160 T.C. 470–557

UNITED STATES TAX COURT

REPORTS

Vol. 160 No. 5

May 1, 2023, to
May 31, 2023

UNITED STATES TAX COURT
WASHINGTON, D.C.

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REPORTS

OF THE

UNITED STATES TAX COURT

ROY A. NUTT AND BONNIE W. NUTT, PETITIONERS *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 15959-22. Filed May 2, 2023.

Ps electronically filed a Petition with this Court at 12:05 a.m. on the morning after it was due. The United States Tax Court is in the eastern time zone. Ps, however, reside in and

electronically filed their Petition from the central time zone where it was 11:05 p.m. on the due date. *Held*: A document that is electronically filed with the Court is filed when it is received by the Court as determined in reference to where the Court is located. *Held, further*, because Ps electronically filed their Petition after the due date in the eastern time zone, the Petition was untimely, and we must dismiss this case for lack of jurisdiction.

Roy A. Nutt and Bonnie W. Nutt, pro sese.
Donielle A. Holmon, for respondent.

OPINION

BUCH, *Judge*: The Commissioner mailed a notice of deficiency to Roy and Bonnie Nutt, and the deadline to file a petition to seek redetermination of the deficiency was stated to be July 18, 2022. The Nutts electronically filed their Petition at 12:05 a.m. on July 19, 2022. But they filed their Petition from Alabama, where it was 11:05 p.m. on July 18, 2022.

A timely filed petition is a prerequisite to our jurisdiction in a deficiency case. "Filing" ordinarily occurs when a petition is received by the Tax Court in Washington, D.C., which is in the eastern time zone. An electronic petition is timely if it is filed by 11:59 p.m. eastern time on the last day for filing. Because the Nutts' Petition was filed after the last day for filing had ended in the eastern time zone, we must dismiss this case for lack of jurisdiction.

Background

The Commissioner mailed a notice of deficiency to the Nutts on April 14, 2022, determining an income tax deficiency and an accuracy-related penalty for 2019. Notwithstanding the actual mailing date, the notice was dated April 18, 2022, and the notice stated that the last day to file a petition with this Court was July 18, 2022. That date was a Monday and was not a legal holiday in the District of Columbia. The notice stated that the Nutts could "get a petition form and the rules for filing from the Tax Court's website at www.ustaxcourt.gov, or by contacting the Office of the Clerk at . . . 400 Second Street, NW, Washington, DC 20217." The Commissioner also sent a letter dated June 7, 2022, to the Nutts in which he reduced the amount of the deficiency and reminded the Nutts of the July 18, 2022, deadline to file a petition in the Tax Court.

While residing in Alabama, the Nutts electronically filed their Petition. At the time of filing, the Court's electronic case management system (DAWSON) automatically applied a cover sheet to their Petition. The cover sheet shows that the Court electronically received the Petition at 12:05 a.m. eastern time on July 19, 2022, and filed it the same day. When the Court received the Petition, it was 11:05 p.m. central time on July 18, 2022, in Alabama.

The Commissioner filed a Motion to Dismiss for Lack of Jurisdiction on September 1, 2022. The Commissioner contends that the Court lacks jurisdiction because the Nutts' Petition was not filed within the time prescribed by section 6213(a).[1] We ordered the Nutts to file an objection, if any, to the Commissioner's Motion to Dismiss for Lack of Jurisdiction. The Nutts did not respond.

Discussion

Like other federal courts, we are a Court of limited jurisdiction, and we may exercise our jurisdiction only to the extent authorized by Congress. I.R.C. § 7442; *Guralnik v. Commissioner*, 146 T.C. 230, 235 (2016); *Naftel v. Commissioner*, 85 T.C. 527, 529 (1985). Our jurisdiction in deficiency cases is predicated on a valid notice of deficiency and a timely petition. I.R.C. §§ 6213, 7442; Rules 13, 20; *Dees v. Commissioner*, 148 T.C. 1, 3–4 (2017). Under section 6213(a), a petition must be filed within 90 days after the notice of deficiency is mailed. If the notice of deficiency specifies a last day for filing a petition that is later than the 90th day, then the deadline by which to file a petition is extended to the date specified. I.R.C. § 6213(a); *Rochelle v. Commissioner*, 116 T.C. 356 (2001), *aff'd*, 293 F.3d 740 (5th Cir. 2002). If the last day falls on a Saturday, Sunday, or legal holiday in the District of Columbia, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. I.R.C. § 7503.

The Nutts' last day to file their Petition was Monday, July 18, 2022. Although the notice of deficiency was actually mailed on April 14, 2022, the notice stated that the last date

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

to file a petition was July 18, 2022, and section 6213(a) allows the Nutts to rely on the date stated in the notice.

A petition is ordinarily "filed" when it is received by the Tax Court in Washington, D.C. *See, e.g.*, *Leventis v. Commissioner*, 49 T.C. 353, 354 (1968) ("[A] petition, in order to be timely filed, must be received by the Court in Washington, D.C., on or before the 90th day."). Although the Court may sit at any place within the United States, its principal office, its mailing address, and its Clerk's office are in the District of Columbia. I.R.C. § 7445; Rule 10. As a result, documents such as petitions are often mailed to the Court for filing. And unless the timely mailing rule of section 7502 applies, a document is not considered to be filed until it is received. *See Guralnik*, 146 T.C. at 240, 242; *Eichelburg v. Commissioner*, T.C. Memo. 2013-269, at *6–8.

The timely mailing rule does not apply to an electronically filed petition. Under section 7502(a), a document that is mailed before it is due but received after it is due is deemed to have been received when mailed. But that rule applies only to documents that are delivered by U.S. mail or a designated delivery service. I.R.C. § 7502(a)(1), (f). Because an electronically filed petition is not delivered by U.S. mail or a designated delivery service, the exception of section 7502 does not apply. Where section 7502 does not apply, "we must look to the date the 'petition' was actually received and filed by the Court to determine whether it was timely filed." *Cassell v. Commissioner*, 72 T.C. 313, 319 (1979).

The Tax Court Rules are consistent with this statutory framework. Rule 22(a) provides that a paper "must be filed with the Clerk in Washington, D.C., during business hours" unless it is electronically filed. As for electronic filings, Rule 22(d) provides that a "paper will be considered timely filed if it is electronically filed at or before 11:59 p.m., eastern time, on the last day of the applicable period for filing."

The Court's website also instructs petitioners how to electronically file a petition through DAWSON in accordance with this Rule. *See* United States Tax Court, *How to eFile a Petition*, https://ustaxcourt.gov/efile_a_petition.html (last visited Mar. 30, 2023). The first instruction states:

> Check the Deadline for Filing
>
> You may have received a notice in the mail from the Internal Revenue Service (IRS). **The Court must receive your electronically filed Petition no later than 11:59 pm Eastern Time on the last date to file.** Petitions received after this date may be dismissed for lack of jurisdiction.

Id.

The Tax Court Rules in this regard are consistent with other federal rules and caselaw. For example, Rule 6(a)(4) of the Federal Rules of Civil Procedure provides that the last day of a period for electronic filing ends "at midnight in the *court's time zone*." (Emphasis added.) Interpreting Federal Rule 6(a), the U.S. Court of Appeals for the Seventh Circuit observed that electronic filing systems have the effect of extending the number of hours available for filing—from when the Clerk's office closes until 11:59 p.m. in the court's time zone—but not the number of days. *Justice v. Town of Cicero, Ill.*, 682 F.3d 662, 664 (7th Cir. 2012). As with Federal Rule 6(a), Rule 22(d) is consistent with the idea that the Court's electronic filing system serves as "a substitute for the clerk of the court." *Royall v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 548 F.3d 137, 142 (D.C. Cir. 2008). The electronic filing system stands in the Clerk's place; it follows that if the "last day" has ended where the Clerk's office is standing, the last day for electronic filing has ended as well.

The U.S. District Court for the Southern District of Indiana considered an issue similar to the one before us. *See McCleskey v. CWG Plastering, LLC*, No. 1:15-cv-01284, 2020 WL 9601835 (S.D. Ind. Nov. 2, 2020). In *McCleskey*, the court entered a judgment on June 5, 2020, holding CWG Plastering, LLC (CWG), liable to a fund for which McCleskey was the trustee. A motion for a new trial or for relief from the judgment was due to be filed "no later than 28 days after the entry of judgment." *Id.*, 2020 WL 9601835, at *1 (citing Fed. R. Civ. P. 59(b)). Twenty-eight days from June 5, 2020, was July 3, 2020. CWG filed its motion for new trial at 12:46 a.m. eastern time on July 4, 2020, in Indianapolis, Indiana, which was 11:46 p.m. central time on July 3, 2020, in Evansville, Indiana. *Id.* These locations are important because the case was pending in Indianapolis, which is in the eastern time zone, but it had been tried in Evansville, which is in the central

time zone.[2] *Id.* at *1 & n.1. CWG argued that the motion was timely because it was filed on July 3, 2020, in the time zone where the case was tried. *Id.* at *1. The court disagreed. *Id.* Citing a local rule that a "document due on a particular day must be filed before midnight local time *of the division where the case is pending*," the court held that the motion was untimely because it was due no later than 11:59 p.m. eastern time on July 3, 2020. *Id.* (citing *Justice*, 682 F.3d at 664). Similar to that local rule, Rule 22(d) dictates that the "last day" of a period for electronic filing ends at 11:59 p.m. eastern time, the Tax Court's local time zone.

The Nutts' Petition was untimely because it was filed in Washington, D.C., after the last day for filing prescribed by section 6213(a). The period within which to file a petition cannot be extended by the Court, and we must dismiss a case for lack of jurisdiction if the petition is not filed within the prescribed time. Rule 25(b)(2)(C); *Hallmark Rsch. Collective v. Commissioner*, 159 T.C. 126, 166–67 (2022); *Blum v. Commissioner*, 86 T.C. 1128, 1131 (1986). If we were to hold that the Nutts' electronically filed Petition was timely because it was still the last day to file in Alabama, even though the last day had ended in the District of Columbia, we would impermissibly be extending the number of days available for filing. *See Justice*, 682 F.3d at 664; *McCleskey*, 2020 WL 9601835, at *1. Accordingly, we must dismiss this case for lack of jurisdiction.

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

GROWMARK, INC. AND SUBSIDIARIES, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 23797-14. Filed May 16, 2023.

P, a fuel blender, is allowed tax credits under I.R.C. § 6426(b) and (c) for fuel mixtures it blended. P claimed the tax credits in determining its excise tax liability and paid its excise tax liability as reduced by those credits (actual excise tax expense). As a fuel blender, P may reduce its taxable income from fuel

[2] *See* Standard Time Zone Boundary in the State of Indiana, 71 Fed. Reg. 3228 (Jan. 20, 2006).

mixture sales by subtracting its cost of goods sold (COGS), including certain federal excise taxes. As part of its COGS, P originally claimed its actual excise tax expense. P asserts in its Petition that it should have claimed its gross excise tax liability, unreduced by the tax credits it received, as part of its COGS. R asserts that for purposes of calculating its COGS, P correctly included its actual excise tax expense. *Held*: P may claim as part of its COGS only that excise tax which it actually incurred or paid. Thus, the amount of fuel excise tax includible in P's COGS is reduced by the amount of the tax credits P claimed and received under I.R.C. § 6426(b) and (c). *Held, further*, legislative history confirms P must use its actual excise tax expense, rather than gross excise tax liability, for purposes of calculating its COGS.

George William Benson, *Andrew R. Roberson*, and *Thomas Kevin Spencer*, for petitioner.

Justin D. Scheid, *Rogelio A. Villageliu*, *Tess deLiefde*, and *James M. Cascino*, for respondent.

PARIS, *Judge*: This case is before the Court to decide petitioner's affirmative allegation. All issues in the notice of deficiency were decided in *Growmark, Inc. & Subs. v. Commissioner*, T.C. Memo. 2019-161.

In a timely notice of deficiency, respondent determined deficiencies with respect to issues other than petitioner's COGS calculation in petitioner's 2009 and 2010 federal income tax of $461,696 and $2,958,319, respectively.[1] Petitioner—in addition to challenging respondent's adjustments in the notice of deficiency—alleged in its Petition that it may reduce its reported taxable income for 2009 and 2010 by $6,938,292 and $7,329,491, respectively, on the basis that it incorrectly calculated its COGS for each of those years by using its actual (net) excise tax expense instead of its gross excise tax liability. Thus, the only issue to be decided in this Opinion is whether a taxpayer that claims a credit against fuel excise tax under section 6426(b) or (c) may also claim as part of its COGS its gross excise tax liability, unreduced by the amount of the credit it received. We conclude that a taxpayer may not.

Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C. (Code), in effect at

[1] Petitioner's tax year ran from September 1 to August 31, so the tax years at issue were from September 1, 2008, to August 31, 2010. For ease of discussion the Court will refer to the tax years at issue as 2009 and 2010.

all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The First Stipulation of Facts and the attached Exhibits are incorporated herein by this reference.

Petitioner is an affiliated group of corporations that includes parent company Growmark, Inc. (Growmark), a Delaware corporation, and several subsidiaries. Growmark is an agricultural cooperative that, as relevant here, sells gasoline and diesel fuel, renewable fuels, alcohol fuel mixtures, and biodiesel mixtures. Petitioner's principal place of business was in Illinois when it timely petitioned this Court for redetermination of the deficiencies set forth in the notice of deficiency.

Petitioner has been selling fuel products since 1927. It added renewable fuels including ethanol, an alcohol produced from corn, in the 1970s and biodiesel, a fuel produced typically from soybean oil, in 2000. During the years at issue petitioner also owned and operated a "terminal"[2] in Illinois and was a "position holder"[3] at that and other terminals, both within the meaning of Treasury Regulation § 48.4081-1(b). In addition, petitioner produced and sold in its trade or business alcohol fuel mixtures by blending taxable gasoline with ethanol[4] as well as biodiesel mixtures by blending diesel fuel with soybean-oil "agri-biodiesel."[5]

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[2] Treasury Regulation § 48.4081-1(b) defines "terminal" as "a taxable fuel storage and distribution facility that is supplied by pipeline or vessel and from which taxable fuel may be removed at a rack." "Rack" is defined as "a mechanism capable of delivering taxable fuel into a means of transport other than a pipeline or vessel." *Id.*

[3] "Position holder" means "the person that holds the inventory position in the taxable fuel [in a terminal], as reflected on the records of the terminal operator. . . . The term also includes a terminal operator that owns taxable fuel in its terminal." Treas. Reg. § 48.4081-1(b) (emphasis omitted).

[4] During the years at issue petitioner was registered under section 4101 to perform the activities described in this Opinion.

[5] "Agri-biodiesel" is "biodiesel derived solely from virgin oils, including esters derived from virgin vegetable oils from corn, soybeans, sunflower seeds, cottonseeds, canola, crambe, rapeseeds, safflowers, flaxseeds, rice bran, mustard seeds, and camelina, and from animal fats." § 40A(d)(2).

Petitioner incurred a section 4081 fuel excise tax liability when it removed a taxable fuel that it owned as a position holder from a rack at a terminal. Petitioner also incurred a section 4081 fuel excise tax liability with respect to the gallons of ethanol and biodiesel when it removed and sold the ethanol or biodiesel as part of an alcohol fuel mixture or biodiesel mixture. During the years at issue the excise tax reflected petitioner's fuel mixtures for sale to third parties for use as fuel; petitioner did not use any of the mixtures it produced for sale as fuel in its trade or business.

During the years at issue the ethanol that petitioner produced and then blended with taxable fuel was eligible for either the alcohol fuel mixture excise tax credit under section 6426(a)(1) and (b) or the alcohol mixture income tax credit under section 40(a)(1). The agri-biodiesel that petitioner produced and then blended with diesel was also eligible for either the biodiesel mixture excise tax credit under section 6426(a)(1) and (c) or the biodiesel mixture income tax credit under section 40A(a)(1) for each gallon of biodiesel that was blended with diesel fuel. Both fuel mixture credits required the fuel to be sold or used as a fuel in a trade or business of the taxpayer.[6] Petitioner was eligible for—but did not elect to use—the income tax credits under sections 40 and 40A. Instead, petitioner claimed the alcohol fuel and biodiesel mixture excise tax credits under section 6426 for all of the alcohol fuel and biodiesel mixtures it produced and sold during 2009 and 2010. It did so because claiming the section 6426 excise tax credits against its section 4081 excise tax liabilities was administratively easier than using the income tax credits and provided a quarterly financial benefit, as opposed to the annual financial benefit that would have been provided by general business credits claimed on an income tax return. Petitioner's entitlement to these credits is not in dispute.

As a taxable fuel position holder, petitioner was required to, and did, file Form 720, Quarterly Federal Excise Tax Return, for each of the quarters beginning or ending within its tax

[6] The tax imposed by section 4081 does not apply to diesel fuel dyed red and used for agricultural purposes. *See* § 4082. This Opinion does not address the excise tax COGS calculation of a fuel blender that is otherwise liable for tax under section 4081 but that generates mixture credits described in section 6426 in that blender's trade or business solely by blending into nontaxable fuels (e.g., into dyed diesel fuel).

years 2009 and 2010. During all relevant periods petitioner claimed the mixture credits on its Forms 720. Petitioner's excise tax credits and liabilities for 2009 and 2010 were as follows:

	2009	*2010*
Incurred excise tax liabilities under section 4081	$117,389,516.97	$122,062,070.30
Claimed alcohol fuel mixture credits under section 6426(b)[7]	6,928,160.00	7,324,661.00
Claimed biodiesel mixture credits under section 6426(c)[8]	10,132.00	4,380.00[9]

For each year at issue, petitioner timely filed (under extension) Form 1120–C, U.S. Income Tax Return for Cooperative Associations. On each Form 1120–C, petitioner included in its COGS its actual excise tax expense—petitioner's reported excise tax liability reduced by the amount of tax credits petitioner was allowed under section 6426. As a result, petitioner's COGS was lower, and its taxable income higher, than it would have been had its excise tax liability not been reduced by the tax credits it received.[10]

Respondent timely issued to petitioner a notice of deficiency on July 16, 2014, determining deficiencies of $461,696 and $2,958,319 for 2009 and 2010, respectively, with respect to

[7] From September 1 through December 31, 2008, the credit under section 6426(b) for the alcohol fuel mixture credit was $0.51 per gallon of alcohol used in the mixture; the same credit was $0.45 from January 1, 2009, through August 31, 2010. The alcohol fuel mixture credit expired at the end of 2011. § 6426(b)(6).

[8] The biodiesel mixture credit expired temporarily at the end of 2009. *See* Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, div. B, § 202(a), 122 Stat. 3765, 3807, 3832. As a result, petitioner did not claim biodiesel credits on its quarterly Forms 720 for any of the calendar quarters of 2010. The biodiesel mixture credit was subsequently retroactively extended through 2011 by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 701(b)(1), 124 Stat. 3296, 3310. The credit has since been extended a number of times, most recently through 2024. *See* Inflation Reduction Act of 2022 (2022 IRA), Pub. L. No. 117-169, § 13201(b), 136 Stat. 1818, 1931–32.

[9] This amount relates to credits claimed and used on petitioner's Forms 720 for the third and fourth calendar quarters of 2009.

[10] To calculate its COGS petitioner first netted the excise taxes it paid with the excise taxes that it collected when it sold the fuel.

the issues set forth in the notice—i.e., issues other than petitioner's COGS calculation. Petitioner timely filed its Petition, alleging error and raising an affirmative allegation as to the excise tax COGS calculation.

OPINION

The sole legal question addressed in this second *Growmark* Opinion is whether a taxpayer that claims a credit against fuel excise tax under section 6426(b) or (c) may also claim as part of its COGS its gross excise tax liability, unreduced by the amount of the credit it received.

I. *Standard of Review*

Generally, the Commissioner's determinations in a statutory notice of deficiency are presumed correct, and the taxpayer bears the burden of disproving each adjustment by a preponderance of the evidence. Rule 142(a)(1); *Welch v. Helvering*, 290 U.S. 111, 115 (1933). There is no presumption against petitioner's affirmative allegations with respect to its COGS calculation, however, because the deficiencies in the notice of deficiency were determined with respect to other issues. Petitioner must nevertheless meet its burden of proof with respect to the allegations.

II. *Background*

A. *COGS*

In the case of a taxpayer that produces and sells inventory in its trade or business, "gross income" includes "the total sales, less the cost of goods sold." Treas. Reg. § 1.61-3(a). In calculating its gross income, the taxpayer may subtract otherwise deductible expenses. Treas. Reg. § 1.446-1(c)(1)(ii).

Although federal excise taxes are generally not deductible under section 164 as taxes paid, those that are "paid or accrued by the taxpayer in connection with an acquisition or disposition of property shall be treated as part of the cost of the acquired property or, in the case of a disposition, as a reduction in the amount realized on the disposition," and, therefore, fuel excise taxes may be included in a taxpayer's COGS calculation. § 164(a) (flush language); *see also Mohawk Liqueur Corp. v. United States*, 324 F.2d 241, 244 (6th Cir. 1963); Treas. Reg. § 1.164-2(f) (providing that excise taxes

may constitute deductible expenses under section 162 or 212); Treas. Reg. § 1.263A-1(e)(3)(i), (ii)(L).

Expenses may be deducted only if actually incurred. *See Affiliated Foods, Inc. v. Commissioner*, 128 T.C. 62, 80 (2007); Treas. Reg. § 1.461-4(g)(6); Rev. Rul. 85-30, 1985-1 C.B. 20; Rev. Rul. 84-41, 1984-1 C.B. 130.

B. *Fuel Excise Taxes*

Section 4081(a)(2) imposes a tax on gasoline and diesel fuel of 18.3 cents per gallon and 24.3 cents per gallon, respectively.[11] Section 4041 imposes a tax on fuels not taxed under section 4081. These federal excise taxes are paid into the Highway Trust Fund, from which expenditures are made to support federal highway programs. *See* § 9503(b) and (c); *see also* Cong. Budget Off., *Financial Options for the Highway Trust Fund* 19 (Dec. 1982).

III. *Fuel Tax Credits*

On account of the significant changes made by the American Jobs Creation Act of 2004 (AJCA), Pub. L. No. 108-357, 118 Stat. 1418, we will consider the relevant fuel tax credits before and after enactment of the AJCA.

A. *Pre-AJCA*

Before enactment of the AJCA, alcohol fuel blenders could claim either (1) a reduced excise tax rate under section 4081(c) for fuels sold or used before December 31, 2004, using taxable fuels mixed with alcohol under regulations prescribed by the Secretary or (2) an income tax credit under section 40, which would then be includible in gross income under section 87. An alcohol fuel blender taking advantage of the reduced excise tax rate under section 4081(c) incurred fuel excise tax liability at the lower rate when it broke bulk—that is, removed a taxable fuel that it owned as a position holder from a terminal rack. *See* Treas. Reg. § 48.4081-6(c). So long as the blender produced the alcohol fuel mixture within 24 hours of removing the taxable fuel, it was never subject to, nor did it pay, fuel

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[11] These rates exclude an additional tax of one-tenth of 1 cent per gallon paid into the Leaking Underground Storage Tank (LUST) Trust Fund. §§ 4041(d), 4081(a)(2)(B). Because it is not material to our analysis, we will not discuss this additional tax again in this Opinion.

excise tax at the higher (full) rate. *See id.* subpara. (1)(i).[12] Additionally, if the full rate of tax was imposed on gasoline that was later used to produce a qualified alcohol blend, section 6427(f) permitted the taxpayer to obtain a refund. The excise taxes collected were appropriated to the Highway Trust Fund. *See* § 9503(b).

Because of the coordination between the income tax and excise tax systems, the net tax savings to the blender—when compared to a nonblender—for a blend percentage identified in section 4081(c)(4) was generally the same whether the blender chose the alcohol fuel income tax credit or the reduced excise tax rate.[13]

Before the AJCA, section 6427 generally allowed persons who used previously taxed fuel for a nontaxable purpose or resold it to obtain a refund equal to the amount of the excise tax paid.[14] Section 34(a)(3) allowed a payment made under section 6427 to be used as a refundable credit against income taxes.

B. *Post-AJCA*

The AJCA revised and restructured the incentives for producing alcohol fuel mixtures. It eliminated reduced rates of excise tax for specific blends of alcohol fuel mixtures and taxed the mixtures at gasoline excise tax rates. The AJCA

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[12] Reduced excise tax rates for the fuel blends ranged from 15.436 cents per gallon for 5.7% ethanol blends to 13.200 cents per gallon for 10% ethanol blends, inclusive of the additional LUST tax.

[13] The timing could be different. Excise taxes are paid quarterly, so a reduced excise tax rate could result in immediate savings when compared to the income tax credit. Additionally, a blender that produced a blend percentage other than one specifically listed in section 4081(c)(4) (i.e., a 5.7%, 7.7%, or 10% blend) would not be eligible for reduced excise tax rates. Consequently, a blender that produced 10% blends was never allowed under prior law to deduct fuel excise tax in excess of 13.2 cents per gallon as part of its costs for the gallons it produced.

[14] Generally the position holder is liable for the excise tax at the time fuel is removed from the terminal rack. In the refund situation contemplated under section 6427 the purchaser would not be directly liable for the excise tax. Rather, the excise tax would have been embedded in the price the purchaser paid for the fuel. Thus, the "refund" allowed under section 6427 would be a payment to the purchaser equal to the amount of excise tax for which the position holder was liable but that the purchaser ultimately paid through an increased purchase price.

replaced the prior benefit of the reduced rate with a credit under section 6426 that could be applied against excise tax imposed under section 4081. AJCA § 301(a), (c)(7), 118 Stat. at 1459–61. It tied the new excise tax credit to the gallons of alcohol used to produce any taxable fuel for sale or use in a taxpayer's trade or business, not the alcohol fuel mixture produced. *Id.* Additionally, the AJCA extended the existing income tax credit for alcohol fuel mixtures through December 31, 2010. *Id.* § 301(c)(3), 118 Stat. at 1461. It also created new incentives for the production of biodiesel mixtures by adding an income tax credit for biodiesel mixtures and making those mixtures eligible for the credit against excise taxes. *Id.* §§ 301(a), 302(a), 118 Stat. at 1459–61, 1463. Section 87 was also amended to include the amount of the biodiesel income tax credit in the taxpayer's gross income. *Id.* § 302(c), 118 Stat. at 1465. The AJCA also added section 6427(e), a credit not tied to taxable fuels. *Id.* § 301(c)(9), 118 Stat. at 1462.[15]

The AJCA appropriated the full 18.3- or 24.3-cent-per-gallon fuel tax on alcohol fuel and biodiesel mixtures, respectively, to the Highway Trust Fund and repealed the existing provisions under which the General Fund retained a portion of the excise taxes. *See id.* § 301(c)(11) and (12), 118 Stat. at 1462–63.[16] The amendment to section 9503 provided that "[f]or purposes of this paragraph, taxes received under sections 4041 and 4081 shall be determined without reduction for credits under section 6426." *Id.* § 301(c)(11). The AJCA further modified section 9503 so that any payments made under section 6427(e) were paid out of the General Fund rather than the Highway Trust Fund. *Id.* § 301(c)(13), 118 Stat. at 1463.

During the years at issue there generally were three ways to claim the credits: (1) using the credits on Form 720 or Form 720–X, Amended Quarterly Federal Excise Tax Return, against excise taxes; (2) filing Form 8849, Claim for Refund of Excise Taxes; or (3) using the credits against income tax by filing Form 4136, Credit for Federal Tax Paid on Fuels. Extensive coordination provisions were put into place to ensure that the credits could be claimed only once, either as income

[15] All of the fuel mixtures in this matter were blended with taxable fuels.

[16] For a period of time the General Fund retained 2.5 cents of ethanol's reduced excise tax rates for deficit reduction. The AJCA also terminated that retention mechanism.

or excise tax credits or as tax refunds. *See* §§ 40(c), 40A(c), 6426(g), 6427(e)(3), 34(b).

IV. *Tax Treatment of Section 6426 Credits*

The issue at hand is whether a taxpayer that claims a credit against fuel excise tax under section 6426(b) or (c) may also claim as part of its COGS its gross excise tax liability, unreduced by the amount of the credit. Petitioner argues that the section 6426 excise tax credit does not reduce excise tax expenses for COGS purposes. To hold otherwise, petitioner contends, would devalue the credit for taxpayers that claim the credit under section 6426 instead of section 6427(e) or section 34(a)(3). Petitioner contends that had it chosen to claim its excise tax credits on Form 8849 or on Form 4136, it would have been able to include its full excise tax liability in its COGS and would have received the full benefit of the credits.[17] Respondent, relying on his interpretation of what he asserts is unambiguous statutory text, contends that as a fuel blender, petitioner's COGS includes actual excise tax expense, which is reduced by the amount of any excise tax credits petitioner received. As respondent sees it, petitioner must first apply the mixture credits under section 6426(b) and (c) against its fuel excise tax liabilities, and to the extent petitioner's credit allowed under section 6426(a) exceeds its fuel excise tax liability, it may request a refund under section 6427(e) or take a refundable credit against its income taxes under section 34(a)(3).

A. *Text*

As an initial matter the Court looks to the text of the statutory provisions at issue. In construing a statute, the Court generally gives effect to the plain and ordinary meaning of its terms. *United States v. Locke*, 471 U.S. 84, 93 (1985). This Court will look beyond the plain meaning of a statute only where the text is ambiguous, where applying the plain meaning would lead to an absurd result, or possibly where there is clear evidence of contrary legislative intent. *Pollock v. Commissioner*, 132 T.C. 21, 30 (2009).

Section 6426(a)(1) provides that "[t]here shall be allowed as a *credit . . . against the tax imposed* by section 4081." (Empha-

[17] As discussed, a taxpayer's excise taxes are part of its COGS deduction.

sis added.) The relevant words "allowed as a credit against the tax imposed" appear several times throughout the Code but are not defined. The alcohol fuel mixture income tax credit under section 40 and the biodiesel mixture income tax credit under section 40A are general business credits, and each is "allowed as a credit against" income tax pursuant to section 38. The credits operate to reduce, not satisfy, the claimant's income tax liability.[18] Similarly, section 4081(b)(2) provides that where tax was previously imposed upon the removal or sale of a taxable fuel, and a blender is later taxed on the fuel blend, the amount of tax previously paid "shall be allowed as a credit against the tax imposed" on the blender.[19] The "credit" in section 4081(b)(2) reduces the blender's excise tax amount under section 4081(b)(1) and is not, as petitioner would have it, a payment of that amount.[20] Thus, the Court concludes that the words "allowed as a credit against the tax imposed," as used in section 6426, refer to a reduction of the tax liability as opposed to an independent payment of the liability.

Moreover, section 9503(b)(1) provides that for purposes of determining the amount transferred into the Highway Trust Fund, taxes received under section 4081 "shall be determined without reduction for credits under section 6426." If the cred-

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[18] As general business credits, sections 40 and 40A are taken into account in determining total income tax liability. They differ from refundable credits, which are treated as payments and applied to the total income tax liability determined. Where Congress has intended for specific general business credits to be treated as deemed payments, it has done so expressly. *See, e.g.*, 2022 IRA § 13801(a), 136 Stat. at 2003–09 (codified at § 6417).

[19] For instance, a blender that removes gasoline at the rack and then later blends it with ethanol for sale is initially taxed on the gasoline at the time of removal under section 4081(a). Then upon later sale of the fuel blend the blender is taxed under section 4081(b). When calculating its excise tax liability, the blender is allowed as a credit against the section 4081(b) tax the amount previously paid under section 4081(a).

[20] Petitioner points to several provisions in the Code under which a credit is treated as a payment of the taxpayer's tax liability and argues that the meaning of the words "allowed as a credit against the tax imposed" depends on the context in which they are used. The Court agrees that, pursuant to the canons of statutory construction, the Court must consider when construing statutory text "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, the relevant context comprises the statutory provisions related to fuel excise taxes and mixture credits.

its under section 6426 did not reduce excise tax liability generally, the statement describing the determination of section 4081 taxes for purposes of section 9503(b) would be superfluous. When construing a statute, the Court must interpret it "so as to avoid rendering any part of the statute meaningless surplusage." *15 W. 17th St. LLC v. Commissioner*, 147 T.C. 557, 586 (2016).

Finally, section 6427(e)(3) provides: "No amount shall be payable under paragraph (1) or (2) with respect to any mixture or alternative fuel with respect to which an amount is allowed as a credit under section 6426." An amount is allowed as a credit under section 6426 against the taxpayer's excise tax liability under section 4041 or section 4081. Thus, the text of section 6427(e)(3) suggests that a taxpayer may not take a section 6427(e) payment before its excise tax liability has been reduced to zero but may do so to the extent any excess credit remains.

Three courts of appeals have reached a similar conclusion based on the plain meaning of the statutory provisions at issue. *See Exxon Mobil Corp. v. United States*, 43 F.4th 424 (5th Cir. 2022); *Delek US Holdings, Inc. v. United States*, 32 F.4th 495 (6th Cir. 2022), *aff'g* 515 F. Supp. 3d 812 (M.D. Tenn. 2021); *Sunoco, Inc. v. United States*, 908 F.3d 710 (Fed. Cir. 2018), *aff'g* 129 Fed. Cl. 322 (2016). Moreover, including these courts, a total of six courts agree, with some nuances in analysis, that section 6426 credits reduce excise tax liability and thus make excise tax deductible only to the extent paid out of pocket. *See Delek US Holdings*, 515 F. Supp. 3d 812; *Exxon Mobil Corp. v. United States*, No. 3:16-CV-2921-N, 2018 WL 4178776 (N.D. Tex. Aug. 8, 2018); *Sunoco*, 129 Fed. Cl. 322.[21] Stated differently, there is agreement among these previous court decisions that petitioner's affirmative allegation would fail.

Although there is no precedent on this issue that we would follow, *see Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971),[22] we do find persuasive

[21] Sunoco was also litigating this issue in another circuit but was barred by collateral estoppel. *ETC Sunoco Holdings, LLC v. United States*, 36 F.4th 646 (5th Cir. 2022) (affirming a district court's ruling granting summary judgment).

[22] This case is appealable to the U.S. Court of Appeals for the Seventh Circuit. *See* § 7482(b)(1)(B).

the reasoning of these courts, which focuses overwhelmingly on the statutory text and structure. Further, because this Court has not previously addressed this issue, we need not overturn any of our own precedent. *Cf. Analog Devices, Inc. & Subs. v. Commissioner*, 147 T.C. 429, 443–45 (2016).

The arguments petitioner and respondent have proffered are substantively similar to those the parties made in *Exxon*, *Sunoco*, and *Delek*. Consistent with those courts and giving effect to the plain meaning of the statutory text at issue, this Court agrees with respondent for purposes of calculating petitioner's COGS. Accordingly, this Court also concludes that when considering the text of all of the relevant provisions together, the credits produced from fuel mixtures for sale in the trade or business of the fuel blender are first used, to the extent of excise tax owed, to reduce excise tax liability. Only then are those credits refundable payments to the extent of any excess.

B. *Legislative Intent*

Even if petitioner's argument were not unambiguously foreclosed by statute, the Court's construction of the text here is consistent with the legislative intent of the AJCA—that is, to provide an equivalent benefit to replace the reduced prior-law excise tax rates for alcohol fuel mixtures, as well as to create a similar benefit for biodiesel mixtures, while protecting the solvency of the Highway Trust Fund. *See* H.R. Rep. No. 108-755, at 308 (2004) (Conf. Rep.), *as reprinted in* 2004 U.S.C.C.A.N. 1341, 1384–85. In enacting the AJCA, Congress recognized that the reduced excise tax rates were contributing to the depletion of the Highway Trust Fund.[23] The AJCA resolved that issue by crediting the Highway Trust

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[23] In 2005 Congress passed the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a)(2), 119 Stat. 594, 1068, which mandated the inclusion of a minimum volume of renewable fuels in gasoline sold or introduced into commerce in the United States. It mandated that 6.1 and 6.8 billion gallons of renewable fuel be introduced into the nation's fuel supply during 2009 and 2010, respectively. *Id.* at 1069. The creation of a renewable fuel mandate around the same time as the modification of the fuel excise tax system further supports the Court's reading of the AJCA. It seems contradictory to suggest that blenders were given an additional tax incentive (beyond that which existed under the pre-AJCA reduced rate excise tax regime) to do something that they were now legally obligated to do.

Fund for the full 18.3- or 24.3-cent-per-gallon fuel tax imposed on blenders, without regard to the credit. § 9503(b). The AJCA provided both for excise tax credit and for payment of any refunds claimed pursuant to section 6427 from the General Fund rather than the Highway Trust Fund. § 9503(c)(2)(A).

However, in seeking to fix an accounting and highway funding issue, at no point did Congress suggest it wanted to substantially enhance the benefits provided by the excise tax credit. In fact, Congress repeatedly stated it sought to provide an "equivalent benefit" to replace the partial excise tax exemption for alcohol fuel mixtures, which necessarily included refundability of excess credits to yield equivalent cashflow consequences for blenders, in particular those whose section 6426 excise tax credits exceeded their section 4081 liabilities. *See* H.R. Rep. No. 108-755, at 304, 2004 U.S.C.C.A.N. at 1381. Under respondent's interpretation of the AJCA, an equivalent benefit is exactly what is provided.

Prior law allowed fuel blenders that produced a blend percentage listed in section 4081(c)(4) to claim a COGS offset in the amount of the reduced excise tax paid. Current law under respondent's interpretation allows a COGS offset in the amount of excise tax actually paid—gross excise tax liability reduced by any tax credits received under section 6426(b) or (c). These two COGS offsets are mathematically and economically equivalent for producers of blend percentages that were listed under prior law and thus yield the same tax benefit.[24]

Petitioner's interpretation of section 6426 would deliver a larger tax benefit by giving taxpayers the benefit of the credit plus a COGS offset that exceeds their actual net fuel costs by the amount of the credit (in effect both a credit and a deduction or offset against gross income). Had Congress intended to increase the benefit of the mixture credit, it would have modified or eliminated the requirement to include the section 40 income tax credit in gross income. Instead, Congress maintained the pre-AJCA tax consequences of the income tax

[24] In fact, under respondent's interpretation of the AJCA, taxpayers always receive at least an equivalent tax benefit, and fuel blenders that produce non-statutorily defined blends receive a better one (as they now receive credit for every gallon of ethanol blended). Petitioner was also a fuel blender of statutorily defined blends. *See supra* notes 13 and 14 and accompanying text.

credit (both for the existing section 40 credit and the new section 40A credit for biodiesel mixtures), namely that the credit was required under section 87 to be included in income and was thus taxable. By allowing the section 6426 excise tax credit to satisfy excise tax liability but not reduce excise tax expense for purposes of COGS, as petitioner contends, Congress would be creating imbalance where it originally sought to, and did, provide "the same net tax effect." *See* Staff of J. Comm. on Tax'n, 96th Cong., General Explanation of the Crude Oil Windfall Profit Tax Act of 1980, JCS-1-81, at 92 n.3 (J. Comm. Print 1981).[25] Absent an explicit statement to this effect, we are not prepared to adopt an interpretation directly contrary to Congress's original intent.

Two additional pieces of legislative history bolster our conclusion. First, according to the AJCA Conference Report, "[t]he benefit obtained from the excise tax credit is coordinated with the alcohol fuels income tax credit." H.R. Rep. No. 108-755, at 304, 2004 U.S.C.C.A.N. at 1381. Second, the Joint Committee on Taxation estimated the "excise tax credit (in lieu of reduced tax rate on gasoline)" not to have any revenue effect—that is, to cost no more or less than the benefit under existing law. Staff of J. Comm. on Tax'n, 108th Cong., Estimated Budget Effects of the Conference Agreement for H.R. 4520, the "American Jobs Creation Act of 2004," JCX-69-04, at 2.[26] Yet petitioner's interpretation would render both of these statements false. An excise tax credit that satisfies excise tax liability but does not reduce COGS, as petitioner seeks, would not be coordinated with an income tax credit that is includible in income. And, as an increased benefit, such a credit could not be enacted without negative revenue effect—that is, without

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[25] Created by the Revenue Act of 1926, ch. 27, § 1203, 44 Stat. 9, 127–28, the Joint Committee on Taxation (JCT) is a joint congressional committee authorized today under section 8001. JCT's membership and legislative duties and powers, which are largely unchanged since 1926, are further prescribed in sections 8002 through 8005 and sections 8021 through 8023.

[26] JCT's revenue estimates are the official revenue estimates for tax legislation considered or enacted by Congress. Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 299, *amended by* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 273, 99 Stat. 1037, 1038, 1098 (now codified at 2 U.S.C. § 601(f)).

the federal government's losing tax revenue beyond that lost under the prior-law reduced excise tax rates.[27]

To overcome this legislative history, petitioner alleges this Court should rely on a Congressional Research Service (CRS) report as the authoritative interpretation of the AJCA changes.[28] However, a CRS report is not legislative history. As the Supreme Court has "repeatedly" said, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). Here, the relevant Conference Report[29] provides an unambiguous answer to the issue, so we need not turn to other, less authoritative documents to ascertain congressional intent. *See Commissioner v. Acker*, 361 U.S. 87, 94 (1959) (Frankfurter, Clark & Harlan, JJ., dissenting) (stating, in criticism of the overbroad use of legislative history, that "[t]he most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body").

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[27] This is so because demand for the credit would increase relative to demand for the partial excise tax exemption under prior law.

[28] Salvatore Lazzari, Cong. Rsch. Serv., RL32979, *Alcohol Fuels Tax Incentives* (2005); *see also* Molly F. Sherlock, Cong. Rsch. Serv., R41227, *Energy Tax Policy: Historical Perspectives on and Current Status of Energy Tax Expenditures* 23 nn.44 & 45 (2011) (including Lazzari's 2005 work without further analysis).

[29] Under the Standing Rules of the U.S. House of Representatives and the U.S. Senate, differences in major legislation passed by both chambers are usually resolved by conference committee. *See, e.g.*, Senate Rule XXVIII. Assuming an agreement is reached to resolve all differences, the conferees file a Conference Report, which includes compromise legislative text and a joint explanatory statement. *See id.* The Conference Report is then acted upon by the House and Senate and, if adopted by both chambers, sent to the President to be signed into law. Given its unique procedural setting, many believe a Conference Report to be the most important source of legislative history. *See* Richard J. McKinney & Ellen A. Sweet, *Federal Legislative History Research: A Practitioner's Guide to Compiling the Documents and Sifting for Legislative Intent*, *in Law Librarians' Society of Washington, D.C., Legislative Source Book* (2001), https://www.llsdc.org/federal-legislative-history-guide ("Normally, an explanatory statement in a conference report is the first item to be reviewed in a legislative history.").

Having considered petitioner's and respondent's arguments, we conclude that much like a general business credit being used to determine total income tax liability, the excise tax credit is taken into account to determine the total excise tax liability and is therefore the equivalent benefit described in and passed under the AJCA.[30] Therefore, we do not agree with petitioner and the result it seeks. Instead, we will honor unambiguous statutory text and clear congressional intent and decline to accept petitioner's position.

The Court has considered all of the arguments made by the parties, and to the extent they are not addressed herein, they are considered unnecessary, moot, irrelevant, or without merit.

To reflect the foregoing,

Decision will be entered under Rule 155.

UNITED THERAPEUTICS CORPORATION, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 10210-21. Filed May 17, 2023.

P is a biotechnology company. For each of the tax years 2011 through 2014, P claimed both the research credit under I.R.C. § 41 and the orphan drug credit under I.R.C. § 45C. Some of P's expenses during those years qualified as both qualified clinical testing expenses under I.R.C. § 45C and qualified research expenses under I.R.C. § 41. For those expenses, P elected to claim the orphan drug credit under I.R.C. § 45C. In determining the research credit for 2014, P elected to use the alternative simplified credit calculation under I.R.C. § 41(c)(5) and the reduced credit under I.R.C. § 280C(c)(3). When calculating the credit under I.R.C. § 41(c)(5), P excluded qualified clinical testing expenses from both its 2014 qualified research expenses and its average qualified research expenses for the three preceding tax years (2011 through 2013). R audited P's return and ultimately issued a Notice of Deficiency determining that P overstated its research credit for 2014 by improperly excluding from its computations the expenses P treated

[30] Petitioner's interpretation would be correct only if Congress had decided to make the tax credit at issue a truly refundable tax credit. There is no evidence suggesting that intent.

as qualified clinical testing expenses for 2011 through 2013. P timely petitioned our Court for redetermination. The case is before us for decision under Rule 122. R maintains that I.R.C. § 45C(c)(2) requires the result reflected in the Notice of Deficiency. P contends that, because of changes in I.R.C. § 41 since its original enactment, I.R.C. § 45C(c)(2) is a dead letter and has no application here. *Held*: The text and structure of I.R.C. §§ 41 and 45C(c)(2) as they existed for 2014 require the result reflected in the Notice of Deficiency.

Thomas H. Dupree, Jr., *Lucas C. Townsend*, *Saul Mezei*, and *John F. Craig III*, for petitioner.

Brandon S. Cline, *Anna L. Boning*, and *Naseem Jehan Khan*, for respondent.

OPINION

TORO, *Judge*: In this deficiency case involving the tax year 2014, we consider a question of first impression: Must expenses that are used to determine the orphan drug credit under section 45C[1] also be taken into account in determining certain elements of the research credit under section 41, with the result that a taxpayer claiming both credits receives a reduced research credit? The Commissioner of Internal Revenue maintains that section 45C(c)(2) requires this result. United Therapeutics Corporation (United Therapeutics) contends that section 45C(c)(2) is a dead letter (often referred to as deadwood) and has no application here.

Resolution of the case turns on a question of statutory interpretation. Sections 41 and 45C provide credits (originally enacted as temporary credits) that Congress extended and amended many times over a number of years. The specific question before us is whether we should give effect to section 45C(c)(2) based on the ordinary meaning of its terms or whether we should ignore the provision altogether as a no-longer-effective rule that Congress neglected multiple times to remove from the Code. In interpreting clear statutory text, we normally do not assume that Congress made a mistake in

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

drafting, and we certainly do not assume that it made the same mistake repeatedly. We see no reason to depart from that practice here. We therefore apply section 45C(c)(2) in accordance with its ordinary meaning and, as explained in more detail below, find in favor of the Commissioner.

Background

The parties submitted this case fully stipulated under Rule 122. The facts below are based on the pleadings and the parties' Stipulation of Facts (including the Exhibits attached thereto). The parties' Stipulation of Facts with accompanying Exhibits is incorporated herein by this reference.

United Therapeutics, a biotechnology company, is a Delaware public benefit corporation. When it timely filed the Petition in this case, United Therapeutics maintained principal places of business in Silver Spring, Maryland, and Durham, North Carolina.

United Therapeutics focuses primarily on the development and commercialization of unique products to address the unmet medical needs of patients with chronic and life-threatening conditions. During the 2014 tax year and the preceding three tax years (2011 through 2013), the company conducted research and development on potential treatments for pulmonary arterial hypertension (which ultimately leads to heart failure and death) and neuroblastoma (a rare form of brain cancer that predominantly affects children and infants), among other diseases.

For each of the tax years 2011 through 2014, United Therapeutics computed and claimed both the research credit under section 41 and the orphan drug credit under section 45C. Some of the company's expenses during those years qualified both as qualified clinical testing expenses under section 45C and as qualified research expenses under section 41. With respect to those expenses, United Therapeutics elected to claim the orphan drug credit under section 45C.

In claiming its research credit for the 2014 tax year, United Therapeutics elected to use the alternative simplified credit calculation under section 41(c)(5) and the reduced credit under section 280C(c)(3).[2] When calculating the credit under

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[2] Section 280C(c), which is not at issue, generally provides that a taxpayer's deductions (or the amounts it would otherwise charge to its capital account)

section 41(c)(5), the company excluded the expenses it had treated as qualified clinical testing expenses for purposes of section 45C from both its 2014 qualified research expenses and its average qualified research expenses for the three preceding tax years (2011 through 2013). In total for 2014, United Therapeutics claimed that it incurred $42,062,405 of qualified research expenses within the meaning of section 41. And it claimed that its average qualified research expenses for the three preceding tax years (2011 through 2013) were $22,605,492. Accordingly, it claimed an adjusted research credit of $2,799,129 for 2014.[3]

The Commissioner audited United Therapeutics and ultimately issued a Notice of Deficiency. The Commissioner determined that United Therapeutics overstated its research credit by improperly excluding from its computations expenses it treated as qualified clinical testing expenses for tax years 2011 through 2013.

The parties have stipulated that if (as United Therapeutics contends) the company properly excluded its qualified clinical testing expenses from the calculation of its average qualified research expenses for the three years immediately preceding its tax year 2014 under section 41(c)(5), then its average qualified research expenses for those years (2011 through 2013) would be $22,605,492. Using that amount, United Therapeutics' research credit under section 41 for tax year 2014 would be $2,799,129.

The parties have also stipulated that if (as the Commissioner contends) United Therapeutics must include its qualified clinical testing expenses for 2011 through 2013 in the calculation of its average qualified research expenses for those years, then its average qualified research expenses would be $49,257,244. Using that amount, United Therapeutics' research credit under section 41 for tax year 2014 would be $1,586,474.

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for qualified research expenses must be reduced according to the amount of the taxpayer's research credit. I.R.C. § 280C(c)(1) and (2). Alternatively, a taxpayer may avoid these requirements by electing to reduce the amount of its research credit pursuant to section 280C(c)(3). Section 280C(b) provides similar rules with respect to qualified clinical testing expenses.

[3] The amounts listed in the text differ from the amounts United Therapeutics reported on its 2014 return because of adjustments agreed on by the parties.

Discussion

Section 38 permits taxpayers to claim a variety of business credits against federal income tax. Among those credits are the section 41 research credit and the section 45C orphan drug credit. United Therapeutics claimed both credits for the 2014 tax year, raising the question of how the two credits relate to each other. We begin with a brief discussion of the history of the two credits and how they interact.

I. *The Research Credit*

Congress introduced the "credit for increasing research activities" as part of the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, § 221(a), 95 Stat. 172, 241. "The credit was intended to 'stimulate a higher rate of capital formation and to increase productivity'" by incentivizing taxpayers to undertake new research. *See Hewlett-Packard Co. & Consol. Subs. v. Commissioner*, 139 T.C. 255, 258–59 (2012) (first quoting S. Rep. No. 97-144, at 76–77 (1981), *as reprinted in* 1981-2 C.B. 412, 438–39; and then quoting H.R. Rep. No. 97-201, at 111 (1981), *as reprinted in* 1981-2 C.B. 352, 358), *aff'd*, 875 F.3d 494 (9th Cir. 2017). In general, the credit was equal to a percentage of the amount by which a taxpayer's "qualified research expenses" for the credit year exceeded its average qualified research expenses for the three preceding tax years. ERTA § 221(a). Consistent with its name, therefore, the credit rewarded taxpayers who increased their research expenditures year over year. The credit was temporary and initially applied only to amounts paid or incurred after June 30, 1981, and before January 1, 1986. *Id.* § 221(d), 95 Stat. at 247.

In the years following its enactment, Congress extended the credit multiple times and, in at least one instance, allowed it to expire for a year before reinstating it prospectively.[4] When we say that Congress "extended the credit," we mean that Congress made the benefit applicable to expenses incurred in a period not originally covered by the statute. *See In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1311–12 (8th Cir.

[4] The Commissioner provided a helpful table summarizing the relevant amendments, their enactment dates, and the effective dates covered by the relevant provisions, which we reproduce in the Appendix. *See also* Suppl. Br. for Resp't 6.

1996) (holding that the Independent Counsel Reauthorization Act of 1987 was validly reenacted when "Congress passed [a public law] amend[ing] the sunset provision . . . of the 1987 Act by substituting the year 1994 for the year 1987"). Without these extensions, taxpayers would not have been entitled to any research credit in years following 1986 for incurring the types of expenses the credit is intended to incentivize. Congress finally made the research credit permanent (that is, it removed the provision that limited its application to specific time periods) in 2015.[5]

Congress also modified the research credit a number of times after its initial enactment, including by moving the credit to different Code sections, changing the primary method of calculating the credit, and adding new methods for calculating the credit, each on more than one occasion.[6]

The version of the research credit in effect for 2014, the tax year before us, was in section 41 (where it remains today). It was extended and amended earlier that year. It describes five methods for calculating the research credit, some that operate as alternatives to each other and some that work in tandem.[7] Each method is different from the others in various respects,

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[5] For a discussion of the budgetary impact of legislation with permanent and temporary effects and the legislative process followed in adopting such legislation, see George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. Rev. 174 (2009). *See also id.* at 199–202 (discussing the initial adoption and subsequent extensions of the research credit). For a broader discussion of temporary legislation, see Jacob E. Gersen, *Temporary Legislation*, 74 U. Chi. L. Rev. 247 (2007).

[6] Significant amendments included, among others, those made by the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, §§ 471, 474(i), 98 Stat. 494, 825–26, 831–32, the Tax Reform Act of 1986 (TRA 1986), Pub. L. No. 99-514, § 231, 100 Stat. 2085, 2173–80, the Omnibus Budget Reconciliation Act of 1989 (OBRA 1989), Pub. L. No. 101-239, § 7110, 103 Stat. 2106, 2322–26, the Small Business Job Protection Act of 1996 (SBJPA), Pub. L. No. 104-188, § 1204, 110 Stat. 1755, 1773–75, and the Tax Relief and Health Care Act of 2006 (TRHCA), Pub. L. No. 109-432, §§ 104, 123(a), 120 Stat. 2922, 2934–36, 2944.

[7] The five methods are (1) the incremental research credit under section 41(a)(1); (2) the basic research credit under section 41(a)(2); (3) the credit related to energy research under section 41(a)(3); (4) the alternative incremental credit under section 41(c)(4); and (5) the alternative simplified credit under section 41(c)(5). The alternative incremental credit expired for taxable years beginning after December 31, 2008, but remains in the statute. I.R.C. § 41(h)(2).

but, consistent with the credit's original design, nearly all the methods include a mechanism to reward taxpayers who increase their research activity in the current year relative to some earlier baseline defined by the statute.

The alternative simplified method—the method United Therapeutics used in 2014—is a good example. Like the original method for calculating the credit adopted in 1981, the alternative simplified method generally requires a taxpayer to compare its current year qualified research expenses to those it incurred during the three preceding years. *See* I.R.C. § 41(c)(5). In particular, section 41(c)(5)(A) provides that, subject to an exception not relevant here, a taxpayer's credit under section 41(a)(1) equals 14% of the amount by which the taxpayer's current year qualified research expenses exceed 50% of its average qualified research expenses for the three previous years.[8] So, a taxpayer that increases its qualified research expenses in the current year relative to the three-year period (i.e., the baseline) generally gets a larger credit. And the calculation of a taxpayer's baseline expenses—i.e., the issue before us—can significantly affect the final credit amount.

II. *The Orphan Drug Credit*

In 1983, approximately two years after first establishing the research credit, Congress enacted the orphan drug credit as part of the Orphan Drug Act, Pub. L. No. 97-414, 96 Stat. 2049 (1983) (codified in relevant part as amended at 21 U.S.C. §§ 360aa–360ee and I.R.C. § 44H). "The Orphan Drug Act incentivizes pharmaceutical companies to develop 'orphan drugs'—drugs for rare diseases that affect such a small portion of the population that there otherwise would be no financial incentive to research and develop treatments." *Catalyst Pharms., Inc. v. Becerra*, 14 F.4th 1299, 1302 (11th Cir. 2021); *see also Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 325 (D.C. Cir. 2020). The orphan drug credit was one of the Orphan

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[8] Expressed in the form of an equation, the formula for calculating the alternative simplified credit is as follows:

$$\text{Current year credit} = 14\% \times (X - (50\% \times ((Y1 + Y2 + Y3) / 3))).$$

In the formula, X represents qualified research expenses for the credit year, and Y1, Y2, and Y3 represent qualified research expenses for the three years preceding the credit year.

Drug Act's financial incentives. The credit could be elected on an annual basis and rewarded taxpayers who, during a taxable year, incurred qualified clinical testing expenses in researching and developing drugs to treat rare diseases. I.R.C. § 44H(a), (b), (d)(5) (1983).

Like the research credit, the orphan drug credit originally was temporary, with an expiration date of December 31, 1987. I.R.C. § 44H(e) (1983). Congress extended and modified the credit frequently over the years.[9] In at least one instance, Congress allowed the credit to expire before reinstating it prospectively, and it ultimately made the credit permanent in 1997. *See infra* Appendix; *see also supra* note 4.

The 2014 version of the credit was in section 45C (where it remains today). It generally permits taxpayers who incur qualified clinical testing expenses[10] and elect to apply section 45C to claim a credit equal to 50% of such expenses for the year, regardless of their expenditures in prior years. I.R.C. § 45C(a), (d)(4). This relatively straightforward computation makes the orphan drug credit a simpler (and more generous) benefit than the research credit, but with a potentially smaller pool of eligible expenses.

III. *Interaction Between the Research Credit and the Orphan Drug Credit*

As one might expect given the overlapping goals of the research credit and the orphan drug credit, expenses that qualify for one credit may also qualify for the other. Congress recognized this potential for overlap and addressed it in section 45C(c), which provides as follows:[11]

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[9] Significant amendments have included, among others, those made by the DEFRA §§ 471, 474(g), 98 Stat. at 826, 831–32, the TRA 1986 §§ 232, 701(c)(2), 1275(c)(4), 1879(b), 100 Stat. at 2180, 2340, 2599, 2905–06, the SBJPA § 1205, 110 Stat. at 1775–76, and the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 604, 111 Stat. 788, 863.

[10] Qualified clinical testing expenses are defined with reference to qualified research expenses under section 41, subject to certain modifications. I.R.C. § 45C(b)(1).

[11] Essentially the same text appeared in the original orphan drug credit at section 44H(c) (1983).

Sec. 45C(c). Coordination with credit for increasing research expenditures.—

(1) In general.—Except as provided in paragraph (2), any qualified clinical testing expenses for a taxable year to which an election under this section applies shall not be taken into account for purposes of determining the credit allowable under section 41 for such taxable year.

(2) Expenses included in determining base period research expenses.— Any qualified clinical testing expenses for any taxable year which are qualified research expenses (within the meaning of section 41(b)) shall be taken into account in determining base period research expenses for purposes of applying section 41 to subsequent taxable years.

As in effect for 2014, neither section 45C(c)(2) nor any other Code provision defines the phrase "base period research expenses."

The parties' dispute turns on the meaning of this coordination rule. A simple example illustrates the stakes.

Assume that each year for four years (2011 through 2014) a taxpayer incurs $50 of expenses that qualify both as qualified research expenses and qualified clinical testing expenses. In each of the same years, the taxpayer also incurs $100 of additional expenses that qualify only as qualified research expenses. The second column of Table 1 below shows the result in the fourth year if, for all four years, the taxpayer claims only the research credit and uses the alternative simplified method to calculate the credit. The third column of Table 1 shows the result if the taxpayer claims only the orphan drug credit.[12]

[12] For simplicity's sake, our discussion here does not take into account section 280C, which operates to further limit a taxpayer's credits in certain circumstances. Additionally, because the research credit is not elective, we recognize that a taxpayer may never be in position to claim the orphan drug credit alone. We therefore include this calculation for comparison purposes only.

Table 1: Research Credit Only or Orphan Drug Credit Only

	Research Credit Only	*Orphan Drug Credit Only*
Year 1 Qualified Research Expenses	$150	NA[13]
Year 2 Qualified Research Expenses	150	NA[13]
Year 3 Qualified Research Expenses	150	NA[13]
Years 1–3 Average Qualified Research Expenses	150	NA[13]
Year 4 Qualified Research Expenses	150	NA[14]
Year 4 Qualified Clinical Testing Expenses	NA[15]	$50
Year 4 Research Credit (a)	10.5[16]	-0-
Year 4 Orphan Drug Credit (b)	-0-	25[17]
Year 4 Total Credits (c) = (a) + (b)	10.5	25

In this example, claiming the more generous orphan drug credit results in a larger credit than claiming the research credit despite the smaller pool of eligible expenses.

The issue before us is how the research credit is computed when the taxpayer claims both the research credit and the orphan drug credit for each of the relevant years. Table 2 below shows the calculation of the research credit (again us-

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[13] Because the computation of the orphan drug credit turns only on qualified clinical testing expenses incurred in the year the taxpayer elects to claim the credit, qualified research expenses incurred in other years are irrelevant to the computation of the credit.

[14] Qualified research expenses that are also qualified clinical testing expenses are reflected in the "Year 4 Qualified Clinical Testing Expenses" line.

[15] Because for purposes of this example the taxpayer elects not to claim the orphan drug credit, qualified clinical testing expenses that are also qualified research expenses are taken into account in the "Year 4 Qualified Research Expenses" line.

[16] Applying the formula described in note 8, the credit computation is as follows: 14% × (150 – (50% × 150)) = 10.5.

[17] As discussed above, the orphan drug credit for the year is equal to 50% of qualified clinical testing expenses incurred in the year: 50 × 50% = 25.

ing the alternative simplified method) and the orphan drug credit during the fourth year in that scenario. The second column reflects United Therapeutics' interpretation of section 45C(c)(2)—i.e., that qualified clinical testing expenses are not included in calculating qualified research expenses for the three preceding years. The third column reflects the Commissioner's interpretation of the provision—i.e., that qualified clinical testing expenses are included in calculating qualified research expenses for the three preceding years because of section 45C(c)(2).

Table 2: Research Credit and Orphan Drug Credit

	United Therapeutics' Position	*Commissioner's Position*
Year 1 Qualified Research Expenses	$100[18]	$150[19]
Year 2 Qualified Research Expenses	100[18]	150[19]
Year 3 Qualified Research Expenses	100[18]	150[19]
Years 1-3 Average Qualified Research Expenses	100	150
Year 4 Qualified Research Expenses	100	100
Year 4 Qualified Clinical Testing Expenses	50	50
Year 4 Research Credit (a)	7[20]	3.5[21]
Year 4 Orphan Drug Credit (b)[22]	25	25
Year 4 Total Credits (c) = (a) + (b)	32	28.5

[18] Expenses that are both qualified research expenses and qualified clinical testing expenses ($50 each year) are ignored in computing the three-year average.

[19] Expenses that are both qualified research expenses and qualified clinical testing expenses ($50 each year) are taken into account in computing the three-year average.

[20] Applying the formula described in note 8, the credit computation is as follows: $14\% \times (100 - (50\% \times 100)) = 7$.

[21] Applying the formula described in note 8, the credit computation is as follows: $14\% \times (100 - (50\% \times 150)) = 3.5$.

[22] *See supra* note 17.

In this example, including the taxpayer's qualified clinical testing expenses in its historical qualified research expenses (as the Commissioner maintains) reduces the research credit for 2014. But the taxpayer is still much better off claiming both credits than claiming the research credit alone (as shown in Table 1, claiming the research credit alone would result in a benefit of only $10.50, while claiming both credits would result in a benefit of $28.50 even under the Commissioner's position). In the case before us, the difference between the research credit computed under the Commissioner's interpretation and the research credit computed under United Therapeutics' interpretation for 2014 is $1,212,655.

IV. *Application to United Therapeutics*

Every year from 2011 through 2014, United Therapeutics, like the taxpayer in our example, incurred expenses that qualified as both qualified clinical testing expenses under section 45C(b) and qualified research expenses under section 41(b). And each year from 2011 to 2014, United Therapeutics elected to claim the orphan drug credit for all these expenses. In 2014, United Therapeutics excluded all qualified clinical testing expenses from its section 41 credit computations (including the calculation of the three-year average for 2011 through 2013). United Therapeutics argues that this approach is required by section 45C(c)(1) and that section 45C(c)(2) is inapplicable.

The Commissioner agrees that section 45C(c) provides the operative rule for coordinating the research credit and the orphan drug credit. He further agrees that section 45C(c)(1) requires qualified clinical testing expenses incurred in 2014 to be excluded when computing qualified research expenses for the credit year (i.e., 2014). But, unlike United Therapeutics, the Commissioner contends that section 45C(c)(2) requires qualified clinical testing expenses that are also qualified research expenses to be *included* in determining qualified research expenses for the three-year reference period described in section 41(c)(5)(A) (here, 2011 through 2013). For the reasons below, we agree with the Commissioner.

A. *The Text and Structure of the Relevant Provisions Decide the Dispute Before Us.*

Section 45C(c) provides that qualified clinical testing expenses must be excluded from all section 41 calculations, except that, under section 45C(c)(2), qualified clinical testing expenses that are also qualified research expenses must be included "in determining base period research expenses for purposes of applying section 41 to subsequent taxable years." The parties agree that the qualified clinical testing expenses at issue are qualified research expenses. So the only question before us is whether "base period research expenses" are relevant to United Therapeutics' research credit computation for 2014. As we show below, they are.

We begin with first principles. As the Supreme Court has explained, "[i]n statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citing *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011)). And, when the statute does not define a term, "we ask what that term's 'ordinary, contemporary, common meaning' was when Congress enacted" the relevant provision. *Id.* at 2362 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). "The people who come before us are entitled, as well, to have independent judges exhaust 'all the textual and structural clues' bearing on that meaning." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)). "When exhausting those clues enables [the Court] to resolve the interpretive question put to us," *id.*, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms," *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

The term "base period research expenses" is not defined in the 2014 version of section 45C or section 41. Accordingly, we look to the term's ordinary meaning. And because there is no dispute that the expenses at issue in this case qualify as research expenses for purposes of section 41, we focus on the term "base period."

The term "base period" has been defined consistently over time. *Cf. BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532, 1537 (2021) ("Whether we look to the time of § 1447(d)'s adoption or amendment, a judicial 'order' meant then what it means today . . . ."). In general, it means "a period of time used as a standard of comparison in measuring changes . . . at other periods of time." *Base Period*, *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1989); *see also Base Period*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/base%20period (last visited May 9, 2023) ("[A] period of business or economic activity used as a basis or reference point . . . .").[23] This meaning is consistent with how Congress has used the term "base period" in other contexts, including in a specific definition provided for limited purposes in section 41(e).[24] Thus, we interpret the term "base period research expenses" to mean research expenses that are incurred during the base period—i.e., the period of time section 41 employs as a standard of comparison (or as a baseline or reference point).

This interpretation is compatible with the structure of sections 45C and 41 and produces a nonabsurd result. It means

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[23] Combining the individual definitions of "base" and "period" produces the same meaning. *See, e.g.*, *Base*, *The American Heritage Dictionary* (5th ed. 2011) ("15. A line used as a reference for measurement or computations."); *Period*, *The American Heritage Dictionary* (5th ed. 2011) ("1. An interval of time characterized by the occurrence of a certain condition, event, or phenomenon . . . ."); *Base*, *Random House Webster's College Dictionary* (2001) ("7. a starting point or point of departure."); *Period*, *Random House Webster's College Dictionary* (2001) ("2. a specific division or portion of time.").

[24] Section 41(e) describes a longstanding method of calculating the research credit that is not at issue in this case: the basic research credit under section 41(a)(2). The basic research credit generally is calculated by using the amount by which a taxpayer's payments for basic research during the year exceed its "qualified organization base period amount." I.R.C. § 41(e)(1)(A). And the calculation of the qualified organization base period amount depends in part on certain categories of expenses incurred during the "base period," I.R.C. § 41(e)(3)–(5), which is defined (for purposes of subsection (e)) to mean "the 3-taxable-year period ending with the taxable year immediately preceding the 1st taxable year of the taxpayer beginning after December 31, 1983," I.R.C. § 41(e)(7)(B). Consistent with the definition we describe above, therefore, the three-year "base period" set out in section 41(e)(7)(B) is a period of time that the statute employs as a standard for comparison.

that, for purposes of computing the research credit under section 41, the taxpayer that makes the election under section 45C must exclude qualified clinical testing expenses incurred in the year for which the election is made when calculating qualified research expenses for that year. *See* I.R.C. § 45C(c)(1). But the taxpayer must include qualified clinical testing expenses incurred during a reference period (i.e., a base period) prescribed by section 41 in its calculation of qualified research expenses for that reference period so long as those qualified clinical testing expenses also meet the definition of qualified research expenses. *See* I.R.C. § 45C(c)(2).

Take section 41(c)(5), which sets out the method for calculating the alternative simplified credit, as an example. As discussed above, that provision requires a taxpayer to compare its qualified research expenses during the current year to the expenses it incurred during "the 3 taxable years preceding the taxable year for which the credit is being determined." I.R.C. § 41(c)(5)(A). The three-year period described in the provision is a period of time that is being "used as a standard of comparison in measuring changes." In other words, the three-year period is a "base period" within the ordinary meaning of that phrase. And so, for a taxpayer that made the section 45C election for each of the three years included in the base period, section 45C(c)(2), interpreted according to its ordinary meaning, requires that the taxpayer's qualified clinical testing expenses (that are also qualified research expenses) be included when calculating qualified research expenses during that period.[25]

This result follows from the text of the relevant provisions, and there is nothing unreasonable or illogical about it. Working together, the two statutory provisions (section 41(c)(5) and section 45C(c)(2)) require taxpayers who have elected the generous orphan drug credit for prior years to account for that prior-year benefit in calculating their research credit for the current year. One can conceive of many reasons why Con-

[25] Expressed in terms of the formula in note 8, our interpretation of section 45C(c)(2) requires qualified clinical testing expenses incurred in the credit year to be excluded from X. But qualified clinical testing expenses incurred in the three years preceding the credit year that also are qualified research expenses must be included in Y1, Y2, and Y3, and must be taken into account in the three-year average against which X is compared if the taxpayer claimed the orphan drug credit in years 1, 2, and 3.

gress might have taken such an approach,[26] which is identical to the approach both parties agree it adopted in the original orphan drug credit.

This analysis resolves the issue before us. *See Lamie*, 540 U.S. at 536 (stating that the Supreme Court will follow the plain meaning of a statute so long as it produces a result that is not absurd). But before concluding, we address certain arguments United Therapeutics raises.

B. *United Therapeutics' Contrary Arguments Are Not Persuasive.*

United Therapeutics resists the straightforward reading of sections 41(c)(5) and 45C(c)(2) set out above based on two principal arguments. First, it maintains that the phrase "base period research expenses" should be read as a defined term. And, second, it argues that a consistency rule in section 41(c)(6)(A) trumps the coordination rule in section 45C(c)(2). Despite United Therapeutics' skillful presentation, neither argument carries the day.

1. *"Base Period Research Expenses" Is Not a Defined Term.*

We turn first to the claim that the phrase "base period research expenses" should be read as a defined term. As we have already said, sections 41 and 45C as in effect for 2014 do not define that phrase. Nor does any other provision of the Code in effect for 2014. Why then does United Therapeutics contend it is a defined term?

United Therapeutics' claim rests on a prior version of the research credit provision. Specifically, when Congress first adopted the research credit in 1981, its computation required the calculation of "base period research expenses."[27] That term was defined in then section 44F(c)(1).[28] When Con-

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[26] Concerns about the cost of the research credit would be one example. *See infra* note 43.

[27] The original research credit was calculated using the amount by which a taxpayer's qualified research expenses for the tax year exceeded its "base period research expenses." I.R.C. § 44F(a) (1981).

[28] Section 44F(c)(1) (1981) provided in part as follows: "For purposes of this section . . . [t]he term 'base period research expenses' means the average of the qualified research expenses for each year in the base period." And the base period was "the 3 taxable years immediately preceding the taxable year for which the determination is being made." *Id.* para. (2)(A).

gress first adopted the orphan drug credit in 1983, it used the same phrase—"base period research expenses"—in section 44H(c)(2). This, United Therapeutics argues, demonstrates that the phrase "base period research expenses" as now used in section 45C(c)(2) must have the defined meaning provided by old section 44F(c)(1). The argument fails for several reasons.

a. *Predecessor Statutes May Not Be Used to Manufacture Ambiguity.*

To begin, we are not interpreting either the research credit or the orphan drug credit provisions as each existed in 1981 and 1983, respectively. Those provisions would not entitle United Therapeutics to the research credit in 2014 because on their face they applied only to expenses incurred long before 2014 and offered no credits whatever for 2014. *See* ERTA § 221(d)(1) ("The amendments made by this section shall apply to amounts paid or incurred after June 30, 1981, and before January 1, 1986."); I.R.C. § 44H(e) (1983) ("Termination.—This section shall not apply to any amount paid or incurred after December 31, 1987."). Instead, the provisions at issue here are section 41 and section 45C(c)(2) as they read in 2014. And by then Congress had removed from the Code the definition of the term "base period research expenses." OBRA 1989 § 7110(b), 103 Stat. at 2323–25.

As the Supreme Court has explained, "[t]he starting point in discerning congressional intent is the existing statutory text, . . . *and not the predecessor statutes*." *Lamie*, 540 U.S. at 534 (emphasis added). We interpret undefined terms in the *existing text* in accordance with their ordinary meaning at the time Congress adopted them. *Niz-Chavez*, 141 S. Ct. at 1480. And when that meaning is clear and produces a nonabsurd result, our analysis is finished. *See Lamie*, 540 U.S. at 534.

Here, the adopting time is either the last time (before 2014) Congress made relevant substantive changes to the orphan drug credit or the time Congress extended the research credit to apply to expenses incurred in 2014. As to the first option, one possible choice is 1996, the year when Congress reinstated the orphan drug credit, moved it, and made it subject to the limitations applicable to general business credits.

See infra p. 514. A second possible choice is 1997, when Congress made the credit permanent (that is, applicable to qualified clinical testing expenses incurred in subsequent years, including 2014). As to the second option, the relevant time is 2014, the year when Congress made the research credit applicable to qualified research expenses incurred in 2014. But regardless of which option is chosen, by the relevant time, the definition of the term "base period research expenses" provided in old section 44F(c)(1) (and later in old section 30(c)(1) and section 41(c)(1), see the research credit history discussed in note 33 below) had been missing from the Code for seven years at the very least.[29] Accordingly, United Therapeutics' argument that the existing text of section 45C(c)(2) somehow still incorporates the old definition is incorrect.[30]

The analysis above faithfully follows the Supreme Court's analysis in *Lamie*, 540 U.S. 526, where the Court considered

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[29] We point to these alternate timeframes because the coordination rule of section 45C(c)(2) could be viewed either as a limiting condition on the orphan drug credit (i.e., a taxpayer electing to claim the more generous benefits of the orphan drug credit must in effect accept a haircut to its otherwise available research credit) or as an inherent condition of the research credit (i.e., the research credit is calculated a certain way when a taxpayer meets a specific condition, namely, that it elected to claim the orphan drug credit during a year included in the base period). We need not decide here which of these alternatives is the proper one as the outcome in this case is the same under either.

[30] United Therapeutics also invokes Treasury Regulation § 1.41-3A in support of its position. Specifically, it argues both (1) that the regulation confirms "base period research expenses" is a concept applicable only to years before 1990 and (2) that the 2001 redesignation of the regulation reflects agreement by the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) that the concept no longer applies. But, as United Therapeutics concedes, the regulation says on its face that it does not apply for taxable years after 1989. *See* Treas. Reg. § 1.41-1(b); T.D. 8930, 2001-1 C.B. 433, 443, 66 Fed. Reg. 280, 289 (Jan. 3, 2001). If predecessor statutes do not cast doubt on the meaning of an existing statute's text, *see Lamie*, 540 U.S. at 534, then we fail to see how a predecessor regulation could do so. Moreover, for years after 1990, Treasury and the IRS simply have not spoken regarding the meaning of "base period research expenses." The 2001 redesignation of the regulation was simply an acknowledgment that the research credit had been amended. Silence by Treasury and the IRS is no concession as to the nature of the amended statute. In other words, administrative confirmation that a regulation interpreting a predecessor statute applies to the period the predecessor statute was in effect does not constrain future interpretations of another statute.

a question arising under the Bankruptcy Code. In *Lamie*, a bankruptcy attorney had sought compensation under section 330(a)(1) of the Bankruptcy Code, 11 U.S.C., which governs court awards of professional fees. His application was denied, and a challenge followed. The attorney's argument turned on the text of 11 U.S.C. § 330(a) before and after an amendment made by the Bankruptcy Reform Act of 1994 (1994 Act), 108 Stat. 4106.[31]

The Supreme Court described the attorney's argument as follows:

> [The debtor's attorney] argues that the existing statutory text is ambiguous . . . . He makes the case for ambiguity, for the most part, by comparing the present statute with its predecessor. Thus, he says the statute is ambiguous because subsection (A)'s "attorney" is "facially irreconcilable" with the section's first part since
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> > "[e]ither Congress inadvertently omitted the 'debtor's attorney' from the 'payees' list, on which the court of appeals relied, or it inadvertently retained the reference to the attorney in the latter, 'payees' list." Brief for Petitioner 17.
>
> Similarly, with respect to the missing conjunction "or" he says,

[31] Before the 1994 Act, 11 U.S.C. § 330(a) read as follows (emphasis added to highlight text later deleted):

> (a) After notice to *any* parties in interest and *to* the United States trustee and a hearing, and subject to sections 326, 328, and 329 *of this title*, the court may award to a trustee, *to* an examiner, to a professional person employed under section 327 or 1103 *of this title, or to the debtor's attorney*—
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney . . . and by any paraprofessional persons employed by such trustee, professional person, or attorney . . . ; and
>
> (2) reimbursement for actual, necessary expenses.

Pursuant to the 1994 Act, § 224(b), 108 Stat. at 4130, 11 U.S.C. § 330(a)(1) was amended to read as follows:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

> "[t]here is no apparent reason, other than a drafting error, that Congress would have rewritten the statute to produce a grammatically incorrect provision." *Ibid.*
>
> This is the analysis followed by the Courts of Appeals that hold the statute is ambiguous. . . . One determines ambiguity, under this contention, by relying on the grammatical soundness of the prior statute. That contention is wrong.

Lamie, 540 U.S. at 533–34.

The Court went on to observe:

> The starting point in discerning congressional intent is the existing statutory text, see *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). So we begin with the present statute.

Id. at 534. And turning to that "present statute," the Court noted: "The statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue." *Id.*

The "present" statutory provisions before us (those in effect for 2014) are not in the least bit "awkward" or "ungrammatical." In these circumstances, there is even less reason than in *Lamie* to consult predecessor versions of the statute.

In short, United Therapeutics invites us to reject the ordinary (not to mention straightforward and nonabsurd) meaning of an existing statute in favor of a predecessor definition that Congress removed from the Code in 1989. Seeing nothing in the existing statute's text that authorizes such a rejection, we decline.

b. *Even the Predecessor Statutes Do Not Require United Therapeutics' Preferred Result.*

As a further point, we are not persuaded that United Therapeutics' argument works even on its own terms. That is, even if we were to conduct the relevant statutory analysis as of 1983, the time the orphan drug credit and the coordination rule at issue here were first adopted, we would not be sure that Congress used the phrase "base period research

expenses" as a defined term. At that time, section 44H(c)(2) (the predecessor of section 45C(c)(2)) read as follows:

> Expenses included in determining base period research expenses.—Any qualified clinical testing expenses for any taxable year which are qualified research expenses (within the meaning of section 44F(b)) shall be taken into account in determining base period research expenses for purposes of applying section 44F to subsequent taxable years.

Note that, when addressing "qualified research expenses," Congress was careful to indicate that it meant such expenses "within the meaning of section 44F(b)." But when it addressed "base period research expenses," Congress did not direct the reader to the specific definition in section 44F(c)(1). Courts presume that when Congress includes certain language in one provision but omits it in another, the inclusion and exclusion are intentional. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))); *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (same). All the more so when the relevant language is missing in the very same sentence.[32] *See Loughrin*, 573 U.S. at 358. Thus, textual clues from 1983 support the view that the phrase "base period research expenses" should be given its ordinary meaning, rather than a special, defined, meaning.

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[32] Note also that the definition provided in section 44F(c)(1) explicitly states that the definition is provided "[f]or purposes of this section." Given that limiting phrase, one would expect Congress to tell us if it wished to give an undefined term in another section the same meaning.

c. *Other Principles Refute United Therapeutics' Position.*[33]

To complicate matters further for United Therapeutics' position, repeals by implication are disfavored. *See Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) ("Where there are two acts upon the same subject, effect should be given to both if possible."); *see also id.* (discussing the standard for implied repeals); *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) (same). When, in 1989, Congress amended the research credit to delete the definition of "base period research expenses," it left the same phrase in section 28(c)(2) (the predecessor of section 45C(c)(2)) untouched. United Therapeutics maintains that this congressional action rendered section 28(c)(2) inapplicable. But it is not clear to us why section 28(c)(2) should be interpreted as having been left with no work to do (that is, as having been effectively repealed by the changes in the research credit) since 1989 when, as we discuss above, it is not difficult at all to apply the text of that section and its successors to the amended text of section 41.[34] United Therapeutics says that there is a difference between a provision's having been made

[33] Summarizing a few changes Congress made to the research and orphan drug credits between 1983 and 1989 helps provide context for the discussion that follows. In 1984, Congress reorganized the credits by "group[ing them] together in [a] more logical order." DEFRA § 471. The orphan drug credit (previously found in section 44H) was moved to new section 28, and the research credit (previously found in section 44F) was moved to new section 30. *Id.* § 471(c), 98 Stat. at 826. Then, in 1986, the research credit was moved yet again, this time to section 41 (where it remains today). TRA 1986 § 231(d)(2), 100 Stat. at 2178. One reason for the change was to treat the research credit in the same manner as other business credits. *Id.* § 231(d)(1), 100 Stat. at 2178. With these changes, the definition of the term "base period research expenses" came to be found in section 41(c)(1). Then, in 1989, Congress amended section 41(c)(1) in its entirety, which resulted in the definition of the term "base period research expenses" (previously included in section 41(c)(1)) being removed from the Code altogether. But Congress left the phrase "base period research expenses" in section 28(c)(2) (the predecessor of section 45C(c)(2)) untouched.

[34] That Congress not only left section 28(c)(2) intact in 1989, but also renumbered it later when it moved the orphan drug credit to section 45C, *see infra* pp. 514–15, further undercuts the view that the provision was impliedly repealed.

inapplicable and implied repeal. On the facts of this case, we are unable to see what that distinction would be.[35]

Even if we were to overlook the law's aversion to implied repeals, United Therapeutics' position runs afoul of another "'cardinal principle' of interpretation." *See Loughrin*, 573 U.S. at 358 (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). In reading the Code as it applied for 2014, we "must give effect, if possible, to [its] every clause and word."[36] *Id.* (quoting *Williams*, 529 U.S. at 404); *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 478 (2017) (same); *see also Sutherland v. Commissioner*, 155 T.C. 95, 104 (2020). Our interpretation of section 45C(c)(2) follows this principle. United Therapeutics, on the other hand, reads section 45C(c)(2) as a dead letter. The Code's text and structure do not support, let alone require, such a reading.

A more in-depth look at the history of the relevant provisions further refutes United Therapeutics' position.[37] We have already discussed changes Congress made to both cred-

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[35] United Therapeutics also faults the Commissioner for not pointing to "[any] evidence, let alone clear evidence, indicating that Congress intended to amend the limited exception set forth in section 45C(c)(2) to apply to the new and different section 41 research credit when Congress overhauled section 41 in 1989." Pet'r's Answering Br. 13. But there was no need for Congress to amend section 28(c)(2) (the predecessor of section 45C(c)(2)) or section 45C(c)(2) itself to apply to changes in the research credit. The existing text, which (as we have explained) did not use a defined term, is sufficiently broad to cover new methods of determining the research credit. This fully explains why Congress both left the provision in the statute in 1989 and did not change it thereafter, including in 2006 when it adopted the alternative simplified method that United Therapeutics used in 2014. *See also infra* pp. 517–19.

[36] As the Supreme Court has maintained for nearly 150 years,

> we are not at liberty . . . to deny effect to a part of a statute. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that "significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"

Petition of Pub. Nat'l Bank of N.Y., 278 U.S. 101, 104 (1928) (quoting *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)).

[37] The "history [we] have in mind here . . . [is] the record of *enacted* changes Congress made to the relevant statutory text over time, the sort of textual evidence everyone agrees can sometimes shed light on meaning."

its from 1983 to 1989. *See supra* note 33. Between the 1989 amendments to the research credit that United Therapeutics highlights and the end of 2014, Congress amended the research credit at least 16 times[38] and the orphan drug credit at least 14 times.[39] Many of the amendments to both credits were minor, but others were significant.

As an example, Congress, which had previously renewed the research credit and the orphan drug credit every few years, allowed them both to expire effective July 1, 1995, for the research credit and December 31, 1994, for the orphan drug credit. It revived the credits in 1996, but not retroactively. Thus, there was a period from 1995 to 1996 when neither credit was available. *See* I.R.C. § 41(h)(1)(A) (1996) (providing that section 41 "shall not apply to any amount paid or incurred . . . after June 30, 1995, and before July 1, 1996"); I.R.C. § 45C(e)(1) (1996) (providing the same for "any amount paid or incurred . . . after December 31, 1994, and before July 1, 1996"). And while Congress made the orphan drug credit permanent in 1997, it continued to extend the research credit every few years, sometimes retroactively, until ultimately making the credit permanent in 2015. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. Q, § 121(a), 129 Stat. 2242, 3049 (2015).

Moreover, when Congress revived the credits in 1996 following their lapse, it simultaneously made changes to both. For example, Congress modified the orphan drug credit by moving it from section 28 to section 45C, thereby subjecting it to the rules and limitations that apply to general business credits, *see* I.R.C. § 38, changing the termination and carryback provisions to reflect the credit's lapse, and making other conforming amendments, *see* SBJPA § 1205. With respect to the research credit, Congress modified the definition of the term "base amount" as it applies to startup companies, provided for the election of the alternative incremental credit, and increased the credit available for certain contract research ex-

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BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 653–54 (1898)).

[38] For a discussion of the amendments, see Kendall B. Fox et al., *Research and Development Expenditures*, 556-3rd Tax Mgmt. (BNA) at X.B (Sept. 30, 2019).

[39] Nearly all the amendments were made by the same statutes that amended the research credit. *See supra* note 38.

penses, among others. *See id.* § 1204, 110 Stat. at 1773–75. And Congress continued to tinker with the research credit over the years, including, as United Therapeutics points out, adding the alternative simplified credit as an option for calculating the credit in 2006. *See* TRHCA § 104(c), 120 Stat. at 2935.

All of this goes to show that, between 1989 and 2014, Congress had a number of opportunities to delete or modify the reference to base period research expenses in section 45C(c)(2) if it was in fact deadwood. These opportunities included, among many others, 2014 (the amendments that made the research credit available for 2014 and made a conforming change to section 45C), 2006 (the amendments that added the alternative simplified method to the research credit and updated a provision of the orphan drug credit), and 1996 (the amendments that resurrected both credits and made other changes). *See infra* Appendix. But with every amendment, Congress left section 45C(c)(2) intact.

Congress's choice in this regard, a choice that it made over and over in the years leading up to 2014, suggests that it was happy with the text of section 45C(c)(2), including the reference to base period research expenses. *New York ex rel. N.Y. State Off. of Child. & Fam. Servs. v. U.S. Dep't of Health & Hum. Servs.' Admin. for Child. & Fams.*, 556 F.3d 90, 99 (2d Cir. 2009) (even "edit[s that] may appear small" are "sufficient" to "demonstrate[] that [one statutory provision] did not escape Congress's notice at the time it amended [another statutory] provision" and a contrary inference would be "unreasonable").

This statutory history also explains in part why United Therapeutics' reliance on *Wisconsin Central*, 138 S. Ct. 2067, is misplaced. That decision undercuts, rather than supports, United Therapeutics' position here. In *Wisconsin Central*, the Supreme Court was called upon to interpret a term contained in a statute that, in relevant part, had been left unchanged since its adoption in 1937. In giving the relevant term the meaning it had in 1937, the Court observed:

> Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost. That is why it's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary, contemporary,

> common meaning . . . at the time Congress enacted the statute." *Perrin*, 444 U.S., at 42. Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.

Wis. Cent. Ltd., 138 S. Ct. at 2074.

What the Supreme Court observed should happen through the legislative process is exactly what Congress has done with respect to the research and orphan drug credits. That constitutionally authorized body has repeatedly "exercise[d] [its] power" "to revise" the terms under which the research and orphan drug credits are made available "in light of new social problems and preferences." *Id.* And, as we have already explained, the statute that made the credit available for the year at issue also left in place the coordination provision that United Therapeutics urges us to read as a nullity. So, following United Therapeutics' lead would require that we ignore "the ordinary, contemporary, common meaning" of the duly enacted statute that gave United Therapeutics the very benefit it seeks. That we will not do. "[A] judge's job [is] only to apply, not revise or update, the terms of statutes." *Id.* (citing *Wis. Cent. Ltd. v. United States*, 856 F.3d 490, 493 (7th Cir. 2017) (Manion, J., dissenting), *rev'd and remanded*, 138 S. Ct. 2067); *see also New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (interpreting the undefined term "contract of employment" as used in the Federal Arbitration Act based on that term's meaning at the time of the Act's adoption in 1925 when (unlike here) the relevant provisions had been left unchanged by Congress).

United Therapeutics' reliance on *Wisconsin Central* is misplaced for another, perhaps more fundamental, reason. That case, the cases on which it relied, and the cases that followed it all concerned the proper interpretation of an undefined term. They all answered the question "what should a court do when the statute does not define the meaning of a relevant term at the time of its enactment?" They neither confronted nor answered the question "what should a court do when Congress removes from the statute a definition that might have been viewed as supplying the meaning of what a party claims to be a 'defined' term that remains in the statute?"

Our case implicates the latter question. In United Therapeutics' telling, the phrase "base period research expenses" was a defined term when it was first adopted and retains that defined meaning even after Congress eliminated the relevant definition from the statute. United Therapeutics cites no authority for this proposition.

Nor does its position make sense in light of the concerns that animate *Wisconsin Central* and like cases. As the Supreme Court observed in *New Prime Inc.*, 139 S. Ct. at 539:

> [I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. *INS v. Chadha*, 462 U.S. 919, 951 (1983). We would risk, too, upsetting reliance interests in the settled meaning of a statute. Cf. 2B N. Singer & J. Singer, Sutherland on Statutes and Statutory Construction § 56A:3 (rev. 7th ed. 2012).

The circumstances before us do not involve the Court's giving an undefined statutory term a meaning different from the ordinary meaning it would have had at the time of its adoption, thus interfering with the "single, finely wrought and exhaustively considered, procedure" for amending a statute. They involve instead a party inviting the Court to treat an undefined term as if it were defined, ignoring a congressional enactment that eliminated the potentially relevant definition from the Code, contrary to the considerations set out in *New Prime Inc.*, and further ignoring repeated amendments to the statute. In short, neither *Wisconsin Central* nor any other authority United Therapeutics cites supports what United Therapeutics asks us to do.

Also weighing against United Therapeutics' position is the 111th Congress's enactment, in 2010, of a new credit that relied on the same language as that used in section 45C(c)(2). Specifically, as part of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9023(a), 124 Stat. 119, 877 (2010), the 111th Congress enacted a new "qualifying therapeutic discovery project credit" under section 48D. And it included in the new credit, in a paragraph entitled "Denial of a double benefit," the following coordination rule, with language nearly identical to that in section 45C(c):

> (i) In general.—Except as provided in clause (ii), any expenses taken into account under this section for a taxable year shall not be taken into

account for purposes of determining the credit allowable under section 41 or 45C for such taxable year.

(ii) Expenses included in determining base period research expenses.—Any expenses for any taxable year which are qualified research expenses (within the meaning of section 41(b)) shall be taken into account in determining base period research expenses for purposes of applying section 41 to subsequent taxable years.

I.R.C. § 48D(e)(2)(C) (2010). If section 45C(c)(2) has been a dead letter since 1989 because of its reference to "base period research expenses," one would not expect Congress to have used the same language for a new credit in 2010. And that same Congress, which was far closer in time to 2014 than the 1989 Congress whose actions United Therapeutics invokes, later amended section 45C itself without modifying the coordination rule in subsection (c)(2). *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 731(b), 124 Stat. 3296, 3317; *cf. New Prime Inc.*, 139 S. Ct. at 540 ("More confirmation yet comes from a neighboring term in the statutory text.").

Of course, we do not consider the actions of the 111th Congress as deciding the meaning of statutory provisions adopted by prior or future Congresses. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). We mention them only to highlight that the atextual reading of section 41 and section 45C that United Therapeutics presses here (that the phrase "base period research expenses" refers to a concept that has been inapplicable from 1989 on) does not appear to have been shared by the 111th Congress or the Senate Finance Committee.[40]

United Therapeutics insisted at the oral argument we held on January 25, 2023, that the coordination rule of old section 28(c)(2) and its successor section 45C(c)(2) remained in the Code because of an "oversight." Tr. 28:5. In its view, Congress's "failure to delete it was not a deliberate choice that [Congress] wanted this section to continue to have life

[40] *See* S. Rep. No. 111-89, at 363 n.149 (2009) (describing the provision that later became section 48D and noting that "[a]ny expenses for the taxable year that are qualified research expenses under section 41(b) are taken into account in determining *base period research expenses* for purposes of computing the research credit under section 41 for subsequent taxable years" (emphasis added)).

and applicability. It was simply a failure to make a corresponding change to section 45C when it overhauled section 41." Tr. 28:14–18. This, United Therapeutics says, "[h]appens fairly often." Tr. 28:12. But we do not interpret statutory enactments by assuming that Congress made mistakes and failed to express in the statutory text what it wished to accomplish. To the contrary, "[w]e 'must presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Dodd v. United States*, 545 U.S. 353, 357 (2005) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)); *see also Russello*, 464 U.S. at 23 ("We would not presume to ascribe this difference to a simple mistake in draftsmanship."); *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 496 (D.C. Cir. 2004) (Roberts, J.) ("In the final analysis, we can remain agnostic on the question whether Congress intentionally left the presentment requirement in [the relevant statute] or simply forgot to take it out. The suggestion that Congress may have 'dropped a stitch,' [*United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 738 (D.C. Cir. 1998),] is not enough to permit us to ignore the statutory text.").

In short, United Therapeutics' contentions concerning the statutory provisions as they existed before 1989 and the changes made in 1989, while understandable in light of the outcome it wishes to achieve, do not provide valid reasons for ignoring the straightforward and ordinary meaning of the statutory text that applies for 2014.

2. *The Consistency Rule of Section 41(c)(6)(A) Does Not Require a Different Outcome.*

United Therapeutics next argues that the consistency rule of section 41(c)(6)(A) mandated its approach. Congress added the consistency rule to section 41 in 1989, when it replaced the definition of "base period research expenses" with a new "base amount" concept. Because the consistency rule pertains to the calculation of the base amount, some background regarding that concept is useful in understanding the rule.

Since the 1989 amendments to the research credit and through 2014, section 41 has provided that one component of the credit is an amount equal to 20% of the taxpayer's qualified research expenses for the year over the "base amount."

I.R.C. § 41(a)(1). The base amount is the product of the taxpayer's "fixed base percentage" and its average gross receipts for the four years preceding the credit year. I.R.C. § 41(c)(1). In general, the fixed base percentage is "the percentage which the aggregate qualified research expenses of the taxpayer for taxable years beginning after December 31, 1983, and before January 1, 1989, is of the aggregate gross receipts of the taxpayer for [those] years." I.R.C. § 41(c)(3)(A).

The consistency rule applies to the calculation of a taxpayer's fixed base percentage. It provides that "the qualified research expenses taken into account in computing such percentage shall be determined on a basis consistent with the determination of qualified research expenses for the credit year." I.R.C. § 41(c)(6)(A).

The consistency rule (as it appears in the statute) refers only to the fixed base percentage and does not, on its face, apply when calculating the alternative simplified credit. But, after Congress enacted the alternative simplified credit in 2006, Treasury and the IRS promulgated a regulation that extended the consistency rule. The regulation provides as follows:

> Treas. Reg. § 1.41-9 Alternative simplified credit.
>
> . . . .
>
> (c) Special rules. . . .
>
> . . . .
>
> (2) Section 41(c)(6) applicability. [Qualified research expenses] for the three taxable years preceding the credit year must be determined on a basis consistent with the definition of [qualified research expenses] for the credit year, without regard to the law in effect for the three taxable years preceding the credit year. This consistency requirement applies even if the period for filing a claim for credit or refund has expired for any of the three taxable years preceding the credit year.

United Therapeutics argues that this rule requires consistency in calculating the two components of the alternative simplified credit—i.e., that it does not permit qualified clinical testing expenses to be excluded in qualified research expenses for the credit year but included for the three preceding years. Again, we disagree.

First, to the extent United Therapeutics relies on the statutory consistency rule, that provision does the company no good. As United Therapeutics appears to recognize, the con-

sistency rule in section 41(c)(6)(A) applies only when calculating a taxpayer's fixed base percentage, a concept that had no relevance in calculating the company's alternative simplified credit.

Second, we disagree with United Therapeutics' interpretation of the regulation, which says simply that taxpayers must apply the same *definition* of qualified research expenses to the credit year and the three preceding years even if there has been a change in law. In other words, if the definition of qualified research expenses, which is provided in section 41(b), changes during the relevant years, the regulation requires taxpayers to apply the credit year definition in identifying its qualified research expenses for all four years. Nothing in the regulation purports to override the coordination rule of section 45C(c), which does not address the definition of qualified research expenses other than by referring back to section 41(b). Rather, section 45C(c) provides a special rule for how a certain category of qualified research expenses—those that are also qualified clinical testing expenses—must be treated after they are identified.

Third, to the extent United Therapeutics intends to use the statutory consistency rule as a textual clue supporting its reading of section 45C(c)(2), that effort also comes up short. We see no conflict between the statutory consistency rule and section 45C(c)(2). Instead, we read the statutory consistency rule the same way Treasury and the IRS do in their regulations, and the same way the U.S. Court of Appeals for the Fifth Circuit read it in *Trinity Industries, Inc. v. United States*, 757 F.3d 400 (5th Cir. 2014). That is, the rule simply requires that the definition of qualified research expenses, which Congress has changed over the years, be applied consistently across the credit year and the years in the reference period. *See* Treas. Reg. § 1.41-3(d)(1) (requiring qualified research expenses "[to] be determined on a basis consistent with the definition of qualified research expenses . . . for the credit year, without regard to the law in effect for the taxable years taken into account in computing the fixed-base percentage or the base amount"); *see also Trinity Indus., Inc.*, 757 F.3d at 411–12 ("In sum, the consistency rule calls for consistent application of the [qualified research expense] definition across the base period years

and the claim year . . . .").[41] This straightforward reading of the statute gives effect to both section 41(c)(5) and section 45C(c)(2), unlike United Therapeutics' preferred reading. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974))).

Moreover, even assuming for the sake of argument that the consistency rule of section 41(c)(6) conflicts with the coordination rule of section 45C(c)(2) in certain circumstances,[42] section 45C(c)(2) would prevail under "the specific governs the general" rule of statutory interpretation. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general." (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992))); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183–88 (2012). Section 41(c)(6) is a general rule that applies to all taxpayers computing the incremental research credit, whereas section 45C(c)(2) applies only to taxpayers who elect to claim the orphan drug credit in addition to the research credit. Accordingly, section 45C(c)(2), which may marginally reduce the overall benefit of both credits for taxpayers who claim the orphan drug credit, is the more specific rule in this context and would control in the event of a conflict.

3. *Policy Considerations Cannot Change the Clear Directive of the Relevant Provisions.*

United Therapeutics also appears to offer a policy argument in support of its position. Its opening brief observes that, in adopting the orphan drug credit,

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[41] United Therapeutics cites *Trinity Industries* in support of its position, but that case interprets the consistency rule the same way we do here.

[42] To reiterate a point we made above, the statutory consistency rule applies only to taxpayers claiming the incremental credit, which relies on the base amount computation. So, even under United Therapeutics' interpretation, it would not create a conflict in this case since United Therapeutics claimed the alternative simplified credit, not the incremental credit. *See supra* note 7.

> Congress aimed to encourage the development of desperately needed treatments. *See* H.R. Rep. No. 101-247, at 1199 (noting that the House Committee on the Budget "modified the method of calculating a taxpayer's base amount in order to enhance the credit's incentive effect"). That objective would be frustrated by reducing the section 41 research credit based on a company's incremental investment in clinical testing of orphan drugs.

Pet'r's Opening Br. 12–13.

But, "[a]s [the Supreme] Court has explained, 'even the most formidable' policy arguments cannot 'overcome' a clear statutory directive." *BP P.L.C.*, 141 S. Ct. at 1542 (quoting *Kloeckner v. Solis*, 568 U.S. 41, 56 n.4 (2012)). Moreover,

> [t]hat a law might temper its pursuit of one goal [for example, the encouragement of desperately needed treatments] by accommodating others [for example, minimizing the budget impact of an incentive provision like the research credit[43]] can come as no surprise. Often legislation becomes possible only because of such compromises. Often lawmakers tread in areas fraught with competing social demands where everyone agrees tradeoffs are required.

Id. at 1539. In the final analysis, we agree that, as United Therapeutics notes in its Answering Brief at 17, "'[t]he judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted.' *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 100 (1958). Congress's policy aims are best served by applying the statute according to its terms . . . ." That is precisely what we do here.

V. *Conclusion*

For the reasons stated above, the case must be resolved in favor of the Commissioner.

To reflect the foregoing,

Decision will be entered for respondent.

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[43] Concern over the cost of the research credit is a common theme in the materials that accompany the legislation governing the research credit. *See, e.g.*, H.R. Rep. No. 101-247, at 1199–1200 (1989), *as reprinted in* 1989 U.S.C.C.A.N. 1906, 2669–70 (explaining that changes were made "at the lowest possible revenue cost"); *see also* Yin, *supra* note 5, at 199–202.

APPENDIX

Research Credit[44]

Legislation	*Date of Enactment*	*Effective Dates*	
		Begin	*End*
Economic Recovery Tax Act of 1981, Pub. L. 97-34	August 13, 1981	July 1, 1981	December 31, 1985
Tax Reform Act of 1986, Pub. L. 99-514	October 22, 1986	January 1, 1986	December 31, 1988
Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647	November 10, 1988	January 1, 1989	December 31, 1989
Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239	December 19, 1989	January 1, 1990	December 31, 1990
Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508	November 5, 1990	January 1, 1991[45]	December 31, 1991
Tax Extension Act of 1991, Pub. L. 102-227	December 11, 1991	January 1, 1992	June 30, 1992
Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66	August 10, 1993	July 1, 1992	June 30, 1995
Small Business Job Protection Act of 1996, Pub. L. 104-188	August 20, 1996	July 1, 1996	May 31, 1997
Taxpayer Relief Act of 1997, Pub. L. 105-34	August 5, 1997	June 1, 1997	June 30, 1998

[44] The tables are reproduced from Respondent's Supplemental Brief pp. 6–7.

[45] The effective date of the relevant provisions was January 1, 1990. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11402(c), 104 Stat. 1388, 1388–473.

Legislation	*Date of Enactment*	*Effective Dates*	
		Begin	*End*
Omnibus Consolidated and Emergency Supplemental Appropriations Act, [1999,] Pub. L. 105-277	October 21, 1998	July 1, 1998	June 30, 1999
Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. 106-170	December 17, 1999	July 1, 1999	June 30, 2004
Working Families Tax Relief Act of 2004, Pub. L. 108-311	October 4, 2004	July 1, 2004	December 31, 2005
Tax Relief and Health Care Act of 2006, Pub. L. 109-432	December 20, 2006	January 1, 2006	December 31, 2007
Emergency Economic Stabilization Act of 2008, Pub. L. 110-343	October 3, 2008	January 1, 2008	December 31, 2009
Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. 111-312	December 17, 2010	January 1, 2010	December 31, 2011
American Taxpayer Relief Act of 2012, Pub. L. 112-240	January 2, 2013	January 1, 2012	December 31, 2013
Tax Increase Prevention Act of 2014, Pub. L. 113-295	December 19, 2014	January 1, 2014	December 31, 2014
Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114-113	December 18, 2015	January 1, 2015	*Made Permanent

Orphan Drug Credit

Legislation	*Date of Enactment*	*Effective Dates*	
		Begin	*End*
Orphan Drug Act, Pub. L. 97-414	January 4, 1983	January 1, 1983	December 31, 1987
Tax Reform Act of 1986, Pub. L. 99-514	October 22, 1986	N/A[46]	December 31, 1990
Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508	November 5, 1990	January 1, 1990[47]	December 31, 1991
Tax Extension Act of 1991, Pub. L. 102-227	December 11, 1991	January 1, 1992	June 30, 1992
Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66	August 10, 1993	July 1, 1992	December 31, 1994
Small Business Job Protection Act of 1996, Pub. L. 104-188	August 20, 1996	July 1, 1996	May 31, 1997
Taxpayer Relief Act of 1997, Pub. L. 105-34	August 5, 1997	June 1, 1997	*Made Permanent

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PRINCE AMUN-RA HOTEP ANKH MEDUTY, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 32817-21P. Filed May 23, 2023.

P owed more than $100,000 in unpaid, legally enforceable federal income tax liabilities and frivolous return penalties relating to eight taxable years. R was unable to collect those liabilities and certified to the Secretary of State that P had a

[46] The effective date of the relevant provisions was January 1, 1983. TRA 1986 § 1879(b)(3), 100 Stat. at 2906.

[47] The relevant section does not appear to include an effective date provision. Omnibus Budget Reconciliation Act of 1990, § 11411, 104 Stat. at 1388–479.

"seriously delinquent tax debt" within the meaning of I.R.C. § 7345 for the relevant years and liabilities. P filed a petition with this Court under I.R.C. § 7345(e)(1) to challenge the certification. R filed a motion for summary judgment arguing that the certification was proper. *Held*: P's liabilities constitute a "seriously delinquent tax debt" under I.R.C. § 7345, and R's certification to the Secretary of State was not erroneous. *Held, further*, the Court lacks jurisdiction under I.R.C. § 7345(e) to review challenges to R's compliance with the notification requirement set forth in I.R.C. § 7345(d).

Prince Amun-Ra Hotep Ankh Meduty, pro se.
Susan K. Bollman, for respondent.

OPINION

URDA, *Judge*: In this passport case petitioner, Prince Amun-Ra Hotep Ankh Meduty, seeks review pursuant to section 7345(e)[1] of the certification by the Commissioner of the Internal Revenue Service (IRS) to the Secretary of State that Mr. Meduty has a "seriously delinquent tax debt" for his 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2012 tax years. The Commissioner has filed a motion for summary judgment under Rule 121, contending that his certification was proper and that he is entitled to judgment as a matter of law. Seeing no error, we will grant the Commissioner's motion.

Background

The following facts are based on the parties' pleadings and motion papers, including the attached declarations and exhibits. *See* Rule 121(c). The exhibits included the relevant portions of the administrative record that formed the basis of the certification. Mr. Meduty lived in Georgia when he timely filed his petition.

Mr. Meduty (formerly known as Steven Bell) failed to file timely tax returns for the 2003–07, 2009, and 2012 tax years. For each of these years except 2007, the IRS prepared a substitute for return under section 6020(b) and later assessed the tax shown on the substitute for return with penalties and interest. Mr. Meduty filed a belated tax return for

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C. (I.R.C.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. All monetary amounts are rounded to the nearest dollar.

2007, and the IRS assessed the amount shown on that return. The IRS also assessed frivolous tax return penalties against Mr. Meduty with respect to his 2005–08 tax years.

In an effort to collect these liabilities, the IRS levied against Mr. Meduty's right to receive his state income tax refunds through an automated levy process known as the State Income Tax Levy Program. These levies took place on a rolling basis from 2012 through 2018 as liabilities for various periods were assessed.

On July 3, 2018, the IRS sent via certified mail to Mr. Meduty's last known address a notice of intent to levy with respect to his outstanding liabilities. Although the IRS received a signed return receipt three days later, Mr. Meduty did not request a collection due process (CDP) hearing or otherwise contest the levy (and the time for doing so has long since expired). The IRS recorded an "initial levy" transaction code with respect to each of the periods and liabilities at issue on August 31, 2018.

On October 1, 2018, the IRS certified Mr. Meduty as an individual owing a seriously delinquent tax debt arising from tax years 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2012. The IRS concurrently sent Mr. Meduty, at his last known address, a Notice CP508C, Notice of Certification of Your Seriously Delinquent Federal Tax Debt to the State Department. At that point, Mr. Meduty's assessed liabilities totaled $106,346.

Approximately three years later, Mr. Meduty petitioned this Court to review the section 7345 certification under section 7345(e)(1). He asserted in his petition, inter alia, that the Commissioner had failed to cite any "authority implementing regulations published in the Federal Register for Code § 7345," that a levy is restricted to "salary or wages of an officer, employee or elected official of the United States or District of Columbia," and that "value of $10,000,000 was sent for acceptance[,] approval[, and] discharge of any debt."

Discussion

I. *Background Law*

A. *Scope and Standard of Review Under Section 7345*

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). In cases that are subject to a de novo scope of review, we 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 cases in which the Court "must confine [itself] to the administrative record to decide whether there has been an abuse of discretion," the ordinary "summary judgment standard is not generally apt." *Van Bemmelen v. Commissioner*, 155 T.C. 64, 78 (2020). In those cases, "summary judgment serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 79.

We need not decide in this case either the applicable scope or standard of review. *See, e.g.*, *Rowen v. Commissioner*, 156 T.C. 101, 106 (2021). As to the scope of review, there is no material dispute between the parties regarding the evidence we should consider. As to the standard of review, our decision would be the same whether we reviewed the Commissioner's certification de novo or for abuse of discretion.

B. *Section 7345 Overview*

If the Commissioner certifies that a taxpayer has "a seriously delinquent tax debt," section 7345(a) provides that the certification shall be transmitted "to the Secretary of State for action with respect to denial, revocation, or limitation of [the taxpayer's] passport."[2] The Commissioner is responsible for notifying the taxpayer of the certification. I.R.C. § 7345(d).

Generally, a "seriously delinquent tax debt" is a federal tax liability that has been assessed, exceeds $50,000 (adjusted for inflation), and is unpaid and legally enforceable. I.R.C. § 7345(b)(1), (f).[3] In addition, to prevail on his motion for

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[2] Section 7345 outlines a two-step procedure whereby the Commissioner sends certification to the Secretary of the Treasury, who then transmits the certification to the Secretary of State. In practice, the IRS follows a one-step procedure whereby the Commissioner, as the Secretary's delegate, transmits the certification directly to the State Department. *See* I.R.C. § 7701(a)(11); *Internal Revenue Manual* (IRM) 5.1.12.27.1, .6, .8 (Dec. 20, 2017).

[3] The inflation-adjusted amount for 2018, the year of the certification here, was $51,000. *See* Rev. Proc. 2017-58, § 3.53, 2017-45 I.R.B. 489, 499.

summary judgment, the Commissioner must demonstrate that either "(i) a notice of lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed, or (ii) a levy is made pursuant to section 6331." I.R.C. § 7345(b)(1)(C). As relevant here, section 6331 requires that the Secretary provide the taxpayer a "brief statement" describing, inter alia, levy procedures, administrative appeal rights, and collection alternatives at least 30 days before the issuance of the levy. I.R.C. § 6331(d).

If a certification is found to be erroneous, or if the certified debt is fully satisfied or ceases to be seriously delinquent, the IRS must reverse its certification and notify the Secretary of State and the taxpayer. I.R.C. § 7345(c)(1), (d). Section 7345(e)(1) permits a taxpayer who has been certified as having a "seriously delinquent tax debt" to petition this Court to determine "whether the certification was erroneous or whether the [IRS] has failed to reverse the certification." If we find that a certification was erroneous, we "may order the Secretary [of the Treasury] to notify the Secretary of State that such certification was erroneous." I.R.C. § 7345(e)(2). The statute specifies no other form of relief that we may grant. *Adams v. Commissioner*, 160 T.C. 1, 8 (2023).

II. *Analysis*

A. *Whether the Certification of Seriously Delinquent Tax Debt Was Erroneous*

The record shows that the Commissioner met the criteria to certify that Mr. Meduty has a "seriously delinquent tax debt." The Commissioner has supplied Forms 4340, Certificate of Assessments, Payments, and Other Specified Matters, for Mr. Meduty's income tax liabilities for 2003, 2004, 2005, 2006, 2007, 2009, and 2012, as well as Forms 4340 related to the frivolous return penalties for 2005 through 2008. These Forms 4340 reflect assessments for each of the years and liabilities at issue and show that as of October 2018, Mr. Meduty had assessed, unpaid, and legally enforceable federal tax

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Although section 7345(b)(2) sets forth certain exceptions to the term "seriously delinquent tax debt," Mr. Meduty does not argue that any applies. We thus will not tarry over them.

liabilities of $106,346. Although Mr. Meduty contests the validity of the underlying liabilities (primarily referencing run-of-the-mill tax-protester arguments), "we do not have jurisdiction to review the liabilities underlying the certification of a seriously delinquent tax debt." *See Adams*, 160 T.C. at 12–13 (citing *Ruesch v. Commissioner*, 154 T.C. 289, 295–98 (2020), *aff'd in part, vacated in part and remanded per curiam*, 25 F.4th 67 (2d Cir. 2022)); *see also Belton v. Commissioner*, T.C. Memo. 2023-13, at *13.[4]

The record also establishes, with respect to each year and type of liability, that a "levy [has been] made pursuant to section 6331." *See* I.R.C. § 7345(b)(1)(C)(ii). To demonstrate levies pursuant to section 6331, the Commissioner relies on both the Forms 4340 and the declaration of a senior program analyst overseeing passport certifications, who was familiar with the Integrated Data Retrieval System (IDRS).[5]

The Forms 4340 for each of the periods and tax liabilities at issue reflect that the IRS (1) issued a notice of intent to levy via certified mail on July 3, 2018, (2) received a signed return receipt on July 6, 2018, and (3) made an initial levy[6]

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[4] We recognize that, after certification, the collection period of limitations expired for the 2003, 2004, 2005, 2006, and 2007 federal income tax liabilities and the 2005, 2006, 2007, and 2008 frivolous return penalty liabilities, and the balances due were written off. The total amount of Mr. Meduty's tax liabilities thus dipped below the 2018 threshold amount after the date of the certifications. This change in circumstances does not suggest that the certification should be reversed. Once a valid certification is made, section 7345(c)(1) and (2) provides that a debt "ceases to be a seriously delinquent debt" only if the debt "has been *fully* satisfied or has become legally unenforceable." (Emphasis added.) Since at least some of the debt remains outstanding and legally enforceable, this requirement has not been satisfied. *See Belton*, T.C. Memo. 2023-13, at *16 n.17.

[5] As we recently explained, IDRS is a computer interface that allows the IRS to retrieve a portion of the data it possesses regarding each taxpayer's federal tax obligations and generate transcripts with respect to such information. *See, e.g.*, *Belton*, T.C. Memo. 2013-13, at *14.

[6] The senior program analyst explained that the transcripts showed numerous levies against Mr. Meduty's state tax refunds through the automatic State Income Tax Levy Program starting in 2012. As the IRS acknowledges, such automatic levies are subject to a postlevy CDP proceeding under section 6330(c)(2) and plainly do not comport with the section 6331 requirement of notice before levy. *See also* IRM 5.1.12.27.5(3) (Dec. 20, 2017) (flush language) ("For purposes of passport certification, a state income tax refund levy will not be recognized as a levy until CDP notification is provided.").

on August 31, 2018. For his part, the senior program analyst declared that he had reviewed Mr. Meduty's IDRS transcripts and that those transcripts displayed action code "TC 971 AC 640." This code "has been created to identify tax periods for which levy action has occurred." IRM 5.19.1.5.19.5(1) (Dec. 26, 2017); *see also Belton*, T.C. Memo. 2023-13, at *22.

"[B]earing the presumption of regularity in mind, we agree that, absent any allegations or evidence that the levies were improper, action code[] . . . 640 would usually suffice to show that the Commissioner properly levied . . . the taxpayer[] . . . ." *Belton*, T.C. Memo. 2023-13, at *22; *see also United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). Mr. Meduty challenges neither his receipt of the notice of intent to levy with respect to each period nor that the IRS properly levied upon his right to receive any state income tax refund by providing notice to the appropriate state official. *See Belton*, T.C. Memo. 2023-13, at *22. We thus conclude that the IRS satisfied the requirement that the levy be made pursuant to section 6331.

On the record before us, at the time of certification Mr. Meduty's liabilities met the statutory definition of "seriously delinquent tax debt."

B. *Mr. Meduty's Remaining Arguments*

In his objection to motion for summary judgment and his supplement thereto, Mr. Meduty raises a panoply of silly and frivolous arguments, including that (1) section 7345 was ineffective without implementing regulations, *but see Int'l Multifoods Corp. & Affiliated Cos. v. Commissioner*, 108 T.C. 579, 587 (1997) ("It is well established that the absence of regulations is not an acceptable basis for refusing to apply the substantive provisions of a section of the Internal Revenue Code."); *Trans City Life Ins. Co. v. Commissioner*, 106 T.C. 274, 300 (1996) ("The Constitution does not require that the Commissioner prescribe regulations . . . [and i]n the absence of regulations, the statutory text may be interpreted in light of all the pertinent evidence, textual and contextual, of its meaning."); (2) levies under section 6331 are only proper

against an "officer, employee, or elected official, of the United States or District of Columbia," *but see Pierson v. Commissioner*, 115 T.C. 576, 578–80 (2000) (finding an identical argument frivolous and without merit); and (3) he has fully satisfied his debt through the posting of a "bonded promissory note" for $10,000,000, *but see Goff v. Commissioner*, 135 T.C. 231, 236 (2010) ("Simply put, neither the note nor anything in connection with the note constitutes payment of [a taxpayer's] liabilities."). We will give no longer shrift to these contentions. *Wnuck v. Commissioner*, 136 T.C. 498, 501 (2011).

Mr. Meduty raises one nonfrivolous argument that implicates the scope of our jurisdiction under section 7345(e). Specifically, he contends that the IRS did not send him proper notice of the certification consistent with section 7345(d).

The jurisdiction Congress conferred in section 7345(e) does not extend to the review of the IRS's compliance with section 7345(d). Section 7345(e)(1) provides that after certification, "the taxpayer may bring a civil action . . . against the Commissioner in the Tax Court, to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification." "The text of section 7345(e) focuses exclusively on the Commissioner's actions certifying seriously delinquent tax debts and authorizes our Court (and the district courts) to determine whether those actions are erroneous." *Adams*, 160 T.C. at 16.

As the U.S. District Court for the District of Columbia recently noted, "§ 7345 does not say that a flawed or failed notice renders a certification erroneous." *McNeil v. United States*, No. CV 20-329 (JDB), 2021 WL 1061221, at *5 (D.D.C. Mar. 18, 2021), *aff'd per curiam sub nom. McNeil v. U.S. Dep't of State*, No. 21-5161, 2022 WL 4349598 (D.C. Cir. Sept. 20, 2022). And the structure of section 7345 belies such a conclusion. Subsections (a) and (b) describe when the Secretary of the Treasury must transmit certification to the Secretary of State and identify which debts qualify as "seriously delinquent tax debt." Neither suggests that notice is a prerequisite to a proper certification by the IRS of a "seriously delinquent tax debt." *See McNeil*, 2021 WL 1061221, at *5. To the contrary, "subsection (d) says that notice to the taxpayer should be 'contemporaneous[]' with certification to State, so it logically cannot be a prerequisite to that certification." *Id.*

Like the District Court for the District of Columbia, we struggle to see any prejudice adhering to a taxpayer who does not receive proper notice of the certification contemplated in subsection (d). Subsection (e) supplies no period of limitations, and a taxpayer such as Mr. Meduty who does not receive proper notice (accepting his factual allegations in their most favorable light) is nonetheless able to challenge a certification. *See* I.R.C. § 7345(e); *see also McNeil*, 2021 WL 1061221, at *5.

In short, we do not believe that our jurisdiction to determine whether a certification is erroneous encompasses patrolling compliance with the requirement to provide notice to a taxpayer "in simple and nontechnical terms of the right to bring a civil action under subsection (e)." *See* I.R.C. § 7345(d).

III. *Conclusion*

We hold that the certification of Mr. Meduty as a taxpayer owing a "seriously delinquent tax debt" was not erroneous. We will grant summary judgment for the Commissioner.

To reflect the foregoing,

An appropriate order and decision will be entered.

JEREMY BERENBLATT, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 7208-17W. Filed May 24, 2023.

P was one of over 100 people interviewed by the IRS as part of an investigation that ultimately led to large recoveries from various institutional and individual taxpayers. His interview took place in November 2007. During that interview, P explained to two special agents and one revenue agent of the IRS his conclusion that a particular transaction, involving digital foreign exchange options, was fraudulent because it lacked economic substance. P did not have any further contact with the IRS about the investigation until the summer of 2015, more than seven years later, when he submitted Form 211, Application for Award for Original Information, to the IRS WBO alleging that the information he had provided in his interview was instrumental to the IRS's eventual recoveries. (P alleged that the IRS began propounding the economic substance theory— and thus began winning lawsuits—only after P's interview.) The WBO issued a determination letter denying P's claim for

award. The denial was based on representations from the primary IRS special agent who interviewed P that the IRS had already known the relevant information before P's interview. P invoked this Court's jurisdiction under I.R.C. § 7623(b)(4) to review the WBO's determination. In the course of discovery, P filed Motions to Compel R to produce various documents and respond to various interrogatories covering periods both before and after P's interview with the IRS. *Held*: R's designation of the administrative record in a whistleblower case enjoys a presumption of correctness absent clear evidence to the contrary. Discovery aimed at completing the designated record shall be allowed only upon a significant showing that there is material in the IRS's possession indicative of bad faith on the IRS's part or of an incomplete record. *Held, further*, P has not made any significant showing of bad faith or an incomplete record in connection with his requests for document production. He has made a limited showing of an incomplete record with respect to one of his interrogatory requests. We will therefore compel R to supplement his interrogatory response in that regard, but we will deny the remaining components of P's Motions to Compel.

Martin E. Karlinsky, for petitioner.

Elizabeth C. Mourges, *Bartholomew Cirenza*, and *Nancy M. Gilmore*, for respondent.

OPINION

COPELAND, *Judge*: Petitioner, Jeremy Berenblatt, has brought an action against the Commissioner (Respondent) of the Internal Revenue Service (IRS) under section 7623(b)(4)[1] to appeal a denial by the IRS's Whistleblower Office (WBO) of his application for a whistleblower award. Before the Court are three pending motions: (1) Petitioner's Motion to Compel Production of Documents, (2) Petitioner's Motion to Compel Responses to Interrogatories, and (3) Respondent's Motion for Summary Judgment. (We hereafter refer to Petitioner's two Motions together as the Motions to Compel.) We previously granted Petitioner's Motion to Stay Proceedings to address these discovery disputes. Therefore, we will address only the Motions to Compel at this time.

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

Background

The following facts are taken from the parties' pleadings and supporting documents. They are stated solely for the purpose of disposing of Mr. Berenblatt's Motions to Compel and not as findings of fact.

On July 1, 2015, the WBO received from Mr. Berenblatt Form 211, Application for Award for Original Information, dated June 25, 2015. The substantive information in the Form 211 was contained in an attached memorandum. Mr. Berenblatt sent the WBO a followup memorandum in support of his Form 211, dated December 8, 2015. We refer to the June 25 memorandum and the December 8 memorandum collectively as the Form 211 memoranda.

I. *Form 211 Memoranda*

The Form 211 memoranda set forth the facts alleged in this paragraph and the paragraphs that follow. Mr. Berenblatt worked as a stock trader in the late 1990s, with an expertise in foreign currency exchange. He earned a significant amount of income during the year 2000, after which he was approached about investing in a digital foreign exchange option transaction known as Short Options Strategies (SOS). SOS was billed as an opportunity for legally minimizing taxes. A digital option is a type of option where the payoff is either a fixed amount or nothing at all, depending on whether the underlying asset passes a stated strike price.

Mr. Berenblatt completed an SOS investor application and funded a trading account. However, he ultimately determined that the probability of the options' yielding a nonzero payoff was negligible, such that the transaction lacked a nontax business purpose and was potentially fraudulent. In the words of the June 25 memorandum: "[Mr. Berenblatt] concluded that it would be impossible to ever make money, as the lottery payout [i.e., the nonzero option payoff] would never materialize. . . . The only conceivable benefit from the deal was the extraordinary tax benefit that had nothing to do with any plausible return on the investment." Mr. Berenblatt did not move forward with the investment.

In late 2007 a special agent (SA) in the IRS's Criminal Investigation Division (CID) called Mr. Berenblatt to request a meeting. The agent mentioned that the U.S. Government

would soon convene a grand jury investigation into some of the SOS promoters. In or around November 2007 Mr. Berenblatt met with Shawn Chandler, another CID SA, at Mr. Chandler's New York office. A third CID SA, Christine Mazzella, and IRS Revenue Agent (RA) Arthur Mason also participated in the meeting. During the meeting, Mr. Berenblatt related his analysis of the SOS transaction to the agents. He explained that the probability distribution for payoffs on the digital options was skewed by the fact that the intermediary bank "controlled the trade and its pricing."

Mr. Berenblatt claims that he was the first person to provide the IRS with a successful litigation tactic for proving the fraudulence of the SOS transaction. He claims that before his interview, the IRS's primary litigating position was that the SOS transactions fell afoul of the "step transaction" doctrine—an argument that had failed in court. According to Mr. Berenblatt, after his interview the IRS began winning cases relating to SOS and similar tax shelters by using the reasoning he had provided to the IRS first.

Mr. Berenblatt seeks an award related to the U.S. Government's recovery of at least $1.4 billion in restitution, forfeiture, and settlement proceeds and at least $5.9 billion in unpaid taxes stemming from digital options and similar shelters.

II. *WBO Review*

In September 2015 the WBO assigned Senior Tax Analyst Laura Meis to review Mr. Berenblatt's whistleblower award application. After reviewing the Form 211 and the June 25 memorandum, Ms. Meis contacted Mr. Chandler, the primary CID SA who had interviewed Mr. Berenblatt in November 2007. Ms. Meis corresponded by email and phone with Mr. Chandler, who related that (1) "[Mr. Berenblatt's] claim as being the first person to provide pertinent and relevant information is not accurate"; (2) Mr. Berenblatt "had not provided any documents for the [SOS] investigation and . . . he was not called to testify [in any related trials]"; and (3) the SOS investigation had been ongoing for two years before Mr. Berenblatt's interview.

Mr. Chandler soon thereafter submitted to the WBO a Form 11369, Confidential Evaluation Report on Claim for Award.

Mr. Chandler checked the "No" box next to the following pertinent questions in item 11:

> A. Did the Service use the information the whistleblower provided to develop specific document requests or other inquiries to the [allegedly noncompliant] taxpayer?
>
> B. Did the Service use the information provided by the whistleblower to validate the completeness and accuracy of the taxpayer's response to information requests?
>
> C. Did the whistleblower provide additional information that would not have been obtained through general audit or investigative techniques?
>
> . . . .
>
> G. Did the whistleblower provide technical or legal analysis of the taxpayer's records or transactions that would not otherwise have been done by the Service?

Mr. Chandler also included the following narrative with that Form 11369:

> The investigation of the [target] taxpayers was well under way by the time the Whistleblower met with, and provided information to, Internal Revenue Service–Criminal Investigation in or around November 2007. (See attached articles: one regarding the law firm of [Taxpayer F],[2] former employer of . . . [Taxpayer P] and [Taxpayer U], ordered to pay a $76 million fine to the IRS in March 2007 and the other article dated May 18, 2006, regarding [Taxpayer H's] involvement relative to the tax shelter transactions discussed by the Whistleblower.) The whistleblower was one of hundreds of individuals identified as having had contact with the taxpayer(s) relative to the tax shelter transactions at issue in the investigation. The whistleblower did not provide any new information relative to the investigation. The whistleblower was not considered a viable potential witness in the investigation and did not testify during the two criminal trials in this matter. In addition, over 100 individuals had been interviewed in the investigation at the point in time the Whistleblower met with Internal Revenue Service–Criminal Investigation in

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[2] Identifying information about the subjects of Mr. Berenblatt's whistleblower claims is being redacted in accordance with Rule 345(b) and this Court's protective order of August 7, 2017. The pseudonyms for the target taxpayers are taken from the reference list of redacted information submitted by Mr. Berenblatt.

or around November 2007 and a vast number of financial and tax related subpoenaed records had been analyzed as well.

As indicated in the narrative, Mr. Chandler attached to the Form 11369 several print articles from major news sources. These articles reported the following pertinent information: (1) a law firm identified by Mr. Berenblatt avoided prosecution in March 2007 by admitting that it developed and marketed tax shelters and paying a $76 million penalty to the IRS and (2) a bank identified by Mr. Berenblatt was the subject of a federal investigation into digital options tax shelters as early as May 2006. None of the articles discussed specific legal theories or litigation strategies regarding the alleged tax shelters.

Sometime after her communication with Mr. Chandler, Ms. Meis prepared a memorandum for the WBO recommending a preliminary full denial of Mr. Berenblatt's award application. In support of this recommendation, Ms. Meis exclusively cited the claims, information, and news articles relayed to her by Mr. Chandler. The WBO sent a preliminary denial letter to Mr. Berenblatt dated January 4, 2017. Ms. Meis then prepared a memorandum recommending a final full denial of Mr. Berenblatt's application. This memorandum contained substantially the same supporting information as Ms. Meis's earlier memorandum. The WBO adopted Ms. Meis's recommendation and sent Mr. Berenblatt a final denial letter, dated March 2, 2017, explaining that "the IRS identified the issue(s) prior to receipt of your information and your information did not substantially contribute to the actions taken by the IRS." Mr. Berenblatt timely submitted his Petition to this Court on March 30, 2017, invoking our jurisdiction under section 7623(b)(4) to consider appeals of whistleblower award determinations by the IRS.

III. *Discovery Disputes*

On May 14, 2019, Respondent filed with this Court the documents that the IRS contends constitute the entire IRS administrative record of Mr. Berenblatt's whistleblower claim. Mr. Berenblatt believes that the produced record is inadequate, and he attempted to obtain further documents and responses from Respondent through informal discovery. After Respondent rejected many of those requests, Mr. Berenblatt filed the Motions to Compel asking us to require Respondent

to produce the following documents and to respond (or supplement his previous responses) to the following interrogatories:[3]

> *Request No. 2(a)*: All Documents [created or modified between March 24, 2007, and March 24, 2008] containing the objectives, strategies, and progress of the SOS Shelter Investigation—such as, for example, when the IRS or [U.S. Department of Justice (DOJ)] first identified [Taxpayer H] and [Taxpayer T] as targets of the investigation, including but not limited to Forms 6085, also known as the "30-Day Workplan," or its equivalent, prepared as part of routine management and supervision of the SOS Shelter Investigation.
>
> *Request No. 12*: With respect to each witness retained as an expert in an SOS Product litigation, provide a copy of each written report prepared by such witness, and all related communications and/or correspondence (including emails) between IRS/DOJ personnel and such expert witnesses.
>
> *Request No. 23*: Documents concerning the "over 100 individuals [that] had been interviewed in the investigation at the point in time the Whistleblower met with the Internal Revenue Service" referenced by Shawn Chandler.
>
> *Request No. 24*: Documents comprising the "financial and tax related subpoenaed records" referenced by Shawn Chandler.
>
> *Interrogatory No. 1(c)*: Describe SA Chandler's role in the SOS Shelter Investigation and position on the SOS Shelter Investigation team including his role in interviews of potential witnesses and other individuals in connection with the SOS Shelter Investigation, including the selection of individuals, the preparation for interviews, and the materials saved from or prepared after interviews.
>
> *Interrogatory No. 3(e)*: Identify all Documents concerning the Berenblatt Interview, including the preparation for, scripts for, scheduling of, notes from, participation in, and follow-up from that interview—including but not limited to notes from [Revenue] Agent Arthur Mason who was present and taking notes at the interview.
>
> *Interrogatory No. 5*: Identify the "over 100" individuals referred to in the Form 11369.
>
> *Interrogatory No. 6*: Identify the "financial and tax related subpoenaed records" referred to in the Form 11369.
>
> *Interrogatory No. 9*: Identify all individuals who provided information to SA Chandler and the SOS Shelter Investigation from September 24,

[3] The identifying numbers for the requests correspond to Mr. Berenblatt's original—and lengthier—requests for documents and responses. We denied without prejudice his motions to compel Respondent to take action on those earlier requests, as those motions failed to specify the particular documents or interrogatories whose production or response he sought to compel.

2006, to September 24, 2008, concerning Taxpayer H's and Taxpayer T's involvement in the SOS Shelter, including information concerning the lack of business purpose and/or economic substance of the SOS Shelter and information concerning Taxpayer H's role with respect to the design, management, and execution of such investments, as well as all Documents that refer, relate to, or contain such information.

Interrogatory No. 10(a): Describe how SA Chandler and SA Christine Mazzella searched for Documents related to Berenblatt and his Petition following commencement of this action, including but not limited to any searches of computer hard drives, network drives, and emails for records stored electronically, including specific search terms used.

Interrogatory No. 10(b): Describe how SA Chandler and SA Christine Mazzella searched for Documents related to Berenblatt and his Petition following commencement of this action, including but not limited to any searches of physical records in secure IRS storage facilities or anywhere else the records are held, including how many boxes or files were examined.

Interrogatory No. 10(d): Describe how SA Chandler and SA Christine Mazzella searched for Documents related to Berenblatt and his Petition following commencement of this action, including but not limited to how SA Chandler and SA Mazzella determined whether a Document was responsive or unresponsive.

Respondent objected to the Motions to Compel on four primary grounds: (1) some of the requests seek tax return information whose disclosure is prohibited by section 6103; (2) some of the requests seek secret grand jury information whose disclosure is prohibited by Rule 6(e) of the Federal Rules of Criminal Procedure; (3) some of the requests seek documents protected by the exception for attorney work product and/or the deliberative process privilege for government agencies; and (4) all of the requested documents are outside of the administrative record concerning Mr. Berenblatt's award claim and therefore are not relevant to this litigation.

Discussion

I. *Overview*

To date, this Court has not explicitly addressed the proper standards for evaluating discovery requests in the specific context of whistleblower appeals under section 7623. Thus, Mr. Berenblatt's Motions to Compel present questions of first impression. We first review the relevant content of section 7623, assure ourselves of jurisdiction in this case, and review the

proper scope and standard of review for whistleblower cases. We then announce our standard for discovery requests in section 7623 cases (following relevant precedent from the U.S. Court of Appeals for the District of Columbia Circuit)[4] and apply that standard to Mr. Berenblatt's Motions to Compel.

II. *Section 7623 Background*

Section 7623 provides for awards to individuals who provide the IRS with information regarding third parties found to have underpaid their taxes or otherwise violated the internal revenue laws. (Such action is colloquially known as "blowing the whistle," and thus these individuals are commonly referred to as "whistleblowers.") *See Whistleblower 972-17W v. Commissioner*, 159 T.C. 1, 4 (2022). Section 7623(a) authorizes discretionary awards, and section 7623(b) mandates awards in certain cases. For example, mandatory awards are available only when the proceeds in dispute exceed $2 million. I.R.C. § 7623(b)(5); *see also Van Bemmelen v. Commissioner*, 155 T.C. 64, 71 (2020). The mandatory award provisions are at issue in this case, so we look more closely at section 7623(b)(1) and (2), which provides in relevant part as follows:

> (1) In general.—If the Secretary proceeds with any administrative or judicial action [against a taxpayer who has underpaid any tax or who has violated, or conspired to violate, the tax laws] based on information brought to the Secretary's attention by an individual, such individual shall . . . receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action . . . . The determination of the amount of such reward by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.
>
> (2) Award in case of less substantial contribution.
>
> (A) In general.—In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a government report, hearing, audit, or *investigation*, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than

[4] In deciding whistleblower cases, we generally follow the precedent of the D.C. Circuit, to which an appeal of our decision in such cases would lie (absent a contrary stipulation by the parties). *See* I.R.C. § 7482(b) (flush language); *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

> 10 percent of the proceeds collected as a result of the action (including any related actions) or from any settlement in response to such action (determined without regard to whether such proceeds are available to the Secretary), taking into account *the significance of the individual's information and the role of such individual* and any legal representative of such individual *in contributing to such action*.

(Emphasis added.)

Thus, there are two prerequisites governing an award under section 7623(b): The IRS must (1) proceed with an administrative or judicial action based on the whistleblower's information (action requirement) and (2) collect proceeds as a result of the action (collection requirement). *See* Treas. Reg. § 301.7623-1(a) ("The awards provided for by section 7623 and this paragraph must be paid from collected proceeds . . . .").[5]

Treasury Regulation § 301.7623-2(b)(1) clarifies the action requirement of section 7623(b)(1):

> [T]he IRS *proceeds based on* information provided by a whistleblower when the information provided substantially contributes to an action against a person identified by the whistleblower. For example, the IRS proceeds based on the information provided when the IRS initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, but for the information provided.

Treasury Regulation § 301.7623-2(d)(1) clarifies the collection requirement of section 7623(b)(1):

> [T]he terms *proceeds of amounts collected* and *collected proceeds* (collectively, *collected proceeds*) include: Tax, penalties, interest, additions to tax,

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[5] The effective-date provision for Treasury Regulation §§ 301.7623-1, -2, and -3 reads as follows: "This rule is effective on August 12, 2014. This rule applies to information submitted on or after August 12, 2014, and to claims for award under sections 7623(a) and 7623(b) that are open as of August 12, 2014." Treas. Reg. §§ 301.7623-1(f), -2(f), and -3(f). Mr. Berenblatt initially provided information to the IRS in 2007, but he did not file his claim for award until 2015. The first sentence of the effective-date provision, standing alone, entails at a minimum that all claims submitted on or after August 12, 2014 (like Mr. Berenblatt's) are subject to the regulations. The second sentence appears to then expand the class of claims to which the first sentence would otherwise apply, rather than narrowing it. Mr. Berenblatt submitted all the relevant information pertaining to his claim on July 1, 2015 (i.e., after August 12, 2014) when he filed his Form 211, notwithstanding that he had submitted substantially the same information during his 2007 interview. Therefore, we hold that these regulations apply to this case.

> and additional amounts collected because of the information provided [by the whistleblower] . . . .

Section 7623(b)(4) further provides that an award determination by the WBO under section 7623(b) may be appealed to this Court.

III. *Jurisdiction*

A. *General Principles*

Like all federal courts, we are a court of limited jurisdiction. *Whistleblower 21276-13W v. Commissioner*, 155 T.C. 21, 26 (2020). We exercise jurisdiction only over matters that Congress expressly authorizes us to consider. *Id.*; *see also* I.R.C. § 7442. Of course, we always have jurisdiction to determine whether we have jurisdiction. *Whistleblower 21276-13W*, 155 T.C. at 26. And we must assure ourselves of our jurisdiction even when not asked to by the parties. *Id.*

The relevant jurisdictional provision in a whistleblower case is section 7623(b)(4). It provides that "[a]ny determination regarding an award under [section 7623(b)](1), (2), or (3) may . . . be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." Determinations under those provisions generally are made by the WBO, which reviews whistleblower claims to determine whether an award will be paid and, if so, decides the amount of the award. *See, e.g.*, I.R.C. § 7623(b)(1), (2)(A), (3).

B. *Tax Court Jurisdiction*

In *Li v. Commissioner*, 22 F.4th 1014, 1017 (D.C. Cir. 2022), the D.C. Circuit clarified that we do not have jurisdiction over an appeal of a "threshold rejection" of a whistleblower award claim where the IRS does not proceed with any relevant administrative or judicial action against the target taxpayers. In so holding, the D.C. Circuit observed that "an award determination by the IRS arises only when the IRS '*proceeds* with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by [the whistleblower].'" *Id.* (quoting I.R.C. § 7623(b)(1)) (alteration in original). After *Li*, in *Whistleblower 972-17W*, 159 T.C. at 7–11, we held that if the IRS proceeded with an action against target taxpayers identified by the whistleblower's

information and collected proceeds from the target taxpayers, our Court has jurisdiction over the appeal notwithstanding the WBO's contention that the collection was not based on the issues identified by the whistleblower.

We now likewise hold that we have jurisdiction over cases, like this one, where the IRS proceeded with an administrative or judicial action against the target taxpayers and, at some point after the whistleblower provided information, collected proceeds in connection with the issue or issues raised by the whistleblower. Our rationale is essentially the same as in *Whistleblower 972-17W*: If the question of whether the IRS prevailed in the various SOS shelter collection actions "based on" Mr. Berenblatt's information were jurisdictional, then we could not determine whether we have jurisdiction until deciding virtually the entire case on its merits. Moreover, it would be unclear what scope and standard of review to apply in making that jurisdictional determination. *See id.* at 9–10. Here, with an "action" commenced and "collection" of proceeds, we conclude that we have jurisdiction to review Mr. Berenblatt's appeal of the denial of his claim for an award.

IV. *Standard and Scope of Review in Whistleblower Cases*

In reviewing an award determination of the WBO, we employ the standard of review of section 706(2)(A) of the Administrative Procedure Act, which generally tells a reviewing court to reverse agency action that it finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Kasper v. Commissioner*, 150 T.C. 8, 21 (2018).

Our scope of review of WBO determinations is generally confined to the administrative record (the so-called record rule). *Id.* at 20; *cf. James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996). "Ordinarily the record is comprised of those documents that were before the administrative decisionmaker," including "all the information it considered directly or indirectly." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009) (first citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); and then citing *Amfac Resorts, L.L.C. v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001)). As articulated by the D.C. Circuit, a court generally should have before it neither more nor less information than the agency (here, the

WBO) had when it made its determination. *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013).

Because our standard of review for WBO award determinations is abuse of discretion and our scope of review is limited to the administrative record, we must be cautious in granting motions to compel discovery.

V. *Discovery in Whistleblower Cases*

In general, the propriety of a discovery request hinges on the underlying substantive dispute and how this Court may resolve that dispute. *See* Rule 70. In particular, Rule 70(b)(1) provides, in relevant part: "Discovery may concern any matter not privileged that is relevant to the subject matter involved in the pending case."

However, in the context of record-rule cases, the D.C. Circuit has held that "[d]iscovery typically is not available," given the presumption that the agency has properly designated the record. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (citing *Air Transp. Ass'n of Am.*, No. 10-0804, 2010 U.S. Dist. LEXIS 144089, at *5 (D.D.C. June 4, 2010)). According to that court, there are two narrow exceptions to this general rule: "[I]f a party makes a significant showing—variously described as a strong, substantial, or prima facie showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record, it should be granted limited discovery." *Id.* at 487–88 (citing *Air Transp. Ass'n of Am.*, 2010 U.S. Dist. LEXIS 144089, at *5). In its reference to the applicable standard ("variously described as strong, substantial, or prima facie"), the D.C. Circuit summarized several strands of previous caselaw. *Cf. Air Transp. Ass'n of Am.*, 2010 U.S. Dist. LEXIS 144089, at *5 (collecting cases).

Therefore, whistleblowers may be granted limited discovery if they make a significant showing that there is material in the IRS's possession indicative of bad faith on the IRS's part in connection with the case or of an incomplete administrative record compiled by the IRS. In evaluating the adequacy of the whistleblower's showing, we will bear in mind that (as noted by the U.S. District Court for the District of Columbia) "a party must provide good reason to believe that discovery will uncover evidence relevant to the Court's decision to look

beyond the [designated] record." *Amfac Resorts*, *L.L.C.*, 143 F. Supp. 2d at 12. Condoning discovery beyond these conditions would belie this Court's limited scope of review in whistleblower cases. In this case, Mr. Berenblatt has not alleged bad faith; therefore, we focus on whether the record was incomplete and briefly address the rules for completing the designated record.

VI. *Discovery Aimed at Completing the Administrative Record*

In *Air Transport Association of America*, the D.C. Circuit countenanced discovery aimed at remedying an "incomplete record." Since the D.C. Circuit did not explicitly define that phrase in *Air Transport Association of America* (or subsequently), we now look to other applicable law and precedents.

A. *Treasury Regulation § 301.7623-3(e)*

Treasury Regulation § 301.7623-3(e) provides a general statement regarding a whistleblower's administrative record and a list of materials that the IRS has determined will always be included in that record, namely:

> Treas. Reg. § 301.7623-3(e) Administrative record. (1) In general. The administrative record comprises all information contained in the administrative claim file that is relevant to the award determination and not protected by one or more common law or statutory privileges.
>
> (2) Administrative claim file. The administrative claim file will include the following materials relating to the action(s) to which the determination relates—
>
> (i) The Form 211, "Application for Award for Original Information," filed by the whistleblower and all information provided by the whistleblower (whether provided with the whistleblower's original submission or through a subsequent contact with the IRS).
>
> (ii) Copies of all debriefing notes and recorded interviews held with the whistleblower (and the whistleblower's legal representative, if any).
>
> (iii) Form(s) 11369, "Confidential Evaluation Report on Claim for Award," including narratives prepared by the relevant IRS office(s), explaining the whistleblower's contributions to the actions and documenting the actions taken by the IRS in the case(s). The Form 11369 will refer to and incorporate additional documents relating to the issues raised by the claim, as appropriate, including, for example, relevant portions of revenue agent reports, copies of agreements entered into with the taxpayer(s), tax returns, and activity records.
>
> (iv) Copies of all contracts entered into among the IRS, the whistleblower, and the whistleblower's legal representative (if any), and

an explanation of the cooperation provided by the whistleblower (or the whistleblower's legal representative, if any) under the contract.

(v) Any information that reflects actions by the whistleblower that may have had a negative impact on the IRS's ability to examine the taxpayer(s).

(vi) All correspondence and documents sent by the Whistleblower Office to the whistleblower.

(vii) All notes, memoranda, and other documents made by officers and employees of the Whistleblower Office and considered by the official making the award determination.

(viii) All correspondence and documents received by the Whistleblower Office from the whistleblower (and the whistleblower's legal representative, if any) in the course of the whistleblower administrative proceeding.

(ix) All other information considered by the official making the award determination.

For purposes of evaluating whether a whistleblower has made a significant showing that there is material in the IRS's possession indicative of an incomplete record, we will deem all materials listed in Treasury Regulation § 301.7623-3(e) to be necessary parts of the complete record.

B. *Materials Directly or Indirectly Considered*

In *Van Bemmelen*, 155 T.C. at 74 (quoting *Cape Hatteras Access*, 667 F. Supp. 2d at 114), we explained that a complete administrative record must contain "all the information [the WBO] considered directly or indirectly" in reaching its decision. Accordingly, we may allow limited discovery if a whistleblower makes a significant showing that the IRS has failed to include materials that the WBO considered, directly or indirectly, in reaching its decision. However, in evaluating the strength of the whistleblower's showing, we will be mindful that "[a]bsent a substantial showing made with clear evidence to the contrary, an agency is presumed to have properly designated the administrative record." *Id.* at 74. Indeed, for a Court to order completion of the designated record, "the [petitioner] must overcome this strong presumption of regularity by putting forth concrete evidence that the documents it seeks to 'add' to the record were actually before the decisionmakers." *Id.* at 74–75 (quoting *Cape Hatteras Access*, 667 F. Supp. 2d at 114).[6]

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[6] For clarity, we emphasize the distinction between a motion to compel discovery and a motion to complete or supplement the record. The former

C. *Extra-Record Evidence*

In *Van Bemmelen*, we explained that in exceptional circumstances we may supplement the designated record with evidence that the WBO neither directly nor indirectly considered (i.e., "extra-record" evidence). The D.C. Circuit has "recognized a small class of cases where district courts [or, as here, our Court] may consult extra-record evidence when 'the procedural validity of the [agency]'s action . . . remains in serious question.'" *Hill Dermaceuticals, Inc.*, 709 F.3d at 47 (second and third alterations in original) (quoting *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)). Specifically, the D.C. Circuit has identified three standards under which extra-record evidence may be consulted:

> (1) if the agency "deliberately or negligently excluded documents [from consideration] that may have been adverse to its decision," (2) if background information was needed "to determine whether the agency considered all the relevant factors," or (3) if the "agency failed to explain administrative action so as to frustrate judicial review."

City of Dania Beach v. FAA, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)); *see also James Madison Ltd. by Hecht*, 82 F.3d at 1095.

Importantly, *City of Dania Beach* discussed only supplementing the administrative record and not "discovery." Here, we note that our disposition of Mr. Berenblatt's Motions to Compel is not dependent on *City of Dania Beach*'s three standards. Therefore, we leave for consideration in a future case whether discovery is appropriate to uncover extra-record evidence.

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motion seeks to obtain material relevant to the case that was not included in the administrative record. If a petitioner discovers such material, he or she may then proceed with the latter motion and move the court to either "complete" the administrative record with material that should have been included in the designated record but was excluded by the agency or "supplement" the administrative record with material that was not initially before the agency but that the petitioner believes should nonetheless be considered in conjunction with the administrative record (i.e., extra-judicial or extra-record evidence). Our standards for evaluating motions to complete and supplement the record are set out in *Van Bemmelen*, 155 T.C. at 73–78.

D. *Summary of Discovery Rules*

On the basis of the foregoing, we hold that whistleblower discovery requests are appropriate upon a significant showing that (1) there is material in the IRS's possession indicative of bad faith on the IRS's part in connection with the case or (2) there is material in the IRS's possession indicating that the designated record omits material the WBO actually considered (directly or indirectly) or that otherwise falls under a category listed in Treasury Regulation § 301.7623-3(e).

VII. *Analysis of Mr. Berenblatt's Motions to Compel*

Mr. Berenblatt's discovery issues are thorny given the length of time the SOS tax shelter investigation had been ongoing before his involvement and the substantial records compiled by IRS CID before his interview. Importantly, while we have allowed whistleblowers to add material to the designated administrative record at times, we have not allowed them to conduct fishing expeditions during discovery. With this background in mind, we evaluate Mr. Berenblatt's individual discovery requests.

Mr. Berenblatt has not supported his Motions to Compel with any evidence of bad faith on the IRS's part, and he has specifically disclaimed any such allegation. He does contend that the record produced by the IRS excludes certain documents related (in some way) to his claim for award, namely, the interview documents and subpoenaed records referred to in Mr. Chandler's Form 11369 narrative, expert reports from the SOS litigation, and additional notes and memos related to his interview with IRS CID.

Therefore, Mr. Berenblatt's contentions center on his insistence that the administrative record produced by the IRS is incomplete. Respondent vehemently disagrees and, in connection with this litigation, provided a 765-page administrative record, accompanied by a declaration of Ms. Meis attesting to its completeness and accuracy. Respondent contends that Mr. Berenblatt's requests are outside the scope of discovery and that he "did not contribute any information that . . . respondent used in any way in [his] investigations of the subjects of petitioner's whistleblower claim." Thus, we are left to sort through whether Mr. Berenblatt has made a significant showing of an incomplete record.

A. *Compelling Additional Document Production*

1. *Mr. Berenblatt's Contention of an Incomplete Record*

Mr. Berenblatt's document request Nos. 23 and 24 ask for any documents relating to the "over 100 individuals [who] had been interviewed in the [SOS] investigation" before the IRS's interview with Mr. Berenblatt, along with the "financial and tax related subpoenaed records" referenced by Mr. Chandler in his Form 11369 narrative. Mr. Berenblatt argues that the complete administrative record would include all such documents because SA Chandler was the decision maker for purposes of the record rule, insofar as he completed the Form 11369 on which Ms. Meis relied. Thus, he contends that the administrative record must include all documents available to SA Chandler at the time he completed the Form 11369 because they were considered at least indirectly in reaching a decision on Mr. Berenblatt's claim.

These contentions fail. First of all, Ms. Meis and her colleagues in the WBO were the decision makers for Mr. Berenblatt's award claim, not Mr. Chandler. Moreover, Mr. Berenblatt has failed to show that the WBO *indirectly* considered the interview documents and subpoenaed records. Mr. Chandler's Form 11369 narrative contains no description whatsoever of the contents of the interview documents or subpoenaed records (nor does the narrative clearly imply what those contents are). Regardless, Respondent has taken the position that Mr. Berenblatt did not contribute to the investigation because the IRS investigation was already well underway at the time of Mr. Berenblatt's interview. Respondent is in effect arguing that there was not a substantial contribution (nor any contribution) under section 7623(b)(2).

Mr. Berenblatt counters that any relevant documents available to the WBO when it ruled on his claim are discoverable whether or not the WBO reviewed them. Mr. Berenblatt cites one of our previous opinions for the proposition that "the administrative record [in a collection due process case] includes not only material that the settlement officer reviewed but also material that was *available* for his review." *Emery Celli Cuti Brinckerhoff & Abady, P.C. v. Commissioner*, T.C. Memo. 2018-55, at *21 (holding that an IRS settlement officer abused his discretion in failing to consider information sub-

mitted by the taxpayer after the due date for submissions but before issuance of the notice of determination). However, the documents at issue in *Emery* had been sent by the taxpayer directly to the settlement officer whose decision we were reviewing for abuse of discretion. Likewise, in the two similar cases we cited in *Emery—Thompson v. U.S. Department of Labor*, 885 F.2d 551, 553–56 (9th Cir. 1989), and *West v. Commissioner*, T.C. Memo. 2010-250, slip op. at 11 n.11—the litigating parties sent relevant documents to the agency decision makers or otherwise brought those documents to their attention.

We therefore find *Emery* inapposite here.[7] If *any* potentially available document in the IRS's possession at the time the WBO made its decision were discoverable, that would render the record rule all but meaningless. Here, there is no evidence or contention that Mr. Berenblatt submitted the interview documents or subpoenaed records to the WBO. Discovery of items available to Mr. Chandler or the WBO is limited to those relevant to Mr. Berenblatt's contribution to the ongoing investigation and generally does not extend to those created before his interview.

As clarified in Treasury Regulation § 301.7623-3(e)(2)(iii), the administrative record includes any Form 11369 prepared with respect to the whistleblower's case (e.g., the Form prepared by Mr. Chandler, which has already been included in the administrative record). The regulation further notes that "[t]he Form 11369 will refer to and incorporate additional documents relating to the issues raised by the claim, as appropriate." This regulation does not explicitly include all such "additional documents" in the record. Even assuming that the documents "incorporate[d]" into the Form 11369 are per se part of the record, for the reasons stated above Mr. Chandler cannot be said to have incorporated the interview records and subpoenaed documents into his Form 11369.[8] There is no good evidence (let alone a significant showing) that any of the documents at issue in request Nos. 23 and 24 are part

[7] This Court has noted before that "[w]histleblower cases are just different [from collection due process cases such as *Emery*]"—in part because whistleblowers do not come before us in their capacity as taxpayers. *Kasper*, 150 T.C. at 20.

[8] Meanwhile, we cannot accept (and the regulation does not indicate) that just *any* external document that a Form 11369 "refer[s] to"—however glancingly—is per se part of the record.

of the complete administrative record. We therefore reject Mr. Berenblatt's argument that his administrative record is incomplete because it did not include the interview documents and subpoenaed records obtained before his interview.

2. *Mr. Berenblatt's Contention of Negligence*

Mr. Berenblatt suggests that even if the WBO neither directly nor indirectly considered the interview documents and subpoenaed records, it should have reviewed them and was negligent in failing to do so. If this is true, Mr. Berenblatt might qualify for discovery by virtue of showing that extra-record evidence can be consulted pursuant to the first *City of Dania Beach* standard (viz, if the WBO deliberately or negligently excluded from consideration documents that may have been adverse to its decision).[9]

However, Mr. Berenblatt's own submissions to the WBO—in particular, the December 8 memorandum—belie his theory of negligence. In that memorandum Mr. Berenblatt cites *Stobie Creek Investments, LLC v. United States*, 82 Fed. Cl. 636 (2008) (No. 05-748), *aff'd*, 608 F.3d 1366 (Fed. Cir. 2010), apparently the first case in which the Government prevailed against an SOS shelter. Mr. Berenblatt contends that the Government's expert witness, David F. DeRosa, "echoed" the nontax business purpose (lack of economic substance) argument that Mr. Berenblatt had conveyed to the IRS agents during his November 2007 interview. However, we take judicial notice that Dr. DeRosa's Expert Report submitted in that case is dated September 14, 2007—before Mr. Berenblatt's interview.[10] *See* United States' Response to Plaintiffs' Motion in Limine to Exclude Reports and Testimony of Dr. David F. DeRosa, Exhibit 1, *Stobie Creek Invs., LLC*. Dr. DeRosa's report opines on an SOS shelter transaction and includes the following relevant statements (supported by ample fact-specific analysis):

[9] We reiterate that we are not here deciding whether extra-judicial or extra-record evidence is discoverable in whistleblower cases. Therefore, we entertain Mr. Berenblatt's allegation of negligence only to show that it does not affect our disposition of his Motions to Compel.

[10] The report was filed in the Court of Federal Claims on March 19, 2008, but is dated September 14, 2007.

> I concluded that the Participants' digital options had the "appearance" of a sweet spot, but that the sweet spot could never materialize because [the intermediary bank] would prevent the sweet spot from being hit.

Id. at 25.

> Given the inability to satisfy any of the business purposes addressed above, I conclude that the Participants created no meaningful advantage by contributing the offsetting options to Stobie Creek Investments, LLC, and that therefore Stobie Creek Investments, LLC had no business purpose in the context of these transactions.

Id. at 93.

Given that Mr. Berenblatt referenced Dr. DeRosa's testimony in his December 8 memorandum to the WBO and, further, that Dr. DeRosa's expert report indicates the Government had already developed the nontax business purpose argument before Mr. Berenblatt's interview, we conclude that the WBO was not negligent in failing to review the interview documents and subpoenaed records at issue (or, at worst, its failure was harmless error). The existence of Dr. DeRosa's report strongly suggests that such a review would have been superfluous.[11]

3. *Remaining Document Requests*

Mr. Berenblatt's remaining document requests—Nos. 2(a) and 12—are for documents "containing the objectives, strategies, and progress of the SOS Shelter Investigation" and for expert witness reports prepared for the IRS during SOS litigation. Mr. Berenblatt does not contend that the WBO directly or indirectly considered any of these documents, nor are we aware of any evidence to that effect. Nor do any of these records fall under one of the categories listed in Treasury Regulation § 301.7623-3(e). Moreover, we find these requests to be overly broad and unduly burdensome because they seek workplans and routine work investigation documents regardless of whether those records relate to information that Mr. Berenblatt provided to the IRS or fall within the timeframe

[11] We emphasize that we are not here deciding that Mr. Berenblatt's Form 211 claim for award lacks merit. Rather, we determine only that the existence of Dr. DeRosa's report—and its label of September 14, 2007—defeats any significant showing of WBO negligence in failing to exhaustively review interview documents and subpoenaed records collected in connection with the SOS litigation.

of Mr. Berenblatt's disclosures. Accordingly, these discovery requests amount to a fishing expedition. We also agree with Respondent that much of the information requested (in particular, most or all of the expert witness reports) is publicly available and thus obtainable from another source. *See* Rule 70(c). Therefore, we cannot uphold any of Mr. Berenblatt's four document requests.[12]

B. *Compelling Additional Answers to Interrogatories*

Most of Mr. Berenblatt's interrogatory response requests seek to compel responses that Respondent has already provided or identification of documents that Respondent asserts do not exist. Our discovery rules do not allow duplicative requests, and we cannot compel discovery of nonexistent information. Rule 70(c). Neither will we compel Respondent to prove a negative. As with the document requests, we will not sanction a fishing expedition nor compel responses related to information outside the designated administrative record without a significant showing of bad faith or an incomplete record. With that background, we find that one of Respondent's partial responses to Mr. Berenblatt's interrogatory response requests was sufficiently terse or indirect as to call into question whether the WBO improperly failed to include information in its possession that might be a proper part of Mr. Berenblatt's administrative record.

Interrogatory No. 3(e) asks Respondent to identify all documents pertaining to Mr. Berenblatt's November 2007 interview with the two CID SAs and RA Mason, or more specifically to "[i]dentify all Documents concerning the Berenblatt interview . . . including but not limited to notes from [Revenue] Agent Arthur Mason who was present and taking notes at the interview."

The *Internal Revenue Manual* (IRM) instructs that handwritten notes are to be kept in the investigative file; however, it does not require agents to take notes during an interview.

[12] In supplemental filings with this Court, Mr. Berenblatt has proposed seeking discovery of certain documents that the IRS identified as being in the possession of the District Court for the Southern District of New York, which oversaw the grand jury investigation of the SOS shelter promoters. Mr. Berenblatt cannot proceed with this third-party discovery unless and until it becomes clear that some or all of these documents are discoverable in his case under the standards set out here.

IRM 9.4.5.9.3 (Feb. 1, 2005). It also allows agents to use their discretion on whether to prepare a Memorandum of Interview: "A memorandum of interview is an informal note or document containing information that the person desires to memorialize." IRM 9.4.5.7.4(1) (May 15, 2008).

Respondent has replied to interrogatory No. 3(e) stating that he already disclosed the documents related to Mr. Berenblatt's interview. However, Respondent leaves unclear whether RA Mason took notes, stating that "Special Agent Chandler does not *believe* RA Arthur Mason took notes at the interview." (Emphasis added.) By contrast, Mr. Berenblatt has conveyed his recollection that RA Mason took notes throughout the interview. We have no reason to doubt the sincerity or accuracy of Mr. Berenblatt's memory. And because Treasury Regulation § 301.7623-3(e)(2)(ii) refers to "[c]opies of all debriefing notes and recorded interviews held with the whistleblower," any notes that RA Mason took at the interview are part of the complete record. Therefore, we will compel Respondent to clarify whether RA Mason took notes during Mr. Berenblatt's interview and, if so, whether such notes still exist, were lost, or were destroyed.

The remaining interrogatory response requests either were adequately addressed or seek information from before Mr. Berenblatt's involvement with the SOS shelter investigation or beyond the scope of inquiry in a whistleblower claim. For example, in interrogatory No. 10(a) Mr. Berenblatt asks Respondent to describe how the special agents searched for information pertinent to his administrative record. It is Mr. Berenblatt's burden in the first instance to make a significant showing that the administrative record is incomplete, not Respondent's obligation to defend how the administrative record was compiled.

VIII. *Overall Observations Regarding the Motions to Compel*

Because all of Mr. Berenblatt's document requests and most of his interrogatory response requests are unsupported by a significant showing of bad faith or an incomplete record, we will deny his Motions to Compel except as to interrogatory response request No. 3(e), as noted above. Generally, we will allow only limited discovery targeted to Mr. Berenblatt's

contact with the IRS and not the entirety of the SOS investigation before his involvement.

IX. *Conclusion*

Mr. Berenblatt asks this Court to compel discovery seeking information and documents that the WBO never considered. Most of Mr. Berenblatt's discovery requests in his Motions to Compel clearly go well beyond the administrative record. He has not tried to show bad faith in Respondent's designation of the administrative record or handling of his claim, and we see no such evidence. Moreover, Respondent adequately answered most of Mr. Berenblatt's interrogatory response requests, with the one exception noted above. Respondent's remaining objections (concerning section 6103, Rule 6(e) of the Federal Rules of Criminal Procedure, the exception for attorney work product, and the deliberative process privilege) do not apply to the specific interrogatory response we are compelling.

To implement the foregoing,

An appropriate order will be issued.