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Family Attribution

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FAMILY ATTRIBUTION

INTRODUCTION

The concept of attribution (constructive ownership) is one of the most difficult concepts to understand and correctly apply in tax law today. Attribution is the imposition of stock ownership upon an individual or entity from another individual or entity for taxation purposes.¹ This concept is further complicated when the already attributed stock is reattributed to a third individual or entity.

Attribution is premised upon control.² It is similar to the incidents of ownership doctrine found throughout the estate and gift tax code.³ Under this doctrine an insured party is presumed to have control over an insurance policy when he or his estate has a right to the economic benefits of the policy.⁴ But if there are no incidents of ownership under Code Section 2042, the policy will not be included in the estate of the deceased taxpayer.⁵ The Code advances the idea of control one step further because attribution is based solely on a relationship between a taxpayer and his family or some other affiliated entity.⁶ For example, the Service will assume that a taxpayer has control over stock rights much like the SEC assumes (under Rule 16(b) of the 1934 Securities Exchange Act) that all individuals who purchase and sell stock in which they have a ten percent interest do so with insider information.⁷

Control is also used in the attribution rules in the consideration of options.⁸ The holder of an option to own stock is considered as actually owning the stock. Therefore, this stock can be attributed to other individuals or entities.⁹ One explanation of this concept is that the option to purchase the shares (which the taxpayer may obtain if the option is exercised) must be set aside until the taxpayer either exercises the option or allows the option to lapse. The concept of control will be discussed further in the waiver of attribution section.

TYPES OF ATTRIBUTION

There are four attribution categories: family, corporate, partnership and estate & trust. There is little uniformity between the various forms.¹⁰ Furthermore, each

¹ B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 9.21 (1979).

² *Id.* Attribution is based upon whom is deemed to have control over the stock rather than mere ownership.

³ Treas. Reg. § 20.2042-1(c) (2) (1986).

⁴ *Id.* This includes the power to change beneficiaries, to surrender, cancel or assign the policy, to revoke an assignment or to use the policy as collateral for loans.

⁵ Treas. Reg. § 20.2042-1(c)(i) (1986). Example: Decedent irrevocably assigned an insurance policy to his spouse, four years before his death, retaining no reversionary interest in the policy. The policy is not includible in decedent's estate.

⁶ B. BITTKER & J. EUSTICE, *supra* note 1.

⁷ SEC Act § 16(b) (1934).

⁸ I.R.C. § 318(a) (4) (1986).

⁹ *Id.*

¹⁰ B. BITTKER & J. EUSTICE, *supra* note 1.

form has several different rules.¹¹ So when considering attribution and its complexity taxpayers are dealing with a scheme of rules for which there is no continuity or consistency.

Although each type of attribution has its own exclusive rules there are some concepts that are universal to all of the attribution code sections. These concepts are not found in the Code, but are generally accepted and used throughout academia to describe the different types of attribution.¹²

The first type is known as chain attribution (double attribution or reattribution) and it causes the greatest confusion in its application.¹³ As the various names suggest, there are two stages to this transfer. First, stock is attributed from an entity to its owners or beneficiaries.¹⁴ Secondly, the attributed stock is then attributed from its owners or beneficiaries to members of their families. (The transfer can also begin with the family members and conclude with the entity.)¹⁵ An example would be Father, F, has a 25% interest in partnership X. Daughter, D, also has a 25% interest in partnership X. The partnership owns the remaining 50 outstanding shares. Individually both F and D are considered to own 37.5% of the partnership's stock.¹⁶ But since F and D are related under Section 318(a)(1), they are considered as owning each other's interests. So in the end what started out as a 25% interest has been transformed by attribution into a 75% interest for both F and D.¹⁷ The attribution of stock from an entity to its owners or beneficiaries (step one) is known as direct attribution and its reverse is known as back attribution.¹⁸ An example of Direct Attribution: A, an individual, has a 50% interest in a partnership. The partnership owns 50 of the 100 outstanding shares. A is considered as owning 75 shares.¹⁹ An example of Back Attribution: Using the same facts as above, the partnership would be considered as owning all the stock.²⁰

Finally, when stock is attributed from one family member to another the transaction is referred to as collateral attribution.²¹ An example would be an individual, H, his wife, W, his son, S, and grandson, G, own the 100 outstanding shares of the stock of a corporation (each own 25 shares). H, W and S are each considered as owning 100 shares while G is considered as owning 50 shares (his own

¹¹ *Id.*

¹² I.R.C. § 7701 (1986). This is a definitional section of the Code.

¹³ B. BITTKER & J. EUSTICE, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ I.R.C. § 318(a)(2)(A) (1986). Both F and D are considered to own 25% of the partnership's 50% interest (12.5%). Therefore, 25% plus 12.5% equals 37.5%.

¹⁷ I.R.C. § 318(a)(1)(A)(ii) (1986).

¹⁸ B. BITTKER & J. EUSTICE, *supra* note 1.

¹⁹ Treas. Reg. § 1.318-2(c) (Example 1) (1986). 50 shares plus 50% of the partnership's 50 shares (25 shares) equals 75 shares.

²⁰ *Id.* The partnership is considered as owning all of A's 50 shares.

²¹ B. BITTKER & J. EUSTICE, *supra* note 1.

and his father's).²² This is the topic of this article.

When considering whom should be included in the family for tax purposes there are three primary groups that the family can be divided into. First, the nuclear family which includes the members of a household. In most cases this would include the taxpayer, his spouse and children. Second, the lineal descendants and ancestors of the taxpayer which includes the members of the extended family. In other words, all the people in a direct line to and from the taxpayer excluding those who make up the taxpayer's nuclear family. The third group are the individuals who are related by affinity, the in-laws and spouses of lineal descendants. The Code, as it stands today, includes all these groups in its attribution rules, although there is no uniformity in their application.²³

There are thirty-four code sections that either define or apply family attribution rules. Among these thirty-four Code sections, there are nine different rules as to whom is to be included and many times these rules are not very different.²⁴ For example, Code Sections 267, 544, 341(d), 341(e), 4975 and Treasury Regulation 1.341-4 all have the same four groups making up the core of whom is included within the family for attribution purposes.²⁵ The only difference between these family groups is the addition to the core of each group.²⁶ In each of the first three, one family group is added and in the fourth, all family groups are used.²⁷

The Code has divided the family into seventeen separate groups.²⁸ Each of these seventeen groups is not a code section or a rule in its own right, but instead it is merely one cog in a large and complex scheme. What makes the Code complex is that these seventeen groups have been arranged into nine different sets.²⁹ These nine sets are the attribution rules.

The attribution rules are both general and specific. The most specific rules are found in Section 672(c) which sets out whom is included in the family for purposes of Code Section 671.³⁰ Section 672 only includes the grantor's spouse, (conditioned on whether the spouse is living with the grantor), parents, children and siblings.³¹ Rule 4975 is the most general attribution rule. It covers the taxpayer's spouse, ancestors, lineal descendants and the spouses of the taxpayer's lineal descendants.

It would not be as bad if the complexity stopped with the nine definitions set

²² Treas. Reg. § 1.318-2 (1986).

²³ See Appendix A.

²⁴ *Id.*

²⁵ See Appendix B.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Appendix A.

²⁹ *Id.*

³⁰ I.R.C. § 672(c) (1986). See Appendix A.

³¹ *Id.*

out where the taxpayer could find them, but this is not the case. The rules are scattered throughout the Code.³² The first attribution rule appears in Section 267 and the last one in Section 4975.³³ Another flaw in the Code is how a rule is explained to the reader. Some rules, such as the rule found in Code Section 318, are contained solely in one code section. But there are other rules, such as the rule in Section 341(e) which refers the taxpayer to the rule in Code Section 267.³⁴ So, in order to understand rule 341(e), one must understand the rule in 267(c). Finally there is the needless repetition of the same attribution rule under another code section. Such is the case with Code Sections 267(c)(4) and 544(a)(2).³⁵ By placing the same rule under two different sections the taxpayer may think that they are different rules. The Service further reinforces this idea by having other rules use both Sections 267 and 544 as their family attribution rule.³⁶ This situation can be illustrated by Code Section 341. Code Section 341(e) uses Section 267 as its family attribution rule and Section 341(d) uses Section 544 as its family attribution rule.³⁷ The family members which make up Sections 267 and 544 are the same.³⁸ Why, then, does the Service further complicate the attribution rules by creating complexity in the reader's psyche.

Although the Code's treatment of family attribution is obviously inadequate there are some good aspects to the Code's treatment of family attribution. For instance, when dealing with lineals and ancestors the Service, when it wanted to be specific, singled out the individuals that were to be included in the family and when a general attribution rule would suffice the Service would use that.³⁹ But, one problem with the use of the general terms of "ancestors" and "lineal descendants" is that these terms cover six or seven individual groups⁴⁰ and places them into two categories. This can be simplified by using a single term, "vertical attribution". By creating fewer categories complexity is diminished and the Code becomes less confusing.

Another advantage is that the rules as they stand are created from seventeen sectors which are mixed and matched.⁴¹ By using a base of three defined terms which is under a single code section the taxpayer will have a better understanding of the rule while the legislature retains maximum flexibility to determine the breadth of the rule. Yet another advantage is the elimination of the problem of the same rule having two names. This is accomplished because instead of the basis of the rules located within each attribution code section they are now laid out in a single section and then applied to the various attribution code sections. Thereby eliminating the illusory dicotomy

³² I.R.C. § 4975 (1986). See Appendix A.

³³ *Id.*

³⁴ I.R.C. § 341(e) (1986).

³⁵ I.R.C. § 267(c)(4), § 431(d) (1986).

³⁶ I.R.C. § 431(e), § 431(d) (1986).

³⁷ *Id.*

³⁸ See Appendix A.

³⁹ *Id.*

⁴⁰ There is an issue in the Code as to whether minor children are a part of the definition of children.

⁴¹ See Appendix A.

that now exists in the Code.

WAIVER OF ATTRIBUTION

These attribution rules are subject to the concept of attribution avoidance. The first type of avoidance is a complete waiver such as is provided for in Code Sections 302 and 306. Both sections require a complete disposition of the stock interest by the taxpayer-shareholder. Under Section 306, the disposition cannot be to anyone who is covered by Section 318(a) (1).⁴² Under Section 302, the taxpayer-shareholder, besides giving up his interest (other than a credit interest), cannot acquire the same stock from the same corporation for a ten year period; beginning on the date of the disposition. In the event such stock is acquired by means other than by bequest or inheritance he must notify the corporation's secretary.

The second type of waiver is a partial waiver. Attribution "attribute[s] unity to a family and such assumptions may, indeed, prove awkward or unfair in cases where families do not behave as the rules assume they will, and intra-family disputes exist as to who should control and how."⁴³ There are often times when "intra-family" disputes result in changes of stock ownership and control. When these cases are brought before the courts for determination the results are not consistent.⁴⁴

The idea of partial attribution as a result of intra-family disputes or bad blood is a fairly new topic. Prior to *United States v. Davis*,⁴⁵ the Supreme Court had not considered the role of attribution regarding Section 302(b)(1). In *Davis* the taxpayer and a second individual organized a corporation, with each receiving 500 shares of stock.⁴⁶ The taxpayer split his 500 shares with his wife.⁴⁷ Shortly thereafter the taxpayer purchased 1,000 shares of preferred stock.⁴⁸ The purpose of this transaction was to increase the corporation's working capital so it could qualify for a loan through the Reconstruction Finance Corporation (RFC).⁴⁹ The stock would be redeemed when the RFC loan had been repaid.⁵⁰ During the period of the loan the taxpayer purchased the other 500 shares from the second individual and split these shares between his children.⁵¹ Once the RFC loan was repaid the corporation redeemed the taxpayer's preferred stock.⁵² The taxpayer considered the redemption as a sale to the company qualifying for capital gain treatment under Section 302.⁵³

⁴² This includes the taxpayer-shareholder's spouse, children, grandchildren, and parents.

⁴³ *Title Insurance and Trust Co. v. United States*, 484 F.2d 462, 465 n.4 (9th Cir. 1973).

⁴⁴ See *Metzger Trust v. Commissioner*, 693 F.2d 459 (5th Cir. 1982), cf. *Haft Trust v. Commissioner*, 510 F.2d 43 (1st Cir. 1975).

⁴⁵ 397 U.S. 301 (1970).

⁴⁶ *Id.*

⁴⁷ *Id.* at 302.

⁴⁸ *Id.*

⁴⁹ *Id.* at 302-03.

⁵⁰ *Id.*

⁵¹ *Id.* at 303.

⁵² *Id.*

⁵³ *Id.*

The Service disagreed stating that the redemption of the taxpayer's stock was essentially equivalent to a dividend and therefore treated as ordinary income under Sections 301 and 316 of the Code.⁵⁴ The issue before the Supreme Court was whether there was a legitimate business motivation for the loan qualifying the distribution under Section 302(b)(1) of the Code.⁵⁵ The court, after reviewing the legislative history, the Code and its corresponding regulations, determined that the attribution rules applied to Section 302(b)(1) (unless eliminated under Code Sections 302(b)(2) and (3)) in determining whether a distribution is "not essentially equivalent to a dividend" and the taxpayer must be deemed the owner of all 1,000 shares of the company's stock.⁵⁶

Davis is often cited in cases in which the bad blood issue is litigated.⁵⁷ It is a dividing line creating disagreement among the circuits as to the role of bad blood in Section 302. The First Circuit does not follow *Davis* and permits a bad blood exception to the absolute *Davis* rule.⁵⁸ The Fifth Circuit follows *Davis*.⁵⁹ Finally, the Internal Revenue Service has also taken a stand on the issue.⁶⁰ The Service, sided with the Fifth Circuit concluding that the bad blood argument "is inconsistent with both the legislative history of Section 318 and the language and the rationale of *Davis*."⁶¹ In an earlier ruling, the Service indicated the factors to be considered in determining whether a reduction in a shareholder's proportional interest is a meaningful reduction within the meaning of *Davis*.⁶² The factors to be considered are "(1) the right to vote and thereby exercise control; (2) the right to participate in current earnings and accumulated surplus; and (3) the right to share in net assets on liquidation."⁶³ The Service also said that the "facts and circumstances of a particular case cannot contradict the mechanical determination under Section 318 of how much stock a shareholder owns."⁶⁴ Also, authorities on the subject say that "the *Davis* decision weakens, but does not eliminate, the family fight argument in mitigation of Section 318 attribution under Section 302 (b)(1)."⁶⁵

As previously stated, the Fifth Circuit and its followers base their argument on two major points, the Supreme Court decision in *Davis* and a strict reading of the legislative history. In *Cerone v. Commissioner*,⁶⁶ the taxpayer and his son were each fifty percent shareholders in a corporation. Because of hostility between taxpayer

⁵⁴ *Id.*

⁵⁵ *Id.* at 304.

⁵⁶ *Id.* at 307.

⁵⁷ See *Metzger Trust v. Commissioner*, 693 F.2d 459, 464-66 (5th Cir. 1982), *Cerone v. Commissioner*, 87 T.C. 1, 18-28 (1986). cf. *Haft Trust v. Commissioner*, 510 F.2d 43, 47-8 (1st Cir., 1975).

⁵⁸ *Haft*, 510 F.2d at 47.

⁵⁹ *Metzger*, 693 F.2d at 465.

⁶⁰ Rev. Rul. 75-502, 1975-2 C.B. 111, Rev. Rul. 80-26, 1980-1 C.B. 66.

⁶¹ Rev. Rul. 80-26, 1980-1 C.B. 66, 67.

⁶² Rev. Rul. 75-502, 1975-2 C.B. 111, 112.

⁶³ *Id.*

⁶⁴ Rev. Rul. 80-26 at 67.

⁶⁵ B. BITTKER & J. EUSTICE, *supra* note 1, § 9.24.

⁶⁶ 87 T.C. 1 (1986).

and his son, the corporation redeemed all of taxpayer's stock therein.⁶⁷ The *Cerone* court held that "family hostility does not nullify the family attribution rules of sec. 318(a)(1)."⁶⁸ The redemption was treated essentially as a dividend within the meaning of Section 302(b)(1).⁶⁹ Besides *Davis*, the *Cerone* court analyzed the legislative history of Section 302 to add support for their strict, no exceptions stance on the bad blood issue citing H.R. No. 1337, "before the enactment of the 1954 Code the attribution rules were sometimes applied and sometimes not applied; to avoid that uncertainty, Section 302 expressly made the attribution rules applicable for purposes of determining whether a distribution in redemption should be treated as a dividend."⁷⁰

In *Metzger Trust v. Commissioner*,⁷¹ the David Metzger Trust (taxpayer) was created by David Metzger to benefit his wife and children and his eldest son was named trustee. Later the family business was incorporated and the trust became a shareholder thereof.⁷² On Metzger's death the eldest son assumed control of the business in which the daughters were directors.⁷³ A quarrel began between the eldest son and the daughters which intensified until there was open animosity between the parties.⁷⁴ Soon the bitterness reached the point where neither party could tolerate the other and they agreed to terminate their joint ownership of the corporation.⁷⁵ Following lengthy negotiations all agreed as to how the stock was to be redeemed, including the Metzger Trust, since the daughters each had a one third interest.⁷⁶ The Trust argued that "family discord may 'mitigate' the application of the attribution rules in determining dividend equivalency, especially given the undisputed fact that the purpose of the redemption was not to distribute corporate earnings."⁷⁷ The *Metzger* court rebuts the Trust's argument by stating the hard and fast rule in *Davis*, that the attribution rules must apply before determining dividend equivalency.⁷⁸ It went on to quote the Senate Report stating, "the rules for constructive ownership of stock Section 318(a) for purposes of this section shall apply generally."⁷⁹ *Metzger* is an important case because it sets out the Fifth Circuit's position on this issue, although the court was not in total agreement.⁸⁰ Other cases have relied upon the legislative history of Section 302 to ensure the blanket treatment of Section 318 on

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 19.

⁷¹ 693 F.2d 459 (5th Cir. 1982).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 460-61.

⁷⁶ *Id.*

⁷⁷ *Id.* at 463.

⁷⁸ *Id.* at 464.

⁷⁹ S. REP. No. 1622, 83rd Cong., 2d sess. 44 (1954), reprinted in 1954 U.S. CODE CONG. & ADMIN. NEWS 4621, 4872.

⁸⁰ *Metzger Trust v. Commissioner*, 693 F.2d 459 (5th Cir., 1982) (Tannenwald J., dissenting).

Section 302.⁸¹ Although the Fifth Circuit will not allow a partial waiver of the Section 318 attribution rules in a Section 302(b)(1) situation, the court did allow bad blood as a factor but at a much later stage of the process. "First, the attribution rules are plainly and straight forwardly applied. Second, a determination is made whether there has been a reduction in the stockholder's proportional interest in the corporation. If not, the inquiry ends because, if there is no change in the stockholder's interest, dividend equivalency results. If there had been a reduction, then all the facts and circumstances must be examined to see if the reduction was meaningful under *United States v. Davis*. It is at this point *and only then*, that family hostility becomes an appropriate factor for consideration."⁸² This is the only way in which the Fifth Circuit will give family hostility any credence.

On the other side of the issue is the First Circuit. In their leading case of *Haft Trust v. Commissioner*,⁸³ Haft was married and had four children (two from this marriage and two from his wife's past marriage). Haft's father-in-law loaned money to the Haft-Gaines Co. in which Haft was both an officer and a stockholder, and purchased 100,000 shares of the corporation's common stock.⁸⁴ He later created four identical taxpayer trusts and transferred 25,000 shares to each without consideration.⁸⁵ Haft was later divorced, but during the proceeding each party made serious and bitter charges and counter charges against the other.⁸⁶ At the time that the proceedings were initiated Haft moved out from the family residence and had no contact with the children for six or seven months.⁸⁷ Sometime after the divorce Mrs. Haft remarried and moved to a new residence taking the children with her.⁸⁸ After the divorce was final Haft was indifferent towards the children.⁸⁹ He did not see them at all from the time of the divorce (1967) till 1971.⁹⁰

The father-in-law terminated the trusts at the time of the divorce proceedings.⁹¹ There were also negotiations respecting the termination of the stock interests which were later redeemed.⁹² The issue in *Haft*, is whether the existence of family hostility is a factor to be considered in mitigation of the constructive ownership rules in determining dividend equivalency on a redemption of corporate stock. At the Tax Court level the court held that "the attribution rules of section 318, I.R.C. 1954, are

⁸¹ *Miller v. Commissioner*, 75 T.C. 182, 190 (1980), *Rickey v. United States*, 592 F.2d 1251, 1254-55 (5th Cir. 1979), *Niedermeyer v. Commissioner*, 62 T.C. 280, 287, 291 (1974), *Fehrs Finance Co. v. Commissioner*, 58 T.C. 174, 188, 190 and *Lewis v. Commissioner*, 35 T.C. 71, 77-78 (1960).

⁸² *Cerone*, 87 T.C. at 22.

⁸³ *Haft*, 510 F.2d at 43 (1st Cir., 1975).

⁸⁴ *Id.* at 45.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

applicable notwithstanding the family fight.”⁹³ This case and a supplemental opinion were appealed.⁹⁴ The First Circuit then heard the case and held “that existence of family hostility is a factor to be considered in mitigation of the constructive ownership rules in determining dividend equivalency on a redemption of corporate stock and that remand was required where the lower court made no finding on the hostility question.”⁹⁵ The *Haft* court interpreted the *Davis* interpretation of meaningful reduction to permit and not “mandate, an examination of the facts and circumstances to determine the effect of the transaction transcending a mere mechanical application of the attribution rules.”⁹⁶ The *Haft* court is not the first to support the family hostility position.⁹⁷

In *Parker*⁹⁸ there was a redemption by a corporation of the father’s stock giving his son majority control.⁹⁹ Prior to the redemption there had been a long history of substantive controversy about the running of the business.¹⁰⁰ The Tax Court considered whether family hostility should be considered as a factor or whether Section 318(a)(1) is conclusive. The *Parker* court looked to the decision in *Squier v. Commissioner*¹⁰¹ for assistance.¹⁰² In *Squier* “The tax court embraced the principle that family discord could belie the community-of-interest rationale of the attribution rules and was a relevant circumstance in determining dividend equivalency under (b)(1).”¹⁰³ The *Squier* court recognized the “sharp cleavage” between the executor and the members of the *Squier* family and held “taking the entire record into account we are satisfied that even after applying the attribution rules here the redemptions in controversy were not essentially equivalent to the distribution of a taxable dividend.”¹⁰⁴ The *Parker* court after considering *Squier* concluded that the redemption was not a dividend because “after taking the entire record into account, including the relationships involved and the history of sharp and continuing disagreement between *Parker* and *Parker Jr.* we conclude on the unusual facts presented that the redemption brought about a significant change of control and we hold that the redemption here at issue was not essentially equivalent to a dividend under section 302 (b)(1).”¹⁰⁵ Several courts have spoken in favor of the partial waiver.¹⁰⁶ In *Bradbury* the court said while “attribution rules are generally applicable to § 302(b)(1), . . . their imposition is not inflexible and if it can be demonstrated that discord exists in a

⁹³ *Haft Trust v. Commissioner*, 61 T.C. 398, 398 (1973).

⁹⁴ Supplemental opinion found at 62 T.C. 145 (1974).

⁹⁵ *Haft*, 510 F.2d at 43-4.

⁹⁶ *Id.* at 48.

⁹⁷ See *Squier v. Commissioner*, 35 T.C. 950 (1961), H.C. *Parker* 30 T.C.M., (P-H) 176 (1961).

⁹⁸ 30 T.C.M. (P-H) at 976.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ 35 T.C. 950 (1961).

¹⁰² *Parker*, 30 T.C.M. (P-H) at 983-4.

¹⁰³ *Haft*, 510 F.2d at 46.

¹⁰⁴ *Squier*, 35 T.C. at 956.

¹⁰⁵ *Parker*, 30 T.C.M. (P-H) at 984.

¹⁰⁶ *Bradbury v. Commissioner*, 298 F.2d 111, 119 (1st Cir. 1962), *Deyoe v. Commissioner*, 66 T.C. 904, 915 (1976) (Dicta).

family relationship which would make attribution unwarranted, they will not be applied.”¹⁰⁷ In *Deyoe*,¹⁰⁸ the court, in dicta, said that they were aware that family hostilities have been taken into consideration in applying the attribution rules to stock redemptions.¹⁰⁹

Why the difference in holdings between the First and Fifth Circuits? First, the First Circuit draws much of its authority from *Davis*. It is agreed that *Davis* is a Supreme Court holding of the role Code Section 318 plays in the scheme of Section 302. But, respecting the *Metzger* court’s judgment, the *Davis* facts do not deal with family hostility. Instead the issues were whether Section 318 applies to a Section 302 problem and whether a redemption of a business is essentially equivalent to a dividend.¹¹⁰ The hostility issue was not addressed and therefore, *Davis* may only be referred to as dicta in resolving the hostility issue and not as authority.

Secondly, an additional problem with the *Metzger* decision is the court’s understanding of Section 318(a)(1) and whom is included as a family member. In *Metzger*, the hostility was between a brother and his two sisters.¹¹¹ Code Section 318(a)(1) includes the taxpayer’s spouse, parents, children and grandchildren; siblings are not included.¹¹² Therefore, under the facts of *Metzger* there is not a Section 318(a)(1) issue because under Section 318(a)(1) siblings are not considered as part of the family for attribution purposes. In his dissent in *Metzger*, Judge Tannenwald recognized these points and said, “we need not decide whether we may or should ameliorate the application of Section 318 rules if justice would be served thereby and I believe that a proper respect for the judicial function and its inherent limitations required that we do not decide these questions before they are properly presented.”¹¹³

PROPOSAL

The complexity and confusion of the family attribution rules can be lessened merely by condensing similar terms and defining them by a general term. The primary purpose is to give the taxpayer a centralized starting point so there is an understanding of the concept before the taxpayer attempts to proceed through the process. All of the possible relationships a taxpayer could have with a family member can be restated in three groups. As previously stated, the first is vertical attribution. This would include all the people before the taxpayer and those who come after. Think of two rays, one going into the past and the other into the future both with the common starting point being the taxpayer. Those included going back from the taxpayer are parents, grandparents and great-grandparents. Those included

¹⁰⁷ *Bradbury*, 298 F.2d at 111.

¹⁰⁸ 66 T.C. 904.

¹⁰⁹ *Id.* at 915.

¹¹⁰ *Davis*, 397 U.S. at 301-02.

¹¹¹ *Metzger*, 693 F.2d at 460-1.

¹¹² I.R.C. § 318(a)(1) (1986). Appendix A.

¹¹³ *Metzger*, 693 F.2d at 459 (Tannenwald, J., dissenting).

coming from the taxpayer are children, grand-children and great-grandchildren.

Secondly, horizontal attribution includes individuals not on the taxpayer's direct family line, but those who fall to one side or the other of the line. Included in this group would be siblings and spouses of the taxpayer. Also included would be spouses of lineal descendants.

The final type of attribution is quadralineal. This type employs both vertical and horizontal attribution. It arises under the estate and gift tax code for the purposes of the generation-skipping tax.¹¹⁴ Quadralineal attribution works like this: B, deceased, leaving no spouse nor issue, leaves property to parents, P. P waives. S, sister predeceased B, but was survived by her daughter, N. N receives the property through intestacy. Another example, same facts as above, but a sister D is alive and the property passes to D, through intestacy. In both examples vertical and horizontal attribution are used. The transfer from B to P is obviously vertical because P is on the ray going back from B. The relation between B and D is horizontal because D is not on either ray extending from B, but instead is to a side of it so horizontal attribution is used. The same is true for D's daughter N. N, just like D is not on either ray, but instead is to the side of it so here too horizontal attribution is used.

The terms, vertical, horizontal, and quadrilineal attribution, would be located in Code Section 7701 in order for them to be applied as a uniform basis for attribution rules to work from or completely incorporate; and also serve as a starting point of reference when someone comes across a family attribution problem. The most obvious advantage of this simplified system is the taxpayer needs only to remember three definitions instead of nine to work through the Code. Furthermore, if the taxpayer cares not to memorize the three definitions they all can be found under the same code section.

CONCLUSION

In conclusion, the family attribution rules can be simplified. The complexity which exists can be significantly reduced merely by using clearly defined terms which the taxpayer understands. Once this is accomplished there will be a simple and clear understanding as to the purpose of attribution and partial waiver can be allowed in cases where there is bad blood between related parties.

ALAN SUNUKJIAN

¹¹⁴ Treas. Reg. § 20.2042-1 (1986).

APPENDIX A**I.R.S. CODE SECTIONS**

1		2
-----		-----
267(c)(4)	425(d)	178
503(b)	554(a)(2)	1.178-2(B)
707(b)(3)	681(b)	1234(d)
1239(c)(2)	1237(a)(2)(A)	179(d)
544(a)(2)		341(e)(8)
-----		-----

RELATIONSHIP

Brother & Sister (inc. 1/2 blood)	X	
Spouse	X	X
Spouse, if living with Grantor		
Spouse, if not legally separated		
Ancestors	X	X
Parents		
Grandparents		
Lineal Descendents	X	X

APPENDIX A - (Continued)**I.R.S. CODE SECTIONS**

1	2
267(c)(4)	425(d)
503(b)	554(a)(2)
707(b)(3)	681(b)
1239(c)(2)	1237(a)(2)(A)
544(a)(2)	
	178
	1.178-2(B)
	1234(d)
	179(d)
	341(e)(8)

RELATIONSHIP

Spouse of Brother
or Sister

Children

Grandchildren

Great Grand-
children

Adopted Children

Brother & Sister

Minor Children

Spouses of
Children,
Grandchildren, and
Great Grand-
children

APPENDIX A - (Continued)

I.R.S. CODE SECTIONS

3	4	5	6
4975	4946(a)(3) 4940(d)(3)(E) 4946(d)	1.341-4(b)(2)	1551(b)(2)(B) 1563(e)

RELATIONSHIPBrother & Sister
(inc. 1/2 blood)

X

Spouse

X

X

X

X

Spouse, if living
with GrantorSpouse, if not
legally separated

Ancestors

X

X

X

Parents

X

Grandparents

X

Lineal Descendents X

X

APPENDIX A - (Continued)**I.R.S. CODE SECTIONS**

3	4	5	6
4975	4946(a)(3) 4940(d)(3)(E) 4946(d)	1.341-4(b)(2)	1551(b)(2)(B) 1563(e)

RELATIONSHIPSpouse of Brother
or Sister

X

Children

X

Grandchildren

X

X

Great Grand-
children

X

X

Adopted Children

X

Brother & Sister

X

Minor Children

X

Spouses of
Children,
Grandchildren, and
Great Grand-
children

X

APPENDIX A - (Continued)**I.R.S. CODE SECTIONS**

	7	8	9
	-----	-----	-----
	672(c)	318(a)(1) 302(c)(1) 304(b)(1) 306(b)(1) 334(b)(3) 338(h)(1) 304(c)(1) 958(b)(3) 856(d)(5) 897(d)(6)(C) 382(1)(3)(A)(i) 416(i)(b)(iii)(II) 453(f)(1)(A)	341(d)
RELATIONSHIP	-----	-----	-----
Brother & Sister (inc. 1/2 blood)			X
Spouse			X
Spouse, if living with Grantor	X		
Spouse, if not legally separated		X	
Ancestors			X
Parents	X	X	
Grandparents			
Lineal Descendents			X

APPENDIX A - (Continued)**I.R.S. CODE SECTIONS**

	7	8	9
	-----	-----	-----
	672(c)	318(a)(1) 302(c)(1) 304(b)(1) 306(b)(1) 334(b)(3) 338(h)(1) 304(c)(1) 958(b)(3) 856(d)(5) 897(d)(6)(C) 382(1)(3)(A)(i) 416(i)(b)(iii)(II) 453(f)(1)(A)	341(d)
	-----	-----	-----
<u>RELATIONSHIP</u>			
Spouse of Brother or Sister			X
Children			X
Grandchildren	X	X	
Great Grand- children		X	
Adopted Children			
Brother & Sister		X	
Minor Children	X		
Spouses of Children, Grandchildren, and Great Grand- children			

APPENDIX B**GROUP NO. FROM APPENDIX A**

<u>RELATIONSHIP</u>	1	2	3	4	5	9
Brother & Sister	x					x
Spouse	x	x	x	x	x	x
Ancestor	x	x	x	x	x	x
Lineal Descendents	x	x	x	x	x	x
Spouses of Lineal Descendents			x			x
Spouses of Brothers & Sisters					x	x