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# Federal Income Taxation--Investment Tax Credit-- Exclusion of "Buildings" From the Investment Tax Credit--Thirup v. Commissioner

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**Federal Income Taxation—INVESTMENT TAX CREDIT—EXCLUSION OF “BUILDINGS” FROM THE INVESTMENT TAX CREDIT—Thirup v. Commissioner, 508 F.2d 915 (9th Cir. 1974).**

In 1966 the appellants, Arne and Pauline Thirup, spent approximately \$80,000 to construct a new greenhouse<sup>1</sup> and replace the siding and roofing on existing greenhouses. On their 1966 federal income tax returns, the Thirups claimed an investment tax credit under section 38 of the Internal Revenue Code for the full amount expended. The Commissioner of Internal Revenue disallowed the investment credit on the ground that the greenhouses were “buildings” within the meaning of section 48(a)(1)(B) and therefore not eligible for the credit. The United States Tax Court affirmed the decision of the Commissioner, holding that the greenhouses were buildings in appearance and function.<sup>2</sup> The United States Court of Appeals for the Ninth Circuit reversed, holding that the greenhouses did not function as buildings and therefore were not excluded from the provisions of the investment tax credit.

**I. HISTORY OF THE INVESTMENT TAX CREDIT AND THE “BUILDING” EXCEPTION**

Sections 38 and 46-50 of the Internal Revenue Code provide for a percentage tax credit on the dollar amount of investment in certain depreciable business property having a useful life of three years or more. Originally called the “investment tax credit,” the credit is now officially known as the “job development investment credit.”<sup>3</sup> The history of the credit has been stormy. First enacted by Congress in 1962,<sup>4</sup> the credit was suspended from October 1966<sup>5</sup> to March 1967<sup>6</sup> and was terminated in April 1969.<sup>7</sup> Congress restored the credit as part of the Revenue Act of 1971.<sup>8</sup>

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1. There was some objection in the Tax Court to the use of the term “greenhouses.” In addition to consisting of two words, one of which clearly implies a building, the word is so broad as to include structures that are substantially different from the appellants’. Record at 6-8, Arne Thirup, 59 T.C. 122 (1972), *rev’d*, 508 F.2d 915 (9th Cir. 1974). However, as was done in the Tax Court and the court of appeals, this case note will, for simplicity’s sake, refer to these structures as greenhouses.

2. Arne Thirup, 59 T.C. 122 (1972), *rev’d*, 508 F.2d 915 (9th Cir. 1974).

3. H.R. REP. No. 92-533, 92d Cong., 1st Sess. 1 (1971).

4. Act of Oct. 16, 1962, Pub. L. No. 87-834, §2, 76 Stat. 962.

5. Act of Nov. 8, 1966, Pub. L. No. 89-800, §1, 80 Stat. 1508.

6. Act of June 13, 1967, Pub. L. No. 90-26, 81 Stat. 57.

7. Act of Dec. 30, 1969, Pub. L. No. 91-172, tit. VII, §703, 83 Stat. 660.

8. Act of Dec. 10, 1971, Pub. L. No. 92-178, tit. I, §101, 85 Stat. 498.

A. *The Origin of the "Building" Exception*

One feature of the investment tax credit that has remained constant throughout its existence is the exclusion of "a building and its structural components" from the provisions of the credit. Section 48(a)<sup>9</sup> defines the types of property eligible for the investment tax credit (known as "section 38 property") as follows:

a. SECTION 38 PROPERTY.—

(a) IN GENERAL.—Except as provided in this subsection, the term "section 38 property" means—

(A) tangible personal property, or

(B) other tangible property (*not including a building and its structural components*) . . . .<sup>10</sup>

The Commissioner of Internal Revenue, exercising congressional authority to promulgate regulations implementing the provisions of the credit,<sup>11</sup> has defined "building" as follows:

The term "building" generally means any structure or edifice enclosing a space within its walls, and usually covered by a roof, the purpose of which is, for example, to provide shelter or housing, or to provide working, office, parking, display, or sales space. The term includes, for example, structures such as apartment houses, factory and office buildings, warehouses, barns, garages, railway or bus stations, and stores. . . . Such term does not include (i) a structure which is essentially an item of machinery or equipment, or (ii) a structure which houses property used as an integral part of an activity specified in section 48(a)(1)(B)(i) if the use of the structure is so closely related to the use of such property that the structure clearly can be expected to be replaced when the property it initially houses is replaced.<sup>12</sup>

9. All references in the text to "section" or "sections," unless otherwise indicated, refer to the Internal Revenue Code of 1954 as amended.

10. INT. REV. CODE OF 1954, §48(a) (emphasis added). Other tangible property qualifies as "section 38 property" only if it provides one of the following operations:

(i) is used as an integral part of manufacturing, production, or extraction or of furnishing transportation, communications, electrical energy, gas, water, or sewage disposal services, or

(ii) constitutes a research facility used in connection with any of the activities referred to in clause (i), or

(iii) constitutes a facility used in connection with any of the activities referred to in clause (i) for the bulk storage of fungible commodities (including commodities in a liquid or gaseous state) . . . .

INT. REV. CODE OF 1954, §48(a)(1)(B).

11. INT. REV. CODE OF 1954, §38(b).

12. Treas. Reg. §1.48-1(e)(1) (1972). The language from the committee reports is similar.

The term "building" is to be given its commonly accepted meaning, that

In spite of the Commissioner's attempt to clarify the meaning of "building," the term has been the cause of much litigation and confusion. Perhaps the controversy surrounding the meaning of "building" is due to the uncertain circumstances under which the exception for buildings was born.

President Kennedy introduced the investment tax credit to Congress in a special taxation message in early 1961. He said:

Specifically, therefore, I recommend enactment of an investment tax incentive in the form of a tax credit of—

Fifteen percent of all new plant [this term includes buildings] and equipment investment expenditures in excess of current depreciation allowances . . . .<sup>13</sup>

In the same message, Kennedy proposed the elimination of capital gains treatment on the sale of essentially all depreciable business property (buildings and equipment). This was to be accomplished through the depreciation recapture provisions of what is now section 1245.<sup>14</sup>

When the President's tax proposals were sent to the House Ways and Means Committee for hearings, they received a cold reception. Labor and business both criticized the investment tax credit.<sup>15</sup> Real estate interests charged that the application of the depreciation recapture provisions to realty would damage the real estate business.<sup>16</sup> After the public hearings were over, Ways and Means Committee members met with Treasury officials in closed-door hearings to develop an acceptable compromise.<sup>17</sup> The resulting compromise bill applied the credit only to new investment in equipment—buildings were left out.<sup>18</sup> It should be noted that the committee decided to exclude buildings from the tax

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is, a structure or edifice enclosing a space within its walls, and usually covered by a roof. It is the basic structure of an improvement to land the purpose of which is, for example, to provide shelter or housing or to provide working, office, display, or sales space. The term would include, for example, the basic structure used as a factory, office building, warehouse, theater, railway or bus station, gymnasium, or clubhouse.

H.R. REP. NO. 1447, 87th Cong., 2d Sess. A18 (1962) (Technical Explanation of the Bill); S. REP. NO. 1881, 87th Cong., 2d Sess. 154-55 (1962).

13. *Hearings on the President's 1961 Tax Recommendations Before the Comm. on Ways and Means*, 87th Cong., 1st Sess. 6 (1961) [hereinafter cited as *1961 Hearings*].

14. *Id.* at 13.

15. *Wall Street Journal*, May 5, 1961, at 2, col. 3; *id.*, May 9, 1961, at 5, col. 2; *id.*, May 16, 1961, at 2, col. 2; *id.*, May 17, 1961, at 3, col. 4; *id.*, May 19, 1961, at 12, col. 1.

16. *Id.*, May 10, 1961, at 1, col. 5; *id.*, May 16, 1961, at 2, col. 2.

17. *Id.*, June 12, 1961, at 1, col. 6.

18. *Id.*, July 18, 1961, at 3, col. 1.

credit only after it had announced that buildings would be excluded from depreciation recapture.<sup>19</sup>

Although the exact reasons for excluding buildings from the tax credit are not known, the following appear to have been major factors: (1) many, principally labor and business, opposed the tax credit;<sup>20</sup> (2) real estate interests strongly opposed depreciation recapture as applied to realty;<sup>21</sup> (3) the Administration seemed to be more concerned with equipment investment than building investment;<sup>22</sup> and (4) the House Ways and Means Committee was concerned about the expected revenue loss from the credit.<sup>23</sup> The elimination of buildings from both the investment tax credit and the depreciation recapture provisions constituted a compromise solution. Once the proposals became law, however, confusion surrounding the building exception emerged.

### B. *Judicial Interpretations of "Building"*

In order to determine whether or not a structure is a building, the courts have developed a dual test: first, does the structure look like a building and, second, does it function as a building?<sup>24</sup> This appearance-functional test derives from the following language in the Treasury regulations:

The term "building" generally means any structure or edifice enclosing a space within its walls, and usually covered by a roof [appearance], the purpose of which is, for example, to provide shelter or housing, or to provide working, office, parking, display, or sales space [function].<sup>25</sup>

The trend in the courts is to stress the function of a structure more than the appearance. In *applying* the functional test, however, the courts have not developed a consistent approach; rather, they have used varying criteria.

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19. Glasman, *Investment Credit—One Year Later*, 1964 TUL. TAX INST. 385, 421.

20. See note 15 *supra*.

21. See note 16 *supra*. President Kennedy specifically intended that the revenue loss from the tax credit would be partially offset by the depreciation recapture provisions. 1961 *Hearings* 20, 44 (Statement of C. Douglas Dillon, Secretary of the Treasury); 3 B.C. IND. & COM. L. REV. 232, 239-40 (1962).

22. See 1961 *Hearings* 20, 390 (Statement of C. Douglas Dillon, Secretary of the Treasury).

23. Glasman, *supra* note 19, at 421.

24. While most courts do make reference to the physical appearance of a structure, it is not always clear how the appearance test is used. Most structures litigated under the investment tax credit look like buildings; therefore, the courts do not explicitly discuss the appearance test. In these cases the courts use that test as a threshold determination but focus on the functional test.

25. Treas. Reg. §1.48-1(e)(1) (1972).

Recent court decisions illustrate the application of the appearance-functional test. In *Robert E. Catron*,<sup>26</sup> petitioner built a metal Quonset-type structure for the sorting and storage of apples. The court held that the one-third of the structure which served exclusively as cold storage qualified as section 38 property.<sup>27</sup> In spite of the structure's appearance as a building, the court emphasized its function: the lack of employee working space determined that the cold storage part did not function as a building. In *Adolph Coors Co.*,<sup>28</sup> two beer cellars and four barley receiving stations qualified as section 38 property. The court followed a functional approach and made no mention of the appearance test. The lack of employee activity taking place in the structures, coupled with the fact that the structures were not useful for other purposes, was determinative.<sup>29</sup>

In *Sunnyside Nurseries*,<sup>30</sup> a companion case to *Arne Thirup*, the Tax Court held that the taxpayer's greenhouses were buildings in appearance and function.<sup>31</sup> Although this holding was the same as that in *Arne Thirup*, the two cases were factually different in several respects. In contrast to the Thirups' greenhouses, the Sunnyside greenhouses had concrete floors and foundations and were made of steel frame and aluminum bar construction. Also, Sunnyside's employees performed substantially more work in the greenhouses than did the Thirups' employees.

Subsequent to *Sunnyside* and *Thirup*, the Tax Court, in *Melvin Satrum*,<sup>32</sup> held that egg-producing facilities qualified as section 38 property. In stressing the functional test, the court distinguished the case from *Sunnyside* and *Thirup* by noting a more limited amount of employee activity in the egg-producing facilities. In another recent case also stressing the functional test, *Brown-Forman Distillers Corp. v. United States*,<sup>33</sup> the Court of Claims held that six whiskey maturation facilities were not buildings for purposes of the credit. The court emphasized three factors in coming to this conclusion: (1) the facilities' lack of working space; (2) the limited utility of the structures for any other pur-

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26. 50 T.C. 306 (1968).

27. *Id.* at 315.

28. 27 CCH Tax Ct. Mem. 1351 (1968), *appeal dismissed per stipulation*, CCH 1975 FED. TAX CITATOR ¶90,599 (10th Cir. 1969).

29. *Id.* at 1362.

30. 59 T.C. 113 (1972).

31. *Id.* at 119.

32. 62 T.C. 413 (1974), *appeal dismissed*, 6 P-H 1975 FED. TAXES ¶61,006 (9th Cir. Sept. 29, 1975).

33. 499 F.2d 1263 (Ct. Cl. 1974).

pose; and (3) the fact that the working space provided in the structures was only incidental to the structures' principal purpose. The court said that the third factor was the main criterion.

Prior to the instant case, then, courts used different criteria in applying the functional test. While at times emphasizing or relying on a particular factor, the courts never explicitly rejected the validity of any one factor.

## II. THE NINTH CIRCUIT REJECTS THE APPEARANCE TEST

In the instant case, the Ninth Circuit Court of Appeals followed the majority of recent cases by stressing the importance of the functional test. In so doing, however, the court rejected outright the appearance test, reasoning that the test is too imprecise to achieve the congressional purpose of encouraging improvements in the quality and quantity of American industrial products. Referring to *Melvin Satrum*<sup>34</sup> and *Brown-Forman*,<sup>35</sup> the court stated that "the most recent authorities have adopted the functional test" and abandoned the appearance test. The court indicated that its purely functional approach eliminates from the tax credit the general purpose building that Congress intended to eliminate and includes those buildings that are specifically adapted for production.<sup>36</sup>

In applying the functional test, the court refused to consider the *amount* of employee activity, the primary consideration in *Melvin Satrum* and *Brown-Forman*, reasoning that the *nature* of employee activity is determinative. If the predominant purpose of the structure is to provide working space and shelter for the employees, the structure functions as a building; but, in contrast, if the structure serves as a productive facility so that the employees' activities therein are only supportive or ancillary to the productive purpose of the structure, the structure qualifies for the investment credit. In the instant case, the employee working space in the greenhouses was only incidental to the purpose of the structures which was to provide a total environment to aid in the growing of flowers. Employee activities were only supportive of that purpose. The greenhouses, therefore, were not buildings and were thus eligible for the investment tax credit.<sup>37</sup>

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34. 62 T.C. 413 (1974).

35. 499 F.2d 1263 (Ct. Cl. 1974).

36. 508 F.2d at 919.

37. *Id.* at 919-20.

### III. ANALYSIS

In the instant case, the Ninth Circuit asserted that a structure's function is the sole test of whether the structure is a building. The court did not discuss, however, whether its purely functional approach would apply if the structure in question functioned as a building but did not have the appearance or physical characteristics of one. It is important, therefore, to determine if the court was correct in rejecting the appearance test altogether and adopting the functional test as the sole criterion. In addition, it is appropriate to examine the legislative history of the "building" exception to see if the court's approach adequately effectuates congressional intent.

#### A. *Rejection of the Appearance Test*

The court justified its rejection of the appearance test on three grounds: (1) the congressional purpose "to encourage improvements in the quality and quantity of American industrial products" would not be served by using the test; (2) recent decisions of other courts have rejected the appearance test; and (3) recent decisions of the Internal Revenue Service have declined to apply the test.<sup>38</sup> Analysis of these three grounds, however, demonstrates the questionable nature of the court's rationale.

The court admitted that the appearance test has support in the regulations<sup>39</sup> and committee reports,<sup>40</sup> yet rejected the test as "too imprecise" to effect the congressional purpose of encouraging more and better production.<sup>41</sup> Without doubt, the overall objective of the credit is to encourage industry to invest in new capital improvements. Nevertheless, the "building" restriction contained in the statutory scheme is evidence that Congress intended to encourage investment within definite limits. The court's statement of congressional purpose, therefore, is not on point, since the relevant inquiry concerning congressional intent is not whether the appearance test encourages investment, but whether this test helps to effectuate the congressional purpose in excluding buildings from the investment tax credit.

The court cited two recent cases, *Brown-Forman*<sup>42</sup> and *Melvin Satrum*<sup>43</sup> as support for its rejection of the appearance

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38. *Id.* at 918.

39. See note 25 *supra* and accompanying text.

40. See note 12 *supra*.

41. 508 F.2d at 918.

42. See note 33 *supra* and accompanying text.

43. See note 32 *supra* and accompanying text.



test. While the cases point out that the appearance test is not always determinative, neither the holdings in the cases nor the language of the opinions reject the appearance test as the court did in the instant case. The Court of Claims in *Brown-Forman* and the Tax Court in *Melvin Satrum* determined that the structures involved had the physical characteristics of buildings, but held that the structures were not buildings because they did not function as such. Although the result in these cases would have been the same without the appearance test, there is no language in either case indicating that the appearance test was rejected. The Ninth Circuit also asserted that two revenue rulings<sup>44</sup> “declined . . . to apply the appearance test.” Both rulings illustrate, however, instances where the appearance test is merely given less weight than the functional test; in neither ruling does the Internal Revenue Service explicitly reject the appearance test.<sup>45</sup>

The impropriety of rejecting altogether the appearance test and relying exclusively on the functional test is suggested by the recent Tax Court case of *Joseph Henry Moore*<sup>46</sup> which involved the applicability of the investment tax credit to trailer houses. The trailer houses did not qualify for the tax credit under section 48(a)(1)(B), since they did not provide one of the operations enumerated in that provision.<sup>47</sup> The taxpayer, therefore, tried to qualify them as “tangible personal property” under section 48(a)(1)(A). The government countered that they were buildings and thus could not qualify as “tangible personal property.” The Tax Court responded in these terms:

The respondent [the Commissioner] urges that since trailers were used to provide shelter or housing, they are, by virtue of their “functional use,” no different from a building. Applying this “functional use” test, the respondent concludes that the trailers should not be treated as tangible personal property for purposes of the investment credit.

The “functional use” test of the regulations (sec. 1.48-1(e)) has been applied by the Court in a differing factual context. . . . But we have never held, and the regulations do not suggest, that “functional use” is the sole criterion by which an item’s status as a building is to be determined. Even the respon-

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44. Rev. Rul. 132, 1968-1 CUM. BULL. 14; Rev. Rul. 359, 1971-2 CUM. BULL. 62.

45. The Commissioner of the Internal Revenue stated in one 1968 revenue ruling, however, that “the definition of the term ‘building’ for investment credit purposes is stated in terms of function rather than physical appearance.” Rev. Rul. 209, 1968-1 CUM. BULL. 16.

46. 58 T.C. 1045 (1972), *aff’d*, 489 F.2d 285 (5th Cir. 1973).

47. See note 10 *supra*.

dent admits that if a trailer is towed from place to place, it would "probably" be personal property. Obviously, in that instance the trailer would also be used for shelter and housing and would serve the function of a building. If "functional use" were the sole standard by which to judge whether a trailer is a building, it should logically be of no importance whether it is towed from town to town or towed from place to place in a trailer park. It is apparent that before the "functional use" test can properly be applied in this case, it must first be shown that the trailers were permanent improvements to the land [*i.e.*, had the physical characteristics of a building]. As we indicated above, this requirement is fully consistent with the respondent's own regulations and with congressional intent.<sup>48</sup>

Applying both the appearance and the functional test, the court held that the house trailers qualified for the investment tax credit.

While not dealing with the same subparagraph of section 48(a)(1) involved in the instant case, the *Moore* decision does illustrate the problem that can arise from the exclusive application of the functional test: a structure that functions as a building may be excluded from the investment tax credit regardless of its physical characteristics. Such would be the result of a mechanical application of the *Thirup* analysis to the facts of the *Moore* case. In light of this possibility, the courts should not reject altogether the appearance test, as did the Ninth Circuit. Application of that test may be necessary in a future case to properly effectuate the congressional purposes underlying the "buildings" exception and the investment tax credit.

### B. Adoption and Application of the Functional Test

The court's exclusive use of the functional test extends the current judicial trend of giving the functional test greater weight than the appearance test when determining whether a structure is a building.<sup>49</sup> There is some inconsistency, however, among the courts in *applying* the functional test. It is not clear from judicial decisions what factors should determine whether a structure functions as a building. Among the criteria used by the courts in evaluating the function of a structure are: the adaptability of the structure to other purposes (the greater the adaptability of a structure, the more it functions as a building);<sup>50</sup> the amount of

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48. 58 T.C. at 1052-53.

49. See notes 26-33 *supra* and accompanying text.

50. See *Brown & Williamson Tobacco Corp. v. United States*, 369 F. Supp. 1283 (W.D. Ken. 1973), *aff'd*, 491 F.2d 1258 (6th Cir. 1974); *Brown-Forman Distillers Corp. v.*

employee activity taking place inside the structure (the greater the activity that takes place, the more the structure provides working space and shelter);<sup>51</sup> the amount of working space inside the structure (the regulations state that one of the purposes of a "building" is to provide working space);<sup>52</sup> and the nature of employee activity (if the employee activity is only incidental to the purpose of the structure, then the structure does not primarily provide shelter or working space).<sup>53</sup>

The court in the instant case took a narrow approach in applying the functional test by focusing entirely on one factor—the nature of the employees' activities. It cited *Brown-Forman*<sup>54</sup> and *Robert E. Catron*<sup>55</sup> as support for this approach.<sup>56</sup> An examination of those cases, however, shows that the courts did not focus solely on the nature of employee activity; they also scrutinized the *amount* of that activity. The Ninth Circuit's approach seems unnecessarily restrictive in contrast to the flexible approaches taken by the other courts. A more reasonable approach in light of the court's emphasis on the flexible nature of the functional test would be to look at several factors, including adaptability and amount of working space.

### C. *The Court's Use of Congressional Intent*

In rejecting the appearance test, the court indicated that the test fails to effectuate the broad purpose of the tax credit.<sup>57</sup> In adopting the functional test, however, the court did not look solely to this broad purpose. It also focused on the narrow purpose of the provision excluding buildings. The court asserted that the functional test excludes from the tax credit the "general purpose buildings" that Congress intended to exclude and includes "those

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United States, 499 F.2d 1263 (Ct. Cl. 1974); *Central Citrus Co.*, 58 T.C. 365 (1972); *Palmer Olson*, 39 P-H Tax Ct. Mem. 1494 (1970); *Adolph Coors Co.*, 27 CCH Tax Ct. Mem. 1351 (1968).

51. See *Brown-Forman Distillers Corp. v. United States*, 499 F.2d 1263 (Ct. Cl. 1974); *Melvin Satrum*, 62 T.C. 413 (1974); *Sunnyside Nurseries*, 59 T.C. 113 (1972); *Adolph Coors Co.*, 27 CCH Tax Ct. Mem. 1351 (1968).

52. See *Brown & Williamson Tobacco Corp. v. United States*, 369 F. Supp. 1283 (W.D. Ken. 1973); *Brown-Forman Distillers Corp. v. United States*, 499 F.2d 1263 (Ct. Cl. 1974); *Central Citrus Co.*, 58 T.C. 365 (1972); *Sunnyside Nurseries*, 59 T.C. 113 (1972); *Palmer Olson*, 39 P-H Tax Ct. Mem. 1494 (1970); *Robert E. Catron*, 50 T.C. 306 (1968).

53. See *Brown & Williamson Tobacco Corp. v. United States*, 369 F. Supp. 1283 (W.D. Ken. 1973); *Brown-Forman Distillers Corp. v. United States*, 499 F.2d 1263 (Ct. Cl. 1974); *Melvin Satrum*, 62 T.C. 413 (1974); *Robert E. Catron*, 50 T.C. 306 (1968).

54. 499 F.2d 1263 (Ct. Cl. 1974).

55. 50 T.C. 306 (1968).

56. 508 F.2d at 919.

57. See text accompanying notes 39-41 *supra*.

specialized structures whose utility is principally and primarily a significantly contributive factor in the actual manufacturing or production of the product itself."<sup>58</sup> As already noted, the court's reliance on the broad objective was inappropriate in the context of the present case.<sup>59</sup> The court's reference to the narrow congressional objective of excluding buildings from the credit was more apposite. The court offered no support, however, for its version of the congressional objective or purpose underlying the "buildings" exception.<sup>60</sup>

Of the four factors<sup>61</sup> that may have influenced the House Ways and Means Committee in making the decision to drop buildings from the provisions of depreciation recapture and the investment tax credit, commentators<sup>62</sup> indicate that the precipitating factor, if not the principal factor, was the pressure from real estate interests that opposed depreciation recapture as applied to realty. The makeup of this special interest group was obviously broad, as is evidenced by the list of parties appearing before the House Ways and Means Committee in 1961,<sup>63</sup> yet these parties had a common goal: maintenance of incentives to buy and sell real estate. This goal was manifested by the real estate interests' opposition to the depreciation recapture rules.<sup>64</sup> The Ways and Means Committee, by excluding from depreciation recapture (and the investment tax credit) the types of real property commonly bought and sold—land and general purpose buildings—satisfied the objectives of these real estate interests.<sup>65</sup>

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58. 508 F.2d at 919.

59. See text accompanying notes 39-41 *supra*.

60. 508 F.2d at 919.

61. See notes 20-23 *supra* and accompanying text.

62. J. EUSTICE, M. FERGUSON & S. ROSS, FEDERAL INCOME TAX LEGISLATION OF 1962-1964 IN PERSPECTIVE 38-39 (1965); Glasman, *supra* note 19, at 420-21.

63. The list of real estate interests opposing depreciation recapture includes: National Association of Real Estate Boards, 1961 *Hearings* 1043; American Hotel Association, 1961 *Hearings* 1215; National Association of Home Builders, 1961 *Hearings* 1233; National Retail Lumber Dealers Association, 1961 *Hearings* 1530; and Building and Construction Trades Council of Greater New York, 1961 *Hearings* 1549.

64. There was also some realtor opposition to the investment tax credit. See 1961 *Hearings* 1531 (testimony of representative of Associated General Contractors of America, Inc.). However, the real estate groups were principally concerned with depreciation recapture. See notes 16 & 63 *supra*.

65. See J. EUSTICE, *supra* note 62, at 38-39. One witness before the committee recommended that buildings should be excluded from the investment credit for reasons independent of depreciation recapture:

Buildings, by contrast [to equipment], are frequently owned by separate corporations or syndicates, and are bought, sold, and exchanged for tax advantages rather than to secure properties which are inherently more productive from an economic standpoint.

But the compromise bill not only appeased the real estate interests; it also restricted the scope of the tax credit, a proposal subject to widespread opposition, and thereby reduced the revenue loss from the credit. The compromise, however, left the heart of the provision—equipment investment—intact. In eliminating land and general purpose buildings, Congress left eligible for the tax credit special purpose structures which function much as do pieces of equipment necessary for a particular production process.<sup>66</sup> With this distinction between “buildings” and productive “non-buildings,” Congress attempted to effectuate the overall purpose of the investment tax credit: stimulation of *production* in the United States.

The court’s decision in the instant case, therefore, is consistent with the overall purpose of the tax credit and, more importantly, the probable motive for the “buildings” exception. The Thirups’ greenhouses were designed to directly facilitate a particular “production” process, to provide a total environment for the production of flowers, and were only useful in that process. The human activity that took place in the greenhouses was merely incidental to the production of flowers. Further, it seems unlikely that the greenhouses would be bought and sold as investments, since their limited function makes them unattractive for investment purposes. As a general rule, real estate investors and builders are more interested in structures that can be used for various

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Because of the differences in the reasons for sale and exchanges of real estate, as compared to machinery and equipment, the denial of the proposed investment credit to certain forms of buildings seems a sound one, which should be adopted in any basic depreciation reform.

1961 *Hearings* 951, 955 (Statement of Dan Throop Smith, Professor of Finance, Harvard Graduate School of Business Administration).

66. While working on the reinstatement of the tax credit in 1971, the Senate Committee on Finance attempted to clarify the meaning of “building.” Although it failed to relieve the confusion significantly, the Committee did give the following example of a special purpose structure:

One example of a type of structure closely related to the product it houses which was called to the attention of the committee is a unitary system for raising hogs which includes automatic feed systems, special airflow units, slatted flooring, pens and partitions. The structure which can be added to, according to the number of hogs raised, is no more than a cover and way of tying together the specially designed pens, automatic feed systems, etc. There is no other practical use for the structure and it can, therefore, be expected to be used only so long as the equipment it houses is used. Such a structure would be eligible for an investment credit.

S. REP. NO. 92-437, 92d Cong., 1st Sess. 29-30 (1971).

As note 10 indicates, there are several other operations besides production which a structure can provide and still be eligible for the tax credit. This case note only refers to production as that was the purpose of the greenhouses in the instant case.

purposes and thus have wider marketability. In sum, the court's distinction between "general purpose" and "special purpose" structures accurately reflected the attempted congressional distinction between "buildings" and productive "non-buildings" and thereby gave effect to the primary purpose of the investment tax credit without expanding it beyond its intended scope.