General Utilities Redux?

By Robert W. Wood • Wood & Porter • San Francisco

For my generation, one of the sea changes in the tax law occurred in 1986, when the so-called *General Utilities* doctrine was repealed. [*General Utilities & Operating Co. v. Helvering*, 296 US 200 (1935).] I started tax practice in 1979, and by 1986 thought I knew something—only later realizing I certainly did not. As I adjusted to that too, it was shocking to see the soul-searching *General Utilities* repeal brought.

This was before the prevalence of LLCs and LLPs. Although we certainly had flow-through entities, some of us thought Subchapter C of the Code represented a higher calling than Subchapter K. I was wrong. Despite the slashing away of decades of corporate tax doctrine that recognized the wisdom of tax-free liquidations, it took some adjustment.

Return of the King?

But like wide neckties morphing into thin ones, or thin ones getting fatter (the back of the closet can have a kind of evergreen quality), I wonder if Subchapter C tax lawyers may be back in vogue again soon. To be sure, no one is speaking fervently about an un-repeal of the *General Utilities* doctrine. (As long as we're on that subject, I have to confess I would love to see it.) Still, talk of increased individual income tax rates—which seems almost inevitable in the near future—may put us back into a mode where top individual rates may outpace top corporate rates.

Will that amount to a cold shoulder for flow-through entities? A boon to C corporations that will pay tax at a lower rate? Assuming that operating income from year to year is the most important factor, perhaps so. Yet gain on sale or liquidation is arguably far more important. Assuming *General Utilities* repeal stays in its grave, my guess is that hordes will not flock to C corporation heaven.

Some commentators, dare I say, are twittering about it. A few percentage points in comparative tax rates may not matter, some have noted, but a bigger rate differential well could. When you add into the mix the question what will happen to the 15-percent dividend tax rate currently prevailing (but scheduled to expire) you have an interesting dynamic. Stay tuned.

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