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WHEN SUBSTANCE-OVER-FORM ARGUMENT IS AVAILABLE TO THE TAXPAYER*

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The gospel that the substance of a transaction, rather than mere form, controls the tax incidents is accepted by all. Substantial divergence exists, however, as to the full meaning of this doctrine, the appropriate scope of its application, and its effect upon particularized tax situations.

At least three levels of meaning exist:

1. The income tax is designed to mesh with, and interfere the least in, the operation of American enterprise. It is not a sweeping, even-handed, across-the-top, gross income tax. Rather, its structure spans the entire breadth of the economy, classifies by legal type all economic transactions, and imposes upon each classified type certain tax incidents and burdens. The Internal Revenue Code, taken as a whole, represents a composite of congressional policy as to the spreading, impact, and weighting of the total tax burden over the entire cross section of the economy. In order for such a system to correctly function, the incident of taxation must be made to depend upon the economic substance of the transaction. To permit the true nature of a transaction to be disguised by mere formalisms which exist solely to alter tax liabilities would seriously impair the effective administration of the tax policies of Congress. In this sense and context, the doctrine of substance-over-form serves a high purpose. It is a search for the essential reality, seeking to uncover the economic substance in order to allow the tax burden to fall with the exact weight which Congress intended.

2. The phrase "substance-over-form" is a label. Like most labels, it is frequently not the determining reason for the tax result, but instead is pasted on the fact situation afterward as a shorthand description of the conclusion. The competitive generalization—that a taxpayer is entitled under the law to so order his affairs as to incur the least tax—is likewise an over-simplification. Generalizations are blunt tools in attempting to uncover essential essence in particularized factual transactions. To the extent these labels are used as substitutes for painstaking

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analysis, each is an impediment and not an aiding hand in the task of reaching results based on substance.

3. A considerable body of thought exists that the doctrine of substance is a sword available to the Commissioner, but that it may not be used as a shield by the taxpayer. The rationalization supporting this view is that, since the taxpayer is originally free to choose the form, the Commissioner may appropriately be heard to say that the form does not comport with substance, but the taxpayer may not be heard to deny on hindsight the freely chosen form. While this homely bit of supposed wisdom has much present currency, it is not wholly accurate as a matter of over-all case analysis.

It is the purpose and task of this article to demonstrate that the substance-over-form argument is available to the taxpayer in an expanding number of situations and with increasing and encouraging success. First, we will turn briefly to the origin and development of the substance doctrine and touch upon its current scope. Second, we shall consider a cross section or sampling of areas in which, under present case precedent, the substance argument is available to the taxpayers.

1. SUBSTANCE v. FORM: ORIGIN, EVOLUTION AND SCOPE OF THE DOCTRINE.

The earliest clear articulation of the substance doctrine traces back to the Supreme Court's opinion in *Weiss v. Stearn*[1] in which the Court stated:

> Questions of taxation must be determined by viewing what was actually done, rather than the declared purpose of the participants. . . . [W]hen applying . . , income tax laws . . . we must regard matters of substance and not mere form.[2]

From this firm beginning, we find that all of the principal milestones in development, expansion and interweaving of the substance doctrine into the fabric of tax law are represented by Supreme Court decisions. The case names are familiar to all—*Gregory v. Helvering,*[3] *Higgins v. Smith,*[4] *Commissioner v. Court Holding,*[5] and many more. While some development has occurred at the lower court level, nevertheless, each new and bold step in the expansion of the primacy of substance is represented by a trail-blazing Supreme Court decision.

Although these case names ring memory bells for all, it may be well to sharpen our recollection briefly, since these decisions exert such pervading influence upon and foundation the whole doctrine of substance-over-form.

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1 265 U.S. 242 (1924).
2 *Id.* at 254.
3 293 U.S. 465 (1935).
4 308 U.S. 473 (1940).
5 324 U.S. 331 (1945).

The *Gregory* case, which is undoubtedly the most cited in the entire field of taxation, means "all things to all men." Factually, the case presented a narrow issue. A closely held corporation, in order to avoid an ordinary dividend to its stockholder upon the distribution of certain appreciated securities, adopted a spin-off device. A subsidiary was formed, the appreciated stock injected into the new corporation in exchange for issuance of its stock, and the stock distributed out to the stockholder. The separate steps fit neatly and literally within the then reorganization provisions of the Internal Revenue Code, which provided nonrecognition of gain as to the entire transaction. In words now famous the Supreme Court held:

> Putting aside . . . motive . . . altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character . . . a transfer of a parcel of corporate shares to the petitioner. . . . [T]he transaction upon its face lies outside the plain intent of the statute. To hold otherwise would exalt artifice over reality.[6]

The case is codified in section 355, which surrounds the corporate spin-offs with elaborate statutory safeguards; in particular, the five-year active business requirement would today inhibit a *Gregory* transaction.

The impact of the *Gregory* case on the over-all complexion of the tax law is hard to overestimate. It is, of course, most widely regarded for its announcement of the "business purpose" requirement.

In scope, the substance doctrine runs, in one respect or another, throughout the tax law. As it has evolved, it has developed four discernable corollaries and companion concepts.

First, those transactions which may be described as bald, bumbling, blatant attempts to avoid tax are usually characterized as "sham." Such categorization is more a matter of degree than the product of any inherently identifying characteristics. "Shams" represent the crudest types of avoidance, are found on its outer fringe, and may normally expect summary treatment by the judiciary.

Second, the business purpose cases represent a separate strain of substance cases. Here usually the Court is confronted, as in the *Gregory* case, with a fact situation in which all the legal forms are present to bring the transaction technically within certain advantageous aspects of the Code structure. The carefully prearranged form, however, covers and disguises the genuine underlying transaction, the essential substance of which is fundamentally different from the form. The courts read into the Code the judicial requirement that a transaction must have some "business purpose" in order to comply with the overriding intention of the Code provision.

[6] Note 3 *supra*, at 469.

Third, many of the substance cases present considerations of economic reality. In these situations, the economic substance of the transaction does not support the Code-contemplated tax treatment. The early Supreme Court case, *Higgins v. Smith,*[7] was among the first to break ground in this direction. The sale by an individual to his wholly owned corporation in order to establish a tax loss was struck down as lacking sufficient economic reality to support a loss deduction. In the words of the Court, "transactions, which do not vary, control or change the flow of economic benefits, are to be dismissed from consideration."[8] The annuity-purchase interest deduction cases which culminated in the Supreme Court's decision in *Knetsch v. United States*[9] are more recent examples of the requirement that some economic reality, apart from that flowing from tax treatment, must be present to give substance to the transaction.

The fourth corollary to the substance doctrine is that of the step transaction, which is referred to by others as the "as if" or "net effect" doctrine. The rule, metaphorically, is that "a given result at the end of a straight path is not made a different result because reached by following a devious path."[10] Under this concept, transactions with several steps in form are, for purposes of analysis, telescoped and the beginning situation compared with the end result. Where the transaction, in net effect, produces a different tax result than that which would attach to its several steps, the transaction is often treated "as if" the net effect had directly occurred.

The outer boundary lines of the doctrine that substance prevails over form are difficult to chart, except by the area-by-area, case-by-case approach, which yields a pragmatic, but often jagged, line. At the perimeter are two separate confining counterforces.

The first is the competitive doctrine that the taxpayer may arrange his affairs in such a way as to incur the least tax, and it enjoys axiomatic judicial acceptance. This counterdoctrine is continuously reaffirmed and one need go no further than the *Gregory* opinion to find it put forth in strong terms:

> 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.[11]

The collision of these two competing doctrines on a case-by-case basis prevents the substance doctrine from unduly encroaching on areas in which the taxpayer's chosen form should be upheld.

The second restraining force is a self-imposed judicial limitation

[7] 308 U.S. 473 (1940).
[8] *Id.* at 476.
[9] 364 U.S. 361 (1960).
[10] Minnesota Tea Co. v. Helvering, 302 U.S. 609 (1937).
[11] Note 3 *supra,* at 469.

which tends to produce a tax world of one-sided reality. The reasons underlying this judicial reluctance may be best drawn from two pungent judicial pronouncements: the first by the Supreme Court in *Higgins v. Smith*[12] and the second by Judge Learned Hand in *United States v. Morris & Essex R.R. Co.*:[13]

> A taxpayer is free to adopt such organization for his affairs as he may choose and, having elected . . . he must accept the tax disadvantages.[14]
>
> The Treasury may take a taxpayer at his word, so to say: When that serves its purpose . . . but that is a rule which works only in the Treasury's own favor: it cannot be used to deplete the revenue.[15]

Should these flowing phrases accurately state a hard and fast rule of law, there is little need to proceed further with this subject. But as we shall demonstrate, the substance-over-form doctrine is not now an entirely one-way street. Although it must be conceded that what is for the Commissioner a well-paved judicially-approved highway, is for the taxpayer often a rough and unmarked road, nevertheless, taxpayers are increasingly finding surprising success along this road.

II. Substance: A Taxpayer's Argument of Expanding Importance

On four separate fronts, each involving a major area of taxation, taxpayers have achieved at least moderate success in advancing the argument that the substance, and not the form, controls. This list does not purport to be inclusive; it seeks only to make one firm point—that the substance argument is indeed available to taxpayers—and it may well be that it is not made frequently enough.

A. *Book Entries*

First, consider book entries. It is settled law that "book entries . . . are intended to record facts, and are evidential, but . . . do not create or destroy facts."[16] Although the taxpayer chooses the manner in which the transaction is recorded and thus chooses the form it takes for accounting purposes, nevertheless, from the earliest it has been recognized that the taxpayer, as well as the Commissioner, may urge a contrary substance. In *Baldwin Locomotive Works* v. *McCoach*[17] the court sustained the taxpayer's position that, in spite of a book entry reflecting income from an upward adjustment in asset value, in substane, no income was derived. From that day until this, it has always been clear that the form given a transaction by the taxpayer in its

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[12] Note 4 *supra*.
[13] 135 F. 2d 711 (2d Cir. 1943).
[14] Note 4 *supra*, at 477.
[15] Note 13 *supra*, at 713.
[16] Sitterding v. Commissioner, 80 F. 2d 939 (4th Cir. 1936).
[17] 221 F. 59 (3d Cir. 1915).

accounting records does not bind. The rule has been applied in a host of fact settings and is now so well entrenched that, except upon reflection, it does not even occur to the mind that it represents a forceful example of a situation where the Commissioner and the taxpayers stand on equal footing when arguing for substance.

B. *Corporate Entity*

In the second area, corporate entity, taxpayers have done less well. The leading case and principal taxpayer stumbling block in this area is the Supreme Court's decision in *Moline Properties, Inc. v. Commissioner.*[18] There the taxpayer, purely as a security device, formed a corporation and, after the loan which had occasioned the creation of the corporation had been paid, the corporation sold the purchased property at a gain. The Supreme Court, although the corporation had no records and maintained no bank account, rejected the taxpayer's contention that the corporate entity should be ignored and the gain taxed to the sole stockholder:

> The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the state law of incorporation . . . or to serve the creator's personal convenience, so long as that purpose is the equivalent of business activity, or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity. . . . [T]he choice of advantages of incorporation . . .required the acceptance of the tax disadvantages.[19]

With the *Moline Properties* case on the books, it is to be expected that taxpayers' attempts to look through corporate form would be uniformly unsuccessful. However, this is not strictly so. A line of cases has developed, beginning with the decisions in *Stewart Forshay*[20] and *Moro Realty Holding Corp.*[21] These cases involve so-called "dummy" corporations—that is, corporate shells which are utilized to hold bare legal title to real estate. The beneficial ownership resides in the stockholders and the corporation is otherwise passive. In these situations, taxpayers have successfully maintained that, in substance, the income belonged and was taxable to the stockholders and not to the corporation. In another case, *Joseph Czvizler,*[22] an individual was allowed to deduct net operating losses of his restaurant, although the lease covering the premises and liquor license were in the name of his corporation. It was demonstrated that, in substance, the corporation was merely a passive record holder for convenience and that the taxpayer individually conducted the entire business.

The multiple corporation cases are an excellent example of a situ-

[18] 319 U.S. 436 (1943).
[19] *Id.* at 438.
[20] 20 B.T.A. 537 (1930).
[21] 25 B.T.A. 1135 (1932).
[22] 22 P-H Tax Ct. Mem. 367 (1953).

ation where the Commissioner, but probably not the taxpayer, is free to disregard corporate entities on grounds of lack of substance. In *Alden Homes, Inc.*[23] sixteen separate home construction corporations were, under the Tax Court holding, compressed into one effective tax entity. Each of the corporations was properly formed, each owned, legally and beneficially, the property on which it separately undertook construction, and entirely separate financial and accounting records were maintained by each.

Assume that in the *Alden* situations certain of the corporate entities had suffered losses. Could the taxpayer successfully argue that, in substance, only one taxable entity existed and thus offset losses against gain? The taxpayer could plausibly say that "what is sauce for the goose should also be sauce for the gander," but this, under the *Moline Properties* case, is certainly not the law. It is obvious that here substance is less important than color.

Putting aside cases involving total disregard of the corporate entity and turning to a related area of sales between stockholder and corporation, we find unencouraging disparity. A striking contrast is provided by the Supreme Court's decision in *Burnet v. Commonwealth Improvement Co.*[24] *and Higgins v. Smith.*[25] In the first case, the Court rejected the taxpayer's contention that no gain should be recognized on the sale between a corporation and its sole stockholder, since no fundamental change in economic status attended the transaction. The Court held that the corporation was, for legal and tax purposes, a separate entity and that therefore the gain must be recognized. When in *Higgins* the reverse situation arose—a loss on a sale—the Supreme Court stated that "transactions, which do not vary or change the flow of economic benefits, are to be dismissed from consideration."[26] The earlier decision in *Commonwealth Improvement* was explained as follows: [A] taxpayer is free to . . . choose and having elected to do business as a corporation, he must accept the tax disadvantages."[27]

The outstanding taxpayer success in the corporate entity area is represented by the case of *United States v. Kintner.*[28] There the taxpayers were not seeking disregard of the corporate entity, but rather sought corporate treatment for a medical partnership in order to achieve a qualified pension plan. In spite of the partnership form and despite state law prohibiting medical practice by corporations, the taxpayers successfully pressed the argument of substance, demonstrating that each of the essential corporate characteristics were present to establish the corporate nature.

[23] 33 T.C. 582 (1959).
[24] 287 U.S. 415 (1933).
[25] Note 4 *supra.*
[26] *Id.* at 476.
[27] *Id.* at 477.
[28] 216 F. 2d 418 (9th Cir. 1954).

C. *Unwanted Form*

The third area of consideration, unwanted form, covers a variety of seemingly unrelated cases. In each of these separate strains of cases, taxpayers have achieved marked success with the argument that substance controls. The common thread which unites this group is the factor that the form of the transaction was either not wanted or not controlled by the taxpayer. Thus, the rationalization that taxpayers cannot be heard to complain of the consequences of their choice loses much of its force.

First, there is the situation in which a buyer wishing to acquire the assets of a corporation is compelled by the seller to purchase the corporate stock in order to reach the assets. The *Kimble-Dimond Milling Company*[29] case landmarks this type of situation. It is a mistake, however, to consider that case an appropriate example for our purposes, since the Commissioner, and not the taxpayer, successfully argued that, in substance, assets were purchased. Nevertheless, in the turn around situations, taxpayers have almost uniformly prevailed in cases of this type. The Tax Court recognized this in *Kimble-Dimond*, stating that "without regard to whether the result is imposition or relief from taxation, the courts have recognized that where the essential nature of a transaction is the acquisition of property, it will be viewed as a whole."[30]

The *Kimble-Dimond* rule, at the corporate level, has now been embodied into the Code—in particular, section 334(b)(1). The statutory provision, once its requirements are satisfied, works automatically regardless of the substance. The statute, although derived from a judicial rule of substance, has transmitted that rule into one of form.

Section 334(b)(1) of the Code does not apply to purchases of stock by individuals in order to reach assets. In this situation, the substance argument appears to be wide open to the taxpayer. In the case of *Estate of Suter*,[31] an individual, in order to reach corporate assets, purchased the stock of a corporation, caused its liquidation, and transferred the assets to a newly formed corporation. The Tax Court held that the intention was to purchase assets as such and not stock in a going business. The court applied the *Kimble-Dimond* rule to give the new corporation a basis determined by reference to the purchase price. An intriguing thing about the case is the fact that the new corporation was capitalized with more than a two-to-one debt-to-equity ratio.

The second group of cases in the area of unwanted form is the fact pattern in which, in order to expand sales or obtain supplies, the taxpayer is required to acquire stock or securities which definitionally

[29] 14 T.C. 74, *aff'd*, 187 F. 2d 718 (5th Cir. 1951).
[30] *Id.*, 14 T.C. at 80.
[31] 29 T.C. 244 (1957).

are capital assets. In these so-called tie-in purchase cases, the taxpayer, where a loss is subsequently incurred upon disposition of the capital asset, has successfully argued that, in substance, a fully deductible business loss was incurred. There are a host of cases supporting such taxpayer arguments. Among the leading are *Commissioner v. Bagley & Sewall Co.*[32] where a contractor was required to post U.S. Bonds to secure performance and suffered a subsequent loss on sale of the bonds, and *Tulane Hardware Lumber Co.*[33] in which the lumber company, in order to obtain plywood, was required to subscribe to debentures of the supplier and suffered a loss upon disposition of debentures. The important aspect of these cases is that, in spite of the fact that the form of the loss would require capital loss treatment, the taxpayers have succeeded in arguing that the underlying business substance of the transaction controls its tax incidents.

Third, are situations in which the legal instruments do not conform to, or articulate fully, the real transaction. In such cases, the taxpayer has advanced with considerable success the argument that substance, not legal form, is paramount.

In business purchases, not infrequently, the instruments do not always present true pictures of the underlying bargain and understanding of the parties. The case of *Wilson Athletic Goods Co. v. Commissioner*[34] presents an informative example. There, Wilson purchased all of the assets of a Wisconsin shoe manufacturer, together with a covenant not to compete, for a lump sum price. On its accounting records, Wilson set up the excess of the purchase price over the book value of the assets as consideration for a covenant not to compete, \$132,000, and good will, \$10,000. Although the contract of purchase provided no breakdown, the Seventh Circuit, in reversing the Tax Court, stated:

> The Tax Court seemed to think that, in order to justify treating the covenant as an intangible capital asset, the contract must have provided an express segregation of the \$132,000.00 from the total purchase price as the value of the covenant. But in tax matters we are not bound by the strict terms of the agreement: we must examine the circumstances to determine the actualities and may sustain or disregard the effect of a written provision or of an omission of a provision, if to do so best serves the purpose of the tax statute. . . . [The] incident of taxation depends upon the substance of the transaction.[35]

Divorce decrees can be broken, as well as marriage contracts. In several recent cases, husbands seeking periodic payment deductions have succeeded in going behind the captions in the divorce decree to

[32] 221 F. 2d 944 (2d Cir. 1955).
[33] 24 T.C. 1146 (1955).
[34] 222 F. 2d 355 (7th Cir. 1955).
[35] *Id.* at 357.

demonstrate that certain amounts labelled as property settlement were, in substance, periodic alimony payments. The Tax Court considered such a case in *Frances Marie Jacobs.*[36] There, after agreeing on alimony payments of $800 per month, the wife's attorney, in order to place part of the amount beyond the continuing jurisdiction of the court, drafted the decree of divorce to incorporate as part of the property settlement monthly payments of $500, fixing the alimony payments at $300. In that situation, it was successfully argued that, in substance, alimony of $800 was paid and deductible and that the form of the decree should not control for tax purposes. The court looked to the substance, allowing the full deduction.

In the *Paul C. F. Vietzke* case,[37] the taxpayer was duped into subscribing for shares in a newly formed insurance company. The state of Indiana acted under its "blue sky" laws when an investigation revealed substantial corporate milking by the incorporators. The Tax Court, in allowing the loss as one from theft, pierced the corporate entity and stated that "the corporate entity [was] a device to route the subscriber's money into the [promoter's] pocket."[38] The case, of course, represents a taxpayer's success in arguing substance—theft loss, over form—worthless security capital loss.

D. *Leaseholds*

The last group of cases, leaseholds, is considered in two parts. First, from the lessee's side and second, from the lessor's side. Some of the results are startling demonstrations of the full potential of the substance argument.

On the lessee's side, two situations present opportunities for the taxpayer to urge economic substance.

One, where the lessee during the term of the lease purchases the fee, offers fertile ground. Where the lessee in order to escape a burdensome lease purchases the property, the purchase price, economically speaking, contains two distinct elements of consideration: payment to terminate the lease and the fair market value of the property. There is no sound reason which prevents current deduction of the amount paid to terminate a business lease, providing the amount paid is equivalent to the burden. In at least one case, *Cleveland Allerton Hotel, Inc. v. Commissioner,*[39] the taxpayer has successfully argued that the package consideration should be fragmentized and that since, in substance, part was paid to escape the burden of an unfavorable lease, such amount was currently deductible. A related fact pattern is presented where the lessee, having made substantial improvements on the leasehold, purchases the property shortly before expiration of the lease. Again, in substance,

[36] 32 P-H Tax Ct. Mem. 384 (1963).
[37] 37 T.C. 504 (1961).
[38] *Id.* at 511.
[39] 166 F. 2d 805 (6th Cir. 1948).

a considerable portion of the price is attributable to the right of the lessor to the leasehold improvements at the termination of the lease. Again the taxpayer has been successful in sustaining the economic substance, ascribing a significant part of the consideration to this right and depreciating this amount over the improvement life.

The second situation on the lessee's side, where a lessee's interest in a lease is purchased after the lessee has made improvement to the leasehold, presents this problem: To what extent may a portion of the leasehold purchase price be allocated to the improvements made by the prior lessee and recovered over the improvement's useful life? Substantial advantages may attend assigning part of the price to improvements. The improvements may have a shorter life than the lease term, thus permitting more rapid recovery of this aspect of the purchase price. Moreover, the character of the deduction is depreciation, which permits limited rapid depreciation methods.

This area is the scene of a notable recent taxpayer victory. In *1220 Realty Co. v. Commissioner*[40] the taxpayer acquired the lessee's rights under two ninety-nine year leases; the property was improved by office buildings having a remaining useful life of twenty years. The court of appeals, accepting the taxpayer's argument that economic substance should prevail, stated that "where the useful life of such buildings is less than the unexpired terms of the leases . . . there is no good reason why the portion of the cost allocable to the buildings should not be depreciated over their useful life."[41] The case, of course, is an excellent example of the use by the taxpayer of the substance argument to overcome the form, which was purchase of a lease.

Turning to the lessor's side, two relatively common commercial transactions offer opportunities which are often overlooked. Both arise in the situation where property is acquired subject to an existing lease.

In the first, opportunity exists where the lessee has constructed improvements on the land. Economically, the purchaser stands in the same position *as to improvements to the land,* whether they have been placed there by the previous land owner or the tenant. The legal rights of the new owner are the same—the right to receive the rental payments and the reversionary right to the land and improvements at the end of the lease. Where the improvements to the land were placed there by the *seller,* the purchase price is allocated between the land and building, depreciation being permitted upon the purchased building over its estimated life.[42] Where the lessee has constructed the improvements and these are to revert to the landlord at the end of the lease, the cases are in conflict as to whether allocation may be made and depreciation allowed.

[40] 322 F. 2d 495 (6th Cir. 1963).
[41] *Id.* at 498.
[42] Treas. Reg. §1.167(a)-5 (1963).

The Tax Court, in a series of early cases, permitted depreciation. It reversed this position in *Albert L. Rowan.*[43] Within the last year however, the Eighth Circuit in *World Publishing Co. v. Commissioner*[44] held that where property is purchased subject to a lease and improvements are present, constructed by the lessee, a portion of the price is properly allocated to the economic cost of the improvements and depreciated over the building's useful life. Here again, a taxpayer has succeeded in going behind the form, a property purchase, and reaching to the underlying economic substance of the purchase transaction.

The second situation which exists as an opportunity on the lessor's side arises where property is purchased subject to a lease and the lease has a premium value. In the market place, the presence of a lease on the property calling for rentals in excess of the fair market value of the property results in the lease having a "premium" value. This economic asset has independent value and in a commercial transaction would command separate consideration. The amount attributable to this "premium" wastes over the life of the lease.

In the situation where property is purchased along with the seller's interest as a lessor under a "premium" lease, an opportunity exists to segregate the "premium" and amortize it ratably over the remaining period of the lease. Although a conflict exists at the circuit court level, *Commissioner v. Moore*[45] in the Ninth Circuit permits amortization Such a rule comports with the realistic commercial economics of the transaction and thus with its substance.

In this over-all area of leases, both on the lessee and lessor's side, the common problem is that of persuading the court to fragment the consideration into its constituent economic parts and to treat each part for tax purposes in accordance with its underlying economic substance. It is an area in which the taxpayers have achieved considerable success in urging substance. Nevertheless, as a word of caution, it is an area in which preplanning aids immeasurably the task of sustaining substance. To the extent the instruments of the transaction break down and realistically separate the constituent economic elements of the transaction, the taxpayer is at least half way home.

In each of the four major areas which we have now covered—book entries, corporate entity, unwanted form, and leaseholds—it has been the purpose not to provide exhaustive or even deep treatment or analysis, but rather to point up and demonstrate that, indeed, the argument of substance over form is available to the taxpayer in a considerable and expanding range of areas.

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43 22 T.C. 865 (1954).
44 299 F. 2d 614 (8th Cir. 1962).
45 207 F. 2d 265 (9th Cir. 1953).