

Rev. Proc. 99-32; 1999-2 C.B. 296;
1999 IRB LEXIS 297, *; 1999-34 I.R.B. 296

Revenue Procedure 99-32

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August 23, 1999

[*1]

APPLICABLE SECTIONS:

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability. (Also, Part I, section 482)

TEXT:

SECTION 1. PURPOSE

Pursuant to section 1.482-1 (g) (3) of the Income Tax Regulations, this revenue procedure prescribes the applicable procedures for the repatriation of cash by a United States taxpayer via an interest-bearing account receivable or payable (the "account") in an amount corresponding to the amount allocated to, or from, such taxpayer under section 482 of the Internal Revenue Code (the "Code") from, or to, a related person with respect to a controlled transaction. Additionally, circumstances are prescribed in which a United States taxpayer may treat an account as offset (the "offset") in whole or part by the amount of a bona fide debt, distribution, or capital contribution between the taxpayer and such related person. Under this revenue procedure; taxpayers whose taxable income has been adjusted under section 482 of the Code are generally permitted to make certain adjustments to conform their accounts to reflect the section 482 allocation. The conditions for treatment under this revenue procedure are set forth in section 3, [*2] the adjustments to be made or allowed are described in section 4 (for Internal Revenue Service as well as taxpayer-initiated adjustments), and the prescribed procedures are set forth in section 5.

SEC. 2. BACKGROUND AND SCOPE

Section 482 of the Code gives the Internal Revenue Service authority to "distribute, apportion or allocate gross income, deductions, credits, or allowances" among certain related organizations, trades or

businesses if it "determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income" of any such entity. Absent a United States taxpayer's election of treatment under this revenue procedure, an adjustment under section 482 (the "primary adjustment") entails secondary adjustments to conform the taxpayer's accounts to reflect the primary adjustment. These secondary adjustments may result in adverse tax consequences to the taxpayer. For example, an allocation of income under section 482 from a foreign parent corporation to its domestic subsidiary corporation would entail a deemed, distribution from the domestic subsidiary to its foreign parent in an amount equal to the primary adjustment [*3] in the year for which the allocation is made. The deemed distribution would be treated as dividend income to the foreign parent to the extent of the earnings and profits of the domestic subsidiary, as recomputed after taking into account the primary adjustment. Under section 881 of the Code, the foreign parent would be subject to a 30-percent tax liability (as reduced by any applicable income tax treaty), and under section 1442 of the Code, the domestic subsidiary would be a withholding agent required to withhold the tax. See Rev. Rul. 82-80, 1982-1 C.B. 89; Treas. Reg. § 1.1441-2 (e) (2). This revenue procedure allows the United States taxpayer to repatriate the cash attributable to a primary adjustment via an account without the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment.

Additionally, section 1.482-1 (a) (3) of the Income Tax Regulations permits a controlled taxpayer to report an arm's length result for controlled transactions based upon prices different from those actually charged. If the adjustment results in an increase in taxable income, the increased income may be reported by the taxpayer at any time. If [*4] the adjustment results in a decrease in taxable income (after appropriate accounting for section 1059A of the Code), the arm's length result may be reported on a timely filed return (including extensions). A United States taxpayer can avail itself of the treatment provided by this revenue procedure to mitigate the Federal income tax consequences of the secondary adjustments that would otherwise result from the taxpayer's "self-initiated" primary adjustment. In the case of a taxpayer-initiated adjustment, a United States taxpayer may, in accordance with section 4.02 of this revenue procedure, use an offset in combination with an account to effectuate the repatriation of the cash attributable to the primary adjustment without the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment. The United States taxpayer is bound by its election of treatment under the revenue procedure. The taxpayer-initiated adjustment for the treatment provided under the revenue procedure will be subject to review and adjustment, and to possible imposition of the section 6662 (e) or (h) penalty, by the Service upon examination.

This revenue procedure [*5] applies in situations where an adjustment is made under section 482 of the Code, as well as to Service-initiated adjustments made under sections 61 or 162 of the Code, provided the adjustment could have been made under section 482 of the Code. All references in this revenue procedure to section 482 of the Code will be deemed to include sections 61 and 162 of the Code, except when the context or express language indicates or provides otherwise.

Any reference in this revenue procedure to an increase or decrease in, or an adjustment of, taxable

income shall also be deemed a reference, in an appropriate case, to a reduction or increase in, or an adjustment of, a taxpayer's loss.

Any reference in this revenue procedure to the Service shall be deemed a reference to the office within the Service that has jurisdiction over the Federal income tax return filed for the taxable year for which the primary adjustment is made.

For purposes of this revenue procedure, a "United States taxpayer" is a domestic corporation, or a foreign corporation that is, or is treated as, engaged in trade or business within the United States.

For purposes of this revenue procedure, an increase or decrease, or an adjustment [*6] of, the taxable income of a United States taxpayer that is a domestic corporation pursuant to section 482 of the Code shall be deemed to include an allocation of an amount to, or from, a related person (being a corporation as defined in section 7701 (a) (3) of the Code), from, or to, a foreign corporation that is a controlled foreign corporation within the meaning of section 957 of the Code solely by reason of ownership of such foreign corporation's stock by such domestic corporation (or any member of the affiliated group within the meaning of section 1504 (a) of the Code in which such domestic corporation is included) with respect to a controlled transaction. In the latter circumstances, the parties to any account established under section 4.01 shall be such controlled foreign corporation and such related person, and for purposes of section 4.01 (2) the requirement to accrue and include, or deduct, interest in, or from, taxable income shall mean accounting for such interest for all Federal income tax purposes that may affect the determination of the taxable income or tax liability of such domestic corporation, including, for example, the computation of earnings and profits, subpart [*7] F income, and the foreign tax credit provided under section 901 of the Code.

Treatment under this revenue procedure shall not be denied solely by reason of the fact a corporation under State law is in existence for the purpose of winding up its affairs, where such corporation, subsequent to its liquidation, was a corporation from, or to, which an amount was allocated pursuant to section 482 of the Code.

SEC. 3. CONDITIONS FOR TREATMENT UNDER THIS REVENUE PROCEDURE

A United States taxpayer described in section 5 shall qualify for the treatment provided in this revenue procedure only if it satisfies the conditions described in this section 3.

.01 A United States taxpayer described in section 5.01 shall qualify for the treatment provided in this revenue procedure if the taxable income of such United States taxpayer is adjusted by the Internal Revenue Service under section 482 and no penalty under section 6662 (e) (1) (B) or (h) of the Code on account of such primary adjustment is asserted and, if challenged, finally sustained. In the case of an adjustment under section 61 or 162, this condition will be deemed to be satisfied if no penalty could have been sustained under section 6662 (e) (1) (B) [*8] or (h) on account of the adjustment that could have been made under section 482.

.02 A United States taxpayer described in section 5.02 shall qualify for the treatment provided in this revenue procedure, provided that the taxpayer shall be bound by its election of such treatment.

.03 A United States taxpayer shall not qualify under sections 3.01 or 3.02 for the treatment provided in this revenue procedure if any part of any underpayment of tax by such taxpayer for the taxable year involved in the section 482 allocation is due to fraud.

SEC. 4. ADJUSTMENTS TO BE MADE OR ALLOWED

.01 Account, interest, currency, and payment. If a United States taxpayer qualifying under section 3 complies with the requirements of section 5, such taxpayer (or any member of the affiliated group within the meaning of section 1504 (a) of the Code in which such taxpayer is included) shall be permitted to establish an interest-bearing account receivable from, or payable to, the related person (being a corporation as defined in section 7701 (a) (3) of the Code) from, or to, whom the section 482 allocation is made with respect to a controlled transaction in an amount equal to the primary adjustment for each of the years [*9] in which an allocation is made. The account may be established and paid in accordance with this revenue procedure without the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment. The account shall:

(1)

be deemed to have been created as of the last day of the taxpayer's taxable year for which the primary adjustment is made;

(2)

bear interest at an arm's length rate, computed in the manner provided in section 1.482-2 (a) (2) of the regulations, from the day after the date the account is deemed to have been created to the date of payment. For purposes of section 1.482-2 (a) (2) (iii), where applicable, the account shall be considered to be a loan or advance having a term extending from the day after the date the account is deemed to have been created through the expiration of the 90-day period required in section 5. The interest so computed shall be accrued and included by the obligee in taxable income for each taxable year during which the account is deemed outstanding, regardless of whether the obligee uses the cash receipts and disbursements method of accounting or the accrual method of accounting. The interest so computed [*10] shall be accrued and deducted (subject to applicable limitations) by the obligor from taxable income for each taxable year during which the account is deemed outstanding;

(3)

be expressed, both as to principal and interest, in the functional currency of a qualified business unit, as defined in section 1.989 (a)-1 of the regulations, through which the controlled transaction was carried out, if the residence of such qualified business unit, as defined in section 988 (a) (3) (B) (ii), is the United States. If the residence of both of the qualified business units through which the controlled transaction was carried out is the United States, then the account shall be expressed, both as to principal and interest, in the functional currency of such U.S. resident qualified business unit of the obligee. If the residence of both of the qualified business units through which the controlled transaction was carried out is a country other than the United States, then the account shall be expressed, both as to principal and interest, in the functional currency of such non-U.S. resident qualified business unit of the corporation that is a domestic corporation, or if both corporations are domestic corporations, [*11] or neither corporation is a domestic corporation, then in the functional currency of such non-U.S. resident qualified business unit of the obligee;

(4)

be paid within the 90-day period required in section 5, or treated as prepaid by offset prior to that time as provided in section 4.02. Payment within the 90-day period must be in the form of money, a written debt obligation payable at a fixed date and bearing interest at an arm's length rate determined in the manner provided in section 1.482-2 (a) (2) of the regulations, or an accounting entry offsetting such account against an existing bona fide debt between the United States taxpayer (or member of its affiliated group) and the related person. Any such payment within the 90-day period, and any such prepayment prior to that time pursuant to section 4.02, shall be treated as a payment of the account for all Federal income tax purposes, regardless of its characterization under foreign law. For example, to the extent that an account is offset pursuant to section 4.02, by a distribution that would otherwise have constituted a dividend, such distribution shall cease to qualify as a dividend under section 316 of the Code or as a dividend for [*12] any Federal income tax purpose; for instance, no foreign tax shall be deemed to have been paid with respect thereto under section 902 of the Code for the purpose of the credit allowed under section 901 of the Code and no dividend received deduction shall be allowed with respect thereto under sections 241 through 247 of the Code. An amount includible in income under section 551 or 951 of the Code shall not be considered a distribution for purposes of this paragraph or section 4.02.

A foreign tax credit shall be allowed for any foreign withholding tax with respect to the repayment of the principal or interest of the account to the extent and subject to the limitations provided under section 901 of the Code. See Treas. Reg. §§ 1.901-2 (e) (5) and 1.904-6 (a) (1) (iv).

.02 Offset. All or part of the interest and principal of an account may be treated as prepaid prior to the

beginning of the 90-day period required in section 5 to the extent of an accounting entry offsetting such account against a bona fide debt between the United States taxpayer (or member of its affiliated group) and the related person, or to the extent of any distribution of property or contribution to capital between such [*13] parties, where the offsetting entry, the distribution, or the capital contribution occurs during the taxable year in which occurs the execution of the closing agreement on behalf of the Commissioner (in a case under section 5.01), or during the taxable year in which occurs the date on which the United States taxpayer files the return reporting the primary adjustment (in a case under section 5.02), or during the taxable year for which the section 482 allocation is made (in a case under section 5.02, but subject to the provisions stated in the next two sentences). For purposes of this revenue procedure, any offset of the account by reason of such a bona fide debt, distribution, or capital contribution during the taxable year for which the section 482 allocation is made shall be treated as a prepayment of the account made as of the beginning of the day after the date the account is deemed to have been created. No untimely or amended returns will be permitted to claim offset treatment by reason of such a bona fide debt, distribution, or capital contribution during the taxable year for which the section 482 allocation is made.

.03 Primary adjustment not affected. A United States taxpayer's [*14] election to avail itself of the provisions of this revenue procedure shall in no way affect the primary adjustment under section 482 of the Code. Such election shall, however, affect the taxpayer's taxable income and credits to the extent indicated by section 4.01 and eliminate the collateral effects of secondary adjustments, such as those described in section 2.

SEC. 5. PROCEDURES TO BE FOLLOWED

.01 Cases pending with the Internal Revenue Service.

(1) If a United States taxpayer whose taxable income has been adjusted by the Internal Revenue Service pursuant to section 482 of the Code desires to avail itself of the treatment provided in section 4, it must file a request in writing with the Service before closing action is taken on the primary adjustment. For purposes of this revenue procedure, the first occurring of the following shall constitute "closing action":

(a)

Execution and acceptance of Form 870-AD, Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment, or execution of a closing agreement relative to the section 482 allocation;

(b)

Stipulation of a section 482 allocation in the Tax Court of the United States;

(c)

Expiration [* 15] of the statute of limitations on assessments for the year to which the allocation applies;

(d)

Final determination of tax liability for the year to which the allocation relates by offer-in-compromise, closing agreement, or court action.

(2) The request shall be signed by a person having the authority to sign the United States taxpayer's Federal income tax returns, and shall contain the following:

(a)

A statement that the taxpayer desires the treatment provided by section 4 of this revenue procedure and the years for which the treatment is requested;

(b)

A description of the arrangements or transactions, or the terms thereof, which gave rise to the primary adjustment;

(c)

An offer to enter into a closing agreement under section 7121 of the Code as provided in section 5.01 (4).

(3) The Service will determine whether the United States taxpayer qualifies for the requested treatment and inform the taxpayer of its decision.

(4) If the Service concludes that section 4 of this revenue procedure properly applies, and if the amount of the primary adjustment has been agreed upon, the United States taxpayer will be requested to enter into a closing agreement under section 7121 of the Code, establishing for [*16] each year involved:

(a)

The amount of the primary adjustment;

(b)

The amount and currency of, and parties to, the account which the taxpayer elects to establish under section 4.01;

(c)

The amount of the interest on the account includible in income, or deductible, pursuant to section 4.01;

(d)

The amount of any foreign tax credit that the taxpayer will claim under section 901 of the Code with respect to payment of the principal or interest on an account established pursuant to section 4.01;

(e)

The manner of payment of the account pursuant to sections 4.01 and 4.02 and the taxpayer's right to receive or make such payment free of the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment, provided the payment of the balance of the account, after taking into consideration any prepayment pursuant to section 4.02 is made within 90 days after execution of the closing agreement on behalf of the Commissioner.

.02 Cases of a United States taxpayer reporting an adjustment pursuant to section 1.482-1 (a) (3) of the regulations. If a United States taxpayer that has increased or decreased its taxable income pursuant to section 482 and section 1.482-1 (a) (3) of the regulations [*17] desires to avail itself of the treatment

provided in section 4, it must file a statement with its Federal income tax return reporting the primary adjustment:

(1)

A statement that the taxpayer desires the treatment provided by section 4 of this revenue procedure for the years indicated and acknowledges that it is bound by its election of such treatment;

(2)

A description of the arrangements or transactions, or the terms thereof, which gave rise to the primary adjustment;

(3)

The amount of the primary adjustment;

(4)

The amount and nature of any correlative allocation to each related person from, or to, whom the section 482 allocation is made with respect to a controlled transaction, and the corresponding account and treatment thereof by each such related person that is consistent with the treatment applied under this revenue procedure;

(5)

The amount and currency of, and parties to, the account which the taxpayer elects to establish under section 4.01;

(6)

The amount of interest on the account includible in income, or deductible, pursuant to section 4.01 and the years of such inclusion or deduction;

(7)

The amount of any foreign tax credit that the taxpayer will claim under section 901 of the Code [*18] with respect to payment of the principal or interest on an account established pursuant to section 4.01;

(8)

The manner of payment of the account pursuant to sections 4.01 and 4.02, which shall be free of the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment, provided the payment of the balance of the account, after taking into consideration any prepayment pursuant to section 4.02, is made within 90 days of the date on which the taxpayer files the return reporting the primary adjustment, and a statement that any such payment within the 90-day period, and any such prepayment prior to that time, shall be treated as a payment of the account for all Federal income tax purposes, regardless of its characterization under foreign law.

.03 Cases pending before the Tax Court of the United States. If a case reaches trial status in the Tax Court and it is determined that the United States taxpayer is entitled to the treatment provided in section 4, the parties may stipulate or otherwise arrange with the Court so that any adjustment in tax for the years before the Court will reflect the application of section 4, provided the taxpayer [*19] executes the required closing agreement.

.04 Cases within the jurisdiction of the Department of Justice. If a United States taxpayer files with the Service a request for treatment under section 4, with respect to a case within the jurisdiction of the Department of Justice, the Service, through its Chief Counsel, will recommend to the Department of Justice the action to be taken with respect to the taxpayer's request.

SEC. 6. EFFECTIVE DATE

.01 In general. This revenue procedure is effective for taxable years beginning after August 23, 1999.

.02 Election for taxable year including August 23, 1999. A United States taxpayer may elect to apply all of the provisions of this revenue procedure on its U.S. income tax return for its taxable year including August 23, 1999.

.03 Taxpayer-initiated adjustments for taxable years prior to the taxable year including August 23, 1999. A United States taxpayer that increased or decreased its taxable income pursuant to section 482 and section 1.482-1 (a) (3) for a taxable year prior to the taxable year including August 23, 1999, shall be permitted to apply the principles of Rev. Proc. 65-17, 1965-1 C.B. 833, and its progeny, in accordance with any reasonable interpretation [*20] thereof for purposes of conforming accounts to reflect the taxpayer-initiated primary adjustment. The Service considers an interpretation that applies the final revised revenue procedure published in this document or its general principles to be such a reasonable

interpretation of Rev. Proc. 65-17.

SEC. 7. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 65-17, 1965-1 C.B. 833, as amended by Rev. Proc. 65-17 (Amend. I), 1966-2 C.B. 1211 and Rev. Proc. 65-17 (Amend. II), 1974-1 C.B. 411, is superseded. Rev. Proc. 65-31, 1965-2 C.B. 1024, Rev. Proc. 70-23, 1970-2 C.B. 505, Rev. Proc. 71-35, 1971-2 C.B. 573, Rev. Proc. 72-22, 1972-1 C.B. 747, Rev. Proc. 72-46, 1972-2 C.B. 827, Rev. Proc. 72-48, 1972-2 C.B. 829, Rev. Proc. 72-53, 1972-2 C.B. 833 and Rev. Rul. 82-80, 1982-1 C.B. 89, are superseded. The references to Rev. Proc. 65-17 in Rev. Proc. 68-16, 1968-1 C.B. 770, Rev. Proc. 89-8, 1989-1 C.B. 778, Rev. Proc. 96-13, 1996-1 C.B. 616, Rev. Proc. 96-14, 1996-1 C.B. 626, and Rev. Proc. 96-53, 1996-2 C.B. 375, shall be treated as references to this revenue procedure.

SEC. 8. DRAFTING INFORMATION

The principal author of this Revenue Procedure is J. Peter Luedtke of the Office of the Associate Chief Counsel [*21] (International). For further information on this revenue procedure, contact J. Peter Luedtke at 202-874-1490 (not a toll-free call) or write to CC:INTL:Br6, Room 3319, 950 L'Enfant Plaza South, SW, Washington, DC 20024.

SEC. 9. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1657.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in section 5. This information is required to determine whether a United States taxpayer that has made a primary adjustment under section 482 of the Code will be permitted to make certain adjustments to conform their accounts to reflect the section 482 allocation. The collections of information are required for a United States taxpayer to obtain the Commissioner's permission to repatriate the cash attributable to a primary adjustment via an account without the Federal income [*22] tax consequences of the secondary adjustments that would otherwise result from the primary adjustment. The likely respondents are businesses or other for-profit institutions.

The estimated total annual reporting and/or recordkeeping burden is 1,620 hours.

The estimated annual burden per respondent/recordkeeper varies from 8 hours to 10 hours depending on individual circumstances, with an estimated average of 9 hours. The estimated number of

respondents and/or recordkeepers is 180.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

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