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Corporate Liquidations: The Kimbell-Diamond Doctrine — May It Rest in Peace

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CORPORATE LIQUIDATIONS: THE KIMBELL-DIAMOND DOCTRINE—MAY IT REST IN PEACE?—*Chrome Plate, Inc. v. District Director of Internal Revenue*, 614 F.2d 990 (5th Cir. 1980).

INTRODUCTION

Due to the pressures of the Great Depression and the financial collapse of many businesses, President Franklin Roosevelt felt a need for the simplification of corporate structures.[1] Congress reacted to this need for simplification and accordingly adopted section 112(b)(6) of the Revenue Act of 1935.[2] This section, which was carried forward into the 1939 Internal Revenue Code with only a few alterations, provided for the tax-free liquidation of a corporate subsidiary, allowing the nonrecognition of gain or loss.[3]

The tax basis for the assets of a liquidated subsidiary under section 112(b)(6) in the 1939 Code was governed by section 113(a)(15) of the Revenue Act of 1936.[4] This basis provision called for the parent com-

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1. *See* H.R. REP. NO. 1681, 74th Cong., 1st Sess. — (1935), *reprinted in*, 1939-1 C.B. 642, 644.

2. Act of Aug. 30, 1935, ch. 829, § 110(a), 49 Stat. 1020.

3. Int. Rev. Code of 1939, ch. 289, § 112(b)(6), 53 Stat. 38 (now I.R.C. § 332).

4. Act of June 22, 1936, ch. 690, § 113(a)(15), 49 Stat. 1684 (now I.R.C. § 334(b)(1)). The latter version of this section provides:

(b) LIQUIDATION OF SUBSIDIARY.—

(1) IN GENERAL.—If property is received by a corporation in a distribution in complete liquidation of another corporation (within the meaning of section 332(b)), then, except as provided in paragraph (2), the basis of the property in the hands of the distributee shall be the same as it would be in the hands of the transferor. If property is received by a corporation in a transfer to which section 332(c) applies, and if paragraph (2) of this subsection does not apply, then the basis of the property in the hands of the transferee shall be the same as it would be in the hands of the transferor.

An exception to this provision was added in the 1954 Code in § 334(b)(2):

(2) EXCEPTION.—If property is received by a corporation in a distribution in complete liquidation of another corporation (within the meaning section 332(b)(2)), and if—

(A) the distribution is pursuant to a plan of liquidation adopted not more than 2 years after the date of the transaction described in subparagraph (B) (or, in the case of a series of transactions, the date of the last such transaction); and

(B) stock of the distributing corporation possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote, and at least 80 percent of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends), was acquired by the distributee by purchase (as defined in paragraph (3)) during a 12 month period beginning with the earlier of,

(i) the date of the first acquisition by purchase of such stock, or

(ii) if any of such stock was acquired in an aquisition which is a purchase within the meaning of the second sentence of paragraph (3), the date on

pany completely liquidating its subsidiary to carry over the subsidiary's basis in its assets.[5]

After section 112(b)(6) was enacted, if a parent corporation fell within this provision's framework, it could not realize the true value of the subsidiary's assets as indicated by the purchase price of the subsidiary's stock. The parent corporation was bound by the carryover basis as prescribed in section 113(a)(15). To avoid this predicament, corporations attempting to use cost or stepped-up basis[6] for the subsidiary's assets have argued that by purchasing the stock, and shortly thereafter liquidating the subsidiary, it was their primary intent to obtain the assets of the subsidiary.[7] They have insisted that the multiple steps involved in obtaining the assets should be treated as a single, integrated transaction.[8]

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which the distributee is first considered under section 318(a) as owning stock owned by the corporation from which such acquisition was made,

then the basis of the property in the hands of the distributee shall be the adjusted basis of the stock with respect to which the distribution was made. For purposes of the preceding sentence, under regulations prescribed by the Secretary, proper adjustment in the adjusted basis of any stock shall be made for any distribution made to the distributee with respect to such stock before the adoption of the plan of liquidation, for any money received, for any liabilities assumed or subject to which the property was received, and for other items.

5. I.R.C. § 334(b)(1) and (2). The tax basis referred to here is the subsidiary's basis in its assets as distinguished from the subsidiary's book value.

Adjustments to this basis are governed by I.R.C. § 1016(b). If liquidation occurs directly after purchase of the stock, no adjustment is required. However, if there is a delay between the date of purchase and the liquidation date, then adjustments must be made to the basis to reflect the operations occurring between those dates. *See* Treas. Reg. § 1.334-1(c)(4) (1972).

For a more detailed analysis, *see* O'HARA, 16-4th T.M., LIQUIDATION OF SUBSIDIARIES—BASIS-SECTION 334(b)(2) at A-10 A-24(1).

6. The terms cost basis and stepped-up basis are often used interchangeably. *See* O'HARA, *supra* note 5, at A-1. Corporations often prefer this cost basis to carryover basis since they will realize a greater tax benefit from the increased depreciation costs. Also, the increased value of assets is more appealing to potential investors examining a corporation's financial statements.

7. A major problem with this argument is establishing the parent corporation's subjective intent. However, section 334(b)(2) is nonelective, and the parent corporation's intent is irrelevant. Once the requirements of section 332 are met, which is a prerequisite to 334(b), followed by the fulfillment of 334(b)(2), the parent will receive a cost basis. *See, e.g.*, Broadview Lumber Co. v. United States, 561 F.2d 698, 711 (7th Cir. 1977); Supreme Inv. Corp. v. United States, 468 F.2d 370, 377 (5th Cir. 1972). The parent may find itself receiving a "stepped-down" basis if, having met the requirements of section 334(b)(2), the purchase price of the subsidiary's stock is less than the value of the subsidiary's assets. *See, e.g.*, Kimbell-Diamond Milling Co., v. Commissioner, 14 T.C. 74 (1950), *aff'd per curiam*, 187 F.2d 718 (5th Cir. 1951), *cert. denied*, 342 U.S. 827 (1951); Broadview Lumber Co. v. United States, 561 F.2d at 711 (7th Cir. 1977).

8. This argument was used in *Texas Bank & Trust Co. of Dallas v. Commissioner*, 12 T.C.M. (CCH) 588 (1953).

In the landmark case of *Kimbell-Diamond Milling Co. v. Commissioner*,[9] which exalted the "single transaction" doctrine,[10] the Commissioner successfully claimed that the basis for the subsidiary's assets should be the cost of the subsidiary's stock.[11] The Tax Court found that since it was the parent's intent to purchase the assets of the subsidiary, the multiple steps involved in liquidating the subsidiary should be viewed as a single transaction.[12] This doctrine, which is now referred to as the *Kimbell-Diamond* doctrine,[13] was based on the fundamental tax concept that the substance of a transaction should prevail over its form.[14]

Thus, the provision covering complete liquidation of a subsidiary originated as section 112(b)(6) of the Revenue Act of 1935. The same section, with minor alterations, appeared in the Internal Revenue Code of 1939. It was carried forward into the 1954 Code as section 332.[15]

The provision for determining the basis of a liquidated subsidiary, found in section 113(a)(15) of the 1939 Code, was expanded in sections 334(b)(1) and (b)(2) of the 1954 Code. In general, section 334(b)(1) provides for a carryover basis, but section 334(b)(2) provides a cost basis exception.[16] The 334(b)(2) exception included "rules effectuating principles derived from *Kimbell-Diamond Milling Co.* . . . ."[17] This codification of the *Kimbell-Diamond*, single transaction doctrine, provides a "mechanistic approach" for acquiring a stepped-up basis in a subsidiary's assets.[18]

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9. 14 T.C. 74 (1950).
10. *Id.* at 80.
11. *Id.* at 81.
12. *Id.* at 80.
13. In *Georgia-Pacific Corp. v. United States*, 264 F.2d 161, 163 (5th Cir. 1959), the court elaborated on the Kimbell-Diamond doctrine:

> [W]hen stock in a corporation is purchased for the purpose and with the intent of acquiring its underlying assets and that purpose continues until the assets are taken over, no independent significance taxwise attaches to the several steps of a multiple step transaction. The final step is, therefore, viewed not as independent of the stock purchase but simply as one of the steps in a unitary transaction, the purchase of assets.

14. T.C. at 80 (citing Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945)). *See also* United States v. Kennedy Constr. Co. of NSR, 572 F.2d 492, 495 (5th Cir. 1978).
15. *See* notes 2 and 3 *supra*.
16. *See* note 4 *supra*.
17. S. REP. NO. 1622, 83d CONG. 2d Sess. 257, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS, 4621, 4894 [hereinafter cited as S. REP. NO. 1622].
18. In *American Potash & Chem. Corp. v. United States*, 399 F.2d 194, 207, (Ct. Cl. 1968), the court noted that section 334(b)(2) was enacted to "inject some degree of certainty" into the law by providing a mechanical test found within section 334(b)(2) to determine if a party is allowed a stepped-up basis. *See also* Chrome Plate Indus. v. District Director of Internal Revenue, 614 F.2d 990 (5th Cir. 1980).

The enactment of section 334(b)(2) has caused considerable controversy concerning the viability of the *Kimbell-Diamond* doctrine. Can the court-created doctrine, which is based on the subjective intent of the parent corporation at the time of liquidation, survive in light of the formalistic, objective requirements of section 334(b)(2)?

FACTS OF THE CASE

In *Chrome Plate Industries v. District Director of Internal Revenue*,[19] the court held that the *Kimbell-Diamond* doctrine is abolished with regard to corporate taxpayers,[20] and, therefore, the only way a parent corporation can receive a cost basis for its subsidiary's assets is by meeting the strict requirements of section 334(b)(2).[21]

In 1972, Chrome Plate Inc. (Chrome Plate), a corporation engaged in chrome plating aircraft cylinders, acquired (through one of its subsidiaries) six corporations (Page corporations) which were involved in the sale and repair of airplanes and airplane engines. The acquisition and subsequent liquidation of the Page corporations was effectuated by a series of transactions.

On December 12, 1972, Page Industries of Oklahoma (PIOI) was created. On December 15, 1972, Chrome Plate Industries, Inc. (CPI) was formed as a wholly owned subsidiary of Chrome Plate.[22] Shortly thereafter, PIOI issued 1,000 shares of its stock to CPI. On December 28, 1972, all of the Page corporations' stock was transferred to CPI,[23] in exchange for $850,000 in cash and notes.[24] CPI then transferred all the Page corporations' stock to PIOI, and in return PIOI transferred 849,000 shares of PIOI common stock. Thus, PIOI not only controlled the Page corporations, but within the same transaction became a wholly

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19. 614 F.2d at 990 (5th Cir. 1980).

20. Note that the *Kimbell-Diamond* doctrine is still applicable to individuals since section 334(b)(2) applies only to corporate taxpayers.

21. 614 F.2d at 999.

22. There are four corporations involved in the transaction. Chrome Plate is the parent corporation; CPI is a wholly owned subsidiary of Chrome Plate and initial purchaser of the Page corporations. PIOI is a newly created corporation that acquires from CPI all of the Page corporations' stock in return for 849,000 shares of PIOI stock. This acquisition makes PIOI, who now owns all of the Page corporation stock, a wholly owned subsidiary of Chrome Plate. CPI added the 849,000 shares of PIOI stock to the 1,000 shares it already owned for a total of 850,000 shares. 614 F.2d a 993.

23. This CPI-Page transaction was accompanied by an individual transfer of 20% interest in one of the six corporations so that, at that point, CPI owned all of the stock of the Page corporations. 614 F.2d at 993, n.1.

24. The court found this met the purchase requirements of section 334(b)(2) by qualifying as a "purchase" under section 334(b)(3). 614 F.2d at 995.

owned subsidiary of CPI,[25] a wholly owned subsidiary of Chrome Plate. The following day the Page corporations were liquidated and PIOI succeeded to their assets. The basis of the acquired assets were unapprovedly stepped up from $250,000[26] to the cost to PIOI of $849,000.[27]

DECISION OF THE COURT

In affirming the holding and reasoning of the district court,[28] the United States Court of Appeals for the Fifth Circuit held that PIOI was not entitled to a stepped-up basis in the Page corporations assets.[29] In part I of the Fifth Circuit's opinion, as in the district court below,[30] it was found that the exchange of the Page corporations' stock by CPI for the stock of PIOI constituted a section 351 transfer[31] and, therefore, failed to qualify as a "pruchase" under section 334(b)(3)(B).[32] Upon the finding of a section 351 transfer, the *Chrome Plate* court found that PIOI was not entitled to a cost basis under section 334(b)(2).[33]

The plaintiff argued that even though it could not receive a cost basis under section 334(b)(2), it nonetheless should be able to receive one under the *Kimbell-Diamond* doctrine.[34] In rejecting this contention, the Fifth Circuit court found that when the objective requirements of section 334(b)(2) were met, there was no room for the *Kimbell-Diamond* doctrine outside the statutory scheme.[35] The court

25. This was the transaction that disqualified PIOI from receiving a stepped-up basis. 614 F.2d at 995. This particular transaction has been labeled "a clear blunder by the taxpayer on form." B. BITTKER & J. EUSTICE, FEDERAL INCOME TAX OF CORPORATIONS AND SHAREHOLDERS, 11.44 at 11-44, n. 103 (4th ed. 1979).

26. This was the original cost of the Page corporations to Mr. Page, their original owner. 614 F.2d at 993, n. 2.

27. Once PIOI had stepped up its basis, Chrome Plate filed a consolidated tax return with PIOI and CPI for the year ending 1973 using this stepped-up basis. 614 F.2d at 993.

28. Chrome Plate, Inc. v. Commissioner, 442 F. Supp. 1023 (W.D. Tex. 1977).

29. 614 F.2d at 1001.

30. 442 F. Supp. at 1026-29.

31. I.R.C. § 351.

32. To qualify for cost basis under section 334(b)(2) one requirement is that there be a purchase. "Purchase" is defined in section 334(b)(3)(B), which stipulates that stock acquired in an exchange to which section 351 applies is not considered a "purchase" for the purposes of that section.

33. 614 F.2d at 995.

34. *Id.* at 996-97.

35. *Id.* at 998-99 (citing Broadview Lumber Co. v. United States, 561 F.2d 698 (7th Cir. 1977); Pacific Transp. Co. v. Commissioner, 483 F.2d 209 (9th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974); Supreme Inv. Corp. v. United States, 468 F.2d 370 (5th Cir. 1972); Boise Cascade Corp. v. United States, 288 F. Supp. 770 (D. Idaho 1968), *aff'd per curium*, 429 F.2d 426 (9th Cir. 1970)).

found that legislative history, "though opaque at best," indicated that Congress was "inserting the principles of *Kimbell-Diamond* in the statute."[36] Noting that Congress had neither enacted nor acknowledged any other exceptions to section 334(b)(1), the court read this as congressional intent to codify the *Kimbell-Diamond* doctrine in section 334(b)(2).[37] Thus, *Chrome Plate* upheld an earlier decision, *International State Bank v. Commissioner*,[38] which held that section 334(b)(2) preempted the *Kimbell-Diamond* doctrine.

ANALYSIS

When a parent corporation has met all of the objective requirements of section 334(b)(2), there is clearly no need for the *Kimbell-Diamond* doctrine.[39] Section 334(b)(2) is a non-elective provision for achieving a stepped-up basis.[40] Thus, once 334(b)(2) requisites have been fulfilled, whether voluntary or involuntarily, the corporate taxpayer will be required to use the stepped-up or cost basis in the subsidiary's assets.[41]

It is in situations where a corporation desires a tax-free liquidation and a cost basis, but has failed to meet section 334(b)(2) requirements, that the viability of the *Kimbell-Diamond* doctrine is at issue. Upon examination of the legislative history of section 334(b)(2), it is unclear whether Congress intended to allow the *Kimbell-Diamond* doctrine to remain viable in such circumstances, or, conversely, intended to make section 334(b)(2) the only means by which a corporate taxpayer could receive a stepped-up basis when liquidating a wholly owned subsidiary.[42]

A. Legislative History and Congressional Intent

In *Chrome Plate*, the Fifth Circuit stated that "[b]y a plain reading of section 334(b)(1) however, it is apparent that Congress meant to

36. 614 F.2d at 999.
37. *Id.*
38. 70 T.C. 173 (1978).
39. *See, e.g.*, Broadview Lumber Co. v. United States, 561 F.2d 698, 711 (7th Cir. 1977); Supreme Inv. Corp. v. United States, 468 F.2d 370, 377 (5th Cir. 1972).
40. Treas. Reg. § 1.334-1(c) (1972).
41. *See, e.g.*, Broadview Lumber Co. v. United States, 561 F.2d 698, 711 (7th Cir. 1977). *Broadview Lumber* did not rule out the possibility that *Kimbell-Diamond* is still viable when a corporation has not met the requirements of § 334(b)(2).
42. Courts have considered the question of congressional intent with respect to the continued viability of the *Kimbell-Diamond* doctrine after section 334(b)(2). Hard cases like the present one give strength to the argument that there should be one tax court appeals system that would eliminate these varying interpretations and decisions. For a good discussion of this issue and the discriminatory nature of the present system *see* Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944).

codify the *Kimbell-Diamond* rule completely in section 334(b)(2)."[43] The court relied primarily on *International State Bank*,[44] a 1978 Tax Court decision which took the position that Congress meant to replace the *Kimbell-Diamond* doctrine with a series of objective tests found in section 334(b)(2) and that to hold otherwise would render the section meaningless. The Tax Court in *International State Bank* said that application of the *Kimbell-Diamond* doctrine in instances where the requirements of section 334(b)(2) had not been met would render the section "a mere piece of advice that Congress has graciously made available for those corporations which wish to claim a cost basis without having to subsequently demonstrate their subjective intent."[45] A congressional position on the issue of the continued viability of the *Kimbell-Diamond* doctrine after section 334(b)(2) is not clearly delineated in committee reports. The Senate Report simply states that section 334(b)(2) "effectuates the principles derived from *Kimbell-Diamond* . . . ."[46] Given the unclear legislative history, a better view of the intent of the legislature is found in *American Potash & Chemical Corp. v. United States*.[47]

In *American Potash*, the court stated that by enacting section 334(b)(2) Congress meant to "inject some degree of certainty into an area of the tax law previously occupied by problems of proving that a taxpayer had the requisite intent."[48] By strictly following the requisites of section 334(b)(2), corporate taxpayers can guarantee themselves a cost basis.[49] However, if a parent corporation falls short of the stipulations contained in section 334(b)(2), it should not be barred completely from receiving this cost basis.[50] This view was adopted in *American Potash* based on the legislative failure to clearly indicate that section 334(b)(2) is the exclusive exception to section 334(b)(1), or that

43. 614 F.2d at 999. It is interesting to note that the United States Court of Appeals for the Fifth Circuit implied that the *Kimbell-Diamond* doctrine was still viable in Griswold v. Commissioner, 400 F.2d 427, 431 (5th Cir. 1968). But in *Supreme Inv. Corp. v. United States*, 468 F.2d 370, 377 (5th Cir. 1972), the same court held that Congress had made a major change by substituting a series of objective tests in place of a determination of the taxpayer's subjective intent to obtain corporate assets.

44. 70 T.C. 173, 180 (1978).

45. *Id.* at 181 (citing Chrome Plate, Inc. v. Commissioner, 442 F. Supp. 1023 (W.D. Tex. 1977)).

46. *See* S. REP. NO. 1622, *supra* note 17.

47. 399 F.2d 194 (Ct. Cl. 1968) (holding that Congress did not intend to eliminate the *Kimbell-Diamond* doctrine by enacting section 334(b)(2)). *See also* Rose Hills Memorial Park Ass'n v. United States, 463 F.2d 425, 433 (Ct. Cl. 1972), *cert. denied*, 414 U.S. 822 (1973) (affirming the viability of the *Kimbell-Diamond* doctrine).

48. 399 F.2d at 207. *See also* Rev. Rul. 74-35, 1974-1 C.B. 85 (where the IRS seems to imply that *Kimbell-Diamond* is still viable).

49. 614 F.2d at 1000.

50. 399 F.2d at 206-09.

Kimbell-Diamond has been preempted.[51] In addition, the court in *American Potash* emphasized that because the *Kimbell-Diamond* doctrine was still applicable to individuals, it was unlikely that Congress meant to differentiate between corporate and individual taxpayers.[52] The *Chrome Plate* court recognized this inconsistency in the applicability of the *Kimbell-Diamond* rule, but considered it a legislative task to correct it.[53]

It is questionable whether Congress would offer section 334(b)(2) as a mere "piece of advice" only to corporate taxpayers and not offer the same advice to non-corporate taxpayers.[54] Although it is not confirmed by the legislative history, the better approach is that Congress was providing corporate taxpayers with a set of objective guidelines, which, if followed strictly, would guarantee them a cost basis. Congress apparently recognized the difficulty under *Kimbell-Diamond* of proving the parent corporation's subjective intent with regard to the assets of a recently acquired subsidiary.[55] Section 334(b)(2) could mitigate this difficulty by providing a key to the corporation's intent.[56] By looking at the extent to which a corporation complied or failed to comply with the mandates of section 334(b)(2), courts could better evaluate that corporation's intent and could better determine whether cost or carryover basis in the subsidiary's assets was more appropriate.[57] Similarly, a corporate taxpayer would know that by not adhering to 334(b)(2) it could avoid a cost basis if it so desired.[58]

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51. 399 F.2d at 208.

52. *Id.*

53. 614 F.2d at 1000.

54. The court in *American Potash* held that it was not the intent of Congress to create an anomaly whereby an individual could receive a stepped-up basis while, under the same circumstances, a corporate taxpayer would be denied a stepped-up basis simply because it had failed to meet the mandates of sectin 334(b)(2). 399 F.2d at 208.

55. The *American Potash* court explained that section 334(b)(2) was enacted to add certainty in this area of tax because of the difficulty of proving a corporation's requisite intent. *Id.* at 207.

56. Boise Cascade Corp. v. United States, 288 F. Supp. 770 (D. Idaho 1968), *aff'd per curiam*, 429 F.2d 426 (9th Cir. 1970); Rev. Rul 60-262, 1960-2 C.B. 114, 115.

57. This suggests that a parent corporation that falls far short of section 334(b)(2) requirements does not have the same level of intent to liquidate a subsidiary's assets as a corporation that falls only slightly short of these requirements. In either case the corporate taxpayer should be able to fall back on *Kimbell-Diamond*, but only if the failure to meet 334(b)(2) requirements is attributable to valid business reasons should the taxpayer be allowed the stepped-up basis. *See* Rev. Rul. 71-326, 1971-2 C.B. 117.

While appearing to be a very "pro-taxpayer" proposition, the ruling could also work to the benefit of the Commissioner. It has been suggested that a non-exclusive approach to 334(b)(2) would prevent tax avoidance and compel the corporate taxpayer to realize its true basis in its assets. Dubroff & Daileader, *Kimbell-Diamond Revisited: A Critique of Judicial Analysis of the Exclusivity of Section 334(b)(2)*, 43 ALB. L. REV. 739, 768-71 (1979) [hereinafter cited as Dubroff & Daileader].

58. Falling within the gamut of 334(b)(2), whether voluntarily or involuntarily, may not always be favorable to the corporate taxpayer. *Cf.* Kansas Sand & Concrete,

B. Statutory Interpretation and the Language of Section 334(b)(2)

The courts in *Chrome Plate*[59] and *International State Bank*[60] seem to rely on the maxim *expressio unius est exclusio alterius*[61] in reaching their decisions. They proposed that the inclusion of section 334(b)(2) was not only the exception to section 334(b)(1), but also excluded all other exceptions, including *Kimbell-Diamond*. This argument is severely weakened by recognizing that in the past when Congress has preempted a judicially created doctrine with a new code provision, it has included language to that effect within the legislative record and in the statute itself.[62] The court in *American Potash*, after citing numerous examples of legislative history that clearly indicated a congressional change in an existing judicial rule,[63] refused to infer that Congress, by enacting section 334(b)(2) had demonstrated any intent beyond providing a set of guidelines by which the corporate taxpayer could assure itself a cost basis.[64]

Additionally, even though section 334(b)(2) includes the word "exception,"[65] it is not sound to conclude, based on the vague legislative history, that this is the only exception Congress intended.[66] For example, in enacting I.R.C. section 119, Congress included the words "but only if" in the provision, making it clear that the only way to receive an exclusion under section 119(a) was to meet the requirements of sec-

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Inc. v. Commissioner, 56 T.C. 522 (1971), *aff'd*, 462 F.2d 805 (10th Cir. 1972) (petitioner required to take a cost basis in the assets when the price was apparently lower than the subsidiary's basis in the same assets).

59. 614 F.2d at 999.

60. 70 T.C. at 181.

61. The maxim literally translates to mean that the expression of one thing is the exclusion of another. BLACKS LAW DICTIONARY 521 (5th ed. 1979). It has been suggested that "current judicial opinion has rejected the applicability of this maxim since it relies on the faulty premise that all possible alternatives or supplemental provisions were necessarily considered and rejected by the legislature." *See* Dubroff & Daileader, *supra* note 57, at 762 n.104.

62. American Potash & Chem. Corp. v. United States, 399 F.2d 194 (Ct. Cl. 1968). The *American Potash* court cited examples of specific statutory language preempting a court created doctrine, *see, e.g.*, I.R.C. §§ 368(a)(1)(C), 337, and 1223. 399 F.2d at 209. The language in the Senate Report on section 1223 is quite specific: "This will change prospectively the rule laid down in *Commissioner of Internal Revenue v. Gracey* (159 F.2d 324) . . . ." 399 F.2d at 209. The court went on to cite numerous other examples and concluded its analysis by finding that without a comparable statement in the legislative history of § 334(b)(2), it cannot be inferred that the *Kimbell-Diamond* doctrine has been preempted, or that Congress had any intent other than to present taxpayers with an objective route for achieving a cost basis. *Id.*

63. *Id.*

64. *Id.*

65. *See* note 4 *supra*.

66. This line of reasoning assumes that Congress evaluated all alternatives and exceptions. Such an assumption is hardly likely. *See* note 61 *supra*.

tion 119(a)(1) or (a)(2).[67] This suggests that Congress could have included language which would have clearly made section 334(b)(2) the only exception and would exclude all other exceptions to 334(b)(1).[68]

It has been stated that "where an act purports to overturn long-standing legal precedent . . ., it is not too much to require that it be done so in unmistakable language."[69] As exemplified by the language in section 119, if Congress had intended to codify the *Kimbell-Diamond* doctrine competely in section 334(b)(2), as the *Chrome Plate* court concluded, it would have provided unmistakable language to that effect in both the congressional reports and in the statute itself. It is unsound to assume that the inclusion of section 334(b)(2) represents the exclusion of all other exceptions without more persuasive legislative history or more specific statutory language.

C. Form Over Substance

The *Chrome Plate* court explained that it did not intend to refute the fundamental tax concept that substance should prevail over form.[70] By holding, however, that section 334(b)(2), which exalts form over substance,[71] is the single exception to 334(b)(1), the court left absolutely no room for a substance over form approach[72] when a tax-free liquidation under I.R.C. section 332 is being considered.

A better view would be to leave the *Kimbell-Diamond* doctrine viable to afford the courts leeway when confronted with a situation where the strict application of 334(b)(2) would be clearly inequitable.[73]

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67. I.R.C. § 119 provides in pertinent part:

(a) MEALS AND LODGING FURNISHED TO EMPLOYEE, HIS SPOUSE, AND HIS DEPENDENTS, PURSUANT TO EMPLOYMENT.—There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependants by or on behalf of his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

68. For example, section 334(b)(2) could have stated in specific language that a cost basis would be allowed, "but only if" the corporate taxpayer meets the current requirements under section 334(b)(2)(A), (b)(2)(B), (B)(i), and (B)(ii).

69. C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 58.03 (4th ed. 1972).

70. 614 F.2d at 1000.

71. *Id.*

72. This approach suggests that the court look beyond the form of the integrated steps of a transaction to the substance of acquiring the assets of a corporation through liquidation. *See, e.g.*, Kimbell-Diamond Milling Co. v. Commissioner, 14 T.C. 74, *aff'd per curiam*, 187 F.2d 718 (5th Cir.), *cert. denied*, 342 U.S. 827 (1951).

73. Judge Tannenwald's concurring opinion in *International State Bank* supported this proposition. He stated:

[I] am not convinced that the doctrine should be considered as having totally lost

This approach would provide its greatest advantage to the corporate taxpayer who, for sound business reasons,[74] finds it impossible to meet the requirements of 334(b)(2).[75] Adopting this approach would have allowed the *Chrome Plate* court and other courts to adhere strictly to 334(b)(2), while still maintaining the substance over form perspective of *Kimbell-Diamond* for certain extraordinary circumstances. Although the form over substance approach would likely reduce taxpayer uncertainty and litigation, it has been suggested that these policy considerations are used primarily to justify the courts' position, which is pro-preemption, in their reading of the legislative history of 334(b)(2).[76]

Thus, the *Chrome Plate* decision represents not only the possibility that the *Kimbell-Diamond* doctrine, at least in the United States Court of Appeals for the Fifth Circuit, may well be dead for nonconforming corporate liquidations. The decision will likely precipitate an increase of inequity to corporate taxpayers due to an uncontrollable noncompliance with 334(b)(2) and a firm, inflexible form over substance approach.

CONCLUSION

The *Chrome Plate* decision that the enactment of 334(b)(2) of the 1954 Internal Revenue Code preempted the *Kimbell-Diamond* doctrine

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its vitality in all situations. Where extraneous events beyond the control of the acquiring corporation preclude a finding of literal compliance with the provisions of section 334(b)(2) and a felicitous reading of that section to cover such situations is not possible, we should not be prevented from utilizing the flexibility which the *Kimbell-Diamond* doctrine affords.

International State Bank v. Commissioner, 70 T.C. 173, 182 (1978).

74. Delays in meeting the requirements of section 334(b)(2) require sound business reasons, and will subject a corporation to scrutiny when a corporation has not met the literal requirements of section 334(b)(2). Rev. Rul. 71-326, 1971-2 C.B. 117.

75. It has been held that when the *Kimbell-Diamond* doctrine is used, there must be an impossibility of directly acquiring a subsidiary's assest before the parent corporation could receive a cost basis. Long Island Water Corp. v. Commissioner, 36 T.C. 377 (1961). A simplistic example of such a situation is where a taxpayer wishing to liquidate a subsidiary is met by a resisting stockholder owning 21% of the subsidiary's stock who refuses to sell out. The parent corporation is thereby prevented from meeting 334(b)(2)(B). Admittedly, in such a situation the parent could maneuver around the stockholder. But if the possibility of such maneuvering is the justification for denying a cost basis under section 334(b)(2), it could be argued that the section is meaningless in any situation where the parent corporation could maneuver around an impossible situation.

This, perhaps, would raise questions of degree and where to draw the line. The courts are forced to weigh questions of equity with the convenience of reduced litigation from the application of cut and dry law. *See* Dubroff and Daileader, *supra* note 57, at 762, n.103.

76. *See* Dubroff and Daileader, *supra* note 57, at 762, n.103.

will be painfully felt by the corporate community seeking a cost basis in a company's assets through purchase of stock and immediate liquidation. Although the decision may have merit based on the vague legislative history in the Congresional Reports, it is totally without justification in other areas.

It is possible that Congress intended to remain neutral on the issue of whether section 334(b)(2) would preempt the *Kimbell-Diamond* doctrine. This position would provide the courts with leeway in order to allow a corporate taxpayer a cost basis in its subsidiary's assets if, for valid business reasons, the parent corporation fell short of the literal requirements of 334(b)(2). This would also permit the courts to adhere to the fundamental tax concept of "substance over form" by allowing them to look through the form of a series of transactions and into its substance. This would alleviate the inequities that arise from a strict application of 334(b)(2).

It can be argued that Congress did not enact 334(b)(2) as a mere "piece of advice" as the *Chrome Plate* court suggests, but as a solid framework through which a corporate taxpayer can assure itself of a stepped-up basis in its subsidiary's assets. In situations where the corporation has not met the requisites of 334(b)(2), courts could examine the *Kimbell-Diamond* intent requirement by measuring the extent to which the corporation adhered to section 334(b)(2) requisites.

Given the unclear legislative history of 334(b)(2), the interpretation provided by the *American Potash* court is the most logical. *Chrome Plate* and *International State Bank* may have gone too far in holding that 334(b)(2) preempted *Kimbell-Diamond* since precise language to that effect is not found in the Congressional Reports or in the statute itself.

At the very least, the "substance over form" approch of *Kimbell-Diamond* is needed in cases where, for valid business reasons, a corporation finds it impossible to meet the meticulous requirements of 334(b)(2). Especially in these circumstances, it is hoped that the *Kimbell-Diamond* doctrine is not "dead."

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