1977

The Deep Structure of Taxation

Charles I. Kingson

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation

Available at: https://digitalcommons.law.yale.edu/ylj/vol86/iss4/10

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Correspondence

The Deep Structure of Taxation

To the Editors:

In his article, *The Deep Structure of Taxation: Dividend Distributions*,¹ in a footnote on the first page, Charles Kingson refers to me by name.² My name is misspelled. I do not believe this alone accounts for my disagreement with the paper.

1. Mr. Kingson commences by criticizing the *Report on Complexity*.³ This is refreshing. Virtually every other commentator has roundly praised the *Report*⁴ and then paid it not the least attention. But a refreshing critique is not necessarily an accurate one.

The *Report* defined complexity in a practical way: Either a reasonably certain conclusion cannot be determined despite diligent and expert research by an able and honest practitioner, or a reasonably certain conclusion can be determined only after an expenditure that is excessive in time and dollars.⁵ The *Report* pointed up an unfortunate history: Everyone having an opportunity to make a massive contribution to the complexity of the system—Congress, the courts, the Treasury Department, the Internal Revenue Service, and the private tax bar—has done so. And continues to do so.

The concern that engendered the *Report on Complexity* was fear of impending breakdown in the self-assessment system.⁶ Contributing factors were labeled Gresham’s Law of Tax Practice (if the tax law is so complex that the able, honest practitioner cannot respond satisfactorily, let’s try someone who doesn’t see so many problems and will give us a quicker, cheaper, and, best of all, more favorable answer) and the Tax Lottery (maybe the return will not be audited, if it is audited perhaps the revenue agent will not uncover the issue, and so on).⁷

Mr. Kingson sees the matter differently. He finds the *Report on Complexity*, in its concern with the practitioner’s inability satisfactorily to advise taxpayers, particularly less affluent taxpayers, “to some extent

3. See id.
6. Id. at 329-30.
7. Id. at 329-31.
disingenuous.” In support, Mr. Kingson assures us that “[f]or a businessman who does not wish to try siphoning off profit from high tax [foreign] countries . . ., subpart F should present no problem.” Now, as it happens, Mr. Kingson is an expert in subpart F, the controlled foreign corporation provisions, and he knows full well it is strewn with risk for the businessman or businesswoman of purest heart. A single current example may suffice. Translated from the Greek, § 956(c) of the Internal Revenue Code says it is a bad thing if your controlled foreign corporation is a pledgor or guarantor of a debt obligation you have issued. Suppose your controlled foreign corporation neither pledges nor guarantees anything. But when you borrow money from your bank, the collateral you pledge includes shares you own in the foreign corporation. Is that a bad thing too? Are you sure? Is anyone?

Mr. Kingson seems to believe that central to the Report on Complexity is “the idea that [the tax] law can be made more understandable or accessible by simplifying the language of the Code.” Not so. No doubt it would be a help were the Internal Revenue Code written in English—certainly it would be novel—but it would hardly carry the day. The Report did not suggest otherwise. Mr. Kingson points to § 341, the notorious collapsible corporation provision. Complex drafting in § 341 is a very real problem, but it is not the problem. The object is not to rewrite § 341. The sensible objective is to eliminate it, to do so by eliminating the need for a collapsible corporation concept. Interestingly, that restructuring of the Code also would resolve the dividend distributions problem that is the principal focus of Mr. Kingson’s paper.

2. Mr. Kingson takes a lexical approach to tax simplification:

In a philosophical sense, meaning itself may be necessarily tentative and imprecise. However, as a matter of tax law the same word can and should refer to business transactions whose structural similarity can be articulated with reasonable precision.

The philosophical notation is open to question, and to judge the suggested principle of tax law one must first understand it. What structural

8. Kingson, supra note 1, at 862 n.5.
9. Id.
10. In Rev. Rul. 76-125, 1976-1 C.B. 204, the Commissioner ruled “bad thing” under § 956(c). It is understood the issue currently is pending decision in the United States Tax Court.
11. Kingson, supra note 1, at 861-62. The emphasis is Mr. Kingson’s.
12. Id. at 862 n.4. Mr. Kingson’s specific reference is to “the necessity to limit strictly to its intended beneficiaries relief from a rule of general application, as in § 341(e).” The cited provision is a triumph of impenetrable drafting, but the origin of the misfortune was not quite as Mr. Kingson perceives it. In point of fact, § 341(e) began life as a special relief measure for one or possibly two taxpayers. At the 11th hour it was decided relief should be spread, and a broad subsection was drafted in some haste; according to a fairly reliable source, the drafting was accomplished in one dark night. Conceivably, periods were in short supply that evening. No better explanation has been offered why the first sentence of § 341(e) exceeds 500 words in length.
13. See pp. 805-06 infra.
14. Kingson, supra note 1, at 863.
similarity, and what tax consequence, shall inform the defining word? The teachings of a famous 19th-century logical empiricist spring to mind:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."  

3. Mr. Kingson's thesis equates simplification to better definition, to ascribing "logical and consistent meaning" to the characterizing terms of the tax law. The thesis is illustrated through examination of a series of court decisions in which the issues were whether a corporate distribution was a dividend for tax purposes and, if so, to whom.

Awarding similar transactions similar consequences would simplify and improve the tax law. But a sensible equation cannot be derived by tinkering with a definition. Mr. Kingson's paper amply if inadvertently supports this conclusion.

4. Humpty Dumpty reminds us that he who defines is master. Mr. Kingson instructs us to see "a dividend for what it is—a removal of assets from corporate solution." He also informs us that "Zenz, Kobacker, Sullivan, and Cromwell reached the correct results," although on "essentially meaningless reasoning." These cases involved stock redemptions. In Sullivan the redemption of shareholder A's stock was held a dividend to shareholder B who had contractually obligated himself to purchase the shares. In the other three cases the Government's attempt to identify a taxable dividend failed. In the Kingson dictionary, when shares are not redeemed a corporate distribution is a dividend, and if shares are redeemed from the seller a corporate distribution is a dividend (to the buyer and not the seller) only if the buyer is thereby relieved of an obligation to pay the purchase price.

5. When Mr. Kingson uses the word "similarity"—his phrase is "structural similarity"—he chooses it to mean similarity in form and not similarity in substance. His paper is explicit:


16. Kingson, supra note 1, at 863; see id. at 913.

17. "Dividend" is defined in I.R.C. § 316 in terms of a corporate distribution out of current or accumulated earnings and profits. The definition is not a happy one. See Blum, The Earnings and Profits Limitation on Dividend Income: A Reappraisal, 53 TAXES 68 (1975). Mr. Kingson's paper takes no position on the earnings and profits aspect of the definitional issue.

18. Kingson, supra note 1, at 895; see id. at 864. I disagree with Mr. Kingson's definition. See pp. 803-04 infra.

[A] court must focus on "negotiation substance." If the negotiations are consistent with the form of distribution and sale carried out by the parties, that form should determine the tax consequences.20

A few illustrations may be helpful. In each case, assume Ms. A owns all of the 1,000 outstanding shares of X corporation. The fair value of X corporation is $1,000 and its assets include available cash of $400. B corporation, unrelated to Ms. A, wishes to acquire X corporation.

Case 1. Pursuant to contract, B purchases from A 600 shares of X, paying $600 in cash, and X simultaneously redeems from A the remaining 400 shares, paying $400 in cash to A.

This is the Zenz case.21 The redemption is not a dividend to A or to B. Mr. Kingson approves the result. He notes that B negotiated to acquire stock of a corporation (X) having (when the dust settles) only $600 of net worth.

Case 2. B negotiates to acquire from A all of the stock of X corporation which, at the time the purchase closes, is to have a net worth of not less than $600. The parties' purchase contract permits A to take from X a $400 dividend at any time between signing and closing. Immediately prior to the closing X distributes $400 to A, and A then sells her 1,000 shares of X corporation to B for $600.

Since B was never contractually obliged to pay more than $600, Mr. Kingson tells us the $400 distribution by X to A, not in redemption of any X shares, should be taxed in accordance with its form: a $400 dividend to A.22 Note that the only difference between Case 1 and Case 2 is a nicety of conveyancing. In both, B negotiated to pay $600 to acquire 100% ownership of a corporation having a $600 net worth. In both, A withdrew $400 from the corporation incident to her closing with B. The sole difference: in Case 1 the parties danced the meaningless minuet of redemption; in Case 2 A's lawyer did not know the steps of the dance.

Case 3. The facts are the same as Case 2 with one addition. As had been intended from the outset, and as the purchase contract contemplated, immediately after the stock purchase X is liquidated with and into B, its momentary parent corporation. The liquidation was contemplated in the purchase contract because, as a condition to closing, A was obliged to obtain the consent of X's institutional creditor to liquidation.

The "negotiation substance" of the transaction unquestionably included the immediate liquidation of X. Would Mr. Kingson characterize the $400 distribution by X to A a liquidating distribution rather than a dividend? He does not say.23

20. Kingson, supra note 1, at 884. Mr. Kingson grounds his conclusion on Court Holding Co. v. Commissioner, 324 U.S. 331 (1945).
22. Kingson, supra note 1, at 888.
23. Cf. Rev. Rul. 70-106, 1970-1 C.B. 70 (corporation B owns 75% of stock of corporation A; B redeems balance of 25% of A stock from A minority shareholders and causes A to liquidate; held, liquidation of A fails to meet 80% control requirement of § 332 (b)(1) because redemption constitutes part of liquidation); Kamis Eng'r Co., 60 T.C. 763 (1973) (where parent and subsidiary simultaneously adopted plans of liquidation and
Case 4. The facts are the same as Case 2. Immediately after purchasing the 1,000 shares of X, B causes X to liquidate. This was B's intention from the outset, and B made very sure nothing in the purchase contract prevented immediate liquidation of X. But B never informed A of the intention to liquidate, and on this point the negotiation, if it can be called such, was silent and one-sided.

Would Mr. Kingson reach the same result in Case 4 as he would reach in Case 3? I do not know.

Case 5. Seeking to acquire X corporation at a net cost of $600, B purchases the 1,000 X shares held by A for $1,000. $400 is borrowed by B from its bank on a day loan. Immediately following the closing, X distributes $400 to B. B uses the money to repay the day loan. At the end of the taxable year B files a consolidated federal income tax return which includes X.

Mr. Kingson will find the $400 distribution a dividend to B, albeit not taxable because of the consolidated return, and he will find it so whether the $400 distribution is simply that or is in redemption of 400 of the 1,000 X shares B purchased from A. But if we take account of the arrangement with the lending bank, from B's viewpoint the "negotiation substance" of the entire transaction in Case 5 does not differ from the negotiation substance of the first four cases. In each, B is paying $600 of its own funds to acquire $600 in net worth, and A is terminating her entire interest in X corporation in exchange for $1,000.

6. In Mr. Kingson's view, a matching of negotiation and form should dictate substance. Seeking certainty of result, he does not ask whether the result is appropriate in the given case. Buyer and seller may not have access to equally expert tax advice. Ms. A, negotiating to receive $1,000 and unaware of the dread tax difference between a $400 pre-closing simple distribution and a $400 pre-closing redemption distribution, may give uninformed consent to B's request that the transaction be kept simple.

When both parties are well counseled, the Kingson solution provides neither more nor less than a taxpayers' joint election as to substantive tax treatment. Individual sellers seek capital gain, corporate sellers prefer sold assets, I.R.C. § 337(c)(2), which excludes a § 332 liquidation from benefit of § 337, is inapplicable and subsidiary is entitled to such benefit on sale of its assets (before 1976 amendments; court's holding codified at I.R.C. § 337(c)(2)); Henry H. Adams, 38 T.C. 549 (1962) (I.R.C. § 337 applies to sales of corporate assets completed on same day as adoption of plan of complete liquidation by corporation, notwithstanding that sale may have preceded such adoption).

24. Cf. Robert Campbell, 15 T.C. 312 (1950) (under 1939 Code, valid § 368(a)(1)(B) reorganization between X and Y notwithstanding that Y transferred X stock to its subsidiary since such transfer was without acquiescence of X shareholders).

25. The form in which the transaction is cast does have other impacts, for example, on the earnings and profits of X. A reasonable response would be to reexamine the need for an earnings and profits concept. See Blum, supra note 17.

26. See, e.g., Clarence Clark Hamlin Trust, 19 T.C. 718 (1953), aff'd, 209 F.2d 761 (10th Cir. 1954) (inadequately advised sellers of corporate stock agreed to allocate 25% of purchase price to their covenant not to compete, resulting in conversion of capital gain to ordinary income and correlative deduction for buyer).
Correspondence

dividends, and buyers are constitutionally opposed to paying tax incident to purchase. Well advised, the parties in their contract of sale elect the tax treatment that best suits the circumstance.

7. Certainly a good case can be made for elections in the tax law, although it is fair to question whether that case can be made with respect to corporate distributions incident to sale. And, however convincing one may find the case for elective tax treatment, why should the form on which the election is made be the contract of sale? If X is incorporated in a foreign jurisdiction that permits simple distributions but forbids share redemptions, why should the United States tax consequences to A, a United States person, be dictated by the strictures of local corporate law? If as a matter of policy Mr. Kingson were correct that negotiation plus form equals substance in the tax law, would it not be better if that form were one the parties jointly complete and file with the Internal Revenue Service? If nothing else, the procedure should reduce the incidence of tax-motivated baroque contracts, and the otherwise inadequately advised party will be informed that tax consequences attend the event.

8. Suppose we were to translate Mr. Kingson's contract-of-sale election into an explicit tax election. What of the buyer and seller who, through inadvertence or lack of knowledge or inability to agree, fail to file the election form? Or, in my view far better, suppose we just forget all about elections and try to work out a more sensible answer.

Once again, we do well to listen to Humpty Dumpty. The Kingson key is in the meaning we give to the word, and under present tax law the key word is dividend.

Mr. Kingson tells us a dividend is "a removal of assets from corporate solution." Professor Walter Blum's definition seems to me more instructive:

A dividend is an occurrence that entails a transfer, direct or indirect, of something of value from the corporation to a shareholder without substantially reducing the equity interest of that shareholder vis-a-vis other owners of the equity.

In each of the bootstrap acquisition transactions we have reviewed, Ms. A is terminating her equity interest in X corporation. As a commercial matter, the distribution and the sale of shares are inseparable steps in an integrated transaction; they should be so viewed as a tax matter. If we accept Professor Blum's definition, we ought to recognize the distribution by X is not a dividend to contractually bound A. And this is so whether the distribution is or is not carried out as a redemption.

27. Absent a consolidated return, dividends received by a domestic corporation from another domestic corporation attract an 85%, and in some cases a 100%, exclusion; the dividends do not reduce the recipient corporation's basis in the shares of the paying corporation. I.R.C. § 243.

28. Kingson, supra note 1, at 895.

Should the distribution be treated as a dividend from X to B, and then as a purchase price payment by B to A? To make the matter concrete, when X distributes $400 to A upon or prior to the closing, should tax consequence turn on whether B's contractual obligation was to pay $600 for a slimmed-down X, or was to pay $1,000 for X in historic condition with any interim distribution to A credited against B's purchase price obligation? In my view the $400 distribution to A should not be treated as a dividend to B, whether the distribution is structured as a redemption or not and whether the distribution does or does not technically relieve B of a contractual obligation to make full payment. The only case in which I would find a dividend to B is Case 5: After purchasing the shares of X, B causes X to distribute to B (whether the distribution is simply that or is structured as a redemption of part of the 1,000 X shares B now owns).

Mr. Kingson should be quick to point out that this formulation rejects the decision in Sullivan. Indeed it does. Contrary to Mr. Kingson's view, I think Sullivan wrongly decided and responsible for much mischief in the tax law. Sullivan equates a contractual obligation to purchase shares with unrestricted ownership of the shares, and distinguishes both from an option to purchase shares. The tax treatment Sullivan accords a contracting purchaser is not inevitable. I would draw the line on the other side and equate the executory contract with the option to buy.

If the $400 nonredemption distribution from X to A is treated as a capital payment to A and not as a dividend to anyone, may A offset any part of the basis at which she holds the 1,000 X shares she is about to sell to B? If the sale to B takes place in the same taxable year, ordinarily the question will be of academic interest. If A's taxable year closes on or after distribution day and before the day of sale, failure to allocate any part of

31. See Kingson, supra note 1, at 884.
32. For example, essentially similar transactions attract dissimilar tax treatment. See Rev. Rul. 69-608, 1969-2 C.B. 43.
33. Cf. Jassy, The Tax Treatment of Bootstrap Stock Acquisitions: The Redemption Route vs. the Dividend Route, 87 HARV. L. REV. 1459, 1477-83 (1974). Mr. Jassy would accord capital gain treatment to the seller in all of the cases described but, because he does not reject Sullivan, would find a dividend to the buyer who is relieved of a primary and unconditional contractual obligation to pay purchase price. As Mr. Kingson points out, Mr. Jassy's formulation would adversely affect the seller if the distribution by X were incident to and followed by B's attempted reorganization acquisition of X under § 368(a)(1)(B). See Kingson, supra note 1, at 867 n.30. Reversal of Sullivan and treatment of the distribution of X to A as a direct capital payment, and not as a constructive payment to A by B, would avoid the problem. Cf. Rev. Rul. 68-285, 1968-1 C.B. 147 (cash payment from escrow account set up by required banking corporation for its dissenting shareholders does not preclude § 368(a)(1)(B) reorganization, even though not all shares had been redeemed prior to acquisition; however, such reorganization is precluded when acquiring corporation pays dissenters or reimburses acquired corporation for its payments).
34. If A has a sufficiently high basis in the X shares, basis allocation vel non may be tax-significant, e.g., if failure to allocate results in a loss on the sale to B, and either B is related to A (§ 267(a)(1)) or A is an electing small business corporation (§ 1372(c)(5) (C)).
Correspondence

her share basis to the capital distribution will increase the gain recognized by A in the earlier year. Jassy\textsuperscript{35} disapproves this result and would require basis allocation by treating the capital distribution as a constructive redemption of an appropriate part of the X shares held by A. This seems to me unnecessarily complex. When night falls on the integrated transaction, all 1,000 X shares will be outstanding in the hands of B; the constructive redemption of 400 shares by X from A must be followed up by a 400-share constructive stock dividend by X to B. The tax law is complicated enough without all this. If we must think in redemption terms, let us pretend A owned additional X shares with a zero basis in her hands, and it was these phantom shares that were redeemed in the phantom redemption.

10. What has all of this to do with the deep structure of taxation? So far, not much. An analysis compounded of integrated transaction concepts and rejection of the Sullivan doctrine has been set against Mr. Kingston's negotiation cum form approach. Neither is satisfactory, for neither challenges basic notions of the tax law.

Special treatment of capital gains, certainly a basic notion in any catalogue, bears heavy responsibility for the complexity of the system. Another miscreant is the lack of a comprehensive corporate tax base. When X, the target company, owns appreciated property not unduly pregnant with recapture potential,\textsuperscript{36} the parties may design a distribution, redemption, or complete liquidation of X to enjoy the benefits of that appreciation free from corporate tax.\textsuperscript{37} The label we affix to a distribution is not an independent determinant. The label is significant only insofar as it attracts better or worse tax consequences. The essential concerns, the deep structural matters, are the differential treatment accorded types of income the tax law now perceives as different, and the exclusion from the corporate income tax base of appreciation in the value of distributed property when that property, in the hands of the distributee, will enjoy a stepped-up basis.

Assume a tax world built on these foundations:

a. No special treatment of capital gains.

b. A distribution by one corporation, to its shareholders, of stock in another corporation is not a taxable event to the distributor. The distribution may be a simple dividend, a redemption or a liquidation.

c. A distribution of appreciated property (other than corporate stock) by a corporation to a noncorporate shareholder is treated as a sale of the property by the distributor at fair market value.

d. A distribution (dividend, redemption, or liquidation) received by one domestic corporation from another is not taxable to the recipient. If property is distributed, basis carries over except as affected by (revised) § 334(b)(2).

e. Gain or loss is not recognized to a corporation when it sells or exchanges shares of another domestic corporation.

f. Section 334(b)(2) is revised. The corporate mechanics of a liquidation

\textsuperscript{35} See Jassy, supra note 33, at 1480.

\textsuperscript{36} E.g., I.R.C. §§ 47 (investment credit), 1245 (personal property), 1250 (real property), 1254 (oil or gas property).

\textsuperscript{37} See I.R.C. §§ 311(d)(2)(A), 356; see also id. § 337.
no longer are required. Instead, the newly purchased subsidiary timely elects to step-up the basis of its assets, and recognizes gain as if it had sold them on election day.

g. Section 337 is repealed.

h. The maximum individual income tax rate is reduced to no more than 50%. Section 1348, the personal service income rate limitation, no longer serves a function and is repealed.

i. Many other sections of the Code have become superfluous and are repealed. Among them, depreciation recapture provisions and § 341, the collapsible corporation horror.

Any serious restructuring of the law can be viewed as an exchange of old problems for new. Even at first look some of the suggested rules seem to warrant further study, and it is safe to assume experience will cast doubt on others. The possibility of error, indeed the virtual certainty of it, is an argument for perceptive analysis and serious debate at the threshold of the legislative process. But it is not an argument against structural reform. In the tax law, the devils we know are not better than the devils we don’t. The present problems in dividend distributions, to which Mr. Kingson devoted 53 pages and 206 footnotes in this journal, bear witness.

To reduce substantially the level of complexity in the tax system, we must reexamine basic concepts. Consistency of definition surely would help, but the root problem lies elsewhere.

Martin D. Ginsburg

38. For example, I am not at all sure of rule (e), which would treat as tax free a corporation’s profitable sale of shares of another corporation. Perhaps this rule should be limited to a sale of shares of a 10% or 50% or even an 80% subsidiary. Non-recognition might also be conditioned upon the selling corporation’s prompt distribution to its shareholders of the proceeds of sale.

39. Repeal of the capital gain benefit and of I.R.C. § 337 would greatly increase the total tax burden when a corporation adopts a plan of complete liquidation, sells its assets, and distributes the proceeds to its shareholders. In this and functionally analogous cases, it might be found appropriate to award to the shareholder a credit for certain taxes paid by the corporation. Integration of corporate and shareholder taxes could, of course, go further, and might involve shareholder credits, corporate deductions for dividends paid, or a mixture of the two.

Author’s Reply:

I know Martin Ginsburg both as a friend and by reason of his fine professional reputation. The misspelling of his name was inadvertent, and I regret the error. His other comments are less persuasive. Let me reply briefly.

1. Mine may be the first published—but it is not the only—dissent from the Report on Complexity. Despite the overpowering distinction of its authors, the organization for which it was written refused to endorse it.¹

¹ The introduction to the Report on Complexity explicitly acknowledges this. See
Correspondence

2. I chose subpart F as an example because the Report chose it as its first example, on the first page. Mr. Ginsburg's example of the unwary pledgor of shares in a controlled foreign corporation misses on three counts:
   a. The small businessman—at least on my block—doesn't even own a controlled foreign corporation, much less pledge it.
   b. I stated that subpart F should not present a problem for the businessman who does not wish to siphon profits or to repatriate them without dividend tax. Mr. Ginsburg's quotation from the article elides the reference to repatriation, which is the only part of the sentence relevant to § 956(c).
   c. Rev. Rul. 76-125 reaches a result favored by Mr. Ginsburg in another context. It concludes that the reduction to cash (by pledge) of previously tax-deferred earnings terminates the deferral. Mr. Ginsburg agrees with this result when an installment seller pledges receivables; and I do not see any significant difference—either in principle or in degree of entrapment—between the two situations.

3. Mr. Ginsburg suggests that I am mistaken in thinking that a significant recommendation of the Report on Complexity was less statutory detail. The Report's first recommendation to Congress, which Mr. Ginsburg elsewhere refers to as one of its central features, was: "At least in some areas, future tax legislation should adopt the form of more generalized statutes stating broad objectives rather than detailed rules."

4. Mr. Ginsburg even questions my poor one-sentence "philosophical notation." His quibble is not so much with me, however, as with Ludwig Wittgenstein, to whom a footnote in the original manuscript referred. That manuscript explained that the article's title was taken from a concept of linguist Noam Chomsky. The passage Mr. Ginsburg quotes was meant to indicate that, whether or not one agreed with the broader implications of Chomsky's views, tax concepts could be made coherent. I am not familiar with the works of Mr. Dumpty.

5. In two instances Mr. Ginsburg criticizes the article I did not write.
   a. The conclusion of the article explicitly agreed with the Report that tax law would be simpler if such preferences as capital gains were eliminated. My point was that complexity arises quite apart from any specific set of rules. To illustrate, Mr. Ginsburg asserts that his proposed restructuring would resolve the dividend distributions problem discussed in the article. If, as he suggests, gain from the sale of stock is excluded from

2. Id. at 327.
4. 1976-1 C.B. 204.
6. Id. at 472.
9. See Kingson, supra note 3, at 915 n.206.

807
income, the specific issue may become whether contributions to (rather than distributions from) the corporation are incident to sale of its stock: but on a different level the same type of Court Holding analysis will have to be made.11

b. The difference between my definition of dividend and Professor Blum's relates to topics I disclaimed covering.12

6. As for criticism of my legal discussion, Mr. Ginsburg states that a distribution and sale of shares are "inseparable steps in an integrated transaction." To me that is the question, not the answer. A distribution was inseparable in Commissioner v. Court Holding Co.;13 it was not inseparable in United States v. Cumberland Public Service Co.14 I have two more specific comments:

a. Mr. Ginsburg states that in his Case 2 "A's lawyer did not know the steps of the dance." But Case 2 is Steel Improvement & Forge Co.,15 in which A's lawyer did know that A was bargaining to receive a dividend. A reported the distribution as such, but mistakenly assumed that it would receive a foreign tax credit.

b. If a distribution is not integrated with a sale, it would a fortiori not be integrated with liquidation of the corporation by the purchaser. If the distribution were integrated with the sale, the correct question as to the effect of the liquidation in Cases 3 and 4 is whether there has been a sale of assets or stock, a question outside the scope of the article.16

7. Finally, I ascribe less importance than does the Report to the cause-and-effect relationship between substantive rules and either the giving of questionable tax opinions (Gresham's Law) or the taking of what are euphemistically called "aggressive" reporting positions (the Tax Lottery). It was not inability to understand the rules that led to the wraparound mortgage, the stop-loss cattle deals, and the movie production shelter. Rather, it was the attempt to stretch a nonstatutory concept as far as possible. Public, well-reasoned analysis of such concepts can debase the currency in which more questionable interpretation must deal.

For most taxpayers, I agree that we should try to limit the number of rules. For those who will play the tax lottery under any system, the answer is to make it more expensive to enter (for example, by increasing the negligence penalty).17 Fewer rules do not necessarily mean greater compliance. Look at the Ten Commandments.

Charles I. Kingson

11. Mr. Ginsburg has similarly devoted considerable effort to fashioning a coherent approach to a problem whose complexity is not statutory. See Ginsburg, supra note 5.
12. See Kingson, supra note 3, at 863 n.20.