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United States v. Woods and the Future of the Tax Blue Book as a Means of Penalty Avoidance and Statutory Interpretation

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UNITED STATES v. WOODS AND THE FUTURE OF THE TAX BLUE BOOK AS A MEANS OF PENALTY AVOIDANCE AND STATUTORY INTERPRETATION

United States v. Woods, 134 S. Ct. 557 (2013)

Cole Barnett[*]

The Blue Book is a "General Explanation" of tax law prepared by the Joint Committee on Taxation, and is commonly relied upon by both taxpayers and the Internal Revenue Service (IRS).[1] In *United States v. Woods*,[2] the U.S. Supreme Court broadly disapproved of judicial deference to the Blue Book when courts are faced with such reliance.[3] Yet, the Court left no guidance on when the Blue Book should or should not prove persuasive.[4] The Court's decision to summarily undermine Blue Book deference[5]—without further elaboration, sophistication, or nuance—will give taxpayers pause when considering whether to rely on the Blue Book.[6] However, the need for pause is unfortunate; the Treasury Department lists the Blue Book as a substantial authority on which taxpayers may rely to avoid certain tax penalties.[7] Moreover, Blue Book reliance is appropriate in various other contexts as a means of statutory interpretation. Nonetheless, the Court has, with a broad stroke, come down against the Blue Book without considering that a given case's facts and circumstances determine the Blue Book's interpretive weight.

The Joint Committee on Taxation (JCT), which creates the Blue Book, is a nonlegislative working group that is promulgated by the Internal

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1. BARBARA H. KARLIN, TAX RESEARCH 52 (2000).
2. 134 S. Ct. 557 (2013).
3. *Id.* at 568.
4. *Id.* (stating that the Blue Book is only "relevant to the extent it is persuasive").
5. The word "deference" is used here in its ordinary sense. The Blue Book is not created by an administrative agency; thus, *Chevron* deference is inapplicable to the Blue Book. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). However, there may be an indirect *Chevron–Mead* deference issue. *See infra* notes 60–63 and accompanying text.
6. The concept of reliance on the Blue Book connotes when a taxpayer or the IRS uses the Blue Book to support their position. Courts use both "deference" and "reliance" to describe situations where the Blue Book is persuasive to the court. *Compare Woods*, 134 S. Ct. at 568 (using the word "relied"), *with* Robinson v. Comm'r, 119 T.C. 44, 94 (2002) (Thornton, J., concurring) (using the word "defer").
7. *See infra* note 16 and accompanying text.

Revenue Code (I.R.C.).[8] The JCT does not develop new laws,[9] but instead helps draft the committee reports that "describe[] the proposed changes to the IRC" and accompany each proposed bill.[10] Committee reports are primary authority and constitute actual legislative history.[11] Once a law is enacted, the JCT may provide a "General Explanation" or "Blue Book" of the new law.[12] The Blue Book is "not an official committee report" as the JCT "is not an official tax-writing committee."[13] However, both the IRS and the Treasury Department recognize the Blue Book as substantial authority, which has lower interpretive value than precedential and persuasive authority.[14] Generally, both taxpayers and the IRS rely on the Blue Book to help interpret ambiguous tax laws.[15] Specifically, under the applicable Treasury Regulation, if the Blue Book supports a taxpayer's position, the taxpayer can rely upon the Blue Book as a substantial authority to avoid a penalty for a substantial understatement of tax.[16]

The Court has faced the issue of Blue Book reliance only once prior to 2013. While not a penalty avoidance case like *Woods*, the case involved an

8. I.R.C. § 8001 (2012); KARLIN, *supra* note 1, at 52.

9. Tax legislation is created by the House Committee on Ways and Means. But note that five members from the Committee sit on the JCT. I.R.C. § 8002(a)(2) ; *see also* GAIL LEVIN RICHMOND, FEDERAL TAX RESEARCH 96 (8th ed. 2010); KARLIN, *supra* note 1, at 49.

10. KARLIN, s*upra* note 1, at 49; *see also* I.R.C. § 8022(3)(A). At each stage of the legislative process, the JCT "assumes the primary responsibility for drafting the committee reports to reflect each committee's actions." KARLIN, s*upra* note 1, at 52.

11. *See Robinson*, 119 T.C. at 73 (noting that the Blue Book is not a legislative document, but a committee report is); *see also* WILLIAM A. RAABE ET AL., FEDERAL TAX RESEARCH 93 (Rob Dewey et al. eds., 8th ed. 2009) ("In many situations where the tax law is unclear, or when recent legislation has been passed, [Committee Reports] can provide insight concerning the meaning of a specific phrase of the statute or of the intention of Congress concerning a certain provision of the law.").

12. *See* I.R.C. § 8022 (allowing the JCT to report investigations and recommendations on the "operation and effects of the Federal system of internal revenue taxes"); KARLIN, *supra* note 1, at 52 ("[The General E]xplanation is also often referred to as the 'Blue Book' because of its blue cover.").

13. RICHMOND, *supra* note 9, at 114; *see also Robinson*, 119 T.C. at 73 ("We acknowledge that the Joint Committee staff summary is not the official legislative document for the conference committee's decisions about TRA 1986; that distinction is accorded the conference committee report.").

14. Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003) (listing the Blue Book as a "substantial authority"); RICHMOND, *supra* note 9, at 8.

15. *See, e.g.*, Fed. Power Comm'n v. Memphis Light, Gas & Water Div., 411 U.S. 458, 471–72 (1973) (using the Blue Book as "compelling" evidence of its interpretation of the I.R.C.); Norman v. United States, C 05-02059 RMW, 2006 WL 2038264, at *4 (N.D. Cal. July 19, 2006) (using the Blue Book to argue that a certain tax applied to a taxpayer), *aff'd*, 287 F. App'x 614 (9th Cir. 2008). *But see* Redlark v. Comm'r, 106 T.C. 31, 56 (1996) (Laro, J., concurring) (giving "little weight" to the Blue Book), *rev'd on other grounds*, 141 F.3d 936 (9th Cir. 1998).

16. *See* I.R.C. § 6662(d)(2)(B); Treas. Reg. § 1.6662-4(d). This is the context in which the Blue Book was used in *Woods*. *See* United States v. Woods, 134 S. Ct. 557, 568 (2013) (rejecting the taxpayer's attempt to rely on the Blue Book to avoid a substantial understatement penalty).

interpretation of an ambiguous tax law. In 1973, the Supreme Court deferred to the Blue Book to help resolve inconsistent legislative history. At issue in *Federal Power Commission v. Memphis Light, Gas & Water Division* (*FPC*)[17] was whether the Federal Power Commission (Commission) had retained, in the face of the Tax Reform Act of 1969, authority to decide the tax reporting methods of utilities.[18] The relevant House and Senate Bills conflicted over whether the utilities could elect, without Commission approval, to continue to use a flow-through tax reporting method.[19] The House Bill stated that utilities *must* continue to use the flow-through method, unless the Commission allowed a change.[20] However, the Senate Bill stated the utilities *could* change their reporting method without the Commission's permission.[21] The Supreme Court held for the Commission and determined that the Blue Book provided "a compelling contemporary indication that the Federal Power Commission was not deprived of its authority to permit abandonment of flow-through."[22]

When other courts have faced Blue Book reliance to help interpret an ambiguous statute—in other context not dealing with penalty avoidance—the degree of Blue Book deference has varied.[23] Some courts conclude the Blue Book's interpretive value is low, and that the Blue Book is only persuasive if corroborated by actual legislative history. For example, in *Redlark v. Commissioner*,[24] the IRS relied on the Blue Book to argue that accumulated interest, relating to federal income tax deficiencies arising from "errors made in computing petitioners' income from their business," was personal and outside the scope of I.R.C. § 163(h)(2)(A).[25] The Tax Court rejected the IRS's position and stated "[w]here there is no corroboration in the actual legislative history, we shall not hesitate to disregard the General Explanation as far as congressional intent is concerned."[26]

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17. 411 U.S. at 471–72.

18. *Id.* at 459.

19. *See id.* at 461–62.

20. *Id.* at 469.

21. *Id.* Unfortunately, the relevant Conference Report further complicated matters. *See id.*at 470–71.

22. *Id.* at 472.

23. *See* United States v. Woods, 134 S. Ct. 557, 568 (2013) ("While we have relied on similar documents in the past, our more recent precedents disapprove of that practice." (citation omitted)); Peter A. Lowy, *U.S. Federal Tax Research*, 100-2d Tax Mgmt. (BNA) A–19 n.88 (2011) (listing several sources who discuss the unsettled "interpretive utility of the Blue Book").

24. 106 T.C. 31 (1996), *rev'd on other grounds*, 141 F.3d 936 (9th Cir. 1998).

25. *Id.* at 32, 44–46.

26. *Id.* at 45. Furthermore, the court reasoned "[g]iven the clear thrust of the conference committee report, the General Explanation is without foundation and must fall by the wayside. To conclude otherwise would elevate it to a status and accord it a deference to which it is simply not entitled." *Id.* at 46. The U.S. Tax Court has consistently reasoned that the Blue Book has little

In contrast to the minimal degree of deference in *Redlark*, in *Norman v. United States*,[27] a federal district court reasoned that the Blue Book's interpretive value is high; the Blue Book can stand alone as "the sole piece of evidence on point"—even without corroboration by legislative history.[28] In *Norman*, the IRS relied on the Blue Book to argue that the Alternative Minimum Tax applies to capital losses.[29] The district court granted summary judgment to the IRS and noted "the General Explanation of the Tax Reform Act of 1986 reveals that Congress specifically intended I.R.C. § 1211 to apply in these circumstances."[30]

These differing levels—or degrees—of Blue Book deference revealed by *FPC*, *Redlark*, and *Norman* are appropriate given that context governs the Blue Book's power to persuade.[31] In the appropriate case, the Blue Book offers "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[32] Still, in other contexts, such as in *Woods*, judicial deference to the Blue Book is inappropriate, thus making Blue Book reliance costly for a taxpayer.[33]

Yet, the instant case, by outright rejecting a taxpayer's reliance on the Blue Book, suggests courts should never defer to the Blue Book. It suggests that the Blue Book is only relevant if, like a law review article, the Blue Book is persuasive.[34] The instant case started in 1999 when Gary Woods created two partnerships, both designed to produce both ordinary and capital losses. Yet, the IRS disallowed the losses for tax purposes.[35]

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interpretive value when not corroborated by actual legislative history. *See, e.g.*, Allen v. Comm'r, 188 T.C. 1, 15 (2002) ("[W]e shall not hesitate to disregard the expressions set forth therein where, as here, those expressions are barren of corroboration in the legislative history."); Robinson v. Comm'r, 119 T.C. 44, 94 (2002) (Thornton, J., concurring) ("[W]e require some direct corroboration of congressional intentions before we defer to Blue Book expressions thereof."); Zinniel v. Comm'r, 89 T.C. 357, 367 (1987) ("[T]he General Explanation noted above, standing alone, without any direct evidence of legislative intent, is not unequivocal evidence of legislative intent . . . ."). These opinions "throw[] doubt on the Blue Book's probative value, particularly when it represents lone evidence of the legislative thinking behind the law." Lowy, *supra* note 23, at A–19.

27. Norman v. United States, C 05-02059 RMW, 2006 WL 2038264 (N.D. Cal. July 19, 2006), *aff'd*, 287 F. App'x 614 (9th Cir. 2008).

28. *Id.* at *4.

29. *Id.* at *2; *see also* I.R.C. § 1211 (2012) (capital losses).

30. *Norman*, 2006 WL 2038264, at *4. The court also noted "the 'Blue Book,' is not part of the statute's official legislative history." *Id.*

31. *See* Michael Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and The Role of "Subsequent" Tax Legislative History*, 11 AM. J. TAX POL'Y 91, 122 (1994).

32. *Cf.* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (discussing the interpretive value of other nonlegislative documents in nontax contexts).

33. *See* United States v. Woods, 134 S. Ct. 557, 568 (2013).

34. *Id.*

35. Woods v. United States, 794 F. Supp. 2d 714, 717 (W.D. Tex. 2011), *aff'd*, 471 F. App'x 320 (5th Cir. 2012), *rev'd*, 134 S. Ct. 557 (2013).

After a Notice of Final Administrative Adjustment, Woods sought judicial review from the United States District Court for the Western District of Texas.[36] The district court concluded that the partnerships were shams,[37] but held the valuation-misstatement penalty did not apply to the underpayment because the IRS had disallowed the losses for tax purposes.[38] While Woods mentioned the Blue Book in his trial brief, the Western District did not discuss the Blue Book in its opinion.[39]

The Court of Appeals for the Fifth Circuit affirmed based on precedent.[40] Like the Western District, the Fifth Circuit made no reference to the Blue Book in its opinion.[41] The Supreme Court granted certiorari to resolve a circuit-level split over whether the valuation-misstatement penalty applied to transactions lacking economic substance—meaning sham transactions.[42] The Court reversed the Fifth Circuit by holding the valuation-misstatement penalty *did* apply to the sham transactions.[43]

Generally, the Court held that the I.R.C. § 6662(e)(1)(A) valuation-misstatement penalty applies to tax underpayments that result from basis-inflating transactions.[44] Specifically, the Court held "the [valuation-misstatement] penalty is applicable to tax underpayments resulting from the partners' participation in the COBRA tax shelter" by concluding that

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36. *Id.* at 716.

37. *See id.* at 718 (reasoning that the plaintiff was sophisticated and that "he also knew, or should have known, that these transactions" lacked "economic substance").

38. *See id.* at 717 (holding the valuation-misstatement penalty did not apply as the District Court was bound by Fifth Circuit precedent, which held that "whenever the Internal Revenue Service totally disallows a deduction, it may not penalize the taxpayer for a valuation overstatement . . . . [T]he underpayment is not attributable to a valuation overstatement; it is attributable to claiming an improper deduction").

39. *See id.*; Plaintiffs' Trial Brief at 4 n.9, *Woods*, 794 F. Supp. 2d 714 (Nos. SA-05-CA-216-H, SA-05-CA-217-H) (citing a Fifth Circuit case that quoted the Blue Book).

40. *See* Woods v. United States, 471 F. App'x 320, 320 (5th Cir. 2012) (per curiam) (holding that "this issue is well settled"), *rev'd*, 134 S. Ct. 557 (2013).

41. *See id.* The Fifth Circuit's brief, two-sentence, per curiam opinion did little more than affirm the district court and cite three cases as precedent. *See id.*

42. United States v. Woods, 134 S. Ct. 557, 562 (2013). The Court also requested briefing to resolve whether district courts have jurisdiction to determine the application of valuation-misstatement penalties in partnership-level cases. *Id.* For an overview of the economic substance doctrine, including recent legislation, see generally Charlene D. Luke, *The Relevance Games: Congress's Choices for Economic Substance Gamemakers*, 66 TAX LAW. 551 (2013).

43. *Woods*, 134 S. Ct. at 565, 568. The Supreme Court reasoned that the COBRA-associated "partnerships were shams." *Id.* at 568. If a partnership's principal purpose is to substantially reduce the partners' tax liability in a manner inconsistent with subchapter K, the IRS may completely ignore the partnership for federal tax purposes. *See* Treas. Reg. § 1.701-2(b) (as amended in 1995); LAURA E. CUNNINGHAM & NOËL B. CUNNINGHAM, THE LOGIC OF SUBCHAPTER K: A CONCEPTUAL GUIDE TO THE TAXATION OF PARTNERSHIPS 249–59 (4th ed. 2011) (discussing the general anti-abuse rule). The Court also held that district courts have jurisdiction to determine the "applicability of the valuation-misstatement penalty" in a partnership-level proceeding. *Woods*, 134 S. Ct. at 564.

44. *Woods*, 134 S. Ct. at 565–66. A property's basis is generally defined as its cost. I.R.C. § 1012(a) (2012).

the plain language of I.R.C. § 6662 proved the penalty applied.[45]

Importantly, the Court not only rejected Wood's reliance on the Blue Book, but (unlike the lower courts) also disapproved of any future Blue Book deference for purposes of statutory interpretation.[46] However, the Court's commentary on the Blue Book's persuasiveness was unnecessary to decide the case for two reasons. First, the Court reasoned the statute in question was unambiguous; the issue required no reference to actual legislative history—much less the Blue Book.[47] Second, the Court noted the Blue Book passage Woods relied upon was not on point.[48]

Woods had designed complex transactions to generate both ordinary and capital losses.[49] First, he purchased a series of long-option spreads for around $46 million.[50] Then, he purchased a series of short options to offset the long options.[51] The net cost of all the transactions to Woods was only about $2.3 million—yet he claimed $45 million in losses.[52] Woods's entire underpayment was due to a valuation misstatement. In contrast, the passage from the Blue Book that Woods relied upon referred to "two separate, non-overlapping underpayments, [where] only one of which [was] attributable to a valuation misstatement," while the other underpayment did not result from a valuation misstatement.[53] Thus, Wood's reliance on the Blue Book was unfounded given that his entire claim, $45 million in supposed "losses," resulted from a valuation misstatement; his underpayments connected with each other and overlapped to create a sham transaction lacking economic substance.[54]

Nevertheless, the Court's conclusion that the Blue Book passage was not on point followed discussion of the Blue Book's low interpretive value.[55] First, the Court noted that the JCT creates the Blue Book after a

45. *Woods*, 134 S. Ct. at 565, 568.

46. *Id.* at 568.

47. *Id.* at 567 n.5.

48. *Id.* at 568.

49. *Id.* at 560; *see* CUNNINGHAM & CUNNINGHAM, *supra* note 43, at 248 (discussing the evolution of "sophisticated partnership structures intended to effect large-scale corporate tax avoidance" and the IRS's response).

50. *Woods*, 134 S. Ct. at 560.

51. *Id.*

52. *Id.* at 560–61.

53. *See id.* at 568. In contrast, the respondent argued that "there is no underpayment attributable to a valuation misstatement (and hence no valuation misstatement penalty) if a tax rule—like the economic substance doctrine—requires an adjustment to tax liability that, by itself, results in the disallowance of the claimed tax benefits." Brief for Respondents at 49, *Woods*, 134 S. Ct. 557 (No. 12-562), 2013 WL 3816999, at *49.

54. *Woods*, 134 S. Ct. at 568 (reasoning that the passage from the Blue Book did not persuade as it "concern[ed] a situation quite different from the one [the court] confront[ed]").

55. *See id.* (noting that the JCT prepares the Blue Book, and then criticizing Blue Book reliance). Justice Scalia, the author of *Woods*, has written extensively on statutory interpretation. *See, e.g.*, Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring) (rejecting the majority's reliance on the Advisory Committee Notes of the Federal Rules of Evidence as they

statute's enactment, which means the Blue Book has no effect on congressional votes.[56] Next, the Court stated that while it had relied on the Blue Book in a previous opinion, more recent cases disapproved of such deference.[57] Remarkably, the Court failed to cite any case law to support the existence of a recent judicial revolution that supposedly disfavors Blue Book deference.[58]

Therefore, under *Woods*, courts should ignore the Blue Book unless it proves persuasive.[59] Yet, following *Woods* creates two problems. First, *Woods* indirectly creates an administrative agency deference concern regarding Blue Book reliance and penalty avoidance. The Treasury Department and the IRS have chosen to treat the Blue Book as a substantial authority upon which taxpayers can rely to avoid underpayment penalties.[60] If courts interpret *Woods* to mean the Blue Book should be ignored (unless persuasive), courts will override the IRS's and Treasury Department's interpretations of the I.R.C.[61] A court's dismissal of the IRS's and Treasury Department's interpretations may create an administrative agency deference issue similar to that of *Chevron*.[62] Therefore, *Woods* adds dirt to muddy water by undermining the Treasury Department's choice to consider the Blue Book a substantial authority.[63]

Second, *Woods*, by broadly disapproving of Blue Book deference, ignores two important realities of tax legislation.[64] The first reality is that tax laws are complex, frequently revised, the result of a "conceptual style of legislation," and have a "contextual tradition of tax interpretation."[65]

"bear no special authoritativeness as the work of the draftsmen"); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 51 (2012).

56. *Woods*, 134 S. Ct. at 568 (quoting Flood v. United States, 33 F.3d 1174, 1178 (9th Cir. 1994)). Other courts dismiss the Blue Book as "post-enactment legislative history" by using the term "post-enactment explanation." *See, e.g.*, Fed. Nat'l Mortg. Ass'n v. United States, 379 F.3d 1303, 1309 (Fed. Cir. 2004). The "post-enactment" element raises a separation of powers concern. The Blue Book is created by a congressional working group, but only after the legislative process is complete. This may blur the line between creating the law and interpreting the law. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 954–56 (1983) (discussing the one-House veto and the legislative lawmaking process).

57. *Woods*, 134 S. Ct. at 568.

58. *Id.*

59. In contrast, the Ninth Circuit suggests that the Blue Book is relevant when a statute is "facially ambiguous." Redlark v. Comm'r, 141 F.3d 936, 941 (9th Cir. 1998).

60. *See* Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003).

61. The authority upon which the Treasury Department relies to interpret the I.R.C. is incredibly complicated. *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1544 & nn.24–27 (2006).

62. *See generally* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467, U.S. 837 (1984).

63. Treas. Reg. § 1.6662-4(d)(3)(iii) lists the Blue Book as substantial authority, alongside the actual I.R.C., Treasury Regulations, and legislative history.

64. *See* Livingston, *supra* note 31, at 95–98 (discussing several concerns surrounding tax legislation).

65. *Id.* at 95.

This "contextual tradition" is marked by emphasis on Treasury Regulations and case law; this tradition makes "a literal or 'plain meaning' rule difficult to apply."[66] Tax laws also evolve quickly in response "to judicial or administrative interpretations of preexisting law."[67] Because of this phenomenon, "post-enactment history" becomes more important as frequent amendments to existing tax laws blur the line between legislative history and post-enactment legislative explanation.[68] The second reality of tax legislation, ignored by broad statements of disfavor, is that the Blue Book is unique. The Blue Book's sole purpose is to "combine the existing legislative history [of tax laws]" into a "single, comprehensive document."[69]

Significantly, the facts and circumstances of each case dictates the extent these two realities affect the Blue Book's interpretive value.[70] With each change in context, the Blue Book's interpretive value rises or falls.[71] Therefore, because the Court made a sweeping disapproval of Blue Book deference, *Woods* will have a disparate impact on future Blue Book deference, depending on the case at hand. *Redlark*, *FPC*, and *Norman* provide examples of differing degrees of Blue Book deference in different factual scenarios and display the disparate effects *Woods* will have on Blue Book deference.

Examining *Woods*'s effects on the *Redlark* context first, where the level of deference is simple corroboration, *Woods* clearly supports Blue Book deference that merely solidifies existing legislative history. Therefore, *Woods* embraces *Redlark*-level deference where the deference is restricted to the mere use of supporting legislative history.[72] Yet, *Woods*'s consistency with *Redlark* is of little significance as *Redlark* is simply not

66. *Id.* at 95–96.

67. *Id.* at 96.

68. The Blue Book is such an example of post-enactment legislative explanation. *Id.*

69. *Id.* at 99.

70. The many contexts in which courts have used the Blue Book is well-documented:

> (1) To resolve inconsistencies within the existing legislative history.
> (2) To provide additional detail where committee reports (especially Conference Reports) have, owing to time pressure or other factors, been left incomplete.
> (3) To prevent abuses that have come to light since the committee reports.
> (4) To announce planned amendments to the statute (frequently in connection with (3), above).
> (5) To respond to factual developments taking place after enactment.

Id. at 105.

71. *See id.* at 105 ("[T]he Blue Book—like other subsequent history—is cited for various purposes, and its persuasiveness depends upon which of these purposes is at issue.").

72. Several courts suggest this view is appropriate; the Blue Book is only of value if corroborated by actual legislative history. *See supra* note 26.

helpful in determining the Blue Book's interpretive value. *Redlark* adds nothing constructive to the issue of Blue Book deference because when actual legislative history is on point, the Blue Book's interpretive value is tangential at best[73] and unnecessary to resolve the case at hand.

In contrast to a mere corroborative use, where the Blue Book's interpretive value is low, the Blue Book's interpretive value is high when there is a conflict in a statute's legislative history. This is the *FPC* context—where the Blue Book deference level is that of a conflict-resolver.[74] Yet, while the instant case notes courts should not consult legislative history to interpret an unambiguous statute,[75] it left no indicia of how to interpret an ambiguous law over which the House and Senate Bills conflict.[76] The Court's lack of guidance on how the conflicting legislative histories of tax laws should be resolved directly undermines Blue Book use as a conflict-resolver. Yet, this attack on the Blue Book is harmful and strips courts of an important—and appropriate—statutory interpretation device. While the conflict-resolver deference level may go beyond a mere "editing function . . . , such use is consistent with the general purpose of the document, and presents relatively little potential for abuse."[77]

In addition, *Woods* will severely affect Blue Book deference in the *Norman* context where legislative history fails to provide guidance on how an ambiguous statute should be applied. In this circumstance, the Blue Book could be appropriately used as a replacement for legislative history.[78] Yet, in this type of case, *Woods* suggests courts should ignore the Blue Book unless it is, "like a law review article, . . . relevant to the extent it is persuasive."[79] At first blush, the Court's view appears correct; after all, the Blue Book is merely a compilation of existing documents. Thus, anything contained in the Blue Book, but not in actual legislative history, should raise serious red flags that the JCT has added to the text without any

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73. *See* Norman v. United States, No. C 05-02059 RMW, 2006 WL 2038264, at *4 (N.D. Cal. July 19, 2006) (alteration in original) (quoting Allen v. Comm'r, 118 T.C. 1, 17 (2002)) (stating that the *Allen* court "examined the Tax Reform Act of 1986's legislative history and the Blue Book for the sole purpose of ensuring that they did not contain 'unequivocal evidence of a clear legislative intent' that 'overr[o]de a plain meaning interpretation'").

74. *See* Livingston, *supra* note 31, at 105 (arguing that the Blue Book is highly persuasive in its role "[t]o resolve inconsistencies within the existing legislative history").

75. United States v. Woods, 134 S. Ct. 557, 567 n.5 (2013). There also remains the deceptive case where a document's ambiguity is only discovered by looking past the document. *See generally* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (discussing ambiguity inherent in the word "chicken").

76. *See Woods*, 134 S. Ct. at 568 (stating *FPC*'s reliance on the Blue Book has fallen out of favor).

77. Livingston, *supra* note 31, at 106.

78. *Cf.* Fed. Power Comm'n v. Memphis Light, Gas & Water Div., 411 U.S. 458, 461–62, 471–72 (1973) (relying on the Blue Book when there was substantial actual legislative history on point, but the history unfortunately conflicted).

79. *Woods*, 134 S. Ct. at 568.

indicia of actual legislative intent.[80] Indeed, this context "raise[s] most clearly the issue of the Blue Book's independent authority."[81]

Still, the risk that the Blue Book contains more than a mere compilation of legislative history must be balanced against a potential upside. The Blue Book may be the best indicia of legislative intent absent actual legislative history, given the complex nature of tax legislation and the Blue Book's unique quality of being created by a group of individuals deeply involved in the tax legislative process. Indeed, *Woods*'s sweeping and negative view of the Blue Book overlooks the special realities that tax laws and the Blue Book present[82] by unfairly equating the Blue Book's interpretive value with that of law review articles.

For an example of the considerable difference in interpretive value between the Blue Book and law review articles, consider the following hypothetical: The meaning of an ambiguous tax law is litigated on first impression, but there is no legislative history on point.[83] However, as the hypothetical petitioner points out, there is a Blue Book passage directly on point that clearly indicates the correct decision is X.[84] In addition, the Blue Book passage contains indicia the legislature intended X to be the result in such cases.[85] In contrast, the hypothetical respondent points to a law review article that sharply concludes Y is the appropriate result in such cases.

If one considers solely the Blue Book's persuasive value weighed against that of a law review article, it is clear—given the Blue Book's alignment with legislative history—that the Blue Book's interpretive value is much higher than that of a law review article. Thus, the *Woods* Court was wrong to conclude that the Blue Book lacks all interpretive value. Without a doubt, the JCT, which creates the Blue Book, is an expert working group "deeply involved in the drafting, amendment, and implementation of all tax legislation."[86] The JCT drafts each committee report at every stage of legislation.[87] The Blue Book receives the same type

80. *See* Livingston, *supra* note 31, at 100.

81. *Id.*

82. *See supra* notes 65–70 and accompanying text.

83. *See* Norman v. United States, C 05-02059 RMW, 2006 WL 2038264, at *4 (N.D. Cal. July 19, 2006) (dealing with a similar fact pattern).

84. I avoided labeling the hypothetical petitioner and respondent either "taxpayer" or "Commissioner" to avoid any preconceived bias as "[t]he Blue Book is on especially weak ground when it adopts anti-taxpayer positions not taken in the committee reports." Livingston, *supra* note 31, at 93.

85. Without some sort of other indicia that the legislature actually intended this interpretation, this hypothetical may represent the most dangerous form of Blue Book deference: when the Blue Book "respond[s] to factual developments taking place after enactment." *Id.* at 120.

86. Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 821 (1998).

87. *See* KARLIN, *supra* note 1, at 52.

of review as the committee reports that accompany the bills,[88] and committee reports are legislative history.[89] Clearly, the Blue Book's interpretive weight pales in comparison to that of legislative history.[90] But, contrary to *Woods*, the Blue Book should carry far more interpretive weight than a law review article.[91]

In conclusion, the instant case will give practitioners, judges, and scholars unreasonable pause when considering Blue Book deference. While the Blue Book's interpretive weight is not concrete, broad disapproval of deference overlooks the Blue Book's—contextually determined—interpretive value. Thus, *Woods* ignores that the Blue Book's interpretive value rises or falls depending on the availability of actual legislative history to resolve the issue, the relative clarity of the statutory provision at issue, and the purpose for which the Blue Book is used.[92]

88. *See* I.R.C. § 8022(3)(A) (2012) (articulating the JCT's duty to report the "results of its investigations"); *cf.* Livingston, *supra* note 31, at 102 (noting the "the differences between the Blue Book and the original committee reports may be more apparent than real"); *id.* at 104 ("[T]he Blue Book is an important document—in some ways more reliable, because of its finality, than the committee reports. Such use makes it difficult for the court to dismiss the Blue Book in more contentious cases.").

89. KARLIN, *supra* note 1, at 49.

90. *See supra* note 26 (listing several cases describing that the Blue Book is not legislative history and is thus due little interpretive weight).

91. *Contra* United States v. Woods, 134 S. Ct. 557, 568 (2013) (equating the interpretive value of the Blue Book with that of a law review article).

92. Livingston, *supra* note 31, at 122 ("The Blue Book's interpretative weight depends, in large measure, on the role it is performing.").