

SUMMARY OF CONTENTS

Special Note on Sources and Citationsxiii

PART I: BASIC ELEMENTS OF INTERNATIONAL TAXATION

| | |
|---|----|
| Chapter 1. U.S. Taxation in the International Setting..... | 3 |
| Chapter 2. Nationality and Residence for Taxation..... | 19 |
| Chapter 3. The Source of Income..... | 29 |
| Chapter 4. International Transfer Pricing..... | 63 |

PART II: INBOUND U.S. TAXATION

| | |
|--|-----|
| Chapter 5. U.S. Taxation of Foreign Persons: | |
| Passive Income | 77 |
| Chapter 6. The Meaning of a U.S. “Trade or Business”..... | 93 |
| Chapter 7. “Effectively Connected” Income | 103 |
| Chapter 8. Gains from Sales of U.S. Real Property | 111 |
| Chapter 9. The Branch Profits Tax..... | 109 |

PART III: OUTBOUND U.S. TAXATION

| | |
|---|-----|
| Chapter 10. Outbound Taxation in Overview..... | 127 |
| Chapter 11. The Foreign Tax Credit: | |
| Background and Overview..... | 133 |
| Chapter 12. The Foreign Tax Credit: | |
| Creditable Foreign Taxes..... | 147 |
| Chapter 13. The Credit Limitation of Section 904..... | 159 |
| Chapter 14. The Indirect Foreign Tax Credit..... | 167 |
| Chapter 15. Grand Overview of Dividends | |
| from Foreign Corporations..... | 179 |
| Chapter 16. Controlled Foreign Corporations: | |
| Subpart F..... | 191 |
| Chapter 17. Controlled Foreign Corporations: | |
| Section 1248..... | 207 |
| Chapter 18. Passive Foreign Investment | |
| Companies (PFICs)..... | 211 |
| Chapter 19. International Corporate Reorganizations..... | 215 |
| Chapter 20. U.S. Citizens Abroad | 219 |
| Chapter 21. Income Tax Incentives for Exports..... | 223 |

SUMMARY OF CONTENTS

PART IV: INCOME TAX TREATIES

| | |
|--|------------|
| Chapter 22. Income Tax Treaties in Overview..... | 229 |
| Chapter 23. Residence in Income Tax Treaties..... | 235 |
| Chapter 24. Business Profits—Permanent Establishments... | 241 |
| Chapter 25. Compensation for Personal Services..... | 251 |
| Chapter 26. Interest, Dividends, Royalties, Rents, and Other Gains..... | 257 |
| Chapter 27. The Rise and Fall of Treaty Tax Shelters: Sandwiches, Conduits, and the Treasury's Response | 267 |
| Table of Cases..... | 293 |
| Index..... | 295 |

TABLE OF CONTENTS

Part I: Basic Elements of International Taxation

| | |
|---|-----------|
| Chapter 1. U.S. Taxation in the International Setting..... | 3 |
| The Nature of International Taxation..... | 3 |
| “Inbound” and “Outbound” Transactions..... | 4 |
| The Study of International Taxation..... | 5 |
| Matters of Terminology..... | 5 |
| The U.S. Taxing Power | 6 |
| Worldwide U.S. Taxation..... | 7 |
| Its Limits in the Code..... | 8 |
| Simpler Times..... | 8 |
| The Problem of Double Taxation..... | 8 |
| A Contract in Kuwait..... | 9 |
| Territorial Taxation..... | 12 |
| U.S. International Taxation in Brief Overview | 14 |
| The Inbound Regime | 14 |
| The Outbound Regime | 15 |
| Tax Havens and Income Shifting..... | 16 |
| Chapter 2. Nationality and Residence for Taxation..... | 19 |
| Nationality..... | 19 |
| The Residence of Individuals..... | 20 |
| Residence Before the Enactment of Section 7701(b)..... | 21 |
| Section 7701(b)..... | 21 |
| Immigration Status: Lawful Permanent Residence..... | 22 |
| “Substantial Presence” in the United States..... | 22 |
| Actual Physical Presence | 23 |
| Substantial Presence by Carryover of Days | 23 |
| Closer Connection and Tax Home in a Foreign Country..... | 25 |
| Exceptions | 25 |
| Entities, Associations, and Partnerships..... | 26 |
| Corporations | 27 |
| Partnerships | 27 |
| Trusts | 28 |
| Chapter 3. The Source of Income..... | 29 |
| Source in General..... | 29 |
| Income from a Single Source..... | 30 |
| Interest Income..... | 30 |
| Marcel’s U.S. Venture..... | 31 |
| The 80-percent Rule..... | 36 |
| U.S. Branch Interest Paid by Foreign Corporations | 36 |
| The Source of Dividends..... | 37 |
| The 25-Percent Rule | 37 |

International Taxation

| | |
|---|----|
| Constitutional Interlude..... | 38 |
| Source of Income from Services | 41 |
| The NHL Player Cases..... | 42 |
| Services Performed Through Associations and Entities..... | 42 |
| Source of Rentals and Royalties | 44 |
| Gains from Sales of Property..... | 45 |
| Real Property | 45 |
| Personal Property..... | 46 |
| Sales of Inventory | 47 |
| The Place of Sale—Passage of Title..... | 48 |
| Income of Mixed Character..... | 50 |
| Section 863(b)..... | 50 |
| The 50/50 Method..... | 52 |
| Independent Factory Price..... | 53 |
| Sales by Foreign Persons Attributable to a U.S. Office..... | 53 |
| Source and Characterization..... | 55 |
| Services or Transfer of Property?..... | 55 |
| <i>Ingram v. Bowers</i> | 55 |
| <i>Oppenheim and Tobey</i> | 57 |
| Further Implications of <i>Ingram v. Bowers</i> | 58 |
| Brief Note on Products, Services, and Software | 59 |
| Equally Brief Note on Electronic Commerce | 60 |

Chapter 4. International Transfer Pricing..... 63

| | |
|---|----|
| Transfer Pricing and Taxation..... | 63 |
| Examples..... | 64 |
| Section 482 | 66 |
| Arm's Length Pricing and Gains from Integration | 67 |
| The Elusiveness of Arm's length Prices | 68 |
| The Regulations under Section 482..... | 69 |
| Related Persons | 69 |
| Arm's Length Results | 70 |
| Methods: the “Best” Method..... | 70 |
| Comparability..... | 71 |
| Sales of Property between Related Persons | 71 |
| Comparable Uncontrolled Price Method | 71 |
| The Resale Price Method..... | 72 |
| Cost Plus Method..... | 72 |
| Transfers of Intangible Property—The “Superroyalty” Clause .. | 73 |
| Advance Pricing Agreements..... | 74 |

Part II: Inbound U.S. Taxation

Chapter 5. U.S. Taxation of Foreign Persons:

| | |
|---------------------------------------|----|
| Passive Income | 77 |
| Generalities on Inbound Taxation..... | 77 |
| The Flat Rate Tax..... | 79 |
| “Fixed or Determinable” Income..... | 79 |
| Gains from Sales of Property..... | 81 |
| Withholding..... | 81 |

| | |
|---|------------|
| Interest from Passive Investments..... | 81 |
| Exempt “Portfolio Interest” | 82 |
| Exceptions, limitations, and Restrictions..... | 83 |
| 10-Percent Shareholders..... | 83 |
| Interest Paid to Foreign Banks..... | 86 |
| Contingent Interest..... | 88 |
| Dividends..... | 89 |
| Income from Intangible Property..... | 89 |
| Sale versus License..... | 90 |
| Sales with Contingent Payments..... | 91 |
| Chapter 6. The Meaning of a U.S. “Trade or Business” | 93 |
| “Business” versus Passive Investing | 94 |
| Rental Real Estate and Natural Resources..... | 94 |
| Other Activities..... | 97 |
| Services | 97 |
| Buying and Selling | 97 |
| Lending Money | 98 |
| Manufacturing | 99 |
| Business “in the United States”? | 99 |
| The Imputation of a Trade of Business..... | 100 |
| Chapter 7. “Effectively Connected” Income..... | 103 |
| The Basic statutory Scheme..... | 103 |
| Fixed or Determinable Income and Capital Gains..... | 104 |
| Assets Used in the Business..... | 104 |
| Activities..... | 105 |
| Other U.S.-Source Income | 105 |
| Foreign Source Income | 107 |
| Deferred Gains from a Trade or Business..... | 109 |
| Elective Effective Connection..... | 110 |
| Chapter 8. Gains from Sales of U.S. Real Property..... | 111 |
| Section 897 | 111 |
| “United States Real Property Interests”..... | 112 |
| Scope of “Real Property” | 112 |
| “Interests” in Real Property | 113 |
| Effects of Valuation | 114 |
| Publicly Traded Stock..... | 115 |
| Foreign Corporations..... | 115 |
| Closing Note on Section 897 | 116 |
| Chapter 9. The Branch Profits Tax..... | 117 |
| Overview | 127 |
| Why? | 127 |
| How? | 119 |
| The “Dividend Equivalent Amount” | 120 |
| The Taxable Event..... | 120 |
| Relation to the Former Second Tax | 121 |
| The Branch Interest Tax..... | 122 |

Part III: Outbound U.S. Taxation

| | |
|--|-----|
| Chapter 10. Outbound Taxation in Overview..... | 127 |
| Double Taxation..... | 117 |
| Less than Single Taxation..... | 117 |
| The Tax System's Dual Response..... | 128 |
| Foreign Corporations..... | 128 |
| Controlled Foreign Corporations | 129 |
| The Entity Question..... | 129 |
| The Old Days..... | 129 |
| Check-the-Box..... | 130 |
| Per Se Corporations..... | 131 |
| Elective Classification..... | 131 |
| Default Rules | 131 |
| Chapter 11. The Foreign Tax Credit: Background and Overview..... | 133 |
| Credit versus Deduction | 133 |
| Early History..... | 134 |
| The Credit Limitation | 136 |
| Effect of the Limitation | 138 |
| Excess Credits and Carryovers..... | 139 |
| “Overall” and “Per-Country” Limitations | 141 |
| The Stakes..... | 144 |
| Chapter 12. The Foreign Tax Credit: Creditable Foreign Taxes..... | 147 |
| Your Vacation in Canada | 147 |
| Is a Foreign Tax an “Income” Tax? | 148 |
| <i>Biddle and Bank of America</i> | 148 |
| The Regulations on CreditableTaxes | 149 |
| Is the Foreign Payment a “Tax”?..... | 151 |
| The Problem of Oil Payments | 151 |
| The Search for a “Reasonable” Royalty..... | 153 |
| Shift of Focus to “Reasonable” Income Taxes..... | 154 |
| Splitting Payments made by Dual Capacity Taxpayers | 155 |
| Credit for “In Lieu of” Taxes | 157 |
| Chapter 13. The Credit Limitation of Section 904..... | 159 |
| The “Overall” Limitation of 1921 | 159 |
| The “Basket” System of the 1986 Act | 160 |
| Section 904(d)..... | 160 |
| The Separate Baskets | 161 |
| The Point of the 1986 Version of the Limitation..... | 162 |
| The General Limitation Basket | 163 |
| Relevance of Source Rules..... | 163 |
| Curtailment of the Basket System in the 2004 Act | 164 |
| Only Two Baskets Beginning in 2007 | 164 |
| Implications of the New Regime | 165 |

| | |
|---|-------------|
| The Special Case of Oil and Gas..... | 166 |
| Chapter 14. The Indirect Foreign Tax Credit..... | 167 |
| The “Deemed Paid” System..... | 168 |
| The 1921 Act | 169 |
| <i>American Chicle</i> | 169 |
| “Gross-up”..... | 171 |
| The Current Pooling System..... | 173 |
| Section 902(a)..... | 173 |
| There is Only One Foreign Tax Credit | 174 |
| Stock Ownership Requirements..... | 174 |
| Lower-Tier Subsidiaries..... | 175 |
| 5-Percent Minimum Beneficial Ownership..... | 175 |
| Older Layers, Older Law | 176 |
| Chapter 15. Grand Overview of Dividends from Foreign Corporations..... | 179 |
| Grand Chart..... | 180 et seq. |
| Chapter 16. Controlled Foreign Corporations: | |
| Subpart F..... | 191 |
| Foreign Corporations and Deferral..... | 191 |
| Foreign Personal Holding Companies..... | 193 |
| Foreign Base Companies..... | 194 |
| Subpart F | 195 |
| Controlled Foreign Corporation Defined..... | 195 |
| “United States Shareholder”..... | 196 |
| Indirect Ownership of CFCs and Attribution | 196 |
| Income Subject to Current Taxation under Subpart F | 196 |
| Foreign Base Company Income | 197 |
| Foreign Personal Holding Company Income | 198 |
| Foreign Base Company Sales Income | 199 |
| Foreign Base Company Services Income | 200 |
| Foreign Base Company Oil Related Income | 201 |
| Section 965: One-Time-Only Repatriation Special | 202 |
| Dividends-Received Deduction | 202 |
| Limitations on “Cash Dividends” | 203 |
| “Domestic Reinvestment Plan” | 204 |
| Now or Never | 205 |
| Chapter 17. Controlled Foreign Corporations: | |
| Section 1248..... | 207 |
| Sales and Liquidations of Controlled Foreign Corporations..... | 207 |
| Sales of Controlled Foreign Corporation Stock..... | 207 |
| Section 1248 | 207 |
| Mechanics of Section 1248 | 208 |
| The Stakes Under Section 1248 | 208 |

International Taxation

Chapter 18. Passive Foreign Investment

| | |
|--------------------------------------|------------|
| Companies (PFICs)..... | 211 |
| Background and Overview..... | 211 |
| PFIC Defined..... | 212 |
| Taxation of PFICs..... | 212 |
| The PFIC Regime of Section 1291..... | 212 |
| The QEF Election | 213 |
| The Mark-to-Market Election..... | 213 |

Chapter 19. International Corporate Reorganizations.....215

| | |
|--|-----|
| The Different Corporate Tax Environments..... | 215 |
| Section 367 | 216 |
| Outbound Transfers Under Section 367(a)..... | 216 |
| Inbound and Wholly-Foreign transfers Under Section 367(b)..... | 218 |
| Enough Said..... | 218 |

Chapter 20. U.S. Citizens Abroad.....219

| | |
|-----------------------------------|-----|
| Section 911 | 219 |
| Qualified Foreign Residents..... | 219 |
| Foreign Earned Income..... | 220 |
| Excluded Amount | 220 |
| Allowance for Housing Costs | 220 |

Chapter 21. Income Tax Incentives for Exports223

| | |
|---|-----|
| Background..... | 223 |
| The 2004 Act..... | 224 |
| “Qualified Production Activities Income”..... | 224 |

Part IV: Income Tax Treaties

Chapter 22. Income Tax Treaties in Overview.....229

| | |
|--|-----|
| Mutual Character of Tax Treaties..... | 229 |
| Tax Treaties and Double Taxation | 229 |
| Allocating Function of Tax Treaties..... | 230 |
| National Treaty Policies | 231 |
| Advancement of Trade..... | 231 |
| The Treaty Network of the United States..... | 232 |
| Model Treaties | 232 |
| The OECD Model Treaty..... | 232 |
| The U.S. Model Treaty | 233 |

Chapter 23. Residence in Income Tax Treaties235

| | |
|-------------------------------|-----|
| Treaty “Residence” | 235 |
| Resolving Dual Residence..... | 236 |
| “Saving” Clauses..... | 238 |

Chapter 24. Business Profits—Permanent Establishments...241

| | |
|------------------------------|-----|
| Marcel’s Wine Business | 241 |
| Business Profits | 243 |

| | |
|--|------------|
| “Permanent Establishment” | 244 |
| Definition in the U.S. Model Treaty | 245 |
| Permanent Establishments through Agents | 246 |
| Profits “Attributable” to a Permanent Establishment | 247 |
| Chapter 25. Compensation for Personal Services | 251 |
| Compensation for Personal Services | 251 |
| Independent Personal Services | 251 |
| Dependent Personal Services | 252 |
| <i>Johansson</i> and “Loan-out” Companies | 253 |
| “Artistes and Athletes” Clauses | 254 |
| Students and Scholars | 255 |
| Chapter 26. Interest, Dividends, Royalties, Rents, and Other Gains | 257 |
| Interest | 257 |
| Dividends | 258 |
| Treaties and the Branch Profits Tax | 258 |
| Section 884(e) | 259 |
| Possible Conflicts with Treaties—Questions of Precedence | 259 |
| Royalties | 260 |
| Royalties Attributable to a Permanent Establishment | 261 |
| Rentals from Tangible Property | 262 |
| Income from Real Property | 262 |
| Gains from the Sale of Real Property | 263 |
| Capital and Other Gains from Sales of Personal Property | 264 |
| “Other Income” Clauses | 265 |
| Chapter 27. The Rise and Fall of Treaty Tax Shelters: Sandwiches, Conduits, and the Treasury’s Response | 267 |
| The Origins of Treaty Tax Havens | 267 |
| Netherlands Antilles Finance Corporations | 268 |
| Treaty Sandwiches | 270 |
| Active Business Sandwiches | 275 |
| Marcel’s Sandwich | 277 |
| Limitations on Treaty Benefits | 280 |
| The End of the Antilles Treaty | 281 |
| The Dutch Sandwich | 281 |
| Section 163(j) | 283 |
| Conduit Regulations Under Section 7701(l) | 286 |
| The Last Incarnation of the Treaty Sandwich | 287 |
| Back to Basics | 289 |
| Check the Box | 289 |
| Table of Cases | 293 |
| Index | 295 |