

US TAX COURT
RECEIVED

APR 29 2020
3:55 PM

SD



US TAX COURT
eFILED

APR 29 2020

WESTERN DIGITAL CORPORATION AND
SUBSIDIARIES, ET AL.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ELECTRONICALLY FILED

Docket No. 18984-18,

4818-19

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Docket Nos. 18984-18; 4818-19

2. Respondent filed an answer in Docket No. 18984-18 on November 30, 2018.

3. Petitioner did not file a reply to Respondent's answer in Docket No. 18984-18. Thus, the pleadings in Docket No. 18984-18 were closed 45 days later, on January 14, 2019. T.C. Rule 37.

4. Petitioner filed a petition in Docket No. 4818-19 on March 8, 2019.

5. Respondent filed an answer in Docket No. 4818-19 on May 3, 2019.

6. Petitioner did not file a response to Respondent's answer in Docket No. 4818-19. Thus, the pleadings in Docket No. 4818-19 were closed 45 days later, on Monday, June 17, 2019. T.C. Rule 37.

7. On June 25, 2019, the Court granted Respondent's and Petitioner's joint motion to consolidate Docket Nos. 18984-18 and 4818-19.

8. These cases are set for trial on a special trial session beginning October 12, 2021.

9. Respondent's Motion for Partial Summary Judgment is made at least 30 days after the date the pleadings closed in these cases and within such times as not to delay the trial. T.C. Rule 121(a).

Docket Nos. 18984-18; 4818-19

10. The issues in these cases are adjustments and alleged overpayments relate to:

- (a) Transfer pricing under I.R.C. § 482;
- (b) I.R.C. § 956;
- (c) Net Operating Loss (“NOL”) deductions and carryforwards,

including AMT NOLs;

- (d) Mathematical errors;
- (e) Impact of stock-based compensation on the transfer pricing

adjustments under I.R.C. § 482;

- (f) Foreign tax credits;
- (g) General business credits;
- (h) Warranty expenses related to Petitioner’s acquisition of HGST,

Inc.;

- (i) Limitation on NOLs under I.R.C. § 382;
- (j) Foreign source income; and,
- (k) Computational adjustments.

Docket Nos. 18984-18; 4818-19

11. This motion concerns adjustments under I.R.C. § 956. Specifically, Respondent asserts that an interest free period in Treas. Reg. § 1.482-2(a)(1)(iii)(B) (“482 Interest Free Exception”) does not apply to I.R.C. § 956(c)(2)(C) (“Section 956(c)(2)(C)”).

12. The 482 Interest Free Exception states that “[i]nterest is not required to be charged on an intercompany trade receivable until the first day of the third calendar month following the month in which the intercompany trade receivable arises.” The 482 Interest Free Exception does not apply to Section 956(c)(2)(C) because:

(a) Nothing on the face of any statute states that the 482 Interest Free Exception or a similar safe harbor applies to Section 956(c)(2)(C);

(b) Nothing in the legislative histories of Sections 482 or 956 state that the 482 Interest Exception or a similar safe harbor applies to Section 956(c)(2)(C);

(c) Nothing on the face of the 482 Interest Free Exception states that it or a similar safe harbor applies to Section 956(c)(2)(C);

(d) Nothing in the regulations under Section 482 states that the 482 Interest Free Exception or a similar safe harbor applies to Section 956(c)(2)(C);

Docket Nos. 18984-18; 4818-19

(e) The regulations under Section 956 demonstrate that the Section 482 Interest Free Exception does not apply to Section 956(c)(2)(C) determinations;

(f) No case law even suggests that the 482 Interest Free Exception or a similar safe harbor applies to Section 956(c)(2)(C); and,

(g) None of Respondent's published official guidance or determinations state that the 482 Interest Free Exception or a similar safe harbor applies to Section 956(c)(2)(C).

13. Filed with this motion, and incorporated by reference, is Respondent's Memorandum in Support of Respondent's Motion for Partial Summary Judgment ("Respondent's Memorandum").

14. Respondent's Memorandum sets forth the relevant facts regarding this issue. In summary, the facts that Respondent relies on are as follows:

(a) Petitioner, Western Digital Corporation ("WDC"), is a multi-national corporation registered in Delaware. WDC owns, and operates through, various domestic and controlled foreign corporations ("CFCs") in the United States and several foreign taxing jurisdictions, including:

(1) Western Digital Technologies, Inc., a U.S. Corporation owned 100% by WDC ("WDT");

Docket Nos. 18984-18; 4818-19

(2) Western Digital Ireland Ltd., a WDC CFC and Cayman Island entity (“WDI”);

(3) Western Digital (Malaysia) Sdn. Bhd., a WDC CFC and Malaysian entity (“WDM”);

(4) Western Digital (Thailand) Co. Ltd., a WDC CFC and Thailand entity (“WDTh”).

(b) WDC designed, developed, manufactured and sold hard disk drives (“HDDs”) worldwide to original equipment manufacturers and original design manufactures for use in desktop, mobile, enterprise and consumer electronic products. It also sold HDDs as stand-alone Western Digital-branded storage products.

(c) WDM and WDTh separately owned and operated manufacturing facilities that produced the finished HDDs. WDM and WDTh sold all HDDs they manufactured to WDT. These sales resulted in accounts payable on WDT’s books. The payment terms for WDT’s purchase of HDDs from WDM and WDTh were 90 days from date of invoice (Net). WDT sold and distributed the HDDs to third parties.

Docket Nos. 18984-18; 4818-19

(d) Respondent determined that the 90 days Net¹ payment terms WDM and WDT had with WDT exceeded what would be ordinary and necessary had the parties been unrelated because: WDT had ample ability to pay WDT and WDM earlier; WDT and other WDC subsidiaries had terms of 60 days Net or sooner with the vast majority of its external suppliers and customers totaling billions of dollars per year; and the industry standard for paying invoices was approximately 60 days Net.

(e) Applying Section 956 (and the computations under Section 951 thereafter), Respondent made adjustments of \$89,784,465 for tax year 2009 and \$52,957,567 for tax year 2010. Petitioner challenged these adjustments in its petitions.

(f) Petitioner contends that the 482 Interest Free Exception is relevant and one of the factors that should be considered when applying Section 956(c)(2)(C).

15. There is no genuine dispute regarding the above facts.

¹ “Net” means the total amount, less discounts or credits, is due on or before a certain number of days from the invoice date. 90 days Net or 90 Net means the total amount due 90 days from the invoice date.

Docket Nos. 18984-18; 4818-19

Telephone: (415) 547-3806

OF COUNSEL:

ROBIN GREENHOUSE

Division Counsel

(Large Business & International)

EWAN D. PURKISS

Area Counsel

(Large Business & International)

H. CLIFTON BONNEY, JR.

Deputy Area Counsel: Strategic Litigation

(Large Business & International)