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Carla Green

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RECENT DEVELOPMENTS IN THE FEDERAL TAX LAW TREATMENT OF NOMINEE CORPORATIONS

CARLA GREEN

I. INTRODUCTION

Nominee corporations are often used in business transactions, particularly real estate deals, for a variety of nontax reasons. For the purposes of this Comment, a nominee corporation is defined as a corporation that holds legal title to property while beneficial ownership remains in other parties or entities.¹ The nontax reasons for employing a nominee corporation include the circumvention of interest rate limitations imposed by state usury laws upon noncorporate borrowers; avoidance of personal liability for loans obtained to acquire, improve, or refinance property in real estate ventures; protection from attachment by, or the claims of, creditors of the beneficial owners of the property transferred to the corporation; facilitation of management or conveyance of property owned by a group of investors; concealment of the identity of the beneficial owners of the property; and prevention of problems that might arise upon the death of an individual who held legal title to property in his own name.²

The use of a nominee corporation to hold title to property, while an effective arrangement for many purposes, may have significant adverse tax consequences. Property dealings between the corporation and its shareholders may result in taxable gains or losses of holding periods.³ More importantly, if the corporation is treated as a viable separate taxable entity and has not made a subchapter S election, income and losses from the property will be attributed to the corporation during the time it holds title to the property. Al-

¹ A variety of terms employed by writers to refer to what is herein called a “nominee corporation” include “conduit corporation,” “shell corporation,” “straw corporation,” and “dummy corporation.” Additionally, some writers define the term “nominee corporation” differently than it is defined in this Comment. The reader should pay close attention to the terminology and corresponding definitions employed in opinions and literature dealing with nominee corporations.


³ Miller, The Nominee Conundrum: The Live Dummy is Dead, but the Dead Dummy Should Live!, 34 TAX L. REV. 213, 214 (1979); Note, supra note 2, at 362-63.
though income from the property may eventually reach the shareholders through the dividend process, losses from the property will never reach the shareholders but will be trapped at the corporate level. Most business ventures depend heavily upon debt financing to provide needed capital. The resulting interest deductions, coupled with any available depreciation or accelerated cost recovery deductions, often produce sufficient tax losses to shelter income generated by the venture and income from other sources as well. The lost availability of such tax losses can have a devastating effect on taxpayers.

In an effort to escape these adverse tax consequences, taxpayers have presented two different arguments. The first argument advocates disregard of the nominee corporation for tax purposes on the theory that the corporation is too insubstantial and its activities are too insignificant to warrant its treatment as a separate taxable entity. This theory is commonly referred to as the "disregard theory." The second approach admits the existence of the corporation as a viable separate entity but argues that the corporation is the agent of the taxpayers and performs its activities under their direction and on their behalf. This approach is called the "agency theory."

The purpose of this Comment is to discuss recent developments in the federal tax law treatment of nominee corporations. The discussion focuses on a series of opinions by the Tax Court and federal circuit courts of appeal that highlight the present controversy over the proper tax treatment of these corporations. Both businessmen and tax practitioners are concerned with the tax consequences flowing from the use of nominee corporations. The following discussion is offered as an aid in determining not only what those consequences are but also what they should be.

II. BACKGROUND CONSIDERATIONS: Moline Properties and National Carbide

A discussion of nominee corporations necessarily begins with the consideration of two landmark Supreme Court cases, Moline

4. Miller, supra note 3, at 214; Note, supra note 2, at 363.
5. For an excellent discussion of the rudiments of tax shelters, see Weidner, Realty Shelter Partnerships in a Nutshell, 8 Ind. L. Rev. 899, 899-900 (1975).
6. See, e.g., Note, supra note 2, at 363; Comment, Corporate Agents and the Flow-Through of Tax Advantages, 12 Seton Hall L. Rev. 798, 798-99 (1982). Differences in terminology as discussed at supra note 1 may be encountered in discussions of these theories.
These two cases are frequently cited and quoted in nominee corporation cases. An understanding of their facts, holdings, and dicta will provide an important background for the discussion of recent developments.

*Moline Properties* involved the use of a nominee corporation as a security device. Under an arrangement suggested by the mortgagee of certain property owned by Uly Thompson, Thompson formed the taxpayer corporation. Thompson conveyed the property to the corporation, which assumed his mortgages. In exchange, Thompson received stock in the nominee corporation. Thompson transferred the stock to a voting trustee, who held the stock as security for an additional loan made by the mortgagee to Thompson. Thompson later repaid the loan and refinanced the mortgages with a different mortgagee, and the stock was transferred back to Thompson. Following these transactions, the property was sold. Part of the sale proceeds was used to pay off the new mortgage liability and the remainder was received by the taxpayer.9

The corporation conducted no activity following the final sale of the property. Prior to the sale, the corporation's activities consisted of assuming one of Thompson's obligations, defending condemnation proceedings, instituting a lawsuit to remove prior restrictions on the property, and leasing a portion of the property for use as a parking lot. The corporation kept no books, maintained no bank account, and owned no assets other than the property. The corporation originally reported the gain from the sale of the property, but Thompson later filed a refund claim on behalf of the corporation and attempted to report the gain as income taxable to himself.10

The Supreme Court rejected the taxpayer's position that the corporation should be disregarded and held that the corporation had a tax identity distinct from its sole stockholder.11 Declining to rule that a corporation could never be disregarded, the Court instead laid down a test which focuses on the purpose and activities of the corporation:

The doctrine of corporate entity fills a useful purpose in busi-

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9. 319 U.S. at 437.
10. Id. at 437-38.
11. Id. at 440.
ness life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.\textsuperscript{12}

The taxpayer in \textit{Moline Properties} argued not only the disregard theory but also that the corporation was the sole stockholder's agent. The Court, however, found no agency contract or any of the "usual incidents of an agency relationship"\textsuperscript{13} and observed that "the mere fact of the existence of a corporation . . . does not make the corporation the agent of its stockholders." For these reasons, the question of agency turned on the same legal issues as did the question of identity. Therefore, the court rejected the agency argument and held the income taxable to the corporation.\textsuperscript{14}

Six years after \textit{Moline Properties}, the Supreme Court revisited the nominee corporation issue in \textit{National Carbide Corp. v. Commissioner},\textsuperscript{15} in which the agency theory was central to the taxpayer's argument. In \textit{National Carbide}, the taxpayers were three wholly-owned subsidiaries of a parent corporation, which had an agency contract with each of the subsidiary corporations. The contracts provided that the subsidiaries were employed as agents to manage and operate production plants and to sell the output; the parent was to furnish capital, management, and office facilities. The subsidiaries agreed to pay the bulk of their profits to the parent. The parent reported the amounts paid to it by the subsidiaries as income, and the subsidiaries reported as their income the nominal amounts retained. The Commissioner notified the subsidiaries of deficiencies resulting from their failure to include amounts paid to the parent in their own income.\textsuperscript{16}

Rejecting the taxpayers' characterization of the relationship with the parent as an agency relationship, the Court held that the subsidiaries should be taxed on the combined amount of income paid to the parent and income retained.\textsuperscript{17} As in \textit{Moline Properties}, the Court ruled that the question of whether the arrangement between

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 438-39 (citations omitted).
\item \textsuperscript{13} \textit{Id.} at 440.
\item \textsuperscript{14} \textit{Id.} at 440-41.
\item \textsuperscript{15} 336 U.S. 422 (1949).
\item \textsuperscript{16} \textit{Id.} at 424-26.
\item \textsuperscript{17} \textit{Id.} at 439.
\end{itemize}
the parties contains the "usual incidents of an agency relationship" depends upon the same legal issues which are pertinent to the question of identity. The National Carbide Court's holding that the subsidiaries were not agents of the parent was apparently based upon the finding that the subsidiaries, and not the parent, held title to the income-producing assets and upon the Court's determination that the bulk of the subsidiaries' earnings was turned over to the parent "not because the latter could command this income if [the subsidiaries] were owned by third persons, but because [the parent owned] and thus completely dominate[d] the subsidiaries." Despite the finding that an agency relationship did not exist in that case, the National Carbide Court was careful to state:

What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor. Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent.

The Court in Moline Properties and National Carbide left open the possibility that a nominee corporation could, in an appropriate case, escape taxation as a separate entity. Such an outcome would permit income and losses to flow through the corporation to the beneficial owners of the property. In an effort to achieve this result, taxpayers over the years have attempted to properly structure their dealings with the nominee corporation, to appropriately document that relationship, and to carefully specify and monitor the corporation's activities. Until recently, however, taxpayers have enjoyed little success under either the disregard or the agency

18. Id. at 427.
19. Id. at 430.
20. Id. at 438. See Miller, supra note 3, at 247-48.
22. See supra notes 12, 21 and accompanying text.
theory.\textsuperscript{23}

The Moline Properties disregard theory has proven to be unavailing in most situations because “business activity” is so easily established by the government.\textsuperscript{24} For example, the existence of a corporation merely as a means of circumventing a state’s usury law restrictions on noncorporate borrowers\textsuperscript{25} has been held to constitute a sufficient business purpose to prevent a corporation from being disregarded as a separate entity for federal tax law purposes.\textsuperscript{26} The agency theory also has been frequently unavailing because of the position taken by some courts that failure under the disregard theory necessarily dictates failure under the agency theory\textsuperscript{27} and because of the manner in which some courts have interpreted and applied the National Carbide test. \textsuperscript{28} In several recent cases, however, taxpayers have abandoned the disregard theory by conceding the existence of the corporation as a viable entity and have focused their arguments on the agency theory.\textsuperscript{29} In some of these cases the taxpayers have prevailed. Thus the disregard theory currently offers little promise and, when argued alternatively with the agency theory, may hinder a taxpayer’s chances under the agency theory. On the other hand, the agency theory, particularly

\begin{footnotesize}
\begin{enumerate}
\item[24.] See Baker & Rothman, Straw Corporations: New Cases Shed Light on Tax-Recognition Criteria, 45 J. Tax’n 84, 86-87 (1976); Note, supra note 2, at 365; see also Commentary, supra note 2, at 665:

[T]he only time a corporation will be disregarded for tax purposes under the Moline Properties doctrine is when it serves no corporate business purpose with respect to the property it holds, but only takes and holds title to such property.

...[T]he business purpose in question must be one which is germane to the functioning of the corporation. The Moline Properties test becomes: Is the corporation required to carry out any functions with respect to the property transferred to it in order to carry out the business purpose of the beneficial owners? If the answer is “yes” the corporation will, much more often than not, be charged with the beneficial ownership of the property and the consequent tax burdens.

\textit{Id.} (footnotes omitted).
\item[25.] See Note, supra note 2, at 363.
\item[26.] E.g., Roccaforte v. Commissioner, 708 F.2d 986, 989 n.3 (5th Cir. 1983); Ourisman v. Commissioner, 82 T.C. 171, 177 n.4 (1984) (citing numerous authorities), vacated and remanded, 760 F.2d 541 (4th Cir. 1985).
\item[29.] Vaughn v. United States, 740 F.2d 941, 943 & n.1 (Fed. Cir. 1984), aff‘g 3 Cl. Ct. 316 (1983) (taxpayer failed on agency theory); Moncrief v. United States, 730 F.2d 276, 280 (5th Cir. 1984) (taxpayer prevailed on agency theory); Ourisman, 760 F.2d 541, 545 n.6 (taxpayer failed on agency theory); Roccaforte, 708 F.2d at 988-89 (taxpayer failed on agency theory).
\end{enumerate}
\end{footnotesize}
when argued alone, does afford taxpayers a viable and potentially prevailing approach.

III. RECENT DEVELOPMENTS

A. Roccaforte

In 1981, the Tax Court in Roccaforte v. Commissioner\(^30\) issued an opinion which is significant in the nominee corporation area. The Tax Court held that a corporation was an agent of a partnership and that the partnership, and not the corporation, was the owner of certain real property for federal tax purposes.\(^31\) The developers in Roccaforte acquired certain real property and formed a partnership with investors in order to construct and operate an apartment complex upon the property.\(^32\) Construction financing, arranged by developers, was made contingent upon the use of a corporation.\(^33\) The partnership therefore created a corporation whose shareholders, directors, and officers were partners of the partnership. The corporation and the partners executed a "nominee agreement" whereby the corporation was to hold title to the real estate and act in accordance with the partners' instructions; beneficial or equitable interest in the property was to remain in the partnership. Under the agreement all proceeds from the property were to belong to the partners, and the partners were to reimburse the corporation for expenses but not for services. The agreement emphasized that the individual partners, and not the corporation, were the owners of the property. The corporation had no assets, liabilities, income, or expenses and was formed solely to circumvent state usury laws.\(^34\) After acquiring the property from the developers, the corporation executed a mortgage note to finance construction of the apartment complex. Realizing that the corporation was a shell, the lender required the developers to personally guarantee the note.\(^35\) The corporation and the partners then entered into an agency agreement, which reaffirmed the prior nominee agreement and the fact that the individual partners were owners of the property.\(^36\)

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31. Id. at 288.
32. Id. at 265.
33. Id. at 266.
34. Id. at 267-68, 270.
35. Id. at 269.
36. Id. at 270.
Once the apartments were constructed and placed in service, the project experienced cash-flow problems. Five of the original partners and three new partners made capital contributions to the partnership in order to pay expenses of the apartment complex. These new partners, however, did not become shareholders of the corporation. They believed that the corporation was the agent for the partnership and that the partnership owned the property.\textsuperscript{37}

Indicating that it was a "nominee corporation" which engaged in "no activity," the corporation reported no income, losses, assets, or liabilities on its federal income tax returns. The partners, on their tax returns, claimed their distributive shares of losses resulting from the partnership's operation of the apartments. The Commissioner asserted that income and losses from the apartment project should be attributed to the corporation, not to the partnership. The taxpayers contended that since the corporation was the partnership's agent, the partners were entitled to the losses. Interestingly, the taxpayers did not argue that the corporation should be disregarded but admitted that the corporation was a viable entity.\textsuperscript{38}

The Tax Court in \textit{Roccaforte} began its consideration of the taxpayers' agency argument by noting that the Supreme Court in \textit{Moline Properties} recognized that "a factual setting might exist where a court could accept the agency argument."\textsuperscript{39} The Tax Court observed that there were, in the facts of \textit{Roccaforte}, an agency agreement and certain "indicia of a true agent" that were not present in \textit{Moline Properties}.\textsuperscript{40} The Tax Court also noted that the Supreme Court in \textit{National Carbide} did not foreclose the possibility of a viable agency relationship but did identify some indicia of a corporate agent.\textsuperscript{41} The court characterized the factors of the \textit{National Carbide} test as follows: (1) "whether the corporation operates in the name and for the account of the partnership;"\textsuperscript{42} (2) "whether the principal (the partnership herein) is bound by the alleged corporate-agent's actions;"\textsuperscript{43} (3) "whether the corporate agent transmitted money received to the partnership;" (4) "whether receipt of income is attributable to assets or employees of the partnership;"

\textsuperscript{37} Id. at 274-76.
\textsuperscript{38} Id. at 277-78.
\textsuperscript{39} Id. at 279.
\textsuperscript{40} Id. at 279-80.
\textsuperscript{41} Id. at 280.
\textsuperscript{42} Id. at 283.
\textsuperscript{43} Id. at 285.
(5) "whether the corporate agent's relationship with the partnership was [not] dependent on the fact that it was owned and controlled by the partners;" and (6) "whether the corporation's activities were consistent with the normal duties of an agent."

Applying the National Carbide test to the facts of Roccaforte, the Tax Court found that the third factor was inapplicable, that the first, second, fourth, and sixth factors were satisfactorily established by the taxpayers, and that only the fifth factor was not successfully proven. Appearing to give equal weight to each factor and appearing to be persuaded by the presence of a majority of the applicable factors, the Tax Court determined that an agency relationship did exist. The court stated, "We believe that the entire substance of the arrangement was one of an agency relationship, and even the form (outside of the corporation's primary liability on the mortgages) indicated the agency relationship that was intended." The court noted that although the taxpayers desired to operate in the partnership form, they were forced to create a corporation in order to secure financing for their project. The court further noted that the partners did not use the limited liability associated with corporate form but remained subject to all claims arising out of the project. The Tax Court held that "where the corporation was formed solely to satisfy the requirement of the

44. Id. at 286.
45. Id. at 287.
46. Id. at 283-287. In the Tax Court's analysis, the first factor was deemed met because the corporation could only act pursuant to the written direction of a committee of the investors, the corporation never represented itself as anything other than an agent of the partnership, some of the partners backed the corporation's representation of its agent status by personally guaranteeing various loans, and banks and other third parties dealing with the corporation were aware of its status. The second factor supported the partners' agency argument because creditors were aware that the corporation was representing itself as the partners' agent, the partners themselves considered themselves bound by the corporation's actions, and all of the loans were guaranteed by some of the partners. The third factor was deemed inapplicable to the building construction involved. The fourth factor was determined in favor of the partners because the apartment complex was an asset of the partnership. The fifth factor was decided against the partners because the investors owned stock in the corporation in precisely the same proportion as their original ownership interests in the partnership, the corporation was controlled and dominated by the partners, the corporation was not compensated for its services, and the corporation and the partnership did not deal with one another at arm's-length. The sixth factor was affirmatively established by the partners because they had been careful to endow the corporation with specific indicia of an agency relationship and because the corporation merely held legal title to the property to enable the partnership to satisfy the lenders' requirements for financing. See Note, supra note 2, at 379 n.143.
47. 77 T.C. at 287. See Note, supra note 2, at 379.
48. 77 T.C. at 287-88.
bank in complying with State usury laws and the indicia of an agency relationship are present, we will respect the status of the corporation as an agent of the partnership."

The Tax Court's decision in Roccaforte in favor of the taxpayers was not unanimous. Judge Fay, in dissent, argued that the majority treated the fifth factor as "merely one of six relevant factors," while, in his view, the National Carbide opinion makes the fifth and sixth factors prerequisite to a finding that an agency relationship exists. In support of this position, he pointed to the Supreme Court's use of the word "must." Judge Fay also stated that the Court of Appeals for the Fifth Circuit, to which an appeal from Roccaforte would lie, has designated these last two factors as "crucial." Based on the National Carbide test and the majority's findings of fact with respect to the fifth factor, he would have held that the corporation was not, for tax purposes, a "mere agent of the partnership."

Another dissenter, Judge Nims, argued that under Moline Properties the agency and entity questions depend upon the same legal issues. An agency argument is therefore subsumed by a court's finding that the activities of a corporation mandate its treatment as a separate entity. He would have held either that the corporation in Roccaforte was a viable entity, resulting in no agency relationship, or that the corporation's relationship with the partnership was a "sham, designed solely to thwart the law of Louisiana." Judge Nims argued that the taxpayers could not invoke the corporate form of doing business for state law purposes and at the same time escape the adverse tax consequences of corporate existence.

One reason the Tax Court's decision in Roccaforte was significant is that it represented to some observers a break from earlier authority. Another reason for its importance is that the decision involved a different interpretation of the National Carbide standard (one more sympathetic to taxpayers) than the interpretation

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49. Id. at 288.
50. Id. at 290 (Fay, J., dissenting). For the fifth and sixth factors, the Supreme Court in National Carbide stated, "[(5)] If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. [(6)] Its business purpose must be the carrying on of the normal duties of an agent." 336 U.S. at 437 (emphasis added).
52. 77 T.C. at 291.
53. Id. at 292-3 (Nims, J., dissenting).
the Fifth Circuit had previously adopted. Not surprisingly, the Tax Court's decision that the corporation in *Roccaforte* was a true nontaxable agent of the principals was reversed by the Fifth Circuit on the grounds that the Tax Court misapplied the *National Carbide* test. The Fifth Circuit agreed with the Tax Court's factual determinations for each factor but rejected the treatment of those factors as conditions entitled to equal weight:

The first four conditions set out in *National Carbide* are general principles of agency law, and serve only as "relevant considerations" in the determination of true agency status. The fifth and sixth conditions, however, are mandatory and absolute . . . [They] are not mere factors of uncertain weight; they are prerequisites which must be satisfied before a corporation can qualify as a true agent.

Because the corporation did not satisfy the mandatory fifth factor, the Fifth Circuit determined as a matter of law that the corporation was not a true nontaxable agent. Voicing concerns that the separate entity regime would collapse if any closely-held corporation was allowed to act as agent of its owners and at the same time claim nontaxable status, the Fifth Circuit concluded that in order to establish a recognizable agency relationship, a taxpayer "should be required to show that an agency relationship could exist independent of [the taxpayer's] ownership and control" of the corporation, precisely as the mandatory fifth condition of *National Carbide* requires.

**B. Ourisman**

In 1984, the Tax Court in *Ourisman v. Commissioner* revisited the corporate agent issues presented in the earlier and factually

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54. *See Jones*, 640 F.2d at 755.
55. *Roccaforte v. Commissioner*, 708 F.2d 986 (5th Cir. 1983).
56. *Id.* at 986-87.
57. *Id.* at 989.
58. *Id.* at 989-90.
59. *Id.* at 990.
60. 82 T.C. 171 (1984).
similar Roccaforte case. Unlike Roccaforte, however, an appeal from the Ourisman case lay not to the Fifth Circuit but to the Fourth Circuit or the District of Columbia Circuit. Thus, the Tax Court was not required to follow the interpretation and application of the National Carbide test given by the Fifth Circuit in Roccaforte.61

Real estate investor and developer Florenz Ourisman joined with a construction company in leasing certain real property upon which the parties intended to construct an office building.62 Ourisman and the construction company formed a partnership to develop the property and applied for construction financing, listing the partnership as “owner” of the property. A lender agreed to provide interim construction financing for the building, provided that the loan, because of state usury law restrictions, would be made to the “corporate nominee” of the partnership. Accordingly, the partnership formed a corporation that, on the date of formation, passed a resolution to act as nominee or agent for the partnership.63 In closing the construction loan, the corporation signed the construction loan agreement, a promissory note, and a deed of trust. Ourisman and the principal shareholders of the construction company personally guaranteed payment of the loan. On the same date as the loan closing, the partnership assigned the leasehold to the corporation for a recited consideration of ten dollars. The assignment stated that the corporation would hold the lease and any improvements upon the leased property, borrow and repay interim financing, and construct a six-story office building “solely as nominee, dummy and straw party for the [p]artnership” and that the “[p]artnership is and shall continue to be the [c]orporation’s principal, the true and lawful owner of the leasehold [and] all improvements . . . , and the real party in interest.”64

Ourisman and the construction company eventually arranged for permanent financing. Application for the permanent loan was made in the name of the nominee corporation, but the application specified that Ourisman and the construction company were the owners of the building. The permanent loan, for which there was no personal liability, was secured by a deed of trust. On the same day as the permanent loan closing, the corporation reassigned the

61. Id. at 185. However, the Fourth Circuit followed the Fifth Circuit’s interpretation of National Carbide. Ourisman v. Commissioner, 760 F.2d 541 (4th Cir. 1985).
62. 82 T.C. at 172.
63. Id. at 173.
64. Id. at 174.
leasehold to the partnership for a recited consideration of ten dollars. The nominee corporation was later dissolved.65

During its existence, the corporation received no paid-in capital or rental income. All loan proceed checks received by the corporation were endorsed to the partnership, which made the principal and interest payments on the loans. The partnership paid all expenses associated with the project and contracted for services in its own name. The only party for whom the corporation performed services was the partnership.66

During the taxable years in question, the corporation reported no income, listed no assets or liabilities, and indicated on its return that its business was that of "corporate nominee." The partnership, on the other hand, claimed losses attributable to the lease and the building. The partners, Ourisman and the construction company, deducted their respective shares of partnership losses on the theory that the corporation acted solely as the agent of the partnership, which, as principal, was responsible for the tax consequences of the office building project.67 However, the Commissioner asserted that the losses generated by the office building project were properly attributable to the corporation rather than to the partnership because no agency relationship recognizable for federal tax purposes existed between the corporation and the partnership.68

The Tax Court observed that courts applying the Moline Properties and National Carbide standards had found no agency when "the relations between the corporation and its owners were entirely consistent with the usual control exercised by shareholders over a corporation."69 However, the Tax Court also observed that

65. Id. at 175.
66. Id. at 175-76.
67. Id. at 176.
68. Id. at 176-77.
69. Id. at 179. The patterns recurring in those cases were as follows:

[T]he shareholders created the corporation to develop or manage their property; the corporation acted only for its owners; the corporation turned over to its owners all the profits earned by it on property to which it held title; the corporation assumed liability for the loans used to finance the property; and the corporation acted without renumeration.

some courts had held the corporation to be a nontaxable agent when the corporation represented both its owners and unrelated parties in the same transactions or when title to the property was held by the corporation only at the time of financing and by the owner at all other times.\textsuperscript{70}

Applying the \textit{National Carbide} test, the Tax Court determined that the first, second, third, fourth, and sixth factors were established.\textsuperscript{71} The fifth factor, however, was not met because the partners' control over the corporation as shareholders determined the corporation-partnership relationship. Each of the partners owned the same percentage of interest in the corporation as in the partnership. The corporation was not compensated for its services and did not act for any other principal. These circumstances were deemed indicative of lack of arm's-length bargaining between the partnership and the corporation with respect to the corporation's services as agent.\textsuperscript{72}

Even though the fifth factor of \textit{National Carbide} was not satisfied, the Tax Court in \textit{Ourisman}, as it had in \textit{Roccaforte}, held that the corporation was the partnership's agent and that the project's losses belonged to the partners.\textsuperscript{73} In so holding, the Tax Court rejected the Fifth Circuit's interpretation of the \textit{National Carbide} test and maintained its own interpretation, which does not require the fifth factor to be satisfied in order for a valid agency relationship to exist. The Tax Court held fast to its position that the Supreme Court did not intend that the agency criteria in \textit{National Carbide} should be a mechanical checklist, requiring satisfaction of its fifth and sixth factors. Rather, the court was concerned with "the essential nature of the relationship between the purported corporate agent and its shareholders."\textsuperscript{74} The court opined that if the Fifth Circuit's approach were adopted, then a corporation could never be its shareholder's agent, despite the presence of other agency indicia, because the shareholders could control their corporation in every case. The true meaning of the Supreme Court's fifth factor in \textit{National Carbide} is, in the eyes of the Tax Court, that "the taxpayer must prove that the agency relationship


\textsuperscript{71} 82 T.C. at 181-83.

\textsuperscript{72} \textit{Id.} at 184.

\textsuperscript{73} \textit{Id.} at 188.

\textsuperscript{74} \textit{Id.} at 185.
existed independently of the shareholders’ ownership and control.’’ The Tax Court held that the partners in *Ourisman* sustained that burden.76

The Tax Court responded to the Fifth Circuit’s argument in *Roccaforte* that under the Tax Court’s position, the security of the separate entity regime was threatened because that position would permit any closely held corporation to qualify as a nontaxable agent. The Tax Court first noted that “[t]he rule of *Moline Properties*, that the corporate entity will generally be respected for tax purposes, is unshaken by our decision.” The court then argued that, in contrast to the facts of *Ourisman*, most closely held corporations are formed in order that the owners may avoid the liability associated with being a principle. The Tax Court further asserted: “To argue that our decision herein permits all closely held corporations to avoid tax as the agents of their shareholders is to ignore the strictures of *National Carbide*.” As the court explained, most closely held corporations could not satisfy the conditions that called for the finding of agency status in *Ourisman*: (1) the corporation had only negligible activities; (2) everyone dealing with the corporation knew that the corporation was acting as an agent; and (3) the partners performed all the substantial activities involved in the project. The court concluded, “[N]ot to collect the corporate income tax when such conditions are satisfied will clearly make no significant difference in the scheme of Federal taxation.”77

As in *Roccaforte*, the Tax Court’s decision in *Ourisman* was not unanimous. Judge Swift agreed with the majority’s holding but not its analysis of the fifth *National Carbide* factor. He argued that the majority and the Fifth Circuit placed excessive emphasis upon the principal’s ownership of the corporate agent. In Judge Swift’s view, the focus of the fifth factor should be “on the manner and degree the agency was represented to third parties and the degree to which third parties acted in reliance upon the agency relationship.”78 Because the representation of an agency relationship and third party reliance thereon were significant facts in *Ourisman*, Judge Swift concluded that *National Carbide’s* fifth factor was

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75. Id. at 186.
76. Id. See B. Bittker & J. Eustice, *supra* note 23, ¶ 2.10. “A better explanation of [*National Carbide and Moline Properties*] is that the corporation must establish that it is an agent for its shareholders . . . by evidence other than the control which shareholders automatically possess over their corporations.” Id. at 2-28.
77. 82 T.C. at 187.
78. Id. at 188 (Swift, J., concurring).
satisfied.  

As he had in Roccaforte, Judge Fay, dissenting in Ourisman, maintained that the corporation was not the partnership’s agent under National Carbide because the agency relationship depended upon the partners’ ownership and control of the corporation.  

Judge Cohen, dissenting in a separate opinion, disapproved of the majority’s decision because he viewed it as permitting a corporation which failed the subchapter S requirements of the Internal Revenue Code to receive tax treatment comparable to that of a valid subchapter S corporation.  

Judge Cohen further reasoned that the Supreme Court’s statement in National Carbide which left open the possibility that an agency relationship could exist between a corporation and one of its owners “does not compel a holding of agency in inappropriate circumstances” but rather “anticipates cases where the corporation serves as agent for unrelated taxpayers, as well as its shareholders.”

C. Moncrief

In 1984, the Fifth Circuit examined the agency theory once again in Moncrief v. United States, a case decided subsequent to the Tax Court’s decision in Ourisman. Two individuals formed a limited partnership which owned an office building. Needing cash to renovate the office building, the individuals arranged to form a new partnership to which they would contribute their interests in the office building plus another piece of real estate and to which a third individual would contribute cash. Because the new partner was slow in making his cash contribution, the partners deeded their interests in the office building to one partner’s wholly-owned corporation, which was used strictly to borrow money. The corporation borrowed the necessary funds and then conveyed title back to the limited partnership. The previously contemplated partner-
ship was then formed.\textsuperscript{84}

On his return, the cash-contributing partner claimed deductions attributable to losses arising from the project. However, the Commissioner determined that the losses generated during the time the corporation held legal title to the office building were attributable to the corporation, not to the partnership. In a refund suit in federal district court, the cash partner argued that the partnership was entitled to all tax losses associated with the office project on the theory that the corporation was the agent of the partnership.\textsuperscript{85} The partners had conceded that the corporation should not be disregarded for tax purposes.\textsuperscript{86} The jury found that the corporation was acting as the partnership's agent, but the district court granted the government's motion for a judgment n.o.v. on the basis that the partner had not met his burden of proof that an agency relationship existed.\textsuperscript{87}

On appeal, the Fifth Circuit, which was bound by its \textit{Roccaforte} decision and thus could not determine whether \textit{National Carbide}'s fifth and sixth factors were mandatory, considered only whether there was, in light of all six "factors," sufficient evidence to support the jury's findings. The court found that the first four factors of the \textit{National Carbide} test could have been found by the jury to be satisfied based upon the evidence presented.\textsuperscript{88} The court also determined that although the jury had not been instructed that the fifth and sixth factors were mandatory, there was no evidence in the record to support a conclusion that either factor was unsatisfied. Therefore, the court reversed the decision of the district court and remanded the case with instructions to reinstate the verdict.\textsuperscript{89}

In its consideration of the fifth factor, the Fifth Circuit first observed a tension between the mandatory fifth factor and the Supreme Court's statement in \textit{National Carbide} that a corporation is not automatically foreclosed from being treated for tax purposes as an agent of its owner-principal. However, the court did not find it necessary to resolve that tension because it found that the principal (the partnership) in \textit{Moncrief} was not the owner of the corpo-

\textsuperscript{84} \textit{Id.} at 278-79.
\textsuperscript{85} \textit{Id.} at 279.
\textsuperscript{86} \textit{Id.} at 280.
\textsuperscript{87} \textit{Id.} at 279.
\textsuperscript{88} \textit{Id.} at 282-83.
\textsuperscript{89} \textit{Id.} at 283, 286.
rate agent. Observing that the Moncrief case was similar to Roccaforte in many respects, the court found a difference with respect to the "crucial" fifth factor. While the partners in Roccaforte initially had the same percentage of interest in the corporation as in the partnership, the corporation in Moncrief was owned entirely by one partner who had only a twenty-five percent interest in the final partnership. The court stated that while Roccaforte apparently did not require total coincidence of ownership between the purported corporate agent and partnership principal (because of the ten percent interest in the partnership later acquired by some new partners who acquired no interest in the corporation), Roccaforte did not make clear the extent to which ownership must coincide before the partnership can be said to own and control the corporation. However, the partial coincidence of ownership present in Roccaforte was sufficient to establish that the partnership in that case did, in fact, own and control the corporation.

In considering whether the Moncrief corporation's relationship with the partnership was dependent on the fact that it was owned and controlled by the partners, the Fifth Circuit used the two inquiries given in Raphan v. United States:

1. Whether the principal owned a controlling interest in the agent; or
2. Whether the

90. Id. at 283.
91. Id. at 284.
92. 3 Cl. Ct. 457 (1983), aff'd in part, rev'd in part, 759 F.2d 879 (Fed. Cir. 1985) (the Federal Circuit upheld the Claims Court's finding that the corporate title holder of the property was an agent of the partnership and that the partners were therefore entitled to the losses from the project).

The Claims Court explained the National Carbide fifth factor as follows:

The crucial inquiry under National Carbide is the nature of the relationship between the agent . . . and the principal . . . If the two entities are affiliated, the burden is on the taxpayer to show, in the words of Roccaforte, "that an agency relationship could exist independent of such ownership and control." . . . The two entities can be affiliated in one of two ways. First, the principal can own a controlling interest in the agent; that was the situation in National Carbide. . . . Second, the entities can be affiliated because the same parties own a controlling interest in both.

3 Cl. Ct. at 461-62 (citations omitted).

As part of the second inquiry, the Raphan court considered whether the interest of the partners were so closely aligned that the partners who held no stock could have controlled the corporation through those partners who did hold stock in the corporation. The Claims Court reasoned, "The fact that principal and agent were not commonly controlled entities goes a long way toward allaying the concerns expressed in National Carbide." Id. at 462.

The Claims Court's allocation of the losses from the project among the partners, but not its holding on the entitlement of the partnership to the losses, was overruled by Congress in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 79(a), 98 Stat. 597 (codified at 26 U.S.C.S. § 752 note (Law. Co-op. Supp. 1985)). No mention of this Act was made by the Federal Circuit when it reversed the Claims Court's allocation of losses.
same parties owned a controlling interest in both the principal and the agent.\textsuperscript{93} Applying these considerations to the facts of \textit{Moncrief}, the Fifth Circuit found that the partnership did not directly own stock in the corporation, that the same parties did not own a controlling interest in both entities, and that there was no evidence that the sole shareholder-partner was so closely aligned in interest with the other partners that the latter could have exercised control over the corporation.\textsuperscript{94} The Fifth Circuit ultimately concluded that the nominee corporation in \textit{Moncrief} was the agent of the partnership.\textsuperscript{95}

In addition to finding the \textit{National Carbide} test satisfied, the Fifth Circuit perceived no "cogent policy grounds" for denying the corporation agency status in \textit{Moncrief}. The court explained:

\begin{quote}
\text{The sole policy consideration enunciated in \textit{Roccaforte} was that the "separate entity regime would collapse" if the taxpayer could predicate an agency relationship on characteristics common to all closely-held corporations. In [\textit{Moncrief}], the taxpayers have conceded that the corporation was a separate entity. As \textit{National Carbide} instructs, the concerns raised with respect to agency relationships are not the same as the concerns raised by arguments of "practical identity."}\textsuperscript{96}
\end{quote}

\textbf{D. The Fourth Circuit's Decision in \textit{Ourisman}}

Surprisingly, the Tax Court's decision that the corporation in \textit{Ourisman} was a true nontaxable agent of the principal was vacated by the Fourth Circuit in 1985\textsuperscript{97} on the grounds that the Tax Court misinterpreted the \textit{National Carbide} fifth factor.\textsuperscript{98} The Fourth Circuit, giving literal effect to \textit{National Carbide}'s language describing the fifth factor, agreed with the Fifth Circuit in \textit{Roccaforte} that the fifth factor is mandatory and not just one of six factors of equal weight.\textsuperscript{99} The Fourth Circuit ruled that under the fifth factor, "a corporation may not be a true nontaxable agent if its relations with its principal are dependent upon the fact that it

\textsuperscript{93} 730 F.2d at 284.
\textsuperscript{94} 730 F.2d at 285.
\textsuperscript{95} Id. at 279, 286.
\textsuperscript{96} Id. at 286 (citation omitted).
\textsuperscript{98} 760 F.2d at 548.
\textsuperscript{99} Id. at 547.
is owned by the principal.” Even though the Fourth Circuit agreed that the “partners scrupulously structured their affairs,” the court concluded that the corporation in Ourisman was not a true agent because the partners failed to establish that the corporation’s relationship with the partnership “was not dependent upon the partners’ ownership and control of the corporation.”

Feeling constrained to follow a literal interpretation of National Carbide in analyzing the agency relationship, the court of appeals stated that “an agency agreement between shareholders and their controlled corporation should not be given effect if the relationship created thereby is entirely consistent with the control that shareholders usually exercise over the corporation.” The court did state that a closely-held corporation might satisfy the independency required by the fifth factor, notwithstanding a principal’s ownership and control of an agent, if an arm’s-length arrangement between the corporation-agent and the partnership-principal is reflected in their relationship. The sole policy reason given by the Fourth Circuit in support of its decision not to treat the corporation as a nontaxable agent of its controlling shareholders was the prevention of the perceived abuse that would result if “shareholders with impunity could take advantage of the system of separate taxation of corporations by treating their corporation as a separate taxable entity with respect to some transactions while treating the corporation as a nontaxable agent with respect to other transactions.”

IV. Discussion

In Roccaforte, Ourisman, and Moncrief, the taxpayers conceded that their respective corporations were viable separate legal enti-

100. Id. at 547-48.
101. Id. at 548.
102. Id. at 548-49.
103. Id. at 548. The Fourth Circuit listed the following considerations as relevant to a finding that an agency relationship was an arm’s length arrangement:
the identity of ownership interests in the principal and agent . . . ; whether a corporation’s articles of incorporation or the first corporate resolutions specifically limit corporate purposes and powers so that the corporation may act only as an agent for third parties . . . ; whether the agent acts for more than one principal . . . ; whether the agent has entered into a written agency contract setting forth the duties and responsibilities of the agent and providing for a reasonable fee for the agent’s services . . . ; and, whether the agent has collected a reasonable fee for its services . . .

Id. (citations omitted).
104. Id. at 549.
ties. They avoided the disregard theory and focused their arguments on the agency theory. This approach by the taxpayer is understandable given the way the taxpayers had structured their dealings with their corporations, the ease with which the Commissioner can establish business activity and thus defeat any attempt to escape the Moline Properties standard for a separate taxable entity, and the conclusion reached by some courts that failure under the disregard theory necessarily results in failure under the agency theory. In structuring transactions and in presenting their position, taxpayers employing nominee corporations would be well-advised to abandon the disregard approach in favor of the agency approach. The desired tax result is more likely to be achieved under the agency theory than under the disregard theory and is more likely to result when the two are not argued alternatively.\textsuperscript{105} Although the agency approach is the more promising of the two theories in a nominee corporation case, taxpayers have not always prevailed even when the agency theory has been argued alone. The disparate outcomes in the cases may be explained in part by the differing factual situations presented by the various cases, in part by the differing judicial interpretations of the National Carbide six-factor test and in part by the differing policy concerns of various courts.

In Roccaforte, the Tax Court adopted an interpretation of the National Carbide test that is more favorable to taxpayers than the Fifth Circuit’s interpretation. The Tax Court reaffirmed the position it took in Roccaforte in the more recent Ourisman case,\textsuperscript{106} despite the Fifth Circuit’s reversal of Roccaforte.\textsuperscript{107} However, the Tax Court’s position has been reversed again, this time by the Fourth Circuit in Ourisman,\textsuperscript{108} and the Tax Court has not had an opportunity to respond to that decision.

The Fifth Circuit and the Fourth Circuit maintain that the fifth National Carbide factor\textsuperscript{109} is mandatory and absolute, while the Tax Court believes that the factor is not crucial and that the Su-

\textsuperscript{105} See Vaughn v. United States, 740 F.2d 941, 943-44 n.1 (Fed. Cir. 1984) (the court agreed with the taxpayer that the disregard and agency theories are not only distinct but are in fact contradictory).

\textsuperscript{106} Ourisman v. Commissioner, 82 T.C. 171 (1984), vacated and remanded, 760 F.2d 541 (4th Cir. 1985).

\textsuperscript{107} Roccaforte v. Commissioner, 708 F.2d 986 (5th Cir. 1983).

\textsuperscript{108} Ourisman v. Commissioner, 760 F.2d 541 (4th Cir. 1985).

\textsuperscript{109} “If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case.” National Carbide, 336 U.S. at 437.
The Supreme Court did not intend to create a mechanical six-factor checklist but was concerned about the essential nature of the relationship between the corporation and its shareholders. As justification for their position, the Fifth Circuit in Roccaforte and Moncrief and the Fourth Circuit in Ourisman relied heavily upon the language "relations with its principal must not be dependent upon the fact that it is owned by the principal." However, the Tax Court's position that the quoted language means that "the taxpayer must prove that the agency existed independently of the shareholders' ownership and control" is an equally reasonable interpretation of that language. Moreover, the Bittker and Eustice treatise is supportive of the Tax Court's position and states:

Although [National Carbide and Moline Properties] are frequently quoted in support of the theory that "business activity" is inconsistent with an agency relationship between the corporation and its shareholders, they do not fully support this theory. A better explanation of these cases is that the corporation must establish that it is an agent for its shareholders (with respect to the transactions in question) by evidence other than the control which shareholders automatically possess over their corporations.

While similar, the facts of the Roccaforte and Moncrief cases are viewed by the Fifth Circuit to diverge with respect to the "crucial" fifth factor. The stock of the corporation in Roccaforte was issued to the partners according to their proportional interests in the partnership, but the stock of the corporation in Moncrief was owned entirely by one individual who had only a twenty-five percent interest in the partnership. In Roccaforte the Fifth Circuit found the fifth factor unsatisfied, while in Moncrief that court found the fifth factor was satisfied. Interestingly, the Moncrief court noted that Roccaforte would not require total coincidence of ownership in the partnership principal and the corporate agent before the partnership would be viewed as owning and controlling the corporation. The fifth factor was not satisfied in Roccaforte notwithstanding the fact that approximately two years following the corporation's organization and the property transfer, three new

110. Ourisman, 82 T.C. at 185.
111. Roccaforte, 708 F.2d at 989 (emphasis added).
112. Ourisman, 82 T.C. at 186.
114. See Moncrief, 730 F.2d at 284.
partners received a total partnership interest of ten percent, but received no corporate stock.

The court nevertheless determined that "the partners" owned and controlled the corporation. . . . In Roccaforte, . . . the partnership entity, by pro rata ownership of all the corporate stock among all the partners, directly owned and controlled the corporation for over two years. When three new partners, with a ten percent aggregate interest, were admitted in the third year, the same parties continued to own a controlling interest in both entities. The partnership entity's ownership and control of the corporation was found to remain intact.115

Thus, in Roccaforte, pro rata ownership of 100% of the stock by the partners holding 90% of the partnership interest was sufficient to establish direct ownership and control and defeat the fifth factor. In Moncrief, 100% ownership of the stock by one of three partners, who was a 25% partner, was insufficient to establish direct ownership and control; as a result, the fifth factor was met. These cases leave open the question of what the outcome would be in the Fifth Circuit with respect to the fifth factor in factual situations falling somewhere between those in Moncrief and Roccaforte. The Fifth Circuit's approach in Moncrief was not merely one of considering the numbers. Rather, the court of appeals, like the Claims Court in Raphan116, "looked behind the 'paper' reality" to determine whether there was such close alignment of interest between the stockholding partners and those who owned no stock that the latter, in reality, could control the corporation through the stockholders.117 Also, the Fifth Circuit did not limit its inquiry to whether the same parties owned a controlling interest in the partnership and the corporation; the court considered whether the partnership owned a controlling interest in the corporation.118 In its analysis, the court endorsed the view of the Claims Court in Raphan that the fifth factor is not satisfied if the principal owns a controlling interest in the agent or if the same parties own a controlling interest in both the partnership and the corporation.119

The Fifth Circuit's sole policy justification expressed in Rocca-

115. Id.
117. Moncrief, 730 F.2d at 285.
118. Id. at 285-86.
119. See Raphan, 3 Cl. Ct. at 461-62.
forfe for denying the corporation agency status was a concern over the potential collapse of the separate entity regime for tax purposes. This policy concern was echoed by the Fourth Circuit in Ourisman. Both courts believed the collapse would occur if a taxpayer could establish an agency relationship on the basis of characteristics common to all closely-held corporations. In the later Moncrief case, the Fifth Circuit raised no new policy concern but justified its holding therein on the grounds that the facts of Moncrief did not implicate its earlier expressed concern.

The taxpayers in Ourisman convincingly argued to the Tax Court that the Fifth Circuit’s concern over the integrity of the separate entity tax regime was “based upon the incorrect assumption that all closely-held corporations automatically satisfy the first four National Carbide characteristics of an agency relationship.” The taxpayers explained that a closely-held corporation normally does not represent itself as an agent of its owners or adopt agency agreements because the owners of the corporation usually wish to avoid personal liability for the corporation’s obligations. Therefore, the first two National Carbide indicia of an agency relationship normally would not be satisfied. Agreeing with this reasoning,

120. Ourisman, 760 F.2d at 549; Roccaforte, 708 F.2d at 990.
121. Moncrief, 730 F.2d at 286. The Fifth Circuit did not clearly articulate its reasoning in Moncrief, but its holding appears to be based on the fact that the taxpayers in Moncrief conceded that the corporation was a separate entity and that, “[a]s National Carbide instructs, the concerns raised with respect to agency relationships are not the same as the concerns raised by arguments of ‘practical identity.’” Id.
123. Id. at 2-3. The petitioners’ supplemental brief states:
An examination of just the first two characteristics, namely (i) whether the corporation operates in the name and for the account of the principal and (ii) whether the corporation binds the principal by its actions, reveals that this assumption is invalid. A closely-held corporation is often formed for the principal purpose of insulating its owners from personal liability. Consequently, such a corporation ordinarily does not represent to third parties that it is acting on behalf of and for the account of its owners or that its actions are binding upon its owners. To do so would provide third parties with an opportunity to pierce the corporate veil and expose the owners to the personal liability they are seeking to avoid.

Similarly, a closely-held corporation generally does not enter a written agency agreement with its owners or adopt a corporate resolution confirming its agency status. Here again, such actions would increase the risk that the owners of the corporation would be liable for the obligations of the corporation. In short, the typical closely-held corporation does not meet the first two National Carbide standards for agency. As a result, the Fifth Circuit’s underlying assumption that the mere assertion of characteristics common to all closely-held corporations is sufficient to satisfy the first four National Carbide indicia of an agency relationship is simply incorrect.
the Tax Court in *Ourisman* said that “[i]n contrast to the facts of the present case, most closely held corporations are formed precisely because their owners wish to avoid . . . the burdens of a principal” and that the restrictions of *National Carbide* would not permit all closely held corporations to use the *Ourisman* decision to avoid tax as the agents of their shareholders.\(^\text{124}\)

The arguments of the taxpayers and reasoning of the Tax Court in *Ourisman* are persuasive and seem to overcome the Fifth Circuit’s sole policy justification in *Roccaforte* for making the fifth *National Carbide* factor mandatory. For that reason, the Fourth Circuit’s decision to vacate the Tax Court’s decision in *Ourisman* came as something of a surprise. The Fourth Circuit’s opinion, however, apparently was not based on the concern voiced by the Fifth Circuit and answered by the Tax Court in *Ourisman*, but on a new policy concern. The Fourth Circuit believed that if a corporation such as that in *Ourisman* were treated as its controlling shareholders’ nontaxable agent, “shareholders with impunity could take advantage of the system of separate taxation of corporations by treating their corporation as a separate taxable entity with respect to some transactions while treating the corporation as a nontaxable agent with respect to other transactions.”\(^\text{125}\) However, even if such “selection with impunity” is viewed as an abuse, this potential does not mandate denying all taxpayers the use of an agency relationship when the fifth factor has not been met.\(^\text{126}\) First, there was no abuse in *Ourisman* comparable to the Fourth Circuit’s “selection with impunity” concern in that *Ourisman* involved only one transaction, not several transactions with differing tax consequences to the corporation for each transaction. The court’s concern was, admittedly, based on a theoretical possibility. Second, this “selection with impunity,” which is the concern of the Fourth Circuit, can just as easily occur in a corporation-partnership agency relationship that satisfies all six of the *National Carbide* criteria as in a situation where the fifth factor is not met. Therefore, the Fourth Circuit’s policy reason for vacating the Tax Court’s decision in *Ourisman* and denying that corporation the

\(^{124}\) *Ourisman*, 82 T.C. at 187.

\(^{125}\) *Ourisman*, 760 F.2d at 549.

\(^{126}\) *Ourisman*, 82 T.C. at 186. The Tax Court’s explanation in *Ourisman* of the Supreme Court’s articulation of the fifth *National Carbide* factor is plausible and finds support in B. BITTKER & J. EUSTICE, supra note 23, ¶ 2.10. See also Kurtz & Kopp, supra note 2, at 648; Miller, supra note 3, at 220; Note, supra note 2, at 367.
status of nontaxable agent is not persuasive.

The recent cases discussed in this Comment indicate that taxpayers have sometimes successfully established agency relationships. Some cases involve situations where the fifth factor is met while others involve situations where satisfaction of the fifth factor is not mandatory. In situations where the fifth factor is a potential obstacle, there is a possible arrangement (one not employed in any of the cases discussed herein) which should be considered. The fifth factor addresses only situations where the corporation is owned by the principal, and taxpayers always have the alternative of utilizing a corporation unrelated to the principal. Indeed, the use of an unrelated entity to perform nominee functions has been recommended in the past and generally remains a well-advised course of action for cautious taxpayers. Possibilities which have been suggested include the use of an institutional organization or the use of an “in-house” corporation whose stock is owned by members of the client’s accounting or law firm. There are additional considerations which are pertinent where the fifth factor is a concern. It is generally helpful to the taxpayer’s position for the principal to pay the agent a reasonable fee for its services and for the corporation to serve as agent for other beneficial owners of property. Finally, as in any nominee case, careful structuring and appropriate documentation of the principal-agent relationship are crucial.

127. "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case.” National Carbide, 336 U.S. at 437 (emphasis added).


129. See Baker & Rothman, supra note 24, at 88; Kronovet, supra note 2, at 59-60.

130. Ourisman, 760 F.2d at 548. The Federal Circuit recently considered the agency argument in Vaughn v. United States, 740 F.2d 941 (Fed. Cir. 1984), a case decided after Moncrief. However, that court did not have to decide whether it deemed the fifth factor mandatory and absolute, as did the Fifth Circuit, because the Vaughn taxpayers failed to satisfy other National Carbide factors. Id. at 947. In Vaughn, the Federal Circuit stated: Moreover, nothing in the record indicates that the entities dealt with each other at arm’s length. Most telling is the fact that . . . the corporation never received compensation for the substantial services rendered nor reimbursements for its expenses. As other courts have found, an independent agent would not be willing to perform services for its principal without compensation. See Roccaforte, 708 F.2d at 990; Ourisman, 82 T.C. 171, 184 (1984).

740 F.2d at 945-46.

131. Ourisman, 760 F.2d at 548; see also Kronovet, supra note 2, at 60.

132. See B. BITTKER & J. EUSTICE, supra note 23, ¶ 2.10.
V. Conclusion

The use of nominee corporations in business transactions is effective to accomplish various taxpayer objectives. This arrangement may have significant adverse tax consequences, however, if the nominee corporation is treated as the beneficial owner of the property to which it holds title. In the past, taxpayers seldom prevailed under either the disregard or the agency theory when the Commissioner challenged their treatment of income and losses from the property as attributable to themselves rather than to the nominee corporation. Recently, however, some taxpayers have successfully utilized the agency argument.

The Tax Court is particularly receptive to the agency argument, and its approach is laudable because it permits taxpayers to employ the useful nominee corporation device, without suffering adverse tax consequences, in situations where there is no compelling reason to deny them this flexibility and latitude in their business and tax affairs. The Tax Court's interpretation and application of National Carbide is readily supportable. Circuit courts which have not yet addressed the agency argument in a nominee corporation case should give serious consideration to adopting the Tax Court's approach. In the Fourth and Fifth Circuits, where the fifth factor is deemed mandatory, there nevertheless exist some factual situations involving partial coincidence of ownership where the fifth factor may be met. When there is no solid policy reason to support a different result, courts in the fourth and fifth circuit should not hesitate to decide in favor of taxpayers with respect to the fifth factor in those factual situations where they are not constrained by precedent to decide otherwise. Finally, taxpayers in any circuit should consider employing unrelated corporations so as to avoid the potential obstacle to desired tax consequences which the fifth National Carbide factor may present.