***Norfolk Southern Corp. v. Commissioner, 104 T. C. 13 (1995)***

Containers owned by U. S. persons must be used at least once each year to transport property to or from the U. S. to qualify for investment tax credits and accelerated depreciation.

**Summary**

Norfolk Southern Corp. entered into a safe harbor lease agreement with Flexi-Van, Inc. in 1981, claiming investment tax credits (ITC) and accelerated depreciation for leased containers. The IRS disallowed these claims, arguing that the containers did not meet the statutory requirement of being "used in the transportation of property to and from the United States" under Section 48(a)(2)(B)(v). The Tax Court held that to qualify for ITC, containers must transport property to or from the U. S. at least once each year during the recapture period. The court found that a significant percentage of the containers met this requirement, allowing ITC for those containers with U. S. on-hire or off-hire activity in 1981 and those leased to companies with U. S. trade routes.

**Facts**

In 1981, Norfolk Southern Corp. entered into a safe harbor lease agreement with Flexi-Van, Inc. , claiming ITC and accelerated depreciation for 38,037 containers. These containers were leased to over 675 shipping companies worldwide, with no restrictions on their use. Flexi-Van's records showed the locations where containers were picked up or dropped off at the start or end of leases but did not track their movements during leases. The containers were primarily standard steel dry vans, manufactured overseas and delivered to Flexi-Van in various countries. Approximately 15% were delivered in the U. S. Flexi-Van was one of the world's largest container lessors, with a significant presence in the U. S. and globally.

**Procedural History**

Norfolk Southern's 1981 tax return was audited in 1983-1984 without adjustment to the container-related ITC. In 1985, the audit was reopened, focusing on the ITC claimed for the containers. The IRS disallowed the ITC, asserting that the containers did not meet the statutory requirement under Section 48(a)(2)(B)(v). Norfolk Southern appealed to the U. S. Tax Court, which heard the case and issued its decision in 1995.

**Issue(s)**

1. Whether a container must be actually used to transport property to or from the United States at least once each year during its recapture period to qualify as "used in the transportation of property" under Section 48(a)(2)(B)(v)?

2. Whether it is inequitable to require petitioners to establish that the containers

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met the statutory requirement for the years in issue?

## Holding

1. Yes, because the statutory language and legislative history of Section 48(a)(2)(B)(v) indicate that Congress intended actual use to qualify for ITC, not just availability for use.

2. No, because the IRS's interpretation of the statute was consistent with its text and purpose, and petitioners failed to show detrimental reliance on any prior IRS interpretation.

## Court's Reasoning

The Tax Court interpreted the statutory language of Section 48(a)(2)(B)(v) to require actual use of containers in transporting property to or from the U. S. The court rejected the petitioner's argument that mere availability for use should suffice, citing the ordinary meaning of "used" and the legislative intent to encourage investment within the U. S. The court also considered the practical implications of tracking container movements, acknowledging the industry's challenges but emphasizing that the burden of proof for ITC eligibility remains with the taxpayer. The court found that a significant portion of the containers met the actual use requirement based on their on-hire or off-hire locations in the U. S. and the lessees' trade routes. The court also rejected the petitioner's equitable estoppel argument, finding no evidence of detrimental reliance on any prior IRS position.

## Practical Implications

This decision clarifies that containers must be used at least once annually to transport property to or from the U. S. to qualify for ITC and accelerated depreciation. Taxpayers and container lessors must maintain records demonstrating this actual use to claim these tax benefits. The ruling underscores the importance of understanding statutory requirements and maintaining adequate documentation for tax purposes. For the container leasing industry, this decision may necessitate improved tracking systems or alternative methods to substantiate U. S. usage. Subsequent cases have applied this ruling, and it has influenced IRS guidance on container ITC eligibility. Businesses must carefully assess their eligibility for tax credits under similar statutes, considering the actual use requirement and potential recapture implications.

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