



Excerpt from Focht v. Commissioner, 68 T.C. 223 (1977):

In Hendler, Hendler Creamery Company, Inc. transferred all its assets to the Borden Co. in exchange for . . . shares of Borden's stock, some cash, and Borden's assumption of all Hendler's liabilities Such liabilities included . . . bonds Borden paid all these liabilities Hendler, on the transfer, realized a gain of over \$6,000,000 but asserted in its tax return that the transaction constituted a tax-free exchange, a reorganization under section 112(i) The government asserted that Borden's assumption of the mortgage bonds was money constructively received by Hendler, which was not distributed to its shareholders, and thereby resulted in recognition of gain

The District Court held that Borden's assumption of Hendler's liability did not constitute the receipt of "money or other property" . . . and was not taxable boot. . . . The Fourth Circuit affirmed . . . In reversing the lower court's decisions Justice Black writing for the Supreme Court stated . . . :

We are unable to agree with the conclusion reached by the courts below that the gain to the Hendler Company, realized by the Borden Company's payment, was exempt from taxation under section 112.

It was contended below and it is urged here that since the Hendler Company did not actually receive the money with which the Borden Company discharged the former's indebtedness, the Hendler Company's gain of \$534,297.40 is not taxable. The transaction, however, under which the Borden Company assumed and paid the debt and obligation of the Hendler Company is to be regarded in substance as though the \$534,297.40 had been paid directly to the Hendler Company. The Hendler Company was the beneficiary of the discharge of its indebtedness. Its gain was as real and substantial as if the money had been paid it and then paid over by it to its creditors. The discharge of liability by the payment of the Hendler Company's indebtedness constituted income to the Hendler Company and is to be treated as such.

Congress immediately responded to nullify the Hendler result by enacting section 112(k) [the predecessor to section 357] . . .