



The Court of Federal Claims Strikes Down Another TCJA Regulation as Contrary to the Statute

Posted October 20, 2026

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I recently blogged on *Siemens Medical Solutions USA v. Commissioner*, 167 T.C. No. 5 (July 15, 2026) (<https://www.taxlitigator.com/wp-content/uploads/2026/09/Tax-Court-Invalidates.pdf>), where the Tax Court invalidated a temporary regulation under IRC §245A as inconsistent with the statute, citing *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Not quite two weeks before the Tax Court's opinion, the Court of Federal Claims in *Keysight Technologies, Inc. v. United States*, __ Fed. Cl. __ (July 2, 2026), invalidated a different regulation under the Tax Cuts and Jobs Act ("TCJA"), Treas. Reg. §1.951A-2(c)(5).

A Little Bit About Sec. 951A and the Regulation

Historically, U.S. corporations did not pay federal income tax on the earnings of their foreign subsidiaries until those earnings were returned to the United States. Rather than simply replacing Section 951's deferral regime, the TCJA added Section 951A, which created a new category of taxable income, "global intangible low-taxed income," otherwise known as "GILTI."

Section 951A obligates United States shareholders of a "controlled foreign corporation" ("CFC") to include in gross income their share of GILTI. GILTI is defined as the excess of "(A) such shareholder's net CFC tested income for such taxable year, over (B) such shareholder's net deemed tangible income return for such taxable year" and defines "net CFC tested income," "tested income" and "tested loss." IRC §951A(b), (c). Sec. 951(d) deals with "qualified business asset investments" of a CFC and subparagraph (d)(4) authorizes the Secretary to issue regulations as appropriate to prevent the avoidance of the purposes of subsection (d) "including such regulations or other guidance which provide for the treatment of property transferred or held temporarily" or "if the avoidance of the purpose of this paragraph is a factor in the transfer or holding of such property."

Treasury promulgated Treas. Reg. §1.951A-2 to provide "rules for determining the tested income or tested loss of a controlled foreign corporation for purposes of determining a United States shareholder's net CFC tested income under §1.951A-1(c)(2)." Treas. Reg. §1.951A-2(a). The rules for determining gross tested income of a CFC and deductions properly allocable to gross tested income are contained in Treas. Reg. §1.951A-2(c).



TCJA created an inconsistency in the treatment of certain taxpayers depending on whether they filed their returns on a calendar-year or fiscal-year basis. Like the regulation at issue in *Siemens Medical Solutions USA*, Treas. Reg. §1.951A-2(c)(5) was promulgated to address the perceived gap in the statute.ⁱ The gap was due to the fact that the transition tax applied to unrepatriated income earned by a foreign subsidiary through December 31, 2017, while GILTI applied to tax years beginning on or after January 1, 2018. A fiscal year taxpayer would have a gap period of January 1, 2018, through the end of its fiscal year during which income earned through a foreign subsidiary was not subject to either the transition tax or GILTI. Under the regulation, deductions or losses attributable to non-taxable gap period transactions are not properly allocable to income taxed under GILTI and are, therefore, not available to reduce income subject to federal income tax.

Background of the Case

Keysight Technologies, Inc., is a multinational technology company headquartered in Santa Rosa, California. Three of its subsidiaries are organized in Singapore and a fourth is organized in Delaware. Keysight and its subsidiaries were all fiscal year taxpayers. Keysight filed refund claims for the 2020, 2021, and 2022 fiscal years, asserting that it's "entitled to an amortization deduction under section 197 of the Internal Revenue Code when computing its [GILTI] inclusion under section 951A." Keysight filed a complaint for a refund in the Court of Federal Claims after the IRS failed to grant its refund claim. The government moved for summary judgment and Keysight moved for partial summary judgment.

In support of its motion, Keysight argued that but for the regulation it would be entitled to amortization deductions under IRC §197 when computing its GILTI inclusion. It further argued that the regulation was invalid because it contradicts the statute and is not a "logical outgrowth of the proposed rule in violation of the Administrative Procedures Act [‘APA’]." Slip Op. at 2. The government argued that companies that filed their returns on a fiscal-year basis received unwarranted benefits due to the effective date of GILTI and that the regulation was designed to deny these benefits. According to the government, Treasury had broad authority under IRC §7805(a) to promulgate "needful rules and regulations" and Congress had specifically authorized Treasury to define the deductions properly allocable to a CFC's gross income. Resultingly, the regulation was valid and the government was entitled to summary judgment.

Terming the regulation "Treasury's self-inflicted fix of a mismatch between foreign subsidiaries with fiscal- or calendar-year tax filing requirements that Congress quietly built into the global intangible low-taxed income (‘GILTI’) statutory scheme," slip op. at 2, the court granted Keysight's motion and denied the government's motion.



The Court's Analysis

The court noted that when *Chevron* was overruled by *Loper Bright*, so was the “presumption that statutory ambiguity favors the agency. *Loper Bright* unambiguously reassigned interpretive authority to the courts but left largely unresolved the methodological question of how that authority is to be exercised. The Court now grapples with that question.” Slip op. at 1 (citation omitted).

In reviewing an agency's actions under the APA, the court is to hold unlawful a regulation if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... is in excess of statutory jurisdiction, authority, or limitations or was enacted without observance” of legally required procedures. Slip op. at 3-4 (internal quotation marks deleted). A regulation that is contrary to the statute is not in accordance with law, is in excess of statutory authority, and is invalid.

According to the court, *Loper Bright* explains that courts have the final say on the meaning of statutes. To determine that meaning, a court must use its “interpretive arsenal.” Under *Skidmore v. Swift Co.*, 323 U.S. 134 (1944), a court is to give weight to an agency's interpretation based on the factors “which give it the power to persuade, if lacking the power to control.” The court, however, remains the final arbiter of a statute's interpretation, particularly when the statute is ambiguous.

The court addressed the government's argument that §7805(a) by itself was sufficient authorization for Treasury to issue the regulation in question would allow it not only to prescribe “needful rules” but to define when rules are needful. If §7805(a) contained the authority claimed by the government, there would be no need for Congress to expressly grant substantive rulemaking authority elsewhere in the Code.

Rejecting the government's argument that §7805(a) in conjunction with §951A(c)(2)(A)(ii) gives Treasury broad discretion to fill gaps or make any necessary rules resulting from TCJA's sweeping changes, the court stated that “Section 951A(b)(2)(A)(ii) does not grant the Treasury specific authority, neither expressly nor impliedly. The statute is altogether ambiguous.” Slip op. at 8. And while other subsections of §951A granted Treasury rule making authority, these were limited to specific subsections and even more specific conditions.

Since §951A did not contain the requisite grant of rulemaking authority, the court had to “venture deeper into the realm of statutory construction and interpretive ambiguity left behind by *Loper Bright*.” The government posited that under *Loper Bright* “sometimes the best reading of a statute is that it delegates discretionary authority to an agency” and that



§951A(b) is best read as granting Treasury authority to issue regulations to determine how to properly allocate deductions to a CFC's tested income. This was based on the phrase "rules similar to the rules of section 954(b)(5)." But that section only authorized the promulgation of regulations for purposes of §954(a), which describes foreign base company income, not GILTI. The government's reliance on §954(b)(5) "appears to be an over-extension of the Treasury's statutory authority, of which the Court can find none other than the overly broad Section 7805(a)." Slip op. at 9.

The court also rejected the government's argument that without an express grant of authority a regulation may be valid if it is reasonably related to the purpose of the enabling legislation and this is the case §1.951A-2(c)(5) since it prevents taxpayer uncertainty, which would affect enforcement of the Code. "The Treasury's concern about taxpayer uncertainty, while laudable, is not supported by the developed record; to the contrary, the Treasury's concern is principally with lost revenue." Slip op. at 9. The financial effect of the outcome was irrelevant to the court.

Lacking express or implied statutory authority to issue the regulation, the court looked to the legislative history of §951A for evidence of Congress's intent. The government pointed to a conference report for the 1986 Tax Reform Act to support the premise that Congress was interested in curbing abusive transactions. The report did not reflect Congressional intent when the statute was enacted. If Keysight's action was within the bounds of the statute, "characterizing Keysight's statutorily authorized conduct as 'abusive' is simply incorrect." Slip op. at 9.

The only concern about non-economic transactions expressed in 2017 Congressional reports was with respect to Qualified Business Asset Investments ("QBAI"). The court noted that if Congress had the concerns posited by the government, "it would not have limited the Secretary's authority to promulgate regulations to QBAI." Slip op. at 10. Although there was no "firm statutory footing for the promulgation of the Regulation", *id.*, a court under Skidmore looks to the agency's interpretation for guidance "when that interpretation is thorough, reasonable, consistent and persuasive." *Id.*

The operative language of §951A(c)(2)(A)(ii) is "properly allocable to such gross income similar to rules of section 954(b)(5)." "Properly allocable" isn't defined. The regulation requires taxpayers to allocate deductions attributable to "disqualified basis" to a category of income termed "qualified CFC gross income" as defined in the regulations. Rejecting the government's argument that "properly allocable" is ambiguous and that the regulation falls within the umbrella of "properly allocable," the court stated that this argument was premised on the claim that the Secretary can read ambiguity into the Tax Code and then resolve that



ambiguity without constraint. Such a claim “is antithetical to the very core of *Loper Bright*. It confers unfettered discretion to administrative agencies.” Slip op. at 11. Section 951A(c)(2)(A)(ii) was not relied on by Treasury in promulgating the regulation.

Whether the language in the regulation is reasonably read under the umbrella of “properly allocable” is a separate question. The term “properly allocable” appears throughout the Code but is not defined. In *Savage v. Commissioner*, 165 TC no. 5” (2025), the Court determined “the ordinary meaning of the phrase ‘properly allocable’ refers to something that may be designated to go with something else and fits appropriately or correctly (permissibly one may say) with it.” Slip op. at 11. Section 951A was enacted on December 22, 2017. At that time, the rule of §954(b)(5) was the factual relationship test. “Properly allocable” does not necessarily mean “factually related” but rather the definition is contextual. “Keysight has demonstrated a clear thread of legislative intent that supports a definition of ‘properly allocable’ more akin to the factual relationship test. This undermines what little authority remained for the Secretary to promulgate the Regulation.” Slip op. at 12.

The court concluded that Treasury “lacked the authority to promulgate the Regulation. The Court agreed that Section 7508(a) grants the Secretary broad authority to prescribe regulations, but that grant alone is insufficient to sustain the Regulation at issue.” ... To allow the Secretary to define terms it deems ambiguous, untethered to congressional grants of authority or the underlying statutory context, is precisely the kind of agency overreach *Loper Bright* was designed to foreclose.” Slip op. at 12-13. The court therefore denied the government’s summary judgment motion and granted Keysight’s partial summary judgment motion.

My View

I never liked the decision in *Chevron*, which I viewed as an abrogation of the duty of the federal courts. After all, as Chief Justice Marshall wrote in *Marbury v. Madison*, 5 U.S. 137, 178 (1803), “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”

The Court of Federal Claims did not explicitly address the “methodological question” of how to exercise its authority. The court stated that §951A was “altogether ambiguous.” The court did not say how the statute was “altogether ambiguous.” The dictionary definition of “altogether” is “wholly, completely.” A wholly ambiguous statute would be one without any clear meaning or correct answer. If that is the case, wouldn’t it be correct to say that Congress implicitly gave Treasury authority to regulate?



Nonetheless, in my view, the court got it right in holding the regulation invalid under *Loper Bright*. Sec. 951A defines “tested income” for purposes of GILTI as gross income (without regard to certain types of income) minus deductions “properly allocable” to such income. Nothing in §951A or any other provision of the Code authorizes Treasury to limit the deductions from gross income for purposes of determining “tested income.”

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⁹Treas. Reg. §1.951A-2(c)(5) states:

(5) Allocation of deduction or loss attributable to disqualified basis

(i) In general. A deduction or loss attributable to disqualified basis is allocated and apportioned solely to residual CFC gross income, and any depreciation, amortization, or cost recovery allowances attributable to disqualified basis is not properly allocable to property produced or acquired for resale under section 263, 263A, or 471.

(ii) Determination of deduction or loss attributable to disqualified basis. Except as otherwise provided in this paragraph (c)(5)(ii), in the case of a depreciation or amortization deduction with respect to property with disqualified basis and adjusted basis other than disqualified basis, the deduction or loss is treated as attributable to the disqualified basis in the same proportion that the disqualified basis bears to the total adjusted basis in the property. In the case of a loss from a taxable sale or exchange of property with disqualified basis and adjusted basis other than disqualified basis, the loss is treated as attributable to disqualified basis to the extent thereof.

(iii) Definitions. The following definitions apply for purposes of this paragraph (c)(5).

(A) Disqualified basis. The term disqualified basis has the meaning set forth in §1.951A-3(h)(2)(ii).

(B) Residual CFC gross income. The term residual CFC gross income means gross income other than gross tested income, gross income taken into account in



determining subpart F income, or gross income that is effectively connected, or treated as effectively connected, with the conduct of a trade or business in the United States (as described in §1.882-4(a)(1)).

(iv) Reductions to disqualified basis pursuant to coordination rules. See §1.245A-7(b) or §1.245A-8(b), as applicable, for reductions to disqualified basis resulting from the application of §1.245A-5.