# RESCISSION – UNDOING A TRANSACTION THAT SEEMED LIKE A GOOD IDEA AT THE TIME

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## INTRODUCTION

How many times have we watched a movie, read a book, or listened to a colleague talk about an action that appeared to be a no-risk proposition, only to turn into a nightmare? At some point, the general lament is uttered: "It seemed like a good idea at the time, but . . ."

Tax plans can be like that, too. A company identifies an acquisition target, proposes a merger with a supplier, or considers an internal restructure. Teams of lawyers, accountants, and operations personnel perform appropriate due diligence. The deal closes. At some point, blemishes, problems, errors float to the surface. The same lament is uttered: "It seemed like a good idea at the time, but . . ."

However, in comparison to the personal nightmare which may have ramifications for a long period of time, an opportunity to undo what was done exists in the business world. Moreover, it exists in the tax world if parties acts quickly. The magic elixir is embodied in the doctrine of rescission. Where it applies, the parties can separate from each other and the transaction is treated as if it never occurred.

## DOCTRINE OF RECISSION

### Annulling the Transaction

The term "rescission" refers to the cancellation or voiding of a contract and the return of the parties to the positions they would have been in had the contract not been made. Rescission is neither a rewriting of the contract nor a correction of an error in an ongoing contract. A rescission is simply a remedy that allows the parties to ignore the existence of the transaction and to be placed in *status quo ante*, again, as if the transaction never took place.[1] The conditions for a successful application of the doctrine of rescission have been clearly described in Revenue Ruling 80-58.

In the ruling, the I.R.S. addressed two situations in Rev. Rul. 80-58. The distinguishing feature between the two situations was the year in which the act of rescission took place. In the first, the transaction and its revision occurred during one tax year. In the second, the transaction occurred in one year, but the rescission occurred in the next. The first transaction could be rescinded. The second could not.

The I.R.S. observed the following with regard to the rescission doctrine:

> The legal concept of rescission refers to the abrogation, canceling, or voiding of a contract that has the effect of releasing the contracting

[1] *A.W. Shaw*, 13 B.T.A. 716 (1928).

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> parties from further obligations to each other and restoring the parties to the relative positions that they would have occupied had no contract been made. A rescission may be effected by mutual agreement of the parties, by one of the parties declaring a rescission of the contract without the consent of the other if sufficient grounds exist, or by applying to the court for a decree of rescission.

**Timely Action Required**

The transaction and its recission must take place in the same year. The reason is explained in *Penn v. Robertson*.[2]

In *Penn*, the taxpayer was a participant in an employees' stock benefit fund created by the directors of the company without the approval of the shareholders. The taxpayer was credited with earnings from the fund for years 1930 and 1931, but the plan was rescinded in 1931 for lack of compliance with corporate governance rules. The court held that although the plan was rescinded for 1930, the annual accounting period principle required the determination of income at the close of the taxable year without regard to subsequent events. Consequently, the rescission in 1931 was disregarded for purposes of determining 1930 taxable income. On the other hand, the rescission for amounts received in 1931 was valid and no income resulted from events in 1931 or the cancellation, itself.

As to the attempt in 1931 to rescind income received in 1930, the court stated:

> A cardinal principle of federal income taxation requires annual returns and accounting; and this principle requires the determination of income at the close of the taxable year without regard to the effect of subsequent events. Thus, in determining whether the credits made on the note in 1930 constituted income for that year, it is necessary to disregard the rescission in 1931; and we must determine the question in the light of conditions that existed at the end of 1930.

As to the attempt in 1931 to rescind income received in that year, the court stated:

> But we agree with the district judge that the rescission in 1931 before the close of the calendar year, extinguished what otherwise would have been taxable income to Penn for that year. The Collector contends that the rescission was not a genuine rescission but really a re-sale of the stock. But this is refuted by the record, the stipulation of counsel and the findings of the district judge. We have no doubt that the parties intended a genuine rescission. Certainly what was done was entirely consistent therewith.

A similar conclusion was reached in *Davis v. U.S.*,[3] where the court explained the purpose of the recission doctrine in denying a post-verdict motion filed by the government:

> * * * [A] taxpayer who by mistake consummates a transaction in a manner that is not in accord with his actual intent may, in the same tax year, with the consent of the other parties, reform the transaction

[2] 115 F.2d 167 (4th Cir. 1940).

[3] 378 F. Supp. 579 (N.D. Tex. 1974).

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> so as to carry out his real intent, and that such reformation will determine the [F]federal tax consequences.

These principles were adopted in Rev. Rul. 80-58 which stated the following as to the effect of a recission made within the same year in which the original transaction was entered:

> In Situation 1 [involving a sale and its rescission in the same year] the rescission of the sale during 1978 placed A and B at the end of the taxable year in the same positions as they were prior to the sale. Thus, in light of the *Penn* case, the original sale is to be disregarded for federal income tax purposes because the rescission extinguished any taxable income for that year with regard to that transaction. See Rev. Rul. 74-501, 1974-2 C.B. 98, which holds that there is no adjustment to the basis of the old stock where a shareholder exercised stock rights and paid the subscription price for the new stock, which subscription price was later returned to the shareholder in the same taxable year in which the rights were issued because the market price of the stock had depreciated to a price below the subscription offer.

The same principle was enunciated in Rev. Rul. 80-58.

> The annual accounting concept requires that one must look at the transaction on an annual basis using the facts as they exist at the end of the year. That is, each taxable year is a separate unit for tax accounting purposes. See *Security Flour Mills Co. v. Commissioner*, 321 U.S. 281 (1944), Ct. D. 1603, 1944 C.B. 526.

***"Generally, the intent that motivates the application of the doctrine of recession is not determinative of its application."***

## TRANSACTIONS THAT BENEFITTED FROM THE RESCISSION DOCTRINE

Generally, the intent that motivates the application of the doctrine of recession is not determinative of its application. Several cases and private letter rulings illustrate that the scope of the rescission doctrine is broad, so long as the parties act to rescind in the same tax period in which the original transaction was consummated and the parties are put back in the original position that existed prior to the transaction.

### Rescission on Account of a Mistake of Fact

*Davis v. U.S., supra.*

In *Davis*, the taxpayer owned shares of corporate stock in a privately held group of companies. He contemplated transferring the shares to his children, but was initially undecided whether to effect the transfer by gift or by sale. Ultimately, he decided to make a gift. At that point, the Vice President and Treasurer of the group owned by Mr. Davis was authorized to implement the transaction. This authorization was consistent the authority held by the Vice President to administer the consummation of business transactions such as the transfer of shares. The Vice President structured the transactions as sales rather than as gifts. This resulted in the potential recognition of capital gain by the taxpayer. The tax exposure was discovered several months after the gifts were made.  Within the same taxable year as the original sale, the original transactions were restructured to be gifts.

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The I.R.S. asserted that the original transaction cast as a sale was binding on the taxpayer. Ultimately, the I.R.S. contended that the transaction was part gift and part sale because the children agreed to pay the resulting gift tax imposed on the taxpayer.

The matter gave rise to a series of cases in Tax Court and in District Court regarding different aspects of the case. The matter in District Court addressed the following question:

> [W]ere [the taxpayers] entitled to judgment as a matter of law on the ground that regardless of the intent of the taxpayers at the time of the transfers of the Cummins stock in April, 1964, they could subsequently, in the same tax year, with the consent of the transferees, and in the absence of fraud, change the transaction to a gift and pay gift tax rather than income tax thereon. *Buff v. Commissioner*, (1972), and cases cited therein[?] (Footnotes omitted.)

The jury found the answer to be yes, and the court confirmed the verdict in ruling on post-verdict motions that were submitted.

> The Court is of the opinion that the plaintiffs are entitled to judgment (1) as a matter of law on the theory above discussed in connection with the motion for instructed verdict, and also (2) on the verdict of the jury considered along with the facts established as a matter of law by stipulation or otherwise. The following cases support the principle that a taxpayer who by mistake consummates a transaction in a manner that is not in accord with his actual intent may, in the same tax year, with the consent of the other parties, reform the transaction so as to carry out his real intent, and that such reformation will determine the federal tax consequences. *United States v. Merrill*, 9 Cir., 211 F. 2d 297, 304 * * *. (Footnotes omitted.)

*U.S. v. Merrill*[4]

*Merrill* involves the payment of an executor's fee received by an individual from the estate of his deceased wife in a state that was a community property jurisdiction. The wife's estate included property that was properly categorized as community property, meaning that he had an existing interest in one-half of the property. The executor's fee allowed by the probate court was $20,000, of which $12,500 was paid in one year and balance – $7,500 – was paid in the following year. The estate tax return was examined before the end of the following year and the examiner disallowed a claim against the estate for the portion of the executor's fee in excess of $10,000, the amount charged to the portion of the community property attributable to the deceased wife.

Consistent with that disallowance, the taxpayer did not report the $7,500 as income in the year of receipt. The I.R.S. contended that, because the $7,500 was received as a claim of right to income, the taxpayer could not disavow that he was taxable

[4] 211 F. 2d 297 (9th Cir. 1954).

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to that income. In rejecting the position of the I.R.S., that an erroneous inclusion of income cannot be reversed if discovered in the year of receipt, the court stated the following:

> [W]ith respect to the $7500 in executor's fees which were mistakenly paid out of the wife's share of the community property in 1940. For as to that part of the fee, the mistake was discovered in the same year as the sum was received (1940) and appropriate adjustments were made in his own books and those of his wife's estate in that year in recognition of the mistake. We think the $7500 receipt in 1940 was thereby placed outside the operation of the "claim of right" rule. * * * We are not aware that the rule has ever been applied where, as here, in the same year that the funds are mistakenly received, the taxpayer discovers and admits the mistake, renounces his claim to the funds, and recognizes his obligation to repay them. *Cf. Carey Van Fleet*, 2 B.T.A. 825; *Curran Realty Co. v. Commissioner*, 15 T.C. 341. We think there is no warrant for extending the harsh claim of right doctrine to such a situation. In such case the Internal Revenue Bureau is not faced with the problem of deciding the merits of the claim to the funds received, for the question has been resolved by the interested parties. No question is here raised as to the *bona fide*s of appellee's 1940 bookkeeping entries relative to the mistaken payments. Good faith is indicated by the fact that the taxpayer's $7500 obligation to the estate was not only recognized by him in 1940 but was paid in cash in 1943.

## Rescission on Account of Change in Circumstances

### *P.L.R. 200613027 – Undoing a Check-the-Box Election*[5]

In P.L.R. 200613027, an L.L.C. that was treated as a partnership for U.S. income tax purposes converted into a corporation under relevant state law. Where permitted under state law, a conversion is effected simply by amending the certificate of formation. For tax purposes, a conversion is treated as a deemed transfer of assets to a corporation that is tax free under Code §351 because the deemed transferors control the corporation. The conversion was effected pursuant to a contract previously entered into with its two shareholders in anticipation of making an I.P.O. of the stock.

Shortly after the conversions, certain precipitous and unexpected deterioration in market conditions caused the I.P.O. to be canceled. No plan existed to attempt another public offering in the near future. In the circumstances, the two shareholders and the corporation proposed that the corporation convert back into an L.L.C. taxable as a partnership before the end of the year that included the original conversion,

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[5] Pursuant to Code §6110(k)(3), a private letter ruling may not be used or cited as precedent by any person other than the taxpayer to whom issued. Nonetheless, it demonstrates the thinking of the National Office of the I.R.S. as of the date issued and may be used as authority to abate the imposition of a penalty. Practically speaking, private letter rulings can serve as guides to National Office interpretations, and I.R.S. employees consider them in issuing letter rulings to similarly situated taxpayers. Saltzman & Book, IRS Practice and Procedure (Thomson Reuters/Tax & Accounting, Rev. 2nd ed. 2002, with updates through October 2021) (online version accessed on Checkpoint [November 15, 2021]) at paragraph 305, n. 458.

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so that it and the owners together again would be subject to only a single level of federal income taxation.

Without application of the rescission doctrine, the return to L.L.C. status would typically be a taxable event at the corporate level and again at the shareholder level. Consequently, the corporation requested a ruling from the I.R.S. allowing the conversion to be rescinded for tax purposes.

***"In order to obtain a favorable ruling from the I.R.S., the corporation and its shareholders were required to make the following representations intended to confirm the facts that existed prior to the original transaction, the facts that existed during the period of existence of the corporation, and the facts that would exist after the rescission."***

In order to obtain a favorable ruling from the I.R.S., the corporation and its shareholders were required to make the following representations intended to confirm the facts that existed prior to the original transaction, the facts that existed during the period of existence of the corporation, and the facts that would exist after the rescission. The scope of the representations illustrate the I.R.S. view of the term *status quo ante*.

- Prior to the incorporation transaction, the L.L.C. was treated as a partnership for Federal income tax purposes.
- The L.L.C. had no current intention or plan to make an election pursuant to §301.7701-3 of the Income Tax Regulations to be classified as an association after converting back into an L.L.C.
- Other than certain redemptions made to certain members of the L.L.C.'s management team as a result of the death or separation from service and a distribution prior to the conversion date which appeared to have been made pursuant to the L.L.C. agreement, no distributions were made by the corporation to its equity holders since the date of the conversion.
- Since the date of the conversion, the corporation took no actions nor did it engage in any transactions with its two owners that were inconsistent with the actions and transactions the Taxpayer would have undertaken had it remained a partnership for Federal income tax purposes at all relevant times, except that profit distributions were not made. Those distributions were scheduled to be made after the rescission was implemented.
- Once the rescission transaction would be implemented, the L.L.C. intended to file its Federal income tax return as if it were a partnership during all of calendar year. In addition, each of its two owners planned to include in income an allocable share of the L.L.C.'s income, deduction, gain, and loss for the period beginning with conversion and ending with the rescission.
- Each member of the management team that received a distribution agreed to report the amounts received as if received from an L.L.C. taxable as a partnership during the entire taxable year.
- Upon the effective date of the rescission, the same operating agreement that was in existence prior to the conversion will continue to be in effect after the rescission, even if the agreement needed to be re-executed.
- The rescission agreement was intended to restore the legal and financial arrangements between the owners and the L.L.C. that would have existed in the absence of the conversion.

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- The effect of the rescission agreement was to cause the legal and financial arrangements between the owners and the L.L.C. to be identical in all material respects to arrangements that would have existed had the conversion not occurred.
- Neither the owners nor the L.L.C. took or intended to take any material position inconsistent with the position that would have existed had the conversion not occurred.

Once the representations were made, the I.R.S. ruled that, pursuant to Rev. Rul. 80-58, the conversion of the L.L.C. into a corporation giving rise to a tax-free transaction under Code §351 could be rescinded with the following consequences:

- The entity was treated as a partnership at all times during calendar year.
- The owners of the entity were treated as partners of the entity during the entire taxable year.
- The conversion of the entity from a corporation into a limited liability company taxable as a partnership pursuant to the rescission was not treated as a liquidation of the corporation for purposes of determining the taxable income of the entity and its owners.

*P.L.R. 200701019 – Undoing a Corporate Merger*

P.L.R. 200701019 involves the rescission of a corporate merger in the following fact pattern.

Parent Corp acquired all the outstanding common stock of Target Corp for cash. The only asset of Target Corp was the outstanding common stock of Subsidiary Corp. Subsidiary Corp did not own any equity interest in any other entity. As part of the acquisition, Parent Corp retired some amounts of Subsidiary Corp's debt in exchange for a note from Subsidiary Corp in the same amount. To maximize operational efficiencies and reduce state franchise tax exposure, immediately after Parent Corp acquired all of Target Corp's outstanding stock, Target Corp was merged into Parent Corp with Parent Corp surviving. The transaction was characterized as a complete liquidation of Target Corp for U.S. income tax purposes.

As result of the merger, Parent Corp became the sole shareholder of Subsidiary Corp. From the date of the merger (and before the rescission), Parent Corp loaned money to Subsidiary Corp for use in Subsidiary Corp's ongoing business.

Shortly after the merger and prior to the end of the taxable year of the merger, Parent Corp experienced an unexpected downturn in its business and realized it would need to dispose of one or more business lines to raise capital. Parent Corp realized that its decision to liquidate Target Corp rather than preserve its adjusted tax basis in Target Corp's stock had not been prudent. Therefore, Parent Corp formed New Target Corp under the laws of the same state in which old Target Corp had been incorporated. The bylaws of New Target Corp were identical to the bylaws of Target Corp. Parent Corp was the sole shareholder of New Target Corp. Parent Corp contributed all the outstanding stock of Subsidiary Corp to the capital of new Target Corp in exchange for all the common stock of new Target Corp.

Again, the I.R.S. required certain representations to ensure that all parties were put back to the same positions that existed before the acquisition of Target Corp was effected and merged into Parent Corp. The representations were detailed as the original transaction and following transactions were more than a simple share acquisition or conversion.

- The retirement of Subsidiary Corp's debt in exchange for a note from Subsidiary Corp in the same amount would have been carried out notwithstanding the merger.
- No actual or constructive transfers of money or property occurred between Subsidiary Corp and Parent Corp or its subsidiaries prior to the rescission transaction other than the contribution of Subsidiary Corp shares to New Target Corp.
- No material changes in the legal or financial arrangements between Subsidiary Corp and Parent Corp or its subsidiaries prior to the date of the rescission transaction.
- After the rescission transaction the legal and financial arrangements among Parent Corp, New Target Corp, and Subsidiary Corp would be identical in all material respects to the legal and financial arrangements among those corporations prior to the merger.
- The merger and the rescission transaction took place in the same taxable year.

The I.R.S. ruled the rescission doctrine applied to the unwinding of the merger of Subsidiary Corp into Parent Corp, based on the above facts and representations. Consequently:

- Target Corp was not treated as having merged into Parent Corp.
- Target Corp and Parent Corp were treated as two separate corporations at all times during the tax year.
- Parent Corp was treated as having been the shareholder of Target Corp at all times during the tax year.
- The merger of the Target Corp into the Parent Corp was not treated as a liquidation of the Target Corp for purposes of determining Parent Corp's or Target Corp's taxable income.

## Rescission to Reverse Unexpected Adverse Tax Consequences

### *P.L.R. 9829044*

In P.L.R. 9829044, the I.R.S. considered whether the legal doctrine of rescission applied to reverse the termination of the status of a U.S. domestic corporation as an S-Corporation ("S Corp"). An S-Corp is a domestic corporation that computes income as if it were an individual, and to the extent provided by law, its shareholders are taxed on the income automatically.

> *“At least two conditions must be satisfied for the remedy of rescission to apply to disregard a transaction for Federal income tax purposes.”*

In the ruling, the shareholders of an S-Corp transferred their stock in the S-Corp to another corporation (“S-Corp II”) that was owned by the same shareholders of the S-Corp. The purpose of the transaction was to streamline the business operations of the two corporation and reduce administrative expenses. A parent S-Corporation – here, S-Corp II – may elect to treat one or more of its eligible subsidiaries as a qualified subchapter S-Corporation subsidiary (“QSub”).The QSub election results in a deemed liquidation of the subsidiary into the parent. Following the deemed liquidation, the QSub is not treated as a separate corporation and all of the subsidiary’s assets, liabilities, and items of income, deduction, and credit are treated as those of the parent.

At some point during the same taxable year, the outside accountants of the S-Corp discovered that shareholder basis in the S-Corp stock was overstated. As a result, a substantial amount of losses reported by the S-Corp would be suspended until the basis was increased. Unfortunately, once S-Corp became a QSub of S-Corp II, the suspended losses were eliminated. To remedy the problem, the transfer of shares in S-Corp to S-Corp II was rescinded and a ruling request was submitted to the I.R.S. to determine whether the rescission would be respected for income tax purposes.

The I.R.S. required the shareholders of S-Corp and S-Corp II to make the following factual representations:

- There were no actual or constructive distributions of money or property from S-Corp to S-Corp II while the latter corporation owned the former.
- There were no actual or constructive contributions of money or property from S-Corp II to S-Corp while the former corporation owned the latter.
- There were no material changes in the legal or financial arrangements between S-Corp and S-Corp II or between one or more of the shareholders and the corporation while latter corporation owned the former.
- After the rescission was implemented, the legal and financial arrangements among all of the parties were identical in all material respects to such arrangements prior to the initial transaction.
- No consideration was paid to any of the shareholders in order to induce shareholder consent to the original transaction or its rescission.

The I.R.S. looked to Rev. Rul. 80-58 for guidance in determining whether the rescission would be respected. At least two conditions must be satisfied for the remedy of rescission to apply to disregard a transaction for Federal income tax purposes. First, the parties to the transaction must return to the *status quo ante*. This means that they must be restored to the relative positions they would have occupied had no contract been made. Second, this restoration must be achieved within the taxable year of the transaction. These are factual questions and in light of the facts recited and the factual representations made, those facts existed. The rescission was not a taxable event in the circumstances.

*P.L.R. 200911004*

P.L.R. 200911004 involves a relatively straightforward merger and rescission completed within the same taxable year involving Acquiring Corp and Target Corp. As a prelude to the merger, Acquiring Corp acquired convertible preferred shares of

Target Corp from existing shareholders, paying cash for the shares. Thereafter, a merger agreement was entered into between Acquiring Corp and Target Corp.

Within several months, Acquiring Corp realized that the merger could yield adverse tax consequences that potentially would be devastating to the viability of Acquiring Corp as an ongoing entity. The ruling did not elaborate on the adverse consequences. Consequently, Acquiring Corp, Target Corp, and certain shareholders of Target Corp undertook steps to rescind the merger and to implement a taxable sale of Target Corp common stock to Acquiring Corp.

Again, the I.R.S. required the following representations from Acquiring Corp:

- At the time of completion of the rescission transaction, the legal and financial arrangements among Acquiring Corp, Target Corp, and their respective shareholders were identical in all material respects to all such arrangements prior to the merger.
- Neither Acquiring Corp nor Target Corp would take any material position for U.S. Federal income tax purposes inconsistent with the position it would have taken had the merger not occurred.
- There was no plan or intention to liquidate Target Corp with or into Acquiring Corp.

The I.R.S. ruled the rescission doctrine applied to the unwinding of the merger of Target Corp into Parent Corp, based on the above facts and representations. Consequently:

- Target Corp was not treated as having merged into Acquiring Corp.
- Target Corp and Acquiring Corp were treated as two separate corporations at all times during the relevant taxable year.
- Acquiring Corp was treated as having acquired all of the Target common stock that was not part of the rescission pursuant to the Agreement as of the date of the rescission.

## I.R.S. ADOPTION OF NO-RULING POLICY

In 2010, guidance on the scope and application of the rescission doctrine was placed on the I.R.S. priority guidance plan. Then, in 2012, the I.R.S. announced that it was no longer issuing private letter rulings regarding rescissions.[6] At about the same time, the guidance project was dropped. However, the no-ruling policy remained in effect. The no-ruling policy was included in Rev. Proc. 2014-3 (Section 3.02(8)), the annual announcement of those domestic provisions of the Code in which the I.R.S. will not issue letter rulings or determination letters.

Although the I.R.S. will not issue a ruling on the application of the rescission doctrine to a particular fact patter, Rev. Rul. 80-58 remains official guidance of the I.R.S. and was recently followed in a private letter ruling issued by the I.R.S. In P.L.R. 202123001, a taxpayer requested an extension of time to change its entity classification within the 60-month period succeeding the effective date of a prior

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[6] In Section 5.02 of Rev. Proc. 2012-3.

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election. Ordinarily, an election cannot be reversed within the 60-month period. In denying the application, the I.R.S. analogized the taxpayer's request to the doctrine of rescission, and Rev. Rul. 80-58 was cited as appropriate authority to state that the conditions for a rescission to be recognized for U.S. income tax purposes were not met.

> Further, though X's request is made in the form of a late election, in substance X is seeking a ruling permitting the rescission of the deemed transaction that occurred in a prior year. Using an overlapping election to rescind a transaction is different than making a second election and is not provided for in the regulations under § 301.7701-3. Moreover, rescissions, in general, raise other considerations. See, *e.g.*, Rev. Rul. 80-58, 1980-1 C.B. 181 (the annual accounting period principle precludes rescission of a transaction completed in a prior year).

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