Montana Law Review

Volume 14
Issue 1 *Spring 1953*

Article 4

January 1953

Contingent Liabilities from Capital Transactions—Is Payment Capital or Ordinary Loss?

Francis E. Coad

Contingent Liabilities From Capital Transactions—Is Payment Capital or Ordinary Loss?

FRANCIS E. COAD*

Introduction: The subject of this article is the problem of whether payment of a contingent liability arising from a prior transaction on which capital gain or loss was realized, should be treated as *capital* or *ordinary* loss in the year of payment. This problem arises where a contingent liability was assumed in the earlier transaction, or transferee or other liability across therefrom as a matter of law. The taxpayer may have realized gain or loss from assets sold or exchanged, or from the liquidation of a corporation.

For the purpose of this discussion we are assuming that the recent *Switlik* case[1] in the Third Circuit is right in holding that the payment of the contingent liability can be treated as loss only in the year of payment, and cannot be used to adjust the earlier capital transaction and get a tax refund, though there is conflict of authority on this point. The *Switlik* case held that such a rule, used by the Supreme Court as to ordinary gain or loss transactions,[2] applied equally to contingent liabilities arising out of earlier *capital* transactions.[3]

Assuming then that the loss from payment of the contingent liability is realized only in the year of payment, is it a capital loss or an ordinary loss?

The Switlik Case (1950): In the *Switlik* case the Tax Court and the Third Circuit both held that such a loss is an ordinary loss.[4] This case clearly presents our specific problem.

*Associate professor of law at Montana State University until his recent death in September, 1952.

[1]Com'r v. Switlik, 184 F(2d) 299, 50-2 USTC #9446 (1950), aff'g 13 T.C. 121.

[2]U.S. v. Lewis, 340 U.S. 590 (1951), and Security Flour Mills v. Com., 321 U.S. 281 (1944), following dictum in North American Oil Consol. v. Burnett, 286 U.S. 417 (1932).

[3]I.R.C. § 23(e) as to individuals and § 23(f) as to corporations allow deductions only of "losses sustained during the taxable year," applying to both capital and ordinary losses, make this conclusion difficult to avoid.

[4]Com'r v. Switlik, 184 F(2d) 299, 50-2 USTC #9446 (3d Cir., 1950), aff'g 13 T.C. 121. Accord, Bauer, 15 T.C. 876 (1950), and Milliken, 15 T.C. 243 (1950). Com'r acquiesced in Bauer and Milliken as to year of realization, but non-acquiesced as to classification as capital loss, 1951-8-13570, p. 1; CCH (1951) para. 6113.

Taxpayers received proceeds of liquidation of a corporation in 1941. In 1944 they had to pay deficiencies in the corporation's taxes because of transferee liability. They deducted these payments as ordinary loss in 1944. The Commissioner contended that these losses took their character from the original transaction, and should be treated as capital losses. The tax Court overruled the commissioner, holding this was not a loss realized by sale or exchange requiring capital loss treatment, and therefore should be deducted as an ordinary loss on a transaction entered into for profit. The Court of Appeals, Third Circuit, said the Tax Court got this result by "adhering to the principle of the tax year" and affirmed. On this appeal the Commissioner relied to a large extent on the *Benedict* case[5] just decided, and from it argued that since only half the gain to taxpayer was recognized originally, the whole loss could not be allowed in 1944 as that would be charging the whole to that part of the gain taken into account in 1941. The Court of Appeals distinguished the *Benedict* case on the ground that it only involved a single tax year.

The Dobson Case (1943-4):[6] The Court of Appeals, Eighth Circuit, in the *Dobson* case, argued that a tax realization was a closed transaction and subsequent realizations must be classified without regard to it. The Supreme Court overruled the Eighth Circuit as to the "tax benefit rule" adopted by the Tax Court, and on the rehearing opinion it affirmed the Tax Court holding that recoveries to the extent that a tax benefit had been received on earlier losses, would be ordinary rather than capital gain, saying:

> "The Tax Court did not find as a matter of fact, and we decline to say as a matter of law, that such a transaction is a 'sale or exchange' of a capital asset in the accepted meaning of those terms."

This statement cannot be construed as approval of the Court of Appeals' basic theory, for the tax benefit rule itself runs contra to it.

The Supreme Court's opinion cannot be given much weight on our specific problem for two reasons. First, it was using the short-lived "Dobson rule" of review of Tax Court cases, and its approval meant only that rules of law adopted by the Tax Court did not clearly violate any statute or regulation having the force of statute. The Tax Court would not be prevented from chang-

[5]U.S. v. Benedict, 338 U.S. 692 (1950).
[6]Dobson v. Com'r, 46 B.T.A. 765, 770 (1942); rev'd in 133 F(2d) 732, 42-1 USTC #9332 (1943); T.C. aff. U.S. 489 (1943), rehearing 321 U.S. 231 (1944).

ing its own rule by such a holding. Second, the facts were much different from those of our problem. In the *Dobson* case, taxpayer, after selling some stock, discovered that he had been defrauded on his original purchase some years before, and recovered damages. This was held to be ordinary gain in the year of recovery. It could hardly be said to have arisen from any earlier "sale or exchange" by the taxpayer of a capital asset. The Supreme Court cannot be said to have approved the statutory construction adopted in the *Switlik* case by this holding.

Duveen Bros. Case (1951):[7] This case is directly contra to Switlik in theory, though it distinguishes Switlik on the facts. Here T took an ordinary deduction under § 23(f) of amounts he was required to pay in the tax year under a contingent liability expressly assumed on the sale of stock in an earlier year. T had reported a capital gain at the time of such sale. The Tax Court upheld the Commissioner's ruling that T was only entitled to a capital loss deduction, saying:

> "In our opinion, the refunds of parts of the purchase price paid for the stock are unquestionably part of the general transaction involving sales of capital assets. The refunds to the purchasers of the stock represent a loss to the petitioner. Since the loss was sustained in connection with the sale of stock, it is a capital loss."

The court distinguishes the *Switlik* case on the facts, reciting its facts at some length and saying that they differ, but not why, except possibly that there is a distinction between transferee liability imposed by law and the liability expressly assumed here. The court said:

> "This Court and the Court of Appeals held, under the facts, that the loss sustained upon the payment of the tax deficiencies, which grew out of transferee liability, was not part of 'a sale or exchange' of capital assets.
>
> "The situation in this case is not analogous. . . ."

Perhaps more significant is language putting the blame for Switlik on the Commissioner:

> "The Commissioner conceded, in the Switlik case, that the later payments of the corporation's tax deficiencies, in 1944, *did not represent losses from 'the sale or exchange' of capital assets."*

Four judges dissented arguing that the subsequent payment

[7]Duveen Bros., 17 T.C. ......, #15 (1951).

on the guarantee was "not loss *occasioned by* the sale or exchange of any capital asset;" that, while related to prior sales, it was not "from sales or exchanges of capital assets" under § 117(a). This is essentially the Switlik theory.

Can Switlik and Duveen Bros. Be Distinguished?: Aside from the fact that the Commissioner in Switlik conceded that the payments were not losses from sale or exchange of capital assets, which is the basic question in classifying the loss as capital loss under § 117(a), there seems to be no essential difference in the two cases. In the one case the contingent liability arose by law while in the other it was expressly assumed. It may be that a line should be drawn as to more remote liabilities having some connection with a capital realization, but transferee liability, whether expressly assumed or not, hardly seems so remote. The two cases proceed on opposite theories of interpretation of § 117(a), the statute defining capital gains and losses, and it does not appear that they should be reconciled on the basis of such an elusive distinction of fact.[8]

Conflicting Theories: The two conflicting theories represented by the *Switlik and Duveen Bros.* cases might be summed up as follows:

Switlik: The statutes give capital gain or loss treatment only to sales or exchanges of capital assets. Only gains or losses *realized by* sale or exchange are entitled to such treatment. Under the tax year concept the gain or loss must be realized by sale or exchange in the tax year. The consequence is that a capital sale or exchange is a closed transaction, and contingent liabilities arising therefrom must be treated as an ordinary loss when realized by payment.

Duveen Bros.: Capital treatment should be given gains or losses which are part of a general transaction involving sales of capital assets. A loss sustained *"in connection with"* a sale of capital assets is a capital loss.

This conflict centers around differing interpretations of § 117(a), defining capital gains and losses.

Statutes: The idea of an inherent distinction between capital

[8]It should be noted here that the Tax Court in 1944 in the Koppers case, 3 T.C. 62, held T entitled only to capital loss deductions for payments on both transferee liability imposed by law (Bexley and Falmouth transactions) and on sale of stock (Koppers Kokomo transaction), where expressly assumed.
See also as overruling an argument for a distinction based on whether T was aware of the liability at the time of the capital realization: Roberta Pittman, 14 T.C. 449 (1950).

transactions and those giving rise to ordinary gain or loss keeps arising in the cases, but there is no basis for it in the code.

The capital gain and loss provisions of the code have just sort of grown by amendment after amendment. When sale of capital assets was held to create taxable income under the broad provisions of the income tax statute taxing income "from any source whatever," statutes were added to give special treatment to gains or losses *"from sale or exchange"* of capital assets. From time to time special statutes have added other transactions to be treated as "sales or exchanges" and hence get this capital gain and loss treatment. The basic definition of a capital gain or loss remains one "from the sale or exchange" of capital assets.[9]

At first glance it seems logical to say that "from the sale or exchange" means "realized from" and hence these statutes mean that the gain or loss must be realized by sale or exchange in the tax year to get capital gain or loss treatment. This seems to be the rationale of the Switlik holding. But is this the correct construction of this language?

§ 117(a) is entitled "definitions." This refers to classification, not realization. It defines capital gains and losses as those *"from the sale or exchange of a capital asset."*

"From" is the key word in construing this provision. Webster's International Unabridged Dictionary, 2nd ed., gives the primary meaning as "indicating a point of starting." It also is used as "indicating the source or original, or that which does or did include or contain." The statutory phrase therefore means literally a gain or loss *having its source or origin* in the sale or exchange of a capital asset, without any implication as to time. There is no definition of "from" which would indicate that this phrase means "by" or "by means of" a sale or exchange.

There is therefore nothing in § 117(a) which must be construed as stating a rule of time and manner of realizing gain or loss. Such gain or loss could just as well have its source or origin in an earlier sale or exchange of a capital asset. The fact that it was realized at a later time and in a different manner would then not be material. However there is nothing here either to prevent construing the statute as meaning that the gain or loss must have its source in an immediate sale or exchange within the tax year.

The concept of *realization* of gains or losses is primarily a judicial concept based on the general statutory provisions, mak-

[9]I.R.C. § 117(a) (2), (3), (4), (5).

ing no distinction between transactions in capital or ordinary assets. The doctrine antedates the special provisions for capital gains and losses.[10] There is certainly no need to hold that § 117(a) governs time and manner of realization of capital gain and loss, as the general rules govern them if § 117(a) is given the restricted construction suggested. In fact, such construction simplifies the doctrine of realization, leaving it as a general principle without an unnecessary exception applying to capital gains and losses.

In addition to eliminating a tricky exception to the general doctrine of realization, this construction comes closer to fitting the idea of an inherent distinction between capital transactions and ordinary transactions. The courts have never been able to see any essential distinction between the nature of the original sale or exchange and later payment of a contingent liability arising therefrom. They first held that the original transaction should be reopened and the tax adjusted.[11] In others, holding that the annual accounting concept as construed by the Supreme Court prevented this, they assumed without question that the gain or loss was still capital.[12] It seems quite arbitrary and a bit unfair to the government to class such a loss as an ordinary loss, or to the taxpayer to class such a gain as an ordinary gain. The suggested construction avoids this as to quite a group of cases. It might prevent another patchwork amendment to the code.

It is believed that this construction of § 117(a) does no violence to its language, fits in well with the general doctrine of realization, and will work out more nearly in accord with the idea of a basic distinction between capital transactions and others, than does the Switlik interpretation. The Duveen Bros. construction seems the best.

However such construction does not settle all problems. In the Dobson type of situation, the recovery of damages for fraud inducing the purchase could hardly be said to have its source in a sale or exchange of capital assets by the taxpayer; even though, in a broader sense, the purchase, later sale, and the recovery of damages all concern the same stock and should be treated the same. This arbitrary statutory definition of capital gain and

[10]Going back at least to Eisner v. Macomber, 252 U.S. 189 (1920).

[11]Barker, 3 PTA 1180 (1926), Joseph A. Mudd, 14 BTA 1417 (1929), O'Neal, 18 BTA 1036 (1930).
Subsequent to North American Oil case: T. H. Symington, Inc., 35 BTA 711 (1937) rev. by Board; Park & Tilford, 43 BTA 348, 381 (1941), rev. by Board.
Subsequent to Switlik in Tax Court: Dictum in Wurtzbaugh, 13 T.C. 1059 (1949) 1 judge.

[12]Koppers Co., 3 T.C. 62 (1944); Edith K. Timken 6 T.C. 483 (1946).

loss cannot be stretched to cover all capital transactions. There is need for a statutory change to adopt a more fundamental definition of capital gains and losses.

The Supreme Court: The *Lewis* case is the most recent of a long line of Supreme Court cases stressing the annual tax year concept.[13] It establishes the "claim of right" doctrine as the pricipal test of when income is realized. While cited by one District Court as stressing a rigid and literal interpretation of the Internal Revenue Code,[14] it does not appear to be stating any new policy of statutory interpretation. The court has said before that it would take the ordinary meaning of the statutory language in the absence of some evidence that Congress intended something else.[15] However it does look to Congressional purpose to explain ambiguities in such language,[16] or even to restrict the ordinary literal meaning of statutory language.[17] It has frowned on importing equitable considerations into matters fairly explicity covered by the code.[18]

In one case the Supreme Court used evidence of Congressional intent derived from the statutes themselves in construing "sales" in § 117(a) as including forced sales.[19] J. Stone in his opinion said:

> "Congress thus has given clear indication of a purpose to offset capital assets by losses from the sale of like property and upon the same percentage basis as that on which gains are based."

However the Court is not going to distort or disregard statutory language because of such general Congressional purpose.[20] The Court has held that other types of realization do not meet the test of "sale or exchange" in § 117(a) unless specific statutes require such treatment.[21]

With the exception of the *Dobson* case,[22] already discussed, which is of almost no value on this point, the Court has not had directly before it the ambiguity in § 117(a) as to whether capital gain or loss must be realized by sale or exchange (or statutory

[13]Ellis R. Lewis, 340 U.S. 590 (1951).
[14]Commercial Trust Co. v. U.S., 96 F. Supp. 718 (W.D.Pa., 1951); same language in Sharon Herald v. Granger, 97 F. Supp. 302 (W.D.Pa., 1951).
[15]McClain v. Com'r, 311 U.S. 527 (1941).
[16]Helvering v. Hammel, 311 U.S. 504 (1941); Crane v. Com'r, 331 U.S. 1 (1947).
[17]Helvering v. Griffiths, 318 U.S. 371 (1943).
[18]Security Flour Mills v. Com'r, 321 U.S. 281 (1944).
[19]Helvering v. Hammel, 311 U.S. 504 (1941).
[20]Fairbanks v. U.S., 306 U.S. 436 (1939).
[21]Helvering v. Flaccus Oak Leather Co., 313 U.S. 247 (1941).
[22]Note 6, p. 3, *supra*.

substitutes) in the current tax year, or may arise directly from an earlier sale or exchange and be realized in the current tax year in some other manner. Literal interpretation of this language leads to one conclusion about as easily as to the other. However the general purpose of Congress, as discussed in the Hammel case, would be better carried out by the latter interpretation. At least a few more transactions which are essentially capital transactions would be so treated, and perhaps the necessity of one more of the patchwork amendments eliminated.

The *Crane* case[23] is an illustration of the difficulties that can arise for the lower courts when the Supreme Court neglects to consider the completely illogical § 117(a) test of capital gains and losses. The case held that a mortgage on property was part of the cost basis, and of the sale price received, though personal liability had not been assumed. J. Vinson carefully considered the basis problem under § 113(a) (5) and construed the word "property" therein to mean the taxpayer's interest in property unreduced by liens thereon including those as to which no personal liability had been assumed. To avoid an absurd result, it was then decided that "property" sold would have to be defined in the same way, and the "amount realized" under § 111(b) would be the amount actually realized plus liens on the property. But no consideration was given to the theory on which the court held that the amount of the mortgage was gain from a "sale or exchange" under § 117(a) entitled to capital gain treatment. There is some vague talk to the effect that the seller "realizes a benefit in the amount of the mortgage as well as the boot" under the "amount realized" terminology of § 111(b). But why is this *capital* gain? There was a sale here of T's equity in the property, but he did not *sell* the mortgage obligation. He received no release of personal obligation as an *exchange*. It seems to be stretching the "gain *from* sale or exchange" language quite a bit to make it a technical formality with such a sale of T's equity creating a gain of the amount of the unassumed mortgage as a taxable gain from such sale. The *Crane* case theory also indicates that a surrender of the mortgaged property to the mortgagee might realize taxable gain or loss, though T did not given get a release of obligation in return. The *Lutz & Schramm* case in the Tax Court so held.[24] But it also held without much consideration that the gain was capital gain. Where is the "exchange" entitling this to capital treatment? The only thing T received in exchange for his surrender of the property would have to be the

[23]Crane v. Com'r, 331 U.S. 1 (1947).
[24]Lutz & Schramm Co. v. Com'r, 1 T.C. 682 (1943).

purely fictitious benefit he was supposed to have received from turning over the unassumed mortgage to someone else. It is to be doubted if the Supreme Court would go so far with its fiction. Previous cases say there is no exchange unless T receives a release of personal obligation in return for his surrender.[25]

The *Crane* case attempted a broad approach, looking to the purpose of Congress and the effect of the proposed construction, as a basis for statutory construction. Where it fell down was in overlooking the necessity of coordinating another pertinent section, § 117(a). The approach of J. Burton in the recent *Jacobson* case[26] is a complete contrast in method. He was concerned primarily with the question of whether cancellation of indebtedness in the case was income. He made a very technical argument from § 22(b) (9) and § 113(b) (3) permitting corporations to file a consent to reduce basis by the amount of debt reductions instead of reporting them as income, sayinug that this specific provision as to corporations implied that individuals could not do the same thing—overlooking authority (conflicting) that they can do this without statutory authority.[27] He argues from this that the individual is required to report such gains under § 22(a). This is the technical, legalistic approach used in the most myoptic fashion. The *Crane* case approach was a bit too broad, causing it to overlook the effect of one very pertinent provision of the code. J. Burton's approach is entirely too narrow.

J. Burton's dictum in the *Jacobson* case throws a shadow of doubt on those cases holding that cancellation of indebtedness incurred in purchasing assets may be used to reduce the basis of such assets instead of reporting it as income. It also throws a touch of doubt on a related group of cases holding that where

[25]Wm. H. Jamison, 8 T.C. 173 (1947) ; Commonwealth, Inc., 36 BTA 850 (1937) ; Com'r v. Hoffman, 117 F(2d) 987, 41-1 USTC #9280 (2nd Cir., 1941) ; Stokes v. Com'r, 124 F(2d) 335, 41-2 USTC #9770 (3rd Cir., 1941) ; Polin v. Com'r, 114 F(2d) 174, 40-2 USTC #9639 (3rd Cir., (1940) ; cf. Parker v. Delaney, 186 F(2d) 455, 51-1 USTC #9112 (1st Cir., 1951), abandonment.

[26]Com'r v. Jacobson, 336 U.S. 28 (1949).

1940). Cf. Parker v. Delaney, 186 F(2d) 455, 51-1 USTC #9112 (1st

[27]Hirsch v. Com'r, 115 F(2d) 656, 40-2 USTC #9791 (7th Cir., 1940) ; Helvering v. A. L. Kilian Co., 128 F(2d) 433, 42-2 USTC #9487 (8th Cir., 1942) ; Edgar J. Kaufman, 10 TCM 790, (1951). Contra: Fifth Avenue-Fourteenth St. Corp. v. Com'r, 147 F(2d) 453, 45-1 USTC #9115 (2nd Cir., 1944). Cf. Denman Tire and Rubber Co. v. Com'r, 14 T.C. 706 (1950).

Inasmuch as § 22(b) (9) gives corporations a broader power than individuals were held to have, an inference that the individual right is negatived is not justified: Higgins v. Smith, 308 U.S. 475-80 (1940).

a contingent obligation is incurred in the purchase of property, payment of it is part of the cost of the property purchased and should be added to basis.[28] Whether this adjustment of basis rule will be used where T got capital assets on a liquidation or exchange in which he realized capital gain or loss is a matter of some doubt not settled by the cases.[29] The existing cases concern purchases or tax-free exchanges and make no point of such a distinction. The rule could be applied or a distinction made, and it is hard to guess which way the courts may go.

The cases allowing adjustment of basis seem to assume that this merely defers realization, with no consideration of whether it may also change the classification of that realization. The erratic nature of the statutory rules as to classification make it hard to estimate what the effect of deferment of realization may be.

It would seem that the courts should not consider one aspect of the capital gain or loss problem without considering all angles. But the arbitrary nature of the classification provisions of the code make this exceedingly hard to do, and make complete consistency impossible.

The recent *Benedict* case[30] was relied on by the Commissioner in his appeal in the *Switlik* case,[31] in an argument that the taxpayer should not be permitted to deduct a full loss when only fifty per cent of the original gain was charged to him. The *Benedict* case concerned a trust in which a charity had a right to a percentage share of the trust income. The court held that only 50% of the charity's share of long term capital gain income could be deducted as a charitable contribution, since only 50% was reported as income. This was a trust in which the charity had an immediate equitable right to a specific share in the income of the trust corpus. If an individual were substituted for the trust, it is hard to see how such a result could be supported. The majority opinion by J. Burton is completely baffling if you overlook the second half of footnote 10 which is the key to the whole thing. The Third Circuit in the *Switlik* case distinguished Benedict be-

[28]Portland Gas Co. v. Com'r, 181 F(2d) 538, 50-1 USTC #9263 (5th Cir., 1950); W. D. Haden Co. v. Com'r, 165 F(2d) 588, 48-1 USTC #9147 (5th Cir., 1948); Holdcroft Transp. Co. v. Com'r, 153 F(2d) 323, 46-1 USTC #9193 (8th Cir., 1946); Brown Fence & Wire Co., 46 BTA 344 (1942); Bermont Oil Co. v. Helvering, 91 F(2d) 710, 37-1 USTC #9298 (C.A., D.C., 1937); Watab Paper Co., 27 BTA 488 (1932), app. dis. 68 F(2d) 998 (8th Cir., 1933); Meeks Motor Fr. Co., 8 TCM 838 (1949).

[29]No cases have been found where there was such prior realization.

[30]Note 5, p. 2, *supra*.

[31]Note 1, p. 1, *supra*.

cause it concerned only a single tax year, but this is not the principal reason why it has no bearing on our problem.

Conclusion: It is our conclusion that the preferable construction of the definitions of capital gains and losses in § 117(a) is gains or losses having their source or origin in a sale or exchange of capital assets. These capital gains or losses can arise from earlier sales or exchanges, and can be realized in a later year by a different type of realization. Contingent rights or liabilities can arise out of a sale or exchange (or statutory substitute therefor, such as a liquidation of a corporation), and the amounts recovered or paid in a later year will still be capital items under such interpretation.

§ 117(a) need not be construed as requiring that a capital gain or loss be realized directly by sale or exchange, though that is a possible interpretation. This section does not purport to concern the time and manner of realizing capital gains and losses. Gains and losses on capital assets are realized in the same manner as those on other assets, under general principles of realization.

The proposed construction comes closest to being a literal interpretation of the statute. It has the advantage of treating both realizations of gain or loss respecting the same asset in the same manner, preventing juggling or unfairness. It appears to accord with the general purpose of Congress, and may avoid another amendment to the code.

This construction still leaves a problem of whether the immediate realization has enough connection with an earlier sale or exchange (or statutory substitute) to be said to have its source or origin in it. Contingent rights or liabilities expressly agreed to on the earlier sale or exchange would meet the test. Transferee liability arising as a matter of law from a sale, exchange or liquidation would also have sufficient connection. Such transactions as the *Dobson* case was concerned with would not seem to meet the test because the right did not arise from the sale causing the earlier loss, but from the still earlier purchase. Many essentially capital transactions would still be excluded from capital gain and loss treatment.

The whole problem illustrates the need for a simple, basic rule for classifying capital gains and losses. Even the Tax Court judges, familiar as they are with the code, occasionally fall into the trap for the unwary, § 117(a), and assume that if you have capital assets and a realization, it follow that you have capital gain or loss. That probably should be the test,[82] which incidentally might have the desirable effect of causing some of the anomalies of § 117(j) to be eliminated in the course of amending the section. There should be little trouble in determining when assets change from one classification to another, as considerable law already exists on this point. A rule would have to be developed as to when contingent rights and liabilities having some connection with an earlier capital transaction should receive the same classification and when they should not. Such a test would seem to be simple and understandable so that ordinary lawyers not specializing in taxation might be able to figure it out.

[82]This is the approach in the American Law Institute's tentative draft of their proposed recodification of the Federal Income Tax Law, see § X225 et seq.