APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

<u>SUMMARY ORDER</u>

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at 40 Foley Square, in the City of New York, on the 15th day of November, two thousand eighteen.

PRESENT: REENA RAGGI,
GERARD E. LYNCH, CHRISTOPHER F. DRONEY,

Circuit Judges.

DIEBOLD FOUNDATION, INC., TRANSFEREE, Petitioner-Appellant,

v. No. 17-3622-cv

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee,

FOR PETITIONER-APPELLANT: A. DUANE WEBBER (Phillip J. Taylor, Mireille R. Oldak, on the brief), Baker & McKenzie LLP, Washington, DC.

FOR RESPONDENT-APPELLEE: CLINT A. CARPENTER (Gilbert S. Rothenberg, Arthur T. Catterall, on the brief), for Richard E. Zuckerman, Principal Deputy Assistant Attorney General, Tax Division, United States Department of Justice, Washington, DC.

Appeal from a decision of the United States Tax Court (Goeke, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the Tax Court is **AFFIRMED.**

This is the second appeal to us arising from Petitioner-Appellant Diebold Foundation, Inc.'s ("Diebold") challenge to a tax assessment by

Respondent-Appellee Commissioner of Internal Revenue ("IRS"). Diebold now appeals from an August 4, 2017, decision of the United States Tax Court in favor of the IRS, holding that Diebold was liable for unpaid income tax for the tax year July 1 through July 2, 1999, in the amount of $33,542,496.29, plus interest.

In our previous decision in this case, we described the complex "Midco" transaction through which a personal holding company, Double-D Ranch ("Double-D"), sold approximately $300 million of its assets, comprising publicly traded securities, real property, and cash. *Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 175–83 (2d Cir. 2013). The value of the non-cash assets had appreciated significantly during the period Double-D held them, such that an asset sale would have triggered a tax liability for built-in gains of approximately $81 million. *Id.* at 176. A "Midco" transaction was executed to arrange for Double-D and the recipients of the liquidated assets to substantially avoid this tax liability. Id. Diebold was one of three foundations which each eventually received—from intermediary "Midco" entities—over $33 million from the sale. *Id.* at 181. Because the remaining facts regarding the Midco transaction are not pertinent for purposes of this appeal, we will otherwise assume the parties' familiarity with those underlying facts in this case.

On March 10, 2006, the IRS sent Double-D a notice of deficiency in the amount of $97,344,076.80 for its declared tax year July 1 through July 2, 1999.[1] "[T]he IRS was unable to find any Double D assets from which to collect the liability." *Diebold*, 736 F.3d at 181. "Deciding that any additional efforts to collect from Double D would be futile," the IRS attempted to collect from Diebold and the other foundations as transferees of transferees of a taxpayer which owed that income tax. *Id.* Accordingly, on July 11, 2008, the IRS sent Diebold a notice of transferee liability for $33,542,496.29—one third of Double-D's liability—for the same short tax year. Diebold and the other foundations filed a petition in the Tax Court challenging the assessment. Initially, "[t]he Tax Court found in favor of the petitioners, holding . . . that Diebold and the other . . . Foundations were not liable as transferees of a transferee." *Id.* at 182. We vacated that decision and remanded the case to the Tax Court. *Id.* at 190.

On remand, the Tax Court concluded, in an August 15, 2016, memorandum opinion, "that Double-D Ranch was liable for unpaid tax for the short tax year ending July [2,] 1999, the notices of liability were timely issued [and] petitioners [including Diebold] are liable as transferees of a transferee of Double D

[1] Prior to the transaction at issue here, Double-D's tax year was set to end on June 30, 2000 After it completed the transaction, however, Double-D filed a corporate tax return for a short taxable year, ending July 2, 1999.

Ranch." App'x at 6–26. On October 4, 2016,—seven years after filing its petition with the Tax Court—Diebold filed a motion to dismiss for lack of subject matter jurisdiction, contending that the notice of deficiency issued to Double-D and the notice of transferee liability issued to Diebold stated the incorrect tax year. *Id.* at 27. The Tax Court denied the motion on June 6, 2017, and it entered a final decision in the IRS's favor on August 4, 2017. Diebold timely appealed.

On appeal, Diebold argues that the Tax Court lacked subject matter jurisdiction because the IRS's notice to Diebold of transferee liability stated an incorrect end date for the July 1, 1999, taxable year (attributed to Diebold as Double-D's transferee). Rather than ending July 2, 1999—as Double-D had itself claimed based on purported stock transfers—Diebold contends the tax year ended June 30, 2000, based on the Commissioner's recharacterization of those transactions as assets transfers.

"We review *de novo* the Tax Court's legal conclusions and for clear error its factual findings." *Chai v. Comm'r*, 851 F.3d 190, 204 (2d Cir. 2017). "In particular, we owe no deference to the Tax Court's statutory interpretations, its relationship to us being that of a district court to a court of appeals, not that of an administrative agency to a court of appeals." *Id.* (internal citations, alterations, and quotation marks omitted).

26 U.S.C. § 6212(a) "authorizes the Secretary of the Treasury or [the Secretary's] delegate to send a taxpayer a notice of deficiency if the Secretary 'determines that there is a deficiency in respect of any tax imposed.'" *Andrew Crispo Gallery, Inc. v. Comm'r*, 16 F.3d 1336, 1340 (2d Cir. 1994) (quoting § 6212(a)). "Section 6213(a) provides in part that 'the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency' and '[t]he Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed.'" *Id.* (quoting 26 U.S.C. § 6213(a)) (alteration in original).

The essential requirements for a valid notice of transferee liability are the same as for a notice of deficiency (together, "notice"). *See* 26 U.S.C. § 6901(a) (stating that, subject to delineated exceptions, transferee liabilities "shall . . . be . . . collected in the same manner and subject to the same provisions and limitations as in the case of the taxes . . . to which the liabilities were incurred"). A notice must, "at a minimum[,] . . . identify the taxpayer, indicate that the Commissioner has made a determination of deficiency [or liability], and specify the taxable year and amount" owed.[2] *O'Rourke v. United States*, 587

[2] As the IRS observes, our decisions, and those of our sister circuits, which have stated that the notice must include the taxable year, appear to have either pre-dated or not explicitly reconciled that requirement with 26 U.S.C. § 7522(a), which was

F.3d 537, 541 (2d Cir. 2009) (quoting *Andrew Crispo Gallery*, 16 F.3d at 1340). "The notice is only to advise the person who is to pay . . . that the Commissioner means to assess him; anything that does this unequivocally is good enough . . . ." *Id.* (quoting *Olsen v. Helvering*, 88 F.2d 650, 651 (2d Cir. 1937)) (internal quotation marks and alteration omitted). And so, we have rejected, for example, the argument that the amount of the deficiency or liability stated in the notice must match the final assessment. *See O'Rourke*, 587 F.3d at 541 (citing *Olsen*, 88 F.2d at 651).

The Fifth Circuit has explained the reasoning behind this standard. In *Stevens v. Comm'r*, 709 F.2d 12, 13 (5th Cir. 1983), that court rejected the argument that the Tax Court's merits determination that no deficiency existed meant that the notice was insufficient to confer jurisdiction upon the Tax Court.

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enacted in 1988. *See Estate of Yaeger v. Comm'r*, 889 F.2d 29, 35 (2d Cir. 1989) (stating the taxable-year requirement and collecting decisions from sister circuits). Section 7522(a) states that a notice must identify, inter alia, the amount of tax due, interest, and penalties. *Id.* It does not state that the notice must include the taxable year underlying the determination. *Id.* However, some other provisions, such as 26 U.S.C. § 6214(b), arguably appear to contemplate that the notice state a taxable year. *Estate of Yaeger*, 889 F.2d at 35, also suggested that due process may require stating the taxable year. *Id.* (citing *Planned Invs., Inc. v. United States*, 881 F.2d 340, 344 (6th Cir. 1989)). We need not decide this issue because the IRS has not argued that a notice need not include the taxable year.

According to the Fifth Circuit, "[i]t is not the existence of a deficiency but the Commissioner's determination of a deficiency that provides a predicate for Tax Court jurisdiction." *Id.* (internal quotation marks and citation omitted) (emphasis in original). "That seems obvious," the Fifth Circuit stated, because "the very purpose of the Tax Court is to adjudicate contests to deficiency notices. If the existence of an error in the determination giving rise to the notice deprived the [Tax] Court of jurisdiction, [it] would lack power to perform its function." *Id.* We agree, and we are aware of no other circuit that has come to a different conclusion.

Here, Diebold contends that, pursuant to the Tax Code and certain Treasury Regulations, the IRS issued a notice with the incorrect taxable year and that this rendered the notice invalid. It is undisputed, however, that prior to sending Diebold a notice, the IRS determined that Double-D had a deficiency for its declared short tax year of July 1, 1999, to July 2, 1999,[3] for which Diebold had transferee liability, that the notice identified Diebold as the taxpayer, and that it stated an amount and taxable year. *See O'Rourke*, 587 F.3d at 541.

There is also no dispute that Diebold understood that the IRS sought to assess it for taxes

[3] As mentioned above, Double-D itself had filed a tax return for a short tax year ending July 2, 1999.

owed by Double-D for its claimed taxable year beginning July 1, 1999 and ending on July 2, 1999. The rationale for noticing a tax deficiency—Double-D's mischaracterization of an assets transfer as a stock transfer—may have raised questions as to whether Double- D had also mischaracterized its July 1, 1999, tax year as a short year ending July 2, 1999, rather than a normal year ending twelve months later on June 30, 2000. As with the substantive correctness of the amount stated on a notice, however, we see no reason why, in these circumstances, where Diebold was not misled as to the basis for the noticed deficiency, the taxable year stated on a notice must be completely correct in order to give the Tax Court jurisdiction.[4] We are here satisfied that the notice issued to Diebold was sufficient to "unequivocally" notify Diebold that "the Commissioner mean[t] to assess" it for a portion of the Double-D deficiency for its claimed tax year beginning July 1, 1999. *Olsen*, 88 F.2d at 651. And so, the notice was sufficient to confer

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[4] Indeed, the Tax Court also recently held that even an ambiguous deficiency notice did not defeat the Tax Court's jurisdiction because it was sufficient that the Commissioner actually made a deficiency determination and "the taxpayer was not misled by the . . . notice." *United States v. Dees*, 148 T.C. 1, 6 (2017); *see also id.* at 15, 19 (Ashford, J., concurring) (stating that "jurisdiction depends on the issuance of a notice . . . , it does not depending on the notice's content," and explaining that "nothing in either section 6212 or 6214 . . . specifically requires a notice of deficiency to include the amount or correct taxable year of a deficiency").

subject matter jurisdiction upon the Tax Court in this case.

Diebold's reliance on certain Tax Court cases is misplaced. Diebold relies primarily on *Century Data Systems, Inc. v. Comm'r*, 80 T.C. 529 (1983). In *Century Data Systems*, the Tax Court dismissed for lack of subject matter jurisdiction a taxpayer's challenge to a tax assessment because the IRS stated the substantively incorrect tax year on the deficiency notice. *Id.* at 535–37. The Tax Court stated that "under [26 U.S.C.] section 6214(b) . . . , the Tax Court simply has no jurisdiction to determine a deficiency for any taxable year other than a taxpayer's correct taxable year." *Id.* at 535.

The Tax Court's reading of section 6214(b) in that decision appears to be incorrect. That provision provides as follows:

> The Tax Court in redetermining a deficiency of income tax for any taxable year . . . shall consider such facts with relation to the taxes for other years . . . as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year . . . has been overpaid or underpaid.

§ 6214(b). Read together with section 6213(a), section 6214(b) provides that the Tax Court has jurisdiction over only the IRS's particular determination that forms the basis for a notice. And so, based on only the notice for the taxable year July 1 to July 2, 1999, in this case, the Tax Court could not have reached a judgment as to (for example) Diebold's 2008–09 taxable year. But the Tax Court in *Century Data Systems*, 80 T.C. at 535, had no basis to read into section 6214(b) a "correctness" requirement for the taxable year stated in a notice.[5] Here, the IRS determined and gave notice of a liability of approximately $33 million for the tax year ended July 2, 1999, and that is the only year for which the Tax Court redetermined whether tax had been overpaid or underpaid. This was sufficient to comply with section 6214(b).

Diebold also cites the Tax Court's decision in *Columbia River Orchards, Inc. v. Comm'r*, 15 T.C. 253, 260–61 (1950). But rather than support Diebold's position, Columbia River Orchards is consistent with the correct reading of section 6214(b). There, the taxpayer challenged an IRS determination for the taxable year January 1 through July 17, 1943. *Id.* at 258. The Tax Court found that the taxable transaction at issue took place after July 17, 1943. *Id.*

[5] We give no deference to the Tax Court's statutory interpretations. *Chai*, 851 F.3d at 204.

at 261. Thus, "there [was] no deficiency for the period over which [the Tax Court had] jurisdiction" and "no deficiency notice for the period [after July 17, 1943] during which the income involved was realized." *Id.* The IRS attempted to constructively extend (with an amended answer) the period covered by the notice. *Id.* The Tax Court rejected the IRS's view that amending its pleading could grant the Tax Court jurisdiction for a tax year extending past July 17, 1943, because only the deficiency notice itself prescribed the Tax Court's jurisdiction. *Id.* The Tax Court accordingly entered judgment *on the merits* in the taxpayer's favor.[6] As such, *Columbia River Orchards* is not helpful to Diebold's argument.

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[6] Diebold contends that the Tax Court in *Columbia River Orchards* dismissed the case for lack of jurisdiction. However, the decision addressed two consolidated cases, Nos. 20501 and 20502. *Columbia River Orchards*, 15 T.C. at 259. The Tax Court dismissed No. 20501 for lack of jurisdiction because the petitioner taxpayer improperly brought that action in the name of a dissolved corporation. *Id.* By contrast, a decision was entered in the taxpayer's favor in No. 20502 for the reasons discussed above. *Id.* at 261. Diebold also relies on the Tax Court's decision in *Pittsburgh Realty Inv. Trust v. Comm'r*, 67 T.C. 260, 281–82 (1976). In *Pittsburgh*, the Tax Court found that the taxable year stated on a notice was substantively incorrect, and it dismissed the action for lack of jurisdiction. *Id.* The Tax Court cited *Columbia River Orchards* to support its decision. But, as we have seen, *Columbia River Orchards* does not support the Tax Court's application of it in *Pittsburgh*. And so, *Pittsburgh* is unpersuasive.

In its reply brief, Diebold changes course and argues for the first time that the Tax Court was wrong to conclude, on the merits, that Diebold's July 1, 1999, tax year ended July 2, 1999.[7] As such, Diebold argues, the Tax Court's decision should be vacated and remanded with instructions to enter a merits decision in its favor. The parties agree that Diebold raised this issue in the Tax Court, but Diebold did not make the argument in its (56-page) opening brief on appeal. As we have previously explained, "[w]e think it reasonable to . . . oblige[] a lawyer to include his [or her] most cogent arguments in [the] opening brief, upon pain of otherwise finding them waived. Thus, arguments not raised in an appellant's opening brief, but only in his reply brief, are not properly before an appellate court even when the same arguments were raised in the trial court." *McCarthy v. S.E.C.*, 406 F.3d 179, 186 (2d Cir. 2005).

Diebold argues that it was entitled to raise the merits issue for the first time in its reply brief because the IRS raised the issue in its response. That premise is incorrect. The IRS's response was a direct rebuttal to Diebold's argument: Diebold contended that a substantively incorrect tax year on the notice deprived the Tax Court of subject matter jurisdiction,

[7] In fact, Diebold all but abandons its jurisdictional arguments in its reply, and only cursorily responds to the IRS's arguments in this regard.

and the IRS showed why it does not.[8] It so happened, as the IRS explained, that this was instead a merits issue.[9] That the IRS pointed this out did not open the door for Diebold to belatedly make this argument in its reply.[10]

Moreover, although we have the discretion to overlook a party's failure to properly raise an issue on appeal if "necessary to avoid manifest injustice," *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000) (internal quotation marks omitted); *see McCarthy*, 406 F.3d at 186, no such injustice would result here.

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[8] Diebold also contends that the IRS waived this argument by not making it in its (successful) defense of Diebold's motion to dismiss in the Tax Court. But Diebold does not provide any authority for the proposition that an appellee is limited to making the same responses to the opposing party's arguments as it made in the trial court. Rather, Diebold cites only to a decision applying the familiar principle that an appellant may waive arguments by failing to timely raise them. *See Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 615 (2d Cir. 2016).

[9] The IRS also devoted a short portion of its response brief to argue, in the alternative, that the taxable year in the notice was substantively correct and so the Tax Court had subject matter jurisdiction even if the notice was required to state the correct year.

[10] To the extent Diebold might argue that a merits argument was subsumed within its jurisdiction argument, and even assuming, arguendo, that this contention has some basis, we have stated that "it is not our obligation"—nor that of an appellee—"to ferret out" arguments "hidden between the lines of [a] brief." *McCarthy*, 406 F.3d at 186. "That, after all, is the purpose of briefing." *Id.*

Diebold is "represented by sophisticated counsel," was aware enough of the argument to make it in the Tax Court, and "had ample opportunity . . . to pursue the argument" on appeal, yet, "[f]or [its] own reasons . . . opted not to do so." *See Motorola Credit Corp. v. Uzan*, 509 F.3d 74, 88 (2d Cir. 2007) (finding no manifest injustice in considering appellants' argument waived). What is more, to consider the argument would prejudice the IRS, which was justified in focusing its response on the arguments Diebold chose to make on appeal. Accordingly, the argument is deemed waived.

The Tax Court therefore properly granted judgment in favor of the IRS. We have considered Diebold's remaining arguments and conclude they are without merit. Accordingly, the order of the Tax Court is AFFIRMED.

FOR THE COURT:
Catherine O Hagan Wolfe, Clerk of Court

APPENDIX B

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DIEBOLD	)
FOUNDATION, INC.,	)
TRANSFEREE,	)
Petitioner(s),	)
	)
V.	) Docket No. 24742-08.
	)
COMMISSIONER OF	)
INTERNAL REVENUE,	)
Respondent	)

DECISION

Pursuant to the opinion of the Court filed August 15, 2016, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED and DECIDED that there is a liability in the amount of $33,542,496.29, plus interest thereon as provided by law from July 11, 2008 to the date such liability is paid, due from petitioner as transferee of a transferee of assets of Double-D Ranch, Inc., transferor, for unpaid income tax of the transferor for a taxable period beginning on July 1, 1999, and ended July 2, 1999.

That petitioner is not liable for pre-notice interest.

(Signed) Joseph Robert Goeke
Judge

ENTERED: **AUG 04 2017**

SERVED Aug 04 2017

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, DC 20217

DIEBOLD FOUNDATION, INC., TRANSFEREE, Petitioner(s),	)	
V.	)	Docket No. 24742-08.
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

ORDER

On August 15, 2016, the Court issued a Supplemental Memorandum Opinion in the above captioned case that held that petitioner was liable as a transferee for the tax deficiency of Double-D Ranch for the short taxable year ended July 2, 1999. In the Supplemental Memorandum Opinion, the Court held that a purported sale of Double-D Ranch stock was, in substance, a sale of assets by Double-D Ranch followed by a liquidating distribution to Double-D Ranch shareholders on July 2, 1999.

Our Supplemental Memorandum Opinion was subsequent to the Opinion of the Court of Appeals for the Second Circuit in *Diebold Found. v. Commissioner*, 736 F.3d 172 (2d Cir. 2013), *vacating and remanding* T.C. Memo. 2012-61, which collapsed the series of transactions at issue for substantive State law purposes.

On October 4, 2016, petitioner filed a Motion to Dismiss for Lack of Jurisdiction pursuant to Rule 53 of the Tax Court Rules of Practice and Procedure on the grounds that the notice of deficiency issued to Double-D Ranch and the notice of transferee liability issued to petitioner are invalid. Respondent opposes the Motion to Dismiss.

Petitioner argues that the notice of deficiency issued to Double-D Ranch and the notice of transferee liability issued to petitioner did not set forth Double-D Ranch's proper taxable year. Double-D Ranch filed a short taxable-year return for the period July 1, 1999 ended July 2, 1999 on the basis of the purported stock sale that occurred on July 2, 1999. The Commissioner issued a notice of deficiency to Double-D Ranch and issued a notice of transferee liability to petitioner for the same short taxable year.

Double-D Ranch filed a short year return on the basis that it entered into a consolidated group upon the sale of the stock on July 2, 1999. A corporation's tax year ends when the corporation becomes a member of a consolidated group. Sec. 1.1502-76(b)(l)(ii)(A)(l), Income Tax Regs. Petitioner argues that as the Court has held no stock sale occurred in substance, Double-D Ranch did not become a member of a consolidated group on July 2, 1999, and accordingly, it was improper for Double-D Ranch to file a short year return. Petitioner's argument follows that because it was improper to file a short year return, the notices of deficiency and transferee liability based on the short year are invalid and the Court lacks jurisdiction. Petitioner argues that Double-D Ranch's proper taxable year is July 1, 1999 through June 30, 2000. According to petitioner, the Commissioner should have issued the notice of deficiency and the notice of transferee liability for Double-D Ranch's taxable year ended June 30, 2000. *See* IRC sec. 7701(a)(23); sec. 7701(a)(24).

Petitioner argues that absent membership in the consolidated group, the only way for the short year to be the proper taxable year is if Double-D Ranch terminated its existence on July 2, 1999. A corporation that goes out of existence is required to file a short year return for the fractional part of the year that it was in existence. Sec. 1.6012-2(a)(2), Income Tax Regs. A corporation goes out of existence when it ceases business and dissolves, retaining no assets. *Id.* If a corporation retains assets, it is treated as a continuing taxable entity for Federal income tax purposes even though it is in the process of liquidation and has terminated its legal existence under State law. *J. Ungar, Inc. v. Commissioner*, 244 F.2d 90, 93 (2d Cir. 1957); *Hill v. Commissioner*, 66 T.C. 701, 705 (1976); *Messer v. Commissioner*, 52 T.C. 440, 448 (1969); *Schick v. Commissioner*, 45 T.C. 368, 372-373 (1966). There is no precise minimal standard for corporate existence; however, the purchase and sale of assets, the existence of corporate debts, and the distribution of funds suggest continued existence for Federal tax purposes. *Hill v. Commissioner*, *supra*.

Petitioner argues that factual stipulations support a finding that Double-D Ranch continued in existence after July 2, 1999. Petitioner sets forth the following facts to support Double-D Ranch's continued existence after July 2, 1999: Double-D Ranch retained historical bank and brokerage accounts, owned and sold marketable securities, purchased and sold corporate stock, held and sold real property, accrued interest income, and was subject to legal obligations under a pledge and security agreement. The parties stipulated that as of June 30, 2000, Double-D Ranch held cash of $249,518 in a bank account and other assets of over $5.7 million. Certain payments to Double-D Ranch's shareholders occurred on July 9 and 12, 1999 in connection with a holdback amount and additional purchase price adjustments from the purported stock sale. Double-D Ranch joined in a consolidated return after July 2, 1999, which petitioner argues is sufficient activity to show Double-D Ranch's continued existence.

Petitioner further argues that the prior Opinions of this Court and the Court of Appeals for the Second Circuit did not find that Double-D Ranch terminated its existence on July 2, 1999. Petitioner argues that Double-D Ranch did not terminate its existence despite the deemed liquidating distribution on July 2, 1999 because it retained assets after that date.

Petitioner argues that this Court and the Court of Appeals did not address whether Double-D Ranch terminated its existence on July 2, 1999. Petitioner's argument treats the decision that Double-D Ranch sold its assets and made a liquidating distribution on July 2, 1999 as a separate and distinct question from continued corporate existence. Petitioner argues that the prior Opinions did not analyze the proper taxable year.

The Court's jurisdiction depends on the issuance of a valid notice of deficiency or a valid notice of transferee liability. The Court's jurisdiction is limited to the taxable year identified in the notice of deficiency or notice of transferee liability. IRC secs. 6214(a), 6901; *Phillips Petroleum Corp. v. Commissioner*, 92 T.C. 885, 888 (1989).

When the Commissioner determines a deficiency, it must be determined for the taxpayer's entire taxable year. *Columbia River Orchards, Inc. v.*

Commissioner, 15 T.C. 253,260 (1950). The Commissioner does not have authority to issue a notice of deficiency for a period of less than a taxpayer's proper taxable year. *Century Data Sys., Inc. v. Commissioner*, 80 T.C. 529, 535 (1983). If a notice covers only a portion of a taxpayer's taxable year, the notice is invalid and the Court does not have jurisdiction to determine the deficiency.
Pittsburgh Realty Inv. Trust v. Commissioner, 67 T.C. 260, 282 (1976); *Schick v. Commissioner*, 45 T.C. 368, 373 (1966).

The fact that a notice of deficiency covers the same tax period as the taxpayer's return does not prevent the taxpayer from showing that the notice of deficiency is based on an improper taxable period. *Columbia River Orchards, Inc. v. Commissioner*, 15 T.C. 253, 260 (1950). Where a taxpayer files a return using an improper taxable period, the return is not valid and does not start the running of the statute of limitations. *Pittsburgh Realty Inv. Trust v. Commissioner*, 67 T.C. 260, 281 (1976).

The parties have not previously raised the question of whether Double-D Ranch's short year is its proper taxable year. In its prior brief to this Court, petitioner argued that the asset sale occurred on July 6, 1999, after the short tax year ended. We rejected this argument and held the asset sale and distribution were collapsed into the stock sale and occurred on July 2, 1999. In our Supplemental Opinion, we stated

> The series of transactions started on July 2, 1999, and substantial steps were taken to complete the transaction on that date. Since the Court of Appeals collapsed the transaction and treated it as a de facto liquidation to shareholders, we conclude that Double-D Ranch was liable for the unpaid tax for its short tax year ended July 2, 1999.

The Court of Appeals collapsed as a single transaction for State substantive purposes the following transactions: the sale of Double-D Ranch stock, the sale of the assets of Double-D Ranch, and the distribution of funds to Double-D Ranch's selling shareholders. *Diebold Found. v. Commissioner*, 736 F.3d 172 (2d Cir. 2013). In the Supplemental Opinion, we held, based on the Second Circuit Opinion, that the transactions at issue, in substance, were a liquidating distribution that occurred on July 2, 1999. Petitioner's argument of retained assets and corporate existence continues to erroneously focus on the form of the transactions, which we have previously rejected. Double-D Ranch retained the assets cited by petitioner as a means to disguise the substance of the sale of Double-D Ranch's assets. For example, petitioner relies on Double-D Ranch's trades in the stock that occurred after July 2, 1999.

Petitioner used the stock trades to generate artificial losses to offset the taxable gain on the sale of Double-D Ranch's assets. In substance, Double-D Ranch did not retain any assets after July 2, 1999 and terminated in existence on July 2, 1999. Petitioner attempts to relitigate the form of the transaction in its Motion, which we refuse to do.

Double-D Ranch in substance liquidated and terminated its existence for Federal tax purposes on July 2, 1999. It was proper for respondent to issue notices on the basis of the short year ending July 2, 1999. The notices of deficiency and transferee liability were valid, and the Court has jurisdiction in this case.

Furthermore, even if we were to find that respondent issued the notices with respect to an incorrect taxable period, we would hold that the error did not invalidate the notices because the error did not mislead petitioner.

I.R.C. section 6214 grants jurisdiction to the Tax Court upon the issuance of a valid notice of deficiency and the filing of a timely petition. I.R.C. section 6212 authorizes the Commissioner to issue a notice of deficiency but does not specify the form or the content of the notice. The minimum requirement for a notice is that it sets forth the taxpayer, the amount of a deficiency, and the tax year involved. *Campbell v. Commissioner*, 80 T.C. 34, 229-230 (1983); *see Alford v. Commissioner*, 800 F.2d 987, 988 (10th Cir. 1986); *Benzvi v. Commissioner*, 787 F.2d 1541, 1542 (11th Cir. 1986). Likewise, no particular form is required for a notice of transferee liability. The notice must determine transferee liability and notify the transferee that the liability will be assessed. *Kellogg v. Commissioner*, 88 T.C. 167, 175 (1987). "[T]he notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough." *Olsen v. Helvering*, 88 F.2d 650, 651 (2d Cir. 1937). In short, a notice of deficiency must meet the general fairness requirements of due process. *Estate of Yaeger v. Commissioner*, 889 F.2d 29, 35 (2d Cir. 1989), *aff'g in part, rev'g in part*, and *remanding* T.C. Memo. 1988-264.

A notice of deficiency that contains a technical error is valid unless the taxpayer is misled or prejudiced by the error. *St. Paul Bottling v. Commissioner*, 34 T.C. 1137 (1960); *Anderten v. Commissioner*, T.C. Memo. 1993-2. In cases where the error involves the taxable year, a deficiency notice is valid where it provides sufficient information so the taxpayer is not reasonably misled as to the taxable period involved. *Sanderling v. Commissioner*, 571 F.2d 174, 176 (3d Cir. 1978); *Commissioner v. Forest Glen Creamery Co.*, 98 F.2d 968, 971 (7th Cir.1938), *Peoplefeeders, Inc. v. Commissioner*, T.C. Memo. 1999-36; *Fernandez v. Commissioner*, T.C. Memo. 1979-476.

In determining whether the notice of deficiency is valid despite an error, the Court looks at the notice of deficiency, with attachments, as well as the circumstances surrounding its issuance and receipt, to determine whether petitioner could have been reasonably confused or misled as to the taxable year involved. *Erickson v. Commissioner*, T.C. Memo. 1991-97; *see Estate of Yaeger v. Commissioner*, *supra*.

After review of the notices of deficiency and transferee liability, with attachments, and the facts and circumstances of this case, we conclude that petitioner would not have been reasonably misled as to the taxable year involved. Petitioner had sufficient information to identify the taxable year at issue.[1] Petitioner did not argue that it was denied due process and has not demonstrated the notices were misleading.

Given due consideration to the foregoing, it is hereby

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[1] Petitioner attempts to distinguish our prior case law that held erroneous notices of deficiency as valid on the basis that the errors had involved mere typographical errors. We find no basis in case law to make such a distinction for purposes of determining the validity of notice which did not mislead the taxpayer.

ORDERED that Petitioner's Motion to Dismiss for Lack of Jurisdiction, filed October 4, 2016, is denied.

(Signed) Joseph Robert Goeke
Judge

Dated: Washington, D.C.
June 6, 2017

APPENDIX D

112 T.C.M. (CCH) 227 (T.C. 2016)

UNITED STATES TAX COURT

SALUS MUNDI FOUNDATION, TRANSFEREE, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent*

DIEBOLD FOUNDATION, INC., TRANSFEREE, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 24741-08, 24742-08.

Filed August 15, 2016.

Allen Duane Webber, Mireille R. Oldak, and Parisa J. Manteghi, for petitioners.

John Richard Mikalchus, Thomas R. Thomas, Frances F. Regan, and Janet F. Appel, for respondent.

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* This opinion supplements our previously filed opinion *Salus Mundi Found. v. Commissioner*, T.C. Memo 2012-61, *vacated and remanded* sub nom. *Diebold Found., Inc. v. Commissioner*, 736 F.3d 172 (2d Cir. 2013), and *rev'd and remanded*, 776 F.3d 1010 (9th Cir. 2014).

SUPPLEMENTAL MEMORANDUM OPINION

GOEKE, Judge: These cases are before the Court on remand from the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Second Circuit for further proceedings in accordance with their opinions in *Salus Mundi Found. v. Commissioner* (*Salus Mundi II*), 776 F.3d 1010, 1017 (9th Cir. 2014), *rev'g and remanding* T.C. Memo. 2012-61 (*Salus Mundi I*), and *Diebold Found., Inc. v. Commissioner*, 736 F.3d 172, 175 (2d Cir. 2013), *vacating and remanding Salus Mundi Found. v. Commissioner*, T.C. Memo. 2012-61, respectively. The issues for decision on remand are: (1) whether Double-D Ranch is liable for tax for the short taxable year ended July 2, 1999; (2) whether the notices of liability issued to Salus Mundi Foundation (Salus Mundi) and Diebold Foundation, Inc. (Diebold Connecticut) (collectively, petitioners), with regard to Double-D Ranch's short taxable year ended July 2, 1999, were issued within the applicable period of limitations for assessment under section 6901(c); (3) whether Diebold Foundation, Inc. (Diebold New York), is a transferee of Double-D Ranch, Inc. (Double-D Ranch), pursuant to section 6901;[1] (4) whether petitioners are liable as transferees of a transferee of Double-D Ranch pursuant to section

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

6901; and (5) whether petitioners are liable for prenotice interest.[2]

<u>Background</u>

We incorporate our findings in *Salus Mundi I* and summarize the relevant background for purposes of this opinion.

Petitioners are two section 501(c)(3) private foundations organized in Arizona and Connecticut on October 22 and July 12, 1999, respectively. Petitioners and Ceres Foundation, Inc. (Ceres Foundation),[3] received all of the assets, consisting of cash and marketable securities, of Diebold New York in equal shares pursuant to Diebold New York's "Plan of Dissolution and Distribution of Assets" during Diebold New York's October 31, 2001, taxable year.

Dorothy R. Diebold was the sole beneficiary of the Dorothy R. Diebold Marital Trust (Marital Trust), created upon her husband Richard Diebold's death on

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[2] The issue of whether a penalty applies is moot because the amount petitioners received is far less than the tax liability imposed by respondent against Double-D Ranch. *See Gumm v. Commissioner*, 93 T.C. 475, 480 (1989), *aff'd without published opinion*, 933 F.2d 1014 (9th Cir. 1991).

[3] Ceres Foundation, Inc. was the third petitioner in *Salus Mundi I*. The Internal Revenue Service did not appeal the decision in favor of Ceres Foundation, Inc., to the Court of Appeals for the Fourth Circuit.

June 18, 1996. The trustees of the Marital Trust were Mrs. Diebold, the Bessemer Trust Co., N.A. (Bessemer Trust), operating primarily through its senior vice president, Austin J. Power, Jr., and Andrew W. Bisset, Mrs. Diebold's personal attorney. Diebold New York was a section 501(c)(3) charitable organization incorporated under the laws of New York in 1963. Its directors were Mrs. Diebold, Mr. Bisset, and Mrs. Diebold's three children.

At the time of the transaction at issue, Double-D Ranch had two shareholders, Diebold New York, holding 2,555 shares, and the Marital Trust, holding 1,280 shares. Double-D Ranch's directors were Mrs. Diebold, her three children, Mr. Bisset, and Mr. Power. The assets of Double-D Ranch consisted primarily of: (1) stock in American Home Products (AHP), a publicly traded company; (2) stock in other publicly traded companies; (3) U.S. Treasury securities; (4) cash; and (5) real estate. The various securities and real estate were highly appreciated.

At some point in May or early June 1999, the cotrustees of the Marital Trust and the directors of Diebold New York decided to sell Double-D Ranch stock. Knowing that the liquidation of Double-D Ranch assets would be likely to generate substantial tax liability, Mr. Power sought a possible solution. Mr. Power was primarily responsible for implementing the sale of the stock. Stephen A. Baxley, a senior vice president in Bessemer Trust's tax department, and

Morton Grosz, Richard Leder, and Adam Braverman assisted in the sale. Messrs. Grosz, Leder, and Braverman were attorneys at Chadbourne & Parke, LLP (Chadbourne & Parke), a law firm. Messrs. Power, Baxley, Grosz, Leder, and Braverman (collectively, Double-D Ranch representatives) represented Double-D Ranch throughout the stock sale process. Mr. Leder, the tax attorney to the Bessemer Trust, was a well-educated and extremely sophisticated adviser with more than 30 years of experience in 1999. After discussing the sale of Double-D Ranch stock with two potential buyers, Double-D Ranch representatives decided to sell the shares to Shap Acquisition Corp. II (Shap II), an entity created specifically by Sentinel Advisors, LLC (Sentinel), for the sale of Double-D Ranch.

On June 17, 1999, Shap II and the Double-D Ranch shareholders executed a letter of intent confirming the terms of the stock sale. The term sheet, attached to the letter of intent, reflected that Shap II would purchase all issued and outstanding Double-D Ranch stock for cash in an amount equal to the fair market value of the corporation's assets minus an agreed-upon discount. The agreed-upon discount was set equal to 4.5% of the fair market value of the Double-D Ranch assets less Double-D Ranch's tax basis in those assets. On June 25, 1999, Shap II and the Double-D Ranch shareholders executed a stock purchase agreement indicating that the closing for the sale would occur on July 1, 1999.

Also on June 25, 1999, Morgan Stanley and Shap II entered a contract whereby Shap II agreed to sell Double-D Ranch's securities to Morgan Stanley after the closing date. The agreement was to be executed on July 1, 1999.

On July 1, 1999, the Double-D Ranch shareholders entered into an escrow agreement with Bessemer Trust whereby Bessemer Trust would serve as the shareholders' representative for all matters relating to the stock purchase agreement and an escrow account would be created with Bessemer Trust whereby Bessemer Trust would act as the escrow agent.

The Double-D Ranch shareholders agreed to deposit a portion of the proceeds from the stock sale into the escrow account for the purpose of satisfying any outstanding business obligations of Double-D Ranch that might have existed before the stock sale. Similarly, Shap II agreed to "hold back" $10 million[4] of the stock purchase price and deposit it in the escrow account. The hold-back amount would become payable to the Double-D Ranch shareholders on or before July 9, 1999, subject to any adjustments relating to certain liabilities of Double-D Ranch.

The closing was delayed from July 1 to July 2, 1999, and the stock purchase agreement was

[4] All amounts are rounded to the nearest dollar.

amended accordingly. Morgan Stanley agreed to change its settlement date to July 6, 1999, the next business day after July 2, 1999. The Marital Trust and Diebold New York sold their Double-D Ranch stock to Shap II for approximately $309 million in cash. Morgan Stanley purchased Double D's securities and Topland Farms purchased Double-D Ranch's real property. Shap II received approximately $319 million from the asset sale. Shap II did not pay any tax on the sale because it claimed losses sufficient to offset the built-in gain. Shap II retained the "hold-back" amount after repaying the loan used to finance the transaction to Rabobank Nederland (Rabobank). On July 9 and 12, 1999, Shap II paid the Marital Trust and Diebold New York the "hold back" amount and additional purchase price adjustments.

Double-D Ranch filed a return for the short taxable year ending July 2, 1999, that was due on October 15, 1999, and was received by the Internal Revenue Service (IRS) on March 20, 2000. Pursuant to its plan of dissolution and distribution of assets effective on January 29, 2001, Diebold New York distributed all of its cash and marketable securities in equal shares to petitioners and the Ceres Foundation, resulting in each petitioner's receiving $32,918,670 from Diebold New York. These transfers were not made in exchange for any property or in satisfaction of an antecedent debt. Mr. Bessemer distributed an additional $5.6 million from the escrow account to the

Marital Trust and to each of the successor foundations of Diebold New York on March 26 and April 14, 2004. Petitioners each received a total of $623,827 from the escrow account, resulting in a total of $33,542,496 received by each petitioner through the dissolution of Double-D.

On March 10, 2006, respondent issued a notice of deficiency to Double-D Ranch, determining a deficiency in income tax of $81,120,064 and a section 6662 penalty of $16,224,012 for the short taxable year ended on July 2, 1999. Respondent determined that the sale of Double-D Ranch's stock by the Double-D Ranch shareholders to Shap II should not be respected for Federal income tax purposes. Respondent determined that in substance the stock sale was really a sale of Double-D Ranch's assets followed by a liquidating distribution to the Double-D Ranch shareholders. While the notice of deficiency was issued after the expiration of the three-year period of limitations under section 6501(a), respondent contends that the six-year period of limitations under section 6501(e) applies. In any event, Double-D Ranch did not file a petition with this Court, and respondent assessed $81,120,064 in tax liability, $16,224,013 in accuracy related penalties, and $3,171,631 in interest against Double-D Ranch on July 31, 2006.

Respondent could not find any assets of Double-D Ranch from which to collect the assessed liability and determined that any additional efforts to collect from it would be futile.

Respondent also determined that petitioners and Ceres Foundation were liable as transferees of a transferee of Double-D Ranch. On July 11, 2008, respondent issued a notice of liability to both petitioners and Ceres Foundation as transferees of the assets of Diebold New York and Double-D Ranch in the amount of $33,542,496 for the corporate income tax and accrued interest assessed against Double-D Ranch for the taxable year ended on July 2, 1999. Petitioners and Ceres Foundation timely filed petitions in this Court, and the cases were consolidated and presented to this Court for decision without trial under Rule 122.[5]

This Court ruled for both petitioners and Ceres Foundation, and respondent appealed with respect to Salus Mundi and Diebold Connecticut. The Court of Appeals for the Second Circuit concluded that Double-D Ranch's shareholders' conduct demonstrated constructive knowledge, collapsed the series of transactions, and found that there was a fraudulent conveyance to Diebold New York under the New York Uniform Fraudulent Conveyance Act (NYUFCA).

[5] The parties agree that the same evidence that was used in *Diebold v. Commissioner*, T.C. Memo. 2010-238, should be used in the present cases, including the trial testimony. As a result, under Rule 122, these cases do not require a trial for the submission of evidence.

The Court of Appeals for the Ninth Circuit adopted the reasoning of the Second Circuit and also found that there was a fraudulent conveyance from Double-D Ranch to Diebold New York under the NYUFCA. The cases were remanded to us to determine (1) whether Diebold New York is a transferee of Double-D Ranch under section 6901, (2) whether petitioners are transferees of a transferee of Double-D Ranch; and (3) whether respondent issued notices of liability and assessed the liability within the statutory period of limitations.

After the Courts of Appeals issued the mandates, we ordered the parties to state their respective positions regarding the issues on remand, and both parties complied. There being no need for trial or further hearing, we review the parties' respective positions in the light of the Courts of Appeals' opinions.

Discussion

To prevail respondent must prove both that Diebold New York is liable as a transferee of Double-D Ranch under section 6901 and that petitioners are liable as transferees of Diebold New York. Two requirements must be met to impose liability on a transferee: (1) the party must be a transferee under section 6901, and (2) the party must be subject to liability at law or in equity.[6] *Diebold Found., Inc. v. Commissioner*, 736 F.3d at 184.

Respondent must also prove that petitioners are liable for interest.

Petitioners' main argument is that the transaction occurred on July 6, 1999; therefore it could not have happened during the taxable year ended July 2, 1999. This argument is unavailing. In collapsing the series of transactions, the Court of Appeals for the Second Circuit concluded that, in substance:

> Double D sold its assets and made a liquidating distribution to its Shareholders, which left Double D insolvent--that is, "the present fair salable value of [its] assets [wa]s less than the amount * * * required to pay [its] probable liability on [its] existing debts as they bec[a]me absolute and matured." N.Y. Debt. & Cred. Law § 271. With the liquidating distribution, Double D did not receive anything from the Shareholders in exchange, and

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[6] The Courts of Appeals for the Second and Ninth Circuits found the second requirement satisfied in regard to Diebold New York but did not make such a finding in regard to petitioners.

> thus it is plain that Double D certainly did not receive fair consideration. As such, all three prongs of § 273 have been met: Double D (1) made a conveyance, (2) without fair consideration, (3) that rendered Double D insolvent. * * *

Id. at 190 (alterations in original) (citing N.Y. Debt. & Cred. Law sec. 273, and *United States v. McCombs*, 30 F.3d 310, 323 (2d Cir. 1994)).

In arguing whether Double-D Ranch actually owed the tax liability respondent determined for its short tax year ended July 2, 1999, petitioners rely on the form of the transaction being respected. They maintain that Double-D Ranch sold the assets on July 6, 1999, and, therefore, the sale could not have occurred during the short taxable year ended July 2, 1999.

Petitioners bear the burden of proof on this matter and offer no arguments additional to the ones discussed *infra* as to Double-D Ranch's tax liability. *See* sec. 6902(a); Rule 142(d). Petitioners point to nothing in the record that shows that respondent incorrectly determined or improperly assessed Double-D Ranch's tax liability for 1999. The stock purchase agreement was slated to close on July 1, 1999, and Morgan Stanley was to buy Double-D's securities on the same day. The closing date was delayed a day and Morgan Stanley agreed to amend its settlement date until the next business day, July 6, 1999. "On July 2, 1999, both parties to the stock sale of Double D took steps to carry out the transaction." *Diebold Found., Inc. v. Commissioner*, 736 F.3d at 180.

The series of transactions started on July 2, 1999, and substantial steps were taken to complete the transaction on that day. Since the Court of Appeals collapsed the transaction and treated it as a de facto liquidation to shareholders, we conclude that Double-D Ranch was liable for the unpaid tax for its short tax year ended July 2, 1999.

I. Statute of Limitations

Under the general rule set forth in section 6501(a), the IRS must assess tax or send a notice of deficiency within three years after a return is filed. The limitations period extends to six years under section 6501(e)(1) "[i]f the taxpayer omits from gross income an amount properly includible therein and * * * such amount is in excess of 25% of the amount of gross income stated in the return."

Respondent issued the notice of deficiency to Double-D Ranch on March 10, 2006, more than three years but less than six years after Double-D Ranch filed its return for the short taxable year ended on

July 2, 1999.[7] Thus, the notice is timely with respect to that return only if the six-year limitations period applies.

Petitioners argue that Double-D Ranch could not have underreported its income for the short taxable year ending July 2, 1999, because Double-D Ranch did not sell its assets during the short taxable year. However, the Courts of Appeals for the Second and the Ninth Circuits concluding that the shareholders had constructive knowledge of the transaction, collapsed the transaction, resulting in a liquidating distribution to the shareholders from Double-D Ranch. Petitioners reported gross income of $74,925 for the short tax year ended July 2, 1999. As a result of the Courts of Appeals' holding, petitioners omitted gross income of $231,837,944, an amount more than 25% of their gross income. Therefore, the six-year period of limitations of section 6501(e) applies.

Under section 6901(c)(1), the Commissioner generally must assess transferee liability within one year after expiration of the period of limitations on the transferor. Section 6901(c)(2) provides that, "[i]n the case of the liability of a transferee of a transferee, within 1 year after the expiration of the period of

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[7] Double-D Ranch's income tax return for the short taxable year ended July 2, 1999, was due on October 15, 1999, and was received on March 20, 2000.

limitation for assessment against the preceding transferee, but not more than 3 years after the expiration of the period of limitation for assessment against the initial transferor".

There is some debate among the parties regarding the date of expiration of the period of limitations. Respondent contends that the date of expiration for Double-D Ranch is August 17, 2006. Petitioners say the date of expiration is no later than September 15, 2006. Therefore, the date of expiration of the period of limitations for Diebold New York is no later than September 15, 2007. The expiration of the period of limitations for petitioners is no later than September 15, 2008. Accordingly, respondent timely issued the notice of deficiency on March 10, 2006, to Double-D Ranch pursuant to section 6501(e)(1), and subsequent notices of liability to petitioners on July 11, 2008, were also timely pursuant to section 6901(c)(2).

II. Whether Diebold New York Was a Transferee Under Section 6901

For purposes of section 6901, the term "transferee" includes, inter alia, donee, heir, legatee, devisee, distributee, and shareholder of a dissolved corporation. *See* sec. 6901(h); sec. 301.6901-1(b), Proced. & Admin. Regs. The inquiry regarding transferee liability under section 6901 has two separate and independent prongs. *See Salus Mundi*

II, 776 F.3d at 1018-1019; *Diebold Found., Inc. v. Commissioner*, 736 F.3d at 184. After the Court of Appeals found Diebold New York liable as a fraudulent transferee of Double-D Ranch under State law, we must now determine whether it is liable as a transferee under Federal law.

The Court of Appeals for the Ninth Circuit recently held that a court must consider whether to disregard the form of a transaction by which the transfer occurred when determining transferee status for Federal law purposes. *See Slone v. Commissioner*, 810 F.3d 599, 605-606 (9th Cir. 2015), *vacating and remanding* T.C. Memo. 2012-57. In performing the inquiry, the court must focus "holistically on whether the transaction had any practical economic effects other than the creation of income tax losses." *Id.* at 606 (quoting *Reddam v. Commissioner*, 755 F.3d 1051, 1060 (9th Cir. 2014), *aff'g* T.C. Memo. 2012-106).

The Courts of Appeals for both the Second and Ninth Circuits have found Diebold New York was a transferee in a transaction that was fraudulent under the NYUFCA. Further, the transaction had no economic purpose other than the creation of income loss for Double-D Ranch. On that basis, we find Diebold New York is liable under section 6901 as a transferee of Double-D Ranch.

III. Whether Petitioners Are Liable As Successor Transferees of Diebold New York

Transferee liability may be asserted against a transferee of a transferee. *Berliant v. Commissioner*, 729 F.2d 496 (7th Cir. 1984), *aff'g Magill v. Commissioner*, T.C. Memo. 1982-148. The Commissioner may collect unpaid taxes of a transferor of assets from a transferee or a successor transferee of those assets. Sec. 6901(a), (c)(2); *Commissioner v. Stern*, 357 U.S. 39, 42 (1958); *Stansbury v. Commissioner*, 104 T.C. 486, 489 (1995), *aff'd*, 102 F.3d 1088 (10th Cir. 1996). We apply New York law in determining whether petitioners are liable as subsequent transferees, and respondent bears the burden of proof. *See* secs. 6901(a), 6902; Rule 142.

A. Petitioners' Liability Under State Law

Under N.Y. Debt. & Cred. Law sec. 273 (McKinney 2012) respondent must prove: (1) a conveyance was made; (2) without fair consideration; (3) by a person who was or will be rendered insolvent by the conveyance. *McCombs*, 30 F.3d at 323. Moreover, a person is insolvent when the "present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." N.Y. Debt. & Cred. Law sec. 271 (McKinney 2012).

Diebold New York transferred all of its assets to petitioners pursuant to its plan of dissolution approved by the Supreme Court of the State of New York, leaving itself with no assets. We previously found Diebold New York liable as a transferee of the assets of Double-D Ranch and now find petitioners liable as transferees of a transferee. Therefore, we hold that petitioners are liable under section 6901 as transferees of a transferee.

1. Conveyance

Under the NYUFCA, a "'conveyance' includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance." *Id.* sec. 270. During the taxable year ended October 31, 2001, petitioners received transfers of approximately $33 million each in cash and marketable securities directly from Diebold New York. In 2004 additional transfers totaling $623,827 to each petitioner were made from the escrow account, constructively through Diebold New York. These payments are a conveyance for purposes of N.Y. Debt. & Cred. Law sec. 273.

2. Fair Consideration

Under New York law, "fair consideration" is defined as:

a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

N.Y. Debt. & Cred. Law sec. 272; *see McCombs*, 30 F.3d at 326 (observing that what constitutes fair consideration must be determined on a case-by-case basis).

The parties have stipulated that the conveyances from Diebold New York to petitioners were not made in exchange for any property or in satisfaction of an antecedent debt. Thus, the transfers were not made in exchange for property as a fair equivalent. Thus, the transfers were not made for "fair consideration".

3. Insolvency

A person is considered insolvent under the NYUFCA when "the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." N.Y. Debt. & Cred.

Law sec. 271. Under New York law, insolvency of the transferor is presumed when a conveyance is made without fair consideration. *United States v. Alfano*, 34 F. Supp. 2d 827, 844-845 (E.D.N.Y. 1999). The transferee then has the burden to come forward and show that the transferor had sufficient assets remaining to pay the debt which existed at the time of conveyance. *Sutain v. Commissioner*, T.C. Memo. 1979-428; *Brown v. Commissioner*, T.C. Memo. 1975-120. The parties have stipulated that, after the conveyance of its assets to petitioners and Ceres Foundation, Diebold New York had no assets. Combined with Diebold New York's liability as an initial transferee of Double-D Ranch, the conveyances to petitioners and Ceres Foundation rendered Diebold New York insolvent.

Conveyances were made to petitioners without fair consideration by Diebold New York, which was rendered insolvent by the conveyances. Accordingly, petitioners are liable as transferees of a transferee under New York law.

B. Petitioners' Liability Under Section 6901

As stated *supra*, under section 6901 the term "transferee" includes, inter alia, donee, heir, legatee, devisee, distributee, and shareholder of a dissolved corporation. *See* sec. 6901(h); sec. 301.6901-1(b), Proced. & Admin. Regs. The inquiry has two separate and independent prongs. *See Salus Mundi II*, 776 F.3d at 1018-1019; *Diebold Found., Inc. v. Commissioner*, 736 F.3d at 184. After finding that the transfers to petitioners were fraudulent under State law, we must now determine whether petitioners are liable under Federal law.

We found petitioners to be transferees of a transferee under NYUFCA. On that basis, we find petitioners are also liable under section 6901 as transferees of a transferee.

IV. Interest

Interest in transferee liability cases is calculated in accordance with two separate periods--prenotice and postnotice--and, under some circumstances, two separate rates. *See generally Estate of Stein v. Commissioner*, 37 T.C. 945 (1962). If the transferee received assets worth less than the creditor's claim against the transferor, then the prenotice period is "measured from a point of time that would not be earlier than the date of transfer" up to (but not including) the notice of liability issue date. *Lowy v. Commissioner*, 35 T.C. 393, 395 (1960). In this instance interest, including its applicable rate, is determined under State law. *See id.*

Because petitioners, as transferees, received assets worth less than Double- D Ranch's tax liability, New York law must determine the extent to which petitioners are liable for prenotice interest. Under New York law petitioners are liable for prenotice interest only where actual fraud exists. *Estate of Stein v. Commissioner*, 37 T.C. at 962.

Respondent contends that actual fraud "may include transfers which are denoted as 'constructively fraudulent' and which fall, for example, within § 273." *Ruderman v. United States*, 355 F.2d 995, 998 (2d Cir. 1966). Actual fraud has been defined as "the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another." *Nasaba Corp. v. Harfred Realty Corp.*, 39 N.E.2d 243, 245 (N.Y. 1942) (quoting Bouvier Law Dictionary 1304). However, we did not find actual fraud in *Salus Mundi I*, slip op. at 34, and we decline to do so here. Accordingly, we do not find actual fraud here, and petitioners are not liable for prenotice interest.

V. Efforts To Collect From Double-D Ranch

We must look to New York law to determine whether the Commissioner has an obligation to pursue all reasonable collection efforts against a transferor before proceeding against a transferee. *See Hagaman v. Commissioner*, 100 T.C. 180, 183-184 (1993); *Jeffries v. Commissioner*, T.C. Memo. 2010-172; *Upchurch v. Commissioner*, T.C. Memo. 2010-169. Where "the transferor is hopelessly insolvent, the creditor is not required to take useless steps to collect from the transferor." *Zadorkin v. Commissioner*, T.C. Memo. 1985-137, 49 T.C.M. (CCH) 1022, 1028 (1985).

We think respondent did pursue all reasonably necessary collection efforts, and petitioners have not shown that respondent's efforts to collect against Double- D Ranch were not reasonably exhausted. If for the sake of argument we presume that respondent did not take reasonable steps, the NYUFCA does not require a creditor to pursue all reasonable collection efforts against the transferor. *See* N.Y. Debt. & Cred. Law secs. 270-281. Therefore, respondent was not required to exhaust collection efforts against Double-D Ranch, and petitioners may be held liable.

We conclude that Double-D Ranch was liable for unpaid tax for the short tax year ending July 1999, the notices of liability were timely issued, Diebold New York is a transferee of Double-D Ranch, petitioners are liable as transferees of a transferee of Double-D Ranch, and petitioners are not liable for prenotice interest.

In reaching our holding herein, we have considered all arguments of the parties, and, to the extent not mentioned above, we conclude they are moot, irrelevant, or without merit.

To reflect the foregoing,
Decisions will be entered under Rule 155.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: April 15, 2013 Decided: November 14, 2013)

Docket No. 12-3225-cv

DIEBOLD FOUNDATION, INC., TRANSFEREE, Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.

Before: POOLER, DRONEY, *Circuit Judges*, SEIBEL,* *District Judge*.

The Commissioner of Internal Revenue ("Commissioner") appeals the decision of the Tax Court (Goeke, J.) holding that the Diebold Foundation, Inc. ("Diebold"), could not be held liable as a transferee of a transferee under 26 U.S.C. § 6901.

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* The Honorable Cathy Seibel, United States District Court for the Southern District of New York, sitting by designation.

As an initial matter, we conclude that, as required by 26 U.S.C. § 7482, the standard of review for mixed questions of law and fact in a case on review from the Tax Court is the same as that for a case on review after a bench trial from the district court: de novo to the extent that the alleged error is in the misunderstanding of a legal standard and clear error to the extent the alleged error is in a factual determination. On the merits, we hold that the two requirements of 26 U.S.C. § 6901 are separate and independent inquiries, a procedural one governed by federal law and a substantive one governed by state law. Under the New York Uniform Fraudulent Conveyance Act, the applicable state statute, the series of transactions collapses based upon the constructive knowledge of the parties involved. The case is remanded to the Tax Court to determine in the first instance whether Diebold is a transferee of a transferee under § 6901 and whether the three-year or six-year statute of limitations is applicable.

Vacated and remanded.

ARTHUR T. CATTERALL, Attorney (Kathryn Keneally, Assistant Attorney General, Tamara W. Ashford, Deputy Assistant Attorney General, Gilbert S. Rothenberg, Kenneth L. Greene, Attorneys), Tax Division, United States Department of Justice, Washington, DC, *for Respondent-Appellant*.

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POOLER, *Circuit Judge*:

The Commissioner of Internal Revenue ("Commissioner") appeals the decision of the United States Tax Court (Joseph Robert Goeke, J.) holding that the Diebold Foundation, Inc. ("Diebold"), could not be held liable as a transferee of a transferee under 26 U.S.C. § 6901. As an initial matter, we conclude that the standard of review for mixed questions of law and fact in a case on review from the Tax Court is the same as that for a case on review after a bench trial from the district court: de novo to the extent that the alleged error is in the misunderstanding of a legal standard and clear error to the extent the alleged error is in a factual determination. *See* 26 U.S.C. § 7482(a). On the merits, we hold that the two requirements of 26 U.S.C. § 6901—transferee status and liability—are separate and independent inquiries, one procedural and governed by federal law, and the other substantive and governed by state law. We further hold that, under the New York Uniform Fraudulent Conveyance Act, the applicable state statute, the series of transactions at issue collapse based upon the constructive knowledge of the parties involved. The case is remanded to the Tax Court to determine in the first instance whether Diebold is a transferee of a transferee under § 6901 and whether the three-year statute of limitations of 26 U.S.C. § 6901(c)(2), which applies transferee of transferee liability, or the six-year statute of limitations of 26 U.S.C. § 6501(e)(1)(A), which applies to collection when substantial omissions are made from the report of gross income, governs. We thus vacate the decision of the Tax Court and remand the case for further proceedings consistent with this opinion.

BACKGROUND

I.

This case involves shareholders who owned stock in a C Corporation ("C Corp"), which in turn held appreciated property. Upon the disposition of appreciated property, taxpayers generally owe tax on the property's built-in gain—that is, the difference between the amount realized from the disposition of the property and its adjusted basis. 26 U.S.C. §§ 1(h), 1001, 1221, 1222. A C Corp, a corporation governed by subchapter C of the Internal Revenue Code, *Eisenberg v. Comm'r*, 155 F.3d 50, 52 n.3 (2d Cir. 1998), is treated as a separate legal entity for tax purposes, 26 U.S.C. § 11. C Corps are also subject to tax on built-in gain. *See* 26 U.S.C. §§ 11, 1201.

When shareholders who own stock in a C Corp that in turn holds appreciated property wish to dispose of the C Corp, they can do so through one of two transactions: an asset sale or a stock sale. In an asset sale, the shareholders cause the C Corp to sell the appreciated property (triggering the built-in gain tax), and then distribute the remaining proceeds to the shareholders.[1] In a stock sale, the shareholders sell the C Corp stock to a third party. The C Corp continues to own the appreciated assets and the built-in gain tax is not triggered. In other words, in an asset sale, because C Corps are treated as separate legal entities for tax purposes, subject to corporate tax (independent of any capital gain taxes assessed against the earning shareholders), a C Corp's sale of its assets imposes an additional tax liability. While the C Corp, and not the shareholders, pays this tax liability, such payment nonetheless reduces the amount of cash available for distribution to those shareholders.

In the case of a stock sale, the assets remain owned by the C Corp and the tax on the built-in gain is not triggered. Buyers would generally prefer to purchase the assets directly and receive a new basis equal to the purchase price, thus eliminating the built-in gain. Sellers generally disfavor the sale of assets because of the attendant tax liability and would prefer to sell the stock and move the tax

[1] *See* 26 U.S.C. §§ 302(a), 331, 1001.

liability on to the purchaser. However, the seller's preferred transaction merely pushes the tax liability down the line; at any point when the shareholders of the C Corp—including new owners who purchased the shares in a stock sale—wish to sell the assets, the built-in gain tax will be triggered. Because of this accompanying tax liability, a stock sale will generally merit a lower sale price than an asset sale.

"Midco transactions" or "intermediary transactions" are structured to allow the parties to have it both ways: letting the seller engage in a stock sale and the buyer engage in an asset purchase. In such a transaction, the selling shareholders sell their C Corp stock to an intermediary entity (or "Midco") at a purchase price that does not discount for the built-in gain tax liability, as a stock sale to the ultimate purchaser would. The Midco then sells the assets of the C Corp to the buyer, who gets a purchase price basis in the assets. The Midco keeps the difference between the asset sale price and the stock purchase price as its fee. The Midco's willingness to allow both buyer and seller to avoid the tax consequences inherent in holding appreciated assets in a C Corp is based on a claimed tax-exempt status or supposed tax attributes, such as losses, that allow it to absorb the built-in gain tax liability. *See* I.R.S. Notice 2001-16, 2001-1 C.B. 730. If these tax attributes of the Midco prove to be artificial, then the tax liability created by the built-in gain on the sold assets still needs to be paid. In many instances, the Midco is a newly formed entity created for the sole purpose of facilitating such a transaction, without other income or assets and thus likely to be judgment-proof. The IRS must then seek payment from the other parties involved in the transaction in order to satisfy the tax liability the transaction was created to avoid.

II.

Double D Ranch, Inc., ("Double D"), a personal holding company, taxed as a C Corp, 26 U.S.C. § 542, had two shareholders: the Dorothy R. Diebold Marital Trust ("Marital Trust") and The Diebold Foundation Inc. ("Diebold New York") (together, the "Shareholders"). The trustees of the Marital Trust were the Bessemer Trust Company N.A. ("Bessemer"), operating primarily through its Senior Vice President, Austin J. Power, Jr., Dorothy Diebold ("Mrs. Diebold"), and Andrew W. Bisset, Mrs. Diebold's attorney and personal advisor. The directors of Diebold New York were Mrs. Diebold, Bisset, and the three adult Diebold children. Diebold New York held slightly more than one-third of the shares of Double D;[2] the rest were held by the Marital Trust. Double D owned assets worth approximately $319 million, including $21.2 million in cash, $6.3 million in real property, and $291.4 million in publicly

[2] On May 28, 1999, the Marital Trust transferred these shares to Diebold New York. Prior to that time, the Marital Trust held all of the shares of Double D.

traded securities. Included in these securities holdings were approximately $129 million in shares of American Home Products Corporation ("AHP") stock; the rest of the portfolio was made up of diversified holdings. The AHP stock, other securities, and the real property—a farm in Connecticut—all had substantial built-in gain, such that the sale of the assets would have triggered a tax liability of approximately $81 million.

By 1999, Mrs. Diebold and her three children were "anxious" for her to begin making cash gifts to them, but the Marital Trust was insufficiently liquid for her to make such gifts. The other trustees, Power of Bessemer and Bisset, explained to Mrs. Diebold that the best way to make such gifts would be to sell the shares of Double D. Power knew that liquidating the assets of Double D would incur the substantial tax consequences discussed above because of the low tax basis of the assets. Power discussed with "a whole network of people, for months," whether there "were potential purchase[r]s for a corporation like Double D." Power engaged senior staff members at Bessemer as well as lawyers in other trust companies, identifying the illiquidity of the trust and the attendant tax consequences as "a problem," and asking, "What's the possible solution? How do we sell this?" Among those with whom Power consulted was Richard Leder, an attorney at Chadbourne & Parke and Bessemer's "principal outside tax counsel." Identifying the steep tax liability inherent in the assets held by Double D, Leder testified, "it was generally known . . . in that profession that there were . . . some people, who for whatever reason, whatever their tax activities are, were able to make very favorable offers to sellers with stock with appreciated assets . . . with the corporation having appreciated assets." Leder directed Power to one of these "people" in the form of Harry Zelnick of River Run Financial Advisors, LLC ("River Run"). Power also sought out Stephen A. Baxley, a managing director at Bessemer, who referred him to Craig Hoffman at Fortrend International LLC ("Fortrend").

The trustees of the Marital Trust and the Directors of Diebold New York each decided that their respective entity would sell all of its Double D stock. Power was primarily responsible for implementing the decision to sell Double D. On May 26, 1999, Power, Baxley, Leder, and two other attorneys, acting as representatives of the Shareholders, met with Zelnick of River Run and Ari Bergmann, a principal at Sentinel Advisors, LLC ("Sentinel"), a small investment banking firm specializing in "structuring economic transactions to solve specific corporate or estate or accounting issues." At this meeting, the Shareholder representatives, Zelnick, and Bergmann discussed methods for valuing Double D's AHP stock and alternatives for dealing with the Connecticut farm property (whether to distribute that asset out of the corporation or to leave it in the corporation for the buyer to sell). They also discussed the possibility of leaving the shareholders with an "option to buy" the farm. Sentinel gave the Shareholders a slideshow presentation of the possibilities for selling and valuing Double D, which Bergmann subsequently sent to the Shareholder representatives for their reference.[3] Shortly after this meeting, Dudley Diebold, one of Mrs. Diebold's adult children who was a Director of Diebold New York, founded Toplands Farm, LLC ("Toplands Farm") to purchase the Connecticut farm property from Double-D.

Several days after the meeting with River Run and Sentinel, the Shareholder representatives met with Craig Hoffman and Howard Teig of Fortrend to discuss the sale of Double D. According to Leder, tax attorney to the Bessemer Trust, he was familiar with Fortrend because he "had represented a seller of stock

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[3] As Appellee rightly points out, many of the documents included with the stipulated facts were conceded to be hearsay, and it was agreed that such documents "cannot be admitted for the truth of the matters asserted therein." In seeking to discourage reliance on these materials, Appellee argues they are barred as hearsay based on this stipulation. However, Appellee misapprehends the use to which these documents were put. The IRS, the lower court, and this Court do not rely on these documents to conclude that it is true, for example, that Fortrend actually had clients with "certain tax attributes that enable them to absorb the tax gain inherent in the assets," which would be a use of the documents to prove the truth of the matter asserted. Rather, these documents demonstrated the surrounding circumstances of which the parties were aware. If not offered to prove the truth of the matter, the attendant hearsay rules have no applicability. Fed. R. Evid. 801.

in another transaction where the buyer had arranged to have [Fortrend] participate in the purchase." Fortrend provided Bessemer with a firm profile that detailed its strategy entitled the "Buy Stock/Sell Assets Transaction." Identifying the tax liabilities endemic to selling a corporation with appreciated assets, Fortrend presented its expertise as follows: "We are working with various clients who may be willing to buy the stock from the seller and then cause the target corporation to sell its net assets to the ultimate buyer. These clients have certain tax attributes that enable them to absorb the tax gain inherent in the assets."

The Shareholder representatives chose to pursue the transaction with Sentinel instead of with Fortrend, and Sentinel sent them an initial term sheet, laying out the preliminary details of the transaction, on June 8, 1999. Sentinel intended to use a newly formed entity, Shap Acquisition Corporation II ("Shap II"), specifically created to carry out the transaction. Power informed the Shareholders that Sentinel would purchase all of the shares of Double D, from both the Marital Trust and from Diebold New York, for a price that "works out to 97% of the market value of the Corporation's assets." Had the Shareholders sold the assets directly, the tax liability would have caused the Shareholders to realize an amount that worked out to approximately 74.5% of the assets' market value, a clear reduction from that negotiated with Shap II. On June 10, 1999, Mrs.

Diebold approved of the sale and directed Power to go forward with it. On June 17, 1999, Shap II and the Shareholders executed a letter of intent and term sheet specifying that Shap II would purchase all issued and outstanding Double D Stock for cash in an amount equal to the value of Double D's assets minus a discount of 4.5% of the built-in gain.[4]

Sentinel intended to purchase the Double D stock through Shap II with financing from Rabobank. Even prior to taking ownership of the Double D stock, Sentinel planned on having Shap II immediately sell Double D's securities portfolio, as it intended to use the proceeds of that sale to repay the loan from Rabobank. Rabobank provided financing on the condition that Shap II enter into a fixed price contract to sell the securities, with the purchase price to be paid directly to Rabobank, pursuant to an irrevocable payment instruction. Rabobank understood that the loan would be outstanding for "not more" than five business days, as that was the "longest settlement

[4] To state this as a formula:

Purchase Price = Value of Assets - 4.5% Built-In Gain

In a stock sale, one would expect the discount rate to be the amount of the tax liability, which would be the tax rate times the built-in gain. Assuming a flat tax rate of 35%, which was the highest marginal corporate tax rate in 1999, the formula would be:

Purchase Price = Value of Assets - 35% Built-In Gain.

period" for the securities to be liquidated. Sentinel determined that the securities would be sold to Morgan Stanley.

While it is not clear that the Shareholders knew the details behind Sentinel's financing plan, the Shareholder representatives did indeed have notice that Shap II planned to sell Double D's securities to Morgan Stanley, based upon the draft of the stock purchase agreement drawn up to execute the stock sale between the Marital Trust and Diebold New York, on the one hand, and Shap II, on the other, which (1) indicated that certain limitations within the agreement would not apply to sale arrangements Shap II already had with Morgan Stanley, (2) held the selling shareholders liable for any costs incurred upon termination in "connection with arrangements for the sale of the Securities by [Double D] following the Closing," and (3) indicated that the agreement's prohibition on assignments of rights would not apply to Shap II assigning its rights "to Morgan Stanley as collateral security for [Shap II's] obligation to deliver the Securities to Morgan Stanley following the closing for purposes of resale." These specific provisions were altered by the Shareholders' attorneys from Chadbourne to make them far more general and to delete the references to Morgan Stanley. In their review of the purchasing agreement, the Chadbourne lawyers also added further detailed provisions dealing with "Tax Matters." These alterations included changing the responsibility of the selling

Shareholders for all taxes "with respect to any tax period ending on or before the Closing Date," to making Shap II, the purchaser, liable for all taxes related to sale of Double D's assets, regardless of the date of the taxable period. The added tax-related provisions also made Shap II liable to the selling Shareholders for related tax refunds and specified that "any sale or other disposition of assets by [Double D] that is consummated after the acquisition of the Shares by [Shap II] shall be treated as occurring after the period ending on the closing date."

After these negotiations, Shap II and the Shareholders executed their stock purchase agreement on June 25, 1999, setting a closing date of July 1, 1999. The agreement also required Shap II to cause Double D to execute an option agreement on the Connecticut farm "immediately" after the closing. This agreement was structured as one between Double D and Toplands Farm, Dudley Diebold's entity, giving Toplands the option to purchase the farm for $6.3 million. Also on June 25, Shap II and Morgan Stanley entered into a contract wherein Shap II agreed to sell the securities held by Double D to Morgan Stanley after the closing date. This agreement mandated the use of the exact same valuation method for the securities as did the agreement between Shap II and the selling Shareholders. The agreement between Morgan Stanley and Shap II was slated to be executed on July 1, 1999—the same day for which the closing between

Shap II and the shareholders was originally scheduled.

On June 30, 1999, Dudley Diebold, acting as manager of Toplands Farm, executed the option agreement to purchase Double D's Connecticut real estate. The agreement, which was to then be executed by Double D "immediately" after the closing, gave Toplands Farm the right to purchase through July 31, 1999. At the same time, Dudley Diebold executed an occupancy agreement that set forth terms allowing Toplands Farm to take possession of the property on July 1, 1999, including requirements that it maintain liability insurance and take responsibility for all utilities and taxes beginning on that date.

The closing between Shap II and Double D was delayed from July 1, 1999, to July 2, 1999. As the closing did not occur as originally scheduled, Shap II could not transfer the securities to Morgan Stanley on July 1, as mandated by the agreement between Shap II and Morgan Stanley. By its terms, Shap II's agreement with Morgan Stanley obligated Shap II to deliver equivalent securities or their cash equivalent to Morgan Stanley in the event the Double D transaction did not occur on July 1, 1999. As it turned out, however, Morgan Stanley did not require this from Shap II. Power contacted Tim Morris, the head of Bessemer's investment department, who contacted John Mack, a very senior officer at Morgan Stanley. Following Morris's call to Mack, Morgan Stanley "backed off" from demanding securities or their cash equivalent from Shap II. Shap II and Double D then closed, a day delayed from the originally set date. Morgan Stanley "backed off" by agreeing to change its settlement date with Shap II to July 6, 1999, the first business day after the July 2, 1999 closing date. Thus, the two agreements—one between Double D and Shap II and the other between Shap II and Morgan Stanley—were both amended to change their closing dates and the date on which the price for all non-AHP shares would be set from July 1 to July 2, while keeping the average pricing mechanism for the AHP shares the same as it had been in the original agreements.

On July 2, 1999, both parties to the stock sale of Double D took steps to carry out the transaction. The selling Shareholders opened an account at Rabobank for the receipt of Double D's cash holdings. The Marital Trust, Diebold New York, and Bessemer executed an agreement with Rabobank in which the bank agreed to waive any of its possible set-off rights against the account. Under such an agreement, Rabobank could not apply any of the money from that account to satisfy Shap II's obligation to pay its loan to the bank. Also on July 2, in executing the closing, Rabobank credited over $297 million to Shap II's account per the loan agreement, and Shap II paid $297 million to the Shareholders, with further adjustments to be paid shortly thereafter. The Shareholders transferred their stock shares to Shap

II, and Bessemer wired Double D's cash holdings from the account at Bessemer to the newly created account at Rabobank.

On the same day, Double D instructed Bank of New York to transfer the securities in Double D's account to Morgan Stanley on July 6, 1999. This was an irrevocable transfer agreement—between Bessemer, Double D, and Shap II—to transfer custody of Double D's assets to Shap II's Morgan Stanley account and "to not honor any other request or instruction which would cause Bessemer to be unable to make such a transfer." Shap II also directed Morgan Stanley to transfer over $258 million into its loan account at Rabobank on July 6 and irrevocably instructed Rabobank to pre-pay its loan obligation with any amounts transferred into that account.

On July 6, 1999, Bessemer and Bank of New York delivered the securities in Double D's accounts to Shap II's Morgan Stanley accounts. As to these transferred securities, which represented approximately 97% of the total value of Double D's securities, Morgan Stanley recorded a trade date of July 2, 1999, and, with the exception of one security, a settlement date of July 6, 1999. Also on July 6, Morgan Stanley wired over $297 million from Shap II's Morgan Stanley account to Shap II's loan account at Rabobank, and Bessemer wired the funds transferred by Shap II pursuant to the closing to the Marital Trust and Diebold New York, in proportion to the amount of stock in Double D each owned. On July 9 and 12, 1999, Shap II paid the Shareholders the additional purchase price adjustments, bringing the total amount paid by Shap II to approximately $309 million. Bessemer distributed these funds to the Marital Trust and Diebold New York on July 12. Bessemer made an additional distribution of $15.7 million to the selling Shareholders on November 8, 1999.

Also pursuant to the closing on July 2, the option agreement regarding the sale of the Connecticut real estate was executed. Toplands Farm paid $1,000 for the option to purchase. Subsequently, Toplands Farm made a down payment to Shap II for the farm on July 28, 1999, and paid the purchase price in full on August 27, 1999.

The transaction described above had the form of a Midco transaction with Shap II in the role of the Midco. The Shareholders sold the Double D stock for approximately $309 million in cash. Morgan Stanley and Toplands Farm purchased, respectively, Double D's securities and real property. Shap II received approximately $319 million from the asset sale. Because it claimed losses sufficient to offset the built-in gain, it did not pay any tax on this amount. After paying back its loan to Rabobank, it retained a profit of approximately $10 million.

Pursuant to a dissolution, effective on January 29, 2001, Diebold New York distributed all of its assets in equal shares to three foundations, each one headed by one of the adult Diebold children: the Diebold Foundation ("Diebold"), Appellee in the instant case, the Salus Mundi Foundation, and the Ceres Foundation. These transfers, of approximately $33 million each, were not made in exchange for any property or to satisfy an existing debt. On March 26 and April 15, 2004, Bessemer distributed an additional $5.6 million from the escrow account used for the sale of Double D to the Marital Trust and to each of the successor foundations of Diebold New York.

III.

The parties to this Midco transaction all filed tax returns. The Shareholders filed timely returns reflecting their sale of Double D stock. Double D filed a corporate return for a short taxable year, beginning July 1, 1999, and ending July 2, 1999, and dissolved. Double D's asset sales were not included in this return. On its tax return for the taxable year ending June 30, 2000, Shap II filed a consolidated return with Double D, on which it reported all of Double D's built-in gain from its asset sales. On this return, Shap II claimed sufficient losses to offset the gain, resulting in no net tax liability.[5]

On March 10, 2006, the IRS issued a notice of deficiency against Double D, determining a deficiency of income tax, penalties, and interest of approximately $100 million for its July 2, 1999 taxable year. The deficiency resulted from the IRS's determination that the Shareholders sale of Double D stock was, in substance, actually an asset sale followed by a liquidating distribution to the Shareholders. Double D did not contest this assessment, but the IRS was unable to find any Double D assets from which to collect the liability.

Deciding that any additional efforts to collect from Double D would be futile, the Commissioner attempted to collect from the Shareholders as transferees of Double D. Section 6901 of the Internal Revenue Code authorizes the assessment of liability against both (a) transferees of a taxpayer who owes income tax and (b) transferees of transferees. 26 U.S.C. § 6901(a)(1)(A)(I), (c)(2). On August 7, 2007, the IRS issued a notice of transferee liability against

[5] The Tax Court concluded that Shap II's losses were artificial losses from a Son-of-BOSS transaction. A Son-of-BOSS transaction is a type of tax shelter that creates artificial tax losses. *See Kligfield Holdings v. Comm'r*, 128 T.C. 192, 194 (2007). The name refers to the fact that the tax shelter "is a variation of a slightly older alleged tax shelter known as BOSS, an acronym for 'bond and options sales strategy.'" *Id.*

Mrs. Diebold as a transferee of Double D. The Tax Court determined that she was not liable because the Marital Trust was the actual Double D shareholder, and the court saw no reason to ignore its separate existence. *Diebold v. Comm'r*, 100 T.C.M. (CCH) 370, at *8 (2010). On July 11, 2008, the IRS issued separate notices of transferee liability against each Foundation for the approximately $33 million each received from Diebold New York.[6] The Commissioner asserted that Diebold New York was a transferee of Double D and that the three successor Foundations were, in turn, transferees of Diebold New York. The Foundations contested the notices of deficiency before the Tax Court, who consolidated their petitions for briefing and decision. The parties agreed to use the same evidence, including trial testimony, that was used in the earlier *Diebold v. Comm'r*, 100 T.C.M. (CCH) 370 (2010). The Tax Court found in favor of the petitioners, holding in a memorandum opinion that Diebold New York was not liable as a transferee of Double D, and thus that Diebold and the other successor Foundations were not liable as transferees of a transferee. Following its memorandum opinion, the Tax Court entered separate decisions in favor of each Foundation. The IRS now appeals.

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[6] In that case, as noted by the Tax Court, the IRS failed to raise the argument that Mrs. Diebold was a transferee of a transferee. *Id.* at *10. The IRS chose not to appeal the decision.

DISCUSSION

I.

In an appeal from the Tax Court, it is without dispute in this Circuit that we review legal conclusions de novo and findings of fact for clear error. *Robinson Knife Mfg. Co. v. Comm'r*, 600 F.3d 121, 124 (2d Cir. 2010). While we have previously held the standard of review for mixed questions of law and fact to be one for clear error, *see Wright v. Comm'r*, 571 F.3d 215, 219 (2d Cir. 2009), all Courts of Appeals are to "review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a)(1). Our case law enunciating the standard of review for mixed questions of law and fact in an appeal from the Tax Court is in direct tension with this statutory mandate. Following a civil bench trial, we review a district court's findings of fact for clear error, and its conclusions of law de novo; resolutions of mixed questions of fact and law are reviewed de novo to the extent that the alleged error is based on the misunderstanding of a legal standard, and for clear error to the extent that the alleged error is based on a factual determination. *MacWade v. Kelly*, 460 F.3d 260, 267 (2d Cir. 2006). Two recent panels of our Court have recognized this contradiction between our case law and 26 U.S.C. § 7482(a)(1) but did not resolve the tension, as they determined that under either standard of review the outcome in the particular case would be the same. *Scheidelman v. Comm'r*, 682 F.3d 189, 193 (2d Cir. 2012); *Robinson Knif*e, 600 F.3d at 124. In the instant case, the standard of review affects the outcome, so our Court can avoid the question no longer.

The standard that mixed questions of law and fact are reviewed under a clearly erroneous standard when we review a decision of the Tax Court was established in this Circuit's jurisprudence in *Bausch & Lomb Inc. v. Comm'r*, 933 F.2d 1084, 1088 (2d Cir. 1991). *Bausch & Lomb* imported the standard from the Seventh Circuit, which, in *Eli Lilly & Co. v. Comm'r*, 856 F.2d 855, 861 (7th Cir. 1988), held the clearly erroneous standard to be applicable. *Eli Lilly* in turn relied upon another Seventh Circuit case, *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1374 (7th Cir. 1987), a tax case on review from the district court. None of these decisions mention 26 U.S.C. § 7482(a)(1), which has been a part of the Internal Revenue Code since 1954. In *Standard Office Building*, the Seventh Circuit indicated that one of the open questions in the appeal was "the kind of 'mixed' question of fact and law . . . that, in this circuit at least, is governed by the clearly-erroneous standard." *Id.* (emphasis added). That court then cited a handful of cases from their circuit that stated this standard from cases reviewing the decision of a district court. 819 F.2d at 1374 (citing *Mucha v. King*, 792 F.2d 602, 605 (7th Cir. 1986) (review from the

Northern District of Illinois noting that "[i]n particular, the Second Circuit had long adhered to the view that [the mixed question of law and fact at issue in the particular case] is not subject to the clearly-erroneous standard") and *Wright v. United States*, 809 F.2d 425, 428 (7th Cir. 1987) (review from the Central District of Illinois)). The Seventh Circuit uses the clearly erroneous standard of review for mixed questions of law and fact when reviewing both decisions of the Tax Court and those of the district courts. Its standard is thus not in tension with 26 U.S.C. § 7482(a)(1), unlike this Court's.

Quoting *Eli Lilly* approvingly, in *Bausch & Lomb*, this Court indicated, "'We are unaware of any decision discussing the standard that governs appellate review of a Tax Court's [determination].'" *Bausch & Lomb*, 933 F.2d at 1088 (quoting *Eli Lilly*, 856 F.2d at 860-61). It was certainly the case that no decision at that time discussed the standard for such appellate review, but the statute which governs our Court's review of Tax Court decisions set out a mandatory standard, tied to the level of review in appeals on review from a district court. 26 U.S.C. § 7482(a)(1). Once imported from the Seventh Circuit, this standard for mixed questions of law and fact, which stands at odds with our standard for such review of district court decisions, was propagated again in *Merrill Lynch & Co. v. Comm'r*, 386 F.3d 464, 469 (2d Cir. 2004) (citing *Bausch & Lomb*, 933 F.2d at 1088), and again in *Wright*, 571 F.3d at 219 (2d Cir.

2009) (citing *Merrill Lynch*, 386 F.3d at 469; *Bausch & Lomb*, 933 F.2d at 1088). These three cases make up the bulk, if not the entirety, of the citations for this standard in subsequent decisions of this Court. *See Wilmington Partners L.P. v. Comm'r*, 495 F. App'x 173, 174 (2d Cir. 2012) (summary order) (citing *Wright*); *Scheidelman*, 682 F.3d at 193-94 (citing *Wright*, *Merrill Lynch*, and *Bausch & Lomb*); *Robinson Knife*, 600 F.3d at 124 (same); *Wright*, 571 F.3d at 219 (citing *Merrill Lynch* and *Bausch & Lomb*).

We now conclude that this standard of review was adopted in error.[7] As all Article III courts, with the exception of the Supreme Court, are solely creatures of statute, *see* U.S. Const. art. III; 28 U.S.C. §§ 1-463, the statute must be determinative in this case. Moreover, there is no reason to review the Tax Court under a different standard than a district court, as "its relationship to us [is] that of a district court to a court of appeals." *Scheidelman*, 682 F.3d at 193

[7] "We readily acknowledge that a panel of our Court is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court, and thus that it would ordinarily be neither appropriate nor possible for us to reverse an existing Circuit precedent." *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009) (internal quotation marks and citation omitted). "In this case, however, we have circulated this opinion to all active members of this Court prior to filing and have received no objection," a process we refer to "as a mini-en banc." *Id.* at 67 & n.9.

(internal quotation marks omitted). We hold that the Tax Court's findings of fact are reviewed for clear error, but that mixed questions of law and fact are reviewed de novo, to the extent that the alleged error is in the misunderstanding of a legal standard. *See* 26 U.S.C. § 7482(a)(1); *MacWade*, 460 F.3d at 267. Having clarified the standard of review applicable to decisions of the Tax Court, we now turn to the merits of the instant case.

II.

Title 26, Section 6901 of the United States Code provides that the IRS may assess tax against the transferee of assets of a taxpayer who owes income tax. 26 U.S.C. § 6901(a)(1)(A)(I). The section provides that the tax liability will "be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred" and allows for the collection of "[t]he liability, at law or in equity, of a transferee of property . . . of a taxpayer." *Id.* A "transferee" includes a "donee, heir, legatee, devisee, [or] distributee." *Id.* § 6901(h).

The Supreme Court has long held that this section "neither creates nor defines a substantive liability but provides merely a new procedure by which the Government may collect taxes." *Comm'r v. Stern*, 357 U.S. 39, 42 (1958) (discussing the predecessor transferee liability statute under the

Internal Revenue Code of 1939, 26 U.S.C. § 311). Although the provision with respect to transferees is not expansive in its terms, the IRS may assess transferee liability under § 6901 against a party only if two distinct prongs are met: (1) the party must be a transferee under § 6901; and (2) the party must be subject to liability at law or in equity. *Rowen v. Comm'r*, 215 F.2d 641, 643 (2d Cir. 1954) (discussing predecessor statute, 26 U.S.C. § 311). Under the first prong of § 6901, we look to federal tax law to determine whether the party in question is a transferee. *Id.* at 644. The second prong, whether the party is liable at law or in equity, is determined by the applicable state law, *Stern*, 357 U.S. at 45, here, the New York Uniform Fraudulent Conveyance Act ("NYUFCA"), N.Y. Debt. & Cred. Law §§ 270-281. Specifically, Section 273 of the NYUFCA establishes liability for a transferee if the transferor (1) makes a conveyance, (2) without fair consideration, (3) that renders the transferor insolvent. *See* N.Y. Debt. & Cred. Law § 273; *United States v. McCombs*, 30 F.3d 310, 323 (2d Cir. 1994). The parties do not dispute the application of this two-pronged test, but contest the relationship between the two prongs and their application to this particular case.

The Commissioner urges that these two prongs are not independent—that a court must first make a determination as to whether the party in question is a transferee, looking to the federal tax law doctrine of "substance over form" to recharacterize the transaction, and that if a court recharacterizes the transaction, when it proceeds to the second prong to make the determination of state law liability, it must assess liability with respect to the recharacterized transaction. Under this formulation, the order in which the two prongs are assessed is critical to the determination of the case. In contrast, Diebold argues that the two prongs of § 6901 are independent: even if the court uses federal law to recharacterize the transaction under the first prong and determines the party in question is a transferee, it must look separately to state law under the second prong to determine whether to recharacterize the transaction when analyzing liability. Under this formulation, if a court has determined that one of the two prongs does not apply to the party at issue—whether they are a transferee or whether they are liable—it need not consider the other prong of § 6901.

The Tax Court accepted Diebold's understanding of the two-prong framework and stated that "[t]he law of the State where the transfer occurred . . . controls the characterization of the transaction." Under the NYUFCA, a party seeking to recharacterize a transaction must show that the transferee had "actual or constructive knowledge of the entire scheme that renders [its] exchange with the debtor fraudulent." *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995). Applying *HBE Leasing*, the Tax Court found that the Shareholders did not have actual or constructive knowledge of the entire series of transactions. Therefore, it respected the form of the transaction between the Shareholders and Shap II as a stock sale. According to the Tax Court, because there was no conveyance from Double D to Diebold New York under § 273 of the NYUFCA, Diebold New York was under no liability in law or equity, and thus the successor foundations were not liable as transferees of a transferee. In making this determination, the Tax Court did not address federal law, but concluded that because there was no state law liability, it was immaterial to the outcome of the case if Diebold was a transferee under the terms of § 6901.

A.

The First and the Fourth Circuits have both recently addressed the relationship between the transferee prong and the liability prong of § 6901. *See Frank Sawyer Trust of May 1992 v. Comm'r*, 712 F.3d 597, 605 (1st Cir. 2013); *Starnes v. Comm'r*, 680 F.3d 417, 428 (4th Cir. 2012). Both of these circuits concluded that the two prongs of § 6901 are independent and that the Tax Court did not err by only addressing the liability prong. *Frank Sawyer*, 712 F.3d at 605; *Starnes*, 680 F.3d at 428. We now join the First and Fourth Circuits in their interpretations of § 6901.

In *Stern*, the Supreme Court recognized that the predecessor statute to § 6901 "neither creates nor defines a substantive liability but provides merely a new procedure by which the Government may collect taxes." *Stern*, 357 U.S. at 42. The statute was enacted in order to do away with the procedural differences between collecting taxes from one who was originally liable and from someone who received property from the original tax ower. *Id.* at 43. The procedures in place prior to the enactment of § 6901's predecessor statute depended upon state statutory or case law and "proved unduly cumbersome." *Id.* The statute was not enacted to expand the government's reach as creditor in collecting taxes. Rather, "[t]he Government's substantive rights in this case are precisely those which other creditors would have under [state] law." *Id.* at 47. As such, § 6901 does not place the government in a better position than any other creditor under state law. This symmetry of rights contemplated under the statute must lead to the conclusion that the requirements of § 6901 are indeed independent. If we accepted the Commissioner's argument that state law liability is assessed based upon the transaction as recharacterized by federal tax law, we would be placing the IRS in a substantially different position than "ordinary creditors under state law." *Starnes*, 680 F.3d at 429. Under the interpretation urged by the Commissioner, the IRS would be able to collapse the transaction based upon federal law, thus transforming it into a conveyance under the applicable state statute, while an ordinary creditor would be required to collapse the transaction under state law—which may require, as it does in this case, a different showing—in order to collect from a transferee. This distinction demonstrates that the position urged by the IRS imports federal law into the substantive determination of liability, in contravention of long settled law that § 6901 is only a procedural statute, creating no new liability. *Stern*, 357 U.S. at 42.

In the instant case, if there was not a "conveyance" under the NYUFCA, a determination that is necessarily made under state law, *id.* at 45, then it is of no moment whether or not the selling Shareholders were "transferees" as defined by federal law—namely, 26 U.S.C. § 6901(h). As the First Circuit recently noted in Frank Sawyer, "if the Trust was not a 'transferee' of the companies for purposes of Massachusetts fraudulent transfer law, then whether or not it was a 'transferee' for purposes of § 6901 is irrelevant." *Frank Sawyer*, 712 F.3d at 605. The same formulation is true in the instant case: if Diebold New York did not receive a conveyance from Double D for purposes of the NYUFCA, "then whether or not it was a 'transferee' for purposes of § 6901 is irrelevant." *Id.* Having determined that the two prongs of § 6901 are " independent requirements, one procedural and governed by federal law, the other substantive and governed by state law," *Starnes*, 680 F.3d at 427, we now turn to the Tax Court's assessment of liability under New York state law.

B.

The NYUFCA defines a "conveyance" as "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance." N.Y. Debt. & Cred. Law § 270. It further establishes liability for a transferee if the transferor, without regard to his actual intent, (1) makes a conveyance, (2) without fair consideration, (3) that renders the transferor insolvent. *See* N.Y. Debt. & Cred. Law § 273; *McCombs*, 30 F.3d at 323. If Double D had sold its assets and liquidated the proceeds to its shareholders without retaining sufficient funds to pay the tax liability on the assets' built-in gains, this would be a clear case of a fraudulent conveyance under § 273. However, due to the Midco form of this transaction, Double D did not actually make a conveyance to the Shareholders. If the form of the transaction is respected, § 273 is inapplicable.

"It is well established that multilateral transactions may under appropriate circumstances be 'collapsed' and treated as phases of a single transaction for analysis under the UFCA." *HBE Leasing*, 48 F.3d at 635 (citing *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35-36 (2d Cir.1993)). *HBE Leasing* describes a "paradigmatic scheme" under this collapsing doctrine as one in which

> one transferee gives fair value to the debtor in exchange for the debtor's property, and the debtor then gratuitously transfers the proceeds of the first exchange to a second transferee. The first transferee thereby receives the debtor's property, and the second transferee receives the consideration, while the debtor retains nothing.

Id. Such a transaction can be collapsed if two elements are met. "First, in accordance with the foregoing paradigm, the consideration received from the first transferee must be reconveyed by the [party owing the liability] for less than fair consideration or with an actual intent to defraud creditors." *Id.* "Second, . . . the transferee in the leg of the transaction sought to be voided must have actual or constructive knowledge of the entire scheme that renders her exchange with the debtor fraudulent." *Id.*[8] Here, it is clear that the first element is met. Though the transaction in the instant case has an additional wrinkle—namely, an additional party who serves as the conduit for the transfers, Shap II—it is still the case that one transferee received Double D's property, another transferee—the Shareholders—

[8] The Commissioner bears the burden of proof with regard to demonstrating that the parties in question had constructive knowledge of the entire scheme. *See HBE Leasing*, 48 F.3d at 636 n.9.

received the consideration for these assets, and Double D was left with nothing, neither its assets nor the value of them. Therefore, in order for there to be liability against the selling Shareholders (and their successor entities), the Shareholders "must have actual or constructive knowledge of the entire scheme that renders [the] exchange with [Double D] fraudulent." *Id.*

While under an application of § 273 to a single transaction, the intent of the parties is irrelevant, the knowledge and intent of the parties becomes relevant when a court is urged to treat multiple business deals as a single transaction. *Id.* at 635-36; *In re Corcoran*, 246 B.R. 152, 158-59 (E.D.N.Y. 2000) (Raggi, J.). Here, the Commissioner urges the Court to consider the sale of Double D stock to Shap II, the sale of Double D assets by Shap II to Morgan Stanley and Toplands Farm, and the distribution of funds to the selling Double D Shareholders as a single transaction such that a conveyance occurred for purposes of § 273. If the transactions are collapsed, they will be treated as though Double D sold all of its assets and made a liquidating distribution to the Shareholders. Under this collapsed transaction, Double D will have transferred all of its assets to the Marital Trust and Diebold New York receiving nothing, much less fair consideration, in exchange.

Therefore, we must now assess whether the Shareholders had actual or constructive knowledge of the entire scheme. The Tax Court concluded they did not. This assessment is a mixed question of law and fact, assessing whether based upon the facts as determined by the Tax Court, the Shareholders had constructive or actual knowledge as a matter of law. Therefore, we review de novo the Tax Court's determination that the Shareholders did not have constructive knowledge, but review for clear error the factual findings that underpin the determination.

Concluding that a party had constructive knowledge does not require a showing that the party had actual knowledge of a scheme; rather, it is sufficient if, based upon the surrounding circumstances, they "should have known" about the entire scheme. *HBE Leasing*, 48 F.3d at 636 (internal quotation marks omitted). Constructive knowledge in this context also includes "inquiry knowledge"—that is, where transferees "were aware of circumstances that should have led them to inquire further into the circumstances of the transaction, but . . . failed to make such inquiry." *Id.* As we noted in *HBE Leasing*, "[t]here is some ambiguity as to the precise test for constructive knowledge," *id.* at 636, in that some cases require "the knowledge that ordinary diligence would have elicited," *see United States v. Orozco-Prada*, 636 F. Supp. 1537, 1543 (S.D.N.Y. 1986), *aff'd*, 847 F.2d 836 (table) (2d Cir. 1988), and other cases have required a "more active avoidance of the truth." *HBE Leasing*, 48 F.3d at 636 (citing *Schmitt v. Morgan*, 471 N.Y.S.2d 365, 367 (3d Dep't 1983)).

However, even as we acknowledge this ambiguity in New York law, we need not reach the issue of which test to apply, because the facts here demonstrate both a failure of ordinary diligence and active avoidance of the truth.

The facts in this case rested upon a substantial number of stipulated facts and submissions which together evince constructive knowledge under either standard. As correctly recognized by the Tax Court, assessing whether constructive knowledge existed in this case requires examining all of the circumstances to conclude whether inquiry was required. Constructive knowledge can also be found if, based on all of the facts and circumstances, the party "should have known" about the entire fraudulent scheme. *Id.* The Tax Court concluded that the circumstances in this case did not require the Shareholder representatives "to make further inquiry into the circumstances of the transaction" between Double D and Shap II. We conclude this was error.

The Tax Court did not sufficiently address the totality of the circumstances from all of the facts, which that court had already laid out itself. The constructive knowledge inquiry does not begin, in this instance, solely with the agreement between Shap II and Double D. Rather, it is of great import that the Shareholders recognized the "problem" of the tax liability arising from the built-in gains on the assets held by Double D. The Shareholders specifically sought out parties that could help them avoid the tax liability inherent in a C Corp holding appreciated assets. They viewed slideshow and other presentations from three different firms—River Run, Sentinel, and Fortrend—that purported to deal with such problems. While the Tax Court is correct in noting that IRS Notice 2001-16 was not yet issued at the time of the instant transactions, this is not determinative on the question of constructive knowledge. The parties to this transaction were extremely sophisticated actors, deploying a stable of tax attorneys from two different firms in order to limit their tax liabilities. One of these attorneys testified, identifying the steep tax liability inherent in the assets held by Double D, that "it was generally known . . . in that profession that there were . . . some people, who for whatever reason, whatever their tax activities are, were able to make very favorable offers to sellers with stock with appreciated assets . . . with the corporation having appreciated assets." While not every taxpayer in the country could have been presumed to have knowledge about the existence of such Midco transactions prior to the IRS issuance of Notice 2001-16, it is plain from the facts found by the Tax Court that these particular actors did. Considering their sophistication, their negotiations with multiple partners to structure the deal, their recognition of the fact that the amount of money they would ultimately receive for an asset or stock sale would be reduced based on the need to pay the C Corp tax liability, and the huge amount of money involved, among other things, it is obvious that the parties knew, or at least should have known but for active avoidance, that the entire scheme was fraudulent and would have left Double D unable to pay its tax liability.

The Shareholder representatives also had a sophisticated understanding of the structure of the entire transaction, a fact that courts consider when determining whether to collapse a transaction and impose liability on an entity. *See HBE Leasing*, 48 F.3d at 635-36 ("The case law has been aptly summarized in the following terms: "In deciding whether to collapse the transaction and impose liability on particular defendants, the courts have looked frequently to the knowledge of the defendants of the structure of the entire transaction and to whether its components were part of a single scheme." (quoting *In re Best Products Co.*, 168 B.R. 35, 57-58 (Bankr. S.D.N.Y. 1994))) (emphasis added). The Shareholder representatives plainly knew that Shap II was a brand new entity that was created for the sole purpose of purchasing Double D stock. They further had notice, by means of the draft stock purchase agreement, that Shap II intended to sell Double D's securities to Morgan Stanley, and by means of the option agreement, Shap II intended to sell the Connecticut real estate to Toplands Farm. The Shareholder representatives knew that Morgan Stanley was going to purchase the securities out of Double D immediately upon closing, and that the specific language referencing Morgan Stanley was stricken at the behest of the Shareholder representatives further suggests that the Shareholders did not want to know, or reveal that they knew, the details of Shap II's plans to immediately sell Double D's assets.

The delay of the original closing date by one day, and the Shareholders' representatives' corresponding intervention between Shap II and Morgan Stanley, make the conclusion of their "active avoidance of the truth" inescapable. By asking Morgan Stanley to "back off" and give Shap II extra time to provide the Double D securities so that the transactions would not be upended, the Shareholders demonstrated not only their knowledge of the structure of the entire transaction, but their understanding that Shap II did not have the assets to meet its obligation to buy equivalent shares on the open market for delivery to Morgan Stanley or pay Morgan Stanley an equivalent sum in cash. This understanding, combined with the Shareholders' knowledge that Shap II had just come into existence for the purposes of the transaction, was more than sufficient to demonstrate an awareness that Shap II was a shell that did not have legitimate offsetting losses or deductions to cancel out the huge built-in gain it would incur upon the sale of the Double D securities.

Taken together, these circumstances should have caused the Shareholder representatives to inquire further into the supposed tax attributes that allegedly would have allowed Shap II to absorb the tax liability of which the Shareholders had intimate knowledge and which indeed was the very reason they structured this deal in the first instance. To conclude that these circumstances did not constitute constructive knowledge would do away with the distinction between actual and constructive knowledge, and, at times, the Tax Court's opinion seems to directly make this mistake. The facts in this case strongly suggest that the parties actually knew that tax liability would be illegitimately avoided, and in any event, as a matter of law, plainly demonstrate that the parties "should have known" that this was a fraudulent scheme, designed to let both buyer of the assets and seller of the stock avoid the tax liability inherent in a C Corp holding appreciated assets and leave the former shell of the corporation, now held by a Midco, without assets to satisfy that liability.

Based on the myriad circumstances discussed above of which they were aware, the Shareholders had a duty to inquire further into the circumstances of the transaction. *HBE Leasing*, 48 F.3d at 636. The term in the stock purchase agreement allocating liability for the taxes to Shap II and Double D is insufficient to relieve the Shareholders of their duty to inquire. This is because the knowledge requirement for collapsing a transaction was designed to "protect[] innocent creditors or purchasers for value." *Id.* It was not designed to allow parties to shield themselves, when having knowledge of the scheme, by simply using a stock agreement to disclaim any responsibility. To accept this rule would be to undermine the very concept of constructive knowledge, as it would allow an incantation of assignment of tax liability to magically relieve the parties of their duty to inquire based on all of the circumstances which they were aware. To relieve parties of this duty, when the surrounding circumstances indicate that they should further inquire, would be to bless the willful blindness the constructive knowledge test was designed to root out. Moreover, we note that when entering into a particular transaction for the express purpose of limiting—or altogether avoiding—tax liability, parties are all the more likely to have this duty to inquire. In such cases, the surrounding circumstances always include a deliberate effort to avoid liability, and it would be the very rare case indeed where a purchasing party would assume such liability without an appropriate discount in the sale price.[9] In such scenarios, being aware that this is the case, parties have a duty "to inquire further into the circumstances of the transaction." *Id.*

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[9] We recognize that some tax avoidance strategies are perfectly permissible. Here, we hold only that whether a transaction arose out of a taxpayer's tax-avoidance motive is simply one factor, among many, that may be considered in determining whether that transaction should be collapsed under state law.

As we have concluded that the Shareholders' conduct evinces constructive knowledge in this case, we collapse the series of transactions and find that there was a conveyance under the NYUFCA. In collapsing the transactions, we conclude that, in substance, Double D sold its assets and made a liquidating distribution to its Shareholders, which left Double D insolvent—that is, "the present fair salable value of [its] assets [wa]s less than the amount . . . required to pay [its] probable liability on [its] existing debts as they bec[a]me absolute and matured." N.Y. Debt. & Cred. Law § 271. With the liquidating distribution, Double D did not receive anything from the Shareholders in exchange, and thus it is plain that Double D certainly did not receive fair consideration. As such, all three prongs of § 273 have been met: Double D (1) made a conveyance, (2) without fair consideration, (3) that rendered Double D insolvent. *See* N.Y. Debt. & Cred. Law § 273; *McCombs*, 30 F.3d at 323. As we have determined that there is state law liability in the instant case, at issue is whether Diebold New York is a transferee under 26 U.S.C. § 6901, and subsequently, whether Diebold, the Appellee here, is a transferee of a transferee under the same statute.

III.

Because the Tax Court determined that there was no state law liability, it did not consider the other questions determinative to the outcome here. We thus remand to the Tax Court to determine in the first instance: (1) whether Diebold New York is a transferee under 26 U.S.C. § 6901, relying upon the federal law principles that govern the question of transferee status; (2) whether Diebold, the Appellee in the instant case, is a transferee of a transferee—that is, a transferee of Diebold New York; and (3) which statute of limitations—the three-year statute of limitations laid out in 26 U.S.C. § 6901(c)(2), the six-year statute of limitations laid out in 26 U.S.C. § 6501(e)(1)(A), or some other statute of limitations—applies.

CONCLUSION

For the reasons stated above, the judgment of the Tax Court is hereby VACATED, and the case is REMANDED to the Tax Court for further proceedings consistent with this opinion.

APPENDIX F

103 T.C.M. (CCH) 1290 (T.C. 2012)

UNITED STATES TAX COURT

SALUS MUNDI FOUNDATION, TRANSFEREE, ET AL.,[1] Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 24741-08, 24742-08.

Filed March 6, 2012

Allen Duane Webber, Summer M. Austin, Jaclyn J. Pampel, Caitlin A. Urban, Ryan J. Kelly, and Phillip J. Taylor, for petitioners.

John Richard Mikalchus, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

GOEKE, Judge: In separate statutory notices of liability, respondent determined that the Salus Mundi Foundation, the Diebold Foundation, Inc. (Diebold Foundation (Connecticut)), and the Ceres

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[1] Cases of the following petitioners are consolidated herewith: Diebold Foundation, Inc., Transferee, docket No. 24742-08; and Ceres Foundation, Inc., Transferee, docket No. 24743-08.

Foundation, Inc. (collectively, petitioners) are liable as transferees of the assets of the Diebold Foundation, Inc. (Diebold Foundation), of $33,542,496[2] each for the corporate income tax, penalty, and accrued interest assessed against Double-D Ranch Inc. (Double-D Ranch), for the taxable year ended July 2, 1999. The primary issues remaining for decision are: (1) whether the Diebold Foundation is liable as a transferee pursuant to section 6901[3] for the unpaid Federal income tax and section 6662 accuracy-related penalty owed by Double-D Ranch for the July 2, 1999, taxable year and (2) whether petitioners are liable as transferees of a transferee pursuant to section 6901 for the unpaid Federal income tax and section 6662 accuracy-related penalty owed by Double-D Ranch for the July 2, 1999, taxable year. For the reasons stated herein, we find that the Diebold Foundation is not liable as a transferee under section 6901 and therefore petitioners are not liable as subsequent transferees under section 6901.[4]

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[2] All amounts are rounded to the nearest dollar.

[3] Unless otherwise indicated, all section references are to the Internal Revenue Code, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[4] The parties also dispute whether the period of limitations expired before the mailing of the notices of liability to petitioners and thus barred respondent from determining transferee liability. As explained *infra*, because we ultimately decide that petitioners are not liable as subsequent transferees, it is not necessary that we decide whether the period of limitations expired.

FINDINGS OF FACT

Some of the facts have been stipulated, and the stipulated facts are incorporated by this reference. Petitioners are three section 501(c)(3) private foundations organized in Arizona, Connecticut, and South Carolina on October 22, July 12, and May 25, 1999, respectively. They received all of the assets of the Diebold Foundation in equal shares pursuant to the Diebold Foundation's "Plan of Dissolution and Distribution of Assets" during the Diebold Foundation's October 31, 2001, taxable year.

I. *The Double-D Ranch Shareholders—the Marital Trust and the Diebold Foundation*

The Dorothy R. Diebold Marital Trust (marital trust) was created upon the death of Richard Diebold on June 18, 1996, in which Mrs. Diebold was the sole beneficiary. At the time of Mr. Diebold's death, the marital trust owned all issued and outstanding shares of stock (3,835 shares) in the Double-D Ranch. The marital trust had three cotrustees: (1) Mrs. Diebold; (2) Bessemer Trust Co., N.A. (Bessemer Trust); and (3) Andrew W. Bisset. Bessemer Trust was a national bank that served as trustee, asset custodian, and investment adviser to the marital trust. Austin Power, Jr., a senior vice president at Bessemer Trust, served as counsel and account manager for both the marital trust and Mrs. Diebold. Mr. Power was Bessemer Trust's representative in its role as trustee of the marital trust. Mr. Bisset is an attorney licensed to practice law in Connecticut and New York who served as Mrs. Diebold's personal attorney after her husband's death.

The Diebold Foundation was a section 501(c)(3) charitable organization organized and incorporated on November 12, 1963, under the laws of the State of New York. Its directors in 1999 were Mrs. Diebold, Mr. Bisset, and Mrs. Diebold's three children. At the request of Mrs. Diebold, on May 28, 1999, approximately one-third of the outstanding stock of Double-D Ranch (1,280 shares) was transferred from the marital trust to the Diebold Foundation. Until July 2, 1999, the marital trust and the Diebold Foundation (collectively, the Double-D Ranch shareholders) owned all of the stock of Double-D Ranch--they held 2,555 shares and 1,280 shares, respectively.

II. *Double-D Ranch*

From at least July 2, 1997, until their resignation effective July 1, 1999, Double-D Ranch's directors were Mrs. Diebold, her three children, Mr. Bisset, and Mr. Power. The assets of Double-D Ranch consisted primarily of: (1) stock in American Home Products (AHP), a publicly traded company; (2) stock in other publicly traded companies; (3) U.S. Treasury securities; (4) cash; and (5) real estate.[5] The various securities and real estate had high fair market values, but low tax bases.

III. *The Decision To Sell Double-D Ranch*

At some point in May or early June 1999, the cotrustees of the marital trust and the directors of the Diebold Foundation decided to sell the stock of Double-D Ranch. Mr. Power was primarily responsible for implementing the sale of the stock. Stephen A. Baxley, a senior vice president in Bessemer Trust's tax department, and Morton Grosz, Richard Leder, and Adam Braverman assisted in the sale. Messrs. Grosz, Leder, and Braverman were attorneys at Chadbourne & Parke, LLP, a nationally known law firm. Messrs. Power, Baxley, Grosz, Leder, and Braverman (collectively, Double-D Ranch representatives) represented Double-D Ranch throughout the stock sale process.

The Double-D Ranch representatives discussed the sale with two groups of purchasers: (1) James M. Rhodes, Harry Zelnick, and Ari Bergmann (collectively, Shap II[6] representatives); and (2) Fortrend International, LLC (Fortrend). The Double-D Ranch representatives initially met with the Shap

[5] The real estate consisted of over 500 acres of property in Connecticut.

[6] Shap II (discussed *infra*) was an entity created for the purchase of the Double-D Ranch stock.

II representatives on May 26, 1999, and with Fortrend on June 1, 1999. Both purchasers presented a similar interest--purchasing the stock of closely held corporations holding assets with high fair market values but low tax bases. While it is not entirely clear what details were discussed at these meetings, the parties did address: (1) the valuation method for the AHP stock; (2) the financial statements, tax returns, and contracts that the seller would need to provide the purchaser; and (3) the real estate held by Double-D Ranch.

The Double-D Ranch representatives ultimately decided to sell the Double-D Ranch stock to the Shap II representatives and gained the approval of Mrs. Diebold and her children in their various capacities. The Shap II representatives created Shap Acquisition Corp. II (Shap II) to serve as the acquirer of the Double-D Ranch stock, with Mr. Rhodes and Mr. Zelnick serving as Shap II's directors and officers. While it is not clear at what level of detail the parties discussed the structure of the transaction, the Double-D Ranch representatives assumed that Shap II would use some form of tax strategy to offset the built-in gains in Double-D Ranch's assets.

IV. *The Letter of Intent and the Valuation of Double-D Ranch*

Representatives from both the seller and the purchaser negotiated the price and drafted the transaction documents. On June 17, 1999, Shap II and the Double-D Ranch shareholders executed a letter of intent confirming the terms of the stock sale. The letter of intent was signed by Mr. Rhodes, Mr. Power, and Mr. Bisset, acting on behalf of Shap II, the marital trust, and the Diebold Foundation, respectively.

Attached to the letter of intent was a term sheet defining the terms of the sale. The term sheet reflected that Shap II[7] would purchase all issued and outstanding Double-D Ranch stock for cash in an amount equal to the fair market value of the corporation's assets minus an agreed-upon discount. The agreed-upon discount was set equal to 4.5% of the fair market value of the Double-D Ranch assets less Double-D Ranch's tax basis in those assets.[8]

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[7] The letter of intent indicated that the purchaser was "XYZ Corporation, a special purpose entity" until the actual purchaser was identified or organized. On June 21, 1999, Shap II was incorporated in the State of Delaware to purchase the Double-D Ranch stock.

[8] For example, if fair market value is $300 and the tax basis is $100, the agreed-upon discount would be $8.50 [4.25% x ($300 - $100)].

As discussed above, Double-D Ranch held mostly marketable securities and real estate. An appraiser valued the real estate at $6,340,000 on July 2, 1999. Most of the securities were easily valued on various securities exchanges, except for the AHP stock. Because Double-D Ranch owned such a large block of AHP stock, selling it all at once in the stock market would have an impact on the stock's value. Therefore, the parties to the Double-D Ranch stock sale decided to value the AHP stock using the "Volume Weighted Average Price" for the five consecutive trading days before the stock sale closing. The average of the weighted prices was considered the value of the AHP stock.

The Double-D Ranch assets were valued as follows:

Item	*Amount*
Cash	$21,125,554
AHP stock	129,085,440
Other securities	162,335,803
Land—farm	6,340,000
	318,886,797

Double-D Ranch's marketable securities were held in two accounts with Bessemer Trust; the remaining marketable securities were held in an account with the Bank of New York.

V. *The Stock Purchase Agreement*

On June 25, 1999, Shap II and the Double-D Ranch shareholders executed a stock purchase agreement. Mrs. Diebold, Mr. Power (as representative for Bessemer Trust), and Mr. Bisset signed on behalf of the marital trust. Mr. Bisset signed on behalf of the Diebold Foundation, and Mr. Rhodes signed on behalf of Shap II. The stock purchase agreement indicated that the closing for the sale would occur on July 1, 1999. The parties established additional bank accounts to handle the various fund transfers made pursuant to the stock purchase agreement. Finally, the parties agreed in article VII, section 7.3 of the stock purchase agreement that—

> [Shap II] will file a consolidated federal income tax return (and, where applicable, state and local tax returns) for the period which includes the Closing Date, which returns will include * * * [Double-D Ranch] from and including the day following the Closing Date * * *. [Shap II] * * * will be responsible for, will pay or cause to be paid, any and all Taxes of * * * [Double-D Ranch] with respect to any taxable period ending after the Closing Date.

VI. *The Escrow Agreement*

On July 1, 1999, the Double-D Ranch shareholders entered into an escrow agreement with Bessemer Trust where: (1) Bessemer Trust would serve as the shareholders' representatives for all matters relating to the stock purchase agreement; and (2) an escrow account would be created with Bessemer Trust whereby Bessemer Trust would act as the escrow agent.

The Double-D Ranch shareholders agreed to deposit a portion of the proceeds from the stock sale into the escrow account for the purpose of satisfying any outstanding business obligations of Double-D Ranch that may have existed before the stock sale. Similarly, Shap II agreed to "hold back" $10 million of the stock purchase price and deposit it in the escrow account. This amount would become payable to the Double-D Ranch shareholders on or before July 9, 1999, subject to any adjustments relating to certain liabilities of Double-D Ranch.

VII. *Shap II's Financing*

Shap II financed its purchase of the Double-D Ranch stock with a loan from Rabobank Nederland (Rabobank). Rabobank issued a loan commitment letter to Shap II indicating: (1) its agreement to lend up to $325 million for the acquisition of the Double-D Ranch stock; (2) that the loan was to mature no later than 30 days from closing; and (3) as collateral for the loan, Shap II would grant Rabobank a first priority lien on the stock of Double-D Ranch and any property Shap II "now has or hereafter shall have any interest, as well as other collateral as mutually acceptable." A copy of the commitment letter was provided to the Double-D Ranch representatives on June 22, 1999. The Double-D Ranch shareholders and their representatives were not listed as a party to the financing agreements between Rabobank and Shap II.

Rabobank imposed certain conditions as part of its agreement to lend the $325 million. The biggest condition was that Shap II enter into a binding agreement to sell the Double-D Ranch assets after Shap II purchased Double-D Ranch's stock. To that end, Shap II and Morgan Stanley executed a document titled "Execution by Morgan Stanley of Volume-Weight Average Price and Market-on-Close Trades on Risk Basis" (Shap II-Morgan Stanley sale agreement). Pursuant to this agreement, Morgan Stanley agreed to purchase and Shap II agreed to deliver 2.4 million shares of AHP stock and various other securities (or their cash equivalent) to Morgan Stanley on the "closing date"[9] without regard to whether the transaction between the Double-D Ranch

[9] The Shap II-Morgan Stanley agreement initially defined the closing date as July 1, 1999, but it was later changed to July 6, 1999.

shareholders and Shap II closed. The securities sold pursuant to the Shap II-Morgan Stanley agreement were valued by the same methods used by Shap II to value the Double-D Ranch assets for the Double-D Ranch stock sale. Neither Double-D Ranch nor the Double-D Ranch shareholders were a party to this agreement. On June 29, 1999, Shap II opened an account with Morgan Stanley to receive custody of the marketable securities owned by Double-D Ranch.[10]

VIII. *The Stock Sale Closing*

The closing was delayed from July 1 to July 2, 1999, and the stock purchase agreement was amended accordingly. Pursuant to the amended stock purchase agreement, Shap II would pay $307 million for the Double-D Ranch stock--$297 million payable immediately and $10 million held back and placed in escrow.

Shap II became the owner of all the shares of Double-D Ranch stock on July 2, 1999, after the execution of various closing documents and the requisite money transfer of $297 million to the escrow account at Bessemer Trust.[11] The closing documents

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[10] Double-D Ranch's securities were in the custody of Bessemer Trust as of July 2, 1999. Morgan Stanley did not receive custody of any marketable securities in that account before July 6, 1999.

[11] Rabobank deposited $297,975,000 into Shap II's Rabobank account; then $297 million was transferred to the escrow account

included, among other documents, the following (all discussed *infra*): (1) the notice of pledge and security agreement; (2) the transfer agreement; and (3) the letter agreement. At the time of the Double-D Ranch stock sale, Double-D Ranch owned, controlled, and possessed assets having a fair market value well in excess of its liabilities.

The transfers of Double-D Ranch's assets were arranged as follows: (1) custody of the assets held by the Bank of New York were to be transferred to Shap II's Morgan Stanley account on July 6, 1999, after the Bank of New York received written confirmation from Mr. Bisset that the stock sale was consummated; and (2) custody of the assets held by Bessemer Trust were to be transferred to Shap II's Morgan Stanley account on July 6, 1999, pursuant to a letter agreement (transfer agreement) executed on July 2, 1999, between Bessemer Trust, Double-D Ranch, and Shap II. The transfer agreement irrevocably instructed Bessemer Trust to transfer custody of Double-D Ranch's assets to Shap II's Morgan Stanley account and "to not honor any other request or instruction which would cause Bessemer to be unable to make such transfer."

Moreover, the closing documents included an option contract between Double-D Ranch and

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at Bessemer Trust and $975,000 was transferred back to Rabobank for its fee for assisting in the transaction.

Toplands Farm, LLC (Toplands Farm).[12] Pursuant to this contract, Toplands Farm paid $1,000 for an option to purchase Double-D Ranch's real estate for its fair market value as of July 2, 1999. Toplands Farm paid Shap II a downpayment of $317,000 on July 28, 1999, and a final payment of $6,022,000 on August 27, 1999.[13]

On July 9 and 12, 1999, Shap II paid the Double-D Ranch shareholders the "hold back" amount and additional purchase price adjustments. Ultimately, the Double-D Ranch shareholders received the following consideration for their stock:

Item	*Date*	*Amount*
Payment at closing	7/2/1999	$297,000,000
Hold back and adjustment	7/9/1999	11,556,321
Price adjustment	7/12/1999	608,800
Price adjustment	7/12/1999	34,066
Total		309,199,187

The following amounts were distributed from the escrow account to the marital trust:

[12] Toplands Farm was formed by one of the Diebold children in order to purchase and operate a farm on the real estate.

[13] The $1,000 option, the $317,000 downpayment, and the $6,022,000 final payment total $6,340,000--the fair market value per the appraisal.

Item	*Amount*
Distribution—7/6/1999	$183,879,480
Distribution—7/12/1999	8,276,028
Distribution—11/8/1999	10,541,167
Distribution—3/26/2004	3,754,850
Distribution—4/15/2004	6,989
Total	206,458,514

The following amounts were distributed from the escrow account to the Diebold Foundation:

Item	*Amount*
Distribution—7/6/1999	$92,120,520
Distribution—7/12/1999	4,156,098
Distribution—11/8/1999	5,280,900
Total	101,557,518

The transfers from the escrow account at Bessemer Trust to the marital trust and the Diebold Foundation were made pursuant to the escrow agreement. The 2004 distributions to the marital trust corrected a misallocation made at the time of the stock sale.

IX. *Post-Closing Transfers*

On July 2, 1999, following the close of the Double-D Ranch stock sale: (1) Mr. Rhodes executed a letter agreement (the letter agreement) that irrevocably instructed Bessemer Trust to transfer custody of Double-D Ranch's assets to Morgan

Stanley on July 6, 1999, in settlement of the Shap II-Morgan Stanley sale agreement made on June 25, 1999; (2) Mr. Rhodes, as president of Shap II, sent a letter to Morgan Stanley instructing them to transfer $258,546,764 to Shap II's Rabobank account on July 6, 1999; and (3) Morgan Stanley and Double-D Ranch entered into a "Pledge and Security Agreement" which granted Morgan Stanley a security interest in the assets held in Double-D Ranch's Bessemer Trust account. Pursuant to the pledge and security agreement, Morgan Stanley agreed that it would not take possession of the assets before July 6, 1999. Mr. Rhodes sent notice of the pledge and security agreement to Bessemer Trust on July 2, 1999. Neither the Double-D Ranch shareholders nor their representatives were a party to the pledge and security agreement.

On July 6, 1999, Bessemer Trust and the Bank of New York transferred Double-D Ranch's assets to Shap II's Morgan Stanley account. Shortly thereafter Rabobank's loan was repaid. Shap II received the following from its sales of the Double-D Ranch assets:

Item	*Amount*
Securities	$291,230,614
Land	6,340,000
Cash	21,126,554
Total	318,697,168

X. *Return Filings*

The Double-D Ranch shareholders timely filed returns that reflected the sale of their Double-D Ranch stock to Shap II on July 2, 1999. The Diebold Foundation reported capital gain with respect to the sale of its 1,280 shares on Form 990-PF, Return of Private Foundation, for its taxable year ended October 31, 1999.

Double-D Ranch timely filed Form 1120, U.S. Corporation Income Tax Return, for its short taxable year ended July 2, 1999, and checked the "final return" box on the return. This return did not report any of Double-D Ranch's asset sales made after the July 2, 1999, stock sale between the Double-D Ranch shareholders and Shap II.

Shap II timely filed a consolidated income tax return with Double-D Ranch for its taxable year ended on June 30, 2000. Shap II's return reported all of the asset sales made by Double-D Ranch between July 2, 1999, and June 30, 2000, but also reported artificial losses,[14] resulting in Shap II's reporting no tax liability for its June 30, 2000, taxable yearend.

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[14] The artificial losses arose from some form of Son-of-BOSS transaction. *See* Notice 2000-44, 2000-2 C.B. 255 (describing so-called Son-of-BOSS transactions); *see also Kligfeld Holdings v. Commissioner*, 128 T.C. 192, 194 (2007) (discussing the prototypical Son-of-BOSS transaction).

XI. *Procedural History*

On March 10, 2006, respondent issued a notice of deficiency to Double-D Ranch, determining a deficiency in income tax of $81,120,064 and a section 6662 penalty of $16,224,012 for the short taxable year ended on July 2, 1999. Respondent determined that the sale of Double-D Ranch's stock by the Double-D Ranch shareholders to Shap II should not be respected for Federal income tax purposes. Respondent determined that in substance the stock sale was really a sale of Double-D Ranch's assets followed by a liquidating distribution to the Double-D Ranch shareholders. While the notice of deficiency was issued after the three-year period of limitations, respondent contends that the six-year period of limitations under section 6501(e) applies.[15] Double-D Ranch did not file a petition with this Court, and respondent assessed the following amounts against Double-D Ranch on July 31, 2006:

Item	*Amount*
Tax	$81,120,064
Sec. 6662 penalty	16,224,013
Interest	3,171,631

[15] Respondent's contention that the six-year period of limitations should apply is also predicated on the assumption that the stock sale should be recast as an asset sale followed by a liquidating distribution.

Respondent could not find any assets of Double-D Ranch from which to collect the assessed liability and determined that any additional efforts would be futile.

On August 7, 2007, respondent issued a notice of liability to Mrs. Diebold as the transferee of the assets of Double-D Ranch in the amount of $97,344,077 for the corporate income tax, penalty, and accrued interest assessed against Double-D Ranch for the taxable year ended July 2, 1999. Mrs. Diebold timely filed a petition, and a trial was held. In *Diebold v. Commissioner*, T.C. Memo. 2010-238, we found that the separate legal existence of the marital trust should not be disregarded and that respondent had not met his burden of showing that Mrs. Diebold was liable as a transferee of the marital trust. As a result, we held that Mrs. Diebold was not liable as a transferee of Double-D Ranch.

Respondent also determined that the Diebold Foundation was liable as a transferee of Double-D Ranch. However, pursuant to its plan of dissolution and distribution of assets effective on January 29, 2001, the Diebold Foundation distributed all of its assets in equal shares to petitioners, resulting in each petitioner's receiving $32,918,670 from the Diebold Foundation.[16] These transfers were not made in

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[16] The plan was approved by the Supreme Court of the State of New York.

exchange for any property or in satisfaction of an antecedent debt.

On July 11, 2008, respondent issued a notice of liability to each petitioner as a transferee of the assets of the Diebold Foundation in the amount of $33,542,496 for the corporate income tax, penalty, and accrued interest assessed against Double-D Ranch for the taxable year ended on July 2, 1999. Petitioners timely filed petitions in this court, and the cases have been consolidated and are before this court for a decision without trial under Rule 122.[17]

OPINION

Section 6901(a)(1) is a procedural statute authorizing the assessment of transferee liability in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the transferee liability was incurred. Section 6901(a) does not create or define a substantive liability but merely provides the Commissioner a remedy for enforcing and collecting from the transferee of the property the transferor's existing liability. *Coca-Cola Bottling Co. v. Commissioner*, 334 F.2d 875, 877 (9th Cir. 1964), *aff'g* 37 T.C. 1006

[17] The parties agree that the same evidence that was used in *Diebold v. Commissioner*, T.C. Memo. 2010-238, should be used in the present case, including the trial testimony. As a result, under Rule 122, these cases do not require a trial for the submission of evidence.

(1962); *Mysse v. Commissioner*, 57 T.C. 680, 700-701 (1972). Section 6902 and Rule 142(d) provide that the Commissioner has the burden of proving the taxpayer's liability as a transferee but not of showing that the transferor was liable for the tax.

Under section 6901(a) the Commissioner may establish transferee liability if a basis exists under applicable State law or State equity principles for holding the transferee liable for the transferor's debts. *Commissioner v. Stern*, 357 U.S. 39, 42-47 (1958); *Bresson v. Commissioner*, 111 T.C. 172, 179-180 (1998), *aff'd*, 213 F.3d 1173 (9th Cir. 2000); *Frank Sawyer Trust of May 1992 v. Commissioner*, T.C. Memo. 2011-298; *Starnes v. Commissioner*, T.C. Memo. 2011-63; *Diebold v. Commissioner*, T.C. Memo. 2010-238. "[T]he existence and extent of liability should be determined by state law." *Commissioner v. Stern*, 357 U.S. at 45. Thus, State law determines the elements of liability, and section 6901 provides the remedy or procedure to be employed by the Commissioner as the means of enforcing that liability. *Ginsberg v. Commissioner*, 305 F.2d 664, 667 (2d Cir. 1962), *aff'g* 35 T.C. 1148 (1961).

Moreover, transferee liability may be asserted against a transferee of a transferee. *Berliant v. Commissioner*, 729 F.2d 496 (7th Cir. 1984), *aff'g Magill v. Commissioner*, T.C. Memo. 1982-148. The Commissioner may collect unpaid taxes of a transferor of assets from a transferee or a successor transferee of those assets. Sec. 6901(a), (c)(2); *Commissioner v. Stern*, 357 U.S. at 42; *Stansbury v. Commissioner*, 104 T.C. 486, 489 (1995), *aff'd*, 102 F.3d 1088 (10th Cir. 1996). The Commissioner bears the burden of proving that a party is liable as a transferee under State law or in equity. Sec. 6902(a); Rule 142(d); *Gumm v. Commissioner*, 93 T.C. 475, 479-480 (1989), *aff'd without published opinion*, 933 F.2d 1014 (9th Cir. 1991).

I. *Parties' Arguments*

Petitioners argue that they cannot be liable as transferees because respondent failed to issue the notices of liability within the applicable three-year period of limitations set forth in section 6901(c)(2), and that the six-year period of limitations in section 6501(e)(1)(A) does not apply because Double-D Ranch did not sell its marketable securities during the July 2, 1999, taxable year. Moreover, petitioners argue that they cannot be liable as transferees because Double-D Ranch itself was not liable for the deficiency and penalty respondent determined in his notice of deficiency for the July 2, 1999, taxable year. Alternatively, if Double-D Ranch is found liable for the income tax and penalty respondent determined in his notice of deficiency, petitioners argue they are not liable under New York fraudulent conveyance law because: (1) Double-D Ranch did not convey any property to the Diebold Foundation; and (2) Double-D Ranch was solvent at the time of its stock sale.

Respondent argues that the six-year period of limitations under section 6501(e) applies to the assessment and collection of Double-D Ranch's liability for the short taxable year ended July 2, 1999, because Double-D Ranch omitted an amount in excess of 25% of gross income stated in the return. Respondent argues that under the substance over form doctrine, the purported sale of Double-D Ranch stock to Shap II must be disregarded and recast as a sale of Double-D Ranch's assets on July 2, 1999, followed by a liquidating distribution of the proceeds to the Diebold Foundation and the marital trust. Therefore, under either New York fraudulent conveyance law or the trust fund doctrine, the Diebold Foundation is liable as a transferee of Double-D Ranch. Respondent concludes that because the Diebold Foundation is liable as a transferee and transferred all of its assets to petitioners for no consideration, petitioners are liable as subsequent transferees of Double-D Ranch.

Whether the three-year or the six-year period of limitations applies depends on how we decide to characterize the transaction between the Double-D Ranch shareholders and Shap II.[18] Therefore, we

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[18] In *Mills v. Everest Reinsurance Co.*, 410 F. Supp. 2d 243, 255 (S.D.N.Y. 2006), the court rejected the defendant's assertion that multiple transfers should be collapsed into one transaction for the purpose of determining when the statute of limitations began to run on the plaintiff's fraudulent conveyance claims. The court noted that transactions have never been collapsed to determine

must first determine whether respondent has shown that the transactions surrounding the Double-D Ranch stock sale should be collapsed under the New York Uniform Fraudulent Conveyance Act (NYUFCA) in deciding whether the Diebold Foundation is liable as a transferee. If we find the Diebold Foundation liable as a transferee, then we must determine whether petitioners are liable as transferees of a transferee.

II. *New York Uniform Fraudulent Conveyance Act*

The law of the State where the transfer occurred (in these cases, New York) controls the characterization of the transaction. *See Commissioner v. Stern*, 357 U.S. at 45. NYUFCA includes provisions imposing transferee liability on

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whether a fraudulent conveyance is timely under the statute of limitations, stating "because a new claim for fraudulent conveyance accrues at the time of each conveyance, it would be illogical and contrary to the spirit of the law to treat a series of transfers as one transaction for the purpose of determining when the statute of limitations was triggered." However, *Tronox, Inc. v. Anadarko Petroleum Corp.* (*In re Tronox Inc.*), 429 B.R. 73, 100 (S.D.N.Y. 2010) rejected this argument in applying the Oklahoma fraudulent transfer statute to a "spin off", reasoning that what constitutes a "transfer" under Oklahoma law is very broad, and the Mills transfers were much more straightforward than the case before it. Because of our factual differences and our holding as explained subsequently, it is not necessary that we address whether a New York court can collapse transactions to determine whether a fraudulent conveyance occurs within the period of limitations.

grounds of both actual and constructive fraud. *See* N.Y. Debt. & Cred. Law secs. 273, 276 (McKinney 2001). The elements of fraudulent conveyance claims under NYUFCA are the same as those under the Federal Bankruptcy Code. *Ames Dept. Stores, Inc. v. Wertheim Schroder & Co.* (*In re Ames Dept. Stores, Inc.*), 161 B.R. 87, 89 n.1 (Bankr. S.D.N.Y. 1993). Respondent asserts that the Diebold Foundation is liable as a transferee under the constructive fraud provision of NYUFCA.

The constructive fraud provision of NYUFCA provides that "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." N.Y. Debt. & Cred. Law sec. 273. The party asserting that a transfer should be set aside under this section bears the burden of showing fraud by a preponderance of the evidence. *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 376 (S.D.N.Y. 2003). Accordingly, establishing constructive fraud (and therefore transferee liability) under N.Y. Debt & Cred. Law sec. 273 requires respondent to prove by a preponderance of the evidence: (1) a conveyance; (2) made without fair consideration; (3) by a person who was or will be rendered insolvent by the conveyance. *See United States v. McCombs*, 30 F.3d 310, 323 (2d Cir. 1994).

A conveyance includes “every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.” N.Y. Debt. & Cred. Law sec. 270 (McKinney 2001). Fair consideration is given—

> a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
>
> b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Id. sec. 272.

Fair consideration must be determined “upon the facts and circumstances of each particular case.” *Sullivan v. Messed* (*In re Corcoran*), 246 B.R. 152, 159 (S.D.N.Y. 2000) (citing *United States v. McCombs*, 30 F.3d at 326). Furthermore, under N.Y. Debt. & Cred. Law sec. 271 (McKinney 2001), a person is insolvent when the “present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.”

Respondent's transferee liability claim under NYUFCA is predicated on the assertion that the series of transactions among the Double-D Ranch shareholders, Shap II, Morgan Stanley, and Rabobank should be collapsed and treated as if Double-D Ranch sold all of its assets and then made a liquidating distribution to its shareholders. If the transactions are collapsed accordingly, then Double-D Ranch will have transferred substantially all of its assets to the Diebold Foundation and the marital trust, receiving virtually nothing in exchange, let alone fair consideration. If the preceding is so found, it follows that the Diebold Foundation will be liable as a transferee of Double-D Ranch's assets under N.Y. Debt. & Cred. Law sec. 273. While intent is generally irrelevant in a constructive fraud action under NYUFCA, when a party is seeking to recharacterize a transaction or series of transactions for purposes of showing no fair consideration was given the party must prove that the multiple transactions were linked and that the transferee had actual or constructive knowledge of the entire scheme that rendered her exchange with the debtor fraudulent. *See Sullivan*, 246 B.R. at 159 (citing *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995)); *Official Comm. Of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co.* (*In re Sunbeam Corp.*), 284 B.R. 355, 370-371 (Bankr. S.D.N.Y. 2002).

Constructive knowledge may be found where the initial transferee became aware of circumstances that should have led to further inquiry into the circumstances of the transaction, but no inquiry was made. *HBE Leasing Corp.*, 48 F.3d at 636. While some cases have stated that purchasers who do not make appropriate inquiries are charged with "the knowledge that ordinary diligence would have elicited," *United States v. Orozco-Prada*, 636 F. Supp. 1537, 1543 (S.D.N.Y. 1986), *aff'd without published opinion*, 847 F.2d 836 (2d Cir. 1988), others appear to have required a more active avoidance of the truth, *see Schmitt v. Morgan*, 471 N.Y.S. 2d 365 934, 471 (App. Div. 1983) (test is whether subsequent purchaser who did not make serious inquiry "was shielding himself from knowledge that a fraudulent conveyance had occurred").

The "knowledge" requirement reflects the policy of the Uniform Fraudulent Conveyance Act to protect innocent purchasers for value who received the debtor's property without awareness of any fraudulent scheme and is closely connected to the requirement of "good faith". *See Gowan v. Wachovia Bank, N.A.* (*In re Dreier LLP*), 453 B.R. 499, 513 (S.D.N.Y. 2011) (citing *HBE Leasing*, 48 F.3d at 636) ("UFCA requirement of 'good faith' refers solely to 'whether the grantee knew, or should have known, that he was not trading normally, but that * * * the purpose of the trade, so far as the debtor was concerned, was the defrauding of his creditors.'" (quoting 1 GGFCP sec. 295, at 512 (1940)). The "good faith" inquiry is an objective one that generally asks whether the transferee had information that put it on inquiry notice that the transferor was insolvent, or that the transfer might be made with a fraudulent purpose, and whether a diligent inquiry would have discovered the fraudulent purpose of the transfer. *Wachovia Bank*, 453 B.R. at 513 (citing *Christian Bros. High Sch. Endowment v. Bayou No Leverage Fund, LLC* (*In re Bayou Group, LLC*), 439 B.R. 284, 310-311 (S.D.N.Y. 2010)) (discussing 11 U.S.C. sec. 548(c)).

HBE Leasing involved the application of NYUFCA in order to collapse multiple transactions on the basis of the knowledge of the transferee. The relevant parties included the debtor corporation, the majority shareholder son, and the mortgagee mother. First, the mortgagee mother made loans to the debtor corporation in exchange for security interests in debtor corporation property. Next, the majority shareholder son had the debtor corporation use the borrowed funds for improper purposes. The primary question was whether these transactions could be collapsed in order to determine whether the debtor corporation received fair consideration in exchange for the security interest granted to the mortgagee mother. The court found that there was sufficient evidence to charge the mortgagee mother with constructive knowledge of the improper expenditures of the borrowed funds (and therefore collapsed the transactions in determining fair consideration under NYUFCA) where: (1) when the mortgagee mother was the director of the debtor corporation, she knew the majority shareholder son had used the debtor corporation as a conduit for making various payments for family and other noncorporate purposes; (2) the mortgagee mother knew the debtor corporation was a defendant in a RICO fraud action; and (3) the mortgagee mother knew that the majority shareholder son had made large loans to the debtor corporation. The court found that the mortgagee mother had constructive knowledge under these circumstances because her "failure to inquire represented a conscious turning away from the subject." *HBE Leasing*, 48 F.3d at 637.

In Sunbeam Corp., 284 B.R. at 371 (citing *In re Greenbrook Carpet Co.*, 722 F.2d 659, 661 (11th Cir.1984)), the court stated that a lender may extend a loan to an entity even if it is aware that this entity ultimately intends to use the funds to repay antecedent debt or invest in a speculative venture. The court reasoned that the fact that a speculative venture turns out to be unprofitable is not grounds to retroactively impute knowledge to the lender that the debtor's investment far exceeded its value. *Id.* at 372.

On the basis of the authorities discussed, in order to collapse the transactions we must determine whether respondent has shown that in 1999 the Diebold Foundation became aware of circumstances that should have led to further inquiry into the circumstances of the transaction, but no inquiry was made. Because the Double-D Ranch representatives concede that they did not inquire into what Shap II planned on doing, we must determine only whether an inquiry was required.

Respondent asserts that the Double-D Ranch representatives: (1) "[H]ad to have been aware that any tax advantage that Shap II intended to obtain could not have been legitimate"; (2) "knew or should have known that they were engaging the services of a company that marketed transactions that were solely tax motivated and designed to artificially avoid taxes"; and (3) "considering the sophistication and educational level of the representatives, their discussions with Fortrend, Sentinel, and River Run, and the large amount of money at stake, it is not plausible that the representatives were in the dark about the substance of the transaction."

It is clear from the record that the Double-D Ranch representatives knew: (1) Shap II would likely need to sell most of the Double-D Ranch assets in order to repay their 30-day loan from Rabobank; and (2) Shap II was planning on using "tax attributes" to offset the built-in gains of the Double-D Ranch assets.

Respondent also asserts that while Mrs. Diebold may have desired to diversify her portfolio or transfer some assets as gifts, the same objectives could have been accomplished by liquidating Double-D Ranch. However, in the absence of knowledge of a nefarious scheme, when faced with the choice of liquidating the assets of Double-D Ranch or selling its stock, the Double-D Ranch shareholders were not required to choose the result that produced the highest tax liability. They chose to maximize the cash proceeds by selling the stock of Double-D Ranch rather than liquidating it.

While there is uncertainty as to what the Double-D Ranch representatives were aware of in 1999 concerning the legitimacy of Shap II's actions, we find that their level of awareness about Shap II's plans to engage in some sort of tax strategy did not require, in 1999, the Double-D Ranch representatives to make further inquiry into the circumstances of the transaction. Notice 2001-16, 2001-1 C.B. 730, regarding intermediary transactions had not been released when the stock sale transaction took place.[19] Shap II was an unrelated third party that acquired the benefits and burdens of ownership of Double-D

[19] Notice 2001-16, 2001-1 C.B. 730, was not released until January 19, 2001, and was not published until February 26, 2001. The Internal Revenue Service and the Department of the Treasury issued this notice to alert taxpayers and their representatives of certain responsibilities that might arise from participating in an "intermediary transaction". These transactions were marketed to taxpayers for the avoidance of Federal income taxes. An intermediary transaction generally involved fraudulently structuring the actions of multiple parties (i.e., an asset purchaser, a stock seller, and a stock purchaser) so that assets and stock changed ownership with no resulting Federal income taxes.

Ranch once the stock sale was complete. There are legitimate transactions that Shap II could have contemplated to offset or defer Double-D Ranch's built-in gains, and respondent has failed to show why the Double-D Ranch representatives should have known that Shap II planned on using a fraudulent tax strategy in order to do so.

Moreover, the facts of these cases are much less egregious than the facts found in HBE Leasing—our transaction is between unrelated parties as opposed to between mother and son; there was no evidence presented that Shap II was a defendant in any relevant legal proceedings; and there has been no finding that the Double-D Ranch representatives had actual knowledge of any past fraudulent activities of Shap II. Furthermore, these cases are similar to *Sunbeam* in that Shap II's tax strategy can be analogized to a "speculative venture". While the Double-D Ranch representatives knew Shap II planned on engaging in some form of tax strategy, the fact that the strategy failed should not retroactively impute knowledge to the Double-D Ranch representatives that Shap II's plans were specious. Therefore, respondent's assertions that the Double-D Ranch representatives should have known that the transaction was not legitimate are insufficient to support a finding that the Double-D Ranch representatives had constructive knowledge of Shap II's entire scheme.

Furthermore, the facts in these cases closely resemble the facts in *Frank Sawyer Trust* and Starnes—both cases where we decided not to collapse various transactions under uniform fraudulent conveyance statutes. In *Starnes*, the taxpayers each owned 25% of the stock of Tarcon, a freight consolidation corporation. The taxpayers had sold virtually all of the assets of Tarcon to an unrelated third party, so that Tarcon had only cash and contingent Federal and State corporate income tax liabilities. Another unrelated third party (Midcoast) and the Tarcon shareholders entered into a contract to sell the Tarcon stock, where Midcoast was obligated to file corporate tax returns and report the capital gains arising from Tarcon's asset sales. After Midcoast failed to pay Tarcon's income tax liabilities, the Commissioner asserted a transferee liability action against the Tarcon shareholders.

In *Frank Sawyer Trust*, the taxpayer owned 100% of the stock in taxi corporations and real estate corporations. Like *Starnes*, the taxpayer had sold all the assets of the corporations to an unrelated third party, so that the corporations had only cash and contingent Federal and State corporate income tax liabilities. Another unrelated third party (Fortrend) and the taxpayer entered into a contract to sell the corporations' stock, where Fortrend was obligated to file corporate tax returns and report the capital gains arising from the corporations' asset sales. After Fortrend failed to pay the corporations' income tax liabilities, the Commissioner asserted a transferee liability action against the taxpayer.

In both *Starnes* and *Frank Sawyer Trust*, the corporations' assets were not used to purchase the stock from the taxpayer, but an independent third party (Rabobank) financed the transaction. Moreover, in both cases the corporations were solvent at the time their stock was sold. Notice 2001-16, *supra*, had been released prior to the transaction in Starnes, but was released after the transactions in *Frank Sawyer Trust*.

We applied State fraudulent conveyance law in both cases to determine whether the taxpayers should be liable for the income tax liabilities of the corporations. Specifically, we focused on whether all of the parties involved had knowledge of the multiple transactions, including the fraudulent scheme to offset the tax liabilities. We held that because the Commissioner failed to show the taxpayers' knowledge of the fraudulent scheme, the transactions should not be collapsed. We then applied the relevant fraudulent conveyance statute without collapsing the transactions and found that because there was no fraudulent conveyance to the taxpayers, they were not liable as transferees.

We find the facts in these cases to be very similar to those in *Starnes* and *Frank Sawyer Trust*. The transaction between the Double-D Ranch shareholders and Shap II was conducted between two unrelated parties. The Double-D Ranch assets were not used to purchase the stock from the Double-D Ranch shareholders; rather, there was an independent infusion of cash in the form of a loan from Rabobank (another unrelated third party). Not only was Double-D Ranch solvent when sold, it had yet to incur any significant tax liability because it had not sold its assets at the time of the stock sale. Lastly, Notice 2001-16, *supra*, had not been released at the time this transaction was consummated. As in *Starnes* and *Frank Sawyer Trust*, respondent has not carried the burden of proving we should collapse the transactions. Accordingly, we will respect the form of the transactions in applying NYUFCA.

An opinion in another transferee case with similar facts has recently been filed—*Feldman v. Commissioner*, T.C. Memo. 2011-297, holding the taxpayer liable as a transferee. However, in holding the taxpayer liable as a transferee, the Court in *Feldman* found that it was "absolutely clear" that the taxpayer was aware the stock purchaser had no intention of ever paying the tax liabilities and the "loan" used to purchase the stock was a sham because it was made by a shareholder of the purchaser and was not evidenced by a writing. Moreover, the *Feldman* transaction took place after the issuance of Notice 2001-16, *supra*. In our cases, the transaction took place before the issuance of Notice 2001-16, *supra*, the funds used to purchase the stock were lent by an independent third party, and the level of knowledge possessed by Double-D Ranch concerning Shap II's plans did not require further inquiry into the circumstances of the transaction.

N.Y. Debt. & Cred. Law sec. 273 requires respondent to show: (1) a conveyance; (2) made without fair consideration; (3) by a person who was or will be rendered insolvent by the conveyance. *See United States v. McCombs*, 30 F.3d at 323. At the time the Double-D Ranch shareholders sold their stock to Shap II, Double-D Ranch was solvent, possessing over $300 million in assets and no significant liabilities. Shap II paid money to the Double-D Ranch shareholders in exchange for the stock. After the stock sale was consummated, Double-D Ranch sold its assets to Morgan Stanley and used the proceeds to repay a prior loan from Rabobank. No assets were conveyed from Double-D Ranch to the Double-D Ranch shareholders. Because there was no conveyance of assets from Double-D Ranch to the Double-D Ranch shareholders that rendered Double-D Ranch insolvent, we find that there was no fraudulent conveyance under NYUFCA from Double-D Ranch to the Double-D Ranch shareholders. Therefore, the Diebold Foundation is not liable as a transferee under section 6901.

III. *Transferee Liability of Petitioners*

Finally, we must determine whether petitioners are liable as subsequent transferees of Double-D Ranch for the unpaid deficiency in corporate income tax, penalty, and interest due from Double-D Ranch for the short taxable year ended July 2, 1999. As previously mentioned, transferee liability may be asserted against a transferee of a transferee. *Berliant v. Commissioner*, 729 F.2d 496. The Commissioner may collect unpaid taxes of a transferor of assets from a transferee or a successor transferee of those assets. Sec. 6901(a), (c)(2); *Commissioner v. Stern*, 357 U.S. at 42; *Stansbury v. Commissioner*, 104 T.C. 486, 489 (1995). Again, we apply New York law in determining whether petitioners are liable as subsequent transferees, and respondent bears the burden of proof.

Under N.Y. Debt. & Cred. Law sec. 273 respondent must prove: (1) a conveyance; (2) made without fair consideration; (3) by a person who was or will be rendered insolvent by the conveyance. *United States v. McCombs*, 30 F.3d at 323. Moreover, a person is insolvent when the "present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." N.Y. Debt. & Cred. Law sec. 271. The Diebold Foundation transferred all of its assets to petitioners pursuant to its plan of dissolution approved by the

Supreme Court of the State of New York, leaving the Diebold Foundation with no assets in the event that it was held liable as a transferee. However, because we hold that the Diebold Foundation is not liable as a transferee of the assets of Double-D Ranch, petitioners cannot be liable as transferees of a transferee. Therefore, we hold that petitioners are not liable under section 6901 as transferees of a transferee.

IV. *Conclusion*

We conclude that respondent has not established that a fraudulent conveyance occurred under New York law. In reaching our holding herein, we have considered all arguments of the parties, and, to the extent not mentioned above, we conclude they are moot, irrelevant, or without merit.

To reflect the foregoing,

Decisions will be entered for petitioners.

APPENDIX G

1. 26 U.S.C. 6212 provides:

Notice of deficiency

(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

(b) Address for notice of deficiency.

(1) Income and gift taxes and certain excise taxes.

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(2) Joint income tax return.

In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

(3) Estate tax.

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

(c) Further deficiency letters restricted.

(1) General rule.

If the Secretary has mailed to the taxpayer a notice of deficiency as provided in subsection (a), and the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, of estate tax in respect of the taxable estate of the same decedent, of chapter 41 tax for the same taxable year, of chapter 43 tax for the same taxable year, of chapter 44 tax for the same taxable year, of section 4940 tax for the same taxable year, or of chapter 42 tax (other than under section 4940) with respect to any act (or failure to act) to which such petition relates, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical or clerical errors), in section 6851 or 6852 (relating to termination assessments), or in section 6861(c) (relating to the making of jeopardy assessments).

(2) Cross references.

For assessment as a deficiency notwithstanding the prohibition of further deficiency letters, in the case of—

(A) Deficiency attributable to change of treatment with respect to itemized deductions, see section 63(e)(3).

(B) Deficiency attributable to gain on involuntary conversion, see section 1033(a)(2)(C) and (D).

(C) Deficiency attributable to activities not engaged in for profit, see section 183(e)(4).

For provisions allowing determination of tax in title 11 cases, see section 505(a) of title 11 of the United States Code.

(d) Authority to rescind notice of deficiency with taxpayer's consent.

The Secretary may, with the consent of the taxpayer, rescind any notice of deficiency mailed to the taxpayer. Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213(a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512(a) (relating to limitations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.

2. 26 U.S.C. 6213 provides:

Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment.

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

(b) Exceptions to restrictions on assessment.

(1) Assessments arising out of mathematical or clerical errors.

If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section

6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof.

(2) Abatement of assessment of mathematical or clerical errors.

(A) Request for abatement. Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter.

(B) Stay of collection. In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph.

(3) Assessments arising out of tentative carryback or refund adjustments.

If the Secretary determines that the amount applied, credited, or refunded under section 6411 is in excess of the overassessment attributable to the carryback or the amount described in section 1341(b)(1) with respect to which such amount was applied, credited, or refunded, he may assess without regard to the provisions of paragraph (2) the amount of the excess as a deficiency as if it were due to a mathematical or clerical error appearing on the return.

(4) Assessment of amount paid.

Any amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment notwithstanding the provisions of subsection (a). In any case where such amount is paid after the mailing of a notice of deficiency under section 6212, such payment shall not deprive the Tax Court of jurisdiction over such deficiency determined under section 6211 without regard to such assessment.

(5) Certain orders of criminal restitution.

If the taxpayer is notified that an assessment has been or will be made pursuant to section 6201(a)(4)—

(A) such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), section 6212(c)(1) (restricting further deficiency letters), or section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and

(B) subsection (a) shall not apply with respect to the amount of such assessment.

(c) Failure to file petition.

If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

(d) Waiver of restrictions.

The taxpayer shall at any time (whether or not a notice of deficiency has been issued) have the right, by a signed notice in writing filed with the Secretary, to waive the restrictions provided in subsection (a) on the assessment and collection of the whole or any part of the deficiency.

(e) Suspension of filing period for certain excise taxes.

The running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to the taxes imposed by section 4941 (relating to taxes on self-dealing), 4942 (relating to taxes on failure to distribute income), 4943 (relating to taxes on excess business holdings), 4944 (relating to investments which jeopardize charitable purpose), 4945 (relating to taxes on taxable expenditures), 4951 (relating to taxes on self-dealing), or 4952 (relating to taxes on taxable expenditures), 4955 (relating to taxes on political expenditures), 4958 (relating to private excess benefit), 4971 (relating to excise taxes on failure to meet minimum funding standard), [or] 4975 (relating to excise taxes on prohibited transactions) shall be suspended for any period during which the Secretary has extended the time allowed for making correction under section 4963(e) .

(f) Coordination with title 11.

(1) Suspension of running of period for filing petition in title 11 cases.

In any case under title 11 of the United States Code, the running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to any deficiency shall be suspended for the period during which the debtor is prohibited by reason of such case from filing a petition in the Tax Court with respect to such deficiency, and for 60 days thereafter.

(2) Certain action not taken into account.

For purposes of the second and third sentences of subsection (a) , the filing of a proof of claim or request for payment (or the taking of any other action) in a case under title 11 of the United States Code shall not be treated as action prohibited by such second sentence.

(g) Definitions.

For purposes of this section—

(1) Return.

The term "return" includes any return, statement, schedule, or list, and any amendment or supplement thereto, filed with respect to any tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44.

(2) Mathematical or clerical error.

The term “mathematical or clerical error” means—

(A) an error in addition, subtraction, multiplication, or division shown on any return,

(B) an incorrect use of any table provided by the Internal Revenue Service with respect to any return if such incorrect use is apparent from the existence of other information on the return,

(C) an entry on a return of an item which is inconsistent with another entry of the same or another item on such return,

(D) an omission of information which is required to be supplied on the return to substantiate an entry on the return,

(E) an entry on a return of a deduction or credit in an amount which exceeds a statutory limit imposed by subtitle A or B, or chapter 41, 42 43, or 44, if such limit is expressed—

(i) as a specified monetary amount, or

(ii) as a percentage, ratio, or fraction, and if the items entering into the application of such limit appear on such return,

(F) an omission of a correct taxpayer identification number required under section 32 (relating to the earned income credit) to be included on a return,

(G) an entry on a return claiming the credit under section 32 with respect to net earnings from self-employment described in section 32(c)(2)(A) to the extent the tax imposed by section 1401 (relating to self-employment tax) on such net earnings has not been paid,

(H) an omission of a correct TIN required under section 21 (relating to expenses for household and dependent care services necessary for gainful employment) or section 151 (relating to allowance of deductions for personal exemptions),

(I) an omission of a correct TIN required under section 24(e) (relating to child tax credit) to be included on a return,

(J) an omission of a correct TIN required under section 25A(g)(1) (relating to higher education tuition and related expenses) to be included on a return,

(K) an omission of information required by section 32(k)(2) (relating to taxpayers making improper prior claims of earned income credit)or an entry on the return claiming the credit under section 32 for a taxable year for which the credit is disallowed under subsection (k)(1) thereof,

(L) the inclusion on a return of a TIN required to be included on the return under section 21, 24 , or 32, if—

(i) such TIN is of an individual whose age affects the amount of the credit under such section, and

(ii) the computation of the credit on the return reflects the treatment of such individual as being of an age different from the individual's age based on such TIN,

(M) the entry on the return claiming the credit under section 32 with respect to a child if, according to the Federal Case Registry of Child Support Orders established under section 453(h) of the Social Security Act, the taxpayer is a noncustodial parent of such child,

(N) an omission of any increase required under section 36(f) with respect to the recapture of a credit allowed under section 36,

(O) the inclusion on a return of an individual taxpayer identification number issued under section 6109(i) which has expired, been revoked by the Secretary, or is otherwise invalid,

(P) an omission of information required by section 24(g)(2) or an entry on the return claiming the credit under section 24 for a taxable year for which the credit is disallowed under subsection (g)(1) thereof, and

(Q) an omission of information required by section 25A(b)(4)(B) or an entry on the return claiming the American Opportunity Tax Credit for a taxable year for which such credit is disallowed under section 25A(b)(4)(A).

A taxpayer shall be treated as having omitted a correct TIN for purposes of the preceding sentence if information provided by the taxpayer on the return with respect to the individual whose TIN was provided differs from the information the Secretary obtains from the person issuing the TIN.

(h) Cross references.

(1) For assessment as if a mathematical error on the return, in the case of erroneous claims for income tax prepayment credits, see section 6201(a)(3) .

(2) For assessments without regard to restrictions imposed by this section in the case of—

(A) Recovery of foreign income taxes, see section 905(c).

(B) Recovery of foreign estate tax, see section 2016.

(3) For provisions relating to application of this subchapter in the case of certain partnership items, etc., see section 6230(a).

3. 26 U.S.C. 6214 provides:

Determinations by Tax Court

(a) Jurisdiction as to increase of deficiency, additional amounts, or additions to the tax.

Except as provided by section 7463, the Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any additional amount, or any addition to the tax should be assessed, if claim therefor is asserted by the Secretary at or before the hearing or a rehearing.

(b) Jurisdiction over other years and quarters.

The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid. Notwithstanding the preceding sentence, the Tax Court may apply the doctrine of equitable recoupment to the same extent that it is available in civil tax cases before the district courts of the United States and the United States Court of Federal Claims.

(c) Taxes imposed by section 507 or chapter 41, 42, 43, or 44.

The Tax Court, in redetermining a deficiency of any tax imposed by section 507 or chapter 41, 42, 43, or 44 for any period, act, or failure to act, shall consider such facts with relation to the taxes under chapter 41, 42, 43, or 44 for other periods, acts, or failures to act as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the taxes under chapter 41, 42, 43, or 44 for any other period, act, or failure to act have been overpaid or underpaid. The Tax Court, in redetermining a deficiency of any second tier tax (as defined in section 4963(b)), shall make a determination with respect to whether the taxable event has been corrected.

(d) Final decisions of Tax Court.

For purposes of this chapter, chapter 41, 42, 43, or 44, and subtitles A or B the date on which a decision of the Tax Court becomes final shall be determined according to the provisions of section 7481.

(e) Cross references.

For provisions giving Tax Court jurisdiction to order a refund of an overpayment and to award sanctions, see section 6512(b)(2).

4. 26 U.S.C. 6901 provides:

Transferred assets.

(a) Method of collection.

The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, estate, and gift taxes.

(A) Transferees. The liability, at law or in equity, of a transferee of property—

(i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes),

(ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes), or

(iii) of a donor in the case of a tax imposed by chapter 12 (relating to gift taxes),

in respect of the tax imposed by subtitle A or B.

(B) Fiduciaries. The liability of a fiduciary under section 3713(b) of title 31, United States Code, in respect of the payment of any tax described in subparagraph (A) from the estate of the taxpayer, the decedent, or the donor, as the case may be.

(2) Other taxes.

The liability, at law or in equity of a transferee of property of any person liable in respect of any tax imposed by this title (other than a tax imposed by subtitle A or B), but only if such liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a).

(b) Liability.

Any liability referred to in subsection (a) may be either as to the amount of tax shown on a return or as to any deficiency or underpayment of any tax.

(c) Period of limitations.

The period of limitations for assessment of any such liability of a transferee or a fiduciary shall be as follows:

(1) Initial transferee.

In the case of the liability of an initial transferee, within 1 year after the expiration of the period of limitation for assessment against the transferor;

(2) Transferee of transferee.

In the case of the liability of a transferee of a transferee, within 1 year after the expiration of the period of limitation for assessment against the preceding transferee, but not more than 3 years after the expiration of the period of limitation for assessment against the initial transferor;

except that if, before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the initial transferor or the last preceding transferee, respectively, then the period of limitation for assessment of the liability of the transferee shall expire 1 year after the return of execution in the court proceeding.

(3) Fiduciary.

In the case of the liability of a fiduciary, not later than 1 year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later.

(d) Extension by agreement.

(1) Extension of time for assessment.

If before the expiration of the time prescribed in subsection (c) for the assessment of the liability, the Secretary and the transferee or fiduciary have both consented in writing to its assessment after such time, the liability may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. For the purpose of determining the period of limitation on credit or refund to the transferee or fiduciary of overpayments of tax made by such transferee or fiduciary or overpayments of tax made by the transferor of which the transferee or fiduciary is legally entitled to credit or refund, such agreement and any extension thereof shall be deemed an agreement and extension thereof referred to in section 6511(c).

(2) Extension of time for credit or refund.

If the agreement is executed after the expiration of the period of limitation for assessment against the taxpayer with reference to whom the liability of such transferee or fiduciary arises, then in applying the limitations under section 6511(c) on the amount of the credit or refund, the periods specified in section 6511(b)(2) shall be increased by the period from the date of such expiration to the date of the agreement.

(e) Period for assessment against transferor.

For purposes of this section, if any person is deceased, or is a corporation which has terminated its existence, the period of limitation for assessment against such person shall be the period that would be in effect had death or termination of existence not occurred.

(f) Suspension of running of period of limitations.

The running of the period of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing to the transferee or fiduciary of the notice provided for in section 6212 (relating to income, estate, and gift taxes), be suspended for the period during which the Secretary is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(g) Address for notice of liability.

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, any notice of liability enforceable under this section required to be mailed to such person, shall, if mailed to the person subject to the liability at his last known address, be sufficient for purposes of this title, even if such person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(h) Definition of transferee.

As used in this section, the term "transferee" includes donee, heir, legatee, devisee, and distributee, and with respect to estate taxes, also includes any person who, under section 6324(a)(2), is personally liable for any part of such tax.

(i) Extension of time.

For extensions of time by reason of armed service in a combat zone, see section 7508.