taxnotes® international

Volume 110, Number 18 ■ May 1, 2023

U.S. Tax Review: Annual APA Report; Corporate AMT; *FedEx*, *Moore*, *Mann*, *Farhy*, and *Coca-Cola*

by Larissa Neumann, Julia Ushakova-Stein, and Mike Knobler

Reprinted from *Tax Notes International*, May 1, 2023, p. 589

U.S. Tax Review: Annual APA Report; Corporate AMT; *FedEx*, *Moore*, *Mann*, *Farhy*, and *Coca-Cola*

by Larissa Neumann, Julia Ushakova-Stein, and Mike Knobler

Larissa Neumann

Julia Ushakova-Stein

Mike Knobler

Larissa Neumann, Julia Ushakova-Stein, and Mike Knobler are partners with Fenwick & West LLP.

In this installment of U.S. Tax Review, the authors review recent developments in the FedEx, Moore, Mann, Farhy, and Coca-Cola cases, as well as the annual advance pricing agreements report and comments on the corporate AMT.

FedEx FTC Victory: Section 965 Reg Held Invalid

In *FedEx*,[1] the U.S. District Court for the Western District of Tennessee invalidated reg. section 1.965-5(c)(1)(ii) and granted FedEx a tax refund of $89 million for improperly denied foreign tax credits. FedEx did not dispute that if the regulation were valid, it would not be entitled to a refund. The opinion is very well written and an important precedent for regulations being invalidated when they contradict the statute. The court also rejected the IRS's argument that policy should control whether a regulation is valid.

Under the transition tax rule in section 965(b), before including the accumulated overseas earnings of profitable subsidiaries in income, U.S. corporations are allowed to offset those earnings with the losses of their unprofitable foreign subsidiaries, which the court called offset earnings.

FedEx argued that it is entitled to FTCs on the offset earnings under sections 959, 960, and 965. The IRS argued that the statutes forbid these FTCs and that, even if the statutory language were ambiguous, reg. section 1.965-5(c)(1)(ii) fills the gap by prohibiting a credit.

Section 959 permits funds to be distributed to the United States shareholder without additional tax if those funds have already been included in income under section 951. Offset earnings, however, were never included in income. Section 965(b)(4)(A) addresses this situation, stating that:

> For purposes of applying section 959 in any taxable year beginning with the taxable year described in subsection (a), with respect to any United States shareholder of a deferred foreign income corporation, an amount equal to such shareholder's reduction under [section 965(b)(1)] which is allocated to such deferred foreign income corporation under this subsection shall be treated as an amount which was included in the gross income of such United States shareholder under section 951(a).

[1] *FedEx Corp. v. United States*, No. 2:20-cv-02794 (W.D. Tenn. 2023).

Section 959 excludes from income earnings that have already been included under section 951, and section 965(b)(4)(A) extends that exclusion to offset earnings by directing that offset earnings be treated as if they were previously included by section 951. The parties agreed that, under sections 959 and 965(b)(4)(A), offset earnings are not included in income when repatriated. They disagreed, however, about how section 965(b)(4)(A) affects FedEx's claim to FTCs.

Before the Tax Cuts and Jobs Act, when a U.S. corporation had to include its foreign subsidiary's earnings in income under subpart F and section 951, section 960(a)(1) provided a credit for foreign taxes, and when the parent repatriated those funds, section 960(a)(2) denied a second, redundant credit. Section 960(a)(3) granted a credit for any additional foreign taxes that had been imposed after the section 951 inclusion and for which no credit had previously been granted.

FedEx argued that section 960(a)(3) provides an FTC for foreign taxes paid on offset earnings because the offset earnings are never included in income under section 951 and FedEx never received a credit under section 960(a)(1).

FedEx argued that section 960(a)(3) unambiguously provides a credit because:

- the distributed offset earnings were excluded from income under section 959;
- those offset earnings are treated as dividends for which a credit is given under sections 901 and 902; and
- the foreign taxes associated with the offset earnings were not previously deemed paid by section 960(a)(1).

FedEx argued that the government cannot deny that credit by using a regulation to rewrite the statutory text.

The government argued that although offset earnings are never actually included in income under section 951, they are deemed to have been included in income and therefore must be treated that way. The government argued that FedEx's associated foreign taxes were deemed to have been paid already under section 960(a)(1), and that section 960(a)(2) states that foreign taxes previously deemed paid under section 960(a)(1) will not be credited again. Because offset earnings are treated as included in income under section 951, the government argued that they cannot produce a credit under section 960.

FedEx responded that the government ignores crucial limiting language; section 965(b)(4)(A) treats offset earnings as included in income "for purposes of applying section 959." Thus, offset earnings are treated as previously included in income under section 959, which shields those earnings from inclusion in income when they are distributed. Offset earnings are not treated as included in income when applying section 960, which controls the grant of tax credits.

The court agreed with FedEx and stated that the government's argument contradicts the ordinary and common meaning of the statute's command that offset earnings be treated as included in income for purposes of applying section 959. As courts have recognized, "for purposes of" is limiting language that confines its subject matter to some purposes but not others. The phrase, "for purposes of applying section 959," singles out one particular section for different treatment and thereby demonstrates that the section 965(b)(4)(A) language should not apply to the remainder of the tax code.

The court held that section 965(b)(4)(A) is unambiguous and applies to section 959, but not to other sections. The government's attempt to stretch section 965(b)(4)(A) by making it apply to both section 959 and section 960 contravenes the plain and ordinary meaning of the statute.

The government argued that section 965(b)(4)(A) applies to section 960(a)(3) because section 960(a)(3) mentions (or, in the government's argument, applies) section 959. The court found this argument unpersuasive. Had Congress intended section 965(b)(4)(A) to apply "for purposes of applying sections 959 and 960," it could have said so.

Also, the apposition of "applying" with "section 959," as well as the absence of any other specifically named part of the tax code, suggests that section 959 — and no other section — is the "limited purpose" or "particular subject matter" to which section 965(b)(4)(A) applies, the court said.

The government's argument would also create too many unintended consequences. The tax code contains many phrases such as "for purposes of" and "for purposes of applying." If a statute says "for purposes of section X, Y is true," under the government's approach, Y would be taken as true not only in section X, but also in any other part of the statutory scheme that mentions or invokes section X.

The court held that the government's theory of the case is not a plausible reading of the pertinent statutes. FedEx's account is simpler and more convincing: Its offset earnings, when distributed, were excluded from gross income under section 959(a), and the foreign taxes paid on offset earnings were never previously "deemed paid . . . under" section 960(a)(1).

The government argued that considerations of policy weigh against FedEx's interpretation of the statute because offset earnings are untaxed in the United States. Giving FTCs on those earnings "is not the mitigation of double tax; it is the elimination of any tax." The court said that although there is considerable weight to the government's arguments, the court cannot consider extratextual indicators of congressional intent, such as legislative history or general considerations of policy.

Amici Urge Section 965 Reg Review

While the U.S. District Court was invalidating a regulation under section 965, the statute itself was being challenged in the Supreme Court. Amicus briefs filed March 27 by the U.S. Chamber of Commerce, the Cato Institute, and other prominent advocacy groups and think tanks urged the Court to grant certiorari in *Moore*,[2] in which the U.S. Court of Appeals for the Ninth Circuit rejected the taxpayers' challenge to the transition tax.[3]

The petition filed by Charles and Kathleen Moore asks the Court to determine whether the 16th Amendment authorizes Congress to tax unrealized sums without apportionment among the states. The Moores argue that section 965, which taxed U.S. shareholders on the unrepatriated earnings of foreign corporations, is not an income tax because it taxed unrealized amounts.

The Cato Institute brief notes that the Court has recognized "the rule that income is not taxable until realized."[4]

"To be subject to an income tax, a taxpayer must have income," the Cato brief asserts. "If a tax on unrealized investment holdings like [section 965] can be treated as an 'income' tax, then anything can be treated as an income tax. And if anything can be treated as an income tax, then the Sixteenth Amendment's limitation to 'income' taxes is meaningless."

Similarly, the U.S. Chamber of Commerce argues that the realization requirement provides a limiting principle that defines the term "income tax."

"Income has a plain and longstanding meaning: for something to be 'income,' it must, in some way, 'come in,'" the chamber brief asserted before quoting the landmark case of *Macomber*.[5] The *Macomber* Court wrote that the "characteristic and distinguishing attribute of income" is "a gain . . . *coming in*, being '*derived,*' that is *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal."[6] (Emphasis in original.) The *Macomber* Court held that Congress lacks the power to tax "accumulated profits [of a corporation] . . . as income of the stockholder" without apportionment among the states.[7]

The various amicus briefs discuss what "realization" has come to mean. The Manhattan Institute and professors Erik M. Jensen and James W. Ely emphasize dominion and control over gains, as described in *First Security Bank*.[8] The Cato Institute distinguishes the tax imposed on subpart F income as applying to a base that is both constructively realized and limited to current-year income of the controlled foreign corporation, unlike the accumulated unrealized earnings taxed by section 965. The Buckeye Institute quotes from Judge Patrick J. Bumatay's dissent from the Ninth Circuit's order denying an en banc rehearing: "While there may be . . . cases that test the outer limits of what constitutes a realized gain, the term

[2] *Moore v. United States*, 36 F.4th 930 (9th Cir. 2022).

[3] *See* Larissa Neumann and Julia Ushakova-Stein, "U.S. Tax Review: Transition Tax, Final FTC Regs, and Priority Guidance Recommendations," *Tax Notes Int'l*, July 4, 2022, p. 23.

[4] *Helvering v. Horst*, 311 U.S. 112, 116 (1940).

[5] *Eisner v. Macomber*, 252 U.S. 189 (1920).

[6] *Id.* at 207.

[7] *Id.* at 219.

[8] *Commissioner v. First Security Bank of Utah*, 405 U.S. 394 (1972).

'income' still retains realization as a definitional requirement."

The Pacific Research Institute and professor Hank Adler argue that the Court should apply the original public meaning of the 16th Amendment, in which "'income' does not include unrealized gains that have not been received by the taxpayer." Americans for Tax Reform makes a similar original public meaning argument, and the Southeastern Legal Foundation quotes ratification-era dictionary definitions for "income" to support its contention that the accumulated earnings taxed by section 965 cannot be taxed without apportionment under the 16th Amendment.

Mann Doesn't Have National Scope

A district court in *Govig*[9] held that the Sixth Circuit's decision in *Mann Construction*[10] does not have nationwide scope.[11] In *Mann*, the Sixth Circuit held that the IRS's failure to follow notice and comment procedures for Notice 2007-83, 2007-2 C.B. 960, "Abusive Trust Arrangements Utilizing Cash Value Life Insurance Policies Purportedly to Provide Welfare Benefits," was a violation of the Administrative Procedure Act.

In *Govig*, the IRS determined that the taxpayers' participation in a trust was a listed transaction under Notice 2007-83 that the taxpayers failed to disclose. The taxpayers sued after the *Mann* decision was released, claiming that the decision set aside Notice 2007-83 nationwide and that they therefore needed no additional proof that the notice is unlawful. Specifically, the complaint asserts five claims:

- failure to follow notice and comment procedures for Notice 2007-83 in violation of the Administrative Procedure Act;
- unauthorized agency action in violation of the Administrative Procedure Act;
- arbitrary and capricious agency action in violation of the Administrative Procedure Act;
- unlawful denial of a refund of the section 6707A penalty paid by one of the plaintiffs; and
- unlawful failure to rescind penalties against all plaintiffs.

The district court stated that the Sixth Circuit did not address the scope of its ruling — whether it was setting aside the notice for purposes of the case before it or for all purposes, everywhere. The district court cited a subsequent Sixth Circuit opinion in *Arizona*,[12] in which the same judge who authored the opinion in *Mann*, Chief Judge Jeffrey S. Sutton, stated that, although a ruling that does not bind the national government in all jurisdictions could lead to forum shopping, the Administrative Procedure Act does not answer whether Congress meant to have decisions be broader than case-by-case judgments. Sutton concluded in *Arizona* that "courts issue judgments that bind the parties in each case."

On remand in *Mann*, the U.S. District Court for the Eastern District of Michigan granted a motion seeking an order that vacated and set aside the notice.[13] The *Govig* court, however, noted that the *Mann* taxpayers did not seek this order in their complaint but instead agreed that their complaint "was not intended to seek an injunction against the IRS or a declaratory judgment that would bind the IRS as to other taxpayers." As a result, the *Govig* court held that because *vacatur* was a "decision not requested by the [*Mann*] parties and not required to accord full relief between them," it was dictum.

As a result, the *Govig* court held that the Sixth Circuit and trial court decisions in *Mann* did not have nationwide scope and render Notice 2007-83 a legal nullity.

Despite that, only two of the *Govig* plaintiffs' claims survived the government's motion to dismiss. The court ruled that the first and third claims were time-barred because they were procedural claims filed more than six years after

[9] *Govig & Associates Inc. v. United States*, No. 2:22-cv-00579 (D. Ariz. 2023).

[10] *Mann Construction Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022).

[11] *See* Neumann and Ushakova-Stein, "U.S. Tax Review: *Green Valley*, Priority Guidance Plan, Corporate AMT, and Stock Buyback Excise Tax," *Tax Notes Int'l*, Dec. 5, 2022, p. 1213. Full disclosure: Two of the authors' colleagues at Fenwick are among the authors of the Cato Institute brief.

[12] *Arizona v. Biden*, 31 F.4th 469, 483-84 (6th Cir. 2022).

[13] *Mann Construction Inc. v. United States*, No. 1:20-cv-11307 (E.D. Mich. 2023).

the agency action. The court ruled that it lacks jurisdiction over the taxpayers' fifth claim — unlawful failure to rescind penalties — because that claim seeks to restrain the IRS from assessing and collecting taxes and is thus barred by the Anti-Injunction Act and the Declaratory Judgment Act.

The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."[14] Under the Declaratory Judgment Act, federal courts may issue declaratory judgments "except with respect to Federal taxes."[15] Together, the *Govig* court held, these provisions "deprive the Court of subject matter jurisdiction to hear injunctive or declaratory claims regarding taxes."

No Levy for Section 6038(B) Penalties

On April 3 the Tax Court found in *Farhy*[16] that the IRS could not assess penalties under section 6038(b) against a taxpayer who failed to file Form 5471 and that it could not collect these penalties via a levy.

The taxpayer did not file Form 5471 for his ownership in two foreign corporations as was required under section 6038(a). The IRS provided the taxpayer with a notice of failure to file and then assessed an initial penalty under section 6038(b)(1) of $10,000 for each year at issue, and subsequently continuation penalties under section 6038(b)(2) totaling $50,000 for each year at issue. Then the IRS issued to the taxpayer Letter 1058, which is a levy notice, to collect the penalties.

In its analysis, the court stated that when a tax (including a deemed tax, such as an additional amount, addition to tax, assessable penalty, or interest) is assessed, the IRS may take some actions to collect the tax administratively. The IRS may immediately assess the tax determined by a taxpayer on his or her own return under section 6201(a)(1), as well as some assessable penalties not subject to the code's deficiency procedures. However, the term "assessable penalties" as used in section 6201(a) is undefined, creating uncertainty about which penalties the IRS may assess and ultimately collect through administrative means.

The taxpayer contended that section 6038(b), unlike a bevy of other penalty sections in the code (discussed below), contains no provision authorizing assessment of the penalty. Therefore, the taxpayer argued, a section 6038(b) penalty is not an assessable penalty, although it may be collected through a civil action.

The IRS contended that the term "assessable penalties" includes any penalties found in the code that are not subject to the code's deficiency procedures. The IRS pointed out that neither section 6201 nor any other code section limits the term "assessable penalties" to those found in chapter 68(B) of the code's subtitle F.

In ruling for the taxpayer, the court stated that Congress has explicitly authorized assessment for a myriad of penalty provisions in the code, but not for section 6038(b) penalties. Section 6671(a) provides that the penalties found in chapter 68 (B) of subtitle F (that is, in sections 6671-6725) "shall be assessed and collected in the same manner as taxes," subjecting those penalties to the secretary's assessment authority under section 6201. Section 6665(a)(1) contains a similar statement about the additions to tax, additional amounts, and penalties provided in chapter 68 of subtitle F (that is, in sections 6651-6751). Further, the court found that other code sections that trigger penalties commonly:

- contain their own express provision specifying the treatment of penalties or other amounts as a tax or an assessable penalty for purposes of assessment and collection;
- contain a cross-reference to a provision within chapter 68 of subtitle F providing a penalty for their violation; or
- are expressly covered by a penalty provision within chapter 68 of subtitle F.

The court also looked to section 2461(a), which states that if a penalty is prescribed without a specific mode of recovery or enforcement, it can be recovered in a civil action. Because section 6038(b) penalties apply for violations of section 6038(a)(1) and (2), without a mode of recovery or

[14] Section 7421(a).

[15] 28 U.S.C. section 2201(a).

[16] *Farhy v. Commissioner*, 160 T.C. No. 6 (2023).

enforcement being specified, these penalties cannot be collected through a levy, the court held.

License Exception Timing Extended

On April 4 the IRS released Notice 2023-31, 2023-16 IRB 1, which delays the requirement to implement the single-country license carveout in the proposed FTC regulations[17] from May 17 to 180 days after the FTC regulations are finalized. The notice states that taxpayers can rely on it. Although there are still many questions and comments outstanding on the FTC regulations, this extension was welcome news, especially for those working on executing updated agreements with third parties.

APA Update

On March 27 Treasury and the IRS released the annual advance pricing agreements report (Announcement 2023-10). Overall, the number of team leaders decreased from 80 at the end of 2021 to 59 at the end of 2022, while the number of applications filed in each year went up from 145 to 183. The leadership decrease likely resulted in the significant decrease in APAs executed and renewed from 2021 to 2022. Thus, the APA program continues to trend each year in the direction of additional outstanding APAs.

The report says that 154 of the 183 APA applications filed in 2022 were bilateral and seven were multilateral. Of the bilateral APA applications in 2022, 29 percent were with Japan, 14 percent with India, and 11 percent with Canada. These are consistent with 2021 statistics. In 2022, 77 APAs were executed plus 42 renewals, significantly lower than in 2021 when 124 APAs were executed plus 78 renewals. Also, as of December 31, 2022, a total of 564 APAs and 237 renewals were pending, the highest number during the last decade and an increase from 461 and 185, respectively, in 2021. As of December 31, 2022, almost half of the pending bilateral APA requests involved either Japan (24 percent) or India (22 percent).

Most of the transactions covered in APAs executed in 2022 involve the sale of tangible goods or the provision of services. Twenty-two percent of the transactions involve the use of intangible property, which the report states can be among the most challenging transactions in the Advance Pricing and Mutual Agreement Program.

In 2022 the most commonly used transfer pricing method for both the sale of tangible property and the use of intangible property continued to be the comparable profits method/transactional net margin method (CPM/TNMM). The CPM/TNMM was used for 77 percent of these types of transactions. For covered transactions involving tangible and intangible property that used the CPM/TNMM, the operating margin is still the most common profit level indicator used to benchmark results — it was used 73 percent of the time.

Comments on Corporate AMT

American Bar Association

The American Bar Association Section of Taxation submitted more than 100 pages of comments on March 20 concerning the corporate alternative minimum tax enacted last year as part of the Inflation Reduction Act (P.L. 117-169).

The recommendations included, among other things, adopting a "fresh start" date for adjusted financial statement income (AFSI) adjustments to book income and book attributes such as basis, other than section 168 adjustments; possible regulatory relief to allow the carryforward of some pre-2020 AFSI losses for determining future AFSI; and regulations that require section 56A to be applied in a manner that will prevent duplications and omissions of book income.

"Absent applicable final regulations, taxpayers should be permitted to adopt any reasonable approach to preventing duplications of income and omissions of deductions and should be required to adopt a reasonable approach to prevent omissions of income and duplications of deductions," the comments said.

For outbound investments, the ABA tax section recommended:

- rules to prevent duplication of income by excluding any dividend from a CFC for which the taxpayer has included its pro rata share of CFC AFSI;

[17] *See* Neumann and Ushakova-Stein, "U.S. Tax Review: Proposed Regs, Audit Disclosure, MAP Stats," *Tax Notes Int'l*, Jan. 2, 2023, p. 31.

- guidance clarifying that, for purposes of determining whether a corporation is subject to the AMT, taxpayers should only include their pro rata share of CFC income, as determined under current Treasury guidance, including reg. section 1.951-1(b) and (e); and
- guidance clarifying that a corporate partner may include its proportionate share of foreign taxes paid by a partnership for purposes of computing its amount of corporate AMT FTCs.

Specifically, the tax section recommended applying the principles of section 704(b) to allocate the appropriate amount of partnership creditable foreign tax expenditures to the corporate partner for corporate AMT FTC purposes.

For inbound investments, comments included incorporating the aggregation rules of section 52(a) and (b) and turning off the exclusion of foreign corporations under section 1563(b)(2)(C) to determine which members are included in a foreign-parented multinational group for purposes of testing whether the group has the required $1 billion in average income necessary to subject it to the corporate AMT. Another commentator recommended that the CFC adjustment rules apply to a domestic member of a foreign-parented multinational group for purposes of determining whether the domestic entities meet the $100 million average income threshold. Also, the tax section recommended clarifying that tax treaties should apply in determining the AFSI of a foreign corporation that has a U.S. trade or business.

Chamber of Commerce

Treasury and the IRS should prioritize the issuance of regulations clarifying when a corporation that has been subject to the corporate AMT will no longer be within the scope of the new tax, the U.S. Chamber of Commerce stated in comments submitted March 21.

Under section 59(k)(1)(C), a corporation will no longer be subject to the corporate AMT regime if: (i) it has a specified number of consecutive tax years, including the most recent tax year, in which its average annual AFSI drops below $1 billion; and (ii) the secretary determines that it would not be appropriate to continue to treat the corporation as an applicable corporation. The chamber urged Treasury to provide guidance regarding the number of years necessary to satisfy clause (i) and the standards that will govern the application of clause (ii).

Other chamber recommendations include:

- guidance confirming that "other comprehensive income" (such as foreign currency translation adjustments and gains and losses associated with pension benefits) is not included in AFSI;
- defining "dividends" in the corporate AMT statute as distributions that are dividends for tax purposes;
- allowing a dividends received deduction in calculating the AFSI whenever it is allowed for regular tax purposes;
- computing a taxpayer's pro rata share of each CFC's net income or loss in the aggregate (netted) for purposes of section 56A(c)(3) and not on a CFC-by-CFC or country-by-country basis;
- disregarding the AFSI state or local income taxes that either (i) are reported as deferred tax expense on the taxpayer's applicable financial statement or (ii) relate to any "uncertain tax position";
- applying depreciation adjustments under section 56A(c)(13) only to property placed in service after the effective date of section 56A;
- excluding distributions of previously taxed earnings and profits from AFSI; and
- the IRS should allow taxpayers to compute their 2023 quarterly estimated tax payments without regard to section 55.

Coca-Cola Blocked Income Issue

In response to the decision in *3M*,[18] Tax Court Judge Albert G. Lauber asked for supplemental briefings on *Coca-Cola*,[19] which also involves a Brazilian legal restriction on the payment of some royalties.

[18] *3M Co. v. Commissioner*, 160 T.C. No. 3 (2023). For prior coverage of the stipulated resolution, see Neumann, Ushakova-Stein, and Knobler, "U.S. Tax Review: *3M*, *Microsoft*, and *Eaton*; Dual Consolidated Loss Rules; Pillars 1 and 2," *Tax Notes Int'l*, Mar. 6, 2023, p. 1223.

[19] *Coca-Cola Co. v. Commissioner*, 155 T.C. 145 (2020).

The first issue Lauber asked the parties to address is how the case should be decided given the court's holding in *3M* that reg. section 1.482-1(h)(2) is valid. The court also asked the parties to address how the remaining issues should be decided assuming, *arguendo*, that reg. section 1.482-1(h)(2) is invalid. Finally, the court noted that in *Procter & Gamble*,[20] another blocked income case, the Sixth Circuit ruled that a Spanish subsidiary had no obligation to pay a dividend to the U.S. parent and that Procter & Gamble should not purposely evade Spanish law by having the subsidiary make barred royalty payments under the guise of paying dividends. Judge Lauber invited the parties to address how the Sixth Circuit's reasoning applies to the facts of the Coca-Cola case, and whether the U.S. Court of Appeals for the Eleventh Circuit, which would hear an appeal of the Coca-Cola case, would likely adopt the same or different reasoning. On March 29, Coca-Cola and the IRS both filed supplemental briefs addressing the Tax Court's questions.

Coca-Cola argued that *3M* addressed the validity of the blocked-income provisions of the 1994 regulations under section 482, as amended in 1986 with the commensurate with income (CWI) provision. The entire court in *3M* agreed that under the section 482 statute, before it was revised to include CWI, the commissioner lacked the authority to tax blocked income under *First Security Bank*. Coca-Cola argued that the pre-1986, single-sentence version of section 482 applied to licenses granted to foreign persons before November 17, 1985. The CWI language applies "only with respect to transfers after November 16, 1985, or licenses granted after such date."

The Coca-Cola brief states that the Brazilian supply point's distribution of dividends does not resolve the blocked-income issue because those dividends cannot be treated as blocked royalty payments, as Procter & Gamble makes clear. ■

[20]*Procter & Gamble Co. v. Commissioner*, 961 F.2d 1255 (6th Cir. 1992), *aff'g* 95 T.C. 323 (1990).