

## Part III

### Administrative, Procedural, and Miscellaneous

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.

(Also: Part I, §§ 482; 1.482-1A, 1.482-1T, 1.482-1.)

Rev. Proc. 2005-46

#### SECTION 1. PURPOSE

This revenue procedure prescribes the procedure to be followed with respect to the claiming of any setoffs (hereinafter “§ 482 setoffs”) to adjustments proposed by the Commissioner pursuant to § 482 of the Internal Revenue Code (“Code”). Rev. Proc. 70-8, modified.

#### SECTION 2. BACKGROUND

.01 Section 1.482-1(g)(4)(i) of the Income Tax Regulations (T.D. 8552, 1994-2 C.B. 93, 125) provides in part:

If an allocation is made under section 482 with respect to a transaction between controlled taxpayers, the district director will also take into account the effect of any other non-arm's length transaction between the same controlled taxpayers in the same taxable year which will result in a setoff against the original section 482 allocation. Such setoff, however, will be taken into account only if the requirements of § 1.482-1(g)(4)(ii)

are satisfied.

.02 Section 1.482-1(g)(4)(ii) of the regulations further provides:

The district director will take a setoff into account only if the taxpayer—

(A) Establishes that the transaction that is the basis of the setoff was not at arm's length and the amount of the appropriate arm's length charge;

(B) Documents, pursuant to paragraph (g)(2) of this section, all correlative adjustments resulting from the proposed setoff; and

(C) Notifies the district director of the basis of any claimed setoff within 30 days after the earlier of the date of a letter by which the district director transmits an examination report notifying the taxpayer of proposed adjustments or the date of the issuance of the notice of deficiency.

The relevant duties of the district director referred to in the regulations are now exercised by the director of field operations. For purposes of this revenue procedure, references to the Commissioner shall be to the director of field operations or other applicable delegate.

.03 The requirement that a taxpayer notify the Commissioner of the basis of any § 482 setoff is separate and distinct from the requirements that the taxpayer must:

(1) Establish that the transaction that is the basis of the setoff was not at arm's length;

(2) Establish the amount of the appropriate arm's length charge; and

(3) Document all correlative adjustments resulting from the § 482 setoff.

The notification requirement requires that the non-arm's length transactions upon which the amount of the appropriate arm's length charge is based be sufficiently identified in the notification to the Commissioner so as to constitute a reasonable foundation for the claimed § 482 setoff and to permit verification by the Commissioner. The listed requirements involve the proving of the § 482 setoff. Taxpayers must establish or

document the requirements described in this section with reasonable specificity.

.04 The taxpayer must notify the Commissioner of the basis of any claimed § 482 setoff within 30 days after the earlier of the date of a letter by which the Commissioner transmits an examination report notifying the taxpayer of proposed adjustments (“30-day letter”) or the date of the issuance of the notice of deficiency. Ordinarily, the taxpayer will be able to notify the Commissioner of the basis of any claimed § 482 setoff during the course of an examination, prior to the time the Commissioner transmits a 30-day letter. In unusual circumstances, this may not be so. However, orderly administration of the Code necessitates a reasonable cutoff point for claiming any § 482 setoffs. The timing provision concerning the notification accommodates both considerations. Accordingly, where a taxpayer does not file a protest to the 30-day letter, the notification must be filed within 30 days after the date of the 30-day letter, unless an extension has been granted by the Commissioner. The request for an extension must be filed before the 30-day period expires. Where the taxpayer files a timely protest, a notification that accompanies the protest will be considered timely. In all events, the notification must be filed no later than within 30 days after the date of the issuance of a notice of deficiency with respect to the adjustments pursuant to § 482.

The provisions of § 7502 of the Code apply as to timeliness of any mailed notification.

.05 To meet the burden of proof concerning any claimed § 482 setoff it will be necessary for the taxpayer to furnish certain detailed information as specified in § 1.482-1(g)(4)(ii) of the regulations and § 2.03 of this revenue procedure. Early submission of such information, when possible, will be to the advantage of both the taxpayer and the

Commissioner. Normally, the information should be submitted concurrently with the notification. The question concerning the appropriateness of granting additional time in this regard lies entirely within the administrative discretion of the Commissioner.

### SECTION 3. OTHER PROCEDURES RELATING TO § 482 SETOFF CLAIMS

.01 The notification to the Commissioner of a § 482 setoff required under § 1.482-1(g)(4)(ii) of the regulations must be a separate written statement.

.02 The notification must sufficiently identify the non-arm's length transaction(s) upon which the claimed § 482 setoff is based so as to constitute a reasonable foundation for the claimed § 482 setoff and permit verification by the Commissioner. Under § 1.482-1(g)(4)(i) of the regulations, the non-arm's length transaction(s) must be between the same controlled taxpayers and in the same taxable year as involved in the transaction that is the subject of the adjustment pursuant to § 482 against which the § 482 setoff is claimed.

.03 The notification must also contain:

(1) The taxpayer's name, address, and U.S. employer identification number or Social Security number;

(2) The date and symbols on the 30-day letter or notice of deficiency specified in § 1.482-1(g)(4)(ii)(C) of the regulations and § 2.04 of this revenue procedure; and

(3) The taxable year(s) involved.

.04 The taxpayer must include with the notification a signed declaration under penalties of perjury that the statements made in the notification, and all evidence submitted, are true, correct, and complete to the best of the taxpayer's knowledge and

belief.

.05 If a duly authorized representative prepares or files the notification, instead of the declaration required by § 3.04 of this revenue procedure, the representative may substitute a declaration stating that the representative:

(1) Prepared the notification and accompanying documents, and

(2) Knows personally that the statements contained therein and all evidence submitted are true, correct, and complete to the best of the representative's knowledge and belief.

.06 An incomplete or improper notification will not extend the period within which the Commissioner is to be notified. Therefore, the taxpayer must be careful to include sufficient information in its notification and, if possible, to submit the notification in sufficient time to permit correction of any deficiencies within the prescribed limitation period. Thus, as indicated in § 2.04 of this revenue procedure, when possible, the notification should be submitted during the examination prior to the issuance of the 30-day letter.

.07 When appropriate, a previously submitted notification may be incorporated by reference into a protest filed by the taxpayer.

.08 To expedite the examination, information necessary to establish the claimed § 482 setoff must be submitted in accordance with § 2.05 of this revenue procedure.

.09 The taxpayer must make available to the Commissioner such information as the Commissioner may require to examine the transactions relied on by the taxpayer. In this connection, the taxpayer must execute such consents extending the statute of

limitations as the Commissioner, in the exercise of the Commissioner's administrative discretion, determines to be necessary to enable an examination of the transactions claimed by the taxpayer as § 482 setoffs. If the taxpayer declines to execute such consents, the Commissioner may reject the claimed § 482 setoffs.

#### SECTION 4. EFFECTIVE DATE

.01 This revenue procedure is effective for taxable years beginning on or after July 25, 2005.

.02 Taxpayers may elect to apply this revenue procedure for any open taxable year beginning after October 6, 1994, but before July 25, 2005. Such election shall be effective for the taxable year of the election and all subsequent open taxable years.

.03 Although this revenue procedure is generally effective for taxable years as stated in §§ 4.01 and 4.02 of this revenue procedure, § 1.482-1(g)(4) of the regulations is generally effective for taxable years beginning after October 6, 1994 (or for earlier open taxable years pursuant to an election under § 1.482-1(j)(2) of the regulations), and § 1.482-1T(d)(5) of the temporary Income Tax Regulations (T.D. 8460, 1993-1 C.B. 90, 110) is generally effective for taxable years beginning after April 21, 1993, but before October 7, 1994 (if no election pursuant to § 1.482-1(j)(2) of the regulations is applicable). For the taxable years beginning after April 21, 1993, to which this revenue procedure is not otherwise applicable pursuant to §§ 4.01 and 4.02 of this revenue procedure, taxpayers must apply § 1.482-1(g)(4) of the regulations and § 1.482-1T(d)(5) of the temporary regulations in a reasonable manner consistent with those regulations. The Commissioner considers an application of the provisions of this revenue procedure

to be a reasonable manner of compliance with such regulations.

.04 For taxable years beginning prior to April 22, 1993, where no election pursuant to § 1.482-1(j)(2) of the regulations is applicable, Rev. Proc. 70-8, 1970-1 C.B. 434, prescribes the procedure to be followed with respect to the claiming of any § 482 setoffs pursuant to § 1.482-1A(d)(3) of the Income Tax Regulations (T.D. 6952, 1968-1 C.B. 218, 220).

#### SECTION 5. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 70-8 is modified.

#### SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is Carol B. Tan of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure, contact Ms. Tan at (202) 435-5265 (not a toll-free call).