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Internal Revenue Code section 483, authorizing the Commissioner to impute or create interest on deferred payments where none was specified, encompasses a wide spectrum of commercial transactions. Analyzing the diverse areas of contracts in which additional interest income can potentially be imputed, the author attempts to alert the practitioner to some of the adverse tax consequences that may result if the section is invoked. The latter portion of the article treats the tax rules affecting allocations of income between related taxpayers. These rules were enacted to prevent the evasion of taxes and the failure to clearly reflect income. Mr. Glaser discusses the Proposed Regulations which provide guidelines to the taxpayer for the proper planning of transactions so as to avoid undesired allocations.

I. UNSTATED INTEREST

PRIOR TO THE Revenue Act of 1964,[1] there was no Internal Revenue Code provision authorizing the imputation of unstated interest on deferred payments arising from the sale of property.[2] The Commissioner of Internal Revenue had attempted to obtain this result through litigation, but the intention of the seller and the buyer was usually held to be determinative.[3] The enactment of Code section 483 concerning the creation or imputation[4] of interest on certain deferred payments was viewed

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1 78 Stat. 19.

2 The Revenue Act of 1964, § 224(a), 78 Stat. 77 amended the INT. REV. CODE OF 1954 [hereinafter cited as CODE] by adding § 483.

3 Smith-Bridgman & Co., 16 T.C. 287 (1951), *acq.*, 1951-1 CUM. BULL. 3 was a case in which the Commissioner attempted to "create" income. It was a CODE § 482 (allocation of income between related taxpayers) case in which the court found that the Commissioner was attempting to create or attribute income where none in fact existed. Although the Commissioner acquiesced in 1951, he has recently indicated that the acquiescence only applied to the proposition that "appropriate adjustments are to be made to the incomes of both members of the group affected to reflect the section 482 allocation." Technical Information Release No. 838, Aug. 2, 1966, 7 CCH STAND. FED. TAX REP. ¶ 6681. In cases involving nonrelated taxpayers, the courts have consistently refused to find interest where it was not stated unless it was clear from the agreement between the parties to the contract that they contemplated a payment in the nature of interest. Kingsford Co., 41 T.C. 646 (1964), *acq.*, 1964-2 CUM. BULL. 6

with alarm by some[5] and resulted in the publication of numerous comments[6] even including the recommendation that section 483 be repealed as were sections 452 and 462 of the 1954 Code.[7] This article will review neither the provisions of the Code nor the Regulations which were adopted on January 24, 1966, for an understanding of the mechanical operation of the section can more readily be gained from an examination of the Code section and the Regulations themselves.[8]

In many cases section 483 merely substitutes its rules in place of negotiations which the parties previously conducted to allocate the tax consequences of the transaction.[9] This is true in situations

and cases cited therein. For a case in which the Tax Court found that interest was contemplated by the parties, see Estate of Betty Berry, 43 T.C. 723 (1965).

4 CODE § 483. Generally, imputed income is considered to be derived from the utilization of property owned by the taxpayer and from services rendered by the taxpayer to himself and family. It would be difficult to obtain a consensus on the precise meaning of the term, but the following appears appropriate: "a flow of satisfactions from durable goods owned and used by the taxpayer, or from goods and services arising out of the personal exertions of the taxpayer on his own behalf." Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514 (1943). For a discussion relating imputed income to "unlabeled income," as the author describes it, but more appropriately "unstated income" under § 483, see Sneed, *Unlabeled Income and Section 483*, 17 U. SO. CAL. 1965 TAX INST. 643 (1965). Section 483 does not constitute statutory recognition of imputed income in spite of its title. A comparison of the problems involved clearly illustrates this. The term "imputed" has been bandied about frequently in recent years and, from the standpoint of its traditional usage in taxation, often misused. See Shlifke, *Taxing as Income the Receipt of Interest-Free Loans*, 33 U. CHI. L. REV. 346 (1966). Such looseness could lay the groundwork for recognition of the imputation of income.

5 Murdoch, *Imputed Interest*, 42 TAXES 844 (1964).

6 Branda, *Imputed Interest and Fictitious Sales Prices: The Unexpected Effects of Section 483*, 21 J. TAXATION 194 (1964); Clark, *1964 Act: Imputed Interest Rules Have Unexpected Effects in Non-Related Areas*, 20 J. TAXATION 288 (1964); Clark & Kasdle, *Proposed Imputed Interest Regulations: A Critique of the Non-Routine Areas*, 23 J. TAXATION 66 (1965); Cohen, *Imputed Interest in the Sale of a Business*, N.Y.U. 23D INST. ON FED. TAX 487 (1965); Crestol, *Final Regs on Imputed Interest Call for Revised Tax Planning in Many Areas*, 25 J. TAXATION 2 (1966); Frome, *"Caveat Vendor: Interest Is Imputed by the Revenue Act of 1964*, 31 BROOKLYN L. REV. 297 (1965); Gurko, *Unstated Interest Under the Revenue Act of 1964*, 33 GEO. WASH. L. REV. 660 (1965); Hoffman, *"Interest" in Deferred Payments Under the Revenue Act of 1964*, N.Y.U. 23D INST. ON FED. TAX 921 (1965); Murdoch, *supra* note 5; Sneed, *supra* note 4.

7 Murdoch, supra note 5, at 853.

8 The effect of § 483 is generally that a portion of the gain on the deferred payment sale of property under a contract which makes no provision for interest or provides for an unrealistically low rate of interest must be treated as interest for all tax purposes. The broad effect of this needs no elaboration.

9 The Treasury felt that this amounted to a manipulation and distortion of the tax law. The Secretary of the Treasury's statement submitted to the House Ways & Means Committee on February 6, 1963, and the Congressional Committee reports indicate that these practices permit the taxpayer to obtain different tax treatment as the result of form controlling substance. S. MISC. REP. NO. 830, 88th Cong., 2d Sess. 102 (1964); H.R. MISC. REP. NO. 749, 88th Cong., 1st Sess. 72 (1963).

where an increase in the seller's tax liability is roughly equal to and accompanied by a decrease in the buyer's tax liability.[10] There are, however, repercussions which might not be apparent, and an attempt will be made herein to touch upon some of these areas so as to alert the practitioner to the possible disastrous consequences if section 483 is invoked because of either no contract provision for interest or because of a provision calling for what the Treasury considers an unreasonably low interest rate.

From a standpoint of a shift in taxation from capital gains rates to ordinary income rates, the provisions of section 483 are not too significant unless substantial sums or long periods of time are involved. Assuming that a taxpayer's income brings him within the 60% tax bracket, the tax increment on the deferred payment in the first year would be 1.3% above the normal 25% capital gains tax.[11] After five years the increase would be 5.8%, bringing the total tax paid to 30.8% of the payment as opposed to 25% under straight capital gains treatment. The above figures assume that section 483 does not apply because the contract calls for simple interest at the rate of 4% per annum. If the deferred payment contract does fall within the provisions of section 483, the result is somewhat more severe, as the Code provides that unstated interest will be computed at 5% compounded semiannually.

It is apparent, however, that the longer the term during which the payments are made, the greater the tax impact. Using the same assumptions made above, it is found that after 10 years the total tax would be 34.9% as opposed to 25%; after 16 years the tax would be 38.6% as opposed to 25%; after 20 years the tax would be 40.6% as opposed to 25%; and after 30 years it would be 44.1% as opposed to 25% of the payment. It is noted that, at 25 years, 50% of the payment would be taxed at capital gains rates and 50% would be taxed at ordinary income rates.

It is also interesting to note that section 483 distributes the

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10 This is clearly shown by the fact that the anticipated increase in tax revenue resulting from the enactment of the section is negligible. S. MISC. REP. NO. 830, 88th Cong., 2d Sess. 104 (1964); H.R. MISC. REP. NO. 749, 88th Cong., 1st Sess. 74 (1963).

11 The law provides for discounting on the basis of six-month brackets, CODE § 483(b). The Regulations contain present value tables for determining "unstated interest" and "total unstated interest." Treas. Reg. § 1.483-1(g). In referring to these tables, it is found that the present value of a payment deferred for between nine and fifteen months is .96154. This means that if interest is provided for a payment due between nine and fifteen months from the date of the contract at a rate of 3.846% there will be no unstated interest. Applying the tax rates to these figures, it is found that 24% of the payment will be paid to the government as a capital gain (.96154 x 25%) and 2.3% of the payment will be paid as an ordinary income tax (3.846 x 60%).

unstated interest equally over the payments made pursuant to the contract. This is an unrealistic approach, since the interest payable during the first year would generally be substantially higher than the interest payable during the last year of a term of years because there would be more principal outstanding during the first year. The taxpayers can decide during negotiation whether the interest deduction to the seller and interest income to the buyer should be greater in the first year, decreasing over the term of the contract, or be equally spread over the term. In reaching this decision, it should be noted that the minimum amount of stated interest, 4% simple interest per annum, is somewhat less than the unstated rate of 5% compounded semiannually.[12]

Where the object of the deferred payment sale is a nondepreciable asset such as goodwill, the seller may be able to negotiate for a higher selling price as a result of section 483. Where sales of nondepreciable property are made for payments over a long period of time, the interest factor will be significant as will be the possible benefit which the buyer could receive from interest deductions of amounts which would be charged to basis in the absence of section 483. Where the property is nondepreciable, the increased interest deduction is not offset by reduced depreciation deductions.

With foregoing thoughts in mind, an attempt will now be made to point out several areas in which the unwary taxpayer can find unpleasant results if section 483 is not carefully considered prior to the execution of a deferred payment contract.

A. *Sale of a Section 1231 Asset*

Assume that a manufacturer-seller purchased machinery in 1962 for $100,000 and sells it in 1966 for $95,000. The basis of the property at the time of the sale is $80,000. Assuming that the sale calls for deferred payments and that it falls under section 483, it would appear that the consequences to the seller are readily determinable. At first blush, one might think that the unstated interest

[12] A cash-basis taxpayer would normally pay decreasing amounts of interest as a result of the typical practice of paying interest regularly on the unpaid balance of the principal sum. Under the accrual method, the taxpayer would presumably treat the situation in the same manner as he would when interest is stated, because the accrual method requires a determination of the proper interest applicable to each period. The contracting parties have substantial freedom in this area and may even lump all of the stated interest in one payment. Secretary of the Treasury's statement submitted to the House Ways & Means Committee on February 6, 1963. S. MISC. REP. NO. 830, 88th Cong., 2d Sess. 102 (1964); H.R. MISC. REP. NO. 749, 88th Cong., 1st Sess. 72 (1963).

provisions are not applicable to the seller, as he will obtain ordinary income on the sale due to the Code provisions for the recapture of post-1961 depreciation at ordinary income rates.[13] Close examination indicates, however, that section 483 would probably be applicable, and the consequences to the seller could include not only the creation of interest but also an unforeseen, adverse effect on the scheduling of gains or losses.

Good tax planning might dictate the realization of losses from the sale of a section 1231 asset, resulting in an ordinary deduction, in a year during which there are no section 1231 gains. The effect of such planning would be the reduction of ordinary income rather than capital gains from sales of section 1231 property.

As indicated above, the taxpayer could be lulled into the belief that section 483 will not apply to the transaction. Yet further inquiry reveals that the tax tretment of the seller will be determined under section 483. The congressional history concerning the exemption indicates that the sale or exchange need not result in a gain and that the question of whether any gain would be recognized; or whether sections 1245 or 1250 of the Code would apply, is not important.[14] Once it is determined that section 483 is applicable, total unstated interest must be computed, and it is assumed that this computation results in a figure of $22,000. This means that the seller will receive ordinary income in the amount of $22,000 over the period of the contract and that the amount realized from the sale will be deemed to be $78,000. Since the tax basis for the property is $80,000, the seller will have a $2,000 loss from the sale of a section 1231 asset in the year of sale. The impact of such an unexpected loss could be substantial, depending upon the circumstances in which the taxpayer finds himself.

B. *Section 453, Installment Sales*

Section 453 of the Code allows a taxpayer to delay reporting his profit from a sale under a contract providing for future payments if the installment method is elected. It is provided, however, that the installment method may only be elected if less than thirty percent of the selling price is received in the year of sale and the

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[13] CODE § 483(f)(3).

[14] This is made relatively clear by the House Committee Report, H.R. REP. NO. 749, 88th Cong., 1st Sess. 87 (1963), which states "The determination of whether this exception applies is made without regard to whether, in fact, the sale or exchange results in a gain or whether the gain (if any) would be recognized, or whether section 1245 or section 1250 of the code applies to some or all of the gain (if any)."

sale is of realty or is a casual sale of personal property. Section 483 compels a recomputation of the results of the sale and could result in its disqualification insofar as the installment method of reporting the income is concerned.

Assume a selling price of $8,500 under a contract which is subject to section 483. The contract provides for a down payment of $2,500. On its face, the sale would qualify as an installment sale because thirty percent of the sale price equals $2,550. However, assume that the sale price as adjusted pursuant to section 483 is $7,940.12. Thirty percent of this figure is $2,382.04, which means that the down payment of $2,500 would disqualify the transaction from treatment under the installment method, with obvious consequences to the taxpayer.

C. *Additional Problem Areas*

The tentacles of section 483 stretch into numerous unsuspected areas of Title 26 of the United States Code. There is disaster lurking around almost every turn in the Code if section 483 reaches out and encircles the transaction. The following list is not all-inclusive, but it will serve to indicate a few of the diverse areas of the Code where the determination that additional interest income exists could have undesired effects: (1) The amount of the investment credit under section 38;[15] (2) Eligibility for the Subchapter S election under section 1372(e)(5); (3) Qualification as a small business corporation under section 1244(c)(1)(E), providing for ordinary loss on certain stocks; (4) Existence of Subpart F income of a controlled foreign corporation under section 954(c)(1); (5) Status as a personal holding company under section 543(a)(1); (6) Disqualification of stock options under section 422; (7) Additional stock problems under sections 302 and 368; and (8) Qualification as a Western Hemisphere Trading Corporation under section 921.

While section 483 has certain limitations,[16] it does cover a wide spectrum of commercial life whenever certain deferred payments are provided, applying "in the case of any contract for the sale or exchange of property."[17] It is noted, however, that the

[15] Pub. L. No. 800, 89th Cong., 2d Sess. (Nov. 8, 1966), Investment Credit and Accelerated Depreciation suspension Act, has suspended the investment credit.

[16] CODE § 483(f).

[17] CODE § 483(a). Little solace can be found in the fact that the transaction must be a "contract" or a "sale or exchange." The legislative and judicial history of "sale or exchange" is extensive and needs no comment here.

provisions of the section generally do not become onerous until a substantial number of years have passed or unless a substantial amount of money is involved.

The section does limit the bargaining between the seller who is attempting to trade overall return for capital gain and the buyer who is attempting to trade interest deduction for reduced overall cost, but the taxpayer is given some leeway in the timing of the interest deduction and inclusion in gross income. The main safety valve provided in the Code is the provision concerning a minimum rate of interest whereby the Commissioner is given the authority to set the rates of interest to be used in computing total unstated interest and in determining whether or not section 483 is applicable to a particular contract. Under the present regulations, the contract is safe if a rate of four percent simple interest is provided. The taxpayer who considers each transaction involving deferred payments in light of the provisions of section 483 should be able to turn them to his advantage in many cases.

II. ALLOCATIONS AMONG RELATED TAXPAYERS

In the last six years, the Internal Revenue Service has focused special attention upon section 482 of the 1954 Revenue Code.[18] This attention has been the result of problems discovered by the service during audits over the years as well as by a great expansion of United States business abroad during the late 1950's and early 1960's which led to an attempt to include provisions in the 1962 Revenue Act which were intended to give the Commissioner additional authority in the area of allocations between related taxpayers. The Congress turned down[19] the provisions with the statement that the authority which the Commissioner was seeking already existed in Code section 482.[20]

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[18] Section 482 had its origin in the Revenue Act of 1921, ch. 136, § 240(d), 42 Stat. 260. It was intended to prevent the evasion of tax by shifts of income and deductions among controlled parties and was directed particularly to foreign subsidiaries which were being used to milk the parent corporation. S. REP. NO. 275, 67th Cong., 1st Sess. 20 (1921). As originally enacted, the section authorized the Commissioner to consolidate accounts of related trades or businesses in order to make an accurate distribution or apportionment of gains, profits, income deductions, or capital.

[19] Congress has enacted other provisions in this general area, examples of which are: CODE §§ 269, 951, 1551, 1561, 6038.

[20] The Treasury Department felt that § 482 was inadequate to protect the revenues. The Conference Committee, H.R. REP. NO. 2508, 87th Cong., 2d Sess. 18-19 (1962), deleted the amendment with the following statement:

> The conferees on the part of both the House and the Senate believe that the objectives of section 6 of the bill as passed by the House can be accom-

The Commissioner took this statement as authority and direction to propose extensive regulations which were allegedly necessitated by the above-mentioned audits showing certain abuses and by requests from taxpayers to provide as much guidance as possible in controversial areas.[21] The Proposed Regulations attempt to set out "safe haven" rules for planning, where it is possible to do so, and where this cannot be done, to cut down the area of dispute as much as possible. In August of 1966, the Commissioner took the following actions: (1) Made a statement of policy;[22] (2) Interpreted certain cases;[23] (3) Expanded the Proposed Regulations issued on April 1, 1965;[24] and (4) Amended Revenue Procedures 64-54 and 65-17.[25]

A. *Purpose of Section 482*

Section 482 of the Code has a two-fold purpose: first, "to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer;"[26] and, second, to prevent evasion of tax by shifts of income or deductions among controlled parties.[27] The Commissioner is authorized to make a distribution, apportionment, or allocation of gross income, deductions, credits, or allowances between or among two or more organizations, trades, or businesses which are owned

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plished by amendment of the regulations under present section 482. Section 482 already contains broad authority to the Secretary of the Treasury or his delegate to allocate income and deductions. It is believed that the Treasury should explore the possibility of developing and promulgating regulations under this authority which would provide additional guidelines and formulas for the allocation of income and deductions in cases involving foreign income.

21 Since the new Proposed Regulations took effect on August 2, 1966, Arthur J. Rothkopf, Associate Tax Legislative Counsel for International Tax Affairs, United States Treasury Department, has given several talks concerning the Proposed Regulations and the motivating forces which prompted the Treasury to issue them in their present form. Mr. Rothkopf has published an article in 44 TAXES 727 (1966), expressing at least his views concerning the Treasury's thinking along these lines.

22 Treasury Department Release, Aug. 2, 1966, 7 CCH STAND. FED. TAX REP. ¶ 6685.

23 Technical Information Release No. 838, Aug. 2, 1966, 7 CCH STAND. FED. TAX REP. ¶ 6682; Technical Information Release No. 839, Aug. 2, 1966, 7 CCH STAND. FED. TAX REP. ¶ 6683.

24 Proposed Treas. Reg. §§ 1.482-1(d), 1.482-2, 1.861-8, 31 Fed. Reg. 10394-406 (1966), replacing Proposed Treas. Reg. §§ 1.482-1, 1.482-2, 30 Fed. Reg. 4256-59 (1965).

25 Rev. Proc. 66-33, 1966 INT. REV. BULL. NO. 34, at 21, extending Rev. Proc. 64-54, 1964-2 CUM. BULL. 1008, and 1966 INT. REV. BULL. NO. 34, amending Rev. Proc. 65-17, 1965-1 CUM. BULL. 833.

26 Treas. Reg. § 1.482-1(b)(1) (1962) [hereinafter cited as Reg.].

27 S. REP. NO. 275, 67th Cong., 1st Sess. 20 (1921).

or controlled directly or indirectly[28] by the same interests and where such action is necessary to prevent evasion of taxes or to clearly reflect income.[29]

As indicated above, the Internal Revenue Service feels that additional rules are necessary in this area to prevent the evasion of taxes or the failure to clearly reflect income. The Commissioner can allocate when his action will cure either of these two evils, and regardless of the taxpayer's reservations[30] concerning the new regulations, it appears that they are here to stay. The Regulation's reissuance on August 2, 1966, introduced some changes, but the principal substantive areas of the April 1, 1965, Proposed Regulations remain.[31] The new issuance is, of course, not final, and additional changes can still be made, but the reissuance in substantially the same form indicates that there will be little change between what is now published and what will ultimately become a part of the regulations. The taxpayer is therefore confronted with the need for compliance.[32]

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[28] Reg. § 1.482-1(a)(3) indicates that any kind of control, direct or indirect, legally enforceable or not, and however exercised or exercisable, is sufficient for purposes of § 482. The courts have agreed. Isse Koch & Co., 1 B.T.A. 624 (1925) is not a § 482 case but contains a discussion of control where legal control does not exist. The following are some § 482 cases which discuss the control problems: South Tex. Rice Warehouse Co., 43 T.C. 914, *aff'd*, 366 F.2d 890 (5th Cir. 1966); Jesse E. Hall, 32 T.C. 390 (1959), *aff'd*, 294 F.2d 82 (5th Cir. 1961); Grenada Indus., Inc., 17 T.C. 231 (1951), *acq.*, 1952-2 CUM. BULL. 2, *aff'd*, 202 F.2d 873 (5th Cir), *cert. denied*, 346 U.S. 819 (1953). This broad definition of control would seem to include a situation where a husband owns one corporation and his wife owns another, under the assumption that the natural family relationship existed. The wife will generally control everything, although at least one case required more evidence of ownership. A. G. Nelson Paper Co., 3 P-H Tax Ct. Mem. 1003 (1944).

[29] For discussions of the case law under § 482, see Hewitt, *Section 482 — Allocation of Income and Deductions Among Related Taxpayers*, N.Y.U. 20TH INST. ON FED. TAX 463 (1962); Plumb & Kapp, *Reallocation of Income and Deductions Under § 482*, 41 TAXES 809 (1963).

[30] See, *e.g.*, Cohen, *Section 482: Treasury's Efforts To Teach an Old Dog Some New Tricks*, 43 TAXES 835 (1965); Hilinski, *New 482 Regs Decrease Latitude of Agents, but Still Place Heavy Burden on Business*, 23 J. TAXATION 102 (1965); Jenks, *The "Creation of Income" Doctrine: A Comment on the Proposed Section 482 Regulations*, 43 TAXES 486 (1965); Miller, *Proposals for Amelioration of Section 482 Allocations Affecting U. S. Taxpayers With Foreign Affiliates*, 44 TAXES 209 (1966); Pergament, *New 482 Regs Provide Arm's Length Rules, Flexibility in Pricing of Tangible Property*, 25 J. TAXATION 238 (1966); Waris, *What's New in Section 482?*, 43 TAXES 614 (1965).

[31] For citations to the Regs. to § 482, see note 24 *supra*.

[32] To overturn a determination by the Commissioner requires a showing of abuse of discretion. The courts are giving great weight to the fact that the Commissioner has been granted considerable discretion by § 482. Spicer Theatre, Inc. v. Commissioner, 346 F.2d 704 (6th Cir. 1965); Pauline W. Ach, 42 T.C. 114 (1964), *aff'd*, 358 F.2d 342 (6th Cir. 1966). The Commissioner does take several positions in the Proposed Regulations which might not survive litigation. An example is the stand taken by the

The Proposed Regulations and amendments to regulations which were published in the Federal Register on August 2, 1966, set forth an additional definition to Treasury Regulation section 1.482-1.[33] "Method of allocation" is described in considerable detail, and the method to be used by the District Director in allocating, apportioning, or distributing among related taxpayers is prescribed.[34] The method is to be determined with reference to the particular transactions or arrangements which result in the avoidance of taxes or the failure to clearly reflect income.[35]

Proposed Regulations section 1.482-2 goes into detail concerning specific situations including the involvement of loans or advances, the performance of services for another, the use of tangible property, the transfer or use of intangible property, and the sale of tangible property.[36] An understanding of the Proposed Regulations requires, of course, a detailed examination, and a mere restatement of their provisions at this point would serve little purpose. Therefore, an attempt will be made to take one of the areas, the sale of tangible property, and relate it to the case law in this area so as to illustrate the complexity of the problem involved.

B. *Taxpayer Guidelines*

One of the purposes of issuing the Proposed Regulations was, according to the Commissioner,[37] to serve as guidelines to taxpayers who seek to resolve questions and plan their transactions in such a manner as to prevent a distribution, apportionment, or allocation. The taxpayer would, of course, like to arrange his affairs to prevent even an attempt by the Commissioner to allocate, distribute, or apportion, and the following discussion will set forth some of these guidelines as developed by the Commissioner in the Proposed Regulations and by the courts over the years.

The complete defense to an attempted allocation by the Commissioner involving sales of tangible property is a showing that the sales were made at arm's length.[38] The Proposed Regulations

Commissioner on the "creation of income," Proposed Treas. Reg. § 1.482-1(d)(4), 31 Fed. Reg. 10394 (1966). An interesting situation exists in the refusal of Congress to enact laws giving the Commissioner authority which has been refused him by the courts while, on the other hand, stating that he already has that authority.

33 Proposed Treas. Reg. § 1.482-1(d), 31 Fed. Reg. 10394 (1966).

34 *Ibid.*

35 *Ibid.*

36 Proposed Treas. Reg. § 1.482-1(d), 31 Fed. Reg. 10395 (1966).

37 Proposed Treas. Reg. § 1.482-1(d), 31 Fed. Reg. 10394 (1966).

38 The fact that a sale of tangible property is at "fair market value" protects the

specifically provide that transactions at arm's length are not to be the subject of action by the Commissioner, and the cases, as well as Revenue Rulings[39] published prior to the Proposed Regulations, also so hold. A recent attempt to impose a test other than the arm's length test was rejected in *Oil Base, Inc. v. Commissioner*,[40] where the taxpayer argued that the test was what income would be properly attributable to each of the two controlled taxpayers as true net income in light of what each performed or produced.[41] There was something with which to make a comparison in this case, as the discounts to the taxpayer's subsidiary, one of its foreign sales representatives, were twice as large as those allowed five uncontrolled foreign sales representatives. The court distinguished its prior decision of *Frank v. International Canadian Corp.*,[42] in which it had stated:

> [W]e do not agree with the Commissioner's contention that "arm's length bargaining" is the *sole* criterion for applying the statutory language of §45 in determining what the "true net income" is of each "controlled taxpayer." Many decisions have been reached under §45 without reference to the phrase "arm's length bargaining" and without reference to the Treasury Department Regulations and Rulings which state that the talismanic combination of words — "arm's length" — is the "standard to be applied in every case."
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> For example, it was not any less proper for the district court to use here the "reasonable return" standard than it was for other courts to use "full fair value," "fair price including a reasonable profit," "method which seems not unreasonable," "fair consideration which reflects arm's length dealing," "fair and reasonable," "fair and reasonable" or "fair and fairly arrived at," or "judged as to fairness," all used in interpreting §45.[43]

C. *The "Arm's Length Bargain" Test*

The courts have not always been as positive as the Commis-

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sale but not necessarily the transaction. Ballentine Motor Co., 39 T.C. 348, *aff'd*, 321 F.2d 796 (4th Cir. 1963).

[39] In Rev. Rul. 15, 1953-1 CUM. BULL. 141, the Commissioner states:

> [A]ll transactions between the parent company and the subsidiary should be on an "arm's length" basis, since section 45 [now 482] of the Code (pertaining to allocation of income and deductions) may be applied in such cases where necessary to prevent evasion of taxes or clearly to reflect the income of either of the separate companies.
>
> In determining whether the transactions in a particular case are at "arm's length," consideration will be given to all the facts and circumstances involved.

This declaration was followed in Rev. Rul. 57-542, 1957-2 CUM. BULL. 462.

[40] 362 F.2d 212 (9th Cir.), *cert. denied*, 385 U.S. 928 (1966).

[41] *Id.* at 214.

[42] 308 F.2d 520 (9th Cir. 1962).

[43] *Id.* at 528-29. (Footnotes omitted.)

sioner that the hypothetical "arm's length bargain" is the proper test. In applying his computation, the Commissioner has had only limited success in the courts and this success has occurred in situations where there were what the Proposed Regulations[44] call "uncontrolled sales."

Starting in the uncontrolled sale area,[45] the Proposed Regulations set forth three methods for determining what is an arm's length price, the premise being that the only acceptable price for tangible property is an arm's length price. These three methods are the comparable uncontrolled price method, the resale price method, and the cost-plus method.[46] The taxpayer does not have a choice of methods. If the comparable uncontrolled price method fits, it must be applied, and the taxpayer can only utilize the next method if the first does not apply. This is true of the third method, cost-plus, also. The only exception to the above statement arises when the taxpayer can satisfy the District Director that another method is more appropriate.

The comparable uncontrolled price method determines the arm's length price which must be applied to a controlled sale by comparing uncontrolled sales which were made under identical circumstances. Provision is made for adjustment to sales prices where differences which have a definite and readily measurable effect on price can be neutralized.

Assuming that the first method is not available, the taxpayer must use the resale price method which involves an adjustment to the resale price obtained by the buyer in the controlled sale. An appropriate markup is subtracted, and any differences which have a definite and readily measurable effect on price are taken into consideration.

The final method which is prescribed in the Proposed Regulations is the cost-plus method. This involves the computation of an arm's length sale price by making certain additions and adjustments to the seller's cost. An appropriate gross profit percentage is added, and, as in the other two methods, any differences which have a definite and readily measurable effect on price are neutralized.

It appears that the Commissioner will be successful in applying

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[44] In addition to Oil Base, Inc. v. Commissioner, 362 F.2d 212 (9th Cir. 1966), see Jesse E. Hall, 32 T.C. 390 (1959).

[45] See Pergament, *supra* note 30, at 229.

[46] Proposed Treas. Reg. § 1.482-1, 32 Fed. Reg. 10394 (1966).

the uncontrolled price method as in *Hall*[47] and *Oil Base*,[48] but the result of utilizing one of the subsequent methods is somewhat in doubt. The Service's efforts to "legislate" in this area are given some weight by the congressional "mandate" resulting from the hearings on the 1962 Revenue Act; however, an attempt to change case law by regulation is unlikely to succeed. If the courts do not defeat it by a frontal attack, it could well be neutralized by findings that the exception, the taxpayer's more appropriate method, is applicable, there being no uncontrolled sales.

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[47] Jesse E. Hall, 32 T.C. 390 (1959).

[48] Oil Base, Inc. v. Commissioner, 362 F.2d 212 (9th Cir. 1966).