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test,[77] adopted a flexible analysis that focuses on each petitioner's unique situation to guide the district courts in determining whether to appoint counsel pursuant to section 1915(d) of Title 28 of the United States Code.[78] Furthermore, the *Whisenant* court reminded the bar of its duty to represent the poor without remuneration by concluding that courts should appoint counsel regardless of the unavailability of federal funding for attorney's fees.[79] The *Whisenant* decision thus ensures that indigent prisoners who bring meritorious civil claims and present exceptional circumstances will have the aid of appointed counsel to receive a fair trial.

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VII. TAX

Identification of Property Underlying Lapsed Options: A Taxpayer Intent Analysis?

The Internal Revenue Code of 1954 (Code) generally allows taxpayers to deduct business losses sustained during the tax year that otherwise are not compensated for by insurance.[1] While an individual taxpayer normally may deduct fully losses incurred in a trade or business as ordinary losses,[2] the taxpayer may claim only a capital loss when the loss transaction involves the sale or exchange of capital assets.[3] The distinction between ordinary and

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availability of skills required to litigate complex civil rights claim); notes 45-52 and accompanying text (allegation of deliberate indifference to serious medical needs too complex for lay representation); notes 61-66 and accompanying text (court should appoint counsel where credibility of witnesses is determinative to case).

77. *See supra* notes 5, 30-34 and accompanying text (discussion of exceptional circumstances test).

78. 739 F.2d at 163.

79. *Id.* at 164; *see supra* note 25 and accompanying text (discussion of irrelevancy of federal funding to decision to appoint counsel).

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1. *See* I.R.C. § 165(a) (West 1984) (general rule allowing deductions for any loss not compensated for by insurance or otherwise); Treas. Reg. § 1.165-1(a), T.D. 6445, 1960-1 C.B. 93, 95 (losses allowed as deductions subject to any prohibitions or limitations within Internal Revenue Code (Code)); Treas. Reg. § 1.165-1(b), T.D. 6445, 1960-1 C.B. 93, 95 (only bona fide losses allowable with substance and not form determining deductible losses).

2. *See* I.R.C. § 165(c)(1) (West 1984) (limitations on deductible losses of individuals include trade or business losses); Treas. Reg. § 1.165-1(e)(I), T.D. 6445, 1960-1 C.B. 93, 97 (same).

3. *See* I.R.C. § 165(f) (West 1984) (capital losses allowed only to extent allowed in Code §§ 1211 and 1212). Section 1211 of the Code imposes a limitation on capital losses. *Id.* § 1211.

capital assets is critical in determining the proper tax treatment when a taxpayer fails to exercise an option[4] and forfeits prior payments to the grantor of the option.[5] Section 1234(a) of the Code treats the loss resulting from a lapsed option as either an ordinary loss or a capital loss, depending upon the character of the property underlying the option.[6] The Code section, accordingly, requires a determination of the character of the property as if the taxpayer had exercised the option and acquired the property.[7] Normally, a taxpayer minimizes the speculative nature of the inquiry for the factfinder by demonstrating, before acquiring an option or while holding an option, that the taxpayer intends to put the underlying property to a particular use that is either consistent or inconsistent with capital asset status.[8] Section 1234(a) of the Code, however, provides no guidance in identifying the property actually underlying the option when the nature of the property is ambiguous and not self-evident.[9] In *Willis v. Commissioner*,[10] the United

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Section 1212 of the Code provides for a limited capital loss carryover or carryback. *Id.* § 1212.

Section 1211 of the Code defines capital asset by including all property held by a taxpayer except for certain broad categories of property described in § 1211(1)-(5). *Id.* § 1221. The United States Supreme Court has stated that the capital asset provision in the Code is an exception to normal tax requirements and, therefore, the definition of a capital asset must be interpreted narrowly and its exclusions applied broadly. *See* Corn Products Refining Co. v. Commissioner, 350 U.S. 46, 52 (1955) (interpreting § 117 of the 1939 Code, predecessor Code provision to § 1221 of the 1954 Code); *see also infra* notes 57-63 and accompanying text (analysis of *Corn Products* decision and its progeny). One of the broader exclusions from the definition of capital asset is property held by a taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business. I.R.C. § 1221(1) (West 1984). *See generally* 2 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 51.2 (1981 & Supp. I 1984) (overview of judicial interpretations of § 1221(1)).

4. *See infra* notes 6-9 and accompanying text (characterization of underlying property determines whether loss is capital or ordinary). An option is a contract to leave an offer open for a specified or reasonable period of time. *See, e.g.*, Saviano v. Commissioner, 80 T.C. 955, 970 (1983) (tax shelter gold "option" held illusory because offer did not create unconditional power of acceptance in option holder); Koch v. Commissioner, 67 T.C. 71, 82 (1976) (distinction drawn between option and contract of sale); Carter v. Commissioner, 36 T.C. 128, 130 (1961) (executive's purchase of below market value treasury stock not pursuant to valid option contract); *see also* 1 B. WILLISTON, WILLISTON ON CONTRACTS § 61A, at 198-99 (3d ed. 1957) (defines option as contract to keep offer open); RESTATEMENT (SECOND) OF CONTRACTS § 25 (1981) (same).

5. *See* I.R.C. § 1234(a) (West 1984) (treatment of loss to purchaser for lapsed option dependent on character of underlying property); *see also id.* § 1234(b) (treatment of grantor of option with respect to gain on lapse of option).

6. *Id.* § 1234(a).

7. *See* Spindler v. Commissioner, 32 T.C.M. (P-H) ¶ 63,202, at 63-1147 to 63-1148 (1963) (taxpayer allowed ordinary loss deduction because optioned property was of character of real estate used in taxpayer's business). *See generally* 3B J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 22.29 (1982 rev. vol. & Supp. 1984) (overview of tax consequences of lapsed options).

8. *See* 2 B. BITTKER, *supra* note 3, ¶ 51.8, at 51-43 (overview of § 1234 of Code).

9. *See* I.R.C. § 1234(a) (West 1984) (Code section makes no reference to identification of underlying property); Treas. Reg. § 1.1234-1(a)(1) & (b), T.D. 6253, 1957-2 C.B. 547, 559-60 (describes proper tax treatment of options without indicating how to identify underlying property).

10. 736 F.2d 134 (4th Cir. 1984).

States Court of Appeals for the Fourth Circuit addressed this identification problem and looked to the taxpayer's intent in identifying the nature of the loss deduction.[11]

In *Willis*, during a series of meetings in April 1976, developer Charles Caveness investigated the possibility of obtaining an option to purchase 1500 acres of prime real estate located near Isle of Palms, South Carolina.[12] Isle of Palms Beach and Racquet Club Company, Inc. (Racquet Club),[13] a partially owned subsidiary of Sea Pines Company, owned the land.[14] Finch Properties, a real estate partnership, owned twenty-seven percent of the outstanding stock of Racquet Club and held a note and mortgage against Sea Pines Company.[15] As a result of the April meetings, Hal Ravenel, who was connected with Sea Pines, obtained an exclusive sales listing allowing Ravenel to sell an option to purchase Finch Properties' interest in Racquet Club.[16] Caveness, thereafter, apparently purchased this option.[17]

In hopes of exercising this option, Caveness contacted Gordon Willis, a long-time business associate.[18] Caveness informed Willis that Caveness held an option to purchase the Isle of Palms land from Finch Properties.[19] On April 19, 1976, Willis and Caveness entered into an agreement transferring

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11. *Id.* at 137-38.

12. *Id.* at 135. The *Willis* court noted that the Isle of Palms consisted of 2.5 miles of beachfront property with 800 acres, out of the total 1500 acres, immediately available for residential development. *Id.*

13. *Id.* The Tax Court in *Willis* noted that the Isle of Palms Beach and Racquet Club, Inc. was incorporated originally as Charleston Beach and Racquet Club Inc. Willis v. Commissioner, 52 T.C.M. (P-H) ¶ 88,180, at 83-693 (1983).

14. *Willis*, 736 F.2d at 135. While the Fourth Circuit record is unclear, the Tax Court record in *Willis* notes that Sea Pines Company was experiencing financial difficulties during 1976. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-695.

15. *Willis*, 736 F.2d at 136. While the Fourth Circuit in *Willis* stated that Sea Pines Company's note and mortgage were on the Isle of Palms land, the Tax Court found that the record was not definitive on that matter, but that indications in the record suggested the Isle of Palms was the security for Sea Pines Company's note. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-695. The face value of the note was $2,639,028.75. *Willis*, 736 F.2d at 136.

16. *Willis*, 736 F.2d at 136. Raymond Finch, a principal in Finch Properties, granted the exclusive sales listing in *Willis* to Ravenel because of Finch's greater familiarity with Ravenel than with Caveness. *Id.* The sales listing permitted Ravenel to present offers to purchase Finch Properties' interest in Sea Pines Company. *Id.* By the terms of the agreement, dated April 7, 1976, the sales listing would expire on April 19, 1976. *Id.* The terms of the option itself required unrefundable payments of $1,000 per day for up to thirty-seven days or else the option would lapse. *Id.*

17. *Id.*

18. *Id.* As noted in *Willis*, Caveness and Willis previously had joined together in various ventures, including the development of a manufacturing enterprise for face protectors for youth baseball players. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-693.

19. *Willis*, 736 F.2d at 136. In *Willis*, in addition to informing Willis that Caveness held an option to purchase the land, Caveness showed Willis aerial photographs and extensive plans for the development of the Isle of Palms property that Sea Pines Company previously prepared. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-693. Caveness, however, only possessed an option to purchase the capital assets of Finch Properties and never had any type of land option to offer to Willis. *Willis*, 736 F.2d at 136.

to Willis a one-half interest in an option to purchase from Finch Properties approximately 1500 acres of ocean property known as the Isle of Palms.[20] Subsequently, Willis made weekly option payments totaling 42,000 dollars over the next six weeks.[21] Following repeated requests from Willis, Caveness eventually showed Willis a copy of the exclusive sales listing from which their option arose.[22] Willis recognized that the listing did not offer an option to buy the Isle of Palms real estate and sent Caveness back to Raymond Finch, a principal in Finch Properties, to secure such an agreement.[23] On May 24, 1976, Caveness and Finch executed an agreement, effective on that date, granting Caveness a new option to purchase the stock and other assets of Finch Properties.[24] Caveness showed this new option to Willis.[25] Since Caveness was unable to obtain an option for the purchase of the Isle of Palms land, Willis decided to abandon his prior option payments made to Finch Properties.[26] Willis deducted the abandoned payments on his 1976 federal income tax return[27] as an ordinary business loss.[28]

The Commissioner of Internal Revenue (Commissioner) subsequently

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20. *Willis*, 736 F.2d at 136. The option in *Willis* provided that Willis make weekly payments of $7,000 for five weeks in escrow for Finch Properties and that both Willis and Caveness would share equally any profits derived from the future development of the land. *Id.*

21. *Id.* In *Willis*, Willis made the required option payments in 1976 on April 19, April 23, May 3, May 10, May 19, and May 26 to South Carolina National Bank by cashier's check, placed in escrow for Finch Properties. *Id.*

22. *Id.* In *Willis*, both the Fourth Circuit and the Tax Court noted that Willis and Caveness could not recall whether Caveness ever showed Willis the sales listing prior to May 24, 1976. *Id.; Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-694. In fact, the Tax Court suggested that Caveness may have had with him a copy of the agreement when Caveness and Willis first met on April 19, 1976, to discuss their possible joint venture. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-694.

23. *Willis*, 736 F.2d at 136.

24. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-694. The Tax Court in *Willis* noted that the new option included the right to purchase Sea Pines Company's note and mortgage issuing by Finch Properties, all the outstanding common stock of Racquet Club held by Finch Properties, and all the contractual rights that Finch Properties had with Sea Pines Company relating to the Racquet Club and Isle of Palms land. *Id.* Under the terms of the new agreement, any payments previously made to Finch Properties prior to the effective date of the new option were to reduce the sales price upon exercising the option. *Id.*

25. *Id.*

26. *Willis*, 736 F.2d at 136.

27. *Id.* The tax return at issue in *Willis* was actually a joint return filed by Willis and his wife, Jean Willis. *Id.* at 136 n.2. Jean Willis was a party in *Willis* solely because she had signed the 1976 joint return. *Id.*

28. *Id.* Apparently, Willis deducted the forfeited option payments in *Willis* as an ordinary loss incurred in his trade or business of real estate development. *Id.; see supra* notes 1-3 and accompanying text (losses related to property held by taxpayer for sale in ordinary course of business are deductible as ordinary losses); *infra* note 54 and accompanying text (land considered ordinary asset if held for sale in ordinary course of taxpayer's trade or business); *infra* note 52 and accompanying text (Commissioner conceded that Willis was in trade or business of real estate development).

In addition to the $42,000 of abandoned payments, Willis deducted the $14 cost for the cashier's checks used to make the option payments as a business loss although the amount was more properly deducted as a business expense. *Willis*, 52 T.C.M. (P-H) ¶ 83,180 at 83-694 n.5.

determined a deficiency on Willis' 1976 tax return.[29] The Commissioner characterized the abandoned payments as a capital loss upon finding that Willis had an option to purchase the capital assets of Finch Properties and not an option to purchase land.[30] Willis sought a redetermination of the deficiency in the United States Tax Court (Tax Court).[31] The Tax Court, however, found for the Commissioner,[32] holding that Willis actually had purchased only an option to acquire capital assets.[33]

On appeal to the Fourth Circuit,[34] Willis again challenged the finding of a deficiency on his 1976 tax return.[35] The *Willis* court acknowledged that its function on review was limited to a determination of whether the Tax Court's finding of a capital loss was clearly erroneous,[36] but concluded, however, that Willis was entitled to deduct the abandoned payments as an ordinary loss.[37] The Fourth Circuit, accordingly, reversed the decision of the Tax Court.[38]

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29. *Willis*, 736 F.2d at 137; *see* I.R.C. § 6211(a) (West 1984) (statutory definition of deficiency).

30. *Willis*, 736 F.2d at 137; *see* I.R.C. § 1234(a) (West 1984) (character of underlying property determines whether loss on lapsed option is capital or ordinary); *see also supra* notes 5-9 and accompanying text (overview of § 1234(a)). Although Congress amended § 1234 in 1976, the amendments were effective only for options issued after September 1, 1976, and, therefore, the amendments were not applicable to *Willis*. *See* Tax Reform Act of 1976, Pub. L. No. 94-955, § 2136(a), 90 Stat. 1929 (1976) (specifying tax treatment for grantors of stock securities or commodities options); *supra* notes 20 & 24 and accompanying text (options in question in *Willis* issued prior to September 1, 1976).

31. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-692.

32. *Id.* at 83-697.

33. *Id.*

34. *Willis*, 736 F.2d 134, 135; *see* I.R.C. § 7482(a) (West 1984) (courts of appeals have exclusive jurisdiction to review Tax Court decisions). The Tax Court is a specialized court of record established under article I of the United States Constitution expressly to resolve disputes in a highly complex area of the law. *See* Kitchin v. Commissioner, 340 F.2d 895, 899 (4th Cir. 1965) (Tax Court determinations given considerable weight because of court's expertise); I.R.C. § 7441 (West 1984) (Tax Court established under article I of Constitution). Established originally as the Board of Tax Appeals in 1924, the Tax Court was an independent agency until its establishment as a court of record by the Tax Reform Act of 1969. *See* I.R.C. § 7441 (West 1954), *as amended by* Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (1969) (establishing Tax Court as court of record). The Tax Court provides taxpayers with a forum to litigate tax disputes without having to pay the disputed tax first and then sue for a refund in district court. *See* Flora v. United States, 362 U.S. 145, 158-63 (1960) (analysis of reasons for establishment of Board of Tax Appeals, predecessor to Tax Court).

The proper venue for review of the Tax Court decision in *Willis* was the United States Court of Appeals for the Fourth Circuit because Willis was a resident of Roanoke, Virginia. *See* I.R.C. § 7482(b)(1)(A) (West 1984) (for noncorporate taxpayers, Tax Court decisions reviewable by court of appeals for the circuit of taxpayer's residence).

35. *Willis*, 736 F.2d at 135, 137.

36. *Id.* at 137-38; *see infra* notes 78-79, 95 and accompanying text (defining parameters of clearly erroneous standard of review).

37. *Id.* at 138.

38. Willis v. Commissioner, 736 F.2d 134, 140 (4th Cir. 1984), *rev'g* 52 T.C.M. (P-H) ¶ 83,180 (1983). A subordinate issue in *Willis* was the Commissioner's assessment of an addition to Willis' tax liability for failing to show reasonable cause to excuse Willis' untimely filing of

The *Willis* court noted that the character of the property underlying an option determines whether the loss incurred when an option goes unexercised is an ordinary or capital loss.[39] By determining that the loss resulting from Willis' failure to exercise the option was an ordinary loss, the Fourth Circuit implicitly found that the property underlying the option was not a capital asset.[40] The Fourth Circuit stated that the record clearly showed that Willis thought he was acquiring an option to purchase the Isle of Palms property.[41] The *Willis* court considered Caveness' representations and the language of the agreement in which Willis acquired a one-half interest in Caveness' original option as supporting Willis' belief that he had acquired a land option.[42] Additionally, the Fourth Circuit noted that Willis specifically designated on the face of many of the cashier's checks that the payments were for a "land option."[43] The *Willis* court also accepted Willis' testimony that he did not see the exclusive sales listing prior to May 24, 1976, and that

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his 1976 federal income tax return. *See id.* at 138-40 (analysis of late filing issue). Willis reviewed and signed the prepared tax return on June 27, 1977, eighteen days before its due date. *Id.* at 138 & 140. The Internal Revenue Service (Service) previously granted Willis an extension from the original April 15, 1977, due date. *Id.* at 137 n.3. Willis, the owner and president of Rockydale Quarries Corporation (Rockydale), gave his signed return to Lynwood Lucas, Rockydale corporate secretary and comptroller. *Id.* at 138. Willis instructed Lucas to prepare a corporate check to cover Willis' tax liability, charging back Willis' personal account with Rockydale, and to file the return on or before its July 15, 1977, due date. *Id.* After drawing and endorsing the check, Lucas mislaid the return and inadvertently failed to file it with the Service until twelve days after the due date. *Id.* at 140. The Service assessed Willis an addition to tax pursuant to § 6651(a)(1) of the Code for the untimely filing of his tax return. *Id.* at 137; *see* I.R.C. § 6651(a)(1) (West 1985) (imposes addition to tax up to 25% of tax liability where taxpayer fails to timely file tax return).

The Tax Court found for the Commissioner on the late filing issue, holding that Willis failed to show reasonable cause to excuse his untimely filing. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-698; *see* I.R.C. § 6651(a)(1) (West 1984) (addition to taxes not imposed if taxpayer shows failure to file due to reasonable cause and not willful neglect). While Treasury regulation § 301.6651-1(c)(1) defines reasonable cause simply as "ordinary business care and prudence in providing for payment of [the taxpayer's] tax liability," the Fourth Circuit in *Willis* noted the myriad of conflicting interpretations and applications of this ordinary business prudence standard. *Willis*, 736 F.2d at 139; *see* Treas. Reg. § 301.6651-1(c)(1), T.D. 7133, 1971-2 C.B. 415, 417 (defining reasonable cause to excuse late filing). Stating that a per se rule barring all inadvertent errors would be inconsistent with the plain and unambiguous language of § 6651(a)(1), the Fourth Circuit reversed the Tax Court, concluding that an erroneous view of the applicable law induced the Tax Court to affirm the Commissioner on this issue. *Willis*, 736 F.2d at 140.

39. *Id.* at 137; *see* I.R.C. § 1234(a) (West 1984) (underlying property determines tax treatment of lapsed option); *see also supra* note 3 (definition of capital asset); notes 5-9 and accompanying text (overview of § 1234(a)).

40. *See Willis*, 736 F.2d at 137-38 (stating that Willis is entitled to ordinary loss if underlying property is land); *see also infra* note 63 (qualification for ordinary loss treatment pursuant to *Corn Products* analysis is highly attenuated).

41. *Willis*, 736 F.2d at 138. *But see Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-695 (Tax Court stated that Willis' belief that he had acquired option for land was irrelevant).

42. *Willis*, 736 F.2d at 138.

43. *Id. But see Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-696 n.8 (question whether Willis

he made his final option payment dated May 26, 1976, before he saw Caveness' May 24, 1976, option.[44]

The *Willis* dissent rejected the Fourth Circuit's intent analysis, arguing that Willis' belief that he acquired a land option should not affect the tax consequences of his failure to exercise the option.[45] The dissent also was unwilling to accept the Fourth Circuit's complete acceptance of Willis' testimony.[46] The dissent questioned whether an experienced and successful businessman, such as Willis, would continue to make substantial option payments before looking at the agreement Caveness purported to possess.[47] The dissent noted that Willis never attempted to recover any of the option payments from either Finch Properties or Caveness.[48] The dissent, therefore, disagreed with the *Willis* majority's conclusion that Willis, in view of the overall facts and circumstances, was entitled to an ordinary loss deduction.[49]

Section 1234(a) of the Code requires an analysis of the property underlying the option rather than the option itself to determine the tax treatment of losses attributable to the failure to exercise the option.[50] Consequently, the nature of the property underlying the option owned by Willis and Caveness controlled the characterization of the loss in *Willis*.[51] Because the Commissioner conceded that Willis suffered a loss of 42,000 dollars in 1976 in his trade or business of developing real estate for resale,[52] the only

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acquired a land option depends on economic substance of transaction and not form Willis used to record payments on his check stubs).

44. *Willis*, 736 F.2d at 138. *But cf. Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-696 (Tax Court questioned reliability of Willis' and Caveness' self-serving testimony).

45. *Willis*, 736 F.2d at 141 (Winter, C.J., dissenting).

46. *Id.* at 141 n.1.

47. *Id.; see Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-696 (Tax Court also questioned whether Willis would make substantial option payments before seeing adequate documentation).

48. *Willis*, 736 F.2d at 141 n.1 (Winter, C.J., dissenting); *see Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-696 (Tax Court questioned Willis' decision not to seek recovery of payments made to Finch Properties).

49. *Willis*, 736 F.2d at 140 (Winter, C.J., dissenting).

50. *See supra* notes 6-9 and accompanying text (overview of application of § 1234(a)).

51. *See Willis*, 736 F.2d at 137 (character of loss is fact question depending on nature of property covered in option).

52. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-695. By admitting that Willis was in the business of developing real estate for resale in *Willis*, the Commissioner made a major concession because the question of whether a taxpayer held real estate primarily for sale in the ordinary course of business is a heavily litigated issue. *See* 2 B. BITTKER, *supra* note 3, ¶ 51.2.3, at 51-14 (overview of judicial interpretations of § 1221(1) excluding real estate from capital asset category). While Willis had another regular business, courts have found that taxpayers were also in the real estate business in addition to their regular business, based on the degree of the taxpayer's real estate activities. *See, e.g.*, Matthews v. Commissioner, 315 F.2d 101, 107 (6th Cir. 1963) (physician with numerous real estate investments was in real estate business); Rossiter v. United States, 282 F.2d 892, 894 (7th Cir. 1960) (lawyers in joint venture with real estate brokers foreclosing property, then reselling, considered in real estate business); Barham v. United States, 301 F. Supp. 43, 44-47 (M.D. Ga. 1969) (lawyer with ownership interest in real estate partnership was in business of real estate development), *aff'd* 429 F.2d 40 (5th Cir. 1970); *see also Willis*, 736 F.2d at 136 (in addition to his real estate activities, Willis was owner and president of Rockydale Quarries Corporation).

substantial issue in Willis concerned the identity of the underlying property.[53] If the property was land, acquired as part of a profit-seeking venture, then the loss resulting from Willis' failure to exercise the option was an ordinary loss.[54] If Willis actually had an option to acquire capital assets, however, Willis could deduct only a capital loss.[55]

The *Willis* dissent correctly questioned the Fourth Circuit's reliance on Willis' intent in acquiring the option to determine the identity of the property.[56] Since the United States Supreme Court's decision in *Corn Products Refining Co. v. Commissioner*,[57] the taxpayer's intent is relevant in determining whether the gain or loss in an asset transaction is ordinary or capital in nature.[58] This intent analysis, however, is applicable only in ascertaining the purpose for which the taxpayer acquired the asset.[59] In *Corn Products*, the Supreme Court held that, although corn futures contracts were literally within the statutory definition of a capital asset,[60] the contracts were ordinary assets in the hands of Corn Products because their purchase constituted an integral part of the ordinary course of Corn Product's business.[61] Subsequent decisions essentially have expanded the *Corn Products* analysis to the point of holding that an otherwise capital asset is an ordinary asset when the taxpayer acquired the asset with an investment or business intent.[62] The intent analysis, however, apparently has not been extended to

53. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-695.

54. *Willis*, 736 F.2d at 137; *see* Spindler v. Commissioner, 32 T.C.M. (P-H) ¶ 63,202, at 63-1147 to 63-1148 (1963) (taxpayer allowed ordinary loss when property underlying lapsed option was real estate in ordinary course of taxpayer's business). *See generally* 3B J. MERTENS, *supra* note 8, § 22.139-140 (overview of examples of real estate held in ordinary course of business qualifying as non-capital assets).

55. *Willis*, 736 F.2d at 137.

56. *See id.* at 142 (Winter, C.J., dissenting); *see also infra* notes 63, 72-76 and accompanying text (arguing that intent is not relevant to identification of property underlying option).

57. 350 U.S. 46 (1955).

58. *See id.* at 50-51 (Court notes Corn Products intended for company's futures transactions to protect against price increases in its new materials and to assure ready supply for future manufacturing needs).

59. *See id.* In *Corn Products*, the taxpayer, lacking adequate storage facilities, purchased corn futures when the price appeared favorable and took delivery only as it needed the corn for its corn starch, syrup, and sugar manufacturing operations. *Id.* at 48. If shortages never materialized, Corn Products would fill their excess corn needs on the spot market and sell their futures at a profit. *Id.* at 49. Corn Products reported its profit from futures transactions as a capital gain. *Id.*

60. *Id.* at 51-54.

61. *Id.* at 50-51.

62. *See, e.g.*, Agway, Inc. v. United States, 524 F.2d 1194, 1201 (Ct. Cl. 1975) (*Corn Products* doctrine applied to stock purchases to acquire source of supply only if there is no investment intent); Schlumberger Technology Corp. v. United States, 443 F.2d 1115, 1120-21 (5th Cir. 1971) (in rejecting temporary business expediency test for proper application of *Corn Products* doctrine, court reaffirms necessity of considering taxpayer's intentions in acquisition and disposition of otherwise capital asset); Booth Newspapers, Inc. v. United States, 303 F.2d 916, 920-21 (Ct. Cl. 1962) (business purpose-investment purpose dichotomy follows from *Corn Products* and progeny). *See generally*, 2 B. BITTKER, *supra* note 3, ¶ 51.10.3 at 51-64 (most common application of *Corn Products* doctrine concerns losses on stock transactions to secure source of supply, where taxpayer demonstrates stock was acquired and held for business

the evidentiary fact question of the identification of the asset until *Willis*.[63]

In *Willis*, the Fourth Circuit's unprecedented extension of the intent analysis also is questionable in light of the general nature of tax law. Taxation generally deals with what taxpayers have done and not what taxpayers intended to do.[64] As the United States Court of Appeals for the Second Circuit stated in *Lynch v. Commissioner*,[65] except when the applicable statute itself turns on intent, tax law depends on objective realities and not on the subjective beliefs of individual taxpayers.[66] In *Lynch*, the Second Circuit affirmed the Commissioner's disallowance of accrued interest deductions when the taxpayer failed to create a legal indebtedness in a sham series of transactions.[67] The Second Circuit looked to the economic realities of the transactions and rejected the taxpayers' argument that their intention was to create a valid debt.[68] Similarly, the United States Court of Appeals for the Fifth Circuit in *Jeffries v. Commissioner*[69] indicated that the tax implications of a transaction are not a matter determined in law upon consideration of general justice and equity or what a taxpayer intended, but are a matter of statutes, regulations, and their interpretations.[70] In *Jeffries*, the Fifth Circuit affirmed the Commissioner's determination of a partial liquidation when the fifty percent owner of a corporation turned over her shares for assets, despite the owner's good faith belief that the transaction was a complete liquidation.[71]

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purposes rather than investment purposes).

63. *See* 2 B. BITTKER, *supra* note 3, ¶ 51.10.3 at 51-63 to 51-67 (implying that intent relevant to *Corn Products* analysis only in determining taxpayer's purpose for acquiring and disposing of what is otherwise capital asset). In applying the *Corn Products* doctrine, the identification of the asset in question is virtually always unambiguous. *See, e.g.*, Agway, Inc. v. United States, 524 F.2d 1194, 1197, 1204-05 (Ct. Cl. 1975) (taxpayer unsuccessful in attempt to apply *Corn Products* analysis to gain on redemption of taxpayer's preferred stock in agricultural cooperative); Booth Newspapers, Inc. v. United States, 303 F.2d 916, 918, 922 (Ct. Cl. 1962) (taxpayer allowed ordinary loss deduction for losses resulting from asset clearly identified as stock of taxpayer's supplier of newsprint); Mansfield Journal Co. v. Commissioner, 274 F.2d 284, 285-86 (6th Cir. 1960) (taxpayer allowed capital gains treatment for gains resulting from transactions involving asset clearly identified as 10-year newsprint supply contract).

64. *See, e.g.*, Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945) (tax consequences determined by substance of transaction, not its mere form); Weiss v. Stearn, 265 U.S. 242, 254 (1924) (taxation determined by what was actually done and not declared purposes of participants); United States v. Phellis, 257 U.S. 156, 172 (1921) (test is what was done, not design or purpose of participants). *See generally* Blum, *Motive, Intent, and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485 (1967) (broad overview of use to intent in taxation).

65. 273 F.2d 867 (2d Cir. 1959).

66. *Id.* at 872.

67. *Id.* at 873. In *Lynch*, the taxpayers failed to create a legal indebtedness after a series of transactions within a seven day period. *Id.* at 871-72. The court disallowed the taxpayers' interest expense deduction because the taxpayers effectively had paid approximately $29,000 for a contractual right to the delivery of Treasury notes and had not assumed any obligation to repay any money in an alleged financing loan. *Id.* at 871-73.

68. *Id.*

69. 158 F.2d 225 (5th Cir. 1946).

70. *Id.* at 226.

71. *Id.* The Fifth Circuit in *Jeffries* noted that the evidence was explicit and undisputed

While the record may indicate that Caveness misled Willis by misrepresenting the nature of the option Caveness possessed,[72] Willis' intention to acquire a land option was irrelevant to the identification of the property underlying the option in which Willis actually acquired an interest.[73] Even though Willis honestly may have believed he had acquired an interest in a land option, all that Finch Properties ever had to offer and all that Willis ever obtained through Caveness was an option to purchase capital assets.[74] The *Willis* court did not find to the contrary.[75] Section 1234(a), the applicable statutory law, turns on intent only derivatively and only to the extent of determining how a taxpayer intended to hold the underlying property if the taxpayer had exercised the option.[76]

Even if the taxpayer's intent was relevant in identifying the nature of the property underlying a lapsed option, the Fourth Circuit's holding in *Willis* exceeded the proper scope of the appellate review of Tax Court decisions.[77] Section 7482 of the Code mandates the clearly erroneous standard of review for Tax Court decisions.[78] The Code's clearly erroneous standard

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that, pursuant to an agreement between the taxpayer and other shareholders of a realty company, the corporation transferred to the taxpayer one-half of its lands and property, and the taxpayer surrendered her fifty percent stock interest in the company. *Id.* at 225-26. The *Jeffries* court concluded by stating that the Commissioner's determination that the taxpayer's gain was a short-term capital gain followed directly from the applicable Code section and Treasury regulation and did not depend on the taxpayer's intent. *Id.* at 226.

72. *Willis*, 736 F.2d at 138.

73. *See supra* notes 59 & 63 and accompanying text (intent inquiry concerns determination of how taxpayer intended to hold asset and not identification of asset); *see also supra* note 64 and accompanying text (substance and not form of transaction generally controls determination of tax liability).

74. *Cf. Willis*, 736 F.2d at 136 (record creates logical inference that Willis could not possibly have acquired land option from Finch Properties because Racquet Club owned Isle of Palms land, and Finch Properties, with whom Willis and Caveness dealt, only had partial ownership interest in Racquet Club).

75. *See id.* at 138 (*Willis* court made no finding that property underlying option was land but concluded without reason, that Willis was entitled to capital loss); *see also id.* at 142 (Winter, C.J., dissenting) (stating that no dispute existed that option actually acquired was for purchase of capital assets).

76. *See* I.R.C. § 1234(a) (West 1984) (tax treatment dependent on character of underlying property, which in turn is dependent on how taxpayer intended to hold property); *see also supra* note 8 and accompanying text (taxpayer's actions normally reduce speculative nature of § 1234(a) inquiry).

77. *See infra* notes 98-100 and accompanying text (Fourth Circuit in *Willis* considered Tax Court findings and improperly drew different factual inference from those findings).

78. *See* I.R.C. § 7482(a) (West 1984) (Tax Court decisions treated as equivalent to district court decisions in nonjury civil actions). Rule 52(a) of the Federal Rules of Civil Procedure govern the review of district court actions tried without a jury. *See* FED. R. CIV. P. 52(a). In reviewing nonjury actions, appellate courts cannot upset the trial court's findings of fact unless such findings are clearly erroneous with due regard given to the opportunity of the lower court to judge witness credibility. *Id.*

Section 7482 of the 1954 Code followed the language of § 1141(c) of the 1939 Code. *See* 2 J. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME AND EXCESS PROFITS TAX LAWS 1953-1939, at 2838-39 (1954). Congress added § 1141(c) to the 1939 Code expressly to overrule the Supreme Court decision in *Dobson v. Commissioner*. See H.R. REP. No. 2087,

provides that a reviewing court cannot upset factual findings of the Tax Court if those findings are supported by substantial evidence on the record, and are not against the clear weight of the evidence or induced by an erroneous view of the law.[79] The United States Supreme Court defined the appellate standard of review of Tax Court decisions in *Commissioner v. Duberstein*.[80] In *Duberstein*, the Court stated that the determination of whether a transfer of property is a gift or payment for services ultimately rests on the application of the factfinder's experience with human nature to the totality of the facts in a given case.[81] Accordingly, the Court noted that the nature of such factual findings necessarily requires a limited appellate review.[82] The Court limited the appellate review of nonjury trials to the clearly erroneous standard,[83] mandating that courts leave factual findings undisturbed unless the reviewing court is firmly convinced that the lower court has committed a mistake.[84] The Court noted that Congress explicitly stated that the standard of review applicable to nonjury district court decisions is applicable to Tax Court decisions as well.[85]

80th Cong., 2d Sess. 16 (1948) *reprinted in* 2 J. SEIDMAN, *supra*, at 2839 (*Dobson* decision gave Tax Court decisions too much weight). In *Dobson*, the Supreme Court held that Tax Court decisions on questions of fact were not reviewable if supported by any evidence in the record. Dobson v. Commissioner, 320 U.S. 489, 501-02 (1943). The current proposed amendments to rule 52(a), nevertheless, reflect Congress' confidence in the implicit strength of factual findings of trial courts. *See* Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 359 (1983) (emphasizing judicial need for finality, proposed rule 52(a) would apply clearly erroneous standard to factual findings based on oral or documentary evidence).

79. *See, e.g.*, Campbell County State Bank, Inc. v. Commissioner, 311 F.2d 374, 377 (8th Cir. 1963) (§ 482 reallocations of deductions by Tax Court based on arbitrary basis held clearly erroneous); Estate of Spicknall v. Commissioner, 285 F.2d 561, 567 (8th Cir. 1961) (Tax Court's misapplication of controlling law regarding deductibility of payments made pursuant to agreement in contemplation of divorce resulted in clearly erroneous decisions); Klamath Medical Serv. Bureau v. Commissioner, 261 F.2d 842, 847 (9th Cir. 1958) (substantial evidence warranted Tax Court finding that payments in excess of 100% of base fees billed by stockholder physicians were nondeductible distributions of corporate income), *cert denied*, 359 U.S. 966 (1959); *see also infra* notes 86-95 and accompanying text (analysis of proper application of clearly erroneous standard by Fourth Circuit). *See generally* 9 J. MERTENS, *supra* note 7, § 51.22-25 (broad overview of nature and scope of appellate review of Tax Court findings).

80. 363 U.S. 278, 290-91 (1960). In *Duberstein*, a taxpayer received an unsolicited automobile from a corporation after giving the corporation a list of potential customers. *Id.* at 280-81. In determining whether a transfer of property is a gift or payment for services, the Court noted that the general nature of the applicable statute and the innumerable factual combinations possible suggest that great emphasis should be given to the conclusions of the factfinder. *Id.* at 289. The Court held that the Tax Court was not clearly erroneous in finding that the transfer of the car was in reality some form of taxable compensation to the taxpayer and dismissed the Sixth Circuit's questioning of the Tax Court's findings. *Id.* at 291-92.

81. *Id.* at 289.

82. *Id.* at 290-91.

83. *Id.* at 291; *see* FED. R. CIV. P. 52(a) (judge's findings of fact in nonjury trial must stand unless clearly erroneous).

84. *Duberstein*, 363 U.S. at 291; *see* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (finding is clearly erroneous when appellate court is left with definite and firm conviction that trial court erred).

85. *Duberstein*, 363 U.S. at 291; *see supra* note 78 (discussing legislative background of

The Fourth Circuit has applied the clearly erroneous standard to numerous Tax Court decisions.[86] For example, in *Road Materials, Inc. v. Commissioner*[87] and *Urban Redevelopment Corp. v. Commissioner*[88] the Fourth Circuit affirmed the Tax Court's decisions, concluding that the Tax Court's findings of fact were not clearly erroneous.[89] In *Road Materials*, the Tax Court found that the corporate taxpayer's advances to an affiliated corporation constituted contributions to capital and were not deductible as a bad dept upon the insolvency of the transferee corporation.[90] The Fourth Circuit in *Road Materials* noted that a court reviewing a decision of the Tax Court was not free to draw its own inferences and conclusions when the evidence before the Tax Court was undisputed.[91] *Urban Redevelopment* involved the disallowance of claimed net operating loss carryover deductions when a sole shareholder acquired control of the taxpayer corporation solely to obtain the benefit of the carryover deductions.[92] The *Urban Redevelopment*

Tax Court standard of review).

86. *See, e.g.*, Daly v. Commissioner, 631 F.2d 351, 354 (4th Cir. 1980) (reversing Tax Court's erroneous interpretation and application of § 162(a)(2) in defining "home" for travel expense deduction purposes); Malmstedt v. Commissioner, 578 F.2d 520, 526-27 (4th Cir. 1978) (reversing Tax Court finding that taxpayer's commercial and residential developments were separate, distinct, and unrelated to businesses in light of undisputed facts to the contrary); Kitchin v. Commissioner, 340 F.2d 895, 899-900 (4th Cir. 1965) (reversing Tax Court's erroneous view of law that accrual of payments under lease with option to buy includable in income before decision to exercise option is made).

87. 407 F.2d 1121 (4th Cir. 1969).

88. 294 F.2d 328 (4th Cir. 1961).

89. *See Road Materials*, 407 F.2d at 1124; *Urban Redevelopment*, 294 F.2d at 332.

90. *Road Materials*, 407 F.2d at 1122. In *Road Materials*, C.N. Haynes was the president and principal shareholder in two family corporations— Road Materials, Inc., which was engaged in highway resurfacing, and Haynes Construction Co., Inc., which was engaged in heavy road construction. *Id.* at 1122-23. As an incentive for continued employment, Haynes helped Haskell Savage form a new corporation, Savage Construction Co., to expand the geographical range of the related corporations' operations. *Id.* at 1123. Subsequently, Haynes arranged for Road Materials to advance Savage Construction over $497,000 without security or any agreement to repay any of the advances. *Id.* Following a variety of problems, Savage Construction Co. became insolvent and Road Materials attempted to deduct the advances as bad debts. *Id.*

91. *Id.* at 1123-24. The Fourth Circuit in *Road Materials* found no error in the Tax Court not considering the form, rather than the substance, of the transaction as controlling. *Id.* at 1124. Likewise, the *Road Materials* court stated that the Tax Court was correct in considering only contemporaneous facts regarding the intention to create a debt. *Id.* The Fourth Circuit implied that, as a reviewing court, it was compelled to affirm the Tax Court upon concluding that the Tax Court's factual findings and view of the applicable law was not clearly erroneous. *Id.* at 1125.

92. *Urban Redevelopment*, 294 F.2d at 329. In *Urban Redevelopment*, for the fiscal years 1950-53, Urban Redevelopment incurred net operating losses. *Id.* Fred Stoneman, the sole shareholder of Urban Redevelopment, began negotiating the sale of his interest in the corporation with Randolph Rouse. *Id.* at 329-30. In the course of the negotiations in 1953, Stoneman's agent informed Rouse about Urban's plans, drawings, and specifications for the construction of a multi-unit housing project. *Id.* at 330. The agent, additionally told Rouse about Urban Redevelopment's potential net operating loss carryovers. *Id.* After acquiring sole interest in Urban Redevelopment, Rouse utilized the carryovers when Urban generated substantial profits in construction and sale of detached housing. *Id.* The Commissioner disallowed the loss carryover

court noted that the inherent improbability in the statements of a witness can justify a court in disregarding his testimony.[93] The Fourth Circuit held that the ultimate findings of the Tax Court in *Urban Redevelopment* were supported by substantial evidence and therefore not clearly erroneous.[94] The *Urban Redevelopment* court, like the *Road Materials* court, accorded the correct degree of deference to the factual findings of the Tax Court.

Both *Road Materials* and *Urban Redevelopment* illustrate the Fourth Circuit's proper application of the clearly erroneous standard of review of Tax Court decisions. Under the clearly erroneous standard, an appellate court cannot reverse the factual findings of the Tax Court and factual inferences drawn therefrom unless there is no substantial evidence to sustain those findings, or if they are against the clear weight of the evidence or induced by an erroneous view of the law.[95] Accordingly, it was not the function of the Fourth Circuit, in reviewing the Tax Court's decision in *Willis*, to retry the case and disturb the Tax Court's findings of evidentiary fact and factual inferences supported by the clear weight of the evidence.[96] In *Willis*, no significant differences in evidentiary findings or view of the applicable statutory law existed between the Tax Court and the Fourth Circuit.[97] The *Willis* court simply took the same facts and drew a different

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deductions, and the Tax Court concurred, finding that the principal purpose for Rouse's acquisition of Urban Redevelopment was the avoidance of federal taxation. *Id.* at 329.

93. *See id.* at 331-32. The *Urban Redevelopment* court questioned whether Rouse, an experienced builder, would verify Urban's losses and not the alleged building plans if Rouse acquired Urban primarily to obtain the plans, as Rouse testified. *Id.*

94. *Id.* at 332. The Fourth Circuit in *Urban Redevelopment* noted that Rouse made no effort to verify the existence or value of Urban Redevelopment's multi-unit housing plans during the negotiations and only made nominal ineffectual efforts to acquire the plans after acquiring control of Urban Redevelopment. *Id.* at 330. In contradistinction, Rouse carefully had his certified public accountant and his attorney verify the net operating losses and promptly used the carryovers in the two taxable years immediately following Rouse's acquisition of Urban Redevelopment. *Id.* at 329-30.

95. *See, e.g.*, Hradesby v. Commissioner, 540 F.2d 821, 824 (5th Cir. 1976) (affirming Tax Court decision when taxpayer failed to prove Tax Court findings were without adequate evidentiary support or result of incorrect interpretation of law); Commissioner v. Riss, 374 F.2d 161, 166 (8th Cir. 1967) (court did not upset findings supported by substantial evidence and not against clear weight of evidence or induced by incorrect view of law); Klamath Medical Serv. Bureau v. Commissioner, 261 F.2d 842, 847 (9th Cir. 1958) (appellate court cannot reverse Tax Court findings that are not clearly erroneous). *See generally* 9 J. MERTENS, *supra* note 7, § 51.23 (overview of review of Tax Court evidentiary factual findings).

96. *See, e.g.*, Wilmington Trust Co. v. Helvering, 316 U.S. 164, 168 (1942) (finding that lower court applied proper interpretation of law, Supreme Court overturned appellate court's reversal of income recognition from dividends in multiple brokerage house accounts); Investers Diversified Servs., Inc. v. Commissioner, 325 F.2d 341, 351-52 (8th Cir. 1963) (holding that Tax Court findings regarding witnesses' testimony was supported by substantial evidence, thus circuit court affirmed Tax Court decision that losses on investment company's sales of discounted mortgages to affiliates were nondeductible and sales to non-affiliates were capital losses); United States Pumice Supply Co. v. Commissioner, 308 F.2d 766, 769 (9th Cir. 1962) (court of appeals lacks power to rejudge or second-guess Tax Court decision regarding conflicting testimony concerning determination of statutory depletion rate of taxpayer's cut pumice blocks).

97. *Compare Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-692 to 83-697 (Tax Court's statement

factual inference concerning the identification of the property underlying the option in contradiction of the clearly erroneous standard.[98]

Moreover, the Fourth Circuit in *Willis* failed to give due deference to the opportunity of the Tax Court to appraise the credibility of the witnesses.[99] To reach its decision, the *Willis* court necessarily had to infer that Willis did not see the exclusive sales listing prior to May 24, 1976.[100] The Tax Court made the contrary inference.[101] Notwithstanding Willis' initial understanding, if Willis continued to make payments after discovering the true character of the option, then no ground existed to assert that Willis did not have an option to purchase the capital assets of Finch Properties.[102]

The Fourth Circuit's inconsistent application of the clearly erroneous standard of review in *Willis* results in a decision of questionable value outside of the particular fact situation involved.[103] Section 1234(a) does not mandate the expansion of a *Corn Products* intent analysis to identify the property underlying an option.[104] Moreover, reliance on a taxpayer's intent in contra-

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of factual findings and applicable law) *with Willis*, 736 F.2d at 135-37 (Fourth Circuit extensively paraphrased Tax Court's statement of facts and restated applicable statutory law).

98. *See Willis*, 736 F.2d at 138 (holding that Willis is entitled to ordinary loss deduction). The clearly erroneous standard of review applies not only to evidentiary facts but also to inferences drawn therefrom. Commissioner v. Duberstein, 363 U.S. 278, 291 (1960); *see supra* notes 80-85 and accompanying text (analysis of *Duberstein*'s statement of proper standard of review).

99. *See Willis*, 736 F.2d at 138 (Fourth Circuit's findings concerning timing of Willis' discovery of true nature of Caveness' original option, noting that Willis testified that he could not recall whether he saw sales listing prior to May 24th); *see also* Goldstein v. Commissioner, 298 F.2d 562, 566 (9th Cir. 1962) (appellate court must give due regard to Tax Court's opportunity to appraise witness credibility); F.C. Publication Liquidating Corp. v. Commissioner, 304 F.2d 779, 781 (2d Cir. 1962) (witness credibility is question for trier of fact to determine); notes 46-47 and accompanying text (Tax Court correctly disregarded inherently improbable testimony).

100. *See Willis*, 736 F.2d at 138 (discounting unclear record regarding when Willis became aware of sales listing provisions); *Willis*, 52 T.C.M. (P-H) ¶ 83,180 at 83-696 (questioning Willis' and Caveness' testimony). In *Willis*, both Willis and Caveness testified that they could not recall when Caveness first showed to Willis the exclusive sales agreement from which Ravenel granted to Caveness the original option. *Willis*, 736 F.2d at 138. Both the Tax Court and the Fourth Circuit dissent in *Willis* found it difficult to believe that a man with Willis' background and experience would continue to pay substantial weekly payments to an unfamiliar entity without satisfactory documentation of the existence of the land option and ownership of the underlying property. *Willis*, 736 F.2d at 141 n.1 (Winter, C.J., dissenting); *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-696. Since 1954, Willis has been involved in various real estate developments with an estimated aggregate value in excess of $35 million. *Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 63-693 n.3; *see supra* note 18 (successful prior manufacturing venture with Caveness).

101. *See Willis*, 52 T.C.M. (P-H) ¶ 83,180, at 83-695 to 83-696 (Tax Court noted that Willis and Caveness claimed to have poor memory of when Willis first saw the exclusive sales listing and discounted Willis' self-serving testimony).

102. *Cf. Willis*, 736 F.2d at 141-42 (Winter, C.J., dissenting) (dissent argues that Willis was at least beneficial owner of interest in Caveness' option and that as long as Willis had exercised right to purchase capital assets, then he possessed the option for capital assets).

103. *See supra* notes 56-76 and accompanying text (discussion of Fourth Circuit's use of intent analysis in *Willis* to determine the identification of property underlying lapsed option).

104. *See supra* notes 5-9 and accompanying text (analysis of § 1234(a)).