UNITED STATES TAX COURT

<table>
<tr><td>SUNIL S. PATEL & LAURIE
MCANALLY PATEL,

Petitioners,

v.

COMMISSIONER OF
INTERNAL REVENUE,

Respondent.</td><td>)
)
)
)
)
)
)
)
)
)
)
)
)</td><td>

Docket Nos. 24344-17
11352-18
25268-18</td></tr>
</table>

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Lucas C. Townsend, TL0165
Jonathan C. Bond, BJ24413
Matt Donnelly, DM24434
Lael D. Weinberger, WL24416
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
LTownsend@gibsondunn.com

Michael J. Desmond, DM0366
Counsel of Record
Nicole M. Butze, MN21114
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
213-229-7531 |
MDesmond@gibsondunn.com

CORPORATE DISCLOSURE STATEMENT

Amicus curiae the National Association of Manufacturers (the "NAM") is a national trade association representing manufacturers across the United States. The NAM does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES i

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

BACKGROUND 6

I. The Economic-Substance Doctrine In The Courts 6

II. Codifying The Economic-Substance Doctrine 8

III. The Underlying Micro-Captive Transaction Triggered Accuracy-Related Penalties, Requiring Analysis Of The Codified Economic Substance Doctrine 12

ARGUMENT 14

I. Section 7701(*o*) Requires Analyzing Relevance Before Analyzing The Merits Of The Economic-Substance Doctrine 14

A. The Text Of Section 7701(*o*)(1) Identifies Relevance Separately From, And Prior To, Analysis Of The Merits 15

B. Pre-Codification Case Law Supports A Relevance Requirement 19

C. The History Of Section 7701(*o*) Helps Explains Why Relevance Is Separate From The Merits 22

II. Without A Threshold Relevance Inquiry, The Application Of The Economic Substance Doctrine Would Dramatically Expand, Contrary To Congress's Command 24

A. The Tax Code Regularly Authorizes Tax-Beneficial Treatment That Would Otherwise Be Disqualified Under The Economic-Substance Doctrine 26

1. Depreciation Elections 26

2. Election Out Of Installment-Sale Treatment 27

3. Elections To Adjust Or Preserve Basis In Property 28

4. Transfer Of Tax Credits 30

B. A Meaningful "Relevance" Analysis Is Needed To Avoid Undercutting These Tax Provisions And To Promote Judicial Efficiency 31

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

ACM P'ship v. Commissioner,
157 F.3d 231 (3d Cir. 1998), *aff'g in part and rev'g in part*, T.C. Memo. 1997-115 21

Advoc. Health Care Network v. Stapleton,
581 U.S. 468 (2017) 16

Alternative Carbon Resources, LLC v. United States,
939 F.3d 1320 (Fed. Cir. 2019) 11

Bank of New York Mellon Corp. v. Commissioner,
140 T.C. 15 (2013) 3

Bank of New York Mellon Corp. v. Commissioner,
801 F.3d 104 (2d Cir. 2015) 10

Blum v. Commissioner,
737 F.3d 1303 (10th Cir. 2013), *aff'g*, T.C. Memo. 2012-16 .... 2, 3, 7

Casebeer v. Commissioner,
909 F.2d 1360 (9th Cir. 1990) 3

Cherin v. Commissioner,
89 T.C. 986 (1987) 3

Compaq Computer Corp. & Subsidiaries v. Commissioner,
277 F.3d 778 (5th Cir. 2001), *rev'g*, 113 T.C. 214 (1999) 20

Cottage Sav. Ass'n v. Commissioner,
499 U.S. 554 (1991) 21

Cross Refined Coal, LLC v. Commissioner,
45 F.4th 150 (D.C. Cir. 2022) 4, 21, 31, 32

Feldman v. Commissioner,
779 F.3d 448 (7th Cir. 2015), *aff'g*, T.C. Memo. 2011-297 11

Fid. Int'l Currency Advisor A Fund, LLC ex rel. Tax Matters Partner v. United States,
661 F.3d 667 (1st Cir. 2011) 11

Frank Lyon Co. v. United States,
435 U.S. 561 (1978) 7

Helvering v. Gregory,
69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) 7

Historic Boardwalk Hall, LLC v. Commissioner,
694 F.3d 425 (3d Cir. 2012), *rev'g*, 136 T.C. 1 (2011) 21

IES Indus., Inc. v. United States,
253 F.3d 350 (8th Cir. 2001) 20

James v. Commissioner,
899 F.2d 905 (10th Cir. 1990), *aff'g*, 87 T.C. 905 (1986) 7

Knetsch v. United States,
364 U.S. 361 (1960)..7

Leocal v. Ashcroft,
543 U.S. 1 (2004)..16

Liberty Global, Inc. v. United States,
2023 WL 8062792 (D. Colo. Oct. 31, 2023)..................................11, 17, 18, 25

Liberty Global v. United States,
No. 23-1410, 2024 WL 3291400 (10th Cir. 2024).....................................11, 12

Liberty Global v. United States,
No. 23-1410, Brief for the Appellee (10th Cir. 2024)................................11, 12

Patel v. Commissioner,
T.C. Memo. 2024-34...12, 17, 25

Patel v. Commissioner,
Docket Record Entry Number 62 13

Patel v. Commissioner,
Docket Record Entry Number 366 13

Ransom v. FIA Card Servs., N.A.,
562 U.S. 61 (2011)..15

Sacks v. Commissioner,
69 F.3d 982 (9th Cir. 1995), *rev'g*, T.C. Memo 1992-596 21

Shockley v. Commissioner,
872 F.3d 1235 (11th Cir. 2017), *aff'g*, T.C. Memo. 2015-113 11

Summa Holdings, Inc. v. Commissioner,
848 F.3d 779 (6th Cir. 2017), *rev'g*, T.C. Memo. 2015-119 20

United Parcel Serv. of Am., Inc. v. Commissioner,
254 F.3d 1014 (11th Cir. 2001), *rev'g*, T.C. Memo. 1999-268 21

United States v. Ron Pair Enters., Inc.,
489 U.S. 235 (1989)..15

Wright v. Commissioner,
809 F.3d 877 (6th Cir. 2016), *rev'g*, T.C. Memo 2011-292, *rev'g*,
T.C. Memo 2014-175..11

Statutes

I.R.C. § 167 26

I.R.C. § 453 28

I.R.C. § 754 29

I.R.C. § 6418 30

I.R.C. § 6662(i) 9, 22

I.R.C. § 6662(a)..9

I.R.C. § 6662(b)(6)..9

I.R.C. § 6676(a)..9

I.R.C. § 6676(c)..9

I.R.C. § 7701(*o*) 5

I.R.C. § 7701(o)(1)..3, 4, 8, 15, 16

I.R.C. § 7701(o)(5)(A) 3, 8

I.R.C. § 7701(*o*)(5)(C) 4, 9, 15, 17, 19

Pub. L. No. 111-152, § 1409(a), 124 Stat. 1029 (Mar. 30, 2010) 2, 8

Other Authorities

ABA Section of Taxation, *Comments on Notice 2010-62* (Jan. 18, 2011) 9

Charlene D. Luke, *The Relevance Games: Congress's Choices for Economic Substance Gamemakers*, 66 Tax Law. 551 (2013)............................23

Estimates of Federal Tax Expenditures for Fiscal Years 2022-2026 (JCX-22-22), Joint Committee on Taxation (2022) 24

IRS Notice 2010-62, 2010-40 I.R.B. 412 4

Jasper L. Cummings, Jr., The Supreme Court's Federal Tax Jurisprudence 155 (Am. Bar Ass'n, 2010)...23

Joint Committee on Taxation Report for Sec. 7701(*o*) (JCX-18-10) (Mar. 21, 2010) 19, 22, 23

Joseph Bankman, *The Economic Substance Doctrine*, 74 S. Cal. L. Rev. 5 (2000) 4, 7

LB&I-04-0422-0014 (Apr. 22, 2022) 10

LB&I-4-0711-015 (July 15, 2011) 10

Leandra Lederman, *W(h)ither Economic Substance?*, 95 Iowa L. Rev. 389 (2010) 22

LMSB-20-0910-024 (Sept. 14, 2010) 10

Martin J. McMahon, *Economic Substance, Purposive Activity, and Corporate Tax Shelters*, 94 Tax Notes 1017 (2002) 21

NAM Manufacturers' Outlook Survey, First Quarter 2024, https://nam.org/wp-content/uploads/2024/03/Outlook-Survey-March-2024-Q1.pdf 1

PwC Seeks Quick Action From Treasury, IRS to Mitigate Uncertainty Created by Economic Substance Codification, Tax Notes (Apr. 22, 2010) 10

Rebecca Rosenberg, *Codification of the Economic Substance Doctrine: Agency Response and Certain Other Unforeseen Consequences*, 10 Wm. & Mary Bus. L. Rev. 199 (2018) 8, 9

Senate Finance Committee, Economic Substance Doctrine (April 7, 2010), https://www.finance.senate.gov/imo/media/doc/Leg%20110%2010 0407agamendment.pdf; 5

Timothy R. Hicks, *Government Victories Using the Economic Substance Doctrine: A Changing of the Tide in Tax Practice?*, 38 Cumb. L. Rev. 101 (2008) 8

Treasury Legislative Counsel, Practitioners Continue Debate over Codification of Economic Substance Doctrine, Federal Tax Day M.4 (Oct. 25, 2010) 10

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 States and in every industrial sector. Manufacturing employs 13 million men and women in the United States, contributes $2.87 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Tax policy plays a key role in manufacturers' ability to thrive in the United States and compete effectively in a global economy. Tax certainty is critical to supporting growth and long-term investment in U.S. manufacturing. In the first quarter of 2024, the NAM surveyed members about their companies' outlook. Ninety-three percent of respondents noted that tax burdens on manufacturing activities would make it more difficult to expand their workforce, invest in new equipment, or expand facilities. NAM Manufacturers' Outlook Survey, First Quarter 2024, https://nam.org/wp-content/uploads/2024/03/Outlook-Survey-March-2024-Q1.pdf.

---

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

It is essential that American manufacturers have clarity on the effects of their tax planning. This case presents novel litigation about the meaning and effect of the term "relevant" in section 7701(*o*) of the Internal Revenue Code (26 U.S.C. or "the Code"). Section[2] 7701(*o*) was added to the Code in 2010 to codify the economic-substance doctrine.[3] As one of first impression, this case will have significant effects on manufacturers with matters pending in the Tax Court and beyond. Accordingly, the NAM offers its perspective to the Court on the importance of clearly addressing the relevance requirement for applying the economic-substance doctrine.

INTRODUCTION

The economic-substance doctrine was developed by courts to address a particular type of tax avoidance: transactions that, although technically compliant with the applicable tax statute, were engaged in only for tax purposes or produced no economic result beyond mere tax avoidance. *Blum v. Commissioner*, 737 F.3d 1303, 1309 (10th Cir. 2013), *aff'g*, T.C. Memo. 2012-16. The doctrine holds that "the Commissioner may rightfully disregard a transaction" that "lack[s] economic substance" in that sense. *Id.* "[A] transaction has economic substance if it is 'likely to

[2] Unless indicated otherwise, all "section" references are to the Internal Revenue Code of 1954.

[3] Pub. L. No. 111-152, § 1409(a), 124 Stat. 1029, (Mar. 30, 2010).

produce economic benefits aside from a tax deduction.'" *Id*. at 1312 (quoting *Casebeer v. Commissioner*, 909 F.2d 1360, 1365 (9th Cir. 1990)). The common-law economic-substance doctrine requires answering "two questions: (1) what was the taxpayer's subjective business motivation, and (2) did the transaction have objective economic substance?" *Id*. at 1309 (internal quotation marks omitted); *see also Bank of New York Mellon Corp. v. Commissioner*, 140 T.C. 15, 32 (2013); *Cherin v. Commissioner*, 89 T.C. 986, 993 (1987). Congress codified this test, requiring that *both* the subjective and objective prongs be met for a transaction to survive scrutiny. I.R.C. § 7701(*o*)(1), (5)(A).

The economic-substance doctrine exists in tension, however, with another basic tenet of the Code: Congress uses tax law to further policies and incentivize behaviors that might otherwise be uneconomic. Such tax-based incentives presuppose that businesses often make choices based on their tax consequences. It therefore cannot be that *any* decision or transaction that is driven by tax considerations is automatically illegitimate.

Cognizant of that inherent tension, courts have long exercised restraint in applying the economic-substance doctrine to avoid undermining congressional policy choices reflected in the Code. In general, "a transaction that is clearly supported by the text, intent, and purpose [of the Code]," as construed by a court, "will withstand judicial scrutiny regardless of whether it otherwise meets the economic substance

test." Joseph Bankman, *The Economic Substance Doctrine*, 74 S. Cal. L. Rev. 5, 12 (2000). In other words, if a transaction comports with Congress's intent in a particular tax provision, the economic-substance doctrine does not apply. *See, e.g.*, *Cross Refined Coal, LLC v. Commissioner*, 45 F.4th 150, 160–61 (D.C. Cir. 2022) (affirming Tax Court).

When Congress codified the test for the economic-substance doctrine in 2010, Congress made clear that it was *not* expanding the circumstances where the doctrine would apply. Rather, Congress instructed courts to continue determining when the doctrine is "relevant" as if the codification "had never been enacted." I.R.C. § 7701(*o*)(5)(C); *see also* IRS Notice 2010-62, 2010-40 I.R.B. 412 (discussing an analysis of "authorities[] prior to the enactment of section 7701(*o*)" providing that the economic-substance doctrine was "not relevant"). As codified, the doctrine is limited to transactions "to which [it] is relevant" and courts "shall" make a "determination" whether the doctrine "is relevant." I.R.C. § 7701(*o*)(1), (5)(C). That determination whether the doctrine should apply at all necessarily must be made *before* a court proceeds to apply it. Indeed, the IRS acknowledges that there is a relevancy threshold. *See* IRS Notice 2010-62, 2010-40 I.R.B. 412 ("section 7701(o)(1) applied in the case of any transaction to which the economic substance doctrine is relevant" and "[we] anticipate[] that the case law regarding the circumstances in which the economic substance doctrine is relevant will continue to develop"). And the Senate

Finance Committee verified that the court's first inquiry is to "determine[] that the economic substance doctrine is relevant to a transaction." If that inquiry is satisfied then, and only then, does the court apply the codified economic substance test. Senate Finance Committee, Economic Substance Doctrine, at 5 (April 7, 2010), https://www.finance.senate.gov/imo/media/doc/Leg%20110%20100407agamendment.pdf; *see also* I.R.C. § 7701(*o*).

A failure to include a threshold relevance analysis will lead to problems that taxpayers and tax experts warned Congress about when codifying the economic-substance doctrine: that the doctrine could become an enforcement mechanism for the IRS to attack tax-motivated transactions that the agency might disfavor but that align with statutory purpose and congressional intent. *See below*, Part II.B. The relevance provision Congress enacted, properly applied at the outset of the analysis, avoids this problem by preserving courts' responsibility to police the IRS's invocation of economic substance. The threshold relevance inquiry ensures that the initial decision of whether the doctrine even applies—whether it is "relevant"—is made by the court. Bypassing that initial inquiry risks enabling the Commissioner to thwart Congress's policy choices, potentially swallowing significant portions of the Code.

Failure to make that threshold relevance determination also could lead to serious practical difficulties. It could change the outcome in certain cases by stacking

the deck against taxpayers with pejorative findings on tax purpose or economic insignificance, in circumstances where the court should not have conducted a purpose inquiry to begin with. Taxpayers also may be burdened with contesting this analysis, first on audit, and later in litigation, in circumstances where the economic substance inquiry should have been unnecessary.

Following the statutory mandate to conduct a threshold relevance inquiry, this Court should first evaluate the taxpayer's reported tax position against the backdrop of the underlying statutory provisions and their legislative intent. The Court can thereby determine if the taxpayers' reporting position falls outside clear application of the statutes, making an economic substance inquiry "relevant." The NAM takes no position on the outcome of that evaluation in this case. Nor does the NAM take a position on the precise circumstances that may count as relevant for the particular application of the doctrine in this case. But the NAM urges this Court to make clear that it is for the courts to undertake the threshold analysis Congress mandated, by deciding whether the economic-substance doctrine is relevant *before* applying the two-part economic-substance inquiry codified in the statute.

BACKGROUND

I. The Economic-Substance Doctrine In The Courts

Almost a century ago, the Second Circuit (in an opinion by Judge Learned Hand) and then the Supreme Court laid the foundations for the economic-substance

doctrine. *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465, 469 (1935). Both the Second Circuit and the Supreme Court agreed that the transaction steps at issue could be disregarded for tax purposes because they did nothing *other* than affect tax consequences. "[T]he question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended." *Gregory*, 293 U.S. at 469.

Over the ensuing decades, the Supreme Court consistently reiterated that courts should not give tax effect to "sham" transactions or transactions lacking "substance"—transactions that did nothing but bring about a tax benefit. *See Knetsch v. United States*, 364 U.S. 361, 366 (1960); *Frank Lyon Co. v. United States*, 435 U.S. 561, 583–84 (1978). Courts applied that principle to both sham transactions (transactions that did not actually happen) and transactions that actually happened but lacked economic substance. Bankman, *supra*, at 12. For both types, the principle was that substance would prevail over efforts to avoid tax. *Id. See generally James v. Commissioner*, 899 F.2d 905, 908 (10th Cir. 1990), *aff'g*, 87 T.C. 905 (1986).

As one might expect of a doctrine that straddles form and substance, ambiguities arose. The circuits split three ways over the test to apply (requiring various combinations of objective economic substance and business purpose). *Blum*, 737

F.3d at 1310; *see generally* Rebecca Rosenberg, *Codification of the Economic Substance Doctrine: Agency Response and Certain Other Unforeseen Consequences*, 10 Wm. & Mary Bus. L. Rev. 199, 206–07 (2018).

II. Codifying The Economic-Substance Doctrine

In 2010, Congress codified the economic-substance doctrine by specifying when and, in certain respects, how, the doctrine applies. Pub. L. No. 111-152, § 1409(a), 124 Stat. 1029 (Mar. 30, 2010). Codified at section 7701(*o*), the Code now defines the economic-substance doctrine as "the common law doctrine under which tax benefits . . . with respect to a transaction are not allowable if the transaction does not have economic substance or lacks a business purpose." I.R.C. § 7701(*o*)(5)(A). The statute resolved the circuit conflict concerning the applicable test by making clear that a transaction must have both objective economic substance and a subjective business purpose to avoid being disregarded. *Id.* § 7701(*o*)(1), (5)(A).

In the leadup to codification, tax practitioners debated the optimal balance between the IRS and the courts in deciding economic-substance issues. *See, e.g.*, Timothy R. Hicks, *Government Victories Using the Economic Substance Doctrine: A Changing of the Tide in Tax Practice?*, 38 Cumb. L. Rev. 101, 118 (2008) (citing arguments). In the end, Congress concluded that the existing pre-codification case law had appropriately left to the courts the decision about whether to apply (or not)

the economic-substance doctrine in a particular case. "The preliminary question of relevance is left to the courts." Rosenberg, 10 Wm. & Mary Bus. L. Rev. at 211. Specifically, Congress provided that any "determination" of relevance "shall be made in the same manner as if this subsection had never been enacted." I.R.C. § 7701(*o*)(5)(C).

Congress also imposed hefty strict-liability penalties for taxpayers whose reporting positions rest on transactions that are found to lack economic substance. The amount of the penalty varies depending on whether the taxpayer disclosed the transaction adequately to the IRS. I.R.C. §§ 6662(b)(6), 6676(a), (c). If the transaction generating the tax benefits is "not adequately disclosed in the return nor in a statement attached to the return," the penalty would be 40 percent of the underpayment. *Id.* § 6662(i). If one took the precaution of disclosing the transaction, and the transaction was then disallowed under the economic-substance doctrine, the 40 percent penalty would be reduced to a still substantial 20 percent. *Id.* §§ 6662(a), (i).

Since codification, the IRS has not often applied the economic-substance doctrine. The IRS's cautious approach may reflect a response to strong urging from the tax community after the enactment of section 7701(*o*) that the IRS should administer the statute in accordance with its purpose as a clarification of judge-made law (coupled with stricter penalties) and not as a mandate to expand the application of the doctrine via broader enforcement. *See, e.g.*, ABA Section of Taxation, *Comments*

on Notice 2010-62 (Jan. 18, 2011); *Treasury Legislative Counsel, Practitioners Continue Debate over Codification of Economic Substance Doctrine*, Federal Tax Day M.4 (Oct. 25, 2010); *PwC Seeks Quick Action From Treasury, IRS to Mitigate Uncertainty Created by Economic Substance Codification*, Tax Notes (Apr. 22, 2010). Whatever the IRS's reasons, the agency erected additional internal checks and safeguards to limit when the doctrine is invoked. Soon after the doctrine's codification, the IRS issued guidance that required IRS agents to clear various hurdles before invoking the doctrine: agents had to obtain approval from the appropriate Director of Field Operations before raising the codified economic-substance doctrine on audit, LMSB-20-0910-024 (Sept. 14, 2010), and IRS auditors had to conduct a multistep analysis before seeking approval from the Director of Field Operations. LB&I-4-0711-015 (July 15, 2011). In 2022, however, the IRS issued further guidance curtailing the controls and directives it had put in place in 2010 and 2011, signaling an intent to increase scrutiny of transactions under the doctrine. LB&I-04-0422-0014 (Apr. 22, 2022).

Courts, meanwhile, have had little occasion to address the codified economic substance doctrine. Most post-codification decisions involve transactions that predated the codification. Because the statute "is not retroactive," it applies only to post-2010 tax years and courts have had little reason yet to consult the codified doctrine. *Bank of New York Mellon Corp. v. Commissioner*, 801 F.3d 104, 115 n.7 (2d

Cir. 2015) (noting that the codified provision is not retroactive and is therefore inapplicable); *Feldman v. Commissioner*, 779 F.3d 448, 455 (7th Cir. 2015) (same), *aff'g*, T.C. Memo. 2011-297; *see also, e.g.*, *Fid. Int'l Currency Advisor A Fund, LLC ex rel. Tax Matters Partner v. United States*, 661 F.3d 667, 670 (1st Cir. 2011) (citing the statute along with common law authorities without explanation in adjudicating issues regarding transaction that predated the statute); *Shockley v. Commissioner*, 872 F.3d 1235, 1247 (11th Cir. 2017) (same), *aff'g*, T.C. Memo. 2015-113; *Wright v. Commissioner*, 809 F.3d 877, 885 (6th Cir. 2016) (same), *rev'g*, T.C. Memo 2011-292, *rev'g*, T.C. Memo 2014-175. One Federal Circuit decision, *Alternative Carbon Resources, LLC v. United States*, 939 F.3d 1320, 1329 (Fed. Cir. 2019), did address the codified doctrine—and acknowledged that relevance is separate from the merits. But even that case addressed the relevance issue only summarily because it found the relevance argument easy to resolve.

The first significant litigation around this question is ongoing in the Tenth Circuit. A federal district court in Colorado applied the economic substance doctrine to deny tax effect to a transaction—and refused to apply a threshold relevance inquiry. *Liberty Global, Inc. v. United States*, 2023 WL 8062792, at *4 (D. Colo. Oct. 31, 2023). That decision is now on appeal in the Tenth Circuit. *See* No. 23-1410 (10th Cir. *filed* Dec. 28, 2023). In the Tenth Circuit, the Government has taken the

position that there is "no threshold relevancy test divorced from the facts and circumstances of each case." *Liberty Global v. United States*, No. 23-1410, 2024 WL 3291400 (10th Cir. 2024), Brief for the Appellee, at *44-57 ("*Liberty Global* Government Brief"). The NAM filed an *amicus curiae* brief supporting neither party taking the position—contrary to the Government—that the codified economic substance doctrine *does* requires a threshold relevance analysis.

III. The Underlying Micro-Captive Transaction Triggered Accuracy-Related Penalties, Requiring Analysis Of The Codified Economic Substance Doctrine

Petitioners reported deductions on their income tax returns for insurance premiums paid on a micro-captive insurance arrangement. *Patel v. Commissioner*, T.C. Memo. 2024-34, at *2. The IRS examined the arrangement, concluded that it did not qualify for micro-captive treatment under section 831(b), and disallowed the deductions. *Id.* at *2–*3. The IRS also imposed numerous accuracy-related penalties, including under section 6662(b)(6), finding that the transaction lacked economic substance under section 7701(*o*). *Id.*

This Court sustained the IRS's disallowance of a deduction for premiums paid, holding that the transaction did not comport with general insurance practices and procedures as required under section 831(b). *Patel,* T.C. Memo. 2024-34, at *2-*3. Due to respondent's failure to comply with the supervisory approval require-

ment under section 6751(b)(1), the Court granted partial summary judgment to petitioners for penalties asserted under section 6662(a), (b)(2), (b)(6), and (i) for just the 2013 taxable year. This Court denied petitioners' summary-judgment motion as to a number of additional penalties (those asserted under section 6662(a), (b)(1), (b)(2), (b)(6), and (i), with respect to the 2014, 2015, and 2016 tax years). *Patel v. Commissioner*, Dkt. 62.

Before the Court now are the several remaining accuracy-related penalties proposed by the IRS for tax years 2014, 2015, and 2016. Among them are penalties under section 6662(b)(6), which imposes an accuracy-related penalty on any underpayment of tax attributable to a transaction lacking economic substance under section 7701(*o*). *See* Dkt. 366 (Order, July 19, 2024). Because the Court's prior analysis of whether petitioners' micro-captive insurance arrangement aligns with section 831(b) did not entail an economic substance inquiry, in order for this Court to hold petitioners liable for the section 6662(b)(6) penalty, the Court must undertake another merit-based inquiry on whether the micro-captive transaction lacks economic substance. This Court has invited briefing on the key issues of first impression arising under section 7701(*o*): Does application of the codified economic substance doctrine require a threshold relevancy determination? If so, when is the economic substance doctrine relevant within the meaning of 7701(*o*)? *See* Dkt. 366 The NAM

addresses the first of these questions. The second question depends on a more granular analysis of the specifics of the case. Relevant here, section 831 only applies to micro-captive insurance arrangements. Because its members are generally not involved with micro-captive insurance arrangements, the NAM takes no position on whether, when the proper relevance inquiry is made, those arrangements are subject to scrutiny under the codified economic substance doctrine.

ARGUMENT

Section 7701(*o*) requires a threshold "relevance" determination before applying the economic-substance doctrine. Section 7701(*o*)(5)(C) expressly instructs courts to make that determination. A failure to adjudicate relevance at the outset would turn section 7701(*o*)(1)'s reference to transactions to which the doctrine "is relevant" upside-down. A relevance inquiry is necessary lest section 7701(*o*) subject broad categories of transactions to economic substance scrutiny that would not have been subject to the doctrine under the common law. This would undermine Congress's policymaking power and create substantial uncertainty for taxpayers, including the NAM's members.

I. Section 7701(*o*) Requires Analyzing Relevance Before Analyzing The Merits Of The Economic-Substance Doctrine

Section 7701(*o*) codifies the economic-substance doctrine developed in case law over many decades and presents in an organized form the approach to the economic-substance doctrine endorsed by Congress. Courts must construe this

statute as they would any other—according to its plain language. That language specifies that the doctrine applies only if it "is relevant" to a transaction. I.R.C. § 7701(*o*)(1). And it directs that a determination of the doctrine's "relevan[ce] to a transaction shall be made." *Id.* § 7701(*o*)(5)(C). That statutorily mandated determination presupposes that the doctrine is not relevant to all transactions. Moreover, the statute directs courts to conduct the relevance inquiry "in the same manner as if [§ 7701(*o*)] had never been enacted," *id.*—that is, in accordance with pre-codification case law, which recognized that the doctrine was not relevant to all transactions. A threshold relevance analysis is thus necessary to implement the statute. The contrary view—assuming that the doctrine should apply to every transaction—would contravene section 7701(*o*).

A. The Text Of Section 7701(*o*)(1) Identifies Relevance Separately From, And Prior To, Analysis Of The Merits

Statutory analysis "starts 'where all such inquiries must begin: with the language of the statute itself.'" *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). Two of the codified doctrine's provisions—section 7701(*o*)(1) and section 7701(*o*)(5)(C)—make clear that a threshold relevance determination is necessary.

First, section 7701(*o*)(1) says:

> In the case of any transaction to which the economic substance doctrine is *relevant*, such transaction shall be treated as having economic substance only if—

> (A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and
>
> (B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.

I.R.C. § 7701(*o*)(1) (emphasis added). It follows that, if the doctrine is *not* relevant to a particular transaction, the test set forth in section 7701(*o*)(1)(A) and (B) never comes into play. The introductory clause begins with a reference to the transaction. The statute then limits the transaction under consideration to any that "is *relevant*" and provides "*such transaction* shall be treated as having economic substance only if" the test for applying the economic substance doctrine is satisfied. I.R.C. § 7701(*o*)(1) (emphasis added). Everything before the word "such" is defining the kind of transaction that is subject to the two-part conjunctive analysis set out in the remainder of section 7701(*o*)(1). That is the natural reading of section 7701(*o*)(1)'s plain language. And it is necessary to avoid rendering part of the provision superfluous. With this statute as with any other, this Court should strive to "give effect" to "every clause and word of [the] statute." *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 478 (2017) (internal quotation marks omitted); *see also Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("we must give effect to every word of a statute wherever possible").

Second, section 7701(*o*)(5)(C) makes clear that courts must determine whether the doctrine is relevant to a transaction. Codified in a part setting forth "[d]efinitions and special rules" for "this subsection," that provision instructs that

"[t]he determination of whether the economic substance doctrine is *relevant* to a transaction shall be made in the same manner as if [§ 7701(*o*)] had never been enacted." I.R.C. § 7701(*o*)(5)(C) (emphasis added). That language unmistakably mandates a determination of relevance by stating that such a "determination . . . shall be made." *Id.* The text of section 7701(*o*)(5)(C) also leaves no doubt that the relevance determination is distinct from the merits of the economic-substance analysis: Unlike section 7701(*o*)(1), which specifies a particular standard for economic substance that resolved a circuit conflict (and thus abrogated the approach some courts had taken), section 7701(*o*)(5)(C) tells courts to determine relevance as they previously had done. Taken together, the two provisions show unambiguously that relevance is separate from the merits of the economic substance analysis and courts must make a relevance determination.

A contrary interpretation would defy both provisions and would render almost the entire introductory clause of section 7701(*o*)(1) superfluous. In the *Liberty Global* litigation, the Government has taken the position, and the district court agreed, that there was no threshold relevance inquiry. 2023 WL 8062792, at *4 (D. Colo. Oct. 31, 2023); *see also Liberty Global* Government Brief, at *44-57. In doing so, the *Liberty Global* litigation exemplifies the problems with trying to write a threshold relevance analysis out of the law. The *Liberty Global* district court, in a decision now on review in the Tenth Circuit, held that "the doctrine's relevance is

coextensive with the statute's test for economic substance, provided by the operative clause." 2023 WL 8062792, at *4. In other words, that district court and the Government posited that the *starting point* is to apply the economic-substance criteria set forth in section 7701(*o*)(1)(A) and (B) to every transaction—*i.e.*, to ask if the transaction had a "meaningful" economic effect on the taxpayer, and whether the taxpayer had a "substantial purpose" other than tax avoidance for the transaction. The court effectively blue-penciled section 7701(*o*)(1) to say: "~~In the case of~~ any transaction ~~to which the economic substance doctrine is relevant, such transaction~~ shall be treated as having economic substance only if." The court itself also acknowledged that its interpretation presented the "risk of tautology." *Id.* at *5. That was an understatement that is unavoidably tautological.

Without a threshold relevance analysis, section 7701(*o*)(5)(C) also becomes entirely unnecessary. Congress provided express direction to conduct a relevance inquiry ("shall be made") and specified how to do so ("in the same manner as if [section 7701(*o*)] had never been enacted"). Any approach that abandons the relevance inquiry (such as that advanced by the Colorado district court) render these instructions a dead letter. That is good reason to reject such a view; Congress would have had no reason to spell out how courts should conduct an inquiry that would never be necessary.

As between an interpretation that gives effect to the introductory clause of section 7701(*o*)(1) and to section 7701(*o*)(5)(C), and an interpretation that would render both entirely superfluous, the choice should be easy. The statute makes clear by its terms that a court must analyze relevance separately from, and prior to, analyzing the merits of the two-part conjunctive test.

B. Pre-Codification Case Law Supports A Relevance Requirement

Case law predating the 2010 legislation strongly supports this interpretation. Section 7701(*o*)(5)(C) expressly incorporates prior judicial practice by providing that "[t]he determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if [section 7701(*o*)] had never been enacted." Although the pre-codification cases did not apply the "relevance" label, Congress recognized that the pre-2010 economic-substance doctrine did not apply to every single transaction reported or reflected on a tax return and expressly left that existing approach undisturbed.

The Joint Committee on Taxation's technical analysis of the 2010 legislation emphasized this point. It noted that the statute "is not intended to alter the tax treatment of certain basic business transactions that, under longstanding judicial and administrative practice[,] are respected." Joint Committee on Taxation Report for Sec.

7701(*o*) (JCX-18-10) at 152 (Mar. 21, 2010) (JCT Report). Pre-2010 decisions recognized that certain business transactions are not properly subject to economic substance scrutiny in two contexts.

First, courts did not engage in economic-substance scrutiny when precedent had already established that the particular form of transaction at issue is permissible. If precedent determined that a prior transaction has economic substance or is not a sham, a new case presenting the same kind of transaction did not need to go through economic substance analysis. *See, e.g.*, *IES Indus., Inc. v. United States*, 253 F.3d 350 (8th Cir. 2001) (finding a particular foreign stock transaction to be valid); *Compaq Computer Corp. & Subsidiaries v. Commissioner*, 277 F.3d 778, 782–83 (5th Cir. 2001), *rev'g*, 113 T.C. 214 (1999) (agreeing with the *IES* decision in a case involving an identical transaction).

Second, courts recognized that Congress can affirmatively provide for favorable tax treatment of a transaction in circumstances that might otherwise be uneconomic, thereby excluding that transaction from economic-substance scrutiny. As the Sixth Circuit explained, when a Code provision is used for its "congressionally sanctioned purposes—tax avoidance—the Commissioner had no basis for recharacterizing the transactions and no basis for recharacterizing the law's application to them." *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779, 782 (6th Cir. 2017) (Sutton,

J.), *rev'g*, T.C. Memo. 2015-119. *See generally Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554 (1991) (a transaction receives a tax benefit when Congress has so provided in the Code). In short, if a transaction comports with Congress's intent in a particular tax provision, the economic-substance doctrine does not apply. *See Cross Refined Coal*, 45 F.4th at 160–61 (taxpayer can take advantage of tax credits designed by Congress); *Sacks v. Commissioner*, 69 F.3d 982, 991–992 (9th Cir. 1995) (same), *rev'g*, T.C. Memo 1992-596; *United Parcel Serv. of Am., Inc. v. Commissioner*, 254 F.3d 1014, 1019–20 (11th Cir. 2001) (same, so long as the transaction is not a sham), *rev'g*, T.C. Memo. 1999-268; *Historic Boardwalk Hall, LLC v. Commissioner*, 694 F.3d 425, 462–63 (3d Cir. 2012) (same), *rev'g*, 136 T.C. 1 (2011).

These examples highlight the fundamental tension in the economic-substance doctrine between honoring the text of the tax law and not allowing technical compliance to be manipulated to defeat Congress's intent. The doctrine's central premise is that transactions undertaken solely to achieve tax benefits generally should be disregarded even if they comply with the letter of the Code. *See, e.g.*, *ACM P'ship v. Commissioner*, 157 F.3d 231, 247 (3d Cir. 1998), *aff'g in part and rev'g in part*, T.C. Memo. 1997-115. But Congress *also* uses the Code to pursue policy ends, including by incentivizing particular transactions. *See, e.g.*, Martin J. McMahon, *Economic Substance, Purposive Activity, and Corporate Tax Shelters*, 94 Tax Notes 1017, 1019 (2002) ("The real difficulty in applying the business purpose, economic

substance, and purposive activity doctrines derives from the fact that the code abounds with provisions that . . . are *intended* to influence economic behavior."); Leandra Lederman, *W(h)ither Economic Substance?*, 95 Iowa L. Rev. 389, 396 (2010) ("Taking the government up on proffered tax benefits is, by definition, not abusive."). Sometimes Congress wants taxpayers to take certain measures and incentivizes them to do so by lowering their taxes—those measures are the point that Congress is trying to promote, and the tax reduction is the means to that end. The Technical Explanation of section 7701(*o*) makes this point clearly: "If the realization of the tax benefits of a transaction is consistent with the Congressional purpose or plan that the tax benefits were designed by Congress to effectuate, it is not intended that such tax benefits be disallowed." JCT Report at 152 n.344. The relevance inquiry recognizes this reality and ensures that the economic-substance doctrine does not ignore it.

C. The History Of Section 7701(*o*) Helps Explains Why Relevance Is Separate From The Merits

The economic-substance doctrine was a creature of case law before it was codified. The codification introduced a substantial penalty: 40 percent of the underpayment added as a penalty on a strict-liability basis. I.R.C. § 6662(i). It is not surprising, therefore, that the codification confirmed a meaningful gatekeeping requirement in more explicit terms than many of the older, pre-codification cases had employed. The "relevance" language made its way into section 7701(*o*) over the

course of a decade of legislative revisions, largely in response to repeated taxpayer concerns (expressed in correspondence and testimony to Congress) that the courts (not the IRS) should ultimately determine when the doctrine applied. *See generally* Charlene D. Luke, *The Relevance Games: Congress's Choices for Economic Substance Gamemakers*, 66 Tax Law. 551 (2013).

Prior to the codification, courts would typically invoke economic substance only at the suggestion of the IRS. *See* Jasper L. Cummings, Jr., The Supreme Court's Federal Tax Jurisprudence 155 (Am. Bar Ass'n, 2010). Historically, the threshold question of when the doctrine should apply was not explicitly framed as a "relevance" inquiry. This may be why the Colorado district court in *Liberty Global*—looking at pre-codification case law—erroneously thought there was no relevance requirement. This is doubly incorrect. Congress intended this "provision be construed as being additive to any such other rule of law." JCT Report at 155. Congress's including the term "relevant" indicates that Congress believed a relevance analysis was already a part of the existing case law. One can only interpret Congress's intent by adding the phrase "relevant" to incorporate prior case law that recognizes the economic-substance doctrine does not apply to every conceivable transaction reported or reflected on a tax return. In addition, the Colorado district court failed to consider that the increased penalties in the codified version of the doctrine

only increase the importance of a gate-keeping relevance inquiry—as Congress recognized.

II. Without A Threshold Relevance Inquiry, The Application Of The Economic Substance Doctrine Would Dramatically Expand, Contrary To Congress's Command

Bypassing the threshold relevance inquiry would have serious practical consequences. Removing that safeguard would expand the reach of the economic-substance doctrine in ways that could nullify Congress's policy judgments.

Tax law has long provided taxpayers with various ways to mitigate their tax liability through elections, choices around the timing of income and deductions, and other provisions. Increasingly Congress has added to these provisions by enacting credits, deductions and other tax expenditures designed to favor certain activities that would be uneconomic absent preferential tax treatment. *See, e.g.*, Estimates of Federal Tax Expenditures for Fiscal Years 2022-2026 (JCX-22-22), Joint Committee on Taxation (2022). In some cases, the line between a tax benefit Congress conferred to incentivize certain behavior and an aggressive interpretation or application of a Code provision designed simply to exploit advantageous tax treatment may be uncertain. The NAM takes no position here on whether the insurance arrangements underlying the IRS's assertion of tax penalties crossed that line. Rather, the NAM simply takes the position that this Court should start its analysis with a threshold "relevance" inquiry.

There are myriad instances under the tax law where the economic-substance doctrine clearly should not apply. The following sections describe four examples. In the absence of a threshold relevance analysis, each instance could require taxpayers and courts to run through an entirely unnecessary economic-substance gantlet.

In the *Liberty Global* litigation, the Colorado district court, after refusing to consider relevance at the threshold, hinted that it might undertake something very much *like* a relevance inquiry at the *end* of its analysis, under the label of "exemptions." 2023 WL 8062792 at *6–7. The Government similarly urged that the relevance determination should only be applicable *after* analyzing all the facts and circumstances. *Liberty Global* Government Brief, at *44–57. Such an approach would provide little comfort. Relevance at the end, rather than beginning, would increase transactional uncertainty and decrease judicial efficiency. The framework also puts a thumb on the scale and risks creating an improper analytical bias in favor of the IRS. This risk is particularly high in edge cases, where adverse findings on the subjective and/or objective prongs of the codified doctrine could improperly influence the *post hoc* "exemption" inquiry in circumstances where those findings should never have been made in the first instance.

A. The Tax Code Regularly Authorizes Tax-Beneficial Treatment That Would Otherwise Be Disqualified Under The Economic-Substance Doctrine

Matters of tax compliance, enforcement, and reporting can be broken into two categories: (1) reporting positions and (2) structured transactions. In theory, simply choosing to report an item on a tax return in a way that produces the most tax advantage should not be subject to challenge under economic substance principles because reporting itself does not involve a "transaction." But the distinction breaks down in practice. Taxpayers often make investment decisions based on an understanding of the favorable way they might be treated for tax purposes. That, in turn, makes those investment decisions themselves "transactions" subject to scrutiny. Against that backdrop, we provide below several examples highlighting issues with the Government's analytical framework in the context of both reporting positions and structured transactions.

1. Depreciation Elections

Taxpayers are generally allowed to recover the cost of investments made in their businesses through depreciation deductions claimed over a fixed period. I.R.C. § 167. Congress has, however, often provided for accelerated cost recovery through "bonus depreciation" deductions that can be claimed over a much shorter period, often entirely in the same year that the investment is made. For most taxpayers, accelerating cost recovery—taking a full deduction immediately rather than over a

period of several years—is advantageous. But not always: The interaction of the accelerated deduction with, for example, expiring tax credits or carryover losses might make bonus depreciation disadvantageous for a taxpayer over the long run. For this reason, Congress gave taxpayers the flexibility to elect out of bonus depreciation under section 168(k)(7), with such an election driven entirely by tax considerations and planning. A similar election is available for certain small businesses under section 179.

While electing out of bonus depreciation is done solely for the purpose of minimizing tax and has no non-tax economics, it flows from the plain language of the statute and is fully consistent with congressional intent. Accordingly, the codified economic-substance doctrine should not be "relevant" to the election and a taxpayer should not be required to demonstrate or litigate the subjective and objective prongs of that doctrine. But if a court skipped over the threshold relevance inquiry, that is precisely what would happen, with preordained failure to survive economic substance scrutiny.

2. Election Out Of Installment-Sale Treatment

Generally, when a taxpayer sells or exchanges property at a gain, the taxpayer must recognize the full amount of gain as taxable income in the year of the sale. However, as a benefit to taxpayers, Congress provided that when a taxpayer sells property and the consideration is made in multiple payments over the course of more

than one year, then the taxpayer can defer recognition of the full gain under the installment method. I.R.C. § 453. Under this method, for tax purposes, income recognition is typically spread out over the term of the payments. While this is generally a benefit, in certain circumstances a taxpayer could prefer to recognize all of the gain in year one for tax planning reasons. For instance, if the taxpayer has a tax credit carryforward that expires in the year of sale, it can only utilize the full benefit of the tax credit if it has the flexibility to elect out of the installment method treatment. Under section 453(d), taxpayers are given the option to elect out of installment sale treatment. This wholly tax-driven election (available without regard to the time-value of the taxes saved compared to the profit realized) might not withstand economic substance scrutiny were the doctrine "relevant." However, it is readily excluded from such scrutiny under the gating relevance inquiry because Congress has provided specifically for this flexibility in tax planning. Yet without a threshold relevance inquiry, a cumbersome analysis of the objective and subjective elements of section 7701(*o*) would be required, even if the election is ultimately recognized as "exempt" from application of the codified economic-substance doctrine.

3. Elections To Adjust Or Preserve Basis In Property

When a taxpayer acquires an interest in a partnership, the taxpayer has two sets of basis (a tax proxy for investment) to consider: its basis in the partnership interest itself, often referred to as "outside basis," and its basis in the underlying

assets of the partnership, often referred to as "inside basis." This can result in a mismatch if, for example, an interest in a partnership is acquired (giving rise to outside basis) but the purchase price is not applied to assets held inside the partnership (inside basis). This mismatch limits the partner's ability to recover the cost of their investment through depreciation when compared to acquisition of the assets directly, rather than through a partnership.

Congress has created an election that can address this mismatch (and eliminate the timing issues) in a taxable year in which there has been either a transfer of a partnership interest by a partner or a distribution of partnership property. I.R.C. § 754. By the partnership making a section 754 election, the partner is able to receive the effect of a personal step-up in its share of the inside basis of assets held by the partnership.

The section 754 election (and other basis-shifting elections, *e.g.*, section 362(e)(2)(C)) is available without regard to the time-value of the tax savings or the profit potential of the underlying transaction. In each case, the transaction giving rise to the election, together with the election, could provide immediate or near-term tax savings the present value of which may exceed (perhaps substantially) the present value of the reasonably expected pre-tax profit from the transaction. However, these tax timing benefits are both well understood and clearly intended by Congress, and the economic-substance doctrine should have no relevance to either. But again,

without a threshold "relevance" inquiry, a cumbersome and time-consuming economic substance analysis would be required.

4. Transfer Of Tax Credits

To support the goal of achieving net-zero carbon emissions, Congress recently provided for the transfer of certain tax credits supporting investment in carbon-neutral energy transition technologies. I.R.C. § 6418. If a taxpayer is not in a position to fully utilize one of these tax credits that it has otherwise properly qualified for, the taxpayer can sell the credit (for cash, tax-free) to an unrelated taxpayer who is able to utilize it immediately. The transferability provisions mark a sharp departure from historic treatment of business tax credits, which were generally only of value to a taxpayer if and to the extent of its positive income tax liability.

The federal tax incentives reflected in the underlying credits have the potential to spur transformative investment in certain areas of the country and certain portions of the economy. The economic-substance doctrine was developed in an era that generally pre-dates the concept of a transferrable federal tax credit of the scope and scale available under this new law. Nevertheless, without a threshold relevance inquiry, there is some question whether the economic-substance doctrine will somehow be applied to these transactions. Congress sanctioned the credit without regard to the expected profit of the credit purchaser, the amount of the resulting tax savings or the subjective intent of the taxpayer in claiming and reporting the credits. If one

claimed the credit but without any other profit or non-tax intent, this could trigger economic-substance doctrine analysis—unless a threshold relevance inquiry makes it possible to consider congressional intent up front. Without a threshold relevance analysis, the resulting uncertainty concerning the potential applicability of the economic-substance doctrine (and hence the validity of the credit transfer transactions) could jeopardize the financing of these federally subsidized investments.

B. A Meaningful "Relevance" Analysis Is Needed To Avoid Undercutting These Tax Provisions And To Promote Judicial Efficiency

These four examples just scratch the surface of Code provisions where the statutory design and Congress's purpose would support favorable tax treatment—irrespective of whether the "transaction" has "economic substance." Without a "relevance" inquiry to consider if section 7701(*o*) applies, normative application of the tax law and unambiguous congressional intent would often be overridden, negating favorable tax treatment and triggering a 40 percent strict liability penalty.

This is a significant concern. Consider the efforts the IRS put into challenging the taxpayers in *Cross Refined Coal*, 45 F.4th 150. As the court ultimately found, the transactions at issue were the type of otherwise uneconomic activity that Congress's refined coal tax credit scheme was intended to incentivize. Notwithstanding this reality, the IRS continued to challenge these "tax-motivated" but wholly appropriate transactions. The IRS ultimately (and rightly) lost in both the Tax Court and

the D.C. Circuit. In the end, a commonsense reading of the law prevailed—but only after some five years of disputing the issue with the IRS. *See id.* at 155.

Congress continues to use tax credits to incentivize emerging technologies and other economic activity Congress deems valuable. Recent examples include the clean energy-related tax credits referenced above. Taxpayers will be wary of responding to the incentives Congress designed if courts are not applying section 7701(*o*) with the care that Congress intended.

CONCLUSION

This Court should recognize that the codified economic substance doctrine requires a threshold determination of whether the doctrine applies to the transactions at issue.

Respectfully submitted this 23rd day of August 2024.

/s/ Michael Desmond

____

Lucas C. Townsend
Jonathan C. Bond
Matt Donnelly
Lael D. Weinberger
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
LTownsend@gibsondunn.com

Michael J. Desmond
Counsel of Record
Nicole M. Butze
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
213-229-7531
MDesmond@gibsondunn.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with Tax Court 151.1, because the Court's July 19, 2024, order specifically extended the 25-page limitation to 50 pages, and this brief contains 41 pages excluding the case caption and signature block. This brief complies with the typeface requirements of Tax Court Rule 23 because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

Michael Desmond

____
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2024, a true and accurate copy of the foregoing filing was electronically served via email, and paper served via FedEx Overnight to Petitioners' counsel at the below email and address.

Patrick J. McCann, Jr.
Chamberlain, Hrdlicka, White, etc.
46th Floor
191 Peachtree Street, N.E.
Atlanta, GA 30303
Email: Patrick.McCann@chamberlainlaw.com

____

Michael J. Desmond
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
213-229-7531
MDesmond@gibsondunn.com

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2024, a true and accurate copy of the foregoing filing was electronically served via email, and paper served via FedEx Overnight to Respondent's counsel at the below email and address.

Sebastian Voth
IRS, Chief Counsel
2400 Avila Road, Suite 4404
Chet Holifield Building
Mail Stop 8800
Laguna Niguel, CA 92677
Email: Sebastian.voth@irscounsel.treas.gov

____

Michael J. Desmond
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
213-229-7531
MDesmond@gibsondunn.com