

The Supreme Court Downplays the Blue Book's Interpretative Value

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On December 3, 2013, the Supreme Court of the United States dismissed the applicability of the Blue Book, a commentary of recently passed tax laws prepared by the Joint Committee on Taxation, as little more than a law review article.

U.S. v. Woods, No. 12-562, decided on December 3, 2013, by the Supreme Court of the United States, upheld the jurisdiction of the district court to determine whether a partnership's lack of economic substance could justify imposing a valuation-misstatement penalty on the partners and applied the valuation-misstatement penalty to the deficiency. It also enunciated the appropriate weight that should be applied to the commentary prepared by the Joint Committee on Taxation (JCT) on recently passed laws in its Blue Book.

Background

The JCT, a nonpartisan committee of the U.S. Congress composed of Ph.D. economists, lawyers and accountants, prepares at the end of each Congress a general explanation of enacted tax legislation referred to as the Blue Book. The JCT, with the help of the staffs of the House Committee on Ways and Means and the Senate Committee on Finance, prepares explanations of enacted tax legislation. The explanation includes a description of the present law (the law in effect immediately prior to enactment), an explanation of the provision and the effective date. The Blue Book also often includes the reasons for the change of the law in the description.

While the courts have generally distinguished the Blue Book from legislative history, the appropriate deference that should be applied to the discussions and conclusions in the Blue Book has been inconsistent and somewhat of a mystery. Historically, the Supreme Court has cited the Blue Book, indicating that the "document provides a compelling contemporary indication" of a statute's meaning, but does not rise to the level of legislative history. *FPC v. Memphis Light, Gas & Water Div.*, 411 US 458, 472 (1973).

Many cases have followed that line of reasoning; the U.S. Court of Appeals for the 7th Circuit agreed that the Blue Book "does not rise to the level of legislative history, because it was authored by Congressional staff and not by Congress. Nevertheless, such explanations are highly indicative of what Congress did, in fact, intend." *Estate of Hutchinson v. Commissioner*, 765 F.2d 665, 669-670

(7th Cir. 1985). The Court of Appeals for the 5th Circuit, citing the 11th Circuit, goes even further, explaining that, while the Blue Book is not binding authority, in absence of “definitive legislative history...substantial weight should be given to the Blue Book.” *Alfaro v. Commissioner*, 349 F.3d 225, 230 (5th Cir. 2003) (citing *Estate of Wallace v. Commissioner*, 965 F.2d 1038, 1050 n.15 (11th Cir. 1992) (the Blue Book provides “a valuable aid to understanding the statute”)). District courts also rely on *FPC v. Memphis Light, Gas & Water Div.* for guidance on the proper use of the Blue Book. For example, the Western District of Oklahoma found that “If the General Explanation is good enough for the Supreme Court, then it is also good enough for this Court to use in considering the intent and manner in which tax measures are to be interpreted.” *Bogardus v. U.S.*, No.CIV.A.90-742-A., 1990 WL 259675, at *2 (W.D.Okla. Dec. 28, 1990),

However, some of the circuit courts have viewed the Blue Book less favorably. The Court of Appeals for the 2nd Circuit recently agreed with U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit that the Blue Book is “a post-enactment explanation” and, therefore, “entitled to little weight.” *Exxon Mobil Corp. & Affiliated Cos. v. Commissioner*, 689 F.3d 191, 201 (2d Cir. 2012) (citing *Fed. Nat’l Mortg. Ass’n v. United States*, 379 F.3d 1303, 1309 (Fed Cir. 2004) and *Fed. Nat’l Mortg. Ass’n v. United States*, 56 Fed. Cl. 228, 238 (Fed. Cl. 2003) (reiterating the view that the Blue Book is “not legislative history at all”)). The 9th Circuit falls into this group, explaining that “the Blue Book is not properly characterized as legislative history because it was written after passage of the legislation and therefore did not inform the decisions of the members of Congress who voted in favor of the Act.” *Flood v. U.S.*, 33 F.3d 1174, 1178 (9th Cir. 1994) (citing *Slaven v. BP America*, 973 F.2d 1468, 1475 (9th Cir. 1992) (finding that after-the-fact legislative observations are generally of minimal assistance in interpreting statutes)).

The U.S. Tax Court has not taken a consistent approach in citing the Blue Book. The Tax Court had cited *FPC v. Memphis Light, Gas & Water Div.* a number of times, holding that the Blue Book provides helpful insight when analyzing statutes. See *Tutor-Saliba Corporation v. Commissioner*, 115 T.C. 1, n. 7 (2000) (“the General Explanation of the Tax Reform Act is a probative contemporary indication of the effect of a statutory provision”); *Robinson, et ux. v. Commissioner*, 119 T.C. 44, 75 (1995) (“Blue Book warrants consideration”); *Estate of Sachs v. Commissioner*, 88 T.C. 796, n. 3 (1987), aff’d in part and rev’d in part 856 F.2d 1158 (8th Cir. 1988) (“‘Blue Book,’ prepared by the staff of the Joint Committee is technically not considered ‘legislative history’ of the Tax Reform Act of 1976, the Supreme Court has relied on such a Blue Book in its analysis of another tax statute.”). The Tax Court has also cited *FPC v. Memphis Light, Gas & Water Div.* and refused to be bound by the conclusions drawn in the Blue Book. See *Redlark, et. ux. v. Commissioner*, 106 T.C. 31, 57 (1996) (“we should not be bound by statements in the 1986 Bluebook”). *Lawson v. Commissioner*, T.C. Memo. 1994-286, attempts to reconcile the Tax Court’s use of the Blue Book by explaining that, in the cases that rely upon the Blue Book, it is “cited along with and as being consistent with other legislative history;” and when the Blue Book is the only statutory explanation, the Tax Court has not found the Blue Book to be dispositive.

United States v. Woods

In *Woods*, the Supreme Court upheld the jurisdiction of the district court to determine whether a partnership’s lack of economic substance could justify imposing a valuation-misstatement penalty on the partners. It also found that the valuation-misstatement penalty applied to the deficiency at issue. On the last page of the opinion, it addressed the taxpayer’s argument that the Blue Book required a different result, and, in an interesting departure from the general belief of the tax bar, the Supreme Court likened the Blue Book to a law review article, which “may be relevant to the extent it is persuasive.” Slip op., at 16.

The Supreme Court cited the 9th Circuit's *Flood v. U.S.*, mentioned above, for the proposition that the Blue Book does not inform the decisions of the members of Congress and explained that in a recent opinion, *Bruesewitz v. Wyeth LLC*, 562 U.S. ___, __ (2011) (slip op., at 17-18), it has "held that such '[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.'" The Supreme Court in *Bruesewitz* explained that "Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law." Therefore, any commentary on legislation that is written after the fact, is not legislative history and not relevant in deciphering ambiguous statutes. The *Woods* opinion also cites *Federal Nat. Mortgage Assn. v. United States*, discussed above, to bolster that argument and clearly agrees with the 9th Circuit's view of the Blue Book.

In *Bruesewitz*, the Supreme Court diminished the value of a Committee Report written by a later Congress, not the Blue Book—a report written immediately after the Congress that enacted the tax legislation. The cases cited in *Bruesewitz* discuss commentary and reports that are not entirely analogous to the Blue Book. For example, *Jones v. United States*, 526 U. S. 227, 238 (1999), explains that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." *Id.* at 18 (citing *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U. S. 633, 650 (1990) (quoting *United States v. Price*, 361 U. S. 304, 313 (1960))). Logically, a later Congress may not know the intent of the prior Congress in enacting a certain statute. However, the Blue Book is written by the JCT's staff, with the help of the staffs of the House Ways and Means committee and the Senate Committee on Finance, staffs that were likely present during the enactment of the legislation.

The Supreme Court acknowledged that it had taken a different view of the Blue Book in the past in *FPC v. Memphis Light, Gas & Water Div.*, but that "more recent precedents disapprove of that practice." Clearly, this represents a shift in the Supreme Court's view of the Blue Book's role in statutory interpretation, and, by equating the Blue Book with a law review article, severely reduces the value of an important tool of tax legal analysis that is relied upon equally by taxpayers and the Internal Revenue Service.

What does that mean today?

Is the Blue Book now an archaic waste of money? The short answer is, No.

Although the Supreme Court has diminished the significance of the Blue Book in interpreting tax law and its use in supporting legal arguments in front of the courts, the Blue Book is still relevant in understanding tax law. It is written by tax professionals who were generally present at the time the legislation was passed and, in some cases, is the only explanation that exists.

Under principles of statutory construction, the legislative history is relevant only if the statutory language is ambiguous. If the Blue Book explanation supports other pre-enactment legislative history, then the courts are likely to find it persuasive; if other pre-enactment legislative history is absent, then the courts may disregard the Blue Book explanation—as the Supreme Court did in *Woods*—or find it persuasive to the extent it supports their conclusion.

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