UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON MUTUAL, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. C06-1550-JCC

ORDER

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 49), Defendant's Response in opposition (Dkt. No. 53), and Plaintiff's Reply (Dkt. No. 61), as well as Defendant's Motion for Partial Summary Judgment (Dkt. No. 51), Plaintiff's Response in opposition (Dkt. No. 58), and Defendant's Reply (Dkt. No. 63). Having considered the parties' briefing and the papers associated therewith, and determining that oral argument is unnecessary, the Court hereby DENIES Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 49), and GRANTS Defendant's Motion for Partial Summary Judgment (Dkt. No. 51), as follows.

I. BACKGROUND

Plaintiff Washington Mutual brings this tax refund action as the successor in interest to H.F. Ahmanson & Company ("Ahmanson"), and its wholly owned subsidiary, Home Savings of America ("Home"). For the tax years in question, specifically those ending on December 31, 1990, 1992, and 1993, Home was a federally chartered savings and loan association. (Am. Compl. ¶¶ 3–4 (Dkt. No. 37).) Plaintiff "seeks to recover the sum of at least $15,542,584, together with interest as the law provides, which sum represents an overpayment by Ahmanson of federal income taxes for the years at issue." (*Id.* ¶ 10.) This overpayment is due, according to Plaintiff, for "additional deductions for amortization and abandonment losses with respect to the intangible assets that Home obtained in December 1981 pursuant to an agreement with the Federal Savings and Loan Insurance Corporation ("FSLIC"), an agency of the United States government." (*Id.* ¶ 13.) These claims were rejected at the administrative level and are now opposed by Defendant United States of America in this action.

As Plaintiff's claims arise from transactions that took place 27 years ago, it is helpful to situate them in context of the time. Savings and loan associations, also known as thrifts, were "historically engaged in the business of offering low-yielding, short-maturity deposit products and loaning out funds received from depositors in the form of long-term, higher-yielding mortgages, thereby earning a positive spread." (Def.'s Mot. 3 (Dkt. No. 51).) As recounted by the United States Supreme Court in *United States v. Winstar Corp.*, 518 U.S. 839, 844 (1996), these institutions had been subject to the regulatory regime that emerged after the Great Depression, under which the Federal Home Loan Bank Board ("FHLBB") was created and vested with authority to charter and regulate federal savings and loan associations, and the Federal Savings and Loan Insurance Corporation ("FSLIC"), under the FHLBB's authority, was given responsibility to insure thrift deposits and regulate all federally insured thrifts. *Id.* This system, as constituted, became severely strained by the "combination of high interest rates and inflation in the late 1970's and early 1980's," which led an increasing number of thrifts to become

insolvent, as "the costs of short-term deposits overtook the revenues from long-term mortgages." *Id.* at 845. In order to stave off the financial damage that would inhere if the FSLIC were forced to cover its deposit insurance obligations on a large scale, federal regulators began facilitating a type of transaction known as a "supervisory merger," by which healthy thrifts were encouraged to take over thrifts that were in danger of failing. (Am. Compl. ¶ 17 (Dkt. No. 37).) One of these transactions, and the tax implications therefrom, gives rise to Plaintiff's claims in this case.

In 1981, Home was what has been referred to here as a "healthy" thrift. In a cooperative venture with the FSLIC and the FHLBB, Home agreed to a supervisory merger with three insolvent savings and loan associations: Security Federal Savings and Loan Association ("Security"), Hamiltonian Federal Savings and Loan Association ("Hamiltonian"), and Southern Federal Savings and Loan Association ("Southern").[1] (*Id.* ¶¶ 18, 20–23.) The parties vigorously contest how to characterize certain aspects of the transaction, however they are largely in agreement as to the mechanics. Home assumed all of the duties and obligations of the merged associations, whose liabilities at the time were in excess of their assets, and received a combination of regulatory conditions and benefits set forth in an "Assistance Agreement" with the FSLIC, with approval by the FHLBB. First, Home received FSLIC assistance in the form of cash contributions (to the extent the book value of the merged thrifts' liabilities exceeded the book value of their respective assets), indemnities related to covered assets, and "other payments and/or credits to be accounted for through use of a 'special reserve account.'" (Def.'s Mot. 9 (Dkt. No. 51); Ex. 26 (Dkt. No. 52-30).) Second, pursuant to FHLBB resolution incorporated by reference into the Assistance Agreement, Home received "branching rights" in Missouri and Florida, which meant that contrary to FHLBB regulations that generally prohibited federal thrifts from establishing branch offices in

[1] Security and Hamiltonian had their home offices in Missouri, while Southern was based in Florida. (Am. Compl. ¶¶ 20–22 (Dkt. No. 37).) These facts are significant for understanding the import of the "branching rights" for which Plaintiff now claims a tax basis.

any state other than the one in which its home office was located, California-based Home was informed that it would be permitted to open branches in Missouri and Florida. (Am. Compl. ¶¶ 19, 26 (Dkt. No. 37).) Third, by FHLBB resolution incorporated by reference into the Assistance Agreement, Home was permitted to use the "purchase method" of accounting for the supervisory merger, by which Home could "treat the excess of the purchase price over the fair market value of the identifiable assets acquired as 'supervisory goodwill,' subject to amortization over 40 years, and to count the amortized supervisory goodwill as an asset for purposes of meeting the FHLBB's regulatory capital requirements for federal thrifts." (*Id.* ¶ 27.) Plaintiff refers to this as the "RAP right." Finally, Home was able to structure the transaction, for tax purposes, as a tax free "G" reorganization, which allowed it to "carry over" the tax bases associated with the acquired assets and thereby realize substantial built-in losses by selling the loans. (Def.'s Mot. 11 (Dkt. No. 51).) This tax treatment was also made available by reference in the Assistance Agreement to FHLBB resolutions "in which the FHLBB made the findings necessary to qualify the merger of Security and Hamiltonian into Southern, and the merger of the new Southern into Home as a tax-free reorganization under Code sections 368(a)(1)(G) and 368(a)(3)(D)(ii)." (Am. Compl. ¶ 29 (Dkt. No. 37).)

In 1991, ten years after these transactions were consummated, Home decided to terminate its branch banking operations in Missouri, and in 1992 and 1993, it "exchanged, sold or otherwise disposed of each of its branches in Missouri." (*Id.* ¶¶ 42–3.) Claiming an entitlement to certain abandonment loss and amortization deductions related to its branching rights and the RAP right, Ahmanson filed IRS refund claims for the tax years in question. The claimed deductions were disallowed. Accordingly, Plaintiff filed this action listing three counts in its Amended Complaint, one for each tax year Plaintiff asserts that it overpaid taxes due. (*Id.* ¶¶ 48–84.)

The crux of the dispute is the branching rights and the RAP right ("the Rights") that Home acquired by reference in the Assistance Agreement with the FSLIC. Specifically, the question is whether a

tax basis may be assigned to these particular regulatory inducements under the terms of the transactions that occurred in 1981. Plaintiff sets forth two alternative theories for why such a basis may be assigned. First, Plaintiff asserts that the FSLIC effectively sold the Rights to Home in exchange for Home's assumption of FSLIC's liability with respect to the three failing thrifts. On this theory, Plaintiff can claim a tax basis for the Rights since "[t]he assumption of liability in connection with the acquisition of property is part of the property's cost for Federal income tax purposes," and under the Internal Revenue Code, "the basis of property shall be the cost of such property . . . ." (Pl.'s Mot. 8–9 (Dkt. No. 49); 26 U.S.C. § 1012).) In the alternative, Plaintiff claims a tax basis in the Rights because they were inducements for Home to enter into the supervisory merger, that is, part of the assistance provided by the FSLIC pursuant to 12 U.S.C. § 1729(f), and therefore excludable from gross income under 26 U.S.C. § 597 (1981). (Pl.'s Mot. 10–16 (Dkt. No. 49).) Defendant disputes both of these claims. With respect to the former, Defendant argues that Plaintiff double-counts the liabilities assumed by Home in order to manufacture separate consideration for the Rights that would assign them a cost and therefore a tax basis. (Def.'s Mot. 16–19 (Dkt. No. 51).) Regarding the latter, Defendant maintains that the Rights were not "money or other property" conveyed by the FSLIC under 12 U.S.C. § 1729(f), and therefore do not qualify for the tax benefits set forth in Section 597. (Def.'s Mot. 19–24 (Dkt. No. 51).)

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). There is no genuine issue for trial unless there is sufficient evidence to support a jury verdict in favor of the nonmoving party. *Anderson*, 477 U.S. at 250. The moving party has the burden of demonstrating the absence of a genuine issue of material fact.

Id. at 257. Furthermore, the Court must draw all reasonable inferences in favor of the nonmoving party. *See F.D.I.C. v. O'Melveny & Myers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994).

In addition to demonstrating that there are no questions of material fact, the moving party must also show that it is entitled to judgment as a matter of law. *Smith v. Univ. of Washington Law School*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim for which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Analysis

i. *Collateral Estoppel*

The parties agree that no genuine issues of material fact preclude summary judgment at this stage, however they differ in how they reach this conclusion. Plaintiff believes, in part, that summary judgment is appropriate here because of the doctrine of collateral estoppel. (Pl.'s Mot. 8 (Dkt. No. 49).) Relying on a case involving these exact same parties and the exact same transactions at issue here, Plaintiff argues that the contours of the present dispute have effectively been decided. In *Home Savings of America v. United States*, 50 Fed. Cl. 427 (2001), the parties to this action litigated a dispute in the United States Court of Federal Claims. With regard to the supervisory merger in this case, that court held, in relevant part, that: (1) the agreement between Home and the FSLIC contained an enforceable promise that supervisory goodwill would count in meeting regulatory capital requirements until such time as the supervisory goodwill from the failing thrift was completely amortized; and (2) a limitation imposed upon the government by the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") constituted a breach of that contract. (*Id*. at 434–39.) This followed from the United States Supreme Court's seminal decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), which held, in part and by plurality, that a particular FHLBB resolution was a contractual commitment rather than a mere

statement of current regulatory policy. (*See id*. at 435.) *Home Savings* characterized the broader holding of *Winstar* as follows: "*Winstar* stands for the proposition that an express promise binding the government can exist even where there is no unmistakable language of promise." (*Id*. at 434.) Plaintiff asserts that these cases resolve many of the underlying facts and legal issues in the instant case; Defendant counters that *Winstar* and *Home Savings* are immaterial to the pending motions, as "[t]he tax basis issues in this case were not at issue in the CFC case." (Def.'s Resp. 7–8 (Dkt. No. 53).)

Mindful of the deference owed to the *Winstar* and *Home Savings* decisions, and with consideration given to the full extent of their holdings, the Court concludes that they do not have preclusive effect upon the precise issues in this case. While it would be of little import to distinguish the instant matter as a tax issue if its factual and legal underpinnings necessarily overlapped with those in *Home Savings*, that is not the case here. *Home Savings* conclusively established that the promise of supervisory goodwill, conveyed by FHLBB resolution and incorporated by reference in the Assistance Agreement between Home and the FSLIC, was enforceable and a limitation imposed by FIRREA constituted a breach of that contract. By no implication or inference does this holding reach the present dispute, which involves whether a tax basis may be assigned to the regulatory inducements Plaintiff indisputably acquired in a contract with the FSLIC. Plaintiff vigorously argues to the contrary, however its arguments are unavailing.

For example, Plaintiff makes the uncontroversial observation that a finding of legally valid consideration was a necessary predicate to the contractual relationship found in *Home Savings*. (Pl.'s Reply 2–3 (Dkt. No. 61).) True enough. However, this insight, by itself, does not purport to resolve or even imply an answer to: (1) whether Home received the Rights as consideration for Home's assumption of the *FSLIC's liabilities*, or (2) whether the Rights were "money or other property" within the meaning of Section 597. Furthermore, Plaintiff claims that "[i]n concluding that the Government breached its contract with Home, the Court of Federal Claims necessarily held that Home received the Rights from

FSLIC." (Pl.'s Reply 3 (Dkt. No. 61).) A more precise way to state the holding, however, is that the Court of Federal Claims necessarily held that Home was owed the Rights by the government as a result of the Assistance Agreement with the FSLIC. While Plaintiff may view this distinction as "[un]intelligible," (*id*. at 1), the latter locution does not unjustifiably assume or imply that Home acquired the FSLIC's liabilities as a separate matter from its acquisition of the failing thrifts' liabilities, thereby making the former a cost for which a tax basis may be assigned. With its use of the phrase "received . . . from FSLIC," Plaintiff cleverly casts the *Home Savings* decision in a light favorable for its present purposes. That decision, however, did not reach the legal issues in dispute here.

Finally, in support of its Section 597 argument, Plaintiff asserts that *Winstar* authoritatively held that the FSLIC's authority to convey the RAP right at issue here came from 12 U.S.C. § 1729(f). (Pl.'s Mot. 13 (Dkt. No. 49).) The precise legal issue Plaintiff now raises, however, is not whether the FSLIC conveyed the RAP right to Home pursuant to its Section 1729(f) authority, but rather whether the RAP right is "money or other property," within the meaning of Section 597, received from the FSLIC pursuant to Section 1729(f). Stated another way, the question is whether Plaintiff may avail itself of Section 597 for the intangible, regulatory benefits that it received from the government through the Assistance Agreement with the FSLIC. Neither *Winstar* or *Home Savings* provide the answer to this question.

Accordingly, while the Court agrees with the parties that no genuine issues of material fact exist that would preclude disposition on summary judgment, it reaches this conclusion without applying the doctrine of collateral estoppel on the basis of the *Winstar* and *Home Savings* cases. The holdings in those cases establish the nature of the obligations between Home and the government, but do not inform the tax implications that flow therefrom.

ii. *Tax Basis in the Rights as Consideration for Assuming the FSLIC's Liabilities*

As described above, Plaintiff's first argument that it may claim a tax basis in the Rights is that they were part of the cost of assuming the FSLIC's liabilities with respect to the three failing thrifts, and under

standard principles of tax accounting, this gives them basis. Plaintiff's view of the transaction is that the "FSLIC was . . . effectively selling the Rights in exchange for the assumption of FSLIC's liability." (Pl.'s Mot. 9 (Dkt. No. 49).)

This characterization of the merger is without merit. Plaintiff repeatedly asserts that by merging with Southern, it assumed the liabilities of the failing thrifts, *and* by entering into the Assistance Agreement with the FSLIC, it assumed the liabilities of the FSLIC. The Court agrees with Defendant that this is double-counting. This is apparent from Plaintiff's assertion that "[i]n the transaction, FSLIC was relieved of its liability when Home merged with the failed thrifts[,]" followed not five lines later by the acknowledgment that "[t]he Government correctly observes that FSLIC insured the failed thrifts' deposits before *and after* the Transaction." (Pl.'s Resp. 5 (Dkt. No. 58) (emphasis added).) Plaintiff tries to massage the contradiction by citing Defendant's statement that "the FSLIC insurance fund was undeniably the better off for the transaction," however this falls far short of demonstrating that "Home assumed FSLIC's liability." (*Id.*) Part of the confusion here is due, perhaps, to the particular nature of federally-backed thrifts, where financial institutions are insured by the federal government in case of default. Under this arrangement, both the institutions and the government may be said to have liabilities, but those liabilities are one and the same. Thus, while the Defendant had an undeniable interest in Home's acquisition of the failing thrifts, it was in no way relieved of its insurance obligations as a result of the transaction. Rather, those obligations were simply less likely to come to fruition.

By concluding that Home did not acquire the Rights in exchange for the FSLIC's liabilities as a separate matter from the supervisory merger itself, the Court does not find that Defendant conveyed the Rights for nothing. There was one transaction that created contractual obligations between Home and the FSLIC: Home agreed to acquire the failing thrifts (which had been merged into one) and to assume their duties and obligations. In exchange, it received the package of regulatory "carrots" contained in the Assistance Agreement. This package included cash, indemnities, the Rights (by reference to FHLBB

resolutions), and importantly, the right to structure the merger transaction as a tax-free "G" reorganization, which was also made possible through the Assistance Agreement. (*See* Am. Compl. ¶ 29 (Dkt. No. 37).)

This last incentive, in particular, cuts against Plaintiff's argument that it can claim a tax basis in the Rights. If the merger is viewed as part of a single, contractual arrangement between Home and the FSLIC, which it must for the reasons set forth above, then Plaintiff's position has to be that along with the considerable tax benefits of the "G" reorganization, it bargained for the right to assign a basis to the Rights as well. As a matter of general contract interpretation, it makes more sense to conclude that whatever tax benefits were conferred came with the part of the aid package specifically concerning taxation: the "G" reorganization. After all, it is not as if that section of the Code failed to address the issue of basis from the transaction. By choosing to classify the merger as a "G" reorganization, Home was able to "carry over" a considerably greater tax basis from the acquired thrifts than it would have enjoyed had it assigned a tax cost basis equal to the reported fair value of the loans it acquired. (*See* Def.'s Mot. 11 (Dkt. No. 51).) There is simply no indication whatsoever that assigning a separate tax basis to the Rights was also part of the bargain. Plaintiff is bound to the tax decisions its predecessor made, decisions that Plaintiff cannot dispute offered considerable benefits.

As a final matter, Plaintiff downplays the significance of the other benefits in the Assistance Agreement, emphasizing that the Rights were integral to Home's decision to go through with the merger. While it appears that other factors played a significant role as well, (*see* Antoci Ltr. (Dkt. No. 52-45)), the Court need not quibble with this assertion. Indeed, it can be assumed that acquiring the Rights was of paramount importance to Home, and for this reason, it bargained for them and enjoyed them for years to follow. The question raised here is whether the right to assign a tax basis to the Rights came as part of the package as well. There is little support for this additional claim.

iii. *Tax Basis in the Rights Under Section 597 of the IRC*

Plaintiff argues, in the alternative, that it has basis in the Rights because they were inducement to participate in the transaction, and therefore excludable from gross income under former Section 597 of the Internal Revenue Code. (Pl.'s Mot. 10–16 (Dkt. No. 49).) As Plaintiff describes, that provision was passed to confer tax benefits upon institutions participating in FSLIC-sponsored mergers and consolidations, and was meant to "ensur[e] that FSLIC assistance payments would never be taxed. (*Id*. at 11 (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1292–93 (Fed. Cir. 2005)).) In order to qualify under Section 597 of the Code, the FSLIC-assistance must have been "money or other property received from the [FSLIC] pursuant to [12 U.S.C. § 1729(f)] . . . ." This latter statute specifically authorized the FSLIC to facilitate the merger or consolidation of insured institutions.

As an initial matter, Defendant asserts that Plaintiff's alternate theories are "factually inconsistent," and therefore "Plaintiff should be required to identify which set of facts it is putting forward." (Def.'s Mot. 19–20 (Dkt. No. 51).) The Court disagrees. The facts under either of Plaintiff's theories of recovery are essentially the same, and involve how the transaction took place and what each of the relevant parties did to participate. What Plaintiff has done in its briefing to the Court, as it is perfectly entitled to do, is present alternative legal theories of recovery. Whether the Rights are properly deemed consideration for the contract between Home and FSLIC, FSLIC-assistance pursuant to 12 U.S.C. § 1729(f) that is entitled to Section 597 treatment, or something else altogether, is a legal question for the Court.

Plaintiff's second theory that the Rights were an inducement to participate in the supervisory merger, and entitled to Section 597 treatment, depends on the breadth assigned to that provision of the Code. At the time in question, it read as follows:

> Sec. 597 FSLIC FINANCIAL ASSISTANCE
>
> (a) Exclusion From Gross Income. - Gross income of a domestic building and loan association does not include any amount of **money or other property** received from the

> Federal Savings and Loan Insurance Corporation pursuant to section 406(f) of the National Housing Act (12 U.S.C. sec. 1729(f)), regardless of whether any note or other instrument is issued in exchange therefor.
>
> (b) No Reduction in Basis of Assets. - No reduction in the basis of assets of a domestic building and loan association shall be made on account of **money or other property** received under the circumstances referred to in subsection (a) . . . .

Pub. L. No. 97–34, § 597, 95 Stat. 172 (1981) (emphasis added). The question, then, is whether the branching rights and the RAP right, conveyed by FHLBB resolution and incorporated into the Assistance Agreement, qualify as "money or other property received from the [FSLIC] pursuant to [12 U.S.C. § 1729(f)] . . . ."

There is some appeal to Plaintiff's interpretation of the Code. First, that the FSLIC could convey the RAP right pursuant to its Section 1729(f) authority appears to be part of the *Winstar* holding. (*See* Pl.'s Mot. 13 (Dkt. No. 49) (citing *Winstar*, 518 U.S. at 890).) Furthermore, the phrase "money or other property" in Section 597 suggests a broad swath of possible FSLIC assistance. At the very least, if "other property" is to have any meaning whatsoever it has to include non-cash assistance. Nonetheless, there are also several incongruities with Plaintiff's reading of the provision. For example, as Defendant points out, the legislative history consistently describes "money or other property" in Section 597 in terms suggesting it must be uniquely *financial* forms of assistance.[2] (*See* Def.'s Mot. 20–21 (Dkt. No. 51).) Furthermore, Defendant observes that the version of 12 U.S.C. § 1729(f) that was in effect when ERTA was passed had last been amended in 1978, which was before the FHLBB began permitting thrifts to acquire interstate branching rights through supervisory mergers. (Def.'s Resp. 20 (Dkt. No. 53).) This would suggest that the parties involved in the 1981 transaction had no expectation that the Rights (or at least

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[2] Defendant also observes that the heading for the Economic Recovery Tax Act of 1981 ("ERTA"), which sets forth Section 597, uses the phrase "financial assistance." (Def.'s Mot. 20–21 (Dkt. No. 51).) Plaintiff objects by arguing that IRC § 7806 disallows the use of headings or titles in construing the meaning of the Code. (Pl.'s Resp. 18 (Dkt. No. 58).) Defendant persists by asserting that "ERTA itself is not a Code section," and therefore the heading for Section 244(a) may be considered. (Def.'s Reply 8 (Dkt. No. 63).)

branching rights) were FSLIC-assistance for the purpose of Section 597, a conclusion consistent with numerous contemporaneous impressions cited by Defendant. (*See* Def.'s Mot. 21 (Dkt. No. 51); Def.'s Reply 7 n.5 (Dkt. No. 63).)

One of the major points of contention between the parties is how to characterize the incorporation of FHLBB resolutions into the Assistance Agreement. *Home Savings* conclusively determined that Plaintiff was owed the Rights, as a matter of contract, based on the Assistance Agreement. Since the contracting party for the Government was the FSLIC, Plaintiff reasons that it was the entity that conveyed the Rights. (Pl.'s Resp. 14–16 (Dkt. No. 58).) Acknowledging the *Home Savings* decision with respect to performance, Defendant argues that only the FHLBB had the authority to convey the Rights, and thus for the purpose of construing Section 597, there is still a cogent distinction between the Assistance Agreement and the FHLBB resolutions incorporated therein. (Def.'s Mot. 23 (Dkt. No. 51).) This is Defendant's "four corners" argument. On this reading, the types of assistance recognized under Section 597 were those contained within the "four corners" of the Assistance Agreement, to the exclusion of the FHLBB resolutions incorporated by reference.

Admittedly, there is not an obvious answer to whether Section 597 may be interpreted as Plaintiff suggests. Neither party cites a case or administrative decision that squarely confronts the scope of Section 597 in this context. Recognizing this fact, and mindful of the "settled principle that exemptions from taxation are not to be implied," *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988), the Court concludes that the Rights are not "money or other property" for the purpose of Section 597. First, principles of statutory construction suggest they are not. Section 597 does not simply apply to "money or other property," but rather an "*amount of* money or other property." 26 U.S.C. § 597 (1981) (emphasis added). This suggests that in order to qualify, the FSLIC assistance must be financial in nature. Furthermore, Plaintiff emphasizes that qualifying FSLIC assistance may be "money *or other property*," a seemingly broad category which, as a matter of plain English usage, does not necessarily exclude the

Rights. However, it cannot be ignored that the phrase "money or other property" operates as a limitation upon what may be presumed to be a broader class of FSLIC assistance. That is, the phrase would be mere surplusage if it did not delineate Section FSLIC assistance qualifying for Section 597 treatment from that which does not. The problem with Plaintiff's theory is that it proves too much; it completely eviscerates any limitation that the phrase "money or other property" would place upon the kind of FSLIC assistance identified in Section 597.

Furthermore, by every indication in the legislative history of ERTA and the contemporaneous acts of the parties, the tax benefits accorded by Section 597 were thought to apply to financial assistance from the FSLIC, such as net worth payments and indemnities against loss, which were to be accounted for with a special reserve account per the Assistance Agreement. (*See* Pl.'s Resp. 16–17 (Dkt. No. 58); Def.'s Mot. 20–21 (Dkt. No. 51).) Plaintiff also cites case law identifying the underlying purpose of Section 597 as "ensur[ing] that FSLIC assistance *payments* would never be taxed." (Pl.'s Mot. 11 (Dkt. No. 49) (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1293 (Fed. Cir. 2005)) (emphasis added).) Recognizing that the general purpose of the statute was to accord favorable tax treatment to parties in a supervisory merger, these sources suggest that Section 597 was limited to FSLIC financial assistance.[3]

Another difference between the Rights and financial assistance from the FSLIC is that the former are more difficult to value, which is a problem for the tax accounting purposes of Section 597. As Defendant observes, it is unclear how to assign value to a non-financial asset such as a regulatory benefit, since the guarantee of performance and the value of a lost regulatory exception are two different measurements. (*See* Def.'s Reply 9 n.7 (Dkt. No. 63).) The Rights were essentially regulatory

[3] Defendant makes much of the fact that Plaintiff's Section 597 theory was crafted by a large accounting firm sometime in the mid-nineties to utilize this section of the Code to "create tax deductions in connection with supervisory mergers." (Def.'s Resp. 18–19 (Dkt. No. 53).) Plaintiff does not deny this, perhaps because its legal argument does not depend on when it took the position it now advances. Nevertheless, this fact at least explains why none of the legislative history or contemporaneous accounts of the parties suggest any awareness that the Rights were FSLIC-assistance under Section 597.

forbearances. That is, both the branching rights and the RAP right allowed Home the option violating certain federal regulations without governmental interference. While the Court can agree that this was something of value to Home, without which it may not have participated in the merger, the notion that the Rights may be accounted for under Section 597 is problematic.

Plaintiff repeatedly asserts that its interpretation must govern since "[t]here is no dispute that if Home received cash in lieu of the Rights, Home would have had basis in the cash under section 597." (*See, e.g.*, Pl.'s Resp. 18 (Dkt. No. 58).) On this rationale, Plaintiff argues that there is no legal or policy-based reason to treat the Rights differently from financial assistance for the purpose of applying Section 597. Unfortunately, this hypothetical begs rather than resolves the question posed. The statute clearly applies to some types of FSLIC assistance and not to others. While frustrating for Plaintiff, there is nothing illogical about treating regulatory benefits differently than cash for tax accounting purposes. For reasons beyond the expertise of this Court, this distinction may reflect careful legislative calculation. Even assuming that Defendant identifies an internal tension or contradiction in the Code, it is not within the Court's authority or capacity to somehow improve on the policy choices set forth in the statute.

Finally, the Court does not consider the distinction Defendant draws between receiving the Rights from the FSLIC and receiving them as a result of the contract with FSLIC to offer much guidance. The requirement that the "money or other property" be "received from the [FSLIC]" simply does not resolve the question of whether it must be received from the FSLIC in its unique institutional capacity, or whether it can be received from the contractual vehicle itself (i.e. the Assistance Agreement). Suffice it to say that for the reasons set forth above, Plaintiff's Section 597 claim must fail without reference to this dispute over how far the "four corners" of the Assistance Agreement extend.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 49) is DENIED, and Defendant's Motion for Partial Summary Judgment (Dkt. No. 51) is GRANTED.

Furthermore, because Defendant has indicated that certain issues remain outstanding, (*see* Def.'s Mot. 2 n.2 (Dkt. No. 51)), the parties are instructed to file a joint status report at their earliest convenience, advising the Court as to how long they will need to try the remaining issues.

SO ORDERED this 12th day of August, 2008.

John C. Coughenour
United States District Judge