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Upstream "C" with a Drop: Form, Substance, and Code Sec. 311(b)

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The relationship between form and substance is fundamental in tax, but it is notoriously difficult to pin down. If you need a summary, it's hard to improve on the maxim that "substance controls over form all the time … except when it doesn't." [Jasper L. Cummings, *Tax Policy, Social Policy, and Politics: Amending Section 162(e)*, 61 TAX NOTES 595 (1993) (paraphrasing NYU Prof. Harvey Dale).]

Normally, we expect the IRS to be leading the charge for substance to control. Of course, there is the familiar exception of the *Danielson* rule, which is driven by the practical necessities of tax administration. But sometimes the IRS embraces form to advance *substantive* tax objectives.

The evolution of the IRS's views on the liquidation-reincorporation doctrine provides an interesting and important example. By soft-pedaling substance in favor of transactional form, the IRS has "amended" Code Sec. 311 to permit a corporation to distribute appreciated property to its controlling parent, tax free, outside of liquidation. Although the IRS is considering tightening up [*see Statement Regarding Private Letter Rulings on Certain Corporate Transactions* (Oct. 13, 2017)], this only underscores how much discretion the Service has to adjust the form/substance settings of our tax system.

Upstreaming Appreciated Assets

Extracting an appreciated asset from a C corporation without triggering entity-level gain is one of the classic tax-planning challenges. In the immediate wake of *General Utilities & Operating Co.* [SCt, 36-1 USTC ¶9012, 296 US 200, 56 SCt 185], this was easy enough. Over the decades, however, Congress and the courts imposed a series of limitations that effectively overruled *General Utilities* as applied to *nonliquidating* distributions. The enactment of current Code Sec. 311(b) in 1986 just made it official.

General Utilities' favorable treatment of *liquidating* distributions has enjoyed a much longer run. The IRS and the courts continued to attack perceived abuses, primarily in the M&A context [*see, e.g.*, *Court Holding Co.*, SCt, 45-1 USTC ¶9215, 324 US 331, 65 SCt 707]. But until the adoption of current Code Sec. 336(a), corporations could generally liquidate without triggering entity-level tax—with the customary exception of depreciation recapture and similar items.

The party didn't completely end in 1986. Under Code Sec. 337(a), a corporation still does not recognize gain or loss when it makes a liquidating distribution to a controlling corporation described in Code Sec. 1504(a)(2). As long as the distributee corporation (Parent) owns at least 80 percent of the liquidating corporation (Sub) by vote and value, Sub will not be taxable on property distributed to Parent.

All in the Family?

Code Sec. 337(a)'s lenient treatment of Sub is not really a holdover of *General Utilities*. Instead, it reflects the intuition that Sub's liquidation into Parent is one of those "mere changes of form" that should not trigger tax consequences. For the same reason, Parent does not recognize gain or loss when it receives the distribution [Code Sec. 332(a)], and also takes a carryover basis in the property received [Code Sec. 334(b)].

If Sub makes a *nonliquidating* distribution, Code Sec. 243(b) lets Parent deduct 100 percent of any dividend received. This is consistent with viewing Parent and Sub as only *formally* distinct. But there is a discontinuity. Even if the distribution is not taxable to Parent, *Sub* is still taxed on any built-in gains pursuant to Code Sec. 311(b).

If Parent and Sub want to "turn off" Code Sec. 311(b), they need to take their relationship to the next level. If they file a consolidated return, Parent and Sub will be treated as if they were divisions of a single corporation. Under the regulations, Parent will exclude the distribution from gross income [*see* Reg. §1.1502-13(f)(2)(ii)], while reducing its basis in Sub's shares by an equal amount [*see* Reg. §1.1502-32]. The gain that Sub recognizes under Code Sec. 311(b) will not be taken into account, courtesy of the regulatory "matching rule" [*see* Reg. §1.1502-13(c)].

That's great, but the disregarded gain does not disappear. It continues to hang over Sub's head as an item of deferred intercompany gain. If circumstances change—notably, if Parent, Sub, or the appreciated property leaves the group—Sub will have to take the deferred gain into account under the "acceleration rule" of Reg. §1.1502-13(d).

This is not just Sub's problem. The deferred intercompany gain will be included in consolidated net income, even if it's triggered by Sub's departure from the group. Hence, tax planners who take the long view still look for ways to allow group members to distribute appreciated assets without triggering Code Sec. 311(b).

Liquidation-Reincorporation

Assume that Parent owns 100 percent of Sub. Sub conducts two businesses: (1) a dynamic new rocket business, which has a basis of $100 but it is already worth $500; and (2) a slow-growth buggy business, which is also worth $500, but has a basis of $475.

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For legitimate business reasons, Parent would like to conduct the rocket business itself. But it still wants to conduct the buggy business through a subsidiary. In a world without taxes, Sub would simply distribute the rocket business to Parent.

If Parent and Sub attempt this in our world *with* taxes, however, the distribution will trigger $400 of gain to Sub under Code Sec. 311(b). Hoping to avoid any such unpleasantness, Parent and Sub devise a two-step transaction. Step one will be the liquidation of Sub, which will transfer *both* of its businesses to Parent. In step two, Parent will reincorporate the buggy business by contributing the buggy assets, probably subject to any buggy liabilities, to a newly organized subsidiary (New Sub) in exchange for all of its stock.

When the modest amount of dust generated by this transaction clears, Parent will be conducting the rocket business directly, while continuing to operate the buggy business through a subsidiary. This is essentially the same result that would have been reached if Sub had simply dividended up the rocket business. Parent and Sub hope that: (1) the liquidation will be tax free under Code Secs. 332(a) and 337(a); and (2) the reincorporation of the buggy business in New Sub will be tax free under Code Sec. 351.

Prima facie, this plan seems unlikely to work. Playing its substance card, the IRS can easily argue that New Sub is just a continuation of Sub (minus the rocket business) in a new corporate shell. New Sub is Sub's *alter ego*, so Parent's acquisition of New Sub's shares is tantamount to its reacquisition of a portion of the Sub shares that were redeemed in the liquidation.

When the two related steps are collapsed, the transaction will not pass muster as a complete liquidation. As defined in Code Sec. 346(a), a "complete liquidation" requires the redemption of *all* of the distributing corporation's stock. Parent's acquisition of New Sub shares will mean that some of Sub's stock was *not* redeemed.

If the integrated transaction is not a complete liquidation of Sub, we can forget about Code Secs. 331, 332, 336 and 337. How, then, *should* the transaction be analyzed?

Alter Ego and Code Sec. 311(b)

If New Sub is Sub's *alter ego*, the most natural analysis of the integrated transaction is that Sub is making a *nonliquidating* distribution of the rocket business, and then changing its name to "New Sub." The liquidation and reincorporation have no effect on Sub as an entity. Sub simply distributes its rocket business, triggering the recognition of $400 of built-in gain pursuant to Code Sec. 311(b).

Rev. Rul. 69-617 Opens the Door

In our hypothetical transaction, Sub's attempt to "liquidate" is implemented by its *dissolution* under local corporate law. Sub terminates operations, distributes its assets, and dissolves. For tax purposes, however, the reincorporation of the buggy business gives Sub a new lease on life: Sub continues to conduct the buggy business as New Sub.

But dissolution is not the only way to get Sub off the org chart. An *upstream merger* will also transfer Sub's assets to Parent, while terminating Sub as a state-law entity. The main difference between the two techniques is that Sub's liabilities must be paid off in dissolution, while Parent will simply assume them in a merger. If Parent can refinance Sub's liabilities in the dissolution, this distinction may have no practical significance.

Suppose, then, that Sub *merges* into Parent, and that Parent then contributes the buggy business to New Sub. The first step is a statutory merger, which may qualify as a reorganization described in Code Sec. 368(a)(1)(A). Assuming a good "A" reorg, Parent's transfer of the buggy business to New Sub looks like an asset drop-down permitted under Code Sec. 368(a)(2)(C).

Will the first step be treated as an "A" reorganization? When a transaction is described in both Code Sec. 368(a)(1)(A) and Code Sec. 332(a), the transfer of the controlled corporation's assets to its parent in the merger will be treated as a distribution in complete liquidation of the controlled corporation. [*See* Reg. §1.332-2(d); Reg. §1.332-2(e), Ex.] The tax consequences of the merger will be determined under Code Secs. 332(a) and 337(a)—*not* the reorganization provisions.

What result, then, if a state-law merger is followed by a drop-down? Under the usual liquidation analysis, the parent would be viewed as reincorporating the buggy business in Sub's *alter ego*. That would prevent the first step from qualifying as a "complete liquidation" under Code Sec. 346(a). If the transaction is viewed as a failed complete liquidation, it might plausibly be taxed as a *nonliquidating* distribution.

In Rev. Rul. 69-617 [1969-2 CB 57], the IRS reached a different result. Following the upstream merger of a subsidiary into its 80-percent parent, the parent dropped the subsidiary's assets and liabilities into a *new* subsidiary. Thanks to this "reincorporation," the state-law merger could not qualify as a complete liquidation.

The new subsidiary succeeded to *100 percent* of the old sub's assets and liabilities, so there was a strong case for viewing the new sub as simply a continuation of the old. But the IRS did not pursue the *alter-ego* analysis. Instead, Rev. Rul. 69-617 treated the overall transaction as an "A" reorganization followed by a drop-down. By way of justification, the IRS noted that nothing in the text of Code Sec. 368(a)(2)(C) suggests that a merger and drop-down cannot qualify as a reorganization if the acquirer already owns 80 percent of the target.

Rev. Rul. 69-617 reached a sensible result, but it put a premium on a formal distinction that the IRS would ordinarily have ignored. If Sub liquidates by *dissolving* into Parent, the transfer of Sub's assets to New Sub is a prohibited "reincorporation." But if Sub liquidates by *merging* into Parent, Rev. Rul. 69-617 treats the transaction as an "A" reorganization followed by a harmless drop-down.

Check-the-Box and Deemed Liquidation

Rev. Rul. 69-617 involved an upstream statutory merger. Mergers are not hard to implement, but there is always room for improvement. This was brought home by the adoption of the check-the-box regulations in 1997. Under the new regime, it became tantalizing easy to carry out a number of paper transactions that are treated, for tax purposes, as liquidations or incorporations.

For example, suppose that Sub is a single-member LLC that has elected to be treated as a corporation. If Sub wants to liquidate for tax purposes, it can do so (subject to some timing constraints) by electing to be treated as a disregarded entity. [*See* Reg. §301.7701-3(g)(1)(ii).] Alternatively, if Sub is a state-law corporation, it can trigger a tax liquidation by getting rechartered as an LLC under a user-friendly direct-conversion statute. [*See* Reg. §1.368-2(m)(4), Ex. 11.]

The check-the-box rules provide for deemed liquidations, not deemed statutory mergers. So, they cannot be used to effect a deemed "A" reorganization, which can then be safely combined with a drop-down pursuant to Rev. Rul. 69-617. Undaunted, corporate-tax planners tried to convince the IRS that a check-the-box liquidation can be treated as a reorganization under Code Sec. 368(a)(1)(C).

Blocked by **Bausch & Lomb**

A transaction can qualify as a "C" reorganization only if: (1) the acquiring corporation acquires "substantially all" of the target's assets; (2) the assets are transferred "solely" in exchange for the acquirer's voting stock and the assumption of the target's liabilities; and (3) the target liquidates. [*See* Code Secs. 368(a)(1)(C) and 368(a)(2)(G).] The IRS has issued a series private letter rulings treating deemed liquidations as "C" reorganizations, provided they are followed by an asset drop-down.

This argument got off to a slow start. Historically, *Bausch & Lomb Optical Co*. [CA-2, 59-1 USTC ¶9468, 267 F2d 75 (2d Cir. 1959), *cert. denied*, SCt, 361 US 835, 80 SCt 88 (1959)] prevented most upstream transactions from qualifying as "C" reorganizations. The sticking point (it was thought) was that the existence of the acquirer's stock interest in the target prevented the acquirer from acquiring the target's assets "solely" for voting stock.

To see the problem, suppose that Parent owns 85 percent of Sub. Parent transfers 100 shares of its voting stock (worth $100) to Sub in exchange for all of Sub's assets (also worth $100). Sub then liquidates, distributing Parent's voting stock to its shareholders *pro rata*—85 shares to Parent and 15 shares to Minority.

Parent has acquired assets worth $100 from Sub, ostensibly in exchange for 100 shares of its voting stock. But Parent got 85 of those shares back when Sub liquidated, so Parent has actually parted with only 15 shares. Those 15 shares are worth only $15, so has Parent received an $85 windfall?

No, because Parent has also given up its 85-percent equity interest in Sub. The transaction has, in effect, converted Parent's stock interest in Sub into a direct interest in Sub's assets. In economic terms, Parent has acquired Sub's assets in exchange for: (1) the 15 voting shares (worth $15) transferred to Minority; and (2) Parent's stock interest in Sub (worth $85).

Under the *Bausch & Lomb* doctrine, the implicit redemption of Parent's stock interest was enough to prevent the transaction from qualifying as the acquisition of Sub's assets "solely" for voting stock. This was not fatal if the transaction could be brought within the boot-relaxation rule of Code Sec. 368(a)(2)(B). But that was impossible when Parent owned more than 20 percent of Sub, as it almost certainly would.

Consequently, there was no point in a taxpayer trying to recharacterize a liquidation-reincorporation as an upstream "C" reorganization with an asset drop. Even if the two transactions had been identical in substance, the transfer of the subsidiary's assets to its 80-percent parent would not have qualified under Code Sec. 368(a)(1)(C).

"C" Reorganizations Hidden in Plain Sight?

This changed in 2000, with the administrative "repeal" of the *Bausch & Lomb* doctrine. Under new Reg. §1.368-2(d)(4)(i), Parent's prior ownership of a stock interest in Sub will not *by itself* prevent the soley-for-voting-stock requirement from being satisfied. Parent's acquisition of Sub's assets can still qualify under Code Sec. 368(a)(1)(C), provided that the sum of (1) the value of any cash or other property (other than Parent's voting stock) transferred to Minority; and (2) the amount of any liabilities assumed by Parent does not exceed 20 percent of the value of Sub's properties.

The new regime invited taxpayers to explore whether the liquidation—especially the *deemed* liquidation—of Sub into Parent might also be viewed as a "C" reorganization. If Parent owns 100 percent of Sub, the dissolution of Sub will transfer substantially all of Sub's assets to Parent, and Sub will liquidate as required by Code Sec. 368(a)(1)(C). However, can the purported "C" reorg get past the fact that Parent does not transfer any of its stock—voting or otherwise—to Sub?

LTR 200830003

In LTR 200830003 (July 25, 2008), Parent owned 100 percent of Sub1, a holding company. Sub1 owned all the stock of Distributing and several other U.S. and foreign subsidiaries. Distributing, in turn, owned all the interests in Controlled, a limited liability company that had elected to be taxed as a C corporation.

The proposed transaction involved the following steps:

1. Sub1 would convert under state law from a corporation to a limited liability company (Sub1 LLC). Sub1 LLC would be a disregarded entity, so the conversion would be a deemed liquidation of Sub1 into Parent.
2. Sub1 LLC would distribute the stock of Distributing and the U.S. subsidiaries to Parent. This would be a non-event from a tax perspective, because Sub1 LLC would be a disregarded entity. Sub1 LLC would *continue* to own its foreign subsidiaries under state law.
3. Parent would now own Distributing directly. Distributing would transfer its interest in Controlled to Parent. Controlled would then elect to be treated as a disregarded entity. That would be a deemed liquidation of Controlled into Parent.
4. Sub1 LLC would then convert *back* into a corporation (New Sub1) under state law. This would be treated as Parent's contribution of the assets that Sub1 LLC had *not* transferred to Parent. New Sub1 would therefore emerge as the owner of the foreign subsidiaries that had originally belonged to Sub1.

Parent would continue to own the stock and other assets that Sub1 LLC *had* transferred to Parent under state law. Hence, the overall transaction was analogous to (1) the liquidation of the original Sub1 into Parent; followed by (2) the reincorporation of *some* of Sub1's assets (namely, its stock in the foreign subsidiaries) in New Sub1.

Parent and Sub1 made extensive representations intended to support the treatment of the deemed liquidation of Sub1 into Parent as *either*: (1) a complete liquidation described in Code Sec. 332; or (2) a "C" reorganization. To qualify under Code Sec. 368(a)(1)(C), however, an acquiring corporation must acquire the target's assets in exchange for the acquirer's voting stock. This appears problematic, because a shareholder does not transfer anything to a corporation in liquidation.

Parent and Sub1 dealt with this statutory inconvenience by representing that Parent would make a *deemed* transfer of its voting shares to Sub1, which would immediately be reversed by the distribution of these "deemed shares" back to Parent in the liquidation of Sub1. This bit of legerdemain was good enough for the IRS, which ruled that Parent and Sub1 would *not* recognize gain or loss in connection with Sub1's conversion from a corporation to an LLC.

Interestingly, LTR 200830003 did not cite any specific Code provision to support this result. In fact, the IRS did not provide any clear tax characterization of the transaction—it just said gain or loss would not be recognized. Perhaps the IRS did not want to endorse the use of imaginary voting stock to shoehorn a liquidation into Code Sec. 368(a)(1)(C).

What is clear, however, is that the IRS did *not* treat New Sub1 as Sub1's *alter ego* under the step-transaction doctrine. If it had done so, it would have treated Sub as: (1) transferring all of its assets to Parent—*except* for the stock of the foreign subsidiaries; and (2) continuing its corporate life in the form of New Sub1. The nonliquidating distribution to Parent would have been taxable to Sub1 under Code Sec. 311(b).

LTR 200952032

In LTR 200952032 (Sept. 24, 2009), Parent owned all of the stock of Sub1 and Sub2. Sub1 was incorporated, oddly, in *both* state X and state Y. Sub2 was incorporated only in state Y.

Sub1 conducted a business in state X. Sub1 and Sub2 purportedly conducted a second business in state Y. Formally, at least, Sub1 and Sub2 owned this second business as a tenancy in common (TIC). However, 100 percent of the income and expenses of the TIC business were reported on Sub2's tax return.

Parent wanted to clear up this confused situation. For "administrative and regulatory purposes," Parent proposed a three-step transaction:

1. Sub1 would convert from a corporation chartered in both states X and Y into a limited liability company (Sub1 LLC) chartered only in state X. Sub1 LLC would be disregarded as an entity distinct from Parent.
2. Sub1 LLC would transfer all of its interest in the TIC business to Sub2 for no consideration.
3. Sub1 LLC would convert *back* to a corporation (New Sub1), but this time it would be chartered only in state X.

Parent and Sub1 did not make any representations concerning the qualification of the initial conversion as a complete liquidation under Code Sec. 332. Instead, they put all their money on Code Sec. 368(a)(1)(C). To support reorganization treatment, they represented that Parent would make a *deemed* transfer of voting stock to Sub1, and that Sub1 would transfer the deemed shares right back to Parent in liquidation.

Once again, the IRS issued a favorable ruling. But now the IRS made it clear that it was treating the deemed liquidation of Sub1 as a reorganization under Code Sec. 368(a)(1)(C). The IRS also stated that this "C" reorganization would *not* be disqualified or recharacterized because of the reincorporation of Sub1 LLC as New Sub1 (minus its interest in the TIC business). The reincorporation was simply a post-reorganization drop-down described in Code Sec. 368(a)(2)(C).

The IRS backed this up with a citation to Reg. §1.368-2(k), which had become effective on May 9, 2008. Under the new regulation, a transaction otherwise qualifying as a reorganization under Code Sec. 368(a) will generally *not* be "disqualified or recharacterized" as a result of one or more subsequent transfers of the acquired assets or stock. [*See* Reg. §1.368-2(k)(1).]

Code Sec. 368(a)(2)(C) already provides that reorganizations will not be "disqualified" by a subsequent asset transfer. The IRS applied this rule to the upstream merger in Rev. Rul. 69-617, *supra*. As the IRS noted, Code Sec. 368(a)(2)(C) permits an asset drop-down following an "A" reorganization even if the acquiring corporation owns an 80-percent interest in the target.

So, Reg. §1.368-2(k)(1) was not really news in this regard. Its significance lies in its statement that a reorganization will not be "recharacterized" because of a subsequent asset transfer. The regulation is apparently assuring us that a reorganization will not be recast as a nonliquidating distribution by a single corporation under the step-transaction-and-*alter-ego* analysis.

That would provide a rationale for the result in LTR 200952032, in which Sub1 liquidated, transferred its interest in the TIC business to Sub2, and then reappeared as New Sub1. The liquidation and reincorporation were implemented through simple state-law conversions, which makes it even harder than usual to view New Sub1 as anything but Sub1's *alter ego*. If Reg. §1.368-2(k)(1) precludes this kind of analysis, that would explain the IRS's failure to even mention the step-transaction doctrine in the letter ruling.

LTR 201127004

In LTR 201127004 (July 8, 2011), the IRS continued with its lenient approach. Parent owned all of the common and preferred stock of Sub, a state Y corporation. Sub's assets included an interest in LLC1, a limited liability company taxed as a partnership.

To reduce state taxes and "enhance management focus" within Sub, Parent decided that it would be better to hold the interest in LLC1 itself. Instead of just having Sub declare a dividend of its interest in LLC1, Parent proposed the following plan:

1. Sub would convert to a state Y limited liability company (Sub LLC), which would be disregarded as an entity separate from Parent.
2. At the time of the conversion, the terms of Sub's preferred stock would be amended to change the number of years that the shares had to be outstanding before they could be redeemed.
3. Disregarded Sub LLC would distribute the interest in LLC1 to Parent.
4. Sub LLC would convert *back* to a state Y corporation (New Sub).

Parent and Sub made the usual reps about a fanciful transfer of voting stock. The IRS ruled that the transaction qualified as a "C" reorganization. The drop-down of assets to New Sub made no difference pursuant to Code Sec. 368(a)(2)(C) and Reg. §1.368-2(k)(1).

How Low Can You Go?

Despite its similarity to LTR 200952032, LTR 201127004 pushed the ball a little further down the field. In the 2009 ruling, Sub1 started the transaction as a corporation chartered in both state X and state Y. At the end, Sub1 held only a charter in state X.

That would have looked like a "good" fact. Although changing a corporation's place of organization within the United States is not a big deal [*see* Code Sec. 368(a)(1)(F)], at least it's something. If literally *nothing* happens to the liquidating subsidiary except that it spends an instant as an LLC, the IRS might find it harder to resist an *alter-ego* analysis.

Changing a subsidiary's state (or states) of incorporation provides a bit of transactional cover. In LTR 201127004, however, Sub was going to stay put. That may explain the decision to combine the liquidation with a modification of the terms of Sub's preferred stock. That would require an amendment to Sub's charter—which, again, is at least *something*.

As we noted at the outset, the IRS issued a statement in October 2017 warning that it would be taking a closer look at liquidation-reincorporation transactions. This followed an IRS official's disclosure at a conference that the IRS had declined to rule on a proposed transaction in which Sub was going to be reincorporated as New Sub in the same state. The problem, according to the official, was that the IRS "couldn't really get an answer on realization, and it just looked like a straight asset distribution." [*See* Amy S. Elliott, *IRS Declines Ruling on Same-State Upstream Asset Transfer*, 153 TAX NOTES 1318 (2016) (quoting Richard Heinecke, branch 5 chief, Office of Associate Chief Counsel (Corporate)).]

The "realization" objection highlights the concern that Sub and New Sub are the same corporation. A taxpayer's purported "transfer" of property to itself is not a disposition of ownership, and it does not result in realization of gain or loss under Code Sec. 1001. [*Cf. J. Dobson*, 1 BTA 1082 (1924) ("since one cannot sell things to himself, the sale was nugatory").] If Sub's brief stint as a disregarded entity is disregarded under the step-transaction doctrine, a liquidation-reincorporation looks like nothing more than a nonliquidating distribution.

But what about Code Sec. 368(a)(2)(C) and Reg. §1.368-2(k)(1)? Don't they "turn off" the step-transaction doctrine? They do, but only if the transaction could qualify as a reorganization in the first place. The IRS official's comment regarding "realization" was apparently a warning that, if New Sub turns out to be nothing more than Sub's *alter ego*, there may be no "C" reorganization for those provisions to protect.

The Road Ahead

In its 2017 statement, the IRS may have signaled that its objections extend beyond the "realization" issue. The IRS said that it would be scrutinizing transactions in which Sub LLC distributes assets to Parent and reincorporates as New Sub "either in the same state as the state of incorporation of the original subsidiary *or a different state*." [Emphasis supplied.]

This is somewhat ambiguous, but it can be read to mean that the IRS has objections that cannot be met by simply reincorporating New Sub in a new state or tweaking its charter. If so, how far do these objections go? Is the IRS reconsidering whether Code Sec. 311(b) should be essentially elective when Parent owns 80 percent of Sub?

The most likely target of any retrenchment will be liquidation-reincorporation transactions under the check-the-box rules. That might not be a hard hole to plug. The IRS could just start enforcing Code Sec. 368(a)(1)(C)'s requirement that Parent acquire Sub's assets in exchange for voting stock.

This wouldn't require a full-fledged revival of the *Bausch & Lomb* doctrine. The IRS could simply recognize—or decree—that a check-the-box "liquidation" is a straightforward distribution of assets in redemption of the corporation's outstanding stock. [*Cf.* Code Sec. 346(a).]

A liquidation, as such, has nothing to do with a shareholder transferring its *own* stock to the distributing corporation. Parent's contribution of its voting stock to Sub prior to liquidate would not be a "meaningless gesture," which can be waived in good conscience. Parent's contribution would be an *irrelevant* gesture.

If the IRS wants to preserve Code Sec. 311(b) from the depredations of paper "C" reorganizations, it should stop "deeming" Parent to have acquired Sub's assets in exchange for voting stock in a check-the-box liquidation. This would just be a matter of abandoning an administrative fiction that the IRS sometimes uses to excuse compliance with the express requirements of Code Sec. 368(a)(1)(C). The IRS giveth, and the IRS taketh away.

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