No. 23-3772

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

3M COMPANY AND SUBSIDIARIES,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

On Appeal from the United States Tax Court, No. 5816-13

AMICUS CURIAE BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION IN SUPPORT OF APPELLANT 3M COMPANY AND SUBSIDIARIES IN SUPPORT OF REVERSAL

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February 14, 2024

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amicus Curiae* certifies that the National Taxpayers Union Foundation is a nonprofit, tax-exempt organization under Internal Revenue Code §501(c)(3) and is incorporated in the District of Columbia. *Amicus* further states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

s/ Tyler Martinez
Tyler Martinez

Dated: February 14, 2024

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INTEREST OF *AMICUS CURIAE*

Founded in 1973, the National Taxpayers Union Foundation ("NTUF") is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal level. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, produces scholarly analyses, and engages in direct litigation and *amicus curiae* briefs upholding taxpayers' rights and challenging administrative overreach by tax authorities. Accordingly, *Amicus* has an institutional interest in this case. All parties consented to the filing of this brief.[1]

SUMMARY OF ARGUMENT

Administrative overreach is a consistent problem. The Administrative Procedure Act (the "APA") aspired to end this issue by requiring agencies and bureaus like the IRS to conform to standard practices to solicit and meaningfully consider public feedback on proposed regulations. This case highlights that the IRS failed to follow even this minimal threshold when it changed its regulation in the face of decades of court precedent to the country. But the Tax Court below gave the

[1] *Amicus Curiae* confirms that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

IRS a free pass. Should the opinion below stand, the protection offered by the APA is at risk of being diluted.

At the center of this dispute is whether the IRS can impute income to 3M for activity that it is barred from getting income from by Brazilian law. This dispute highlights the ambiguous and difficult nature of applying 26 U.S.C. § 482 to these situations. Indeed, the Tax Court below generated hundreds of pages of dense legal opinion trying to apply the law in this case. But this Court should be mindful of the well-established rule that ambiguities in the tax code (and underlying regulations) need to be resolved in favor of the taxpayer.

Absent the IRS's sudden change in regulation in 1994, the taxpaying community already had a long line of established precedent to guide it. The IRS had it too. Supreme Court decisions, Tax Court opinions, and the careful analysis of this Court's sister Circuits all came to the same conclusion that, in these sorts of situations, companies like 3M cannot be held responsible for subsidiary income it could not realize under foreign law.

That all changed when the IRS promulgated 26 C.F.R. § 1.482-1(h)(2). Now, the government would try to impute income where a parent company could not reach the funds. One would expect such a sudden change in the law to include careful, reasoned analysis for why and how the new rule would be applied. But the IRS failed to listen to comments highlighting these issues. In the final regulations, the IRS

provided no reasoned analysis—or *any* analysis—of how the new regulations interacted with established court decisions.

Therefore, the IRS failed to follow the APA and thus is not entitled to any deference because it failed to provide a reasoned analysis meaningfully engaging with comments from the regulated community. The IRS's promulgation of the rules it applies to 3M and it subsidiaries in Brazil—found at IRS, Intercompany Transfer Pricing Regulations Under Section 482, 59 Fed. Reg. 34971 (July 9, 1994) ("Final Regulations")—should therefore be set aside and the Tax Court decision below reversed.

ARGUMENT

Much of this case centers on if 26 C.F.R. § 1.482-1(h)(2) is a permissible implementation of the 26 U.S.C. § 482 and to what extent *Chevron* deference applies. *See*, *e.g.*, Add. 231–63 (Tax Court plurality op.); Op. Br. at 32–47; *see also Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).[2] But a step before such analysis is asking if the regulation was promulgated correctly: for a regulation created in violation of the APA is *ultra vires*. *See*, *e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016) ("*Chevron* deference

[2] The status of *Chevron* deference is currently under review by the Supreme Court in a pair of challenges, both argued on January 17, 2024. *Loper Bright Enterprises v. Raimondo*, U.S. No. 22-45; *Relentless, Inc. v. Dept. of Comm.*, U.S. No. 22-1219. No matter the outcome of those cases, a regulation issued in violation of the APA's procedures is still unlawful, even under *Chevron*.

is not warranted where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation."). Because the IRS here failed to follow the APA, its regulation should therefore be set aside.

I. The Promulgation of the Final Regulation was Arbitrary and Capricious and in Contravention of Judicial Opinion.

A. Ambiguous Tax Provisions should be Read in Favor of the Taxpayer.

Knowing if the Commissioner can invoke 26 U.S.C. § 482 is difficult, because doing so deals with a complex interplay between corporate governance, federal tax law, and international tax law. The Tax Court opinion below demonstrates this reality: application of the statute to 3M's business generated hundreds of pages of opinions from the judges of the Tax Court. *See* Add. 1–346. This is all the more reason why the Final Regulation needed to provide detail in the reasoning of the IRS—especially where the new rule departed from established case law and practice.

Ambiguity in the tax law must favor the taxpayer. In *Gould v. Gould*, 245 U.S. 151, 153 (1917), the Supreme Court recognized that "the established rule" in "the interpretation of statutes levying taxes" is to not go "beyond the clear import of the language used" in the statute. Thus, "[i]n case of doubt [tax statutes] are construed *most strongly against the government*, and in favor of the citizen." *Id.* (collecting cases since 1842) (emphasis added). That holding was affirmed just a few years later.

United States v. Merriam, 263 U.S. 179, 188 (1923) (applying *Gould*, 245 U.S. at 153); *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (applying *Gould* and holding that "if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer…").

This Court continues to apply this principle. *See*, *e.g.*, *Clajon Gas Co., L.P. v. C.I.R.*, 354 F.3d 786, 789 (8th Cir. 2004). This Court's sister Circuits agree. For example, the Federal Circuit mostly recently applied this rule. *See*, *e.g.*, *Kisor v. McDonough*, 995 F.3d 1347, 1369 (Fed. Cir. 2021) (applying *Gould* and *Merriam*). It is the majority rule across the country. *United States v. Marshall*, 798 F.3d 296, 319 (5th Cir. 2015) (collecting cases, including *Merriam*); *Exxon Mobil Corp. & Affiliated Cos. v. C.I.R.*, 689 F.3d 191, 199 (2d Cir. 2012) (applying *Merriam* and noting the Circuit is "particularly mindful" of this rule); *Saginaw Bay Pipeline Co. v. United States*, 338 F.3d 600, 604 (6th Cir. 2003); *Duke Energy Nat. Gas Corp. v. Comm'r*, 172 F.3d 1255, 1260 n.7 (10th Cir. 1999); *Royal Caribbean Cruises, Ltd. v. United States*, 108 F.3d 290, 294 (11th Cir. 1997) (per curiam) (collecting cases, including *Gould*); *Busse v. C.I.R.*, 479 F.2d 1147, 1150–51 (7th Cir. 1973) (applying *Merriam*). The government should clearly set out who owes taxes, when they owe taxes, and how much to pay—not change attribution at the whim of the Commissioner or his designees.

Prior case law and established practice prior to the Final Regulations did precisely this by taking a broad view on what may be viewed as a "foreign legal restriction," and thus not taxable by the IRS. The prior procedures left any ambiguity in favor of the taxpayer. This is important in this context because otherwise the IRS, and later the federal courts, would otherwise need to wade into what is and is not taxable according to the codes of other nations.

B. The Final Regulation Departed From Established Precedent Protecting Taxpayers.

An agency may not induce reliance on established practices, policies, and case law, only to abruptly change the policy in a new regulation with no reasoning behind its decision. But that is precisely what happened here, creating an example of an arbitrary and capricious decision when the IRS promulgated the Final Regulation. Prior case law—most notably the Supreme Court's decision in *Commissioner of Internal Revenue v. First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972), and related Tax Court opinions—set a very different standard than the one the IRS later adopted without analysis in 1994. This prior case law read ambiguities in the statute (or the facts on hand) in favor of the taxpayer rather than allowing broad use of 26 U.S.C. § 482 by the Commissioner.

The Tax Court first addressed the issue of legal restrictions in *L.E. Shunk v. Latex Products, Inc. v. Commissioner*, 18 T.C. 940 (T.C. 1952). In *Shunk*, a prophylactics manufacturer and distributor were owned by the same interest. *Id.* at

941–42. Due to wartime production demands and wartime price controls, the distributor raised the price of the goods while the manufacturer could not under the wartime laws. *Id*. at 950–52; *id*. at 959 (Discussing Office of Price Admin., General Maximum Price Regulation, 7 Fed. Reg. 3153 (Apr. 28, 1942)). The IRS nonetheless attempted to shift the distributor's income to count as the manufacturer's income. *Id.* at 952. The Tax Court in 1952 rejected the IRS's attempt, holding that the IRS had "no authority to attribute to petitioners income which they could not have received." *Id.* at 961. Because the "uncontroverted effect of [the price control] regulations in prohibiting petitioners from receiving the very income sought to be attributed to them," the IRS therefore "acted in excess of [its] power" in trying to reallocate the income. *Id*.

Shunk informed the basis of the Supreme Court's later holding in *First Security Bank*, 405 U.S. at 406, which examined § 482. *First Security Bank* centered on a pair of banks that were wholly owned subsidiaries of a holding company. *See id*. at 396. Again, as in *Shunk*, the IRS sought to use § 482 to attribute the income of insurance activities (i.e. the premiums of the policies) generated by the holding company to that of the banks. *See id.* at 399–400. But the banks "could never have received a share of the[] premiums" under existing case law at the time. *Id*. at 401. Indeed, the "penalties for violation of the banking laws [for selling insurance]

include possible forfeiture of a bank's franchise and personal liability of directors." *Id*. at 402.

The *First Security Bank* Court held that while assignment of taxable income can happen before the assignor receives the funds, nonetheless, "the assignment-of-income doctrine assumes that the income *would have been received by the taxpayer* had he not arranged for it to be paid to another." *Id*. at 403–04 (emphasis added). Where the banks could not receive the income, the IRS could not assign it since the "complete power" of receiving the income "hardly includes the power to force a subsidiary to violate the law." *Id*. at 405. That is because the theory of assigning income as taxable to another is based on the ability to "'command the income'" and thus "'enjoy[] the benefit of the income on which the tax is laid.'" *Id*. at 404 (quoting *Harrison v. Schaffner*, 312 U.S. 579, 582 (1941)) (bracket supplied); *id*. at 404 n.17 (collecting cases with similar rule).

At the time of *First Security Bank*, the IRS regulations were consistent with this interpretation. *Id*. at 404. Applying the IRS's own rule, the Supreme Court held:

> The regulation, as applied to the facts in this case, contemplates that Holding Company—the controlling interest—must have 'complete power' to shift income among its subsidiaries. It is only where this power exists, and has been exercised in such a way that the 'true taxable income' of a subsidiary has been understated, that the Commissioner is authorized to reallocate under § 482.

Id. at 405. Violating the banking laws is not to have "complete power" over the income. *Id*. The IRS could not, therefore, assign income when the taxpayer could

not realize the income legally anyway, the Court reasoned, based on Tax Court's holding in *Shunk*. *See id*. at 406.

In 1990, the Tax Court in *Procter & Gamble Co. v. Commissioner*, 95 T.C. 323, 335–36 (T.C. 1990), affirmed that foreign legal restrictions also prohibit the IRS's allocation of income under section 482. This was untimely upheld by the Sixth Circuit. *See Procter & Gamble Co. v. C.I.R.*, 961 F.2d 1255, 1259 (6th Cir. 1992) (affirming Tax Court's opinion and applying *First Security Bank*). The next year, the Tax Court reaffirmed foreign legal restrictions stop the IRS from allocating income under § 482. *See Exxon Corp. v. C.I.R.*, 66 T.C.M. (CCH) 1707 (T.C. 1993). The Fifth Circuit affirmed, stating, "Because [the oil company subsidiary] lacked the power to sell Saudi crude above the OSP, reallocation under § 482 is inappropriate." *Texaco, Inc. v. C.I.R.*, 98 F.3d 825, 830 (5th Cir. 1996).

Until January 21, 1993, when the IRS issued temporary regulations, the Treasury rules applied this common-sense rule on illegality being a bar to applying § 482. In a sudden policy shift, the IRS Proposed Regulations began to depart from *First Security Bank* and its progeny with no explanation on why. *See* IRS, Intercompany Transfer Pricing Regulations Under Section 482, 58 Fed. Reg. 5310 (Jan. 21, 1993) ("Proposed Regulations").

Given the disparity between the Proposed Regulations and the earlier precedent, this notice constituted a drastic shift in policy away from the established

norm. In response, various organizations submitted comments questioning the legality of the Proposed Regulations. *See*, *e.g.*, TEI SEES ROOM FOR IMPROVEMENT IN TRANSFER PRICING REGS, TAX NOTES (Aug. 6, 1993) (reproducing comments of Tax Executives Institute).[3] These comments raised concerns with the regulatory attempt to overturn *Proctor & Gamble* and *First Security Bank* and stressed the IRS's requirements for a foreign legal restriction under section 482 were overbroad. *See id.* ("The proposed regulation constitutes a not-too-subtle attempt to overrule *Procter & Gamble Co. v. Commissioner*.").

The alarm bells were ringing on the sudden shift of how the IRS planned to apply § 482 in the future. One might expect the IRS to either withdraw this attempt to subvert *Proctor & Gamble*, *Texaco*, and *First Security Bank*, or otherwise adequately explain its rationale. But the taxpayers never got such an explanation. The sudden, unexplained rulemaking was therefore arbitrary and capricious because it violated the APA's requirements.

C. The Final Regulations were Arbitrary and Capricious.

Absent a statutory exception, agencies are required to comply with the APA's notice and comment requirements "before promulgating a rule that has legal force." *Little Sisters of the Poor Saints Peter & Paul Home v. Penn.*, 591 U.S. ___, 140 S.

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[3] https://www.taxnotes.com/research/federal/other-documents/public-comments-on-regulations/tei-sees-room-for-improvement-in-transfer-pricing-regs/14d5p?highlight=%22IL-401-88%22.

Ct. 2367, 2384 (2020). Rules like 26 C.F.R. § 1.482-1(h)(2), which legislate the public's behavior, must go through notice and comment rulemaking. *See*, *e.g.*, *Hewitt v. Comm'r of IRS*, 21 F.4th 1336, 1342 (11th Cir. 2021) (applying *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015)). The basis of the rule must articulate a "rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and quotation marks omitted); *cf.* 5 U.S.C. § 706(2)(A) (holding as unlawful an agency rule which is arbitrary and capricious).

Most importantly, "in promulgating the final rule, the agency must include in the rule's text a concise general statement of its basis and purpose." *Hewitt*, 21 F.4th at 1342 (cleaned up, citations omitted). These statements must be detailed enough "enable the reviewing court to see the objections [from the community] and why the agency reacted to them as it did." *Id*. In doing so, "the agency must rebut vital relevant or significant comments." *Id*. at 1343 (collecting cases, quotation marks omitted). The purpose of notice-and-comment rulemaking is to "give[] affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes" while "afford[ing] the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 587 U.S. ___, 139 S. Ct. 1804, 1816 (2019).

The IRS gave little to no explanation for its departure from the established use of "foreign legal services" or response to the commentators in the Final Regulations. *See e.g.* Final Regulations, 59 Fed. Reg. at 34971. The Final Regulations contained one sentence under the "Background" section which summarily acknowledged the comments: "*After consideration of all the comments*, the proposed regulations under section 482 are adopted as revised by this Treasury decision, and the corresponding temporary regulations are removed." *Id.* at 34972 (emphasis added). The Final Regulations explain the rules "reflect numerous modifications in response to the comments received on the 1993 regulations, both the format and the substance of the final regulations are generally consistent with the 1993 regulations." *Id*. at 34975.

This is mere boilerplate. At no point did the Final Regulations specifically address the commentators' concerns about Final Regulations' treatment of foreign legal restrictions or provide any explanation as to why it was departing from the established judicial precedent from the Supreme Court and this Court's sister Circuits. Rather, the Final Regulations merely summarized what the new regulatory rule pertaining to foreign legal restrictions was. *See e.g. id.* at 34973, 34981. Simply put, the final regulation did not provide any explanation or justification for its change in policy.

The Tax Court, however, did not hold the IRS to the *Encino Motorcars* and *State Farm* standards. The Tax Court's opinion only briefly addressed whether the

IRS complied with the APA's requirements. The Tax Court plurality surmised the IRS "was already aware that the proposed regulation was inconsistent with the caselaw," and therefore a detailed analysis was not needed. Add. 268 (plurality op.). The Tax Court then held that the comments highlighting contrary Supreme Court precedent were "not significant," because everyone knew the rules were in opposition to case law—and thus did not need to be addressed by the IRS in the final rulemaking. *Id*. (holding "comments about inconsistency with prior caselaw were not significant.").

But that is precisely the point: the IRS was moving away from established caselaw, the better reading of § 482, and long-established practice. At that moment, the IRS needed to be clear on why and how it was changing the law. Instead, it ignored the regulated community, and the Tax Court approved that merely performative application of APA notice-and-comment rulemaking. This Court should reverse that erroneous, overly deferential holding, and make the IRS comply with the APA.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be reversed, and the IRS Final Regulations should be set aside as unlawful since they were issued in violation of the APA's procedures.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because this brief contains 3,154 words, as counted by Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

Pursuant to 8th Cir. R. 28A(h)(2), *Amicus* states that the brief has been scanned for viruses using Bitdefender Endpoint Security Tools (version 7.96124), and it is virus-free. Pursuant to 8th Cir. R. 28A(h)(3), *Amicus* also states that the electronic copy of this brief was "generated by printing to PDF from the original word processing file."

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Tyler Martinez
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Dated: February 14, 2024

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief of National Taxpayers Union Foundation in Support of Appellant 3M Company and Subsidiaries using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

/s/ Tyler Martinez
Tyler Martinez
NATIONAL TAXPAYERS UNION FOUNDATION

Dated: February 16, 2024

Counsel for Amicus Curiae