A Response to Professor Choi's *Beyond Purposivism in Tax Law*

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ABSTRACT: This Response to Professor Choi's excellent Article, Beyond Purposivism in Tax Law*, questions whether the proposals made by the Article can solve the tax shelter problem and argues that a better response is to bolster purposivism with a statutory general anti-abuse rule ("GAAR").*

INTRODUCTION

In *Beyond Purposivism in Tax Law,* Jonathan Choi criticizes the "conventional wisdom" among tax scholars that "purposivist theories of statutory interpretation solve the problem of tax shelters, because shelters comply with the text but not the purpose of tax statutes."[1] Choi argues that "the predominant form of purposivism in tax scholarship, which combines specific statutory purposes with general structural principles of tax law, cannot separate shelters from ordinary tax planning[,]" which includes "widely accepted tax strategies" that also fail a purposivist analysis.[2] Instead, Choi "proposes a new framework to go beyond purposivism in tax law, complementing purposivist techniques with pragmatism or doctrinalism. Pragmatism applies explicit policy judgments when statutory purposes run out; doctrinalism applies rules, like canons of construction, that provide

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1. Jonathan H. Choi, *Beyond Purposivism in Tax Law*, 107 IOWA L. REV. 1439, 1439 (2022).
2. *Id.*

determinate answers when statutory purpose is ambiguous."[3] Choi argues that "[p]ragmatism generally leads to better results in any particular case, while doctrinalism provides taxpayers certainty in planning legitimate transactions."[4] According to Choi, "[t]he ideal compromise is a hybrid: Agencies should primarily apply pragmatic purposivism in ex ante guidance, while agencies and courts should primarily apply doctrinalist purposivism in ex post adjudication."[5] Choi states, "[t]he ex ante/ex post split comports with existing administrative and common law, and it suits the relative strengths of agencies and courts. Ultimately, it gives interpreters the flexibility to deal with pernicious, sophisticated modern tax shelters."[6]

In what follows, I will first discuss Choi's rejection of purposivism, which I disagree with. I will then argue that purposivism is not helpful given that most judges are textualists, and that Choi's remedies would fail for the same reason. Finally, I will propose an alternative solution, which has been successfully implemented in many other countries: The General Anti-Abuse Rule ("GAAR").

I. CHOI'S CRITIQUE OF PURPOSIVISM

Reasonable minds can disagree with Choi's examples for why purposivism fails to adequately address tax shelters. Choi correctly states that a notorious tax shelter like the contingent liability shelter in *Black & Decker*[7] would fail under a narrow purposivist approach (which focuses on the specific purpose of a statutory provision).[8] He then cites three examples of legitimate tax strategies that would also fail such a narrow purposivist approach: the "double-dummy merger," "the prepayment of expenses by cash-method taxpayers," and "the check-the-box election."[9] He also cites the *Compaq* transaction as an example of a shelter that would pass a narrow purposivist muster.[10]

I do not regard these examples as persuasive, because I do regard the three examples of "legitimate tax strategies" as illegitimate. Double-dummy mergers—which use section 351 to achieve a merger—depart from the purpose of section 351, which was aimed at allowing tax-free incorporations of single corporations.[11] They are designed to avoid the limitations on

3. *Id.*

4. *Id.*

5. *Id.*

6. Choi, *supra* note 1, at 1439.

7. *See* Black & Decker Corp. v. United States, 436 F.3d 431, 432–34 (4th Cir. 2006).

8. Choi, *supra* note 1, at 1451 ("This narrow view of specific purposes would indeed bar strategies like the *Black & Decker* shelter.").

9. *See id.* at 1451–56.

10. *See id.* at 1465–67; *see also* Compaq Comput. Corp. v. Comm'r, 277 F.3d 778, 779 (5th Cir. 2001), *rev'g* 113 T.C. 214 (T.C. 1999).

11. *See* KAREN C. BURKE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS: IN A NUTSHELL 57–109 (8th ed. 2019); *see also* I.R.C. § 351 (2018).

mergers contained in section 368 (e.g., the former inability to merge U.S. and foreign corporations directly under Delaware law, which has since been reversed by a change in Delaware law).[12] The fact that this technique is commonly used does not make it legitimate, and a court would be justified in striking it down as inconsistent with Congressional purposes.

The use of the cash-method to accelerate deductions is likewise contrary to Congressional intent: to simplify tax accounting for individuals, not to allow them to accelerate deductions.[13] A taxpayer who prepays rent before it is due does not have a liability to pay and therefore should be denied a deduction until the liability arises, just like a taxpayer who overpays foreign taxes voluntarily is denied the foreign tax credit.

Finally, check-the-box has been notoriously abused,[14] since it was the foundation of all the techniques used before 2017 to avoid Subpart F (e.g., the notorious Double Irish Dutch Sandwich).[15] It is also inconsistent with the Supreme Court decision in *Morrisey*.[16] A court would almost certainly have struck the regulation down on this basis had an appropriate case been found, but there was nobody with standing to bring such a case since the Internal Revenue Service ("IRS") is bound by its own regulation and an election always benefits taxpayers.

Nor do I agree with Choi that *Compaq* would have survived a proper narrow purposivist examination. In *Compaq*, the taxpayer acquired Royal Dutch Shell American depositary receipts ("ADRs") from a tax-exempt entity for one hundred dollars just before a dividend was about to be paid.[17] The taxpayer then received the dividend of twenty and immediately sold back the ADRs to the tax-exempt for eighty dollars.[18] The point of the transaction—which was otherwise a wash from the taxpayer's perspective—was that there was a Dutch withholding tax of three imposed on the dividend, for which the taxpayer claimed a foreign tax credit.[19] The Tax Court rejected the shelter on economic substance grounds because there was no profit potential, but the Court of Appeals reversed because Compaq Computer Corporation had to include the withholding tax in income when it received the dividend, and therefore it had expenses of one hundred and income of (80 + 20 + 3) = 103 dollars, which created a profit potential sufficient to satisfy the objective

12. *See* Steven A. Bank, *A Transcontinental "A" Train? Foreign Mergers Under Section 368(A)(1)(A)*, 54 TAX L. 555, 556–57, 564 n.59 (2001); DEL. CODE ANN. tit. 8, § 252 (2022).

13. *See* MICHAEL J. GRAETZ & ANNE L. ALSTOTT, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 651–736 (9th ed. 2022).

14. *See* Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 730–37 (2011).

15. *Id.* at 706–13, 737–40.

16. Morrissey v. Comm'r, 296 U.S. 344 (1935) (defining what is a corporation for tax law purposes). The *Morrissey* definition of "corporation" was overturned by check-the-box by allowing taxpayers to choose whether an entity such as an LLC would be treated as a corporation. Kleinbard, *supra* note 14, at 730–37.

17. *See* Compaq Comput. Corp. v. Comm'r, 277 F.3d 778, 779–80 (5th Cir. 2001).

18. *See id.*

19. *See id.* at 780–82.

prong.[20] However, from a purposivist perspective, the purpose of the foreign tax credit is to prevent double taxation. In *Compaq*, there was no double taxation because the taxpayer paid out one hundred and received one hundred, so it did not bear the burden of the Dutch tax. Moreover, because the taxpayer did not receive the three dollars, the tax cannot be treated as part of the profit, and that is not the point of the section 78 gross-up.[21]

It is relatively easy to show that other shelters would also have failed a purposivist analysis. For example, in the KPMG FLIP transaction, the taxpayer had an option to acquire the shares of a foreign corporation that invested in Union Bank of Switzerland ("UBS").[22] UBS redeemed the foreign corporation's investment and at the same time the taxpayer invested the same amount in UBS directly.[23] Under section 302 and the attribution rules, the foreign corporation was deemed to own the UBS stock held by the taxpayer, and therefore there was no reduction in the foreign corporation's ownership of UBS upon the redemption.[24] This resulted in dividend treatment under section 302, with no tax consequences to the foreign corporation.[25] The taxpayer then argued that the foreign corporation's basis in its UBS shares should be shifted to the UBS shares it held because these were the shares that created dividend treatment.[26] As a result, the taxpayer could sell the UBS shares at a loss that it could use to shelter other income. However, the purpose of section 302 was to create dividend treatment for taxable U.S. individuals,[27] and that is the context in which the basis-shifting rule applies. Section 302 should not apply to a foreign corporation redeeming shares in another foreign corporation.

Purposivism would also have defeated the tax shelter in *Tucker*.[28] *Tucker* involved a customized tax shelter devised by KPMG.[29] The taxpayer had $41 million of income from exercising stock options in 2000.[30] The taxpayer formed an S corporation, Sligo, that in turn became a 99 percent owner of an Irish corporation, Epsolon.[31] The taxpayer contributed $2 million to Sligo,

20. *Id.* at 782, 786–88.

21. *Id.* at 784–86. Section 78 provides that when a taxpayer receives a dividend subject to foreign tax and gets a foreign tax credit for it, the taxpayer should include the foreign tax in income because otherwise there would be a double benefit (both a deduction and a credit) for that amount. I.R.C. § 78.

22. For the FLIP transaction, see generally Calvin H. Johnson, Commentary, *Tales from the Kpmg Skunk Works: The Basis-Shift or Defective-Redemption Shelter*, 108 TAX NOTES 431 (2005).

23. *Id.* at 435–36.

24. *Id.*

25. *Id.*

26. *Id.* at 435–38.

27. *Id.* at 438.

28. *See* Tucker v. Comm'r, 114 T.C.M. (CCH) 326, 2017 WL 4158704, at *3, *aff'd* 766 F. App'x 132 (5th Cir. 2019).

29. *Id.* at *2–5.

30. *Id.* at *2.

31. *Id.* at *4–5.

which in turn contributed $1.5 million to Epsolon; the other $500,000 was used as a fee to pay Lehman, who was the counterparty to the transactions.[32] Epsolon then entered into offsetting foreign exchange options that had a theoretical 40 percent chance of making a profit on the taxpayer's $2 million investment.[33] Initially the options produced a $39 million gain, but this was followed as expected by a $39 million loss.[34] The key to the transaction was that the gain occurred while Epsolon was a controlled foreign corporation ("CFC") from December 1st to December 27, 2000, but the loss occurred on December 28, 2000.[35] At that point, Epsolon had become a partnership under a

check-the-box election filed December 27th.[36] The purported result was that the gain was deferred in Epsolon—because it was a CFC for less than thirty days and therefore Subpart F did not apply—but the loss flowed through to Sligo and on to the taxpayer's return.[37] However, as the Tax Court held, neither the thirty-day exception to CFC treatment nor check-the-box were intended to enable taxpayers to separate out gain on forex options from offsetting losses.[38]

Finally, purposivism would have led to a taxpayer defeat in the paradigmatic corporate tax shelter case, *ACM Partnership* ("*ACM*").[39] In *ACM*, a partnership was formed between Algemene Bank Nederland N.V. ("ABN"), Colgate-Palmolive Company ("Colgate"), and Merrill Lynch MLCS, Inc ("MLCS").[40] The partnership acquired one hundred dollar short term notes which were structured to pay seventy dollars up front and the other thirty dollars in contingent payments based on the London Interbank Offering Rate ("LIBOR").[41] Under the contingent installment payment regulations, the partnership spread the one hundred dollar basis equally over the term of the notes,[42] resulting in a gain in year one (because the cash payment exceeded the basis) and an offsetting loss in the subsequent years.[43] ABN was allocated the gain in year one, and thereafter exited the partnership, so that the subsequent loss was allocated to Colgate as a 98 percent partner.[44] This result

32. *Id.* at *5–6.
33. *Id.* at *4.
34. Tucker v. Comm'r, 114 T.C.M. (CCH) 326, 2017 WL 4158704, at *10, *aff'd* 766 F. App'x 132 (5th Cir. 2019).,
35. *Id.* at *7, *12.
36. *Id.* at *13–16.
37. *Id.* at *12–15.
38. *Id.* at *13–17.
39. *See* ACM P'ship v. Comm'r, 157 F.3d 231, 233 (3d Cir. 1998).
40. *Id.*
41. *Id.* at 234.
42. *Id.*
43. *See id.* at 234.
44. *Id.* at 236–37.

was inconsistent with the section 704 regulations that reject such shifting allocations[45] (but were avoided by ABN exiting the partnership).

In my opinion, therefore, narrow purposivism would have worked against most tax shelters, and it is hard to find genuinely legitimate tax strategies that fail a purposivist analysis. For example, acquiring tax exempt bonds or capitalizing a corporation with debt rather than equity, clearly satisfy congressional purposes, even though they are purely tax motivated transactions and might fail a test like economic substance (that focuses on the taxpayer's purpose). Indeed, the original substance over form cases like *Gregory v. Helvering*[46] and *Knetsch*[47] focused on Congressional purpose, not taxpayer purpose; it was only in *Frank Lyon*[48] that the Court misguidedly shifted to a focus on the taxpayer's purpose.

II. Choi's Remedies

The problem with a purposivist approach, however, is that it runs contrary to the tendency of contemporary judges to be textualists. A good example is *Gitlitz*, in which Justice Thomas for the 8-1 majority stated,

> Second, courts have discussed the policy concern that, if shareholders were permitted to pass through the discharge of indebtedness before reducing any tax attributes, the shareholders would wrongly experience a "double windfall": They would be exempted from paying taxes on the full amount of the discharge of indebtedness, *and* they would be able to increase basis and deduct their previously suspended losses. Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern.[49]

Similar views were expressed, for example, in *Summa Holdings*, in which the Sixth Circuit upheld a notorious tax shelter based on a literal reading of the Code.[50]

Given this tendency, it is unlikely that courts could be relied upon to strike down shelters using a purposivist approach—requiring them to look at legislative history—which is anathema to textualists (and as Choi notes, may be lacking in contemporary tax legislation).[51] Choi's solution is to apply "pragmatic" approaches to the adoption of tax regulations by the IRS, and "doctrinal" approaches to tax adjudication.[52] But both remedies would likely

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45. Treas. Reg. §1.704–3(c) (2022).
46. Gregory v. Helvering, 293 U.S. 465, 469–70 (1935).
47. Knetsch v. United States, 364 U.S. 361, 367–69 (1960).
48. Frank Lyon Co. v. United States, 435 U.S. 561, 583–84 (1978).
49. Gitlitz v. Comm'r, 531 U.S. 206, 219–20 (2001) (citation omitted).
50. Summa Holdings, Inc. v. Comm'r, 848 F.3d 779, 789–90 (6th Cir. 2017).
51. *See* Choi, *supra* note 1, at 1445–46.
52. *Id.* at 1442–43.

fail in a textualist context that also rejects deference to administrative agencies. Choi summarizes his pragmatic purposivism as follows:

> This Article argues that a better and more direct test of whether a transaction is a tax shelter is simply whether it violates the normative preferences of tax experts. While this definition does not achieve universal consensus, it better describes the underlying problem of tax shelters and resituates the conversation over abusive transactions as an explicit discussion of policy rather than faithful agency.[53]

Choi argues that these experts within the Treasury and IRS should therefore apply normative principles like "efficiency, fairness, process, fidelity to Congress, the institutional capacities of the courts and the Treasury, and more."[54]

The problem with this approach is that textualist judges are likely to reject it as a departure from the text of the statute and as requiring too much deference to administrative agencies. Choi states:

> The idea of a *Chevron* space closely parallels pragmatic purposivism. The Treasury first applies conventional purposivist criteria in order to determine whether a statute is ambiguous. If the statute is ambiguous, *Chevron* deference permits the Treasury to write rules on pragmatic grounds. Under this framework, the Treasury applies pragmatism where specific purposes run out.[55]

But what if the Supreme Court overrules *Chevron*, as it is increasingly likely to do given its overall skepticism toward Congressional delegations of authority to administrative agencies?[56] In that case, it seems to me unlikely that the Treasury will succeed in upholding "the normative preferences of tax experts" against a literal interpretation of the statute.

Nor is a doctrinal purposivism by courts likely to survive a textualist attack. A main tool of such a doctrinal purposivism would be the economic substance doctrine, which has the advantage of being codified as section 7701(o) [57] and therefore less suspect to textualist critique. However, even economic substance can be attacked, as illustrated by the petition for certiorari filed by the taxpayer (represented by former Solicitor General Garre) in the *Tucker* case.[58] The petition explains its critique of doctrinal purposivism as follows:

53. *Id.* at 1442.

54. *Id.* at 1467.

55. *Id.* at 1472 (footnote omitted).

56. *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (presenting empirical findings on the amount of agency-win rates in circuit courts from 2003 to 2013).

57. *See* I.R.C. § 7701(o).

58. Petition for a Writ of Certiorari at 1–3, Tucker v. Comm'r, 140 S. Ct. 378 (2019) (mem.) (No. 19-41), 2019 WL 2913745, at *1–3.

This case presents a square circuit split about an important, recurring question of federal tax law. Over the last four decades, the lower courts—acting without guidance from this Court—have developed deeply conflicting versions of what is known as the "economic substance doctrine." Some courts, like the D.C. and Sixth Circuits, hold that the doctrine is a "judicial device [] for divining and effectuating congressional intent, not for supplanting it." *Horn v. Commissioner*, 968 F.2d 1229, 1234 (D.C. Cir. 1992). As such, those courts invoke the doctrine to interpret otherwise ambiguous tax rules, but recognize that the doctrine has no application when a rule's text is clear and its application mechanical. Other courts, including the Fifth, Third, and Federal Circuits, invoke the doctrine even where the text clearly and unambiguously authorizes the challenged tax treatment—using the doctrine to *void* the results of such provisions when a court believes that, even though there is no ambiguity in the rule, Congress would not have intended the particular result.

This conflict has great practical importance. Not only does it implicate the proper role (and limits) of courts in giving effect to unambiguous provisions of law, but it impacts the ability of taxpayers to rely on the law as written. As Judge Sutton observed in a similar vein, "[i]f the government can undo transactions that the terms of the Code expressly authorize, it's fair to ask what the point of making these terms accessible to the taxpayer and binding on the tax collector is." *Summa Holdings, Inc. v. Commissioner*, 848 F.3d 779, 782 (6th Cir. 2017). Likewise, he continued, "[t]he best way to effectuate Congress's nuanced policy judgments is to apply each provision as its text requires—not to elevate purpose over text when taxpayers structure their transactions in unanticipated tax-reducing ways." Id. at 788–89.

In this case, Petitioner Keith Tucker made a bona fide investment that had a 40 percent chance of generating a significant profit. Through a mechanical application of three unambiguous tax rules—a bright-line, 30-day rule that excluded certain foreign income from taxation and two rules that allowed taxpayers to make elections between available tax treatments—the investment also reduced his taxable income. The Tax Court and the Fifth Circuit both agreed that the tax results he claimed followed directly from those unambiguous tax rules. Yet those courts nevertheless invoked the economic substance doctrine to override the clear effect of the applicable statutes and regulations, and disallow the resulting deduction.

This Court should grant review to resolve the circuit split over whether the economic substance doctrine may be invoked to void the results of clear and unambiguous provisions, or is a more limited

> tool for interpreting ambiguous text. And this Court should reverse, because the text-overriding approach to the economic substance doctrine is fundamentally at odds with the proper role of the courts and the basic principles of statutory interpretation that apply to every other title of the United States Code.[59]

It is hard to see how courts could apply any kind of purposivism (doctrinal or otherwise) to tax shelters if this approach is adopted by the Supreme Court. As long as the shelter comports with the words of the statute, as every shelter invariably does, it will be upheld.

III. A Possible Solution

And yet, there may be a possible solution to the shelter problem that goes beyond Choi's approach. It is for Congress to adopt GAAR.

The GAAR is modeled after the Partnership Anti-Abuse Rule ("PAAR"), which was adopted by the IRS after *ACM*[60] (which it won on economic substance grounds but could be a model for other shelters that pass economic substance because they have a realistic possibility of a profit, like the shelter in *Tucker*). The PAAR states,

> The provisions of subchapter K and the regulations thereunder must be applied in a manner that is consistent with the intent of subchapter K as set forth in paragraph (a) of this section (*intent of subchapter K*). Accordingly, if a partnership is formed or availed of in connection with a transaction a principal purpose of which is to reduce substantially the present value of the partners' aggregate federal tax liability in a manner that is inconsistent with the intent of subchapter K, the Commissioner can recast the transaction for federal tax purposes, as appropriate to achieve tax results that are consistent with the intent of subchapter K, in light of the applicable statutory and regulatory provisions and the pertinent facts and circumstances. Thus, even though the transaction may fall within the literal words of a particular statutory or regulatory provision, the Commissioner can determine, based on the particular facts and circumstances, that to achieve tax results that are consistent with the intent of subchapter K—
>
> (1) The purported partnership should be disregarded in whole or in part, and the partnership's assets and activities should be considered, in whole or in part, to be owned and conducted, respectively, by one or more of its purported partners;
>
> (2) One or more of the purported partners of the partnership should not be treated as a partner;

59. *Id.* (alterations in original) (footnote omitted).

60. *See* KAREN C. BURKE, FEDERAL INCOME TAXATION OF PARTNERS AND PARTNERSHIPS: IN A NUTSHELL 8–10, 43–48 (6th ed. 2020).

> (3) The methods of accounting used by the partnership or a partner should be adjusted to reflect clearly the partnership's or the partner's income;
>
> (4) The partnership's items of income, gain, loss, deduction, or credit should be reallocated; or
>
> (5) The claimed tax treatment should otherwise be adjusted or modified.[61]

The regulation then lists several factors that can be taken into account in establishing whether a partnership is used in a manner that is inconsistent with the intent of Subchapter K.[62]

When the PAAR was first proposed, it was met with an almost universal rejection by the Tax Bar, with the exception of the New York State Bar Association Tax Section.[63] The argument against it was that it would create uncertainty and chill legitimate transactions.[64] But the PAAR has now been in effect for over twenty-five years, and there is no evidence that it chilled legitimate transactions using partnerships. This conclusion is true even for aggressive (but arguably legitimate) transactions like the Up-C method of avoiding the dual tax on income earned through a partnership while doing an initial public offering ("IPO") of a corporation that is a partner in the partnership.[65] Up-Cs also allow the company to step up the basis of the partnership's underlying tax assets when the pre-IPO owners exit the company and sell their partnership units to the corporation.[66] That step up generally saves each Up-C company (and costs the government) hundreds of millions in taxes over the life of the company.[67] Not surprisingly, rather than leaving that value with the company, the founders put a contract in place that requires the company to pay that value over to them.[68] Despite these tax advantages, the IRS has not challenged the Up-C.[69]

I would suggest that Congress explicitly adopt a GAAR modeled after the PAAR but applying to the entire Code, not just Subchapter K. Such a GAAR

61. Treas. Reg. § 1.701–2(b) (2022). The regulation goes on to specify what the intent of Subchapter K is, which would not be possible in a GAAR.

62. *Id.* § 1.701–2(c).

63. *See generally* TAX SEC., N.Y. STATE BAR ASS'N, REP. NO. 788, OID ANTI-ABUSE RULE (1994), https://nysba.org/NYSBA/Sections/Tax/Tax%20Section%20Reports/Tax%20Reports%201994/No.%20788%20Report%20on%20OID%20Anti-Abuse%20rule.pdf [https://perma.cc/6GL6-RKC2] (commenting in support of the original issue discount anti-abuse rule).

64. *Id.* at 5–6.

65. *See* Gladriel Shobe, *Supercharged IPOs and the Up-C*, 88 U. COLO. L. REV. 913, 934 (2017).

66. *Id.* at 943–45.

67. *Id.*

68. *Id.* at 930, 944–45.

69. *See id.* at 919; *see also* Gladriel Shobe, *The Substance Over Form Doctrine and the Up-C*, 38 VA. TAX REV. 249, 250–51 (2018).

may give judges who are textualists—but who wish to strike down a particular transaction—the statutory basis to do so without relying on purposivism.[70]

Many other countries like Canada, India, Israel, and the United Kingdom have adopted the GAAR, frequently with procedural limitations on how it may be deployed (e.g., approval by the Chief Counsel).[71] The result has been that these countries have far fewer tax shelters than the United States, even though some of them (e.g., the United Kingdom) also tend to interpret statutes literally.[72]

There is another potential advantage of a GAAR: It enables the tax statute to be much shorter and simpler. The Code is full of provisions that were designed to close particular loopholes, like section 901(k), which was adopted to block the *Compaq* transaction.[73] The problem with such specific loophole closers is that they are narrow: 901(k) only applies to taxes on dividends, and taxpayers shifted to interest and royalties, which required Congress to adopt section 901(l).[74] Such narrow loophole closers are abound in the 5,622 pages of the Code. The Canadian Income Tax Act, which benefits from having a GAAR, is much shorter.[75]

CONCLUSION

Overall, Professor Choi's Article is an important contribution because it lays out the limits of purposivism in tax law considering the preference of judges for textualism. However, his proposed solutions are also likely to be rejected by textualist judges. A better solution is to adopt a statutory general anti-abuse rule which will give judges a basis for rejecting clearly abusive transactions.

70. On the Supreme Court and anti-abuse doctrines, see JASPER L. CUMMINGS JR., THE SUPREME COURT'S FEDERAL TAX JURISPRUDENCE: AN ANALYSIS OF FACT FINDING METHODS AND STATUTORY INTERPRETATION FROM THE COURT'S TAX OPINIONS, 1801–PRESENT 133–51 (2d ed. 2016).

71. *See generally* Richard Krever, *General Reports: GAARs*, *in* GAARS —A KEY ELEMENT OF TAX SYSTEMS IN THE POST-BEPS WORLD (Michael Lang et al., eds., 2016) (discussing various implementations of GAARs across countries).

72. Judith Freedman, *The UK GAAR*, *in* GAARS —A KEY ELEMENT OF TAX SYSTEMS IN THE POST-BEPS WORLD 741–48 (Michael Lang et al., eds., 2016).

73. I.R.C. § 901(k); Sae Jin Yoon, Michael R. Lloyd & H. David Rosenbloom, *Surprise! Your Foreign Tax Credit Is Not Allowed Under Section 901(l)*, 73 TAX NOTES INT'L 171, 171–72 (2014).

74. I.R.C. § 901(l).

75. Income Tax Act, R.S.C. 1985, c C–1 (Can.); *id.* § 245.