FOREIGN TAX II – LAW 509  
Syllabus

COURSE DESCRIPTION AND LEARNING OBJECTIVES:

Foreign Tax II is the second in a series of classes offered by USF’s LLM program focusing on United States taxation of international activities. In this course, you will learn the rules surrounding U.S. taxation of U.S. owned and controlled foreign subsidiaries, special topics pertaining to the foreign tax credit, an overview of the rules governing the pricing of transactions between controlled subsidiaries, select topics in international transactions (e.g., international M&A), general outbound tax planning, an introduction to the OECD’s Base Erosion and Profit Shifting Final Reports and Action Plan, and other relevant international tax legislation that came into effect under the Tax Cuts and Jobs Act of 2017 (TCJA).

REQUIRED COURSE MATERIALS:


Daniel J. Lathrope, Selected Sections, United States International Taxation, 2018 Edition / Foundation Press (Internal Revenue Code & Regulations). Sections of the Internal Revenue Code and regulations should be reviewed as they are discussed in the Text.

HOURS OF WORK PER CLASS:

The American Bar Association standards for accrediting law schools contain a formula for calculating the amount of work that constitutes one credit hour. According to ABA Standard 310(b)(1), “a ‘credit hour’ is an amount of work that reasonably approximates: (1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time.” This is a 2-credit hour online class, meaning that applying the ABA standard to the number of credits offered for this class, you should plan on spending a total of 12 hours per week (4 online and 8 preparing for the modules) on course-related work.
EXAMINATION AND GRADING:

Your grade will be based on a number of factors:

- Final exam – 75% of your grade will be determined by an anonymously graded classroom-based examination. The exam may be checked out between February 25 and February 27, 2019. The exam will take between 2-3 hours.
- Writing Project – 20% of your grade will be based on a writing project. This project will entail a paper not to exceed 15 pages (double-spaced, including footnotes) on a selected topic of the OECD’s Base Erosion and Profit Shifting Final Reports, international tax provisions of the Tax Cuts and Jobs Act of 2017 (TCJA), other current developments in the International Tax landscape, or some combination of the above (details to be discussed in class).
- Zoom-Meeting Class Participation – 5% of your grade will be determined by your attendance and participation in weekly (Tuesday evenings from 6-7pm Pacific Time (first Zoom session on January 15, 2019)) zoom meetings intended to provide supplemental discussion of any technical questions raised by the relevant materials of the weekly Modules.
- Quizzes - Quizzes will be administered for most modules, intended to assess your review and understanding of the subject matter. However, quizzes will not comprise any part of the course grade.

IMPORTANT DATES:

Access to Online Course: Monday, January 7, 2019

Writing project: Due Monday, February 18, 2019 (by 11:59 pm Pacific)

Course ending date: Friday, February 22, 2019

Final exam: May be “checked out” between February 25 and February 27, 2019

OFFICE HOURS:

Office hours can be arranged on an as needed/requested basis.
Study Module 1

Background on reading / problems:

Chapter 6 provides a somewhat detailed introduction to the byzantine world of US anti-deferral rules. Like many of the subjects we will study in this class, the subject matter can be exceedingly dense and challenging. We will spend significant classroom time making sense of these rules.

By the end of this week, you will be able to:

- Navigate the basic subpart F mechanics (e.g., existence of “U.S. shareholders”, what qualifies as a “controlled foreign corporation”, calculation ordering rules, etc.)
- Identify, understand, and analyze the different categories of subpart F income and foreign base company income in particular
- Apply the different types of exceptions and limitations to subpart F income
- Understand the rules concerning global intangible low tax income (“GILTI”)
- Comprehend the big picture policy – why do these rules exist?

Also, note that I have included as part of the assignment a brief document from the Organization for Economic Cooperation and Development (“OECD”). The OECD, sponsored by the G20, is leading a major review of existing international tax rules to limit opportunities for large multinational corporations to “base erode and profit shift”, i.e., the BEPS project. This project, the determinations of which were recently published in a final report, will are leading to fundamental changes to the international tax landscape and so will be a continuing point of discussion for the class. Also, the OECD’s work touches many of the subjects we will study in this class (e.g., anti-deferral (or CFC) rules, transfer pricing, tax planning structures, etc.). As such, it will be helpful (and hopefully interesting) background reading.

Reading:

1) Skim: OECD Background Brief – Base Erosion Profit Shifting (“BEPS”) Project
2) Skim: OECD Executive Summaries BEPS 2015 Final Reports
4) Casebook Supplement: Deferral Principle: 7 – 8, 12 – 14 ¶ 1165f
5) Subpart F regime; Key FBCI categories; calculation mechanics; etc.: Casebook: 494 – 504, 530 – 561; Casebook Supplement: 63 – 68 ¶ 6010 - ¶ 6017, 70 – 72 ¶ 6030 – ¶ 6065, 75 – 77 ¶ 6085, 6165
6) IRS Training Seminars: Please skim the following two documents which provide a helpful and brief summary of some key subpart F issues. The seminars are training tools the IRS uses to help its own auditors understand the anti-deferral rules.
   o Subpart F Overview: http://www.irs.gov/pub/int_practice_units/DPLCUV_2_01.PDF
Study Module #2: Anti-deferral Rules, Cont.

Background on reading:

Continuing with the U.S. anti-deferral provisions, we will take a deep-dive in IRC § 956 (which aims to prevent disguised repatriations without recognition of US tax on repatriated assets) and IRC § 1248 (which originally aimed to prevent taxpayers from “bailing out” foreign earnings at lower than appropriate tax rates). We will also review a number of other related issues (e.g., disclosure framework for international subsidiaries, and some tax policy issues related to subpart F and the digital economy). We will also spend time during class pulling all of Chapter 6 together.

By the end of this week, you will be able to:

- Understand the IRC § 956 definition – when and how is section 956 triggered? Identify and analyze types of "investments in U.S. property” and exceptions.
- Comprehend its relationship to subpart F and previously taxed income; apply section 956 calculation mechanics.
- Consider, understand, and apply the IRC § 960 impact (i.e., deem paid credit implications of an IRC § 956 inclusion)?
- Understand the IRC § 1248 definition – know when and how is IRC § 1248 triggered?
- Know how to calculate section 1248 gain (e.g., what part of gain is subject to dividend recharacterization; what E&P pools are included as “1248 amounts”; etc.)
- Comprehend the big picture policy – why do these rules exist?

Reading:

1) IRC § 956 - Investment in U.S. Property: Casebook: 584 - 590 (through paragraph 6210), 599 – 600; Casebook Supplement: 77 – 78 [¶ 6200 – 6205]
2) Previously taxed income and ordering rules – Casebook: 603 – 605; Casebook Supplement: 79 – 80 [¶ 6240]
3) FTCs - skim: Casebook: 609 - 610 (stop at para 6260)
5) Subpart F & the New Economy: Casebook: 573 - 580
6) Skim: Copyrighted Article Sales – Review Reg. 1.861-18(a) – (c), (f)(1)-(2)
7) Chief Counsel Advice “CCA” 201106007
8) Information Reporting: Casebook: 627-629
Chapter 7  
Foreign Tax Credit – Special Issues

Study Module 3:

Background on reading:
This module is focused on a few special issues related to the foreign tax credit (“FTC”). The items covered in this section presume a basic understanding of the FTC (so dust off those notes from International Tax II).

By the end of this week, you will be able to:

- Understand the modified territorial system introduced under the TCJA through the dividend received deduction and the repeal of the section 902 indirect foreign tax credit
- Refresh your understanding of the basic fundamentals of the FTC system (e.g., separate basketing, determination of US v. foreign source net income, etc.)
- Identify types of income that would fall into each so-called separate limitation category and applicable exceptions
- Understand and analyze the treatment of losses
- Apply the special rules to prevent manipulation of the U.S. sourcing rules

Reading:

2) Transition tax / mandatory repatriation under Section 965: Casebook Supplement: 43 – 45
3) Indirect Credit (Former Section 902): Skim: 367 – 372 [¶ 5135]; Casebook Supplement: 56 – 59 [¶ 5135 – 5254]
4) Skim: Effect of CFC Status on Calculation of U.S. Shareholder FTC: Casebook Supplement: 82 [¶ 6255]
5) Introduction and Separate Baskets: Casebook: 664 – 677
   - Focus on (much simplified) post-2006 general & passive baskets, and FTC limitation mechanics from pages 664-666
   - Skip paragraphs: 7040 - Export-related income; 7050 - Elective simplifying rules
6) Impact of the TCJA on FTC Limitations and Separate Basket Rules: Casebook Supplement: 57 – 59 [¶ 5215 – 5254], 85 – 88 [¶ 7005 - ¶ 7045], Skip ¶ 7025
7) Treatment of Losses: Casebook: 677 - 681 (through first half of page)
   - Skip paragraphs: 7075 - Recapture of foreign losses on sale of CFC stock (page 681); 7150 - Deconsolidation to manipulate FTC limitations (page 693)
8) Impact of the TCJA on Treatment of Losses: Casebook Supplement: 88 – 91 [¶ 7070 - ¶ 7170]
   - Note special interest allocation rule discussed at paragraph 7100 (page 686)
10) Allocation & Apportionment of Expenses: Skim Casebook: 691 (bottom) - 692 (first half); Skim 131 (starting at paragraph 2220) - 136 (through first full paragraph on the page).
11) Preserving U.S.-Sourcing Income: Casebook: 695 (paragraph 7160)
12) Tax Planning Note Under Separate Limitations: Casebook: 697 - 699
13) Skim: Policy Considerations: Casebook: 703 – 709
CHAPTER 8  Transfer Pricing

Study Module 4:

Background on reading:

Transfer pricing deals with the pricing of inter-group transactions, which make-up an increasingly large component of global trade. Suffice it to say, this is probably the most controversial and controversy-laden topic in international tax today. Companies sometimes take aggressive positions when they price their intercompany transactions, resulting in a movement of profits from high-tax locations to lower (or no) tax locations. Given the highly factual and grey nature of these disputes, tax authorities sometimes take equally aggressive opposing positions in their attempt to push profits back into their jurisdiction. The result, not surprisingly, can be huge controversies over the appropriate pricing method, what comparables are used, who the tested party or tested transaction is, and the amount of any adjustment.

By the end of this week, you will be able to:

- Comprehend the broad nature of IRC § 482, and understand when it applies
- Identify and understand the different methods and when one is applied versus another
- Appreciate and assess circumstances in which a contract and/or economic adjustment will be respected
- Know the reporting / documentation requirements
- Understand the provisions of the Base Erosion and Anti-Abuse Tax (“BEAT”) enacted under the TCJA

Reading:

- BEAT: Casebook Supplement: 24 – 27 [¶ 3148], 38 – 39
- Introduction to Transfer Pricing: Casebook: 710 - 749
  - Introduction & basics
    - Note the foundations of US transfer pricing (e.g., the Arm's-Length principle; the Best Method rule; comparability standards).
    - Note penalties and administrative requirements surrounding pricing issues
  - Transfer Pricing of Services
    - Closely review the U.S. Steel decision (including the discussion from the B&L decision).
    - Note the "could have" discussion from that case (page 729, paragraph 3rd paragraph)
    - Consider all of the different intercompany transactions identified
    - Note the real issue - who gets the residual profit associated with production / shipment
  - Transfer Pricing of Sales
    - Closely review the B&L decision
    - Note the court's focus on what the taxpayers did, not what they could have done
    - Note the primary and secondary pricing methodologies utilized by the taxpayer, the method identified by the IRS, the differences & pricing-related implications.
- Transfer pricing of intangibles – introduction: Casebook: 751 – 756
- Casebook Supplement: 92 – 95 [¶ 8040 – ¶ 8150]
CHAPTER 12  International Aspects of Intellectual Property

Study Module 5

Background on reading:

This study module will focus on various issues related to the use of intellectual property (e.g., continued discussion of IP-related TP issues, an overview of different forms of IP, structuring opportunities related to IP (e.g., licensing, sale, etc.))

By the end of this week, you will be able to:

- Understand the foreign-derived intangible income export rules enacted under the TCJA
- Appreciate and understand the different ways IP can be exploited – sale v. license
- Appreciate the broad tax definition of IP - IRC § 936(h)(3)(B)
- Understand the role of IRC § 367(d) - Super royalty provision & denial of ability of taxpayers to transfer intangible property tax-free under normal tax rules
- Understand the basic structure of a cost sharing agreement (i.e., a “CSA”)
- Analyze the sale of copyrights (pay very close attention to the reading in 993-995 dealing with the sale of copyrights – this is a huge issue to many local tech companies).

Reading:

- Introduction: Casebook: 966 – 972, 973 (only the first paragraph in paragraph 12,025), Casebook Supplement: 179 – 182 [¶ 12,000 – ¶ 12,275]
- Skim: Casebook: Brief overview of different types of IP: starting on 973, Paragraphs 12,030; 12,040 (first paragraph); 12,045 (page starting on page 976).
- Sale treatment of IP: Casebook: paragraph 12,050 (only first 2 paragraphs); paragraph 12,090 (pages 993 – 995). Pay close attention to paragraph 12,090 (starting on page 993).
- Skim: Casebook: Deeper dive into IP-related Transfer Pricing issues: 1038 - 1067
  - Cost Sharing Arrangements (“CSA”)
    - Possibly the most high profile tax planning strategies employed by US multinationals
    - Subject of huge debate and controversy
  - Veritas Software Corp. v. C.I.R., 133 T.C. No. 14 (133 T.C. 297)
    - Note the different approaches used by the government and taxpayer to value the appropriate CSA buy-in
    - Why benefit did Veritas get from entering into the cost sharing agreements?
    - Why does the IRS / US government dislike such cost sharing agreements?
CHAPTER 10  International M&A

Study Module 6:

Background on reading:

Chapter 10 covers some of the most complicated subject matter in international taxation. Do your best with the reading. I will do my best to simplify and provide context in class.

By the end of this week, you will be able to:

- Distinguish between and analyze the application and operation of sections 367(a) and 367(d)
- Comprehend the basic application of the branch loss recapture rules
- Analyze and apply the section 367(b) rules and understand the interplay with section 1248

Reading:

- Introduction & Overview of general reorg rules: Casebook: 814 - 823 (stop at paragraph 10,025)
- Outbound transfers of property:
  - IRC 367(a) & Limitations: Casebook: 823 (start at paragraph 10,025) - 833 (through paragraph 10,045), Casebook Supplement: 148 – 150 [¶ 10,025 – ¶ 10,045]
  - IRC 367(d) - Special rule for tax-free transactions involving intangibles:
    - Overview and basic mechanics: Casebook: 849 (starting at paragraph 10,090)-855
  - Skim: Branch loss recapture provisions: Casebook: 855 - 859
    - Focus on the basic gist & don’t get side-tracked with the staggering complexity on pages 858 & 859
- Other international transactions (e.g., IRC 367(b))
  - Introduction / overview: Casebook: 867 (starting at paragraph 10,130) - 872 (1st paragraph)
  - 1248 Deemed Dividends: Casebook: 872 (starting at paragraph 10,135) - 873 (stop at paragraph 10,140)
  - Skim: Other non-outbound liquidations: Casebook: 873 (starting at paragraph 10,140) - 875
Class Writing Assignment – OECD BEPS / TCJA Project

Background:

The Organization for Economic Cooperation & Development (“OECD”) has reviewed / re-written key aspects of the existing international tax system into final reports. As part of the project, the OECD has identified 14 different action plans, as follows:

• ACTION 1 - Address the tax challenges of the digital economy
• ACTION 2 - Neutralise the effects of hybrid mismatch arrangements
• ACTION 3 - Strengthen CFC rules
• ACTION 4 - Limit base erosion via interest deductions and other financial payments
• ACTION 5 - Counter harmful tax practices more effectively, taking into account transparency and substance
• ACTION 6 - Prevent treaty abuse
• ACTION 7 - Prevent the artificial avoidance of PE status
• ACTIONS 8, 9, 10 - Assure that transfer pricing outcomes are in line with value creation
• ACTION 11 - Establish methodologies to collect and analyse data on BEPS and the actions to address it
• ACTION 12 - Require taxpayers to disclose their aggressive tax planning arrangements
• ACTION 13 - Re-examine transfer pricing documentation
• ACTION 14 - Make dispute resolution mechanisms more effective

On 5 October 2015, the OECD published 13 final reports and an explanatory statement outlining consensus actions under the base erosion and profit shifting (BEPS) project. It is now for governments to digest and introduce the necessary legislation. The OECD has also released a number of comprehensive documents that provide important context to the above action plans.

• OECD Executive Summaries BEPS 2015 Final Reports
• Addressing BEPS Report (July, 2012) (background reference to Final Reports)
• BEPS Action Plan (7/19/13) (background reference to Final Reports)

In addition to the OECD’s investigations and reports, a number of investigations / reports related to multinational tax planning have also occurred and/or been published in the U.S. and EU, as follows:

• U.S. – Senate Permanent Subcommittee On Investigations (“PSI”), Report on Offshore Profit Shifting (Apple Case Study)
• U.S. – U.S. Senate PSI, Report on Offshore Profit Shifting (Caterpillar Case Study)
• EU – State Aid Investigations: Apple (Ireland) / Fiat (Luxembourg) / Starbucks (Netherlands)

Separately, the TCJA includes significant changes to long-standing international tax provisions such as moving to a territorial taxation system, repeal of indirect foreign tax credits, and other major anti-base-erosion provisions.
Assignment:

The project will entail each student picking a topic (such as those listed above) which they are interested in and then preparing a paper as noted above. Examples of acceptable paper topics include:

- Analysis of the overall BEPS project – what is it, what are its goals, what are the implications, etc.
- Analysis of a selected action item from the BEPS action plan
- Analysis of a US PSI report (e.g., Apple or Caterpillar)
- Analysis of the EU State Aid Investigations (generally or with respect to a particular investigation)

The paper should provide a detailed overview of the topic, provide necessary background / context to the issues discussed, and discuss real world implications as a result of the report and/or legislative developments.