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Barnes Group: Tax Court Turns A Blind Eye to *Rauenhorst*

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In this article, Jacobs argues that the Tax Court's analysis in *Barnes Group Inc. v. Commissioner* is fundamentally flawed.

Introduction

A decade ago, in *Rauenhorst v. Commissioner*,[1] the Tax Court presumably laid to rest the idea that the commissioner has the right to litigate against his own revenue rulings and other published guidance. However, in its recent decision in *Barnes Group Inc. v. Commissioner*,[2] the Tax Court not only permitted the commissioner to argue against a revenue ruling but imposed substantial penalties as well.

Even though the taxpayer cited *Rauenhorst* prominently in its briefs regarding its reliance on the IRS's revenue ruling, the Tax Court in *Barnes* did not cite or discuss *Rauenhorst*. The omission of *Rauenhorst* raises serious questions regarding the Tax Court's intentions, especially in light of its acceptance of contentions that were either explicitly or implicitly rejected in *Rauenhorst* and its sister decision *Dover Corp. & Subs. v. Commissioner*,[3] another precedent division opinion of the Tax Court.

The Tax Court in *Barnes* held that revenue rulings are only reliable when the transactional facts do not exceed the scope of the facts in the revenue ruling. However, many of the IRS's seminal revenue rulings, including the revenue ruling at issue in *Barnes*, contain an intentionally generic set of facts and are designed to state legal principles of universal application. The Tax Court's treatment of revenue rulings in *Barnes* not only is contrary to its prior precedents but also is unworkable in the context of those types of broad legal rulings.[4]

Facts of *Barnes*

A deep understanding of the facts in *Barnes Group* is not critical to the issues presented in this article. The important facts are that the taxpayer, a U.S. corporation (Barnes), was engaged in a manufacturing and distribution business and operated both domestically and overseas. As a result of several business acquisitions, Barnes had significant company debt. At the same time, Barnes's foreign subsidiaries held a substantial amount of cash and were generating cash in excess of their operating needs. A dividend or loan of this excess cash to the taxpayer — that is, by repatriation — would trigger a significant federal tax liability.[5] Barnes developed a foreign finance structure (aka a reinvestment plan) to free up the overseas cash for use domestically — without triggering a federal tax liability.

Under the reinvestment plan, a series of transactions were established that ultimately resulted in cash held by one of Barnes's indirect, wholly owned foreign subsidiaries (ASA) being transferred to Barnes. First, Barnes formed a domestic foreign financing entity (Delaware) and a foreign financing entity (Bermuda). Second, as part of a tax-free section 351 transaction, ASA and Barnes transferred foreign currency to Bermuda in exchange for Bermuda common stock. Third, in a second section 351 transaction, Bermuda and Barnes transferred Bermuda common stock and foreign currency to Delaware in exchange for Delaware stock (Barnes received Delaware common stock and Bermuda received Delaware preferred stock). Fourth, Delaware converted the foreign currency it received from Bermuda and Barnes into U.S. dollars and transferred those funds to Barnes as a loan.

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[1] 119 T.C. 157 (2002).
[2] T.C. Memo. 2013-109.
[3] 122 T.C. 324 (2004).

[4] I offer no comment on the overall merits of the Tax Court's decision or the tax strategy involved. *See* Monte A. Jackel, ''Transactions Done to Fit the Tax Strategy: We Should Know Better,'' *Tax Notes*, May 20, 2013, p. 935. Rather, this article is directed to those portions of the *Barnes* decision that speak to the IRS's revenue rulings.

[5] A distribution to the extent of earnings and profits would represent a taxable dividend. Sections 301 and 316. A loan from a controlled foreign corporation would be treated as taxable income. Sections 951 and 956.

Ultimately, ASA and Delaware ended up owning all of the common stock of Bermuda and Bermuda ended up owning all of the preferred stock of Delaware. Barnes ended up with cash that it used to pay off its debt.[6] Thus, the reinvestment plan accomplished Barnes's objectives of repatriating some of its overseas cash.

Subpart F Rules

Subpart F provides specific rules relating to controlled foreign corporations such as ASA and Bermuda. Under those rules, a loan or equity investment from a CFC may result in taxable income. Specifically, under section 951, U.S. shareholders of a CFC are taxed directly on their pro rata share of the CFC's earnings that are invested in specified types of U.S. property.[7] For this purpose, U.S. property includes the stock and debt of U.S. corporations.[8] However, the CFC's investment is expressly limited to the CFC's adjusted basis in the U.S. property.[9]

The purpose of the subpart F rules is to require the shareholder of a CFC to report his share of the CFC's undistributed income.[10] The rules measure the extent of the U.S. shareholder's taxation by the CFC's investment in U.S. property and beyond that limit the taxation of the undistributed income to the CFC's adjusted basis in U.S. property. The subpart F rules address situations in which overseas money is repatriated in ways that are traditionally not taxable — that is, loans.

What is important here is the application of the adjusted basis rule in section 956(a) and whether the IRS's position in Rev. Rul. 74-503[11] and Rev. Rul. 2006-2[12] foreclose the attribution of income to Barnes under that rule for purposes of subpart F.

Revenue Rulings

In Rev. Rul. 74-503, one corporation (X) transferred shares of its treasury stock (with a fair market value of $3,000x and purchased by X years earlier for $2,000x) to a second corporation (Y) in exchange for newly issued shares of Y stock (with an FMV of $3,000x) that constituted 80 percent of the only outstanding class of stock of Y. The transaction was a tax-free section 351 transaction for X, and no gain or loss was recognized to Y under section 1032(a). No other facts or limitations on the facts are identified in the ruling, including whether X and Y are domestic or foreign corporations.

Rev. Rul. 74-503 addresses the calculation of the basis of the stock received by Y in a section 351 transaction involving the exchange of its own stock, which in turn requires the determination of the basis of the stock transferred by X.

Section 358(a) generally applies to determine the basis of property received by a transferor in a section 351 transaction. However, section 358(e) provides that section 358(a) does not apply to property acquired by a corporation in an exchange of its own stock as consideration, in whole or in part, for the transfer of property to it. Therefore, Rev. Rul. 74-503 concludes that the basis rules in section 358(a) are not applicable in determining the basis of the Y stock received by X in the transaction.

Rev. Rul. 74-503 further concludes that under reg. section 1.1032-1(d), the basis of the X stock received by Y and the basis of the Y stock received by X is determined under section 362(a) because the transaction also qualifies, for purposes of determining basis, under section 351. Under section 362(a), the basis to a corporation of property acquired in a section 351 transaction is the same as it would be in the hands of the transferor. Therefore, Rev. Rul. 74-503 states that the basis of the X treasury stock received by Y will be the same as it was in the hands of X immediately before the exchange. Moreover, the basis of the newly issued stock of Y received by X is the same as it was in the hands of Y immediately before the exchange.

Rev. Rul. 74-503 concludes that the basis of previously unissued stock in the hands of the corporation issuing it in a transaction to which section 362 applies is zero. Rev. Rul. 74-503 treats a corporation's treasury stock (that is, the stock of X) the same as its previously unissued stock. Accordingly, Rev. Rul. 74-503 holds that the basis of the X treasury stock received by Y is zero and the basis of the newly issued Y stock received by X is zero (the zero basis doctrine).

Rev. Rul. 74-503 was a key component of the tax analysis for the reinvestment plan. Importantly, in an opinion letter provided to Barnes before the execution of the reinvestment plan, PricewaterhouseCoopers analyzed whether the exchanges involving Delaware and Bermuda resulted in income inclusion under sections 951 and 956. Based on the zero-basis doctrine set forth in Rev. Rul. 74-503, the opinion letter concluded that Bermuda should have a zero basis in the Delaware preferred stock for U.S. federal income tax purposes because Bermuda had exchanged its own stock in exchange for Delaware preferred stock as part of a section 351 transaction. Consequently, under the adjusted basis rule in section 956, the PwC opinion concluded that Barnes

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[6] A second series of transactions involving the same entities and steps was undertaken as part II of the reinvestment plan.

[7] Sections 951(a)(1)(B) and 956(a).

[8] Section 956(c)(1)(B) and (C).

[9] Section 956(a).

[10] Boris I. Bittker and James S. Eustice, *Federal Income Taxation of Corporations and Shareholders*, para. 15.61[3], at 15-149 (2002).

[11] 1974-2 C.B. 117.

[12] 2006-1 C.B. 261.

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had no includable income under subpart F regarding Bermuda's investment in Delaware.

In December 2005, five years after the reinvestment plan was effected, the IRS released Rev. Rul. 2006-2 — which revoked Rev. Rul. 74-503, but on a prospective basis only. Rev. Rul. 2006-2 states that conclusions in Rev. Rul. 74-503 regarding X's basis in the Y stock received in the exchange — that is, that such basis is determined under section 362(a) — are "incorrect." Rev. Rul. 2006-2 also states that the other conclusions in the ruling, including the conclusions that X's basis in the Y stock received in the exchange and Y's basis in the X stock received in the exchange are zero, "are under study." Rev. Rul. 2006-2 states: "Under the authority of section 7805(b), the Service will not challenge a position taken prior to December 20, 2005, with respect to a transaction occurring prior to such date, by a taxpayer that reasonably relied on the conclusions in Rev. Rul. 74-503. *See* section 601.601(d)(2)(v) of the Statement of Procedural Rules."

Rauenhorst Principles

In *Rauenhorst v. Commissioner*,[13] the taxpayers assigned stock warrants to charitable institutions. At the time of the assignments, the charitable institutions were not under any legal obligation to sell the warrants; however, it was fully anticipated they would sell the warrants and in fact did so. The IRS determined that the assignments represented anticipatory assignments of income that were taxable to the taxpayers. In the Tax Court proceedings, the taxpayers argued to the contrary — relying on a 1978 revenue ruling[14] — that the assignment of income doctrine was inapplicable in the absence of a legal obligation to sell on the part of the charity. Despite the on-point revenue ruling, the IRS argued in its Tax Court briefs that "revenue rulings are not binding on respondent or the courts" and the 1978 ruling did not control that case in light of Tax Court and appellate court case law decided after its adoption by the Service.[15]

The Tax Court concluded that the IRS was "disavowing" its 1978 revenue ruling in the litigation, even though it had not revoked or modified that ruling.[16] The Tax Court refused to permit the Service to argue against the legal principles of its 1978 revenue ruling:

> Although we do not question the validity of the opinions of this Court and the Courts of Appeals upon which respondent relies, we are not prepared to allow respondent's counsel to argue the legal principles of those opinions against the principles and public guidance articulated in the Commissioner's currently outstanding revenue rulings.
>
> . . . .
>
> While this Court may not be bound by the Commissioner's revenue rulings, and in the appropriate case we could disregard a ruling or rulings as inconsistent with our interpretation of the law, . . . in this case it is respondent who argues against the principles stated in his ruling and in favor of our previous pronouncements on this issue. The Commissioner's revenue ruling has been in existence for nearly 25 years, and it has not been revoked or modified. No doubt taxpayers have referred to that ruling in planning their charitable contributions, and, indeed, petitioners submit that they relied upon that ruling in planning the charitable contributions at issue. Under the circumstances of this case, we treat the Commissioner's position in Rev. Rul. 78-197 . . . as a concession.[17]

The Tax Court ended its opinion by strongly admonishing the IRS for attempting to argue against its own published guidance on which the taxpayer had justifiably relied and for imposing penalties in addition to the income tax liabilities.[18]

The IRS Office of Chief Counsel immediately responded to the Tax Court's decision in *Rauenhorst* by directing his attorneys not to take positions in litigation contrary to the Service's published guidance:

> It has been a longstanding policy of the Office of Chief Counsel that we are bound by our published positions, whether in regulations, revenue rulings, or revenue procedures, and that we will not argue to the contrary. Accordingly, we do *not* take positions in litigation, TAMs, PLRs, CCAs, advisory opinions, etc., inconsistent with a position that the Service has taken in published guidance or in proposed regulations.[19]

The Tax Court reaffirmed the principles of *Rauenhorst* in another precedent opinion, *Dover Corp. & Subs. v. Commissioner*, two years later.[20] *Dover* involved a complicated corporate transaction. Like *Barnes*, the facts of *Dover* involved CFCs and the

[13]*Rauenhorst*, 119 T.C. 157.
[14]Rev. Rul. 78-197, 1978-1 C.B. 83.
[15]*Rauenhorst*, 119 T.C. 157.
[16]*Id.* at 169-170.
[17]*Id.* at 170-173 (references and citations omitted).
[18]*Id.* at 182-183.
[19]CC-2002-043, *clarified and superseded by* CC-2003-014.
[20]*Dover Corp. & Subs. v. Commissioner*, 122 T.C. 324 (2004).

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subpart F income rules. The taxpayer, a U.S. corporation, owned all the stock of a U.K. corporation (D) that, in turn, owned all the stock of a second U.K. corporation (H). Both D and H were CFCs. D sold the stock of H to a third party. The taxpayer later filed an election under the check-the-box regulations to treat H as a disregarded entity for federal tax purposes immediately before the stock sale. The result of this election was that H was treated as if it had liquidated under section 332, with D receiving its assets. D was treated as selling H's assets to the unrelated buyer.

The taxpayer argued that the deemed sale of assets qualified as a sale of property used in D's (and not H's) trade or business because D succeeded to H's business, thus removing the sale from subpart F income treatment.[21] Under the same provisions at issue in *Barnes*, a U.S. taxpayer must include in income its pro rata share of a CFC's subpart F income.[22] For this purpose, the CFC's subpart F income includes "foreign personal holding company income," which is defined to include gains from the sale or exchange of property "which does not give rise to any income."[23] The regulations under section 954 specify that tangible, real, and intangible property "used or held for use in" the CFC's trade or business is excluded from this definition.[24]

The question in *Dover* turned on whether D's deemed sale of the H assets qualified as a sale of properties "used in" D's "trade or business," as the section 954 regulations required. The taxpayer relied on a 1975 revenue ruling that held that in any corporate amalgamation involving the attribute carryover rules of section 381, the surviving or recipient corporation (in that case, D) is viewed as if it had always conducted the business of the formerly separate corporation (in that case, H), the assets of which are acquired by the surviving corporation.[25] The IRS, on the other hand, argued that the revenue ruling had been displaced by case law that the respondent argued mandated a different conclusion. Like *Rauenhorst*, the Tax Court in *Dover* refused to permit the Service to argue against the 1975 revenue ruling:

> We therefore consider respondent to have conceded that, as a direct result of a section 332 liquidation of an operating subsidiary, the surviving parent corporation is considered as having been engaged in the liquidated subsidiary's preliquidation trade or business, with the result that the assets of that trade or business are deemed assets used in the surviving parent's trade or business at the time of receipt. . . . Therefore . . . we conclude that respondent has conceded that Dover UK's deemed sale of the H&C assets immediately after the check-the-box liquidation of H&C constituted a sale of property used in Dover UK's business within the meaning of section 1.954-2(e)(3)(ii) through (iv), Income Tax Regs.[26]

As a result of this holding, the taxpayer did not have subpart F income from D's sale of H's assets.

The Tax Court's holdings in *Rauenhorst* and *Dover* were not the first cases to hold the IRS to the legal principles stated in its revenue rulings. The Tax Court articulated the same principles in *Walker v. Commissioner*,[27] *Phillips v. Commissioner*[28] (a court-reviewed opinion), and *Burleson v. Commissioner*.[29] The principles espoused in *Rauenhorst* and by the taxpayer in *Barnes* are not novel. They were indeed well established in the Tax Court when *Rauenhorst* and *Dover* were decided, and there should have been no doubt about that when the Tax Court considered *Barnes*.

Barnes's Preclusion Argument

Barnes told the Tax Court that it had reasonably relied on Rev. Rul. 74-503 and based on Rev. Rul. 2006-2 and Rev. Rul. 74-503, the IRS was precluded from arguing against the position that Bermuda's adjusted basis in the Delaware preferred stock was zero. Barnes's position is unmistakably clear from its briefing papers filed in the Tax Court.[30]

Barnes states in its opening brief that "Rev. Rul. 2006-2 prohibits respondent from challenging Barnes' position in this case" and "Respondent is bound by the 'the service will not challenge' clause in Rev. Rul. 2006-2."[31] Barnes cites *Rauenhorst* and also *Dover* as the legal basis for its position: "In a Tax Court proceeding, a Revenue Ruling constitutes a concession of the legal analysis reflected in the ruling and is binding on the Respondent."[32] Barnes further contends that "the obligation of the Respondent to adhere" to Rev. Rul. 2006-2 is "compelled by

[21] Section 954(c)(1)(B)(iii).
[22] Section 951(a)(1)(A)(i).
[23] Sections 952(a)(2), 954(a)(1), and 954(c).
[24] Reg. section 1.954-2(e)(3)(ii)-(iv).
[25] Rev. Rul. 75-223, 1975-2 C.B. 109.
[26] *Dover Corp.*, 122 T.C. at 350.
[27] 101 T.C. 537 (1993).
[28] 88 T.C. 529 (1987).
[29] T.C. Memo. 1994-364.
[30] Opening Trial Brief for Petitioners, Dkt. No. 27211-09 (July 2, 2012) (Barnes Opening Brief); Reply Trial Brief for Petitioners, Dkt. No. 27211-09 (Aug. 30, 2012) (Barnes Reply Brief).
[31] Barnes Opening Brief at 88, 92.
[32] *Id.* at 92.

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the tax policy rationale articulated in *Rauenhorst*.''[33] In its reply brief, Barnes leads its argument stating, ''Respondent is prohibited by its published guidance from challenging Barnes' tax return positions'' and again states that ''Respondent cannot argue against his own revenue ruling,'' citing *Rauenhorst* and *Dover*.[34]

Tax Court Opinion in *Barnes*

In *Barnes*, the Tax Court addressed the application of Rev. Rul. 74-503 and Rev. Rul. 2006-2 as a ''preliminary matter'' in its opinion.[35] Even though Barnes had presented its argument under *Rauenhorst*, the Tax Court avoided any mention of that case or the other case law applying the *Rauenhorst* principles. Instead, the Tax Court followed the ''script'' presented by the IRS in its reply brief[36] to conclude that the Service was entitled to ignore those revenue rulings in the context of *Barnes*. The problem is that this was essentially the same idea the IRS presented to the Tax Court in *Rauenhorst* and that the Tax Court soundly rejected.

The Tax Court pointed to the IRS's Statement of Procedural Rules for the proposition that revenue rulings are limited to the specific facts set forth in the ruling — quoting language in reg. section 601.601(d)(2)(v)(a): ''The conclusions expressed in Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated in the revenue ruling.''[37] Moreover, the court also quoted reg. section 601.601(d)(2)(v)(e), which states that taxpayers may rely on revenue rulings in determining the tax treatment of their own transactions, to emphasize two additional parts of that procedural rule:

> 1. ''Since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same.''
>
> 2. ''They should consider the effect of subsequent legislation, regulations, court decisions, and revenue rulings.''[38]

In support of the same proposition, the Tax Court quoted the following language from a memorandum opinion, *Briarcliff Candy Corp. v. Commissioner*[39]: ''Revenue Rulings of respondent speak to the limited fact situations before respondent at that moment.''[40] The Tax Court also cited *Anschutz Co. v. Commissioner*,[41] in which ''the Tenth Circuit observed that the problem with the taxpayer's reliance on a revenue ruling was that the transactions at issue in the case before the court, *considered as a whole*, were different from the *entirety* of the transactions at issue in the revenue ruling.''

There are several problems with the Tax Court's analysis. First, regarding the Statement of Procedural Rules, the Tax Court in *Rauenhorst* specifically addressed those rules and notably did not find the provisions relied on in *Barnes* to be relevant to the IRS's litigating position against the 1978 revenue ruling in that case.[42] On the contrary, the Tax Court in *Rauenhorst* focused on other provisions in the Statement of Procedural Rules (and corresponding provisions in the introduction section of each volume of the Internal Revenue Bulletin) to the effect that revenue rulings ''are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.''[43] The Tax Court in the court-reviewed opinion in *Phillips v. Commissioner* emphasized that same portion of the Statement of Procedural Rules.[44] That important rule is not even mentioned in *Barnes*.

Second, the Tax Court's proposition that taxpayers cannot rely on the legal principles stated in a revenue ruling when their facts ''exceed the scope''[45] of the facts of the revenue ruling cannot be squared with *Rauenhorst* and certainly not with the more complicated facts of *Dover*. If direct alignment of the transactional facts with the revenue ruling facts were required, as *Barnes* seems to hold, the transactions in *Rauenhorst* and *Dover* would not have satisfied that standard and many of the IRS's seminal revenue rulings would not be reliable.

Although recent revenue rulings are more expansive in their recitation of facts, it is clear that early revenue rulings (from the 1970s) used a simple and generic fact set to establish a general legal principle applicable to the multitude of transactions with more complex facts. Rev. Rul. 74-503 falls squarely into this category of rulings. It sets forth a general

[33]*Id.*
[34]Barnes Reply Brief at 72, 78.
[35]*Barnes Group*, T.C. Memo. 2013-109, slip op. at 34.
[36]Reply Brief for Respondent, Dkt. No. 27211-09 (Aug. 31, 2012), at 64-66.
[37]*Barnes Group*, T.C. Memo. 2013-109, slip op. at 36.
[38]*Id.* at 36-37.
[39]T.C. Memo. 1987-487.
[40]*Barnes Group*, T.C. Memo. 2013-109, slip op. at 37.
[41]664 F.3d 313, 330 (10th Cir. 2011) (emphasis added), *aff'g* 135 T.C. 78 (2010).
[42]*Rauenhorst*, 119 T.C. at 182.
[43]*Id.* (quoting reg. section 601.601(d)(2)(v)(d)).
[44]*Phillips*, 88 T.C. at 534.
[45]*Barnes Group*, T.C. Memo. 2013-109, slip op. at 40. The Tax Court stated that ''additional facts beget additional issues.'' *Id.* at 38.

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legal principle regarding the basis of stock received by a corporation in a section 351 transaction in exchange for its own stock. The facts of Rev. Rul. 74-503, like similar rulings during that same era, are nondescript and indistinguishable from other corporate transactions.[46] Under the *Barnes* approach, that circumstance is seemingly fatal — but it should not be.

Third, the Tax Court's reliance on the opinion in *Briarcliff* is a curious choice. That case was decided many years before *Rauenhorst*, it is a memorandum opinion, and the opinion (in a footnote) suggests that the revenue ruling must be ''directly on point'' to be justifiably relied on.[47] The Tax Court stated that ''even assuming the Revenue Ruling were directly on point, such Rulings merely set forth the views of respondent. Thus, they represent the views of one party to the litigation before the Court. As such, they do not constitute precedent by which this Court is bound.''[48] This statement runs squarely against not only the Statement of Procedural Rules but also the precedent in *Rauenhorst*, *Dover*, *Walker*, and *Phillips*.

The Tax Court in *Briarcliff* cited the Fifth Circuit's opinion in *Stubbs, Overbeck, and Associates v. United States*[49] to support its position that revenue rulings were not precedent or binding. However, the IRS cited this same case for the same proposition in *Rauenhorst*.[50] The Tax Court rejected the Service's reliance on *Stubbs* and, while accepting that the Tax Court was not bound by revenue rulings, construed the statements in *Stubbs* as dictum.[51] The Tax Court observed[52] that the Fifth Circuit rejected the IRS's argument that it was not bound by revenue rulings in a subsequent case, *Estate of McLendon v. Commissioner*.[53]

Fourth, following the IRS's argument, the Tax Court in *Barnes* applied an ''entire transaction'' approach, using substance-over-form principles, to evaluate the application of Rev. Rul. 74-503.[54] In the Tax Court's view, Rev. Rul. 74-503 was only applicable ''if we respect the form of the reinvestment plan.''[55] This position again runs up against the Tax Court's holding in *Rauenhorst*. Indeed, the IRS's argument in *Barnes*, which the Tax Court accepted, is the same ''global transaction'' argument that the Service made in *Rauenhorst* and which the Tax Court rejected in that case.[56] Moreover, the IRS's argument in *Rauenhorst* was based on substance-over-form principles — in particular, the assignment of income doctrine and the step transaction doctrine.[57] Obviously, if the application of the 1978 revenue ruling had been subject in the first instance to the substance-over-form case law, the 1978 revenue ruling would not have had any meaningful application to the facts of *Rauenhorst*. However, contrary to the substance-over-form case law and the IRS's contention that the ''global transaction'' must be considered, the Tax Court applied the ''legal obligation'' principles from the 1978 revenue ruling.

Fifth, the Tax Court in *Barnes* focused on the fact that multiple entities were involved, that CFCs were involved, and that the taxpayer's planning was designed to avoid the subpart F rules.[58] The problem with this analysis is that those same factors were present in *Dover*. As the Tax Court explained in that case, ''the crucial finding'' in the revenue ruling (and other rulings applying it) is that, ''in any corporate amalgamation involving the attribute carryover rules of section 381, the surviving or recipient corporation is viewed as if it had always conducted the business of the formerly separate corporation(s) whose assets are acquired by the surviving corporation.''[59] In other words, the legal principles of the 1975 revenue ruling, which were applied to a generic fact pattern, were equally applicable to the more complex set of facts in *Dover*. Similarly, in *Barnes*, the legal principles in Rev. Rul. 74-503, espousing the zero basis doctrine for exchanges of a corporation's own stock, are equally applicable to the more complex set of facts involved in that case. Rev. Rul. 74-503 is a ''one size fits all'' ruling.

Sixth, the Tax Court's suggestion that subsequent legal developments displace justified reliance on a revenue ruling is similarly flawed. In *Rauenhorst*, the Tax Court applied the 1978 revenue ruling in place of the IRS's reliance on a series of Tax Court and appellate court cases that were contrary to the

[46]This circumstance distinguishes *Anschutz*. Unlike the generic fact pattern in Rev. Rul. 74-503, and the rulings at issue in *Rauenhorst* and *Dover*, the revenue ruling in *Anschutz* was based on a particular set of facts identified in the ruling and did not announce any broadly applicable legal principles. *See* Rev. Rul. 2003-7, 2003-1 C.B. 363.

[47]*Barnes Group*, T.C. Memo. 2013-109, slip op. at 37.

[48]*Id.*

[49]445 F.2d 1142, 1146-1147 (5th Cir. 1971).

[50]*Rauenhorst*, 119 T.C. at 172.

[51]*Id.*

[52]*Id.* at 172-173.

[53]135 F.3d 1017 (5th Cir. 1998), *rev'g* T.C. Memo. 1996-307.

[54]*Barnes Group*, T.C. Memo. 2013-109, slip op. at 37-40.

[55]*Id.* at 37.

[56]*Rauenhorst*, 119 T.C. at 168-169.

[57]*Id.* at 163 (describing various doctrines relied on by the IRS).

[58]*Barnes Group*, T.C. Memo. 2013-109, slip op. at 40.

[59]*Dover Corp. & Subs*, 122 T.C. at 349.

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revenue ruling.[60] In holding the IRS to the principles of the 1978 revenue ruling, the Tax Court explicitly rejected the "ripened to a practical certainty" position espoused by the Ninth Circuit and Tax Court in *Ferguson v. Commissioner*[61] and the Tax Court in *Estate of Applestein v. Commissioner*.[62] Also, the Second Circuit, in *Blake v. Commissioner*,[63] questioned the validity of the 1978 revenue ruling. The Tax Court in *Rauenhorst* refused to permit the IRS to rely on the statements in *Blake* contrary to the legal position announced in the 1978 revenue ruling.[64] Chief Counsel Notice 2002-043 makes this clear, stating that the Chief Counsel policy of not arguing against revenue rulings "applies regardless of the age of the guidance and regardless of whether courts have chosen to follow the published position. So long as the published guidance remains on the books, the Office of Chief Counsel will follow it."

[60] *Rauenhorst*, 119 T.C. at 167-171.
[61] 174 F.3d 997 (9th Cir. 1999), *aff'g* 108 T.C. 244 (1997).
[62] 80 T.C. 331 (1983).
[63] 697 F.2d 473 (2d Cir. 1982), *aff'g* T.C. Memo. 1981-579.
[64] *Rauenhorst*, 119 T.C. at 169-170.

Conclusion

The Tax Court's analysis in *Barnes* is fundamentally flawed on several levels. First, the Tax Court's failure to discuss or even cite *Rauenhorst* is surprising in light of Barnes's reliance on that case and other cases applying its principles. Second, the Tax Court should have accepted the legal principles of Rev. Rul. 74-503, as both the Statement of Procedural Rules and the court's precedent in *Rauenhorst*, *Dover*, *Walker*, and *Phillips* required. The Tax Court, of course, was free to analyze the facts of the *Barnes* case in light of those legal principles. That is not what it did, however. Third, the Tax Court's suggestion that the IRS can freely argue against its published guidance when the transactional facts do not directly align with the revenue ruling facts or by applying a "global transaction" approach sets a dangerous course. The admonitions in *Rauenhorst* and in the chief counsel notices that followed that decision have been potentially undermined by *Barnes*. Taxpayers now face the same state of uncertain reliance on published guidance that existed before *Rauenhorst*.

SUBMISSIONS TO *TAX NOTES*

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