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***1031 HOW TAX THINKS** [\[FN1\]](#)

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It is an honor to be asked to this school, especially to give one of the Donahue Lectures. Professor Anthony Polito, a friend for whom I have been a guest teacher, suggested my name in part to introduce this series to taxation. Constitutional law, the usual fare, finds a more preconditioned audience. But that may be because--as a professor who taught me both subjects said--“A lot of people know or think they know a great deal about the Constitution, though they couldn't quote you one sentence of it.” [\[FN1\]](#)

By contrast, most people think they know nothing about tax, although it informs their lives. Tax influences your choice of renting or buying a home, selling or keeping stocks, how to save for retirement. On a professional level, understanding the way that tax looks at the world--the concepts in which it thinks--shows you how to analyze a transaction no matter what rules apply.

For tax thinking boils a transaction down not to labels but to who gets what why, and it forces you to examine where and how it says that. [\[FN2\]](#) The clarity of former tax lawyers like Robert H. Jackson, Harry Blackmun, and Sumner Redstone shows that--far from being a bunch of crazies speaking in tongues--tax law represents just the opposite. Much of tax practice consists of trying to find logical definitions of ordinary English words (such as “sale” and “ownership”); and tax tries to root those definitions in the concerns of actual transactions. [\[FN3\]](#)

For example, parties to a transfer indicate what sale and ownership mean by what matters to them. They bargain about who will have the risk of loss, the right to profits, the control over decisions. Tax law incorporates--or as this ***1032** lecture suggests, should incorporate--that meaning by having risk, reward, and control determine tax ownership. To illustrate, when Lands' End manufactures a sweater, it decides what kind of sweater to make; takes the risk of not finding a buyer; and becomes entitled to any profit. Until transfer to a customer, we consider that Lands' End owns the sweater. After transfer, only the customer cares about its value or use; and we then say that the customer owns the sweater.

Transferring the sweater's ownership constitutes a sale, because a sale is the transfer of the ownership of property for money. [\[FN4\]](#) When Lands' End gives up its entire interest, the change in ownership is obvious; and tax law is only calling a sale what everybody knows is a sale. But tax law has reasoned to that conclusion, and making that reasoning explicit becomes necessary to characterize the significant situations in which transferors retain an interest in the property.

That reasoning connects elements. The elements of risk, reward, and control are identified with ownership; the elements of transfer and ownership, with sale. Risk, reward, and control therefore define ownership; and their transfer defines sale. The definitions are somewhat concomitant--what sale means depends on what ownership

means. But a single concept, ownership, underpins both.

Making definitions by connecting elements lies at the heart of tax thinking, and a delight in recognizing connections often indicates a burgeoning tax lawyer. [FN5] To test this theory, I used to give summer associates a bogus tax aptitude test. The idea of the test was that if they liked seeing the test's connections--whether or not they got the answer--they might like tax law. Let me try two:

1. What do Baa Baa Black Sheep, the alphabet, and Twinkle, Twinkle, Little Star have in common? Well, hum one of them. When you hum one, you hum all three; because they all have the same tune. [FN6]
2. Sarah Barney Belcher of Taunton, Massachusetts, was the ancestor of which of the following?

Douglas MacArthur

Franklin Roosevelt

Winston Churchill

The answer is, all three. [FN7] *1033 Confusion from the use of language to distort ownership connections comes out in such everyday situations as television commercials and airline movies. Late-night commercials for a vegetable peeler, for instance, might describe the price differently than would Lands' End. When you order a sweater from Lands' End delivered to 120 Tremont Street, you're impliedly saying that if you don't deliver it, I won't pay for it. This means that Lands' End has the risk of its sweater not getting there, so that Lands' End is paying for delivery on its own behalf rather than yours.

Late-night commercials, on the other hand, may advertise sale of a vegetable peeler for \$19.95 plus \$4.95 for shipping and handling. This breaks the connection between the person who risks nondelivery of the property and the person who should pay for delivery. The commercial is asking the buyer to pay for getting what he ordered. This attempt to disguise a \$25 sales price by separating it into a price and a \$4.95 service fee may gull people; but when allocations get too extreme, truth appears. A Mercedes dealer could not charge one dollar for the car plus \$49,000 for shipping, handling, manufacture and distribution.

When before a movie a flight attendant comes up and asks whether you want to purchase a headset, airlines are making a twofold misdefinition. The airline is not transferring ownership of that headset: you have to give it back at the end of the flight. The flight attendant might say, "Do you want to rent a headset for a while?"; but that doesn't describe the transaction either. The headset matters only because it lets you listen to the movie. The more accurate but irritating question would be, "Do you want to pay to hear the movie?" At that, people would bristle. I once had a flight attendant try to sell me a headset for Mel Brooks' film "Silent Movie." When I laughed, she said, "Well, there's background music."

Confusing people about vegetable peelers or headsets is trivial. The real fortunes await those who can confuse ownership in tax law. [FN8] They start with a built-in advantage, since just reasoning about a sweater requires two logical connections. It is easier to confuse than clarify--easier to make a wrong connection, to focus on an extraneous factor, to leave out a necessary element. Given that advantage and the financial rewards of using it, it is no wonder that tax confusion and tax statutes have grown apace.

In 1934 all of tax law--the entire statute--took up 100 pages. At about that time, Edwin Cohen (later to become Treasury's top tax official) started work for a famous tax lawyer named Norris Darrell (Learned Hand's son-in-law). Darrell called him into his office, gave him a copy of the 1936 Code, and *1034 instructed him, "When you finish reading it, come back to me."

Cohen read it twice, annotated it, and came back the following week. Darrell handed him the 400 pages of tax regulations interpreting that Code. After another week, Cohen had read them. "Okay," Darrell said, "Now we're ready to go to work."

Today, a practitioner's version of the Code weighs seven and a half pounds, and the regulations seventeen and a half. If you said to an incoming associate, "When you finish reading it . . .," he'd never come back. The pages foreclose result after specific result, chase abuse after abuse, but fail to view them as repeated use of the same techniques. Those techniques exploit flaws and inconsistencies in the same very few basic concepts: the ownership of assets; the obligation for liabilities (the mirror of asset ownership); and the disregard of intermediate ownership. [FN9] The Code and regulations--rather than trying to create logical and coherent definitions of those concepts--keep gnawing at their results.

In an atmosphere of ad hoc fixes, definition becomes increasingly elusive. Irrelevant factors begin to determine the meaning of words, and elements vary from one context to another. This talk gives a preliminary idea of what has happened, how tax failed to think, or--to paraphrase a President from Massachusetts--why tax slept.

Ownership

My talk focuses primarily on the concept of ownership. Ownership is the most important, most fundamental concept of tax law. Tax attributes--income, deductions, credits--belong to the owner of property that generates them. The word itself suggests that tax consequences--income, deductions, etc.--are attributed to the owner. Probably because of its importance, the concept of ownership has been the most misconstrued. The courts, the Treasury, and Congress have all mangled it.

Practitioners and taxpayers--by turn inviting and capitalizing on governmental illogic--have too made generous contributions. Beyond making sure that waiters pay tax on their tips, enforcement of the Code does not rely that much on the outnumbered Internal Revenue Service. At abstract and sophisticated levels, it relies on the great law and accounting firms-- specifically, on their unwillingness to countenance certain transactions. But what they are willing to countenance depends so much on what courts--in particular the Supreme Court--countenance; and two of the Court's milestone *1035 cases on ownership would countenance almost anything. One, Frank Lyon, [FN10] made the meaning of ownership incomprehensible; the other, Clay Brown, [FN11] made it clearer but wrong.

There has been much talk and legislation about tax shelters, a term that is more epithet than description. [FN12] Tax shelters have been blamed on shoddy promoters, but few shelters are shoddier than those approved by the Court in Lyon and Brown. Like Hemingway's acknowledgment of the debt of American literature to Huckleberry Finn, [FN13] this talk acknowledges the debt of tax shelters to the Supreme Court. What characterizes, if not defines, a tax shelter is the divorce of tax attributes from economic ownership. What the Supreme Court has done is to let income inclusions and allowable deductions go to one person, while economic risk and reward stay with another. [FN14]

The most important aspect of ownership, I believe--what most concerns the owner of property--is risk of loss. To limit exposure to liability, people have historically done business through corporations even though that added an extra layer of tax. Similarly, what underlies the distinction between recourse and nonrecourse debt, between general and limited partnership interests, is limitation of risk. The importance of this became apparent some ten years ago to members of Lloyd's of London, the insurance syndicate. Social cachet accompanied being asked to join the ancient and aristocratic membership of Lloyd's. When Lloyd's had huge losses, many people who had been recently asked to join found out for the first time that by doing so they had put their whole net worth at stake. Will Rogers once said that to him the important thing wasn't the return on his capital, but the return of his capital. In Lyon and more directly in Brown, the Supreme Court denied this basic economic truth--the fundamental connection between risk of loss and ownership. [FN15]

Brown was probably the first nationally marketed tax shelter (although the term hadn't surfaced at the time) that did not depend on a provision linked to a specific industry like oil. [\[FN16\]](#) In Brown, the taxpayers sold their business to a charity for a ten-year \$1.3 million note payable solely out of its profits. [\[FN17\]](#) The charity then leased the assets for ten years to a new corporation, appropriately called Fortuna, for rent intended to funnel out all business profits to the charity. [\[FN18\]](#) The rent to the charity, which was exempt from tax, was in turn funneled back to the Browns in payment of a note given to them as purchase *1036 price. [\[FN19\]](#)

Thus, if the business earned \$100 of profits and paid them as rent to the charity, the charity would pay \$100 to the Browns in payment of the purchase price note. This would leave the Browns with \$75 after a 25 percent capital gain tax, as contrasted with five dollars if they had kept the corporation and distributed its after-tax profits as dividends. [\[FN20\]](#)

A diagram of the transaction might look like this:

Figure here

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The transaction had several vulnerabilities; [\[FN21\]](#) but this was--as the government's brief said--a tax case "of rare importance." Its lead counsel, Wayne Barnett, decided to make the argument of the hedgehog rather than the fox.

He focused on the principle that if the charity did not have any risk of loss, ownership of the business and its profits had been retained rather than transferred. [\[FN22\]](#) Accordingly, there had been no sale eligible for capital gain rates.

Justice White, writing for the majority, rejected the risk of loss argument. [\[FN23\]](#) The transaction, he said, "obviously" fit the "common and ordinary meaning" of sale, as well as its state law definition. [\[FN24\]](#) But as Justice Harlan stated in his concurrence, except for tax purposes, the transaction "ma[de] no sense." [\[FN25\]](#) Transactions that make no sense are not within the common meaning of sale. Thus, Justice White's opinion in Clay Brown incorporates, into the criterion of ordinary meaning and common understanding of sale, an uncommon and extraordinary transaction. [\[FN26\]](#)

As Justice Harlan saw the transaction, the Browns had traded their residual interest in the business (after the first \$1.3 million of profits had been funneled first as rent to the charity and then back to them as purchase price) for the benefit of the charity's tax exemption. [\[FN27\]](#) Because that \$1.3 million of profits would be free of the 50 percent corporate income tax, the Browns were *1037 increasing their after-tax return for ten years by more than the residual they were giving up. [\[FN28\]](#) Harlan saw as an obvious truth what tax has spent the next forty years trying to deny: that a dollar of tax saved is just as valuable as any other dollar. [\[FN29\]](#) In other words-- to put it exactly contrary to present-day doctrine --saving income tax has both business purpose and economic substance. [\[FN30\]](#)

Current efforts to combat tax shelters focus on lack of business purpose (nontax motive) and lack of economic substance (nontax profit). But this approach blinks two economic truths. One, a tax buck is as good as any other buck (better, in fact, because you don't pay tax on it). Two, to the extent that you pay for a tax benefit, you will get less of a nontax benefit. For example, if the current after-tax return is six percent, and the tax rate is 33? percent, for \$100 you can buy a pretax return of \$9, or a tax attribute worth \$6, but not both.

If you pay for a tax attribute worth \$4, you will also get a pretax income of \$3. After a tax of 33? percent on the \$3 pretax income, you will have \$6 (\$4 plus (\$3-1)). If a tax attribute is worth \$8, you will accept a pretax loss of \$3, which will leave you with the same \$6 (\$8 minus (\$3-1)). The pretax loss of \$3 is analogous to the Browns'

giving up their residual interest in the business for an \$8 tax benefit from the charity's exemption.

This is not to say that tax attributes should be as tradeable as baseball cards. What it does suggest is that efforts to insert business purpose and economic substance into an area that already has business purpose and economic substance--the transfer of tax attributes--engrafts dissembling and invention into an area that already has enough. The transfer of tax attributes would be sufficiently constrained if their enjoyment required economic ownership, and economic ownership required risk. Time after time, statutes require risk as a condition of getting a specific tax attribute. [\[FN31\]](#) A more coherent approach would be to require risk to get almost any tax attribute associated with property. [\[FN32\]](#)

This has already been done in determining the character of income. Whether income is from the performance of services or the transfer of property --what kind of income a person has--depends on who has risk in the property. [\[FN33\]](#) Who has risk in the property should likewise determine what person has that income.

A dozen years after *Brown*, the court decided *Lyon*--the same issue in a *1038 different context. [\[FN34\]](#) Whereas *Brown* involved the transfer of income from a taxable person to a tax-exempt one, *Lyon* involved the transfer of deductions from a tax-exempt person to a taxable one. [\[FN35\]](#) The arguments therefore resembled those in the earlier case. The government argued that the transferee did not really own the property, because it had no significant economic interest in it; [\[FN36\]](#) and the taxpayer argued that state law considerations should control.

In *Lyon*, state regulatory authorities would not permit *Worthen Bank*, an Arkansas corporation, to borrow funds to finance its new office building. [\[FN37\]](#) As an alternative, *Frank Lyon Co.* bought the building and leased it to the bank for 25 years. [\[FN38\]](#) The bank also had options to purchase the building at a fixed price and to renew the lease for up to 65 years. *Lyon* paid the purchase price of \$7.6 million in part with \$7.1 million borrowed from an insurance company. It paid the remaining \$500,000 from its own funds, but had in fact borrowed \$500,000 from *Worthen* in what the court termed an "unrelated" loan. [\[FN39\]](#) As an economic rather than a psychological matter, however, *Worthen* put up no cash. [\[FN40\]](#)

Rentals under the lease equaled mortgage payments to *New York Life*, so that *Lyon* would get no cash during the first 25 years unless *Worthen* exercised its option to purchase. [\[FN41\]](#) The purchase option required *Worthen* to assume the mortgage and to pay *Lyon* its \$500,000 plus 6 percent cumulative interest. [\[FN42\]](#) Since *Lyon* was likely paying at least six percent interest on its \$500,000 borrowing from *Worthen*, [\[FN43\]](#) it not only put up no cash but had no possibility of profit. [\[FN44\]](#)

*1039 *Lyon's* real reward was the value of the tax attributes-- deductions for depreciation and interest. [\[FN45\]](#) In return for those, it was willing to give up any pretax profit. [\[FN46\]](#) Nevertheless, the Supreme Court decided that *Lyon* rather than *Worthen* owned the building, using perhaps the most quoted (and risk-disregarding) sentence in recent tax history:

In short, we hold that where, as here, there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the government should honor the allocation of rights and duties among the parties. [\[FN47\]](#)

In other words, state regulatory considerations could override the economics of a transaction. [\[FN48\]](#) That sentence overlooks two points. One, the regulatory considerations that outweighed taking into account *Lyon's* limited economic stake were those of *Worthen*, not of taxpayer *Lyon*. [\[FN49\]](#) Two, the sentence assumes its conclusion. [\[FN50\]](#) The transaction is multi-party only if *Lyon* is considered a party. [\[FN51\]](#) If *Lyon* is only an agent for transmission of *New York Life's* money to *Worthen*, the transaction is essentially between two parties; and, as the court admits, under that construct *Lyon* would not be considered to own the building. [\[FN52\]](#)

A diagram of Lyon without the residual resembles that of Brown:

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Those two flawed cases have laid the groundwork for what are now attacked as tax shelters. [\[FN53\]](#) So long as we do not make our definitions logical-- particularly that of ownership--distortions of meaning will follow no matter how long the Code or how many the attacks on the imprecisely defined but cathartically reviled tax shelter. As John Gardner said, a society that values bad philosophers more than good plumbers will have both bad philosophers *1040 and bad plumbers. Neither its theories nor its pipes will hold water.

Robert Hellawell, a tax professor at Columbia, wrote a short essay in the 1970s which predicted that by 2039 the Code would be twenty volumes long. Twenty percent of the population would be needed to interpret it, and journals would be devoted to a single section. A generalist would be one who understood an entire section, whereas specialists would concentrate on subsections. Persons called communicators would convey the interaction between one section and another.

We of course are not there yet, and no definition will stop all abuses. But many tax shelters have as their root the confusion over ownership of assets, which others similarly have their source in confusion over the ownership of liabilities. [\[FN54\]](#) Accordingly, analysis of what common techniques shelters rely on--what recurring ways they use to divorce tax ownership from risk, tax liabilities from decrease in value--might be more productive than delegating more elephants to stamp out more ants. (The ants generally win.)

This could result in a concept of ownership that conforms economic risk with income and deductions. As part of that concept, subsequent changes in ownership that were relied on would be considered as part of the original transaction; so that the answer of how long you must wait before taking the next contemplated step would be, forever. [\[FN55\]](#)

In that world, there would be put paid to the interminable cloudy and inconsistent philosophizing about economic substance. Economic substance is economic ownership. There would be put paid to tax advisers telling clients what the clients' own nontax motive is and requiring additional unwanted investment to produce additional unwanted pretax income. If you own the asset or owe the liability, if the risk keeps you awake at night, you get the attribute; and the ants will go elsewhere.

[\[FN1\]](#). This Article is based on a speech that Mr. Kingson delivered on October 23, 2003, as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the Suffolk University Law Review to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

[\[FN1\]](#). Hanna and Olyck, Interview, Professor Ernest J. Brown Emeritus. American Bar Association Section of Taxation. Newsletter (Winter 1995), p. 9 at 10. Mr. Brown was agreeing with the perception that he taught the Internal Revenue Code like the Constitution and the Constitution like the Code. He considered the text of the Constitution "highly relevant" to its interpretation; and conversely, that specific text of the Code should be seen as "text in a structure."

[\[FN2\]](#). The French word *préciser* captures this flavor.

[\[FN3\]](#). When reluctant to give a favorable opinion, I have been alleged not to understand the transaction, the

industry, the real world. When I have been willing to give one, those concerns are not raised.

[FN4]. I add “for money” because people confuse sale and exchange. When a transferor gets property instead of money, there is an exchange. The sports pages keep saying that Babe Ruth was “traded” to the Yankees, but his contract was in fact sold. The Red Sox received cash, not another player (a problem that has continued for 85 years).

[FN5]. The member of a large firm who practices tax law once said to me, “Don't tell my partners, but I'd do this for nothing.”

[FN6]. When my daughter's music teacher asked the Baa Baa question at parents' night, no one--including me--got it.

[FN7]. See William Manchester, *American Caesar* 17 (Little, Brown & Company 1978). Apart from a connection among the three, asking the question makes no sense. No one could be expected to know the answer (except possibly guessing Churchill because his mother was American).

[FN8]. A revenue agent in Illinois auditing real estate transactions realized that it was better to join them than beat them. He formed a company to create the kind of transactions he had been auditing, sold it to a premier financial institution, and now owns the Chicago Bulls and White Sox.

[FN9]. Disregard of intermediate ownership, sometimes referred to as step transaction doctrine, should occur when a preplanned transaction obviates its consequences. Whether to disregard such ownership, however, is decided by using meaningless phrases like “interdependent steps” and “end result.” The reasoning should instead be algebraic, like Senator Baker's famous Watergate question, “What did the President know and when did he know it?”

[FN10]. [Frank Lyon Co. v. United States, 435 U.S. 561 \(1978\)](#).

[FN11]. [Comm'r v. Brown, 380 U.S. 563 \(1965\)](#).

[FN12]. The epithet is frequently preceded by the redundant “abusive.”

[FN13]. Ernest Hemingway, *Huckleberry Finn* (O'Meally ed. 2003).

[FN14]. See generally [Frank Lyon Co. v. United States, 435 U.S. 561 \(1978\)](#); [Comm'r v. Brown, 380 U.S. 563, 575 \(1965\)](#).

[FN15]. [Brown, 380 U.S. at 575](#); [Lyon, 435 U.S. at 572-73](#).

[FN16]. See [Brown, 380 U.S. at 576-77](#).

[FN17]. [Id. at 567](#).

[FN18]. [Id.](#)

[FN19]. [Id.](#)

[FN20]. The corporate tax rate was then 50 percent; and individual rates went up to 90 percent. If the corporation earned \$100, it would pay \$50 in tax; and distribution of the remaining \$50 as dividends would incur additional tax

of \$45

[FN21]. These included the preplanned lease to Fortuna and measuring the rent by Fortuna's profits.

[FN22]. *Brown*, 308 U.S. at 570.

[FN23]. *Id.* at 573.

[FN24]. *Id.* at 569, 571.

[FN25]. *Id.* at 580 (Harlan, J., concurring).

[FN26]. *Brown*, 308 U.S. at 571 (Justice White's opinion).

[FN27]. *Id.* at 580 (Harlan, J., concurring).

[FN28]. *Id.* The Browns' after-tax return also increased by their payment of tax on the \$1.3 million of profits at capital gain rather than ordinary income rates.

[FN29]. *Id.* at 580 (Harlan, J., concurring).

[FN30]. See *id.*

[FN31]. See Code sections 1(h)(11)(b)(iii), 246(c), 465, 901(k), and 1059.

[FN32]. This would affect tax avoidance transactions not generally considered tax shelters, such as tracking stock. In tracking stock, the risk of loss in the tracked subsidiary belongs to public shareholders of the tracked company. But tax attributes of the tracked subsidiary (income, deductions, credits) belong to the parent.

[FN33]. See, e.g., [Treasury Regulations §§ 1.861-18\(d\)](#) and Example 15 of -18(h).

[FN34]. See generally [Comm'r v. Brown](#), 380 U.S. 563 (1965); [Frank Lyon Co. v. United States](#), 435 U.S. 561 (1978).

[FN35]. [Brown](#), 380 U.S. at 567; [Lyon](#), 435 U.S. at 574. The transferor, Worthen Bank, was not legally exempt from tax; but owing to deductions allowed specifically to banks, it was effectively exempt from tax.

[FN36]. [Lyon](#), 435 U.S. at 573 (calling entire transaction a sham).

[FN37]. *Id.* at 563.

[FN38]. *Id.* at 566.

[FN39]. *Id.* at 565, 567. The interest rate on such loan, however, was related to the Worthen transaction. *Id.* at 566-67. As part of its competitive offer to purchase the building, Frank Lyon Co. had offered to reduce Worthen's rent for five years by \$21,000 a year, a total of \$105,000. *Id.* at 565. Since Worthen was to pay the rent directly to mortgagee New York Life, free from any offsetting claims, New York Life refused to consent to the reduction. *Id.* Instead, Frank Lyon Co. agreed to increase its interest rate payable on the \$500,000 loan to three percentage points

above the usual rate. See [Frank Lyon Co. v. United States, 536 F.2d 746, 748 n.1 \(8th Cir. 1976\)](#). Three percent of \$500,000 is \$15,000 a year, so it would take seven years for the extra interest on the loan to equal the rent reduction. [Lyon, 435 U.S. at 565, 567](#). This is consistent with the fact that the loan, made in 1969, was still outstanding at the time of the 1975 trial of the tax case. See generally [Frank Lyon Co. v. United States, 536 F.2d 746 \(8th Cir. 1976\)](#).

[FN40]. See [Lyon, 435 U.S. at 564-69](#).

[FN41]. [Id. at 568](#).

[FN42]. [Id. at 567](#).

[FN43]. See [Frank Lyon Co., 536 F.2d at 748](#). Worthen, a bank, was unable to sell its own obligations at an interest rate of six percent. *Id.*

[FN44]. Although the \$500,000 loan was stated to be unrelated to purchase of the building, a question arises as to why Lyon needed a loan at all. One of Frank Lyon Co.'s motivations for the transaction was its concern about a tax imposed on corporations that accumulated funds not needed in its business. See Appellee's Brief at 20, [Frank Lyon Co. v. United States, 536 F.2d 746 \(8th Cir. 1976\)](#).

[FN45]. See [Lyon, 435 U.S. at 571-2](#).

[FN46]. See [id. at 580](#). Of course, it did not really put up any cash to deserve earning a pretax profit, except possibly the interest on the \$500,000 borrowed from Worthen. *Id.*

[FN47]. *Id.* at 583-84.

[FN48]. See *id.* at 583-84.

[FN49]. [Lyon, 435 U.S. at 563-64](#).

[FN50]. See [id. at 583-84](#).

[FN51]. See *id.*

[FN52]. See *id.* at 573-76 (distinguishing precedent)

[FN53]. See generally [Frank Lyon Co. v. United States, 435 U.S. 561 \(1978\)](#); [Comm'r v. Brown, 380 U.S. 563 \(1965\)](#).

[FN54]. See [Tufts v. United States, 461 US 300 \(1983\)](#), whose incorrect result was codified in Code section 7701(g). To combat tax shelters, the recent amendment of a Code section dealing with liabilities had to make that section irrelevant. [I.R.C. § 357\(d\)](#) (2004).

[FN55]. This would overrule the result in cases like [Esmark, Inc., v. Commissioner, 90 T.C. 171 \(1988\)](#), *aff'd*, [886 F.2d 1318 \(7th Cir. 1989\)](#) (unpublished opinion), and [King Enterprises, Inc. v. United States, 418 F.2d 511 \(Ct. Cl. 1969\)](#). In *Esmark*, ownership that the parties made sure would have no meaning was given effect for tax purposes. In *King Enterprises*, a transfer of ownership that the taxpayer had not insisted on, had no right to control, and was disregarded by the other party to the transaction in obtaining a ruling from the Internal Revenue Service was given effect for tax purposes.

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