163 T.C. 46–112

UNITED STATES TAX COURT

REPORTS

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August 1, 2024, to

August 31, 2024

UNITED STATES TAX COURT

WASHINGTON, D.C.

JUDGES OF THE UNITED STATES TAX COURT

Chief Judge

KATHLEEN KERRIGAN

Judges

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RONALD L. BUCH
JOSEPH W. NEGA
CARY DOUGLAS PUGH
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PATRICK J. URDA
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ALINA I. MARSHALL
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KASHI WAY [1]
ADAM B. LANDY [2]

Senior Judges recalled to perform judicial duties under the provisions of section 7447 of the Internal Revenue Code:

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JAMES S. HALPERN
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Special Trial Judges

LEWIS R. CARLUZZO, *Chief Special Trial Judge*

PETER J. PANUTHOS
DIANA L. LEYDEN
JENNIFER SIEGEL
ZACHARY FRIED

CHARLES G. JEANE, *Clerk*

SHEILA A. MURPHY, *Reporter of Decisions*

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[1] Judge Way took the oath of office on August 7, 2024.
[2] Judge Landy took the oath of office on August 8, 2024.

AUGUST TABLE OF CASES

REPORTS

OF THE

UNITED STATES TAX COURT

J.E. RYCKMAN, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 750-21L. Filed August 1, 2024.

P owes approximately $200,000 in Canadian tax for tax years 1993 and 1994. In 2017 the Canada Revenue Agency sent the Internal Revenue Service (IRS) a mutual collection assistance request (MCAR) under the Canada-U.S. Income Tax Treaty (Treaty). Once the U.S. Competent Authority granted the MCAR, the IRS filed a notice of federal tax lien (NFTL) against P. The IRS notified P of the NFTL filing but stated that she had no right to a collection due process (CDP) hearing under I.R.C. §§ 6320 and 6330. P nonetheless requested a CDP hearing within 30 days of the IRS's notice. When the IRS denied P's request, she petitioned for review of that denial under the color of I.R.C. § 6330(d)(1). *Held*: We have jurisdiction under I.R.C. § 6330(d)(1) to review a determination only if, in making that determination, the IRS was subject to one or more obligations imposed by I.R.C. § 6320 or § 6330. *Held, further*, Treaty Article XXVI A requires the United States to collect an accepted Canadian revenue claim as it would a U.S. tax assessment for which the taxpayer's right to a CDP hearing (among other rights) has lapsed or been exhausted. Consequently, P has no additional rights under I.R.C. § 6320 or § 6330 with respect to the IRS's collection of her Canadian tax liability, and those statutes imposed no obligations on the IRS with respect to P's hearing request. *Held, further*, we lack jurisdiction over P's Petition because the IRS did not issue a determination letter to P that would invoke our jurisdiction under I.R.C. § 6330(d)(1), and it had no obligation to do so.

David R. Jojola, *Derek W. Kaczmarek*, *Nicholas Michaud*, and *Paul J. Vaporean*, for petitioner.

Ping Chang and *Derek S. Pratt*, for respondent.

OPINION

COPELAND, *Judge*: Petitioner, J.E. Ryckman, filed her Petition to contest the determination of the Commissioner of Internal Revenue (Commissioner) to deny her a hearing to challenge the filing of a notice of federal tax lien (NFTL) against her by the Internal Revenue Service (IRS). The NFTL was filed to secure Ms. Ryckman's tax liabilities owed to Canada. The IRS is attempting to collect those liabilities on Canada's behalf pursuant to Article XXVI A (Assistance in Collection) of the Canada-U.S. Income Tax Treaty (Treaty).[1]

The Commissioner has moved to dismiss Ms. Ryckman's Petition for lack of jurisdiction. This case raises a question of first impression for our Court: whether we have jurisdiction to review an IRS denial of a hearing request regarding collection of taxes pursuant to a mutual collection assistance request (MCAR) made by Canada under the Treaty.

Background

The following background is drawn from the parties' pleadings, Motion papers, and Exhibits. This background is stated solely for the purpose of ruling on the Commissioner's Motion to Dismiss for Lack of Jurisdiction and not as findings of fact. Ms. Ryckman resided in Arizona when she filed her Petition.

According to the Canada Revenue Agency (CRA), Ms. Ryckman owes approximately $200,000 in Canadian tax for tax years 1993 and 1994. Ms. Ryckman resided in the United States in 2017 when the CRA sent the IRS an MCAR in accordance with Treaty Article XXVI A(2) (Ryckman MCAR), representing that the 1993 and 1994 tax liabilities are "finally determined" within the meaning of Treaty Article XXVI A(2), i.e., Canada "has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in [Canada] have lapsed or been exhausted."[2] The U.S. Competent Authority, an office within the IRS, granted the MCAR under Treaty Article XXVI A(3)[3] and forwarded it to an IRS collection office.

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[1] Convention With Respect to Taxes on Income and on Capital, Can.-U.S., Sept. 26, 1980, T.I.A.S. No. 11,087, as Amended by the Protocols signed on June 14, 1983, T.I.A.S. No. 11,087 (Protocol 1), and March 28, 1984, T.I.A.S. No. 11,087 (Protocol 2), *as reprinted in* 1986-2 C.B. 258. It was further amended by Protocols signed on March 17, 1995, T.I.A.S. No. 97-1216 (Protocol 3), July 29, 1997, T.I.A.S. No. 97-1216 (Protocol 4), and September 21, 2007, T.I.A.S. No. 08-1215.2 (Protocol 5). We refer to the Convention and the Protocols collectively as the Treaty.

[2] In later correspondence with the IRS, the CRA represented that Ms. Ryckman's liabilities will remain collectable under Canadian law until June 2026.

[3] Treaty Article XXVI A was added to the Treaty by Article 15 of Protocol 3, which entered into force on November 9, 1995. However, Article 21(3) of Protocol 3 provides that Article XXVI A "shall have effect for revenue claims

On December 7, 2020, IRS Revenue Officer Susan Mitchell (RO Mitchell) mailed the NFTL to the Maricopa County Recorder in Phoenix, Arizona. The NFTL lists Ms. Ryckman's 1993 and 1994 liabilities along with the following explanation:

> THIS AMOUNT IS DUE, OWING, AND UNPAID TO THE GOVERNMENT OF CANADA, AND IS BEING COLLECTED ON BEHALF OF CANADA IN ACCORDANCE WITH ARTICLE XXVIA OF THE USA-CANADA INCOME TAX CONVENTION AND APPLICABLE INTERNAL REVENUE LAWS OF THE UNITED STATES OF AMERICA. PAYMENTS SHOULD BE MADE PAYABLE TO THE RECEIVER GENERAL OF CANADA, NOT THE IRS, BUT SHOULD BE MAILED TO THE ADDRESS CONTAINED HEREIN. THE IRS COORDINATOR WILL FORWARD THE PAYMENT TO OTTAWA.

On January 25, 2021, RO Mitchell mailed Ms. Ryckman a letter informing her that the NFTL was filed "and that you have the right to a hearing to discuss collection options." However, RO Mitchell represented that a statutory hearing under section 6320(b)[4] was "NOT available to you as a Canadian taxpayer in the United States." On February 4, 2021, Ms. Ryckman's representative faxed to RO Mitchell Form 12153, Request for a Collection Due Process or Equivalent Hearing, requesting a collection due process (CDP) hearing on the NFTL filing under section 6320(b) and indicating that Ms. Ryckman could not fully pay the balance and would like the IRS to consider an installment agreement.

On February 8, 2021, RO Mitchell mailed Ms. Ryckman a letter titled "Request for Collection Due Process Hearing - Denied" (denial letter). In the denial letter, RO Mitchell stated that the IRS could not grant Ms. Ryckman's request for a CDP hearing for the following reason:

> Because the foreign tax liability is treated as a finally determined U.S. tax liability, your procedural rights to restrain collection under U.S. law through a CDP hearing under Internal Revenue Code Sections 6320 or 6330 are treated as lapsed or exhausted.

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finally determined by a requesting State after the date that is 10 years before the date on which the Protocol enters into force."

[4] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C. or Code), in effect at all relevant times, and regulation references are to the *Code of Federal Regulations*, Title 26 (Treas. Reg.), in effect at all relevant times.

However, RO Mitchell indicated that Ms. Ryckman could still "request review under the Collection Appeal Program (CAP) of the IRS Independent Office of Appeals to contest the filing of [the NFTL]."

On February 18, 2021, Ms. Ryckman filed her Petition, asking us to determine that the Commissioner erred in denying her a CDP hearing and to remand her case to the IRS Independent Office of Appeals (IRS Appeals) for a statutory hearing.

Discussion

I. *Tax Court Jurisdiction Generally*

The Tax Court is a court of limited jurisdiction and may exercise jurisdiction only to the extent expressly authorized by Congress. *See* I.R.C. § 7442; *Hallmark Rsch. Collective v. Commissioner*, 159 T.C. 126, 135 (2022); *Breman v. Commissioner*, 66 T.C. 61, 66 (1976). We are without authority to enlarge upon that statutory grant. *McCrory v. Commissioner*, 156 T.C. 90, 93 (2021). Nevertheless, we always have jurisdiction to determine whether we have jurisdiction over a case. *Cooper v. Commissioner*, 135 T.C. 70, 73 (2010). The party seeking to invoke our jurisdiction must affirmatively show that we have jurisdiction. *See David Dung Le, M.D., Inc. v. Commissioner*, 114 T.C. 268, 270 (2000), *aff'd*, 22 F. App'x 837 (9th Cir. 2001). If we lack jurisdiction to consider an issue, then despite a party's choice of our Court as a forum to settle the dispute, we may not decide the issue. *Naftel v. Commissioner*, 85 T.C. 527, 530 (1985).

II. *Overview of Sections 6320 and 6330*

Sections 6320 and 6330 (CDP statutes) specify CDP rights for taxpayers against whom the IRS has made an NFTL filing or proposes a levy to collect an assessed tax liability. Sections 6320(a) and 6330(a) require the IRS to notify a taxpayer of an NFTL filing or a proposed levy, respectively, and of the taxpayer's right to request (within 30 days of the notice) a CDP hearing with IRS Appeals. Sections 6320(b)(2) and 6330(b)(2) each specify that the taxpayer "shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax [subject to the lien or levy] relates." Section 6320(c) provides that the provisions of section 6330(c), (d) (other than paragraph (3)(B)), (e), and (g) apply to a hearing conducted under section 6320(b).

Section 6330(c) requires the Appeals officer who conducts the CDP hearing to verify satisfaction of all requirements of law and administrative procedure applicable to the NFTL filing or levy, to generally consider any other issues raised by the taxpayer at the hearing, and to consider whether the NFTL filing or levy balances the need for the efficient collection of taxes with the taxpayer's legitimate concern that collection actions be no more intrusive than necessary.

Section 6330(g) provides that if the IRS determines that any portion of a hearing request is based on a position that the IRS has officially identified as frivolous or otherwise reflects a desire to delay or impede the administration of federal tax law, *see* I.R.C. § 6702(b)(2)(A), then the IRS "may treat such portion as if it were never submitted and such portion shall not be subject to any further administrative or judicial review."

Section 6330(e)(1) provides generally that once a taxpayer timely requests a CDP hearing, then while the hearing and any appeals are pending the IRS may not proceed with any proposed levy action (if applicable) and the period of limitations under section 6502 for collecting the tax is suspended.

Section 6330(d)(1) provides that the taxpayer who requests a CDP hearing "may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)."

The legislative history of the CDP statutes indicates Congress's desire that a taxpayer who submits a CDP hearing request after the 30-day deadline of section 6330(a)(3)(B) still should be afforded a hearing. *See* H.R. Rep. No. 105-599, at 266 (1998) (Conf. Rep.), *reprinted in* 1998-3 C.B. 747, 1020 ("The Secretary must provide a hearing equivalent to the pre-levy hearing if later requested by the taxpayer."). The Commissioner has issued regulations providing for an "equivalent hearing" for taxpayers who make untimely requests under either section 6320(b)(1) or section 6330(b)(1). *See* Treas. Reg. § 301.6320-1(i). "The equivalent hearing will be held by Appeals and generally will follow Appeals' procedures for a CDP hearing." *Id.* subpara. (1). However, generally neither collection action nor the period of limitations for collection is suspended while an equivalent hearing is pending. *Id.* subpara. (2), Q&A-I3 and I4; *cf.* H.R. Rep. No. 105-599, at 266, *reprinted in* 1998-3 C.B. at 1020 ("[T]he Secretary is not required to suspend the levy process pending the completion of a hearing that is not requested within 30 days of the mailing of the Notice [of Intent to Levy]."). Furthermore, determinations made in equivalent hearings are not subject to judicial review. *See Ramey v. Commissioner*, 156 T.C. 1, 11 (2021).

III. *Treaty Article XXVI A*

Treaty Article XXVI A provides in relevant part:

> 1. The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in paragraph 9, together with interest, costs, additions to such taxes and civil penalties, referred to in this Article as a "revenue claim".
>
> 2. An application for assistance in the collection of a revenue claim shall include a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined. For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.
>
> 3. A revenue claim of the applicant State that has been finally determined may be accepted for collection by the competent authority of the requested State and, subject to the provisions of paragraph 7, if accepted shall be collected by the requested State as though such revenue claim were the requested State's own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State's own taxes.
>
> 4. Where an application for collection of a revenue claim in respect of a taxpayer is accepted
>
> (a) By the United States, the revenue claim shall be treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received[.]
>
> . . . .
>
> 5. Nothing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either Contracting State. If, at any time pending execution of a request for assistance under this Article, the applicant State loses the right under its internal law to collect

> the revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection.
>
> 6. Subject to this paragraph, amounts collected by the requested State pursuant to this Article shall be forwarded to the competent authority of the applicant State. Unless the competent authorities of the Contracting States otherwise agree, the ordinary costs incurred in providing collection assistance shall be borne by the requested State and any extraordinary costs so incurred shall be borne by the applicant State.
>
> 7. A revenue claim of an applicant State accepted for collection shall not have in the requested State any priority accorded to the revenue claims of the requested State.
>
> . . . .
>
> 9. Notwithstanding the provisions of [Treaty] Article II (Taxes Covered), the provisions of this Article shall apply to all categories of taxes collected, and to contributions to social security and employment insurance premiums levied, by or on behalf of the Government of a Contracting State.
>
> 10. Nothing in this Article shall be construed as:
>
> . . . .
>
> (b) Imposing on either Contracting State the obligation to carry out administrative measures of a different nature from those used in the collection of its own taxes or that would be contrary to its public policy . . . .

IV. *Analysis of Ms. Ryckman's Petition*

Ms. Ryckman argues that we have jurisdiction over her case under sections 6320(c) and 6330(d)(1). Section 6330(d)(1) provides as follows:

> The person may, within 30 days of a determination *under this section*, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).

(Emphasis added.) Accordingly, section 6330(d)(1) grants us jurisdiction only to review an IRS determination made "under this section." Therefore, we must decide whether the denial letter constituted a determination *under* section 6330 (and, by cross-reference, section 6320).

A. *Jurisdiction Under Section 6330(d)(1)*

We have consistently held that our jurisdiction under section 6330(d)(1) is contingent on (1) the issuance of a valid notice of determination and (2) a timely petition for review.[5] *Goza v. Commissioner*, 114 T.C. 176, 182 (2000). We now clarify whether a denial letter refusing a CDP hearing regarding the collection of Canadian taxes under the Treaty can be construed as a determination letter that would give us jurisdiction. In other words, we must decide whether the denial letter was issued "under this section" (i.e., section 6330 or, by cross-reference, section 6320), which in turn means that in making that determination the IRS was subject (or purported itself to be subject) to one or more obligations imposed (whether expressly or implicitly) by section 6320 or 6330. *See Under*, *Merriam-Webster's Collegiate Dictionary* 1287 (10th ed. 1997) ("subject to the authority, control, guidance, or instruction of"). For instance, if a taxpayer timely files a CDP hearing request, then generally the IRS has an express obligation to hold a hearing, *see* I.R.C. §§ 6320(b)(1), 6330(b)(1), and then an implied obligation to make a determination on the basis of the hearing, *see* I.R.C. § 6330(c)(3). Accordingly, both the prehearing determination of whether to grant the taxpayer a hearing and the posthearing determination of whether to uphold the NFTL filing or levy are made "under this section."

Our interpretation of the phrase "under this section" is consistent with our caselaw interpreting the CDP statutes. For instance, if a taxpayer fails to timely file a CDP hearing request, then absent grounds for equitable tolling of the 30-day deadline, *see Organic Cannabis Found., LLC v. Commissioner*, 161 T.C. 13, 45–46 (2023), the IRS is not obligated by either CDP statute to hold a hearing or make a determination. (If the IRS has any obligation to hold a hearing in this circumstance, it is imposed by Treasury Regulation § 301.6320-1(i).) We have consistently held that "[a] decision letter issued after an equivalent hearing generally is not considered a determination under section 6330 and is therefore insufficient to invoke our jurisdiction." *Ramey*, 156 T.C. at 11; *see also Moorhous v. Commissioner*, 116 T.C. 263, 270 (2001) ("[B]ecause [the taxpayer] . . . failed to file a timely request for an Appeals Office hearing, the Appeals Office was not *obliged* to conduct such a hearing. In this regard, the decision letter issued to

[5] In *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1501 (2022), the Supreme Court held that the 30-day petition filing deadline specified in section 6330(d)(1) is nonjurisdictional and subject to equitable tolling.

[the taxpayer] . . . was not, and did not purport to be, a determination letter pursuant to section 6320 or section 6330." (Emphasis added.)).

There are limited exceptions to the rule stated in *Ramey*, such as when the taxpayer timely requests a CDP hearing but the IRS offers only an equivalent hearing and issues a decision letter rather than a notice of determination. *See Craig v. Commissioner*, 119 T.C. 252, 259 (2002) (holding that we have jurisdiction over the IRS's determination on a timely requested CDP hearing notwithstanding the determination's label). But in such a case the IRS was in fact obligated by section 6320 or 6330 to make a posthearing determination. Conversely, if the taxpayer was not in fact entitled to a CDP hearing but the IRS issues a notice that purports to be a notice of determination under the CDP statutes and contains no indications to the contrary, then we have held that we have jurisdiction to review the notice. *See Shirley v. Commissioner*, T.C. Memo. 2014-10, at *13–14; *Kim v. Commissioner*, T.C. Memo. 2005-96, 89 T.C.M. (CCH) 1123, 1125–26. Our interpretation of the phrase "under this section" is consistent with these holdings because in such cases the IRS *purports* to be making a determination subject to obligations imposed by the CDP statutes.

We have also held that we have jurisdiction over the IRS's determination that some or all portions of a hearing request are frivolous positions or have a delaying motive, such that administrative and judicial review is not available. *See* I.R.C. § 6330(g); *Buczek v. Commissioner*, 143 T.C. 301, 307–09 (2014); *Thornberry v. Commissioner*, 136 T.C. 356, 367 (2011). Such a determination is subject to the obligation implicitly imposed on the IRS by section 6330(g) to not act arbitrarily and capriciously in determining whether some or all portions of a hearing request are frivolous. *See Buczek*, 143 T.C. at 309. Meanwhile, we have held that if we determine that all portions of a hearing request are indeed frivolous, then we lack jurisdiction to review the IRS's determination to proceed with collection against the taxpayer. *Id.* In that situation the IRS's determination to proceed with collection is not subject to any obligations imposed by either CDP statute, since section 6330(g) denies the taxpayer any further rights under those statutes.

B. *Scope of the CDP Statutes*

What we must decide is whether the IRS was subject to any obligations imposed by the CDP statutes when it denied Ms. Ryckman's CDP hearing request. To answer this question, we begin with the statutory text. Pursuant to section 6320(a)(1), the provisions of section 6320 apply only to a "person described in section 6321," viz, a person "liable to pay any tax [who] neglects or refuses to pay the same after demand." Meanwhile, although section 6330(a)(1) does not specifically cross-reference section 6331 (which generally authorizes the IRS to collect an unpaid "tax" by levy), section 6330(a)(3)(A) provides that the levy notice sent to the taxpayer must include "the amount of unpaid tax." Therefore, we hold that the rights afforded by the CDP statutes apply only to those people subject to IRS actions to collect "tax."

Ms. Ryckman argues that the word "tax" in the CDP statutes is not limited to taxes imposed by the Code but also encompasses foreign taxes being collected by the IRS pursuant to the provisions of an in-force treaty (for instance, the Canadian taxes at issue in this case). We agree that "if the United States accepts a request from Canada to collect a revenue claim, the United States must collect the revenue claim as if it were its own revenue claim," and that "[Treaty] Article 26A authorizes th[e] IRS to employ the procedures created under I.R.C. §§ 6201, 6301 to pursue and collect Canadian revenue claims." *Retfalvi v. United States*, 930 F.3d 600, 610–11 (4th Cir. 2019); *see also Lidas, Inc. v. United States*, 238 F.3d 1076, 1081 (9th Cir. 2001) (holding that the IRS is "bound by law to employ the same procedures to obtain information requested by France pursuant to the [France-U.S. Income Tax] Treaty as it would employ in the investigation of a domestic tax liability"). However, we must still consider how the Treaty provisions interact with the CDP statutes.

C. *Interpretation of Treaty Article XXVI A*

1. *General Principles*

Income tax treaties to which the United States is a party are on an equal footing with domestic law in that both are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *see also* I.R.C. § 894(a) ("The provisions of this title [i.e., the

Code] shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer."); I.R.C. § 7852(d)(1) ("For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law."). When a treaty and an act of Congress "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).[6]

When interpreting a treaty, we begin with the text of the treaty and give the terms their ordinary meaning unless a more restricted sense is clearly intended. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982); *Am. Air Liquide, Inc. & Subs. v. Commissioner*, 116 T.C. 23, 29 (2001), *aff'd*, 45 F. App'x 721 (9th Cir. 2002). The plain meaning of a treaty's text controls unless its effect is contrary to the intent or expectations of the treaty partners. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006); *Sumitomo Shoji Am., Inc.*, 457 U.S. at 180; *Amaral v. Commissioner*, 90 T.C. 802, 812 (1988). Treaties generally should be liberally construed to give effect to the purpose of the treaty. *United States v. Stuart*, 489 U.S. 353, 368 (1989); *Estate of Silver v. Commissioner*, 120 T.C. 430, 434 (2003). "[W]here a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred . . . ." *Stuart*, 489 U.S. at 368 (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940)). In addition to consulting the ordinary meaning of a treaty's terms, we may consult the interpretation of a treaty provision adopted by the relevant Government agency (here, the IRS). While not dispositive, the agency's interpretation

[6] The dissenting opinion states that the opinion of the Court "presents an irreconcilable conflict with the later-enacted statutory CDP provisions." *See* dissenting op. p. 69. While we agree that the CDP statutes would trump the Treaty in the case of an irreconcilable conflict (because they were enacted later in time), we do not see there to be a conflict. We address the dissent's concerns *infra* notes 10–12.

"is entitled to great weight." *Sumitomo Shoji Am., Inc.*, 457 U.S. at 184–85.[7]

Treaty Article III(2) provides:

> As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires . . . , have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.

2. *The Treaty's Foreclosure of CDP Rights*

Under Treaty Article XXVI A(4)(a), once the United States accepts a Canadian revenue claim, it is required to treat that claim "as an assessment under United States laws against the taxpayer." On the basis of this provision's context (viz, a tax treaty article dealing with collection of tax liabilities), we interpret Treaty Article XXVI A(4)(a) to require the United States to treat an accepted Canadian revenue claim as a U.S. *tax* assessment.

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[7] The dissenting opinion cites a nonprecedential memorandum issued by the IRS Office of Chief Counsel in 1999 as evidence that the IRS has interpreted Treaty Article XXVI A as not foreclosing CDP rights for U.S. taxpayers subject to IRS collection activity for Canadian revenue claims. *See* I.R.S. Chief Couns. Adv. Mem. 199939034, 1999 WL 779472 (Oct. 1, 1999); dissenting op. p. 74. However, the dissent fails to mention that since at least 2005 the *Internal Revenue Manual* (IRM)—another nonprecedential IRS publication—has consistently reflected the position that CDP rights do *not* attach to MCARs under tax treaties. *See* IRM 5.21.7.4.1(10)(b) (June 3, 2020) ("A taxpayer identified in an inbound MCAR case is not entitled to a Collection Due Process (CDP) hearing because the tax liability at issue is a foreign tax liability. A taxpayer may request review under the Collection Appeals Program (CAP)."); IRM 5.21.7.4.5 (Nov. 13, 2015) ("The taxpayer does not have a CDP right for a foreign tax liability, but is entitled to Collection Appeals Program (CAP) rights."); IRM 5.1.8.7.7.1(6) (June 1, 2010) ("Taxpayers on incoming MCAR cases are not entitled to Collection Due Process (CDP) rights, but are entitled to Collection Appeals Program (CAP) rights."); IRM 5.1.8.7.7.1(6) (Apr. 22, 2008) ("Taxpayers on incoming MCAR cases are not entitled to CDP rights but are entitled to CAP rights."); IRM 5.12.6.3.6.1(3) (2005) ("Collection Due Process rights are not available for MCARs. However, . . . a Collection Appeals Program hearing may be requested by the taxpayer . . . ."). Although neither the IRM nor Chief Counsel Advice has the force of law or confers substantive rights on taxpayers, the IRM "govern[s] the internal affairs and administration of the IRS, and reliably describes the functions delegated to the different offices within the IRS." *DelPonte v. Commissioner*, 158 T.C. 159, 161 n.4 (2022).

However, Treaty Article XXVI A(3) provides the caveat that an accepted revenue claim “shall be collected by the requested State as though such revenue claim were the requested State’s own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State’s own taxes.” The definition of “finally determined” is indicated by Treaty Article XXVI A(2): “[A] revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.” Accordingly, we interpret Treaty Article XXVI A(3) to provide that when the United States accepts a Canadian revenue claim, the claim must be treated as a U.S. tax assessment for which all rights to restrain collection have lapsed or been exhausted.

The Treaty does not define the phrase “restrain collection,” but the right to request a CDP hearing under section 6320(b) or 6330(b) is manifestly a right to restrain collection. If IRS Appeals agrees with the taxpayer in a levy hearing, the IRS will not proceed with the levy (or will return previously seized property to the taxpayer). Agreement with the taxpayer in an NFTL hearing might result in release or withdrawal of the NFTL, *see* I.R.C. §§ 6325(a)(1), 6323(j), thereby removing any priority the IRS held over the taxpayer’s other secured creditors, *see* I.R.C. § 6323(a). Therefore, when the United States accepts a Canadian revenue claim, it must collect the revenue claim as it would a U.S. tax assessment for which the taxpayer’s administrative and judicial rights to restrain collection, *including* rights to a CDP hearing, have lapsed or been exhausted. Sections 6320(b)(2) and 6330(b)(2) generally grant only one opportunity for a CDP hearing (and thus a judicial appeal) with respect to a given tax period and a given collection action. *See* Treas. Reg. §§ 301.6320-1(d)(1) and (2), Q&A-D1, 301.6330-1(d)(1) and (2), Q&A-D1. Therefore, it would be unreasonable to interpret Treaty Article XXVI A as providing an additional administrative or judicial forum in the United States when the opportunity for such appeals in Canada has been exhausted. To hold otherwise would make superfluous the requirement in Treaty Article XXVI A(2) that “all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted." Finally, Treaty Article XXVI A(5) reiterates that "[n]othing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's [i.e., Canada's] finally determined revenue claim by the requested State [i.e., the United States], based on any such rights that may be available under the laws of either Contracting State."

Accordingly, Treaty Article XXVI A forecloses the administrative and judicial protections of the CDP statutes in the case of Canadian revenue claims. Even if the CDP statutes in principle apply to the IRS's collection of foreign taxes, Treaty Article XXVI A(3) requires the United States to treat a Canadian revenue claim as though the taxpayer has exhausted all CDP rights. Therefore, when the IRS granted the Ryckman MCAR and filed an NFTL against Ms. Ryckman, the Treaty precluded her from having what would effectively be an additional CDP hearing because such rights were exhausted or lapsed in Canada. Ms. Ryckman's situation is analogous to that in which the IRS denies a CDP hearing request for a tax period and collection action for which the taxpayer already had a hearing opportunity. We have held that we lack jurisdiction to review a decision letter issued after an equivalent hearing on a nonstatutory request. *See Orum v. Commissioner*, 123 T.C. 1, 11–12 (2004), *aff'd*, 412 F.3d 819 (7th Cir. 2005). Absent a determination made by the IRS under section 6320 or 6330, Ms. Ryckman lacked the jurisdictional hook to enter this Court.

Furthermore, Treaty Article XXVI A(10)(b) does not alter this result. That subparagraph provides that nothing in Article XXVI A "shall be construed as . . . [i]mposing on either Contracting State the obligation to carry out administrative measures of a different nature from those used in the collection of its own taxes or that would be contrary to its public policy." Of course, the United States generally does not collect U.S. taxes by NFTL filing or levy without first affording the taxpayer a right to a CDP hearing. However, if Treaty Article XXVI A(10)(b) were read to import the full range of legal protections for taxpayers under the Code, then it would directly conflict with Treaty Article XXVI A(3) (which requires the requested State to collect an accepted revenue claim as though all rights to restrain collection in the requested State have lapsed or been exhausted) and also Treaty Article XXVI A(5) (which provides that nothing in Treaty Article XXVI A shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's revenue claim by the requested State). The best way to harmonize these provisions is to interpret Treaty Article XXVI A(10)(b) as clarifying that neither Contracting State has an obligation to carry out administrative measures of a different nature than those used in the collection of its own *finally determined* taxes. *Cf. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . [e.g.,] because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . . ."). In fact, it would be a very unusual step to require the IRS to verify that all requirements of Canadian law and Canadian administrative procedure were followed in making the revenue claim that the Treaty has tasked the IRS with collecting. *Cf.* I.R.C. § 6330(c)(1) ("The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met."). Likewise, it would be untenable for the IRS to grant a collection alternative, such as an installment payment arrangement or an offer-in-compromise,[8] on behalf of the CRA.[9] Finally, we note that we are unaware of any public policy reason for ensuring CDP rights with respect to accepted Canadian revenue claims for which the taxpayer's analogous Canadian rights have lapsed or been exhausted.

Ms. Ryckman argues that to the extent Treaty Article XXVI A conflicts with the CDP statutes, the Code sections must prevail since they were enacted later in time.[10]

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[8] In fact, the acceptance of an offer-in-compromise would reduce the amount of the revenue claim—improperly impeding the CRA from collecting the full amount of Canadian tax due.

[9] We have not been asked (and we decline to address) whether Ms. Ryckman could pursue collection alternatives directly with the CRA.

[10] The CDP statutes were added to the Code by the IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746–50, and would clearly be controlling under the last-in-time rule if the Treaty and the CDP statutes could not be harmonized. For the reasons set forth in this Opinion, we see no reason to resort to that rule. Furthermore, the

See Whitney, 124 U.S. at 194. However, Treaty Article XXVI A does not conflict with either CDP statute. Rather, while those statutes by default provide taxpayers with certain rights to restrain collection, they also limit administrative and judicial

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last-in-time rule is analogous to the doctrine of implied repeal, under which courts give precedence to a later-in-time statute that contradicts an earlier one (but first endeavor to interpret the statutes to avoid a conflict). *See Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring) ("The [last-in-time rule] is quite similar to the familiar doctrine against implied repeal of statutes—under which courts will not interpret an ambiguous statute to repeal a prior statute."). As the Supreme Court reminds us: "'[R]epeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (second alteration in original) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). The Supreme Court has clarified this principle as follows: "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." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). What that means here is that the provisions for collection of finally determined Canadian revenue claims set forth by the earlier enacted Treaty should not be subsumed by the more general CDP statutes (which are not by their terms limited to any particular type or types of tax). Further, the U.S. Court of Appeals for the Ninth Circuit, to which an appeal of this case would lie absent a contrary stipulation by the parties, *see* I.R.C. § 7482(b)(1)(G)(i), has adopted a "minor exception" corollary to the doctrine of implied repeal, under which, "by creating minor exceptions to later-enacted statutes based on earlier ones, both statutes can be preserved," *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1070 (9th Cir. 2010) (quoting *Lujan-Armendariz v. INS*, 222 F.3d 728, 744 (9th Cir. 2000)); *see also Donaldson v. United States*, 653 F.2d 414, 418 (9th Cir. 1981). Because we follow a court of appeals decision that is squarely on point if appeal of our decision lies to that court of appeals alone, we take heed of relevant Ninth Circuit precedent here. *See Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). The Ninth Circuit has clarified that the presence of a "notwithstanding any other law" clause in the later-enacted statute may defeat the minor exception corollary. *See United States v. Novak*, 476 F.3d 1041, 1052–53 (9th Cir. 2007). However, as noted in the text above, the CDP statutes do not contain a "notwithstanding" clause. Therefore, to the extent that our interpretation of Treaty Article XXVI A is construed as potentially conflicting with the CDP statutes (a construction we reject), the last-in-time rule still does not apply in favor of the CDP statutes. Rather, Treaty Article XXVI A might then be seen as a minor exception to the general CDP statutes (an exception involving only the narrow class of accepted Canadian revenue claims). "At most this leaves a small puncture in a broad shield." *Donaldson*, 653 F.2d at 418.

review in certain circumstances. Treaty Article XXVI A, as well, forecloses those default rights in the context of Canadian revenue claims accepted by the IRS.[11] Neither CDP statute provides that its provisions apply notwithstanding any other law. By contrast, in *Whitney*, 124 U.S. at 192–93, a treaty provided that the United States would not impose any higher duties than those specified in the treaty on certain imports from the Dominican Republic, while a later U.S. statute imposed duties "of general application, making no exception in favor of goods of any country." In such a true conflict as that, the Supreme Court held that the later-in-time law must prevail. *Id.* at 194. In this case, by contrast, it is entirely possible to construe the CDP statutes and Treaty Article XXVI A so as to give effect to both, and we are therefore bound to do so. *Whitney*, 124 U.S. at 194. Moreover, Treaty Article XXVI A does not fairly admit of a construction under which Ms. Ryckman would have additional administrative or

[11] The CDP statutes provide (among other things) prerequisites for the existence of a taxpayer's CDP rights: The taxpayer must timely request a hearing, I.R.C. §§ 6320(a)(3)(B), 6330(a)(3)(B); Treas. Reg. § 301.6330-1(b)(2), Q&A-B2, and the taxpayer generally is not entitled to more than one CDP hearing opportunity per tax period, I.R.C. §§ 6320(b)(2), 6330(b)(2); Treas. Reg. § 301.6330-1(d)(2), Q&A-D1. (We do note however that the 30-day deadline for the taxpayer to request a CDP hearing after receiving a lien or levy notice, *see* I.R.C. §§ 6320(a)(3)(B), 6330(a)(3)(B), may be equitably tolled where the circumstances warrant it, *Organic Cannabis Found., LLC*, 161 T.C. at 45. By contrast, Treaty Article XXVI A(2) and (3) provide (by implication) that those prerequisites are deemed unsatisfied in the case of an accepted Canadian revenue claim. (That is, Treaty Article XXVI A(2) and (3) in effect direct the IRS to treat the taxpayer, for purposes of section 6330, as though she either failed to timely request a CDP hearing or already received one.) Therefore, the CDP statutes and Treaty Article XXVI A(2) and (3) address different subject matters—the prerequisites for CDP rights in the one case, and conditions for deeming those prerequisites unsatisfied in the other—and thus cannot conflict with each other. (For instance, the CDP statutes nowhere say that their prerequisites can never be deemed or treated as unsatisfied. Likewise, Treaty Article XXVI A never provides a different set of prerequisites for CDP rights than those provided in section 6330.) Treaty Article XXVI A(3) instructs the United States to treat an accepted Canadian revenue claim as a finally determined revenue claim under U.S. law concerning collection (of which the CDP statutes are an instance). This instruction does not contradict the CDP statutes because the hearing rights they afford do not apply to finally determined revenue claims in the first place.

judicial rights such as those to a CDP hearing with respect to the NFTL. *Cf. Stuart*, 489 U.S. at 368.[12]

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[12] The dissenting opinion points to the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Japan-U.S., Nov. 6, 2003, T.I.A.S. No. 04-330, as Amended by the Protocols signed on November 6, 2003, T.I.A.S. No. 04-330, and January 24, 2013, S. Treaty Doc. No. 114-1 (2015) (Japan-U.S. Convention), and the U.S. Treasury Department's Technical Explanation of the 2013 Protocol as evidence for a contrary interpretation of the Treaty. *See* dissenting op. pp. 74–75. Article 27 of the Japan-U.S. Convention institutes a mutual collection assistance regime similar to that under the Treaty, and the Technical Explanation indicates that outstanding CDP rights do not preclude a U.S. revenue claim from being "finally determined." However, the Japan-U.S. Convention cannot be taken as evidence (other than evidence by contrast) of what the United States and Canada agreed to in the Treaty with regard to CDP rights. This is because there are at least four significant differences between the Japan-U.S. Convention and the Treaty that bear on the CDP rights issue:

1. Article 27(5) of the Japan-U.S. Convention defines a revenue claim as "finally determined" not when all administrative and judicial rights "to restrain collection" in the applicant State have lapsed or been exhausted (as in Treaty Article XXVI A(2)), but instead when all administrative and judicial rights "to dispute or appeal the revenue claim" have lapsed or been exhausted. The latter definition, unlike the former, does not clearly encompass challenges to "collection" as opposed to the "liability" amount.

2. Paragraph 15(a)(i) of the 2003 Protocol to the Japan-U.S. Convention provides that "[f]or the purposes of evaluating the final determination of a revenue claim [in the context of Article 27(5)] . . . in the case of the United States, any administrative or judicial rights available to the taxpayer in connection with the revenue claim that arise after the collection of the revenue claim . . . shall not be taken into account." The Treaty contains no comparable proviso.

3. Article 27(6) of the Japan-U.S. Convention provides that once a revenue claim has been accepted, it "shall be collected by the requested State as though such revenue claim were the requested State's own revenue claim in accordance with the laws applicable to the collection of the requested State's own revenue claims." This provision is markedly different from Treaty Article XXVI A(3), which requires the requested State to collect an accepted revenue claim as though it were its own revenue claim "finally determined in accordance with the laws applicable to the collection of the requested State's own taxes." (Emphasis added.) It is telling that the words "finally determined" were removed from the collection procedures in the Japan-U.S. Convention.

D. *The IRS's Determination on Ms. Ryckman's Hearing Request*

Because Ms. Ryckman had no additional administrative or judicial rights in the United States under the CDP statutes with respect to the NFTL, neither statute imposed any obligations on the IRS in its treatment of her hearing request. Therefore, the IRS's denial letter foreclosing Ms. Ryckman's CDP hearing request was not a determination letter subject to judicial review under section 6330(d)(1), and we are without jurisdiction to consider Ms. Ryckman's Petition.

To reflect the foregoing,

An order of dismissal for lack of jurisdiction will be entered.

Reviewed by the Court.

KERRIGAN, FOLEY, NEGA, JONES, GREAVES, and MARSHALL, *JJ.*, agree with this opinion of the Court.

BUCH, PUGH, ASHFORD, URDA, TORO, and WEILER, *JJ.*, dissent.

JONES, *J.*, concurring: I join the opinion of the Court in full. I write separately to underscore why the Constitution requires steadfast adherence to the text of the Canada-U.S.

4. Article 27(7) of the Japan-U.S. Convention provides, in relevant part, that "acts of collection carried out by the requested State in pursuance of an application for assistance, which, according to the laws of the applicant State, would have the effect of suspending or interrupting the period of limitation on the collection of a revenue claim in the applicant State if carried out by the applicant State, shall also have this effect with respect to the revenue claim under the laws of the applicant State." There is no comparable provision in the Treaty, which means that if Ms. Ryckman were given a CDP hearing, the relevant Canadian periods of limitation on collection would continue to run for the duration of that hearing and any subsequent judicial action. (Canada's Income Tax Act, R.S.C. 1985, c. 1, §§ 222(8)(a) and 225.1, pauses the Canadian period of limitation on collection if the taxpayer appeals the tax assessment in a Canadian court, but no mention is made of appeals to any foreign collection authority or foreign court.) This scenario may well demonstrate at least one reason why Treaty Article XXVI A(5) clarifies that the Treaty does not provide for any further administrative or judicial review of Canada's finally determined revenue claims by the United States.

Income Tax Treaty,[1] which is an agreement that was negotiated and duly enacted pursuant to the authority vested in the political branches under our constitutional scheme. The Court's role in interpreting treaties is to faithfully interpret the text of the agreement, and the opinion of the Court is consistent with that mandate.

The Treaty Clause of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2. The Canada-U.S. Income Tax Treaty is one such treaty, duly enacted by the authority vested in the President, by and with the advice and consent of the Senate. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506 (2008). Further, as the opinion of the Court explains, we give the terms of the Treaty their ordinary meaning unless a more restricted interpretation is clearly intended. *See, e.g.*, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982); *Bhutta v. Commissioner*, 145 T.C. 351, 360 (2015); *see also* op. Ct. pp. 56–57. "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Am., Inc.*, 457 U.S. at 180 (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)); *see also Bhutta*, 145 T.C. at 360; op. Ct. pp. 56–57.

Treaties generally should be liberally construed to give effect to their purpose. *See, e.g.*, *United States v. Stuart*, 489 U.S. 353, 368 (1989). However, courts "may not read international treaties so broadly as to create unintended benefits or to reach parties not within the scope of a treaty's language." *Int'l Bank for Reconstr. & Dev. v. Dist. of Columbia*, 171 F.3d 687, 691 (D.C. Cir. 1999) (citing *Maximov*, 373 U.S. at 55–56);

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[1] Convention With Respect to Taxes on Income and on Capital, Can.-U.S., Sept. 26, 1980, T.I.A.S. No. 11,087, as Amended by the Protocols signed on June 14, 1983, T.I.A.S. No. 11,087 (Protocol 1), and March 28, 1984, T.I.A.S. No. 11,087 (Protocol 2), *as reprinted in* 1986-2 C.B. 258. It was further amended by Protocols signed on March 17, 1995, T.I.A.S. No. 97-1216 (Protocol 3), July 29, 1997, T.I.A.S. No. 97-1216 (Protocol 4), and September 21, 2007, T.I.A.S. No. 08-1215.2 (Protocol 5). The opinion of the Court refers to the Convention and the Protocols collectively as the Treaty. *See* op. Ct. note 1.

see also Baturin v. Commissioner, 31 F.4th 170, 176 (4th Cir. 2022), *rev'g and remanding* 153 T.C. 231 (2019).

The United States ratified the Treaty with the expectation that it would be interpreted according to its terms. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (citing 1 Restatement (Third) of Foreign Relations Law of the United States § 352(1) (Am. L. Inst. 1986)). By agreeing to assist Canada under these terms, the United States is bound in a matter of grace and comity. *See Opati v. Republic of Sudan*, 590 U.S. 418, 421 (2020). Further, the Treaty embodies those judgments that the Constitution reserves to the political branches. *See* U.S. Const. art. II, § 2, cl. 2. Therefore, faithful adherence to and interpretation of the text of the Treaty is critical so as not to upset these complex and delicate foreign policy judgments. *See Borochov v. Islamic Republic of Iran*, 94 F.4th 1053, 1067 (D.C. Cir. 2024).

The opinion of the Court closely adheres to the text of the Treaty. Specifically, the opinion of the Court carefully and persuasively considers the phrases "finally determined" and "restrain collection" in Article XXVI A(2). *See* op. Ct. pp. 58–60.[2] Further, the opinion of the Court hews to the plain text of the Treaty, which prohibits the provision of any rights of administrative or judicial review of a Canadian revenue claim by the United States. Specifically, Article XXVI A(5) of the Treaty provides that "[n]othing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested state, based on any such rights that may be available under the laws of either Contracting State." *See* op. Ct. pp. 58–60. Accordingly, the Court properly concludes that an accepted Canadian revenue

[2] Although the definition in Article XXVI A(2) is formulated solely in terms of the applicant State (Canada here), *see* dissenting op. pp. 72–73, it seems rather unlikely that the Treaty partners intended the phrase "finally determined" as used in Article XXVI A(3) (in regard to the requested State (the United States here)) to be defined without reference to the definition just given in Article XXVI A(2).

And is noteworthy that Article XXVI A(3) refers to the laws applicable to *collection*, not simply *assessment*. CDP rights are part of the collection process. So it would be odd to determine that a U.S. tax liability is "finally determined in accordance with the laws applicable to . . . collection" when the taxpayer's rights to a CDP hearing have not yet lapsed or been exhausted.

claim must be treated as a U.S. tax assessment for which all rights to restrain collection have been exhausted. *See* op. Ct. p. 58.

The dissent misses the forest for the trees in its effort to create friction between the Code and the Court's interpretation of the Treaty. *See* dissenting op. pp. 69–70. In doing so, it forsakes the crucial perspective that this case arises under a treaty, duly negotiated and approved by the political branches. The Court's interpretation is respectful of our role in the constitutional scheme and faithful to the text of the agreement between the sovereigns. The dissent's reading would impermissibly expand the scope of the Treaty and create benefits unsupported by its plain text. *See, e.g.*, *Int'l Bank for Reconstr. & Dev.*, 171 F.3d at 691 (citing *Maximov*, 373 U.S. at 55–56); *see also* op. Ct. pp. 58–59. The opinion of the Court correctly avoids opening the door to a legal process that the text of the Treaty does not support and that the political branches have not clearly authorized.

FOLEY, NEGA, and COPELAND, *JJ.*, agree with this concurring opinion.

URDA, *J.*, dissenting: The opinion of the Court posits that the United States relinquished by treaty in 1995 procedural safeguards that Congress did not enact until 1998. The opinion of the Court's reading of the Treaty—at once too broad and too narrow—generates an irreconcilable conflict between the Treaty and the CDP procedures subsequently enshrined in the Code. The later enactment must control. The attempt of the opinion of the Court to harmonize the two is little more than wishing away the problem that it birthed. Nonetheless, harmony *is* possible in this case, as the applicable Treaty provisions, properly read together, are fully consistent with the procedural protections governing collection that Congress saw fit to enact. Under that harmonious reading of the Treaty and the CDP procedures, Ms. Ryckman prevails.

I.

A survey of the conflict between the Treaty and the Code that the opinion of the Court has created must be grounded in the legal principles governing this area. “Where the Code and a treaty pertain to the same subject matter but manifest an irreconcilable conflict, ‘the last expression of the sovereign will * * * control.’” *Adams Challenge (UK) Ltd. v. Commissioner*, 156 T.C. 16, 44 (2021) (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889)). “A conflict is found only where there is ‘a clear repugnancy’ between the statute and the treaty.” *Id.* at 45 (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 457 (1945)). On the other hand, “if there is no conflict between the two, then the Code and the treaty should be read harmoniously, to give effect to each.” *Id.* at 44 (quoting *Pekar v. Commissioner*, 113 T.C. 158, 161 (1999)).

The Supreme Court has “held ‘that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.’” *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)).[1] To put it another way, “it is within Congress’ power to change domestic law, even if the law originally arose from a self-executing treaty.” *Noriega v. Pastrana*, 564 F.3d 1290, 1295–96 (11th Cir. 2009). “Whether or not the United States ‘undertakes’ to comply with a treaty says nothing about what laws it may enact. The United States is *always* ‘at liberty to make . . . such laws as [it] think[s] proper.’” *Medellín v. Texas*, 552 U.S. 491, 509 n.5 (2008) (quoting *Todok v. Union State Bank of Harvard, Neb.*, 281 U.S. 449, 453 (1930)).

The treaty interpretation put forward by the opinion of the Court produces an irreconcilable conflict with procedural protections later enacted in sections 6320 and 6330. The opinion of the Court reads Article XXVI A to foreclose access to any procedural safeguards with respect to the issuance of an NFTL to collect a liability under the Treaty. Just three years after the Treaty’s ratification, however, Congress saw fit to condition the IRS’s use of liens and levies to collect a liability on access to procedural safeguards including a CDP hearing and judicial review. As there is a clear repugnancy

[1] The opinion of the Court attempts to avoid controlling treaty interpretation principles by importing the doctrine of implied repeal, which the Court thinks provides firmer footing. *See* op. Ct. note 10. The doctrine of implied repeal has no applicability to this treaty interpretation question.

between the Court's interpretation of the Treaty (no rights tied to an NFTL filing) and the statutory provisions (yes, rights), the later enactment must control. *See, e.g.*, *Medellín*, 552 U.S. at 509 n.5; *Breard*, 523 U.S. at 376; *see also Adams Challenge*, 156 T.C. at 44.

The opinion of the Court makes a half-hearted attempt to harmonize the two authorities, but the clash remains. The opinion of the Court hangs its hat on the fact that "[n]either CDP statute provides that its provisions apply notwithstanding any other law." *See* op. Ct. p. 62. This view is askew. The CDP statutes did not need any additional text to make clear that they trump prior conflicting law, including treaties. *See, e.g.*, *Medellín*, 552 U.S. at 509 n.5; *Breard*, 523 U.S. at 376. And where Congress has wished to preserve earlier agreements with other nations in the face of conflicting subsequent legislation, it has added text to that effect, which it did not do here. *See* S. Rep. No. 100-445, at 318–19 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4515, 4830 (collecting examples where Congress circumscribed scope of certain tax provisions in deference to preexisting treaty obligations); *see also* 28 U.S.C. § 1604 (stating that the Foreign Sovereign Immunities Act's baseline grant of immunity to foreign sovereigns is "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment" of the Act); *Simon v. Republic of Hung.*, 77 F.4th 1077, 1091 (D.C. Cir. 2023) (discussing "treaty exception" text in the Foreign Sovereign Immunities Act); *Moore v. United Kingdom*, 384 F.3d 1079, 1083–84 (9th Cir. 2004) (same).[2]

In summary, the opinion of the Court endorses an interpretation of the relevant Treaty provisions that presents an irreconcilable conflict with the later-enacted statutory CDP provisions. The opinion of the Court fails to pay due

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[2] In a note the opinion of the Court states that Paragraphs 2 and 3 of the Treaty here "provide (by implication) that those [CDP] prerequisites are deemed unsatisfied in the case of an accepted Canadian revenue claim." *See* op. Ct. note 11. The Treaty contains no support for this novel concept and, as we will describe below, the text of the Treaty does not support the attempt to conflate the distinct requirements of Paragraphs 2 and 3. The Court is attempting to fit the CDP regime on a procrustean bed of its own design, rather than allowing the Treaty and the regime to operate harmoniously. To the extent that they cannot (as seems to be the case under the opinion of the Court's view), the CDP regime must win.

heed to the long-established rules governing the resolution of such conflicts, which dictate that the later-in-time statute applies to render the Treaty provisions null to the extent of the conflict. Given the conflict that plainly flows from the opinion of the Court's interpretation, Ms. Ryckman should be entitled to avail herself of the later enacted statutory protections Congress put in place before the IRS attempts to collect a liability by lien or levy.[3]

II.

And yet it does not have to be this way. The conflict generated by the Court's interpretation may be avoided by a better reading of the relevant Treaty provisions.

"In interpreting treaties, 'we begin with the text of the treaty and the context in which the written words are used.'" *Water Splash, Inc. v. Menon*, 581 U.S. 271, 276 (2017) (quoting

[3] The concurrence emphasizes the importance of faithful treaty construction and suggests that this dissent fails to accord the proper deference due to the actions of the political branches. *Au contraire*. Like the concurrence, this dissent respects the political sensitivities accompanying treaties and rejoices in the splendors of our separation of powers, which undergirds our system of government. But this case does not implicate those principles. Congress's ratification of a treaty places it on par with any other law that has been passed by Congress and signed by the President, and Congress remains free to change its mind. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."). The political branches have underscored this point in the tax context by enacting section 7852(d)(1), which provides that "[f]or purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law." *See also* S. Rep. No. 100-445, at 325, *reprinted in* 1988 U.S.C.C.A.N. at 4836 ("[T]he committee finds it disturbing that some assert that a treaty prevails over later enacted conflicting legislation in the absence of an explicit statement of congressional intent to override the treaty; that it is treaties, not legislation, which will prevail in the event of a conflict absent an explicit and specific legislative override."). *See generally id.* at 321–28, *reprinted in* 1988 U.S.C.C.A.N. at 4832–40 (discussing at length treaty-statute interactions under the U.S. Constitution, as well as common interpretive errors). Under the opinion of the Court's view of what the Treaty says, a conflict exists between the Treaty provisions here and Congress's subsequent enactment of safeguards that click into place when the IRS collects by lien or levy. Its later choice governs.

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988)); *see also Air Fr. v. Saks*, 470 U.S. 392, 396–97 (1985); *Toulouse v. Commissioner*, 157 T.C. 49, 57–58 (2021). "The plain meaning of a treaty's text controls unless its effect is contrary to the intent or expectations of the treaty partners." *Toulouse*, 157 T.C. at 57; *accord Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982); *cf. Rocca v. Thompson*, 223 U.S. 317, 332 (1912) ("[T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.").

Treaties "are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (quoting *Saks*, 470 U.S. at 396). "Because a treaty ratified by the United States is 'an agreement among sovereign powers,'" the Supreme Court has considered as "'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellín*, 552 U.S. at 507 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)); *see also United States v. Stuart*, 489 U.S. 353, 365–66 (1989); *Adams Challenge*, 156 T.C. at 45.

"The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *Stuart*, 489 U.S. at 369 (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984)). "Similarly, '[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.'" *Id.* (quoting *Sumitomo*, 457 U.S. at 184–85); *see also United States v. Global Fishing, Inc.* (*In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*), 634 F.3d 557, 568 (9th Cir. 2011). This Court has previously "found the Treasury Department's technical explanations of income tax treaties helpful in interpreting treaty provisions." *Smith v. Commissioner*, 159 T.C. 33, 39 n.11 (2022). We have likewise considered IRS guidance memoranda “to show the IRS’ position.” *Adams Challenge*, 156 T.C. at 43 n.14.

“Where a treaty and a statute relate to the same subject, courts attempt to construe them to give effect to both.” *Toulouse*, 157 T.C. at 58; *accord Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Adams Challenge*, 156 T.C. at 44. Specifically, “[i]n non-tax contexts the Supreme Court has sought to read statutes in harmony with treaties and rejected constructions of terms that would unnecessarily create conflict between the two.” *Adams Challenge (UK), Ltd. v. Commissioner*, 154 T.C. 37, 62 n.18 (2020) (citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968) (declining to interpret a statute to abrogate hunting and fishing rights granted to Native Americans by a treaty)); *accord United States v. Payne*, 264 U.S. 446, 448 (1924) (stating that a later-enacted statute, while controlling in case of conflict, “should be harmonized with the letter and spirit of the treaty, so far as that reasonably can be done”); *Whitney*, 124 U.S. at 194 (stating that, where a treaty and legislation relate to the same subject, “the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either”).

The Treaty provisions here can—and thus should—be read harmoniously with the subsequently enacted safeguards in sections 6320 and 6330. The relevant Treaty provisions contemplate a distinction between the substance of the revenue claim underlying the request for assistance and the procedures by which the claim is to be collected. The Treaty uses the law of the applicant country as to the former and the requested country as to the latter.

Paragraphs 2 and 5 of the Treaty relate to *what* is to be collected. Paragraph 2 requires that an applicant state certify that the claim is finally determined under the applicant state’s own laws, which is defined to mean “when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial right of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.” Paragraph 5 then clarifies that the acceptance of the claim prohibits any merits-based challenge, providing that “[n]othing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State." These provisions enshrine the law of the applicant state as governing the substantive validity of the underlying claim. *See* Treasury Department Technical Explanation of the U.S.-Canada Income Tax Treaty, as Amended by the Protocol Signed on June 14, 1983, and the Protocol Signed on March 28, 1984, at 77, https://www.irs.gov/pub/irs-trty/canatech.pdf (last visited July 23, 2024) ("Thus, when an application for collection assistance has been accepted, the substantive validity of the applicant State's revenue claim cannot be challenged in an action in the requested State."); Canada: Senate Foreign Relations Committee Report 06/13/1995 (1980 Protocol), Tax Treaties (RIA), (Westlaw 2024), RIA TAXT 1370 ("Nothing in the assistance in collection article shall be construed as creating or providing any rights of administrative or judicial review of the applicant country's finally determined revenue claim by the requested country . . . .").

On the other side of the ledger lie Paragraphs 3, 4, and 10, which address *how* the claim is to be collected. Paragraph 3 provides that, once a revenue claim of an applicant state is accepted, that claim "shall be collected by the requested State as though such revenue claim were the requested State's own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State's own taxes." Paragraph 4 puts meat on the bones, assigning the accepted claim a specific status in the requested state's tax regime. Thus, under Paragraph 4(a), a finally determined Canadian revenue claim is "treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received." For its part, Paragraph 10(b) provides that the Treaty does not "[i]mpos[e] . . . the obligation to carry out administrative measures of a different nature from those used in the collection of its own taxes or that would be contrary to its public policy." Read together, these provisions illustrate that the law of the requested state supplies the procedures governing collection.

The opinion of the Court goes astray by grafting the understanding of "finally determined" from the specific context of an applicant state's application for assistance onto the requested state's manner of collecting the claim. The definition of "finally determined" set forth in Paragraph 2 is tailored to the obligations of the applicant state and cannot be imported into the Paragraph 3 context, which deals exclusively with the conduct of the requested state. Moreover, Paragraphs 4, 5, and 10 would seem to have little function if "finally determined" under Paragraph 3 meant that all procedural rights under the requested state's law were deemed to have lapsed and been exhausted. And the opinion of the Court's approach would appear to give priority to a revenue claim from Canada in contravention of Paragraph 7, with the removal of CDP procedures ostensibly allowing a Canadian claim to cut ahead of a U.S. counterpart that must comply with such procedures.

The most apt reading of the relevant provisions together is that the exhaustion text of Paragraph 2 is confined to that Paragraph and that the normal collection procedures of the requested state apply.[4] Under this reading, there is no conflict with the CDP safeguards, including the requirements of a hearing and judicial review.

The postratification actions of the implementing agency provide support for this view. The IRS considered the interplay between the Treaty and the CDP procedures in 1999, taking the position (in a nonprecedential memorandum) that "sec. 6330 applies to treaty levies but that only issues concerning the Service's administrative collection procedures (e.g., challenges as to whether the procedural requirements have been met for the Service's use of summonses, liens, and/or levies) and not issues concerning the liability itself, may be raised at a hearing." I.R.S. Chief Couns. Adv. Mem. 199939034, 1999 WL 779472 (Oct. 1, 1999).[5]

The opinion of the Court attempts to refute this point by noting that the IRS switched positions six years later, citing *Internal Revenue Manual* provisions offering administrative options rather than the CDP regime with respect to the

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[4] Although Paragraph 2 prefaces the definition of "finally determined" with the phrase "[f]or the purposes of this Article," this definition is inherently limited to a revenue claim of an applicant state by its own text, which exclusively refers to rights in an "applicant state." This reading does not render the introductory phrase surplusage as the concept of a revenue claim of an applicant state being "finally determined" recurs in Paragraphs 3 and 5.

[5] We have previously considered such nonprecedential memoranda "to show the IRS' position." *Adams Challenge*, 156 T.C. at 43 n.14.

Treaty. *See* op. Ct. note 7. This course of conduct undermines, rather than bolsters, the opinion of the Court's interpretation of "finally determined." That interpretation is premised on the Treaty's purported foreclosure of "all *administrative* and judicial rights." The IRS plainly does not see it that way, as it has offered first judicial, then administrative, processes since at least 1999.

The Government's approach to a similar Collection Assistance provision in the tax treaty with Japan, another close treaty partner, sheds further light. *See* Treasury Department Technical Explanation of the 2013 Protocol Amending the U.S.-Japan Income Tax Treaty 23, https://home.treasury.gov/system/files/131/Treaty-Japan-Pr2-TE-10-29-2015.pdf (last visited July 23, 2024). This technical explanation states that "Paragraph 5 requires the applicant State to certify that the revenue claim for which collection assistance is sought has been 'finally determined,'" a term defined in the same manner as in the 1995 protocol to the Treaty at issue in this case. The technical explanation goes on to clarify that neither CDP rights in the United States nor certain rights under Japanese law (dating to 1962) preclude a revenue claim from being "finally determined" under the relevant law. Although the opinion of the Court goes to great lengths to point out differences between the Treaty here and the treaty with Japan, *see* op. Ct. note 12, it misses the key lesson from the Japanese treaty: The postratification conduct suggests that the United States has embraced the notion that CDP rights happily coexist with a "finally determined" claim, which is the result the text read harmoniously supports here.

The opinion of the Court objects, however, that this result would grant two bites at the procedural apple—first in Canada and then in the United States. *See* op. Ct. pp. 58–59. The Treaty allows for just that, and it makes sense to do so. The Treaty is structured to ensure that, before requesting assistance, the applicant country exhausts all remedies available to it. One can well understand why sovereign nations would wish certitude before entertaining an application for collection assistance. *See, e.g.*, Richard E. Andersen, *Andersen Analysis of United States Income Tax Treaties* ¶ 24.03[1][b][ii] (2010) ("In accordance with th[e] doctrine [of the revenue rule], . . . the United States typically does not assist another country in the collection of taxes."). Although the opinion of the Court reflects an ostensible belief that the exhaustion of remedies in Canada should count as the exhaustion of remedies in the United States, this position lacks any support in the Treaty, which establishes that the law of the requested state governs collection procedures, or from Congress, which has not seen fit to strip away American procedural safeguards where a close Treaty partner has conducted its own proceedings.

The opinion of the Court also observes that it would be passing strange for the IRS to be in the position of verifying requirements of Canadian law or to grant a collection alternative. It is not odd, however, for sovereign nations to respect and abide by each other's collection procedures. The practical concerns recited by the opinion of the Court are mole hills, nothing more. Verification in this context would be accomplished by confirming that an application was properly made under the Treaty. And the grant of a collection alternative would not compromise Canada's tax claim but merely represent the IRS's best judgment as to what part of the claim may be collected and which collection mechanisms the United States will employ to do so.

To sum up, the Treaty can be harmonized with the later enacted CDP safeguards in sections 6320 and 6330. Under a correctly harmonized view, Ms. Ryckman is entitled to the protections outlined in those sections before the IRS moves to collect by lien or levy.

BUCH, PUGH, ASHFORD, TORO, and WEILER, *JJ.*, agree with this dissent.

VARIAN MEDICAL SYSTEMS, INC. AND SUBSIDIARIES, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 8435-23. Filed August 26, 2024.

I.R.C. § 245A, which was enacted by the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, § 14101, 131 Stat. 2054, 2189 (2017), provides a deduction (DRD) for certain dividends received by a U.S. corporation from certain foreign corporations. Given its formulation, the DRD had the potential to interact with existing I.R.C. § 78. As in effect before the TCJA, I.R.C. § 78 provided that, for taxpayers who claimed foreign tax credits, a specified amount "shall be treated for purposes of this title (other than [I.R.C. §] 245) as a dividend received by such domestic corporation from the foreign corporation." TCJA amended I.R.C. § 78 to provide that amounts treated as dividends under I.R.C. § 78 do not qualify for the DRD under I.R.C. § 245A. But in certain circumstances, TCJA's amendments to I.R.C. § 78 did not take effect until a tax year starting after I.R.C. § 245A took effect. Relying on this effective date mismatch, for fiscal year 2018, P claimed the DRD for an amount it treated as a dividend under I.R.C. § 78. In its Motion for Partial Summary Judgment, P argues that it is entitled to the DRD for this amount plus an additional amount alleged in its Petition. R disagrees in his own Cross-Motion for Partial Summary Judgment. Additionally, R argues in the alternative that, if we find P is entitled to the DRD for amounts treated as dividends under I.R.C. § 78, then I.R.C. § 245A(d)(1) limits the foreign tax credits to which P would otherwise be entitled. *Held*: P is entitled under I.R.C. § 245A to a deduction for amounts properly treated as dividends under I.R.C. § 78 for its 2018 tax year. *Held, further*, Treas. Reg. § 1.78-1 does not alter this conclusion because it cannot contravene the clear statutory text. *Held, further*, I.R.C. § 245A(d)(1) disallows foreign tax credits to the extent they are attributable to amounts P properly treats as dividends under I.R.C. § 78 and deducts under I.R.C. § 245A. *Held, further*, P's Motion will be granted in part, and R's Motion will be granted in part.

Jean A. Pawlow, *Andrew C. Strelka*, *Eric J. Konopka*, and *Alexandra B. Clionsky Kelly*, for petitioner.

Andrew M. Tiktin, *David J. Berke*, *Meenu Kapai*, *Usha Ravi*, and *H. Clifton Bonney, Jr.*, for respondent.

OPINION

TORO, *Judge*: We must address in this deficiency case two questions of first impression: (1) how do two effective date provisions enacted by the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (2017), and an existing provision of the Internal Revenue Code (section 78)[1] interact and (2) how does a new Code provision enacted by the TCJA

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[1] Unless otherwise indicated, statutory references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C. or Code), in effect at all relevant times, regulation references are to the *Code of Federal Regulations*, Title 26 (Treas. Reg.), in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

(section 245A) actually apply? We answer both questions by following the plain text of the relevant provisions.

Congress enacted the TCJA in 2017. Among other things, the TCJA added to the Code new section 245A, which allows a domestic corporation a deduction for certain dividends received from foreign subsidiaries. Section 245A applies to "distributions made after . . . December 31, 2017." TCJA § 14101(f), 131 Stat. at 2192.

Because the deduction under section 245A applies to dividends received by a domestic corporation from a foreign corporation, it had the potential to interact with existing section 78. As in effect before the adoption of the TCJA, that section provided that, for taxpayers who claimed foreign tax credits, a specified amount "shall be treated for purposes of this title (other than section 245) as a dividend received by such domestic corporation from the foreign corporation."

Recognizing that section 245A might otherwise allow a taxpayer who claims foreign tax credits to deduct a dividend that section 78 would have deemed the taxpayer to receive, the TCJA amended section 78 to preclude that result. But, instead of using the same effective date that it applied to section 245A, the TCJA amended section 78 for "taxable years of foreign corporations beginning after December 31, 2017, and . . . taxable years of United States shareholders in which or with which such taxable years of foreign corporations end." TCJA § 14301(d), 131 Stat. at 2225.

For some taxpayers—including those with foreign subsidiaries with fiscal years (that is, foreign subsidiaries whose taxable years do not run from January 1 to December 31 of each year)—this effective date mismatch created a window during which section 245A was in effect, but the amendments to section 78 were not. The question before us is whether, during that window, section 245A provided one such taxpayer, Varian Medical Systems, Inc. (Varian), a deduction for a dividend that it was deemed to receive under section 78.

Seeking partial summary judgment, the Commissioner argues that, despite the disparate effective dates, Varian cannot claim a deduction for its section 78 dividend because section 245A permits a deduction only for dividends that are actually distributed (or treated as distributed) from earnings, and, in the Commissioner's view, section 78 dividends do not satisfy this requirement. Alternatively, the Commissioner argues that Treasury Regulation § 1.78-1, as amended June 21, 2019, disallows the deduction.

Varian disagrees, arguing that the operative text of section 245A permits the deduction and that no other provision prohibits it. Varian also argues that Treasury Regulation § 1.78-1 is invalid because it purports to apply amended section 78 to a period starting before the effective date provided in the TCJA. It therefore seeks partial summary judgment in its favor.

Because a plain reading of the statutory text authorizes the deduction under section 245A, we will grant Varian's Motion for Partial Summary Judgment. Relatedly, we will deny the Commissioner's Cross-Motion for Partial Summary Judgment insofar as he asks us to conclude that Varian cannot claim a deduction under section 245A for any section 78 dividend.

The Commissioner also argues that, if Varian is entitled to the deduction, section 245A(d)(1) limits the amount of foreign tax credits Varian may claim. We agree with the Commissioner on this point and therefore will grant his Motion in part.

Background

The following facts are derived from the parties' pleadings and Motion papers. They are stated solely for the purpose of ruling on the Motions before us and not as findings of fact in this case. *See Rowen v. Commissioner*, 156 T.C. 101, 103 (2021) (reviewed).

Originally founded in 1948, Varian is the parent company of a consolidated group of medical device and software manufacturers. Its principal place of business is in Palo Alto, California.

Varian operates through corporations in many different countries, at least some of which are controlled foreign corporations (CFCs) as that term is defined in section 957(a). Varian and its CFCs are fiscal year taxpayers, meaning their taxable years do not end on December 31. *See* I.R.C. § 441(a), (d), (e). As relevant for this case, the fiscal year of Varian and its CFCs started on September 30, 2017, and ended on September 28, 2018 (2018 Year).

Varian filed a consolidated federal income tax return for the 2018 Year. On the return, Varian elected to claim foreign tax credits for foreign taxes that it was deemed to pay under section 960 and was therefore required to "gross up" its taxable income under section 78 by reporting a dividend of approximately $159 million. Varian also claimed a deduction of approximately $60 million under section 245A in connection with the dividend it was treated as receiving under section 78 from its first tier CFCs.

The Commissioner examined Varian's tax return and issued Varian a Notice of Deficiency in which, among other things, he disallowed Varian's claimed deduction under section 245A. The Commissioner also increased Varian's section 78 dividend by nearly $1.9 million.[2] The Commissioner further determined, in the alternative, that if Varian was entitled to deduct its section 78 dividend under section 245A, then "I.R.C. § 245A(d) would disallow any foreign tax credits attributable to that amount. Accordingly, [Varian's] foreign tax credits [would] be reduced by approximately $6,362,356."

Varian timely petitioned our Court for a redetermination of the Commissioner's determinations. In its Petition, Varian alleged that the disallowance of its section 245A deduction was erroneous. Varian also alleged for the first time that it is entitled to additional section 245A deductions (on top of those claimed in its return) of approximately $100 million, primarily related to the portion of its section 78 dividend arising from its lower tier CFCs.

On September 27, 2023, Varian filed the Motion for Partial Summary Judgment now before us. In its Motion, Varian asks us to determine as a matter of law that it is entitled to a deduction under section 245A for its section 78 dividend for the 2018 Year. On December 4, 2023, the Commissioner filed his own Cross-Motion for Partial Summary Judgment asking for, in effect, the opposite conclusion. Further briefing ensued, and we held a hearing on the Motions on May 17, 2024. After the U.S. Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), overruling *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we sought the parties' views on the impact of the *Loper Bright* decision on this case, which they provided on July 29, 2024.

[2] Varian does not dispute this adjustment.

Discussion

I. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, time-consuming, and unnecessary trials. *Fla. Peach Corp. v. Commissioner*, 90 T.C. 678, 681 (1988). The Court may grant summary judgment when there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(a)(2); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). In deciding whether to grant summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the adverse party. *Sundstrand Corp.*, 98 T.C. at 520.

The parties generally agree with respect to the relevant facts, and there is no dispute that we may resolve their Motions as a matter of law.

II. *Legal Principles*

We begin by considering some legal principles established more than 100 years ago.

A. *Historical Background*

The United States has long taxed the worldwide income of its citizens and domestic corporations. *See, e.g.*, *Cook v. Tait*, 265 U.S. 47, 56 (1924). This policy choice creates the potential for double taxation—that is, taxation of the same income by both the United States and another country. *See AptarGroup Inc. v. Commissioner*, 158 T.C. 110, 112 (2022).

To address the risk of double taxation, since 1919 the law has allowed U.S. citizens and domestic corporations to elect to claim a credit for income tax paid to a foreign country. *See* Revenue Act of 1918, ch. 18, § 238(a), 40 Stat. 1057, 1080–81; *see also Burnet v. Chi. Portrait Co.*, 285 U.S. 1, 12 (1932). The law also permitted U.S. corporations that were shareholders in foreign corporations to claim foreign tax credits for certain taxes paid by the foreign corporations. *See* Revenue Act of 1918, ch. 18, § 240(c), 40 Stat. at 1082 (subsequently revised and eventually codified at I.R.C. § 902 by the Internal Revenue Code of 1954, ch. 736, § 902, 68A Stat. 1, 286); *Am. Chicle Co.*

v. United States, 316 U.S. 450, 453–54 (1942); *see also United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 135 (1989). But, while this system eliminated double tax in some situations, it also led to disparate treatment of U.S. corporations that conducted business through foreign branches rather than foreign subsidiaries. *See Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 982 n.21 (5th Cir. 1977). We explain by way of a simplified example.[3]

Imagine that USCo was a U.S. corporation that earned income in the United States and also operated a foreign branch in Country A. The foreign branch was not a separate entity from USCo for federal tax purposes, so its earnings were immediately taxable to USCo in the United States. *See Columbian Rope Co. v. Commissioner*, 42 T.C. 800, 817 (1964).

If USCo's foreign branch had $100 of earnings in Country A, then all $100 would have been immediately taxable to USCo in the United States. Assuming a 20% U.S. corporate tax rate, USCo preliminarily would have owed $20 in U.S. tax. If, however, Country A also taxed the earnings at 15%, then USCo would instead have paid $15 of tax to Country A and would have been entitled to a $15 credit against its U.S. tax. The $15 credit would have offset USCo's preliminary tax liability of $20 in the United States, with the ultimate result that USCo would have owed $5 in U.S. tax.

Now consider AmCo, another U.S. corporation that operated in Country A. But, rather than using a branch, AmCo operated through a foreign subsidiary (F Sub). Unlike a foreign branch, F Sub would have been a separate entity from AmCo for U.S. tax purposes, and its earnings from Country A generally would have been taxable to AmCo only when repatriated in the form of a dividend (or otherwise attributed to AmCo). *See Anderson, Clayton & Co.*, 562 F.2d at 976; *Whirlpool Fin. Corp. & Consol. Subs. v. Commissioner*, 154 T.C. 142, 151–53 (2020) (citing *Textron Inc. & Sub. Cos. v. Commissioner*, 117 T.C. 67, 73 (2001)), *aff'd*, 19 F.4th 944 (6th Cir. 2021); *Vetco Inc. & Subs. v. Commissioner*, 95 T.C. 579, 585 (1990).

If F Sub earned $100 in Country A, and, as in the foreign branch example, Country A imposed $15 of tax on those earnings, F Sub would have $85 to distribute to AmCo.

[3] The example is for illustrative purposes only and does not reflect all the complexities of the foreign tax credit.

And AmCo would owe $17 of U.S. tax on that distribution ($85 × 20% = $17). Note that AmCo's U.S. tax liability would have been lower than USCo's ($17 versus $20). Like USCo, however, AmCo would still have been able to credit the full $15 of tax that F Sub paid to Country A, leaving it with a net U.S. tax liability of $2 ($3 less than USCo).[4]

Thus, AmCo, operating through a foreign subsidiary, would have had a better tax outcome than USCo, operating through a foreign branch. While foreign tax credits eliminated double tax on Country A earnings in both cases, AmCo had less U.S. taxable income than USCo, and thus a larger proportionate credit, because it received only after-tax earnings from Country A. Considering this outcome to be inappropriate, Congress set out to eliminate the disparate taxation of foreign earnings as part of its comprehensive changes to the international tax system in 1962.

B. *Addition of Section 78*

In 1962, Congress enacted the Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960. The Act adopted new section 78 to address the perceived disparity highlighted above.[5] *See* Revenue Act of 1962, § 9(b), 76 Stat. at 1001. Section 78 read as follows:

> Sec. 78. Dividends received from certain foreign corporations by domestic corporations choosing foreign tax credit.
>
> If a domestic corporation chooses to have the benefits of subpart A of part III of subchapter N (relating to foreign tax credit) for any taxable year, an amount equal to the taxes deemed to be paid by such corporation under section 902(a)(1) (relating to credit for corporate stockholder in foreign corporation) or under section 960(a)(1)(C) (relating to taxes

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[4] For a more complete and complex example, see the Report of the Senate Finance Committee on the Revenue Act of 1962 (1962 Senate Finance Committee Report), which set out reasons for enacting section 78. S. Rep. No. 87-1881, at 66–67 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3297, 3368–70.

[5] The Act also introduced subpart F of part III, subchapter N of chapter 1 of subtitle A of the Code. Revenue Act of 1962, § 12(a), 76 Stat. at 1006. Historically, the so-called subpart F provisions have required significant U.S. shareholders of CFCs to pay current U.S. tax on investment income and other types of mostly "portable" income earned through the foreign corporations. *TBL Licensing LLC v. Commissioner*, 158 T.C. 1, 27 n.18 (2022), *aff'd*, 82 F.4th 12 (1st Cir. 2023). For a general discussion of subpart F, see Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations & Shareholders* ¶ 15.61 (2020), Westlaw FTXCORP.

> paid by foreign corporation) for such taxable year shall be treated for purposes of this title (other than section 245) as a dividend received by such domestic corporation from the foreign corporation.

Revenue Act of 1962, § 9(b), 76 Stat. at 1001.

Returning to our simplified example, after the adoption of section 78, if AmCo were to claim foreign tax credits for the $15 it was deemed to pay to Country A, then section 78 would treat AmCo as if it received an additional $15 dividend from F Sub for the year. *See Champion Int'l Corp. v. Commissioner*, 81 T.C. 424, 427 (1983) ("The effect [of section 78 was] to treat the domestic corporation as though it had received a distribution out of the foreign corporation's before-tax profits and then paid the foreign income tax thereon itself."). Therefore, instead of reporting $85 of taxable income, AmCo would report $100 of taxable income, just like USCo (the $85 actual dividend from F Sub plus the $15 deemed dividend under section 78). *See H.H. Robertson Co. v. Commissioner*, 59 T.C. 53, 77 n.13 (1972) ("As a consequence of sec. 78 'gross-up,' the total profits of the foreign corporation in respect of a particular dividend would be taken into account for U.S. tax purposes . . . ."), *aff'd*, 500 F.2d 1399 (3d Cir. 1974) (unpublished table decision). Accordingly, after applying its foreign tax credits, AmCo would owe $5 in U.S. tax (($100 × 20%) – $15 = $5), again like USCo. The adoption of section 78 thus eliminated the perceived tax benefit to U.S. corporations operating through foreign subsidiaries.[6]

After the enactment of section 78, the Department of the Treasury and the Internal Revenue Service (together, Treasury) adopted the first regulation under section 78. *See* T.D. 6805, 1965-1 C.B. 38, 30 Fed. Reg. 3208 (Mar. 9, 1965). In relevant part, the regulation explained that "[a] section 78 dividend shall be treated as a dividend for all purposes of the Code, except that it shall not be treated as a dividend under section 245, relating to dividends received from certain foreign corporations, or increase the earnings and profits of the domestic corporation." Treas. Reg. § 1.78-1(a) (1965). The regulation also explained that section 78 dividends are treated as received in the same taxable year in which the U.S. corporation (1) received the dividend of foreign earnings upon

[6] Again, for a more complete example, see the 1962 Senate Finance Committee Report.

which it was deemed to pay foreign taxes or (2) included in its subpart F income amounts for which it had deemed paid foreign taxes under section 960. Treas. Reg. § 1.78-1(d) (1965).

Section 78 remained virtually unchanged for more than 50 years until Congress's sweeping changes to the international tax system in 2017. These changes form the basis of the dispute in this case.

C. *2017 Tax Cuts and Jobs Act*

Among other things, the TCJA made significant changes to how the United States taxes income that a domestic corporation earns outside the United States. *See Moore v. United States*, 144 S. Ct. 1680, 1685 (2024). "The primary goal was to encourage Americans who controlled foreign corporations to invest earnings from their foreign investments back in the United States instead of abroad." *Id.* at 1685–86.

As relevant here, the TCJA moved the United States from the worldwide system of taxation described above to a partial territorial tax system. *See id.* In simplified terms, under a partial territorial system, certain income a domestic corporation earns from subsidiaries operating outside the United States generally is eliminated from the U.S. taxable base through a deduction.[7]

As part of this transition, the TCJA enacted a one-time tax referred to as the Mandatory Repatriation Tax (MRT). TCJA § 14103, 131 Stat. at 2195–208 (codified at I.R.C. § 965); *see also Moore*, 144 S. Ct. at 1686. The MRT generally required that certain accumulated foreign earnings held by CFCs, but not repatriated to the U.S. shareholders, be included in the U.S. shareholders' subpart F income and taxed at a lower-than-normal rate. *See* TCJA § 14103, 131 Stat. at 2195–208; *Moore*, 144 S. Ct. at 1686.

1. *New Section 245A*

Key to this case, the TCJA enacted new section 245A, granting U.S. corporations a deduction for the foreign-source

[7] This is in contrast to a worldwide system, under which income from subsidiaries operating outside the United States is first included in U.S. taxable income, with any increase in tax fully or partially offset with foreign tax credits. *See AptarGroup Inc.*, 158 T.C. at 112.

portion of any dividends they received from certain foreign corporations. TCJA § 14101(a), 131 Stat. at 2189–90. The operative rule of section 245A was included in subsection (a), which reads as follows:

> Sec. 245A. Deduction for foreign source-portion of dividends received by domestic corporations from specified 10-percent owned foreign corporations.
>
> (a) In general.—In the case of any dividend received from a specified 10-percent owned foreign corporation by a domestic corporation which is a United States shareholder with respect to such foreign corporation, there shall be allowed as a deduction an amount equal to the foreign-source portion of such dividend.

Section 245A also provides rules for calculating the foreign-source portion of dividends that a U.S. corporation may deduct from its income, *see* I.R.C. § 245A(c), as well as a rule limiting the foreign tax credit "with respect to any dividend" for which section 245A permits a deduction (which we will discuss later), *see* I.R.C. § 245A(d).[8]

As relevant here, the TCJA made new section 245A effective for "distributions made after . . . December 31, 2017." TCJA § 14101(f), 131 Stat. at 2192.

2. *Amendment to Section 78*

To reflect new section 245A and other changes the TCJA made to the Code, Congress also amended section 78 to read:

> Sec. 78. Gross up for deemed paid foreign tax credit.
>
> If a domestic corporation chooses to have the benefits of subpart A of part III of subchapter N (relating to foreign tax credit) for any taxable year, an amount equal to the taxes deemed to be paid by such corporation under subsections (a), (b), and (d) of section 960 (determined without regard to the phrase "80 percent of" in subsection (d)(1) thereof) for such taxable year shall be treated for purposes of this title (other than sections 245 and 245A) as a dividend received by such domestic corporation from the foreign corporation.

TCJA § 14301(c), 131 Stat. at 2222. In relevant part, the revised statute no longer references section 902, which

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[8] Relatedly, the TCJA amended section 246(c), which generally prohibits the section 245A deduction "in respect of any dividend on any share of stock" that the taxpayer has held for an insufficient period. *See* TCJA § 14101(b), 131 Stat. at 2191. There is no dispute in this case that Varian satisfied the relevant holding period.

the TCJA eliminated, *see* TCJA § 14301(a), 131 Stat. at 2221, and mirrors changes Congress made to section 960, *see* TCJA § 14301(b), 131 Stat. at 2221–22. In addition, it provides that section 78 dividends are not treated as dividends for purposes of section 245A.

Congress gave the amendments made to section 78, as well as those made to sections 902 and 960, a different effective date from that used for section 245A. Specifically, it applied the amendments "to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end." TCJA § 14301(d), 131 Stat. at 2225. This meant that the amendments to section 78 (and sections 902 and 960) had different effective dates based on whether a taxpayer and its foreign subsidiaries use a calendar year tax year (January 1 to December 31) or a fiscal year tax year (e.g., July 1 to June 30).[9]

III. *Varian's Entitlement to the Section 245A Deduction*

We now consider whether, in light of these rules, Varian is entitled to deduct an amount equal to its section 78 dividend for the 2018 Year. For the reasons set out below, we conclude that it is.

A. *Statutory Analysis*

We begin with the familiar maxim "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). It is after all "the sole function of the courts—at least where the disposition required by the text is not absurd—'. . . to enforce [plain statutory text]

[9] On January 2, 2019, the Chairman of the House Ways and Means Committee released a Tax Technical and Clerical Corrections Act Discussion Draft addressing various "technical and clerical corrections" related to the TCJA. Chairman Kevin Brady, Committee on Ways and Means, U.S. House of Representatives, *Tax Technical and Clerical Corrections Act Discussion Draft* (Jan. 2, 2019), https://republicans-waysandmeansforms.house.gov/uploadedfiles/tax_technical_and_clerical_corrections_act_discussion_draft.pdf. The draft included a proposed fix for the effective date mismatch between new section 78 and section 245A, *id.* at 73, but Congress never acted on the proposal. We draw no inference from this congressional inaction. *See Alexander v. Sandoval*, 532 U.S. 275, 292–93 (2001).

according to its terms.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). And when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Cheneau v. Garland*, 997 F.3d 916, 920 (9th Cir. 2021) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)). Applying these principles here produces a clear result.

As discussed above, section 245A allows a U.S. corporation to deduct an amount equal to the foreign-source portion of "*any dividend received* from a specified 10-percent owned foreign corporation" in which it "is a United States shareholder with respect to such foreign corporation." I.R.C. § 245A(a) (emphasis added). To calculate the foreign-source portion, the U.S. corporation must apply a ratio. I.R.C. § 245A(c)(1).[10]

In this case, the parties do not dispute that Varian is a "United States shareholder" of specified 10% owned foreign corporations. But they disagree as to whether Varian's section 78 dividend qualifies as a "dividend [it] received" within the meaning of section 245A(a). We conclude that it does.

Most significantly, the text of section 78 could hardly be clearer on this point. It states, in relevant part, that the amount Varian includes under section 78 "shall be treated for purposes of this title (other than section 245 [which is not at issue here]) *as a dividend received* . . . from the foreign corporation." I.R.C. § 78 (emphasis added). And section 245A(a) authorizes taxpayers to deduct "any dividend received from a specified 10-percent owned foreign corporation." Thus, the relevant text in the two provisions is effectively identical.

Moreover, section 78 specifies that the amount to which it applies is treated as a dividend for purposes of the entire Code with just one exception. That exception is section 245, a

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[10] Section 245A(c)(1) provides as follows:

Sec. 245A(c). Foreign-source portion.—For purposes of this section—

(1) In general.—The foreign-source portion of any dividend from a specified 10-percent owned foreign corporation is an amount which bears the same ratio to such dividend as—

(A) the undistributed foreign earnings of the specified 10-percent owned foreign corporation, bears to

(B) the total undistributed earnings of such foreign corporation.

provision not relevant here. The Commissioner's longstanding regulations reiterated this rule until their amendment in 2019. *See* Treas. Reg. § 1.78-1(a) (1965) ("A section 78 dividend shall be treated as a dividend *for all purposes of the Code*, except that it shall not be treated as a dividend under section 245, relating to dividends received from certain foreign corporations, or increase the earnings and profits of the domestic corporation." (Emphasis added.)).[11]

To summarize, section 78 provides that Varian must treat the amount to which section 78 applies as a dividend received from its foreign subsidiaries for all relevant purposes of the Code, and section 245A(a) provides a deduction for the foreign-source portion of *any* dividend received from such subsidiaries. The obvious conclusion is that section 245A and section 78, read together, authorize Varian to deduct its section 78 dividend for the 2018 Year. And no other provision in effect for that year disallows the deduction. Rather, we agree with Varian that the disparate effective dates for new section 245A and the amendments to section 78 resulted in a gap period in which its section 78 dividend qualified for a deduction under section 245A.

B. *The Commissioner's Arguments*

The Commissioner advances several arguments explaining why he thinks this result is incorrect. None alters the result here.

1. *Section 78 Dividends as Distributions*

The Commissioner's primary argument is that section 78 dividends are not qualifying dividends for purposes of section 245A because they are not "distributed (or treated as distributed) out of [a foreign corporation's] earnings to the U.S. shareholder." Resp't's Br. in Support of Cross-Mot. Summ. J. (Resp't's Br.) 21. The Commissioner bases his argument on the effective date provision under the TCJA, which states that section 245A applies to "distributions made after . . . December 31, 2017." TCJA § 14101(f), 131 Stat. at 2192. The Commissioner also points to section 245A(c)(2)(A), which,

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[11] For reasons we discuss later, the Commissioner's revised regulation does not change the result here. *See infra* Part III.B.4.

in describing how to calculate the foreign-source portion of a dividend, refers to "the taxable year . . . in which the dividend is distributed." But the Commissioner's argument fails for at least five reasons.

a. *Operative Rule in Section 245A*

First, the operative rule in section 245A sets out the conditions for deductibility, but says nothing about distributions. Rather, it says simply that the deduction is available "[i]n the case of any *dividend received*," I.R.C. § 245A(a) (emphasis added), essentially mirroring the text of section 78. We are not inclined to read the reference to "distributions" in the effective date provision to add another unstated requirement to the operative rule. Similarly, the references in section 245A(c)(2) to the "year . . . in which the dividend is distributed" and the "dividends distributed during [the] taxable year" simply explain how to compute the foreign-source portion of a dividend for purposes of section 245A. And the computation works just fine for section 78 dividends: one simply treats the section 78 dividend as the dividend for purposes of applying the instructions, as section 78 mandates. We disagree that a computation that may easily be applied to a section 78 dividend somehow shows that section 78 dividends cannot qualify for the deduction.

b. *Meaning of "Dividend"*

Second, even if we did read a distribution requirement into section 245A(a), we would conclude that a deemed dividend under section 78 satisfies the requirement. Recall that a section 78 dividend is treated as a dividend for purposes of the entire Code, with one inapplicable exception. A dividend is a distribution, both under the statutory definition of the term and its ordinary meaning. The former, found at section 316(a), states that, "[f]or purposes of this subtitle [which includes section 245A], the term 'dividend' means any distribution of property made by a corporation to its shareholders . . . out of its earnings and profits accumulated after February 28, 1913, or . . . its earnings and profits of the taxable year." And there are many examples of the latter. *See, e.g.*, *Dividend*, *Black's Law Dictionary* (11th ed. 2019) (defining "dividend" as "[a] portion of a company's earnings or profits distributed pro rata to its shareholders"); *Dividend*, *Random House Webster's College Dictionary* (2001) (defining "dividend" as "a sum paid to shareholders out of company earnings"); *Dividend*, *Webster's New International Dictionary of the English Language* (2d ed. 1959) (defining "dividend" as "[a] sum of money or quantity of commodities to be divided and distributed"). Therefore, if section 78 requires a taxpayer to deem a dividend received from a foreign corporation, that dividend would also be deemed to be distributed by the foreign corporation, satisfying any implicit requirement in section 245A.[12] *Cf. Rawat v. Commissioner*, 108 F.4th 891, 896 (D.C. Cir. 2024) ("[A]lthough a definitional provision is typically used to give meaning to a defined term, rather than . . . to give meaning to the language of the definition, such a provision works both ways: if a statute defines 'house' as 'an enclosed structure used as a residence,' one would be hard-pressed to say that the statute's use elsewhere of the phrase 'an enclosed structure used as a residence' means anything but 'house.'"), *rev'g* T.C. Memo. 2023-14.

c. *Coordinated Statutory Amendments*

Third, coordinating amendments that Congress made to other Code sections in the TCJA confirm that a dividend or deemed dividend—without an express provision for a distribution—suffices to qualify for the deduction under section 245A. These amendments establish that either (1) no distribution requirement exists, or (2) alternatively, any distribution requirement is satisfied by a dividend or a deemed dividend.

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[12] To the extent there are any questions about how the timing of a section 78 dividend squares with the effective date of section 245A, the Commissioner has not raised them. Therefore, the Commissioner has forfeited the argument. *See Rowen*, 156 T.C. at 115–16 (legal argument not raised in motion for summary judgment considered forfeited); *see also Mano-Y&M Ltd. v. Field* (*In re Mortg. Store, Inc.*), 773 F.3d 990, 998 (9th Cir. 2014) ("A litigant may waive an issue by failing to raise it in a [district] court."). Nevertheless, we do not believe that such an argument would prevail because Varian's section 78 dividends would likely be considered received as of the end of its taxable year (i.e., after December 31, 2017) since the calculation of the dividend depends on taxes deemed paid over the course of the entire year.

1. *Section 1248(j)*

We turn initially to section 1248, a provision that applies when a U.S. person who meets certain ownership requirements sells or exchanges stock in a foreign corporation. Section 1248(a) generally provides that the gain recognized on the sale or exchange of the stock "shall be included in the gross income of such person as a dividend." Put simply, section 1248(a) provides a recharacterization rule that treats a portion of the gain from the sale as a dividend inclusion for the seller. *See, e.g.*, Joel D. Kuntz & Robert J. Peroni, *U.S. International Taxation* ¶ B6.02[2][b] (2024), Westlaw USIT WGL.

The TCJA coordinated section 1248 with section 245A by adding section 1248(j). *See* TCJA § 14102(a)(1), 131 Stat. at 2192. New section 1248(j) provides, in relevant part, that "any amount received by the domestic corporation which is treated as a dividend by reason of this section shall [also] be treated as a dividend for purposes of applying section 245A."

The Commissioner tells us this amendment would have been unnecessary if simply recharacterizing an amount as a dividend were sufficient to qualify for a deduction under section 245A, because, even before the TCJA, section 1248(a) affected such a recharacterization. Thus, the Commissioner's argument goes, section 1248(j) was needed to satisfy the "distribution" requirement that he reads into section 245A. But the Commissioner misconstrues the statute, which, when considered carefully, contradicts his arguments.

To begin, the addition of section 1248(j) was necessary because the reach of the dividend recharacterization under section 1248(a) was unclear. Note carefully what section 1248 said before the addition of section 1248(j). It simply provided that gain recognized on a sale or exchange by a certain type of person would be included in the gross income of that person as a dividend. Note also that the provision did not say that the recharacterized amount would be a dividend for all purposes of the Code. Nor did it say that the dividend would be treated as a deemed distribution of some sort, although Congress certainly addressed distributions elsewhere in section 1248. *See, e.g.*, I.R.C. § 1248(f), (k). Accordingly, because the recharacterization work of section 1248(a) was limited in its reach, to ensure that gain recharacterized by virtue of section 1248(a) was treated as a dividend received for purposes of section

245A, Congress needed to adopt an affirmative rule. And that is exactly what it did in adding section 1248(j). There, Congress told us that gain recharacterized as a dividend by virtue of section 1248(a) would also "be treated as a dividend for purposes of applying section 245A." I.R.C. § 1248(j).

No such rule was necessary for a section 78 dividend. Existing section 78 already told us that the amount discussed in that section "shall be treated . . . as a dividend received by such domestic corporation from the foreign corporation" for purposes of this title. Saying that an amount will be treated in a particular manner "for purposes of this title" (i.e., the Code) is equivalent to listing every section in the Code and saying that the amount will be so treated for purposes of each section. Thus, Congress did not need to say more to bring a section 78 dividend within the scope of section 245A. Section 245A plainly is within the Code and section 78 therefore provided that the relevant amounts would be treated as dividends received for purposes of that section, precisely as section 1248(j) did. By contrast, Congress did need to say something if it wanted to preclude a section 78 dividend from being considered under section 245A. And, for the year before us, it stayed silent.

Section 1248(j) highlights an even greater problem for the view the Commissioner advances. As we have said, the Commissioner claims that a deduction under section 245A is predicated on the existence of a distribution and a deemed dividend does not suffice. But section 1248 addresses gains on sales or exchanges of stock. Such transactions involve no actual distributions by the foreign subsidiary whose stock is being transferred. Any consideration in this type of transaction would come from a counterparty, not the subsidiary. Moreover, section 1248(a) does not create any deemed distribution—only a deemed dividend, which is inadequate in the Commissioner's view. So, if (as the Commissioner contends) a distribution (actual or expressly deemed) were a prerequisite for section 245A to apply, a person with recharacterized gain under section 1248(a) would be out of luck with respect to a section 245A deduction, absent some further rule.

The Commissioner acknowledges as much and contends that section 1248(j) fills the gap. But look at what that provision actually says. Specifically, it says that amounts treated as dividends for purposes of section 1248 "shall [also] be *treated as a dividend* for purposes of applying section 245A." I.R.C. § 1248(j) (emphasis added). To reiterate, section 1248(j) says that any amount it covers shall be treated as a dividend—*not* that it shall be treated as a distribution. So section 1248(j) does not even fill the gap the Commissioner purports to see. Or, put another way, if we were to accept the Commissioner's argument, then the addition of section 1248(j) would have been insufficient to entitle taxpayers to the deduction under section 245A.[13] And of course we do not presume that Congress enacts legislation that has no effect. *See United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring in part and concurring in judgment) (describing the "presumption against ineffectiveness" as reflecting "the idea that Congress presumably does not enact useless laws"); *see also United States v. Hayes*, 555 U.S. 415, 427 (2009) (rejecting an interpretation in part because under it the statute would have been a nullity in multiple states); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012).

Perhaps seeing the wisdom of these principles, the Commissioner acknowledges that the addition of section 1248(j) was in fact sufficient to provide a deduction for amounts under section 245A. The same is true for section 78. As we have demonstrated, section 1248(j) added nothing to the Code that section 78 did not already include. Rather, the wording of section 1248(j) confirms that section 245A requires nothing more than (1) an amount being treated as a dividend and (2) that treatment being extended for section 245A purposes either by express cross-reference to section 245A (as in the case of section 1248) or by a broader cross-reference that includes section 245A (as in the case of section 78).

Finally, as if all this were not enough, section 1248(j) also undercuts the Commissioner's reliance on the computation provisions of section 245A. Recall that, for purposes of determining the foreign-source portion of a dividend, section 245A(c) applies a ratio. Specifically, section 245A(c)(1) provides that

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[13] When pressed on this point at the hearing, counsel for the Commissioner argued that we should read section 1248(j) and a similar provision in section 964(e)(4) as if they required that amounts "be treated as a dividend of the type that would qualify [for a deduction] under section 245A." Hearing Tr. 67. We are unconvinced by this interpretation, which impermissibly adds words and concepts to the text Congress actually adopted.

the foreign-source portion "is an amount which bears the same ratio to [the] dividend" as "the undistributed foreign earnings" of the foreign corporation bear to "the total undistributed earnings" of the foreign corporation. And in calculating the undistributed earnings, section 245A(c)(2) refers to the "year . . . in which the dividend is distributed" and the "dividends distributed during [the] year." Because section 78 dividends, the Commissioner says, are not actual or deemed "distributions," the ratio does not work, presumably because there would be no "year . . . in which the dividend is distributed."

But, if the Commissioner's reading of section 245A(c) were correct, the same analysis would apply to amounts treated as dividends under section 1248. Those amounts also are not "distributed," and nothing in section 1248 deems them as distributions. So for those amounts too the ratio would not work if an actual or deemed distribution were required. Yet, at our hearing on the Motions held on May 17, 2024, counsel for the Commissioner conceded that the ratio would work for section 1248 dividends and that they are in fact eligible for the deduction under section 245A. So, the computation provisions of section 245A cannot be the impediment that the Commissioner portrays them to be.

2. *Section 964(e)(4)*

Similarly, section 964(e), the other provision the Commissioner cites, deals with gain recognized by a CFC on the sale or exchange of stock in a foreign corporation. Like section 1248(a), section 964(e)(1) recharacterizes a portion of the gain as a dividend received by the CFC. And Congress coordinated the rule with section 245A by providing that the deduction "shall be allowable" to the ultimate U.S. shareholder for the resulting subpart F income "in the same manner as if such subpart F income were a dividend received by the shareholder from the selling [CFC]." I.R.C. § 964(e)(4)(A)(iii). For the same reasons that we discussed with respect to section 1248, Congress needed to add an affirmative rule if it wished for gain recharacterized under section 964(e)(4) to get the benefit of section 245A. Moreover (as with section 1248), nowhere does the text of section 964 provide specifically for a distribution to a domestic corporation, as the Commissioner says is required. Rather, the amounts for which a taxpayer may claim a section 245A deduction are subpart F inclusions (i.e., not distributions). And again, section 964(e)(4) does not fill the purported gap, because it provides for the subpart F inclusion to be treated in the same manner as a *dividend* and not as a distribution. Once more, therefore, Congress viewed treating an amount as a dividend as sufficient to accomplish its purpose of making an amount eligible for a deduction under section 245A.[14]

To summarize, as the Commissioner appears to agree, adopting a rule that treats an amount *as a dividend* for purposes of section 245A is sufficient to qualify the amount for the dividends received deduction. *See* I.R.C. §§ 964(e)(4)(A)(iii), 1248(j). And, by its express terms, section 78 already treated the amount discussed there as a dividend for all purposes of the Code (other than one section that is not relevant here). Accordingly, there was no need for Congress to change section 78 to confirm that section 78 dividends qualified for the deduction.[15]

d. *Historical Practice*

Fourth, our conclusion here is consistent with Congress's historical practice in this area of the Code. In 1976, Congress made changes to sections 902, 960, and 78 repealing special rules that had applied to investments in "less developed country corporations," a term that was previously defined at section 902(d). *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1033, 90 Stat. 1520, 1626–28. The changes to sections 902, 960, and 78 were substantive, and Congress made them effective "in respect of any distribution received by a domestic corporation" before or after specified dates. Tax Reform Act of 1976 § 1033(c), 90 Stat. at 1628.

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[14] In section 245A(f), Congress took the same approach with respect to amounts under section 1291, excluding those amounts from the deduction by providing that they "shall not be treated as a dividend for purposes of this section."

[15] For this reason, we also reject the Commissioner's argument that the lack of a specific rule allowing the deduction for section 78 dividends—in contrast to the specific rules provided under section 1248 and section 964—means that the deduction is not available. And, of course, Congress did ultimately provide a specific rule under section 78, as we discuss further below. But that rule was not in effect for the year before us.

This was an interesting choice because, as counsel for the Commissioner acknowledged at the hearing, section 960 applies primarily in the context of subpart F inclusions, which are not distributions (or deemed distributions). Under the Commissioner's argument, therefore, because Congress made the 1976 amendments effective only for "distribution[s] received," the change to section 960 and the related change to section 78 arguably would never have taken effect. But, as we have said, we do not presume that Congress enacts ineffective legislation. And Treasury apparently agreed, confirming by regulation that, for purposes of the new regime, section 951 inclusions would qualify as deemed distributions. *See* T.D. 7649, 1979-2 C.B. 274, 274, 44 Fed. Reg. 60,085, 60,085–86 (Oct. 18, 1979). The historical determination that subpart F inclusions qualified as distributions for purposes of applying the effective date provision of the 1976 amendments further supports our conclusion that section 78 dividends similarly qualify here.

e. *Section 78 Amendment*

A final word on textual inferences for now. Congress appears to have been well aware that, without some intervention, section 78 dividends would be deductible under section 245A. That is why it amended section 78 to preclude the deduction. But Congress chose a later effective date for this amendment, allowing fiscal year taxpayers like Varian to deduct their section 78 dividends for a limited time. This choice stands in contrast to another express exclusion from section 245A, which Congress crafted to take effect at the same time as the deduction. *See* I.R.C. § 245A(f) (expressly excluding from deductibility any amounts treated as dividends by section 1291(d)(2)(B)). In other words, Congress knew how to draft a contemporaneous exclusion if it so desired. *See Knight v. Commissioner*, 552 U.S. 181, 188 (2008) ("The fact that [Congress] did not adopt [a] readily available and apparent alternative strongly supports rejecting [a] reading [that relies on the rejected alternative text]."); *Thomas v. Commissioner*, 160 T.C. 371, 382 (2023) (citing *Knight v. Commissioner*, 552 U.S. at 188). But, for section 78, it chose a different course, and we will not ignore its choice. *See Cheneau*, 997 F.3d at 920; *see also Russello v. United States*, 464 U.S. 16, 23 (1983)

("We would not presume to ascribe this difference to a simple mistake in draftsmanship.").

2. *The Import of Sections 275(a)(4) and 261*

The Commissioner further argues that section 275(a)(4) precludes Varian from claiming any deduction under section 245A for its section 78 dividend. In relevant part, section 275 provides:

> Sec. 275. Certain taxes.
>
> (a) General rule.—No deduction shall be allowed for the following taxes:
>
> . . . .
>
> (4) Income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States if the taxpayer chooses to take to any extent the benefits of section 901.

The Commissioner claims that permitting the deduction of section 78 dividends violates this rule because it "would be an effective deduction for the amount of 'the taxes deemed to be paid' by [Varian] under section 78 and other Code sections," for which it already claims foreign tax credits. Resp't's Br. 31. But the Commissioner's argument again misses the mark.

Section 275(a)(4) prohibits deductions "for [specified] taxes." But section 78 dividends are not "taxes." Rather, they are "amount[s] equal to the taxes deemed to be paid" by a U.S. corporation that are "treated . . . as a dividend" for all relevant purposes of the Code. And section 245A provides a deduction for dividends, not taxes. As we explained in *Champion International Corp.*, 81 T.C. at 427, "[t]he effect [of section 78 was] to treat the domestic corporation as though it had received a distribution out of the foreign corporation's before-tax profits and then paid the foreign income tax thereon itself." Put differently, the deduction is for the deemed distribution the domestic corporation is considered to receive, not for the taxes that corporation is deemed to pay.[16]

The Commissioner might counter that the deemed dividend here amounts to the same thing as taxes. But the text of section 275(a) does not stretch so far. The statute prohibits what it says it prohibits (here, deductions "for . . . taxes"). It does not extend to any circumstance that arguably has the

[16] As we discuss further below, section 245A has its own rule addressing the U.S. tax treatment of those taxes. *See infra* Part IV.

same substantive effect.[17] Accordingly, section 275(a)(4) has no application to the facts before us.

Next, the Commissioner focuses on the text of section 261 to support his argument. Specifically, section 261 provides: "In computing taxable income no deduction shall in any case be allowed in respect of the items specified in [part IX of subchapter B]." In essence, the Commissioner argues that section 261 broadens the class of deductions disallowed by section 275(a)(4) to include deductions "in respect of" foreign income taxes. But we disagree with the Commissioner that section 261 has the broadening effect he claims it does.

As the Supreme Court has said, and the Commissioner acknowledges in his Brief, section 261 serves as a "priority-ordering directive" requiring that items specified in part IX of subchapter B take precedence over other deduction granting provisions in computing taxable income. *See Commissioner v. Idaho Power Co.*, 418 U.S. 1, 17 (1974); *see also Pac. Power & Light Co. v. United States*, 644 F.2d 1358, 1360 (9th Cir. 1981) (citing *Commissioner v. Idaho Power Co.*, 418 U.S. at 17). For example, section 261 (combined with section 161) ensures that certain capital expenditures for which a deduction is disallowed by section 263 are not deducted under section 167 for exhaustion and wear and tear. *See Commissioner v. Idaho Power Co.*, 418 U.S. at 17–18. But section 261 applies only so far as an item is specified in Part IX. Because section 275(a)(4) precludes deductions for *foreign taxes* for which foreign tax credits are claimed, Varian's deduction for its section 78 *dividends* is not disallowed.

Additionally, it would make little sense for Congress to specify in section 275 and the 26 other provisions currently referenced by section 261 that deductions are disallowed

[17] If we were to give section 275(a)(4) such a broad construction, one might question whether the enactment of section 78, which the Commissioner argues was "to prevent the effective allowance of both a credit and a deduction for deemed-paid foreign taxes," Resp't's Br. 12, would have been superfluous, since a predecessor of section 275(a)(4) was already on the books at the time section 78 was adopted, *see* Internal Revenue Code of 1954 § 164(b), 68A Stat. at 47 ("No deduction shall be allowed for the following taxes: . . . (6) Income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States, if the taxpayer chooses to take to any extent the benefits of section 901 (relating to the foreign tax credit).").

for certain, specifically described items only to broaden the scope of the disallowance for all those items in a separate, one-sentence provision. Not only would that reading of section 261 contradict the clear text of multiple other provisions, but it would render the more limited disallowances in those provisions duplicative of section 261. We see little sense in reading the text this way when a perfectly reasonable alternative is available. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))). Accordingly, we reject the Commissioner's argument that sections 261 and 275(a)(4) combined preclude Varian's deduction.[18]

3. *Policy Considerations*

Throughout his Motion papers, the Commissioner appeals to policy considerations to argue that Varian cannot be allowed a deduction for its section 78 dividend. A principal concern, according to the Commissioner, is that allowing the deduction will produce "an absurd result and an inappropriate windfall for a subset of taxpayers" (i.e., taxpayers like Varian) and will permit effectively "both a deduction and a credit for foreign taxes," which he says section 78 "was enacted specifically to prevent." Resp't's Br. 3.

At the May 17, 2024, hearing, the Court asked counsel whether these and similar statements in the Commissioner's Motion papers were intended to invoke the absurd results doctrine, which allows a court to depart from a statute's clear text in certain circumstances. Counsel clarified that the Commissioner was not invoking the doctrine. The decision was wise, because the absurd results doctrine imposes a high bar. Specifically, an interpretation is absurd only if the result would be "so gross as to shock the general moral or common

[18] That section 261 applies "in respect of the items specified in this part" does not give us license to disallow deductions not specified in the referenced part or to expand the scope of the specified items beyond what the text of the relevant provisions can fairly bear. No matter how broadly one reads the phrase "in respect of," *see infra* Part IV.A, the analysis under section 261 is cabined by "the items specified"—i.e., the operative rules (like section 275) that disallow specific deductions. Section 261 explains how these provisions relate to other Code provisions, but it does not change their substance.

sense," *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930), or if it is "quite impossible that Congress could have intended the result . . . and [if] the alleged absurdity is so clear as to be obvious to most anyone," *Tamm v. UST-U.S. Trustee* (*In re Hokulani Square, Inc.*), 776 F.3d 1083, 1088 (9th Cir. 2015) (quoting *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in the judgment)). These circumstances are not present here.

For example, the Code is full of provisions that treat taxpayers differently. This does not mean that those provisions are absurd. *See Harrelson*, 282 U.S. at 61 ("Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify the law by construction."); *see also Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. 262, 271 (2019) ("[A] result that 'may seem odd . . . is not absurd.'" (quoting *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005))); *United States v. Paulson*, 68 F.4th 528, 544 (9th Cir. 2023) (stating that "a statute is not absurd if 'it is at least rational,'" and that "the bar for 'rational' is quite low" (first quoting *In re Hokulani Square*, 776 F.3d at 1088; and then quoting *United States v. Lopez*, 998 F.3d 431, 438 (9th Cir. 2021), *abrogated on other grounds by Pulsifer v. United States*, 144 S. Ct. 718 (2024))).[19] Similarly, that our interpretation of section 245A will reduce the amount of income tax owed by certain taxpayers does not mean that result is absurd.

Further, general policy concerns (i.e., those that fall short of an absurd result) and speculation about congressional intent cannot override clear statutory text. *See United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391, 1404 (2023) ("Nor do we need to address any of the parties' policy arguments, which 'cannot supersede the clear statutory text.'" (quoting *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 192 (2016))); *Gitlitz v. Commissioner*, 531 U.S.

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[19] The statute before us easily satisfies this standard. Indeed, one can come up with a number of reasons Congress might have chosen the text it did. For example, the effective date Congress chose for the amendments to section 78 conformed with the effective dates for important changes Congress made to the foreign tax credit (e.g., repealing section 902 and modifying section 960). Congress may reasonably have chosen to prioritize coordinating these changes in section 78 over those related to section 245A.

206, 220 (2001) ("Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern."). That is so because "[a]chieving a better policy outcome . . . is a task for Congress, not the courts."[20] *Hartford Underwriters Ins. Co.*, 530 U.S. at 13–14; *see also Crowe v. Wormuth*, 74 F.4th 1011, 1032 (9th Cir. 2023) ("[O]ur role is not to devise a 'better' administrative scheme than the one Congress enacted. '[P]ractical difficulties . . . do not justify departure from the [statute's] plain text.'" (quoting *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014))); *Tex. Brine Co. v. Am. Arb. Ass'n*, 955 F.3d 482, 486 (5th Cir. 2020) ("We are not the final editors of statutes, modifying language when we perceive some oversight."); *Fisher Flouring Mills Co. v. United States*, 270 F.2d 27, 32 (9th Cir. 1958) ("Even if it be said that the omission . . . is a palpable error . . . this Court can give no remedy. 'To supply omissions transcends the judicial function.'" (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926))).

For the reasons we have described, Congress spoke clearly on the point at issue when it enacted section 245A and selected the mismatched effective dates for that provision and the amendments to section 78. Appeals to policy and Congress's overarching purpose cannot overcome these choices, no matter how much the Commissioner may dislike them. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) ("[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993))); *see also Metzger Tr. v. Commissioner*, 693 F.2d 459, 472 (5th Cir. 1982) ("As understandable as it may be, yielding to the temptation to 'do equity' in a specific tax case by looking past plain language to judicially perceived purpose will not do."), *aff'g* 76 T.C. 42 (1981); *Metzger Tr.*, 76 T.C. at 59 ("Courts do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning to the

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[20] In light of these clear directives from the Supreme Court, the Commissioner's citations of older cases that may reflect a different view of the judiciary's role in statutory construction cases cannot carry the day.

statutes as passed by Congress."). And an unenacted technical correction proposal does not alter the result.

The force of these principles is especially apparent in a case like this one, where Congress chose the rule it adopted over a readily available alternative. Specifically, the Senate version of the bill that became the TCJA had conforming effective dates for the bill's section 78 amendments and for new section 245A, which, if applied, would have precluded Varian's deduction. *Compare* S. 1, 115th Cong. § 14101(f) (2017) (applying new section 245A "to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end"), *with id.* § 14301(d) (applying the same effective date to the amendments to section 78). The House version, on the other hand, proposed the disparate effective dates that ultimately were enacted. *Compare* H.R. 1, 115th Cong. § 4001(f) (2017) (applying new section 245A to "distributions made after . . . December 31, 2017"), *with id.* § 4101(d) ("The amendments made [to section 78] shall apply to taxable years beginning after December 31, 2017."). And Congress chose the House proposal, with slight modifications. *See* TCJA § 14101(f), 131 Stat. at 2192; *id.* § 14301(d), 131 Stat. at 2225.

Moreover, Congress chose the rule it adopted for section 78 despite making changes to other statutory provisions to reflect the adoption of section 245A and made those changes effective at the same time as section 245A. *See, e.g.*, TCJA § 14101(b) and (c), 131 Stat. at 2191 (inserting references to section 245A into section 246); *id.* subsec. (d) (inserting references to section 245A into section 904(b)). Congress could have included in TCJA § 14101 a similar, modest amendment to section 78 with an effective date matching that of section 245A, while leaving the more substantive amendments for TCJA § 14301 with an effective date that matched the repeal of section 902 and the amendments to section 960, but it followed a different path. We will respect the choice that Congress made and give effect to the statute as written. *Cf. Thomas*, 160 T.C. at 382.

Finally, the Commissioner argues that Varian's "position is illogical in treating its subpart F income as ineligible for the Section 245A DRD but the Section 78 gross-up arising from that inclusion as qualifying, even though the latter is the tax expense that was incurred on subpart F income." Resp't's Br. 23 n.10. We struggle to see why Varian's position is illogical. As a general matter, subpart F income is not a dividend; rather it is simply an inclusion in gross income. *See Rodriguez v. Commissioner*, 137 T.C. 174, 177–78 (2011), *aff'd*, 722 F.3d 306 (5th Cir. 2013). Therefore, subpart F income does not qualify for a deduction under the terms of section 245A. But, as we have already discussed, section 78 expressly deems Varian to receive a dividend, which does qualify for the deduction. So, at bottom, the Commissioner's problem lies with the text of the statute, not Varian's position.

4. *Amended Treasury Regulation § 1.78-1*

Finally, the Commissioner argues that Treasury Regulation § 1.78-1, as revised June 21, 2019, precludes Varian from deducting its section 78 dividend. In relevant part, the second sentence of Treasury Regulation § 1.78-1(a) (as amended in 2019) says:

> A section 78 dividend is treated as a dividend for all purposes of the Code, except that it is not treated as a dividend for purposes of section 245 or 245A, and does not increase the earnings and profits of the domestic corporation or decrease the earnings and profits of the foreign corporation.

Subsection (c) then applies this sentence (and this sentence only) "to section 78 dividends that are received after December 31, 2017, by reason of taxes deemed paid under section 960(a) with respect to a taxable year of a foreign corporation beginning before January 1, 2018."[21]

The rule adopted by the revised regulations essentially gives one of the TCJA's amendments to section 78 an earlier effective date than provided for in the TCJA to prevent taxpayers like Varian from deducting section 78 dividends. But, as we have already observed, the plain text of the statutes provides for the deduction.[22] As the Supreme Court has said, "self-serving

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[21] The effective date for the rest of the regulation matches the effective date for the section 78 amendments and therefore does not apply for Varian's 2018 Year.

[22] In the preamble to the final regulation, Treasury acknowledged that the rule was "necessary to ensure that th[e] principle [that a section 78 dividend is not eligible for a deduction under section 245A] is consistently applied with respect to a CFC that uses a fiscal year beginning in 2017 . . . in order to prevent the arbitrary disparate treatment of similarly situated

regulations never 'justify departing from the statute's clear text.'" *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021) (quoting *Pereira v. Sessions*, 138 S. Ct. 2105, 2118 (2018)); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014) ("[T]he need to rewrite clear provisions of the statute should have alerted [the Government] that it had taken a wrong interpretive turn."); *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) ("[W]here . . . the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation."); *Abdo v. Commissioner*, 162 T.C. 148, 168 (2024) (reviewed) ("Respondent's regulation . . . cannot change the result dictated by an unambiguous statute." (citing *Niz-Chavez*, 141 S. Ct. at 1485)).

The Commissioner initially argued that, even if we disagreed with his interpretation of the statute, the statute was at least ambiguous and that, under *Chevron*, we had to accept his regulation's attempt to fill the gap because his interpretation was permissible. But of course *Chevron* has now been overruled. *See Loper Bright*, 144 S. Ct. at 2273. A "permissible" interpretation of a statute no longer prevails simply because an agency offers it to resolve a perceived ambiguity. *See id.* at 2266, 2273.

As the Supreme Court observed in *Loper Bright*, "statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.'" *Id.* at 2266 (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)). And, in cases involving ambiguity, "instead of declaring a particular party's reading 'permissible' . . . , courts [must] use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Id.* Put another way, "in an agency case as in any other . . . even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—the reading

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taxpayers." T.D. 9866, 2019-29 I.R.B. 261, 296, 84 Fed. Reg. 29,288, 29,319 (June 21, 2019). Treasury said that, without the rule in the revised regulation, "a U.S. shareholder of a fiscal year CFC would effectively be able to take both a credit and a deduction for foreign taxes by claiming a section 245A deduction with respect to its section 78 dividend." *Id.* A fair reading of this preamble is that Treasury thought the plain statutory text provided (or could be read as providing) for the deduction Varian claims, as we find here.

the court would have reached if no agency were involved." *Id.* (cleaned up).

In short, "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Id.* And, as we have shown above, the best (indeed the unambiguous) reading of the provisions at issue here permits Varian's deduction.

In reaching this conclusion, we have given "[c]areful attention to the judgment of the Executive Branch." *Id.* at 2273. The Executive's views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 2262 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "The weight of such a judgment in a particular case," of course, "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 2259 (quoting *Skidmore*, 323 U.S. at 140).

Nevertheless, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id.* at 2273. It "remains the responsibility of the court to decide whether the law means what the agency says." *Id.* at 2261 (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment)). Indeed, "Congress expects courts to do their ordinary job of interpreting statutes." *Id.* at 2267. "And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute." *Id.*[23]

In the cases that come before us, "the question that matters [is]: Does the statute authorize the challenged agency action?" *Id.* at 2269. And, in answering that key question, we may not follow the Executive's guidance (expressed in a regulation

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[23] *See also Loper Bright*, 144 S. Ct. at 2274 (Thomas, J., concurring) ("The judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." (cleaned up)); *id.* at 2275 (Thomas, J., concurring) ("The Founders envisioned that the courts would check the Executive by applying the correct interpretation of the law." (cleaned up)); *id.* at 2284–85 (Gorsuch, J., concurring) (explaining that the framers designed a judicial system "in which impartial judges, not those currently wielding power in the political branches, would 'say what the law is' in cases coming to court" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

or elsewhere) when (as here) it contradicts the statutory text. *See, e.g.*, *Niz-Chavez*, 141 S. Ct. at 1485; *Koshland v. Helvering*, 298 U.S. at 447. The Supreme Court's view on this principle is unanimous. *See Loper Bright*, 144 S. Ct. at 2264 (observing that, even under *Chevron*, "'[i]f the intent of Congress is clear, that is the end of the matter,' [*Chevron*, 467 U.S. at 842,] and courts were therefore to 'reject administrative constructions which are contrary to clear congressional intent,' [*Chevron*, 467 U.S. at 843, n.9]"); *see also id.* at 2297 (Kagan, J., dissenting) (summarizing *Chevron* and observing that the step one "inquiry is rigorous: A court must exhaust all the 'traditional tools of statutory construction' to divine statutory meaning. [*Chevron*, 467 U.S.] at 843, n.9. And when it can find that meaning—a 'single right answer'—that is 'the end of the matter': The court cannot defer because it 'must give effect to the unambiguously expressed intent of Congress.' *Kisor* [*v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)] (opinion of the Court); *Chevron*, 467 U.S., at 842–843"); *id.* at 2300 (Kagan, J., dissenting) ("Where Congress has spoken, Congress has spoken; only its judgments matter. And courts alone determine when that has happened: Using all their normal interpretive tools, they decide whether Congress has addressed a given issue.").

That Congress delegated certain rulemaking authority to Treasury under section 245A[24] does the Commissioner no good here. This is so because his regulation purports to modify the effective date provision for new section 78, which could hardly have been clearer. In other words, it impermissibly attempts to change an unambiguous provision of the statute. As a result, the regulation falls outside the boundaries of any authority that Congress may have delegated under section 245A or 7805. *See, e.g.*, *United States v. Locke*, 471 U.S. 84, 95 (1985) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978))); *see also*

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[24] Section 245A(g) provides: "Regulations.—The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section, including regulations for the treatment of United States shareholders owning stock of a specified 10 percent owned foreign corporation through a partnership."

Loper Bright, 144 S. Ct. at 2263 (noting that, where Congress has delegated discretionary authority to an agency, courts fulfill their role by "fix[ing] the boundaries of [the] delegated authority" (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 27 (1983))).

The Commissioner pushes back on this reading of the regulation. Specifically, he says that the regulation was not intended to interpret the statute's effective date, but rather "the ambiguous interaction between [s]ection 245A and [p]rior [s]ection 78 during the relevant period." Resp't's Br. 3. We are unconvinced for at least two reasons.

First, if the revised regulation truly were aimed at resolving an ambiguity between section 245A and prior section 78, one would expect it to reference section 902, which was referenced in prior section 78 and was still in effect for Varian's 2018 Year. *See* TCJA § 14301(d), 131 Stat. at 2225 (striking section 902 for "taxable years of foreign corporations beginning after December 31, 2017, and [for] taxable years of United States shareholders in which or with which such taxable years of foreign corporations end"). But neither the revised regulation nor its effective date provision mentions section 902. Rather, the sentence of the revised regulation purporting to disallow section 245A deductions for section 78 dividends applies only "to section 78 dividends that are received . . . by reason of taxes deemed paid under section 960(a)." Treas. Reg. § 1.78-1(c). Therefore, the revised regulation ignores a key part of prior section 78 and presumably would not prevent Varian from claiming a section 245A deduction for its section 78 dividends related to section 902 deemed paid taxes. Thus, the omission of any reference to section 902 from the new regulation casts doubt on the Commissioner's claim that the regulation interprets prior section 78.

Second, and more importantly, we cannot ignore that the revised regulation makes precisely the same change as new section 78 (adding an explicit carveout for section 245A), but with an earlier effective date. No matter what the revised regulation intended to interpret, it cannot contradict the clear effective date provided for in the statutory text.[25] *See supra* pp. 104–06.

[25] In this context, contrary to the Commissioner's arguments in his supplemental briefing, the revised regulation cannot be viewed as either

For these reasons, the amended regulation does not alter our conclusion as to Varian's claimed deduction.[26]

IV. *Section 245A(d) Limits on Foreign Tax Credits*

The final question we must resolve is how section 245A(d) affects the foreign tax credits that Varian claimed for its deemed paid foreign taxes. In relevant part, section 245A(d)(1) provides that "[n]o credit shall be allowed under section 901 for any taxes paid or accrued (or treated as paid or accrued) with respect to any dividend for which a deduction is allowed under this section."

A. *The Applicability of the Limitation*

The Commissioner argues that, if we allow Varian to deduct its section 78 dividend under section 245A, then section 245A(d) requires Varian to reduce its credits by an appropriate amount. In the Commissioner's view, that amount is the amount of Varian's deemed paid foreign tax that is attributable to the foreign earnings reflected in its section 78 dividend.

Varian, on the other hand, claims that section 245A(d) is irrelevant to its section 78 dividend. In essence, Varian would have us read section 245A(d)(1) as limiting foreign tax credits only for "taxes paid or accrued (or treated as paid or accrued) *on* any dividend." Because Varian misreads the operative text, notably the phrase "with respect to," we agree with the Commissioner.

The ordinary meaning of the phrase "with respect to" is "concerning" or "relating to." *See Respecting*, *The American Heritage Dictionary* (5th ed. 2018) ("With respect to; concerning."); *Cal. Tow Truck Ass'n v. City & Cnty. of S.F.*, 807 F.3d 1008, 1021 (9th Cir. 2015) ("[T]he phrase 'with respect to' is generally understood to be synonymous with the phrase[] 'relating to.'" (quoting *Fireman's Fund Ins. Co. v. Plant Insulation Co.* (*In re Plant Insulation Co.*), 734 F.3d 900, 910 (9th Cir.

"necessary" or "appropriate" to implement section 245A, regardless of how broadly one construes those terms as used in section 245A(g). *See, e.g.*, *Locke*, 471 U.S. at 95; *Koshland v. Helvering*, 298 U.S. at 447.

[26] In view of these conclusions, we need not address the many other arguments the parties raise regarding the procedural and substantive validity of amended Treasury Regulation § 1.78-1.

2013))); *see also Khan v. United States*, 548 F.3d 549, 556 (7th Cir. 2008) ("Synonyms for 'with respect to' include 'pertaining to' and 'concerning.'" (citing *Encarta World English Dictionary* (2007))); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 856 (2018) (Thomas, J., concurring in the judgment) ("The phrase 'with respect to' means 'referring to,' 'concerning,' or 'relat[ing] to.'" (quoting *Oxford American Dictionary & Language Guide* (1999 ed.))). Courts have given this phrase and similar ones a broad meaning. *See Cal. Tow Truck Ass'n*, 807 F.3d at 1021; *see also Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (defining the phrase "related to" as embracing those things "having a connection with or reference to" something else (quoting *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008))); *Adams Challenge (UK) Ltd. v. Commissioner*, 154 T.C. 37, 63 (2020) (analyzing relevant cases and finding "no appreciable difference between the terms 'related to,' 'connected with,' and 'in connection with'"). With this principle in mind, we conclude that section 245A(d)(1) limits foreign tax credits so far as the deemed paid foreign taxes for which a taxpayer claims credits relate to the dividends for which a taxpayer claims a deduction.

Varian's deemed paid foreign taxes undoubtedly relate to its section 78 dividend.[27] As we have explained, a section 78 dividend represents the share of a foreign corporation's earnings that were paid out to a foreign country as tax and therefore never repatriated (or attributed) to the domestic corporation. *See Champion Int'l Corp.*, 81 T.C. at 427. In other words, a section 78 dividend reflects genuine earnings of a foreign corporation that are taxed by a foreign country. By claiming foreign tax credits for those taxes, and including a section 78 dividend in income, a domestic corporation (like Varian) is treated as if it had received all the foreign corporation's foreign earnings and directly paid the tax on those earnings. Therefore, the foreign taxes Varian is treated as paying were "with respect to" its section 78 dividend within the meaning of section 245A(d)(1).

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[27] We of course acknowledge that, while the meaning of "related to" and similar phrases is broad, it is not without limits. *See Whistleblower 972-17W v. Commissioner*, 159 T.C. 1, 15–16 (2022) (reviewed) (discussing authorities). But the facts before us now do not approach those limits.

B. *The Amount of the Limitation*

Having decided that section 245A(d)(1) limits foreign tax credits so far as they are attributable to taxes paid (or deemed paid) on the earnings reflected by Varian's section 78 dividend, we now consider the amount of the limitation. In his Motion papers, the Commissioner expresses this limitation through the following equation:

$$\text{Disallowed Foreign Tax Credit} = \text{Deemed Paid Foreign Tax Credit} \times \left(\frac{\text{Section 78 gross-up}}{\text{Net section 965 inclusion + section 78 gross-up}} \right)$$

We agree that this equation properly reflects the limitation provided for in section 245A(d)(1) in the context of foreign tax credits resulting from an inclusion in subpart F on account of the MRT.

To illustrate how this equation applies, assume AmCo was a 100% shareholder of a CFC (CFC 1) that had \$100 of earnings in Country A. If Country A taxed those earnings at a 20% rate, then CFC 1 would have paid \$20 of tax and had \$80 of earnings remaining. If we assume the earnings qualified as subpart F income for U.S. tax purposes, then \$80 would have been included in AmCo's subpart F income and AmCo would have been treated as paying \$20 in tax to Country A under section 960(a). As a result, AmCo would have been entitled to \$20 of foreign tax credits and would have been treated under section 78 as receiving a \$20 dividend out of CFC 1's earnings. If AmCo claimed a deduction for the \$20 section 78 dividend under section 245A, then section 245A(d)(1) would reduce its allowable foreign tax credits as follows:

$$\text{\$4 (Disallowed FTC)} = \text{\$20 (Deemed Paid FTC)} \times \left(\frac{\text{\$20 (Section 78 gross-up)}}{\text{\$100 (Subpart F inclusion}^{28}\text{ + section 78 gross-up)}} \right)$$

The same principle applies to limit Varian's claimed foreign tax credits. Accordingly, because Varian claims a deduction under section 245A for its section 78 dividend, it must reduce its foreign tax credits by the amount that its deemed paid

[28] For purposes of this example, the taxpayer has a general subpart F inclusion rather than a section 965 inclusion in its subpart F income. Either way, the equation achieves the same result.

foreign taxes are attributable to the foreign earnings reflected in its section 78 dividend.

V. *Conclusion*

For the reasons stated above, we will grant Varian's Motion to the extent it seeks a deduction under section 245A for its section 78 dividend and will deny the Commissioner's Motion to the extent it seeks the opposite conclusion. Furthermore, we will grant the Commissioner's Motion so far as it seeks to limit Varian's foreign tax credits under section 245A(d)(1).

To reflect the foregoing,

An appropriate order will be issued.

Reviewed by the Court.

KERRIGAN, FOLEY, BUCH, NEGA, PUGH, ASHFORD, URDA, COPELAND, JONES, GREAVES, MARSHALL, and WEILER, *JJ.*, agree with this opinion of the Court.