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Recommended Citation
John L. Ruppert, Section 453: Installment Sales Involving Related Parties or Trusts, 29 DePaul L. Rev. 47 (1979)
Available at: https://via.library.depaul.edu/law-review/vol29/iss1/3

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SECTION 453: INSTALLMENT SALES INVOLVING RELATED PARTIES OR TRUSTS

John L. Ruppert*

Section 453 installment sales reporting has been a viable concept in the Internal Revenue Code for fifty-three years. Despite this long history, however, confusion still exists regarding the application of section 453. In this article, the author explores the current law concerning installment sales involving related parties or trusts. He then examines legislation that recently was proposed by Congress as a response to years of judicial inconsistency in this area.

Section 453 of the Internal Revenue Code\(^1\) embodies the congressional recognition of one simple concept: taxpayers, regardless of their accounting method, should be permitted to return gain from the sale of property for deferred payment obligations as those obligations are satisfied rather than when the obligations are received. This concept has endured throughout each of the modifications of section 453 since its first appearance in the taxing statutes in the form of section 212(d) of the Revenue Act of 1926.\(^2\) Despite both its fifty-three year history and the simplicity of its purpose, the exact parameters of section 453 remain unclear.

The past two decades have witnessed repeated taxpayer attempts to obtain the benefits of section 453 while minimizing the economic risks inherent in long-term, deferred payment transactions.\(^3\) Taxpayers seeking to qualify such transactions for installment reporting have structured their sales in accordance with two basic patterns. The first pattern may be characterized as

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1. I.R.C. § 453(b)(1), in pertinent part, states:
   Income from (A) a sale or other disposition of real property, or (B) a casual sale or other casual disposition of personal property . . . for a price exceeding $1,000 may (under regulations prescribed by the Secretary) be returned on the basis and in the manner prescribed in subsection (a) [i.e., installment payment received times (gross profit/total contract price)].

2. Revenue Act of 1926, ch. 27, § 212(d), 44 Stat. 9 (Feb. 26, 1926).

3. The Service’s position in both published and private rulings with respect to such transactions has been antagonistic. See notes 13-27, 84, and accompanying text infra.
the "related party" installment sale. The hallmark of such a transaction is an installment sale by the taxpayer to a relative or controlled business entity who, or which, immediately resells the property to an independent third party for a lump-sum consideration equal to the related party’s adjusted basis (cost) in the property. In effect, the seller and related party, as an economic unit, obtain the benefit of installment reporting while having access to the full sales proceeds.

The second installment sale situation is a variation on the more conventional related party pattern. This transaction involves the use of a trust intermediary. Rather than first selling the property to a related individual or controlled business entity, the seller transfers property on the installment method to a new or existing trust. The trust is then free to dispose of the newly acquired property to a third party. Usually, the resale proceeds are the means by which the trust discharges its installment obligation.

At the outset, it must be noted that a taxpayer has an absolute right to elect the benefits of section 453 if all of the statutory requirements are satisfied. This is true even if the purchaser is ready and willing to pay cash for the property. If the purchaser is unwilling to accept a deferred payment arrangement, however, the seller is left only with the option of finding an alternative purchaser.

Theoretical problems arise when the seller interjects an intermediary between the purchaser and seller in order to complete an already negotiated

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4. See notes 13-61 and accompanying text infra.
5. It is this element, an immediate resale at a price equal to the reseller’s cost basis in the property, that has rankled the Service and Congress. See notes 132-44 and accompanying text infra.
6. As will be discussed subsequently, this pattern may be divided into two categories: sales to related party-trusts and sales to trusts in order to qualify for installment reporting in a § 337 liquidation. The former sales arise out of the same fact patterns as the classic installment sales to a related individual. See notes 88-105 and accompanying text infra. The latter sales are a product of the general rule prohibiting the use of § 453 between shareholders and corporations in a § 337 liquidation. See, e.g., Mercedes Frances Freeman Trust v. Commissioner, 36 T.C. 799 (1961), aff’d, 303 F.2d 580 (8th Cir. 1962); Rev. Rul. 73-500, 1973-2 C.B. 113. See notes 62-87 and accompanying text infra.
7. See notes 64-117 and accompanying text infra.
8. See Bookwalter v. Mayer, 345 F.2d 476 (8th Cir. 1965); Williams v. United States, 219 F.2d 523, 527 (5th Cir. 1955); McGillick v. Commissioner, 42 T.C. 1059 (1964); Reaver v. Commissioner, 42 T.C. 72 (1964); Griffin v. Commissioner, 24 T.C.M. (CCH) 467 (1965).
9. See, e.g., Technical Advice Memorandum 7940002, where the Service cited Rev. Rul. 73-396, 1973-2 C.B. 160, and explained that:
   [Rev. Rul. 73-396] involved a seller of substantially depreciated property who negotiated a deferred payment sale on the installment basis after refusing to accept an offer by the purchaser to pay the full sale price in cash in the year of the sale. We held in that ruling that the seller could elect to report his gain on the installment method even though it was clear that the sale was made on the installment basis for the purpose of deferring recognition of gain pursuant to section 453 of the Code.
See also Pozzi v. Commissioner, 49 T.C. 119, 128 (1967); Ludlow v. Commissioner, 36 T.C. 102 (1961).
sale for cash without losing the benefits of section 453. To date, the Service has relied primarily upon the doctrines of constructive receipt and substance over form when attacking the legitimacy of such transactions. Unfortunately, neither the courts nor the Service have applied these two theories with any degree of consistency.

Faced with a growing body of inconsistent precedent, Congress has proposed changes in section 453(b) designed to end abuses of the installment reporting method. Unlike prior case law and rulings, however, the proposed legislation focuses exclusively on the related party issue without mentioning resale of the property. At present, the bill sweeps too broadly, pulling within its ambit numerous legitimate installment sales that have never been subject to attack by the Service even under the broadest reading of the constructive receipt and substance over form doctrines.

This article will review the current law concerning installment sales involving related parties or trusts. It then will examine in detail S. 1063 and H.R. 3899, one legislative response to twenty-five years of inconsistency.

**CLASSIFYING THE NATURE OF THE INSTALLMENT SALE**

"Related Party" Sales

An installment sale involving a related party consists of three distinct parties: the taxpayer (seller), the related party purchaser (related party), and an independent third party purchaser (purchaser). Such transactions also involve at least two sales: the original installment sale by the seller to the related party, and a cash resale by the related party to the purchaser usually in the same year as the original installment sale.

The classic example of this form of installment sale is found in Revenue Ruling 73-157. The ruling outlines two situations: an installment sale by a father to his son, and a similar installment sale by a taxpayer to his controlled corporation. In both situations, the son and the corporation resold the property to a third party pursuant to a prearranged plan of resale between the taxpayer and the third party. The Service denied both taxpayers the benefits of section 453 on the ground that both transactions lacked economic reality.


12. See specifically notes 131-33, 140-44, and accompanying text infra.

The taxpayer's son and the controlled corporation were deemed to have served merely as agents or conduits for consummation of the taxpayer's prearranged resale.14

In Revenue Ruling 73-536,15 the Service dispelled any notion that its conclusion in Revenue Ruling 73-157 resulted solely from a factual determination that the related party was obligated to resell the property pursuant to the seller's prearranged negotiations. The ruling involved an installment sale of securities by a wife to her husband. The parties intended that the husband would immediately resell the securities to finance his own purchase of them. A resale did not occur, however, until four months after the original installment sale.16

Citing Revenue Ruling 73-157, the Service ruled that the mere intention of, or understanding between, the original parties that the related party would resell the property was to be considered as "strong evidence that the original sale lacked economic substance."17 As in the first situation discussed in Revenue Ruling 73-157, the Service concluded that the husband had acted merely as an agent or conduit for his wife in selling the property, emphasizing such factors as the relationship of the parties and their knowledge of the husband's intent to resell.18

Important differences between Revenue Ruling 73-157 and Revenue Ruling 73-536 are apparent. Revenue Ruling 73-157 appears to define prearranged resales in terms of the existence of three identifiable parties at the time of the original installment sale. In that ruling, the purchaser and the terms of his purchase agreement were known to both the seller and the related party at the time the installment sale was consummated.19 In con-

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14. Id. The crucial factor in both of these transactions was that the seller negotiated the resale directly with the purchaser prior to the installment sale. Id. Surprisingly, the Service did not feel compelled to discuss the relationship of the parties to any extent.

16. Id. at 158-59. Nevertheless, the Service presumed that the related party's purchase was designed solely to permit the taxpayer to avail herself of § 453. Id. at 159.
17. Id. In the opinion of the Service, the combination of marital relationship and an immediate resale by the acquiring spouse negated any claim the taxpayer might have of economic substance to the installment sale. See Coleman, supra note 10, at 2; Goldstein, supra note 10, at 4.

18. Rev. Rul. 73-536, 1973-2 C.B. 158, at 159. One is left to wonder about the interrelationship of the "lacking in economic substance" and the agency/conduit concepts. The former hints at a substance over form analysis while the latter is rooted in the constructive receipt doctrine. See notes 118-27 and accompanying text infra.

Revenue Ruling 73-536 did not involve a prearranged resale. Instead, the seller and related party only intended that the related party would resell the property. The identity of the purchaser and the terms of the resale agreement were unknown at the time of the installment sale.\(^{20}\)

Revenue Ruling 73-536, unlike Revenue Ruling 73-157, concedes that under the proper circumstances, a sale between related parties, followed by an immediate resale, may qualify for section 453 installment treatment.\(^{21}\) Unfortunately, the ruling fails to identify what constitutes the proper circumstances. Also, it is difficult to determine whether it was more important that there was a prearranged sale or that related parties were involved in the transaction.\(^{22}\) Finally, the ruling's definition of prearranged resale seems too broad.\(^{23}\) It is doubtful that the definition of prearranged resale should extend beyond sales negotiated between the seller and the purchaser prior to the seller's installment sale of the property to a related party.\(^{24}\)

The scope of Revenue Ruling 73-157 was expanded by the Service in Revenue Ruling 77-414,\(^{25}\) where the taxpayer desired to sell the development rights to his property to a local county board. He sought to report the trans-

\(^{20}\) Rev. Rul. 73-536, 1973-1 C.B. 158, at 159. In Roberts v. Commissioner, 71 T.C. 311 (1978) (appeal filed by the Government with the 9th Cir.), the court approved an installment sale to a newly-created trust despite the trust's avowed intention to resell the property. See notes 96-103 and accompanying text infra. The court noted that a prearranged plan to resell stock for its market value, a sum not subject to influence by the parties, did not vitiate the installment sale. The court, however, was careful to note that the trust was under no obligation to resell. 71 T.C. at 323. See also Schnee, Installment Sales: An Available Planning Device, 57 TAXES 174, 176-77 (1979) [hereinafter cited as Schnee].

\(^{21}\) The Service premised its concession on the "reality" of the underlying installment sale, stating:

A transaction involving an installment sale between clearly related taxpayers if allowed by a resale of the property to an unrelated third party may be bona fide, and thus, qualify for the installment method of reporting. However, if such a transaction purporting to be an installment sale lacks reality, it will be no more effective in avoiding taxes than any other type of sale.


\(^{22}\) Both factors are emphasized in the ruling. Id.

\(^{23}\) A mere intention to resell, without the presence of an actual prearranged resale, was treated as the equivalent of a prearranged resale. The Service seems to indicate that the closer the relationship among the parties the less immediate or certain the resale needs to be in order to trigger the agency/conduit or economic substance arguments. Unfortunately this analysis was not adopted in Revenue Ruling 77-414, 1977-2 C.B. 299. See notes 25-28, 43-45 and accompanying text infra.

\(^{24}\) See, e.g., Nye v. United States, 407 F. Supp. at 1348-49; but cf. Weaver v. Commissioner, 71 T.C. 443 (1978) (appeal filed by the government with the 9th Cir.) (where the court observed that sales through "straw parties" were not to be respected).

See Rev. Rul. 73-536, 1973-2 C.B. at 159, where the Service noted that as a prerequisite to recognition of an installment sale, the sale must reflect economic reality. See Williams v. United States, 219 F.2d at 527; Griffiths v. Commissioner, 37 B.T.A.,314 (1938), rev'd, 103 F.2d 110 (7th Cir. 1943), aff'd, 308 U.S. 355, 357-58 (1939). In addition, such sales may not merely pass title through a conduit. See, e.g., Hallowell v. Commissioner, 56 T.C. 600, 606-08 (1971); Commissioner v. Court Holding Co., 2 T.C. 531 (1943), rev'd, 143 F.2d 823 (5th Cir. 1944), rev'd, 324 331, 333-34 (1945).

action under section 453, but local law prohibited the board from purchasing property on the installment method. Therefore, the county interposed an independent, third party bank between itself and the taxpayer. Pursuant to a prearranged plan, the taxpayer sold the development right to the bank under the installment method, and the bank immediately conveyed the right to the county for a lump-sum payment.  

Citing Revenue Ruling 73-157, the Service concluded that the bank was an "unnecessary" intermediary. In support of this conclusion, the Service cited the Tax Court decision in Wrenn v. Commissioner. Wrenn involved an installment sale of stock by a husband to his wife. Mrs. Wrenn resold the stock on the same day and, pursuant to the original sales agreement, purchased mutual fund shares as security for her installment obligations. The Commissioner contended that the entire transaction lacked a business purpose, identifying such factors as the intrafamily nature of the sale, the prearranged resale, and the retention of the proceeds within the family unit. The Tax Court held that while interspousal sales are subject to close scrutiny, they do not per se create an agency relationship. Rather, the court determined that the legitimacy of an intrafamily installment sale should be tested by the degree of independence of the parties and the presence of a substantive, if not a business, purpose. In light of the marital relationship

26. Id. at 299-300. The ruling indicates that the county chose a specific bank. The sales proceeds paid to the bank by the county were not to be held by the bank as an escrow agent, nor would the funds be held in an escrow account. In addition, the bank did not hold the funds as a deposit by or on behalf of the taxpayer. Finally, the bank was free to reinvest the funds as it saw fit. Id. at 300.

27. Id. at 301. The ruling is conclusory in its analysis. Moreover, it is difficult to reconcile its conclusion with that of the earlier rulings in light of the latter's emphasis on the degree of control exercised by the seller over the intermediary. See Rev. Rul. 75-536, 1973-2 C.B. 158, at 159; Rev. Rul. 73-157, 1973-1 C.B. 213. The Service's conclusion that the transaction may be a sham appears incorrect. The bank served as the agent of the purchaser not the seller. The seller possessed no control over the intermediary. There is no indication that the transaction between the taxpayer and the bank was not what it appeared to be, an arm's length installment sale. Therefore, no reason existed to deny the seller the use of § 453.


29. Id. at 577-78.

30. Id. at 579. Absent from the Commissioner's argument was any reference to the constructive receipt doctrine. Rather, the Commissioner premised his attack on the substance over form doctrine. Id.

31. Id. at 582. The court concluded that close scrutiny was necessary anytime the relationship of the parties afforded the possibility of tax avoidance. Id. at 584.

32. Id. The court did not dispute the applicability of the control or economic benefit test of Rushing v. Commissioner, 441 F.2d 593 (5th Cir. 1971), aff'd, 52 T.C. 888 (1969). Id. at 581-82. The primary concern of the court, however, was clearly the lack of a substantive purpose for the installment sale. Id. at 583-84. The court concluded that Mrs. Wrenn's immediate resale of the shares was indicative of the fact that she did not purchase them for their intrinsic worth. Nor did Mrs. Wrenn regard the shares as a means of obtaining funds at a low interest rate (four percent), for there was no indication that she needed such funds. Finally, the sole reason for her purchase of mutual fund shares was to satisfy her obligation under the installment sales agreement. Id. at 583. As for Mr. Wrenn, the court rejected his contention that the increase in
of the parties, the intended resale of the property by the related party, and the lack of any substantive purpose for the original installment sale, the court concluded that the taxpayer failed to carry his burden of proof.  

The "substantive purpose" concept is of particular significance in Wrenn because the Service relied only on the "substance over form" doctrine. By focusing on the substantive purpose behind the related party's installment purchase, the Wrenn court relegated the factors of relationship of the parties and prearranged, or pre-intended, resale to their proper place, as merely indicia of a suspect transaction. If the constructive receipt doctrine had been the focus of the Wrenn court, the degree of relationship between the seller and the related party might have been the determinative factor because under this doctrine, taxation of the seller on the full sales proceeds turns on the issue of the seller's control over the related party.

In contrast to the result in Wrenn, an intrafamily installment sale was recognized as bona fide in Nye v. United States. As in Wrenn, one spouse in Nye sold securities on the installment method to the other spouse. The taxpayer was aware of her husband's intention immediately to resell the securities in order to liquidate his own business liabilities. Citing Revenue Ruling 73-157, the Commissioner contended that the marital relationship of the parties placed the purchasing spouse in the position of an agent or conduit for the selling spouse.

Based on Rushing v. Commissioner, the court concluded that the proper test for determining the legitimacy of an intrafamily installment sale was whether the seller directly or indirectly controlled the proceeds of the resale or derived any economic benefit from the transaction. The court rejected his investment return percentage from three percent to five percent constituted a sufficient "substantive purpose" to satisfy § 453. Id. at 584.  

33. Id. See the brief discussion of these factors in Interspousal Installment Sales, supra note 10, at 279-80.

34. If the Service had argued the constructive receipt doctrine rather than the substance over form concept, the issue of substantive purpose would have been irrelevant. The substantive purpose issue, however, plays a vital role where the substance over form doctrine is in issue. By attacking the very substance of a sale, the Service implicitly shifts the burden to the taxpayer to defend the form of the transaction chosen. Demonstration of a substantive purpose to the form of the transaction chosen is one means by which the taxpayer may defend such form. See notes 118-27 and accompanying text infra.

Where the constructive receipt argument is the focus, the only real issue is the degree of control exercised by the seller over the intermediary. The form of the transaction is only of secondary importance. See the discussion of Nye v. United States, 407 F. Supp. 1345 (M.D.N.C. 1975), at notes 35-39 and accompanying text infra.


36. Id. at 1347-48.

37. The court rejected the Commissioner's argument asserting that "[t]he prearranged plan argument only makes sense when a three party transaction makes use of a strawman as a conduit between the first and third parties . . . ." Id. at 1350.

38. 441 F.2d 593 (5th Cir. 1971), aff'g, 52 T.C. 888 (1969). See the discussion of Rushing at notes 64-74 and accompanying text infra.

the Service's contention that the mere fact the seller was aware of the related party's intent to resell precluded the seller from reporting her gain on the installment method.40

In addition, the court denied that the marital relationship of the parties, standing alone, was determinative of the issue.41 Although such a relationship might give rise to a presumption of agency, the court observed that the unique factual setting of the transaction rebutted any such presumption. Pointing to the economic independence of each spouse, the sizeable personal estate of each, and the absence of any apparent control by the wife over the resale proceeds, the court rejected the Service's analogy to Revenue Ruling 73-157.42

The breadth of Revenue Ruling 77-414 demonstrates the Service's continued adherence to the resale element as the primary indicia of a "sham" installment sale. Absent in this ruling is any mention of the seller's control over, or economic benefit from, the resale proceeds.43 In fact, the Service appears to concede that the seller and intermediary bank were totally unre-

40. Id. at 1350. The court distinguished Revenue Ruling 73-157. The court opined that an attack by the Service based on a "prearranged plan" of resale only makes sense when two parties purposely interpose a straw conduit. The Service made no argument that any plan of sale ever existed between Mrs. Nye and the eventual purchasers. The court concluded: "Certainly the I.R.S. cannot be contending that any time an installment purchaser makes it known to the installment seller that he . . . plans to resell at some future date the installment seller immediately loses his . . . right to report gain pursuant to section 453(b)." Id. This statement goes far beyond the four corners of the Nye facts. In Nye, the parties were married; however, the ultimate purchaser was unknown, the husband held the stock for six months, and the husband and wife demonstrated some degree of economic independence. 407 F. Supp. at 1350. Therefore, Nye represents no more than a factual determination that the sale between husband and wife was bona fide, at arm's length, and worthy of recognition as an independent transaction. See Comment, Federal Income Tax—Use of Installment Sale Reporting for Sales Between Related Taxpayers: the Separate v. Single Economic Entity Argument, 54 N.C. L. REV. 714, 717-20 (1976) [hereinafter cited as Use of Installment Sale Reporting].

41. Nye v. United States, 407 F. Supp. at 1349-50. It is questionable whether the Service focused solely upon the marital relationship of the parties or upon a combination of relationship and immediate resale.

42. Id. at 1350. See also note 40 supra. The Nye and Wrenn decisions are difficult to distinguish. The foremost distinguishing factor between the two decisions is the lack of any substantive purpose in Wrenn. If the three-pronged test outlined in Wrenn, see note 33 and accompanying text supra, is applied to the facts of Nye, it is difficult to support the Nye result. It would appear that the two factors most important to the outcome of these two decisions were the length of time the purchasing spouse held the property, and the presence of any substantive purpose for the purchasing spouse to acquire the property in an installment sale.

43. Control over the related party always has been considered crucial in the related party installment sale cases. In Nye v. United States, the court specifically found that the facts rebutted any inference that Mr. Nye was an agent for his wife. 407 F. Supp. at 1350. Even more to the point, in Wrenn, the Tax Court stated: "As noted in Nye, bona fide transfers of this nature are to be accorded section 453 relief, but in order to be deemed bona fide both the buyer and seller must demonstrate their independence. . . ." 67 T.C. at 582. See Tripp, Installment Sales to Related Parties, 52 TAXES 261, 265-67 (1974) [hereinafter cited as Tripp] (prearranged resales indicate no independence on the part of the purchaser). See also O'Hare, supra note 17, at 32-34 (prearranged resale demonstrates control by the seller—analogy to escrow cases discussed in note 84 infra).
The very premise of Revenue Ruling 73-157 and Revenue Ruling 73-536, that the relationship between the seller and the related party denotes some degree of control by the seller over the resale proceeds, has vanished. In view of the relationship between the local county board and the bank, it is difficult to imagine a clearer instance of a bona fide, arm's length transaction between unrelated parties. In contrast, the control or economic benefit test of Rushing stands at the heart of the Nye and Wrenn decisions. Neither court disputed the applicability of the Rushing test to the facts before them. The difference in results in these two decisions may be explained on the basis of their factual differences.

Recently, the Nye approach was affirmed in Oman Construction Co. v. Commissioner. Oman involved multiple resales of certain construction equipment. The Commissioner alleged that the installment sale by the partners in Acme, the assignee of Oman, to an intermediary entity, Volunteer, lacked substance because of a prearranged resale by Volunteer. Citing Rushing, the court examined each transaction to determine if the sellers, directly or indirectly, controlled the proceeds of the resale or derived any economic benefit. In contrast to Revenue Ruling 73-536, the court rejected the Service's reliance upon the prearranged-resale-by-the-intermediary theory. Noting that neither the seller nor the intermediary knew at the time of the sale who the purchaser on resale would be, the eight-month interval between sale and resale, and the absence of any evidence that the taxpayers controlled the intermediary, the court sanctioned the taxpayers' use of section 453.

44. See Rev. Rul. 77-414, 1877-2 C.B. 299, at 301, where the Service states: "[a]lthough the intermediate purchaser is not related to the taxpayer in the instant case, the transaction would be similar to the situations described in Rev. Rul. 73-157, and the taxpayer will be considered to have received the full purchase price in the year of the sale."

45. See note 26 supra.

46. See Wrenn v. Commissioner, 67 T.C. at 582 ("Although we agree with that analysis of the law pertaining to interspousal installment sales, [citing Nye's reference to Rushing], we must determine whether these petitioners have demonstrated that they qualify. . . .")

47. 37 T.C.M. (CCH) 1849-57 (1978).

48. Id. at 1849-65. Oman Construction Corporation (OCC) sold certain equipment to Oman Partnership (OP) in April, 1968. The partners in OP were the controlling shareholders of OCC. OP resold some of the equipment between April, 1968, and May, 1969, at which time it distributed any remaining equipment to the partners. The partners then contributed the property to Acme, a partnership in which they were the sole partners. Acme immediately sold the equipment on the installment basis to Volunteer, Ltd., who, in turn, resold the equipment to Mercury eight months later. The court found that Volunteer and Acme were unrelated. Id. at 1849-59.

49. Id.

50. The court observed that Volunteer had no knowledge at the time of the installment sale that it would be able to resell to Mercury. A major factor supporting this conclusion was the eight-month interval between purchase and resale. Id. at 1849-65. In effect, the court applied the "at risk" theory to legitimate the intermediary installment sale. See O'Hare, supra note 17, at 33-34.

Section 482 may have some impact on sales between related business entities. See I.R.C. § 482. The statute permits the Commissioner to distribute gross income between commonly con-
Finally, to be contrasted with the Oman and Nye decisions is the often-cited 1939 Supreme Court case, Griffiths v. Commissioner.\(^{51}\) In Griffiths, the taxpayer negotiated a resale of stock to a party who had fraudulently sold the same stock to the taxpayer in an earlier transaction. Pursuant to the plan of sale, but unknown to the purchaser, the taxpayer formed a new, wholly-owned corporation, sold the stock to it, and completed the resale through the corporation. The proceeds of the sale were paid directly to the taxpayer who immediately transferred them to the corporation.\(^{52}\)

The United States Supreme Court held that the tax laws were less concerned with title than they were with command or control over the economic benefit from the property.\(^{53}\) In the Court's opinion, control could be exercised in numerous ways, such as retention of title, creation of a controlled entity, or interposition of a subservient agent. The Court concluded that the taxpayer's control over the wholly-owned corporation warranted treating the taxpayer as if he had actually received the proceeds directly.\(^{54}\)

In summary, the courts and the Service have identified numerous factors relevant to the issue of the legitimacy of an installment sale to a related party. Some of the most important factors are: 1) the nature of the relationship between the seller and the related party;\(^{55}\) 2) the presence of a prearranged plan of resale to an identifiable purchaser;\(^{56}\) 3) the proximity in time trolled or owned business entities. It is interesting to speculate on whether the Commissioner may raise § 482 as a possible means of attributing the full resale proceeds received by a reselling business entity to the related business entity from which it acquired the property on the installment basis. See Adess, The Role of Section 482 in Nonrecognition Transactions—The Outer Edges of its Application, 57 Taxes 946 (1979).

52. Id. at 356-57.
53. Id. at 357-58.
54. Id. To be contrasted with Oman and compared with Griffiths is Hindes v. United States, 326 F.2d 150 (5th Cir. 1964), rev’d, 246 F. Supp. 147 (W.D. Tex. 1964); cert. denied, 377 U.S. 908 (1964). Subsequent to accepting the purchaser's offer of $300,000 cash for his property, the taxpayer formed a corporation, the sole stockholders of which were his mother, father, and attorney. This corporation was capitalized with $1,000 and the property was sold to it for $265,000 in notes payable over ten years. The court concluded that the corporation was merely an agent of the seller. Id. at 151-52. Interestingly, there is no mention of the Griffiths decision in Hindes. See the discussion of Hindes in Coleman, supra note 10, at 2; Tripp, supra note 43, at 263 n.10.
55. See Griffiths v. Commissioner, 308 U.S. at 356-57 (controlled corporation); Hindes v. United States, 326 F.2d at 151 (controlled corporation); Nye v. United States, 407 F. Supp. at 1349 (husband and wife); Wrenn v. Commissioner, 67 T.C. at 582-84 (husband and wife); Oman Construction Co. v. Commissioner, 37 T.C.M. (CCH) at 1849-65 (related businesses); Rev. Rul. 73-536, 1973-2 C.B. 158, at 158-59 (husband and wife); Rev. Rul. 73-157, 1973-1 C.B. 213 (son and controlled corporation).
56. See Griffiths v. Commissioner, 308 U.S. at 357-58 (prearranged plan to resell); Hindes v. United States, 326 F.2d at 151-52 (prearranged plan to resell); Oman Construction Co. v. Commissioner, 37 T.C.M. (CCH), at 1849-65 (no prearranged plan); Rev. rul. 77-414, 1977-2 C.B. 299, at 301 (prearranged plan).

The Service will attack such prearranged transactions solely on the presence of an intent to resell. See Nye v. United States, 407 F. Supp. at 1350 (mere intent to resell); Wrenn v. Com-
between the installment sale and the resale; the presence of a business or substantive purpose for the structure of the transaction; the retention of proceeds within the economic family unit; if a business entity is interposed, whether such entity is a newly-formed entity or an existing entity; and whether the installment obligation of the related party may be accelerated.

**Seller-Created Trusts**

The second form of installment sale employed by taxpayers seeking to obtain the benefits of section 453 involves the interposition of a trust, rather than an individual or other business entity, between the seller and the ultimate purchaser. These transactions may be subdivided into two distinct categories: trusts used in connection with section 337 liquidations, and trusts used to effectuate resales on the open market.

**Installment Sales of Stock in a Liquidating Corporation to a Trust: Sections 453 and 337**

The most famous of the installment sales cases involving a sale to a trust of stock in a corporation liquidating under section 337 is *Rushing v. Commissioner*. *Rushing* involved a taxpayer who was one of two coequal owners of the corporation, 67 T.C. at 584 (mere intent to resell); Rev. Rul. 77-414, 1977-2 C.B. 299, at 299-301 (mere intent). For a discussion of the impact of an immediate resell see Coleman, supra note 10, at 2; Garrar, supra note 10, at 113-14; Goldstein, supra note 10, at 124; O'Hare, supra note 17, at 33-34; *Use of Installment Sale Reporting*, supra note 40, at 719-20; *Interspousal Installment Sales*, supra note 10, at 279-81.

57. See Nye v. United States, 407 F. Supp. at 1347 (resale four months later-installment sale recognized); Wrenn v. Commissioner, 67 T.C. at 578, 583 (resale on same day as sale-installment treatment denied); Oman Construction Co. v. Commissioner, 37 T.C.M. (CCH) at 1849-65 (eight months between sale and resale-installment sale recognized); Rev. Rul. 73-536, 1973-2 C.B. 158, at 159 (resale in same year as installment sale-installment sale treatment denied.). See also Goldstein, supra note 10, at 4 (unsuccessful resale attempts add credibility to the original installment sale); O'Hare, supra note 17, at 33-34 (immediate resale gives rise to an inference that the purchaser was not "at risk"—the longer a related party is at risk the more bona fide the installment sale appears).


60. See Griffiths v. Commissioner, 308 U.S. at 356-58 (newly-formed corporation treated as a sham); Hindes v. United States, 326 F.2d at 151-52 (5th Cir. 1964) (newly-formed corporation treated as a conduit); Rev. Rul. 73-157, 1973-2 C.B. 213 (ruling doesn't state whether the corporate conduit was a pre-existing entity or a newly-formed corporation). See also Garrau, supra note 10, at 113-14 (newly-formed corporation subject to attack under Commissioner v. Court Holding Co., 324 U.S. 331 (1945)).


62. See note 6 supra. See also notes 64-87 and accompanying text infra.

63. See note 6 supra. See also notes 88-105 and accompanying text infra.

64. 441 F.2d 593 (5th Cir. 1971), aff'g, 52 T.C. 888 (1969).
of two corporations. In 1962, the corporations adopted section 337 plans of liquidation.\textsuperscript{65} Thereafter, all the assets of the corporations were sold. Just prior to the expiration of the statutory twelve-month period within which the corporations were required to liquidate, the taxpayer sold his shares in the liquidating corporations on the installment basis to a newly-formed, irrevocable trust.\textsuperscript{66}

In an attempt to deny the taxpayer the benefits of section 453, the Commissioner raised such arguments as assignment of income, agency/conduit, and constructive receipt.\textsuperscript{67} The court rejected all three contentions. In the opinion of the court, the assignment of income concept addressed the issue of which taxpayer was the proper taxable party.\textsuperscript{68} The court noted that in Rushing there was no question whether the seller would eventually recognize the full amount of his gain; the only real issue was one of timing.\textsuperscript{69} Under such circumstances, the court could not find any grounds for invoking the assignment of income doctrine.

Turning to the constructive receipt and agency arguments, the court stated the test as follows: “In order to receive any installment benefits the seller may not directly or indirectly have control over the proceeds or possess the economic benefits therefrom.”\textsuperscript{70} Applying this test, the court emphasized the following factors: 1) the trust was an autonomous entity that was irrevocable and independent of the taxpayer’s control; the trust was neither a puppet nor an “economic serf” of the taxpayer;\textsuperscript{71} 2) the taxpayer

\textsuperscript{65} Id. I.R.C. \textsection 337(a) states:
If, within the 12-month period beginning on the date on which a corporation adopts a plan of complete liquidation, all of the assets of the corporation are distributed in complete liquidation . . . no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.
See also Treas. Reg. \textsection 1.337-1 which states: “All assets . . . both tangible and intangible, must be distributed within the 12-month period.”

\textsuperscript{66} 441 F.2d at 594.

\textsuperscript{67} Id. at 597-98. The purpose behind the transaction as structured by the taxpayer was to avoid the prohibition on the use of \textsection 453 in conjunction with a liquidating distribution under \textsection 337. See Mercedes Frances Freeman Trust v. Commissioner, 303 F.2d 580, 584 (8th Cir. 1962), aff’d, 36 T.C. 779 (1961); Rev. Rul. 73-500, 1973-2 C.B. 113, at 114. Therefore, the Commissioner was reluctant to permit the taxpayers to obtain indirectly a result they could not obtain directly.

\textsuperscript{68} The court stated:
[T]his is not a case where one taxpayer has attempted to shift the gain to a second taxable entity in order to reap the benefits of the second entity’s lower tax rate. The price the trust paid the taxpayers for the stock was the full value of the stock, including the appreciation in value which would be realized upon liquidation. We therefore find the Commissioner’s reliance upon the anticipatory assignment of income theory entirely misplaced simply because no income was assigned.

\textsuperscript{70} 441 F.2d at 597.

\textsuperscript{69} In turn, the timing issue was viewed as a constructive receipt question. Id.

\textsuperscript{71} Id. at 598.

\textsuperscript{71} Id. See the discussion of the control element in Weaver v. Commissioner, 71 T.C. 443 (1978) (appeal filed by the government with the 9th Cir.) in notes 75-87 and accompanying text infra.
retained no control over the liquidating distribution; 72 and 3) the trustee had independent duties and responsibilities to persons other than the taxpayer. 73 Relying on these factors, the court held the section 453 sale to be bona fide. 74

Recently, Rushing was affirmed in Weaver v. Commissioner. 75 In this instance, the taxpayer and his brother each owned fifty percent of the stock of Columbia Match Co. (CMC). After completing negotiations for the sale of all of the corporate assets, the taxpayer and his brother each created irrevocable trusts for their children and sold their CMC stock on the installment method to the trust. Immediately thereafter, the bank, as trustee, adopted a section 337 plan of liquidation, liquidated the corporation, and transferred the assets to the purchaser. 76 The Service attacked this arrangement on numerous grounds. The major theories proffered were lack of economic reality, agency/conduit, and substance over form. 77 In a detailed opinion, the court rejected all of these arguments and held for the taxpayer. 78

The decision in Weaver rests squarely on the two-part, control or economic benefit test of Rushing. 79 The court observed that in Rushing the sale had economic substance because the trustee had the power to void the

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72. The taxpayer owned exactly 50% of the voting stock. 441 F.2d at 598.
73. For example, the trustee had duties to the beneficiaries of the trust. Id. In reality, the taxpayer's only effective means of obtaining the benefit of the liquidation was under the installment obligations of the trust. Id.

Prior to Weaver, many authors felt uneasy with the Rushing decision. One writer has questioned whether the trustee's power to void the § 337 liquidation was illusory in light of the fact that the corporation had disposed of all of its assets prior to the taxpayer's sales to the trusts. In this author's opinion, the trust's power to void the liquidation was the crucial factor in Rushing. Galant, Section 337 and the Rushing Case, 50 TAXES 216, 220-23 (1972) [hereinafter cited as Galant]. This author also raised additional questions such as could a Rushing trust work where the taxpayer owned more than 50% control of the corporation or where the corporate sale of assets was for cash rather than notes? Id. See also Garrou, supra note 10, at 112-15 (the trustees in Rushing would have had a fiduciary duty to sell such a large block of stock).
74. 441 F.2d at 598.
75. 71 T.C. 443 (1978) (appeal filed by the government with the 9th Cir.).
76. On July 14, 1971, the sellers and the ultimate purchaser reached a tentative sale agreement. A draft of the sale contract was completed on July 21, 1971. On July 28, 1971, the seller created and funded the trusts. On July 29, 1971, the installment sale to the trust occurred. On July 30, 1971, the plan of liquidation was adopted and the assets were sold to the ultimate purchaser. Id. at 444-48.
77. Id. at 450, 455.
78. The court concluded that:

After the transfer of the stock to the trusts, the petitioner's recourse was limited to recovery as provided in the installment sales agreement. "From an economic standpoint the trust, unlike a mere conduit or straw party, had significant potential benefits and risks from the transaction." See Pityo v. Commissioner supra at 237. Petitioners had neither the control of nor the economic benefit from the liquidation proceeds. Id. at 455.
79. The court stated that "[w]e think the Rushing and Pityo cases were decided correctly and are precedent controlling the disposition of this case." Id. at 452.
In Weaver, as in Rushing, the trust was irrevocable, the trustee was independent of the taxpayer, and the trustee owed fiduciary responsibilities to the beneficiaries (of which the taxpayer was not one). Despite the presence of a prearranged, informal understanding between the seller and the trust that the trust would resell the assets, the trustee was under no obligation to do so. The trustee’s sole legal duty was to act independently to protect the interests of the beneficiaries.

Examining specific prohibitions in the trust agreement regarding invasions of principal, the court determined that none of the limitations were unfavorable to the trust or designed to prevent the possibility of an appreciating corpus. Such factors as the taxpayer’s lack of control over trust investments, the absence of any collateral for the trust’s installment obligations, and the risk of corpus appreciation or depreciation inherent in the trust’s investment policies, distinguished this arrangement from the line of unfavorable escrow cases. The court observed that two issues of control inhered

80. Id. at 451. The court, however, bifurcated the control issue into control over the liquidation and control over the trust. Apart from the issue of control over the liquidation, the court noted that control over the trust might be determinative of the issue of whether a sale had economic substance. Id. at 454-55.

81. Id. at 452-54.

82. Id. at 452. The court noted that the determinative fact in the Weaver decision was the trustee’s ability to act in an independent capacity. Id. In support of its conclusions, the court also cited Pityo v. Commissioner, 70 T.C. 225 (1978). As in Rushing, the Pityo trustee was free to resell or not resell the stock acquired in the earlier installment sale at its own discretion. Id. at 238.

83. This fact negated the inference that the sole reason for the trust’s purchase was to enable the seller to qualify for § 453 treatment. 71 T.C. at 453-54.

84. Concurrently with the developments in the related party line of cases, a body of law involving installment sales and escrows has emerged. The typical fact pattern involves a seller who seeks to report gain on the installment method and an ultimate purchaser who desires to pay cash. To accommodate both parties, the full sales proceeds are placed in an escrow (e.g., cash, certificates of deposit, or notes of a third party), the sole function of which is to defer payment of such proceeds to the seller. With only one recent exception, the courts and the Service have applied the constructive receipt doctrine to accelerate the full proceeds into the seller’s gross income in the year of sale. See Rev. Rul. 77-294, 1977-2 C.B. 173, revoking Rev. Rul. 68-246, 1968-1 C.B. 198; Rev. Rul. 73-451, 1973-2 C.B. 158; Private Letter Ruling 783004 (March 28, 1978); Private Letter Ruling 7751051 (Sept. 22, 1977). See also Harris v. Commissioner, 477 F.2d 812 (4th Cir. 1973), rev’g, 56 T.C. 1165 (1971); Williams v. United States, 219 F.2d 523 (5th Cir. 1956); Rhodes v. United States, 243 F. Supp. 894 (W.D.S.C. 1965); Lustgarten v. Commissioner, 71 T.C. 303 (1978); Stiles v. Commissioner, 69 T.C. 558 (1978), acq. 1978-2 C.B. 2; Oden v. Commissioner, 56 T.C. 569 (1971); Pozzi v. Commissioner, 49 T.C. 119 (1967); Trivett v. Commissioner, 36 T.C.M. (CCH) 675 (1977). See also Goldstein, supra note 10, at 4; Parker, Substitution of Escrow Will Destroy Benefits of Installment Sale Says IRS, 47 J. Tax. 346 (1977) [hereinafter cited as Parker]; Comment, Taxation: Use of Escrow Arrangements in Installment Sales, 27 Okla. L. Rev. 543 (1974); Income Tax Consequences, supra note 1, at 113.

Recently, in Porterfield v. Commissioner, 72 T.C. No. 8 (Oct. 15, 1979), Tax Ct. Rep. (CCH) 4120, the Tax Court permitted a taxpayer to report his gain on the sale of certain property on the installment method despite the interposition of an escrow funded with certificates of deposit. The documents of sale recited that the seller had received $285,000 in cash from the
in the Weaver arrangement: the trust's control over the liquidation, and the taxpayer's control over the trust.\textsuperscript{85} The absence of the latter of these two factors was found to be determinative of the Service's substance over form argument.\textsuperscript{86}

The Weaver court concluded by outlining three factors crucial to its decision in favor of the taxpayer. First, the taxpayer exercised no direct or indirect control over the trust. The trusts were independent and did not serve as mere conduits for the taxpayer. Second, recovery of the taxpayer's investment was limited solely to the trust's installment obligations. Third, the trust bore significant economic risks of corpus appreciation or depreciation.\textsuperscript{87}

\textit{Trusts to Effectuate Open-Market Sales}

Installment sales to taxpayer-created trusts for the purpose of effecting sales of the same property on the open market closely approximate the related party installment sale cases. The most important of these decisions is

purchaser. In fact, the purchaser deposited the proceeds in an escrow. The terms of the escrow required that such proceeds be invested in certificates of deposit, and that as the purchaser's installments obligations matured, the escrow agent would cash a certificate and pay such funds directly to the seller. The Commissioner, citing Oden v. Commissioner, 56 T.C. 569 (1971), contended that the seller had received the entire sales proceeds in the year of sale. The court distinguished Oden on the grounds that in that decision the parties intended the escrow to serve as an independent source of payment. In contrast, the court in Porterfield determined that the escrow was intended merely as a security device, the seller continued to look to the purchaser as the sole obligor, all interest on the escrowed proceed was paid to the purchaser, and the purchaser personally made all payments on his notes. Tax Ct. Rep. at 4124.

As in the case of sales to related parties, the recent case law has evidenced a shift away from the constructive receipt doctrine and toward the substance over form analysis. The Porterfield decision is an excellent example of this trend. Despite finding that the escrow arrangement withstood a substance over form analysis, the court ignored the constructive receipt doctrine. Consistent with the early constructive receipt cases, however, the courts will not tax the seller on the full sales proceeds if the escrow arrangement imposes a substantial restriction on the seller's receipt of such proceeds, other than the mere passage of time. See Stiles v. Commissioner, 69 T.C. 558 (1978), \textit{acq.}, 1978-2 C.B. 2; Oden v. Commissioner, 56 T.C. 569 (1971); Murray v. Commissioner, 38 B.T.A. 624 (1933), \textit{acq.}, XII-2 C.B. 11; Rev. Rul. 79-91, 1979-11 I.R.B. 9. See Solomon & Kirkelie, The Installment Sale—Qualification, 26 U.S. CALIF. TAX. INST. 669, 790-97 (1974) [hereinafter cited as Solomon & Kirkelie].

85. 71 T.C. at 454-55.

86. \textit{Id.} at 453-54. \textit{See also} note 80 and accompanying text \textit{supra}. The court's emphasis on the degree of control exercised by the seller over the trust, rather than over the liquidation, casts serious doubts as to the substance of the fears raised by one commentator. See the discussion in note 73 \textit{supra}. By focusing upon the seller's control over the trust, such issues as the seller's percentage ownership in the liquidating corporation and the nature of the consideration received by the corporation for its asset become less significant. Nevertheless, it is important to note that the seller in Weaver only owned 50% of the liquidating corporations. In contrast to Rushing, however, it would appear that no sale of assets occurred prior to the installment sale to the trust, and the eventual purchase price for the assets was paid in cash by the buyer. \textit{Id.} at 446-48.

87. 71 T.C. at 455.
Pityo v. Commissioner,\textsuperscript{88} involving a taxpayer who created five irrevocable trusts for his children, gave $100,000 to the trusts, and, on the same day, sold $1,032,000 worth of stock to the trusts on the installment basis. Prior to the sale, the taxpayer was advised that the stock should be sold and reinvested in mutual funds. The trustee agreed with such a plan, and the parties expressly indicated their intent that the proceeds be reinvested accordingly.\textsuperscript{89} Similar to theories proffered in Rushing and Weaver, the Commissioner again raised the constructive receipt, agency/conduit, and substance over form arguments.\textsuperscript{90}

Once again, the court found the control or economic benefit test of Rushing to be determinative. As in Weaver and Rushing, the court emphasized that the trust was an independent entity with fiduciary obligations to its beneficiaries.\textsuperscript{91} The court distinguished Revenue Ruling 73-157 on the grounds that a prearranged resale was absent. In that ruling, the installment sale was made only after a prearranged sale with the ultimate purchaser had been negotiated. In contrast, the Pityo trust was under no obligation to resell. Although the taxpayer expected the trusts to resell the stock, the trustee was under no obligation to do so.\textsuperscript{92} Like the Weaver court, the Pityo court observed that the trust bore significant risk of potential future gain or loss. At all times, however, its duty of exclusive allegiance to the beneficiaries, not the settlor, was controlling. Therefore, the trustee's prior, informal understanding with the taxpayer that it would resell the shares was deemed not to be determinative.\textsuperscript{93}

\begin{itemize}
  \item \textsuperscript{88} 70 T.C. 225 (1978).
  \item \textsuperscript{89} Id. at 227-30. Prior to the installment sales to the trusts, the taxpayer discussed his declining financial condition with his stockbroker. Both the installment sale and the investment in mutual fund shares were at the broker's advice. Id. at 227. As a general rule, the bank, as trustee, would not invest in mutual funds. Id. at 228.
  \item \textsuperscript{90} Id. at 232-34.
  \item \textsuperscript{91} Id. at 233-34. After creation of the trusts, the seller had no contact with the trustee, who had absolute discretion over such issues as whether to sell the stock, when to sell, and what to reinvest in. Id. at 236. These factors were found to be determinative. For a discussion of Pityo, see Schnee, supra note 20, at 175-76. See also Coleman, supra note 10, at 1-2.
  \item \textsuperscript{92} 70 T.C. at 237 n.6. One is left to wonder at the court's failure to address the "intent to resell" analysis of Revenue Ruling 73-536. See the discussion in notes 15-19 and accompanying text supra. Also absent is any reference to Revenue Ruling 77-414. Implicitly, the Pityo court appears to have rejected the significance of pre-intended resales where the intermediary purchaser is an independent trustee, the trustee is under no obligation to resell, any resale would occur on the open-market (rather than to an ultimate purchaser identifiable at the time of the sale to the trust), and the trustee is "at risk" during the interim period.
  \item See also Fincke v. Commissioner, 39 B.T.A. 510, 514 (1939), where a taxpayer's sale to a trust at a price equal to his adjusted basis was not treated as a sham merely because the seller intended the trust to resell the stock at a profit. The Pityo court also cited Nye v. United States, 407 F. Supp. 1345 (M.D.N.C. 1975), to support its conclusion regarding installment sales where the seller is aware of the purchaser's intention to resell on the open market. 70 T.C. at 236.
  \item \textsuperscript{93} Id. at 237-38.
\end{itemize}
Finally, the court addressed the issue of substantive purpose, a concern first raised in the Wrenn decision.\textsuperscript{94} The court experienced little difficulty concluding that the trustee's independence, the economic risk it bore with respect to corpus appreciation or depreciation, and its fiduciary duties to the trust beneficiaries created numerous substantive purposes for the structure of the transaction both from the perspective of the trust as well as the taxpayer.\textsuperscript{95}

Pityo was cited with approval in Roberts v. Commissioner.\textsuperscript{96} On facts nearly identical to those of Pityo, the Commissioner raised the same arguments and was unsuccessful again.\textsuperscript{97} As in Pityo, satisfaction of the Rushing test was at the core of the controversy. The Commissioner objected to the use of the Rushing control test in a case involving a trust used to effectuate an open-market sale. The court, however, observed that the primary purpose of the Rushing test, determination of the independent significance of the intermediary, was the exact issue in controversy.\textsuperscript{98} In the words of the court, if the intermediary is an independent entity, "[t]he fact that the [taxpayer] may have opted . . . to put the proceeds beyond his legal control does not vitiate . . . the transaction once it was consummated."\textsuperscript{99}

Turning to the issue of the independent significance of the trust, the court identified various factors relevant to the inquiry. First, the court observed,
the trust was irrevocable and was a valid and distinct entity under state law.100 Second, despite the fact that family trustees were used, the court accepted the taxpayer's evidence concerning their economic independence.101 Third, by possessing the sole authority over whether the stock should be sold and, if so, when it should be sold, the trustees were under no obligation to resell the stock.102 The mere fact that a resale was intended by the parties did not destroy the legitimacy of the original installment sale. Finally, the court noted, the absence of any security for the trust's obligations left the seller as a "party at risk."103 Based upon these facts, the court recognized the transaction as a legitimate installment sale.

Thus, installment sales to seller-created trusts have been treated more favorably than installment sales to related parties. The two-part control or economic benefit test of Rushing has emerged as the definitive standard in the trust cases. The courts have consistently recognized the legitimacy of installment sales to irrevocable trusts managed by independent trustees. It is interesting to note that the courts have been unreceptive to the Commissioner's reliance upon a prearranged, or intended, resale as the indicia of a "sham" installment sale.104 Instead, the courts have demonstrated a willingness to look beyond such arrangements to the more fundamental issue of trust independence. One of the indicia of such independence is the trustee's ability to void such prearranged plans. In addition, the courts have relied heavily upon the fiduciary's duty to act exclusively for the benefit of the beneficiaries. The interaction of these two elements presents strong evidence in support of a claim to independent, economic significance by any trust entity.105

In summary, numerous indicia of a bona fide sale to an independent trustee may be culled from the precedents. The most important factors appear...
to be whether: 1) the trust is irrevocable;\(^{106}\) 2) the seller has any power to alter or amend the trust;\(^{107}\) 3) the seller is a beneficiary of the trust;\(^{108}\) 4) the trustee is in fact independent (who controls or may control investments, discretionary distributions, or sales of assets);\(^{109}\) 5) the trustee may void any prearranged resale or liquidation;\(^{110}\) 6) the trust is subject to the economic risk of appreciation or depreciation in the trust corpus (this supplies the substantive purpose for the trust to enter into the transaction);\(^{111}\) 7) the trust’s obligations may be accelerated;\(^{112}\) 8) the seller is limited solely to the installment obligations of the trust for investment recovery;\(^{113}\) 9) the trust’s obligations are secured;\(^{114}\) 10) the trustee owes fiduciary duties and obligations to the trust beneficiaries;\(^{115}\) 11) the trust agreement is so restrictive with regard to principal and income distributions as to destroy the trustee’s independence;\(^{116}\) and 12) the trustee is a close family member.\(^{117}\)

106. See Rushing v. Commissioner, 441 F.2d at 598 (irrevocable); Weaver v. Commissioner, 71 T.C. at 449 (irrevocable trust); Roberts v. Commissioner, 71 T.C. at 322 (irrevocable); Pityo v. Commissioner, 70 T.C. at 235 (irrevocable). See also Galant, supra note 73, at 219-21; Garrou, supra note 10, at 114.

107. See Rushing v. Commissioner, 441 F.2d at 598 n.6 (settlor could remove trustee and appoint a new corporate trustee); Weaver v. Commissioner, 71 T.C. at 447 (beneficiaries could remove trustee); Roberts v. Commissioner, 71 T.C. at 322 (settlor had no power to remove trustees); Pityo v. Commissioner, 70 T.C. at 229 (settlor could remove trustee and appoint a new corporate trustee).

108. See Rushing v. Commissioner, 441 F.2d at 598; Weaver v. Commissioner, 71 T.C. at 453-55; Pityo v. Commissioner, 70 T.C. at 238.

109. See Weaver v. Commissioner, 71 T.C. at 447, 454 (settlor could not be an investment adviser); Roberts v. Commissioner, 71 T.C. at 322-23 (original plan was to reinvest in mutual funds; however, the trustees chose to also invest in bonds and real estate); Pityo v. Commissioner, 70 T.C. at 234-37 (settlor had no contract with trustee after creation of the trust).

110. See Rushing v. Commissioner, 441 F.2d at 598 (trustee could terminate § 337 liquidation); Weaver v. Commissioner, 71 T.C. at 451, 454-55 (power to terminate the § 337 liquidation); Roberts v. Commissioner, 71 T.C. at 323 (trustees had absolute discretion as to resales); Pityo v. Commissioner, 70 T.C. at 238-39 (trustee chose investments independently). See also Coleman, supra note 10, at 2; Galant, supra note 73, at 220-23; Schnee, supra note 20, at 175-77; Tripp, supra note 43, at 266-67.

111. See Weaver v. Commissioner, 71 T.C. at 453-55; Roberts v. Commissioner, 71 T.C. at 323.

112. See note 61 supra.

113. See Rushing v. Commissioner, 441 F.2d at 598; Weaver v. Commissioner, 71 T.C. at 452; Roberts v. Commissioner, 71 T.C. at 323-24; Pityo v. Commissioner, 70 T.C. at 236. See also O’Hare, supra note 17, at 33-34 (seller must remain “at risk”).

114. See Rushing v. Commissioner, 441 F.2d at 594-95 (notes secured by trust assets); Weaver v. Commissioner, 71 T.C. at 447-48, 454 (no cash collateral); Roberts v. Commissioner, 71 T.C. at 323 (no collateral given). See also Garrou, supra note 10, at 114 (intermediary purchaser should not pledge resale proceeds as security).

115. See Rushing v. Commissioner, 441 F.2d at 598; Weaver v. Commissioner, 71 T.C. at 453-55; Pityo v. Commissioner, 70 T.C. at 238. See also Galant, supra note 73, at 220-23; Garrou, supra note 10, at 113; Schnee, supra note 20, at 176.

116. See Weaver v. Commissioner, 71 T.C. at 453-54.

117. See Roberts v. Commissioner, 71 T.C. at 322 (brother and accountant of settlor-settlor factually demonstrated their independence). See also Schnee, supra note 20, at 176-77.
Conclusions

It is difficult, if not impossible, to reconcile a taxpayer's absolute right to elect installment reporting under section 453 with the Service's continued reliance on the constructive receipt doctrine in the context of an installment sale to a related party. The authorities are clear that a taxpayer may refuse a cash offer and negotiate an installment sale if desired. Therefore, the constructive receipt doctrine appears to be less a mode of analysis than it is a conclusory label invoked by the Service to characterize the result it desires to reach.

If the constructive receipt doctrine is not the proper mechanism to tax installment sellers on the full sales proceeds in the year of sale, what doctrine, if any, is appropriate? The answer appears to be the substance over form doctrine. Unfortunately, the case law precedents have confused the substance over form and constructive receipt doctrines. References to both doctrines appear in the cases without a clear indication which doctrine is controlling. Courts have invoked the substance over form doctrine based on the conclusion that the related party served as a mere agent. Alternatively, courts have combined the constructive receipt doctrine with the conclusion that the intermediary sale must be ignored. The current state of the law is confusing, at best.

In reality, the constructive receipt doctrine has no applicability at all to installment sales involving related parties. If the substance of the sale comports with its form, the taxpayer, as a matter of right, should be permitted to report the gain on the installment method. If the sale does not withstand a substance over form attack, it is because either the related party or the installment sale should be ignored. If the intermediary entity or the intermediary installment sale must be ignored, it is difficult to perceive how the taxpayer/seller can be in constructive receipt of the proceeds from either such a sale or the equally fictional resale by the related party.

118. See notes 8-9 and accompanying text supra. The presumption in all of these cases, however, is that the installment sale is bona fide. See Ludlow v. Commissioner, 36 T.C. 102, 107-08 (1961) (section 453 permitted despite purchaser's desire to pay cash). See also Solomon & Kirkelie, supra note 84, at 669.

119. The Service routinely raises the constructive receipt argument whenever an installment sale involves a trust or related party.

120. See Solomon & Kirkelie, supra note 84, at 827-35 (substance over form is the real analysis). See also the most recent decisions involving trusts and related parties: Weaver v. Commissioner, 71 T.C. 443 (1978) (appeal filed by the government with the 9th Cir.) (the substance over form doctrine applied to a trust purchaser in the setting of a § 337 liquidation); Roberts v. Commissioner, 71 T.C. 311 (1978) (appeal filed by the government with the 9th Cir.) (substance over form applied to a trust which resold on the open market); Wrenn v. Commissioner, 67 T.C. 576 (1976) (installment sale to spouse denied on grounds of substance over form).

121. See, e.g., Rushing v. Commissioner, 441 F.2d 593 (5th Cir. 1971) (mixture of substance over form and constructive receipt); Nye v. United States, 407 F. Supp. 1345 (M.D.N.C. 1975) (substance over form analysis coupled with constructive receipt factors).

122. McInerney v. Commissioner, 82 F.2d 665 (6th Cir. 1936) (constructive receipt).
mediary party is to be ignored, nothing can be constructively received; thus, no installment sale has occurred.

When an installment sale is not in substance what it purports to be in form, the proper doctrine under which to tax the seller on the full sales proceeds is the actual receipt doctrine. However, if actual receipt is the proper result of a substance over form analysis, one must account for the fact that the property has been transferred from the seller to the ultimate purchaser for cash, not deferred payments. If one assumes that the purchaser has acquired the property for cash, taxation of the seller on the full sales proceeds in the year of sale must be reconciled with the fact that the seller will be receiving deferred payments from the related party. Finally, the neutral tax impact on the related party must be explained.

One way to account for all of these results in a consistent fashion is to treat the seller as having actually received the sales proceeds from the ultimate purchaser and then deposited such proceeds with the related party. A similar analysis was employed by the tax court in Pozzi v. Commissioner and Lustgarten v. Commissioner. The only difference between these two decisions and the fact pattern postulated is that Pozzi and Lustgarten involved escrows, not related parties. Because the same question of whether the intermediary entity should be respected is involved in both instances, the same analysis should hold true in both settings. If this is the proper method to analyze a related party installment sale, the planning factors outlined in the previous sections take on even greater significance. Only if an installment sale fails the substance over form test should the form of the transaction be ignored. In any event, regardless of whether the intermediary sale is or is not an installment sale or the intermediary party is or is not to be ignored, the constructive receipt doctrine is inapplicable to installment sales transactions involving related parties.

**SENATE BILL 1063 AND HOUSE OF REPRESENTATIVES BILL 3899: A LEGISLATIVE RESPONSE**

In light of the current “all the facts and circumstances” test employed by the courts in determining the legitimacy of installment sales between related parties, the substance over form concept seems to be the better analysis. See Solomon & Kirkelie, supra note 84, at 788-90 (constructive receipt in the Pozzi setting is erroneous—the better analysis is substance over form); Parker, supra note 84, at 349 (substance over form, not economic benefit or constructive receipt, is the controlling doctrine). In both the escrow and the related party cases, the real issue is whether the intermediated entity should be respected. Consequently, one finds the substantive purpose doctrine in the related party cases performing the same function as the substantial limitation concept in the escrow cases. Both doctrines serve to substantiate the independent existence of the intermediary. See note 84 supra.

123. See Solomon & Kirkelie, supra note 84, at 833-35 (treat the seller as having actually received the cash).
125. 71 T.C. 303 (1978).
126. See note 84 supra. The escrow cases have relied almost exclusively on the constructive receipt theory. Nevertheless, the substance over form concept seems to be the better analysis. See Solomon & Kirkelie, supra note 84, at 788-90 (constructive receipt in the Pozzi setting is erroneous—the better analysis is substance over form); Parker, supra note 84, at 349 (substance over form, not economic benefit or constructive receipt, is the controlling doctrine). In both the escrow and the related party cases, the real issue is whether the intermediated entity should be respected. Consequently, one finds the substantive purpose doctrine in the related party cases performing the same function as the substantial limitation concept in the escrow cases. Both doctrines serve to substantiate the independent existence of the intermediary. See note 84 supra.

127. See notes 55-61, 106-17, and accompanying text supra.
parties, a legislative response now appears likely. On May 3, 1979, Senators Dole and Long and Representatives Ullman and Conable proposed that section 453(b) be amended to read as follows:

Subsection Does Not Apply to Disposition to Related Persons.—
(A) In General.—This subsection shall not apply to a disposition directly or indirectly to a related person.
(B) Related Person Defined.—For purposes of this subsection, the term “related person” means a person bearing a relationship to the person disposing of the property which is set forth in section 267(b) or 707(b)(1).
(C) Exception For Certain Redemptions.—Subparagraph (A) shall not apply to any redemption to which section 302(a) . . . or section 303(a) . . . applies. 128

The preamble to the bill specifies that the abusive practice sought to be eliminated by the amendment is the sale “of appreciated property on the installment basis to a related party . . . and then having the property sold by the related party at little or no taxable gain because the cost basis for the second sale would reflect the entire purchase price under the installment sale.” 129 In effect, the related parties would realize the entire gain in the year of the installment sale but would defer reporting such gain by election of the installment reporting method.

There is no doubt that the practice outlined in the bill may constitute an abuse of the legislative intent behind, if not the express language of, section 453. The cases from Rushing through Weaver attest to the skepticism with which such transactions have long been viewed. Nevertheless, it must be questioned whether the proposed solution adequately remedies the perceived abuse.

Senate bill 1063 and House of Representatives bill 3899 (hereinafter referred to as S. 1063) represent a case of legislative overkill. Immediate resales are at the heart of the “abuse” identified in the introduction to the bills. 130 Nevertheless, section 453(b) as proposed makes no reference to resales. The legislation indirectly remedies the resale problem by denying installment sales reporting to any installment sale between related parties. Thus, regard-

128. See S. 1063, 96th Cong., 1st Sess. § 1 (1979); H.R. 3899, 96th Cong., 1st Sess. (1979); Hearings before the House Ways and Means Committee have been completed but not yet published. See also Hearing Before the Subcommittee on Taxation and Debt Management Generally of the Senate Finance Committee. 96th Cong., 1st Sess. (1979) [hereinafter referred to as the Senate Hearing]. S. 1063 and H.R. 3899 are significant because, of the hundreds of tax bills proposed annually, these bills have been sponsored by the chairmen and ranking minority members of the Senate Finance and House Ways and Means Committees.
129. See also Staff of Joint Committee on Taxation, Description of S. 1062 and S. 1063 Relating to Simplification of Certain Procedure and Administrative Provisions and Installment Sale Reporting Rules Under the Internal Revenue Code 21-23 (1979) [hereinafter cited as Joint Committee] (realization of full sales proceeds at the cost only of installment reporting); CONG. REC. S.5,184 (daily ed. May 2, 1979).
130. Id.
less of the absence of a resale, S. 1063 would deny a taxpayer the right to report gain on a sale to a related party under section 453.

A second, and equally serious, flaw in the proposed amendment of section 453(b) arises from its incorporation of section 267(b) as the definition of "related party." The fault with incorporating this definition lies in its over-breadth. The bill as presently drafted would deny installment reporting treatment to legitimate installment sales of family-held business interests between related parties. A seller would no longer be able to retire by selling an interest in the family business on the installment basis to a son or brother. Clearly, there is nothing in the prior case law to indicate that installment reporting should be denied in such an instance.

131. I.R.C. § 267(b) defines a related party as follows:

RELATIONSHIPS.—The persons referred to in subsection (a) are

1. Members of a family, as defined in subsection (c)(4);
2. An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual;
3. Two corporations more than 50 percent in value of the outstanding stock of each of which is owned, directly or indirectly, by or for the same individual, if either one of such corporations, with respect to the taxable year of the corporation preceding the date of the sale or exchange, was, under the law applicable to such taxable year, a personal holding company or a foreign personal holding company;
4. A grantor and a fiduciary of any trust;
5. A fiduciary of a trust and a fiduciary of another trust, if the same person is a grantor of both trusts;
6. A fiduciary of a trust and a beneficiary of such trust;
7. A fiduciary of a trust and a beneficiary of another trust, if the same person is a grantor of both trusts;
8. A fiduciary of a trust and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for the trust or by or for a person who is a grantor of the trust; or
9. A person and an organization to which section 501 (relating to certain education and charitable organizations which are exempt from tax) applies and which is controlled directly or indirectly by such person or (if such person is an individual) by members of the family of such individual.

CONSTRUCTIVE OWNERSHIP OF STOCK.—For purposes of determining, in applying subsection (b), the ownership of stock—

1. The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants...

132. Section 267(b) is certainly broad enough to cover all the cases discussed earlier in this article. In fact, the only related party precedents beyond the scope of S. 1063 and § 267(b) would be Oman Construction Co. v. Commissioner, 37 T.C.M. (CCH) 1849-57, 1849-61 (1978) (sale to an intermediary not related to the seller) and Rev. Rul. 77-414, 1977-2 C.B. 299 (sale to a totally unrelated third party).

The breadth of S. 1063 in the area of related party installment sales seems anomalous in view of the bill's failure to address escrow transactions. In view of Rev. Rul. 79-91, 1979-11 I.R.B. 9, however, it is doubtful that a better legislative response could be drafted in the escrow area. Revenue Ruling 79-91 provides the circumstances under which escrowed proceeds will be treated as subject to a substantial limitation. See note 84 supra.

133. This was the major concern of the staff of the Joint Committee on Taxation. See Joint Committee, supra note 129, at 28 where the report provides:

In dealing with potential abuses from related party installment sales, the bill adopts a simple across-the-board denial of installment sale reporting for sales be-
Recognizing these problems as major stumbling blocks to any legislative response to the Nye-Rushing line of developments, the Staff of the Joint Committee on Taxation has offered three alternatives. Each of these proposals is more focused and takes into account the nature of the property sold, the presence or absence of a resale, and the nature of the relationship between the parties. As one alternative, the Joint Committee Staff has suggested that a fixed resale period of two to three years from the date of the installment sale be established. If the related party, as defined in section 267(b), resells the property within this period, the original seller will be treated as having constructively disposed of the installment obligations held.\footnote{Joint Committee, supra note 129, at 28.}

Under the second alternative, the same moratorium period could be implemented in conjunction with a bipartite classification of property. If the property consists of marketable securities, any resale by the related party would trigger a constructive disposition of the installment obligations held by the taxpayer. In contrast, only resales by the related party during the two year period immediately following the installment sale would trigger a constructive disposition of the installment obligations held by the taxpayer when property other than marketable securities is in issue.\footnote{Id. at 29.} As a third alternative, installment reporting might be denied any taxpayer who sells marketable securities to a related party. In the case of other types of property, the two-year resale period of alternatives one and two would be adopted.\footnote{Id. See also note 133 supra.}

All of the alternatives suggested by the Staff of the Joint Committee represent an improvement over S. 1063 as currently drafted. By focusing on sales to related parties and immediate resales, each of the alternatives represents a legislative response that is more finely tuned to the perceived "abuse."\footnote{See also Senate Hearings, supra note 128, at 49-50, 68-69, 75, 80, 128, 138-39, 143-46, 168-69, 191-93, 246 (many witnesses assailed the breadth of the § 267(b) rules in the setting of an installment sale to a related party).} Unfortunately, even the Joint Committee Staff's proposals are too broad. The real problem does not simply rest with resales by related...
parties but rather with the presence of both of these factors when they are
coupled with an absence of any purpose for structuring the transaction in
such a fashion. In such circumstances, the only perceivable reason for choos-
ing this form would be to permit the seller to report on the installment
method when the purchaser is willing to pay only cash. It is difficult to
ascertain any purpose other than accommodating the original seller that
could motivate the related party to engage in such a transaction. As
currently drafted, S. 1063 and the Joint Committee Staff’s proposals fail to
limit their reach to such transactions. Instead, all resales, whether at a gain,
a loss, or at no gain or loss, are treated the same.

The inadequacies of all the alternatives are demonstrated by the following
example. Assume S owns marketable stocks with a basis of $50 and desires
to sell that stock on the installment method. Therefore, on January 1, 1979,
S sells the stock on the installment method to his brother, B, for $100, the
fair market value of the stock on that day. The value of the stock rises
dramatically and B sells the stock on the open-market on June 1, 1979, for
$130.

On these facts, S. 1063 would prohibit S from reporting his gain on the
installment method. Consequently, S would recognize fifty dollars of cap-
ital gain from the sale in 1979. The Joint Committee Staff’s proposals
would treat B’s sale of stock at a thirty dollar capital gain as a constructive
disposition by S of B’s notes, similarly triggering fifty dollars of capital gain
for S in 1979. Under either proposal, B could then report his short-term
capital gain of $30 in 1979 or elect to report such gain on the installment
method. These results would follow despite the absence of any prearranged
resale by S or any intent on the part of S or B to resell the stock at the time
of the installment sale. Neither S. 1063 nor the Joint Committee Staff’s
proposals take not account the possibility that B may have purchased the
property both to accommodate S as well as for his own personal invest-
ment. Each of the aforementioned proposals is simply too inflexible to
deal with this possibility.

Faced with the conclusion that none of these legislative solutions
adequately deals with the “abuses” of related party installment sales, three
alternatives remain. Despite its inadequacies, S. 1063 or one of the Joint
Committee Staff’s proposals may be adopted. Such a decision could be jus-

138. Contra, Wrenn v. Commissioner, 67 T.C. at 584, where the court noted that any sub-
stantive purpose would suffice. The court took care to note that lack of a business purpose was
not the test. See notes 32 and 94 supra. It is not difficult to conceive of situations where the
related party may benefit from an installment sale followed by an immediate resale. The ques-
tion remains, however, of whether the seller should be permitted to benefit equally. Wrenn v.
Commissioner, 67 T.C. at 584, appears to take the position that an immediate resale is strong
evidence that accommodating the seller was the primary if not the only reason for the related
party’s installment acquisition.

139. See notes 32 and 94 supra.
tified on the basis that the benefits of administrative convenience and certainty outweigh any inequities inherent in the statutory framework.\textsuperscript{140}

As a second alternative, the present proposals could be modified. One modification might be to shorten the Joint Committee Staff's two-year moratorium period on resales to one year. Such an alternative would tie together the concept of investment motive under section 453 with the holding period for long-term capital gain under section 1222.\textsuperscript{141}

A third alternative modification might be to graft an appreciation exception onto the two-year resale moratorium proposal. For example, if the property sold to the related party were to appreciate more than twenty-five percent over its adjusted basis in the hands of the related party, that party would be permitted to resell the property without triggering a constructive disposition of the installment obligations in the hands of the seller.\textsuperscript{142} In effect, satisfaction of the appreciation test would create a statutory presumption of a substantive purpose for the installment sale.

Two problems are immediately apparent with this second proposed modification. First, it is difficult to reconcile the addition of another statutory test under section 453 in the face of Congress' avowed goal of tax simplification.\textsuperscript{143} Moreover, it is even more difficult to justify creating one exclusion to the two-year resale period when other equally deserving, but less codifiable, "substantive purposes" are ignored.\textsuperscript{144}

Perhaps the most logical manner in which to test the substance of a transaction that is cast, in form, as an installment sale to a related party is to examine each transaction on a case-by-case basis. This is the current position of the law after twenty-five years of judicial and Service review. The courts have done no better than to conclude that the legitimacy of an installment

\textsuperscript{140} The very reason for the language used in S. 1063 appears to have been motivated by a desire for simplification. See \textit{Cong. Rec.} S.5,184 (daily ed. May 2, 1979), where Senator Long states:

\textit{I am introducing today two bills that the staff has prepared pursuant to my instructions. . . . The second bill relates to the simplification and revision of the rules for certain installment sales.}

\textit{Mr. President, these bills would improve existing law relating to procedure and installment sales by making simplifying changes and by eliminating several deficiencies.}

Nevertheless, the Report of the Staff of the Joint Committee on Taxation has indicated that S. 1063's simplification creates too great an inequity. See notes 130-38 and accompanying text \textit{supra}.

\textsuperscript{141} See \textit{I.R.C.} \textsection 1222. This alternative may be operating from the erroneous presumption that investment motive and one-year holding period are synonymous. It fails to consider that the consequences under a modified form of S. 1063 might be so dire that investment has nothing to do with the taxpayer's holding of the property.

\textsuperscript{142} This concept would be analogous to the exceptions-to-the-exception structure of \textsection 341. See \textit{I.R.C.} \textsection 341.

\textsuperscript{143} See note 140 \textit{supra}.

\textsuperscript{144} See notes 32 and 94 \textit{supra}.
sale involving a related party is dependent on "all the facts and circumstances" of each case. Congress' struggle to draft a legislative solution in this area only reaffirms this conclusion.

CONCLUSION

A review of the case law involving installment sales to related parties reveals a vast array of misguided analyses and misleading verbiage. Nevertheless, the conclusions reached reflect one overriding element of consistency, that is, a willingness on the part of the courts to examine each case on the basis of its own particular facts. This method of analysis has produced a laundry list of "do's" and "don'ts" for taxpayers selling on the installment method to related parties. As a result, many of the inconsistencies in the precedents may be explained on the basis of factual dissimilarities among the cases.

With respect to the labels attached by the courts to their modes of analyses, the constructive receipt doctrine seems misplaced. The most recent decisions have avoided the constructive receipt language and have instead focused on the substance over form argument.145 The constructive receipt and substance over form arguments often lead to similar conclusions, but, from a theoretical standpoint, the latter is the only real tool of any analytical value in this area.146

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146. See notes 118-27 and accompanying text supra.