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TAXATION OF
INTERNATIONAL
TRANSACTIONS
MATERIALS, TEXT AND PROBLEMS

Fourth Edition



Charles H. Gustafson
Robert J. Peroni
Richard Crawford Pugh

WEST

**TAXATION OF
INTERNATIONAL
TRANSACTIONS**
MATERIALS, TEXT AND PROBLEMS
Fourth Edition

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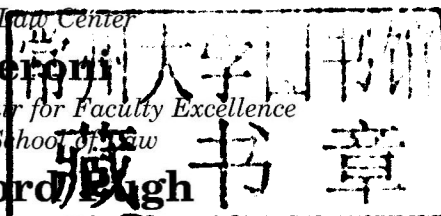
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DEDICATION

We dedicate this book to the thousands of students with whom we have worked and who have helped us to gain insights about tax law and tax law pedagogy.

Professor Gustafson also dedicates this book to his loving and supportive wife, Kate Gustafson.

Professor Peroni also dedicates this book to his loving and supportive parents, the late Emil Peroni and Betty Peroni.

Professor Pugh also dedicates this book to his loving and supportive wife, Nan Pugh.

PREFACE

The observation that law is being globalized has become something of a cliché. Like many clichés, the observation is true. Practitioners throughout the United States and in other countries are discovering that their work compels them to address problems with international dimensions.

The effects of an increasingly global marketplace, coupled with the mobility of people and ideas, have affected tax practitioners as well. In the United States the taxation of international transactions was once the province of a relatively limited number of specialized practitioners located primarily in a number of major cities. But the rapid growth of trade and investment arrangements that cross national boundaries has changed the picture materially. Attorneys, accountants, consultants and executives who may never have contemplated a career involving international trade and investment are finding themselves involved in business planning decisions that require analysis of many international factors.

This book is designed to serve as an initial step in the process of confronting one aspect of modern international trade and investment realities—the determination and administration of U.S. income tax liabilities resulting from international transactions. This area of the income tax law is particularly complex. There are a number of factors contributing to its complexity. The general complexity of the U.S. tax law is obviously a basic ingredient, as is the complexity of the foreign tax systems that may affect the analysis of any problem. Moreover, international trade and investment transactions are themselves often very complicated, and the complications are compounded by the sometimes conflicting demands of two or more national tax regimes. Technological changes, such as the evolution of electronic commerce, impose new strains on existing rules and procedures.

Another source of challenge is the seemingly constant change in the law. U.S. income tax law affecting international transactions has been subject to almost continuous change and adjustment over the past 50 years. In a familiar pattern, many of these changes have given rise to development of tax-avoidance techniques that in turn have attracted further legislative action intended to protect national revenues. One challenging element of the frequency of change that confronts this edition is the possibility that individual and corporate income tax rates will be changing just when the book is being published. Throughout the book, we have used a 35-percent tax rate as examples for both individual and corporate taxpayers. As we go to press, there is a debate about possible actions by Congress at the end of 2010 that may result in changes in those rates.

This volume is designed primarily for use in law schools, business schools and schools of management. As an introductory course book, it necessarily

leaves some stones unturned and is not intended to be the basis for advice to clients. It does, however, provide students with an opportunity to explore in considerable detail the basic topography of tax considerations that confronts foreign individuals and entities that would participate in the U.S. economy and U.S. individuals and entities that seek to generate income abroad. As such, it will be useful to those who contemplate at least the possibility of further work in the field as well as those who may need or wish to be able to recognize when an international tax specialist should be consulted.

The textual discussion, cases, rulings and other materials in the volume are accompanied by problems designed to demonstrate the operation of the applicable provisions and to provide focus for an examination of the policy considerations that relate to them. Some of the problems are designed to demonstrate specific points. Others provide an opportunity to apply relevant provisions in the context of a tax planning exercise. Many of the problems include references to other countries. Such references are used to facilitate discussion. However, the problems do not actually reflect the laws of any country other than the United States. In a number of instances, the problems require the analysis of the impact of treaty provisions that might be in effect. Such references do not, unless otherwise indicated, represent treaties that are actually in force between the United States and the country or countries identified in the problem.

We fully recognize that there are more materials in the course book than can be addressed in most course or seminar offerings. The book has been prepared with the expectation that professors will choose among topics that are to be addressed in a particular course or seminar offering, and we have sought to facilitate the selection process by using a paragraph numbering system.

Chapter 1 serves as an introduction to the conceptual and administrative considerations that inhere in the establishment of a structure for taxing the income deriving from international transactions. It introduces the principal policy considerations relevant to any evaluation of international taxing provisions. It reflects the influence of international law considerations, including particularly jurisdictional limitations, on the formulation of international tax policy and introduces tax treaties as a source of income tax law to which students may not previously have been exposed.

Chapter 2 reflects the process by which specific items of income and expense are attributed to geographical areas (usually countries) for various tax reasons by examining the so-called "source rules." These source rules are invoked for different purposes throughout the book.

Chapters 3 and 4 deal with "inbound transactions" (the taxation of income realized from investments and activities in the United States by foreign individuals and entities). The effect of tax treaties on inbound transactions is reflected throughout these chapters.

Most of the remainder of the book concerns the U.S. income tax treatment of "outbound transactions" (the taxation of income realized from investments and activities abroad by U.S. individuals and entities). Chapters 5

and 7 deal with aspects of the foreign tax credit and the limitations thereon. Chapter 5 also considers alternative approaches to mitigating international double taxation for U.S. persons, including the foreign earned income exclusion and the impact of tax treaties. Chapter 6 deals with various provisions intended to limit the ability of U.S. investors to avoid or defer U.S. taxes on foreign investment and business activities by using foreign corporations. Chapter 9 deals with issues arising from the use of foreign currencies.

The materials on transfer pricing set forth in Chapter 8 and the materials in Chapter 10 dealing with international tax-free exchanges apply to both inbound and outbound transactions.

Chapter 11 (international sale of goods), Chapter 12 (exploitation of intangible property rights abroad) and Chapter 13 (direct investment abroad) are intended for use in particular by professors who may wish to give an international tax planning emphasis to the treatment of outbound transactions.

Chapter 14 deals with two areas, the anti-international boycott rules and the Foreign Corrupt Practices Act, in which essentially political objectives have been advanced through the use of tax law provisions.

The materials covered in this volume generally reflect developments through November 1, 2010.

We have adopted a number of editing practices for this volume. Most footnotes are omitted from judicial opinions. Those that appear bear their original numbers in the opinions. Deletions of portions of judicial opinions, revenue rulings and other materials are indicated by ellipses.

This volume reflects a revised examination of the issues involved in the taxation of international transactions and introduces some new material not covered in the prior editions of the book. It is by necessity the product of our collective years in the classroom teaching international taxation and our various professional experiences. We are interested in your reflections about it. We have very much appreciated the comments and suggestions by professors and students who have used the earlier editions, including particularly Alice Abreu, Peter Blessing, Karen Brown, Glenn Coven, Joe Dodge, Cliff Fleming, Deborah Geier, Tracy Kaye, Michael Kirsch, Dan Lathrope, Julie Roin, Adam Rosenzweig, Stephen Shay, Bill Sherman, Jeff Strnad, Steve Wrappe and Eric Zolt. We welcome comments and suggestions with respect to this edition.

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We also wish to express our appreciation to the Georgetown University Law Center, the University of San Diego School of Law and the University of Texas School of Law for their support of this project.

The book, although a new work, has a rich ancestry which we wish to acknowledge. It derives from a volume entitled *Taxation of International Transactions* by Charles H. Gustafson and Richard C. Pugh and published by

CCH, Inc. That volume in turn was a revised and expanded version of *Taxation of Transnational Transactions* by the late Robert Hellawell, of Columbia University, and Richard C. Pugh, which was also published by CCH, Inc.

CHARLES H. GUSTAFSON

ROBERT J. PERONI

RICHARD CRAWFORD PUGH

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168	6105	305	13,075
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245 (c)(1)(A)	11,180	332	10,035
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267(b)	4270	332	13,065
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361	10,130
361	12,000
361	12,130
361	12,200
362	10,023
362	10,030
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362(a)	10,023
362(a)	10,030
362(b)	10,015
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541—547.....	6000	861(a)(6).....	2115
541.....	6000	861(a)(6).....	2175
551—558.....	6025	861(a)(9).....	2211
551—558.....	6000	861(b).....	2225
553.....	6000	862.....	2000
553(a)(5).....	6125	862.....	6090
611.....	5050	862(a)(1).....	2005
613.....	5050	862(a)(2).....	2010
684.....	10,125	862(a)(3).....	11,070
701.....	6180	862(a)(3).....	2025

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Sec.	This Work Par.	Sec.	This Work Par.
862(a)(3)	5345	864(c)(4)	3135
862(a)(4)	10,090	864(c)(4)(A)	3120
862(a)(4)	12,040	864(c)(4)(B)(i)	3120
862(a)(4)	12,115	864(c)(4)(B)(ii)	3120
862(a)(4)	12,125	864(c)(4)(B)(iii)	11,080
862(a)(4)	12,130	864(c)(4)(B)(iii)	3120
862(a)(4)	12,131	864(c)(5)	1145
862(a)(4)	12,195	864(c)(5)	2150
862(a)(4)	13,075	864(c)(5)	3045
862(a)(4)	2015	864(c)(5)(A)	3045
862(a)(5)	13,075	864(c)(5)(A)	3120
862(a)(5)	2105	864(c)(6)	3115
862(a)(6)	10,000	864(c)(7)	10,105
862(a)(6)	11,070	864(c)(7)	3115
862(a)(6)	11,080	864(d)	6195
862(a)(6)	2115	864(d)(1)	11,235
862(a)(6)	2175	864(d)(1)	6090
862(a)(9)	2211	864(d)(1)	7010
863	2000	864(d)(2)	6090
863	2160	864(d)(3)	6090
863(b)	11,005	864(d)(4)	6090
863(b)	11,240	864(d)(5)(A)	6090
863(b)(2)	11,065	864(d)(5)(A)(i)	11,235
863(b)(2)	11,135	864(d)(6)	11,235
863(b)(2)	13,070	864(d)(6)	6090
863(b)(2)	2160	864(d)(6)	7010
863(c)	2180	864(d)(7)	11,235
863(d)	2180	864(d)(7)	6090
863(e)	2180	864(e)(1)	2230
864	2000	864(e)(2)	2230
864	5253	864(e)(2)	3140
864(b)	1145	864(e)(5)	5253
864(b)	3005	864(e)(7)(B)	2230
864(b)	3010	864(e)(7)(C)	7145
864(b)	3030	864(e)(7)(F)	2230
864(b)	3110	864(f)	2230
864(b)	3190	864(f)	7145
864(b)	4160	864(f)(4)(C)	2230
864(b)(1)	1145	864(f)(5)(C)	2230
864(b)(1)	3010	864(f)(6)	2230
864(b)(2)	1145	864(g)	2240
864(b)(2)(A)	3015	865	1150
864(b)(2)(B)	3015	865	2000
864(b)(2)(B)(ii)	3015	865	2110
864(b)(2)(C)	3015	865	2115
864(c)	1145	865	2130
864(c)	3110	865	2175
864(c)(2)	11,070	865(a)	10,090
864(c)(2)	1145	865(a)	12,090
864(c)(2)	3100	865(a)	12,115
864(c)(2)	3185	865(a)	13,075
864(c)(2)	6075	865(a)	2110
864(c)(2)(B)	3100	865(a)	2130
864(c)(3)	11,070	865(a)	2165
864(c)(3)	1145	865(a)	4110
864(c)(3)	3100	865(a)(1)	12,115
864(c)(3)	3120	865(b)	10,000
864(c)(3)	4115	865(b)	10,030
864(c)(4)	11,070	865(b)	11,005
864(c)(4)	1145	865(b)	11,065
864(c)(4)	3120	865(b)	11,070
864(c)(4)	3130	865(b)	11,240

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Sec.	This Work	Par.	Sec.	This Work	Par.
865(b)	13,070		871(b)	1145	
865(b)	2115		871(b)	1285	
865(c)	12,115		871(b)	4160	
865(c)	13,075		871(b)	4200	
865(c)	2135		871(b)(1)	3000	
865(c)(1)	2135		871(c)	4102	
865(c)(1)	2140		871(d)	3095	
865(c)(2)	2135		871(d)	3195	
865(d)	12,115		871(g)(1)(B)	4027	
865(d)(1)	2140		871(h)	1150	
865(d)(1)(A)	10,090		871(h)	4040	
865(d)(1)(A)	12,115		871(h)(3)	4040	
865(d)(1)(A)	12,125		871(h)(4)	4040	
865(d)(1)(A)	13,075		871(i)	1150	
865(d)(1)(A)	2140		871(i)(2)(A)	4035	
865(d)(1)(A)	2165		871(i)(2)(B)	4045	
865(d)(1)(B)	10,090		871(i)(2)(B)(i)	4045	
865(d)(1)(B)	12,115		871(i)(2)(B)(ii)	4042	
865(d)(1)(B)	12,125		871(i)(2)(B)(ii)	4045	
865(d)(1)(B)	13,075		871(i)(2)(D)	3230	
865(d)(1)(B)	2165		871(i)(2)(D)	4045	
865(d)(2)	12,115		871(j)	4046	
865(d)(2)	2140		871(j)	4047	
865(d)(2)	7042		871(l)	4042	
865(d)(3)	12,115		871(l)(1)(B)	4045	
865(d)(3)	2140		871(l)(2)	4045	
865(d)(4)	12,115		871(m)	4020	
865(d)(4)(A)	2140		872(b)(5)	4046	
865(d)(4)(B)	12,115		873(a)	3135	
865(e)(1)	2150		873(b)	3150	
865(e)(2)	11,080		873(b)(3)	3150	
865(e)(2)	2150		874(c)	3135	
865(e)(2)	3120		875(1)	3060	
865(e)(3)	2150		875(1)	4175	
865(f)	2130		875(2)	3060	
865(f)	2145		877	1195	
865(g)	2110		877	1270	
865(g)	2130		877	3135	
865(g)(1)(A)(i)(II)	3120		877	5010	
865(g)(2)	2130		877(a)	1195	
865(h)	7005		877A	1195	
865(h)	7042		877(a)(2)	1195	
865(i)(4)	2145		877(a)(2)(A)	1195	
865(j)	2130		877(a)(2)(B)	1195	
871	1195		877A(a)	1195	
871	3110		877A(b)	1195	
871	4015		877A(c)—(f)	1195	
871	4120		877A(g)(1)(B)	1195	
871	5355		877A(g)(4)	1195	
871(a)	1150		877A(g)(5)	1195	
871(a)	4000		877(b)	1195	
871(a)	4047		877(b)	3135	
871(a)(1)(A)	1285		877(b)	5010	
871(a)(1)(A)	3110		877(c)	1195	
871(a)(1)(A)	5095		877(c)	1195	
871(a)(1)(B)	4000		877(c)(1)	1195	
871(a)(1)(C)	4027		877(c)(2)	1195	
871(a)(1)(D)	1150		877(c)(2)(A) (former)	1195	
871(a)(1)(D)	4020		877(c)(2)(B)—(c)(2)(D) (former)	1195	
871(a)(1)(D)	4110		877(c)(3)	1195	
871(a)(2)	1150		877(d)(1)	1195	
871(a)(2)	4110		877(d)(1)(A)	1195	

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Sec.	This Work Par.	Sec.	This Work Par.
877(d)(1)(B)	1195	892	3240
877(e)(1)	1195	892(a)(1)	3240
877(e)(2)	1195	892(a)(2)	3240
877A(g)(4)	1195	892(b)	3240
879	4280	893	3240
881	10,000	893(a)	3240
881	10,095	893(a)(3)	3240
881	3110	893(b)	3240
881	4015	893(c)	3240
881	4095	894(a)(1)	1235
881	4120	894(c)(1)	4102
881	5000	894(c)(2)	4102
881	6070	895	3240
881(a)	11,070	897	1150
881(a)	1150	897	1255
881(a)	4000	897	1295
881(a)(1)	3110	897	2155
881(a)(1)	5095	897	3195
881(a)(2)	4000	897	4185
881(a)(3)	4027	897	4190
881(a)(4)	1150	897	4195
881(a)(4)	4110	897	4200
881(c)	1150	897	4205
881(c)	4040	897	4210
881(c)(3)(A)	4040	897	4220
881(c)(3)(B)	4040	897	4225
881(c)(3)(C)	4040	897	4235
881(c)(4)	4040	897	4245
881(d)	1150	897	4255
881(d)	3230	897	4260
881(d)	4035	897	4290
881(d)	4045	897(a)(1)	4200
882	10,000	897(a)(2)	4200
882	10,095	897(b)(2)(B)	4205
882	1145	897(c)(1)(A)	10,100
882	4200	897(c)(1)(A)(i)	4200
882	5000	897(c)(1)(A)(ii)	10,100
882	6070	897(c)(1)(A)(ii)	4205
882	6075	897(c)(1)(A)(ii)	4240
882(a)	11,070	897(c)(1)(A)(ii)	4245
882(a)	2225	897(c)(1)(B)	4205
882(a)(1)	3000	897(c)(2)	4205
882(b)	11,070	897(c)(3)	4205
882(b)	6365	897(c)(4)	4205
882(c)(1)	3135	897(c)(5)(A)	4205
882(c)(1)(B)	3135	897(c)(6)(A)	4200
882(c)(2)	3135	897(c)(6)(B)	4200
882(d)	3195	897(c)(6)(C)	4205
884	1145	897(d)(1)	4215
884	3230	897(e)	4225
884	4180	897 et seq.	2155
884	6075	897(i)	4220
884(c)(1)	3235	898	6065
884(d)(1)	3230	898	6360
884(d)(2)	3230	898(a)	6360
884(e)	1275	898(b)	6360
884(e)	3230	898(c)(1)(A)	6360
884(e)(2)	3230	898(c)(2)	6360
884(e)(4)	3230	901	12,015
884(f)(1)	2005	901	13,050
884(f)(1)	3230	901	13,070
892	1150	901	13,150