UNITED STATES TAX COURT

SUNIL S. PATEL AND LAURIE MCANALLY PATEL, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket Nos. 24344-17, 11352-18, 25268-18. Judge Jones Paper Filed

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE*

National Foreign Trade Council, Inc., respectfully moves for leave to file the brief attached to this motion as *amicus curiae* in the above-captioned case.

IN SUPPORT, the movant states:

1. National Foreign Trade Council, Inc. ("NFTC") is the premier business organization in the United States advocating a rules-based world economy to foster international trade, tax, and investment policies, and economic cooperation. Founded in 1914, the NFTC is the oldest and largest U.S. association of businesses devoted to international trade and tax matters. NFTC believes that its *amicus curiae* brief can provide information and assistance to the Court.

2. The NFTC's mission is to promote efficient and fair global commerce by advocating public policies that foster an open international trade and investment regime. The NFTC's membership includes over 100 companies, representing most major sectors of the U.S. economy, including manufacturing, technology, energy, retail, and agribusiness. The NFTC's membership consists primarily of U.S. firms engaged in all aspects of international business, trade, and investment. NFTC members account for over $5 trillion in global revenue. They also represent a significant share of total U.S. exports and U.S. private foreign investment.

3. On July 19, 2024, the Court issued an order ("Briefing Order") that the parties brief two issues with respect to I.R.C § 7701(o). Specifically, the Court ordered briefing to address two issues: (1) "Whether section 7701(o) requires a threshold relevancy determination"; and (2) "If the Court concludes that section 7701(o) requires a threshold relevancy determination, the circumstance(s) in which the economic substance doctrine is 'relevant' within the meaning of section 7701(o)." Briefing Order at 2. After noting the "novelty of the issues" and indicating that "the Court welcomes amicus briefs," the Court set August 23, 2024 as the date by which to file any motions for leave to file a brief as amicus curiae and lodge proposed briefs. Briefing Order at 2–3.

4. The decision to permit the filing of an *amicus curiae* brief is within the discretion of the Court. *See Ward v. Commissioner*, T.C. Memo. 1992-535, 64

T.C.M. (CCH) 714, 716. Such submissions are appropriate when they will provide additional information and assistance, and especially when they can help the Court understand how its decision will affect other taxpayers. Order, *Rajagopalan v. Commissioner*, T.C. Dkt. No. 21394-11 (Mar. 22, 2017).

5. NFTC understands that the proper application of section 7701(o) is important to many corporate taxpayers that have engaged in complex restructuring transactions, which achieve multiple business objectives, and are facing potential economic substance challenges to certain structures or steps that were adopted for tax-efficient reasons. The proper application of the economic substance doctrine is especially critical where taxpayers face a strict liability penalty for transactions that lack economic substance under section 6662. Accordingly, the resolution of the two issues raised in the Briefing Order will have wide-ranging impact in addition to the relevance to the above-captioned case.

6. NFTC has contacted counsel for both petitioners and respondent. Petitioners and respondent do not object to the filing of this motion.

WHEREFORE, NFTC respectfully requests that the Court grant this motion for leave to file the attached *amicus curiae* brief.

Dated: September 4, 2024

Respectfully submitted,

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Nos. 24344-17, 11352-18, 25268-18

IN THE UNITED STATES TAX COURT

SUNIL S. PATEL AND LAURIE
MCANALLY PATEL,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

AMICUS BRIEF OF THE NATIONAL FOREIGN TRADE COUNCIL, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Tax Court Rules 20(c) and 151.1(c), Amicus Curiae National Foreign Trade Council, Inc., states that it does not have a parent corporation and that no publicly held company owns 10% or more of the stock of the amicus.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae National Foreign Trade Council, Inc. ("NFTC") is the premier business organization in the United States advocating a rules-based world economy to foster international trade, tax, and investment policies, and economic cooperation. Founded in 1914, the NFTC is the oldest and largest U.S. association of businesses devoted to international trade and tax matters.

The NFTC's mission is to promote efficient and fair global commerce by advocating public policies that foster an open international trade and investment regime. The NFTC's membership includes over 100 companies, representing most major sectors of the U.S. economy, including manufacturing, technology, energy, retail, and agribusiness. The NFTC's membership consists primarily of U.S. firms engaged in all aspects of international business, trade, and investment. NFTC members account for over $5 trillion in global revenue. They also represent a significant share of total U.S. exports and U.S. private foreign investment.

The NFTC respectfully submits this brief amicus curiae to address the Tax Court's July 19, 2024, Order in *Patel v. Commissioner,* Dkt Nos. 24344-17, 11352-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Tax Court Rule 151.1(c).

18, 25268-18, seeking briefs from the parties as well as amicus briefs on the following issues:

1) Whether section 7701(o)[2] requires a threshold relevancy determination; and

2) If the Court concludes that section 7701(o) requires a threshold relevancy determination, the circumstance(s) in which the economic substance doctrine is "relevant" within the meaning of section 7701(o).

NFTC's amicus brief does not comment on any of the facts or issues involved in *Patel*. It is focused only on addressing the two questions raised by the Tax Court in the abstract.

Section 7701(o) is unambiguous that a threshold relevancy determination is required. Such a reading of the statute is consistent with both the plain meaning of the statute and the legislative history and is the only way to give meaning to both the first clause in section 7701(o)(1) and section 7701(o)(5)(C). Section 7701(o)(5)(C) requires the court to look to cases decided before the codification of the economic substance doctrine to determine when the doctrine is relevant. This threshold relevancy determination is all the more critical where taxpayers face a

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[2] All section references are to the Internal Revenue Code of 1986, as amended.

strict liability penalty for transactions lacking economic substance under section 6662.

There is no simple test for the relevancy determination. Instead, there are categories of transactions to which the economic substance doctrine has not been applied historically and for which section 7701(o) should not be relevant today. If not explicitly rejected, the economic substance doctrine has been implicitly rejected for these categories of transactions: (1) transactions on the "Angel List," *see* section II.B.1, *infra*; (2) transactions that involve an actual sale or exchange or liquidation, *see* section II.B.2, *infra*; (3) transactions authorized by Congress, *see* section II.B.3, *infra*; and (4) transactions that occur as part of the taxpayer's ongoing business operations or a corporate restructuring, *see* section II.B.4, *infra*.

For these reasons, NFTC requests that this Court hold that section 7701(o) requires a threshold relevancy determination and hold that the economic substance doctrine is not relevant to the transactions to which the doctrine did not apply pre-codification.

ARGUMENT

I. Whether Section 7701(o) Requires a Threshold Relevancy Determination: It Does.

A. Overview of Section 7701(o)

Economic substance originated as a common law judicial doctrine in 1935 and was ultimately codified in 2010 in section 7701(o). *See Gregory v. Helvering*, 293 U.S. 465 (1935). Throughout its history, the doctrine has been applied to "den[y] tax benefits arising from transactions that do not result in a meaningful change to the taxpayer's economic position other than a purported reduction in federal income tax." H.R. Rep. No. 111-443, pt. 1, at 292 (2010).[3] Section 7701(o) titled "Clarification of Economic Substance Doctrine," was enacted in order to

[3] While there is no official legislative history for the particular legislation that enacted section 7701(o), the House Report for the predecessor healthcare legislation that was not enacted (H.R. REP. NO. 111-443, pt. 1, at 291–98 (2010) (hereinafter "House Report"), relating to the Reconciliation Act of 2010), as well as the Joint Committee on Taxation Report for the particular legislation that enacted section 7701(o), contain nearly identical discussions of the background and reasons for enactment of section 7701(o). STAFF OF J. COMM. ON TAX'N, 111TH CONG., TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS OF THE "RECONCILIATION ACT OF 2010," AS AMENDED, IN COMBINATION WITH THE "PATIENT PROTECTION AND AFFORDABLE CARE ACT," at 142–156 (Comm. Print. 2010) (hereinafter "JCX-18-10" or "JCT Report"). And, both the federal district court in *Liberty Global, Inc. v. United States*, Civil Action No. 1:20-cv-03501-RBJ, 2023 WL 8062792 at *4 (D. Colo. Oct. 31, 2023), *appeals docketed*, Nos. 23-1410 (10th Cir. Dec. 28, 2023), 24-9004 (10th Cir. June 24, 2024) and the Internal Revenue Service ("IRS") in I.R.S. Notice 2014-58, 2014-44 IRB 746, have treated the House Report as if it were legislative history for section 7701(o).

resolve a circuit split about how the economic substance doctrine was applied and to create a "uniform definition of economic substance." JCT Report at 152–54.

Section 7701(o)(1) provides:

> In the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if – (A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and (B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.

Section 7701(o)(5)(C), titled "Determination of application of doctrine not affected," provides that "[t]he determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if this subsection had never been enacted." The codification of the economic substance doctrine was not intended to change when courts would apply the doctrine: "Thus, the provision does not change present law standards in determining when to utilize an economic substance analysis." JCT Report at 152; *see also id.* at 155.

B. Statutory Construction Principles Applied in the Tax Court

While there are sometimes differences between jurisdictions, the statutory construction principles applied by the Tax Court are similar to the principles used by the Supreme Court and the circuit courts. The Tax Court has held that if an Internal Revenue Code provision has a plain and unambiguous meaning, the court need not look further than the words of the statute and should apply the statute as written, without regard to the canons of construction or legislative history. *See TG Mo. Corp. v. Commissioner*, 133 T.C. 278, 288 (2009) (*citing Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997)); *Venture Funding Ltd., v. Commissioner*, 110 T.C. 236, 241–42 (1998); *Fernandez v. Commissioner*, 114 T.C. 324, 329–30 (2000) (citations omitted). In determining whether the statutory language is plain and unambiguous, the Tax Court considers both the statute as a whole and the context of the particular provision in light of the overall statutory scheme. *See Moneygram Int'l, Inc. v. Commissioner*, 153 T.C. 185, 204–05 (2019), *aff'd* 999 F.3d 269 (5th Cir. 2021) (citations omitted); *TG Mo. Corp.,* 133 T.C. at 288 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

Where the statute does not have a plain meaning, then typically the Tax Court's next step in attempting to discern Congress's intent is to apply canons of construction. *See Guardian Indus. Corp. v. Commissioner*, 143 T.C. 1, 14 n.12 (2014) (*citing Green v. City of New York*, 465 F.3d 65, 79 (2d. Cir. 2006)). When the plain meaning and canons of construction do not reveal Congress's intent, the court may then look to legislative history. *See TG Mo. Corp.*, 133 T.C. at 288 (2009) (*citing Fernandez*, 114 T.C. at 329–30). The Tax Court has stated that it will not consider legislative history in interpreting a statute unless it first concludes that the statute is ambiguous. *Id.*; *Carlson v. Commissioner*, 116 T.C. 87, 93 (2001).

Similar to the Supreme Court, *see United States v. Am. Trucking Ass'n,* 310 U.S. 534, 543 (1940) and *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 242 (1989), the Tax Court recognizes that even if the statutory language appears to be unambiguous, it may look beyond the plain language where a literal interpretation would either lead to an absurd result or produce a result "demonstrably at odds with the intentions of the drafters." *Am. Airlines, Inc. v. Commissioner*, 144 T.C. 24, 38 (2015); *see also Loper Bright Enters. v. Raimondo,* 144 S. Ct. 2244, 2266 (2024) ("statutes … must have a single, best meaning.").

The Tax Court, like the Supreme Court and circuit courts, s*ee Gitlitz v. Commissioner*, 531 U.S. 206, 219–20 (2001) and *The Limited, Inc. v. Commissioner*, 286 F.3d 324, 336 (6th Cir. 2002), does not base an interpretation of a statute or regulation on a "policy concern" when the statutory language is plain. In *Combrink v. Commissioner*, the Tax Court rejected a taxpayer's appeal to policy considerations—namely that Congress was not specifically concerned with the type of transaction the taxpayer engaged in—over the application of the plain language of the statute. 117 T.C. 82, 89 (2001). "[W]e note that whatever particular abuses may have led to the enactment of section 304, we may not judicially create a supposed policy-based exception where a transaction falls within the plain language of the statute as written." *Id*.

C. Under the Tax Court's Statutory Construction Principles, A Threshold Relevancy Determination is Required Under Section 7701(o).

The statutory language of section 7701(o)(1), when read in the context of the entire statutory scheme, leads to only one conclusion: There is first a determination of whether the "economic substance doctrine" is relevant to a particular transaction. Next, if the economic substance doctrine is relevant, there is a determination of whether the transaction does or does not have "economic substance."

The first determination is a clause in the nature of a condition: "In the case of any transaction to which the economic substance doctrine is relevant…." This clause causes the entirety of section 7701(o)(1) to be a conditional sentence. The second determination is the main clause of the sentence: "such transaction shall be treated as having economic substance only if (A) … and (B) …." It springs into action only if the condition in the first clause is met. The entire sentence reads like a common conditional sentence, such as: "If it doesn't rain tomorrow, the game will be played." If the "doctrine" is relevant, test the transaction under clauses (A) and (B); if it is not relevant, then don't.

Said another way, the "relevancy" of the economic substances doctrine to the transaction must exist before the transaction is required to undergo the rigors of the two-pronged economic substance test in clauses (A) and (B). The first clause is a "screen" to determine whether the application of clauses (A) and (B) in the main clause is necessary.

The conditional nature of section 7701(o)(1) is evident from the words used in the first clause. This clause begins by limiting the main clause to "any transaction to which the economic substance doctrine is relevant." That limitation means that not *every* transaction is subject to clauses (A) and (B), but rather only the relevant ones. It also suggests there are transactions out there for which the economic substance doctrine is *not* relevant.

It is noteworthy that the first clause refers to the "economic substance doctrine," whereas the main clause describes when a transaction has or doesn't have "economic substance." This distinction was intentional, as evident from the remainder from the statutory scheme.

First, according to section 7701(o)(5)(C), the determination of whether the economic substance doctrine is relevant – which mirrors the language in the first clause of section 7701(o)(1) – "shall be made in the same manner as if this subsection had never been enacted." There is only one way to read that language: it means that relevancy is determined based on case law decided without the benefit of section 7701(o), that is, cases involving tax years prior to the effective date of section 7701(o).

It would be nonsensical to apply section 7701(o)(5)(C) to anything beyond the first clause in section 7701(o)(1). It could not apply to the main clause, because that would say clauses (A) and (B) should be applied as if section 7701(o)(1) had not been enacted. That would be impossible, since clauses (A) and (B) are clearly intended to be applied in their enacted form. Thus, any view that the relevancy requirement in the first clause is the same as the economic substance test in clauses (A) and (B) cannot be reconciled with section 7701(o)(5)(C).

Second, when section 7701(o)(5)(C) is read together with the first clause of section 7701(o)(1), it is clear that the first clause is juxtaposed with the main clause in section 7701(o)(1). Clauses (A) and (B) in the main clause represent a change in law. They require a new, consistent approach for determining if a transaction does or doesn't have economic substance. The two-pronged test is now conjunctive, meaning that a taxpayer must satisfy both prongs to ensure its transaction has economic substance. This test also requires a "substantial" non-tax purpose. Basically, clauses (A) and (B) apply going forward from 2010. The first clause, on the other hand, looks backward to years before 2010 before applying clauses (A) and (B).

Third, this juxtaposition of the first clause and the main clause is reinforced by a series of operating rules that apply for purposes of clause (A) or clause (B), or both. By strong negative inference, these rules do not apply to *all* of section 7701(o)(1), precisely because they are intended to impact only the part of section 7701(o)(1) that describes the new test for economic substance. Section 7701(o)(2)(A) prescribes a special rule for determining whether clauses (A) and (B) are met when the taxpayer relies on profit potential. Section 7701(o)(2)(B) requires that fees and other transaction expenses be taken into account in determining pre-tax profit under clause (A). Section 7701(o)(4) prohibits a financial accounting benefit from counting as a non-tax purposes under clause (B) if the benefit is basically a reduction of federal income tax. Unnecessary confusion would ensue if these rules also applied to determine whether the economic substance doctrine is relevant.

Based on the foregoing, the Tax Court could easily treat the first clause in section 7701(o)(1) as a threshold relevancy determination based on the plain meaning rule. In applying the plain meaning rule, the Tax Court looks not only at the provision in the context of the overall statutory scheme, but also uses the interpretive canon that statutes will be interpreted in a manner to give meaning to each provision. Concluding that section 7701(o) requires a relevancy determination before applying the two-pronged economic substance test is the only way to give meaning to both the first clause in section 7701(o)(1) and section 7701(o)(5)(C).

Another approach would be for the Tax Court to declare the first clause in section 7701(o)(1) to be ambiguous, even when read together with section 7701(o)(5)(C), and then turn to the legislative history for clarification.

The House Report fully supports a conclusion that the first clause of section 7701(o)(1) requires a threshold relevancy determination before applying the two-pronged economic substance test. First, it ties the first clause to the language in section 7701(o)(5)(C) by stating:

> The determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if the provision had never been enacted. Thus, the provision does not change current law standards *in determining when to utilize an economic substance analysis*.

House Report at 295–96 (emphasis added); *see also* JCT Report at 152. In a footnote to the second sentence quoted above, the House Report states:

> If the tax benefits are clearly consistent with all applicable provisions of the Code and the purposes of such provisions, it is not intended that such tax benefits be disallowed if the only reason for such disallowance is that the transaction fails the economic substance doctrine as defined in this provision.

Id. at 296 n.124. This footnote makes it clear that Congress recognized that certain transactions might fail the two-pronged economic substance test, but nevertheless should not be subject to that test. *See also* JCT Report at 152 n.344. The threshold relevancy determination is needed to make sure that certain transactions do not lose their tax benefits due to the two-pronged test.

Second, the House Report explains that "[t]he provision is not intended to alter the tax treatment of certain basic business transactions that, under longstanding judicial and administrative practice are respected, merely because the choice between meaningful economic alternatives is largely or entirely based on comparative tax advantages." House Report at 296; *see also* JCT Report at 152. Again, Congress recognized that certain "basic business transactions" might not pass the rigors of the two-pronged test because of the tax-driven nature of the structure, but nevertheless are to be permitted. It is because of the threshold relevancy determination that these basic business transactions should not be questioned under section 7701(o).

Consequently, if the Tax Court were to consult the legislative history of section 7701(o), it would confirm its preliminary conclusion that a threshold determination of relevancy is required before the two-pronged economic substance is applied to a particular transaction.

D. IRS Counsel is Bound by I.R.S. Notice 2010-62

Treasury and the IRS have not issued any proposed, temporary, or final regulations interpreting section 7701(o). The only "published guidance" consists of two Internal Revenue Bulletin (IRB) notices: I.R.S. Notice 2010-62, 2010, 2010-40 IRB 411, and Notice 2014-58. In Notice 2010-62, Treasury and IRS confirm that the first clause in section 7701(o)(1), together with section 7701(o)(5)(C), require a threshold determination of relevancy:

> Section 7701(o)(5)(C) provides that the determination of *whether a transaction is subject to the economic substance doctrine* shall be made in the same manner as if section 7701(o) had never been enacted. In addition, section 7701(o)(1) only applies in the case of any transaction to which the economic substance doctrine is relevant. Consistent with these provisions, the IRS will continue to analyze when the economic substance doctrine will apply in the same fashion as it did prior to the enactment of section 7701(o). *If authorities, prior to the enactment of section 7701(o), 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.* The IRS anticipates that the case law regarding the circumstances in which the economic substance doctrine is relevant will continue to develop. Consistent with section 7701(o)(5)(C), codification of the economic substance doctrine should not affect the ongoing development of authorities on this issue. The Treasury Department and the IRS do not intend to issue general administrative guidance regarding the types of transactions to which the economic substance doctrine either applies or does not apply.

Notice 2010-62 (emphasis added).

The government's explanation of the relevancy requirement is in sharp contrast with the analysis of this requirement in *Liberty Global,* which is discussed in detail below. First, Notice 2010-62 relies on section 7701(o)(5)(C) to inform its interpretation of the first clause in section 7701(o)(1). Second, it equates the determination of whether the economic substance doctrine is relevant with a "determination of whether a transaction is *subject to* the economic substance doctrine." *Cf.* Notice 2010-62 (emphasis added). The phrase "subject to" is clearly not the same as a determination of whether a transactions lacks economic substance after applying clauses (A) and (B) in section 7701(o)(1). Third, the government states its intent to continue to follow the pre-section 7701(o)(1) case law holding that the economic substance doctrine is not relevant to certain transactions. That statement strongly supports the notion that the relevancy determination is separate from the determination of whether a transaction lacks economic substance.

In Tax Court, IRS counsel may not make a legal argument that contradicts the IRS's position in an IRB Notice. *See* I.R.S. Chief Counsel Notice CC-2003-014 (May 8, 2003) (Chief Counsel attorneys "may not argue contrary to final guidance," and "[f]inal guidance consists of final regulations, temporary regulations, revenue rulings, revenue procedures, IRB notices, and announcements."). Thus, an IRB Notice, such as Notice 2010-62, is considered as binding on the government as a revenue ruling. And the Tax Court has admonished

Chief Counsel attorneys against taking positions in litigation that contradict a revenue ruling. *See Rauenhorst v. Commissioner*, 119 T.C. 157, 170–71 (2002); *see also* I.R.C. § 7430(c)(4)(B)(iv) (categorizing notices and revenue rulings, among other forms of guidance, as "applicable published guidance"); *Blasius v. Commissioner*, T.C. Memo. 2005-214 at *9 (citations omitted).

E. Errors Made in Liberty Global Decision

This first question was recently addressed by the federal district court of Colorado in *Liberty Global*. The court held that, despite the statutory language conditioning the application of the two-pronged test in section 7701(o)(1) on whether "the economic substance doctrine is relevant," a threshold relevancy determination was not required by the statute. *Liberty Global*, Slip Op. at *5. Rather, the court held that "the doctrine's relevance is coextensive with the statute's text for economic substance" in clauses (A) and (B) of section 7701(o)(1). *Id.* at *4. In so doing, the court did not even mention section 7701(o)(5)(C).

The district court's ruling improperly puts the cart before the horse. Read literally, it requires a court, without any limitations or exceptions, to immediately begin scrutinizing the transaction in question to determine whether it fails *either* clause (A) or clause (B). If there is a failure of either clause, the transaction will be deemed to lack economic substance. At that time, a belated, and now completely unimportant, determination can be made that the economic substance doctrine was "relevant" to the transaction. Conversely, if the transaction satisfies both prongs, an equally unimportant determination can then be made that the economic substance doctrine was "not relevant" to the transaction.

1. Different Considerations for the Tax Court

The Tax Court is of course a different forum with different precedent and different government counsel. As discussed above, counsel for the IRS are bound to apply IRS published guidance. Department of Justice attorneys do not feel so constrained and often promote legal theories that could not be pursued by IRS counsel in Tax Court litigation.

Another reason is that in *Liberty Global*, for purposes of the summary judgment motions, the taxpayer conceded that the first three of four steps lacked economic substance under the two-pronged test. *See Liberty Global*, Slip Op. at *9. This means the taxpayer was staking its entire economic substance exposure on the alleged preliminary determination of whether the economic substance doctrine was relevant. The briefing for taxpayer and the amici pushed hard for a complete separation between the threshold relevancy determination and the two-pronged economic substance determination.[4]

2. Errors in Analysis

The federal district court in *Liberty Global* first erred by consulting the legislative history of section 7701(o) before it completed a proper plain meaning analysis of the statutory language. Slip Op. at *3. The court made no attempt to interpret the meaning of the first clause in section 7701(o)(1) with reference to section 7701(o)(5)(C) and, indeed, did not even mention section 7701(o)(5)(C). Instead, the court turned immediately to the House Report for guidance, before making any determination that the language in the first clause of section 7701(o)(1) – "In the case of any transaction to which the economic substance doctrine is relevant" – was ambiguous. *Id.*; *compare* House Report at 295.

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[4] We are filing our amicus brief on behalf of corporate taxpayers that engaged in complex restructuring transactions that achieved multiple business objectives, but are facing potential economic substance challenges to certain structures or steps that were adopted for tax-efficient reasons. In these transactions, even if there were no preliminary threshold determination of relevance, the taxpayers expect to prove as part of the two-pronged inquiry that either the economic substance doctrine is in fact not relevant or that both prongs in section 7701(o) are satisfied. Thus, while we believe a determination of relevancy is required by the statute and should be done preliminarily, it is less critical whether that determination is done preliminarily or as part of the two-pronged inquiry.

By comparison, the Tax Court generally does not consult legislative history if the text of the statute may be read unambiguously and reasonably. *See TG Mo. Corp.,* 133 T.C. at 288; *Fernandez,* 114 T.C. at 329–30; *Carlson*, 116 T.C. at 93. The Tax Court was reversed by the Sixth Circuit in a case where it "raced to the legislative history" to support its interpretation of statutory language, while ignoring the plain meaning of such language. *The Limited*, 286 F.3d at 335. Thus, the Tax Court could not take the approach that was taken in *Liberty Global*.

The *Liberty Global* court next erred by misinterpreting the particular legislative history it consulted. Slip Op. at *4. The House Report quoted the following passage from *ACM Partnership v. Commissioner*, 73 T.C.M. (CCH) 2189, 2215 (1997), *aff'd and rev'd in part,* 157 F.3d 231 (3d Cir. 1998):

> The doctrine of economic substance becomes applicable, and a judicial remedy is warranted, where a taxpayer seeks to claim tax benefits, unintended by Congress, by means of transactions that serve no economic purpose other than tax savings.

House Report at 292. The court incorrectly concluded that the "ordinary meaning" of the phrase "becomes applicable" in the above quote was the same as the meaning of "relevant" in the first clause of section 7701(o)(1). *Liberty Global*, Slip Op. at *4. The quote from *ACM Partnership* was not addressing whether the economic substance doctrine was relevant. The Tax Court's opinion in *ACM Partnership* does not even discuss relevance. The opinion focuses on whether the economic substance doctrine should be *applied* to deny the tax benefits of the transactions in question. Determining relevance is distinct from determining whether the doctrine actually applies to deny tax benefits.

The *Liberty Global* court incorrectly draws support from the fact that cases in the Tenth Circuit decided prior to the enactment of section 7701(o) did not mention a threshold relevancy determination. It was rare, however, for courts in that period to discuss relevance. In many cases involving transactions having the hallmarks of a tax shelter, such as the *ACM Partnership* case, the IRS argued for application of the economic substance doctrine, and the courts determined if it applied or didn't apply without mentioning relevance. In cases where it didn't apply, one might say in retrospect that economic substance wasn't relevant. There are also many cases in which the IRS argued other judicial doctrines (*e.g.*, substance over form, step transaction), but did not put economic substance at issue. Was that because the doctrine was not relevant? The point is that the pre-section 7701(o) case law cannot be relied on for the district court's conclusion that relevancy is synonymous with applicability, particularly when "relevance" was not part of the lexicon in that era.

Another significant error was the court's failure to consult *all* of the legislative history once it decided to make its decision based on the legislative history. The House Report makes it clear that the two-pronged economic substance is not intended to deny tax benefits to certain transactions that are driven by tax planning reasons:

> The provision is not intended to alter the tax treatment of certain basic business transactions that, under longstanding judicial and administrative practice are respected, merely because the choice between meaningful economic alternatives is largely or entirely based on comparative tax advantages.

House Report at 296. The House Report then lists four “basic business transactions” that should not be subjected to the economic substance doctrine, stating that “[t]he examples are illustrative and not exclusive.” *Id.* The JCT Report lists the same four transactions, but also states that certain tax credits are not intended to be disallowed where “a taxpayer makes the type of investment or undertakes the type of activity that the credit was intended to encourage.” JCT Report at 152. The message is unmistakable from these reports that the economic substance doctrine is not relevant to these transactions. The message is not directing *how* the doctrine should be applied; rather, the message is don’t apply it all.

The federal district court erred in determining that a threshold relevancy determination is not required under section 7701(o). This Court should not make the same mistake.

II. If a Threshold Relevancy Determination is Required, Under What Circumstances is the Economic Substance Doctrine Relevant?

A. Determining Relevancy Generally

There is no well-defined test in the case law for determining when the economic substance doctrine is relevant. Often, the courts apply the economic substance doctrine when a transaction has certain hallmarks of a tax shelter. *See, e.g.*, *Blum v. Commissioner*, 737 F.3d 1303, 1310 (10th Cir. 2013) (stating that a transaction that results in "enormous tax savings" may trigger "red flags"); *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1352 (Fed. Cir. 2006) (explaining that "the economic substance doctrine has required disregarding, for tax purposes, transactions that … lack economic reality"). The IRS has developed a list of various hallmarks for its agents to consider to support a conclusion that the "application of the economic substance doctrine may be appropriate," including that the "[t]ax benefit is artificially generated by the transaction" and the "[t]ransaction is outside the taxpayer's ordinary business operations." I.R.S. Memo. LB&I-04-0422-0014 (Apr. 22, 2022).

Conversely, when a court or even the IRS concludes that application of the economic substance doctrine to a transaction would not be appropriate, it is usually because the transaction falls into one of the categories of transactions to which the economic substance doctrine has not typically been applied. While it is rare for a court or the IRS to reach an explicit threshold determination that the doctrine is not "relevant" to a particular transaction, a compelling case can be made that the doctrine was deemed irrelevant, at least implicitly, in the categories of transactions discussed in section II.B. below.

There is one notable case, however, in which the court explicitly held that the economic substance doctrine is not relevant. In *Massachusetts Mut. Life Ins. Co. v. United States*, the issue was whether the taxpayer could deduct policyholder dividends in the year before the dividends were paid, as opposed to the following year. 103 Fed. Cl. 111, 115 (2012), *aff'd*, 782 F.3d 1354 (Fed. Cir. 2015). The taxpayer had attempted to accelerate its deduction of the dividends by guaranteeing a minimum amount of dividends it would pay in the following year to a defined group of policyholders. 103 Fed. Cl. at 132. The IRS primarily argued that the guarantee did not satisfy the "all events" test for the liability. The IRS also argued that the guarantee arrangement lacked economic substance "because the 'dividend-guarantee resolutions had no economic effect', and … 'no non-tax business purpose.'" *Id.* at 167. The Court of Federal Claims held that the economic substance doctrine was not relevant. *Id.* at 173. The Federal Circuit upheld the lower court's decision on the "all events test." 782 F.3d at 1362–65. The government did not appeal the lower court's decision on economic substance. *Id.* at 1362.

The Court of Federal Claims' analysis of the economic substance issue is quite instructive. First, the court agreed with the taxpayer that the economic substance doctrine is not applicable when "the legitimacy of the underlying transaction is not challenged by the government." 103 Fed. Cl. at 168–69. Second, the court distinguished economic substance cases such as *Coltec*, on the basis that the guarantee arrangement *was a part of the taxpayer's normal, everyday business operations*, noting that taxpayer's payment of policyholder dividends was "central to Plaintiffs business and that of the mutual life insurance industry as a whole." *Id*. at 171.

B. Categories of Transactions to Which Economic Substance Doctrine Should Not Be Considered Relevant

1. "Angel List" in House Report and JCT Report

The requirement in section 7701(o)(5)(C) to determine relevancy based on pre-section 7701(o)(1) authorities involves a distinct and much more complex question, which cannot be answered on the face of the statute. Section 7701(o)(5)(C) directs what can be an exhaustive search for authorities that tell us when the economic substance doctrine is or isn't relevant. Faced with that daunting task, it would be natural, and indeed expected, that a court would consult the legislative history and other extraneous materials. And the legislative history reveals a thoughtful and valuable list of transactions and structures that should not be subject to the rigors of the economic substance doctrine.

The House Report explains that the new law was "not intended to alter the tax treatment of certain basic business transactions that, under longstanding judicial and administrative practice are respected, merely because the choice between meaningful economic alternatives is largely or entirely based on comparative tax advantages." House Report at 296. These basic business transactions are set out in a nonexclusive list, the so-called "Angel List," and include:

1) The choice between capitalizing a business enterprise with debt or equity;

2) A U.S. person's choice between utilizing a foreign corporation or a domestic corporation to make a foreign investment;

3) The choice to enter a transaction or series of transactions that constitute a corporate organization or reorganization under subchapter C; and

4) The choice to utilize a related-party entity in a transaction, provided that the arm's length standard of section 482 and other applicable concepts are satisfied.

Id. The JCT Report includes these same transactions and specifies that these "examples are illustrative and not exclusive." JCT Report at 152 n.345.

The JCT Report also indicates that section 7701(o) is not intended to affect tax benefits that are "consistent with the Congressional purpose or plan that the tax benefits were designed to effectuate," such as tax credits under sections 42 (low-income housing), 45 (production tax credit), 45D (new markets tax credit), 47 (rehabilitation credit) and 48 (energy credit). *Id*. at 152 n.344.

The Angel Lists in the House Report and JCT Report, as well as the cases cited in support thereof, provide a court with a useful starting point for determining whether the economic substance doctrine is relevant or not. As this list is illustrative and not exclusive, courts are free to consider other authorities addressing other transactions where either the economic substance doctrine was found to be not relevant or the transaction was found to have economic substance.

2. Judicial Precedent for Certain Transactions

Courts effectively have exempted certain types of transactions from the economic substance test, in addition to the types of transactions in the Angel List. Two of the more prominent examples are the transactions in *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554 (1991) and *Granite Trust Co. v. United States*, 238 F.2d 670 (1st Cir. 1956). Each case involved a transaction (or series of transactions) that was entirely motivated by tax planning considerations, yet nevertheless was respected, along with the expected tax benefits. These transactions would not likely pass an application of a conjunctive, two-pronged economic substance test due to the tax avoidance motive. For that reason, they can be viewed as exempt from the economic substance test.

In *Cottage Savings,* a savings & loan association ("S&L") exchanged a devalued mortgage loan portfolio for a loan portfolio of substantially identical risk held by an unrelated party. 499 U.S. at 557–58. The S&L did so purely for tax reasons, so that it could report a tax loss, but not a regulatory accounting loss (which would have impaired its capital). *See id.* The IRS denied the loss and won on an economic substance argument in the Sixth Circuit. *Cottage Sav. Ass'n v. Commissioner*, 890 F. 2d 848, 852–53, 855 (6th Cir. 1989), *rev'd*, 499 U.S. 554 (1991). The Supreme Court reversed, permitting the tax loss on grounds there was an actual section 1001 realization event due to the material differences between the exchanged properties. 499 U.S. at 566–67. The fact that the transaction was undertaken solely for tax purposes was not important. *See id.* at 567 (explaining that mortgages that are substantially identical for regulatory accounting purposes could still exhibit differences that are material for tax purposes). One reasonable interpretation of *Cottage Savings* is that an actual sale or exchange of properties cannot be disregarded under the economic substance doctrine, notwithstanding a primary tax motive for the transaction.

Granite Trust is the leading authority for the well-established principle that a corporate shareholder with a built-in loss in stock of a subsidiary can transfer sufficient subsidiary stock to another person (often a related person) to cause its ownership to drop below the 80% threshold, and then liquidate the subsidiary under section 331 and recognize the loss. *See Granite Trust*, 238 F.2d at 678; *see also George L. Riggs, Inc. v. Commissioner*, 64 T.C. 474 (1975). The IRS has long refrained from asserting that transactions structured to take advantage of section 331 lack economic substance. That is because both courts and the IRS have viewed the decision to either liquidate under section 332 or structure into a section 331 liquidation as effectively elective in nature. *Granite Trust*, 238 F.2d at 676–77.

As a result, the only relevant inquiry is whether stock was transferred in sufficient amount to another person before the liquidation occurs, in order to avoid a section 332 liquidation. Post-*Granite Trust*, it has not mattered to the courts or the IRS whether the transferee is a related person, the transaction was structured with a tax avoidance purpose, or the liquidation occurs quickly after the stock transfer. *See, e.g.*, *Riggs*, 64 T.C. at 489 ("[W]e conclude that section 332 is elective in the sense that with advance planning and properly structured transactions, a corporation should be able to render section 332 applicable or inapplicable."); I.R.S. Priv. Ltr. Rul. 201419011 (May 9, 2014); I.R.S. Priv. Ltr. Rul. 201334006 (Aug. 23, 2013); I.R.S. Priv. Ltr. Rul. 201330004 (July 26, 2013);

I.R.S. Priv. Ltr. Rul. 201252008 (Dec. 28, 2012); I.R.S. Priv. Ltr. Rul. 201014002 (Apr. 9, 2010); *cf. Assoc. Wholesale Grocers, Inc. v. United States*, 927 F.2d 1517 (10th Cir. 1991) (distinguishing *Granite Trust* where, as part of integrated plan, the parent transferred a portion of its subsidiary stock to another party, liquidated the subsidiary, and purchased the portion of subsidiary's assets that were distributed to the party).

When Congress codified the economic substance doctrine in section 7701(o) in 2010, practitioners began to question, in both written submissions and panel discussions, whether *Granite Trust* transactions would now be challenged. Jodi J. Schwartz, *Economic-Substance Doctrine and Subchapter C: What, Me Worry?,* TAXES, Mar. 2011, at 113; Letter from Mark J. Silverman & Amanda Pedvin Varma, Steptoe & Johnson LLP, to Michael F. Mundaca, Asst. Sec'y (Tax Policy), Dep't of the Treasury, and Douglas H. Shulman, Comm'r, IRS, re: *Request for Guidance on Economic Substance Doctrine (Section 7701(o))*, 2010 TNT 130-11 (July 17, 2010). On a number of occasions, senior government officials have expressed the view that, notwithstanding the enactment of section 7701(o), *Granite Trust* remains "good law." Amy S. Elliott, *IRS Not Targeting 'Granite Trust' Transactions Under New Economic Substance Law, Official Says,* TAX NOTES (May 10, 2010) (quoting Marie Milnes-Vasquez, a senior technical reviewer for IRS Office of Associate Chief Counsel (Corporate) as saying "We are not trying to close down intercompany *Granite Trust* transactions …. If there's real ownership, it's a real transfer").

The exemption of sales/exchanges and liquidations from the rigors of the two-pronged test is entirely consistent with the insightful statement from the House Report, concluding that if the tax benefits are consistent with the Code, then the economic substance doctrine does not apply. *See* House Report at 296 n.124.

3. Congressional Incentives

The JCT Report promotes the concept that the economic substance doctrine should not apply to deny tax credits "in a transaction pursuant to which, in form and substance, a taxpayer makes the type of investment or undertakes the type of activity that the credit was intended to encourage." JCT Report at 152 n.344. Courts have developed the same concept in decisions both before and after the enactment of section 7701(o).

In *Sacks v. Commissioner*, 69 F.3d 982 (9th Cir. 1995), the IRS challenged the taxpayer's tax benefits derived from a sale-leaseback of solar water heaters in part on grounds that the investment was a sham because it projected only after-tax cash flows, as opposed to pre-tax cash flows. That transaction presumably would not satisfy the two-pronged test in clauses (A) and (B) of section 7701(o)(1) because, due to section 7701(o)(2)(A), a transaction is required to have pre-tax profit. The Ninth Circuit permitted the tax benefits and denied the IRS's sham transaction attack, stating:

> 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. A tax advantage such as Congress awarded for alternative energy investments is intended to induce investments which otherwise would not have been made.

69 F.3d at 993.

Similarly, years later in *Cross Refined Coal, LLC v. Commissioner*, 45 F.4th 150 (D.C. Cir. 2022), the IRS challenged the taxpayer's credits from a refined coal project on grounds that the investment was not expected to produce a *pre*-tax profit. Again, this investment presumably would fail the two-pronged test in section 7701(o)(1). Citing *Sacks,* the D.C. Circuit upheld the investment and the tax benefits on grounds that "a partnership's pursuit of after-tax profit can be legitimate business activity … in the context of tax incentives, which exist precisely to encourage activity that would not otherwise be profitable." *Id.* at 158.

Other types of transactions have effectively been exempted from the economic substance doctrine because they followed the structure that Congress outlined for the particular tax benefit. In *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779 (6th Cir. 2017), the Sixth Circuit rejected an IRS argument that commissions paid in respect of DISC shares held in a Roth IRA should be treated as exceeding the Roth IRA contribution limits even though the law permitted taxpayer's specific transactions as structured. *Id.* at 781–82. While the IRS's main attack was based on the substance-over-form doctrine, the court addressed the economic substance doctrine, stating it had no role to play in these circumstances even though the transaction lacked economic substance:

> But these economic-substance principles—which undergird the traditional use of the substance-over-form doctrine—do not give the Commissioner purchasing power here. Congress designed DISCs to enable exporters to defer corporate income tax. The Code authorizes companies to create DISCs as shell corporations that can receive commissions and pay dividends that have no economic substance at all.

Id. at 786.

4. Complex Corporate Restructurings Supported by Business Objectives

Courts analyzing corporate business transactions or restructurings tend to either (i) address the economic substance doctrine and conclude that it is violated or not violated or (ii) ignore it altogether without discussion and decide the case on other grounds. *See, e.g.*, *Nassau Lens Co. v. Commissioner*, 308 F.2d 39 (2d Cir. 1962), *remanding* 35 T.C. 268 (1960); *NA Gen. P'ship v Commissioner*, T.C. Memo. 2012-172. It is rare for a court to explicitly hold that the economic substance doctrine is not relevant. Nevertheless, the fact these types of transactions are upheld notwithstanding a primary tax avoidance motive, particularly when they occur as part of the taxpayer's ordinary business operations, is arguably the equivalent that the conjunctive, two-pronged economic substance test is not relevant.

Most corporate tax shelter cases such as *ACM Partnership* involve isolated transactions outside the taxpayer's trade or business that are used to generate a tax loss or deduction. In cases where a transaction occurs as part of the taxpayer's ongoing business operations or a corporate restructuring, courts generally do not apply the economic substance doctrine to deny tax benefits. Instead, they respect the transaction if it is real and has legal or economic consequences, particularly if it is just a tax-efficient means of implementing a series of steps that have an overall business purpose. *See, e.g.*, *United Parcel Serv. of Am., Inc. v. Commissioner*, 254 F.3d 1014 (11th Cir. 2001), *rev'g*, T.C. Memo 1999-268; *Shell Petroleum Inc. v. United States*, 102 A.F.T.R. 2d 2008-5085 (S.D. Tex. 2008); and *Countryside Ltd. P'ship v. Commissioner*, T.C. Memo. 2008-3.

In these corporate transaction or restructuring cases, the taxpayer often has a primary purpose to use a particular transaction or structure for tax minimization purposes. If a conjunctive economic substance test were strictly applied in these cases, the particular transaction or step giving rise to the tax benefit could be disregarded based on the taxpayer's failure to meet the subjective business purpose prong. Courts recognize, however, that doing so would conflict with the longstanding principle that corporations are entitled to structure their business transactions in a manner that minimizes or completely avoids taxes. *See, e.g.*, *United Parcel Serv.*, 254 F.3d at 1019 (citing *Gregory v. Helvering*, 293 U.S. at 469). When a court upholds the taxpayer's tax planning in the face of a primary tax avoidance motive, it is not always clear if the court is determining that the economic substance doctrine is not relevant or, alternatively, is finding that doctrine may be relevant, but applies it with considerably less vigor than it would to a purely tax-driven transaction that occurs outside of taxpayer's normal business operations. The line between the two outcomes is often blurry.

One of the earliest examples of a court facing this tension between legitimate tax planning and an economic substance challenge is *Kraft Foods Co. v. Commissioner*, 232 F.2d 118 (2d Cir. 1956). In *Kraft*, during a period in which consolidated tax returns were not permitted, a domestic subsidiary issued a debenture to its domestic parent for the primary purpose of generating interest deductions at the subsidiary level. *Id*. at 120–21. The IRS argued that the debentures should be disregarded for tax purposes because it served no business purpose other than the minimization of taxes. *Id.* at 127. Indeed, the taxpayer conceded that tax considerations were the primary motivation of the debentures. *Id.* In holding that the tax motivation should not cause the debentures to be disregard, the court stated:

> The Commissioner argues that transactions, though formally perfect and in compliance with a provision of the tax statute, must be disregarded if they have no purpose germane to the conduct of the business other than tax minimization. He relies on *Gregory v. Helvering* …. We do not think that these cases hold that tax minimization is an improper objective of corporate management; they hold that transactions, even though real, may be disregarded if they are a sham or masquerade or if they take place between taxable entities which have no real existence. The inquiry is not what the purpose of the taxpayer is, but whether what is claimed to be, is in fact. … Both [parent] and [subsidiary] are substantial enterprises engaged in separate businesses involving millions of dollars each year, exclusive of intercorporate transactions. Taxpayer is one of the nation's largest food companies; its name is a household word. Taxpayer cannot be characterized as an unreal corporate entity. Likewise with the transaction involved here. The parties, each having a separate and real corporate personality, engaged in certain objective acts with the intent of creating legal rights and duties. We think that the occurrence of these acts affected their legal relations. Since the acts were real and the taxable entities cannot be characterized as sham entities, the transaction should not be disregarded merely because the transaction was entered into in response to a change in the governing tax law.

Id. at 127–28 (citations omitted).

In *United Parcel Service,* the Eleventh Circuit confirmed that the economic substance doctrine does not apply to transactions entered into as part of a company's ongoing business activities. 254 F.3d at 1019–20. The taxpayer ("UPS") restructured its operations to shift certain insurance income to an offshore insurance company that was spun off to the UPS shareholders. *Id*. at 1016–17. The Tax Court concluded that the arrangement was a sham because, in its view, UPS failed to prove that the transaction was motivated by non-tax business reasons or had economic substance. T.C. Memo. 1999-268 at *38. However, on appeal, the Eleventh Circuit overturned the Tax Court, stating that the restructuring had the necessary "economic effects" to remove it from "shamhood." 254 F.3d at 1017.

The Eleventh Circuit distinguished the business purpose analysis that is applied to tax shelters such as in *ACM Partnership*, where the transactions "would not have occurred, *in any form*, but for tax avoidance reasons." *Id.* at 1020 (emphasis in original). Rather, the Eleventh Circuit found that the contracts entered into created genuine obligations, *id.* at 1018–19, and that the transaction was motivated by UPS's desire to provide its customers with loss coverage while lowering UPS's liability exposure. *Id*. at 1020. Further, the restructuring had the necessary business purpose because, "when we are talking about a going concern like UPS," the transaction has a business purpose "as long as it figures in a bona fide, profit-seeking business." *Id*. at 1019 (citing *ACM Partnership*, 157 F.3d at 251).

The Eleventh Circuit then considered the effect of a tax avoidance motive on business purpose. Citing *Gregory v. Helvering*, the court noted that tax planning was permissible. *Id*. Comparing the formation of a corporation to a corporation's choice between debt and equity, the court further clarified that, "[t]here 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." *Id*. Essentially, although the restructuring was "sophisticated and complex," the court found that tax motivated choices between alternatives in achieving a goal do not mean that the transaction lacks a business purpose. *Id*. at 1020.

Other courts have upheld the ability of a business to choose a tax efficient alternative to accomplish its business objective, and similarly rejected the application of the economic substance doctrine. For example, in *Shell Petroleum*, a Shell subsidiary ("Shell Sub") contributed high basis, low value properties to a newly formed corporation ("Shell Frontier") in a section 351 transaction for preferred stock, prior to the enactment of section 351(g) and section 362(e). Shell Sub sold a portion of its preferred stock to unrelated investors and recognized a loss. Shell Frontier took a carry-over basis in Shell Sub's contributed assets, giving it a substantial built-in loss. 102 A.F.T.R. 2d at 2008-5105. The IRS challenged the creation of this potential double deduction, on the grounds that the transaction lacked economic substance. *Id.* at 2008-5110.

The district court rejected this argument, holding that the transaction had both a valid business purpose and objective economic substance. *Id.* at 2008-5113.

The transaction was compared to the "restructuring of a going concern" in *United Parcel Service* and was distinct from the transaction in *Coltec*, which was "outside of [taxpayer's] routine business activities." *Id*. at 2008-5110–11. The court further stated: "[T]his is not a case in which the taxpayer has engineered a transaction solely for tax purposes, but one in which the taxpayer has undertaken a transaction to accomplish legitimate, non-tax objectives and has permissibly structured it so as to maximize the attendant tax benefits under then-existing law." *Id*. at 2008-5113.

Another example is *Countryside Limited Partnership v. Commissioner*, T.C. Memo. 2008-3, in which two of four partners wanted to be redeemed, but also wanted to defer the tax. Solely for tax purposes (which the taxpayer conceded), the partnership borrowed cash, caused a lower-tier partnership to invest the cash in third party bank notes, and then distributed the lower-tier partnership interests in redemption of the partners' interests. *Id*. at *3–*4. Through the use of selective section 754 elections and the tiered partnership structure, the lower-tier partnership did not step down its basis in the notes, and the distributing partnership stepped up the basis in its inside assets, which was later converted into a loss. *Id.* at *6. The redeemed partners then held a partnership interest with low outside basis but high inside basis in the bank notes, allowing for the repayment of the notes and reinvestment of the proceeds in a tax deferred manner by allowing the partners to defer the gain until they sold their distributed partnership interests. *Id*. The IRS argued that, under the economic substance doctrine, the partnership effectively distributed cash to the redeemed partners in a taxable transaction. *Id.* at *11.

The Tax Court held that since the overall redemption transaction served a business objective of redeeming two partners, the means of accomplishing that objective could not be challenged on the grounds they were tax-motivated. *Id.* at *17–*18.

CONCLUSION

The first question of whether there is a threshold relevancy determination under section 7701(o) is relatively easy to answer based solely on the plain meaning of the statutory language in section 7701(o)(1), particularly when it is read in the context of the overall statute. And that answer is unequivocally yes. The same result should be reached if the statutory language is considered ambiguous and the question needs to be resolved by reference to the legislative history. A conclusion that there is no threshold relevancy determination simply cannot be reconciled with either the statutory language or the legislative history.

The second question regarding the circumstances under which the economic substance doctrine is relevant is more challenging. It is clear that the statute *mandates* an inquiry into whether the economic substance doctrine would be *relevant* to the transaction (or series of transactions) in question under the law as it existed prior to the enactment of section 7701(o). What is not so clear is exactly how that determination is to be made, particularly when courts prior to the enactment of section 7701(o) did not explicitly make a threshold determination of relevancy. Yet this mandate, and the obvious intent of Congress, cannot be ignored by the Tax Court and is critical where taxpayers face a strict liability penalty for transactions that lack economic substance under section 6662.

This amicus brief describes various categories of transactions to which the economic substance doctrine historically has not been applied and for which section 7701(o) should not be relevant today: (1) transactions on the "Angel List"; (2) transactions that involve an actual sale or exchange or liquidation; (3) transactions authorized by Congress; and (4) transactions that occur as part of the taxpayer's ongoing business operations or a corporate restructuring. All of the above scenarios should be considered "circumstances in which the economic substance doctrine is *not* relevant."

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion was served on the parties on September 4, 2024, by mailing a copy First-Class Mail, postage paid, and emailing an electronic copy to the following addresses:

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