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Ownership Not Required: The Expansion of Section 167(h) in *CGG Americas, Inc. v. Commissioner*

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I. INTRODUCTION

Offshore oil and gas exploration and production (E&P) is an old business; the first offshore well began operating off the coast of California in 1896.[1] Since this time, however, technological advances have shaped offshore E&P into an entirely different beast. Gone are the days of wooden decks in shallow waters. Today's deepwater rigs are capable of extracting oil and gas from thousands of feet below the surface[2] and can cost between $600 and $650 million to construct.[3] Modern seismic technology allows E&P companies to discover swaths of previously untouched reserves in waters surrounding the continental United States. No area has been impacted by this more than the Gulf of Mexico, which boasts thousands of offshore wells—collectively providing around seventeen percent of the total crude oil and five percent of the total natural gas produced in the United States.[4]

Seismic data in the Gulf of Mexico lies at the heart of the July 2016 Tax Court opinion *CGG Americas, Inc. v. Commissioner*, in which the court analyzed the appropriate tax treatment of seismic data acquisition and processing activities undertaken by Compagnie Générale de Géophysique Americas (CGGA).[5] CGGA conducted marine seismic surveys for the purpose of "detect[ing] or suggest[ing]" the presence of oil and gas, thereafter nonexclusively licensing the data gathered through these surveys to customers "engaged in oil and gas exploration and development."[6] In its opinion,

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1. *Offshore Petroleum History*, AM. OIL & GAS HIST. SOC'Y, http://aoghs.org/offshore-history/offshore-oil-history/ [https://perma.cc/5EDK-Z6BD] (last visited Feb. 21, 2017) ("In 1896, as enterprising businessmen pursued California's prolific Summerland oilfield all the way to the beach, the lure of offshore production enticed Henry L. Williams and his associates to build a pier 300 feet out into the Pacific . . . .").

2. Elisabeth Fischer, *Deepwater: The Gulf of Mexico's Deepest Offshore Oil and Gas Rigs*, OFFSHORE TECH. (July 4, 2012), http://www.offshore-technology.com/features/featuregulf-mexico-deepest-offshore-oil-gas-rigs/ [https://perma.cc/L5U9-XT9T]. The Perdido rig in the Gulf of Mexico is the deepest floating rig in the world, extracting from an oil and natural gas field approximately 8,000 feet beneath the surface. David Russell Schilling, *World's Largest Offshore Oil Platform an Engineering Masterpiece*, INDUSTRY TAP (June 9, 2014), http://www.industrytap.com/worlds-largest-offshore-oil-platform-engineering-masterpiece/20699 [https://perma.cc/22CS-J2NQ].

3. Bloomberg News, *Maersk Drilling Will Spend as Much as $6 Billion on Oil Rig Orders*, SAN DIEGO SOURCE (Mar. 18, 2012), http://www.sddt.com/News/article.cfm?SourceCode=20120318fb#.WKVAyHhK9cJ [https://perma.cc/ARZ7-ZPJ3].

4. *Gulf of Mexico Fact Sheet*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/special/gulf_of_mexico/index.cfm [https://perma.cc/SMY8-Z8JQ] (last visited Feb. 21, 2017); *see also* BUREAU OF OCEAN ENERGY MGMT., COMBINED LEASING REPORT (Aug. 1, 2016), https://www.boem.gov/Combined-Leasing-Reports-2016/ [https://perma.cc/MC2T-AHPJ] (providing that the BOEM currently manages 3,762 active leases, 883 of which are producing (that is, have produced product such as oil or gas)).

5. 147 T.C. No. 2, at 4631 (July 21, 2016).

6. *Id.* at 4631–32.

the court determined that CGGA's expenses associated with its acquisition and processing of seismic data from the outer continental shelf in the Gulf of Mexico fell within the bounds of "geological and geophysical expenses" (G&G expenses) as defined in Section 167(h)(1).[7] Under Section 167(h)(1), "[a]ny geological and geophysical expenses paid or incurred in connection with the exploration for, or development of, oil or gas within the United States . . . shall be allowed as a deduction ratably over the 24-month period beginning on the date that such expense was paid or incurred."[8] To make use of this remarkably short timeframe for the amortization of capitalizable costs, CGGA persuaded the court that its activities produced G&G expenses, thereby shifting a substantial portion of its tax liability into the future.[9]

The question for the court related not to what counts as a G&G expense, but rather to who qualifies for the deduction. The statute provides, "Geological and geophysical exploration expenditures are [those costs incurred] for the purpose of obtaining and accumulating data that will serve as a basis for acquisition or retention of properties."[10] If CGGA conducted surveys to acquire and process seismic data for the purpose of detecting the presence of oil and gas, does it not necessarily follow that CGGA's data serves to inform determinations regarding acquisition or retention of properties? Certainly. The crux of the issue, however, lies in *who* is making the determinations to acquire or retain property.

Traditionally, G&G expenses have been associated with entities holding ownership or leasehold rights in the underlying properties subject to exploration.[11] CGGA, having no such rights, was assessed a deficiency on these very grounds; the IRS reasoned that because CGGA did not have—or intend to have—ownership or leasehold rights in any of the properties it surveyed, it could not make use of Section 167(h)(1) to shorten the timeframe

7. *See id.* at 4631; I.R.C. § 167(h)(1) (2012).
8. I.R.C. § 167(h)(1).
9. *CGG Ams.*, 147 T.C. No. 2, at 4633, 4642. The IRS contended that CGGA should amortize its geophysical expenses under Section 167(g) rather than Section 167(h). *Id.* at 4633; Brief in Support of Motion for Summary Judgment at 5, *CGG Ams.*, 147 T.C. No. 2 (July 21, 2016) (No. 25097-10). Under the income forecast method in Section 167(g), CGGA would compute its depreciation deduction by multiplying its capitalized geophysical expenses by the current year's income arising from such expenses over the income anticipated as a result of the expenses through the tenth taxable year. *See* § 167(g); *CGG Ams.*, 147 T.C. No. 2, at 4633 n.8 (citing STEPHEN F. GERTZMAN, FEDERAL TAX ACCOUNTING ¶ 5.05[12][d][i], at 5-76 to -77 (2d ed. 1993)).
10. Rev. Rul. 77-188, 1977-1 C.B. 76, 77.
11. Robert A. Swiech, *Geological and Geophysical Expenses for the Oil and Gas Industry*, A.B.A. SEC. TAX'N, May 8, 2009, 2009 ABATAX-CLE 0508017 (Westlaw).

over which it could deduct expenses arising from its seismic data acquisition and processing activities.[12] Despite this, the Tax Court found for CGGA, holding that G&G expenses "are not confined to owners of mineral interests" and that "the costs of the surveys borne by CGGA were incurred in connection with the exploration for, or development of, oil and gas."[13]

CGG Americas marks a significant departure from past treatment of G&G expenses, establishing a precedent for the expanded application of Section 167(h) to a novel body of taxpayers. This Note analyzes the court's decision to expand Section 167(h) to such entities as CGGA, drawing upon cases, revenue rulings, and legislative history to discern the appropriateness of the decision in light of relevant policy concerns. Following this Introduction, Section II of this Note sketches the historical framework of G&G expenses, using historical cases and revenue rulings to illustrate the evolution of the concept across much of the twentieth century and detailing the legislative history of the concept's ultimate codification in Section 167(h) in 2005. Section III thereafter recounts the facts and analysis of the *CGG Americas* opinion, noting strengths and weaknesses in the parties' arguments amongst the backdrop of previously discussed historical points of reference. Section III also discusses the implications of the court's approach in terms of its potential future application. Section IV concludes that while the approaches advanced by each party hold merit, the textualist approach to statutory interpretation advanced by CGGA deviates from, or rather expands upon, the historical conceptualization of G&G expenses. Furthermore, this Note advocates an approach limiting the application of Section 167(h)(1) in the context of seismic data acquisition and processing, under which an entity benefitting from economies of scale associated with the nonexclusive licensing of data would be barred from applying Section 167(h) to expenses from those activities giving rise to the seismic data.

II. BACKGROUND

A. Early Cases, Revenue Rulings, and Field Memorandums

Proper tax treatment of G&G expenses has been the subject of debate for nearly a century. Over this period, the IRS has altered its approach numerous times. Proponents of the oil and natural gas industry criticized the results as inconsistent and problematic from an administrative, factual, and legal standpoint.[14] From the industry's perspective, G&G expenses

12. *CGG Ams.*, 147 T.C. No. 2, at 4632–33.
13. *Id.* at 4642.
14. *See* Frank M. Burke, Jr., *Current Expensing of Geological and Geophysical Costs: A Need for Legislative Clarification*, 34 OKLA. L. REV. 778, 780 (1981) ("[T]he . . . history of the treatment of [G&G expenses] for federal income tax purposes illustrates the

should, in theory, fall within the bounds of "ordinary and necessary business expenses," as current deductibility would provide "an incentive for the risks taken by the oil and gas industry."[15] Despite this, the Treasury and IRS have long considered G&G expenses to be capital in nature.[16]

The lineage of cases requiring the capitalization of G&G expenses can be traced as far back as 1928. During this year, the Board of Tax Appeals (BTA) issued two opinions requiring taxpayers to capitalize particular geological expenditures associated with the acquisition of oil and gas leasehold interests.[17] Additional BTA opinions reinforced this capitalization requirement in ensuing years, albeit in the context of minerals.[18] In 1941, however, the IRS retreated. In a June 1941 General Counsel Memorandum (GCM), the IRS took the position that G&G expenses "properly deductible in computing net income" were "also deductible in computing net income from the property for the purpose of determining the net income limitation

[IRS's] inconsistent and confusing approach to the subject."); George E. Ray & Oliver W. Hammonds, *The Treatment of Oil and Gas Exploration Costs for Federal Income Tax Purposes: Geological and Geophysical Expenditures*, 28 TEX. L. REV. 910, 912 (1950) ("There are endless numbers of problems . . . to which no one in the industry or in the [IRS] knows the question, let alone the answer, and cannot possibly know until after many years of practice with the new procedures . . . .").

15. Burke, *supra* note 14, at 778.

16. *Id.*; *see also* Reply to Petitioners Response to Motion for Summary Judgment at 5, *CGG Ams.*, 147 T.C. No. 2 (2016) (No. 25097-10) ("[F]ederal tax law precedent [has] guided the reporting of '[G&G] expenses' for decades.").

17. *See* Nusbaum v. Comm'r, 10 B.T.A. 664, 665 (1928) (holding that amounts paid to a geologist for his investigation of the oil possibilities of a tract of land were capital expenditures (first citing Crompton Bldg. Corp. v. Comm'r, 2 B.T.A. 1056, 1056 (1925); then citing D. N. & E. Walter & Co. v. Comm'r, 4 B.T.A. 142, 142 (1926); and then citing *McCandless*, 5 B.T.A. at 1114); Thompson v. Comm'r, 9 B.T.A. 1342, 1345 (1928) (holding that expenditures for surveys, geological opinions, settlement of suits involving title to lands, abstracts of title, and legal opinions upon titles were capital expenditures (first citing McCandless v. Comm'r, 5 B.T.A. 1114, 1114 (1927); and then citing Gopher Granite Co. v. Comm'r, 5 B.T.A. 1216, 1216 (1927)).

18. *See* Rialto Mining Corp. v. Comm'r, 25 B.T.A. 980, 986 (1932) (holding that "expenditures . . . made in connection with the survey and exploration of mining property which the petitioner owned or expected to own" were capital expenditures (first citing *Thompson*, 9 B.T.A. at 1342; and then citing Jefferson Gas Coal Co. v. Comm'r, 16 B.T.A. 1135, 1135 (1929)); G.E. Cotton v. Comm'r, 25 B.T.A. 866, 869 (1932) (holding that "expenditures made in prospecting [a] mineral lease . . . [were] capital expenditures [to be] added to the cost of the mine when brought to production"); Parker Gravel Co. v. Comm'r, 21 B.T.A. 51, 61 (1930) (holding that an amount "paid for engineering services [to ascertain] the extent and character of gravel deposits" was a capital expenditure).

on percentage depletion."[19] Later that same year, in an October 1941 GCM, the IRS further specified that "[d]eductible [G&G expenses] directly attributable to a specific interest or property" constituted deductions "for purposes of determining the net income limitation on the percentage depletion allowance."[20]

The taxpayer-favorable GCM was short-lived, however, as the Treasury reinstated the G&G expense capitalization requirement with full force in 1942 via the unpublished Field Procedure Memorandum 241.[21] G&G expenses incurred in the acquisition of oil and gas leases were mandatorily capitalized, as were expenses incurred in determinations concerning the retention of existing leases.[22] Unlike today, however, G&G expenses not resulting in the acquisition or retention of properties were allowed as ordinary and necessary current expenses.[23]

B. Income Tax Office Decision 4006 and Subsequent Revenue Rulings

In 1950, by way of Income Tax (IT) Office decision 4006, the IRS abolished expensing of G&G expenses as "ordinary and necessary" business expenses under Section 23(a)(1).[24] This decision, however, did not preclude the current deductibility of certain G&G expenses, and the IT Office opted instead to alter the provision under which deductions would be proper. Similar to Field Procedure Memorandum 241, IT 4006 permitted deductions of G&G

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19. I.R.S. Gen. Couns. Mem. 22,689 (June 1941). Under this GCM, G&G expenses not attributable to a particular producing property were allocated to "the several producing properties." *Id.*; *see also* Burke, *supra* note 14, at 781 ("This ruling generated a stir within the oil and gas industry . . . .").

20. I.R.S. Gen. Couns. Mem. 22,956 (Oct. 1941). In contrast to the June GCM, under the October GCM, "[o]verhead or general items of deduction" (that is, nonspecific G&G expenses) were allocated to *all* properties. *Id.*

21. *See* Ray & Hammonds, *supra* note 14, at 914 ("Then the Treasury, quietly and unannounced, startled the industry with the now famous Field Procedure Memorandum No. 241, issued by the Bureau to its field agents and engineers in 1942."); *see also* Schermerhorn Oil Corp. v. Comm'r, 46 B.T.A. 151, 161–62 (1942) (holding that contingent payments other than salary paid to a geologist for recommendations regarding acquisition of properties for oil development were capital expenditures). In *Schermerhorn Oil*, the BTA articulated a test for capital expenditures: "The test is whether the expenditures are made in connection with the acquisition or preservation of a capital asset. If so, they are capital expenditures." *Id.* at 162.

22. *See* Ray & Hammonds, *supra* note 14, at 914.

23. *See id.*

24. I.T. 4006, 1950-1 C.B. 48, 48. Reemphasizing the IRS's general position in this decision, IT 4006 first provided that G&G expenses "constitute capital expenditures and are not deductible as business expenses." *Id.* I.R.C. § 23(a)(1) (1940), mentioned above, is the predecessor to the current I.R.C. § 212(1) (2012). I.R.C. § 212(1) (2012).

expenses not resulting in the acquisition or retention of properties, but as losses rather than as ordinary and necessary expenses.[25]

Defining G&G expenses as "costs . . . incurred for the purpose of obtaining and accumulating data which will serve as a basis for the acquisition or retention of property," IT 4006 clearly anticipated treatment—capitalization or deduction as a loss—turning on oil and gas interest acquisition or retention determinations.[26] If IT 4006 obtained interests on the basis of the G&G expense-associated data, it would capitalize these costs "as part of the cost of such property."[27] IT 4006 planned to allocate equally the costs of reconnaissance-type surveys "to locate those portions of the project area which have the greatest promise" to such "areas of interest," and the decision would allocate further costs associated with each individual area of interest only to the specific area from which the costs arose.[28] Thus, IT 4006 capitalized costs of a detailed survey of an area of interest alongside the area's allocable reconnaissance-survey costs if the area was acquired or retained as a result of data obtained through such surveys.[29] Only in cases in which either no areas of interest were identified or no properties within or adjacent to areas of interests were acquired or retained could G&G expenses be deducted as current losses.[30]

In 1977, the IRS reiterated IT 4006's approach in Revenue Ruling 77-188, updating its position only as it related to the definition of "property" and the availability of the G&G expense treatment to "ore or mineral (other than oil or gas)" exploration expenditures.[31] Over the ensuing three decades,

25. *See* I.T. 4006, 1950-1 C.B. at 48.
26. *See id.* at 49.
27. *Id.*
28. *Id.*
29. *Id.* at 50.
30. *See id.* In *American Smelting & Refining Co. v. United States*, the Court of Claims interpreted IT 4006 to permit current deduction of G&G expenses allocable to portions of properties not actually leased (that is, portions, by acreage, for which lease options were released). 423 F.2d 277, 288 (Ct. Cl. 1970). However, in Revenue Ruling 77-187, the IRS declined to follow *American Smelting*, stating, "Deduction of a portion of the exploration expenditures is not allowable as a result of acquiring or retaining only a part of the properties explored by the taxpayer." Rev. Rul. 77-187, 1977-1 C.B. 50, 50.

31. Rev. Rul. 77-188, 1977-1 C.B. 76, 76–77. In this Revenue Ruling, the IRS provided that in the context of G&G expenses, "property" is equivalent to the term as defined in Section 614. *Id.* at 77. Further, the IRS disallowed G&G expense treatment for ore or mineral exploration expenditures, specifying that such expenditures are only deductible under Section 617. *Id.* Though not a change per se, the IRS also removed the language relied on in *American Smelting* to justify loss treatment of G&G expenses allocable to portions of properties not ultimately retained. *See id.*; *see also Am. Smelting*,

this position remained largely unchanged; revenue rulings in this area amounted to little more than additional guidance for application of the position to specific fact patterns.[32] In Revenue Ruling 80-153, for example, the IRS specified that costs associated with test drilling on another taxpayer's adjoining tract were capitalizable for the taxpayer-at-issue who contributed to the costs of drilling on this adjoining tract despite the fact that the well was nonproductive and thus ultimately plugged.[33] Although the nonproductive well was not drilled on the taxpayer-at-issue's land, the IRS required this taxpayer to capitalize the contribution, reasoning that the payment related to the retention of property.[34]

Further explaining the application of its position in Revenue Ruling 83-105, the IRS provided seven factual situations, "illustrating, by example, how the various [G&G expenses] are to be allocated" and explaining "what constitutes an abandonment as a potential source of mineral production."[35] This Revenue Ruling, which had the express purpose of amplifying of Revenue Ruling 77-188,[36] aimed to provide comprehensive guidance to taxpayers. Yet inconsistencies in the IRS's position still remained.[37]

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423 F.2d at 288 (quoting I.T. 4006, 1950-1 C.B. at 49); I.T. 4006, 1950-1 C.B. at 49; Swiech, *supra* note 11 ("[T]he prior IT 4006 language quoted by the court in ASARCO 'costs of exploration attributable to that property should be capitalized' was dropped.").

32. *See, e.g.*, Rev. Rul. 83-105, 1983-2 C.B. 51, 51 ("In addition to illustrating, by example, how the various geological and geophysical costs are to be allocated, what constitutes an abandonment as a potential source of mineral production is explained. Rev. Rul. 77-188 amplified."); Rev. Rul. 82-9, 1982-1 C.B. 39, 39 ("The taxpayer previously deducted the costs of obtaining the items as intangible drilling and development costs and has a zero basis in them. Therefore, the taxpayer's charitable contribution deduction is zero."); Rev. Rul. 80-342, 1980-2 C.B. 99, 99 ("The drilling expenses are not intangible drilling and development costs subject to the elective provisions of sections 1.263(c)-1 and 1.612-4(a) of the regulations; they are capital expenditures allocable to any leases that may be acquired based on information obtained from the well."); Rev. Rul. 80-153, 1980-1 C.B. 10, 10 ("A 'bottom hole' contribution is includible in the recipient's gross income and must be treated as capital expenditure by the payor.").

33. Rev. Rul. 80-153, 1980-1 C.B. at 10–11.

34. *Id.* During the same year, in Revenue Ruling 80-342, the IRS held that any member of a consortium (composed of several oil companies) that successfully acquired a lease "on the areas of interest to which the information obtained from [test] drilling" applied must allocate its share of expenditures associated with test drilling to that lease. Rev. Rul. 80-342, 1980-2 C.B. at 101.

35. Rev. Rul. 83-105, 1983-2 C.B. at 51–55.

36. *Id.* at 55 ("Rev. Rul. 77-188 is amplified.").

37. Swiech, *supra* note 11. The following highlights one such inconsistency:

> [I]n situations 5 and 6, a lease was retained although surveys showed no potential for mineral production. However, the geological and geophysical costs were treated inconsistently in the two situations. The only apparent difference in the two situations was that the taxpayer in situation 5 expressed that his reason for retaining the lease was for future exploration at greater depths and that no explanation for retention of the lease was given in situation 6. Thus, it appears that when surveys

C. Section 167(h) Enacted and Revised

Beginning in the mid-1990s, a push to allow current expensing of G&G expenses resurfaced, evidenced by the introduction of numerous bills containing language to this effect.[38] Years of failed attempts to abolish the IRS's capitalization requirement through legislation ensued,[39] but in

> indicate that a property is worthless, a taxpayer might be able to secure a loss deduction for the geological and geophysical costs by indicating that the lease is being retained for further exploration at different depths, formations, or features than previously surveyed.

Id.; Rev. Rul. 83-105, 1983-2 C.B. at 54–55.

38. *See, e.g.*, Domestic Oil and Gas Preservation Act, S. 770, 105th Cong. § 2(a) (1997) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); National Energy Security Act of 1997, H.R. 1648, 105th Cong. § 4(a) (1997) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); Domestic Oil and Gas Production and Preservation Act, S. 451, 104th Cong. § 121(a) (1995) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); S. 34, 104th Cong. § 1(a) (1995) ("[T]he tax treatment which applies to the taxpayer's intangible drilling and development costs shall also apply to . . . geological and geophysical costs for the purpose of ascertaining the existence, location, extent, or quality of any deposit of oil or gas within the United States . . . .").

39. *See, e.g.*, S. 696, 108th Cong. § 2(b)(1) (2003) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); S. 1199, 107th Cong. § 2(b)(1) (2001) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); Energy Tax Policy Act of 2001, H.R. 2511, 107th Cong. § 304(a) (2001) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); National Energy Security Act of 2000, S. 2557, 106th Cong. § 803(a) (2000) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas as expenses which are not chargeable to capital account."); Marginal Well Preservation Act of 2000, S. 2265, 106th Cong. § 3(b) (2000) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas as expenses which are not chargeable to capital account."); Taxpayer Refund Act of 1999, S. 1429, 106th Cong. § 1105(a) (1999) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); Taxpayer Refund and Relief Act of 1999, H.R. REP. NO. 106-289, at 80 (1999) (Conf.

2005, the oil and gas industry's position finally prevailed. During this year, the 109th Congress introduced two bills containing language providing a two-year amortization period for G&G expenses.[40] The first of these bills, H.R. 1541, was approved and recommended by the House Ways and Means Committee but was never voted on by the House.[41] The House opted instead to pass the second, H.R. 6,[42] before sending the bill to the Senate.

The Senate passed H.R. 6, but only after removing the two-year G&G expense amortization provision.[43] The House disagreed with this amendment, but agreed to send the bill to a conference committee.[44] This conference committee recommended a compromise proposal containing the two-year amortization provision.[45] Although the conference committee's explanatory statement contained no mention of particular provisions,[46] Representative William Thomas stated, "[T]hose who follow tax legislation can and should use the Joint Committee on Taxation's publication . . . as the functional equivalent of a statement of managers for the purposes of completing their

Rep.) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); United States Energy Economic Growth Act, S. 325, 106th Cong. § 201(a) (1999) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account."); United States Energy Economic Growth Act, S. 1929, 105th Cong. § 201(a) (1998) ("[A] taxpayer may elect to treat geological and geophysical expenses incurred in connection with the exploration for, or development of, oil or gas within the United States . . . as expenses which are not chargeable to capital account.").

40. Enhanced Energy Infrastructure and Technology Tax Policy Act of 2005, H.R. 1541, 109th Cong. § 205(a) (2005); Energy Policy Act of 2005, H.R. 6, 109th Cong. § 1329(a) (2005). The first bill to contain language providing a two-year amortization period for G&G expenses, however, was introduced in 2003. *See* Energy Tax Policy Act of 2003, H.R. 1531, 108th Cong. § 304(a) (2003) ("Any geological and geophysical expenses paid or incurred in connection with the exploration for, or development of, oil or gas within the United States . . . shall be allowed as a deduction ratably over the 24-month period beginning on the date that such expense was paid or incurred.").

41. *See* H.R. REP. NO. 109-45, at 34–35 (2005); CGG Ams., Inc. v. Comm'r, 147 T.C. No. 2, 4639 (July 21, 2016) (citing *id.* at 34). In recommending H.R. 1541, the Committee reasoned that a two-year amortization period would "foster increased exploration for new sources of supply" and provide "substantial simplification for taxpayers, significant gains in taxpayer compliance, and reductions in administrative cost." H.R. REP. NO. 109-45, at 36.

42. 151 CONG. REC. H2449–50 (daily ed. Apr. 21, 2005) (House vote on H.R. 6).

43. 151 CONG. REC. S7477 (daily ed. June 28, 2005) (Senate vote on amended version of H.R. 6).

44. 151 CONG. REC. H5772 (daily ed. July 13, 2005) ("Mr. Speaker, I ask unanimous consent to . . . disagree to the Senate amendment, and agree to the conference asked by the Senate.").

45. H.R. REP. NO. 109-190, at 433–34 (2005) (Conf. Rep.).

46. *See id.* at 561–63; *see also CGG Ams.*, 147 T.C. No. 2, at 4640 ("[T]he statement did not discuss any particular provision of the compromise proposal." (citing *id.*)).

understanding of what the tax incentives provide."[47] In this publication, issued on the same day as Representative Thomas's statement, the Joint Committee on Taxation described Revenue Ruling 77-188 in depth, first noting, "IRS administrative rulings have provided further guidance regarding the definition and proper tax treatment of G&G costs."[48]

The House passed the compromise proposal also on the same day as Representative Thomas's statement,[49] and the Senate passed the proposal only a single day after.[50] Ten days after Senate approval, upon the President's signing of the bill, the two-year amortization period for G&G expenses became law.[51] With the exception of 2006 and 2007 amendments to lengthen the amortization period for "major integrated oil companies,"[52] the G&G expense provision, Section 167(h), has remained intact since its enactment.

III. *CGG AMERICAS, INC. V. COMMISSIONER*

A. Factual Background

The applicability of Section 167(h)(1) comprised the sole issue evaluated in *CGG Americas, Inc. v. Commissioner*.[53] During the years in question, 2006 and 2007, "CGGA's activities . . . included the acquisition, processing, and imaging of data that it acquired in specific areas within the outer continental shelf of the Gulf of Mexico."[54] As stipulated by the parties, these marine seismic survey activities "constituted geophysical exploration for

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47. 151 CONG. REC. H6953 (daily ed. July 28, 2005).

48. STAFF OF J. COMM. ON TAXATION, 109TH CONG., JCX-60-05, DESCRIPTION AND TECHNICAL EXPLANATION OF THE CONFERENCE AGREEMENT OF H.R. 6, TITLE XIII, THE "ENERGY TAX INCENTIVES ACT OF 2005" 55–57 (Comm. Print 2005).

49. *See* 151 CONG. REC. H6972–73 (daily ed. July 28, 2005).

50. *See* 151 CONG. REC. S9374 (daily ed. July 29, 2005).

51. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1329, 119 Stat. 594, 1020 (2005) (codified as amended at I.R.C. § 167(h) (2012)).

52. *See* Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 503, 120 Stat. 345, 354–55 (2006) (adding Section 167(h)(5), which directs major integrated oil companies to use a five-year amortization period for G&G expenses); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 1502, 121 Stat. 1492, 1800 (2007) (amending Section 167(h)(5) to lengthen major integrated oil companies' G&G expense amortization period from five to seven years).

53. 147 T.C. No. 2, 4631 (July 21, 2016) ("After concessions by the parties, the only issue remaining for decision is whether the expenses CGGA incurred to conduct certain marine surveys and to process data from the surveys are deductible under section 167(h).").

54. Brief in Support of Motion for Summary Judgment, *supra* note 9, at 3.

oil and gas," thus the nature of CGGA's activities was not at issue.[55] Notwithstanding this stipulation, the IRS disputed CGGA's application of Section 167(h)(1), asserting that the provision only applies to owners of oil and gas interests, not to those in the business of licensing seismic data to companies seeking to acquire oil and gas interests.[56]

1. The Taxpayer's Position

CGGA premised its argument supporting its use of Section 167(h)(1) on a textualist reading of the provision.[57] Indeed, CGGA stated, "It is 'axiomatic that the starting point in every case involving construction of a statute is the language [of the statute] itself.'"[58] Dispensing with the need for in-depth judicial inquiry, CGGA contended, "When the language of the statute 'is plain and admits of no more than one meaning the duty of interpretation does not arise and rules which are to aid doubtful meanings need no discussion.'"[59] In CGGA's view, the primacy of Section 167(h)(1)'s plain language was manifest:

> [T]he phrase "[g]eophysical expenses paid or incurred in connection with the exploration for, or development of, oil or gas within the United States" plainly includes expenses that were paid or incurred to conduct geophysical activities that captured or generated geophysical data and information used to search for or detect oil or gas within the United States.[60]

CGGA parsed Section 167(h)(1)'s language into independently definable segments to expand on its plain language interpretation of the provision. Focusing on the "exploration for . . . oil and gas" language first, CGGA reasoned that since its activities comported with industry definitions of both "exploration" and "geophysical exploration," they necessarily constituted

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55. *See id.* at 6; *CGG Ams.*, 147 T.C. No. 2, at 4633 n.6 ("[E]ven though the IRS contends that the survey expenses are not 'geological and geophysical expenses', it does not contest that the survey expenses related to 'geophysical activities'. . . .").

56. *See CGG Ams.*, 147 T.C. No. 2, at 4633; Reply to Petitioners Response to Motion for Summary Judgment, *supra* note 16, at 4 ("CGGA only supplies others who are in the business of exploration for, and development of, oil and gas (commonly known as E&P companies) with data and information, gathered by its activities of conducting marine surveys and stored in its marine data library.").

57. *See* Reply to Petitioners Response to Motion for Summary Judgment, *supra* note 16, at 1–2 ("Rather than employing, or even considering, all of the statutory construction tools, [CGGA] isolates each word of section 167(h) and assigns suitable definitions or meanings wherever they can be found, except in federal income tax authorities.").

58. Brief in Support of Motion for Summary Judgment, *supra* note 9, at 3 (quoting Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985)).

59. *Id.* at 27 (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

60. *Id.* at 30 (quoting I.R.C. § 167(h)(1) (2012)). CGGA asserted, "The statutory language of section 167(h)(1) is plain and permits no more than one meaning." *Id.* at 27.

the term "exploration" as used in Section 167(h)(1).[61] Turning next to the "in connection with" language of Section 167(h)(1), CGGA reasoned that because the Supreme Court has interpreted "in connection with" broadly, Congress intended Section 167(h)(1) to have a similarly broad interpretation.[62] Accordingly, geophysical expenses with any logical relationship to exploration or development were necessarily incurred "in connection with the exploration for, or development of, oil or gas."[63]

2. The IRS's Position

In stark opposition to CGGA's approach, the IRS relied on a historical analysis of G&G expense treatment.[64] To build the framework for its position against applying Section 167(h) to CGGA's geophysical expenditures, the IRS emphasized the importance of congressional intent for enacting Section 167(h), noting that a failure to consider established tax law precedent known to Congress at the time of Section 167(h)'s passage amounted to a distortion of congressional intent.[65] Congress did not "writ[e] this new amortization statute on a blank slate."[66]

"[T]ax treatment of [G&G expenses] has always been associated with the activity of owning mineral interests," the IRS maintained, thus it logically

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61. *Id.* at 37.

> The term 'exploration' is understood within the oil and gas industry to mean the commercial search for oil, gas, and sulphur, including geological and geophysical marine and airborne survey . . . . 'Geophysical exploration' is understood within the oil and gas industry to mean exploration that utilizes geophysical techniques . . . to produce data and information on oil, gas, and sulphur resources in support of possible exploration and development activities.

Id. at 34–35.

62. *Id.* at 39 (quoting Huntsman v. Comm'r, 905 F.2d 1182, 1184–85 (8th Cir. 1990) (discussing the Supreme Court's expansive interpretation of "in connection with" in the context of a tax provision (citing Snow v. Comm'r, 416 U.S. 500, 503 (1974))), *rev'g* 91 T.C. 917 (1988)).

63. *Id.* at 40; I.R.C. § 167(h)(1) (2012). Omitted from the court's opinion, CGGA also contended in brief that since its activities were regulated as G&G exploration activities under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356b (2012), they necessarily "satisf[ied] the requirements of section 167(h)(1)." Brief in Support of Motion for Summary Judgment, *supra* note 9, at 51 (citing Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356b (2012)).

64. *See* Reply to Petitioners Response to Motion for Summary Judgment, *supra* note 16, at 5.

65. *See id.*

66. *Id.*

follows that the same is true for the concept as codified in Section 167(h).[67] From the IRS's perspective, given that CGGA did not incur its geophysical expenses "to retain or acquire an oil or gas lease or to drill any oil or gas wells," its expenditures were precluded from G&G expense treatment for tax purposes, rendering Section 167(h)(1) inapplicable.[68] Expanding on the precise intent underlying Section 167(h)'s passage, the IRS stated, "Congress wanted to alleviate the complexity imposed by Rev[enue] Rul[ing] 77-188 on specific taxpayers involved in specific situations."[69] This, the IRS claimed, is demonstrated by the fact that much of the "discussion in the Present Law section of the 2005 Committee Report was devoted exclusively to an explanation of Rev[enue] Rul[ing] 77-188 and its application under Rev[enue] Rul[ing] 83-105."[70] Indeed, if "Congress wanted the taxpayers working within those Rulings to have simplification, increased compliance and lower administrative costs," then "applying the statute to situations that were not previously subject to Rev[enue] Rul[ing] 77-188 would be 'demonstrably at odds with the intentions of its drafter.'"[71]

B. Holding and Analysis

Despite agreeing with the IRS that the legislative history of Section 167(h) suggests a common nexus between G&G expenses as the term is used in the statute and "similar phrases" in Revenue Rulings 77-188 and 83-105, the Tax Court held for CGGA.[72] The court reasoned that irrespective of this link, the rulings do not "define those terms as including only the costs of taxpayers owning mineral interests."[73] The court accepted that Congress intended Section 167(h) to apply to parties acquiring or retaining oil and gas interests—owners of mineral interests; however, it did not view this as dispositive of "whether nonowners are governed by section 167(h)."[74] Although "Congress's principal concern when it enacted section 167(h) may have been owners," the court explained, "that does not mean that section 167(h) covers owners and no other types of taxpayers."[75]

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67. *See id.* at 8 ("It has always been associated with whether and when exploratory wells are drilled or abandoned prior to development.").
68. *See id.*
69. *See id.* at 17.
70. *Id.*; STAFF OF J. COMM. ON TAXATION, 109TH CONG., JCX-60-05, *supra* note 48, at 55–57.
71. Reply to Petitioners Response to Motion for Summary Judgment, *supra* note 16, at 18 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).
72. CGG Ams., Inc. v. Comm'r, 147 T.C. No. 2, 4640 (2016).
73. *Id.*
74. *Id.* at 4641.
75. *Id.*

The court further reasoned, "A law can achieve effects different than those that Congress principally intended to achieve in enacting the law."[76] The court analogized to a Fifth Circuit case that permitted the FDA to regulate pharmacy compounds as "new drugs" under the Federal Food Drug and Cosmetic Act of 1938 despite indications in the legislative history "that some supporters of the law—both in and out of Congress—intended that the law regulate the manufacturing of drugs by nonpharmacists."[77] Like this Fifth Circuit case, the court opined that although the legislative history of Section 167(h) indicates that the statute's supporters had mineral interest owners in mind, it does not "show they intended the provision's effect to be limited to mineral interest owners." In the court's view, had Congress intended such a limitation, "it could have enacted one."[78]

C. Implications: Appropriating Legislative Powers

As the court demonstrated when it referred to the Fifth Circuit case, it is possible to find instances in which courts explicitly extend the boundaries of a statute beyond that which Congress contemplated. Generally speaking, however, when an issue involving congressional intent arises in litigation, the court seeks to tailor application of the statute in question to comport with rather than expand upon this intent.[79] If that were not the case, the process of discerning congressional intent would be rendered meaningless. Discerning congressional intent enables a court to delineate the appropriate boundaries around a statute; accordingly, a court's purposeful extension beyond such boundaries negates the necessity of determining how Congress anticipated the statute to apply.

As explained above, CGGA argued for a plain language reading of Section 167(h), claiming the language of the statute admitted of only a single meaning.[80]

76. *Id.*

77. *Id.* (citing Med. Ctr. Pharmacy v. Mukasey, 536 F.3d 383, 397, 388 n.4, 406 (5th Cir. 2008)).

78. *Id.* at 4641–42 ("The absence of such a limitation, viewed in conjunction with the equivocal nature of the legislative materials, convinces us that [G&G expenses] are not limited to taxpayers that own mineral interests.").

79. *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 3, 9 (1994) ("[T]he role of the courts is to fill in the gaps in legislation by interpreting the intentions of the law's enacting coalition.").

80. *See supra* Section III.A.1. In brief, CGGA stated, "The intent of Congress is determined from the language of the statute itself, which is the most persuasive evidence of the statute's purpose." Brief in Support of Motion for Summary Judgment, *supra* note

On the basis of this claim, CGGA stated, "[I]f 'the terms of a statute [are] unambiguous, judicial inquiry is complete.'"[81] The IRS, however, clearly articulated an ambiguity in the language of Section 167(h)(1).[82] In response to CGGA's broad interpretation of Section 167(h)(1)'s "in connection with" language,[83] the IRS explained that when "in connection with" is divorced from the tax meaning of G&G expenses, Section 167(h)(1) "becomes ambiguous," rendering it "unclear whether the statute requires the expenses . . . to be in connection with the taxpayer's exploration, or in connection with *anyone's* exploration for oil or gas."[84] In essence, CGGA asked the court to neglect possible alternative interpretations of Section 167(h)(1)'s terms, despite the IRS having demonstrated an ambiguity inherent in the terms of the statute.

This language, "in connection with," was arguably the most important language for purposes of CGGA's case, as it is in that phrase that ambiguity regarding *who* was carrying out the exploration or development activities arose. By finding for the taxpayer on the ground that Section 167(h) did not explicitly limit its application to owners of oil and gas interests, the court neglected to consider this point of ambiguity, thereby implicitly accepting CGGA's plain language argument. Perhaps if the court had relied less on the plain language of the statute itself, it would have afforded greater weight to the case law and legislative history, both of which plainly demonstrate that only those taxpayers who acquire and retain oil and gas interests incur G&G expenses for purposes of Section 167(h)(1).[85]

This case is problematic in terms of its implications. At its core, it appropriates the power of the legislature by means of a spurious congressional intent analysis rooted in a plain language reading of the statute. Other courts employing a similar analysis would have little difficulty construing statutes to fit any number of things not explicitly limited by the language of the statutes themselves. Even in the face of compelling evidence—spanning

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9, at 53. The cases CGGA cited to for this proposition, however, provide that the language of the statute is the *starting place*. *See* Lamie v. United States Tr., 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text . . . ."); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.'" (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992))).

81. Brief in Support of Motion for Summary Judgment, *supra* note 9, at 27 (first citing Rubin v. United States, 449 U.S. 424, 430 (1981); and then citing United States v. Ron Pair Enters., Inc. 489 U.S. 235, 241 (1989)).

82. *See* Reply to Petitioners Response to Motion for Summary Judgment, *supra* note 16, at 10.

83. *See supra* Section III.A.1.

84. Reply to Petitioners Response to Motion for Summary Judgment, *supra* note 16, at 10 (emphasis added).

85. *See* discussion *supra* Sections II.A, II.C.

multiple decades—that a statute was only intended to apply to a given set of things, courts could simply point to the lack of an explicit limitation to justify an expansive plain language reading of the statute. This blurs the separation of powers between government branches, albeit under the guise of furthering congressional intent.

D. Comparison with Contextually Related Concepts

1. Intangible Drilling Costs Under Section 263(c)

G&G expenses exist on a spectrum—at one end of the spectrum are the purely exploratory G&G expenses like those incurred by CGGA; at the other end are those incurred solely during development. The latter end of this spectrum includes expenses "incident to and necessary for the drilling of wells and the preparation of wells for the production of oil or gas," meaning that it spills into, or overlaps with, the adjacent concept of Intangible Drilling and Development Costs (IDC).[86] Thus, where G&G expenses fall on the exploration-to-development spectrum can determine whether they are treated as G&G expenses or IDC for tax purposes.[87]

Section 263(c) directs the U.S. Treasury to prescribe regulations "grant[ing] the option to deduct as expenses intangible drilling and development costs in the case of oil and gas wells."[88] Treasury Regulations Section 1.612-4(a) thus provides:

> In accordance with the provisions of section 263(c), intangible drilling and development costs incurred by an operator (one who holds a working or operating interest in any tract or parcel of land either as a fee owner or under a lease or any other form of contract granting working or operating rights) in the development of oil and gas properties may at his option be chargeable to capital or to expense.[89]

In the context of the interplay between IDC and G&G expenses, we can derive two alternative conclusions from the IDC ownership requirement. The first supports application of a similar ownership requirement for G&G expenses, given that circumstances exist in which G&G expenses constitute IDC—because IDCs overlap with a portion of the G&G expense spectrum.

86. *See* Treas. Reg. § 1.612-4(a) (1965).
87. The IRS states, "Often, taxpayers will deduct an entire G&G survey as IDC when only a small portion relates to a specific well location." IRS, INTERNAL REVENUE MANUAL, § 4.41.1.2.2.3.2 (2013), https://www.irs.gov/irm/part4/irm_04-041-001.html [https://perma.cc/VT5L-KGEM].
88. I.R.C. § 263(c) (2012).
89. Treas. Reg. § 1.612-4(a).

The second supports the notion that Congress purposefully excluded any similar ownership requirement for G&G expenses. Without mentioning the IDC ownership requirement, the Tax Court endorsed the second of these alternatives. To the court, had Congress anticipated ownership limitations in the context of G&G expenses, Section 167(h)(1) would have included language similar to that found in Treasury Regulations Section 1.612-4(a). Note, however, that the ownership requirement in Treasury Regulations 1.612-4(a) was not of Congress's making.[90]

2. Qualifying Income Under Section 7704(d)(1)(E)

Though less related to G&G expenses than the concept of IDC, it is worth noting that the approach the court took in *CGG Americas* mirrors that taken by the Treasury in the context of the natural resources exception in Section 7704(d)(1)(E). The natural resources exception excludes from corporate—entity-level—taxation any publicly traded partnership with sufficient qualifying income "derived from" natural resource-related activities.[91] In May 2015, the Treasury issued proposed regulations that aimed to clarify the types of activities from which a publicly traded partnership can derive qualifying income.[92] Finalized in January 2017, Treasury Regulations Section 1.7704-4 codified years of expansive Private Letter Rulings concerning the natural resource exception, officially extending the exception to support entities that never gain possession of the natural resource.[93]

In much the same way that Regulations Section 1.7704-4 extended qualifying income to auxiliary entities providing support to entities actually engaged in oil and gas production, the tax court in *CGG Americas* extended G&G expenses to an entity providing support to entities actually engaged in oil and gas exploration. In both cases, taxpayers whom Congress did not anticipate received favorable treatment through post-enactment extensions of the respective statutes.

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90. *See Tax Code, Regulations, and Official Guidance*, INTERNAL REVENUE SERV., https://www.irs.gov/tax-professionals/tax-code-regulations-and-official-guidance [https://perma.cc/XX92-9QMR] (last updated Jan. 11, 2017) ("Treasury regulations . . . pick up where the Internal Revenue Code (IRC) leaves off by providing the official interpretation of the IRC by the U.S. Department of the Treasury.").

91. I.R.C. § 7704(d)(1)(E) (2012).

92. Prop. Treas. Reg. § 1.7704-4, 80 Fed. Reg. 25970, 25970–71 (May 6, 2015).

93. Treas. Reg. § 1.7704-4 (2017); *see generally* Kristofer A. Thompson, Special Report, *Refining 'Qualifying Income' for Natural Resource Activities*, 152 TAX NOTES 701 (2016) (analyzing proposed regulations treating hydraulic fracturing support services as qualifying income).

IV. CONCLUSION

The language of Section 167(h)(1) plainly encompasses the activities undertaken by CGGA when read in complete isolation. In the context of historical materials, however, it becomes clear that the issue of Section 167(h)(1)'s application is more multifaceted than the provision's words alone portray.[94] From the earliest cases involving G&G expenses through the codification of the concept in Section 167(h), G&G expenses were exclusively associated with owners of oil and gas interests. At no point have parties lacking the intent to acquire or retain oil or gas interests engaged in activities giving rise to G&G expenses.

Whether this history should play a role in determining if Section 167(h)(1) applies to CGGA turns on whether Section 167(h)(1)'s language permits only a single interpretation, as any ambiguity in the provision's language justifies reliance on historical materials.[95] Given the ambiguity inherent to Section 167(h)(1)'s "in connection with" language, the court erred in relying on the provision's language to the exclusion of its historical materials.[96]

Had the court given greater weight to historical materials, it could have established a rule on the basis of a point noted in brief by CGGA. In brief, CGGA stated, "The non-exclusive licensing model employed by CGGA and its competitors took advantage of economies of scale by spreading the costs of data acquisition and processing over time and among multiple customers who desired to make use of the data."[97] Interestingly, this point by CGGA highlights a component absent from the history of G&G expenses: economies of scale. At no point in the historical materials do the parties involved incur G&G expenses with the intention of taking advantage of economies of scale. Accordingly, in the context of seismic data acquisition and processing, the court could have created a rule under which an entity benefitting from economies of scale associated with the non-exclusive licensing of seismic data would be barred from applying Section 167(h)(1) to expenses from those activities giving rise to the seismic data.

Limiting the application of Section 167(h)(1) to entities incurring G&G expenses to acquire or retain oil or gas interests—to the exclusion of entities benefiting from economies of scale associated with G&G activities—is not only consistent with the history of G&G expenses, it is also sound as

94. *See* discussion *supra* Sections II.A, II.B.
95. *See* discussion *supra* Section III.A.2.
96. *See* discussion *supra* Sections III.B, III.C.
97. Brief in Support of Motion for Summary Judgment, *supra* note 9, at 41.

a policy matter. CGGA and its competitors profit directly from their G&G activities, as they engage in these activities for the sole purpose of licensing the products of their labor, namely seismic data, to entities seeking to acquire or retain oil or gas interests.[98] This licensing creates additional value, realized as profit, that would not be present were the interest owning customers to incur G&G expenses on their own behalf.

Allowing CGGA to benefit from both economies of scale—associated with its seismic data licensing—and the accelerated amortization available under Section 167(h)(1) creates an imbalance in the incentive scheme at the heart of Section 167(h). CGGA derives profit from its G&G activities without the need to actually acquire and retain oil or gas interests; it has no need to actually drill for and extract oil or gas to reap the benefits of its labor. Although "CGGA and its competitors took on a significant portion of the up-front cost of generating geophysical data and information and the associated risk," effectively "reduc[ing] the risks borne by CGGA's customers as part of the exploration process,"[99] the fact that Section 167(h)(4) anticipates the possibility of an oil or gas interest's abandonment during Section 167(h)(1)'s two-year amortization period demonstrates that Congress did not contemplate that risk-shifting when enacting Section 167(h).[100]

Overly expansive interpretations like the one advanced by CGGA set precarious precedent for the Tax Court. By adopting CGGA's approach, the court fundamentally altered the nature of Section 167(h)(1), thereby permitting its application to a new body of taxpayers. Under the court's reasoning, any lack of explicit limiting language can potentially suffice to extend a statute's application.[101] Congress holds the power to enact legislation, thus the expansion or restriction of statutes' applications should be left to the legislative branch. When the judiciary appropriates the power to expand beyond what Congress contemplated, it diminishes the separation of powers. In sum, if taxpayers like CGGA wish to rewrite statutory language to fulfill their tax-planning goals, they should seek legislative change rather than asking a court to reach beyond the limits of its power.

98. CGG Ams., Inc. v. Comm'r, 147 T.C. No. 2, 4632 (July 21, 2016).

99. Brief in Support of Motion for Summary Judgment, *supra* note 9, at 58.

100. *See* I.R.C. § 167(h)(4) (2012) ("If any property with respect to which geological and geophysical expenses are paid or incurred is retired or abandoned during the 24-month period . . . no deduction shall be allowed . . . and the amortization deduction . . . shall continue with respect to such payment.").

101. The court endorsed a broad and flexible reading of the Code's language. *See CGG Ams., Inc.*, 147 T.C. No. 2, at 4641 ("A law can achieve effects different than those that Congress principally intended to achieve in enacting the law.").