Interpreting CAMT's International Provisions in the Absence of Regulations

*By Gary B. Wilcox**

I. Introduction

Wolters Kluwer®

The corporate alternative minimum tax ("CAMT") enacted in the Inflation Reduction Act ("IRA") is remarkable not only for what it says but for what it does not say. Normally, significant tax legislation would undergo significant hearings in the House and Senate tax-writing committees, followed by one or more reports explaining the committees' recommendations. Then the legislation would move to the Conference Committee, where a conference report would be written. Due partly to the reconciliation process in which CAMT was enacted, there is no committee report or conference report, that is, there is no official legislative history. Treasury and IRS will attempt to divine Congressional intent and eventually fill in many of the gaps with regulations, but will face significant challenges in developing fair and workable rules. For tax legislation as revolutionary as CAMT, that is truly remarkable.

Meanwhile, companies subject to CAMT ("applicable corporations") are scrambling to apply a complex new tax regime that is effective for tax years beginning after December 31, 2022. Following CAMT's enactment on August 16, 2022, practitioners and commentators quickly focused on a number of provisions that were ambiguous or could lead to unintended results.[1] Treasury and IRS issued interim guidance on December 27, 2022, in Notice 2023-7 (the "Notice"), addressing recognition and nonrecognition transactions, cancellation of debt income and bankruptcy, depreciation adjustments, and certain credits, among other things. This Notice, however, also included a long list of other issues—but by no means all the outstanding issues—in need of guidance.

In all likelihood, taxpayers will be forced to apply CAMT in the calendar year 2023 without the benefit of final regulations. Taxpayers are permitted to rely on the Notice until proposed regulations are issued. Conceivably, proposed regulations could be issued in 2023 and could permit taxpayers to rely on them until final regulations are issued. For any final regulations to be effective retroactively for the calendar year 2023, they must be issued within 18 months of

GARY B. WILCOX is a Partner at Mayer Brown LLP.

 © 2023 G.B. WILCOX

August 16, 2022,[2] which is around February 16, 2024. It is also conceivable that final regulations, when issued, will permit taxpayers to elect to apply them retroactively. But the final regulations will likely be too late to be helpful for calendar year 2023 return positions (necessitating an amended return if the taxpayer's position is changed).

This article seeks to determine how some of CAMT's international "outbound" provisions should be interpreted based solely on the statutory language as well as any extrinsic evidence from other sources of Congress's possible intent, in the absence of any official legislative history. Statutory interpretation has always been a special province of the courts. Therefore, taxpayers seeking to interpret a provision or defend their interpretation should focus on how courts would apply statutory construction principles to resolve the interpretive issues.

II. Overview of Statutory Construction Principles

Because statutory construction involves a vast body of Supreme Court case law, the basic principles are generally uniform between federal circuits. Each circuit begins with the "plain language" of the statute, applies rules called the "canons of construction" to interpret the statute's text, and looks to extrinsic aids, such as legislative history and committee reports, to resolve ambiguities. The circuits' applications of these principles may differ, however, in how the principles interact and in their relative weight.

A. Plain Meaning Rule

Courts begin statutory construction with the "plain language" of the statute.[3] If the statute is clear and unambiguous, "the text of the statute is the end of the matter."[4]

In general, courts give words their ordinary, contemporaneous meaning in determining the plain meaning of a statute.[5] Here, "contemporaneous" means contemporaneous with the enactment of the statute.[6] Thus, "[w]hen the text of a statute contains undefined terms," the court will look to, among other things, dictionaries from the time of enactment.[7]

Where, however, Congress uses technical words or terms of art, courts generally give those rules their technical meanings. As the Supreme Court explained, "[w]here Congress has used technical words or terms of art, 'it [is] proper to explain them by reference to the art or science to which they [are] appropriate.'"[8]

In determining whether the statute is clear or unambiguous, it "must be viewed in the context of the statute as a whole."[9] Disputed language is considered ambiguous if it is "reasonably susceptible of different interpretations."[10]

Finally, courts have found exceptions to the plain meaning rule, and thus have looked beyond the express language of a statute in order to give force to Congressional intent, where a literal interpretation would either "lead to an absurd result"[11] or be "demonstrably at odds" with the intent of the legislators.[12]

B. Canons of Construction

In interpreting statutes (including the Code), courts apply rules referred to as "canons of construction."[13] Courts also refer to these rules as "canons of interpretation" or "maxims."[14] The canons are a series of common law rules, often stated in Latin, that apply to statutes, regulations, and other legal writings. There are a large number of canons: the late Justice Scalia and Brian Garner explored 57 canons in their 2012 book on statutory interpretation without purporting to have assembled a comprehensive list.[15] The following are examples of some common canons of construction that courts use to interpret a tax statute's plain meaning (the list is not exhaustive):

- **Surplusage.** Statutes should be construed "so that no clause, sentence, or word is rendered superfluous, void, or insignificant."[16]
- **Presumption of Consistent Usage.** The same word used in a statute should be presumed to have the same meaning.[17]
- ***Noscitur a Sociis* (it is known by its associates).** "[T]he meaning of an unclear word or phrase should be determined by the words immediately surrounding it."[18]
- ***Ejusdem Generis* (of the same kind).** "Where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified."[19]
- ***Expressio Unius est Exclusio Alterius* (negative implication).** When a statute names one item of an associated group, it excludes others not mentioned.[20]
- ***Generalia Specialibus Non Derogant* (specific controls over the general).** If there is a conflict between a general provision and a specific provision, the specific provision prevails.[21]

The canons are not mandatory rules.[22] Instead, as the Supreme Court has explained, "[t]hey are guides that 'need not be conclusive.'"[23] They "are designed to help

judges determine the Legislature's intent as embodied in particular statutory language."[24] For that reason, combined with the sheer number of canons, different canons often point toward different conclusions.[25] In addition, other considerations may overcome the conclusion that would otherwise be reached by applying one or more of the canons.[26]

C. Legislative History and Other Extrinsic Aids

Federal courts look to legislative history in interpreting statutes. This is particularly true when they are tasked with resolving ambiguities both in statutes generally and in the Code.[27] Even when the statute has a plain meaning, courts may look to legislative history where it clearly demonstrates a contrary intent.[28]

Circuits generally agree on the weight of various types of legislative history, giving greater weight to contemporaneous documents such as the House Ways and Means Committee Report or the Senate Finance Committee Report than to post-enactment sources such as the Joint Committee on Taxation Blue Books (summaries).[29]

Despite the level of agreement on legislative history, however, courts vary in the thresholds required for looking to the legislative history and in their willingness to do so.[30] In the case of CAMT, perhaps with so little to choose from, courts may be a bit more wide-ranging in their consultation of extrinsic aids outside of these resources.[31] In this regard, it should be noted that there are no formal restrictions on the extrinsic aids that a court can review and rely upon.[32]

III. Controlled Foreign Corporation Provisions

A. Code Sec. 56A(c)(1)

56A(c)(1) provides that "[a]ppropriate adjustments shall be made" in AFSI when an applicable financial statement covers a period that is different from the taxable year. This provision should be currently effective without the need for regulations. Congress knows how to preface the quoted phrase with the phrase "Under regulations," but did not do that here.[33]

The language in Code Sec. 56A(c)(1) is nearly identical to former Code Sec. 56(f)(2)(D), which was part of the "adjusted net book income" ("ANBI") regime effective for taxable years beginning in 1987, 1988, and 1989.[34] Final regulations interpreting former Code Sec. 56(f)(2)(D) permitted taxpayers to determine ANBI for the taxable year by including *pro rata* portions of ANBI from each overlapping financial accounting year.[35] In Example (6) of former Treas. Reg. §1.56-1(b)(7), the taxpayer had a calendar tax year for 1987 but a June 30 fiscal year. Taxpayer's ANBI for 1987 included 50% of ANBI from the applicable financial statement for the year ending June 30, 1987 and 50% of ANBI from the applicable financial statement for the year ending June 30, 1988.

Taxpayers should have the option of interpreting Code Sec. 56A(c)(1) in the same manner in the absence of regulations, by claiming that Code Sec. 56A(c)(1) is ambiguous and then applying the "prior construction canon." Under this canon, "where ... Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law," including both administrative and judicial interpretations.[36]

This same canon conceivably could apply to permit taxpayers to use one of the three permissible methods in Reg. §1.451-3(h)(4)(i) to reconcile the difference between a fiscal year and a tax year. Like former Code Sec. 56(f)(2)(D), Code Sec. 56A(c)(1) uses the term "applicable financial statement," but also states it has the same definition as that provided in Code Sec. 451(b)(3), which was enacted in the 2017 Tax Cuts and Jobs Act. One of the three methods in Reg. §1.451-3(h)(4)(i) is a *pro rata* approach similar to the approach in former Treas. Reg. §1.56-1(b)(4)-(7).

B. Code Sec. 56A(c)(2)(C)

Code Sec. 56A(c)(2)(C) provides that AFSI includes "dividends received" by a taxpayer from another corporation that is not part of the taxpayer's consolidated return. Separately, Code Sec. 56A(c)(3)(A) provides that if taxpayer is a U.S. shareholder of a controlled foreign corporation ("CFC"), it must also include its "*pro rata* share" of the CFC's AFSI. The taxpayer community has urged Treasury and IRS to quickly exercise their regulatory authority under Code Sec. 56A(c)(15)(A) to prevent the "duplication" of income that would result if all or part of the CFC's AFSI is included in the taxpayer's AFSI once under Code Sec. 56A(c)(3) and again in the form of an actual dividend under Code Sec. 56A(c)(2)(C).

Taxpayers, however, should be able to avoid such a duplication of income in the absence of regulations for several reasons. First, similar language as that contained in Code Sec. 56A(c)(2)(C) has been interpreted by Treasury and IRS to not require a double inclusion of the CFC's financial

statement income. Former Code Sec. 56(f)(2)(C)(ii) provided that a taxpayer was required to include "the earnings" of a non-consolidated corporation (*e.g.*, a CFC) in its ANBI "only to the extent of the sum of the *dividends received* from such other corporation and *other amounts* required to be included in gross income under this chapter in respect of the earnings of such other corporation." (emphasis added). Former Treas. Reg. §1.56-1(b)(2)(iv) provided the same rule for both "dividends" and "other amounts," to wit: "The [ANBI] of a taxpayer shall include the earnings of other corporations not filing a consolidated Federal income tax return with the taxpayer only to the extent that amounts are required to be included in the taxpayer's gross income under chapter 1 of the Code with respect to the earnings of such other corporation."[37] Thus, the phrase "required to be included in gross income" was considered to modify both the term "dividends received" and the term "other amounts."

The foregoing interpretation of former Code Sec. 56(f)(2)(C)(ii) was not obvious. It could be considered "ambiguous" as to whether the phrase "required to be included in income" modified "dividends received" as well as "other amounts." Under a canon known as the "doctrine of the last antecedent," a "limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows."[38] If that canon were applied, the "included in income" requirement would apply only to "other amounts." But, as we know, most canons are not mandatory, and for every canon there is often an equal and opposite canon. Arguably, some version of the *ejusdem generis* (of the same kind) canon could be applied to support treating "dividends received" and "other amounts" similarly. That is, it would indeed be odd to say "dividends received" are included even if they were already included in income, but that "other amounts" would not be included if they were already included in income.

Regardless, Treasury and IRS have already interpreted a Code provision similar to Code Sec. 56A(c)(2)(C) as requiring the inclusion of dividends received and other amounts in ANBI (the then-equivalent of AFSI) only to the extent they have not previously been included in taxable income.[39] Taxpayers should have the option of reading Code Sec. 56A(c)(2)(C) in the same manner on the grounds that the provision is ambiguous and the "prior construction canon" applies.

It could also be argued that an interpretation of Code Sec. 56A(c)(2)(C) that causes the double inclusion of CFC dividends is "demonstrably at odds" with the intent of Congress, particularly in light of the parenthetical following the term "dividends received"—"(reduced to the extent provided by the regulations)"—and the grant of regulatory authority in Code Sec. 56A(c)(15) to write regulations "to prevent the omission or duplication of any item." Together, these provisions indicate that Congress intended to avoid a double inclusion of income.[40] Another argument, discussed below, is that the grant of regulatory authority in Code Sec. 56A(c)(15) is self-executing and does not require the issuance of regulations. *See* Section V.A., *infra*. That is, the Code currently provides that AFSI shall be adjusted to prevent the duplication of income. On balance, however, the application of the prior construction canon may be the most compelling.

C. Code Sec. 56A(c)(3)(B)

The taxpayer community has urged Treasury and IRS to issue regulations or other published guidance confirming that the taxpayer's pro rata share of each CFC's net income or loss is aggregated (*i.e.*, netted) for purposes of determining whether there is a "negative adjustment" under Code Sec. 56A(c)(3)(B), rather than determining whether there is a negative adjustment on a CFC-by-CFC basis. If one looks only at the language in Code Sec. 56A(c)(3)(A), it appears to be ambiguous. Code Sec. 56A(c)(3)(A) first refers to a taxpayer being a U.S. shareholder "of one or more controlled corporations," suggesting an aggregate approach." Then, Code Sec. 56A(c)(3)(A) goes on to say "the net income or loss" is to be computed for "each" CFC, suggesting a CFC-by-CFC approach.

The legislative history from the Build Back Better Act, which was passed by the House of Representatives on November 19, 2021 but not passed by the Senate, quite clearly supports an interpretation that measures the net income or loss in the aggregate: "In the case of a U.S. shareholder of a CFC, AFSI includes the pro rata share of the AFSI of such CFC. The AFSI of CFCs are aggregated globally, and losses in one CFC may offset income of another CFC. Overall losses of CFCs may not reduce AFSI of a U.S. corporation, but may be carried forward and used to offset CFC income in future years."[41] While the legislative history of the Build Back Better Act is not technically considered legislative history for the Inflation Reduction Act,[42] an argument can be made that it should be given weight in light of the similarity of the CAMT provisions in these two pieces of legislation and the lack of any legislative history for the Inflation Reduction Act.

A better argument, perhaps, is to assert the plain meaning rule by focusing on the broader statutory context. Code Sec. 59(l) determines the CAMT foreign

tax credit by first calculating the lesser of two amounts. The first amount is "the aggregate of the applicable corporation's pro rata share (as determined under Code Sec. 56A(c)(3))" of the foreign income taxes taken into account on the applicable financial statement "of each" CFC and paid or accrued "by each such" CFC. The second amount is "the product of the amount of the adjustment under Code Sec. 56A(c)(3) and the percentage specified in Code Sec. 55(b)(2)(A)(i)." Clearly the first amount requires an aggregation of U.S. shareholder's pro rata shares of taxes. This compels the conclusion that the second amount has to be a Code Sec. 56A(c)(3) "adjustment" determined in the aggregate for the "lesser of" comparison to make any sense. So, if the reference to "the adjustment under Code Sec. 56A(c)(3)" in Code Sec. 59(l)(1)(A)(ii) could only mean an adjustment determined in the aggregate, the similar reference to "the adjustment" in Code Sec. 56A(c)(3)(B) should also be interpreted as an aggregate adjustment.

D. Code Sec. 56A(c)(5)

Code Sec. 56A(c)(5) first provides that AFSI "shall be appropriately adjusted to disregard" any foreign income taxes that "are taken into account into account on the taxpayer's applicable financial statement." Then, "to the extent provided in regulations," the preceding sentence does not apply if the taxpayer chooses to deduct the foreign income taxes rather than claim a foreign tax credit. Other than the "to the extent provided in regulations" phrase, these provisions were clearly taken from former Code Sec. 56(f)(2)(B).[43] Former Treas. Reg. §1.56-1(d)(3) interpreted former Code Sec. 56(f)(2)(B) consistent with the statute—basically, foreign income taxes that were taken into account on taxpayer's applicable financial statement were added back to ANBI if they were claimed as a credit, and not added back if they were claimed as a deduction.

It is debatable whether the phrase "to the extent provided in regulations" in Code Sec. 56A(c)(5) requires regulations before taxpayers are permitted to *not* add back to AFSI those foreign income taxes that are deducted rather than claimed as a credit. Cases have differed on whether that phrase prevents the regulatory grant from being self-executing.[44] Arguably, in this case (as discussed further below), the ability to avoid adding back foreign income taxes that were deducted is currently effective, particularly in light of how similar statutory language in former 56(f)(2)(B) has been interpreted in that manner. That is, courts tend to treat regulatory grants in taxpayer-friendly statutes as self-executing if it is fairly clear what result Congress intended.[45]

Code Sec. 56A(c)(5) goes on to say: "The Secretary shall prescribe such regulations or other guidance as may be necessary and appropriate to provide for the proper treatment of current and deferred taxes for purposes of this paragraph, including the time at which such taxes are properly taken into account." There was no reference to "current and deferred taxes" in former Code Sec. 56(f)(2), but Treasury and IRS nevertheless addressed the treatment of "current and deferred" taxes in former Treas. Reg. §§1.56-1(d)(3) and (4). Former Treas. Reg. §§1.56-1(d)(3)(i) provided: "Taxes directly or indirectly taken into account consist of the taxpayer's total income tax expense that includes both current and deferred income tax expense." Former Treas. Reg. §§1.56-1(d)(4)(vii) provided that if deferred foreign taxes were added back to ANBI in a prior year and then deducted under Code Sec. 164(a) in the current year, a current year deduction of those taxes from ANBI is permitted if they were deferred in years beginning in 1987. In light of these prior interpretations of how deferred taxes are treated in a similar context, and the use of "shall" in the regulatory grant, it is reasonable to argue that the regulatory grant for deferred taxes is self-executing (as discussed further below) to the extent of deferred tax issues covered in the prior regulations.

IV. Foreign Tax Credit Provisions

A. Code Sec. 59(l)

Code Sec. 59(l)'s "lesser of" rule requires a determination of the foreign income taxes that are (1) "taken into account on the applicable financial statement of each "CFC" and (2) "paid or accrued (for Federal income tax purposes) by each such" CFC. Taxpayers are concerned about how this provision will be applied when, as is frequently the case, these two events do not occur within the same taxable year. The literal risk is that the CAMT foreign tax credit is not permitted for taxes that are counted in different years for financial and tax purposes.

Fortunately, there was a helpful colloquy between Senator Menendez and Senator Wyden on August 6, 2022, prior to the enactment of the IRA, which discussed the consequences of a taxpayer having different tax years for foreign and U.S. purposes. Senator Menendez asked: "Does Treasury have the authority to issue regulations dealing with potential issues with foreign income taxes relating to nonconforming foreign tax years and how

Wolters Kluwer

that impacts foreign tax credits in the corporate alternative minimum tax?" Senator Wyden responded: "Yes, regulations such as these would be in line with the legislative text and our intent for companies to be able to appropriately utilize foreign tax credits in the alternative minimum tax."[46]

The colloquy is not directly on point, as it focuses on different tax years, and not technically a difference between when taxes are taken into account for financial purposes and when they are paid or accrued for U.S. tax purposes. But it may be on point if the foreign tax year dictates the year in which the tax is taken into account for financial statement purposes. Using this colloquy to help avoid losing a foreign tax credit over timing differences may not be acceptable to some courts. But there are instances in which courts have relied on a colloquy to support their interpretation of a statute.[47]

Again, a better argument may be to assert the plain meaning rule with a focus on the broader statutory context. Code Sec. 56A(c)(3) squarely addresses the need to make adjustments when there are different periods for financial statement and tax purposes, which is the exact difference at issue in Code Sec. 59(l)(1)(A)(i). Borrowing the "appropriate adjustments" language from Code Sec. 56A(c)(3), an "appropriate adjustment" in the context of Code Sec. 59(l)(1)(A)(i) would be to apply the CAMT foreign tax credit in the later of the financial statement year or the tax year, in order to prevent a loss of the credit.

B. Corporate Partner's Proportionate Share of Partnership Foreign Taxes

Some tax practitioners have questioned whether an applicable corporation may claim its *pro rata* share of a CFC's foreign income taxes when it owns the CFC through a partnership. The concern is that the CAMT provisions do not explicitly address what to do with a corporate partner in a partnership that owns a CFC.

In the case of the foreign tax credit being claimed by a corporate partner for U.S. federal income tax liability purposes, there is nothing explicit on that either. In Rev. Rul. 71-141,[48] the IRS addressed a fact pattern in which two corporations (M and Q) were 50/50 partners in a partnership that in turn owned 40% of a foreign corporation (T). The IRS relied on Code Sec. 702(a)(6), which provides that a partner shall take into account its distributive share of the partnership's foreign income taxes, as well as Reg. §§1.702-1(a)(6) and 1.703-1(b)(2), to conclude that M and Q were entitled to a Code Sec. 902 credit for their distributive shares of T's foreign income taxes that were "deemed to have been paid with respect to dividends received from T through [the partnership]."

While a few things have changed since 1971, including the repeal of Code Sec. 902, the authorities relied on by the IRS have not changed, nor has the underlying rationale for treating a corporate partner as having paid its distributive share of foreign income taxes incurred by the partnership's CFC. This ruling, together with the requirement in Code Sec. 56A(c)(2)(D)(i) that an applicable corporation must include in its AFSI its distributive share of the partnership's AFSI, ought to be enough for anyone to be comfortable, in the absence of regulations, that the corporation may claim a CAMT foreign tax credit for its *pro rata* share of the partnership's CFC's taxes.

V. Effect of Regulatory Grants

A. Are Any of the Regulatory Grants Self-Executing?

The IRA added five regulatory grants of authority in Code Sec. 56A[49] and another three in Code Sec. 59.[50] For each regulatory grant in which a specific directive is made (that is, other than a general directive to carry out the purposes of the Code Sec. or subsection), there is a question whether the directive is self-executing or, alternatively, requires regulations to have any force or effect.

The courts have applied a "how versus whether" test in determining whether a regulatory grant is self-executing.[51] Specifically, is Congress delegating to Treasury the decision of "whether" to issue a regulation as well as "how" to implement the regulation, or is it directing the Treasury to issue a regulation and delegating only the decision of "how" to implement the regulation? Courts have answered that question by examining the particular language in the grant, and looking for a strong indication by Congress of the result intended (including on the basis of what the court perceives as congressional purpose).[52] Particularly when Treasury has failed to issue final regulations for a number of years, the courts effectively have created "phantom" regulations for the benefit of a taxpayer to effectuate the intent of Congress.[53] Courts, however, also have treated taxpayer-unfavorable regulatory grants as self-executing where Congressional intent for a particular result is clear.[54]

Treating any of the CAMT regulatory grants as self-executing may be challenging due to the lack of legislative history. Nevertheless, a strong case can be made for several of the grants.

First, it can be argued that regulations are not necessary for a taxpayer to avoid the duplication of income from a CFC dividend under Code Sec. 56A(c)(2)(C) to the extent the earnings supporting the dividend have already been included in AFSI under Code Sec. 56A(c)(3)(A). Code Sec. 56A(c)(15)(A) provides that "[t]he Secretary *shall* issue regulations to provide for such adjustments to adjusted financial statement income as the Secretary determines necessary to carry out the purposes of this section, including adjustments (A) *to prevent* the omission or *duplication* of any item." (emphasis added). This directive is buttressed by a parenthetical in Code Sec. 56A(c)(2)(C) immediately following the reference to "dividends received" from the CFC: "(reduced to the extent provided by the Secretary in regulations other guidance)." Together these provisions make it clear that Congress did not want dividend income from a CFC included in AFSI if it has already been included in AFSI. Neither the lack of an express statement to that effect in the legislative history[55] nor the use of "to the extent" language rather than the term "shall" [56] have stopped courts from treating similar language as self-executing.

Second, the "to the extent" clause in Code Sec. 56A(c)(5), which states that the add-back to AFSI for foreign taxes does not apply to foreign taxes if the taxpayer has chosen to deduct them instead of claiming a foreign tax credit, represents a fairly obvious indication of what Congress intended. The "to the extent provided in regulations" clause has been treated as a "whether" regulation in one case,[57] but as a "how" regulation in another case.[58] The decision in the latter case seems more appropriate here.

Third, as discussed above, the directive in Code Sec. 56A(c)(5) that Treasury "shall" issue regulations regarding current and deferred taxes should be regarded as self-executing and interpreted similar to how Treasury interpret this same concept in the former ABNI regulations.

B. What is the Scope of the Treasury's Authority Under These Grants?

The regulatory grants of authority in Code Secs. 56A and 59 come in three varieties: specific delegations,[59] general delegations,[60] and a mixture of the two.[61]

Where a regulation is issued by Treasury pursuant to an express delegation of authority in the Code provision, and the specific matters to be addressed are described therein (a "specific delegation"), generally a court must defer to that regulation unless it is found to be "arbitrary, capricious, or manifestly contrary to the statute."[62]

Where regulation is issued pursuant to a general delegation of authority in a Code provision (*e.g.*, "The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of the section"),[63] or issued pursuant to Code Sec. 7805(a) where there is no general delegation in the Code provision,[64] a court must first determine that Congress made an implicit delegation of authority to Treasury to address the particular matter at issue before it grants deference to the regulation.[65] It does that by examining whether Congress left a gap for Treasury to fill, typically based on ambiguity of statutory language.[66] If the court determines there has been an implicit delegation, it grants deference as long as the regulation is a "permissible construction of the statute."[67] This form of *Chevron* deference for regulations issued pursuant to an implicit delegation is not as deferential as the "arbitrary and capricious" standard used for regulations issued pursuant to a specific delegation.

The foregoing distinction between "specific delegation regulations" and "general delegation regulations" can assist in determining the proper scope of the regulation. For "specific delegation regulations," the scope must be consistent with the delegation. For "general delegation regulations," the scope must be tied to some idea or principle emanating from the statute. The latter regulations can be considered invalid if they add restrictions not contained in the statute[68] or otherwise conflict with the statute.[69]

Regulations issued under a general grant of authority are nearly indistinguishable from regulations issued under Code Sec. 7805(a). Courts apply *Chevron* to regulations promulgated under Code Sec. 7805(a) by considering only the operative Code section as the source of authority for the regulation.[70] Any Code Sec. 7805(a) regulation hoping for *Chevron* deference must still point to a gap in the statute that needs to be filled, in order to have the requisite authority to fill that gap.[71]

VI. Any Reasonable Method in the Absence of Regulations

It is often said that a court will accept a taxpayer's reasonable position in the absence of regulations or other guidance addressing the particular issue. The authority most frequently cited for this principle is in *Gottesman v. Commissioner*,[72] in which the issue was whether the accumulated taxable income for Code Sec. 531 purposes should be calculated on a separate company basis or a consolidated basis. The pre-1966 regulations required computation on a combined basis. Then, the 1966

regulations were silent and provided no guidance on the issue. No regulations requiring computation on a combined basis were issued until 1968; such regulations were later withdrawn and then re-proposed in 1979. The Tax Court addressed whether it was proper for the taxpayer to apply a "separate company" method during the 1973-1975 tax years, and held for the taxpayer, stating that the government "had ample opportunity to amend" the regulations and the court would not "fill in the gaps":

> We cannot fault [taxpayer] for not knowing what the law was in this area when the Commissioner charged by Congress to announce the law (sec. 1502) never decided what it was himself ... Thus, we find that the Commissioner's regulations regarding the manner in which the accumulated earnings tax was to be imposed on corporations making consolidated returns were ambiguous during the years at issue. This ambiguity was of the Commissioner's making, and, as such, must be held against him ... [Taxpayer's] interpretation of these regulations was reasonable under the circumstances.[73]

Besides *Gottesman*, there are many other examples of similar approaches taken by the Tax Court and Supreme Court, both inside and outside of the consolidated return area, even in cases where the taxpayer is viewed as receiving an unwarranted benefit. Some of these cases involve situations like *Gottesman* where a taxpayer is relying on a favorable application of existing regulations that the government has failed to amend.[74] Other cases involve situations where a taxpayer is relying on a statute for which Treasury has been directed to issue regulations but has not, and the issue is whether a court may apply the statute in the taxpayer's favor in the absence of regulations.[75]

The government recently sought to limit the application of *Gottesman* to cases involving taxes in the nature of penalties, and the Third Circuit in *Duquesne Light Holdings, Inc. & Subs. v. Comm'r*[76] agreed that *Gottesman* involved a "penalty tax that is strictly construed against the IRS" and did not apply to "ordinary corporate tax." Other courts, however, have either cited *Gottesman* favorably[77] or determined that it was not applicable for various legitimate reasons,[78] without any mention of *Gottesman* involving penalty taxes.

As for taxpayers implementing CAMT in 2023, IRS may assert that *Gottesman* does not apply because that case and others such as *Woods Investment* involve situations where the government failed for many years to address the issue in guidance, and here the government is acting fervently to issue regulations. Nevertheless, the principle that a "reasonable position" will be upheld in the absence of guidance has been applied by both courts and the IRS without regard to whether there was a delay in issuing guidance.[79]

Moreover, taxpayers have been given a special tool to arrive at a substantial authority position in the absence of regulations. Reg. §1.6662-4(d)(3)(ii) states:

> There may be substantial authority for the tax treatment of an item despite the absence of certain types of authority. Thus, a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.

Using this provision, and the application of statutory construction principles, taxpayers can at least arrive at a position that is protected from penalties. A "well-reasoned" analysis could consider the types of authorities that a court might consider in the absence of any official legislative history—such as colloquies, legislative history from prior proposed legislation, or regulations interpreting similar provisions in prior legislation—even if those authorities are not themselves listed as the types of authorities that may independently be used to support a substantial authority position.

VII. Conclusion

This article is premised on the belief that Treasury and IRS will not issue retroactive final regulations within 18 months of the IRA's enactment, and that, at least for calendar year 2023, taxpayers will have to navigate many of the CAMT questions in a world without final regulations. But anything is possible. If indeed retroactive final regulations are issued by the 18-month deadline of around February 16, 2024, then the value of this article will have dropped significantly. If the regulations are favorable, then taxpayers will be happy, and this article will be mostly irrelevant. If they are unfavorable, and taxpayers are unhappy, some taxpayers may question the regulations' validity. But that is a very different topic—and article.

A more likely possibility is that, at some point prior to the extended due date for calendar year 2023 returns, either proposed regulations are issued but not final regulations, or final regulations with a prospective effective date, are issued following the issuance of proposed regulations. An expectation in both situations is that

taxpayers will be permitted to rely on them retroactively, although it has become common for Treasury and IRS to condition that reliance on taxpayers applying the regulations on an all-or-nothing basis. If a taxpayer chooses to rely on proposed regulations or prospective final regulations in full, retroactive to January 1, 2023, then, again, the value of this article will have been eclipsed—at least for that taxpayer.

On the other hand, if due to unfavorable provisions a taxpayer chooses not to apply proposed or final regulations in full on a retroactive basis, and instead decides to go without regulations for 2023 and defend its reasonable positions based on statutory construction principles, then hopefully this article will be a useful guide. In those situations, there are invariably some parts of the regulations that the taxpayer will want to apply. While the taxpayer taking the "go it alone" route would be precluded from *relying* on parts of the regulations the taxpayer finds favorable, the taxpayer could still apply them on grounds they represent "reasonable" interpretations for substantial authority purposes, and the government would have difficulty claiming otherwise.[80]

ENDNOTES

* Gary appreciates the valuable contributions of Lucas Giardelli and Sonal Majmudar, also partners at Mayer Brown LLP.

1 *E.g.*, ABA Tax Section, Comments on Corporate Alternative Minimum Tax Under Section 59(k) (March 20, 2023); NYSBA Tax Section, Report No. 1473—Report on Selected Issues Relating to the Corporate Alternative Minimum Tax (March 20, 2023); U.S. Chamber of Commerce, New Corporate Alternative Minimum Tax—Implementation Issues and Priority Guidance Recommendations (March 21, 2023).

2 Code Sec. 7805(b)(2).

3 *See*, *e.g.*, *Am. Tobacco Co. v. Patterson*, SCt, 456 US 63, 68, 102 SCt 1534 (1982) ("As in all cases involving statutory construction, 'our starting point must be the language employed by Congress ….'"), quoting *Reiter v. Sonotone Corp.*, SCt, 442 US 330, 337, 99 SCt 2326 (1979); *Watt v. Alaska*, SCt, 451 US 259, 265–66, 101 SCt 1673 (1981), quoting *Blue Chip Stamps v. Manor Drug Stores*, SCt, 421 US 723, 756, 95 SCt 1917 (1975) (Powell, J. concurring).

4 *Steele v. Blackman*, CA-3, 236 F3d 130, 133 (2001).

5 *Metro One Telecommunications, Inc.*, CA-9, 2013-1 USTC ¶50,107, 704 F3d 1057, 1061 (2012) ("Moreover, '[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary contemporary meaning'"), quoting *Walters v. Metro Educ. Enters., Inc.*, SCt, 519 US 202, 207, 117 SCt 660 (1997); *Microsoft Corp.*, CA-9, 2002-2 USTC ¶50,800, 311 F3d 1178, 1183 (2002), citing *Fed. Deposit Ins. Corp. v. Meyer*, SCt, 510 US 471, 476, 114 SCt 996 (1994).

6 *See*, *e.g.*, *Microsoft Corp.*, CA-9, 2002-2 USTC ¶50,800, 311 F3d at 1183 (looking to "[d]ictionary definitions contemporary to the original enactment of [Code Sec.] 927(a)(2)(B)" in interpreting the provision).

7 *Id.*; *see also Z. Siddiqui*, CA-9, 2004-1 USTC ¶50,193, 359 F3d 1200, 1202–03 (2004) (applying the statutory definition to a defined term, "disclosure," in Code Sec. 6103(b)(8) but looking to a 1976 dictionary to interpret an undefined term, "act.").

8 *Corning Glass Works v. Brennan*, SCt, 417 US 188, 201, 94 SCt 2223 (1974).

9 *Robinson v. Shell Oil Co.,* SCt, 519 US 337, 341, 117 SCt 843, 846 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").

10 *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, SCt, 470 US 451, 473 n. 27, 105 SCt 1441 (1985).

11 *American Trucking Association*, SCt, 310 US 534, 543, 60 SCt 1059 (1940).

12 *Ron Pair Enters., Inc.*, SCt, 89-1 USTC ¶9179, 489 US 235, 109 SCt 1026 (1989), citing *Griffin v. Oceanic Contractors, Inc.*, SCt, 458 US 564, 571, 102 SCt 3245 (1982) ("[T]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters'").

13 *See*, *e.g.*, Guardian Industries Corp., 143 TC 1, 14–15, Dec. 59,965 (2014).

14 *See*, *e.g* Chickasaw Nation, SCt, 2001-2 USTC ¶50,765, 534 US 84, 93, 122 SCt 528 (2001) (using the phrase "canons of statutory interpretation"); *Hewlett-Packard Co.*, 139 TC 255, 268, Dec. 59,200 (2012) ("the venerable rule of statutory construction, commonly referred to as the maxim '*expressio unius est exclusion alterius*'").

15 Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012).

16 *See, e.g.*, *Gorospe*, CA-9, 451 F3d 966, 960 (2006); *Guardian*, *supra* at 14–15.

17 *See*, *e.g.*, *Blue Lake Rancheria*, CA-9, 653 F3d 1112, 1117 (2011) ("[i]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."), quoting *Keystone Consol. Indus., Inc.*, SCt, 508 US 152, 159, 93-1 USTC ¶50,298, 113 SCt 2006 (1993).

18 *Microsoft Corp.*, CA-9, 2002-2 USTC ¶50,800, 311 F3d 1178, 1184 (2002), citing *Gustafson v. Alloyd Co.*, SCt, 513 US 561, 575, 115 SCt 1061 (1995).

19 *Lacy*, CA-9, 119 F3d 742, 748 (1997) ("[*Ejusdem generis* means] that a general term following more specific terms means that the things embraced in the general term are of the same kind as those denoted by the specific terms"), citing *Baird*, CA-9, 85 F3d 450, 453 (1996).

20 *Silvers v. Sony Pictures Entertainment, Inc.*, CA-9, 402 F3d 881, 885 (2005) ("The doctrine of *expression unius est exclusion alterius* 'as applied to statutory interpretation creates a presumption that[,] when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions'"), quoting *Boudette v. Barnette*, CA-9, 923 F2d 754, 756–57 (1991).

21 *Radzanower v. Touche Ross & Co.*, SCt, 426 US 148, 153–54, 96 SCt 1989 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."); *Morton v. Mancari*, SCt, 417 US 535, 550–51, 94 SCt 2474 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment").

22 *Chickasaw Nation*, *supra* at 94.

23 Chickasaw, supra at 94 *Nation*, SCt, 2001-2 USTC ¶50,765, 534 US at 93, 122 SCt 528, quoting *Circuit City Stores, Inc. v. Adams*, SCt, 532 US 105, 115, 121 SCt 1302 (2001).

24 *Id.*

25 *Id.*

26 *See*, *e.g.*, *Xilinx, Inc.*, CA-9, 2010-1 USTC ¶50,302, 598 F3d 1191, 1196–1197 (2010) (applying principles of statutory interpretation to the Code Sec. 482 regulations and concluding that the canon the specific controls over the general did not apply, because it would conflict with the overall purpose of the Code Sec. 482 regulations).

27 *See B. Gregory*, 149 TC 43, 47, 149 TC No. 2, Dec. 60,964 (2017) ("If there is ambiguity and it's necessary to resort to legislative history, we do so with caution"); *Xianli Zhang*, CA-FC, 640 F3d 1358, 1373 (2011) ("Confronted with a textual ambiguity arising from '[l]ess-than-meticulous

Wolters Kluwer

drafting,' we may refer to legislative history in resolving the ambiguity").

[28] *See*, *e.g.*, *L.L. Christensen*, CA-9, 2008-1 USTC ¶50,312, 523 F3d 957, 962 (2008) ("Even though the plain language and context of the statute indicate a joint return requirement, we may look to see if the legislative history clearly expresses contrary intent."); *Nat'l RR Passenger Corp. v. Nat'l Ass'n of RR Passengers*, SCt, 414 US 453, 458, 94 SCt 690, 693 (1974) ("But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent").

[29] *Compare AD Global Fund, LLC*, FedCl, 2005-2 USTC ¶50,583, 67 FedCl 657, 677 (2005) ("The most persuasive sort of legislative history are the reports from the committees that studied, drafted, and proposed the legislation"), citing *Garcia*, 469 US 70, 76, 105 SCt 479 (1984); *Agro-Jal Farming Enterprises, Inc.*, 145 TC 145, 155 at n. 8 (2015) (The Blue Book Report "is written by the staff of the Joint Committee on Taxation, but because it is written *after* the passage of the legislation, it has no bearing on statutory interpretation") (emphasis in original); *J.E. Anderson*, 123 TC 219, 234, Dec. 55,721 (2004) ("Reports by the Senate Committee on Finance are an authoritative source for legislative intent"), citing *Thornburg v. Gingles*, SCt, 478 US 30, 44, 106 SCt 2752 (1986); and *S. Yari*, 143 TC 157, 166, Dec. 60,017 (2014) ("[T]he Blue Books are not legislative history, though they can sometimes be relevant if persuasive") *with R.J. Todd*, CA-5, 89-1 USTC ¶9116, 862 F2d 540 (1988) (affirming Tax Court's reliance on committee reports, including the Joint Committee report, but noting that the Joint Committee Report "is not technically legislative history"), *overruled on different grounds G. Woods*, SCt, 2013-2 USTC ¶50,604, 134 SCt 557 (2013).

[30] *E.g.*, *Morgan v. Gay*, CA-3, 471 F3d 276, 278 (2006) ("For the vast majority of ambiguous statutory provisions, then, relying on legislative history to discern legislative intent should be done with caution, if at all").

[31] For example, the courts have variously used reports from the Congressional Budget Office and from the Taxpayer Advocate. *See, e.g., S. Yari*, 143 TC 157, 166, Dec. 60,017 (2014) (using Taxpayer Advocate material), *aff'd*, CA-9, 669 FApp'x 489 (2016); *National Australian Bank*, FedCl, 55 FedCl 782, 785 (2003) (citing "tax experts" from, *inter alia*, Congressional Budget Office and Comptroller General regarding their interpretation of the statute in projecting revenue), *aff'd*, CA-FC, 452 F3d 1321 (2006).

[32] *AD Global Fund, supra* at 67891 (analyzing and weighing history before, during, and after legislative debate; proposal from President; reports of American Bar Association and American Law Institute; and text and history of predecessor statutes).

[33] Compare Code Sec. 67(e)(2) ("Under regulations, appropriate adjustments shall be made ….) with Code Sec. 704(c)(1)(B)(iii) ("appropriate adjustments shall be made ….").

[34] Former Code Sec. 56(f)(2)(D) provided: "(D) Statements covering different periods—Appropriate adjustments shall be made in adjusted net book income in any case in which an applicable financial statement covers a period other than the taxable year."

[35] Former Reg. §1.56-1(b)(4)–(7); T.D. 8307 (August 17, 1990).

[36] *Lorrillard, Div. of Loew's Theatres, Inc. v. Pons*, SCt, 434 US 575, 580-81, 98 SCt 866, 870 (1978). *See also Keystone Consolidated Industries*, SCt, 93-1 USTC ¶50,298, 508 US 152, 159, 113 SCt 2006 (1993) ("The phrase 'sale or exchange' had acquired a settled judicial and administrative interpretation over the course of a half century before Congress enacted" section 4975); *Bragdon v. Abbott*, SCt, 524 US 624, 642-45, 118 SCt 2196 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well"); *Molzof*, SCt, 502 US 301, 112 SCt 711, 716 (1992), citing *Morissette*, SCt, 342 US 246, 263, 72 SCt 240, 250 (1952) ("A cardinal rule of statutory construction holds that: '[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed'").

[37] *See also* Examples (4) and (5) of former Treas. Reg. §1.56-1(b)(7).

[38] *Lloyd v. J.P. Morgan Chase & Co.*, CA-2, 791 F3d 265, 271 (2015), quoting *Barnhart v. Thomas*, SCt, 540 US 20, 26, 124 SCt 376 (2019).

[39] Interestingly, former Treas. Reg. §1.56-1(d)(4) provided rules "to prevent omission or duplication." These rules focused on three different fact patterns, but not the double inclusion fact pattern. Presumably that is because former Treas. Reg. §1.56-1(b)(2)(iv) already addressed the double inclusion issue.

[40] Apparently the government agrees. *See* "IRS Notes Concerns about CFC Double Counting Under Corporate AMT," Doc. 2022-33441 (Tax Notes, Oct. 17, 2022) (Paul McLaughlin of the IRS Office of Associate Chief Counsel (International) was quoted as saying: "Between those two [sections 56A(c)(2)(C) and 56A(c)(3)] and certainly in (c)(15), you can see a policy on the face of the statute that duplications are definitely not intended").

[41] Build Back Better Act—Rules Committee Print 117-18, Section-by-Section.

[42] The legislation that passed the House on Nov. 19, 2021 was amended, renamed as the Inflation Reduction Act, and passed by the Senate on August 7, 2022. The Inflation Reduction Act was then passed by the House on August 12, 2022 and signed into law by President Biden on August 16, 2022.

[43] Former Code Sec. 56(f)(2)(B) provided in pertinent part: "The amount determined under subparagraph (A) shall be appropriately adjusted to disregard any Federal income taxes, or income, war profit, or excess profits taxes imposed by any foreign country or possession of the United States, which are directly or indirectly taken into account on the taxpayer's applicable financial statement. The preceding sentence shall not apply to any such taxes (otherwise eligible for the credit provided by Code Sec. 901 without regard to Code Sec. 901(j)) imposed by a foreign country or possession of the United States if the taxpayer does not choose to take, to any extent, the benefits of Code Sec. 901."

[44] Compare *F.E. Traylor*, 9 TCM 93, Dec. 46,456(M), TC Memo. 1990-132, *aff'd without published opinion*, CA-11, 959 F2d 970 (1992) and *Alexander,* 95 TC 467, Dec. 46,946 (1990), *aff'd without published opinion*, CA-7, 842 F2d 180 (1988).

[45] *See, e.g.*, *Int'l Multifoods*, 108 TC 579, 589, Dec. 52,100 (1997); *Occidental Petrol. Corp.*, 82 TC 819, 829, Dec. 41,240 (1984).

[46] Senate Congressional Record, S4165 (August 6, 2022).

[47] *See*, *e.g.*, *Commonwealth Energy System*, DC-MA, 99-1 USTC ¶50,582, 49 Fsupp 2d 57 (1999) (court upheld taxpayer's claim to an investment tax credit based on a colloquy that "directly addressed the issue").

[48] 1971-1 CB 11. *See also* Reg. §1.701-2(d), Ex. 5 (This example suggests that dividends may qualify for a dividends received deduction even though the subsidiary is owned through a partnership).

[49] Code Secs. 56A(c)(2)(C), 56A(c)(5), 56A(c)(13), 56A(c)(15), and 56A(e).

[50] Code Secs. 59(k)(2)(D), 59(k)(3), and 59(l)(3).

[51] *See, e.g.*, *15 West 17th Street*, 147 TC 557, 147 TC No. 19, Dec. 60,766 (2016); *Estate of Neumann*, 106 TC 216, Dec. 51,280 (1996) ("Are the regulations a necessary condition to determining 'whether' the GST tax applies, as petitioner contends, or do they constitute only a means of arriving at 'how' that tax, otherwise imposed by the statute, should be determined, as respondent contends").

[52] *Francisco*, 119 TC 317, Dec. 54,965 (2002); *Int'l Multifoods*, 108 TC 579, Dec. 52,100 (1997); *Estate of Maddox*, 93 TC 228, Dec. 45,924 (1989); *First Chicago Corp.*, 88 TC 663, Dec. 43,792 (1987), *aff'd*, CA-7, 88-1 USTC ¶9244, 842 F2d 180 (1988); *Occidental Petrol. Corp.*, 82 TC 819, Dec. 41,240 (1984).

[53] *Occidental*, *supra* at 829 (no regulations eight years after statute enactment); *Estate of Maddox*, *supra* at 233 (no regulations 13 years after statute enactment).

[54] *See, e.g.*, *Estate of Neumann*, *supra*; *Sundance Helicopters, Inc.*, FedCl, 2012-1 USTC ¶70,310, 104 FedCl 1 (2012); *Pittway Corp.*, CA-7, 97-1 USTC ¶70,069, 102 F3d 932 (1996); *H Enterprises International, Inc.*, 105 TC 71, Dec. 50,785 (1995); *F.E. Traylor*, 59 TCM 93, Dec. 46,456(M), TC Memo. 1990-132, *aff'd without published opinion,* CA-11, 959 F2d 970 (1992).

[55] *International Multifoods*, *supra* at 588 ("[R] respondent's reliance on the absence of any mention of Code Sec. 865(j) in the committee reports is erroneous, since Congress articulated the overall purpose behind Code Sec. 865 in the legislative history").

[56] *Traylor*, *supra.*

[57] *Alexander*, *supra.*

[58] *Traylor*, *supra.*

[59] Code Secs. 56A(c)(2)(C), 56A(c)(5), 56A(c)(13), and 59(k)(2)(D).

[60] Code Sec. 59(l)(3).

[61] Code Secs. 56A(c)(15), 56A(e), and 59(k)(3).

[62] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, SCt, 467 US 837, 843-44, 104 SCt 2778, 2781 (1984).

[63] The following cases involved general delegations but the courts still determined whether there was a gap that needed filling. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, SCt, 545 US 967, 125 SCt 2688 (2005); *Household Credit Servs., Inc. v. Pfennig*, SCt, 541 US 232, 124 SCt 1741 (2004); *Chamber of Commerce of the United States v. NLRB*, CA-4, 721 F3d 152 (2013).

[64] *Mayo Found. for Med. Educ. & Rsch.*, SCt, 562 US 44, 2011-1 USTC ¶50,143, 131 SCt 704 (2011).

[65] *Sea-Land Serv., Inc. v. Dep't of Transp.*, DC-DC, 137 F3d 640, 645 (1998) (The deference mandated in *Chevron* "comes into play, of course, only as a consequence of statutory ambiguity, and then *only* if the reviewing court finds an implicit delegation of authority to the agency") (emphasis added).

[66] *Id.*

[67] *Chevron, supra* at 843.

[68] *Stephenson Trust*, 81 TC 283, 294, Dec. 40,439 (1983) (Court invalidated regulation issued under Code Sec. 7805(a) that required multiple trusts to be consolidated and treated as one trust, on grounds "it adds restrictions not contained in the statute nor contemplated by Congress").

[69] *C.E. Sala*, DC-CO, 2008-1 USTC ¶50,308, 552 FSupp 2d 1167, 1202 (2008) ("A Treasury regulation that conflicts with the statute is invalid, even if cast as an anti-abuse regulation"), *rev'd on other grounds*, CA-10, 2010-2 USTC ¶50,527, 613 F3d 1249 (2010).

[70] *See, e.g.*, *Mayo Foundation for Medical Educ. & Research*, SCt, 2011-1 USTC ¶50,143, 562 US 44, 52-60, 131 SCt 704 (2011); *Good Fortune Shipping SA*, DC-DC, 2018-2 USTC ¶50,355, 897 F3d 256 (2018) (invalidating regulation as an unreasonable interpretation of operative code section, without even mentioning that regulation was promulgated pursuant to Code Sec. 7805(a)), *rev'g* 148 TC 262, 148 TC No. 10. Dec. 60,860 (2017); *Keller Tank Services II, Inc.*, CA-10, 2017-1 USTC ¶50,159, 854 F3d 1178, 1195-96 (2017); *Romano-Murphy*, CA-11, 2016-1 USTC ¶50,209, 816 F3d 707, 717-18 (2016).

[71] *See, e.g.*, *Sea-Land Serv., supra* at 645.

[72] *Gottesman*, 77 TC 1149, Dec. 38,442 (1981).

[73] *Id.* at 1157 and 1158.

[74] *See, e.g.*, *Henry C. Beck Builders, Inc.*, 41 TC 616, 628-629, Dec. 26,652 (1964) ("Respondent's reluctance to use his conceded power in this area to set forth rules of general application … does not justify in this case a judicial improvisation to prevent a reduction of the revenue that is problematic in both nature and amount"); *Woods Investment Co.*, 85 TC 274, 281-282, Dec. 42,315 (1985) (Tax Court declined to deny taxpayer a double benefit, stating that "judicial interference … is not warranted to alter the result," that "[t]his Court apply these regulations and the statute as written," and that the Commissioner "should use his broad power to amend the regulations"); *Transco Exploration Co.*, 95 TC 373, Dec. 46,906 (1990), *aff'd*, CA-5, 92-1 USTC ¶50,041, 949 F2d 837 (1992) ("the thrust … of *Woods Investment* … is that when the Secretary is delegated authority to promulgate legislative regulations and does not do so, we will not interfere if the regulations as written support the taxpayer's position"); *Transco Exploration Co.*, CA-5, 92-1 USTC ¶50,041, 949 F2d 837, 841 (1992) ("Courts are particularly ill-equipped to overhaul complicated tax provisions whose function in the general tax scheme is beyond their ken"); *CSI Hydrostatic Testers, Inc.*, 103 TC 398, 411, Dec. 50,101 (1994) ("As we stated in *Woods*, we will apply the consolidated return regulations and the Code as written"); *United Dominion Industries, Inc.,* SCt, 2001-1 USTC ¶50,430, 532 US 822, 838, 121 SCt 1934 (2001) ("To the extent that the Government has exercised that authority, its actions point to the single-entity approach as the better answer. To the extent the Government disagrees, it may amend its regulations to provide for a different one"); *Dover Corp. & Subs.*, 122 TC 324, 352, Dec. 55,630 (2004) (Tax Court believed that the government was "free to amend" its regulations and that the perceived abuse was "a problem of [Respondent's] own making").

[75] *Int'l Multifoods*, 108 TC 579, 589, Dec. 52,100 (1997) ("It is well established that the absence of regulations is not an acceptable basis for refusing to apply the substantive provisions of a Code Sec. of the Internal Revenue Code … we must do 'the best we can' in applying Code Sec. 865 and the policy underlying it"); *First Chicago*, 88 TC 663, 676–77, Dec. 43,792 (1987); *Occidental Petrol. Corp.*, 82 TC 819, 829, Dec. 41,240 (1984) ("Secretary, to this day, some eight years after the effective date of these new provisions, has not yet promulgated any such regulations … Congress could hardly have intended to give the Treasury the power to defeat the legislatively contemplated operative effect of such provisions merely by failing to discharge the statutorily imposed duty to promulgate the required regulations").

[76] *Duquesne Light Holdings Inc. & Subs.*, CA-3, 2017-2 USTC ¶50,268, 861 F3d 396 (2017).

[77] *Applied Research Assocs., Inc.*, 143 TC 310, 320–21, Dec. 60,052 (2014).

[78] *State Farm Mut. Auto. Ins. Co.*, 130 TC 263, 280, 292, Dec. 57,472 (2008); *Conn. Gen. Life Ins. Co.*, CA-3, 99-1 USTC ¶50,500, 177 F3d 136, 143, 146 (1999); *Garvey, Inc.*, ClsCt, 83-1 USTC ¶9163, 1 ClsCt 108, 51 AFTR 2d 83-271 (Ct. Cl. 1983), *aff'd*, CA-FC, 84-1 USTC ¶9214, 726 F2d 1569 (1984); *Norwest Corporation,* 111 TC 105, Dec. 52,830 (1998); *Marvel Entertainment, LLC*, 145 TC 69, Dec. 60,351 (2015), *aff'd per curiam*, CA-2, 2016-2 USTC ¶50,403, 842 F3d 1291 (2016).

[79] *See, e.g.*, *D.E. Wigfall*, 43 TCM 978, Dec. 38,907(M), TC Memo. 1982-171 (court accepted taxpayer's formula for determining what portion of a realized gain is attributable to the nonresidential use of a residence, referring to "the myriad of logical formulae one could devise for section 1034 allocations, the lack of any decided cases addressing the allocation formula issue, and the absence of any guiding regulation"); FSA 199941001 (February 2, 1999) (stating that in the absence of regulations under Code Sec. 453A(b) defining "face amount" for contingent payment obligations, "it is reasonable to look to a taxpayer's calculation of the value of the transferred property … in order to ascertain a face amount of the installment obligation for purposes of Code Sec. 453A(b)(2)"); FSA 200006004 (January 31, 2005) (citing *Gottesman*, the IRS stated: "Because there are no regulations directly applicable to the Series A and B notes, under either Code Sec. 382(l)(5) or the OID regime, a court may permit Taxpayer to use any reasonable method to determine the amount of interest attributable to indebtedness converted to stock").

[80] Notice CC-2003-014 (May 8, 2003) (IRS attorneys may not take positions contrary to final or temporary regulations in force, or to proposed regulations if there are no final or temporary regulations currently in force addressing a particular matter).

© Wolters Kluwer

This article is reprinted with the publisher's permission from INTERNATIONAL TAX JOURNAL, a bimonthly journal published by CCH Incorporated. Copying or distribution without the publisher's permission is prohibited. To subscribe to INTERNATIONAL TAX JOURNAL or other journals, please call 1-800-344-3734 or visit taxna.wolterskluwer.com. All views expressed in this publication are those of the author and not necessarily those of the publisher or any other person.

Wolters Kluwer