



1981

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Recommended Citation

Nancy Heydemann, *Taxation - Brother-Sister Controlled Corporations - Treasury Regulation Section 1.1563(a)(3) Invalidated*, 4 U. ARK. LITTLE ROCK L. REV. 333 (1981).

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**TAXATION—BROTHER-SISTER CONTROLLED CORPORATIONS—
TREASURY REGULATION SECTION 1.1563-1(a)(3) Invalidated. *Vogel Fertilizer Co. v. United States*, 634 F.2d 497 (Ct. Cl. 1980), cert. granted, 101 S. Ct. 1693 (1981).**

Arthur Vogel held all of the stock of Vogel Popcorn Company.¹ Vogel also owned 77.49 percent of the stock of taxpayer Vogel Fertilizer Company (Vogel). The remaining 22.51 percent of this company's stock was owned by Richard Crain.² In computing its tax liability for 1973 through 1975, taxpayer Vogel did not claim the full surtax exemption because it originally treated itself and Vogel Popcorn Company as members of a brother-sister controlled group of corporations as defined by Internal Revenue Code section 1563(a)(2). In 1976, however, Vogel asserted that it was not part of a brother-sister controlled group and claimed a refund. After its claim was disallowed, Vogel sued for a refund in the United States Court of Claims.

Vogel contended that because Richard Crain did not own stock in each corporation his stock ownership could not be considered for purposes of the eighty percent test of Internal Revenue Code section 1563(a)(2). This section defines a brother-sister controlled group as:

Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own . . . stock possessing—

(A) at least 80 percent . . . of each corporation, and

(B) more than 50 percent . . . of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

The government pointed to Treasury Regulation section 1.1563-1(a)(3)³ which does not require common ownership under the eighty percent test, and contended that the treasury regulation should govern since it is not inconsistent with the Internal Revenue

1. Vogel owned all of the common stock, which was over 80 percent of all classes of stock entitled to vote, and he held the voting preferred stock as trustee of the Alex Vogel Family Trust.

2. The government did not contend that the stock owned by either person may be attributed to the other under I.R.C. § 1563(d).

3. Treas. Reg. § 1.1563-1(a)(3) (1972) provides in pertinent part:

(i) The term "brother-sister controlled group" means two or more corporations if the same five or fewer persons who are individuals, estates, or trusts own (directly

Code section it interpreted. The Court of Claims held for Vogel and partially invalidated Treasury Regulation section 1.1563-1(a)(3) as being an overly expansive interpretation of Internal Revenue Code section 1563(a)(2). *Vogel Fertilizer Co. v. United States*, 634 F.2d 497 (Ct. Cl. 1980), *cert. granted*, 101 S. Ct. 1693 (1981).

Over the years, Congress has provided more and more stringent means of preventing abuse of the tax system by groups of corporations conducting business as a single entity while claiming multiple surtax exemptions.⁴ Prior to the Revenue Act of 1964,⁵ Internal Revenue Code section 1551 was one provision which was specifically aimed at corporate diversification for the purpose of securing the surtax exemption.⁶ Section 1551 was limited in its effectiveness because it applied only when one corporation transferred property

and with the application of the rules contained in paragraph (b) of § 1.1563-3), singly or in combination, stock possessing—

(a) At least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation; and

(b) More than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

4. This abuse occurred as a result of the corporate income tax structure. Prior to 1979, the corporate income tax consisted of a normal tax imposed on all taxable income, and a surtax, which was added to the normal tax. The first \$25,000 of the corporation's taxable income was exempted from the surtax. Revenue Act of 1964, Pub. L. No. 88-272, Ch. 1, § 11(d), 78 Stat. 19 (current version at I.R.C. § 11(d)). Controlled groups of corporations were unable to claim the full surtax exemption provided by § 11(d). However, controlled corporate groups could elect to pay a 6% penalty, I.R.C. § 1562(b), and utilize the multiple surtax exemption under I.R.C. §§ 1562 and 1564(a). I.R.C. § 1562 was repealed by sections 401(a)(2) and (h)(1) of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 604. As phased out, it was not applicable to taxable years beginning after 1974. Section 1561(a) was amended effective December 31, 1974, by sections 401(a)(1) and (h)(1) of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 604. After 1974, a controlled group of corporations was allowed a single surtax exemption which could be divided equally among the corporations comprising the group or allocated by agreement.

For 1979 and thereafter all corporate income in excess of \$100,000 is taxed at a rate of 46%. Revenue Act of 1978, Pub. L. No. 95-600 § IV(K)1, 92 Stat. 2763, as amended by Economic Recovery Act of 1981, Pub. L. No. 97-34, — Stat. —. A lower-than-maximum tax rate on a limited amount of corporate earning is achieved through a bracket system of four \$25,000 brackets, covering the first \$100,000 of taxable income. I.R.C. § 11. A controlled corporate group may apply the less-than-maximum rates to only one of each of the \$25,000 income tax brackets. Income taxed at the rate provided for each bracket is allocated equally among members of the controlled group unless the members consent to a plan calling for an unequal allocation. I.R.C. § 1561(a).

5. Revenue Act of 1964, Pub. L. No. 88-272, 78 Stat. 19 (1964).

6. I.R.C. § 1551 (originally enacted as Small Business Tax Revision Act of 1958, Pub. L. 85-866, Title II, § 205(a), 72 Stat. 1676 (1958)).

to another corporation, and not when the multiple corporations were created by a transfer of property from the stockholders of the first corporation to the second corporation.⁷ Further, the section required a showing of improper tax motive for the use of more than one corporation.⁸ Section 1551 also contained a control component requiring that the transferor corporation or its stockholders own eighty percent or more of the transferee corporation, in either voting power or total value of shares.⁹ Virtually every litigated case prior to 1964 was decided by a determination of the taxpayer's motive and no case seriously raised any question of interpretation of the section's control requirements.¹⁰

The Revenue Act of 1964 significantly expanded the Commissioner of Internal Revenue's power to deal with multiple surtax exemptions. First, a mechanical test based upon stock ownership was incorporated into section 1551 thereby eliminating the question of taxpayer motive from determinations regarding controlled group status under that section.¹¹

Second, sections 1561 through 1563 were added to the Internal Revenue Code. Section 1563 defined a brother-sister controlled group as two or more corporations where one individual owned eighty percent or more of the stock of each of two or more corporations.¹² Once a group of corporations came within the scope of section 1563, section 1561 would limit the group of controlled corporations to one surtax exemption under section 11(d), to be divided equally or apportioned among the corporations if all members

7. *Id.*

8. I.R.C. § 1551(a).

9. I.R.C. § 1551(b).

10. Thomas, *Brother-Sister Multiple Corporations—The Tax Reform Act of 1969 Reformed by Regulation*, 28 TAX L. REV. 65, 69 (1972).

11. I.R.C. § 1551(b)(2). Under section 1551(b)(2), a brother-sister controlled group is deemed to exist when five or fewer persons own in the aggregate at least 80 percent of the voting stock of each corporation or 80 percent of the total value of the outstanding stock of each corporation, I.R.C. § 1551(b)(2)(A), and when these same persons own more than 50 percent of the value or voting power of the stock in each corporation taking into account the stock ownership of each such person only to the extent that such individual's stock ownership is identical with respect to each such corporation, I.R.C. § 1551(b)(2)(B). Further, provisions were added to section 1551 making it applicable to transfers of property from individuals, as well as from corporations, to a corporation if those individuals controlled both the transferee corporation and another corporation. I.R.C. § 1551(a)(3). Thus, the section no longer covers only situations in which there has been a transfer of property from a corporation.

12. Revenue Act of 1964, Ch. 6, § 1563(a)(2), added Pub. L. No. 88-272, Title II, § 235(a), Feb. 26, 1964, 78 Stat. 120.

consent.¹³

According to the Treasury Department, the 1964 legislation reduced but did not eliminate the substantial tax savings claimed by businesses through the use of multiple corporations.¹⁴ The eighty percent ownership test of section 1563(a)(2) was easily avoided where a group of stockholders operated more than one corporation as an economic enterprise, while carefully insuring that no one stockholder's ownership exceeded eighty percent of more than one corporation.¹⁵

In 1969 the Treasury proposed and Congress adopted in sections 1561 and 1563 the eighty percent and fifty percent tests of section 1551.¹⁶ The tests, which expanded the definition of controlled group to include the aggregate ownership of five or fewer persons, replaced the former test of section 1563(a)(2).¹⁷ The fifty percent test was added to section 1563(a)(2) for the specific purpose of insuring "that this expanded definition of brother-sister controlled group [applied] only to those cases where the five or fewer individuals [held] their eighty percent in a way which [allowed] them to operate the corporations as one economic entity"¹⁸

13. Revenue Act of 1964, added Pub. L. No. 88-272, Title II, § 235(a), Feb. 26, 1964, 78 Stat. 116, and amended Pub. L. No. 91-172, Title IV, § 401(a)(1), Dec. 30, 1969, 83 Stat. 599.

14. See general explanation of Treasury Tax Reform Proposals in STAFF OF HOUSE WAYS AND MEANS COMMITTEE, 91ST CONG., 1ST SESS., HEARINGS BEFORE THE COMMITTEE ON WAYS AND MEANS—pt. 14, pg. 5387 (Comm. Print 1950).

15. *Id.* at 5396.

16. I.R.C. § 1563(a)(2). Revenue Act of 1969 amended Tax Reform Act of 1969, Pub. L. No. 91-172, Title IV, § 401(c), (d), Dec. 30, 1969, 83 Stat. 602.

17. See general explanation of Treasury Tax Reform Proposals in STAFF OF HOUSE WAYS AND MEANS COMMITTEE, 91ST CONG., 1ST SESS., HEARINGS BEFORE THE COMMITTEE ON WAYS AND MEANS—pt. 14, pg. 5387 (Comm. Print 1950).

The explanation is clarified with the following example:

Part (1) of this test is satisfied if the group of five or fewer persons as a whole owns at least 80 percent of the voting stock or value of shares of each corporation, regardless of the size of the individual holdings of each person. Thus, for example, part (1) (but not necessarily part (2)) is met whether one person owns 80 percent of the voting stock of each corporation, four persons each own 20 percent of the voting stock of each corporation, or one person owns 60 percent of the voting stock of one corporation and 40 percent of another, and another person owns 40 percent of the voting stock of the first and 60 percent of the second.

Part (2) of the test is satisfied only if the same five or fewer persons own more than 50 percent of the voting stock or value of shares of each corporation, considering stock owned by a particular person only to the extent that it is owned identically in each of the corporations. Thus, for example, a person who owns 80 percent of the voting stock of one corporation and 30 percent of another would be considered as owning 30 percent of both corporations for purposes of part (2) of the test.

Id. at 5169.

18. *Id.* at 5394.

The House Report for the Revenue Act of 1969 states that "the stock ownership test for brother-sister controlled groups would be the same test employed in section 1551(b)(2) of the Code."¹⁹ One author has noted the significance of the use of the term "employed" as it manifests the intent of Congress to adopt the precise interpretation of the test being applied under the section, rather than the mere words of Code section 1551.²⁰ Although there have been no reported cases construing the meaning of the control test under section 1551(b)(2), the treasury regulations interpreting it indicate that to be considered for purposes of the ownership tests each person must own some stock in each corporation.²¹

Despite the legislative intent to adopt the same test employed in section 1551 for section 1563(a)(2), the regulation under section 1563(a)(2) alters the interpretation of the statute by including persons owning stock "singly or in combination" for purposes of the eighty and fifty percent tests.²² Although this language brings otherwise excluded corporations into the purview of the statute, the Treasury Department gave no indication prior to enactment that such an expansive application of the statute was contemplated.

The validity of Treasury Regulation section 1.1563-1(a) has been extensively litigated. In *Fairfax Auto Parts v. United States*²³ the Tax Court invalidated the regulation, holding that a person must own stock in each member of the controlled group in order for his stock to be taken into account for the ownership tests of section 1563(a)(2).²⁴ The Fourth Circuit Court of Appeals reversed the Tax Court in a short *per curiam* opinion²⁵ agreeing with the lower court's four dissenting justices, who had argued that treasury regulations are entitled to great weight and should be declared invalid only if they are "unreasonable and clearly inconsistent with the statute."²⁶

Prior to the Fourth Circuit's ruling in *Fairfax*, the Tax Court

19. H.R. Rep. No. 91-413 (Part 2), 91st Cong., 1st Sess., 76 (1969). The Senate Report follows the House Report without change. S. Rep. No. 91-552, 91st Cong., 1st Sess., 135-36 (1969).

20. See Thomas, *supra* note 10.

21. *Id.*

22. Treas. Reg. 1.1563-1(a)(3) (1972). See note 3 *supra*.

23. 65 T.C. 798 (1976), *rev'd and remanded*, 548 F.2d 501 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977).

24. *Fairfax Auto Parts v. Commissioner*, 65 T.C. 798, 803 (1976). See note 36 *infra* for an explanation of the Tax Court's reasoning.

25. *Fairfax Auto Parts v. Commissioner*, 548 F.2d 501 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977).

26. *Fairfax Auto Parts v. Commissioner*, 65 T.C. 798, 807 (1976) (Simpson, J., dissenting).

held for the taxpayer on this issue in *T.L. Hunt, Inc. v. Commissioner* and was reversed by the Eighth Circuit Court of Appeals.²⁷ The Eighth Circuit subsequently followed *Hunt* in *Yaffee Iron and Metal Corp. v. United States*.²⁸ Although adhering to its views in *Fairfax*, the Tax Court followed *Hunt* in *Dixie Realty Co. v. Commissioner*²⁹ since the appeal in *Dixie* lay in the Eighth Circuit.³⁰

Despite the appellate courts' rulings, the Tax Court refused to waiver on its interpretation of the statute and again held for the taxpayer in *Allen Oil Co., v. Commissioner*, which was reversed by the Second Circuit Court of Appeals.³¹ After the Court of Claims decision in *Vogel*, the Fifth Circuit in *Delta Metalforming Co. v. Commissioner* affirmed the Tax Court and aligned itself with the Court of Claims.³² The Tax Court has persisted in holding for the taxpayer on this issue in any case appealable to a circuit which has not yet determined the validity of Treasury Regulation section 1.1563-1(a)(3).³³

In *Vogel Fertilizer Company*, the United States Court of Claims recognized that Internal Revenue Code section 1563(a)(2) is subject to at least four different interpretations³⁴ and that the correct interpretation should not be determined solely by reference to the statutory language.³⁵ Although the court approved of the Tax Court's analysis of the statutory language in *Fairfax*,³⁶ it admitted that "the

27. 45 T.C.M. (P-H) 952 (1976), *rev'd*, 562 F.2d 532 (8th Cir. 1977).

28. 593 F.2d 832 (8th Cir. 1979), *cert. denied*, 444 U.S. 843 (1979).

29. 49 T.C.M. (P-H) 1321 (1980).

30. *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971). The Tax Court is not subject to geographic division. According to *Golsen*, however, it will follow a court of appeals decision on an issue when appeal lies solely to that court. See 28 U.S.C. § 1294 (1976) concerning appellate procedure for district courts, and 26 U.S.C. § 7482 (1976) concerning appellate procedure for the United States Tax Court.

31. 48 T.C.M. (P-H) 348 (1979), *rev'd*, 614 F.2d 336 (2d Cir. 1980).

32. 47 T.C.M. (P-H) 1473 (1978), *aff'd*, 632 F.2d 442 (5th Cir. 1980) (appeal pending).

33. *Charles Baloian Co. v. Commissioner*, 68 T.C. 620 (1977) (appeal pending to Ninth Circuit); *Davidson Chevrolet Co. v. Commissioner*, 48 T.C.M. (P-H) 1598 (1979) (appeal pending to Sixth Circuit).

34. *Vogel Fertilizer Co. v. United States*, 634 F.2d 497 (1980), *cert. granted*, 101 S. Ct. 1693 (1981) (citing *Libin and Abramowitz, Multiple Corporations: A Surprising Interpretation of Section 1563(a)(2) in Temporary Regulations*, 2 *The Tax Advisor* 326 (1971)). These interpretations are described as "literal," "sweeping," "intermediate," and "narrow."

35. *Id.* at 501.

36. The court stated:

The key words of the statute relevant to an analysis of the issue are: if 5 or fewer persons . . . own . . .

(A) at least 80 percent . . . of each corporation, and

(B) more than 50 percent . . . of each corporation, taking into account the

different view taken by Treas. Reg. § 1.1563-1(a)(3) is not wholly unreasonable as a construction of the words appearing in section 1563(a)(2)."³⁷

The principal reason that the court held the treasury regulation invalid was because it found the regulation to be totally inconsistent with the legislative history and purpose of the statute.³⁸ The Treasury explanation of the 1969 proposals relating to the expanded definition of a brother-sister controlled group in section 1563(a)(2) clearly indicated that each of the five or fewer persons considered under the eighty percent test must hold stock in each corporation in the controlled group.³⁹ The technical explanation of Treasury Tax Reform Proposals in hearings on the subject of tax reform before the House Committee on Ways and Means⁴⁰ contains the following statement:

Under the proposal, the present definition would be changed so that a group of corporations would constitute a brother-sister controlled group if (1) the same *five* or fewer persons own at least

stock ownership of *each such person* only to the extent such stock ownership is identical with respect to each such corporation. [§ 1563(a)(2). Emphasis supplied].

Since the "five or fewer persons" is the conjunctive subject of both the 80 percent test and the 50 percent test, it cannot be gainsaid that both tests must be satisfied by the same ownership group. However, to gain entrance into the ownership group for purposes of the 50 percent test one must possess stock in each corporation involved since an absence of such stock ownership produces an identical stock ownership of zero or, put another way, no stock ownership at all. If ownership of stock in each corporation involved is a precondition to membership in the ownership group for purposes of the 50 percent test, and the ownership groups for the 50 percent test and 80 percent test are one and the same, it follows in our mind that one must own stock in each corporation before his stock can be taken into account for purposes of the 80 percent test.

Furthermore, the language of the 50 percent test comports with this analysis. The words "each such person" appearing therein refer to the "five or fewer persons" constituting the ownership group for purposes of both the 80 percent and 50 percent tests. The import of such usage is that each person – and not just some of the persons – counted for purposes of the 80 percent test must be also counted for purposes of the 50 percent test. To interpret the statutory language as respondent has done in his regulation is plainly inconsistent with the thrust of the statutory language. Hence, we hold that for a person's stock ownership to be taken into account for purposes of the 80 percent test that person must own stock in each member of the brother-sister controlled group.

Vogel Fertilizer Co. v. United States, 634 F.2d 497, 501-02 (Ct. Cl. 1980), *cert. granted*, 101 S. Ct. 1693 (1981) (quoting *Fairfax Auto Parts v. Commissioner*, 65 T.C. 798, 802-03 (1976)). Both common English usage and the "last antecedent" doctrine support the Tax Court's interpretation. *Id.* at 502.

37. *Id.* at 503.

38. *Id.* at 509.

39. *Id.* at 503.

40. See HEARINGS, *supra* note 14.

80 percent of the voting stock or value of shares of each corporation, and (2) these five or fewer individuals own more than 50 percent of the voting power or value of shares of each corporation considering a particular person's stock only to the extent that it is owned identically with respect to each corporation.⁴¹

The use of the word "same" in the above sentence convinced the court that the same five or fewer persons must own stock in each corporation.⁴²

Further, the court found that the regulation removed the pre-1969 Tax Reform Act's requirement that each stockholder own some stock in each corporation.⁴³ The removal of this requirement was not mentioned in any of the Treasury's explanations of the proposals, which stated only that present law is expanded "by considering the combined stock ownership of five individuals, rather than one individual, in applying the 80 percent test."⁴⁴ The court noted that in every example in the Treasury explanation involving the eighty percent test, the persons mentioned owned some stock in each corporation.⁴⁵ "[I]f the Treasury was indeed proposing to remove the requirement of sameness in the 80 percent test, it is scarcely credible that an example to illustrate this important change would not have been given."⁴⁶ The eighty percent test was to be a test of independent significance while the fifty percent test, according to the Treasury's explanation, was added to insure that the corporations are in fact controlled by the group of stockholders as one economic entity.⁴⁷ The explanation states that "even where the 80 percent ownership test is met, the brother-sister definition will not apply unless the stockholdings of the individuals in the various corporations also meet the 50 percent identical ownership test."⁴⁸ The emphasis placed on the eighty percent test as the primary requirement convinced the court that it was intended to measure only the number of stockholders and not the extent of overlapping stock ownership.⁴⁹

The government argued that Congress had implicitly adopted Treasury Regulation section 1.1563-1(a)(3) when it incorporated

41. *Id.* at 5168.

42. *Vogel Fertilizer Co. v. United States*, 634 F.2d 497, 507 (Ct. Cl. 1980), *cert. granted*, 101 S. Ct. 1693 (1981).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 507-08.

section 1563 by reference into subsequent statutes at a time when the treasury regulation had already been published.⁵⁰ The court rejected this argument, however, since there was no indication in the legislative history that Congress was aware of any regulation interpreting the control requirements for brother-sister corporations.⁵¹ Furthermore, the court found it "highly unlikely that Congress would require a lesser identity of ownership between brother-sister corporations owned by up to five persons than between a more centralized and more easily controlled parent-subsidiary group."⁵² The court found that no reasonable purpose was served by counting non-stockholders in the eighty percent test⁵³ and thus held the regulation invalid.⁵⁴

The Court of Claims in *Vogel Fertilizer Company* correctly interpreted Internal Revenue Code section 1563(a)(2). The legislative history of this section affords no basis for holding that Vogel Fertilizer Company and Vogel Popcorn Company are a brother-sister controlled group of corporations. Since Richard Crain did not hold stock in Vogel Popcorn Company, his business interests were not the type which Congress was attempting to regulate by taxing as a single entity corporations which are controlled by the same group of stockholders. By including Crain as one of the five or fewer persons owning eighty percent of the stock of each corporation, the government unjustly tied him to a corporation in which he had no interest. The

50. *Id.* at 508. The government argued that since Internal Revenue Code section 1563(a)(2) contains identical language to the previously enacted section 1551(b)(2), Congress must have intended to adopt the interpretation of this language made in Treas. Reg. § 1.1551-1 (1967).

51. *Vogel Fertilizer Co. v. United States*, 634 F.2d 497, 508 (Ct. Cl. 1980), *cert. granted*, 101 S. Ct. 1693 (1981). Likewise, the Court failed to draw any definite conclusions with respect to proper interpretation of § 1563(a)(2) from the later enactment of ERISA, the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, §§ 1013(c)(1) and 1015, 88 Stat. 921, 925, which incorporated § 1563(a) by reference in §§ 404(a)(1)(c) and 414(b) of the Internal Revenue Code after Treas. Reg. § 1.1563-1(a)(3) had been published.

52. *Id.* at 510. Section 1563(a)(1) defines a "parent-subsidiary controlled group" as existing where a parent corporation owns stock representing 80 percent of the value or voting power of one or more subsidiary corporations either directly or indirectly through a subsidiary.

53. *Id.* at 511. The court was not convinced by the Second Circuit's opinion in *Allen Oil Co. v. Commissioner*, 614 F.2d 336 (2d Cir. 1980), nor the majority opinion in *T.L. Hunt, Inc. v. Commissioner*, 562 F.2d 532, 536 (8th Cir. 1977), finding that their explanations merely reflect the Treasury's interpretations of the 80 percent test as exemplified by Treas. Reg. § 1.1563-1(a)(3). The courts in *Allen* and *T.L. Hunt* viewed the 80 percent test as insuring that the stock is closely held. However, the court in *Vogel* finds that this only restates the defendant's interpretation and does not deal with the corporation's being considered one corporate entity. *Id.* at 510-11.

54. *Id.* at 512.

only common stockholder, Arthur Vogel, failed to satisfy the eighty percent test. The addition of Crain's stock ownership to the eighty percent test did not increase the relationship between the corporations. In effect, the treasury regulation had altered the congressional mandate by lowering the figure which Congress chose to measure substantial identity between two or more corporations.

The Court of Claims is a national court available to every taxpayer.⁵⁵ Although the Tax Court and district courts are bound by decisions of the court of appeals of the circuit in which the taxpayer resides, the Court of Claims is bound only by decisions of the United States Supreme Court.⁵⁶ *Vogel* created an opportunity for taxpayers to avoid litigating in Tax Court or district court, when those courts would be bound by a court of appeals decision upholding the validity of Treasury Regulation section 1.1563-1(a)(3), by bringing the action in the Court of Claims. The validity of the treasury regulation will finally be resolved by a Supreme Court decision on the issue.⁵⁷

Nancy Heydemann

55. 28 U.S.C. § 1491 (Supp. II 1978).

56. 28 U.S.C. § 1255 (1976).

57. *Vogel Fertilizer Co. v. United States*, 634 F.2d 497 (Ct. Cl. 1980), *cert granted*, 101 S. Ct. 1693 (1981).