



Federal Tax ADVISORY ■

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Antique Weapons

From time to time, the IRS hauls out antique weapons to attack transactions it considers abusive for which no other remedy is available. The oldest weapon of all is Section 269. Because it addresses solely corporate transactions, and at least half of all “tax shelters” use corporations (the other half use partnerships), it always looks threatening.

But it has not proved threatening in recent years. It’s been a long time since the IRS has succeeded in beating a tough tax shelter with Section 269. The problem is the second and third parts of its three-part test.

The first part is easy: either someone acquires control of a corporation or a corporation acquires property in a carryover-basis transaction from an unrelated person. The related-person limitation knocks out a lot of potential applications. But taxpayers often overlook the fact that if they create a new corporation (including check the box) to do a deal, that constitutes acquiring control.

Assuming the first part is satisfied, the IRS then has to show that the acquisition was for the principal purpose of evasion or avoidance of federal income tax by securing the benefit of a deduction, credit, or other allowance that such person or corporation would not otherwise enjoy.

We can expect a big argument over “principal purpose,” but also the taxpayers usually defend against this tactic by claiming that the disputed transaction was not the only route to the tax benefit.

There are several old, convoluted court opinions rejecting the application of Section 269 on the “would not otherwise enjoy” grounds, or on principal purpose. Back in the days of the tax shelters of the late 20th century, top-tier tax lawyers wrote million-dollar opinions citing those cases in the taxpayers’ favor.

Unless and until some court takes a more practical approach to Section 269, it will continue to be much less useful to the IRS than the economic substance doctrine has been, even though that doctrine was made up of whole cloth, whereas Congress enacted Section 269 to deal with a large swath of the abuses the doctrine has been used on.

Taxpayers facing Section 269 on audit should treat it seriously, but also should know that it means the IRS is playing with a weak hand.

For more information, please contact [Jack Cummings](#) at 919.862.2302.

Join our tax attorneys at a reception being held at the Capital City Club in Atlanta on October 4 alongside the ABA 2018 Joint Fall CLE Meeting. Register [here](#).

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