Cross Refined Coal, LLC, et al. v. Commissioner of Internal Revenue: Enabling Congressional Intent in the Energy Transition?

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I. OVERVIEW

Seeking to take advantage of a tax credit that incentivized coal-refining for the purpose of reduced emissions, AJG Coal, Inc. (AJG) set out to develop coal-refining technology and build a coal-refining facility through a new subsidiary, Cross Refined Coal, LLC (Cross).[1] AJG's business model for Cross was contingent on a tax credit that offset operation losses and necessitated the recruitment of business partners.[2] Consequently, AJG formed a partnership with Fidelity Investments (Fidelity), who purchased a 51 percent stake, and Schneider Electric (Schneider), who purchased a 25 percent stake.[3] All three members entered into a partnership relying on expected after-tax credit profits.[4]

Cross claimed over $25 million in tax credits for the 2011 and 2012 tax years, which were distributed amongst its members.[5] The IRS then determined that Fidelity and Schneider could not claim their expected tax credits, asserting Cross was an invalid partnership on the grounds that it

1. Cross Refined Coal, LLC v. Comm'r of Internal Revenue, 45 F.4th 150, 153 (D.C. Cir. 2022).
2. *Id.* at 154.
3. *Id.*
4. *Id.*
5. *Id.* at 155.

was not formed to carry on a business and that its members did not share in profits and losses.[6]

Cross then brought suit in the tax court, who ruled in Cross' favor.[7] The tax court found all three members made substantial contributions and shared in the profits and losses of Cross, and in turn comprised a bona fide partnership.[8] The IRS then appealed to the U.S. Court of Appeals for the D.C. Circuit to contest Cross as a bona fide partnership.[9]

The D.C. Circuit *held* that (1) partnerships formed to conduct activity in pursuit of tax credits have valid business purpose to satisfy bona fide partnership requirements; and (2) partnerships engaging in business activity made profitable only by the application of tax credits possess necessary economic substance for purposes of partnership validity. *Cross Refined Coal, LLC v. Comm'r of Internal Revenue*, 45 F.4th 150 (D.C. Cir. 2022).

II. BACKGROUND

A. *Production Tax Credits*

The Production Tax Credit (PTC) is an income credit for the production of electricity from qualified energy resources, first made available with the Energy Act of 1992.[10] The PTC offsets tax liability for owners of qualifying renewable energy facilities who produce and then sell electricity to unrelated persons, with the amount of tax benefit determined by the amount of electricity produced.[11] There are currently nine types of qualifying renewable energy sources and two types of coal eligible for PTC consideration, including wind, solar, and geothermal.[12]

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6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *E.g.*, Richard G. Sweich, *Income Taxation of Natural Resources*, § 24.21 (2014). Passage of the PTC is considered to be the first instance of Congress acting to address climate change. *E.g.*, Michelle D. Layser, *Improving Tax Incentives for Wind Energy Production: The Case for A Refundable Production Tax Credit*, 81 Mo. L. Rev. 453, 455 (2016).
11. Layser, *supra* note 10, at 455. The maximum credit rate is adjusted annually for inflation. MOLLY F. SHERLOCK, CONG. RSCH. SERV., R43453, THE RENEWABLE ELECTRICITY PRODUCTION TAX CREDIT: IN BRIEF 4 (2014).
12. *E.g.*, Brian S. Masterson, *Tucker on Tax Planning Real Estate Transactions*, § 15:4 (June 2022). "The PTC provides a corporate tax credit of 1.3 cents/kWh for electricity generated from landfill gas (LFG), open-loop biomass, municipal solid waste resources, and small power waste facilities." EPA, *Renewable Electricity Production Tax Credit Information*, Landfill Methane Outreach Program (LMOP), Res. Funding LFG Energy Projects, https://www.epa.

The PTC is considered instrumental in encouraging renewable energy investment and development.[13]

I.R.C. section 45(c)(7) ("refined coal credit") is intended to reduce the amount of sulfur dioxide, nitrous oxide, and mercury at coal combustion plants by encouraging innovations in fuel efficiency.[14] The refined coal credit may be claimed by taxpayers that lease or operate facilities that produce and then sell refined coal.[15] While not considered a renewable energy source, its inclusion in the PTC regime is justified by environmental benefits resulting from the preferable emission rate of carbon dioxide and other greenhouse gases in comparison to unrefined coal emissions.[16]

B. Partnership Structure Anti-Abuse Provisions: Bona Fide Partnerships and Economic Substance

A variety of perceived tax benefits granted to enterprises organized as partnerships have inspired bad faith "sham partnerships" by parties seeking to attain these benefits exploitatively.[17] Notably, tax partnership entities are not subjected to the enterprises' benefits and burdens—those flow directly to the partners, whether individuals or corporations.[18] In response, various anti-abuse doctrines have been codified in legislation, regulations, and the common law with the purpose of precluding transactions that seek to impermissibly characterize their operations as qualifying for desirable tax consequences.[19]

Two judicial anti-abuse doctrines are pertinent here: (1) the bona fide partnership requirement; and (2) the economic substance requirement.

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gov/lmop/renewable-electricity-production-tax-credit-information. Also, Electricity from wind, closed-loop biomass and geothermal resources receive as much as 2.6 cents/kWh. *Id.*

13. *See*, *e.g*., Layser, *supra* note 10, at 456–57.

14. Sweich, *supra* note 10, § 24.214 (2014) (citing I.R.C. § 45(c)(7)).

15. *Id.*

16. Masterson, *supra* note 12, § 15:4.

17. *E.g*., Cross Refined Coal, LLC v. Comm'r of Internal Revenue, 45 F.4th 150, 155 (D.C. Cir. 2022) (citing Comm'r v. Culbertson, 337 U.S. 733, 752 (1949) (Frankfurter, J. concurring).

18. 26 U.S.C. § 701 (1954); I.R.S. Notice 2000-44, 2000-2 C.B. 255 (in which the IRS shared its anti-abuse concerns over a tax avoidance strategy wherein disproportionately high basis is used to generate tax losses).

19. *See*, *e.g*., Frank V. Battle, Jr., *The Appropriateness of Anti-Abuse Rules in the U.S. Income Tax Systems*, 48 TAX LAW. 801, 802 (1995) ("In its purist form, an anti-abuse rule is a rule designed to prevent a taxpayer from achieving a result which is inconsistent with a dominant policy of the law by altering the tax consequences which would otherwise have flowed from a transaction, to others more consistent with that policy.").

1. Bona Fide Partnerships

In response to the lack of a comprehensive definition for "partnership" under the tax code,[20] along with circumstances of the partnership structure's tax consequences inspiring the appearance of sham partnerships amongst otherwise non-partner entities, the bona fide partnership doctrine seeks to determine if a claimed partnership will actually be recognized as such for federal income tax purposes.[21] A determination under the bona fide partnership doctrine is made irrespective of whether the partnership is formally organized as a partnership.[22] Partnerships that fail to be recognized as bona fide, or where a particular partner whose interest does not qualify as bona fide equity participation, are considered sham partnerships.[23]

The bona fide partnership doctrine is derived from the substance-over-form doctrine, a larger tax principle that permits courts to perceive a transaction's form as it is in reality, rather than the surface-level implications of its formal structure.[24] Two Supreme Court decisions, *Commissioner of Internal Revenue v. Tower,* 327 U.S. 280 (1946) *and Commissioner of Internal Revenue v. Culbertson*, 337 U.S. 733 (1949), provide the two fundamental requirements that must be met for a partnership to be valid:[25] (1) the partners intended to carry on business as partners and (2) the partners intended to share in either the profits, the losses, or both.[26]

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20. *Cross Refined Coal*, 45 F.4th at 156. "[Relevant anti-abuse statutes] [sic] defines a partnership as including 'a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on . . . .' [Further, statutes] [sic] unhelpfully defines a partner as including 'a member in such a syndicate, group, pool, joint venture or organization.' The IRS regulations prove more helpful, in that they require a profit motive in carrying on a 'trade, business, financial operation, or venture.'" William Halliday, *Historic Boardwalk Hall and the Substance-over-Form Doctrine*, 2013 Inside Basis 4, 6 (2013) (quoting I.R.C. § 761(a); I.R.C. § 7701(a)(2); Treas. Reg. 301.7701–1(a)(2)).

21. *E.g*., Halliday, *supra* note 20, at 12–13 (quoting *Culbertson*, 337 U.S. at 752 (Frankfurter, J., concurring) ("Men may put on the habiliments of a partnership whenever it advantages them to be treated as partners underneath, although in fact it may be a case of 'The King has no clothes on' to the sharp eyes of the law.").

22. *Cross Refined Coal*, 45 F.4th at 156.

23. *See*, *e.g*., Karen C. Burke & Grayson M.P. McCouch, *Sham Partnerships and Equivocal Transactions*, 69 Tax Law 625, 627 (2016).

24. *Id*. at 642–43. The substance-over-form doctrine is not to be confused with the economic substance doctrine, another equity doctrine to assess partnership validity and discussed below. *Id*.; *See* discussion, *infra* note 34.

25. *E.g*., *Cross Refined Coal*, 45 F.4th at 156–57.

26. *E.g*., *id*.

In *Tower*, the court listed numerous factors to consider when determining partnership validity, including whether the partners intended to join for the purpose of business, jointly contributed capital, shared in profits and losses, and jointly managed the enterprise.[27]

In *Culbertson*, the court put forth a facts and circumstances intent test to determine the purpose of the parties in forming their partnership enterprise.[28] Alleged partners must have good faith purpose to join together in a business purpose that is the present, at-hand conduct.[29] The *Culbertson* court named eight facts and circumstances to consider in making a partnership determination, now known as the *Culbertson* factors.[30] These factors are considered in a totality-of-circumstances test analysis.[31]

Federal Circuit Courts have since extended the bona fide partnership doctrine beyond the aforementioned two requirements. The Third Circuit Court of Appeals held that historic rehabilitation tax credits were impermissibly applied to a partnership called *Historic Boardwalk Hall LLC v. Commissioner*.[32] The court used the *Culbertson* test to find the investor partners' interests lacked meaningful risk or upside benefit and the transactions amounted to sales of credits.[33]

2. Economic Substance Doctrine

Pursuant to the economic substance doctrine, a taxpayer is denied benefits arising from transactions that satisfy formalistic partnership requirements but do not change the taxpayer's economic position beyond mere tax reduction, with the only benefit resulting from the transaction

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27. Comm'r v. Tower, 327 U.S. 280, 286–87, 290 (1946); David S. Miller, *Taxpayers' Ability to Avoid Tax Ownership: Current Law and Future Prospects*, 51 Tax Law. 279, 349 n.170 (1998).

28. Comm'r v. Culbertson, 337 U.S. 733, 742 (1949).

29. *E.g.*, Ilana Safer, *Economic Substance Doctrine Applied to Determine the Validity of a Family Limited Partnership for Federal Transfer Tax Purposes: Knight v. Commissioner*, 54 TAX LAW. 873, 877 n.42 (2001) (citing *Culbertson*, 337 U.S. at 742). "The *Culbertson* test require[s] *a*, not a primary, business purpose; the existence of a tax motive is not even mentioned in the opinion." WILLIAM MCKEE, WILLIAM NELSON & JAMES WHITMIRE, FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS ¶ 1.05, 14, Westlaw (2022).

30. *Culbertson*, 337 U.S. at 742 (identifying the factors as: (1) the partnership agreement between the parties; (2) the conduct of the parties; (3) statements made by the parties; (4) testimony made by disinterested persons; (5) parties' relationship; (6) the expertise and capital commitments of a given party member; (7) the "actual" control of income and income usage; and (8) facts revealing the intent of a given party or parties).

31. *See*, *e.g.*, *id.*; Halliday, *supra* note 20, at 6.

32. 694 F.3d 425 (3d Cir. 2012) *cert. denied* 569 U.S. 1004 (2013).

33. *Historic Boardwalk*, 694 F.3d at 454–55, 462.

related to taxation.[34] The doctrine is applied with a two prong test: (1) whether the taxpayer has demonstrated a business purpose in the transaction other than tax avoidance and (2) whether the taxpayer has demonstrated the transaction had economic substance other than the generated tax benefits.[35] Economic substance doctrine application differs across jurisdictions.[36]

In *Sacks v. Commissioner*[37] the Court of Appeals for the Ninth Circuit found a transaction had economic substance, despite being structured for advantageous tax purposes, because practical economic effects were present.[38] The taxpayer entered a partnership with solar water heater company BFS Solar, who devised a sale-leaseback purchase structure wherein the taxpayer purchased solar water heaters and leased them back to BFS Solar.[39] Leased solar water heaters were then installed in the homes of consumers, who paid rent to BFS Solar.[40] The court considered a variety of factual circumstances in their finding that non-tax economic effects were present, including the taxpayer's personal obligation to pay the price, the taxpayer paying fair market value, the genuine nature of the solar water heater business, and the consequences of a rise or fall in energy prices engendering risk in the transaction.[41] Notably, the court rejected the argument that profit seeking on a post-tax basis fails to grant economic substance to a transaction.[42]

In *Alternative Carbon Resources v. United States*, the Court of Appeals for the Federal Circuit held a partnership invalid for lack of economic substance due to the obligations of partners being bereft of any economic consequence.[43] The taxpayer, a fuel-mixer firm, transferred

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34. WILLIS ET AL., PARTNERSHIP TAXATION, ¶ 1.05, 3, Westlaw (2022). Economic substance doctrine is, unlike the bona fide partnership requirement, distinct from the substance-over-form doctrine. Yoram Keinan, *The Many Faces of the Economic Substance's Two-Prong Test: Time for Reconciliation?,* 1 N.Y.U.J.L. & BUS. 371, 387 (2005) ("The Commissioner currently has three major means of disallowing tax benefits that arise from a tax-motivated transaction: (i) statutory anti-abuse rules . . . . (ii) re-characterization of the form of the transaction under the substance-over-form [doctrine]; and (iii) the economic substance doctrine.").

35. *E.g.*, Keinan, *supra* note 34, at 392.

36. *See*, *e.g*., WILLIS ET AL., *supra* note 34, ¶ 1.05 at 3. Some courts have applied economic substance doctrine as a conjunctive standard, where both tests must be met to validate a transaction, while others have applied it disjunctively. *E.g*., Keinan, *supra* note 34, at 392–94.

37. 69 F.3d 982 (9th Cir. 1995).

38. *Id*. at 988.

39. *Id*. at 985.

40. *Id*.

41. *Id*. at 988.

42. *Id*. at 991.

43. 939 F.3d 1320, 1329 (Fed. Cir. 2019).

alternative fuel to partners in return for annual fixed fees and sales prices found by the court to be nominal.[44] The court reasoned that investor partners had no reasonable expectation that the partnership would generate profit and only sought collection of a tax credit.[45] By solely providing a nominal fee and failing to demonstrate an anticipation of profitability, investor partners failed to demonstrate economic substance inherent in their partnership.[46]

III. THE COURT'S DECISION

The court first affirmed the tax court's decision that all three partners intended to engage in legitimate business activity and became legitimate business partners.[47] AJG's motives in recruiting Fidelity and Schneider were to spread its investment risk over a large number of projects and seek partners able to take advantage of refined-coal credits immediately.[48]

As low-tax entities like AJG commonly attract partnerships with this general scheme,[49] and Congress intended refiners to use this strategy,[50] AJG's partnership with Fidelity and Schneider sits entirely within the congressional intent of the refined coal credit.[51] Assessing the extent of their involvement in the operation of Cross, Fidelity's and Schneider's contributions, the court determined the contributions were sufficient for partnership requirements, as they included major decision-making, involvement in day-to-day operations, and monthly contributions.[52]

The court wholly rejected the commissioner's argument that the taxpayer-partners did not engage in a legitimate business activity when it sought a profit only possible through the application of the refined coal credit.[53] Taking inspiration from the Ninth Circuit's opinion in *Sacks v. Commissioner*, the court reasoned that viewing transactions as shams because they do not stand as economically sound without tax credits "hamstring[s]" Congress's ability to encourage desirable, yet unprofitable, activities through tax credits. Per the Ninth Circuit's reasoning, Congress makes desired enterprises profitable through tax

44. *Id.* at 1332.
45. *Id.* at 1330.
46. *Id.* at 1329, 1331.
47. Cross Refined Coal v. Comm'r of Internal Revenue, 45 F.4th 150, 157 (D.C. Cir. 2022).
48. *Id.*
49. *Id.* at 157–58.
50. *Id.* at 158 (citing 26 U.S.C. § 45(e)(3)).
51. *Id.*
52. *Id.*
53. *Id.*

incentives, even if they would not have been profitable otherwise; as such, plaintiff's behavior here was directly incentivized.[54]

Further, the court distinguished the dispute here from that of *Alternative Carbon Resources v. United States*,[55] which held a taxpayer could not claim an alternative fuel credit if it never expected a profit apart from the claimed tax credits.[56] The court in *Alternative Carbon* further enumerated that a transaction may be unprofitable sans tax credit and still have economic substance by meaningfully altering the taxpayer's economic position outside of tax consequences.[57] Cross Refined Coal, the court reasoned, satisfies this condition of economic substance to qualify as a partnership.[58]

The court differentiated AJG's partnership from those sham partnerships that have no purpose other than creating tax losses, such as the plaintiffs in *ASA Investerings Partnership v. Commissioner*.[59] Transactions that are post-tax profitable and still have a non-tax business purpose, like Cross's, profit through "congressionally encouraged business purpose[s]," such as the production of refined coal.[60] Additionally, the court highlighted the commissioner's recognition that AJG bereft of partners would have operated a legitimate business, even with no potential for pre-tax profit.[61]

The D.C. Circuit found the tax court correctly concluded that AJG's partners, Fidelity and Schneider, shared in the profit and risk of loss for Cross Refined Coal.[62] The success or failure of Cross, the court reasoned, had a direct impact on the success of either partner's investment, and each partner paid their proportional shares at times when Cross produced no profits but continued to incur expenses.[63]

Significant risk was associated with their involvement, including the possibility that partners would not recover much of their investment or even qualify for the sought-after tax credit.[64] Although there were aspects of the partnership where AJG's partners were insulated from Cross's

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54. *Id.* at 158 (citing Sacks v. Comm'r, 69 F.3d 982, 982, 991–92 (9th Cir. 1995).
55. 939 F.3d 1320, 1330 (Fed. Cir. 2019).
56. *Cross Refined Coal*, 45 F.4th at 159 (citing Alt. Carbon Res. v. United States, 939 F.3d 1320, 1330 (Fed. Cir. 2019)).
57. *Id.* (citing *Alt. Carbon*, 939 F.3d at 1331–32).
58. *Id.*
59. *Id.* at 161; 201 F.3d 505 (D.C. Cir. 2000).
60. *Cross Refined Coal*, 45 F.4th at 159.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 161.

downside risk,[65] the D.C. Court decided Fidelity and Schneider "had much skin in the game" in reference to their equity stake.[66] Far from merely "buying" tax credits to retain larger post-tax profits,[67] plaintiffs sought tax credits by investing in the Congressionally incentivized economic substance of "cleaner coal" production,[68] rather than transactions without practical economic effects.[69] Ultimately, the court determined that Fidelity's and Schneider's equity stakes carried material risk of not being returned for transactions baring economic substance.[70]

IV. ANALYSIS

The D.C. Circuit found itself assessing the partnership validity of an enterprise that brushed against lofty congressional energy ambitions on one side, and judicial doctrines intended to prevent tax-exploitive motives on the other.[71] The court managed to preserve the intentions and utility of judicial anti-abuse doctrines that prevent bad faith transactions while respecting the legislative intent of the refined coal credit specifically, and the PTC generally.[72]

The court's decision affirmed Congress's intention of encouraging emission-reducing energy investment[73] and represents a step forward in a federal tax policy cognizant of broader energy investment goals. Energy transition advocates may be skeptical to celebrate the benefits of a judgement for recognizing refined-coal credits as successful.[74] However, judicial recognition of the legislative intent undergirding the PTC tax credit necessarily works to broaden its application, and in turn encourages emission-reduced and renewable energy production more effectively.

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65. *Id.* at 159–60. Fidelity's purchase agreement contained a liquidated damages provision that allowed them to exit the Cross partnership and "receive a prorated portion of its investment if Cross did not meet certain benchmarks." *Id.* at 154, 159–60. Cross's sub-license agreement also protected both partners from "minor fluctuations in variable operating costs. *Id.* at 160.

66. *Id.* at 161.

67. *Id.* at 160.

68. *Id.* at 160–61.

69. *Id.* at 161.

70. *Id.* at 161–62.

71. *Cf.*, *id.* at 153, 156–58.

72. *See*, *e.g.*, *id.* at 155, 158 (citing 26 U.S.C. § 45(e)(3), Comm'r v. Culbertson, 337 U.S. 733, 752 (1949) (Frankfurter, J., concurring)).

73. *E.g.*, *id.* at 158, 160–61.

74. The environmental utility of the refined coal tax credit has been called into question by environmental groups. *E.g.,* Brian C. Prest & Alan Krupnick, *How Clean is "Refined Coal?" An Empirical Assessment of a Billion-Dollar Tax Credit,* Res. For the Future, 5 (Aug. 2020) https://media.rff.org/documents/Refined_Coal_Report_rev_8-20.pdf.

Policy arguments for addressing energy transition deficiencies through further adjustments in tax policy are supported by the success of tax credits encouraging emission-reducing energy production,[75] though this record is paired with the difficult reality applicants face in qualifying for these tax credits.[76] While Congress has demonstrated its willingness to encourage renewable energy production through systemic tax policy,[77] especially when compared to the broader legislative history of climate change policy endeavors,[78] use of these credits is narrowed by the limited pool of investors and producers who can claim them.[79] On the investor front, equity investors are mostly relegated to a small pool of institutional entities who generate high transaction costs,[80] themselves already amongst a select group of the largest equity investors.[81] On the production front, fledgling renewable energy companies necessarily find difficulty generating liabilities that can be absorbed by the credit.[82] Consequently, a large number of renewable energy producers rely on a small number of

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75. *See generally*, ROBERTA F. MANN & TRACEY M. ROBERTS, TAX LAW AND THE ENVIRONMENT: A MULTIDISCIPLINARY AND WORLDWIDE PERSPECTIVE (2018). The finance of renewable energy projects in the U.S. has generally been undertaken by renewable energy project developers, who design and often operate facilities, and tax equity investors, who partner with developers under finance structures designed to take advantage of federal support for renewable energy projects. *E.g*., Sweich, *supra* note 10, § 24.11 (2014).

76. *See, e.g*., Mormann, *infra* note 81, at 963; Cowan, *infra* note 77, at 362–63.

77. *See, e.g*., Robert K. Cowan, *Different Name, Same Result: Why Master Limited Partnerships Are Unlikely to Finance Our Green Energy Future*, 98 TEX. L. REV. 357, 360 (2019). Tax credits are often seen as an opportunity to advance goals across the aisle, whether that be tax reduction priorities of Republicans or policy initiatives of Democrats, "mak[ing] them our politicians' favorite mechanism for subsidizing renewable energy." *Id*. at 360.

78. *See, e.g.,* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 8 (2014) ("Congress [has failed] to pass major environmental legislation over the past two decades, particularly legislation addressing climate change."); Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U.L. REV. 673, 694 n.48 (2015) ("Consider that administrative regulation of carbon emission and climate change is proceeding under a statute, the Clean Air Act, written in the 1970s to address different problems altogether.").

79. *See, e.g*., Felix Mormann, *Requirements for A Renewables Revolution*, 38 Ecology L.Q. 903, 963 (2011); Layser, *supra* note 10, at 460 ("The pool of so-called "tax equity investors" is limited to roughly eleven to twenty cash-rich corporations outside the energy industry that include household names like Google, MetLife, Bank of America, J.P. Morgan, Wells Fargo, and Morgan Stanley.").

80. *See, e.g*., Cowan, *supra* note 77, at 362–63.

81. *See*, *e.g*., Felix Mormann, *Beyond Tax Credits: Smarter Tax Policy for A Cleaner, More Democratic Energy Future*, 31 YALE J. ON REG. 303, 326 (2014) (discussing the profitability requirements necessary to take advantage of energy tax credits being difficult to achieve amongst even large equity investors). "[B]illions of dollars of institutional capital from pension funds, sovereign wealth funds, and other potential investors are sidelined by the tax code." *Id.*

82. *E.g*., Cowan, *supra* note 77, at 362.

equity investors able to take advantage of credits generated from production liabilities.[83]

By qualifying the Congressional legislative intent behind a renewable energy credit as a source of legitimate business purpose in organizing a partnership, the pool of would-be renewable energy producers in tentative reliance on a successful claim of that credit are more likely to find their reliance affirmed. Thus, tension in the duality of tax credits successfully encouraging emission-reducing energy production, and the difficulty in qualifying for such credits, is alleviated by ensuring that parties intending to successfully generate renewable energy have shown legitimate non-tax business purpose as intended through legislation.

The court's finding of economic substance in transactions only made profitable on a post-tax basis[84] furthers Congress's purpose in encouraging renewable energy production.[85] Renewable energy ventures tend to face high risk of failure and long periods of pre-profit investment during initial phases of development,[86] making them poor candidates for safe returns on investment and guaranteed profit margins.[87]

As the opinion notes, encouraging activity that is unprofitable, or at the very least having reasonable likelihood of being unprofitable bereft credits, is the very intent behind the creation of credits for renewable energy production.[88] Where profit-seeking activity is mandatory to earn credits for the production of renewable energy, as is the case here, credits unclaimable where they are relied upon only frustrates Congress's purpose in encouraging renewable energy production generally.[89] Partnerships *should* be formed in reliance on these credits to achieve profitability, as this affirms the intentions of Congress and serves the more general purpose of achieving higher rates of renewable energy production.

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83. *Id*. Further, rules of the Internal Revenue Service that disallow transferring tax credits ensure developers "must enter into partnerships with corporate investors that have income to shelter." *Id*. at 362.

84. Cross Refined Coal v. Comm'r, 45 F.4th 150, 160–61 (D.C. Cir. 2022).

85. *See*, *e.g*., 26 U.S.C. § 45.

86. *E.g*., Cowan, *supra* note 77, at 362.

87. *See*, *e.g*., *id*.

88. *Cross Refined Coal*, 45 F.4th at 158–59.

89. *See*, *e.g*., *id*.

V. CONCLUSION

In conclusion, the D.C. Circuit effectively balanced the requirements of judicial anti-abuse partnership doctrines with the congressional intent behind the refined-coal credit.[90] The D.C. Circuit thus joined the Ninth Circuit in recognizing post-tax profits as providing economic substance to transactions for income taxation purposes.[91] The cumulative benefits to the energy transition resulting from: (a) recognition of pursuing legislatively endorsed emission reduction as a legitimate business interest, and (b) economic substance found in post-tax profits expected from energy tax credits are most likely modest at best. However, with the historic prevalence of renewable energy tax credits as viable sources of energy transition infrastructure,[92] why not see precedent that serves to expand the pool of successful PTC applicants as conducive to the realization of congressional intent in energy transition legislation? The measured response is to do just that, in tandem with an examination of other energy transition financing structures.

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90. *See id.* at 156-57, 160–61.
91. Sacks v. Comm'r, 69 F.3d 982, 991 (9th Cir. 1995).
92. *See* discussion, *supra* note 75.
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