Marvel and *United Dominion*'s Dangerous Dictum

by Lawrence M. Axelrod


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In this article, Axelrod questions the Tax Court's use of an unfortunate dictum in the Supreme Court's *United Dominion* opinion to support its decision in *Marvel*.

On September 7, a three-judge panel of the Second Circuit issued a two-paragraph per curiam opinion in *Marvel*,[1] rejecting the taxpayer's appeal of the Tax Court's decision in favor of the government. That decision required the Marvel Entertainment consolidated group to reduce the consolidated net operating loss (CNOL) carryovers attributable to members of the entire consolidated group, rather than simply the portion of the CNOL attributable to the four subsidiaries in bankruptcy.[2] Under section 108(b), a taxpayer in a bankruptcy proceeding that has excluded cancellation of indebtedness (COD) income must reduce its tax attributes, beginning with its NOL carryovers. In *Marvel*, the excluded COD income that gave rise to attribute reduction under section 108(b) arose in 1998, predating the 2003 promulgation of temporary consolidated return regulations, which were modified and finalized in 2005.[3] Marvel argued that the only loss carryovers subject to reduction were the portion of the CNOL carryovers attributable to the four subsidiaries in bankruptcy. The Tax Court, however, sided with the government, holding that the CNOL carryovers subject to reduction were those of the entire group. The tax controversy had relevance for later years because NOL carryovers have a 20-year life and the amount of the group's CNOLs carried to a subsequent year depended on the amount of CNOLs the group would not have been required to reduce in the year of the excluded COD income.

What should have been a simple administrative law question has now become a troubling consolidated return precedent because of the Tax Court's acceptance, and the Second Circuit's affirmance, of the government's broad reading of the Supreme Court's 2001 opinion in *United Dominion*.[4] This article maintains that the Tax Court took an unfortunate dictum from the *United Dominion* opinion (dictum that is demonstrably incorrect) and treated it as the central holding of the case.[5] For a lower court to suggest that the Supreme Court may have misspoken is the jurisprudential equivalent of "the king has no clothes," a suggestion that a lower court may be understandably reluctant to make. Nevertheless, when the high court's lapse is not critical to its decision, a lower court can be less timid. Distinguishing the facts and context of an arguably precedential case from the facts and context of another case to avoid contradicting the higher powers is what courts should do.

Background

In 1980 Congress enacted the Bankruptcy Tax Act, which amended section 108, concerning the tax treatment of income from the discharge of indebtedness.[6] Generally, taxpayers that have discharge of indebtedness must include the amount of the discharge in gross income under section 61(a)(12). If, however, the discharge occurs in a title 11 case (that is, a bankruptcy proceeding) or to the extent the taxpayer is insolvent, section 108(a) allows the otherwise includable income to be excluded. The exclusion, however, does not come free of charge. Section 108(b) requires the "tax attributes of the

[1]*Marvel Entertainment LLC v. Commissioner*, No. 15-3335-ag (2d Cir. 2016), *aff'g* 145 T.C. 69 (2015).

[2]*See* Amy S. Elliott, "Second Circuit Hears *Marvel* Case on Consolidated NOL Reductions," *Tax Notes*, Sept. 5, 2016, p. 1346.

[3]T.D. 9192.

[4]*United Dominion Industries Inc. v. Commissioner*, 532 U.S. 822 (2001).

[5]"The issue in the current case, which was central to the opinion of the Supreme Court in *United Dominion*, is identifying the appropriate NOL in a consolidated return context," the Tax Court wrote.

[6]P.L. 96-589, section 2(a).

taxpayer'' to be reduced in the order specified in subsection (b)(2), beginning with NOL carryovers. An ordering rule in section 108(b)(4) allows the taxpayer first to use any of its tax attributes to offset taxable income for the year of the debt discharge before applying the reductions. If the amount of excluded COD income exceeds the tax attributes available for reduction — referred to as ''black-hole COD'' — there are generally no additional tax consequences. If, however, the debtor is a subsidiary in a consolidated group and there is an excess loss account regarding the subsidiary's stock, the excess loss account must be included in income to the extent of the black-hole COD.[7] Section 1017 contains various elections, limitations, and special rules concerning discharge of indebtedness, which are not relevant to the issues here.

If an affiliated group elects to file a consolidated return and a member has excluded COD income, section 108(b)(1) requires ''the tax attributes of the taxpayer'' to be reduced.[8] The question at issue in *Marvel* was, absent regulatory guidance, what the tax attributes of the taxpayer were. Marvel argued that the taxpayer was only the subsidiary or subsidiaries in bankruptcy, not the entire group. Only the debtor-members were in bankruptcy, and the test for insolvency is always at the separate corporate level. The government argued in its brief, and repeatedly in oral argument, that the question was not who the taxpayer was but what the taxpayer's tax attributes were. The government's answer to its own question was that a taxpayer's tax attributes are the attributes that can offset its income or otherwise reduce its tax liability, which in a consolidated return would include all CNOL carryovers, without regard to whether the CNOL carryovers were generated by the subsidiaries in bankruptcy or any other member of the group. That is a reasonable definition and has a surface appeal. But it is not the only reasonable definition. By contrast, Marvel argued that a taxpayer's tax attributes are the debtor-subsidiaries' allocable share of the CNOL or other consolidated tax attributes that they generated and that each would take with it if it ceased to be a member of the group — another reasonable definition in the absence of regulations addressing the question. Marvel argued further that the regulations in place for the years at issue contained examples illustrating the issue and supporting its position. In fact, the IRS adopted the taxpayer's position in a 1991 private letter ruling,[9] a position it has come to rethink.

The tax issue presented in *Marvel* was not new. It had been around since the enactment of the Bankruptcy Tax Act of 1980. The issue showed up in several examples in the consolidated return regulations, and it is obvious from reading the examples that until 2003, the government could not decide on an approach and was ducking the issue. Not until the promulgation of reg. section 1.1502-28T in 2003 did the government issue a clear set of fairly intricate regulations. As discussed later, the simplistic approach used in the *Marvel* decisions has numerous problems that required the promulgation of special rules and byzantine computations in reg. section 1.1502-11(c) when reg. section 1.1502-28 was made final in 2005. Under general principles of tax and administrative law, if a rule is unclear, there is more than one reasonable approach, and if the responsible agency has not promulgated guidance on the issue, a taxpayer may take any reasonable approach.[10] That should have been enough to resolve the tax controversy, except for one small intervening event: the Supreme Court's 2001 opinion in *United Dominion*.

United Dominion

In 2001 the Supreme Court issued its first opinion on a consolidated return issue in 67 years.[11] *United Dominion* involved the 10-year carryback rule for product liability losses described in section 172(f) (now renamed and expanded to include specified liability losses) as applied to a consolidated group's CNOL. Under section 172(b)(1)(C), an NOL for any tax year can be carried back 10 years (rather than the usual two years) to the extent the taxpayer incurs the types of expenses described in section 172(f). In *United Dominion*, some members of the group incurred product liability expenses but were profitable on a stand-alone basis. Other members incurred losses (on a stand-alone basis) in excess of the income of the profitable members, but the loss members did not independently incur product liability expenses. The government argued that the test for eligibility for the 10-year carryback should be done on a member-by-member basis and that

[7]Reg. section 1.1502-19(c)(1)(iii)(B).

[8]Reg. section 1.1502-80(a) states, ''The Internal Revenue Code (Code) or other law, shall be applicable to the group to the extent the regulations do not exclude its application.''

[9]LTR 9121017.

[10]*Gottesman and Co. Inc. v. Commissioner*, 77 T.C. 1149 (1981).

[11]In a previous article, I stated that the Supreme Court heard three consolidated return cases in 1934 and decided it didn't want to hear another one for 67 years. Lawrence M. Axelrod and Jeremy B. Blank, ''The Supreme Court, Consolidated Returns, and 10-Year Carrybacks,'' *Tax Notes*, Mar. 5, 2001, p. 1383. *Ilfeld v. Hernandez*, 292 U.S. 62 (1934); *Helvering v. Morgan's Inc.*, 293 U.S. 121 (1934); *McLaughlin v. Pacific Lumber Co.*, 293 U.S. 351 (1934).

because the members with the product liability expenses were profitable, no portion of the CNOL could be carried back more than two years. The Court reviewed the rules for CNOL carrybacks in reg. section 1.1502-21 (and its predecessor provision) and rightly rejected the government's position. As the Court stated, the concept of a separate NOL in a consolidated return context "simply does not exist," a statement quoted in the Tax Court's opinion in *Marvel*. Accordingly, United Dominion was allowed to carry back its CNOL 10 years to the extent of the sum of product liability expenses incurred by all members.[12]

The result in *United Dominion* was absolutely appropriate. A consolidated group computes its consolidated taxable income (CTI) or CNOL for a consolidated year, and the character or status of that income or loss is determined on a consolidated basis in carrying any loss back or forward. Thus, questions regarding the sourcing and character of income (for example, capital or ordinary, and foreign or U.S. source), applicability of the corporate equity reduction transaction limitations in section 172(b)(1)(D), or eligibility for a 10-year carryback benefit for specified liability losses to CNOLs is determined on a consolidated basis.[13] In *Marvel*, the taxpayer did not argue that members have separate NOLs, but rather that members have an allocable share of the CNOL, a concept that is common throughout the consolidated return regulations.

Unfortunately, the Supreme Court's opinion in *United Dominion* rates only a B+. The opinion contains statements not essential to the result reached (that is, dicta) that in some cases are simply inaccurate. Those statements were not the focus of the case, and if the Court were faced with a case directly on point, there is little doubt it would clarify what was meant. Not surprisingly, because those statements were helpful to the IRS, the government seized on them in its arguments and the Tax Court repeated them as support for its conclusion that members cannot have an allocable share of the CNOL.

The Tax Court's Opinion

The Second Circuit's per curiam opinion rejected the taxpayer's appeal "for substantially the same reasons stated by the Tax Court in its complete and well-reasoned opinion." In the Tax Court's opinion, Judge Robert P. Ruwe discussed *United Dominion* at length:

> The Court also examined reg. section 1.1502-79(a)(3) [the predecessor to current reg. section 1.1502-21(b)(1)], which apportioned a consolidated group's CNOL to members of the group for purposes of carrying back losses to separate return years. The Court acknowledged that reg. section 1.1502-79(a)(3) provides a close analogy for a separate member NOL but found that the regulation applies only narrowly to determine carryback and carryforward NOLs to separate return years in which the member was not part of the consolidated group. The Court reasoned that, because no carrybacks to separate return years were at issue, reg. section 1.1502-79(a)(3) was inapplicable in calculating the taxpayer's [product liability loss] using the separate-entity approach. . . . In describing the inapplicability of the apportionment rules, the Court stated that reg. section 1.1502-79(a)(3) "unbakes the cake for only one reason, and that reason has no application here."[14]

One can hardly fault Ruwe. After all, how can you go wrong citing the Supreme Court — unless the Court misspoke? Despite the dictum in *United Dominion* to the contrary, apportionment of tax attributes among members is a tool used for numerous consolidated return regulation purposes in addition to carrying a portion of a CNOL to a separate return year.[15] One purpose is determining the amount of each member's absorbed loss and the basis adjustments for a subsidiary's stock when the sum of loss members' losses exceeds the sum of profitable members' income. Consider the following examples:

> For the consolidated return year, a group consists of P and its two wholly owned subsidiaries, S1 and S2. For the year, P generates $45 of separate taxable income, S1 loses $30,

[12]Under the facts of that case, some members of the group were not members in the carryback years.

[13]In *United Dominion*, Justice David H. Souter invited the government to change the result by regulation if it disagreed: "To the extent the government disagrees, it may amend its regulations to provide a different [approach]." The government has since conceded that the Court's decision was right and incorporated in prop. reg. section 1.1502-21(b)(2)(iv)(C) a single entity approach for determining the attributes of a CNOL.

[14]For a critique of the metaphor as misapplied — the cake is "sliced," not "unbaked" — see Jared H. Gordon, "Unbaking the Consolidated Cake: Deciphering the Impact of *United Dominion*," 28 *J. Corp. Tax'n* 3 (2001).

[15]Reg. section 1.1502-11(b) limits the use of S's "deductions and losses carried over from prior years"; reg. section 1.1502-32(b)(3) reduces basis "to the extent of S's deduction or loss is absorbed . . . is carried forward and absorbed in a subsequent year"; reg. section 1.1502-33(d)(2) increases E&P if "the member with the tax attribute could have absorbed the attribute"; reg. section 1.1502-36(d)(4) states "S's attributes available for reduction [when a loss share of a subsidiary's stock is disposed of] are . . . net operating loss carryovers."

> and S2 loses $60. Under reg. section 1.1502-11(a), the group has a $45 CNOL for the consolidated return year. Under reg. section 1.1502-21(b)(2)(iv), the portion of the CNOL attributable to S1 is $15, and the portion of the CNOL attributable to S2 is $30. Under the investment adjustment rules in reg. section 1.1502-32, P's basis in S1's stock is reduced by $15, the amount of S1's loss that is absorbed in the year, and P's basis in S2's stock is reduced by $30, the amount of S2's loss that is absorbed in the year. If at the beginning of the following year, P were to sell 20 percent or less of S1's stock, S1 would remain a member of the group, but P's basis in the sold shares would be reduced by a proportionate share of S1's loss that was absorbed in the preceding year.

In its brief, the taxpayer cited Example 5 of reg. section 1.1502-19(g), as it read in 1998:

> (a) Facts. P forms S with a $150 contribution, and S borrows $150. For Year 1, S has a $50 ordinary loss that is carried over as part of the group's consolidated net operating loss. For Year 2, P has $160 of ordinary income, and S has a $160 ordinary loss. Under section 1.1502-32(b), S's loss results in P having a $10 excess loss account in S's stock.
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> (c) Discharge of indebtedness. . . . S's creditors discharge $40 of S's indebtedness during Year 3, S is insolvent by more than $40 before the discharge, the discharge is excluded from the P group's gross income under section 108(a), and $40 of the $50 consolidated net operating loss carryover attributable to S is eliminated under section 108(b).

Note that the example expressly states that "$40 of the $50 consolidated net operating loss carryover attributable to S is eliminated." The words "attributable to S" are not surplusage. The consolidated return regulations are replete with references to a member's allocable share of a CNOL. The statement in the *United Dominion* opinion that CNOLs are apportioned to members solely for purposes of a carryback or carryover to separate return years is simply incorrect, although not essential to the decision. In *United Dominion*, the government argued that a member's deductions in excess of its income, or negative separate taxable income (STI), were the equivalent of a separate NOL. The Court's rejection was unequivocal: "STI is merely an accounting construct devised as an interim step in computing a group's CTI or CNOL."[16] In *Marvel*, the Tax Court confused a "separate NOL" with "a member's allocable share of a CNOL." The former does not exist, but the latter is a core concept. The Tax Court's opinion cited the Supreme Court's treatment of the portion of a CNOL attributable to a member as providing "a close analogy for a separate member NOL," but even a close analogy is not necessarily perfect. Ironically, the consolidated attribute reduction regulations prescribed as temporary in 2003 and issued as final in 2005 apply attribute reduction to the portion of the consolidated group's tax attributes allocable to the debtor-member before reducing the consolidated attributes of other members.[17] Yet the government argued in *Marvel* that in the absence of regulations, allocating a portion of the CNOL to a member was unreasonable under *United Dominion*.

Impact on Bankruptcy Law

More troubling are the implications that a broad reading of *United Dominion* may have in the bankruptcy context. Bankruptcy courts have routinely granted — and the Second Circuit affirmed in *Prudential Lines*[18] — injunctions preventing an owning member of a bankrupt subsidiary from claiming a worthless stock deduction in order to preserve the value of the portion of a CNOL attributable to the bankrupt subsidiary.[19] In light of a potentially broad reading of *United Dominion*, however, commentators have expressed concern that *Prudential Lines* may no longer be good law.

Although the rule established by *Prudential Lines* is fairly well settled and has been often cited for the proposition that tax losses generated by a bankrupt member of a consolidated group represent an asset of that entity's bankrupt estate, the Supreme Court's reasoning in *United Dominion* could extend to determine that absent a written tax sharing agreement, a bankrupt consolidated entity is not entitled to payment from group members that use favorable tax attributes generated by the bankrupt entity. The conclusion is plausible if *United Dominion* stands for the proposition that a consolidated group member does not have an exclusive property right to tax losses it generates while part of the consolidated group because for consolidated

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[16] *United Dominion*, 532 U.S. at 835.

[17] Reg. section 1.1502-28(a)(2).

[18] *In re Prudential Lines Inc. v. PSS Steamship Co. Inc.*, 107 B.R. 832 (Bankr. D.N.Y. 1989) (preliminary injunction), 114 B.R. 27 (Bankr. D.N.Y. 1990) (permanent injunction), *aff'd*, 928 F.2d 716 (2d Cir. 1991).

[19] Under section 382(g)(4)(D), the claiming of a worthless stock deduction by an owning member would create a zero limitation on the subsidiary's NOL carryovers.

groups, there is only one tax loss — the consolidated tax loss, which represents an asset of the group.[20]

Can anyone seriously maintain that the Supreme Court intended to overrule *Prudential Lines* by its dictum in *United Dominion* that the allocation of a consolidated group's CNOL to a member applies solely in carrying a portion of the CNOL to a separate return year? In its brief in the Second Circuit, the government argued that *Prudential Lines* was, in fact, overridden, but backed off during oral argument and instead maintained that apportionment of the CNOL could apply to a bankrupt subsidiary because the subsidiary would be leaving the group. However, the long-standing position of the IRS is that a subsidiary remains in the group while in bankruptcy.[21]

Circular Basis and Unworkability

Perhaps the strongest argument against the decisions of the Second Circuit and the Tax Court in *Marvel* is that applying attribute reduction to the portion of a CNOL attributable to members other than the debtor is unworkable, given the consolidated return regulations in place in 1998. When a debtor-subsidiary has excluded COD income, the amount is generally treated as tax-exempt income for purposes of the investment adjustment regulations and increases the owning member's basis in the subsidiary's stock.[22] When section 108(b) applies to reduce the portion of a subsidiary's CNOL, under the investment adjustment regulations, the owning member's basis in the subsidiary's stock is reduced.[23] If the stock of the debtor-subsidiary (or of a subsidiary that had its portion of a CNOL reduced) is sold during the year, the gain or loss on the stock sale is affected by either the NOL reduction or the excluded COD income. Under the position espoused by Marvel, the basis increase and basis reduction would be a wash because the excluded COD income and attribute reduction would always be in the same member. Under prior law, if there were insufficient tax attributes to reduce, or the attribute reduction did not cause a stock basis reduction (such as if credit carryovers were reduced), the excluded COD income would cause the basis of the debtor-subsidiary's stock to be increased by only the amount of the basis decrease. If, however, the portion of a CNOL attributable to a subsidiary other than the debtor-subsidiary was reduced, as the *Marvel* decision sanctions, the basis of the debtor-subsidiary's stock would have a net increase and the basis of the other subsidiary's stock would have a net decrease. If the stock of either subsidiary was sold in the year of the debt discharge, circular basis adjustments would ensue.

The circular basis problem is one that even seasoned corporate tax lawyers find challenging, but here is an attempt at an explanation. Under section 108(b)(4)(A), tax attribute reduction occurs after the determination of the tax imposed for the year of the debt discharge. Under the investment adjustment regulations in reg. section 1.1502-32, the adjustments to the basis of a subsidiary's stock are made immediately before the disposition of that stock. As one tax wit put it: "Both section 108(b)(4) and reg. section 1.1502-32 want to be last."[24] Consider the following example:

> P owns all the stock of two subsidiaries, S1 and S2, with which it files a consolidated return. At the beginning of the year, P has a $20 basis in S2's stock. The group has a $135 CNOL carryover from the previous year, $60 of which is attributable to S2 and $75 of which is attributable to P. S1 has no portion of the CNOL carryover. For the year, S2 generates $18 of income, but P and S1 break even (without regard to the sale of the S2 stock). During the year, S1 goes into bankruptcy and has $60 of excluded COD income. Also, at the end of the year, P sells all its S2 stock for $70.

Before applying the attribute reduction rules of section 108(b)(2), the group must first determine its consolidated tax liability for the year. P has a gain of $50 on S2's stock ($70 sale price less $20 basis). Under the rules of reg. section 1.1502-11(b), the amount of S2's loss that is used in a year in which S2's stock is disposed of is tentatively determined without regard to any gain or loss on S2's stock. Thus, the use of S2's $60 portion of the CNOL carryover is limited to the amount that would have been used if P had not sold its S2 stock. Because S2 generated 4/9 (60/135) of the CNOL carryover, the portion of S2's CNOL that may be used to offset the $18 of tentative taxable income (determined without regard to P's gain on S2's stock) is limited to $8 (4/9 x $18). Thus, the total CNOL carryover for the year that may be used is $83 (S2's $8 portion and P's $75 portion). For the year, the group's $68 ($50 + $18) of CTI (before applying the CNOL carryover) is

[20]Russell J. Kestenbaum and Dale L. Ponikvar, "Aspects of the Consolidated Group in Bankruptcy: Tax Sharing and Tax Sharing Agreements," 58 *Tax Law.* 835 (2005).

[21]Rev. Rul. 63-104, 1963-1 C.B. 172, and LTR 6807120920A, LTR 200643001, and LTR 200843012.

[22]Reg. section 1.1502-32(b)(3)(ii)(C).

[23]Reg. section 1.1502-32(b)(3)(iii)(A).

[24]John Broadbent, former special counsel to the associate chief counsel (corporate).

offset by approximately $6.55 (8/83 x $68) of S2's portion of the CNOL and $61.45 (75/83 x $68) of P's portion of the CNOL.

Unfortunately, that's just the beginning of the problem. If $6.55 of S2's portion of the CNOL is absorbed by the group for the year of the sale of S2's stock, then under the investment adjustment rules, P's basis in S2's stock must be reduced from $20 to $13.45 to reflect the absorption of S2's portion of the CNOL. As a result, P's gain on its sale of the S2 stock will be $56.55, not $50. The group's taxable income before applying the CNOL carryover will be $74.55 ($56.55 + $18), not $68. Remember, section 108(b)(4) provides for the use of current-year losses before applying the reductions under section 108(b)(2). Accordingly, the entire computation must be redone again, and perhaps again and again.

The circular basis problem created by reducing the portion of a CNOL attributable to a member other than the debtor-member was brought to the attention of the regulation writers after Treasury and the IRS issued the proposed and temporary regulations in 2003, resulting in the promulgation of reg. section 1.1502-11(c) in 2005.[25] That regulation requires a nine-step computation (''the nine circles of hell''). To state the obvious, that solution is not intuitive and was not in the regulations in 1998 when Marvel's four subsidiaries had excluded COD income. It is unclear how the courts would propose to implement their decisions in *Marvel* if the stock of a subsidiary were sold in the year of discharge. Have the courts volunteered to issue the regulations that Treasury and the IRS failed to write for 23 years after the enactment of the Bankruptcy Tax Act of 1980? The answer is anyone's guess.

The Unwritten Reason

In the quest to understand what appears to be an unjustified result in *Marvel*, we might consider the view of the courts on the taxpayer's position. The Tax Court's opinion quotes the report of the Senate Finance Committee that accompanied the Bankruptcy Tax Act, saying that section 108 was:

> intended to carry out the Congressional intent of deferring, but eventually collecting within a reasonable period, tax on ordinary income realized from debt discharge. Thus in the case of a bankrupt or insolvent debtor, the debt discharge amount is applied to reduce the taxpayer's net operating losses and certain other tax attributes, unless the taxpayer elects to apply the amount first to reduce basis in depreciable assets.[26]

If Marvel had prevailed, almost $87 million of debt discharge would have been excluded from income without any tax attribute reduction.[27] The Tax Court opinion, however, neglected to quote the sentence from that same Senate Finance Committee report saying that ''any amount of debt discharge which is left after attribute reduction under these rules is disregarded, i.e., does not result in income or have other tax consequences.'' Perhaps the court regarded that rule as an unfortunate but unavoidable limitation. As my first-year contracts professor intoned, ''You can't get blood from a stone.'' Nevertheless, the court may have believed as a matter of tax policy that the tax system should, if possible, exact its pound of tax attributes as the price for income exclusion. By subjecting CNOLs of the entire group to reduction, that policy objective was achieved.

Conclusion

In *Marvel,* the Tax Court and the Second Circuit accepted the broad interpretation of an unfortunate and inaccurate dictum in the Supreme Court's *United Dominion* opinion. This article maintains that the Supreme Court never intended such a broad interpretation and that the confusion between the nonexistent concept of a ''member's separate NOL'' and the ubiquitous concept of a ''member's allocable share of a CNOL'' would be clarified if the Court directly addressed the interpretation of its own dictum. The confusion of the Court in equating those concepts, and now the exacerbation of that confusion by the Tax Court and the Second Circuit, has created an unworkable situation for basis computations under the consolidated return regulations in place before 2003. Further, the decisions have created a problematic precedent for tax as well as other areas of the law. The narrower interpretation of *United Dominion*, espoused by the taxpayer in *Marvel*, would have been consistent with the regulations in place for the year at issue and would not have unsettled existing law. The Supreme Court may be unwilling to hear another consolidated return case for the next 67 years, but the ability to undo its own damage may ultimately rest in its hands. ■

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[25]The Tax Court's opinion acknowledged the changes from the temporary to the final regulations but apparently did not recognize their significance or necessity, stating: ''With slight modifications, the temporary regulation was adopted as final and effective for COD income discharged after March 21, 2005.'' Reg. section 1.1502-11(c).

[26]S. Rep. No. 96-1035, at 10-11 (1980), 1980-2 C.B. 620, 625.

[27]There were no excess loss accounts concerning the stock of the four bankrupt subsidiaries, and therefore, the excess loss account recapture rule of reg. section 1.1502-19(c)(1)(iii)(B) would not have applied.