A Reivew of the National Carbide Line of Cases After Commissioner v. Bollinger: Time to Look in Other Directions

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REVIEW OF THE *NATIONAL CARBIDE* LINE OF CASES AFTER *COMMISSIONER V.BOLLINGER*: TIME TO LOOK IN OTHER DIRECTIONS

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I. INTRODUCTION

A fundamental federal income taxation query asks, who is the taxpayer? The issue has arisen in the sale-leaseback context, with courts attempting to identify the substantive owner of property and thus the party entitled to depreciation deductions.[1] The question has

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1. *See, e.g.*, Frank Lyon Co. v. United States, 435 U.S. 561 (1978) (finding the taxpayer to be the owner and not just the financier of depreciable property leased back to the prior owner by applying substance-over-form analysis); Rice's Toyota World, Inc. v. Commissioner, 752 F.2d 89 (4th Cir. 1985) (disallowing depreciation deductions for computer equipment, pur-

arisen when corporate tax rates were lower than personal rates, prompting individual service providers to form corporations to perform services the taxpayers formerly conducted in their individual capacities.[2] Finally, the issue has arisen in the context of corporate agents, sometimes called "dummy corporations."[3]

The tax effect of using a "controlled corporate agent" is the subject of this paper. Statutes and case law have failed to define precisely "controlled corporate agent." The term, however, generally refers to a corporation formed merely to act as the agent of its shareholders or another entity in which the shareholders possess an ownership interest.[4] A number of bona fide business reasons necessitate the use of a corporate agent.[5] For example, lenders seeking to avoid state usury law limitations on loans to noncorporate borrowers may require that such debtors form a corporation. Typically, in these cases, individuals engaged in real estate development and management operate through a partnership for flexibility and for the tax benefit resulting from the flow-through of initial losses.[6] In response to the lender's

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chased by the taxpayer at an inflated purchase price, paid primarily with nonrecourse debt, and subsequently leased back to the prior owner, because the transaction had no economic substance). *See also* Cliff & Levine, *Reflections on Ownership — Sales and Pledges of Installment Obligations*, 39 TAX LAW. 37 (1985) (examining factors used to determine ownership); Note, *Tax Aspects of the Nominee Corporation:* Roccaforte v. Commissioner, 22 TULSA L.J. 61 (1986) (examining disagreement among circuit courts as to the appropriate theory to use in determining whether corporation is a nominee).

2. *See, e.g.*, Keller v. Commissioner, 77 T.C. 1014, 1030 (1981), *aff'd*, 723 F.2d 58 (1983). As the result of the Tax Reform Act of 1986, enacted on October 22, 1986, the maximum corporate marginal tax rate increased to 34%, generally effective after December 31, 1987. I.R.C. § 11(b) (1986). At the same time, the maximum marginal rate, for example, for single individuals decreased to 28%. I.R.C. § 1(c) (1986). Although these marginal rates might be increased by 5% under certain circumstances, the flip-flop in maximum corporate versus maximum individual rates, in principle, is unaffected. *See* I.R.C. §§ 1(g), 11(b) (1986).

3. *See, e.g.*, Raphan v. United States, 759 F.2d 879 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 843 (1985) (upholding for federal income tax purposes, taxpayers' disregard of the corporation they formed solely to hold nominal legal title to property). *See generally* Falk, *Nominees, Dummies and Agents: Is it Time for the Supreme Court to Take Another Look?*, 63 TAXES 725 (1985) (reviewing distinction between nominees, dummies and agents and implications of each); Miller, *The Nominee Conundrum: The Live Dummy is Dead, but the Dead Dummy Should Live*, 34 TAX L. REV. 213 (1979) (examining evolution of tax cases involving dummy corporations); Riess, *Supreme Court Provides Safe Harbor for Use of Straw Corporations*, 16 J. REAL EST. TAX'N 99 (1989) (noting that a corporate agent is no more than a formalism); *see infra* notes 4-14 and accompanying text.

4. Raphan v. United States, 3 Cl. Ct. 457, 462 (1983).

5. *See* Riess, *supra* note 3, at 99-100; Note, *Recent Developments in the Federal Tax Law Treatment of Nominee Corporations*, 13 FLA. ST. U.L. REV. 361 (1985).

6. *See* Rands, *Organizations Classified as Corporations for Federal Tax Purposes*, 59 ST. JOHN'S L. REV. 657, 694-95 (1985).

requirement of a corporate borrower, the individuals form a "C" corporation to hold title to acquired real estate, sign loan documents, and execute other documents in connection with real estate transactions.[7] Generally, parties to these transactions are aware that the corporation is holding title to the real estate and executing documents in only a nominal capacity.[8]

In other instances, a taxpayer may wish to engage in a transaction as an undisclosed principal to avoid attracting undue attention which could interfere, for example, with negotiations in purchasing property. Conversely, in the sale of property, individuals may desire a corporate nominee to ease title conveyance problems or management when various persons have ownership interests.[9] "S" corporations may not be an option because of the various prerequisites to qualifying for "S" status and possible limitations on the current utilization of losses.[10]

When the principal is unrelated to the corporate agent, the corresponding tax effect is akin to that of a flow-through entity.[11] That is,

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7. For an explanation of the term "'C' corporation," see *infra* note 10.

8. *See, e.g.*, George v. Commissioner, 844 F.2d 225, 229 (5th Cir. 1988) (partners in the principal/partnership were aware that title to real estate beneficially owned by the partnership was held in nominee capacity by a corporate agent and the various creditors of the partnership were also aware of the nominee or agency arrangement); Roccaforte v. Commissioner, 708 F.2d 986, 987 (5th Cir. 1983) (mortgagees advised by letter that corporation held title to mortgaged real estate solely in nominee capacity).

9. *See* Riess, *supra* note 3, at 99-100.

10. "S" corporations are specially defined in I.R.C. § 1361 (1986) and governed by subchapter S and, to the extent consistent with subchapter S, subchapter C of Chapter 1 of subtitle A of the Internal Revenue Code of 1986. I.R.C. § 1371(a) (1986). All other corporations, commonly called "C" corporations, are governed by subchapter C, and thus are separately taxable on income earned pursuant to 26 U.S.C. § 11(a) (1986). Although the term "corporation" is not defined within the Internal Revenue Code, examples of entities possibly falling within the classification of corporation are given in I.R.C. § 7701(a)(3) (1986). *See also* Larson v. Commissioner, 66 T.C. 159 (1976) (discussing characteristics that define corporations and holding that an organization will be taxed as a corporation if it possesses more characteristics of a corporation than not).

The advantage of qualifying as an "S" corporation is that, generally, the corporation's items of income and loss are passed through to the shareholders without recognition at the corporate level. I.R.C. §§ 1363(a), 1366 (1986). The disadvantages include the inability to have more than thirty-five shareholders, more than one class of stock, and nonindividuals as shareholders. I.R.C. § 1361 (1986). More significantly, the current pass through of losses is limited, again, generally speaking, to the equity or debt provided by the shareholder, as adjusted for prior items of income or loss. *See* I.R.C. §§ 1366(d), 1367 (1986). *See generally* Note, *The Use of Corporations in Real Estate Transactions: Judicial Acceptance of the Agency Theory*, 8 J. CORP. L. 361, 385 (1983) (discussing the advantages and disadvantages of subchapter S corporations in real estate endeavors).

11. *See* Commissioner v. Bollinger, 485 U.S. 340 (1988); Rands, *supra* note 6, at 694-95.

the Internal Revenue Service (the "Service") taxes the principal on income produced or losses incurred in connection with the agent's activities on behalf of the principal, without recognition to the agent. When the principal holds a controlling interest in the corporate agent, however, the principal-agent structure is exposed to challenge under the *National Carbide Corp. v. Commissioner*[12] line of cases regardless of the legitimacy of the business purpose.[13] Under this line of cases, the alleged agency relationship is subject to special scrutiny. The *National Carbide* line of cases address the concern that a principal with a controlling interest might choose to regard or disregard the agency relationship depending solely upon the tax consequences.[14]

National Carbide, the 1949 watershed case decided by the Supreme Court, involved taxpayer claims that income earned by subsidiary corporations was taxable solely to the parent corporation pursuant to an agency relationship.[15] The Court articulated a new six-factors test in determining whether the taxpayer's use of a controlled corporate agent reflected a "true agency relationship." Applying this test, the Court refused to find such a relationship and reallocated the parent corporation's disputed income to the subsidiaries.[16]

After *National Carbide*, taxpayers struggled to force a fit between their business needs for a corporate agent and the *National Carbide* six-factors test.[17] In addition, the lower courts' application of the test

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12. 336 U.S. 422 (1949).

13. *See* Moline Properties, Inc. v. Commissioner, 319 U.S. 436, 438-39 (1943); *see also* Ourisman v. Commissioner, 760 F.2d 541, 548-49 (4th Cir. 1985) (stating that while the court was sympathetic to the taxpayer's need for a corporate agent, it was compelled, nonetheless, to determine whether the alleged agency relationship could exist independently of the corporation shareholder relationship). *Ourisman* was decided before the Supreme Court decision in the case of Commissioner v. Bollinger, 108 S. Ct. 1173 (1988), wherein the Court suggested that the corporation-shareholder relationship should not preclude, per se, an agency relationship between corporate agent and its owner-principal. *Id.* at 1177. Whether the Court intended to abandon the requirement that the agency relationship exist independently of the control exercised over the corporate agent by the owner principal, however, is not clear. *See infra* notes 133-37.

14. *See Bollinger*, 108 S. Ct. at 1178-79 (1988); *Ourisman*, 760 F.2d at 549 (4th Cir. 1985).

15. *National Carbide*, 336 U.S. at 426.

16. *Id.* at 434-39. See *infra* note 55 and accompanying text for *National Carbide*'s six-factors test.

17. *See, e.g.*, Raphan v. United States, 759 F.2d 879 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 843 (1985). In an attempt to satisfy the *National Carbide* requirements, some of which include transmission of receipts by the corporate agent to the principal and the authority to bind the principal to obligations with third parties, taxpayers often executed agency agreements containing provisions tailored specifically to the *National Carbide* criteria. For an example of a typical agency agreement, see Raphan v. United States, 3 Cl. Ct. 457, n.2 (1983), *aff'd in part, rev'd in part*, 759 F.2d 879 (Fed. Cir. 1985).

varied widely. Some courts elevated one factor over another,[18] while others applied the test rigidly by requiring the presence of circumstances satisfying all six listed criteria.[19]

In response to these disparate holdings, in March of 1988, the United States Supreme Court decided the case of *Bollinger v. Commissioner*,[20] addressing once again whether a taxpayer can treat a corporation in which it has a controlling interest as an agent with corresponding tax effect.[21] The facts in *Bollinger* involved the typical scenario whereby a partnership engaged in real estate development forms a corporation solely to arrange financing for the partnership activities.[22] While not addressing completely the proper application of the *National Carbide* factors, the Court did refuse "to parse the text of *National Carbide* as though that were itself the governing statute."[23] Instead, the Court relied upon the presence of three circumstances to find a "true agency."[24]

Nonetheless, the question remains after *Bollinger* whether the Court intended to replace the *National Carbide* test and, if so, whether the tax effect for taxpayers compelled by business necessity to use a corporate agent is any more certain.[25]

For taxpayers forced to use a corporate agent business structure, the tax cost of a successful challenge to the validity of an alleged agency relationship could be disastrous. The reallocation of losses from the alleged principal, often a pass-through entity, to the alleged agent,

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18. *See infra* notes 98-114 and accompanying text; *see also* Seto & Glimcher, *When Will a Related Corporate Nominee Be a Partnership's Agent?*, 68 J. TAX'N 380, 381 (1988) (analyzing three-part *Bollinger* test for controlled corporate agents); Note, *Recent Developments in the Federal Tax Law Treatment of Nominee Corporations*, 13 FLA. ST. U.L. REV. 361, 380-83 (1985) (reviewing appellate and tax court decisions on tax treatment of nominee corporations) [hereinafter *Recent Developments*].

19. *See, e.g.*, Moncrief v. United States, 730 F.2d 276 (5th Cir. 1984).

20. 108 S. Ct. 1173 (1988).

21. *Id.* at 1175-76.

22. *Id.*

23. *Id.* at 1179.

24. *See infra* text accompanying note 149.

25. *See generally* Seto & Glimcher, *supra* note 18, at 385 (suggesting that the "lesson to be learned from *Bollinger* is that the line between an agent and a controlled corporation is best defined on a case-by-case basis, in the frustrating but time honored common law tradition."). *But see* Liebmann, *Disregarding the Corporate Nominee:* Commissioner v. Bollinger, 42 TAX LAW. 371, 378 (1989) (concluding *National Carbide* factors no longer determinative); Riess, *supra* note 3, at 99 (finding the *Bollinger* decision to provide "clear guidance" in the controlled corporate agent context).

often a "C" corporation,[26] could result in the permanent loss of deductions, assessment of deficiencies, and possibly penalties.[27]

Given the importance of the business structure to attending tax consequences, a rule of law with the potential for such consequences should have clearer parameters.[28] This paper, then, has a threefold purpose: first, to examine the *National Carbide* decision and the tax law environment in which it was decided; second, to illustrate the ad hoc results of applying the *National Carbide* factors even as modified by *Bollinger*; and third, to suggest an approach which focuses on section 482 of the Internal Revenue Code of 1986 as amended (the "Code"),[29] supplemented by judicial doctrines as necessary.

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26. For an explanation of the term "C" corporation, see *supra* note 10.

27. *See, e.g.*, O'Neal v. Commissioner, 56 T.C.M. (CCH) 1347 (1989); *see also infra* notes 149-57 and accompanying text.

"S" corporations aside, corporate losses are deductible by the corporation only; generally, the shareholders receive no current tax benefit from a corporation's operating losses. B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 1.07 (abr. 5th ed. 1987). *See also* Rands, *supra* note 6 (noting that expenses and losses incurred by the alleged corporate agent in connection with activities on behalf of, for example, a partnership-principal, often are desired by the partners as current deductions against other income). However, effective, generally, for tax years beginning after December 31, 1986, is I.R.C. § 469 (1986). Generally speaking, section 469 prevents certain taxpayers, including individuals, from deducting a net loss from activities in which they do not "materially participate," with material participation defined generally in Internal Revenue Code § 469(h) as involvement in the operations of an "activity" on a "regular, continuous, and substantial" basis. Specific requirements which must be met before a taxpayer is treated as materially participating in an activity are set forth in Temp. Treas. Reg. § 1.469-5T. The general effect of § 469 is to prevent a taxpayer from currently using a net loss from activities in which he is not a material participant (passive activities) as a deduction against earned income, such as wages, or other kinds of nonpassive income. *See* I.R.C. §§ 469(a)-(e) (1986). Section 469 may act as an impediment to corporate agent structures motivated solely by a desire for the tax benefit of a pass-through of losses attributed from the corporate agent to the principal partnership.

Various assessments, including interest, additions to tax, and penalties will be imposed upon a taxpayer who fails to pay timely the amount of tax due, even if the correct amount is determined beyond the due date as the result of protracted litigation with the Commissioner. *See* I.R.C. §§ 6601-6711 (1986). Depending upon the taxpayer's intent, willfulness, and knowledge of the underpayment of tax, the taxpayer may be subject to criminal penalties. *See* I.R.C. §§ 7201-7216 (1986).

28. *Cf.* Larson v. Commissioner, 66 T.C. 159 (1976) (suggesting the desirability of giving courts more leeway in balancing factors if entity will be taxed as a corporation).

29. Section 482 states, in pertinent part, as follows:

> In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he

II. THE BIRTH OF THE *NATIONAL CARBIDE* LINE OF CASES

The *National Carbide* decision has produced uncertainty for taxpayers and stirred controversy among commentators since the Supreme Court decided it some forty years ago.[30] Because the *Bollinger* Court failed to overrule *National Carbide* and its progeny, these cases still stand as the law governing recognition of a business structure using a controlled corporate agent.[31] Therefore, an analysis of the *National Carbide* line of cases must begin with a close examination of the decision that spawned the controversy.

A. *The Question of Valid Agency Status Distinguished From That of Separate Taxable Status*

The Supreme Court based the *National Carbide* decision in part on its prior decision in *Moline Properties, Inc. v. Commissioner.*[32] *Moline Properties* stands for the proposition that a corporation is a separate taxable entity whenever it engages in business activity.[33] In *Moline Properties*, an individual formed a corporation, at the insistence of a creditor, to hold mortgaged property. By forming a corporation, the individual could pledge the stock as security for an additional loan to the incorporator.[34] Thereafter, the corporation engaged in some land use litigation, leasing activities, and property sales.[35] The sole shareholder sought to report the income from these activities on his personal income tax return by disregarding the corporation. The taxpayer claimed the corporation was merely his agent because of his status as sole shareholder, without relying upon any traditional indicia of an agency relationship.[36] While not foreclosing the possibility that

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> determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

I.R.C. § 482 (1986).

30. *See* Falk, *supra* note 3, at 725 (noting a "confusing tax history concerning the integrity of the corporation" and its ability to act as its shareholder's agent); Rands, *supra* note 6, at 696 (noting that courts have taken an "ill-fitting approach," which confuses the question of whether a corporation is a viable taxable entity with whether it is a valid agent); Riess, *supra* note 3, at 101 (noting a "history of uncertainty").

31. *See* Greenberg v. Commissioner, 56 T.C.M. (CCH) 1030 (1989) (noting that the Supreme Court in *Bollinger* reaffirmed the applicability of the *National Carbide* criteria, but in a less rigid manner); Seto & Glimcher, *supra* note 16, at 384.

32. 319 U.S. 436 (1943).

33. *Id.* at 438-39.

34. *Id.* at 437.

35. *Id.* at 437-38.

36. *Id.* at 440.

a corporation could act as an agent for its shareholder, the Court refused to recognize an agency relationship based solely on the identity of interests shared by a closely held corporation and its shareholder.[37] Focusing directly upon the question of when a corporation becomes a separate taxable entity, the Court held that a corporation possesses separate taxable status whenever it has a business purpose or conducts business activity.[38]

By contrast, *National Carbide* involved the presence of agency agreements between a large chemical manufacturer, Airco, and three of its wholly owned subsidiaries.[39] The subsidiaries managed the production and marketing of various chemical products.[40] Pursuant to the agreements, Airco lent the subsidiaries interest free working capital and supplied certain management services, equipment, and office facilities.[41] In return, the subsidiaries remitted to Airco all but six percent of earned profits. Airco, rather than the subsidiaries, reported these profits as taxable income.[42]

The Commissioner reallocated Airco's reported income to the subsidiaries and assessed deficiencies accordingly.[43] The subsidiaries claimed they should not be taxed on the reallocated income because they had received the income only in their capacity as agents for Airco.[44] They argued an agency relationship existed for tax purposes partially because of the complete ownership and control of one corporation by another.[45] The Court had clearly rejected this position in *Moline Properties*.[46] In addition, the subsidiaries claimed agency status because of written agency agreements, noting that as agents they were excepted from the holding in *Moline Properties* that a corporation with business activity is taxable separately on the income it generates.[47] Thus, they argued the income earned was taxable not to the subsidiaries, but solely to Airco.[48]

While accepting the subsidiaries' interpretation of *Moline Properties*, the Court refused to accept the proposition that a parent corpo-

37. *Id.*
38. *Id.* at 438-39.
39. *National Carbide*, 336 U.S. at 424 n.1.
40. *Id.* at 424-25.
41. *Id.* at 425-26.
42. *Id.*
43. *Id.*
44. *Id.* at 426-27.
45. *Id.* at 429.
46. *Moline Properties*, 319 U.S. at 439-41.
47. *National Carbide*, 336 U.S. at 426.
48. *Id.* at 426-27.

ration's complete ownership and control of a subsidiary creates the kind of agency relationship referenced in *Moline Properties*.[49] Further, the Court did not find the existence of agency contracts controlling.[50] The Court viewed testimony regarding Airco's desire to operate through separately incorporated subsidiaries to minimize liability for its multistate operations as strong evidence of Airco's lack of intent to operate the subsidiaries as agents.[51] Such a result is directly contrary to that which a normal agency relationship would achieve.

In part, the Court found the arrangements between Airco and its subsidiaries more indicative, in substance, of a typical parent-subsidiary relationship than of an agency relationship.[52] Nonetheless, the Court did not cite the substance-over-form or sham transaction doctrine as a basis for its holding.[53] Instead, the Court rested its decision on the failure of the arrangement to satisfy the newly formulated test for tax recognition of a controlled corporate agent.[54] As applied by the *National Carbide* Court, that test required the consideration of the following six factors:

> (1) Whether the corporation operates in the name of the principal and on its behalf;
> (2) Whether the agent corporation binds the principal by its actions;
> (3) Whether the agent corporation transmits money received for the account of the principal to the principal;
> (4) Whether receipt of income is attributable to the services and assets of the principal and not the agent;

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49. *Id.* at 439.

50. *Id.* at 435-36.

51. *Id.* at 438 n.21.

52. *Id.* at 438.

53. *Id.* at 438-39. Having found that the subsidiaries remitted profits to the parent corporation because of the control exercised by the parent as controlling shareholder, and not as principal, the Court could have rested its holding on a substance-over-form analysis. Such an analysis would have looked at the transaction as a whole to determine its economic substance, without attempting to isolate one circumstance from another, as apparently the *National Carbide* Court did when it articulated its six-factors test. *Id.* at 437-38. *See, e.g.*, Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945). The following is a concise statement of the substance-over-form or sham transaction doctrine: "To treat a transaction as a sham, the court must find that the taxpayer was motivated by no business purposes other than obtaining tax benefits in entering the transaction, and that the transaction has no economic substance because no reasonable possibility of a profit exists . . . [or because the arrangement is not compelled by business or regulatory realities as determined from the facts and circumstances]." Rice's Toyota World, Inc. v. Commissioner, 752 F.2d 89, 91 (4th Cir. 1985); *also see* Frank Lyon Co. v. United States, 435 U.S. 561 (1978); Cliff & Levine, *Reflections on Ownership — Sales and Pledges of Installment Obligations*, 39 TAX LAW. 37 (1985).

54. *National Carbide*, 336 U.S. at 438-39.

> (5) Whether the agent corporation's relations with its principal are dependent upon the latter's ownership of the principal; and
> (6) Whether its business purpose is the carrying on of the normal duties of an agent.[55]

Applying the factors set forth above, the Court concluded that the subsidiaries were not "true agents" of Airco.[56] Unable to find that the profits were taxable only to Airco as principal in a bona fide agency relationship, the rule in *Moline Properties* compelled the Court to find the subsidiaries taxable on the profits.[57] In so finding, the Court distinguished the question of whether an arrangement constitutes a valid agency relationship from the question of whether an entity is a viable taxpayer.

B. *Off on the Wrong Track — Criticism of the Court's Holding in* National Carbide

The *National Carbide* Court failed to explain its purpose in articulating a new six-factors test for controlled corporate agents rather than relying upon traditional tax law doctrines.[58] Commentators have suggested that the Court intended to establish a federal common law of agency.[59] More narrowly viewed, the Court may have intended merely to list considerations particularly relevant to the case at hand without requiring their application in all cases involving controlled corporate agents.[60]

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55. *Id.* at 437.
56. *Id.* at 438-39.
57. *Id.*
58. The court prefaced its six-factors holding by stating its intent not to "foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor." *Id.* at 437. The Court also referred to, at least some of the six factors, as "relevant considerations." *Id.* at 437. Thus, its intent to leave the door open to recognition, for tax purposes, of a controlled corporate agent was stated clearly. What remains unclear, even after *Bollinger*, is whether a "true corporate agent" can be measured only by the presence of certain select criteria or whether the totality of the circumstances was the intended measure. *See infra* note 60.
59. Seto & Glimcher, *supra* note 18, at 385.
60. Given the *National Carbide* holding, as set forth below, it is arguable that all requirements but those of an agency relationship independent of common control and an agency business purpose were intended as merely relevant considerations. That holding, in pertinent part, is as follows:

> Whether the corporations operates in the name . . . of the principal, binds the principal . . . *are some of the relevant considerations in determining whether a true agency exists.* If the corporation is a true agent, its relations with its principal

For example, the first two *National Carbide* factors address whether an alleged corporate agent holds itself out to third parties as acting on behalf of its principal. Conceivably, the Court directed these factors at evidence that the alleged principal in *National Carbide* desired to insulate itself from liability for its alleged corporate agents' (or subsidiaries') activities; this objective indicated a lack of intent to form an agency relationship.[61] The sixth *National Carbide* factor, which addresses whether an alleged agent's business activities constitute the usual duties of an agent, provides another example. Here, the concern likely was the breadth of the alleged corporate agents' business activities.[62] Arguably, these examples suggest that the Court's focus in establishing the now famous *National Carbide* factors was primarily upon the case at hand. Such a list of factors, fine-tuned primarily for the facts at hand, lacks the generality necessary for a rule of law suitable for subsequent application.

In comparison, traditional tax law doctrines such as substance over form and assignment of income could have supported the *National Carbide* holding with precedential weight.[63] Unfortunately, the Court cited neither traditional tax law doctrine nor statutory grounds in support of its decision.[64] Without a statutory basis or general doctrine

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> must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent.

National Carbide, 336 U.S. at 437 (emphasis added). In addition, if the Court in *Bollinger*, as its language suggests, intended to reduce the *National Carbide* requirement of an independent agency relationship to "a generalized statement of the concern . . . that the separate-entity doctrine of *Moline* not be subverted," then the *National Carbide* six-factors checklist has been reduced indeed to a mere list of relevant considerations. *Bollinger*, 108 S. Ct. 1179.

61. *National Carbide*, 336 U.S. at 438 n.21.

62. *Id.* at 424 n.1.

63. *See supra* note 53. It is puzzling that the *National Carbide* Court referenced assignment of income and sham transaction concerns in footnotes without focusing upon either doctrine in the body of its decision. *See* 336 U.S. at 437 n.19 (Court discussed the applicability of the assignment-of-income doctrine to income produced as the result of assets owned and labor supplied by the subsidiaries); *id.* at 437 n.20 (Court considered the possible application of the sham transaction doctrine regardless of whether criteria of agency are satisfied). Furthermore, these traditional tax law doctrines were "alive and kicking" at the time of the decision in *National Carbide. See, e.g.*, Corliss v. Bowers, 281 U.S. 376 (1930) (anticipatory assignment of income doctrine applied to family income-shifting arrangement); Commissioner v. Court Holding Co., 324 U.S. 331 (1945) (substance-over-form analysis applied to post-liquidation sale of assets by a shareholder imputed to the corporation because it negotiated the terms of the sale).

64. Arguably, determinations of whether transactions are sales or leases, agency arrangements or corporate-shareholder relationships, or effective transfers of property interests versus mere anticipatory assignments of income are all determinations requiring an analysis of the economic substance of the transaction. *See, e.g.*, Commissioner v. Tower, 327 U.S. 280, 291

to support the six factors, lower courts have applied them exclusively, and at times rigidly, as if they were a statutory mandate.[65]

III. CASES SUBSEQUENT TO *NATIONAL CARBIDE*: VARYING ANALYSES

The lower courts utilized two differing applications of the *National Carbide* criteria. The Tax Court refused to apply the test rigidly, focusing instead upon the genuineness of the business purpose for the chosen structure.[66] Alternately, the Fourth and Fifth Circuit Courts of Appeal routinely decided against taxpayers using a controlled corporate agent solely because of the presence of common control.[67] The Sixth Circuit in *Bollinger* declined to follow the Fourth and Fifth Circuits and necessitated the Supreme Court's decision of that case in early 1988.[68]

A. *Tax Court Decisions — Pre-*Bollinger

When discussing Tax Court decisions in the *National Carbide* line of cases, one must remember that the Fourth and Fifth Circuits generally reversed the Tax Court in pre-*Bollinger* cases they reviewed.[69] Nonetheless, the Tax Court decisions reflect an analysis more suggestive of the substance-over-form concerns and less suggestive of mechanical application of *National Carbide*'s six factors. Further, the Supreme Court's *Bollinger* decision suggests that appellate courts will follow the Tax Court's approach in the future.

In *Roccaforte v. Commissioner*,[70] the Tax Court faced a fact pattern typical of those cases following *National Carbide*. There, the taxpayers

(1946) (Court found a lack of any real economic change with respect to the person earning the income after considering all the facts and circumstances in applying assignment-of-income doctrine); Roccaforte v. Commissioner, 77 T.C. 263 (1981), *rev'd*, 708 F.2d 986 (5th Cir. 1983) (Court concluded the "entire substance" of the arrangement was one of an agency relationship). *See* Cliff & Levine, *supra* note 53, at 37-42 (noting that determining whether there has been a shift in ownership of property is a factual determination without any one circumstance controlling). Thus, the question arises why the determination of a valid agency relationship has been hamstrung, first, by the *National Carbide*'s six-factors checklist, and now, perhaps, by *Bollinger*'s three-factors checklist. *See infra* note 123 and accompanying text.

65. *See infra* notes 98-114 and accompanying text.

66. *See* Rands, *supra* note 6, at 700-03; *infra* text accompanying notes 70-96.

67. *See Recent Developments*, *supra* note 18, at 381-82; *infra* text accompanying notes 98-114.

68. *Bollinger*, 108 S. Ct. 1173 (1988), *aff'g*, 807 F.2d 65 (6th Cir. 1986).

69. *See* George v. Commissioner, 803 F.2d 144 (5th Cir. 1986), *vacated*, 108 S. Ct. 1264 (1988); Frink v. Commissioner, 798 F.2d 106 (4th Cir. 1986), *vacated*, 108 S. Ct. 1264 (1988); text accompanying notes 98-114.

70. 77 T.C. 263 (1981), *rev'd*, 708 F.2d 986 (5th Cir. 1983).

formed a partnership for real estate development purposes and sought financing for construction and operation of an apartment complex from private investors and various lending institutions.[71] Permanent financing became available contingent upon the use of a corporate rather than a partnership entity for borrowing purposes.[72] The lending institution was unwilling to loan the amount of money requested to a partnership borrower because state usury laws limited the amount of interest lenders could charge to noncorporate borrowers.[73] Thus, the taxpayers formed a corporation solely to hold title to the real estate, execute the loan documents, and receive the loan proceeds as agent for the partnership.[74]

Various indicia of an agency relationship documented the parties' intent. The partners and co-owners of the real estate had executed a nominee agreement with the corporation. This agreement provided that the corporation held title to the real estate solely as a nominee with no authority to act with respect to the property without written authorization of the partners, the true beneficial owners of the property.[75] Later, the partnership and the corporation entered into an agency agreement that reaffirmed the nominee agreement, restated the purpose of forming the corporation, and provided that the partners would indemnify and hold harmless the corporation as agent for its activities in connections with the apartment complex.[76] In addition, the parties consistently revealed the corporation's agency status to third parties.[77]

Although the corporation filed a corporate tax return, it reported no income, losses, assets, or liabilities; instead these items were reported on the partnership tax return. The taxpayers reported their distributive share of the partnership loss attributable to the real estate development activities on their personal income tax returns.[78] The Commissioner disallowed the partnership losses reported by the taxpayers for tax years 1975 and 1976, claiming that the losses were attributable to the corporation's rather than the partnership's activities.[79] The taxpayers conceded that the corporation was a viable

71. *Roccaforte*, 77 T.C. at 267.
72. *Id.* at 269.
73. *Id.* at 270.
74. *Id.* at 265-68.
75. *Id.* at 268.
76. *Id.* at 270.
77. *Id.* at 269.
78. *Id.* at 277.
79. *Id.* at 277-78.

taxable entity requiring recognition. Nonetheless, they sought to attribute the income and losses from the real estate development activities to the partnership, claiming that the corporation held title to the assets and acted merely in the capacity of agent for the partnership.[80]

The Tax Court distinguished the existence of a viable taxable entity, as discussed in *Moline Properties*, from the *National Carbide* issue of valid agency relationship. It found the alleged corporate agent to satisfy the criteria for taxable entity status. The Tax Court concluded, however, that such a finding did not preclude the existence of a valid agency relationship.[81] In determining the substance of the arrangement, the Tax Court found an agency relationship in substance even though not all six *National Carbide* criteria were met.[82]

The Fifth Circuit Court of Appeals reversed the Tax Court's *Roccaforte* decision on appeal.[83] Undaunted, the Tax Court subsequently applied the *National Carbide* elements in a similar fashion in *Ourisman v. Commissioner*,[84] a case appealable to the Fourth Circuit.[85] Noting its careful consideration of the same issue in *Roccaforte*, the Tax Court characterized the *National Carbide* criteria as "indicia of agency"[86] and not a "'factor checklist' to be mechanically applied to the facts of each case . . . ."[87] More importantly, the Court again refused to require the fifth *National Carbide* element[88] as an absolute prerequisite to finding a valid agency relationship in the controlled corporate agent context.[89] Finding for the taxpayers, the Tax Court summarized its interpretation of the *National Carbide* factors as follows:

> The one crucial question under *National Carbide* concerns the essential nature of the relationship between the purported corporate agent and its shareholders . . . . The Supreme Court expressly recognized that a corporation could act as an agent for its owners under certain circumstances

80. *Id.* at 278.
81. *Id.* at 278-79.
82. *Id.* at 287-88.
83. 708 F.2d 986 (5th Cir. 1985), *reh'g denied*, 715 F.2d 577 (5th Cir. 1983).
84. 82 T.C. 171 (1984), *vacated*, 760 F.2d 541 (4th Cir. 1985).
85. *Ourisman*, 82 T.C. at 185. The Court noted it was not required to follow the Fifth Circuit when venue for appeal was to the Fourth Circuit and restated its position that the *National Carbide* criteria were merely relevant considerations in determining the true substance of the arrangement. *Id.*
86. *Id.* at 181.
87. *Id.* at 185.
88. *See supra* text accompanying note 55.
89. *Ourisman*, 82 T.C. at 185.

. . . . In other words, the taxpayer must prove that the agency existed independently of the shareholders' ownership and control. In the present case, the petitioners have sustained such burden.[90]

As in *Roccaforte*, the Tax Court in *Ourisman* focused upon the economic substance of the arrangement and the presence of a business purpose to negate any inference of a scheme for avoiding taxes.

In addition, the Tax Court in *Ourisman* dismissed the concern that recognition of a corporate agent for tax purposes will allow taxpayers to disregard any closely held corporation solely for tax purposes under a guise of agency.[91] The Court stated, "[t]he rule of *Moline Properties*, that the corporate entity will generally be respected for tax purposes, is unshaken by our decisions"; a corporation may act as an agent of its owners and still be a separate taxable entity.[92] The Court also noted that most taxpayers form closely held corporations for limited liability purposes and that a corporate agent arrangement could defeat this objective.[93] Thus, in the Tax Court's view, shareholders are unlikely to seek an agency arrangement solely for tax avoidance purposes.

In summary, the Tax Court's pre-*Bollinger* decisions discussed above — *Roccaforte* and *Ourisman* — illustrate three essential points:

(1) A corporation can be an agent for its shareholders or for an entity controlled by its shareholders without violating the rule in *Moline Properties*;

(2) The Tax Court will characterize a corporation as an agent in substance when the arrangement reflects sufficient indicia of a traditional agency relationship without facts suggesting a tax avoidance motive; and

(3) In determining whether an agency relationship exists, in substance, the Tax Court will not apply the *National Carbide* factors in a mechanical or rigid fashion.

Nonetheless, the Tax Court did not address the proper allocation of income between the principal and the corporate agent.[94] Relevant to

90. *Id.* at 185-86.

91. *Id.* at 187.

92. *Id.*

93. *Id.*

94. Although the Tax Court in its *Roccaforte* decision noted the lack of arm's-length terms, including an agency fee, between the principal partnership and the corporate agent, it considered this circumstance to be relevant to the *National Carbide* requirement of an agency relationship independent of common control. *Roccaforte*, 77 T.C. at 287. The Tax Court did not consider, in either its *Roccaforte* or its *Ourisman* decisions, whether the lack of an agency fee provided an opportunity for the manipulation or distortion of taxable income.

this issue is the presence of arm's-length charges between the parties for the use of property and for services and goods provided.[95] Though not of primary concern to the Tax Court, an arm's-length fee arrangement was crucial to the Fourth Circuit's application of the *National Carbide* factors prior to *Bollinger* as discussed below.[96]

B. *The Circuit Courts of Appeal Cases — Pre-*Bollinger

The most significant difference between the Tax Court cases discussed above and the decisions of the Fourth, Fifth, and Federal Circuits,[97] has been the weight given the fifth *National Carbide* factor. This factor provides that "[i]f the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case."[98] Courts have often interpreted the fifth factor as questioning whether common control exists. These courts find common control when the principal owns the corporate agent or the same party (or parties) owns both the principal and the corporate agent.[99]

Because the *National Carbide* Court provided little guidance as to its purpose in articulating the six-factors agency test or to the weight to be given each factor, lower courts have been at liberty to apply the *National Carbide* decision in a substance over-form spirit or strictly as a statutory mandate.[100] As noted above, the Tax Court

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The proper allocation of income between related or commonly controlled parties is the focus of I.R.C. § 482 (1986). Section 482, in pertinent part, is set forth *supra* note 29.

95. *See supra* note 94. Arm's-length terms, including fee arrangements for services provided, are required by I.R.C. § 482 to accomplish its purpose of determining the "true taxable income of each [commonly] controlled taxpayer." Treas. Reg. § 1.482 1(b)(1) (as amended in 1968).

96. *See infra* notes 106-10 and accompanying text.

97. Vaughn v. United States, 740 F.2d 941, 945 (Fed. Cir. 1984).

98. *National Carbide*, 336 U.S. at 437.

99. *See* Moncrief v. United States, 730 F.2d 276 (5th Cir. 1984); *see also supra* note 4.

100. *See supra* note 53. Courts that use the *National Carbide* six factors merely as relevant considerations effectively are applying a substance-over-form or sham transaction analysis because such an analysis looks to the totality of the circumstances in determining the economic substance of the transaction(s). *See, e.g.*, National Investors Corp. v. Hoey, 144 F.2d 466, 467 (2d Cir. 1944) (stating that the Commissioner can look at the "actualities and upon determination that the form employed of doing business . . . is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute . . . ."). Application of the *National Carbide* factors merely as relevant considerations seems even more appropriate after the Supreme Court's *Bollinger* decision. *See supra* note 60 and accompanying text.

However, even those courts which claimed to apply the *Carbide* factors merely as relevant factors did not consider any other circumstances supporting or refuting a valid agency relationship. *See, e.g.*, *Roccaforte*, 77 T.C. at 287, *rev'd*, 708 F.2d 986 (5th Cir. 1983); *Bollinger*, 807 F.2d at 69-70 (6th Cir. 1986), *aff'd*, 485 U.S. 340 (1988). Perhaps a more expanded vision of relevant circumstances would have forced a clearer articulation of a substance-over-form approach and a corresponding deemphasis on the *National Carbide* six factors. *See supra* note 64.

took the former route, while the Fourth, Fifth, and Federal Circuits took the latter approach.[101]

For example, in the Fifth Circuit's *Roccaforte* decision, the court explicitly rejected the Tax Court's position that each of the *National Carbide* factors should be given equal weight to determine the "entire substance" of the transaction.[102] Instead, the court found the fifth factor, requiring an agency relationship independent of common control, and the sixth factor, requiring that the corporation's business purpose be that of an agent's, to be prerequisites to a finding of true agency.[103] Thus, the presence of common ownership in *Roccaforte* precluded a finding of agency despite the presence of substantial indicia of an agency relationship and purpose.[104]

Similarly, the Fourth Circuit in *Ourisman* refused to find a true agency relationship in a controlled corporate agent context, also requiring satisfaction of the fifth and sixth *National Carbide* factors.[105] More importantly, the Fourth Circuit found that the presence of an arm's-length arrangement between the alleged principal and controlled corporate agent determined whether the relationship satisfied the fifth *National Carbide* factor.[106] The court stated that although it could not define precisely what was required in an arm's-length arrangement, it considered the following circumstances relevant:

(1) Identity of ownership interests in the principal and agent;

(2) Limitations upon the ability of the corporation to act other than as agent for third parties;

(3) Activities as an agent on behalf of more than one principal;

(4) Presence of a written agency agreement between the parties; and

(5) Collection by the agent of a reasonable fee for its services.[107]

Applying the *National Carbide* factors and, as set forth above, its own list of additional considerations, the Fourth Circuit concluded that the Tax Court erred as a matter of law in determining that the corporation in *Ourisman* was a true nontaxable agent.[108] The court focused upon the lack of arm's-length terms between the principal partnership and the corporate agent in concluding that the arrangement failed to

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101. The Tax Court cases are discussed at *supra* notes 69-96 and accompanying text. The Fourth and Fifth Circuit decisions are discussed at *infra* notes 102-14 and accompanying text.

102. *Roccaforte*, 708 F.2d at 989.

103. *Id.*

104. *Id.* at 989-90.

105. *Ourisman*, 760 F.2d at 549.

106. *Id.* at 548.

107. *Id.* at 547-48.

108. *Id.* at 548.

satisfy the fifth *National Carbide* factor.[109] Prior to *Ourisman*, courts seemingly considered the percentage of common ownership to be the litmus test for satisfaction of the fifth factor.[110]

In most Fourth and Fifth Circuit cases, common control was the stumbling block to finding an agency relationship for tax purposes.[111] Noteworthy, however, was the Fourth Circuit's attempt in *Ourisman* to interpret the fifth *National Carbide* factor as requiring the presence of arm's-length terms. Although other courts have referred to the need for an arm's-length flavoring,[112] it appears that only the *Ourisman* court has attempted to flesh out the meaning of arm's length in the controlled corporate agent context.[113] Regardless, the Supreme Court's recent decision in *Commissioner v. Bollinger* discourages a focus upon the presence of arm's-length terms in determining the validity of an alleged agency relationship.[114]

IV. THE *BOLLINGER* DECISION AND SUBSEQUENT CASES

The facts in *Bollinger* typified the cases that followed *National Carbide*. The taxpayers formed a partnership for the purpose of developing real estate and then formed a corporate agent to obtain financing.[115] Virtually the same parties owned the partnership as owned the corporate agent, and the usual indicia of agency were present.[116] In *National Carbide*, by contrast, the taxpayers had no business reason for using the subsidiaries as agents.[117] In fact, evidence indi-

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109. *Id.*

110. *Compare* Raphan v. United States, 3 Cl. Ct. 457, 462 (1983), *aff'd in part, rev'd in part*, 759 F.2d 879 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 843 (1985) (finding not more than 50% control and a lack of close alignment of interest between the principal and corporate agent to satisfy fifth *National Carbide* factor of agency relationship independent of common ownership) *with Ourisman*, 760 F.2d at 547-48 (examining various factors in determining whether the purported agency relationship existed independent of common control) *and* Frink v. Commissioner, 798 F.2d 106 (4th Cir. 1986), *vacated*, 108 S. Ct. 1254 (1988) (also finding more than 50% ownership interest as precluding agency relationship independent of common control).

111. *See, e.g.*, Frink v. Commissioner, 798 F.2d 106, 108-09 (4th Cir. 1986); Roccaforte v. Commissioner, 708 F.2d 986, 987-89 (5th Cir. 1983). The Federal Circuit in Raphan v. United States, 759 F.2d 879 (Fed. Cir. 1985), upheld an agency relationship with a corporate agent based on the presence of the required indicia of common law agency, but in a structure lacking common control.

112. *See, e.g.*, Roccaforte v. Commissioner, 77 T.C. 263, 287 (1981), *rev'd*, 708 F.2d 986 (5th Cir. 1983), *reh'g denied*, 715 F.2d 577 (5th Cir. 1983). *See supra* note 83.

113. *See Ourisman*, 760 F.2d at 547-48.

114. *Bollinger*, 108 S. Ct. 1173 (1988).

115. *Id.* at 1175.

116. *Id.* at 1175-76.

117. *National Carbide*, 336 U.S. at 438.

cated that the taxpayers formed the subsidiaries to insulate the parent corporation from liability, a business reason suggesting a relationship opposite that of principal-agent.[118]

Despite these factual differences, the analytical approaches taken by the Supreme Court in both these cases is similar in many respects. First, the Court in *Bollinger* expressed concern that an agency agreement might be a guise for an anticipatory assignment of income,[119] stating that income generated by property should be taxable to its owner.[120] The *National Carbide* Court had expressed a similar concern.[121] Although the Court in each case was inclined to disregard sham transactions and anticpatory assignments of income, neither the *Bollinger* Court nor the *National Carbide* Court based its holding on these concepts.[122] Instead, each Court focused on the presence of select circumstances indicating an agency relationship under state common law without explaining whether other state law agency factors might also support a valid agency relationship.[123]

A. *The Court's Analysis in* Bollinger

The Court's analysis in *Bollinger* began, as have so many others in the *National Carbide* line of cases, with an application of the rule in *Moline Properties.*[124] However, the Court may have blurred the distinction between the question of taxable entity status and that of valid agency by stating as follows:

> Obviously, *Moline*'s separate-entity principle would be significantly compromised if shareholders of closely held corpora-

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118. *Id.* at 438 n.21.

119. *Bollinger,* 108 S. Ct. at 1176. In effect, the Court implied an assignment-of-income issue in stating the problem as the determination of who owns the property, citing Helvering v. Horst, 311 U.S. 112 (1940) and Commissioner v. Sunnen, 333 U.S. 591 (1948). *Id.*

120. *Id.*

121. *See supra* notes 63-65 and accompanying text.

122. *Bollinger,* 108 S. Ct. at 1177-78. *See supra* notes 63 65 and accompanying text.

123. *Bollinger,* 108 S. Ct. at 1179; *National Carbide,* 336 U.S. at 437.

For example, the law of agency recognizes an undisclosed principal. RESTATEMENT (SECOND) OF AGENCY § 4 (1958). Yet a valid agency relationship in the context of common control would not be recognized in the case of an undisclosed principal for federal income tax purposes if the *National Carbide* factors, supplemented by the *Bollinger* factors, are an exclusive listing of circumstances relevant to such a determination. Both *National Carbide* and *Bollinger* listed the disclosure of the agency relationship to third parties as a factor to be considered. *Bollinger,* 108 S. Ct. at 1179; *National Carbide,* 336 U.S. at 437.

124. *Bollinger,* 108 S. Ct. at 1177. That rule requires the recognition of a corporate entity as a taxable entity if the corporation has a business purpose or carries on business activities. *Moline Properties,* 319 U.S. at 438-39.

> tions could, by clothing the corporation with some attributes of agency with respect to particular assets, leave themselves free at the end of the tax year to make a claim — perhaps even a good faith claim — of either agent or owner status, depending upon which choice turns out to minimize their tax liability.[125]

This excerpt suggests the Court failed to recognize that a corporation likely will be a separate taxable entity under *Moline Properties* even though it qualifies as a valid agent with regard to assets it holds or goods and services it provides.[126] The level of activity necessary to meet the separate taxable entity status test of *Moline Properties* is fairly minimal.[127] A court can test the issue of valid agency, however, under *National Carbide*'s six-factors approach,[128] *Bollinger*'s three-factors approach,[129] or, consistent with the position taken in this article, by a substance-over-form analysis which considers without constraint the overall facts and circumstances.[130]

In addition, the Court's concern that principals, such as shareholders or partnerships in common control structures, will freely regard or disregard an agency relationship solely for tax purposes fails to recognize other limitations on such a scheme. As the Tax Court acknowledged in *Roccaforte* and *Ourisman,* such unfettered use of an agency-relationship label will defeat the primary reason for forming corporations — to achieve limited liability for the shareholders.[131] Thus, the *Bollinger* Court's failure to recognize the business disadvantage of using a corporate agent and the ease with which an arrangement can satisfy the separate taxable entity status under *Moline Properties* arguably caused it to accept unnecessarily the Commissioner's claim that taxpayers would use controlled corporate agents solely to escape taxation.[132]

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125. *Bollinger,* 198 S. Ct. at 1177.

126. Other courts have committed the same error, concluding that recognition of a corporate agent will defeat the rule in *Moline Properties. See, e.g., Roccaforte,* 708 F.2d at 990. In comparison, the Tax Court in *Ourisman* distinguished the recognition of a corporation as a taxpaying entity from the recognition of a corporation as a valid agent. *Ourisman,* 82 T.C. at 171. *See* Bartels v. Birmingham, 332 U.S. 126, 131 (1947); *see also* Miller, *supra* note 3, at 252-60 (examining evolution of cases which involve dummy corporation); *supra* text accompanying notes 55-58.

127. *Moline Properties,* 319 U.S. at 438-39. *See* B. BITTKER & J. EUSTICE, *supra* note 27, ¶ 2.07(1).

128. *See Ourisman,* 82 T.C. at 187; B. BITTKER & J. EUSTICE, *supra* note 27, ¶ 2.10.

129. *See* George v. Commissioner, 844 F.2d 225, 228-29 (5th Cir. 1988).

130. *See supra* text accompanying note 53 and *infra* text accompanying notes 165-69, 189-90.

131. *See Roccaforte,* 77 T.C. at 287; *Ourisman,* 82 T.C. at 187.

132. An agency relationship creates special fiduciary duties and entails obligations not present in other arrangements. An agent, acting within the scope of his authority, can obligate the

However, the *Bollinger* Court did resist the Commissioner's advocacy of a "prophylactically clear test of agency" in a controlled corporate agent situation.[133] The Commissioner argued for this test, a position taken by the Fourth and Fifth Circuits, which virtually bars the recognition of an agency relationship in a common control context.[134] Such a bar was unacceptable to the Court because it intended, consistent with *National Carbide*, to leave open the possibility of a true agency relationship despite the existence of common control.[135] To assure the "genuineness" of the agency relationship and to prevent manipulation of income, the Court required the presence of the following three factors:

> (1) Written agency agreement at the time assets are acquired by the corporate agent;
> (2) Activities by both the principal and the agent consistent with the agreement; and
> (3) Representation of the agency arrangement to all third parties dealing with the asset.[136]

Unfortunately, the Court in *Bollinger* refrained, as it did in *National Carbide*, from suggesting the weight to accord these factors or whether other circumstances might provide the same assurance of "genuineness."

Lastly, in a surprising twist, the Court abandoned inquiry into the presence of arm's-length terms, noting that "neither . . . [an agency fee nor arm's-length terms] is demanded by the [state common] law of agency . . . ."[137] This language is troubling given that section 482

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principal contractually, even for liabilities resulting from the agent's torts. H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP, ch. 1, § 3 (1979). This exposure to liability defeats one of the purposes of operating in the corporate form, and thus, diminishes the likelihood that shareholders will attempt use of a corporate agent arrangement solely, for example, to benefit from the resulting attribution of corporate losses. *See supra* note 93 and accompanying text. For the Supreme Court's recognition of the "flow-through" effect of a corporate agent structure, see *Bollinger*, 108 S. Ct. at 1177.

133. *Bollinger*, 108 S. Ct. at 1177-79.

134. *Id.* at 1178-79.

135. *Id.*

136. *Id.*

137. *Id.* at 1179. The court stated as follows:

> We see no basis . . . for holding that unequivocal evidence [of a valid agency relationship] can only consist of the rigid requirements [of] (arm's-length dealing plus agency fee) that the Commissioner suggests. Neither of those is demanded by the law of agency, which permits agents to be unpaid family members, friends, or associates.

Id.

of the Code generally requires the presence of arm's-length terms between commonly controlled entities.[138] Because that section focuses primarily upon a clear reflection of income, requiring arm's-length terms sufficient to satisfy section 482 might have alleviated the Court's concerns regarding income manipulation.[139]

In summary, the conflict between the Fourth, Fifth, and Sixth Circuits forced the Supreme Court in *Bollinger* to revisit an issue that has proven slippery and abstract for commentators and courts alike.[140] The Court seemed concerned about the violation of assignment of income and sham transaction doctrines; yet, the Court failed to rely upon either doctrine in its holding. Instead, the Court articulated what some have called a new federal common law test for agency[141] and what others are characterizing as solely a clarification of the *National Carbide* factors.[142] Moreover, questions remain regarding the application of this three-part test, such as whether its application is mandatory and how it relates to the *National Carbide* test. As with all judge-made law, lower court interpretation of the decision may provide answers to some of these questions. A brief look at some subsequent lower court cases follows.

B. *Cases Subsequent to* Bollinger

Two of the first cases to address the controlled corporate agent issue after *Bollinger* are *Frink v. Commissioner*,[143] decided by the Fourth Circuit, and *George v. Commissioner*,[144] decided by the Fifth Circuit. Both cases arose from factually similar situations and were decided after the Supreme Court vacated judgments for the Commissioner and remanded the cases for further consideration in light of the *Bollinger* decision.[145] The vacated judgments were based primarily

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The Court's language, as set forth above, raises the question of whether other requirements such as the requirements of a written agency agreement and representations of the agency relationship to third parties, both seemingly mandatory factors under *National Carbide* and *Bollinger*, also can be abandoned, as neither is required under the law of agency. *See* H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP, ch. 2, § 12 (1979).

138. *See supra* notes 29, 95.

139. *See* Commissioner v. First Security Bank, 405 U.S. 394, 408 (1972) (Marshall, J., dissenting); Falk, *supra* note 3, at 729; *infra* notes 170-90 and accompanying text.

140. *Bollinger*, 108 S. Ct. at 1175-76. *See supra* note 30 and accompanying text.

141. *See, e.g.*, Seto & Glimcher, *supra* note 18, at 385.

142. *See, e.g.*, Riess, *supra* note 3, at 105-06.

143. 846 F.2d 5 (4th Cir. 1988), *vacated and remanded*, 108 S. Ct. 1264 (1988).

144. 844 F.2d 225 (5th Cir. 1988).

145. *Id.* at 226; *Frink*, 846 F.2d at 6.

upon a finding that common control and the lack of arm's-length terms prevented satisfaction of the fifth *National Carbide* element.[146]

The facts in these two cases typify other corporate agent cases involving the formation of a partnership for development or operation of real estate, followed by the formation of a corporation to obtain financing in compliance with demands of the lending institutions.[147] In addition, the arrangements satisfied all but the fifth of the *National Carbide* factors. On remand, both the Fourth and Fifth Circuit found for the taxpayers, concluding that the three-part *Bollinger* test had been met.[148]

In its decision, the Fifth Circuit provided some insight into how the *National Carbide* factors might interact with the *Bollinger* three-part test. The court cited both sets of factors in its decision, but specifically disregarded *National Carbide*'s fifth factor once it determined that *Bollinger*'s three-part test was met, stating as follows:

> Therefore, we hold that the agency test set forth in *Bollinger* is met . . . . When agency is clear, there is no risk that taxpayers could, at the end of the year, manipulate the corporation's status to minimize their tax liability . . . . Consequently, when it is clear that the parties intended that the corporation act only as an agent, there is no need to make a separate strict inquiry about the extent to which the agent corporation's status is dependent on the principal's ownership.[149]

Thus, having decided that the arrangement satisfied *Bollinger*'s requirements, the court apparently found it unnecessary to apply, point by point, the six-part *National Carbide* test, especially with respect to factor five.[150]

Two later Tax Court memorandum decisions also cite both *National Carbide* and *Bollinger* as the bases for their holdings. *O'Neal v. Commissioner*[151] involved the formation of a corporation at the insistence of a potential lender in light of state usury laws limiting interest charged to noncorporate borrowers.[152] The taxpayers/shareholders needed the funds to operate an automobile dealership that they previ-

146. *See George*, 844 F.2d at 228.
147. *Id.* at 226-27; *Frink*, 798 F.2d at 108-09.
148. *Frink*, 846 F.2d at 6; *George*, 844 F.2d at 229.
149. *George*, 844 F.2d at 229.
150. *Id.* at 228.
151. 56 T.C.M. (CCH) 1347 (1989).
152. *Id.*

ously operated as sole proprietors.[153] The Commissioner disallowed expenses deducted on the taxpayers' individual income tax returns, assessed late filing penalties, and imposed negligence penalties.[154] A portion of the deficiencies resulted from $158,511 in constructive dividends caused by the taxpayers' use of corporate funds for personal living expenses.[155]

The taxpayers argued that the corporation was merely their agent. Thus, the money deemed received from the corporation was taxable to them not as constructive dividends, but as income attributable to them as principals.[156] Correspondingly, they argued that the corporation's losses and expenses were also attributable to them as principals.[157]

Applying first the *Bollinger* criteria, the court noted that the taxpayers offered no written agency agreement, no evidence that the taxpayers represented the agency relationship to third parties, nor any evidence that the corporate agent otherwise functioned in a manner typical of an agent. The court then found that the taxpayers' failure to meet *Bollinger*'s three-part test meant that evidence of a true agency relationship independent of common control was lacking, and thus, the arrangement failed to meet the fifth *National Carbide* factor.[158] Somewhat surprisingly, the court further stated that "[s]ince satisfaction of that factor is mandatory, . . . our conclusion makes it unnecessary to explore the extent to which the other five factors involved in determining whether a corporation is a true agent of its owner principal have been satisfied."[159]

Similarly, in the Tax Court memorandum decision of *Greenberg v. Commissioner*,[160] the Court interpreted *Bollinger*'s three-part test as complementing the *National Carbide* criteria by providing clearer content to *National Carbide*'s fifth factor.[161] According to both the *O'Neal*

153. *Id.*
154. *Id.* at 1349.
155. *Id.* at 1348.
156. *Id.*
157. *Id.* at 1348-49.
158. *Id.* at 1348.
159. *Id.* The statement is surprising in light of the Supreme Court's *Bollinger* decision, wherein the Court clarified the fifth *National Carbide* factor — requiring an agency relationship independent of common control — as not a mandatory prerequisite after all; rather, the Court characterized the fifth factor as a generalized concern that a corporation not evade taxation under the rule in *Moline Properties*. *Bollinger*, 108 S. Ct. at 1179.
160. 56 T.C.M. (CCH) 1030 (1989).
161. *Id.* at 1032.

court and the *Greenberg* court, *Bollinger* rejects the position that the fifth factor only can be met by evidence of arm's-length dealing, including an agency fee, and instead merely requires evidence that the agency relationship is genuine.[162]

The thread tying these post-*Bollinger* cases together is the deciding courts' belief that *Bollinger* complements, rather than supplants, *National Carbide* by providing clearer content to *National Carbide*'s fifth factor. Each of these courts viewed *National Carbide*'s fifth factor, in light of *Bollinger*, as requiring substantial evidence of the "genuineness" of the alleged agency relationship. Such an interpretation is commendable in that it avoids the artificiality of making the "genuineness" of the arrangement dependent upon the absence of common control.[163] Nonetheless, these decisions leave unanswered the question of whether that "genuineness" can be supported by other factors considered indicative of an agency relationship under traditional agency law concepts. Finally, to the extent that *Bollinger* rejects the requirement of arm's-length terms, it threatens to give taxpayers a false sense of security. The Commissioner still has broad powers under section 482 of the Code which can be applied to force arm's-length fee arrangements between related parties.[164]

V. ALTERNATIVES TO THE *NATIONAL CARBIDE* LINE OF CASES

As outlined previously in this paper, fact patterns involving the use of corporate agents conceivably give rise to three separate issues:

> (1) Whether the alleged corporate agents are separate taxable entities or so closely aligned in interest with their shareholder(s) as to require a "merging" of their identity for tax purposes;
> (2) Whether income earned and losses incurred by the alleged corporate agent are attributable to its principal pursuant to a valid agency relationship; and

162. *Id.*; *O'Neal*, 56 T.C.M. at 1348.

163. *See, e.g., George*. 844 F.2d at 229 (stating that "when it is clear that the parties intended that the corporation act only as an agent, there is no need to make a separate strict inquiry about the extent to which the agent corporation's status is dependent on the principal's ownership"). *See also* Rands, *supra* note 6, at 702 (advocating an analysis which determines who is the substantive owner of property, title to which is held in nominee capacity, rather than a *National Carbide* agency approach); Miller, *supra* note 3, at 258-60 (noting that the *National Carbide* requirement of an agency relationship independent of common control can be assured simply by transferring a percentage of ownership to an unrelated third party so as to dilute the control factor).

164. *See infra* notes 170-209 and accompanying text.

(3) Whether arm's-length charges for the use of assets, employees, loans, and services exist between the principal(s) and the corporate agent.[165]

Moline Properties squarely answers the first question. As long as a corporation has a business purpose or carries on business activities, it is a separate taxable entity.[166] Courts have historically analyzed the second issue by applying the *National Carbide* factors, now refined by *Bollinger*'s three factors test for "genuineness of the agency relationship."[167] The third issue reflects section 482 concerns. Except for its brief appearance in a *National Carbide* footnote, section 482 has been noticeably absent from this line of cases. Armed with the fifth *National Carbide* factor, perhaps the Service has felt no need to swing the section 482 hammer. Given, however, the Service's historic use of section 482 to attack a "variety of tax abuses,"[168] and given the Supreme Court's rejection of a requirement for arm's-length terms in *Bollinger*,[169] the Service may soon find use for section 482 in controlled corporate agent cases.

A. *Section 482*

Current section 482 was first enacted as section 45 of the Revenue Act of 1928.[170] Its purpose was, and still is, "to prevent the avoidance of tax liability through fictions and 'to deny the power to shift income . . . arbitrarily among controlled corporations, and to place such corporations rather on a parity with uncontrolled concerns.'"[171]

165. Regarding the first issue, see *supra* notes 32-38, 80-82 and accompanying text. The second issue is discussed at length at *supra* notes 39-65, 116-42 and accompanying text. For a discussion of the third issue, see *infra* notes 170-209 and accompanying text.

166. *Moline Properties*, 319 U.S. at 438-39.

167. *Bollinger*, 108 S. Ct. at 1178-79.

168. A Study of Intercompany Pricing, Discussion Draft 7 (Oct. 18, 1988) [hereinafter Discussion Draft] (compiled by the Treasury Department, Office of International Tax Counsel, Office of Tax Analysis, and the Internal Revenue Service, among others). *See infra* text accompanying notes 191-209.

169. *Bollinger*, 108 S. Ct. at 1179. *See supra* note 137.

170. Revenue Act of 1928, ch. 852, § 45, 45 Stat. 806.

171. Commissioner v. First Security Bank, 405 U.S. 394, 408 (1972) (Marshall, J., dissenting). The statute's purpose was set forth in the Senate Committee Report, as follows:

> Section 45 is based upon section 240(f) of the 1926 act, broadened considerably in order to afford adequate protection to the Government. The section of the new bill provides that the commissioner may, in the case of two or more trades or businesses owned or controlled by the same interests, apportion, allocate, or distribute the income or deductions between or among them, in such manner as may be necessary in order to prevent evasion (by the shifting of profits, the making of fictitious sales, and other methods frequently adopted for the purpose of "milking"), and in order to arrive at their true tax liability.

S. REP. NO. 960, 70th Cong., 1st Sess.

The statute authorizes the Secretary of the Treasury to allocate items of income, deductions, and credits among or between related taxpayers. The Secretary may exercise this authority only as necessary to clearly reflect income or prevent evasion of taxes.[172] Although section 482 is available to the Commissioner in tax fraud cases, its use is not limited to situations of tax evasion or where avoidance motive is present.[173]

The Secretary can exercise authority to reallocate income or losses to clearly reflect income and thereby determine an individual or entity's "true taxable income"[174] with respect to any "group of controlled taxpayers."[175] The Treasury Regulations define a "group of controlled taxpayers" to mean organizations, trades, or businesses (including individuals) owned or controlled, directly or indirectly, by the same interests.[176] The regulations contain no threshold percentage of ownership requirement for satisfying the term "controlled."[177] The regulations do, however, create a presumption of control if the taxpayers have arbitrarily shifted income or deductions.[178]

The standard for determining the "true taxable income" of a controlled group member is, as it has been since 1935, "that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer."[179] Basically, this standard requires the identification of charges between unrelated taxpayers in comparable transactions.[180] The problem with such a standard is its dependence upon finding a comparable transaction without a common control context.

To provide taxpayers with further guidance as to the meaning of the term "arm's length," the Service issued final regulations in 1968 governing the following five transactional categories:

(1) Loans or advances;[181]
(2) Services;[182]

172. *See* Discussion Draft, *supra* note 168, at 6-8; Treas. Reg. § 1.482-1(c) (as amended in 1968).

173. Treas. Reg. § 1.482-1(c) (as amended in 1968).

174. Treas. Reg. § 1.482-1(a) (as amended in 1968).

175. Treas. Reg. § 1.482-1(c) (as amended in 1968); Treas. Reg. § 1.482-1(a) (as amended in 1968).

176. Treas. Reg. § 1.482-1(a) (as amended in 1968).

177. *Id.*

178. Treas. Reg. § 1.482-1(a)(3) (as amended in 1968).

179. Treas. Reg. § 1.482-1(b)(1) (as amended in 1968); Treas. Reg. 86, § 45-1(b) (1935).

180. Treas. Reg. § 1.482-1(d)(3) (as amended in 1968); Discussion Draft, *supra* note 168, at 12.

181. Treas. Reg. § 1.482-2(a) (as amended in 1988).

182. Treas. Reg. § 1.482-2(b) (as amended in 1988).

(3) Use of tangible property, including leases;[183]
(4) Transfer or use of intangible property;[184] and
(5) Sales of tangible property.[185]

The regulations governing these transactional areas still generally look to charges for similar transactions between unrelated taxpayers in defining the arm's-length standard.[186] In certain circumstances, however, the regulations provide exceptions to the arm's-length requirement or safe harbor arm's-length charges. For example, the regulations grant an exception to the arm's-length charge requirement for services performed by one member of a controlled group for the benefit of another member unless the services represent an integral part of the business activity of either the service provider or the recipient.[187] This exception allows a cost-sharing arrangement to exist with respect to, for example, shared managerial or marketing services. The exception would not apply, however, if either the service provider or the recipient were in the business of providing marketing services.[188]

In summary, section 482 appears broad enough to apply to controlled corporate agent cases to prevent an artificial shifting of income or loss from the corporate agent to the principal. The Commissioner advocated its application in *National Carbide* with respect to the lack of interest charges on monies that the parent corporation advanced to the subsidiaries and with respect to the lack of rental charges for the use of assets.[189] A possible de minimis exception aside,[190] there

183. Treas. Reg. § 1.482-2(c) (as amended in 1988).

184. Treas. Reg. § 1.482-2(d) (as amended in 1988).

185. Treas. Reg. § 1.482-2(e) (as amended in 1988).

186. *See, e.g.*, Treas. Reg. § 1.482-2(b)(3) (as amended in 1988). *See also* Treas. Reg. § 1.482-1(d)(3) (as amended in 1968) (providing "the term arm's-length refers to the amount which was charged or would have been charged in independent transactions with unrelated parties under the same or similar circumstances considering all the relevant facts.").

187. Treas. Reg. § 1.482-2(b)(3) (as amended in 1988).

188. *Id. See* Treas. Reg. § 1.482-2(b)(7)(ii)(a) for a description of "integral services."

189. *National Carbide*, 336 U.S. at 433-34 n.13.

190. A possible *de minimis* exception was suggested in an article in which the Commissioner expressed his view that insignificant deviations from arm's-length charges would not result in reallocations under I.R.C. § 482. Cohen, *How the IRS Intends to Administer the New Regulations Under Section 482*, 28 J. TAX'N 73, 74 (Feb. 1968).

During the January 13, 1988 oral argument in the *Bollinger* case, Justice O'Connor, in response to the Assistant to the Solicitor General's argument for an arm's-length agency fee, asked whether the fee might be rather minimal. The Solicitor General's assistant argued a fee was required nonetheless because the corporation did more than hold bare legal title, it exposed itself to liability. Sheppard, *Supreme Court Considers Whether Corporations Should be Treated as Separate Taxpayers*, 38 TAX NOTES 215, 216 (1988).

appears to be no reason why it would not also apply to services performed by a corporate agent in financing, brokering, or managing property, or any other service typically performed by an agent.

B. *Section 482 in Conjunction with Judicial Doctrines*

As early as 1935, the Service began using section 482 along with sham transaction and assignment of income doctrines to prevent tax evasion and to clearly reflect income. For example, in the 1935 case of *Asiatic Petroleum Co. v. Commissioner*,[191] the Second Circuit upheld the Commissioner's use of section 482 (then section 45)[192] to reallocate approximately three million dollars in profits to a domestic holding company from its foreign subsidiary.[193] The holding company "sold" stock at cost to one of its foreign subsidiaries.[194] The same day, the foreign subsidiary sold the stock to an unrelated entity, realizing almost three million dollars in profits.[195] The domestic holding company did not report the profits on the consolidated return it filed with the related subsidiaries.[196]

In response to the taxpayer's claim that the statute was an unconstitutional taking of property without due process, the court stated:

> [The section] does not measure the tax of one person by the income of another; . . . rather, it looks through form to reality, and recognizes that the appreciation in value during the transferor's ownership of the property (when realized for the benefit of the real owners . . .) should be ascribed to the transferor rather than the transferee . . . . If anticipatory arrangements intended to circumvent taxes may be disregarded by the courts without the aid of statutory authority, a statute authorizing the Commissioner to disregard them under similar circumstances cannot be unconstitutional.[197]

Thus, the Second Circuit justified the application of section 482 by comparing it to the traditionally accepted doctrines of assignment of income and substance over form.[198]

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191. 79 F.2d 234 (2d Cir. 1935), *cert. denied*, 296 U.S. 645 (1935), *reh'g denied*, 296 U.S. 664 (1935).

192. *See supra* note 170 and accompanying text.

193. *Asiatic Petroleum*, 79 F.2d at 235.

194. *Id.*

195. *Id.*

196. *Asiatic Petroleum*, 79 F.2d at 235.

197. *Id.* at 238. The court recognized section 482 (then section 45) as a remedy available to the Commissioner when confronted with sham transactions. *Id.*

198. The Third Circuit reached a similar result, preventing the shifting of losses from a corporation unable to use them to a related corporation able to use the losses, in the 1943 case

In *Foglesong v. Commissioner (Foglesong I)*,[199] the Seventh Circuit examined the interrelation of section 482 and the assignment-of-income doctrine. The Commissioner there argued that the court should disregard the personal service corporation formed by the taxpayer and tax the corporation's income directly to the taxpayers.[200] The taxpayers, a sales representative and his wife, were the only shareholders in the corporation which was formed to provide the taxpayer with limited liability, contract with customers, and provide a vehicle for expansion of the taxpayer's business interests.[201] The Commissioner attacked the arrangement as an anticipatory assignment of income, even though the taxpayer executed novations with existing customers substituting the corporation for the taxpayer.[202]

The court rejected the assignment-of-income attack on grounds that the novations worked a transfer of property rights, rather than a mere assignment of future income.[203] More important, however, was the Court's view that it should not use the assignment-of-income doctrine as a "broad-scale disregard of the corporate form" when less intrusive legal bases, such as section 482, are available.[204] In remanding the decision for reconsideration under section 482, the court stated:

> Section 482 . . . appears available to allocate among controlled taxpayers . . . [income, deductions, or credits] to prevent evasion of taxes or to clearly reflect the income of controlled taxpayers. Other statutory provisions and "common law" doctrines, *structured for more limited application*, may also be available to remedy potential tax abuse.[205]

On remand, the Tax Court applied section 482, reallocating ninety-eight percent of the corporation's taxable income to the taxpayer.[206] Although the case again came before the Seventh Circuit in *Foglesong II*,[207] the *Foglesong II* decision only altered the Tax Court's section 482 holding as it relates to a sole shareholder who works exclusively for his corporation.[208]

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of *National Securities Corp. v. Commissioner*. 137 F.2d 600 (1943), *cert. denied*, 320 U.S. 794 (1943).

199. 621 F.2d 865 (7th Cir. 1980).
200. *Id.* at 869.
201. *Id.* at 866-68.
202. *Id.* at 870.
203. *Id.* at 870-71, 873.
204. *Id.* at 869, 872.
205. *Id.* at 872 (emphasis added).
206. Foglesong v. Commissioner, 691 F.2d 848, 850 (7th Cir. 1982).
207. *Id.*
208. *Id.* at 851. The Court carved out an exception to section 482's otherwise broad appli-

The Seventh Circuit, in *Foglesong I*, required an item-by-item reallocation of income and expense under section 482 rather than the wholesale disregard of the taxpayer's chosen business structure sought by the commissioner.[209] In so doing, the court rejected application of the assignment-of-income doctrine without evidence of a sham transaction when a remedy with a less intrusive effect existed. Thus, the court recommended deferring to judicial doctrines over section 482 only when the perceived tax abuse is the result of a sham or fraudulent structure.

VI. Conclusion

In the case of a controlled corporate agent, there are essentially three federal income tax issues. The first, whether the alleged agent is a viable taxable entity, turns upon the presence of a business purpose or activity. The second, whether the corporation is a genuine agent, should depend upon the economic reality of the alleged arrangement. The third issue, concerning the determination of the true taxable income of a controlled corporate agent, is essentially a section 482 concern.

The first issue, as long as it is distinguished from the other two, should seldom cause uncertainty for taxpayers. The amount of activity required to satisfy the viability issue is so minimal that most corporations in the controlled corporate agent context will be separate taxable entities under *Moline Properties*. The second issue, addressed most recently by the *Bollinger* Court and almost forty years ago by the *National Carbide* Court, will continue to cause uncertainty with respect to the requisite amount of state law indicia of agency. Therefore, courts should take an approach similar to the Seventh Circuit's analysis in *Foglesong I* in controlled corporate agent cases. Once a court determines that the corporation has a separate taxable status and a bona fide business purpose for the agency relationship, the focus ought to be whether the transactions between the related parties truly reflect taxable income, a section 482 analysis. Such an analysis requires arm's-length charges, thereby reducing the risk that the taxpayer will use the arrangement to manipulate income. Moreover, despite the *Bollinger* Court's apparent rejection of any requirement of arm's-length fees in the controlled corporate agent context, section 482 continues to lurk in the background.

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cation for shareholders who work exclusively for their corporations. *Id.* The Internal Revenue Service has not accepted this exception. Rev. Rul. 88-38, 1988-21 I.R.B. 11.

209. *Id.* at 872.