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Tenth Circuit: Taxpayer's request for rehearing en banc in *Liberty Global* denied

The U.S. Court of Appeals for the Tenth Circuit on August 17, 2026, [denied](#) the taxpayer's request for a rehearing en banc of its April 2026 [decision](#) in *Liberty Global Inc. v. United States*, No. 23-1410, in which the court rejected the taxpayer's claim that the codified economic substance doctrine in section 7701(o) was not relevant to a transaction the taxpayer undertook and affirmed the judgement of the federal district court denying the taxpayer's refund claim.

Three of the 12 active judges on the Tenth Circuit voted to grant the rehearing en banc, including the judge who wrote a dissenting opinion in the court's April 2026 decision. The dissenting judge also wrote a dissenting opinion to the court's order denying the rehearing en banc (joined by the other judges who voted to grant en banc rehearing), in which the judge reiterated her view that section 7701(o) requires a meaningful threshold relevancy determination, in line with the recent Tax Court holding in *Patel v. Commissioner*, 165 T.C. 171 (2025).

Summary of April 2026 decision

Section 245A, created by the 2017 Tax Cuts and Jobs Act (TCJA), permits certain U.S. corporate taxpayers to obtain a 100% deduction for dividends (including deemed dividends under section 964(e) or section 1248) from their foreign subsidiaries out of foreign earnings and profits (E&P). However, temporary regulations under section 245A issued on June 18, 2019, limited the deduction under section 245A for dividends out of E&P created by certain extraordinary transactions that occurred during the period between the effective dates of section 245A (dividends received after December 31, 2017) and GILTI (tax years beginning after December 31, 2017).

The taxpayer, a U.S. subsidiary of a British media conglomerate, petitioned the federal district court in Colorado in November 2020 for a refund of approximately \$109 million in taxes (including penalties and interest) on the basis that the temporary regulations were invalid. In particular, the taxpayer claimed that it met the requirements under section 245A to deduct income from a transaction that occurred in December 2018, but because the temporary regulations were made retroactive, it did not receive the full deduction.

The refund suit was resolved through two rounds of summary judgment motions—the first concerning the validity of the temporary regulations, and the second concerning the applicability of the economic substance doctrine.

In the first round of summary judgment motions, the district court agreed with the taxpayer and held that the temporary regulations were procedurally invalid because they were issued without notice and comment.

In the second round of summary judgment motions, the district court agreed with the government that the taxpayer's refund claim must be disallowed under section 7701(o)'s codified economic substance doctrine.

The taxpayer conceded that all aspects of the first three steps of its 2018 transaction failed both prongs of the codified economic substance doctrine but argued that the economic substance doctrine was not "relevant" to its transaction because the economic substance doctrine does not apply to "basic business transactions," such as corporate organizations under section 351 and entity selections.

The district court rejected the taxpayer's argument, noting that section 7701(o) contained no categorical exceptions. The district court then concluded that the economic substance doctrine is "relevant" whenever "a taxpayer seeks to claim tax benefits, unintended by Congress, by means of transactions that serve no economic purpose other than tax savings." Applying that standard, the district court concluded the doctrine was relevant because the taxpayer exploited a legislative mismatch through transactions that served no economic purpose other than tax savings and, thereby, "violated congressional intent."

The Tenth Circuit affirmed the district court's conclusion that the taxpayer was not entitled to any of the section 245A deductions it claimed with respect to its 2018 transaction. The Tenth Circuit analyzed the "narrow question" that it said the taxpayer had appealed—specifically whether the codified economic substance doctrine was relevant to the taxpayer's transaction at issue. The Tenth Circuit majority opinion determined that the economic substance doctrine is relevant "to attempts by taxpayers to mechanically utilize the provisions of the Tax Code to obtain a benefit not intended by Congress" and that the taxpayer's transaction met that standard.

The dissenting judge concluded, however, that the district court's failure to conduct a threshold relevancy inquiry contradicted the clear statutory language of section 7701(o), as well as applicable precedent, and thus constituted reversible error. The dissenting judge found that the district court interpreted section 7701(o) as essentially providing that the economic substance doctrine applies to all transactions, which was erroneous. Rather, the economic substance doctrine applies only when another Code provision makes economic reality or taxpayer motive relevant, and because the taxpayer's transaction did not implicate any such provision, the economic substance doctrine should not apply.

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