

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **201751014**

Release Date: 12/22/2017

CC:INTL:B06:CJBello
POSTF-122080-16

Third Party Communication: None
Date of Communication: Not Applicable

UICL: 482.02-00, 482.09-00

date: August 17, 2017

to:

Division Counsel, Large Business & International

from: Christopher J. Bello
Branch Chief, CC:INTL:6
Associate Chief Counsel (International)

subject:

This Chief Counsel Advice responds to your request for assistance dated November 13, 2015. This advice may not be used or cited as precedent.

LEGEND

Taxpayer =
Affiliate1 =
Affiliate2 =

[REDACTED]

Individual1 =
Individual2 =

[REDACTED]

State1 =
State2 =

[REDACTED]

Taxable Year1 =
Taxable Year2 =
Taxable Year3 =
Calendar Year1 =

Calendar Year2 =
 Month1 =
 [REDACTED]
 Month3 =
 Date1 =
 Date2 =
 [REDACTED]
 Date4 =
 [REDACTED]
 Period1 =
 Period2 =
 Amount1 =
 Amount2 =
 Amount3 =
 [REDACTED]
 =

=

ISSUES

1. Whether the [REDACTED] provided by Taxpayer in this fact pattern are controlled transactions for purposes of section 482.
2. If a transfer pricing adjustment is made, whether Exam should [REDACTED] to determine the amount of the adjustment.

CONCLUSIONS

1. The [REDACTED] provided by Taxpayer are controlled transactions for purposes of section 482. However, even though the [REDACTED] are controlled transactions, an adjustment to the pricing of the [REDACTED] is not appropriate in this [REDACTED] fact pattern because the [REDACTED] paid for Taxpayer's [REDACTED] are arm's length prices.
2. Because the [REDACTED] are arm's length prices, we need not address the second issue.

FACTS

Taxpayer is a State1 corporation headquartered in State2. During Taxable Year1, Taxable Year2, and Taxable Year3, Taxpayer was owned by

. We refer collectively to

I. History

Taxpayer was formed in Calendar Year1 several . Prior to that year,¹

. During that time, Affiliate1 provided

pursuant to The were provided

amount that exceeded . At that time, Affiliate1 charged an

In Month1

Taxpayer was to perform the

, Taxpayer would assume

functions stated the following regarding the transfer of to Taxpayer:

¹ For simplicity, we use the term

provided the following terms² regarding the

In Calendar Year1, the
a between Taxpayer and

A as amended and supplemented over time, memorialized
provides: . Section of the

A.

B.

²

C.

provides: . Section of the

Taxpayer claims that

In Calendar Year2,

II. Current Operations

Currently,

Taxpayer claims that a relatively small proportion of the
. Taxpayer also claims that, to the extent that one of the

. In those cases, the
. Such

payments are not

III. Corporate Management

As contemplated in the

During the taxable years at issue, Individual2 served as

. For example, the most recently amended
as was

Generally, the

The current provides a catch-all clause that states: “

.” It is the

IV.

Since its inception, Taxpayer has provided Taxpayer

. The most recent was signed by Taxpayer and
on Date1.

Pursuant to the , Taxpayer is also

For

purposes of the

Taxpayer's methodology for calculating

Taxpayer advertises its
item that

on its website as the

See " " (last visited on June 29, 2017).

V. Compensation of Taxpayer Employees

Taxpayer compensates non-officer employees predominantly with

Taxpayer's executive compensation program comprises the following elements:

Awards under the plans are based

VI. Tax Reporting

Taxpayer is taxed as a C corporation and files a consolidated federal income tax return (Form 1120) with its domestic subsidiaries. Each of

During the taxable years at issue, Taxpayer reported income from the equal to the

³

While Taxpayer pays

. For example, Affiliate2 is

³ Contemporaneous with our consideration of your request for advice and our development of this memorandum, the National Office (with primary jurisdiction residing in

VII. [REDACTED]

[REDACTED]

4

[REDACTED]

[REDACTED]

5

[REDACTED]

6

[REDACTED]

4

5

6

[REDACTED]

[REDACTED]

At the opening conference for the Audit in Month3, Taxpayer's representatives stated that,

[REDACTED]

LAW AND ANALYSIS

I. Issue 1

A. Section 482 in general

Section 482 provides, in relevant part:

In any case of two or more organizations, trades, or businesses . . . owned or controlled directly or indirectly by the same interests, the Secretary may

[REDACTED]

[REDACTED]

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, trades, or businesses.

Thus, before the Service has authority to apply section 482, the following requirements must be met: (1) there must be two or more organizations, trades, or businesses (collectively “entities”); (2) such entities must be commonly owned or controlled by the same interests; and (3) an adjustment must be necessary to prevent tax avoidance⁸ or clearly to reflect income.

B. Common Ownership or Control

Here, Taxpayer and clearly satisfy the requirement of two or more entities.⁹ The next question is whether those entities are commonly owned or controlled. The statute and the regulations express the common ownership or control requirement as a disjunctive rule. See I.R.C. § 482 (“owned or controlled”); Treas. Reg. § 1.482-1(i)(5) and (6) (“owns or controls” and “owned or controlled,” respectively); see also Austin Inv. Fund, LLC v. U.S., 2015 U.S. Dist. LEXIS 156312, *11 (“The statute does not require both ownership and control; it requires only one or the other. Sunshine Dep’t Stores, Inc. v. C.I.R., T.C. Memo 1981-586, 42 T.C.M. (CCH) 1379 (T.C. 1981) aff’d sub nom. Sunshine Dep’t Stores, Inc., v. Internal Revenue Serv., 705 F.2d 470 (11th Cir. 1983) (‘[T]he relevant language of section 482 is phrased in the disjunctive: either common ownership or control, directly or indirectly, will suffice.’”). Because, in this fact pattern, Taxpayer and the

, the common ownership requirement is not satisfied

⁸ See Foster v. Commissioner, 80 T.C. 34, 157-158 (1983), aff’d in relevant part, 756 F.2d 1430 (9th Cir. 1985), cert. denied, 474 U.S. 1055 (1986) (for purposes of section 482, evasion of taxes means tax avoidance).

That does not, however, preclude the possibility of common control. Treas. Reg. § 1.482-1(i)(4) provides:

Controlled includes 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. It is the reality of the control that is decisive, not its form or the mode of its exercise. A presumption of control arises if income or deductions have been arbitrarily shifted. (Emphasis in original.)

We agree with you [REDACTED] that the fact that

[REDACTED] supports a finding of common control in this case. See, e.g., Charles Town, Inc. v. Commissioner, 372 F.2d 415, 419-420 (4th Cir. 1966) (standing for the proposition that management control of an entity, absent a meaningful ownership interest, can satisfy the common control requirement); compare with Treas. Reg. § 1.482-1A(b)(1) (1968) (providing in relevant part: “The interests controlling a group of controlled taxpayers are assumed to have complete power to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the taxable income from the property and business of each of the controlled taxpayers.”) and Commissioner v. First Security Bank of Utah, N.A. et al., 405 U.S. 394, 404-405 (1972) (interpreting the “complete power” language of the 1968 regulation: “The regulation, as applied to the facts in this case, contemplates that Holding Company – the controlling interest – must have ‘complete power’ to shift income among its subsidiaries. It is only where this power exists, and has been exercised in such a way that the ‘true taxable income’ of a subsidiary has been understated, that the Commissioner is authorized to reallocate under § 482.”). The current regulation does not contain the “complete power” language of the 1968 regulation.

Thus, unlike the control concept set forth in the 1968 regulation (as interpreted by the United States Supreme Court) which was premised, among other things, on the ability of the controlling interests to influence transfer prices, the control concept set forth in the current regulation requires only that the controlling interests control the taxpayers (and not that they exercise control to affect the transfer prices between the taxpayers). With those rules in mind, the control requirement has been met. The remaining question, then, is whether an adjustment is necessary to prevent tax avoidance or clearly to reflect income.

**C. Even Though Common Ownership or Control is Present, the
are, Nonetheless, Arm’s Length Prices and Clearly
Reflect Income**

Even though common ownership or control is present in this case, an adjustment under section 482 would not be warranted because the third threshold requirement under that provision – that an adjustment is necessary to prevent tax avoidance or

clearly to reflect income – has not been met. To the contrary, the evidence leads us to conclude that in this fact pattern, the in question are arm’s length prices.

Based on the information provided to us, Taxpayer’s assertion we agree with

Moreover, the purchase of

for the the () are compensation provided by Taxpayer to

We also note that Taxpayer’s

Stated differently, based on the information that we have been provided it appears to us that, amounts charged by Taxpayer to

pricing ensure that the will be arm's length.

Finally, we note that section 482 is not intended to . If Exam were to increase the under section 482,

10

Accordingly, we conclude that even though the are controlled transactions, the are arm's length prices

11

II. Issue 2

Because the charged for the are arm's length, we need not address the second issue.

10

11

Please call the branch at (202) 317-6939 if you have any further questions.

Christopher J. Bello
Chief, Branch 6
(International)