

indebtedness of the taxpayer or a promise of the taxpayer to provide services or property in the future.

#### *Economic Performance Rules for Payment Liabilities*

Section 1.461-4(g) provides that economic performance occurs in the case of a liability requiring payment to another person arising out of a workers compensation act, tort, or other designated liability as payments are made to the person to which the liability is owed. Therefore, the temporary regulations provide in § 1.461-2T(e)(2) that, except as provided in section 468B or the regulations thereunder, economic performance does not occur when a taxpayer transfers money or other property to a trust, escrow account, or court to provide for the satisfaction of a contested workers compensation, tort, or other liability designated in § 1.461-4(g) unless the trust, escrow account, or court is the claimant or the taxpayer's payment to the trust, escrow account, or court discharges the taxpayer's liability to the claimant. *See Maxus Energy Corporation and Subsidiaries v. United States*, 31 F.3d 1135 (Fed. Cir. 1994). Rather, economic performance occurs in the taxable year in which the taxpayer transfers money or other property to the person asserting the liability that the taxpayer is contesting, or in the taxable year in which payment from the trust, escrow account, or court registry is made to the person to which the liability is owed.

#### **Effective Date**

In general, the temporary regulations apply to transfers made in taxable years beginning after December 31, 1953, and ending after August 16, 1954. However, the temporary regulations apply to transfers of any stock of the taxpayer or any stock or indebtedness of a related person on or after November 19, 2003. Section 1.461-2T(e)(2)(i) applies to transfers of money or other property after July 18, 1984, the effective date of section 461(h). Similarly, § 1.461-2T(e)(2)(ii) applies to transfers of money or other property after July 18, 1984, to satisfy workers compensation or tort liabilities, and applies to transfers of money or other property in taxable years beginning after December 31, 1991, the effective date of § 1.461-4(g), to satisfy payment liabilities designated under § 1.461-4(g) (other than liabilities for workers compensation or tort).

#### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in

Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Please refer to the cross-referenced notice of proposed rulemaking published elsewhere in this issue of the **Federal Register** for applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### **Drafting Information**

The principal author of these regulations is Norma Rotunno of the Office of the Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury participated in their development.

#### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

#### **Amendments to the Regulations**

■ Accordingly, 26 CFR part 1 is amended as follows:

#### **PART 1—INCOME TAXES**

■ 1. The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ 2. Section 1.461-2 is amended by:

■ 1. Removing paragraph (a)(5).

■ 2. Revising paragraph (c)(1).

■ 3. Redesignating paragraph (e)(2) as paragraph (e)(3) and revising it.

■ 4. Adding new paragraph (e)(2).

The addition and revisions read as follows:

#### **§ 1.461-2 Contested liabilities.**

\* \* \* \* \*

(c) \* \* \*

(1) [Reserved]. For further guidance, see § 1.461-2T(c)(1).

\* \* \* \* \*

(e) \* \* \*

(2) [Reserved]. For further guidance, see § 1.461-2T(e)(2).

(3) *Examples.* The provisions of this paragraph are illustrated by the following examples:

*Example 1.* A, an individual, makes a gift of certain property to B, an individual. A pays the entire amount of gift tax assessed against him but contests his liability for the tax. Section 275(a)(3) provides that gift taxes are not deductible. A does not satisfy the requirement of paragraph (a)(1)(iv) of this section because a deduction would not be

allowed for the taxable year of the transfer even if A did not contest his liability to the tax.

*Example 2.* [Reserved]. For further guidance, see § 1.461-2T(e)(3), *Example 2.*

\* \* \* \* \*

■ 4. Section 1.461-2T is added to read as follows:

#### **§ 1.461-2T Contested liabilities (temporary).**

(a) and (b) [Reserved]. For further guidance, see § 1.461-2(a) and (b).

(c) *Transfer to provide for the satisfaction of an asserted liability—(1) In general.* (i) A taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property beyond his control to—

(A) The person who is asserting the liability;

(B) An escrowee or trustee pursuant to a written agreement (among the escrowee or trustee, the taxpayer, and the person who is asserting the liability) that the money or other property be delivered in accordance with the settlement of the contest;

(C) An escrowee or trustee pursuant to an order of the United States or of any State or political subdivision thereof or any agency or instrumentality of the foregoing, or of a court, that the money or other property be delivered in accordance with the settlement of the contest; or

(D) A court with jurisdiction over the contest.

(ii) In order for money or other property to be beyond the control of a taxpayer, the taxpayer must relinquish all authority over the money or other property.

(iii) The following are not transfers to provide for the satisfaction of an asserted liability—

(A) Purchasing a bond to guarantee payment of the asserted liability;

(B) An entry on the taxpayer's books of account;

(C) A transfer to an account that is within the control of the taxpayer;

(D) A transfer of any indebtedness of the taxpayer or of any promise by the taxpayer to provide services or property in the future; and

(E) A transfer to a person (other than the person asserting the liability) of any stock of the taxpayer or of any stock or indebtedness of a person related to the taxpayer (as defined in section 267(b)).

(c)(2) through (d) [Reserved]. For further guidance, see § 1.461-2(c)(2) through (d).

(e) *Deduction otherwise allowed—(1) [Reserved].* For further guidance, see—§ 1.461-2(e)(1).

(2) *Application of economic performance rules to transfers under*