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Carried Interest Update: US Tax Court Denies Service Provider Partner Status in Informal Partnership

By Mark Leeds and Guoyu Tao [1]

It's not always apparent when a person cast as a partner should be treated as a disguised service provider or employee. This issue is squarely presented in the private fund area when drafting partnership carried interest provisions and implementing management fee waivers.[2] In each of these cases, if the ostensible partnership interest is disguised compensation, the "partner" will have ordinary income instead of an allocable share of the partnership's capital gains and other items. In addition, if an allocation or distribution is disguised compensation, the partnership could be liable for failure to withhold federal income taxes.[3]

About 70 years ago, the US Supreme Court provided initial guidance on distinguishing compensation arrangements from partnerships for federal income tax purposes.[4] Broadly speaking, the Supreme Court defined a partnership as the sharing of income and gains from conduct of a business between two or more venturers. This rule has been loosely codified in Section 761 of the Internal Revenue Code of 1986, as amended (the "Code"). While the standard appears simple enough, the question as to when a person is receiving a share of partnership income or compensation continues to be a vexing issue.[5] In July 2018, the Tax Court, in *White v. Commissioner*,[6] again took up this issue in the context of the conduct of a real estate mortgage business. This Legal Update examines the court's analysis and the implications of the decision on tax planning for private funds and joint ventures.

The Facts Relevant to Whether the Business Was Conducted as a Partnership

After Marc White ("Marc") retired from a managerial position in an automobile business in late 2010, he was approached by his ex-wife, April Van Patten ("April"), about starting a new business in real estate and mortgage lending. April held a real estate broker license in California and a national mortgage lending originator license. Her current spouse, Kevin Van Patten ("Kevin"), also had experience in the real estate business. Although Marc did not have expertise in real estate, he drew down his retirement savings to provide capital for the new business. Marc's then-wife, Kelly White ("Kelly"), also held a real estate license and a salesperson license.

The couples created a new mortgage business, with Marc providing the initial business capital and overseeing office operations, Kelly overseeing the real estate agents and assisting with the agents' work, Kevin managing the marketing of the business and supervising loan structuring and processing and April serving as the broker of record. Although only Marc made a capital contribution at the beginning of the

business, other members contributed professional services with their respective expertise during the conduct of the business. Thus, the recitation of the facts supported the conclusion that each of the parties had contributed services to the venture and was an active participant in the mortgage business.

The business maintained multiple banking accounts and used various names on the banks' records.[7] Marc was authorized to use the funds in all of the accounts, while the Van Pattens were not designated as signatory for any of the accounts. Marc was designated as the sole proprietor of the business on at least one set of bank accounts. They retained a bookkeeper to manage the business records if and when the business was profitable. No other professional personnel were employed to assist with the accounting and tax matters of the business.

The parties asserted that they had agreed to split the profits of the business equally. Cash distributions to the parties, however, were haphazard and not recorded. Certain distributions to the Van Pattens were designated as commission payments. The financial accounts of the business were managed quite informally. The Whites commingled their private expenses and private savings with the assets of the business; profits were distributed to the Van Pattens through payments of their expenses on their behalf. In addition, the records that the parties provided were inconsistent with the documented payments. As the Van Pattens did not contribute capital to the business, all losses were borne by Marc.

The business was never profitable. At the end of 2012, the couples dissolved the venture, and the Van Pattens agreed to purchase the Whites' interest in the business.

The tax reporting for the venture was not consistent with there being a partnership between the two couples. The business issued Forms 1099-MISC to April for distributions of cash made to the Van Pattens (or expenses paid on their behalf). The parties did not file a partnership return. Each set of couples reported certain items incurred in connection with the business on Schedule C of their individual income tax returns.

In addition, the Internal Revenue Service ("IRS") asserted that Marc and Kelly had underreported the income from the business. This underreporting gave rise to the Tax Court litigation. The Whites defended against the assertion of federal income tax due by claiming, *inter alia*, that they were taxable only on their distributive share of the unreported income. Hence, the issue was joined as to whether the parties had entered into a partnership or whether the business was a sole proprietorship owned by Marc.

The Tax Court Decision

The Tax Court applied the eight-factor test laid out by the court in *Luna v. Commissioner*[8] to determine whether the business between the Van Pattens and Whites constituted a partnership for US federal income tax purposes. Under this test, the court would consider the following factors in determining whether a business arrangement constitutes a partnership:

1. The agreement of the parties and their conduct in executing its terms;
2. The contributions, if any, that each party has made to the venture;
3. The parties' control over income and capital and the right of each to make withdrawals;
4. Whether each party was a principal and coproprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his or her services contingent compensation in the form of a percentage of income;

5. Whether business was conducted in the joint names of the parties;
6. Whether the parties filed federal partnership returns or otherwise represented to respondent or to persons with whom they dealt that they were joint venturers;
7. Whether separate books of account were maintained for the venture; and
8. Whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise.

No one factor is determinative.[9] All of the factors must be weighed, and the conclusion as to whether a partnership exists is decided based on the totality of the facts and circumstances.

The Tax Court found that as the taxpayers failed to provide sufficient evidence that demonstrated an equal splitting of business profits, the first factor weighed in favor of not finding a partnership. The court found that although the Van Pattens contributed professional services, no capital contributions were made and therefore the second prong was failed. In addition, the Van Pattens had no financial control since they were not authorized to access any of the accounts. No evidence suggested that the remuneration the Van Pattens received from the business were payments of their share of partnership distributions. The Whites did not list the Van Pattens as co-owners of the business on any of the accounts, and the Van Pattens did not list the Whites as joint owners of the business on the checks they wrote on behalf of the business. No partnership return was filed. The commingling of the Whites' personal expenditures with the financials of the business also weighed against the taxpayers in the finding of the existence of a partnership. In addition, despite the parties' testimony to the contrary, the evidence did not support a finding that the Whites and the Van Pattens had joint control over the business. Based on the weighing of these factors, the court concluded that the Whites and the Van Pattens had not formed a partnership. As a result, the Whites were held to be taxable alone on the unreported income.

Relevant Decisions, IRS Publication and Proposed Regulation

As we note above, the issue as to whether a partnership exists between two or more participants in a business venture has been the subject of litigation and IRS guidance for approximately 70 years, but the issue continues to reappear with regularity. The issue arises not just in the case of disguised service providers but also in the case of disguised lenders. Both sets of authority offer guidance on when a person will be considered to be a partner for federal income tax purposes. Accordingly, it is valuable to consider the holding of this latest case in the context of the relatively developed body of law to see how private funds can better structure carried interests and management fee waivers to ensure that managers will be respected as partners.

THE INTENT TEST, THE ECONOMIC SUBSTANCE DOCTRINE AND MEANINGFUL PARTICIPATION IN THE PROFIT AND LOSS OF THE PARTNERSHIP

In *Commissioner v. Tower*,[10] one of the oldest cases to consider the issue as to whether a partnership existed for federal income tax purposes, the US Supreme Court adopted an intent test and suggested that the intent must be supported by a finding that the members of the business either contributed capital or provided vital services to the joint activity. The *Culbertson* Court, *supra*, preserved the intent test and announced a totality-of-the-circumstances test. In rejecting the capital or vital services requirement, the Court provides that the test is to consider "whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective

abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with business purpose intended to join together in the present conduct of the enterprise."

The preeminent case addressing the importance of intent and incorporating profit-sharing risk into a partnership interest in order for a person to be treated as a partner is *TIFD III-E, Inc. v. United States* (a/k/a Castle Harbor).[11] Although *TIFD-III E* is not discussed in *White*, it dovetails with the Tax Court's analysis and is worth evaluating in determining whether there is sufficient profit-sharing in a given case for a person to be treated as a partnership. At the outset, it is worth noting that the facts in *TIFD-III E* were diametrically opposed to those in *White* in that the parties in *TIFD-III E* employed legions of sophisticated tax counsel, dotted every "i" and otherwise paid attention to formalities. Nonetheless, the taxpayer in that case did not do any better than the Whites with respect to convincing the court that a partnership existed.

In *TIFD-III E*, the taxpayer entered into a partnership with two non-US banks that were not US taxpayers. The banks contributed $117.5 million to the partnership, which constituted 18% of the capital of the venture. The banks had no say in the management of the partnership. The partnership agreement allocated 98% of the partnership's "operating income" to the banks. The taxpayer (essentially) had the unilateral right to determine whether income would be classified as operating income. For book purposes, the partnership had significant depreciation deductions (which reduced the amount of the income allocation) but no tax depreciation. Under the partnership agreement, the distributions to the banks were set at slightly over 9% per annum, and this return was guaranteed by the other partner and cash arrangements. Thus, the banks received allocations of taxable income significantly in excess of the amounts that they would receive as distributions. The IRS challenged the status of the banks as partners.

The court, relying on *Culbertson*, *supra*, held that non-US banks had no intent to be partners and should be characterized as secured lenders. Their internal communications about the transaction referred to their outlay as loans. The guarantee and cash collateral arrangements assured the banks of repayment. The use of the 9% target distributions, coupled with the taxpayer's ability to remove income from operating income status, prevented the banks from receiving income in excess of the 9% rate. The court characterized a provision that would have provided the banks with an extra 2.5% return on their investment as "kicker interest" and not as an interest in partnership profits.

In *ASA Investerings Partnerships v. Commissioner*,[12] the taxpayer entered into a partnership with a non-US bank. The partnership entered into a contingent installment sale transaction over short-term notes that generated a large non-economic gain, which was allocated to the non-US bank. In the next year, the US taxpayer bought out most of the interest held by the non-US bank and caused the partnership to (essentially) reverse the prior transaction and generate a large capital loss, which was allocated to the US partner. The US partner had informally agreed to indemnify the non-US bank against any economic loss. The transactions were structured to provide the non-US bank with a partnership return that was the equivalent of a fee for its participation in the transaction and interest on its capital contribution. The IRS challenged the validity of the partnership in order to deny the non-economic loss to the US partner.

In *ASA*, the Tax Court applied the *Culbertson*, *supra*, doctrine and found that a domestic corporation and the non-US bank did not have the required intent to come together and share

profits from a venture when they arranged a tax shelter in the form of a partnership. On appeal, the DC Circuit upheld the Tax Court's finding that the non-US bank "did not share in profits and losses." The non-US bank had no ability to profit from the partnership's holdings because the gain and loss opportunities from such holdings had been hedged away. The non-US bank assumed only a *de minimis* risk because of the structure of the transactions and the informal guarantee. Accordingly, the court held that the partnership would not be respected for federal income tax purposes.

In *Virginia Historic Tax Credit Fund 2001 LP v. Commissioner*,[13] three individuals sponsored partnerships to invest in sub-partnerships that rehabilitate properties that would be eligible for a Virginia state tax credit in respect of the renovation. Each investor in an investment partnership was promised a money-back guarantee that he or she would receive a share of the tax credits generated by the sub-partnership's rehabilitation expenditures ($1 for each $.80 invested) and a 0.01% share of the other partnership items. The offering materials stated that the 0.01% interest was not expected to be a material amount of partnership income, gain, loss or deduction. Each investment partnership acquired a 0.01% in a sub-partnership only after the rehabilitation was complete. As a result, the Virginia tax credits were available to investors as soon as they made their contributions to the investment partnerships. The investors were bought out of the investment partnerships for a "pittance" in the year after their contribution.

The IRS challenged the conclusions that the individuals who contributed money to the investment partnerships were partners in these partnerships. Instead, the IRS asserted that the individuals had simply purchased state tax credits. As a result, the investment partnerships would have had gain equal to the excess of the sales price of the credits over the cost of the credits. The Fourth Circuit found that despite the form of a partnership, the transaction was a disguised sale of the Virginia tax credits. As relevant to the issue as to whether the investors should be treated as partners for federal income tax purposes, the court focused on the fact that the investors faced "no true entrepreneurial risk." Instead, they received a fixed rate of return from the ability to claim the Virginia tax credits as the interest in the investment partnership was not expected (and did not) provide them with more than a *de minimis* return. Accordingly, the investors were not treated as partners for federal income tax purposes.

In *Historic Boardwalk Hall, LLC v. Commissioner*,[14] the Third Circuit adopted a bona fide participation requirement in rejecting the partner status to a taxable investor that invested in the restoration of historic property of New Jersey through a partnership. The court provided that to be respected as a partner, the investor must have a "meaningful stake in the success or failure of the partnership." As the investor was assured to receive certain tax credits and a preferred return regardless of the success or failure of the rehabilitation program, the court found that the investor lacked meaningful downside risk in its investment. As the investor could only expect to receive limited upside potential, the court found that the investor is not a bona fide participant. The court rejected the investor's reliance on the form over substance doctrine. Quoting *Southgate Master Fund, LLC v. United States*,[15] the court stated that "[t]he fact that a partnership's underlying business activities had economic substance does not, standing alone, immunize the partnership from judicial scrutiny. . . . The parties' election of the partnership form must have been driven by a genuine business purpose."

THE FORMALITIES OF CONDUCTING BUSINESS IN A PARTNERSHIP

The courts have sustained taxpayers' assertions that partnerships existed even in instances in

which partnership formalities were not observed, when the conduct of the parties clearly supported the fact that a joint venture existed. Thus, the facts that the Whites did not memorialize their arrangement in a formal partnership agreement and did not report their venture on a partnership tax return should not have been fatal to the finding of a partnership for federal income tax purposes. Nonetheless, the failure to follow formalities or properly report the results of the venture created additional hurdles that the Whites could not overcome.

Strickland v. Commissioner[16] addressed whether a partnership existed when the parties did not enter into a written partnership agreement. A father agreed to join in the operating of two service stations with his son and a bookkeeper. The father contributed leasehold, dealership and management services. The son contributed bookkeeping services for one of the stations and management services for the other station. The bookkeeper contributed bookkeeping services for the second station. The profits for the first station were split equally between the father and the son; the profits for the second station were split equally among the three participants.

The Tax Court found that a partnership existed even though the parties only had an oral partnership agreement. The Tax Court specifically found that the facts that no partnership return was filed, that the business was conducted only under the father's name and that the parties intended to conceal the partnership status of their business were not dispositive; the court specifically stated that a "partnership agreement may be entirely oral and informal."[17]

CCA 201323015[18] addressed whether a collaboration between two corporations is a partnership when the parties involved entered into side agreements that they did not intend to form a partnership. The two corporations joined together in the manufacturing, developing and marketing of a product. The IRS found that a partnership existed because the corporations shared in the net profits and losses. The IRS stated that a partnership exists when the conduct of the parties "plainly show" such a relationship.

PROPOSED REGULATIONS TO PREVENT DISGUISED PAYMENTS FOR SERVICES BEING TREATED AS PARTNERSHIP INTERESTS

The Code itself provides that when a partner is compensated without regard to partnership income, the compensation paid to the partner is treated in the same manner as compensation paid to a non-partner.[19] Under Code § 707(a)(2), the Treasury was granted broad authority to draw the boundaries between bona fide partnership allocations and payments of service fees. As *White* demonstrates, it may be difficult in a given case to differentiate between compensation and a share of partnership income.

In 2015, the Treasury issued Proposed Treasury Regulation § 1.707-2. This regulation would recharacterize certain allocations of partnership income as disguised compensation for services if certain tests are met. If an allocation is recharacterized as disguised compensation, the amount received would be taxable at ordinary income rates. The proposed regulation was initially drafted to combat abusive management fee waiver transactions. However, it was drafted broadly and could also affect carried interest arrangements of private equity funds. While further action on the regulation appears to be on hold,[20] it offers insight into structuring carried interests and management fee waivers (which was the subject of the regulation).

The proposed regulation sets the following standard for determining when an allocation should be treated as a disguised payment for services:

1. The service provider, as a partner or in anticipation of becoming a partner, performs services for the partnership;
2. The partnership makes an associated allocation to the service provider; and
3. The provision of services and the allocation of partnership income, when viewed together, suggest that the service provider is acting in a non-partner capacity.

The proposed regulation further provided a six-factor test for partnerships' arrangements, which would determine whether the allocations to service providers are disguised payments of services based on whether:

1. The arrangement has significant entrepreneurial risk;
2. The service provider holds, or is expected to hold, a transitory partnership interest;
3. The service provider receives an allocation and distribution in a time frame comparable to the time frame that a non-partner service provider would typically receive payment;
4. The service provider became a partner primarily to obtain tax benefits that would not have been available if the services were rendered to the partnership in a third-party capacity;
5. The value of the service provider's interest in general and continuing partnership profits is small in relation to the allocation and distribution; and
6. The arrangement provides for different allocations or distributions with respect to different services received, the services were provided by one person or related persons and the entrepreneurial risks associated with the different allocations vary significantly.

The existence of entrepreneurial risk is the most significant factor, while the importance of the other five factors is dependent on the facts of specific transactions. If an allocation lacks significant entrepreneurial risk, this would suggest that the allocation is a payment for services unless the other five factors suggest otherwise, and vice versa. Specifically under this first factor, the proposed regulation provides that an allocation is presumed to be lacking significant entrepreneurial risk when the following facts exist:

(i) The allocations are capped when the cap is reasonably expected to apply in most years;

(ii) The service provider's share of income is reasonably certain;

(iii) The allocations are made with respect to gross income;

(iv) The allocations are predominantly fixed in amount, reasonably determinable or designed to assure that sufficient net profits are highly likely to be available to be distributed to the service provider; or

(v) In cases of management fee waivers, either the waiver of service fees is non-binding, or the partnership is not timely notified of the waiver or its terms.

When the presumption is created, the allocation will be deemed to be a disguised payment for services unless other facts and circumstances suggest, by clear and convincing evidence, that the risk associated with the allocation is significant.

In Example 3 provided under the proposed regulation, the Treasury concluded that the allocation to the service-providing partner is not a disguised payment when the partner received 10% of the partnership's net profits or losses over the life of the partnership.[21]

Example 4 of the proposed regulation addressed an allocation by an investment partnership. The assets of the partnership are tradable securities, and the partnership has elected to mark to market the value of its assets. The service provider received a special allocation of the partnership's net gain over the 12-month period of the following taxable year. This allocation is respected as long as the income of the partnership cannot be reasonably predicted because the allocation is neither reasonably determinable nor highly likely to be available due to the partnership's mark-to-market election.

In Example 5, a general partner controls a company that provides management services to the partnership. He or she received an additional allocation of interest in future net profit of the partnership. This allocation is not a disguised payment for services if the allocation to the general partner is neither highly likely to be available nor reasonably determinable.

In Example 6, under similar facts as provided in Example 5, the partnership agreement further provided that the management company can waive the management fee upon 60 days' prior written notice before the beginning of the relevant taxable year of the partnership. In exchange, the partnership will allocate an additional partnership interest to the management company. If the allocation is neither highly likely to be available nor reasonably determinable, then the allocation is not a disguised payment for the company's services.

The proposed regulation's strong emphasis on the existence of significant entrepreneurial risk resonate the holdings articulated by the courts in *ASA*, *Virginia Historic* and *Historic Broadwalk Hall*, *supra*.

However, while the case law discussed above focus on whether a business arrangement constitutes a partnership and whether a service provider should be respected as a partner, the proposed regulation targets each specific allocation or distribution made to a service partner or in anticipation of becoming a partner. That is to say, under the proposed regulation, even if a partnership is found to exist and the service provider otherwise qualifies as a partner, it is still possible that allocations to the service partner would be recharacterized as disguised payment of the partner's services if the test provided in the proposed regulation is not passed.

Lessons from the *White* Decision

First, the context of the dispute in *White* should not be overlooked. The case arose from the fact that the parties had not reported the receipt of income. It was not a question as to whether allocations were correct. In this sense, the case is similar to *TIFD-III E*, *supra*, in that the finding of the existence of a partnership would have left trade or business income untaxed. (In *White*, it's not clear if the IRS pursued an assessment against the Van Pattens, but the facts of the case suggest that the Van Pattens may have been judgment proof.)

Second, the court's analysis in *White* suggests that even when the business opportunity is brought to the capital partner—that is, the partner who stakes the venture—by a prospective income partner, the income "partner" will be respected as a partner for federal income tax purposes only if his or her compensation is truly tied to the results of the venture. The business operated by the Whites and the Van Pattens was not found to constitute a partnership partly because the couples conceded that, contrary to their oral agreement, they did not split the profits equally.

Third, the *White* court relied heavily on the banking record in determining whether the Whites and the Van Pattens had joint control over the business and whether a co-proprietorship existed between the couples. It is

clear that business records, especially banking records, are of significant importance.

Fourth, the court's reasoning in *White* supports the conclusion that courts will consider whether the business arrangement is, in substance, what would normally be deemed a partnership. For example, in *ASA* and *TIFD-III E*, the courts held that the arrangement between the parties was more properly treated as creditor-debtor relationships. In *Virginia Historic*, the court suggested that the business transaction was a disguised sale. In *White*, the arrangement was more properly characterized as an employment relationship.

As always, it is clear for the practitioner that consistent and candid presentation substantially weighs in favor of the taxpayer. In *White*, the court relied heavily on the record of the business when the testimonies of the petitioner and his business partner were inconsistent. In *TIFD-III E*, the fact that the banks referred to their involvement as a loan influenced the court in holding that the banks should not be characterized as partners. In contrast, in *Strickland*, the court found the petitioner's testimony credible when the business record was lacking because his testimony was consistent with that of the other witnesses.

Planning When Compensating Service Partners

Unfortunately, no bright lines emerge from the court's decision in *White* as to when an informal arrangement will be treated as a partnership for federal income tax purposes. However, *White* shows that when planning carried interests, attention to formalities will help, and the formalities need to be consistent with the substance of the arrangement. The *White* decision makes clear that service partners have a much stronger case for being respected as partners when compensatory payments are separated from profit-sharing and when distributions are made in accordance with the business arrangement, not on an as-needed basis. What is clear for practitioners is that under the *Culbertson* test as refined by modern cases, the existence of a joint profit intent alone is insufficient by itself to warrant a finding of the existence of a partnership. Instead, proper tax planning suggests there needs to be true profit sharing, a written partnership agreement, separate books and records and the filing of partnership returns. The proposed Code § 707 regulations, if finally promulgated, will create the additional hurdle of the partnership testing every allocation made by it to a service partner to ensure that the allocation is not a disguised payment for services. Otherwise, even if a service partner is respected as a partner under case law, specific allocations that did not meet the standard set forth in the proposed regulation could be recharacterized as disguised payments of the partner's services.

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2 In July 2015, the Treasury and the Internal Revenue Service issued proposed regulations that address whether arrangements in which the private equity fund managers receive an interest in the managed partnership's future profits

in exchange for waiving part or all of their management fees (generally a fixed payment for services provided to the partnership) constitute disguised compensation.

[3] See Section 7501 of the Internal Revenue Code of 1986, as amended.

[4] *See Culbertson v. Comm'r*, 69 S. Ct. 1210 (1949).

[5] For prior coverage of this issue, *see* Leeds and Davis, *Historic Boardwalk Hall v. Commissioner: IRS Dissolves a Partnership Between Pitney Bowes and the NJSEA*, reprinted at https://www.martindale.com/litigation-law/article_Greenberg-Traurig-LLP_1611398.htm. It is also worth noting that the IRS has stated it is actively auditing management fee waiver transactions. See Shreve, *IRS Looking for Management Fee Waiver Problems in Audits* (BNA Tax Management Report (March 13, 2017)); Davison, *Carried Interest Crackdown Stalls After Tax Law Changes* (BNA Financial Planning Journal (May 15, 2018)) ("The IRS is pursuing aggressive fee waiver arrangements through audits.").

[6] T.C. Memo. 2018-102 (July 2018).

[7] In its accounts with the Bank of America, the business was listed in the bank's record as a corporation titled "Mortgage Lending Services of California." In its accounts with American River Bank, the business was listed as a sole proprietorship owned by Mr. White under the names of "Mr. White DBA Mortgage Lending Services of CA," "Mr. White DBA Homebuyers Resource Center" and "Mr. White DBA Mortgage Lending Services – Trust Account."

[8] 42 T.C. 1067, 1077-1078 (1964).

[9] *White*, T.C. Memo 2018-102 at 16-17 (citing *Luna*, 42 T.C. at 1077-78 (citing *Smith's Estate v. Comm'r*, 313 F.2d 724 (1963); *Beck Chemical Equipment Corporation v. Comm'r*, 27 T.C. 840 (1957)).

[10] 327 U.S. 280 (1946).

[11] 459 F.3d 220 (2nd Cir. 2006), *rev'g* and remanding 342 F. Supp. 2d 94 (D. Conn. 2004), *rev'd*, 666 F.3d 836 (2d Cir. 2012), *rev'd*, 604 F. App'x 69 (2d Cir. 2015).

[12] 201 F.3d 505 (D.C.Cir. 2000), *aff'g*, T.C. Memo 1998-305.

[13] 639 F.3d 129 (4th Cir. 2011).

[14] 694 F.3d 425 (3rd Cir. 2012).

[15] 659 F.3d 466, 484 (5th Cir. 2011).

[16] T.C. Memo 1986-85 (March 1986).

[17] *Id.* at 19 (citing *Ayrton Metal Co. v. Comm'r*, 299 F.2d 741, 742 (2d Cir. 1962); *Seattle Renton Lumber Co. v. U.S.*, 135 F.2d 989, 991 (9th Cir. 1943)).

[18] Chief Counsel Advice 201323015 (Jun 7, 2013).

[19] Code § 707(a).

[20] See Davison, *IRS Putting Corporate Projects on Hold to Focus on Tax Law* (BNA Daily Tax Report (May 21, 2018)).

[21] Proposed Regulation § 1.707-2(d) Example (3)(i), (ii).

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