

Fed. Tax’n Income, Est.& Gifts ¶ 4.3

**\*1 Federal Taxation of Income, Estates and Gifts**

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**Part 1. History, Constitutionality, and Structural Principles**

**Chapter 4. Interpreting the Internal Revenue Code**

4.3 PERVASIVE JUDICIAL DOCTRINES

**4.3.1 Introductory**

During the nineteenth century, the practice of construing taxing statutes strictly against the government was said to be “founded so firmly upon principles of equity and natural justice as not to admit of reasonable doubt.”[1](#co_footnote_F1_107960481_1) As explained by Mr. Justice Story in 1842:

In every case...of doubt, [taxing] statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and therefore are not to be liberally construed.[2](#co_footnote_F2_107960481_1)

This approach, which bracketed taxing statutes with laws imposing criminal penalties or forfeitures, was not without challenge, even in its heyday,[3](#co_footnote_F3_107960481_1) and by now has been largely abandoned.[4](#co_footnote_F4_107960481_1)

Contemporary courts apply tax laws with greater tolerance—some would say enthusiasm.[4.1](#co_footnote_F4_1_107960481_1) Today, strict construction is more likely to be used against the taxpayer in cases deciding the scope of statutory exceptions, deductions, and similar allowances.[5](#co_footnote_F5_107960481_1)

It is far from clear, however, why the Code should be construed strictly against either the taxpayer or the government.[6](#co_footnote_F6_107960481_1) A more salutary attitude was advocated by Mr. Justice Holmes, responding to the once-popular adage that statutes in derogation of the common law should be strictly construed:

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.[7](#co_footnote_F7_107960481_1)

In applying the Code to particular transactions, the courts frequently distinguish between “tax avoidance” and “tax evasion” and between “form” and “substance,” assert that transactions are to be taken at face value for tax purposes only if they are imbued with a “business purpose or reflect economic reality,” and integrate all steps in a prearranged plan rather than give effect to each step as though it were an isolated transaction.[7.1](#co_footnote_F7_1_107960481_1) These presuppositions or criteria are so pervasive that they resemble a preamble to the Code, describing the framework within which all statutory provisions are to function. But these judicial presuppositions, like the canons of statutory construction, are more successful in establishing attitudes and moods than in supplying crisp answers to specific questions.[8](#co_footnote_F8_107960481_1)

**\*2** They are, however, extremely important despite their vagueness. Indeed, in some areas they are influential primarily because they are vague; when the meaning of a provision is veiled by fog, taxpayers may tread more warily than when the landmarks are clearly visible. As Mr. Justice Brandeis observed in a similar context:

If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone, you may slip, and go over; but anybody can tell you where you can walk perfectly safely within convenient distance of that precipice.[9](#co_footnote_F9_107960481_1)

Mr. Justice Holmes did not object to the in terrorem effect of uncertainty even in criminal law:

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so...and if he does so it is familiar to the criminal law to make him take the risk.[10](#co_footnote_F10_107960481_1)

Laymen are typically more inclined than the expert to trust paper work as a shield against tax liability. Tax lawyers are bombarded at cocktail parties with tax schemes that would not convince the most inexperienced revenue agent and teeter on the brink of fraud. Randolph Paul’s comments on this subject cannot be improved:

Above all things, a tax attorney must be an indefatigable skeptic; he must discount everything he hears and reads. The market place abounds with unsound avoidance schemes which will not stand the test of objective analysis and litigation. The escaped tax, a favorite topic of conversation at the best clubs and the most sumptuous pleasure resorts, expands with repetition into fantastic legends. But clients want opinions with happy endings, and he smiles best who smiles last. It is wiser to state misgivings at the beginning than to have to acknowledge them ungracefully at the end. The tax adviser has, therefore, to spend a large part of his time advising against schemes of this character. I sometimes think that the most important word in his vocabulary is “No”...[11](#co_footnote_F11_107960481_1)

**4.3.2 Tax Avoidance Versus Tax Evasion**

Although the terms are occasionally used interchangeably,[12](#co_footnote_F12_107960481_1) “tax avoidance” and “tax evasion” are usually differentiated—the former denoting noncriminal modes of minimizing or avoiding tax liability and the latter, fraudulent behavior. The line between noncriminal conduct (which may or may not achieve its tax reduction objective) and fraudulent misconduct is discussed elsewhere in this work;[13](#co_footnote_F13_107960481_1) for present purposes, the term “tax evasion” is reserved for conduct that entails deception, concealment, destruction of records, and the like, while “tax avoidance” refers to behavior that the taxpayer hopes will serve to reduce his tax liability but that she is prepared to disclose fully to the IRS.[14](#co_footnote_F14_107960481_1)

**\*3** Used in this sense, “tax avoidance” embraces a wide spectrum of personal, financial, and business transactions. Taxpayers often organize corporations, establish trusts, make gifts, sell property, and borrow money—to mention only a few obvious areas—in ways or at times selected to reduce tax liabilities. In many cases, tax savings are so clearly allowed by statute that even the most severe moralist would direct any criticism at Congress rather than the taxpayer. When the Code requires the taxpayer to pick one of several options (for example, cash or accrual accounting, straight line or accelerated depreciation), it would be quixotic to gladden the heart of the Commissioner of Internal Revenue by electing the most costly. Citizens who want to make a voluntary contribution to the Treasury can do so by sending in their checks at any time; there is no reason to use the tax return as a vehicle for such generosity. Similarly, it is hard to fault a taxpayer who engages in a transaction with significant nontax results (for example, operating a business as a proprietorship rather than in corporate for, or selling property rather than continuing to hold it), even though this decision is motivated more by the tax savings to be achieved than by the transaction’s other consequences. Even Mr. Justice Holmes, who allegedly said that “I like to pay taxes; with them I buy civilization,” did not give his money to the Treasury until his death.[15](#co_footnote_F15_107960481_1)

The Code bristles with elections, options, and statutory incentives. Congress expects, and often hopes, that they will be used. It may, indeed, be confusing to label as tax avoidance behavior so clearly sanctioned by Congress. In common parlance, that term often conjures up a transaction whose success depends on a debatable interpretation of an ambiguous statutory provision or on an inadvertent loophole in the law that will probably be closed if and when it comes to public attention. Used in this sense, “tax avoidance” implies risk, and this in turn raises the question: If the taxpayer is trying to take advantage of an ambiguous provision, should it be construed against the taxpayer in order to discourage tax avoidance, at least if that was the sole or principal motive?

It is clear that the courts do not regard themselves as vested with a roving commission to extirpate tax avoidance. There are three classic statements justifying judicial disregard of motive if, although close to the dividing line, the taxpayer stays on the nontaxable side. One is a 1930 observation by Mr. Justice Holmes: “The fact that [the taxpayer] desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you may intentionally go as close to it as you can if you do not pass it.”[16](#co_footnote_F16_107960481_1) The second statement is by Judge Learned Hand:

[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.[17](#co_footnote_F17_107960481_1)

**\*4** The third, described as “the most eloquent short defense ever to appear of the state of being tax-conscious and, by implication, of the art of tax planning,”[18](#co_footnote_F18_107960481_1) is also by Judge Learned Hand:

Over and over again courts have said that there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.[19](#co_footnote_F19_107960481_1)

The statement that tax avoidance is practiced by rich and poor alike is exaggeration, since wage earners have few opportunities to “arrange [their] affairs” so as to reduce their taxes, and it is not clear why Judge Hand felt impelled to commend persons engaged in tax avoidance for “do[ing] right,” rather than merely to uphold their privilege to do so. These reservations aside, his central message—“the doctrine that a man’s motive to avoid taxation will not establish his liability if the transaction does not do so without it”[20](#co_footnote_F20_107960481_1)—is widely accepted.

Judicial reluctance to decide tax cases on the basis of the taxpayer’s state of mind is understandable. Tax planning is as American as apple pie. If doubts were routinely resolved against persons harboring a motive, purpose, or intent[21](#co_footnote_F21_107960481_1) to reduce tax liability, scrupulous taxpayers would pay a heavy price for candor in responding to the IRS’s questions about their state of mind. At the same time, disingenuous taxpayers and persuasive liars would go scot-free, unless revenue agents, judges, and juries came to reject their disavowals of a tax-avoidance intent as too bizarre to be believed. In that event, however, taxpayers who were in fact too ignorant, naive, or openhanded to inquire into the tax effect of their transactions would be penalized along with the others. An intermediate approach, under which a tainted purpose would not automatically count against the taxpayer but would be fatal if it met a specified standard (e.g., “principal,” “major factor,” “proximate cause”), would be at least as difficult to apply in practice as a blanket rule and would probably be as erratic in its results as the now-buried estate tax concept of “transfers in contemplation of death.”[22](#co_footnote_F22_107960481_1)

It would be a mistake, however, to conclude that the flavor of a stew is never impaired by a lavish infusion of tax-avoidance motive. After asserting that the taxpayer’s purpose is a neutral circumstance, both Holmes and Hand in the first two opinions quoted above went on to resolve the tax question in favor of the government, and it is hard to escape the conclusion that the aroma of tax avoidance contributed to the outcome.[23](#co_footnote_F23_107960481_1) Moreover, even if the taxpayer’s purpose was wholly irrelevant in these cases, it cannot be disregarded in various other circumstances.

**\*5** First, the Code contains many statutory provisions that explicitly make tax avoidance an operative factor in determining tax liability. For example, [§ 532](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS532&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) imposes a special tax on “every corporation...formed or availed of for the purpose of avoiding the income tax with respect to its shareholders”; [§ 357(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS357&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_3fed000053a85), involving assumptions of debt in certain transfers to controlled corporations, requires a determination of whether “the principal purpose of the taxpayer...was a purpose to avoid Federal income tax”; and [§ 306(b)(4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS306&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_6ad60000aeea7) exempts certain stock sales and redemptions from unfavorable tax treatment “if it is established to the satisfaction of the [IRS that the transactions were] not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income tax.”[24](#co_footnote_F24_107960481_1) Difficulties in administering statutory distinctions between transactions that are, and those that are not, dominated by tax-avoidance objectives have more than once led Congress to impose a disability on all transactions in a suspect category, whether guilty or not.[25](#co_footnote_F25_107960481_1)

Second, in deciding whether to accept at face value the form in which a transaction was cast by the taxpayer or to probe for its substance or net effect, revenue agents and courts sometimes respond to the aroma of tax avoidance like hounds to the scent of foxes. They are likely to suspect that the form adopted by the taxpayer is a self-serving declaration—“[m]otive is a persuasive interpreter of equivocal conduct”[26](#co_footnote_F26_107960481_1)—if tax considerations seem to be more influential than nontax results in shaping a transaction. Used as a divining rod, however, a tax-avoidance purpose serves only the preliminary purpose of advising the IRS and courts where to dig; it does not help in deciding whether what is actually found belongs on the taxable or the nontaxable side of the statutory line. In the words of Randolph Paul:

In deciding a fact issue the courts will analyze and scrutinize with special zeal where tax avoidance appears as a motive. But that motive will be immaterial except as an eye-opening mechanism or interpreter of equivocal conduct; it will not negate the effect of a transaction which has really occurred.[27](#co_footnote_F27_107960481_1)

The Court of Appeals for the Eighth Circuit, however, has gone a bit further:

When a taxpayer...boldly proclaims that his intent, at least in part, in attempting to create a trust is to evade taxes, the courts should examine the forms used by him for the accomplishment of his purpose with particular care; and, if his ingenuity fails at any point, the court should not lend him its aid by resolving doubts in his favor.[28](#co_footnote_F28_107960481_1)

Beyond those cases where a tax-avoidance intent is “boldly proclaimed,” such a purpose may be inferred as frequently from the nature of the transaction. Whatever his state of mind, if he travels into a territory that is much frequented by tax-conscious citizens, revenue agents and courts are likely to subject his papers to searching scrutiny.

**\*6** Finally, when construing ambiguous statutory language, the courts often reject interpretations that would sanctify legal formalities and thereby foster tax avoidance. Since a statutory construction affects all taxpayers, however, the state of mind of the litigant who happens to come before the court is less important in such cases than the objectives of taxpayers as a group. If a court concludes that taxpayers are likely to engage in a particular transaction primarily to reduce taxes rather than to achieve nontax business or personal objectives, the statutes affecting the transaction are often construed strictly in favor of the government, and this meaning is visited upon all taxpayers, even those wholly devoid of tax-avoidance purpose. For example, the following comments in *Helvering v. Clifford*, taxing to the husband-grantor the income of a short-term trust established for the benefit of his wife, refer to the state of mind of the “average” taxpayer and would probably not yield to proof that the litigant’s outlook on life was different:

We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position. It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact.[29](#co_footnote_F29_107960481_1)

**4.3.3 Form Versus Substance**

In 1921, when today’s federal income tax was still in its swaddling clothes, the Supreme Court recognized “the importance of regarding matters of substance and disregarding forms in applying the...income tax laws.”[30](#co_footnote_F30_107960481_1) More recently, the substance-over-form principle has been called “the cornerstone of sound taxation.”[31](#co_footnote_F31_107960481_1)

There are times, however, when form alone determines tax consequences. For example, numerous accounting elections drastically affect tax liabilities without altering taxpayers’ relations with the outside world.[32](#co_footnote_F32_107960481_1) A taxpayer’s right to report income using the cash method rather than the accrual method, to elect accelerated depreciation rather than straight line depreciation, and to use a fiscal or calendar year is not in any way impaired by the fact that these are matters of form rather than substance. Similarly, a taxpayer with several blocks of stock of the same company, purchased at different times at different prices, can sell either high-cost or low-cost shares merely by designating which shares are intended to be sold, even though the designation has no nontax ramifications.[33](#co_footnote_F33_107960481_1)

Also, a few statutory provisions deliberately elevate, or have been construed to elevate, form above substance. An example is [§ 71(c)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS71&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), which provides that a payment under a decree of divorce or separate maintenance is not taxable to the recipient if the decree fixes the amount “as a sum which is payable for the support of children of the payor spouse,” a condition that usually requires “specific earmarking” and cannot be satisfied by evidence that in substance, though not in form, the payment was made for the support of the children.[34](#co_footnote_F34_107960481_1) The Court of Appeals for the Sixth Circuit reached a similar conclusion in a case involving a domestic international sales corporation (DISC) owned by two Roth IRAs.[34.1](#co_footnote_F34_1_107960481_1) Randolph Paul once said that “[l]awyers who do not know that form sometimes controls, should not be practicing law.”[35](#co_footnote_F35_107960481_1)

**\*7** Despite these examples of the occasional preeminence of form, the courts are ordinarily willing if not eager to take account of the substance behind the veil of form.[36](#co_footnote_F36_107960481_1) The appeal to substance is sometimes deplored as more confusing than helpful, and the words “form” and “substance” have been castigated by Judge Learned Hand as “vague...anodynes for the pains of reasoning.”[37](#co_footnote_F37_107960481_1) A mature jurisprudence, however, could not consistently adhere to all formalities. To reach no further back than the Europe of the Middle Ages and Renaissance, for example, the Catholic Church’s prohibition of usury set in motion a never ceasing inquiry into the form of transactions designed to evade the restriction, including sales of property with an option in the seller to repurchase for a higher price at a later date—a device that is still sometimes used in the hope of avoiding the tax results of a mortgage.[38](#co_footnote_F38_107960481_1)

Unfortunately, it is almost impossible to distill useful generalizations from the welter of substance-over-form cases. The facts of the cases are usually complicated, and it is rarely clear which facts are crucial to the decision and which are irrelevant. This uncertainty about the precedential value of decisions is often compounded by the courts’ failure to say whether their conclusions rest on findings of fact that might have gone the other way if a witness had been more credible or additional evidence had been offered on a particular point.

In *Knetsch v. United States*, for example, the Supreme Court held that a transaction (the purchase of ten 30-year deferred annuity savings bonds, financed by a down payment and funds borrowed from the issuer against their cash surrender value) was “a sham,” devoid of appreciable economic results, because “there was nothing of substance to be realized by [the taxpayer] beyond a tax deduction.”[39](#co_footnote_F39_107960481_1) The factual basis for this conclusion was that the taxpayer was paying interest at the rate of 3.5 percent on his obligation, while the investment was growing in value by only 2.5 percent annually; the net annual cash loss of one percent of the borrowed funds was incurred only to achieve a tax deduction for the interest paid, and the transaction held out no promise of economic profit. Although the taxpayer had the right to refinance the loan if funds became available from other lenders at a lower rate, he either offered no evidence on the prospect of such a reduction in interest rates or failed to convince the trial judge that refinancing was a viable option, and the Supreme Court implicitly assumed that it was not.[40](#co_footnote_F40_107960481_1)

A drastic, albeit unlikely, decline in interest rates could have converted the investment into a profitable venture, and another taxpayer, with faith in such a change, might have believed that an economic profit could be made from the very transaction that the Court characterized as a “sham.” The Court incorporated the trial judge’s findings of fact, thereby implying a limited scope for the decision, but other parts of the opinion suggest that any taxpayer purchasing a similar contract would be denied a deduction, regardless of his economic expectations, at least if he embarked on the investment when money market conditions were similar to those prevailing during 1953 and 1954, the years before the Court.

**\*8** Another barrier to generalizing from the decided cases is uncertainty whether the courts, in particular cases, are interpreting the statutory provision on which the taxpayer relies or enunciating a principle to be applied throughout the Code. In his famous opinion in the *Gregory* case, for example, Judge Learned Hand said of certain transactions: “[T]heir only defect was that they were not what [the statutory predecessor of [§ 368(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS368&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381)] means by a ‘reorganization,’ because the transactions were no part of the conduct of the business of either or both companies; so viewed they were a sham.”[41](#co_footnote_F41_107960481_1) Despite this reference to a particular statutory provision, Judge Hand’s language is regularly quoted as having much broader significance.[42](#co_footnote_F42_107960481_1) A related source of difficulty is the common judicial practice of citing the substance-over-form doctrine in combination with other broad concepts (most commonly, the business purpose and step transaction doctrines and the requirement of an accurate accounting method), thus obscuring the independent force of each of these grounds of decision.

Moreover, form usually has some substantive consequences, so that if two transactions differ in form, they probably are not identical in substance. This inconvenient fact of life may require distinguishing between “superficial formalities” and substantial formalities.[43](#co_footnote_F43_107960481_1) For example, the Court of Appeals for the Second Circuit has construed the Supreme Court’s opinion in *Frank Lyon Co. v. US* [44](#co_footnote_F44_107960481_1) to affect the form-versus-substance issue as follows:

While we exalt substance over form, we do not ignore the form. The touchstone in determining whether the form of an agreement should govern is the opinion of the Supreme Court in *Frank Lyon*, which held that agreements which were intended to have economic substance, as opposed to mere tax avoidance, should be given effect for tax purposes.... That opinion set forth several factors...

The first factor inquires whether there is a legitimate non-tax business reason for the form; in other words, were the parties motivated at least in part by reasons unrelated to taxes?...The second...factor requires that the agreement have non-tax “economic substance.”...We have construed that factor to require a “change in the economic interests of the relevant parties.”...The Court found it relevant that the parties were independent of each other. [Also,] *Frank Lyon* ...requires that the parties not disregard the form of the arrangement.[45](#co_footnote_F45_107960481_1)

Applying these factors, the Second Circuit gave effect to an arrangement by which a passive owner of a truck employed a trucking company to operate the truck. The agreement obligated the owner to pay all operating expenses and entitled the trucking company to retain 21 percent of the revenues from the truck’s operation as compensation for its services. The IRS contended that the arrangement was in substance a lease, but the court rejected this characterization, primarily because, by casting the parties in the roles of employer and independent contractor, the agreement relieved the trucking company of financial risks it would have borne as lessee.

**\*9** Finally, for the reasons just canvassed, it often is difficult, if not impossible, to ascertain whether a decision holding that the form chosen by a particular taxpayer does not accurately reflect the substance of the transaction is in conflict with a decision supporting another taxpayer’s version of a similar transaction. The Supreme Court occasionally grants certiorari because of a conflict among the circuit courts in cases of this type, but if each case rests on the genuineness of the particular taxpayer’s transaction, the nature of the conflict is unclear. In *Knetsch*, for example, the conflict was with a case in which the trial judge did not find the transaction to be a sham.[46](#co_footnote_F46_107960481_1)

The substance-over-form doctrine is invoked by the government with greatest success with respect to transactions between related persons, since in these circumstances form often has minimal, if any, nontax consequences and particular forms are often chosen solely to reduce taxes. For example, a purported installment sale of property by parents to their children may, on analysis, be akin to a gift of the property because the alleged debt is more likely to be forgiven (or paid off with funds received as gifts from the parents) than to be enforced. Recognizing that a “sale” between family members may not be what it purports to be and that evidence of its true nature is peculiarly within the taxpayers’ control, Congress has laid down several statutory rules that treat intra-family sales differently from sales to third parties. An example is [§ 267(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS267&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381), forbidding taxpayers to deduct losses on such sales, even if effected at the property’s fair market value.[47](#co_footnote_F47_107960481_1)

Even if a transaction is not explicitly condemned by statute, its form may be disregarded by the courts in appropriate circumstances. For example, a sale and leaseback of real estate may be denied sales status,[48](#co_footnote_F48_107960481_1) and the ostensible date of a sale may be ignored in favor of the time when the benefits and burdens of ownership are transferred.[49](#co_footnote_F49_107960481_1) Loans to members of the lender’s family are also grist for the substance-over-form mill, since it is often a reasonable guess that the borrower will not be pressed for repayment as vigorously as an outsider.[50](#co_footnote_F50_107960481_1) The same can be said of loans by controlling shareholders to their own corporations and, conversely, of loans by their corporations to them, especially if the advances are proportionate to stock ownership.[51](#co_footnote_F51_107960481_1)

Transactions between parent and subsidiary corporations or other members of an affiliated corporate group provide another set of tempting targets for legislative, administrative, and judicial marksmen armed with the substance-over-form weapon. Also, [§ 482](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS482&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) permits the IRS to “distribute, apportion, or allocate gross income, deductions, credits, or allowances” among two or more organizations that are “owned or controlled directly or indirectly by the same interests...in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations.” Pursuant to this capacious charter of authority, the Treasury has promulgated extensive regulations that test all transactions among related persons by the standard of “a taxpayer dealing at arm’s length with an uncontrolled taxpayer.”[52](#co_footnote_F52_107960481_1) Many transactions that are vulnerable to attack under the substance-over-form doctrine are equally vulnerable under [§ 482](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS482&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), and the two are often invoked in tandem by government briefs.

**\*10** Mention should also be made of a diametrically opposite approach to transactions between related persons, exemplified by the statutory permission granted to affiliated corporations to file consolidated returns, under which intragroup transactions are disregarded and the income or loss of the group as a consolidated unit is based on its dealings with the outside world.[53](#co_footnote_F53_107960481_1) A similar, but more limited provision is made for married couples; gain or loss is never recognized on a sale, exchange, or other transfer of property between spouses, and the transferee-spouse takes the transferor’s adjusted basis for the property, with the consequence that appreciation or depreciation accruing while the transferor held the property can be recognized on a subsequent sale by the transferee.[54](#co_footnote_F54_107960481_1)

Transactions at arm’s length with outsiders are far less vulnerable to substance-over-form attacks by the government than self-dealing transactions. For nontax reasons, the parties usually fully express their understanding in the documents, so that the chosen form ordinarily embodies the substance of their transaction. This fusion of form and substance is especially likely if they have divergent tax interests. For example, if the agreement for the sale of a business includes a covenant by the sellers not to compete with the buyers, the buyer may prefer a large allocation of the purchase price to the covenant because the costs of the covenant may be deductible over a shorter period than the costs of the acquired assets (particularly, goodwill), but the seller may want to minimize the allocation to the covenant because amounts so allocated are ordinary income.

However, such an opposition of interests does not mean that the characterization adopted by the parties to an arm’s-length bargain is invariably conclusive. For example, the seller of a business may be indifferent as between ordinary income and capital gains and may therefore accede to the buyer’s wishes in allocating the purchase price between a covenant not to compete and the assets of the business. Also, when two parties expect to be taxed at very different rates, they can often devise a legal form that assigns the tax advantages to the party who can best use them and divide the tax savings between them. For example, the amount to be paid under an alimony agreement is often affected by the fact that the payor’s deductions for the payments will produce tax savings far exceeding the taxes resulting from the recipient’s inclusion of the alimony in gross income;[55](#co_footnote_F55_107960481_1) railroads and airlines with a long history of business losses often lease equipment rather than buy it, thereby enabling the lessor to derive a tax advantage from depreciation deductions that would be useless to the lessee.[56](#co_footnote_F56_107960481_1)

If a transaction is consummated in a form that fairly reflects its substance, it ordinarily passes muster despite the conscious pursuit of tax benefits; in this case, the choice of form resembles an election provided by statute. On the other hand, if the form does not coincide with the transaction’s substance, the fact that it was negotiated at arm’s length by unrelated taxpayers does not protect it against attack, because the assumption of opposing tax interests is inapplicable. For example, the substance-over-form doctrine can be successfully invoked in order to treat a purported lease of business equipment with an option in the lessee to purchase the property as a sale on credit if the option price is nominal in amount or the term of the lease is coextensive with the property’s anticipated economic life.[57](#co_footnote_F57_107960481_1)

**\*11** The presence of a third party with whom the taxpayer has bargained at arm’s length also fails to protect a tax-avoidance plan if the formalities employed by the taxpayer have no significant impact on the other contracting party and are tolerated or accepted as an accommodation rather than as an integral part of the basic transaction.[58](#co_footnote_F58_107960481_1) This phenomenon is characteristic of cases in which the taxpayer engages in preliminary mumbo jumbo to prepare assets for an impending sale or effects the transfer indirectly through a conduit. An acerbic comment by Chief Judge John R. Brown of the Court of Appeals for the Fifth Circuit stands as a summary of this attitude. Refusing to allow the taxpayers in a complex transaction to hide behind a facade entailing the use of an intermediary named, by an appropriate fortuity, W.R. Deal, he said: “The Deal deal was not the real deal. That ends it.”[59](#co_footnote_F59_107960481_1)

The Tax Court struggled for several years to develop the form-over-substance doctrine as a more objective and useful tool for tax shelter cases, most of which involved dealings with unrelated third parties. In one frequently cited case, the court held that an elaborate transaction in which the taxpayer purportedly purchased cattle was a sham and that the taxpayer thus acquired nothing in the transaction.[60](#co_footnote_F60_107960481_1) The court enumerated eight factors relevant to whether a bona fide sale occurred, including whether the putative purchaser took possession, who bore the risk of loss to the property, who paid property taxes, and who received profits from the operation and sale of the property. The ultimate issue, the court said, is whether the benefits and burdens of ownership passed to the purchaser.

A rogue offshoot of the substance-over-form doctrine suggests that when a taxpayer selects one of several forms that have identical economic consequences, the government can disregard the chosen form and tax the transaction as though the most costly of the alternatives had been employed. For example, in *Esmark, Inc. v. CIR*, an unrelated corporation, pursuant to a prior agreement with the taxpayer, purchased more than 50 percent of the taxpayer’s stock in a tender offer accepted by thousands of public shareholders, and the taxpayer promptly redeemed the shares in exchange for shares of a subsidiary of the taxpayer.[61](#co_footnote_F61_107960481_1) The unrelated corporation’s only purpose for acquiring the taxpayer’s stock was to exchange it for the stock of the subsidiary. The transaction was structured in this way in order to qualify the taxpayer for nonrecognition under a rule that applied to the distribution in redemption, but would not have applied if the stock had been sold for cash.[62](#co_footnote_F62_107960481_1) The IRS therefor argued that the taxpayer should be taxed as though it had sold the stock of the subsidiary for cash and the cash had been used to redeem stock from shareholders of the taxpayer who wished to cash in their stock. The Tax Court disagreed, pointing out:

**\*12** No route was more “direct” than the others. Each route required two steps, and each step involved two of the three interested parties. Each route left [the taxpayer], the [taxpayer’s] shareholders and the purchaser in the same relative positions. Faced with this choice, [the taxpayer] chose the path expected to result in the least tax.[63](#co_footnote_F63_107960481_1)

Because none of the available routes to the parties’ ultimate positions was more direct than any of the others, it could not be said that any one of the routes represented the substance of the transaction, while the others were mere formal contrivances.[64](#co_footnote_F64_107960481_1)

On close inspection, the most-costly-alternative theory turns out to be a drastic extension, rather than a mere restatement, of the substance-over-form doctrine. Indeed, the government has rarely even attempted to exploit this mode of increasing the tax bite.[65](#co_footnote_F65_107960481_1) The Code imposes tax liability on the basis of so many fictions (e.g., the separate identity of corporations and the independence of family members from each other) that it virtually invites taxpayers to act on the same fictions.[66](#co_footnote_F66_107960481_1) As Holmes said in rejecting a taxpayer’s request that the courts pierce a corporation’s veil in a state tax case: “[I]t leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true.”[67](#co_footnote_F67_107960481_1)

**4.3.4 Business Purpose**

As applied to tax matters, the business purpose doctrine originated with the *Gregory* case, involving the sole shareholder of a corporation that owned marketable securities, which she wanted to obtain in her personal capacity for sale to a third party. A straightforward distribution of the securities to her would have been taxable as a dividend. To avoid this result, the securities were transferred to a newly created second corporation, whose stock was issued to the taxpayer; she then dissolved the new corporation, receiving the securities as a liquidating distribution. Under the statutory predecessor of [§ 368(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS368&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381), taken literally, this transaction was a tax-free corporate reorganization. The trial court held that “a statute so meticulously drafted must be interpreted as a literal expression of the taxing policy” and that the second corporation was entitled to recognition, despite its transitory life as a vehicle to transfer the securities from the first corporation to its sole shareholder.[74](#co_footnote_F74_107960481_1) The Court of Appeals for the Second Circuit reversed, holding that the transaction did not qualify as a “reorganization” when the purpose of the statutory definition of that term was taken into account:

The purpose of the section is plain enough; men engaged in enterprises—industrial, commercial, financial, or any other—might wish to consolidate, or divide, to add to, or subtract from, their holdings. Such transactions were not to be considered as “realizing” any profit, because the collective interests still remained in solution. But the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution. To dodge the shareholders’ taxes is not one of the transactions contemplated as corporate “reorganizations.”[75](#co_footnote_F75_107960481_1)

**\*13** The Supreme Court endorsed this reasoning, observing:

Putting aside...the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner.[76](#co_footnote_F76_107960481_1)

Though its career was launched in a reorganization context,[77](#co_footnote_F77_107960481_1) the business purpose standard rapidly proliferated as an implied requirement of other statutory provisions.[77.1](#co_footnote_F77_1_107960481_1) In 1949, Judge Learned Hand summarized its jurisdiction as follows:

The doctrine of *Gregory v. Helvering* ...means that in construing words of a tax statute which describes commercial or industrial transactions we are to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation.[78](#co_footnote_F78_107960481_1)

Judge Hand’s reference to statutory provisions that describe “commercial or industrial transactions” seemingly excludes the doctrine’s application to itemized deductions.[79](#co_footnote_F79_107960481_1) Indeed, the concept of a business purpose is ill-suited to allowances for payments that are not profit oriented, including alimony, medical expenses, and charitable contributions. Taxpayers routinely deduct these payments even though they serve personal rather than business purposes, and the Code obviously contemplates this practice.

More troublesome, however, is the status of interest paid on loans incurred in tax-avoidance transactions that promise no economic gain but will be worthwhile if the interest can be deducted. [Section 163](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS163&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) allows interest to be deducted, in many cases even if the borrowing is wholly personal, but does it also allow a deduction for interest paid to finance a transaction serving only a tax-avoidance purpose? The leading case on this subject—*Knetsch v. United States*, discussed earlier[80](#co_footnote_F80_107960481_1)—denied an interest deduction for loans of this type on the ground that the transaction was a sham, without explicitly employing the business purpose doctrine. Some decisions on identical transactions, however, relied primarily on *Gregory* in reaching the same result, and these opinions were cited with apparent approval by the Supreme Court in *Knetsch* .[81](#co_footnote_F81_107960481_1) Another formulation is that such a transaction lacks economic reality; in effect, it is all form and no substance.

In another case of this type, the court was unwilling to characterize the transaction as a sham, but it denied the deduction because the loan did not have “purpose, substance, or utility apart from [its] anticipated tax consequences.”[82](#co_footnote_F82_107960481_1) Recognizing that [§ 163](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS163&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) is not limited to interest paid on profit-oriented borrowings, the court nevertheless held that some purpose other than tax avoidance was required. Conscious that taxpayers who can afford to pay cash often buy residences on credit because the interest will be deductible, the court limited its decision to “pure” tax-avoidance transactions:

**\*14** [Section 163(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS163&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_8b3b0000958a4) should be construed to permit the deductibility of interest when a taxpayer has borrowed funds and incurred an obligation to pay interest in order to engage in what with reason can be termed purposive activity, even though he decided to borrow in order to gain an interest deduction rather than to finance the activity in some other way. In other words, the interest deduction should be permitted whenever it can be said that the taxpayer’s desire to secure an interest deduction is only one of mixed motives that prompts the taxpayer to borrow funds; or, put a third way, the deduction is proper if there is some substance to the loan arrangement beyond the taxpayer’s desire to secure the deduction...On the other hand, and notwithstanding [Section 163(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS163&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_8b3b0000958a4)’s broad scope, this provision should not be construed to permit an interest deduction when it objectively appears that a taxpayer has borrowed funds in order to engage in a transaction that has no substance or purpose aside from the taxpayer’s desire to obtain the tax benefit of an interest deduction; and a good example of such purposeless activity is the borrowing of funds at 4% in order to purchase property that returns less than 2% and holds out no prospect of appreciation sufficient to counter the unfavorable interest rate differential.[83](#co_footnote_F83_107960481_1)

**By rephrasing the business purpose doctrine so that any “purposive activity” (other than the mere reduction of taxes) qualifies under provisions that embrace nonbusiness transactions, the court secured a deduction for the paradigmatic taxpayer who borrows to finance the American way of life, spend now, pay later.**

**4.3.4A Economic Substance**

The substance over form and business purpose concepts are closely related and have effectively coalesced in some cases, developing an economic substance doctrine, which is sometimes called the sham transaction doctrine.[83.1](#co_footnote_F83_1_107960481_1) Congress, in 2010, enacted a statutory “clarification” of this doctrine.[83.1a](#co_footnote_F83_1a_107960481_1)

• *1.* Common law development of doctrine. *In one of the earlier cases articulating this approach,* Rice’s Toyota World, Inc. v. CIR*, the Court of Appeals for the Fourth Circuit said “To treat a transaction as a sham, the court must find that the taxpayer was motivated by no business purpose other than obtaining tax benefits in entering the transaction, and that the transaction has no economic substance because no reasonable possibility of a profit exists.”**[83.2](#co_footnote_F83_2_107960481_1) The Eighth Circuit’s formulation of this two-part test is that “a transaction will be characterized as a sham if ‘it is not motivated by any economic purpose outside of tax considerations’ (the business purpose test), and if it ‘is without economic substance because no real potential for profit exists’ (the economic substance test).”**[83.3](#co_footnote_F83_3_107960481_1)*

The Court of Appeals for the Eleventh Circuit has verbalized the sham transaction and business purpose doctrines as separate tests, saying that “the focus of the inquiry under the sham transaction doctrine is whether a transaction has economic effects other than the creation of tax benefits,”[83.4](#co_footnote_F83_4_107960481_1) but that “[e]ven if the transaction has economic effects, it must be disregarded if it has no business purpose and its motive is tax avoidance.”[83.5](#co_footnote_F83_5_107960481_1) Similarly, the Eighth Circuit, while using the *Rice’s Toyota World* formulation, has assumed, without deciding, that “a failure to demonstrate either economic substance *or* business purpose [causes a transaction to be characterized as] a sham for tax purposes.”[83.6](#co_footnote_F83_6_107960481_1) In contrast, the Tax Court has said that “[a] transaction imbued with economic substance normally will be recognized for tax purposes even in the absence of a nontax business purpose.”[83.7](#co_footnote_F83_7_107960481_1)

**\*15** The Court of Appeals for the Third Circuit has used a more flexible approach:

The inquiry into whether the taxpayer’s transactions had sufficient economic substance to be respected for tax purposes turns on both the “objective economic substance of the transactions” and the “subjective business motivation” behind them.... However, these distinct aspects of the economic sham inquiry do not constitute discrete prongs of a “rigid two-step analysis,” but rather represent related factors both of which inform the analysis of whether the transaction had sufficient substance, apart from its tax consequences, to be respected for tax purposes....[83.8](#co_footnote_F83_8_107960481_1)

Similarly, some Tax Court cases apply a subcategory of the sham doctrine, called “sham in substance,” which the court defines as “the expedient of drawing up papers to characterize transactions contrary to objective economic realities and which have no economic significance beyond expected tax benefits.”[83.9](#co_footnote_F83_9_107960481_1) A transaction is apparently a sham in substance if it effects no significant change in the parties’ economic positions apart from taxes. A purported sale, for example, is a sham in substance if it does not transfer beneficial ownership of the property and putative payments of purchase price circulate among the parties in ways that cancel themselves out.[83.10](#co_footnote_F83_10_107960481_1) According to another court, “[s]hams in fact are transactions that never occur...Shams in substance are transactions that actually occur but which lack the substance their form represents.”[83.11](#co_footnote_F83_11_107960481_1)

Apart from their efforts to articulate a standard to be applied, the courts have struggled with defining the concepts of “economic substance” and “business purpose.” According to the Tax Court

Key indicators of presence or a lack of economic substance include presence or absence of arm’s-length price negotiations, the relationship between the sales price and fair market value, the structure of financing of the transaction, whether there was a shifting of the benefits and burdens of ownership, and the degree of adherence to contractual terms. [Other indications of a lack of substance are:] (1) Tax benefits were the focus of promotional materials; (2) the investors accepted the terms of purchase without price negotiation; (3) the assets in question consist of packages of purported rights, difficult to value in the abstract and substantially overvalued in relation to tangible property included as part of the package: (4) the tangible assets were acquired or created at a relatively small cost shortly prior to the transactions in question: and (5) the bulk of the consideration was deferred by promissory notes, nonrecourse in form or in substance.[83.12](#co_footnote_F83_12_107960481_1)

According to the Eleventh Circuit, “[t]he kind of ‘economic effects’ required to entitle a transaction to respect in taxation include the creation of genuine obligations enforceable by an unrelated party.”[83.13](#co_footnote_F83_13_107960481_1) The court found such economic effects in an arrangement by which United Parcel Service, which charged its customers 25 cents for each $100 of value declared in excess of $100 and sustained losses in covering excess value of much less than these charges, reorganized the excess value coverage by (1) insuring excess value with an independent insurer for premiums equal to the amounts UPS charged its customers and (2) organized a subsidiary corporation in Bermuda, which reinsured the risks undertaken by the independent insurer for premiums equal to those received by the insurer, less commissions, fees, and excise taxes. The insurer was found to have “genuine obligations.” The “reinsurance treaty..., while certainly reducing the odds of loss, [did not] completely foreclose the risk of loss because reinsurance treaties, like all agreements, are susceptible to default.”[83.14](#co_footnote_F83_14_107960481_1) Moreover, because UPS distributed the stock of the Bermuda subsidiary to its shareholders, the subsidiary was “an independently taxable entity that is not under UPS’s control.”[83.15](#co_footnote_F83_15_107960481_1) The Eleventh Circuit acknowledges that although the sham transaction “doctrine has few bright lines,...‘it is clear that transactions whose sole function is to produce tax deductions are substantive shams.”’[83.16](#co_footnote_F83_16_107960481_1)

**\*16** However, if an investment is one on which Congress has explicitly bestowed a tax incentive, the investment, if imbued with economic substance, is not considered a sham merely because the taxpayer could not expect profits apart from tax benefits.[83.17](#co_footnote_F83_17_107960481_1) According to the Court of Appeals for the Ninth Circuit, “If the government treats tax-advantaged transactions as shams unless they make economic sense on a pre-tax basis, then it takes away with the executive hand what it gives with the legislative.”[83.18](#co_footnote_F83_18_107960481_1)

Also, the Fifth and Eighth Circuits, even in the absence of such an expressed policy, found that transactions effected solely to garner tax benefits were not shams.[83.19](#co_footnote_F83_19_107960481_1) The taxpayers purchased shares of foreign corporations, evidenced by American Depository Receipts, in market transactions effected in the United States. The purchases were made after the corporations had declared dividends but immediately before the record dates for the dividends, and the shares were promptly sold, ex-dividend, for prices approximating the purchase prices, less 85 percent of the dividends. The sales thus resulted in short-term capital losses of approximately 85 percent of the dividends, which the taxpayers deducted against capital gains realized in other transactions. The dividends, when paid to the taxpayers, were reduced by 15 percent foreign withholding taxes, for which the taxpayers claimed the foreign tax credit. The sales of the shares occurred on the same days as the purchases and were arranged to minimize the possibility of market gains and losses other than those reflecting the dividend. The transactions were recommended by investment banks, which received handsome fees for their suggestion. Taking the fees into account, the transactions were virtually guaranteed to yield losses apart from the U.S. tax benefits of capital loss deductions and foreign tax credits. Although the taxpayers advanced no reasons for the transactions other than U.S. tax benefits, the courts found the transactions were not shams, largely because, before taking any taxes, U.S. or foreign, into account, the transactions yielded a profit of something less than 15 percent of the dividends, the amount of the foreign withholding tax.

Courts’ inquiries into business purpose in applying the *Rice’s Toyota World* test illustrate the ambiguous status of business purpose in the tax law. The Fourth Circuit’s articulation of the test indicates that a “business purpose other than obtaining tax benefits” is essential.[83.20](#co_footnote_F83_20_107960481_1) According to the Tax Court

To satisfy the business purpose requirement of the economic substance inquiry, “the transaction must be rationally related to a useful nontax purpose that is plausible in light of the taxpayer’s conduct and \* \* \* economic situation.”...This inquiry takes into account whether the taxpayer conducts itself in a realistic and legitimate business fashion, thoroughly considering and analyzing the ramifications of a questionable transaction, before proceeding with the transaction.[83.21](#co_footnote_F83_21_107960481_1)

**\*17** [ci][ia]In contrast, the Eighth Circuit, noting that “the business purpose test is a subjective economic substance test,” referred to the Supreme Court’s dictum in *Gregory v. Helvering* affirming “the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits,”[83.22](#co_footnote_F83_22_107960481_1) and concluded that a “taxpayer’s subjective intent to avoid taxes...will not by itself determine whether there was a business purpose to a transaction.”[83.23](#co_footnote_F83_23_107960481_1) Although the transactions before the Eighth Circuit were suggested by a tax shelter promoter, were wholly unrelated to the taxpayer’s business, and were obviously carried out solely to obtain tax benefits, the court found a business purpose, noting the care with which the taxpayer managed the transactions to minimize financial risk and implying that a careful tax shelter investor always has a business purpose.[83.24](#co_footnote_F83_24_107960481_1)

According to the Eleventh Circuit in the *United Parcel Service* case

A “business purpose” does not mean a reason for a transaction that is free of tax considerations. Rather, a transaction has a “business purpose,” when we are talking about a going concern like UPS, as long as it figures in a bona fide, profit-seeking business.... This concept of “business purpose” is a necessary corollary to the venerable axiom that tax-planning is permissible. *See Gregory v. Helvering*,...The Code treats lots of categories of economically similar behavior differently. For instance, two ways to infuse capital into a corporation, borrowing and sale of equity, have different tax consequences; interest is usually deductible and distributions to equityholders are not. There may be no tax-independent reason for a taxpayer to choose between these different ways of financing the business, but it does not mean that the taxpayer lacks a “business purpose.” To conclude otherwise would prohibit tax-planning....

The transaction under challenge here simply altered the form of an existing, bona fide business, and this case therefore falls in with those that find an adequate business purpose to neutralize any tax-avoidance motive.[83.25](#co_footnote_F83_25_107960481_1)

When a transaction is found to be a sham, the taxpayer may lose not only the tax benefits sought by the transaction but also deductions for cash paid in the transaction. Such payments, the Tax Court has held, are “neither a cost of doing business nor an expense incurred with an intent to make a profit independent of tax consequences.”[83.26](#co_footnote_F83_26_107960481_1) However, some Courts of Appeal have taken the less harsh approach of allowing a loss deduction for real economic losses incurred in transactions undertaken principally to generate tax benefits denied under a sham analysis.[83.27](#co_footnote_F83_27_107960481_1)

• *2.* Statutory “clarification.” *Congress, in 2010, enacted a “clarification” of the economic substance doctrine,**[83.28](#co_footnote_F83_28_107960481_1) establishing conditions that must be met with respect to any transaction “to which the economic substance doctrine is relevant.”**[83.29](#co_footnote_F83_29_107960481_1) The “economic substance doctrine” is “the common law doctrine under which [income] tax benefits ... with respect to a transaction are not allowable if the transaction does not have economic substance or lacks a business purpose.”**[83.30](#co_footnote_F83_30_107960481_1) Whether the doctrine is relevant to a transaction is determined “as if” the statutory rules “had never been enacted.”**[83.31](#co_footnote_F83_31_107960481_1) Neither the Treasury nor the IRS “intend to issue general administrative guidance regarding the types of transactions to which the economic substance doctrine either applies or does not apply.”**[83.32](#co_footnote_F83_32_107960481_1) For individuals, the statutory rules only apply to transactions in connection with a trade or business or an activity for the production of income.**[83.33](#co_footnote_F83_33_107960481_1) Under the statute, a transaction has economic substance “only if” it “changes” the taxpayer’s “economic position ... in a meaningful way (apart from Federal income tax effects)”* and *“the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into” the transaction.**[83.34](#co_footnote_F83_34_107960481_1) A “State or local income tax effect” is “treated in the same manner as a Federal income tax effect” if it “is related to a Federal income tax effect.”**[83.35](#co_footnote_F83_35_107960481_1) In other words, a transaction satisfies the economic substance doctrine only if it has both meaningful economic effects and a purpose other than reducing or eliminating federal and state income taxes. The statute puts to rest any lingering doubt under the cases about whether the two branches of the test are alternative or cumulative.**[83.36](#co_footnote_F83_36_107960481_1)For purposes of the economic position portion of the doctrine, a transaction is deemed to have a “potential for profit ... only if the present value of the reasonably expected pre-tax profit from the transaction is substantial in relation to the present value of the expected net tax benefits that would be allowed if the transaction were respected.”**[83.37](#co_footnote_F83_37_107960481_1) “Fees and other transaction expenses” are “taken into account as expenses in determining pre-tax profit.”**[83.38](#co_footnote_F83_38_107960481_1) Under the purpose branch of doctrine, “achieving a financial accounting benefit” is disregarded “as a purpose for entering into a transaction if the origin of such financial accounting benefit is a reduction of Federal income tax.”**[83.39](#co_footnote_F83_39_107960481_1)*

**\*18** • *3.* Disaggregation of multipart transactions. *Before applying the economic substance doctrine, a court must sometimes define the transaction to be examined under the doctrine. According to the Tax Court, “The relevant transaction to be tested is the one that produces the disputed tax benefit, even if it is part of a larger set of transactions or steps.”**[83.40](#co_footnote_F83_40_107960481_1) In the transaction before the court, the taxpayer had, in effect, borrowed a large amount of money from another bank, but the loan was dressed up in a complex set of entities, most created for the purpose of the transaction, and numerous payments among these entities, subject to varying conditions. The loan undeniably had economic substance, and the court, for example, allowed the taxpayer deductions for interest on the loan.**[83.41](#co_footnote_F83_41_107960481_1) The court, however, separated the loan from the many steps through which the loan and interest payments on the loan were effectuated, pointing out that “the requirements of the economic substance doctrine are not avoided simply by coupling a routine transaction with a transaction lacking economic substance.”**[83.42](#co_footnote_F83_42_107960481_1) It held that these steps lacked economic substance and denied foreign tax credits claimed to have flowed from these steps.**[83.43](#co_footnote_F83_43_107960481_1)The statute codifying the economic substance doctrine states that the term transaction “includes a series of transactions.”**[83.44](#co_footnote_F83_44_107960481_1) The legislative history states, however, that this language does not alter the court’s ability to aggregate, disaggregate, or otherwise recharacterize a transaction when applying the [economic substance] doctrine. For example, the provision reiterates the present-law ability of the courts to bifurcate a transaction in which independent activities with non-tax objectives are combined with an unrelated item having only tax-avoidance objectives in order to disallow those tax-motivated benefits.**[83.45](#co_footnote_F83_45_107960481_1) According to the IRS, [g]enerally, when a plan that generated a tax benefit involves a series of interconnected steps with a common objective, the “transaction” includes all of the steps taken together—an aggregation approach. This means that every step in the series will be considered when analyzing whether the “transaction” as a whole lacks economic substance. However, when a series of steps includes a tax-motivated step that is not necessary to achieve a non-tax objective, an aggregation approach may not be appropriate. In that case, the “transaction” may include only the tax-motivated steps that are not necessary to accomplish the non-tax goals—a disaggregation approach.**[83.46](#co_footnote_F83_46_107960481_1)*

• *4.* Accuracy-related penalty. *In codifying the economic substance doctrine, Congress made important changes in the accuracy-related penalty: The penalty applies to an underpayment of tax attributable to a “disallowance of claimed tax benefits by reason of a transaction lacking economic substance ... or failing to meet the requirements of any similar rule of law.”**[83.47](#co_footnote_F83_47_107960481_1) Moreover, if the transaction is “not adequately disclosed in the return” or “a statement attached to the return,” the penalty rate is 40 percent of the underpayment, rather than the usual 20 percent, with respect to the underpayment attributable to the transaction.**[83.48](#co_footnote_F83_48_107960481_1) An “amendment or supplement” to a taxpayer’s return is disregarded in applying these rules if the amendment or supplement is filed after the IRS first contacts the taxpayer “regarding the examination of the return.”**[83.49](#co_footnote_F83_49_107960481_1) Finally, the reasonable cause exception—which excuses the penalty if the taxpayer shows reasonable cause and good faith—does not apply to an underpayment attributable to a disallowance of tax benefits claimed to flow from a transaction lacking economic substance.**[83.50](#co_footnote_F83_50_107960481_1)Also, although the penalty on an erroneous refund claim—20 percent of the “excessive amount” of the claim—is normally excused on a showing of a “reasonable basis” for the claim, an excessive claim attributable to a transaction lacking in economic substance may “not be treated as having a reasonable basis.”**[83.51](#co_footnote_F83_51_107960481_1)*

**4.3.5 Step Transactions**

**\*19** The step transaction doctrine requires that the interrelated steps of an integrated transaction be analyzed as a whole rather than treated separately. Like the business purpose doctrine, it began as an interpretation of a detailed statutory provision,[84](#co_footnote_F84_107960481_1) but it has been a successful cultural imperialist, on which the sun never sets. Its control is especially pronounced in the corporate-shareholder area.[85](#co_footnote_F85_107960481_1)

Because business transactions often have no sharp beginning or clearly defined end and because income must be computed annually, it is often necessary to divide a transaction into its constituent elements for tax purposes. If a thin segment is taken in isolation, however, it may be too artificial a base for tax computations. As a consequence, two or more formally separate steps may be amalgamated and treated as a single transaction if they are in substance integrated, interdependent, and focused on a particular end result. Under [§ 351](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS351&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), for example, the tax treatment of a transfer of property to a corporation in exchange for its stock depends on whether the transferors have control of the corporation “immediately after the exchange,”[86](#co_footnote_F86_107960481_1) a phrase that seems to concentrate on an instantaneous point of time and thus to exclude cases where the requisite control is acquired in a series of nonsimultaneous exchanges. But the Treasury regulations, in conformity with the case law, state that the statutory condition “does not necessarily require simultaneous exchanges...but comprehends a situation where the rights of the parties have been previously defined and the execution of the agreement proceeds with an expedition consistent with orderly procedure.”[87](#co_footnote_F87_107960481_1) Another consequence of taking all integrated steps together in determining whether control exists “immediately after the exchange” is that momentary compliance with this statutory condition is insufficient if control is dissipated by a transfer of stock that, although somewhat delayed, was contemplated from the outset as an essential part of the transaction.[88](#co_footnote_F88_107960481_1)

A similar example is the “creeping control” concept applied in determining whether an acquisition of stock of a target corporation by an acquiring corporation is “in exchange solely for...voting stock” within the meaning of [§ 368(a)(1)(B)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS368&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_50660000823d1). If, for example, the acquiring corporation buys 25 percent of the target corporation’s stock for cash in 1997 and then acquires 75 percent in 1998 solely in exchange for its voting stock, does the 1998 transaction meet the requirement of [§ 368(a)(1)(B)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS368&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_50660000823d1) that “the acquisition” be solely for stock? Taken by itself, it does, but if the 1997 and 1998 acquisitions are viewed as interrelated steps in a single transaction, the statutory standard is not met because both cash and stock are used. Whether there is only a single nonqualified acquisition for cash and stock or one acquisition for cash and a later, separable qualified acquisition for voting stock depends on the facts and circumstances. The latter conclusion is only appropriate if the 1997 purchase is consummated for its own sake, not as part of an integrated plan that includes the 1998 exchange.[89](#co_footnote_F89_107960481_1)

**\*20** Although the foregoing illustrations all involve corporate-shareholder relations, the step transaction doctrine is also encountered frequently in other areas of tax law.[90](#co_footnote_F90_107960481_1)

While it is usually easy to foresee the results that flow from the application of the step transaction doctrine, it is more difficult to predict when the doctrine will be applied. At one extreme, if the parties have agreed to a series of steps, no one of which will be legally effective unless all are consummated, application of the doctrine is ordinarily assured. In the absence of such an all-or-nothing plan, predictions are more perilous. Sometimes a series of steps, though independent, may occur simultaneously or in rapid succession; the taxpayer may simply seize upon the fact that he is engaged in negotiations or has a lawyer at hand to achieve several independent objectives, each of which would be pursued on its own even if the others had to be abandoned. Recognizing this possibility, the Tax Court has said: “The test is, were the steps taken so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series?”[91](#co_footnote_F91_107960481_1) However, in addition to this interdependence test, the Tax Court has also recognized a binding commitment test (taxpayer was contractually bound to complete all steps when the first in a series of transactions was undertaken) and an end result test (“separate steps constitute prearranged parts of a single transaction intended to reach an end result”), implying that satisfaction of any of the three tests is sufficient to invoke the step transaction doctrine.[91.1](#co_footnote_F91_1_107960481_1)

Despite intimations to the contrary in the early cases, the step transaction doctrine does not require a prior agreement committing the parties to the entire series of steps once the first is taken; there is ample authority for linking several prearranged or contemplated steps, even in the absence of a contractual obligation or financial compulsion to follow through.[92](#co_footnote_F92_107960481_1) Moreover, while simultaneity is often the best evidence of interdependence, the step transaction doctrine has been applied to events separated by as much as five years and, on other facts, held inapplicable to events occurring within a period of 30 minutes.[93](#co_footnote_F93_107960481_1)

The step transaction doctrine is usually enunciated as a general principle, but the courts may be more ready to apply it to some provisions than to others, implicitly assuming that Congress would have intended this difference in approach. In applying a provision that involves only a single taxpayer, for example, it is fruitless to ask whether several steps are linked together by contract, prearrangement, or expectations, and the statutory focus may be wholly on the taxpayer’s intent. Much can be said for declining to link commercial transactions (e.g., the incorporation of a proprietorship) with noncommercial events (e.g., gifts by the taxpayer to members of his family), even if they occur simultaneously.[94](#co_footnote_F94_107960481_1) But if the courts have been significantly influenced by considerations of this type, they have not explicitly said so.[95](#co_footnote_F95_107960481_1)

**\*21** Although step transaction cases often are concerned with whether the tax consequences of a particular step with significant legal or business consequences should be determined by treating it as part of a larger single transaction, there are also many cases where particular steps in an integrated transaction are disregarded as transitory events or empty formalities. These rather different results of the step transaction doctrine are illustrated by two contrasting cases.

First, assume a taxpayer transfers property to a corporation in exchange for its stock, intending to sell one half of the stock to a third person as soon as the first step is completed. If the two steps are found to be interrelated and mutually dependent, the taxpayer does not have control of the transferee corporation “immediately after the exchange” within the meaning of [§ 351(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS351&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_8b3b0000958a4), with the result that gain or loss is recognized on the exchange of property for stock.[96](#co_footnote_F96_107960481_1) The sale of the stock in this case is a serious, indeed a fateful, step in the integrated transaction.

Compare this situation with *Gregory*, where a corporation transferred certain securities to a newly organized subsidiary and distributed the subsidiary’s stock to the corporation’s sole shareholder (Mrs. Gregory), who promptly liquidated the subsidiary and sold the securities received in the liquidation. Because the subsidiary was a transitory vehicle for accomplishing a distribution of the securities to Mrs. Gregory, its formation, the distribution of its stock, and its liquidation were disregarded as unnecessary steps, and Mrs. Gregory was taxed as though the corporation had distributed the securities to her as a dividend.

In *Minnesota Tea Co. v. Helvering*, the Supreme Court provided a classic formulation of the latter variation of the step transaction doctrine: “A given result at the end of a straight path is not made a different result because reached by following a devious path.”[97](#co_footnote_F97_107960481_1) The unnecessary step in this case was a distribution of cash by a bankrupt corporation to its shareholders, who were required to pay the funds to the company’s creditors. In holding that this was only a “devious path” by which corporate funds were routed to the creditors (rather than a true distribution to the shareholders), the Court said: “The preliminary distribution to the stockholders was a meaningless and unnecessary incident in the transmission of the fund to the creditors...so transparently artificial that further discussion would be a needless waste of time. The relation of the stockholders to the matter was that of a mere conduit.”[98](#co_footnote_F98_107960481_1)

When the step transaction doctrine is employed to disregard transitory or unnecessary steps, it overlaps and becomes almost indistinguishable from the business purpose doctrine (under which the unnecessary step is ignored because lacking in business purpose) and the substance-over-form principle (nullifying the unnecessary step as a formality that merely obscures the substance of the transaction). The *Gregory* case, for example, is often cited in support of the business purpose and substance-over-form doctrines, but it could be equally validly viewed as a step transaction case; indeed, it is cited in *Minnesota Tea* in support of the “devious path” formula.[99](#co_footnote_F99_107960481_1) A typical amalgamation of all three ideas is the following statement in a revenue ruling:

**\*22** The two steps of the transaction...were part of a prearranged integrated plan and may not be considered independently of each other for Federal income tax purposes. The receipt by A of the additional stock of x in exchange for the sole proprietorship assets is transitory and without substance for tax purposes since it is apparent that the assets of the sole proprietorship were transferred to x for the purpose of enabling Y to acquire such assets without the recognition of gain to A.[100](#co_footnote_F100_107960481_1)

The principal practical difference between the critical-step and unnecessary-step variations of the step transaction doctrine seems to lie in the taxpayer’s greater ability to invoke the former than the latter. The reason for linking together all interdependent steps with legal or business significance, rather than taking them in isolation, is to base tax liabilities on a realistic view of the entire transaction. For this reason, and because the steps themselves are not ordinarily intended to obscure the transaction’s substance, the taxpayer is usually as free as the Commissioner to insist that it be viewed as a whole.[101](#co_footnote_F101_107960481_1) When unnecessary or transitory steps are deliberately employed by the taxpayer, the courts are less disposed to permit the taxpayer to retrace the steps in order to leave the devious path and get back on the straight and narrow.[102](#co_footnote_F102_107960481_1)

In some circumstances, two or more transactions are not analyzed as a single transaction, even if they are undertaken as parts of a single plan and occur within a short period of time. According to the IRS

The determination of whether steps of a transaction should be integrated requires review of the scope and intent underlying each of the implicated provisions of the Code. The tax treatment of a transaction generally follows the taxpayer’s chosen form unless: (1) there is a compelling alternative policy; (2) the effect of all or part of the steps of the transaction is to avoid a particular result intended by otherwise-applicable Code provisions; or (3) the effect of all or part of the steps of the transaction is inconsistent with the underlying intent of the applicable Code provisions.[102.1](#co_footnote_F102_1_107960481_1)

Under these principles, successive nonrecognition transfers may be recognized as separate transactions: “Back-to-back nonrecognition transfers are generally respected when consistent with the underlying intent of the applicable Code provisions and there is no compelling alternative policy.”

In a situation described in a 2017 ruling, a corporation transferred the assets of an active business to a subsidiary corporation in exchange for additional stock of the subsidiary, an exchange claimed to be covered by [§ 351](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS351&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), and the subsidiary then distributed stock of a subsubsidiary to the parent corporation, in a transaction claimed to be within the nonrecognition rules of [§ 355](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS355&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)).[102.2](#co_footnote_F102_2_107960481_1) The IRS held that the two transactions could be analyzed separately, even though the purpose of the first transfer was to allow a requirement of [§ 355](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS355&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) to be satisfied for the distribution. “On these facts, nonrecognition treatment under [§§ 351](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS351&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) and [355](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS355&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) is not inconsistent with the congressional intent of these Code provisions.”

**4.3.6 Disavowal of Form by Taxpayers**

**\*23** When taxpayers invoke the substance-over-form, business purpose, or step transaction doctrine in order to escape the normal tax consequences of a transaction to which they are parties, the judicial reaction gravitates between two extremes.[103](#co_footnote_F103_107960481_1)

At one end of the spectrum, taxpayers are told that the government can cut through their red tape if it wishes, but that it is equally free to leave them entangled in the form they selected. The classic statement of this principle is in *Higgins v. Smith*, a 1940 Supreme Court opinion holding that a taxpayer did not incur a deductible loss on selling depreciated securities to a wholly owned corporation.[104](#co_footnote_F104_107960481_1) Referring to *Burnet v. Commonwealth Improvement Co.*,[105](#co_footnote_F105_107960481_1) an earlier case taxing the gain on a similar sale despite the taxpayer’s argument that the transaction resulted in a paper profit but no economic gain, the Court said:

In the *Commonwealth Improvement Company* case, the taxpayer, for reasons satisfactory to itself, voluntarily had chosen to employ the corporation in its operations. A taxpayer is free to adopt such organization for his affairs as he may choose, and having elected to do some business as a corporation, he must accept the tax disadvantages.

On the other hand, the Government may not be required to acquiesce in the taxpayer’s election of that form for doing business which is most advantageous to him. The Government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute. To hold otherwise would permit the schemes of taxpayers to supersede legislation in the determination of the time and manner of taxation.[106](#co_footnote_F106_107960481_1)

Another frequently quoted formulation of the same point is by Judge Learned Hand: “It is true that the Treasury may take a taxpayer at his word, so to say; when that serves its purpose, it may treat his corporation as a different person from himself; but that is a rule which works only in the Treasury’s own favor; it cannot be used to deplete the revenue.”[107](#co_footnote_F107_107960481_1)

This judicial refusal to permit taxpayers to repudiate their own handiwork is occasionally supported by the traditional elements of estoppel. The form, as characterized by the taxpayer on the tax return, may be accepted at face value by the IRS. If the taxpayer later attempts to discard the form and portray events in a more realistic light, it may be administratively difficult or even impossible to correct all related prior returns of the taxpayer and other parties to the same transaction because memories have faded or the statute of limitations has run.[108](#co_footnote_F108_107960481_1)

Even when no irreversible waves have been set in motion, taxpayers have sometimes been denied the right to invoke the substance-over-form doctrine: “It would be quite intolerable to pyramid the existing complexities of tax law by a rule that the tax shall be that resulting from the form of transaction taxpayers have chosen or from any other form they might have chosen, whichever is less.”[109](#co_footnote_F109_107960481_1) This attitude may be buttressed by a belief that a taxpayer’s repudiation of a deliberately chosen form is unappealing conduct even when prejudice to the government’s interest cannot be proved.

**\*24** For example, in *Durkin’s Estate v. CIR*,[110](#co_footnote_F110_107960481_1) the decedent-taxpayer’s interest in a corporation was terminated by (1) the corporation making a bargain sale of certain of its assets to the taxpayer and (2) the taxpayer selling his stock to the other shareholder at a bargain price. In response to the IRS’s contention that the taxpayer realized a constructive dividend equal to the difference between the value of the property received from the corporation and the price paid, it was argued that the two bargain sales were, in substance, a redemption of the taxpayer’s stock and should be taxed as such. However, the Tax Court held the taxpayer was bound by the form of the transaction. The taxpayer did not exhibit “an honest and consistent respect for the substance of the...transaction”;[111](#co_footnote_F111_107960481_1) he reported the transaction on his tax returns consistently with the form in which it was cast, and the effort to restructure the transaction in accordance with its alleged substance was a litigation strategy developed years later. Moreover, the IRS’s challenge to the price paid by the taxpayer in the purchase from the corporation did not, according to the court, open the way for the taxpayers to disavow the form of the transactions; “to hold otherwise would at a minimum be an untoward invitation to the kind of mispricing and concealment that petitioners attempted here.”[112](#co_footnote_F112_107960481_1)

At the opposite extreme, many cases hold that the substance-over-form doctrine is a two-way street, open to taxpayers as well as to the government. As early as 1929, for example, the Court of Appeals for the Fourth Circuit cited the “settled principle” that “courts will not permit themselves to be blinded or deceived by mere forms of law” and then observed:

The rule just stated is of peculiar importance in tax cases; for, unless the courts are very careful to regard substance and not form in matters of taxation, there is grave danger on the one hand that the provisions of the tax laws will be evaded through technicalities and on the other that they will work unreasonable and unnecessary hardship on the taxpayer. It is instructive to note the many tax cases decided in recent years in which the courts have not hesitated to ignore corporate forms, and to decide the questions involved in the light of what the parties have actually done, rather than on the basis of the forms in which they have clothed their transactions.[113](#co_footnote_F113_107960481_1)

In a more graphic expression of the same sentiment, the Court of Appeals for the Ninth Circuit said, “One should not be garroted by the tax collector for calling one’s agreement by the wrong name.”[114](#co_footnote_F114_107960481_1)

The Supreme Court has also permitted taxpayers to disavow a tax-oriented contract on showing that its form conflicted with economic reality, despite the government’s willingness to accept the contract as written.[115](#co_footnote_F115_107960481_1) The case involved an effort to shift liability for social security taxes on the wages of musicians from bandleaders to ballroom operators by vesting the latter with rights under a standard union contract that were not intended to be enforced. Despite this barefaced denial of the employment realities, the IRS was willing to accept the agreement, perhaps because the ballroom operators were more responsible taxpayers than the bandleaders. The Court, however, allowed the operators to repudiate the fictitious employer-employee relationship, hinting, without explicitly holding, that *Higgins v. Smith* and its other one-way-street cases should be confined to “the problem of corporate or association entity.”[116](#co_footnote_F116_107960481_1) There are many lower court decisions that similarly allow the taxpayer to invoke the substance-over-form doctrine, and some important IRS rulings appear to follow suit.[117](#co_footnote_F117_107960481_1)

**\*25** Between these two extremes are cases that allow taxpayers to escape from the forms selected by them but impose a more stringent burden of proof than is ordinarily applicable in tax cases. Describing this middle ground, the Tax Court has observed that “the so-called ‘two-way street’ seems to run downhill for the Commissioner and uphill for the taxpayer.”[118](#co_footnote_F118_107960481_1) For example, when the sales price of a going business is allocated by the parties among the items purchased, some courts permit the buyer or seller to repudiate the agreed allocation only on “strong proof” of its failure to reflect economic reality;[119](#co_footnote_F119_107960481_1) in the Court of Appeals for the Third Circuit, the taxpayer can disavow the allocation only on showing that it was induced by mistake, fraud, or the like.[120](#co_footnote_F120_107960481_1) This intermediate approach has been applied primarily to taxpayers attempting to escape allocations in contracts for the sale of a going business or the stock of an incorporated enterprise with a concomitant covenant not to compete, and it is discussed elsewhere in that connection.[121](#co_footnote_F121_107960481_1)

**4.3.7 Taxpayers’ Duty of Consistency**

In various circumstances, courts have said that taxpayers have an obligation to be consistent in dealing with the IRS. According to the Tax Court, “[t]he duty of consistency is based on the theory that the taxpayer owes the Commissioner the duty to be consistent in the tax treatment of items and will not be permitted to benefit from the taxpayer’s own prior error or omission.”[122](#co_footnote_F122_107960481_1) The duty arises, the court has said, when:

(1) the taxpayer has made a representation or reported an item for tax purposes in one year

(2) the Commissioner has acquiesced in or relied on that act for that year, and

(3) the taxpayer desires to change the representation, previously made, in a later year after the statute of limitations on assessments bars adjustments for the initial year.[123](#co_footnote_F123_107960481_1)

The idea is sometimes expressed as estoppel or quasi estoppel. When the foregoing requirements are met, the IRS “may act as if the previous representation, on which [it] relied, continued to be true, even if it is not. The taxpayer is estopped to assert the contrary.”[124](#co_footnote_F124_107960481_1) The duty applies only to inconsistencies in questions of fact and inconsistencies on mixed questions of law and fact, not to inconsistent positions on questions of law.[124.1](#co_footnote_F124_1_107960481_1) The duty may also be inapplicable if “all pertinent facts are known” to both the IRS and the taxpayer at all relevant times.[124.2](#co_footnote_F124_2_107960481_1)

Some examples of the application of this duty: (1) A taxpayer who took a deduction for an expenditure, but was later reimbursed for the expenditure, was estopped from claiming the reimbursement was not taxable because the deduction was taken in error;[125](#co_footnote_F125_107960481_1) (2) a taxpayer who renounced U.S. citizenship, but thereafter obtained a U.S. passport by representing that the renunciation was coerced, was estopped from claiming for tax purposes that he had ever not been a citizen;[126](#co_footnote_F126_107960481_1) (3) an heir who also served as executor of the estate was estopped from claiming a basis for the inherited property that was higher than the value of the property reported on the estate tax return;[127](#co_footnote_F127_107960481_1) (4) an heir who signed an agreement in order to qualify the estate for special use valuation of property was estopped from later asserting that the property was never eligible for this valuation;[128](#co_footnote_F128_107960481_1) and (5) a life insurance salesman, who represented himself on several returns as eligible to participate in a qualified retirement of the insurer, was estopped from claiming that distributions from the plan were tax-free because he was not an eligible participant and his participation therefore disqualified the plan.[129](#co_footnote_F129_107960481_1)

**4.3.8 IRS Duty of Consistency**

**\*26** Taxpayers seeking to escape a tax to which they have no substantive defense sometimes point to the IRS’s mistaken failure to impose the tax on other similarly situated taxpayers. If racial, political, or similar constitutional overtones are absent and the taxpayer is simply the random victim of an unusually thorough audit, the claim that others got away scot-free usually gets nowhere.[130](#co_footnote_F130_107960481_1) First, because tax returns and audits are confidential,[131](#co_footnote_F131_107960481_1) systematic comparisons are rarely feasible. Isolated instances or trade gossip do not establish that other taxpayers systematically enjoyed a sanctuary denied the taxpayer. Second, even if the IRS systematically exempted other taxpayers, it is not obvious that the error should be extended until it is universal. Third, the taxpayer may be the test case in an IRS campaign to rectify the error so that it can get back on the right track.

Despite these reasons for rejecting the “why only me?” defense, a few decisions support the proposition that “the Commissioner cannot tax one and not another without a rational basis for the difference.”[132](#co_footnote_F132_107960481_1) In one of these cases, *IBM Corp. v. United States*, the Court of Claims held that it was an abuse of discretion for the IRS to apply an unfavorable tax ruling retroactively to a taxpayer whose principal business competitor was taxed only prospectively on identical facts.[133](#co_footnote_F133_107960481_1) In another case, the Tax Court held that a long-standing IRS practice of excluding certain fringe benefits from gross income had to be applied to the taxpayer in a litigated case “on the same basis as it is applied to other taxpayers” unless the IRS was prepared to change the practice as to all taxpayers.[134](#co_footnote_F134_107960481_1)

In *Davis v. CIR*, in contrast, the Tax Court noted that “our responsibility is to apply the law to the facts of the case before us and determine the tax liability of the parties before us; how the Commissioner may have treated other taxpayers has generally been considered irrelevant in making that determination.”[135](#co_footnote_F135_107960481_1) “Any change in that position would have widespread ramifications in the administration and application of the Federal tax laws and in the conduct of our work,” requiring the court in every trial “to allow the petitioner to inquire into the Commissioner’s treatment of other similarly situated taxpayers.”[136](#co_footnote_F136_107960481_1) The court, however, commented that “those problems may not be insurmountable, and the notion of equal justice has strong appeal in our society and might lead to the conclusion that [the consistency rule asserted by the taxpayer] should ultimately be adopted.”[137](#co_footnote_F137_107960481_1) The court found it unnecessary to take that step in the case before it.

In time, *IBM Corp.* and cases following it may turn out to be the thin edge of a powerful equal-protection wedge. However, these cases involve unusual circumstances, and they do not so far seriously undermine the government’s theory that “taxpayers can never avoid liability for a proper tax by showing that others have been treated generously, leniently, or erroneously by the Internal Revenue Service.”[138](#co_footnote_F138_107960481_1)

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| **Footnotes** | |
| [1](#co_fnRef_F1_107960481_ID0EFH_1) | [Cahoon v. Coe, 57 NH 556, 570 (1876)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1876008215&pubNum=0000579&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_579_570&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_579_570). |
| [2](#co_fnRef_F2_107960481_ID0EYH_1) | [US v. Wigglesworth, 28 F. Cas. 595, 597 (CCD Mass. 1842)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800137906&pubNum=0000349&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_349_597&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_349_597). |
| [3](#co_fnRef_F3_107960481_ID0EGAAC_1) | For an extended nineteenth century discussion of this subject, see Cooley, A Treatise on the Law of Taxation 265–275 (Callaghan, 2d ed. 1886), who (at 272) favored a middle road:  Construction is not to assume either that the taxpayer, who raises the legal question of his liability under the laws, is necessarily seeking to avoid a duty to the state which protects him, nor, on the other hand, that the government, in demanding its dues, is a tyrant, which, while too powerful to be resisted, may justifiably be obstructed and defeated by any subtle device or ingenious sophism whatsoever...All construction...which assumes either the one or the other, is likely to be mischievous, and to take one-sided views, not only of the laws, but of personal and official conduct.  The trend away from strict construction has been strengthened by frequent inclusion in state laws of a directive to interpret the law with a view to accomplishing its objectives. 2A Sands, Statutes and Statutory Construction § 58.03 n.14 (Callaghan, 4th ed. 1973). |
| [4](#co_fnRef_F4_107960481_ID0EKAAC_1) | But see [Ivan Allen Co. v. US, 422 US 617, 627 (1975)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975129836&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_627&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_627) (penalty taxes to be strictly construed against government); [Fullman, Inc. v. US, 434 US 528, 533 n.8 (1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978114186&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_533&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_533) (strict construction principle not applicable to penalties that can be easily avoided by following statutory guidelines). |
| [4.1](#co_fnRef_F4_1_107960481_ID0EZAAC_1) | But see Avi-Yonah, *Rodriguez*, *Tucker*, and the Dangers of Textualism, 167 Tax Notes Fed. 87 (Apr. 6, 2020). |
| [5](#co_fnRef_F5_107960481_ID0E4AAC_1) | See, e.g., [Corn Prods. Ref. Co. v. CIR, 350 US 46 (1955)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1955117966&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (strict construction of term “capital assets” in order to limit “preferential treatment” for capital gains); [Interstate Transit Lines v. CIR, 319 US 590, 593 (1943)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120523&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_593&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_593) (income tax deductions are a “matter of legislative grace and...the burden of clearly showing the right to the claimed deduction is on the taxpayer”); [Stiles v. CIR, 69 TC 558, 563 (1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978290211&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_563&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_563) (acq.) (as exceptions to the general rule, relief provisions are to be strictly construed).  Despite the popularity of the theory that many tax allowances are the equivalent of subsidies and constitute a program of “welfare for the rich”—see Bittker, Income Tax “Loopholes” and Political Rhetoric, 71 Mich. L. Rev. 1099, 1100 (1973)—it has evidently not been suggested that these provisions should be liberally construed in favor of the taxpayer, in the spirit of [Cox v. Roth, 348 US 207 (1955)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1955117985&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (welfare legislation is to be liberally construed in favor of its intended beneficiaries).  In litigated cases, the taxpayer usually has the burden of proof on factual issues, as explained infra ¶ 115.4.2; the discussion in the text is concerned with legal questions. |
| [6](#co_fnRef_F6_107960481_ID0EMBAC_1) | See generally Griswold, [An Argument Against the Doctrine That Deductions Should Be Narrowly Construed as a Matter of Legislative Grace, 56 Harv. L. Rev. 1142 (1943)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0344264393&pubNum=0003084&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [7](#co_fnRef_F7_107960481_ID0E6BAC_1) | [Johnson v. US, 163 F. 30, 32 (1st Cir. 1908)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100702&pubNum=0000348&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_348_32&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_348_32) (Mr. Justice Holmes on circuit). For a similar comment by Mr. Justice Stone in a tax case, see [White v. US, 305 US 281, 292 (1938)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1938121822&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_292&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_292) (duty of courts, in tax cases as in other litigation, is to decide “what [the] construction fairly should be”), quoted with approval by Griswold, supra Fn 6, at 1144–1145; see also Cooley’s earlier support for evenhandedness, supra Fn 3. |
| [7.1](#co_fnRef_F7_1_107960481_ID0EXCAC_1) | According to the Tax Court  much of the caselaw using the economic substance, sham transaction, and other judicial doctrines in interpreting and applying tax statutes, represents an effort to reconcile two competing policy goals. On one hand, having clear, concrete rules embodied in a written Code and regulations that exclusively define a taxpayer’s obligations (1) facilitates smooth operation of our voluntary compliance system, (2) helps to render that system transparent and administrable, and (3) furthers the free market economy by permitting taxpayers to know in advance the tax consequences of their transactions. On the other side of the scales, the Code’s and the regulations’ fiendish complexity necessarily creates space for attempts to achieve tax results that Congress and the Treasury plainly never contemplated, while nevertheless complying strictly with the letter of the rules, at the expense of the fisc (and other taxpayers). . . . [The antiavoidance] judicial doctrines applied in tax cases all represent efforts to rein in activity that, while within the technical letter of the rules, deeply offends their spirit.[CNT Investors, LLC v. CIR, 144 TC 161 (2015)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2035659712&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [8](#co_fnRef_F8_107960481_ID0E5CAC_1) | Thus, Paul’s monumental effort to provide a “restatement” of the law of tax avoidance (Paul, Restatement of the Law of Tax Avoidance, in Studies in Federal Taxation (Callaghan 1937)) contains few generalizations and demonstrates that the subject is “exquisitely uncertain,” as Judge Jerome Frank points out in his introduction (at 2) to the Paul essay. See generally Rice, Judicial Techniques in Combating Tax Avoidance, 51 Mich. L. Rev. 1021 (1953).  See also the Australian and Canadian statutory catchall prohibitions on tax-avoidance transactions, described by Blum, Motive, Intent, and Purpose in Federal Income Taxation, 34 U. Chi. L. Rev. 485, 524–525 n.107 (1967). |
| [9](#co_fnRef_F9_107960481_ID0E5DAC_1) | Quoted in Mason, Brandeis: A Free Man’s Life 352 (Viking Press 1946). |
| [10](#co_fnRef_F10_107960481_ID0E2EAC_1) | [US v. Wurzbach, 280 US 396, 399 (1930)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930122708&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_399&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_399) . Although judicial tolerance of vagueness in criminal statutes has dwindled ( US v. [Harris, 347 US 612 (1954)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954120885&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ), the in terrorem effect of vagueness on would-be tax dodgers is usually approved by the commentators. See Blum, *Knetsch v. U.S*.: A Pronouncement on Tax Avoidance, 1961 Sup. Ct. Rev. 135, 158. |
| [11](#co_fnRef_F11_107960481_ID0EPGAC_1) | Paul, The Lawyer as a Tax Adviser, 25 Rocky Mtn. L. Rev. 412, 416 (1953). See infra ¶ 110.2.4. |
| [12](#co_fnRef_F12_107960481_ID0EFHAC_1) | See Paul, Restatement of the Law of Tax Avoidance, in Studies in Federal Taxation 9, 12 et seq. (Callaghan 1937); Mr. Justice Holmes’ observation in [Bullen v. Wisconsin, 240 US 625, 630–631 (1916)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1916100463&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_630&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_630) quoted infra Fn 16; [IRC § 482](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS482&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), which uses the term “evasion” but is applicable to a broad spectrum of transactions having no fraudulent overtones (infra ¶ 79.1). See also Arnold, General Anti-Avoidance Rules: A Comparative Perspective, 52 Canadian Tax J. 488 (2004). |
| [13](#co_fnRef_F13_107960481_ID0ELHAC_1) | See infra ¶ 114.4. |
| [14](#co_fnRef_F14_107960481_ID0EPHAC_1) | However, tax protesters have been prosecuted for willful violations of law that entail no concealment. See infra ¶ 114.9. |
| [15](#co_fnRef_F15_107960481_ID0EYIAC_1) | The original location of this widely quoted comment eludes us. In [Compania General de Tabacos de Filipinas v. Collector, 275 US 87, 100 (1927)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1927123756&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_100&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_100), Holmes, dissenting, said, “Taxes are what we pay for civilized society.” |
| [16](#co_fnRef_F16_107960481_ID0EOKAC_1) | [Superior Oil Co. v. Mississippi, 280 US 390, 395–396 (1930)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930122657&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_395&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_395) . See also Mr. Justice Holmes’ earlier statement to the same effect in [Bullen v. Wisconsin, 240 US 625, 630–631 (1916)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1916100463&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_630&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_630) :  We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.The term “evade” is used by Mr. Justice Holmes to denote an unsuccessful attempt to avoid taxation, not as synonymous with fraud. See supra Fn 12. |
| [17](#co_fnRef_F17_107960481_ID0EBLAC_1) | [Helvering v. Gregory, 69 F2d 809, 810 (2d Cir. 1934)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900118925&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_810&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_810), aff’d sub nom. [Gregory v. Helvering, 293 US 465 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123966&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), discussed at greater length in ¶¶ 4.3.4 and 94.5.1 . Judge Hand’s assurance that there is no “patriotic duty to increase one’s taxes” was curiously echoed by the claim made by some during the Vietnam War that paying their taxes would make them war criminals under the principles applied at the Nuremberg Trial. See supra ¶ 1.2.5 Fn 60. See generally Likhovski, [The Duke and the Lady: *Helvering v. Gregory* and the History of Tax Avoidance Adjudication, 25 Cardozo L. Rev. 953 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0297721024&pubNum=0001441&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [18](#co_fnRef_F18_107960481_ID0EXLAC_1) | Chirelstein, [Learned Hand’s Contribution to the Law of Tax Avoidance, 77 Yale LJ 440, 456 (1968)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0332669117&pubNum=0001292&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&fi=co_pp_sp_1292_456&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_1292_456). |
| [19](#co_fnRef_F19_107960481_ID0ENMAC_1) | [CIR v. Newman, 159 F2d 848, 850–851 (2d Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947114729&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_850&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_850) (dissenting opinion), cert. denied, [331 US 859 (1947)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947201414&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [20](#co_fnRef_F20_107960481_ID0EGNAC_1) | [Chisholm v. CIR, 79 F2d 14, 15 (2d Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935129922&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_15&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_15), cert. denied, [296 US 641 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935203242&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [21](#co_fnRef_F21_107960481_ID0E2NAC_1) | For distinctions among these terms, see Blum, supra Fn 8, at 485; Paul, Motive and Intent in Federal Tax Law, in Selected Studies in Federal Taxation 255, 271–304 (Callaghan, 2d ser. 1938). |
| [22](#co_fnRef_F22_107960481_ID0EIOAC_1) | See infra ¶ 126.4.4. |
| [23](#co_fnRef_F23_107960481_ID0E1OAC_1) | In Superior Oil Co. v. Mississippi, 280 US 394 (1930), the Court said that a crucial document (relied on by the taxpayer to establish that a transaction was in interstate commerce and immune to a state sales tax) “seems to have had no other use than...to try to convert a domestic transaction into one of interstate commerce”; in [Helvering v. Gregory, 293 US 465 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123966&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), the taxpayer created a transitory corporation that was promptly, and pursuant to plan, liquidated. On the significance of tax avoidance in *Gregory*, see Chirelstein, supra Fn 18, at 464, concluding that Judge Hand favored “an interpretative rule of general application...that ambiguous transactions were to be characterized in the Commissioner’s favor, unless the taxpayer could dispel the ambiguity by showing that the form which he had chosen carried with it, or was expected to carry with it, some appreciable economic effect beyond tax savings.” |
| [24](#co_fnRef_F24_107960481_ID0EEBAE_1) | For other instances and general discussion, see Blum, How the Courts, Congress and the IRS Try to Limit Legal Tax Avoidance, 10 J. Tax’n 300 (1959); Cohen, Tax Avoidance Purpose as a Statutory Text in Tax Legislation, 9 Tul. Tax Inst. 229 (1960); Fischer, Intent and Taxes, 32 Taxes 303 (1954). |
| [25](#co_fnRef_F25_107960481_ID0EIBAE_1) | E.g., [IRC § 267(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS267&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381) (infra ¶ 78.1.1) (deduction denied for losses on sales between related taxpayers, whether at fair market prices or not), [§ 166(d)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS166&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_e07e0000a9f57) (infra ¶ 33.6) (nonbusiness bad debts are capital rather than ordinary losses). |
| [26](#co_fnRef_F26_107960481_ID0EBCAE_1) | [Texas & NORR v. Brotherhood of Ry. Clerks, 281 US 548, 559 (1930)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930121996&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_559&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_559). |
| [27](#co_fnRef_F27_107960481_ID0E1CAE_1) | Paul, supra Fn 12, at 152. |
| [28](#co_fnRef_F28_107960481_ID0EUDAE_1) | [Morsman v. CIR, 90 F2d 18, 22 (8th Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1937126344&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_22&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_22), cert. denied, [302 US 701 (1937)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1937202738&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [29](#co_fnRef_F29_107960481_ID0EVFAE_1) | [Helvering v. Clifford, 309 US 331, 335–336 (1940)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1940125146&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_335&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_335), discussed infra ¶ 80.1.1. |
| [30](#co_fnRef_F30_107960481_ID0EVGAE_1) | [US v. Phellis, 257 US 156, 168 (1921)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921113845&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_168&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_168) . See Weisbach, An Economic Analysis of Anti-Tax-Avoidance Doctrines, 4 Am L. & Econ. Rev. 88 (2002). For the states’ use of federal antiavoidance doctrines in applying their tax laws, see Glickman & Calhoun, [The “States” of the Federal Common Law Tax Doctrines, 61 Tax Law. 1181 (2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0342990333&pubNum=0100406&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [31](#co_fnRef_F31_107960481_ID0EZGAE_1) | [Weinert’s Est. v. CIR, 294 F2d 750, 755 (5th Cir. 1961)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961114537&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_755&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_755). |
| [32](#co_fnRef_F32_107960481_ID0ELHAE_1) | [Section 472(c)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS472&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_4b24000003ba5), which permits LIFO accounting for inventories to be used for tax purposes only if the same method is used in reporting to investors and lenders, is an exception to this general principle. See infra ¶ 105.8.5 text accompanying fns 109–115 for [§ 472(c)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS472&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_4b24000003ba5). |
| [33](#co_fnRef_F33_107960481_ID0ESHAE_1) | See infra ¶¶ 41.7.2, 41.7.3. |
| [34](#co_fnRef_F34_107960481_ID0EVIAE_1) | [CIR v. Lester, 366 US 299 (1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961125508&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (construing corresponding provision of pre-1984 law), discussed infra ¶ 77.1.7 text accompanying fns 79–82 . See [IRC § 152(e)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS152&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7fdd00001ca15) (child of divorced parents deemed to have received more than one half of support from custodial parent unless that parent waives dependency exemption in writing, in which case noncustodial parent is deemed to have provided more than one half, discussed infra ¶ 30.3.5); [Foxman v. CIR, 41 TC 535, 551 (1964)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964298151&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_551&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_551) (acq.), aff’d, [352 F2d 466 (3d Cir. 1965)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966101836&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (partnership provisions permitting “partners themselves to determine their tax burdens inter sese to a certain extent”). |
| [34.1](#co_fnRef_F34_1_107960481_ID0E1IAE_1) | [Summa Holdings, Inc. v. CIR, 848 F3d 779 (6th Cir. 2017)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040960133&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . Two shareholders of the taxpayer established Roth IRAs, and the IRAs became the indirect shareholders of a DISC that received commissions on export sales made by the taxpayer. The IRS contended that the commissions were, in substance, dividends to the shareholders, who then transferred the funds to their IRAs. The court disagreed, finding that the DISC and IRA regimes both elevated form over substance: “By congressional design, DISCs are all form and no substance, making it inappropriate to tag Summa Holdings with a substance-over-form complaint with respect to its use of DISCs,” and Roth IRAs are also “designed for tax-reduction purposes.” See Cummings, DISCs: Deferral or Shifting? 155 Tax Notes 1173 (May 22, 2017); Haxton & Levine, No End (Result) in Sight, 156 Tax Notes 967 (Aug. 21, 2017); Ware & Yablonicky, Ninth Circuit Urged to Uphold Roth IRA Transaction in *Mazzei*, 164 Tax Notes Fed. 867 (Aug. 5, 2019). |
| [35](#co_fnRef_F35_107960481_ID0EHJAE_1) | Paul, Restatement of the Law of Tax Avoidance, in Federal Taxation at 89 n.304 (Callaghan 1937). See also Blum, The Importance of Form in the Taxation of Corporate Transactions, 54 Taxes 613 (1976); Kingson, [The Deep Structure of Taxation: Dividend Distributions, 85 Yale LJ 861, 863](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0332812301&pubNum=0001292&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&fi=co_pp_sp_1292_863&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_1292_863) et seq. (1976); Steinberg, [Form, Substance and Directionality in Subchapter C, 52 Tax Law. 457 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0112772882&pubNum=0100406&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Willens, Form and Substance in Subchapter C—Exposing the Myth, 84 Tax Notes 739 (Aug. 2, 1999). |
| [36](#co_fnRef_F36_107960481_ID0EWJAE_1) | Tax cases are not unique in searching for substance; a common analogue is the piercing of the corporate veil in private lawsuits. See Ballantine, Ballantine on Corporations [§ 122](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS122&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (Callaghan, rev. ed. 1946); Paul, Restatement of the Law of Tax Avoidance, in Federal Taxation at 66–73 (Callaghan 1937). |
| [37](#co_fnRef_F37_107960481_ID0EEKAE_1) | [CIR v. Sansome, 60 F2d 931, 933 (2d Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932129753&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_933&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_933), cert. denied, [287 US 667 (1932)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933203367&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [38](#co_fnRef_F38_107960481_ID0ELKAE_1) | Noonan, The Scholastic Analysis of Usury 95–98 (Harvard Univ. Press 1957). For current parallels, see infra ¶¶ 40.7, 52.1.4. |
| [39](#co_fnRef_F39_107960481_ID0E5LAE_1) | [Knetsch v. US, 364 US 361, 366 (1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960122586&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_366&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_366) . See Blum, *Knetsch v. U.S.*: A Pronouncement on Tax Avoidance, 40 Taxes 296 (1962). |
| [40](#co_fnRef_F40_107960481_ID0EFMAE_1) | See [Cherin v. CIR, 89 TC 986 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988057606&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (if transaction is objectively lacking in substance, it is ignored for tax purposes even if taxpayer had subjective objective to profit apart from taxes). |
| [41](#co_fnRef_F41_107960481_ID0EBOAE_1) | [Helvering v. Gregory, 69 F2d 809, 810–811 (2d Cir. 1934)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900118925&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_810&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_810), aff’d sub nom. [Gregory v. Helvering, 293 US 465 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123966&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . For more extensive discussion, see infra ¶ 94.1.6. |
| [42](#co_fnRef_F42_107960481_ID0EGOAE_1) | See also Blum’s comment (supra Fn 39, at 305) that the Supreme Court in *Knetsch* “was either saying a great deal about many and various tax-avoidance schemes not before the Court, or it was omitting to indicate why the interest deduction should be interpreted as [limited to transactions that appreciably affect the taxpayer’s beneficial interests].” Blum, *Knetsch v. U.S.*: A Pronouncement on Tax Avoidance, 40 Taxes at 296 (1962). |
| [43](#co_fnRef_F43_107960481_ID0E1OAE_1) | [Blueberry Land Co. v. CIR, 361 F2d 93, 101 (5th Cir. 1966)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966121208&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_101&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_101) (“courts will...look beyond the superficial formalities”). |
| [44](#co_fnRef_F44_107960481_ID0EGPAE_1) | [Frank Lyon Co. v. US, 435 US 561 (1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978114216&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), discussed infra ¶ 4.4.3 text accompanying fns 20–26. |
| [45](#co_fnRef_F45_107960481_ID0EMRAE_1) | [Newman v. CIR, 902 F2d 159, 163–164 (2d Cir. 1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990084792&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_163&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_163). |
| [46](#co_fnRef_F46_107960481_ID0E2SAE_1) | [US v. Bond, 258 F2d 577 (5th Cir. 1958)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1958111243&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; see Blum, *Knetsch v. U.S.*: A Pronouncement on Tax Avoidance, 40 Taxes 300–301 (1962). |
| [47](#co_fnRef_F47_107960481_ID0E2TAE_1) | [Section 267(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS267&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381) is discussed in ¶ 78.1. See also [IRC § 704(e)(3)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS704&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_4b250000f9dd6) (sale of partnership interest within family treated as gift; discussed infra ¶ 86.3), [§ 166(d)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS166&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_5ba1000067d06) (nonbusiness bad debt deductible only as capital loss, not as ordinary loss; discussed infra ¶ 33.6). |
| [48](#co_fnRef_F48_107960481_ID0ELUAE_1) | See infra ¶¶ 4.4.2, 40.7.1. |
| [49](#co_fnRef_F49_107960481_ID0EQUAE_1) | [Hineman v. Brodrick, 99 F. Supp. 582, 583 (D. Kan. 1951)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951117680&pubNum=0000345&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_345_583&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_345_583) (receipt by farmer of money for sale of grain delayed two years “to effect a possible saving of federal taxes”); see infra ¶ 105.3.1. |
| [50](#co_fnRef_F50_107960481_ID0EVUAE_1) | See infra ¶ 33.2. |
| [51](#co_fnRef_F51_107960481_ID0EZUAE_1) | See infra ¶ 91.10.2 (characterizing advances by shareholders to their corporations as bona fide loans or as equity contributions); ¶ 92.2 (whether a transfer of funds by a corporation to its shareholders is a dividend or a loan). |
| [52](#co_fnRef_F52_107960481_ID0ERWAE_1) | Reg. [§ 1.482-1(b)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000547&cite=26CFRS1.482-1&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_3fed000053a85); see infra ¶ 79.3. |
| [53](#co_fnRef_F53_107960481_ID0EKXAE_1) | See infra ¶ 97.2. |
| [54](#co_fnRef_F54_107960481_ID0EOXAE_1) | [IRC § 1041](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS1041&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), discussed infra ¶ 44.6. |
| [55](#co_fnRef_F55_107960481_ID0EZYAE_1) | See infra ¶ 77.1. |
| [56](#co_fnRef_F56_107960481_ID0E4YAE_1) | See infra ¶ 4.4.3. |
| [57](#co_fnRef_F57_107960481_ID0ERZAE_1) | See infra ¶¶ 4.4.2, 40.7.1. |
| [58](#co_fnRef_F58_107960481_ID0EA1AE_1) | See [Berry Petroleum Co. v. CIR, 104 TC 584 (1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995114251&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d without published opinion, 142 F3d 942 (9th Cir. 1998) (in order to avoid having to disgorge short-swing profits, seller of stock worth $5 million asked taxpayer-buyer to structure transaction as stock sale for $3.8 million and one-year option on various property of another subsidiary of seller, for which taxpayer paid $1.2 million; held, option premium is, in substance, part of stock’s purchase price and therefore is not deductible as loss on option’s expiration unexercised). |
| [59](#co_fnRef_F59_107960481_ID0EW1AE_1) | [Blueberry Land Co. v. CIR, 361 F2d 93, 102 (5th Cir. 1966)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966121208&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_102&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_102) . See also [Waterman SS Corp. v. CIR, 430 F2d 1185 (5th Cir. 1970)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970119802&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [401 US 939 (1971)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971243113&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“another attempt to ward off tax blows with paper armor”). |
| [60](#co_fnRef_F60_107960481_ID0EI2AE_1) | [Grodt & McKay Realty, Inc. v. CIR, 77 TC 1221 (1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982216370&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [Cherin v. CIR, 89 TC 986 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988057606&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (if transaction is objectively lacking in substance, it is ignored for tax purposes even if taxpayer had subjective objective to profit apart from taxes).  Courts have, in several cases, rejected claims of tax benefits flowing from lease-in-lease-out (LILO) and sale-in-lease-out (SILO) transactions. For example, in [Exelon Corp. v. CIR, 147 TC No. 9 (2016)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039816013&pubNum=0001415&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), the court denied tax benefits claimed from SILO transactions because it found that the taxpayer (the purported buyer in sale-in transactions) did not assume the benefits or burdens of ownership of the property. The transactions “created a circular flow of money” and did not “significantly alter . . . the parties’ rights and obligations with respect to the” property. See [John Hancock Life Ins. Co. v. CIR, 141 TC 1 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031229361&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (finding that several LILO and SILO transactions met economic substance test, but denying some claimed tax benefits because substance of some lease transactions was not “true lease”). |
| [61](#co_fnRef_F61_107960481_ID0EI3AE_1) | [Esmark, Inc. v. CIR, 90 TC 171 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988016670&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d, [886 F2d 1318 (7th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989141816&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [62](#co_fnRef_F62_107960481_ID0EQ3AE_1) | [IRC §§ 311(a), 311(d)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS311&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_8b3b0000958a4) (before amendment in 1982). |
| [63](#co_fnRef_F63_107960481_ID0EM4AE_1) | [Esmark, Inc. v. CIR, 90 TC 171, 196 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988016670&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_196&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_196), aff’d, [886 F2d 1318 (7th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989141816&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . But see [Associated Wholesale Grocers, Inc. v. US, 927 F2d 1517 (10th Cir. 1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991053877&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (taxpayer sold stock of subsidiary to unrelated person and immediately thereafter purchased all of subsidiary’s assets except one grocery store; held, because sale and purchase were mutually interdependent, they should be treated as liquidation of subsidiary followed by sale of grocery store). |
| [64](#co_fnRef_F64_107960481_ID0E14AE_1) | But see [Rev. Rul. 87-66, 1987-2 CB 168](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987177938&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (where shareholders of old corporation transfer all their stock to newly formed corporation in exchange for stock and old corporation promptly liquidates, transaction is analyzed as though old corporation had transferred its assets to new corporation in exchange for stock and had distributed stock to its shareholders in complete liquidation; restructured transaction is reorganization under [§ 368(a)(1)(D)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS368&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_ba430000991d0)); Vogelenzang, [The Resequencing Aspect of Revenue Ruling 87-66: Applying *Kimbell-Diamond* to Reorganizations, 18 J. Real Est. Tax’n 219 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0101744039&pubNum=0100325&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [65](#co_fnRef_F65_107960481_ID0EM5AE_1) | See especially Judge L. Hand, dissenting in [Gilbert v. CIR, 248 F2d 399, 410–412 (2d Cir. 1957)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957101637&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_410) (shareholders’ right to deduct, as bad debts, their pro rata advances to their corporation when it became insolvent), discussed by Chirelstein, Learned Hand’s Contribution to the Law of Tax Avoidance, 77 Yale LJ 460–472 (1968). But see [Charles McCandless Tile Serv. v. US, 422 F2d 1336 (Ct. Cl. 1970)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970117059&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (payments to shareholder-employees treated as dividends in part, although reasonable relative to services performed, discussed infra ¶ 22.2). |
| [66](#co_fnRef_F66_107960481_ID0ER5AE_1) | Chirelstein attributes to Judge L. Hand “a perception that the Internal Revenue Code is in part a clumsy system of implied elections, of which some, such as the choice to do business in corporate form, are freely exercisable by the taxpayer and binding on the Commissioner, while others, notably those involving self-dealing transactions, are within the Commissioner’s discretion to approve or reject.” Viewed in the large, the Code’s “clumsy system of implied elections” is even more favorable to the taxpayer because it is less restricted by the most-costly-alternative theory than Judge Hand evidently wished. See Chirelstein, Learned Hand’s Contribution to the Law of Tax Avoidance, 77 Yale LJ 471 (1968). |
| [67](#co_fnRef_F67_107960481_ID0EB6AE_1) | [Klein v. Board of Supervisors, 282 US 19, 24 (1930)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930122399&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_24&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_24). |
| [74](#co_fnRef_F74_107960481_ID0EABAG_1) | [Gregory v. CIR, 27 BTA 223, 225 (1932)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932000132&pubNum=0000165&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_165_225&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_165_225) . See generally Likhovski, [The Duke and the Lady: *Helvering v. Gregory* and the History of Tax Avoidance Adjudication, 25 Cardozo L. Rev. 953 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0297721024&pubNum=0001441&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [75](#co_fnRef_F75_107960481_ID0EZBAG_1) | [Helvering v. Gregory, 69 F2d 809, 811 (2d Cir. 1934)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900118925&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_811&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_811). |
| [76](#co_fnRef_F76_107960481_ID0EWCAG_1) | [Gregory v. Helvering, 293 US 465, 469 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123966&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_469&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_469). |
| [77](#co_fnRef_F77_107960481_ID0EDDAG_1) | For its application in its original area of application, see infra ¶ 94.1.6. See also [IRC § 357(b)(1)(B)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS357&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_2a4b0000e5562) (statutory use of term “bona fide business purpose”; discussed infra ¶ 91.4.3). |
| [77.1](#co_fnRef_F77_1_107960481_ID0EIDAG_1) | See generally Bowen, Whither Business Purpose? 80 Taxes 275 (Mar. 2002); Smith, [Business Purpose: The Assault Upon the Citadel, 53 Tax Law. 1 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0115704304&pubNum=0100406&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [78](#co_fnRef_F78_107960481_ID0E1DAG_1) | [CIR v. Transport Trading & Terminal Corp., 176 F2d 570, 572 (2d Cir. 1949)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1949116506&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_572&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_572), cert. denied, [338 US 955 (1950)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1950200191&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)).  According to the Court of Appeals for the District of Columbia Circuit  A tax system of rather high rates gives a multitude of clever individuals in the private sector powerful incentives to game the system. Even the smartest drafters of legislation and regulation cannot be expected to anticipate every device. The business purpose doctrine reduces the incentive to engage in such essentially wasteful activity, and in addition helps achieve reasonable equity among taxpayers who are similarly situated—in every respect except for differing investments in tax avoidance.  [ASA Investerings Partnership v. CIR, 201 F3d 505, 513 (DC Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000035886&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_513&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_513), cert. denied, [531 US 871 (2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000428171&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [Boca Investerings Partnership v. US, 314 F3d 625, 631 (DC Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002790905&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_631&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_631), cert. denied, [540 US 826 (2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003460792&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“while taxpayers are allowed to structure their business transactions in such a way as to minimize their tax, these transactions must have a legitimate non-tax avoidance business purpose to be recognized as legitimate for tax purposes”). In both *ASA Investerings* and *Boca Investerings*, the court disallowed partners’ deductions for their distributive shares of partnerships’ capital losses for lack of evidence of a business reason for their participations in the partnerships. See *Boca Investerings Partnership v. US*, supra, at 632 (deductions allowable only if there was “a non-tax business purpose need for the partnership in order to accomplish the goals of the partners”). |
| [79](#co_fnRef_F79_107960481_ID0EJEAG_1) | See infra ¶ 30.4. |
| [80](#co_fnRef_F80_107960481_ID0EKFAG_1) | Supra ¶ 4.3.3 text accompanying fns 39–40. |
| [81](#co_fnRef_F81_107960481_ID0EEGAG_1) | [Knetsch v. US, 364 US 361, 366 n.4 (1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960122586&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_366&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_366), citing [Diggs v. CIR, 281 F2d 326 (2d Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960101049&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [364 US 908 (1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960202287&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Weller v. CIR, 270 F2d 294 (3d Cir. 1959)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959110938&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [364 US 908 (1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960202279&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’g [Emmons v. CIR, 31 TC 26 (1958)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1958001017&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Weller v. CIR, 31 TC 33 (1958)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1958001018&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [82](#co_fnRef_F82_107960481_ID0E5GAG_1) | [Goldstein v. CIR, 364 F2d 734, 740 (2d Cir. 1966)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966122091&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_740&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_740), cert. denied, [385 US 1005 (1967)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967201897&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83](#co_fnRef_F83_107960481_ID0ENIAG_1) | [Goldstein v. CIR, 364 F2d 734, 741–742 (2d Cir. 1966)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966122091&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_741&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_741) . See [Peerless Indus., Inc. v. US, 94-1 USTC ¶ 50,043 (ED Pa.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994031710&pubNum=0000866&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (not officially reported), aff’d without published opinion, [37 F3d 1488 (3d Cir. 1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994190383&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (taxpayer issued 50-year, $20 million zero-coupon bond to college for $23,060 (yield of 14 percent); college paid issue price with funds contributed by taxpayer’s principal shareholder; held, original issue discount (OID) on bond not deductible because transaction served no business purpose; purpose to increase college’s endowment not sufficient); [Sheldon v. CIR, 94 TC 738 (1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990084850&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (*Goldstein* followed in disallowing deductions for interest in “repo” transactions where taxpayers’ partnership simultaneously purchased Treasury bills, sold them for cash, and agreed to repurchase them in future for same price plus interest; transactions lacked “tax-independent purpose” because taxpayer’s sole purpose was to generate current deductions for interest expense under repurchase agreement, even though matching discount income under repurchased bills would not be recognized until following year). |
| [83.1](#co_fnRef_F83_1_107960481_ID0EMJAG_1) | See generally Borek, Frattarelli & Hart, [Tax Shelters or Efficient Tax Planning? A Theory of the Firm Perspective on the Economic Substance Doctrine, 57 JL & Econ. 975 (2014)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0428584664&pubNum=0001457&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Canellos, [A Tax Practitioner’s Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters, 54 SMU L. Rev. 47 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0283475710&pubNum=0101925&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Cummings, The Sham Transaction Doctrine, 145 Tax Notes 1239 (Dec. 15, 2014); Gergen, [The Common Knowledge of Tax Abuse, 54 SMU L. Rev. 131 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0283475714&pubNum=0101925&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Grewal, Economic Substance and the Supreme Court, 116 Tax Notes 969 (Sept. 10, 2007); Hariton, [When and How Should the Economic Substance Doctrine Be Applied? 60 Tax L. Rev. 29 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0332224879&pubNum=0001247&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Glassman, [It’s Not a Lie If You Believe It: Tax Shelters and the Economic Substance Doctrine, 58 Fla. L. Rev. 665 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0327092749&pubNum=0100174&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Halpern, [Putting the Cart Before the Horse: Determining Economic Substance Independent of the Language of the Code, 30 Va. Tax Rev. 327 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0357515528&pubNum=0001508&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Kleinbard, Corporate Tax Shelters and Corporate Tax Management, 51 Tax Exec. 231 (May-June 1999); O’Neill, Let’s Try Again: Reformulating the Economic Substance Doctrine, 121 Tax Notes 1053 (Dec. 1, 2008); Shaviro & Weisbach, The Fifth Circuit Gets it Wrong in *Compaq v. Commissioner*, 94 Tax Notes 511 (Jan 28, 2002); Yin, [Getting Serious About Corporate Tax Shelters: Taking a Lesson From History, 54 SMU L. Rev. 209 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0283475719&pubNum=0101925&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). See also Senate Committee on Governmental Affairs, Permanent Subcommittee on Investigations, 108th Cong., 1st Sess., U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals (2003); Cummings, Economic Substance and IRS Management, 161 Tax Notes 1197 (Dec. 3, 2018); Lurie, I Know *Crane* and BOSS Isn’t *Crane* (A Historical Perspective), 86 Tax Notes 1932 (Mar. 27, 2000); Oei, [Beyond Economic Substance: Interrogating the Full Impacts of Third-Party Relationships in Tax Shelter Cases, 13 U. Pa. J. Bus. L. 383 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0362297070&pubNum=0206572&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)).  For extensive discussion of the distinction between the substance over form and economic substance doctrines, see [Rogers v. US, 281 F3d 1108 (10th Cir. 2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002140467&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . Essentially, the distinction is that the substance over form doctrine characterizes a transaction for tax purposes by its true nature, not necessarily according to the form taxpayers chose for the transaction, while the economic substance doctrine denies tax effect to a transaction whose economic effects and business justification are insignificant in relation to the tax benefits claimed to flow from the transaction. |
| [83.1a](#co_fnRef_F83_1a_107960481_ID0ERJAG_1) | [IRC § 7701(o)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_094e0000e3d66), discussed infra fns 83.31–83.40. |
| [83.2](#co_fnRef_F83_2_107960481_ID0EZKAG_1) | [Rice’s Toyota World, Inc. v. CIR, 752 F2d 89, 91 (4th Cir. 1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985102631&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_91&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_91) . See [Wells Fargo & Co. v. US, 957 F3d 840 (8th Cir. 2020)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2050833895&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (finding that “structured trust advantaged repackaged securities transaction (STARS)” had no reasonable possibility of a profit apart from taxes).  This approach has a precursor in Judge Learned Hand’s opinion in the *Gregory* case, stating that the “only defect” of the transactions involved in the case “was that they were not what [the statutory predecessor of [§ 368(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS368&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381)] means by a ‘reorganization,’ because the transactions were no part of the conduct of the business of either or both companies; so viewed they were a sham.” Helvering v. Gregory, 69 F2d 810, 811 (2d Cir. 1934), aff’d sub nom., [Gregory v. Helvering, 293 US 465 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123966&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [Nicole Rose Corp. v. CIR, 320 F3d 282, 284 (2d Cir. 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003176868&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_284&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_284) (“Whether a transaction lacks economic substance is a question of fact that we review under the clearly erroneous standard”). |
| [83.3](#co_fnRef_F83_3_107960481_ID0E1LAG_1) | [IES Indus., Inc. v. US, 253 F3d 350, 353 (8th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001516565&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_353&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_353), quoting from [Shriver v. CIR, 899 F2d 724, 725–726 (8th Cir. 1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990056337&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_725&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_725) . See Keinan, [The Many Faces of the Economic Substance’s Two-Prong Test: Time for Reconciliation? 1 NYU J. L. & Bus. 371 (2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0330388820&pubNum=0196949&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.4](#co_fnRef_F83_4_107960481_ID0ERMAG_1) | [Kirchman v. CIR, 862 F2d 1486, 1492 (11th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988164463&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_1492&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_1492) . See [United Parcel Serv. v. CIR, 254 F3d 1014, 1018 n.2 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001522919&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_1018&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_1018) (“*Rice’s Toyota World*, unlike *Kirchman*, requires a tax-avoidance purpose as well as a lack of substance; *Kirchman* explicitly refuses to examine subjective intent if the transaction lacks economic effects”); [US v. Heller, 866 F2d 1336 (11th Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989024963&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [493 US 818 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000780&cite=493US818&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“federal tax law disregards transactions lacking in economic purpose which are undertaken only to generate a tax savings”). See also [Rose v. CIR, 868 F2d 851, 853 (6th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989029911&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_853&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_853) (“the basic inquiry [is] whether the transaction had any practicable economic effect other than the creation of income tax losses”). |
| [83.5](#co_fnRef_F83_5_107960481_ID0E6MAG_1) | [United Parcel Serv. v. CIR, 254 F3d 1014, 1018 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001522919&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_1018&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_1018), cert. denied, [535 US 986 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002084826&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [Curtis Inv. Co. v. CIR, TC Memo. 2017-150](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2042308311&pubNum=0001051&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d, [2018 WL 6380325 (11th Cir. 2018)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2046188763&pubNum=0000999&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d sub nom., [2018 WL 6422483 (4th Cir. 2018)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2047047047&pubNum=0000999&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (finding that custom adjustable rate debt structure (CARDS) transactions lacked economic effect apart from tax benefits and were entered into without business purpose); Cummings, The Facts About CARDS, 157 Tax Notes 817 (Nov. 6, 2017). But see [Winn-Dixie Stores, Inc. v. CIR, 254 F3d 1313, 1316 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001553226&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_1316&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_1316) (sham-transaction doctrine is “that a transaction is not entitled to tax respect if it lacks economic effects or substance other than the generation of tax benefits, or if the transaction serves no business purpose”). |
| [83.6](#co_fnRef_F83_6_107960481_ID0EYNAG_1) | [IES Indus., Inc. v. US, 253 F3d 350, 353 (8th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001516565&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_353&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_353) . See [DeMartino v. Comm’r, 862 F2d 400, 406 (2d Cir. 1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988153181&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_406&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_406) (transaction is sham “if it is fictitious or if it has no business purpose or economic effect other than the creation of tax deductions”). |
| [83.7](#co_fnRef_F83_7_107960481_ID0EFOAG_1) | Saba Partnership v. CIR, 78 TCM (CCH) 684, 718 (1999), remanded, [273 F3d 1135 (DC Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001510129&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . In remanding, the Court of Appeals directed the Tax Court to reconsider its decision in light of [ASA Investerings Partnership v. CIR, 201 F3d 505 (DC Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000035886&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [531 US 871 (2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000428171&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), which “makes clear that ‘the absence of a nontax business purpose is fatal’ to the argument that the Commissioner should respect an entity for federal tax purposes.” [273 F3d 1135, 1141](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001510129&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_1141&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_1141) . See [Saba P’ship v. CIR, 85 TCM (CCH) 817 (2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003153168&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“no meaningful distinction between the partnerships in these cases and the partnership determined to be a sham in *ASA Investerings*...”). |
| [83.8](#co_fnRef_F83_8_107960481_ID0ELPAG_1) | [ACM Partnership v. CIR, 157 F3d 231, 247 (3d Cir. 1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998210692&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_247&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_247), cert. denied, [526 US 1017 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999033232&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . The court found a purported installment sale, devised as the centerpiece of a corporate tax shelter, to be lacking in economic substance. The partnership purchased short-term securities and promptly sold them for a cash down payment equal to 80 percent of their value and contingent notes having a present value equal to the remaining 20 percent. The notes, which called for a series of payments tied to the London Interbank Offered Rate (LIBOR), specified no maximum amount, but they were payable over a fixed period. Under the installment sales regulations, the basis of property sold in a contingent price sale is spread ratably over the years in which payments could be received if the sales contract fixes the period over which payments will be received but does not establish a maximum selling price. Reg. [§ 15a.453-1(c)(3)(i)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000547&cite=26CFRS15A.453-1&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_e97b0000f2de6), discussed infra ¶ 106.1.5 text accompanying fns 85–89 . As applied to ACM’s sale, this rule would have produced a large capital gain for the year of the sale and offsetting capital losses for subsequent years. Most of the capital gain was allocated to a foreign partner that was exempt from U.S. tax on capital gains, and most of the capital losses were allocated to a U.S. corporate partner that had realized a large capital gain in an unrelated transaction and hoped to offset this gain with deductions for the losses allocated to it from the partnership. The court affirmed the Tax Court’s conclusion “that ACM’s exchange of the [short-term securities] for contingent-payment LIBOR notes which gave rise to the tax consequences at issue generated only ‘a phantom loss’ that was not ‘economically inherent in the object of the sale’ and did not have ‘economic substance separate and distinct from economic benefit achieved solely by tax reduction.”’ [157 F3d at 249](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998210692&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_249&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_249), quoting from [ACM Partnership v. CIR, 73 TCM (CCH) 2189, 2215 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997063638&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_1620_2215&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_1620_2215).  The Court of Appeals for the District of Columbia Circuit, considering a substantially identical transaction, held that the partnership, not merely the particular transactions, was a sham for federal tax purposes. [Boca Investerings Partnership v. US, 314 F3d 625 (DC Cir. 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002790905&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [ASA Investerings Partnership v. CIR, 201 F3d 505 (DC Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000035886&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [531 US 871 (2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000428171&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.9](#co_fnRef_F83_9_107960481_ID0EDQAG_1) | [Falsetti v. CIR, 85 TC 332, 347 (1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986950009&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_347&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_347) (no purchase occurred where (1) U.S. person sold property to Cayman Islands corporation, (2) corporation resold property at much higher price to U.S. partnership, (3) original U.S. seller later reimbursed partners of U.S. partnership for their investments in partnership, with interest, and (4) purchasers took no steps to search title, record deeds, or take control of property). See [CNT Investors, LLC v. CIR, 144 TC 161 (2015)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2035659712&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“In a transaction that is a sham in substance, papers may have been signed and money moved around, but in concrete, economic terms, the transaction is a nullity. Afterward, the parties’ beneficial interests remain essentially unchanged”); [Helba v. CIR, 87 TC 983 (1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987035464&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d without opinion, [860 F2d 1075 (3d Cir. 1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988127832&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (partnerships’ purported purchase of videotapes was sham in substance because (1) transactions were made on terms unilaterally established by sellers, suggesting a lack of arm’s-length bargaining, (2) notes given in payment of price effectively bore interest at 52 percent annually, (3) principal amounts were so inflated as to cast doubt on whether notes, although purportedly recourse notes, would ever be enforced, and (4) offering memoranda contained detailed information on expected tax benefits, but were largely silent on economic aspects of transactions). |
| [83.10](#co_fnRef_F83_10_107960481_ID0ELQAG_1) | See [Rev. Rul. 99-14, 1999-1 CB 835, 836](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999075553&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), superceded by [Rev. Rul. 2002-69, 2002-44 IRB 760](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002647319&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“In determining whether a transaction has sufficient economic substance to be respected for tax purposes, courts have recognized that offsetting legal obligations, or circular cash flows, may effectively eliminate any real economic significance of the transaction”). |
| [83.11](#co_fnRef_F83_11_107960481_ID0EYQAG_1) | [Kirchman v. CIR, 862 F2d 1486, 1492 (11th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988164463&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_1492&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_1492). |
| [83.12](#co_fnRef_F83_12_107960481_ID0EYRAG_1) | [Rose v. CIR, 88 TC 386, 410–411, 412 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987085450&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_410&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_410), aff’d, [868 F2d 851, 853 (6th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989029911&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_853&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_853) (art tax shelter was sham because (1) taxpayers invested “primarily, if not exclusively” to obtain tax benefits, (2) price fixed at $550,000, but value negligible, and (3) price financed with nonrecourse debt not likely to be paid). For cases following *Rose*, see [Pasternak v. CIR, 990 F2d 893 (6th Cir. 1993)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993082353&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Ryback v. CIR, 91 TC 524 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988113747&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Horn v. CIR, 90 TC 908 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988061566&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (tax shelter investment in gold mines; “the ‘gold’ [taxpayers sought] was not located in the ground but in the anticipated tax benefits”); [Clayden v. CIR, 90 TC 656 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988047207&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See also [Hudson v. CIR, 103 TC 90, 100 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994157510&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_100&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_100), aff’d without opinion, [71 F3d 877 (5th Cir. 1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995241811&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“In deciding whether transactions lack economic substance, we consider such factors as the lack of arm’s-length negotiations, inflated purchase prices, the structure of the financing of the transactions, and the degree of adherence to contractual terms”); [Rev. Rul. 99-14, 1999-1 CB 835, 836](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999075553&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“a key factor is whether the transaction has any practical economic effect other than the creation of tax losses.... The presence of an insignificant pre-tax profit is not enough to provide a transaction with sufficient economic substance to be respected for tax purposes”).  The Court of Appeals for the Second Circuit has warned against overly impressionistic applications of the sham doctrine, reversing a decision based primarily on the trial court’s evaluation of the merits of a motion picture owned by the taxpayer’s partnership. [Jacobson v. CIR, 915 F2d 832, 839 (2d Cir. 1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990142534&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_839&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_839) (“We reject this judicial version of the Siskel and Ebert ‘thumbs up, thumbs down’ approach...”). See also [Bryant v. CIR, 928 F2d 745, 749 (6th Cir. 1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991058400&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_749&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_749) (Tax Court improperly found gold mine investment was sham where gold mine actually existed and produced gold; “in determining whether a transaction was a sham, the court should not address whether, in the light of hindsight, the taxpayer made a wise investment, [but] whether the taxpayer made a *bona fide* investment at all or whether he merely purchased tax deductions”). |
| [83.13](#co_fnRef_F83_13_107960481_ID0EQSAG_1) | [United Parcel Serv. v. CIR, 254 F3d 1014, 1018 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001522919&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_1018&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_1018), citing [Frank Lyon Co. v. US, 435 US 561 (1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978114216&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See Stansbury, *United Parcel Service of America v. Commissioner*: Eleventh Circuit Delivers a Message on Judicial Economy, 30 Tax Mgmt. Int’l J. 415 (2001); Taylor & Immerman, The Curious Role of Motive in the Tax Court’s Analysis in *UPS*, 85 Tax Notes 1321 (Dec. 6, 1999). See also Kingson, Tax Confusion Over Tax Ownership, 93 Tax Notes 409 (Oct. 15, 2001), reprinted in 24 Tax Notes Int’l 499 (Oct. 29, 2001). |
| [83.14](#co_fnRef_F83_14_107960481_ID0EETAG_1) | [United Parcel Serv. v. CIR, 254 F3d 1014, 1018 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001522919&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_1018&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_1018). |
| [83.15](#co_fnRef_F83_15_107960481_ID0ESTAG_1) | [United Parcel Serv. v. CIR, 254 F3d 1014, 1019 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001522919&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_1019&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_1019). |
| [83.16](#co_fnRef_F83_16_107960481_ID0EYTAG_1) | [Winn-Dixie Stores, Inc. v. CIR, 254 F3d 1313 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001553226&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), quoting [Kirchman v. CIR, 862 F2d 1486, 1492 (11th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988164463&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_1492&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_1492) . See [In Re CM Holdings, Inc., 301 F3d 96, 102 (3d Cir. 2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002525670&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_102&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_102) (“Economic substance is a prerequisite to the application of any Code provision allowing deductions”). |
| [83.17](#co_fnRef_F83_17_107960481_ID0EIUAG_1) | However, courts have held that by enacting [§ 264(c)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS264&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_10c0000001331), disallowing deductions for interest on loans against life insurance if four or more of the first seven annual premiums are paid by borrowing, Congress did not create a safe harbor for deductions for interest on loans against corporate-owned life insurance (COLI) acquired as tax shelters found to be sham, notwithstanding compliance with the four-of-seven rule. [In re CM Holdings, Inc., 301 F3d 96, 105 (3d Cir. 2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002525670&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_105&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_105) (“Choosing a tax-favored investment vehicle is fine, but engaging in an empty transaction that shuffles payments for the sole purpose of generating a deduction is not”); [Winn-Dixie Stores, Inc. v. CIR, 254 F3d 1313 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001553226&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [535 US 986 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002084826&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)).  Under a COLI arrangement, a corporation purchases life insurance on a group of its employees, often including relatively lowly paid employees (leading to references to the arrangements as janitors’ insurance). The corporation names itself as beneficiary and assumes responsibility for all premium payments. It borrows against the policies to pay premiums for only three of the first seven years, in order to comply with [§ 264(c)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS264&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_4b24000003ba5), but it withdraws against cash surrender value to pay premiums for other years. The policies are structured to limit the possibility of the corporation profiting by employee deaths. Cash flow from the arrangement is usually negative before taxes, at least for the first 15 or so years of the arrangement, but after taking into account deductions for interest on policy loans, cash flow is positive. Courts have found these arrangements to be shams because they offer little if any opportunity for profit apart from taxes. In addition to the cases cited in the preceding paragraph, the cases so holding include [Dow Chem. Co. v. US, 435 F3d 594 (6th Cir. 2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008249691&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [549 US 1205 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010418441&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [American Elec. Power v. US, 326 F3d 737 (6th Cir. 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003315313&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [540 US 1104 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003694421&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.18](#co_fnRef_F83_18_107960481_ID0EVUAG_1) | [Sacks v. CIR, 69 F3d 982, 992 (9th Cir. 1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995217181&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_992&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_992) . See [Historic Boardwalk Hall, LLC v. CIR, 136 TC 1 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2024281592&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (rehabilitation tax credits taken into account in determining whether taxpayer had genuine expectation of profit; expectation of pretax profit not required to demonstrate economic substance); Bauer & Juran, The Economic Substance of Tax Credits, 131 Tax Notes 499 (May 2, 2011). |
| [83.19](#co_fnRef_F83_19_107960481_ID0EEVAG_1) | [Compaq Computer Corp. v. CIR, 2002-1 USTC ¶ 50,144 (5th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001592312&pubNum=0000866&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [IES Indus., Inc. v. US, 253 F3d 350 (8th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001516565&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See Kingson, Tax Confusion Over Tax Ownership, 93 Tax Notes 409 (Oct. 15, 2001). |
| [83.20](#co_fnRef_F83_20_107960481_ID0E6WAG_1) | [Rice’s Toyota World, Inc. v. CIR, 752 F2d 89, 91 (4th Cir. 1985)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985102631&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_91&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_91).  In [Black & Decker Corp. v. US, 436 F3d 431 (4th Cir. 2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008333225&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), the court rejected a district court’s application of the business purpose test. During its taxable year 1998, for which it had substantial capital gains, the taxpayer (1) transferred $561 million in cash to a newly organized corporation in exchange for stock of the corporation and the corporation’s assumption of the taxpayer’s liability for contingent employee healthcare claims valued at $560 million and (2) sold the stock to an unrelated person for $1 million. The taxpayer claimed a capital loss of $560 million on the stock sale. The district court granted summary judgment rejecting the IRS’s claim that the transaction lacked in economic substance, finding that because the corporation had taken over administration of the taxpayer’s health plans, the transactions had “very real economic implications” and that “A corporation and its transactions are objectively reasonable, despite any tax-avoidance motive, so long as the corporation engages in bona fide economically-based business transactions.” The Court of Appeals reversed on this point, finding that the district court had “strayed from our precedents” and “mischaracterized the Rice’s Toyota test, which focuses not on the general business activities of a corporation, but on the specific transaction whose tax consequences are in dispute.” [Black & Decker Corp. v. US, 436 F3d 431, 441 (4th Cir. 2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008333225&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_441&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_441) . See Burke, *Black & Decker* in the Fourth Circuit: Tax Shelters and Textualism, 111 Tax Notes 315 (Apr. 17, 2006); Lipton, [Will *Black & Decker* Turn out to Be a Pyrrhic Victory for the IRS? 104 J. Tax’n 200 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0315012472&pubNum=0100326&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)).  For cases finding that similar liability assumption transactions lacked economic substance, see [Coltec Indus., Inc. v. US, 454 F3d 1340 (Fed. Cir. 2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009534246&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [549 US 1206 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010693617&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Gerdau Macsteel, Inc. v. CIR, 139 TC 67 (2012)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028514534&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See generally Lipton, [What Will Be the Impact of the Government’s Economic Substance Victory in *Coltec*? 105 J. Tax’n 136 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0327471584&pubNum=0100326&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Prusiecki, *Coltec*: A Case of Misdirected Analysis of Economic Substance, 112 Tax Notes 524 (Aug. 7, 2006). |
| [83.21](#co_fnRef_F83_21_107960481_ID0E2XAG_1) | [Compaq Computer Corp. v. CIR, 113 TC 214, 224 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999216084&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_224&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_224), rev’d, [277 F3d 778 (5th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001592312&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.22](#co_fnRef_F83_22_107960481_ID0E3YAG_1) | [Gregory v. Helvering, 293 US 465, 469 (1935)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123966&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_469&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_469). |
| [83.23](#co_fnRef_F83_23_107960481_ID0EKZAG_1) | [IES Indus., Inc. v. US, 253 F3d 350, 355 (8th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001516565&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_355&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_355). |
| [83.24](#co_fnRef_F83_24_107960481_ID0EOZAG_1) | The Fifth Circuit, dealing with a taxpayer who engaged in a substantially identical transaction without considering much beyond the hoped for tax benefits, still found business purpose for the transaction. [Compaq Computer Corp. v. CIR, 2002-1 USTC ¶ 50,144 (5th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001592312&pubNum=0000866&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . The Tax Court said in *Compaq* that the business purpose “inquiry *takes into account* whether the taxpayer conducts itself in a realistic and legitimate business fashion, thoroughly considering and analyzing the ramifications of a questionable transaction, before proceeding with the transaction.” [Compaq Computer Corp. v. CIR, 113 TC 214, 224 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999216084&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_224&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_224), rev’d, [2002-1 USTC ¶ 50,144 (5th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001592312&pubNum=0000866&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (emphasis added). However, the Tax Court did not say that thorough consideration and analysis establishes a business purpose for a transaction that has no “useful nontax purpose.” |
| [83.25](#co_fnRef_F83_25_107960481_ID0EQ2AG_1) | [United Parcel Serv. v. CIR, 254 F3d 1014, 1019–1020 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001522919&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_1019&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_1019). |
| [83.26](#co_fnRef_F83_26_107960481_ID0EL3AG_1) | [Price v. CIR, 88 TC 860, 886 (1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987118278&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_886&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_886), aff’d without opinion (10th Cir. 1990).  Several other courts have held that costs incurred in arranging and executing a transaction lacking economic substance are not deductible because, in the language of [§ 162(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS162&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_8b3b0000958a4), they are neither “ordinary” nor “necessary.” [Klamath Strategic Inv. Fund, LLC v. US, 568 F3d 537 (5th Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018843468&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Karr v. CIR, 924 F2d 1018 (11th Cir. 1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991036769&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Kirchman v. CIR, 862 F2d 1486 (11th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988164463&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Gerdau Macsteel, Inc. v. CIR, 139 TC 67 (2012)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028514534&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Winn-Dixie Stores, Inc. v. CIR, 113 TC 254 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999235584&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d, [254 F3d 1313 (11th Cir. 2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001553226&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.27](#co_fnRef_F83_27_107960481_ID0EQ3AG_1) | See, e.g., [ACM Partnership v. CIR, 157 F3d 231 (3d Cir. 1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998210692&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [526 US 1017 (1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999033232&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“The actual economic losses associated with ACM’s ownership of the LIBOR notes are both economically substantive and separable from the sham aspects of the underlying transaction”); [US v. Wexler, 31 F3d 117 (3d Cir. 1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994150114&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [513 US 1190 (1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994231116&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.28](#co_fnRef_F83_28_107960481_ID0ED4AG_1) | [Pub. L. No. 111-152, § 1409(a), 124 Stat. 1029 (2010).](http://www.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID(I54B465A041-9711DF93ADE-62B13BD9BAB)&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=SL&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) The provision applies to transactions “entered into” after March 30, 2010. Id. § 1409(e). See generally Staff of Joint Comm. on Tax’n, Technical Explanation of the Revenue Provisions of the “Reconciliaton Act of 2010,” as Amended, in Combination With the “Patient Protection and Affordable Care Act” (JCX-18-10) (Mar. 21, 2010); Armstrong, [OMG! ESD Codified!: The Overreaction to Codification of the Economic Substance Doctrine, 9 Fla. A&M UL Rev. 113 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0404132993&pubNum=0207321&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Cullinan & Lord, Economic Substance Doctrine: Unconstitutionally Vague? 130 Tax Notes 700 (Feb. 7, 2011): Jellum, [Codifying and “Miscodifying” Judicial Anti-Abuse Tax Doctrines, 33 Va. Tax Rev. 579 (2014)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0405879725&pubNum=0001508&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); McMahon, Living With the Codified Economic Substance Doctrine, 128 Tax Notes 731 (Aug. 16, 2010); Rosenberg, [Codification of the Economic Substance Doctrine: Agency Response and Certain Other Unforeseen Consequences, 10 Wm. & Mary Bus. L. Rev. 199 (2018)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0477710472&pubNum=0213241&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Wells, [Economic Substance Doctrine: How Codification Changes Decided Cases, 10 Fla. Tax Rev. 411 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0356667143&pubNum=0111260&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). See also Jackel, Subchapter K and the Codified Economic Substance Doctrine, 128 Tax Notes 321 (July 19, 2010); Lubin, [Congress Should Address Tax Avoidance Head-On: The Internal Revenue Code Needs a GAAR, 30 Va. Tax Rev. 339 (2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0357515529&pubNum=0001508&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)).  Proposals to codify the economic substance in the Code were debated for years before the 2010 enactment. See ABA Section of Taxation, Supplemental Comments on the Proposed Codification of the Economic Substance Doctrine, 115 Tax Notes 389 (Apr. 23, 2007); Battiste, [Why Congress Should Codify the Economic Substance Doctrine: A Discussion on the Virtues of a Predictable Test, 7 Fla. St. U. Bus. L. Rev. 51 (2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0340578366&pubNum=0199425&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Chirelstein & Zelenak, [Tax Shelters and the Search for a Silver Bullet, 105 Colum. L. Rev. 1939 (2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0305997226&pubNum=0003050&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Gideon, Corporate Tax Shelter Proposals and Transparency, in Nat’l Tax Ass’n, Proc. 92d Ann. Conf. on Tax’n 269 (1999); Miller, An Alternative to Codification of the Economic Substance Doctrine, 123 Tax Notes 747 (May 11, 2009); Stretch, Lay & Galoto, Economic Substance and Strict Liability Do Not Mix, 123 Tax Notes 1357 (June 15, 2009); Zelenak, [Codifying Anti-Avoidance Doctrines and Controlling Corporate Tax Shelters, 54 SMU L. Rev. 177 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0283475717&pubNum=0101925&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). See also Aprill, [Tax Shelters, Tax Law, and Morality: Codifying Judicial Doctrines, 54 SMU L. Rev. 9 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0283475708&pubNum=0101925&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Cooper, [International Experience With General Anti-Avoidance Rules, 54 SMU L. Rev. 83 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0283475712&pubNum=0101925&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Galle, [Interpretative Theory and Tax Shelter Regulation, 26 Va. Tax Rev. 357 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0331695030&pubNum=0001508&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Gunn, [The Use and Misuse of Antiabuse Rules: Lessons From the Partnership Antiabuse Regulations, 54 SMU L. Rev. 159 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0283475716&pubNum=0101925&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.29](#co_fnRef_F83_29_107960481_ID0ER4AG_1) | [IRC § 7701(o)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_00a40000f8ca6). |
| [83.30](#co_fnRef_F83_30_107960481_ID0E64AG_1) | [IRC § 7701(o)(5)(A)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7f5e000003ce6). |
| [83.31](#co_fnRef_F83_31_107960481_ID0EE5AG_1) | [IRC § 7701(o)(5)(C)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_3cb90000dd482). According to the IRS, this means that if prior “authorities ... provided that the economic substance doctrine was not relevant to whether certain tax benefits are allowable, the IRS will continue to take the position that the economic substance doctrine is not relevant to whether those tax benefits are allowable,” but “the case law regarding the circumstances in which the economic substance doctrine is relevant” should “continue to develop.” [Notice 2010-62, 2010-40 IRB 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022968657&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.32](#co_fnRef_F83_32_107960481_ID0ES5AG_1) | [Notice 2010-62, 2010-40 IRB 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022968657&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). Also, the IRS will not issue a private letter ruling or determination letter on whether the economic substance doctrine is relevant to a transaction or whether a transaction complies with the requirements of [§ 7701(o)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_094e0000e3d66). |
| [83.33](#co_fnRef_F83_33_107960481_ID0EX5AG_1) | [IRC § 7701(o)(5)(B)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_40040000d5472). |
| [83.34](#co_fnRef_F83_34_107960481_ID0ER6AG_1) | [IRC § 7701(o)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_00a40000f8ca6). See [Notice 2010-62, 2010-40 IRB 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022968657&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (IRS relies “on relevant case law under the common-law economic substance doctrine in applying” each of two prongs of test). See generally [John Hancock Life Ins. Co. v. CIR, 141 TC 1 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031229361&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (finding that several lease-in-lease-out (LILO) and sale-in-lease-out (SILO) transactions did not fail either objective or subjective prongs of economic substance test, but that some claimed tax benefits were not allowable because substance of some lease transactions was not “true lease”). |
| [83.35](#co_fnRef_F83_35_107960481_ID0ERABG_1) | [IRC § 7701(o)(3)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_1ab50000ec462). |
| [83.36](#co_fnRef_F83_36_107960481_ID0EZABG_1) | See [Notice 2010-62, 2010-40 IRB 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022968657&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ([§ 7701(o)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_00a40000f8ca6) “mandates the use of a conjunctive two-prong test to determine whether a transaction shall be treated as having economic substance”). |
| [83.37](#co_fnRef_F83_37_107960481_ID0EHBBG_1) | [IRC § 7701(o)(2)(A)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_20750000664c2). See [Notice 2010-62, 2010-40 IRB 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022968657&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“In performing this calculation, the IRS will apply existing relevant case law and other published guidance”). |
| [83.38](#co_fnRef_F83_38_107960481_ID0EVBBG_1) | [IRC § 7701(o)(2)(B)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_3a5a0000d3512). The Treasury is directed to “issue regulations requiring foreign taxes to be treated as expenses in determining pre-tax profit in appropriate cases.” See [Notice 2010-62, 2010-40 IRB 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022968657&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (The Treasury intends to issue such regulations, but until it does, “the enactment of the provision does not restrict the ability of the courts to consider the appropriate treatment of foreign taxes in economic substance cases”). |
| [83.39](#co_fnRef_F83_39_107960481_ID0EDCBG_1) | [IRC § 7701(o)(4)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_0fc50000781c0). |
| [83.40](#co_fnRef_F83_40_107960481_ID0EBDBG_1) | [Bank of New York Mellon Corp. v. CIR, 140 TC 15, 34 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2029836361&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_34&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_34). |
| [83.41](#co_fnRef_F83_41_107960481_ID0EJDBG_1) | [Bank of New York Mellon Corp. v. CIR, TC Memo 2013-225](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031619949&pubNum=0001051&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.42](#co_fnRef_F83_42_107960481_ID0EXDBG_1) | [Bank of New York Mellon Corp. v. CIR, 140 TC 15, 34 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2029836361&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_34&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_34). |
| [83.43](#co_fnRef_F83_43_107960481_ID0E3DBG_1) | The court also denied deductions for costs of establishing and effectuating these steps. [Bank of New York Mellon Corp. v. CIR, 140 TC 15, 47 (2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2029836361&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_47&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_47). |
| [83.44](#co_fnRef_F83_44_107960481_ID0EBEBG_1) | [IRC § 7701(o)(5)(D)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_a7b6000098c86). |
| [83.45](#co_fnRef_F83_45_107960481_ID0EJEBG_1) | HR Rep. No. 111-443(1), 111th Cong., 2d Sess. 296-297 (2010). |
| [83.46](#co_fnRef_F83_46_107960481_ID0EXEBG_1) | [Notice 2014-58, 2014-44 IRB 746](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034550280&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [83.47](#co_fnRef_F83_47_107960481_ID0ESFBG_1) | [IRC § 6662(b)(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6662&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_61d20000b6d76). For the accuracy-related penalty, see infra ¶ 114.4.  The IRS has announced that it will not use the reference to “any similar rule of law” as an independent basis for imposing the penalty. According to the IRS, a “similar rule of law” is a “rule or doctrine that disallows” income tax benefits “related to a transaction because ... the transaction does not change a taxpayer’s economic position in a meaningful way (apart from Federal income tax effects)” or “the taxpayer did not have a substantial purpose (apart from Federal income tax effects) for entering into the transaction.” Thus, a similar rule of law is “a rule or doctrine that applies the same factors and analysis that is required under [section 7701(o)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS7701&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_094e0000e3d66) for an economic substance analysis, even if a different term or terms (for example, ‘sham transaction doctrine’) are used to describe the rule or doctrine.” The IRS has assured taxpayers that if it “does not raise” the economic substance doctrine to disallow claimed tax benefits “and instead relies upon other judicial doctrines (e.g., the substance over form or step transaction doctrines) to support the underlying adjustments, the IRS will not apply a [section 6662(b)(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6662&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_61d20000b6d76) penalty.” [Notice 2014-58, 2014-44 IRB 746](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034550280&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (effective for transactions entered into after March 30, 2010). |
| [83.48](#co_fnRef_F83_48_107960481_ID0EJGBG_1) | [IRC §§ 6662(i)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6662&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_2d8d0000f3311), [6662(i)(2)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6662&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_f2fd000080d26). To be adequate, the disclosure must be made on a Form 8275 or 8275-R. [Notice 2010-62, 2010-40 IRB 411](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022968657&pubNum=0004502&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). See also Hodes, The Case for a Different Kind of Disclosure Regime, 128 Tax Notes 975 (Aug. 30, 2010). |
| [83.49](#co_fnRef_F83_49_107960481_ID0EXGBG_1) | [IRC § 6662(i)(3)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6662&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_b4940000fb763). |
| [83.50](#co_fnRef_F83_50_107960481_ID0E3GBG_1) | [IRC §§ 6664(c)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6664&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_10c0000001331), [6664(c)(2)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6664&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_fcf30000ea9c4). |
| [83.51](#co_fnRef_F83_51_107960481_ID0EJHBG_1) | [IRC § 6676](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6676&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [84](#co_fnRef_F84_107960481_ID0EBIBG_1) | It is dangerous to be dogmatic in pinpointing the source of this protean doctrine, particularly because in its earlier days it was sometimes regarded as an aspect of the pervasive injunction to look at substance rather than form. The earliest explicit statement of the step transaction doctrine, however, seems to be [Warner Co. v. CIR, 26 BTA 1225, 1228 (1932)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932000393&pubNum=0000165&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_165_1228&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_165_1228) (acq.), which held that a statutory provision relating to corporate reorganizations “permits, if it does not require, an examination of the several steps taken which culminated in the taxpayer’s acquisition of the...assets.” See also [Tulsa Tribune Co. v. CIR, 58 F2d 937, 940 (10th Cir. 1932)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932127313&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_940&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_940) (rejecting, a few months before *Warner Co*. was decided, an “attempt [by the government] to break this transaction up into two elements by saying that Jones bought the property and then transferred it to the corporation in exchange for its capital stock”); [Carter Publications, Inc. v. CIR, 28 BTA 160, 164 (1933)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933000100&pubNum=0000165&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_165_164&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_165_164) (acq.) (“the whole series of acts, corporate and otherwise, constituted only a single transaction”). See also Cummings, Avoiding Linked Events: How Long Must We Wait? 148 Tax Notes 781 (Aug. 17, 2015). |
| [85](#co_fnRef_F85_107960481_ID0EIIBG_1) | See generally Paul, Step Transactions, in Paul, Selected Studies in Federal Taxation 200 (Callaghan, 2d ser. 1938); Bowen, The End Result Test, 72 Taxes 722 (1994); Mintz & Kwall & Maynard, [Dethroning *King Enterprises*, 58 Tax Law. 1 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0303739293&pubNum=0100406&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category));Plumb, Step Transactions in Corporate Reorganizations, 12 NYU Inst. on Fed. Tax’n 247 (1954); Murray, Step Transactions, 24 U. Miami L. Rev. 60 (1969). See also Cummings, [Circular Cash Flows and the Federal Income Tax, 64 Tax Law. 535 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0367192970&pubNum=0100406&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [86](#co_fnRef_F86_107960481_ID0EGJBG_1) | [IRC § 351(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS351&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_8b3b0000958a4), discussed infra ¶ 91.5.2. |
| [87](#co_fnRef_F87_107960481_ID0EXJBG_1) | Reg. [§ 1.351-1(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000547&cite=26CFRS1.351-1&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381). See also [Rev. Rul. 79-250, 1979-2 CB 156](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979020341&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [88](#co_fnRef_F88_107960481_ID0E2JBG_1) | Reg. [§ 1.351-1(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000547&cite=26CFRS1.351-1&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381). |
| [89](#co_fnRef_F89_107960481_ID0EHLBG_1) | See generally [Reeves v. CIR, 71 TC 727 (1979)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979290138&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), vacated sub nom. [Chapman v. CIR, 618 F2d 856 (1st Cir. 1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980112700&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), rev’d sub nom. [Heverly v. CIR, 621 F2d 1227 (3d Cir. 1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980118162&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; infra ¶ 94.2.3. |
| [90](#co_fnRef_F90_107960481_ID0EVLBG_1) | See, e.g., InterTAN, Inc. v. CIR, 86 TCM (CCH) 767, aff’d without opinion (5th Cir. 2004) (denying tax effect to transactions by which (1) taxpayer’s Canadian subsidiary borrowed $20 million from bank and used proceeds to repay debt owed to taxpayer, (2) taxpayer paid $20 million to subsidiary for newly issued stock, (3) subsidiary redeemed stock for $20 million, (4) taxpayer reloaned $20 million to subsidiary, and (5) subsidiary repaid bank; accuracy-related penalty imposed because taxpayer’s treatment of transaction not supported by substantial authority); [Redwing Carriers, Inc. v. Tomlinson, 399 F2d 652 (5th Cir. 1968)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968118801&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (sale of old equipment and purchase of new, although purportedly separate, treated as a single transaction, which was like kind exchange under [§ 1031](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS1031&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category))); [Century Elec. Co. v. CIR, 192 F2d 155 (8th Cir. 1951)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951116631&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [342 US 954 (1952)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1952201264&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (also involving [§ 1031](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS1031&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category))); [Coupe v. CIR, 52 TC 394 (1969)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969290063&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (acq. in result) (three-party exchange) ; [Magnolia Dev. Corp. v. CIR, 19 TCM (CCH) 934 (1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960001071&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (transaction with charity). But see [Norwest Corp. v. CIR, 108 TC No. 265 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0001415&cite=108TCNO265&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (in “debt-equity conversion,” taxpayer exchanged debt denominated in foreign currency for units of that currency, subject to restrictions requiring investment of currency in local corporation and barring repatriation of investment for 12 years; held, because restrictions did not require investment in particular foreign corporation, payment of debt and investment of currency were separate transactions that cannot be integrated under step transaction doctrine); [GM Trading Corp. v. CIR, 103 TC 59 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994156218&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), rev’d, [121 F3d 977 (5th Cir. 1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997178890&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (same result on similar facts).  See, e.g., [InterTAN, Inc. v. CIR, 87 TCM (CCH) 767](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004042846&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d without opinion (5th Cir. 2004) (denying tax effect to transactions by which (1) taxpayer’s Canadian subsidiary borrowed $20 million from bank and used proceeds to repay debt owed to taxpayer, (2) taxpayer paid $20 million to subsidiary for newly issued stock, (3) subsidiary redeemed stock for $20 million, (4) taxpayer reloaned $20 million to subsidiary, and (5) subsidiary repaid bank; accuracy-related penalty imposed because taxpayer’s treatment of transaction not supported by substantial authority); [Andantech LLC v. CIR, 83 TCM (CCH) 1476 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002237281&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d on this issue, [331 F3d 972 (DC Cir. 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003403871&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (disregarding limited liability company (LLC) created as part of lease stripping transaction; LLC purchased computers and leased them back to user, sold rights to future rents, and allocated resulting income to nonresident alien members, who claimed exemption under income tax treaty and quickly disposed of their interests pursuant to prearranged plan). |
| [91](#co_fnRef_F91_107960481_ID0EZMBG_1) | [Manhattan Bldg. Co. v. CIR, 27 TC 1032, 1042 (1957)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957001044&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_1042&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_1042) (acq.), citing [American Bantam Car Co. v. CIR, 11 TC 397 (1948)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1948000199&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d per curiam, [177 F2d 513 (3d Cir. 1949)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1949201786&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [339 US 920 (1950)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1949201585&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . The interdependency test was proposed and extensively discussed by Paul, supra Fn 85. Mintz & Plumb, supra Fn 85, at 285, conclude that in reorganization cases, the test “seems to be whether the step was intended, or even contemplated as an alternative,” rather than the interdependency test proposed by Paul. See [Andantech LLC v. CIR, 83 TCM (CCH) 1476, 1506 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002237281&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_1620_1506&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_1620_1506) (interdependence test met where “the steps involved in the transactions at issue lack any reasoned economic justification standing alone”).  The Tax Court has also said:  [W]hen a taxpayer adheres strictly to the requirements of a statute intended to confer tax benefits, whether or not steps in an integrated transaction, when the result of the steps is what is intended by the parties and fits within the particular statute, and when each of the several steps and the timing thereof has economic substance and is motivated by valid business purposes, the steps shall be given effect according to their respective terms.  [Tandy Corp. v. CIR, 92 TC 1165 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989081742&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [Falconwood Corp. v. US, 422 F3d 1339 (Fed. Cir. 2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007229787&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (compliance with detained requirements of regulation on consolidated returns precluded IRS resort to step transaction doctrine). In contrast, according to the Court of Appeals for the Tenth Circuit  To ratify a step transaction that exalts form over substance merely because the taxpayer can either (1) articulate some business purpose allegedly motivating the indirect nature of the transaction or (2) point to an economic effect resulting from the series of steps, would frequently defeat the purpose of the substance over form principle.[True v. US, 190 F3d 1165 (10th Cir. 1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999207963&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [91.1](#co_fnRef_F91_1_107960481_ID0EGNBG_1) | [Andantech LLC v. CIR, 83 TCM (CCH) 1476, 1504 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002237281&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_1620_1504&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_1620_1504) . According to the Tax Court, the binding commitment test may be applied as the exclusive test only if a substantial amount of time lapses between two steps. On the other hand, the court stated that “a transaction need only satisfy one of the tests to allow for the step transaction doctrine to be invoked.” [Superior Trading, LLC v. CIR, 137 TC 70, 90 (2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026074827&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_90&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_90) (finding that one year was not substantial period for this purpose and that end result and interdependence tests were satisfied in instant case), aff’d, [728 F3d 676 (7th Cir. 2013)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031352184&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See also [Kenna Trading, LLC v. CIR, 143 TC 322 (2014)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034699234&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (reaffirming holding of *Superior Trading* with respect to essentially identical transactions). |
| [92](#co_fnRef_F92_107960481_ID0EVNBG_1) | See [King Enters., Inc. v. US, 418 F2d 511 (Ct. Cl. 1969)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969120980&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [93](#co_fnRef_F93_107960481_ID0EZNBG_1) | Compare [Douglas v. CIR, 37 BTA 1122 (1938)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1938000405&pubNum=0000165&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (acq.) (five-year delay in consummating corporate reorganization resulting from nonassignability of contracts and disputed claims) with [Henricksen v. Braicks, 137 F2d 632 (9th Cir. 1943)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943117619&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (liquidation treated as independent of transfer of assets to new corporation 30 minutes later). |
| [94](#co_fnRef_F94_107960481_ID0EOOBG_1) | See infra ¶ 91.5.2. |
| [95](#co_fnRef_F95_107960481_ID0ESOBG_1) | For classification of step transaction cases by type of business transaction, see Mintz & Plumb, supra Fn 85; Murray, supra Fn 85. |
| [96](#co_fnRef_F96_107960481_ID0E3PBG_1) | [IRC § 351(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS351&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_8b3b0000958a4), discussed infra ¶ 91.5.2. |
| [97](#co_fnRef_F97_107960481_ID0EXRBG_1) | [Minnesota Tea Co. v. Helvering, 302 US 609, 613 (1938)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1938122467&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_613&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_613). |
| [98](#co_fnRef_F98_107960481_ID0EKSBG_1) | [Minnesota Tea Co. v. Helvering, 302 US 609, 613–614 (1938)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1938122467&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_613&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_613). |
| [99](#co_fnRef_F99_107960481_ID0EOTBG_1) | [Minnesota Tea Co. v. Helvering, 302 US 609, 614 (1938)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1938122467&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_614&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_614). |
| [100](#co_fnRef_F100_107960481_ID0EBUBG_1) | [Rev. Rul. 70-140, 1970-1 CB 73](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970015310&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). See [Perry v. US, 520 F2d 235 (4th Cir. 1975)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975111810&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [423 US 1052 (1976)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976214269&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (demonstration of business purpose for isolated step in multistep integrated transaction is insufficient; business purpose must be shown for transaction as a whole); [JM Turner & Co. v. CIR, 247 F2d 370, 376 (4th Cir. 1957)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957102224&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_376&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_376) (“it is the substance, not the form, of the transaction, which must control our conclusion, and a transaction accomplished in two mutually dependent steps should be viewed as a whole”). |
| [101](#co_fnRef_F101_107960481_ID0EWUBG_1) | See [Helvering v. New Haven & SSLRR, 121 F2d 985, 988 (2d Cir. 1941)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1941120903&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_988&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_988), cert. denied, [315 US 803 (1942)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1942201538&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (rejecting “the effort of the CIR to atomize the plan, as it were; i.e., to separate into its separate steps and treat the last as though it stood alone”); [CIR v. Ashland Oil & Ref. Co., 99 F2d 588, 591 (6th Cir. 1938)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1938129901&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_591&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_591), cert. denied, [306 US 661 (1939)](http://www.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000780&cite=306US661&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (taxpayer wanted to acquire assets of another corporation but was compelled to acquire its stock, which was promptly surrendered in complete liquidation; held, transaction was in effect an acquisition of assets; “closely related steps will not be separated either at the instance of the taxpayer or the taxing authority”). |
| [102](#co_fnRef_F102_107960481_ID0E1UBG_1) | See infra ¶ 4.3.6. |
| [102.1](#co_fnRef_F102_1_107960481_ID0E1VBG_1) | [Rev. Rul. 2017-9, 2017-21 IRB 1244](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041557735&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [102.2](#co_fnRef_F102_2_107960481_ID0ENXBG_1) | [Rev. Rul. 2017-9, 2017-21 IRB 1244](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041557735&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [103](#co_fnRef_F103_107960481_ID0EHZBG_1) | See generally Baillif, [The Return Consistency Rule: A Proposal for Resolving the Substance-Form Debate, 48 Tax Law. 289 (1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0105115568&pubNum=0100406&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Blatt, [Lost on a One-Way Street: The Taxpayer’s Ability to Disavow Form, 70 Or. Law Rev. 381 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0101292023&pubNum=0001219&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Donaldson, When Substance-Over-Form Argument Is Available to the Taxpayer, 48 Marq. L. Rev. 41, 48–50 (1964); Rosen, Substance Over Form—A Taxpayer’s Weapon, 1970 S. Cal. Tax Inst. 689; Smith, [Substance and Form: A Taxpayer’s Right to Assert the Priority of Substance, 44 Tax Law. 137 (1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0101351476&pubNum=0100406&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). See Harris, Should There Be a “Form Consistency” Requirement? *Danielson* Revisited, 78 Taxes 88 (Mar. 2000). |
| [104](#co_fnRef_F104_107960481_ID0EC1BG_1) | [Higgins v. Smith, 308 US 473 (1940)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1940125176&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . Between the taxable year before the Court and the time of the Court’s decision, Congress enacted the predecessor of [§ 267(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS267&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_7b9b000044381), which explicitly denies a deduction for such losses. See infra ¶ 78.1.1. The Court held this statutory provision did not imply the law was otherwise in prior years. |
| [105](#co_fnRef_F105_107960481_ID0EO1BG_1) | [Burnet v. Commonwealth Improvement Co., 287 US 415 (1932)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932123832&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . In this case, the securities were sold by the corporation to its sole shareholder, but the Court in *Higgins v. Smith* did not regard this factual difference as relevant. |
| [106](#co_fnRef_F106_107960481_ID0E32BG_1) | [Higgins v. Smith, 308 US 473, 477–478 (1940)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1940125176&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_477&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_477). |
| [107](#co_fnRef_F107_107960481_ID0ET3BG_1) | [US v. Morris & Essex RR, 135 F2d 711, 713 (2d Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943119727&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_713&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_713), cert. denied, [320 US 754 (1943)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943200576&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [CIR v. National Alfalfa Dehydrating & Milling Co., 417 US 134, 149 (1974)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127193&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_149&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_149) (“a taxpayer is free to organize his affairs as he chooses, [but] once having done so,...he must accept the tax consequences of his choice, whether contemplated or not”); [Consolidated Edison Co. v. US, 10 F3d 68 (2d Cir. 1993)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993224948&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“when knowledgeable parties cast their transaction voluntarily into a certain formal structure,...they should be, and are, bound by the tax consequences of the particular type of transaction which they created”); [Nestlé Holdings, Inc. v. CIR, 152 F3d 83 (2d Cir. 1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998161524&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (rejecting subsidiary corporation’s attempt to characterize sale to its parent for price exceeding fair market value as sale at fair market value, plus capital contribution). |
| [108](#co_fnRef_F108_107960481_ID0EH4BG_1) | See [Unvert v. CIR, 72 TC 807 (1979)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980290206&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d, [656 F2d 483 (9th Cir. 1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981136477&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [456 US 961 (1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982217654&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (review of cases on quasi estoppel). For mitigation of the statute of limitations in the case of inconsistency by the taxpayer or the IRS, see infra ¶ 113.9. |
| [109](#co_fnRef_F109_107960481_ID0E64BG_1) | [Television Indus., Inc. v. CIR, 284 F2d 322, 325 (2d Cir. 1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960114368&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_325&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_325) . The taxpayer was not necessarily asking for the benefit of the cheapest alternative to the form used; even if the tax resulting from preferring substance to form is less than would be owing if the form were taken at face value, this lesser tax may be greater than would have resulted from an alternative way of reaching a similar business result. See in this connection the discussion of the most-costly-alternative theory in ¶ 4.3.3. |
| [110](#co_fnRef_F110_107960481_ID0EX5BG_1) | [Durkin’s Est. v. CIR, 99 TC 561 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992198195&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [111](#co_fnRef_F111_107960481_ID0EM6BG_1) | [Durkin’s Est. v. CIR, 99 TC 561, 574 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992198195&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_574&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_574). |
| [112](#co_fnRef_F112_107960481_ID0E36BG_1) | [Durkin’s Est. v. CIR, 99 TC 561, 575 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992198195&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_575&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_575) . See [Adobe Resources Corp. v. US, 967 F2d 152, 156](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992125960&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_156&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_156), reh’g denied, [975 F2d 1119 (5th Cir. 1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992175991&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“the taxpayer cannot argue substance over form, except when necessary to prevent unjust results”). See [Norwest Corp. v. CIR, 111 TC 105 (1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998166951&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“when a taxpayer seeks to disavow its own tax return treatment of a transaction by asserting the priority of substance only after the Commissioner raises questions with respect thereto, this Court need not entertain the taxpayer’s assertion of the priority of substance”). In Pinson v. CIR, 80 TCM (CCH) 13, 21–22 (2000), the Tax Court summarized its decisions on the issue as follows:  In determining whether a taxpayer may...disavow the form adopted for a transaction, this Court has considered at least four factors: (1) whether the taxpayer seeks to disavow his or her own tax return treatment for the transaction; (2) whether the taxpayer’s tax reporting and other actions show an honest and consistent respect for the alleged substance of the transaction; (3) whether the taxpayer is unilaterally attempting to have the transaction treated differently after it has been challenged; and (4) whether the taxpayer will be unjustly enriched if permitted to alter the transactional form.... If a taxpayer is not precluded from arguing that substance, as opposed to form should control tax consequences, he or she must then establish the claimed substance of the transaction under a heightened burden of proof. |
| [113](#co_fnRef_F113_107960481_ID0EGBAI_1) | [Western Md. Ry. v. CIR, 33 F2d 695, 698 (4th Cir. 1929)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1929126042&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_698&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_698) . Other early cases to the same effect are [Weiss v. Stearn, 265 US 242 (1924)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924120924&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (looking to substance of transaction at taxpayer’s behest), and [Prairie Oil & Gas Co. v. Motter, 66 F2d 309 (10th Cir. 1933)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933129917&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (same). |
| [114](#co_fnRef_F114_107960481_ID0E4BAI_1) | [Pacific Rock & Gravel Co. v. US, 297 F2d 122, 125 (9th Cir. 1961)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961115209&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_125&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_125) . Despite this auspicious comment, the taxpayer lost; since the court found the agreement murky, perhaps it was a case of suicide rather than garroting. See [Clark v. US, 341 F2d 691, 695 (9th Cir. 1965)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965112591&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_695&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_695) (quoting “garrote” metaphor but finding transaction correctly labeled). |
| [115](#co_fnRef_F115_107960481_ID0EMCAI_1) | [Bartels v. Birmingham, 332 US 126 (1947)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947114244&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (three justices dissenting). |
| [116](#co_fnRef_F116_107960481_ID0EJDAI_1) | [Bartels v. Birmingham, 332 US 126, 131 (1947)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947114244&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_131&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_131). |
| [117](#co_fnRef_F117_107960481_ID0ENDAI_1) | E.g., [Weinert’s Est. v. CIR, 294 F2d 750, 755 (5th Cir. 1961)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961114537&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_755&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_755) (taxpayer “has a right to assert the priority of substance”); [Shaw v. CIR, 59 TC 375, 383–384 (1972)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973290203&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_383&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_383) (acq.) (“preference for substance over form in tax matters extends to claims of petitioner and respondent alike”).  The Tax Court, in a case involving the allocation of a payment in settlement of a claim between principal and interest, said  Where there is an express allocation in a settlement agreement of a settlement payment, that allocation is generally respected for tax purposes if the agreement was entered into by the parties in an adversarial context at arm’s length and in good faith.... However, to be respected the allocation must reflect the “reality” of the settlement, and the court must discern, based on all the facts and circumstances surrounding the settlement, “in lieu of what” the settlement amount was paid.  [Indeck Energy Serv., Inc. v. CIR, 85 TCM (CCH) 1128, 1136 (2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003286048&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_1620_1136&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_1620_1136) (finding all of payment to be for payee’s stock, as stated in agreement, even though settlement was based on arbitrator’s award of lesser amount with interest).  A basic IRS ruling requiring certain purported leases of equipment to be treated as sales does not suggest that its principles apply only at the government’s initiative, and its neutral language implies that taxpayers can invoke its standards as freely as revenue agents. [Rev. Rul. 55-540, 1955-2 CB 39](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1955012378&pubNum=0001048&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); see infra ¶ 4.4 for other rulings of similar import. |
| [118](#co_fnRef_F118_107960481_ID0EIEAI_1) | [Rogers v. CIR, 29 TCM (CCH) 869 (1970)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970000614&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d, [445 F2d 1020 (2d Cir. 1971)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971111454&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [119](#co_fnRef_F119_107960481_ID0ELEAI_1) | See, e.g., [Muskat v. US, 554 F3d 183 (1st Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017977073&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Ullman v. CIR, 264 F2d 305 (2d Cir. 1959)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959104477&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . In *Muskat*, the court stated that the strong proof rule  applies when the parties to a transaction have executed a written instrument allocating sums of money for particular items, and one party thereafter seeks to alter the written allocation for tax purposes on the basis that the sums were, in reality, intended as compensation for some other item. The rule provides that, in order to effect such an alteration, the proponent must adduce “strong proof” that, at the time of execution of the instrument, the contracting parties actually intended the payments to compensate for something different....Phrased another way, the party seeking to alter a written allocation must demonstrate an actual meeting of the minds with respect to some other allocation. The heightened standard strikes the appropriate balance between predictability in taxation and the desirability of respecting the contracting parties’ real intentions....In applying it, evidence that a written allocation lacks independent economic reality, though likely relevant, is not sufficient to satisfy the strong proof test.*Muskat v. US*, [supra, at 188–189](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017977073&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_188&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_188) (finding that taxpayer failed to provide strong proof that payment under noncompete agreement was intended as payment for goodwill). |
| [120](#co_fnRef_F120_107960481_ID0EQEAI_1) | E.g., [CIR v. Danielson, 378 F2d 771 (3d Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967117016&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [389 US 858 (1967)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967200202&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [Plante v. CIR, 168 F3d 1279 (11th Cir. 1999)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999071768&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (applying *Danielson* rule to taxpayer who tried to avoid sale agreement’s characterization of disposition of corporate debts owed to taxpayer-shareholder as contribution to capital). In [Peterson v. CIR, 827 F3d 968 (11th Cir. 2016)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039339348&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), the court applied the *Danielson* rule to an agreement requiring post-retirement payments to the taxpayer, who had worked as an independent contractor for the payor, holding that for self-employment tax purposes, the taxpayer was bound by the agreement’s “unambiguous . . . characteriz[ation]” of the payments “as deferred compensation.” The contractual provisions applied by the court included language that was added to the agreement by the employer after the taxpayer had signed the agreement, pursuant to a provision allowing the employer to amend the agreement unilaterally. |
| [121](#co_fnRef_F121_107960481_ID0EUEAI_1) | Infra ¶ 4.4.6. |
| [122](#co_fnRef_F122_107960481_ID0EXFAI_1) | [Cluck v. CIR, 105 TC 324, 331 (1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995217073&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_331&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_331) . See [Lewis v. CIR, 18 F3d 20, 26 (1st Cir. 1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994063000&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_26&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_26) (duty of consistency “prevents a taxpayer who has already had the advantage of a past misrepresentation—in a year now closed to review by the government—from changing his position and, by claiming he should have paid more tax before, avoiding the present tax”). See generally Johnson, [The Taxpayer’s Duty of Consistency, 46 Tax L. Rev. 537 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0102256880&pubNum=0001247&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). According to the Court of Appeals for the Ninth Circuit  the duty of consistency not only reflects basic fairness, but also shows a proper regard for the administration of justice and the dignity of the law. The law should not be such a idiot that it cannot prevent a taxpayer from changing the historical facts from year to year in order to escape a fair share of the burdens of maintaining our government. Our tax system depends upon self assessment and honesty, rather than upon hiding of the pea or forgetful tergiversation.  [Ashman’s Est. v. CIR, 231 F3d 541 (9th Cir. 2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000581969&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (taxpayer, who claimed on 1990 return that she had rolled over qualified plan distribution but was late in reinvesting portion of distribution, excluded 1993 distribution of this portion on ground it was taxable in 1990, not 1993; “once a taxpayer has transfigured the true facts, the power to change them back to their old form may well be lost”). |
| [123](#co_fnRef_F123_107960481_ID0E6GAI_1) | [LeFever v. CIR, 103 TC 525, 543 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994212940&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_543&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_543), aff’d, [100 F3d 778 (10th Cir. 1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996254055&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . For a substantially identical statement, see [Herrington v. CIR, 854 F2d 755, 758 (5th Cir. 1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988109401&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_758&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_758), cert. denied, [490 US 1065 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989075467&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See also [Ashman’s Est. v. CIR, 75 TCM (CCH) 2160, 2161 (1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998093665&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_1620_2161&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_1620_2161) (“duty of consistency...is an equitable doctrine that prevents a taxpayer from adopting a position for a particular year and, after the period of limitations has expired for that year, adopting a contrary position that affects his or her tax liability for an open year”).  For a substantially identical statement, see [Kielmar v. CIR, 884 F2d 959 (7th Cir. 1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989126458&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . *Ashman’s Est.* has been affirmed, [231 F3d 541 (9th Cir. 2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000581969&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)).  According to the Court of Appeals for the Sixth Circuit, however, a taxpayer violates the duty of consistency only if he or she makes a misrepresentation beyond merely reporting an item on a particular return. In [Banks v. CIR, 345 F3d 373 (6th Cir. 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003661142&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), rev’d & remanded on another issue, [125 S. Ct. 826 (2005)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006088092&pubNum=0000708&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), the taxpayer claimed a deduction for alimony on his 1993 return, but in litigation over his tax liability for 1990, and after the statute of limitations had run for 1993, the taxpayer asserted that 1990 was the proper year for the deduction. The Tax Court agreed that 1990 was the proper year, but it held that the taxpayer, having been finally allowed the deduction for 1993, was barred by the consistency doctrine from deducting the alimony for 1990. The Court of Appeals reversed because “the tax court made no finding that Petitioner engaged in a misrepresentation,” the taxpayer took the deduction for 1993 based on “a mistake of law, not of fact,” and “there is an open issue as to whether the Commissioner had the same facts on hand as did Petitioner when he took the...deduction in 1993.” [Id. at 388](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003661142&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_388&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_388). |
| [124](#co_fnRef_F124_107960481_ID0E4HAI_1) | [Herrington v. CIR, 854 F2d 755, 758 (5th Cir. 1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988109401&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_758&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_758). |
| [124.1](#co_fnRef_F124_1_107960481_ID0ECIAI_1) | [LeFefer v. CIR, 100 F3d 778 (10th Cir. 1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996254055&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Herrington v. CIR, 854 F2d 755, 758 (5th Cir. 1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988109401&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_758&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_758), cert. denied, [490 US 1065 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989075467&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [Bennet v. Helvering, 137 F2d 537 (2d Cir. 1943)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943116366&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . In [Posner’s Est. v. CIR, 87 TCM (CCH) 1288 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004459976&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), the court held that property of a trust created under a decedent’s husband’s will was not part of the decedent’s gross estate because she had no general power of appointment over the trust property or other interest in the trust surviving her death. A marital deduction had, however, been allowed to the husband’s estate under a rule ([§ 2056(b)(5)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS2056&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_277b00009cfc7)) that only applied if the decedent had a general power of appointment. The court found that the consistency rule did not require inclusion of the trust in the decedent’s gross estate. “The executor of Mr. Posner’s estate and the executor of decedent’s estate, as well as [the IRS] agents upon audit of Mr Posner’s estate’s estate tax return, all acted in accordance with the mutual mistake of law that Mr. Posner’s will gave decedent a general power of appointment.” *Posner’s Est.*, supra, at 1294. |
| [124.2](#co_fnRef_F124_2_107960481_ID0EGIAI_1) | [Southern Pac. Transp. Co. v. CIR, 75 TC 497, 560 (1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981290132&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_560&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_560). |
| [125](#co_fnRef_F125_107960481_ID0ETIAI_1) | [Unvert v. CIR, 656 F2d 483 (9th Cir. 1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981136477&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See Bentley Court II Ltd. P’ship v. CIR, 91 TCM (CCH) 1216 (2006) (taxpayer claimed low-income housing credits for six years; after statute of limitations had run for first three years, IRS denied credits for fourth, fifth, and sixth years and required taxpayer, for fourth year, to recapture credits claimed for first three years; held, duty of consistency precluded taxpayer from defeating recapture by contending that it was ineligible for credits taken); [Spencer Medical Assocs. v. CIR, 73 TCM (CCH) 2309 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997068194&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (partnership claimed deductions for research expenses incurred by promissory note denominated in rapidly depreciating foreign currency; held, even though similar notes had been found in prior cases to be lacking in economic substance, duty of consistency required partnership to recognize foreign exchange gain as though note were valid); [Hughes & Luce, LLP v. CIR, 68 TCM (CCH) 1169 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994220519&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), aff’d on another ground, [70 F3d 16 (5th Cir. 1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995228323&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [116 S. Ct. 1824 (1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996058738&pubNum=0000708&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (duty of consistency required law firm to include in gross income reimbursements of expense advances erroneously deducted in earlier years). See also [Ashman’s Est. v. CIR, 75 TCM (CCH) 2160 (1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998093665&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (taxpayer reported having timely rolled over distribution received from pension plan, but rollover was actually made after rollover period had expired; held, duty of consistency required that taxpayer include in gross income distribution received from transferee plan after limitations period ran on rollover year). The appeal in *Spencer Medical Assocs.* has been dismissed, [155 F3d 268 (4th Cir. 1998)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998154628&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . *Ashman’s Estate* has been affirmed, [231 F3d 541 (9th Cir. 2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000581969&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [126](#co_fnRef_F126_107960481_ID0EWIAI_1) | [Rexach v. US, 390 F2d 631 (1st Cir. 1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968116587&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [127](#co_fnRef_F127_107960481_ID0EZIAI_1) | [Beltzer v. US, 495 F2d 211, 212 (8th Cir. 1974)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974110105&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_212&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_212) (“a taxpayer in this situation, innocent or otherwise, who has already had the advantage of a past alleged misstatement—such advantage now beyond recoupment—may not change his posture and, by claiming he should have properly paid more tax before, avoid the present levy”). See [LeFever v. CIR, 100 F3d 778 (10th Cir. 1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996254055&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (duty of consistence precluded heirs who signed agreement electing special use valuation from later denying validity of election); [Janis v. CIR, 87 TCM (CCH) 1322, 1329 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004464771&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_1620_1329&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_1620_1329), aff’d, [461 F3d 1080 (9th Cir. 2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009755935&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (“Whether there is sufficient identity of interests between [estate and beneficiary] to apply the duty of consistency...depends on the facts and circumstances of each case”; duty applied to beneficiaries who were also executors of estate and trustees of trust holding property in question); [Van Alen v. CIR, TC Memo. 2013-235](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031815956&pubNum=0001051&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (duty of consistency bound estate beneficiaries to follow estate’s valuation under [§ 2032A](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS2032A&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), even though executor was taxpayers’ mother, not themselves).  In [Letts’ Est. v. CIR, 109 TC 290 (1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997231828&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), a husband’s estate improperly claimed an estate tax marital deduction for a trust in which his wife had only a life estate, but the statute of limitations ran without the IRS having audited the estate tax return. The court held that the duty of consistency required inclusion of the trust in the wife’s estate, as though the marital deduction had been allowable to the husband’s estate. Because the wife was a coexecutor and beneficiary of the husband’s estate, the court found it appropriate to treat the estates of husband and wife as one taxpayer for this purpose. The IRS was found to have acquiesced in the treatment of the trust on the husband’s estate tax return, even though the return was not audited. |
| [128](#co_fnRef_F128_107960481_ID0E3IAI_1) | [Cluck v. CIR, 105 TC 324 (1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995217073&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) ; [LeFever v. CIR, 103 TC 525, 543 (1994)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994212940&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_543&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_543). |
| [129](#co_fnRef_F129_107960481_ID0EAJAI_1) | [Eagan v. US, 80 F3d 13 (1st Cir. 1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996076394&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [Arberg v. CIR, 94 TCM (CCH) 215 (2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012991375&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (wife’s reporting of results in investment account on separate return precluded taxpayers, in later joint return year, from treating account as husband’s trading account). |
| [130](#co_fnRef_F130_107960481_ID0E1JAI_1) | See [Ray v. US, 25 Cl. Ct. 535, 92-1 USTC ¶ 50,187 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992065553&pubNum=0000852&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (taxpayer claimed to be only one of 688 employees who was taxed on proceeds of employer-union settlement; held, although “it is probable” that IRS “gave disparate treatment” to settlement recipients, this was no defense to tax; “a failure of the IRS to assess deficiencies against some taxpayers does not preclude an assessment against other taxpayers”). See also [Kliethermes v. US, 27 Fed. Cl. 111, 92-2 USTC ¶ 50,584 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992197374&pubNum=0000613&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (IRS not estopped from denying deductions merely because deductions for similar items were accepted in earlier years). |
| [131](#co_fnRef_F131_107960481_ID0E4JAI_1) | [IRC § 6103](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6103&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), discussed infra ¶ 111.3. |
| [132](#co_fnRef_F132_107960481_ID0EALAI_1) | [US v. Kaiser, 363 US 299, 308 (1960)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960122531&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_780_308&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_780_308) (Frankfurter, J., concurring) (“And so, assuming the correctness of the principle of ‘equality,’ it can be an independent ground of decision that the Commissioner has been inconsistent, without much concern for whether we should hold as an original matter that the position the Commissioner now seeks to sustain is wrong”). See generally Johnson, An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution, 77 Tenn. L. Rev. (2010); Pietruszkiewicz, [Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly? 74 U. Cin. L. Rev. 531 (2006)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0318626109&pubNum=0001259&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=LR&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)); Zelenak, Should Courts Require the Internal Revenue Service to Be Consistent? 40 Tax L. Rev. 411 (1985). |
| [133](#co_fnRef_F133_107960481_ID0EOLAI_1) | [IBM Corp. v. US, 343 F2d 914 (Ct. Cl. 1965)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965105574&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)), cert. denied, [382 US 1028 (1966)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966203850&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . See [Sirbo Holdings, Inc. v. CIR, 476 F2d 981, 987 (2d Cir. 1973)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973109501&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_987&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_987) (“the Commissioner has a duty of consistency toward similarly situated taxpayers; he cannot properly concede capital gains treatment in one case and, without adequate explanation, dispute it in another having seemingly identical facts which is pending at the same time”); [Farmers’ & Merchants’ Bank v. US, 476 F2d 406, 409 (4th Cir. 1973)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973109361&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_409&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_409) (IRS abused discretion in denying refund based on accounting treatment disallowed by prospective revenue ruling issued after taxable years at issue; “No rational basis is found here for differentiating between the appellant and the other banks. Fortunately, such use of discretion is reviewable,...and we decry it”). See also [Computer Sciences Corp. v. US, 50 Fed. Cl. 388, 2001-2 USTC ¶ 50,635 (2001)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001796797&pubNum=0000613&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (finding that IRS unreasonably discriminated between similarly situated taxpayers by applying revenue ruling to require change of accounting method on for amounts paid after 1989, except to extent deducted on return filed before December 7, 1990, regardless of year-end).  In [Gateway Equip. Corp. v. US, 247 F. Supp. 2d 299, 320 (WDNY 2003)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003192765&pubNum=0004637&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_4637_320&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_4637_320), the court found that the IRS violated its duty of consistency by continuing to collect an excise tax from the taxpayer after it had lost in litigation involving liability of the taxpayer’s principal competitor, located in another judicial circuit, for same tax.  The explanation proffered by the IRS in this case is that it has a right to continue litigating its position until it secures a favorable opinion or until the Supreme Court grants certiorari.... That is an accurate explanation of options available to the IRS. However, it is not a rational explanation of why the IRS has treated Gateway different from other...distributors. |
| [134](#co_fnRef_F134_107960481_ID0E2LAI_1) | [Vesco v. CIR, 39 TCM (CCH) 101 (1979)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979002479&pubNum=0001620&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |
| [135](#co_fnRef_F135_107960481_ID0E3MAI_1) | [Davis v. CIR, 65 TC 1014, 1022 (1976)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976290100&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_1022&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_1022) . The taxpayer in the case was Kenneth Culp Davis, a prominent administrative law scholar, who was contesting denial of deductions for expenses incurred by his wife in pursuing graduate studies and wanted to know whether the IRS had allowed similar deductions to similarly situated students. See [Jaggard v. CIR, 76 TC 222 (1976)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981290079&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) (quoting *Davis* and reaching same conclusion). See also [Stichting Pensioenfonds v. US, 129 F3d 195, 200 (DC Cir. 1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997218884&pubNum=0000506&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_506_200&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_506_200) (“*IBM* applies only to direct competitors”); [Austin v. US, 611 F2d 117, 120 (5th Cir. 1980)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980100353&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_120&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_120) (Court of Claims has limited *IBM* “to a case where the taxpayer has requested a private ruling and has received different treatment from another receiving a private ruling. In the case before us, there was no private ruling”). |
| [136](#co_fnRef_F136_107960481_ID0ETNAI_1) | [Davis v. CIR, 65 TC 1014, 1022–1023 (1976)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976290100&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_1022&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_1022). |
| [137](#co_fnRef_F137_107960481_ID0EBOAI_1) | [Davis v. CIR, 65 TC 1014, 1023 (1976)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976290100&pubNum=0000838&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_838_1023&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_838_1023). |
| [138](#co_fnRef_F138_107960481_ID0EGPAI_1) | [IBM Corp. v. US, 343 F2d 914, 919 (Ct. Cl. 1965)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965105574&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&fi=co_pp_sp_350_919&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)#co_pp_sp_350_919), cert. denied, [382 US 1028 (1966)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966203850&pubNum=0000780&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)) . For cases rejecting “why only me?” as a defense, see [Bookwalter v. Brecklein, 357 F2d 78 (8th Cir. 1966)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966100537&pubNum=0000350&originatingDoc=Ib25d1ca1c00f11da8725eac5fdcb2c2d&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.History*oc.Category)). |

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