CORPORATE AGENTS AND THE FLOW-THROUGH OF TAX ADVANTAGES

Traditionally, taxpayers have preferred to use the partnership form of ownership over the corporate form for the development of real estate projects.[1] Unlike a corporation, which is a taxable entity,[2] a partnership is not.[3] This form permits the profits and losses of the venture to flow-through to each individual partner.[4] Regardless of the form of ownership, substantial financing is often required for the real estate projects. State usury laws restrict the interest rates that can be charged on loans.[5] Since corporations are usually exempt from these laws, they are allowed to pay higher interest rates for the financing.[6] As a result, a real estate partnership seeking financing for its projects often must create a corporation to attract a lender.[7] When a corporation is formed solely to avoid state law restrictions on interest rates, it holds only record title to the property.[8] Nevertheless, the Internal Revenue Service (IRS) has consistently held that the corporation, rather than the partnership, is the true owner of the property. Accordingly, it has denied the flow-through of any tax advantages to the individual partners.[9]

In response to the IRS's attribution of ownership to the corporation,[10] taxpayer-partners have advanced two theories. The first,

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[1] M. LEVINE, REAL ESTATE TRANSACTIONS, TAX PLANNING AND CONSEQUENCES § 764 (3d ed. 1981).

[2] I.R.C. § 11 (1976).

[3] *Id.* § 701. Although a partnership is not a taxable entity, the partners are liable as individuals for the income tax of the business. *Id.*

[4] *Id.* § 702. Each partner, in determining his own income tax, accounts for his distributive share of the partnership's income, gains, losses, deductions, and credits. *Id.* Unless otherwise provided by the partnership agreement, a partner's distributive share is equal to his interest in the partnership's profit and capital. *Id.* § 704. *See generally* Z. CAVITCH, BUSINESS ORGANIZATIONS § 3 (rev. perm. ed. 1982) (discussion of various tax factors to consider in choosing form of business organization).

[5] K. LIFTON, PRACTICAL REAL ESTATE: LEGAL TAX AND BUSINESS STRATEGIES 373 (1979). Specific rates, rules, and penalties vary from state to state. *Id.* at 373-74.

[6] *Id.* at 379.

[7] *E.g.*, Collins v. United States, 386 F. Supp. 17, 20-21, (S.D. Ga.), *aff'd per curiam*, 514 F.2d 1282 (5th Cir. 1975); Strong v. Commissioner, 66 T.C. 12, 14, *aff'd mem.*, 553 F.2d 94 (2nd Cir. 1977).

[8] *E.g.*, Collins v. United States, 386 F. Supp. 17, 20 (S.D. Ga.), *aff'd per curiam*, 514 F.2d 1282 (5th Cir. 1975); Strong v. Commissioner, 66 T.C. 12, 13, *aff'd mem.*, 553 F.2d 94 (2nd Cir. 1977).

[9] *E.g.*, Collins v. United States, 386 F. Supp. 17 (S.D. Ga.), *aff'd per curiam*, 514 F.2d 1282 (5th Cir. 1975).

[10] The problem of attribution of ownership is not unique to the avoidance of state usury laws. The issues to be discussed in this Comment arise whenever the IRS determines that an

known as the "disregard theory," states that the corporation is merely a "shell" to be ignored for income tax purposes.[11] The second, the agency theory, recognizes the corporation and characterizes it as an agent of the partnership.[12] If the taxpayer prevails on either theory, he is entitled to receive all tax deduction benefits associated with ownership of the property.[13] Thus, the taxpayer's goal in litigation is to convince the court that for income tax purposes, the owner of the property is the partnership, not the corporation. Although taxpayers confronted with this dilemma customarily have raised both the disregard and agency theories in support of their position, they have primarily relied on the former.[14] Since the disregard theory has usually failed in this context,[15] the agency theory has emerged as the more viable alternative.[16]

The agency theory, unencumbered by a concurrent disregard argument[17], was examined for the first time in two 1981 decisions, *Jones v. Commissioner*[18] and *Roccaforte v. Commissioner.*[19] In

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intended "shell" corporation is the taxable owner of the property. See Tomlinson v. Miles, 316 F.2d 710, 711 (5th Cir.), *cert. denied,* 375 U.S. 828 (1963) (corporation formed to facilitate management and transfer of property owned by group of individuals); Harrison Property Management Co. v. United States, 475 F.2d 623, 624 (Ct. Cl. 1973), *cert. denied,* 414 U.S. 1130 (1974) (corporation formed to ensure undisrupted management of oil leases in event of death of one of three owners).

[11] See Miller, *The Nominee Conundrum: The Live Dummy is Dead, but the Dead Dummy Should Live,* 34 TAX L. REV. 213 (1979), for a comprehensive discusssion of the disregard theory.

[12] *See* Kahn, *Planning the Selection of a Business Organization for the Holding of Real Estate in Light of Recent Developments,* 35 N.Y.U. INST. 839, 841 (1977).

[13] *See* Carver v. United States, 412 F.2d 233, 240 (Ct. Cl. 1969).

[14] *E.g.,* Collins v. United States, 386 F. Supp. 17, 20-21 (S.D. Ga.), *aff'd per curiam,* 514 F.2d 1282 (5th Cir. 1975); Bolger v. Commissioner, 59 T.C. 760, 763-66 (1973).

[15] *E.g.,* Tomlinson v. Miles, 316 F.2d 710 (5th Cir.), *cert. denied,* 373 U.S. 828 (1963); Estate of Lichstein v. Commissioner, 21 T.C.M. (CCH) 1335 (1962). In Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1945), the United States Supreme Court announced the test for evaluating disregard arguments: a corporation will be treated as a separate taxable entity as long as its purpose is "the equivalent of business activity or is followed by the carrying on of business by the corporation." *Id.* at 438-39. Because most corporations meet this test, courts refuse to disregard them. *See* Stogel & Jones, *Straw and Nominee Corporation in Real Estate Tax Shelter Transactions,* 3 WASH. U. L. Q. 403, 406, (1976).

[16] *See* Baker & Rothman, *Straw Corporations: New Cases Shed Light on Tax-Recognition Criteria,* 45 J. TAX'N 84, 88 (1976) (suggesting that if use of conduit corporation is necessary for non-tax purposes, agency corporation is preferred to shell corporation); Stogel & Jones, *supra* note 15, at 404, 411-12, 427 (also suggesting that agency corporation as opposed to shell corporation is better alternative where conduit corporation is needed to achieve tax shelter in real estate project).

[17] These two arguments are inherently inconsistent. The argument that a corporation should be recognized and given agency status must necessarily be weakened by the effects of an earlier contention that the corporation was so insignificant that it should be ignored. Brief for Petitioner at 42, Roccaforte v. Commissioner, 77 T.C. 263 (1981).

[18] 640 F.2d 745 (5th Cir.), *cert. denied,* 102 S. Ct. 507 (1981).

[19] 77 T.C. 263 (1981).

Jones, a limited partnership formed a corporation to obtain financing for an apartment complex.[20] As a general partner to the limited partnership, the corporation executed financing and construction contracts, held title to the property, and managed the project during development.[21] Affirming a tax court decision, the United States Court of Appeals for the Fifth Circuit held that the taxpayers failed to prove that the corporation acted as an agent of the limited partnership.[22] In *Roccaforte*, the tax court, faced with similar facts,[23] found that an agency relationship existed between the corporation and the limited partnership.[24]

The *Jones* and *Roccaforte* courts both employed the standard for evaluating an agency relationship announced in *National Carbide Corp. v. Commissioner*[25] in the same novel way; they used a factor by factor analysis.[26] Their differing findings resulted from an implicit change in the standard as applied by the *Roccaforte* court.[27] While the *Jones* decision represents the original composition of the factors, the *Roccaforte* decision reflects the identical factors somewhat reweighed.[28] This Comment will examine the emergence of the agency theory and the evolution of the *National Carbide* standard by which it is evaluated.

The modern agency theory evolved from the United States Supreme Court's decision in *Moline Properties, Inc. v. Commissioner.*[29] In *Moline*, Uly O. Thompson, at the suggestion of his mortgagee, formed a corporation to hold title to and assume mortgages on certain real property.[30] He exchanged the real estate for stock in the corporation and then transferred the stock to a voting trustee appointed by the mortgagee.[31] After repaying the original mortgage, Mr. Thompson regained the stock. Thereafter the property was sold.[32] Initially, the sale was reported in the income tax return of the corporation. Thompson, however, subsequently claimed a refund on behalf of the corpo-

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[20] 640 F.2d at 747-48.
[21] *Id.* at 748-49.
[22] *Id. at* 755.
[23] 77 T.C. at 265-78.
[24] *Id.* at 288.
[25] 336 U.S. 422, 437 (1949).
[26] *Jones*, 640 F.2d at 752-54; *Roccaforte*, 77 T.C. at 283-87.
[27] See *infra* notes 195-204 and accompanying text.
[28] See *infra* notes 195-96 and accompanying text.
[29] 319 U.S. 436 (1943); *see* Baker & Rothman, *Nominee and Agency Corporations: Grasping for Straws*, 33 N.Y.U. INST. 1255, 1285-86 (1975).
[30] 319 U.S. at 437.
[31] *Id.* The trustee held the stock as security for an additional loan made to Thompson. *Id.*
[32] *Id.*

ration and attempted to report the gain from the sale as income to himself in his individual tax return.[33] The IRS disagreed.[34]

The Board of Tax Appeals, disregarding the corporation, held that the income was taxable to Thompson.[35] The Court of Appeals for the Fifth Circuit reversed, finding the corporation to be a taxable entity.[36] The United States Supreme Court granted certiorari to determine whether the corporation should be disregarded for income tax purposes.[37]

Arguing primarily the disregard theory and secondarily the agency theory, the taxpayer contended that the gain realized from the sale was chargeable to him personally.[38] The Supreme Court stated that a corporation is a separate taxable entity if its purpose is either "the equivalent of a business activity or is followed by the carrying on of business by the corporation."[39] It reasoned that the Moline corporation was formed because of "a business necessity, . . . pressure from creditors," and that it conducted business activities which included mortgaging, selling, and leasing property.[40] Thus, the Court refused to disregard the corporation, finding that it had a tax identity separate and distinct from Thompson.[41]

Turning to the agency argument, the *Moline* Court found that it was simply another form of the original identity question.[42] Specifically noting the absence of an "agency contract" and the "usual incidents of an agency relationship," the Court concluded that the remaining legal issues had previously been discussed in the context of disregarding the corporation.[43] Although the *Moline* Court did not thoroughly examine the agency argument, it did imply that under different circumstances an agency relationship might be deemed to exist for tax purposes.[44]

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[33] *Id.* at 438. Thompson similarly reported the gain from a subsequent sale of property held by the corporation to himself individually. *Id.*

[34] *Id.*

[35] Moline Properties, Inc., v. Commissioner, 45 B.T.A. 647, 651 (1941), *rev'd*, 131 F.2d 388 (5th Cir. 1942), *aff'd*, 319 U.S. 436 (1943).

[36] Commissioner v. Moline Properties, Inc., 131 F.2d 388, 389 (5th Cir. 1942), *aff'd*, 319 U.S. 436 (1943). The court of appeals reasoned that taxpayers choosing to do business through the corporate form must accept all consequences of that choice. Thus, a corporate entity purposefully selected would not be disregarded unless it were used for fraudulent purposes. *Id.* at 389.

[37] 319 U.S. at 438.

[38] *Id.* 438-40.

[39] *Id.* at 439.

[40] *Id.* at 440.

[41] *Id.*

[42] *Id.* at 440-41.

[43] *Id.*

[44] *See* Kahn, *supra* note 12, at 872.

In *National Carbide,* a landmark decision,[45] the Supreme Court defined the requirements for the agency status suggested by the *Moline* decision.[46] In *National Carbide,* three wholly owned subsidiaries of Air Reduction Corporation (Airco) acted as production and sales companies.[47] An agency contract between Airco and each subsidiary provided for the subsidiary to retain a nominal fee for its services and turn over the remainder of the profits to Airco.[48] Although the subsidiaries held title to the production assets, Airco provided the capital, management, and offices for the operations.[49]

Airco's capital contributions were reflected in the subsidiaries' books as accounts payable to Airco, and approximately equaled the value of the subsidiaries' assets.[50] The profit realized from the sales was treated as income to Airco; thus, the reported income of each subsidiary consisted only of the service fee.[51] The Commissioner disagreed with this characterization contending that the income transferred to Airco as well as the fee retained were taxable to the subsidiaries.[52] The tax court found that the subsidiaries were agents of Airco, and permitted the parent to treat all profits as income.[53] The Court of Appeals for the Second Circuit reversed.[54] It reasoned that Airco chose to manufacture and sell its products through subsidiary corporations for business reasons. Therefore, those subsidiaries were corporations under the law, despite Airco's high level of control.[55]

On grant of certiorari, the subsidiaries contended that they acted merely as agents for Airco, and thus were excepted by the *Moline* decision from the general rule that a corporation engaging in a business activity is a taxable entity.[56] In examining the taxpayers' contentions, the Supreme Court considered whether the "usual incidents of an agency relationship" existed between Airco and its subsidiaries.[57]

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[45] Almost every subsequent case dealing with the issue has cited *National Carbide.*

[46] 336 U.S. at 437.

[47] *Id.* at 424-25. Each subsidiary was assigned a separate product. *Id.* at 425.

[48] *Id.* at 425. The fee was six percent on the outstanding capital stock. *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 426.

[53] National Carbide Corp. v. Commissioner, 8 T.C. 594, 612-14 (1947), *rev'd,* 167 F.2d 304 (2d Cir. 1948), *aff'd,* 336 U.S. 422 (1949).

[54] Commissioner v. National Carbide Corp., 167 F.2d 304, 307-08 (2d Cir. 1948) *aff'd,* 336 U.S. 422 (1949).

[55] *Id.* at 307.

[56] 336 U.S. at 426.

[57] *Id.* at 433-40. Petitioners argued in part that their relationship to Airco was similar to the relationship between the parent and subsidiary in Southern Pacific Co. v. Lowe, 247 U.S. 330 (1918). 336 U.S. at 427. There, the Court determined that the parent's control of the subsidiary was so complete as to allow both corporations to be treated as one. 247 U.S. at 337. The Supreme Court in *National Carbide,* however, decided that the *Southern Pacific* complete ownership

The Court determined that the subsidiaries actually owned the "income-producing assets."[58] Consequently, the control exercised by Airco was indistinguishable from the control exercised by the shareholder in *Moline*.[59] The Court, therefore, concluded that despite the existence of "agency contracts," the subsidiaries were not Airco's agents.[60]

The *National Carbide* Court, however, was careful not to foreclose the possibility of a true corporate agent acting on behalf of an owner-principal without suffering tax liability for income resulting from the transactions.[61] The Court set forth four factors relevant to an agency evaluation:

> [w]hether the corporation [(1)] operates in the name and for the account of the principal, [(2)] binds the principal by its actions, [(3)] transmits money received by it to the principal, and [(4)] whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal.[62]

It continued with two critical factors. (5) "If the corporation is a true agent, its relations with its principal *must* not be dependent upon the fact that it is owned by the principal." (6) "Its business purpose *must* be the carrying on of the normal duties of an agent."[63]

Applying this standard to the facts, the Court found that the relationship between Airco and its subsidiaries was dependent upon ownership.[64] Specifically, the subsidiaries transferred their earnings to Airco simply because they were owned and operated by Airco.[65] Thus, the fifth factor was not satisfied, and the relationship between Airco and its subsidiaries did not meet the standard.[66]

The *National Carbide* six factor standard became the criterion for determining whether a true agency exists for tax purposes.[67] In

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factor was inapplicable for tax purposes. 336 U.S. at 432. The Court relied instead on the *Moline* decision. *Id.* at 433-34.

[58] 336 U.S. at 434-35. The Court noted that Airco merely supplied the assets. Thus, a determination of whether the method of furnishing the assets was a capital contribution, as indicated by the substance of the transaction, or a loan, as represented by the form, was unnecessary. *Id.* at 435.

[59] *Id.*at 433-34.

[60] *Id.* at 436-39. The Court found the agency contracts to be in opposition to the tax theory requiring income to be taxable to those who earn it. *Id.* at 436. The proposition that income is not assignable for tax purposes has subsequently been codified. I.R.C. § 83 (1976).

[61] 336 U.S. at 437.

[62] *Id.*

[63] *Id.* (emphasis added).

[64] *Id.* at 438.

[65] *Id.*

[66] *See id.* at 437-39.

[67] *E.g.*, Harrison Property Management Co. v. United States, 475 F.2d 623, 627-29 (Ct. Cl. 1973), *cert. denied*, 414 U.S. 1130 (1974); *see* Kronovet, *Straw Corporations: When Will They Be Recognized; What Can and Should Be Done*, 39 J. TAX'N 54, 56 (1973).

subsequent cases, courts continued to reject taxpayers' contentions that a wholly-owned corporation acted as an agent for its owner.[68] Some courts merely made a general reference to the *National Carbide* standard.[69] Others emphasized the fifth factor, but also examined other relevant considerations.[70] At least one court summarily rejected a taxpayer's agency claim, relying solely on the fifth and sixth factors.[71]

The reluctance of courts to recognize an agency relationship in the context of wholly-owned corporations is apparent from the decision rendered in *Carver v. United States*.[72] In *Carver*, a lawyer used Chase National as a conduit corporation for himself and his clients.[73] The corporation held title to parcels of real estate owned by Carver alone,[74] by Carver and an unrelated third party,[75] and by Carver's clients.[76] The Commissioner accepted the corporation as a nominee for Carver's clients, but refused to accept it as a nominee for Carver in similar transactions.[77] The United States Court of Claims rejected Carver's argument that the corporation was not a taxable entity because under state law it never had a beneficial interest in the real estate.[78] Turning to the agency argument,[79] the court of claims refused to find that the corporation acted as an agent in transactions in which Carver was the sole principal; however, an agency was found to exist in transactions involving property owned by Carver and a third party.[80] Since the evidence clearly indicated that Chase Na-

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[68] *E.g.*, Greer v. Commissioner, 344 F.2d 20 (5th Cir. 1964); Harrison Property Management Co. v. United States, 475 F.2d 623 (Ct. Cl. 1973), *cert. denied*, 414 U.S. 1130 (1974). *Contra* Caswal Corp. v. Commissioner, 19 T.C.M. (CCH) 757 (1960) (decided without reference to *National Carbide*); K-C Land Co. v. Commissioner, 19 T.C.M. (CCH) 183 (1960) (relied on decision subsequently reversed). Although the courts found that an agency existed for tax purposes, neither case is considered reliable precedent by commentators. *See* Kahn, *supra* note 12, at 872-73 n.103; Kronovet, *supra* note 67, at 56.

[69] *E.g.*, Greer v. Commissioner, 344 F.2d 20 (5th Cir. 1964).

[70] Harrison Property Management Co. v. United States, 475 F.2d 623, 627-28 (Ct. Cl. 1973), *cert. denied*, 414 U.S. 1130 (1974); Stillman v. Commissioner, 60 T.C. 897, 907-08 (1973).

[71] Collins v. United States, 386 F. Supp. 17, 21 (S.D. Ga.) *aff'd per curiam*, 514 F.2d 1282 (5th Cir. 1975).

[72] 412 F.2d 233 (Ct. Cl. 1969).

[73] *Id.* at 234. The corporation had originally been created in 1925 to obtain financing for a construction project that had not been pursued. *Id.*

[74] *Id.* Mr. Carver utilized the corporation from 1929-1957 at which time all property and mortgages were conveyed to Carver and the corporation was dissolved. *Id.*

[75] *Id.* at 240.

[76] *Id.* at 234.

[77] *Id.* at 234-35.

[78] *Id.* at 237-39. The court reasoned that the *Moline* and *National Carbide* decisions allowed attribution of property beneficially owned by others to a corporation for tax purposes. *Id.*

[79] *Id.* at 239.

[80] *Id.* at 240.

tional was an agent or trustee for the independent third party, the court found that "the relationship must have been equally valid, under all the circumstances, for Mr. Carver" in transactions where the third party was involved.[81] Thus, Mr. Carver recovered the taxes assessed against him as a result of the real estate deal.[82] The partial success of the agency argument in *Carver* was completely dependent upon the involvement of an unrelated investor.[83] The court's refusal to extend agency status to transactions in which Carver was the sole principal exemplifies the almost prohibitive effect of the fifth factor of the *National Carbide* standard. The only way to prove that an agency relationship exists independently of ownership control is to show the existence of that relationship with one who has no ownership interest.

In Revenue Rulings 75-31[84] and 76-26,[85] the IRS recognized the agency status of corporations formed to obtain financing for low income housing projects.[86] In both instances, the corporations were general partners to limited partnerships. They were created in compliance with New York law to hold record title to the property and to execute loan agreements.[87] They also made declarations of their fiduciary capacity, which were publicly filed with other official documents.[88] In each case, the certificate of incorporation provided that the control of the corporation was subject to the supervision and control of a state agency, which could assume actual control in the event of mismanagement.[89]

The IRS based its finding of agency upon documentation acknowledging that as a general partner, the corporation was holding record title for the limited partnership.[90] Special emphasis was placed on the public declarations and other filings that evidenced this

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[81] *Id.* Surprisingly, the Commissioner refused to consider Chase National Carver's agent in this transaction, despite a "manifest relationship of either agency or trust." *Id.*

[82] *Id.*

[83] *Id.*

[84] 1975-1 C.B. 10.

[85] 1976-1 C.B. 10.

[86] The factual differences between the two rulings are significant only with respect to the personal liability of the general partners for repayment of the loans. In Rev. Rul. 75-31, the loan made by the Federal Housing Authority was a recourse loan, so a determination of liability was necessary. 1975-1 C.B. at 13-14. In Rev. Rul. 76-26, the financing obtained from the New York State Urban Development Corporation was a nonrecourse loan and therefore liability was not an issue. 1976-1 C.B. at 12.

[87] 1976-1 C.B. at 11. The limited partnership retained the equitable interest in the project. *Id.*

[88] *Id.*

[89] *Id.* at 10.

[90] *Id.* at 11.

relationship.[91] To determine whether the agency relationship would be valid for federal income tax purposes, the Service considered whether it was based on control derived from ownership, in essence the fifth *National Carbide* factor.[92] Because control of the corporation was subject to the approval of a government agency having the right to actually assume control, the Service found that the partnership did not actually control the corporation. The agency relationship, therefore, was deemed to exist independent of ownership.[93] Based on these findings, the Service declared that the partnership would be treated as the owner of the housing project and the corporation as its agent for federal income tax purposes.[94] Thus, the position of the IRS was consistent with earlier judicial determinations[95] that the fifth *National Carbide* factor must be satisfied for the agency theory to prevail.

The agency theory was recently examined independently of the disregard theory in *Jones*. In 1981, Dr. Jones and several other individuals formed San Mateo Properties, Ltd., (Mateo Partnership), a limited partnership, to develop an apartment complex in the vicinity of Dallas, Texas.[96] As general partner, Dr. Jones contributed real estate to the partnership in return for a seventy-five percent interest in the project. As limited partners, the remaining individuals each contributed cash in exchange for a five percent interest.[97]

Mateo Partnership sought financing for the project, but was unable to secure the necessary loans because of state usury laws. The lending institutions agreed to finance the complex if the loans were made to a corporation. In view of this requirement, Mateo Partnership applied for financing and executed loan commitments in the name of an as yet unformed corporation.[98] Dr. Jones personally guaranteed the loans and executed a construction contract, which was later redrawn in the corporation's name.[99]

The partners formed San Mateo Properties, Inc. (Mateo Corporation) in June of 1973. Dr. Jones, his wife, and a limited partner

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[91] *Id.*

[92] 1976-1 C.B. at 11; 1975-1 C.B. at 10.

[93] 1976-1 C.B. at 11.

[94] *Id.* at 12.

[95] *See* Collins v. United States, 386 F. Supp. 17, 21 (S.D. Ga.), *aff'd per curiam*, 514 F.2d 1282 (5th Cir. 1975); Harrison Property Management Co. v. United States, 475 F.2d 623, 627 (Ct. Cl. 1973), *cert. denied*, 414 U.S. 1130 (1974).

[96] 640 F.2d at 747.

[97] *Id.*

[98] *Id.*

[99] *Id.* The agency status of the corporation was not disclosed to the bank officer who believed he was dealing primarily with Dr. Jones. *Id.* The contractor also believed that he was dealing with Jones personally rather than the corporation. *Id.* at 752.

were its directors and officers. All of the shareholders of the corporation were also partners in the partnership.[100] The amended partnership agreement, naming Mateo Corporation as a general partner, authorized the corporation to execute construction contracts and loan documents. The corporation also was to manage the construction of the complex and to hold title to the property.[101] It was specifically authorized to function without disclosing its fiduciary capacity.[102] Although Mateo Corporation was not to share in partnership losses, it was to be paid thirty percent of the partnership's net profits as compensation for services.[103]

In July of 1973, Mateo Partnership conveyed to Mateo Corporation the real estate that Dr. Jones originally contributed to be used as the site for the apartment complex. During the construction period, the corporation changed construction orders, borrowed additional funds, and paid interest on the loans.[104] Upon completion of the complex, Mateo Partnership assumed the management function with all the control incident thereto.[105]

Mateo Corporation filed a corporate income tax return for each year from 1973 to 1975. The returns listed real estate investment as the corporation's business activity. No income or expenses were reported.[106] For the corresponding years, the partnership filed income tax returns showing losses primarily attributable to interest and operating expenses. Each partner claimed his proportionate share of the losses on his individual tax returns for the same period.[107] The IRS challenged the partner's reported losses, asserting that Mateo Corporation actually owned the apartment complex,[108] and that the income and expenses derived from ownership were includable in the corporation's tax return.[109] The tax court, upholding the Service's determination, found that the corporation was a taxable entity under the *Moline* test, and not an agent of the partnership under the *National Carbide* standard.[110]

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[100] *Id.* at 748.
[101] *Id.*
[102] *Id.*at 748-49.
[103] *Id.* at 748. This compensation was exclusive of capital gains. *Id.*
[104] *Id.* at 749.
[105] *Id.* The partnership leased apartments, collected rent, and paid operating expenses. *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 750.
[109] *Id.*
[110] Jones v. Commissioner, 1978 T.C.M. (P-H) ¶ 75,446, at 1868 (1978), *aff'd*, 640 F.2d 745 (5th Cir. 1981). According to the tax court, incorporation for the avoidance of state usury laws was a valid business purpose and execution of a construction contract was sufficient business

The taxpayers appealed the decision to the Court of Appeals for the Fifth Circuit, contending that the Mateo Corporation's "alleged relationship . . . as an undisclosed general partner of the limited partnership . . . [should] be recognized for tax purposes despite legal title lying in Mateo Corporation."[111] The court of appeals determined that the *National Carbide* standard applied.[112] It further noted that the burden was on the taxpayer to prove the existence of the relationship.[113]

The court of appeals methodically applied the six factor *National Carbide* test to the facts.[114] It relied on the failure to disclose the corporation's fiduciary capacity to third parties in concluding that the taxpayers had failed to establish that the corporation "act[ed] in the name and for the account of the partnership."[115] Thus, the first factor of the standard had not been established.[116] The court found the evidence of partial disclosure to be insufficient to distinguish *Jones* from prior cases in which the taxpayer's agency argument had failed.[117] The *Jones* court also determined that the second factor, the

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activity to satisfy the *Moline* standard. *Id.* The court then found that the *National Carbide* test was not met because the petitioner failed to prove that the corporation's status was not dependent upon ownership by the partnership. *Id.* Thus, petitioners failed to meet the fifth *National Carbide* factor.

[111] 640 F.2d at 751. The court of appeals noted that the tax court's consideration of the disregard theory was unnecessary because the taxpayers always contended that the corporation should be recognized. *Id.* at 750.

[112] *Id.* at 751-52. The court noted that the application of the standard to a corporate general partner-limited partnership would not be identical to its application to an agent-principal relationship. The *Jones* corporate general partner would necessarily be compared to a "normal" general partner rather than a "normal" agent in considering the duties it performed. *Id.* at 752 n.11.

[113] *Id.* at 752.

[114] *Id.* at 752-54.

[115] *Id.* at 752-53. Specifically, the lending institutions were unaware that the Mateo Corporation acted on behalf of the partnership. *Id.* at 752.

[116] *Id.* The evidence that the partnership leased and managed the completed complex, however, indicated that some parties, for example the tenants, were aware that the partnership owned the apartments. *Id.*

[117] *Id.* at 752-53. The *Jones* court cited Collins v. United States, 386 F. Supp. 17 (S.D. Ga.), *aff'd per curiam*, 514 F.2d 1282 (5th Cir. 1975), and Harrison Property Management Co. v. United States, 475 F.2d 623, 672 (Ct. Cl. 1973), *cert. denied*, 414 U.S. 1130 (1974), as two cases in which the taxpayer's agency argument failed despite partial disclosure. 640 F.2d at 752-53.

In *Collins*, individuals owning real estate as tenants-in-common formed a corporation to avoid state usury laws in financing the construction of an apartment complex. 386 F.Supp. at 18-19. The real estate was conveyed to the corporation and the loan was executed by the corporation. *Id.* at 19. After the loan was repaid, the completed apartment complex was conveyed back to the investors as tenants-in-common and the corporation was dissolved. *Id.* The co-tenants claimed the interest and depreciation deductions which resulted from the project during the construction period on their individual federal income tax returns. The Commissioner assessed a deficiency in their returns. *Id.*

In *Harrison*, individuals formed a corporation to hold title to oil leases to property. 475 F.2d at 624. The corporation was created to facilitate management of the properties in the event of

corporation's ability to bind the partnership,[118] had been satisfied, although it questioned the effectiveness of this factor in proving the agency relationship.[119]

After finding the third factor, namely the transmission of money from the agent to the principal irrelevant to the case,[120] the circuit court concluded that the taxpayers had satisfied the fourth factor—the attibutability of corporate income to the partnership's employees and assets.[121] Since the partnership held equitable title to the property, the court conceded that all corporate income was attributable to the partnership's assets, a factor traditionally afforded little weight in agency evaluations.[122]

The *Jones* court next considered whether the relationship between the corporate general partner and the limited partnership was dependent upon ownership.[123] The court remarked that the arrangement providing thirty percent compensation for services rendered could have been sufficient to support the taxpayers' argument had

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the death of one of the owners. *Id.* The individuals conveyed the property to the corporation, retaining beneficial ownership. *Id.* at 624-25. Each owner reported his proportionate share of the income and expenses from the property on his federal income tax returns for 1961, 1962, and 1963. The corporation filed federal tax returns for the corresponding years reporting no income or expenses. *Id.* at 625. The Commissioner assessed a deficiency against the corporation for each year.

Both the *Harrison* and *Collins* courts applied the *National Carbide* standard to evaluate the agency question, but neither court employed a factor-by-factor analysis. 475 F.2d at 626-30; 386 F. Supp. at 21. The facts of each case, however, did indicate that the "owners" sometimes acted in their individual capacities with respect to the property after it had been conveyed to the corporation. 475 F.2d at 625-26; 386 F. Supp. at 20. Thus, in *Harrison* and *Collins* there was at least partial disclosure. The facts similarly suggest that in each case the "owners" were bound by the corporations' actions. 475 F.2d at 624-25; 386 F.Supp. at 19. Because the sole corporate asset in *Harrison* and *Collins* was the property previously conveyed by the "owners," all corporate income was clearly attributable to an asset belonging to the "owners." 475 F.2d at 629; 386 F. Supp. at 19-20.

Despite apparent satisfaction of the second and fourth factors, the courts, in *Harrison* and *Collins* rejected the taxpayers' agency arguments. 475 F.2d at 629; 386 F.Supp. at 21. In reaching their decisions, the courts focused on whether the relationship between the corporations and "owners" would have existed independent of ownership control and whether the corporation conducted the usual duties of an agent. 475 F.2d at 627; 386 F.Supp. at 21. In both *Harrison* and *Collins* the purported "agency" relationship failed this test and the corporation was denied agency status for federal income tax purposes. 475 F.2d at 628-29; 386 F.Supp. at 21.

[118] 640 F.2d at 753.

[119] *Id.* See *supra* note 117. Additionally, the court found that a written agency contract was not determinative of the agency issue. 640 F.2d at 753.

[120] 640 F.2d at 753. An agent's transferring of monies to a principal would be consistent with an agency relationship. A general partner that was "constructing and managing an apartment complex," however, would not necessarily transfer monies to the partnership. *Id.* Further, in *Jones*, there was no "significant cash" to consider. *Id.*

[121] *Id.*

[122] *Id.* See *supra* note 117.

[123] *Id.* at 753-54.

payments actually been made.[124] In the absence of payment or evidence of the amount, timing, and reasonableness of future payments, this provision was excluded from consideration. The taxpayers' failure to produce evidence of an arms-length transaction led the court to conclude that the fifth *National Carbide* factor had not been satisfied.[125]

Similarly, the *Jones* court found no evidence that the corporation's conduct was consistent with the usual duties of a corporate general partner. Specifically, the taxpayers had not introduced evidence to prove that non-disclosure of fiduciary capacity was common to corporate general partners.[126] The court of appeals, therefore, found that the taxpayers failed to satisfy the significant sixth factor.[127]

In sum, the taxpayers prevailed on the second and fourth factors. The third factor was irrelevant; the first factor could not be conclusively established; and the taxpayers failed to sustain their burden of proof on the critical fifth and sixth factors.[128] Commenting that the second and fourth factors had been insufficient in prior cases to support an agency finding,[129] the court held that the taxpayers "failed to carry their burden of proof with respect to the *National Carbide* standard," and affirmed the tax court decision.[130]

The *Roccaforte* decision, like *Jones*, analyzed the agency theory independently of a disregard argument, but with very different results. In 1973, Jack N. Dyer, Sr. and Jack N. Dyer, Jr. (the Dyers) acquired property in Baton Rouge, Louisiana with the intention of constructing an apartment complex thereon.[131] Ten other individuals contributed cash in exchange for a percentage interest in the project.[132] After some investigation, the Dyers received commitments for the necessary financing contingent upon a corporation being used to execute the loans.[133] The Dyers and nine of the investors formed Glenmore Manor Apartments Partnership (Glenmore Partnership).[134]

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124 *Id.* at 754. The compensation payments were not to commence until the net profits exceeded the prior losses. This had not yet occurred. *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 754-55. The court specifically termed the fifth and sixth factors "crucial." *Id.* at 755.

129 *Id.* at 753. See *supra* note 117.

130 640 F.2d at 755.

131 77 T.C. at 265.

132 *Id.*

133 *Id.* at 266.

134 *Id.* at 267. One investor did not join the partnership agreement and subsequently withdrew from the venture. *Id.* at 267 n.2.

The partnership subsequently created Glenmore Manor Apartments, Inc. (Glenmore Corporation) with the partners as the sole shareholders, corporate directors, and officers.[135]

The corporation and partnership executed a nominee agreement,[136] which was subsequently affirmed as the agency agreement.[137] The corporation was to hold title to the real estate and to act as instructed by the co-owners.[138] Since the partners retained the beneficial interest in the property, the corporation was precluded from making any independent decision or acting without specific directions from them.[139] Furthermore, under the agreement all income the corporation collected was to be transferred to the partnership, although the corporation would be reimbursed for the cost of services rendered.[140] The corporation "had no assets, liabilities, income or expenses" as it was formed merely to avoid the usury laws.[141] In late 1973, Glenmore Corporation purchased the site of the apartment complex from the Dyers.[142]

The Dyers personally guaranteed all loan agreements that the corporation executed.[143] The bank officer who handled the financing arrangements was aware that Glenmore Corporation was a shell, because of the need for personal guarantees and the scarcity of the corporation's assets.[144] This belief was reinforced by the Dyers' letter responding to the bank's request for the corporation's financial statements which stated that the corporation was a nominee corporation with no assets, liabilities, income, or expenses.[145]

After the apartment complex was completed, the partners were asked to make additional capital contributions to be used in operating the complex even though the partnership had obtained additional financing.[146] Five of the partners contributed the necessary sums and

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[135] *Id.* Three partners, Robert J. Zernolt, George M. Bonfanti, and Jack N. Dyer, Jr. became the corporation's officers and directors. All partners were shareholders in the corporation, and were issued stock in amounts proportionate to the particular investor's partnership interest. *Id.*

[136] *Id.* at 268.

[137] *Id.* at 270.

[138] *Id.* at 268. The corporation was subsequently instructed to execute construction contracts, sign financing agreements, accept the completed project, and lease the apartments. *Id.* at 268-69.

[139] *Id.* at 268.

[140] *Id.* The corporation, however, did not receive a fee for services rendered. *Id.*

[141] *Id.* The Louisiana usury law limited mortgage interest rates to 10%, in 1973. *Id.* at 268 n.3. Corporations were, however, exempt from this restriction. *Id.*

[142] *Id.* at 269.

[143] *Id.*

[144] *Id.* The apartment complex was the sole asset. *Id.*

[145] *Id.* at 269-70.

[146] *Id.* at 275.

three new partners were admitted to the partnership.[147] The new partners did not become shareholders of the corporation.[148] They believed that the corporation was acting as an agent for the partnership.[149]

Both the corporation and the partnership filed tax returns for the years 1973-1976.[150] The corporation's returns reflected that it was a nominee corporation without assets, liabilities, income or losses.[151] The partners claimed the partnership's losses from the construction and operation of the apartment complex on their individual state income tax returns for 1975 and 1976.[152] The State of Louisiana Department of Revenue and Taxation disallowed the losses, and assessed additional taxes against the partners. The partners petitioned the State Board of Tax Appeals for reevaluation of the assessed deficiencies. The State Department of Revenue and Taxation did not oppose the petition; thus judgment was entered for the partners.[153] The Commissioner, however, determined that there were deficiencies in the partners' federal tax returns for 1975 and 1976.[154] The partners appealed to the tax court.[155]

Writing for the majority, Judge Sterrett indicated that the issue was whether Glenmore Partnership or Glenmore Corporation was entitled to claim the 1975 and 1976 losses derived from the Glenmore Manor Apartments.[156] The taxpayers asserted that the partnership was the true owner of the apartment complex, and that the corporation was a mere agent. Thus, the partnership actually sustained the losses realized from the operation of the complex, and the individual partners could properly claim them.[157] Conversely, the Commissioner contended that the corporation was the owner of the complex; therefore, the corporation, not the partners, was entitled to deduct the losses.[158]

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[147] *Id.*

[148] *Id.* at 276.

[149] *Id.* Roccaforte, one of the new partners, stated that he would not have invested in the apartment complex if he thought he were investing in a corporation. *Id.*

[150] *Id.* at 277.

[151] *Id.*

[152] *Id.* These losses resulting from business expenses had been reported by the partnership in its tax return. *Id.*

[153] *Id.*

[154] *Id.* at 264.

[155] *Id.*

[156] *Id.* at 278. The court indicated that the necessity of addressing additional issues was dependent upon the resolution of the issue of which business entity was entitled to the loss deductions. *Id.* See *infra* note 178.

[157] 77 T.C. at 278.

[158] *Id.*

Recognizing that the taxpayers were not arguing that the corporation should be disregarded, the tax court determined that the only issue was whether the corporation was acting as an agent of the partnership.[159] The majority reviewed prior agency cases, emphasizing the judiciary's repeated suggestion that a true agency could exist in the proper circumstances.[160] The court distinguished *Roccaforte* from *Moline* because of the existence of a formal agency agreement and the indicia of a true agency relationship,[161] but noted that such an agreement was not conclusive of an agency relationship.[162] The tax court then systematically evaluated the facts of *Roccaforte* in light of the *National Carbide* test.[163]

The court found that the corporation did act "in the name and for the behalf of the partnership," thereby satisfying the first *National Carbide* factor.[164] Its finding was based on the corporation's limited scope of authorized activity and the lenders' knowledge of the agency relationship.[165] The court concluded that the partnership was bound by the corporation's actions on three grounds: the disclosure of the agency relationship, the partner's intention to be bound, and the existence of an agency agreement.[166] Thus, the taxpayers satisfied the second *National Carbide* factor.[167] The third factor concerning whether the corporate agent transferred funds received to the principal was disregarded as inapplicable because of the type of project involved.[168] The tax court found that the fourth factor was satisfied since the corporation's income was attributable to the assets of the partnership.[169] The apartment complex was considered a partnership

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[159] *Id.* at 278-79. The court noted the taxpayer's acknowledgement of the inconsistency created by concurrent disregard and agency arguments. It further stated that prior disregard decisions would not be considered controlling. *Id.*

[160] *Id.* at 279-83. Although in each of the cited cases taxpayers' agency arguments were rejected, the decisions implicitly or explicitly supported the possiblity of a future successful agency finding. *Id. See, e.g.*, Strong v. Commissioner, 66 T.C. 12, 26 n.13, *aff'd mem.*, 553 F.2d 94 (2d Cir. 1977).

[161] 77 T.C. at 279-80.

[162] *Id.* at 283.

[163] *Id.* at 283-87.

[164] *Id.* at 285.

[165] *Id.* at 284-85. The *Roccaforte* court stated that the agency relationship was "common knowledge" as a result of the Dyers' personal guarantees of the loans and letters from the Dyers describing the corporation as an agent. *Id.* at 284.

[166] *Id.* at 285-86.

[167] *Id.* at 285.

[168] *Id.* at 286. As in *Jones*, the construction and management of an apartment complex would not require the managing agent to transfer money to the principal. *Id.* See *supra* note 120 and accompanying text.

[169] 77 T.C. at 286. The only corporate asset was the record title to the apartment complex. *Id.*

asset despite legal title lying in the corporation. In addition, the partners had contributed the capital, and the partnership had retained the beneficial title to the property.[170]

After determining that the original partners owned and controlled the corporation, and after considering the lack of compensation to the corporation, the *Roccaforte* court found that the relationship between the two entities was based on the partnership's complete ownership of the corporation.[171] The transactions between the two could not be classified as arms-length. Thus, the taxpayers failed to satisfy the fifth factor.[172]

The tax court noted that the taxpayers had produced sufficient evidence to prove that the "corporation's activities were consistent with the normal duties of an agent."[173] Because the corporation held only record title to the property and the partners had consistently disclosed the agency relationship, the court found that the taxpayers had satisfied the sixth factor.[174]

Noting the absence of a tax avoidance scheme, the tax court concluded that the taxpayers had intended to operate as a partnership.[175] They had not sought limited liability or any other benefit associated with the corporate business form.[176] In addition, the corporation had been formed solely to avoid state usury laws.[177] Satisfied that the substance and indicia of the facts presented supported an agency relationship, the *Roccaforte* court held that the corporation was an agent of the partnership for tax purposes, despite its failure to meet the fifth *National Carbide* factor.[178]

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[170] *Id.*

[171] *Id.* at 286-87.

[172] *Id.* at 287.

[173] *Id.*

[174] *Id.*

[175] *Id.* at 287-88.

[176] *Id.* at 287.

[177] *Id.*

[178] *Id.* at 288. Judges Fay and Nims wrote dissenting opinions. Judge Fay's dissent pointed out that the majority ignored the traditional "absolute" nature of the fifth and sixth factors. *Id.* at 290-91 (Fay, J., dissenting). Judge Nims asserted that the corporation's activities went beyond the duties of a mere agent. *Id.* at 292 (Nims, J., dissenting). His opinion suggests that the complete disclosure of a corporation's mere fiduciary capacity cannot achieve the avoidance of state usury laws. *Id.* at 292-93 (Nims, J., dissenting).

The *Roccaforte* court resolved two additional issues which will not be discussed in this Comment. The court denied the new partners' assertion that they were entitled to claim their share of the entire 1975 losses even though they joined the partnership in December of 1975. *Id.* at 288-89. However, the court did hold that the taxpayers could use the "interim closing of the books method" to determine allocation of losses. *Id.* at 289-90.

In *Jones*, the taxpayers urged that the wholly owned corporation was not a shell, but a viable entity which should be recognized as an agent of the limited partnership.[179] In *Roccaforte*, the taxpayers made the same argument. Indeed, the factual similarities between the two cases are striking. In each case, the taxpayers intended to develop an apartment complex through a partnership entity, yet were compelled by state usury laws to form corporations to obtain financing.[180] In each case, the corporations held only record title to the property, and the taxpayers retained the beneficial interest in the project.[181] Additionally, the taxpayers personally guaranteed the loans.[182] Nonetheless, the *Roccaforte* taxpayers successfully established the existence of an agency relationship;[183] the *Jones* taxpayers did not.[184]

The different results reached by the two courts would not be difficult to reconcile if in making their decisions the courts had relied upon either of two factual distinctions in the cases. First, in *Jones*, the corporation was organized as a general partner to a limited partnership.[185] In *Roccaforte*, the corporation was a separate company created as a nominee to act on behalf of the partnership.[186] This difference in form could have justified the use of dissimilar criteria and analysis. The *Jones* court, however, specifically determined that the *National Carbide* standard applied to a corporate general partner-limited partnership relationship.[187]

Second, in *Jones*, the corporation was owned entirely by the partners, and each partner was a shareholder of the corporation.[188] In *Roccaforte*, the owners of the corporation and the members of the partnership were not identical since the new partners did not become stockholders.[189] The absence of identity between the owners of the corporation and the partners could have affected the court's evaluation of the *National Carbide* fifth factor. Clearly, when the ownership of the two related entities differs, the implication that a purported agency relationship is actually due to ownership control is weakened.

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[179] *Jones*, 640 F.2d at 750-51; *Roccaforte*, 77 T.C. at 278-79. See *supra* notes 111 & 159 and accompanying text.

[180] *Jones*, 640 F.2d at 747; *Roccaforte*, 77 T.C. at 265-66. See *supra* text accompanying notes 96-98 & 132-34.

[181] *Jones*, 640 F.2d at 748; *Roccaforte*, 77 T.C. at 268. See *supra* text accompanying notes 101-04 & 138-39.

[182] *Jones*, 640 F.2d at 747; *Roccaforte*, 77 T.C. at 271. See *supra* text accompanying notes 99 & 143.

[183] 77 T.C. at 288. See *supra* text accompanying note 178.

[184] 640 F.2d at 755-56. See *supra* text accompanying note 130.

[185] 640 F.2d at 748. See *supra* text accompanying note 101.

[186] 77 T.C. at 268. See *supra* text accompanying notes 135-38.

[187] 640 F.2d at 752. See *supra* note 112 and accompanying text.

[188] 640 F.2d at 748. See *supra* text accompanying note 100.

[189] 77 T.C. at 276. See *supra* text accompanying note 148.

Nevertheless, the tax court, looking to the original ownership of the corporation and the partnership,[190] found that the ownership of the two entities was identical.[191] Although the composition of ownership in *Roccaforte* differed from the one in *Jones*, the *Roccaforte* court viewed them as the same. Therefore, the court's treatment of the factual distinctions, or lack of it, negated any impact they might have had.

The pattern of disclosure of the fiduciary relationship was an important decisional criterion in both cases. In *Roccaforte*, the disclosure was complete; in *Jones*, there was only partial disclosure.[192] Both courts' findings on the first and sixth factors were based almost exclusively on disclosure of the fiduciary capacity of the corporation.[193] These were the only factors that were satisfied in *Roccaforte*, but not in *Jones*.[194] The *Roccaforte* court's attitude toward disclosure is indeed puzzling. The court regarded complete disclosure as totally consistent with the goal of avoiding state usury laws.[195] This view certainly reflects the IRS's emphasis on disclosure in its revenue rulings,[196] but is in direct opposition to statements by other courts that disclosure of a mere fiduciary relationship would result in a failure to avoid usury laws.[197] If complete disclosure is a determining factor for the existence of an agency relationship, state law may severely limit future application of the *Roccaforte* decision.[198]

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[190] 77 T.C. at 286-87. See *supra* text accompanying note 171.

[191] 77 T.C. at 286-87. See *supra* text acccompanying note 171.

[192] See *supra* notes 115, 126, 165 & 174 and accompanying text.

[193] *Jones*, 640 F.2d at 752, 754; *Roccaforte*, 77 T.C. at 284, 287. See *supra* notes 15-16 and accompanying text; text *supra* accompanying notes 64-65, 126-27 & 173-74.

[194] Both *Jones* and *Roccaforte* satisfied the second and fourth factors. 640 F.2d at 753; 77 T.C. at 285. In each case the third factor was considered inapplicable. 640 F.2d at 753; 77 T.C. at 286. Both taxpayers failed to establish an agency relationship independent of control associated with ownership. 640 F.2d at 754; 77 T.C. at 287. See *supra* text accompanying notes 118-125 & 166-172.

[195] 77 T.C. at 284-85.

[196] See *supra* text accompanying notes 88-141.

[197] In Bolger v. Commissioner, 59 T.C. 760, 766 (1973), the tax court stated that "the existence of an agency relationship would have been self-defeating in that it would have seriously endangered, if not prevented" the avoidance of state usury laws. The *Roccaforte* court mentioned this statement in a footnote and attempted to reconcile the two positions by concluding that the Roccaforte corporation was the "principal" with respect to the mortgages and the agent for the partnership "in all other respects." 77 T.C. at 287 n.10. Judge Nims clearly did not agree that the avoidance of usury laws could be compatible with an agency relationship, stating that "to avoid the Louisiana usury law there had to be some substance to the corporation's activities beyond the mere functioning as nominee or agent." *Id.* at 292 (Nims, J., dissenting).

[198] *See* Miller, *Nominee Corporations and Usury: Tax Court Takes Another Giant Step; IRS Edges Forward*, 10 REAL EST. TAX IDEAS 8 (1981). Professor Miller points out the importance of determining whether a particular jurisdiction requires actual or paper ownership to avoid usury laws. *Id.* at 2. Although this issue was not addressed by the court in *Roccaforte*, it should be noted that Louisiana law requires only paper ownership. *In re* Le Blanc, 622 F.2d 872, 875-77 (5th Cir. 1980).

Most notably, a comparison of the *Roccaforte* and *Jones* decisions reveals the metamorphosis of the *National Carbide* standard. The *Jones* finding of agency reflects the traditional standard of four "relevant considerations" and two critical factors.[199] The *Roccaforte* decision implicitly represents a standard composed of six equal factors.[200] Because the sixth factor was satisfied, conclusive determination of its critical status after *Roccaforte* is impossible.

It is indisputable, however, that satisfaction of the fifth factor—existence of an agency relationship independent of ownership control—is no longer crucial to a decision. Such a reevaluation, though not without precedent,[201] is particularly surprising given the firmness with which previous decisions upheld the traditional standard.[202]

The language of the *National Carbide* standard is indicative of its traditional interpretation. The first four factors are characterized as considerations that are relevant to an agency decision.[203] Consequently, the Supreme Court seems to have been suggesting which facts may be examined in reaching an agency determination. The language of the fifth and sixth factors, however, is mandatory. The relationship "must not" be based upon ownerhip.[204] The duties "must be" . . . the normal duties of an agent."[205] This word choice indicates that a failure to satisfy these factors would preclude a finding of a true agency.

Moreover, the absolute nature of the fifth and sixth factors has been affirmed repeatedly. Not only have courts relied on these factors in conjunction with other considerations, but they have at times re-

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[199] 640 F.2d at 755. The court specifically describes the fifth and sixth factors as "crucial." *Id.*

[200] 77 T.C. at 283-87. The court never specifies the weight of any particular factor in the total evaluation. *Id.* The implication that the factors had been given equal weight was, however, recognized by Judge Fay. "The majority treats . . . [the fifth factor] as merely being one of six relevant factors." *Id.* at 290 (Fay, J., dissenting).

[201] In Larson v. Commissioner, 66 T.C. 159 (1976), the tax court reduced the "corporate resemblance test," used to determine whether an association should be taxed as a corporation, to a four factor test, requiring at least three factors for corporate characterization. Prior to *Larson*, the interpretation of the test had been whether, taking all significant characterizations into consideration, the business organization more nearly resembles a corporation. *See* Morrissey v. Commissioner, 296 U.S. 344 (1935).

[202] *See* Collins v. United States, 386 F. Supp. 17, 21 (S.D. Ga.), *aff'd per curiam*, 514 F.2d 1282 (5th Cir. 1975) (satisfaction of only fifth and sixth factors necessary to meet *National Carbide* test); Harrison Property Management Co. v. United States, 475 F.2d 623, 627 (Ct. Cl. 1973), *cert. denied*, 414 U.S. 1130 (1974) (fifth and sixth factors were basis of decision and designated significant criteria).

[203] 336 U.S. at 437.

[204] *Id.*

[205] *Id.*

jected an agency argument solely on the failure to satisfy them.[206] In addition, the IRS has included in its revenue rulings the independence of control from ownership as one of only two requirements for agency status.[207] Thus, the characterization of the fifth factor as absolute was firmly established before *Roccaforte* and *Jones*.

Clearly, the tax court in *Roccaforte* did not consider the fifth factor to be critical. After expressly finding that the relationship between the corporation and the partnership was not independent of ownership control, the court concluded that an agency did exist for tax purposes.[208] The finding of an agency relationship notwithstanding, the failure to satisfy the fifth factor signals a change in the *National Carbide* standard.[209] That change was a reweighing of the factors. Since the court did not acknowledge or perhaps even realize that it was changing the standard, the extent of the reevaluation remains unclear.

Despite the uncertainty that exists in the wake of the *Roccaforte* decision, the failure to establish the existence of an agency relationship independent of ownership control clearly is no longer fatal to an agency argument. Taxpayers may find it encouraging that in at least one case a corporate agent was able to "handle property and income of an owner-principal without being taxable therefore."[210] This possibility implied in *Moline*, explicitly stated and narrowly restricted in *National Carbide*, and reaffirmed in numerous subsequent decisions, has become a reality. Interestingly, however, this result could only be achieved by relaxing the *National Carbide* standard.

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[206] Collins v. United States, 386 F. Supp. 17, 21 (S.D. Ga.), *aff'd per curiam*, 514 F.2d 1282 (5th Cir. 1975).

[207] Rev. Rul. 76-26, 1976-1 C.B. at 11; Rev. Rul. 75-31, 1975-1 C.B. at 10. See *supra* text accompanying notes 92-95.

[208] 77 T.C. at 286-88. See *supra* text accompanying notes 171, 172 & 178.

[209] 77 T.C. at 200 (Fay, J., dissenting). Judge Fay, adhering to the traditional standard, stated that failure to satisfy the fifth factor "alone mandates a decision for the Commissioner." *Id.*

[210] 336 U.S. at 437.