



## Federal Tax ADVISORY ■

**MAY 1, 2014**

### Supreme Court May Consider Economic Substance Doctrine

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Several taxpayers have petitioned or are considering petitioning the Supreme Court of the United States to review their losses at the hands of lower court judges applying the economic substance doctrine. Alston & Bird filed a brief as amicus in support of one such petition recently. Brief of Alston & Bird LLP as Amicus Curiae in Support of Petitioner, *WFC Holdings Corp. v. United States*, No. 13-1037 (April 17, 2014).

#### **Interests of the Amicus**

The firm's brief explained its interests as follows. Alston & Bird is a general practice law firm that has long represented taxpayers in federal tax planning and controversy matters. With more than 80 attorneys practicing in various areas affected by federal and state taxes, its tax practice is one of the largest law-firm-based tax practices in the country. Alston & Bird's tax clients include both longstanding firm clients and clients who choose Alston & Bird solely for its tax expertise. Clients include Fortune 100 companies, small startup businesses, nonprofit entities and individuals.

A significant role of Alston & Bird's tax practice is to provide advice on the tax aspects of the structure and implementation of business transactions, both large and small. Tax planning matters handled by Alston & Bird involve virtually all forms of business transactions, from taxable and tax-free acquisitions, dispositions and venture formations to financings and reorganizations involving a variety of industries, including telecommunications, banking, real estate, insurance, manufacturing, financial services and the service industries generally.

Alston & Bird also maintains a national tax controversy practice defending client tax positions under challenge by the Internal Revenue Service (IRS). Tax controversy matters handled by Alston & Bird include audits, administrative appeals, trial and appellate tax litigation at all levels of the federal court system, and mediation of both docketed and non-docketed tax cases.

Since the mid-1990s, Alston & Bird's tax practitioners have been called upon to address the burgeoning reliance by the IRS and the lower federal courts on what is now generally known as the economic substance doctrine. Alston & Bird files this amicus brief not with reference to the particular facts of the case of the Petitioner, but with reference to the common plight of the Petitioner and thousands of other taxpayers, including our clients, who every year are

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faced with either assertions of this uncertain ground for tax assessments by the IRS or the inability to know what the law is for purposes of planning their financial and business affairs.

## Summary of the Argument

The brief summarized the argument as follows. This Court should grant a writ of certiorari in this case to clarify the validity, meaning and applicability of the so-called economic substance doctrine, which, as applied in the decision below, by other lower courts and by the IRS, has created widespread and growing uncertainty about the tax law in the practitioner and taxpayer communities. This uncertainty drastically hampers the ability of legal advisors and other tax professionals to know what the law is so that they can advise their clients regarding the tax implications of their proposed financial transactions and business dealings. In turn, the inability of tax professionals to provide sound legal advice to their clients renders it all but impossible for a taxpayer to exercise what is, undoubtedly, his "legal right . . . to decrease the amount of what otherwise would be his taxes, or altogether avoid them by means which the law permits." *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).

## Other Cases

There are several other recent losses under the economic substance doctrine that wind up in petitions to the Court for review. The most likely candidates are the transactions like that in *Bank of N.Y. Mellon Corp. v. Comm'r*, 140 T.C. 15 (2013). The taxpayer economically bore the burden of a foreign tax, but the Tax Court denied its right to claim a foreign tax credit.

The ruling was based on the economic substance doctrine. It focused on a specific step in the transaction and thought it had no business or profit purpose, despite the fact that the taxpayer received a below-market loan from its counterparty. The opinion in effect applied the economic substance doctrine as a positive rule of law. It did not deny that the taxpayer engaged in the transaction; that the entity formed was actually formed; and that the foreign tax paid was actually paid. Rather, the court just did not believe the taxpayer was entitled to a credit and denied it, despite compliance with all other requirements of law.

### ***Why Would the Supreme Court Take One of These Cases?***

Many believe that the Supreme Court would not be interested in hearing this type of case. We disagree. The Supreme Court is supremely interested in its own preeminence as the interpreter of the laws of the United States, including in particular the tax laws. The economic substance doctrine has been generated by lower federal courts over the last 30 years, with no help from the Supreme Court. Many of these lower court opinions erroneously cite Supreme Court opinions for principles for which they do not stand.

When the Supreme Court sees such a case resulting in denial of a tax benefit the law allows, it will want to find out why.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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