Department of the Treasury | Internal Revenue Service | Office of Chief Counsel **Notice**

CC-2003-010

March 14, 2003

Subject: Change in Litigating Position UIL#482.02-00

Cancel Date: Until Incorporation into the CCDM

Purpose

The purpose of this notice is to announce a change in the Service's litigating position concerning the application of section 482 to certain aspects of "lease strips" or other "stripping transactions" described in Notice 95-53, 1995-2 C.B. 334.

Discussion

Section 482 provides, in part:

> In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations.

Control is defined to include any kind of control, direct or indirect, whether legally enforceable or not, and however exercisable or exercised, including control resulting from the actions of two or more taxpayers acting in concert or with a common goal or purpose. Treas. Reg. § 1.482-1(i)(4). It is the reality of control that is decisive, not its form or the mode of its exercise. Id.; *Ach v. Commissioner*, 42 T.C. 114 (1964), *aff'd*, 358 F.2d 342 (6th Cir.), *cert. denied*, 385 U.S. 899 (1966). A presumption of control arises if income or deductions have been arbitrarily shifted. Treas. Reg. § 1.482-1(i)(4).

Based upon this definition of control, the Service announced in Notice 95-53 that it would apply section 482 to reallocate gross income, deductions, credits, or allowances among parties to lease-stripping transactions as appropriate. The Notice did not specify, however, the manner or the particular step of the transactions to which section 482 would be applied. Pursuant to the

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Notice, the Service has taken the position in specific cases that parties to lease-stripping transactions were commonly controlled within the meaning of section 1.482-1(i)(4) solely on the basis that the parties acted in concert pursuant to a common plan to shift income and deductions arbitrarily.

After careful consideration, the Service will no longer argue that section 482 applies to treat parties to a lease-stripping transaction as commonly controlled (within the meaning of section 1.482-1(i)(4)) at the time income is stripped from the lease solely on the basis that the parties acted pursuant to a common plan to shift income and deductions arbitrarily between or among themselves. The issue under section 482 is whether an allocation between or among organizations, trades, or businesses owned or controlled by the same interests is necessary to prevent the evasion of taxes or clearly to reflect the income of any of such organizations, trades or businesses. Therefore, the reference in section 1.482-1(i)(4) to "control resulting from the actions of two or more taxpayers acting in concert or with a common goal or purpose "operates to bring within the application of section 482 situations in which two or more taxpayers act in concert to control another organization, trade or business with a common goal or purpose to arbitrarily shift income or deductions between one or more of such taxpayers and the controlled organization, trade or business**.**

The most classic example of this situation is three equal and otherwise unrelated shareholders in a corporation that, acting in concert, individually purchase from or sell items to the corporation at prices that differ from those that would be charged by unrelated parties in similar circumstances. Even though none of the shareholders individually has actual or effective control of the corporation, where the shareholders act in concert with a common goal of shifting income or deductions from or to the corporation, section 1.482-1(i)(4) provides that the control necessary for the application of section 482 exists. *See, e.g.,* B. Forman Co., Inc. v. Commissioner, 453 F.2d 1144 (2d Cir. 1972), *cert. denied*, 407 U.S. 934, *rehearing denied*, 409 U.S. 899 (1972), *aff'g*, in part, and *rev'g*, in part, 54 T.C. 912 (1970); South Texas Rice Warehouse Co. v. Commissioner, 366 F.2d 890 (5th Cir. 1966), *aff'g*, 43 T.C. 540 (1965), *cert. denied*, 386 U.S. 1016 (1967).

By contrast, the fact that unrelated parties engage in a transaction does not by itself evidence the type of control necessary to satisfy the "acting in concert or with a common goal or purpose" requirement of section 1.482-1(i)(4), regardless of whether such transaction may be viewed as having arbitrarily shifted income between the otherwise unrelated parties. A broader interpretation of section 1.482-1(i)(4) would be inconsistent with the policies underlying section 482, which provides for allocations between or among organizations, trades or businesses "owned or controlled directly or indirectly by the same interests."

Any questions concerning the foregoing may be directed to Sheila Ramaswamy of the Office of Associate Chief Counsel (International) at (202) 622-3870.

/s/
B. JOHN WILLIAMS
Chief Counsel