A Review of BMC Software, Inc. v. Commissioner of Internal Revenue: Should Intercompany Accounts Receivable Be Considered "Debt"?

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The matter of BMC Software, Inc. v. Commissioner, *tried before the U.S. Tax Court, involved (1) the BMC repatriation of foreign funds through the Internal Revenue Code Section 965 repatriation tax holiday and (2) the subsequent distinction between related-party accounts receivable and related-party debt that resulted from a 2007 transfer pricing settlement between BMC and the Internal Revenue Service. This discussion (1) describes the facts of the case, (2) explains the Tax Court's reasoning behind its decisions, and (3) concludes with commentary on the unanswered questions raised as a result of this case.*

Introduction

In the matter of *BMC Software, Inc.* ("*BMC*") *v. Commissioner*,[1] the U.S. Tax Court (the "Tax Court") ruled on the definition of "debt" as it relates to intercompany indebtedness between a U.S. taxpayer and its foreign subsidiary.

At issue in this decision was the BMC accounts receivable owed from its foreign subsidiary, BMC Software European Holding (BSEH). This accounts receivable was created as a result of a transfer pricing settlement between BMC and the Internal Revenue Service (the "Service") in 2007.

The specific question in the BMC decision was whether or not this accounts receivable increased the company's related-party indebtedness between October 3, 2004, and March 31, 2006 (the testing period). If it did, then the amount of money that BMC repatriated under the Internal Revenue Code Section 965 tax holiday would be reduced, and BMC would owe additional tax.

That is, if the intercompany accounts receivable were deemed to be debt, then BMC would have overstated its dividends received deduction ("special dividend") and it would have to retroactively pay the regular tax on the amount of the overstatement.

Related-party indebtedness was relevant in this decision, because Section 965 does not permit any increase in related-party indebtedness to be included in the amount of funds eligible for the special dividend.

The testing period is relevant because Congress provided that the amount of the Section 965 special dividend deduction would be reduced by any increase in related-party indebtedness during the "testing period."

The Service took the position that (1) the establishment of the account receivable, resulting from a transfer pricing adjustment in 2007, constituted increased related-party indebtedness, (2) the related-party debt should be applied retroactively to the testing period, and (3) this amount should not be included in the special dividend.

BMC disagreed and petitioned the Tax Court for relief.

The Tax Court filed its opinion on September 18, 2013, ruling in favor of the Service. In its opinion, the Tax Court concluded that some of the

funds repatriated by BMC under Section 965 were ineligible for the special dividend. This is because those funds included an intercompany accounts receivable that the Tax Court considered to be a form of intercompany debt.

BMC subsequently filed an appeal with the U.S. Court of Appeals for the Fifth Circuit (the "Fifth Circuit"), and the case is currently pending review. The Fifth Circuit's decision could have broad implications for intercompany transfer pricing issues.

The Facts of the Matter

BMC is a U.S. corporation that develops and licenses computer software. BSEH is a wholly owned foreign subsidiary of BMC, and is classified as a controlled foreign corporation (CFC) under Section 957.

Section 957 defines a CFC as a non-U.S. corporation whose combined voting power of its stock is over 50 percent owned by a U.S. taxpayer.

Prior to 2002, BMC and BSEH jointly developed software under cost-sharing agreements, which were terminated in 2002. BMC assumed title to the intellectual property and subsequently paid royalties to BSEH.

The dispute in this decision stems from two economic events that occurred between BMC and BSEH.

First, BMC repatriated funds held by BSEH through a Section 965 special dividend. Second, the Service imposed transfer pricing adjustments for royalties paid by BMC to BSEH for the year in which BMC received the special dividend. The Service's adjustment (to both the special dividend year and to other years) gave rise to an accounts receivable between BMC and BSEH.

The ensuing matter hinged on the Tax Court's definition of debt. This is because the Service contended that accounts receivables constitute debt and, therefore, should be excluded from the special dividend calculation pursuant to Section 965(b)(3).

The Tax Court ruled in favor of the Service on September 18, 2013. The taxpayer subsequently appealed to the Fifth Circuit. The taxpayer's appeal is still pending before the Fifth Circuit.

Event #1: BMC's Special Dividend

Section 965 was enacted in 2004 as part of the Jobs Creation Act. It was intended to encourage U.S. corporations to repatriate profits held offshore by foreign subsidiaries, via a special dividend, and to reinvest those funds in the domestic economy.

Section 965 allows for 85 percent of such repatriated earnings to be tax deductible. The repatriation is deemed to take the form of a special dividend, and the amount eligible for the tax deduction may not include any related-party indebtedness.

That is, for purpose of calculating the special dividend, Section 965(b)(3) disallows the inclusion of any increase in related-party indebtedness. This measure was intended to forestall U.S. taxpayers from engaging in debt financed repatriation of earnings that would have otherwise been generated and taxed in the United States.

For its tax year ending March 31, 2006, BMC elected to exercise its right to repatriate funds held by BSEH pursuant to Section 965. For tax year 2006, BMC elected to repatriate $721 million in foreign funds, of which it claimed $709 million as eligible for the special dividend.

In its case before the Tax Court, BMC argued that on the date that it elected to receive the special dividend, there had been no increase in related-party indebtedness during the testing period of October 3, 2004, to March 31, 2006.[2]

Event #2: Transfer Pricing Adjustments

Subsequently, and unrelated to the special dividend, the Service determined that the royalties BMC paid to BSEH between 2003 and 2006 were inflated (i.e., not at arm's length).

This determination led to:

1. the BMC U.S. reported taxable income being understated in those years and

2. Service-imposed transfer pricing adjustments to the BMC taxable income.

Primary Adjustment

A primary adjustment was made to the accounts of BMC and BSEH for the years 2003 to 2006 to reflect arm's-length pricing. These adjustments increased the BMC income by $35 million for 2003, $23 million for 2004, $22 million for 2005, and $22 million for 2006.[3]

These adjustments were effected through a closing agreement between BMC and the Service, executed on August 30, 2007.

A closing agreement is essentially a legally binding, final agreement between the Service and a taxpayer related to a matter. The potential benefit to the taxpayer for engaging in a closing agreement with the Service is that it can provide a permanent resolution to the issue.

Regulation 301.7121-1(a) defines the nature of closing agreements as follows:

> The Commissioner may enter into a written agreement with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period ending prior or subsequent to the date of such agreement. A closing agreement may be entered into in any case in which there appears to be an advantage in having the case permanently and conclusively closed, or if good and sufficient reasons are shown by the taxpayer for desiring a closing agreement and it is determined by the Commissioner that the United States will sustain no disadvantage through consummation of such an agreement.

Secondary Adjustment

A secondary adjustment is required because U.S. taxpayers who have had primary adjustments made to their taxable income under Section 482 should then contend with the accounting treatment of the counterparty (i.e., the foreign subsidiary).

In other words, the foreign subsidiary's financial statements need to be adjusted to properly reflect the adjustments made to the U.S. taxpayer's financial statements.

These secondary adjustments amend the parties' balance sheet accounts. The BMC secondary adjustments related to transactions between BMC and BSEH for the years 2003 to 2006, and were effected through another closing agreement between BMC and the Service, executed on August 30, 2007.

The secondary adjustments to square the accounts between BMC and BSEH were achieved through the establishment of accounts receivable for the years 2003 to 2006, owed by BSEH to BMC, on a tax-free basis.[4]

Unless the taxpayer elects to exercise its privileges under Revenue Procedure 99-32,[5] the secondary adjustments to "square the ledger" between party and counterparty are treated as dividends or capital contributions for U.S. tax purposes and are subject to withholding tax.[6]

Revenue Procedure 99-32 was created to provide relief from this collateral tax effect. Under Revenue Procedure 99-32, the secondary adjustments may be accomplished through the establishment of accounts receivable, in the amount of the transfer pricing adjustments, on a tax-free basis.

The secondary adjustments closing agreement conclusively established that BMC had elected to conform the accounts through accounts receivable, bearing interest at the applicable federal rate, pursuant to Revenue Procedure 99-32.

The interest was deductible from the BSEH taxable income. BSEH subsequently paid the principle and interest owed within 90 days of the effective date of the secondary adjustments closing agreement.[7]

Mathematical Illustration of the Chain of Events

The relevant chain of events in this case is depicted in Exhibit 1 on the next page. For simplicity and illustrative purposes, the figures presented are hypothetical and unrelated to BMC, and the foreign subsidiary's taxation is omitted.

The Service's Position

The Service argued that the secondary adjustments accounts receivable established in 2007 increased the related-party indebtedness, and, therefore, BMC had taken too large a special dividend in 2006.

Under Section 965(b)(3), the amount of the special dividend should be reduced by the increase in related-party indebtedness unless it is due to the ordinary course of trade.

The Service reduced the amount of BMC's special dividend by $43 million, citing *Bush v. United States*,[8] in which the court opined, "The teaching of these cases is that a closing agreement will not implicitly preclude the imposition of otherwise applicable law. If the parties intend that a law will not apply, they must explicitly agree on that point in the closing agreement."

Exhibit 1
Hypothetical Illustration of the Events Relating to Section 965, 482, and 965(b)(3)

		U.S. Co.		Foreign Sub.
Event 1: Repatriation (Section 965) – assume $2,000				
	Cumulative royalties paid	-		2,000
	Section 965 repatriation	2,000		(2,000)
Less:	Income shielded (85%)	1,700		
Equals:	Taxable income	300		
Less:	Income tax expense (at 35% tax rate)	105		
Equals:	Ending balance	1,895	**[A]**	-
Event 2: Transfer price adjustments (Section 482) – assume $500				
	Transfer price adjustment (size of excess royalty)	500	**via accounts receivable (Rev. Proc. 99-32)**	(500)
Less:	Income tax expense (at 35% tax rate)	175		
Equals:	Ending balance	325	**[B]**	
	Total ending balance <u>without</u> related party debt reduction	**2,220**	**= [A + B]**	
Event 3: IRS dissalows repatriation of accounts receivable amount (Section 965(b)(3) – related party debt increase)				
	Original repatriation amount	2,000		
	Accounts receivable amount disallowed (Section 965(b)(3))	500		
	Section 965 repatriation – revised	1,500		
Less:	Income shielded (85%)	1,275		
Equals:	Taxable income	225		
Less:	Income tax expense (at 35% tax rate)	79		
Equals:	Ending balance	1,421	**[C]**	
	Total ending balance <u>with</u> related party debt reduction	**1,746**	**= [B + C]**	

Notes:
- We are viewing the transactions from the Service's perspective, hence taxation by the foreign government is not addressed.
- The figures above are based on a hypothetical example for illustrative purposes, and are not actual figures related to BMC.

The Service added that if BMC had desired that the secondary adjustments closing agreement not classify the accounts receivable as debt, BMC should have indicated so. It also pointed out that BMC had drafted the agreement.

Although the secondary adjustments accounts receivable were formally established in 2007, which was after the testing period observed for compliance with the Section 965(b)(3) special dividend, the Service determined that these secondary adjustments resulted in:

1. an increase in related-party indebtedness and
2. retroactively applied to the testing period.

The Service also contended that the secondary adjustments accounts receivable were not the product of the ordinary course of trade, since they were borne out of transfer pricing adjustments. This is notwithstanding the fact that the transfer pricing adjustments related to the ordinary course of trade royalties between BMC and BSEH.

The Service, therefore, determined that BMC had overstated the Section 965 special dividend by $43 million and issued a deficiency notice for tax year 2006. BMC then petitioned the Tax Court for relief.

Tax Court Opinion (September 18, 2013)

Issues Considered by the Tax Court[9]

Prior to reaching its opinion, the Tax Court stated that it would decide on the following issues:

- Whether the secondary adjustments accounts receivable constituted increased related-party indebtedness for the purposes of Section 965

- Whether the secondary adjustments accounts receivable, that were deemed established during the testing period, should retroactively be taken into account when determining the amount of funds eligible for the Section 965 special dividend
- Whether the parties agreed in the secondary adjustments closing agreement that repayment of the accounts receivable should be free from further taxation

In addition to opining on these issues, the Tax Court also examined other points of contention, specifically the BMC argument that a violation of Section 965(b)(3) requires intent.

Does a Violation of Section 965(b)(3) Require Intent?

The Tax Court examined the BMC assertion that the related-party debt rule (Section 965(b)(3)) applies only if there is an abusive transaction intended to skirt U.S. taxation.

In the Tax Court analysis of statutes pertinent to that and other areas of contention, it asserted that "our principal task when interpreting a statute is to ascertain and give effect to Congress' intent,"[10] and the Tax Court will examine legislative history "to ascertain congressional intent only if a statue is silent or ambiguous."[11]

To decide on this issue, the Tax Court considered the BMC citation of language that Congress added later to Section 965, which conferred to the Service the authority to issue regulations preventing transactions that avoid the statute's purposes.[12]

The Tax Court also considered language contained in a Joint Committee on Taxation explanation that stated, "It is anticipated that dividends would be treated as attributable to a related-party transfer of cash or other property under this authority only in cases in which the transfer is part of an arrangement undertaken with a principal purpose of avoiding the purposes of the related-party debt rule of Section 965(b)(3)."

The Tax Court concluded that Section 965(b)(3) "does not include an intent requirement." In reaching this conclusion, the Tax Court noted that Congress did not amend the operative language of Section 965(b)(3) when it added the aforementioned language, but rather conferred to the Service discretion to add supplemental regulations aimed at preventing circular transactions intended to skirt being classified as indebtedness.

In other words, a taxpayer's intent would be observed, but it would not be the litmus test.

Should Accounts Receivable Be Defined as "Debt"?

The Tax Court turned to dictionary definitions, not finance definitions, to determine the meaning of "debt" as it related to Section 965 and the secondary adjustments accounts receivable. The Tax Court noted, "We may consider dictionary definitions to understand the meaning that Congress may have intended."[13]

It then cited the definition of indebtedness according to *Black's Law Dictionary*, which defines indebtedness as, "the condition or state of owing money" or "something owed; a debt."[14]

The Tax Court acknowledged that the term "account receivable" is defined neither by Revenue Procedure 99-32 nor by the secondary adjustments closing agreement.

The Tax Court thus turned again to *Black's Law Dictionary*, which defines accounts receivable as, "an account reflecting a balance owed by the debtor."[15]

Based on these definitions of debt and accounts receivable, the Tax Court concluded that the BMC secondary adjustments accounts receivable established pursuant to Revenue Procedure 99-32 constituted increased indebtedness.

Should Accounts Receivable Be Considered "Trade Payables" and Be Exempt from the Definition of Debt?

BMC contended that pursuant to Notice 2005-38, the secondary adjustments accounts receivable were actually trade payables, and, therefore, ought to be excluded from the definition of increased indebtedness.

Notice 2005-38 states: "For purposes of section 965(b)(3), the term 'indebtedness' does not include indebtedness arising in the ordinary course of a business from sales, leases, or the rendition of services provided to or for a CFC by a related person, provided that such indebtedness is actually paid within 183 days."[16]

The Service, alternatively, argued that the secondary adjustments accounts receivable were established by the closing agreement, not the course of ordinary business, and were, therefore, not trade related.

The Tax Court held that the accounts receivable were not established in the ordinary course of business, and furthermore were paid more than a year after the time frame for which the accounts receivable were assigned.

Whether the Increased Indebtedness Occurred During the Testing Period

The Tax Court then examined whether the secondary adjustments accounts receivable constituted increased indebtedness during the testing period, despite being established in 2007, after the testing period.

The Service contended that BMC agreed in the secondary adjustments closing agreement that the accounts receivable were deemed established during the testing period.

This was the shortest section of the Tax Court opinion. The Tax Court held that, per the secondary adjustments closing agreement, two of the accounts receivable were deemed established during the testing period.

Additional Income Tax Resulting from the Secondary Adjustments Closing Agreement

BMC argued that, pursuant to the secondary adjustments closing agreement, it should be free of any further federal income tax consequences resulting from the establishment of the accounts receivable, namely those which pertain to the special dividend.

The Tax Court cited *Schering Corp. v. Commissioner*, whereby the closing agreement in that case stated that the accounts receivable was "free of further Federal income tax consequences."[17]

The Tax Court held that the accounts receivable repayment, and not the accounts receivable themselves, was free of further tax consequences and, therefore, ruled that the accounts receivable were deemed established for all federal tax purposes.

The Ruling[18]

The Tax Court issued its opinion on September 18, 2013, and ruled in favor of the Service. The Tax Court concluded that the secondary adjustments accounts receivable "constitute indebtedness for the purposes of Section 965(b)(3)," and were, therefore, disallowed as part of the BMC special dividend.

The Tax Court also concluded that:

1. the related party debt rule is not confined strictly to increased indebtedness resulting from willful abuse of the U.S. Code (i.e., intent was not required) and
2. the accounts receivable were deemed established during the testing period, and, therefore, should retroactively be applied for purposes of determining the special dividend.

Consequences of the Tax Court Decision

The Tax Court decision leaves many issues outstanding for corporate tax professionals and their advisers. These issues relate to the definitions of debt and accounts receivable, the distinction between the reporting of, and the economic reality of, intercompany transactions, and the proper crafting of transfer pricing agreements between taxpayers and the Service.

Even after the *BMC* decision, many transfer pricing issues remain open to interpretation.

The next section of this discussion points out some of the questions that were raised as a result of this Tax Court decision.

Definition of Debt

The Tax Court ultimately relied on *Black's Law Dictionary*[19] for the definition of debt, defined as "the condition of owing money," and the definition of "account receivable" defined as an "account reflecting a balance owed by the debtor."[20]

By this definition, any liability on a balance sheet could be classified as debt. This definition of debt would conflict with conventional financial definitions of debt, which typically exclude trade accounts payable.

The Tax Court also ignored the definition of debt included in other regulations, such as the U.S. Bankruptcy Code. Bankruptcy Code Section 101(12) defines debt as a "liability on a claim," and defines a claim as a legal "right to payment."[21]

Since BMC had a controlling interest in BSEH, did BMC technically then have the "power" to enforce the accounts receivable claim, and did it have a legal "right to payment" as defined by the terms of the accounts receivable closing agreement?

BMC argued in its appeal to the Fifth Circuit that "this court and numerous others have recognized that 'indebtedness' for federal income tax purposes requires 'existing unconditional and legally enforceable obligation to pay'" (*Tomlinson v. 1661 Corp.*, 377 F.2d 291, 295, Fifth Circuit 1967).[22]

The Tax Court did not introduce the concept of Bankruptcy Code Section 523, which lists certain liabilities that are nondischargeable in Chapter 11. Nondischargeable means that a borrower cannot seek relief from the obligation.

Section 523 states that liabilities will not be considered debt for the purposes of bankruptcy law "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty . . . imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition."

Section 523 was designed to stymie taxpayers from avoiding liabilities related to fines, penalties, and other legal obligations such as alimony payments. Section 523 seems to solidify such obligations as unavoidable, and since they are legally enforceable, fit within the Bankruptcy Code definition of debt.

If one were to define debt as an enforceable, legal obligation, would it be too much of a leap to deem the secondary adjustments accounts receivable as arising indirectly out of the BMC obligation to the Service? The BSEH liability to BMC may not have been owed to the Service directly, but it was owed to the Service indirectly.

This is because the transfer pricing adjustments, which gave rise to the creation of accounts receivable, did result from a tax penalty imposed on BMC. It remains to be seen if the BMC secondary adjustments accounts receivable will be deemed a liability by the Fifth Circuit for purposes of Section 965.

Legal Fictions under Revenue Procedure 99-32

The BMC secondary adjustments accounts receivable created pursuant to Revenue Procedure 99-32 were a legal fiction. This is because BMC did not actually loan money to BSEH, at least, not directly. If a company extends a loan to a CFC, but wishes to avoid having it classified as a loan, could it achieve this by overpaying for a service rendered by the CFC "accidentally" and later demand reimbursement?

What if an individual overpays their cellular phone bill, and later recognizes the error and requests a credit or refund? The amount is essentially an account receivable on the side of the individual, and an account payable on the side of the service provider. Would that overpayment constitute a loan to the service provider?

Debt is typically a contract entered into between two parties willingly and knowingly. BMC established the accounts receivable only because there was no recourse other than to pay a second, punitive tax. If you are forced to jump into a frigid swimming pool because a dog attacked you, did you jump into that pool willingly, or were you forced to jump into the pool by the dog?

Retroactive Establishment of Liabilities

What is the relevant date for establishing the secondary adjustment accounts receivable liability? BMC, in its reply brief on appeal to the Fifth Circuit, asserts that the accounts receivable was established over 20 months after the end of the tax year in which BMC received the special dividend and, therefore, it should not apply to the testing period.[23]

The Service, in its brief to the Fifth Circuit, contends that the accounts receivable was established between March 31, 2005, and March 31, 2006, which was during the testing period.[24]

Should the accounts receivable be dated retroactively to the testing period? Revenue Procedure 99-32 stipulates that the accounts receivable will "be deemed to have been created as of the last day of the taxpayer's taxable year for which the primary adjustment is made."[25]

Since there were adjustments for multiple years (i.e., 2003 through 2006), the Service contended that there were accounts receivable for multiple years, including when the special dividend was received in 2006.

Furthermore, is it relevant that the intent of Section 965(b)(3) was to prevent debt financed dividends? BMC argued that it did not directly finance the special dividend with debt, because the special dividend was paid before the establishment of the secondary adjustment accounts receivable.

But did BMC finance the dividend with debt after the fact? This is one question still pending before the Fifth Circuit.

Burden of Defining Terms Contained in a Closing Agreement

Who bears the burden of defining accounts receivable as debt in a closing agreement; the taxpayer or the Service? The Service contended that the responsibility was on BMC.

The Service cited *Bush v. United States*,[26] and noted that, if it was intended that a law not apply to the terms of the agreement, it should have been be so stated.

BMC argued, on appeal to the Fifth Circuit, that the closing agreement was based on language mandated by the Service,[27] implying that the responsibility was on the Service.

Because of this, BMC argued that it cannot be considered to be the drafter of the agreement, and was, therefore, not responsible for the omission of how debt was defined.

Accounts Receivable and Trade Receivables

Should the secondary adjustments accounts receivable be considered a trade receivable resulting from the ordinary course of business?

The Service, in its Notice 2005-38, set forth that "debt does not include the following ordinary course obligations of CFCs: a) obligations in the ordinary course of the CFC's business from sales, leases, licenses, or the rendition of services provided to or for a CFC by a related person, provided such obligations are actually paid within 183 days. See Section 7.02 of Notice 2005-38 and Section 10.08 of Notice 2005-64. . . ."[28]

This issue is debatable. On the one hand, the BMC royalty payments that eventually gave rise to the creation of the secondary adjustments accounts receivable, were paid in the ordinary course of business.

On the other hand, the secondary adjustments accounts receivable were for the amount of the excess of royalty payments above an arm's-length amount, which one may argue did not arise through the ordinary course of business.

Summary and Conclusion

This discussion presented a review of the tax matter related to the *BMC* decision.

In *BMC*, the Tax Court concluded that some of the money repatriated by BMC under the Section 965 special dividend in 2006 was ineligible for a lower tax rate.

This is because the Tax Court considered certain accounts receivables, established as a result of a subsequent and unrelated 2007 transfer pricing settlement, to be intercompany debt. The Tax Court, therefore, reduced the amount of dividends eligible for Section 965 repatriation.

This dispute may have been avoided if the closing agreement between BMC and the Service had been crafted with a clear definition of debt, a clear definition of whether the accounts receivable would be applied retroactive to the testing period, and/or a clear definition of whether the accounts receivable arose through the ordinary course of trade, which would have exempted it from classification as an increase in related-party debt for purposes of Section 965.

Notes:

1. 141 T.C. No. 5 (September 18, 2013).
2. Ibid.
3. Ibid.
4. Ibid.
5. Rev. Proc. 99-32, IRB 1999-34, C.B. 296, August 2, 1999.
6. Regulation 1.482-1(g)(3)(i).
7. 141 T.C. No. 5 (2013).
8. 375 F.2d 602 (D.C. Cir. 1967).
9. 141 T.C. No. 5 (2013).
10. United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 542-543 (1940).
11. Burlington No. R.R. Co. v. Okla. Tax Comm'n, 481 U.S. 454, 461 (1987); Miss. Poultry Ass'n, Inc. v. Madigan, 992 F.2d 1359, 1364 n.28 (5th Cir. 1993).
12. Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, Sec. 403(q)(3), 119 Stat. at 2627.
13. Dixon v. Commissioner, 132 T.C. 55, 76 (2009).
14. *Black's Law Dictionary,* 8th Ed. (St. Paul, MN: West, 2004), 783.
15. Ibid., 18.
16. IRB Notice 2005-38, sec. 7.02(b).
17. Schering Corp. v. Commissioner, 69 T.C. 579 (1978).
18. 141 T.C. No. 5 (2013).
19. *Black's Law Dictionary*, 783.
20. No. 13-60684, BMC Software, Incorporated (appellant) v. Commissioner of Internal Revenue (appellee), BMC's reply brief, April 28, 2014, at 3.
21. U.S.C. Section 101(11) (1982).
22. No. 13-60684, BMC Software, Incorporated (appellant) v. Commissioner of Internal Revenue (appellee), BMC's reply brief, April 28, 2014, at 3.
23. Id. at 1.
24. Id., brief for the appellee, March 26, 2014, at 41.
25. Revenue Procedure 99-32, 26 CFR 601.105: "Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability."
26. 375 F.2d 602 (D.C. Cir. 1967).
27. No. 13-60684, BMC Software, Incorporated (appellant) v. Commissioner of Internal Revenue (appellee), BMC's reply brief, April 28, 2014, at 7.
28. IRC 965 Dividend Repatriation Audit Guidelines, LMSB-0808-043, August 27, 2008, http://www.irs.gov/Businesses/IRC-965-Dividend-Repatriation-Audit-Guidelines.

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