U.S. federal tax purposes.

Note: A check-the-box election by itself, or made in connection with a transfer, may result in a deemed transfer to a foreign corporation.

(3) ***Step 2.*** Determine whether, for U.S. federal tax purposes, the transaction involves or is deemed to involve:

- The formation of, or contribution to, a corporation.
- A reorganization of a corporation.
- A liquidation of a corporation.
- A distribution from a corporation, including a spin-off or split-off.
- A sale of stock of a corporation.
- A transfer of intangible property.

(4) ***Step 3.*** Obtain or create organizational charts depicting, in chronological order, the transactions for U.S. federal tax purposes. This is an important consideration since a specific transaction may only be a single step made as part of a multi-step plan. For example, an internal restructuring planned by a multinational corporation may involve numerous related transactions undertaken over a period of time. The symbols commonly used to represent the different types of entities on organizational charts are shown at IRM 4.61.13.2.1.1(3).

(5) ***Step 4.*** Determine whether any transaction, alone or in connection with one or more other transactions, is described in IRC 332, 351, 361, 354, 355, 356 or 361.

(6) ***Step 5.*** If the determination under step 4 is “yes,” consider the application of IRC 367 to the transaction.

Exhibit 4.61.11-1 (04-03-2020)
Acronyms

Acronym	Definition
CAS	Computer Audit Specialist
CFC	Controlled Foreign Corporation
CBA	Cross Border Activities
DCL	Dual Consolidated Loss
E&P	Earnings and Profits
GRA	Gain Recognition Agreement
IDR	Information Document Request
LB&I	Large Business and International
RA	Revenue Agent
SRA	Senior Revenue Agent
TTPO	Treaty and Transfer Pricing Operations

Exhibit 4.61.11-2 (04-03-2020)
Development of IRC 367 Transactions - Audit Tools, References and Resources

Issue teams should consult the following resources:

1. International Knowledge Base SharePoint site. A library that provides concept, process and transaction based practice units. The practice units explain the law, provide audit tools and techniques, and contain additional resources. Practice units are not official pronouncements of law and cannot be used, cited or relied upon as such.
2. Servicewide Knowledge Management Database
3. Auditor's Workbench
4. Publication 5125, LB&I Examination Process
5. Computer Audit Specialist Examination Resources webpage – Application and Tools