TAX COUNSEL CONSIDERATIONS IN THE ACQUISITION OF A TAX LOSS TARGET COMPANY

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Tax counsel, and valuation analysts and other financial advisers (analysts), are often retained to advise acquisitive clients with regard to proposed merger and acquisition (M&A) transactions. The analysts typically focus on the pricing and structuring of the proposed M&A transaction, while tax counsel consider all of the income tax and other tax planning and compliance issues related to structuring and completing the M&A transaction. The analysts may be expected to work with, and provide assistance to, the acquirer's taxation, legal, and other professional advisers, particularly in the assessment of the risks and expected returns of the proposed transaction. Accordingly, with analysts in a supporting role, tax counsel should be aware of all of the taxation considerations with regard to the proposed M&A transaction.

Tax counsel should be aware that when one of the transaction participants involves a loss corporation (or a target company with certain other tax attributes), the IRS may allege that the principal purpose of the proposed transaction is to evade or avoid income taxes. Of course, the target entity's tax attributes should not be ignored in the consideration and pricing of the proposed M&A transaction, but they should not be the principal reason for the transaction.

Tax counsel should be prepared to assist the acquirer in defending against any IRS challenge to the tax motivations for the proposed transaction. That is, tax counsel should be prepared to assist the acquirer to understand and document the non-tax-related economic benefits that are the primary reasons for—and the primary value drivers of—the proposed M&A transaction.

M&A announcements and completions continue to occur at a brisk level in many industries throughout the U.S. economy. This generally positive trend in M&A activity continues despite general concerns about COVID-19 as a national health issue and despite the negative impact of the pandemic on the national economy.

The typical reasons for M&A transactions in most industries remain the same, regardless of the national health impacts and the national economic effects of the COVID-19 pandemic. Tax counsel should be aware that some of the reasons for clients to consider a potential M&A transaction include: (i) the economies of scale and of size related to the combined entity; (ii) the elimination of a competitor (due to the consolidation) resulting in geographic concentration; (iii) the combination of different industry segment participants into a more diversified combined company; (iv) the ability of the transaction acquirer to "buy" (acquire) business functions and capabilities at a lower cost than the cost to "make" (internally develop) business functions and capabilities; (v) the availability of low-interest-rate debt financing and of plentiful equity financing that is looking for investment opportunities; and (vi) the availability of otherwise successful target companies that do not have other management/ownership succession options available to them.

Any combination of these post-M&A transaction economic benefit factors could lead to the client's: (i) identification of an acquisition target company; (ii) negotiation and consummation of a successful M&A transaction; and (iii) creation of an integrated combined entity that is experiencing post-merger synergies, economies of scale, and other combined entity value enhancements.

Throughout the COVID-19 pandemic, companies in many industry segments have remained quite successful, experiencing increased revenue, profitability, and taxable income. Such financially successful companies are often attractive M&A target companies. Other companies have experienced operational problems, decreased revenue levels, and financial distress. These other companies have experienced negative profitability, and tax-related net operating losses. In addition to their other attributes, the tax attributes, including the net operating loss (NOL) carryforwards, of these financially distressed companies may also make them attractive M&A target companies. In fact, the tax attributes of the "loss" companies may increase the attractiveness or enhance the acquisition value of such M&A candidate companies to financially successful acquisitive companies.

Tax counsel should advise corporate acquirers and their analysts to be careful when pricing and structuring the potential acquisition of M&A target corporations with NOL and certain other income tax attributes. Of course, the income tax attributes of such a loss target company are an important consideration in the pricing of any M&A transaction. And, the income tax attributes of the potential target company are a component of the value of any potential target company. However, tax counsel should advise that corporate acquirers and analysts understand that the acquisition of the target company's income tax benefits should not be the only—or even the primary—value driver in (or purpose of) the potential M&A transaction.

The IRS may disallow the acquirer's use of the target company's NOL carryforward—or other income tax attributes—if the IRS concludes that the M&A transaction was solely based on the value of such tax attributes. Tax counsel should consider this risk with regard to the acquirer's pricing and structuring of an M&A transaction involving a financially distressed target company. This discussion summarizes the factors that tax counsel, acquired clients, and the client's analysts should all consider when structuring an M&A transaction that involves a target corporation with such income tax attributes.

SECTION 269 AND THE TAX LOSS TARGET CORPORATION

Internal Revenue Code section 269 often serves as the justification for disallowing tax attributes related to an M&A transaction that the IRS decides was intended to evade or to avoid income tax. While the NOL of a target corporation can be used (with restrictions) to affect the taxable income of the acquirer, the IRS will carefully scrutinize any M&A transactions that it believes to be primarily motivated by tax avoidance.

First, tax counsel should advise clients that the M&A transaction should be structured and economically justified in order to prevent the IRS from disallowing the use of the target corporation's tax attributes.

Second, tax counsel should advise the acquirer to expect that the IRS will limit the annual amount of any target company NOL benefits through the application of Code section 382. Section 382 restricts the combined entity's use of the target company's NOL carryforwards (and certain built-in losses) following a loss corporation ownership change transaction.

In addition, if the IRS believes that the M&A transaction was primarily tax-motivated, it may apply a number of other statutory provisions in order to restrict the transaction's income tax benefits. Such statutory provisions are intended to disallow—or to re-characterize—the target corporation's losses and other income tax attributes.

ACQUISITIONS PRINCIPALLY INTENDED TO AVOID OR TO EVADE INCOME TAX

Code section 269(a) provides the IRS with the authority to disallow a deduction, a credit, or any other income tax benefit. The IRS may disallow these income tax benefits if the benefits are obtained by a taxpayer (either a corporation or a person) that acquires control of a corporation for the principal purpose of avoiding or evading federal income tax.

The statutory language of section 269 provides a specific definition of "control." For purposes of section 269, "control" means the ownership of the corporation stock possessing either: (i) 50 percent of the combined total voting rights of all classes of stock that are entitled to vote; or (ii) at least 50 percent of the total value of the shares of all classes of stock. For this purpose, control of the corporation may be acquired directly or indirectly. The direct acquisition of control typically occurs through a target company stock purchase or exchange. An indirect acquisition of control may occur, for example, if the taxpayer corporation itself redeems the shares of certain shareholders. That is because the corporation's stock redemption could leave a remaining shareholder with a controlling ownership interest.

The acquisition of control of the tax benefit corporation must occur in order for the IRS to apply the section 269 provisions. One example where a court rejected the IRS's application of section 269 is *Jackson Oldsmobile, Inc. v. U.S.*[1] In that decision, the Fifth Circuit upheld the trial court's ruling that there was an acquisition of nonvoting stock that represented less than 50 percent of the corporation's value. The Fifth Circuit reached this conclusion because one shareholder had owned 100 percent of the corporation's voting stock—both before and after the acquisition of the nonvoting stock.

Tax counsel should be aware that voting stock ownership is not the only factor that the IRS looks at to determine who has voting control of the target corporation. Of course, the percentage of voting common stock owned by the acquirer (either an individual or a corporation) is the first factor that the IRS considers. However, sometimes there is evidence that other factors also influence who actually has operational control of the target corporation.

This issue of de facto control versus voting stock ownership was an important consideration in *Hermes Consol. Inc. v. U.S.*[2] In the *Hermes* decision, the Court of Federal Claims explained that "the ultimate expression of voting power is the ability to approve or disapprove of fundamental changes in the corporate structure, and the ability to elect the corporation's board of directors."[3]

In addition, an acquirer (either an individual or a corporation) cannot transfer control from itself to itself. That is, for purposes of applying section 269, the IRS may not recognize an "acquisition" when the taxpayer simply revives its own dormant subsidiary corporation. This no-control transfer result will occur even if the taxpayer uses the subsidiary corporation for a new purpose. This is because the ownership (and operational) control of the target corporation did not change hands. An example of this situation occurred in *The Challenger, Inc. v. Commissioner.*[4] In that judicial decision, the Tax Court explained that control must be both relinquished and then re-established in order for there to be a change of control.

DEFINITION OF TAX AVOIDANCE AS THE PRINCIPAL TRANSACTION PURPOSE

Treasury Regulation 1.269-3(a) provides an explanation of the "principal purpose" requirement with respect to the proposed transaction. That is, tax avoidance becomes the principal purpose of the transaction if it "exceeds in importance any other purpose." The language of this regulation doesn't mean that tax avoidance has to be the only purpose (or economic justification) of the M&A transaction. But, according to the section 269 regulations, tax avoidance does have to be the principal (or the primary) purpose of the M&A transaction.

In a taxpayer-friendly interpretation, some courts have interpreted "principal" purpose to mean that tax avoidance has to be more important to the acquisition than all other purposes combined. Under such an interpretation, the tax avoidance purpose does not just have to be the single most important purpose. It has to be more important than the summation of all other transaction motivation purposes.[5]

Of course, there are numerous strategic and economic justifications for creating a new combined entity through an M&A transaction. These reasons include limiting the entity's liability, increasing the combined debt capacity, decreasing the combined entity's cost of capital, increasing combined purchasing power, increasing the entity's market concentration and penetration, gaining access to otherwise unavoidable technology or intellectual property, and many other reasons. Income tax simplification and income tax reduction may also be valid economic justifications for an M&A transaction. However, evading or avoiding income tax cannot be the principal—or even the most important—economic justification for the M&A transaction.

Section 269 provides the IRS with the authority to disallow tax benefits when a profitable corporation acquires a loss corporation for the sole purpose of utilizing the target company's NOLs or other tax attributes. As described in the Sixth Circuit's decision in *The Zanesville Investment Co. v. Commissioner,* the typical section 269 controversies "have dealt with the sale by one control group to another of a corporation with, typically, a net operating loss carryforward and the efforts of the new control group to utilize this carryforward by funneling otherwise taxable income to a point of alleged confluence with the carryforward."[6]

CONSIDERATION OF THE SOURCE OF THE NOLS

The IRS may apply section 269 to disallow the use of pre-acquisition NOLs and other tax attributes regardless of which party to the M&A transaction is the source of the income tax benefit. In other words, for section 269 purposes, it does not matter whether the loss corporation is the target corporation or the acquirer corporation. The IRS—and the courts—may still apply section 269 to restrict the use of the pre-acquisition losses after an M&A transaction.[7]

The IRS has made a few attempts to apply section 269 to disallow post-acquisition losses that taxpayers have applied to the post-acquisition combined entity income. However, the courts have generally not accepted such an application of section 269.[8]

Nonetheless, some courts have accepted the IRS's application of section 269 on a post-acquisition basis. These cases all involved instances where the acquired corporation was consistently generating an operating loss. In these cases, the post-transaction combined company attempted to offset the acquirer company's income against the acquired target company's continuing losses. In other words, the courts concluded that the acquirer completed the acquisition in order to have access to (and enjoy the tax benefit of) the target corporation's expected post-acquisition losses.[9]

In assessing whether target company tax attributes are the principal purpose of the transaction, the IRS often considers both the pre-acquisition losses and the post-acquisition losses of the target company. If the target's losses do not repeat every single year—but do occur with some regularity—then the IRS may allege that the target corporation's tax losses were the principal purpose of the transaction.

The IRS may also consider whether the acquirer (either an individual or a corporation) operates the loss target company differently after the acquisition. For example, let's assume that Connie Client (Connie) owns the profitable Alpha Company (Alpha). Alpha is a water, sewer, and pipeline construction company. Connie acquires the stock of Beta Corporation (Beta). Beta is another water, sewer, and pipeline construction company—with a large NOL carryforward. The amount of Alpha's income is not sufficient to fully benefit from the Beta NOL carryforward (even considering the effect of the section 382 limitation).

Now, let's assume that Connie also owns Gamma Corporation (Gamma). Gamma is an unrelated—but profitable—highway and street construction company. Connie merges Gamma into Alpha in order to have sufficient Alpha income to fully utilize the Beta NOL carryforward.

The IRS may allege that the principal purpose of the Gamma merger was the avoidance of income tax, and may apply section 269 to disallow Alpha's utilization of the Beta NOL.

The IRS has not been successful in applying section 269 to block the mere deferral of income tax. In *Rocco v. Commissioner,* the IRS claimed that tax avoidance was the taxpayer's principal purpose for using the cash method of accounting.[10] The Tax Court rejected the IRS's position, stating that section 269 applies to "deductions or credits, the allowance of which would result in a permanent reduction of revenue."[11] The *Rocco* court concluded that the government was "attempting to disallow a benefit which defers the tax but does not result ultimately in the avoidance or the evasion of tax."[12]

TRANSACTION SUBSTANCE OVER TRANSACTION FORM

The redemption of a shareholder's shares in a loss corporation may trigger section 269 if the stock redemption puts another shareholder into a control position. In other words, the IRS may treat such a stock redemption as if it was an acquisition of the loss target corporation. However, the IRS's application of section 269 may not always prevail in such instances. For example, in *Younker Bros., Inc. v. U.S.,* the court rejected the IRS's application of section 269, concluding that nontax motivations were the principal purpose of the shareholder redemption.[13]

In *Briarcliff Candy Corp. v. Commissioner,* the Tax Court made clear that it would broadly consider substance over form in the application of section 269. The Tax Court accepted the IRS's application of section 269 with respect to a loss acquirer corporation's purchase of a profitable subsidiary corporation, stating that section 269 was "broadly drafted to include any type of acquisition which constitutes a device by which one corporation secures a tax benefit to which it is not otherwise entitled."[14]

Tax counsel's advice to corporate acquirers may be that neither the IRS nor the courts will limit the application of section 269 to the "plain vanilla" M&A transaction, in which a profitable acquirer corporation buys a target corporation with an NOL carryforward.

THE APPLICATION OF SECTION 269 TO A NEW CORPORATION

Occasionally, the IRS may attempt to apply section 269 after the taxpayer's formation of a new corporate entity. According to Treasury Regulation 1.269-3(b)(3), section 269 may apply when an individual owns high-income assets and then transfers those assets to a newly formed controlled corporation that generally produces NOLs.

One example of the application of section 269 to a new corporation involved the musician and comedian Victor Borge.[15] For years, Borge earned a substantial amount of income from his musical comedy entertainment appearances. Totally unrelated to his work as an entertainer, Borge also owned an unincorporated poultry business that consistently generated operating losses. However, the tax law limited the annual amount of the unincorporated business losses that Borge could apply to offset his considerable entertainment income. So Borge incorporated the poultry business and he contracted through the new (unprofitable) corporation to provide his (profitable) entertainment services.

The IRS applied section 269 to disallow the offset of the new corporation's losses against Borge's entertainment-related income. Borge challenged the IRS's application of section 269 and brought the case to trial. On appeal, the Second Circuit agreed with the IRS, holding that the new corporation was formed for the primary purpose of providing an income tax benefit to Borge, upholding the application of section 269 to deny the income offset by the corporation's operating losses.

Normally, the IRS applies section 269 when a taxpayer utilizes a corporate form to enjoy income tax benefits from either built-in or pre-existing circumstances. The most typical example of this circumstance is when a target corporation has an available NOL carryforward. However, the IRS may also apply section 269 when the taxpayer creates a new corporation around an existing business for the principal purpose of obtaining income tax benefits.

Of course, the IRS will not apply section 269 to disallow tax benefits when there are alternative (non-tax-related) purposes for the formation of the corporate entity. In particular, the courts often consider these other, non-tax-related reasons for the corporate formation. For example, the Tax Court decision in *Cromwell Corp. v. Commissioner,* states that "[t]he formation of a holding company to acquire another corporation is not an unusual procedure and is not a 'device' which would distort the income of … the principals … as comprehended by Section 269."[16]

THE S CORPORATION EXCEPTION TO SECTION 269

According to Revenue Ruling 76-363, section 269 cannot be applied to disallow any deduction, credit, or other tax allowance of a corporation that has elected to be taxed under Subchapter S. Under the section 1366 rules for S corporations, such small business corporations pass through income, gains, losses, and deductions to the company shareholders. Accordingly, and practically, section 269 will not apply to limit an S corporation's deductions, credits, or other tax allowances.

In addition to Revenue Ruling 76-363, the courts have recognized that the tax pass-through status of an S corporation effectively negates the application of section 269 to disallow income tax benefits at the corporation level. For example, in *Modern Home Fire & Casualty Ins. Co. v. Commissioner,* the IRS alleged that the principal purpose of the shareholder's use of the S corporation was to offset losses against the corporation's income.[17] The Tax Court concluded that, even if the IRS's allegation was correct (which the court did not need to rule on), section 269 would not apply to an S corporation.

THE SECTION 382 LIMITATION ON NOL USE

Section 269 is intended to limit tax avoidance or tax evasion related to the acquisition of a loss target company. In contrast, section 382 is intended to limit the acquirer's annual use of the acquired NOLs of a target company that has an NOL carryforward.

Sections 382(g) and (i) describe the test for when the section 382 NOL limitation is triggered. The section 382 NOL limitation applies after there is an "ownership change" in the loss target corporation. Such an ownership change occurs if the percentage of corporate stock owned by any five percent shareholder increases by more than 50 percentage points over the lowest stock percentage owned by that shareholder. The look-back period for the testing of the 50 percentage point ownership change is three years.

An ownership change occurs when the loss target corporation is acquired either in a taxable purchase or in a tax-free reorganization. A taxable purchase may involve an asset purchase accounted for under section 1060. A tax-free reorganization may involve any of the reorganization structures accounted for under sections 368(a)(1)(A), (C), or (D).

The annual amount of the pre-change NOL available to the acquirer is calculated as the fair market value of the target loss corporation at the time of the ownership change multiplied by the applicable federal long-term tax-exempt rate. Section 382(k)(1) defines a loss target corporation as a corporation that is entitled to use an NOL carryback or carryforward or that has an NOL for the current tax year in which the ownership change occurred.

A loss target corporation also includes any corporation with a "net realized built-in loss." According to section 382(h)(3)(A), a corporation will have a net unrealized built-in loss if the aggregate adjusted basis of the corporation's assets exceeds the aggregate fair market value of the corporation's assets. This comparison is made just before the date of the ownership change that triggers section 382.

Section 382(h)(1)(B) provides the limitation on the acquirer's use of the target corporation's net unrealized built-in loss. That limitation is described as follows: The acquirer corporation treats the net unrealized built-in loss as a pre-ownership change loss that can offset post-change income only to the extent of the above-described section 382 annual limitation.

Section 382(h)(2)(B) provides that a recognized built-in loss is any loss recognized on the disposition of an asset during a five-year period. That five-year period begins on the ownership change date. The amount of the recognized built-in loss that is treated as a pre-change loss is limited to the amount of the net unrealized built-in loss.

OTHER POTENTIAL CHALLENGES TO M&A TRANSACTIONS

Tax counsel is aware that the IRS may also challenge the income tax motivations behind an M&A transaction by applying other tax provisions and doctrines. For example, the IRS may challenge the M&A transaction under the section 482 (and the related regulations) intercompany transfer price rules. The IRS may also challenge the tax impact of the M&A transaction under several non-statutory legal doctrines. For example, the IRS may attempt to recharacterize the M&A transaction based on the principle of economic substance, the principle of substance over form, the principle of a sham transaction, or the principle of a step transaction.

The M&A transaction should be safe from an IRS challenge under the business-purpose legal doctrine if the transaction is shown to be motivated by a valid business purpose—other than tax avoidance or tax evasion.

PROPOSED M&A TRANSACTION PLANNING CONSIDERATIONS

There is little that a corporate acquirer can do to avoid the application of the section 382 limitation on the annual use of the acquired loss corporation's NOLs. However, there are numerous factors that tax counsel may recommend that a corporate acquirer consider to avoid (or to successfully defend against) the IRS's application of section 269 in an M&A transaction. The transaction participant's analysts and other financial advisers may assist the tax counsel in the development and documentation of these considerations.

The owners/managers of the acquirer corporation (and the owners/managers of both corporations, in the case of a merger transaction) should seriously contemplate—and carefully document—the following considerations:

- The acquirer company should have a written acquisition plan that is approved by its board of directors. In the case of a merger, both companies should have a written merger plan that is approved by their respective boards of directors. This written transaction plan (or plans) should thoroughly document (and quantify, if possible) all of the non-tax reasons for completing the proposed M&A transaction.
- To the extent that there are both tax reasons and non-tax reasons for the M&A transaction, the written plan (or plans) should make clear that the non-tax reasons are the principal reasons for the proposed transaction. The non-tax reasons may include industry, strategic, and operational considerations. These non-tax considerations should be described so as to make it obvious that they are the principal transaction drivers.
- Financial projections for the post-transaction entity should be included in the written plan (or plans). These financial projections should, of course, include any of the expected post-transaction income tax benefits—and all other post-transaction benefit considerations. However, the post-transaction financial projections should demonstrate that non-tax factors—that is, operating income, post-merger synergies, economies of scale and size, etc.—are the principal components of the combined entity's expected cash flow.
- If a profitable entity is acquiring or merging with a loss entity, then the post-transaction business plan should demonstrate how the transaction will "turn around" (or make profitable) the business operations that were previously operating at a loss. If the target corporation's operating loss is expected to be temporary or is due to extraordinary circumstances (e.g., the temporary impact of the COVID-19 pandemic), then those factors should be described in the post-transaction business plan.
- In particular, a corporation acquiring (or merging with) a target company in a different line of business should describe the business (i.e., non-tax) reasons for the M&A transaction. There are numerous valid business purposes for such consolidation transactions, including planned product/service/geography diversification, access to financing collateral, access to new lines of distribution, reduction of any seasonality effects,

access to intellectual property or to business licenses, and so on. All such non-tax reasons should be discussed in the written M&A transaction plan or plans.

- If the necessary financial data are unavailable, tax counsel may ask the analysts to quantify the non-tax reasons for the proposed transaction. The purpose of this financial analysis is to demonstrate that the non-tax benefits represent the largest component of the proposed transaction price. In particular, such a financial analysis could demonstrate that the value of the non-tax acquisition considerations exceed the value of the taxation acquisition considerations.

Including any and all of the above considerations in a written acquisition plan, business plan, strategic plan, or financial projection will provide contemporaneous evidence of the business purposes and reasons for the proposed M&A transaction. Tax counsel may explain to the transaction participants that such contemporaneous evidence may be very important for future use in the acquirer's defense against any IRS challenge of the completed transaction.

CONCLUSION

M&A activity continues at a brisk level in many industries throughout the economy. It is uncertain whether this positive trend in M&A activity is occurring in spite of the COVID-impacted economic conditions or because of them. Either way, participants in many industries may be faced with M&A pricing and structuring considerations, either as the acquirer entity or as the target entity.

Tax counsel and their acquirer clients should understand that income tax considerations are an important element in the planning and pricing of any M&A transaction. However, tax counsel should advise their acquisitive clients that income tax considerations should not be the principal motivation or purpose of the proposed M&A transaction. If tax considerations are the principal transactional purpose, then the IRS may allege that the transaction is intended to avoid or to evade federal income tax. Particularly if there is a loss corporation as one of the transaction participants, the IRS may attempt to apply section 269—or some other statutory provisions or judicial precedent—to restrict or disallow the income tax benefits of the proposed transaction.

Accordingly, tax counsel and other professional advisers to the transaction participants should carefully plan for any M&A transaction involving a loss target corporation or other related income tax benefits. Such tax-related transaction planning should include the impact of the section 382 limitation on the acquirer's annual use of acquired loss corporation's NOLs. Tax counsel can assist the transaction participants with the written documentation of all of the non-tax reasons for—and the motivation drivers of—the proposed M&A transaction.

Notes

1 Jackson Oldsmobile, Inc. v. U.S., 237 F. Supp 779 (M.D. Ga. 1964), aff'd, 371 F.2d 808 (5th Cir. 1967).

2 Hermes Consol. Inc. v. U.S., 14 Cl. Ct. 398 (1988).

3 Id. at 405.

4 The Challenger, Inc. v. Comm'r, T.C. M. 1964-338 (1964).

5 See, e.g., U.S. Shelter Corp. v. U.S., 13 Cl. Ct. 606 (1987); Bobsee Corp. v. U.S., 411 F.2d 231 (5th Cir. 1969).

6 The Zanesville Inv. Co. v. Comm'r, 335 F.2d 507, 509 (6th Cir. 1964).

7 See, e.g., Supreme Inv. Corp. v. U.S., 468 F.2d 370 (5th Cir. 1972).

8 See Herculite Protective Fabrics Corp. v. Comm'r, 387 F.2d 475 (3rd Cir. 1968); The Zanesville Inv. Co., 335 F.2d at 514.

9 See, e.g., R.P. Collins & Co., Inc. v. U.S., 303 F2d 142 (1st Cir. 1962); Hall Paving Co. v. U.S., 471 F.2d 261, 262 (5th Cir. 1973).

10 Rocco, Inc. v. Comm'r, 72 T.C. 140 (1979).

11 Id. at 150.

12 Id. at 153.

13 Younker Bros., Inc., 318 F. Supp 202 (S.D. Iowa 1970).

14 Briarcliff Candy Corp. v. Comm'r, T.C. M. 1987-487 (1987).

15 Borge v. Comm'r, 405 F 2d 673 (2d Cir. 1968).

16 Cromwell Corp. v. Comm'r, 43 T.C. 313, 321 (1964).

17 Modern Home Fire & Casualty Ins. Co. v. Comm'r, 54 T.C. 839 (1970).