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III

The Doctrine of Libson Shops and Its Evolving Impact on Single Corporate Taxpayers

Richard T. Watson

IT IS A regrettable fact of life that closely held corporations frequently fail to realize the bright hopes of their founders and suffer economic disaster. Entrepreneurs are, however, optimists by nature, and the failure of one business enterprise often leads to the founding of a new one. The initiation of a second business venture frequently finds the entrepreneur's own financial resources severely depleted, and fresh capital from a new investor may be essential.

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The general subject of net operating loss carryovers has been examined in some detail in the past.[1] There have, however, been significant, recent developments in an area of this subject matter of great importance to closely held corporations, namely, the doctrine of *Libson Shops, Inc. v. Koehler*[2] and its impact on the net operating loss carryovers of single continuing corporations which undergo a change of ownership, of business, or both.

Under these circumstances, one of the original entrepreneur's most valuable assets may be a direct outgrowth of his original corporation's misfortunes — namely, the corporation's net operating loss carryovers. Preservation of these carryovers may result in the tax sheltering of the profits of a new business which is conducted within the framework of the old corporation. This tax shelter may make an otherwise marginal investment in a new business very attractive indeed.[3]

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[1] Pomeroy, Hawkins, Adelson & Harvey, *Tax Utilization of Net Operating Losses*, 14 W. RES. L. REV. 233 (1963).

[2] 353 U.S. 382 (1957).

[3] Although most frequently relevant in the area of closely held corporations, the problems herein discussed may involve publicly traded corporations and substantial amounts of money. For a discussion of a possible 12 million dollar deficiency involving the applicability of the *Libson Shops* doctrine to a publicly traded corporation, see *Tax Trouble*, Forbes, Jan. 15, 1966, p. 42.

I. SIGNIFICANCE OF THE DOCTRINE: A JUDICIAL LIMITATION ON NET OPERATING LOSS CARRYOVERS

Section 269 and section 382(a) of the Internal Revenue Code of 1954 limit the right of a corporation to carry over its own net operating losses in certain specified circumstances. The judicial limitations growing out of the decision in *Libson Shops, Inc. v. Koehler*[4] are of significance chiefly in circumstances where a corporation with loss carryovers undergoes a change of business, of ownership or both but does so in a manner not subject to the provisions of section 269 or section 382(a). While these sections will not be subject to detailed analysis here, their general scope should be noted in order to define the area in which judicial limitations on net operating loss carryovers growing out of the decision in *Libson Shops* are of importance.

Under section 269, use of a corporation's own loss carryovers will be denied if a person or persons acquire control of the corporation for the principal purpose of securing the benefits of the loss carryovers. For these purposes, control is defined as acquisition of either fifty per cent of the voting stock of the corporation or of stock representing fifty per cent of the value of the corporation.[5] Under section 382(a) which, unlike section 269, has no counterpart in the Internal Revenue Code of 1939,[6] use of a corporation's own loss carryovers will be denied if, within a two-year period, persons acquire by purchase fifty per cent of the common stock ownership of the corporation, and the corporation fails to carry on substantially the same trade or business which it did prior to the acquisition.[7] In general, the test under section 382(a) is whether the old business has been continued substantially undiminished, rather than whether a new business has been added.[8]

What if, however, a corporation changes its business but does so in such a manner that neither section 269 nor section 382(a)

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4 *Ibid.*

5 See Harvey, *Acquisitions to Obtain Benefits of Losses — Section 269, Tax Utilization of Net Operating Losses*, 14 W. RES. L. REV. 290 (1963).

6 Section 382(a) was included in the Internal Revenue Code of 1954 because, in the view of Congress, § 129 of the Internal Revenue Code of 1939 (the predecessor of § 269) had proved "ineffective" and had placed a "premium on litigation and a damper on valid business transactions." S. REP. NO. 1622, 83d Cong., 2d Sess. 53 (1954).

7 See Pomeroy, *Limitations Where the Same Taxpayer Seeks to Carry the Loss to Another Year, Tax Utilization of Net Operating Losses*, 14 W. RES. L. REV. 254 (1963).

8 Treas. Reg. § 1.382(a)1-(h)(8) (1962) [hereinafter cited as Reg. §].

is applicable. Consider, for example, a situation in which a closely held corporation has incurred substantial net operating losses, and a determination is made to cease its old business. At this point, a new party invests fresh capital in the corporation and receives forty-six per cent of the common stock of the corporation. The corporation then commences new and highly profitable activities. May the losses of the discontinued business be carried over and applied against the taxable profits of the new business? Neither section 269 nor section 382(a) is applicable in such a case.[9] Nonetheless, until quite recently, and perhaps even now given the proper additional facts, the Commissioner, relying on the doctrine of *Libson Shops*, would seek to disallow the carryover.[10]

II. GENESIS OF THE DOCTRINE: THE DECISION IN LIBSON SHOPS

Libson Shops was a merger case decided under the 1939 Code. The precise question presented in the case was whether a corporation resulting from a merger of seventeen commonly owned, but separately incorporated businesses could carry over and deduct the pre-merger net operating losses of three of its constituent corporations from the post-merger income attributable to the others. The Commissioner disallowed the carryovers. The United States Supreme Court agreed with the Commissioner and held that the carryovers were properly disallowed since "the income against which the offset is claimed was not produced by substantially the same businesses which incurred the losses."[11] The concept that losses may be carried over only against profits from the same business that incurred the losses has come to be known as the doctrine of *Libson Shops.*

III. EVOLUTION OF THE DOCTRINE: DECISIONS UNDER THE 1939 CODE

Libson Shops involved a merger, as opposed to a single continuing corporation, and the Supreme Court, in a footnote to its opinion, expressly stated that it did not pass on situations involving a single

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[9] The fact pattern presented in the example is analogous to that in Kolker Bros., 35 T.C. 299 (1960), *nonacq.*, 1963-2 CUM. BULL. 6. In *Kolker* the taxpayer prevailed; however, the Commissioner non-acquiesced.

[10] See Rev. Rul. 40, 1963-1 CUM. BULL. 46, discussed in text accompanying notes 16-20 *infra.* See also Technical Information Release (TIR) 773, 7 CCH 1965 STAND. FED. TAX. REP. ¶ 6751, discussed in text accompanying notes 34-45 *infra.*

[11] Libson Shops, Inc. v. Koehler, 353 U.S. 382, 390 (1957).

continuing corporation.[12] The Commissioner, however, treated the footnote as an invitation rather than as a limitation and began to apply the doctrine of *Libson Shops* to single continuing corporations.[13] The first such application was to situations involving flagrant trafficking in loss corporations, such as the purchase of a corporate shell containing net operating losses with the intent of sheltering the profits of a new business to be conducted within the purchased corporation. The Commissioner enjoyed uniform success in applying *Libson Shops* in these cases, each of which involved a shift of more than fifty per cent of the stock ownership and a discontinuance of the corporation's old business.[14] These decisions, reached under the 1939 Code, are not too troublesome for current tax planning purposes inasmuch as the same result would be reached under section 382(a)(15) of the 1954 Code.[15] The Commissioner, however, in Revenue Ruling 63-40,[16] expressed an even more extreme view of the implications of *Libson Shops* by announcing that, in his view, a corporation's net operating losses would survive a change of its business only if there was little or no change in the ownership of the corporation during or after the period in which the losses were incurred.[17]

Two recent decisions, while not directly on point, lend support to the position taken by the Commissioner in Revenue Ruling 63-40, at least in situations governed by the 1939 Code.[18] In *Julius*

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[12] *Id.* at 390 n.9.

[13] The Commissioner announced his position by withdrawing his acquiescence in Northway Sec. Co., 23 B.T.A. 532 (1931), *acq.*, X-2 CUM. BULL. 52 (1931) and substituting his nonacquiescence in 1960-2 CUM. BULL. 8.

[14] See, *e.g.*, Federal Cement Tile Co. v. Commissioner, 338 F.2d 691 (7th Cir. 1964); Norden-Ketay Corp. v. Commissioner, 319 F.2d 902 (2d Cir.), *cert. denied*, 375 U.S. 953 (1963); J. G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962); Commissioner v. Virginia Metal Prods., Inc., 290 F.2d 675 (3d Cir.), *cert. denied*, 368 U.S. 889 (1961); Mill Ridge Coal Co. v. Patterson, 264 F.2d 713 (5th Cir.), *cert. denied*, 361 U.S. 816 (1959).

[15] As pointed out earlier, there was no provision comparable to § 382(a) in the 1939 Code. It was apparently to prohibit carryovers under circumstances such as those in the cases cited in note 14 *supra*, that § 382(a) was included in the 1954 Code. See S. REP. NO. 1622, 83d Cong., 2d Sess. 53 (1954).

[16] 1963-1 CUM. BULL. 46.

[17] Rev. Rul. 40, 1963-1 CUM. BULL. 46, 47-48 uses the language, "no change," "little or no change" and not "more than a minor change." The Commissioner has never explicitly stated how large "little or no" or not more than "minor" is for the purposes of Rev. Rul. 63-40. One court, discussing the ruling, observed that twenty-four per cent was clearly more than minor. Huylers v. Commissioner, 327 F.2d 767, 773 (7th Cir. 1964).

[18] Allied Cent. Stores, Inc. v. Commissioner, 339 F.2d 503 (2d Cir. 1964), *cert. denied*, 381 U.S. 903 (1965); Julius Garfinckel Co. v. Commissioner, 335 F.2d 744 (2d Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

Garfinckel Co. v. Commissioner,[19] a parent corporation merged a profitable, wholly owned subsidiary into a fifty-nine per cent owned subsidiary which had incurred substantial operating losses. After the merger, the parent owned ninety-five per cent of the surviving corporation. The change of stock ownership of the loss corporation was thus approximately thirty-five per cent. Although finding the question a difficult one, the Second Circuit Court of Appeals, relying on *Libson Shops*, denied the surviving corporation the use of its own loss carryovers.

In *Allied Cent. Stores, Inc. v. Commissioner*,[20] a parent organization, which had incurred losses, merged into itself three wholly owned, profitable subsidiaries. The Second Circuit Court of Appeals again denied the parent the use of its own loss carryovers, even though there was no change in the stock ownerhip of the loss corporation.

Certiorari was denied in both *Garfinckel* and *Allied Cent. Stores* early in 1965. The carryovers in these cases were denied despite the fact that in neither case was there an attempt to carry losses across the lines of a merger — in both instances the corporate existence of the entity which had incurred the losses was continued. Further, in neither case was there a shift of more than fifty per cent of the stock ownership of the corporate entity which had incurred the losses. Thus, although these cases involved corporate combinations rather than single continuing corporations, they nevertheless lend support to the position taken by the Commissioner in Revenue Ruling 63-40 that losses incurred by a corporation in one line of business cannot be carried over against profits subsequently earned in a different line of business even in the absence of a fifty per cent change of stock ownership.

However, *Libson Shops* itself was decided under the 1939 Code as were the other cases discussed above. What of the applicability of *Libson Shops* in situations involving the 1954 Code? The specific result reached in *Libson Shops* — that net operating losses of parties to a statutory merger do not survive across the lines of the merger — could not be reached in a case involving the same facts under the 1954 Code. Section 381(a), which was new in the 1954 Code, specifically allows such carryovers and the Commissioner acknowledged in Revenue Ruling 58-603[21] that *Libson*

[19] 335 F.2d 744 (2d Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

[20] 339 F.2d 503 (2d Cir. 1964), *cert. denied*, 381 U.S. 903 (1965).

[21] Rev. Rul. 603, 1958-2 CUM. BULL. 147.

Shops is inapplicable under the 1954 Code to mergers and certain other tax-free transactions described in section 381(a).[22] However, while the Commissioner conceded that the actual result reached in *Libson Shops* is wrong under the provisions of the 1954 Code, he nevertheless has relied on his interpretation of the decision in that case to deny loss carryovers of single continuing corporations in 1954 Code years. In doing so, he has asserted that as to such corporations, which are outside the provisions of section 381(a), *Libson Shops* continues to apply with full force.[23]

IV. Rejection of the Doctrine Under the 1954 Code: The Decision in Maxwell Hardware

The first appellate decision which expressly considered whether the Commissioner was correct in attempting to apply *Libson Shops* under the 1954 Code was *Maxwell Hardware Co. v. Commissioner*.[24] In *Maxwell Hardware*, two real estate developers entered into an arrangement with the owners of an unsuccessful hardware business having large net operating loss carryovers. Under the agreement, the developers were to conduct their real estate business within the corporate shell of the hardware company with the objective of offsetting the net operating losses of the hardware business against the profits of the real estate business. Through the use of nonvoting preferred stock, complex redemption and liquidation provisions, and a voting trust, substantially all of the profits of the real estate operation, and thus the benefits of the net operating loss, were allocated to the developers. However, since the developers received only nonvoting preferred stock which, at the time of the acquisition represented less than fifty per cent of the total value of the outstanding stock, the developers did not acquire control for purposes of either section 269 or section 382(a) and those sections were accordingly inapplicable. The Commissioner disallowed the loss carryovers and the Tax Court sustained the disallowance relying on *Libson Shops*, thus holding the *Libson Shops* doctrine to be applicable under the 1954 Code.[25]

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[22] Reorganizations defined in § 368(a)(1)(B) (stock for stock acquisitions) are not mentioned in § 381(a) and thus remain subject to the *Libson Shops* doctrine.

[23] Rev. Rul. 40, 1963-1 CUM. BULL. 46.

[24] 343 F.2d 713 (9th Cir. 1965), *reversing* Arthur T. Beckett, 41 T.C. 386 (1963). Although the Ninth Circuit in Maxwell Hardware v. Commissioner, 343 F.2d 713, 716 (9th Cir. 1965), was the first appellate court to pass on the question of the applicability of *Libson Shops* under the 1954 Code, the question was presented in Commissioner v. Goodwyn Crockery Co., 315 F.2d 110 (6th Cir. 1963). However, in that case both the Commissioner and all courts involved totally overlooked the issue.

[25] Arthur T. Beckett, 41 T.C. 386 (1963).

The Court of Appeals for the Ninth Circuit reversed, holding that since the result reached in *Libson Shops* could not have been reached on the same facts had the 1954 Code applied, the decision was no longer a valid precedent as applied to similar factual situations arising under the 1954 Code. The court stated:

> By enacting the 1954 Code, Congress destroyed the precedential value of the rule of decision of Libson Shops; that is, that for a loss carryover deduction to be allowed, the income against which the offset was claimed must have been produced by substantially the same business which incurred the losses. This is not now the law.[26]

Furthermore, the court expressly found that congressional intent in enacting the 1954 Code was to eliminate "unanticipatable judge-made rules."[27] The court stated: "A dispassionate consideration of the 1954 Code must lead to the conclusion, we believe, that Congress has deliberately sanctioned such so-called 'trafficking' [in loss carryovers] in those situations where it is not *expressly* abjured."[28] Thus, in the Ninth Circuit the doctrine of *Libson Shops* has been held to be completely inapplicable to all cases governed by the 1954 Code.

Immediately following the decision in *Maxwell Hardware*, the situation was, in summary, as follows: The Commissioner had taken the position that, if a single corporation changed its business and attempted to offset losses incurred in one business against profits subsequently earned in the new business, the carryover could be denied under *Libson Shops* in both 1939 and 1954 Code years as long as there was more than a minor change in stock ownership attendant to the change in business.[29] For these purposes, it did not matter whether the original business was discontinued or whether it was continued but failed to earn sufficient profits to offset the losses earlier incurred.[30] The courts, in general, had supported the

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[26] Maxwell Hardware Co. v. Commissioner, 343 F.2d 713, 716 (9th Cir. 1965).

[27] *Id.* at 718.

[28] *Id.* at 719. (Emphasis added.)

[29] Rev. Rul. 40, 1963-1 CUM. BULL. 46.

[30] The Commissioner made this point most explicitly in Rev. Rul. 395, 1959-2 CUM. BULL. 475, 479, which dealt with mergers. In that ruling he set forth the requirement that taxpayers subject to the *Libson Shops* doctrine must keep records that will enable the Commissioner to insure that losses from one business activity are carried forward only against the profits from the same activity and not against profits from a new business acquired by merger. In cases such as Julius Garfinckel v. Commissioner, 335 F.2d 744 (2d Cir. 1964), *cert. denied*, 379 U.S. 962 (1965), loss carryovers were denied notwithstanding the fact that the business activity which had given rise to the losses was continued.

Commissioner's position with respect to the applicability of *Libson Shops* under the 1939 Code[31] and the Tax Court had agreed as to its applicability under the 1954 Code.[32] However, in the one appellate decision to pass directly on the question, *Libson Shops* had been held entirely inapplicable under the 1954 Code.[33]

V. Restatement of the Doctrine: Technical Information Release No. 773

Seven months after the decision in *Maxwell Hardware*, Technical Information Release (TIR) No. 773[34] was released. The TIR reported that the Internal Revenue Service would not follow the decision in *Maxwell Hardware*, and that certiorari in that case had not been requested because of a lack of conflict between the circuits.

TIR 773 also announced the Commissioner's new position on the applicability of *Libson Shops* under the 1954 Code. Henceforth, according to the release, the Commissioner will apply *Libson Shops* only to situations where there has been both a change of a corporation's business as defined in section 382(a) and the regulations thereunder, and "a fifty per cent or more shift in the benefits of a loss carryover."[35] The release stated that Revenue Ruling 63-40 would be modified to the extent that it was inconsistent with the new position.

In TIR 773, the Commissioner made a significant retreat on at least three points. First, in agreeing to apply *Libson Shops* only in cases where there has been at least a "fifty per cent change in the beneficial ownership of the loss,"[36] the Commissioner repudiated the most important holding of Revenue Ruling 63-40[37] and bowed to persistent criticism of his view of the application of *Libson Shops* to single continuing corporations.[38] Revenue Ruling 63-40[39] con-

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[31] See text accompanying notes 14-20 *supra*.

[32] Arthur T. Beckett, 41 T.C. 386 (1963).

[33] Maxwell Hardware Co. v. Commissioner, 343 F.2d 713 (9th Cir. 1965), *reversing* Arthur T. Beckett, 41 T.C. 386 (1963).

[34] TIR 773, 7 CCH 1965 Stand. Fed. Tax Rep. § 6751.

[35] *Ibid.*

[36] *Ibid.*

[37] 1963-1 Cum. Bull. 46.

[38] See, *e.g.*, Harris, *Libson Shops and Related Cases*, N.Y.U. 21st Inst. on Fed. Tax 1307 (1963); Hawkins, *Loss Carryovers in Insolvency Reorganizations, Tax Utilization of Net Operating Losses*, 14 W. Res. L. Rev. 273, 288-90 (1963). The Section on Taxation of the American Bar Association for a number of years has been endeavoring to persuade the Commissioner to refrain from applying *Libson Shops* under the 1954 Code. See Committee on Corporate Stockholder Relationships, *Report*, A.B.A. Section on Taxation — 1962 Program & Comm. Rep. 47-49.

demned any change of business coupled with a more than minor change of stock ownership.[40] Thus, in the example previously given where a new investor purchased forty-six per cent of the common stock of a corporation with net operating losses, under Revenue Ruling 63-40 *Libson Shops* would destroy the corporation's carryovers if its business were changed. Now, however, under TIR 773, *Libson Shops* will be inapplicable to such a situation.[41]

Second, the announcement that the change of business tests of section 382(a) will apply for the purposes of the *Libson Shops* doctrine represents a substantial retreat from the Commissioner's former position on that question. It had been the Commissioner's view that the mere continuation of the business which had given rise to net operating losses was not a bar to the disallowance of carryovers under the *Libson Shops* doctrine. The question was whether prior losses were being carried over against subsequent profits from the same business which had incurred the losses or against profits earned in some different business; thus, the old unprofitable business not only had to be continued but also had to become profitable.[42] Under section 382(a), the test is quite different and, from the taxpayer's point of view, is much easier to meet since under that section the old business need only be continued — its profitability is immaterial.[43] This means that so long as the old business which gave rise to a loss carryover continues substantially undiminished, *Libson Shops* will be inapplicable even if the old business remains unprofitable and its losses, both past and future, are offset against the profits of a new business continued within the same corporate entity. This will be true even if the addition of the new business is coupled with a shift of stock ownership of more than fifty percentage points.[44]

Finally, in agreeing to apply *Libson Shops* only where there has been both a change of business and a change of ownership, the Commissioner has apparently abandoned the argument, relevant chiefly in insolvency reorganizations, that a complete change of

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[39] 1963-1 CUM. BULL. 46.

[40] See text accompanying note 1-6 *supra*.

[41] However, if the new investor acquires anything in addition to the stock interest, the result may be otherwise. See text accompanying notes 47-49 *infra*.

[42] See discussion in note 30 *supra*.

[43] Reg. § 1.382(a)1-(h)(8) (1962).

[44] TIR 773, 7 CCH 1965 STAND. FED. TAX REP. ¶ 6751, states that *Libson Shops* will be inapplicable unless there is *both* a change of business and of ownership. However, § 269 may be applicable under the circumstances described in the text.

stock ownership destroys a corporation's loss carryovers even absent any change in the nature of the business.[45]

VI. Conclusion

The above concessions greatly reduce the possible application of *Libson Shops* under the 1954 Code, even assuming, contrary to the decision in *Maxwell Hardware*, that the doctrine is applicable at all.[46] However, in marginal cases, the doctrine may still prove troublesome, since TIR 773 contains no hint as to the meaning of a "beneficial change of ownership of the loss" beyond the observation that the shift includes direct and indirect shifts and "transactions having the effect of shifting the benefit of the loss by shifting assets, stock, profit interests, or other valuable rights."[47] However, there is no indication as to the length of the period over which the shift will be measured, or which of the attribution rules of the code, if any, will be used. Nor is there any indication as to whether stock options, warrants, convertible preferred stock, or convertible debentures, all of which are common in connection with investments in new corporations, will be considered and, if considered, how they will be valued. Will compensation paid to a new investor for services rendered be considered and, if so, to what extent?[48] Often a corporation which has incurred losses can, because of its tax shelter, afford to pay a higher than normal purchase price

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[45] See Willingham v. United States, 289 F.2d 283 (5th Cir.), *cert. denied*, 368 U.S. 828 (1961). For an analysis of the Commissioner's former position, see Hawkins, *supra* note 38, at 285-90. The Commissioner had asserted his former position as recently as December, 1964, in his brief in *Maxwell Hardware*. Brief for Respondent, p. 65 n.19, Maxwell Hardware Co. v. Commissioner, 343 F.2d 713 (9th Cir. 1965).

[46] The rationale of the Commissioner's new position is somewhat obscure. He does not concede that his interpretation of *Libson Shops* under the 1939 Code was in error, nor does he concede that the decision in *Maxwell Hardware* is correct; rather, he takes the position that *Libson Shops* under the 1954 Code means something different than it did under the 1939 Code. His view is, apparently, that Congress in enacting the 1954 Code broadened the area in which loss carryovers were to be allowed but did not broaden it to include all areas not expressly prohibited by statute.

[47] TIR 773, 7 CCH 1965 Stand. Fed. Tax Rep. ¶ 6751.

[48] In Jackson Oldsmobile, Inc. v. United States, 237 F. Supp. 779 (D. Ga. 1965), *appeal docketed*, 5th Cir., which was decided before the release of TIR 773, one shareholder held in excess of fifty per cent of the outstanding common stock at all relevant times. Nonetheless the Commissioner has to date not dismissed his appeal. In *Jackson Oldsmobile* the minority shareholder was engaged in a program of purchasing the stock of the majority shareholder out of the profits of the corporation. It may be the Commissioner's view that inasmuch as the loss carryover increased the corporation's after-tax profits and thereby accelerated the shift of ownership to the minority shareholder, the facts present a prohibited shift of the benefits of the loss carryover.

for a new business. If the purchase is made from a shareholder of the loss corporation, will the inflated purchase price constitute a benefit, and if so, how is it to be measured?[49]

In situations such as those mentioned, the "new" doctrine of *Libson Shops* may, because of its vagueness, prove to be a serious trap for the unwary and care must still be taken any time that a corporation undergoes a change in the nature of its business at the same time that a portion of its stock changes hands.[50]

Nonetheless, as a result of the Commissioner's retreat in TIR 773, important new opportunities have been created for infusing new capital into corporations which have experienced a bleak past but anticipate a brighter tomorrow.

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[49] Rev. Rul. 40, 1963-1 CUM. BULL. 46, excluded transactions between related taxpayers, transactions involving installment sales, and transactions involving an acquisition price in excess of fair market value from even the limited protection given by that ruling. No reference is made to these factors in TIR 773.

[50] The Commissioner's clarification of the doctrine of *Libson Shops*, if it be such, comes none too soon, for in the recent decision in Clarksdale Rubber Company, 45 T.C. 234 (1965), the Tax Court indicated in dicta: (1) that *Libson Shops* does apply under the 1954 Code; (2) that it applies *only* when there is a shift of common stock ownership of *less* than fifty percentage points; and (3) that when it does apply, the change of business test involved is the harsher test formerly advocated by the Commissioner rather than that of § 382(a). This formulation would lead to the strange result that transactions involving a shift of stock ownership of less than fifty percentage points would be judged by a sterner standard than those involving a shift of fifty percentage points or more. The evolution of the *Libson Shops* doctrine from the original opinion of the Supreme Court to the Tax Court's interpretation in *Clarksdale* must make discouraging reading for those who would simplify the Internal Revenue Code and rely on judicial interpretation to deal with technical problems.