



YOU'VE BEEN WARNED

States Applying Tax Anti-Abuse Doctrines to Transactional Taxes

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Overview

- Traditional income tax anti-abuse concepts are now being widely adopted and applied in non-income tax contexts.
- These concepts allow taxing authorities and courts to ignore the form of a transaction and instead look to the substance of the arrangement to determine proper taxation.
- These developments are changing many long-held assumptions regarding form-over-substance and often produce unexpected results.



What is the economic substance doctrine?

- Historically a federal income tax concept arising from common law.
- *Gregory v. Helvering*, 293 U.S. 465 (1935)
 - A series of corporate transactions were designed to conform to the Code as a "reorganization," but for the sole purpose of transferring the shares in question to the taxpayer, with a resulting tax liability less than that which would have ensued from a direct transfer by way of dividend.
 - *Held*: While the plan conformed to the terms of the statute, there was no reorganization within the intent of the statute.



What is the economic substance doctrine?

- “It is quite true that, if a reorganization in reality was effected within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.”
- “. . . was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else.”
- “. . . the transaction, upon its face, lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.”



What is the economic substance doctrine?

- In general, this doctrine denies tax benefits arising from transactions that do not result in a meaningful change to the taxpayer's economic position other than a purported reduction in federal income tax.
 - “The tax law . . . requires that the intended transactions have economic substance separate and distinct from economic benefit achieved solely by tax reduction. The doctrine of economic substance becomes applicable, and a judicial remedy is warranted, where a taxpayer seeks to claim tax benefits, unintended by Congress, by means of transactions that serve no economic purpose other than tax savings.”
 - *ACM Partnership v. Commissioner*, 157 F.3d 231 (3d Cir. 1998), aff'g 73 T.C.M. (CCH) 2189 (1997), cert. denied 526 U.S. 1017 (1999).



What is the economic substance doctrine?

- Often used to deny claimed tax benefits if the transaction that gives rise to those benefits lacks economic substance independent of tax considerations – notwithstanding that the purported activity actually occurred.



What is the economic substance doctrine?

- The economic substance doctrine has many siblings:
 - Business purpose
 - Sham transaction
 - Substance over form
 - Step transaction
- These often overlap and have been used interchangeably and in conjunction with one another.



What is the economic substance doctrine?

- **Business purpose**

- The business purpose doctrine involves a subjective inquiry into the motives of the taxpayer – that is, whether the taxpayer intended the transaction to serve some useful non-tax purpose.
- In making this determination, some courts have bifurcated a transaction in which independent activities with non-tax objectives have been combined with an unrelated item having only tax-avoidance objectives in order to disallow the tax benefits of the overall transaction.
- *ACM Partnership v. Commissioner*, 157 F.3d 231 (3d Cir. 1998), aff'g 73 T.C.M. (CCH) 2189 (1997), cert. denied 526 U.S. 1017 (1999).



What is the economic substance doctrine?

■ Sham transaction

- “A factual sham is one in which the alleged transactions never took place. In an economic sham, or a sham in substance, the alleged transactions actually took place, but are nonetheless without economic substance.”
- *Lerman v. Comm’r*, 939 F.2d 44 (3d. Cir. 1991)
- *Knetsch v. United States*, 364 U.S. 361 (1960) (denying interest deductions on a “sham transaction” whose only purpose was to create the deductions)



What is the economic substance doctrine?

▪ Substance over form

- Did substance of the transaction comport with the form asserted by the taxpayer?
- Was the change in economic position that occurred, if any, consistent with the form asserted?
- Was the claimed business purpose supported the particular tax benefits that were claimed?
- *Klamath Strategic Investment Fund, LLC v. United States*, 472 F. Supp. 2d 885 (E.D. Texas 2007)
- *TIFD- III-E, Inc. v. United States*, 459 F. 3d 220 (2d Cir. 2006)



What is the economic substance doctrine?

- **Step transaction**

- Collapses or disregards a series of related but unnecessary transactions when there was no independent purpose behind the intervening steps other than to achieve a certain tax benefit.
- *Smith v. Comm'r*, 78 T.C. 350 (1982)



What is the economic substance doctrine?

- **Doctrine has experienced criticism and areas of uncertainty.**
 - Must a taxpayer establish the presence of both economic substance (i.e., the objective component) and business purpose (i.e., the subjective component)? Or is one enough to uphold the transaction?
 - What exactly is the non-tax economic benefit a taxpayer must establish in order to satisfy economic substance?
 - What is the proper balance between economic risk and profit potential versus tax benefits?
 - Do mere financial accounting benefits from the tax savings suffice? Is that a valid business purpose?
 - Does the involvement of tax-indifferent parties (e.g., tax-exempt entities) influence its application?
 - Who has the burden of proof?
 - Does the doctrine violate separation of powers?



FEDERAL CODIFICATION

- IRC § 7701(o) - Clarification of economic substance doctrine
 - 1) Application of doctrine. In the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if -
 - a) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, *and*
 - b) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction



FEDERAL CODIFICATION

- **IRS definitions and limitations**

(5)(A) Economic substance doctrine. The term “economic substance doctrine” means the common law doctrine under which tax benefits under subtitle A with respect to a transaction are not allowable if the transaction does not have economic substance or lacks a business purpose.

- Note the conjunctive application

(5)(B) Exception for personal transactions of individuals. In the case of an individual, paragraph (1) shall apply only to transactions entered into in connection with a trade or business or an activity engaged in for the production of income.

- Interest on home equity loans?

(5)(C) Determination of application of doctrine not affected. The determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if this subsection had never been enacted.

- Incorporation of common law

(5)(D) Transaction. The term “transaction” includes a series of transactions.

- Encompasses step transaction doctrine



FEDERAL CODIFICATION

Special rules

- Profit potential

(2)(A) In general. The potential for profit of a transaction shall be taken into account in determining whether the requirements . . . are met with respect to the transaction only if the present value of the reasonably expected pre-tax profit from the transaction is substantial in relation to the present value of the expected net tax benefits that would be allowed if the transaction were respected.
- State and local tax benefits

(3) State and local tax benefits. For purposes of paragraph (1), any State or local income tax effect which is related to a Federal income tax effect shall be treated in the same manner as a Federal income tax effect.
- Financial accounting benefits

(4) Financial accounting benefits. For purposes of paragraph (1)(B), achieving a financial accounting benefit shall not be taken into account as a purpose for entering into a transaction if the origin of such financial accounting benefit is a reduction of Federal income tax.
- Note absence of any reference to an independent state tax benefit.
Only relevant state benefits are those deriving from federal benefit.



STATE CODIFICATION

- States have applied these doctrines in familiar income tax contexts
 - Anti-PIC statutes
 - Alternative apportionment
 - Forced combination
 - Transfer pricing
 - Interest and related party expense disallowance



STATE CODIFICATION

- Many state have begun to codify them directly – and they often are not limited to income taxes.
 - Massachusetts
 - New Hampshire
 - Washington
 - California
 - Ohio
 - Tennessee
 - Wisconsin



STATE CODIFICATION

- Mass. Gen. L. ch. 62C - Disallowance of sham transactions and related doctrines
 - Section 3A. In applying the laws referred to in section 2, the commissioner may, in his discretion, disallow the asserted tax consequences of a transaction by asserting the application of the *sham transaction doctrine* or *any other related tax doctrine*, in which case the taxpayer shall have the burden of demonstrating by clear and convincing evidence as determined by the commissioner that the transaction possessed both: (i) a valid, good-faith business purpose other than tax avoidance; and (ii) economic substance apart from the asserted tax benefit. In all such cases, the taxpayer shall also have the burden of demonstrating by clear and convincing evidence as determined by the commissioner that the asserted nontax business purpose is commensurate with the tax benefit claimed. Nothing in this section shall be construed to limit or negate the commissioner's authority to make tax adjustments as otherwise permitted by law.
- These are general administrative provisions and they apply to numerous taxes – income, sales/use, estates, stock transfer, cigarettes, etc.



STATE CODIFICATION

- N.H. Rev. Stat. § 21-J:38-a (2005) - Sham Transactions May Be Disallowed
 - I. The commissioner may disallow any sham transaction in ascertaining any taxpayer's tax liability. With respect to transactions between members of a controlled group, the *taxpayer shall bear the burden* of establishing by a preponderance of the evidence that a transaction or a series of transactions between the taxpayer and one or more members of the controlled group was not a sham transaction. For all other taxpayers, the *commissioner shall bear the burden* of establishing by a preponderance of the evidence that a transaction or series of transactions was a sham transaction.
 - II. In administering *any tax*, the commissioner may apply the doctrines of *economic reality*, *substance over form*, and *step transaction*.
 - III. If the commissioner disallows a sham transaction under paragraph I, the applicable limitation period for assessing the tax, together with applicable penalties, charges, and interest, shall be extended for a period equal to the applicable limitation period. *Nothing in this paragraph shall be construed as extending an applicable limitation period for claiming any refund of a tax.*
 - IV. The commissioner may adopt rules under RSA 541-A that are necessary to administer this section, including rules establishing criteria for identifying sham transactions.



STATE CODIFICATION

- N.H. Rev. Stat. § 21-J:38-a (2005) - Sham Transactions May Be Disallowed

V. In this section:

- a) "Controlled group" means 2 or more person related in such a way that one person directly or indirectly owns or controls the business operation of another member of the group.
- b) "Sham transaction" means a transaction or series of transactions without economic substance because there is *no business purpose or expectation of profit other than obtaining tax benefits.*
- c) "Tax" includes any tax administered by the commissioner.
- d) "Taxpayer" includes any person or entity subject to a tax



STATE CODIFICATION

- Wash. Rev. Code § 82.32.655 (2010) – Tax avoidance
 - 1) It is the legislature's intent to require all taxpayers to pay their fair share of taxes. To accomplish this purpose, it is the *legislature's intent to stop transactions or arrangements that are designed to unfairly avoid taxes.*
 - 2) The department must disregard, for tax purposes, the tax avoidance transactions or arrangements that are described in subsection (3) of this section. The department must deny the tax benefit that would otherwise result from the tax avoidance transaction or arrangement.



STATE CODIFICATION

- In determining whether the department must disregard a transaction or arrangement described in this section, the department may consider the following:
 - a) Whether an arrangement or transaction changes in a meaningful way, apart from its tax effects, the economic positions of the participants in the arrangement when considered as a whole;
 - b) Whether substantial nontax reasons exist for entering into an arrangement or transaction;
 - c) Whether an arrangement or transaction is a reasonable means of accomplishing a substantial nontax purpose;
 - d) An entities' relative contributions to the work that generates income;
 - e) The location where work is performed; and
 - f) Other relevant factors.



STATE CODIFICATION

- **This section applies only to the following transactions or arrangements:**
 - a) Arrangements that are, in form, a joint venture or similar arrangement between a *construction contractor* and the owner or developer of a construction project but that are, in substance, substantially guaranteed payments for the purchase of construction services characterized by a failure of the parties' agreement to provide for the contractor to share substantial profits and bear significant risk of loss in the venture;
 - b) Arrangements through which a taxpayer attempts to avoid tax under chapter [82.04](#) RCW [B&O Tax] by disguising income received, or otherwise avoiding tax on income, from a person that is not affiliated with the taxpayer from business activities that would be taxable in Washington by *moving that income to another entity that would not be taxable in Washington*; and
 - c) Arrangements through which a taxpayer attempts to avoid tax under chapter [82.08](#) [Sales Tax] or [82.12](#) RCW [Use Tax] by engaging in a transaction to *disguise its purchase or use of tangible personal property* by vesting legal title or other ownership interest in another entity over which the taxpayer exercises control in such a manner as to effectively retain control of the tangible personal property.



STATE CODIFICATION

- The department is *not required to prove a taxpayer's subjective intent in engaging in the transaction or arrangement.*
- The department adopted final rules in April 2015 to assist in determining whether a transaction or arrangement is within the scope of subsection (3) of this section. The rules include numerous examples of transactions that the department will disregard for tax purposes.
- This section does not affect the department's authority to apply any other remedies available under statutory or common law.



STATE APPLICATION

- **Ignore/Re-characterize Transactions**
- *Pi in the Sky, LLC v. Testa*, Case No. 2015-2005 (Ohio Bd. of Tax App., Jan. 29, 2017)
 - LLC formed for the sole purpose of purchasing plane
 - Stated to be purchase for lease, non-taxable sale for resale All leasing activity was with owner of LLC, no third party leases or use
 - All lease documents, loans, etc. were signed on behalf of both lessee/lessor by LLC's indirect owner and primary user of plane
 - Indirect owner signed purchase loan individually
 - Everything at personal address, no separate business location
 - State applied sham transaction doctrine to impose use tax on purchase of aircraft
 - “taxpayer did not engage in legitimate ‘business’, resulting in taxpayer’s lease agreement . . . declared a sham”
 - “lease lacked both factual and economic substance”
 - “in effect, one operation”
 - Not even given credit for sales taxes paid on lease payments
 - Taxpayer didn’t show up for prior hearing, factual record was set at that level
 - Might have come out different had they tried to make their case



STATE APPLICATION

- *Indiana Department of State Revenue v. Belterra Resort Indiana, LLC*, 935 N.E.2d 174 (Ind. 2010)
 - Step transaction doctrine applied to impose use tax on purchase and contribution of a riverboat casino vessel to a subsidiary
 - Riverboat manufactured and purchased in Alabama, title and possession transferred to parent in international waters (no Alabama tax paid)
 - Next day, while still offshore, parent contributed riverboat to subsidiary as contribution to capital (no Alabama tax paid)
 - Subsidiary then moved vessel to casino resort site on the Ohio River and placed it into service
 - Court collapsed transactions so as to treat the boat as having been purchased by Taxpayer at retail, rejected non-taxable capital contribution position:
 - The sequence of events were “component parts of a single transaction intended from the outset to reach the ultimate result of avoiding Indiana use tax while maintaining 100% control of [the boat]”
 - Each step was “so interdependent that it is unreasonable to conclude that any of the transactions would have been undertaken except with a view to completing the whole series of transactions.”
 - “The substance, rather than the form, of transactions determines their tax consequences.”²⁶



STATE APPLICATION

- *In re TJX Cos.*, DTA No. 812048 (N.Y. Div. Tax App. Nov. 9, 1995)
 - Taxpayer agreed to sell business to third party structured as a stock sale with a 338(h)(10) election. Taxpayer held some assets of the business directly and so it transferred those assets as a capital contribution to a wholly-owned subsidiary (tax free) and then transferred the stock of subsidiary and other subsidiaries that operated the business to the purchaser (tax free).
 - NY contended that the **substance over form doctrine** and the **step transaction doctrine** should be applied to assets, which would result in treatment as taxable asset sale to third party.
 - ALJ refused to apply these doctrines since steps were carried out for legitimate business and tax (income) reasons (to achieve stock sale and 338(h)(10) treatment, allowing the subsidiaries to take advantage of a better position for recognition of gains or losses), and that favorable sales tax result was just a by-product.



STATE APPLICATION

- *In re AMO USA, Inc.*, DTA No. 824550 (N.Y. Div. Tax App. June 19, 2014)
 - Taxpayer patented various methods and apparatus used to perform laser assisted surgery. Taxpayer sold laser systems, plastic key cards (required to use laser) and patent license fees (all separately stated on invoices); sales tax not collected on patent fees on basis of intangible.
 - N.Y. contended transaction was an indivisible bundled transaction or an integrated transaction, urging an application of the step doctrine.
 - ALJ refused to apply these doctrines
 - observed step transaction doctrine is usually applied to corporate acquisitions, mergers and liquidations
 - has been applied in the context of real property transfer gains tax;
 - novel application to the sales transaction is ill-fitting and tenuous;
 - the individual step of having customers purchase patent license was an intended end result in and of itself, i.e., the protection and preservation of a valuable intangible.



STATE APPLICATION

- **Taxpayer Application**
- *Ohio Valley Aluminum Co. LLC v. Dep't of Revenue*, No. 2013-CA-000507-MR (Ky. Ct. App. Sept. 12, 2014)
 - Subsidiary purchased and owned scrap metal that was processed by its parent
 - By separating those functions, they attempted to exclude the cost of the scrap metal from the parent's "cost of production" in order to be eligible for sales tax energy exemption
 - Kentucky Court of Appeals applied the substance over form doctrine to conclude the entities constituted one company for calculating the amount of sales tax due.
 - The subsidiary had no employees, was wholly owned, used the parent as its only aluminum processor, and commingled its assets in the same bank account as the ultimate parent.
 - “. . . not two distinct companies, but a single company which has attempted to limit its tax liability by dividing the same processes . . . between a parent company and a subsidiary which exists merely on paper.”



STATE APPLICATION

- *Mapo, Inc. v. State Bd. of Equalization*, 53 Cal. App. 3d 246 (1975)
 - No sales tax was payable by Mapo, a wholly-owned corporation, on its transactions with its grandparent when the corporation owned no materials, kept no corporate books, bore no liability for its operations;
 - Mapo was created as a result of multi-union jurisdictional problems within the grandparent organization. Mapo's sole function, while operating under one vertical union agreement, was to fabricate entertainment devices on orders from its grandparent which furnished materials and retained title to all ideas, materials and completed devices. Mapo acted only as a conduit for payment of salaries; it was a separate corporation in name only.
 - The court held that the Board ignored substance for form in that the grandparent exercised control over the day-to-day operations of Mapo. The temporary, paper-work transactions which resulted from its existence did not justify the imposition of sales taxes.



STATE APPLICATION

Polling Question # 1: Substance of Transaction

Facts: Taxpayer/Owner of a chain of restaurants transfers some of its businesses and assets, but not the liabilities, to a newly created corporation owned by the Taxpayer in exchange for the first issue of stock in the new corporation. On the same day, the Taxpayer transferred the stock to an existing subsidiary in exchange for the assumption of liabilities of the businesses previously transferred to the new corporation. Note, in California the transfer of assets without the assumption of any liabilities to a newly formed corporation solely in exchange for first issue of stock is a nontaxable occasional sale. Reg. 1595(b)(4).

What did the hearing officer conclude?

- a) Good business purposes supported each non-taxable transfer, therefore sales tax is not applicable to the series of transfers.
- b) No sales tax is due on the transfer of assets to the commencing corporation; no sales tax is due on the stock transfer because the transfer did not involve TPP;
- c) The transfers are taxable because they were not independent of each other and the substance of the transactions was to transfer the entire businesses in series of steps involving the assumption of liabilities which need to be viewed as a whole.
- d) None of the above



STATE APPLICATION

Polling Question # 2: Valid Business Purposes

Manufacturer proposes transferring all of its assets (including employees) and none of its liabilities to a newly-formed subsidiary solely in exchange of stock followed by the sale of such stock to K who will operate the manufacturing business. The structure of the transactions is to satisfy federal labor concerns about triggering employment loss notices if an asset transfer and to minimize K's exposure to liabilities of operating the business.

The Board's legal staff concluded:

- a) The business purposes for structuring the transactions as proposed were substantial and valid and therefore the transactions need not be combined and no sales tax is owed on the otherwise separate nontaxable transfers;
- b) The two transactions were not independent and when combined in substance constitute a sale of assets for consideration (stock of K) subject to sales tax;
- c) None of the above



STATE APPLICATION

- California Annotations – several examples of state applying **step-transaction doctrine** to multi-step transactions (e.g., *California Sale & Use Tax annotations 395.2000* (Nov. 19, 1974))
 - Contribution of assets to subsidiary followed by sale of subsidiary stock
 - Transaction generally respected if transfer has business purpose
 - Hearing Office found such purpose lacking
- *Annotation 395.1892 (June 4, 1990)*
 - Contribution of assets without liabilities to newly-created subsidiary solely in exchange for stock of subsidiary, followed by sale of stock to an unrelated entity
 - Transaction structured to avoid Department of Labor issues
 - Advisory letter opined that the proposed transfer will not be a taxable transaction for purposes of the California Sales and Use Tax Law



OTHER TAX TYPES

▪ Real Estate Transfer Tax

- Wisconsin did *not* apply doctrines to real estate transfer tax (*The Collegiate, LLC v. Wisconsin Dep't of Revenue*, No. 08-T-047, Wis. Tax App. Comm'n, Dec, 15, 2009)
 - Taxpayer LLC transferred real estate to another LLC owned by the exact same family members
 - Transfer would have been exempt if real estate was first transferred to members and then transferred to other LLC
- New York State has applied **step-transaction doctrine** in *In re Kelly*, DTA No. 819863 (ALJ, Div. Tax App. Dec. 8, 2005; affmd by Tax Appeals Tribunal, Feb. 1, 2007)
 - DTA applied doctrine despite acknowledging business purpose for transactions may have existed but such is not dispositive
- See also *City of New York Statement of Audit Procedure*, No. RPTT 2008-1 (Feb. 29, 2008)
 - applying doctrine to certain real property transfers into and out of charitable organizations



OTHER TAX TYPES

▪ Property Taxes

- *McMillin-BCED/Mirimar Ranch N. v. City of San Diego*, 31 Cal. App. 4th 545 (1995) (mod. 32 Cal. App. 4th 264a): Applied **step transaction doctrine** to determine if a change in ownership had occurred that would trigger reassessment under Prop. XIII.; applicable where only one of three tests under *Andantech L.L.C. v. Comm’r*, 83 T.C.M. (CCH) 1476 (2002) is satisfied
- *Joyce E. Penner v. County of Santa Barbara et al*, 37 Cal. App. 4th 1672 (1995): When it enacted Revenue and Taxation Code section 63.1, the Legislature declared that the section 2(h) exemption should apply where a parent transfers property from a legal entity owned by the parent, such as a partnership, to the parent and then to the children. In an uncodified section of the statute, the Legislature declared its intent that the transfer of real property from a legal entity to a parent who is the sole owner of the entity “shall be fully recognized and shall not be ignored or given less than full recognition under a **substance-over-form or step-transaction doctrine**, where the sole purpose of the transfer is to permit an immediate retransfer” from the parent to the parent's children. (Stats. 1987, c. 48, section 2.); The doctrine has no application here. Under the step transaction doctrine certain steps actually taken are ignored. The doctrine does not, however, allow a taxpayer to invent steps that never existed to obtain an exemption



OTHER TAX TYPES

- *Shuwa Investments Corporation v. County of Los Angeles*, 1 Cal. App. 4th 1635 (1991): Applied **step transaction doctrine** to determine if a change of ownership occurred in a three step transaction; doctrine applied where all three tests were satisfied
- *Ocean Avenue LLC v. County of Los Angeles*, 227 Cal. App. 4th 344 (2014): County argued in a change of ownership case that the court should apply the **substance over form** doctrine and conclude that the economic reality of the underlying membership transfers was a sale. The Court observed the argument lacked merit: First, this is a California property tax issue, not a federal income tax issue, which means that federal law is not controlling or even helpful. Second, the Assessment Appeals Board was bound by the property tax rules in the California Code of Regulations, so we cannot justify departing from those rules to uphold the Board's decision.



OTHER TAX TYPES

- *Dyanlyn Two v. County of Orange*, 234 Cal.App.4th 800 (2015): Applying the step transaction doctrine to override the unusual partnership arrangement did not justify overriding application of R&TC sections 60 and 62 in the context of leases.
- *Read v. Supervisor of Assessments of Anne Arundel County*, 731 A.2d 868 (Md. 1999): Adopted the **step transaction doctrine** to treat a series of transactions as a withdrawal of property for purpose of conveyance subject to rollback tax.
- *Mid City Bank, Inc. v. Douglas County Board of Equalization*, 616 N.W.2d 341 (Neb. 2000): Applied the **step transaction doctrine** to treat a series of transactions as a “purchase” of assets for purpose of valuation.



THANK YOU

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