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Divided 10th Circuit affirms District Court on economic substance doctrine in *Liberty Global*

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On April 21, 2026, a divided panel of the Tenth Circuit affirmed the District Court's ruling in *Liberty Global Inc. v. United States*, holding that the economic substance doctrine applied to disregard certain tax benefits resulting from a structured transaction. The decision fails to provide meaningful guidance on the application of the economic substance doctrine and is in tension with a recent Tax Court opinion.

Factual background

In 2018, Liberty Global, Inc. (LGI) was a multinational group with a non-U.S. parent operating a global telecommunications business. After Congress passed the 2017 tax reform law known as the Tax Cuts and Jobs Act (TCJA), LGI engaged in tax planning that exploited a gap in the effective dates for the Section 245A deduction and the global intangible low-taxed income (GILTI) rules. LGI and its non-U.S. affiliates owned through its U.S. group, Telenet Group BVBA (Telenet Group) and Telenet Group Holding NV/SA (TGH), engaged in a four-step step transaction (Project Soy) that triggered taxable gain and, as a result, generated earnings and profits (E&P) in LGI's non-U.S. affiliates owned by the U.S. group. Because of this E&P, LGI was able to treat all of the gain on its subsequent transfer of TGH to a non-U.S. affiliate as a dividend that could be offset by a deduction under Section 245A and remove TGH from the U.S. tax net. And because this transfer occurred before the last day of the tax year of LGI's controlled foreign corporations, the transactions that generated the E&P were not subject to U.S. tax under the GILTI rules. To prevent this result, Treasury had promulgated temporary regulations under Section 245A that sought to close the statutory effective-date gap. It did so just before the expiration period for the regulations to be retroactively effective from the date the statute was enacted, but without notice and comment. LGI paid the tax liability resulting from the regulations and then amended its return and sued for a refund in the District Court of Colorado on the ground that the regulations were invalid.

District Court holding

The District Court ruled on two summary judgment motions: it first agreed with LGI that the regulations were procedurally invalid due to a lack of notice and comment without good cause for abandoning the regular process, but it later sided with the government that the economic substance doctrine (ESD) applied to Project Soy. Section 7701(o), which codified the ESD, provides that in "the case of any transaction to which the [ESD] is relevant" (the relevancy inquiry), the transaction has economic substance only if it both (A) "changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position," and (B) "the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction." Regarding the relevancy inquiry, Section 7701(o)(5) states that the determination of whether the ESD "is relevant to a transaction shall be made in the same manner as if [Section 7701(o)] had never been enacted." LGI conceded prongs A and B in its summary judgment motion, noting that three of the four steps of Project Soy "served no substantial non-tax purpose for LGI," and it argued instead that the threshold relevancy inquiry should foreclose application of the ESD because each of the steps of Project Soy was a "basic business transaction," such as an incorporation or entity selection, which the legislative history of Section 7701(o) indicated should be exempt from the

ESD. The District Court rejected LGI's argument and, although it purported to rule that there is no threshold relevancy inquiry, undertook an evaluation of the transaction and concluded it was inconsistent with congressional intent. The District Court therefore held that the ESD applied to Project Soy, holding that the ESD is "relevant" within the meaning of Section 7701(o) whenever a taxpayer seeks to claim tax benefits, unintended by Congress, by means of transactions that serve no economic purpose other than tax savings. The District Court also rejected LGI's contention that steps of Project Soy were exempt from Section 7701(o) as "basic business transactions," finding that Section 7701(o) contained no such categorical exceptions and, furthermore, that Project Soy was not a basic business transaction but instead a highly structured tax-avoidance scheme. The District Court concluded that, due to LGI's concessions, Project Soy failed both prongs of Section 7701(o). LGI filed its opening brief with the Tenth Circuit on April 30, 2024.

Tenth Circuit holding

On April 21, 2026, the Tenth Circuit issued its long-awaited ruling. The majority opinion affirmed the District Court's decision, answering the narrow question of whether the ESD was relevant to Project Soy in the affirmative. The majority emphasized that Project Soy constituted "an elaborate tax-avoidance scheme designed to shield billions in income" through "economically meaningless transactions between closely related entities." The majority dismissed as a "red herring" LGI's argument that the relevancy inquiry is embedded in Section 7701(o) and that the District Court's ruling purporting to disregard it would render the relevancy inquiry "surplusage." The majority therefore did not explicitly adopt the District Court's conclusion that there is no threshold relevancy inquiry, nor did it address Section 7701(o)(5), which limits the application of the statute to transactions that would be subject to the ESD if Section 7701(o) had not been enacted. Rather than meaningfully engaging with LGI's arguments, the majority reiterated the District Court's conclusion that the ESD was relevant because Project Soy was an attempt to mechanically utilize the tax law to obtain a benefit not intended by Congress. The majority stated that no exceptions for basic business transactions appear in the text of Section 7701(o) and that, even assuming certain basic business transactions exist that are exempt from the ESD, Project Soy would not be exempt because Project Soy in the aggregate was not a basic business transaction. The majority did not clarify how the relevancy inquiry should be conducted. Although the majority's review of the District Court's grant of summary judgment was *de novo*, it did not engage in a new application of the law to the facts.

The dissent undertook a close reading of the statutory language, a thorough review of the relevant case law, and a consideration of legislative history and congressional policy. The dissent found that both the statute and congressional intent require a threshold determination of relevancy prior to the application of the ESD and show that Congress clearly intended that Section 7701(o) should not apply to all transactions. In a close reading of Section 7701(o)(5), the dissent determined that the relevancy inquiry required a survey of the case law before the enactment of Section 7701(o) to synthesize general principles to determine when to apply the ESD. As a result of this survey, the dissent concluded that "the economic substance doctrine can be relevant only when there is a dispute about whether the taxpayer actually has done in substance what a Code provision—from an economic perspective—requires." For example, the dissent discussed the Sixth Circuit case *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779 (6th Cir. 2017), where a taxpayer transferred money from a domestic international sales corporation (DISC) to a Roth IRA account to take advantage of a tax benefit. The dissent agreed with the Sixth Circuit's holding that by congressional design, DISCs and Roth IRAs are "all form and no substance." Therefore, ESD principles did not give the IRS the authority "to override statutory text when it did not like the way these tax saving mechanisms were being used." The dissent similarly characterizes the check-the-box regulations as by design "all form and no substance," noting therefore that the ESD is not relevant to check-the-box elections. Applying these principles to Project Soy, the dissent noted that LGI's choice of when to sell a CFC to recognize gain did not turn on economic reality or taxpayer motive and should be routinely deemed to be within the control of the taxpayer, even where a sale does not change the economic position of a taxpayer and lacks a non-tax business purpose. The dissent argued that the ESD was not relevant to this timing choice, taking issue with the contention that the E&P was artificial, given that the E&P constituted real economic gain. The dissent also found that the ESD did not apply to Telenet Group's capitalization choices (including its use of debt and non-qualified preferred stock) or to the conversion of an entity into a corporation because check-the-box elections do not turn on economic reality or taxpayer motive. Accordingly, the dissent concluded that the ESD should not apply to Project Soy.

Key takeaways

Further developments in LGI

LGI may seek *en banc* review of the decision in LGI. In addition, it could petition the Supreme Court for certiorari, though the chance that such a petition would be granted is somewhat low because there is not yet a circuit split on the interpretation of Section 7701(o). It is worth noting, however, that the Supreme Court granted certiorari in *Moore v. United States*, 602 U.S. 572 (2024), and that case did not involve a circuit split, although it did raise important constitutional

questions.

Potential conflict with Tax Court's ruling in *Patel* and possible circuit split

Another recent ruling with respect to Section 7701(o) is *Patel v. Commissioner*, 165 T.C. No. 10 (Nov. 12, 2025), where the Tax Court unanimously held that a separate relevancy inquiry is required before the ESD may be applied by reason of both (1) the text of Section 7701(o) ("[W]e easily conclude that the statute requires a relevancy determination") and (2) the applicable legislative history ("[T]he legislative history confirms that the codified economic substance doctrine is not intended to apply to every transaction and may be applied only when it is 'relevant'"). The Tax Court reaffirmed this holding in *Royalty Management Insurance Co. Ltd. v. Comm'r*, TC Memo 2024-87. The Tax Court's practice is to follow its own precedent unless the appeal in a given case lies to a Circuit Court of Appeals that applies a different standard. As a result, taxpayers other than those who reside in the Tenth Circuit should be able to rely on *Patel*. It may be possible for the Tax Court to harmonize the majority opinion in *Liberty Global* with the Tax Court's views on the relevancy inquiry if the Tax Court describes the "congressional intent" inquiry as the test, though it remains to be seen whether it will do so for taxpayers in the Tenth Circuit.

The Tenth Circuit's decision is also arguably in tension with the application of the ESD reflected in a recent decision, *Perrigo v. United States*, 294 F. Supp. 3d 740, in the District Court for the Western District of Michigan. In *Perrigo*, the IRS challenged on economic substance grounds the taxpayer's assignment of certain contractual rights relating to generic pharmaceuticals to its non-U.S. affiliate, while maintaining the distribution rights for those same generic drugs with its U.S. affiliate, which the taxpayer treated as resulting in the residual profits from the sale of the generic drugs in the United States inuring to the benefit of the non-U.S. affiliate. In holding for the taxpayer, the District Court in multiple instances stressed the sentiment that "[t]ax planning is as American as apple pie." Although the District Court did not address whether a relevancy test is formally necessary under Section 7701(o) (which applied to one of the years at issue in the case), in applying the subjective prong of the ESD the court noted that it "is not a demanding standard for the taxpayer…" The court evaluated the taxpayer's overall business objectives relevant to its tax planning—profiting from the sale of the generic drugs—and had little trouble concluding that the subjective prong was met. If *Perrigo* is appealed by the IRS and affirmed by the Sixth Circuit, a circuit split could potentially emerge in the application of Section 7701(o), which would merit Supreme Court review.

Planning perspective

Even though, as noted, the Tenth Circuit's opinion is controlling only for taxpayers residing in that circuit, it would be prudent from a tax planning perspective to:

- Plan transactions keeping in mind the practical carte blanche the IRS will have in asserting the ESD in the Tenth Circuit and any jurisdiction that follows it;
- Preserve contemporaneous evidence of the non-tax business reasons for transactions; and
- Be mindful of whether the steps of transactions pass muster under Section 7701(o), whether they are analyzed separately or in the aggregate.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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