

IX. 外国法人的非营业收入

IX. Non-business Income of a Foreign Person



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- 《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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- Asset Protection Strategies Volume II, American Bar Association published Apr. 2005 (MM responsible for 1/5 of the text).

Disclaimer

The law is constantly changing at an unprecedented pace. Also, each client's separate fact situation must be carefully examined before applying any principals of law. Furthermore, this outline is not intended to be a substitute for the practitioner's own research into this area of law and how the law applies to a client's specific situation. Therefore, the author takes no responsibility how the areas of law covered by this outline apply to the reader or the reader's clients. Finally, to ensure compliance with requirements imposed by the IRS Circular 230, we hereby inform you that any U. S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any matter addressed herein.

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Please note that we do not accept international taxation of foreign retirement plan type of work. Should you have individual foreign retirement plan type of work, the following person was recommended to us:

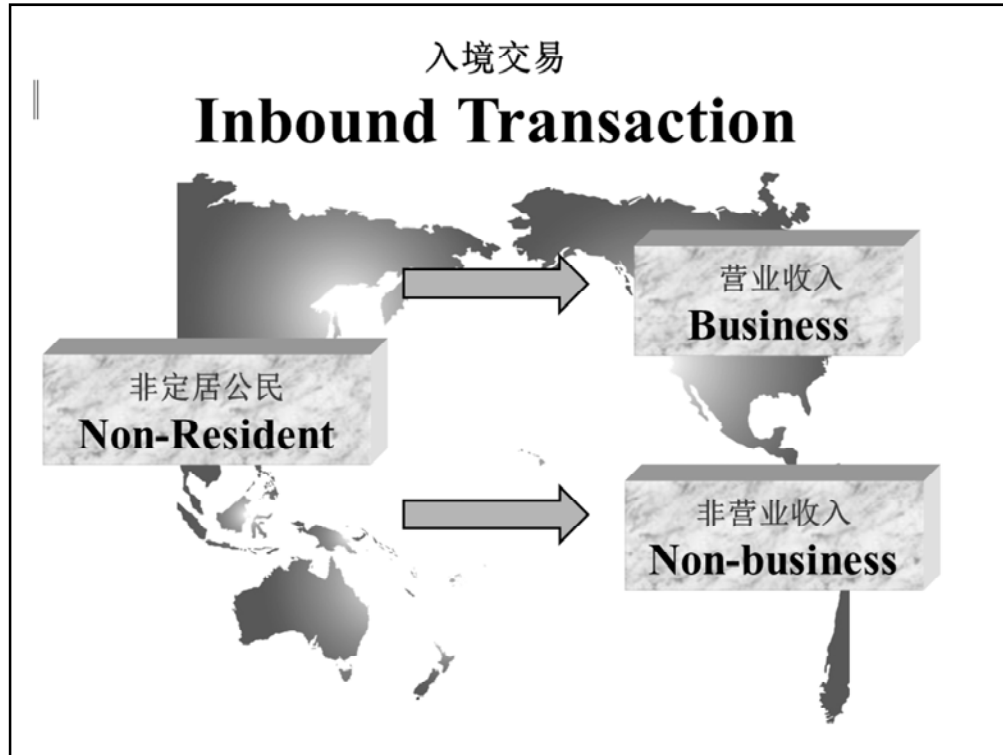
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Table of Contents

- A. Inbound Transaction
 - 1. Effectively Connected Income
 - 2. Fixed, Determinable, Annual, or Periodic (“FDAP”)
 - 3. Foreign Person
 - 4. Three Possible Tax Results
- B. Sourcing of Income
 - 1. FDAP Income Subject to Treaty Reduction
 - a. Interest
 - b. Dividends
 - c. Royalties
 - 2. FDAP Subject to Treaty Exclusion – Personal Services
 - 3. FDAP Income No Treaty Benefit
 - a. Rental Income
 - b. Insurance Products
- C. FDAP Taxation
 - 1. U.S. Source – 30% Tax Rate
 - 2. Foreign Source FDAP
- D. Summary Chart of Investment Income
- E. Interest Income
 - 1. Portfolio Interest
 - a. Registered
 - b. Private Note
 - c. Three Exceptions
 - 2. Bank Deposit Income
 - 3. 80/20 Grandfathered Rule
 - 4. Treaty Reduction
 - 5. Interest Treaty Withholding Chart
- F. Dividends
 - 1. General Reduction Rate for < 10% Shareholder
 - 2. Direct Reduction Rate for 10% or Greater Shareholder
 - 3. 80/20 Grandfathered Rule
 - 4. Dividend Treaty Withholding Chart
- G. Capital Gains
 - 1. Not Subject to FDAP
 - 2. Gains Are Foreign Source Income
 - 3. Non-Resident by Treaty
- H. Rents
 - 1. Devastating Effect of Rental Real Estate
 - 2. Passive to Trade or Business Income Chart
- I. Royalties
 - 1. Non-Treaty
 - 2. Treaty
 - 3. Classification of Software
 - 4. Methods to Create a Royalty

目录

- A. 入境交易
 - 1. 有效关联收入
 - 2. 固定的、可确定的、年度的或固定周期的收入(“FDAP”)
 - 3. 外国法人
 - 4. 3种可能的税收结果
- B. 收入来源
 - 1. 被税收协定降低税率的 FDAP 收入类型
 - a. 利息
 - b. 股息/股东红利
 - c. 无形资产使用收入
 - 2. 被税收协定列为免税的 FDAP 收入类型 – 个人服务
 - 3. 没有税收协定优惠条例的 FDAP 收入类型
 - a. 租金收入
 - b. 保险产品
- C. FDAP 税收制度
 - 1. 美国来源– 30% 税率
 - 2. 外国来源 FDAP
- D. 投资收入的总结图
- E. 利息收入
 - 1. 证券投资利息
 - a. 注册形式
 - b. 私人票据
 - c. 3个例外条例
 - 2. 银行存款收入
 - 3. 80/20 祖父条例
 - 4. 税收协定下降低的税率
 - 5. 税收协定下利息的预提税率图
- F. 股息/股东红利
 - 1. 一般降低的税率-适用于小于 10%权益的股东
 - 2. 直接降低的税率-适用于等于或大于 10%权益的股东
 - 3. 80/20 祖父条例
 - 4. 税收协定下股息的预提税率图
- G. 资本收益
 - 1. 不属于 FDAP
 - 2. 收益属于外国来源收入
 - 3. 税收协定保护下的非定居美国的外国公民
- H. 租金收入
 - 1. 房地产租金收入的毁灭性税收结果
 - 2. 从投资收入到营业收入分类图
- I. 无形资产使用收入
 - 1. 没有税收协定的情况

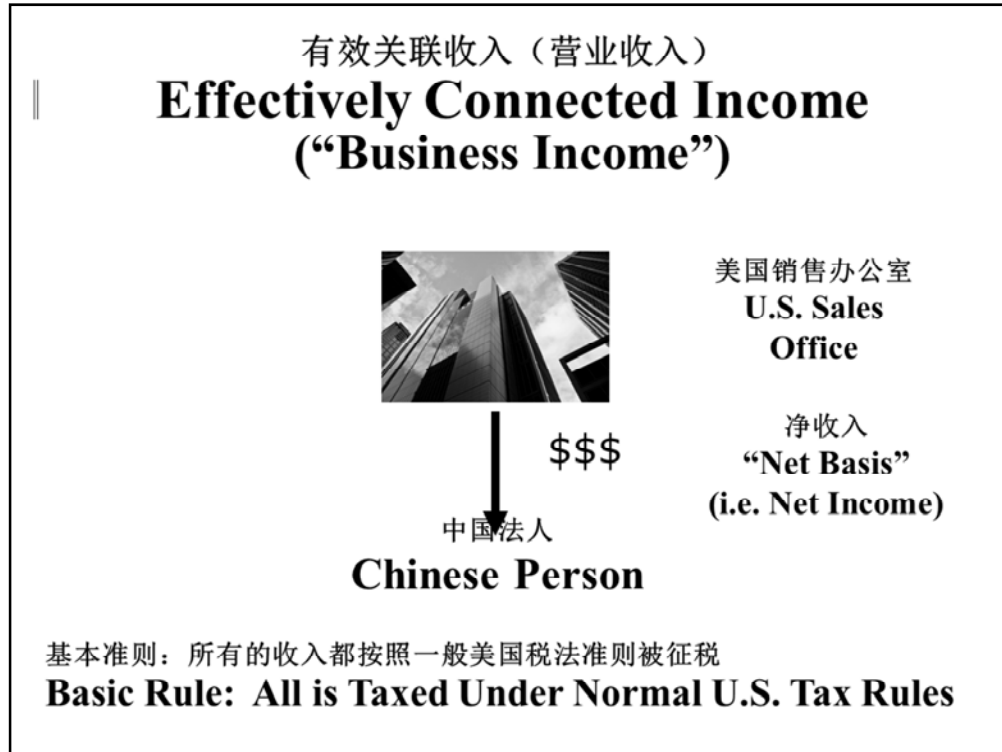


A. Overview

A non-resident alien may invest in the U.S. or operate a business in the U.S. Investment income is more precisely defined as “fixed, determinable, annual, or periodic income (“FDAP Income”). Business income is more precisely defined as effectively connected income (“ECI”).

A. 概览

非定居美国的外国公民可以在美国投资或者经商。投资收入在税法上被更为精确地定义为“固定的、可确定的、年度或定期的收入”（FDAP 收入）。营业收入则被定义为“有效关联收入”（ECI 收入）。



1. Effectively Connected Income to a U.S. Business

If a foreign person transacts a U.S. business as a branch or through a U.S. flow through entity, the foreign person is taxed on U.S. net income using the normal U.S. tax rules. Sometimes this is referred to as a “net basis” for taxation. A “branch” means that the foreign person did not create a U.S. corporation to do U.S. business. The taxation of a branch when compared to a U.S. corporation will be discussed in a later outline.

It should be noted that renting land, residential, and possibly commercial real estate is not considered a trade or business unless an IRC 871(d) election is made. Generally, this is particularly troublesome, because rental real estate will be subject to the 30% withholding tax on gross rents (i.e., before any deduction for expenses) under the investment income (i.e., FDAP) rules of taxation.

1. 美国业务的有效关联收入

如果外国法人通过在美国的公司分支或者美国的过渡实体来进行美国的贸易经营，那么外国法人在美国的计税基础是净收入，收税制度为一般的美国税收制度，这在税法上有时被称为是“净基础”。分支意味着外国法人没有设立一个美国公司来经营业务。美国公司和分支的税收制度将在之后的章节讨论。

需要指出的是，土地出租、住宅楼和一些商业地产在美国税法上不属于贸易经营活动，除非纳税人做了税法条例第 871(d)的选择。一般来说，这会引来一些小麻烦，因为房地产的出租收入需要在总收入（无任何支出抵扣）的基础上预提 30%的所得税，这是根据投资收入（FDAP 收入）的税收制度要求来预提的。

FDAP收入-非营业收入

FDAP - Non-Business Income

- 固定的、可确定的、年度或阶段性的=不完全正确的定义

Fixed, determinable, annual or periodic = Misnomer

- 投资收入 **Investment Income** +

- 不包括投资收益

Does not include capital gains p. 22

- 财政法规 **Treas. Reg. 1.1441-2(a)(3)**

- 任何的非营业收入 **Any non-business income**

- 工资 **Wages**

- 租金收入和无形资产使用收入 **Rents & Royalties**

2. Fixed, Determinable, Annual, or Periodic Income – “FDAP Income”

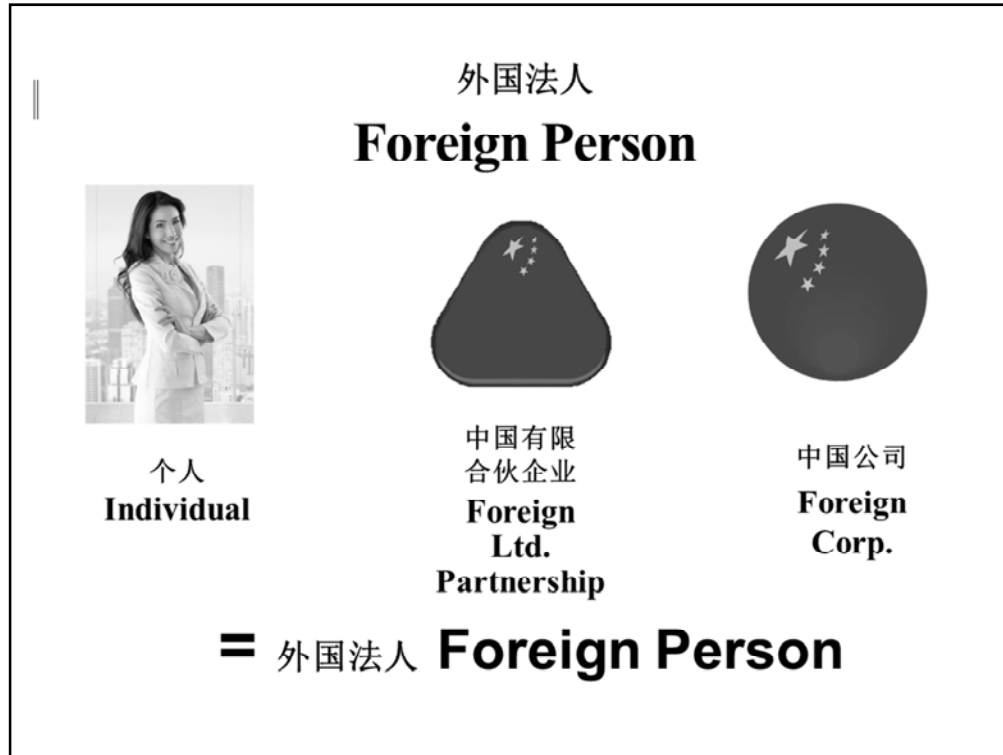
The term “fixed determinable, annual or periodic income” is for the most part a misnomer. While interest income may be periodic, dividends generally are not. Further, dividends are not fixed or determinable. The same is true for rents and royalties. For this reason the name “FDAP” is not helpful in defining the type of income taxed under IRC § 871 and § 881. Instead, a better definition is that FDAP has the following two components and one exclusion from its definition.

- (1) Investment income, excluding capital gains; plus
- (2) Any non-business income, which would include
 - (a) Wages;
 - (b) Rents & Royalties.

2. 固定的、可确定的、年度的或固定阶段性的收入-FDAP 收入

短语“固定的、可确定的、年度的或固定阶段性的收入”是一个不完全正确的定义。尽管利息收入可能是阶段性的，但股东红利一般来说不是的。另外，红利也不是固定或可确定性的。同样的，租金和无形资产使用费也不是的。因此，“FDAP”这个名字在定义税法条例 871 和 881 下的收入类型方面不是很有帮助。更好的对 FDAP 的定义是以下两点加上一个例外条例：

- (1).投资收入，但不包括资本收益，加上
- (2).任何非营业类型收入，包括
 - (a).工资
 - (b).租金和无形资产使用收入

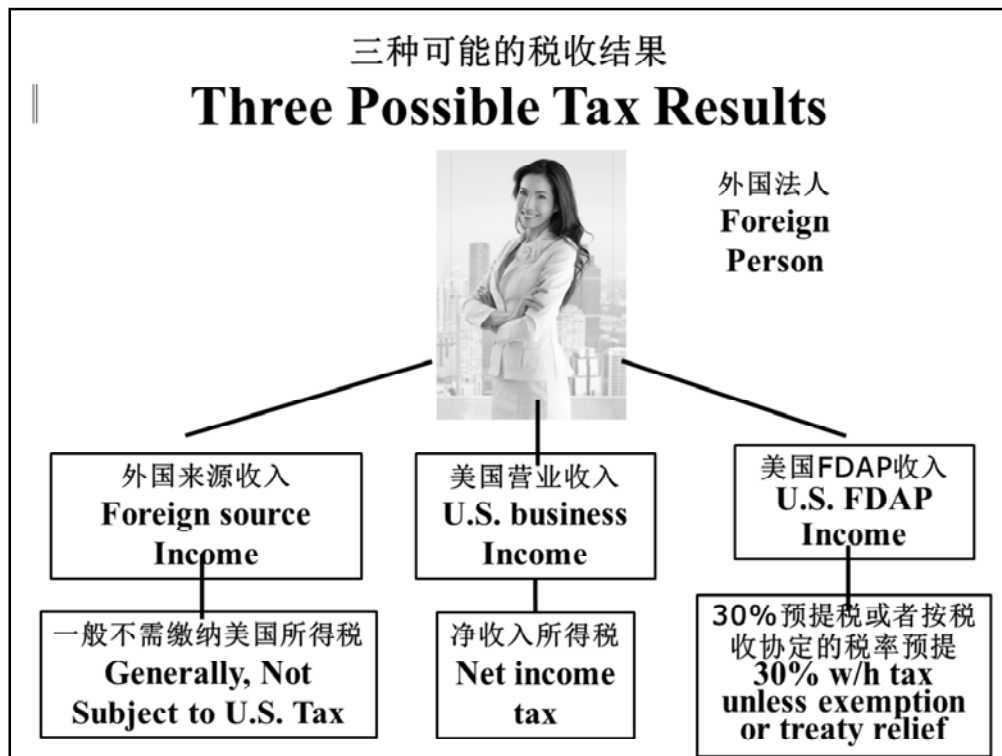


3. Foreign Person - Definition

The term Foreign Person includes an individual, foreign limited partnership or foreign corporation. For purposes of this outline, foreign entities are denoted in red and U.S. entities are denoted in blue.

3. 外国法人-定义

外国法人包括个人、外国有限合伙企业、外国公司。在本章范围内，外国实体用红色图形表示，美国实体用蓝色图形表示。



4. Three Possible Tax Results

To make the analysis easier to visualize in this outline, we will assume that a Chinese individual is investing in the U.S., rather than a Chinese partnership or Chinese corporation. Please note that the analysis is the same if a Chinese partnership or a Chinese corporation were investing in the U.S.

The above chart divides a Chinese person's income into the following three categories:

- (1) Foreign source income.
- (2) U.S. Income effectively connected with a trade or business; and
- (3) U.S. source – FDAP income;

Foreign source FDAP and foreign business income is very seldom subject to U.S. taxation. Income effectively connected with a U.S. business is taxed to the foreign person on a net basis. U.S. source FDAP is taxed at a 30% rate and subject to the 30% withholding. IRC §§ 871, 881, and 1441.

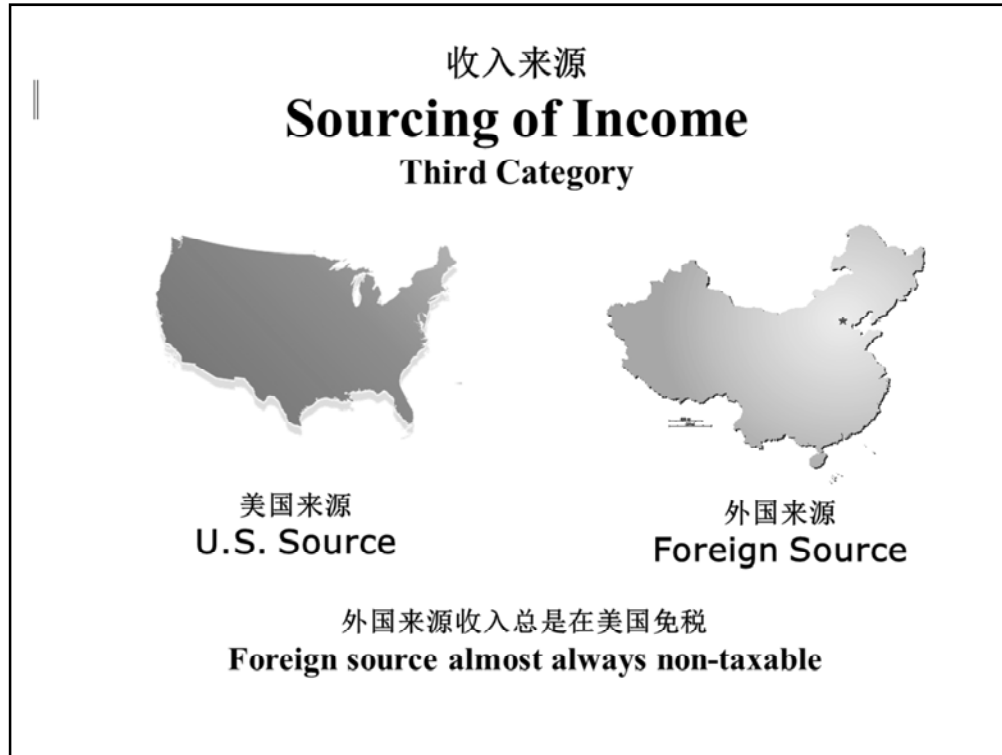
4. 三种可能的税收结果

为了使分析过程更形象，我们使用一个中国人（不是中国合伙企业或中国公司）在美国投资为例。注意这个分析是和在中国合伙企业或中国公司在美国投资的分析是一样的。

上面的图表将一个中国法人的收入分成了三种类型：

- (1) 外国来源收入
- (2) 美国经营贸易的有效关联收入
- (3) 美国来源的 FDAP 收入

外国来源的 FDAP 收入和外国来源的营业收入很少在美国被征税。外国法人在美国经营贸易的有效关联收入的计税基础是净收入。美国来源的 FDAP 收入的税率是 30%，并且需要按照 30% 预提税。参见美国税法条例 871，881 和 1441。



B. Sourcing of Income

Income is sourced as either U.S. source income or foreign source income. Income will be sourced as to effectively connected income as well as FDAP income. As related to FDAP, if it is foreign source FDAP it is seldom subject to U.S. taxation. On a different note, assets are sourced foreign and U.S. for estate tax purposes of a non-resident alien. Unfortunately, the income tax and estate tax rules are not always the same.

B. 收入来源

收入的来源分成美国来源和外国来源。划分收入来源时，分成有效关联收入和 FDAP 收入两类来分别划分。对于 FDAP 收入，如果是外国来源，那么很少在美国被征税。另外美国的遗产税是按照非定居美国的外国公民的资产的归属地为美国还是外国来决定的，但收入所得税和遗产税的税收制度不总是一样的。



Most the FDAP sourcing rules are in IRC § 861. Further, the 30% FDAP tax on certain types of FDAP income such as interest, dividends, and royalties are almost always reduced by an income tax treaty.

1. FDAP Subject to Treaty Reduction

a. Interest

Interest paid by the U.S. federal or state governments, a U.S. resident, or a U.S. entity is U.S. source income. IRC § 861(a)(1). This is the IRC rule, a treaty may reduce the U.S. tax on interest income paid to a foreign person or it may in essence change the sourcing rule. Modern treaties do this by providing that the interest paid to the foreign person may only be taxed by the nation where the foreign person is a resident.

b. Dividends

Dividends paid by a corporation formed in the U.S. IRC § 861(a)(2).

c. Royalties

Royalties are sourced where the property is used under § 861(a)(4). However, modern income tax treaties have the effect of changing the sourcing of income to foreign source. Modern treaties do this by providing that the royalties paid to the foreign person may only be taxed by the nation where the foreign person is a resident.

大部分的 FDAP 收入来源划分条例是在税法条例第 861 章，并且对于部分需要缴纳 30% 所得税的 FDAP 收入类型，如利息、股息和无形资产使用收入，总是有税收协定提供更高的税率。

1. 由税收协定降低税率的 FDAP 收入类型

a. 利息

一个美国居民或美国实体收到的美国联邦政府或州政府支付的利息属于美国来源收入。参见美国税法条例 861(a)(1)。这是美国税法典条例，税收协定可能会降低外国公民收到的利息所得税或者在根本上改变收入来源地。现代税收协定规定了外国法人收到的利息只能由该法人的税法居住国来征税。

b. 股息

在美国成立的公司支付的股息。参见美国税法条例 861(a)(2)。

c. 特权使用费收入

按照美国税法条例 861(a)(4)，特权使用费收入的来源是财产所在地，但现代税收协定可以将收入来源改为外国来源。现代税收协定规定了外国纳税人收到的特权使用费只能由该纳税人的税法居住国来征税。

被税收协定排除在可征税收入之外的FDAP收入

FDAP Subject to Treaty Exclusion

- 个人服务收入 **Personal Services**
 - 服务所在地为美国 **Working in the U.S.**
 - 没有税收协定时 **Non-Treaty**
 - **> \$3,000 and less than 90 days**
 - 有税收协定时 **Treaty**
 - 收入由外国雇主支付
Paid by foreign employer (“FE”)
 - 外国雇主没有美国常设机构
FE does not have a U.S. permanent establishment
 - 在美国的时间不超过183天
<= 183 days in U.S.

2. FDAP Subject to Exclusion by Treaty

Personal services performed by a non-resident alien are classified as FDAP income.

a. *Non-Treaty*

IRC § 861(a)(3) states that the source is U.S. However, there is an exception if the nonresident alien is in the U.S. for less than 90 days, the amount paid is less than \$3,000, and the services are performed as an employee of a foreign entity. .

b. *Treaty*

A treaty generally changes this rule so that the foreign person is not taxed on any income in the U.S. for long as they are not in the U.S. for more than 183 days.

2. 被税收协定排除在可征税收入之外的 FDAP 收入类型

非定居美国的外国公民通过个人服务获得的收入属于 FDAP 收入。

a. 无税收协定

美国税法条例第 861(a)(3)条将个人服务收入的来源归为美国，但是有一个例外条例规定，如果该非定居美国的外国公民在美国的时间少于 90 天，所得少于 3000 美元，并且是作为外国公司的员工来提供服务，那么收入来源将不属于美国。

b. 有税收协定

税收协定改变了这条条例，使得外国法人在美国居住的时间不超过 183 天时，他们的个人服务所得免于美国所得税。

没有税收协定优惠政策的FDAP收入

FDAP Income **No** Treaty Benefit

- 租金收入 **Rental Income**
 - 美国不动产或有形资产
U.S. real property or tangible property used in the U.S.
- 保险产品(承销收入)
Insurance products (underwriting income)
 - 人寿保险;年金
Life insurance; annuities
 - 外国法人-外国来源收入
foreign person – foreign source
 - 美国公民或定居美国的外国公民--美国来源收入
U.S. citizen or resident-U.S. source
 - 也包括意外保险
Also includes casualty insurance

3. FDAP Income – No Treaty Benefit

a. Rental Income

Rental income is discussed in the same part of the IRC as royalty income under the heading Rental and Royalty income. IRC § 861(a)(4). However, royalty income has treaty rules that reduce U.S. income taxation, and rental income does not. Rental income on real and tangible property in the U.S. is always sourced U.S. There is no special treaty rule for this type of income.

b. Insurance Products

Insurance products are sourced based on the recipient of the annuity or insurance. If the recipient is a U.S. person (i.e. citizen or U.S. resident) then the income is U.S. source. If the recipient of an insurance product is a foreign person, then the income is foreign source.

3. FDAP 收入-无税收协定条例

a. 租金收入

租金收入税收条例和无形资产使用收入税收条例在税法法典中是在同一个章节里的，章节标题为租金和无形资产使用收入。参见税法法典 861(a)(4)。但是无形资产使用收入在税收协定里有相关的条例降低了对它的税率，而租金收入则没有。美国的不动产和有形财产的租金收入总是属于美国来源收入，对该类型的收入没有特别的税收协定条例。

b. 保险产品

保险产品是根据年费或保险费的接收人来划分来源的。如果接收人为美国法人（美国公民或税法上的美国居民），那么收入就属于美国来源。如果接收人认识外国法人，那么收入就属于外国来源。

美国FDAP U.S. FDAP

- 美国来源的FDAP收入有30%预提税

U.S. Source FDAP subject to 30% (withholding) tax § 871 & § 881

- 预提税率等于应付税率

The withholding is the tax § 1441

- 提交年税表时没有额外的税赋

No obligation to file tax return.

- **Reg. 1.6012-1(b)(2)(i), -2(g)(2)(i)**

- 外国来源的FDAP收入几乎都免于美国所得税

Foreign source FDAP seldom subject to U.S. Taxation

C. FDAP Taxation

1. U.S. Source 30% Tax Rate

Section 871 for individuals, partnerships, and trusts and § 881 for corporations impose a 30% tax on FDAP income. The assumption is that the U.S. government may not be able to collect the tax from a foreign person. Therefore, a withholding obligation is imposed on the payor of the FDAP income. IRC § 1441. The withholding is the same 30% as the tax rate under IRC § 871 and § 881. Since the withholding and the tax rate are the same, for so long as the tax is withheld, the foreign person has no obligation to file a tax return. Treas. Reg. §1.6012-1(b)(2)(i), 2(g)(2)(i).

2. Foreign Source FDAP Income

The general rule, and almost absolute rule, is that foreign source FDAP income is not subject to U.S. taxation for a non-resident alien. One exception is if the foreign source FDAP income is reclassified as income effectively connected with a U.S. trade or business. This would happen if a foreign person owned a U.S. business, and the U.S. business invested in foreign securities as part of its working capital.

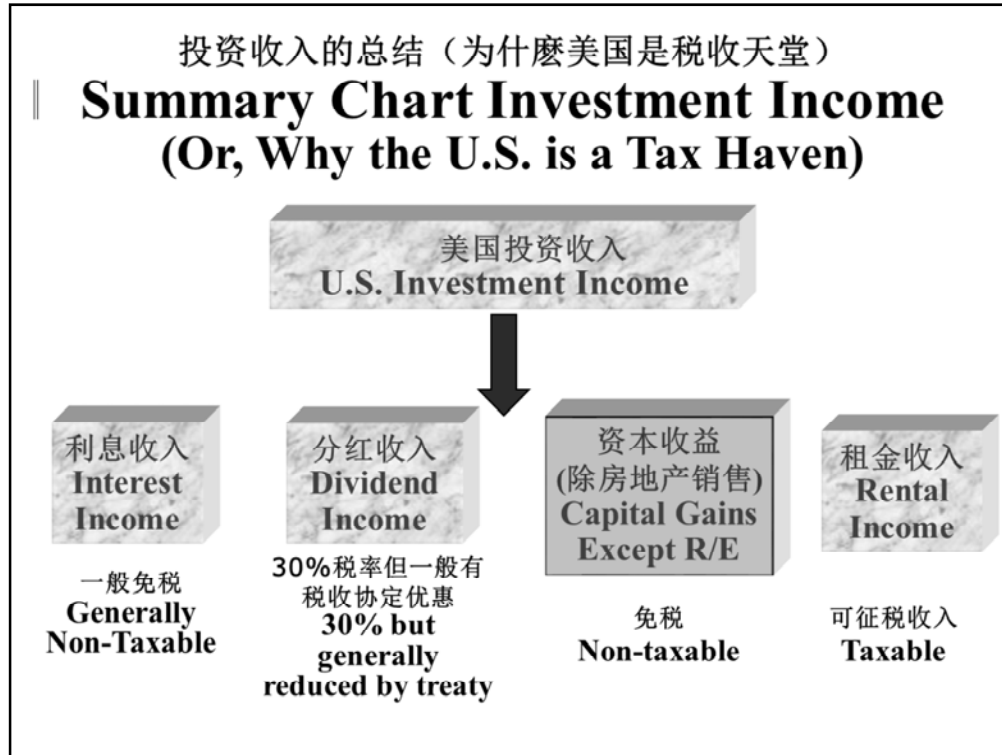
C. FDAP 收入的税收制度

1. 美国来源 FDAP 收入-30%税率

税法法典第 871 章节针对个人、合伙企业和信托的 FDAP 收入，第 881 章节针对公司的 FDAP 收入征税 30% 的所得税。由于美国政府不便向外国法人征收税款，因此税法规定由 FDAP 收入的支付人向美国政府预提相应的所得税。参见税法法典第 1441 章。预提税率同样是法典第 871 和 881 章下规定的 30%。由于预提税率和纳税人应付的所得税税率是一样的，只要支付人正确地预提了 FDAP 收入所得税，外国法人将不需要在年底提交年度税表。参见财政法规 §1.6012-1(b)(2)(i), 2(g)(2)(i)。

2. 外国来源 FDAP 收入

一般制度是，一个税法上的非定居美国的外国公民的外国来源 FDAP 收入在美国是免税的，但有一个例外是当 FDAP 收入被美国税法重新归类为和美国的贸易经营有关的有效关联收入时，它将不再免税。这种结果可能发生在外国法人在美国有贸易经营活动并且投资了外国证券作为部分运营资金。



D. Summary Chart of Investment Income

Many times the U.S. complains of other nations being tax havens. Conversely, many foreign nations point to the U.S.'s favorable taxation for interest income, capital gains, and many times dividends under a treaty, and make similar statements regarding the U.S.

1. Interest Income

Usually, interest income will be excluded from U.S. taxation under either the portfolio interest or bank deposit interest exclusion. Further, even if interest income is not excluded, Almost always a treaty will provide a lower tax rate than the 30% FDAP rate.

2. Dividend Income

U.S. dividend income is subject to the normal 30% withholding tax, unless a lower rate of taxation is available pursuant to a tax treaty. IRC 1441(a). Tax treaties typically reduce dividends from 5% to 15%.

3. Capital Gains

Except for real estate, a foreign person does not pay any tax on a capital gain transaction.

4. Rental Income

Gross rents received on real estate (unless it is a hotel or motel) does not qualify as a U.S. business. Therefore, unless an IRC 871(d) election is made, gross rents are subject to a 30% withholding tax.

D. 投资类收入的总结图

美国人常常抱怨其他国家相比于美国是税收天堂。但很多其他国家又会反过来指出美国在利息收入、投资收益和很多股东红利收入方面有着更为优惠的税收协定。

1. 利息收入

通常，投资利息或者银行存款的利息不属于美国可征税收入，即使属于可征税收入，通常也总会有一些税收协定条例提供比 30%FDAP 所得税率更低的税率。

2. 股东红利

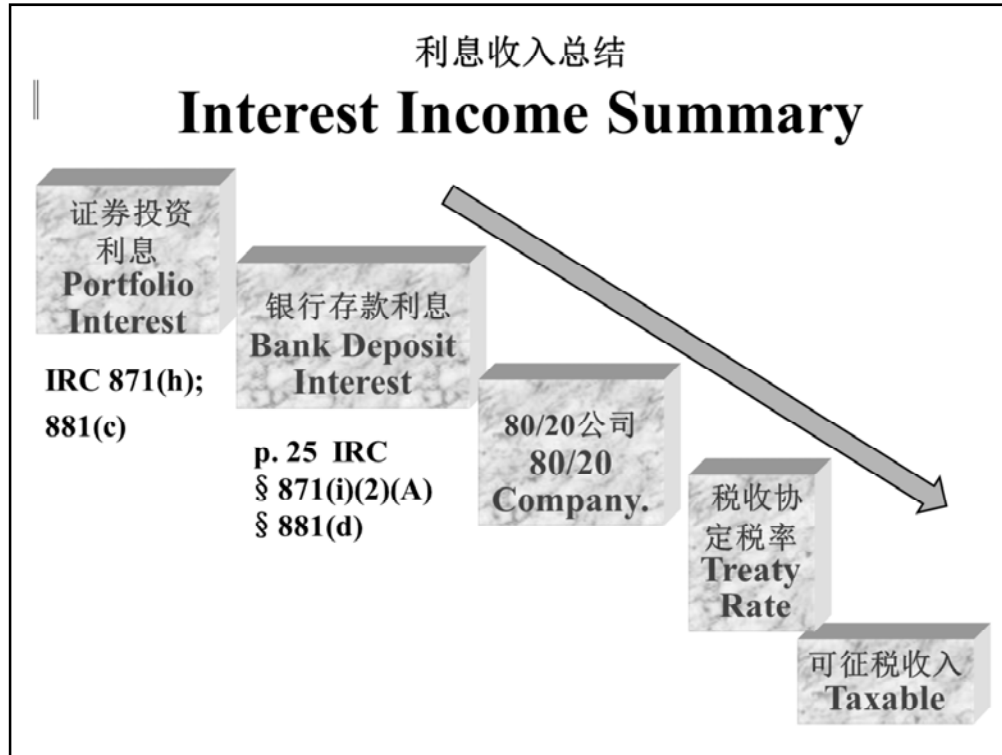
美国税法条例 1441(a)规定对美国公司的股息收入预提 30%的所得税，除非有相应的税收协定提供更低的税率。一般税收协定将该税率降低为 5%至 15%。

3. 投资收益

除房地产之外，外国法人的投资收益在美国免税。

4. 租金收入

房地产的总租金收入（除了酒店旅馆）在美国税法上不属于营业收入，因此对总的租金收入需要预提 30%FDAP 所得税，除非纳税人做了税法条例 871(d)的税法选择。



E. Interest Income

Portfolio interest is commonly derived from governmental bonds (e.g. treasury bills) as well as corporate bonds. Almost all U.S. interest that is paid to a foreign person will be exempt from taxation under either the portfolio interest exemption or the bank deposit interest exemption. Some companies whose business is 80% foreign have a grandfather rule for exclusion of some interest. Finally, any interest that does not qualify for these exemptions is generally reduced by a tax treaty.

1. Portfolio Interest

U.S. debt obligations that are issued in a prescribed “registered form,” are tax exempt for foreign persons. IRC 871(h). Since foreign investors are such a large portion of the investment market, most U.S. issuers comply with these relatively simple treasury regulations. Correspondingly, most investment grade debt instruments are tax exempt to foreign persons. It should be noted that even a private note may be made to qualify for the portfolio interest exclusion.

E. 利息收入

投资利息的收入一般来自于政府公债和公司公债。基本上所有的支付给外国法人的利息在美国都是免税的，依据是投资利息免税制度或者银行存款免税制度。对一些 80%以上业务在国外的公司则有一个祖父条款可以将利息免税。其他的不满足这些免税制度的利息收入则通常能够通过税收协定来支付较低的所得税。

1. 投资利息

以规定的注册形式发行的美国的公债支付给外国法人的利息是免税的。参见美国税法条例 871(h)。由于外国投资者在美国投资市场是占了非常大的比例，大部分的美国债券发行人都使用该税收条例。因此，大部分的投资级债券对于外国人来说都是免税的。同时，私人票据也可能满足该投资利息免税制度。

证券投资利息

Portfolio Interest Income



1. 债务被登记，只能由借债公司转移给发行人
Obligation is registered and may be transferred only by surrender to issuer
2. 本金和利息的所得权只能通过记账系统转移
Right of principal and interest may only be transferred by book entry
3. 同时满足以上1和2 **Both 1. and 2. above**

a. Registered Form

A debt obligation is in registered form for the purpose of meeting the portfolio interest exclusion if both:

- (1) the **payer** receives a form W-8 declaring the beneficial owner is not a U.S. person (IRC 871(h)(2)(B)); **and**
- (2) the obligation is in registered form by meeting one of the following three requirements:
 - (a) “The obligation is registered as to both principal and any stated interest with the issuer (or its agent) **and** transfer of the obligation may be effected only by surrender of the old instrument and either the reissuance by the issuer of the old instrument to the new holder or the issuance by the issuer of a new instrument to the new holder,
 - (b) The right to the principal of, and stated interest on, the obligation may be transferred only through a book entry system* maintained by the issuer (or its agent), **or**
 - (c) The obligation is registered as to both principal and any stated interest with the issuer (or its agent) and may be transferred through both of the methods described in (a) and (b).” Treas. Temp. Reg. 5f.103-1(c)(1).

*An obligation shall be considerable transferable through a book entry system if the ownership of an interest in the obligation is reflected in a book entry, whether or not the physical securities are issued. A book entry is a record of ownership that identifies the owner of an interest in the obligation. Treas. Temp. Reg. 5f.103-(c)(2)

Bearer bonds no longer qualify for the portfolio interest exemption.

a. 注册形式

如果债券注册的形式满足了以下两条，那么债券利息将免于美国所得税：

(1) 付款人收到了 W-8 表格，申明收益所有人不是美国法人，并且

(2) 债券的注册形式满足以下三种中的一种：

(a) 债券注册了本金和票面利息，发行人(或代理人)，并且债务的转移只能根据借债公司，由旧债券的发行人再发行给新的债券持有人或者由新债券的发行人发行给新的债券持有人；

(b) 本金和票面利息的所得权和债务只能通过发行人（或代理人）的记账系统转移，或者

(c) 债务注册了本金和票面利息，发行人（或代理人），并且可以通过以上（a）和（b）方式转移。

只要债券利息的所有权已在记账系统中入账，债务就被认为是可以通过记账系统转移的，无论有形证券本身有没有被发行。会计分录记录下了债券利息的所有者。

无记名债券不满足该债券利息免税条例。

证券投资利息

Portfolio Interest Income



1. 该票据只能通过返还给出票人并发行新票据的方式转移
“This note may only be transferred by surrendering this note to the maker for a new instrument or reissuance.”
2. 该票据只能通过记录该票据的记账系统转移
“This note may only be transferred by an entry recording such transfer on the books of the maker.”
3. 以上1和2的组合 **A combination of both 1. and 2.**

b. Private Note

A private note may also be drafted so that it qualifies for the portfolio interest exclusion, provided that it follows the registered requirements previously discussed.

In this respect, the mere addition of either the first or second sentence above should qualify the private debt instrument for the portfolio interest exclusion. Also, a combination of the two should also qualify such as:

“This note may only be transferred by either one of the following methods:

- (a) surrendering this note to the maker for a new instrument or reissuance; or
- (b) by an entry recording such transfer on the books of the maker.”

b. 私人票据

如果满足前面提到的三个注册要求的私人票据也满足证券投资利息的免税条例。

因此，只要在票据的条款里增加这三个要求中的第一或第二条就能使它的利息满足证券投资利息的免税条例。同时，综合第一或第二条也能够满足，例如：

“该票据只能通过以下两种方式中的其中其中一种转移：

- (a) 返还给票据出票人并且出具新票据或者重新出具该票据；或者
- (b) 通过票据出票人的款记分录登记转移。



3个例外条例 **3 Exceptions**

1. 付给外国银行的利息
Interest paid to foreign banks
 - 区别母公司和美国子公司
Distinguish between – Parent and U.S. sub.
2. 利息付给10%以上所有权的关联方
Interest paid to a 10% related persons
 - 美国子公司的外国母公司
Foreign parent of a U.S. subsidiary
3. 参与贷款（例如：或有利息）
Participation (i.e. contingent interest payment) Loans
 - 基于收入所得、利润、或者贷款人的其他款项
Based on the income, profits, or other items of the debtor

c. Three Exceptions

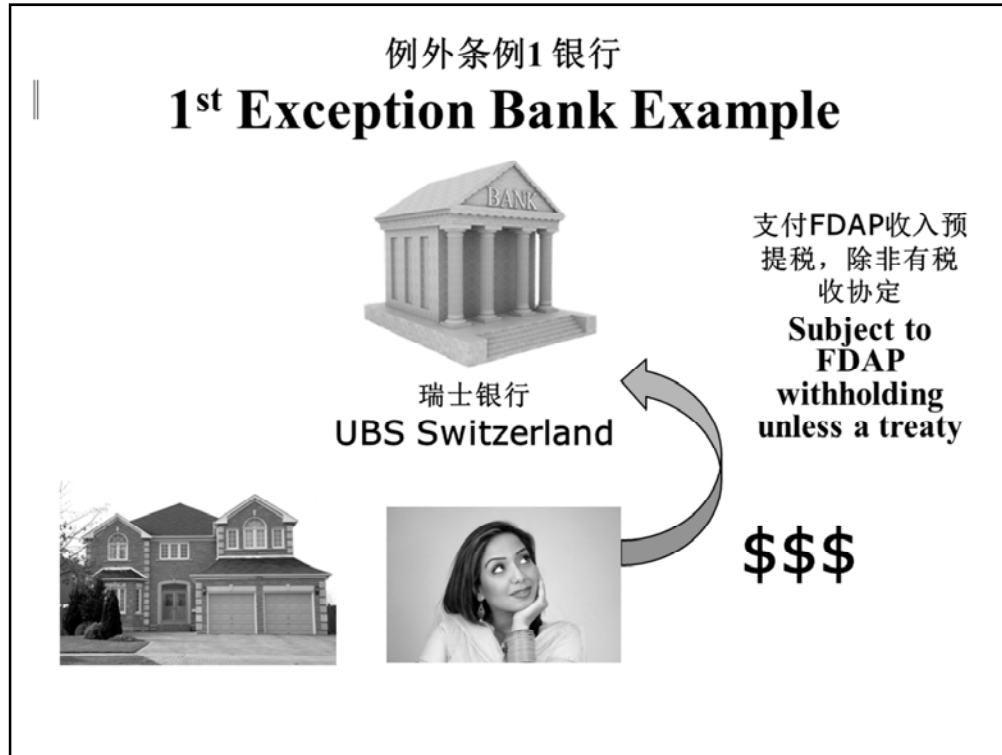
The following three types of transactions do not qualify for the portfolio interest exclusion:

- 1) Interest paid to a foreign financial institution in the ordinary course of business;
- 2) Interest paid to a 10% related person; and
- 3) Participation loans.

c. 三个例外条例

以下三种类型的交易满足证券投资利息的免税制度。

- 1). 在常规业务范围内的付给外国金融机构的利息；
- 2). 付给拥有 10%股权的关联方的利息；
- 3). 参与贷款。



1) Interest Paid to a Foreign Financial Institution

Regarding the first item, interest paid to a parent foreign company must be distinguished from interest paid to a U.S. subsidiary of the parent company. The interest paid by a U.S. person to the parent financial institution is not eligible for the portfolio interest exclusion. The interest paid by a U.S. person to a U.S. subsidiary of the foreign parent is taxed just like any other U.S. company on a net basis. However, if the foreign bank parent loans its U.S. subsidiary bank funds, the interest on this note is subject to the FDAP withholding. See *b)* discussed on the next page.

a) Interest Paid to the Parent Company

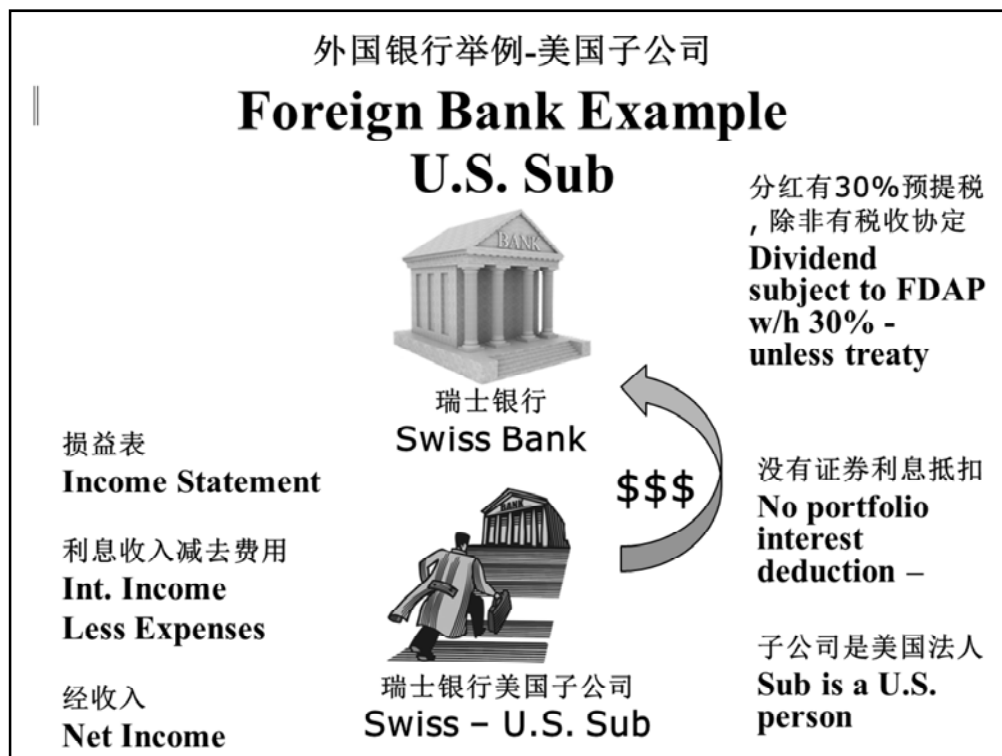
In the above diagram, the U.S. lady has relations with a parent Swiss Bank. The Swiss Bank (parent) makes a loan on her house. When she pays her mortgage payment, the interest portion is subject to FDAP withholding under IRC § 1441. In other words, she is suppose to withhold 30% of the interest each month, and remit it to the government. This is the case, unless the U.S.- Swiss Income Tax Treaty reduces the withholding rate for interest. Fortunately, this is the case, the Swiss-U.S. treaty reduces the withholding to zero.

1). 付给外国金融机构的利息

针对前页提到的第一条例外，需要区分付给外国母公司的利息和付给美国子公司的利息。由美国法人付给外国金融母公司的利息不在投资利息免税条例范围内。由美国法人付给外国公司在美国的子公司的利息的税收制度和其他美国公司所遵循的制度是一样的，即按照净收入缴税。而一个银行的外国母公司借给在美国的子银行贷款，所得的利息收入属于 FDAP 收入，需要预提 FDAP 所得税。详细见下页 b)的分析。

a). 付给母公司的利息

在上面的分析图中，这位美国女士和瑞士银行的母银行有业务来往，银行贷款给她买房子，当她还贷款时，需要同时对利息部分预提 FDAP 收入所得税，即每个月预提给美国政府贷款利息的 30%的所得税。除非美国和瑞士之间的税收协定降低了该预提税率。而事实上，美国和瑞士的税收协定也确实将该预提税率降低为 0。



b) Interest Paid to the U.S. Subsidiary

Interest paid to a foreign parent financial institution must be distinguished from interest paid to a U.S. subsidiary. A U.S. subsidiary is a domestic corporation taxed on its world-wide income. There is no look through rule to the foreign parent. Therefore, payments of interest expense by a U.S. person to a foreign parent's U.S. subsidiary are not subject to the FDAP tax and there is no withholding requirement.

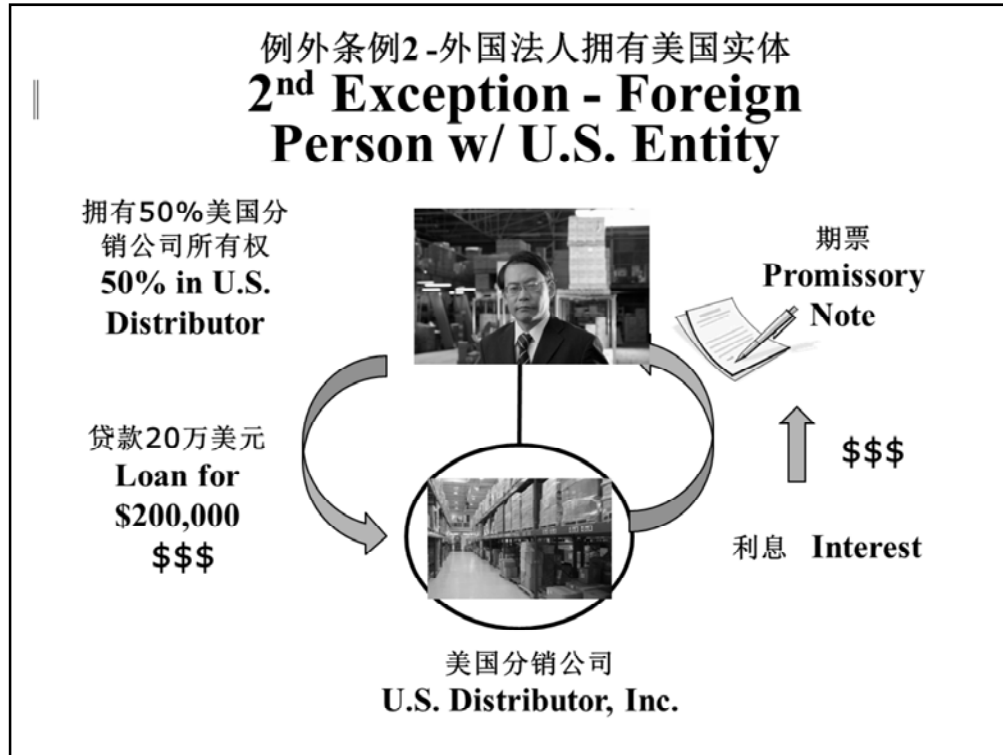
If the foreign parent had loaned money to the U.S. subsidiary, when the U.S. subsidiary pays the foreign parent, there is no portfolio interest deduction. This is due to the 10% or greater ownership discussed on the next page. Therefore, the interest payment from the U.S. subsidiary is subject to the 30% withholding, unless it is reduced under the U.S. – Swiss income tax treaty.

b). 付给美国子公司的利息

付给金融机构的外国母公司的利息和付给美国子公司的利息不同，美国子公司是美国境内的公司，它在美国的计税基础是全球来源收入，没有参照外国母公司缴税制度的规定，因此美国公司付给另一个母公司在国外的美国子公司利息时，该利息不属于 FDAP 收入，也没有预提所得税的规定。

如果是外国母公司借款给美国子公司，当美国子公司还款时，利息收入也不免税。这是由于付给拥有公司 10%以上股权的关联方利息时不免税，详细将在下一页中分析。因此美国子公司在付给外国母公司利息时，需要预提 30%所得税，除非有类似于美国-瑞士税收协定的条例降低税率。

例外条例2 -外国法人拥有美国实体
2nd Exception - Foreign Person w/ U.S. Entity



2) *Interest Paid to a 10% or Related Shareholder*

In the above diagram, a Japanese businessman owns a 50% interest in a U.S. distributor. In order to begin operations, the Japanese businessman loaned the U.S. distributor \$200,000. When the U.S. distributor pays the interest income to the Japanese businessman, there is no portfolio interest exclusion. The U.S. distributor is responsible for the § 1441 30% withholding, unless such amount is reduced by treaty. The Japan-U.S. Income Tax Treaty (2003) Art. 11(2) reduces the withholding to 10%.

2) *付给10%以上股东的利息*

在上面的例子中，日本商人拥有一个美国分销公司 50%的权益，该分销公司向他借了 20 万美元增加运营。当美国分销公司还款给他时，所付的利息不属于投资利息，不免税。美国分销商按照税法第 1441 章需要预提 30%所得税，除非有相应的两国的税收协定降低该税率。日本和美国的税收协定（2003）第 11（2）条将该预提税率降至 10%。

例外条例3-参与票据

3rd Exception Participation Note



票据款项

Terms of the Note

1. 利息率5%
Interest at 5%
2. 运营收入的12%作为
部分利息收入
**12% of operating
profit as interest**
3. 15%的出售票据收益
15% of gain on the sale

3) *Participation Note*

A participation note, which is sometimes referred to as a contingent interest note, provides that in addition to the interest charge, the holder of the note shares in the profits and/or the equity of the business. This is done by defining interest something similar to the language below:

The maker shall pay interest computed as follows:

1. Five percent of the principal of the note, plus
2. 12% of the operating profit computed quarterly; plus
3. 15% of the gain on the sale of the business assets or stock.

Operating profit as well as the gain on the sale will need to be defined in the promissory note. In essence the holder of the note has become a quasi equity partner.

Participation notes do not qualify for the portfolio interest exception. This is because such notes would be an easy device for foreign corporation to siphon earnings out of the U.S. and avoid U.S. taxation.

3) 参与票据

参与票据有时也被称为或有利息票据，它提供了额外的利息，票据持有人分享借债公司的利润以及/或者权益。相应的票据条款一般会以如下方式出现：

出票人需要按一下计算方式支付利息：

1. 票据本金的 5%，加上
2. 公司季度运营利润的 12%，加上
3. 公司出售资产或股票的收益的 15%。

运营利润和资本收益还需要在期票中进一步定义。总的来说，票据持有人将成为一个准股权合伙人。

参与期票的利息不属于证券投资利息免税范围，因为外国公司能够很容易地利用这样的期票将利润从美国转移来避免美国的税收。

银行存款利息

Bank Deposit Interest



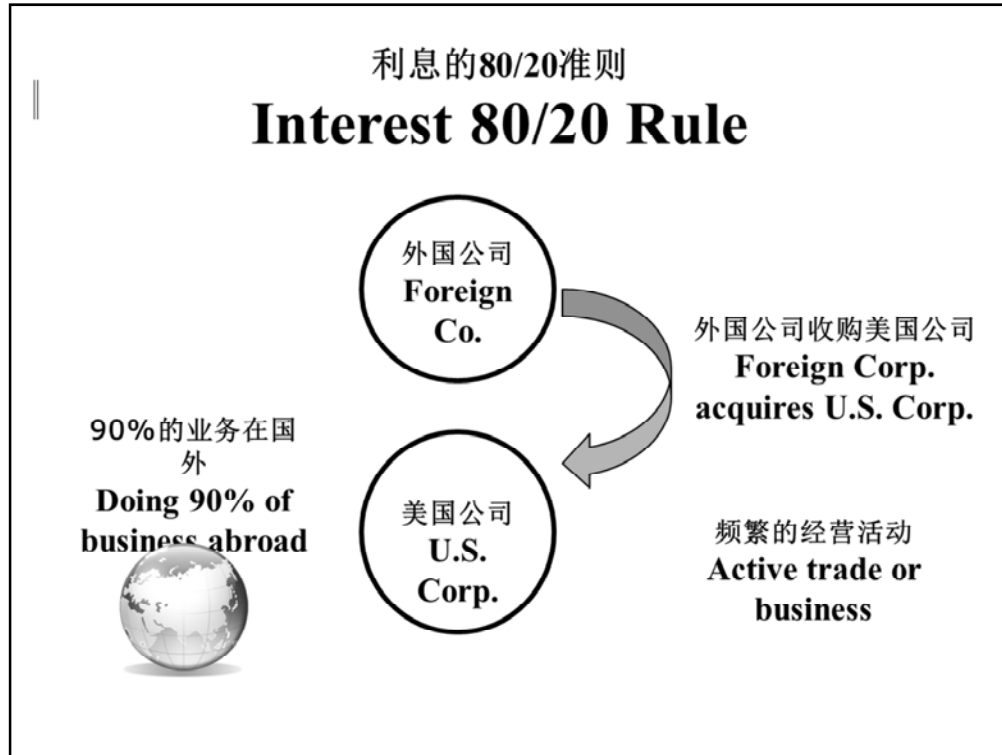
1. 例如-存款证；储蓄账户；保险公司利息
Examples – Certificate of deposit; savings account; included interest from insurance companies
2. 但不能是银行10%以上的股东
Cannot have an ownership interest of 10% or more in the bank
3. 美国税法条例 **IRC 871(i)(2)(A)**

2. Bank Deposit Income

For so long as a foreign person does not own 10% or greater in a U.S. financial institution, bank deposit interest is also exempt from taxation. Bank deposit interest includes interest from deposits at banks, savings institutions, and insurance companies. IRC 871(i)(2)(A).

2. 银行存款收入

只要外国法人没有在美国的金融机构里掌握 10%或以上股权，他们在银行的存款利息都是在美国免税的。银行存款利息包括来自于银行的存款利息，来自存款机构的利息，和来自保险公司的利息。参见税法条例 871(i)(2)(A)。



3. 80/20 Rule- Grandfathered Rule

The 80/20 rule is a special exclusion of interest income when it is paid by a U.S. subsidiary to a foreign corporation. Under the Education Jobs Act of 2010, the 80/20 rule was repealed prospectively. There is some grandfathering for payments related to loans before 2010. See IRC § 871(l).

a. *Creation of the Structure*

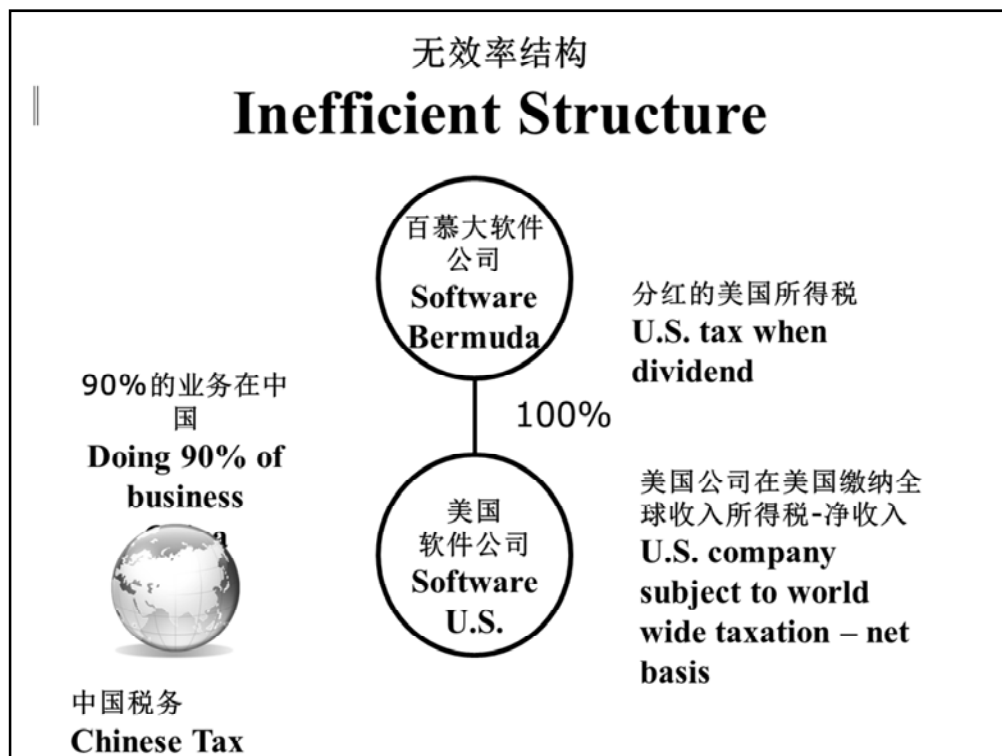
Assume a U.S. corporation primarily does business abroad (i.e. 90% of its income is foreign source income). The foreign source income must be from the active conduct of a trade or business. A foreign corporation finds that the U.S. business is highly profitable and acquires the U.S. corporation (i.e. purchases 100% of the stock).

3. 80/20 准则-祖父条款

80/20 准则是一个将美国子公司付给外国母公司的利息收入排除在可征税收入之外的特别的条例。按照 2010 年的教育工作法，80/20 准则在之后的年份被废除。对于 2010 年以前的贷款有一些祖父规则。参见美国税法条例第 871(1)条。

a. 创建结构

假设美国公司的业务主要在国外（假设 90%的收入来自于国外）（外国来源收入必须来自于公司的频繁的业务），有一个外国公司觉得美国的业务利润更高，于是收购了该美国公司（假设 100%收购）

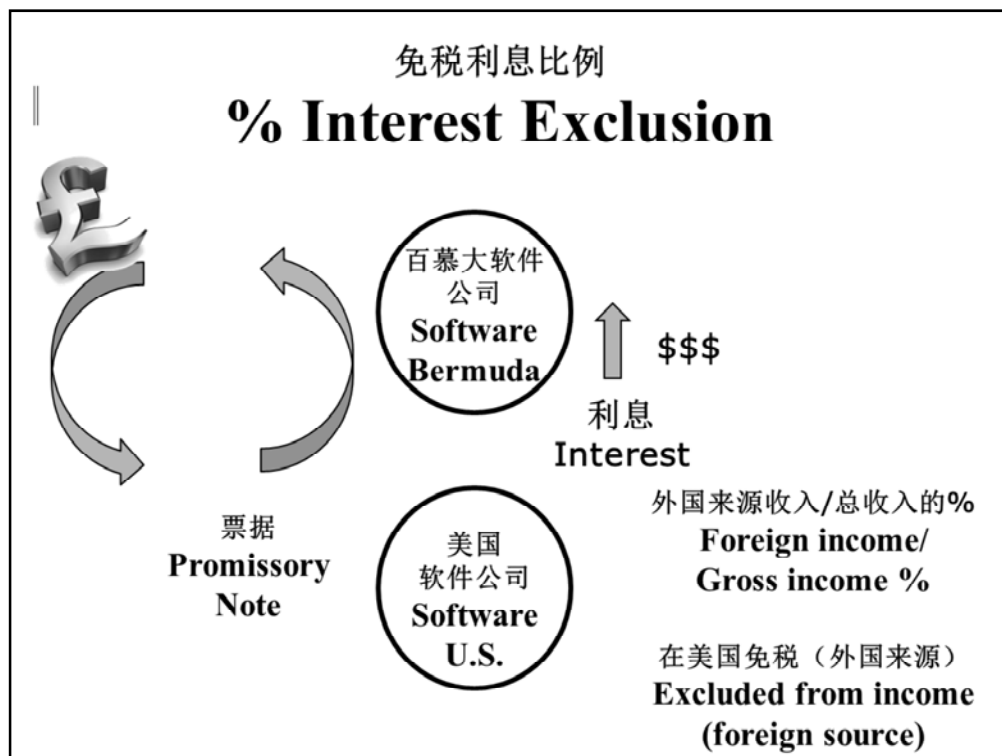


b. Tax Inefficient Structure

The above structure is highly inefficient from a world-wide tax basis. This is because China will most likely impose a tax on income earned in China (i.e. assuming the U.S. corp. has something similar to a permanent establishment in China) and the U.S. will also tax world-wide income. Further, the U.S. will then seek to tax any income (i.e. dividends) repatriated by the U.S. subsidiary to foreign parent. For this reason, the 80/20 rule seeks to eliminate part of the U.S. tax attributable to this inefficient structure.

b. 税法无效结构

以上的结构对于全球收入征税体系来说是很无效的，因为中国大部分情况下会对中国来源收入征税（假设美国公司也有类似的“常设机构”在中国），而美国又会对公司的全球收入征税，并且美国还会对美国子公司返还给外国母公司的收入（如分红）征税。因此，用 80/20 准则可以消除部分在这个税收无效的机构产生的美国税收。



c. *% Interest Exclusion*

If the U.S. subsidiary meets the 80/20 test, then interest paid to the parent corporation is excluded to the extent of total foreign income divided by the total gross income. For Example, if Software U.S. had total income of \$1,000 of which \$950 of the income was from sales in China, then the percentage exclusion would be 95%. If Software U.S. paid \$100 of interest expense during the year to Software Bermuda, Software Bermuda would exclude \$95 of interest income from its U.S. earnings.

c. 免税利息百分比

如果美国子公司满足了 80/20 的测试，那么付给母公司的利息可以有部分免税，最高百分比等于外国来源收入占总收入的百分比。举例来说，如果美国软件公司有总收入 1000 美元，其中 950 美元来自中国的销售收入，那么有 95% 的利息可以在美国免税。如果美国软件公司支付了 100 美元利息给百慕大软件公司，那么百慕大软件公司可以有 95 美元的利息在美国免税。

税收协定的优惠政策

Treaty Reduction



瑞士银行
Swiss - Bank

需要缴纳FDAP收入的预提税，除非有税收协定特例

**Subject to
FDAP
withholding
unless a treaty**

\$\$\$



Article 11(2)
2006 treaty

4. Treaty Reduction

In the previous example the lady above had a withholding obligation under § 1441 for the interest payments on her mortgage. This is because the Swiss bank did not have a permanent establishment (e.g., was not conducting a trader or business) in the U.S. If she intentionally violated this withholding requirement, do we throw her in jail?

In the event that interest is not excluded under the portfolio interest exclusion or the bank deposit interest exclusion, one still needs to check to see if the amount of tax is reduced or eliminated pursuant to a treaty. For example, the following provisions of Article 11 of the 1996 Swiss tax treaty reduces the interest withholding to zero:

1. Interest derived and beneficially owned by a resident of a Contracting State shall be taxable only in that State.
2. The term "interest" as used in this Convention means income from debt-claims of every kind, whether or not secured by mortgage, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures, and including an excess inclusion with respect to a residual interest in a real estate mortgage investment conduit. However, the term "interest" does not include income dealt with in Article 10 (Dividends). Penalty charges for late payment shall not be regarded as interest for the purpose of this Convention.
3. The provisions of paragraph 1 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or . . .

4. 税收协定降低税率

在前面的例子中，纳税人要按照税法条例第 1441 章对她的贷款利息支付预提税，因为瑞士银行在美国没有常设机构(假设在美国没有业务)，那么如果她故意不交预提税，她会被关进监狱吗？

对于不满足证券投资利息或银行存款利息免税条例的其他利息，税收协定仍然可能提供一些降低税率的特例。比如 1996 年瑞士税收协定的第 11 章中的以下条例将利息的预提税率降低为 0：

1. 在协约州产生并且收益人为协约州居民的利息只能在该州被征税。
2. 本协定中的利息是指任何债务类型的利息，无论有没有抵押，尤其是政府有价证券或债券收入，包括证券或债券所附的溢价和奖金，不动产抵押投资管道的剩余权益，但不包括协定第 10 章（股东分红）中的收入。迟交的罚款不属于本协定范围内的利息。
3. 条例 1 不适用于在其他协约州有公司业务并且有常设机构的利息收益人，或者...

税收协定下的利息预提税率

Interest Treaty Withholding Chart

澳大利亚	Australia			10%
加拿大	Canada			0%
中国	China			10%
法国	France			0%
德国	Germany			0%
爱尔兰岛	Ireland			0%
日本	Japan			10%
韩国	Korea, South			12%
卢森堡	Luxembourg			0%
墨西哥	Mexico			15%
荷兰	Netherlands			0%
俄罗斯	Russia			0%
瑞典	Switzerland			0%
英国	United Kingdom			0%

鼓励外商投资

Encourage foreign investment

5. Interest Treaty Withholding Chart

Above are some of the reduced treaty rates for interest withholding between various countries. Most countries as well as businesses established in these countries are seeking investment dollars in the form of a loan. To encourage foreign investment, these treaty countries generally lower the interest withholding to zero.

5. 税收协定下的利息预提税率表

以上表格是部分国家在税收协定下的利息预提税率。这些大部分国家和在这些国家的公司都希望通过贷款的形式来寻找投资，为了鼓励这些投资，针对这些国家的税收协定将利息预提税率降低到了0。

股息/红利

Dividends

两层系统

Two Tier System

1. 一般税率 --- 对于拥有股权10%以下的股东通常为15%
General Rate usually 15% for Less than 10% Owners
2. 直接税率 --- 对于拥有股权10%以上的股东通常为5%
Direct Rate usually 5% for 10% Owners or More



F. Dividends

Dividends are subject to a 30% withholding tax unless it is reduced by a treaty. Article 10(2) is where the model 2006 treaty typically reduces the dividend amount.

Under U.S. income tax treaties, there is a two tier reduced dividend tax rate:

- (1) the general rate for owners of less than 10% of the stock in the corporation; and
- (2) the direct dividend rate for owners who own 10% or more in the stock of the corporation.

Usually the reduction is to 5 % if the shareholder owns 10% or more of the corporation or 15% in all other cases.

F. 股东红利

公司在支付股东红利时需要预提 30%所得税，除非有税收协定降低税率。2006年版的示范协定第 10(2)条降低了该税率。


在美国所得税协定下，有两个降低后的股息税率：

- (1) 一般税率，适用于在公司的权益小于 10%；
- (2) 直接股息税率，适用于在公司的权益等于或大于 10%。

通常，如果股东在公司的权益等于或大于 10%（在一些案例中为 15%），那么股息税率将降低为 5%。

一般降低的税率

General Reduction Rate



30% 预提税
30% withholding

除非按菲律宾税收协定
下25%税率
**Unless Filipino
Treaty Rate – 25%**

不享有美国税法条例
1(h)11下的“合格股息
税率”
**No “qualifying
dividend rate”
under IRC § 1(h)11**

↑ \$\$\$

分红
Dividend

微软公司
**Microsoft,
Inc**

1. General Reduction Rate For Less Than a 10% Owner

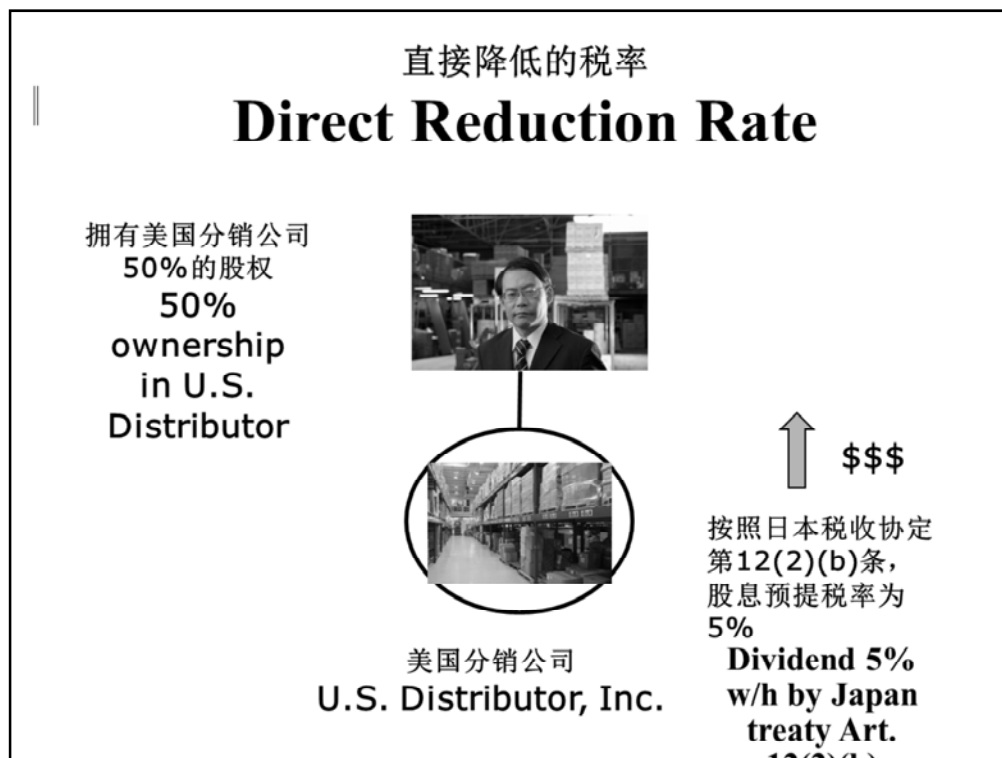
Dividends are subject to a 30% withholding tax unless it is reduced by a treaty. Article 10(2) 2006 Model Treaty. The general treaty withholding rate for less than 10% owners is typically 15%. However, the Philippines has an old treaty and it only reduces the general rate to 25%. The same is true for Greece and Pakistan where the withholding rate under these treaties is 30%.

Under IRC § 1(h)(11), the qualified dividend rate is 20%. This would be less than the withholding rates under Philippines, Greece, and Pakistan treaties. Unfortunately, a foreign person cannot take advantage of the qualified dividend rate. This is because a foreign person is not taxed under § 1 of the IRC. Rather, the non-resident alien is taxed under IRC § 871 or § 872 as the case may be. The same result occurs when a dividend is paid to a foreign person in a non-treaty nation; there is no qualified dividend rate.

1. 降低的股息税率-适用于公司 10%以下权益的股东

股息收入在没有税收协定的情况下需要预提 30%所得税，一般协定将公司 10%以下权益股东的股息税率降低为 15%，但美国和菲律宾的税收协定是一个较早的版本，其中的股息税率为 25%。同样的，美国-希腊和美国-巴基斯坦的税收协定下的股息税率也高达 30%。

根据美国税法条例 1(h)(11),合格股息的税率是 20%，这比菲律宾、希腊和巴基斯坦税收协定提供的预提税率来的更低。不幸的是，外国法人不能够使用美国税法条例下的合格股息的税率，原因是美国税法法典第 1 章不适用于外国法人。美国税法上的非定居美国的外国公民需要按照美国税法法典第 871 章或者第 872 章的制度来交税。同样的，当股息是付给来自于没有税收协定国的外国法人，也不能够使用合格股息税率。

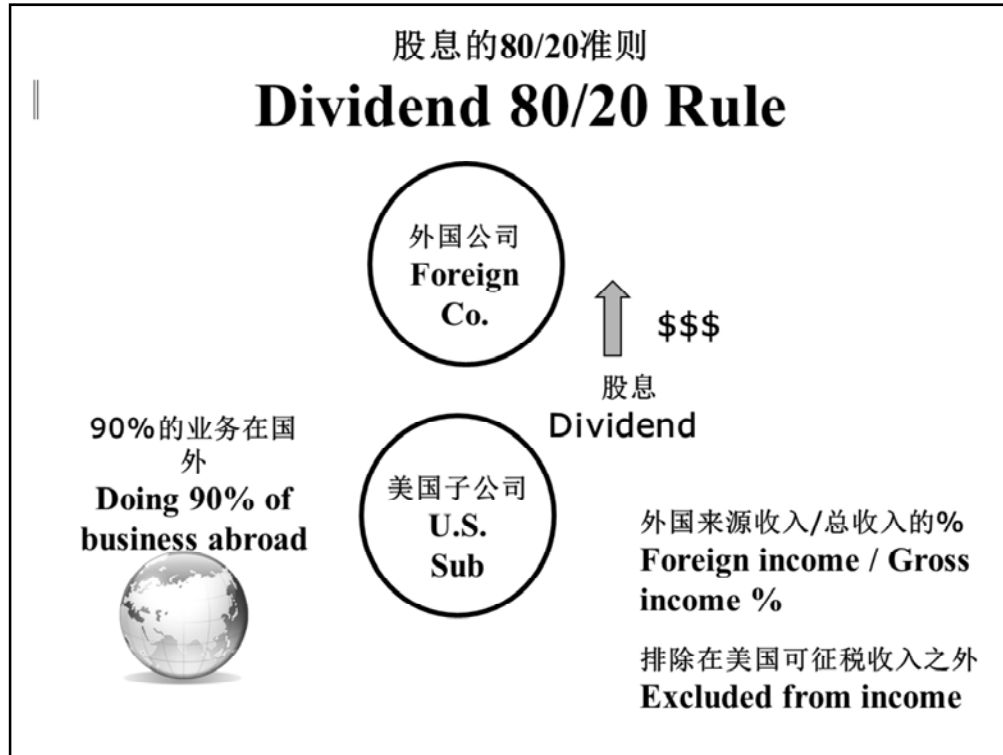


2. Direct Reduction Rate For Dividends Paid to a 10% or Greater Owner

For dividends paid to a 10% or greater owner, typically modern income tax treaties reduce the FDAP withholding tax to 5%. Article 10 (2).

2. 直接降低的税率-适用于公司 10%或以上权益的股东

对于付给公司 10%或以上权益的股东的红利，现代税收协定将预提税率降低到了 5%。参见税收协定第 10(2)条。



3. 80/20 Rule – Grandfather Rule

Similar to the 80/20 rule for interest, there is an 80/20 rule for dividends excluded from income. To the extent of foreign income divided by worldwide income, the dividend is excluded from withholding tax when paid from the U.S. subsidiary to the foreign parent. Again, the Education Jobs Act of 2010, prospectively repealed the 80/20 rule for years after December 31, 2010. However, to the extent of earnings and profits accumulated prior to that time, there are some grandfathering provisions. See IRC § 871(l).

3. 80/20 规则-祖父条例

和利息的 80/20 规则类似的，股东红利也有一个 80/20 规则将其排除在可征税收入范围。当美国子公司付给外国母公司红利时，最高可免于预提税的百分比为外国来源收入占总的全球范围收入的百分比。同样的，2010 年的教育法将这个 80/20 规则自 2010 年 12 月 31 日之后废除，但是对于该日之前累积的收入和利润，仍然有一些祖父条例提供优惠。参见税法条例 871(1)。

税收协定下分红的预提税率

Dividend Treaty Withholding Chart

	General Reduction	Direct Reduction
澳大利亚 Australia	15%	5%
加拿大 Canada	15%	5%
中国 China	10%	10%
法国 France	15%	5%
德国 Germany	15%	5%
爱尔兰岛 Ireland	15%	5%
日本 Japan	10%	5%
韩国 Korea, South	15%	10%
卢森堡 Luxembourg	15%	5%
墨西哥 Mexico	10%	5%
荷兰 Netherlands	15%	5%
俄罗斯 Russia	10%	10%
瑞典 Switzerland	15%	5%
英国 United Kingdom	15%	5%

4. Dividend Treaty Withhold Chart

Above are some of the reduced treaty rates for dividend withholding between various countries. The general rate of reduction is typically 15% for shareholders owning less than 10% of the corporation; and 5% for shareholders owning 10% or more in the corporation.

4. 税收协定下红利的税率

以上是一些国家在税收协定下降低的红利的税率。对于 10%以下权益的股东为一般降低后的税率 15%，对于 10%以上权益的股东为 5%。

投资收益

Capital Gains

- 一般准则-非定居美国的外国公民的投资收益在美国免税

General Rule – Nonresident alien is not subject to tax on capital gains

- 不属于FDAP收入 – 财政法规 § 1.1441-2(b)(2)(i)

Not subject to FDAP – Reg. § 1.1441-2(b)(2)(i)

- 收益为外国来源 – 税法条例 § 865(a)

Gains are foreign source § 865(a)

- 个人财产的归属地为出售方的税法居住地

Personal property is sourced to the residence of the seller



G. Capital Gains

Except for real estate, a non-resident alien does not pay tax on U.S. capital gains. This is because of two independent reasons.

1. Not Subject to FDAP

The first reason is that capital gains are not defined as FDAP income. A non-resident alien is taxed only on (a) U.S. FDAP income; or (b) U.S. effectively connected income. These are the only two methods to tax a non-resident alien. First, a capital gain is not business income so it will never be effectively connected income. Second, Treas. Reg. § 1.144-2(a)(3) states that capital gains are not FDAP income. Therefore, except for real estate which is taxed under IRC § 897, capital gains are excluded from U.S. taxation.

2. Gains Are Foreign Source Income

The second reason is the as we will learn later, the sale of personal property is sourced base on the residence of the seller. The stock certificate is personal property. Therefore, when a foreign person sells the stock, the gain will be foreign source income. A foreign person is seldom taxed on foreign source income, and in this case there is no exception that results in taxation.

G. 资本收益

除了房地产之外，非定居美国的外国公民的资本收益在美国是免税的，这主要有两个原因：

1. 不属于 FDAP 收入

第一个原因是非定居美国的外国公民的资本收益不属于 FDAP 收入。非定居美国的外国公民在美国的可征税收入只有两类：(a) 美国来源的 FDAP 收入；(b) 美国有效关联收入。资本收益不属于运营收入，因此它永远不可能成为有效关联收入，并且，按照财政法规 1.144-2(a)(3)，资本收益也不属于 FDAP 收入，因此除了房地产收益需要按照税法条例第 897 章制度缴税之外，其他的资本收益都不属于美国可征税收入。

2. 收益属于外国来源收入

第二个原因是个人财产的归属地是根据出售方的税法居住地判定的。股票证书属于个人财产，因此当外国法人抛售股票是，他的收益属于外国来源收入。外国法人的外国来源收入在美国一般是免税的，并且没有其他例外条例使它们成为可征税收入。

税收协定下非定居美国的外国公民

Non-Resident by Treaty

- 税收协定联系切断规则

Treaty Tie-Breaker Rules

- 按税法条例，美国来源的资本收益属于美国可征税收入

Code – says U.S. capital gains taxed

- 然而，税收协定可以改变该条例

However, treaty may override this

- 不动产 税法条例 § 897

Real property § 897

- >183天 - 非定居美国的外国公民

> 183 days – nonresident alien

- 房地产之外的资本收益

Capital gains other than real estate

3. Non-Resident by Treaty

There are three methods discussed in the Classification of a Taxpayer where a foreign person is not classified as a U.S. resident (weighted average substantial presence test; closer connection test; and treaty tie-breaker test). The treaty tie-breaker test is typically used where the foreign person has stayed in the U.S. for 183 days or more in the current taxable year and does not wish to be classified as a resident alien. In the Classification of a Taxpayer outline, we noted that treaty tie-breaker was the worst method to use to be classified as a non-resident alien. One of the reasons we were concerned with using this method to prevent U.S. taxation is the possible taxation of U.S. capital gains. In other words, there is an exception where a non-resident alien may be subject to income tax on U.S. capital gains, not foreign capital gain.

3. 税收协定下的非定居美国的外国公民

在美国的外国公民有三种方式不属于美国税法上的美国定居者（加权平均实际居住测试法；紧密联系测试法；税收协定联系切断测试法）。税收协定联系切断测试法通常适用于外国公民在美国当年居住的时间等于或超过了 183 天但不希望成为税法上的定居美国的外国公民的类型。在纳税人分类的章节里，我们提到了税收协定联系切断测试法是我们最后才会使用的方法，其中一个原因就是在该方法下，外国公民的美国资本收益可能会成为美国可征税收入。换句话说，作为非定居美国的外国公民，他们也可能需要对美国资本收益缴纳美国所得税，当然外国资本收益还是免税的。

美国投资收益

U.S. Capital Gains

- 按照美国税法条例 § 871(a)(2)，税率为30%
IRC § 871(a)(2) – 30% Tax
- 然而，美国税法条例 § 865将个人财产的收益来源规定为其税法居住地
However, IRC § 865 sources gains of personal property to residence
 - 可以使用“安全港”一年，将税法居住地归为外国
One year safe harbor that tax residence is abroad
- 美国税法条例 § 865 (h)允许税收协定将收入来源归属为外国来源
IRC § 865 (h) allows a treaty to source foreign
- 现代税收协定第12(6)条
Article 12(6) Modern Treaty
- 中国税收协定没有排除所有资本收益的条例
Chinese treaty does not have catchall language

IRC § 871(a)(2) imposes a 30% tax on gains derived from within the United States from the sale or exchange of a capital asset. However, IRC § 865(a)(2) states that gains from the sale of personal property (i.e. stock) is sourced by the person's residence. For IRC § 865 to apply, the person must have a tax home outside the U.S. IRC § 865(g)(1)(A)(i)(II). Generally, a person may live primarily in the U.S. only for one year under a safe harbor Rev. Proc. before he or she will be deemed to have a tax home in the U.S.

IRC § 865(h) provides an exception from the 30% tax when specifically addressed by treaty. IRC § 865(h)(2)(A)(ii). Modern treaties solve the U.S. taxation issue under Article 12(6) where there is catchall language that prevents U.S. taxation on capital gains. Unfortunately, the 1984 Chinese treaty does not have this catch all language.

美国税法条例§ 871(a)(2)对在美国境内进行的资本收益征收 30%的资本收益税。然而，美国税法条例§ 865(a)(2)规定个人资产（包括股票）的销售收益的归属地为该纳税人的税法居住地。美国税法条例§ 865 适用的前提是纳税人在美国以外有一个税法居住地。通常一个纳税人对于税收协定提供的这个“安全港”只能利用一年，即可以有一年在美国居住大部分时间而仍然成为税法上的非定居美国的外国公民。

美国税法条例§ 865(h)针对税收协定，对这个 30%的资本利得税提供了一个例外条例，参见税法条例§ 865(h)(2)(A)(ii)。现代税收协定解决了协定第 12(6)中将所有的资本收益都排除在美国可征税收入之外的问题。不幸的是，1984 年的中国税收协定没有这个排除所有资本收益的条例。

租金收入

Rents

- 所有的租金的计税基础都是总收入，除非

All rents taxed on a gross basis – unless:

- 有积极的贸易经营活动，或者

Active trade or business or

- 按照美国税法条例 § 871(d) 和 § 881 (d)，做税法选择

IRC § 871(d) & § 881 (d) election

- 没有税收协定优惠条例 **No treaty relief**



H. Rents

All rents on personal or real property are subject to a 30% FDAP tax unless the rental activity constitutes a trade or a business or an election is made to tax the rental activity as a trade or business under IRC § 871(d) and § 881(d). Further, there is no treaty relief for rental income.

H. 租金收入

所有的个人财产和不动产的租金收入都需要提交 30% 的 FDAP 收入所得税，除非出租活动属于贸易经营活动的性质，使出租收入需要按照税法条例 871(d) 和 881(d) 下营业收入制度缴税。另外，对于出租收入，税收协定没有提供优惠特例。

住宅租金举例

Residential Rental Example

租金收入	Rents - \$900 mo. x 12	\$10,800
折旧费	Depreciation	\$ 2,700
利息支出	Interest	6,000
房地产税	Real Property Tax	700
保险费	Insurance	500

		9,900

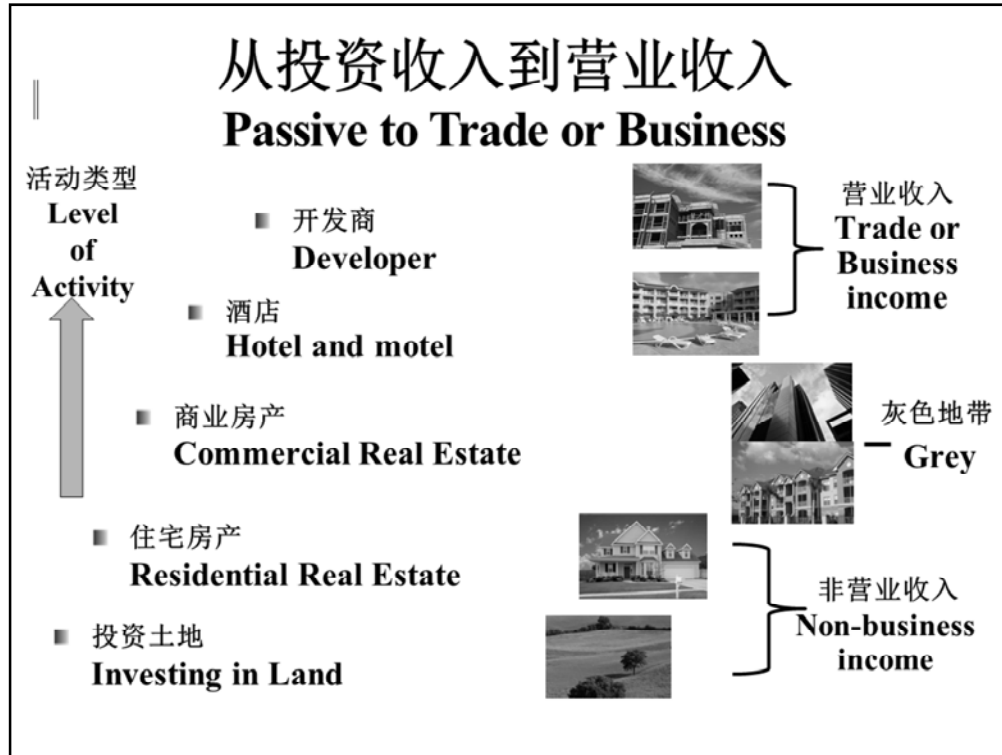
净收入	Net Income	\$ 900
FDAP收入税	FDAP Tax = \$10,800 x 30% = \$3,240	

1. Devastating Effect on Residential Real Estate

The above example details the devastating effect of not making an § 871(d) or § 881(d) election on residential real estate. Here, the foreign person would be subject to a 30% tax on gross rents, even though he or she only made \$900 on the residential rental property. Absent the election, residential real estate is not a trade or business, and all deductions are lost by a non-resident alien.

1. 住宅房地产的毁灭性的税收结果

以上的例子向我们展示了在没有对住宅房地产做税法 871(d)或 881(d)选择时会产生很坏的结果。尽管该外国法人最后的净收入只有 900 美元，他仍然需要在总的租金收入的基础上缴纳 30%的所得税。如果不做这个税法选择，那么住宅房地产不属于贸易经营活动，所有的费用支出也都不能在税法上进行抵扣。



2. Passive to Trade or Business Income Chart

The above bullet points represent a progression from passive to trade or business income. Investing in land as well as the rental of residential real estate are always passive income and are taxed as FDAP. Conversely, the activities of a hotel, motel, or developer are always active trade or business income. Therefore, these trade or business activities are taxed as effectively connected income. In the middle is the grey area of commercial real estate. This may be classified as an active trade or business or it may be classified as passive income depending on the facts. Unfortunately, there are few cases in determining exactly what level of activity makes commercial real estate an active trade or business.

Case Cites:

Land:

Herbert v. Commr., 30 T.C. 26 (1958);

Residential Real Estate:

Espinosa v. Commr., 107 T.C. 146 (1996);

Swallows Holding, Ltd. v. Commr., 515 F. 3d 162 (3d Cir. 2008);

Commercial Real Estate:

Pinchot v. Commr., 113 F.2d 718 (2d. Cir. 1940);

Lewenhaupt v. Commr., 20 T.C. 151 (1953); *aff'd*, 221 F.2d 227 (9th Cir. 1955)

2. 从投资收入到营业收入

以上是从投资收入到营业收入的几种房地产类型。土地投资和住宅房地产的收入总是属于投资性收入，按照 FDAP 收入制度纳税。酒店、旅馆和开发商的收入总是属于营业收入，按照有效关联收入纳税。处于这两种情况中间的是商业房地产的灰色地段，它们可以属于营业收入，也可以属于投资性收入，需要根据具体情况而定。不幸的是，很少有案例给出了哪些活动会使商业房地产满足贸易经营活动的类型。

相关案例：

地产：

Herbert v. Commr., 30 T.C. 26 (1958);

住宅房地产：

Espinosa v. Commr., 107 T.C. 146 (1996);

Swallows Holding, Ltd. v. Commr., 515 F. 3d 162 (3d Cir. 2008);

商业房地产：

Pinchot v. Commr., 113 F.2d 718 (2d. Cir. 1940);

Lewenhaupt v. Commr., 20 T.C. 151 (1953); *aff'd*, 221 F.2d 227 (9th Cir. 1955)

无形资产使用收入

Royalties



■ 定义很宽泛 **Defined broadly**

- 包括专利权、版权、商标、商业过程、品牌名使用，和贸易机密的所得

Amounts received under licenses of patent, copyright, trademark, business process, use of trade name or brand, and trade secrets

- 根据生产力定价的知识产权的出售

Sale of intellectual property if payments are in anyway based on productivity.

I. Royalties

Royalties are defined broadly and includes any license or use of property that does not transfer all of the ownership rights to the property. In this respect, it also includes the sale of intellectual property if the purchase price is computed by any formula related to productivity (e.g. contingent on sales by the purchaser).

I. 无形资产使用收入

无形资产使用收入的定义很广泛，包括任何财产的使用许可，但没有转移财产的所有权。因此，它也包括销售价格由生产率决定的知识产权的销售收益。

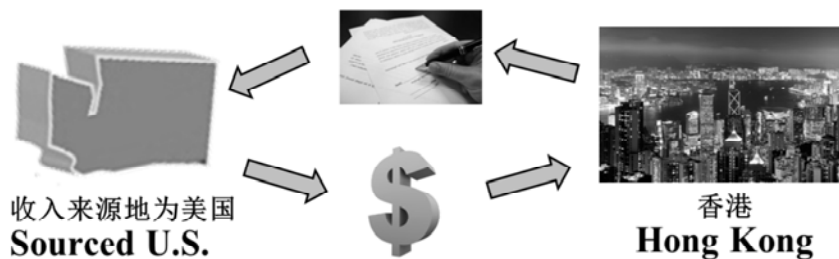
无形资产使用收入

Royalties

- 没有税收协定时，收入来源地位财产使用地

Non-Treaty - Sourcing is where the property is used – § 861(a)(4)

- 香港公司授予微软使用权 **Hong Kong licenses to Microsoft**
- 微软支付无形资产使用费 **Microsoft pays a royalty**
- 香港公司获得FDAP收入 **FDAP income to Hong Kong company**
- 微软公司有30%预提税赋 **Microsoft has 30% withholding obligation**



1. Non-Treaty

A royalty is sourced where the property is used. Therefore, if Microsoft pays a Hong Kong company for technology and it is not a sale, Microsoft has a FDAP withholding obligation. On a second side note, neither Hong Kong nor Taiwan has an income tax treaty with the U.S., even though mainland China does. IRS Notice 97-40.

1. 无税收协定

无形资产使用收入的来源由财产所在地决定。因此，如果微软公司向香港公司支付技术使用费，那么微软公司需要预提 FDAP 收入所得税。另外，香港和台湾与美国之间都是没有税收协定的，而中国大陆是有的。

无形资产使用收入

Royalties

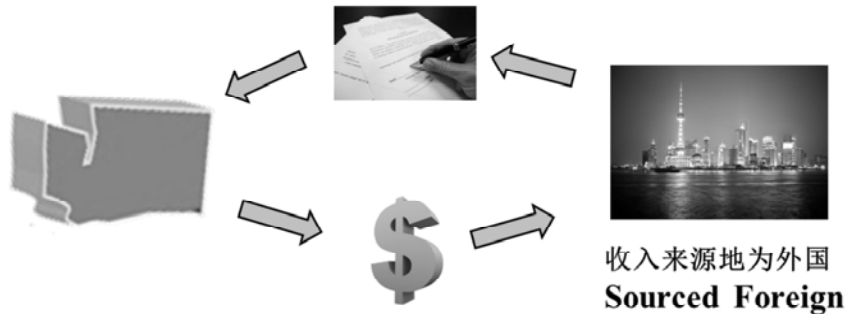
■ 税收协定 Treaty

- 将收入来源改为接受方所在地

Changes the sourcing rule to where received

- 外国来源收入-在美国免税

As foreign source income – not taxed in U.S.



2. Treaty

Generally, a treaty reduces a royalty to zero. On a side note, typically a treaty does this not by reducing the withholding rate, but by stating that:

1. Royalties arising in a Contracting State (i.e. the U.S.) and beneficially owned by a resident of the other Contracting State (i.e. the foreign country) may be taxed only in that other State (i.e. the foreign country).

Art. 12, Par. 1 Model 2006 Treaty.

2. 税收协定

一般来说，税收协定将无形资产使用收入将为 0。并且，税收协定其实没有将预提税率降低，而是规定了：

1. 如果无形资产使用收入是在协约的一方地区（美国）产生，并且受益人是协约的另一方（外国）的税法上的居民，那么该收入只能由受益人所属的地区（外国）征税。

参见 2006 示范协约第 12 章第一部分

软件分类

Classification Software

- 财政法规 **Treas. Reg. § 1.861-18**
 - 产品销售-软件程序的销售，如微软办公室应用软件
Sale of Goods - If buying a program like Word or Windows Office – similar to a book. Treated as a sale
 - 服务-根据应用提供编程服务
Service - If custom programming on any application, then payment is a service.
 - 许可证-授予技术使用权
License - If licensed the technology = Royalty.

3. Classification of Software

The transfer of technology may be classified primarily in one of three types of transactions:

a. Sale

If a U.S. person purchases an off the shelf type of product, then it is considered similar to a book. This is the case even though you are granted a license to use the property.

b. Custom programming

If a U.S. person pays a Hong Kong person to custom program or modify an existing program, then this is a service transaction. As we will discuss later, services are sourced where the service is performed – Hong Kong. As foreign source income, they are not subject to any withholding obligation on the part of a U.S. payor.

c. License

If the Hong Kong company licenses the software it developed to Microsoft and it is not an off the shelf type of purchase, then Microsoft is paying a royalty. A royalty is subject to a 30% FDAP withholding, unless reduced by a treaty. Since Hong Kong does not have a treaty with the U.S., the withholding would be 30%.

Treas. Reg. § 1.861-18.

3. 软件的分类

技术转移主要可以分成以下三种类型的交易：

a. 销售

从商场货柜上购买软件产品和购买一本书是一个性质的，即使获得了软件公司的技术使用许可，仍然被认为是销售交易。

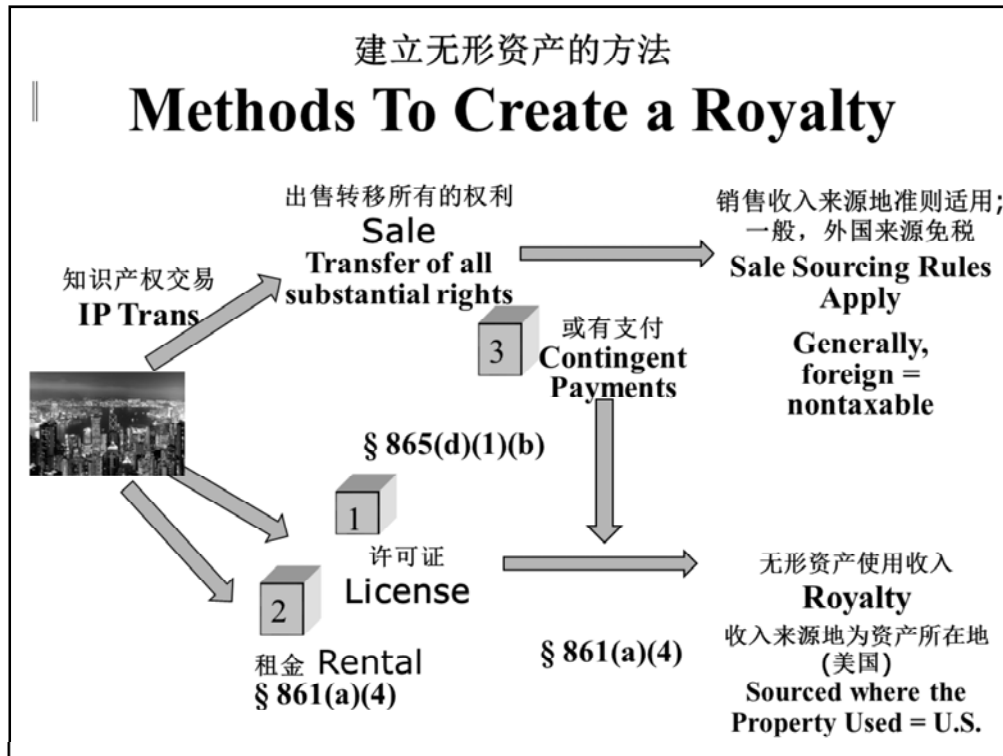
b. 自定义编程

如果一个美国公司支付香港公司费用来获得自定义编程服务或者修改现有程序的服务，那么这属于服务交易。服务类型的收入的来源地是根据服务提供的地点决定的，在这里就是香港。对于美国支付方来说，他们也不需要为对方的外国来源收入提交预提税。

c. 技术使用许可

如果香港公司授予美国微软公司软件使用许可，并且其中没有软件产品购买交易，那么微软公司支付的就是无形资产使用费。对此需要预提 30%FDAP 所得税，除非有税收协定降低税率。由于香港和美国之间没有税收协定，相应的预提税率维持在 30%不变。

参见财政法规§ 1.861-18。



4. Methods Create a Royalty

The normal method that a royalty is created is by a license to use the property. However, the IRC looks to the substance of the transaction to determine whether it is a license or a sale. For example, in the previous slide a sale of something similar to an off the shelf book is classified as a sale of goods. Similarly, legal titles in documents are not necessarily controlling. For example, a “rental contract of intangible property for tax purposes is the same as a license. Therefore, rents of intellectual property are also classified as a royalty.

Finally, many times an inventor will wish to sell his or her patent (or other intellectual property). However, neither the purchaser or the inventor seller know the value of the patent. Therefore, they structure a sales contract where the purchaser is paid over time based on the sales volume of the purchaser. Looking at the substance of this transaction, the IRC classifies such a sale as a royalty.

4. 创建无形资产的方法

常规的无形资产是通过财产使用许可证来创建的。然而，美国税务局会审查交易的实质来判断它是使用许可交易还是销售交易。举之前的例子，如果是从商场货柜上购买产品，那么它属于销售交易。类似的，法律文件上的所有权也未必能起决定性作用。无形资产的出租合同在税法上和使用许可证是一样的，因此知识产权的租赁收入也属于无形资产使用收入。

最后，很多时候投资者希望将他们的专利或其他知识产权出售给他人，但是购买人和专利的发明人都不知道专利的价值，因此他们可能会商定一个销售合同，购买人将根据之后的销售量来分阶段支付购买专利。根据交易的实质，美国税务局裁定这些收入为无形资产使用收入。