No. 13-60684

In the United States Court of Appeals for the Fifth Circuit

BMC SOFTWARE, INCORPORATED,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

On Appeal from the United States Tax Court,
District IRS-1, No. 15675-11

BRIEF OF APPELLANT

Christine L. Vaughn
cvaughn@velaw.com
VINSON & ELKINS L.L.P.
2200 Pennsylvania Avenue N.W.
Suite 500 West
Washington, D.C. 20037
202.639.6517 (telephone)
202.879.8817(facsimile)

George M. Gerachis
ggerachis@velaw.com
Gwendolyn J. Samora
gsamora@velaw.com
Lina G. Dimachkieh
ldimachkieh@velaw.com
VINSON & ELKINS L.L.P.
1001 Fannin Street
Suite 2500
Houston, Texas 77002
713.758.2942 (telephone)
713.615.5214(facsimile)

Attorneys for Petitioner-Appellant BMC Software, Incorporated

January 22, 2014

CERTIFICATE OF INTERESTED PERSONS

No. 13-60684, *BMC Software, Incorporated v. CIR*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. **Petitioner-Appellant BMC Software, Inc. ("BMC").** BMC is a wholly-owned subsidiary of BMC Software Finance, Inc., which is wholly-owned by Boxer Parent Company, Inc. Boxer Parent Company, Inc. is a closely-held, non-publicly traded corporation owned by affiliates of Golden Gate Capital Private Equity, Inc., Bain Capital Partners, LLC, Insight Venture Partners, L.P., Westhorpe Investment Pte, Ltd and Elliot Associates, L.P.

2. **Counsel for BMC.** BMC is represented by George M. Gerachis, Gwendolyn J. Samora, and Lina G. Dimachkieh of Vinson & Elkins, L.L.P., 1001 Fannin, Suite 2500, Houston Texas 77002, and by Christine L. Vaughn of Vinson & Elkins L.L.P, 2200 Pennsylvania Avenue, N.W., Suite 500 West, Washington, D.C. 20037.

3. **Respondent-Appellee Commissioner of Internal Revenue.** The Respondent below and Appellee in this Court is the Commissioner of Internal Revenue ("the Commissioner").

4. **Counsel for the Commissioner.** The Commissioner is represented by Ellen Page DelSole and Kathryn Keneally, U.S. Department of Justice, Tax Division, P.O. Box 502, 601 D Street, N.W., Washington DC 20044-0000, by Daniel L. Timmons, Internal Revenue Service, 14th Floor MS 2500 N. 4050 Alpha Road, Dallas, TX 75244-0000, and by William J. Wilkins, Internal Revenue Service, 1111 Constitution Avenue, N.W. Washington, DC 20224-0000.

/s Gwendolyn J. Samora__________
Gwendolyn J. Samora
Attorney of Record for
BMC Software, Incorporated

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellant BMC Software, Inc. ("BMC") respectfully requests oral argument. This case presents an issue of first impression interpreting section 965 of the Internal Revenue Code[1]: whether the Commissioner can reduce tax benefits granted by Congress to taxpayers—to encourage them to repatriate funds from their foreign subsidiaries and invest in the U.S. economy—by deeming that section 965(b)(3) "related-party indebtedness" was retroactively created from a limited purpose closing agreement—which was entered into several taxable years after and was wholly unrelated to the section 965 repatriation—under taxpayer relief provisions (Rev. Proc. 99-32 and Treas. Reg. § 1.482-1(g)(3)) permitting a taxpayer, after section 482 transfer pricing adjustments to ordinary course transactions with its foreign subsidiaries, to square its intercompany accounts by repatriating funds from such subsidiaries without further adverse tax consequences. The Court's decision may help to resolve a number of similar cases pending in various forums. BMC believes that oral argument would materially aid the Court in its decisional process.

[1] Unless otherwise stated, all section references are to the Internal Revenue Code of 1986 ("I.R.C." or the "Code") (26 U.S.C.) or the Treasury regulations promulgated thereunder ("Treas. Reg.") (26 C.F.R.), as amended and in effect during the years at issue.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS i

TABLE OF AUTHORITIES vii

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED..2

STATEMENT OF THE CASE...4

A. BMC Was the Parent of BMC Software European Holding, a Controlled Foreign Corporation Under Section 957.............................4

B. In 2004, Congress Enacted Section 965 to Encourage U.S. Corporations to Repatriate Funds from Their Foreign Subsidiaries. 5

C. In Tax Year 2006, BMC Repatriated Over $700 Million from BSEH and Claimed the Section 965 DRD...6

D. In Tax Year 2008, BMC and the Commissioner Settled a Transfer Pricing Dispute Unrelated to the Section 965 DRD..............7

E. The TP Closing Agreement Resulted in Adjustments That Increased BMC's Taxable Income by $101,560,040 for Tax Years 2003–2006...9

F. BMC Sought Rev. Proc. 99-32 Relief to Square Its Intercompany Cash Accounts Without Further Adverse Tax Consequences. 10

G. At No Time Before Executing the 99-32 Closing Agreement Did the Parties Discuss Section 965...12

H. The 99-32 Closing Agreement Permitted BMC to Square Its Accounts Without Further Federal Income Tax Consequences. 13

I. On November 27, 2007, BMC Established and BSEH Paid the Accounts Receivable Pursuant to the Terms of the 99-32 Closing Agreement..16

J. In 2011, the Commissioner Issued a Deficiency Notice to BMC, Claiming that the Accounts Receivable Established in Tax Year 2008 Resulted in Retroactive Tax Consequences for Tax Year 2006. 17

SUMMARY OF ARGUMENT 17

ARGUMENT 21

I. The Tax Court Misconstrued the Term “Indebtedness” in Section 965(b)(3). 21

A. The Term “Indebtedness” Under Section 965(b)(3) Requires Application of General Federal Income Tax Principles 21

B. The Accounts Receivable Cannot Be Indebtedness Arising During the Testing Period Under General Federal Income Tax Principles. 23

1. Under general federal income tax principles, indebtedness does not exist unless and until there is an “existing, unconditional, and legally enforceable obligation to pay.” 23

2. No obligation to pay the accounts receivable was “existing, unconditional, and legally enforceable” until well after March 31, 2006 (the close of the Testing Period). 24

3. Calculating interest back to certain dates does not result in the creation of debt as of those dates under general federal income tax principles. 27

4. Section 482 adjustments do not create indebtedness. 28

II. The Tax Court Misconstrued the 99-32 Closing Agreement to Imply an Agreement that the Accounts Receivable Would Constitute Retroactive Debt Under Section 965(b)(3). 29

A. This Case Implicates Basic Principles of Contract Interpretation – Applied in the Context of a Limited Purpose Closing Agreement. 30

B. The Tax Court Erroneously Implied an Agreement That Was Not Expressly Agreed to in the 99-32 Closing Agreement. 33

1. The 99-32 Closing Agreement deals only with BMC's Rev. Proc. 99-32 relief to conform its accounts to reflect agreed-upon section 482 adjustments. 34

2. The parties did not expressly agree that the accounts receivable would constitute "debt for all federal income tax purposes," much less for section 965(b)(3) purposes. 36

3. The parties did not expressly agree that the "accounts receivable" were to be treated as retroactive debt. 38

C. The Tax Court Failed to Construe the 99-32 Closing Agreement as a Whole and in Light of the Surrounding Circumstances. 39

1. The 99-32 Closing Agreement must be interpreted in light of the surrounding regulatory context – including Rev. Proc. 99-32 and Treas. Reg. § 1.482-1(g)(3). 39

2. Properly construed, the 99-32 Closing Agreement unambiguously permitted BMC and BSEH to square their accounts without further tax consequences. 41

3. The Tax Court's distinction between "establishing" and "paying" accounts is untenable. 43

D. The Tax Court's Interpretation of the 99-32 Closing Agreement Is Unreasonable and Leads to Absurd Results. 46

1. The Tax Court's interpretation of the 99-32 Closing Agreement permits the Commissioner to do indirectly what he admittedly cannot do directly. 47

2. The Tax Court's decision permits the Commissioner to use a taxpayer relief provision, Rev. Proc. 99-32, as a sword to deny BMC the benefits of section 965 48

E. BMC's Interpretation Prevails Regardless of Whether the 99-32 Closing Agreement Is Unambiguous or Ambiguous. 52

III. The Tax Court's Decision Will Produce Troublesome, Unintended Consequences. 55

A. The Tax Court's Holding that 99-32 "Accounts Receivable" Constitute "Debt for All Federal Income Tax Purposes" Produces Collateral Consequences at Odds with the Regulatory Scheme. 55

B. The Tax Court's Decision Undermines the Purpose of Section 965–and the Related-Party Debt Exception. 56

CONCLUSION 59

CERTIFICATE OF SERVICE 60

CERTIFICATE OF COMPLIANCE REGARDING ECF FILINGS 61

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 62

TABLE OF AUTHORITIES

Page(s)

Cases

BKCAP, LLC v. Captec Franchise Trust 2000-1,
572 F.3d 353 (7th Cir. 2009) 30

Beanstalk Group, Inc. v. Am Gen. Corp.,
283 F.3d 856 (7th Cir. 2002) 46

Bethlehem Steel Corp. v. United States,
270 F.3d 135 (3d Cir. 2001) 30, 43, 53

Blue Cross & Blue Shield United of Wis. & Subsidiaries v. United States,
71 F.3d Cl. 641 (2006)....................55

Burlington No. R.R. Co. v. Okla. Tax Comm'n,
481 U.S. 454 (1987)....................57

Bush v. United States,
84 Fed. Cl. 90 (2008).................... 32, 33

Cappuccilli v. Comm'r,
T.C. Memo 1980-347, *aff'd*, 668 F.2d 138 (2d Cir. 1981) 25

CGL Underwriters v. Edison Chouest Offshore, Inc.,
8 F.3d 21, 1993 WL 455600 (Oct. 22, 1993) 43

Cinema '84 v. Comm'r,
294 F.3d 432 (2d Cir. 2002) 30

Deputy v. Du Pont,
308 U.S. 488 (1940)....................23

Eisenberg v. Comm'r,
78 T.C. 336 (1982).................... 29, 55

Ellinger v. United States,
470 F.3d 1325 (11th Cir. 2006) 30, 32, 33, 45

Estate of Mixon, Jr. v. United States,
464 F.2d 394 (5th Cir. 1972) 22

Estate of Magarian v. Comm'r,
97 T.C. 1 (1991)..32

Geringer v. Comm'r,
61 T.C. Memo. 1991-32 32

Great Plains Real Estate Dev., L.L.C. v. Union Central Life Ins. Co.,
536 F.3d 939 (8th Cir. 2008) 47

Guilzon v. Comm'r,
985 F.2d 819 (5th Cir. 1992) 36

Halbig v. Sebelius,
___ F. Supp.2d ___, 2014 WL 129023 (D.D.C. Jan. 15, 2014)......................22

Indeck Energy Services, Inc. v. Comm'r,
T.C. Memo 2003-101 ....24, 27-28

John Hancock Life Ins. Co. v. Comm'r,
141 T.C. No. 1 (2013)...23

Koch Business Holdings, LLC v. Amoco Pipeline Holding Co.,
554 F.3d 1334 (11th Cir. 2009) 46

Last v. United States,
37 Fed. Cl. 1 (1996)...32, 33

Long v. Comm'r,
93 T.C. 5, 9 (1989)...*passim*

Midkiff v. Comm'r,
96 T.C. 724 (1991)...25-27

Noguchi v. Comm'r,
992 F.2d 226 (9th Cir. 1993) 26

Pennzoil Co. v. F.E.R.C.,
645 F.2d 360 (5th Cir. 1981) 40, 43

Pritired 1 LLC v. United States,
816 F. Supp. 2d 793 (S.D. Iowa 2011)...36

R.I. Charities Trust v. Engelhard Corp.,
267 F.3d 3 (1st Cir. 2001)..47

Rink v. Comm'r,
47 F.3d 168 (6th Cir. 1995) 30, 31

Rodriguez v. Comm'r,
722 F.3d 306 (5th Cir. 2013) 21

S&O Liquidating Partnership v. Comm'r,
291 F.3d 454 (7th Cir. 2002) 30

Schering Corp. v. Comm'r,
69 T.C. 579 (1978)... *passim*

Skidmore v. Swift & Co.,
323 U.S. 134 (1944)..37

Smith v. United States,
850 F.2d 242 (5th Cir. 1988) 30, 32, 33

Streber v. Comm'r,
137 F.3d 216 (5th Cir. 1998) 54

Terrell v. Comm'r,
625 F.3d 254 (5th Cir. 2010) 21

Tomlinson v. 1661 Corp.,
377 F.2d 291 (5th Cir. 1967) 22, 23

United States v. Lane,
303 F.2d 1 (5th Cir. 1962) 30

United States v. Nat'l Steel Corp.,
75 F.3d 1146 (7th Cir. 1996) 30

United States v. Wilson,
322 F.3d 353 (5th Cir. 2003) 54

Vail Resorts, Inc. v. United States,
2011 WL 2621361 (D. Colo. July 1, 2011) 30, 34

Zaentz v. Comm'r,
90 T.C. 753 (1988)....................32

Statutes

26 U.S.C. § 7442....................1

26 U.S.C. § 7482(a)(1)....................1

26 U.S.C. § 7483....................1

26 U.S.C. §§ 6212-6215....................1

American Jobs Creation Act of 2004,
Pub. L. No. 108-357, 118 Stat. 1418....................5

I.R.C. § 1361(c)(5)(B)....................23

I.R.C. § 163(a)....................24, 25

I.R.C. § 166....................25, 55

I.R.C. § 482....................*passim*

I.R.C. § 7121....................31, 34

I.R.C. § 7121(a)....................31

I.R.C. § 7121(b)....................31

I.R.C. § 7421(a)....................22

I.R.C. § 901....................15, 49, 50

I.R.C. § 904....................55

I.R.C. § 957....................4

I.R.C. § 965....................*passim*

I.R.C. § 965(a)(1)....................5

I.R.C. § 965(b)(3)....................*passim*

I.R.C. § 965(c)....................3

Treas. Reg. § 1.166-1(c) 23

Treas. Reg. § 1.482-1(g)(2)(iii) 25

Treas. Reg. § 1.482-1(g)(3) .... *passim*

Treas. Reg. § 1.482-2(a)(2)(iii) 12, 15, 28, 35

Treas. Reg. § 1.482-2(g)(3) 55, 56

Treas. Reg. § 1.545-2(g)(2) 23

Treas. Reg. § 1.861-9T 55

Other Authorities

5 MARGARET N. KNIFFIN,
CORBIN ON CONTRACTS § 24.11 (rev. ed. 1998) 42

11 RICHARD A. LORD,
WILLISTON ON CONTRACTS § 30.2 (4th ed. 1999) 31

2A SUTHERLAND STATUTORY CONSTRUCTION § 47.29 (7th ed. 2013) 22

Black's Law Dictionary 22

H.R. Rep. No. 108-755 (2004) 5, 57

Notice 2005-38, 2005-1 C.B. 1100 .... 6, 22

Notice 2005-64, 2005-2 C. B. 471 .... 13, 36

RESTATEMENT (SECOND OF CONTRACTS) § 212 42

RESTATEMENT (SECOND) OF CONTRACTS § 201(1) 54

RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981) 31

RESTATEMENT (SECOND) OF CONTRACTS § 203 31

Rev. Proc. 68-16, 1968-1 C.B. 770 34

Rev. Proc. 99-32, 1999-2 C.B. 296 .... passim

JURISDICTIONAL STATEMENT

The Tax Court had jurisdiction over BMC's petition for redetermination of the Commissioner's deficiency notice under 26 U.S.C. §§ 7442, 6212-6215. This Court has appellate jurisdiction over the Tax Court's September 18, 2013, final decision under 26 U.S.C. § 7482(a)(1). BMC timely filed its notice of appeal on September 25, 2013 (RE-2).[2] *See* 26 U.S.C. § 7483.

[2] BMC's Record Excerpts will be cited as "RE-[Tab. No.]:[page]." The Record on Appeal will be cited as "Doc-[No].[page]." Exhibits will be cited as EX-[Number]:[page].

ISSUES PRESENTED

1. Did the Tax Court err as a matter of law when it construed the term "indebtedness" in section 965(b)(3) using a dictionary definition rather than well-established general federal income tax principles?

2. Did the Tax Court err as a matter of law in holding that the accounts receivable established and paid pursuant to the parties' "99-32 Closing Agreement,"[3] would constitute related-party indebtedness for all federal income tax purposes, including for purposes of section 965(b)(3)?

3. Did the Tax Court err as a matter of law in holding that the accounts receivable at issue here, which were indisputably established and paid under the 99-32 Closing Agreement on November 27, 2007, effectively constituted retroactive debt, dating back to the applicable testing period (October 3, 2004, to March 31, 2006) for section 965(b)(3) related-party indebtedness?

4. Properly construed under applicable contract interpretation principles, does the 99-32 Closing Agreement unambiguously provide that BMC would be allowed to establish and pay the accounts receivable without the imposition of further tax consequences resulting from secondary or collateral adjustments?

[3] The "99-32 Closing Agreement" is a limited purpose closing agreement entered into pursuant to Rev. Proc. 99-32, 1999-2 C.B. 296, a taxpayer relief provision implementing Treas. Reg. § 1.482-1(g)(3). *See infra* pp. 10-11.

5. Alternatively, if the 99-32 Closing Agreement is ambiguous, did the Tax Court err in refusing to credit the undisputed testimony of BMC's principal negotiator, Randell Price, that the parties to the 99-32 Closing Agreement intended to permit BMC to square its intercompany accounts to reflect the primary adjustments from the section 482 transfer pricing settlement without any further federal income tax consequences in any tax year?

6. Should this Court reverse the Tax Court's decision on the grounds that (a) the Tax Court's erroneous holding that 99-32 accounts constitute debt for all federal income purposes will have far-reaching, unintended consequences; (b) the Tax Court has erroneously used a taxpayer relief provision (Rev. Proc. 99-32) as a sword to deny BMC a benefit to which it was entitled under another provision of the Code—namely, section 965; and/or (c) the Tax Court undermined the purpose of section 965 when it upheld the Commissioner's reduction of BMC's dividends received deduction by accounts that were indisputably not used to finance the dividend repatriated by BMC's subsidiary in Tax Year 2006?

STATEMENT OF THE CASE

This tax dispute presents an issue of first impression. It concerns the effect, if any, of a limited purpose closing agreement, entered into in Tax Year 2008 under Internal Revenue Service ("IRS") Revenue Procedure 99-32 (the "99-32 Closing Agreement"), on deductions previously taken by BMC in Tax Year 2006 under section 965 for dividends received from its controlled foreign subsidiary in that tax year. The facts giving rise to this dispute are detailed below.

A. BMC Was the Parent of BMC Software European Holding, a Controlled Foreign Corporation Under Section 957.

BMC is one of the world's leading software companies. EX-3J. During all relevant tax years, one of BMC's wholly-owned subsidiaries, BMC Software European Holding ("BSEH"), was a controlled foreign corporation ("CFC") under section 957. RE-4:3(¶8). BSEH, in turn, owned 100% of the shares of BMC Software Europe and BMC Software Mauritius (the "BSEH subsidiaries"), both of which were disregarded as separate from BSEH for federal income tax purposes. RE-4:3(¶9). BMC filed its consolidated federal income tax returns using a taxable year ending March 31st of each year (the last day of BMC's fiscal year). RE-4:2-3(¶7). The tax return at issue here is the one for the year ending March 31, 2006 ("Tax Year 2006"),[4] filed on December 8, 2006. RE-4:2(¶1)

[4] BMC's fiscal and taxable years ending March 31, 2002 – March 31, 2008, are referred to herein as "Tax Year 2002" through "Tax Year 2008."

B. In 2004, Congress Enacted Section 965 to Encourage U.S. Corporations to Repatriate Funds from Their Foreign Subsidiaries.

Congress enacted section 965 in October 2004 as a temporary economic stimulus measure to encourage U.S. corporations to repatriate funds from their foreign subsidiaries and thereby facilitate domestic reinvestment. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 422(a), 118 Stat. 1418, 1514-15 (2004). Section 965 makes certain dividends received by a U.S. corporation eligible for an 85% dividends received deduction ("DRD") if certain requirements are met. I.R.C. § 965(a)(1); RE-4:3-4(¶11). However, to prevent taxpayers from claiming a section 965 DRD where the U.S. corporation "directly or indirectly (*e.g.*, through a related party) finances the payment of a dividend from a controlled foreign corporation," H.R. Rep. No. 108-755, at 315 (2004), Congress included section 965(b)(3), the related-party indebtedness exception.

Section 965(b)(3) provides that the amount of repatriated dividends otherwise eligible for the section 965 DRD must be reduced by the amount of any increase in the CFC's "indebtedness . . . to any related person," measured as of October 3, 2004 (section 965's effective date), and as of the close of the taxable year for which the DRD election is claimed—for BMC, March 31, 2006 (referred to as the "Testing Period"). *See* I.R.C. § 965(b)(3). Section 965(b)(3) does not define the term "indebtedness," but there is a well-settled definition of

"indebtedness" under general federal income tax principles that is applied by the courts. *See infra* pp. 23-27 (indebtedness means an existing, unconditional, legally enforceable obligation to pay). The Commissioner has recognized as much, and has stated that for purposes of section 965(b)(3), the term "indebtedness" is "defined under general Federal income tax principles." *See* Notice 2005-38 § 7.02(a), 2005-1 C.B. 1100, 1111; RE-3:13.

C. In Tax Year 2006, BMC Repatriated Over $700 Million from BSEH and Claimed the Section 965 DRD.

BMC decided to implement a section 965 domestic reinvestment plan. RE-6:31, 33-34. Mr. Randell G. Price, then BMC's Director of Tax and later its Senior Director of Tax, had the primary role in developing BMC's 965 plan. RE-6:27-28, 31. In preparing that plan, Mr. Price reviewed section 965, its legislative history, and several IRS notices; he also analyzed the financial statements and accounts for BMC, BSEH, and the BSEH subsidiaries and determined that there was no related-party indebtedness between BMC and BSEH for the period leading up to the adoption of BMC's 965 plan. RE-6:34-36, 38.

The 965 plan was approved by BMC's President, CEO, and Board of Directors in June 2006. RE-4:5-6(¶¶18-19). Pursuant to that plan, BMC repatriated $721,080,018 in cash dividends from BSEH in Tax Year 2006 (*i.e.*, the one ending March 31, 2006). RE-4:7-8(¶22).

In December 2006, Mr. Price reviewed BMC's Tax Year 2006 return and confirmed that no related-party indebtedness between BMC and BSEH had arisen during the Testing Period. RE-6:40. On its 2006 return, BMC (i) reported no related-party indebtedness; (ii) identified $708,840,732 of the repatriated sum as qualifying for the section 965 DRD; and (iii) deducted 85% of that amount, or $602,514,622, from its income under section 965. RE-4:9-11(¶¶24, 29).

D. In Tax Year 2008, BMC and the Commissioner Settled a Transfer Pricing Dispute Unrelated to the Section 965 DRD.

The other Code provision at issue is section 482 (dealing with transfer pricing adjustments), which grants the Commissioner authority to "distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among" related corporate entities if he determines that such a reallocation is necessary to "clearly reflect the income" of the related parties. I.R.C. § 482. As of December 8, 2006, when BMC filed its Tax Year 2006 return (in which BMC claimed the section 965 DRD), the Commissioner had not proposed any section 482 transfer pricing adjustments for Tax Years 2005 or 2006 – the years falling within the Testing Period. RE-4:16(¶48).

However, the Commissioner was then examining BMC's returns for Tax Years <u>2002 and 2003</u> and the amount of certain intercompany royalties (referred to as the "buy-out royalties" and the "inbound royalties") between BMC and the

BSEH subsidiaries. *See* RE-4:12-14(¶¶39-43). In late 2005, the Commissioner issued a report and "30-day letter" to BMC determining section 482 adjustments to the buy-out and inbound royalties for Tax Years 2002 and 2003; in January 2006, BMC filed a protest to the 30-day letter; and in May 2006, the Commissioner's Office of Appeals ("IRS Appeals") accepted BMC's case. RE-4:15-16(¶¶45-47).

During February and March of 2007, BMC and IRS Appeals engaged in negotiations concerning the buy-out and inbound royalties between BMC and its foreign affiliates. RE-4:16(¶49); RE-6:31-32, 41-42. Jerry D. Payne ("Mr. Payne"), Appeals Officer, represented the Commissioner in negotiations to settle the transfer pricing dispute and the subsequently executed closing agreements. RE-5:2(¶60); RE-6:41-43. Mr. Price handled negotiations for BMC. RE-6:32.

Although the negotiations initially included only Tax Years 2002 and 2003, Mr. Price offered to settle the transfer pricing issues for Tax Years 2004–2006, in addition to Tax Years 2002 and 2003. RE-4:16(¶¶48-49); RE-6:43-44. Because Tax Years 2004–2006 were still under the jurisdiction of the IRS Examination Division ("Exam"), Mr. Payne consulted with Exam, as required, before binding the Commissioner to any transfer pricing settlements for those years. RE-6:44. In March 2007, Mr. Price and Mr. Payne reached a tentative agreement on the adjustments to the buy-out and inbound royalties between BMC and the BSEH subsidiaries for Tax Years 2002 through 2006 – an agreement subsequently

memorialized on an IRS Form 906 and referred to as the Transfer Pricing Closing Agreement ("TP Closing Agreement"). RE-7; RE-4:16-17(¶¶49-50).

E. The TP Closing Agreement Resulted in Adjustments That Increased BMC's Taxable Income by $101,560,040 for Tax Years 2003–2006.

The TP Closing Agreement was signed by BMC in April 2007, and became effective on September 25, 2007. RE-7; RE-4:17(¶50). It included a schedule of revised inbound and buy-out royalties between BMC and its foreign affiliates for Tax Years 2003–2006. *Id.* The net result was that BMC agreed to certain adjustments or increases to its income (the "Primary Adjustments") totaling $101,560,040 for Tax Years 2003–2006, as follows:

Tax Year (ending March 31st)	**Primary Adjustment** (net increase in BMC's income)
2003	$35,260,040
2004	$22,900,000
2005	$21,700,000
2006	$21,700,000
Total:	**$101,560,040**

RE-5:3(¶67); RE-6:45-47; RE-7.

Based on the Primary Adjustments, BMC had to include in its taxable income – and pay additional taxes on – the $101,560,040 of income it should have earned (but in fact had been paid to BSEH) in Tax Years 2003 through 2006. RE-6:46-47. The Primary Adjustments in the TP Closing Agreement resulted in

"correlative allocations" decreasing BSEH's earnings and profits for Tax Years 2003 through 2006 by $101,560,040. RE-6:46; RE-5:4(¶68). But the $101,560,040 that BMC "overpaid" in royalties to the BSEH subsidiaries remained in the cash accounts of BSEH. RE-6:47.

F. BMC Sought Rev. Proc. 99-32 Relief to Square Its Intercompany Cash Accounts Without Further Adverse Tax Consequences.

Treasury Regulation § 1.482-1(g)(3) requires adjustments to taxpayers' accounts to reflect adjustments such as the Primary Adjustments in the TP Closing Agreement:

> *Adjustments to conform accounts to reflect section 482 allocations*. (i) *In general.* Appropriate adjustments must be made to conform a taxpayer's accounts to reflect allocations made under section 482. Such adjustments may include the treatment of an allocated amount as a dividend or a capital contribution (as appropriate), or, in appropriate cases, pursuant to such applicable revenue procedures as may be provided by the Commissioner . . . repayment of the allocated amount without further income tax consequences. [emphasis added]

Revenue Procedure 99-32, issued pursuant to Treas. Reg. § 1.482-1(g)(3), states that, in the absence of the relief provided by Rev. Proc. 99-32, a primary adjustment under section 482 "entails secondary adjustments to conform the taxpayer's accounts to reflect the primary adjustment," and that such "secondary adjustments may result in adverse tax consequences to the taxpayer." Rev. Proc. 99-32 § 2, 1999-2 C.B. 296.

Absent Rev. Proc. 99-32 relief, the cash imbalances between BMC and BSEH as a result of the Primary Adjustments would have required BMC to make a "conforming adjustment," as used in Treas. Reg. § 1.482-1(g)(3), or a "secondary adjustment," as referred to in Rev. Proc. 99-32 – in the form of a $101,560,040 deemed contribution to the capital of BSEH. RE-4:21(¶56); RE-6:47-49. If BSEH thereafter repatriated the $101,560,040 to BMC to correct the cash imbalances, that repatriation would be taxed – for a second time – as a dividend to BMC in the year of repatriation. RE-4:21(¶56); RE-6:47-49. Where Rev. Proc. 99-32 relief is elected, its effects replace the deemed capital contribution conforming treatment, allowing the taxpayer "to repatriate the cash attributable to a primary adjustment via an account without the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment." *Id.*

On June 14, 2007, BMC requested Rev. Proc. 99-32 relief to conform the cash accounts of BMC and BSEH to reflect the Primary Adjustments without any further adverse federal income tax consequences. RE-5:2(¶61); EX-28R. As Mr. Price explained: "[W]e have now the cash in the wrong place. . . And we want to be able to square the cash accounts, bring the cash back without any adverse tax consequences, or secondary adjustments, some type of inclusion in taxable income. Because <u>we have already picked up the primary adjustments in taxable income</u>." RE-6:47 (emphasis added); *see also* RE-6:48. Mr. Price also testified that BMC's

intent in requesting Rev. Proc. 99-32 relief was to put BMC in the same place it would have been had the section 482 Primary Adjustments been reflected on BMC's original returns for the tax years at issue. RE-6:66, 71-72.

G. At No Time Before Executing the 99-32 Closing Agreement Did the Parties Discuss Section 965.

On July 2, 2007, Mr. Price submitted a draft of the 99-32 Closing Agreement to Mr. Payne, which contained provisions required by the IRS under Rev. Proc. 99-32, including ones providing (a) for establishing and paying the accounts receivable; (b) for computing "safe harbor" interest on the accounts receivable pursuant to Treas. Reg. § 1.482-2(a)(2)(iii); and (c) that payment of the accounts would be "free of the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment. . . ." EX-29R; RE-5:2(¶62); EX-25J; RE-6:50-51, 55. After receiving BMC's draft, Mr. Payne consulted with both Appeals Officer Cesar Faz and Exam, and made substantive changes that BMC accepted. RE-5:2-3(¶¶ 60, 64); RE-6:43-44.

At no point did Mr. Payne or anyone for the Commissioner mention section 965 or inform BMC that any accounts established and paid pursuant to the 99-32 Closing Agreement would constitute debt for all purposes, or "retroactive" related-party indebtedness under section 965(b)(3). RE-6:53-55. Mr. Payne certainly never requested that the 99-32 Closing Agreement refer to section 965 or related-

party indebtedness. RE-4:21(¶57); RE-6:43-44. It was not until September 2008 that the Commissioner issued Advice Memorandum 2008-010, instructing its personnel to include a provision in future closing agreements informing taxpayers that, by electing Rev. Proc. 99-32 relief, they would reduce their previous section 965 DRD. EX-13J. BMC's 99-32 Closing Agreement contains no such language.[5]

H. The 99-32 Closing Agreement Permitted BMC to Square Its Accounts Without Further Federal Income Tax Consequences.

The 99-32 Closing Agreement incorporates by reference the TP Closing Agreement and Rev. Proc. 99-32, which in turn was issued pursuant to Treas. Reg. § 1.482-1(g)(3). RE-8; RE-7; RE-4:19(¶52); RE-6:50-51. The "WHEREAS" clauses note that "BMC timely requested relief described in section 4 of Rev. Proc. 99-32 and the parties wish to describe herein the basis on which such relief will be granted." RE-8. Following the recital mandated by the IRS's standard Form 906 closing agreement, which stated that "IT IS HEREBY DETERMINED AND

[5] Nor did Messrs. Price and Payne discuss IRS Notice 2005-64 (one of several notices issued in 2005 providing guidance about section 965), a 21-page single-spaced document that stated, with no analysis whatsoever: "Accounts payable established under Rev. Proc. 99-32 . . . in connection with section 482 adjustments are to be treated as indebtedness for purposes of section 965(b)(3)." EX-11J, § 10.06. No such language was proposed or included in the 99-32 Closing Agreement, and the Commissioner has stipulated that Notice 2005-64 did not amend Rev. Proc. 99-32 and thus was not a part of the 99-32 Closing Agreement. RE-4:11(¶33). Moreover, even the single sentence in Notice 2005-64 does not indicate that accounts receivable established <u>after</u> the close of the Testing Period could be deemed debt retroactive to the Testing Period. Although Mr. Price reviewed Notice 2005-64 back in 2005 and 2006, when he prepared BMC's 965 plan, he did not recall focusing on the single sentence in Notice 2005-64 because at the time no indebtedness existed between BMC and BSEH, and no transfer pricing adjustments had been proposed for Tax Years 2005 or 2006 – the tax years within the Testing Period. RE-6:39-41.

AGREED for federal income tax purposes . . . ," the parties set forth the specific terms on which Rev. Proc. 99-32 relief was to be granted. *Id.*

Paragraph 1 specifies the "Primary Adjustments" that are to be made to the earnings and profits of BSEH pursuant to the terms of the TP Closing Agreement, and Paragraph 2 provides for the establishment of accounts receivable for each of Tax Years 2003 through 2006, totaling $101,560,040 (the total amount of the Primary Adjustments). It provides: "The parties will establish the following interest-bearing accounts receivable from BSEH to BMC in the amounts and as of the dates indicated. All amounts will be in United States dollars:

Date Receivable Established	Amount
March 31, 2003	$35,260,040
March 21, 2004	$22,900,000
March 31, 2005	$21,700,000
March 31, 2006	$21,700,000

RE-8; RE-4:19-20(¶53).

In Paragraph 3, the parties agreed that the "accounts receivable shall bear interest at the applicable Federal rate in effect on the dates specified in paragraph 2 from such dates to the dates of repayment," as required by section 4.01(2) of Rev. Proc. 99-32. RE-8; RE-5:5(¶72). Mr. Price understood that it was necessary to properly compute the interest on the accounts using the "safe harbor" interest rates

of Treas. Reg. § 1.482-2(a)(2)(iii), in order to satisfy § 4.01(2) of Rev. Proc. 99-32. RE-6:52. Paragraph 3 also provided that the interest on the accounts "will be deductible from the taxable income of BSEH as computed for U.S. tax purposes" but that "such interest will be includible in the taxable income of BMC." RE-8.

Paragraph 4 provides that it was "not anticipated that any withholding tax will be imposed on payments of principal or interest hereunder," but that "[t]o the extent any withholding tax is imposed on such payments, . . . BMC may claim a foreign tax credit in respect of such withheld tax to the extent allowable under I.R.C. § 901." RE-8.

Finally, paragraph 5 of the 99-32 Closing Agreement provides that "BSEH will pay the account receivable, including interest thereon, by intercompany payment." Paragraph 5 further provides (in the wording required by Rev. Proc. 99-32) that the payment of the accounts receivable by intercompany payment "will be free of the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment; *provided*, the payment of the balance of the account . . . is made within 90 days after execution of this closing agreement on behalf of the Commissioner." RE-8.

One such federal income tax consequence the parties sought to eliminate was treatment of the amount repatriated as a taxable dividend, treatment which otherwise would have resulted absent Rev. Proc. 99-32 relief. RE-4:21(¶56). But

that was not the only tax consequence the parties sought to eliminate. As explained by Mr. Price at trial: "My understanding was that we needed to incorporate . . . the IRS's language from [Rev. Proc.] 99-32. And that once we incorporated that language, and both parties agreed, IRS and BMC, that was the end of the story, if you will. That allowed us the relief from secondary federal income tax consequences." RE-6:55. Mr. Price thus testified, without contradiction, that the purpose of paragraph 5 was to make clear that the money could come back with "[n]o federal income tax consequences, period," whether those tax consequences were in Tax Year 2008 or some other year. RE-6:77.

I. On November 27, 2007, BMC Established and BSEH Paid the Accounts Receivable Pursuant to the Terms of the 99-32 Closing Agreement.

Under the 99-32 Closing Agreement and Rev. Proc. 99-32, BMC and BSEH had 90 days from September 25, 2007, the effective date of the agreement, to establish and settle the accounts receivable, while avoiding any further tax consequences. RE-4:19-20(¶53); RE-8. If BMC had not established the accounts, or if BSEH had not paid the accounts, within that 90-day period, any subsequent payment made by BSEH to BMC to repatriate sums equaling the Primary Adjustments would have been a fully taxable dividend. RE-5:21(¶56). However, BMC and BSEH performed within 90 days. On November 27, 2007 (during Tax Year 2008), the accounts receivable and corresponding accounts payable were

established on the books of BMC and the BSEH subsidiaries, and, on the same day, the accounts were paid by wire transfer to BMC. RE-4:21(¶54); RE-5:4(¶70); EX-33P; RE-6:58-61.

J. In 2011, the Commissioner Issued a Deficiency Notice to BMC, Claiming that the Accounts Receivable Established in Tax Year 2008 Resulted in Retroactive Tax Consequences for Tax Year 2006.

On May 4, 2011, the Commissioner issued a statutory notice of deficiency to BMC, determining a deficiency of $12,911,500 for Tax Year 2006. RE-4:2(¶2). The sole basis for this deficiency determination was that BMC's election to obtain relief under Rev. Proc. 99-32 in Tax Year 2008, and the resulting establishment and payment of the accounts receivable pursuant to the 99-32 Closing Agreement, retroactively increased (by $43.4 million) the related-party indebtedness between BMC and BSEH during the section 965(b)(3) Testing Period. RE-4:22(¶22).

After a trial on the merits on May 23, 2012 (RE-6), at which the only witness to testify was BMC's chief negotiator, Randell Price, the Tax Court issued its decision affirming the deficiency determination. RE-3. BMC appeals.

SUMMARY OF ARGUMENT

This case involves two taxpayer relief provisions: (1) section 965 and (2) Rev. Proc. 99-32 (implementing Treas. Reg. § 1.482-1(g)(3)). The former is an economic stimulus measure enacted to encourage U.S. taxpayers to repatriate sums from foreign subsidiaries to facilitate investment in the U.S. economy. The latter,

issued to promote compliance with the transfer pricing rules, allows taxpayers to repatriate, without further adverse tax consequences, cash from foreign subsidiaries to conform their accounts following section 482 adjustments. The Commissioner argued, and the Tax Court agreed, that when a taxpayer seeks relief under Rev. Proc. 99-32 to conform its cash accounts, it retroactively forfeits a portion of the DRD benefit provided by section 965. The Tax Court wrongly permitted the Commissioner to use Rev. Proc. 99-32 and Treas. Reg. § 1.482-1(g)(3), designed to shield a taxpayer against further adverse tax consequences, as a sword to deny BMC the benefit of the section 965 DRD.

The Tax Court's decision cannot be squared with section 965, congressional intent, or fundamental principles of tax law. Under those principles, which apply for purposes of section 965(b)(3), "indebtedness" requires an existing, unconditional, and legally enforceable obligation to pay a sum certain. No such indebtedness existed between BSEH and BMC during the Testing Period. Indeed, no legally enforceable obligation to pay a sum certain could have possibly arisen before the September 25, 2007, the effective date of the 99-32 Closing Agreement, or, arguably, before November 27, 2007, when the accounts receivable were established and paid. In holding that a 99-32 account constitutes retroactive debt for all purposes, including for purposes of section 965(b)(3), the Tax Court

stretched Rev. Proc. 99-32 far beyond its intended scope, turning general federal income tax law principles on their heads.

The Tax Court also misinterpreted the 99-32 Closing Agreement. The 99-32 Closing Agreement is a special, limited purpose closing agreement which granted BMC relief to square its accounts without further federal income tax consequences. Under established law, the Tax Court was required to, but did not, strictly construe the 99-32 Closing Agreement to encompass only the matters as to which the parties expressly agreed. Instead, the Tax Court erroneously "implied" an agreed, retroactive debt term not expressly agreed to in the 99-32 Closing Agreement. The 99-32 Closing Agreement nowhere mentions "debt," "indebtedness," or "related-party indebtedness," and nowhere refers to section 965(b)(3). The mere fact that BMC and BSEH agreed to establish "accounts receivable" as of certain dates, solely for the purpose of computing safe harbor interest under applicable Treasury regulations, does not transform those accounts into "indebtedness" as of those dates under general federal income tax principles.

The Tax Court further erred in refusing to interpret the 99-32 Closing Agreement as a whole and in light of the regulatory framework, which includes Treas. Reg. § 1.482-1(g)(3) and Rev. Proc. 99-32. Properly construed, the 99-32 Closing Agreement unambiguously permits BMC and BSEH to establish and pay the accounts receivable without further adverse federal income tax consequences,

whether those consequences would arise in Tax Year 2008 (when the accounts were established and paid) or in prior tax years. The Tax Court's conclusion that the parties intended to eliminate only a single tax consequence in Tax Year 2008—*i.e.*, dividend taxation on the full amount repatriated—cannot be squared with the language of the 99-32 Closing Agreement and, if accepted, leads to the absurd result that the Commissioner can do indirectly, in Tax Year 2006 (impose a tax on the sums repatriated), what he cannot do directly in Tax Year 2008 (impose a tax on the sums repatriated). Because BMC's interpretation of the 99-32 Closing Agreement is the only reasonable one, the Tax Court's decision must be reversed.

Even if this Court were to find that the 99-32 Closing Agreement is ambiguous, the interpretation sought by BMC prevails because the only evidence of the parties' intent was offered by BMC. That evidence shows that the purpose of the 99-32 Closing Agreement was to permit BMC to square or conform its intercompany accounts without any further federal income tax consequences in any year. Thus, one way or another, the Tax Court's decision must be reversed, and judgment should be rendered that BMC owes no deficiency for Tax Year 2006.

ARGUMENT

Standard of review is <u>de novo</u>. This Court reviews Tax Court decisions under the same standard it applies to district court decisions. *See Rodriguez v. Comm'r*, 722 F.3d 306, 308 (5th Cir. 2013). Issues of law are reviewed *de novo* and issues of fact are reviewed for clear error. *Terrell v. Comm'r*, 625 F.3d 254, 258 (5th Cir. 2010). Here, the Tax Court's decision presents only issues of law. Accordingly, the *de novo* standard of review applies.

I. THE TAX COURT MISCONSTRUED THE TERM "INDEBTEDNESS" IN SECTION 965(b)(3).

A. <u>The Term "Indebtedness" Under Section 965(b)(3) Requires Application of General Federal Income Tax Principles.</u>

The threshold issue in this case is one of statutory interpretation – the meaning of "indebtedness" in section 965(b)(3). Section 965(b)(3) provides that the one-time deduction for dividends received by a U.S. taxpayer "shall be reduced by" any increase in the "amount of indebtedness" owed to any related party by the CFC paying the dividend, measured between October 3, 2004, and "the close of the taxable year" (here, March 31, 2006) of the section 965 election. I.R.C. § 965(b)(3). The Tax Court should have applied general federal income tax principles to determine whether the accounts receivable established under the 99-32 Closing Agreement constituted "indebtedness" under section 965(b)(3)—well-settled principles which courts, including this one, have applied consistently in

defining indebtedness. *See, e.g., Estate of Mixon, Jr. v. United States,* 464 F.2d 394 (5th Cir. 1972); *Tomlinson v. 1661 Corp.,* 377 F.2d 291 (5th Cir. 1967). Indeed, "[i]n the absence of legislative intent to the contrary, or other overriding evidence of a different meaning, technical terms or terms of art used in a statute are presumed to have their technical meaning." 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.29 (7th ed. 2013); *see also Halbig v. Sebelius*, ___ F. Supp. 2d ___, 2014 WL 129023, *10 (D.D.C. Jan. 15, 2014) (absent a clear indication by Congress, court views the term "tax" used in section 7421(a) as having the same meaning as the term "tax" as used elsewhere in the Code).

But the Tax Court inexplicably ignored general federal income tax principles and instead turned to the definition of "indebtedness" in *Black's Law Dictionary*. Based solely on that definition, the Tax Court concluded that "indebtedness" for purposes of section 965(b)(3) is "the condition of owing money or being indebted." RE-3:14.[6] And because *Black's Law Dictionary* defines an "account receivable" as "[a]n account reflecting a balance owed by the debtor," the Tax Court concluded, without further analysis, that the accounts receivable established under the 99-32 Closing Agreement—created for the special purpose of conforming related intercompany accounts following a section 482 adjustment without further tax

[6] While the Tax Court acknowledged the Commissioner's published position that "indebtedness" in section 965(b)(3) is defined under "general Federal income tax principles," the court did not apply those principles. *See* Notice 2005-38 § 7.02(a), 2005-1 C.B. 1100, 1111; RE-3:13-14.

consequences—must be "indebtedness" under section 965. RE-3:14-15. This simplistic analysis is fundamentally flawed.

B. The Accounts Receivable Cannot Be Indebtedness Arising During the Testing Period Under General Federal Income Tax Principles.

1. Under general federal income tax principles, indebtedness does not exist unless and until there is an "existing, unconditional, and legally enforceable obligation to pay."

As this Court has recognized, under federal income tax principles, "indebtedness" requires "an existing unconditional and legally enforceable obligation to pay." *Tomlinson*, 377 F.2d at 295; *accord John Hancock Life Ins. Co. v. Comm'r*, 141 T.C. No. 1, at 83 (2013). Similar definitions of "debt" or "indebtedness" can be found throughout the Code and Treasury regulations.[7] Thus, an obligation to pay is not "indebtedness" for federal income tax purposes unless—and until—it is unconditional and legally enforceable. As the Supreme Court stated in *Deputy v. Du Pont*, 308 U.S. 488, 497 (1940), "although an indebtedness is an obligation, an obligation is not necessarily an 'indebtedness' . . . ." Similarly, an "account" may create an obligation to pay, but an account is not "indebtedness" unless and until it is unconditional and legally enforceable.

[7] *See, e.g.*, I.R.C. § 1361(c)(5)(B) ("term 'straight debt' means any written unconditional promise to pay on demand or on a specified date a sum certain in money . . ."); Treas. Reg. § 1.166-1(c) ("bona fide debt is a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money"); Treas. Reg. § 1.545-2(g)(2) ("'indebtedness' means an obligation absolute and not contingent, to pay on demand or within a given time, in cash or other medium, a fixed amount").

2. No obligation to pay the accounts receivable was "existing, unconditional, and legally enforceable" until well after March 31, 2006 (the close of the Testing Period).

Here, no obligation to pay the accounts receivable established under the 99-32 Closing Agreement was "existing, unconditional, and legally enforceable" until well *after* March 31, 2006, the close of the Testing Period. Any obligation to pay the accounts could not have been unconditional and legally enforceable until, at the earliest, September 25, 2007, the effective date of the 99-32 Closing Agreement.

Courts have recognized that an obligation to pay is not unconditional, and debt does not exist, if the timing and amount of the payment are uncertain. In *Indeck Energy Servs., Inc. v. Comm'r*, T.C. Memo 2003-101, a Shareholder's Agreement required a corporation to purchase its president's shares upon his employment terminating. An arbitrator awarded the president a fixed price per share plus 10-percent interest from January 31, 1991; after subsequent legal proceedings, the parties entered into a settlement agreement in 1994 for the amount awarded by the arbitrator plus 10-percent interest from January 31, 1991. The court denied the corporation's section 163(a) interest deduction, *see* I.R.C. § 163(a) (providing that a "deduction" shall be allowed on "interest paid or accrued within the taxable year on indebtedness"), because the interest accrued from the initial award in 1991 until the 1994 settlement was not interest on "indebtedness." The court held that any obligation on behalf of the corporation to purchase the

president's shares was "far too indefinite to give rise to indebtedness" prior to the 1994 settlement. *Indeck*, T.C. Memo 2003-101 at 500. The same is true here: indebtedness could not have arisen until, at the earliest, September 25, 2007, the date the 99-32 Closing Agreement became effective.

In *Cappuccilli v. Comm'r*, the Tax Court applied a similar analysis in the context of section 482 transfer pricing adjustments. T.C. Memo 1980-347, *aff'd*, 668 F.2d 138 (2d Cir. 1981). There, the taxpayers sought a bad debt deduction under Code section 166 for the amount of interest allocated to them from a related party under section 482 for earlier tax years. The court held that if a "debt" was created, it did not come into existence until the amount was no longer subject to a contingency, that is, until the year in which the section 482 allocations were subject to a final determination by a final court decision upholding the allocations. *Cappuccilli* is fully consistent with Treas. Reg. § 1.482-1(g)(2)(iii) (primary section 482 adjustments and correlative allocations are not considered made until the date of a final determination).

Moreover, as explained by the Tax Court in *Midkiff v. Comm'r*, 96 T.C. 724 (1991), an obligation to pay is conditional, and no indebtedness exists, at any time during which the purported debtor is free to back out of the deal. In *Midkiff*, the taxpayers claimed a deduction for interest paid on the purchase price of real property under section 163(a), where the interest accrued from the date a

condemnation action commenced until the date the taxpayers and the seller entered into a settlement agreement. But the *Midkiff* court denied the deduction because the interest did not accrue on "indebtedness." *Midkiff*, 96 T.C. at 739-40. Although the taxpayers had committed in writing to purchase the property following the condemnation action, the court reasoned that the interest was not paid or accrued on "indebtedness" because the taxpayers' obligation to purchase the property was not unconditional and legally enforceable until the sale closed.[8]

Under *Midkiff*, it is arguable that indebtedness did not arise between BSEH and BMC until the accounts receivable were established and paid on November 27, 2007, because, prior to that time, both BMC and BSEH could have backed out of the arrangement. Under Rev. Proc. 99-32 and Treas. Reg. § 1.482-2(g)(3), any amount unpaid 90 days after the effective date of the 99-32 Closing Agreement would have been characterized as a contribution to BSEH's capital. *See Long v. Comm'r*, 93 T.C. 5, 9 (1989). All the "accounts receivable" were designed to do was establish an accounting mechanism to allow BMC and BSEH to conform their cash accounts. (The accounts receivable and payable provided for in the revenue procedure "are but a means to an end, the end being reconciliation of economic realities to tax consequences." *Id* at 11.) But at the very least, both BMC and

[8] The Eleventh Circuit affirmed, finding that the obligation to pay was conditional because the taxpayers were free to back out of the deal until they paid for the property and acquired the fee interest at closing. *See Noguchi v. Comm'r*, 992 F.2d 226, 227 (9th Cir. 1993).

BSEH were free to back out of the deal prior to September 25, 2007, the date on which the 99-32 Closing Agreement became effective. RE-4:19(¶52).

The Tax Court erred in holding that the accounts receivable established under the 99-32 Closing Agreement constitute related-party indebtedness, retroactive to the Testing Period, which ended on March 31, 2006. Before September 25, 2007, (a) there was no fixed obligation to establish or pay the accounts receivable; (b) the actual amounts of the section 482 adjustments had not yet been finally determined; and (c) the parties were free to back out of the deal.

3. Calculating interest back to certain dates does not result in the creation of debt as of those dates under general federal income tax principles.

Debt cannot be deemed to arise as of a certain date in the past merely because the parties agree that interest should be computed on a particular sum owing as of that date. *See Midkiff*, 96 T.C. 724 (settlement agreement that included payment of purchase price plus annual interest for each of the prior five years did not give rise to retroactive indebtedness in such prior years); *Indeck*, T.C. Memo 2003-101 (settlement agreement that included payment of arbitral award plus annual interest for each of the prior three years did not give rise to retroactive indebtedness because the obligation to pay was not fixed or legally enforceable until parties entered into settlement agreement). The court in *Indeck* explained that "an amount denominated as interest to settle a dispute, even where

stated as a percentage per annum of a designated amount, does not entitle [the taxpayer] to an interest deduction where indebtedness did not exist." *Indeck*, T.C. Memo 2003-101 at 502.

The mere fact that the 99-32 Closing Agreement provided for calculating interest on the accounts receivable as of prior tax years does not create "indebtedness" in those years where, as here, under general federal income tax principles "indebtedness" did not otherwise exist. Revenue Procedure 99-32 explicitly states that accounts created under its provisions are treated as "loans" as of the date the account is deemed to have been created "[f]or purposes of section 1.482-2(a)(2)(iii)" (*i.e.*, for calculating the amount of safe harbor interest due). Rev. Proc. 99-32 § 4.01(2). Yet this does not mean that a "debt" is created as of such date for all federal income tax purposes. The questions of whether and when "indebtedness" arises under general federal income tax principles are more complex and nuanced than the mere "condition of owing money."

4. Section 482 adjustments do not create indebtedness.

Nor was indebtedness created by virtue of the Primary Adjustments agreed to in the TP Closing Agreement in Tax Year 2008 – which in turn gave rise to the request for relief under Rev. Proc. 99-32. It is well-settled that the reallocation of income pursuant to section 482 does not create a debt obligation; rather, section 482 "is designed merely to accurately reflect the taxpayer's income." *Eisenberg v.*

Comm'r, 78 T.C. 336, 347 (1982); *Long*, 93 T.C. at 9. If the section 482 Primary Adjustments did not give rise to indebtedness, then the accounts established pursuant to Rev. Proc. 99-32 – which were designed to permit BMC to square its accounts so as to put BMC in the same place it would have been had the section 482 Primary Adjustments been reflected on BMC's original returns for the tax years at issue – do not constitute indebtedness. RE-6:66, 71-72. Regardless, even if section 482 adjustments could give rise to indebtedness (and they do not), the amount of the 482 adjustments were not certain until, at the earliest, September 25, 2007, when the TP Closing Agreement became effective. RE4:17(¶50).

Indebtedness does not exist for federal income tax purposes unless and until there is an unconditional and legally enforceable obligation to pay a fixed sum. There was no such obligation between BSEH and BMC until, at the earliest, September 25, 2007 – which is well after the March 31, 2006 date on which the Testing Period closed. Accordingly, the Tax Court's decision must be reversed and judgment rendered for BMC.

II. THE TAX COURT MISCONSTRUED THE 99-32 CLOSING AGREEMENT TO IMPLY AN AGREEMENT THAT THE ACCOUNTS RECEIVABLE WOULD CONSTITUTE RETROACTIVE DEBT UNDER SECTION 965(b)(3).

The Tax Court also erred in misinterpreting the 99-32 Closing Agreement. For this reason, too, the Tax Court's decision must be reversed.

A. <u>This Case Implicates Basic Principles of Contract Interpretation – Applied in the Context of a Limited Purpose Closing Agreement.</u>

"Closing agreements are no more than contracts, and are 'governed by the rules applicable to contracts generally.'" *Long*, 93 T.C. at 10 (quoting *United States v. Lane*, 303 F.2d 1, 4 (5th Cir. 1962)). Courts have uniformly held that closing agreements, which are in essence settlement agreements, are governed by federal common law contract principles. *See Smith v. United States*, 850 F.2d 242, 245 (5th Cir. 1988); *see also Ellinger v. United States*, 470 F.3d 1325, 1336 (11th Cir. 2006); *Cinema '84 v. Comm'r*, 294 F.3d 432, 445 (2d Cir. 2002); *Bethlehem Steel Corp. v. United States*, 270 F.3d 135, 139 (3d Cir. 2001); *United States v. Nat'l Steel Corp.*, 75 F.3d 1146, 1150 (7th Cir. 1996); *Rink v. Comm'r*, 47 F.3d 168, 171 (6th Cir. 1995); *Vail Resorts, Inc. v. United States*, 2011 WL 2621361, at *5 (D. Colo. July 1, 2011). Federal contract common law includes the "core principles of the common law of contract that are in force in most states." *S&O Liquidating P'ship v. Comm'r*, 291 F.3d 454, 459 (7th Cir. 2002).

The "cardinal rule" of contract interpretation is to "'ascertain the intention of the contracting parties and to give effect to that intention if it can be done consistently with legal principles.'" *Lane*, 303 F.2d at 4; *accord BKCAP, LLC v. Captec Franchise Trust 2000-1*, 572 F.3d 353, 359 (7th Cir. 2009). The "primary function of the court is to ascertain the intention of the parties" as of the "time they

executed the contract." 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 30.2, at 16-20 (4th ed. 1999). A court does not view words and provisions in isolation – context matters. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. b (1981).

"Words and other conduct are interpreted in light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." *Id.* § 202(1). Similarly, a written contract is "interpreted as a whole, and all writings that are part of the same transaction are interpreted together." *Id.* § 202(2); *see id.* § 202 cmt. d. An "interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless." *Rink*, 47 F.3d at 171; *accord* RESTATEMENT (SECOND) OF CONTRACTS § 203(a). Unless a "different intention is manifested," language that has a "generally prevailing meaning . . . is interpreted in accordance with that meaning," and "technical terms . . . are given their technical meaning when used in a transaction within their technical field." *Id.* § 202(3).

The relevant "context" in this case includes the fact that the 99-32 Closing Agreement is a specialized agreement, entered into under section 7121. I.R.C. § 7121. Section 7121(a) authorizes the Commissioner to enter into agreements in writing with any person relating to the "liability of such person . . . in respect of any internal revenue tax for any taxable period." Section 7121(b), in turn, provides that closing agreements are final and conclusive as to the matters agreed upon and

may not be annulled, modified, set aside, or disregarded unless there is a showing of "fraud or malfeasance, or misrepresentation of a material fact." Three types of closing agreements exist; the one at issue here, Form 906 ("Closing Agreement on Final Determination of Specific Matters"), documents an agreement as to a specific matter affecting tax liability, in past or future years. *See Estate of Magarian v. Comm'r,* 97 T.C. 1, 5 (1991); *Zaentz v. Comm'r*, 90 T.C. 753, 760 (1988).

Accordingly, although closing agreements are generally interpreted under federal common law contract principles, such agreements, because of their limited nature, are strictly construed to bind the parties only to the matters expressly agreed upon. *See Ellinger*, 470 F.3d at 1336-37; *Bush v. United States*, 84 Fed. Cl. 90, 95 (2008); *Last v. U.S.*, 37 Fed. Cl. 1, 7 (1996); *Geringer v. Comm'r,* T.C. Memo 1991-32 (citing *Zaentz*, 90 T.C. at 766). "[O]nly matters specifically spelled out in a closing agreement as being resolved will be treated as settled." *Ellinger*, 470 F.3d at 1337. "Premises underlying the agreement" or "not specifically noted as settled" do not bind the parties. *Id*. (quotation omitted).

Thus, courts refuse to "imply" terms into a closing agreement that are not expressly there. Indeed, in *Smith*, the closing agreement was "limited on its face to a determination of the Smiths' 1978 and 1979 losses from New Star Venture." 850 F.2d at 245. This Court noted that the closing agreement did "not purport to apply [that] determination to the Smiths' taxable income for those years" or "address the

question of penalties and interest." *Id.* Because the closing agreement in *Smith* did not expressly address whether the IRS could recover penalties and interest, this Court declined to imply a term barring the IRS from seeking penalties and interest as provided for by law. *See also Bush*, 84 Fed. Cl. at 95 (refusing to imply a term waiving the government's right to interest and penalties); *Last*, 37 Fed. Cl. at 7 (refusing to apply a closing agreement term waiving the statute of limitations).

B. The Tax Court Erroneously Implied an Agreement That Was Not Expressly Agreed to in the 99-32 Closing Agreement.

While the Tax Court acknowledged that "[s]ome closing agreements decide only specific issues and bind the parties only as to those issues" (RE-3:22), the Tax Court ignored the well-settled rule that a limited purpose closing agreement, such as the 99-32 Closing Agreement, should be strictly construed to bind the parties only to the matters expressly agreed upon. *See Ellinger*, 470 F.3d at 1336-37. Instead, the Tax Court wrongly "implied" a term into the 99-32 Closing Agreement not expressly agreed to by the parties—one in which the parties purportedly agreed that the accounts receivable established and paid pursuant to that agreement would constitute retroactive related-party indebtedness under section 965(b)(3).

1. The 99-32 Closing Agreement deals only with BMC's Rev. Proc. 99-32 relief to conform its accounts to reflect agreed-upon section 482 adjustments.

The place to start is determining the matters "expressly" agreed to in the 99-32 Closing Agreement. As the court explained in *Vail Resorts*, the IRS's own procedures (in Rev. Proc. 68-16, 1968-1 C.B. 770) emphasize that closing agreements are limited in scope and that final determinations of "specific matters" should be reflected on Form 906 in clear and express terms in the numbered paragraphs following the "WHEREAS" clauses and following the caption "NOW IT IS HEREBY DETERMINED AND AGREED for federal income tax purposes that . . . ." *See Vail Resorts*, 2011 WL 2621361, at *6-7 (discussing Rev. Proc. 68-16). Thus, as explained by the court in *Vail Resorts* "any matter intended to be treated as [part of a] § 7121(b) Agreement must be explicitly mentioned in a closing agreement as an item the parties have specifically agreed to. Conversely, mere reference to a tax attribute or tax property is insufficient to deem it a matter that [has been] conclusively resolved." 2011 WL 2621361, at *7.

Here, the 99-32 Closing Agreement dealt only with a specific matter—relief under Rev. Proc. 99-32 to conform BMC's cash accounts following the section 482 Primary Adjustments from the TP Closing Agreement. Both the TP Closing Agreement and Rev. Proc. 99-32 are specifically referenced in the WHEREAS clauses preceding the numbered paragraphs containing the matters specifically

agreed to in the 99-32 Closing Agreement, and the parties expressly stated that the purpose of the 99-32 Closing Agreement was "to describe herein the basis on which such [Rev. Proc. 99-32] relief will be granted." RE-8.

The specifically agreed-to matters forming the basis for BMC's Rev. Proc. 99-32 relief are set out in paragraphs 1 through 5 – namely (1) that the section 482 "Primary Adjustments" in the TP Closing Agreement reduce BSEH's earnings and profits in Tax Years 2003–2006 (and increase BMC's income in those years), (2) that interest-bearing accounts receivable will be established from BSEH to BMC in the amounts of the Primary Adjustments, as of the dates in paragraph 2; (3) that the accounts receivable shall bear interest at the "applicable Federal rate" (the "safe harbor" rates of Treas. Reg. § 1.482-2(a)(2)(iii)) from such dates, with such interest income to be included in BMC's taxable income; (4) that BMC could claim a foreign tax credit if any withholding tax were imposed on payments by BSEH; and (5) that BSEH would pay the accounts receivable by intercompany payment and that "[s]uch payment will be free of the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment; *provided*, the payment of the balance of the account" was made within 90 days of the effective date of the 99-32 Closing Agreement. RE-8. No other matter was expressly agreed to.

2. The parties did not expressly agree that the accounts receivable would constitute "debt for all federal income tax purposes," much less for section 965(b)(3) purposes.

The Tax Court held that BMC, by agreeing to establish interest-bearing "accounts receivable" under the 99-32 Closing Agreement, effectively agreed that those accounts receivable would constitute "debt for all federal income tax purposes," including for purposes of the related-party debt exception in section 965(b)(3). RE-3:3, 15-16, 21. However, this Court will search the 99-32 Closing Agreement in vain for any "express" agreement that the accounts receivable to be established and paid pursuant to that agreement would be treated as debt, indebtedness, or related-party indebtedness under section 965(b)(3). The agreement nowhere mentions any of those words.

Nor does the 99-32 Closing Agreement refer to or incorporate the one-sentence conclusory assertion in Notice 2005-64 that Rev. Proc. 99-32 accounts "are to be treated as indebtedness for purposes of section 965(b)(3)." EX-11J. Indeed, the Commissioner has stipulated that Notice 2005-64 did not amend Rev. Proc. 99-32 and thus was not part of the 99-32 Closing Agreement. RE-4:11(¶33); *see supra* note 5. Moreover, IRS notices are not binding on the court, *see Guilzon v. Comm'r*, 985 F.2d 819, 822 (5th Cir. 1993); *Pritired 1 LLC v. United States*, 816 F. Supp. 2d 693, 728 (S.D. Iowa 2011). Because the Commissioner's position is contrary to general federal income tax principles, *see supra* Part I, the statement

buried in Notice 2005-64 is wholly unpersuasive and entitled to no weight under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In the absence of an express agreement that the "accounts receivable" under the 99-32 Closing Agreement would constitute "debt" for all federal income tax purposes, or for purposes of section 965, the Commissioner cannot prevail. Ignoring the law governing the strict interpretation of limited purpose closing agreements, however, the Tax Court implied a debt term never mentioned, much less expressly agreed to in the 99-32 Closing Agreement. Worse, the Tax Court failed to acknowledge that, long after BMC entered into the 99-32 Closing Agreement, the Commissioner issued Advice Memorandum 2008-010 (September 4, 2008), instructing its personnel to include in future closing agreements a provision *expressly stating* that by electing relief under Rev. Proc. 99-32, the taxpayer would be reducing the section 965 DRD for accounts deemed established during the testing period. EX-13J. The absence of such language from the 99-32 Closing Agreement is telling, and confirms that the agreement does not expressly make the accounts receivable related-party indebtedness under section 965(b)(3).

The Tax Court attempted to skirt the lack of an express agreement relating to section 965(b)(3) by taking one of the terms included in the agreement – the "accounts receivable" in paragraph 2 – and transforming that term into "debt for all federal income tax purposes." But, as explained above, *see* Part I, the Tax Court's

equation of "accounts receivable" with "debt for all federal income tax purposes," including under section 965(b)(3), cannot be sustained.

3. The parties did not expressly agree that the "accounts receivable" were to be treated as <u>retroactive</u> debt.

Equally unfounded is the Tax Court's holding that the parties expressly and unambiguously agreed that two of the "accounts receivable" (totaling $43.4 million) were "deemed to have been established" under the 99-32 Closing Agreement as of the end of Tax Years 2005 and 2006, thereby establishing "indebtedness" <u>retroactive</u> to the Testing Period. RE-3:22-23. The agreement provides in paragraph 2 that the parties "will establish" the accounts receivable – *i.e.*, <u>after</u> the agreement became effective. And it is undisputed that the accounts receivable were not established by BMC and BSEH until November 27, 2007 (the same day the accounts were settled by intercompany payment) – well after the Testing Period. Although the 99-32 Closing Agreement provided that the "accounts receivable" would be treated as established, for the limited purpose of computing the "safe harbor" interest, as of the dates set forth in paragraph 2, there is nothing in the agreement that expressly states that the accounts receivable established as of the end of Tax Years 2005 and 2006, even assuming they could be considered "debt" for some purposes, would be indebtedness under section 965(b)(3) <u>retroactive</u> to the Testing Period. As explained, such a construction of

the 99-32 Closing Agreement by the Tax Court contravenes the fundamental federal income tax principles that govern this case.

C. The Tax Court Failed to Construe the 99-32 Closing Agreement as a Whole and in Light of the Surrounding Circumstances.

The Tax Court's decision also violates fundamental principles of contract interpretation. Properly interpreted, the 99-32 Closing Agreement unambiguously provides that BMC could square its accounts, by establishing and paying the accounts receivable, *without any further federal income tax consequences* that would otherwise result from secondary or collateral adjustments.

1. The 99-32 Closing Agreement must be interpreted in light of the surrounding regulatory context – including Rev. Proc. 99-32 and Treas. Reg. § 1.482-1(g)(3).

Under general principles of contract interpretation, (a) contract language "should be interpreted in light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight;" (b) a written contract is "interpreted as a whole, and all writings that are part of the same transaction are interpreted together;" (c) an interpretation that "gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless;" and (d) unless a contrary intent is indicated, language that has a "generally prevailing meaning" is interpreted in accordance with that meaning, but

"technical terms and words of art" are given their technical meaning when used in a transaction within their technical field. *See supra* pp. 30-31.

These rules instruct that the 99-32 Closing Agreement should be construed in light of and in harmony with Rev. Proc. 99-32, which is a specialized taxpayer relief provision designed to permit the taxpayer to square intercompany cash accounts to accurately reflect transfer pricing adjustments under section 482. *See supra* pp. 10-12. And because Rev. Proc. 99-32 was issued pursuant to Treas. Reg. § 1.482-1(g)(3), the revenue procedure—and in turn the 99-32 Closing Agreement—must be construed in light of and consistent with that regulation. *See Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 388 (5th Cir. 1981) (interstate gas purchase contracts should be interpreted in federal regulatory context).

Treasury Regulation § 1.482-1(g)(3) provides that when a transfer pricing dispute is resolved, "appropriate adjustments must be made to conform the taxpayer's accounts to reflect the allocations made under section 482." *Id.* The regulation further provides that "such adjustments *may* include the treatment of an allocated amount as a dividend or a capital contribution (as appropriate) *or*, in appropriate cases, pursuant to such applicable revenue procedures as may be provided by the Commissioner . . . repayment of the allocated amount without further income tax consequences." *Id.* (emphasis added). Revenue Procedure 99-32 is an "applicable revenue procedure" under Treas. Reg. § 1.482-1(g)(3).

The conforming adjustment required under Treas. Reg. § 1.482-1(g)(3) could be either treatment of the allocated amount as a capital contribution or, as Rev. Proc. 99-32 permits, repayment of the allocated amount "without further income tax consequences" via an account established pursuant to the revenue procedure. Revenue Procedure 99-32 thus "allows the United States taxpayer to repatriate the cash attributable to a primary adjustment via an account without the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment." Rev. Proc. 99-32, 1999-2 C.B. 296. As Mr. Price testified, it was in this regulatory context that BMC requested relief under Rev. Proc. 99-32—to square its cash accounts without any further federal income tax consequences in any year, so that after squaring its accounts, BMC would be in the same position it would have been had it charged the correct transfer pricing on its original returns. RE-6:47-48, 55, 65-66, 71-72, 76-77.

2. Properly construed, the 99-32 Closing Agreement unambiguously permitted BMC and BSEH to square their accounts without further tax consequences.

Paragraph 5 of the 99-32 Closing Agreement, tracking the language required by the Commissioner in Rev. Proc. 99-32, provides that BSEH "will pay the account receivable, including interest thereon, by intercompany payment," and that "[s]uch payment will be free of the Federal income tax consequences of the secondary adjustments that would otherwise result from the primary adjustment."

EX-26J. Viewed in the regulatory context of Rev. Proc. 99-32 and Treas. Reg. § 1.482-1(g)(3), the only reasonable interpretation of paragraph 5 is that BMC was permitted to repatriate the sums represented in the accounts receivable (the Primary Adjustments under the TP Closing Agreement) without any further income tax consequences from collateral or secondary adjustments.

This was confirmed by Randell Price's undisputed testimony. He explained that, based on his past dealings with Rev. Proc. 99-32, he understood that once BMC incorporated "the IRS's language from [Rev. Proc.] 99-32 . . . and both parties agreed, IRS and BMC, that was the end of the story, if you will. That allowed us the relief from secondary federal income tax consequences." RE-6:55; *see also* RE-6:77 (paragraph 5 made clear that the money could come back with "[n]o federal income tax consequences, period," regardless of the year).

Because Mr. Price's testimony explains the technical language in paragraph 5 and is consistent with the language used, it does not violate the parol evidence rule. Corbin's treatise explains that "[i]nterpretation of a contract is a process that is distinct from, but is sometimes confused with, application of the 'parol evidence rule.'" 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.11, at 105 (rev. ed. 1998); *see also* RESTATEMENT (SECOND OF CONTRACTS) § 212. Thus, as this Court has recognized, the "parol evidence rule excludes extrinsic evidence only when such evidence is offered for the purpose of varying or contradicting the terms of an

integrated contract; it does not exclude evidence offered in aid of interpreting and giving meaning to the terms of the contract." *CGL Underwriters v. Edison Chouest Offshore, Inc.*, 8 F.3d 21, 1993 WL 455600, at *4 (Oct. 22, 1993) (citing CORBIN ON CONTRACTS § 543 (1960)); *accord Pennzoil Co.*, 645 F.2d at 388 ("The parol evidence rule excludes extrinsic evidence offered to vary or contradict, rather than to explain and interpret, the terms of an integrated contract.").

Here, when the 99-32 Closing Agreement is construed as a whole, including paragraph 5, in light of the regulatory context and all surrounding circumstances, including Mr. Price's testimony, there is only one reasonable interpretation of that agreement: BMC and BSEH unambiguously were permitted to establish and pay the accounts receivable with no further federal income tax consequences from any secondary or collateral adjustments, regardless of the year imposed. *See Bethlehem Steel*, 270 F.3d at 139 (if, considering the language and all surrounding circumstances, a contract is subject to only one reasonable interpretation, then it is unambiguous and must be enforced according to its terms).

3. The Tax Court's distinction between "establishing" and "paying" accounts is untenable.

In rejecting BMC's interpretation of the 99-32 Closing Agreement, the Tax Court drew a distinction between the agreement to "establish" the accounts receivable (in paragraph 2), and the "payment" of the accounts receivable (in

paragraph 5). Thus, the Tax Court held that, in paragraph 2, BMC agreed that the accounts receivable would be debt "established for all Federal income tax purposes," but that in paragraph 5, the Commissioner agreed only that one federal income tax consequence would be avoided – namely the tax consequence that would otherwise be associated with the repayment of a deemed capital contribution in Tax Year 2008. The Tax Court reasoned:

> We find it significant that "repayment," not the accounts receivable, was free of consequences that "would otherwise result" from the primary adjustment. This indicates that the taxpayer avoids the consequences that would have resulted absent the election. It is undisputed that the deemed capital contribution from [BMC] to BSEH was a secondary adjustment that would otherwise have resulted from the primary adjustment. The parties further agree that an eliminated "Federal income tax consequence" of that secondary adjustment included the taxable dividend [BMC] would have received upon cash payment from BSEH equal to the deemed capital contribution. Such a secondary adjustment would have been subject to tax with the entire amount consequently included in [BMC's] income. <u>It is this adverse tax consequence that the election avoided</u>.

RE-3:20-21 (emphasis added).

The Tax Court's tortured reading of paragraph 5, however, cannot be squared with the contract language. Paragraph 5 does not state that only one tax consequence would be avoided, or that the only tax consequence the parties sought to avoid was the taxable dividend, in Tax Year 2008, that would otherwise be associated with the payment of a dividend. Instead, paragraph 5 is worded broadly to provide that "payment" of the accounts "will be free of the Federal income tax

consequenc**es**" – plural – "of the secondary adjustment**s**" – plural – "that would otherwise result from the primary adjustment." The adjustment that the Commissioner makes here, namely to deem the accounts receivable retroactive debt for all federal income tax purposes, based on the establishment and payment of the accounts, is a "secondary adjustment" within the meaning of paragraph 5, and the $12.9 million deficiency the Commissioner determined for Tax Year 2006, is one of the "tax consequences" avoided under paragraph 5. The Tax Court implies a limitation in paragraph 5 to a single tax consequence that nowhere appears, contrary to the rule that closing agreements will bind the parties only to the matters expressly agreed upon. *See Ellinger*, 470 F.3d at 1336-37.

Moreover, the Tax Court's distinction between establishing and paying the accounts receivable ignores the object of Rev. Proc. 99-32 relief, as stated in Treas. Reg. § 1.482-1(g)(3), which is to permit the taxpayer to repay "the allocated amount without further income tax consequences." The whole purpose of the 99-32 Closing Agreement was to permit BMC to conform its accounts and repatriate the allocated amounts (*i.e.*, the Primary Adjustments) without any further federal income tax consequences. The very relief sought, *i.e.*, squaring of the accounts to reflect the primary adjustments, in turn, could only occur by establishing and paying the accounts within 90 days (here, it was done on the same day). Indeed, Rev. Proc. 99-32 itself does not support the purported distinction between

"establishing" and "paying" accounts receivable. Section 5.01(4) of Rev. Proc. 99-32 makes clear that a taxpayer cannot receive relief without both establishing and paying the accounts receivable within 90 days. *See Long*, 93 T.C. at 5. The Tax Court's interpretation of paragraph 5 denies BMC the very relief it sought under Rev. Proc. 99-32, by permitting the Commissioner to impose a further tax consequence from the squaring of BMC's cash accounts.

Finally, the Tax Court's analysis ignores that the establishment and payment of the accounts under 99-32 is itself a "secondary adjustment" that supplants the "deemed capital contribution" secondary adjustment. That is the whole effect of the election. *See supra* pp. 10-11, 40-41. Thus, the establishment and payment of the Rev. Proc. 99-32 accounts under the terms of the 99-32 Closing Agreement is a secondary adjustment that the parties agreed would be "free" of further Federal income tax consequences.

D. The Tax Court's Interpretation of the 99-32 Closing Agreement Is Unreasonable and Leads to Absurd Results.

A contract will not be interpreted to produce absurd results "in the sense of results that the parties, presumed to be rational persons pursing rational ends, are very unlikely to have agreed to seek." *Beanstalk Grp., Inc. v. Am Gen. Corp.*, 283 F.3d 856, 860 (7th Cir. 2002); *accord Koch Bus. Holdings, LLC v. Amoco Pipeline Holding Co.*, 554 F.3d 1334,1338 (11th Cir. 2009); *Great Plains Real Estate Dev.,*

L.L.C. v. Union Cent. Life Ins. Co., 536 F.3d 939, 946 (8th Cir. 2008); *R.I. Charities Trust v. Engelhard Corp.*, 267 F.3d 3, 7 (1st Cir. 2001). The Tax Court's interpretation of the 99-32 Closing Agreement violates this contract interpretation principle and produces absurd and unreasonable results.

1. The Tax Court's interpretation of the 99-32 Closing Agreement permits the Commissioner to do indirectly what he admittedly cannot do directly.

It is undisputed that BMC recognized additional taxable income totaling $101,560,047 in Tax Years 2003 through 2006 based on the Primary Adjustments under the TP Closing Agreement, and paid the applicable taxes on that additional income. RE-5:3(¶67). It is also undisputed that the reason BMC (like any rational taxpayer) sought Rev. Proc. 99-32 relief in the wake of the transfer pricing settlement was to avoid having to pay tax on the $101,560,040 a second time – *i.e.*, when the sums were repatriated in Tax Year 2008. RE-6:47-49. Indeed, the Tax Court acknowledges that, under paragraph 5 of the 99-32 Closing Agreement, BMC was permitted to establish and pay the accounts receivable, in Tax Year 2008, without the tax consequences that would otherwise flow from the repayment – *i.e.*, dividend taxation, in Tax Year 2008, on the full amount repatriated. In other words, the Tax Court conceded (as does the Commissioner) that the parties agreed that BMC would not be taxed a second time, in Tax Year 2008, on the $101,560,040 that was repatriated in Tax Year 2008. RE-3:20-21.

Yet the Tax Court held that the parties nonetheless unambiguously agreed that the Commissioner could reach back to Tax Year 2006 and do indirectly, to $43.4 million of the total amount repatriated, what it could not do directly. According to the Tax Court, the parties agreed, despite the language in paragraph 5, that the Commissioner could (a) adjust the related-party indebtedness between BMC and BSEH during the Testing Period, based on the accounts that were deemed established (for purposes of computing safe harbor interest) in Tax Years 2005 and 2006; (b) disallow BMC's DRD, claimed in Tax Year 2006, by $43.4 million; and (c) impose a further tax consequence on BMC in Tax Year 2006, based on accounts established and paid in Tax Year 2008, on that additional $43.4 million – to the tune of a $12.9 million tax deficiency. In essence, the Tax Court held that the parties agreed that $43.4 million of the total amount that the parties agreed (pursuant to the 99-32 Closing Agreement) could be repatriated "free" of further federal income tax consequences would nonetheless be subject to tax consequences in Tax Year 2006 under a different Code provision. Rational persons would not agree to this sort of absurd "gotcha."

2. The Tax Court's decision permits the Commissioner to use a taxpayer relief provision, Rev. Proc. 99-32, as a sword to deny BMC the benefits of section 965.

Revenue Procedure 99-32 and its predecessor, Rev. Proc. 65-17, historically have been interpreted as equitable taxpayer relief provisions. As the court

explained in *Schering Corp. v. Comm'r*, 69 T.C. 579, 597 (1978): "[T]he primary purpose of Rev. Proc. 65-17 was to permit repatriation of amounts reallocated to a United States corporation without such repatriation triggering an additional tax . . . as a distribution of property by the subsidiary to the parent. As such it is essentially equitable in nature." (emphasis added). The court explained that, given this equitable purpose, Rev. Proc. 65-17 should not be construed "to deny the United States taxpayer a benefit available to it under other sections of the Code." *Id.* (emphasis added). *Schering* rejected the Commissioner's argument, analogous to the one made here, that the U.S. taxpayer should be denied a credit for withheld foreign tax (a benefit it was otherwise entitled to receive under Code section 901) that had been imposed on the payment of cash repatriated from the U.S. taxpayer's Swiss subsidiary under a Rev. Proc. 65-17 closing agreement.

The Tax Court decision here guts the equitable principles underpinning *Schering*. According to the Tax Court, the closing agreement in *Schering* "characterized the payment for Federal income tax purposes notwithstanding the foreign tax authority's dividend treatment" and thus "[t]he Commissioner and the taxpayer were bound to treat the payment as a return of principal [*i.e.,* as debt] for all Federal income tax purposes and the repayment was no longer a dividend." RE-2:19-20. The Tax Court concluded that because *Schering* does "not permit inconsistent characterizations for Federal income tax purposes," the accounts

receivable established by BMC "are deemed established for all Federal income tax purposes." *Id.*:20-21. The Tax Court, however, misreads the holding in *Schering*. The court in *Schering* permitted precisely the sort of "inconsistent treatment" the Tax Court here disclaims – and rejected the Commissioner's argument that the return of cash was to be treated as debt for all federal income tax purposes.

In *Schering*, the U.S. taxpayer claimed a foreign tax credit for the Swiss tax withheld on the entire amount payable by its Swiss subsidiary in satisfaction of the accounts established under the closing agreement. *Schering,* 69 T.C. at 584, 588. The Commissioner asserted that the Swiss withholding tax could not be considered an "income tax" under U.S. tax principles because it was levied on the repayment of indebtedness owed by the foreign subsidiary to the U.S. taxpayer, and that the amount of the repayment allocated to principal (*i.e.*, what the Commissioner claimed was "debt") was not subject to U.S. taxation.[9] *Schering* held that the U.S. taxpayer was entitled to take into account the full amount of the payment in calculating its foreign tax credit under section 901, even though the accounts under the closing agreement might be indebtedness for another purpose. *Id.* at 589.

In finding that the taxpayer in *Schering* "should be entitled under section 901 to claim credit for the Swiss tax in calculating its United States tax liability,"

[9] The Commissioner had allowed the credit on the portion of the repayment allocable to interest, but denied the credit on the amount he characterized as allocable to principal.

id. at 601, the court applied a dividend characterization to the repayment for U.S. tax purposes under section 901, instead of the characterization as repayment of indebtedness as argued by the Commissioner. The court rejected the Commissioner's reliance on the revenue procedure and closing agreement to characterize the repayment as a return of interest and principal for purposes of determining eligibility for the foreign tax credit. The court looked instead to the substance of the payment, noting that but for "the administrative relief provisions" of the revenue procedure it would have been "subject to dividend taxation in the United States as a distribution of earnings and profits." *Id.* at 593. The taxpayer's election of relief under the revenue procedure in *Schering* did not preclude this "inconsistent" treatment for purposes of claiming the foreign tax credit.

Under *Schering*, the Commissioner cannot use an equitable relief provision like Rev. Proc. 99-32 as a sword to deny the taxpayer a benefit it would otherwise be entitled to under another Code provision. By misreading and misapplying *Schering*, however, that is precisely what the Tax Court sanctioned here.

It is undisputed that, on March 31, 2006, after BMC implemented its 965 plan, *there was no indebtedness* between BMC and BSEH. RE-6:36. And the purpose of the 99-32 Closing Agreement was to permit BMC to square its accounts without further tax consequences. Just as the form of the mechanism used to square the accounts in *Schering* did not control whether the U.S. taxpayer was

entitled to a benefit under another Code section, use of the accounts receivable here as the mechanism to square BMC's accounts cannot be used by the Commissioner to deny BMC the benefit of the DRD provided for in Code section 965. For this reason, too, the Tax Court's decision must be reversed.[10]

E. BMC's Interpretation Prevails Regardless of Whether the 99-32 Closing Agreement Is Unambiguous or Ambiguous.

For the reasons explained above, BMC's interpretation of the 99-32 Closing Agreement is the only reasonable one, and the interpretation offered by the Commissioner – and accepted by the Tax Court – is not reasonable. This Court should hold as a matter of law that the 99-32 Closing Agreement is unambiguous and by its terms permitted BMC and BSEH to conform their accounts, by establishing and paying the accounts receivable through an intercompany payment, without further federal income tax consequences in any year.

[10] Equally misplaced is the Tax Court's observation that the closing agreement in *Schering* "did not preclude all tax consequences," and thus that "collateral consequences would be determined by applying the characterization [from the closing agreement] for all Federal income tax purposes." RE-2:20. In *Schering*, the Commissioner argued that no foreign tax credit was allowed because the closing agreement and the revenue procedure provided that repayment was "free of further Federal income tax consequences" and allowing a federal tax "credit" was a collateral tax consequence not specifically addressed by the closing agreement. The *Schering* court dismissed this argument by interpreting the closing agreement as "prescrib[ing] only that petitioner need not recognize gross income" on receiving payment and not "determining any collateral tax consequences disadvantageous to petitioner which might ensue upon the payment of that sum." *Schering*, 69 T.C. at 595. The court read the closing agreement to accomplish its purpose of allowing the taxpayer to repatriate sums without suffering any "disadvantageous" or "adverse" tax consequences such as those that would result from the Commissioner's proposed debt characterization.

But, at the very least, BMC's interpretation of the 99-32 Closing Agreement is a reasonable interpretation of the agreement – which **would** mean that the 99-32 Closing Agreement is ambiguous. *See Bethlehem Steel*, 270 F.3d at 139 (contract is ambiguous if subject to more than one reasonable interpretation, and where contract is ambiguous the court can consider extrinsic evidence to determine its meaning). If the 99-32 Closing Agreement is ambiguous, BMC offered the only evidence of the meaning of the language used.

Mr. Price testified without contradiction that (a) BMC intended to be permitted to bring back all of the cash attributable to the reallocated royalties, including the $43.4 million for Tax Years 2005 and 2006, free of tax consequences in any year; (b) he understood the accounts receivable were treated as debt only for the narrow purpose of computing interest under the safe harbor provisions of the section 482 Treasury regulations; (c) no one from the IRS had ever contended, in connection with this closing agreement or earlier ones, that Rev. Proc. 99-32 accounts were debt for all federal income tax purposes; (d) neither Mr. Price nor Mr. Payne (on behalf of the Commissioner) discussed section 965 during negotiations of the 99-32 Closing Agreement; and (e) Mr. Price understood that the purpose of Rev. Proc. 99-32 was to put BMC in the same place as it would have been had it charged the correct transfer pricing on its original returns (not in a worse place, as urged by the Commissioner). RE-6:43-44, 47-49, 51-55, 66, 71-72.

Despite knowing that BMC would call Mr. Price to describe BMC's understanding of the 99-32 Closing Agreement, the Commissioner chose not to call as a witness its negotiator Mr. Payne (the IRS Appeals Officer) to refute Mr. Price's testimony concerning BMC's understanding. Because Mr. Payne is a witness "controlled" by the Commissioner, the failure to call Mr. Payne gives rise to an inference that Mr. Payne's testimony would have been unfavorable to the Commissioner – *i.e.* that Mr. Payne would have confirmed that he shared Mr. Price's understanding of the 99-32 Closing Agreement. *See United States v. Wilson*, 322 F.3d 353, 363 & n.14 (5th Cir. 2003); *Streber v. Comm'r*, 138 F.3d 216, 221-22 (5th Cir. 1998). Because this Court can infer that the negotiating representatives for BMC and the Commissioner "attached the same meaning" to the 99-32 Closing agreement, the agreement should be "interpreted in accordance with that [shared] meaning." RESTATEMENT (SECOND) OF CONTRACTS § 201(1).

But even if this Court declines to draw an adverse inference from the Commissioner's failure to call Mr. Payne, the only evidence of the parties' intent is that introduced by BMC. Therefore, if the 99-32 Closing Agreement is ambiguous, this Court should hold, based on Mr. Price's undisputed testimony, that the parties' intent in entering into the 99-32 Closing Agreement was that BMC and BSEH could establish and pay the accounts receivable with no other adverse tax consequences in any year. *See Blue Cross & Blue Shield United of Wis. &*

Subsidiaries v. United States, 71 Fed. Cl. 641, 649 (2006) (where the IRS failed to offer extrinsic evidence refuting the taxpayer's understanding of an ambiguous closing agreement, the taxpayer's understanding prevailed). Thus, regardless of whether this Court determines that the 99-32 Closing Agreement is ambiguous or unambiguous, this Court should hold that the agreement precludes the Commissioner from seeking to impose further tax consequences, period.

III. THE TAX COURT'S DECISION WILL PRODUCE TROUBLESOME, UNINTENDED CONSEQUENCES.

A. The Tax Court's Holding that 99-32 "Accounts Receivable" Constitute "Debt for All Federal Income Tax Purposes" Produces Collateral Consequences at Odds with the Regulatory Scheme.

The Tax Court's erroneous holding, that "accounts receivable" established under Rev. Proc. 99-32 constitute debt for all federal income tax purposes, will affect taxpayers in a wide variety of circumstances, producing consequences not intended under Treas. Reg. § 1.482-2(g)(3). For example, if a 99-32 account is debt for all federal income tax purposes, then in a case where the 99-32 account is established – but not paid by the foreign subsidiary – the U.S. taxpayer will assert a "bad debt" deduction under section 166. Such a result would be contrary to the holdings of *Long* and *Eisenberg*.[11]

[11] Treating 99-32 accounts as debt will also affect a taxpayer's foreign tax credit because the amount of "foreign source" interest will be subject to change based on section 482 adjustments and Rev. Proc. 99-32 agreements entered into years later. *See generally* Treas. Reg. § 1.861-9T, I.R.C. § 904 and associated regulations.

Treating 99-32 accounts as debt for all federal income tax purposes will have countless other consequences because the existence of debt produces effects that ripple through many Code provisions. Indeed, the terms "debt" and "indebtedness" appear in more than 1,000 places in the Code and over 9,000 places in the Treasury regulations. The Commissioner's argument that an account created under Rev. Proc. 65-17 was debt for all federal income tax purposes was rejected in *Schering*. Had the Commissioner intended to adopt such a sweeping rule when he later issued Rev. Proc. 99-32 to replace Rev. Proc. 65-17, he would have drafted Rev. Proc. 99-32 very differently. Yet there is nothing in the plain language of Rev. Proc. 99-32 to indicate adoption of such a broad rule with its attendant far-reaching federal income tax consequences.[12]

B. <u>The Tax Court's Decision Undermines the Purpose of Section 965–and the Related-Party Debt Exception.</u>

The Tax Court's decision also undermines congressional intent, as expressed in section 965, by which Congress encouraged U.S. corporate taxpayers to repatriate money held in foreign subsidiaries for purposes of investing in the U.S. economy. The exception for related-party indebtedness was "intended to prevent a deduction from being claimed in cases in which the U.S. shareholder directly or indirectly (*e.g.*, through a related party) finances the payment of a dividend from a

[12] BMC does not concede that such a rule would have been valid, however, as it would contravene both general federal income tax principles and Treas. Reg. § 1.482-2(g)(3).

controlled foreign corporation." H.R. Rep. No. 108-755, at 315. In such cases, Congress recognized that "there may be no net repatriation of funds, and thus it would be inappropriate to provide the deduction." *Id.* The Tax Court failed to construe section 965(b)(3) in light of its stated purpose, holding that section 965(b)(3) does not require an "intent" to establish indebtedness. RE-3:13.

Regardless of whether there is an "intent" requirement, however, the language of section 965(b)(3) must be construed in light of the stated congressional purpose where, as here, the statute is subject to more than one interpretation or is silent. *See Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987). Congress did not define the term "indebtedness" in section 965(b)(3), but that technical term has a well-established meaning under judicial decisions, and Congress clearly intended to reduce the amount subject to the DRD only when the "U.S. shareholder directly or indirectly (*e.g.*, through a related party) finances the payment of a dividend from a controlled foreign corporation." H.R. Rep. No. 108-755, at 315. Thus, if there was not an increase in <u>actual</u> indebtedness during the relevant Testing Period (October 3, 2004 – March 31, 2006), then in order to reduce the DRD under section 965(b)(3) there had to be a non-debt avoidance transaction during that period resulting in no "net repatriation of funds." Here, there was neither an increase in actual debt nor a non-debt avoidance transaction.

It is undisputed that (1) there was no intercompany indebtedness between BMC and BSEH between October 3, 2004, and March 31, 2006; (2) BMC did not finance the section 965 dividends repatriated by BSEH; and (3) there was a "net" repatriation of funds to the U.S. totaling $721,081,018, the amount repatriated to BMC under its 965 plan. RE-4:21-22(¶¶58-59). Indeed, the undisputed evidence establishes that BSEH had more than adequate cash and other current assets, even taking into account the $101,560,040 in adjustments to BMC's income under the TP Closing Agreement, and the corresponding adjustments to BSEH, to pay the full $721,081,018 in section 965 dividends in Tax Year 2006. RE-6:69-71. Accordingly, the Tax Court erred in upholding the Commissioner's deficiency determination where the section 965 dividend was not financed by BMC and no related party indebtedness existed during the Testing Period.

The absurdity of the Commissioner's position is demonstrated in other cases working their way through the courts. For example, in a currently pending Tax Court dispute with Medtronic (T.C. Dkt. No. 6944-11), the Commissioner has disallowed Medtronic's section 965 DRD on a "protective" basis; the Commissioner determined that transfer pricing adjustments proposed for years dating back to 2005 and 2006, which will not be resolved until 2014 or later and which may result in Medtronic requesting Rev. Proc. 99-32 relief, will result in a decrease in the amount of dividends qualifying for the section 965 DRD. The

Commissioner's interpretation of the related-party indebtedness exception violates general federal income tax principles, cannot be squared with the language or purpose of section 965, unfairly penalizes U.S. taxpayers that repatriated funds in reliance on a statutory provision expressly designed to incentivize investments in the U.S. economy, and frustrates Congress' purpose in enacting section 965.

CONCLUSION

For the foregoing reasons, BMC respectfully requests the Court reverse the Tax Court's decision and render judgment that BMC owes no tax deficiency for Tax Year 2006. BMC also requests all such other relief to which it is entitled.

Respectfully submitted,

VINSON & ELKINS L.L.P.

/s Gwendolyn J. Samora
George M. Gerachis
ggerachis@velaw.com
Gwendolyn J. Samora
gsamora@velaw.com
Lina G. Dimachkieh
ldimachkieh@velaw.com
1001 Fannin Street
Suite 2500
Houston, Texas 77002
713.758.2942 (telephone)
713.615.5214(facsimile)

VINSON & ELKINS L.L.P
Christine L. Vaughn
cvaughn@velaw.com
2200 Pennsylvania Avenue N.W.
Suite 500 West
Washington, D.C. 20037
202.639.6517 (telephone)
202.879.8817(facsimile)

Attorneys for Petitioner-Appellant BMC Software, Incorporated

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served electronically on the following counsel of record on this 22nd day of January, 2014:

Ellen Page DelSole
U.S. Department of Justice
Tax Division, Appellate Section
P.O. Box 502
Washington, DC 20044

Kathryn Keneally
U.S. Department of Justice
Tax Division
601 D Street, N.W.
Washington, DC 20044

s/ Gwendolyn J. Samora
Gwendolyn J. Samora

CERTIFICATE OF COMPLIANCE REGARDING ECF FILINGS

Pursuant to Section A(6) of the ECF Filing Standards for the United States Court of Appeals for the Fifth Circuit, the undersigned counsel hereby certifies that no privacy redactions to this document were required under the applicable rules, that the electronic submission is an exact copy of the paper document, and that the document has been scanned for viruses using the most recent version of a commercial virus scanning program (Sophos Antivirus, Version 10) and, according to the program, is free of viruses.

s/ Gwendolyn J. Samora
Gwendolyn J. Samora
Attorney for Appellant

Dated: January 22, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2 and FED. R. APP. P. 32(a)(7)(B)(iii), the Brief contains 13,929 words.

2. The Brief has been prepared: in proportionally spaced typeface using Microsoft Word 2010, in Times New Roman 14 pt. (except for footnote text, which is 12 pt. pursuant to 5th Cir. R. 32.1).

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in FED. R. APP. P. 32(a)(7)(B), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

s/ Gwendolyn J. Samora
Gwendolyn J. Samora
Attorney for Appellant

Dated: January 22, 2014

US 2233048v.12

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

January 23, 2014

Ms. Lina Ginan Dimachkieh
Vinson & Elkins, L.L.P.
1001 Fannin Street
First City Tower
Suite 2500
Houston, TX 77002-6760

Mr. George Matthew Gerachis
Vinson & Elkins, L.L.P.
1001 Fannin Street
First City Tower
Suite 2500
Houston, TX 77002-6760

Ms. Gwendolyn Johnson Samora
Vinson & Elkins, L.L.P.
1001 Fannin Street
First City Tower
Suite 2500
Houston, TX 77002-6760

Ms. Christine L. Vaughn
Vinson & Elkins, L.L.P.
2200 Pennsylvania Avenue, N.W.
Suite 500W
Washington, DC 20037

No. 13-60684 BMC Software, Incorporated v. CIR
USDC No. 15675-11

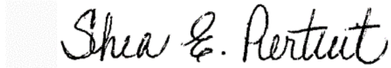
The following pertains to your brief electronically filed on January 22, 2014.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies will result in the dismissal of your appeal pursuant to 5TH CIR. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk



By: _________________________
Shea E. Pertuit, Deputy Clerk
504-310-7666

cc:
Mrs. Ellen Page DelSole