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Services and Intangibles

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Scope of Presentation

- Controlled services transactions.
- Intangibles ownership.
- Non-owner contributions to the value of intangibles.
- Imputation of contractual terms.

Controlled Services Transactions (CST")

- A CST is any activity by one member of a group of controlled taxpayers (the "renderer") that results in a benefit to one or more other members of the controlled group (the "recipient").
  - An activity includes the performance of functions, assumptions of risks or use by the renderer of tangible or intangible property or other resources, capabilities, or knowledge, or making available to the recipient any property or resources of the renderer.

CST: Benefit

- A benefit may result to the owner of an intangible if the renderer engages in an activity that is reasonably anticipated to result in an increase in the value of an intangible.

Indirect or Remote Benefit

- An activity is considered not to benefit any recipient if, at the time of performance, any present or reasonably anticipated benefit is so indirect or remote that a recipient would be unwilling to pay the renderer on a fixed or contingent-payment basis or to perform the activity for itself.
- Illustrations:
  - Duplicative activities.
  - Shareholder activities.
  - Passive association activities.

Intangibles Ownership

- Legally protected. The legal owner (by operation of law (*i.e.,* patent, or by contract, *i.e.,* license) generally will be considered the sole owner of the IP.
  - The legal owner will not be considered the sole owner for § 482 purposes if the IRS determines that the ownership is inconsistent with the economic substance of the transaction.
- Not legally protected. The party that controls the non-legally protected IP will be considered the sole owner.

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Non-Owner Contributions to IP Value

- Related parties that develop or enhance the value of IP owned by another related party are entitled to arm's length return for their contributions.

Imputation of Contractual Terms

- General Rules.
  - IRS will respect written contract (that is entered into before the transaction is entered into) if terms are consistent with economic substance of the underlying transaction.
  - In the absence of a written agreement, the IRS may impute a contractual agreement between the related parties based on the economic substance of the transaction.

Imputation of Contractual Terms (continued)

- Several examples in the Temporary Regulations permit the IRS to re-characterize controlled services transactions (such as R&D services contracts or distribution agreements) as high-value intangibles transfers, thereby implicating the commensurate with income rules retroactively to the re-characterized arrangement.

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