Davis Polk & Wardwell

450 Lexington Avenue
New York, N.Y. 10017
212-450-4000

October 4, 2002

By Electronic Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Ex Parte Notice

Re: **Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to <u>AT&T Comcast Corporation, Transferee, MB Docket No. 02-70</u>**

Dear Ms. Dortch:

The Media Bureau has inquired about the potential tax implications of certain Derivative Transactions under the proposed Agreement and Declaration of Trust which was filed by Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") in the above-referenced proceeding on September 13, 2002. Under Section 1259 of the Internal Revenue Code (which is attached), a constructive sale for federal income tax purposes can result if a taxpayer enters into a transaction that substantially eliminates the risk of loss and opportunity for gain with respect to, among other things, appreciated stock. Neither the Internal Revenue Code, the tax regulations nor formal IRS pronouncements define a specific interest that must be retained in a derivative transaction in order to avoid a constructive sale for federal income tax purposes. However, the attached article cites an attorney in the U.S. Treasury's Office of Tax Policy as stating that a 20 percent spread in derivative transactions with a three to five year term will not trigger a constructive sale for tax purposes. This 20 percent guideline has been widely followed by practitioners in the field and has been proposed by the New York State Bar Association as an appropriate safe harbor. The appropriate page from the New York State Bar proposal is attached, as is another article which similarly suggests that a 20 percent spread is a reasonable safe harbor for avoiding a constructive sale for tax purposes. In addition, Comcast has consistently followed this guideline.

Pursuant to section 1.1206(b) of the Commission's rules, this letter is being filed electronically with the Office of the Secretary. If you have any questions, please contact me.

Very truly yours,

/s/ Po Sit
Po Sit

Attachments

cc:	W. Kenneth Ferree	Roger D. Holberg	Royce D. Sherlock
	Neil A. Dellar	James R. Bird	Erin Dozier
	Lauren Kravetz Patrich	William Dever	Cynthia Bryant
	Jeff Tobias	Simon Wilkie	Qualex International

Internal Revenue Code

§ 1259 Constructive sales treatment for appreciated financial positions.

(a) In general.
If there is a constructive sale of an appreciated financial position—

(1) the taxpayer shall recognize gain as if such position were sold, assigned, or otherwise terminated at its fair market value on the date of such constructive sale (and any gain shall be taken into account for the taxable year which includes such date), and

(2) for purposes of applying this title for periods after the constructive sale—

(A) proper adjustment shall be made in the amount of any gain or loss subsequently realized with respect to such position for any gain taken into account by reason of paragraph (1) , and

(B) the holding period of such position shall be determined as if such position were originally acquired on the date of such constructive sale.

(b) Appreciated financial position.
For purposes of this section —

(1) In general.
Except as provided in paragraph (2) , the term "appreciated financial position" means any position with respect to any stock, debt instrument, or partnership interest if there would be gain were such position sold, assigned, or otherwise terminated at its fair market value.

(2) Exceptions.
The term "appreciated financial position" shall not include—

(A) any position with respect to straight debt if—

(i) the position unconditionally entitles the holder to receive a specified principal amount,

(ii) the interest payments (or other similar amounts) with respect to such position meet the requirements of clause (i) of section 860G(a)(1)(B) , and

(iii) such position is not convertible (directly or indirectly) into stock of the issuer or any related person,

(B) any hedge with respect to a position described in subparagraph (A) , and

(C) any position which is marked to market under any provision of this title or the regulations thereunder.

(3) Position.
The term "position" means an interest, including a futures or forward contract, short sale, or option.

(c) Constructive sale.
For purposes of this section —

(1) In general.
A taxpayer shall be treated as having made a constructive sale of an appreciated financial position if the taxpayer (or a related person)—

(A) enters into a short sale of the same or substantially identical property,

(B) enters into an offsetting notional principal contract with respect to the same or substantially identical property,

(C) enters into a futures or forward contract to deliver the same or substantially identical property,

(D) in the case of an appreciated financial position that is a short sale or a contract described in subparagraph (B) or (C) with respect to any property, acquires the same or substantially identical property, or

(E) to the extent prescribed by the Secretary in regulations, enters into 1 or more other transactions (or acquires 1 or more positions) that have substantially the same effect as a transaction described in any of the preceding subparagraphs.

(2) Exception for sales of nonpublicly traded property.
The term "constructive sale" shall not include any contract for sale of any stock, debt instrument, or partnership interest which is not a marketable security (as defined in section 453(f)) if the contract settles within 1 year after the date such contract is entered into.

(3) Exception for certain closed transactions.

(A) In general. In applying this section , there shall be disregarded any transaction (which would otherwise be treated as a constructive sale) during the taxable year if—

(i) such transaction is closed before the end of the 30th day after the close of such taxable year,

(ii) the taxpayer holds the appreciated financial position throughout the 60-day period beginning on the date such transaction is closed, and

(iii) at no time during such 60-day period is the taxpayer's risk of loss with respect to such position reduced by reason of a circumstance which would be described in section 246(c)(4) if references to stock included references to such position.

(B) Treatment of positions which are reestablished. If—

(i) a transaction, which would otherwise be treated as a constructive sale of an appreciated financial position, is closed during the taxable year or during the 30 days thereafter, and

(ii) another substantially similar transaction is entered into during the 60-day period beginning on the date the transaction referred to in clause (i) is closed—

(I) which also would otherwise be treated as a constructive sale of such position,

(II) which is closed before the 30th day after the close of the taxable year in which the transaction referred to in clause (i) occurs, and

(III) which meets the requirements of clauses (ii) and (iii) of subparagraph (A) ,

the transaction referred to in clause (ii) shall be disregarded for purposes of determining whether the requirements of subparagraph (A)(iii) are met with respect to the transaction described in clause (i) .

(4) Related person.
A person is related to another person with respect to a transaction if—

(A) the relationship is described in section 267(b) or 707(b) , and

(B) such transaction is entered into with a view toward avoiding the purposes of this section .

(d) Other definitions.
For purposes of this section —

(1) Forward contract.
The term "forward contract" means a contract to deliver a substantially fixed amount of property (including cash) for a substantially fixed price.

(2) Offsetting notional principal contract.
The term "offsetting notional principal contract" means, with respect to any property, an agreement which includes—

(A) a requirement to pay (or provide credit for) all or substantially all of the investment yield (including appreciation) on such property for a specified period, and

(B) a right to be reimbursed for (or receive credit for) all or substantially all of any decline in the value of such property.

(e) Special rules.

(1) Treatment of subsequent sale of position which was deemed sold.
If—

(A) there is a constructive sale of any appreciated financial position,

(B) such position is subsequently disposed of, and

(C) at the time of such disposition, the transaction resulting in the constructive sale of such position is open with respect to the taxpayer or any related person,

solely for purposes of determining whether the taxpayer has entered into a constructive sale of any other appreciated financial position held by the taxpayer, the taxpayer shall be treated as entering into such transaction immediately after such disposition. For purposes of the preceding sentence, an assignment or other termination shall be treated as a disposition.

(2) Certain trust instruments treated as stock.
For purposes of this section , an interest in a trust which is actively traded (within the meaning of section 1092(d)(1)) shall be treated as stock unless substantially all (by value) of the property held by the trust is debt described in subsection (b)(2)(A) .

(3) Multiple positions in property.
If a taxpayer holds multiple positions in property, the determination of whether a specific transaction is a constructive sale and, if so, which appreciated financial position is deemed sold shall be made in the same manner as actual sales.

(f) Regulations.
The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section .

1ST ITEM of Level 1 printed in FULL format.

July 1, 1998, Wednesday

1998 DTR 126; d9

SECTION: TAX, BUDGET & ACCOUNTING

TITLE: Financial Products: IRS LOOKING FOR 20 PERCENT SAFE HARBOR FOR COLLARS UNDER **CONSTRUCTIVE SALES** RULES

AUTHOR: By Darren Allen

TEXT:

The Internal Revenue Service and Treasury Department apparently have decided that 20 percent collars placed around appreciated financial positions over a three- to five-year period will not trigger a Section 1259 constructive sale, a Treasury official confirmed late June 29.

Paul Crispino, an attorney in Treasury's Office of Tax Policy, said a safe harbor for collars is needed to properly administer the constructive sales rules. "You have to have a safe harbor, with some type of rule to give taxpayers some certainty," Crispino said, confirming remarks he made at a Wall Street Tax Association conference.

Financial products practitioners said they would welcome a safe harbor for collar transactions because many practitioners are worried that regulators otherwise would conduct their analyses on a facts-or-circumstances basis.

According to Crispino, the government is viewing a safe harbor provision in which collars would not be deemed to be equivalent to a sale if:

-- There is a 20 percent spread;

-- The collar lasts no longer than three to five years; and

-- The current strike price is enveloped by the collar.

If such a safe harbor is promulgated, IRS would be taking a position that matches the thinking of many financial products industry observers who have tried to define what variance between a put and a call on any appreciated position should be considered non-abusive -- that is, the collar range that would not trigger the provisions of the statute passed as part of the 1997 tax act (P.L. 105-34).

David Schizer, a former associate at Davis Polk & Wardwell in New York who now is an associate professor at Columbia Law School, said June 26 that he supports the issuance of rules to tell taxpayers what economics will trigger constructive sales treatment. "As it stands now, there is no clear, particularly satisfying answer to that question," he said during a financial products seminar in New York sponsored by the American Conference Institute.

Key Question.

An acceptable collar range is a key question confronting practitioners trying to salvage some monetizing opportunities in the wake of Section 1259's closing of short-against-the-box transactions, which allows payment of capital gains tax to be postponed until the taxpayer's death

Treasury and the IRS have placed the Section 1259 regulatory project (REG-102191-98) on the 1998 business plan. Since Congress passed the 1997 tax act, practitioners have said that collars within a 20 percent range should be acceptable. Shortly before the IRS opened the regulatory project, government officials hinted that a safe harbor for collars might be established.

Crispino said the constructive sales project is not a high agency priority. Financial Asset Securitization Investment Trust rules and stepped-down preferred share regulations rank much higher on the list. However, giving tax planners guidance on safe, non-abusive collars is important, he said.

"We would like to come out with some rule because determining when a transaction actually resembles a sale is a difficult, facts-and-circumstances test," Crispino said.

Schizer welcomed such frankness from the government, and was pleased that there might be a definitive standard to formulate the types of collars that are excluded from gain recognition requirements under the constructive sales statute. "This was the first time we had heard a government person in the field tell us what the agency might be thinking," he said.

Jeffrey Callender, a partner at Deloitte & Touche LLP in New York, said the safe harbor would be a relief to financial products practitioners who are pushing to see just how narrow a collar can be and still be viable in the context of Section 1259. "Tax professionals on the Street are pushing to find out how loose is loose," he said June 19 during an Institute of International Bankers seminar in New York. "It is nice to see somebody taking a stand and telling us how loose collars have to be in order to succeed."

Like a Calorie-Free Dessert.

Other practitioners familiar with Crispino's remarks likewise expressed their hopes that an official IRS announcement will be made soon on the acceptable collar range. They want guidance on what is a "safe" range, and want to know at what point a range becomes abusive and, therefore, available for retroactive attack under regulations

William Taggart Jr., a financial services tax partner at Coopers & Lybrand LLP in New York, said practitioners are spending a lot of time estimating the width of acceptable collars. "The duration of the options, the volatility of the underlying stock issue has left the community in a position of confusion," he said.

Short-against-the-box and other monetizing strategies essentially gave taxpayers a way to exit a position economically, take the cash in the form of leverage, and delay taxes almost indefinitely, Schizer said. "Tax-free hedging is like a calorie-free dessert," he said. "Hopefully, you can manage to avoid the disadvantages."

Taggart noted that practitioners in a post-constructive sales statute world are left to figure out how to replicate the tax-free hedging of appreciated positions that were permitted for more than 60 years. "Our basic premise of derivatives taxation is form-driven. With practically the same economics, different positions will achieve different tax results, giving you the opportunity to achieve a solution to tax problems."

Source: All Sources : / . . . / : **Tax Analysts Tax Notes Today, Worldwide Tax Daily, and State Tax Today**
Terms: **(new york state bar association) and (tax section) and (section 1259) and (options pricing)** (Edit Search)

MAY 29, 1997 THURSDAY

DEPARTMENT: Congressional Tax Correspondence (CTC)

CITE: 97 TNT 103-11

LENGTH: 20468 words

HEADLINE: 97 TNT 103-11 NYSBA REPORTS ON PROPOSED CONSTRUCTIVE SALE LEGISLATION. (Section 351 -- Transfer to Controlled Firm) (Release Date: May 21, 1997) (Doc 97-15293 (54 pages))

CODE: Section 351 -- Transfer to Controlled Firm

SUMMARY:
The **New York State Bar Association Tax Section** (NYSBA) has sent Rep. Barbara B. Kennelly, D-Conn., a report addressing the constructive sale provisions and the amendment to section 351 contained in H.R. 846.

The NYSBA report discusses the bill's safe-harbor exemption of short-term hedging transactions from treatment as constructive sales and recommends against inclusion of the safe harbor. The NYSBA believes "that a hedge with constructive sale economics is economically equivalent to a sale, regardless of its duration, and should be taxed as such."

In other principal comments, the NYSBA report addresses the standard for constructive sale; the special rule for income in respect of a decedent; the effective date for constructive sales; and the amendment of section 351.

AUTHOR:
Loengard, Richard O., Jr.
New York State Bar Association Tax Section

GEOGRAPHIC:
United States

INDEX:
transfer to controlled firm

REFERENCES:
Subject Area:
Business Tax Issues
Principal Cited Reference:
H.R. 846

TEXT:

Release Date: May 21, 1997

Trading Price per Share of ABC Stock on Maturity Date	Exchange Ratio	Cash Equivalent Amount
Less than $ 100	1.0 share	Value of one share of ABC stock
From and including $ 100 to and including $ 115	1.0 share to .87 shares	$ 100
Above $ 115	.87 shares	$ 100 plus 87% of the excess of the value of one share of ABC stock over $ 115

By issuing the Exchangeable Debentures, Taxpayer has eliminated all of its risk of loss with respect to the ABC Stock, since any depreciation in the value of the ABC Stock has been shifted to the Holders. For example, if ABC common stock is trading at $ 80 per share on the Maturity Date, Taxpayer can either deliver one share of its ABC Stock or $ 80 of cash to retire each Exchangeable Debenture.

Nevertheless, Taxpayer will not be deemed to have made a constructive sale of its ABC Stock unless Taxpayer has entered into a transaction that is substantially the same as one of the four "core cases" described in subsections (c)(1)(A)-(D) of the Bill. The issuance of the Exchangeable Debentures is similar in certain respects to the issuance of a forward contract to sell a fixed number of shares of ABC Stock for a fixed price. However, because the number of shares of ABC Stock (or equivalent value) that will be delivered at maturity of the Exchangeable Debentures is variable, it is appropriate to compare the value of the opportunity for profit that Taxpayer has retained to the value of the total risk of loss and opportunity for profit that exists with respect to the ABC Stock, as determined using **options pricing.** Taxpayer's financial advisor has provided the following information regarding the value of certain five-year options on shares of ABC common stock:

Strike Price	Value of Put Option
$ 100	$ 21

Strike Price	Value of Call Option
$ 100	$ 35
$ 115	$ 25

Based on these option prices, the value of 100% of the opportunity for profit with respect to a share of ABC stock over the five-year term of the Exchangeable Debentures is $ 35. /71/ Moreover, the value of the opportunity for profit that has been retained by Taxpayer with respect to each share during the five-year period is $ 10 (equal to the excess of the $ 35 value of all the opportunity for profit above $ 100 over the $ 25 value of the opportunity for profit above $ 115). /72/ Thus, the value of the opportunity for profit retained by the taxpayer ($ 10) represents more than 17% of the sum of the absolute values of the total opportunity for profit ($ 35) and risk of loss ($ 21) with respect to the ABC stock over the five- year period (i.e.., 56) Accordingly, Taxpayer has not entered into a constructive sale of the ABC Stock.

3. OUT-OF-THE MONEY COLLARS.

A typical "collar" is a hedging transaction whereby a taxpayer hedges a portion of its risk of loss and relinquishes a portion of its opportunity for profit by purchasing an out-of-the-money put option (i.e., one whose strike price is below the current stock price) and selling an out-of-the-money call option (i.e., one whose strike price is above the current stock price). /73/

Since the put option's strike price is below the current stock price, the taxpayer retains the risk of loss between the current stock price and the strike price of the put option. In addition, the taxpayer retains the opportunity for profit between the current stock price and the strike price of the call option. Combined, this risk of loss and opportunity for profit can be substantial, thereby negating a constructive sale. If, on the other hand, the collar is too "tight," the taxpayer may not have retained sufficient risk of loss or opportunity for profit, in which case the collar would be substantially equivalent to a forward sale of the stock.

In order to determine whether a collar is "wide" enough, it might be possible to use the **option pricing** approach to quantify the risk and opportunity retained by the taxpayer. In many situations, however, it may be difficult or costly for taxpayers to obtain the required information. /74/ Accordingly, consideration should be given to adopting a safe harbor with respect to collars whose "range" includes the current trading price of the security subject to the collar. For example a safe harbor might apply to any collar that has: (i) a relatively short term (e.g., not exceeding three or, alternatively, five years), (ii) a total "spread" of at least 20% of the current trading price of the hedged security, and (iii) a spread that includes the current trading price of the hedged security.

Such a safe harbor would not account for many key factors relevant to the amount of risk and opportunity retained by a taxpayer. For example, such a safe harbor would not consider the volatility of the appreciated security being hedged, the expected current yield (dividends or interest) on the underlying appreciated security, or the term of the hedge (to the extent it is less than three or five years). Accordingly, many collars that do NOT substantially eliminate the taxpayer's risk of loss and opportunity for profit with respect to an appreciated security would nevertheless fail to qualify for the safe harbor. /75/ On the other hand, the safe harbor has the clear merit of being easy to understand and administer and would seem to protect cases that are adequately distinguished from the core cases targeted by the Proposal. We have not undertaken any quantitative analysis to support the suggested safe harbor, however, and note that it would probably be advisable to limit such a safe harbor to collars that hedge appreciated common stock.

The following example illustrates application of this safe harbor. X, an individual, owns 1,000 shares of stock of HIJ Corporation (the "HIJ Stock"), representing less than one percent of the total outstanding stock of HIJ. X purchased the HIJ Stock for $ 10 per share on March 1, 1993. The stock of HIJ is widely-held and publicly-traded. On January 1, 1997, at a time when the stock of HIJ is trading at $ 100 per share, X enters into a transaction with a financial institution whereby X purchases a three-year put option with a strike price of $ 90 and sells a three-year call option with a strike price of $ 110 (collectively referred to as the "collar"). X receives net proceeds of $ 8 for entering into the collar since the cost of the put option ($ 10) is less than the price X receives for selling the call option ($ 18).

In this example, the put option and the call option are each 10% out-of-the-money (based on the difference between the option's respective strike prices and the trading price of the HIJ Stock at the time the collar is entered into). Collectively, the options reflect a 20% "spread" between the put price and the call price. In addition, the spread of the collar includes the trading price of the HIJ Stock at the time the collar is entered into. Finally, the three- year term of the option will satisfy the safe harbor's maximum term requirement (of three or, alternatively, five years). Accordingly, entering into the collar will not constitute a constructive sale.

FOOTNOTES

/1/ The principal authors of the discussion of the constructive sale proposal are David Schizer and Samuel Dimon. The principal author of the discussion of the proposed amendments to Section 351 is Andrew Berg. Substantial contributions were made by Richard Loengard and Michael Schler. Helpful comments were received from Peter Furci, Bruce Haims, Harold Handler, David Hariton, Sarah Reddick, Judah Rosensweig, Robert Scarborough, Daniel Shefter, and Steven Todrys.

29TH ITEM of Focus printed in FULL format.

Tax Notes Today

JULY 20, 1998 MONDAY

DEPARTMENT: Special Reports (SPR)

CITE: 98 TNT 138-91

LENGTH: 12852 words

HEADLINE: 98 TNT 138-91 HEDGING UNDER SECTION 1259. (Section 1259 -- Appreciated Financial Positions) (Release Date: July 20, 1998) (Doc 98-22826 (12 pages))

CODE: *Section 1259* -- Appreciated Financial Positions

SUMMARY:

Professor David M. Schizer examines opportunities for tax-free hedging under new *section 1259*.

David M. Schizer is an associate professor at Columbia Law School. As an associate in the tax department of Davis Polk & Wardwell, he was one of the principal drafters of the **New York State Bar Association's** report on H.R. 846, the bill that was enacted as *section 1259*. The author wishes to thank Marvin Chirelstein, Sam Dimon, and Po Sit for their very insightful comments.

Schizer notes that before the Taxpayer Relief Act of 1997, it was a simple matter for taxpayers to attain the main advantages of selling an appreciated asset -- cash proceeds and insulation from market risk -- without incurring capital gains tax. Schizer explains that under new *section 1259*, such tax-free hedging has become more difficult. This article outlines the principal methods by which tax- free hedging still may be achieved. The conclusion is that, in general, a taxpayer must either reduce the duration of her hedge or accept meaningful exposure to the hedged asset's performance.

AUTHOR: Schizer, David M.
Columbia Law School

GEOGRAPHIC: United States

INDEX: hedging transactions

REFERENCES:
Subject Area:

Financial instruments tax issues

TEXT:

common financial transactions that do not result in constructive sale treatment."). Yet until this guidance is offered, taxpayers face some uncertainty, at least in marginal transactions. In the interim, they may wish to follow the safe harbor recommended by the **New York State Bar Association** ("NYSBA"). /66/

[36] The NYSBA proposed three criteria, /67/ each of which must be satisfied: first, the hedge must be for a relatively short term (not exceeding three or, alternatively, five years). The reason for this requirement is that, the shorter the hedge, the more significant a given "spread" of retained exposure will be -- because the underlying asset is more likely to trade within this spread. /68/ Second, the hedge must expose the taxpayer to a "spread" representing at least 20 percent of the hedged security's current trading price. Thus, if the stock is at $ 100, the standard is satisfied for hedges that leave the taxpayer with exposure from, for example, $ 95 to $ 115, $ 80 to $ 120, or $ 100 to $ 120. Third, this 20 percent spread must include the current trading price of the hedged security. The point is that, if the stock is trading at $ 100, it is more meaningful to retain exposure from $ 100 to $ 120 than from $ 30 to $ 50.

[37] The NYSBA illustrated the above standard with the following example:

> X, an individual, owns 1,000 shares of stock of HIJ Corporation (the "HIJ stock"), representing less than one percent of the total outstanding stock of HIJ. X purchased the HIJ Stock for $ 10 per share on March 1, 1993. The stock of HIJ is widely-held and publicly traded. On January 1, 1997, at a time when the stock of HIJ is trading at $ 100 per share, X enters into a transaction with a financial institution whereby X purchases a three-year put option with a strike price of $ 90 and sells a three-year call option with a strike price of $ 110 (collectively referred to as the "collar"). X receives net proceeds of $ 8 for entering into the collar since the cost of the put option ($ 10) is less than the price X receives for selling the call option ($ 18).
>
> In this example, the put option and the call option are each 10 percent out-of-the-money (based on the difference between the option's respective strike prices and the trading price of the HIJ Stock at the time the collar is entered into). Collectively, the options reflect a 20 percent "spread" between the put price and the call price. In addition, the spread of the collar includes the trading price of the HIJ stock at the time the collar is entered into. Finally, the three-year term of the option will satisfy the safe harbor's maximum term requirement (of three or, alternatively, five years). Accordingly, entering into the collar will not constitute a constructive sale. NYSBA Report, at 46.

7. Options pricing: a more nuanced approach.

[38] The "spread" approach is simple to administer, but imprecise. The problem is that all 20 percent spreads are not created equal. On a stable utility stock that is unlikely to rise more than 20 percent during the term of the hedge, a taxpayer who retains appreciation from $ 100 to $ 120 is retaining most of the appreciation. On a high- tech start-up company that could easily