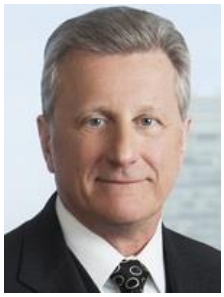
Rules Of Construction Provide Framework For Decoding TCJA

By **Andrew Roberson and Roger Jones** (February 28, 2019, 7:47 PM EST)

Andrew Roberson



Roger Jones

Under the U.S. Constitution, there are three branches of the federal government. The legislative branch — Congress — enacts laws. The executive branch — the president, vice president, cabinet and most federal agencies — enforces laws. The judicial branch — the U.S. Supreme Court and other courts — interprets and applies laws. The Tax Cuts and Job Act, enacted in late 2017,[1] brought with it significant changes in the tax law that will result in the intersection of these three branches over the next several years. New tax laws were enacted and existing laws were modified in several respects. The U.S. Department of the Treasury and the Internal Revenue Service have been working diligently to provide guidance under the TCJA to taxpayers; some guidance has been welcomed and some has been questioned as potentially beyond the scope of the laws enacted by Congress.

Congress' enactments in the TCJA and the IRS' guidance regarding those enactments are potentially subject to competing interpretations of Congress' intent in enacting the TCJA and the IRS' intent underlying its interpretation of the statute. The interpretive principles discussed below provide a framework for discerning those intentions and clarifying the tax law.

A number of the comments submitted to the IRS in the notice and comment process relating to the TCJA-related proposed regulations have been based — in part, at least — on the application of some of these principles. In light of the TCJA, the guidance being issued by the IRS and those comments, this article revisits some of the more common rules used in interpreting and applying the law to cases and controversies.[2]

Where to Begin — The Statutory or Regulatory Text

The Supreme Court has stated that "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others."[3]

This cardinal canon is that the interpretation of language, whether statutory or regulatory, always starts with the language itself.[4] If the language is plain, "the sole function of the courts is to enforce it according to its terms."[5] In other words, a court should "presume that [the] legislature says in a statute what it means and means in a statute what it says there."[6] This is commonly referred to as the "plain meaning" rule.

While this basic tenet of construction is easy enough to state, determining whether the language at issue is plain or ambiguous can be difficult. To assist with this determination, courts have developed other construction rules. For example, the specific context in which language is used and the broader context of the statute as a whole must be examined.[7]

Absent a specific definition, undefined terms are given their ordinary and customary meanings.[8] In assessing the plain meaning of statutory language, a statutory term that has an established legal or commercial meaning must, absent clear instructions to the contrary, be interpreted in light of its established meaning.[9] Additionally, where the same

word or phrase appears multiple times within a text, it is presumed to have the same meaning each time.[10] Finally, the inclusion of language in one portion of a statute or regulation but its omission in another portion is generally considered intentional.[11] Thus, language that appears ambiguous in isolation may be unambiguous when viewed as part of the overall statutory or regulatory framework and other usage of the same language.

A determination that the language in dispute is plain limits the ability of an agency such as the IRS to issue guidance that is contrary to the language's plain meaning.[12] Thus, questions regarding the appropriate deference to the IRS' position, whether in regulations, other published guidance or private guidance, should not arise if the plain meaning rule applies.[13]

In construing provisions in the TCJA and the regulations promulgated thereunder, taxpayers must start first and foremost by examining the language used by Congress, the Treasury and the IRS. If that language is plain, it may be difficult for the IRS or taxpayers to argue for a contrary meaning based on nonstatutory means, such as legislative history, the Bluebook[14] and IRS pronouncements.

Exceptions to the Plain Meaning Rule

The plain meaning rule is not absolute. For example, the plain meaning of statutory or regulatory language will not be enforced if it would lead to an "absurd" result.[15] In this rare situation, courts will look to the purpose of the provision at issue. This is commonly referred to as the "absurd results" rule.

The absurd results rule itself requires interpretation, i.e., when is a result "absurd"? The Supreme Court has indicated that an "odd" result is generally not an "absurd" result.[16] Indeed, the origin of the rule indicates that it is a high bar:
[I]t must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all of mankind would, without hesitation, unite in rejecting the application.[17]

However, in practice, courts over the years appear to have softened a bit. For example, the U.S. Tax Court has sometimes framed the inquiry as whether there is "unequivocal evidence of legislative purpose" that overrides the plain meaning of the language used.[18] A scrivener's or drafting error is a related situation where a court may look past the plain meaning of the language to determine what Congress meant.

For example, the Supreme Court has held that courts should "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."[19] Other courts have similarly applied the language as if an error had not been made.[20]

Although the absurd results rule is rarely invoked, it still must be considered by taxpayers in interpreting the TCJA and underlying regulations promulgated by the Treasury and the IRS. Additionally, taxpayers should be cognizant of whether a simple scrivener's error has occurred and determine the likelihood that a court will take corrective action.

Other Commons Rules of Construction

There are scores of other rules of construction that courts apply in interpreting statutory and regulatory language. Some are frequently used while others arise only sparingly. And, over time, some rules may lose their luster with courts. Selected rules are discussed briefly below.

Specific Governs the General Rule

A longstanding rule is that a specific provision governs a general provision.[21] This rule dates back over a hundred years:
[I]t is an old and familiar rule that] where there is in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.[22]

The rule commonly applies to statutes or regulations in which a general allowance or disallowance is contradicted by a specific allowance or disallowance.[23]

Thus, in interpreting the TCJA and its implementing regulations, taxpayers need to be mindful of situations where there may be two competing provisions. To the extent there is an inconsistency between a specific rule and a general one, this rule should be helpful in properly interpreting the language at issue.

Surplusage, Nonexclusivity and Negative Implication Rules
It is a cardinal principle of statutory construction 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.[24]

Thus, courts are reluctant to treat language as surplusage in any setting.[25] The effect of this rule is that courts should not assume that words used by the drafter are meaningless, otherwise they would not have been employed.

Similarly, a presumption of nonexclusivity applies to the word "includes." Thus, as a general rule, use of the word "includes" or "including" is "not one of all-embracing definition, but connotes simply an illustrative application of the general principle."[26] On the other hand, words such as "exclusive" and "means" should be interpreted as a complete definition and strictly construed.[27]

The negative implication rule — expressio unius est exclusio alterius — provides that if a statute provides specific exceptions to a general rule, courts infer that the drafter intended to exclude any further exceptions.[28] However, this rule is not absolute and courts have held that it does not apply if the result is contrary to all other textual and contextual evidence of intent.[29] And, some courts have indicated that this rule is less useful in the context of interpreting regulations.[30]

The TCJA and its implementing regulations present vast and complex rules. Wherever possible, taxpayers should strive to interpret these rules in a manner that gives meaning to each clause. However, there may be situations where this rule can be invoked if the IRS presents an interpretation that ignores or eliminates specific terms used in the rules. Some potential situations where this might arise is when words such as "only," "solely" or "exclusively" are disregarded and an interpretation of a statute or regulations is proffered that extends its meaning beyond the specific circumstances announced in the rule.

Title/Headings Rule

The title or heading of a provision may shed light on the meaning of the language used in the provision.[31] The Supreme Court has enunciated this rule as follows:
[The] heading is but a short-hand reference to the general subject matter involved. … [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in the most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.[32]

Thus, a heading will not limit the plain meaning of the language but may be helpful in resolving an ambiguity and may be useful for interpretative purposes.[33]

Titles and headings used in the TCJA and implementing regulations should not be conclusively relied upon nor immediately discounted. Rather, it should be determined whether the title or heading can be used to clear up any ambiguity or to reinforce the plain meaning of the language used by Congress or the IRS.

The Legislative Reenactment Rule

It is well established that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[34] Thus, when a new law is adopted incorporating provisions from prior law, it is presumed that Congress was aware of any existing interpretation of the law insofar as it impacts the new statute.[35]

The TCJA and its implementing regulations, while adopting several new rules, are based in some instances on existing rules and principles. Many of those rules and principles have been around for decades and have been interpreted by the courts and the IRS. Thus, in appropriate circumstances, it may be possible to argue that settled interpretations of prior law should be used in interpreting the TCJA insofar as the prior law informs the intended operation of the new provisions. On the other hand, given some of the sweeping changes made by Congress, arguments may exist that interpretations of prior rules need to be revisited.

The Strict Construction Rule

Over a century ago, the Supreme Court addressed how courts should interpret tax statutes:
In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.[36]

This "strict construction" rule, has been applied to regulations.[37] Use of this rule has diminished over time and, although still followed by many courts, does not enjoy universal approval.[38]

In circuits where this rule remains intact, it can potentially be a powerful tool where TCJA provisions and the underlying regulations are not clear. Taxpayers should review the law in the controlling circuit to determine whether this rule may be useful in challenging IRS interpretations of the TJCA or regulations in situations where the result of the language at issue is not clear.

Dictionary Act Rules

Rules of construction can also be found in the Dictionary Act, which refers to the provisions found in the United States Code, chapter 1, Sections 1 through 8. The Internal Revenue Code incorporates the Dictionary Act via cross reference.[39] For example, singular includes plural — and vice versa — and masculine includes feminine — and vice versa. On the other hand, the Internal Revenue Code also provides that such cross references "are made only for convenience, and shall be given no legal effect."[40] And, the Supreme Court has held that the Dictionary Act does not apply if "the context indicates otherwise."[41]

In interpreting and applying the TCJA and implementing regulations, the singular-to-plural rule should be considered. Additionally, it must be determined whether the context in which either the singular or plural term is used indicates that the rule should not be followed.

Conclusion

Navigating the code, let alone the new changes from the TCJA and its implementing regulations, can be a daunting task for taxpayers and the courts. Revisiting common rules of statutory and regulatory construction is beneficial for taxpayers and their advisers in formulating tax return positions and defending against the IRS disputes that are sure to arise in the coming years.

Andrew R. Roberson is a partner and Roger J. Jones is senior counsel at McDermott Will & Emery LLP.

McDermott Will & Emery LLP is a regular contributor to Tax Authority Law360.

[1] 115 P.L. 97

[2] The same rules generally apply to interpreting both statutory and regulatory provisions. Union Carbide Corp. v. Commissioner, 110 T.C. 375, 384 (1998).

[3] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

[4] Id.; see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007); U.S. v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); Ernst & Ernst v.

Hochfelder, 425 U.S. 185 (1976).

[5] Caminetti v. U.S., 242 U.S. 470, 485 (1917); see also Woods Inv. Co. v. Commissioner, 85 T.C. 274, 282 (1985) ("This court will apply these regulations and the statute as written.").

[6] BedRoc Ltd. v. U.S., 541 U.S. 176, 183 (2004) (quotations and citations omitted); see also PMMB-Rose Hill, Ltd. v. Commissioner, 900 F.3d 193, 208-09 (5th Cir. 2018) (declining to consider deference to IRS interpretation that conflicted with the plain meaning of its own regulation).

[7] Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). Put another way, "the language and design of the statute as a whole" must be considered in determining whether the language is plain. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); see also Rand v. Commissioner, 141 T.C. 376, 385 (2013).

[8] Perrin v. U.S., 444 U.S. 37, 42 (1979); see also Stenberg v. Carhart, 530 U.S. 914, 942 (2000) (providing that when a statute provides a specific definition, courts must follow that definition, even if it varies from the term's ordinary meaning).

[9] See Board of Governors of the Federal Reserve v. Dimension Fin. Corp., 474 U.S. 361, 373 (1986) (interpreting "commercial loan" according to its "accepted ordinary commercial usage"); Morisette v. United States, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art … it presumably knows and adopts the cluster of ideas that were attached to each borrowed work."); Henry v. United States, 251 U.S. 393, 395 (1920) ("The law uses familiar legal expressions in their familiar legal sense … .").

[10] Atl. Cleaners & Dyers Inc. v. U.S., 286 U.S. 427, 433 (1932); TG Mo. Corp. v. Commissioner, 133 T.C. 278, 296 (2009). It should be noted that this rule "is not rigid." U.S. v. Cleveland Indians Baseball Co., 532 U.S. 200, 213 (2001); Rand, 141 T.C. at 386.

[11] Russello v. U.S., 464 U.S. 16, 23 (1983); see also Village of Barrington v. STB, 636 F.3d 650, 661 (D.C. Cir. 2011) (calling this rule "one of the most basic tenets of statutory interpretation").

[12] Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326, 1334 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.'"); Durbin Paper Stock Co. v. Commissioner, 80 T.C. 252, 257 (1983) ("A regulation which is in conflict with the statute is invalid to that extent."); CWT Farms, Inc. v. Commissioner, 79 T.C. 1054, 1062 (1982) ("A regulation which contradicts the unambiguous language of the statute it purports to interpret cannot stand.").

[13] See, e.g., Pub. Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989) ("But, of course, no deference is due to agency interpretations at odds with the plain language of the statute itself.").

[14] Staff of Joint Comm. on Taxation, 115th Cong., 2d Sess., General Explanation of Public Law 115-97 (JCS-1 2018).

[15] U.S. v. American Trucking Assns., Inc., 310 U.S. 534, 543-44 (1940).

[16] Exxon Mobil Corp. v. Allapattah Services, Inc., 292 U.S. 55, 60 (1930); but see Public Citizen v. U.S., 491 U.S. 440, 455 (1989) (stating that a literal interpretation of a statute that would "compel an odd result" requires a search of evidence of congressional intent).

[17] Sturges v. Crowninshield, 17 U.S. 122, 203 (1819); see also Crooks v. Harrelson, 282 U.S. 55, 60 (1930) ("the absurdity must be so gross as to shock the general moral or common sense").

[18] Huntsberry v. Commissioner, 83 T.C. 742, 747-48 (1984).

[19] United States Nat'l Bank of Ore. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 462 (1993) (quoting Hammock v. Loan & Trust Co., 105 U.S. 77, 84-85 (1882).

[20] See, e.g., In re Price, 370 F.3d 362, 369 (3d Cir. 2004) ("Ambiguity does not arise merely because a particular provision can, in isolation, be read in several ways or because a statute contains an obvious scrivener's error."); Adkison v. Commissioner, 129 T.C. 97 (2007) (assuming failure to make an on obvious conforming adjustment was inadvertent and applying the law as if the amendment had been made). For further discussion on this point, see Haxton & Vouri-Misso, "Deference Provided to Regulations When There's A Drafting Error" (April 2, 2018) (available at https://www.mwe.com/insights/deference-provided-regulations-drafting-error/).

[21] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

[22] U.S. v. Chase, 135 U.S. 255, 260 (1890).

[23] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012).

[24] TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quotations and citations omitted); see also U.S. v. Home Concrete & Supply LLC, 132 S.Ct. 1836, 1841-42 (2012).

[25] TRW, Inc., 534 U.S. at 31; see also IRC Section 7701(c) ("The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.")

[26] Federal Land Bank of St. Paul v. Bismarck Lumber Co, 314 U.S. 95, 100 (1941).

[27] Dunaway v. Commissioner, 124 T.C. 80, 92 (2005); Parker v. Commissioner, 38 B.T.A. 989, 995 (1938).

[28] Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Rand, 141 T.C. at 387; Tele-Communications, Inc. v. Commissioner, 95 T.C. 495, 514 (1990).

[29] Burns v. U.S., 501 U.S. 129, 136 (1991); Rand, 141 T.C. at 387-88.

[30] See, e.g., Exelon Generation Co., LLC v. Local 15, IBEW, 676 F.3d 566, 571 (7th Cir. 2012) (noting that this "beleaguered canon ... has reduced force in the context of interpreting agency administrated regulations"); Cheney R.R. Co. v. ICC, 902 F.2d 66, 69 (D.C. Cir. 1990) (describing the rule as "an especially feeble helper in an administrative setting").

[31] Section 7806(b) provides that "[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect." However, courts have still looked to headings and titles in the Internal Revenue Code as an aid to determine a statute's meaning and purpose. See, e.g., Koprowski v. Commissioner, 138 T.C. 54, 64 n.6 (2012).

[32] Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-29 (1947).

[33] Caltex Oil Ventures v. Commissioner, 138 T.C. 18, 28 (2012) (collecting cases).

[34] Lorillard v. Pons, 434 U.S. 575, 580 (1978).

[35] Id. at 581.

[36] Gould v. Gould, 245 U.S. 151, 153 (1917).

[37] Falconwood Corp. v. U.S., 422 F.3d 1339, 1348 (Fed. Cir. 2005).

[38] See Mohamed v. Commissioner, T.C. Memo. 2013-255. For a more detailed discussion of this rule, see Roberson & Jones, "Lenity and Strict Construction – Overlooked Tools of Construction?" Tax Notes, April 14, 2014.

[39] IRC Section 7701(p)(1).

[40] IRC Section 7806(a).

[41] U.S. v. Hayes, 555 U.S. 415, 422 n.5 (2009); see also Commissioner v. Driscoll, 669 F.3d 1309 (11th Cir. 2012).