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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-127380-02]

RIN 1545-BA79

Outbound Liquidations to Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance regarding the application of section 367(e)(2) to certain outbound liquidations. The regulations amend the anti-abuse rule of §1.367(e)-2(d) by narrowing the scope of the rule to apply only to outbound transfers to a foreign corporation in a complete liquidation of a domestic corporation in which a principal purpose of the liquidation is the avoidance of U.S. tax. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by February 18, 2003.

Requests to speak and outlines of topics to be discussed at the public hearing scheduled for March 3, 2003, at 10 a.m. must be received by February 11, 2003.

ADDRESSES: Send submissions to CC:ITA:RU (REG-127380-02), room 5226, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

Submissions may be hand delivered Monday through Friday between the hours of 8 a.m.

and 5 pm to: CC:ITA:RU (REG-127380-02), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20044. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at [www.irs.gov/regs](http://www.irs.gov/regs). The public hearing will be held in room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Aaron A. Farmer (202) 622-3860; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Lanita Van Dyke, (202) 622-7180 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### **Background**

Generally, a liquidating corporation does not recognize gain or loss under section 337(a) on a distribution of any property to an 80-percent distributee (as defined in section 337(c)) in a complete liquidation to which section 332 applies. Section 367(e)(2) provides that, in the case of any liquidation to which section 332 applies, section 337(a) and (b)(1) shall not apply where the 80-percent distributee is a foreign corporation except as provided in regulations. The purpose of section 367(e)(2) generally is to prevent the removal of appreciated assets from U.S. taxing jurisdiction without the imposition of a U.S. corporate level tax. See H.R. Conf. Rep. No. 99-841, at II-202 (1986).

On August 9, 1999, the IRS and Treasury published final regulations (TD 8834 in the **Federal Register** at 64 FR 43072) under section 367(e)(2) regarding distributions of

property in a complete liquidation under section 332 by a domestic corporation to a foreign parent corporation (outbound liquidation) and by a foreign corporation to a foreign parent corporation (foreign-to-foreign liquidations).

With regard to foreign-to-foreign liquidations, §1.367(e)-2(c) generally provides that nonrecognition treatment applies under section 337(a) and (b)(1) when a foreign corporation (foreign liquidating corporation) makes a distribution of property in complete liquidation under section 332 to a foreign corporation that meets the ownership requirements of section 332(b). The regulations require gain to be recognized in a foreign-to-foreign liquidation if the foreign liquidating corporation makes a distribution of property which either is used by the foreign liquidating corporation in the conduct of a trade or business within the United States (a U.S. trade or business) at the time of the distribution or which ceased to be used in the conduct of a U.S. trade or business within the ten-year period ending on the date of distribution and would have been subject to section 864(c)(7) had it been disposed. The final regulations include an exception to this gain recognition rule in certain circumstances where the property is distributed to a foreign corporation that uses such property in a U.S. trade or business for the ten-year period following the distribution, provided that certain requirements are satisfied. §1.367(e)-2(c)(2).

The final regulations included an anti-abuse rule providing that the Commissioner may require a foreign or domestic liquidating corporation to recognize gain (or treat the liquidating corporation as if it had recognized a loss) on a liquidating distribution if a

principal purpose of the liquidation is the avoidance of U.S. tax. The final regulations further provide that a liquidation may have a principal purpose of tax avoidance even though the tax avoidance purpose is outweighed by other purposes (taken together or separately).

The preamble to the final regulations states that the anti-abuse rule would apply, for example, if a principal purpose of a liquidation is the distribution of a domestic liquidating corporation's earnings and profits without a U.S. withholding tax. The preamble to the final regulations also states that, in certain circumstances, the IRS is also concerned about a liquidation of a domestic corporation into a U.S. branch of a foreign corporation in a manner that facilitates the avoidance of U.S. tax, including the inappropriate use of attributes such as net operating losses. The preamble does not address the potential application of the anti-abuse rule to foreign-to-foreign liquidations.

### **Explanation of Provisions**

Since the final regulations were issued, various commentators have expressed concern that the anti-abuse rule is overly broad because it is not limited by its express terms to outbound liquidations. Specifically, it has been brought to the attention of Treasury and the IRS that uncertainty regarding the potential application of the anti-abuse rule is preventing taxpayers from engaging in legitimate business transactions involving foreign-to-foreign liquidations. Although the preamble to the final regulations does not address any circumstances in which the anti-abuse rule would apply to a foreign-to-foreign liquidation, the rule by its express terms could so apply. Application of this rule to require

gain recognition in a foreign-to-foreign liquidation is not consistent with the approach of the final regulations that require gain recognition in the case of a foreign-to-foreign liquidation only in particular and limited circumstances. Accordingly, these proposed regulations would amend the anti-abuse rule to limit its application only to outbound liquidations.

The proposed regulations also would clarify what constitutes a principal purpose of tax avoidance for purposes of the anti-abuse rule. The proposed regulations similarly would clarify the anti-abuse rule in §1.367(e)-2(b)(2)(iii)(C)(1).

### **Effective Date**

These regulations are proposed to apply to distributions occurring on or after September 7, 1999, or to distributions in taxable years ending after August 8, 1999, if the taxpayer has elected to apply the final regulations to such distributions. The IRS intends that, prior to the publication of these regulations in final form, the Commissioner will exercise its authority under the anti-abuse rules in §1.367(e)-2(b)(2)(iii)(C)(1) and (d) in a manner that is consistent with these proposed regulations.

### **Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

## **Comments and Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight copies) that are submitted timely to the IRS. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at [www.irs.gov/regs](http://www.irs.gov/regs). The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for March 3, 2003, beginning at 10:00 a.m. in room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by February 11, 2003. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for reviewing outlines has passed. Copies of the agenda will be

available free of charge at the hearing.

### **Drafting Information**

The principal author of these proposed regulations is Aaron A. Farmer of the Office of the Associate Chief Counsel (International), IRS. However, other personnel from the Treasury and the IRS participated in their development.

### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### **PART 1-- INCOME TAXES**

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 1.367(e)-2, is amended as follows:

1. Paragraph (b)(2)(iii)(C)(1) is amended by removing the parenthetical “(taken together or separately)” and adding “when taken together” in its place.

2. Paragraph (d) is revised.

The revision reads as follows:

§1.367(e)-2 Distributions described in section 367(e)(2).

\* \* \* \* \*

(d) Anti-abuse rule. The Commissioner may require a domestic liquidating corporation to recognize gain on a distribution in liquidation described in paragraph (b) of

this section (or treat the liquidating corporation as if it had recognized loss on a distribution in liquidation), if a principal purpose of the liquidation is the avoidance of U.S. tax (including, but not limited to, the distribution of a liquidating corporation's earnings and profits with a principal purpose of avoiding U.S. tax). A liquidation may

have a principal purpose of tax avoidance even though the tax avoidance purpose is outweighed by other purposes when taken together.

\* \* \* \* \*

Robert E. Wenzel

Deputy Commissioner of Internal Revenue.