Capital Gains Exception to the House's "General Utilities" Repeal: Further Indigestions from Overly Processed "Corn Products"

John W. Lee
William & Mary Law School, jwleex@wm.edu

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I. Introduction

Under present law a purchasing corporation usually effects a cost-basis acquisition of all or a substantial part of another corporation’s assets either by (a) a direct asset purchase from Target corporation in connection with its timely liquidation (to which existing section 337 applies at the corporate level and section 331 at the shareholder level), or (b) a timely purchase of “control” (at least 80 percent) of Target’s stock followed by a timely election of existing section 338. In the direct asset acquisition (1) the purchasing corporation obtains a section 1012 cost basis for Target’s assets and leaves behind Target’s “tax attributes”; (2) Target recognizes income in a “bulk sale” of its assets only to the extent of “recapture income,” which overrides the shield of existing section 337; and (3) Target’s shareholders recognize capital gain on the liquidating distributions by Target. If the purchasing corporation purchased the assets on credit, Target’s shareholders may report their (capital) gain on the installment method, thus treating principal payments on the purchasing corporation’s “purchaser evidences of indebtedness” distributed to them in the section 331 liquidation of Target as payments (when received) for their Target stock.

Commentators and experts disagree as to whether the cost-basis rules [allowed by sections 337 and 338 of the Code] merely fuel, or are the motor that drives, the current mania.

With the Target stock acquisition route, (1) Target is treated pursuant to the purchasing corporation’s election of existing section 338 as a new corporation, with a “clean slate” of tax attributes, which purchased (old) Target’s assets on the day after purchasing corporation acquired such control. New Target corporation obtains a cost basis in such assets equal, in uncomplicated single shot 100 percent acquisition, to the sum of purchasing corporation’s purchase price of such stock (including any future payments), and old Target’s liabilities (including the tax on old Target’s recapture income); (2) old

Footnotes begin on p. 1381.
Target is deemed to have sold on the day purchasing corporation acquired control all of its assets for “fair market value in a single transaction to which section 337 applies,” thereby triggering as to old Target only a tax on its recapture income; and (3) Target’s shareholders recognize capital gains on the sale of their stock to purchasing corporation. If purchasing corporation’s purchase price includes future payments, Target’s shareholders may report their gain on the installment method. Purchasing corporation may maintain new Target corporation’s continued existence (presumably filing consolidated income tax returns) or may liquidate it in a nonrecognition transaction receiving the assets at new Target corporation’s section 338(b) “cost” basis.

In contrast under present law (1) purchasing corporation may obtain a “carryover” basis (i.e., old Target’s basis) in Target’s assets by (a) acquiring its assets or stock in a “reorganization” qualifying under section 368, in which case (2) Target does not recognize any gain and purchasing corporation (or Target as an 80 percent controlled subsidiary) maintains, subject to the section 382 rules governing “carryover” of old Target’s NOLs, its tax attributes; and (3) shareholders of old Target do not recognize any gain or loss to the extent they receive stock in purchasing corporation in the transaction and, of course, will have a “substituted” basis in such stock. Alternatively, purchasing corporation may transactionally elect carryover basis by acquiring control of Target but not electing section 338 and then maintaining or liquidating it, although in this event Target’s shareholders will recognize gain or loss as to the consideration they receive, including any stock in purchasing corporation.

A number of present tax law factors favor a cost-basis acquisition of Target or its assets over a carryover basis acquisition. Most significant is the cumulative effect in cost-basis acquisitions of (1) purchasing corporation obtaining the benefits of leverage plus ACRS on current fair market value of Target’s depreciable assets, (2) with the only Target level “toll charge” being its tax on “recapture income,” which may be offset by its net operating losses, and (3) the Target shareholders receiving installment reported capital gains, thereby unlocking many dispositions.

Commentators and experts disagree as to whether the above cost-basis tax rules merely fuel, or are the motor that drives, the current “merger-mania.” But clearly if the Target level toll-charge for purchasing corporation’s cost basis were raised from the current tax on recapture income only to full recognition of appreciation as the House bill would in non-close corporations and with the House’s proposed liberalization of section 382 regarding survival of Target’s NOLs following its acquisition, in a reversal of current practice most acquisitions of Target corporations would be structured as carryover basis acquisitions with a resulting substantial increase in revenue.

H.R. 3838 continues a three decade incremental trend toward corporate level tax parity among [section 366, section 337, and section 338 transactions].

II. Proposed Limitations on General Utilities

The House’s Tax Reform Act of 1985 (H.R. 3838) continues a three decade incremental trend towards corporate level tax parity among (1) corporate distributions of assets to shareholders in complete liquidation (section 336), (2) corporate (or post-distribution shareholder) sales of Target’s assets pursuant to a complete liquidation (section 337), and (3) shareholder sales of the Target’s stock electively treated as a sale of Target’s assets pursuant to a pseudo-liquidation (section 338). These reforms would also partially restore corporate level parity between (a) liquidating distributions, stock sales, or asset sales on the one hand and (b) distributions by a continuing corporation, i.e., redemptions and dividends (section 311) on the other.

At the same time, H.R. 3838’s partial repeal of the Target level shelter in existing sections 336-338 should also be viewed as but another step in a 20-year trend of legislatively cutting back the scope of the General Utilities doctrine.
limited close active business nonrecognition exception to proposed sections 336-338.

The House bill technically denies the corporate level exemption, otherwise available to Target, to the extent of qualified stock ownership (5-and-10 noncorporate shareholder rule) in an active business corporation, to (1) "any gain or loss which is an ordinary gain or loss," (2) any short-term capital gain or loss, and (3) any gain Target would recognize upon a disposition of installment obligations within section 453B.4 The House Ways and Means Committee Report illustrates ordinary gains and losses with those "derived from inventory items or items held for sale to customers."5 The probable basis for the ordinary-capital distinction was "that there is no logical basis for exempting inventory, whether or not sold in bulk, or other assets held for sale to customers in the ordinary course of business."6 Indeed, the bulk of testimony at earlier related hearings7 and of the commentary8 agree that any continued section 336-338 exemption from gain or loss recognition should be limited to largely investment or inflationary derived gains of a small or closely held (target) corporation in a liquidating setting.

The 1985 House proposals intentionally restrict the corporate-level exemption to property...[not sold or exchanged] in the ordinary course of...business.

The 1985 House proposals intentionally restrict the corporate-level exemption to property of a sort which Target did not sell or exchange in the ordinary course of its business. The Corn Products doctrine, under one widely followed reading, however, extends ordinary income treatment to any operating asset, whether a capital asset or a depreciable business asset, whose use is essential to or "integral" to the business. This reading would largely limit the revised section 336-338 exemption to Target's investment assets, and gain would be recognized on essential operating assets, such as plant and equipment, even though Target corporation customarily did not sell such property in the ordinary course of its business. Another, contrary reading of Corn Products holds that it does not apply to isolated sales, including a liquidation sale, of operating assets. Opponents of the proposed repeal of General Utilities are virtually unanimous that repeal should not include long-term capital assets and their argument has considerable political appeal as relief for closely held businesses.9 It is thus likely that any reform will retain at least in part an exemption drawing a capital-ordinary line. Furthermore, the conflict, noted above, between integral asset and isolated transaction alone demands that the drafters address the Corn Products issue when such line is finally drawn.

The recent proposals of the Chairman of the Senate Finance Committee do not provide relief to the General Utilities repeal at the Target level. Rather, as supported by some commentators,10 relief would be provided in certain acquisitions or liquidations where Target does not exceed $5 million in the form of a basis increase to former Target shareholders in their Target stock (thereby reducing shareholder's outside gain on the liquidation or acquisition). Such "small" business outside basis increase would approximate the gain Target recognized on its long-held capital assets.

III. Corn Products Doctrine

The term "capital asset" is defined by section 1221 as all "property" held by the taxpayer with five enumerated exceptions, the most important of which focus on inventory and property held primarily for sale to customers in the ordinary course of business and on installment obligations generated by sales of such assets. The Supreme Court, however, engrafted a further exception onto the predecessor to section 1221 in Corn Products Refining Co. v. Commissioner.41

"The Corn Products Doctrine has exhibited an omnidirectional resilience productive of an endless stream of litigation over essentially factual issues,"42 in large part because the Supreme Court's opinion did not adequately distinguish which, if any, of the following factors were decisive to its conclusion that the corn futures at issue were not capital assets, resulting in ordinary income on their sale at a gain: (1) The taxpayer, a corn refining company, recurringly purchased (and subsequently sold or exercised depending on the market) corn futures; (2) such futures, while not inventory, were a substitute since they insured a source of corn; (3) the Court agreed with the Second Circuit and Tax Court below that the purchases of the futures were an "integral part" of the taxpayer's business designed to "hedge" against price increases in corn; and (4) the taxpayer's profit from the sales of the corn futures arose from everyday operation (whether due to recurring or inventory-like aspects is unclear) and constituted a normal source of business income.43

Several unresolved Corn Products issues may pose problems under the proposed provisions.

Several unresolved Corn Products issues may pose problems under the proposed provisions. One issue which Congress should perhaps address is how Corn Products applies to proposed section 336-338 transactions where Target acquired or holds stock in subsidiaries with a mixed investment-business motive—a well-known developing area.44 Potentially much more troublesome, however, is the largely unacknowledged case-law conflict as to the role of Corn Products regarding nonrecurring sales of operating assets. One approach simply looks to whether use of the property is essential to, and an integral part of, the taxpayer's business. If so, Corn Products applies. The other focuses instead on whether such a sale constitutes (a) a regular source of the taxpayer's income, making the doctrine apply, or (b) is a sale totally or partially terminating business assets that the taxpayer does not customarily sell, thus rendering the doctrine inapplicable because the sale is not a normal source of business profits.

A. 'Integral Part' Test

In Corn Products the Supreme Court noted that the lower court decisions had found that the taxpayer's
futures transactions were “an integral part of its business designed to protect its manufacturing operations against a price increase in its principal raw material and to ensure a ready supply for future manufacturing requirements.” The Court agreed that the taxpayer’s futures activity was not separate and apart from its manufacturing operation and instead was vitally important as a form of insurance against increases in the price of raw corn. The bulk of the Corn Products progeny utilizing the term “necessary and integral” or similar language seem to employ the phrase as a synonym for “business purpose” for the acquisition and holding of the asset at issue as contrasted with an investment purpose.

The court opined that its approach did not read section 1231 out of the statute.

As the cases gradually extended this sort of necessary and integral analysis, or better words, from property held as a hedge in order to be assured of raw materials (and bought and sold regularly) to property directly used to acquire raw materials and finally to property itself used in the direct production of income, with no weight given to the frequency of disposition of such property in the business, the doctrine arguably produced increasingly wrong results. For instance, the then Court of Claims in Norton v. United States applied Corn Products to deny capital gains treatment to the liquidating sale by a logging business of a timber cutting contract, which ensured the taxpayer “a ready source of supply of a logging business raw material, timber.” The Court of Claims found that the timber cutting contract was so integrally related to the taxpayer’s ordinary business objectives of logging timber that a “business use” intention rather than an “investment” intent prevailed from acquisition until (liquidating) sale. The Norton court relied upon Corn Products notwithstanding the taxpayer’s contention that the sale represented the concluding phase of liquidating the logging business. While the court opined that its approach did not read section 1231 out of the statute for “business connected” assets, that is precisely the result that follows where the focus is on the business use of the property rather than on whether its sale constitutes a normal source of the taxpayer’s business income. Disturbingly, the district court in Becker Warburg Paribas Group Inc. v. United States extended Corn Products to allow a brokerage business an ordinary loss on the sale of one of its stock exchange seats because the asset was itself used as an integral part of the primary business. It is but a small step to next apply Corn Products to the disposition of any business connected asset, be it plant, equipment or intangibles, even goodwill.

B. Corn Products and Section 1231: ‘Integral Part’ and ‘Isolated Transaction’ Collide

Significantly, Norton and Becker Warburg Paribas did not involve section 1231 assets. In general, section 1231 provides for capital gains treatment as to net gains and ordinary loss treatment as to net losses upon the sale, exchange, or involuntary conversion of (a) depreciable property used in the taxpayer’s trade or business and held for more than six months and (b) real property so used and held, which in each instance is neither inventory nor property held primarily for sale to customers in the ordinary course of the taxpayer’s trade or business and does not fall in any other of the section 1221-type exclusions. Section 1231 is significant to the Corn Products doctrine because it has served as the arena for the conflict between the ordinary course of business and the integral and necessary part readings of the doctrine even though section 1231 no longer offers much opportunity for capital gains.

The first decisions considering the question concluded that the Corn Products doctrine was inapplicable to section 1231; the best decision reasoned that by its very nature a section 1231 asset is “integral” to the business, so that the doctrine, if applicable, would read the section out of the Code. The Court of Claims particularly had problems in effectively addressing the Corn Products-section 1231 issue since it generally relied on the integral and necessary act reading. Consequently, that tribunal held on numerous occasions that sales of section 1231 assets were not integral to the taxpayer’s mainstream business, even where they were recurring. Moreover, preservation of these precedents probably led the then Court of Claims to develop the following “elaborate rationale” where property which was used in the taxpayer’s mainstream business (e.g., leasing or manufacturing) was also sold with regularity: (1) “Primary purpose” is determined at time of sale, (2) in sale-or-rent operations, “primarily” invokes a contrast, not between selling and renting, but between selling in the ordinary course of business and selling outside of that normal course, and (3) the regular sales constituted a secondary business. Such elaborate rationale appears contrary at least to the spirit of Malat v. Riddell, where the Court propounds its definition of “primarily” for section 1221 as “of first importance” or “principally” in the context of apartment projects apparently developed for rental purposes or selling, whichever was more profitable, where prior decisions by-and-large had found ordinary income because the sales in such “dual purpose” areas were a “substantial” part of the mainstream business. While Malat appears not to be a dual purpose case, but rather an undecided purpose case, read against the preceding sell-or-rent cases its clear import is that where a taxpayer truly has a dual motive, e.g., primarily to use the property in rentals or manufacturing, with a lesser purpose of sale, the property is not held primarily for sale. The Court of Claims’ rationale thus is flawed. If the taxpayer regularly sells such property not held primarily for sale, such sales constitute a normal source of business income and Corn Products should apply, notwithstanding that such property literally qualifies as a “capital asset.”

The leading case applying Corn Products to section 1231 assets, Hollywood Baseball Association v. Commissioner, unfortunately relied upon an integral test—defined as “carried on to protect or to allow the function of the taxpayer’s true business.” Yet the sales there of baseball player contracts by a farm club on the demand of a major league club in fact were substantially recurring and constituted a major source of income to the taxpayer. Hence, the court could easily have rested on the ordinary course-recurring tack or even that the player contracts were held primarily for sale. Indeed, commentators have pointed to section 1231 as proof for the proposition that the integral act reading of Corn Products is overly broad.
Several decisions contrary to the “integral act” approach have found Corn Products factually inapplicable to section 1231 property used as an integral part of the business by focusing on whether the sale of such property was a regular transaction. For example, the Tax Court in Shea’s Estate v. Commissioner held that the taxpayer’s sale of a ship charter (a bilateral contract granting the taxpayer the right, and the obligation, to transport cargo by sea for a five-year period for the charterer) was not subject to the Corn Products doctrine because the sale of the charter “was not a regular transaction as a part of the business.” In fact, it was highly unusual, the sale of the charter separately resulting solely from the destruction of the vessel by accident. The sale stemmed from the decision... to cease business.”

In short, the transaction was not a normal source of business income. Save for the fact that the charter contract in Shea’s Estate was amortizable over the five-year period and, hence, a section 1231 asset, while the timber cutting contract in Norton was not depreciable and, hence, not a section 1231 asset, the two cases appear factually indistinguishable, yet conflicting decisions resulted. Moreover, the Tax Court refused in Guggenheim v. Commissioner to apply Corn Products to a partial termination of a business, i.e., a sale of part of the operating assets (a part interest in depreciable livestock held for breeding purposes, a section 1231 asset), on the grounds that the sale was not for the purpose of furthering the horse-breeding business. Similarly, the Fifth Circuit in Nelson Weaver Realty Co. v. Commissioner in a nonsection 1231 asset case ruled the doctrine inapplicable to an “isolated” sale of a mortgage service contract, which had provided over half of the taxpayer’s business of servicing mortgages for lenders, on the ground that in Corn Products the taxpayer regularly dealt in corn futures as part of its everyday business operations. The results in Guggenheim and Nelson Weaver Realty contrast strongly with the result obtained in Becker Warburg Paribas.

As a practical matter, the courts in general were very reluctant to apply Corn Products to section 1231 assets unless sales were substantially recurring...

Clearly, as a practical matter, the courts in general were very reluctant to apply Corn Products to section 1231 assets unless sales were substantially recurring, and even then the courts frequently resorted instead to “elaborate rationales” as to the taxpayer’s primary purpose. Conversely, some tribunals were considerably less reluctant to rely on Corn Products where nonsection 1231 assets were involved. However, since the decisions did not explicitly turn on the class of asset, but rather in effect on the test applied—integral use vs. isolated sale—the problem remains. As the above survey amply illustrates, if we disregard the class of asset (section 1231 asset or not) and whether gain or loss was involved, the cases are impossible to reconcile, with different treatment, according to the Corn Products test utilized, of (1) a contract used by one taxpayer to obtain timber processed in its logging businesses, a contract used by another taxpayer to obtain cargo to be shipped in its shipping business, and a contract used by still another to provide services in its mortgage servicing business, and (2) livestock used to produce offspring in a livestock breeding business, a stock exchange seat used to sell property or services to customers in a brokerage business, and surely improved real estate (plant or offices, apartments) used to manufacture or held for rental in a manufacturing or rental business.

In a choice between (a) an “integral and necessary act” reading of Corn Products, focusing in effect on the degree of business necessity, and (b) a reading limiting the doctrine to dispositions of property of the type sold in the ordinary course of the taxpayer’s business, albeit not held primarily for such purpose (with perhaps a slight modification for property acquisitions made in lieu of a deductible or amortizable business expenditure), the latter approach is necessary to preserve section 1231 (or better what is left of it) and the chief proposed exemption to revised sections 336-338. And if the receding reading is proper for section 1231 operating assets, it should be equally proper for nonsection 1231 operating assets. Although commentators have offered many other formulations and refinements of the Corn Products doctrine (often attempting to reconcile the myriad cases), the above conflicting positions are those most frequently utilized by the courts as to assets other than stock. However, which approach, if either, is correct is not decisive for purposes of this article. The possibility that cases so in conflict might apply to new sections 336-338 demands that the drafters of the statute, or more appropriately the Committee Reports, explicitly address the manner in which the Corn Products doctrine should apply to these provisions. Otherwise, the certainty or simplification goal of tax reform is lost here. Moreover, as long as the broad integral act precedents are not overruled, the common-law process creates substantial risk that Corn Products will be applied improperly in revised sections 336-338 transactions to section 1231 assets and other assets which are integrally used in business operations but not sold in everyday business operations.

C. Corn Products and Existing Section 337

Section 337 exempts gain from the corporate tax if the gain is realized in qualifying sales or exchanges of property, a term defined in section 337(b). Cases arose, however, in which courts thought it improper to exempt the gain because it would have been taxed under case law doctrines, such as the assignment of income doctrine, had section 337 not appeared to be applicable. Some decisions, notably Pridemark, Inc. v. Commissioner held that section 337 did not apply. The Pridemark court reached result by holding an item was property under section 337 only if it would be a capital asset under section 1221. The court reasoned that (1) neither section 337 nor section 1221 was intended to allow corporate income from normal operations to escape the full corporate tax, and (2) the section 337 definition of property closely paralleled the section 1221 definition of property which was impliedly adopted by the Congress. Later decisions, however, properly refused to equate these two provisions and therefore restricted “property” for section 337 only to the extent set forth in section 337(b). Instead, wisely following a functional approach (to achieve “parity” between existing sections 336 and 337), they applied such
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case-law doctrines directly to section 337 where appropriate.

The Ninth Circuit in Hollywood Baseball Association also declined to equate sections 1221 and 337, but did apply the Corn Products doctrine to section 337. Unfortunately, the decision was quite cryptic. On the one hand, Hollywood Baseball at different points noted that the policy underlying section 1221 (and section 1231) was not intended "to give preferential treatment to profits and losses arising from the everyday operation of the business,"79 and similarly that the policy behind section 337 was to deny exemption to "sales in the ordinary course of business... as if the corporation were not in the process of liquidating."80 On the other hand, the Ninth Circuit did not turn its decision on these stated policies. Rather, similarly to the subsequently discredited Prudemak reasoning, it saw the development of section 337 from the House to the Senate version as "[p]erhaps... made in order to make the language of section 337 more nearly approximate the language of sections 1221 and 1231. If so, it would seem to follow that Corn Products is applicable to section 337."81 Moreover, by relying on a Corn Products "integral" reasoning rather than the ordinary course of business reading, Hollywood Baseball raised the possibility that section 337 would be eviscerated as to integral operating assets. Indeed, when the Tax Court finally rejected Prudemak in favor of applying the existing section 336 case-law overrides (assignment of income in the case at bar) to existing section 337, it distinguished Hollywood Baseball on the ground that the sale of Target’s mortgage servicing contracts in the case before it was not a prerequisite to the conduct of the taxpayer’s business82 (The Tax Court appears unaware that it follows an "integral" argument as to operating assets in new sections 336-338 is nevertheless problematic.83

IV. Corn Products and Proposed Sections 336-338

H.R. 3838, in practical effect, would codify Prudemak by continuing General Utilities only for section 337 "liquidating" distributions of long term capital gain property. The bill would, however, effect parity between section 337, on the one hand, and sections 336 and 338, on the other hand, by also eliminating General Utilities for short term capital gain and ordinary income property in transactions falling under sections 336 and 338. General Utilities thus would be left to exempt gain on long term capital assets of closely held active businesses. Such a limitation would seem certain to raise the question whether Corn Products applied to those sections in light of the fact that it was applied to section 337 although the statutory equivalence between sections 337 and 1221 was not nearly so great as it would be between proposed sections 336-338 and section 1221. Furthermore, the application of Corn Products to section 337 produced results that were not on a parity83 with the results under section 336 and pre-1982 section 334(b)(2). In the revised scheme under the proposed sections, parity would seem to be a stronger, more conscious aim, and Corn Products would have to be applied to sections 336-338 to achieve it. Clearly any continued exemption should not be available for property customarily sold by Target in the ordinary course of its business, although not held primarily for such sale. To this extent Corn Products or a similar doctrine is needed. But the doctrine should not be applied merely because an otherwise long-term capital or section 1231 asset is integral to Target corporation’s business.

Hopefully, the drafters will focus on the conflicting readings of the doctrine in this context—integral asset vs. nonrecurring sale—and explicitly stake out a position, presumably in the legislative history. Otherwise, even after Target meets the quite technical “qualified stock ownership” and “active business” tests (itself a quagmire of conflict) and threads its way through the maze of statutory and case-law recapture income rules, Target’s advisers must plumb the seemingly endless, conflicting Corn Products progeny to determine whether the corporate level exemption is available. When you consider that (a) the revised sections 336-338 rules governing transactions involving widely held Target corporations, which presumably would have access to expert and diligent tax advice, would be relatively simple, and (b) closely held Targets would be less likely to have such ready access, or even realize it is needed, then the true perversity of the proposed regime begins to unfold. At least the drafters could still avoid the Corn Products trap for the unwary.

Corn Products too often works as a one-way street...[with taxpayers reporting] sales producing gain as capital...and sales producing loss as ordinary loss.

Commentators differed as to whether the Corn Products doctrine should apply to section 337; with those in favor pointing to the similarity in policy of denying preferential treatment to ordinary course of business transactions,84 and those opposing its application relying on the policy of encouraging parity between existing sections 336 (to which the doctrine presumably would not apply) and 337.85 The absence of post-Hollywood Baseball decisions applying Corn Products to either section 1231 assets or to section 337 transactions could indicate a conscious decision by the Commissioner and the Justice Department not to utilize the integral reading in these contexts.86 More likely, such absence reflects their belated awareness that Corn Products too often works as a one-way street: taxpayers tend to report sales producing gain of otherwise capital assets as capital gain (and escape audit and challenge) and sales producing loss as ordinary loss.87 Whether the government could resist the opportunity to

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For a previous special report on the tax aspects of corporate takeovers, see “Using the Tax Code to Fend Off Corporate Takeover ‘Sharks’,” by Jonathan Barry Forman, Tax Notes, March 18, 1985, pp. 1165-1166.
"Target" is used in text and footnotes to refer to both (a) a corporation whose assets or stock are purchased or acquired by a purchasing corporation, and (b) a corporation in which a complete liquidation occurs. See Crane v. Commissioner, 331 U.S. 1 (1947), any future, e.g., installment, payments to be made by purchasing corporation and any Target liabilities assumed, or taken subject to, by purchasing corporation, see Meyerson v. Commissioner, 47 T.C. 340 (1966), but probably not in excess of the fair market value of the acquired Target's assets. See Estate of Franklin v. Commissioner, 544 F.2d 1045 (9th Cir. 1976); see generally Andrews, On Beyond Tuffy's, 61 Taxes 949 (1983).

Such attributes include the laundry list contained in section 338(1), principally "earnings and profits" and "net operating losses" and carryovers of other credits, as well as various tax elections.

If Target sells the inventory of one of its businesses during the 12-month period following the adoption of its plan of complete liquidation other than to a single purchaser in a single transaction, the otherwise available shield of present section 337(1) is "lifted." Sections 337(b)(1)(A) and (2). This requirement creates a "broken lot of inventory" discontinuity with an existing section 337 shield. See Ginsburg, Taxing Corporate Acquisitions, 38 Tax L. Rev. 171, 279 (1983) ("Ginsburg, 38 Tax L. Rev."). Notwithstanding the literal language of existing sections 337(b) and 338, courts and the Service through the case-law and statutory "recapture income" doctrines and provisions tax a liquidating corporation (whether distributing its assets or selling them) on certain items. See note 33 infra.

Section 331(a). This assumes that (a) Target is not "collapsible" under section 341(b) or that section 341(e)(4) applies, see present section 337(c)(1); and (b) the stock is a "capital asset" in the shareholder's hands. This requirement too can cause discontinuity between an asset acquisition (existing section 337) and a stock acquisition (existing section 338). See Ginsburg, 38 Tax L. Rev., supra at 254-255. For excellent policy discussions of the possibility of repeal of the collapsible corporation provisions if the General Utilities doctrine were completely repealed also, see Ginsburg, Collapsible Corporations—Revisiting on Old Misfortune, 33 Tax L. Rev. 309, 325-328 (1976); Staff of Senate Finance Committee, Preliminary Report, The Reform & Simplification of the Income Taxation of Corporations, S. Print 98-98, 98th Cong. 1st Sess. 33-34 (1983) ("Senate Finance Staff, Preliminary Report").

Installation reporting permits a taxpayer to ratably offset basis against principal payments as received (usually in present and) in future year(s). Section 453(c). An inadequate rate of interest usually triggers the time value of money rules.

Section 453(h)(1)(A). See generally Newman, Structuring the Sale of the Closely Held Corporate Business: Alternate Strategies, 41 N.Y.U. Inst. on Fed. Tax. (vol. 1) 3-1, 3-32-3-33 (1983). Prior to the Installation Sales Revision Act of 1980, Public Law 96-471, the receipt of the purchasing corporation's "purchaser evidences of indebtedness" constituted payment in the year of such receipt to Target shareholders to the extent of their fair market value. See Ginsburg, Taxing the Sale for Future Payment, 30 Tax L. Rev. 469, 484 (1975). This pre-1980 section 337 discontinuity with installment stock purchase of "control" of Target corporation by purchasing corporation followed by section 337 liquidation with installment stock purchase of "control" of Target corporation by purchasing corporation followed by section 337 liquidation of Target resulting in a section 337(b)(2) "cost-basis" in the assets was the policy basis of Rushing v. Commissioner, 441 F.2d 593 (5th Cir. 1971), and its progeny (permitting shareholder-level installment reporting upon sale of Target stock to third person who effects liquidation of Target and sale of its assets), effectively overruled where the third party is related by the second disposition "rules" of section 453(e). See S. Rep No. 96-1000, 96th Cong. 2d Sess. 13-14 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 494-500.

Under present section 338(g)(1) purchasing corporation must elect section 338 by the 15th day of the ninth month beginning after the month in which it acquired 80 percent of Target's stock ("acquisition date"). Under the "asset consistency" rules of present section 338(e), a cost-basis acquisition by purchasing corporation or any affiliate of assets from Target or any affiliate, unless sold in the ordinary course of business, during an up to three-year or more "consistency period," present section 338(h)(4)(A) and (B), triggers a deemed section 338 election. The anti-selectivity consistency rules have been criticized as a great source of complexity as well as misdirected. Ginsburg, 38 Tax L. Rev. supra at 299-300. Temporary section 338 regulations, through an elaborate web of rewards and punishment, generally turn such asset acquisition into a carryover basis acquisition, thereby not triggering a deemed election, unless purchasing corporation affirmatively elects a cost-basis in such assets. See Temp. Reg. section 1.338-4T(F)(4)(iv) Q & A No. 1; Preamble to Q & A's Relating to Domestic Matters Under Section 338, 50 Fed. Reg. 16403-04 (April 25, 1985). See generally Wellen, A Roadmap to Section 338, 28 Tax Notes 461 (July 22, 1985).

Existing section 338(a)(2).

Existing sections 338(b)(1) and (2) provide the new Target corporation's aggregate basis in old Target's "acquisition date" assets consists of (a) the "grossed up" basis of Target's stock recently purchased by purchasing corporation (i.e., purchased during the 12-month acquisition period, existing section 338(b) (6)(B)), and (b) purchase corporation's basis in all other Target stock, section 338(b)(6)(B), with both adjusted for Target's liabilities and "other relevant items." Such liabilities include old Target's tax liability as to "recapture income." S. Rep. No. 97-494, Vol. I, 97th Cong. 2d Sess. 193 (1982); Temp. Treas. Reg. section 1.338(b)-1T(f)(1).

If purchasing corporation acquires 80 percent, but less than 100 percent, of Target's stock by the end of the "acquisition date" and elects existing section 338, two rules deal with the presence of remaining minority Target shareholders: (1) The "gross-up" rule of existing section 338(b)(4) increases new Target's deemed purchase price as if the purchasing corporation had purchased 100 percent of Target's stock at the average per share price that it purchased the "recently purchased" Target stock. (2) As a "surrogate" toll charge for the proportionate outside Target shareholder tax that is not triggered where purchasing corporation purchases less than 100 percent of Target's stock, the deemed section 337 shield as to old Target's deemed bulk sale is proportionately lifted to the extent that purchasing corporation does not acquire through purchase or certain redemptions the remaining stock in new Target corporation held by minority old Target shareholders within a 12-month lookforward after the acquisition date. Existing sections 338(c)(1) and (h)(7). This lifting of the present deemed section 337 bulk sale shield also does not apply if new Target corporation is liquidated within such 12-month lookforward, provided that such minority shareholders do not elect section 333. Existing section 333(c)(1).

Existing section 338(a)(1) "Recapture income" overrides such deemed section 337 shield just as it would an actual section 337 sale by Target, indeed, extracting this Target level toll charge was the purpose of the deemed bulk section 337 sale in the statute. Joint Committee Staff, General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. Law 97-248, 97th Cong. 2d Sess. 133 (1982). "Recapture income" is further discussed in note 33 infra.

This assumes that section 341(a) is inapplicable and the stock is a capital asset in the hands of the selling Target shareholders. See note 5 supra.


Section 344(b)(1).

Section 361(a) This statement assumes no undistributed corporate level "boot" or nonqualifying property. Section 361(b). See generally Capital Gain on the Corporate Level in Tax-Free Reorganizations, 27 Tax L. Rev. 499 (1972).

FOOTNOTES

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The twin statutory requirements of (1) continuity of shareholder interest and (2) continuity of business enterprise coupled with their sporadic and varied codification in some but not all of section 368’s reorganization definitions in manifestations of (a) a requirement of voting purchasing corporation stock as consideration for Target’s stock or assets (“B,” “C,” and reverse triangular “A”) and in some cases that purchasing corporation or its parent acquired 80 percent control of Target (“B” and reverse triangular “A”), in one step in the case of a reverse triangular “A,” which codify the shareholder level continuity of interest requirement; and (b) the requirement that purchasing corporation require “substantially all of the properties” of target (“C” and both triangular “A” reorganizations) constitute the principal sources of the problems in this area. See Senate Finance Staff, Preliminary Report, supra at 27-29. Due to the differences that the various formulations of these requirements play in the different reorganizations, the definitions “defy rationalization.” Senate Finance Staff, Preliminary Report, supra at 27. These various requirements cause differences in the transactions for Target shareholders with respect to (1) consideration permitted; (2) “creeping acquisitions” (purchasing corporation acquires stock in Target either for cash or voting stock in purchasing corporation over a period of time); (3) disposition of unwanted assets by Target in anticipation of its acquisition; (4) payments by purchasing corporation to offset Target’s “recapture” of interest in purchasing corporation by former Target shareholders (even including nonvoting preferred purchasing corporation stock). In contrast, only voting purchasing corporation stock may be utilized in a “B,” “C,” and reverse triangular “A” reorganization with varying amounts of “boot” permitted in those three reorganizations. See generally Dean & Egerton, Acquisitive Reorganizations: The Other Method of Buying and Selling a Corporate Business, 27 U. Fla. L. Rev. 935, 936-939 (1975); Dailey, The Voting Stock Requirement of B and C Reorganizations, 20 Tax L. Rev. 725 (1971). How long before and after the acquisition Target shareholders must hold their stock is unclear. See Senate Finance Staff, Final Report, supra at 40.

“Creeping acquisitions,” i.e., multi-stage acquisitions of Target stock by purchasing corporation are possible in “A,” forward triangular “A” and “B” reorganization, but such piecemeal acquisitions pose separate problems in “C” and intense problems in reverse triangular “A” reorganizations. See generally Levin & Bowen, Taxable and Tax-Free Two-Step Acquisitions and Minority Shareholder Subsidiarization, 33 Tax L. Rev. 325 (1978); MacLean, Creeping Acquisitions, 21 Tax L. Rev. 345 (1966).

Unwanted Target assets may be disposed of by Target prior to an acquirer merger (including through a tax-free division under section 355), see N.Y. State Bar Assn., Report on the


A failed second step merger may also disqualify the initial section 355 transaction. Prop. Treas. Reg. section 1.355-2(c)(2).

Subject to the common-law requirement of continuity interest, Target shareholders may be paid with cash from purchasing corporation or Target in a “A” or forward triangular “A” (although payments by Target in a forward triangular “A” may cause Target to fail the “substantially all” test cf. Treas. Reg. section 1.368-2(j)(1)(f) & ) (2). Dissenters may be paid by Target in a “B,” but never by purchasing corporation. Dissenters in a “C” theoretically may be paid cash by purchasing corporation, up to 20 percent of the total consideration, section 368(b)(2)(B), but the reality of having to count Target liabilities against the 20 percent boot rule makes for questionable for purposes of section 368. Target may pay dissenters subject to the substantially all requirement in a reverse triangular “A.” Under “current” NOL rules (i.e., the pre-1976 rules applicable to at least 1985) patently inconsistent rules apply with “B” and triangular “A” with careful planning avoiding completely the limitations, subject then of course to the consolidation return URL rules. See n.25, infra, for House’s proposed revision of section 382.

Also, survival of Target as an entity is possible only in a “B,” reverse triangular “A,” and an “A” reorganization in which purchasing corporation disappears. The rules on the tax effect of assumption of Target’s liabilities by purchasing corporation, as well as who can pay Target’s reorganization expenses, appear hopelessly unprincipled and confused under current law. See Freling & Martin, Current Reorganization Techniques, 55 Tax Notes 852, 860-861 (1977); Dailey, supra at 754-58; Macon, Factors to a Tax-Free Acquisition Reorganization, Rights to Acquire Stock, Subsequent Mergers of Acquiring Corporation; Collateral Arrangements, 32 N.Y.U. Inst on Fed Tax 549, 554-557 (1974).

Surely, any reform eliminating these complexities is preferable, and even if some terms are left for future developments.

Leverage is shorthand for debt-financing.

“Leverage” was short for debt-financing.

The current combination of ITC, depreciable basis, and acceleration of depreciation for three-year and five-year ACRS property was designed to yield tax benefits equal to those produced by expensing capital costs or expensing capital income.” Warren, Accelerated Capital Recovery, Debt, and Tax Arbitrage, 38 Tax Law 549, 554 (1984); see Steines, Income Tax Allowances for Cost Recovery, 40 Tax L. Rev 483, 537-538 (1985). This effect coupled with leverage may be viewed as the equivalent of combining interest deductibility with tax-exempt income, i.e., tax arbitrage.” Warren, supra, at 563.

Section 338 clearly precludes Target from using any of the affiliated group’s NOL’s to offset Target’s “recapture income” arising from the deemed section 357 sale, see H.R. Rep. No. 97-750, 97th Cong. 2d Sess. 537, 539 (1982); see County, supra at 268-269. Commentators initially feared that Target might not be able to use its own NOL’s to offset its “recapture income” since new Target corporation is a new taxpayer with a clean slate. See Ginsburg, 38 Tax L. Rev. supra at 272; Ferguson & Ferguson, The Taxable Corporation’s Acquisition of an Operating Subsidiary, 38 Tax L. Rev. 65 (1983); see Sec. 338 supra, at 12-1, 12-53 (1984). The temporary regulations fortunately provide that Target’s attributes, including NOLs, may be carried over to, and carried back from, the deemed sale return, which is deemed to occur in a separate taxable year. Temp. Reg. section 1.338-1(f)(3)(iv). Moreover, section 338(a), as “currently in effect” does not apply solely because of the operation of section 338 to bar a NOL carryover to old Target’s final return. Temp. Reg. section 1.338-47(k)(3) Q & A No. 1. However, the temporary regulations in determining
the Target attributes that can be carried over apply the disaffiliation—deconsolidation rules of Treas. Reg. sections 1.1502-21 and 1.1502-79. These regulations carve out the separate NOL attributable to Target. Hence, minor discontinuity remains in an actual section 337 sale by a Target which is a member of an affiliated group. For example, a group's NOL could offset Target's "recapture income." Whereas, in a section 338 election following a qualified stock acquisition, only the portion of the affiliated group's NOL attributable to Target itself (or Target and its subsidiaries) can offset the "recapture income" arising from the deemed section 337 sale.

See Senate Finance Staff, Preliminary Report, supra at 33.


3H.R. Rep. No. 99-426, supra at 285 ("[T]he committee does not intend to supersede other existing statutory rules and judicial doctrines (including, but not limited to, section 1245 and section 1250 recapture, the tax benefit doctrine, and the assignment of income doctrine.)") See Corporate Tax Reform Proposals, supra at 40-44, for a concise discussion of these and other perils of the present law general rule of nonrecognition in this area. For a laundry list of "statutory recapture" items see Ferguson & Sliver, supra at 1-30 n. 76.

3Proposed section 336(c)(2).


5Corporate Tax Reform Proposals, supra at 51.


8See authorities cited in notes 37 and 38, supra. On a theoretical basis a continued corporate-level exemption for long-term capital assets merits serious consideration, basically to accommodate limitations of "distributing sale" to operating profits. Id But given the realities that (1) virtually no corporate level tax is currently actually levied on business operations (due to ACRS, leverage, ITc, compensation to principals in closely held...
corporations, etc.) and (2) the cost-basis liquidation provisions appear most frequently utilized to transfer a business with a single (shareholder) level capital gain tax, (plus the recapture income toll charge at the Target corporation level) the real world issue is not double taxation, but rather whether there will be a full tax at least one time. Compare Corporate Tax Reform Proposals, supra at 17-18, 49. Even if the closely held corporation is taxed on its earnings, the ridiculously low graduated bottom corporate rates in comparison with the entrepreneur's usually high bracket on any additional income coupled with the opportunity to invest the business' net profits after minimal or no taxation in capital or section 1231 assets (e.g., plant and land) erode most of the credit to the entrepreneur raised argument that absent the General Utilities exemption for long-term capital and section 1231 assets, the entrepreneur who incorporated her or his farm or corner drugstore would be worse off than if he or she had operated as a sole proprietor or in a partnership. Why do you think he or she incorporated in the first place? The Senate Finance Staff said it well: 

Although the General Utilities doctrine, which exempts corporate level gain from tax on liquidation or current distribution, is often thought of as a relief provision from the double tax system, in fact present law often leaves taxpayers better off on balance, than they would be if no corporate level tax were imposed. Thus, if confronted by a choice between the current system and a repeal of the corporate level tax, such taxpayers should choose current law. Senate Finance Staff Preliminary Report, supra at 88.

Sure enough, at least their tax advisers so chose (apparently for similar reasons). See Sheppard, General Utilities Repeal: Of Ostriches and Motherhood, 30 Tax Notes 691 (February 10, 1986). The tax advantages of the "inside" corporate tax shelter (of low graduated rates) are widely proclaimed in the tax literature. See generally Atkins & Jacobs, Closely Held Businesses: Tax Planning after ERTA, 13 Tax Adviser 516 (1982); Fink, Is There Still Life For Professional Corporations?, 9 Rev. of Tax'n of Indiv's 123, 128 (1985); Wood, Incorporation of Professionals Still Offers Benefits, 64 Taxes 38, 41 (1986). To the extent the above pattern persists after this round of tax reform, absolute repeal of General Utilities would closer approximate at least one full tax.

The Senate Finance Staff also argued that because no rationale exists for making entrepreneurs better off than they would be under a tax system without a corporate level tax, General Utilities should be repealed. Senate Finance Staff, Preliminary Report, supra at 88. Treasury single corporate tax rate two percentage points below the top individual rate would have ended the above abuse. Given that this approach does not appear to be politically feasible, my colleague Charles Koch argues for repeal of the corporate tax in general, not on the classic ground that corporations don't actually pay the double tax (i.e., they pass it on to consumers or shareholders), but rather on the above observation that owners of close corporations at least must be better off manipulating the combination of corporate and personal income tax. The nontax advantages of incorporation are dubious at best. See generally Garlin, Partnership vs. Corporation; Non-Tax Shelter Business Enterprise, 54 N.Y.U.L. Rev. 788 (1979); Kessler & Yorio, Choosing the Appropriate Form for the Small Business, 1 Corp. L. Rev. 291, 297 (1978). At least for the lower levels of corporate income, a mandatory flow-through of income and loss to shareholders appears preferable to the current use of the closely held corporation as a tax shelter.

If the H.R. 3838 shift of $150 billion in tax burden from individuals to corporations is effective, it will largely be to the public corporations. They will pay an inside tax. The close corporation can continue to use the inside low rate corporate shelter. Yet the continued General Utilities exemption will be available only to the likely abuse candidates, the close corporation. "Principle" and politics here aren't even strange bedfellows; they sleep in different towns.

"See Wolffman, supra at 87; cf. Johnson, supra. But see Beck, supra at 828.
taxpayers by eliminating the current alternate maximum 28 percent rate, see H.R. 3838, supra at section 302, while retaining those categories of income or loss. In effect this just increases the stakes in revised section 336-338 transactions for Target corporation-level long-term capital gain income: recognition at ordinary rates and exemption.


See, e.g., Rabinovitz & Shashy, supra at 973, 979, 983-984; Case Note, Liquidating Corporation Denied Nonrecognition Benefits of Section 337 Because Sales of Depreciable Assets Were Integral Part of Its Business, 24 Vand. L. Rev. 181, 188 (1970) (sales, not assets, must be integral); Heyde, supra at 11 indeed, one of the definitions of section 1245 property (subject to recapture of depreciation) consists of "property ... used as an integral part of manufacturing, production, extraction ... etc." Section 1245(a)(3)(B). Hence, an integral use in the business reading of Corn Products would render this provision superfluous and further "would seem to indicate that all section 1231 assets may be subject to the Corn Products doctrine. The question would not seem to be merely whether such assets or transactions were integral to the business but whether they were integral to an ordinary income transaction and productive of planned and continuing ordinary gain." Discussion Draft: Capital Assets—Malat and Corn Products Problems, Chief Counsel's Conference, Dearborn, Michigan, August 24 thru 28, 1970, Tax Court Litigation Session II p. 28. Unfortunately, the only judicial consideration of this argument is superficial. See Int'l Shoe Mach. Corp. v. United States, 369 F. Supp. 588, 593 (D. Mass. 1973), aff'd, 491 F.2d 157 (1st Cir. 1974).

Grant Oil Tool Co. v. United States, 381 F.2d 399, 399 (Ct. Cl. 1967); Philadelphia Quartz Co. v. United States, 374 F.2d 512, 515 (Ct. Cl. 1967); E.I. du Pont de Nemours & Co. v. United States, supra.

See Int'l Shoe Machine Corp. v. United States, supra at 593.

See, e.g., Cont'l Can Co. v. United States, 442 F.2d 405, 414-415 (Ct. Cl. 1970).


See Bernstein, supra at 1107-09.

See id. at 1112.


See Note 54, supra.


Confusingly, the Tax Court earlier had applied the Corn Products doctrine to a termination of business sale of timber cutting contracts, on the grounds that they had been acquired in the ordinary course of the taxpayer's business. J.R. Simplot Co. v. Comm'r, 26 T.C.M. 488, 492 (1967).

44 F.2d 599, 570 (1966).

307 F.2d 897, 90 (5th Cir. 1962) ("By no stretch of the imagination can the routine day-to-day sale of corn futures be equated with an isolated sale of an agency contract."). See also Oliva v. Comm'r, 77 T.C. 524, 545 (1981), appeal dismissed, (1st Cir. 1982) (sale of inventories by business of machining metal parts was not an accepted and predictable part of such business, but instead was isolated, nonrecurring and, hence, entitled to capital gains). The Fifth Circuit has historically staked out the position that a "single-shot" capital gain "is not a sale in the ordinary course of business. See note 35 supra.


Some commentators would interpret "integral" as meaning the sales, rather than the use of the asset, need be integral to the taxpayer's mainstream business for the Corn Products doctrine to apply. See Case Note, 24 Vand. L. Rev supra at 188-189; Heyde, supra at 11. This would usually be the case if sales were recurring (except, perhaps, under the former Court of Claims approach, see note 55, supra and accompanying text), but such an approach could easily turn into a substitute for ordinary income (see note 70 supra).

See, e.g., Javaras, supra; Rabinoivitz & Shashy, supra. Although beyond the scope of this article, more of the reported decisions involving otherwise capital or section 1231 assets not held primarily for sale probably could be reconciled under a model focusing on the source of the income or loss, rather than on the importance of the taxpayer's motives. Gain arising from market appreciation would be capital unless the taxpayer recurring engaged in the transactions, in which case the ordinary source of business income principle would override. Conversely, losses arising from business use would be ordinary. Of course, precisely this capital gain/ordinary loss result bothered the Tax Court so in W.W. Windle Co. v. Comm'r, supra, and probably disturbed other tribunals as well. See Wright v. Comm'r, 756 F.2d 1039 (4th Cir. 1985).

Simplification denotes to practitioners attainment of a reasonably certain conclusion by diligent and expert research without expenditure of excessive research time. Committee on Tax Policy, New York State Bar Ass'n, Tax Section, A Report on Complexity and the Income Tax, 27 Tax L. Rev. 325, 327 (1972).

See United States v. Mora, 159 F.2d 142, 141-143 (1st Cir. 1946) (the plain language of the statute is to get around the case-law development, to the present statutory language, the taxpayer's motives. Gain arising from insensible degrees to be led to conclusions incompatible with the statutory framework. The corrective of this is to get back to the provisions of the Internal Revenue Code itself, to see whether a proposed conclusion.. .comports with the statutory scheme." Anderson v. United States, 468 F. Supp. 1065, 1100 (D. Minn. 1979), aff'd, 624 F.2d 1106 (8th Cir. 1980), appears an example of this principle; extending Windle to nonstock circumstances, notwithstanding the clear reluctance of the Windle court itself to take that step.

345 F.2d 35, 44-45 (4th Cir. 1965); accord, Coast Oil Co. v. Comm'r, 50 T.C. 526, 535 (1968), affd, 442 F.2d 402 (9th Cir. 1970) (per curiam).

Coherent criticisms of this thesis are contained in Midland-Ross Corp. v. United States, 485 F.2d 110, 116 (6th Cir. 1973). Similarly, the Ninth Circuit later pointed out that (a) the definitions in existing sections 337 (b) and 1221 are not identical, and (b) the "income generated by normal operations of a business passage" in the legislative history relied upon by Pridemark related to history discussing the present law "bulk sales" exception relating to inventory contained in existing section 337 (b) (2). Hollywood Baseball Ass'n v. Comm'r, 423 F.2d at 449-500; accord, Midland-Ross Corp. v. United States, supra at 116.

Midland-Ross Corp. v. United States, supra at 118; accord, Peterson v. United States, 723 F.2d 43 (8th Cir. 1983) (per curiam); Storz v. Comm'r, 583 F.2d 972, 975 (8th Cir. 1978);
The "parity" issue prior to TEFRA arose most frequently in the contrast between Target corporation level treatment in Target stock and Target asset sales. See generally Bonovitz, Problems in Achieving Parity in Tax Treatment Under Sections 337 and 334(b)(2), 34 N.Y.U. Inst. on Fed. Tax 57, 60-75 (1976). Target asset sales pursuant to a complete liquidation under section 331 triggered section 337 if its timing requirements were met. Prior to section 338 (enacted in 1982), the acquiring or "purchasing corporation" could obtain a "cost-basis" in Target's assets following a timely qualified purchase of "control" of Target's stock only by "timely" liquidating Target under section 332, thereby triggering the cost-basis adjustments of new repeal section 334(b)(2). The liquidation of Target triggered application of section 338 at the Target level and, thus, the issue of parity between stock and asset sales. The goal of parity here has come even closer with the enacting and successive amendments of existing section 338, although total parity has not yet been reached; see Ginsburg, 36 Tax L. Rev. supra at 253-256, 289, 295-297 (1983); Ferguson & Silver, supra, at 12-35-12-39, 12-48-12-56. Neither, unfortunately, would H.R. 3838 reach perfect parity, see, e.g., proposed section 337(b)(3)(A).

The Fifth Circuit in Campbell Taggart, supra at 457, similarly viewed the "necessary and integral act" test, which it believed many courts apparently considered synonymous with business purpose, as merely the previously rejected as controlling "degree of business needed," phrase slightly differently and hence only a factor in determining intent.

For instance, even after Windle had clearly articulated the "Heads-I-win, Tails-you-lose" features of the Corn Products doctrine and at the same time that the Justice Department clearly hoped to limit the doctrine to inventory-like situations and eschew motive analysis, see Brief for Appellee at 44-48, 52, 65-68, 84-87; Corn Products, supra, at 431-432, 435-436 (Ct. Cl. 1977). The service nevertheless shortly-sightedly attempted in Bell Fibre Prods, Corp. v. Comm'r, 36 CCH T.C. M 182, 190 (1977), appeal dismissed F.2d (7th Cir. 1977), to repudiate Windle, apparently because the taxpayer at bar had realized a gain, rather than a loss.

The government's litigating stance in Norton indicates this is not the case. Even if it were, taxpayers might still raise these arguments where to their advantage as witnessed by Becker Warburg Paribas.

On the facts before it, the Union Pac. majority found that the taxpayer had acquired the stock of subsidiary railroad companies (previously owned by it but sold in a distress workout) for an operating business purpose (to obtain connecting railroads and run as a unified business) and not to make an investment 524 F.2d at 1358. The author of the Agway opinion (Judge Nicholls) dissented on this point, reasoning that the subsidiaries were intended to be a permanent addition to the taxpayer's assets 524 F.2d 1368. Indeed, he would virtually restrict Corn Products as to corporate stock to a "temporary expedienty" where the stock is acquired "as an expedient to tide the buyer over a period of shortage and high prices of some material vitally needed in his business [and with] an intention to dispose of the acquisition when the shortage ended, which was carried out with reasonable promptness." Waterman, Largen & Co. v. United States, 419 F.2d 845, 859 (Ct. Cl. 1969) (Nicholls, J., dissenting). And, conversely under this view, a permanent addition to a subsidiary to a corporation's capital would not enjoy Corn Products' ordinary loss status. Union Pac. R.R. v. United States, supra at 1387, 1388 (Nicholls, J., dissenting); Waterman, Largen & Co. v. United States, supra at 855 (Davis, J., dissenting) ("I note, in addition, that I am not yet convinced that the standard of investment or business purpose is appropriate for this type of case in which a permanent acquisition of stock is made.")