Can Grammar Solve the Conservation Easement Proceeds Regulation?

by Anson H. Asbury

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In this article, Asbury explores recent interpretations of the conservation easement regulations and suggests that the Tax Court and some federal appellate courts have adopted a grammatically incorrect reading of the proceeds regulation that departs from a widely accepted canon of interpretation and notably alters results for parties.

In the interest of full disclosure, the author represents the petitioner in one of the cases discussed herein, *Cox Point*.

In *Hewitt*, the Eleventh Circuit recently held that "the Commissioner's interpretation of reg. section 1.170A-14(g)(6)(ii) [the proceeds regulation] is arbitrary and capricious and violates the . . . procedural requirements" of the Administrative Procedure Act.[1] The holding reversed the Tax Court's disallowance of the Hewitts' qualified conservation contribution because the deed of conservation easement did not conform with the perpetuity requirement of that regulation.[2] *Hewitt* may be the most notable of several appellate decisions that have considered the regulatory requirements for qualified conservation contributions.[3]

Qualified conservation contributions, commonly referred to as conservation easements, and the allowable deductions associated with them have been subject to IRS scrutiny for many years. As early as 2003 the IRS was focusing on conservation easement donations, then largely in the context of historic facade easements over privately held residences. The agency issued Notice 2004-41, 2004-1 C.B. 31, warning against those who "may be improperly claiming charitable contribution deductions." More recently, the IRS has focused on "syndicated conservation easements," which were identified as a listed transaction in Notice 2017-10, 2017-4 IRB 544. The recent enforcement efforts involving these transactions have included hundreds of examinations,[4] dozens of Tax Court cases,[5] actions for injunctive relief,[6] and even a criminal indictment.[7]

[1] *Hewitt v. Commissioner*, No. 20-13700 (11th Cir. 2021) (slip op. at 3), *rev'g and remanding* T.C. Memo. 2020-89.

[2] For a general overview of qualified conservation contributions under section 170(h), see Anson H. Asbury, "Understanding the Conservation Easement Donation Tax Deduction (or Strawberry Fields Forever)," *The Federal Lawyer* (Mar. 2016).

[3] *See Pine Mountain Preserve LLLP v. Commissioner*, 978 F.3d 1200 (11th Cir. 2020); *TOT Property Holdings LLC v. Commissioner*, 1 F.4th 1354 (11th Cir. 2021); *Champions Retreat Golf Founders LLC v. Commissioner*, 959 F.3d 1033 (11th Cir. 2020); *BC Ranch II LP v. Commissioner*, 867 F.3d 547 (5th Cir. 2017).

[4] Letter from Charles Rettig to then-Senate Finance Committee Chair Chuck Grassley, R-Iowa, providing easement transaction data to senators (Feb. 12, 2020).

[5] Kristen A. Parillo, "Deluge of Tax Court Easement Petitions Continues," *Tax Notes Federal*, Oct. 26, 2020, p. 687.

[6] *United States v. Zak*, No. 1:18-cv-05774-AT (N.D. Ga. 2018).

[7] *United States v. Lewis*, No. 1:21-cr-00231 (N.D. Ga. 2021).

The regulation invalidated in *Hewitt* is commonly referred to as the proceeds regulation, and deeds of conservation easement routinely contain a "proceeds clause" intended to conform to the regulation. The proceeds regulation was promulgated under section 170(h)(5)(a), which states that a "contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity."[8] This statutory language is often referred to as the perpetuity requirement. Failure to protect the property subject to the restrictive easement in perpetuity will result in denial of the tax deduction.

The Eleventh Circuit's holding in *Hewitt* again is notable because it rejected the precedential Tax Court opinion in *Oakbrook*, on which the trial court relied.[9] *Oakbrook* itself is pending appeal to the Sixth Circuit on the validity of the regulation.[10] Speculation has already begun about the scope of the *Hewitt* holding[11] and what effect it may have on the pending decision in the Sixth Circuit. Some, including the Tax Court, have speculated that a decision affirming the regulation from the Sixth Circuit may warrant consideration by the Supreme Court.[12] That question may belie the facts underlying the two cases because the deed language being examined in each case is substantively different, but we will not consider that question here.[13]

And Then There Were Three . . .

Just as the ninth studio album from English prog rockers Genesis, referenced above, was not about the departures of guitarist Steve Hackett and lead singer Peter Gabriel, this article is not about *Hewitt* or *Oakbrook*. This article is about a third interpretation of the proceeds regulation that is rooted in the language of the regulation itself. This is also not an academic question. The third interpretation is pending consideration following a motion for partial summary judgment in the matter of *Cox Point*.[14] The decision of the Tax Court in that case, whatever it may be, is appealable to the Fourth Circuit.[15] Accordingly, any decision in *Cox Point* may well present the federal appellate courts with another opportunity to consider the language of the proceeds regulation.

Cox Point argues that the prevailing construction of the proceeds regulation is an ungrammatical reading of the plain language of the regulation. As such, it defies the well-established canon of interpretation commonly known as the "rule of the last antecedent." This canon of construction has been adopted by the Tax Court, many federal appellate courts, and the Supreme Court. While canons of interpretation are often associated with statutes, they also have been applied to regulations, and the rule of the last antecedent has been used to construe Treasury regulations in the Tax Court. Further, the grammatical construction offered in *Cox Point* is supported by the expert testimony of Bryan A. Garner, distinguished research professor of law at Southern Methodist University Dedman School of Law and renowned author, instructor, and explainer of grammar.[16]

Grammar Time[17]

The idea of a careful grammatical reading of the regulation originates in the Fifth Circuit opinion, *PBBM-Rose Hill.* This opinion has been relied on to deny many proceeds clause arguments, including the trial decision in *Hewitt*.[18]

[8] Section 170(h)(5)(a).

[9] *Oakbrook Land Holdings LLC v. Commissioner*, 154 T.C. 180 (2020).

[10] *Oakbrook Land Holdings LLC v. Commissioner*, No. 20-2117 (6th Cir. appeal filed Nov. 16, 2020).

[11] Theresa Schliep, "Fallout From the 11th Circ. Easement Ruling Could Be Blunted," *Law360*, Jan. 6, 2022.

[12] *Wisawee Partners II LLC v. Commissioner*, No. 6105-18 (Jan. 7, 2022) (order denying summary judgment).

[13] The deeds in *Coal Property Holdings LLC v. Commissioner*, 153 T.C. 126 (2019); *PBBM-Rose Hill Ltd. v. Commissioner*, No. 26096-14 (2016) (bench opinion), *aff'd*, 900 F.3d 193 (5th Cir. 2018); and *Hewitt* are also factually inapposite to the deeds in *Cox Point Propco LLC v. Commissioner*, No. 16731-19 (T.C. petition filed Sept. 10, 2019), and discussed *infra*, and *Oakbrook* because those deeds carved out proceeds for future improvements and, in the instance of *Railroad Holdings LLC v. Commissioner*, T.C. Memo. 2020-22, also prior claims.

[14] *Cox Point*, No. 16731-19.

[15] Section 7482.

[16] Garner has been described as "a genius" by David Foster Wallace. *See* D.T. Max, "D.F.W.'s Favorite Grammarian," *The New Yorker*, Dec. 11, 2013. Of greater relevance, Garner's extensive curriculum vitae also includes coauthoring *Reading Law: The Interpretation of Legal Texts* (2012) with the late Supreme Court Justice Antonin Scalia. His expert report in the *Cox Point* litigation is now subject to a pending motion *in limine*.

[17] All apologies to M.C. Hammer, *Please Hammer, Don't Hurt 'Em* (1990) (lyrics to "U Can't Touch This"). Hat tip to Guinevere Moore.

[18] *PBBM-Rose Hill*, 900 F.3d at 205-207.

Central to the proceeds regulation debate is the relative clause that describes the proportionate value used to determine the amount of the donation:

> that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time[19] (hereinafter "relative clause").

In *PBBM-Rose Hill*, the Fifth Circuit determined that the relative clause in the proceeds regulation described the phrase "property right" and not "fair market value."[20] Based on that interpretation, the appellate court determined that the relative clause required the creation of a fraction "equal to the value of the conservation easement at the time of the gift, divided by the value of the property as a whole at that time."[21]

Before adopting that approach, the Fifth Circuit considered a different result if the relative clause applied to fair market value:

> If the aforementioned phrase is interpreted to modify "fair market value," then the "proportionate value" would equal the dollar amount of the value of the conservation easement at the time of the gift. In favor of this interpretation is the use of the term "value," which is "the monetary worth of something." *Value*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003); *see also Value*, Black's Law Dictionary (10th ed. 2014) ("The monetary worth or price of something; the amount of goods, services, or money that something commands in an exchange."). The regulations discussing the determination of the "fair market value" of the conservation easement also support the notion that the "proportionate value" is a sum of money. *See, e.g.*, 26 C.F.R. section 1.170A-14(h)(3)(i) ("If there is a substantial record of sales of easements comparable to the donated easement . . ., the fair market value of the donated easement is based on the sales prices of such comparable easements."). Under this construction, the phrase "bears to the value of the property as a whole at that time" would be useful only to explain why the value is named "proportionate." *Id.* Section 1.170A-14(g)(6)(ii).[22]

The Fifth Circuit's instinct was sharp, but unfortunately it chose the former approach to arrive at its holding. The circuit court's rejected approach was the correct grammatical reading of the regulation because it applied the rule of the last antecedent. Under this principle of grammar, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."[23] Here the phrase that immediately precedes the relative clause is "fair market value," not "property right." As a matter of grammatical and legal interpretation, the Fifth Circuit erred when it applied the limiting phrase to the earlier term, "property right."[24]

In a case involving a separate statute, the Supreme Court explained the rule of the last antecedent:

> The Third Circuit's reading disregards — indeed, is precisely contrary to — the grammatical "rule of the last antecedent," according to which a limiting clause or phrase (here, the relative clause "which exists in the national economy") should ordinarily be read as modifying only the noun or phrase that it immediately follows (here, "any other kind of substantial gainful work"). *See* 2A N. Singer, Sutherland on Statutory Construction section 47.33, p 369 (6th rev. ed. 2000) ("Referential and qualifying words and phrases, where no contrary intention

[19] Reg. section 1.170A-14(g)(6)(ii).

[20] *PBBM-Rose Hill*, 900 F.3d at 206. The Fifth Circuit's post-trial appellate opinion arose from a bench opinion of the Tax Court that was not subject to ordinary post-trial briefing. *PBBM-Rose Hill Ltd. v. Commissioner*, No. 26096-14 (T.C. Oct. 7, 2016) (order).

[21] *Id.* at 207.

[22] *Id.* at 206.

[23] *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016); *see also McClelland v. Commissioner*, 83 T.C. 958, 965-966 (1984) (applying the doctrine); Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* 144 (2012) (describing the well-established doctrine).

[24] The Fifth Circuit was confronted on appeal with rather nuanced legal arguments that arose from a bench opinion of this court. *PBBM-Rose Hill v. Commissioner*, No. 26096-14 (T.C. Oct. 7, 2016) (order).

> appears, refer solely to the last antecedent"). While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, we have said that construing a statute in accord with the rule is "quite sensible as a matter of grammar." *Nobelman v. American Savings Bank*, 508 U.S. 324, 330, 124 L. Ed. 2d 228, 113 S. Ct. 2106 (1993).[25]

In the pending *Cox Point* litigation, Garner was asked to opine on the grammatical construction of the proceeds regulation. He was specifically asked to consider the proper antecedent of the relative clause.[26] Garner's review included the grammatical consideration of the regulation by the Fifth Circuit in its *PBBM-Rose Hill* opinion.

Garner said, "As a grammatical matter, the question is not a close one."[27] He continued:

> The reading that makes the relative clause modify *property right* is grammatically flawed — especially given that this reading involves a syntactic leapfrog over 11 intervening words. The word *that* becomes grammatically faulty as a "remote relative" or what some grammarians call an "extraposed relative."[28] [Emphasis in original.]

Garner determined that the grammatical reading adopted by the Fifth Circuit incorrectly relies on the remote relative phrase "property right." The syntactic leapfrog he describes is evidence within the regulation itself that should call the proposed grammatical construction into question. Garner concluded that "the reading that construes the relative clause (the *that*-clause) modifying *fair market value* is grammatically proper" (emphasis in original).[29] This is the reading of the regulation urged in *Cox Point* but also suggested in the appellate briefing for *Oakbrook*, the case pending in the Sixth Circuit.[30]

Garner does not opine on the law. But he does point out that the rule behind the grammatically proper reading of the regulation is coincident with a legal canon of statutory interpretation. That the rule of grammar — the rule of the last antecedent — applied by Garner in his expert report is also a well-established canon of statutory interpretation is further support for his grammatical conclusion.

Follow You Down[31]

Treasury regulations should be read under the same canons of construction that apply to the interpretation of statutes. The Tax Court has held that the canons of statutory construction apply to the interpretation of Treasury regulations when the regulation is ambiguous.[32] However, the language of a Treasury regulation need not be ambiguous for the traditional canons of interpretation to apply. The Tax Court has also applied statutory canons of interpretation to Treasury regulations when the regulation is not ambiguous.[33]

In *Sklar*, the court noted that "we presume that the Treasury, the drafter of the regulation, said what it means and means what it said."[34] The Tax Court's approach in *Sklar* aligns directly with the grammatical precepts set forth by Garner. He

[25] *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *see also* Scalia and Garner, *supra* note 23, at 144-146 (2012) ("Last Antecedent Canon"); *see also, e.g., Hurlburt v. Black*, 925 F.3d 154, 161 (4th Cir. 2019) (overruling an existing Fourth Circuit precedent that failed to follow the rule of the last antecedent); *Power Fuels LLC v. Federal Mine Safety & Health Review Commission*, 777 F.3d 214, 219 (4th Cir. 2015) (applying the rule of the last antecedent to interpret 30 U.S.C. section 802(h)(1)(C)); *Auto-Owners Insurance Company v. Sarata*, 33 F. App'x 675, 678 (4th Cir. 2002) ("As the district court observed, qualifying clauses typically modify only the immediately preceding words and phrases. This basic rule of both grammar and interpretation is commonly known as the last antecedent rule.") (citing *Bakery & Confectionery Union & Industry International Pension Fund v. Ralph's Grocery Co.*, 118 F.3d 1018, 1026 (4th Cir. 1997); *Virginia v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996)).

[26] Garner's expert opinion was attached as Exhibit A to Petitioner's Response to Motion for Partial Summary Judgment in the *Cox Point* litigation. As Tax Court pleadings are not readily accessible to the public without cost, a copy of his expert report has been posted at Asbury Law Firm Tax Counsel, "Appearances & Articles."

[27] Declaration of Professor Bryan A. Garner in Support of Objection to Motion for Partial Summary Judgment by Resp. at 4, *Cox Point*, No. 16731-19.

[28] *Id*. at 5.

[29] *Id*.

[30] Brief for Petitioner-Appellant at 21, *Oakbrook Land Holdings LLC v. Commissioner*, Nos. 20-2117, 20-2141 (6th Cir. Jan. 25, 2021).

[31] Gin Blossoms, *Congratulations I'm Sorry* (1996).

[32] *Estate of Schwartz v. Commissioner*, 83 T.C. 943, 953 (1984).

[33] *See Sklar, Greenstein & Scheer PC v. Commissioner*, 113 T.C. 135, 143 (1999) (applying cardinal canon of interpretation).

[34] *Id*. (citing *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992)); *see also McCarthan v. Director of Goodwill Industries-Suncoast*, 851 F.3d 1076, 1127 (11th Cir. 2017) (quoting Scalia and Garner: Congress is "presumed to be grammatical in [its] compositions"; discussing restrictive clause in habeas statute), *cert. denied*, 138 S. Ct. 502 (2017).

suggests that legal drafters are "not presumed to be unlettered" and that such a "presumption is unshakable" when it comes to enactments.[35]

The Tax Court has sided with the Fifth Circuit's finding that the plain language of the proceeds regulation is ambiguous. Most recently, in the memorandum opinion that accompanied the reviewed opinion in *Oakbrook*,[36] the court wrestled with the plain meaning of the regulation and its apparent ambiguity.[37]

The Tax Court also has applied canons of construction rooted in grammar in the interpretation of regulations. In *Sierracin*,[38] the Tax Court reviewed the language of reg. section 1.451-3(a)(1):

> "unique items of a type which is not normally carried in the finished goods inventory of the taxpayer" and opined that as a matter of grammatical construction, the phrase "which is not normally carried in the finished goods inventory of the taxpayer" modifies the singular word "type," not the plural word "items."[39]

Although not specifically identified as such, the grammatical construction relied on in *Sierracin* is the rule of the last antecedent.[40]

The Fourth Circuit, the court to which the pending *Cox Point* matter is appealable, has also adopted the canon of the last antecedent to interpret the IRC. In *Grewe*, the Fourth Circuit noted that "general statutory interpretation rules require 'a limiting clause . . . to be applied only to the last antecedent.'"[41]:

> Accordingly, "under this title" modifies "any tax, interest or penalty," rather than "any administrative or court proceeding." Thus, the proper interpretation of section 7430(a) is that the IRC applies to any proceeding brought in connection with the collection of any tax, interest or penalty *imposed* by Title 26.[42] [Emphasis in original.]

The rule of the last antecedent has also been applied in many circuits, including the Sixth and Eleventh.[43] The Eleventh Circuit reviewed the language of 30 U.S.C. section 932, which provides that "in no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits."[44] The court considered two ways to interpret the text. If "at the time of his or her death" were interpreted to modify "determined," then the miner's eligibility would have to be determined before their death. On the other hand, if "at the time of his or her death" were interpreted to modify "eligible," then the miner needs to be found eligible only at the time of their death and need not have their eligibility formally determined before their death.[45] The Eleventh Circuit then applied the rule of the last antecedent

[35] Declaration of Professor Bryan A. Garner in Support of Objection to Motion for Partial Summary Judgment by Resp. at 8, *Cox Point*, No. 16731-19 (Jan. 4, 2021).

[36] *Oakbrook Land Holdings LLC v. Commissioner*, T.C. Memo. 2020-54.

[37] *Id.* at *9-*12.

[38] *Sierracin Corp. v. Commissioner*, 90 T.C. 341, 361 (1988), *acq. in result* 1990-1 C.B. 1.

[39] *Id.*

[40] *See also CRI-Leslie LLC v. Commissioner*, 882 F.3d 1026, 1029 n.1 (11th Cir. 2018), *aff'g* 147 T.C. 217 (2016) (rejecting the taxpayer's proffered interpretation of section 1234A in favor of the last antecedent rule); *McClelland v. Commissioner*, 83 T.C. 958, 965-966 (1984) (rejecting the taxpayer's proffered interpretation of section 613(c)(2) in favor of "literal language of the statute" supported by the last antecedent rule); *Estate of Gerson v. Commissioner*, 127 T.C. 139, 172-173 (2006) (Laro, J.; Colvin, J.; Vasquez, J.; Gale, J.; and Wherry, J., dissenting).

[41] *Grewe v. United States (In re Grewe)*, 4 F.3d 299, 302 (4th Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994) (citing *FTC v. Mandel Bros. Inc.*, 359 U.S. 385, 389 (1959)); *see also Huffman v. Commissioner*, 978 F.2d 1139, 1145 (9th Cir. 1992) ("As a general rule, a modifying clause applies only to its immediate antecedent.").

[42] *In re Grewe*, 4 F.3d at 302 (4th Cir. 1993) (emphasis in original).

[43] *See, e.g.*, *Carroll v. Sanders (In re Sanders)*, 551 F.3d 397, 399 (6th Cir. 2008) (applying the rule of the last antecedent to 11 U.S.C. section 1328(f)(1)); *United States v. Boulding*, 960 F.3d 774, 781-782 (6th Cir. 2020) (applying the last antecedent canon to the "plain text" of 21 U.S.C. section 404(a)); *Cracker Barrel Old Country Store Inc. v. Cincinnati Insurance Co.*, 499 F. App'x 559, 564 (6th Cir. 2012) (discussing the application of the last antecedent rule to a clause in an insurance contract); *Bingham Ltd. v. United States*, 724 F.2d 921, 927 n.3 (11th Cir. 1984) (applying the rule of the last antecedent to interpret 18 U.S.C. section 845(a)(4)); *Kehoe v. Fidelity Federal Bank Trust*, 421 F.3d 1215 (11th Cir. 2005) (addressing the lower court's incorrect application of the rule of the last antecedent).

[44] *Oak Grove Resources LLC v. Office of Workers Compensation Programs*, 920 F.3d 1283, 1289 (11th Cir. 2019).

[45] *Id.*

and determined that the phrase "at the time of his or her death" is more naturally read as modifying the word "eligible."[46] The court elaborated, "If Congress had intended otherwise, it would (or should) have drafted the statute differently, and more precisely, to refer to a 'miner who was determined at the time of his or her death to receive benefits.'"[47]

The same reading of the regulation that Garner finds ungrammatical and in conflict with the canon of the last antecedent was adopted by the Tax Court in *Oakbrook*,[48] *Railroad Holdings*,[49] and *TOT Property Holdings*.[50] The parties in each of these cases apparently followed the grammatical construction in *PBBM-Rose Hill* without further consideration of the structure of the proceeds regulation. Thus, the prevailing interpretation of the proceeds regulation is out of sync with the appropriate grammatical construction of the words of the regulation and a well-established canon of interpretation adopted by the Tax Court and many federal courts of appeal.[51]

What Does It Mean?[52]

Still, the proceeds regulation states that something must be "at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time."[53] Applying proper grammar and the canon of the last antecedent, that something is the fair market value determined according to the regulation at the time of the donation.

The correct interpretation of the proceeds regulation may simply be that it means what it says, to wit: In the event of judicial extinguishment, the donee is entitled to the proportionate value of its property right to the donor's property right, which is at least the fair market value of the donated property interest as determined at the time of conveyance.[54] As the Fifth Circuit explained when it rejected the proper grammatical approach, the value of the donation is a fixed amount.[55] The taxpayers in *Cox Point* and *Oakbrook* also argue that the amount is fixed.

The proceeds regulation further states that the "proportionate value of the donee's property rights" must remain constant and that if the conservation restriction is extinguished, the donee "must be entitled to a portion of the proceeds at least equal" to that proportionate value.[56] Thus, under the plain language of the proceeds regulation, the donee is entitled to a fixed amount — the proportionate value at the time of the donation, nothing more and nothing less. This view is also endorsed by the appellant's briefing in *Oakbrook*.[57]

Where Do We Go From Here?[58]

The Tax Court's majority opinion in *Oakbrook* is largely focused on refuting the petitioner's challenges to the procedural and substantive validity of the proceeds regulation. The concurrence in result filed by Judge Emin Toro,[59] however, provides an interesting interpretive view — that is, whether the amount of proceeds on extinguishment should be "a fixed dollar amount equal to the fair market value of the easement as of the grant date."[60] He argues that a fixed amount does not account for any market appreciation of the property between the date of donation and the date of extinguishment.[61] He

[46] *Id.*

[47] *Id.* at 1290.

[48] *Oakbrook*, T.C. Memo. 2020-54.

[49] *Railroad Holdings*, T.C. Memo. 2020-22.

[50] *TOT Property Holdings LLC v. Commissioner*, No. 5600-17 (T.C. Dec. 23, 2019) (bench opinion), *aff'd*, 1 F.4th 1354 (11th Cir. 2021).

[51] The parties to *Woodland Property Holdings LLC v. Commissioner*, T.C. Memo. 2020-55, adopted a similar construction but also redefined the regulation's syntax stating that "the regulation requires, in short, that the donee receive a *proportionate share* of the sale proceeds, as determined *by the fraction* set forth in the regulation" (emphasis added). *Id.* at *7.

[52] The Flaming Lips, *Embryonic* (2009).

[53] Reg. section 1.170A-14(g)(6)(ii).

[54] *See United States v. Banker*, 876 F.3d 530 (4th Cir. 2017) ("The district court and Government's interpretation is faithful to this text, giving meaning to each word and punctuation mark.") (citing *Branigan v. Bateman (In Re Bateman)*, 515 F.3d 272, 277 (4th Cir. 2008); Scalia and Garner, *supra* note 23, at 140-143 (2012)).

[55] *PBBM-Rose Hill*, 900 F.3d at 206 ("The 'proportionate value' would equal the dollar amount of the value of the conservation easement at the time of the gift.").

[56] *Id.*

[57] Brief for Petitioner-Appellant at 21-22, *Oakbrook Land Holdings*, Nos. 20-2117, 20-2141 (6th Cir. Jan. 25, 2021).

[58] The Alan Parsons Project, *The Turn of a Friendly Card* (1980) (lyrics to "Games People Play").

[59] Joined by Judge Patrick J. Urda in whole, by Judge Courtney D. Jones in part I, and by Judge David Gustafson in parts I, II.A, and II.B.

[60] *Oakbrook*, 154 T.C. at 205-206 (Toro, J., concurring).

[61] *Id.*

does so by turning to the statute and focusing on the interest conveyed to the donee there — that is, a property right. He then reasons that the conveyed interest in the donated property, like any other property right, might fluctuate in value over time. It is hard to argue with his instinct to lean toward the primacy of the statute in his analysis. But in so doing, he implicitly accepts the ungrammatical reading of the regulation.

Judge Toro's analysis of the statute, with an emphasis on the vesting of a property right in the donee, is eminently logical when paired with the incorrect grammatical reading of the regulation in which the relative clause modifies that extraposed relative — property right.[62] His view is less persuasive under the grammatically correct reading of the regulation. When the relative clause more properly relates to fair market value, the connection to the language in the statute is more tenuous.[63] That is, if the only way to give meaning to the statute is to disregard both the rules of grammar and the canons of legal interpretation when construing the regulation, then it seems the regulation may be a substantively arbitrary and capricious interpretation of the statute. This is an argument also offered by the appellants in *Oakbrook*.[64]

Further, the suggestion that the amount permitted for a tax deduction might change over time in the absence of a clawback provision is a bit unusual.[65] General tax and accounting principles prefer that a deduction match the period in which the deduction-producing event occurs (often considered with depreciation, but applicable here to a donation).[66] Generally, one might expect the distribution of cash proceeds upon extinguishment of a conservation easement to be a separate transaction from the donation, occurring many years after the donation.

If a donee organization received cash proceeds upon extinguishment, those dollars would not be subject to tax because of its nonprofit status. The proceeds distributed to the donor, however, are a different matter entirely. Proceeds from a property encumbered by a conservation easement would be treated the same as cash proceeds from the disposition of any other piece of real property; to the extent the value exceeds basis, adjusted for improvements, the amount realized should be subject to tax.[67] In the event of an involuntary conversion, the donor may be able to defer all or some of her proceeds by timely identifying and acquiring an appropriate like-kind exchange.[68] Still, that gain is captured in the carryover basis in the replacement property and, at some point, will be taxed upon sale. So whatever cash might be allocated to the donor will ultimately be taxed, while the cash allocated to the donee will escape the tax system duty-free.

In such a highly charged enforcement environment — the government routinely describes syndicated conservation easements as abusive — it is unusual that the government is advancing a policy stance that transfers excess funds to a nontaxable donee and permanently diverts funds from the fisc.[69] Yet this stance is exactly the government's litigating position in these cases.

The Fifth Circuit in *PBBM-Rose Hill* was concerned with avoiding a windfall to the donor for value received in excess of the donation upon extinguishment. That concern seems unfounded.

[62] It is well settled that a conservation easement is an easement in gross. *See, e.g.*, *Pine Mountain Preserve LLLP v. Commissioner*, 978 F.3d 1200, 1203 (11th Cir. 2020); *Kaufman v. Commissioner*, 784 F.3d 56, 59 (1st Cir. 2015); *Commissioner v. Simmons*, 646 F.3d 6, 8 (D.C. Cir. 2011). But some jurisdictions recognize an easement in gross as a personal right rather than a property right, which raises an interesting question about the statute's directive. *See, e.g.*, *Dyer v. Dyer*, 275 Ga. 339, 340, 566 S.E.2d 665, 667 (Ga. 2002) (An easement in gross, unlike an easement appurtenant, is "a mere personal right in the land of another." (Citation omitted.)).

[63] Fair market value appears a dozen times in section 170, but nowhere in subsection (h), the section describing the restrictions required for qualified conservation contributions.

[64] Brief for Petitioner-Appellant at 29, *Oakbrook Land Holdings*, Nos. 20-2117, 20-2141 (6th Cir. Jan. 25, 2021).

[65] *See generally* section 2010(c)(3), amended by the Tax Cuts and Jobs Act, section 11061(a) (IRS issued regulations eliminating potential clawback for gifts made between 2017 and 2025 during the period of the increased lifetime gift tax exclusion, even when the decedent dies after 2025 and the exclusion amount is less).

[66] *See Simon v. Commissioner*, 103 T.C. 247, 253 (1994) (citing *Hertz Corp. v. United States*, 364 U.S. 122, 126 (1960); *Massey Motors Inc. v. United States*, 364 U.S. 92, 104 (1960)).

[67] *See generally* section 1001.

[68] *See* section 1033.

[69] Interestingly, the only guidance published by the IRS on the allocation of proceeds upon extinguishment allows for the allocation of value for improvements to the donor. LTR 200836014. A position that does protect the fisc in perpetuity but has been repeatedly rejected in favor of the government's litigation positions. *See, e.g.*, *Brashear v. Commissioner*, T.C. Memo. 2020-122, at *11 n.5.

The prospect of a real windfall, particularly when it is the product of donor-financed improvements, seems remote. Apart from the obvious cost of the improvements that might increase the gross value of — and the donor's basis in — the eased property, the ultimate proceeds from that added value to the donor are still taxable upon extinguishment.

If proceeds in excess of the value of the original donation are distributed to the donor, it seems the windfall, if any, would accrue to the government. A straightforward reading might allow the government to achieve multiple policy imperatives: conserving property in exchange for a tax deduction in a known amount, protecting the value of the exchanged deduction by diverting condemnation proceeds to a conservation-minded organization in that amount, and preserving the ability to collect additional tax on any distribution in excess of that amount.

Instead, the IRS's litigating position yields a result that harms the fisc permanently, runs contrary to well-established doctrines of taxation, and potentially discourages donors from making donations (as suggested in the comments received when the regulation was being drafted).[70] Further, when the value of proceeds to be distributed to the donee is at least an amount that is fixed at the time of the donation, the donee should receive nothing less than it was entitled to at the date of the donation.

In total, an interpretation of the proceeds regulation that follows ordinary rules of grammar, is consistent with well-established rules of statutory construction, and results in a fixed value that protects the policy imperative and the fisc seems to be the most rational approach to a plainly confusing regulation. We suggest that Garner's interpretation of the proceeds regulation is grammatically sound and rooted in well-established canons of interpretive jurisprudence. But it is still just one of the many interpretive stabs at these dense and difficult regulations.

The British lads in Genesis paid homage to their homeland's most famous modern author with the title of their album, but the problem presented here may bear more resemblance to Agatha Christie's hallmark work.[71] Christie's characters ultimately were unsuccessful in solving the nursery rhyme and finding the murderer. It remains to be seen if this quandary can be solved:

> Four little Soldier Boys going out to sea;
> A red herring swallowed one and then
> there were Three.[72] ■

[70] *Hewitt*, No. 20-13700 (slip op. at 17), *rev'g and remanding* T.C. Memo. 2020-89.

[71] *And Then There Were None* is Christie's best-selling crime novel that follows 10 strangers as they arrive on a mysterious island and are murdered one by one according to the text of a vague and unsettling nursery rhyme hung in each of the stranger's rooms. Agatha Christie, *And Then There Were None* (1939).

[72] *Id.* at 247.