

No. 22-9

IN THE
Supreme Court of the United States

WHIRLPOOL FINANCIAL CORPORATION ET AL.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit**

**BRIEF OF PRICEWATERHOUSECOOPERS
LLP, DELOITTE TAX LLP, AND KPMG LLP AS
AMICI CURIAE IN SUPPORT OF
PETITIONERS**

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PricewaterhouseCoopers LLP, Deloitte Tax LLP, and KPMG LLP (collectively, “Amici”) respectfully submit this brief as *amici curiae* in support of petitioners Whirlpool Financial Corporation & Consolidated Subsidiaries and Whirlpool International Holdings S.à.r.l (f/k/a Maytag Corporation) & Consolidated Subsidiaries.¹

STATEMENT OF INTEREST

Amici are professional services firms that provide tax services in the United States. The networks of professional firms to which Amici belong provide such services in over 150 countries around the world.² Amici and their respective networks represent three of the world’s “Big Four” accounting, tax, and advisory professional service organizations.³

¹ Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel for Amici provided timely notice of Amici’s intent to file this brief, and all parties have consented to its filing.

² Amici submit this brief on their own behalf, and not on behalf of the networks to which they belong.

³ Ernst & Young LLP is the financial statement auditor of Whirlpool Corporation and accordingly is not a participant as an *amicus curiae*.

PricewaterhouseCoopers LLP, a Delaware limited liability partnership, is the United States member firm of the global network of member firms of PricewaterhouseCoopers International Limited, a UK private company limited by guarantee. Each member firm is a separate and independent legal entity. The member firms in the PwC global network provide audit, assurance, advisory, and tax services to many of the world's largest corporations. Member firms in the PricewaterhouseCoopers global network include more than 295,000 people across offices in 156 countries, and provided services to 84 percent of the companies comprising the Fortune Global 500 during its 2021 fiscal year.

Deloitte Tax LLP, a Delaware limited liability partnership owned by Deloitte LLP and its individual partners and principals who actively participate in its business, provides tax services to a variety of clients located in the United States and throughout the world. Deloitte LLP is the United States member firm of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee. Deloitte Touche Tohmatsu Limited's global network of member firms consists of separate and independent legal entities with approximately 345,000 people in more than 150 countries and territories, and is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax, and related services, serving nearly 90 percent of Fortune Global 500 companies.

KPMG LLP, a Delaware limited liability partnership, is the United States firm of the global organization of independent professional services firms affiliated with KPMG International Limited, a

private English company limited by guarantee. Each firm is a legally distinct and separate entity and describes itself as such. KPMG LLP provides audit, advisory, and tax services to many of the world's largest corporations. The network of firms affiliated with KPMG International Limited include more than 236,000 professionals in 145 countries and territories.

Amici assist hundreds of multinational enterprises with issues related to the U.S. taxation of income earned by their foreign branches and subsidiaries. Amici have substantial expertise and interest in both the importance of Treasury Regulations to efficient tax administration and the legal framework governing U.S. taxation of multinational enterprises. Amici are thus in a unique position to discuss the significance of the Sixth Circuit's decision, the uncertainty it has created, and the adverse collateral consequences that may result if the Sixth Circuit's reasoning is allowed to stand.

Amici do not have a practice of joining together to provide this Court with their views at the certiorari stage. Amici are doing so here not only because of their particular perspectives on the issues involved, but also because they strongly believe this case is exceptionally important and warrants this Court's review.

SUMMARY OF ARGUMENT

Congress has enacted numerous provisions of the Internal Revenue Code (the “Code”) that are not self-executing—i.e., that depend on “regulations prescribed by the Secretary.” These provisions affect broad swaths of American economic and everyday life, such as the circumstances in which taxpayers can claim tax deductions for charitable contributions that they have made and when taxpayers can obtain extensions of time within which to pay tax deficiencies. The question whether Code provisions that are expressly conditioned on regulations can be interpreted without regard to those regulations thus has implications far beyond the definition of foreign base company sales income that is at issue in this case.

Amici respectfully submit that it is important to the proper functioning of the tax system that taxpayers be able to rely on the fact that Treasury Regulations will be taken into account in the administrative and judicial interpretation of Internal Revenue Code provisions—especially those provisions whose effect is expressly conditioned on the issuance of regulations. The body of Treasury Regulations as a whole assist taxpayers in complying with their obligations under the Code, and taxpayers have enormous reliance interests that rest on these regulations being used to interpret and apply the statutory provisions pursuant to which they are promulgated. This Court should grant certiorari to address the substantial uncertainty that the Sixth Circuit’s decision has created.

ARGUMENT

I. Congress Has Conditioned Numerous Internal Revenue Code Provisions on the Issuance of Treasury Regulations.

Congress has repeatedly made the policy decision to enact provisions of the Internal Revenue Code whose effect is expressly conditioned on the issuance of Treasury Regulations. In this case, which involves the intricate system that Congress has created to tax the foreign income of U.S. taxpayers, Congress delegated to Treasury the authority to determine whether foreign income earned by certain foreign corporations would be taxed immediately or whether tax on that foreign income would be deferred until a later date. More broadly, Congress's delegations of regulatory authority to Treasury in the Internal Revenue Code extend far beyond the specific provision at issue in this case. Congress has used the identical phrase "under regulations promulgated by the Secretary" to place an express condition on the effect of numerous provisions throughout the Code.

Congress has used this statutory language both in situations in which Treasury could use the delegated authority to increase the amount of tax due and in situations in which it could decrease the amount of tax due. For example, in this case, Congress delegated to Treasury the authority to extend the definition of foreign base company sales income to certain income earned by foreign branches. *See* 26 U.S.C. § 954(d)(2). This would generally have the effect of increasing the current tax due from multinational corporations.

By contrast, unless Treasury has prescribed regulations, no taxpayer can claim a deduction for a charitable contribution. 26 U.S.C. § 170(a)(1) provides that “[a] charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.” Measured against the statutory baseline that, in the absence of regulations, no charitable contribution deduction is allowable, the delegation of authority here can serve only to permit deductions that would otherwise be disallowed.

26 U.S.C. § 338(h)(10) provides that “[u]nder regulations prescribed by the Secretary,” a taxpayer may elect to treat certain stock purchases as asset acquisitions. This election is widely used by taxpayers to facilitate sales of companies and is a basic tool for planning corporate acquisitions.

There are numerous other instances of Congress’s use of this language in the Internal Revenue Code. *See, e.g.*, 26 U.S.C. § 66(c) (“Under regulations prescribed by the Secretary,” relief to an estranged spouse from inclusion of certain community income in gross income where inclusion would be inequitable); 26 U.S.C. § 962(a) (“Under regulations prescribed by the Secretary,” election for a U.S. shareholder of a controlled foreign corporation to be subject to tax at corporate rates); 26 U.S.C. § 6161(b)(1) (“Under regulations prescribed by the Secretary,” extension of time for paying certain tax deficiency amounts).

These provisions reflect a policy choice by Congress to delegate certain details to be filled in through the exercise of Treasury’s expertise. Adherence to the Constitutional separation of powers

should lead courts to respect, rather than usurp, Congress's express, unambiguous delegation of authority.⁴ Here, however, as the petition explains, the Sixth Circuit majority simply "ignored" the regulations that Treasury had promulgated. Pet. at 25. Given the numerous instances in which Congress has enacted Internal Revenue Code provisions with the identical "under regulations prescribed by the Secretary" language, the Sixth Circuit's decision could have effects far beyond the statutory provision at issue in this case.

II. Taxpayers Should Be Able to Rely on Treasury Regulations.

Taxpayers rely on Treasury Regulations in structuring their business and personal decisions. They make decisions based on the well-founded belief that, where Congress has expressly delegated authority to Treasury to promulgate regulations, courts will apply those regulations when adjudicating disputes about the meaning of the statutory language.

It is well established, both within the tax system and in other contexts, that regulations can create reasonable reliance interests in the regulated public. *Service v. Dulles*, 354 U.S. 363, 388 (1957) ("While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so . . ., and having done so he could not, so long as the Regulations remained

⁴ To be sure, where Treasury promulgates regulations that exceed the scope of the authority granted by Congress or are otherwise contrary to law, courts can and should set aside those regulations.

unchanged, proceed without regard to them.”); *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674 (1973) (“Of course, there can be no question that PICCO had a right to look to the Corps of Engineers’ regulations for guidance.”)

The reliance interests are particularly strong in this case. As the petition explains, the regulation at issue has been in place for more than half a century. Pet. at 3. Amici provide tax services to numerous multinational corporations that have structured their businesses in reliance on the detailed international tax regime created by the foreign base company sales income regulation at issue here. It is a workaday occurrence for many of Amici’s professionals to provide tax services with respect to the many other regulations promulgated pursuant to express congressional delegations of authority to Treasury.

The Sixth Circuit’s disregard of the regulations in its attempt to interpret the requirements of the statute creates substantial uncertainty with respect to the efforts to comply with the Internal Revenue Code by taxpayers and the Amici who advise them. Review by this Court is necessary to reassure taxpayers that when Congress expressly conditions tax provisions on the issuance of Treasury Regulations, courts will take those regulations into account in interpreting the requirements of the Internal Revenue Code.

CONCLUSION

For the foregoing reasons, Amici respectfully encourage the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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