The Ghost in the Machine: Does the All-Events Test Survive in Code Section 404?

Rosina B. Barker

The all-events test is the fundamental requirement for deductions by an accrual basis taxpayer. Under the test, amounts cannot be deducted until all events have occurred that establish the fact and amount of the liability, and an economic performance test has been satisfied. In the case of compensation for services, the test generally means that payments cannot be deducted before the services are performed. But does the test govern an employer's deduction for contributions to a qualified plan? The IRS thinks it does—certainly in the case of contributions made as "grace period" contributions after the end of the taxable year for which the deduction is claimed, and maybe even for other contributions as well. But on examination, it turns out that a rule that is assumed to be there—apparently isn't.

This article explores a simple question with a surprisingly unsimple answer: Does the all-events test govern the deduction for contributions to a qualified plan?

The all-events test is the cornerstone of tax accounting for accrual-basis taxpayers, and runs like this: The taxpayer cannot deduct a liability until the taxable year in which all events have occurred that establish the fact of the liability; the amount of the liability can be determined with reasonable accuracy; and "economic performance" has occurred.[1]

In the case of payments for services, the test generally means that compensation cannot be deducted before services are performed.[2] Contributions to a qualified plan, of course, are payment for services.[3] So, restated more precisely, the question is this: Does the all-events test mean that qualified plan contributions cannot be deducted in the year before the taxable year in which related services are performed?

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The basic nature of the question may surprise many tax practitioners. Satisfaction of the all-events test is the minimum threshold requirement for accrual-basis deductions. Why shouldn't it govern qualified plan deductions as well? And if it does not, why doesn't everyone know it? How could there be questions on so basic an issue?

All good questions. But a little detective work reveals that if the all-events test lurks in the qualified plan deduction rules, it is very hard to find.

TAX PLANNING POTENTIAL

This question is of more than theoretical interest (although we ourselves have a sneaking intellectual admiration for lawyers who can find principles of law lurking in out-of-the-way places—the aura of the penumbra of the Constitution, say). The all-events test is among the Code's principle bulwarks against taxpayers' ongoing attempts to accelerate deductions. Because of the time value of money, a deduction taken in an earlier year is more valuable than the same deduction taken in a later year. For any particular deduction, if the all-events test does not apply, the better for the taxpayer seeking the deduction, and the worse for the fisc.

The tax-planning potential of this issue is particularly significant for taxpayers who combine two specific tactics: First, maintain a plan year different from the employer's taxable year (for example, a plan year ending November 30 and an employer's taxable year ending December 31); and, second, use the special "grace period" contribution rule of Internal Revenue Code Section 404(a)(6) (more on this below). Using these two devices, for example, an employer might claim a deduction in 1997, for 401(k) plan contributions deducted from participants' salaries in connection *with services they perform during 1998*. For a large employer, the potential tax savings of accelerating its deduction in this way run to the tens of millions of dollars.

No surprises here: because of their vast tax savings potential, strategies like this have attracted lots of recent employer attention, and also lots of IRS opposition. Of the many IRS arguments raised in opposition, this article explores one limited issue—but the most fundamental: Is the strategy blocked at the start by the all-events test?

WHAT THE DEDUCTION STATUTE SAYS

A brief review of the applicable deduction rules may be helpful: Contributions to a qualified plan are deductible under Section 404(a)

of the Internal Revenue Code.[4] They are deductible in the taxable year "when paid," but, under Section 404's general requirements, only if they "would otherwise be deductible" under "this chapter." "This chapter" includes Code Section 461, which codifies the all-events test. So on its face Section 404(a) incorporates the all-events test as a threshold condition for deductions to a qualified plan.

Even though generally deductible only in the taxable year "when paid," qualified plan contributions are eligible for a limited "grace period" deduction. Under Code Section 404(a)(6), contributions made in one taxable year can be claimed as a deduction for the *preceding* taxable year if, among other things, they are paid by the filing deadline of the tax return for that preceding year (the "grace period"). This may seem complicated, but the rule has a familiar counterpart: Individual taxpayers may deduct IRA contributions on their return, even if the contribution is made in the next calendar year, if the contribution is made by the filing date of the return for the taxable year of the deduction.

LOOKING FOR THE ALL-EVENTS TEST IN THE DEDUCTION RULES

Because the details of any analysis quickly get tangled up in the complex rules governing qualified plan deductions, the following discussion is couched in terms of a hypothetical taxpayer, Employer A. In all of our examples, Employer A maintains a profit sharing plan with only two kinds of contributions: participants' elective deferrals under Section 401(k), and employer matching contributions under Section 401(m). Also, Employer A maintains its profit sharing plan on a different fiscal year than its own: Employer A's taxable year ends January 31 while its profit sharing plan has a calendar plan year, ending December 31. As a further simplifier, we will confine our discussion to the deductibility of Employer A's matching contributions. By discussing only matching contributions we can assume that a single employer payment is made for matching contributions earned by participants over many months of service. (With participants' elective 401(k) contributions, this simplifying assumption is not possible. Labor Department regulations require that participants' elective deferrals be placed in trust no later than 15 days after elected. This 15-day timetable does not apply to employer matching contributions.)

Case 1 (simple): Employer A makes a contribution on December 31, 1998, to pay matching contributions for the 401(k) deferrals elected by participants over the course of the entire 1998 plan year (that

elected by participants over the course of the entire 1998 plan year (that is, January through December of 1998). Employer A deducts the December 31 contribution for its taxable year ended January 31, 1999.

Case 2 (harder): Employer A makes another contribution on January 31, 1999 (the last day of its 1999 taxable year). Employer A uses the January 31 contribution to pay matching contributions for the 401(k) deferrals elected by participants during the first six months of the next taxable year—February through July of 1999. Employer A deducts the January 31 contribution for its taxable year ended January 31, 1999—that is, the same taxable year in which the contribution is made, but the taxable year preceding the taxable year in which related services are performed.

Case 3 (hardest): Case 3 is like Case 2, except that the matching contribution is made *after* the taxable year for which the deduction is claimed. That is, Employer A makes a contribution on July 31, 1999, to pay matching contributions for 401(k) deferrals elected by participants during the taxable year up to that date—February through July of 1999. Under the grace period rules of Section 404(a)(6), A deducts the contribution for the taxable year ended January 1, 1999—that is, the taxable year preceding the taxable year in which the contribution is made and services are performed.

Case 1: Contribution Deducted in Year Paid, Services Already Performed.

Let's start first with Case 1, in which Employer A seeks to deduct the contribution actually made on December 31, 1998, for its plan year ending January 31, 1999. The December 31 contribution is made as A's matching contributions for its entire 1998 plan year, which, recall, is the 1998 calendar year. This means that the December 31 contribution is attributable in part to service performed in January of 1998—that is, performed in the taxable year *preceding* the taxable year of the deduction. (Recall that the taxpayer's taxable year runs from February 1 to January 31 of the next calendar year.)

Problem?

First, to step back a bit. This practice (and variants) is so common that most employers and practitioners probably do not stop to think whether it might raise a tax issue. The IRS certainly does not. But actually it runs into the very same statutory roadblock encountered by the more obviously problematic Case 2.

Recall that Section 404 says two things. Section 404(a)(3) states that the contributions are deductible in the taxable year "when paid."

But as its threshold condition, Section 404 also says that contributions are deductible only if "otherwise deductible" under "this chapter," which includes Section 461 and the all-events test.

On thinking about deductible plan contributions, practitioners and the IRS always remember that the all-events test forbids deductions in the year *before* the taxable year in which services are performed. But the test has another implication as well: the test also forbids deducting payments in the taxable year *after* the taxable year of accrual. In the case of services, this means that compensation is not deductible in a year *after* the year in which services are performed. This principle goes back to the "granddaddy" of accrual accounting cases, *U.S. v. Anderson*, 269 U.S. 422 (1926).[5]

So at first blush, yes, there is a problem, because Section 404 contradicts itself. The "when paid" rule allows the deduction in full, while the all-events test, which is incorporated by reference, would disallow the part of the contribution attributable to services performed in January of 1998. Which rule prevails?

Simple. The "when paid" rule. The December 31 contribution is deductible in full. This is universally followed in practice. Anybody questioning it would be pointed to the Supreme Court's holding under pre-ERISA law that Section 404(a) puts accrual basis taxpayers on a cash basis for purposes of qualified plan contributions in *Williams v. Commissioner*, 429 U.S. 569, 578-9 (1977). The doubter would also be steered to long-standing regulations stating that contributions are deductible in the year of payment, *"regardless of the fact that the taxpayer may make his returns on the accrual method of accounting. . . ."*[6]

In short, in Case 1, the "when paid" rule trumps the all-events test.

Case 2: Contribution Deducted in Year Paid, for Services Not Performed until Next Taxable Year

Now for Case 2: Employer A seeks to deduct the December 31, 1998, contribution for its taxable year ending January 31, 1999—even though the amounts will be used to pay matching contributions earned by participants working in the next taxable year. From a tax policy point of view, Case 2 is tougher than Case 1 because it runs right into the heart of the all-events test. Related services have not been performed; so it would appear all-events have not occurred that would fix the fact and amount of the liability, nor has economic performance been satisfied. Under the all-events test, Employer A loses. No deduction is permitted in Case 2.

But hold on: Recall that the statute says the contribution is deducted "when paid." The Supreme Court in *Williams* said that the "when paid" rule puts accrual basis employers on a cash basis for their qualified plan contributions. Treasury regulations specify that the "when paid" rule governs, even for accrual basis taxpayers. And we have already seen this rule trumps the ordinary rules of accrual basis tax accounting in Case 1. So which rule prevails in Case 2?

Guidance under pre-ERISA law was clear: The when-paid rule trumps. For example, Revenue Ruling 74-468, 1974-2 C.B. 140, applicable to pre-ERISA Section 404(a), states that the "need to incur a liability for the contribution is not present where a properly authorized contribution is actually paid to the profit sharing trust in the year for which the deduction is claimed as required by Section 401(a)(2) and is not recoverable by the employer." At least five pre-ERISA revenue rulings say the same thing: no accrual is required for contributions if they are paid to the trust in the taxable year for which the deduction is claimed.[7]

Post-ERISA guidance on Case 2 questions, however, is just about nonexistent. Sherlock Holmes famously solved a case by deducing his conclusion from the fact that the resident watchdog did not bark in the night.[8] Tax law is not detective fiction. But it is tempting to conclude that the IRS's silence is similarly full of meaning: Guidance was not issued because everyone assumed that the answer was so obvious, the question did not need raising. This is certainly the conclusion reached by the Tax Court, in the single post-ERISA case on this issue. In *Plastic Engineering & Manufacturing Co. v. Commissioner,* 78 T.C. 1187 (1982), the IRS challenged a taxpayer who claimed deductions for contributions to a qualified defined benefit plan, because the contribution was based in large part on services after the taxable year, like our Case 2. The Tax Court upheld the taxpayer. In its own dog-didn't-bark-in-the-night analysis, the court noted in dictum that the IRS's litigators did not challenge the deduction on the basis of accrual accounting principles, "apparently because the statute allows the deduction 'when paid.'"

Looking farther afield at related parts of the law, we come to the same conclusion. Framers of the law have not expressly addressed Case 2. But the overall scheme of the Code and regulations show one thing: If deductions are forbidden for qualified plan contributions made in the taxable year before related services are performed, this rule is not apparent to legislators and regulators. Consider, for example, that amounts are deductible in the year paid even if:

- Contributed to a defined benefit pension plan and based on services rendered after the close of the taxable year for which the deduction is claimed[9];
- Calculated on the basis of salary increases that will not occur until *future years*[10]; or even
- Based in part on "unpredictable contingent events" that have *not yet occurred*.[11]
- Contributed to a qualified profit sharing or money purchase pension plan for nonvested benefits, even though forfeitures will be used to reduce future employer contributions.[12]

In short, regulators, lawmakers, and the courts have more or less assumed that the all-events test does not apply to Section 404(a), even after enactment of ERISA.

The All-Events Test after DEFRA

We cannot, however, stop with guidance issued under Section 404 before 1984. In the DEFRA provisions of 1984, Congress codified the all-events test as Section 461(h) of the Code. As part of its overhaul, Congress also added the test's third prong, stating that amounts are not deductible before related "economic performance" has occurred. Applied to compensation for services, the economic performance test is satisfied "as such person provides such services," *except as otherwise provided in regulations*.[13] Thus, the IRS has broad rule-making authority with respect to the economic performance test as applied to compensation. In addition, Congress slightly rewrote the threshold condition for Section 404 deductions to state that amounts must be deductible under "this chapter"—automatically including Section 461—rather than, as before, "under section 162."

All of this raises the question considered here: Could it be that the all-events test was slipped into Section 404 by DEFRA? If so, then the new economic performance prong of the test clearly implies that the contribution is not deductible in the year before related services are performed, at least absent regulations to the contrary. And even without the economic performance test, the pre-DEFRA two-pronged all-events test would still apply, that is, (1) all-events must have occurred to establish the fact of the liability, (2) in an amount that could be determined with reasonable accuracy. Under *Anderson*, the pre-DEFRA all-events test would make Case 2 problematic, even without DEFRA's added economic performance test.

Having waffled back and forth on this question, even the regulation writers at the IRS appear finally to have decided that the answer is, no, the all-events test still does not apply. Agency practice is less than clear on this point, however.

The IRS's initial indecision is seen in the course of the regulations issued under Section 461. Temporary regulations issued after DEFRA stated that a contribution is deductible "only to the extent that the all-events test . . . and the economic performance requirement of section 461(h) are satisfied."[14] The regulation went on to state that economic performance occurs *as the contribution is made.*

Together, the two provisions of the temporary regulation were confusing. On the one hand, the regulation stated that the economic performance prong was met when contributions are *paid*, rather than, as for other kinds of compensation, when services are performed. On the other hand, the other two traditional prongs of the test still applied to plan contributions. Arguably, these two prongs alone would deny a deduction before related services are performed, even without the economic performance test.

Did the special economic performance test of the temporary regulation mean that payment alone is enough for total satisfaction of all three prongs of the all-events test? What about the other two prongs of the test? Would they require that services be performed before the related plan contributions are deductible? If so, what was the point of providing a special "when paid" economic performance test? In short, regulators' intent in setting forth these seemingly contradictory provisions was unclear.

The final regulation deletes the passage in question altogether. As a result, the final regulation omits any discussion of the economic performance test and all-events test as applied to qualified plan contributions.

Does the deletion clear up the confusion? In some ways, yes. It is a reasonable inference that the regulators affirmatively concluded that the all-events test simply does not apply to qualified plan contributions.[15] By way of explanation, the final regulation's preamble states that the former section was deleted because the "specific timing rules of section 404 generally should take precedence over the more general economic performance rules."[16] In short, the final regulation seems to recognize that Section 461 simply does not apply to Section 404.

Moreover, the regulators' decision is consistent with Congress's apparent intent in legislative history. For example, the DEFRA Conference Committee Report states that, under new law, an employer's deduction for deferred compensation or benefits "*is subject to the*

rules in the Code (as amended elsewhere in the conference agreement) governing deferred compensation, deferred benefits, and funded welfare benefit plans' deduction for deferred compensation or benefits."[17] In other words, Congress intended that the deduction rules of Section 404 stand on their own, without incorporating the all-events test of Section 461. Legislative history is less than entirely clear, however, because it still leaves unexplained DEFRA's amendment of Section 404 to include all provisions of "this chapter" including Section 461. Despite this residual puzzle, the Joint Committee staff took the unambivalent position that even after DEFRA the all-events test simply does not apply to qualified plan contributions, and wrote in the DEFRA Bluebook that "to the extent that sections 83, 404, 404A and 419 apply, *the rules under section 461(a) which determine whether an amount has been incurred are not relevant.*"[18]

In short, Case 2 seems to be permitted, because the all-events test does not apply. The test did not apply to Section 404(a) before ERISA. The test was not added by ERISA, nor was it added during the DEFRA's codification and overhaul of the test, as is shown by legislative history and regulations under DEFRA.

Then why do we say that the final DEFRA regulation only partly clears up the initial confusion caused by the temporary regulations? Because it is unclear that IRS enforcement policy has caught up with the implication of the agency's own regulations. In 1990, the IRS issued Revenue Ruling 90-105, 1995-2 CB. While not specifically relevant to Case 2, Revenue Ruling 90-105 did state as one of its assumptions that the all-events test applies to Case 2-like questions. The revenue ruling was issued *before* issuance of final regulations, which, as we have seen, suggest the IRS reversed course on this point. So, technically, Revenue Ruling 90-105 has been superseded, at least on this point. But it never has been revoked. Moreover, IRS "audit guidelines " issued under Section 404 (that is, guidelines published for field examiners, instructing them what to look for on audit), while not entirely clear, arguably take the position that a contribution to a profit sharing plan is not deductible for one taxable year if made for services rendered after the taxable year.

The position is not well articulated, and no rationale is advanced. Nonetheless, it may be a signal that the IRS is not entirely comfortable with the radical implication of its own regulation: that the all-events test—the Code's most significant rule for accrual basis taxpayers—does not apply to deductions for contributions to a qualified plan—the Code's biggest-ticket deduction item.

Case 3: Contribution Deducted in Year Before Contribution Made or Services Performed

In Case 3, Employer A seeks to deduct a contribution in its taxable year ending January 31, 1999, as a grace period deduction under Code Section 404(a)(6), when the contribution is made on July 31 of 1999, and related services are rendered after January 31. Case 3 is the toughest. It looks the most aggressive, it is worth the most money to taxpayers, and it is the subject of ongoing litigation. Recently, for example, the Ninth Circuit in *Lucky Stores, Inc. and Subsidiaries v. Commissioner*, 107 T.C. 1, 13 (1996), affirmed, 1998 U.S. App. LEXIS 20299 (9th Cir. 1998), upheld the Tax Court in denying a grace period deduction for an employer's contributions to a multi-employer defined benefit plan, when the contributions were required by the employer's collective bargaining agreement to be placed in the plan monthly on the basis of services performed in the immediately preceding month—that is, services performed in the taxable year after the taxable year of the deduction. (See also *Airborne Freight Corporation v. United States*, 76 AFTR 2d 95-7497, 96-1 USTC par. 50,004, 19 E.B.C. 2342 (W.D. Wash. 1995).)

Neither *Lucky Stores* nor *Airborne Freight*, however, is relevant to our discussion here. The Ninth Circuit decided both cases by holding that they did not meet the bare statutory requirements of Section 404(a)(6).The Tax Court, which denied the deduction in *Airborne Freight*, decided the case under the special contribution limits applicable to multi-employer defined benefit plans under Code Section 412. Neither court reached the accrual accounting arguments raised by the IRS on brief.

So, back to our question: Any other objections aside, is Case 3 blocked by the all-events test?

Under the peculiar structure of Section 404(a)(6), the all-events test could enter the question in either of two ways. First, the statute provides that an amount is not deductible as a grace period contribution unless it would have been deductible had it been made on the last day of the preceding taxable year. That is, the July 31 contribution in Case 3 would not be deductible unless it would have been deductible if made on January 31, 1999. This hypothetical in fact describes our Case 2. In our discussion of Case 2 we concluded that the January 31 contribution would indeed have been deductible. So the all-events test is not a problem under the "last day of the preceding taxable year" counterfactual test.

Second, the all-events test could conceivably enter Section

404(a)(6) as a stand-alone requirement for grace period contributions. That is, even if the all-events test does not apply to contributions made in the same taxable year as the deduction, it might apply uniquely to grace period contributions deducted under Section 404(a)(6). This position, in fact, is among those implicitly preserved by the IRS on brief and in Revenue Ruling 90-105.

With a little more excavation, however, it is apparent that the IRS's arguments on this point do not stand on much. Specifically, all the IRS's cited authorities derive from cases and guidance under pre-ERISA Section 404(a)(6), when the statute unambiguously included an all-events test. ERISA amended the statute, however. Let's see what happened:

Before enactment of ERISA, Section 404(a)(6) read:

> For the purposes of paragraphs (1), (2) and (3), an *accrual basis taxpayer* shall be deemed to have made a payment on the last day of the preceding taxable *year of accrual* if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof). [Emphasis supplied.]

There was a considerable amount of litigation under pre-ERISA Section 404(a)(6) (and its predecessor Section 23(p)(3) of the 1939 Code), as the IRS challenged employers' ongoing attempts to deduct grace period contributions. Taxpayers were typically unsuccessful. The courts held pretty much unanimously that a taxpayer could deduct a grace period contribution for a taxable year only if liability for the contribution had *accrued* within that taxable year. When they bothered to provide authority for the accrual requirement, the courts specifically hinged it on the statutory phrase "year of accrual" in Section 404(a)(6).[19]

ERISA eliminated the phrase "an accrual basis taxpayer" and substituted "taxable year" for "taxable year of accrual."[20] Congress thus deleted the *only* statutory authority cited by the courts to date for the accrual requirement under Section 404(a)(6)—and indeed, removed all references to "accrual" under the grace period rule. Under normal principles of statutory construction, when Congress deletes words of restriction, it is presumed that Congress intended to delete the restriction. (Note that the inference from deletion of a restriction is more clear-cut than the more problematic implication of Congress's reenactment of statutes).[21] That is, it is a reasonable inference that in

ERISA Congress deleted the accrual accounting requirements from Section 404(a)(6).

Right after enactment of ERISA, the IRS agreed that the pre-ERISA accrual requirement for grace period contributions was a bygone. For example, Revenue Ruling 76-28 states that grace period contributions are deductible "whether a taxpayer is on the cash or accrual method of accounting, and *whether or not the conditions for accrual* otherwise generally required of accrual basis taxpayers have been met." [Emphasis supplied.] Numerous private letter rulings similarly held that grace period contributions under post-ERISA Section 404(a)(6) were deductible for the preceding taxable year even if not accrued in that year.[22]

Perhaps because of the tax planning strategies, arising from the provision, however, the IRS has changed its mind. In Revenue Ruling 90-105, for example, the IRS took the position that the all-events test (among other things) disallowed deductions in a case essentially like our Case 3. The IRS similarly cited the all-events test on brief, among other arguments, in contesting taxpayers' grace period deductions in *Airborne Freight* and *Lucky Stores.*

But while asserting that the accrual requirement applies to post-ERISA Section 404(a)(6), the IRS has to do a little twisting to get there. The most firmly cited authority for the IRS position is the Supreme Court's opinion in *Williams.* The holding of *Williams* is inapposite, actually, as the case applied only to pre-ERISA Section 404(a)(6). But the Court also noted in dictum that ERISA extended the "same" grace period rule to cash basis taxpayers. In published rulings and its briefs the IRS has taken the position that this dictum means that Congress did nothing else when it amended Section 404(a)(6)—specifically, the Congress did not also eliminate the accrual requirement for accrual basis taxpayers. This is a logical non sequitur. In any event, because the case was decided under pre-ERISA Section 404(a)(6), the Court did not have before it the question of whether ERISA deleted the pre-ERISA accrual requirement.

One other authority has been advanced by the IRS. Old pre-ERISA regulations state that grace period contributions are not deductible unless accrued.[23] As the regulation was promulgated before ERISA, and has not been amended since, the cited passage is beside the point. The relevant issue is whether the rule survives the statute's amendment by ERISA. The IRS has not tackled this issue. Consider, for example, its treatment of the issue in its *Airborne Freight* brief before the Ninth Circuit. Like good litigators everywhere with a less

than strong position, the IRS flatly asserts, without authority, that the rule does survive the statute's modification, and moves on quickly to the next thought.

It would thus appear that the all-events test does not apply to grace period contributions under Code Section 404(a)(6). It applied before ERISA, but—when the law is read under standard principles of statutory construction—was repealed. Until recently, the IRS assumed it had been repealed, and published private and public guidance to that effect. Now that the IRS wants to read the rule back into the statute, it is having trouble finding credible guidance to reinsert it. In short, while the IRS may disagree, it would appear that Case 3 too is permitted under the all-events test.

CONCLUSION

The all-events test is among the most basic requirements for a deduction under the Code. Contributions to qualified plans are among the Code's largest deduction items. So it would appear that the all-events test should apply—or if it does not, the reason for its absence must be clear. But we have seen that the test would appear not to apply. It should be there—but it cannot be found. In the case of contributions made in the same year, the rule did not apply before ERISA. It was not put in by ERISA. It was not put in by DEFRA. Regulations, guidance, case law, and the overall statutory scheme governing deductions, all work as if the test just was not there.

In the case of grace period contributions, somewhat different problems are raised, but the end result is similar. The test existed before ERISA, but seems to have been repealed. Even the IRS assumed it had been repealed. And now that the IRS wants to assert that the test still governs, at least in the case of grace period contributions, it is having a tough time finding authority for the proposition that the test survived ERISA.

In short, a puzzle. It should be there, but apparently it is not. In *Alice in Wonderland*, the Cheshire Cat disappeared slowly until only its smile remained. In the case of the all-events test, there seems to be even less left behind.

NOTES

1. *Anderson* (cited on p. 43). I.R.C. §461(h).

2. Treas. Reg. §1.461-1(a)(3). I.R.C. §461(h)(2)(A)(i).

3. Treas. Reg. §1.404(a)-1(b).

4. I.R.C. §404(a)(1) (relating to contributions to qualified pension plans); I.R.C. §404(a)(3) (relating to contributions to stock bonus and profit sharing plans).

5. See also Treas. Reg. §1.461-1(a)(3).

6. Treas. Reg. §1.404(a)-1(c).

7. Rev. Rul. 56-366, 1956-2 C.B. 976; Rev. Rul. 63-117, 1963-1 C.B. 92; Rev. Rul. 71-38, 1971-1 C.B. 130, *all four rulings obsoleted by* Revenue Ruling 84-50, 1984-1 C.B. 279, in light of ERISA.

8. Conan Doyle, Sir Arthur, "The Adventure of the Silver Blaze," from *The Memoirs of Sherlock Holmes, The Complete Sherlock Holmes,* Doubleday, 1960.

9. Treas. Reg. §1.404(a)-14(c)(1).

10. Treas. Reg. §1.412(c)(3)-1(b)(4)(ii).

11. I.R.C. §§412(l)(5)(A)(iii), 412(l)(4)(b)(ii).

12. I.R.C. §401(a)(8), *as amended by* P.L. 99-514 §1119(a) (1986); Rev. Rul. 71-31, 1973-2 C.B. 203.

13. I.R.C. §461(h)(2)(A)(i).

14. Temp. Treas. Reg. §1.461(h)-4T, Q&A-1, *deleted by* T.D. 8408 ¶11,1992-1 C.B. 155, 166.

15. Cf. *Spink v. Lockheed Corp.*, 60 F.3d 616, 621 (when legislators include limiting language in earlier version of bill but delete it prior to enactment, presumption arises that limitation not intended).

16. T.D. 8408, 1992-1 C.B. 155, 158.

17. H.R. Rep. No. 98-861, 98th Cong., 2d Sess. 872, 877 (Conference Committee Report) (1984).

18. Staff of the Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong., 2d Sess. 265 (1984). [Emphasis supplied.] See also H.R. Rep. No. 98-432 (part 2), 98th Cong., 2d Sess. 1255-56 (Ways and Means Committee Report) (1984) (For contributions to a qualified pension, profit sharing, or stock bonus plan under Section 404 or 404A, "the taxpayer generally is allowed a deduction when contributions are made to the plan."); H.R. Rep. No. 98-861, 98th Cong., 2d Sess. 872, 874 (Conference Committee Report) (1984) (Under the House bill, which was adopted by the DEFRA conferees with exceptions not relevant here, "*the economic performance standard will not apply* to a liability of the taxpayer to provide benefits to employees of the taxpayer through a qualified pension, profit sharing or stock bonus plan described in section 404 or 404A." [Emphasis supplied.]

19. *Chesapeake Corp. of Virginia v. Commissioner*, 17 T.C. 655, 672-673 (1951); *Abingdon Potteries Co. v. Commissioner*, 19 T.C. 23, 26 (1952); *Barrett Timber Corp. v. Commissioner*, 29 T.C. 76, 77 (1957); *Louisville Tin and Stove Co. v. Commissioner*, 29 T.C.M. (P-H) ¶ 60,103, 620 (1960), affirmed, 287 F.2d 887 (6th Cir. 1961); *Misceramic Tile Co. v. Commissioner*, 37 T.C.M. (P-H) ¶ 68,031, 171 (1963); *Subscription Television Inc. v. Commissioner*, 43 T.C.M. (P-H) ¶ 74,107, 507 (1974).

20. ERISA §1021(b)(3).

21. See, e.g., *Independent Insurance Agents of America v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992) ("Under traditional rules of statutory construction, the meaning of Section 92's omission is plain; material omitted on reenactment is deemed repealed."); *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 373 (1905) ("[I]t cannot in reason be said that the omission gives rise to the implication that there was the intention of Congress to reenact it."); *United States v. One Ice Box*, 37 F.2d 120 (N.D. Ill. 1930) ("Where the legislative body, in amending an act, omits certain limitations expressed in the original act in simple language, plain in its meaning, the presumption of law is that the limitation no longer exists, at least in the absence of other express words showing that it was intended to continue.").

22. See, e.g., PLR 8042133 (accrual not necessary for deduction under §404(a)(6) if Rev. Rul. 76-28 satisfied); PLR 8208047 (Taxpayer's request for postponement of deductions for contribution of employer stock to qualified plan until value of stock becomes readily ascertainable, denied even though consistent with the "open transaction" doctrine of *Burnet v. Logan*, 283 U.S. 404 (1931), "all-events test" and other accrual accounting rule, because "section 404(a)(6) of the Code places all taxpayers on a cash basis"); PLR 7945115 (Under I.R.C. §404(a)(6) and Rev. Rul. 76-28, grace period contributions to defined benefit plan deductible for preceding taxable year even though not accrued as of end of that taxable year); PLR 8714008 (Nothing in the Code or the regulations requires contributions made after the close of the taxable year to be attributable to unfunded past service liability incurred in the previous taxable year in order to be deductible pursuant to Section 404(a)(6)).

23. Treas. Reg. §1.404-1(c).