INTERNATIONAL LAW QUARTERLY

Vol. III, No. 3 THE FLORIDA BAR JUNE/JULY 1985

Tax Planning Under Foreign Tax Corporation Rules

by William M. Sharp and Betty K. Steele

The Tax Reform Act of 1984,[1] contains the foreign sales corporation, (FSC) provisions,[2] which are intended to confer certain defined U.S. income tax benefits upon qualifying export-oriented activities.[3] The FSC provisions in most instances replace the domestic international sales corporation rules,[4] thereby quashing the "illegal subsidy" objection raised by several countries against the United States under the General Agreement on Tariffs and Trade.[5]

This Article is not intended to provide a detailed review of the FSC provisions and the recently issued FSC temporary regulations,[6] all of which have been reviewed in the legal press and at a variety of national seminars.[7] Rather, this Article will briefly discuss the FSC qualifying organizational and operational rules, and most importantly, it will examine certain practical planning approaches for the use of FSCs.

FSC Organizational Rules

Certain statutory prescribed organizational rules must be met before a corporation may seek to avail itself of the U.S. income tax exemption rules contained in the FSC provisions.[8] These threshhold rules are as follows:

1. The FSC must be a corporation created or organized under the laws of any foreign country or possession of the U.S., except for Puerto Rico.
2. The FSC may have no more than 25 shareholders at any time during the taxable year.
3. The FSC may not have any preferred stock outstanding at any time during the taxable year.
4. The FSC must maintain an office located outside the United States and maintain a set of permanent books of account at such office as well as at a location within the United States.
5. The FSC must have a member serving on the Board of Directors who is not a resident of the United States.
6. The FSC must make a proper and timely election to be treated as an FSC and may not be a member of an affiliated group of corporations that include a DISC as a member.[9]

FSC Operational Rules

In order to determine the amount of income generated by an FSC which may qualify for tax exempt treatment, the following overview analysis should be reviewed.

First, the FSC's "foreign trade income"for the entire taxable year of the FSC must be determined. "Foreign trade income" is defined as gross income of an FSC attributable to "foreign trading gross receipts" ("FTGR"),[10] which include gross receipts of an FSC from certain defined activities:

1. The sale or exchange or other disposition of export property.
2. The lease or rental of export property for use by the lessee outside of the United States.

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3. For services which are related and subsidiary to the activities described in 1 and 2 above.
4. For engineering or architectural services for construction projects located, or proposed for location, outside of the United States.
5. For the performance of certain managerial services for an unrelated FSC or interest-charge DISC so long as the managerial services pertain to the production of FTGR described in categories 1, 2, or 3 above; provided however, that for any taxable year such managerial services will not qualify as FTGR unless at least fifty percent of an FSC's gross receipts for such taxable year are derived from the activities described in categories 1, 2, and/or 3 above.[11]

Second, in order to generate FTGR, the FSC must satisfy the so-called "foreign management" rule at *all times* during the taxable year of the FSC, as set forth below:

I. All meetings of the Board of Directors of the corporation seeking qualification as an FSC and all meetings of the shareholders of such corporation must be held outside of the United States.
2. The principal bank account of such corporation must be maintained outside of the United States at all times during the taxable year.
3. All dividends, legal and accounting fees and salaries of members of the Board of Directors of such corporation disbursed during the taxable year must be disbursed out of bank accounts of the corporation maintained outside of the United States.[12]

Third, in order to generate FTGR with respect to any particular export, leasing or otherwise qualifying FSC activity, the so-called "foreign economic processes" test must be met with respect to *each* transaction. These rules are summarized as follows:

I. The corporation seeking qualification as an FSC, or any person acting under contract with such corporation, has participated outside the United States in the solicitation (other than advertising), negotiation, or making of a contract relating to such transaction,[13] and;
2. The "foreign direct costs" incurred by such corporation attributable to the particular transaction equals or exceeds 50 percent of the "total direct costs" attributable to the transaction.[14]

The FSC provisions clearly contemplate the applicability of the foreign direct cost requirement on a transaction-by-transaction basis, which could present serious data collection and accounting problems to large, or even small, United States exporters. Accordingly, the Legislative History and the Temporary Regulations to the FSC provisions provides that in lieu of the transaction-by-transaction approach, the foreign direct cost requirement may be applied to all sales made to a single customer.[15] In addition, special rules also apply to product line groupings and contract groupings.[16]

Another key area of concern regarding the foreign economic processes requirement is the regulatory sanction permitting an FSC to utilize the services of an agent for the performance of the necessary activities pertaining to the economic processes requirement.[17] Several documentary concerns arise whenever an FSC utilizes an agent for purposes of meeting the foreign economic processes requirement.[18]

Fourth, after determining an FSC's FTGR for a taxable year, in order to compute the exempt portion of FTI of the FSC, the following rules must be followed:

1. If income generated by an FSC is based upon arm's-length pricing between unrelated parties, or if between related parties, under the guidelines of Section 482, then "exempt foreign trade income" is equal to 32 percent of the foreign trade income derived from the particular transaction.19 In contrast, in the case of transactions involving related parties, 16/23 of the foreign trade income derived from such transactions shall be treated as "exempt foreign trade income.20
2. Because exempt foreign trade income is an exclusion from gross income of an FSC, deductions are required to be allocated on a proportionate basis between exempt and non-exempt foreign trade income and those allocated to exempt foreign trade income are not taken into account for purposes of determining the ultimate tax burden to an FSC with respect to non-exempt foreign trade income.21
3. In the case of exports by or through an FSC which is a controlled taxpayer (as defined in Treas. Reg. §1.482-l(a)(4)), the taxable income of such FSC and the corporation or persons controlling such FSC must be determined (before the exemption percentages described in 1 above are applied), this determination is based upon a transfer price pursuant to certain statutory prescribed formulae, in an amount which does not exceed the greatest of:

(i) 1.83 percent of the foreign trading gross receipts derived from the sale of such property by such FSC;
(ii) 23 percent of the combined taxable income of such FSC and the related person which is attributable to the foreign trading gross

receipts derived from the sale of such property by such FSC; or

(iii) Taxable income based upon the sale price actually charged but subject to the Section 482 arm's-length rules.[22]

In order to utilize the special administrative pricing rules, all five of the activities described in Section 924(e) and all the activities pertaining to the solicitation, negotiation and making of the contract for sale, as set forth in Section 924(d)(l)(a) must be performed by the FSC or an agent thereof.[23] It is important to note, however, that for purposes of the administrative pricing rules these two requirements can be met wherever the activities are performed, either within or without the United States.[24] Notwithstanding this flexibility, in the event a significant quantum of such activities are performed in the United States, the foreign direct costing rules may be violated for purposes of qualifying the particular transaction as FTGR.[25]

Fifth, after determining exempt foreign trade income of an FSC, certain "distribution" rules should be analyzed in order to avoid double and possibly *triple* taxation to an FSC and its shareholders. (Triple taxation could occur, for instance, if investment income were generated by an FSC and such income was taxed in the foreign jurisdiction in which the FSC was formed (for which a U.S. foreign tax credit is unavailable [pursuant to Sections 275(a)(4), 901(h) and 906(b)(5)], at the FSC level and at the shareholder level, due to lack of a dividends received deduction in certain circumstances.) Generally, any distribution by an FSC to a shareholder is treated first as made out of earnings and profits attributable to foreign trade income, and then, out of other earnings and profits.[26] Under the present FSC provisions, investment income and certain carrying charges are automatically subject to taxation at the FSC level, whether or not such amounts are distributed at the end of the taxable year of the FSC.[27] In the event the FSC utilizes the administrative pricing rules, the income generated by the FSC will either be exempt from U.S. income taxation or automatically subject to United States income taxation.[28] In this instance, distributions made by the FSC to a corporate shareholder otherwise qualifying under Section 245 will be subject to the dividends received deduction. However, such dividends received deduction will not be permissible with respect to distributions made from earnings and profits attributable to non-exempt foreign trade income determined without reference to the administrative pricing rules under Section 923(a)(2).[29] This particular provision would create a situation involving double taxation in the event the non-exempt trade income of the FSC was subject to U.S. income taxation at the corporate level and such income were again taxable and distributed to the corporate shareholder. However, the present Technical Corrections Act would remedy this problem with respect to both this category of income and certain categories of investment in carrying charge income.[30]

Pursuant to the FSC provisions, "exempt foreign trade income"is treated as *foreign source income,* which is *not* effectively connected with the conduct of a trade or business within the U.S.[31] In contrast, the source characterization of the portion of the foreign trade income that is *not* treated as (i) "exempt foreign trade income" and (ii) Section 923(a)(2) "non-exempt income" is treated as having a U.S. source.[32] Unlike the DISC rules, which shifted the taxable event of the DISC to its shareholder(s) with respect to income not qualifying as "accumulated DISC income,"[33] in the case of an FSC, the non-exempt foreign trade income in certain instances will be directly subject to U.S. income tax.[34] Moreover, the particular category of foreign trade income and the nature of the transaction in which such income is generated will determine the taxability of dividend distribution by its FSC to its parent corporation.[35]

Planning Considerations

Analyzing the FSC Determination

In light of the FSC qualifying organizational and operational rules, a critically important threshhold evaluation must be made: should an FSC be formed or would an alternative vehicle be more appropriate? This evaluation will require

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This newsletter is prepared and published by the International Law Section of The Florida Bar.

an analysis of the FSC provisions based on the facts and circumstances of the particular exporter, including its export volume and pricing structure, executive compensation structure, current and future cash flow needs, and the availability of other tax benefits, such as tax credit and net operating loss carryovers.

For example, a closely-held U.S. corporate exporter generating $600,000 of annual net income from otherwise qualifying exports may simply desire to "zero out" the corporate level income tax by contributing maximum amounts to a defined benefit plan and distributing any remaining balance as appropriate salary or bonuses.[36] However, if this same corporate exporter has substantial corporate level capita1 requirements, use of an FSC or interest-charge DISC should be considered. Alternatively, in some instances complete U.S. tax deferral by use of a foreign corporation may be preferable to either FSC or interest-charge DISC treatment. This may be the case if the jurisdiction in which the foreign corporation is to be incorporated is not a qualifying jurisdiction for an FSC under the FSC provisions or if the administrative costs of maintaining an FSC are not warranted.

In summary, the "evaluation" segment of the FSC determination requires a great deal of thought and analysis, including development of pro forma tax savings/ cost analysis based upon not only alternative structures, i.e., FSC v. interest-charge DISC, but also alternate FSC pricing provisions.[37]

Exemption and Deferral Planning

It should also be noted that foreign trade income and investment income of an FSC will not be subject to Subpart F treatment. However, Section 923(a)(2) non-exempt income will continue to be subject to Subpart F treatment.[38] Nevertheless, as further discussed below, combining the tax benefits of the FSC provisions with the tax deferral provisions under Subpart F with respect to certain export sales activities may generate significant overall tax benefits to the U.S. exporter. These tax benefits could best be realized by a pure trading company with significant overseas presence, as opposed to manufacturing export company.

For example, suppose the XYZ trading company purchases personal property from an unrelated manufacturer, and resells this property to various purchasers located in Latin America. The U.S. company employs a sales force of 1 sales persons, most of whom spend 60-70 percent of their time soliciting, negotiating or closing sales transactions outside of the U.S. Given this scenario, the formation of an FSC through which the sales activities could be structured would possibly generate the following benefits:

1. With respect to total foreign trade income,[32] percent thereof would qualify for exempt treatment under the FSC provisions.[39]
2. With respect to the remaining 68 percent portion of non-exempt foreign trade income, which is referred to as "Section 923(a)(2) income," such income may be subject to tax deferral treatment under U.S. income tax law so long as the related party rules under Section 954(d) are not violated and the foreign corporation otherwise is not engaged in trade or business in the United States.[40]

Small FSC

An alternative tax vehicle to the FSC and the interest-charge DISC is a "small FSC." The term "small FSC" is defined as an FSC that has made an election[41] effective for the tax year, to be treated as a small FSC and which is not a member, at any time during the taxable year, of a controlled group of corporations which includes an FSC unless such other FSC has also made small FSC election effective for that year. Generally, the foreign management and foreign economic process requirements do not apply with respect to any small FSC.[43]

While the small FSC vehicle may be an attractive one for exporters, it is one best used by exporters with foreign trading gross receipts of $5 million or less per taxable year. This is because any foreign trading gross receipts of a small FSC for the taxable year which exceeds $5 million shall not be taken into account in determining the exempt foreign trade income of such corporation. If the foreign trading gross receipts exceed $5 million, the corporation may allocate $5 million of its gross receipts in such manner as it may select in accordance with regulations which are yet to be issued. In applying this limit, it should be noted that all small FSCs which are members of the same controlled group shall be treated as a single corporation. The regulations will provide the manner for allocating the $5 million among the foreign trading gross receipts of small FSCs which are members of the same controlled group.[44]

Legal Documents

The overall objective in connection wit structuring an FSC operation is not only technically comply with the various FSC provisions and the underlying regulations, but also equally to develop a set of legal and accounting documentation which are consistent with and generally support such technical compliance. Because final regulations have yet to be issued under the FSC provisions, finalization of a complete set of legal documents to reflect the FSC operation is somewhat tentative. Nevertheless, set forth below is a brief discussion of certain key documents:

1. *Buy-sell/ commission agreement - this* contract should specify payment for a maximum consideration to the FSC as permitted under the administrative pricing rules, where applicable, and it should also require by contract the FSC to perform the foreign economic processes activities. Although the temporary regulations do not explicitly require written contracts with respect to these activities, in order to fully document the FSC relationship, such contracts should be utilized.

2. *Service/subcontractor agreement* -- as discussed earlier, the foreign economic processes requirement may be subcontracted to the FSC's parent corporation or another related party. In order to fully document this relationship, a written contract would be preferable to the apparently permissible oral relationship that the temporary regulations contemplate.

Jurisdictional Considerations

As was discussed above, the FSC must be organized under the laws of a qualifying jurisdiction outside United States customs territory, including certain U.S. possessions.[45] Once the decision to form an FSC has been reached, a jurisdiction offering favorable local tax treatment, as well as a favorable business climate, must be selected. Because many of the qualifying jurisdictions have enacted special FSC incentive legislation,[46] the local taxation issue is probably secondary to the business climate analysis[47] which must generally balance those facts and circumstances relevant to a particular enterprise. The exporter and its advisors must closely evaluate the exporter's current and projected business operations in addition to the tax and other legal rules of a particular FSC jurisdiction. Finally, the U.S. exporter, in evaluating a given foreign jurisdiction, should consult with foreign legal counsel and accounting advisors.

While the authors do not recommend any particular jurisdiction for incorporating an FSC. it should be noted that many international trust companies believe that the U.S. Virgin Islands is the premier location for organization and operation of an FSC. This conclusion is based upon the presence of similar language, communication and legal systems vis-a-vis the U.S. Moreover, Section 925(e)(5) provides that U.S. possessions (including the U.S. Virgin Islands, but excluding Puerto Rico) may not impose tax on the foreign trade income of an FSC prior to January 1, 1987.[48] The FSC incentive legislation enacted by the U.S. Virgin Islands also adds to its attraction as a jurisdiction in which to form an FSC.

FOOTNOTES

[1]The Tax Reform Act of 1984, P.L. 98-369.98 Stat. 678, 98th Cong., 2d Sess., July 18, 1984 (hereinafter referred to as the "TRA").

[2]Sections 921-27. All "Sections" referred to herein are to the Internal Revenue Code of 1954, as amended. unless otherwise stated. The foreign sales corporation provisions as added to the Internal Revenue Code by the TRA arc referred to herein as the "FSC provisions." Similarly, a foreign sales corporation is referred to herein as an "FSC."

[3]These United States income tax benefits provide. as discussed below, that a certain portion of income generated by export sales and certain other qualifying activities of an FSC will be exempt from United States income taxation.

[4]Section 991, *et seq*. For a discussion of the new "interest charge"domestic international sales corporation provisions, *see* Sharp, Steele & Jacobson, ***Foreign Sales Corporations: Export Analysis and Planning,*** 63 TAXES 163, 196-97 (March 1985) [hereinafter referred to as "Sharp, Steele & Jacobson"] (portions of this article are based upon the former article); Norcross ***Interest-Charge DISCs and Small FSCs: A Comparison of the Tax Benefits,*** 63 TAXES 134 (Feb. 1985). The domestic international sales corporation provisions arc referred to herein as the "DISC provisions." Similarly, a domestic international sales corporation is referred to herein as a "DISC."

[5]General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective January 1, 1984) (hereinafter referred to as "GATT"). For a discussion of GATT, see Sharp, Steele & Jacobson at 164.

[6]Temporary Internal Revenue Service Regulations (T.D. 7993 and T.D. 7994) on Foreign Sales Corporations, 49 F.R. 48283-O I and 49 F.R. 48273-02 (December 12, 1984).

[7]See Sharp, Steele & Jacobson at n. 1.

[8]Section 922(a).

[9]Section922(a)(l); see also Temp. Reg. §l.921-2T(a)(Q& A 1). Because of the general inability of an FSC to take advantage of the foreign tax credit for any taxes paid on its foreign trade income (hereinafter sometimes referred to as "FTI"). it is important to minimize the imposition of foreign taxes. See Sharp, Steele & Jacobson at 199, 200.

[10]Section 923(b); Temp. Reg. §1.921-2T(f) (Q&A 9).

[11]Section924(a);Temp. Reg. §l.921-2T(f)(Q&A9). Fora discussion of the term "export property see Section 927(a)(1).

[12]Section 924(c); Temp. Reg. §1.924(c)-IT.

[13]Section 924(d)(1): Temp. Reg. §1.924(d)-IT.

[14]Section 924(d)(1)(B). As a general rule it is not necessary for an FSC, or its agent, to incur expenses in each of the five expense categories set forth in Section 924(e) in order to qualify for either the 50 percent test or the alternative 85 percent test (which provides that if, with respect to any two of the five "fundamental activities," a corporation with respect to any transaction. incurs foreign direct costs which equal or exceed 85 percent of the total direct costs, the costing requirement is deemed met (Section 924(d)(2)).

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[15]Congressional Committee reports, which include the House, Senate and Conference Committee reports, as reported by Commerce Clearing House, Inc. ***Tax Reform Act*** of 1984 at 1107 [H.Rep. 98-861, 98th Cong., 2d Sess. (hereinafter referred to as the "Legislative History')].

[16]Temp Reg §1.924(d)-IT(e)(1).

[17]Temp. Reg §1.924(d)-IT(b).

[18]***Id.***

[19]Section923(a)(2); Temp. Reg. §1.921-2(T)(h) (Q&A 13). If a corporation is a shareholder of an FSC, then Section 923(A)(2) shall be applied to that corporation by substituting "30 percent" for "32 percent." Section 291(a)(4)(A).

[20]Section 923(a)(3); see Section 925(a)(1), (2). If a corporation is a shareholder of an FSC, then Section 923(A)(3) shall be applied to that corporation by substituting "15/23" for "16/23." Section 291(a)(4)(B).

[21]Section 921.

[22]Section925(a);Temp. Reg. §l.921-2T(h)(Q&As 12-13).

[23]Section925(c);Temp. Reg. §l.921-2T(h)(Q&As 12-13). This does not apply to small FSCs, however. See note 43, *infra*

[24]Legislative History at 1110;Temp. Reg. §921-2T(b)(Q& As 12-13).

[25]***Id.***

[26]Section 926(a); Temp. Reg. §921-2T(m)(Q&A 20). *See also Joint Committee on Taxation. Description of the Technical Corrections Act of 1985 (H.R. 1800 and S. 814). (JCS-7-85). April 14, 1985, CCH Special 2 at page 120 (hereinafter referred to as "Technical Corrections Act').*

[27]Section 921(d).

[28]Section 921(d)(l)(A), (B) (all operating income of an FSC other than exempt foreign trade income and "Section 923(a)(2) income" is to be treated as effectively connected with a U.S. trade or business).

[29]Section 245(c); Temp. Reg. '1.921-2T(m) (Q&A 20).

[30]Technical Corrections Act at 120.

[31]Section 921(a); Temp. Reg. '1.921-2T(i) (Q&A 14).

[32]Section 921(d).

[33]See Section 995.

[34]Section 921(d).

[35]Section *245(c);see* Temp. Reg. §1.921-2T(m)(Q&A 20); *see also discussion* in text accompanying notes 26-30, *supra.*

[36]Section 401(k). Salary and bonuses, of course, must b reasonable trade or business expenses under Section 162.

[37]*See* Sharp, Steele & Jacobson at 190-194.

[38]Section 951(e); Temp. Reg. §1.921-2T(n) (Q&A 21).

[39]See the text accompanying note 19, *supra*.

[40]*See* Section 923(a)(2); *see also* Section 954(d) and Section 864.

[41]Section 927(f)(l).

[42]Section 922(h)

[43]Section 924(b)(2)(A). A significant saving of administrative costs may be achieved through use of a small FSC, although the foreign incorporation office and director requirements must still be met. In addition, a small FSC must still perform all of the economic processes relating to a transaction in order to use the administrative pricing rules; however, none of these activities need be performed outside of the U.S.. Temp. Reg. §1.921-2T(h) (Q&A 12).

[44]Section 924(b)(2)(B).

[45]Sections 922(a)(l)(A), 927(e)(3).

[46]Barbados and the U.S. Virgin Islands, for instance, enacted legislation exempting FSC income from local taxes. BNA DAILY TAX REPORT (December 14, 1984) LL-2.

[47]*See* TAX NOTES (December 10, 1984) at 946-49.

[48]Section 927(e)(5); see Section 927(e)(3).

William M. Sharp, Esq. (B.S. Drake University, J.D. Indiana University, LL.M. New York University), and Betty K. Steele, Esq. (A. B. Brown University, J.D. Vanderbilt University) practice with Jacobs, Robbins, Gaynor, Burton, Hampp, Burns, Bronstein & Shasteen, P.A., in Tampa, Florida.

Committee Reports

International Business & Commercial Law Committee

The International Business and Commercial Law Committee has recently been established. Its first project will be to assist in the organization of a two volume CLE manual on Inbound (Vol. 1) and Outbound (Vol. 2) International Transactions. The Committee has been coordinating this effort with the other Committees through Kenneth Claussen, the Chairman of the International Law Section.

The project is presently pending approval by the Executive Committee of the International Law Section. It is anticipated that the contents of the two volumes will be:

Volume 1, Inbound International Transactions:

1. Overview
2. Tax Aspects of Inbound Investment at the Entry Level
3. Tax Aspects of Withdrawal and Repatriation of Funds
4. Business Structure
5. Banking Operations
6. Offshore Financial Centers

7. Private Placements of U.S. Enterprises
8. General Overview of Antitrust Considerations
9. Raw Materials and Inventory for Use in Business
10. Importation of Capita1 Goods
11. Reporting Requirements

Volume 2, Outbound International Transactions:
1. United States Investment Abroad.
2. Offshore Manufacturing Operations
3. International Licensing and Technology Transfers
4. International Sale of Goods, including Foreign Countertrade
5. United States Exporting Procedures
6. United States Importing Procedures
7. Financial International Transactions
8. Taxation of International Transactions

Once Executive Committee approval is obtained, the project will be coordinated with CLE, and chapter authors will begin work. Estimated time for completion of the project, from the date of Executive Committee approval, is one year.

Any member of the Committee who wishes to participate in this project, please let us know.

Saturnino E. Lucio, II
Committee Chairman
Hornsby & Whisenand
1110 Brickell Avenue-Penthouse
Miami, Florida 33131
(305) 371-8484

Immigration Committee

The Immigration Committee reports the following activities for 1984-85 with respect to our goals:

1. CLE Manual: The Committee is supervising and participating in revising the Florida Bar CLE Manual on Immigration Law and Practice last published in 1983. There have been many changes in the applicable regulations relating to Students Visas (F-l's and M-l's) *Intracompany Transferrees Visas* (L-l's) and Investor/ Treaty Trader Visas (E-l; E-2's). In addition, new chapters will be added relating to consular processing, and other matters affecting aliens. The final drafts of revisions are due on 1 June 1985. and we hope to have the new manual published by October of 1985.

2. Liaison with INS: Sarah Lea Tobocman, Co-Chairperson attended a liaison meeting with the District Director and INS personnel along with attorney representatives from the American Immigration Lawyers for the Association (AILA). The meetings provide a forum to interchange concerns between INS and Florida Bar members. A representative from our Committee will be attending such liaison meeting in the future on a regular basis and any members' of the Section should contact the Committee Chairperson with their concerns.

3. Unauthorized Practice of Law: During the past few months we have met with members of the Bar's Unauthorized Practice of Law (UPL) Committee to voice our concerns regarding UPL in the Immigration area. We are particularly concerned about the misrepresentations made to the public by notary publics in the preparation of Immigration forms and by other non-attorney representatives who are exacting fees from the public to prepare Immigration files, contrary to INS's own regulations. At our meeting with UPL members we advised of our availability as consultants regarding prosecutions for UPL in the Immigration area. We further have discussed the possibility of jointly publishing a pamphlet in English and Spanish regarding the difference between notary public and attorneys. A meeting is currently scheduled at the State Attorney's office to discuss our further involvement in this area. Co-chairperson Sarah Lea Tobocman, will also be attending the UPL Committee of the American Immigration Lawyers Association at its annual conference in early June and will report back regarding efforts in this area on a national level.

4. Plans for the Coming Year: We want to involve more members of the Bar in our Committee. We see a need to reach out to other Sections to make them aware of the immigration consequences of actions taken on behalf of their clients. We hope to provide information, in the form of articles, and at CLE seminars in the various different areas of interest for the Criminal Law Section, Corporate Law Section, and Family Law Section.

Any persons intersted in joining our efforts, please contact the Co-Chairperson of the Committee and try to attend the annual meeting of the Bar in June.

Many thanks to Ken Claussen and the Executive Council of the Section for your support.

Sarah Lea Tobocman &
Clemente Vazquez-Bello
Co-Chairpersons,
Immigration Committee

1985 Calendar of Events

DATE	PLACE	EVENT	SPONSOR/ CONTACT
June 26-30	Boca Raton Hotel and Club, Boca Raton, Florida	Florida Bar Annual Meeting	The Florida Bar Gail Campbell 904-222-5286
June 27-30	Panama	Empresario '85	Sindicato de Industriales de Panama P.O. Box 6-4798 El Dorado, Panama
July 4-11	Washington, D.C.	ABA Annual Meeting	
July 14-20	London, England	ABA Annual Meeting	
July 16-18	Mexico	Quimica '85 Trade Fair	U.S. Department of Commerce Helmath Kirchschlager 202-377-8228
July 31		World Trade Council Membership Meeting"India-U.S. Trade Potential" *A Special Dinner Event*	Susan Hill Fort Lauderdale World Trade Council 305-462-6000
August 14	Marina Bay, Florida	Advanced International Trade Series *Legal Aspects of International Trade-half day program*	Susan Hill Fort Lauderdale World Trade Council 305-462-6000
August 29 thru September 6	Korea Taiwan Hong Kong	Port Management Seminar Mission	U.S. Department of Commerce William Johnson 202-377-5012
September 17-19	San Juan Puerto Rico	CaribeCom '85	Bill Wormes 703-685-0600
September 28 thru October 4	Acapulco, Mexico Excelaris Hyatt/ Regency	XXV Conference of the Inter-American Bar Assoc.	Executive Secretary Inter-American Bar Assoc. Washington, D.C. John 0. Dahlgren 202-789-2747

Chairman's Report

One benefit of our continued growth has been the development of a degree of continuity to our activities from one year to the next. We are now able to identify and plan programs for the new year well before the beginning of the year. As a consequence, 1 would like to briefly describe some of our more significant programs which are on our agenda for next year with the purpose of encouraging our previously inactive members to become active at the very beginning of the year. My list is by no means a comprehensive list and I know from discussions with our incoming chairman, Bruce Starling, that he has several innovative programs which he intends to implement during his year.

We have been asked by the Section of International Law and Practice of the American Bar Association to co-host its annual midwinter meeting which it has tentatively scheduled for December 5-7 in Miami. This will be a three day weekend program and will provide an excellent opportunity for Florida practitioner's to meet international lawyers from other parts of the country.

We are developing three lawyer exchange programs. First, we plan to repeat our meeting with Canadian attorneys, however, this time the Canadian Bar Association, through its Quebec and Ontario divisions, will join us in Florida next March. Tentative plans call for our meeting to be in Orlando with a side trip to Miami. Second, we are planning a week long program in Europe in 1986 utilizing the contacts and materials which were developed for our International Symposium. Finally, we are discussing a Caribbean trip for the end of November with the primary contender being Barbados. With the new U.S. tax income treaty and internal legislation to promote the island as an international off-shore financial center, a fall visit would be timely.

Two CLE programs are scheduled. We will present our Annual Caribbean Update as a collateral event to C.C.A.A.'s Annual Conference on the Caribbean to be held in Miami, November 19-22 1985. A portion of our joint Canadian program will be devoted to a CLE presentation, the topics focusing on the Canadian's interests in Florida law issues surrounding Canadian investment in Florida. In addition to these two programs, there have been developments in the international tax area which may warrant an additional program.

The international business and commercial law committee plans on sponsoring a CLE manual which will be devoted to outbound international transactions. This will be a twelve to eighteen month project which should be underway by this fall.

Our growth and recognition have also presented opportunities for the section to participate in the programs of Florida's international business community. The section's participation as a member of the Florida Council of International Development's delegation recognizing "International Business Day" in Tallahassee with the Governor and Lt. Governor was the first of many programs in which we will participate.

Rather than review the ongoing programs for each of the committees for the upcoming year, I draw your attention to the committee preference from which appears later in this issue. 1 encourage you to sign up for one or more committees and to follow through in becoming genuinely involved in its activities. For our section to continue its growth, you must become involved and our committees are the beginning point for your participation. I also urge you to call or write the committee chairman or leadership of the section about your committees' programs and the pace at which it is developing its programs.

We are on a good course and although we have an extremely capable new chairman the success of his programs will depend on your participation and hard work. This was the essential ingredient to the success of the programs during my year.

Again, I want to thank all those who devoted their time to our activities and I encourage you to continue your support and even to work harder with our new chairman.

Kenneth F. Claussen
Chairman

Don't forget to rejoin the International Law Section when you receive your 1985-86 Bar dues statement.

Doing Business in China

by Roger L. Hiatt

"Oh, East is East and West is West, and never the twain shall meet" may have been true for Rudyard Kipling, but it is no longer the case.[1] After suffering centuries of heavy-handed European incursions, China is meeting the West on terms of equality and mutual respect. Last October, British and Chinese negotiators initialed a joint declaration: on July 1, 1997. Hong Kong will revert to China as a special autonomous administrative zone.[2] The continuation of Hong Kong's capitalistic economy and individual liberties is guaranteed at least until 2047. How will entrepreneurial Hong Kong fit into Communist China? It will not be the first pocket of capitalist enterprise in that nation.

Directly across the Hong Kong border lies the Shenzhen Special Economic Zone, where for the past five years, China has matched foreign investment capital with local Chinese labor. Some $500 million is already invested, and $1.8 billion promised, in joint ventures and wholly foreign-owned enterprises.[3] Wages average a mere $76 a month, far below Hong Kong, but twice China's urban average.4 Although worker productivity is not yet equal to Hong Kong's, the wage differential more than compensates. Shenzhen is a success. Young workers sport modish clothes and skyscrapers sprout like rice fields.

Shenzhen is not Hong Kong's only competitor in the People's Republic. Five years ago, Chinese Communist Party leader Deng Xiao-ping initiated a series of economic experiments, among which were three other "special economic zones," like Shenzhen.[5] The success of these experiments has led to more innovations. Fourteen new areas are to join the four existing special economic zones as appropriate sites for foreign investment. Ironically, all fourteen are key coastal cities, generally former European-controlled "treaty ports". having intact (albeit, pre-1949) industrial infrastructures.[6] All special economic zones will offer special tax breaks, cheap rentals and reduced trade restrictions. Even more startling reforms were announced in September of 1984. Central planning in many sectors is to be gradually abandoned; prices on many commodities will be allowed to float. as in a market economy; factories and, parenthetically, their workers, will rise and fall on their own merits.[7]

Hong Kong's future as East Asia's financial center may be assured. but its position as a manufacturing center is being challenged. Hong Kong currently exports more than all the rest of China and its per capita income is 18 times greater. More than 40%, of China's foreign exchange is obtained through Hong Kong. It is no wonder that China has planned ahead for the day when Britain's lease of Hong Kong lapses. China obviously has an interest in preserving Hong Kong's prosperity while at the same time spreading the wealth beyond the city's borders. What is puzzling is the Chinese solution: encouraging foreign investors to manufacture on the mainland while continuing to trade and bank in Hong Kong. Considering China's post-revolutionary history, not only is the solution startling, but so also is the speed and success with which it is being implemented.

The development of a framework for economic and commercial contacts between the United States and China began in 1979, when the two nations established diplomatic relations.[8] Anxious to preserve its foreign exchange, China initiated trade through various countertrade arrangements, all of which require either the purchase of products from China as a condition of sales to China or the payment for foreign goods or services with Chinese goods.[9] These arrangements have developed to include barter (a one-time exchange of product for product), compensation trade (an agreement to sell technology or equipment with either full or partial payment in goods manufactured with the equipment) and counterpurchase agreements (payment for goods with unrelated local products).[10]

China quickly moved to welcome foreign investment, by promulgating the Law on Joint Ventures.[11] The joint venture is structured as a limited liability company.[12] Authorization must be obtained from the Chinese Foreign Investment Commission.[13] There are various requirements: the chairman of the board of directors of the corporation must be a Chinese official, and the minimum foreign investment is 25 percent of total equity.[14] The Chinese have great latitude as to equity inputs, which may include land, factory, infrastructure. materials, machinery and labor. Foreigners may provide equipment, external marketing expertise, management. technology and capital. Profits are shared in proportion to the registered capital of the investors.[15]

The establishment of the first four Special Economic Zones (SEZs). all in south China dovetailed with the Law on Joint Ventures. by providing sites for these new enterprises. A wide variety of incentives accompanies the SEZ regime, including a lower income tax, tax holidays and certain duty-free imports. Detailed regulations governing these investment incentives were approved in August 1980.[16]

The next step in opening China to foreign investment was The Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investments, adopted on September 10,1980. The Law reaches taxable income derived from productions, business and other sources of any joint venture within or without the territory of China.[17] Taxable income of a joint venture is the net income during a tax year, after deduction of costs, expenses and losses in that year.[18] The income tax rate is a flat 30 percent; in addition, there is a local surtax of 10 percent of the national tax.[19] The effective tax rate on joint ventures is thus 33 percent. Various provisions in the Law grant tax relief. For example, a newly established joint venture scheduled to operate for a period of 10 years or more may, upon approval of national taxing authorities, be exempt from income tax for the first profitable year and be allowed a 50 percent reduction in the second and third years.[20] A participant in a joint venture reinvesting its share of profits in China for a period of not less than 5 years may, upon approval of national taxing authorities, obtain a refund of 40 percent of the tax paid on the reinvested profit.[21] Detailed Rules and Regulations interpreting the newly approved joint venture tax law were promulgated by the Chinese Ministry of Finance on December 14, 1980.[22] Even more favorable tax treatment than that discussed above can be obtained by locating the joint venture in a special economic zone, taking advantage of their local tax incentives.

Authorization for wholly owned foreign enterprises shortly followed the approval of joint ventures; the foreign enterprise must meet the same criteria as joint ventures. The Chinese authorities have been much more reticent in granting approval for a wholly owned foreign enterprise than for a joint venture. A notable advance in the wholly owned foreign enterprise area has been made by 3-M. which has recently opened a facility in Shanghai.

Taxation of the foreign enterprise is covered by The Income Tax Law of the People's Republic of China Concerning Foreign Enterprises, effective January 1, 1982. Taxable income is defined exactly as for joint ventures.[23] Taxable income from the foreign enterprise is taxed on an annual basis at progressive rates, in much the same way as corporate net income is taxed by the United States.[25] Here is the schedule of applicable tax rates:

Annual income below 250,000 Yuan	20 percent
That part of annual income from 250,000 to 500,000 Yuan	25 percent
That part of annual income from 500,000 Yuan to 750,000 Yuan	30 percent
That part of annual income from 750,000 to 1,000,000 Yuan	35 percent
That part of annual income over 1,000,000 Yuan	40 percent

An additional local 10 percent tax. also levied as a percentage of the taxable income, is also authorized. Unlike the joint venture. there is no provision for partial remission of tax on reinvested profits. There is partial tax relief available for enterprises operating in "low profit occupations" such as farming and forestry, just as for joint ventures in those industries.[26] Detailed Rules and Regulations interpreting the law governing taxation of foreign enterprises were promulgated by the Ministry of Finance on February 21, 1982.[27] Reduction of tax rates and other additional tax benefits can be obtained by locating the foreign enterprise in a special economic zone.

Ease of repatriation of profits is critical to any business venture in China. All hard currency transfers out of China must be routed through the Bank of China, generally through irrevocable letters of credit.[28] The Bank of China utilizes an extensive network of correspondent banks worldwide and enjoys a reputation for prompt payment. It is important to note that profits of joint enterprises being remitted out of China may be subject to an additional 10 percent tax on the remittance.[29] It is not yet entirely clear whether this is an additional tax or a refundable withholding credit. This problem may be entirely avoided by locating the joint enterprise in a SEZ; the problem does not arise with remitted profits from a wholly owned foreign enterprise.

On April 30, 1984, the United States and China signed an income tax treaty, specifying tax treatment, including withholding, for various types of income.[30] For example, dividends, interest and royalties are to be taxed at a rate no greater than 10 percent.[31] The treaty contains no additional tax incentives for U.S. investors in China, such as a "tax sparing" credit. However, diplomatic notes exchanged commit the U.S. to amend this treaty to include such incentives. if they are ever extended to any other country.[32]

China now has a workable statutory scheme to encourage foreign investment. Impediments to

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doing business in China do continue to exist. Beijing (Peking) remains vigilant against the slightest implication of any infringement on Chinese sovereignty. Negotiating the terms of the investment is time-consuming and technical. The Chinese put great stress on the appropriateness of the technology transferred and the training of local people, while minimizing foreign exchange expenditures. The bureaucratic structure is complex and cumbersome; contract clauses must be carefully drafted. Nevertheless, as a site for manufacturing goods, especially for export, China is attractive. There's no doubt that complying with Chinese law may seem complicated. But considering the economic advantages of low overhead and favorable tax treatment, a familiar American adage could be redrawn "Go east, young manufacturer, go east, and grow up with China!"[33]

FOOTNOTES:

[1]Kipling, Rudyard, "The Ballad of East and West", 1889, in full text:
Oh, East is East, and West is West
and never the twain shall meet,
Till Earth and Sky stand presently at God's
great judgment seat;
But there is neither East nor West,
border, nor bread, nor birth,
When two strong men stand face to face
though they come from the ends of the earth!

[2]"The Hong Kong Agreement", ***Time,*** October 8, 1984, p.6.

[3]***Ibid.,*** p.10.

[4]***Ibid.***

[5]The original SEZ, all in Southern China, include Shenzhen, Shantou and Zhuhai, in Guangdong province and Hui, Xiamen and Fuzhou, in Fujian province. The Shenzhen zone, which includes Shekou port and a heavy industrial development area, is generally seen as a light industrial and agricultural area, as is Zhuhai. Shantou and Xiamen are both slated to be centers for export processing.

[6]The fourteen coastal cities are Dalian, Qinhuangdao, Tianjin, Yantai, Qingdao, Lianyungang, Nantong, Shanghai, Ningbo, Wenzhou, Fuzhou, Guangzhou, Zhanjian and Beihai.

[7]"Peking Turns Sharply Down Capitalist Road in New Economic Plan," *Wall Street Journal,* October 25, 1984, pp.1,29.

[8]*Doing Business with China,* U.S. Department, International Trade Administration, 1983, p.1.

[9]***Ibid.*** p.6.

[10]Brehm, Carolyn L., "Flex Trade", ***The China Business Review,*** September-October, 1983, pp. 16, 18.

[11]Law on Joint Ventures, National People's Congress, July 8, 1979.

[12]***Ibid.,*** article 4.

[13]***Ibid..*** article 3.

[14]***Ibid..*** articles 6 and 4.

[15]***Ibid..*** article 4.

[16]Regulations on Special Economic Zones in Guangdong Province, approved by the 15th Session of the Standing Committee of the Fifth National People's Congress on August 26, 1980.

[17]The Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment, article 1.

[18]***Ibid.,*** article 2.

[19]***Ibid.,*** article 3.

[20]***Ibid.,*** article 5.

[21]***Ibid.,*** article 6.

[22]Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China Concerning Joint Ventures with Chinese and Foreign Investment, approved by the State Council on December 10, 1980, promulgated by Ministry of Finance on December 14, 1980.

[23]The Income Tax Law for Foreign Enterprises of the People's Republic of China, article I.

[24]***Ibid.,*** article 3.

[25]***Ibid..*** article 4.

[26]***Ibid..*** article 5.

[27]Detailed Rules and Regulations of the People's Republic of China for the Implementation of the Income Tax Law concerning Foreign Enterprises, approved by the State Council on February 17, 1982, and promulgated by the Ministry of Finance on February 21, 1982.

[28]*See,* The Procedures of the People's Republic of China for Prohibiting the State Currency from Entering or Leaving Our Country, promulgated by the Government Administrative Council, March 6, 1951; Provisional Regulations on the Bank of China on Foreign Exchange Certificates, March 19,1980; and Provisional Regulations for Exchange Contro of the People's Republic of China, promulgated by the State Council, December 18, 1980.

[29]Detailed Rules and Regulations for the Implementation of the Income Tax Law of the People's Republic of China Concerning Joint Venture with Chinese and Foreign Investment, article 4.

Roger L. Hiatt, an attorney with the Miami law firm of Hornsby & Whisenand, has worked on transactions involving legal and tax aspects of investment in China. He holds a graduate law degree concentrated in private international business law from Columbia School of Law, a graduate law degree in taxation from Boston University School of Law, and an M.B.A. from the University of Kansas. He received the J.D. degree from Washburn School of Law, Topeka, Kansas.

[30] Agreement between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, April 30, 1984.

[31] ***Ibid.,*** articles 9, 10 and 11.

[32] See notes exchanged between Premier Zhao Ziyang, of the People's Republic of China, and President Ronald Reagan, of the United States of America, on April 30, 1984.

[33] Soule, John Babsone Lane, "Go west, young man,"from an article in the ***Terre Haute Express*** (1851). Horace Greely used the expression in an editorial in the *New York Tribune.*

How To Make Foreign Investments in Spain

by Jose A. Arcila

Foreign investments in Spain are governed by Decree No. 3021 of October 31, 1974 and its implementing regulations. For foreign investment purposes, foreign residents of Spain investing in Spanish currency are not considered to be foreign investors.

Foreign investors may, according to this Decree, incorporate a company, buy an already existing company, or register a branch in Spain. Subscription to or acquisition by a foreign corporation of 50 percent or less of the stock of a Spanish authorities; however, prior approval is required if the subscription or acquisition is in excess of 50 percent. Registration of a branch in Spain always requires prior approval.

In April, 1981, certain foreign investments in Spain were liberalized in accordance with the provisions of Royal Decree No. 623 dated March 27, 1981. This legislation authorizes foreign investors to incorporate fully foreign-owned subsidiaries or to register a branch in Spain provided that the corporate capital thereof does not exceed 25 million pesetas and that the branch does not engage in certain activities specifically protected by the Government.

Whether a foregin investor should carry-out its investment in Spain through the acquisition, formation of a company or registration of a branch, should be determined based on the nature of the project and the type of proposed activities of the investor in Spain.

In turn, the determination of the subsidiary's corporate capital should be carefully considered. If the capital is not in excess of 25 million pesetas, the foreign investor will not need, according to the above-mentioned 1981 foreign investment liberalization, the approval of the Spanish authorities even if the foregin participation in the Spanish subsidiary exceeds 50 percent, although certain verifications must be obtained in advance. However, if the foreign participation in the Spanish company exceeds 50 percent and the capital of the company is in excess of 25 million pesetas, prior approval of the Spanish authorities must be obtained.

Foreign Participation in a Spanish Company with a Corporate Capital in excess Million Pesetas

According to Decree No. 3021, a foreign investor may acquire up to 50 percent of the capital of a Spanish company without prior administrative approval.[1]

If the foreign participation is in excess of 50 percent of the capital of a Spanish company and the company's capital exceeds 25 million pesetas, then the foreign participation in the Spanish company would require prior administrative approval.

Such approval is not expressly subject to specific requirement. Yet, the following are the principal items which the Spanish foreign investment authorities will consider before approving an investment:

(1) The number of jobs to be created by the Spanish company;

(2) Whether or not the foreign currency balance of the Spanish company will be positive;[2]

(3) The impact of the foreign investment on the national economy, and on the specific industrial sector in which the investment is to be made;

(4) The volume of exports of the products manufactured by the Spanish company, which, in principle, should be similar to the average volume of exports made by the industrial sector in which the Spanish company is engaged; and

(5) The size of the foreign investment in terms of cash and/or capital equipment contributions to the Spanish company.

An application for foreign majority ownership of a Spanish company requires the presentation to the Administration of a questionnaire in which full disclosure must be made of all information surrounding the proposed investment. The Spanish authorities evaluating the project may request negotiation or modification of any of the above items. The whole procedure nor-

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mally takes up to three months, but if substantial negotiations are required a longer time may be needed.

In those instances where a major foreign participation has been approved, additional approvals will be required in order to:

(1) Modify the corporate purpose of the Spanish company;

(2) Increase the capital;

(3) Increase the foreign participation percentage if said percentage is less than 100 percent;

(4) Transfer the foreign participation to another foreign investor; or

(5) Modify an other condition imposed by the authorities upon the investment in the Spanish company.

A Spanish company with foreign participation, as individually authorized by the Government may increase its capital and issue new shares without administrative approval by means of capitalizing its reserves, provided that the foreign participation in the resulting capital remains unchanged. Capital increases made in the ordinary course of business of the company may also be made provided that the Government originally approved the foreign investment in the Spanish company and the percentage of foreign participation after the capital increase remains unchanged.

Incorporation of a Subsidiary with a Corporate Capital of less than 25 Million Pesetas

Non-residents and Spanish companies wih foreign majority participation, according to the March 1981 Royal Decree No. 623, may incorporate a company or register a branch in Spain without proper approval, provided that the corporate capital thereof does not exceed 25 million pesetas. Legislation in force before 1981 required prior approval whenever foreign participation in a Spanish company exceeded 50 percent, or a non-resident company registered a branch in Spain.

Non-basic chemicals electronics, computer and other sectors specifically protected by the Government are not included in this liberalization.

The proposed investment must be submitted to the Office of Foreign Transactions so that it can verify that it qualifies under the terms of the Royal Decree. If no objections are made within thirty days, the investment can be made immediately.

It should be noted that the above liberalization does not cover the acquisition of shares in a company with less than 25 million pesetas capital. Said acquisition of shares requires the prior approval of the Spanish authorities if the stock to be purchased exceeds 50 percent of the total stock issued by the company.

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FOOTNOTES

[1] Foreign participation in Spanish companies engaged in certain activities such as radio, newspaper, information agencies, mining, hydrocarbons, banking, insurance, petroleum refineries, air transportation, shipping, concessions of public waters, government contractors, manufacturers of capital goods, are subject to certain special foreign investment regulations.

[2] Foreign currency balance is generally intended to mean the existing difference between the foreign currency received by the Spanish company and the foreign currency acquired by said company for purposes of making payments outside Spain. Funds contributed to capital, foreign loans (except for loans with a term of at least three years granted by the parent company), and payments for imports to be incorporated as fixed assets of the Spanish company are normally excluded from said computation.

Mr. Arcila is a practicing lawyer in Madrid, Spain, and a partner of Baker & McKenzie. He received his “Licenciado en Derecho” ***Degree from the University of Madrid in 1973. He worked during three years in the Baker & McKenzie in Chicago and is familiar with problems of U.S. investors in Spain. He specializes in foreign investments and international transactions.***

1980 U.S.-Canada Tax Treaty: Impact on Canadian Investment in U.S. Real Estate

by Robert F. Hudson

I. Overview.

A. Coverage and Format. The focus of this article is the impact of the 1980 U.S.-Canada Income Tax Treaty on Canadian investment in U.S. real estate. The format is to address (1) the 1980 Treaty rules impact on certain key aspects of U.S. real estate investments, (2) the relevant effective dates and transitional rules, and (3) the main planning techniques which remain for capital gains cases. The discussion of (a) the basic statutory framework in Canada and the U.S., (b) the 1942 Treaty rules, and (c) the planning techniques for non-capital cases have been deleted from the original outline for purposes of abbreviating this article.

B. Background/Highlight. With respect to Canadian investment in U.S. real estate, the 1942 U.S.-Canada Income Tax Treaty (the "1942 Treaty") provided Canadian investors with substantial relief from U.S. income tax. The treaty exemption became especially important with the enactment of the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") which provided for the general taxation of gains realized by foreign investors in U.S. real estate. The 1980 U.S.-Canada Income Tax Treaty (the "1980 Treaty"), keeping in step with the new generation of treaties, permits each country largely unfettered application of its domestic tax laws with respect to investments in real estate by residents of the other. For example, the 1980 Treaty eliminates maximum rates of tax on rental income [1980 Treaty, Art. VI; of. 1942 Treaty, Art. XI limiting the rate to 15% when applied to gross rents], and terminates most, but not all, exemptions from taxes on disposition gains. [1980 Treaty, Art. XIII.] The 1980 Treaty was finally ratified in August, 1984, following amendments pursuant to two major protocols during the interim four-year period.

II. U.S. Rental Income

A. 1980 Treaty Provisions

1. ***Rents.*** Articles VI, VII(6) and XIII of the 1980 Treaty would permit the U.S. to fully tax direct Canadian investment in U.S. real estate. The former "net income election" is no longer available, necessitating reliance upon the Code "net income election." [Code §§871(d), 882(d).] In addition, if rents are not considered to be effectively connected to a U.S. trade or business (and the Code net income election is not availed of), then the 30% flat U.S. tax on gross rent would apply (rather than the former 15% maximum flat rate). [See 1942 Treaty, Art. XI.]

2. ***Distributions.***

a. ***Lower withholding tax rate on non-portfolio dividends.*** The 1980 Treaty reduces to 10% (from 15% under the 1942 Treaty) the U.S. withholding tax rate on dividends paid by a U.S. corporation to a Canadian corporate shareholder owning 10% or more of the U.S. company's stock. [1980 Treaty Art. X(2)(A).] In all other cases, the dividend withholding tax rate continues to be 15% (as under the 1942 Treaty), rather than the usual U.S. tax rate of 30%. [1980 Treaty Art. X(2)(b); Code §§871(a), 881(a).]

b. ***"Second-tier dividend withholding taxes" now applicable to Canadian corporations.*** In a further change from the 1942 Treaty, the 1980 Treaty now provides that the so-called "second-tier dividend withholding tax" may apply to dividend distributions by a direct Canadian corporate investor at the same rates applicable to other "U.S. source dividends" *(i.e.,* 10% rate if 10% or greater corporate shareholder; otherwise a 15% rate). Specifically, Art. X(7) of the 1980 Treaty would permit the U.S. to levy withholding tax on a dividend paid by a Canadian corporation "to the extent that the dividend is attributable to profits earned in taxable years beginning after the date of signature of the Convention [September 26,1980] if, for the three-year period ending with the close of the company's taxable period preceding the declaration of the dividend . . . at least 50% of such company's gross income from all sources was included in the computation of business profits attributable to a permanent establishment which such company had in [the United States.]"

(i) "Business profits" are not defined in the 1980 Treaty, although the provision of Article VII(6) suggest that the concept is broad enough to include rental income. [See Boidman, "Canadian Investment in U.S. Real Estate," ***Canadian Mortgage Practice*** ("CMPR") 42-40 at n. 96 (1984) regarding potential argument that rental income should not be considered "business income" for purposes of Article (X)(7).]

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(ii) A second issue is whether the Canadian corporation has a "permanent establishment" for purposes of Article X(7). The U.S. decision in ***de Amodio v. Comr.*** [34 T.C. 897 (1960)] suggests that the ownership of rental property itself is not necessarily sufficient to establish a "permanent establishment" and reference must be had to whether the Canadian corporate owner also maintains an office and staff for purposes of administering the property, such that administration by an independent property manager may not be sufficient. [For contrary dicta, see ***Lewenhaupt v. Com'r., 20*** T.C. 151 (1953).]

(iii) If the U.S. does impose a second-tier dividend withholding tax pursuant to Art. X(7), difficult issues regarding the crediting of such U.S. taxes may arise under Canadian tax law. [*See,* Boidman, "Canadian Investment in U.S. Real Estate," ***Report of Proceedings of the 33rd Tax Conference, Canadian Tax Foundation (1981 Conference Report),*** at p. 472.]

3. Miscellaneous. Art. X(8) of the 1980 Treaty would permit the application of both the "U.S. personal holding company" rules and the accumulated earning tax rules to a Canadian corporation where "50% or more in value of the outstanding voting shares of the company is owned, directly or indirectly, throughout the last half of its taxable year, by citizens or residents of the United States . . . or by residents of a third state."

B. Effective Dates and Transitional Rules.

1. Distributions. The effective date for the various dividend withholding tax rules of Art. X of the 1980 Treaty generally became applicable to payments made on or after October 1, 1984. [Aft. XXX(2)(a).] However, the provisions of Article XXX(5) should serve to insulate Canadian corporations from the so-called "second-tier dividend withholding tax" through the end of the Canadian corporation's first taxable year beginning on or after January 1, 1985, via the transitional rules permitting the extended application of Article XII of the 1942 Treaty.

2. Rental Income. As a general rule, the new treaty provisions impacting on rental income would be applicable to the first taxable year commencing on or after January 1, 1985. [1980 Treaty, Art. XXX(2)(b).] However, the special transition rule of Art. XXX(5) will serve, in effect, to maintain the current 15% limit on gross withholding taxes on rental income through the end of the first tax year commencing after calendar 1984. It also should entitle a Canadian owner of U.S. real estate to use the treaty (rather than the Code) "net income election" in respect of the first tax year after 1984. [*See* Boidman, "New Canada-U.S. Treaty: Effective Dates and Transitional Issues," Vol. ***32, No. 5 Canadian Tax Journal*** 909 (Sept.-Oct. 1984).]

III. Financing Considerations.

A. Overview. The financing aspects of a Canadian investment in U.S. real estate can have significant impact on the overall economic results. The two principal tax factors are (1) the question of deductibility of interest and other financing costs, and (2) the question of whether withholding taxes on interest payments would increase the overall cost of borrowing. Withholding taxes which are not fully creditable may represent an additional cost to a lender, in which case he will ordinarily seek to increase the applicable rate of interest. The overall assessment will require reference to both the basic statutory rules in Canada and the U.S. and the impact of the 1980 Treaty. The highlights of the 1980 Treaty considerations are outlined below.

B. 1980 Treaty Provisions.

1. Basic Interest Withholding Rate. The U.S. withholding rate on interest paid by a non-Canadian/U.S. taxpayer to a Canadian resident continues to be 15%.

2. Second-Tier Interest Withholding Exemption is Eliminated. The 1980 Treaty eliminates the former withholding tax exemption (under Art. XII of the 1942 Treaty) with respect to interest payments by a Canadian resident to a non-U.S. person. Art. XI(8) of the new treaty permits the U.S. to impose a 15% withholding tax on interest payments by a direct Canadian corporate investor to a Canadian or other non-U.S. lender, to the extent that the interest is considered to "arise in the U.S." within the meaning of Art. XI(6). For this purpose, the interest payment would be considered to "arise in the U.S."to the extent that the Canadian investor has a "permanent establishment"in the U.S. with respect to its U.S. rental property. Thus, if the Canadian corporate investor/borrower's U.S. real estate investment does not constitute a U.S. "permanent establishment," the U.S. will not be entitled to impose its interest withholding tax, notwithstanding that the investor may be entitled to deduct the interest in computing its net income from the U.S. investment under the rules related to either being engaged in a U.S. trade or business or pursuant to a "net income election" made under Code §882(d).

Art. XIII(3)(e) of the 1980 Treaty provides for continuing exemption from U.S. withholding tax in respect of loans entered into by a Canadian corporation prior to September 26, 1980. The 1980 Treaty does not deal specifically with the U.S. "thin capitalization" or allocation rules and, therefore, does not appear to modify the restrictions inherent therein.

C. Effective Dates and Transitional Rules. As a general matter, the rules of Art. XI regarding taxation of interest are applicable to payments made on or after October 1, 1984. [Art. XXX(2)(a).]. However, under the special transition rule of Art. XXX(S), a direct Canadian investor should be able to continue to claim the second-tier withholding tax exemption under Art. XII of the 1942 Treaty through the end of its first taxable year commencing on or after January 1, 1985.

IV. Taxation of Capital Gains.

A. **Overview.** The taxation of capital gains from the disposition of U.S. real property interests is an area which has undergone considerable change since 1980, with the enactment of the Foreign Investment in U.S. Real Property Tax Act of 1980 ("FIRPTA"), the advent of the 1980 Treaty (with its basic change in yielding to U.S. taxation of such gains), and the recent enactment of the FIRPTA withholding tax. [Code §1445.] Because of the transitional rules under the 1980 Treaty, 1985 will be a particularly important year for Canadian investors in U.S. real estate, since the principal exemption from U.S. capital gains tax will soon pass.

B. 1980 Treaty Provisions. Art. XIII of the 1980 Treaty contains virtually no ongoing exemption from source country taxation of real estate capital gains. [Art. XIII(l).] In addition, gains derived from indirect real estate interests (i.e., through real estate corporations, trusts or partnerships) will also be fully taxable. [Art. X111(3).] As an historical matter, it should be noted that this end result is the consequence of the amendment of both paragraphs 3 and 5 of Art. XIII by the 1983 protocol [Art. VI], inasmuch as the original 1980 version of the new treaty (which was originally signed just prior to the enactment of FIRPTA) contained certain limitations on U.S. capital gains taxation which were not consistent with the new FIRPTA legislation. These original, somewhat more liberal capital gains provisions were deemed inappropriate by the U.S. Congress, and served as one of the principal reasons for the effective rejection of the initial treaty, requiring its subsequent amendment and delay in ratification.

C. Effective Dates and Transitional Rules.

1. ***Article XXX(5) Override Extension.*** Art. XXX(5) of the 1980 Treaty extends the capital gains exemption available under Art. VIII of the 1942 Treaty through the end of the Canadian's taxpayer's first taxable year commencing on or after January 1, 1985. Thus, in the case of Canadian investors with fiscal years, this provision may serve to exempt dispositions made prior to the close of their fiscal years ending in 1986 (possibly as late as November 30, 1986). There appears to be no question respecting this result, notwithstanding potentially conflicting provisions under FIRPTA. [See Rev. Rul. 85-76, 1985-23 IRB20(6/10/85); see also the "Explanation of Proposed Income Tax Treaty (and Proposed Protocols) between the United States and Canada" prepared by the staff of the Joint Committee on Taxation, U.S. Congress, for the Senate Foreign Relations Committee hearings on the treaty on April 26, 1984 (report dated April 25, 1984, No. 33-7270JCS20-84).]

2. ***Article XIII(9) "Fresh Start "Rule.*** In addition to the Art. XXX(5) transition relief described immediately above, Art. XIII(9) of the 1980 Treaty provides a permanent exemption from U.S. capital gains taxation with respect to inherent appreciation in U.S. real property interests as of December 31, 1984. This tax-free step-up in basis or so-called "fresh start" rule provides, in effect, that the portion of a gain reasonably considered to have accrued up to that point, but realized thereafter, would be exempt from U.S. taxation. However, as a general matter, this fresh start rule will only be available to Canadians or certain related parties who own the property (or an applicable prececessor property) on September 26, 1980, the date the 1980 Treaty was first signed, and who would have been eligible at that time for protection under Art. VIII (thereby requiring that the property must not have "formed part of the business property of a permanent establishment" on September 26, 1980). the following technical aspects of Art. XIII(9) also should be noted:

a. The fresh start rule can also apply to a seller who did not own the subject U.S. real property on September 26, 1980, but acquired it (either before or after the 1980 Treaty enters into force) in a nonrecognition transaction direcyly or indirectly from a person who did own it on September 26, 1980. [The Technical Explanation contains eleven different examples setting out the circumstances where Art. XIII(9) applies and in particular how the "nonrecognition" rules operate so as to entitle a transferee to the fresh start rules. A "nonrecognition" transaction has

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an extended meaning for this purpose, including transactions granted such status by administrative decree pursuant to Art. XIII(8).]

b. A qualifying property may not have existed (or have been owned) on September 26,1980, but rather was, for example, received in an exchange for property originally owned on September 26, 1980.

c. The fresh start rule can apply to property received in a nonrecognition transaction taking place after the 1980 Treaty comes into force.

d. Art. XIII(9)(d) precludes application of the fresh start rule to any property which was owned after September 26,198O by a resident of another country. (This could have an adverse impact on Canadian investors who might otherwise benefit from a liquidation of a U.S. real property holding corporation, as discussed further below.)

e. The conceptual principle of eliminating the inherent gain which arises prior to new Article XIII coming into effect is implemented in one of two ways. Under the first method, gain realized on the ultimate disposition is assumed to have accrued on a straight-line basis, with a proration being made based on the number of months the property was owned before January 1, 1985, versus the number of months owned subsequent to December 31, 1984. For purposes of this proration, if the eligible taxpayer is not the original owner, but acquired the property (or substitute property) in a nonrecognition transaction the period of ownership before 1985 is, according to the Technical Explanation, to be determined by including "the number of months in which a predecessor in interest held the property." Where the fresh start rule applies to replacement property, one must assume that the holding period of the original property is attributed to and used in respect of the substitute property, even if the latter did not exist before 1984.

f. In lieu of utilizing the straight-line proration basis for determining the exempt portion of the gain realized (as described immediately above), the Canadian taxpayer has the option of using a December 31, 1984 valuation if it will reduce the net amount of the gain which is taxable upon the post-1985 disposition. [Art. XIII(9) provides for exclusion of ". . . such greater portion of the gain as is shown to the satisfaction of the competent authority of the other state to be reasonably attributable to that period.']

D. Planning Techniques.

1. ***Individual Canadian Investor.*** The transitional rules discussed immediately above can provide Canadian investors in U.S. real estate with full or partial exemption from U.S. tax on dispositions in 1985 or subsequent years. However, overall tax benefits normally arise only where there is also exemption or deferral from immediate Canadian tax. In the case of a Canadian individual, the most likely circumstance where this combination of exemptions will arise is where a Canadian owner of a personal residence in the U.S. would be exempt from Canadian taxation upon disposition pursuant to the Canadian "principal residence" rules. The combination of this "principal residence"exemption under Canadian tax law with the U.S. tax exemption under Art. VIII of the 1942 Treaty (as extended by Art. XXX(5) of the 1980 Treaty) will serve to exempt the Canadian individual from the usual taxing provisions if the sale is made before the end of calendar year 1985. In contrast, if such an owner disposes of the property after 1985, the entire gain will be subject to U.S. tax unless it qualifies for the so-called "fresh start" rule of Art. XIII(9). If the Canadian individual is not eligible for Art. XIII(9) (e.g., he acquired the property after September 26, 1980), the Canadian investor should give serious consideration to selling the property before 1986 if the value of the property has increased significantly. The foregoing disposition timing factors will also be meaningful to a direct Canadian investor in other U.S. real estate (besides a "principal residence") who is in a position to avoid or defer Canadian tax by reason of exemption, loss carryforward, loss from other source, tax shelter or similar compensating items under Canadian tax law.

2. Property Held by U.S. Company. In the case in which U.S. real estate is owned through a U.S. corporation (whose shares are owned by a Canadian corporation), the tax minimization opportunities (as well as the complexity of the related tax analysis) increase substantially inasmuch as it may be possible to defer or avoid tax in both Canada and the United States in a broader spectrum of cases.

a. From the Canadian perspective, this normally would require the disposition to be carried out through either a sale by the U.S. corporation followed by a liquidation, or a liquidating distribution of the U.S. real estate to the Canadian corporate shareholder followed by the disposition. In most circumstances involving non-FAPI ***(i.e.,*** active business) property, neither of these two types of transactions should result in taxation in Canada at the Canadian corporate level. Important elements of the relevant Canadian rules (respecting "foreign affiliates," "exempt surplus," "Foreign Accrual Property Income," etc.) are found in Part LIX of the Income Tax Regulations, the substantial revision of which (November 1982) is still in draft form. See Boidman, "The Foreign Affiliate System - Canadian Taxation After 1982: A Structured Overview,"CCH Canadian Limited, 1983; D. G. Broadhurst, "The All New 1982 Foreign Affiliate Regulations," Vol. 30, No. 6 & Vol. 31, No. 1, ***Canadian Tax Journal,*** p. 891 (Part I) (Nov.-Dec. 1982) and p. 61 (Part II) (Jan.-Feb. 1983).]

b. In order for U.S. tax not to apply to the foregoing transactions, the U.S. corporation must qualify for a Code nonrecognition rule (such as Code §336 in the case of a liquidating distribution, or Code §337 in the case of a one-year plan of sale and liquidation) and the Canadian shareholder must be eligible for either a Code nonrecognition rule or one of the transitional rules under the 1980 Treaty. Planning in this area also must take account of FIRPTA §1125(d) that generally will deny a step-up in cost basis of a U.S. real property interest in the hands of a transferee who is related (in a specially defined manner) to a transferor who is exempt from U.S. tax on the gain arising from said disposition under a U.S. treaty exemption (such as Art. VIII of the 1942 Treaty). Thus, FIRPTA §1125(d) may limit the apparent benefits of certain Art. VIII exemption transactions during the Art. XXX(5) transition period, but as noted further below, FIRPTA §1125(d) does not apply to transactions governed by Art. XIII(9) of the 1980 Treaty.

c. In the case of a Code §337 sale and liquidation transaction, a Canadian shareholder should be exempt from U.S. tax under Art. XXX(5) of the 1980 Treaty, provided the liquidation proceeds are realized before the end of such shareholder's 1985 fiscal year. (In this regard, it should be noted that Code §337 applies only if no single corporate shareholder owns 80% or more of the shares of the corporation, although the constructive ownership rules should not apply if related-party transactions are entered into to reduce the ownership percentage below 80%) [However, this exemption may be inapplicable if the U.S. corporation is considered to be "collapsible" within the meaning of Code §341, such that its liquidation would be deemed to give rise to "ordinary income," rather than "capital gain.'] In addition, if the Code §337 sale and liquidation takes place after 1985, the Canadian shareholder still may be entitled to relief under Art. XIII(9) of the 1980 Treaty.

d. In the case in which the U.S. corporation is liquidated and the property distributed to Canadian shareholders (followed by the sale of same), additional treaty and Code issues may arise. Most importantly, where the liquidation takes place after 1984, nonrecognition treatment under Code §336 may no longer apply once Treasury regulations are issued under new Code §367(e). [Section 131(e) of the Tax Reform Act of 1984 added new Code §367(2) to provide as follows:

> "In the case of any distribution described in Section 336 by a domestic corporation which is made to a person who is not a United States person, to the extent provided in regulations, gain shall be recognized under principles similar to the principles of this Section."

(Emphasis added.) Temporary regulations on this subject are not expected before the summer of 1985, at the earliest.]

e. Although the Canadian shareholder may be exempt from U.S. tax on the liquidation under the transitional rule of Art. XXX(5) or even by reason of a Code rule (e.g., §332), in many cases the Canadian shareholder will take the property for U.S. tax purposes at a carry-over cost basis. [In the case of a Code §332 liquidation (involving an 80% or greater corporate shareholder), cost basis carries over under Code §334(b)(l). While liquidations in other cases (e.g., under Code §331) normally result in a a step-up in cost basis to current fair market value under code §334(a), this result is generally considered to be overridden by the related party, anti-avoidance rule of FIRPTA §1125(d).] Accordingly, if the U.S. real property interest is taken on a carry-over basis for U.S. purposes, exemption from U.S. tax on a subsequent sale can arise only under Art. XXX(5). [Art. XIII(9) of the 1980 Treaty cannot apply to a property which has been owned since September 26, 1980 by a non-Canadian, which would include ownership by a U.S. corporation.] Thus, an exemption under Art. XXX(5) of the 1980 Treaty (by virtue of invoking Art. VIII of the 1942 Treaty) will arise only to the extent that the sale of the carry-over basis property takes place prior to the end of the 1985 tax year *and* the Canadian investor does not have a "permanent establishment" with respect to the U.S. real property interest (or otherwise). [Before the applicability of FIRPTA, the provisions of Code §894(b) would render an unrelated permanent establishment inoperative provided the U.S. property did not in and of itself amount to a trade or business. However, this former safe-harbor rule does not apply to

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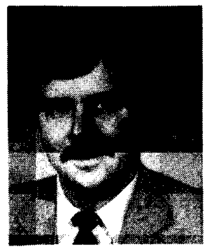
sales occurring after the effective date of FIRPTA.] This latter requirement regarding no "permanent Establishment" can present insurmountable obstacles where either there is a U.S.-based partner involved or the appointment of an independent property manager is not feasible. (From the U.S. tax perspective, this permanent establishment problem could be eliminated by simply having the Canadian corporate shareholder sell the stock of the U.S. real property holding corporation during the Art. XXX(5) transition period, but said transaction apparently will not be exempt from Canadian income taxation under the FAPI rules, unlike the liquidation transactions.)

f. It may be possible to utilize the fresh start rules of Art. XIII(9) to convert the tax-free step-up in basis of the stock of a U.S. real property holding corporation into cost basis in the underlying property of that U.S. corporation. According to the Technical Explanation, the anti-avoidance rule of FIRPTA §1125(d) (requiring a reduction in cost basis in treaty-protected related-party transactions) will not apply when relief arises under Art. XIII(9) of the 1980 Treaty. Accordingly, a Canadian shareholder may be totally or partially exempt from U.S. tax upon a post-1984 or 1985 liquidation pursuant to Art. XIII(9), and still achieve a step-up in cost basis for the U.S. real property interest received (in cases when the Code rules otherwise provide for a step-up in basis), notwithstanding FIRPTA §1125(d). [The Technical Explanation makes this point as follows: "The amount of the gain which is reduced by reason of the application of paragraph 9 is not to be treated for U.S. tax purposes as an amount of 'non-taxed gain'under Section 1125(d)(ii)(B) of FIRPTA, where that Section would otherwise apply."]

This article is excerpted from a more detailed outline prepared by the author for the Florida Bar-International Law Section's "First Joint Seminar: Current Legal Issues Affecting U.S.1 Canada Trade and Investment" (held in Montreal, Canada, March 14 & 15, 1985). The course handbook, including the author's more detailed outline, may be ordered from The Florida Bar, CLE Office, Tallahassee, FL 32301-8226 for a cost of $20.00. Alternatively, you are welcome to contact the author for a copy of his complete outline on this subject (tel. no. 305 374-4800).



Robert F. Hudson, Jr. is international tax' partner with the Miami law firm of Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. Mr. Hudson received his undergraduate and J.D. degrees from the University of Florida and the LL.M. degree in Taxation from New York University.

Mr. Hudson was project chairman and a principal author of The Florida Bar's "Proposed Revisions of Pending FIRPTA Withholding Tax Bill (February 10, 1984)"which was enacted, in slightly modified form, as Section 129 of the Tax Reform Act of 1984 [adding Code' 1445 and limiting Code' 6039C].

Sample FIRPTA Certification Forms

(Editor's Note: A number of typewriter errors were left undetected in the FIRPTA forms published in the April 1985 Quarterly. Our apologies to Maureen O'Brien and Andrew S. Markus.

FIRPTA Withholding Regulations require that certain certification forms be used. The sample forms are reproduced in their entirety.)

Individual Transferor Certification

Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property must withhold tax if the transferor (seller) is a foreign person. To inform the transferee (buyer) that withholding of tax is not required upon my disposition of a U.S. real property interest, I, [name of transferor], hereby certify the following:

1. I am not a nonresident alien for purposes of U.S. income taxation;

2. My U.S. taxpayer identifying number (Social Security number) is ______________; and

3. My home address is ____

I understand that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement I have made her could be punished by fine, imprisonment or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct and complete.

[Signature and Date]

Entity Transferor Certification

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by [name of transferor], the undersigned hereby certifies the following on behalf of [name of transferor]:

1. [Name of transferor] is not foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. [Name of transferor]'s U.S. employer identification number is ______________; and

3. [Name of transferor]'s office address is ______________________. [Name of transferor] understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalities of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of [name of transferor].

[Signature and date]
[Title ________]

Individual Interest-Holder Certification

Under section 1445(e) of the Internal Revenue Code, a corporation, partnership, trust or estate must withhold tax with respect to certain transfers of property if a holder of an interest in the entity is a foreign person. To inform [name of entity] that no withholding is required with respect to my interest in it, I, [name of interest-holder], hereby certify the following:

1. I am not a nonresident alien for purposes of U.S. income taxation;

2. My U.S. taxpayer identifying number (Social Security number) is ______________; and

3. My home address is ____

I understand that this certification may be disclosed to the Internal Revenue Service by [name of entity] and that any false statement I have made here could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete.

[Signature and date]

Entity Interest-Holder Certification

Under section 1445(e) of the Internal Revenue Code, a corporation, partnership, trust or estate must withhold tax with respect to certain transfers of property if a holder of an interest in the entity

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is a foreign person. To inform [name of entity] that no withholding is required with respect to [name of interest-holder]'s interest in it, the undersigned hereby certifies the following on behalf of [name of interest-holder]:

1. [Name of interest-holder] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. [Name of interest-holder]'s U.S. employer identification number is ______________; and

3. [Name of interest-holder]'s office address is ______________________________ and place of incorporation (if applicable) is ____

[Name of interest-holder] understands that this certification may be dislosed to the Internal Revenue Service by [name of entity] and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of [name of interest-holder].

[Signature and date]
[Title]

Changes in FIRPTA Withholding Regulations Needed

by Jonathan H. (Jason) Warner

This article parallels more detailed comments recently submitted to the Treasury by The Florida Bar Tax Section on the Temporary Regulations for FIRPTA withholding. The author participated in preparing those comments along with Robert F. Hudson, Jr. (project chairman) and Joel J. Karp. The author also participated with these same gentlemen and Marshall J. Langer in preparing the initial proposal of the Florida Bar Tax Section which led, with some modifications, to the present FIRPTA withholding tax provision.

Transactions involving foreign investors became substantially more complicated January 1, 1985 with the implementation of withholding tax under Internal Revenue Code Section 1445 on dispositions of U.S. real property interests ("USRPIs") by foreigners. Temporary regulations implementing the new withholding tax were issued by the Internal Revenue Service ("IRS") on December 28, 1984. While generally the temporary regulations are very reasonable and responsive to the inherent practical difficulties of withholding, some problems remain to be worked out in the final regulations. Among the more important of these problems are the following:

1. Exemption for Foreign Developers. The temporary regulations provide no relief from withholding suitable for a foreign developer actively selling U.S. real estate or a foreign investor holding multiple USRPIs for sale. As an example, consider a Panamanian corporation developing a condominium project in the United States. The corporation is engaged in a U.S. trade or business and generally will be subject to U.S. tax just as would a U.S. developer in similar circumstances. However, unlike the U.S. developer, to avoid withholding by purchasers (assuming that the exemption for residences under $300,000 is unavailable or not accepted by the purchaser) the temporary regulations require the foreign developer to obtain a withholding certificate, either by entering into a "special agreement" with the IRS for the payment of tax [Temporary Regulations Section (hereinafter "Temp. Reg. §") 1.1445-3T(e)(l)] or by establishing to the satisfaction of the IRS that reduced withholding will not jeopardize the collection of tax [Temp. Reg. §1.1445-3T(c)(4)]. Neither alternative is attractive.

To qualify for a special agreement, the taxpayer must enter into a security agreement with the Service and, depending on the circumstances, must pay either interest or a 25 percent surcharge on the tax to cover possible interest and penalties [Temp. Reg. §l.l445-3T(e)(2)]. The types of security contemplated by Temp. Reg. §1.1445-3T(e)(3) generally would not be acceptable to a real estate developer operating on a thin profit margin.

Alternatively, the developer could seek authorization for withholding a reduced (here, zero) amount, based on a determination by the IRS that reduced withholding would not jeopardize the collection of tax. This procedure requires the submission of a statement of law and fact to support the request, together with an explanation of why the transferor is unable to enter into a special agreement. The wording of the regulation does not lead one to believe that economic harm or discrimination such as cited above would be satisfactory to the IRS as reasons why the transferor could not enter into a special agreement.

The result is that a withholding certificate practically is unavailable for a foreign developer as a practical matter. However, the long term presence in the United States inherent in any sizable condominium project should be adequate assurance to the IRS that the developer will meet its tax obligations. What is needed. rather than a mere liberalization of the above regulations, is a procedure whereby such a developer could obtain from the IRS a "blanket" certification, exempting it from withholding on the sales of condominium units. The IRS should allow such a blanket certificate where the evidence indicates that the foreign developer is so involved in the U.S. market that it should be trusted to file and pay tax on the same basis as a U.S. developer. To do otherwise discriminates unfairly against foreign developers.

There is a simple solution to this problem for a foreign corporate developer from a country having an appropriate treaty with the United States. Such a corporation can elect under Code Section 897(i) to be taxed as a U.S. corporation, since the temporary regulations allow this election to apply for withholding purposes as well as substantive tax purposes. This result was not expressly authorized by Code Section 1445, but is expected to be addressed in the pending Technical Corrections Act of 1985.

2. Actual Knowledge. Under Code Section 1445, a transferee is not entitled to rely on a transferor's "certification of non-foreign status" if the transferor has actual knowledge that the certification is false, or has received a notice from a transferor's or transferee's agent pursuant to Temp. Reg. §1.1445-4T that the certification is false. The legislative history is clear that "actual knowledge" means "personal" knowledge, that "constructive" knowledge is not included, and that there is no duty to inquire into the validity of the certification. The regulations should take the opportunity to assure taxpayers that the actual knowledge test does not raise any duty to inquire into the accuracy of the non-foreign certificate.

3. Belated Notice. The temporary regulations introduced the concept of "belated notice" of the falsity of a non-foreign certification. In the ordinary withholding situation [under Code Section 1445(a)] the transferee is entitled to rely upon a non-foreign certification only with respect to amounts paid prior to receipt of a belated notice (from an agent or elsewhere) that the initial certification was false. A transferee receiving a belated notice is required to withhold the full 10 percent of the total amount realized by the transferor on the transaction from the consideration remaining to be paid, to the extent possible. (There are other, more complex, forms of withholding required for belated notices under the situations covered by Code Section 1445(e).] What is not clear from Temp. Reg. §1.1445-2T(b)(4)(iv) is whether the transferee is liable for withholding from payments which are to be made to a third-party creditor, pursuant to either liabilities assumed from the transferor or purchase money indebtedness in favor of the transferor negotiated to a third-party holder in due,course either before or after the date of the belated notice. The IRS should clarify that the withholding obligation of the transferee in case of a belated notice applies only to the payments actually made directly to the transferor, at least in the usual Code Section 1445(a) withholding situation. To do otherwise would place in jeopardy either the transferee or a third-party holder of the debt.

4. Foreclosures. Since a foreclosure against a USRPI owned by a foreigner technically constitutes a disposition under FIRPTA and thus would be subject to withholding, the temporary regulations protect foreclosing creditors other than in abusive situations. There are two main areas of difficulty with the temporary regulations.

First, while Temp. Reg. §1.1445-2T(d)(3) provides creditors a mechanism to avoid withholding by filing an appropriate notice with the IRS where no consideration is paid to the debtor other than a release of the debt secured by the USRPI at the time of foreclosure. withholding

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is required within ten days of the foreclosure if any amount potentially is payable to the debtor, such as when an amount greater than the property is bid in at the foreclosure sale by the creditor or by a third party. In this situation, the temporary regulations simply do not take into consideration the practicalities of foreclosures, since it is frequently indeterminable at the time of the foreclosure sale what amount will be ultimately paid over to the debtor, such as when other mortgage interests and liens need to be determined through court order at a later point in time. Also, in Florida, the entire bid price must be paid to the Clerk of the Circuit Court within a few days, with no provision for reduction because of withholding tax obligations. An appropriate resolution of this issue would be to apply the withholding tax only to amounts paid directly to the foreign debtor.

Second, no special relief is available for a creditor taking back property by a deed in lieu of foreclosure, and the creditor must seek a withholding certificate. There appears to be no valid reason for denying relief in this situation, and, at least for institutional lenders, the procedure should be treated the same as other foreclosure mechanisms.

5. Non-US Real Property Holding Corporation Affidavit. To establish that a sale of stock in a corporation is not subject to withholding tax under Code Section 1445, the corporation may give a certification that it is not a U.S. real property holding corporation ("USRPHC'). Under Temp. Reg. §1.14452T(c)(i), however, the corporation apparently is not allowed to give such a certification if it has not timely notified the IRS that it is not a USRPHC, pursuant to Reg. Section 1.897-2(h)(1)(ii)(A). For tax years 1980 through 1983. such notice was required to be filed with the IRS by March 31, 1985; for subsequent years, the notice is to be filed with the corporation's tax return. This requirement should be done away with entirely, as an inappropriate prerequisite to the sale of stock in a corporation which is not a USRPHC.

6. Residence Exemption. The exemption from withholding for a residence sold for $300,000.00 or less requires that the buyer acquire the property to use as a "residence." Temp. Reg. §1.14452T(d) provides a safe harbor if the transferee has definite plans to reside at the property for at least 50 percent of the number of days that the property is in use during each of the first two 12-month periods following the date of transfer. Since occasionally a buyer decides to acquire a personal residence through a land trust, corporation or partnership, the temporary regulations should extend the exemption to allow for this. Also, the exemption should include the purchase of unimproved property with the intent of building a residence on it if the total cost does not exceed the $300,000.00 limit and if the residence is constructed within a certain period of time.

7. Non-Recognition Provisions. The IRS attempted to respond to practical concerns by exempting from withholding certain types of transactions in which gain or loss is not required to be recognized. Generally, the transferee is not required to withhold if the transferor certifies that the transferor is entitled to non-recognition treatment on the transfer. The transferee must provide a copy of the certification to the IRS within ten days after the transaction. Among other things, the transferee may not rely upon the exemption if the transferee and the transfer or are related persons within the meaning of Reg. Section 1.897-l(i). This effectively prevents tax-free incorporations under Code Section 351 as well as liquidations of corporations exempt under Code Section 332 and 897(d), as the transferor and the transferee in such transactions are related parties. Parties to such transactions should not have to obtain a withholding certificate to avoid withholding and the exemption for non-recognition transactions should be broadened to cover these transactions.

Another problem in connection with non-recognition transactions, is that even though the transaction is of the type subject to Code Section 1445(e), but is exempt from withholding thereunder, it may still be subject to withholding under Code Section 1445(a). As an example, in a liquidation of a foreign corporation into a U.S. corporation under Code Section 332, as to which the Code Section 897(d) is inapplicable because of Code Section 897(d)(l)(B)(i), a transfer in liquidation is exempt from withholding under Temp. Reg. §1.1445-5T(d). However, if Code Section 1445(a) is also applied to the same transaction, withholding may be required of the U.S. parent corporation even though there is no substantive FIRPTA tax on the liquidation. The regulations should clarify that this result was not intended.

8. Use of Net Operating Losses in Determining Maximum Tax Liability. When an application for withholding certificate is filed on the basis that the maximum tax due on the disposition would be less than the statutory withholding amount, apparently the Foreign Operations Division of the Service takes the position that the taxpayer may not utilize net operating loss carryovers from prior years to reduce the tax due for withholding purposes, apparently because the administrative burden of reviewing such prior losses is viewed as inordinate. However, Temp. Reg. §1.14453T(c)(2)(v) calls for an adjustment of the taxable amount for "any other factor that may increase or reduce the tax" from the USRPI disposition. Particularly if tax returns have been filed on which such net operating losses are reflected, the IRS should take such returns at face value and allow such losses as "other factors" to be taken into account pursuant to the regulations,

9. Installment Sales-Interest Charge on Deferred Tax. Temp. Reg. §1.1445-3T(e) provides for interest to be charged on a deferred payment of withholding tax from the date of which the full withholding tax (not the actual tax) would have been due, regardless of the reason for the deferment. This effectively does away with the tax-deferral benefits of an installment sale. Particularly when added to the requirement of giving security for the future payment of tax, charging interest on the entire tax burden from the date of the transaction is excessive, and the regulation should be revised to charge interest only from the dates on which each payment of tax otherwise would have been required under normal reporting rules.

There are many other areas in which the temporary regulations could be improved, and the IRS is still soliciting comments from practitioners and other interested parties. Hopefully, the final version of the regulations will further the fine initial effort of the Internal Revenue Service.

Jonathan H. (Jason) Warner is a partner with the Miami firm of Greenberg, Traurig, Askew, Hoffman, Lipoff, Rosen & Quentel, P.A. He received a B.A. degree from Louisiana State Unviersity in 1968 and a J.D. degree from Columbia University School of Law in 1971. Currently, Mr. Warner is Special Projects Chairman, Florida Bar Tax Section and Co-Chairman, Florida Investment Committee. International Center of Florida.

Proposed Change in Regulations for Temporary Workers by INS would have great impact on the Business Community

by Sarah Lea Tobocman

The Immigration and Naturalization Service, through its Adjudications Divisionis considering certain (intracompany transferree) visa petitions. The enactment of such regulations would have the effect of allowing extensions of stay of such temporary visas despite the fact that a permanent residency petition had been filed. This would primarily help alien beneficiaries of L-l and H-l visas whose authorized period of stay expires while they are waiting for the adjudication of a preference peition either under the sixth or third preference petition either under the sixth or third preference. ***Please note that the new proposed provisions represent the current thinking of the Adjudications Division, and not the official views of the Immigration Service:***

L and H Regulations and Operating Instructions[1]

The Adjudications Division of the Immigration and Naturalization Service is considering changes in certain regulations which impact on the business community. The proposals to amend the L regulations have been submitted to the Department of State, which has not yet had time to determine their feasibility. Some of the procedural changes may impose an undue workload on the State Department, in which case it will be necessary to revise them.

The following outline of major provisions represents current thinking in the Adjudications Division and does not represent official views of the Service:

L Regulation (8 CFR 214.2(1)

I. General

A. The filing of a preference petition after the admission of an L would *not* prevent the issuance of an extension of stay assuming the nonimmigrant is otherwise in compliance with the law.

B. An alien's period of stay in the U.S. under the L visa could not exceed six years.

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PROPOSED CHANGE

from preceding page

Initial admission could be for three years; and extension could be granted for up to two years; and a second extension of up to one year could be granted under extraordinary circumstances, after certification to the Administrative Appeals Unit.

C. The regulations a 214.2(1) will be completely reorganized and reworded to make requirements clearer, consistent, and easy to follow.

II. Definitions

A. Managerial and executive capacity--the definitions would be modified to require that at least 90 percent of the employee's time must be spent in performing managerial or executive duties.

B. Specialized knowledge-the definition would be revised to require that the knowledge be narrowly held in the organization, unique. and involve a key process or function which enhances the organization's operation and competitiveness in the market place.

C. Qualifying Organization The term "qualifying organization" would be added, to refer to the petitioner and any related organizations found to meet the requirements of section 101(a)(15)(L). The petitioner would be required to do business in the United States and abroad directly or through its qualifying organizations for the duration of the alien's stay in the U.S. as an intracompany transferee.

III. Blanket Petitions

A. A petitioner would be able to file a blanket petition on behalf of itself and its qualifying organizations if:

1. The petitioner is engaged in commercial trade or services in the United States.

2. The petitioner and the other qualifying organizations are three or more in number.

3. The petitioner and the owner qualifying organizations have either transferred at least 10 "L" managers, executives. or specialized knowledge professionals to the U.S. during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least 25 million dollars; or have a United States workforce of at least 1000 employees.

B. Blanket petitions would be approved initially for three years and approved indefinitely thereafter. Thus the blanket procedure would be expanded to include specialized knowledge, but only professionals who possess specialized knowledge.

C. Requirements for proof of qualifying relationships would be simplified, and current requirements for documentation of the internal organizational structure and titles of positions would be eliminated.

D. A new form, specifically for L petition, would be developed, in addition to a separate form (Certificate of Eligibility) to be used by petitioners to certify the eligibility of aliens against blanket petitions when they seek to transfer an alien to the U.S.

C. Blanket program procedures

1. When a qualifying organization seeks to transfer an alien to the U.S., the petitioner would complete a certificate of eligibility and send it and a copy of the approval notice to the beneficiary with a copy to the consular office or the port-of-entry in the case of Canadians.

2. Beneficiaries would apply for a visa at the consular office or apply for admission at a port of entry, in the case of Canadians, with these documents. Consular officers and inspectors would determine the eligibility of the intended employment and the eligibility of the alien "L" classification.

3. At the time of admission, Service inspectors would collect a copy of the certificate of eligibility from the alien and send it to th appropriate Service office for control purposes.

H Regulations

- Will simplify the wording of the regulations.
- Will authorize the admission of H-1s for an initial period of three years with extensions in the same manner as for Ls.
- The filing of a preference petition after the admission of an H-l would not prevent the issuance of an extension of stay assuming the nonimmigrant is otherwise in compliance with the law.
- Will more specifically define the documentation of distinguished merit and ability.
- Original admission of an H-3 would be for up to the full extent of the training program not to exceed three years.
- Provides for approval of an H petition in whole or in part.
- Requires the concurrent filing of Forms I-539 and Form I-129B to keep applications together.
- Would automatically revoke H-l petition of nurse who fails State licensing exam.
- Will limit admission of nurses on H-l visas to one year. Further extensions will be contingent on presentation of State nursin credential.

Other Regulations

- Initial admission would be extended as follows:
  J-l duration of status
  B-l one year
  E three years

NOTE: The Immigration Committee will provide subsequent updates on the proposed regulations in the Law Quarterly.

FOOTNOTES:

‘Appendix I, *Interpreter Releases,* May 10, 1985, pp. *450-452.*

Sarah Lea Tobocman, partner in the law firm of Margoles & Tobocman, specializes in immigration, corporate, international and family law. Ms. Tobocman is co-chair of the Immigration Committee of the International Law Quarterly.

International Law Section Budget, 1985-86

The following budget was approved by the Executive Council on January 25, 1985 and by the Board of Governors of The Florida Bar May 1985.

ACCOUNT DESCRIPTION	1985-86 PROPOSED BUDGET
REVENUES:	
Dues	$18,000
Dues Retained by TFB (1/2 dues collected)	9,000
Net Dues:	$ 9,000
CLE SEMINARS:	
Seminar I	
Dec ‘85 Caribbean Update	$300
Seminar II	
Feb/Mar ‘86 U.S./ Canada	300
Total Seminar Income:	$600
OTHER REVENUE:	
Interest	$ 3 5 0
Total Other Revenue	350
TOTAL REVENUE:	$9,950

EXPENSES:	
Postage	$ 1,200
Printing	675
Officers Office Expense	900
Newsletter	2,500
Supplies	50
Photocopying	75
Out of State Travel	600
CLE Speaker Expense	500
Committee Expense	1,000
Board or Council	1,200
Bar Annual Meeting	1,500
Midyear Meeting	175
Awards	100
Int’l. Law Exchange Programs (2)	4,000
Non Standard CLE Costs	
Operating Reserve	500
Other	500
TOTAL EXPENSES	**$15,475**
NET OPERATIONS	(5,525)
BEGINNING FUND BALANCE	9,310
ENDING FUND BALANCE	$3,785

Section Financial Policies

Revised April 26, 1985

Budget Policies

A. Section Budget Preparation

Designated officers or the Budget Committee of the section shall prepare and submit to the Executive Council for approval, a proposed budget for the forthcoming fiscal year. The proposed budget as approved by the Executive Council shall be submitted to the Bar by the date designated by the Budget Committee of the Bar.

B. Approval of Budget

The budgets proposed by the sections shall be considered by the Budget Committee of the Bar in the same manner as all other suggestions submitted to the Committee. The Budget Com-

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mittee of the Bar shall recommend a proposed budget to the Board of Governors for its approval. All notice, hearing and objection provisions of the Integration Rule and Bylaws shall remain in effect.

C. Publication of Budget

The section's proposed annual budget as recommended by the Budget Committee of the Bar and approved by the Board of Governors will be distributed to all section members. The budget will include full disclosure of the section's policy regarding reimbursement of officer or member expenses. The approved budget including the required disclosure shall be published prior to July 1 of the budgeted fiscal year.

D. Budgeting of an Operating Reserve

The section shall budget an operating reserve sufficient to provide for contingencies inherent in the nature of their budget. The purpose of the operating reserve is to provide a source of funds for amendment purposes in the event of shortfalls of budgeted revenues or underestimation of budgeted expenses. It may not be used for new programs or line items or material alternation in nature or scope of existing section activities.

E. Legislative Expenses

(Re: SBP 9.14(c)(5))

No section shall budget or expend for legislative activities any amount greater than the amount budgeted or received as voluntary dues from section members.

(This policy shall comply with Board policies.)

F. Travel

1. Budgeting of Out-of-State/ Country Travel for Staff

All out-of-state trips that are expected to require staff support will be reported in the Section's annual budget preparations indicating the purpose, location and duration of the trip(s). For all out-of-state trips, the section will be responsible for paying the staff transportation.

2. Approval of Out-of-State Staff Travel

All out-of-state staff travel requested by the section must be approved by the Executive Director of The Florida Bar at least thirty days in advance of such travel.

3. Member Reimbursement of Out-of-State Travel

All Reimbursement of out-of-state travel shall be budgeted and reported as a separate line item.

4. Member Reimbursement of Meeting-Related Travel

Meeting related travel expenses shall be identified by a separate line item in the budget except as included in the out-of-state travel line item.

G. Gratuities

No funds shall be budgeted for payments to Bar staff.

H. Budget Amendments

During any fiscal year, by action of its Executive Council, a section may make budget amendments without Budget Committee approval of up to an aggregate 10% of their total disbursement budget provided no new line item or program is added by the section. ***The Executive Council may delegate this authority to its duly authorized Executive Committee provided actions of the Executive Committee are ratified by the full Council.*** All budget amendments that are more than 10% of the aggregate disbursement budget and all new programs must be approved by the Board of Governors.

I. Publication of Budget vs Actual Operations

The section shall publish a comparison of the final budget and actual results of operations for the fiscal year within a reasonable period after the end of the fiscal year.

Disbursement Policies

A. Disbursement Authorization

Expenditures shall be authorized only in accordance with budget as approved.

B. General Purchasing & Contracting Policies

All standard Bar policies regarding purchasing, contracting, employment for personal services and documentation of expenditures must be complied with. While policies are not reproduced here in detail, coordinators should be adequately versed to guide a section through compliance in the normal course of business.

Purchase orders issued by the purchasing agent are required for all purchase of goods and services of $100 or more. Documentation of price shopping is required as is evidence of receipt. Original invoices or receipts are required for payment of expenses except where the lawyer has made payment to the vendor. In those cases a copy of the invoice or bill is acceptable. Invoices or receipts are not required for the normal miscellaneous office expenses of copying, postage and phone charges.

All personal services are provided under written contract approved by the Executive Director or his designee.

C. Disbursement Approval

Payment of reimbursable expenses in excess of $25 a month must be approved in writing by the officer(s) designated by the Section. Payment requests, requiring approval, including appropriate documentation, shall be sent to the designated officer for approval and forwarded to the coordinator for payment.

In the event invoices, receipts or other documentation is lost by the section member, the designated officer has the discretion to accept a written statement as to the nature and amount of the expenditures and that the documentation was lost, signed by the person reporting the expense.

Any expenses requiring approval, incurred by the officer designated to approve expenses must be approved by another officer.

D. Entertainment and Liquor Expenses:

SBP 5.19(c)(1)

Sections should not budget section funds for entertainment purposes. However, minor amounts may be expended for refreshments at functions which invite attendance of the general membership of the section. Also fees collected specifically for entertainment purposes at a section function may be expended for such purposes. (3/80)

(The policy shall comply with Board policies.)

E. Section Reimbursement Policy

Sections may separately budget a fixed amount to be paid annually to section officers for reimbursement for all expenses incurred as opposed to reimbursing expenses on an item-by-item basis. Except for the expense allowance herein provided for section officers, all reimbursement of expenses must be in accordance with the following or be on a more restrictive basis as determined by individual sections:

1) Telephone Charges: Telephone charges must be itemized as to amount and at least one of the following: (a) party called and date, (b) telephone number, or (c) purpose of the call.

2) Copy Costs: Office copy costs are not to exceed 10¢ per copy. Itemize number of copies and purpose of copies. (Miscellaneous, general, etc. is an appropriate description for a small number of copies.)

3) Postage: Any large mailings must be itemized as to what was mailed to whom and at what cost. (NOTE: Mailings should be done by section coordinator at the Bar headquarters when possible.)

4) Printing: All printing shall be done at The Florida Bar headquarters unless, for the benefit of the section and the Bar, circumstances warrant otherwise.

5) Travel Expenses: Section/ Committee work involves time and expenses which are not generally reimbursed; however, expenses will be reimbursed on special occasions when individuals are requested to incur expenses on behalf of the section as long as prior approval has been obtained from either the Chairman or Chairman-elect. In these instances, the following reimbursement policy applies: (Travel expense reimbursement is essentially the same as for Bar employees.)

a) Air fare in all instances shall be “coach”.

b) Mileage is reimbursed at the maximum rate permissible by IRS without reporting such reimbursement to the Internal Revenue Services of some lower figure set by the section.

c) When taxis or limousines are not practical, a rental car may be used. The rental car shall be a subcompact or compact, or any other vehicle at a rate no greater than the rates for a subcompact or compact.

d) The method of travel should be the most economical, considering both time and travel costs.

e) Meals shall be reimbursed at the same rate as applicable for expenses by staff members of The Florida Bar. If there is a group meal function which is paid for by the section, no individual meal reimbursement shall be permitted.

f) Copies of receipts for lodging, out-of-town travel expenses (airline tickets, etc.) and all other charges of $25 or more (other than mileage and authorized meal allowances) must be attached.

g. When paying expenses (meals, etc.) for other individuals, the names of the other parties must be indicated and the relation to Bar activity disclosed.

h. Expenses may not be paid for companions, spouses, associates, etc., that would not otherwise be payable directly to that companion, spouse, etc. ***This policy shall not prohibit payment of spouse expenses of a non-Florida Bar member speaker. Such spouse expenses related to a CLE course shall be deemed “excess speaker expense” under I(J) of this policy and shall be charged to the applicable section budget category.***

6) Time Limits for Reimbursement Requests: Expenses to be considered for reimbursement must be submitted at least quarterly within 30 days of the end of the quarter for any quarter the cumulative unreported expenses exceed $100. Expense reports due for periods ending on June 30 must be filed by July 15. A section may elect to hold actual payment of such expense statements until July 15 after the end of the fiscal year.

These policies are minimal umbrella policies for sections to operate within. Sections shall establish policies specific to the individual section within the umbrella policies.

To: Members of the International Law Section

From: Bruce C. Starling

Re: Committee Appointments

As our Section enters its fourth year, I expect a dramatic increase in the scope of the activities of committees. However, in order to succeed with the planned expansion of activities, many new lawyers must commit their time to committee work. Lawyers who have participated in committee activities have found their work to be challenging and time rewarding. I solicit each member's support and participation as we continue to build our Section.

Committee work involves time, travel and related expenses which are not reimbursed by the Section or The Florida Bar. Since there are approximately ten lawyers who want to serve for every one committee position, please only return the form if you can commit both the time and expenses necessary to do an outstanding job.

I would encourage each member to write me directly in care of The Florida Bar if you have any questions, comments or suggestions regarding the purpose and scope of the International Law Section, how we can improve existing projects, expand into new areas or provide additional services to our members.

Sincerely,

Bruce C. Starling
Chairman-elect

INTERNATIONAL LAW SECTION COMMITTEES

(875) **ANNUAL MEETING:** Responsible for planning and executing a program at The Florida Bar's Annual Convention.

COMPARATIVE LAW COMMITTEES:

(878) **FOREIGN LAW COMMITTEE:** This committe has four divisions responsible to study and inform the Section and Bar concerning legal developments in the Caribbean, Europe, far East and Central and South American countries as they impact on members of the Bar.

(879) **EDUCATION COMMITTEE:** To plan and execute each year at least two CLE programs on significant and timely international law related topics.

(880) **IMMIGRATION:** To represent the Section before the Immigration and Naturalization Service and to advise members of the Section and Bar on developments in immigration law.

(881) **INTERNATIONAL BUSINESS, BANKING AND COMMERCIAL LAW:** Responsible for advising the Section and Bar on developments in international business and corporate law which impact on the commercial relations between U.S. businessmen and the nationals of foreign countries.

(812) **INTERNATIONAL LEGAL EXCHANGE COMMITTEE:** To plan travel arrangements and social events for Florida and out-of-country programs and to establish, maintain and strengthen relations between members of the legal profession in Florida and their colleagues in other nations.

(883) **INTERNATIONAL LITIGATION AND ARBITRATION:** Responsible for keeping abreast of developments in the area of international litigation and arbitration of commercial disputes and advise members of the Section and Bar on current developments in the area.

884) INTERNATIONAL PROPERTY, ESTATE AND TRUST LAW: Responsible to study and report on the developments affecting the international application of property, estate and trust laws and to undertake projects which will advise members of the Section and Bar on how to avoid problems created by multinational application of such laws.

(885) INTERNATIONAL TAXATION: Responsible for keeping abreast of issues relating to taxation of persons and companies involved in international investment, trade and commerce.

(886) LEGISLATIVE COMMITTEE: Responsible for monitoring state and federal legislation affecting international law and keeping members of the Section and Bar updated on this legislation.

(887) PUBLICATIONS COMMITTEE: Responsible for International Law Quarterly which updates members of the Section and Bar in the areas of international law and preparation of articles for the Florida Law Journal and Florida Bar News.

(888) TRADE COMMITTEE: To advise members of the Section and Bar on current developments in international tariff, trade and customs law.

INTERNATIONAL LAW SECTION
1985-86

Committee Preference Form

DEADLINE FOR RETURNING THIS FORM TO THE FLORIDA BAR: JULY 31,1985

After marking your choice, please return this entire page to: **International Law Section**
The Florida Bar
Tallahassee, Florida 32301

Name______________________________ Attorney No. ______________

Address____

City/ State/ Zip_______________________________________

PLEASE FILL IN COMMITTEE CODE NUMBER AND NAME FROM LIST BELOW IN ORDER OF PREFERENCE:

1st Choice: #_____ Committee Name: ______________________________

2nd Choice: #_____ Committee Name: ______________________________

875 Annual Meeting Committee
878 Foreign Law Committee
879 Education Committee
880 Immigration Committee
881 International Business, Banking and Commercial Law Committee
882 International Legal Exchange Committee
883 International Litigation and Arbitration Committee
884 International Property, Estate and Trust Law Committee
885 International Taxation Committee
886 Legislative Committee
887 Publications Committee
888 Trade Committee

PLEASE INDICATE AMOUNT OF TIME YOU WILL BE ABLE TO SPEND WITH YOUR CHOSEN COMMITTEE(S):

__ Less than one day/month; __ one day/month; __ more than one day/month

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