(as defined in section 383(a)(2)) or net capital loss.

(e) Ordering rules for net operating losses, etc.

(1) Carryover rules

If any preacquisition loss may not offset a recognized built-in gain by reason of this section, such gain shall not be taken into account in determining under section 172(b)(2) the amount of such loss which may be carried to other taxable years. A similar rule shall apply in the case of any excess credit or net capital loss limited by reason of subsection (d).

(2) Ordering rule for losses carried from same taxable year

In any case in which—

(A) a preacquisition loss for any taxable year is subject to limitation under subsection (a), and

(B) a net operating loss from such taxable year is not subject to such limitation,

taxable income shall be treated as having been offset 1st by the loss subject to such limitation.

(f) Regulations

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this section, including regulations to ensure that the purposes of this section may not be circumvented through—

(1) the use of any provision of law or regulations (including subchapter K of this chapter), or

(2) contributions of property to a corporation.

(Added Pub. L. 100–203, title X, § 10226(a), Dec. 22, 1987, 101 Stat. 1330–414; amended Pub. L. 100–647, title II, § 2004(m)(1)–(4), Nov. 10, 1988, 102 Stat. 3606, 3607; Pub. L. 101–239, title VII, § 7812(c)(1), Dec. 19, 1989, 103 Stat. 2412.)

AMENDMENTS

1989—Subsec. (e)(1). Pub. L. 101–239 substituted ''built-in gain'' for ''build-in gain''.

1988—Subsec. (a). Pub. L. 100–647, § 2004(m)(1)(A), amended subsec. (a) generally, making changes in substance and structure.

Subsec. (b). Pub. L. 100–647, § 2004(m)(3), substituted ''corporations under common control'' for ''50 percent of gain corporation held'' in heading and amended text generally. Prior to amendment, text read as follows: ''Subsection (a) shall not apply if more than 50 percent of the stock (by vote and value) of the gain corporation was held throughout the 5-year period ending on the acquisition date—

''(1) in any case described in subsection (a)(1), by members of the affiliated group referred to in subsection (a)(1), or

''(2) in any case described in subsection (a)(2), by the acquiring corporation or members of such acquiring corporation's affiliated group.

For purposes of the preceding sentence, stock described in section 1504(a)(4) shall not be taken into account.''

Subsec. (c)(1)(A). Pub. L. 100–647, § 2004(m)(1)(D), substituted ''subsection (a)(1)(B)'' for ''subsection (a)(2)''.

Subsec. (c)(2). Pub. L. 100–647, § 2004(m)(1)(C), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''The term 'acquisition date' means the date on which the gain corporation becomes a member of the affiliated group or, in any case described in subsection (a)(2), the date of the distribution or transfer in the liquidation or reorganization.''

Subsec. (c)(4) to (8). Pub. L. 100–647, § 2004(m)(1)(B), redesignated par. (4) as (8) and added pars. (4) to (7).

Subsecs. (e), (f). Pub. L. 100–647, § 2004(m)(2), (4), substituted ''a corporation'' for ''the gain corporation'' in subsec. (e)(2), redesignated subsec. (e) as (f), and added subsec. (e).

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–239 effective, except as otherwise provided, as if included in the provision of 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

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