



letters to the editor

The Step Transaction Doctrine: Beyond the Grasp of Mere Mortals?

To the Editor:

I've enjoyed *Tax Notes'* recent coverage of an old saw, the step transaction doctrine. Considerable thought and analysis went into Jerred Blanchard's article, "Reflections on Rev. Rul. 2001-46 and the Continued Vitality of *Kimbell-Diamond*," *Tax Notes*, Dec. 31, 2001, p. 1875. Ditto for the gloss put on this topic by Jasper Cummings, "Rev. Rul. 2001-46 Revisited," *Tax Notes*, Feb. 4, 2002, p. 641.

Still, I want to add at least one somewhat cynical (but nevertheless practical) observation. In the everyday world of corporate transactions (and watchful waiting for the IRS's big step transaction stick), I wonder whether it is very important whether the series of steps sought to be integrated are individually meaningless or not. As Jasper Cummings observes, in some cases individual steps are not completely meaningless (and yet implicitly the step transaction doctrine can be applied). In others, the steps will have meaning (small or large), yet the doctrine can be applied.

Unfortunately, I question whether any of us can ever expect to get any definitive guidance from the Service on exactly when it thinks the mystical step transaction doctrine should take effect.

My own simplistic view invokes dusty old references (supported by a significant volume of case law) about the degree of interdependence of the steps, the existence (or lack) of binding commitment, elapsed time, and the often critical end results/intention of the parties' inquiry. Like Messrs. Blanchard and Cummings, I think *Esmark v. Commissioner*, 90 T.C. 171 (1988), *aff'd* 886 F.2d 1318 (7th Cir. 1989), is a terribly important case. As that case demonstrates (and many others, too), the Internal Revenue Service has not done well with the step transaction doctrine, particularly in court.

I'll admit it is troubling that the Service has (administratively) trotted out step transaction authority a couple of times of late. The recent iterations of step transaction doctrine were in several rulings. Revenue Ruling 2001-26, 2001-23 I.R.B. 1297, takes an aggressive stance about step transaction doctrine precedent. I wonder how existing step transaction authority could support this result. The facts in Revenue Ruling 2001-26, after all, do not indicate that the first step of the

transaction was conditioned on the second. The merger in the ruling was the unilateral act of the acquiring entity, undertaken to squeeze out minority shareholders. The ruling says we should assume the step transaction doctrine applies (an article of faith, I guess).

Far more important, of course, is Revenue Ruling 2001-46, 2001-42 I.R.B. 1, which also addressed two step acquisitions, this time dealing with assets. A good deal has already been written about Revenue Ruling 2001-46. Mr. Blanchard and Mr. Cummings both deepened my understanding.

Unfortunately, I question whether any of us can ever expect to get any definitive guidance from the Service on exactly when it thinks the mystical step transaction doctrine should take effect. Nevertheless, I wonder whether it is not just plain impossible to say with certainty when the Service will stop tweaking step transaction authority. Maybe this is truly a tax doctrine that, like pornography, we can only know when we see it. While I applaud the analyses of learned practitioners on this important and troubling topic, I fear that some topics, like religion, can't be explained.

Very truly yours,

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