

the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, to which such amendment relates, see section 7817 of Pub. L. 101-239, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-647 effective, except as otherwise provided, as if included in the provisions of the Revenue Act of 1987, Pub. L. 100-203, title X, to which such amendment relates, see section 2004(u) of Pub. L. 100-647, set out as a note under section 56 of this title.

EFFECTIVE DATE

Pub. L. 100-203, title X, §10226(c), Dec. 22, 1987, 101 Stat. 1330-416, provided that: "The amendments made by this section [enacting this section] shall apply in cases where the acquisition date (as defined in section 384(c)(2) of the Internal Revenue Code of 1986 as added by this section) is after December 15, 1987; except that such amendments shall not apply in the case of any transaction pursuant to—

"(1) a binding written contract in effect on or before December 15, 1987, or

"(2) a letter of intent or agreement of merger signed on or before December 15, 1987."

ELECTION TO HAVE AMENDMENTS BY PUB. L. 100-647 NOT APPLY

Pub. L. 100-647, title II, §2004(m)(5), Nov. 10, 1988, 102 Stat. 3607, provided that: "In any case where the acquisition date (as defined in section 384(c)(2) of the 1986 Code as amended by this subsection) is before March 31, 1988, the acquiring corporation may elect to have the amendments made by this subsection not apply. Such an election shall be made in such manner as the Secretary of the Treasury or his delegate shall prescribe and shall be made not later than the later of the due date (including extensions) for filing the return for the taxable year of the acquiring corporation in which the acquisition date occurs or the date 120 days after the date of the enactment of this Act [Nov. 10, 1989]. Such an election, once made, shall be irrevocable."

PART VI—TREATMENT OF CERTAIN CORPORATE INTERESTS AS STOCK OR INDEBTEDNESS

Sec. 385. Treatment of certain interests in corporations as stock or indebtedness.

AMENDMENTS

1969—Pub. L. 91-172, title IV, §415(a), Dec. 30, 1969, 83 Stat. 613, added part heading and analysis of sections.

§ 385. Treatment of certain interests in corporations as stock or indebtedness

(a) Authority to prescribe regulations

The Secretary is authorized to prescribe such regulations as may be necessary or appropriate to determine whether an interest in a corporation is to be treated for purposes of this title as stock or indebtedness (or as in part stock and in part indebtedness).

(b) Factors

The regulations prescribed under this section shall set forth factors which are to be taken into account in determining with respect to a particular factual situation whether a debtor-creditor relationship exists or a corporation-shareholder relationship exists. The factors so set forth in the regulations may include among other factors:

(1) whether there is a written unconditional promise to pay on demand or on a specified

date a sum certain in money in return for an adequate consideration in money or money's worth, and to pay a fixed rate of interest,

(2) whether there is subordination to or preference over any indebtedness of the corporation,

(3) the ratio of debt to equity of the corporation,

(4) whether there is convertibility into the stock of the corporation, and

(5) the relationship between holdings of stock in the corporation and holdings of the interest in question.

(c) Effect of classification by issuer

(1) In general

The characterization (as of the time of issuance) by the issuer as to whether an interest in a corporation is stock or indebtedness shall be binding on such issuer and on all holders of such interest (but shall not be binding on the Secretary).

(2) Notification of inconsistent treatment

Except as provided in regulations, paragraph (1) shall not apply to any holder of an interest if such holder on his return discloses that he is treating such interest in a manner inconsistent with the characterization referred to in paragraph (1).

(3) Regulations

The Secretary is authorized to require such information as the Secretary determines to be necessary to carry out the provisions of this subsection.

(Added Pub. L. 91-172, title IV, §415(a), Dec. 30, 1969, 83 Stat. 613; amended Pub. L. 94-455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub. L. 101-239, title VII, §7208(a)(1), Dec. 19, 1989, 103 Stat. 2337; Pub. L. 102-486, title XIX, §1936(a), Oct. 24, 1992, 106 Stat. 3032.)

AMENDMENTS

1992—Subsec. (c). Pub. L. 102-486 added subsec. (c).

1989—Subsec. (a). Pub. L. 101-239 inserted "(or as in part stock and in part indebtedness)" before period at end.

1976—Subsec. (a). Pub. L. 94-455 struck out "or his delegate" after "Secretary".

EFFECTIVE DATE OF 1992 AMENDMENT

Pub. L. 102-486, title XIX, §1936(b), Oct. 24, 1992, 106 Stat. 3032, provided that: "The amendment made by subsection (a) [amending this section] shall apply to instruments issued after the date of the enactment of this Act [Oct. 24, 1992]."

REGULATIONS NOT TO BE APPLIED RETROACTIVELY

Pub. L. 101-239, title VII, §7208(a)(2), Dec. 19, 1989, 103 Stat. 2337, provided that: "Any regulations issued pursuant to the authority granted by the amendment made by paragraph (1) [amending this section] shall only apply with respect to instruments issued after the date on which the Secretary of the Treasury or his delegate provides public guidance as to the characterization of such instruments whether by regulation, ruling, or otherwise."

[PART VII—REPEALED]

[§ 386. Repealed. Pub. L. 100-647, title I, § 1006(e)(8)(A), Nov. 10, 1988, 102 Stat. 3401]

Section, added Pub. L. 98-369, div. A, title I, §75(a), July 18, 1984, 98 Stat. 594; amended Pub. L. 99-514, title

XVIII, §1805(c)(1), Oct. 22, 1986, 100 Stat. 2810, related to transfers of partnership and trust interests by corporations.

EFFECTIVE DATE OF REPEAL

Repeal effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99-514, to which such amendment relates, see section 1019(a) of Pub. L. 100-647, set out as an Effective Date of 1988 Amendment note under section 1 of this title.

[§§ 391 to 395. Repealed. Pub. L. 94-455, title XIX, § 1901(a)(55), Oct. 4, 1976, 90 Stat. 1773]

Section 391, acts Aug. 16, 1954, ch. 736, 68A Stat. 131; Sept. 2, 1958, Pub. L. 85-866, title I, §22(a), 72 Stat. 1620, related to effective date of section 301 et seq. of this title.

Section 392, act Aug. 16, 1954, ch. 736, 68A Stat. 131, related to effective date of section 331 et seq. of this title.

Section 393, act Aug. 16, 1954, ch. 736, 68A Stat. 132, related to effective date of section 351 et seq. of this title.

Section 394, act Aug. 16, 1954, ch. 736, 68A Stat. 133, related to effective date of section 381 et seq. of this title.

Section 395, act Aug. 16, 1954, ch. 736, 68A Stat. 133, related to special rules for application of this subchapter.

EFFECTIVE DATE OF REPEAL

Repeal effective for taxable years beginning after Dec. 31, 1976, see section 1901(d) of Pub. L. 94-455, set out as an Effective Date of 1976 Amendment note under section 2 of this title.

Subchapter D—Deferred Compensation, Etc.

Part

- I. Pension, profit-sharing, stock bonus plans, etc.
- II. Certain stock options.
- III. Rules relating to minimum funding standards and benefit limitations.¹

AMENDMENTS

2006—Pub. L. 109-280, title I, §113(a)(2), Aug. 17, 2006, 120 Stat. 852, added item for part III.

1964—Pub. L. 88-272, title II, §221(d)(1), Feb. 26, 1964, 78 Stat. 75, substituted “Certain stock options” for “Miscellaneous provisions” in heading to part II.

PART I—PENSION, PROFIT-SHARING, STOCK BONUS PLANS, ETC.

Subpart

- A. General rule.
- B. Special rules.
- C. Special rules for multiemployer plans.
- D. Treatment of welfare benefit funds.
- E. Treatment of transfers to retiree health accounts.¹

AMENDMENTS

1984—Pub. L. 98-369, div. A, title V, §511(d), July 18, 1984, 98 Stat. 862, added heading for subpart D.

1980—Pub. L. 96-364, title II, §202(b), Sept. 26, 1980, 94 Stat. 1285, added heading for subpart C.

SUBPART A—GENERAL RULE

Sec.

- 401. Qualified pension, profit-sharing, and stock bonus plans.
- 402. Taxability of beneficiary of employees’ trust.
- 402A. Optional treatment of elective deferrals as Roth contributions.

¹ Period editorially supplied.

¹ Editorially supplied. Subpart E of part I added by Pub. L. 101-508 without corresponding amendment of part analysis.

Sec.

- 403. Taxation of employee annuities.
- 404. Deduction for contributions of an employer to an employees’ trust or annuity plan and compensation under a deferred-payment plan.
- 404A. Deduction for certain foreign deferred compensation plans.
- [405. Repealed.]
- 406. Employees of foreign affiliates covered by section 3121(l) agreements.
- 407. Certain employees of domestic subsidiaries engaged in business outside the United States.
- 408. Individual retirement accounts.
- 408A. Roth IRAs.
- 409. Qualifications for tax credit employee stock ownership plans.
- 409A. Inclusion in gross income of deferred compensation under nonqualified deferred compensation plans.

AMENDMENTS

2004—Pub. L. 108-357, title VIII, §885(c), Oct. 22, 2004, 118 Stat. 1640, added item 409A.

2001—Pub. L. 107-16, title VI, §617(e)(2), June 7, 2001, 115 Stat. 106, added item 402A.

1997—Pub. L. 105-34, title III, §302(e), Aug. 5, 1997, 111 Stat. 829, added item 408A.

1986—Pub. L. 99-514, title XVIII, §1899A(70), Oct. 22, 1986, 100 Stat. 2963, substituted “Qualifications” for “Qualification” in item 409.

1984—Pub. L. 98-369, div. A, title IV, §491(d)(54), (e)(10), July 18, 1984, 98 Stat. 852, 853, struck out items 405 and 409, which read “Qualified bond purchase plans” and “Retirement bonds”, respectively, and redesignated item 409A as 409.

1983—Pub. L. 98-21, title III, §321(e)(2)(D)(ii), Apr. 20, 1983, 97 Stat. 120, substituted “Employees of foreign affiliates covered by section 3121(l) agreements” for “Certain employees of foreign subsidiaries” in item 406.

1980—Pub. L. 96-603, §2(d)(1), Dec. 28, 1980, 94 Stat. 3510, added item 404A.

Pub. L. 96-222, title I, §101(a)(7)(L)(v)(VIII), Apr. 1, 1980, 94 Stat. 200, substituted “tax credit employee stock ownership plans” for “ESOPS” in item 409A.

1978—Pub. L. 95-600, title I, §141(f)(8), Nov. 6, 1978, 92 Stat. 2795, added item 409A.

1974—Pub. L. 93-406, title II, §1016(b)(1), Sept. 2, 1974, 88 Stat. 932, inserted heading “Subpart A—General Rule” and added analysis of subparts.

Pub. L. 93-406, title II, §2002(h)(2), Sept. 2, 1974, 88 Stat. 970, added items 408 and 409.

1964—Pub. L. 88-272, title II, §220(c)(1), Feb. 26, 1964, 78 Stat. 62, added items 406 and 407.

1962—Pub. L. 87-792, §5(b), Oct. 10, 1962, 76 Stat. 827, added item 405.

§ 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification

A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

- (1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a)(3)(B) (relating to deduction for contributions to profit-sharing and stock bonus plans), or by a charitable remainder trust pursuant to a qualified gratuitous transfer (as defined in section 664(g)(1)), for the purpose of distributing to such employees or their beneficiaries the cor-