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6-10-2013

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# Valuation Misstatement Penalties Require Valuation Misstatements

by David J. Shakow\*

Is the IRS properly applying the valuation misstatement penalties of section 6662? Section 6662(b)(3) imposes a penalty when an underpayment is “attributable to . . . [a]ny substantial valuation misstatement . . .” There is currently a split in the circuits as to whether courts can impose a valuation misstatement penalty in a tax shelter transaction that lacks economic substance, for in that case the taxpayer’s underpayment of tax is arguably not “attributable to” the valuation misstatement.<sup>1</sup> The Supreme Court has accepted certiorari in one case that raises this issue.<sup>2</sup> But the way the IRS now applies this penalty, mostly to tax shelter investors, reflects a misreading of the section. If that misreading is recognized, the penalty should not be applied to many of the tax shelter cases in which the IRS has asserted it. It would follow that the significance of the split in the Circuits is substantially reduced.

Section 6662(e)(1)(A) states:

(e) Substantial Valuation Misstatement Under Chapter 1.—

(1) In General.—For purposes of this section, there is a substantial valuation misstatement under chapter 1 if—

(A) the value of any property (or the adjusted basis of any property) claimed on any return of tax imposed by chapter 1 is 150

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<sup>1</sup> Compare, e.g., *Todd v. Commissioner*, 862 F.2d 540 (5<sup>th</sup> Cir. 1988) (no penalty imposed under predecessor of section 6662), with *Gilman v. Commissioner*, 933 F.2d 143, 151 (2d Cir. 1991). For a recent review of the law on this issue, see *Gustashaw v. Commissioner*, 110 A.F.T.R.2d 2012-6169 (11<sup>th</sup> Cir. 2012) (9/28/12) (criticizing *Todd*). The Tax Court very recently changed its position and sided with the majority view reflected in *Gilmore* and *Gustashaw*. *AHG Investments LLC v. Commissioner*, 140 T.C. No. 7 (3/14/13) (penalty imposed).

<sup>2</sup> See Postscript to this article; see discussion of the issue appealed in *Roberson, Spencer & Connolly*, “Will High Court Resolve Circuit Split on Valuation Misstatement Penalty?” Tax Notes, March 4, 2013, p. 1113.

percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be), . . .

Section 6662(a) applies a 20% penalty in such a case. Under section 6662(h), the penalty is increased to 40% when the value (or adjusted basis) is 200% or more of the correct amount, because there is then a “gross valuation misstatement.”<sup>3</sup> Although the Code refers primarily to “valuation” misstatements, and only parenthetically to inflated basis, in most cases where this penalty has been asserted recently, the IRS has penalized taxpayers when the adjusted bases of their assets were inflated, even though the inflated bases did not result from inflated valuations.

#### APPLYING SECTION 6659, THE ORIGINAL VALUATION MISSTATEMENT SECTION

Code section 6659,<sup>4</sup> the original valuation misstatement section, was titled “Addition to Tax in the Case of Valuation Overstatements for Purposes of the Income Tax.” It is clear from the legislative history of this penalty that Congress’s target was serious overvaluations of assets and their effect on the courts. Here are excerpts from the “Reasons for Change” in the House Committee’s report for the original version of the valuation misstatement penalty, which was added to the Code as section 6659 in 1981:<sup>5</sup>

The Committee believes that a specific penalty was needed to deal with various problems related to valuation of property. This particular need is illustrated by the fact that there are about 500,000 tax disputes

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<sup>3</sup> Section 6662(h) is an extension of the substantial valuation penalty set forth in section 6662(e). It mechanically substitutes a 40% penalty instead of 20% if the substantial valuation misstatement is 200% (or more) of the correct amount. With the substitutions mandated by section 6662(h)(2)(A) in place, section 6662(e)(1)(A), in pertinent part, would read as follows:

“the value of any property (or the adjusted basis of any property) claimed on any return of tax imposed by chapter 1 is 200 percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be),”

<sup>4</sup> Section 6659(c) read:

VALUATION OVERSTATEMENT DEFINED—For purposes of this section, there is a valuation overstatement if the value of any property, or the adjusted basis of any property, claimed on any return is 150 percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be).

<sup>5</sup> H. Rep. No. 97-201, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 243 (July 21, 1981). The House bill was adopted in Conference. H. Rep. No. 97-215 at 262-263. There is no substantive discussion of the reasons for the valuation misstatement penalties in the legislative history of the 1989 revision of these provisions, which is discussed below.

outstanding which involve property valuation questions of more than routine significance. These cases alone involve approximately \$2.5 billion in tax attributable to the valuation issues.

The committee recognizes that valuation issues frequently involve difficult questions of fact. Often these issues seem to be resolved simply by “dividing the difference” in the values asserted by the Internal Revenue Service and those claimed by the taxpayer. Because of this approach to valuation questions, the committee believes that taxpayers were encouraged to overvalue certain types of property and to delay the resolution of valuation issues. . . .

In recognition of the fact that valuation issues often are difficult, especially where unique property is concerned, the committee decided to adopt a “bright line” test for the application of a new penalty. Under this test, only significant overvaluations will be penalized. . . .

I have looked at the cases (close to 1,000) which cite section 6659, the penalty that was in effect in the 1980s. Of those that I examined, around 450 clearly involved substantive attempts by the IRS to exact the valuation misstatement penalty from taxpayers.<sup>6</sup> All the cases (but, perhaps, one) clearly involve issues of valuation, including the basis that results from overvaluation. They do not raise legal issues that implicate Code provisions and general tax doctrines that taxpayers used to inflate the basis of assets.<sup>7</sup> Sixty-three involved overstated charitable contributions. It is straightforward to

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<sup>6</sup> See Appendix B. I used RIA Checkpoint to identify all the cases that cited section 6659 and attempted to categorize each one. As is true of the cases I looked at in connection with section 6662(e) and (h), see text at notes 15-21, *infra*, there were many in which section 6659 was cited but not applied, and many in which the facts underlying the transaction were not spelled out with enough detail to allow me to determine why the penalty had been asserted. In some cases, the IRS did not assert the penalty for valuation misstatements under section 6659, but instead imposed the higher interest rate on deficiencies mandated by section 6621(c) in the case of a transaction involving a valuation misstatement as defined in section 6659. It is not clear why the section 6659 penalty itself was not asserted in those cases, although in some it is possible that the penalty under section 6659 would not have led to an additional payment by the taxpayer because of other penalties to which the taxpayer was subject. Section 6621(c) was repealed in the 1989 Act, which redefined the scope of the valuation misstatement penalty and moved it from section 6659 to section 6662.

<sup>7</sup> The one possible exception is *Groves v. Commissioner*, TC Memo 1999-415. The facts are not set out clearly in the opinion, but it appears the taxpayer recorded basis of stock he sold without a factual

apply an overvaluation penalty in such a case. One involved claimed improvements on a farm purchased by a limited partnership, a transaction which the court does not clearly label as a tax shelter.<sup>8</sup>

The other 380 or so were tax shelters that were based on overvaluations of property. Thus, by its terms and by its application, section 6659 penalized taxpayers who attempted to reduce their tax liabilities by overvaluations.

#### SECTION 6662, THE CURRENT VERSION OF THE PENALTY PROVISION

As originally passed in section 6659, the penalty provision applied when “the value of any property, or the adjusted basis of any property” was inflated. That would seem to have given the IRS the power to impose the penalty for any type of basis overstatement. Nevertheless, as we have shown, the penalty was applied only to cases involving actual overvaluations.

In 1989, the penalty provisions were restructured, and the overvaluation penalty was moved to section 6662. The legislative history of the valuation misstatement penalty, in both 1981 and 1989, is devoid of any discussion of inflated *basis*. The focus is on valuations. Yet the recent tax shelter cases where the section 6662(e) and (h) overvaluation penalty has been asserted involve taxpayers’ attempts to interpret the Code to obtain increased basis of assets. They have not raised any “difficult questions of fact” (the language of the legislative history) that valuation issues raise.

If the IRS’s current broad reading of the statute, which ignores the “value” part of overvaluation, were correct, the penalty would apply in any case where a taxpayer’s basis is far in excess of the basis determined by the court. There are many situations where this could arise. Here is a far from complete listing.

An item could be capitalized when it should not have been capitalized.

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foundation for the numbers used. There is no discussion of the section 6659 penalty in the opinion, so it is not clear if this failure of the taxpayer is the basis for the IRS’s imposing the section 6659 penalty. In any event, unlike the recent cases where the penalty has been imposed, the issue was purely factual (how much did the taxpayer actually pay for the stock sold), not a legal issue as to how to calculate basis.

<sup>8</sup> Weis v. Commissioner, 94 TC 473 (1990) (limited partnership bought farm; claimed improvements had value 243% of actual value).

The amount that should be capitalized in respect of an item could be mismeasured.

A taxpayer could fail to take allowable depreciation.

A liability associated with a property's purchase price could be mismeasured.

A liability associated with a property's purchase price could be improperly so associated.

Basis could be misallocated in the context of basis reduction under section 1017.

A stockholder could fail to reduce the basis of stock in respect of a return of capital distribution.

A bondholder could fail to reduce a bond's basis for amortizable bond premium.

A homeowner could fail to make the correct basis adjustments in the case of a sale and purchase of a residence under old section 1034.

A farmer could fail to adjust basis for a loan from the Commodity Credit Corporation to the extent of loans treated as income under section 77.<sup>9</sup>

A taxpayer could capitalize development expenditures allowed as a deduction under section 616.

A taxpayer could capitalize amounts allowed as research and development deductions under section 174.

A holder of Subchapter S stock could fail to adjust basis under section 1367.

A corporation could fail to make adjustments to CFC stock under section 961.

A taxpayer could fail to reduce basis by the amount of extraordinary dividends under section 1059.

An allocation under 338(h)(10) could be incorrect because some items are not properly valued.

An improper allocation could be made under section 358 for section 351, 354, 355, 356, and 361 exchanges.

Although there are many situations in which the valuation misstatement penalty, so read, could be applied, it has been applied in virtually none. This is consistent with the headings of section 6662(e) and 662(h), which refer to "valuation misstatements." "The headings used in a statute are aids in ascertaining its meaning."<sup>10</sup>

The reenactment of the penalty in 1989 provides further support for the conclusion that it should be applied only when the taxpayer has overstated the value of an

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<sup>9</sup> See I.R.C. § 1016(a)(8).

<sup>10</sup> Webb v. Commissioner, 67 T.C. 293, 305 n.11 (1976).

asset. When the penalty was reenacted, the reference to basis overstatements was placed in a parenthetical. This affects how the statute should be understood. In interpreting a statute, the use of parentheticals indicates that the parenthetical phrase “*is related to, or dependent upon*” the non-parenthetical phrase it follows.<sup>11</sup> “[P]arentheses ‘reduce[] the grammatical import’ of the language contained therein.”<sup>12</sup> In particular, courts may decline to ascribe independent meaning to a parenthetical statutory phrase (such as the one we are considering) beginning with the word “or” because “it can reasonably be construed to illustrate or explain” the preceding phrase.<sup>13</sup>

The limited scope of the parenthetical in section 6662(e) is illustrated by comparing that section to other provisions that have a similar structure. Section 6662(e) begins:

For purposes of this section, there is a substantial valuation misstatement under chapter 1 if—(A) the value of any property (or the adjusted basis of any property) claimed on any return of tax imposed by chapter 1 is 150 percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be), . . .

The phrase “as the case may be” refers to two or more items listed elsewhere in the Code section where the phrase appears. I have found the phrase in over 250 places in the Code.<sup>14</sup> In most sections where the phrase is used, the items are of equal significance

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<sup>11</sup> *Disabled in Action of Pennsylvania, v. Southeastern Pennsylvania Transportation Authority*, 539 F.3d 199, 212 (3d Cir. 2008) (emphasis added).

<sup>12</sup> *Id.*, quoting *Peters v. Ashcroft*, 383 F.3d 302, 309 (5<sup>th</sup> Cir. 2004). *Peters*’ full discussion of parentheses is as follows:

[The court’s] approach finds additional support in decisions, cited by this court in *Monjaras-Castaneda, supra* at 330, that have construed statutory parentheticals to signify clarifications, non-exclusive identifications, or visual aids. Congress in fact reduced the grammatical import of conspiracy and attempt, and correspondingly emphasized the breadth of “relating to,” when it replaced commas cordoning off conspiracy in the predecessor provision with the parentheses that now appear.

383 F.2d 308-309.

<sup>13</sup> *Mizrahi v. Gonzales*, 492 F.3d 156, 166 (2d Cir. 2007).

<sup>14</sup> See complete list in Appendix C.

and are not dependent on each other.<sup>15</sup> There are only four clauses (one of which appears twice) where one “case” referred to in the phrase is in parentheses and one is not.

Section 56E(d)(1) says “The term ‘qualified zone academy’ means any public school (or academic program within a public school).”<sup>16</sup> Paragraph (A) then discusses “such public school or program (as the case may be)”. Clearly, the item in parentheses (“academic program within a public school”) is a category related to the item outside (“public school”), and is dependent on it: you don’t know what an academic program within a public school is unless you know what a public school is.

Section 312(d)(2) says:

In the case of a distribution of stock or securities, or property, to which section 115(h) of the Internal Revenue Code of 1939 (or the corresponding provision of prior law) applied, the effect on earnings and profits of such distribution shall be determined under such section 115(h), or the corresponding provision of prior law, as the case may be.

Again, the item in parentheses is related to the item it follows, and is dependent on it; you don’t know what a “corresponding” provision is without understanding the original provision..

Section 503(f) discusses “a loan made by a trust described in section 401(a) to the employer (or to a renewal of such a loan . . .). Paragraphs (2) and (3) then discuss “the making or renewal, as the case may be.” Again, the renewal (in parentheses) is related to the item immediately before it, and is dependent on it: you have to identify the original loan to identify its renewal.

Thus there is a consistent structure throughout the Code: when an item in parentheses and an item immediately before it are referred to thereafter “as the case may be,” the item in parentheses is closely related to the item immediately before it, and is dependent on it. The same understanding should be applied in section 6662(e). Accordingly, when that section speaks of “the value of any property (or the adjusted basis

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<sup>15</sup> For example, section 1(f)(2), dealing with the phaseout of the marriage penalty in the 15 percent bracket, speaks of “The table which under paragraph (1) is to apply in lieu of the table contained in subsection (a), (b), (c), (d), or (e), as the case may be.”

<sup>16</sup> The same definition can be found in section 1397E(d)(4)(A)(i).



of any property) claimed on any return of tax imposed by chapter 1 [that] is 150 percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be),” we should understand the term “adjusted basis” to refer to a category related to “value,” and dependent on it.

It follows that the penalty for a 150% discrepancy in *adjusted basis* should be understood in light of the penalty for a 150% discrepancy in *value* that it follows. In other words, the basis overstatement to which section 6662(e) refers is one that arises from the type of problem that the section was targeted to address, namely subjective overvaluations that allow taxpayers to claim very large deductions or credits on their tax returns.

But if valuation is the focus of the statute, why is the basis parenthetical needed at all? Why didn’t Congress limit its overvaluation penalty to direct taxpayer overvaluations? The answer surely is that the *overvaluations* that powered many of the shelters Congress was attacking with this penalty generated credits and depreciation that were a function of *basis*. Certainly, when overvaluations are directly used by taxpayers to claim excessive deductions for charitable contributions,<sup>17</sup> for example, no reference to basis is needed. However, consider the plastic recycling shelter.<sup>18</sup> Taxpayers pay over a million dollars (most of it represented by nonrecourse debt) for a plastic recycling unit that costs \$18,000 to manufacture and is worth no more than \$50,000. Taxpayers then take credits and depreciation based on the vastly inflated basis. The *value* of the property is not “claimed” on the return, but the property’s *basis*—which is a function of overvalued property—is. It would appear that, to prevent taxpayers from arguing that the penalty does not apply to them because their deficiencies were not a result of claiming an overvalued asset directly on a return, Congress added a parenthetical reference to basis to

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<sup>17</sup> Appendices A and B cite 87 cases where the overvaluation penalty was imposed on taxpayers who claimed excessive deductions in this way.

<sup>18</sup> Seventy reported cases dealing with this shelter where a valuation misstatement penalty was asserted are cited in Appendix B. The specific facts in the text are taken from *Merino v. Commissioner*, 196 F.3d 147 (3d Cir. 1999). Note that, while only seventy reported cases deal with this shelter, many of those cases involved multiple taxpayers. For example, the decision in *Provizer v. Commissioner*, TC Memo 1992-177, *affd. per curiam* without published opinion, 996 F.2d 1216 (6th Cir. 1993), bound a number of the roughly 250 docketed cases on this issue. That opinion indicates that another approximately 1600 undocketed cases involved this shelter.

this penalty provision. In other words, the parenthetical reference to basis is needed to deal with basis that is inflated *as a consequence of* an overvaluation of property.

#### HOW HAS THE VALUATION MISSTATEMENT PENALTY BEEN APPLIED RECENTLY?

That is not how the IRS has applied the penalty recently. To evaluate where the IRS has, and has not, applied the penalty, I looked at the cases that have cited sections 6662(e) and 6662(h) (that is, the cases involving post-1989 tax years).<sup>19</sup> One hundred nineteen reported decisions cite section 6662(h), and another ten cite section 6662(e) without citing section 6662(h). This does not amount to 129 separate litigations, since the total includes a number of litigations that are reflected in more than one decided case.

An examination of the cases that cite section 6662(h) or section 6662(e) shows the following:

Twenty-four cases involved the valuation of easements (such as conservation easements) and other assets contributed to tax-exempt entities;

Two related to other valuation issues

One applied the step transaction doctrine to disallow a step-up in the basis of stock<sup>20</sup>

Twenty-five were “Son-of-BOSS” transactions<sup>21</sup>

Seven were foreign currency shelters<sup>22</sup>

Seven were cattle shelters promoted by Mr. Hoyt<sup>23</sup>

Four were CARDS shelters<sup>24</sup>

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<sup>19</sup> See Appendix A. I used RIA Checkpoint for this research. It brought up 73 cases that refer to 6662(e) and 119 that refer to 6662(h). I attempted to track down other cases where the reference was in a different form, such as “subsection (h) of section 6662,” but surely did not find all such cases.

<sup>20</sup> *G.D. Parker, Inc. v. Commissioner*, TC Memo 2012-327. This was not a marketed tax shelter. Interestingly, the court was troubled by the fact that the penalty was asserted where there was no valuation issue.

<sup>21</sup> E.g., *106 Ltd. v. Commissioner*, 684 F.3d 84 (D.C. Cir. 2012) (court concludes that basis of stock was inflated by disregarding a contingent liability).

<sup>22</sup> E.g., *Klamath Strategic Investment Fund v. U.S.*, 568 F.3d 537 (5<sup>th</sup> Cir. 2009) (taxpayer reduces amount of liability related to investment in currency-trading partnership by having very high interest rate on loan).

<sup>23</sup> These were cattle breeding shelters. E.g., *Keller v. Commissioner*, 556 F.3d 1056 (9<sup>th</sup> Cir. 2009) (cattle overvalued).

<sup>24</sup> E.g., *Gustashaw v. Commissioner*, 110 A.F.T.R.2d 2012-6169 (11<sup>th</sup> Cir. 2012) (taxpayer uses full amount of loan as basis, although taxpayer is only responsible for repayment of principal).

Twenty-one were other promoted shelter transactions.<sup>25</sup>

If we put aside the cases that directly raised an issue of valuation (the 26 charitable contribution and other valuation cases) and look only at the basis cases, we find that significantly less than half of them involve a basis inflated because of an overvaluation.<sup>26</sup> Instead, the inflated basis stems from a legal argument (for example, the proper treatment of contingent liabilities). “Value” plays no role in those cases.

In addition, the reported cases involve transactions that were promoted by major accounting firms or by other promoters. If we look only at those cases that do not involve actual overvaluations, we find only one where a taxpayer created inflated basis without the encouragement of promoters.<sup>27</sup> Penalties for inflated basis are asserted in structured transactions.

Why aren’t there more reported cases of this type involving taxpayers who were not involved in tax shelters? There are a number of possible explanations for this somewhat surprising result. Perhaps taxpayers who act without the prodding of promoters are not as greedy as the well-advised and don’t reach the 150% threshold of overstatement. Or perhaps those taxpayers have reasonable cause for their misstatements, thereby avoiding any penalty.<sup>28</sup>

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<sup>25</sup> The total of cases identified in the text is smaller than the number of cases that cite 6662(e) or (h). I could not determine the nature of the issue raising the section 6662(e) or (h) concern where the issue was not spelled out clearly in the case (often when the issue the court considers is procedural), e.g. *Funk v. Commissioner*, TC Memo 2001-291. I also omitted cases where the IRS conceded there was no 6662(e) or (h) penalty after first asserting it, e.g. *Kraus v. Commissioner*, TC Memo 2003-10; *Chin v. Commissioner*, TC Memo 2003-30; *Bradley v. MDC Credit Corp.*, 107 AFTR 2d 2011-1420 (D. S.D. 2011) (indemnity for tax liability; IRS apparently did not collect any penalties when case was resolved by stipulation). I omitted them because the IRS’s unwillingness to pursue the penalty issue might have reflected the IRS’s conclusion that it was wrong to assert the penalty in the first place. I also omitted section 482 cases, e.g., *DHL Corp. v. Commissioner*, TC Memo 1998-461, because they are subject to a separate provision in section 6662(h). A number of cases cite section 6662(e) or section 6662(h) for purposes of analysis where the section was not an issue in the litigation before the court.

<sup>26</sup> The twenty-five Son-of-BOSS cases, the eight foreign currency cases, and the four CARDS cases do not involve overvaluations. The seven Hoyt shelters do involve overvaluations. Less than half of the twenty-one other structured transactions involve actual overvaluations. The cases that don’t involve overvaluations were all decided after 2004.

<sup>27</sup> The exception is *G.D. Parker, Inc.*, cited in note 20.

<sup>28</sup> Under section 6664(c), there is a reasonable cause exception for penalties under section 6662.

These explanations are not correct. There are reported cases in which taxpayers, acting without the assistance of promoters, were liable for penalties (but not a penalty under section 6662(h) or section 6662(e)) for which they did not successfully assert a reasonable cause defense, and in which they overstated basis by at least 200%. Presumably, there are many other cases like this, since the facts in cases in which penalties are asserted are often so favorable to the Government that they are not brought to court.

Here are a few reported examples where penalties other than valuation overstatement penalties were asserted, and the taxpayer used a basis more than 200% of the basis ultimately found by the court:

In *Diaz v. Commissioner*,<sup>29</sup> taxpayer claimed a \$553,269 basis on a property she sold, but the court upheld the government's assertion that basis was only \$154,000. Apparently the taxpayer made no assertion in court to justify the inflated basis that she used on her return. The 20% accuracy related penalty was imposed, but no gross valuation misstatement penalty was asserted.

In *Allnutt v. Commissioner*,<sup>30</sup> taxpayer sold equipment for which he claimed a basis. The court held that the basis of the equipment was zero. The negligence penalty was assessed, but no gross valuation misstatement penalty was asserted.

In *Medlin v. Commissioner*,<sup>31</sup> the court found basis in each of two properties of \$1,903. The taxpayer did not report any gain on these transactions, which were sales for \$22,000 and \$23,000. The taxpayer was subject to a fraud penalty.

In *Brodsky v. Commissioner*,<sup>32</sup> the taxpayer's claim of bases in two properties of \$47,600 and \$36,685 was rejected by the court, which allowed taxpayer only a zero basis. The negligence penalty was asserted, but no penalty under section 6662(e) or (h).

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<sup>29</sup> TC Memo 2012-241 (2012).

<sup>30</sup> TC Memo 2004-239 (2004).

<sup>31</sup> TC Memo 2003-224 (2003).

<sup>32</sup> 82 T.C.M. 505 (2001).

In *Leighton v. Commissioner*,<sup>33</sup> the court added \$653,787 of capital gain to taxpayer's income because taxpayer could not prove any basis in property sold. The IRS asserted the substantial understatement penalty but no penalty under section 6662(e) or (h).

In *Tabbi v. Commissioner*,<sup>34</sup> the court reduced the basis of a lot acquired by the taxpayer as a gift from \$19,500 to zero. Fraud, negligence, and substantial understatement penalties were asserted, but not a valuation misstatement penalty.

In each of these cases, it would appear that the IRS could have asserted a 40% penalty under section 6662(h) but did not do so. Why did it not do so? If one thinks of this penalty as targeted at overvaluations, which is what the title of the section says, or if one looks at the discussion in the legislative history of the overvaluation penalty when it was first passed in 1981, which also speaks only of the problems of valuation, one can conclude that, since none of these cases had anything to do with valuation, it was inappropriate to apply the statute to them.

Our explanation of the language of the penalty, which recognizes that the basis parenthetical should be interpreted in light of the phrase that it follows (which deals with errors in valuation), is consistent with the fact that the IRS has *not* applied the penalty in more situations. But it does not explain the many recent cases where the IRS *has* asserted the penalty, because many of the cases where the penalty has been asserted are not ones where valuation is an issue. For example, in the “son-of-BOSS” transaction, a taxpayer uses a pair of options to create additional basis in assets while claiming that there is no matching liability in the structure. The IRS's legal attacks on shelters such as these relate to arguments about economic substance and the definition of a liability, not an analysis of the fair market value of the options.

In fact, what binds together the recent cases where the IRS has asserted valuation misstatement penalties is that they involve marketed tax shelters. The IRS's approach could well be explained by considering the effect on the IRS of the large number of tax-

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<sup>33</sup> 70 T.C.M. 1109 (1995), *aff'd*, 108 F.3d 332 (5th Cir. 1997).

<sup>34</sup> TC Memo 1995-463 (1995).

shelter cases that were subject to this penalty in the first ten years of its application (see Appendix B). Given the overwhelming number of tax-shelter cases that were subject to section 6659 penalties, it seems plausible that, in the eyes of the IRS, the valuation misstatement penalty came to be viewed as another tax shelter penalty. But it isn't. There are penalty sections of the Code that are specifically intended to deal with tax shelter transactions, such as section 6662A (imposition of accuracy-related penalty on understatements with respect to reportable transactions), and section 6662(b)(6) (penalty in respect of underpayment attributable to disallowance of a tax benefit by reason of a transaction lacking economic substance). The valuation misstatement penalties were not introduced into the Code to deal with tax shelters that do not involve overvaluation. They were part of an effort to control the Tax Court's case load.<sup>35</sup> From the reported cases from the 1980s, it appears that the IRS understood this limitation in the application of the valuation misstatement penalty. However, now it is using the valuation misstatement penalty as a surrogate for a "tax shelter" penalty that Congress has not authorized. When the attention of the courts is directed to the limited significance of the reference to basis in the statute, they should be willing to reject the IRS's approach.

#### THE REGULATIONS

The regulations under section 6662(e) do not recognize the significance of the parenthetical reference to basis in that section. They were first proposed in 1991,<sup>36</sup> ten years after the statute was passed, but they were intended to take account of the 1989 amendment that clearly subordinated the basis reference by moving it into a

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<sup>35</sup> This is evident from the legislative history quoted above at note 4. See also *Drobny v. Commissioner*, TC Memo 1995-209, which quotes from H. Rept. 98-861, at 985-986 (1984), 1984- 3 C.B. (Vol. 2) 239-240, as follows (emphasis added):

The conferees note that a number of the provisions of recent legislation have been designed, in whole or in part, to deal with the Tax Court backlog. Examples of these provisions are the increased damages assessable for instituting or maintaining Tax Court proceedings primarily for delay or that are frivolous or groundless (sec. 6673), the adjustment of interest rates (sec. 6621), *the valuation overstatement* and substantial understatement penalties (secs. 6659 and 6661), and the tax straddle rules (secs. 1092 and 1256).

<sup>36</sup> See 56 FR 8943 (March 4, 1991)

parenthetical.<sup>37</sup> Rather than tracking the language in the statute, the regulations drop the parentheses completely.

*Substantial valuation misstatement.* There is a substantial valuation misstatement if the value or adjusted basis of any property claimed on a return of tax imposed under chapter 1 is 200 percent or more of the correct amount.<sup>38</sup>

The examples in the regulations do not make clear whether the overstated basis of the assets they describe were the result of an inaccurate valuation.<sup>39</sup> In light of the Supreme Court’s decision in *Mayo*,<sup>40</sup> does this interpretation demand *Chevron*<sup>41</sup> deference?

There are two responses to this argument. First, there is nothing in the regulations that is directly contrary to the interpretation given above. While the regulations do not state that a “valuation misstatement” that arises because of an inflated basis must stem from an overvaluation, they don’t contradict that view either.<sup>42</sup>

Second, the regulation arguably violates the first step in a *Chevron* analysis. *Chevron* says that we must first determine whether the statute is sufficiently clear on its face that there is no need to defer to an administrative pronouncement.<sup>43</sup> In this regard, it is noteworthy that the regulations do not track the language of the statute, to the extent they drop the parentheses that are in the text of the statute. Congress could certainly have

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<sup>37</sup> See IA-015-90, 56 F.R. 8943 (3/4/91), the Notice of Proposed Rulemaking, which acknowledges the 1989 amendments that moved the penalty provision from section 6659 into section 6662.

<sup>38</sup> Treas. Regs. § 1.6662-5(e)(1).

<sup>39</sup> Treas. Regs. § 1.6662-5(d).

<sup>40</sup> *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. \_\_\_\_ (2011).

<sup>41</sup> *Chevron USA v. Natural Resources Defense Council*, 467 U. S. 837, 131 s.Ct. 704 (1984). For a more thorough discussion of the *Mayo* and *Chevron* issues, see David Shakow, “Who’s Afraid of the APA?” 134 Tax Notes 825 (Feb. 13, 2012).

<sup>42</sup> Example 3 in Treas. Regs. § 1.6662-5(d) comes closest to raising an issue with the statement in the text. In that example, the taxpayer claims a positive basis for depreciation although it had “fully depreciated” the asset in previous years. However, this could arise where the inflated basis is due to an overvaluation. Take a case of an asset depreciated on a straight-line basis over fifteen years. If the asset should have a basis of \$150,000, but instead is given a basis of \$450,000 by the taxpayer, the \$30,000 annual depreciation that the taxpayer will deduct in the first five years (a \$450,000 basis will lead to deductions of \$30,000/year over 15 years) will exhaust the asset’s actual \$150,000 basis, but the taxpayer will claim that it still has \$300,000 of basis to depreciate.

<sup>43</sup> E.g., *Mayo*, supra note 40, at \_\_\_\_ (“ask whether Congress has ‘directly addressed the precise question at issue.’”)

left the reference to basis outside parentheses, as it stood prior to 1989. But the statute now puts the reference to basis into parentheses, and the actual language of the statute must be interpreted. The restatement of the rule in the regulations, which omits the parentheses that were inserted in the text of the statute, does not demand deference since it ignores the way the statute is drafted. In fact, the interpretation we have given to the statute, with parentheses, is simple and straightforward. It reflects the legislative history of the penalty and the way the penalty was applied for the decade after it was passed: basis overstatements are subject to the penalty when they result from overvaluations. Grammatical rules and punctuation are appropriate factors in interpreting a statute.<sup>44</sup>

The change in the IRS's application of the valuation misstatement penalty in the 1990s, so that it applies to cases that have nothing to do with valuation, is unsupported by the statute and should be rejected. To the extent the regulation is read to support an overbroad interpretation of the statute, it can be ignored,

#### CONCLUSION

A cursory reading of section 6662(e) and section 6662(h) might suggest that these "valuation misstatement" penalties apply to a wide range of transactions that have nothing to do with valuations. However, when standard rules of statutory interpretation are applied to these provisions, their scope is substantially narrowed. This narrower application is consistent with the legislative history of these penalty provisions and their actual application, with one notable exception: the IRS has recently applied these provisions to tax shelters that involve no issues of valuation. Indeed, the substantial majority of recent cases where the IRS has asserted the 40% penalty of section 6662(h) involve tax shelters with inflated basis and no overvaluation. The IRS does not have the authority to assert a valuation misstatement penalty in those cases.

If this understanding of the misstatement penalties is recognized, the split in the Circuits regarding the application of section 6662(h)<sup>45</sup> loses most of its significance. The

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<sup>44</sup> See, e.g., *Haas v. Peake*, 525 F.3d 1168, 1179 (Fed Cir. 2008 (punctuation supports Government position)); *Garfias v. Holder*, 702 F.3d 504, 525 n.16 (9<sup>th</sup> Cir. 2012) (rejecting interpretation of statute that "violates both the rules of grammar and the statutory scheme").

<sup>45</sup> See authorities cited in notes 1 and 2, *supra*.



cases where the issue arises are tax shelters without economic substance. These shelters inflate basis without reference to any valuation misstatement. Taxpayers have argued that, if their shelter deductions are disallowed because the transaction has no economic substance, they cannot be penalized under section 6662(h) because reducing the inflated basis was not necessary in order to disallow their deductions. If section 6662(h) is properly understood, the penalty does not apply in these situations in any event, and the issue now being presented to the Supreme Court disappears.

#### POSTSCRIPT

After this article was submitted for publication, the Supreme Court accepted certiorari in *United States v. Gary Woods*,<sup>46</sup> a Fifth Circuit decision which raised the issue of whether the valuation misstatement penalty can be asserted if the taxpayer concedes that the transaction had no economic substance. In accepting certiorari, the Court said:

In addition to the question presented by the petition, the parties are directed to brief and argue the following question: Whether the district court had jurisdiction in this case under 26 U.S.C. §6226 to consider the substantial valuation misstatement penalty.<sup>47</sup>

This issue had been noted in a footnote to the Government's reply brief.<sup>48</sup> It cited two appellate decisions which had "called into question" whether the applicability of the overstatement penalty could be decided in a partnership-level proceeding where the partnership had participated in a sham transaction.<sup>49</sup> However, the brief went on to assert that the Tax Court and the Court of Federal Claims had since concluded that, "properly understood," these decisions do not preclude partnership-level review of penalty issues

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<sup>46</sup> 109 AFTR 2d 2012-751 (5<sup>th</sup> Cir. 2012), aff'g per curiam 794 F.Supp.2d 714 (W.D. Tex. 2011), reh'g den., 110 AFTR 2d 2012-751 (5<sup>th</sup> Cir. 2012).

<sup>47</sup> The Court's order can be accessed at [http://www.supremecourt.gov/orders/courtorders/032513zor\\_q86b.pdf](http://www.supremecourt.gov/orders/courtorders/032513zor_q86b.pdf).

<sup>48</sup> The Reply Brief is at Tax Notes Today, February 20, 2013, 2013 TNT 58-44.

<sup>49</sup> *Petaluma FX Partners, LLC v. Commissioner*, 591 F.3d 649, 655-656 (D.C. Cir. 2010); *Jade Trading, LLC v. United States*, 598 F.3d 1372, 1378-1380 (Fed. Cir. 2010).

similar to the one presented here.”<sup>50</sup> If the Court decides that the courts do not have jurisdiction to resolve the penalty issues in a partnership-level proceeding, it may not resolve the penalty issue discussed in this article after all.

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<sup>50</sup> *Tigers Eye Trading, LLC v. Commissioner*, 138 T.C. 67, 130-134 (2012); *Arbitrage Trading, LLC v. United States*, No. 06-202, 2013 WL 365601, at \*13 (Fed. Cl. 1/30/13). Chamberlain Hrdlicka was counsel to the taxpayer in *Jade Trading*, *Tigers Eye Trading*, and *Arbitrage Trading*.

**Appendix A\***  
**Cases under section 6662**

**SON OF BOSS (25)**

106 Ltd. v. Commissioner, 684 F.3d 84 (D.C. Cir. 2012)  
3K Investment Partners v. Commissioner, 133 TC 112 (2009)  
6611, Ltd. v. Commissioner, TC Memo 2013-49  
7050 Ltd. v. Commissioner, TC Memo 2008-112  
Alpha I, L.P. v. U.S., 682 F.3d 1009 (Fed Cir. 2012)  
American Boat Company, LLC v. U.S., 583 F.3d 471 (7th Cir. 2009)  
Arbitrage Trading, LLC v. United States, 111 AFTR 2d 2013-666 (Ct. Fed. Cl. 2013)  
Bemont Investments, L.L.C v. U.S., 109 AFTR 2d 2012-1922 (5th Cir. 2012)  
Bergmann v. Commissioner, 137 T.C. 136 (2011)  
Blak Investments v. Commissioner, T.C. Memo. 2012-273 (9/25/12).  
Candyce Martin 1999 Irrevocable Trust v. U.S., 108 AFTR 2d 2011-6693 (N.D. Ca. 2011)  
Clearmeadow Investments, LLC v. U.S., 103 AFTR 2d 2009-2786, 87 Fed. Cl. 509 (Ct. Fed. Cl. 2009)  
Domulewicz v. Commissioner, 129 TC 11 (2007)  
Jade Trading, LLC v. U.S., 107 AFTR 2d 2011 (Ct. Fed. Claims 2011)  
Krause v. U.S., 106 AFTR 2d 2010-6736, 398 Fed. Appx. 35 (5th Cir. 2010)  
Murfam Farms, LLC v. U.S., 106 AFTR 2d 2010-5893, 94 Fed. Cl. 235 (Ct. Fed. Claims 2010)  
Nussdorf v. Commissioner, 129 TC 30 (2007)  
Olesen v. Commissioner, TC Memo 2009-307  
Palm Canyon X Invest., LLC, TC Memo 2009-288  
Petaluma FX Partners v. Commissioner, 591 F.3d 649 (D.C. Cir. 2010)  
Rawls Trading, L.P. v. Commissioner, 138 T.C. No. 12 (2012)  
SAS Investment Partners v. Commissioner, TC Memo 2012-159

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\* I have not attempted to check systematically the subsequent history of these cases, since my interest is in determining when the IRS asserts the valuation misstatement penalty.

Stobie Creek Investments, LLC v. U.S., 102 AFTR 2d 2008-5442, 82 Fed. Cl. 636 (Ct. Fed. Cl. 2008)

Thompson v. Commissioner, 137 T.C. 220 (2011)

Tigers Eye Trading, LLC v. Commissioner, 138 T.C. No. 6 (2012)

#### **HOYT SHELTER (7)**

Estate of Capehart v. Commissioner, 125 T.C. 211 (2005)

Hitchen v. Commissioner, TC Memo 2004-265

Jaroff v. Commissioner, TC Memo 2004-276

Keller v. Commissioner, 556 F.3d 1056 (9th Cir. 2009)

McDonough v. Commissioner, 103 AFTR 2d 2009-833 (9th Cir. 2009)

Panice v. Commissioner, TC Memo 2007-110

Phillips v. Commissioner, 114 T.C. 115 (2000)

#### **FOREIGN CURRENCY (8)**

CEMCO Investors, LLC v. U.S., 99 AFTR 2d 2007-1882, (N. D. Ill. 2007)

Fears v. Commissioner, 129 T.C. 8 (2007) (foreign currency options)

Fidelity Int'l Currency Advisor A Fund, LLC v. U.S. 661 F.3d 667 (1st Cir. 2011)

Klamath Strategic Investment Fund, LLC v. U.S. 472 F. Supp. 2d 885 (E.D. Tex. 2007)

Meruelo v. Commissioner, 132 TC 355 (2009)

New Millennium Trading, L.L.C. v. Commissioner, 131 TC 275 (2008)

Rovakat LLC v. Commissioner, TC Memo 2011-225 (distressed assets)

Sala v. U.S., 100 AFTR 2d 2007-5097 (D. Colo. 2007) and 552 F. Supp. 2d 1167 (D. Colo. 2008)

#### **CARDS (4)**

Crispin v. Commissioner, TC Memo 2012-70

Douglas v. U.S., 98 AFTR 2d 2006-6307 (N.D. Cal. 2006)

Gustashaw v. Commissioner, 110 A.F.T.R.2d 2012-6169 (11<sup>th</sup> Cir. 2012)

Kerman v. Commissioner, TC Memo 2011-54

#### **OTHER STRUCTURED TRANSACTIONS (21)**

Blum v. Commissioner, TC Memo 2012-16 (OPIS--options)

Chemtech Royalty Associates, L.P. v. United States, 111 AFTR 2d 2013-\_\_\_ (M.D. La. 2013 (SLIPS)

Gerdau MacSteel Inc. v. Commissioner, 139 T.C. No. 5 (2012) (Deloitte double deduction—contingent liabilities)

Goldin v. Commissioner, TC Memo 2004-129 (2004) (Robotics shelter)

Gottsegen v. Commissioner, TC Memo 1997-314 (1997) (plastics recycling shelter)

Hawk, Jr. v. Commissioner, TC Memo 2012-154 (2012) (“intermediary” transaction)

LKF X Investments LLC v. Commissioner, TC Memo 2009-192 (suspect “market-linked deposit”)

Long Term Capital Holdings, LP v. United States, 96 AFTR 2d 2005-6344 (D. Conn. 2005) (CHIPS and TRIPS)

Martin v. Commissioner, TC Memo 1995-448 (Renewable Energy System).

Nevada Partners Fund, LLC v. U.S., 105 AFTR 2d 2010-2133 (S.D. Miss. 2010) (FOCUS)

New Phoenix Sunrise Corp. v. Commissioner, 106 AFTR 2d 2010-7116 (6th Cir. 2010) (BLISS)

Princeton Strategic Invest. Fund, LLC v. U.S., 108 AFTR 2d 2011-7519 (N.D. Cal. 2011) (BLIPS)

RJT Investments v. Commissioner, 491 F.3d 732 (8<sup>th</sup> Cir. 2007) (matching “bonus coupons”)

Santa Monica Pictures, LLC v. Commissioner, TC Memo 2005-104 (2005)

Schwartz v. Commissioner, TC Memo 1994-320 (lithograph shelter)

Scoville v. Commissioner, 108 F.3d 1386 (9<sup>th</sup> Cir. 1997) (master recording)

Southgate Master Fund, LLC. v. U.S., 659 F.3d 466 (5th Cir. 2011) (nonperforming Chinese loans)

Starnes v. Commissioner, TC Memo 2011-63 (interest rate swap option)

Superior Trading LLC v. Commissioner, 137 T.C. 70 (2011) (DAD—distressed receivables)

Wilmington Partners, L.P. v. Commissioner, TC Memo 2009-193 (reset note)

Woods v. United States, 794 F.Supp.2d 714 (W.D. Tex. 2011) (COBRA)

#### **CHARITABLE CONTRIBUTIONS (24)**

1982 East, LLC v. Commissioner, TC Memo 2011-84 (2010) (conservation easement)

Bergquist v. Commissioner, 131 T.C. 8 (2008)

Boltar v. Commissioner, 136 TC 326 (2011) (conservation easement)

Derby v. Commissioner, TC Memo 2008-45 (intangibles contributed to medical foundation)

Dunlap v. Commissioner, TC Memo 2012-126 (façade easement)

Esgar Corporation v. Commissioner, TC Memo 2012-35 (conservation easement)

Evans v. Commissioner, TC Memo 2010-207 (façade easement)

Friedberg v. Commissioner, TC Memo 2011-238 (façade easement)

Herman v. Commissioner, TC Memo 2009-205 (conservation easement)

Jacobson v. Commissioner, TC Memo 1999-401

Kaplan v. Commissioner, TC Memo 2006-16 (real property)

Kaufman v. Commissioner, 136 T.C. 294 (2011) (façade easement)

Kellahan v. Commissioner, TC Memo 1999-210

Kiva Dunes Conserv. LLC v. Commissioner, TC Memo 2009-145 (conservation easement)

Mitchell v. Commissioner, 138 T.C. No. 16 (2012) (conservation easement)

Pollard v. Commissioner, TC Memo 2013-38

Rolfs v. Commissioner, 135 TC 471 (2010)

Rothman v. Commissioner, TC Memo 2012-163 (façade easement)

Sergeant v. Commissioner, TC Memo 1998-265 (yachts)

Strasburg v. Commissioner, TC Memo 2000-94 (conservation easement)

Turner v. Commissioner, 126 T.C. 299 (2006) (façade easement)

Wall v. Commissioner, TC Memo 2012-169 (preservation easement)

Whitehouse Hotel Ltd. Partnership v Commissioner, 131 T.C. 112 (2008), vacated and remanded, 615 F.3d 321 (5<sup>th</sup> Cir. 2010), on remand, 139 T.C. No. 13 (2012) (façade easement)

Zeluck v. Commissioner, TC Memo 2012-98 (historic preservation easement)

#### **OTHER VALUATION (2)**

Beaver Bolt, Inc. v. Commissioner, TC Memo 1995-549 (determining FMV of covenant not to compete so total amount paid can be allocated to it)

Litman v. United States, 81 Fed. Cl. 315 (2008) (value of stock received in IPO)

#### **OTHER (1)**

G.D. Parker, Inc. v. Commissioner, TC Memo 2012-327 (step transaction doctrine applied to disallow step-up in basis of stock)

**Appendix B\***  
**Cases under old section 6659**

**PLASTIC RECYCLING (70)**

Addington v. Commissioner, 205 F.3d 54 (2d Cir. 2000)  
Allison III v. U.S., 80 Fed. Cl. 568 (Ct. Fed. Cl. 2008)  
Atkind v. Commissioner, TC Memo 1995-582  
Avellini v. Commissioner, TC Memo 1995-489  
Baratelliv. Commissioner, TC Memo 1994-484  
Barber v. Commissioner, TC Memo 2000-372  
Barlow v. Commissioner, 301 F.3d 714 (6<sup>th</sup> Cir. 2002)  
Becker v. Commissioner, TC Memo 1996-538  
Bennett v. Commissioner, TC Memo 1996-14  
Berry v. Commissioner, TC Memo 2001-311  
Busch v. Commissioner, TC Memo 1996-342  
Carroll v. Commissioner, 88 AFTR 2d 2001-7129 (2d Cir. 2001)  
Clark v. U.S., 171 F. Supp. 2d 1341 (C.D. Ga. 2001)  
Cohen v. Commissioner, TC Memo 2003-303  
Conway v. U.S., 326 F.3d 1268 (Fed. Cir. 2003)  
Davenport Recycling Associates v. Commissioner, TC Memo 1998-347  
Dworkin v. Commissioner, TC Memo 1995-533  
Dyckman v. Commissioner, TC Memo 1999-79  
Eisenberg v. Commissioner, TC Memo 1995-180  
Evans v. Commissioner, TC Memo 1999-66  
Farrell v. Commissioner, 136 F.3d 889 (2d Cir. 1998)  
Feinberg v. Commissioner, TC Memo 2003-304  
Ferraro v. Commissioner, TC Memo 1999-324  
Fine v. Commissioner, TC Memo 1995-222  
Fisher v. Commissioner, TC Memo 1994-434  
Fralich v. Commissioner, TC Memo 1995-257  
Friedman v. Commissioner, TC Memo 1996-558

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\* I have not attempted to check systematically the subsequent history of these cases, since my interest is in determining when the IRS asserts the valuation misstatement penalty.

Gilmore & Wilson Construction Co. v. Commissioner, 166 F.3d 1221 (10<sup>th</sup> Cir. 1999)

Gollin v. Commissioner, TC Memo 1996-454

Gottsegen v. Commissioner, TC Memo 1997-314

Greene v. Commissioner, TC Memo 1997-296

Greer v. Commissioner, TC Memo 2007-119

Grelsamer v. Commissioner, TC Memo 1996-399

Halpern v. Commissioner, TC Memo 2000-151

Henry v. Commissioner, TC Memo 1997-86

Hirshfield v. U.S., 177 F.Supp.2d 220 (S.D. N.Y. 2001), aff'd per curiam, 70 Fed. Appx. 609 (2d Cir. 2003)

Estate of Hogard v. Commissioner, TC Memo 1997-174

Jaroff v. Commissioner, TC Memo 1996-527

Kaliban v. Commissioner, TC Memo 1997-271

Klein v. U.S., 86 F Supp 2d 690 (E. D. Mich. 1999)

Kohn v. Commissioner, TC Memo 1999-150

Korchak v. Commissioner, TC Memo 2005-244

Kott v. Commissioner, TC Memo 1995-181

Kowalchuk v. Commissioner, TC Memo 2000-153

Lacher et ux. v. Commissioner, TC Memo 2000-260

Lewin v. Commissioner, TC Memo 2003-305

Merino v. Commissioner, 196 F.3d 147 (3d Cir. 1999)

Pace v. Commissioner, TC Memo 1995-580

Paulson v. Commissioner, TC Memo 1995-387

Pearlman v. Commissioner, TC Memo 1995-182

Pierce v. Commissioner, TC Memo 1995-223

Provizer v Commissioner, TC Memo 1992-177 affd. per curiam without published opinion, 996 F.2d 1216 (6th Cir. 1993)

Ramesh v. Commissioner, TC Memo 1995-346

Reimann v. Commissioner, TC Memo 1996-84

Reister v. Commissioner, TC Memo 1995-305

Sann v. Commissioner, TC Memo 1997-259

Estate of Satin v. Commissioner, TC Memo 1994-435

Shapiro v. Commissioner, TC Memo 1995-224



Singer v. Commissioner, TC Memo 1997-325  
Skyrms v. Commissioner, TC Memo 1997-69  
Spears v. Commissioner, 131 F.3d 131 (2d Cir. 1997)  
Stone v. Commissioner, TC Memo 1996-230  
Thornsjo v. Commissioner, TC Memo 2001-129  
Triemstra v. Commissioner, TC Memo 1995-581  
Ulanoff v. Commissioner, TC Memo 1999-170  
Weitzman v. Commissioner, TC Memo 2001-215  
West v. Commissioner, TC Memo 2000-389  
Wilson v. Commissioner, TC Memo 1995-525  
Zenkel v. Commissioner, TC Memo 1996-398  
Zidanich v. Commissioner, TC Memo 1995-382

#### **MASTER RECORDINGS AND TV VIDEOTAPE SHELTERS (104)**

AD Global Fund, LLC v. U.S., 67 Fed. Cl. 657 (Ct. Fed. Cl. 2005) (video game)  
Aero Warehouse Corp. v. Commissioner, TC Memo 1989-180  
American Educare, Ltd. v. Commissioner, TC Memo 1990-159  
Anderson v. Commissioner, TC Memo 1992-102  
Antoine v. Commissioner, TC Memo 1996-358  
Apperson v. Commissioner, TC Memo 1987-571  
Avers v. Commissioner, TC Memo 1988-176  
Backstrom v. Commissioner, TC Memo 1997-211  
Baigent v. Commissioner, TC Memo 1987-314  
(George L.) Barber v. Commissioner, TC Memo 1991-301  
(William E.) Barber v. Commissioner, TC Memo 1989-284  
Bilye v. Commissioner, TC Memo 1988-209  
Booker v. Commissioner, TC Memo 1996-347 (video game)  
Brooke v. Commissioner, TC Memo 1996-262  
Buxbaum v. Commissioner, TC Memo 1992-675  
Charlton v. commissioner, TC Memo 1990-402  
Chester v. Commissioner, TC Memo 1986-355  
Chiechi v. Commissioner, TC Memo 1993-630  
Christian v. Commissioner, TC Memo 1994-332

Clayden v. Commissioner, 90 TC 656 (1988) (TV videotapes)  
Coffey v. Commissioner, TC Memo 1991-516  
Dawson v. Commissioner, TC Memo 1996-45 (medical education)  
Depew v. Commissioner, TC Memo 1988-48  
Diego Investors – IV, TC Memo 1989-630  
Donahue v. Commissioner, TC Memo 1991-181  
Doyle v. Commissioner, TC Memo 1989-465  
Dumski v. Commissioner, TC Memo 1991-299  
Ellison v. Commissioner, TC Memo 1992-741  
Feldmann v. Commissioner, TC Memo 1991-353  
Festa v. Commissioner, TC Memo 1992-333  
Foy v. Commissioner, TC Memo 1992-81  
Frazell v. Commissioner, 88 TC 1405 (1987) (educational)  
Fritz v. Commissioner, TC Memo 1991-176  
Garcia v. Commissioner, TC Memo 1991-451  
Gerhart v. Commissioner, TC Memo 1991-35  
Goldberg v. Commissioner, TC Memo 1992-108  
Gray Jr. v. Commissioner, TC Memo 1996-525  
Haiduk v. Commissioner, TC Memo 1990-506 (stamp masters)  
Harmon v. Commissioner, TC Memo 1986-305  
Harness v. Commissioner, TC Memo 1991-321  
Hattersley v. Commissioner, TC Memo 1992-55  
Hawkins v. Commissioner, TC Memo 1987-233  
Hester v. Commissioner, TC Memo 1992-554  
Hill v. Commissioner, TC Memo 1987-380  
Hinojos v. Commissioner, TC Memo 1991-401  
Hopkins v. Commissioner, TC Memo 1992-134  
Hunt v. Commissioner, TC Memo 1989-660  
Illes v. Commissioner, TC Memo 1991-449  
Jagla v. Commissioner, TC Memo 1991-300  
Janklow v. Commissioner, TC Memo 1988-46  
Joint Implant Surgeons, Inc. v. Commissioner, TC Memo 1988-558 (& art shelter)

Jonathan T. Bromwell & Associates, Inc. v. Commissioner, TC Memo 1993-438  
(paperback books)

Kennedy v. Commissioner, TC Memo 1996-360

Kims v. Commissioner, TC Memo 1994-262

Kirin v. Commissioner, TC Memo 1996-356

Kovacevich v. Commissioner, TC Memo 1986-513

Leuhsler v. Commissioner 1991-179

Looney v. Commissioner, TC Memo 1988-332

Lucas v. Commissioner, TC Memo 1991-302

Marinos v. Commissioner, TC Memo 1989-492

Masters v. Commissioner, TC Memo 1994-197 and TC Memo 1994-178

Masuga v. Commissioner, TC Memo 1991-311

Maultsby v. Commissioner, TC Memo 1989-659

Maxwell v. Commissioner, 87 TC 783 (1986) (video game)

McCain v. Commissioner, TC Memo 1987-285

McCrary v. Commissioner, 92 TC 827 (1989)

McCune v. Commissioner, TC Memo 1988-513

Menardi v. Commissioner, TC Memo 1992-57

Miller v. Commissioner, 104 TC 378 (1995)

Minovich v. Commissioner, TC Memo 1994-89

Morrissey v. Commissioner, TC Memo 1989-646

Morrow v. Commissioner, TC Memo 1988-372

Neumann v. Commissioner, TC Memo 1998-126

Nielsen v. Commissioner, 87 TC 779 (1986)

O'Harren v. Commissioner, TC Memo 1990-332

Parson v. Commissioner, TC Memo 1992-70

Patmon v. Commissioner, TC Memo 1989-189

Penix v. Commissioner, TC Memo 1991-332

Perau v. Commissioner, TC Memo 1991-304

Prohaska v. Commissioner, TC Memo 1991-305

Prohaska v. Commissioner, TC Memo 1991-306

Rampulla v. Commissioner, TC Memo 1993-504

Rhodes v. Commissioner, 108 F3d 1370 (2d Cir. 1997)

Richie v. Commissioner, TC Memo 1995-59  
Riederich v. Commissioner, TC Memo 1991-164  
Roberson v. Commissioner, 142 F.3d 435 (6<sup>th</sup> Cir. 1998)  
Rybak v. Commissioner, 91 TC 524 (1988)  
Scoville v. Commissioner, 108 F3d 1386 (9<sup>th</sup> Cir. 1997)  
Secoy v. Commissioner, TC Memo 1987-286  
Seely v. Commissioner, TC Memo 1986-216  
Sharbek v. Commissioner, TC Memo 1992-87  
Shelton v. Commissioner, TC Memo 1988-351  
Stoy v. Commissioner, TC Memo 1996-359  
Tassistro v. Commissioner, TC Memo 1987-192  
Turner v. Commissioner, TC Memo 1995-363  
Urbanski v. Commissioner, TC Memo 1994-384  
Virovec v. Commissioner, TC Memo 1991-303  
White v. Commissioner, TC Memo 1987-251  
Whittaker v. Commissioner, TC Memo 1992-29  
Wicker v. commissioner, TC Memo 1988-225  
Williams v. Commissioner, TC Memo 1996-357  
Wolf v. Commissioner, TC Memo 1991-205  
Young v. Commissioner, TC Memo 1989-480  
Zfass v. Commissioner, 118 F3d 184 (4<sup>th</sup> Cir. 1997) (medical education)

#### **ENERGY CONSERVATION AND MANAGEMENT DEVICES (38)**

Barr v. Commissioner, TC Memo 1995-120 (Saxon)  
Cooper v. Commissioner, 88 TC 84 (1987) (solar water heating systems; transactions held genuine, but higher interest rate applied because value was overstated under § 6659)  
Crawford v. Commissioner, TC Memo 2002-10 (“First Energy”)  
Engler v. Commissioner, TC Memo 1995-338  
Garner v. Commissioner, TC Memo 1996-37  
Heasley v. Commissioner, TC Memo 1988-408  
Heil v. Commissioner, TC Memo 1994-417  
Kaba v. Commissioner, TC Memo 1989-148  
Katchis v. U.S., 84 AFTR 2d 99-5503 (C.D. N.Y. 1999)

Keenan v. Commissioner, TC Memo 1989-300  
Kincaid v. Commissioner, TC Memo 1999-419  
Levine v. Commissioner, TC Memo 1995-362  
Lucas v. Commissioner, TC Memo 1995-341  
Maminga v. Commissioner, TC Memo 1995-361  
Mosesian v. Commissioner, TC Memo 1990-415 (wind turbines)  
Olson v. U.S., 172 F.3d 1311 (Fed. Cir. 1999)  
Osowski v. Commissioner, TC Memo 2000-367  
O'Sullivan v. Commissioner, TC Memo 1994-395 (wind turbine)  
Pacheco v. Commissioner, TC Memo 1989-296  
Paxson v. Commissioner, TC Memo 1994-513 (Saxon)  
Plank v. Commissioner, TC Memo 1993-234  
Poplar v. Commissioner, TC Memo 1995-337  
Roach v. Commissioner, TC Memo 1989-586  
Rogers v. Commissioner, TC Memo 1990-619  
Schillinger v. Commissioner, TC Memo 1990-640 (Saxon)  
Sinclair v. Commissioner, TC Memo 1990-10  
Soriano v. Commissioner, 90 TC 44 (1988)  
Spears v. Commissioner, TC Memo 1992-78  
Stewart v. Commissioner, TC Memo 1989-505 (solar devices) (95 cases)  
Toan v. Commissioner, TC Memo 2000-384  
Upchurch v. Commissioner, TC Memo 1996-441 (Saxon)  
Van Duzer v. Commissioner, TC Memo 1991-249 (windfarm)  
Vojticek v. Commissioner, TC Memo 1995-444  
Walford v. Commissioner, 95 AFTR 2d 2005-1240, 123 Fed. Appx. 952 (10<sup>th</sup> Cir. 2005)  
Wall v. Commissioner, TC Memo 1991-611 (farm energy equipment)  
Wood v. Commissioner, TC Memo 1991-205 (solar water heating)  
Wood v. Commissioner, TC Memo 1990-25 (energy equipment)  
Estate of Woodward v. Commissioner, TC Memo 1995-523

#### **OIL AND GAS (24)**

Aude v. Commissioner, TC Memo 1997-478  
Barnhill Jr. v. Commissioner, TC Memo 1996-97 (Elektra/Hemisphere)

Copeland v. Commissioner, 290 F.3d 326 (5<sup>th</sup> Cir. 2002)  
Crittendon v. Commissioner, TC Memo 1990-156  
Dugow v. Commissioner, TC Memo 1993-401  
Ferrell v. Commissioner, 90 TC 1154 (1988)  
Hendricks v. Commissioner, TC Memo 2005-72  
Estate of Jonson v. Commissioner, 118 TC 106 (2002)  
Karlsson v. Commissioner, TC Memo 1997-432  
Kirch v. U.S., 83 AFTR 2d 99-2153 (D. Ohio 1999) (Elektra/Hemisphere)  
Lax v. Commissioner, TC Memo 1994-329  
Lebow v. Commissioner, TC Memo 1995-333  
Marinovich v. Commissioner, TC Memo 1999-179  
Martin v. Commissioner, TC Memo 2000-187 (Elektra/Hemisphere)  
McComb v. Commissioner, TC Memo 1994-577  
McGann v. U.S., 81 Fed. Cl. 642 (Ct. Fed. Cl. 2008)  
Osterhout v. Commissioner, TC Memo 1993-251  
Palmer v. Commissioner, TC Memo 1987-204  
Peat Oil and Gas Associates v. Commissioner, 100 TC 271 (1993) (Koppelman Process)  
Sergy v. Commissioner, TC Memo 1990-442  
Smith v. Commissioner, 91 TC 733 (1988) (Koppelman Process)  
Starrett v. Commissioner, TC Memo 1990-183  
Vanderschraaf v. Commissioner, TC Memo 1997-306  
Webb v. Commissioner, TC Memo 1990-556

### **CHARITABLE DONATION (63)**

Alpern Trust v. Commissioner, TC Memo 1988-200  
Angell v. Commissioner, TC Memo 1986-528  
Baker v. Commissioner, TC Memo 1990-263 (medical videotapes)  
Bennett v. Commissioner, TC Memo 1991-604  
Bragg v. Commissioner, 102 TC 715 (1994)  
Brigham v. Commissioner, TC Memo 1992-413  
Chou v. Commissioner, TC Memo 1990-90  
Clemens v. Commissioner, TC Memo 1992-436 (conservation easement)  
Cranfill v. Commissioner, TC Memo 1988-478

Cunningham v. Commissioner, TC Memo 1987-298  
D'Arcangelo v. Commissioner, TC Memo 1994-572  
Davis v. Commissioner, TC Memo 1999-250  
Dorsey v. Commissioner, TC Memo 1990-242 (façade easement)  
Dubin v. Commissioner, TC Memo 1986-433  
Easton v. Commissioner, TC Memo 1991-461  
Engel v. Commissioner, TC Memo 1993-362  
Ferguson v. Commissioner, 108 TC 244 (1997) (stock)  
Ferman, Jr. v. Commissioner, TC Memo 1994-541  
Frates v. Commissioner, TC Memo 1987-79  
Gibbs v. Commissioner, TC Memo 1988-491  
Glick v. Commissioner, TC Memo 1997-65  
Griffin v. Commissioner, TC Memo 1989-130  
Harding v. Commissioner, TC Memo 1995-216  
Hecker v. Commissioner, TC Memo 1987-297  
Higgins v. Commissioner, TC Memo 1990-103 (conservation easement)  
Hunter v. Commissioner, TC Memo 1986-308  
Jennings v. Commissioner, TC Memo 1988-521  
Johnson v. Commissioner, 85 TC 469 (1985)  
Johnson v. Commissioner, TC Memo 1989-394 (mining interest)  
Kerckhoff v. Commissioner, TC Memo 1987-299  
Klavan v. Commissioner, TC Memo 1993-299  
Leibowitz v. Commissioner, TC Memo 1997-243  
Losch v. Commissioner, TC Memo 1988-230 (preservation easement)  
Malone v. Commissioner, TC Memo 1987-300  
Mast v. Commissioner, TC Memo 1989-119  
McMurray v. Commissioner, TC Memo 1992-27  
Estate of Miller, TC Memo 1991-515  
Murphy v. Commissioner, TC Memo 1991-276  
Parks v. Commissioner, TC Memo 1994-1  
Pasqualini v. Commissioner, TC Memo 1994-323  
Perdue v. Commissioner, TC Memo 1991-478  
Provitola v. Commissioner, TC Memo 1990-523

Rhoades v. Commissioner, TC Memo 1988-279  
Robins v. Commissioner, TC Memo 1997-245  
Rochin v. Commissioner, TC Memo 1992-262  
Rohde v. Commissioner, TC Memo 1990-656  
Rollinson v. Commissioner, TC Memo 1987-372  
Schachter v. Commissioner, TC Memo 1986-292  
Schapiro v. Commissioner, TC Memo 1991-128 (conservation easement)  
Schwab v. Commissioner, TC Memo 1994-232 (conservation easement)  
Stanley Works v. Commissioner, 87 TC 389 (1986) (conservation easement)  
Stotler v. Commissioner, TC Memo 1987-275 (scenic easement)  
Suna v. Commissioner, TC Memo 1988-541  
Tallal v. Commissioner, 88 TC 1192 (1987), and TC Memo 1986-548  
Torney v. Commissioner, TC Memo 1993-385 (stock)  
Van Zeist v. Commissioner, 100 F.3d 1259 (7<sup>th</sup> Cir. 1996)  
Vesper v. Commissioner, TC Memo 1989-358  
Waranch v. Commissioner, TC Memo 1989-596  
Weintrob v. Commissioner, TC Memo 1990-513  
Weiss v. Commissioner, TC Memo 1993-228  
Williams v. Commissioner, TC Memo 1988-6  
Williford v. Commissioner, TC Memo 1992-450  
Winokur v. Commissioner, 90 TC 733 (1988)

**CATTLE SHELTERS (INCLUDING HOYT SHELTERS) (17)**

Bales v. Commissioner, TC Memo 1989-568 (Hoyt)  
Barnes v. Commissioner, TC Memo 2004-266 (Hoyt)  
Boyer v. Commissioner, TC Memo 1992-724  
Brown v. Commissioner, TC Memo 1992-379 (standard bred horses)  
Cherin v. Commissioner, 89 TC 986 (1987)  
Coward v. Commissioner, TC Memo 1997-198 (Hoyt)  
Daoust v. Commissioner, TC Memo 1994-203  
Ertz v. Commissioner, TC Memo 2007-15 (Hoyt)  
Givens v. Commissioner, TC Memo 1989-529  
Jackson v. Commissioner, TC Memo 1990-520



Massengill v. Commissioner, TC Memo 1988-427  
McBroom v. Commissioner, TC Memo 1995-485 (Hoyt)  
Mitchell v. Commissioner, TC Memo 1995-411 (Hoyt)  
Persson v. Commissioner, TC Memo 1989-567 (bull)  
Rasmussen v. Commissioner, TC Memo 1992-212  
River City Ranches #1 Ltd. v. Commissioner, 401 F.3d 1136 (9<sup>th</sup> Cir. 2005) (Hoyt)  
Zirker v. Commissioner, 87 TC 970 (1986) (no penalty; valuation overstatement was a result of the finding that there was no sale and did not lead to that conclusion)

#### **MOTION PICTURE SHELTER (24)**

Ailloni-Charas v. Commissioner, TC Memo 1988-83  
Bailey v. Commissioner, 90 TC 558 (1988)  
Brown v. Commissioner, TC Memo 1988-527  
Estate of Canfield, TC Memo 1987-294  
Dillon v. Commissioner, TC Memo 1998-5  
Garner v. Commissioner, TC Memo 1987-510 (TV film)  
Green v. Commissioner, TC Memo 1989-436  
Helba v. Commissioner, 87 TC 983 (1986)  
Isenberg v. Commissioner, TC Memo 1987-269  
Jameson v. Commissioner, TC Memo 1985-262  
Law v. Commissioner, 84 TC 985 (1985)  
Losmann v. Commissioner, TC Memo 1990-149 (TV show)  
Markin v. Commissioner, TC Memo 1989-665  
Meister v. Commissioner, TC Memo 1988-487  
Pellman v. Commissioner, TC Memo 1988-37  
Estate of Ravetti v. Commissioner, TC Memo 1994-260  
Samford v. Commissioner, TC Memo 2000-266  
Schwartz v. Commissioner, TC Memo 1987-381  
Segal v. Commissioner, TC Memo 1992-390  
Smith v. Commissioner, TC Memo 1990-510  
Taft v. Commissioner, TC Memo 1987-542  
Taube v. Commissioner, 88 TC 464 (1987) (court found price not inflated)  
Upham v. Commissioner, TC Memo 1989-253

West v. Commissioner, 88 TC 152 (1987)

### **LEASING SHELTER (43)**

Abramson v. Commissioner, TC Memo 1987-276 (equipment)  
Alhouse v. Commissioner, TC Memo 1991-652 (computers)  
Anderson v. Commissioner, TC Memo 1993-607 (containers)  
B and A Distributing Co. v. Commissioner, TC Memo 1988-589 (computers)  
B.D. Morgan & Co. v. Commissioner, TC Memo 1988-569 (software)  
Barton v. Commissioner, TC Memo 1988-396 (data processing equipment)  
Batastini v. Commissioner, TC Memo 1987-378 (school buses)  
Brand v. Commissioner, TC Memo 1988-194 (containers)  
Chellappan v. Commissioner, TC Memo 1988-208 (equipment)  
Cleland v. Commissioner, TC Memo 1993-589 (containers)  
Cohen v. Commissioner, TC Memo 1988-525 (computers)  
Coleman v. Commissioner, TC Memo 1990-509 (computers)  
Dobbs v. Commissioner, TC Memo 1987-361 (computers)  
Dybsand v. Commissioner, TC Memo 1994-56 (philatelic leasing)  
Falligan v. Commissioner, TC Memo 1993-606 (containers)  
Gainer v. Commissioner, TC Memo 1988-416 (containers)  
Gilman v. Commissioner, TC Memo 1990-205 (computers)  
Grainek v. Commissioner, TC Memo 1989-433 (computers)  
Henninger v. Commissioner, TC Memo 1991-574 (medical equipment)  
HGA Cinema Trust v. Commissioner, TC Memo 1989-370 (computers)  
Hoffpauir v. Commissioner, TC Memo 1996-41 (software)  
Jones v. Commissioner, TC Memo 1987-163 (containers)  
Kenney v. Commissioner, TC Memo 1993-108 (trailers)  
Kimmich v. Commissioner, TC Memo 1999-349  
Marcinek v. Commissioner, TC Memo 1993-631 (containers)  
Mukerji v. Commissioner, 87 TC 926 (1986) (computers)  
Noonan v. Commissioner, TC Memo 1986-449 (containers)  
Offermann v. Commissioner, TC Memo 1988-236 (computers)  
Pearlstein v. Commissioner, TC Memo 1989-621 (computers)  
Qureshi v. Commissioner, TC Memo 1996-169 (containers)

Raquet v. Commissioner, TC Memo 1996-279 (also mining)  
Rudisill v. Commissioner, TC Memo 1992-388 (computer software)  
Sacks v. Commissioner, TC Memo 1992-596 (solar equipment)  
Santulli v. Commissioner, TC Memo 1995-458 (sale/leaseback)  
Shortal v. Commissioner, TC Memo 1992-560 (containers)  
Smith v. commissioner, TC Memo 1988-420 (computers)  
Todd v. Commissioner, 89 TC 912 (1987) (containers)  
Van Roekel v. Commissioner, TC Memo 1989-74 (computers)  
Warren v. Commissioner, TC Memo 1993-405 (photocopy machines) and TC Memo 1989-34 (computers)  
Weiss v. Commissioner, TC Memo 1987-505 (railroad boxcars)  
Weller v. Commissioner, TC Memo 1990-562 (container)  
Wilson v. Commissioner, TC Memo 1989-284 (electrical nerve stimulator)  
Young v. Commissioner, TC Memo 1988-440 (computers)

#### **MINING (17)**

Beck v. Commissioner, TC Memo 1994-392 (gold)  
Borrell v. Commissioner, TC Memo 1989-251  
Coggin v. Commissioner, TC Memo 1993-209 (coal)  
Davis v. Commissioner, TC Memo 1989-607 (coal)  
Del Guercio v. Commissioner TC Memo 1989-354 (coal)  
Green v. Commissioner, TC Memo 1987-29 (gold and silver)  
Haught v. Commissioner, TC Memo 1993-58 (also charitable contribution)  
Hodges v. Commissioner, TC Memo 1992-370 (gold)  
Kappenberg v. Commissioner, TC Memo 1994-292 (gold)  
Kelley v. Commissioner, TC Memo 1993-495 (coal)  
Krivitsky v. Commissioner, TC Memo 1987-460 (gold and silver)  
Milner v. Commissioner, TC Memo 1993-91 (gold and silver)  
Nowak v. Commissioner, TC Memo 1994-428 (gold)  
Parker v. Commissioner, 86 TC 547 (1986) (also charitable contribution)  
Silverman v. Commissioner, TC Memo 1996-69  
Snyder v. Commissioner, 86 TC 567 (1986) (also charitable contribution)  
Zegeer v. Commissioner, TC Memo 1987-590 (coal)

### **BARRISTER SHELTERS (8)**

Barton v. Commissioner, 97 TC 548 (1991)  
Belloff v. Commissioner, TC Memo 1992-346  
Connell v. Commissioner, TC Memo 1996-349  
Goettee, Jr. v. Commissioner, TC Memo 2003-43  
Mann-Howard v. Commissioner, TC Memo 1992-537  
Powell v. Commissioner, TC Memo 1997-560  
Reile v. Commissioner, TC Memo 1992-488  
Smith v. U.S., 56 Fed. Cl. 112 (Ct. Fed. Cl. 2003)

### **ART (9)**

Ballard v. Commissioner, TC Memo 1988-436  
Barr v. Commissioner, TC Memo 1989-69  
Barrash v. Commissioner, TC Memo 1987-592  
Bronson v. Commissioner, TC Memo 1993-233  
Gangel v. Commissioner, TC Memo 1991-358  
Mandelbaum v. Commissioner, TC Memo 1990-223  
Estate of Murray v. Commissioner, TC Memo 1987-602  
Nicklo v. Commissioner, TC Memo 1988-235  
Schwartz, Jr. v. Commissioner, TC Memo 1994-320

### **OTHER STRUCTURED TRANSACTIONS (30)**

Brown v. Commissioner, TC Memo 1989-645 (research and experimentation)  
Carlson v. Commissioner, TC Memo 1987-306 (cable TV franchises)  
Cashman v. Commissioner, TC Memo 1989-533 (paperback books)  
Chupack v. Commissioner, TC Memo 1989-548 (paperback books)  
Ernstoff v. Commissioner, TC Memo 1988-146 (cable system)  
Finkelman v. Commissioner, TC Memo 1994-158 and TC Memo 1989-72 (real estate)  
Gentry v. Commissioner, TC Memo 1988-188 (real estate)  
Glassley v. Commissioner, TC Memo 1996-206 (jojuba r&d)  
Golden v. Commissioner, TC Memo 1989-514 (computer software)  
Goldman v. Commissioner, TC Memo 1988-355 (family planning device)

Hartford v. Commissioner, TC Memo 1995-351 (horse breeding)  
Hattier v. Commissioner, TC Memo 1990-2 (research and development)  
Hauser v. Commissioner, TC Memo 1992-641 (educational software development)  
Hendrickson v. Commissioner, TC Memo 1992-639 (educational software development)  
Kretschmer v. Commissioner, TC Memo 1989-242 (computer software)  
Leger v. Commissioner, TC Memo 1987-146 (book publishing)  
Lynch v. Commissioner, TC Memo 1990-575 (TV program, non-theatrical rights)  
Moore v. Commissioner, TC Memo 1989-38 (research and development)  
Mosack v. Commissioner, TC Memo 1990-175 (stress management software)  
Novinger v. Commissioner, TC Memo 1991-289 (computer chip production)  
Peek v. Commissioner, TC Memo 1988-135 (CATV system)  
Pleasant Summit Land Corp. v. Commissioner, TC Memo 1987-469 (real estate)  
Ronnen v. Commissioner, 90 TC 74 (1988) (nursing home software)  
Sammons v. Commissioner, TC Memo 1986-318 (horse)  
Somerville v. Commissioner, TC Memo 1996-165 (leveraged real estate)  
Taylor v. Commissioner, TC Memo 1992-219 (develop automatic weapons)  
Vangeloff v. Commissioner, TC Memo 1992-514 (master negatives)  
Visser v. Commissioner, TC Memo 1993-13 (greenhouse)  
Winans Trust v. Commissioner, TC Memo 1989-663 (horse)  
Wyatt v. Commissioner, TC Memo 1991-621 (avocado grove)

**OVERVALUED PROPERTY IN DEALINGS WITH CORPORATION OR PARTNERSHIP (4)**

Beaver Bolt, Inc. v. Commissioner, TC Memo 1995-549 (non-compete agreement)  
Buckley v. Commissioner, TC Memo 1994-470 (non-compete agreement)  
Burke v. Commissioner, TC Memo 1997-237  
Weis v. Commissioner, 94 TC 473 (1990) (limited partnership bought farm; claimed improvements had value 243% of actual value)

**Appendix C**  
**Code Sections Using the Phrase “As the Case May Be”**

§1(f)(2)	§414(q)(5), (u)(9)(A)	§735(a)(1), (a)(2)
§22(d)	§415(a)(2)	§751(c)
§25C(d)(2)(B)(ii)	§417(a)(5)(A), (f)(6)	§772(c)(2), (c)(3)(A), (c)(4), (d)(3)(B), (d)(4)(A)
§45K(d)(3)	§420(c)(3)(E)(i), (f)(2)(B)(ii)(II), (f)(2)(D)(i)(I), (f)(2)(D)(iii)	§805(a)(4)(D)(i)
§50(c)(5)		§806(a)(3)(D)(ii)
§54E(d)(1)(A), (B), D(ii)	§424(g)	§807(d)(4)(B)(i), (e)(7)(A)
§72(r)(2)(B)(ii)(I)	§430(f)(4)(B)(ii)	§817A(b)(1)(A)
§108(b)(4)(B)	§431(b)(5), (b)(7)(B)(i)	§842(c)(2)(B)
§121(d)(12)(A)(ii)	§441(f)(2)(A)	§844(a), (b)
§139B(c)(3)(A)	§451(i)(3)(B)	§851(b)
§148(b)(4)(I)(ii)	§458(c)(1), (c)(2)	§852(b)(3)(D)(ii)
§166(d)(2)(A)	§473(f)(2)	§855(c)
§168(i)(10), i(13)(B)(iii)(I)	§475(b)(2)	§856(i)(1)(B)
§170(f)(11)(A)(i)	§501(c)(25)(E)(i)(II)	§857(b)(3)(D)(ii)
§217(g)(2)	§503(f)(2), (f)(3)	§860(f)(2)(B)
§247(b)(1)	§514(c)(9)(E)(ii)(I)	§860C(e)(1)
§267(e)(5)(C)(1)	§613A(c)(2)(A), (c)(6)(G)(i), (c)(7)(A), (c)(7)(B), (d)(3)	§864(b)(2)(c), (c)(6), (c)(7), (f)(5)(C)
§279(c)(5)(A)		§872(b)(6)
§281(c)	§616(b)	§877(g)(1)
§291(b)(2)	§631(b), (c)	§883(c)(1), (c)(3)(A)
§306(f)	§643(i)(1)	§891
§312(d)(2), (k)(3)(B)	§663(b)(2)	§897(h)(4)(D)(i), (h)(4)(D)(ii)
§355(g)(2)(B)(v)(I)	§664(f)(3)	§901(b)(5), (c)(1)
§357(a), (b)(1), (c)(1)	§667(b)(6)(A)(i), (b)(6)(A)(ii)	§904(b)(3)(E)(i)
§381(c)(2)(A), (c)(16)	§691(a)(2)	§907(c)(3)
§401(a)(15)	§704(c)(1)(B)(i)	§937(a)(1)
§402(h)(3)	§724(a), (b)	
§408(d)(1)		
§411(c)(3)		

§953(e)(2)(B)(ii), (e)(2)(C), (e)(3)(B)(i)	§1400Q(a)(3)(A), (b)(1)(A)	§4974(b)
§961(a)	§1442(a)	§4978(c)
§965(b)(1), (c)(2)(C)(ii)(II)	§1444	§4979(f)(1)
§988(a)(1)(A), (a)(1)(B), (a)(2), (b)(3), (c)(1)(C)(i)(II), (c)(1)(E)(v)(I)	§1445(b)(7), (e)(1), (e)(4)	§4979A(c)(1)
§1016(a)(23), (c)(4)	§1561(b)	§4980B(f)(2)(B)(i)(VI)
§1060(d)(2)	§2016	§5005(e)(2)
§1091(d)	§2032A(c)(3), (e)(14)(A)	§5064(b)(2)
§1231(a)(1)	§2632(e)(2)(A)	§5121(c)(4)
§1250(d)(7)	§2641(b)	§5681(b)
§1256(f)(4)(B), (g)(9)(A)(i), (g)(9)(B)	§2642(e)(2)(A), (e)(3)(B)	§6045(h)(1)
§1286(f), (g)	§2652(a)(3)	§6047(b)
§1291(d)(2)(C)(i)	§2654(a)(2)	§6049(d)(8)(A)
§1296(c)(2)	§2661(1), (2)	§6053(b)
§1311(b)(1)	§2701(a)(4)(B)(ii), (d)(3)(B)(iii)	§6091(b)(4)
§1312(5), (6)	§3121(b)(19)	§6103(b)(5)(B)(ii)
§1314(b)	§3126	§6107(c)
§1341(b)(5)	§3231(e)(1)	§6166(b)(2)(B)
§1351(a)(1)	§3306(c)(19)	§6206
§1361(b)(3)(A)(ii)	§3404	§6213(a)
§1362(f)(3)(A), (f)(4), (f) (flush)	§3406(e)(5)(B), (e)(5)(C)	§6226(g)
§1383(a)(2)B, (b)(2)	§4216(b)(2)(A)	§6228(a)(6)
§1397E(d)(4)(A)(i), (d)(4)(A)(ii), (d)(4)(A)(iv)(II)	§4261(e)(1)(A), (e)(1)(C)(i)	§6241(c)(2)(D)
§1400N(l)(4)(B)(i)	§4262(e)(3)	§6247(d)
	§4611(d)(3), (e)(2)	§6252(e)
	§4662(b)(8)(C)(ii)	§6414
	§4911(d)(2)(B)	§6416(f)
	§4945(e)(2)	§6427(b)(1), (b)(2)(A), (l)(1), (l)(4)(A), (l)(4)(A)(ii)
	§4958(c)(4)	§6501(e)(2), (k), (l)(1)
		§6511(b)(2)(C), (c)(2)
		§6521(a)
		§6621(c)(2)(B)(ii)

§6652(b)	§7122(d)(3)(C)	§7612(c)(2)(G)
§6655(g)(3)(C), (g)(4)(E)	§7422(e)	§7652(d)(2)(A)
§6662(e)(1)(A)	§7428(a), (c)(1)(C)	§7701(a)(33)(A), (b)(8)
§6675(b)(1)	§7429(a)(3)(A)(i), (b)(3)(A)(i)	§7874(a)(2)(B)
§6851(a)(1)	§7502(a)(1)	§9002(11)
§6852(a)(1), (a)(3)	§7512(c)	§9032(9)
§6901(a)(1)(B)	§7517(a)	§9801(f)(2)(B)(ii)