

No. 13-1037

IN THE
Supreme Court of the United States

WFC HOLDINGS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF ALSTON & BIRD LLP
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

MARY T. BENTON
Counsel of Record
GEORGE B. ABNEY
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000
mary.benton@alston.com

Attorneys for Amicus Curiae



TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
INTERESTS OF THE <i>AMICUS</i>	1
SUMMARY OF THE ARGUMENT.....	3
REASONS FOR GRANTING THE PETITION.....	4
I. THE DECISION BELOW, AND OTHER LOWER COURT DECISIONS, CREATE AND APPLY ARBITRARY AND CONFLICTING STANDARDS NEVER APPROVED BY THIS COURT TO OVERRIDE THE INTERNAL REVENUE CODE.	4
II. THE UNAUTHORIZED EXPANSION OF THE ECONOMIC SUBSTANCE DOCTRINE CASTS A PALL OF SUSPICION OVER THE RIGHT OF TAXPAYERS TO DECREASE THEIR TAXES BY LAWFUL MEANS.	9
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Page

CASES

<i>ACM Partnership v. Commissioner</i> , 157 F.3d 231 (3d Cir. 1998)	8
<i>ACM Partnership v. Commissioner</i> , T.C. Memo. 1997-115	5-6
<i>Avco Mfg. Co. v. Commissioner</i> , 25 T.C. 975 (1956)	12
<i>Commissioner of Internal Revenue v.</i> <i>Day & Zimmermann, Inc.</i> , 151 F.2d 517 (3d Cir. 1945).....	12
<i>Frank Lyon Co. v. United States</i> , 435 U.S. 561 (1978).....	4, 5, 8
<i>Friedman v. Commissioner</i> , 869 F.2d 785 (4th Cir. 1989).....	7
<i>Gitlitz v. Commissioner</i> , 531 U.S. 206 (2001).....	7
<i>Granite Trust Co. v. U.S.</i> , 238 F.2d 670 (1st Cir. 1956).....	12, 13, 14
<i>Gregory v. Helvering</i> , 293 U.S. 465 (1935).....	<i>passim</i>
<i>Hanover Bank v. Commissioner</i> , 369 U.S. 672 (1962).....	7

Cited Authorities

	<i>Page</i>
<i>Helvering v. F. & R. Lazarus & Co.,</i> 308 U. S. 252 (1939).....	4
<i>Higgins v. Smith,</i> 308 U.S. 474 (1940).....	5
<i>In re CM Holdings, Inc.,</i> 301 F.3d 96 (3d Cir. 2002)	7
<i>Jacobellis v. Ohio,</i> 378 U.S. 184 (1964).....	8
<i>Jacobson v. Commissioner,</i> 915 F.2d 832 (2d Cir. 1990)	7
<i>Knetsch v. United States,</i> 364 U.S. 361 (1960).....	5
<i>Riggs v. Commissioner,</i> 64 T.C. 474 (1975)	13
<i>Sala v. United States,</i> 613 F.3d 1249 (10th Cir. 2010).....	8
<i>Sochin v. Commissioner,</i> 843 F.3d 351 (9th Cir. 1988).....	7
<i>United Parcel Serv. of Am., Inc. v.</i> <i>Commissioner,</i> 254 F.3d 1014 (11th Cir. 2001)	7

Cited Authorities

	<i>Page</i>
<i>United States v. Cumberland Pub. Serv. Co.,</i> 338 U.S. 451 (1950).....	6-7
<i>United States v. Home Concrete & Supply, LLC,</i> 132 S. Ct. 1836 (2012).....	11
<i>United States v. Quality Stores, Inc.,</i> --U.S.---- (2014).....	11
<i>WFC Holdings Corp. v. U.S.,</i> 728 F.3d 736 (8th Cir. 2013).....	6, 8, 10

STATUTES

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1409(e)(1), 124 Stat. 1029	9
---	---

Internal Revenue Code (26 U.S.C.):

§ 165	12
§ 331	12
§ 332	13, 14
§ 332(a)	12
§ 336	12
§ 337(a)	12
§ 351	14
§ 1504(a)(2)	12
§ 7701(o)	6, 9
§ 7701(o)(1)	9
§ 7701(o)(5)(C)	9

Cited Authorities

Page

ADMINISTRATIVE MATERIAL

IRS Chief Counsel Memo. AM2012-009, Nov. 15, 2012 . . .	6
IRS Priv. Ltr. Rul. 87-13-041, 1986 WL 372821	14
IRS Priv. Ltr. Rul. 2010-14-002, 2010 WL 1411503. . . .	14
IRS Priv. Ltr. Rul. 2013-30-004, 2013 WL 3856953 . . .	14
IRS Priv. Ltr. Rul. 2013-34-006, 2013 WL 4496006 . . .	14
IRS Rev. Proc. 2014-3, 2014-1 IRB 111, sec. § 3.01(33)	14

OTHER MATERIALS

Yin, George K., <i>The Problem of Corporate Tax Shelters: Uncertain Dimensions, Unwise Approaches</i> , 55 Tax L. Rev. 405 (Spring 2002)	11
---	----

Alston & Bird LLP, by and through the undersigned counsel, by consent of the parties, submits this brief amicus curiae respectfully praying that the Court grant the Petitioner a writ of certiorari.* In support of the petition, Alston & Bird states as follows:

INTERESTS OF THE *AMICUS*

Alston & Bird LLP is a general practice law firm that has long represented taxpayers in federal tax planning and controversy matters. With 80-plus attorneys practicing in various areas affected by federal and state taxes, its tax practice is one of the largest law-firm-based tax practices in the country. Alston & Bird's tax clients include both long-standing firm clients and clients who choose Alston & Bird solely for its tax expertise. Clients include Fortune 100 companies, small startup businesses, nonprofit entities, and individuals.

A significant role of Alston & Bird's tax practice is to provide advice on the tax aspects of the structure and implementation of business transactions, both large and small. Tax planning matters handled by Alston & Bird

* Pursuant to Sup. Ct. R. 37.6, Alston & Bird LLP certifies that no counsel for either party authored any part of this brief and that no person, other than the amicus and its counsel, made a monetary contribution intended to fund the preparation of the brief. Alston & Bird LLP certifies, consistent with Sup. Ct. R. 37.2(a), that counsel of record for both parties have been notified more than ten days before this filing of its intention to file the brief and have given their consent. The Petitioner has filed a blanket waiver and the consent of the Respondent is being submitted herewith.

involve virtually all forms of business transactions, from taxable and tax-free acquisitions, dispositions, and venture formations to financings and reorganizations, involving a variety of industries, including telecommunications, banking, real estate, insurance, manufacturing, financial services and the service industries generally.

Alston & Bird also maintains a national tax controversy practice defending client tax positions under challenge by the Internal Revenue Service (“IRS”). Tax controversy matters handled by Alston & Bird include audits, administrative appeals, trial and appellate tax litigation at all levels of the federal court system, and mediation of both docketed and non-docketed tax cases.

Since the mid-1990s, Alston & Bird’s tax practitioners have been called upon to address the burgeoning reliance by the IRS and the lower federal courts on what is now generally known as the economic substance doctrine. Alston & Bird files this amicus brief not with reference to the particular facts of the case of the Petitioner, but with reference to the common plight of the Petitioner and thousands of other taxpayers, including our clients, who every year are faced with either assertions of this uncertain ground for tax assessments by the IRS, or the inability to know what the law is for purposes of planning their financial and business affairs.

SUMMARY OF THE ARGUMENT

This Court should grant a writ of certiorari in this case to clarify the validity, meaning, and applicability of the so-called economic substance doctrine, which, as applied in the decision below, by other lower courts, and by the IRS, has created widespread and growing uncertainty about the tax law in the practitioner and taxpayer communities. This uncertainty drastically hampers the ability of legal advisors and other tax professionals to know what the law is so that they can advise their clients regarding the tax implications of their proposed financial transactions and business dealings. In turn, the inability of tax professionals to provide sound legal advice to their clients renders it all but impossible for a taxpayer to exercise what is, undoubtedly, his “legal right . . . to decrease the amount of what otherwise would be his taxes, or altogether avoid them by means which the law permits.” *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW, AND OTHER LOWER COURT DECISIONS, CREATE AND APPLY ARBITRARY AND CONFLICTING STANDARDS NEVER APPROVED BY THIS COURT TO OVERRIDE THE INTERNAL REVENUE CODE.

This Court has never explicitly authorized a broadly applicable economic substance doctrine that generally overrides otherwise applicable provisions of the Internal Revenue Code (“Code”). Rather, this Court has sometimes construed a business purpose requirement into a particular code section, such as the corporate reorganization nonrecognition rules. *See Gregory v. Helvering*, 293 U.S. 465, 469-70 (1935) (“When subdivision (B) speaks of a transfer of assets by one corporation to another, it means a transfer made ‘in pursuance of a plan of reorganization’ (section) 112(g) of corporate business; and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here.”; “[T]he transaction upon its face lies outside the plain intent of the statute.”). At other times this Court has endorsed the use of traditional fact finding methodologies to determine the true substance of a transaction, as opposed to the labels affixed to it by the parties. *See Frank Lyon Co. v. United States*, 435 U.S. 561 (1978) (ruling for the taxpayer by applying common law fact finding to determine who economically owned property, which determined the taxpayer’s eligibility to claim depreciation deductions).¹

1. *See also, Helvering v. F. & R. Lazarus & Co.*, 308 U. S. 252, 255 (1939) (finding a transaction which was “in written form

Over the past approximately 30 years, however, lower federal courts and the IRS have conflated these two legal processes of statutory interpretation and common law fact finding, and have radically expanded the scope and reach of this Court’s precedents, to create what is now commonly referred to as the economic substance doctrine (“ESD”). The business purpose rule of *Gregory* and the search for economic substance in fact of *Frank Lyon* have been melded into a two prong test (shorthanded as business purpose and economic substance) that a taxpayer must prove its way out of to avoid losing a claimed tax benefit under the ESD.

Consequently, lower courts have not limited the so-called ESD to specific tax code provisions that require a business purpose. Neither has the ESD been used as a traditional fact-finding methodology to ferret out the substance of transactions. Rather, as was true in the decision below, the IRS and the lower courts have applied the ESD to override the Internal Revenue Code by disregarding transactions that satisfy the Code’s provisions. *See ACM Partnership v. Commissioner*,

a transfer of ownership with a lease back, was actually a loan secured by the property involved,” and thereby ruling for the taxpayer); *Higgins v. Smith*, 308 U.S. 474, 477 (1940) (holding that a transaction may be disregarded “upon determination that the form employed . . . is unreal or a sham,” and ruling against a taxpayer who attempted to realize losses upon sales of stock to his desk drawer corporation); *see Knetsch v. United States*, 364 U.S. 361, 366 (1960) (ruling against the taxpayer by finding a purported loan transaction was not actually a forbearance to collect money in exchange for interest payments, because neither party intended to loan, borrow, or pay back approximately four million dollars).

T.C. Memo. 1997-115 (internal citation omitted) (“The tax statutes apply only ‘to transactions entered upon for commercial purposes and ‘not to . . . transactions entered upon for no other motive but to escape taxation.’”); IRS Chief Counsel Memo AM2012-009, Nov. 15, 2012, (citing *ACM Partnership* for the proposition that the “common law” economic substance doctrine nullifies otherwise applicable tax statutes when the IRS decides the transaction was entered into for “tax avoidance” purposes).

Neither this Court nor Congress has ever authorized a sweeping rule that permits the IRS to override the Code anytime it unilaterally decides a transaction lacks a business purpose or economic substance. Section 7701(o), enacted after the years at issue in this case, does not authorize such a sweeping doctrine as it only clarifies the two factors the taxpayer is required to prove if the judge made ESD is found relevant, relevance being a concept wholly undefined in the statute. The frequent citing of decisions of this Court as support for the judge made ESD, including in the Eighth Circuit opinion below,² constitute misreading and expansion of those decisions. The ESD itself directly contracts this Court’s repeated insistence that once the facts are found using the full range of common law fact finding tools, and the statute is properly interpreted and construed, the tax laws apply as written. *See United States v. Cumberland Pub. Serv. Co.*,

2. “While the origin of the economic substance doctrine is generally traced to the Supreme Court’s holding in *Gregory v. Helvering*, ..., current application of the doctrine stems primarily from the Supreme Court’s decision in *Frank Lyon Co. v. United States*” *WFC Holdings Corp. v. U.S.*, 728 F.3d 736, (8th Cir. 2013).

338 U.S. 451, 454-455 (1950) (rejecting an application of substance-over-form fact finding to deprive the taxpayer of the normal operation of the statute to facts as found by the court); *Gitlitz v. Commissioner*, 531 U.S. 206, 219-20 (2001) (refusing to apply the statute contrary to its terms, even though the taxpayer received a “double windfall Because the Code’s plain text permits the taxpayers here to receive these benefits, we need not address this policy concern.”); *Hanover Bank v. Commissioner*, 369 U.S. 672, 688 n. 23 (1962) (“Granting the government’s proposition that these taxpayers have found a hole in the dike, we believe it one that calls for the application of the Congressional thumb, not the court’s.”).

The lack of authorization from this Court for a sweeping rule that permits the IRS to override the Code anytime it unilaterally decides a transaction is a tax loophole is evident in the growing conflict among the federal circuits over the meaning and applicability of the ESD. Many federal circuits have held that “a transaction ceases to merit tax respect when it has no economic effects other than the creation of a tax benefit.” *See, e.g., United Parcel Serv. of Am., Inc. v. Commissioner*, 254 F.3d 1014, 1018 (11th Cir. 2001) (internal quotations omitted); *see also, Sochin v. Commissioner*, 843 F.3d 351, 354 (9th Cir. 1988); *Jacobson v. Commissioner*, 915 F.2d 832, 837 (2^d Cir. 1990); *In re CM Holdings, Inc.*, 301 F.3d 96, 102 (3^d Cir. 2002); *Friedman v. Commissioner*, 869 F.2d 785, 792 (4th Cir. 1989).

But this formulation masks fundamental ambiguities in the ESD: what is “the transaction” and when is the ESD relevant in the first place? In the decision below, the Eighth Circuit joined the Tenth Circuit in holding that

even where an overall transaction is profitable and clearly has economic effects, it can still fall under the ESD for a variety of reasons. *See WFC Holdings v. Commissioner*, 728 F.3d 736, 746 (8th Cir. 2013) (recognizing components of the transaction were economically beneficial, but disallowing deduction because other components were not and could have been simplified); *Sala v. United States*, 613 F.3d 1249, 1253-54 (10th Cir. 2010) (reversing trial court decision upholding loss deduction where the transaction generated a profit, but the tax benefit exceeded the potential and actual profit).

The radical misreading of this Court's authorities by the IRS and the lower courts, and the conflict among the federal circuits regarding the ESD's meaning and applicability, effectively supplant the text of the Code with a malleable and undefined "I know it when I see it" approach to resolving tax disputes. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see also, ACM Partnership v. Commissioner*, 157 F.3d 231, 265 (3d Cir. 1998) (McKee, J., dissenting) (criticizing the economic substance doctrine as akin to a "smell test": "If the scheme is question smells bad, the intent to avoid taxes defines the result as we do not want the taxpayer to 'put one over.'")

Certiorari is necessary to reaffirm the primacy of the Code in determining what the tax law is and in resolving tax disputes. Ideally the Court will announce that there is no ESD, although its "two prongs" may describe a way to find facts in certain difficult fact finding situations (for example, cases addressing who owns property, as in *Frank Lyon*). If not, certiorari is necessary to prevent inconsistent application of the ESD, and to establish when the doctrine is relevant.

II. THE UNAUTHORIZED EXPANSION OF THE ECONOMIC SUBSTANCE DOCTRINE CASTS A PALL OF SUSPICION OVER THE RIGHT OF TAXPAYERS TO DECREASE THEIR TAXES BY LAWFUL MEANS.

The Court should grant the writ of certiorari to clarify the law so that taxpayers can exercise the right this Court recognized in 1935 to decrease their taxes by any lawful means. *See Gregory v. Helvering*, 293 U.S. 465, 469 (1935).

In 2010 Congress enacted Code § 7701(o), which applies only to transactions occurring after March 30, 2010 and, therefore, is not applicable here. It purported to resolve uncertainty about whether the two factual showings a taxpayer must make to escape the ESD (according to certain lower court decisions) are conjunctive or disjunctive: going forward they will be conjunctive. *See* § 7701(o)(1); *see also* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1409(e)(1), 124 Stat. 1029, 1070. The section neither creates nor approves of an economic substance doctrine, but states that whatever it is the courts (referring to lower federal courts) have done under that rubric, the proof required of the taxpayer to escape the government's assertion of the doctrine shall be as specified in § 7701(o) in the future. The text of the statute twice refers to the necessity of the doctrine to be found relevant to the particular transaction, and states that a "determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if this subsection had never been enacted." *See* 26 U.S.C. §§ 7701(o)(1) & (5)(C).

But the fundamental problem for taxpayers is that neither the IRS nor the courts have squarely addressed the relevancy requirement of the ESD prior to or post-codification. Either they do not recognize it as an independent issue at all, or they suggest, without directly saying so, that because they find the taxpayer's actions to be contrary to the purposes of Congress, the taxpayer loses under the ESD. And to be clear, when they discern the purposes of Congress they are not doing so to interpret the statute to prevent the taxpayer's claim; they do so to justify saying the taxpayer loses under the ESD even though the Code has admittedly been satisfied. The Eighth Circuit below did not address the relevance of the doctrine. But it is clear from its analysis that it decided to deny the tax benefits sought not because it interpreted the statute to deny the benefit or because it found the required facts not to have occurred, but because the taxpayer failed to prove out of the two prong test of the ESD. *WFC Holdings Corp. v. Commissioner*, 728 F.3d 736, 738 (8th Cir. 2013) ("We hold that WFC failed to adequately show that the transaction had either objective economic substance or a subjective, non-tax business purpose, and we affirm.").

However, as this Court stated nearly 80 years ago, "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering*, 293 U.S. 465, 469 (1935). A necessary corollary of the right stated by Justice Sutherland in *Gregory* is the ability of taxpayers to know what the tax law permits. Absent an objectively understandable relevancy requirement, however, no amount of careful and reasonable tax planning will avoid the reach of the ESD. Neither the lower federal courts that have applied the ESD, nor the IRS, have shown

any inclination to define the relevance of the doctrine, either globally or step by step. Therefore, lacking guidance from Congress, the ESD's relevance is wholly undefined. An undefined doctrine granting the IRS carte blanche authority to disregard the plain meaning of the Code serves no valid purpose, and instead serves only to instill fear in taxpayers seeking to lawfully reduce their tax burdens. See Yin, George K., *The Problem of Corporate Tax Shelters: Uncertain Dimensions, Unwise Approaches*, 55 Tax L. Rev. 405, 421-22 (Spring 2002) (noting the government often invokes the ESD for its *in terrorem* effect).

On some occasions, as in IRS Chief Counsel Memo AM2012-009, cited above, the IRS has asserted that it will apply the economic substance doctrine when it decides the transaction at issue does not comport with Congress' purposes in writing the statute. Certainly, Congress' purposes can sometimes be discerned and used to interpret the statute. See, e.g., *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012); *United States v. Quality Stores, Inc.*, ---U.S.---- (2014) (interpreting the FICA withholding rules based on analysis of Congress' purposes). However, when the IRS makes this assertion in connection with the ESD it does not go on to interpret the statute, purposively or otherwise. Rather, it asserts the ambiguous ESD as a general anti-loophole rule, concludes that the taxpayer cannot meet the burden of proving out of the ESD, and then announces that the taxpayer loses. Indeed, because most cases applying the ESD go directly to the two prong test, that appears to have become a de facto standard of relevancy: if the taxpayer cannot prove out of the tests, the doctrine must be relevant, and the taxpayer necessarily loses.

Faced with a fundamentally ambiguous doctrine, unconstrained by any relevancy restriction, taxpayers and tax practitioners are rightfully concerned about the continued validity of traditional tax planning vehicles. For example, Code §§ 332(a) and 337(a) allow a parent corporation to receive property of a liquidating subsidiary with neither the parent nor the subsidiary recognizing gain on the transaction. The sections apply when the parent corporation owns at least 80% of the vote and value of the stock of the subsidiary. 26 U.S.C. § 1504(a)(2). If the 80% ownership test is not met, the subsidiary liquidation is taxable under §§ 331 and 336, or may produce a § 165 loss. Therefore, a minor change in stock ownership – for example, a decrease in ownership from 80% to 79% – can convert a non-taxable reorganization into a taxable reorganization, and vice versa.

For more than 50 years corporations have become accustomed to flexibility in asserting control over, or decontrolling, subsidiaries in anticipation of a liquidation in order to achieve the desired tax result – either recognition (to utilize losses) or non-recognition (to avoid gain). Changing stock ownership in order to achieve the desired tax result was approved by the First Circuit in *Granite Trust Co. v. U.S.*, 238 F.2d 670 (1st Cir. 1956), in reliance on *Commissioner of Internal Revenue v. Day & Zimmermann, Inc.*, 151 F.2d 517 (3d Cir. 1945) and *Avco Mfg. Co. v. Commissioner*, 25 T.C. 975 (1956).

In *Granite Trust*, a bank (“parent”) owned 100% of the stock of a subsidiary whose sole asset was the real property occupied by the parent. Because the fair market value of the property had declined and was less than the parent’s basis in the stock of the subsidiary, the banking

authorities pressed the parent to make reductions in the stock basis. To resolve the situation, the parent developed a plan to have the parent acquire the real property at fair market value and then liquidate the subsidiary. But for the non-recognition rule of § 332's predecessor, the acquisition and liquidation would trigger a beneficial tax loss that could be claimed by the parent. After informally deciding to liquidate the subsidiary, the parent sold or otherwise disposed of enough stock to fall below the 80% ownership threshold. The acknowledged purposes of the sale of stock was to avoid the predecessor of Code § 332, which provided that a loss could not be recognized on the liquidation of an 80% subsidiary. The government argued (1) that the "end result" of the transaction was a complete liquidation and that the intermediate steps involving the sales and gift should be disregarded and (2) that there were no valid sales or gift of the stock. The First Circuit rejected both arguments. In holding for the taxpayer, the First Circuit recognized that the facts showed that the transfers of stock were motivated solely by tax considerations, but also found that the transfers of the stock were "legal transactions not fictitious or so lacking in substance as to be anything different from what they purported to be." *Granite Trust*, 238 F. 2d at 678.

Subsequently the IRS acquiesced in another similar decision holding that taxpayers may structure liquidations in a way that makes Code § 332 either applicable or inapplicable. See *Riggs v. Commissioner*, 64 T.C. 474, 489 (1975), *acq.* 1976-2 C.B. 2 ("[S]ection 332 is elective in the sense that with advanced planning and properly structured transactions, a corporation should be able to render section 332 applicable or inapplicable."). And as recently as 2013, the IRS advised taxpayers, by way of

private letter rulings, that they may structure liquidations to achieve desired tax benefits consistent with the *Granite Trust* line of authorities. See IRS Priv. Ltr. Rul. 87-13-041, 1986 WL 372821; IRS Priv. Ltr. Rul. 2010-14-002, 2010 WL 1411503; IRS Priv. Ltr. Rul. 2013-30-004, 2013 WL 3856953; IRS Priv. Ltr. Rul. 2013-34-006, 2013 WL 4496006.

The decision below, which questioned the economic substance of a similar corporate non-recognition provision involving a § 351 exchange, raises concerns that the IRS and the lower courts may attempt to use the ESD to disregard long-accepted tax planning transactions, such as § 332 transactions upheld in *Granite Trust*. Those concerns were increased on January 2, 2014, when the IRS formally announced, for the first time, that it will no longer provide rulings on the “treatment of transactions in which stock of a corporation is transferred with a plan or intention that the corporation be liquidated.” IRS Rev. Proc. 2014-3, 2014-1 IRB 111, sec. 3.01(33). Although the procedure does not state that the reason for the change is due to potential application of the ESD, taxpayers and their advisors are hard pressed not to worry that, in light of the decision below and the general expansion of the ESD, the IRS has changed its view regarding the application of the ESD to corporate liquidations and reorganizations.

CONCLUSION

Because the economic substance doctrine is too vague to be fairly applied to taxpayers and because it has no proper ground in the tax jurisprudence of this Court, this Court should grant Petitioner's writ of certiorari to review the Eighth Circuit's application of this doctrine, inform the taxpaying public and practitioners whether it authorizes this judicial addendum to the federal tax laws, and, if so, clarify its meaning and applicability.

Respectfully submitted,

MARY T. BENTON

Counsel of Record

GEORGE B. ABNEY

ALSTON & BIRD LLP

One Atlantic Center

1201 West Peachtree Street

Atlanta, GA 30309

(404) 881-7000

mary.benton@alston.com

Attorneys for Amicus Curiae