U.S. Tax Treaties And The NIIT – Does The Tax Treaty Apply?

Defending against legislated double taxation!

John Richardson – January 20, 2025

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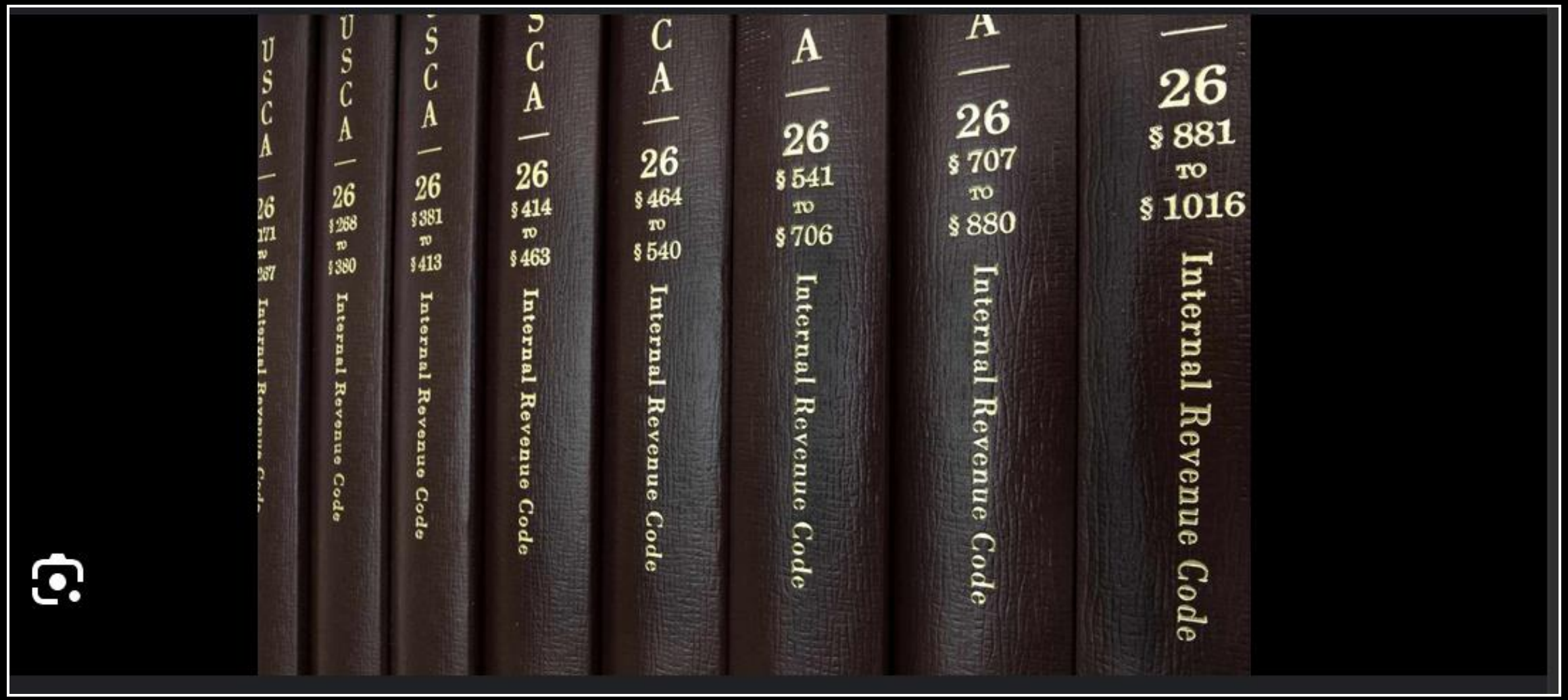

Part A – Looking Solely At The Law Of The USA (How Could The Treaty Possibly Matter?)

Introduction – Legislated Double Taxation On Foreign Source Investment Income

26 U.S. Code Subtitle A - Income Taxes

U.S. Code | Notes

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CHAPTER 1—NORMAL TAXES AND SURTAXES (§§ 1 – 1400Z–2)
CHAPTER 2—TAX ON SELF-EMPLOYMENT INCOME (§§ 1401 – 1403)
CHAPTER 2A—UNEARNED INCOME MEDICARE CONTRIBUTION (§ 1411)
CHAPTER 3—WITHHOLDING OF TAX ON NONRESIDENT ALIENS AND FOREIGN CORPORATIONS (§§ 1441 – 1465)
CHAPTER 4—TAXES TO ENFORCE REPORTING ON CERTAIN FOREIGN ACCOUNTS (§§ 1471 – 1474)
[CHAPTER 5—REPEALED] (§§ 1491 – 1494)
CHAPTER 6—CONSOLIDATED RETURNS (§§ 1501 – 1564)

Why 26 U.S. Code § 27 Denies A Foreign Tax Credit For Taxes Paid on Investment Income

26 U.S. Code § 27 - Taxes of foreign countries and possessions of the United States

The amount of taxes imposed by foreign countries and possessions of the United States shall be allowed as a **credit against the tax imposed by this chapter** to the extent provided in section 901 [1]

https://www.law.cornell.edu/uscode/text/26/27

The FTC is allowed ONLY for taxes imposed by Chapter 1. The NIIT is Chapter 2A!

Part B – What About The Tax Treaty?

Q. Can a tax treaty create a credit for foreign taxes that extends beyond the provisions of the Internal Revenue Code?

A. Judge Blank in Christensen (France Tax Treaty) and Judge Solomson in Bruyea (Canada Tax Treaty) say YES!!

_____-

But they reach this conclusion for different reasons and in different contexts.

The U.S. Model Tax Treaty Double Taxation Clause (In part)

Article 23

RELIEF FROM DOUBLE TAXATION

1. In the case of _____, double taxation will be relieved as follows:

2. In accordance with the provisions and **subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof),** the United States shall allow to a resident or citizen of the United States as a credit against the United States tax on income applicable to residents and citizens:

a) the income tax paid or accrued to _____ by or on behalf of such resident or citizen; and

https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf

The Canada U.S. Tax Treaty (and other tax treaties) contains the same provision …

Article XXIV

Elimination of Double Taxation

1. In the case of the United States, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a citizen or resident of the United States, …

https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/united-states-america-convention-consolidated-1980-1983-1984-1995-1997.html

What does "subject to the limitations of the law of the United States" mean?

At least two possibilities:

1. If the credit would NOT be allowed under the Internal Revenue Code than it cannot be allowed under the tax treaty. Does this really make sense? How does the treaty mean anything?
2. "Subject to the limitations of the law of the United States" means in the procedural or computational sense as described in IRC Section 904.

Judge Solomson ruled (in contrast to Judge Blank in Chrisensen) that …

"Subject to the limitations of the law of the United States" means in a procedural or computational sense.

This means:

- Tax treaties CAN create a foreign tax credit that is independent of and extends beyond what the Internal Revenue Code allows
- The issue of whether a credit is allowed for a foreign tax is determined UNDER THE TAX TREATY and NOT under the Internal Revenue Code!!
- https://citizenshipsolutions.ca/2025/01/20/bonjour-part-3-from-christensen-to-bruyea-boldly-go-where-no-interpretation-of-foreign-tax-credits-for-the-niit-has-gone-before/

The arc of the moral universe is long. But, it bends toward justice!

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