

## XI. 出口商品到美国时的美国所得税

# XI. U.S. Income Taxation When Exporting Goods to the U.S.

## Sale of Goods

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- Regis Campfield's Notre Dame 税收和遗产规划研究所(2007)和(2009)
- Lonnie McGee 南加州税法及遗产规划论坛(2006)，(2007)，(2009-2011)
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- 《资产保护规划指导》，CCH 出版；
- 《资产保护战略》，美国律师协会出版；
- 《资产保护战略二》，美国律师协会出版

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Mr. is honored to have spoken multiple times at the following distinguished estate planning seminars:

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He is also a co-author of the following three treatises:

- The Asset Protection Planning Guide: A State-of-the-Art Approach to Integrated Estate Planning, Commerce Clearing House (CCH) treatise, first edition;
- Asset Protection Strategies, American Bar Association (two chapters); and
- Asset Protection Strategies Volume II, American Bar Association published Apr. 2005 (MM responsible for 1/5 of the text).

## Table of Contents

- A. Overview
- B. Evolution of Exporting to the U.S.
  - 1. Direct Export or Use of Agents
  - 2. Structures That Result in U.S. Taxation
- C. Analysis is Different For Treaty and Non-Treaty Analysis
- D. Non-Treaty Flow Chart Analysis
  - 1. U.S. Business Under the IRC?
  - 2. U.S. Source or Foreign Source Income
  - 3. Resourcing of Foreign Source Income
- E. Methods to Sell Goods in the U.S.
- F. Non-Treaty Analysis
  - 1. Sales Office (i.e. Branch)
  - 2. Direct Export of Goods
  - 3. Independent Agent
  - 4. Dependent Agent
- G. Treaty Analysis
  - 1. Permanent Establishment
  - 2. Direct Export
  - 3. Independent Agent
  - 4. Dependent Agent
- H. How Much Could Be Sold in the U.S.
- I. Planning Issues
  - 1. Independent Agent Reclassified
  - 2. Rubber Stamp Approval
  - 3. Other Activities in the U.S.
  - 4. U.S. Taxes Due For All Years
- J. Possible Solutions
- K. Evolution of Exporting to U.S. – Brief Summary
- L. Non-Treaty Trade or Business Exception
- M. Non-Treaty Business Income Exception
- N. Taisei Treaty Analysis
- O. Taisei Non-Treaty Analysis

# 国际税法期刊

## Journal of International Taxation

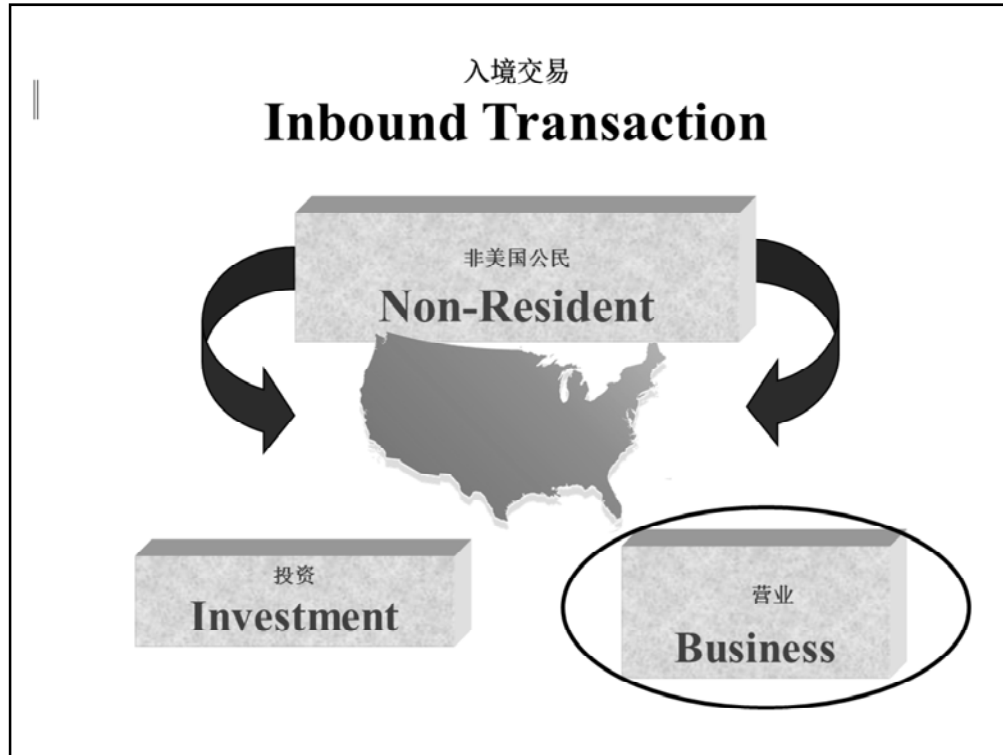


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Professor Lu Zhi'an – Fudan University

The Journal of International Taxation is America's most well respected periodic publication on international taxation. This outline was derived from a two-part article published in the Journal of International Taxation.

We are honored to have Professor Lu Zhi'an from Fudan University as a co-author. Professor Lu Zhi'an is the first Chinese professor to ever be published in the Journal of International Taxation.





## A. Overview

This outline deals with an inbound transaction. A foreign person is conducting a trade or business transaction with a U.S. person. For purposes of this outline, the term foreign person means a nonresident alien individual, foreign partnership, foreign trust, or foreign corporation.

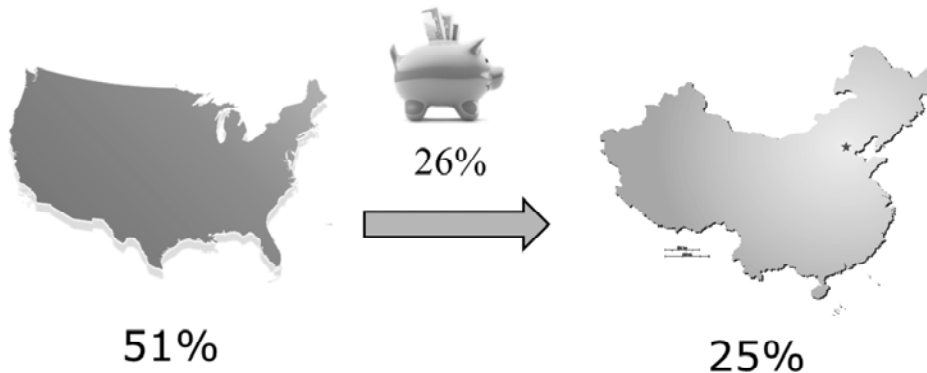
A foreign person is subject to income tax on two types of income: (1) fixed, determinable, annual, or periodic income (“FDAP Income”); and/or (2) effectively connected income (“ECI”). In layperson’s terms, FDAP is generally investment income; and ECI is generally business income.

本章讨论的是美国入境交易，即外国法人和美国法人进行贸易或商业交易的情况。在此，我们所用的“外国法人”是指非美国居住公民，外国合伙企业，外国信托和外国股份公司。

美国政府对外国法人在两种收入上征收所得税：(1) 固定的、确定性的、每年或固定周期的收入（FDAP 收入）；（2）有效关联收入（ECI 收入）。在专业术语中，FDAP 收入一般是投资收入，ECI 收入一般是经营收入。

## 中国拥有较低的所得税税率

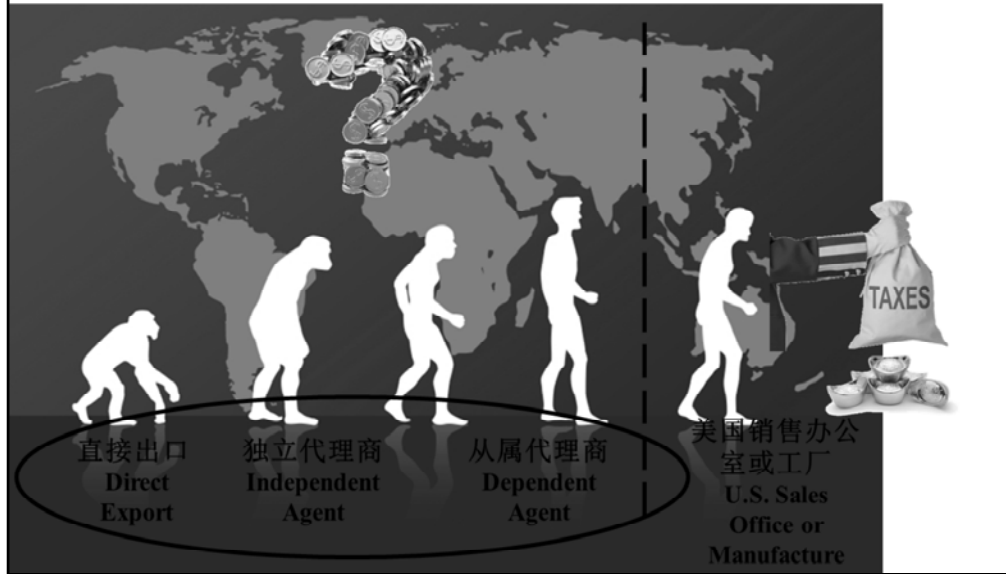
### China Has a Lower Income Tax Rate



China has a lower income tax rate. If the income is taxed in the U.S. and remitted as a dividend to China, the U.S. tax rate will typically be approximately 51%. On the other hand, if the income is taxed in the U.S., the Chinese enterprise rate is 25%. Therefore, the amount of tax saved by having an export sale taxed in China is approximately 26%.

出口至美国的不同方式的历史演变

## Evolution of Exporting to the U.S.



### B. Evolution of Exporting to the U.S.

#### 1. Direct Export or Use of Agents

Many times a Chinese business begins doing business by selling goods directly to a U.S. firm or possibly through an importer. After a profitable relationship has been created, the Chinese Business may then seek to expand sales to U.S. customers through an independent agent or a distributor. As the next step, the Chinese business may wish to use a dependent agent, usually an employee, to sell goods in the U.S. Finally, a Chinese Business may eventually open a U.S. sales office, manufacture in the U.S., form a U.S. corporation or U.S. partnership. For all of the sales methods other than a U.S. sales office, manufacturing in the U.S., forming a U.S. corporation or a U.S. partnership, a foreign business may be able to avoid U.S. income tax on the sale of goods.

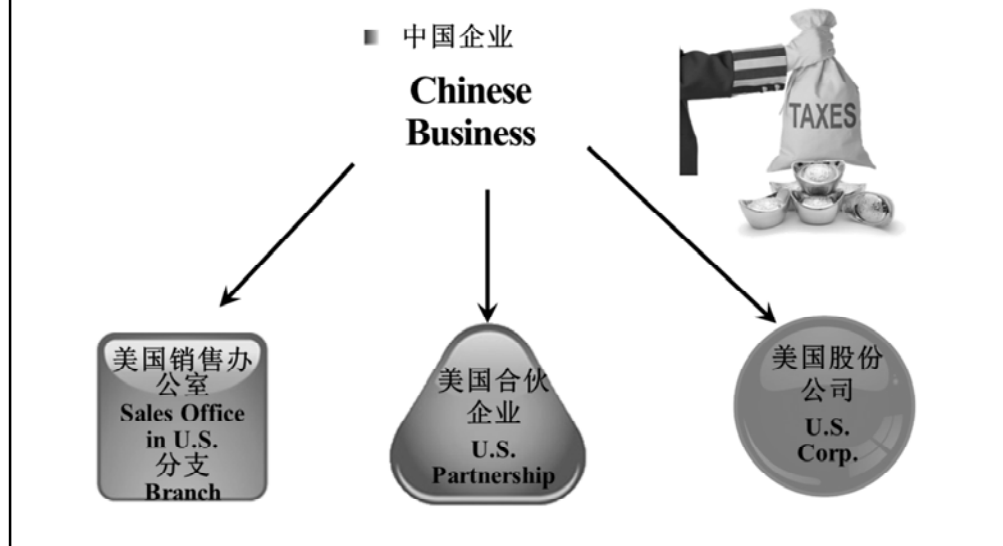
### B. 出口美国方式的常规演变

#### 1. 直接出口或者使用代理商

很多时候，一个中国公司在出口初始阶段会选择直接出口或者通过一个进口商的方式出口。之后当有了比较稳定的盈利关系之后，中国公司会试图寻找独立代理商或者经销商来扩大出口业务。进一步的，中国公司会使用从属代理商，通常为自己的外派员工，在美国进行销售。最后，中国公司可能会选择在美国设立销售办公室，工厂，成立一个美国股份公司或美国合伙制企业。在以上所有的销售方式中，除了最后的设立销售办公室和工厂，成立美国股份公司或者合伙企业之外，其他方式都能够避免缴纳美国收入税。

被纳入美国收入税的几种公司结构

## Structures That Result in U.S. Taxation



### 2. Results in U.S. Taxation

As noted on the previous page, opening a U.S. sales office or manufacturing in the U.S. results in U.S. taxation. The formation of a U.S. partnership or a U.S. corporation also automatically results in U.S. taxation. However, a U.S. partnership or U.S. corporation is subject to tax on worldwide income. Therefore, should a Chinese business evolve to the level of opening a U.S. partnership or a U.S. corporation, such entity should only conduct business in the U.S. so that sales outside the U.S. are not taxed by the U.S.

### 2. 在美国的收入税概况

正如前一页幻灯片所提及的，在美国设立一个销售办公室或者工厂将会导致在美国需要缴销售收入税的情况。成立美国股份公司或者合伙制企业也将自动导致美国税收。但是美国股份公司或者合伙企业在美国是需要缴纳全球收入的税的，所以如果一个中国公司要在美国成立股份公司或者合伙制企业的话，建议该美国企业最好只在美国经营业务，否则在美国之外的收入所得也将被纳入美国收入税范围。



### C. Analysis is Different For Treaty and Non-Treaty Analysis

#### 1. Non-Treaty Analysis Compared to a Treaty Analysis

The analysis with treaty countries and non-treaty countries is different. Treaties limit each contracting nation's ability to impose a tax. Therefore, if a treaty addresses a certain income tax issue, it may reduce what is subject to income tax, the amount subject to income tax, which nation may tax the income, or the rate of income taxation. As applied to the export of goods, treaties reduce the types of transactions that are subject to income taxation.

#### 2. Non-Treaty Chinese Nations

The outline uses mainland China and Hong Kong for examples. This is because China has an income tax treaty with the U.S., but Hong Kong does not. One might think that Hong Kong became part of China in 1997, and therefore, it is under China's treaty. Unfortunately, the U.S. takes the position that this is not the case. IRS Notice 97-40. Taiwan as well as Macao also do not have income tax treaties with the U.S.

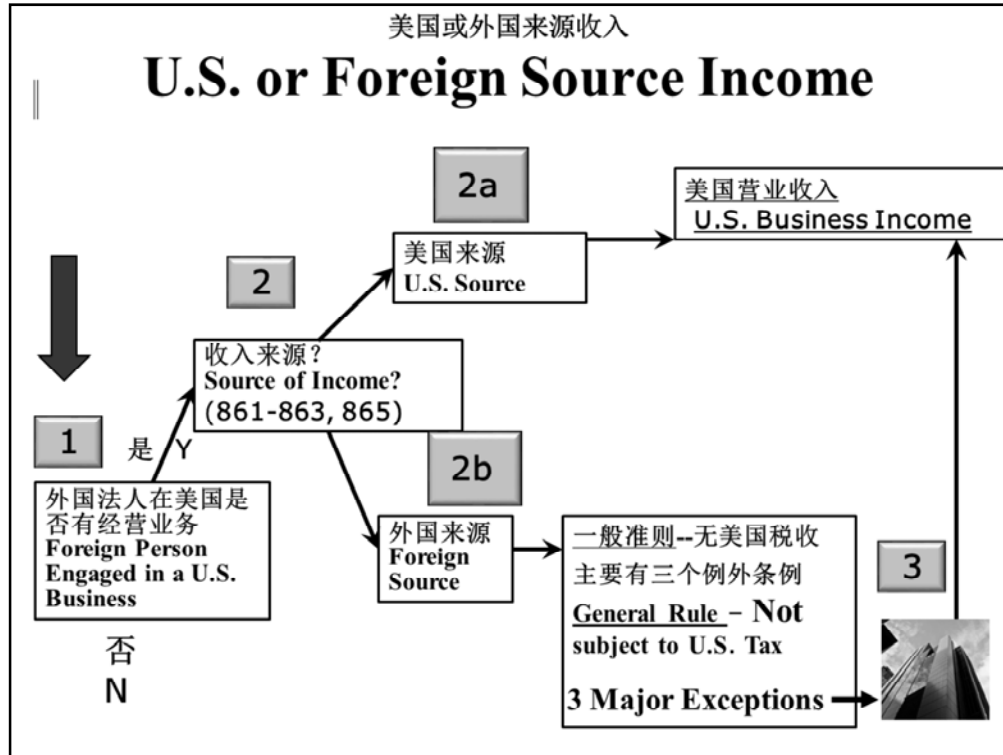
### C. 有税收协定和没有税收协定的不同分析

#### 1. 分析比较

分析有税收协定的情况和没有税收协定的情况很不同。税收协定给了协定国税收上的优惠政策，因此当协定在规范某一个所得税的问题时，它可以减少所得税的纳税范围或是纳税数额，需要纳税的国家，以及所得税税率。当适用于出口交易时，协定会减少征税的交易类型。

#### 2. 中国地区的税收协定

本章采用中国大陆地区和香港地区为例，因为中国大陆地区和美国有税收协定，但香港地区则没有。人们可能会因为香港在 1997 年回归了中国政府而认为它可能也受用于中美之间的税收协定，但事实是美国政府并没有改变对香港的无协定政策（参见美国税务局第 97-40 号通知）。台湾地区 and 澳门地区和美国之间也没有税收协定。



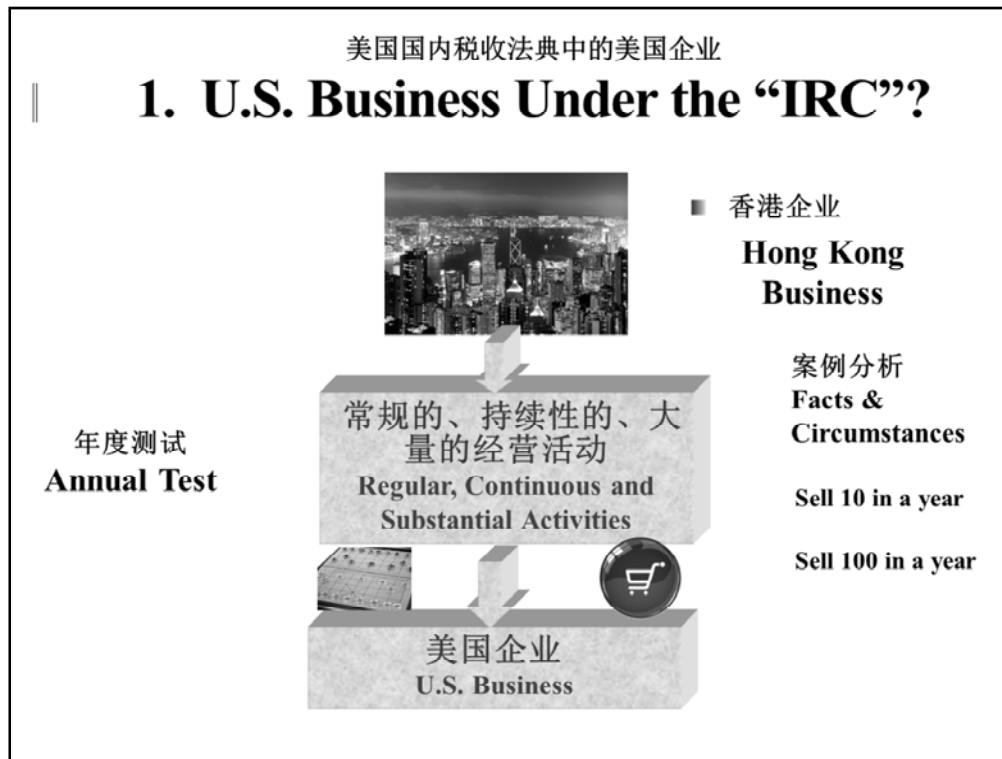
#### D. Non-Treaty Analysis

The above chart depicts a three step process for determining whether the foreign person will be subject to U.S. ECI tax. First, is the foreign person engaged in a U.S. trade or business. If a foreign person is engaged in a U.S. trade or business, second, what is the source of income – U.S. or foreign? If it is foreign source, then generally it is not taxable as effectively connected income. This is the case unless the third step applies and such income is resourced to U.S. source income by one of three exceptions.

#### D. 无税收协定流程图分析

以上的流程图描述了判断外国法人是否需要缴纳美国有效关联收入所得税的三个步骤。第一步，判断外国法人是否在美国有经营业务；第二步，判断收入的来源是美国还是外国，如果是外国来源，那么通常这样的不会被归为有效关联收入进行缴税，除非在第三步判断中，收入被某三个例外条例重新归类为美国来源的收入。

# 1. U.S. Business Under the “IRC”?



## 1. Is the Hong Kong Business Engaged in a U.S. Business?

Whether a Chinese person is considered doing business in the U.S. depends on the number and magnitude of the business transactions. In order to constitute a U.S. trade or business, the profit activities must be regular, continuous, and substantial to constitute a U.S. trade or business. *Commr. v. Spermacet Whaling & Shipping Co.*, 281 F.2d 646 (6<sup>th</sup> Cir. 1960).

### a. *Trade or Business – Real Estate Examples*

*In Lewenhaupt v. Comm’r*, 20 TC 151 (1953), the foreign person rented three commercial pieces of real estate through an agent, this level of rental activity was sufficient to constitute a trade or business. In *Amodio v. Comm’r*, 34 T.C. 894 (1960), the foreign person rented four U.S. residential properties in different states through different U.S. agents, this constituted a trade or business. Conversely, in *Evelyn M. L. Neill*, 46 B.T.A. 197 (1942), the foreign person inherited property that was leased for a long term to a tenant who was required to pay the taxes, insurance, and maintenance on the property. In this case, the one tenant, long lease, and responsibilities assumed by the tenant resulted in the Tax Court concluding that the foreign person’s activities did not rise to the level of a trade or business.

### b. *Internet Example*

Assume a Hong Kong business sells Chinese chess (i.e. xiang qi) over the internet. If during the year, only one chess set was sold to a U.S. customer, then the Hong Kong business would seldom be considered doing a trade or business in the U.S. However, what if the level of activity rises to 100 chess sets throughout the year, then most likely the Hong Kong business would meet the regular, continuous, or substantial test.

## 1. 香港公司是否在美国有经营业务

一个中国法人是否被判断为在美国有经营业务取决于业务交易的数量和广度。利润必须是常规的、持续性的和大量的，才会被认为在美国有经营业务。参见美国案例 *Commr. v. Spermacet Whaling & Shipping Co.*, 281 F.2d 646 (6<sup>th</sup> Cir. 1960)。

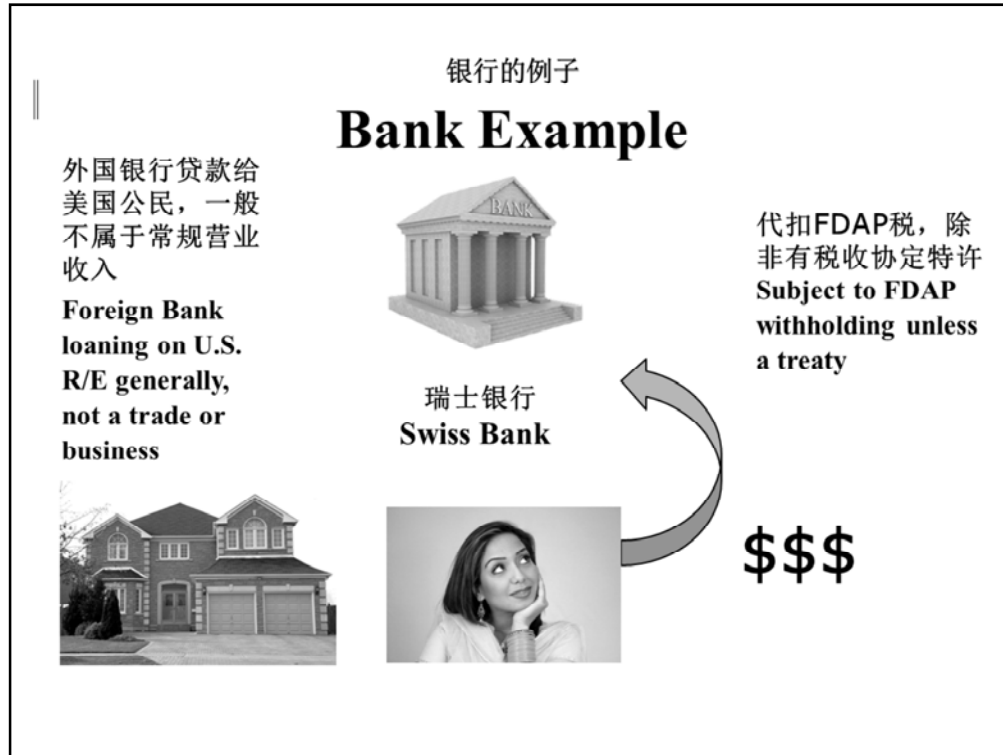
### a. *经营业务之房地产案例*

在案例 *Lewenhaupt v. Comm'r*, 20 TC 151 (1953)中，外国法人通过一个中介租了三处房产，这样的情况已足以构成在美国有经营业务。在案例 *Amodio v. Comm'r*, 34 T.C. 894 (1960)中，外国法人通过美国中介商在美国的不同州租了四个美国住宅楼，这在其他几个考虑因素中也已组够使该企业被裁定在美国有经营业务。相反的判决情况有：在案例 *Evelyn M. L. Neill*, 46 B.T.A. 197 (1942)中，外国纳税人继承了一处房产并长期租赁给了一个租户，并要求租赁方支付所有相关的税款、保险和维修费。这几个事实，包括只有一个租户、租约为长期、租客负担所有费用，都促使了美国税务法庭最后裁定该外国纳税人并没有达到在美国有常规经营业务的程度。

### b. *网络案例*

假设一个香港企业在网络上销售中国象棋，如果一年中只有一副中国象棋被销售给了美国客户，那么该香港企业将不太会被认为在美国有经营业务，但如果销售量在一年内达到了 100 副，那么该香港企业将很有可能被判定为满足了经营业务的三个特征条件：业务的常规性、持续性和大量性。





*c. Foreign Bank Example*

In the above example, it is assumed that our U.S. Citizen has a foreign bank account with a Swiss bank. The Swiss bank does not solicit U.S. citizens to make loans in the U.S.. Rather, it is out of the banking relationship with the U.S. citizen that the Swiss bank proceeded to make a loan to the U.S. person. Further, assume that only three loans were made to U.S. customers during the year from this Swiss bank. In this case, the Swiss bank would generally not be in a trade or business, because its lending activities into the U.S. are not regular, continuous, and substantial. In this case, this results in the income being FDAP income to the Swiss bank.

*c. 外国银行的例子*

在以上的例子中，我们假设美国公民在一家瑞士银行有一个账户。这家瑞士银行没有积极地在美国拓展贷款业务，对美国公民的贷款也不在这家瑞士银行的常规业务范围。再假设这家瑞士银行在整个一年中只对美国公民做了三笔贷款，那么这家瑞士银行的贷款服务将不被认为是在经营常规业务，因为它的贷款活动不是常规性、持续性和大量的。因此这些贷款相关收入将被定性为FDAP投资收入。

美国经营业务的判别

## U.S. Trade or Business Attribution Issues



在判断公司在美国是否有经营业务时需要同时考虑独立代理商和从属代理商的活动

**Both Independent and Dependent Agency is considered in determining whether there is a U.S. Trade or Business**

### *d. Dependent and Independent Agent Activities are Attributed*

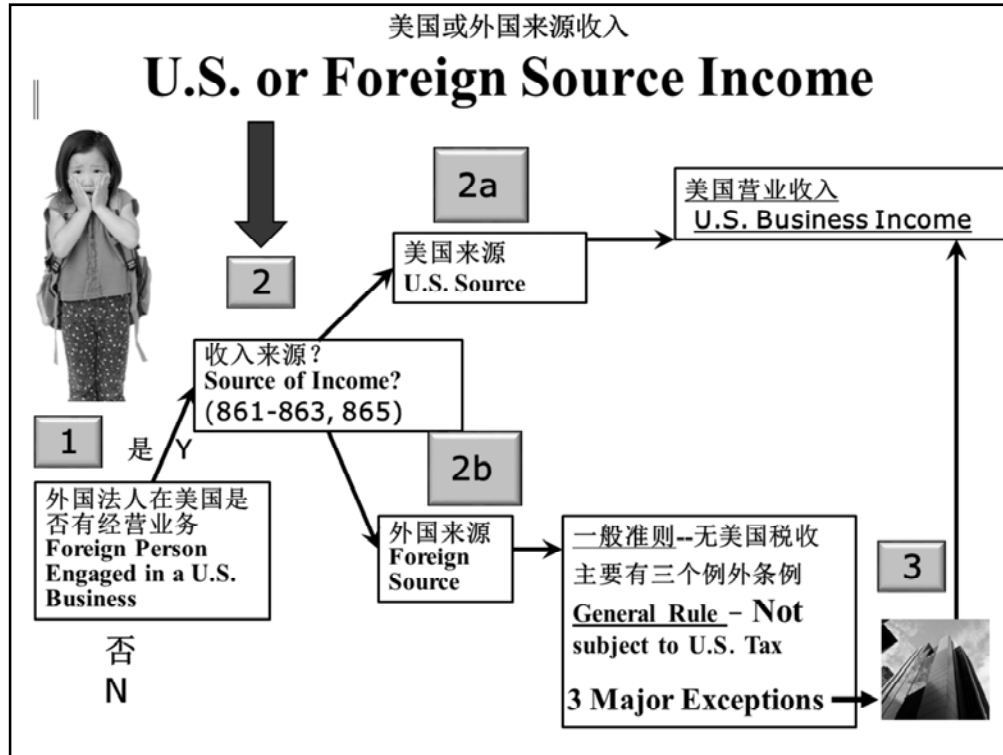
The general rule for the “trade or business test” (i.e. step 1) is that both independent and dependent agency are attributed to the foreign person. See Rev. Rul. 70-424; Rev. Rul. 55-617 that states without discussion the sale of goods by a U.S. commission agent is engaged in a U.S. trade or business. Also see *Frank Hadfield v. Comm’r*, 23 TC 633 (1955) where a Canadian company that sold cards on consignment through an exclusive agency agreement was engaged in business in the U.S.

Agency under the “trade or business test” for a non-treaty country must be distinguished from the agency test discussed in step 3 under the resourcing rules of §864(c)(4)(B) and §865(e)(2). The agency test under step 3 distinguishes between independent agents and dependent agents. In this respect, PLR 8147001 has the correct result, but probably an incorrect analysis on how to get to the result. This PLR will be discussed later in the materials.

### *d. 从属代理商和独立代理商的活动被归为外国法人的活动*

“贸易经营活动”的第一个满足条件一般将独立代理商和从属代理商的活动归为外国法人的活动。参见财政法规 70-424 和 55-617，陈述了美国佣金代理商的销售活动算作在美国有贸易经营活动。另外参见案例 *Frank Hadfield v. Comm’r*, 23 TC 633 (1955)，一个加拿大公司通过独家代理商委托销售卡片的活动算作在美国有贸易经营活动。

在没有税收协定的情况下，“贸易经营活动”中的代理商和财政法规 864(c)(4)(B)和 865(e)(2)，收入来源判定准则，中的代理商不是同一个概念。收入来源判定中的代理商区分了独立代理商和从属代理商。在这方面，私信判决准则 147001 给出了正确的结果，但分析过程有些漏洞。我们将在之后对该私信判决做更多讨论。



## 2. U.S. or Foreign Source

The general rules of IRC § 861 through § 863, and § 865 are used to determine the source of the income. If it is U.S. source it will be taxable to the extent that it is effectively connected income. If it is foreign source, then it is generally nontaxable unless it is recharaterized as discussed in step 3. Assuming the income is U.S. source, there are two types of effectively connected income. Business income from the operating business and FDAP/capital gain income that is attributable to business operations.

### 2. 美国来源收入还是外国来源收入

收入来源的判断由美国国内税法法典第 861 至 863 章和第 865 章的一般规则来规定。如果是美国来源收入，那么所有有效关联收入将会被征税，如果是外国来源收入，那么除非被前面所提到的第三步判断中的例外条件重新划分为美国来源收入，否则一般不属于可征税收入。另外，美国来源的有效关联收入有两种类型，一种是常规营业收入，一种是属于公司运营范围的 FDAP 收入或资本收益。

美国来源的营业收入

## **U.S. Source Business Income**

1. 商品销售收入-所有权转移准则  
**Sale of Goods – Title passage rule**
2. 服务类收入  
**Services § 864(b)(b)(1)**
3. 股票债券交易收入-个别例外  
**Trading of Stocks and Securities – Exception discussed later**
4. 房产出租收入-按房产所在地  
**Rental of Property – where used**
5. 房产销售-总是属于营业收入  
**Sale of real property § 897(a)  
Always deemed a trade or business**

### *a. U.S. Source - Business Income*

Once it is determined that the business income is U.S. source, it is taxed as effectively connected income under the residual force of attraction principle. § 864(c)(3).

#### *i. Types of Income*

##### *1) Sale of Goods*

The sale of goods are sourced under the “title passage rule.” By using FOB shipping point, a foreign person is able to create foreign source income. This is discussed in detail in 2.b.

##### *2). Services*

Services are sourced where the service is performed. § 864(b)(1)

##### *3) Dealing in Stock or Securities*

While there are two exceptions for trading in securities, there is not an exception for a dealer in securities. However, for the dealer to be U.S. source, he or she must be performing the service in the U.S.

##### *4). Rental Income*

Rental income is sources where the property is used.

##### *5) Sale of Real Estate*

The sale is also sourced where the real property is situated. Pursuant to § 897, the sale of real estate is always deemed a trade or business.

*a. 美国来源收入之营业收入*

营业收入一旦被判断为是美国来源收入，那么它将按照美国税法法典第 664(c)(3)条下的“剩余引力法则”被征收有效关联收入所得税。

*i. 收入类型*

*1) 产品销售收入*

产品销售收入的来源划分按照所有权转移点来判断，当采用起运点转移所有权时，收入来源将归为外国来源，这在 2.b 中有详细的分析。

*2) 服务类收入*

服务类型收入的来源按照服务的提供地点来划分。美国税法法典第 864(b)(1)条

*3) 股票债券收入*

股票债券交易中，对于自行交易者有两个例外条例，但对于有客户来源的债券商没有任何例外条例。对于一个债券商的判定是他在美国提供债券服务给客户。

*4) 出租业务收入*

出租业务收入的来源由房产的所在地来判定。

*5) 房地产销售收入*

房地产销售的收入来源同样的由房产的所在地来判定，按照美国税法法典第 897 条，房地产的销售总是属于在美国有经营业务（有效关联收入）。

美国来源的营业收入

## U.S. Source Business Income

6. 外国保险销售给美国客户属于美国来源收入

**Foreign insurance sold to U.S. persons is U.S. Source § 864(c)(4)(C)**

7. 矿产收入来源为开采地

**Minerals are sourced where they are extracted**

### *6) Sale of Insurance*

Foreign insurance sold to U.S. persons is U.S. source. § 864(c)(4)(C).

### *7) Minerals*

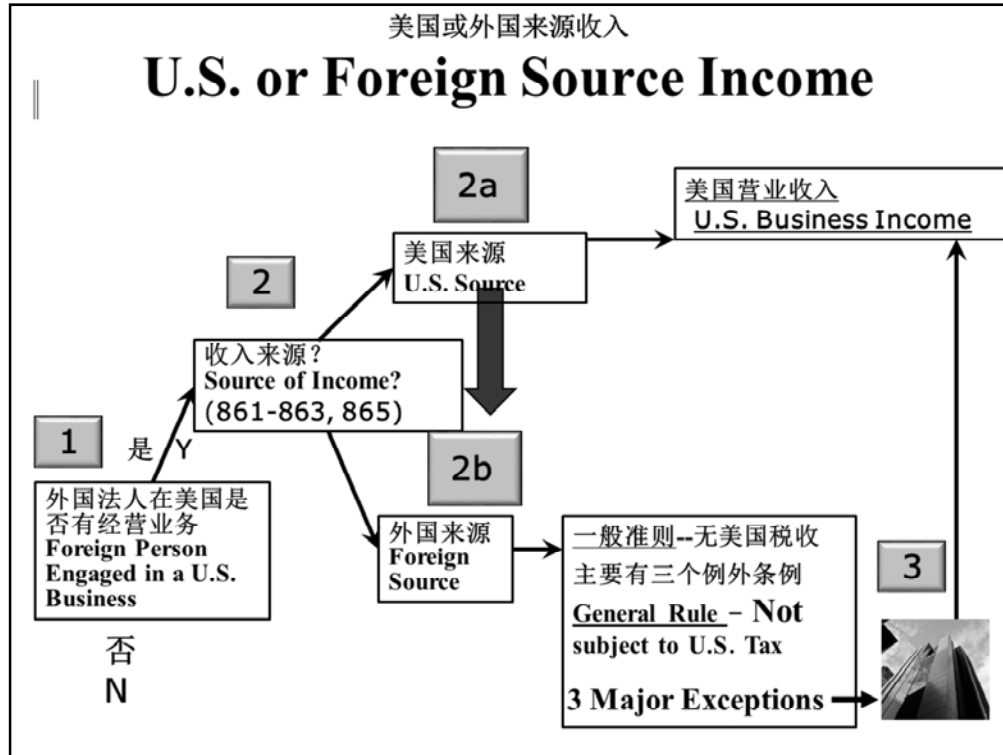
Minerals are sourced where they are extracted.

### *6) 保险的销售收入*

外国保险卖给美国法人时属于美国来源收入。参见美国税法法典 864(c)(4)(C)

### *7) 矿产收入*

矿产收入的来源由矿产的开采地决定。



### b. Foreign Source Income

Foreign business income is generally not subject to U.S. income taxation, unless the FDAP rules should apply. Income is generally sourced where the person performs the service or the location of the property. For example, if a foreign bank has a U.S. branch and the U.S. branch makes a loan to a foreign person, the interest income is sourced to where the payor resides, and is therefore, foreign source income. The major exception to this rule is the sale of goods where sourcing is not governed by where the service provider, payor, or location of the property. Rather, sale of goods is governed under something known as the “title passage rule.”

### b. 外国来源收入

外国的营业收入通常不被征收美国所得税，除非有 FDAP 收入条例适用。而收入来源通常根据纳税人提供服务所在地或者财产所在地来决定。举例来说，如果一个外国银行在美国有一个分支，该美国分支贷款给一个外国法人，那么利息收入来源将根据利息支付人的居住地决定，也就是外国来源。这个准则的一个最主要的例外条例是对于产品销售的，它由所有权转移规则来判断，而非服务的提供者或付款人或资产所在地来判断。



Regardless of whether or not there is a treaty, an export transaction may be designed to completely avoid any U.S. income tax. This is because goods may be sourced based on the title passage rule.

*a. FOB Shipping Point – No Tax*

With FOB shipping point, title to the goods would pass when the goods are shipped from Hong Kong. For inventoried goods, Treas. Reg. § 1.861-7 provides that this would result in all foreign source taxation. For manufactured goods, 50% is sourced to Hong Kong (or outside the U.S. based on where the goods are manufactured). The other 50% of manufactured goods may be sourced to Hong Kong by simply passing title to the goods in Hong Kong – FOB shipping point.

*b. FOB Destination Point – (100% Taxed - Inventory ; 50% Taxed Manufacturing)*

With FOB destination, title to the goods would pass in the U.S. For inventoried goods, this would result in 100% of sale being classified as U.S. source income, resulting in U.S. taxation of such income. For a Chinese manufacturer, this would result in 50% of the income being classified as U.S. source income. Therefore, with a non-treaty country (i.e., Hong Kong), to avoid U.S. taxation, title to the goods should pass at Hong Kong.



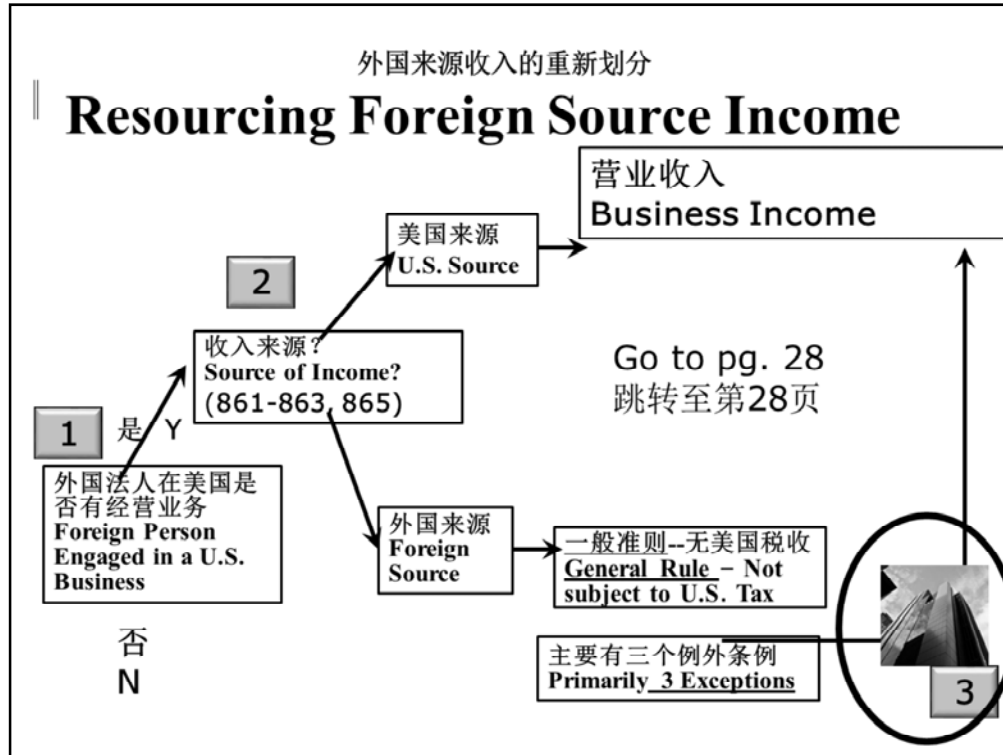
无论有没有税收协定，出口销售交易都可以免于美国所得税，原因就是产品销售收入的来源是由产品所有权转移地来决定的。

a. *所有权在起运点转移-无税收收入*

所有权在起运点转移时，在香港发货的产品的所有权将会在香港转移。对于库存货品，美国财政法规第 1.861-7 条规定，全部收入为外国来源收入；而对于生产货品，条例规定 50%为生产地来源收入，即香港，另外 50%为所有权转移地来源，即也是香港。

b. *所有权在目的地转移-库存商品 100%收税，生产商品 50%收税*

采用所有权在目的地转移时，商品的所有权将在美国转移。对于库存商品，这将使得所有的销售收入归类为美国收入来源，征税所得税。对于生产商品，并且生产地在中国，50%的收入将会归为美国来源。因此，对于没有税收协定的地区，要使销售收入避免美国收入所得税的方法就是采用所有权在起运点转移（即香港）的方法。



### 3. Resourcing of Foreign Source Income

Generally, foreign source effectively connected income is not taxed by the U.S. However, there are three (possibly four) statutory exceptions that reclassify foreign source ECI as U.S. source ECI.

#### 3. 外国来源收入的重新划分

通常，外国来源的有效关联收入不会被征收美国收入所得税，但三个例外条例会把外国来源收入重新定性为美国来源的有效关联收入。

重新归类为美国来源收入

## Resourcing as U.S. Source Income

- 三种外国法人在美国有固定营业场，收入来源被重新归类的情况：

### **Three cases of reclassification if the foreign person has a fixed place of business § 864(c)(4)(B)**

- a. 销售知识产权许可证 Licensing Agreement;
  - b. 金融交易 Finance transaction; or
  - c. 外国收入来源的商品销售 Sale of goods foreign source
- 商品销售-外国收入来源 -美国税法法典第865(e)(2)条  
Sale of goods – foreign source § 865(e)(2)
  - 比税法法典第864(c)(4)(B)(iii)条纳入更多，因而实质取代  
Broader and takes the place of § 864(c)(4)(B)(iii)

The three cases of resourcing require a foreign person to have a *fixed place of business* in the U.S. which the foreign source income is attributable. § 864(c)(4)(B). These three sources of income are:

- (1) rents or royalties for the use of intangible property;
- (2) dividends or interest that is derived in a finance, banking or similar business;
- (3) sale of goods where the property passed outside the U.S. under the title passage rule.

It should be noted that there is another exception that converts foreign source sale of good income to U.S. source income under § 865(e)(2). This section is slightly broader than the third resourcing fact pattern under § 864(c)(4)(B). Therefore, it trumps § 864(c)(4)(B)(iii), the exception under § 865(e)(2) is used instead.

Finally, as discussed under the independent agent and dependent agent discussion later in this outline, an agent's office may be attributed to the foreign person, thereby triggering the resourcing rules of § 864(c)(4)(B) and § 864(e)(5).

这三种情况要求外国法人在美国有固定营业场所，使得这些外国收入的来源被重新追述为该美国固定场所。这三种类型的收入分别为：

- (1) 房地产租金或无形资产使用费
- (2) 金融机构、银行或其他类似机构的公司分红或利息收入
- (3) 按照所有权转移法则，所有权在外国转移的产品销售收入

需要指出的是，另外还有一个例外条例，美国税法法典 865(e)(2)，将外国来源的产品销售收入转为美国来源收入。该条例比 864(c)(4)(B)下第三条收入来源重新划分的范围稍微广一些，因此它实质上取代了 864(c)(4)(B)(iii)。

最后，如之后的独立代理商和从属代理商章节中讨论到的，代理商的办公公司可能会被追溯为师外国法人的，从而使税法法典第 864(c)(4)(B)条和第 864(e)(5)条的重新划分收入来源地准则产生效用。

a. 知识产权收入被重新划分的案例

## Licensing Reclassification Example



### a. Licensing IP reclassification

Seldom does one see the above structure. Usually, a foreign person would create a U.S. subsidiary for this type of a transaction. However, it is possible that a foreign person would create a U.S. branch that is developing intellectual property (IP) out of a U.S. fixed place of business. The branch licenses the IP to a foreign person (i.e. the Hong Kong company).

Initially, the income is foreign source, because rents and royalties are sourced where the property is used. However, since the foreign branch has a fixed place of business that actively sold the IP to the Hong Kong company, § 864(c)(4)(B)(i) reclassifies the income as U.S. source income. Since it is effectively connected income it is now subject to U.S. tax.

This is the same result that would occur if a foreign person had created a U.S. subsidiary. The U.S. subsidiary would have been subject to worldwide taxation on a net basis.

### a. 知识产权许可证的重新归类

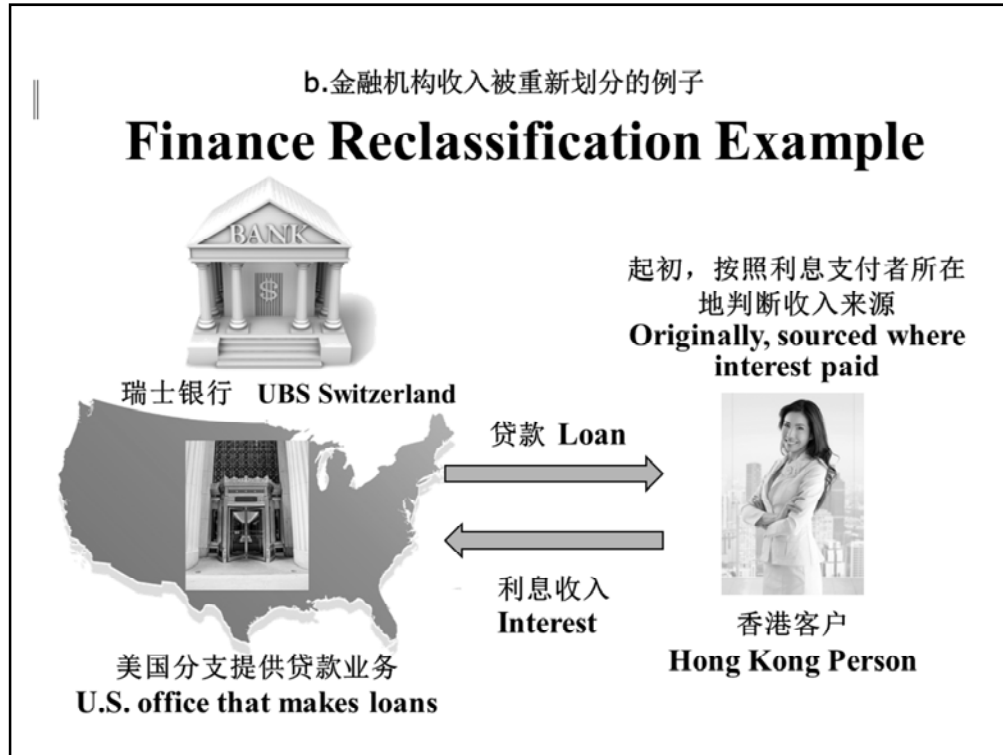
以上的结构很少出现。在该结构中, 通常一个外国法人会在美国设立一个子公司, 但外国法人也可以在美国设立一个分支并由该固定营业场所申请知识产权许可证, 然后分支向外国公司销售(在此为香港公司)知识产权许可证。

起初, 收入来源为外国来源, 因为租金和知识产权许可证收入的来源都由资产使用所在地决定, 但由于该外国分支在美国有固定场所, 并向香港公司积极地开展了出售知识产权许可证的业务, 按照美国税法法典第 864(c)(4)(B)(i)条, 收入被重新归位美国来源的收入, 又由于它是有效关联收入, 因此属于美国税收范围。

如果外国法人在美国设立一个子公司, 那么结果将会相同。美国子公司在美国被征税的范围是全球范围内的净收入。

b. 金融机构收入被重新划分的例子

## Finance Reclassification Example



### b. Finance Reclassification Example

Generally, customers develop relationships with certain persons in a bank. In this respect, they do not change banks from a subsidiary of a parent to the parent or from a branch operation to a parent simply because such person is foreign. In the above example, assume a Hong Kong business has a relationship with a New York branch of a Swiss bank. Therefore, the New York bank makes a loan to the foreign person, (i.e. Hong Kong).

Loans are sourced based on the residence of the borrower. In this case it would be Hong Kong, and therefore, the income to the N.Y. branch would be foreign source income.

### b. 金融机构收入的重新划分案例

一般来说，客户会和一个银行的某一个分支有业务联系。他们不会因为该银行是外国银行，就将联系从子公司银行转到母公司银行或是从母公司银行转到子公司银行。假设香港公司和瑞士银行的纽约分所有业务联系，也就是说纽约分所贷款给该一个外国公司。

这些贷款收入的来源为贷款者的所在地，在这个例子中就是香港，因此纽约分所的贷款收入将成为外国来源收入。



*c. Sale of Goods From a U.S. Office*

As previously noted § 865(e)(2) is broader and trumps § 864(c)(4)(B)(iii). It provides that if a U.S. branch of a foreign person sells goods through a U.S. fixed place of business, even if the sale of goods are initially foreign (i.e. FOB shipping point), then the sale is reclassified as U.S. source income.

The concept of a fixed place of business can many times be an elusive topic. The simple case is when a foreign person (i.e. the Hong Kong company) opens a branch office (i.e. the lease is in the name of the Hong Kong Company). The more complicated cases are under what circumstances a fixed place of business are attributed to the Hong Kong company through an independent agent.

*c. 从美国办公司销售产品*

我们在之前指出过，美国税法法典第 865(e)(2)条比第 864(c)(4)(B)(iii)条范围更广，因而实质上取代了 864(c)(4)(B)(iii)。如果美国分支通过美国固定营业场所向外国法人销售产品，那么销售收入将被归为美国来源收入，即使起初被归为外国来源（比如通过所有权在起运点转移的方法）。

这个固定营业场所的概念是一个很模糊的概念。最简单的一种情况是当外国法人在美国拥有分支办公司，比如一个香港公司在美国以其名义租赁了一个办公室。稍微复杂一些的情况需要分析在哪些情况下，一个独立代理商的固定营业场所会被追溯为属于外国公司。

卖给美方货物的销售方法

## Methods to Sell Goods in the U.S.

a.

直接出口  
Direct Export



b.

通过独立代理商  
Independent Agent



c.

从属代理商/中国出差雇员  
Dependent Agent



d.

通过设立销售办公室（分支）  
Sales Office (Branch)



### E. Methods to Sell Goods in the U.S.

There are four primary ways to sell goods to the U.S.

#### (1). *Direct Export*

The Chinese business exports the goods directly to the U.S. Company. No middleperson, broker, independent agent, or distributor is used in transferring the goods to the U.S. company.

#### (2). *Independent Agent*

A Chinese business may sell goods to a U.S. buyer through an independent agent (e.g. broker, middleperson, or distributor). These goods may be sold on consignment or the independent agent may take orders for the Chinese company.

#### (3). *Traveling Dependent Agent*

A Chinese business may sell goods to a U.S. buyer through a dependent agent. A traveling dependent agent is an employee

#### (4). *Sales Office*

A Chinese business creates a sales office in the U.S. The sales office is staffed with Chinese employees. For non-treaty countries (such as Hong Kong discussed later) the term used in the internal revenue code (“IRC”) is “a fixed place of business.” For treaty countries, the term used in the IRC is a “permanent establishment.”



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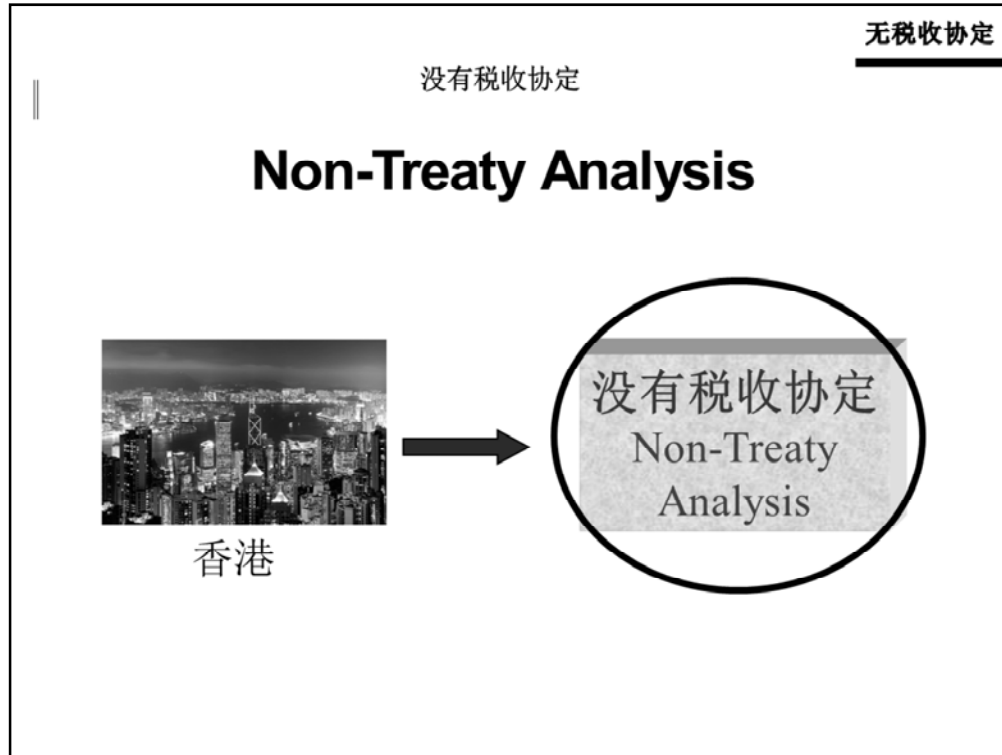
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### F. Non-Treaty Analysis

The analysis with treaty countries and non-treaty countries is different. Naturally, a treaty does provide more benefits than the non-treaty statutory IRC code analysis.

The outline uses mainland China and Hong Kong for examples. This is because China has an income tax treaty with the U.S., but Hong Kong does not. One might think that Hong Kong became part of China in 1997, and therefore, it is under China's treaty. Unfortunately, the U.S. takes the position that this is not the case. IRS Notice 97-40. It should also be noted that neither Taiwan nor Macau have income tax treaties with the U.S.

#### F. 没有税收协定的情况

对和美国有税收协定的情况分析和没有税收协定的情况分析是很不同的。在有成约的情况下，公司将会享受到更多的税收利益。

本次演讲将会使用中国大陆和香港地区为例子来解释。因为中国大陆地区和美国是有税收协定的，而香港地区则没有。人们可能会认为由于香港在1997年回归了中国，所以应该也能享有成约的特惠政策，但事实上，美国政府并没有这样对待。另外值得注意的是，台湾和澳门地区和美国之间也没有在大陆所拥有的协定特惠政策。

销售办公室(分支)

## U.S. Sales Office (Branch)



美国的办公室 (分支)  
U.S. Office(Branch)



香港  
HongKong



### 1. Sales Office – Fixed Place of Business

If the Hong Kong business has a U.S. sales office or manufactures in the U.S., then the Hong Kong business will be subject to U.S. income tax. IRC § 864(c)(5)(A); IRC § 864(c)(4)(B)(iii).

#### 1.驻美销售办公室-“固定营业场所”

根据美国税法第 864(c)(5)(A)条，如果香港公司在美国拥有销售办公室或者工厂，那么该香港企业将要缴纳美国收入税。

无税收协定

直接出口货物

## Direct Export Goods

所有权转移规则  
Title Passage Rule





Title  
所有权

起运点（装运地）交货FOB  
Shipping Point



香港

没有美国所得税  
No U.S. Income Tax

## 2. Direct Export

Regardless of whether or not there is a treaty, an export transaction may be designed to avoid any U.S. income tax. This is because goods may be sourced based on the title passage rule.

### a. *FOB Shipping Point – No Tax*

With FOB shipping point, title to the goods would pass when the goods are shipped from Hong Kong. As previously noted, for inventoried goods, Treas. Reg. § 1.861-7 provides that this would result in all foreign source taxation. For manufactured goods, 50% is already sourced to Hong Kong (or outside the U.S. based on where the goods are manufactured). The other 50% of manufactured goods may be sourced to Hong Kong by simply passing title to the goods in Hong Kong – FOB shipping point.

### b. *FOB Destination Point – (100% Taxed - Inventory ; 50% Taxed Manufacturing)*

With FOB destination, title to the goods would pass in the U.S. For Hong Kong (which is deemed to be a non-treaty nation), this would result in 100% of sale being classified as U.S. source income, resulting in U.S. taxation of such income. For a Chinese manufacturer, this generally would result in 50% of the income being classified as U.S. source income. Therefore, with a non-treaty country (i.e., Hong Kong), to avoid U.S. taxation, title to the goods should pass at Hong Kong.

## 2. 直接出口

无论有没有税收协定，出口交易都能够经过计划而免于美国税收。因为我们能够使用所有权转移的规则来将收入划为中国范围。

### *a. 起运点交货的情况-无税收*

当销售合同采用起运点交货方式时，所有权在起运点转移，我们使用香港为例。对于库存的商品，美国税法第 1.861-7 条规定，所有收入都为外国收入。对于加工生产的商品，50%的收入被划为生产地收入，在我们的例子中为香港，另外 50%的收入也将被划为所有权转移地的收入，同样的还是香港。因此将不产生任何税收。

### *b. 目的地交货的情况-库存商品 100% 征税，生产商品 50% 征税*

当销售合同采用目的点交货的方式时，所有权在卸货点转移，也就是在美国转移。对于一个香港库存商品企业，这将导致所有的销售收入都需要在美国缴税，而对于一个中国大陆的生产商，这也将导致 50%的收入被美国征税。

因此，对于没有税收协定的地区，例如香港，要想避免美国税收，销售合同需要采用起运点交货的方式使所有权在香港转移。

美国税法中独立代理商的定义

## Definition - Independent Agent



➤ 拥有美国办公室

Has own U.S. Office

批发商,进口商,经销商  
**Distributor, Importer,  
 Broker**

工厂代表  
**MFG  
 Representative**

经销商用个人  
 账户购买  
 Broker - buy on  
 own Account

佣金代理商  
 Commissioned  
 Agent

### 3. *Definition of Independent Agency*

The code defines an independent agent as “broker, commission agent, or agent of independent status acting in the ordinary course of his business.” § 864(c)(5)(A). The concept of broker may be more easily defined to include the terms “importer” and “distributor.” In these cases, the broker, importer, or distributor purchases the goods from the Hong Kong business and then resells them for a profit. The second category, a commission agent, may be more analogous to the term “manufacturer’s representative.” A manufacturer’s representative typically represents three or more different companies selling different product lines. The manufacturer representative obtains sales orders for the manufacturers and receives a commission paid by the manufacturers. For a detailed analysis of the definition of an independent agent contract please see Thomson Reuter’s Journal of International Taxation articles (1) *Foreign Business, U.S. Customers – Reducing U.S. Income Tax (Part 1) – May 2011*; (2) *Reducing United States Income Tax – January 2013*, by Mark Merric, Professor Lu Zhi’an (Fudan University); and Wang Jiadi. These articles may be downloaded at:

[http://www.internationalcounselor.com/export\\_goods\\_article.html](http://www.internationalcounselor.com/export_goods_article.html).

### 3.独立代理商的定义

美国税法法典将独立代理商定义为“经销商，佣金代理商或者在常规经营业务时拥有独立自主权的代理商”。经销商的概念类似于进口商或者批发商。经销商或者进口商、批发商从香港公司购买货物然后再卖给美国客户从中赚取差价利润。

佣金代理商更类似于生产厂家代理人。生产厂家代理人通常会做几家不同生产厂家的代理人，卖几种产品。他们从终端客户那里获取订单，然后从生产厂商那里赚取佣金。我在另两篇和复旦大学陆志安教授共同发表的文章里进行关于该类型销售的更具体的分析，欢迎在座有兴趣的到我的公司网站下载阅读：

[http://www.internationalcounselor.com/export\\_goods\\_article.html](http://www.internationalcounselor.com/export_goods_article.html).

*Foreign Business, U.S. Customers – Reducing U.S. Income Tax (Part 1) – May 2011; (2) Reducing United States Income Tax – January 2013,*

分销商/进口商

## Distributor/ Importer

利用独立账户经销

### Buys on Own Account



PLR 7702043120D

1. 能够自行定价  
**Total discretion in setting price**
2. 所有权在美国境外转移  
**Title passed abroad**
3. 进口其他商家的啤酒（非独家代理）  
**Imports other beers (not exclusive contract)**
4. 不能够代表外国公司签署合同  
**Cannot execute contracts on behalf of foreign person**

#### *a. Distributor or Importer*

The distributor or importer buys the goods from the foreign person and resells them in the U.S. for a profit. In this respect the transaction is very similar to the direct export transaction to a U.S. retailer such as Wal\*Mart. Conversely, many name brand products place restrictions regarding the sale of their products. For example, in PLR 7702043120D, the importer had the following restrictions:

1. The importer could import other beers from any other than two prohibited countries;
2. The importer could sell the beer for any price, however, it must inform the foreign company of the sales price;
3. The foreign person would grant a discount to the importer for advertising its product in the U.S., but the importer is not required to advertise on behalf of the foreign person; and
4. The foreign person would supply advertising materials to the beer importer.

The Service concluded that the importer was an independent agent for the following reasons:

1. The importer has total discretion in setting the selling price;
2. It imported and distributed other beers;
3. Title passed to the importer on purchase of the beer; and
4. The importer cannot execute contracts on behalf of the foreign person.



a. 分销商或进口商

分销商或进口商从外国购买商品再销售给美国客户获取利润，这样的交易和直接出口给美国的零售商，例如沃尔玛，是很类似的。相反的，很多品牌在销售时设置了很多限制，例如，在美国私信判决 7702043120D 中，进口商有如下的限制：

1. 进口商可以进口从其他任何国家进口啤酒，除了两个国家；
2. 进口商可以以任何价格销售啤酒，但必须告知外国公司销售价格；
3. 外国公司可以给进口一定的折扣来促进美国市场销售，但是进口商不能够代表外国公司进行市场宣传；
4. 外国公司会向进口商提供广告宣传的材料。

税务局以此总结，该进口商是独立代理商，理由如下：

1. 进口商有独立的设定销售价格的权利；
2. 进口商进口和分销其他品牌的啤酒
3. 啤酒的所有权在进口商买进啤酒的时候转移；
4. 进口商不能够代表雇佣他的外国公司独立的签署合同。

一般佣金代理商

## General Commissioned Agent



PLR 8147001



1. 代理商销售外国合伙企业的电子时钟收音机  
**Agent sold radio time from FP**
2. 代理商从中提取佣金  
**Received a commission**
3. 如果卖出比标准价格高的价格, 代理商拿取额外利润  
**If sold higher than standard price, keep the profit**
4. 非独家代理合同  
**No exclusive contract**
5. 不是销售产品吗?  
**Not the sale of goods?**

### *b. General Commissioned Agent*

The general commissioned agent does not take title to the foreign person's goods. Rather the general commission agent obtains contracts for the foreign person. From the sales price of the foreign person's goods, the general commission agent receives a commission. Many times the general commission agent will have some flexibility in setting the price of the goods. However, there are minimum prices that the general agent cannot go below.

There appears to be no case law directly on point. So this outline will discuss PLR 8147001. In PLR 8147001, Y, the U.S. agent, sold radio time from a foreign person. The foreign person was broadcasting into the U.S. from outside the U.S.: Y received a commission, and did not have an exclusive contract. Y had the discretion to sell the radio time for higher than the standard price, and keep the difference. Further, U.S. companies could buy the advertising time directly from the foreign person, rather than through Y.

The PLR concluded that these facts were distinguishable from Rev. Rul. 70-424, since Y did not have an exclusive contract with the foreign person. It then stated that broadcasting income is sourced where the facilities are, and therefore not subject to U.S. taxation.

While the author agrees that the broadcasting income is not U.S. source, he questions the analysis. It does not appear that broadcasting has a resourcing rule. This being the case, the activities of an agent are irrelevant regarding changing the source of income from foreign to U.S. source, and the foreign person is not taxable by the U.S. simply because the income is foreign source. Anyway, the PLR was included to show a general commission agent type of analysis.

b. 一般佣金代理商

一般佣金代理商不从外国公司获取商品的所有权，而是获取销售合同，继而在商品的销售价格的基础上获取一定的佣金。很多时候，佣金代理商能够重新设定销售价格，但一般会有一个最低的价格要求。

在美国税法案例中，似乎没有直接涉及这个话题的案例，所以我们在此讨论美国私信判决准则 PLR 8147001。再改私信中，美国代理商 Y 代表外国公司销售收音机时钟，外国公司在美国境外向美国做宣传，Y 从中获取佣金，Y 的代理商合同也不是独家代理合同。Y 有提高销售价格的权利并拿取差价利润，另外，美国的客户也可以不通过 Y 直接从外国公司那里购买产品。

该私信判决最后裁定以上这些事实和美国税收裁定 70-424 适用的情况不同，因为 Y 并没有为该外国公司做独家代理。另外广播收入的来源为广播设施的所在地决定，因此不属于美国的可征税收入。

尽管作者很同意广播收入不属于美国来源收入，但对分析过程有些不同看法。从税法上来看，对于广播收入还没有一个重新划分来源的条例。在这个案例里，代理商的活动是和改变外国收入来源成为美国来源无关的，外国公司的收入在美国面试不只是因为该收入是外国来源的。不过总而言之，在这里引入这私信判决准则，是为了向大家解释一般佣金代理商的分析过程。

美国税法中独立代理商的定义

## U.S. Taxation Independent Agent



签合同  
Execute  
Contracts



存储货物  
Store Goods



委托销售  
Sell on Consignment



In a non-treaty country, an independent agent may execute contracts on behalf of the Hong Kong business without resulting in U.S. income taxation. However, it is uncertain whether the Hong Kong Business may open a warehouse in the U.S. or whether the U.S. agent may sell the goods on consignment. The majority view for a non-treaty country is either a warehouse in the U.S. or selling goods by consignment will result in U.S. income tax to the Hong Kong business. For a detailed discussion of this issue see Thomson Reuter's Journal of International Taxation (2) *Reducing United States Income Tax – January 2013*, by Mark Merric, Professor Lu Zhi'an (Fudan University); and Wang Jiadi. This article may be downloaded at:  
[http://www.internationalcounselor.com/export\\_goods\\_article.html](http://www.internationalcounselor.com/export_goods_article.html).

在和美国没有税收协定的地区，再以香港为例，独立代理商可以代表香港的公司签署销售合同而并不产生美国税收问题。然而，在该香港公司能否在美国设立仓库或者它的美国独立代理商能否被委托销售而不产生税收的问题上却还存在很多争议。大部分的观点认为在美国设立仓库或者委托美国独立代理商销售将会对该香港企业产生美国收入税。

有兴趣的读者可以到公司网站

[http://www.internationalcounselor.com/export\\_goods\\_article.html](http://www.internationalcounselor.com/export_goods_article.html) 进一步阅读另一片文章：*Reducing United States Income Tax*（如何降低美国的所得税）— 2013年1月，作者：Mark Merric, 陆志安（复旦大学），王佳娣

委托销售

## Consignment



对美国销售时的所有权转移地点  
**Title Passes When Sold in U.S.**

案例 **Handfield** V. 财政法规 **Treas. Reg. 1.867-7**

### *c. Consignment*

Does the title passage rule, *Handfield*, or *Treas. Reg. § 1.867-7* control. International treaties generally provide little, if any, guidance regarding the treatment if an independent agent holds consigned goods. Most treaties cite *Handfield v. Commr.*, 23 TC 633 (1955), noting that consignment may result in taxation. However, the analysis appears more complicated.

If a foreign person has imputed to them a U.S. trader of business due to the magnitude or number of the transactions, then the next step in the analysis is whether the income is U.S. or foreign source. Whether income is U.S. or foreign source depends upon the title passage rule. In a consignment sale, title transfer when the goods are in the U.S. Therefore, under this analysis, the foreign person is subject to U.S. taxation under the ECI rules.

Some cite *Handfield* as authority that an agent's sale of goods on consignment results in U.S. taxation. However, the law at the time *Handfield* was decided in 1955 may well be distinguished from the current law and income tax regulations.

First, the court did not discuss the difference between an independent agent or a dependent agent. Rather, it concluded that since the goods were sold on consignment, *Handfield* controlled the selling price, and there was an exclusive contract, News Company was *Handfield's* agent. Second, it appears distinguishing between independent and dependent agent was irrelevant, because of the U.S.-Canada tax treaty which provided,

### c. 委托销售

对于委托销售，是所有权转移规则、案例 *Handfield*、还是财政法规 1.867-7 最具决定性？对此，国际上的相关论著很少提供探讨，大部分的论著会引用案例 *Handfield v. Commr.*, 23 TC 633 (1955)，并指出委托销售可能成为美国的可征税收入。但具体的分析其实要复杂的多。

如果外国公司由于业务量巨大而产生了美国的贸易经营，那么下一步就是要分析这些收入是属于美国来源还是外国来源，而这是要使用所有权转移规则来判断的。在委托销售中，所有权在商品到达美国的时候转移，因此，外国公司按照有效关联收入制度需要在美国缴纳委托销售收入所得税。

有些分析使用 *Handfield* 案例作为税法依据，从而得出代理商的委托销售是要在美国缴纳所得税的，但是 *Handfield* 案例是在 1955 年裁决的，当时的税法制度和现在的有着很多不同。

首先，法庭并没有讨论独立代理商和从属代理商的区别，它的总结是，由于商品是委托销售的，*Handfield* 有掌握定价的能力，并且他有独家代理商，*News* 公司。其次，由于美国加拿大的相关税收协定，在这里并不需要讨论区别独立代理商和从属代理商。

“When an enterprise of one of the contracting States carries on a business in the other contracting State through *an employee or agent* established there, who has general authority to contract for the principal or has a stock of merchandise from which he regularly fills orders which he receives, such enterprise shall be deemed to have a permanent establishment in the later State (Paragraph 3(f)).”

In Handfield, once the Tax Court found that News Company was Handfield’s *agent*, automatically the treaty resulted in taxation because News Company regularly filled orders on behalf of Handfield. The Tax Court also made repetitive statements that the contract was in essence a consignment.

Treas. Reg. § 1.864-7(d)(3)(i), enacted in 1972, specifically states that

“an agent who, in pursuance of his usual trade or business, and for compensation, sells goods or merchandise *consigned or entrusted to his possession*, management, and control for or by the owner of such goods or merchandise is an *independent agent*.”

An independent agent’s office is not attributed to a foreign person. Further, Treas. Reg. § 1.864-7(d)(2) states:

“The office or other fixed place of business of an independent agent . . . shall not be treated as the office or other fixed place of business of his principal who is a nonresident alien individual or a foreign corporation, *irrespective of whether such agent has authority to negotiate and conclude contracts in the name of his principal*, and regularly exercises that authority, or *maintains a stock of goods from which he regularly fills orders on the principals behalf*.

At this point, it appears that Treas. Reg. § 1.864-7 should nullify Handfield. But as noted above, relevant authorities that discuss the issue appear to be few and far between. Further, there is the issue of the title passage rule and foreign source income. In this respect, should a client wish to rely on the Treas. Reg. §, the author recommends obtaining a PLR on the issue.

“当税收协定的一方地区的公司在协定的另一方地区有贸易经营活动，并且是通过那里的员工或者代理商经营的，并且员工或代理商被授权和客户签署合同或者有一定的存货让其常规性地自行完成订单需求，那么该公司将被认为在该地区有常设机构。”（税收协定第3段（f））

在 Handfield 案例中，当税法法庭得知 News 公司是他的代理商的时候，按照税收协定，他的收入将马上成为美国的可征税收入，因为 News 公司常规性地代表 Handfield 完成订单需求。税法法庭也一再地重申，他的合同本质上是委托销售合同。

但 1972 年通过的财政法规 1.864-7(d)(3)(i)具体地规定了：

“能在常规的贸易经营活动中为商品所有者提供委托销售或者委托管理服务的代理商是独立代理商。”

因此，独立代理商的办公室不被认为是外国公司的。财政法规 1.864-7(d)(2)还规定到：

“如果独立代理商的雇佣方为一个非定居美国的外国公民或者一个外国公司，那么该代理商的办公室或其他固定营业场所不被认为其雇佣方的常设机构，无论该代理商有没有被授权以雇佣方的名义和客户洽谈签署合同，并且常规性地执行该权利，也无论该代理商是否有一定存货能够使其常规性地代表雇佣方接受并完成订单。”

至此，财政法规 1.864-7 似乎不能为 Handfield 提供完全有力的法律依据，但如之前所说的，相关的法律依据很少。此外，这其中还涉及所有权转移规则和外国来源收入方面的问题。因此，如果该客户想要使用财政法规 1.864-7 作为自己行为依据的话，本作者建议先向美国税务局申请一个私信判决。



从属代理商/中国出差雇员

## Dependent Agent



签合同  
Execute  
Contracts



委托销售  
Sell on Consignment



能在美设仓库  
Warehouse



#### 4. Dependent Agent

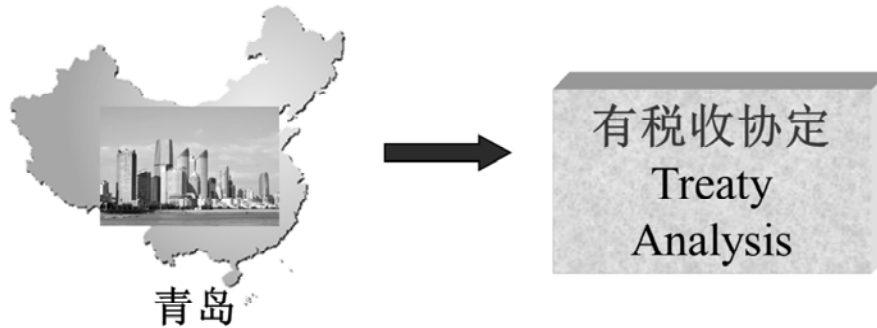
In a non-treaty country, a dependent agent cannot execute contracts or sell goods on consignment, without resulting in U.S. taxation. Further, the Hong Kong business probably cannot open a warehouse in the U.S. without incurring U.S. taxation.

#### 4. 从属代理商

在无税收协定的地区，从属代理商同样也不能够独立地和美国客户签署销售合同或者被委托销售并免去美国收入税。同样地，香港公司基本上也不能够在美国拥有仓库而不产生美国税收问题。

有税收协定的情况

## Income Tax Treaty



➤ 远利于没有税收协定的情况

More favorable results than non-treaty

### G. Income Tax Treaty Analysis

Once it has been determined that a Chinese business is engaged in a U.S. trade or business, whether the Chinese business will be subject to U.S. tax may well depend on whether there is an applicable income tax treaty.

On the other hand, China and the U.S. entered into an income tax treaty in 1984. As discussed later in this outline, when compared to a non-treaty tax regime, an income tax treaty primarily helps Chinese businesses avoid U.S. tax when the Chinese business passes title in the U.S. for an export transaction, sells goods through an independent agent or sells goods through a traveling dependent agent. As also discussed later in this outline, there are two different income taxes: (1) the graduated rate income tax, and (2) the branch profits tax. The Chinese-U.S. income tax treaty eliminates the second tax, the branch profits tax.

### G. 与美国之间有税收协定的出口情况分析

一个中国企业一旦涉及在美国的销售交易之后，该交易所得是否需要缴纳美国收入税便取决于该企业所在地区和美国之间是否签署过税收协定。中国大陆地区和美国在 1984 年签署过税收协定。接下来我们将会看到，与无税收协定的情况相比，该税收协定帮助中国大陆地区的企业避免了很大的美国税收，特别是在当销售合同使用目的地交货的方式，或者当企业使用独立代理商或者使用外派员工出口销售时。

之后我们还将讨论两个不同的案例：（1）渐变收入税（2）分支利润税。中美税收协定剔除了第二项分支利润税。

## To result in U.S. Taxation, Must Have a Permanent Establishment

中美收入税成约 第五章 第二部分 Article 5, Par. 2



租赁或购置常设机构

**Rents or owns a Permanent Establishment**

### 1. Permanent Establishment

In a treaty country, U.S. income tax is imposed only if the Chinese business has a permanent establishment. A permanent establishment is substantially similar to the concept of a fixed place of business in the non-treaty analysis.

#### *a. Definition of a Permanent Establishment*

Article 5(2) of the 2006 Model Treaty discusses permanent establishments. A permanent establishment is defined as a fixed place of business where enterprise business is carried on. The term permanent establishment includes:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop; and
- (f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.

## 1. 常设机构

在与美国有税收协定的地区，美国只对有驻美“常设机构”的中国公司征收收入税。“常设机构”的概念和在没有税收协定的分析中所用的“固定营业场所”的概念基本是一样的。

### *a. 常设机构的定义*

条约第五章第二条对常设机构进行了定义。在该定义下，常设机构是指企业进行全部或部分营业的固定营业场所。它包括：

- (a) 管理场所
- (b) 分支机构
- (c) 办事处
- (d) 工厂
- (e) 作业场所
- (f) 矿场，油井或气井，采石场，或者其他开采自然资源的场所

根据协定，“常设机构”不包括：

## Activities Disregarded Art. 5(4)

- a) 专为存储,展示或交付货物为目的而使用的设施

use of a facility solely for storage, display or delivery

- b) 专为存储,展示或交付为目的而保存货物

Maintenance of stock of goods solely for storage,  
display, or delivery

### *b. Activities Disregarded*

Article 5(2) of the 2006 model treaty gigantically clear up the ambiguity found in the non-treaty analysis. The exceptions under a) and b) make it clear that goods may be stored in the U.S. and held for delivery. In this respect, neither an independent or dependent agent has a consignment issue or any storage or delivery of goods issue.

### *b. 被排除在“常设机构”定义之外的活动:*

条约第五章第二条进一步列举说明了某一些被排除在常设机构之外的情况。其中(a)和(b)明确了货物可以被存储在美国以备发送。在这种情况下,无论是独立代理商还是从属代理商都将免于委托销售或存储或配送的一些争议问题。

根据协定，“常设机构”不包括：

## Activities Disregarded Art. 5(4)

- c) 专为另一企业加工处理为目的而设的存货

Maintenance of stock of goods for processing by another enterprise

- d) 只用于购买商品或收集信息的固定场所

Maintenance of a fixed place of business solely for “purchasing goods” or “collecting information.”

Exception c) is more for the manufacturing of a foreign person’s goods, and not the subject of this outline. Exception d) has two parts. First it allows for a branch to purchase goods without creating a fixed place of business. Second, it allows a foreign person to set up a fixed place of business to collect marketing information.

条款(c)更多地用于外国货品生产商，我们在这里不做过多的讨论。条款(d)分成两部分，首先，它使得中国公司在美国的其他分支可以购买商品而不牵涉“常设机构”的问题；再者，它也使得外国公民能够购置一个固定场所收集信息而同样地不产生税收问题。

根据协定，“常设机构”不包括：

## **Activities Disregarded Art. 5(4)**

- e) 为企业进行其他准备性或辅助性活动的固定场所

Maintenance of fixed place of business for any other activity of a preparatory or auxiliary character

- f) 为以上任何五项活动的结合所设的固定场所

Maintenance of a fixed place of business for any combination of the above.

Exception e) is generally for when a foreign business is getting prepared to open a permanent establishment. All of the studies and research to determine the optimal location do not create a permanent establishment until one is actually opened.

Exception f) make it clear that any combination or all of the first five elements does not create a permanent establishment.

条例(e)主要适用于外国企业在建立美国固定公司地点的前期准备阶段。所有的选择固定地点的前期研究活动都不被列入税收阶段，直到固定公司地点真正开始运作。

条例(f)进一步说明任何前五条的组合情况都不作为固定公司地点的运作证明，从而不属于税收阶段。

根据协定，“常设机构”不包括：

## **Activities Disregarded Art. 5(4)**

另外，子公司的经营活动不被列入母公司的经营活动做判断

Also, Article 5(7) – No attribution of a subsidiary

其他无关联分支的经营活动也不被列入判断依据

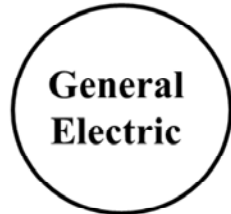
Article 7 no attribution of an unrelated branch

There are two more exceptions that are important. Article 5(7) states that a subsidiary’s activities will not be attributed to a parent. In other words, a subsidiary may be actively involved in the sale of a different product line, and these activities are not attributed to the parent. Finally, Article 7 states an unrelated branches fixed place of business is not attributed to the parent to determine whether this particular branch is a permanent establishment.

另外还有两条很重要的例外条例。成约第五章第七条规定子公司的经营活动不被列入母公司的经营活动。换句话说，子公司将有可能可以积极地投入另一个产品的销售而不会被计入母公司在美国的纳税收入。最后成约第七章规定无关联分支（比如在美国另一个州的分支）的经营活动将不被列入另一个分支的经营活动来判断该分支是否具有了固定公司地点的活动。



直接出口

**Direct Export**目的地（卸货地）交货  
FOB Destination Point

或者

OR

起运点（装运地）交货  
FOB Shipping Point

不用所有权转移规则判断

**No Title Passage Rule****2. Direct Export -No Title Passage Rule**

In the non-treaty analysis, the sourcing of income for goods generally depended on the title passage rule. If title passed from the Hong Kong company to the U.S. purchaser FOB shipping point (i.e. when the goods left Hong Kong), then the income was foreign source income. If title passed when the goods reached the U.S. company, FOB destination, then the income was U.S. source.

In a treaty country, there is no title passage rule. Rather, the relevant question is whether the foreign person has a permanent establishment. If so, he or she is taxed on the income attributable to the permanent establishment.

**2. 直接出口-无所有权转移条例**

在无税收协定的情况下，销售收入是否被纳入美国税收范围取决于所有权转移点。如果所有权在起运点转移，举例来说一个香港公司向美国销售时所有权在货物离开香港那一刻转移，那么该销售收入不属于美国税收收入。反之，如果所有权在目的地转移，那么收入将属于美国税收收入。

在有税收协定的地区，不使用以上的所有权转移规则来判断，而是使用是否有驻美“常设机构”来判断。如果有，那么所有由该常设机构创造的收入将被美国征收入税。

独立代理商

## Independent Agent



存储货物  
Store Goods



接订单或者卖寄销  
Take Sales Orders or  
Sell on Consignment



签合同  
Execute Contracts



Dependent

### 3. Independent Agent

#### a. *Definition*

As previously mentioned, an independent agent is a person who acts in the ordinary course of his or her business. Article 5(6). The term “independent agent” includes a distributor, wholesaler, middleman, and broker. As such, an independent agent may have his own office, purchase goods on his account, sell goods on assignment, and execute contracts. Also, due to the storage exception under Article 5(4)(a), an independent agent may store goods on behalf of the Chinese business. All of these activities may be carried on by an independent agent without these activities being attributed to the Chinese business, which if such attribution occurred would create a permanent establishment. Rev. Rul. 63-113; Rev. Rul. 76-322.

With a treaty country, the Chinese business may store goods in the U.S. Further, an independent agent may sell goods on consignment as well as execute contracts.

### 3. 独立代理商

#### a. *定义*

正如之间提到的，独立代理商是在常规的经营业务中自主交易。根据中美税收协定第五章第六条，独立代理商包括分销商、批发商、中间人和经销商。他们可能拥有自己的办公室，在自己的账户上购买商品，用委托销售的方式销售并自主执行销售合同。中美税收协定第五章第四条还允许独立代理商可以代表中国公司存储商品。独立代理商的这些经营活动都不会被认为雇佣该独立代理商的中国公司在美国拥有“常设机构”。

换句话说，中国公司可以利用独立代理商在美国存储货品，委托独立代理商销售并让他们执行销售合同。

|| **Who is Your Hero?**

你的英雄是谁？



# Chief Executive Officer

## 首席执行官



The title to the movie is Chief Executive Officer, and it is the story of the Haier corporation. From an export transaction perspective, we need to ask who is the hero in this movie?

Líng Mǐn

凌敏



Should our hero be the Chief Executive Officer of Haier Zhan Ruimin, whose screen name was Ling Min.

|| Xiàng Huá

向华



How about XXXX, whose screen name was Xiang Hua, the Chief Operations Officer. Without Xiang Hua's efforts most likely Haier would have never succeeded.

# Yáng Yáng

杨阳



College  
Hardest  
FM co  
Reluctant

What about Yang Yang a recent college graduate in marketing. She has six months of experience with Haier.

In the 1990s, during a company meeting Xiang Hua states that Haier is going to sell internationally. Further, they have chosen the hardest market in the world to sell a refrigerator – France. This is because France has more quality control standards for refrigerators than any nation in the world.

Xiang Hua, then looks at Yang Yang and tells her that Yang Yang is to go to France and sell \$30 million of refrigerators through FM Company in the first year. The problem is that Haier has no relationship with FM Company, and Yang Yang must do this on a cold call.

Naturally, being a recent marketing graduate, Yang Yang states she thinks the request is too much. Xiang Hua replies, “What more would you need, we have given you six months of training at Haier?”

Yang Yang goes to France, eventually is able to meet with President of FM Company on a cold call, and does in fact sell \$30 million of refrigerator to France in the first year. For this reason, Yang Yang is my hero in the movie.

从属代理商/中国出差雇员

## Dependent Agent (e.g. Employee)

- 不能独立签署销售合同

Agent cannot execute contracts



- 然而，可以在美国拥有仓库

However, may have a U.S. warehouse



- 通常情况下为出差雇员

Should probably be a traveling  
dependent agent

#### 4. Dependent Agent

A dependent agent is generally an employee. In a treaty country, a dependent agent cannot execute contracts on behalf of the principal without resulting in U.S. taxation. However, the Chinese business may open a warehouse in the U.S. and goods may be delivered from the warehouse. Finally, the dependent agent should probably be a traveling dependent agent who does not rent any office space in the U.S.

#### 4. 从属代理商

最常见的从属代理商是公司的员工。在有收入成约的地区，为了避免美国收入税，从属代理商不能代表公司签署销售合同。但是中国公司可以在美国购置仓库，货物可以直接从仓库配送。通常情况下，这样的从属代理商是被外派员工，在美国没有租赁办公室。



中国出差雇员

## Dependent Agent



销售谈判在中国境内完成

Negotiated,  
approved in  
China

The dependent agent may e-mail sales orders to the Chinese company. However, the Chinese business should participate in some of the negotiations, the approval process, and the rejection process.

驻美的从属代理商可以通过电子邮件发送销售单回中国公司，但是为了免于税收，销售谈判的整个过程和决策必须由中国公司参与进行。

能够免于美国所得税的销售上限

## How Much Could Be Sold in the U.S.?



➤ 没有美元货币上限

There is no dollar limitation

### H. How Much May Be Sold Without U.S. Taxation

Many advisors think that there may be a dollar amount limit before the Chinese business is subject to U.S. taxation. However, there is no dollar limit. As long as a Chinese Business does not evolve to the level of income taxation, it may sell any amount of goods to the U.S. without U.S. taxation.

### H. 能够免于美国收入税的销售量

很多意见专家认为中国公司出口销售时，能够免于美国收入税的部分是有上限的。事实上，条例中是没有美元上限的。只要中国公司没有以上提到的会引起收入税的活动，中国公司能够在美国进行任何销售量而不产生任何美国收入税。

前期规划事项

## Planning Issues



独立代理商被重新划分的情况:

Independent Agent Reclassified:

橡皮图章批准

Rubber Stamp Approval

在美国的其他经营活动

Other Activities in the U.S.

### I. Planning Issues

Sometimes the Internal Revenue Service will take the position that an independent agent should be classified as a dependent agent. The Internal Revenue Service does this by asserting that the Chinese business legally or economically controls the agent. Should the Internal Revenue be successful with this challenge, many times the Chinese business will now be subject to U.S. taxation.

If a dependent agent's sales orders are routinely approved without involvement of the Chinese business in the negotiation process, approval process, and rejection process, then the dependent agent will be considered to have authority to conclude contracts. The colloquial expression for this issue is generally known as a "rubber stamp approval." A rubber stamp approval will deem the dependent agent to have executed the contract on behalf of the Chinese business and result in U.S. income taxation.

The previous discussion regarding the evolution of exporting to the U.S. assumes that the Chinese business has no other activities in the U.S. Before any conclusion may be drawn regarding when a Chinese business exporting goods may be taxed in the U.S., all of the activities of the Chinese business must be analyzed.

## I. 前期规划

有时美国税务局会把独立代理商的性质重新归类为从属代理商。他们的依据是代理商在法律和经济上都由中国公司掌控。如果判定成立的话，那么中国公司将面临美国税收的负担。

如果从属代理商的销售订单通常不经过中国公司和客户之间的销售谈判和决策，那么这样的代理商被认为是有自主签署合同权。在英语俗语中我们称之为“橡皮图章批准”。被扣以“橡皮图章批准”之名的从属代理商被认为能够代表中国公司执行销售合同，并且这样的情况需要缴纳美国收入税。

在前面的关于出口美国四种销售演变方式的讨论中，我们的假设前提是中国公司在美国没有其他的经营活动。但是如果要知道最终是否需要缴纳美国收入税，我们还必须要对中国公司的所有经营活动做一个分析。

独立代理商被重新划分为从属代理商

## Independent Agent Classified as a Dependent Agent

独立代理商

**Independent Agent**



从属代理商=公司员工

**Dependent Agent =  
Employee**



### 1. Agent - Employee v. Non-Employee

Agents are generally classified as independent and dependent agents. However, the lines between the different types of agents can easily be blurred depending on how much control the principal exercises over the agent.

The simple definition of a dependent agent is an employee. An independent agent is not an employee. However, many independent agent agreements may be drafted so that the agent is so controlled by the Chinese business from a legal and economic perspective that in essence he or she is treated for tax purposes as a dependent agent.

### 1. 代理商-员工还是非员工

代理商通常被分为独立代理商和从属代理商。然后这两者之间的界线是很容易被模糊的，取决于代理商被雇佣的公司在实质上掌控多少。

从属代理商最简单的定义是公司员工，而独立代理商不是公司员工。但由于很多独立代理商的合同的草拟方式不当，使得美国税务局能够申辩该代理商在法律和经济上是受公司所控，从而在缴税目的上被重新划分为从属代理商。

## Rev. Rul. 70-424

重新划分为从属代理商的情况：

For Dependent Agency Reclassification:

-美国独家代理商

Sole agent for sale of products in U.S.

-代理商不能销售竞争者产品

Cannot sell a competitor's products

-也不能从竞争商家获取经济利益

Or take a financial interest in a competitor

-该外国公司共同承担一定量的经济损失

In the event of a loss, foreign person agrees to share in loss up to a specified amount

The general classification that employees are dependent agents and all non-employees are independent agents is an oversimplification. An agency contract may so control a general commission agent's activities that in essence he or she is a dependent agent. Without discussion, in Rev. Rul. 70-424, the Treasury Department concluded that following factors in combination resulted in the foreign person carrying on a trade or business in the U.S. subject to U.S. taxation:

1. U.S. agent was the sole agent for the sale of FP's products;
2. The U.S. agent could not sell a competitor's product;
3. The U.S. agent could only obtain contracts subject to FP's approval;
4. The U.S. agent guaranteed certain levels of sales; and
5. If there was a loss the foreign person agreed to share in the loss up to a certain amount.

因此我们可以发现，对于公司员工就是从属代理商而非员工就是独立代理商的分类过于简单化了，一个代理商合同的条款有时能够给予公司很大限度的对于代理商的控制从而使得代理商在本质上属于从属代理商。美国税法准则 70-424 规定，如果一个外国实体具有如下列举的任何一种特征，那么该外国实体将需要缴纳美国税收：

1. 如果雇佣的美国代理商是该外国公司产品的唯一销售代理商
2. 如果雇佣的美国代理商不能够销售该外国公司的竞争者的产品
3. 如果雇佣的美国代理商只能在该外国公司批准的情况下签署销售合同
4. 如果雇佣的美国代理商对该外国公司承诺一定量的销售
5. 如果该外国公司承诺共同分担一定量的经济损失



## 2. Rubber Stamp Approval

The Organization for Economic Cooperation and Development (OECD) has a model treaty. The U.S. frequently looks to the OECD model treaty when interpreting various provisions of its treaties. In this respect, the OECD model treaty details concerns when sales orders from a dependent agent are routinely approved without the foreign business being involved in the negotiations. Should this be the case, then the foreign business would be deemed to have a permanent establishment. Presently, there are no cases on point in the U.S. regarding this issue. Conversely, since this principal may be applied by the U.S. courts, the Chinese businesses directly involved in the negotiations should be documented as well as sales orders that are rejected.

## 2. 橡皮图章批准

经济合作组织有一些示范条约。美国政府常常会借鉴这些示范条约来修改之前的税收协定。经济组织示范条约对于从属代理商在没有外国公司的参与批准下签署销售合同的情况明确了很多细节规定。如果满足了这些细节，那么该外国公司将被美国税法局认为是在美国拥有“常设机构”。目前，美国还没有这样的实际案例公布，但中国公司应当保留参与销售合同谈判的文案记录以确保不在将来被美国税法法院定案。

# 通过网络视频进行销售洽谈

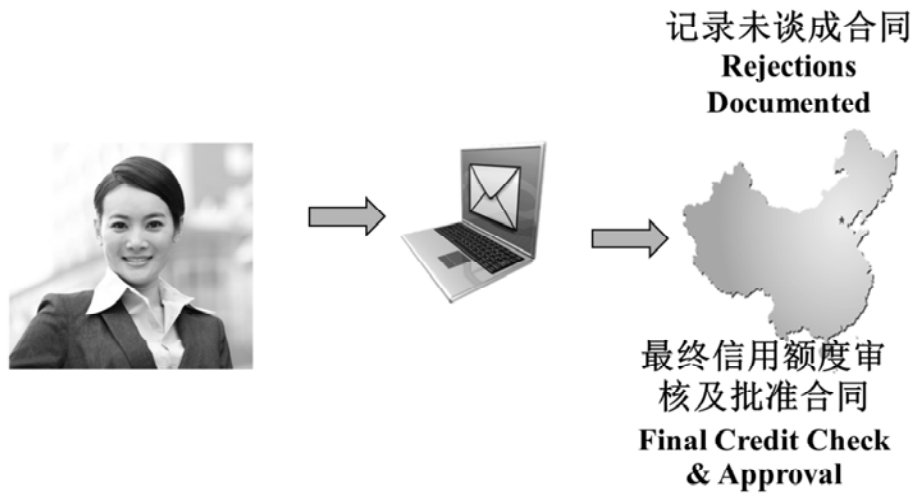
## Negotiate Via Skype



To reduce the chance of a rubber stamp approval, we suggest that the Chinese firm be involved in the negotiations via a video conference. A memo regarding the negotiations should be kept by the Chinese firm.



## 销售谈判后发送草拟合同 After Negotiations Send Proposal



After the negotiations, the proposed sales order can then be e-mailed to China for the credit check and final approval. The Chinese firm needs to document sales orders that are declined.

在美国的其他经营活动

## **Other Activities in the U.S.?**

- 无关联分支的销售办公室

Sales office of an unrelated branch

- 美国子公司

Subsidiary in the U.S.

- 尊重母公司和子公司之间的实体

Respecting the entities between a parent and a subsidiary

### 3. Other Activities in the U.S.

In a non-treaty country, all activity of the Hong Kong business is considered in determining whether or not a direct export transaction, independent agent, or a dependent agent will result in U.S. income taxation. For example, in Treas. Reg. § 1.864-4(b), a French Company sold two different products: (1) wine; and (2) electronics. The wine sales were a direct export transaction and the electronics were through a U.S. sales office. The U.S. sales office tainted the direct export wine transactions resulting in U.S. income taxation.

A U.S. subsidiary formed by a Hong Kong business also will result in taxation. Conversely, a U.S. subsidiary formed by a Chinese company may not result in taxation, but this will depend on the activities of the subsidiary as well as respecting the separateness of the Chinese business and the U.S. subsidiary.

### 3. 在美国的其他经营业务活动

在没有税收协定的地区，比如一个香港公司，它的所有的经营活动都将决定了它的直接出口交易、独立代理商或者从属代理商是否需要缴纳美国收入税。举例来说，在美国税法第 1.864-4(b)条中，一个法国公司销售两种不同的产品：红酒和电器。红酒的销售是直接出口，而电器的销售是通过在美国的销售办公室。然而这个在美国的销售办公室影响了红酒的直接出口销售的方式，使它也变成了需缴税交易。

香港公司成立的美国子公司也需要缴纳美国收入税。然而大陆的公司在美国成立的子公司则一般不需要，当然具体还需要看该子公司的经营活动。大陆的公司和美国子公司一般是被看作是相互独立的实体的。

需要缴纳过去所有年份的税赋

## U.S. Taxes Due For All Years



2010

2011

2012



限制法令无用

Statute of Limitations Never Runs

拖欠的税款，罚款和累计利息

Past Taxes, Penalty, & Interest

#### 4. U.S. Taxes Due For All Years

If a Chinese business is not taxable on its direct export sales, independent agent sales, and possibly dependent agent sales, then it would not be required to file any U.S. income tax return. The problem is the determination of whether the Chinese business is subject to U.S. income tax is fairly fact specific after analyzing all of the Chinese business's connections with the U.S. Further, the Internal Revenue Service may decide to interpret a treaty differently than it has done in the past with the objective to collect more tax from foreign businesses. Should the Internal Revenue Service be successful with such a challenge, then the statute of limitations for filing U.S tax returns would never have run. The Chinese business would owe income tax for all prior years, plus penalties, and plus interest. The amount due by the Chinese firm could well be incredibly large.

#### 4. 应缴纳的所有年份的美国税

如果一个中国公司没有在直接出口销售或者独立代理商销售或者有可能的从属代理商销售上被美国政府征收税款，那么将不需要填报年税申报表。是否需要缴纳美国收入税通常是基于对该中国公司和美国之间的实质性联系的事实分析。美国税法局可能会做出和以往的判决不同的决定以此从外国公司征收更多的税。一旦被征税，那么限制法令将不起任何作用，中国公司将会被要求缴纳过去所有年份的收入税，罚款金还有累计利息。金额将高得惊人。

解决办法

## Possible Solutions



无论有无税收协定，填报保护性年税表

For Treaty and Non-Treaty  
Countries, file a protective  
return

如果没有税收协定，还能够申请私信判定

If Non-Treaty Country, file a  
Private Letter Ruling

### J. Possible Solutions

In addition to having a detailed review of all of the Chinese business operations in the U.S., the Chinese business may file a “protective income tax return.” A protective income tax return reports the earnings and deductions of the U.S. operations. However, no tax is due. Rather, the reason for no taxation is explained when filing the return. Filing a protective return does not prevent the Internal Revenue Service from challenging the tax position taken by the Chinese firm. However, it generally limits the time period for the Internal Revenue Service to three years.

In a non-treaty country, the Hong Kong business (also, Taiwan or Macao) may apply to the Internal Revenue Service for a private letter ruling regarding how the Internal Revenue Service will rule on the transaction. Should the Internal Revenue Service agree the Hong Kong business is not taxable, then this agreement is binding with the Hong Kong business. Unfortunately, this procedure is not available in a treaty country, because the Internal Revenue Service will not rule on the effect of treaties. Also, even with a non-treaty country, the cost for such a ruling typically is somewhat expensive, around about \$50,000.

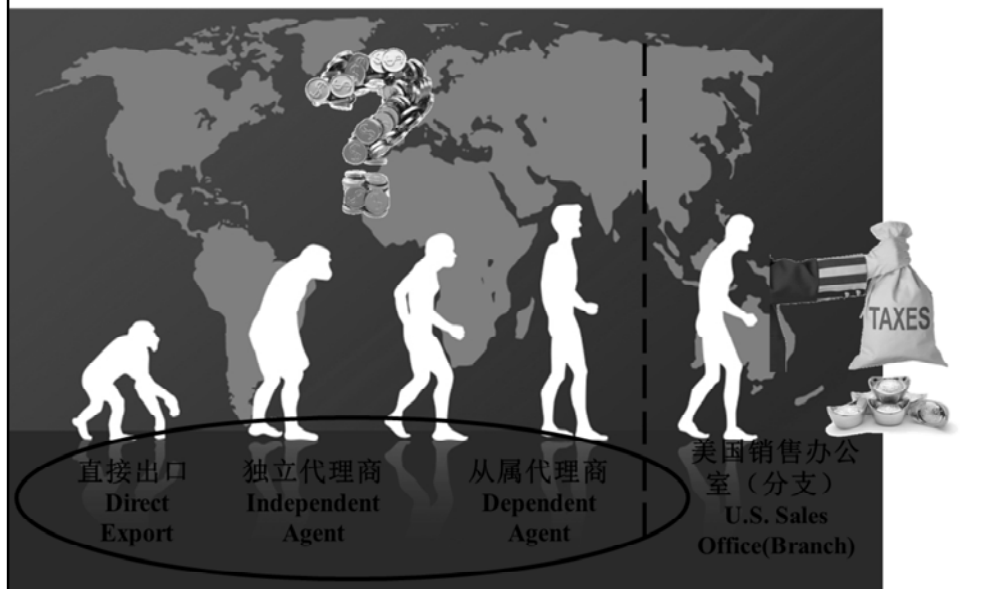
## J. 解决方案

除了具体的规划中国公司在美国的经营活动之外，中国公司还可以选择填报“保护性年税报表”。“保护性年税报表”是用来申报美国经营业务的收入和支出的，但不用缴纳税款。这张报表向美国税务局陈述了无需缴税的理由。虽然填报保护性年税报表并不能保证美国税务局不向中国公司征税，但它一般情况下限制了美国税务局在三年内向公司征税。

在没有税收协定的地区，香港，台湾或澳门企业可以向美国税务局提交私信申请情况判定，如果税务局判断该情况不需缴税，那么该私信判决将能够保护该企业。不幸的是，这项私信判决的服务不对有税收协定的地区开放，理由是美国税务局不会对协定做出管制。另外，这项私信判决的服务是很贵的，一般在 5 万美金左右。

出口至美国的不同方式的历史演变

## Evolution of Exporting to the U.S.

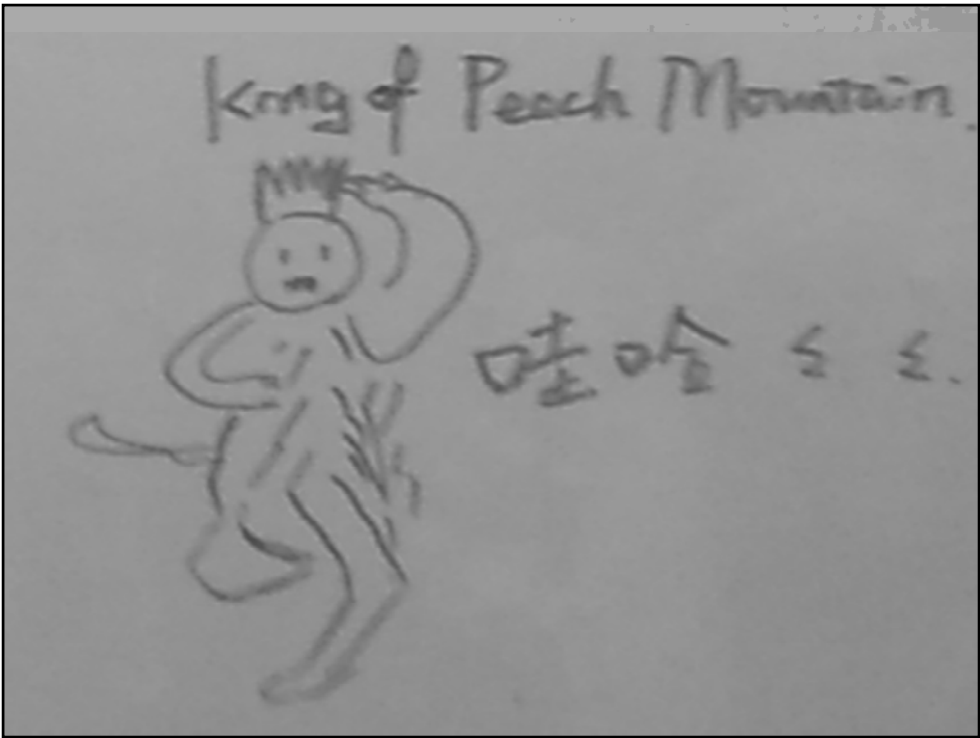


### K. Conclusion

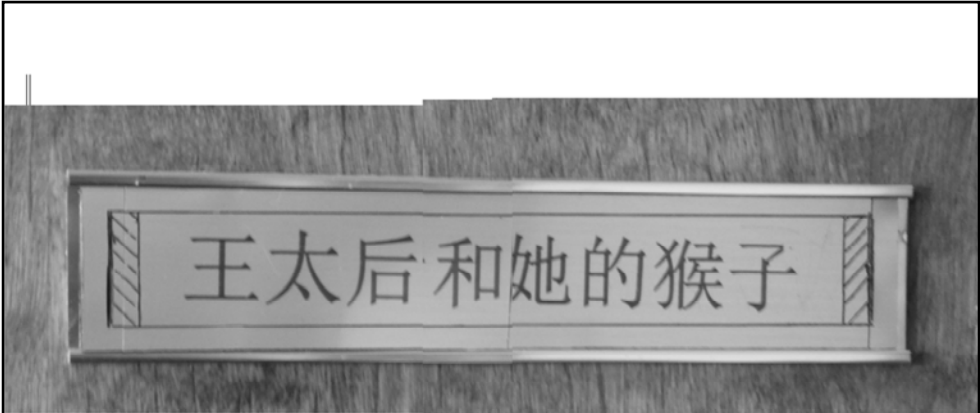
Before a Chinese business manufactures in the U.S., opens a U.S. sales office, a U.S. partnership, or a U.S. corporation, there are many export transactions that do not result in taxation. These transactions are direct export sales, independent agent sales, and dependent agent sales. Whether these transactions will result in no U.S. income taxation depends on analyzing the scope of and agent contracts as well as all of the Chinese business's activities in the U.S. It also depends on whether the Chinese business is from a non-treaty or a treaty country. Further, the Chinese business should file protective U.S. income tax returns to reduce possible U.S. tax amounts should the Internal Revenue Service challenge and be successful in taxing the Chinese business. Finally, if the Chinese business is from a non-treaty country, then it Chinese business should consider filing for a private letter ruling.

### K. 总结

在中国公司在美国进行加工生产，设立销售办公室，美国合伙制企业或者股份公司之前，有很多出口销售交易是不被征税的。这些交易是直接出口，独立代理商出口和从属代理商出口。这些交易是否会被征税取决于代理商活动在代理商合同上的拟定陈述方式，以及中国公司在美国的经营活动的分析。同时也取决于该中国企业来自于有税收协定还是没有税收协定的地区。最后，一个中国企业应该要填报美国保护性年税报表以降低美国税务局向其征税的可能性。同时，在没有税收协定的地区的企业在有需要的情况下也可以考虑使用申请私信判定的方式应对高税收风险。



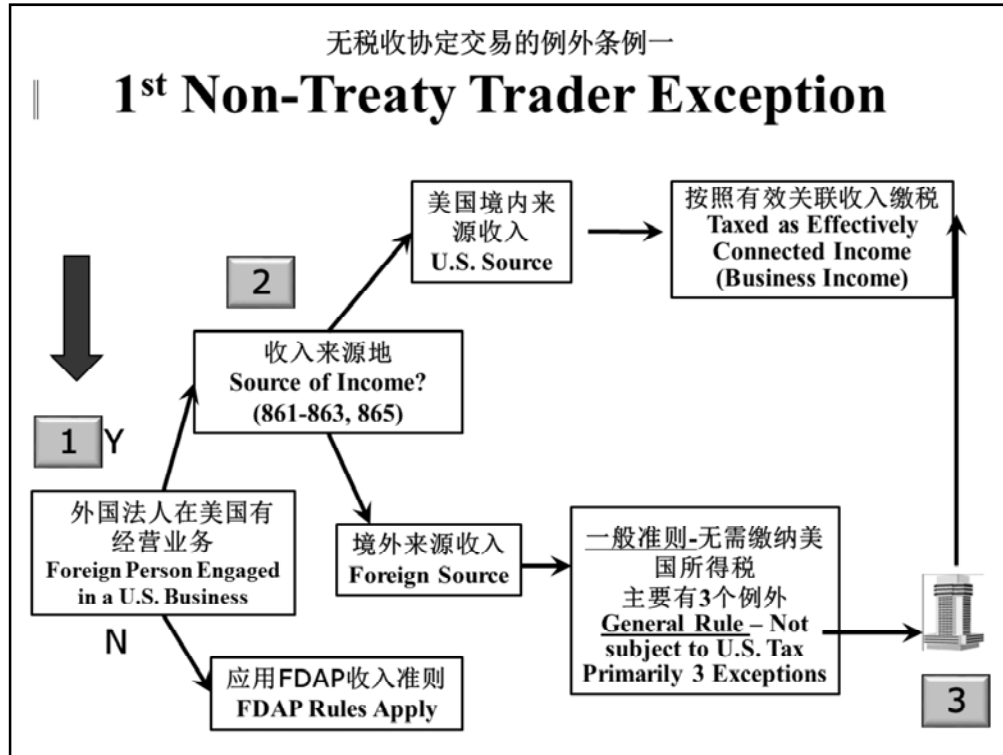




王太后和她的猴子

她的公事房门  
写





### L. Non-Treaty Trader Exception

A trader in securities is not considered a trade or a business under the first test of whether a foreign person is engaged in a U.S. trade or business.

### L. 无税收协定交易的例外条例

证券交易者在第一个测试中不属于在美国经营业务的类型。

|| 证券交易不属于公司运营

## “Trading in Securities” Exceptions to trade or business



但在这个例外条例中，频繁的短期交易属于公司运

**But for the exception, frequently buying and selling toward  
short term gains (i.e. trading) is a trade or business**

Under general U.S. tax principles, trading in securities would be classified as a trade or business. However, as applied to the taxation of a nonresident alien, the IRC provides two major exceptions where trading is not classified as a trade or business. These two exceptions will be discussed after distinguishing between an investor, trader, or dealer.

按照一般美国税法制度，证券交易属于一般运营收入，然而对于非定居美国的外国公民，有两种证券交易不属于运营收入。这两种类型将在投资者和交易者的对比之后被讨论。

## 投资人分类

# Classification of Those Who Hold Investments

- 券商-替客户投资交易  
**Dealer – Broker – Selling for others**
  - ✓ 运营收入 **Income ordinary**
  - ✓ 运营支出 **Expenses ordinary**
  - ✓ 个体经营在个人税表的附表C上申报所得与支出  
**Schedule C if sole proprietor**
- 投资人-拥有长期投资策略  
**Investor – Long Term Strategies**
  - ✓ 资本收益-个人税表附表D  
**Income capital gain – Schedule D**
  - ✓ 不超过投资收入的投资利息支出-个人税表附表A  
**Investment interest expense to the extent of investment income – Schedule A**

## 1. Classifications of Those Who Hold Investments

### a. *Dealer*

The dealer is the brokerage firm that sells and manages investments for others, such as Charles Schwab and Bernstein. Income to a dealer is ordinary and expenses are ordinary. Almost all dealers do business through a corporation. However, if they were an individual, they would report their income on Schedule C.

### b. *Investor*

Most clients are investors. The income or loss from their investments are capital gain, and are investment interest expense. If funds were borrowed to purchase investments, the interest is classified as investment interest expense. It is deductible to the extent of investment income. The excess amount of deductible investment interest expense is deducted on Schedule A.

## 1. 投资人的类型

### a. *券商*

券商是指为客户管理投资的经纪商行，例如美国的投资理财公司嘉信理财和伯恩斯坦。券商的收入和支出属于常规营业收入和支出。几乎所有的券商都是通过股份制公司来开展业务。但如果是个体经营的形式，他们将收入支出通过个人税表附表 C 来申报。

### b. *投资人*

大部分客户都是投资人。他们的盈利和损失都属于资本收益的性质。如果资金用来购买投资，那么利息属于投资利息，可以和投资收入相抵扣，超过投资收入的部分在附表 A 上抵扣。

交易员

## Trader

### 交易员 **Trader**

- ✓ 没有做税法法典495(f)选择时 **No § 475(f) Election**
  - 资本收益-个人税表附表 **D Capital gain income – Schedule D**
  - 个体经营利息支出-个人税表附表C  
**Business Interest expense – Schedule C**
  - 没有投资利息限制 **No investment interest limitation**
- ✓ 做税法法典495(f)选择时 **§ 475(f) election**
  - **Mark to Market**
  - 普通收益-税表4797 **All income or loss ordinary – Form 4797**
  - 个体经营利息支出-个人税表附表C  
**Schedule C Business interest expense**
  - 必须在往年报税截止日前提交选择  
**Must be made by due date of prior years return**
  - **2008年在2008年4月15日前 4/15/2008 for the year 2008**
- ✓ 私信判决可以撤销475(f)选择 **PLR to revoke the § 475(f) election**

#### *c. Trader*

Unlike a long term investor, a trader seeks to make money on short term changes in the market. The nature and how many trades it takes to qualify as a trader is discussed in the following pages. From a tax perspective, there are two types of traders:

##### *i. No §475 Election*

If no § 475 election has been made, the gain is capital gain income reported on Schedule D. However, any interest expense attributable to investment activities is deducted as an ordinary deduction on Schedule C. There is no investment interest limitation, and no income is reported on schedule C.

##### *ii. § 475 Election*

If there has been a § 475 Election, all gains or losses recognized during the year are reported as ordinary gains and ordinary losses. Also, at the end of the year, securities are “marked to market.” This means for all securities that are held at year end, to the extent of any gain it is recognized as ordinary income, and to the extent of any loss it is an ordinary loss. All securities held at the end of the year step up to a fair market value basis. The gains and losses from the actual sales during the year are combined with the deemed gains and losses on the mark to market computation. The ordinary income or loss is reported on Form 4797. Finally, to the extent of any interest expense attributable to purchasing the investments, it is deducted as an ordinary expense on Schedule C.

An election to be classified as a trader must be made by the due date of the prior year’s return. Further, it takes a PLR to revoke the § 475 election.

c. 交易员

和长线投资人不同，交易员往往在市场上做短线交易。以下部分会讨论交易员的性质，以及多少交易才会满足交易员的定义。在美国税法上，交易员主要有两种类型：

i. 不做税法 475 选择

如果没有做税法 475 选择，那么收益属于资本收益，在个人税表附表 D 上申报，任何相关的利息支出都作为运营支出在附表 C 上抵扣。投资利息的抵扣是没有上限的，收入也都不在附表上申报。

ii. 做税法 475 选择

另外美国税法上有一个 475 的选择，可以将当年所有的收益和损失作为营业收入和损失来缴税。并且，证券在年底的价值为市场价值。换言之，对于当年所有确认的收入都将成为营业收入性质，而所有确认的损失都将成为营业损失的性质。并且在年底，所有仍持有的证券的成本都将提高为它们的市场价值。实际交易的收益损失和被税法视同为交易的市场价值的收益损失相加减之后作为普通收益和损失在税表 4797 上申报。另外，购买投资的利息支出将作为运营支出在附表 C 上抵扣。

这个按照交易员税法制度缴税的税法选择必须在前一年的报税截止日前作出，如果之后要撤回的话，需要提交美国私信判决申请。

## 交易员的定义

# What's a "Trader"

- 要素：纳税人的意图；收入的性质；交易的频繁度和广度  
Factors: T's intent; nature of income; and the frequency, extent, and regularity of the transactions.
- 可征税收入的活动必须是大量的，即频繁的、常规性的和持续性的  
Activity must be "substantial," meaning the activity must be "frequent, regular and continuous" enough to be a T/B.
- 一些案例：第二个要求是纳税人的交易为短线投资而非长线投资  
Some cases: A second requirement is that T is **trying to catch swings in the daily market** movement rather than profit from long-term holdings.

### *iii. Number of Transactions to Qualify as a Trader*

To be a trader, purchases and sales of securities must be substantial meaning frequent, regular, and continuous throughout the year. Trading for three months out of the year does not qualify. *Chen v. Commr.*, T.C. Memo 2004-132. Case law does not give us any precise number of trades that establish that someone is a trader. However, the following cases give some guidance:

1,100 sales and purchases each year was deemed a trader. *Mayer v. Comm'r*, TC Memo 1994-209.

83 purchases and 41 sales in one year, and 76 purchases and 30 sales in a second year was not substantial. *Moller v. U.S.*, 721F.2d 810 (Fed. Cir. 1983).

323 trades in 3 months was not substantial because the trades were not throughout the year. *Chen v. Commr.*, TC Memo 2004-132.

289 trades that were done on 63 days of the year in 2001, and 371 trades done on 110 days were not substantial, because trading on less than 50% of the days of the year does not indicate the frequency, continuity and regularity indicative to be a trader. *Holsinger v. Comm'r*, T.C. Memo 2008-91.

In addition to the number of trades, a possibly required factor was articulated by the court in *Holsinger v. Comm'r*. Here, the Tax Court noted that traders would also buy and sell the same security on the same day to catch swings in the daily market.



### iii. 满足成为交易员的交易数量

满足交易员税法定义的交易必须是大量的，即频繁地、常规性和持续性。一年中只做三个月交易的将不满足。参见案例 *Chen v. Commr.*, T.C. Memo 2004-132. 美国的案例法并没有给出过一个明确的满足交易员身份的交易数量，然而以下这些案例能够给我们一些方向：

在案例 *Mayer v. Comm'r*, TC Memo 1994-209 中，每年 1100 个买卖交易量被视为交易员的交易量。

在案例 *Moller v. U.S.*, 721F.2d 810 (Fed. Cir. 1983) 中，一年 83 个买进交易，41 个卖出交易，另一年 76 个买进交易，30 个卖出交易的情况被视为不满足交易员的交易量。

在案例 *Chen v. Commr.*, TC Memo 2004-132 中，一年中 3 个月内有 323 个交易量被视为不满足交易员的定义，因为交易并没有持续一整年。

在案例 *Holsinger v. Comm'r*, T.C. Memo 2008-91 中，有 289 个交易是在 2001 年的 63 天之内进行的，另外 371 个交易是在 110 天内进行的，这也被视为不满足交易员的定义，因为一年间发生交易的天数不足一年，不满足频繁性、常规性、持续性的特征。

此外，除了数量之外，在美国法庭案例 *Holsinger v. Comm'r* 中提出了另外一个可能会被要求的因素，即交易员会在当天买进卖出同一个证券来捕捉市场的每日振幅。

证券交易不属于运营收入的例外情况

## Exceptions Where Trading Not a Trade or Business

1. 例外条例：通过独立代理商交易不属于美国的运营收入  
**Trading through an independent agent (e.g. broker) does not constitute a U.S. business – IRC § 864(b)(2)(A)(i); (B)(i)**
  - 然而，外国法人在美国有固定营业场所并和交易有关时，该例外条例不适用  
**However, exceptions do not apply if foreign person has a fixed place of business in U.S. from which it effected the trades § 864(b)(2)(C)**
2. 通过个人独立账户交易，或通过美国员工和或其他代理商交易，不属于美国运营收入  
**Trading on own account even trading effected through a U.S. employee or other agent does not constitute a U.S. business. (A)(ii); (B)(ii)**

### 2. Exceptions Where Trading Not a “Trade or Business”

§ 864 gives the following two exceptions for when trading will not be classified as a U.S. trade or business.

#### *a. Trading Through an Independent Agent*

Trading through an independent agent such as Bernstein or Charles Schwab does not constitute a trade or business. However, this exception does not apply if the foreign person has a fixed place of business in the U.S.

This is a common sense exception that supports the current tax free treatment of capital gains to foreign persons. If a foreign person buys or sells securities as an investor, capital gains are not taxed to such foreign person. If trading through an independent agent was considered a trade or business, then this income would be source to the U.S. becoming effectively connected business income. This would result in U.S. taxation.

#### *b. Trading on Own Account – With a Dependent Agent*

There is a second exception where even if a foreign person has a dependent agent (i.e. employee) trading on his or her account, this will not result in trading being classified as a business with regards to a foreign person.

## 2. 交易不属于一般运营性质的例外情况

美国税法 864 给出了以下两个例外情况：

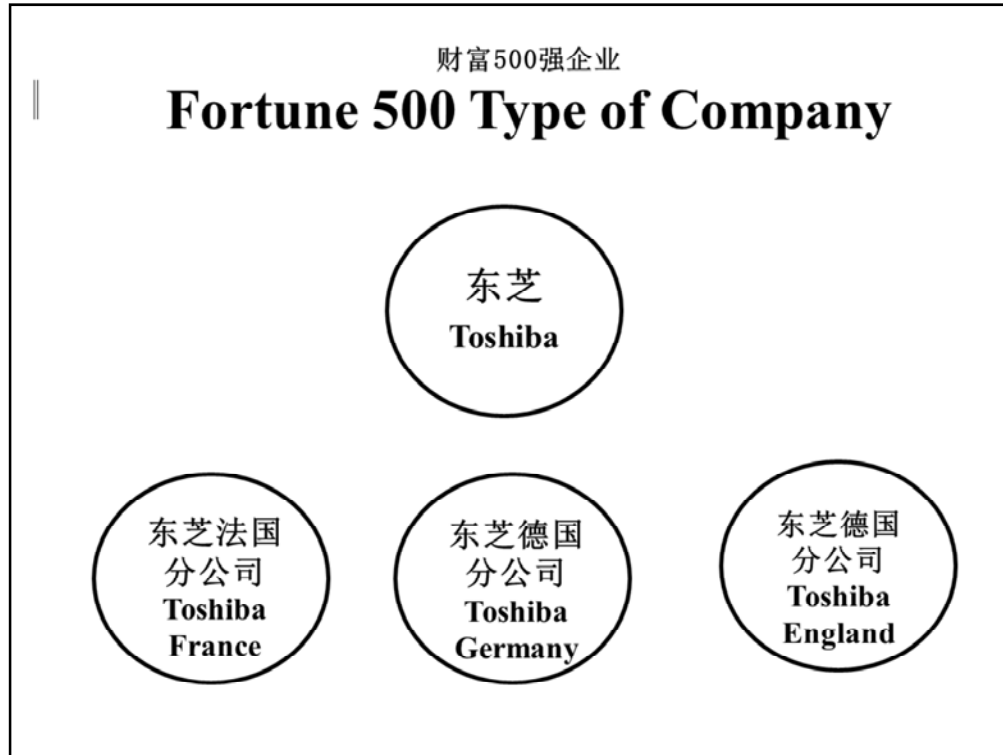
### a. 通过独立代理商的交易

通过独立代理商，例如美国的投资理财公司嘉信理财和伯恩斯坦，进行交易不属于公司运营性质，但这个例外条例不适用于在美国有常设办公点的外国法人。

由于外国法人买卖证券的资本收益是免税的，这个例外条例有利的，因为如果被划分为运营收入的话，那么该收入将会被追溯为是美国来源的有效关联收入，从而成为美国的可征税收入。

### b. 非独立代理商通过个人账户交易

第二个例外条例是当外国法人在美国用独立账户交易，即使有从属代理商（例如雇员），交易也不属于公司运营性质。



*c. Fortune 500 Companies*

The trader rule becomes very important for large corporations. These corporations have operations and financing on a world-wide basis. The investment of the company's working capital as well as long term investments generates significant investment income. Since over half of the world's investments in equities are in U.S. securities, foreign corporations having no operations in the U.S. would inadvertently be taxed as a trader and subject to U.S. tax under the U.S. effectively connected income rules.

*c. 财富500强公司*

对于大公司来说，这个税法上的交易员的制度起着很重要的作用。这些大企业在全球范围内都有业务和融资，公司的运营资本和长期投资会产生很大的投资收益。由于全球超过半数的股权投资是美国股票，在美国没有运营业务的外国公司的投资在美国就属于美国有效关联收入并按照交易员的缴税制度来缴税。

东芝综合资产

## Toshiba Consolidated Assets

### 流动资产 Current Assets

先进 Cash

应收账款 Accounts Rec.

存货 Inventory

短期投资 Short Term Investments XXXXX

长期投资 Long Term Investments XXXXX

例外条例的作用是使得投资收入成为固定或可确定的年度或定期（“FDAP”）收入

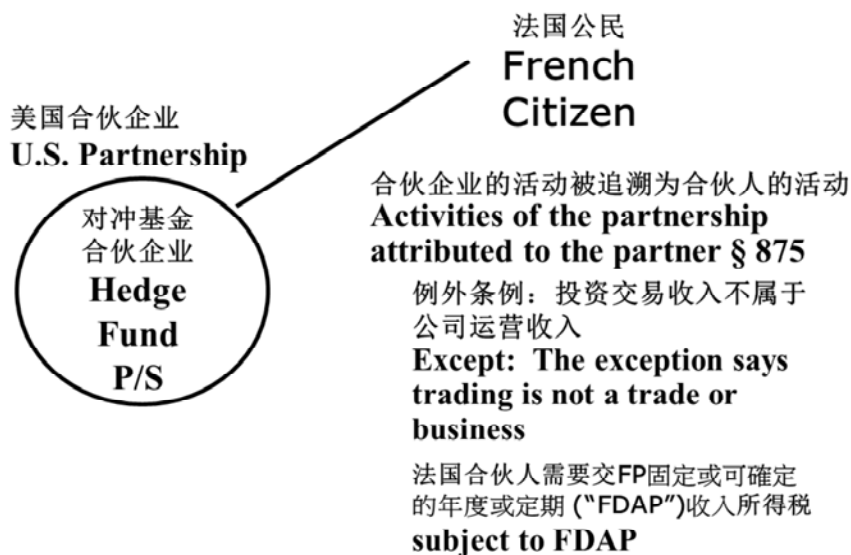
**Trading exception makes the investment income FDAP income**

The trader rule becomes very important for large corporations. These corporations have operations and financing on a world-wide basis. The investment of the company's working capital as well as long term investments generates significant income. Since over half of the world's investments in equities is in U.S. securities, foreign corporations having no operations in the U.S. would inadvertently could be taxed as a trader and subject to U.S. tax under the U.S. effectively connected income rules. The trading exception makes it so a company not doing business in the U.S. is subject only to FDAP withholding.

对于大公司来说，这个税法上的交易员的制度起着很重要的作用。这些大企业在全球范围内都有业务和融资，公司的运营资本和长期投资会产生很大的投资收益。由于全球超过半数的股权投资是美国股票，在美国没有运营业务的外国公司的投资在美国就属于美国有效关联收入并按照交易员的缴税制度来缴税。证券交易税收的例外条例就使得不在美国开展业务的公司只需要预提 FDAP 收入税。

举例-法国合伙人

## Example – French Partner



### d. U.S. Hedge Fund

Hedge funds conduct their business in partnership form. The activities of a partnership are generally attributed to the partner. Therefore, if the hedge fund is a dealer, a French investor in the partnership becomes a dealer. If this was the case, then the French investor in the hedge fund would have U.S. source ECI and be subject to U.S. tax.

Conversely, if the hedge fund is a trader, then the French Citizen is classified as a trader. IRC § 875(1). The exception applies and for purposes of whether the French Citizen is doing business in the U.S., a trader is not a trade or business. Therefore, the French Citizen would not have any U.S. source effectively connected income. The FDAP rules would continue to apply.

### d. 美国对冲基金

对冲基金是以合伙企业的形式运作。合伙企业的活动通常会被追溯为合伙人的。因此如果对冲基金是券商,投资了它的合伙企业的法国投资者就会成为券商,那么投资这个对冲基金的法国投资者就会有美国来源的有效关联收入,需要在美国缴纳税收。

相反的,如果对冲基金是交易员性质,那么法国投资者就属于交易员性质,由于无论在美国有没有经营业务,交易员税收的例外条例都适用,因此在这个情况下,法国投资者就没有任何美国来源的有效关联收入,适用的相关税收条例是FDAP收入条例。

## How Far Does the Exemption Go

### 举例 Example

富国银行做了一笔 2 亿美金的贷款

Wells Fargo makes a \$200 M loan

➤ 贷款业务属于常规业务

In the business of making loans

另有一对冲基金参与了该笔贷款

Hedge fund participates in the loan

对冲基金不是贷款的创建者，而是购买了贷款的一部分

Hedge fund did not originate loan, they purchased part of it.

华尔街期刊利用了一个48小时的例外条例

Wall Street takes the position of a 48 hour rule

i. 在48小时之后，例外条例适用

After 48 – Exception applies

### *e. How Far Do the Exemptions Go?*

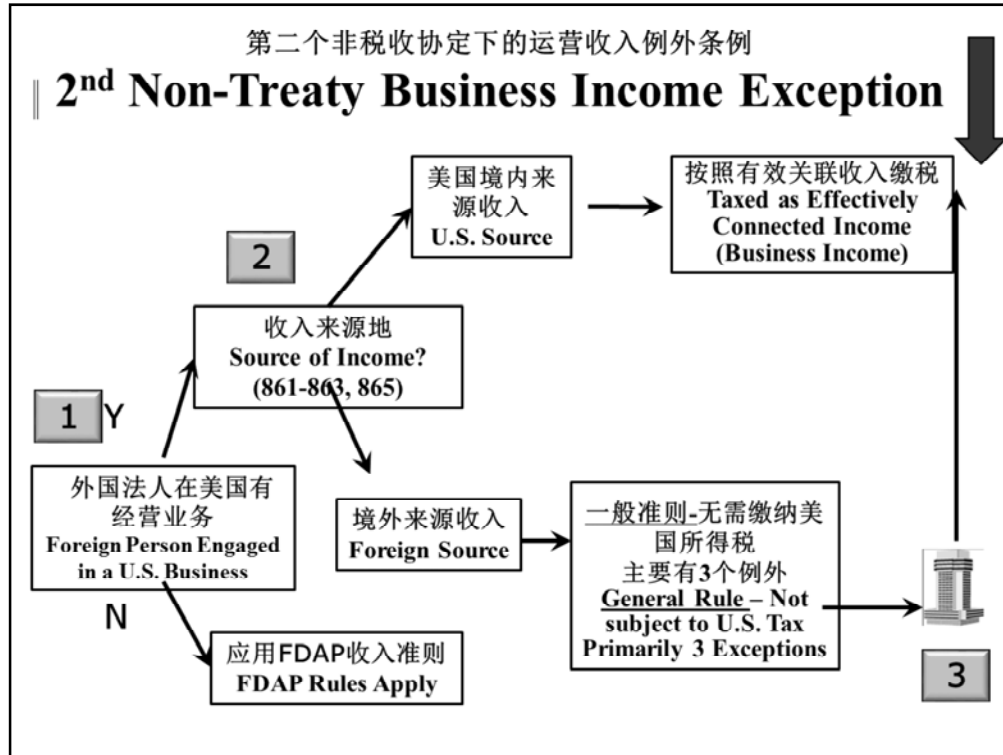
The exception to trade or business status for a trader is frequently used by hedge funds. For example, Wells Fargo makes a \$200 million loan. Wells Fargo does not want to bear the entire risk of loss so it sells part of the loan to other financial institutions. Assume a hedge fund wishes to participate and purchases (i.e. buy from Wells Fargo) part of the promissory note.

Please note that the hedge fund did not originate the loan, rather they purchased it. Therefore, the question is whether the hedge fund is a dealer or a trader. Wall Street takes the position that as long as 48 hours expire after Wells Fargo closes the loan, the purchase by the hedge fund does not create dealer status.

### *e. 例外条例的范围*

交易员交易性质的例外条例常常被对冲基金使用。举例来说，富国银行做了一笔 2 亿美元的贷款，并且出售了部分贷款给其他的金融机构来分散风险损失。此时有一个对冲基金想要从富国银行购买部分的期票。

由于对冲基金并不是贷款的创建人，而是购买人，因此问题的关键就落到了这个对冲基金将被归为券商性质还是交易员性质。华尔街期刊认为只要购买是在富国银行签署贷款 48 小时之后发生的，那么这个对冲基金就不属于券商性质。



### M. FDAP and Capital Gains Taxed as Business Income

Another important exception reclassifies FDAP income and capital gains as business income. This reclassification in essence takes away any portfolio interest exclusion, reduction of withholding tax on interest, dividends, or royalties, as well as makes capital gains taxable.

### M. FDAP 收入和资本收益按照营业收入制度缴税

另外一个很重要的例外条例将 FDAP 收入和资本收益重新划分为营业收入。这个重新划分造成的结果是使得利息收入不再属于免税收入，也使得利息、分红和无形资产使用收入的预提税提高，同时资本收益也变成可征税收入。



固定或可确定的年度或定期(“FDAP”)收入/资本收益  
=运营收入(有效关联收入)

## **FDAP/Capital Gains = Business Income (ECI)**

- 除以下情况外被归为FDAP收入

Classified as FDAP Income unless either:

- 公司运营活动测试法适用的情况

Business activities test applies or

- 资产使用测试法使用的情况

Asset use test

If either FDAP or capital gain income is directly associated with a U.S. trade or business, it is taxed as effectively connected income, not FDAP income and in the case of capital gains, not exempt from taxation. From a procedural standpoint, so that the withholding agent does not income tax on this type of FDAP income, the foreign person files form W-8ECI.

There are two primary tests used to determine the amount, if any, of FDAP/Capital gain business income:

如果 FDAP 收入或者资本收益是和美国的公司业务直接相关的，那么需要按照有效关联收入来缴税，而不是 FDAP 收入，资本收益也将不再免税。从程序上来说，预提税机构不再对这些 FDAP 收入预提收入所得税，该外国法人提交税表 W-8ECI。

对于 FDAP 收入或资本收益被划分为有效关联收入的数额，主要有两种计算方法。

固定或可确定的年度或定期(“FDAP”)收入/资本收益  
=运营收入(有效关联收入)

## FDAP/Capital Gains = Business Income (ECI)

- 公司运营活动测试法通常适用于美国税法法典864(c)(2)(B)下的外国  
证券交易

Business-activities test generally applies to a foreign  
securities dealer § 864(c)(2)(B)

- 涉及证券(被动资产)

Dealing in securities(passive assets)



美国分支或代理商  
**U.S. Branch or  
Agent**



英国公司  
**English Corp.**

### 1. Business Activities Test

The business activities test requires that a foreign securities dealer doing business in the U.S. report such income as effectively connected income and pay U.S. tax on such income. § 1.864-4(c)(3).

### 1. 公司营业活动方法

该方法要求在美国开展业务的外国券商将收入按照有效关联收入来申报并且支付美国收入所得税。

固定或可确定的年度或定期(“FDAP”)收入/资本收益

## FDAP/Capital Gains

- 资产使用测试法适用于所有其他的公司业务  
Asset use test applies to all other businesses  
§ 864(c)(2)(A)
- 运营资金的概念 Working capital concept
  - 用于流动资产和流动负债的现金和证券  
Cash and securities needed to fund the current assets and current liabilities during a year of operation
- 银行存款或投资组合利息的豁免不适用  
No bank deposit or portfolio interest exemption

### 2. Asset Use Test

With the exception of the business use test that is frequently associated with foreign securities dealers doing business in the U.S., the asset use test applies to other businesses, particularly selling or manufacturing in the U.S. Treas. Reg. § 1.864(c)(2)(i). Only assets that are held to meet the present needs of that trade or business, and not anticipated needs are considered. An asset is considered as meeting the present needs if it is held to meet the operating expenses of a trade or business. Conversely, if an asset (i.e. a security) is held for (1) the future diversification into a new trade or business, (2) expansion of trade or business activities conducted outside of the U.S., (3) future plant replacement; or future business contingencies, then it is not a present need. Treas. Reg. § 1.864(c)(2)(iv).

In this respect, the asset use test may be viewed similar to a working capital concept where the income from cash or securities needed to fund the operations during the year is classified as effectively connected income.

### 2. 资产使用测试法

公司营业活动测试法主要适用于外国券商在美国开展业务的情况，而资产使用测试法适用于其他的业务类型，尤其是在美国销售或制造产品的类型。参见美国财政条例 1.864(c)(2)(i)。被测试的资产只包括那些达到目前公司业务需求的，不包括那些预期中将来需要用到的资产。而达到目前公司业务需求是指公司运营开支的需求。相反的，如果一个资产的存在是为了(1) 将来拓宽新的业务类型，(2) 拓展美国以外的业务，(3) 将来取代现在的工厂，(4) 满足将来业务应急需求，那么不属于目前的业务需求。参见美国财政条例 1.864(c)(2)(iv)。

运营资金-会计年初

## Working Capital – Beg. Year

流动资产 <b>Current Assets:</b>		流动负债 <b>Current Liabilities:</b>	
现金 Cash	100	应付账款 Accts Payable	700
应收账款 Receivable	300	短期应付票据 Current portion	
存货 Inventory	800	- Note Payable	400
投资 Investments	200		-----
		总额 Total	1,100
	-----	运营资金=300美元	
总额 Total	1,400	<b>Working capital = \$300</b>	

*a. Working Capital at the Beginning of the Year*

Working capital is an accounting balance sheet concept. In general, working capital is defined as current assets minus current liabilities. Also, since it is a balance sheet concept, it changes from day to day. For example, on one day accounts receivable may be high. However, three days later they may have been converted to cash because the receivable were collected, and then a week later the cash was used to purchase some equipment. In this respect, an average working capital throughout the year must be computed. The interest, dividend and capital gain income attributable to the average cash and investments from the current assets become effectively connected income. Since this FDAP/capital gain income has been reclassified as effectively connected income, there is no bank deposit or portfolio interest exemption.

In the above balance sheet, the company has current assets of \$1,400 and current liabilities of \$1,100. Therefore the working capital at this point is \$300. However, as every accountant knows, current assets and current liabilities are constantly fluctuate. Receivables are collected, this increases cash. Payables are paid which conversely reduces cash. Inventory is received and current assets increase. At the same time, the bill for the inventory arrives and accounts payable increase. Therefore, an average working capital must be computed.

#### *a. 运营资金-会计年初*

运营资金是一个资产负债表的概念，通常被定义为流动资产减去流动负债。也因为是资产负债表上的项目，运营资金每天都在变化。比如，应收账款在某一天可能很高，但三天之后可能就转到了现金帐目，一周之后就被用于购置了新的设备。因此，我们需要计算出运营资金的年平均值。归属于流动资产中的年平均现金和投资帐目的利息、分红和资本收益属于有效关联收入，原先使用与银行存款和投资利息免税条例将不再使用。

在上面这张资产负债表中，公司的流动资产为 1400 美元，流动负债为 1100 美元，因此，运营资金为 300 美元。但众所周知，流动资产和流动负债浮动很频繁。应收账款会增加现金流，应付账款会减少现金流，存货的增加会增加流动资产，支付存货订单又会增加应付账款。因此，年平均运营资金是很有必要计算的。

运营资金-会计年中

## Working Capital – Middle Year

流动资产 <b>Current Assets:</b>		流动负债 <b>Current Liabilities:</b>	
现金 Cash	100	应付账款 Accts Payable	200
应收账款 Receivables	300	短期应付票据 Current portion	
存货 Inventory	400	- Note Payable	100
投资 Investments	400	总额 Total	300
	-----		-----
总额 Total	1,200	运营资金=900美元	
		<b>Working capital = \$900</b>	

*b. Working Capital – Middle of the Year*

The above partial balance sheet shows the change in working capital. At the beginning of the year, the working capital was \$300. Here it is \$900. Taking the average of \$300 at the beginning of the year with \$900 at the mid-year point yields \$600.

This computation is a crude estimate of a method that a company may attempt to compute its FDAP ECI. It is not the only method. The Treasury Regulations only give vague examples without any specific computational references.

*b. 运营资金-会计年中*

上面的部分资产负债表显示了运营资金的变化，在会计年初，运营资金是 300 美元，到了年中增加到了 900 美元。平均值为 600 美元。

这个计算只是一个粗略的估算方法，公司可以用来计算 FDAP 有效关联收入。它不是唯一的。美国财政规则在这方面只给出了很模糊的例子，没有很具体的计算方法的参考例子。

## Taisei et. al. Treaty Analysis

■ 协定第5章第6条 **Article 5(6)**

- 通过独立代理商经营业务的企业不属于拥有固定营业场所

Enterprise does not have a P.E. merely by carrying on a business through an independent agent.

■ 协定第5章第5条 **Article 5(5)**

- 被授权并且常规性地代表外国法人签署合同的从属代理商的营业场所被追溯为外国法人的固定营业场所

Dependent agent has and habitually exercises authority to conclude contracts on behalf of foreign person = **P.E.**

- 美国的再保险代理商是独立代理商还是从属代理商？

Is Fortress a independent or dependent agent?

- 案例中没有商品销售 No sale of goods in this case.

### N. *Taisai Fire and Marine Insurance Co. 104 TC 535 (1955) – Treaty Analysis*

The Taisei case provides a unique fact pattern where the Service attempted to assert that a management contract confined the activities of an agent Fortress so much that the agent should be classified as a dependent agent. If classified as a dependent agent, the dependent agent's office would be imputed to the principal, and result in U.S. taxation under the permanent establishment treaty rules.

### N. 日本大成火灾水上保险公司案例-税收协定分析

日本大成的案例提供了一个非常独特的案例模型，在这个案例中美国税务局认为被代理商合同限制非常多的代理商属于从属代理商的性质，从而代理商的办公室将被认为是代理商雇佣公司在美国的办公室，继而按照税收协定下常设机构的制度，需要在美国缴税。

日本大成火災水上保險 公司案例-稅收協定分析

## Taisei et. al. v. Commr. U.S. Japan Treaty

銷售資產和災害保險

Sell

Property  
& Casualty  
Insurance

大成保險

**Taisei**

尼桑

**Nissan**

富士保險

**Fuji**

千代田壽險

**Chiyoda**

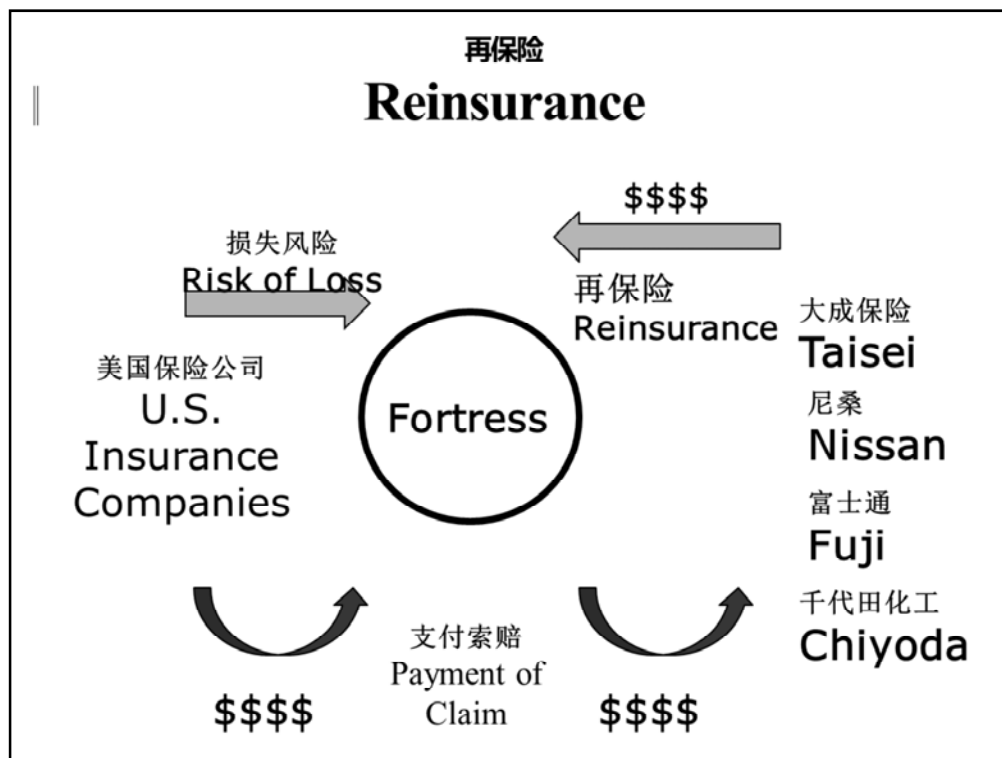
\$\$\$



While the case serves as an excellent real life learning tool, it is quite complex because it involves the concepts of insurance and reinsurance. So the fact pattern starts with four Japanese insurance companies selling property and casualty insurance to the Japanese public. Therefore, dollars go from the Japanese public to the four Japanese property and casualty insurance companies. In exchange, the four Japanese property and casualty insurance companies agree to insure the Japanese purchasers against property and casualty losses.

同时，这个案例的复杂性还在于它涉及到了保险和再保险的概念。整个案例的背景起自于四个向日本公众出售资产和意外保险的日本保险公司。也就是说，日本公众向这几个保险公司支付保险费来防止财产和意外损失。





### 1. The Reinsurance Contract

The four Japanese insurance companies do not wish to absorb the entire risk of loss. Therefore, they sell part of the risk of loss to other insurance companies, in this case certain U.S. insurance companies. Many times with reinsurance contracts, there is an agent or broker in the middle. In this case, the agent is a company named Fortress. Again, the Service's argument is that the agency contract between the Japanese four insurance companies is so restrictive that the activities of Fortress should be attributed to the four Japanese insurance companies.

#### 1. 再保险合同

这四个日本保险公司希望能够分散所有的风险损失。因此，他们将部分的风险损失卖给了其他的保险公司，包括一些美国的保险公司。很多时候，一个再保险合同会由一个代理商或者经纪人在中间参与。在这个案例中，中间商是一个叫做 Fortress 的保险公司。税务局的观点是日本保险公司和 Fortress 之间的代理合同对 Fortress 的活动规定和限制程度已经达到了应该将 Fortress 所有的活动追溯为是这四家日本保险公司自己的活动。

对纳税人有利的事实证据

## Facts Not Held Against Taxpayer

- 每个日本公司在美国都有一个办公室

Each Japanese company has a U.S. office in the U.S. that

- 为日本公司提供美国市场的信息

Provides information on the U.S. market, and

- 服务于美国客户

Assists its U.S. clients

- 未获得授权以任何形式拟定保险合同

No authority to write any form of insurance.

### 2. Facts Not Held Against Fortress

There are a few facts that at first blush appear to be detrimental to the Japanese insurance companies.

#### *a. Office to Gather Information*

First, each Japanese company has a U.S. office. However, the activities of the U.S. office are to gather marketing information, assist its U.S. clients that buy insurance from them, but such office has no authority to write any form of insurance. Naturally, if the office had the authority to write insurance, this fact alone would be deadly under the permanent establishment rules.

### 2. 对 Fortress 没有不利的事实

有一些事实初看起来可能对日本保险公司是不利的。

#### *a. 用于搜集信息的办公室*

首先，每个日本公司在美国都有一个办公室，但它们是用于搜集美国市场的信息以及服务美国客户购买保险，这些办公室并没有被授权创建任何形式的保险。如果这些办公室有权创建保险，那么这在常设机构准则下将会是非常致命的不利因素。

常设机构=美国税

## Permanent Establishment = U.S. Tax

Article 5, Par. 2



### 例外 Exceptions:

(1) 用于搜集信息的办公室

Maintenance of an office to collect information Article 5(4)(d);  
and

(2) 辅助性的活动

Activities that are auxiliary character Article 5(4)(e)

The mere opening of a U.S. office appears to create a permanent establishment. If such U.S. office was a sales office, this would be fatal. However, an exception where a foreign person may open a U.S. office is maintenance of an office to collect information (Article 5(4)(d)) and activities that are auxiliary in character. Article 5(4)(e).

美国办公室的存在看起来是一个常设机构。如果这个办公室是一个销售办公室，那么情况会是如此，但外国法人在美国的常设机构并不包括用来搜集信息和进行一些辅助性的活动办公室。参见税收协定条款 5(4)(d) 和 5(4)(e)。

### 对纳税人无不利的事实证据

## Facts Not Held Against Taxpayer

- 千代田化工 在纽约有分支，并且在四个州有保险资格证  
Chiyoda has a branch office in New York and has insurance licenses in 4 states.
  - 纽约分支的活动和北卡罗来纳州的活动无关  
Article 7 – Activities in N.Y. not related to North Carolina - Fortress
- 富士通在伊利诺伊州有一个全资子公司，参与了这些美国保险公司的3个保险项目  
Fuji has a 100% subsidiary in Illinois, which participates in 3 insurance programs with these U.S. insurance companies.
  - 50%的收入交给富士通 50% of this income is sent to Fuji
  - 子公司的常设机构不追溯到母公司 Article 5(7) – no attribution of subsidiary to a parent regarding a P.E.
- 判决中没有被讨论到的 Not discussed in decision

### *b. Branch Sales Office*

Other facts that look particularly detrimental to two of the Japanese insurance companies is that one, Chiyoda, has a branch sales office and the second, Fuji, has a subsidiary that sells insurance. Possible U.S. taxation attributable to these facts are not discussed in the decision. The reason is because the tax treaty protects against them. Article 7 states that activities that are not related are not attributed to each other. The activities of Chiyoda selling insurance in four states has nothing to do with the reinsurance contracts with Fortress in North Carolina. One is the sale of insurance to the public, the other is transferring the risk of a product that was sold in Japan.

### *c. Sales Subsidiary*

Regarding Fuji, Article 5(7) states that a subsidiary of a parent are not attributed to the parent to find that the parent has a permanent establishment. Without attribution, it is only the agency agreement with Fortress that becomes important from a treaty analysis.

### *b. 销售分支办公室*

其他的看起来对这两个日本保险公司特别不利的事实包括，千代田化工在美国有一个销售办公室，富士则在美国有一个子公司卖保险。但是这些可能会引起美国征税的事实都没有在最终的裁决中被讨论，其原因是税收协定起到了反这些事实的保护作用。税收协定第 7 章中提到了不相关联的经营活动不追溯为其他分支的活动。而千代田化工在其他四个州的保险销售和 Fortress 在北卡罗来纳的再保险业务没有任何的关联，前者是向公众销售保险，而后者则是转移在日本销售的保险的风险。

### *c. 子公司的销售*

关于富士，税收协定第 5（7）条规定了在判定母公司在美国有没有常设机构时，子公司的经营活动列入母公司的活动的考虑范围。因此这样一来，只有 Fortress 的代理商合同成了这里的分析重点。

### 对纳税人有利的事实证据

## General Facts in Taxpayer's Favor

- 四个日本公司在日本都有再保险办公室  
All four Japanese companies have a reinsurance office in Japan.
- 每个日本公司和2-3家其他的美国代理商合作  
Each Japanese company does business with two or three other U.S. agents other than Fortress.
  - 没有独家代理的合同  
There is no “exclusive agreement”
- Fortress是一个再保险承销管理公司  
Fortress is a reinsurance underwriting manager
  - 不自己撰写承办保险  
Does not write any insurance on its own
  - 提供拟定管理合同  
Fortress writes management contracts
  - 通过经纪商工作  
Works through brokers

### 3. Facts in Favor of the Taxpayer

#### a. *Own Reinsurance Company*

All four Japanese companies had a reinsurance office in Japan. In other words, they could have sold part of the insurance risk on the property casualty insurance contracts through their own reinsurance company, rather than through Fortress.

#### b. *No Exclusive Agreement*

As one of the greatest factors indicating a dependent agent, the Service looks to see if the agent has an exclusive arrangement. Rev. Rul. 90-80; Rev. Rul. 70-424; *Handfield v. Commr.*, 23 T.C. 633 (1955). Also see PLR 7702043120D that found the taxpayer to be an independent agent, and distinguished Rev. Rul. 70-424 because the taxpayer did not have an exclusive arrangement. Fortunately, in *Taisei* each Japanese company did business with two or three other reinsurance agents. There was no “exclusive agreement” with Fortress.

#### c. *Fortress in the Business of Obtaining Reinsurance Contracts*

Fortress does not write any reinsurance contracts on its own. Rather, it seeks customers to barter reinsurance deals. This point is somewhat related to the no exclusive agreement in that Fortress has multiple customers who are actually competitors.

### 3. 对纳税人有利的事实

#### a. *拥有再保险公司*

所有这四个日本保险公司在日本都有再保险办公室，换言之，他们可以通过他们自己的再保险公司，而不是 Fortress 来销售部分的保险合同来分散风险。

#### b. *没有独家代理商合同*

美国税务局在判定一个代理商为从属代理商性质的最重要的一个事实是独家代理商合同。参见美国税法准则 90-80 和 70-424，案例 *Handfield v. Commr.*, 23 T.C. 633 (1955)。同时在美国私信判决 7702043120D 中将纳税人判定为独立代理商的原因也是其不满足美国税法准则 70-424 中的独家代理合同的情况。幸运的是，日本大成保险公司在日本的每一家公司都和其他两到三家再保险代理商合作，对 Fortress 来说不存在独家代理的情况。

#### c. *再保险业务属于 Fortress 的常规业务范围*

Fortress 自己不创建任何的保险公司，它的业务方式通常是寻找客户再保险。这也从另一方面说明了 Fortress 不做独家代理，相反的，它还有很多客户是彼此的竞争者。

## 管理合同

# Management Agreements

- **Fortress**是管理者(代理商) Fortress is the manager (agent)
  - 被授权代表每个日本保险公司执行再保险合同  
Has authority to execute reinsurance (retrocede reinsurance) contracts as an agent on behalf of each Japanese insurance company.
  - 每个日本公司都要对**Fortress**代表执行的自己的合同负法律责任  
Each Japanese company is liable for its own contracts that Fortress executes on its behalf.
- **Fortress**也可以和其他公司签署管理合同  
Fortress may enter other management agreements with other companies
  - 没有禁止竞争协议 No non-compete provision
  - **Fortress**除了日本公司外还有**13**个其他的客户  
Fortress has 13 other clients other than the four Japanese companies

#### 4. *Management Agreement*

An analysis of the management agreement brings up elements of both a dependent agent as well as an independent agent.

##### *a. Conclude Contracts on Behalf of the Japanese Companies*

An independent agent may conclude contracts on behalf of a principal without having the independent agent's permanent establishment attributed to the principal. 2006 Model Treaty Article 5(6). However, a dependent agent cannot. Article 5(7). Therefore, if the provisions in the management contract so control Fortress both legally and economically, then Fortress becomes a dependent agent, resulting in ECI to the Japanese Companies on their profits of selling the reinsurance contracts.

##### *b. Do Business With Other Insurance Companies*

A couple of key elements pointing toward an agent being classified as an independent agent are that the agent is not an exclusive agent. In other words there is no non-compete clause preventing the agent from doing business with competitors. Further, Fortress shows that it has 13 other competitors that it does business with regarding finding reinsurance



#### 4. 管理合同

管理合同的分析设计了独立代理商和从属代理商的界定因素。

##### a. *代表日本公司签署合同*

独立代理商可以代表雇佣公司签署合同，不会引起雇佣公司在美国有常设机构的问题。参见 2006 版税收协定第 5(6)条。但是从属代理商不能代表雇佣公司签署合同，参见 2006 版税收协定第 5(7)条。因此，如果管理合同的条款对 Fortress 在法律和经济上都非常限制的话，那么 Fortress 就成了日本公司的从属代理商，日本公司的再保险销售收入将因此成为美国的有效关联收入而需要在美国缴税。

##### b. *和其他保险公司合作*

另外一些重要的判定代理商为独立代理商性质的因素是能够说明代理商不是独家代理。也就是说，代理商没有签署非竞争合同来阻止其为其他竞争公司做代理。Fortress 证明了它确实也在为日本保险公司的其他 13 家竞争公司做再保险业务。

## Management Agreements

### ■ 索赔处理 Disposition of Claims

#### ■ 保险购买人的索赔由Fortress处理

Claims by persons who bought insurance are handled by Fortress

#### ■ 这些索赔可能持续若干年未解决

Sometimes these claims may not settle for years.

#### ■ Fortress对于代表日本公司的索赔处理有完全掌控权

Fortress has total control over the disposition of claims on behalf of the Japanese companies

### *c. Disposition of Claims*

As part of Fortress's business it handled the disposition of the insurance claims. This shows a business activity of Fortress, rather than simply acting as a dependent agent conduit of the Japanese companies. This was further evidenced by noting that some claims may take years to settle. Finally, Fortress had total control over the disposition of any of the Japanese companies. It was not controlled by any of these companies in the final outcome of whether or how much was paid on a claim.

### *c. 保险索赔的处理*

Fortress 公司的部分业务是处理保险索赔。这也显示了 Fortress 公司是有自己的业务活动的，而非只是日本公司的从属代理商。另外有一些索赔可能持续很多年后才解决的事实也进一步证明了这一点，最后，Fortress 对处理索赔也有着完全的掌控权，包括需不需要赔偿和赔偿多少。

## 管理合同

# Management Agreements

- Fortress的收入 **Fortress's Income**
  - 管理费用是基于所有客户前一年的保费总额 Management fee based on the all client's last years gross premiums
    - 覆盖所有的运营开支，包括员工薪水 Designed to cover operating expenses including salaries
  - 或有利润是基于公司的盈利情况 Contingent profit based on the profitability of the business written
  - 在个别再保险合同上有一些微小的佣金 Immaterial override commissions on certain reinsurance contracts
  - 经济上独立? Economically independent?

### *d. Fortress's Income*

This is a weak point in Fortress's cases. The management fee paid by each client is based on the gross premiums of all of Fortress's clients, plus a contingent profit based on the reinsurance agreement and settlement of the claims. The Service argued that this was like a foreign parent agreeing to cover its branch's expenses. Fortress noted that they also received override commissions for certain reinsurance contracts. However, the Tax Court noted such amounts were immaterial. In this respect, the overrides did not help much in defending against the Service's position that Fortress was not "economically independent."

### *d. Fortress 的收入*

这在 Fortress 的案例中是一个不利的因素。Fortress 的客户的管理费是基于 Fortress 所有客户的保费总额加上一个基于再保险合同和索赔处理情况的或有利润。美国税务局认为这就相当于一个外国母公司向它的分支支付开支。Fortress 指出他们在个别再保险合同上也收到一些额外的佣金。但税务法庭指出这些佣金额是非常微小的，也就是说，这些额外佣金太过微小，不足以反驳税务局认为 Fortress 在经济上不独立的观点。

## 管理合同

# Management Agreements

### ■ 通讯 **Communication**

- 拥有Fortress 三分之一股权的Kornfield先生每年都和和每一家日本公司开年会

1/3 owner of Fortress, Mr. Kornfield, had an annual meeting separately with each Japanese company.

- 可能会涉及一些无关的项目

Probably irrelevant items mentioned

- 所有其他的通讯都是通过书信或传真

Other communications were by letter or telefax.

- 没有电话通讯

No communications by phone

### *e. Communications*

Some authors question why the Tax Court discussed the degree of communication between Fortress and the Japanese companies. The Tax Court noted that there was an annual meeting with each Japanese Company to discuss the results of the year by one of Fortress's officers. Also, that all other communications were by letter or telefax. No communications were by phone. While it is a bit speculative, the Tax Court may have been trying to point out that the Japanese companies did not have any discussions on the day to day operations of Fortress's business. In this respect, the Japanese companies were not controlling Fortress.

### *e. 通讯*

有一些评论家提出了税务法庭讨论 Fortress 和日本公司之间通讯的程度的目的。税务法庭提出了 Fortress 和每一个日本保险公司每年都有一次年会来讨论当年 Fortress 的管理者的运营情况。所有其他的通讯都是同时通过书信或者电子传真的，没有电话通讯。我们对此的推测是，税务局可能是想借此指出日本公司和 Fortress 之间并没有在每天的运营活动方面有沟通，因此日本公司并没有控制 Fortress 的运营活动。

## 税务法庭的分析

# Tax Court Analysis

- 必须是公司的常规业务

### **Must be acting in the ordinary course of his or her business**

- 1963年经济合作与发展组织示范条约第五章注释

Commentary to Art 5 of OECD 1963 Model Treaty

- 非独立代理商的定义 **Dependent Agent is both**

- 法律上和 Legally and

- 经济上都不独立 Economically dependent

- 示范条约的技术解释 Technical explanation Model Treaty ¶ 79

- 税务局认为“和”应替换为“或者” Service argued “and” = “or”

## 5. Tax Court Analysis

As previously noted, since the independent agent is concluding contracts on behalf of its employer, the sole issue is whether Fortress is a dependent or an independent agent.

### *a. Definition*

Nothing in the legislative history of the 1977 Japanese Treaty or its legislative history defines an “independent agent.” Therefore, the Tax Court looked to the 1963 OECD Model Treaty, which the Japanese Treaty was based on. (OECD = Organization for the Economic Cooperation and Development).

Under the OECD technical notes, a dependent agent must be both “legally and economically” dependent. It should be noted that the Service attempted to argue that the “and” should be interpreted as “or.” Therefore, in the Service’s position was if either test of the two prong test was met, it would result in Fortress being classified as a dependent agent. Naturally, this would make the Japanese companies liable for the U.S. income tax. Fortunately, the Tax Court did not follow the Service’s position, and the word “and” meant that both prongs of the test needed to be met.

## 5. 税务法庭的分析

如前所述，既然独立代理商能够代表雇佣公司签署合同，那么这个案子里最大的问题就是 Fortress 到底是独立代理商还是从属代理商。

### a. 定义

1977 年的美国对日本的税收协定或其他的立法史上对“独立代理商”有过明确的定义，因此，美国税务法庭参考了其原版协定：1963 年经济合作发展组织示范协定。

根据该示范协定，从属代理商必须为法律和经济上都不独立。税务局认为其中的“和”关系应理解为“或”关系，因此税务局认为，只要 Fortress 满足了法律不独立或经济不独立中的其中之一，它就是从属代理商，日本公司相应的就需要支付美国的收入所得税。幸运的是，税务法庭并没有支持美国税务局的立场，它认为要成为从属代理商，仍然需要满足法律和经济上都不独立这两个条件。

## 独立代理商

# Independent Agent

### ■ 法律上独立 **Legally Independent ¶ 80**

- 代理商不受制于细节要求

Agent cannot be subject to detailed instructions

- **Fortress**在做决策时的原则是基本可接受限度

Here, Fortress made all of its own business decisions subject to the “net acceptance” limit

- **Fortress**还大量处理其他公司的保险索赔

Substantial activity of Fortress handling claims other than the Japanese Cos.

### *b. Legally Independent*

The Tax Court noted that the term “legally independent” meant that the agent cannot be subject to detailed instructions. Fortress handling the claims, and exclusively making the final decision regarding the settlement of the claims is an important factor that Fortress is not being controlled by the Japanese companies. Further, the lack of communication between the Japanese companies and Fortress also indicates that Fortress is not subject to the Japanese company’s instructions. Finally, the substantial activity of Fortress handling other claims other than the Japanese companies provides evidence that Fortress is not legally controlled.

### *b. 法律上独立*

美国税务法庭提出了法律上独立意味着代理商不能够隶属于合同上非常明细的行为条款。**Fortress** 处理索赔并且在处理时拥有独立的决策权是一个很重要的证据证明了它并不为日本保险公司在法律上所控。另外，它们之间没有很多的通讯来往也暗示了 **Fortress** 并不需要按照日本公司的指示工作。最后，**Fortress** 大量的处理其他公司的保险索赔的活动也证明了它在法律上不被日本公司控制。

## Independent Agent

- 经济上独立 **Economically Independent**
  - 代理商必须承担公司风险 Agent must bear business risk ¶ 81
    - Fortress在管理费用里覆盖了包括员工薪水的运营支出  
Fortress covered its operating expenses including salaries with its management fee
    - 然而，如果有再保险客户取消合同，Fortress必须要找到新的业务  
However, Fortress had to acquire business if one of reinsurers cancelled a contract (6 mo. Notice).
    - 有一些大客户 Several significant clients (17)
    - 有一些客户流动 Some reasonable turnover of clients
    - Fortress的利润是一个很重要的因素  
Profit of Fortress was a significant factor

### c. *Economically Independent*

In order for an agent to be economically independent and fail the second prong of the dependent agent test, the agent must bear business risk. The management contract regarding Fortress's management fee is a bit troubling in this respect. In essence, the Service was arguing that it was a cost plus type of contract where Fortress did not have any risk. All of Fortress's operating costs of the previous year were divided among its clients based on the respective gross revenue of the reinsurance contracts. Fortress countered with the argument that when Fortress lost a client during the year, the overhead was not covered – unless Fortress found a new client with at least comparable reinsurance gross income. Fortress's history demonstrated that there was some reasonable turnover of Fortress's clients, and therefore, Fortress had some expectation of loss.

Another key element of being economically independent is that the principal doesn't control the agent's profits. Fortress did have strong profits in most years, much more than an employee (i.e. dependent agent) would typically have working directly under a Company's control.

### c. *经济上独立*

要满足在经济上独立要求代理商必须能够承担公司风险损失。Fortress 的管理合同的条款在这方面不是很有利。税务局的理由是 Fortress 的合同是开支补偿类型的而没有任何有风险的合同，它往年的运营成本都是根据各个再保险合同的毛利润分摊到每一个客户。Fortress 反驳说它每丢失一个客户的损失是都是由它自己承担的，除非它能够再找到一个新的再保险利润相当的新客户。Fortress 过去的记录证明了它有一定的合理的客户流动，所以它有一定的预期损失。

另一个经济独立的因素是雇佣公司不能够控制代理商的利润。Fortress 在大部分年间都有很好的利润，远远高于一般一个从属代理商能够从雇佣公司那里获取的利润。



## 独立代理商

# Independent Agent

- 经济上独立 **Economically Independent**
  - 独家代理合同 Exclusive contract ¶ 82
    - “如果代理商能够在不对目前业务造成影响的前提下改动客户或获取新的客户”不足以说明  
Not conclusive by itself “if agent has the capacity to diversify and acquire other clients w/out substantial modification to current business or harm to its business profits.”
    - Fortress没有任何的独家代理合同  
Here, Fortress was under no exclusive agreement.
  - Fortress在法律和经济上都不独立  
Fortress neither legally nor economically dependent

On a side note, the court discussed the exclusive contract issue. As noted in Rev. Rul. 70-424, the Service finds that an exclusive contract is the most important, if not a determinative element, of whether an agent is a dependent agent. The Tax Court did not agree that an “exclusive agency” contract by itself was determinative. It quoted the technical explanation of Section 82 of the OECD treaty. Further, the Tax Court concluded that Fortress did not have an exclusive contract due to the 13 other insurance companies it worked for.

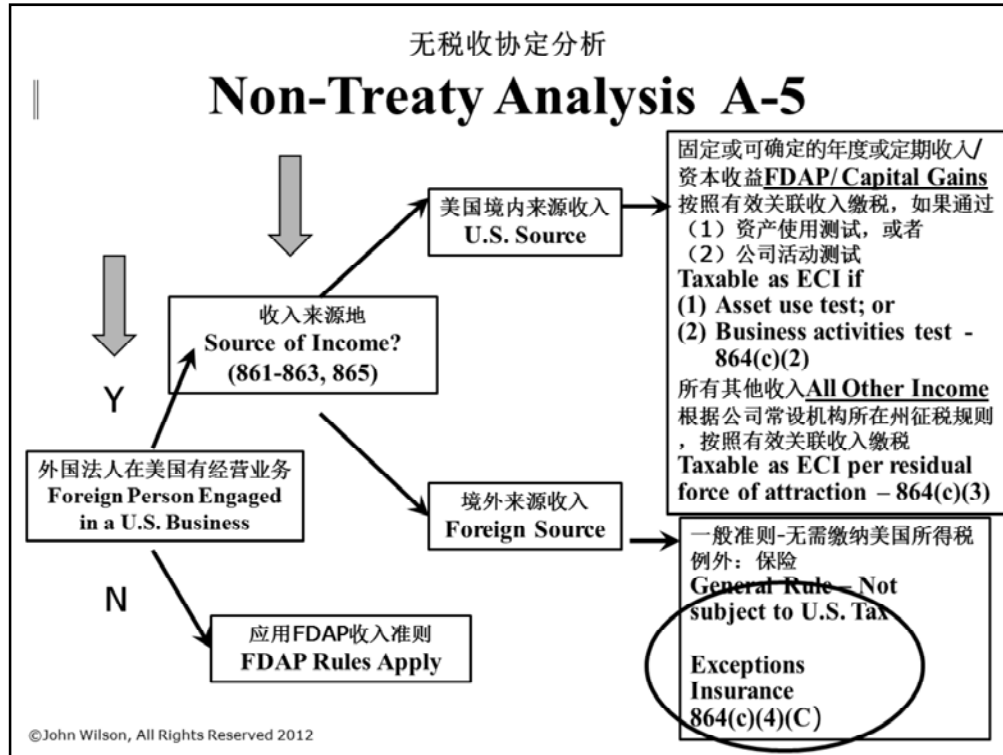
### *d. Conclusion*

Therefore, the Tax Court concluded that Fortress was neither legally or economically dependent on the Japanese insurance companies, and was not an dependent agent.

另外要指出的是，税务法庭讨论了独家代理合同的事项。在税法准则 70-424 中，税务局提出了独家代理合同是最重要但非决定性的判断代理商是非为从属代理商的因素。税务法庭对此不同意，它认为独家代理合同是具有决定性的因素。税务法庭对此引入了经济合作发展组织协定第 82 章的注释，并由此判定 Fortress 没有独家代理合同，因为它同时还与其他 13 家保险公司合作。

### *d. 总结*

税务法庭最后判定 Fortress 在法律和经济上都不从属于日本保险公司，它不是一个从属代理商。



### O. Taisai If Non-Treaty Analysis

Some practitioners have commented that if the same transaction had been with a non-treaty country, as to a couple of the four Japanese companies, the results may well have been different. With the sale of goods, and a couple of other exceptions, there is a three step analysis for a non-treaty country.

### O. 如果没有税收协定，大成案例的分析

有一些业内人士提出了，如果没有税收协定，这个案子可能会有非常不同的结果。根据商品销售和一些例外条例，没有税收协定的分析可以分成三步。

## Non-Treaty Analysis A-5

- 所有的代理商都被考虑在内 All Agency Counts
- 常规性地和持续性地为四家日本公司代理  
IRC 864(b) – Regularly & continuously acting on behalf of the four Japanese companies
- 几乎没有任何安全港 Almost no safe harbors
  - 没有税收协定第5(7)条所提供的不考虑子公司的活动的特惠  
No Article 5(7) that prevents attribution of a subsidiary
  - 没有税收协定第7章所提供的不考虑非关联分支的活动的特惠  
No Article 7 that prevents attribution of an unrelated branch
  - 千代田寿险分支，富士保险子公司  
Chiyoda branch office; Fuji Sub

### 1. All Agency Counts

The first major difference between a treaty and non-treaty country is that all agency counts. For the most part, there are no safe harbor rules similar to the 2006 Model Treaty Art. 5(4), Art. 5(7) and Art. 7. Assuming that Japan was not a treaty country for purposes of this analysis, this would be particularly troublesome for two of the four Japanese insurers.

#### a. *Sales Branch and Sales Office*

Chiyoda had a branch office selling insurance in New York. Fuji had a subsidiary also selling insurance in the U.S. This should create a U.S. trade or business for both of these companies.

### 1. 所有的代理商都计入考虑

非税收协定国相较于税收协定国分析的第一个重要的不同点是所有的代理商都需要列入考虑范围。对于大部分的交易，也没有了类似于 2006 年税收示范协定中第 5(4),5(7)和第 7 章提供的的安全港优惠政策。如果日本和美国之间没有税收协定，那么对于这四家日本保险公司中的其中两家，结果会变得非常不利。

#### a. *销售分支和销售办公室*

千代田寿险在纽约有一个分支办公室销售保险。富士在美国也有子公司销售保险。它们都会使得这两个公司被认定在美国有开展公司业务。

搜集信息和提供客服的美国办公室

## U.S. Office to Collect Marketing Information and Assist Clients

- 每个日本公司在美国都有办公室

Each Japanese company has a U.S. office in the U.S. that

- 提供美国市场的信息

Provides information on the U.S. market, and

- 提供美国客服

Assists its U.S. clients

- 没有被授权创建任何形式的保险

No authority to write any form of insurance.



### *b. Office to Gather Marketing Information and Assist Clients*

In a non-treaty country, whether an office to gather marketing information results in a U.S. trade or business is unclear. However, the Japanese companies also assisted clients from this office, that may further the argument that they were carrying on a U.S. trade or business.

### *b. 用于搜集市场信息和提供客户服务的办公室*

在没有税收协定的国家，用于搜集市场信息的办公室是否会引起拥有美国公司业务的判定不是非常的明确，然后，由于这些日本公司在美国的办公室还是用来提供对客户的服务，这为进一步争辩它们在美国开展公司业务提供了证据。

## Non-Treaty Analysis

- 保险意外收入 – 收入来源由受保的资产所在地决定

Insurance casualty income – sourced by location of property insured – IRC § 861(a)(7)

- 日本 Japan
- 然后，税法法典864(4)(C)有再划分收入来源规则

However, resourcing rule under IRC § 864(4)(C)

- 保险收入来源再划分规则没有非独立代理商在法典864(c)(5)下的例外条例

Insurance resourcing rule does not have the dependent agent exception of IRC § 864(c)(5).

### 2. Foreign Source Income

At first blush, it appears that the insurance income is foreign income, because the property insured is located in Japan. However, there is a different resourcing rule for insurance under IRC § 864(c)(4)(C). This turns it into U.S. source income.

### 3. Resourcing Rule

Unrelated to the facts of *Taisai*, the dependent agent not being able to conclude contracts exception to creating a fixed place of business is only for the sale of goods. IRC § 864(c)(5)(A). In *Taisei* this factor would not have mattered because Fortress concluded contracts for its principals.

### 2. 外国来源收入

初看之下，由于受报财产属于日本，保险收入属于外国来源收入，然而，美国税法法典第 864(c)(4)(C)有一个重新划分收入来源地的准则将外国来源收入列为美国来源收入。

### 3. 重新划分收入来源准则

另外值得注意的是，独立签署合同的从属代理商将引起常设机构问题的例外条例只适用于商品销售的情况。参见美国税法法典第 865(c)(5)(A)。但在大成案例中，这个条例不会因为 Fortress 代表日本保险公司签署合同而产生影响。

总结

## Summary

1. 销售商品, 服务, 还是知识产权 Goods, Services, Intellectual Property?
  - a. 直接出口交易(例如: 卖给沃尔玛)  
Direct export transaction (e.g. sold to Wal\*Mart)
  - b. 独立代理商 Independent Agent
    - i. 利用自己的账户销售 (进口商; 分销商)  
Sells on own account (importer; distributor)
    - ii. 佣金代理商 Commission agent
    - iii. 成本加上合同类型 Cost plus type of contract
  - c. 非独立代理商 Dependent agent

### P. Summary of Key Factors – Sale of Goods

#### 1. Who were the goods sold to or by whom?

##### a. *Direct Export Transaction*

In a direct export transaction, a foreign person does not have either a fixed place of business or a permanent establishment by virtue of this type of sales transaction.

##### b. *Independent Agent*

If the independent agent buys goods on its own account as an importer or distributor, it is analogous to the direct export transaction. Absent abnormal facts, the independent agent's office is not attributed to the foreign person. If the independent agent is acting like a manufacturer's agent, with multiple lines, and receiving a commission, the independent agent will probably not be classified as a dependent agent. However, the amount of control the foreign person exercises over the independent agent as well whether there is any exclusive agreement needs to be analyzed. Finally, if the independent agent is on a cost plus type of contract, then it may be questionable whether such independent agent is actually independent.

##### c. *Dependent Agent*

A dependent agent includes both employees and any independent agent that is reclassified as a dependent agent due to the legal or economic dependence of the agent.

## I. 商品销售时的关键点

### 1. 商品销售的买卖双方

#### a. *直接出口*

在直接出口的交易中，外国法人在美国没有设立固定营业场所（常设机构）。

#### b. *独立代理商*

c. 如果独立代理商作为进口商或分销商用自己的账户买进商品，这就相当于是直接出口。在没有其他不利的事实因素下，独立代理商的办公室不被认为是外国雇佣公司的。如果独立代理商类似于一个工厂代理商，有几个代理项目，并且接受佣金，那么独立代理商也不会被认为是从属代理商。然而，外国法人对于独立代理商的控制程度，以及是否有独家代理合同这两点是需要考虑的。如果独立代理商的费用是由雇佣公司补偿的，那么该代理商本质上是否独立也是有争议的。

#### d. *从属代理商*

从属代理商包括员工和其他由于法律或经济不独立而被重新归类为从属性质的独立代理商。

## 总结

# Summary

2. 如果是代理商，他们可以独立签署合同吗？  
If agent, can they conclude contracts?
3. 如果没有税收协定：If non-treaty:
  - a. 所有权转移点在哪里？ Where did title pass?
  - b. 商品存储地是在美国吗？ Are goods being stored in U.S.
4. 外国合伙企业在美国有其他的活动吗？  
Does FP have any other activities in the U.S.?

### 2. Can the Agent Conclude Contracts

If a dependent agent can conclude contracts in either a treaty or non-treaty country, it is fatal.

### 3. If a Non-Treaty:

In a non-treaty country, title must pass abroad. Further, no goods may be stored in the U.S.

### 4. Any Other U.S. Activities

In a treaty country, branch operations of a different type of business do not taint a direct export transaction. Conversely, in a non-treaty country, if the foreign person has a U.S. electronic branch selling goods and direct export of wine, the electronics branch will taint the wine sales. Treas. Reg. § 1.864-4(b).

### 2. 代理商能签署合同吗？

无论是有税收协定还是没有税收协定的情况，如果从属代理商能够独立签署合同的话，那么都会直接导致外国公司需要缴纳美国所得税。

### 3. 没有税收协定

在没有税收协定的国家，商品的所有权必须要在外国转移才能避免美国税收，并且，公司在美国不能够存储货品。

### 4. 其他的在美国的活动

对于有税收协定的国家的公司，它在美国的分支如果是做不同的业务的，那么分支的活动不会影响该外国公司直接出口交易的免税状态。不同的是，对于没有税收协定的国家的公司，即使其美国分支在美国销售的产品和它采用直接出口方式出口的商品不同，该美国分支的经营活动仍然会改变那些直接出口的商品的免税状态。