

## Clark Armitage Comments in Law360 on Top International Tax Cases of 2023

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The IRS scored a victory early this year when a divided U.S. Tax Court upheld contested transfer pricing regulations, followed by a defeat in Tennessee, where a federal judge struck down rules for the 2017 tax overhaul's repatriation provision.

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What's implied with that order is that 3M applies, according to Clark Armitage, a Member at Caplin & Drysdale.

As Armitage saw the case, the logical way to interpret the order is the judge saying, "Unless you can convince me otherwise, I'm just going to apply it."

The case is 3M Co. et al. v. Commissioner of Internal Revenue, case number 5816-13, in the U.S. Tax Court.

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The IRS argued that foreign tax credits for these earnings wouldn't be the mitigation of double tax, but the elimination of any tax, according to Armitage. Yet the court allowed this outcome to stand, he said.

"This arguably means that courts are willing to say that the statutory language speaks for itself even if it produces bad policy outcomes, provided the words are clear and unambiguous," Armitage said.

As part of the ruling, Judge Mays cited a bankruptcy case, *Tennessee v. Hildebrand*, where the court said the legislative history of a Tennessee state law could be examined "when the language is ambiguous or leads to an absurd result."

As Armitage saw it, the "absurd" result question in *Tennessee v. Hildebrand* could be applied to a hypothetical situation where two U.S.-parented groups of controlled foreign corporations each earn \$1,000, but pay different amounts of foreign tax in part due to how they're structured. Specifically, one group has 10 local principal entities that each earn \$100, and the other group has one principal that loses \$1,000 and 10 routine entities that each earn \$200.

If the foreign income tax rate is 25% for all entities, the first group pays tax of \$250 and the second group pays tax of \$500. According to Armitage, it wouldn't be an absurd result if the second group were able to credit the entire \$500 in foreign tax credits against the Section 965 tax.

"I think it's an appropriate result, or at least a reasonable policy choice, to allow the second group, which was simply unlucky relative to the first group, to credit all of the taxes paid even," he said.

Armitage added, "If you agree with that, then that gives a lot of credence that Congress would have acted intentionally to produce a statutory scheme that allowed for the later crediting of these taxes."

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