SUPREME COURT OF THE UNITED STATES

No. 91–1677

COMMISSIONER OF INTERNAL REVENUE, PETI-TIONER
v. KEYSTONE CONSOLIDATED INDUSTRIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 24, 1993]

JUSTICE STEVENS, dissenting.

For the reasons stated in the opinions of the Tax Court, 60 TCM 1423 (1990), and the Court of Appeals, 951 F. 2d 76 (CA5 1992), I am persuaded that the transfer of unencumbered property to a pension trust is not a "sale or exchange" prohibited by 26 U. S. C. §4975(c)(1)(A) of the Internal Revenue Code. I would merely add these two observations.

In holding that an employer's transfer of unencumbered property to a pension fund in satisfaction of a funding obligation is a "sale or exchange" barred by §4975(c)(1)(A), the Court draws upon the well established rule that *for income tax purposes* the transfer of property to satisfy an indebtedness is a "sale or exchange." *Ante*, at 6. It is equally well established, however, or at least was so at the time Congress enacted §4975(c)(1)(A), that *any* contribution of property by an employer to an employee pension fund, whether done so voluntarily or pursuant to a funding obligation, is, for income tax purposes, a "sale or exchange" of that property. See *Tasty Baking Co.* v. *United States*, 393 F. 2d 992 (Ct. Cl. 1968); *A. P. Smith Manufacturing Co.* v. *United States*, 364 F. 2d 831 (Ct. Cl. 1966); *United States* v. *General Shoe Corp.,* 282 F. 2d 9 (CA6 1960); see also Rev. Rul. 75–498, 1975–2 Cum. Bull. 29. If indeed our focus in answering the question presented in this case is to be Congressional understanding of the term "sale or exchange" as it relates to the determination of gain or loss, it would seem to follow that Congress, in enacting §4975(c)(1)(A), rejected the very

distinction between voluntary and mandatory contributions that the Commissioner advocates and that the Court today embraces. The alternative, of course, is to recognize, as did the Tax Court and the Court of Appeals, that Congress did not intend to import into §4975(c)(1)(A) the meaning of "sale or exchange" that has developed and been applied in the very different context of measuring a taxpayer's gain or loss upon the disposition of property. See 951 F. 2d, at 79; 60 TCM, at 1425. I would so hold.[1]

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[1]In defense of his position, the Commissioner argues that there is no inconsistency in relying on the well established meaning of "sale or exchange," and holding that a voluntary contribution to a pension plan is not barred by §4975(c)(1)(A). The latter, the Commissioner argues, bars the "sale or exchange" of property "between a plan" and an employer, whereas the relevant provisions of the Internal Revenue Code refer more generally to the "sale or exchange" of property. See, *e.g.*, 26 U. S. C. §1001(c); 26 U. S. C. §1222. By this reasoning, a voluntary transfer of property to a pension plan is a "sale or exchange" for purposes of determining gain or loss, but is not a "sale or exchange" between the employer and the plan within the meaning of §4975(c)(1)(A) because it was not made in satisfaction of a mandatory funding obligation.

The Commissioner's argument, in my view, places more weight on the words "between a plan" in §4975(c)(1)(A) than they can reasonably bear. The Commissioner asks that we accept the hypothesis that Congress drew upon a settled body of law regarding the terms "sale or exchange" in the income tax context, but then, by the use of these three words, departed from that settled usage and drew a distinction between voluntary and involuntary contributions that had been roundly rejected in the case law and by the Internal Revenue Service itself. Again, as did the Court of Appeals and the Tax Court, I find it more likely that Congress intended that we

The Court is properly concerned about the potential for abuse associated with an employer's transfer of property to a pension plan. See *ante*, at 7–8. It is worth noting, however, that the risk of abuse is mitigated by the fact that the trustees of a pension plan have the right—indeed, the duty—to refuse to accept property transfers that are disadvantageous to the trust. See generally 29 U. S. C. §1104. Indeed, there may well be situations in which a rule that disables the trustees from accepting any consideration other than cash may be contrary to the best interests of the trust. For example, one can easily imagine a situation in which the trustees, acting prudently and in the best interests of the plan beneficiaries, would prefer that an employer transfer an undervalued piece of property to the plan, as opposed to selling the property to a third party at a discount and satisfying its funding obligation in cash. Though the majority's reading of the statute is plausible, I am not persuaded that Congress intended to so restrict employers and pension plan trustees.

I respectfully dissent.

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construe §4975(c)(1)(A) in its context, and independent of the meaning attributed to the term "sale or exchange" in other parts of the Internal Revenue Code.