Rollovers to Roth IRAs Are Complicated by Substance-over-Form Doctrines

By Vorris J. Blankenship

Vorris J. Blankenship examines how the judicially created "substance-over-form" doctrines can impact rollovers to Roth IRAs.

Judicially created "substance-over-form" doctrines can undermine some rollovers to Roth IRAs. Among the most vulnerable are successive rollovers that seek to minimize the tax on "taxable qualified rollover contributions" (TQR contributions). A taxpayer may make a TQR contribution to a Roth IRA from a traditional IRA or from a qualified retirement plan, tax-deferred annuity or eligible state/local government plan (for convenience, hereafter "qualified plans").

Also subject to attack under substance-over-form doctrines are TQR contributions made in conjunction with the purchase of qualifying longevity annuity contracts (QLACs). Perhaps most vulnerable of all are TQR contributions to a Roth IRA of a taxpayer's previous contributions to a traditional IRA, if made to avoid limitations on a taxpayer's direct contributions to a Roth IRA (so-called "back door" Roth contributions).

The Substance-over-Form Doctrines

The U.S. Supreme Court held long ago in *E.F. Gregory* that the IRS may look through the form of a tax-motivated transaction and treat it for tax purposes in accordance with its substance (the substance-over-form doctrine).[1] The lower courts have used and developed the doctrine extensively. Over the years, the courts have splintered the doctrine into a number of subsidiary doctrines. Unfortunately though, the distinctions between these subsidiary doctrines are often unclear and the doctrines tend to overlap.

The "sham transaction doctrine" generally targets purported transactions that never actually occurred, as well as actual transactions without substance.[2] The "step transaction doctrine" allows the collapse of a series of steps into a

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single transaction.[3] The "business purpose doctrine" looks through transactions that do not have a business purpose.[4] The "economic substance doctrine" attacks transactions that lack economic reality and business purpose. The economic substance doctrine often appears to overlap the business purpose and sham transaction doctrines.[5]

Judicially created "substance-over-form" doctrines can undermine some rollovers to Roth IRAs.

The IRS would almost certainly use the step transaction doctrine to attack problematic retirement plan rollovers, and combinations of such rollovers. Problematic rollovers are particularly susceptible to step transaction analysis since they generally use a series of tax-motivated steps to achieve desired tax results. Even if those steps should have some kind of business purpose (doubtful), business purpose is generally irrelevant to application of the step transaction doctrine.[6]

The sham transaction doctrine, on the other hand, is not a very good fit for analyzing rollovers since it is generally applied to unconsummated transactions or transactions lacking substance[7]; whereas, rollovers are normally consummated in actual transactions prescribed in detail by the tax law.

The IRS is also unlikely to invoke the economic substance doctrine. Congress, the IRS and the courts have all indicated the doctrine is reserved for the most egregious types of cases.[8] The IRS has even enumerated the factors it will consider before invoking the doctrine. The enumerated factors that militate against its use include situations where it is more appropriate to invoke the step transaction doctrine. The IRS also discourages its use in situations involving statutory elections subject to detailed statutory and regulatory requirements (as with retirement plan rollovers).[9]

Consequently, almost by default, the IRS and the courts can be expected to attempt to apply the step transaction doctrine to problematic rollovers. They will consider applying the doctrine if any one of the following three tests is satisfied:

1. Under the "end result" test, a court may treat as a single transaction any series of steps meant at the outset to achieve a particular end result.[10]
2. Under the "mutual interdependence" test, a court may collapse the steps if they are so interdependent that individual steps would be pointless without completion of the steps.[11]
3. Under the "binding commitment" test (generally applicable to multi-year steps), a court may collapse the transaction if, when the first step is taken, there is a binding commitment to complete the series of steps.[12]

The binding commitment test will rarely apply since a taxpayer normally has complete discretion to roll over funds to or from his or her own retirement plans and IRAs. The mutual interdependence test will also rarely apply since interim steps that are rollovers to plans or IRAs normally have some independent significance.[13] That is, the recipient plan or IRA will usually have different provisions, governance and management than the transferring plan or IRA. However, the end result test may apply, depending on the circumstances.

There is, nevertheless, one additional consideration of overriding importance. All the substance-over-form doctrines (including the step transaction doctrine) are intended to assure that the congressional purpose for legislation is actually achieved, and is not frustrated by tax-motivated schemes that merely comply with the literal letter of the law.[14] The self-evident corollary is that those doctrines should not override taxpayer transactions that Congress intended to permit.[15] Thus, congressional intent to allow a particular type of tax-motivated transaction should be a complete defense against IRS substance-over-form arguments.[16]

Taxable Qualified Rollover Contributions

Before 2008, taxable qualified rollover contributions (TQR contributions) could be made to a Roth IRA only from traditional IRAs. However, it did not matter that the TQR contribution included funds previously rolled over to the traditional IRA from a qualified plan. Nor did it matter that the TQR contribution occurred immediately after the rollover from the qualified plan to the traditional IRA.[17]

The IRS has never attempted to subject these two steps to analysis under the step transaction doctrine. The IRS forbearance is almost certainly due to its belief that the steps are consistent with the underlying congressional purpose of encouraging taxable transfers to Roth IRAs.[18]

For tax years after 2007, the tax law also allows a taxpayer to make TQR contributions to a Roth IRA directly from a qualified plan.[19] The IRS has treated these more recently allowed TQR contributions as an additional short-cut method for making TQR contributions, without invalidating the old IRA conduit method.[20] Specifically, the IRS said of the more recent legislation:

> [Under the legislation] a rollover from an eligible employer plan … to a Roth IRA results in the same federal income tax consequences … as a rollover to a non-Roth IRA *immediately followed* by a conversion to a Roth IRA [except that other IRAs are not taken into account].[21] (Emphasis added.)

Thus, the IRS treats such a TQR contribution as if it passed through a newly formed traditional IRA (but without regard to investment in other traditional IRAs). Under this theory, the TQR contribution is hypothetically taxable as an IRA distribution and not as a qualified plan distribution. Consequently, rules unique to the taxation of distributions from qualified plans do not apply. For example, the special treatment of net unrealized appreciation in employer securities,[22] and the special tax treatment of lump-sum distributions available for taxpayers born before 1936,[23] do not apply.

Far from trying to apply the step transaction to TQR contributions from qualified plans, the IRS actually invented an additional step (through a hypothetical traditional IRA) to effectuate what it considered to be congressional intent. The IRS indicated it was heeding the congressional admonition to subject such rollovers "to the present law rules that apply to rollovers from a traditional IRA into a Roth IRA."[24]

Comparison of Direct and Indirect TQR Contributions

A taxpayer now has two distinctly different ways to make a TQR contribution from his qualified plan to a Roth IRA, without fear of running afoul of the step transaction doctrine. A taxpayer may use his or her traditional IRA as a conduit for the TQR contribution or the taxpayer may make the TQR contribution directly from his or her qualified plan to a Roth IRA.

To illustrate, assume Joe Black recently retired. Mr. Black has $100,000 in his qualified retirement plan, with after-tax investment of $30,000. During his working years, Mr. Black also made nondeductible contributions of $75,000 to his traditional IRA, with the account balance growing to $125,000. He has not received any previous distributions from either the IRA or qualified plan. In addition, assume the rollovers in the following examples all occur on December 31, the last day of Mr. Black's tax year.

Example 1. Mr. Black made a TQR contribution to a Roth IRA of the entire $100,000 balance in his qualified retirement plan. Mr. Black's $30,000 recovery of investment in the qualified plan is not taxable. The remaining $70,000 of employer contributions and plan earnings (hereafter "earnings" in the aggregate) is taxable. Note that it is irrelevant whether Mr. Black participates in any other plans or owns any IRAs.

Example 2. Assume, alternatively, that Mr. Black rolled over the entire $100,000 balance in his qualified plan tax-free to his traditional IRA, thereby increasing his IRA account balance to $225,000. Immediately thereafter, Mr. Black made a TQR contribution of $100,000 from his IRA to a Roth IRA. Mr. Black's total investment in his IRA was $105,000 ($30,000 rolled over from his qualified plan and $75,000 attributable to his direct nondeductible contributions to the IRA).

Consequently, his exclusion percentage for the TQR contribution is 46.7 percent. Mr. Black computes the exclusion percentage by dividing his total $105,000 investment in the IRA by the IRA's $225,000 account balance. Consequently, 46.7 percent of the $100,000 TQR contribution, or $46,700, is nontaxable. The remaining $53,300 taxable amount is less than the $70,000 taxable amount in Example 1 (for a direct TQR contribution from the qualified plan).

Thus, in this case, actually running the TQR contribution through a traditional IRA saved taxes on $16,700 ($70,000 taxable in Example 1 less $53,300 taxable in Example 2). Note, however, that a TQR contribution directly from the qualified plan would have been more beneficial if the percentage of investment in Mr. Black's qualified plan had been relatively higher than the percentage of investment in his IRA.

Allocation of After-Tax Investment to Multiple Rollovers

The IRS now allows taxpayers to combine rollovers to traditional IRAs with TQR contributions to Roth IRAs, all from a single qualified plan distribution.[25] If the multiple rollovers are all trustee-to-trustee rollovers and the taxpayer does not retain any portion of the distribution, the taxpayer may allocate after-tax investment and earnings among the rollovers in any proportions desired. However, if the multiple rollovers also include one or more indirect 60-day rollovers, the taxpayer must first allocate the earnings portion of the distribution among the trustee-to-trustee rollovers to the extent possible, before allocating any remaining earnings and investment.[26]

These new rules allow a taxpayer to make totally tax-free multiple rollovers even though the rollovers include a normally taxable TQR contribution to a Roth IRA. The taxpayer may make the rollovers tax-free by (1) limiting the TQR contribution to the amount of the distributed investment, and (2) allocating all the investment to the TQR contribution.[27]

Example 3. Assume the facts are the same as in Examples 1 and 2. However, instead of the rollovers described there, Mr. Black directs his qualified plan to make trustee-to-trustee rollovers of $70,000 of his $100,000 account balance to his traditional IRA and $30,000 to a Roth IRA (the TQR contribution). Because both rollovers are trustee-to-trustee rollovers, Mr. Black can allocate the $30,000 of investment to the Roth IRA and the $70,000 of earnings to the traditional IRA. Thus, each rollover is entirely tax-free.

Combining Direct and Indirect TQR Contributions

In Example 3 above, Mr. Black was satisfied with a TQR contribution of only $30,000 to his Roth IRA, perhaps because the contribution was entirely nontaxable. However, he may want instead to transfer the entire $100,000 in his qualified plan to a Roth IRA in a way that minimizes the taxable amount.

Example 4. Assume the facts are the same as in Example 3. However, immediately after the rollovers from his qualified plan, Mr. Black makes another TQR contribution from his traditional IRA to his Roth IRA in an amount equal to the $70,000 rolled over from his qualified plan.

Then, the exclusion percentage for Mr. Black's TQR contribution from his traditional IRA is 38.5 percent. Mr. Black computes the exclusion percentage by dividing his total $75,000 investment in the IRA by the IRA's $195,000 account balance (original account balance of $125,000 plus the $70,000 rolled over from his qualified plan). Consequently, 38.5 percent of the $70,000 TQR contribution, or $26,950, is a nontaxable recovery of investment.

As in Examples 1 and 2, above, Mr. Black has made TQR contributions of $100,000 to a Roth IRA ($30,000 directly from his qualified plan and $70,000 using his traditional IRA as a conduit). However, his total nontaxable recovery of investment in the TQR contributions is $56,950 ($30,000 from his qualified plan and $26,950 from his traditional IRA). This $56,950 nontaxable recovery of investment is greater than the $30,000 nontaxable recovery in Example 1 for a TQR contribution of the entire $100,000 from the qualified plan. It is also greater than the $46,700 nontaxable recovery in Example 2, for the TQR contribution of the entire $100,000 using the traditional IRA as a conduit.

Mr. Black could have achieved the same result by making a trustee-to-trustee rollover to his IRA followed by an indirect 60-day TQR contribution to a Roth IRA, all from the same qualified plan distribution. As noted above, a taxpayer must first allocate the earnings portion of a distribution to trustee-to-trustee rollovers to the extent possible, before allocating any remaining earnings or investment to 60-day rollovers.[28]

Example 5. Assume the facts are the same as in Example 4. However, instead of the rollovers described there, Mr. Black directs his qualified plan to make a trustee-to-trustee rollover of $70,000 of his $100,000 distribution to his traditional IRA. He directs the trustee to distribute the remaining $30,000 directly to himself. Then, within the 60-day period for indirect rollovers, Mr. Black contributes the $30,000 to a Roth IRA (the TQR contribution). In this situation, the $70,000 of earnings in the distribution is automatically allocated to the trustee-to-trustee rollover into the IRA and the remaining $30,000 of investment is allocated to the 60-day TQR contribution.[29]

Assume that immediately after the rollover from his qualified plan to his IRA, Mr. Black makes another TQR contribution from his traditional IRA to his Roth IRA in an amount equal to the $70,000 rolled over from the qualified plan. As in Example 4, Mr. Black has made TQR contributions of $100,000 to a Roth IRA ($70,000 using his traditional IRA as a conduit and $30,000 in an indirect 60-day TQR contribution to his Roth IRA).

The exclusion percentage for Mr. Black's TQR contribution from his traditional IRA is 38.5 percent, computed in the same way as in Example 4. As in Example 4, his total nontaxable recovery of investment in the TQR contributions is $56,950 ($30,000 from his qualified plan and $26,950 from his traditional IRA).

Of course, the risk in Examples 4 and 5 is that the IRS might try to apply the step transaction doctrine to collapse the steps into a single transaction. On the face of it, the end result test of the step transaction doctrine does appear to apply. To minimize his tax cost, Mr. Black engaged in a series of steps meant to achieve a particular end result ($100,000 transferred from his qualified plan to his Roth IRA). He intended from the outset to achieve this end result under his pre-arranged plan. The end result could have been achieved without the steps by making a TQR contribution of the entire $100,000 from his qualified plan directly to his Roth IRA.[30]

The counter-argument is that what Mr. Black did was within the broad congressional purpose underlying the statutory scheme. The IRS has implicitly found sufficient congressional intent to allow a taxpayer to choose between (1) a TQR contribution from a qualified plan directly to a Roth IRA, and (2) a TQR contribution using an IRA as a conduit. If a taxpayer may use either of these flexible rules to reduce the tax on a TQR contribution, it seems reasonable to conclude that combining the rules to reduce tax is also consistent with the congressional purpose.

In similar situations, involving statutory elections subject to detailed statutory and regulatory requirements (as with retirement plan rollovers), the IRS and the courts have refused to apply substance-over-form doctrines.[31] In Rev. Rul. 90-95,[32] the IRS declined to apply the step transaction to a corporate acquisition and liquidation of a target corporation. The IRS ruled that the step transaction was pre-empted by the availability of a statutory election allowing the acquiring corporation to treat the acquisition as an asset acquisition rather than a stock acquisition. The doctrine was pre-empted by the availability of the election even though the taxpayer did not actually make the election.

Furthermore, when the courts have applied the step transaction doctrine, it has nearly always involved successive steps applied to the same property. However, in Examples 4 and 5, the portion of plan funds involved in the direct TQR contribution from the qualified plan to the Roth IRA is necessarily different property than the portion of the funds routed through the traditional IRA. Each such portion of distributed funds is subjected to its own parallel step or series of steps, and each such step or series of steps has been blessed by the IRS when done separately and in isolation. Moreover, it is fair to say the step transaction doctrine was originally designed to collapse successive steps; it was not designed to combine parallel transactions.

The IRS, then, has allowed alternative methods for transferring funds from qualified plans to Roth IRAs seemingly without regard to the different tax consequences flowing from the different after-tax investment computations. It has even allowed taxpayer discretion in allocating after-tax investment between trustee-to-trustee rollovers from the same distribution. All this indicates a broad and flexible IRS view of the congressional purpose in providing rules for determining the nontaxable investment portions of rollovers, leaving no room for application of the step transaction doctrine or other substance-over-form doctrines.

TQR Contributions in Different Tax Years

If the IRS and the courts accept the approach illustrated in Examples 4 and 5, they should also accept an alternative that could further minimize the tax on TQR contributions. This alternative would separate direct and indirect TQR contributions into two different tax years.

Example 6. Assume the facts are the same as in Example 5. However, instead of the distributions and rollovers described there, on December 31 Mr. Black directs his IRA to make a $70,000 TQR contribution from his traditional IRA to a Roth IRA. On January 2 of the following year, Mr. Black directs his qualified plan to distribute the entire $100,000 balance of his qualified plan by making trustee-to-trustee rollovers of $70,000 to his traditional IRA and $30,000 to a Roth IRA (the TQR contribution). Because both rollovers are trustee-to-trustee rollovers, Mr. Black can allocate the $30,000 of investment to the Roth IRA and the $70,000 of earnings to the traditional IRA.

The IRS now allows taxpayers to combine rollovers to traditional IRAs with TQR contributions to Roth IRAs, all from a single qualified plan distribution.

Then, the exclusion percentage for Mr. Black's TQR contribution from his traditional IRA is 60 percent. Mr. Black computes the exclusion percentage by dividing his total $75,000 investment in the IRA by the IRA's $125,000 account balance. Consequently, 60 percent of the $70,000 TQR contribution, or $42,000, is a nontaxable recovery of investment.

As in Examples 1 and 2, above, Mr. Black has made TQR contributions of $100,000 to a Roth IRA ($70,000 using his traditional IRA as a conduit and $30,000 directly from his qualified plan). However, his total nontaxable recovery of investment in the TQR contributions is $72,000 ($42,000 from his traditional IRA and $30,000 from his qualified plan). This $72,000 nontaxable recovery of investment is greater than the nontaxable recovery of investment in each of the Examples 1 to 5 above.

Again, the IRS might try to apply the step transaction doctrine to collapse the steps into a single transaction. The counter-argument is the same as in the previous examples. In short, what Mr. Black did was within the broad congressional purpose underlying the statutory scheme. As in the previous examples, (1) the portion of plan funds transferred from the qualified plan to the Roth IRA, and (2) the funds transferred from the traditional IRA are not the same funds. In addition, rollovers are highly regulated rule-based transactions that the IRS and the courts may be reluctant to collapse.[33] Finally, the parallel steps in Example 6 are separated into two different tax years, perhaps providing some additional insulation from the step transaction doctrine.[34]

Lack of Intent to Complete Non-Simultaneous Steps

It is of course prudent to acknowledge the possibility that the IRS might succeed in attacking the nearly simultaneous steps described in Examples 4, 5 and 6. That does not mean, however, that the IRS would be successful in attacking similar *non-simultaneous* steps without proof that all the steps were intended at the outset.[35]

Example 7. Assume the facts are the same as in Example 5. That is, Mr. Black directs his qualified plan to make a trustee-to-trustee rollover of $70,000 of his $100,000 distribution to his traditional IRA. He then uses the $30,000 distribution paid directly to him to make a 60-day TQR contribution to his Roth IRA. As in Example 5, the $70,000 of earnings is automatically allocated to the rollover to the IRA and the $30,000 of investment is allocated to the TQR contribution. Thus, both rollovers are tax-free.

However, unlike in Example 5, Mr. Black does not make an additional $70,000 TQR contribution from his traditional IRA to his Roth IRA. He has no intention of making such a TQR contribution because he is in a high marginal tax bracket and does not feel the Roth advantages are worth the tax cost.

In December of the following year, he learns he will be in a low marginal tax bracket for that year because of unexpected losses from a business venture. Consequently, he makes a $70,000 TQR contribution from his traditional IRA to his Roth IRA.

The result is the same as in Example 5, except for some variation in the computation of the nontaxable recovery of investment due to the intervening accumulation of earnings or losses in the traditional IRA. Mr. Black has made TQR contributions of $100,000 to a Roth IRA, $30,000 in an indirect 60-day TQR contribution to his Roth IRA and $70,000 using his traditional IRA as a conduit (albeit stretched over a longer period).

The real difference between Examples 5 and 7 is that the step transaction doctrine clearly does not apply in Example 7. It does not apply because we have posited in Example 7 that Mr. Black did not intend to use his traditional IRA as a conduit when he rolled over his qualified plan distribution. Of course, in the real world, Mr. Black's intent must be determined based on the evidence. However, some evidence of his lack of intent can be found in the difference between his respective tax brackets for the two years involved. Additional evidence may be found in the time lapse between the steps, and the uncertain tax consequences due to valuation changes and intervening accumulations of income or loss in the traditional IRA.[36]

Combining a QLAC Purchase with a TQR Contribution

A Roth IRA is not required to make minimum distributions during a retiree's lifetime. Thus, a retiree may avoid or minimize required minimum distributions by making a TQR contribution to a Roth IRA from his or her traditional IRA or qualified plan.[37] However, the retiree must generally pay tax on the TQR contribution.[38] An acceptable and less tax-costly alternative might be to combine the purchase of a qualifying longevity annuity contract (QLAC) with a TQR contribution.

QLACs allow a retiree to defer the annuity starting date until he or she is as old as age 85, without violating required minimum distribution rules.[39] However, some limitations apply. Aggregate QLAC premiums paid during a retiree's lifetime by all his or her plans and IRAs may

not exceed $125,000 (adjusted for inflation). Nor may cumulative premiums paid by a plan or IRA exceed 25 percent of the account balance of the plan or IRA on the date of a premium payment. All IRA account balances are aggregated for this purpose.[40]

Example 8. Assume Brian Barry has a $340,000 account balance in a traditional IRA (that does not already include a QLAC and that does not include after-tax investment). Mr. Barry has no other IRAs or retirement plan funds. Mr. Barry directs his IRA to purchase a QLAC for a premium of $85,000. The premium satisfies the $125,000 and 25-percent statutory limitations on QLAC premiums. Immediately thereafter, Mr. Barry makes a TQR contribution to a Roth IRA of the remaining $255,000 balance of the IRA.

On these facts, Mr. Barry has achieved substantial deferral. As already noted, the Roth IRA is not required to make minimum distributions during his lifetime. The QLAC, the only remaining asset of the traditional IRA, is not required to make minimum distributions until Mr. Barry reaches age 85. Of course, the QLAC deferral is not quite as good as the more complete Roth deferral. On the other hand, Mr. Barry has avoided paying tax on the $85,000 he would have rolled over to the Roth IRA if he had not used it for the QLAC premium.

The IRS might try to attack these successive transactions under the step transaction doctrine or under some other substance-over-form doctrine. To succeed, the IRS would have to show that such doctrines allow the IRS to reverse the order of the transactions so that the TQR contribution to the Roth IRA was deemed to occur before the QLAC purchase. Then, use of the entire remaining $85,000 balance of the IRA to purchase the QLAC would not satisfy the requirement that cumulative premiums paid by the IRA not exceed 25 percent of the IRA's account balance on the date of a premium payment.

It is unlikely the IRS would succeed in such an effort. In several very relevant cases, the IRS failed in its attempt to reverse the order of transactions. In each case, the taxpayer had made one or more contributions to a charity, which the charity sold after a relatively short interval. The IRS asserted that the transactions should be treated as a sale of the property by the taxpayer followed by a contribution of the sales proceeds to the charity. In refusing to reverse the transactions, the courts stated that they would not recast two actual transactions into two fictional transactions or generate events which never took place. The courts also emphasized the substance and finality of the first transaction (the charitable contribution).[41]

Similarly, in *B. Gross*,[42] the taxpayers contributed property to a partnership and a few days later made gifts of partnership interests to their children. The Tax Court refused to reverse the transactions to make the gifts to the children precede the contributions to the partnership. Furthermore, in *Esmark Inc.*,[43] the Tax Court, when faced with two equally direct routes to an end result, allowed the taxpayer to use the route resulting in the least tax.

A seemingly contrary decision in *Court Holding Co*.[44] is distinguishable. In *Court Holding*, shareholders liquidated their corporation and personally sold the corporate assets. The Supreme Court treated the sale as a corporate sale followed by liquidation of the corporation. However, the court did not simply reverse the transactions. Rather, it held that the corporation actually made the sale because it did all the negotiating of the sale.

By contrast, in *Cumberland Public Service Co.*,[45] the Supreme Court found, in a similar situation, that negotiation of the sale of distributed corporate assets was actually and substantively done by shareholders after distribution of the assets. The court refused to recharacterize the transactions, and did not attempt to reverse the order of the transactions (*i.e.*, by saying the sale of assets occurred before the corporate distribution).

The courts should similarly refuse to create fictional transactions reversing the order of a QLAC purchase and a TQR contribution. The purchase of a QLAC (the first transaction) is just as substantive and final as the first transaction in the cases described above. In addition, different portions of the IRA account balance are used to (1) purchase the QLAC, and (2) make the TQR contribution, whereas the same property is usually involved in successive steps when courts apply the step transaction doctrine. Finally, utilization of QLACs and TQR transactions are both viewed very favorably by the IRS and Congress: QLACs to prevent exhaustion of retirement funds and TQR contributions to generate immediate government revenue.

IRA Rollover to a Qualified Plan Combined with a TQR Contribution

A taxpayer may have the opportunity to roll over an IRA distribution tax-free to a qualified retirement plan. If so, the taxpayer may roll over only the earnings portion of the distribution to the qualified plan. The taxpayer may then retain tax-free the investment portion of the distribution, or roll the investment portion over tax-free to a Roth IRA.[46]

To consummate the rollover, the taxpayer may receive an actual distribution from the IRA and within 60 days roll over the earnings portion to the qualified plan.[47] Alternatively, the trustee of the IRA may transfer the earnings portion directly to the trustee of the qualified plan and distribute the investment portion to the taxpayer. In either case, the tax law treats the transaction as if the taxpayer received the entire amount of the distribution and rolled over only the earnings portion.[48]

Rather than retain the investment, the taxpayer should be able to roll it over tax-free to a Roth IRA. As discussed above, the IRS has provided that a taxpayer who receives a distribution from a qualified plan may roll over the earnings portion of the distribution to another qualified plan and roll over the investment portion to a Roth IRA.[49] Arguably, then, a taxpayer who receives a distribution from an IRA should be able to do the same thing, particularly since the Code specifically allows only the earnings portion of an IRA distribution to be rolled over to a qualified plan.

Unfortunately, though, the analogy is a bit weakened by the different general rules applicable to rollovers from qualified plans and IRAs. In support of its flexibility regarding qualified plans, the IRS cited the *general* statutory provision mandating the rollover of plan earnings before investment.[50] By contrast, the general rule governing rollovers from IRAs requires proportionate allocations of earnings and investment. Although a more specific statutory provision overrides this general rule for an IRA rollover of earnings to a qualified plan, the provision does not mention the rollover of investment. Nor is there any express statutory mechanism or other authority providing for a rollover of only that part of an IRA distribution consisting of investment.[51]

Whether or not a taxpayer wants to roll over the investment portion of an IRA distribution to a Roth IRA, the taxpayer may have other reasons to want to roll over the earnings portion to a qualified plan. Those reasons may raise step transaction issues.

Example 9. John White retires in 2015 at age 56. Mr. White has $100,000 in his qualified retirement plan, with after-tax investment of $30,000. During his working years, Mr. White also made nondeductible contributions of $25,000 to his traditional IRA, with the account balance growing to $125,000. He has not received any previous distributions from either the IRA or qualified plan, and he has no other IRAs or qualified plans. Mr. White would like to withdraw all the funds in his IRA for personal use, but he does not satisfy any of the exceptions from the 10-percent penalty for withdrawals before age 59 1/2.[52]

Instead, Mr. White rolls over the $100,000 earnings in his IRA to his qualified plan, and personally retains the $25,000 investment portion. Immediately thereafter, Mr. White takes a $100,000 distribution from his qualified plan. He asserts that he is not subject to the 10-percent early withdrawal penalty due to the retirement age exception available for qualified plans (but not for IRAs).[53] To qualify for this retirement age exception, a taxpayer must generally be at least age 55 during the calendar year of his or her retirement.[54]

An IRS attack on these transactions would almost certainly succeed. The end result test of the step transaction doctrine appears to apply. To circumvent the penalty on premature distributions, Mr. White engaged in a series of steps meant to achieve the same end result (distribution of the balance of his IRA). He intended from the outset to achieve this end result under his pre-arranged plan. The result could have been achieved directly without the steps, but not without incurring the premature distribution penalty.[55] Furthermore, what Mr. White did is clearly not within the congressional purpose underlying the statutory scheme.

Of course, if Mr. White had not intended at the outset to use his qualified plan as a conduit for his IRA funds, the step transaction would not have applied. For example, Mr. White could have intended to leave the funds in the qualified plan because he believed the investments offered by the plan were superior to those available to the IRA. If, subsequently, he suffered personal financial setbacks that induced him to withdraw the funds from the plan, the passage of funds through the plan should not trigger the premature distribution penalty.

"Back Door" Contributions to a Roth IRA

A taxpayer with earned income may generally make after-tax contributions directly to a Roth IRA each year, subject to inflation-adjusted annual dollar limits. Although these direct Roth contributions are phased out for high income taxpayers, some practitioners believe high income taxpayers can make such contributions "through the back door."

All taxpayers, including high income taxpayers, can make nondeductible contributions to a traditional IRA, subject to the usual earned income and annual dollar limitations. Taxpayers may also make TQR contributions from a traditional IRA to a Roth IRA. Thus, a nondeductible contribution to an IRA by a high income taxpayer, followed by a TQR contribution of the same amount to

a Roth IRA, appears to satisfy the literal requirements of the tax law, even though the high income taxpayer could not have made the Roth contribution directly.

Example 10. Mr. Green is single and earns compensation of $300,000 for the year 2015. He currently has no funds in either a traditional IRA or a Roth IRA. He cannot make direct contributions to a Roth IRA, as he desires, because his modified adjusted gross income is too high.

Instead, he makes a $5,500 nondeductible contribution to a newly formed traditional IRA. Immediately thereafter, Mr. Green makes a $5,400 TQR contribution from his traditional IRA to a Roth IRA. Mr. Green asserts the TQR contribution is entirely tax-free because it consists entirely of Mr. Green's nondeductible contribution to his traditional IRA. Thus, he has seemingly circumvented the prohibition against direct contributions to his Roth IRA.

Unfortunately, the IRS can attack these successive transactions under the step transaction doctrine and would very likely succeed. The end result test of the step transaction doctrine appears to apply. To circumvent a forbidden transaction, Mr. Green engaged in a series of steps meant to achieve the same end result (direct contributions to a Roth IRA). He intended from the outset to achieve this end result under his pre-arranged plan. The result could have been achieved directly without the steps—but not without incurring a penalty on an excess contribution to the Roth IRA.[56]

What Mr. Green did does not appear to be within the congressional purpose underlying the statutory scheme. If Mr. Green's plan succeeded, the very *specific* statutory limitation on Roth contributions would be eliminated or severely restricted by the more *general* statutory provisions that allow (1) after-tax contributions to IRAs, and (2) TQR contributions from IRAs to Roth IRAs. It is a hallowed rule of statutory construction that a statute of general application will not control or nullify a statute with a more specific purpose.[57]

Furthermore, even if related statutes can be read to allow particular combinations of otherwise legitimate transactions, it will not be assumed Congress intended to allow those transactions if they violate a substance-over-form doctrine. In *K.F. Knetsch,*[58] the Supreme Court construed a statute denying deductions for interest paid on post-1953 annuities as implicitly allowing interest deductions for pre-1954 annuities. Nevertheless, the court refused to allow interest deductions on a pre-1954 annuity transaction that was a sham. Similarly, a court is likely to collapse a back door TQR contribution if it is a step transaction, even though the court would otherwise allow TQR contributions containing nondeductible IRA contributions.[59]

It follows that the step transaction should apply if, at the time Mr. Green made his nondeductible contribution to his IRA, he had then *intended* to transfer the funds on to a Roth IRA. On the other hand, if he had not then intended to transfer the funds to a Roth IRA, the steps should not be collapsed and the tax law should not treat Mr. Green as making a direct contribution to the Roth IRA. The normal rules applicable to the nondeductible contribution and TQR contribution should apply. It really does come down to intent at the outset.[60]

Application of the step transaction doctrine to TQR contributions yields mixed results.

Example 11. Mr. White is earning compensation of $250,000 for the year 2015. He has an IRA with an account balance of $10,000 containing no after-tax investment. He has no funds in any other IRA or Roth IRA, and he cannot make contributions to a Roth IRA because his modified adjusted gross income is too high. His income is also too high to make deductible contributions to his traditional IRA. Instead, he makes a $5,500 nondeductible contribution to his traditional IRA to allow income on the funds to accumulate tax-free. He has no intention of rolling over any of the IRA funds to a Roth IRA because over one-half of the amount of the rollover would be taxable in a high marginal tax bracket.

In December of the following year when the balance of his traditional IRA is $22,000, Mr. White realizes he will be in low marginal tax bracket for that year because of unexpected losses from a business venture. Consequently, he converts the $22,000 balance of his traditional IRA to a Roth IRA. The $5,500 after-tax investment in his IRA is nontaxable. The remaining $16,500 is taxable.

Thus, Mr. White has effectively made an unexpected back door contribution of $5,500 to his Roth IRA,

and the step transaction doctrine does not apply. It does not apply because Mr. White's $5,500 contribution to his traditional IRA stands on its own as the desired result since Mr. Black did not then intend to make a further TQR contribution from his traditional IRA to a Roth IRA.

Step Transactions and the Passage of Time

As noted above, the longer the interval between a first step and the final step or steps, the generally weaker is the evidence that a step transaction was intended at the outset. In fact, if the interval is long enough, the courts may decline to apply the step transaction altogether, regardless of the taxpayer's original intent. In *I. Gordon*,[61] the interval between the first step and the final step was one year and nine months, overlapping three tax years. The Supreme Court refused to apply the step transaction in the absence of a "binding commitment," saying the "basic premise of annual tax accounting" must be respected.

However, subsequent federal court decisions have continued to apply the step transaction doctrine when the interval between the first and last step is less than one year (even though there is no binding commitment). In several of those cases the interval even overlapped two tax years.[62] Note also that the courts in some of those cases have indicated that the decision of the Supreme Court in *Gordon* might be limited to cases in which it is the taxpayer who is arguing for application of the step transaction doctrine, or might be limited to the type of corporate spin-off involved in *Gordon*.[63]

Conclusion

Application of the step transaction doctrine to TQR contributions yields mixed results. On the one hand, the IRS is not likely to succeed in applying the doctrine to multiple rollovers from a qualified plan to a Roth IRA, even if the taxpayer used a traditional IRA as a mere conduit for some of the rolled-over amount. It is also highly likely that the purchase of a QLAC with some of the funds in a traditional IRA, followed by a TQR contribution of the remaining IRA balance, would survive an attempt to apply the step transaction doctrine.

Furthermore, it is unlikely the IRS would succeed in nullifying a rollover to a qualified plan of the earnings portion of an IRA distribution, followed by a TQR contribution to a Roth IRA of the investment portion. On the other hand, the step transaction would almost certainly apply if the qualified plan then immediately distributed the amount of the rollover received from the IRA.

It is also highly likely that the step transaction doctrine would apply to a nondeductible contribution to a traditional IRA that is immediately rolled over in a TQR contribution to a Roth IRA (a so-called "back-door Roth contribution").

ENDNOTES

1 *E.F. Gregory*, SCt, 35-1 USTC ¶9043, 293 US 465, 55 SCt 266. Although there is room for disagreement, this article labels the doctrine derived from *Gregory* as the substance-over-form doctrine and treats all related doctrines as derived from the substance-over-form doctrine. Although the Supreme Court in *Gregory* did not actually use the phrase "substance-over-form," it did refer to the suspect transaction as "a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character" and "an elaborate and devious form of conveyance masquerading as a corporate reorganization." *Id.*

2 *K.P. Kirchman*, CA-11, 89-1 USTC ¶9130, 862 F2d 1486.

3 *D.E. Clark*, SCt, 89-1 USTC ¶9230, 489 US 726, 109 SCt 1455.

4 *G.V. Zmuda*, CA-9, 84-1 USTC ¶9442 731, F2d 1417.

5 Code Sec. 7701(o); *Coltec Industries, Inc.,* CA-FC, 2006-2 USTC ¶50,389, 454 F3d 1340, *cert. denied*, 549 US 1206.

6 *H.A. True*, CA-10, 99-2 USTC ¶50,872, 190 F3d 1165; *Aeroquip-Vickers, Inc.*, CA-6, 2003-2 USTC ¶50,693, 347 F3d 173, *cert. denied*, 543 US 809 (2004); *G.D. Parker*, 104 TCM 627, Dec. 59,267(M), TC Memo. 2012-327. To the contrary, Tax Court cases such as *Tandy Corp.* 92 TC 1165, Dec. 45,738; *Gateway Hotel Partners, LLC*, 107 TCM 1023, Dec. 59,806(M), TC Memo. 2014-5.

7 *K.P. Kirchman*, CA-11, 89-1 USTC ¶9130, 862 F2d 1486; *CNT Investors, LLC*, 144 TC 11, Dec. 60,263 (2015).

8 Code Sec. 7701(o)(5)(C); *Nassau Lens Co., Inc.,* CA-2, 62-2 USTC ¶9723 , 308 F2d 39; Notice 2010-62, 2010-2 CB 411, *amplified by*, Notice 2014-58, IRB 2014-44, 746. In Notice 2014-58, the IRS states that the economic substance doctrine includes any "rule or doctrine that applies the same factors and analysis that is required ... for an economic substance analysis, even if a different term or terms (for example, 'sham transaction doctrine') are used to describe the rule or doctrine." So, for example, the IRS will apply the economic substance doctrine to transactions the courts have traditionally analyzed under that doctrine even if some courts have mistakenly identified the doctrine as the sham transaction doctrine. For such misidentifications *see e.g., Black & Decker Corp.*, CA-4, 2006-1 USTC ¶50,142, 436 F3d 431; *United Parcel Service of America, Inc.*, CA-11, 2001-2 USTC ¶50,475, 254 F3d 1014; *Winn-Dixie Stores Inc.,* CA-11, 2001-2 USTC ¶50,495, 254 F3d 1313, *cert. denied*, 535 US 986 (2002).

9 IRS Guidance for Examiners and Managers on the Codified Economic Substance Doctrine and Related Penalties (LB&I-4-0711-015).

10 *Aeroquip-Vickers, Inc.*, *supra* note 6; *Security Industrial Ins. Co.* CA-5, 83-1 USTC ¶9320, 702 F2d 1234.

11 *Associated Wholesale Grocers*, CA-10, 91-1 USTC ¶50,165, 927 F2d 1517; *True*, *supra* note 6; *R.A. Penrod*, 88 TC 1415, Dec. 43,941 (1987).

12 *I. Gordon*, SCt, 68-1 USTC ¶9383, 391 US 83, 88 SCt 1517; *G.R. Redding*, CA-7, 80-2 USTC ¶9637, 630 F2d 1169, *cert. denied*, 450 US 913 (1981); *McDonald's Restaurants of Ill., Inc.,* CA-7, 82-2 USTC ¶9581, 688 F2d 520.

[13] *True*, *supra* note 6; *Associated Wholesale Grocers*, *supra* note 11.

[14] "But the question for determination is whether what was done, apart from the tax motive, was the thing *which the statute intended*. ... [T]he rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside *the plain intent of the statute*. [Emphasis added.]" *Gregory*, *supra* note 1. "The economic substance doctrine represents a judicial effort to enforce the statutory purpose of the tax code. From its inception, the economic substance doctrine has been used to prevent taxpayers from subverting the legislative purpose of the tax code by engaging in transactions that are fictitious or lack economic reality simply to reap a tax benefit. ... [T]he economic substance doctrine is merely a judicial tool for effectuating *the underlying Congressional purpose* that, despite literal compliance with the statute, tax benefits not be afforded based on transactions lacking in economic substance. [emphasis added]" *Coltec Industries, Inc., supra* note 5. "A strictly rule-based tax system cannot efficiently prescribe the appropriate outcome of every conceivable transaction that might be devised and is, as a result, incapable of preventing all unintended consequences. Thus, many courts have long recognized the need to supplement tax rules with anti-tax avoidance standards, such as the economic substance doctrine, *in order to assure the Congressional purpose is achieved* [emphasis added]." Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures* (JCS 02-05) (Jan. 27, 2005).

[15] "While the distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial when the corporation is closely held, Congress has chosen to recognize such a distinction for tax purposes. ... The subsidiary finding that a major motive of the shareholders was to reduce taxes does not bar this conclusion. ... Congress having determined that different tax consequences shall flow from different methods by which the shareholders of a closely held corporation may dispose of corporate property, we accept its mandate." *Cumberland Public Service Co.*, SCt, 50-1 USTC ¶9129, 338 US 451, 70 SCt 280. "[The courts have,] when confronted with a statutory provision not explicitly turning on the relationship between parties to a transaction or requiring an underlying business purpose, adopted a cautious approach and asked merely whether the form superimposed upon the transaction has a result similar to the one Congress had in mind when it drafted the section involved. ... In short, while the existence of a tax motive or the lack of a business purpose is the starting point for a challenge to the form of a transaction adopted by a taxpayer, it is, in the absence of legislative intent to the contrary, not the finish line, for if the substantive result is of the general type considered by Congress to be within the particular provisions involved, the fact that a different but equally feasible form would have resulted in a greater tax is of no consequence. And, since legislative intent must oftentimes be unclear, the form adopted will usually be recognized except where it is a patent distortion of normal business practice . ... The well-spring of tax policy is Congress, not the federal courts. In the long run, the judicial gloss imposed upon the Code must be derived from the congressional purpose underlying the provisions involved in each case. And to the extent the Code grows in complexity and detail, the courts must be careful not to attribute to Congress overall purposes or meanings not reflected in the statutory language or clearly demonstrated in the legislative history." *Nassau Lens Co., Inc.*, CA-2, 62-2 USTC ¶9723, 308 F2d 39.

[16] Congress delegated legislative-type authority to the Secretary of the Treasury to promulgate corporate consolidated return regulations. Thus, intent that the consolidated return regulations allow a series of steps precludes application of the step transaction doctrine. *Falconwood Corp.*, CA-FC, 2005-2 USTC ¶50,597, 422 F3d 1339.

[17] Notice 2009-75, 2009-2 CB 436; Notice 2008-30, 2008-1 CB 638.

[18] Legislative history expressly recognizes the validity of the steps, without any apparent concern that the steps might otherwise be subject to the step transaction doctrine due to their near simultaneity. The staff of the Joint Committee on Taxation stated simply that: "Amounts that have been distributed from a [qualified plan] may be rolled over into a traditional IRA, and then rolled over from the traditional IRA into a Roth IRA." Staff of the Joint Committee on Taxation, 108th Cong., 2d Sess., *Technical Explanation of the "Pension Protection Act of 2006,"* (JCX-38-06) (Aug. 3, 2006).

[19] Code Sec. 408A(e)(12); Pension Protection Act of 2006 (P.L. 109-280), § 824.

[20] Notice 2009-75, 2009-2 CB 436.

[21] *Id.*

[22] Notice 2009-75, 2009-2 CB 436; Code Sec. 402(e)(4).

[23] *Id.* Grandfathered by the Tax Reform Act of 1986 (P.L. 99-514), § 1122(h)(3). *See* Code Sec. 402(e)(4)(H) (1986) for the relevant statutory provisions (available for tax years before 1987 without a birthdate requirement).

[24] Notice 2009-75, 2009-2 CB 436; Staff of the Joint Committee on Taxation, 108th Cong., 2d Sess., *Technical Explanation of the "Pension Protection Act of 2006,"* (JCX-38-06) (Aug. 3, 2006).

[25] For this purpose, a single distribution includes all payments scheduled to be made at the same time (disregarding reasonable delays due to plan administration). Notice 2014-54, IRB 2014-41, 670.

[26] *Id.*

[27] *Id.* The above example is based on the example in Notice 2014-54.

[28] *Id.*

[29] *Id.*

[30] These rollover transactions are all between entities effectively controlled by the taxpayer. The courts have held that transactions between related parties are particularly suspect under the step transaction doctrine. *See J.P. Kornfeld*, CA-10, 98-1 USTC ¶50,241, 137 F3d 1231, *cert. denied*, 525 US 872 (1998); *B.R. Brown*, CA-9, 2003-1 USTC ¶60,462, 329 F3d 664, *cert. denied*, 540 US 878 (2003) (referring to entities transitorily holding property as "mere conduits").

[31] *Nassau Lens Co.*, *supra* note 15; Internal Revenue Service Guidance for Examiners and Managers on the Codified Economic Substance Doctrine and Related Penalties (LB&I-4-0711-015).

[32] Rev. Rul. 90-95, 1990-2 CB 67.

[33] *Id.*

[34] In *Tandy Corp.*, 92 TC 1165, Dec. 45,738 (1989), the court refused to move a step from the year it occurred into the preceding year just to facilitate application of the step transaction doctrine.

[35] The relevant intent is the intent to complete the last step in the series, and not merely the intent to avoid taxes. *True*, *supra* note 6; *C. Brown*, CA-6, 89-1 USTC ¶9190, 868 F2d 859; *R.A. Penrod*, *supra* note 11. However, the intent may be disregarded if consummation of the last step is uncertain due to substantial interim contingencies. *W.R. Klauer*, 99 TCM 1254, Dec. 58,172(M), TC Memo. 2010-65; *Cal-Maine Foods, Inc.*, 93 TC 181, Dec. 45,918 (1989).

[36] *E. Christian Est.*, 57 TCM 1231, Dec. 45,926(M), TC Memo. 1989-413 (subjective intent determined by examining objective evidence); *T.H. Holman,* 130 TC 170, Dec. 57,455, *aff'd on other grounds*, CA-8, 2010-1 USTC ¶60,592, 601 F3d 763 (the passage of time is some evidence of lack of intent).

[37] Code Sec. 408A(c)(5).

[38] Code Sec. 408A(d)(3)(A)(i).

[39] T.D. 9673, effective for annuity contracts purchased after July 1, 2014, or contracts received in exchange for existing contracts after that date. Reg. §1.401(a)(9)-6, Q&A 17(e).

[40] Reg. §1.401(a)(9)-6, Q&A 17(b), Q&A 17(d)(2)(i). A plan's account balance on the date of a premium payment is equal to the account balance as of the preceding valuation date, increased by subsequent contributions, and decreased by subsequent distributions. Reg. §1.401(a)(9)-6, Q&A 17(d)(1)(iii).

[41] *P. Grove,* CA-2, 73-2 USTC ¶9591, 490 F2d 241; *L. Greene*, CA-2, 94-1 USTC ¶50,022, 13 F3d 577, *cert. denied*, 219 US 1028 (1996); *L.B. Sheppard*, CtCls, 66-1 USTC ¶9461, 361 F2d 972.

[42] *B. Gross*, 96 TCM 187, Dec. 57,544(M), TC Memo. 2008-221.

[43] *Esmark Inc.*, 90 TC 171, Dec. 44,548, (1988), CA-7, *aff'd without opinion*, CA-7, 886 F2d 1318 (1989).

[44] *Court Holding Co.*, SCt, 45-1 USTC ¶9215, 324 US 331, 65 SCt 707.

[45] *Cumberland Public Service Co.*, *supra* note 15.

[46] Code Sec. 408(d)(3)(A)(ii).

[47] *Id.*

[48] If an IRA makes a trustee-to-trustee transfer to another IRA, the transfer is generally not

treated as a distribution and rollover, instead it is treated as a mere change of trustee. Rev. Rul. 78-406, 1978-2 CB 157. However, when an IRA trustee transfers funds directly to the trustee of an entity governed by different tax rules, the IRS and the tax law treat the transfer as a distribution to the taxpayer and a transfer by the taxpayer to the other entity. For example, the IRS treats a trustee-to-trustee transfer from a SIMPLE IRA to a traditional IRA as an actual distribution to the taxpayer and a transfer by the taxpayer to the traditional IRA. 1998-1 CB 269, Notice 98-4, Q&A I-4. In addition, the tax law treats a trustee-to-trustee transfer from a traditional IRA to a Roth IRA as the equivalent of an actual distribution from the IRA and a transfer by the owner to the Roth IRA. Code Secs. 408A(d)(3)(C), 408(d)(3); Reg. §1.408A-4, Q&A 1(b). *See also* Rev. Rul. 71-541, 1971-2 CB 209, where the IRS stated that certain direct trustee-to-trustee transfers (not intended to be distributions) between plans qualified under Code Sec. 401(a) will nevertheless be treated as distributions if the recipient plan is not made subject to the same restrictions imposed by the tax law on the transferring plan.

[49] Notice 2014-54, IRB 2014-41, 670.

[50] *Id*.

[51] Code Sec. 408(d)(3).

[52] Code Sec. 72(t).

[53] Distributions by a qualified plan of funds previously rolled over from an IRA are generally subject to the premature distribution penalty rules and exceptions applicable to qualified plans. Rev. Rul. 2004-12, 2004-1 CB 478.

[54] Code Sec. 72(t)(2)(A)(v).

[55] These rollover transactions are all between entities effectively controlled by the taxpayer. The courts have held that transactions between related parties are particularly suspect under the step transaction doctrine. *See J.P. Kornfeld*, CA-10, 98-1 USTC ¶50,241, 137 F3d 1231, *cert. denied*, 525 US 872 (1998); *B.R. Brown*, *supra* note 30.

[56] *Id*.

[57] "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, SCt, 417 US 535 (1974). "[C]ourts should disfavor interpretations of statutes that render language superfluous. ..." *Conn. Nat'l Bank v. Germain*, SCt, 503 US 249 (1992). A *specific* ERISA provision forbidding alienation of pension benefits could not be overridden by a more *general* statute allowing a union to recover an officer's embezzlement of union funds. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, SCt, 493 US 365 (1990). The Pueblo Lands Act could not be read in way that would nullify a clause granting the Secretary of the Interior authority to allow a conveyance of Indian lands. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, SCt, 472 US 237 (1985). A statute allowing the government to enforce its levy on property cannot be read literally to nullify a statute allowing a more senior lien holder to enjoin enforcement of the government's levy. *Tex. Commerce Bank-Fort Worth*, CA-5, 90-1 USTC ¶50,155, 896 F2d 152. A *specific* statutory provision allowing the attorney general to appoint special prosecutors to indefinite terms was not overridden by a *general* statute applying a four-year limit to similar appointments by government agencies generally. *Navarro*, CA-9, 160 F3d 1254 (1998). An individual's *specific* statutory right to receive notification of IRS examination of bank records overrides IRS's general right to examine records that have been voluntarily supplied by a bank. *P.J. Neece*, CA-10, 91-1 USTC ¶50,007, 922 F2d 573.

[58] *K.F. Knetsch*, SCt, 60-2 USTC ¶9785, 364 US 361, 81 SCt 132 (a statute denying deductions for interest paid on post-1953 annuities continues to allow interest deductions for pre-1954 annuities, but does not authorize interest deductions on pre-1954 annuity transactions that are shams).

[59] Roth IRAs were first authorized by the Taxpayer Relief Act of 1997. The Conference Committee Report specifically acknowledges both (1) the Act's limitation on direct Roth contributions for high income individuals, and (2) the continuing availability of nondeductible contributions to traditional IRAs. The report states: "[A]n individual who cannot (or does not) make contributions to a deductible IRA or Roth IRA can make contributions to a nondeductible IRA." However, the report nowhere authorizes a subsequent TQR contribution that would constitute the final step in an otherwise forbidden step transaction. *Taxpayer Relief Bill of 1997 Conference Report and Statement of the Managers*, H.R. 2014, July 31, 1997.

[60] The relevant intent is the intent to complete the last step in the series, and not merely the intent to avoid taxes. *True*, *supra* note 6; *C. Brown*, *supra* note 35; *Penrod*, *supra* note 11. However, the intent might be disregarded if consummation of the last step is uncertain due to substantial interim contingencies. *Klauer*, *supra* note 35; *Cal-Maine Foods, Inc.*, 93 TC 181, Dec. 45,918 (1989).

[61] *Gordon*, *supra* note 20.

[62] *King Enterprises, Inc.*, CtCls, 69-2 USTC ¶9720, 418 F2d 511; *Redding*, *supra* note 12; *McDonald's Restaurants of Ill., supra* note 12; *Security Industrial Insurance Co.*, *supra* note 10; *Barnes Group, Inc.*, 105 TCM 1654, Dec. 59,516(M), TC Memo. 2013-109, *aff'd in unpublished opinion*, CA-2, 2014-2 USTC ¶50,498, 593 FedAppx 7, *Cf.*, Reg. §1.367(a)-2T (foreign corporation reorganization steps within six months are conclusively step transactions, thereafter potentially so); Reg. §1.150-2 (certain replacements, within 12 months, of private activity bond funds previously allocated to prior expenditures are conclusively subject to the step transaction doctrine).

[63] *King Enterprises, supra* note 62; *Security Industrial Insurance Co.*, *supra* note 10.