No. 09-36109

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON MUTUAL, INC.,
as successor in interest to
H.F. Ahmanson & Co. and Subsidiaries,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLEE

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GLOSSARY

1982 Act – Garn-St. Germain Depository Institutions Act of 1982

Bank Board – Federal Home Loan Bank Board

Code – Internal Revenue Code (26 U.S.C.)

ERTA – Economic Recovery Tax Act of 1981

FASB – Financial Accounting Standards Board

FIRREA – Financial Institutions Reform, Recovery, and Enforcement Act of 1989

FHLBB – Federal Home Loan Bank Board

FSLIC – Federal Savings and Loan Insurance Corporation

"G" reorganization – a tax-free reorganization described in I.R.C. § 368(a)(1)(G)

GAAP – generally accepted accounting principles

I.R.C. – Internal Revenue Code (26 U.S.C.)

RAP – regulatory accounting principles

Rights – the RAP right and branching rights at issue in this case

S&L – savings and loan association

SEC – Securities and Exchange Commission

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

1. Jurisdiction in the District Court

H.F. Ahmanson & Co. ("Ahmanson") was the common parent of an affiliated group of corporations that filed consolidated federal income tax returns (the "Ahmanson group"). (ER 262.)[1] Home Savings of

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[1] "ER" references are to appellant's excerpts of record. "SER" references are to appellee's supplemental excerpts of record. "Doc." references are to the documents in the original record, as numbered by
(continued...)

America ("Home") was a member of the Ahmanson group. (*Id.*) On June 28, 2005, Washington Mutual, Inc. ("appellant" or "taxpayer"), as successor in interest to Ahmanson, filed timely amended returns with the Internal Revenue Service ("IRS") on behalf of the Ahmanson group, claiming refunds for the years 1990, 1992 and 1993. (ER 269, 271, 274.) *See* Internal Revenue Code (26 U.S.C.) ("the Code" or "I.R.C.") § 6511(a).[2] The IRS did not grant the refund requests. (ER 270, 272, 275.)

On October 27, 2006, taxpayer timely filed suit on the Ahmanson group's refund claims in the United States District Court for the Western District of Washington. (ER 262, 306.) *See* I.R.C. § 6532(a)(1). The District Court had jurisdiction over taxpayer's suit pursuant to 28 U.S.C. § 1346(a)(1) and § 7422(a) of the Code.

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[1] (...continued)
the Clerk of the District Court. "Br." references are to appellant's opening brief.

[2] All statutory citations – which, unless otherwise indicated, refer to the Code – are made to the provision as amended and in effect at the time in question. The most important provisions are set forth in the Addendum, *infra*.

2. Jurisdiction in this Court

The District Court entered judgment in favor of the United States on the issues addressed by the parties in their cross-motions for partial summary judgment and dismissed taxpayer's remaining claims. (ER 1-2.) That judgment was a final order disposing of all parties' claims, and this Court therefore has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

3. Timeliness of appeal

The District Court entered judgment on November 6, 2009. (ER 314.) Taxpayer filed a timely notice of appeal (ER 19-22) on December 15, 2009, within 60 days after entry of judgment. *See* 28 U.S.C. § 2107(b).

STATEMENT OF THE ISSUE

In 1981, Home Savings of America acquired three financially troubled savings and loan associations ("S&Ls") by way of tax-free mergers. In connection with those acquisitions, the federal government ("the Government") provided Home not only with certain tax-free financial assistance, but also with some regulatory concessions, *i.e.*, the right to maintain branches outside of its home state (the "branching rights") and the right to treat "supervisory goodwill" as capital for

regulatory capital purposes (the "RAP rights"). The issue presented in this case is whether the District Court correctly concluded that taxpayer was not entitled to over $60 million in deductions during 1990, 1992 or 1993 respecting the abandonment of the branching rights and the amortization of the RAP rights because Home had no "basis" in those rights for tax purposes.

STATEMENT OF THE CASE

This suit for refund of federal income taxes paid for the years 1990, 1992 and 1993 centers on whether Home Savings of America, a member of the Ahmanson group, is entitled to amortization deductions and a loss deduction with respect to certain regulatory concessions it obtained in connection with a federally-assisted takeover of three financially-troubled S&Ls in 1981. (ER 261-305.) Because any such deduction presupposes that Home had a tax basis in those rights, the parties addressed the threshold basis issue in cross-motions for partial summary judgment. (Docs. 49, 51.) The District Court (Judge John C. Coughenour) granted the Government's motion (ER 3-18) and entered

judgment accordingly for the United States on taxpayer's basis-deduction claims (ER 1-2).[3] Taxpayer now appeals. (ER 19-22.)

STATEMENT OF FACTS

A. Regulatory backdrop

In 1981, when the transaction at issue in this case took place, federally-chartered S&Ls (or "thrifts") were regulated by the Federal Home Loan Bank Board (the "Bank Board"). *See* 12 U.S.C. §§ 1461-1469 (1976 & Supp. V 1981). The Federal Savings and Loan Insurance Corporation (FSLIC), operating under the direction of the Bank Board, insured deposits in such institutions and was authorized to provide financial assistance to ailing thrifts. *See id.* §§ 1725(a), 1729(f)(1).

In response to the savings and loan crisis of the late 1970's and early 1980's, the Government began adopting policies that encouraged the acquisition of financially weak institutions by financially healthy ones. In 1978, Congress specifically authorized FSLIC to facilitate such acquisitions through financial assistance in order to "save the cost of liquidating such insured institution[s]." *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630,

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[3] The court dismissed taxpayer's remaining claims, which the parties had resolved by settlement agreement. (ER 2.)

§ 105(b)(2), 92 Stat. 3641, 3647; 12 U.S.C. § 1729(f)(2), (3) (Supp. V 1981), Addendum, *infra*. And in 1981, the Bank Board amended its regulations to provide that, notwithstanding its general policy of approving only intrastate branching applications, it would approve, in its discretion, (1) the establishment of interstate branches by means of FSLIC-assisted acquisitions of troubled thrifts, subject to the existence of certain circumstances as determined by the Bank Board; and (2) the establishment of additional interstate branches by the acquiring thrift in the state where the troubled thrift was located. *See* Statement of Policy Amendment Regarding Supervisory Mergers and Acquisitions, 46 Fed. Reg. 19,221 (Mar. 30, 1981); Statement of Policy Regarding Supervisory Mergers and Acquisitions, 46 Fed. Reg. 45,120 (Sept. 10, 1981); 12 C.F.R. § 556.5(a)(3) (1982).

Also in 1981, the Bank Board signaled its willingness to allow more favorable accounting treatment, for book (non-tax) purposes, of the intangible asset (goodwill) created under the "purchase method" of accounting when the value of the liabilities assumed by the acquiring thrift exceeded the value of the assets it acquired in the transaction. By way of background, as explained by Richard C. Breeden, a former Chairman of the Securities and Exchange Commission (SEC):

> When a troubled thrift was acquired, its assets (mostly long-term mortgages which had depreciated in value as a result of changes in interest rates) were recorded on the buyer's books at fair market value in accordance with GAAP [generally accepted accounting principles]. The "discount," or difference between the original book value and the fair market value, was booked as income over the estimated life of the assets on an interest-method basis. The net liabilities (i.e., the fair value of total liabilities less the fair value of the assets acquired) were recorded as goodwill and expended on a straight-line basis over an amortization period.
>
> GAAP . . . specif[ied] only that the goodwill be amortized over the period benefited, not to exceed 40 years. If a thrift used the maximum 40-year period, the yearly "expense" for goodwill would be one-fortieth of the total amount. Because the typical life of the purchased assets usually averaged about 10 years, however, this would mean that the "discount" was recorded as income over a shorter period.[4] Thus, the income from amortizing the purchase discount would exceed the expense from goodwill, and the acquiring thrift would generate net income during the first 10 years after the acquisition. . . .

Richard C. Breeden, *Thumbs on the Scale: The Role that Accounting Practices Played in the Savings and Loan Crisis*, 59 Fordham L. Rev. S71, S81-S82 (1991) (fn. refs. omitted); *see also id.* n.31.

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[4] "In the typical case, . . . the disparity [in value] between assets and liabilities from which the accounting goodwill was derived was virtually equal to the . . . discount from face value of the thrift's outstanding loans." *United States v. Winstar Corp.*, 518 U.S. 839, 852 (1996) (citing William K. Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stan. L. & Policy Rev. 102, 104-105 (1990)); *see* SER 18, 21, 24.

From 1974 to 1981, the Bank Board required thrifts to amortize goodwill over no more than 10 years, and in 1980 it even proposed a regulation that would have tied the amortization of goodwill to the accretion of loan discount into income. Breeden, 59 Fordham L. Rev. at S82; *see* Treatment of Goodwill Acquired in Mergers, 45 Fed. Reg. 72,681, 72,682 (Nov. 3, 1980). But it withdrew the proposed regulation in August 1981 and, shortly thereafter, announced its acquiescence in principle to 40-year amortization of goodwill. *See* Treatment of Goodwill Acquired in Mergers, 46 Fed. Reg. 42,274 (Aug. 20, 1981); FHLBB Memorandum R-31b, 1981 WL 388376 (Sept. 1, 1981). Citing Financial Accounting Standards Board (FASB) Interpretation No. 9, which addressed the subject of purchase method accounting in the context of thrift acquisitions, FHLBB Memorandum R-31b provided that if the amount paid for any separately identified intangible asset can be determined, then that amount shall *not* be included in goodwill. (SER 2.)

B. The transaction at issue

Southern Federal Savings and Loan Association of Broward County ("Southern") was a federally-chartered mutual S&L located in Florida. (ER 174.) On September 8, 1981, Southern's board of

directors authorized FSLIC to find a buyer for Southern. (ER 233.) On November 5, 1981, Home Savings and Loan Association,[5] at the time a California-chartered savings and loan association (ER 60), submitted a proposal to acquire Southern. (ER 233.) Home subsequently agreed to acquire two other struggling thrifts as part of the deal: Hamiltonian Federal Savings and Loan Association ("Hamiltonian") and Security Federal Savings and Loan Association ("Security"), each located in Missouri. (ER 222, 233.) Other Missouri thrifts expressed interest in acquiring either Hamiltonian or Security, while other Florida thrifts expressed interest in acquiring Southern, but Home's proposal was the least costly to FSLIC. (ER 229, 231, 233.)

Home's acquisition of Southern, Hamiltonian, and Security (the "target thrifts") was structured as two separate mergers, each governed by applicable federal regulations and subject to the approval of the Bank Board. (ER 117-18, 121, 142, 145.) *See* 12 C.F.R. § 552.13 (1982). On November 25, 1981, the target thrifts entered into a merger agreement providing for the merger of Hamiltonian and Security into Southern, and Southern and Home entered into a separate merger

[5] Home changed its name to Home Savings of America in connection with the transaction described herein. (ER 60.)

agreement providing for the merger of Southern into Home immediately following the first merger. (ER 106-147.) Besides being conditioned upon the consummation of the Southern-Hamiltonian-Security merger, the merger of Southern into Home was subject to the condition that "FSLIC shall have entered into an agreement with Home in form and substance satisfactory to Home." (ER 142.)

The agreement between FSLIC and Home referred to in the Southern-Home merger agreement took the form of an "Assistance Agreement" dated December 17, 1981. (ER 174-206.) The agreement recited that FSLIC "has decided, pursuant to § 406(f) of the [National Housing] Act, 12 U.S.C. § 1729(f) (Supp. III 1979), to provide indemnification and/or financial assistance as set forth in this Agreement." (ER 175.) As summarized in a memorandum to the Bank Board from H. Brent Beesley, the Director of FSLIC, dated December 16, 1981, this assistance included indemnification against losses resulting from liabilities for which no reserve was made or arising out of legal challenges to the mergers or the Agreement; cash contributions equal to the negative net worth of each target thrift, including certain net appraised losses; indemnification for net appraised losses on real estate acquired by foreclosure during the 5-

year term of the Agreement; and indemnification for losses on specified "problem loans." (ER 224.) The assistance was to be accounted for through a series of debits and credits to a special reserve account. (ER 180-85.)

Home's obligations under the Assistance Agreement were subject to certain conditions. (ER 200.) One was the Bank Board's issuance of a "supervisory forbearance letter," representing that, during the 5-year term of the Assistance Agreement, it would waive violations of regulatory reserve and net worth requirements attributable to the former assets and liabilities of the target thrifts to which Home succeeded. (SER 5.) *See* 12 C.F.R. § 563.13 (1982). Another condition was the Bank Board's issuance of a letter certifying that the "grounds specified in 12 U.S.C. § 1464(d)(6)(A)(i) [insolvency] or (iii) [unsafe or unsound conditions to transact business] exist or will exist with respect to each" of the target thrifts, which was necessary to ensure that the transaction would qualify as a tax-free reorganization described in § 368(a)(1)(G), Addendum, *infra*, as was contemplated by the Assistance Agreement. (ER 175.) *See* I.R.C. § 368(a)(3)(D)(ii)(III) (1982), Addendum, *infra.*

The Assistance Agreement also incorporated by reference "any resolutions or letters issued contemporaneously [t]herewith by" the Bank Board or FSLIC. (ER 204.) In resolutions dated December 17, 1981, the Bank Board made the determinations necessary to its approval of the establishment of Home's Florida and Missouri branches resulting from Home's acquisition of the target thrifts, *see* 12 C.F.R. § 556.5(a)(3)(ii)(*a*)(*2*), (*3*) (1982), approved the establishment of those branches, and conditionally approved Home's establishment of two more branches each in Florida and Missouri. (ER 211, 226.) The Bank Board also provided a letter to Home that same day, stating that "future applications of Home . . . for permission to establish or maintain branch offices in the State of Florida and Missouri shall be processed, for the purposes of a particular application, . . . as if the home office of Home were located in Florida or Missouri, respectfully [sic]." (ER 215.)

Another December 17, 1981 Bank Board resolution (ER 213) provided that–

> the Bank Board hereby finds that the submission of Home concerning the accounting treatment to be afforded its acquisition of Southern . . . appropriately supports the application of the purchase method of accounting for the acquisition; and . . . the Bank Board hereby determines that it does not object to (1) the amount of any resulting intangible assets being first assigned to the acquired savings

> deposit base . . . , which will have a life of ten (10) years, and (2) any excess being assigned to goodwill and initially amortized, in accordance with generally accepted accounting principles, over forty (40) years . . . .

Using the purchase method of accounting to record the transaction on its books, Home reported the fair market value of the assets and liabilities acquired as $670,829,000 and $934,757,000, respectively. (ER 246.) Based on a formula contained in the foregoing resolution, Home allocated approximately $3.7 million of the resulting intangible asset to the acquired deposit bases of the target thrifts (to be expensed for book purposes on a straight-line basis over 10 years) and allocated the remainder – more than $260 million – to goodwill (to be expensed for book purposes on a straight-line basis over 40 years). (ER 266, SER 12, 18-19, 21-22, 24-25.) Home accrued the corresponding "loan discount" into income for book purposes over the average life of the loans using the accelerated "level interest yield" method. (SER 7, 13, 18-19, 21-22, 24-25.) *See* p. 7, *supra*.[6]

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[6] Although Home represented to the SEC that its use of the purchase method of accounting with respect to the Southern transaction would not generate book income (SER 9), a more accurate statement would have been that Home did not expect the incremental net income generated annually by its use of that method to result in *overall* net income for any of the target thrifts for the first three years

(continued...)

On an information statement attached to its consolidated federal income tax return for 1981, the Ahmanson group reported the mergers by which the target thrifts were acquired by Home as tax-free reorganizations described in § 368(a)(1)(G). (ER 57.) The statutorily-required "plan of reorganization" included with the information statement consisted in part of the Form 8-K on which Home had reported the Southern transaction to the SEC. (ER 59-62.) The Form 8-K reported that "[t]he purchase price for the assets of [the target thrifts] was the fair market value of the liabilities of the [target thrifts] which were assumed by Home." (ER 60.)[7]

C. Litigation resulting from FIRREA

In 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat.

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[6] (...continued)
after the acquisition (*i.e.*, that Home anticipated that such incremental net income would only have the effect of reducing losses during that period). (SER 12-25.)

[7] The Form 8-K also stated that, to the extent the fair market value of the liabilities assumed exceeded the fair market value of the assets acquired, Home would treat such excess for book purposes as goodwill in accordance with GAAP (which would include FASB Interpretation No. 9, *see supra* p.8) and that such goodwill was "related to" expansion into new markets. (ER 61.)

183 ("FIRREA"). Among other things, FIRREA introduced strict new "capital to total assets" ratio requirements for thrifts, and it also–

> defined "core capital" to exclude "unidentifiable intangible assets," [12 U.S.C.] § 1464(t)(9)(A), such as goodwill. Although the reform provided a "transition rule" permitting thrifts to count "qualifying supervisory goodwill" toward half the core capital requirement, this allowance was phased out by 1995. § 1464(t)(3)(A). . . .

United States v. Winstar Corp., 518 U.S. 839, 857 (1996).

In *Winstar*, the Federal Circuit agreed with the Court of Federal Claims that "[t]he three plaintiff thrifts negotiated contracts with the bank regulatory agencies that allowed them to include supervisory goodwill[8] (and capital credits) as assets for regulatory capital purposes and to amortize that supervisory goodwill over extended periods of time," and the Supreme Court "accept[ed] the Federal Circuit's conclusion" in that regard. *Winstar*, 518 U.S. at 861 (quoting *Winstar Corp. v. United States*, 64 F.3d 1531, 1545 (Fed. Cir. 1995)), 867; *see also id.* at 864, 866.[9] The Court also "accept[ed] the Federal Circuit's

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[8] The Court defined "supervisory goodwill" as "[g]oodwill recognized under the purchase method [of accounting] as the result of an FSLIC-sponsored supervisory merger." 518 U.S. at 849.

[9] The Court noted that "[t]he anterior question whether there were contracts at all between the Government and respondents dealing

(continued...)

conclusion that the Government breached these contracts when, pursuant to the new regulatory capital requirements imposed by FIRREA, 12 U.S.C. § 1464(t), the federal regulatory agencies limited the use of supervisory goodwill and capital credits" as acceptable regulatory capital. *Id.* at 870. The Court explained that it "took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here." *Id.* at 860. The Court rejected the applicability of these special rules, *id.* at 871-910, and "affirm[ed] the Federal Circuit's ruling that the United States is liable to respondents for breach of contract." *Id.* at 910.

In the wake of the Supreme Court's decision in *Winstar*, the Court of Federal Claims ruled in favor of Home in its own *Winstar*-type action pertaining to Home's acquisition of the target thrifts and of other thrifts in similar deals. *See Home Sav. of Am. v. United States*, 50 Fed. Cl. 427 (2001) ("*Home I*"), *aff'd in part and vacated in part*, 399 F.3d 1341 (Fed. Cir. 2005) ("*Home IV*"), *on remand to* 70 Fed. Cl. 303 (2006)

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[9] (...continued)
with regulatory treatment of supervisory goodwill . . . is not strictly before us." 518 U.S. at 860.

("*Home VI*"); *Home Sav. of Am. v. United States*, 57 Fed. Cl. 694 (2003) ("*Home III*"), *aff'd*, 399 F.3d 1341 (Fed. Cir. 2005) (collectively, "*Home Savings*"). Although Home "tacitly acknowledge[d] the lack of explicit language regarding the inclusion of supervisory goodwill in regulatory capital," the court concluded that the Bank Board resolution approving Home's proposed treatment of supervisory goodwill for *accounting* purposes must be construed as allowing Home to count such goodwill as capital for purposes of regulatory capital requirements. *Home I*, 50 Fed. Cl. at 434, 437-38. The court then found that "the limitation imposed by FIRREA on plaintiffs' ability to count supervisory goodwill in meeting their regulatory capital requirements constituted a breach of the contracts entered into by plaintiffs and the government in the Florida/Missouri and Illinois/Texas transactions." *Id.* at 439. In *Home III* and *Home VI*, *supra*, the court awarded Home a total of $90,360,000 in damages and grossed up the awards for taxes, resulting in a total award of $149,951,000.

D. Taxpayer's refund claims

On June 28, 2005, the date the Federal Circuit denied the Government's petition for rehearing in *Home IV*, taxpayer, acting as successor in interest to Home's parent, Ahmanson, filed amended

returns for the group, claiming refunds for the years 1990, 1992 and 1993. (ER 269, 271, 274.) Taxpayer took the position that Home was entitled to amortization deductions for all three years with respect to the Regulatory Accounting Principles rights ("RAP rights") it had obtained in connection with the acquisition of the target thrifts, *viz.*, "the contractual rights to count the Supervisory Goodwill resulting from the acquisition to satisfy its regulatory capital requirements for 40 years." (ER 281-82, 289, 296.) Because Home had sold its Missouri branches, taxpayer maintained that Home was entitled to abandonment loss deductions for 1992 and 1993 respecting its Missouri branching rights. (ER 289, 296.)

Based on the adjustments set forth on the amended returns (including some that ultimately were settled below), taxpayer claimed refunds of $91,442,362 each for the years 1990 and 1992 and $8,935,369 for the year 1993, or a total of $191,820,093. (ER 278, 292, 299.) The IRS did not grant the refund requests. (ER 270, 272, 275.)

E. District Court proceedings

1. Taxpayer's original complaint

Taxpayer brought this suit for refund in the District Court. In its original complaint, taxpayer alleged that Home's initial aggregate basis

in the Missouri branching rights and the RAP rights associated with its acquisition of the two Missouri thrifts (Hamiltonian and Security) was $87,385,441. (SER 31-32 ¶ 34.) Taxpayer further alleged that Home's initial aggregate basis in its Florida branching rights and the RAP right associated with its acquisition of the Florida thrift (Southern) was $180,118,478 (SER 32 ¶ 35), for an aggregate basis in RAP rights and branching rights (pertaining to both Missouri and Florida) of $267,503,919. Taxpayer nevertheless allocated the entire $267,503,919 to the RAP rights in calculating the amortization deductions to which it claimed Home was entitled respecting those rights for 1990, 1992, and 1993 ($6,687,598 based on 40-year amortization; $39,919,816 based on 5-year phase-out). (SER 34, 36, 38 ¶¶ 51-52, 62-63, 74-75.) Moreover, taxpayer allocated the entire amount of basis it had assigned to the Missouri branching rights and the Missouri-associated RAP rights ($87,385,441) to the Missouri branching rights in claiming that Home was entitled to an $87,385,441 abandonment loss deduction respecting those rights in 1993. (SER 38 ¶ 73.) Taxpayer sought refunds of at least $13,572,737 for each of the years 1990 and 1992 and a refund of at least $39,992,631 for 1993, or a total minimum refund of $67,138,105. (SER 35, 37, 39, ¶¶ 58, 69, 84.)

2. Taxpayer's amended complaint

In its amended complaint, taxpayer alleged that Home's tax basis in the RAP rights was $46,809,000 under § 1012 (the general cost-basis rule) or $63,000,000 under §§ 362(b) (the carryover-basis rule applicable to tax-free reorganizations) and 597 (relating to financial assistance received from FSLIC under 12 U.S.C. § 1729(f)). (ER 266-67.) Based on those figures, taxpayer alleged that Home was entitled to amortization deductions with respect to the RAP rights for each year of either $6,436,238 or $8,662,500 (based on the 5-year phase-out) or $1,170,225 or $1,575,000 (based on their initial 40-year life). (ER 269, 271, 273.) Taxpayer alleged in the alternative that, if there were separate RAP rights associated with Home's Missouri branches, then, because Home sold those branches in 1992 and 1993, it was entitled to abandonment loss deductions for those years equal to any remaining unamortized basis in those rights. (ER 271, 273.)

Taxpayer further alleged in its amended complaint that Home's tax basis in the Missouri branching rights was $25,605,000 under § 1012 or $35,000,000 under §§ 362(b) and 597. (ER 266-67.) Taxpayer argued that Home was entitled to an abandonment loss deduction for 1992 in an unspecified amount "with respect to the branching rights

associated with the branches divested in that year" and an abandonment loss deduction for 1993 of either $25,605,000 or $35,000,000. (ER 271, 273.) Taxpayer alleged in the alternative that, to the extent Home was not entitled to recover its alleged basis in the Missouri branching rights or in any separate RAP rights associated with the Missouri branches through loss or amortization deductions, those amounts should be added to Home's basis in those branches in computing its gain or loss on its sales of the branches in 1992 and 1993. (ER 271, 273-74.) Taxpayer sought refunds of at least $3,836,998, $2,188,321, and $9,517,265 for 1990, 1992, and 1993, respectively, or a total minimum refund of $15,542,584. (ER 270, 272, 275.)

3. The parties' motions for partial summary judgment

Taxpayer filed a motion for partial summary judgment on the issue whether Home had a tax basis in the RAP rights and the Missouri branching rights (collectively, the "Rights"). (Doc. 49.) Taxpayer prefaced its substantive argument with the contention that, under the doctrine of collateral estoppel, "the decisions of the Court of Federal Claims [in *Home Savings*] establish the material facts relevant to [taxpayer's] motion." (*Id*. at 8.) According to taxpayer, those

"undisputed material facts" were that "(1) Home contracted with FSLIC; (2) Home received the Branching Rights and RAP Right as consideration or inducement from FSLIC; and (3) Home's consideration for the Rights was the assumption of FSLIC's liability." (*Id.* at 7.)

Taxpayer first argued that Home's "assumption of FSLIC's liability" resulted in a cost basis for Home in the Rights under § 1012, measured by "the excess of the total liabilities over the current fair market value of the failed thrifts' assets." (Doc. 49 at 9-10.) Next, taxpayer argued that if Home did not have a cost basis in the Rights, then it had a basis in the Rights equal to their fair market value, on the theory that Home's receipt of the Rights was income to Home in the form of an inducement to acquire the target thrifts. (*Id.* at 10.) Under this theory, Home had a fair market value basis in the Rights even though, according to taxpayer, the Rights were excluded from Home's gross income under § 597, Addendum, *infra*.[10] (*Id.* at 11.) Taxpayer argued that this result followed from § 597(b), which provided that "[n]o reduction in the basis of assets of a [thrift] or bank shall be made

[10] Regarding the applicability of § 597, taxpayer contended that "the Supreme Court specifically held that FSLIC conveyed the RAP Right at issue in *Winstar*" pursuant to 12 U.S.C. § 1729(f), which is referred to in § 597(a). (Doc. 49 at 13.)

on account of money or other property received" tax-free under § 597(a). (*Id*. at 12.)

The Government filed its own motion for partial summary judgment on the issue whether "[taxpayer's] tax basis theories fail as a matter of law." (Doc. 51 at 2.) Regarding taxpayer's cost-basis theory, the Government argued that Home had assumed the liabilities, not of FSLIC, but of the target thrifts, and that in any event, the theory was inconsistent with Home's reporting of the transaction as a tax-free reorganization described in § 368(a)(1)(G) (a "G" reorganization). (*Id*. at 16-19.) Specifically, the Government argued that, because "substantially all of the liabilities" of Southern had to have become liabilities of Home "as a result of the transfer" of Southern's assets to Home in order for the transaction to have qualified as a "G" reorganization, *see* I.R.C. § 368(a)(3)(D)(ii)(II) (1982), Home could not have assumed those liabilities in exchange for the Rights. (*Id*. at 16-17.) As for taxpayer's alternative theory, the Government argued that assigning a fair market value basis to property received as income is appropriate only when the recipient in fact includes the value of the property in its gross income for tax purposes, which Home indisputably did not do with respect to the Rights. (*Id*. at 13.) The Government also

argued that taxpayer could not contend that § 597 produced a different result, since the Rights did not constitute financial assistance received from FSLIC pursuant to 12 U.S.C. § 1729(f), as contemplated by § 597.[11] (*Id*. at 19-24.)

On the issue of collateral estoppel, the Government argued in its opposition to taxpayer's motion that *Home Savings* established only the first of taxpayer's three "undisputed material facts": that Home had contracted with FSLIC. (Doc. 53 at 11 & n.13.) The Government maintained that the case had not established that Home had received the Rights from FSLIC (as opposed to the Bank Board) or that Home had "paid for" the Rights by assuming liabilities, much less those of FSLIC. (*Id*. at 8, 11.) Taxpayer countered 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." (Doc. 61 p.3.) Taxpayer also asserted that the furnishing of consideration by Home – a necessary incident of that contract –

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[11] In that regard, the Government asserted that "*Winstar* does not speak to the issue of whether the RAP right constituted financial assistance provided by the FSLIC for purposes of § 597." (Doc. 51 at 22.) *See* note 10, *supra* p. 22.

established that "Home's consideration [for the Rights] was its assumption of FSLIC's liability." (*Id.* at 5.)

4. The District Court's opinion

The District Court granted the Government's motion and denied taxpayer's motion. (ER 3-18.) As a threshold matter, the court concluded that *Winstar* and *Home Savings* "do not have preclusive effect upon the precise issues in this case." (ER 9.)[12] Regarding the latter case, the court remarked:

> *Home Savings* conclusively established that the promise of supervisory goodwill, conveyed by [Bank Board] 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 [Home] indisputably acquired in a contract with the FSLIC.

(*Id.*) The court further observed that even if, as taxpayer argued, *Winstar* established that FSLIC was authorized to convey the RAP right under 12 U.S.C. § 1729(f) (the provision referred to by § 597(a)),

[12] Although the court discussed both *Winstar* and *Home Savings* under the heading "Collateral Estoppel" (ER 8), *Winstar* does not implicate that doctrine, since nonmutual offensive collateral estoppel does not apply against the Government. *See United States v. Mendoza*, 464 U.S. 154, 162-63 (1984).

the question – to which "[n]either *Winstar* or *Home Savings* provide the answer" – 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)] . . . .' " (ER 10, 14 [alterations in second quotation in original].)

Turning to the merits, the court rejected taxpayer's cost-basis theory. Although taxpayer "repeatedly assert[ed] 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 rejected this theory as "double-counting." (ER 11.) The court continued:

> [W]hile the [Government] had an undeniable interest in Home's acquisition of the failing thrifts, [FSLIC] 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.

(*Id.*) Recognizing that the Government did not "conve[y] the Rights for nothing," the court reasoned that the consideration provided by Home for the Rights (and for other "carrots" contained in the Assistance Agreement) was its promise to acquire the failing thrifts. (*Id.*)

The court then rejected taxpayer's "fair market value" basis theory on the ground that the Rights were not "money or other property" within the meaning of § 597. (ER 15.) The court reasoned that both the statutory language (referring to an *amount* of money or other property) and its legislative history (containing repeated references to "financial assistance") support the conclusion that § 597 applied only to FSLIC assistance that was financial in nature. (ER 15-16.) The court also rejected taxpayer's argument that "there is no legal or policy-based reason to treat the Rights differently from financial assistance for the purpose of applying Section 597," concluding that "there is nothing illogical about treating regulatory benefits differently than cash for tax accounting purposes." (ER 17.) In any event, the court reasoned, "it is not within the Court's authority or capacity to somehow improve on the policy choices set forth in the statute." (*Id.*)

Taxpayer now appeals.

SUMMARY OF ARGUMENT

1. The District Court correctly held that Home did not obtain a cost basis in the Rights under § 1012 of the Code. As the court recognized, the basic premise of taxpayer's cost-basis theory – that Home "purchased" the Rights by assuming liabilities of the "seller"

(FSLIC) – fails for the simple reason that Home indisputably did not assume any liabilities of FSLIC. Implicitly recognizing this flaw in its argument, taxpayer argues on appeal that Home purchased the Rights from FSLIC by assuming a portion of the liabilities of the target thrifts. This variation on the cost-basis theme, however, is inconsistent with both the documentation of the transaction and Home's tax reporting in accordance with that documentation.

Home structured its acquisition of Southern (which, in turn, had just acquired Hamiltonian and Security) as a merger of two federal S&Ls under applicable federal regulations. Under those regulations, and as contemplated in the merger agreement, Home succeeded to all of the assets and liabilities of Southern by operation of law. Moreover, Home reported the transaction on the Ahmanson group's 1981 consolidated federal income tax return as a tax-free reorganization described in § 368(a)(1)(G) of the Code, the benefits of which were statutorily conditioned, by § 368(a)(3)(D)(ii)(II), on Home's having assumed "substantially all" of Southern's liabilities as a result of the merger. Notwithstanding the foregoing, taxpayer insists that its modified cost-basis theory – which presupposes that Home assumed a portion of Southern's liabilities "outside the merger" in exchange for the

Government's provision of the Rights – reflects the "reality" of the transaction and is entirely consistent with the tax-free status of the merger under § 368(a)(1)(G). Its arguments are unavailing.

Apart from its questionable merit, taxpayer's appeal to what it deems to be "reality" is misplaced under the circumstances of this case. Taxpayer is poorly positioned to ask the court to recast the transaction Home actually carried out in the hope of obtaining additional tax benefits. Its predecessor having chosen to structure the acquisition of Southern as a merger (and to receive the tax benefits that were attendant to that chosen form), taxpayer may not now disavow that form. Taxpayer's attempts, moreover, to demonstrate why its posited bifurcation of Home's assumption of Southern's liabilities *should* be deemed compatible with § 368(a)(1)(G), aside from being wrong in theory, cannot be squared with the plain language of the statutory requirement, in § 368(a)(3)(D)(ii)(II), that Home have assumed "substantially all" of Southern's liabilities as a result of the merger, rather than outside of it.

2. The District Court also correctly held that Home did not obtain a fair-market-value basis in the Rights. Taxpayer's fair-market-value theory is premised on Home's receipt of the Rights falling within

the ambit of § 597(a) of the Code, which applied only to "money or other property received from [FSLIC] pursuant to [12 U.S.C. § 1729(f)]." Section 1729(f), however, listed only financial forms of assistance. To the extent the scope of the § 1729(f) assistance referenced in § 597 can be deemed ambiguous, it is clear that Congress intended § 597 to apply only to FSLIC *financial* assistance, rather than to regulatory concessions such as the Rights. That intent is clear from the title of the § 597 ("FSLIC Financial Assistance"), the title of the enacting statute (which was identical), the legislative history, and the language of the effective-date provision.

There are two additional reasons why § 597 did not apply to Home's receipt of the Rights. First, the Rights were not "received from" FSLIC, as § 597(a) expressly requires. Rather, the Bank Board granted them pursuant to resolutions that were incorporated by reference into the Assistance Agreement between FSLIC and Home. Although the District Court did not resolve the parties' disagreement on this point, it correctly rejected taxpayer's contention that the *Home Savings* court "necessarily held" that Home received the RAP right from FSLIC. In short, the fact that the Bank Board resolutions granting the Rights became enforceable promises by dint of their incorporation by reference

into the Assistance Agreement (as the court in *Home Savings* held) does not alter the fact that the Rights originated from the Bank Board, not FSLIC.

Second, even if Home could be deemed to have received the Rights from FSLIC, it would not have received them pursuant to 12 U.S.C. § 1729(f), as required by § 597(a) of the Code. Although taxpayer acknowledges that § 1729(f) listed only financial forms of assistance, it erroneously contends that the courts, Congress, and even the Bank Board broadly interpreted the provision as encompassing non-financial forms of assistance as well. In particular, taxpayer contends that the Supreme Court in *Winstar* "held" that the RAP right at issue there was granted under the authority of § 1729(f). A close reading of the passage relied upon by taxpayer, however, reveals that taxpayer's textual claim is based on its own inference rather than on any definitive statement by the Court. The Court in *Winstar* also cited FSLIC's general contract-making authority under 12 U.S.C. § 1725(c), which is a likelier source of the power. And in any event, the context of that passage establishes that it is *dictum*, since it is not necessary to any of the Court's holdings in the case.

As demonstrated below, taxpayer's arguments that both Congress and the Bank Board viewed 12 U.S.C. § 1729(f) as the statutory authority for granting branching rights as well are easily refuted. Moreover, the 1982 amendments to the National Housing Act affirmatively establish that, consistent with the types of assistance actually listed in § 1729(f), FSLIC assistance under that provision was limited to financial assistance. Taxpayer's reliance on § 597 in support of its fair-market-value basis theory is therefore misplaced.

The decision of the District Court is correct and should be affirmed.

ARGUMENT

The District Court correctly held that Home was not entitled to loss or amortization deductions respecting the Rights because it had no "basis" in them

Standard of review

This Court reviews *de novo* a grant of summary judgment. *E.g., Charles Schwab & Co., Inc. v. Debickero,* 593 F.3d 916, 918 (9th Cir. 2010).

A. Introduction

1. The concept of "basis" for tax purposes

The term "basis" refers to the amount treated as a taxpayer's capital stake in an asset for income tax purposes. It is taken into account for tax purposes as an offset to the amount realized (or as a measurement of loss) upon the disposition of the asset, or, in the case of certain business and investment assets, in the form of depreciation or amortization deductions over the life of the asset. *See In re Lilly*, 76 F.3d 568, 572 (4th Cir. 1996). The general rule is that a taxpayer's initial basis in an asset is equal to the cost of acquiring the asset. I.R.C. § 1012. For these purposes, the term "cost" generally includes any assumption of the seller's liabilities. *See, e.g., Commissioner v. Oxford Paper Co.*, 194 F.2d 190, 192 (2d Cir. 1952).

In the case of an asset received as compensation for services, the taxpayer's basis, or "tax cost," is equal to the fair market value of the property received, because the latter is the amount includible in the taxpayer's income for the year of receipt.[13] *See* I.R.C. § 61(a)(1); Treas.

[13] "The term 'tax cost' is often used as a descriptive label for the basis of property that was not purchased in a conventional sense but whose fair market value was included in the taxpayer's gross income."

(continued...)

Reg. § 1.61-2(d)(1), (2)(i) (26 C.F.R.). Likewise, the basis of property received in other types of taxable transactions is generally the fair market value of the property received (which, in the case of a taxable exchange of property, will equal the sum of (1) the taxpayer's adjusted basis in the relinquished property, and (2) any gain recognized by the taxpayer on the exchange). *See United States v. Davis*, 370 U.S. 65, 73 (1962) (basis of divorcing wife in property received in exchange for marital rights was property's fair market value); *Philadelphia Park Amusement Co. v. United States*, 126 F. Supp. 184, 188-89 (Ct. Cl. 1954) (basis of property received in taxable exchange is the fair market value of property received).

Special basis rules apply when a corporation receives property in connection with a tax-free reorganization described in § 368 or as a tax-free contribution to capital within the meaning of § 118. The general rule in these situations is that the recipient corporation succeeds to the basis of the property in the hands of the transferor ("carryover basis"), increased by the amount of gain (if any) recognized by the transferor on

[13] (...continued)
2 Bittker & Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 41.2.5, at 41-24 (3d ed. 1999).

the transfer. I.R.C. § 362(a)(2), (b). The basis of property received by a corporation as a contribution to capital from a nonshareholder, however, is zero. I.R.C. § 362(c)(1). Moreover, if a nonshareholder contribution to capital takes the form of cash, then the recipient corporation must reduce the basis of any property it acquires with that cash in the ensuing 12-month period by the amount of the contribution (or, if any of the cash is not so spent, reduce the basis of other assets *pro tanto*). I.R.C. § 362(c)(2).

Taxpayer contends that one other special basis rule – that provided in § 597(b) – is relevant here. Under § 597(b), "[n]o reduction in the basis of assets of a [thrift] or bank shall be made on account of money or other property received under the circumstances referred to in subsection (a)." And under § 597(a), "[g]ross income of a [thrift] does not include any amount of money or other property received from [FSLIC] 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."

2. Tax-free reorganizations

As a general matter, neither a corporation that is a party to a "reorganization" nor a shareholder thereof recognizes gain or loss on

qualifying exchanges undertaken pursuant to the plan of reorganization. I.R.C. §§ 354(a)(1), 361(a). As indicated above, a corporation that acquires assets in such a tax-free reorganization generally takes a carryover basis in the assets. I.R.C. § 362(b).

Section 368(a)(1) defines the term "reorganization" for these purposes in terms of seven transactions that, in tax parlance, are commonly identified by the letter assigned to the subparagraph in which they are described. Under this nomenclature, a "G" reorganization is a court-approved transfer by a corporation of all or part of its assets to another corporation in a bankruptcy, receivership, foreclosure, or similar judicial proceeding, provided generally that the owners of the transferor corporation receive stock or securities of the transferee corporation pursuant to the plan of reorganization. I.R.C. § 368(a)(1)(G), (a)(3)(A), (a)(3)(B). In the case of a receivership, foreclosure, or similar proceeding before a federal or state agency involving a financial institution, the agency is treated as a court for these purposes. I.R.C. § 368(a)(3)(D). Under former § 368(a)(3)(D)(ii), a transfer of assets by an S&L could qualify as a "G" reorganization even if its owners did not receive stock or securities of the transferee corporation, but only if (1) the S&L transferred substantially all of its

assets to the transferee corporation, (2) substantially all of the liabilities of the transferring S&L immediately before the transfer became liabilities of the transferee corporation as a result of the transfer, and (3) the Bank Board or FSLIC (or the equivalent state authority) certified the existence (or imminent existence) of a ground for appointing a receiver for the transferor S&L specified in 12 U.S.C. § 1464(d)(6)(A)(i) (insolvency), (ii) (dissipation of assets), or (iii) (unsafe or unsound business conditions). *See* I.R.C. § 368(a)(3)(D)(ii)(I), (D)(ii)(II), (D)(ii)(III) (1982).

B. The District Court correctly held that Home did not have a cost basis in the Rights

1. Having assumed no liabilities of FSLIC, Home cannot ascribe any "cost" basis to the Rights

Taxpayer's argument below that Home obtained a cost basis in the Rights by assuming liabilities of the purported "seller" – FSLIC – is demonstrably wrong. The only liabilities that Home assumed in connection with its acquisition of the target thrifts were those of the thrifts, not FSLIC. To be sure, in doing so, Home undeniably lessened FSLIC's insurance risk, since Home's acquisition of the failing thrifts prevented FSLIC from having to make good on their deposits to the

extent necessary. As the District Court correctly recognized, however, that circumstance "falls far short of demonstrating that 'Home assumed FSLIC's liability.' " (ER 11.)

On appeal, taxpayer apparently concedes that Home did not assume any liabilities of FSLIC, positing instead that Home "eliminate[d] FSLIC's impending exposure as insurer of the deposits" (Br. 21) and thereby "enabled FSLIC to protect the cash position of its deposit insurance fund" (*id.* at 20). These descriptions are accurate and confirm what is evident from the record: Home simply did not assume any liabilities of FSLIC.

2. Taxpayer's contention that Home assumed some of the liabilities of the target thrifts in exchange for the Rights is inconsistent with the transaction documents and with Home's reporting of the merger as a tax-free "G" reorganization

Unable to square its initial cost-basis theory with the record, taxpayer pivots on appeal, arguing that Home actually received the Rights in exchange for its assumption of a part of the liabilities of the target thrifts. This theory, however, does not jibe with the

documentation of the transaction or with Home's treatment of its merger with Southern as a tax-free "G" reorganization.[14]

a. Home could not have assumed substantially all of the liabilities of Southern pursuant to the merger while assuming a portion of those liabilities outside the merger in exchange for the Rights

As indicated above, if the acquiring corporation in a FSLIC-assisted merger did not issue stock or securities as part of the transaction, the transaction could qualify as a tax-free "G" reorganization only if, *inter alia*, "substantially all of the liabilities of the [acquired thrift] immediately before the transfer bec[a]me, *as a result of the transfer* [of its assets to the acquiring corporation], liabilities of the [acquiring corporation]." I.R.C. § 368(a)(3)(D)(ii)(II) (1982). There is no dispute that Home did not issue stock or securities as part of its acquisition of Southern. (ER 57, 60, 135.) Accordingly, in order for the transaction to have qualified as a "G" reorganization, substantially all of Southern's liabilities immediately before the merger must have become liabilities of Home as a result of the merger.

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[14] Because the other target thrifts, Hamiltonian and Security, had merged with Southern just prior to Southern's merger with Home (ER 106-147), their liabilities, which had become those of Southern, were also assumed by Home.

Taxpayer's argument (Br. 32) that Home assumed a portion of Southern's liabilities "outside the framework of the merger" – *i.e.*, in exchange for the Rights – is clearly inconsistent with both the requirement of § 368(a)(3)(D)(ii)(II) and the transaction documents. If all of Southern's liabilities became liabilities of Home as a result of the merger (which they did), then there simply were no liabilities of Southern that Home could have assumed outside the framework of the merger. All of taxpayer's arguments to the contrary run headlong into the plain language of § 368(a)(3)(D)(ii)(II).

Consider, for instance, taxpayer's assertion (Br. 33) that "there is no inconsistency between 'G' reorganization treatment for the assets obtained in the merger and assigning a cost basis to the Rights obtained from the government outside the merger." Quite the opposite is true. If, as taxpayer contends, Home obtained that cost basis by assuming a portion of Southern's liabilities "outside the merger" in exchange for the Rights, then Home did not assume substantially all of Southern's liabilities pursuant to the merger and, under § 368(a)(3)(D)(ii)(II), the merger did not qualify as a "G" reorganization. Similarly, taxpayer asserts (Br. 34) that "[s]plitting costs for tax purposes between assets acquired from two parties is not unique to this

transaction." That may be so, but if Home split its assumption of Southern's liabilities between the assets acquired from Southern pursuant to the merger and the Rights acquired from the Government outside the merger, then Home did not assume substantially all of Southern's liabilities pursuant to the merger and, again, under § 368(a)(3)(D)(ii)(II), the merger did not qualify as a "G" reorganization.[15]

By structuring the Southern transaction as a tax-free "G" reorganization, Home obtained a significant tax benefit in the form of a carryover basis in the loans acquired from the target thrifts. Since that basis far exceeded the value of the loans, Home stood to (and did) generate substantial tax losses by selling the loans. (SER 27-28; SER 29, ll.19-23.) Home may not now recast the form of the transaction in derogation of § 368(a)(1)(G) in order to obtain an additional, unwarranted tax benefit. *See Commissioner v. Nat'l Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 149 (1974) ("This Court has

[15] In that regard, taxpayer's assertion that "[t]he reorganization rules are not concerned with the amount of the acquirer's costs," Br. 34, completely disregards the requirement of § 368(a)(3)(D)(ii)(II) that the acquiring corporation assume substantially all of the target's liabilities pursuant to the reorganization, not just the portion equal to the value of the assets acquired in the reorganization.

observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice . . . and may not enjoy the benefit of some other route he might have chosen to follow but did not.") (citations omitted).

b. Taxpayer misplaces its reliance on certain Revenue Rulings

Although taxpayer contends that two Revenue Rulings support its position that Home's receipt of the Rights must be viewed separately from its tax-free merger with Southern, those rulings actually stand for precisely the opposite proposition. In Revenue Ruling 73-233, 1973-1 C.B. 179, the two 20-percent shareholders of X Corp., *B* and *C*, refused to consent to the proposed tax-free merger of X Corp. into Y Corp. unless *A*, the 60-percent shareholder of X Corp., agreed to permit each of *B* and *C* to receive 25 percent (rather than 20 percent) of the Y Corp. shares to be issued to the X Corp. shareholders pursuant to the merger. *A* agreed and, to effectuate the agreement, transferred one-third of his X Corp. shares back to X Corp. as a contribution to capital, thereby reducing his ownership interest in X Corp. to 50 percent and increasing *B*'s and *C*'s respective ownership interests in X Corp. to 25 percent.

Although a taxpayer is generally held to the form of the transaction he executes, it is fundamental that the IRS is free to examine whether the substance comports with the form, *Higgins v. Smith*, 308 U.S. 473, 477 (1940), and whether a series of related transactions should be viewed as a whole, *Minnesota Tea Co. v. Helvering*, 302 U.S. 609, 613 (1938). To that end, the IRS ruled that *A*'s pre-merger relinquishment of a portion of his X Corp. shares to X Corp. "will not be considered independently of" the merger and the related agreement between *A*, *B*, and *C*. 1973-1 C.B. at 180. Accordingly, the IRS recast the transaction as a merger, followed by taxable transfers by *A* of some of the Y Corp. shares he received in the merger to *B* and *C*. Notably, recasting the ownership adjustments among the X Corp. shareholders in this manner was entirely consistent with the status of the merger as a tax-free "A" reorganization. *See* I.R.C. § 368(a)(1)(A) ("reorganization" includes "a statutory merger or consolidation"). In contrast, taxpayer's contention that Home assumed a portion of Southern's liabilities outside the merger in exchange for the Rights is, by reason of the "substantially all" requirement of § 368(a)(3)(D)(ii)(II), entirely *inconsistent* with the status of the merger as a tax-free "G" reorganization.

Revenue Ruling 70-140, 1970-1 C.B. 73, also cited by taxpayer, is even more helpful to the Government. In that ruling, *A* operated two businesses, one through his wholly-owned corporation, X Corp., and one as a sole proprietorship. Y Corp. wanted to acquire both businesses. Pursuant to an agreement with Y Corp., *A* transferred the assets of his sole proprietorship to X Corp. and then transferred all of his X Corp. shares to Y Corp. solely in exchange for shares of Y Corp. voting stock. *See* I.R.C. § 368(a)(1)(B) (stock-for-stock acquisition).

The IRS ruled that *A*'s transfer of assets to X Corp. – which, viewed in isolation, would not have triggered any gain to *A*, *see* I.R.C. § 351(a) – and the subsequent tax-free "B" reorganization "were part of a prearranged integrated plan and may not be considered independently of each other for Federal income tax purposes." 1970-1 C.B. at 73. Accordingly, the IRS recast the transaction as a taxable sale of the sole proprietorship's assets by *A* to Y Corp. in exchange for a portion of the Y Corp. shares *A* had received in the transaction, a tax-free exchange of *A*'s X Corp. shares for the remainder of the Y Corp. shares *A* had received in the transaction, and a tax-free contribution by Y Corp. of the sole proprietorship's assets it had purchased to its new wholly-owned subsidiary, X Corp. In taxpayer's words (Br. 36), "a

portion of the acquirer's stock received in the reorganization [was] carved out of the tax-free transaction and treated as an amount received for the sale of [the sole proprietorship's] assets." As was the case in Revenue Ruling 73-233, that carve-out is entirely consistent with the status of *A*'s exchange of X Corp. shares for the remaining portion of the Y Corp. shares in a tax-free "B" reorganization. *See* I.R.C. § 368(a)(1)(B). In contrast, if some of the liabilities assumed by Home in the Southern merger were to be carved out of the merger and treated as having been assumed by Home in exchange for the Rights, then, by reason of Home's need to have assumed "substantially all" of Southern's liabilities as a result of the merger in accordance with § 368(a)(3)(D)(ii)(II), the Southern merger would no longer qualify as a "G" reorganization.

c. Taxpayer's hypothetical substitution of a cash payment from FSLIC would not alter the foregoing analysis

Taxpayer states that if "FSLIC had offered a different inducement to Home to enter into the merger – namely, a cash payment instead of the Rights . . . there would be no question that Home would have a tax basis in the cash received from FSLIC . . . [and t]he "G" reorganization tax treatment of the thrift acquisition . . . would still be precisely the

same as occurred here." Br. 37 (emphasis added). Of course, under § 597(a), taxpayer actually did enjoy an exclusion from gross income for the financial assistance it received from FSLIC under the Assistance Agreement, and under § 597(b), it was relieved of any requirement to reduce its basis in its assets *pro tanto*. *See* I.R.C. § 362(c)(2). Hypothesizing a cash payment as a side inducement to enter into a deal, however, does not posit a situation comparable to taxpayer's theory that Home achieved a cost basis for the Rights by assuming a portion of Southern's liabilities outside of its merger with Southern.[16] Indeed, if the cash payment taxpayer hypothesizes had been made in exchange for Home's assuming a portion of Southern's liabilities outside the merger (rather than as an inducement to undertake the merger), then the transaction would have run afoul of the "substantially all" requirement of § 368(a)(3)(D)(ii)(II) (and therefore would not have qualified as a tax-free "G" reorganization) for precisely the same reason that an extra-merger assumption of liabilities in exchange for the Rights would have flunked that requirement.

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[16] Home would have had a full basis in any cash received as a side inducement to acquire the target thrifts, not under any cost-basis theory, but because cash (if denominated in the taxpayer's functional currency) always takes a basis equal to its face amount.

As a result, contrary to taxpayer's suggestion (Br. 37), the "difference in the form of the consideration" provided by the Government has no bearing whatsoever on its cost-basis argument. That argument fails not because the Government provided the Rights instead of cash, but because it presupposes that Home assumed a portion of Southern's liabilities outside the merger, in contravention of the "substantially all" requirement of § 368(a)(3)(D)(ii)(II). That is the "cogent basis" (*id.*) for denying Home a cost basis in the Rights.

C. The District Court correctly held that Home did not obtain a fair market value basis in the Rights by operation of § 597

In order to prevail on its alternative theory, taxpayer must establish (1) that Home received the Rights from FSLIC, (2) that FSLIC conveyed the Rights pursuant to 12 U.S.C. § 1729(f), and (3) that the Rights were "property" within the meaning of § 597(a). Taxpayer fails on all three fronts.

1. Home did not receive the Rights from FSLIC

Although the District Court did not resolve the issue whether Home received the Rights from FSLIC, it did reject taxpayer's argument that the *Home Savings* court "necessarily held" as much and

that its (taxpayer's) position was therefore established by collateral estoppel. (ER 9.) As the District Court remarked:

> 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. . . . With its use of the phrase "received . . . from FSLIC," [taxpayer] 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.

(ER 10 [second ellipsis in original].) Because taxpayer's opening brief does not "specifically and distinctly" contend that the District Court erred in rejecting its reading of *Home Savings* on this point or in rejecting its collateral estoppel argument in general,[17] the issue of collateral estoppel is deemed waived on appeal. *See, e.g., Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

The fact that the Rights were conveyed by the Bank Board, and not FSLIC, is evident from the transaction documents. The Assistance Agreement recited that FSLIC would "provide *indemnification and/or*

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[17] Indeed, taxpayer misleadingly suggests that the District Court ruled *favorably* on its collateral estoppel argument. *See* Br. 21-22 & n.2 (referring to the District Court's "acknowledge[ment]" of the binding nature of the *Home Savings* court's rulings and findings, and then erroneously referring to "[t]hese findings of a contractual arrangement in which *FSLIC* exchanged regulatory rights") (emphasis added).

financial assistance as set forth in this Agreement." (ER 175 (emphasis added).) This FSLIC-sourced assistance included indemnification against losses resulting from unreserved-for liabilities or arising out of legal challenges to the mergers or the Assistance Agreement; cash contributions equal to the negative net worth of each target thrift, including net appraised losses with respect to real estate and service corporations; indemnification for net appraised losses on real estate acquired by foreclosure during the 5-year term of the agreement; and indemnification for losses on specified "problem loans," all of which were to be accounted for through debits and credits to a special reserve account. (ER 180-85, 224.)

The Rights, on the other hand, emanated from the Bank Board. In resolutions dated December 17, 1981, the Bank Board made the determinations necessary to its approval of the establishment of Home's Florida and Missouri branches resulting from Home's acquisition of the target thrifts, approved the establishment of those branches, and conditionally approved the establishment of the additional Florida and Missouri branches for which Home had requested approval. (ER 211.) The Bank Board also provided a letter to Home indicating that future requests for permission to establish

branches in the Florida and Missouri would be processed as routine (intrastate) branching applications. (ER 215.)

Another December 17, 1981 Bank Board resolution (ER 213) provided that–

> the Bank Board hereby finds that the submission of Home concerning the accounting treatment to be afforded its acquisition of Southern . . . appropriately supports the application of the purchase method of accounting for the acquisition; and . . . hereby determines that it does not object to . . . the amount of any resulting intangible assets . . . being assigned to goodwill and initially amortized, in accordance with generally accepted accounting principles, over forty (40) years . . . .

This is the resolution that the *Home Savings* court identified as the source of the RAP right. *Home I*, 50 Fed. Cl. at 435-38 & nn.9 & 10. The fact that this resolution (and presumably the branching rights resolutions and letter) obtained the status of enforceable promises through incorporation by reference into a contract executed by FSLIC does not alter the fact that the Bank Board, and not FSLIC, bestowed the RAP right and the branching rights upon Home.[18]

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[18] As indicated *supra* at p. 5, FSLIC operated under the direction of the Bank Board, not the other way around. Accordingly, FSLIC could not have directed the Bank Board to issue the resolutions at issue.

2. Even if Home had received the Rights from FSLIC, it would not have received them pursuant to 12 U.S.C. § 1729(f)

As in effect at the time of the Southern transaction, 12 U.S.C. § 1729(f)(2), Addendum, *infra*, provided, in pertinent part, that in order to facilitate a takeover of a FSLIC-insured thrift in default (or in danger of default) by another FSLIC-insured thrift, whether accomplished by merger or consolidation or by purchase of assets and assumption of liabilities, FSLIC was authorized to–

> purchase any such assets or assume any such liabilities, or make loans to such other insured institution, or guarantee such other insured institution against loss by reason of its merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution in or in danger of default.

Taxpayer acknowledges (Br. 50, 51) that this provision lists only financial forms of assistance, while the Rights are nonfinancial forms of assistance. Taxpayer maintains, however, that "the courts, Congress, and the [Bank Board] have broadly interpreted section 1729(f)," such that "there is no question that its terms extend to non-financial forms of assistance like regulatory rights granted by FSLIC or the [Bank Board]." (*Id.*) Taxpayer is wrong.

a. Contrary to taxpayer's assertion, the Supreme Court did not hold that the RAP right at issue in *Winstar* was granted under the authority of 12 U.S.C. § 1729(f)

In *Winstar*, the Government argued, *inter alia*, that the federal thrift regulators "had no authority to bargain away Congress's power to change the law in the future, and that [the Court] should in any event find no such authority conferred without an express delegation to that effect." 518 U.S. at 888. The Court rejected the applicability of this line of argument: "The answer to the Government's contention . . . is that a contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty." *Id*. at 889; *see also ibid*. ("The same response answers the Government's demand for express delegation of any purported authority to fetter the exercise of sovereign power."). Since "there were no contracts to surrender the Government's sovereign power to regulate," the Court deemed the Government's arguments in this regard inapposite. *Id*. at 890; *see also id*. n.35.

Having thus disposed of the Government's "authority" argument, the Court could have stopped there and turned to "[t]he Government's

final line of defense . . . the sovereign acts doctrine." 518 U.S. at 891.

Instead, the Court added:

> There is no question, conversely, that the Bank Board and FSLIC had ample statutory authority to do what the Court of Federal Claims and the Federal Circuit found they did do, that is, promise to permit respondents to count supervisory goodwill and capital credits toward regulatory capital and to pay respondents' damages if that performance became impossible. The organic statute creating FSLIC as an arm of the Bank Board, 12 U.S.C. § 1725(c) (1988 ed.) (repealed 1989), generally empowered it "[t]o make contracts," and § 1729(f)(2), enacted in 1978, delegated more specific powers in the context of supervisory mergers: . . .

Id. at 890 (first alteration in original) (fn. ref. omitted). After quoting 12 U.S.C. § 1729(f)(2), the Court then stated:

> Nor is there any reason to suppose that the breadth of this authority was not meant to extend to contracts governing treatment of regulatory capital. Congress specifically recognized FSLIC's authority to permit thrifts to count goodwill toward capital requirements when it modified the National Housing Act in 1987:
>
>> "No provision of this section shall affect the authority of the [FSLIC] to authorize insured institutions to utilize subordinated debt and goodwill in meeting reserve and other regulatory requirements." 12 U.S.C. § 1730h(d) (1988 ed.) (repealed 1989).

Id. at 890-91 (alteration in original). The Court also noted that the language of an attendant 1987 committee report was to the same effect (albeit couched in terms of the Bank Board's authority). *Id.* at 891.

The Court closed by reiterating that "[t]here is no serious question that FSLIC (and the Bank Board acting through it) was authorized to make the contracts in issue." *Id.*

There are two problems with taxpayer's characterization (Br. 51) of the foregoing discussion in *Winstar* as "holding that the RAP right at issue [in *Winstar*] was granted under the authority of section 1729(f)." First, the only thing the Court definitively stated was that the federal regulators were statutorily authorized to grant the RAP right. Taxpayers construe the Court's reference to 12 U.S.C. § 1729(f)(2) as establishing that the Court viewed the provision as an independent source of authority for granting the RAP right. But it is just as plausible to conclude that the Court merely viewed § 1729(f)(2) as indicative of Congressional intent to encourage FSLIC-assisted takeovers of troubled thrifts. If so, then the general grant of contractual authority in § 1725(c) – which was also cited by the Court – may plausibly be considered the source of authority to grant the RAP right. Notably, § 1729(f)(2) could not have been the statutory source of authority with respect to the RAP right granted in two of the three cases before the Court in *Winstar*, since the acquiring entities in those cases, Winstar Corporation and The Statesman Group, Inc., were not

"insured institutions" as required by § 1729(f)(2). Moreover, the 1987 statutory amendment and legislative history cited by the Court as indicative of the regulators' authority to grant the RAP right do not identify the statutory source of that authority.[19]

In any event, the Court's discussion of the statutory source of the regulators' authority to grant the RAP right is clearly *dictum*, since it is in no way necessary to any of the Court's holdings. As the Court explained:

> We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here … [including] the rule that an agent's authority to make such surrenders [of sovereign authority] must be delegated in express terms, [and] the doctrine that a government may not, in any event, contract to surrender certain reserved powers . . . ."

518 U.S. at 860 (citations omitted). Once the Court determined that the contracts at issue were simply "promises to make good any losses arising from subsequent regulatory changes," and therefore did not

[19] Similarly, the Court's observation that there is "[no] reason to suppose that the breadth of this authority was not meant to extend to contracts governing treatment of regulatory capital," 518 U.S. at 890, does not specify whether "this authority" refers to FSLIC's contractual authority under 12 U.S.C. § 1725(c) or its assistance authority under 12 U.S.C. § 1729(f)(2).

implicate either of the cited rules, *id*. at 889, its adjudicatory task on that front was complete, and the ensuing discussion of statutory authority is *dictum*. Even if the Court's conclusion that the regulators were statutorily authorized to grant the RAP right is considered necessary to its holding in the case, the case certainly did not require the Court to determine the exact locus of that authority.

b. The 1982 amendments to the National Housing Act confirm that the Rights were not granted pursuant to 12 U.S.C. § 1729(f)

Not only does *Winstar* fail to preclude a finding that 12 U.S.C. § 1729(f) was not the source of authority to grant the RAP rights, the 1982 amendments to 12 U.S.C. §§ 1729(f) and 1730a – enacted just 10 months after the consummation of the Southern transaction – demand such a finding. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, §§ 122(a), 123(a), 96 Stat. 1469, 1480, 1483 (the "1982 Act"). As indicated above, taxpayer essentially argues that, although the types of assistance described in § 1729(f)(2) were clearly of a financial nature, nothing in that provision specifically limited the authorized assistance to financial types of assistance or otherwise precluded a broad interpretation of the statute as authorizing other, nonfinancial forms of assistance as well. The 1982 Act, however,

redesignated the existing § 1729(f)(3) as § 1729(f)(4) and inserted the following new § 1729(f)(3):

> (3) [FSLIC] may provide any person acquiring control of, merging with, consolidating with or acquiring the assets of an insured institution under section 1730a(m) of this title with *such financial assistance as it could provide an insured institution under this subsection.*

12 U.S.C. § 1729(f)(3) (1982) (emphasis added). Section 1730a(m) – also added by the 1982 Act – authorized FSLIC, in times of financial instability, to approve takeovers of ailing insured thrifts not only by other insured thrifts, but by "any company." 12 U.S.C. § 1730a(m)(1)(A)(i) (1982).

If, as taxpayer maintains, § 1729(f)(2) was not limited to financial assistance, then, given the specific reference to financial assistance in § 1729(f)(3), one must conclude that Congress intended to authorize financial and nonfinancial assistance in connection with takeovers described in § 1729(f)(2), but only financial assistance in the case of takeovers described in § 1730a(m). This scenario is all the more unlikely in light of the fact that takeovers of insured thrifts by other insured thrifts could be described in both § 1729(f)(2) *and* § 1730a(m). Accordingly, the only sensible reading of § 1729(f)(2), as suggested by the types of assistance it described, as well as Congress's nearly

contemporaneous construction thereof by way of its 1982 addition of § 1729(f)(3), is that it did not authorize the types of nonfinancial assistance exemplified by the Rights. Rather, the statutory authority for such nonfinancial assistance is derived from some other provision – presumably 12 U.S.C. § 1725(c) or a similar broad grant of authority.

This reading of § 1729(f)(2) is further confirmed by the addition of 12 U.S.C. § 1730a(m) by the 1982 Act. As indicated above, § 1730a(m) granted FSLIC broad authority to approve takeovers of ailing insured thrifts in times of financial instability. 12 U.S.C. § 1730a(m)(1)(A)(i) (1982). Subject to exceptions not relevant here, this authority was exercisable "[n]otwithstanding any [other] provision . . . of Federal law." *Id*. One of the other provisions of Federal law that § 1730a(m) overrode was § 1730a(e)(3), which at the time prohibited FSLIC from approving an interstate acquisition of a thrift. 12 U.S.C. § 1730a(e)(3) (1982). In effect, then, § 1730a(m) authorized FSLIC to grant interstate branching rights in connection with supervisory mergers. *See* H.R. Conf. Rep. No. 100-261, at 139 (1987), *reprinted in* 1987 U.S.C.C.A.N. 588, 608 (recognizing FSLIC's existing authority to approve interstate acquisitions under § 408(m) of the National Housing Act, *i.e.*, 12 U.S.C. 1730a(m)). Notably, the authority granted by § 1730a(m) extended to

takeovers of thrifts that were "eligible for assistance pursuant to section 1729(f) of this title." 12 U.S.C. § 1730a(m)(1)(A)(i) (1982). But if, as taxpayer maintains, FSLIC was already authorized to grant interstate branching rights pursuant to § 1729(f), then there would have been no need for the separate grant of authority in § 1730a(m).[20] And, given this clear indication in § 1730a(m) that Congress in 1982 did not consider interstate branching rights as being § 1729(f) assistance, there is no reason to suspect that it considered other nonfinancial assistance, such as RAP rights, as being so either.

c. There is no merit to taxpayer's contention that both the Bank Board and Congress recognized 12 U.S.C. § 1729(f) as the source of authority for granting branching rights in this context

On the subject of branching rights, taxpayer asserts (Br. 46-47) that both the Bank Board and Congress recognized 12 U.S.C. § 1729(f) as the statutory source of authority for granting such rights in connection with supervisory mergers. Taxpayer is wrong.

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[20] Although FSLIC was not specifically authorized (under 12 U.S.C. § 1729(f) or otherwise) to grant interstate branching rights in December, 1981, the Bank Board undoubtedly was authorized to do so. *See* Statement of Policy Amendment Regarding Supervisory Mergers and Acquisitions, 46 Fed. Reg. 19,221 (Mar. 30, 1981) ("the Board has authority to approve interstate acquisitions in supervisory cases").

Taxpayer erroneously claims (Br. 46) that the Bank Board "identified section 1729 as the source of . . . authority to provide branching rights to assist supervisory mergers" by including § 1729 in an unlabeled list of citations that taxpayer labels the "citation of statutory authority" at the close of FHLBB Resolution No. 81-157. That resolution amended Bank Board policy regarding interstate branching in the context of supervisory mergers. *See* Statement of Policy Amendment Regarding Supervisory Mergers and Acquisitions, 46 Fed. Reg. 19,221, 19,222 (Mar. 30, 1981) (amending 12 C.F.R. § 556.5). The list of citations to which taxpayer refers is obviously not a "citation of statutory authority," since the list of citations prefacing (and specifically labeled as authority for) 12 C.F.R. Part 556 (1982), which incorporates the above-referenced amendments, does not include 12 U.S.C. § 1729. Moreover, Resolution 81-157 itself makes it clear that, inasmuch as the existing regulatory prohibition against interstate branching was qualified by the word "generally," the Bank Board already "ha[d] authority to approve interstate acquisitions in supervisory cases," and the amendments merely set forth "policy guidelines regarding factors [the Bank Board] will consider when deciding whether to exercise this authority." 46 Fed. Reg. at 19,221; *see*

note 20, *supra* p. 59. Accordingly, taxpayer's assertion (Br. 46) that the Bank Board "understood that section 1729 was the statutory authority for . . . [the] provision of assistance in the form of branching rights to facilitate these mergers" simply does not hold up.

Taxpayer's related contention (Br. 47) that Congress, too, recognized in 1987 "that . . . assistance . . . in the form of . . . branching rights was provided pursuant to section 1729(f)" likewise does not withstand scrutiny. Taxpayer notes (Br. 46-47) that H.R. Conf. Rep. No. 100-261 (1987), discussed *supra* at p. 58, refers to FSLIC's existing authority to approve interstate acquisitions "under 406(f) *or* 408(m) of the National Housing Act [12 U.S.C. §§ 1729(f), 1730a(m)]." *Id*. at 139 (emphasis added). But as explained above, § 408(m) of the National Housing Act, 12 U.S.C. § 1730a(m), disproves taxpayer's § 1729(f) argument altogether. The suggestion in the 1987 Conference Report that branching rights could be granted under § 1729(f) independently of § 1730a(m) is therefore refuted by § 1730a(m) itself.[21]

[21] Since the authority in § 1730a(m) was conditioned on a thrift's eligibility for assistance under § 1729(f), *see supra* pp. 58-59, the mistake in the 1987 Conference Report could be attributable to something as innocuous as an inadvertent substitution of the word "or" for the word "and."

3. Even if 12 U.S.C. § 1729(f) could be construed as authorizing nonfinancial assistance, the reference to § 1729(f) assistance in § 597(a) must be construed as being limited to financial assistance

As the District Court correctly recognized (ER 10), the issue whether 12 U.S.C. § 1729(f), rather than some other statute, authorized the granting of the Rights is ultimately beside the point, since the real issue is whether the Rights were "other property received from [FSLIC] pursuant to [12 U.S.C. § 1729(f)]" within the meaning of § 597(a). As we have just shown, there are compelling reasons to conclude that § 1729(f) was not the source of authority to grant the Rights. But at the very least, the term "money or other property received from [FSLIC] pursuant to [12 U.S.C. § 1729(f)]" in § 597(a) is ambiguous. And any such ambiguity is swept away by the legislative history of § 597, not to mention its very title (as enacted): "FSLIC Financial Assistance."

Before turning to the legislative history of § 597, we address taxpayer's erroneous contention (Br. 48 n.6) that "[t]he court correctly observed that no weight should attach to the fact that section 597 is titled 'FSLIC Financial Assistance.'" The court said no such thing; it merely recited the parties' arguments on this issue. (ER 14 n.2.) In

that regard, it is not at all clear that § 7806(b),[22] the provision cited by taxpayer, serves to abrogate (in the context of the Internal Revenue Code) the normal rule that "[t]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Porter v. Nussle*, 534 U.S. 516, 527-28 (2002) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (internal quotation marks omitted)). *Compare United States v. Thayer*, 201 F.3d 214, 221 (3d Cir. 1999), *Chernin v. United States*, 149 F.3d 805, 815-16 (8th Cir. 1998), *and Reese v. United States*, 24 F.3d 228, 231 (Fed. Cir. 1994) (consulting the titles of §§ 7202, 1341, and 104, respectively), *with Alcoa, Inc. v. United States*, 509 F.3d 173, 181 n.7 (3d Cir. 2007) (citing § 7806(b) in declining to rely on title of § 1341). In any event, as discussed below, the legislative history is sufficiently clear to make reliance on the title of § 597 unnecessary.

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[22] "(b) ARRANGEMENT AND CLASSIFICATION. – No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law."

Congress added § 597 to the Code as part of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 244(a), 95 Stat. 172, 255 ("ERTA"). ERTA § 244 – which is not part of the Code and therefore could not be subject to § 7806(b) – was also entitled "FSLIC Financial Assistance," and ERTA § 246(c) made § 244 thereof applicable "to any *payment* made on or after January 1, 1981." 95 Stat. at 256 (emphasis added). The Conference Committee report explained that the provision applied to money or property contributed to a thrift by FSLIC "under its financial assistance program" and applied to "assistance payments" whether or not the thrift issued any debt or equity instrument in exchange therefor. H.R. Conf. Rep. No. 97-215, at 284 (1981), *reprinted in* 1981-2 C.B. 481, 526. The report added that no inference was intended regarding the proper tax treatment of FSLIC "assistance payments" under prior law. *Id.*; *see also* Staff of the Joint Comm. on Taxation, 97th Cong., *General Explanation of the Economic Recovery Tax Act of 1981* (Comm. Print 1981), at 151-52 (noting that FSLIC often aided ailing thrifts through "contributions of funds" to those thrifts or by "contribut[ing] money" to a healthy thrift as an inducement to merge with the ailing thrift, and remarking that "Congress concluded that the tax laws should be modified to facilitate providing of *financial*

assistance by the FSLIC and mergers of financially troubled institutions into stronger institutions") (emphasis added).

The title of ERTA § 244, its applicability to *payments* made after 1980, and the repeated references in the legislative history of § 597 to "financial assistance," "payments," and the like overwhelmingly establish that Congress understood the term "money or other property received from [FSLIC] pursuant to [12 U.S.C. § 1729(f)]" as used in § 597(a) to refer to financial assistance. Had Congress intended § 597(a) to apply to nonfinancial, as well as financial, forms of FSLIC assistance, it could have done so. But it did not. As for taxpayer's lament (Br. 54) that Congress should have afforded the same tax treatment for financial and nonfinancial forms of assistance, we concur in the District Court's observation that "it is not within the Court's authority or capacity to somehow improve on the policy choices set forth in the statute." (ER 17.)

CONCLUSION

For the foregoing reasons, this judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for the United States respectfully inform the Court that they are not aware of any related cases pending before this Court.

ADDENDUM

United States Code:

12 U.S.C. (Supp. V 1981):

§ 1729. Liquidation of insured institutions

* * * * *

(f) Loans and purchases by Corporation

(1) In order to prevent a default in an insured institution or in order to restore an insured institution in default to normal operation, the Corporation is authorized, in its discretion and upon such terms and conditions as it may determine, to make loans to, to purchase the assets of, or to make a contribution to, an insured institution or an insured institution in default.

(2) Whenever an insured institution is in default or, in the judgment of the Corporation, is in danger of default, the Corporation may, in order to facilitate a merger or consolidation of such insured institution with another insured institution or the sale of the assets of such insured institution and the assumption of its liabilities by another insured institution and upon such terms and conditions as the Corporation may determine, purchase any such assets or assume any such liabilities, or make loans to such other insured institution, or guarantee such other insured institution against loss by reason of its merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution in or in danger of default.

(3) No contribution or guarantee shall be made pursuant to paragraphs (1) or (2) of this subsection in an amount in excess of that which the Corporation finds to be reasonably necessary to save the cost of liquidating such insured institution in or in danger of default, but if the Corporation determines that the continued operation of such institution is essential to provide adequate savings or home financing services in its community,

such limitation upon the amount of a contribution or guarantee shall not apply.

26 U.S.C. (1982):

§ 368. Definitions relating to corporate reorganizations

(a) Reorganization

(1) In general. – For purposes of parts I and II and this part, the term "reorganization" means –

* * * * *

(G) a transfer by a corporation of all or part of its assets to another corporation in a title 11 or similar case; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356.

* * * * *

(3) Additional rules relating to title 11 and similar cases

(A) Title 11 or similar case defined. – For purposes of this part, the term "title 11 or similar case" means –

(i) a case under title 11 of the United States Code, or

(ii) a receivership, foreclosure, or similar proceeding in a Federal or State court.

* * * * *

(D) Agency proceedings which involve financial institutions

(i) For purpose[s] of subparagraphs (A) and (B) –

* * * * *

(II) In the case of a financial institution to which section 593 applies, the term "title 11 or similar case" means only a case in which the Board (which will be treated as the court in such case) makes the certification described in clause (ii).

(ii) A transaction otherwise meeting the requirements of subparagraph (G) of paragraph (1), in which the transferor corporation is a financial institution to which section 593 applies, will not be disqualified as a reorganization if no stock or securities of the corporation to which the asserts are transferred (transferee) are received or distributed, but only if all of the following conditions are met:

(I) the requirements of subparagraphs (A) and (B) of section 354(b)(1) are met with respect to the acquisition of the assets,

(II) substantially all of the liabilities of the transferor immediately before the transfer become, as a result of the transfer, liabilities of the transferee, and

(III) the Board certifies that the grounds set forth in section 1464(d)(6)(A)(i), (ii), or (iii) of title 12, United States Code, exist with respect to the transferor or will exist in the near future in the absence of action by the Board.

(iii) For purposes of this subparagraph, the "Board" means the Federal Home Loan Bank Board or the Federal Savings and Loan Insurance Corporation or, if neither has supervisory authority with respect to the transferor, the equivalent State authority.

*   *   *   *   *

§ 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).

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/s/ Arthur T. Catterall
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Attorney for Appellee

Dated: May 24, 2010

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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