Nos. 06-74246, 06-74269

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

XILINX, INC. AND CONSOLIDATED SUBSIDIARIES,
Petitioner-Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF OF INTERNATIONAL TRADE AND OTHER ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC OF APPELLEE XILINX, INC.

Allen Duane Webber

Baker & McKenzie LLP
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7040

Andrew P. Crousore
Baker & McKenzie LLP
660 Hansen Way
Palo Alto, California 94304
(650) 856-5508

Mark A. Oates
Thomas V. Linguanti

Baker & McKenzie LLP
One Prudential Plaza
130 East Prudential Plaza
Chicago, Illinois 60601
(312) 861-7594

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, each of the amcius parties listed below is a not-for-profit corporation organized under the laws of the referenced jurisdiction and has no stock, and therefore no publicly traded company owns 10 percent or more of its stock.

American Apparel & Footwear Association	Tennessee
American Chemistry Council ("ACC")	New York
Biotechnology Industry Organization	D.C.
Business Software Alliance	D.C.
Financial Executives International	D.C.
Information Technology Industry Council	Delaware
National Association of Manufacturers	New York
National Foreign Trade Council	D.C.
Organization for International Investment	Delaware
Pharmaceutical Research and Manufacturers of America	Delaware
Semiconductor Industry Association	California
Software Finance and Tax Executives Council	D.C.
Software and Information Industry Association	D.C.
Technology Association of America	Virginia
Technology Network	California
Tax Council	D.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Treaties

Legislative History

TABLE OF AUTHORITIES

Page

Other Authorities

STATEMENT OF THE IDENTITIES INTERESTS, AND AUTHORITY TO FILE OF THE AMICI CURIAE

The American Apparel and Footwear Association is the national trade association representing apparel, footwear and other sewn products companies, and their suppliers, which compete in the global market.

The American Chemistry Council represents approximately 150 of the leading companies engaged in the business of chemistry, a $689 billion enterprise that accounts for ten cents of every dollar in U.S. exports.

The Biotechnology Industry Organization is the world's largest trade association representing more than 1,200 biotechnology research companies, academic centers, and related entities worldwide, engaged in cutting-edge research relating to healthcare, agriculture, and the environment.

The Business Software Alliance is an association of 28 of the world's leading software and hardware technology companies with operations in over 70 countries.

Financial Executives International is a professional association representing the interests of more than 15,000 chief financial officers and other senior financial executives from over 8,000 major companies in the U.S. and Canada.

The Information Technology Industry Counsel represents the interests of the information and communications technology industry, including member companies that are among the global leaders in innovation from all areas in

information and communications technology, including hardware, services, and software.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

The National Foreign Trade Council, with 300 members, is the oldest U.S. business association dedicated to international tax, trade, and human resource matters.

The Organization for International Investment is a business association in Washington, D.C., that exclusively represents the U.S. operations of more than 150 companies based abroad.

The Pharmaceutical Research and Manufacturers of America, with 28 member companies, is a voluntary non-profit association that represents the country's leading research-based pharmaceutical and biotechnology companies.

The Semiconductor Industry Association is the leading voice for the semiconductor industry, which is the second largest U.S. exporting industry, and represents over 70 U.S. semiconductor companies that account for nearly 90 percent of the semiconductor production in the U.S.

The Software Finance and Tax Executives Council is a Washington, D.C.-based trade association that provides educational resources for policymakers and others regarding high-tech and finance policy issues.

The Software and Information Industry Association, with approximately 400 members, is the principal trade association for the software and digital content industry and provides government relations, business development, corporate education, and intellectual property protection services.

The Tax Council is a non-profit and non-partisan association based in Washington, D.C., that contributes to a better understanding of complex tax laws and regulations through a variety of international forums.

The Technology Association of America is the leading voice for the U.S. technology industry and represents approximately 1,500 member companies of all sizes from the public and commercial sectors of the economy.

The Technology Network is a national network of CEOs and senior executives of technology companies, with more than two million employees, in the fields of information technology, e-commerce, biotechnology, clean energy and venture finance.

The members of the Amici Curiae referenced above (the "Member-companies") include many of the largest multi-national corporations doing business around the world with headquarters inside and outside the United States.

The Member-companies are potentially subject to double taxation (*i.e.*, tax on the same income in both the U.S. and another country), and rely upon the transfer pricing laws in the various countries, as well as international norms and tax treaties, to ameliorate this double taxation. The key to avoiding double taxation is uniform adherence to one internationally accepted objective measure to evaluate related-party transactions. That measure is the "arm's length standard," which the U.S.'s treaty partners, the U.S. Congress, the U.S. Treasury Department, the Commissioner of Internal Revenue and, until this case, the U.S. Courts, uniformly have followed. The Member-companies are alarmed by the Majority's unprecedented approach in this case, which abandons the uniform application of the long-established domestic and international arm's length standard and accordingly will result in double taxation to the Member-companies.

In accordance with Federal Rule of Appellate Procedure 29(a), counsel to the Amici Curiae have obtained Appellee's consent to the filing of this brief, and have been advised by Appellant's counsel that the Commissioner does not object or consent to the filing of this brief.

Nos. 06-74246, 06-74269

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

XILINX, INC. AND CONSOLIDATED SUBSIDIARIES,
Petitioner-Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF OF INTERNATIONAL TRADE AND OTHER ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC OF APPELLEE XILINX, INC.

The above-referenced organizations ("Amici") collectively represent thousands of corporations with a global footprint that conduct business in the U.S. The Amici write to support the Petition for Rehearing or Rehearing En Banc of Appellee Xilinx, Inc. because of the almost certain risk of double taxation that will occur if the Majority opinion is allowed to stand. The Majority eviscerates the long-standing arm's length standard that the Congress, Courts, Treasury Department ("Treasury"), and Commissioner of Internal Revenue ("Commissioner") repeatedly have mandated as the bedrock of the transfer pricing

regime under section 482,[1] the Treasury Regulations thereunder generally, and the cost-sharing regulations in particular. The Majority, without the benefit of a briefing by the parties on the particular issue deemed to be dispositive, lays to waste more than three quarters of a century of legislative, regulatory, judicial and administrative affirmations that the arm's length standard controls in all applications of section 482.

The Majority reversed the Tax Court premised on its erroneous conclusion that the 75-year old requirement in Treas.Reg. §1.482-1(b)(1)(1994) that the Commissioner apply the arm's length standard "in every case" under section 482 is irreconcilable with the requirement in Treas.Reg. §1.482-7(d)(1)(1995) that cost sharing participants share "all costs". Op:6163, 6165. Based on this perceived irreconcilable conflict, the Majority held that the "all costs" language of the cost sharing regulations trumped the arm's length standard. Id.

The Majority's rejection of the arm's length standard in favor of a non-conforming approach will undermine international trade by subjecting multinational companies doing business in the U.S. to double taxation. To avoid such double taxation, the international community, under the leadership of the U.S., has adopted the arm's length standard as the common measuring stick by

[1] Unless otherwise indicated, all "section" references herein are to the Internal Revenue Code (26 U.S.C.) or Treasury Regulations (26 C.F.R.) in effect during the years at issue.

which companies and nations evaluate the pricing of trillions of dollars of related-party, cross-border transactions annually. This long-standing international legal standard has its roots in the same legislative, regulatory and judicial history under section 482 that should guide the Court in this case. The Majority's demotion of the arm's length standard to a mere "regulatory gloss" on the statutory authority to allocate income (Op.6169 n.9) directly conflicts with the numerous opinions of the Supreme Court, this Court and other courts that the arm's length standard is inherent in, and controls all allocations under, section 482. Moreover, the Majority ignores Treasury's regulatory intent to apply the arm's length standard "in every case," including cost sharing arrangements.

Accordingly, the Amici respectfully submit that the Majority opinion should be set aside in favor of an analytical approach that harmonizes with the great weight of Congressional, judicial, regulatory, and administrative authority and appropriately respects the arm's length standard as the very essence of section 482 and the Regulations thereunder, including Treas.Reg. §1.482-7(d)(1)(1995).

I. FOR MORE THAN 75 YEARS, CONGRESS, THE COURTS, THE COMMISSIONER AND TREASURY CONSISTENTLY HAVE MANDATED THE APPLICATION OF THE ARM'S LENGTH STANDARD AS THE FUNDAMENTAL BASIS FOR THE EXERCISE OF THE DISCRETION GRANTED IN SECTION 482 TO MAKE ALLOCATIONS TO CLEARLY REFLECT INCOME.

In the 1920s, in response to concerns that taxpayers could shift or "milk" profits from one related corporation to another, Congress enacted a series of statutes designed to prevent the manipulation of profits between related entities, which culminated in the adoption in the Revenue Act of 1928 of section 45, the predecessor to section 482. See H.R. Rep. No. 70-2, at 16-17 (1927); S.Rep. No. 70-960, at 24 (1928). The first courts to apply this provision established the arm's length standard as the governing principle under section 45, and courts have continued to this day to interpret section 482 as mandating in every case the application of the arm's length standard. Following the judiciary's lead, Treasury built the entire regulatory regime under section 45 on the foundation of the arm's length standard, and embraced that principle in all subsequent iterations of the regulations as the touchstone for applying, and limiting the Commissioner's discretion under, section 482. *See, e.g., United States Steel Corp. v. Commissioner*, 617 F.2d 942, 947 (2d Cir. 1980) (taxpayer that satisfies the arm's length standard "has earned the right, under the Regulations, to be free from a § 482 reallocation"). Similarly, the Commissioner has at all times, including in this

case, invoked the arm's length standard as the basis for exercising discretion under section 482 to make allocations among related parties.

The original statutory language in section 45 has survived intact through several re-enactments over more than 80 years, and section 482 thus remains virtually identical to its 1928 predecessor (except for the "commensurate with income" provision added in 1986). Through its words and deeds, Congress has codified the arm's length standard as the very core of section 482 and mandated its application in every case in which the Commissioner exercises discretion under section 482.

A. For Nearly Eight Decades, Courts Consistently Have Construed the Statutory Language of Section 482 to Mandate Application of the Arm's Length Standard.

The courts initially construed the "clear reflection of income" and tax avoidance provisions of section 45 based only on its statutory language and legislative history, without the benefit of any regulations. In 1933, the Board of Tax Appeals ("BTA") expressly held that the arm's length standard was the proper statutory interpretation: "The purpose of [section 45] is to place transactions between related trades and businesses owned or controlled by the same interests upon the same basis as if such businesses were dealing at arm's length with each other." *See Advance Cloak Co. v. Commissioner*, B.T.A. Memo. 1933-78, 1933 B.T.A.M. (P-H) ¶33,078, at 108. The BTA applied the arm's length standard

under section 45 so that "the real income of the [taxpayer] might be clearly reflected." *Gordon Can Co. v. Commissioner*, 29 B.T.A. 272, 275 (1933).

Still construing just the statute, in *Asiatic Petroleum Co. v. Commissioner*, 31 B.T.A. 1152, 1159 (1935), *aff'd*, 79 F.2d 234 (2d Cir. 1935), the BTA upheld the Commissioner's re-allocation of gain between related corporations "clearly to reflect [their] income" because the sale "was not an arm's length transaction." The BTA explained that "[t]he obvious purpose of section 45 [was] to place a controlled taxpayer on a parity with an uncontrolled taxpayer for purposes of determining tax liability . . . in order clearly to reflect [the taxpayer's] true income." *Tennessee-Arkansas Gravel Co. v. Commissioner*, B.T.A. Memo. 1938-240, 1938 B.T.A.M. (P-H) ¶38,240, at 418. Thus, the arm's length standard was the statutory tool used to ensure that the income of related parties was clearly reflected, i.e., in parity with the income that the taxpayer would have received if it dealt at arm's length with an unrelated party.

Since the early 1930's, courts repeatedly have reiterated the purpose of section 482 and its predecessor as described by the BTA, always by reference to the controlling arm's length standard. In 1952, the Second Circuit explained that Congress adopted section 45 "to deny the power to shift income . . . arbitrarily among controlled corporations, and to place such corporations rather on a parity with uncontrolled concerns." *Central Cuba Sugar Co. v. Commissioner*, 198 F.2d

214, 216 (2d Cir. 1952). The Third Circuit similarly instructed that to determine the "true net income" of related parties under "the scope of Section 45", "the technique used is the application of the standard of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." *Commissioner v. Chelsea Products, Inc*., 197 F.2d 620, 623 (3d Cir. 1952).

In each subsequent decade, courts (including the Supreme Court, other circuit courts, the Tax Court, the Court of Federal Claims, and this Court) have hailed the arm's length standard as the basis for the Commissioner's exercise of discretion under section 482, and uniformly have agreed that the purpose of section 482 is to place controlled taxpayers on a tax parity with uncontrolled taxpayers dealing at arm's length. *See, e.g., Commissioner v. First Sec. Bank of Utah*, 405 U.S. 394, 407 (1972); *Borge v. Commissioner*, 405 F.2d 673, 675-676 (3d Cir. 1968), *cert. denied sub nom. Danica Enterprises v. Commissioner*, 395 U.S. 933 (1969); *Eli Lilly and Co. v. United States*, 372 F.2d 990, 997 (Ct. Cl. 1967); *Eli Lilly & Co. v. Commissioner*, 856 F.2d 855, 859-860 (7th Cir. 1988); *Bausch & Lomb, Inc. v. Commissioner*, 92 T.C. 525, 581 (1989), *aff'd*, 933 F.2d 1084 (2d Cir. 1991); *Compaq Computer Corp. v. Commissioner*, T.C. Memo 1999-220, 78 T.C.M. (CCH) 20 (1999); *DHL Corp. v. Commissioner*, 285 F.3d 1210, 1217 (9th Cir. 2002).

B. For 75 Years, the Regulations Have Reflected the Congressional Intent and Purpose to Apply the Arm's Length Standard in Every Case Under Section 482 (and its Predecessor).

Following the lead of the courts, Treasury enshrined in the first regulations under section 45 the same arm's length standard articulated by the BTA. In language that still echoes today, the regulations declared that:

> The purpose of section 45 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true net income from the property and business of a controlled taxpayer.

Article 45-1(b), Regulation 86 (1935); compare Treas.Reg. §1.482-1(a)(1)(1994). Treasury defined "true net income" as that "which would have resulted to the controlled taxpayer, had it in the conduct of its affairs . . . dealt with the other member or members of the group at arm's length." Art. 45-1(a)(6), Regulation 86 (1935); compare Treas.Reg. §1.482-1(b)(1)(1994). Then, as now, Treasury mandated that "[t]he standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer." Art. 45-1(b), Regulation 86 (1935); Treas.Reg. §1.482-1(b)(1)(1994).

C. Repeated Reenactments Confirm Congressional Ratification of the Arm's Length Standard.

In 1932, even before Congress reenacted section 45, the Senate gave its advice and consent to the first U.S. income tax treaty with France, which expressly incorporated the arm's length standard reflected in section 45. *See* Convention

Concerning Double Taxation, U.S.-Fr., art. IV, Apr. 27, 1932, 49 Stat. 3145, 3146-47 (1935) (ratified by U.S. in 1932).[2]

In 1934, Congress reenacted section 45 (1928) without material change, S. Rep. No. 73-558, at 29 (1934), and thereby reaffirmed reliance on the arm's length standard the BTA adopted and applied in *Advance Cloak* and *Gordon Can.*

In 1943, Congress modified section 45 (1928) to replace "gross income and deductions" with "gross income, deductions, credits, and allowances," but advised that this amendment made "no change in existing law." H.R. Rep. No. 78-871, at 50 (1943).

In 1954, Congress enacted the language of section 45 (1928) as section 482 of the I.R.C. of 1954, without "substantive changes." H.R. Rep. No. 83-1337, at 4304 (1954).

Congress reenacted the same statutory language yet again as section 482 of the I.R.C. of 1986, and added the "commensurate with income" standard applicable to transfers of intangible property (and not to the costs to be shared under cost sharing arrangements), which "Congress intended . . . to be consistent

[2] All bilateral income tax treaties ratified by the U.S. since 1932 have explicitly incorporated the arm's length standard. Notice 88-123, "A Study of Intercompany Pricing under Section 482 of the Code," 1988-2 C.B. 458, 475 ("White Paper")(footnotes omitted).

with the arm's length standard . . . and . . . will be so interpreted by the Internal Revenue Service and the Treasury." White Paper, 1988-2 C.B. at 458.

The Staff of the Joint Committee on Taxation ("Joint Committee") has observed that "section 482 and the regulations thereunder require that all transactions between related parties be conducted on terms consistent with an 'arm's length' standard, and permit the Secretary of the Treasury to reallocate income and deductions among such parties if that standard is not met." Joint Committee, Description Of Chairman's Modification To The "Energy Tax Incentives Act Of 2003," J. Comm. on Taxation No. 108-Jcx-28-03, at 16 (2003); Joint Committee, Description Of The Highway Reauthorization And Excise Tax Simplification Act Of 2004, J. Comm. on Taxation No. 108-Jcx-5-04, at 138 (2004).

The repeated reenactment of the same statutory language in section 482 over more than 80 years, together with explicit Congressional acknowledgement of and assent to the arm's length standard consistently applied by the courts and Treasury, establishes Congressional approval and incorporation of the arm's length standard and must be respected. *See, e.g., Nat'l Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Lorillard, a Division of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978); *Miller v. Maxwell's International Inc.*, 991 F.2d 583, 588, n.3 (9th Cir. 1993). Such "Treasury regulations and [judicial,

administrative or agency] interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561 (1991).

D. The Arm's Length Standard Controls in All Matters Under Section 482, and is Not a Mere "Regulatory Gloss" That Can Be Wiped Away By The Regulations or the Court in Favor of An Arbitrary Standard.

The Majority attempts to sidestep eighty years of decisions, rulings, regulations and reenactments by declaring that "achieving an arm's length result is not itself the regulatory regime's goal; rather its purpose is to prevent tax evasion by ensuring taxpayers accurately reflect taxable income attributable to controlled transactions." Op:6167 (footnote omitted). In this, the Majority is simply wrong. The Majority discounted the "tax parity" language in the second sentence of Treas. Reg. § 1.482-1(a)(1)(1994), upon which the Dissent relied, in favor of the statement in the first sentence that "[t]he purpose of Section 482 is to ensure that taxpayers clearly reflect income attributable to controlled transactions and to prevent the avoidance of taxes with respect to such transactions." Op: 6167 and n.7.

Contrary to the Majority's view, the Regulations expressly rely upon the arm's length standard to achieve both the parity referenced by the dissent and the clear reflection of income and prevention of avoidance of taxes referenced by the

Majority. From 1935 through 1993, all prior versions of this regulation expressly provided that "the purpose of section 45 [later, section 482] is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true net [later, taxable] income from the property and business of a controlled taxpayer." See Article 45-1(b), Regulation 86 (1935); Treas.Reg. §1.482-1(b)(1)(1968).

Consistent with this history, Treasury Regulation §1.482-1(a)(1)(1994), like Temp.Treas.Reg §1.482-1T(a)(1)(1993), provided:

> The purpose of section 482 is to ensure that taxpayers clearly reflect income attributable to controlled transactions, and to prevent the avoidance of taxes with respect to such transactions. Section 482 places a controlled taxpayer on a tax parity with an uncontrolled taxpayer by determining the true taxable income of the controlled taxpayer.

Further, Treas.Reg. §1.482-1(b)(1)(1994) and Temp.Treas.Reg §1.482-1T(b)(1)(1993) instructed:

> In determining the true taxable income of a controlled taxpayer, the standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer.

The Preamble to the 1993 temporary regulations explains, contrary to the Majority's interpretation, that the arm's length standard remains the touchstone for all allocations under section 482:

> ***The scope and purpose provisions have been reorganized to make clear that the arm's length standard is the guiding principle for all allocations under section 482***, and to provide additional guidance for determining comparability under the arm's length standard. ***Section 1.482-1T(a)(1)***

> ***reaffirms that the purpose of section 482 is to ensure that taxpayers clearly reflect their income by placing a controlled taxpayer on a tax parity with an uncontrolled taxpayer by determining the controlled taxpayer's true taxable income.***
>
> * * *
>
> Section 1.482-1T(b)(1) reaffirms that in determining a taxpayer's true taxable income, ***the standard to be applied is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer (the arm's length standard).*** In this respect, ***the regulations are consistent with the current regulations*** and reflect many comments on the proposed regulations, which stressed ***the importance of adhering to the arm's length standard***.

T.D. 8470, 58 Fed. Reg. 5263, 5265 (Jan. 21, 1993)(emphasis added).

Thus, the very regulatory language cited by the Majority was intended to "reaffirm" that the purpose of section 482 is to place controlled and uncontrolled taxpayers on "tax parity" under the arm's length standard to clearly reflect the taxpayer's income. As the controlling principle for all allocations under section 482 and its predecessor since 1928, the arm's length standard is not a mere "regulatory gloss" that Treasury, the Commissioner, or this Court can wipe away in favor of some arbitrary standard that has no foundation in the behavior of uncontrolled parties bargaining at arm's length. *Cf. Nat'l Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). Rather, the arm's length standard is the very ***source of uniformity*** in the allocation of income among related parties under section 482 and the similar transfer pricing regimes of other nations.

II. TREASURY AND THE COMMISSIONER AT ALL TIMES INTENDED THAT THE ARM'S LENGTH STANDARD GOVERN DETERMINATIONS UNDER THE COST SHARING REGULATIONS.

Treasury and the Commissioner consistently have applied the arm's length standard to cost sharing arrangements under section 482. Treas.Reg. §1.482-2(d)(4)(1968) expressly required parties to share costs on an arm's length basis and limited the Commissioner's discretion to make adjustments only "as may be necessary to reflect each participant's arm's length share of the cost and risks of developing the property." The 1968 final cost sharing regulations reflected "a concise statement of general rules based on arm's length standards," (Treasury Department Release F-1217 at 5 (April 16, 1968)), and remained in force until the adoption of Treas.Reg. §1.482-7(1995).

In 1994, Treasury and the Commissioner published new regulations under section 482, which retained the explicit arm's length limitation in the cost sharing provisions in Treas.Reg. §1.482-2(d)(4)(1968). *See* T.D. 8552, 1994-2 C.B. 93, 98-99. The 1994 regulations, like the 1968 regulations, confirmed that the arm's length standard must be applied "in every case." Treas.Reg. §1.482-1(b)(1)(1994).

In late 1995, Treasury and the Commissioner issued final cost sharing regulations under Treas.Reg. §1.482-7(1995). See T.D. 8632, 1996-1 C.B. 85. Treas.Reg. §1.482-7(a)(2)(1995) allowed the Commissioner's allocations relating to cost sharing arrangements only "to the extent necessary to make each controlled

participant's share of the costs . . . equal to its share of reasonably anticipated benefits." Although this limitation did not explicitly restate the arm's length standard, the statements and actions of Treasury and the Commissioner before, during and after the adoption of the 1995 cost sharing regulations demonstrate that they intended to embrace, and not to depart from, the arm's length standard.

The Preamble to Treas.Reg. §1.482-7(1995) ("1995 Preamble") identified and discussed many provisions that changed from the original 1968 cost sharing regulations and the 1992 proposed regulations, but did not even hint at any potential departure from the arm's length standard in any aspect of the cost sharing regulations. If Treasury and the Commissioner had intended to eliminate the fundamental arm's length standard from the core of the cost sharing regulations, they would have said so. They did not.

In the 1995 Preamble, Treasury and the Commissioner explained that the new cost sharing regulations were intended to follow the policies of the 1992 Proposed Regulations and the approach of the 1994 Final Regulations, both of which explicitly applied the arm's length standard in the context of cost sharing:

> ***Without fundamentally altering the policies of the 1992 proposed regulations,*** the final regulations reflect numerous modifications in response to the comments described above. ***They also reflect the approach of the final section 482 regulations relating to transfers of tangible and intangible property.***

T.D. 8632, 1996-1 C.B. at 87 (emphasis added). The "polic[y] of the 1992 proposed regulations" relating to cost sharing was the continued adherence to the arm's length standard. See Prop.Treas.Reg. §1.482-2(g)(1)(i)(1992); Notice of Proposed Rulemaking, 1992-1 C.B. 1164, 1169-70. Prop.Treas.Reg. §1.482-2(g)(1)(i)(1992) expressly limited the sharing of costs to an "arm's length share of the costs[.]"

The "approach" of the 1994 Final Regulations is that "the governing principle under section 482 is the arm's length standard" (T.D. 8552, 1994-1 C.B. at 98), and that the "standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer." Treas.Reg. §1.482-1(b)(1)(1994). When the 1994 Final Regulations were issued, any adjustments under the cost sharing regulations were expressly limited to an "arm's length share of the costs." Thus, the policy and approach of the 1992 proposed and 1994 final regulations reflected an unambiguous reaffirmation of continued adherence to the arm's length standard.

Moreover, the 1995 Preamble provides:

> Section 1.482-7(a)(2) restates the general rule of cost sharing in a manner intended to ***emphasize its limitation*** on allocations: no section 482 allocation will be made with respect to a qualified cost sharing arrangement, except to make each controlled participant's share of the intangible development costs equal to its share of reasonably anticipated benefits.

T.D. 8632, 1996-1 C.B. at 87 (emphasis added). Given this emphasis on the ***limitation*** of the Commissioner's discretion to make allocations, it would be inconsistent to read the regulation to ***expand*** the Commissioner's cost sharing allocation authority by eliminating the arm's length standard. Treasury and the Commissioner simply did not intend the reference to "all costs" in the 1995 cost sharing regulations to read the arm's length standard out of the cost sharing regulations.

Indeed, given the importance to international trade of uniform acceptance of the arm's length standard by the U.S. and its trading partners, Treasury and the Commissioner have ***never*** taken the position – and cannot pragmatically take the position – that the arm's length standard does not apply to cost sharing arrangements. As the Dissent recognized (Op:6181-85), Treasury's unchanging treaty position both before and after 1995 shows its intent that the arm's length standard governs cost sharing agreements.

The Technical Explanations prepared by Treasury to describe the 1996 and 2006 U.S. Model Tax Treaties unambiguously provide that cost sharing agreements are governed by the arm's length standard. 1996 Technical Explanation, 1 *Tax Treaties* (CCH) ¶216, at 10,691-26; 2006 Technical Explanation, 1 *Tax Treaties* (CCH) ¶215, at 10,641. Before 1995, the U.S. entered into treaties with Austria, Bangladesh, Denmark, Estonia, Japan, Ireland, Italy,

Latvia, Lithuania, Slovenia, South Africa, Thailand, Turkey, United Kingdom and Venezuela that apply the established arm's length standard to cost sharing agreements. *See* 1-4 *Tax Treaties* (CCH) ¶¶703-11,154. After 1995, all new U.S. treaties continued to mandate that the arm's length standard governs cost sharing agreements. *See* 2-4 *Tax Treaties* (CCH) ¶¶2,945-8,816 (*e.g.*, treaties with Finland, Germany, India, Luxembourg, and Sweden). Treasury's consistent treaty position is unambiguous – cost sharing arrangements must comply with the arm's length standard.

The Commissioner's statements to Congress before and after 1995 also show that the arm's length standard governs cost sharing. In 1992, the Commissioner told Congress that the 1992 proposed cost sharing regulations "affirm the arm's length standard." 1992 IRS Report on the Application and Administration of Section 482 at 9 (Apr. 10, 1992), 92 TNT 77-19 (LEXIS). In 1999, the Commissioner again told Congress that "[u]nder current Treasury Regulations, the IRS is willing to consider many different approaches to . . . transfer pricing methodology or ***cost sharing practices, provided these approaches satisfy the arm's length principles.***" 1999 IRS Report on the Application and Administration of Section 482, Chapter IV at 5 (Apr. 21, 1999), 1999 TNT 108-10 (LEXIS)(emphasis added).

The Majority, without the benefit of briefing by the parties, blithely throws out the arm's length standard – the international norm for transfer pricing adjustments – and thereby threatens international trade with the very real spectre of double taxation. Most fundamentally, at no time in this litigation has the Commissioner ever argued that the 1995 cost sharing regulations are divorced from the arm's length standard. Before this Court reverses eighty years of historical adherence to the arm's length standard, the Court should consider, through a rehearing or rehearing en banc, the statutory, regulatory, judicial, administrative and treaty history of section 482 and the arm's length standard, as well as the substantial harm and uncertainty that the Majority's opinion will impose upon the international trading community through the abandonment of the consistent application of the arm's length standard.

CONCLUSION

For the reasons set forth above, the Amici respectfully request that this Court grant the Petition for Rehearing or Rehearing en Banc of Appellee Xilinx, Inc., and affirm the Decision of the Tax Court.

Dated this 21st day of August, 2009.

Respectfully submitted,

/s/ Allen Duane Webber
Allen Duane Webber
Mark A. Oates
Andrew P. Crousore
Thomas V. Linguanti

Baker & McKenzie LLP
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7040

Attorneys for referenced Amici

CERTIFICATE OF COMPLIANCE

I, Allen Duane Webber, attorney for the Amici, hereby certify that:

Pursuant to Fed. R. App. 29(d) and 32(a)(7), and Ninth Circuit Rule 29-2(c), the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 4,101 words.

DATED: August 21, 2009

//s// Allen Duane Webber
Allen Duane Webber
Baker & McKenzie LLP
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7040

Attorney for referenced Amici

CERTIFICATE OF SERVICE

I, Allen Duane Webber, hereby certify that I electronically filed the foregoing BRIEF OF INTERNATIONAL TRADE AND OTHER ASSOCIATIONS AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC OF APPELLEE XILINX, INC. with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage paid, to the following non-CM/ECF participants:

SEE ATTACHED SERVICE LIST

DATED: August 21, 2009

//s// Allen Duane Webber
A. Duane Webber
Baker & McKenzie LLP
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 452-7040

Attorney for referenced Amici

SERVICE LIST FOR CASE Nos. 06-74246, 06-74269

William J. Wilkins
Chief Counsel
INTERNAL REVENUE SERVICE
1111 Constitution Avenue, NW.
Washington, DC 20224

John A. DiCicco
Acting Assistant Attorney General
DOJ – U.S. DEPARTMENT OF JUSTICE
Tax Division
P.O. Box 502
Washington, DC 20044

John M. Breen
INTERNAL REVENUE SERVICE
1111 Constitution Avenue, NW.
Washington, DC 20224

Richard T. Morrison
DOJ – U.S. DEPARTMENT OF JUSTICE
Tax Division/Appellate Section
P.O. Box 502
Washington, DC 20044