No. 17-1151

In the Supreme Court of the United States

DUQUESNE LIGHT HOLDINGS, INC. & SUBSIDIARIES,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Tax Court and the court of appeals each determined that nearly $200 million in deductions that petitioner had claimed in consolidated tax returns were duplicative of another deduction petitioner had claimed in an earlier consolidated return arising from the same underlying economic loss. Those courts further held that no provision of the Code or the pertinent regulations clearly authorized duplicative deductions in these circumstances. Both courts accordingly upheld the Commissioner's determination to disallow the duplicative deductions. The question presented is as follows:

Whether the court of appeals correctly applied this Court's precedent in holding that neither the Internal Revenue Code nor pertinent regulations clearly authorized the duplicative deductions that petitioner claimed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 861 F.3d 396. The opinion of the Tax Court (Pet. App. 64a-122a) is unreported but is available at 2013 WL 4838626.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2017. A petition for rehearing was denied on November 17, 2017 (Pet. App. 123a-124a). The petition for a writ of certiorari was filed on February 14, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal tax law has long permitted affiliated corporations—domestic parent corporations and their

direct and indirect domestic subsidiaries—to file consolidated federal income-tax returns. 26 U.S.C. 1501; see 26 U.S.C. 1504(a) and (b) (defining "affiliated group" and "includible corporation," and requiring that at least 80% of each group member's stock be owned by parent or another group member); Revenue Act of 1928, ch. 852, § 141(a), 45 Stat. 831. Since 1928, the Treasury Department (Treasury) has been charged with "prescrib[ing] such regulations as [it] may deem necessary" to ensure that "the tax liability of any affiliated group" filing such a return is "determined * * * in such manner as clearly to reflect the income[ ] * * * and * * * to prevent avoidance of * * * tax liability." 26 U.S.C. 1502; see Revenue Act of 1928, ch. 852, § 141(b), 45 Stat. 831.

As Treasury soon recognized, consolidated income-tax reporting lends itself to efforts by affiliated companies to reduce their tax liability by claiming duplicative deductions for the same underlying economic losses. Since 1928, Treasury and the Internal Revenue Service (IRS) have addressed several specific scenarios in which affiliated companies might seek to claim such deductions.

a. In one fact pattern common among early cases, a parent corporation would use an unsuccessful subsidiary's operating losses to offset the parent's income on consolidated tax returns. When the subsidiary eventually ceased operations and dissolved, the parent would claim a duplicative investment loss resulting from the corresponding diminution in value of the subsidiary's stock. In 1929, pursuant to Congress's 1928 directive, Treasury addressed that possibility by adopting regulations providing that no gain or loss could be recognized on a liquidating distribution by a consolidated subsidiary. See Treas. Reg. 75, art. 37(a) (1929).

This Court confronted that basic fact pattern in *Charles Ilfeld Co.* v. *Hernandez*, 292 U.S. 62 (1934) (*Ilfeld*). In *Ilfeld*, a parent company that owned two subsidiaries filed consolidated returns for several years before 1929 that took account of the subsidiaries' losses. *Id.* at 63-64. In 1929, the subsidiaries were liquidated. *Id.* at 64. In its amended consolidated return for 1929, the parent company sought to deduct its own loss based on its investment in the subsidiaries. *Ibid.*

The Commissioner rejected the claimed deduction, and this Court upheld his determination. *Ilfeld*, 292 U.S. at 64, 66-69. The Court first determined that the deduction was prohibited by the 1929 Treasury regulations. *Id.* at 67-68. The Court further explained that the deduction was not permitted for the more fundamental reason that "[t]he allowance claimed would permit petitioner twice to use the subsidiaries' losses for the reduction of its taxable income." *Id.* at 68. "By means of the consolidated returns in earlier years," the parent company "was entitled to deduct" those losses. *Ibid.* But in the 1929 consolidated return, the Court stated, the parent sought to "claim[ ] for 1929 deductions for diminution of assets resulting from the same losses." *Ibid.* "If allowed," the Court explained, "this would be the practical equivalent of double deduction," and "[i]n the absence of a provision of the Act definitely requiring it, a purpose so opposed to precedent and equality of treatment of taxpayers will not be attributed to lawmakers." *Ibid.* The Court found "nothing in the Act that purports to authorize double deduction of losses or in the regulations to suggest that the commissioner construed any of its provisions to empower him to prescribe a regulation that would permit consolidated returns to be made on the basis now claimed by petitioner." *Ibid.*

Later that year, the Court again addressed essentially the same scenario in *McLaughlin* v. *Pacific Lumber Co.*, 293 U.S. 351 (1934). As in *Ilfeld*, a parent company had previously deducted operating losses of a consolidated subsidiary, and after liquidating the subsidiary the parent later claimed a deduction based on its own investment loss. See *id.* at 353-354. Unlike in *Ilfeld*, however, in *Pacific Lumber* the 1929 Treasury regulations were inapplicable because the tax year at issue (1923) predated them. The Commissioner denied the parent company's claimed investment-loss deduction on the ground that, "since [the subsidiary] was affiliated with [the parent] and allowance was made, in computing consolidated net income, for all deductible losses sustained by the subsidiary during the several years, a further deduction reflecting directly or indirectly the same losses was not allowable." *Id.* at 354-355.

This Court upheld the Commissioner's determination. *Pacific Lumber*, 293 U.S. at 355-357. The Court explained that

> a consolidated return must truly reflect taxable income of the unitary business, and consequently it may not be employed to enable the taxpayer to use more than once the same losses for reduction of income. Losses of [the subsidiary] that were subtracted from [the parent's] income are not directly or indirectly again deductible.

Id. at 355; see *id.* at 355-356 (citing, *inter alia*, *Ilfeld*, 292 U.S. at 68). The Court determined that the parent company—which "[p]resumably * * * had within its control the records showing" the relevant facts—had failed to carry its burden of showing that the latter deduction was not duplicative. *Id.* at 356. The Court accordingly held that the deduction was not permitted. See *id.* at 356-357.

Treasury has also adopted regulations to address a slightly different scenario in which affiliated companies might attempt to duplicate losses where, after the group has claimed deductions for a subsidiary's losses, the parent company sells its stock in the subsidiary (rather than dissolving it as in *Ilfeld* and *Pacific Lumber*) and claims a loss on that sale. In 1966, Treasury addressed that scenario by adopting what are known as the "investment-adjustment rules." See generally 26 C.F.R. 1.1502-32. Those rules establish a comprehensive system of annual stock-basis adjustments. They require a parent company to record annual increases or decreases in the basis of stock it owns in a consolidated subsidiary that generally correspond to the subsidiary's positive or negative operating results. See *ibid.* The rules thus prevent the subsidiary's losses (or profits) from being duplicated as losses (or gains) on a subsequent sale of the subsidiary's stock to a purchaser outside the consolidated group.

b. Another type of loss duplication within an affiliated group can occur when the value of the parent company's stock in a consolidated subsidiary declines not because of the subsidiary's operating losses, but instead because of an unrealized decline in the value of the subsidiary's own assets. The investment-adjustment rules do not address that scenario because they require the parent to adjust its basis in the subsidiary's stock based on the subsidiary's operating results, not on unrealized gains or losses in the value of its assets. Those rules thus do not prevent an affiliated group from claiming duplicative deductions by (1) claiming a deduction based on the parent's loss on a non-deconsolidating sale of a portion of its stock in the subsidiary—*i.e.*, a sale of less than 20% of the subsidiary's stock, which would not result in terminating the subsidiary's status as a member of the affiliated group, see 26 U.S.C. 1504(a)(2)—and then (2) claiming a further deduction based on the subsidiary's own subsequent loss on the sale of its assets while it remains a member of the consolidated group.

In regulations finalized in September 1991, Treasury addressed this form of intra-group loss duplication. 26 C.F.R. 1.1502-20 (1992) (Former Section 1.1502-20). As relevant here, Former Section 1.1502-20 disallowed a parent company from deducting any loss on the sale of a consolidated subsidiary's stock to a purchaser outside the group that was attributable to "duplicated loss"—a figure that was roughly equivalent to the built-in loss with respect to the subsidiary's assets at the time of the stock sale (*i.e.*, the amount by which the subsidiary's basis in its assets exceeded their value). See 26 C.F.R. 1.1502-20(a)(1), (c)(1)(iii) and (2)(vi) (1992). Former Section 1.1502-20, however, was not limited to the specific situation in which an affiliated group could duplicate losses through a parent's non-deconsolidating sale of a portion (*i.e.*, less than 20%) of the subsidiary's stock; it also applied and disallowed deductions based on a parent's loss on a deconsolidating sale (*i.e.*, more than 20%) of a subsidiary's stock. Because such a deconsolidating sale would render the subsidiary no longer a group member, see 26 U.S.C. 1504(a)(2), the former subsidiary's built-in loss with respect to its assets would be recognized (*i.e.*, upon its subsequent sale of those assets) outside the consolidated group. It thus would not enable the group to take duplicative deductions in consolidated returns.

In *Rite Aid Corp.* v. *United States*, 255 F.3d 1357 (2001), the Federal Circuit held Former Section 1.1502-20 partially invalid on that basis. *Id.* at 1359-1360. The court reasoned that Former Section 1.1502-20 encompassed a form of loss duplication that can occur "regardless of whether [the parent and the subsidiary] corporations file[d] separate or consolidated returns" prior to the sale. *Id.* at 1360. The court held that Former Section 1.1502-20 therefore exceeded Treasury's rulemaking authority because it did not address "a problem created from the filing of consolidated returns," and because Treasury lacked authority to disallow the deduction to which the group otherwise would be entitled. *Id.* at 1359. On October 3, 2001, the Federal Circuit denied the government's petition for rehearing en banc, and the government did not seek this Court's review.

c. Following *Rite Aid*, Treasury adopted new temporary regulations addressing losses from sales of a subsidiary's stock that are implicated here. Pet. App. 7a-8a, 35a. The new regulations "separated the rules for stock losses * * * primarily into two temporary regulations"—Sections 1.337(d)-2T and 1.1502-35T—to address two distinct issues. *Id.* at 35a; see *id.* at 35a-36a.[1]

Treasury adopted Section 1.337(d)-2T to address losses attributable to "built-in gain" with respect to the subsidiary's assets at the time it became a member of the affiliated group. 67 Fed. Reg. 11,034, 11,036-11,037 (Mar. 12, 2002). "A built-in gain occurs when an asset

[1] Although Sections 1.337(d)-2T and 1.1502-35T were initially adopted as temporary regulations, both were later adopted without substantive change as final regulations. See 71 Fed. Reg. 13,008, 13,008-13,009 (Mar. 14, 2006) (Section 1.1502-35); 70 Fed. Reg. 10,319, 10,320 (Mar. 3, 2005) (Section 1.337(d)-2). This case implicates only the temporary regulations, which were in effect from March 7, 2002, until the final regulations took effect.

increases in value before being sold." Pet. App. 28a-29a.[2] Section 1.337(d)-2T established a "[g]eneral rule" that "[n]o deduction is allowed for any loss recognized by a member of a consolidated group with respect to the disposition of stock of a subsidiary." 26 C.F.R. 1.337(d)-2T(a)(1) (2002). It also created an exception to that general rule, providing that a "[l]oss is not disallowed under paragraph (a)(1) of this section * * * to the extent the taxpayer establishes that the loss * * * is not attributable to the recognition of built-in gain on the disposition of an asset (including stock and securities)." 26 C.F.R. 1.337(d)-2T(c)(2) (2002). Section 1.337(d)-2T applied to losses occurring on or after March 7, 2002. See 26 C.F.R. 1.337(d)-2T(g) (2002).

The IRS recognized that Section 1.337(d)-2T "d[id] not disallow stock loss[es] that reflect[ ] * * * built-in asset losses of a subsidiary member." I.R.S. Notice 2002-18, 2002-1 C.B. 644. It explained, however, that "the IRS and Treasury believe[d] that a consolidated group should not be able to benefit more than once from one economic loss." *Ibid.* Treasury and the IRS accordingly expressed their "inten[t] to issue regulations"—with the same March 7, 2002, effective date—addressing that separate issue, which would "prevent a consolidated group from obtaining a tax benefit from both the utilization of a loss from the disposition of stock * * *

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[2] The built-in gain problem generally arises when a member of the consolidated group (P) purchases the stock of an existing, nonmember corporation (S) that owns appreciated assets, which S then sells. S's resulting taxable gain increases P's basis in the stock of S under the investment-adjustment rules, even though the value of that stock remains the same. If P then sells the stock of S, P will recognize a non-economic tax loss that offsets the gain recognized by S on the sale of its assets.

and the utilization of a loss or deduction with respect to another asset that reflects the same economic loss." *Ibid.*

Shortly thereafter, Treasury adopted Section 1.1502-35T, which directly addressed the issue of loss duplication. 67 Fed. Reg. 65,060 (Oct. 23, 2002) (proposed regulations); 68 Fed. Reg. 12,287, 12,292 (Mar. 14, 2003) (temporary regulations). The stated "purpose" of Section 1.1502-35T was "to prevent a group from obtaining more than one tax benefit from a single economic loss." 26 C.F.R. 1.1502-35T(a) (2003). The regulation achieved that effect by establishing a loss-suspension rule, which provided that

> [a]ny loss recognized by a member of a consolidated group with respect to the disposition of a share of subsidiary member stock shall be suspended to the extent of the duplicated loss with respect to such share of stock if, immediately after the disposition, the subsidiary is a member of the consolidated group of which it was a member immediately prior to the disposition (or any successor group).

26 C.F.R. 1.1502-35T(c)(1) (2003). Consistent with the IRS's stated intention in Notice 2002-18, Section 1.1502-35T—like Section 1.337(d)-2T—applied (with exceptions that are irrelevant here) to losses that occurred on or after March 7, 2002. See 26 C.F.R. 1.1502-35T(j) (2003).

2. a. Duquesne Light Holdings, Inc. (Duquesne) was the common corporate parent of an affiliated group of companies (collectively petitioner) engaged in the electricity-distribution business. Pet. App. 65a. Petitioner filed consolidated federal income-tax returns in all relevant years. *Ibid.*

In the late 1990s, Duquesne formed AquaSource, a wholly owned subsidiary, to expand into the water-utility business. Pet. App. 6a. From 1997 to 2001, Duquesne made capital contributions to AquaSource in excess of $453 million and received AquaSource stock. *Id.* at 66a-68a. AquaSource used the contributed funds to acquire more than 50 utility companies. *Id.* at 6a.

AquaSource began to decline in value, and by the end of 2001 Duquesne's outside advisors at Lehman Brothers valued it as being worth less than $200 million. See Gov't C.A. Br. 13; C.A. App. 545-557. Duquesne decided to explore possible divestiture of its interest in the AquaSource business. Pet. App. 6a. After the Federal Circuit held in *Rite Aid*, *supra*, that Former Section 1.1502-20 was partially invalid, petitioner "arranged a series of transactions in which [Duquesne] incurred a loss on AquaSource stock, * * * AquaSource incurred losses on the sale of its assets," and petitioner sought deductions based on both sets of losses. *Ibid.*

On December 31, 2001, Duquesne transferred 50,000 AquaSource shares (4.17% of its holdings) to Lehman, in exchange for $4 million worth of "strategic advisory services" that Lehman had provided and was to provide to Duquesne. Pet. App. 6a-7a; C.A. App. 522. In its consolidated return for 2001, petitioner claimed a consolidated net capital loss that included a $199 million capital loss to Duquesne on that purported sale (2001 Duquesne Loss). Pet. App. 7a. That calculation was based on petitioner's position that Duquesne could allocate almost half of its aggregate basis in its AquaSource shares to the 4.17% interest it had transferred to Lehman. *Ibid.* Petitioner carried back most of its 2001 consolidated net capital loss to the 2000 tax year and received a refund of $35 million. *Ibid.*

From March 2002 to July 2003, AquaSource sold all of its assets—consisting mostly of stock in its subsidiaries—to unrelated parties. Pet. App. 8a & n.4; C.A. App. 206,

309. In petitioner's consolidated tax returns for 2002 and 2003, it claimed consolidated net capital losses that included capital losses to AquaSource from those sales of $59.6 million (2002 AquaSource Loss) and $192.8 million (2003 AquaSource Loss), respectively. Pet. App. 9a, 70a. Petitioner carried back its 2002 and 2003 consolidated net capital losses to the 2000 tax year, and received a refund of approximately $40 million. *Id.* at 8a-9a.

b. In January 2010, the IRS issued a notice of deficiency with respect to petitioner's return for the 2000 tax year, asserting a deficiency of $37 million. Pet. App. 76a. The deficiency was based primarily on the IRS's disallowance of $199.1 million of the loss petitioner had sought to carry back to the 2000 year. *Ibid.*

The IRS identified two alternative grounds for that determination. First, the IRS disallowed the 2001 Duquesne Loss in its entirety for multiple reasons, including (*inter alia*) that the sale lacked economic substance and that petitioner had improperly calculated Duquesne's basis in the "sold" shares. Pet. App. 77a-78a. Second, the IRS determined that, even if the 2001 Duquesne Loss were allowed, a corresponding portion ($199.1 million) of the 2002 and 2003 AquaSource Losses still should be disallowed because "those losses duplicate the economic loss claimed in connection with the 2001 transfer of AquaSource stock." *Id.* at 79a. In an earlier examination report, the IRS had explained that this alternative position was premised on the *Ilfeld* doctrine, and that neither the Internal Revenue Code nor pertinent regulations authorized duplicative deductions in these circumstances. C.A. App. 316-324.

3. Petitioner contested the deficiencies in the Tax Court. Both petitioner and the IRS sought summary judgment on the question whether, under *Ilfeld*, the IRS could disallow the deductions claimed for the 2002 and 2003 AquaSource Losses to the extent of $199.1 million. Pet. App. 9a-10a. While those motions were pending, the Tax Court issued its opinion in *Thrifty Oil Co. & Subsidiaries* v. *Commissioner*, 139 T.C. 198 (2012), in which it upheld the IRS's disallowance of duplicative deductions in the consolidated-return context based on *Ilfeld*. Pet. App. 10a. The court directed the parties here to file supplemental briefs addressing *Thrifty Oil*. *Id.* at 10a, 81a-82a.

After receiving the supplemental submissions, the Tax Court granted summary judgment to the IRS on the *Ilfeld* issue. Pet. App. 82a-117a. Petitioner contended that the court should not follow its decision in *Thrifty Oil* because the court's decision in that case was based on precedent of the Ninth Circuit (to which an appeal in *Thrifty Oil* would have been taken), whereas here an appeal would lie in the Third Circuit. After discussing the precedent of each circuit at length, the court rejected petitioner's premise that the two circuits' precedents are inconsistent. *Id.* at 92a-102a.[3]

The Tax Court next held that the deductions petitioner claimed for the 2002 and 2003 AquaSource Losses were duplicative of the deduction claimed for the 2001

[3] Although the Tax Court is a court of nationwide jurisdiction in tax matters, it endeavors to follow the precedent of the court of appeals to which an appeal of the case before it would lie. See *Golsen* v. *Commissioner*, 54 T.C. 742, 757 (1970), aff'd, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971); see also 26 U.S.C. 7482(a)(1) and (b) (2012).

Duquesne Loss. Pet. App. 103a-106a. The court concluded that there was "no genuine dispute of fact" that those deductions "'represent the same economic losses' and therefore are duplicate or double deductions." *Id.* at 105a-106a (brackets and citations omitted).

Finally, applying the rule articulated by this Court in *Ilfeld*, the Tax Court determined that such duplicative deductions were not authorized here because no "specific provision exists 'demonstrating Congress' intent to allow'" them. Pet. App. 106a (citation omitted). The court rejected petitioner's contention that 26 U.S.C. 165 demonstrates such intent. Pet. App. 106a-107a. Section 165 provides that "[t]here shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise," 26 U.S.C. 165(a), and establishes rules for particular types of losses, 26 U.S.C. 165(b)-(m). The Tax Court explained that Section 165 is merely a "'general allowance' provision" that does not evince any specific intent to "'authoriz[e] the double deduction.'" Pet. App. 107a (citation omitted).

The Tax Court also rejected petitioner's contention that its claimed deductions could not be disallowed "in the absence of consolidated return regulations promulgated by the Treasury that authorize the disallowance of those deductions." Pet. App. 115a. The court acknowledged that neither Former Section 1.1502-20 (which the Federal Circuit had held partially invalid in *Rite Aid*) nor new Section 1.1502-35T prohibited the deductions. *Id.* at 115a-117a. The Tax Court explained, however, that those provisions also "d[id] not prohibit the Court from determining whether under [*Ilfeld*] duplicate deductions for the same economic loss are allowable," *i.e.*, whether any provision specifically *authorized* them. *Id.* at 116a.

Based on the parties' stipulation regarding the allocation of the duplicative losses, the court disallowed the deduction for the 2002 AquaSource Loss in its entirety ($59.6 million) and disallowed $139.5 million of the deduction for the 2003 AquaSource Loss—a total disallowance of $199.1 million, the amount of the 2001 Duquesne Loss. *Ibid.*[4]

4. The court of appeals affirmed. Pet. App. 1a-63a.

a. The court of appeals agreed with the Tax Court that no genuine factual dispute existed that the 2002 and 2003 AquaSource Losses duplicated the entire $199.1 million 2001 Duquesne Loss because they "were deducted for the same underlying economic loss." Pet. App. 19a; see *id.* at 11a-19a. The court explained that, under this Court's decisions in *Ilfeld* and later cases, "the Code should not be interpreted to allow the taxpayer 'the practical equivalent of'" a "'double deduction' . . . absent a clear declaration of intent by Congress." *Id.* at 2a (quoting *United States* v. *Skelly Oil Co.*, 394 U.S. 678, 684 (1969), in turn quoting *Ilfeld*, 292 U.S. at 68) (brackets omitted); see *id.* at 20a-24a. The court concluded that petitioner had not identified any such clear declaration in either the Code or pertinent regulations. *Id.* at 24a-39a.

The court of appeals rejected petitioner's contention that 26 U.S.C. 165 clearly authorizes duplicative deductions in these circumstances. Pet. App. 24a-27a. The

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[4] Petitioner also sought summary judgment on the ground that the statute of limitations barred the assessment of any deficiency attributable to the disallowance of the 2001 Duquesne Loss or the 2002 AquaSource Loss. C.A. App. 85-87, 239-283. The Tax Court rejected that argument, Pet. App. 117a-122a, as did the court of appeals, *id.* at 39a-42a, and petitioner does not seek review of that issue in this Court.

court observed that Section 165(a) "allows '*a* deduction' for '*any* loss,'" which "indicates that it allows a single deduction for a single loss." *Id.* at 25a (quoting 26 U.S.C. 165(a)). The court further explained that, in any event, Section 165(a)'s "brief text * * * certainly contains no express authorization of a double deduction," and that the court was "unaware of any evidence of congressional intent to that effect." *Ibid.* The court additionally observed that the statutes at issue in *Ilfeld* and *Pacific Lumber* were "indistinguishable from" and "materially identical to" current Section 165(a). *Id.* at 26a-27a; see *id.* at 25a-27a. The court of appeals stated that "*Ilfeld* and *Pacific Lumber*'s rejection of such a strikingly similar predecessor to § 165 as a rationale for a double deduction thus provide[d] further support for [the court's] conclusion that the current statute does not provide that rationale." *Id*. at 27a. Petitioner also cited Section 165(f), which limits the deductibility of capital losses, but the court explained that "[t]hese limitations are irrelevant to the prospect of a double deduction for the same economic loss." *Id.* at 25a.

The court of appeals also rejected petitioner's contention that 26 C.F.R. 1.1502-32 and 26 C.F.R. 1.337(d)-2T (2002)—either in combination with Section 165 or on their own—supplied the requisite clear authorization. Pet. App. 27a-39a. The court explained that Section 1.1502-32 "does not support [petitioner's] position" because its "basis adjustments address the prospect of a duplicated loss in a transaction where the subsidiary recognizes its loss before the parent engages in a stock sale," and "here, the parent's stock sale occur[red] first." *Id.* at 32a.

As for Section 1.337(d)-2T, the court of appeals acknowledged that paragraph (c)(2) creates an exception to the general rule of paragraph (a)(1), providing that a "[l]oss is not disallowed under paragraph (a)(1) . . . to the extent the taxpayer establishes that the loss . . . is not attributable to" the subsidiary's prior "recognition of built-in gain on the disposition of an asset." Pet. App. 32a (quoting 26 C.F.R. 1.337(d)-2T(c)(2) (2002)) (brackets in original). The court disagreed, however, with the "infer[ence]" petitioner drew from "this double negative ('not disallowed') on a negative ('not attributable')" that "any stock losses not reflecting a built-in gain, including duplicative losses, are deductible." *Id.* at 32a-33a. It further explained that petitioner's reading of Section 1.337(d)-2T was inconsistent with "the structure and purpose of the broader regulatory regime" that governs consolidated returns. *Id.* at 33a. Under that regime, the court observed, the netting of capital gains and losses occurs on a group-wide basis, not separately with respect to each member, and this "single entity" treatment "reflects the same single-entity approach as the *Ilfeld* doctrine." *Ibid.*; see *id.* at 33a-34a; 26 U.S.C. 1222; 26 C.F.R. 1.1502-22.

The court of appeals further explained that the history and context of Section 1.337(d)-2T undermined petitioner's position. Pet. App. 34a-38a. Treasury's original loss-disallowance regulation, Former Section 1.1502-20, had separately disallowed losses attributable to "built-in gain" with respect to the subsidiary's assets, and losses attributable to "duplicated loss." *Id.* at 34a-35a. The court noted that, after Former Section 1.1502-20 was held partially invalid in *Rite Aid*, Treasury had "separated the rules for stock losses" into Sections 1.337(d)-2T and 1.1502-35T, with the former addressing built-in gain and the latter addressing loss duplication. *Id.* at 35a. Although petitioner contended that its claimed deductions were not expressly precluded by Section 1.337(d)-2T, the court found that point irrelevant because that regulation "ha[d] nothing to do with loss duplication." *Id.* at 37a-38a. The court declined to "hold that the IRS implicitly authorized [petitioner's] double deductions" merely because those deductions "were not explicitly banned" in a regulation addressing a different issue. *Id.* at 39a.[5]

b. Judge Hardiman dissented. Pet. App. 43a-63a. In his view, *Ilfeld* permits a double deduction so long as the statute or regulation "fairly may be read to authorize" it. *Id.* at 46a. Judge Hardiman "agree[d] with the Majority's excellent analysis that § 165 does not authorize a double deduction." *Id.* at 51a. He would have held, however, that Section 1.337(d)-2T supplies the necessary authorization for a double deduction here. *Id.* at 52a-58a. Judge Hardiman "ha[d] no quarrel with the Majority's convincing argument that [petitioner's] reading of § 1.337(d)-2T runs contrary to the provision's context and broad purposes." *Id.* at 60a. In his view, however, that provision's text—despite its "tortured prose"—unambiguously established that the deductions petitioner claimed were allowed. *Id.* at 61a.

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[5] Petitioner did not argue below that Section 1.1502-35T clearly authorized double deductions in this case. While acknowledging that Section 1.1502-35T "failed to prevent a double deduction here because of how [petitioner] structured the relevant transactions," the court of appeals "agree[d] with the Tax Court that" petitioner could not "meet the clear authorization test of *Ilfeld*" simply by showing that petitioner "did not violate" that regulation as well. Pet. App. 36a-37a.

ARGUMENT

The court of appeals correctly applied this Court's precedent in holding that the duplicative deductions claimed by petitioner were not allowable because no pertinent statutory or regulatory provision clearly authorized them. Neither the court of appeals' ultimate conclusion, nor its analysis applying this Court's case law, conflicts with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 27-34) that the court of appeals misapplied the principles set forth in *Charles Ilfeld Co.* v. *Hernandez*, 292 U.S. 62 (1934) (*Ilfeld*), and subsequent decisions of this Court. That argument lacks merit and does not warrant review.

a. This Court made clear more than 80 years ago that the federal tax laws should not be construed to grant a taxpayer "the practical equivalent of double deduction" for the "same losses * * * [i]n the absence of a provision of the Act definitely requiring it." *Ilfeld*, 292 U.S. at 68. The Court explained that allowing double deductions for the same economic loss is "so opposed to precedent and equality of treatment of taxpayers" that such a purpose "will not be attributed to lawmakers" absent a clear indication that Congress intended that result. *Ibid.* The Court found "nothing in the Act that purports to authorize double deduction of losses or in the regulations to suggest that the commissioner construed any of its provisions to empower him to prescribe a regulation that would permit consolidated returns to be made on the basis now claimed by [the taxpayer]." *Ibid.*

In articulating that background interpretive principle, the Court in *Ilfeld* did not announce a novel legal rule. It cited two earlier decisions in which the Court had expressed disapproval of duplicative deductions. See 292 U.S. at 68 (citing *Burnet* v. *Aluminum Goods Mfg. Co.*, 287 U.S. 544, 551 (1933) (explaining that "equitable principles of accounting applied to the calculation of the net income of the business unit do not permit deduction of the loss twice"), and *United States* v. *Ludey*, 274 U.S. 295, 301 (1927) (explaining that "[a]ny other construction" of the statute besides the one the Court adopted "would permit a double deduction for the loss of the same capital assets")). The Court in *Ilfeld* merely distilled from those prior decisions the principle that an intent to permit duplicative deductions should not lightly be imputed to Congress.

The Court has repeatedly reaffirmed that principle in subsequent decisions. Eight months after its decision in *Ilfeld*, the Court upheld the Commissioner's decision disallowing a deduction claimed by an affiliated group in a consolidated return. *McLaughlin* v. *Pacific Lumber Co.*, 293 U.S. 351 (1934). The Court explained that, "since [the subsidiary] was affiliated with [the parent] and allowance was made, in computing consolidated net income, for all deductible losses sustained by the subsidiary during the several years, a further deduction reflecting directly or indirectly the same losses was not allowable." *Id.* at 354-355; see *id.* at 355-357.

Thirty-five years later, the Court reiterated and amplified *Ilfeld*'s interpretive principle. *United States* v. *Skelly Oil Co.*, 394 U.S. 678, 684 (1969). In *Skelly Oil*, the taxpayer sought a deduction under the "claim of right" doctrine for customer refunds representing overcharges it had included in income in previous years. See 26 U.S.C. 1341. In accordance with "percentage depletion" rules, however, the taxpayer had already effectively deducted 27.5% of each prior year's overcharges, and the Commissioner disallowed the deduction to that extent. See 394 U.S. at 679-680. After the Tenth Circuit ruled in favor of the taxpayer, this Court granted certiorari "to consider whether the Court of Appeals decision had allowed [the taxpayer] 'the practical equivalent of double deduction,' in conflict with past decisions of this Court and sound principles of tax law." *Id.* at 680 (quoting *Ilfeld*, 292 U.S. at 68). The Court then answered that question in the affirmative. *Id.* at 683-685. The Court reiterated that "the Code should not be interpreted to allow [a taxpayer] 'the practical equivalent of double deduction,' absent a clear declaration of intent by Congress." *Id.* at 684 (quoting *Ilfeld*, 292 U.S. at 684). Applying that principle, the Court held that neither Section 162 (which addresses deductions for business expenses) nor Section 165 (deductions for losses) of the Code entitled the taxpayer to "a total of $1.27½ in deductions for every $1" that it had "refunded to its customers." *Ibid.*

b. The courts below correctly applied that interpretive principle in this case. Agreeing with the Tax Court, the court of appeals found that the deductions petitioner claimed for the 2002 and 2003 AquaSource Losses represented "the same underlying economic loss" as the deduction it had claimed for the 2001 Duquesne Loss. Pet. App. 19a; see *id.* at 11a-19a. Petitioner does not challenge that determination in this Court. The court of appeals correctly explained that, under *Ilfeld*, *Skelly Oil*, and other precedents, the deductions petitioner claimed therefore were not allowable absent a "clear declaration allowing double deductions for the same loss on consolidated returns." *Id.* at 20a. The court also correctly held that petitioner had identified no statutory or regulatory provision clearly authorizing duplicative deductions here. *Id.* at 24a-39a.

i. Petitioner argued below that its duplicative deductions were authorized by 26 U.S.C. 165. See Pet. App. 24a; Pet. C.A. Br. 15. But as the court of appeals explained, that provision actually undermines petitioner's position and "certainly contains no express authorization of a double deduction." Pet. App. 25a; see *id.* at 24a-27a. Section 165(a) simply establishes a "general rule * * * that '[t]here shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.'" *Id.* at 25a (quoting 26 U.S.C. 165(a)) (brackets in original). That provision's reference to "'*a* deduction' for '*any* loss'" suggests "that it allows a single deduction for a single loss." *Ibid.* (citation omitted).

Indeed, Section 165(a) closely resembles provisions that the Court has previously concluded do not supply the requisite clear authorization of duplicative deductions. Pet. App. 26a. "At the time *Ilfeld* was decided," a provision of the Revenue Act of 1928, ch. 852, 45 Stat. 791—which the IRS specifically brought to this Court's attention—stated that, "'In computing net income there shall be allowed as deductions: . . . In the case of a corporation, losses sustained during the taxable year and not compensated by insurance or otherwise.'" *Ibid.* (quoting Revenue Act of 1928, ch. 852, § 23(f), 45 Stat. 800). This Court found "nothing in the Act that purports to authorize double deduction of losses." *Ilfeld*, 292 U.S. at 68. Similarly in *Pacific Lumber*, the IRS brought to the Court's attention a provision "materially identical to § 165(a)," Pet. App. 27a, yet the Court again held that a duplicative deduction was not authorized, *Pacific Lumber*, 293 U.S. at 355-357. And in *Skelly Oil*, the Court determined that Section 165 itself did not provide the necessary clear authorization. 394 U.S. at 683-684 (explaining that the Court need not resolve the "dispute between the parties" as to whether the refunds were governed by Section 165 or Section 162 because in either event a duplicative deduction would not be authorized). The current text of Section 165(a) is identical to the version that applied in *Skelly Oil*. See 26 U.S.C. 165(a) (1958).

The court of appeals also correctly rejected petitioner's contention that Section 165(f), which establishes special rules for capital losses (incorporating the limitations of 26 U.S.C. 1211 and 1212), clearly authorizes a double deduction. Pet. App. 25a (explaining that the limitations of Sections 1211 and 1212 "are irrelevant to the prospect of a double deduction for the same economic loss, and in any event they are not at issue here"). In this Court, petitioner does not appear to challenge the court of appeals' conclusion that neither Section 165(a) nor Section 165(f) clearly authorized the duplicative deductions based on the 2002 and 2003 AquaSource Losses. Cf. Pet. 11 (stating that "[petitioner] could deduct the [2001 Duquesne Loss] under 26 U.S.C. § 165"). And petitioner does not contend that any other statutory provision contains a "clear declaration of intent by Congress" to allow its duplicative deductions. *Skelly Oil*, 394 U.S. at 684.

ii. The court of appeals also correctly held that none of the regulatory provisions petitioner cited—on their own or in combination with Section 165—clearly authorized duplicative deductions in these circumstances. Pet. App. 27a-39a. The Treasury regulation that addressed loss duplication is 26 C.F.R. 1.1502-35T (2003). See Pet. App.

36a-37a. Petitioner has never contended that Section 1.1502-35T clearly indicates that petitioner's duplicative deductions are allowed. And while Section 1.1502-35T did not *prohibit* the deductions petitioner claimed, the mere fact that the deductions did not also "violate" that regulation "is not enough to meet the clear authorization test of *Ilfeld*." *Id.* at 37a.

In the court of appeals, petitioner suggested that 26 C.F.R. 1.1502-32—the investment-adjustment rules—authorized the deductions. See Pet. App. 31a-32a; Pet. C.A. Br. 15. That provision is inapposite by its own terms, however, "because its basis adjustments address the prospect of a duplicated loss in a transaction where the subsidiary recognizes its loss *before* the parent engages in a stock sale," but here "the parent's stock sale occur[red] first." Pet. App. 32a (emphasis added). In this Court, petitioner appears to have abandoned its argument that Section 1.1502-32 provides the required clear authorization.

Finally, the court of appeals correctly rejected petitioner's contention that 26 C.F.R. 1.337(d)-2T (2002) clearly authorized its duplicative deductions. Pet. App. 32a-39a. Paragraph (a)(1) of that provision stated a "[g]eneral rule" that "[n]o deduction is allowed for any loss recognized by a member of a consolidated group with respect to the disposition of stock of a subsidiary." 26 C.F.R. 1.337(d)-2T(a)(1) (2002). That general rule established an express regulatory prohibition on the deductions it encompassed, even if such deductions would otherwise be permissible. Paragraph (c)(2), on which petitioner's argument rested, created an exception to that general rule, stating that "[l]oss is not disallowed under paragraph (a)(1) of this section * * * to the extent the taxpayer establishes that the loss * * * is not attributable to the recognition of built-in gain on the disposition of an asset (including stock and securities)." 26 C.F.R. 1.337(d)-2T(c)(2) (2002).

The most natural reading of the phrase "is not disallowed under paragraph (a)(1)" in Section 1.337(d)-2T(c)(2) is that a loss that satisfies paragraph (c)(2)'s criteria is not disallowed by paragraph (a)(1) itself—not that such a loss is deductible without regard to other limitations in the Code and regulations. "The word 'under' is [a] chameleon" with "'many dictionary definitions and must draw its meaning from its context.'" *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010) (citation omitted). A reference to an action taken "under" a statute is most naturally read to refer to one taken "'pursuant to' or 'by reason of the authority of'" the statute. *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 630 (2018) (citing *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989) (R.B. Ginsburg, J.)); see *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39 (2008) (stating that "a thing that is 'under' a statute is most naturally read as being 'subject to' or 'governed by' the statute" (citation omitted)); *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 252 (3d Cir. 2003) (Alito, J.) ("[w]hen an action is said to be taken 'under' a provision of law * * * , what is generally meant is that the action is 'authorized' by the provision of law").

In the present context, the phrase "is not disallowed under paragraph (a)(1)" thus is most naturally understood to mean that a deduction for a loss that satisfies paragraph (c)(2) is not disallowed pursuant to or by reason of paragraph (a)(1), *i.e.*, that paragraph (a)(1) itself does not authorize disallowance of the deduction. But the fact that a deduction is "not explicitly banned" by a particular regulation does not mean that the deduction is "implicitly authorized" without regard to other Code or regulatory provisions. Pet. App. 39a. Section 1.1502-35T(c)(1)—which had the same effective date as Section 1.337(d)-2T—provided for the suspension of "duplicated loss," and it instructed that the suspension was to be "appl[ied] *after* the rules of § 1.337(d)-2T." 26 C.F.R. 1.1502-35T(c)(9) (2003) (emphasis added). A loss that was not disallowed by operation of Section 1.337(d)-2T(a)(1) could be suspended under that other provision. At a minimum, the language of Section 1.337(d)-2T did not unambiguously authorize petitioner's duplicative deductions.

The "structure and purpose of the broader regulatory scheme" further undermine petitioner's interpretation. Pet. App. 33a; see *id.* at 33a-37a. In construing statutes, "[a] provision that may seem ambiguous in isolation" may be "clarified by the remainder of the statutory scheme," including when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). That principle bolsters the court of appeals' interpretation of Section 1.337(d)-2T. The "consolidated return regime adopt[s] the 'single entity' approach to prevent distortion of tax liability," thus "treat[ing] the entire consolidated group as a single taxpayer and reduc[ing] the significance of each member's separate existence." Pet. App. 33a (citations and internal quotation marks omitted). "The *Ilfeld* doctrine also reflects a single-entity approach by preventing the group as a whole from claiming duplicative deductions that the separate existence of parent and subsidiary would otherwise allow." *Ibid.* Construing Section 1.337(d)-2T to authorize an affiliated group to claim duplicative deductions would contradict that single-entity approach.

The history of Section 1.337(d)-2T reinforces the court of appeals' understanding. In the regime in force before *Rite Aid Corp.* v. *United States*, 255 F.3d 1357 (Fed. Cir. 2001), a single regulation, 26 C.F.R. 1.1502-20 (1992), addressed both built-in gain and loss duplication. Pet. App. 34a-35a. After that regulation was held partially invalid in *Rite Aid*, Treasury replaced it with (as relevant here) Sections 1.337(d)-2T and 1.1502-35T, which addressed those issues separately. *Id.* at 35a. The subject matter of Section 1.1502-35T regarding loss duplication came much closer to the type of duplicative deductions petitioner claims, whereas Section 1.337(d)-2T(c)(2) "ha[d] nothing to do with loss duplication." *Id.* at 38a. An inference that petitioner's duplicative deductions were implicitly authorized by Section 1.337(d)-2T(c)(2) would therefore be especially attenuated.

c. Petitioner contends (Pet. 27-34) that the court of appeals misapplied the interpretive principle stated in *Ilfeld* and subsequent cases by requiring clear authorization before permitting a duplicative deduction. That argument lacks merit. The court below correctly recited and applied the principle that "the Code should not be interpreted to allow the taxpayer 'the practical equivalent of'" a "'double deduction' . . . absent a clear declaration of intent by Congress." Pet. App. 2a (quoting *Skelly Oil*, 394 U.S. at 684, in turn quoting *Ilfeld*, 292 U.S. at 68) (brackets omitted); see *id.* at 20a ("*Ilfeld* requires a clear declaration allowing double deductions for the same loss on consolidated returns."); *id.* at 24a (stating that petitioner's burden was to identify a "clear declaration in statutory text or a properly authorized regulation" that a duplicative deduction was permitted).

Petitioner argues that *Ilfeld* permits a duplicative deduction so long as a statute or regulation "fairly may be read to authorize it." Pet. 27 (quoting *Ilfeld*, 292 U.S. at 66). That is incorrect. The statement petitioner quotes from *Ilfeld* pertains to deductions in general, not to duplicative deductions. See 292 U.S. at 66. The Court made that statement in the course of explaining that the consolidated-return regulations did not authorize the claimed investment-loss deduction in the first place, *i.e.*, before the Court explained that the duplicative nature of the deduction provided an additional basis for disallowing it. See *ibid.* The decisions the Court cited as support for that statement, which did not involve double deductions, confirm that the statement referred to the general rule that the taxpayer has the burden of proving his entitlement to a deduction. See *ibid.* (citing *Brown* v. *Helvering*, 291 U.S. 193, 199 (1934), *Burnet* v. *Houston*, 283 U.S. 223, 227 (1931), and *Woolford Realty Co.* v. *Rose*, 286 U.S. 319, 326 (1932)).

Any doubt on this score is resolved by the Court's subsequent and even more emphatic statement in *Skelly Oil* that "the Code should not be interpreted to allow [a taxpayer] 'the practical equivalent of double deduction,' absent a clear declaration of intent by Congress." 394 U.S. at 684 (quoting *Ilfeld*, 292 U.S. at 68). Petitioner dismisses *Skelly Oil* (Pet. 28) on the ground that the Court there "did not use *Ilfeld* to override specific regulations that authorized th[e] deductions" at issue. That response misses the central point. The Court in *Skelly Oil* stated (and applied) an interpretive principle concerning the type of affirmative language that must appear in the pertinent statutory or regulatory provisions in order for a duplicative deduction to be "authorized" (*ibid.*) in the first place. See 394 U.S. at 684. It was because no pertinent provision clearly authorized the duplicative deduction claimed in that case that the Court upheld the Commissioner's decision to disallow it. See *ibid.*

Petitioner contends (Pet. 29-34) that the decision below allows the IRS to disregard its own regulations and prevents taxpayers from reasonably relying upon them. That argument lacks merit. The court of appeals did not construe *Ilfeld* or *Skelly Oil* as permitting courts or the Commissioner to disallow claimed deductions that are in fact clearly "authorized" by "specific regulations." Pet. 28. It concluded instead that the regulations petitioner cited did not authorize the claimed duplicative deductions. Borrowing from the dissent below, petitioner describes the court of appeals as having adopted a "triple-authorization" rule requiring authorization for each of two deductions and separate authorization permitting duplicative deductions. Pet. 3, 18, 26-27; see Pet. App. 44a. The court adopted no such interpretive approach, but simply required that a statute or regulation contain a "clear declaration allowing double deductions." Pet. App. 20a.

Petitioner further contends (Pet. 28-29) that, whatever principle *Ilfeld* and *Skelly Oil* articulated, any rule requiring clear authorization for a duplicative deduction did not survive *Gitlitz* v. *Commissioner*, 531 U.S. 206 (2001). That is incorrect. *Gitlitz* involved a double tax benefit arising from the interplay between the Code provisions that deal with discharges of indebtedness (26 U.S.C. 108) and S corporations (26 U.S.C. 1361 *et seq.*). Siding with the Commissioner, the Tenth Circuit had stated that it could adopt the taxpayers' theory permitting that benefit "only if [it] is unequivocally supported by the statutory text." *Gitlitz* v. *Commissioner*, 182 F.3d 1143, 1148 (1999), rev'd, 531 U.S. 206 (2001).

Although the Court reversed the Tenth Circuit, it did not take issue with that interpretive rule. Instead, the Court rejected the Tenth Circuit's implicit conclusion that the taxpayers' theory lacked unequivocal support in the statutory text. See *Gitlitz*, 531 U.S. at 219-220 (noting Tenth Circuit's "policy concern" regarding the "'double windfall'" resulting from the taxpayers' position, but concluding that the Court "need not address this policy concern" because the result sought by the taxpayers was required by the statute's "plain text"). The dissent in *Gitlitz* did not suggest that *Ilfeld* trumps unambiguous statutory or regulatory language, but simply disagreed with the Court's conclusion that the statutory text was unambiguous. See *id*. at 223 (Breyer, J., dissenting) ("The arguments from plain text on both sides here produce ambiguity, not certainty."). *Gitlitz* therefore does not support petitioner's contention that the court of appeals departed from this Court's precedent.

2. Petitioner contends (Pet. 17-26) that review is warranted to resolve a conflict among the courts of appeals regarding the nature and scope of the rule articulated in *Ilfeld* and later cases. Petitioner does not contend that any other court of appeals has held that duplicative deductions claimed by an affiliated group of companies in a consolidated return, of the type petitioner claimed here, are authorized by the Code or pertinent regulations. Instead, it asserts (Pet. 17-18) that lower courts have disagreed in their description of the rule *Ilfeld* articulated, with some characterizing it as an "interpretive principle" or "canon," and others "treat[ing]

Ilfeld as a substantive rule." Petitioner advocates the former characterization, stating that *Ilfeld* "reflects a case-specific application of [a] more general canon of interpretation." Pet. 27. That alleged circuit conflict provides no sound basis for this Court's intervention.

Even if different courts of appeals had announced conflicting views of the conceptual basis for the rule articulated in *Ilfeld*, this Court's review would not be warranted because the court below described *Ilfeld* in the terms petitioner favors. In the first sentence of its opinion, the court explained that "[t]his appeal concerns the continued vitality of the so-called *Ilfeld* doctrine for interpreting the Internal Revenue Code." Pet. App. 2a. It elsewhere referred to the "interpretive principle" that the *Ilfeld* Court applied. *Id.* at 37a ("So this case comes down to whether, under the interpretive principle of *Ilfeld*, § 1.337(d)-2T clearly authorizes the losses in 2002-03 for the Duquesne consolidated group that duplicates the loss it took for 2001."); *id.* at 38a (noting that *Ilfeld* "remains a valid interpretative principle for consolidated returns until the Supreme Court tells us otherwise"). The Third Circuit's agreement with petitioner's preferred characterization makes this case an unsuitable vehicle to resolve any inconsistency among the courts of appeals' understanding of *Ilfeld*.

In any event, petitioner's assertion (Pet. 17) of a "deep conflict" among the courts of appeals is mistaken. Petitioner cites several decisions that describe *Ilfeld* as articulating an "interpretive principle." Pet. 18-22 (citing *Transco Exploration Co.* v. *Commissioner*, 949 F.2d 837 (5th Cir. 1992), *O'Brien* v. *Commissioner*, 771 F.2d 476 (10th Cir. 1985), and *Textron, Inc.* v. *United States*, 561 F.2d 1023 (1st Cir. 1977)). But petitioner identifies no decision that describes the *Ilfeld* doctrine as a substantive rule of tax law or otherwise rejects the view that it functions as an interpretive principle.

Petitioner contends (Pet. 2) that the decision below, as well as decisions of the Eighth and Ninth Circuits, have in substance applied *Ilfeld* to "grant[] the IRS license to override even unambiguous statutory and regulatory provisions if application of their plain terms would result in a double tax benefit." See Pet. 22-25 (citing *Marwais Steel Co.* v. *Commissioner*, 354 F.2d 997 (9th Cir. 1965), and *Comar Oil Co.* v. *Helvering*, 107 F.2d 709 (8th Cir. 1939)). That is incorrect. As explained above, the court of appeals in this case did not conclude that *Ilfeld* permits the Commissioner to disallow double deductions that are unambiguously authorized by statute or regulation merely because in practical effect the deductions reflect the same economic loss. Instead, it applied the "clear declaration" (Pet. App. 20a) requirement of *Ilfeld* and *Skelly Oil* to determine *whether* the Code or regulations in fact authorized the deduction that petitioner claimed. See pp. 20-26, 28, 30, *supra*.

The other decisions petitioner cites also did not interpret *Ilfeld* as establishing any "freestanding, substantive tax rule." Pet. 22 (capitalization omitted). *Marwais Steel* involved the same basic fact pattern as *Ilfeld* and *Pacific Lumber*—in which a parent company funds the operating losses of its subsidiary, uses those losses to offset its income, and also claims a corresponding investment loss—with the notable difference that the parent (Marwais) and its subsidiary (Wilmington) did not file consolidated returns. See *Marwais Steel*, 354 F.2d at 997-998 & n.1. Instead of offsetting the parent's income on a current basis, the subsidiary's operating losses accumulated as net-operating-loss carryovers, to which the parent succeeded and which it used upon the subsidiary's dissolution. *Ibid.* The Commissioner disallowed the deduction, and the Tax Court upheld that determination. *Id.* at 998-999.

The Ninth Circuit affirmed, citing *Ilfeld* and *Pacific Lumber*. *Marwais Steel*, 354 F.2d at 998-999 & n.4. Although its reasoning is not wholly clear, the court appears to have viewed *Ilfeld* and *Pacific Lumber* as controlling on the facts presented, *i.e.*, where a parent company seeks to use a subsidiary's operating losses to offset its own income, and also claims a corresponding investment loss. See *id.* at 998 (describing "the sequence of facts" in *Ilfeld* as "reversed from what we have here"). The Ninth Circuit appears to have cited *Marwais* only once in the ensuing five decades. See *Stewart* v. *United States*, 739 F.2d 411, 415 (1984) (per curiam) (describing *Marwais* as holding that a "parent corporation could not deduct amount of loans to subsidiary as losses on liquidation of subsidiary since these amounts had already been deducted as bad debts").

In *Comar Oil*, the Eighth Circuit held that a taxpayer who had previously claimed a deduction in the wrong year could not claim the same deduction in the proper year if the IRS was time-barred from disallowing the previous deduction. See 107 F.2d at 711-712. Although the court cited *Ilfeld*, it primarily based that conclusion on *R.H. Stearns Co.* v. *United States*, 291 U.S. 54 (1934), and *Stone* v. *White*, 301 U.S. 532 (1937), which had addressed the application of equitable principles in the tax context. See *Comar Oil*, 107 F.2d at 711-712. In the nearly 80 years since *Comar Oil* was decided, the Eighth Circuit apparently has cited it only once, see *United States* v. *Stutsman Cnty. Implement*

Co., 274 F.2d 733, 736 (1960), and has not construed that decision as establishing any broader substantive rule. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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