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From: [REDACTED]

Sent: Monday, August 29, 2022 12:23:58 PM

To: [REDACTED]

Cc:

Bcc:

Subject: RE: 7701(o) Question

Hi, [REDACTED].

There is no case law on section 7701(o) relating to when a transaction was “entered into” for purposes of applying the codified doctrine. The Service did, however, issue guidance in analyzing “transaction” for the purposes of section 7701(o).

Whether the codified economic substance doctrine applies to the transaction (because it was entered into after the March 30, 2010 effective date) is a factual inquiry. The codified doctrine, however, defines “transaction” to include a “series of transactions.” I.R.C. § 7701(o)(5)(D). The facts below seem to indicate that this may be a “series of transactions” depending on how factually similar the pre-codified steps are to the steps taken in 2015.

The Service can use an aggregation or disaggregation approach to determine whether a transaction lacks economic substance under section 7701(o). See I.R.S. Notice 14-58, 2014-44 I.R.B. 746. The aggregation approach interprets “transaction” to include all of the steps taken together when a plan that generates a tax benefit involves a series of interconnected steps. Id. From the facts described below, it appears that the creation of the NewCap, merging OldCap into NewCap, and the issuance of new policies would be a series of interconnected steps to generate a tax benefit. Under the aggregation approach, therefore, it appears “the transaction” was entered into before the effective date of section 7701(o), as the steps are included together.

The disaggregated approach applies when a series of steps includes a tax motivated step that is not necessary to achieve a non-tax objective, the “transaction” may include only the tax-motivated steps that are not necessary to accomplish the non-tax goals. See I.R.S. Notice 14-58. The disaggregated approach may apply here. If the tax-motivated step is entering into new policies, there may be an argument that those steps can be viewed in isolation, notwithstanding what took place with OldCap and NewCap. The facts here would need to show that what occurred after 2010 is not part of a “series of transactions” and that the tax-motivated step is not necessary to obtain a non-tax goal.

It should be noted, however, that the codification of the economic substance doctrine did not supplant the common law doctrine. The common law doctrine can be applied to transactions entered into before and after March 30, 2010.

Let me know if you would like to schedule a call to discuss further.

[REDACTED]

[REDACTED]
[REDACTED]