

Part III - Administrative, Procedural, and Miscellaneous
Contributions to Foreign Partnerships Under Section 6038B

Notice 98-17

This Notice provides simplified rules (pending the issuance of regulations) for reporting the transfer of property by U.S. persons to foreign partnerships under section 6038B of the Internal Revenue Code (the Code), as amended by the Taxpayer Relief Act of 1997 (the 1997 Act). The Notice applies to transfers made after August 5, 1997 and before January 1, 1998. Taxpayers may also apply the simplified rules of this Notice to transfers to foreign partnerships made after August 20, 1996 and subject to the reporting requirements of section 1494(c), so that the penalties under that section shall not apply.

SECTION 1. BACKGROUND

A. Sections 1491-1494

Before its repeal, section 1491 imposed a 35 percent excise tax on a transfer of property ("section 1491 transfer") by a U.S. person to a foreign partnership (unless section 1492 applied). The excise tax was 35 percent of the excess of the fair market value of the property transferred over its adjusted basis plus any gain recognized to the transferor upon the transfer.

In 1996, section 1494(c) was enacted, adding a penalty (even if no excise tax was due) for failure to file a return reporting a section 1491 transfer made after August 20, 1996. Sections 1491-1494 were repealed by the 1997 Act, effective August 5, 1997.

B. Notices 97-18 and 97-42

Notice 97-18, 1997-10 I.R.B. 35, issued after enactment of section 1494(c) and before its repeal, excluded certain section 1491 transfers from the reporting requirement and provided that no penalty would be imposed under section 1494(c) with respect to a section 1491 transfer if a Form 926 reporting such transfer was filed by the date specified in that notice.

Notice 97-42, 1997-29 I.R.B. 12, also issued after enactment of section 1494(c) and before its repeal, extended the due date for filing Form 926 to report section 1491 transfers made during the taxable year that included August 20, 1996, to the due date (including extensions) of the transferor's timely-filed income tax return or information return for the first taxable year beginning on or after January 1, 1997.

C. Section 6038B as amended by the 1997 Act

The 1997 Act amended section 6038B to require that certain transfers by U.S. persons to foreign partnerships be subject to reporting under section 6038B. These transfers are contributions described in section 721 ("section 721 contributions") and any other contributions described in regulations. Under section 6038B(b)(1), this reporting is required only if: 1) the transferor holds (immediately after the transfer) directly or indirectly at least a 10 percent interest in the partnership, or 2) the fair market value of the property transferred (alone, or aggregated with certain other section 721 contributions) exceeds \$100,000.

SECTION 2. SECTION 6038B REPORTING FOR TRANSFERS MADE AFTER

AUGUST 5, 1997 AND BEFORE JANUARY 1, 1998

Section 721 contributions to foreign partnerships made after August 5, 1997 and before January 1, 1998 and required to be reported under section 6038B shall be reported by the filing of Form 926 with Part I of the form completed and the information required in this Section 2 attached. Form 926 and its attachments must be filed with the transferor's tax return or information return for the taxable year that includes the date of transfer. The notation "Filed under Notice 98-17" should be marked at the top of the form.

A U.S. person that contributes to a foreign partnership appreciated property subject to the allocation rules of section 704(c) (property with built-in gain), or any intangible property, in a transfer subject to section 6038B, must separately identify the property (except to the extent that the property is permitted to be aggregated in making allocations under section 704(c)). A U.S. person that contributes built-in gain property must also indicate the foreign partnership's method of allocating the built-in gain under section 704(c).

The value of other contributed property must be aggregated by category on a statement attached to Form 926 (with, in each case, a brief description of the property). The categories are:

- (1) Stock in trade of the transferor (inventory);
- (2) Tangible property (other than stock in trade) used in a trade or business of the transferor;
- (3) Cash, stock, notes receivable and payable, and other securities; and,

(4) Other property.

Until further notice, taxpayers transferring property to partnerships will be required to report under section 6038B only section 721 contributions. Any guidance exercising the authority to require the reporting of other contributions will be prospective only. Additionally, Section 761(a) allows certain organizations that would otherwise be treated as partnerships to elect not to be treated as partnerships for purposes of subchapter K of the Code. Until further notice, any transfer to a foreign partnership with a valid section 761(a) election in effect will not be required to be reported under section 6038B.

SECTION 3. RELIEF FROM SECTION 1494 REPORTING

Section 1144(d)(2) of the 1997 Act provides that the section 1494(c) penalty will not apply to any transfers which would otherwise be subject to the penalty, if taxpayers comply with the reporting requirements of amended section 6038B or such simplified reporting requirements as the Secretary may prescribe. In order to avoid any section 1494(c) penalty which otherwise would apply in respect of transfers to foreign partnerships, taxpayers need only comply with the simplified reporting requirements provided in Section 2, above. Furthermore, section 721 contributions need only be reported by taxpayers described in section 6038B(b)(1).

A transfer to a foreign partnership may consist solely of property which would not be required to be reported under section 6038B and this Notice, but which is required to be reported under section 1494 and Notice 97-18. Taxpayers need not report such

transfers to avoid penalties under section 1494(c). However, in such cases, at their option, taxpayers may file a Form 926 with the notation "Filed under Notice 98-17 -- no reportable transfers" at the top of the form.

This Notice does not affect any obligation under section 1494 to report transfers to foreign entities other than foreign partnerships. Also, if a transfer to a foreign partnership was subject to the excise tax under section 1491, the tax must still be paid and the transfer reported on Form 926. If the excise tax does not otherwise apply by reason of section 1492, the taxpayer must still comply with all applicable requirements of that section. Finally, a U.S. person that is required to report under section 1494 and does not comply with the reporting requirements of this Notice remains subject to penalties under section 1494(c).

SECTION 4. EFFECTIVE DATES

This Notice is effective for transfers made after August 5, 1997 and before January 1, 1998. The Form 926 reporting such transfers must be filed with the transferor's timely-filed (including extensions) income tax return or information return for the period in which the transfers occur. Transferors choosing to report under these rules in respect of transfers subject to section 1494(c), must file a Form 926 including the information required by this Notice with their return for the first taxable year beginning on or after January 1, 1997 (the reporting deadline under Notice 97-42).

SECTION 5. PAPERWORK REDUCTION ACT

The collections of information contained in this Notice have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1586.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information contained in this Notice are in Sections 2 and 3. The information is required to determine if gain and income from property transferred to foreign partnerships is correctly taxed to U.S. transferors. The information will be used for the purpose described in the preceding sentence. The collections of information are required to obtain a benefit. The likely respondents are businesses or other for-profit institutions, individuals, and not-for-profit institutions.

The estimated total annual reporting and/or recordkeeping burden is 250 hours.

The estimated annual burden per respondent/recordkeeper varies from 0.25 hours to 1.0 hours, with an average burden of 0.5 hours. The estimated number of respondents and/or recordkeepers is 500.

The estimated frequency of responses (used for reporting requirements only) is once per year.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required

by 26 U.S.C. 6103.

DRAFTING INFORMATION

The principal author of this notice is Robert Lorence of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Mr. Lorence at (202) 622-3860 (not a toll-free call).