

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 00–157

UNITED DOMINION INDUSTRIES, INC., PETITIONER
v. UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[June 4, 2001]

JUSTICE STEVENS, dissenting.

This is a close and difficult case, in which neither the statute nor the regulations offer a definitive answer to the crucial textual question. Absent a clear textual anchor, I would credit the Secretary of the Treasury’s concerns about the potential for abuse created by the petitioner’s reading of the statutory scheme and affirm the decision of the Court of Appeals on that basis.¹

As the majority accurately reports, during the time relevant to this case, §172(b)(1)(I) of the Internal Revenue Code of 1954 allowed any “taxpayer” who “ha[d] a product liability loss” to carry back its excess product liability losses for 10 years. The resolution of this case turns on whether, when a group of affiliated corporations files a

¹ JUSTICE THOMAS accurately points to a tradition of cases construing “revenue-raising laws” against their drafter. See *ante*, at 1 (THOMAS, J., concurring). However, when the ambiguous provision in question is not one that imposes tax liability but rather one that crafts an exception from a general revenue duty for the benefit of some taxpayers, a countervailing tradition suggests that the ambiguity should be resolved in the government’s favor. See, e.g., *INDOPCO, Inc. v. Commissioner*, 503 U. S. 79, 84 (1992); *Interstate Transit Lines v. Commissioner*, 319 U. S. 590, 593 (1943); *Deputy v. Du Pont*, 308 U. S. 488, 493 (1940); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934); *Woolford Realty Co. v. Rose*, 286 U. S. 319, 326 (1932).

consolidated tax return, the entire group should be considered the “taxpayer” for the purposes of implementing this provision or whether each individual corporation should be seen as a “taxpayer.”

There is no obvious answer to this question. On the one hand, it is generally accepted that the rationale behind the consolidated return regulations is to allow affiliated corporations that are run as a single entity to elect to be treated for tax purposes as a single entity. See, *e.g.*, Brief for Petitioner 17–19 (collecting sources in which the Internal Revenue Service so stated). On the other hand, it is quite clear that each corporation in such a group remains in both a legal and a literal sense a “taxpayer,” a status that has important consequences. See *Woolford Realty Co. v. Rose*, 286 U. S. 319, 328 (1932) (“The fact is not to be ignored that each of two or more corporations joining . . . in a consolidated return is none the less a taxpayer”); 26 U. S. C. §7701(a)(14) (defining a “taxpayer” as “any person subject to any internal revenue tax,” where a related provision defines “person” to include corporations). As both the group and the individual corporations are considered “taxpayers” in different contexts, the statute presents a genuine ambiguity.

When a provision of the Internal Revenue Code presents a patent ambiguity, Congress, the courts, and the IRS share a preference for resolving the ambiguity via executive action. See, *e.g.*, *National Muffler Dealers Assn., Inc. v. United States*, 440 U. S. 472, 477 (1979). This is best achieved by the issuing of a Treasury Regulation resolving the ambiguity. *Ibid.* In this instance, however, the Secretary of the Treasury issued no such regulation. In the absence of such a regulation, the majority has scoured tangentially related regulations, looking for clues to what the Secretary might intend. For want of a more precise basis for resolving this case, that approach is sound.

It is at this point, however, that I part company with the

STEVENS, J., dissenting

majority's analysis. The fact that the regulations forward a particular method for calculating a consolidated "net operating loss" (NOL) for a group of affiliated companies, see Treas. Reg. §1.1502-21(f), tells us how the Secretary wants the NOL to be calculated whenever it is necessary to determine a consolidated NOL, but it does not tell us what provisions of the Code require the calculation of a consolidated NOL. That is a separate and prior question. Even if we were to draw some mild significance from the presence of such a regulation (and the absence, at the time these returns were filed, of a similar regulation for the calculation of corporation-specific NOL's), the power of that inference is counterbalanced by the fact that the regulations listing deductions that must be reported at the consolidated level makes no mention of product liability expenses. See Treas. Reg. §1.1502-12; see also *H. Enterprises Int'l, Inc. v. Commissioner*, 105 T. C. 71, 85 (1995) (construing Treas. Reg. §1.1502-80(a) to provide "[w]here the consolidated return regulations do not require that corporations filing such returns be treated differently from the way separate entities would be treated, those corporations shall be treated as separate entities when applying provisions of the Code"). In addition, the subsequent promulgation of a method for calculating a corporation-specific NOL (albeit for a different purpose), see §1.1502-79(a)(3) (defining "separate net operating loss"), demonstrates that there are no inherent problems implicit in undertaking such a calculation.

In short, I find no answer to this case in the text of the statute or in any Treasury Regulation.² However, the government does forward a valid policy concern that militates against petitioner's construction of the statute: the

²I am also in full agreement with the Court's rejection of the Government's double-deduction argument. See *ante*, at 11-12.

fear of tax abuse. See Brief for United States 40–42. Put simply, the Government fears that currently unprofitable but previously profitable corporations might receive a substantial windfall simply by acquiring a corporation with significant product liability expenses but no product liability losses. See *id.*, at 40. On a subjective level, I find these concerns troubling. Cf. *Woolford Realty Co.*, 286 U. S., at 330 (rejecting “the notion that Congress in permitting a consolidated return was willing to foster an opportunity for juggling so facile and so obvious”). More importantly, however, I credit the Secretary of the Treasury’s concerns about the potential scope of abuse. Perhaps the Court is correct in suggesting that these concerns can be alleviated through applications of other anti-abuse provisions of the Tax Code, see *ante*, at 15, but I am not persuaded of my own ability to make that judgment. When we deal “with a subject that is highly specialized and so complex as to be the despair of judges,” *Dobson v. Commissioner*, 320 U. S. 489, 498 (1943), an ounce of deference is appropriate.

I respectfully dissent.³

³Because I agree with the majority that the calculation contemplated by Treas. Reg. §1.1502–79(a)(3) better approximates the NOL that each company would have had reported if filing individually than the alternative forwarded by the Government, see *ante*, at 10, I agree with the Court of Appeals’ decision to adopt that measure and would affirm the decision below in its entirety.