FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMA L. SLONE, Transferee, *Petitioner-Appellee*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	No. 16-73349 Tax Ct. No. 6629-10
SLONE FAMILY GST TRUST, UA Dated, August 6, 1998, Transferee, D. Jack Roberts, Trustee, *Petitioner-Appellee*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	No. 16-73351 Tax Ct. No. 6630-10
JAMES C. SLONE, Transferee, *Petitioner-Appellee*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	No. 16-73354 Tax Ct. No. 6631-10

SLONE REVOCABLE TRUST, UA Dated September 20, 1994, Transferee, James C. Slone and Norma L. Slone, Trustees, *Petitioner-Appellee*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	No. 16-73356 Tax Ct. No. 6632-10 OPINION

Appeal from a Decision of the
United States Tax Court

Argued and Submitted February 13, 2018
San Francisco, California

Filed July 24, 2018

Before: Mary M. Schroeder and Paul J. Watford, Circuit Judges, and William K. Sessions III,* District Judge.

Opinion by Judge Schroeder

COUNSEL

Arthur T. Catterall (argued), Francesca Ugolini, and Gilbert S. Rothenberg, Attorneys; David A. Hubbert, Acting Assistant Attorney General; Tax Division, United States Department of Justice, Washington, D.C.; for Respondent-Appellant.

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* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

Stephen E. Silver (argued) and Jason M. Silver, Silver Law PLC, Scottsdale, Arizona, for Petitioners-Appellees.

OPINION

SCHROEDER, Circuit Judge.

These consolidated appeals by the Commissioner of Internal Revenue from the Tax Court involve the Commissioner's efforts to hold Petitioners, the former shareholders of a close corporation, Slone Broadcasting Co. ("Slone Broadcasting"), responsible for taxes owed on the proceeds of its 2001 sale of assets to another broadcasting company, Citadel Broadcasting Co. ("Citadel"), for $45 million. This generated an estimated tax liability of $15.3 million. This is the second time the Commissioner has appealed to this Court. The background is described in more detail in our first opinion, *Slone v. C.I.R.*, 810 F.3d 599 (9th Cir. 2015). We only summarize here.

The Petitioners followed up the asset sale to Citadel by selling Slone Broadcasting's stock to another company, Berlinetta, Inc. ("Berlinetta"), an affiliate of Fortrend International, LLC ("Fortrend"). *See id.* at 602. Berlinetta assumed Slone Broadcasting's income tax liability. *Id.* Berlinetta, using borrowed funds, paid the Petitioners an amount representing the net value of the company after the asset sale plus a premium representing almost two-thirds of the amount of Slone Broadcasting's tax liability. The Petitioners thus

received two-thirds of the amount Slone Broadcasting should have paid in taxes after the asset sale.

Berlinetta and Slone Broadcasting then merged into a new company called Arizona Media Holdings, Inc. ("Arizona Media"), *id.* at 603, purportedly engaged in the business of debt collection. After the newly formed entity repaid the loan Berlinetta had used to purchase Petitioners' stock, however, the new company had no assets with which to pay the taxes due from the original asset sale. So the Commissioner went after the Petitioners as the ultimate transferees of the proceeds of the original sale of assets. The Commissioner seeks to establish that the Petitioners are liable for the Slone Broadcasting tax liability that Berlinetta assumed but never paid.

In the first appeal we considered the Tax Court's original ruling in favor of the Petitioners. We remanded to the Tax Court because it had not applied the correct test to determine whether the Petitioners were "transferees" under 26 U.S.C. § 6901. *See Slone*, 810 F.3d at 606–08. Under that section, the Commissioner can, under certain circumstances, assess tax liability against a taxpayer who is "'the transferee of assets of a taxpayer who owes income tax,'" and such liability is assessed as if the transferee were the original taxpayer. *Id.* at 604 (quoting *Salus Mundi Found. v. Comm'r*, 776 F.3d 1010, 1017 (9th Cir. 2014)). We held that the Petitioners would be subject to transferee liability if two conditions were satisfied: first, the relevant objective and subjective factors must show that under federal law the transaction with Berlinetta

lacked independent economic substance apart from tax avoidance; and second, we explained Petitioners must be liable for the tax obligation under applicable state law. *See id.* at 604–08. The Tax Court erred in its first decision in failing to look behind the form of this transaction to determine its economic substance under federal law. In the first appeal, we emphasized that both federal and state law issues must be satisfied to create liability. *See id.* at 608.

On remand to the Tax Court, the Commissioner argued that the Petitioners received, in substance, a liquidating distribution from Slone Broadcasting, and that the form of the stock sale to Berlinetta should be disregarded. Petitioners emphasized that the proceeds they received came from Berlinetta, not Slone Broadcasting. The Tax Court chose to address only state law issues. It correctly looked to the Uniform Fraudulent Transfer Act ("UFTA") that Arizona has adopted, but the Tax Court concluded it could disregard the form of the stock sale to Berlinetta and look to the entire transactional scheme only if Petitioners knew that the scheme was intended to avoid taxes. The Tax Court concluded Petitioners had no such knowledge and ruled once again for the Petitioners.

On appeal the Commissioner argues that the Tax Court misinterpreted the Arizona statute to require actual or constructive knowledge, but that even if the statute requires such a showing, the Commissioner satisfied its burden. We do not reach the issue of statutory interpretation because the record contains ample evidence that Petitioners were at the very least on

constructive notice that the entire scheme had no purpose other than tax avoidance.

This record, as described in our earlier opinion and in the Tax Court's opinion below, shows that the purpose of Petitioners' transaction with Berlinetta was tax avoidance, and that reasonable actors in Petitioners' position would have been on notice that Berlinetta never intended to pay Slone Broadcasting's tax obligation. It is not disputed that Slone Broadcasting, following its asset sale to Citadel, was not engaged in any business activities. It held only the cash proceeds of the sale and receivables, plus the accompanying $15 million tax liability. When Petitioners sold the stock to Berlinetta, along with that tax liability, Petitioners received, in substance, an ostensibly tax-free liquidating distribution from Slone Broadcasting. There was no legitimate economic purpose other than to avoid paying the taxes that would normally accompany a liquidating asset sale and distribution to shareholders. *See Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 175 (2d Cir. 2013).

The financing transactions further demonstrate that the deal was only about tax avoidance. Berlinetta borrowed the funds to make the purchase. After the merger with Slone Broadcasting into Arizona Media, that entity, had it been intended to be a legitimate business enterprise, could have repaid the loan over time and retained sufficient capital to sustain its purported debt collection enterprise and cover the tax obligation. Instead, the financing was structured so that, after the merger, Slone Broadcasting's significant cash

holdings went immediately out the door to repay the loan Berlinetta used to finance its purchase of the Slone Broadcasting stock and tax liability. In the first appeal, Judge Noonan observed that this case bears a striking resemblance to *Owens v. Commissioner*, 568 F.2d 1233 (6th Cir. 1977), in which a similar cash-for-cash purchase was held to be a liquidating distribution to the shareholder. *See Slone*, 810 F.3d at 608–09 (Noonan, J., concurring in part and dissenting in part). The analogy is apt.

While the majority of the panel in the first appeal declined to reach the issue of economic substance under federal law, it is appropriate to do so now. The Petitioners' sale to Berlinetta was a cash-for-cash exchange lacking independent economic substance beyond tax avoidance. *See Feldman v. C.I.R.*, 779 F.3d 448, 455-57 (7th Cir. 2015). Indeed Petitioners' own advisors expressed surprise over this transaction; one of Petitioners' lawyers testified that in his nearly twenty years of private practice he "had never seen a transaction like this."

We therefore turn to whether, under Arizona law, the Petitioners are liable to the government for Slone Broadcasting/Arizona Media's tax liability. *See Slone*, 810 F.3d at 604–05. As the Tax Court recognized, this question must be resolved under Arizona's Uniform Fraudulent Transfer Act. The Commissioner argues in this appeal that Petitioners are liable under that statute's constructive fraud provisions. *See* Ariz. Rev. Stat. §§ 44-1004(A)(2), 44-1005. The Arizona UFTA's constructive fraud provisions protect a creditor in the

event a debtor engages in a transfer of assets that leaves the debtor insolvent, i.e., unable to pay its outstanding obligations to the creditor. *See Hullett v. Cousin*, 63 P.3d 1029, 1032–33 (Ariz. 2003). Specifically, the UFTA provides that a transaction is constructively fraudulent as to a creditor (here, the IRS), if the debtor (here, Slone Broadcasting), did not "receiv[e] a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:

> (a) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (b) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

Ariz. Rev. Stat. § 44-1004(A)(2); *see id.* § 44-1005 (debtor's transfer fraudulent as to creditor when "the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation").

Our review of the record confirms that Petitioners' sale of Slone Broadcasting stock to Berlinetta, and Berlinetta's assumption of Slone Broadcasting's tax liability, was, in substance, a liquidating distribution to Petitioners, which left neither Slone Broadcasting nor

Berlinetta able to satisfy Slone Broadcasting's $15.3 million tax liability. Such a transfer, in which the debtor, Slone Broadcasting, received no reasonably equivalent value in return for its transfer to its shareholders and was left unable to satisfy its tax obligation, falls squarely within the constructive fraud provisions of the Arizona UFTA.

The Tax Court held that Petitioners had no actual or constructive knowledge of Berlinetta's tax avoidance scheme, and thus concluded it had to consider merely the rigid form of the deal. According to the Tax Court, because the Petitioners received their money from Berlinetta, and not formally from Slone Broadcasting/Arizona Media, there was no transfer from the "debtor" for purposes of sections 44-1004(A)(2) and 44-1005 of the UFTA.

In this appeal, the Commissioner contends that we should look to the substance of the transactional scheme to see that Berlinetta was merely the entity through which Slone Broadcasting passed its liquidating distribution to Petitioners. We agree, because the Tax Court, without adequate explanation, viewed itself bound by the form of the transactions rather than looking to their substance. Its concern was apparently that the Commissioner had not established the requisite knowledge on the part of the participants in the scheme to render Petitioners accountable. This, however, is belied by the record.

Reasonable actors in Petitioners' position would have been on notice that Berlinetta intended to avoid

paying Slone Broadcasting's tax obligation. Berlinetta communicated its intention to eliminate that tax obligation, and Slone's leaders and advisors, despite their suspicions surrounding the transaction, asked no pertinent questions. In Berlinetta's earliest solicitations to Slone Broadcasting, Berlinetta marketed its ability to pay the shareholders a premium on account of its ability to eliminate the company's tax liabilities. Berlinetta's affiliate company, Fortrend, wrote in a letter to Jack Roberts, Petitioners' longtime accountant, that Fortrend could pay a premium purchase price because of its ability to "resolve liabilities at the corporate level." This proposal raised justified suspicions in Slone Broadcasting's leadership. Mr. Slone, the company's president, testified that upon learning that an entity wanted to purchase Sloan Broadcasting, after it had already been effectively sold to Citadel, he asked Jack Roberts, "can that be done?" Unsure, Roberts replied, "well, I'm going to find out."

That Berlinetta provided little information regarding how it would eliminate Slone Broadcasting's tax liability, coupled with the structuring of the transactions, provided indications that would have been hard to miss. Slone Broadcasting's advisors understood that the transaction made sense from Berlinetta's perspective only if Slone Broadcasting's tax liability were eliminated. This deal was, after all, an uneven cash-for-cash exchange in which Berlinetta paid Petitioners most of what Slone Broadcasting should have paid in taxes. Yet Petitioners' retained counsel testified that when he and Jack Roberts asked

for details, Berlinetta told them "it was proprietary, it was a secret, and it was theirs, and we weren't going to be a party to it, and I said fine." And in a lengthy memo retained counsel prepared in November of 2001 analyzing the subject of potential transferee liability, counsel wrote that Berlinetta would distribute almost all of Slone Broadcasting's cash to repay the loan used to finance the deal. The memo never analyzed how Berlinetta could legally offset Slone Broadcasting's taxable gain from the asset sale. The memo merely concluded that Petitioners would not be liable as transferees of the proceeds of Slone Broascasting's asset sale if the Commissioner successfully challenged the entity's attempt to offset the tax liability.

The Tax Court misinterpreted Petitioners' suspicions and Berlinetta's reassurances to mean Petitioners lacked actual or constructive knowledge of the tax avoidance purpose of the scheme. This record establishes that the Petitioners were, at the very least, on constructive notice of such a purpose. In reaching a contrary conclusion, the Tax Court confused actual and constructive notice, in effect allowing Petitioners to shield themselves through "the willful blindness the constructive knowledge test was designed to root out." *Diebold*, 736 F.3d at 189–90; *see Salus Mundi*, 776 F.3d at 1020. It is clear that Petitioners' stock sale to Berlinetta, in which Berlinetta assumed Slone Broadcasting's tax liability, and Berlinetta paid Petitioners an amount representing the net value of the company after the asset sale and most of the amount that should

have been paid in taxes on that asset sale, operated in substance as a liquidating distribution by Slone Broadcasting to Petitioners, but in a form that was designed to avoid tax liability. Slone Broadcasting's distribution to Petitioners was thus a constructively fraudulent transfer under the Arizona UFTA. Petitioners are liable to the government for Slone Broadcasting's federal tax obligation as "transferees" under 26 U.S.C. § 6901.

REVERSED and REMANDED for entry of judgment in favor of the Commissioner.

T.C. Memo. 2016-115

UNITED STATES TAX COURT

NORMA L. SLONE, TRANSFEREE, ET AL.,[1]
Petitioners *v.* COMMISSIONER OF
INTERNAL REVENUE, Respondent.*

Docket Nos. 6629-10, 6630-10, 6631-10, 6632-10. Filed June 13, 2016.

Stephen Edward Silver, Derek Kaczmarek, and *Jason M. Silver*, for petitioners.

John Wayne Duncan, for respondent.

SUPPLEMENTAL MEMORANDUM OPINION

HAINES, *Judge*: These cases are before us on remand from the U.S. Court of Appeals for the Ninth Circuit in accordance with its opinion in *Slone v. Commissioner*, 810 F.3d 599 (9th Cir. 2015), *vacating and remanding* T.C. Memo. 2012-57 (*Slone I*). At our request, the parties filed supplemental briefs in which they were to address the issues raised by the Court of Appeals. The parties have agreed that these cases may be decided on remand on the basis of the evidence submitted at the original trial. Unless otherwise indicated,

[1] Cases of the following petitioners are consolidated herewith: Slone Family GST Trust, UA Dated August 6, 1998, Transferee, D. Jack Roberts, Trustee, docket No. 6630-10; James C. Slone, Transferee, docket No. 6631-10; and Slone Revocable Trust, UA Dated September 20, 1994, Transferee, James C. Slone and Norma L. Slone, Trustees, docket No. 6632-10.

* This opinion supplements our previously filed opinion *Slone v. Commissioner*, T.C. Memo. 2012-57.

all section references are to the Internal Revenue Code in effect for the year at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Background

We incorporate herein by this reference the facts that we found in *Slone I*, set forth under the heading FINDINGS OF FACT in that opinion. These facts are based upon the stipulations of fact and this Court's credibility findings as to each witness appearing before it. We summarize pertinent facts and portions of our opinion in *Slone I* for the benefit of the reader.

Slone Broadcasting operated several radio stations in Tucson. In 2001 and 2002 Slone Broadcasting was a C corporation with a tax year ending June 30. Slone Broadcasting had two shareholders, the Slone Revocable Trust and the Slone Family GST Trust (Slone GST Trust). Both trusts were formed pursuant to the laws of Arizona. James C. Slone and Norma L. Slone were the trustees of the Slone Revocable Trust and the grantors of the Slone GST Trust, an irrevocable trust.

John Barkley was the sole trustee of the Slone GST Trust from its inception. He is a licensed fiduciary in the State of Arizona. He hires accountants, lawyers, stockbrokers, and other professionals to aid him in carrying out his duties which are defined, in these cases, by the documents that established the Slone GST Trust. He exercises his authority independently from Mr. and Mrs. Slone.

On July 2, 2001, Slone Broadcasting sold its assets to Citadel Broadcasting Co. (Citadel) for $45 million, which resulted in an estimated combined Federal and State income tax liability of approximately $15 million. Mr. Slone's accountant, D. Jack Roberts, a certified public accountant with over 30 years of experience, advised on the accounting aspects of the transaction, and Tom Chandler, Slone Broadcasting's attorney, advised on the legal aspects of the transaction. Neither of the advisers proposed tax strategies to reduce the Federal and State income taxes resulting from the sale.

After the closing of the asset sale, Slone Broadcasting did not conduct any business. There were no plans to liquidate the corporation at any time, nor were there any plans to make distributions to its shareholders. On October 15, 2001, Slone Broadcasting made its first estimated Federal income tax payment of $3,100,000 to the Internal Revenue Service (IRS) for its tax year ended (TYE) June 30, 2002.

Fortrend International, LLC (Fortrend), sent an unsolicited letter and brochure to Mr. Roberts on June 29, 2001. The letter described Fortrend as a "private investment/merchant-banking group" seeking opportunities to acquire corporations in situations where the "assets of the Target Corporation can be profitably sold and/or leased to one or more purchasers/lessees". The letter also stated that Fortrend was able to "structure transactions that help manage or resolve liabilities at the corporate level". Mr. Roberts did not review the letter and company brochure until after the closing of the asset sale.

On August 8, 2001, Fortrend sent Mr. Roberts a second letter expressing Fortrend's continued interest in purchasing Slone Broadcasting's stock. It described Fortrend's relationship with MidCoast Credit Corp. (MidCoast), a corporation engaged in the business of collecting delinquent credit card debt acquired from banks. After receiving the second letter, Mr. Roberts informed Mr. Slone, in general, about Fortrend and MidCoast and the proposal to buy Slone Broadcasting's stock. Mr. Slone gave Mr. Roberts permission to investigate further and to proceed if the transaction looked viable. On September 7, 2001, Fortrend sent a third letter to Mr. Roberts, attaching the Fortrend/MidCoast business plan together with financial projections.

Mr. Roberts hired Steven Phillips, a tax attorney, as counsel to advise Mr. and Mrs. Slone and the Slone Revocable Trust on any Fortrend proposals. Mr. Phillips was not involved in, and did not provide any legal advice with respect to, the asset sale. On September 10, 2001, Mr. Phillips met with Mr. Slone to discuss the proposed transaction. This meeting was Mr. Slone's only contact with Mr. Phillips. Mr. Roberts represented Mr. Slone in all other communications with Mr. Phillips.

Mr. Roberts provided the Fortrend/MidCoast business plan to Mr. Phillips for review. Mr. Phillips contacted a broker in the asset recovery business to inquire about MidCoast's reputation. The broker informed Mr. Phillips that MidCoast played an active role in the asset recovery industry and had a reputation as an aggressive but legitimate collector. Mr.

Phillips reviewed the projections in the Fortrend/MidCoast business plan and concluded that they were reasonable. The reputations of Fortrend and MidCoast together with those of their attorneys and accountant advisers were good. There was no reason for Mr. Roberts or Mr. Phillips to suspect any impropriety.

Mr. Roberts and Mr. Phillips knew that Fortrend had a strategy to reduce the income tax due as a result of the asset sale. When they asked Fortrend what actions would be taken to achieve the tax savings, they were told that Fortrend's methods could not be disclosed because they were "proprietary". However, Fortrend represented that Berlinetta, Inc. (Berlinetta), an entity created by Fortrend that would acquire the shares, had not engaged in any transaction that would be deemed a "listed transaction" pursuant to Notice 2001-51, 2001-2 C.B. 190. Mr. Phillips negotiated an increase in the purchase price for the stock based upon what he described as a "premium" payment resulting from the tax savings that Berlinetta anticipated. When negotiations concluded, the parties agreed to a purchase price of $35,753,000 plus Berlinetta's assumption of Slone Broadcasting's Federal and State income taxes owed as of the closing date.

As trustee of the Slone GST Trust, Mr. Barkley hired Greg Gadarian, another tax attorney independent from Mr. Phillips, to advise the Slone GST Trust with respect to any Fortrend proposals. On November 21, 2001, Mr. Phillips wrote a memorandum describing Fortrend's plan to offset the gains from the asset sale by contributing high basis/low value assets to

Berlinetta in a section 351 transaction and selling those assets at a loss before the end of 2001. The memorandum also provided a legal analysis of the transferee liability considerations facing Slone Broadcasting's shareholders and concluded that they would not be exposed to such liability. Mr. Gadarian reviewed Mr. Phillips' memorandum and performed his own research. Mr. Gadarian agreed with Mr. Phillips' conclusions. Mr. Gadarian had no reason to think that the stock sale transaction was other than a legitimate sale. He therefore orally advised Mr. Barkley that there were no material legal obstacles to the proposed transaction. Soon after, Mr. Barkley approved the transaction on behalf of the Slone GST Trust. Both Mr. Phillips and Mr. Gadarian were aware of Notice 2001-16, 2001-1 C.B. 730, and both concluded that it did not apply.

On December 3, 2001, Mr. Phillips informed Mr. Roberts that there were no legal obstacles to proceeding. Mr. Roberts advised Mr. Slone that both Mr. Phillips and Mr. Gadarian had analyzed the legal implications of the transaction and concluded that it could proceed.

On December 10, 2001, Slone Broadcasting entered into the stock sale agreement with Berlinetta. Slone Broadcasting had no involvement in the financing. The stock sale agreement restricted the use of funds held in Slone Broadcasting's bank account until 10 days after the closing date.

At the stock sale closing the Slone Revocable Trust and the Slone GST Trust received $30,819,544 and

$2,550,456 in cash, respectively. Mr. Slone and his children resigned as the officers and directors of Slone Broadcasting. Slone Broadcasting did not make any distributions to its shareholders between the closing date of the asset sale and the closing date of the stock sale. After the stock sale was closed petitioners had no knowledge or say in the operation of Slone Broadcasting.

Two days after the closing of the stock sale, on December 12, 2001, Slone Broadcasting merged with Berlinetta, with Slone Broadcasting as the surviving corporation. Because the right to use the name "Slone Broadcasting" was not part of the sale, on January 17, 2002, Slone Broadcasting changed its name to Arizona Media.

The IRS began its examination of Arizona Media's TYE June 30, 2002, in March 2005. On April 14, 2008, Arizona Media submitted Form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, to the IRS, accepting a deficiency for its TYE June 30, 2002. Arizona Media failed to pay the assessed tax, penalty, and interest. No moneys were ever collected from Arizona Media. On August 28, 2009, Arizona Media was administratively dissolved for failure to file its annual report with the State of Arizona.

On December 22, 2009, respondent issued transferee liability notices to the Slone Revocable Trust and the Slone GST Trust, determining that the trusts were liable for $16,193,881 and $2,550,832, respectively,

plus interest, as transferees of assets, for the unpaid liability of Arizona Media for its TYE June 30, 2002. Additionally, respondent issued separate transferee liability notices to Mr. and Mrs. Slone individually, determining each liable under a transferee liability theory for $16,193,881, plus interest, for the unpaid liability of Arizona Media. Petitioners timely filed their petitions.

In *Slone I* we determined that the stock sale was a legitimate transaction and that the form of the transaction must be respected such that petitioners were not transferees under section 6901 for Federal tax purposes. Therefore, we determined that petitioners were not liable for the income tax liability accepted by Arizona Media on April 14, 2008.

Discussion

The Court of Appeals remanded these cases to us in order for us to make necessary findings to apply the test set forth in *Commissioner v. Stern*, 357 U.S. 39 (1958). *Stern* requires the satisfaction of a two-pronged test in order for a tax liability to be imposed on a transferee pursuant to section 6901. *Id.* at 44-45. The first prong is satisfied if the party is a "transferee" under section 6901 and Federal tax law. The second prong is satisfied if the party is "substantively liable for the transferor's unpaid taxes under state law". *Salus Mundi Found. v. Commissioner*, 776 F.3d 1010, 1018 (9th Cir. 2014), *rev'g and remanding* T.C. Memo. 2012-61. Both prongs must be satisfied in order for liability

to be imposed on a transferee. *See Commissioner v. Stern*, 357 U.S. at 44-45. Respondent has the burden of proving that petitioners are liable as transferees, but he does not have the burden of proving that the taxpayer is liable for the tax. *See* sec. 6902(a); Rule 142(d).

On remand, the Court of Appeals instructed this Court to apply the tests set out in *Stern*, stating:

> Under the first prong of this test, the tax court should apply the relevant subjective and objective factors to determine whether the Commissioner erred in disregarding the form of the transaction in order to impose tax liability on the shareholders as "transferees" under § 6901. Under the second prong of the *Stern* test, the tax court should analyze whether the shareholders are liable under state law for Sloan [sic] Broadcasting/Arizona Media's unpaid tax liability. *See Salus Mundi*, 776 F.3d at 1018, 1020. The tax court may begin its analysis with either prong. The Commissioner may hold the shareholders liable as "transferees" under § 6901 only if both prongs of the *Stern* test are satisfied. *See id.*

Slone v. Commissioner, 810 F.3d at 608 (fn. ref. omitted). The prongs "are separate and independent inquiries." *Id.* at 605 (quoting *Salus Mundi Found. v. Commissioner*, 776 F.3d at 1012).

As instructed by the Court of Appeals, we may begin our analysis with either prong. Therefore, we will address the second prong to determine whether petitioners are "substantively liable for the transferor's

unpaid taxes under state law". *See Salus Mundi Found. v. Commissioner*, 776 F.3d at 1018.

I. State Law Prong

We must apply Arizona law because that is the State where the transfer occurred. *Estate of Miller v. Commissioner*, 42 T.C. 593, 598 (1964). Arizona enacted the Uniform Fraudulent Transfer Act (UFTA) in 1990, and it outlines when a transfer is fraudulent for State law purposes. *Hullet v. Cousin*, 63 P.3d 1029, 1032 (Ariz. 2003). The UFTA is codified at Ariz. Rev. Stat. Ann. secs. 44-1001 to 1010 (2013), and is "based upon the uniform act promulgated by the National Conference of Commissioners on Uniform State Laws in 1984. * * * The UFTA replaced Arizona's Uniform Fraudulent Conveyance Act ('UFCA') * * *. Like the UFCA, the UFTA's purpose is to protect creditors." *Hullet*, 63 P.3d at 1032.

A. The Form of the Stock Sale

Respondent argues that the form of the stock sale should be disregarded and treated as a liquidating distribution for purposes of applying the UFTA. Petitioners, however, argue that the form of the stock sale should be respected. Where a decision involves State law, we "must apply State law in the manner that the highest court of the State has indicated that it would apply the law." *Swords Trust v. Commissioner*, 142 T.C. 317, 342 (2014). If the State's highest court has not weighed in on the matter, we "must predict how the

highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) (quoting *Lewis v. Tel. Emps. Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996)).

Arizona has not provided a specific test to determine when the doctrine of substance over form will be used to recast a transaction for purposes of the UFTA. However, unless specifically displaced by its provisions, the principles of law and equity supplement the UFTA. Ariz. Rev. Stat. Ann. sec. 44-1010. Accordingly, we must look to other cases that have applied the substance over form doctrine in similar situations. *See Alterman Trust v. Commissioner*, T.C. Memo. 2015-231. In order for the stock sale to be recast as a liquidating distribution, respondent must prove that petitioners had actual or constructive knowledge of the entire scheme. *See id.* at *48 ("[I]n order to 'render the initial transferee's exchange with a debtor fraudulent, that transferee must have had either actual or constructive knowledge of the entire scheme.'" (quoting *Starnes v. Commissioner*, T.C. Memo. 2011-63, slip op. at 24)). We find that respondent did not sustain his burden of proof as to either actual or constructive knowledge.

1. Actual Knowledge

Mrs. Slone was not involved in the business and was simply a signatory to the sale documents. We hold that she did not have actual knowledge.

Mr. Roberts advised Mr. Slone of Fortrend and MidCoast's proposal to purchase Slone Broadcasting's stock, and Mr. Slone authorized Mr. Roberts to investigate the transaction. Mr. Roberts hired Mr. Phillips to advise Mr. Slone on proposals from Fortrend, and Mr. Slone met with Mr. Phillips to discuss the stock sale on one occasion. Mr. Slone relied on his advisers' expertise and had no involvement in vetting the legitimacy of the transaction or negotiating its terms. We hold that Mr. Slone did not have actual knowledge of the scheme that Fortrend/Berlinetta planned to use to avoid paying Slone Broadcasting's tax liability.

Mr. Roberts and Mr. Phillips knew that Fortrend planned to take steps to reduce the amount of income tax due as a result of the asset sale but were stonewalled when they asked about the strategy Berlinetta planned to use. They were told that these methods were "proprietary" and could not be revealed. We hold that, like Mr. and Mrs. Slone, that Mr. Roberts and Mr. Phillips did not have actual knowledge of the scheme that Fortrend/Berlinetta planned to employ in order to avoid payment of Slone Broadcasting's income tax liability.

Mr. Barkley and Mr. Gadarian similarly lacked actual knowledge of Fortrend/Berlinetta's scheme. Mr. Gadarian reviewed a memorandum prepared by Mr.

Phillips, performed his own research, and advised Mr. Barkley that there were no material legal issues in proceeding with the stock sale. We hold that Mr. Gadarian and Mr. Barkley had no actual knowledge of Fortrend/Berlinetta's tax avoidance scheme.

2. Constructive Knowledge

Constructive knowledge exists when, on the basis of the circumstances, the transferee should have known about the entire scheme. *Diebold Found., Inc. v. Commissioner*, 736 F.3d 172 (2d Cir. 2013), *vacating and remanding Salus Mundi Found. v. Commissioner*, T.C. Memo. 2012-61; *HBE Leasing v. Frank*, 48 F.3d 623, 636 (2d Cir. 1995). It also exists in situations where transferees "were aware of circumstances that should have led them to inquire further into the circumstances of the transaction, but * * * [they] failed to make such inquiry." *Diebold Found., Inc. v. Commissioner*, 736 F.3d at 187 (quoting *HBE Leasing*, 48 F.3d at 636).

As noted above, Mrs. Slone had no involvement in the stock sale other than signing documents. Mr. Slone relied on Mr. Roberts and Mr. Phillips to advise him regarding the transaction's propriety. Mr. Slone credibly testified at trial that because he lacked the knowledge to determine whether it would be "all right" to sell the Slone Broadcasting stock, he hired individuals with the requisite expertise to advise him. He had no ownership interest and had resigned all positions in the corporation at the time the stock sale closed. We

hold that Mr. and Mrs. Slone did not have constructive knowledge of Fortrend's tax avoidance scheme.

Mr. Roberts and Mr. Phillips were aware that Fortrend had a strategy to reduce the income tax that would be due as a result of the asset sale. They made a reasonable inquiry as to the actions Berlinetta would take to achieve the tax savings and were told that Fortrend's methods were "proprietary" and could not be disclosed. But Fortrend did represent that Berlinetta had not engaged in any transactions that would be deemed a listed transaction pursuant to Notice 2001-51, *supra*. Petitioners' advisers similarly lacked constructive knowledge of Fortrend/Berlinetta's scheme.

Mr. Gadarian, another independent tax attorney, was hired to advise the Slone GST Trust with respect to any Fortrend proposals. Mr. Gadarian concluded that there was no reason to think that Fortrend was involved in any impropriety.

Petitioners' advisers' due diligence confirmed that MidCoast was a legitimate player in the debt recovery business known for its "hardball" collection tactics. MidCoast and Fortrend were represented by reputable law and accounting firms.

Mr. Phillips' memorandum to Mr. Gadarian dated November 21, 2001, explains Fortrend's plan to offset the gains from the asset sale by contributing high basis/low value assets to Berlinetta in a section 351 transaction and selling those assets at a loss before the end of 2001. This information was insufficient to give petitioners' advisers knowledge of Fortrend's scheme.

As we have acknowledged in other cases: "[T]here are legitimate tax planning strategies involving built-in gains and losses and * * * it was not unreasonable, in the absence of contradictory information, for the representatives to believe that the buyer had a legitimate tax planning method." *Alterman Trust v. Commissioner*, at *58 (quoting *Swords Trust v. Commissioner*, 142 T.C. at 349).

Petitioners and their advisers had no reason to believe that Fortrend's strategies were other than legitimate tax planning methods. We hold that the form of the stock sale must be respected because petitioners and their advisers did not have actual or constructive knowledge of Fortrend's tax strategies before or after the closing of the stock sale transaction.

B. Application of the UFTA to the Stock Sale

Now that we have determined that the form of the stock sale must be respected, we will apply the UFTA to the transaction to determine whether petitioners may be held substantively liable for Slone Broadcasting's unpaid taxes under Arizona law. Respondent asserts that petitioners are liable under the constructive fraud provisions found in Ariz. Rev. Stat. Ann. secs. 44-1004(A)(2) and 44-1005 and for actual fraud under Ariz. Rev. Stat. Ann. sec. 44-1004(A)(1). We will address each in turn.

For purposes of the UFTA, a "creditor" is defined as a person who has a right to payment, and a "debtor" is a person who is liable for making the payment. *Id.*

sec. 44-1001(2), (3), (5). A transfer is broadly defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease and creation of a lien or other encumbrance." *Id.* sec. 44-1001(9).

1. Ariz. Rev. Stat. Ann. Sec. 44-1004(A)(2)

Ariz. Rev. Stat. Ann. sec. 44-1004(A)(2) provides that a transfer made by a debtor is fraudulent as to a creditor

> if the debtor made the transfer * * * without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: (a) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. (b) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

This is true regardless of whether the creditor's claim arose before or after the transfer was made. *Id.*

In these cases the IRS was the creditor and Slone Broadcasting was the debtor. When petitioners sold their Slone Broadcasting shares, the consideration they received was from Berlinetta, not from Slone Broadcasting. In fact, no consideration was received from Slone Broadcasting because the form of the stock

sale transaction must be respected. Because no transfer was made by Slone Broadcasting – the debtor – as a result of the stock sale, we hold there was no constructive fraud pursuant to Ariz. Rev. Stat. Ann. sec. 44-1004(A)(2). *See Alterman Trust v. Commissioner*, at *65 ("The IRS is a creditor of AC, but the AC shareholders did not receive transfers from AC when they sold their stock to the MidCoast acquisition vehicles.").

2. Ariz. Rev. Stat. Ann. Sec. 44-1005

The UFTA includes another constructive fraud provision. A transfer by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving reasonably equivalent value in exchange and was insolvent at that time or became insolvent as a result of the transfer. Ariz. Rev. Stat. Ann. sec. 44-1005.

As noted above, the stock sale resulted in Berlinetta's making transfers to petitioners, not Slone Broadcasting's. Because there were no transfers made by Slone Broadcasting, the debtor, we hold that Ariz. Rev. Stat. Ann. sec. 44-1005 cannot be applied to the stock sale. *See Alterman Trust v. Commissioner*, at *67 ("AC did not make any transfers to petitioners in the stock sale to the MidCoast acquisition vehicles.").

3. Ariz. Rev. Stat. Ann. Sec. 44-1004(A)(1)

The UFTA also has an actual fraud provision. A transfer by a debtor is fraudulent as to a creditor,

regardless of whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer "[w]ith actual intent to hinder, delay or defraud any creditor of the debtor." Ariz. Rev. Stat. Ann. sec. 44-1004(A)(1). Ariz. Rev. Stat. Ann. sec. 44-1004(B) sets forth the following 11 factors that may be considered when determining whether actual intent exists:

> 1. The transfer or obligation was to an insider.
>
> 2. The debtor retained possession or control of the property transferred after the transfer.
>
> 3. The transfer or obligation was disclosed or concealed.
>
> 4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> 5. The transfer was of substantially all of the debtor's assets.
>
> 6. The debtor absconded.
>
> 7. The debtor removed or concealed assets.
>
> 8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> 9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> 10. The transfer occurred shortly before or shortly after a substantial debt was incurred.

> 11. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

There is no dispute that 5 of the 11 factors are not present in these cases. We hold that the debtor, Slone Broadcasting: (1) did not retain possession or control of the transferred property after the stock sale; (2) did not conceal the stock sale; (3) had not been sued or threatened with suit before the stock sale; (4) did not abscond; and (5) did not transfer the essential assets of the business to a lienor who transferred the assets to one of its insiders. Respondent argues, however, factors 1, 5, 7, 8, 9, and 10 do apply to these cases. We will address each in turn.

a. Factor 1: Transfer to an Insider

Respondent argues that Slone Broadcasting's assets were transferred to insiders. This argument fails because we have held that the form of the stock sale must be respected. Petitioners sold their stock in Slone Broadcasting to Berlinetta in exchange for cash, and there was no transfer of Slone Broadcasting's assets to petitioners. This factor does not weigh in favor of finding actual fraud under the UFTA.

b. Factor 5: Transfer of Substantially All Assets

Respondent alleges that the cash petitioners received in exchange for their shares constituted a liquidating distribution of substantially all of Slone

Broadcasting's assets. We disagree because the form of the stock sale must be respected. Petitioners received cash from Berlinetta in exchange for their Slone Broadcasting shares. They did not receive a transfer of substantially all of Slone Broadcasting's assets. This factor does not weigh in favor of finding actual fraud under the UFTA.

c. Factor 7: Debtor Removed or Concealed Assets

Respondent asserts that petitioners removed Slone Broadcasting's assets because they received, in substance, a liquidating distribution in exchange for their stock in a de facto liquidation. Because we have held that the form of the stock sale must be respected, we disagree. The transfer at issue in these cases, the stock sale, did not result in a removal of Slone Broadcasting's assets. Petitioners are not responsible for Berlinetta's actions that occurred after the closing of the stock sale. This factor does not weigh in favor of finding actual fraud under the UFTA.

d. Factor 8: Value of Consideration Debtor Received Reasonably Equivalent to Value of Asset Transferred

Respondent alleges that Slone Broadcasting did not receive consideration in exchange for the transfer of its assets. Because we have held that the form of the stock sale must be respected, we disagree. Petitioners received cash from Berlinetta in exchange for their

Slone Broadcasting shares. Slone Broadcasting did not surrender any assets or receive any consideration in connection with the stock sale. This factor does not weigh in favor of finding actual fraud under the UFTA.

e. Factor 9: Debtor Insolvent or Became Insolvent Shortly After Transfer Was Made

For purposes of the UFTA, "[a] debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." Ariz. Rev. Stat. Ann. sec. 44-1002(A). Debtors that are not generally paying their debts as they come due are presumed to be insolvent. *Id.* sec. 44-1002(B).

Slone Broadcasting's assets exceeded its debts at the closing date of the stock sale. Slone Broadcasting paid $3.1 million as an estimated payment towards its Federal income tax liability before the closing of the stock sale. Respondent did not prove that the sum of Slone Broadcasting/Arizona Media's debts was greater than all of Slone Broadcasting/Arizona Media's assets at a fair valuation. Nor did he prove that Slone Broadcasting/Arizona Media was not paying its debts as they came due. Arizona Media's Federal income tax liability was in dispute until it became fixed on April 14, 2008, when it submitted a Form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, accepting a deficiency for its TYE June 30, 2002. Accordingly, respondent has not met his burden of proof to show that

at the time of the stock sale, or shortly thereafter, Slone Broadcasting/Arizona Media was insolvent. This factor does not weigh in favor of finding actual fraud under the UFTA.

f. Factor 10: Transfer Occurred Shortly Before or Shortly After Substantial Debt Was Incurred

Respondent argues that the stock sale occurred shortly after the sale of Slone Broadcasting's assets, which gave rise to substantial debt – its tax liabilities. The UFTA defines "debt" as a liability on a claim, and the term "claim" is broadly defined to mean a right to payment, even if contingent, unmatured and unsecured. *Id.* sec. 44-1001(2), (4). The sale of Slone Broadcasting's assets to Citadel on July 2, 2001, resulted in an estimated combined Federal and State income tax liability of approximately $15 million. Approximately five months later, at the time of the stock sale, Slone Broadcasting had a debt for the presumed tax due from the asset sale. This factor does not persuade us to hold that there was actual fraud under the UFTA.

Our evaluation of the factors set forth in the UFTA leads us to conclude that there was no actual fraud, and we so hold.

II. Conclusion

On the basis of the above analysis, we hold that the State law prong of the *Stern* test has not been satisfied. Satisfaction of both prongs of the *Stern* test is

necessary in order for respondent to prevail in these cases. *See Slone v. Commissioner*, 810 F.3d at 608 ("The Commissioner may hold the shareholders liable as 'transferees' under § 6901 only if both prongs of the *Stern* test are satisfied."). Because we have held that the State law prong of the *Stern* test has not been satisfied, it is not necessary for us to analyze the Federal law prong of the test.

In reaching our decision, we have considered all arguments, 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.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES C. SLONE; NORMA L. SLONE; SLONE REVOCABLE TRUST; UA DATED SEPTEMBER 20, 1994; TRANSFEREE, *Petitioners-Appellees*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	No. 12-72464 Tax Ct. No. 6632-10
NORMA L. SLONE, *Petitioner-Appellee*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	No. 12-72495 Tax Ct. No. 6629-10
SLONE FAMILY GST TRUST, *Petitioner-Appellee*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	No. 12-72496 Tax Ct. No. 6630-10

JAMES C. SLONE, *Petitioner-Appellee*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	No. 12-72497 Tax Ct. No. 6631-10 ORDER AND AMENDED OPINION

Appeal from a Decision of the
United States Tax Court

Argued and Submitted
November 21, 2014—San Francisco, California

Filed June 8, 2015
Amended August 28, 2015

Before: John T. Noonan and Sandra S. Ikuta, Circuit Judges and William H. Albritton, III,* Senior District Judge.

Order;
Opinion by Judge Ikuta:
Partial Concurrence and Partial Dissent
by Judge Noonan.

COUNSEL

Arthur T. Catterall (argued) and Francesca Ugolini, (argued), Assistant United States Attorneys; Kathryn Keneally, Assistant Attorney General; Tamara W. Ashford, Deputy Assistant Attorney General; Gilbert S.

* The Honorable William H. Albritton III, Senior District Judge for the U.S. District Court for the Middle District of Alabama, sitting by designation.

Rothenberg and Kenneth L. Greene, Attorneys, Tax Division, United States Department of Justice, Washington, D.C., for Respondent-Appellant.

Stephen E. Silver (argued), Jason M. Silver, and David R. Jojola, Silver Law PLC, Scottsdale, Arizona, for Petitioners-Appellees.

ORDER

The opinion filed June 8, 2015, and appearing at 788 F.3d 1049, is hereby amended as follows:

On page 1053, the second sentence of the penultimate paragraph and the final paragraph should be deleted and replaced with the following:

> The test for this second prong depends on the law of the state where the transfer occurred. *See, e.g.*, *id.* ("Under the [New York Uniform Fraudulent Conveyance Act], 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.' ") (alterations in original) (quoting *Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 184–85 (2d Cir. 2013)). The two Stern test prongs "are separate and independent inquiries." *Salus Mundi*, 776 F.3d at 1012.

With this amendment, the petition for rehearing, filed July 16, 2015, is **DENIED**. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

IKUTA, Circuit Judge.

This appeal involves two sales. First, Slone Broadcasting Co. sold essentially all of its assets to Citadel Broadcasting Co. for $45 million. The shareholders of Slone Broadcasting then sold all their shares to Berlinetta, Inc. for $33 million. The substance of the stock sale, according to the Commissioner of the Internal Revenue Service (IRS), is that the shareholders received a liquidating distribution from the corporation. The Commissioner contends that the form of this transaction should be disregarded for federal tax law purposes. The shareholders, in turn, claim that the transaction was a legitimate stock sale transaction and its form must be respected. The tax court agreed with the shareholders. On appeal, we conclude that the tax court applied an incorrect test in holding that it would respect the form of the stock sale.

I

Slone Broadcasting Co., a radio broadcasting business, had two shareholders: the Slone Revocable Trust, for which James C. Slone and his wife Norma L. Slone were trustees, and the Slone Family GST Trust, for which John Barkley was the sole trustee. On December 21, 2000, Slone Broadcasting entered into an asset purchase agreement with Citadel Broadcasting Co., in which Citadel agreed to pay $45 million for all assets of the radio stations owned and operated by Slone

Broadcasting. The transaction closed in July 2001. Because Slone Broadcasting's basis in these assets was $6.4 million, Slone Broadcasting realized a capital gain of approximately $38.6 million and incurred an estimated federal and state income tax liability of $15.3 million. The corporation did not make any distributions to the shareholders. In October 2001, Slone Broadcasting made its first federal income tax payment of $3.1 million to the IRS for the tax year ended June 30, 2002.

Before the transaction with Citadel closed, Fortrend International, LLC expressed an interest in a merger deal with Slone Broadcasting. Fortrend proposed purchasing all of Slone Broadcasting's shares for $29.8 million, and then restructuring the company to engage in the asset recovery business. Slone Broadcasting's shareholders investigated whether Fortrend and its offer were legitimate. A tax attorney hired by the shareholders confirmed that Fortrend's business plan projections were reasonable, and he consulted with an industry expert to confirm that Fortrend and its third-party service provider were reputable and were represented by well-regarded accounting and law firms. When the shareholders asked for information regarding the methods it would use to reduce the shareholders' tax liability, Fortrend would not respond, claiming its methods were proprietary. Nevertheless, Fortrend assured Slone Broadcasting that the transaction would not be a "listed transaction" pursuant to IRS Notice 2001-51, 2001-2 C.B. 190, which specifies tax avoidance transactions that must be disclosed or

registered. On December 10, 2001, the Slone Broadcasting shareholders agreed to sell all the shares of Slone Broadcasting to Berlinetta, Inc., a Fortrend affiliate, for $35.8 million. Berlinetta agreed to assume Slone Broadcasting's income tax liability. The shareholders, Slone Revocable Trust and the Slone Family GST Trust, received cash payments of $31 million and $2.6 million, respectively, from the sale.

After closing, Slone Broadcasting merged with Berlinetta. The new company changed its name to Arizona Media Holdings, Inc. On December 13, 2001, a shareholder of Arizona Media contributed Treasury bills with a basis of $38.1 million to the new company. Arizona Media then sold the bills for $108,731. Arizona Media filed its tax return for the tax year ended June 30, 2002, reporting a $37.9 million gain from the asset sale and an offsetting loss of $38 million from the Treasury bill sale. Arizona Media claimed it had no income tax liability, and requested a refund for the $3.1 million tax payment made by Slone Broadcasting. The IRS granted this refund.

The IRS began investigating Arizona Media in March 2005. The IRS assessed a tax deficiency for taxes due on Slone Broadcasting's December 2000 sale of assets to Citadel in the amount of $13.5 million in 2008, along with a penalty of $2.7 million and interest of $7.3 million.[1] Arizona Media failed to pay any of the assessed tax, penalty, or interest. In August 2009, the

[1] Arizona Media had agreed to extend the limitations period in which the IRS could assess tax liability through May 2008.

state of Arizona administratively dissolved Arizona Media for failure to file an annual report.

After failing to collect the tax deficiency from Arizona Media, the IRS sent notices of liability to the former shareholders of Slone Broadcasting. The notices claimed that the shareholders were liable for the taxes owed on Slone Broadcasting's sale of assets to Citadel because the shareholders were "transferees" of Slone Broadcasting for purposes of 26 U.S.C. § 6901. (Section 6901 authorizes the IRS to require a transferee of assets to pay the unpaid taxes owed by the transferor under certain circumstances.) The IRS took the position that it could disregard the form of the shareholders' sale of Slone Broadcasting stock to Berlinetta. Instead, according to the IRS, the substance of the transaction was that Slone Broadcasting dissolved upon selling its assets to Citadel, and then distributed those assets to its shareholders through the Fortrend transaction.

The shareholders filed petitions for review of this determination in tax court, arguing that the form of the stock sale transaction to Berlinetta should be respected, and therefore the shareholders were not "transferees" of Slone Broadcasting's assets under § 6901.

The tax court agreed, holding that "[w]e will respect the form of the transactions in this case." It first found that the asset sale between Slone Broadcasting and Citadel was genuinely independent from the stock sale between Slone Broadcasting and Berlinetta, and that there was no evidence that the Slone

Broadcasting shareholders conducted the asset sale as the first step in a tax scheme to offset the potential capital gains from the sale. Second, the court found that the Slone Broadcasting shareholders neither knew, nor should have known, that Fortrend and Berlinetta were involved in an illegitimate tax evasion scheme. The court noted that when the shareholders asked for more information about Fortrend's methods for offsetting gains from the asset sale, they were told that the methods were proprietary. The court concluded that the shareholders had no duty to conduct further investigation, and no responsibility for any tax strategies adopted by Berlinetta after the transaction closed.

Based on these findings and conclusions, the tax court held that neither the substance over form doctrine, nor any related doctrine, required the tax court to "recast the stock sale as a liquidating distribution."[2] The tax court concluded that the form of the stock sale between the shareholders and Berlinetta should be respected, and therefore rejected the IRS's theory that the shareholders were liable for taxes, interest, and penalties arising from Slone Broadcasting's sale of its assets. The Commissioner timely appealed.

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[2] The tax court held that the Commissioner had waived an alternative argument that the stock sale should be disregarded for tax purposes under the economic substance doctrine, but did not explain the difference between this doctrine and the "substance over form" doctrine which it considered. As explained below, any subtle differences between these doctrines is not relevant for our analysis here.

II

We have jurisdiction over this appeal under I.R.C. § 7482(a)(1). We review a tax court's factual determinations for clear error and its application of legal standards de novo. *See Sacks v. Comm'r*, 69 F.3d 982, 986 (9th Cir. 1995). Because a tax court must apply the correct legal standards when it characterizes a transaction for tax purposes, *see id.*, we reject the shareholders' argument that such a characterization raises only questions of fact.

A

The question before us is whether the Slone Broadcasting shareholders can be held liable for taxes on Slone Broadcasting's sale of assets to Citadel because the shareholders were "transferees" of the proceeds of that sale.

Under 26 U.S.C. § 6901, the Commissioner can assess tax liability against a taxpayer who is "the transferee of assets of a taxpayer who owes income tax." *Salus Mundi Found. v. Comm'r*, 776 F.3d 1010, 1017 (9th Cir. 2014). Tax liabilities on transferred assets shall, with certain exceptions, be "assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the cases of taxes with respect to which the liabilities were incurred." 26 U.S.C. § 6901.

While federal law provides the procedure for collecting tax liabilities from a transferee, state law

answers the question whether the alleged transferee is substantively liable for the tax. *Comm'r v. Stern*, 357 U.S. 39, 44–45 (1958). Therefore, in order to impose tax liability on a transferee, a court must engage in a two-pronged inquiry, *see Salus Mundi*, 776 F.3d at 1018 (citing *Stern*, 357 U.S. at 42, 44–45), which is sometimes called the *Stern* test. The first prong asks: "is the party a 'transferee' under § 6901 and federal tax law?" *Id.* Under federal law, a "transferee" is defined as including a "donee, heir, legatee, devisee, [or] distributee." 26 U.S.C. § 6901(h). Treasury regulations further define the term "transferee" to include "the shareholder of a dissolved corporation." 26 C.F.R. § 301.6901-1(b).

The second prong of the *Stern* test asks: "is the party substantively liable for the transferor's unpaid taxes under state law?" *Salus Mundi*, 776 F.3d at 1018. The test for this second prong depends on the law of the state where the transfer occurred. *See, e.g.*, *id.* ("Under the [New York Uniform Fraudulent Conveyance Act], 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.'") (alterations in original) (quoting *Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 184–85 (2d Cir. 2013)). The two Stern test prongs "are separate and independent inquiries." *Salus Mundi*, 776 F.3d at 1012.

B

The Commissioner argues that the tax court erred in analyzing the first prong of the *Stern* test: whether the shareholders are "transferees" as "shareholder[s] of a dissolved corporation." 26 C.F.R. § 301.6901-1(b). The parties do not dispute that if the form of the stock sale transaction between the shareholders and Berlinetta is respected, the shareholders did not receive a liquidating distribution from a dissolved corporation, and therefore were not transferees of Slone Broadcasting's assets (or liable for Slone Broadcasting's taxes). Therefore, the crucial question is whether the tax court erred in respecting the form of the shareholders' stock sale to Berlinetta for federal tax purposes under the first prong of the *Stern* test, leaving it unnecessary for the tax court to analyze the shareholders' substantive liability under state law under the second prong of the *Stern* test.

Although we have not previously considered how a court should analyze a transaction for purposes of transferee liability under § 6901, both the Supreme Court cases, and our own precedent, require us to look through the form of a transaction to consider its substance. The Supreme Court has long recognized "the importance of regarding matters of substance and disregarding forms," *United States v. Phellis*, 257 U.S. 156, 168 (1921), because "[t]he incidence of taxation depends upon the substance of a transaction," *Comm'r v. Court Holding Co.*, 324 U.S. 331, 334 (1945). In explaining the factors that should guide a court's analysis regarding when it is appropriate to disregard the form of

a transaction, the Supreme Court framed the inquiry as whether "there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached." *Frank Lyon Co. v. United States*, 435 U.S. 561, 583–84 (1978).

We have interpreted *Frank Lyon* as requiring courts to consider both subjective and objective factors in characterizing a transaction for tax purposes. *See Casebeer v. Comm'r*, 909 F.2d 1360, 1362–63 (9th Cir. 1990). We have used different terminology from time to time, but consistently apply the same approach. In *Casebeer*, we applied "a two-part test for determining whether a transaction is a sham: 1) has the taxpayer shown that it had a business purpose for engaging in the transaction other than tax avoidance? 2) has the taxpayer shown that the transaction had economic substance beyond the creation of tax benefits?" *Id.* at 1363 (citing *Bail Bonds by Marvin Nelson, Inc. v. Comm'r*, 820 F.2d 1543, 1549 (9th Cir. 1987)); *see also Sacks*, 69 F.3d at 987–88 (considering subjective and objective factors in analyzing whether a transaction was a sham). Similarly, in *Reddam v. Commissioner*, we applied the "economic substance doctrine," which likewise focused on two prongs: "the subjective aspect of whether the taxpayer intended to do anything other than acquire tax deductions, and the objective aspect of whether the transaction had any economic substance other than creation of tax benefits." 755 F.3d

1051, 1059 (9th Cir. 2014) (quoting *Sacks*, 69 F.3d at 987). Finally in *Stewart v. Commissioner*, we referred to the "substance-over-form doctrine" as part of a well-established body of common law that included consideration of a transaction's "business purpose" and "economic reality." 714 F.2d 977, 987–88 (9th Cir. 1983).

In determining whether to disregard the form of a transaction, we do not conduct a "rigid two-step analysis" applying the subjective and objective factors, but rather focus "holistically on whether the transaction had any practical economic effects other than the creation of income tax losses." *Reddam*, 755 F.3d at 1060 (internal quotation marks and emphasis omitted); *see also Sacks*, 69 F.3d at 987–92 (looking at a transaction as a whole to determine whether it was a sham). If a common sense review of the transaction leads to the conclusion that a particular transaction does not have a non-tax business purpose or "any economic substance other than creation of tax benefits," *Reddam*, 755 F.3d at 1059 (internal quotation mark omitted), the form of that transaction may be disregarded, and the Commissioner may rely on its underlying economic substance for tax purposes.

This approach to characterizing a transaction for tax purposes, considering both subjective and objective factors, is also used by other circuits, although they too describe in it varying ways. *See, e.g., Feldman v. Comm'r*, 779 F.3d 448, 454 (7th Cir. 2015) (noting that the "animating principle" of each of "several related, overlapping doctrines used in tax cases," including "the

'substance over form' doctrine, the 'business purpose' doctrine, [and] the 'economic substance' doctrine," is that "the law looks beyond the form of a transaction to discern its substance"). As *Feldman* noted, "[t]he distinctions between these doctrines are subtle, if they exist at all." *Id.* at 454 n.6; *see also* Bittker and Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 4.3.4A (3d ed. Supp. 2014) (noting that the substance over form doctrine, the business purpose doctrine, the economic substance doctrine, and the sham transaction doctrine have tended to coalesce in the case law).[3] Congress has codified a similar approach considering subjective and objective factors.[4]

We conclude that this approach is applicable for determining whether a taxpayer is a transferee for purposes of § 6901. Accordingly, when the Commissioner claims a taxpayer was "the shareholder of a dissolved corporation" for purposes of 26 C.F.R. § 301.6901-1(b), but the taxpayer did not receive a liquidating distribution if the form of the transaction is

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[3] *But see Altria Grp., Inc. v. United States*, 658 F.3d 276, 291 (2d Cir. 2011) (stating, without explanation, that "[t]he substance over form doctrine and the economic substance doctrine are independent bases to deny a claimed tax deduction").

[4] In 2010, Congress revised 26 U.S.C. § 7701 to clarify that a transaction has economic substance when: (1) the transaction meaningfully changes the taxpayer's economic position and (2) the taxpayer has a substantial purpose for entering into the transaction. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1409(a), 124 Stat. 1029 (2010). This provision applies only to transactions entered into after March 30, 2010, *id.* § 1409(e), and is therefore inapplicable to the Slone Broadcasting transaction.

respected, a court must consider the relevant subjective and objective factors to determine whether the formal transaction "had any practical economic effects other than the creation of income tax losses." *Reddam*, 755 F.3d at 1060 (internal quotation mark omitted).

C

We now apply these principles to the question whether the tax court erred in holding that the Commissioner could not impose the tax liability of Slone Broadcasting/Arizona Media on the Slone Broadcasting shareholders. According to the Commissioner, the tax court should have found that the "objective economic realities" establish that the stock sale between the shareholders and Berlinetta was in substance a liquidating transaction. Further, the Commissioner asserts that the tax court should have found that Slone Broadcasting was a "shell with nothing but cash and significant tax liabilities" when the shareholders sold the stock, because it had no ongoing business activities, no contractual obligations, and no debts aside from its tax liability. The Commissioner concludes that the stock sale was effectively a liquidation of the company, terminating its business operations and leaving the shareholders with cash.

Not surprisingly, the Slone Broadcasting shareholders disagree. They claim that after its asset sale to Citadel, Slone Broadcasting retained the human capital and resources to acquire another radio station, and therefore was not a "lifeless shell" at the time of its

stock sale to Berlinetta. The shareholders also argue that they had no improper tax avoidance purposes for entering into the sale. Further, the shareholders assert that the stock sale had economic substance because Fortrend/Berlinetta actively engaged in debt recovery after the sale.

We cannot resolve this dispute because the tax court failed to apply the correct legal standard for characterizing the stock sale transaction for the purposes of federal transferee liability. The court did not address either the subjective or objective factors we apply in characterizing a transaction for tax purposes, as it failed to make any finding on whether the shareholders had a business purpose for entering into the stock purchase transaction other than tax avoidance, or whether the stock purchase transaction had economic substance other than shielding the Slone Broadcasting shareholders from tax liability. Instead, the tax court focused its factual inquiry and analysis on factors that might be relevant to the second prong of the *Stern* test for assessing transferee liability, whether a party is substantively liable for the transferor's unpaid taxes as a matter of state law. For instance, the tax court's findings that the shareholders had not orchestrated the asset sale and the stock sale as a single scheme for tax evasion purposes, that Fortrend and its third-party service provider were legitimate players in the debt collection industry, and that the shareholders had no reason to believe that Fortrend was using illegitimate tax evasion methods and had no duty to inquire further all relate to the question whether the

shareholders lacked actual or constructive knowledge of the entire tax evasion scheme that rendered their transaction with Fortrend fraudulent under state law. *See Salus Mundi*, 776 F.3d at 1020. But the tax court did not use these factual findings to analyze the shareholders' liability under the applicable state law; it instead concluded, based on these findings, that the form of the stock sale should be respected for the shareholders' transferee status under the first prong of the *Stern* test. This was an error.

Because the tax court applied the wrong legal standard to the question of transferee liability, it failed to make findings relating to the relevant factors for determining whether the Commissioner could properly disregard the form of the transaction. The tax court should make these determinations in the first instance. *See Lewis v. Comm'r*, 560 F.2d 973, 978 (9th Cir. 1977) (reversing and remanding when the tax court did not make proper factual findings). On remand, the tax court should make the findings necessary to apply the *Stern* test correctly. Under the first prong of this test, the tax court should apply the relevant subjective and objective factors to determine whether the Commissioner erred in disregarding the form of the transaction in order to impose tax liability on the shareholders as "transferees" under § 6901. Under the second prong of the *Stern* test, the tax court should analyze whether the shareholders are liable under state law for Slone Broadcasting/Arizona Media's unpaid tax liability. *See Salus Mundi*, 776 F.3d at 1018, 1020. The tax court may begin its analysis with either prong.

The Commissioner may hold the shareholders liable as "transferees" under § 6901 only if both prongs of the *Stern* test are satisfied. *See id.*[5]

VACATED AND REMANDED.

NOONAN, Circuit Judge, concurring in part and dissenting in part:

I concur in parts I-IIB of the opinion. I write separately because I conclude that the record is sufficient to reach the merits of the federal law inquiry under 26 U.S.C. § 6901. I would hold that the transaction between Slone Broadcasting and Berlinetta had no economic substance and that the Slone Broadcasting shareholders are transferees under 26 U.S.C. § 6901. Therefore, I would remand to the Tax Court only on the question of state law substantive liability.

The Supreme Court has stated that "[t]he general characterization of a transaction for tax purposes is a question of law subject to review," even though "[t]he particular facts from which the characterization is to be made are not so subject." *Frank Lyon Co. v. United States*, 435 U.S. 561, 581 n.16 (1978). As the opinion correctly articulates, the standard in this circuit is that "[t]he Tax Court's factual determinations about a transaction's economic substance are reviewed for clear error, but the legal standards it applies and the application of those standards to the facts are reviewed de novo." *Reddam v. Comm'r*, 755 F.3d 1051, 1059 (9th

[5] Costs are awarded to the Commissioner.

Cir. 2014). Based on the facts as found by the Tax Court and reviewed under the applicable standard, I find it clear that the sale to Berlinetta did not have "any economic substance other than the creation of tax benefits." *Id.* (internal quotation mark omitted).

In *Owens v. Comm'r*, 568 F.2d 1233 (6th Cir. 1977), the Sixth Circuit considered a similar sale of a corporation whose only asset was cash and noted that "[w]hen one purports to sell cash in corporate solution the burden is surely particularly severe on the seller to show that the only purpose served is not tax avoidance." *Id.* at 1239. The court explained that "[t]he reason for such a heavy burden when the corporation owns just cash is that the corporation has already been effectively liquidated from a corporate law viewpoint, and such a liquidation is a step in the process of winding up a corporation's affairs." *Id.*

The Sixth Circuit examined whether the sale of stock was in fact the sale of the "equity of a business," distinguishing between sale of a going concern and sale of corporate assets. *Id.* ("When a stockholder sells his stock, he is selling his proprietary interest in a going concern and not an interest in the corporate assets."). The court concluded that because the corporation had no ongoing business activity, the corporation "was a lifeless shell at the time of the purported sale of stock." *Id.* ("A corporation that is not carrying on business activity can be a ready vehicle for use as 'nothing more than a contrivance' in a scheme of illegitimate tax avoidance." (quoting *Gregory v. Helvering*, 293 U.S. 465, 469 (1935))).

The Sixth Circuit also examined the financing for the stock purchase. It noted that the purchasers, who took out a loan to buy the stock, had two alternatives to repay the loan: "they could have withdrawn the cash from the bank account, thereby reducing [the corporation] to an empty corporate shell, and pay the loan immediately," or "they could have earned profit with [the corporation's] business, and paid the loan over a period of time." *Id.* at 1240. If the purchasers had planned to operate the corporation as a going concern, "[t]he risks of such a business would have led the Bank . . . to require collateral, but . . . the record does not reveal that collateral was required." *Id.* In fact, the purchasers "withdrew all the cash from the [corporation] bank account the same day as the purported sale of stock" in order to repay the loan. *Id.*

The Sixth Circuit held that because "tax liabilities cannot be altered on the basis of parties exchanging the most fungible commodity of all, cash," the stock sale should not be respected. *Id.*

Many of the same factors considered by the Sixth Circuit in *Owens* are present in this case. Slone Broadcasting was a corporation with no assets other than cash and a built-in gain tax liability of about $15 million that was sold for cash. There is no dispute in this case that Slone Broadcasting had no business operations at the time of the sale to Berlinetta. The financing scheme was very similar to that in *Owens:* One of the conditions of the purchase loan from Rabobank was that it be repaid using Slone Broadcasting's cash, via an irrevocable payment instruction, as soon as

Berlinetta acquired Slone. Just as in *Owens*, the purchaser of Slone Broadcasting borrowed the purchase price, and after closing, immediately withdrew money from the corporate bank account in order to repay the purchase loan. While the Tax Court found that "Berlinetta also held at least $18,459,360 of equity at the time of closing" apart from the loan from Rabobank, the only support in the record for this finding is a law firm opinion letter prepared for Slone Broadcasting and written three months after the stock sale. I would conclude that this finding was clearly erroneous. In any event, it is undisputed that Berlinetta did in fact borrow the purchase price from Rabobank and immediately repaid the loan with Slone Broadcasting's cash.

Just as in *Owens*, these undisputed facts are sufficient to draw the legal conclusion that the sale of Slone Broadcasting's stock was in substance a liquidating distribution to Slone Broadcasting's shareholders. Thus, the Slone Broadcasting shareholders are "transferees" under 26 U.S.C. § 6901 as "the shareholder[s] of a dissolved corporation." *See* 26 C.F.R. § 301.6901-1(b). I would remand to the Tax Court to determine whether the shareholders are substantively liable under Arizona state law.

T.C. Memo. 2012-57

UNITED STATES TAX COURT

NORMA L. SLONE, TRANSFEREE, ET AL.,[1] Petitioners, *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket Nos. 6629-10, 6630-10, 6631-10, 6632-10 Filed March 1, 2012.

Stephen Edward Silver, *David R. Jojola*, and *Jason M. Silver*, for petitioners.

John Wayne Duncan and *Charles B. Burnett*, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

HAINES, *Judge*: This case arises from petitions for judicial review filed in response to notices of transferee liability issued to petitioners (transferee notices). The issues for decision are: (1) whether the period of limitations for assessment expired before the mailing of the transferee notices to petitioners; (2) whether the substance over form doctrine applies to recast the transactions at issue; and (3) if so, whether petitioners are liable as transferees under section 6901 for

[1] Cases of the following petitioners are consolidated herewith: Slone Family GST Trust, UA Dated August 6, 1998, Transferee, D. Jack Roberts, Trustee, docket No. 6630-10; James C. Slone, Transferee, docket No. 6631-10; and Slone Revocable Trust, UA Dated September 20, 1994, Transferee, James C. Slone and Norma L. Slone, Trustees, docket No. 6632-10.

Arizona Media Holding, Inc.'s (Arizona Media) unpaid Federal income tax liability for the tax year ended June 30, 2002.[2]

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulations of fact, together with the attached exhibits, are incorporated herein by this reference. At the time petitioners filed their petitions, they resided in Arizona.

I. The Slone Family and Slone Broadcasting Co.

Petitioner James C. Slone began his career in the radio industry in 1955. In 1963 Mr. Slone became a disc jockey at KHOS, a local radio station in Tucson, Arizona. Mr. Slone worked his way up to general manager of KHOS and served in that position until 1971, when he was offered the opportunity to take over as the manager of KCUB, another Tucson radio station. KCUB was owned and operated by Rex Broadcasting Co. (Rex Broadcasting), an Arizona corporation formed in 1968. Mr. Slone accepted the KCUB offer. As part of his agreement with KCUB, Mr. Slone became a partial owner of Rex Broadcasting.

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[2] All section references are to the Internal Revenue Code, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure. Amounts are roundest [sic] to the nearest dollar.

Over time, Mr. Slone and his wife, petitioner Norma L. Slone, acquired all the outstanding shares of Rex Broadcasting. In 1998, Mr. Slone changed Rex Broadcasting's name to Slone Broadcasting Co. (Slone Broadcasting). In 2001 and 2002 Slone Broadcasting was a C corporation with a tax year ending June 30.

Slone Broadcasting was a family-run business, operating several radio stations in Tucson. In 2000 and 2001 Mr. Slone was Slone Broadcasting's president; his son James was its general manager, vice president and secretary; his son Fred was its national sales manager; and his daughter Mary was its treasurer as well as an on-air personality. Mrs. Slone did not work for Slone Broadcasting.

In 2001 Slone Broadcasting had two shareholders: (1) the Slone Revocable Trust, which owned 114,956 shares of class A voting stock and 951,834 shares of class B nonvoting stock; and (2) the Slone Family GST Trust (Slone GST Trust), which owned 82,770 shares of class B nonvoting stock. Both trusts were formed pursuant to the laws of Arizona. Mr. and Mrs. Slone were the trustees of the revocable trust and the grantors of the Slone GST Trust, an irrevocable trust.

John Barkley was the sole trustee of the Slone GST Trust from its inception in 1998 throughout the time of the transactions at issue. He is a licensed fiduciary in the State of Arizona and is authorized to serve in various capacities, including personal representative, conservator and trustee. He hires accountants, lawyers, stockbrokers, and other professionals to aid

him in carrying out his duties which are defined, in this case, by the documents that established the Slone GST Trust. He exercises his authority independently from Mr. and Mrs. Slone.

II. The Asset Sale

In 2000, after consulting with his family, Mr. Slone decided to sell the Slone Broadcasting business. He believed that a small family-run business faced difficult challenges competing against larger companies. One of those larger companies was Citadel Broadcasting Co. (Citadel) owned by Larry Wilson. Mr. Wilson had previously shown an interest in buying Slone Broadcasting's radio stations and, when approached, indicated a continued interest in the acquisition.

The ensuing negotiations with Citadel were handled by a media broker consultant hired by Slone Broadcasting. Mr. Slone's accountant, D. Jack Roberts, a certified public accountant with over 30 years of experience, advised on the accounting aspects of the transaction, and Tom Chandler, Slone Broadcasting's attorney, advised on the legal aspects of the transaction. None of the advisers proposed tax strategies to reduce the Federal and State income taxes resulting from the sale.

On December 21, 2000, Slone Broadcasting entered into an asset sale agreement with Citadel (the asset sale). The asset sale closed six months later on July 2, 2001. The purchase price was $45 million for all the assets of the radio stations owned and operated by

Slone Broadcasting. Slone Broadcasting's adjusted basis in the assets sold totaled $6,401,074, resulting in a gain from the sale of $38,598,926 and an estimated combined Federal and State income tax liability of approximately $15,314,000.

The sale documents excluded the name "Slone Broadcasting" from the assets sold. Slone Broadcasting and Mr. Slone were not prohibited from reentering the media market by a noncompetition agreement. During negotiations with Citadel, Mr. Slone wanted to withdraw one of the radio stations from the sale so that he and his family could maintain a presence in the Tucson radio market. Citadel would not agree to the change. Therefore, after the closing of the asset sale, Slone Broadcasting did not conduct any business.[3] There were no plans to liquidate the corporation at any time, nor were there any plans to make distributions to its shareholders. In fact, no distributions were made. On October 15, 2001, Slone Broadcasting made its first estimated Federal income tax payment of $3,100,000 to the Internal Revenue Service (IRS) for its tax year ended June 30, 2002.

III. The Stock Sale

Helen Johnson, a representative of Fortrend International, LLC (Fortrend), sent an unsolicited letter

[3] The Slone family did not conduct any business in the radio industry again until 2006, when Mr. and Mrs. Slone purchased KEVT, a Tuscon radio station, through a related limited liability company.

and brochure to Mr. Roberts on June 29, 2001. Ms. Johnson's letter described Fortrend as a "private investment/merchant-banking group" seeking opportunities to acquire corporations in situations where the "assets of the Target Corporation can be profitably sold and/or leased to one or more purchasers/lessees." The letter also stated that Fortrend was able to "structure transactions that help manage or resolve liabilities at the corporate level." Mr. Roberts did not review the letter and company brochure until after the closing of the asset sale.

On August 8, 2001, Ms. Johnson sent Mr. Roberts a second letter expressing Fortrend's continued interest in purchasing Slone Broadcasting's stock. It described Fortrend's relationship with Midcoast Credit Corp. (Midcoast), a corporation engaged in the business of collecting delinquent credit card debt acquired from banks. After receiving the second letter, Mr. Roberts informed Mr. Slone, in general, about Fortrend and Midcoast and the proposal to buy Slone Broadcasting's stock. Mr. Slone gave Mr. Roberts permission to investigate further and to proceed if the transaction looked viable.

On September 7, 2001, Ms. Johnson sent a third letter to Mr. Roberts, attaching the Fortrend/MidCoast business plan together with financial projections. The plan described a typical stock sale and subsequent business model as follows:

- An acquisition company ("AC") purchases stock of target corporation (the "Company") that is a C corporation;
- The Company has sold some or all of its assets;
- The Company engages MidCoast to re-engineer its operations into the asset recovery business, i.e. purchasing and collecting receivables;
- A significant portion of the proceeds received from the asset sale remains in the Company and is used by the Company to re-engineer its operations into the asset recovery business;
- The Company will reinvest the cash flows into additional purchases of receivables;
- The Company will sign a management contract with MidCoast for MidCoast to perform services for the Company.

Mr. Roberts hired Steven Phillips, a local tax attorney, as counsel to advise Mr. and Mrs. Slone and the Slone Revocable Trust on any Fortrend proposals. Mr. Phillips was not involved in and did not provide any legal advice with respect to the asset sale. On September 10, 2001, Mr. Phillips met with Mr. Slone to discuss the proposed transaction. This meeting was Mr. Slone's only contact with Mr. Phillips. Mr. Roberts represented Mr. Slone in all other communications with Mr. Phillips.

Mr. Roberts provided the Fortrend/MidCoast business plan to Mr. Phillips for review. Mr. Phillips

contacted a broker in the asset recovery business to inquire about MidCoast's reputation. The broker informed Mr. Phillips that MidCoast played an active role in the asset recovery industry and had a reputation as an aggressive collector, but a legitimate one. Mr. Phillips reviewed the projections in the Fortrend/MidCoast business plan and concluded that they were reasonable. The reputations of Fortrend and Midcoast together with those of their attorneys and accountant advisers were good. There was no reason for Mr. Roberts or Mr. Phillips to suspect any impropriety.

On October 24, 2001, Fortrend sent Mr. Roberts a letter of intent to purchase Slone Broadcasting's stock through an affiliate, Berlinetta, Inc. (Berlinetta). Berlinetta's sole shareholder was Willow Investment Trust (Willow), a Fortrend entity. The letter of intent proposed a purchase price of $29,800,000 plus the assumption of Slone Broadcasting's Federal and State income taxes owed as of the closing date. Slone Broadcasting's balance sheet showed:

Assets:

Cash and cash equivalents	$35,764,147
Due from related parties	2,052,961
Income tax refunds receivable	175,466
Prepaid income taxes	3,800,000
Total	41,792,574

Liabilities and stockholder's equity:	
Income taxes payable	$15,004,269
Stockholder's equity	
Class A voting common stock	114,956
Class B nonvoting common stock	26,673,349
Total	41,792,574

Mr. Roberts and Mr. Phillips knew that Fortrend had a strategy to reduce the income tax due as a result of the asset sale. When they asked Fortrend what actions Berlinetta would take to achieve the tax savings, they were told that Fortrend's methods could not be disclosed because they were "proprietary". However, Fortrend represented that Berlinetta had not engaged in any transaction that would be deemed a "listed transaction" pursuant to Notice 2001-51, 2001-2 C.B. 190. Mr. Phillips negotiated an increase in the purchase price for the stock based upon what he described as a "premium" payment resulting from the tax savings anticipated by Berlinetta. When negotiations concluded, the parties agreed to a purchase price of $35,753,000 plus Berlinetta's assumption of Slone Broadcasting's Federal and State income taxes owed as of the closing date.

As trustee of the Slone GST Trust, Mr. Barkley hired Greg Gadarian, another local tax attorney independent from Mr. Phillips, to advise the Slone GST Trust with respect to any Fortrend proposals. On November 21, 2001, Mr. Phillips wrote a memorandum describing the transaction to Mr. Gadarian, providing a legal analysis of the transferee liability considerations facing Slone Broadcasting's shareholders, and

concluding that they would not be exposed to such liability. Mr. Gadarian reviewed Mr. Phillips' memorandum and performed his own research. Mr. Gadarian agreed with Mr. Phillips' conclusions. Mr. Gadarian had no reason to think that Fortrend planned to use an illegitimate scheme to offset the gains from the asset sale. He therefore orally advised Mr. Barkley that there were no material legal obstacles to the proposed transaction. Soon after, Mr. Barkley approved the transaction on behalf of the Slone GST Trust. Both Mr. Phillips and Mr. Gadarian were aware of Notice 2001-16, 2001-1 C.B. 730, and both concluded that it did not apply. On December 3, 2001, Mr. Phillips informed Mr. Roberts that there were no legal obstacles to proceeding. Mr. Roberts advised Mr. Slone that both Mr. Phillips and Mr. Gadarian had analyzed the legal implications of the transaction and concluded that it could proceed.

On December 10, 2001, Slone Broadcasting entered into the stock sale agreement with Berlinetta (stock sale). Berlinetta financed the acquisition of the stock through a combination of loans and equity. Utrecht-America Finance Co., the U.S. branch of Cooperative Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank), lent Berlinetta $30 million, to be paid back no later than December 30, 2001. Slone Broadcasting had no involvement in the financing. The stock sale agreement placed a restriction on the use of funds held in Slone Broadcasting's bank account until 10 days after the closing date. Berlinetta also held at least $18,459,360 of equity at the time of closing.

At the closing the Slone Revocable Trust and Slone GST Trust received $30,819,544 and $2,550,456 in cash, respectively. Mr. Slone and his children resigned as the officers and directors of Slone Broadcasting. Slone Broadcasting did not make any distributions to its shareholders between the closing date of the asset sale and the closing date of the stock sale.

On their joint Form 1040, U.S. Individual Income Tax Return, Mr. and Mrs. Slone reported a basis in their Slone Broadcasting stock of $106,679, resulting in a reported gain from the stock sale of $32,765,826.[4] The Slone GST Trust filed a Form 1041, U.S. Income Tax Return for Estates and Trusts, for 2001, reporting a basis of $8,277 in its Slone Broadcasting stock and a gain from the stock sale of $2,542,179. Because the Slone GST Trust was deemed a grantor trust, *see* secs. 671-678, its income and expenses, including the gain from the stock sale, were reported on the 2001 joint Federal income tax return of its grantors, Mr. and Mrs. Slone.

IV. Arizona Media

Two days after the closing of the stock sale, on December 12, 2001, Slone Broadcasting merged with Berlinetta, with Slone Broadcasting as the surviving corporation. Because the name "Slone Broadcasting"

[4] For Federal income tax purposes, the Slone Revocable Trust is a disregarded entity, and it did not file a Federal tax return.

was not part of the sale, on January 17, 2002, Slone Broadcasting changed its name to Arizona Media.[5]

On December 13, 2001, Willow contributed Treasury bills to Arizona Media with a purported basis of $38,148,304, and on January 7, 2002, Arizona Media sold the Treasury bills for $108,731. On July 7, 2002, Arizona Media filed its Federal tax return for its tax year ended June 30, 2002, reporting a $37,885,260 gain from the asset sale and an offsetting loss of $38,039,573 from the sale of the Treasury bills. On August 6, 2002, the IRS refunded Arizona Media the $3,100,000 estimated tax payment previously made by Slone Broadcasting.

The IRS began its examination of Arizona Media in March 2005. The president of Arizona Media at the time was Tim Conn, who was identified as the corporation's president, secretary, and treasurer in its annual report filed with the Arizona Corporation Commission. Arizona Media's bylaws prohibited the same person from simultaneously serving as both president and treasurer of the corporation.

On March 10, 2005, Arizona Media submitted to the IRS a Form 872, Consent to Extend the Time to Assess Tax, for its tax year ending June 30, 2002, signed by Mr. Conn, agreeing to extend the period of limitations for assessment to December 31, 2006. On

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[5] For simplicity, although the name change did not occur until January 17, 2002, we will refer to the surviving corporation as Arizona Media at all times after the closing of the stock purchase agreement.

March 15, 2005, Arizona Media provided the IRS with a Form 2848, Power of Attorney and Declaration of Representative, signed by Mr. Conn, authorizing Arizona Media's attorney, Randall Dick, to execute further extensions on Arizona Media's behalf. Over the next three years, Mr. Dick signed additional Forms 872, agreeing to extend the period of limitations for assessment of Arizona Media for the taxable year ended June 30, 2002. The final extension was authorized on September 17, 2007, and extended the period of limitations for assessment to December 31, 2008. On April 14, 2008, Arizona Media submitted Form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, to the IRS, accepting a deficiency in income tax of $13,494,884 and a penalty pursuant to section 6662 of $2,698,997. The IRS assessed the tax and the penalty on May 30, 2008, together with interest of $7,277,395.

Arizona Media failed to pay the assessed tax, penalty, and interest. As a result, on October 20, 2008, the IRS placed Arizona Media's account on the Federal Payment Levy Program. On December 5, 2008, the IRS issued a notice of intent to levy, a due process notice, and a levy notice (notice of levy) to Arizona Media, and on December 12, 2008, filed a notice of Federal tax lien for Arizona Media's taxable year ended June 30, 2002. The IRS issued further notices of levy to Arizona Media on February 10, August 4 and September 9, 2009. No moneys were ever collected from Arizona Media. On August 28, 2009, Arizona Media was administratively

dissolved for failure to file its annual report with the State of Arizona.

V. Transferee Notice

On December 22, 2009, respondent issued transferee notices to the Slone Revocable Trust and Slone GST Trust, determining that the trusts were liable for $16,193,881 and $2,550,832, respectively, plus interest, as transferees of assets for the unpaid liability of Arizona Media for the tax year ended June 30, 2002. Additionally, respondent issued separate transferee notices to Mr. and Mrs. Slone individually, determining each liable under a transferee theory for $16,193,881, plus interest, for the unpaid liability of Arizona Media. Petitioners timely filed their petitions.

OPINION

I. Section 6901

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 is incurred. Section 6901(a) does not independently impose tax liability upon a transferee but provides a procedure through which the Commissioner may collect from a transferee unpaid taxes owed by the transferor of the assets if an independent 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); *Hagaman v. Commissioner*, 100 T.C. 180, 183 (1993); *Starnes v. Commissioner*, T.C. Memo. 2011-63. 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). Section 6902(a) 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.

II. Period of Limitations

Petitioners argue that the deficiency and the penalty determined against Arizona Media for the tax year ended June 30, 2002, were not timely assessed and, therefore, respondent is time barred by the period of limitations under section 6901 from assessing transferee liability against petitioners. Section 6501(a) provides, generally, that the amount of any tax must be assessed within three years of the filing of a return. The period of limitations for assessment of a liability against an initial transferee is one year after the expiration of the period of limitations for assessment against the transferor. Sec. 6901(c)(1). For a transferee of a transferee, section 6901(c)(2) provides that the period of limitations expires one year after the expiration of the period of limitations for assessment against the previous transferee, but not more than three years after the expiration of the period of limitations against the initial transferor.

Section 6501(c)(4) allows for extension of the period of limitations for assessment by agreement of the taxpayer and the Secretary. Arizona Media's Federal income tax return was deemed filed on September 15, 2002, creating a September 15, 2005, deadline for assessment pursuant to section 6501(a).[6] On March 10, 2005, Arizona Media submitted a Form 872 to the IRS, signed by Mr. Conn as president, extending the period for assessment to December 31, 2006. Further extensions were filed by Mr. Dick pursuant to a power of attorney, the last of which extended the assessment period for tax year ended June 30, 2002, to December 31, 2008. Respondent assessed the deficiency and penalty in this case on May 30, 2008.

Respondent contends that because Arizona Media agreed to extend its period of limitations for assessment to December 31, 2008, the period of limitations for assessment against an initial transferee of Arizona Media was extended to December 31, 2009. *See* sec. 6901(c)(1). The transferee notices were sent to petitioners on December 22, 2009.

Petitioners argue that Arizona Media's extension consents were not signed by authorized officers of Arizona Media and, therefore, were invalid. More specifically, petitioners argue that Mr. Conn did not have the authority to sign the original Form 872, extending the

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[6] Arizona Media filed its Federal tax return for its tax year ended June 30, 2002, on July 7, 2002. Nonetheless, a return is considered filed on the last day prescribed for filing if it is filed before that day. Sec. 6501(b)(1). September 15, 2002, was the last day prescribed for Arizona Media to file. *See* sec. 6072(b).

period of limitations for Arizona Media to December 31, 2006, and did not have the authority to sign the power of attorney granting Mr. Dick the right to authorize subsequent extensions. As a result, petitioners argue that the transferee notices were issued outside the period of limitations.

Section 6062 provides that corporate returns may be signed by "the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act." Rev. Rul. 83-41, 1983-1 C.B. 349, provides that the IRS will generally apply the same rules to a consent to extend the period of limitations. When Mr. Conn signed the original Form 872 and the power of attorney granting Mr. Dick the authority to sign future extensions, he served as both the president and the treasurer of Arizona Media. Petitioners argue that because Arizona Media's bylaws prohibit the same person from simultaneously holding both positions, Mr. Conn was neither the president nor the treasurer of Arizona Media and had no authority to sign the documents at issue.

Petitioners rely on Arizona law to support this argument. Ariz. Rev. Stat. Ann. (A.R.S.) sec. 10-840 (2004) provides that the board of directors of a corporation shall appoint officers in accordance with its bylaws. A.R.S. sec. 10-841 (2004) also provides that each officer of an Arizona corporation must perform his or her duties in accordance with the bylaws.

Petitioners' argument is not persuasive. We do not need to determine whether Mr. Conn had actual

authority to sign the documents at issue because even if he did not, he had ostensible authority. Under Arizona law, ostensible authority is that authority which exists where the principal knowingly or negligently holds his agent out as possessing it, or permits him to assume it, under such circumstances as to estop the principal from denying its existence. *Koven v. Saberdyne Sys., Inc.*, 625 P.2d 907, 911 (Ariz. Ct. App. 1980). To establish ostensible authority, the record must reflect not only that the alleged principal held out another as his agent, but also that the person who relied upon the manifestation was reasonably justified in doing so under the facts of the case. *Id*. at 912.

In *Koven*, the court held that an annual report submitted to the Arizona Corporation Commission granted the listed vice president of the corporation the ostensible authority to receive service of process. In the instant case, Arizona Media's annual report filed with the Arizona Corporation Commission identified Mr. Conn as the corporation's president, secretary, and treasurer. Similar to the report in *Koven*, this filing gave Mr. Conn the ostensible authority to sign the documents at issue on behalf of Arizona Media.

Section 1.6062-1(c), Income Tax Regs., provides that an individual's signature on a return, statement, or other document made by or for a corporation is prima facie evidence that the individual is authorized to sign the return, statement, or other document. Petitioners have not presented any facts suggesting that the IRS had reason to suspect that Mr. Conn did not have the authority to sign the documents at issue. Therefore, the IRS determination that Mr. Conn had

the authority to sign the documents at issue was reasonably justified. The period of limitations for assessment with respect to Arizona Media was validly extended to December 31, 2008, and the transferee notices were not time barred.

III. Theory of the Case

Respondent's theory of the case has changed from the pleadings to his briefs. The transferee notices state that the stock sale should not be respected for Federal tax purposes because it is substantially similar to an "intermediary transaction" tax shelter described in Notice 2001-16, *supra*. Under that notice, respondent sought to collapse the asset sale and the stock sale to recharacterize the transactions as an asset sale followed by a liquidating distribution. Respondent abandoned this argument on brief and acknowledged that the asset sale was independent from the stock sale. Respondent now argues the substance over form doctrine to recast the stock sale alone as a liquidating distribution.[7] Respondent has further conceded that

[7] Respondent also argued that the stock sale should be disregarded for Federal tax purposes pursuant to the economic substance doctrine. Respondent presented this argument for the first time at trial and on brief. We do not find this argument to be timely, and, therefore, we will not consider its applicability. *See, e.g.*, *Estate of Mandels v. Commissioner*, 64 T.C. 61 (1975); *Estate of Horvath v. Commissioner*, 59 T.C. 551, 556 (1973); *Frentz v. Commissioner*, 44 T.C. 485, 490-491 (1965), *aff'd* per order, 375 F.2d 662 (6th Cir. 1967) ("This Court has held on numerous occasions that it will not consider issues which have not been pleaded.").

petitioners' transferee liability under section 6901 relies on his underlying substance over form argument.[8] Therefore, if we determine that the stock sale must be respected for Federal tax purposes, respondent's concession resolves the transferee liability issue in favor of petitioners.

IV. Substance Over Form Doctrine

Courts use substance over form and its related judicial doctrines to determine the true meaning of a transaction disguised by formalisms that exist solely to alter tax liabilities. *See United States v. R.F. Ball Constr. Co.*, 355 U.S. 587 (1958); *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945); *Stewart v. Commissioner*, 714 F.2d 977, 987-988 (9th. Cir. 1983), *aff'g* T.C. Memo. 1982-209; *Rose v. Commissioner*, T.C. Memo. 1973-207. In such instances, the substance of a transaction, rather than its form, will be given effect. We generally respect the form of a transaction, however, and will apply the substance over form principles only when warranted. *See Gregory v. Helvering*, 293 U.S. 465 (1935); *Blueberry Land Co. v. Commissioner*, 361 F.2d 93, 100-101 (5th Cir. 1966), *aff'g* 42 T.C. 1137 (1964).

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[8] Respondent states that his transferee liability theory is "predicated" on the underlying substance over form argument. Pretrial Mem. 19; Opening Br. 64; Reply Br. 82.

We will respect the form of the transactions in this case. Respondent has conceded that the asset sale was independent from the stock sale. The asset sale was negotiated by a media broker with Mr. Roberts providing accounting advice and Mr. Chandler legal advice. Mr. Roberts credibly testified that no tax strategies to offset the potential gain arising from the asset sale were discussed before the closing of the asset sale. The asset sale closed on July 2, 2001, more than five months before the closing of the stock sale. Slone Broadcasting's first installment of $3,100,000 of Federal income tax attributable to the asset sale was paid. There is no evidence that Fortrend, Midcoast, or Berlinetta was involved in any way in the asset sale, nor is there any evidence that a sale of stock was anticipated at the time that the asset sale was negotiated and closed.

With respect to the stock sale, Fortrend initiated contact with Slone Broadcasting after the closing of the asset sale. Mr. Roberts credibly testified that a letter addressed to him from Fortrend dated June 29, 2001, was not reviewed before the closing of the asset sale. Attorneys having no involvement in the asset sale were retained to negotiate the stock sale: Mr. Phillips for Mr. and Mrs. Slone and the Slone Revocable Trust, and Mr. Gadarian for the Slone GST Trust. Due diligence confirmed that Midcoast was a legitimate player in the debt collection industry and Fortrend and MidCoast had reputable law and accounting firms representing them. The purchaser of the stock, Berlinetta, was capable of closing by using funds provided by loans from Rabobank and other assets it owned. Berlinetta

agreed that it would not use the assets of Slone Broadcasting for 10 days after the closing of the stock sale.

Respondent contends that petitioners, through their representatives, knew that Fortrend planned to offset the gain from the asset sale and that the offset was the reason the stock sale made financial sense to Fortrend. In fact, in Mr. Phillips' memo to Mr. Gadarian dated November 21, 2001, he explains Fortrend's plan to offset the gains from the asset sale by contributing high basis/low value assets to Berlinetta in a section 351 transaction and selling those assets at a loss before the end of 2001. Respondent argues that this was enough information for petitioners to know of Fortrend's illegitimate scheme. We disagree.

We have addressed this argument in *Frank Sawyer Trust of May 1992 v. Commissioner*, T.C. Memo. 2011-298, another transferee liability case involving Fortrend, where we stated:

> Had the * * * [taxpayer] known of Fortrend's illegitimate scheme to fraudulently offset the tax liabilities of the corporations, then we would be inclined to disregard the form of the stock sales in favor of respondent's contentions. However, there are legitimate tax planning strategies to defer or avoid paying taxes, so it was not unreasonable for the * * * [taxpayer] to believe that Fortrend had a legitimate method of doing so.

Petitioners had no reason to believe that Fortrend's methods were illegal or inappropriate. When Mr. Roberts and Mr. Phillips asked Fortrend for more

information about how Berlinetta planned to offset the gains from the asset sale, they were told that Fortrend's methods were "proprietary". Petitioners did not have a duty to inquire further and are not responsible for any tax strategies Berlinetta used after the closing of the stock sale.

Neither the substance over form doctrine nor any related doctrines apply to recast the stock sale as a liquidating distribution. Therefore, we find that the stock sale should be respected for Federal tax purposes.[9]

Respondent has conceded that his theory of transferee liability is predicated on his underlying substance over form argument with respect to the stock sale. Because we have determined that the stock sale must be respected for Federal tax purposes, respondent's concession resolves the transferee liability issue

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[9] This Court has decided a series of transferee liability cases stemming from transactions involving Fortrend and/or MidCoast. *See Frank Sawyer Trust of May 1992 v. Commissioner*, T.C. Memo. 2011-298; *Feldman v. Commissioner*, T.C. Memo. 2011-297; *Starnes v. Commissioner*, T.C. Memo. 2011-63; *Griffin v. Commissioner*, T.C. Memo. 2011-61; *CHC Indus., Inc. v. Commissioner*, T.C. Memo. 2011-33; *LR Dev. Co., LLC v. Commissioner*, T.C. Memo. 2010-203. Of these cases, *Feldman* and *CHC* are the only cases where we held against the taxpayer. *Feldman* is factually distinguishable from the instant case. First, in *Feldman* the taxpayer knew that MidCoast, as the stock purchaser, had no intention of ever paying the tax liabilities. Second, the taxpayer did not conduct the proper due diligence. And third, the financing for the stock purchase was a sham. The unique facts of *Feldman* are not applicable to the instant case. *CHC* is also factually distinguishable because a distribution was made to a shareholder, a factor not present in the instant case.

in favor of petitioners and we need not analyze that liability under State law.

The Court, in reaching its holdings, has considered all arguments made, and, to the extent not mentioned, concludes that they are moot, irrelevant, or without merit.

To reflect the foregoing,

Decisions will be entered for petitioners.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORMA L. SLONE, Transferee, Petitioner-Appellee, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	No. 16-73349 Tax Ct. No. 6629-10 ORDER (Filed Oct. 1, 2018)

SLONE FAMILY GST TRUST, UA Dated, August 6, 1998, Transferee, D. Jack Roberts, Trustee, Petitioner-Appellee, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	No. 16-73351 Tax Ct. No. 6630-10

JAMES C. SLONE, Transferee, Petitioner-Appellee, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	No. 16-73354 Tax Ct. No. 6631-10

SLONE REVOCABLE TRUST, UA Dated September 20, 1994, Transferee, James C. Slone and Norma L. Slone, Trustees, Petitioners-Appellees, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	No. 16-73356 Tax Ct. No. 6632-10

Before: SCHROEDER and WATFORD, Circuit Judges, and SESSIONS,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Watford has voted to deny the petition for rehearing en banc, and Judges Schroeder and Sessions have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied.

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.