56 Tax Management Memorandum 253

Beyond Safe Harbors: Recent Developments in Insurance & Risk Distribution

By Logan R. Gremillion, Esq.
The Feldman Law Firm LLP
Houston, Texas

Logan R. Gremillion is a tax attorney with The Feldman Law Firm LLP. He is a graduate of New York University's renowned Graduate Tax Program. While at the University of Texas at Austin, Gremillion received his J.D., proceeded by his B.B.A. in finance (with honors), which he received from the Mays Business School at Texas A&M.

Since the dawn of the modern industry in the coffee shops of London, people have been looking to reduce or normalize their losses through the trading and pooling of risk with others. At the same time, as with all other transactions, the government has sought to tax insurance arrangements. Insurance is both a creature of domiciliary regulation and federal taxation. What qualifies as insurance for regulatory licensing purposes may not be insurance for federal income tax purposes, and what qualifies as insurance for federal tax purposes is not necessarily insurance for regulatory licensing purposes. There is, however, a significant overlap.

The issue regarding what constitutes insurance for federal tax purposes has been subject to extensive litigation and Internal Revenue Service ("IRS") guidance in the captive insurance area. Captive insurance is an insurance arrangement where the insurer is in some form related to the companies it insures, typically through common ownership or control. Captives were typically formed where market coverage was non-existent or cost-prohibitive. The economics of true captive insurance arrangements are very similar to the economics of non-captive insurance arrangements.

WHAT IS INSURANCE?

According to the National Association of Insurance Commissioners ("NAIC") insurance is defined as "an economic device transferring risk from an individual to a company and reducing the uncertainty of risk via pooling." [1] The Oxford English Dictionary defines insurance as "a contract by which one party (usually a company or corporation) undertakes, in consideration of a payment (called a premium) proportioned to the nature of the risk contemplated, to secure the other against pecuniary loss, by payment of a sum of money in the event of destruction of or damage to property ...." [2] There are as many different definitions of insurance as there are books in which to publish them. However, the definition of the term "insurance" is absent from one important source, the Internal Revenue Code ("IRC" or the "Code").

---

[1] National Association of Insurance Commissioners (NAIC) Glossary of Insurance Terms (2015) available at http://www.naic.org/consumer_glossary.htm.

[2] Oxford University Press, *Oxford English Dictionary* (2015).

Amounts paid for insurance are deductible as ordinary and necessary business expenses under §162. [3] Subchapter L of the Code provides, in significant detail, for the taxation of insurance companies. However, there is no definitive statement on what qualifies as insurance in the entirety of the Code or the regulations promulgated by the Department of the Treasury. The duty of defining insurance for purposes of taxation has fallen upon the courts. Writing for the Supreme Court, Justice Frank Murphy acknowledged that none of the revenue acts had defined insurance. [4] In determining whether or not amounts paid under a contract were premiums paid for insurance, Justice Murphy further stated that insurance transactions must involve an actual insurance risk and that "(h)istorically and commonly insurance involves risk-shifting and risk distribution." [5]

---

[3] Unless otherwise stated, all section references are to the Internal Revenue Code, as amended, and the regulations promulgated thereunder.

[4] *Helvering v. LeGierse*, 312 U.S. 531 (1941).

[5] *Id.*

The courts have developed this three-part framework of insurance risk or common notions of insurance, risk shifting and risk distribution as the requirements for a valid insurance contract for federal tax purposes. The IRS has applied these requirements in numerous administrative rulings and in the position it has taken in disputes with taxpayers over deductions of insurance premiums. The requirement of insurance risk simply stated is that the risk being insured must be of a fortuitous nature. [6] In distinguishing between insurance risk and speculative risk, courts have found that in insurance risk there is only risk of loss, [7] whereas speculative risk has some potential of profit. [8]

---

[6] *Commissioner v. Treganowan*, 183 F.2d 288 (2d Cir. 1950).

[7] *AMERCO, Inc. Et al. v. Commissioner*, 979 F.2d 162 (9th Cir. 1992).

[8] *Sears, Roebuck and Co. v. Commissioner*, 96 T.C. 671 (T.C. 1991).

RISK SHIFTING

The requirement of risk shifting simply stated is that the risk of loss must be shifted from one person, the insured, to another, the insurer. Courts have described risk shifting in stating a required aspect of insurance is the "transferring from the insured to the insurer the consequences of a possible future event." [9] From an economic standpoint, if the insured no longer bears the full risk of loss, that loss has been shifted to another.

---

[9] *Clougherty Packing Co. v. Commissioner*, 811 F.2d 1297 (9th Cir. 1987).

Historic Analysis

The IRS, for a significant amount of time, had adopted the "economic family" approach to risk shifting. That is, if the risk remained in the same economic family, the risk was not shifted from one person to another. The IRS issued Rev. Rul. 77-316, [10] in which three different situations involving an insurance company subsidiary writing insurance to its brother-sister companies were all found to lack the requisite risk-shifting because the group of companies represented an economic family beyond which the risk was not transferred.

---

[10] Rev. Rul. 77-316, 1977-2 C.B. 53.

The IRS relied upon this rationale in several cases challenging insurance arrangements. In *Humana Inc. v. Commissioner*, [11] the Sixth Circuit rejected the economic family argument and found that risk can be shifted from an insured subsidiary to a brother-sister insurance company subsidiary. In ruling against another insurance arrangement, the Third Circuit refused to adopt the economic family theory and instead found that the presence of a guaranty from the insured undermined the transfer of risk. [12] In a further rejection of the economic family theory, the Ninth Circuit explained how risk shifting can occur between a parent insured and a subsidiary insurance company:

---

[11] *Humana Inc. v. Commissioner*, 881 F.2d 247 (6th Cir. 1989).

[12] *Gulf Oil Corporation v. Commissioner*, 914 F.2d 296 (3d Cir. 1990).

The insurance risk is the possibility that a particular event for which an insured will be held liable will occur. Of course, from the standpoint of the insured there can be no profit from that risk. The only possible outcomes are loss or no loss. It is that risk which must be transferred to the insurer if true insurance is to be involved.
Speculative risk, on the other hand, is merely investment risk, and it can produce profit or loss. An insurance company, for example, may earn or lose money based upon the outcome of its investment, underwriting, adjusting and management activities. When it does, the value of its stock will increase or decrease, and if the parent owns that stock it, too, will suffer gain or loss. [13]

---

[13] *AMERCO, Inc. Et al. v. Commissioner*, 979 F.2d 162 (9th Cir. 1992).

The court used this rationale to argue that the presence of additional unrelated risk meant that the insurance risk was shifted from the insurer even where the insurer is a wholly owned subsidiary of the insured, as the speculative risk is the only risk retained by the parent insured.

Administrative Guidance
With the courts rejecting the economic family theory espoused by the IRS, the IRS publicly announced in 2001 that it would no longer assert the economic family approach for purposes of determining whether or not risk shifting was present. [14] The IRS maintained that it would challenge insurance arrangements on the facts and circumstances of each arrangement. In formal guidance issued since its decision to no longer assert the economic family theory against captive insurance arrangements, the IRS has summarized its position on risk shifting as occurring “if a person facing the possibility of an economic loss, transfers some or all of the financial consequences of the potential loss to the insurer, such that the loss by the insured does not affect the insured because the loss is offset by a payment from the insurer.” [15]

---

[14] Rev. Rul. 2001-31, 2001-26 I.R.B. 1348.

[15] Rev. Rul. 2002-89, 2002-52 I.R.B. 984.

Recent Developments
In the recent *Rent-A-Center* case, [16] the Rent-A-Center holding company (“RAC”) formed a wholly owned insurance subsidiary, Legacy, for purposes of insuring workers' compensation, automobile and general liability risks of RAC's operating subsidiaries. The IRS challenged the arrangement between the operating subsidiaries and Legacy on multiple grounds, including that the arrangement lacked the requisite risk shifting. The Tax Court disagreed. The court reasoned that the policies shifted risk in part by analyzing the balance sheet and net worth of the subsidiaries. This approach looks to the economic consequences of the insurance arrangement on balance sheet and net worth of the insured. If the reimbursement under the insurance policies were to cause an increase in assets (the reimbursement) accompanied by a decrease (the reduction in value of the stock of the insurer), it is arguably evidence of lack of risk shifting. Additionally, the Tax Court held that outstanding guarantees in favor of Legacy from RAC did not undermine the risk shifting present in the arrangement. [17] Unlike the parental guaranty of an undercapitalized insurance subsidiary that invalidated the risk shifting in *Kidde*, [18] the Tax Court found that Legacy was financially capable of meeting its obligations and that

the guaranty was issued for the separate purpose of satisfying regulatory licensing requirements with respect to treating deferred tax assets as admitted assets for solvency purposes. [19]

---

[16] *Rent-A-Center Inc. and Affiliated Subsidiaries v. Commissioner*, 142 T.C. 1 (2014).

[17] *Id.*

[18] *Kidde Industr. Inc. v. United States*, 40 Fed. Cl. 42 (Fed. Cl. 1997).

[19] *Rent-A-Center Inc. and Affiliated Subsidiaries v. Commissioner*, 142 T.C. 1 (2014).

In the other recent insurance case from the Tax Court, the court again employed the balance sheet and net worth analysis. In *Securitas*, [20] the U.S. holding company subsidiary ("SHI") of a foreign parent company had several subsidiaries operating various businesses including an insurance subsidiary, Protectors. The foreign parent also had its own recently formed Irish insurance subsidiary, SGRL, which operated as a reinsurer, including for Protectors. The court stated that its "balance sheet and net worth analysis indicates that the captive insurance arrangement has shifted any economic consequences of a risk from the SHI Group subsidiaries to Protectors and then to SGRL." [21] Also similar to the *Rent-A-Center* case, SHI had issued a guaranty in favor of Protectors, which the court found to be adequately capitalized, and the guaranty was issued only to preserve the tax-exempt status of another company in the SHI group; moreover, no amounts were paid under the guaranty. [22]

---

[20] *Securitas Holdings Inc. and Subsidiaries v. Commissioner*, T.C. Memo 2014-225.

[21] *Id.*

[22] *Id.*

The risk-shifting requirement is a fairly straightforward analysis. If the economics of the arrangement are such that the risk of loss is transferred from the insured to the insurer, the arrangement has satisfied the risk-shifting requirement. All agreements of the arrangement must be examined, not just the insurance policies themselves. [23] As is illustrated above, a guaranty or offsetting contract can negate the risk shifting achieved under the insurance policies.

---

[23] *Helvering v. Le Gierse*, 312 U.S. 531 (1941).

RISK DISTRIBUTION

Quoting the opinion of the expert witness in the case, Dr. Neil A. Doherty, the Tax Court in *Harper Group* [24] stated that risk shifting and risk distribution are two sides of the same coin. While risk shifting looks at the arrangement and risk from the perspective of the insured, risk distribution looks to the insurer to see if the risks acquired by the insurance company are distributed among a pool of risks such that no one claim can have an extraordinary adverse affect on the insurer. The result is that the volatility of losses as an insurer is reduced by insuring a large number of discrete risks.

[24] *The Harper Group and Includible Subsidiaries v. Commissioner*, 95 T.C. 45 (1991).

Historic Analysis

In examining insurance arrangements for the presence of risk distribution, the early cases typically looked to the number of insured parties. In *Treganowan*, [25] the "insurance" arrangement involved a voluntary participation in a death benefit program for members of the New York Stock Exchange. To join the program, members had to contribute $15 to the fund and pay a $15 contribution to the fund when another member died; as a benefit, the program paid out $20,000 to the family of a deceased member. The court found that the risk of loss was distributed among the 1,373 members of the exchange. [26]

---

[25] *Commissioner v. Treganowan*, 183 F.2d 288 (2d Cir. 1950).

[26] *Id.*

In *Humana*, [27] the insurance company Health Care Indemnity, Inc., insured its parent company, Humana, Inc., and various other subsidiaries of Humana, Inc. The court held that the insurance arrangement between the brother-sister subsidiaries and Health Care Indemnity, Inc. satisfied risk distribution requirements stating “we see no reason why there would not be risk distribution in the instant case where the captive insures several separate corporations within an affiliated group and losses can be spread among the several distinct corporate entities.” [28] The policies issued by Health Care Indemnity in*Humana* covered between 22 and 48 distinct insured corporations and 64 to 97 individual hospitals.

[27] *Humana Inc. v. Commissioner*, 881 F.2d 247 (6th Cir. 1989).

[28] *Id.*

In *Gulf Oil*, [29] the Tax Court stated “risk transfer and risk distribution occur only when there are sufficient unrelated risks in the pool for the law of large numbers to operate … In this instance ‘unrelated’ risks need not be those of unrelated parties; a single insured can have sufficient unrelated risks to achieve adequate risk distribution.” [30]

[29] *Gulf Oil Corp. v. Commissioner*, 89 T.C. 1010, *aff'd in part*, 91 F.2d 396 (3d Cir. 1990).

[30] *Id.*

While the position taken in *Gulf Oil* clearly indicated the intent of the analysis to be based on individual risks or risk exposures and not the number insured parties, the courts developed a shorthand method of measuring risk distribution. This method looked to the percentage of risk, typically measured by premiums paid, that an insurance arrangement insured related-party insurance and non-related party insurance. In *AMERCO*, the Ninth Circuit validated this approach where the related-party insurance varied from 26% to 48% of the insurance business underwritten:

As we have already pointed out, risk distribution looks at the transaction from the standpoint of the insurer. Here, where a substantial part of the insurer's business comes from sources unrelated to the parent and its subsidiaries, it was proper for the Tax Court to decide that there was sufficient risk distribution. The distribution aspect is rather apparent. As the Tax Court found, Republic's ‘insurance business was diverse, multifaceted, and … involved a substantial amount of outside risks. More of the money in its pool came from outside unrelated insureds than came from AMERCO & Subsidiaries.' That determination is clearly not erroneous. [31]

[31] *AMERCO, Inc. Et al. v. Commissioner*, 979 F.2d 162 (9th Cir. 1992).

In *Harper Group*, [32] the Ninth Circuit continued this analysis of unrelated business of the insurance company as a short cut to risk distribution stating “the only relevant way in which this case differs from *AMERCO* is that here the unrelated business of the captive (insurer) was from 29 percent to 33 percent of its total business, rather than the 52 percent to 74 percent found in *AMERCO*.” [33] The court went on to compare instances in which an insurance arrangement was held to be true insurance. For example, the court contrasted *Sears Roebuck* [34] with 99.75% unrelated insurance to other cases, such as*Beech Aircraft* [35] with 0.5% unrelated business, that found the arrangement was not true insurance. This analysis was continued with the Court of Federal Claims finding the arrangement between Ocean Drilling and Exploration Company and its wholly owned subsidiary, Mentor Insurance Limited, to have achieved adequate levels of risk distribution. [36]

[32] *The Harper Group, et al. v. Commissioner*, 979 F.2d 1341 (9th Cir. 1992).

[33] *Id.*

[34] *Sears Roebuck & Co. v. Commissioner*, 972 F.2d 858 (7th Cir. 1992).

[35] *Beech Aircraft Corp. v. United States*, 797 F.2d 920 (10th Cir. 1986).

[36] *Ocean Drilling & Exploration Co. v. United States*, 24 Cl. Ct. 714 (1991), *aff'd*, 988 F.2d 1135 (Fed. Cir. 1993).

In *Kidde Industries Inc.*, [37] the court broke from this shorthand method of approximating risk distribution by way of related and unrelated business and discussed the economic reality of risk distribution by stating:

[37] *Kidde Indust. Inc. v. United States*, 40 Fed. Cl. 42 (1997).

Risk distribution addresses the risk that over a short period of time claims will vary from the average. Risk distribution occurs when particular risks are combined in a pool with other, independently insured risks. By increasing the total number of independent, randomly occurring risks that a corporation faces (i.e., by placing risks into a larger pool), the corporation benefits from the mathematical concept of the law of large numbers in that the ratio of actual to expected losses tends to approach one. In other words, through risk distribution, insurance companies gain greater confidence that for any particular short-term period, the total amount of claims paid will correlate with the expected cost of those claims and hence correlate with the total amount of premiums collected. [38]

[38] *Id.*

While this statement may be the most accurate discussion of risk distribution, it is difficult to quantify risks and the “law of large numbers” short of statistical analysis. This difficulty is what lead to the adoption of the related-unrelated shorthand method of determining risk distribution, as well as the IRS's administrative guidance and safe harbors addressing the presence of risk distribution.

Administrative Guidance

The IRS has published five revenue rulings and a handful of private letter rulings on risk distribution in an insurance arrangement. The first revenue ruling addressed an insurance arrangement between a parent corporation and a wholly owned insurance subsidiary. [39] The ruling stipulates that, in the contemplated arrangement, the premiums are established according to industry custom, and in all aspects the parties apply arm's-length principles in the transaction. In the first situation, the premiums earned by the insurance company subsidiary as a result of insuring the parent constituted 90% of the total premiums earned, and the remaining 10% of premiums are a result of insuring parties unrelated to the parent. In the second situation, the amount of premiums earned as a result of insuring the parent corporation consisted of less than 50% of the total premiums earned, with the remaining 50% a result of insuring unrelated parties.

---

[39] Rev. Rul. 2002-89, 2002-52 I.R.B. 984.

The IRS ruled that, in the first situation, the arrangement between the parent and the insurance company subsidiary lacked the requisite risk shifting and risk distribution for the arrangement to be insurance for federal income tax purposes. In the second situation, the IRS found that the arrangement between the parent and the insurance company subsidiary had the requisite risk shifting and risk distribution. Accordingly, the IRS concluded that, in the first situation, the premiums paid to the insurance company by the parent were not deductible insurance premiums, and that, in the second situation, the premiums paid were deductible insurance premiums. [40]

---

[40] *Id.*

The analysis by the IRS in Rev. Rul. 2002-89 mirrors the related business-unrelated business analysis undertaken by the courts discussed above. Similar to the second situation in Rev. Rul. 2002-89, *AMERCO* involved the insuring of unrelated parties to the extent of 52% to 74% of total premiums earned, and the arrangement was found to have achieved adequate levels of risk distribution. [41] In the second situation of Rev. Rul. 2002-89, the IRS established a safe harbor in that, where an insurance subsidiary receives more than 50% of premiums from unrelated parties, the insurance company has achieved risk distribution and the arrangement will be respected. The IRS also established that it would consider situations where only 10% of the risk is unrelated as not achieving the required level of risk shifting and risk distribution.

---

[41] *AMERCO, Inc. Et al. v. Commissioner*, 979 F.2d 162 (9th Cir. 1992).

Simultaneous with Rev. Rul. 2002-89, the IRS released Rev. Rul. 2002-90, addressing risk shifting and risk distribution in an insurance arrangement. [42] In Rev. Rul. 2002-90, the IRS presented a situation where a parent company with 12 operating subsidiaries, each providing professional services in a distinct geographic territory, formed an insurance company subsidiary for the purposes of insuring professional liability risks of the 12 other subsidiaries. The ruling provides that each individual operating subsidiary comprises no less than 5% and no more than 15% of the total risk insured by the insurance company subsidiary. The IRS reasoned that the pooled premiums are such that "a loss by one operating subsidiary is borne, in substantial part, by the premiums paid by others." [43] The IRS concluded that the arrangement had achieved risk shifting and the required levels of risk distribution and held that the premiums paid by the operating subsidiaries were deductible insurance premiums. This ruling establishes a fairly narrow safe harbor, in which the IRS seems to place emphasis on concentration of risk by stipulating, no single insured subsidiary may constitute more than 15% of the total risk.

---

[42] Rev. Rul. 2002-90, 2002-52 I.R.B. 985.

[43] *Id.*

The IRS revisited and expanded upon this "12 insured with 5 percent to 15 percent of total risk" concept in Rev. Rul. 2005-40. [44] The IRS presents four scenarios in Rev. Rul. 2005-40. In Situation 1, a domestic corporation operating a courier business with a large fleet of vehicles, which is stipulated to represent a significant volume of independent, homogenous risks, enters into an insurance arrangement with an unrelated insurance company on arm's-length terms to insure the risk of loss arising from the operation of the vehicle fleet. The insurance company does not insure any entity or operations other than those of the courier business. In Situation 2, the facts are the same as Situation 1, except that the unrelated insurance company also insures another courier business, with the second courier business comprising 10% of the total risks insured.

---

[44] Rev. Rul. 2005-40, 2005-27 I.R.B. 4.

Situation 3 in Rev. Rul. 2005-40 is similar to Rev. Rul. 2002-90, in which a domestic corporation operating a courier transport business conducts its business through 12 single member limited liability companies (LLCs). The LLCs are disregarded entities for federal tax purposes. The LLCs operate a large fleet of vehicles that are stipulated to represent a significant volume of independent, homogenous risks. The domestic corporation enters into an arrangement with an unrelated insurance company at arm's-length terms to insure the risk of loss arising from the operation of the vehicle fleet in the courier business, whereby each LLC represents no less than 5% and no more than 15% of the total risk insured. The unrelated insurance company does not insure any other operations.

In Situation 4, the facts are identical to Situation 3, except that each of the 12 LLCs elect to be treated as an association for tax purposes.

The IRS, in analyzing the situations presented in Rev. Rul. 2005-40, argues that Situations 1, 2 and 3 all lack the requisite level of risk distribution. Only in Situation 4 does the IRS bless the insurance arrangement and conclude that the premiums are deductible expenses. In discussing the presence of risk distribution the IRS states "courts have recognized that risk distribution necessarily entails a pooling of premiums, so that a potential insured is not in significant part paying for its own risks.” [45] The IRS cites to *Humana* [46] as well as *Ocean Drilling*, [47] *Beech Aircraft*, [48] *Treganowan*, [49] *Crawford Fitting*, [50]and *AMERCO* [51] all in support of this statement.

---

[45] *Id.*

[46] *Humana Inc. v. Commissioner*, 881 F.2d 247 (6th Cir. 1989).

[47] *Ocean Drilling & Exploration Co. v. United States*, 24 Cl. Ct. 714 (1991), *aff'd*, 988 F.2d 1135 (Fed. Cir. 1993).

[48] *Beech Aircraft Corp. v. United States*, 797 F.3d 920 (10th Cir. 1986).

[49] *Commissioner v. Treganowan*, 183 F.2d 288 (2d Cir. 1950).

[50] *Crawford Fitting Co. v. United States*, 606 F. Supp. 136 (N.D. Ohio 1985).

[51] *AMERCO, Inc. Et al. v. Commissioner*, 96 T.C. 18 (1981), *aff'd*, 979 F.2d 162 (9th Cir. 1992).

It would appear that this statement by the IRS is based upon a misunderstanding of risk distribution. None of the decisions stated that a large number of insured parties was a requirement to achieve risk distribution. This statement, in fact, ignores the cases that discuss risk distribution as a factor of independent risks. In discussing risk distribution, *Clougherty Packing* states “(b)y assuming numerous relatively small, independent risks that occur randomly over time, the insurer smooths out losses to match more closely to its receipt of premiums.” [52] Likewise, the court in *Kidde* addresses risk distribution as a factor of independent risks. [53]

---

[52] *Clougherty Packing Co. v. Commissioner*, 811 F.2d 1297 (9th Cir. 1987).

[53] *Kidde Indust. Inc. v. United States*, 40 Fed. Cl. 42 (1997).

Recent Developments

Further eroding the argument that risk distribution requires a certain number of insured parties is the Tax Court's decision in *Rent-A-Center*. [54] As previously described, RAC formed Legacy for purposes of insuring workers' compensation, automobile and general liability risks of its operating subsidiaries. In addition to its unsuccessful lack of risk-shifting contention analyzed above, the IRS challenged the Legacy arrangement on the ground that it lacked the requisite risk distribution. During the years at issue, Legacy insured between three and 10 RAC subsidiaries, with an average of more than 64% of risk in one subsidiary. [55] In finding that Legacy had achieved adequate risk distribution, the Tax Court noted:

---

[54] *Rent-A-Center Inc. and Affiliated Subsidiaries v. Commissioner*, 142 T.C. 1 (2014).

[55] *Rent-A-Center Inc. and Affiliated Subsidiaries v. Commissioner*, 142 T.C. 1 (2014) (Respondent's Brief ¶106).

During the years in issue RAC's subsidiaries owned between 2,623 and 3,081 stores; had between 14,300 and 19,740 employees; and operated between 7,143 and 8,027 insured vehicles. RAC's subsidiaries operated stores in all 50 states, the District of Columbia, Puerto Rico and Canada. RAC's subsidiaries had a sufficient number of statistically independent risks. Thus, by insuring RAC's subsidiaries, Legacy achieved risk distribution. [56]

---

[56] *Rent-A-Center Inc. and Affiliated Subsidiaries v. Commissioner*, 142 T.C. 1 (2014).

The reasoning that the court used in finding risk distribution in *Rent-A-Center* illustrates how the true nature of risk distribution lies in discrete independent risks, not independent insured parties.

The Tax Court addressed a similar issue with *Securitas*, wherein Securitas Holdings Inc. (SHI) had acquired Protectors, and the foreign parent company of SHI had established a wholly owned Irish insurance subsidiary, SGRL [57] Protectors issued insurance policies in favor of the SHI operating subsidiaries and ceded the insurance written to SGRL. The IRS challenged the insurance arrangement between the SHI operating subsidiaries, Protectors and SGRL in part due to the lack of risk distribution. The premiums related to 11 subsidiaries of SHI with each individual subsidiary allocated anywhere from 0.003% to 37.015% of total premiums in one year, and from 0.149% to 88.346% of premiums in the following year. [58]

---

[57] *Securitas Holdings Inc. and Subsidiaries v. Commissioner*, T.C. Memo 2014-225.

[58] *Id.*

The IRS claimed the arrangement lacked risk distribution because the majority of premiums paid to SGRL were attributable to a single subsidiary. Protectors and SGRL insured workers' compensation, automobile, employment practice, general liability and fidelity liability risks. The SHI subsidiaries employed approximately 100,000 people and operated over 2,250 vehicles. In finding that the insurance arrangement between the SHI subsidiaries, Protectors and SGRL had sufficient risk distribution the court notes:

Risk distribution is viewed from the insurer's perspective. As a result of the large number of employees, offices, vehicles, and services provided by the U.S. and non-U.S. operating subsidiaries, SGRL was exposed to a large pool of statistically independent risk exposures. This does not change merely because multiple companies merged into one. [59]

---

[59] *Id.*

The IRS did not appeal the Tax Court's decisions in either *Rent-A-Center* or *Securitas* (with the absence of an appeal in the former, a court-reviewed decision, somewhat surprising in light of the issuance of concurring and dissenting opinions by the Tax Court judges). The analysis of risk distribution in both of these recent cases is a step toward reconciling the economic reality of an insurance arrangement.

The Tax Court opinions in *Rent-A-Center* and *Securitas* recognize the economic reality of risk distribution in an insurance arrangement. If an insurance company issues policies to 100 corporations, each operating one store, the risk is the same as if those individual stores were owned by one holding company. The opinions also appear to undermine the determinations in Rev. Rul. 2005-40. In Rev. Rul. 2005-40, the IRS stipulated that all the scenarios involved a significant volume of independent risks. If risk distribution is truly achieved by a pool of statistically independent risk exposures, Situations 1 through 3 of Rev. Rul. 2005-40 would have adequate risk distribution, and the premiums paid in each instance would be deductible for federal tax purposes.

The *Rent-A-Center* and *Securitas* opinions do not represent a paradigm shift in the taxation of insurance companies. The economic principles of risk shifting and risk distribution have been the foundation of all the cases involving taxation of insurance arrangements. However, the decisions do bring to light a key flaw in how the IRS has examined insurance arrangements for the past 10 years. The shortcuts to achieving risk shifting and risk distribution through the coverage of a significant amount unrelated risk (e.g., 29% in *Harper Group* and 52% in *AMERCO*) or through the coverage of multiple operating subsidiaries (*Humana*) was viewed not as a factor evidencing the shifting and distribution of risk but as a requirement.