IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No.: 23-3772

3M Company,

Appellant,

v.

Commissioner of Internal Revenue,

Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT
No. 5816-13

BRIEF OF NATIONAL FOREIGN TRADE COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae National Foreign Trade Council, Inc. states that it does not have a parent corporation and that no publicly held company owns 10% or more of the stock of the amicus.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Rules

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae National Foreign Trade Council, Inc. ("NFTC") is the premier business organization in the United States advocating a rules-based world economy to foster international trade, tax, and investment policies, and economic cooperation. Founded in 1914 to support the open world trade system against the escalating rivalries that erupted into World War I, the NFTC is today the oldest and largest U.S. association of businesses devoted to international trade and tax matters.

The NFTC's mission is to promote efficient and fair global commerce by advocating public policies that foster an open international trade and investment regime. The NFTC's membership includes over 100 companies, representing most major sectors of the U.S. economy, including manufacturing, technology, energy, retail, and agribusiness. The NFTC's membership consists of U.S. firms engaged in all aspects of international business, trade, and investment. NFTC members account for over $5 trillion in global revenue. They also represent a significant share of total U.S. exports and U.S. private foreign investment.

Like the appellant, NFTC members operate globally and face restrictions in several countries that limit the payment of royalties from a foreign corporation to a

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

U.S. parent or affiliate. NFTC and its members have a substantial interest in the outcome of this case.

CONSENT OF THE PARTIES

Pursuant to Federal Rule of Appellate Procedure 29, NFTC has received consent from all parties to file this amicus brief. FED. R. APP. P. 29(a)(2).

INTRODUCTION & SUMMARY OF THE ARGUMENT

Pursuant to its "Blocked Income Rule," the Internal Revenue Service ("IRS") asserts the authority to allocate to a U.S. taxpayer purported "income" that the taxpayer never received—and, indeed, could not have received without violating the law of a foreign sovereign. The Tax Court's decision upholding the Blocked Income Rule should be reversed for at least three independent reasons.

First, as discussed more thoroughly in 3M's Initial Brief, the Blocked Income Rule fails under the first step of a *Chevron* analysis. (Because that issue has been fully briefed by 3M, this amicus brief focuses on practical considerations of particular interest to NFTC and its members.)

Second, assuming *arguendo* that the statute is ambiguous, the Blocked Income Rule fails *Chevron* step two because it does not embody a permissible interpretation of the law Congress enacted. As real-world examples make clear—examples that are regrettably all-too-familiar to NFTC and its members—application of the rule to multinational businesses with operations within and outside of the United States leads to demonstrably unjust results that Congress could not have intended. Notably, the IRS has not just failed to adduce any evidence that Congress *implicitly* intended—or even might have intended—to inflict double taxation and competitive disadvantages on lawful U.S. taxpayers; its flawed policy bears no discernible relationship to the statutory purposes that Congress *expressly* incorporated into the text of the operative provision.

Third, and relatedly, the Blocked Income Rule is procedurally invalid because the IRS failed to properly consider or respond to significant comments that alerted the agency to the substantial problems noted above. Regulated entities that had acquired hard-won knowledge of the legal and practical realities facing businesses that operate across national borders—including organizations like NFTC and its members—had ample basis for doubting the propriety of the Blocked Income Rule. But such experience can only be brought to bear if agencies wielding massive law-making powers consider such information before displacing settled expectations and charting a bold new course. As explained at length below, knowledgeable parties submitted numerous and detailed comments warning the IRS that the Blocked Income Rule suffered from a broad range of defects—including those flagged by 3M and NFTC in discussing steps one and two the *Chevron* framework. Instead of taking corrective action—or even explaining its decision to dismiss such concerns and suggestions—the IRS simply ignored comments that stood in the way of its preferred policy, reasoning that it was somehow exempt from the generally applicable procedural requirements imposed by the APA. If the IRS had acknowledged that it—like all other agencies—was required to *address* significant concerns raised by comments, it might well have avoided or ameliorated the enormous practical problems its rule has spawned for law-abiding businesses. At any rate, the agency's manifest refusal to even *consider* such comments cannot be countenanced—and supplies a narrow and independent basis for reversing the judgment below.

ARGUMENT

I. The Tax Court Erred in Upholding the Blocked Income Rule.

The Blocked Income Rule is invalid for at least three distinct reasons of particular interest to NFTC and its members.

A. The Blocked Income Rule Fails Under the First Step of Chevron.

NFTC agrees with 3M that the Blocked Income Rule fails under the first step of the *Chevron* analysis. It is well-settled that under *Chevron* courts must first determine whether "Congress has supplied a clear and unambiguous answer to the interpretive question at hand." *Pereira v. Sessions*, 585 U.S. 198, 208 (2018). If after employing the "traditional tools of statutory construction," the court finds that the statute is unambiguous then *Chevron* is inapplicable as a matter of law. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 521 (2018).

3M correctly articulates why Section 482 is unambiguous. Section 482 authorizes the IRS to "allocate gross income . . . among such organizations, trades or businesses" that are "owned or controlled directly or indirectly by the same interests" as "necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or business." 26 U.S.C. § 482. Based on the ordinary meaning of "income" in both traditional and statutory usage, 3M correctly explains that income in this context can only mean payments that can actually be made. Initial Brief at 34–35.

Further, the judicial authority identified by 3M bolsters the conclusion that Section 482 is unambiguous. *Id.* at 36–45. In *Commissioner v. First Security Bank of Utah, N.A.*, the Supreme Court explained that income necessarily means that the person must be able to receive the payment in order for it to be considered income. 403 U.S. 394, 403 (1972). In doing so, the Court concluded that Section 482 did not permit the IRS to allocate "income" to a taxpayer that legally could not be made—exactly what the IRS sought to do with the Blocked Income Rule. *Id.* at 401–06. Accordingly, NFTC agrees with 3M that the Tax Court erred in determining that Section 482 is ambiguous.

B. <u>The Blocked Income Rule leads to unjust results that Congress could not have intended.</u>

Assuming that the statute is ambiguous (it is not), *Chevron* step two requires courts to consider whether the regulation "is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In doing so, courts are instructed to determine "whether the same statutory text, history, and purpose permit the interpretation chosen by the agency." *Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of Treasury*, 392 F. Supp. 3d 22, 42 (D.D.C. 2019). While the court may not substitute its own judgment for that of the agency, *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the agency still must show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates," *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Thus, the agency will not receive any deference under *Chevron* when the regulation is unreasonable. *See, e.g., Good Fortune Shipping SA v. Commissioner*, 897 F.3d 256, 261–264 (D.C. Cir. 2018) (holding that the IRS's regulation was unreasonable because it conflicted with the plain language of the statute and it created unfair results for similarly-situated entities).

Applying those principles here, the Blocked Income Rule fails *Chevron* step 2 for several reasons. First, as real-world examples make clear, it is unfair and unreasonable for the IRS to reallocate foreign income to U.S. taxpayers that did not—and could not—receive that income. Second, the purpose of the relevant Internal Revenue Code provision further supports the conclusion that Congress never intended companies to be faced with such perverse incentives—i.e., violate the law of a foreign country or suffer adverse consequences, such as double taxation.

A consumer goods manufacturing company ("Company"), an NFTC member, illustrates the unfair and unreasonable dilemma that companies are now faced with due to the Blocked Income Rule. The Company owns valuable trademarks, patents, and technical know-how that are located in the United States. In order to allow foreign subsidiaries to sell products in their local jurisdiction, the Company's U.S. operations license this intellectual property to their foreign subsidiaries. Most subsidiaries license the intellectual property for a royalty rate of up to 10 percent of sales of consumer goods.

The Company, however, cannot always guarantee that the foreign subsidiaries will be able to pay the royalty rate of up to 10 percent of sales of consumer goods due to foreign legal restrictions. For example, in countries such as Nigeria, Ghana, and Pakistan, the Company must seek approval for the charged royalty rates from the local regulatory bodies.

In Nigeria, a local regulatory agency called the National Office for Technology Acquisition and Promotion ("NOTAP") must approve of the requested royalty rate. NOTAP registers technology transfer agreements in manufacturing, information and communication technology, finance and insurance, and many other industry sectors. *Updated Requirements for the Registration of Technology Transfer Agreements*, NAT'L OFF. FOR TECH. ACQUISITION AND PROMOTION, https://perma.cc/CRL4-3XJL. During this process, NOTAP requires that the Company submit an application that includes the trademark license, net sales of locally manufactured goods that are covered by the trademark, ownership structure of the company, evidence of registration of trademark locally and internationally, and all other documents as contained in the Know-How agreement. *Id.* Thus, the Company must be able to show the benefit coming into the country.

Similarly, the Ghana Investment Promotion Centre ("GIPC")—a separate governmental body—requires the Company to also seek approval of the royalty rate. In Ghana, the technology transfer agreements must abide by and be compliant with the Ghana Investment Promotion Centre Act, 2013 (Act 865) ("GIPC Act") and the Technology Transfer Regulations, 1992 (L.I. 1547). *Technology Transfer Agreements*, GHANA INV. PROMOTION CENTRE, https://www.gipc.gov.gh/technology-transfer-agreements/. Under the GIPC Act, there are four main types of technology transfer agreement: intellectual property rights; provision technical services and assistance; provision of technical know-how to acquire, install, and use machinery; and provision of management services. *Id.* The application process is quite extensive, and if the Company's submitted application is non-compliant, then the Company only has two months to correct any deficiency. *Id.*

The State Bank of Pakistan ("State Bank") also has a similar process that requires the Company to seek approval of its requested royalty rate. The State Bank requires that the Company's application for remittance of the royalty or technical fee is submitted to the Foreign Exchange Department – Investment Division in Karachi. *Agreements for Transfer of Tech. Payment of Royalty/Technical Fee to the Foreign Collaborators*, STATE BANK OF PAKISTAN, https://www.sbp.org.pk/epd/

1992/c101.htm. Once it is received and reviewed, the State Bank will record the application if it complies with the requisite rules.

For each country, the foreign body—whether it is a political branch or national bank—will limit the royalty rate well below an arm's length royalty rate. The local subsidiary is prohibited from paying a royalty in excess of the amount set by the foreign jurisdiction and, thus, these transactions will fail under the arm's length standard. The deferral method in the Blocked Income Rule does not apply because each country applies its royalty calculations based on a per taxpayer standard, as opposed to a generally applicable law. Thus, the result is the Company is exposed to a potential IRS audit and adjustment. If the IRS makes an adjustment and increases the royalty rate, the Company will be subject to double taxation because the IRS would impute additional income to the United States without a corresponding payment or deduction abroad.

With the complex and varying foreign country regimes that allow U.S. parent companies to receive little to no royalty income from the foreign subsidiary, and the Blocked Income Rule that insists on imputing income to the United States entity that could never be paid by the foreign subsidiary without any viable exception, the law-abiding Company is stuck in the quintessential "Hobson's choice." It must "decide" to either (1) violate the law of a foreign sovereign in connection with business conducted in that sovereign's jurisdiction, so as to satisfy the Blocked Income Rule's requirements; or (2) risk an IRS-initiated adjustment without a corresponding deduction in the foreign jurisdiction, resulting in double taxation on the deemed royalty that could never be legally paid by the foreign subsidiary. This cannot credibly be considered a real choice.

Additionally, the Company cannot qualify for the election to defer income because the restrictions are not publicly promulgated and applied equally to all similarly situated taxpayers. Instead, it is forced into a situation where the only choice is to follow foreign regulations and be subject to double taxation in the United States because of the IRS's rigid Blocked Income Rule.

As the above examples demonstrate, the Blocked Income Rule will inevitably lead to a chilling effect on companies engaged in cross-border licensing of IP rights.[2] Rather than encourage companies to expand their operations across the globe, the Blocked Income Rule creates the incentive for companies to discontinue these transnational relationships due to the fear of incurring excessive taxation for income the company never received. In a world that is increasingly interconnected, the Blocked Income Rule puts companies with intellectual property located in the United States at a significant competitive disadvantage.

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[2] *See also Coca-Cola Co. & Subsidiaries v. Commissioner*, T.C. Memo. 2023-135, 2023 WL 7410872 (Nov. 8, 2023).

The IRS has not pointed to any evidence that Congress intended to impose such severe and unfair burdens on law-abiding American businesses. What is more, the *codified* statutory purpose supports the conclusion that Congress never intended this unjust result. *See Ass'n for Cmty. Affiliated Plans*, 392 F. Supp. 3d at 42 (explaining that courts should consider the statutory purpose in determining whether the agency interpretation is reasonable).

Section 482 authorizes the IRS to reallocate income reported by entities that are under common control "to prevent the evasion of taxes or clearly to reflect the income of any of" the entities. 26 U.S.C. § 482. The agency's purpose fails to give proper respect to foreign law and practices. Any allocation to a U.S. taxpayer of income that it did not and could not have received does not "reflect the income" of that taxpayer. Income is defined as "[t]he money or other form of payment that one ***receives***." *Income*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). While the Internal Revenue Code does not define "income" explicitly, it is incorporated into the definition of "gross income," which means "all income from whatever source ***derived***." 26 U.S.C. § 61 (emphasis added). In both the traditional and the statutory definition, the emphasis is on the payment that the individual receives. Courts construing statutes presume that Congress says what it means and means what it says. *Dodd v. United States*, 545 U.S. 353, 357 (2005). Here, Congress did not manifest any intention, textual or otherwise, for the IRS to be allowed to tax U.S. taxpayers on payments that they could not receive.

In sum, the Tax Court erred in upholding the IRS's Blocked Income Rule because that regulation: (1) generates unfair and unreasonable results, such that companies must choose between violating foreign law or suffering adverse consequences, including double taxation; and (2) frustrates Congress's explicit objectives, as evidenced by the plain language of the governing statute. *See, e.g., Good Fortune Shipping SA*, 897 F.3d at 261–264.

C. The Blocked Income Rule is Procedurally Invalid Because the IRS Failed to Consider Comments Alerting the Agency to Significant Problems and Potential Remedies.

The defects noted above could and should have been avoided. Before the Blocked Income Rule went into effect, commenters advised the agency of substantive problems with the rule, highlighted the ineffectiveness of its proposed exceptions to the rule, and offered suggested changes to the proposed rule to better effectuate express congressional purposes. *See infra.* But the IRS did not just reject those comments, it failed to give them any consideration whatsoever. That procedural error provides a distinct and independent basis for the reversing the judgment.

When reviewing an agency action, the court is tasked with determining whether the agency acted in an arbitrary and capricious manner. *See* 5 U.S.C. § 706.

"To satisfy the APA's 'arbitrary and capricious' standard, an agency must 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 203 (D.C. Cir. 2007) (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43). An agency's interpretation cannot be reasonable and, instead, must be arbitrary and capricious when it fails to consider all the relevant factors or there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Sierra Club v. Davies*, 955 F.2d 1188 (8th Cir. 1992).

Put another way, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Veh. Mfrs. Ass'n*, 463 U.S. at 43. Thus, the "agency must cogently explain why it has expressed its discretion in a given manner" and effectively show that its decision was a "product of reasoned decision making." *Id.* at 48, 52. To satisfy that requirement, the agency is required to consider *and* respond to significant comments. *See, e.g., Hussian v. Madigan*, 950 F.2d 1546, 1554 (11th Cir. 1992); *Balt. Gas & Elec. Co. v. United States*, 817 F.2d 108, 116 (D.C. Cir. 1987).

In promulgating the Blocked Income Rule, the IRS did not consider *or* respond to significant comments. Many examples make that clear; the following discussion addresses four illustrative comments for the Court's consideration.

First, the Tax Executives Institute ("TEI") commented that the then-proposed regulation "constitue[d] a not-so-subtle attempt to overrule" the Court of Appeals for the Sixth Circuit's decision in *Procter & Gamble Co. v. Commissioner*. (Stipulation, Ex. 41-J). Besides objecting to the overreach of the IRS in attempting to overturn settled precedent, TEI noted that the legal restriction for Blocked Income Rule did not apply to all businesses equally. Also, TEI pointed out the timing in the proposed rule created a "trap for the unwary," stating that "a taxpayer who believes its pricing satisfies the arm's length standard will not make the deferred income method election – it will have no reason to do so (except on a speculative, protective basis)." Thus, TEI concluded that the then-current regulations appropriately balanced the relevant interests as they allowed for an election after the adjustment had been made and before the occurrence of certain events.

Second, the American Petroleum Institute ("API") also submitted a comment, ignored by the IRS, directly bearing on one of the main issues in this appeal. (Stipulation, Ex. 40-J). In the comment, API emphasized that the then-proposed regulation cannot effectively overrule the reasoning of the U.S. Supreme Court and the Court of Appeals for the Sixth Circuit: *Commissioner v. First Security Bank*, 405

U.S. 394 (1972), and *Proctor & Gamble v. Commissioner*, 961 F.2d 1255 (6th Cir. 1992). Thus, API pointed out that the proposal simply reflected the IRS's current litigation position—that these cases were wrongly decided—rather than appropriately applying the current status of the law to the agency's action.

API next explained that the proposed regulations and restrictions were unrealistic and problematic. The proposed regulation, API warned, was rife with ambiguity that would only ensure the continuation of litigation in this area. In fact, API argued that the proposed regulation created more ambiguity because it was departing from the settled principles in the case law. Further, API asserted that the issues with the regulation and exception were particularly acute for the oil industry because of the increased level of scrutiny that industry faces from both sovereign governments and transnational organizations. Specifically, API stated that the regulations imposed a series of restrictions which would effectively negate the intended relief in the proposed rule and would be ineffective in protecting innocent companies from being subject to double taxation. This is an issue that NFTC members face today, as described in the real-world examples set out above.

Third, TRW, Inc.'s comment likewise pointed to substantive issues with the proposed regulations, including inconsistencies with both precedent from the U.S. Supreme Court and the U.S. Court of Appeals for the Sixth Circuit. (Stipulation, Ex. 42-J). Further, TRW stated that it agreed that foreign governments should not impose restrictions on royalty payments, but disagreed that the agency was the proper forum for U.S. government actions to enforce such a policy. It noted that this was particularly true given the significant risk that it would create inconsistencies in U.S. Tax Policy and penalize companies wishing to compete in certain foreign markets.

TRW then went on to provide specific changes to the proposed regulation, including eliminating the requirement that foreign law also apply to uncontrolled transactions, and resolving the ambiguity that dividends do not constitute a method for circumventing foreign legal restrictions. Similarly, TRW, Inc. suggested that the foreign tax deductions or credits associated with dividends paid by a controlled foreign corporation to its U.S. parent corporation should be immediately allowable to the U.S. taxpayer.

Fourth, the United States Council for International Business ("USCIB") commented that the proposed regulation "constitute[d] an obvious attempt by the IRS to override the unfavorable decision" from the *Procter & Gamble* case that undermined the long-standing judicial interpretations of Section 482. (Stipulation, Ex. 43-J). In addition to undermining well-settled case law, USCIB noted that the conditions to allow a taxpayer to elect income deferral under the Blocked Income Rule were so restrictive that very few, if any, taxpayers could benefit from the exception. Finally, USCIB concluded that the IRS should not be allowed to "unilaterally make section 482 applicable" to unrelated situations by contorting the plain language of the statute well beyond its intended scope.

Even a cursory review of these comments shows that they raised substantial issues warranting careful consideration—such that the IRS's failure to give such comments *any* consideration renders the Blocked Income Rule arbitrary and capricious. The IRS's rule cannot be reasonable because it did not consider the practical effects on companies by implementing this regulation. *Citizens to Preserve Overton Park, Inc*, 401 U.S. at 416. Instead, as these comments illustrated, the effects of the IRS's Blocked Income Rule led to more uncertainty in the business community and created opportunities where certain companies are treated differently simply because of where they choose to expand their business globally. Further, similar to *Motor Vehicle Manufacturers Association* where the agency failed to consider relevant alternatives and explain its reasoning in doing so, the IRS here never explained why there could not be a different version of the rule that took practical realties into consideration. 463 U.S. at 50–51. Nor did the agency respond to comments that the election to defer income was virtually impossible to satisfy because of the stringent requirements. Had the IRS considered the arguments, the election could have been tailored to provide taxpayers with an option to delay the recognition of income, which would have mitigated the extreme result of the regulations. Instead, the IRS simply ignored significant comments that explained the practical repercussions that would ensue from the promulgation of the Blocked Income Rule. *Hussian v. Madigan*, 950 F.2d 1546, 1554 (11th Cir. 1992).

The IRS's failure to consider relevant comments is not surprising, given that the agency explicitly—and incorrectly—reasoned that the APA's procedural requirements did not apply to its promulgation of the Blocked Income Rule. The IRS stated that "[i]t also has been determined that section 553(b) of the Administrative Procedure Act . . . do[es] not apply to these regulations." 59 Fed. Reg. 34,971-01(1994). If the IRS had recognized that it, like every other agency subject to the APA, was duty-bound to properly consider and respond to significant comments, it might well have avoided or mitigated the substantial problems infecting the Blocked Income Rule. Instead, the agency simply ignored those comments. This procedural failure alone requires reversal of the Tax Court's decision upholding the agency's rule. *See, e.g., Hussian*, 950 F.2d at 1554.

CONCLUSION

For the foregoing reasons, this Court should reverse the Tax Court's decision.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,936 words in accordance with Federal Rule of Appellate Procedure 29(a)(5). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 14-point Times New Roman font.

/s/Amit Agarwal
Amit Agarwal

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2024, an electronic copy of the foregoing brief was filed with the Clerk for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system.

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