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REVITALIZING THE *CORN PRODUCTS* DOCTRINE

The Supreme Court, in *Corn Products Refining Co. v. Commissioner*,¹ created a nonstatutory exception to the definition of capital assets.² This exception, known as the *Corn Products* doctrine, provides ordinary treatment for property that produces a normal source of business income, even though the property would otherwise fall under the definition of a capital asset provided in section 1221 of the Internal Revenue Code (the Code).³ The Tax Court, however, has repeatedly narrowed the doctrine, restricting its application in several ways.⁴

This Note examines the development and erosion of the *Corn Products* doctrine and suggests a framework for its revitalization. Part I discusses the birth and significance of the doctrine. Part II traces the doctrine's application by the Tax Court and other federal courts and reviews the restrictions placed on the doctrine's scope. In Part III, this Note analyzes an unsuccessful attempt by Congress to reform the *Corn Products* doctrine. Finally, Part IV proposes a business risk test that would enable courts to define the scope of the *Corn Products* doctrine in accordance with congressional intent.

I. THE *CORN PRODUCTS* DOCTRINE

Section 1221 of the Code defines capital assets as "property held by the taxpayer," with five classes of exceptions.⁵ The distinction between capital assets and ordinary assets is important because it triggers different tax

1. 350 U.S. 46 (1955).

2. Section 1221 of the Internal Revenue Code [hereinafter cited as the Code] defines capital assets as follows:

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other . . . property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business;

(3) a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property . . . ;

(4) accounts or notes receivable acquired in the ordinary course of trade or business for services rendered or from the sale of property described in paragraph (1);

(5) a publication of the United States Government

I.R.C. § 1221 (1982).

3. See *infra* notes 5-23 and accompanying text.

4. See *infra* notes 52-70 and accompanying text.

5. See *supra* note 2.

treatment for gains and losses recognized from the sale or disposition of an asset.⁶ From the taxpayer's perspective, ordinary gains are less desirable than capital gains and ordinary losses are more desirable than capital losses.⁷

The Supreme Court, in *Corn Products Refining Co. v. Commissioner*,⁸ created a nonstatutory sixth exception to the definition of a capital asset.⁹ In *Corn Products*, the company manufactured products from grain corn.¹⁰ Due to limited storage facilities, it maintained only a three-week supply of corn.¹¹ When the company exhausted this reserve, it bought corn on the spot market.¹² In order to insulate itself against unexpected price surges in the spot market, the company bought corn futures.¹³ If the futures price was less than the spot market price, the company took delivery of the corn. Otherwise, the company paid the price on the spot market and sold the futures.¹⁴ The company treated the sale of its corn futures as the sale of capital assets.¹⁵

Both the Tax Court¹⁶ and the Court of Appeals for the Second Circuit¹⁷ held that the corn futures were ordinary assets, thus requiring the company to pay a higher tax on the recognized gains from the sales.¹⁸ The Supreme Court affirmed,¹⁹ noting that the futures played an "inte-

6. The Code applies different tax treatment to capital assets and ordinary assets. A noncorporate taxpayer may deduct 60% of any net capital gain. I.R.C. § 1202 (1982). On the other hand, ordinary gains do not qualify for this deduction. As for losses, the Code allows a deduction for the full amount of ordinary losses, but limits deductions for capital losses. I.R.C. § 1211 (1982).

7. See *supra* note 6. See generally 1 TREASURY DEPARTMENT REPORT TO THE PRESIDENT, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH 100-105 (1984) (discussing the "complexity" and "inequitable" operation of capital gains treatment).

8. 350 U.S. 46 (1955).

9. *Id.* at 47.

10. *Id.* at 48.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 48-49.

15. *Id.* at 49. See *supra* note 6 (discussing the different tax treatment accorded capital gains and ordinary income).

16. 11 T.C.M. (CCH) 721 (1952).

17. 215 F.2d 513 (2d Cir. 1954).

18. The Tax Court found that the futures contracts were a hedge against price increases and thereby qualified for ordinary asset treatment. 11 T.C.M. (CCH) at 726. The court of appeals also applied ordinary asset treatment, finding that the futures could not "reasonably be separated from the inventory item" excluded from the definition of capital assets under the Code. 215 F.2d at 516. The court of appeals reasoned that because the company entered the futures market to stabilize inventory costs, the futures contracts should be treated as inventory. *Id.*

19. 350 U.S. at 54.

gral part” in the taxpayer’s business.²⁰ The Court noted that capital asset treatment is an exception to the Code’s normal treatment of property.²¹ Furthermore, capital assets should be defined narrowly and its exceptions should be applied broadly.²² The Court ultimately held that Congress intended to treat profits and losses from everyday business operations as ordinary income or loss.²³

II. APPLICATION OF THE *CORN PRODUCTS* DOCTRINE

Implicit in the *Corn Products* opinion is the Supreme Court’s examination of the taxpayer’s motives for purchasing the asset in question.²⁴ In subsequent cases, courts have used a variety of motive tests to distinguish capital assets from ordinary assets. The most widely applied tests are the business motive/investment motive test and the substantial investment motive test.

A. *The Business Motive/Investment Motive Test*

In *Booth Newspapers, Inc. v. United States*,²⁵ the Court of Claims applied the business motive/investment motive test for the first time. In *Booth*, the taxpayers were newspaper publishers who had purchased a paper mill to ensure a steady supply of newsprint. Upon the sale of the mill, the taxpayers treated the loss from the sale as an ordinary loss.²⁶ The Court of Claims agreed with the taxpayers, treating the motive issue as an either-or inquiry. Under the test, an asset is either acquired and held with an investment motive, receiving capital asset treatment, or is acquired and held with a business motive, requiring ordinary treatment.²⁷ No search is made for a possible secondary motive or purpose.²⁸

20. The Court noted that both lower courts had found the company’s purchases of futures to be an integral part of the taxpayer’s business. The Court further noted that these findings were questions of fact and thus “should not ordinarily be disturbed.” *Id.* at 51.

21. *Id.* at 52. The Code reflects congressional intent to preclude preferential tax treatment to gains and losses arising from everyday business operations. *See, e.g.*, I.R.C. § 337 (1982) (recognizing gain or loss upon the liquidation of certain business property); I.R.C. § 1221 (1982) (denying capital asset treatment to certain business property); I.R.C. § 1231 (1982) (providing ordinary treatment to net losses from disposition of certain business property).

22. 350 U.S. at 52.

23. *Id.* at 52-53.

24. *Id.* at 50-51.

25. 303 F.2d 916 (Ct. Cl. 1962).

26. *Id.* at 917-20.

27. In *Booth*, the Court of Claims stated:

[I]f securities are purchased by a taxpayer as an integral and necessary act in the conduct

In *Missisquoi Corp. v. Commissioner*,²⁹ the Tax Court endorsed the business motive/investment motive test. Although the Tax Court acknowledged the existence of an investment purpose behind the purchase of certain securities, it held that such purpose did not motivate the transaction.³⁰ The court thus disregarded *any* underlying investment motive, focusing only on the predominant business motive.³¹ The Internal Revenue Service formally adopted the business motive/investment motive test in Revenue Ruling 75-13.³²

Use of the business motive/investment motive test enabled courts to broadly apply the *Corn Products* doctrine to a wide variety of assets³³ and businesses.³⁴ In *United States v. Genes*,³⁵ the Supreme Court expanded the business motive/investment motive test to cover losses for bad debts. According to the Court, a "dominant-motivation standard" should determine whether a taxpayer entered a transaction with a business or investment motive.³⁶ According to the Court, this approach

of his business, and continue to be so held until the time of their sale, any loss incurred as a result thereof may be fully deducted from gross income as a[n] . . . ordinary loss. If, on the other hand, an investment purpose [is] found to have motivated the purchase or holding of the securities, any loss realized upon their ultimate disposition must be treated in accord with the capital asset provisions of the Code.

303 F.2d at 921. This language is consistent with the approach employed in *Corn Products*, which focused on the presence of business motives to negate any investment motive. *See Corn Products*, 350 U.S. at 50.

28. For several recent cases applying the business motive/investment motive test, *see, e.g.*, *Campbell Taggart, Inc. v. United States*, 744 F.2d 442, 459 (5th Cir. 1984) (taxpayer motivated solely by business motive); *Irwin v. United States*, 558 F.2d 249, 252 (5th Cir. 1977) (taxpayer motivated solely by business motive); *Luszko v. Commissioner*, 42 T.C.M. (CCH) 1048, 1050 (1981) (taxpayer motivated by dominant investment motive); *Datamation Servs., Inc. v. Commissioner*, 35 T.C.M. (CCH) 1092 (1976) (taxpayer motivated by predominant investment motive).

29. 37 T.C. 791 (1962).

30. *Id.* at 796.

31. *See Note, Taxpayer Motivation and the Corn Products Doctrine*, 29 Tax Law. 660, 665 (1976).

32. Rev. Rul. 75-13, 1975-1 C.B. 67 (revoked by Rev. Rul. 78-94, 1978-1 C.B. 58).

33. *See, e.g.*, *Hollywood Baseball Ass'n v. Commissioner*, 423 F.2d 494 (9th Cir. 1970) (contracts); *Commissioner v. Bagley & Sewell Co.*, 221 F.2d 944 (2d Cir. 1955), *aff'g* 20 T.C. 983 (1953) (government bonds); *Arkansas Best Corp. v. Commissioner*, 83 T.C. 640 (1984) (shares of stock).

34. Courts have applied the *Corn Products* doctrine to corporate taxpayers whose only activities consisted of acquiring and managing their securities. *See, e.g.*, *Campbell Taggart, Inc. v. United States*, 744 F.2d 442 (5th Cir. 1984); *Allied Chem. Corp. v. United States*, 305 F.2d 433 (Ct. Cl. 1962); *Arkansas Best Corp. v. Commissioner*, 83 T.C. 640 (1984). However, in the case of a noncorporate taxpayer, the Supreme Court held that managing securities was not a business. *Higgins v. Commissioner*, 312 U.S. 212, 218 (1941).

35. 405 U.S. 93 (1972).

36. In *Genes*, the Court considered whether an uncollectable loan constituted a "business" or a "nonbusiness" bad debt. The taxpayer owned 44% of the stock of a close corporation, having

would afford “workability” and “certainty.”³⁷

B. *The Substantial Investment Motive Test*

Unlike the business motive/investment motive test, the substantial investment motive test recognizes that a transaction may involve dual motives. Under this test, the existence of a substantial investment motive precludes application of the *Corn Products* doctrine.

Beginning with *W.W. Windle Co. v. Commissioner*,³⁸ the Tax Court exhibited a preference for this new method of motivation analysis. In *Windle*, the taxpayer, a wool processor, purchased a controlling block of stock in a woolen mill to ensure itself a “captive customer.”³⁹ Studies had predicted that the new company, Nor-West, would be profitable and that Windle would profit from sales it made to Nor-West.⁴⁰ Nor-West, however, suffered severe financial losses and liquidated.⁴¹ Windle claimed an ordinary loss deduction for its Nor-West stock on the ground that it purchased and held the stock solely for business purposes.⁴²

The Tax Court found that although Windle had a *principal* business motive, the acquisition of a captive customer, it also had a substantial investment motive, the expectation of profit.⁴³ The court held that the existence of a substantial investment motive precluded the application of

originally invested about \$40,000 in the company. 405 U.S. at 93. The taxpayer also was the president, receiving an annual salary of \$12,000. To help the company's poor financial situation, Generes lent it over \$300,000. *Id.* at 98-99. When the company went bankrupt, Generes claimed the loans were nonbusiness bad debts and deducted them against ordinary income. *Id.* at 99.

The Court employed the business motive/investment motive test because of the ease of its application. The Court stated:

The dominant motivation standard has the attribute of workability. It provides a guideline of certainty for the trier of fact. . . . By making the dominant motivation the measure, the logical tax consequence ensues and prevents the mere presence of a business motive, however small and however insignificant, from controlling the tax result at the taxpayer's convenience.

Id. at 104.

37. *Id.*

38. 65 T.C. 694 (1976), *appeal dismissed*, 550 F.2d 43 (1st Cir.), *cert. denied*, 431 U.S. 966 (1977).

The first court to adopt the substantial investment motive test was the Court of Claims in *Dearborn Co. v. United States*, 444 F.2d 1145 (Ct. Cl. 1971).

39. 65 T.C. at 704-05.

40. *Id.* at 705.

41. *Id.* at 702.

42. *Id.* at 703.

43. *Id.* at 706.

the *Corn Products* doctrine, requiring capital asset treatment.⁴⁴

The *Windle* court noted several reasons for its adoption of the substantial investment motive test. First, the court feared that an expansive definition of capital assets would increase subjective analysis and unpredictability.⁴⁵ Second, the substantial investment motive test would decrease taxpayer opportunity to whipsaw the government.⁴⁶ Finally, the court stated that a more restrictive analysis of the *Corn Products* doctrine would better effectuate Congress' classification of ordinary and capital assets.⁴⁷

Courts have examined three primary factors to determine whether a substantial investment motive exists.⁴⁸ First, courts have considered the length of time that a purchaser intends to hold an asset and the time that he actually does hold it. A person who purchases an asset for a short-term business need and holds it after that need has expired is presumed to act with an investment motive.⁴⁹ Second, a taxpayer's payment of a premium above an asset's fair market value may indicate the absence of an investment motive.⁵⁰ Finally, the acquisition of an asset with the expectation of profits may indicate an investment motive.⁵¹

44. *Id.* at 712.

45. *Id.* at 713. The court expressed concern that if the exceptions to capital assets were expanded, taxpayers and courts would be uncertain of the proper treatment to accord specific assets.

46. *Id.* The court believed that if it lessened the degree of investment motive required to preclude *Corn Products* treatment, the resulting decrease in taxpayer flexibility would decrease taxpayer opportunity to whipsaw the government.

The term "whipsaw" describes a situation in which a taxpayer categorizes a gain or loss as either capital or ordinary solely to provide the most favorable tax consequence.

47. According to the court, "in the last analysis, Congress has decided what is a capital asset, and there must be limits to the liberties we can take with the statutory language of section 1221." *Id.*

48. See, e.g., *Dearborn Co. v. United States*, 444 F.2d 1145 (Ct. Cl. 1971); *W.W. Windle Co. v. Commissioner*, 65 T.C. 694 (1976), *appeal dismissed*, 550 F.2d 43 (1st Cir.), *cert. denied*, 431 U.S. 966 (1977).

49. See, e.g., *Dearborn Co. v. United States*, 444 F.2d 1145, 1166 (Ct. Cl. 1971) (investment motive found when stock purchased for permanent business need was sold before need expired); *Crow v. Commissioner*, 79 T.C. 541, 563 (1982); *W.W. Windle Co. v. Commissioner*, 65 T.C. 694, 712 (1976) (investment motive found when stock purchased for permanent business need is disposed of before the business need expired), *appeal dismissed*, 550 F.2d 43 (1st Cir.), *cert. denied*, 431 U.S. 966 (1977).

50. See, e.g., *Dearborn Co. v. United States*, 444 F.2d 1145, 1167 (Ct. Cl. 1971) (nonpayment of premium implied investment intent); *FS Servs., Inc. v. United States*, 413 F.2d 548, 554 (Ct. Cl. 1969) (payment of a premium implied business intent); *Booth Newspapers, Inc. v. United States*, 303 F.2d 916, 917 (Ct. Cl. 1969) (payment of a premium implied business motive); *W.W. Windle Co. v. Commissioner*, 65 T.C. 694, 712 (1976) (nonpayment of a premium implies investment motive), *appeal dismissed*, 550 F.2d 43 (1st Cir.), *cert. denied*, 431 U.S. 966 (1977).

51. See, e.g., *Dearborn Co. v. United States*, 444 F.2d 1145, 1166-67 (Ct. Cl. 1971) (expectation

C. *Post Windle Treatment of the Corn Products Doctrine—A Narrowing in Scope*

Although federal district and appellate courts have generally relied on the business motive/investment motive test,⁵² the Tax Court has consistently applied the substantial investment motive test when faced with a *Corn Products* issue.⁵³ In addition, the Tax Court has narrowed the scope of the doctrine. For example, in *Pollack v. Commissioner*,⁵⁴ decided one year after *Windle*, the Tax Court limited application of the doctrine with respect to partnership interests. In *Pollack*, the taxpayer, a management consultant, bought an interest in a limited partnership venture that acquired and rehabilitated failing businesses.⁵⁵ Once acquired, these failing businesses engaged the services of the limited partners.⁵⁶ Although *Pollack* expected to profit from this work referral system,⁵⁷ the venture failed and *Pollack* sold his interest at a loss.⁵⁸

Relying on the *Corn Products* rationale, *Pollack* sought an ordinary loss deduction, claiming that business interests alone motivated the transaction.⁵⁹ The Tax Court denied *Corn Products* treatment and stated that the doctrine applied only to transactions arising under Code sections that refer to the capital asset definition in section 1221.⁶⁰ Because the Code section governing the transfer of partnership interests did not refer to section 1221, the court reasoned that *Corn Products* treatment was unavailable.⁶¹

of profits implied investment motive); *Arkansas Best Corp. v. Commissioner*, 83 T.C. 640, 654 (1984) (expectation of asset appreciation implied investment motive); *Bell Fibre Prods. Corp. v. Commissioner*, 36 T.C.M. (CCH) 182 (1977) (expectation of profits implied investment motive); *W.W. Windle Co. v. Commissioner*, 65 T.C. 694, 705 (1976) (expectations of profits “make it impossible for us to find that there was no substantial investment motive”), *appeal dismissed*, 550 F.2d 43 (1st Cir.), *cert. denied*, 431 U.S. 966 (1977).

52. *See, e.g.*, *Campbell Taggart, Inc. v. United States*, 744 F.2d 442, 457 (5th Cir. 1984) (taxpayer with predominant business motive allowed an ordinary loss deduction on sale of stock).

53. *See, e.g.*, *Arkansas Best Corp. v. Commissioner*, 83 T.C. 640 (1984); *Mariani Frozen Food, Inc. v. Commissioner*, 81 T.C. 448 (1983).

54. 69 T.C. 142 (1977).

55. *Id.* at 143-44.

56. *Id.* at 143.

57. *Id.*

58. *Id.* at 144.

59. *Id.* at 145.

60. *Id.* at 147 n.7.

61. *Id.* at 147. Section 741 of the Code provides that when a taxpayer transfers a partnership interest, any gain or loss from such transfer shall be treated as “gain or loss from the sale or exchange of a capital asset.” I.R.C. § 741 (1982). Although the *Pollack* court correctly noted that § 741 did not refer to § 1221, the court ignored the fact that the term “capital asset” appeared in

The Tax Court has also narrowed the scope of the *Corn Products* doctrine by placing a strict burden of proof on the taxpayer. To prevail in the Tax Court, the taxpayer must not only prove the presence of a business motive, but also disprove the existence of a substantial investment motive.⁶²

Two aspects of this burden of proof have removed *Corn Products* treatment from the reach of most taxpayers. First, the Tax Court has set a low threshold for finding a substantial investment motive. Thus, the existence of profit forecasts and projections, for example, may be sufficient to indicate a substantial investment motive.⁶³ Second, the Tax Court has strictly applied its motive analysis to cases involving changed motives. Prior to *Windle*,⁶⁴ the taxpayer's motive at the time of the sale of the asset controlled for tax purposes.⁶⁵ After *Windle*, however, if a taxpayer's motive changed after purchase of the asset, he could no longer disprove a substantial investment motive.⁶⁶ Because he held the asset with an investment purpose for a period of time, he presumably possessed a substantial investment motive.

III. UNSUCCESSFUL EFFORTS AT REFORM

Congress intended to deny capital gains treatment to property used as a normal source of business income.⁶⁷ The *Corn Products* doctrine furthers this policy by providing ordinary income treatment to profits and

§ 741 and that this term must have been defined *somewhere* in the Code. The logical source was § 1221. Thus, the court's rationale for denying *Corn Products* treatment did not justify the result.

For a general discussion of the *Pollack* decision and the *Corn Products* doctrine, see Note, *The Corn Products Doctrine and Its Application to Partnership Interests*, 79 COLUM. L. REV. 341 (1979); Note, *Section 741 and Corn Products: A Logical Extension?*, 31 U. FLA. L. REV. 90 (1978).

62. See, e.g., *Wright v. Commissioner*, 47 T.C.M. (CCH) 422, 427 (1983) ("petitioners have the burden of proving the absence of a substantial investment motive in petitioner's purchase and retention of the stock"); *Hollingsworth v. Commissioner*, 71 T.C. 580, 585 (1979) ("petitioners have the burden of proof to negate a substantial investment motive [in] purchasing and holding the note").

63. See *supra* note 51.

64. See *supra* notes 38-47 and accompanying text.

65. See, e.g., *Chemplast, Inc. v. Commissioner*, 60 T.C. 623, 632 n.9 (1973); *Missisquoi Corp. v. Commissioner*, 37 T.C. 791, 797-98 (1962); *GulfTex Drug Co. v. Commissioner*, 29 T.C. 118, 121 (1957).

66. See, e.g., *Arkansas Best Corp. v. Commissioner*, 83 T.C. 640, 653 (1984) ("When a taxpayer's motive changes between the time of purchase and the time of disposition . . . the character of the gain or loss at disposition of the stock will be capital."); *Hollingsworth v. Commissioner*, 71 T.C. 580, 587 n.3 (1979) ("a subsequent abandonment of petitioner's substantial investment motive in purchasing the note will not alter [the finding of capital loss treatment]").

67. See *supra* note 22 and text accompanying note 23.

losses arising from everyday business activities.⁶⁸ The Tax Court's narrow construction of the *Corn Products* doctrine, however, ignores congressional intent.

The Tax Court's reliance on motive analysis raises additional concerns. Any motive test is difficult to apply. Inherent in such tests are ambiguities that often point to several possible motives.⁶⁹ Ambiguities lead to taxpayer uncertainty and increase the potential for taxpayer manipulation. Because of lack of predictability, motive tests encourage the use of "formalisms and artificial distinctions."⁷⁰ Consequently, courts may reach incorrect conclusions.

The problems discussed above suggest the need for reform. Effective reform would require a method of analysis that would avoid the inherent difficulties of motive analysis, minimize the potential for taxpayer manipulation, and accommodate Congress' intent to limit preferential tax treatment. Several suggested reforms have included provisions that would provide the taxpayer with a free election to choose the tax status of all *Corn Products* assets, either capital or noncapital. The taxpayer would then be held to that choice when taxes were due.⁷¹

Congress considered a version of free election but ultimately rejected it.⁷² Under the bill, if the taxpayer elected noncapital treatment on property and realized a gain, the tax treatment would automatically be ordinary. If the taxpayer realized a loss, however, the government could deny the taxpayer ordinary treatment.⁷³ Thus, the major defect in the bill was that it clearly favored the government.

A commentator has suggested a freer election system that would improve upon the failed House bill. This proposal would allow the taxpayer to elect the tax treatment of certain assets upon their acquisition.⁷⁴ If the taxpayer, within thirty days after acquisition, filed notice with the Secretary of the Treasury that the asset was not an investment, then gain or loss upon disposition would receive ordinary treatment. If the taxpayer did not file notice, however, gain or loss from disposition would receive capital treatment.

68. See *Corn Products*, 350 U.S. at 52.

69. See Note, *The Unpleasant Taste of Corn Products*, 53 S. CAL. L. REV. 311, 332-34 (1979).

70. *Woodward v. Commissioner*, 397 U.S. 572, 577 (1970).

71. See Note, *supra* note 69, at 344-54.

72. H.R. 10902, 94th Cong., 2d Sess., reprinted in H.R. REP. NO. 94-1360, 94th Cong., 2d Sess. 6-7 (1976).

73. See Note, *supra* note 69, at 353.

74. See *id.* at 346-47.

The major advantage of this proposal is that it would limit the taxpayer's ability to whipsaw the government upon disposal of an asset.⁷⁵ This proposal, however, would also present several disadvantages. First, although the proposal would prevent taxpayer manipulation at the end of an asset's holding period, the taxpayer could still engage in manipulation at the time of the election. Regardless of investment or business motives, a taxpayer could determine an asset's ultimate tax treatment based upon a preliminary assessment of whether a gain or loss would result upon disposition. Second, free election would frustrate congressional intent to give ordinary asset treatment to an asset acquired solely for everyday business activities. The taxpayer, by failing to file with the Secretary, would receive capital asset treatment when Congress clearly intended otherwise. In the case of a gain, the taxpayer would receive an undeserved windfall.

IV. A NEW PROPOSAL—THE BUSINESS RISK TEST

This Note proposes that courts should allow *Corn Products* treatment if the taxpayer establishes a reasonable likelihood that an acquired asset would reduce a substantial business risk. The taxpayer would bear the burden of making this showing.⁷⁶ First, the taxpayer would be required to establish the existence of a substantial business risk. Second, the taxpayer would be required to prove that the acquired asset would be reasonably likely to reduce that risk. In the case of a gain, the taxpayer could refute the government's attempt to apply the *Corn Products* doctrine by proving the absence of a reasonable likelihood that the asset would reduce a substantial business risk.⁷⁷

The requirement that the taxpayer establish a *substantial* business risk⁷⁸ would ensure that courts would not grant ordinary income treat-

75. Because the taxpayer would be required to choose the tax treatment at the time of acquisition, he could not wait to determine whether a gain or loss would be realized and then elect the more favorable treatment.

76. The taxpayer would be required to make this showing only if the asset did not fall within one of the enumerated capital asset exceptions listed in § 1221.

77. The taxpayer could refute a government claim of *Corn Products* treatment by showing that the business risk test was not met. He could do this by establishing: (1) the lack of a business; (2) the lack of a substantial business risk; or (3) that the asset would not be reasonably likely to reduce the substantial business risk.

78. To minimize taxpayer manipulation, the factfinder's determination of the existence of a substantial business risk should be objective.

ment for an asset purchased to reduce some nominal business risk.⁷⁹ For example, courts should deny *Corn Products* treatment to losses resulting from the taxpayer's sale of stock in a business that supplies an insignificant quantity of material to the taxpayer if a dependable and abundant supply were available from other sources.⁸⁰ The significance of the risk must be such that a reasonable taxpayer would attempt to reduce it.

The second element of the business risk test would require the taxpayer to establish a reasonable likelihood that the acquired asset would reduce the defined business risk.⁸¹ The factfinder would employ an objective analysis to determine whether the taxpayer met his burden. The factfinder would determine the reasonableness of a transaction at the time the taxpayer entered into it. Thus, the fact that an asset ultimately failed to reduce the business risk would not preclude *Corn Products* treatment of the transaction.⁸²

To determine whether a transaction would be reasonably likely to reduce a substantial business risk, the factfinder should analyze the following two factors. First, the factfinder should examine the relationship between the asset and the risk. The strength of this relationship could be determined by examining the nature of the asset and its suitability for reducing a risk in the taxpayer's business. This nexus should be sufficiently strong.⁸³ Second, the factfinder should compare the degree of the business risk to the value of the acquired assets. The amount of the assets purchased should be reasonably related to the substantiality of the business risk. This examination would differ from the examination of the relationship between the risk and the asset because this analysis would compare the quantum of the assets purchased with the quantum of the business risk.⁸⁴

79. A requirement of substantiality would prevent a taxpayer from manipulating tax treatment because of an insignificant business risk.

80. Conversely, ordinary loss treatment would be appropriate for a taxpayer who suffered a loss upon the sale of stock in a company that supplied all or most of a certain product to the taxpayer.

81. This requirement insures that the purchase of the asset would be causally connected to the business risk.

82. A taxpayer should not be deprived of *Corn Products* treatment just because his assessment of the risk-reducing capability of an asset proved to be incorrect.

83. For example, if the taxpayer were a clothing manufacturer who purchased and sold stock in a furniture company, the nexus between the purchased asset and any taxpayer business risk would be too weak to allow *Corn Products* treatment. However, if a clothing manufacturer purchased and sold stock in a clothing retailer or a cotton mill, the nexus between the asset and the risk would probably warrant *Corn Products* treatment.

84. For example, if a taxpayer who grew and marketed fruits and vegetables bought only three

The business risk test would avoid the difficulties inherent in motive tests.⁸⁵ The factfinder's determination would be based on objective evidence without regard to subjective motives. The business risk test also would minimize taxpayer manipulation without unduly restricting the *Corn Products* doctrine's availability.⁸⁶ Because taxpayers would be unable to easily manipulate factual circumstances, taxpayers would be less likely to whipsaw the government. Finally, the business risk test would further congressional intent by denying preferential tax treatment to property used as a normal source of business income.⁸⁷ Because the business risk test would focus on the asset's relationship to the business, *Corn Products* treatment would be available only to those assets that fell within the scope of the capital assets exception that Congress intended to create.

V. CONCLUSION

By adopting the business risk test, courts could restore the *Corn Products* doctrine to its intended status. Congress recognized the need for some reform but unfortunately failed to provide a solution. The business risk test would further congressional intent, avoid the problems inherent in current motive analysis, and frustrate potential taxpayer manipulation.

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percent of the stock in a retail food outlet, courts could preclude *Corn Products* treatment. Arguably, there would be no reasonable likelihood that the relatively small purchase of stock would reduce the substantial business risk of marketing the taxpayer's produce. On the other hand, courts could apply *Corn Products* treatment to the purchase of a controlling interest in such a retail food outlet because there would be a reasonable likelihood that a controlling interest would reduce the business risk.

85. See *supra* notes 69-70 and accompanying text.

86. See *supra* note 70 and accompanying text.

87. See *supra* notes 67-68 and accompanying text.