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Introduction

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INTRODUCTION

*Christopher H. Hanna**

IN 1934, Judge Learned Hand wrote the following as part of his opinion in *Helvering v. Gregory*:

We agree with the Board [of Tax Appeals] and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.¹

This language has been cited by courts and commentators, and the opinion (in which Judge Hand held against the taxpayer) is generally considered to establish the business purpose doctrine.² In recent years, a new type of transaction generally referred to as a "corporate tax shelter" has revived interest in Judge Hand's famous opinion. The reason is that some or many corporate tax shelters lack a business purpose or economic substance and are therefore subject to possible recharacterization. The 1997 Tax Court decision in *ACM Partnership v. Commissioner*, which was affirmed in part by the U.S. Court of Appeals for the Third Circuit, is probably the most prominent recent example of a court recharacterizing a transaction based on the economic substance doctrine.³ In 1999, the Treasury Department⁴ and the Joint Committee on Taxation⁵ released extensive studies on corporate tax shelters. In early 2000, the Treasury Department released temporary and proposed regulations relating to

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1. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

2. See BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 1.05[2][c] (7th ed. 2000).

3. *ACM P'ship v. Comm'r*, T.C. Memo. 1997-115, *aff'd in part and rev'd in part*, 157 F.3d 231 (3d Cir. 1998), *cert. denied* 526 U.S. 1017 (1999).

4. DEPARTMENT OF THE TREASURY, WHITE PAPER: THE PROBLEM OF CORPORATE TAX SHELTERS (DISCUSSION, ANALYSIS AND LEGISLATIVE PROPOSALS) (July 1999); DEPARTMENT OF THE TREASURY, REPORT TO THE CONGRESS ON PENALTY AND INTEREST PROVISIONS OF THE INTERNAL REVENUE CODE (Oct. 1999); see also DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2001 REVENUE PROPOSALS (Feb. 2000).

5. JOINT COMMITTEE ON TAXATION, STUDY OF PRESENT-LAW PENALTY AND INTEREST PROVISIONS AS REQUIRED BY SECTION 3801 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 (INCLUDING PROVISIONS RELATING TO CORPORATE TAX SHELTERS) (JCS-3-99) (July 22, 1999); see also JOINT COMMITTEE ON TAXATION, COMPARISON OF RECOMMENDATIONS RELATING TO CORPORATE TAX SHELTERS MADE BY THE DEPARTMENT OF TREASURY AND THE STAFF OF THE JOINT COMMITTEE ON TAXATION (JCX-25-00) (Mar. 7, 2000).

corporate tax shelters⁶ and the staff of the Senate Finance Committee issued draft statutory language that would discourage the use of abusive corporate tax shelters.⁷ More recently, Secretary of the Treasury Lawrence Summers stated “[c]ombating abusive tax shelters is perhaps the biggest challenge facing our tax administration system today.”⁸

In this symposium issue, eleven leading tax scholars discuss the traditional judicial anti-avoidance doctrines such as the business purpose and economic substance doctrines as well as the substance over form and step transaction doctrines. A number of the scholars focus on the possibility of codifying these judicial doctrines, primarily in light of corporate tax shelters. In the first article,⁹ Professor Ellen Aprill writes that in examining the debate over codification of judicial doctrines in light of corporate tax shelters, it is helpful to look at the broader jurisprudential perspective over rulemaking generally. She believes that the debate about legal rules versus standards is not unique to tax law. Rather, Professor Aprill argues that the work of philosophers such as Professor Frederick Schauer can be helpful in this debate. She uses Schauer’s work in deciding what questions should be asked and where the analytical focus should be. Professor Aprill concludes that codification of broad standards raises concerns about the excessive exercise of administrative authority but that the tax administrative process operates to limit administrative discretion. She also concludes that private parties are concerned about the errors of administrative officials while administrative officials are concerned about the errors of private parties and, as a result, in the absence of empirical data on corporate tax shelters, resolution of the disagreement must be a matter of informed judgment.

Professor Steven Bank makes two major points in his comment on Professor Aprill’s article.¹⁰ First, while agreeing with Professor Aprill that the discussion of the corporate tax shelter problem can be aided by referring to the broader debate over rulemaking generally, he questions why Professor Aprill relies only on one side of this debate, Schauer’s presumptive positivist view, for perspective on this issue. Second, if Schauer’s view is indeed the most accurate description of the rulemaking process, Professor Bank suggests that this might counsel against, rather than for, codifying legal doctrines in the fight against corporate tax shelters. Citing the experience with the development of the tax-free reorgani-

6. T.D. 8877, 65 Fed. Reg. 11205 (Mar. 2, 2000); T.D. 8876, 65 Fed. Reg. 11215 (Mar. 2, 2000); T.D. 8875, 65 Fed. Reg. 11211 (Mar. 2, 2000) amended by T.D. 8896, 65 Fed. Reg. 49909 (Aug. 16, 2000).

7. STAFF OF THE SENATE FINANCE COMMITTEE, CORPORATE TAX SHELTER PRELIMINARY STAFF DISCUSSION DRAFT (May 24, 2000). The staff of the Senate Finance Committee issued a revised draft on October 5, 2000.

8. Nicholas Kulish & Tom Herman, *Summers Promises Crackdown on “Loss-Generation Transaction,”* WALL ST. J., Nov. 17, 2000, at A2.

9. Ellen P. Aprill, *Tax Shelters, Tax Law, and Morality: Codifying Judicial Doctrines*, 54 SMU L. REV. 9 (2001).

10. Steven A. Bank, Comment: *Codifying Judicial Doctrines: No Cure for Rules But More Rules?*, 54 SMU L. REV. 37 (2001).

zation provisions, he argues that presumptive positivism helps explain why additional rules are often ineffective cures for the effects of “leaky” tax rules.

Peter Canellos gives a tax practitioner’s perspective on structuring business transactions and tax shelters.¹¹ He suggests that disclosure of tax shelters as well as penalties for non-disclosure and failure on the merits may be the appropriate solution to curbing aggressive tax shelters. As a result, Mr. Canellos believes that disclosure and penalties should be given a chance to work in halting or at least slowing down the current tax shelter boom before enactment of a substantive disallowance provision possibly in the nature of a general anti-avoidance rule (GAAR). He further writes that a GAAR may be appropriate in countries that do not have a judicially created body of substance over form authority. The United States is not one of those countries and therefore substance over form should remain a legal doctrine, asserted by the government or taxpayers but interpreted and applied by the courts.

Professor David Weisbach comments on Mr. Canellos’ article.¹² Professor Weisbach believes that disclosure and penalties are not sufficient to halt the current tax shelter boom. He believes that a strong substantive disallowance rule is both necessary and appropriate. In addition, Professor Weisbach writes that even if the courts would disallow many tax shelters, current law may be too weak. He believes that a strong anti-shelter doctrine needs to be considered.

Professor Graeme Cooper gives a detailed international perspective on general anti-avoidance rules.¹³ He focuses on four common law jurisdictions (the United Kingdom, Canada, Australia and New Zealand) and their experience with a GAAR, including why they adopted (or did not adopt) a GAAR as their preferred strategy in dealing with corporate tax shelters, what form those rules have taken in the jurisdictions where a GAAR was adopted, and how their approach differs from the United States. Professor Cooper argues that the experience of countries enacting a GAAR shows that it can play a useful role without doing the damage that tax practitioners have come to fear.

Professor Mark Gergen writes that the standards of tax motive and economic substance mediate our desire that tax law be principled and our desire that it be rule bound.¹⁴ The standards are a product of a commitment to law by imperfect rules. While acknowledging that this may seem obvious, Professor Gergen states that the point is worth making because

11. Peter C. Canellos, *A Tax Practitioner’s Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47 (2001).

12. David A. Weisbach, Comment: *The Failure of Disclosure as an Approach to Shelters*, 54 SMU L. REV. 73 (2001).

13. Graeme S. Cooper, *International Experience with General Anti-Avoidance Rules*, 54 SMU L. REV. 83 (2001).

14. Mark P. Gergen, *The Common Knowledge of Tax Abuse*, 54 SMU L. REV. 131 (2001).

in working through the analysis, we learn something about how the standards ought to be applied and, in addition, the argument helps us better appreciate recent anti-abuse regulations and rulings that posit norms of tax law that cannot be violated intentionally but can be violated inadvertently.

Professor Joseph Bankman comments on both Mr. Canellos' article and Professor Gergen's article.¹⁵ He writes that Mr. Canellos' division of tax practice into two bars (the tax bar and the tax shelter bar) has inspired him to propose two additional divisions: young lawyers versus old lawyers and accountants versus lawyers. Professor Bankman then discusses the resulting four categories and the differing viewpoints and attitudes of those in each category.

Professor Alan Gunn writes on the use and misuse of anti-abuse rules in the tax laws by focusing on the partnership anti-abuse regulations.¹⁶ He argues that the partnership anti-abuse regulations go beyond the traditional judicial anti-avoidance doctrines of substance over form, business purpose, economic substance and step transaction. Professor Gunn maintains that a transaction can be "abusive" without running afoul of the traditional anti-avoidance judicial doctrines. He compliments the Treasury Department for introducing the "prevention of abuse" concept in the regulations but fears that because of defects in the regulations, they will not be taken seriously.

Professor Lawrence Zelenak comments on Professor Gunn's and Professor Aprill's articles.¹⁷ He discusses codifying the judicial anti-avoidance doctrines in the form of a GAAR but concludes that it would not end the proliferation of corporate tax shelters. He suggests two alternatives approaches to enactment of a GAAR: imposing criminal penalties on corporate officers who fail to comply with disclosure requirements and enacting a corporate tax schedular system analogous to the passive loss rules contained in section 469.

Professor Martin McMahon writes that "substance controls over form, except, of course, those cases in which form controls."¹⁸ In this light, he discusses the various anti-avoidance judicial doctrines utilizing a number of well-known cases. Professor McMahon makes a number of observations, including the difficulty in finding consistent "principles" in the business purpose, economic substance and sham transaction doctrines, and the common thread in the corporate tax shelter cases as being transactions taking place outside the ordinary course of the taxpayer's business. He also concludes that codification of the judicial anti-avoidance doc-

15. Joseph Bankman, Comment: *The Business Purpose Doctrine and the Sociology of Tax*, 54 SMU L. REV. 149 (2001).

16. Alan Gunn, *The Use and Misuse of Antiabuse Rules: Lessons from the Partnership Antiabuse Regulations*, 54 SMU L. REV. 159 (2001).

17. Lawrence Zelenak, Comment: *Codifying Anti-Avoidance Doctrines and Controlling Corporate Tax Shelters*, 54 SMU L. REV. 177 (2001).

18. Martin J. McMahon, Jr., *Random Thoughts on Applying Judicial Doctrines to Interpret the Internal Revenue Code*, 54 SMU L. REV. 195 (2001).

trines is not necessary but may be appropriate or helpful depending on how detailed the codification.

Professor George Yin closes the symposium with his article in which he suggests that history can be of help in solving the corporate tax shelter problem.¹⁹ Professor Yin states that it is important to determine that corporate tax shelters are a problem in the U.S. tax system. Rather than relying on anecdotal evidence, the government needs to focus on the actual data in determining whether a problem exists. If corporate tax shelters are as serious a problem as is currently suggested, Professor Yin states that a bold response would be appropriate along the lines of the passive loss rules contained in section 469, *i.e.*, a broad, reasonably clear, outcome-oriented rule that is not affected by taxpayer purpose, intent, or the other elements making up the taxpayer's transaction. He suggests two possible ways in implementing this solution: (1) enactment of an "anti-abuse" rule that denies a particular tax result if no sensible legislator would have approved of the result at the time the statute was drafted although the uncertainty of such a rule would likely undermine its ability to be a deterrent to corporate tax shelters; or (2) taxing public corporations on their income reported for financial accounting purposes with certain adjustments for specific deviations provided by the tax rules.

In closing this introduction, it is interesting to note that some of the most high profile issues in the U.S. tax system today, such as the applicability of the substance versus form, business purpose, and economic substance doctrines, are the exact same issues that the government, courts, and commentators struggled with years ago. The eleven tax scholars who participated in this symposium issue have made an important contribution to the tax law literature. Although they disagree on a number of important issues and have suggested many different ways to solving the problem of corporate tax shelters, each of the contributors has identified important issues and fleshed out the analysis in trying to resolve these issues.

19. George K. Yin, *Getting Serious About Corporate Tax Shelters: Taking a Lesson from History*, 54 SMU L. REV. 209 (2001).

