Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:AOK:OKL:TL-N-5211-99
HEDowns

date: SEP 27 1999

to: Chief, Examination Division, Arkansas-Oklahoma District

from: District Counsel, Arkansas-Oklahoma District, Oklahoma City

subject: **Section 467 and Claim for Deferral of "Placement Allowance"**

DISCLOSURE STATEMENT

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ADVICE

This is in response to your memorandum dated August 17, 1999. You asked whether payments pursuant to an agreement entered into by the taxpayer, [redacted], with [redacted], would qualify as I.R.C. § 467 rent, recognition of which may be deferred over the life of the agreement. You provided a copy of the agreement, and of the opinion of the Midstates Region Retail Industry Specialist, Robert Steinmetz, regarding your question. We agree that the agreement between [redacted] and [redacted] is not a lease or rental agreement with respect to tangible property, and that payments made pursuant to the agreement are not payments of rent, and are not deferrable under section 467.

Section 451 provides that, generally, an item of income is included in taxable income in the year in which actually or constructively received. Section 467(a) provides that, in the case of a lessor or a lessee under any section 467 rental agreement, there shall be taken into account for any taxable year the sum of the amount of rent which accrues during such taxable year as determined under section 467(b) and interest for the year on amounts which were taken into account in prior taxable years and which are unpaid.

A section 467 rental agreement is any rental agreement for the use of tangible property under which there is at least one amount allocable to the use of property during a calendar year following the year in which use occurs or there are increases in the amount of rent to be paid under the agreement. I.R.C. § 467(d)(i)(A) and (B). Section 467 applies only to leases or other similar arrangements that constitute section 467 rental agreements. Treas. Reg. § 1.467-1(a)(2). A section 467 rental agreement is defined by regulation. A rental agreement includes any agreement that provides for the use of tangible property and is treated as a lease for Federal income tax purposes. A section 467 rental agreement means a rental agreement that has increasing or decreasing rents, or deferred or prepaid rents. Treas. Reg.§ § 1.467-1(c) and 1.467-1(h)(12).

We found no cases under section 467 which turned on the issue of whether an agreement was or was not a rental agreement for purposes of that section. The law is clear that section 467 applies only to rental with respect to tangible property. The determination of whether the agreement in issue is a rental agreement with respect to tangible property must be made on the basis of the agreement itself, and on the intent of the parties as expressed in the agreement.

It appears clear from the agreement itself that the parties did not consider the agreement a rental agreement. The parties described the agreement as one "whereby [redacted] will supply [redacted] with [redacted] brand greeting cards and related personal expression products...." By the parties' terms, the agreement involved the purchase by [redacted] of greeting cards and personal expression merchandise from [redacted]. The agreement covered a [redacted]-year period. [redacted] paid [redacted] $[redacted] at the time of execution of the agreement, which the parties agreed represented "a placement allowance of $[redacted] for each of the [redacted] existing stores." [redacted] did not occupy or control any property of [redacted] under the terms of the agreement.

The letter contract you provided appears to be the parties' final written agreement. There is no indication in the writing that it was a partial or tentative agreement, or that there were conditions or terms of the agreement not included in the document. Terms of a written contract that appear to be clear, complete and not ambiguous will generally be interpreted according to their plain, i.e. common or usual, meaning. Although a party to a contract may be permitted by a court to provide testimony or other evidence regarding the meaning of terms, that party generally has a fairly heavy burden of persuasion to convince a court that the parties, in fact, did intend some other meaning for a term than its plain meaning. We are aware of no evidence that the parties intended some meaning other than the plain meaning for terms of the agreement. Based on the information you provided, we believe that a court would look to the language of the agreement and to the substance of the relationship between [redacted] and [redacted] that resulted, and would find that the agreement was not a lease or rental agreement for purposes of section 467.

If you have any questions regarding this advice, please call attorney Elizabeth Downs at (405) 297-4825. With this memorandum we are closing our file.

BRUCE K. MENEELY
Assistant District Counsel

cc: ARC (TL) MSR