

"Includes, But Is Not Limited To..."

Now, what do you suppose that means in the law?

PERHAPS THE MOST EXHAUSTIVELY WELL-SETTLED LEGAL CONCEPT involved in the application of the income tax is the meaning and effect of the term "includes" in a statutory definition in tax law. This term has received so much attention because some of the places it appears in the law so plainly reveal the limited scope of the tax.

The term has also received a lot of attention because the power- and revenue-hungry operators of the state really want Americans to misunderstand the limited scope of the tax. Those operators have long exploited the fact that "includes" is often used in casual speech as being "supplemental", as in, "also includes".

The common "also includes" usage misleads many people presented with statutes in which "includes" appears. This is because contrary to that common usage, "includes" in law is the near-equivalent of "means", providing for the creation of a narrow, specialized class to which the term being statutorily-defined exclusively applies. The enumerated examples that follow "includes" in the definition illustrate the special class, which embraces those examples and also other members of the broader general class of such objects which, while not listed explicitly, share the special characteristics that distinguish the enumerated examples from that general class-- but no others.

An example is seen in the ruling of the federal Sixth Circuit Court of Appeals in 2008 in the case of [*Mobley v. C.I.R.*](#), (6th Circuit No. 07-2019). The three-judge panel ruminates over whether a definition of "courts" referred to in 28 USC 1631 (28 USC § 610- Courts defined) could encompass the Tax Court. The definition involved reads:

"As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade".

Weighing various different approaches to considering the question, the panel observes that, *"One might think, for example, that all of the "include[d]" courts listed in section 610 are Article III courts, which would exclude the Tax Court-- an Article I court."* That is, the

panel admits that if all the courts listed in the statutory definition were courts of the Article III class, those of other classes-- despite being well within the common meaning of "courts"-- would necessarily be recognized as being EXCLUDED from the meaning of "courts" for the purposes of this statute. (Ultimately, the panel goes on to point out that, in fact, an Article I court-- the Court of Federal Claims-- IS listed in the definition, and so finds that Tax Court can qualify.)

This rule of construction is explicitly prescribed in federal tax law, where we find 26 USC § 7701(c):

Includes and including: The terms "includes" and "including" when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined. Rev. Act of 1938 §901(b) (codified at 26 USC 7701(c)).

The US Supreme Court has helpfully described the application of this tax law rule:

"[T]he verb "includes" imports a general class, some of whose particular instances are those specified in the definition."

Helvering v Morgan's, Inc, 293 U.S. 121, 126 fn. 1 (1934);

"[I]ncluding... ..connotes simply an illustrative application of the general principle."

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 62 S.Ct. 1 U.S. (1941)

as has the Treasury Department:

"The terms "includes and including" do not exclude things not enumerated which are in the same general class."

This language was previously published as both 27 CFR 26.11 and 27 CFR 72.11. It now appears at [27 CFR 18.11](#), and at [27 CFR 447.11](#) with the addition of "or are otherwise within the scope thereof".

The federal Ninth Circuit Court of Appeals expresses this in *Pacific National Insurance Co. v. United States*, 422 F.2d 26 (9th Cir., 1970) by describing "includes" as conveying "'a calculated indefiniteness with respect to the outer limits of the term" defined." (quoting *First National Bank In Plant City, Plant City, Florida v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969)) and then adding, from its own precedent in *United States v.*

Graham, 309 F.2d 210, 212 (9th Cir. 1962), "Its scope is illustrated rather than qualified by the specified examples."

The Sixth Circuit explicitly adopts the *Pacific* construction in *Mueller v. Nixon*, 470 F.2d 1348 (6th Cir. 1972), adding that the enumerated list in an "includes"-equipped definition "is exemplary in nature."

In 1998, the First Circuit put it this way:

"The terms 'includes' and 'including' . . . shall not be deemed to exclude other things otherwise within the meaning of the term defined." 26 U.S.C. § 7701(c). In light of this we apply the principle that a list of [enumerated examples] should be construed to include by implication those additional [items] of like kind and class as the expressly included [items]. *fn2 This follows from the canon *noscitur a sociis*, "a word is known by the company it keeps." *Neal v. Clark*, 95 U.S. 704, 708-09 (1878)."

Brigham v. United States, 160 F.3d 759 (1st Cir. 1998)

There IS an exception though...

A different construction arises where qualifying language, such as "but is not limited to" has been added (i.e. "includes, but is not limited to..." or "including, but not limited to..."). In this case, the meaning of the term being defined in the statute includes, but is not limited to, those in the class illustrated by the examples enumerated. In this case the meaning can therefore also embrace other things within the broad, all-inclusive class of the term being defined without regard to the limitations of the sub-class illustrated by the enumerated examples.

Consider, for instance, how the following would be read if it were an actual statute:

*Person defined.-The term "person", as used in this subchapter, **includes, but is not limited to**, an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.*

Under such language, persons other than exclusively those distinguished from the general class "person" due to being in the class of those under a relevant duty as illustrated by the

enumerated examples *would* be included within the meaning of "person" where the term appeared in the affected subchapter (unless excluded elsewhere or otherwise).

Of course, this exception proves the rule, and that's really the point here: Where "includes" appears WITHOUT qualifying language such as "but is not limited to...", the lack of this qualifier in contrast to its appearance elsewhere emphasizes that in such cases "includes" unequivocally means, "includes, and IS limited to..." the class illustrated by the examples that follow.

This is, in fact, a formal doctrine of statutory construction (as well as obvious common sense):

""[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "

Russello v. United States, 464 US 16, 23, 78 L Ed 2d 17, 104 S Ct. 296 (1983)
(Quoting *United States v. Wong Kim Bo*, 472 F. 2d 720, 722 (CA 1972))

SO, BECAUSE PROPER UNDERSTANDING OF "INCLUDES" WITHOUT the excepting modifier is so helpfully illustrated and emphasized by the occasional appearance of those exceptions, I have assembled a (non-comprehensive) collection of excepted instances to be found within Title 26 for everyone's edification and enjoyment, and everyone's use where helpful in explaining the truth about the tax to others.

(Note that emphasis is added on the excepting modifiers; otherwise emphases are as in the original. What is presented are excerpts from the longer originals-- generally just the portion containing the modifiers, sometimes with a little more in order to provide context.

Also, the language that follows is taken from what is known as "the IRC of 1986". The modifying language that appears in most of these code sections is as found in the underlying statutes themselves. However, the statute underlying section 61 does not contain the "including, but not limited to" language presented in the "code" version reproduced here. Instead the statute accomplishes the same effect in a different way, using "or gains profits and income derived from any source whatever" to expand the scope of its definition to "income" derived from other than merely sources consistent with the class illustrated by the examples enumerated.)

Here are the exceptions:

61 Gross income defined

(a) **General definition**

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, **including (but not limited to)** the following items:

127 Educational assistance programs

(c) **Definitions; special rules**

For purposes of this section—

(1) **Educational assistance**

The term “educational assistance” means—

(A) the payment, by an employer, of expenses incurred by or on behalf of an employee for education of the employee (**including, but not limited to**, tuition, fees, and similar payments, books, supplies, and equipment), and

162 Trade or business expenses

(2) **Exception for local legislation**

In the case of any legislation of any local council or similar governing body—

(A) paragraph (1)(A) shall not apply, and

(B) the deduction allowed by subsection (a) shall include all ordinary and necessary expenses (**including, but not limited to**, traveling expenses described in subsection (a)(2) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

168 Accelerated cost recovery system

(C) **Special rule for reservation infrastructure investment**

(ii) Qualified infrastructure property

For purposes of this subparagraph, the term “qualified infrastructure property” means qualified Indian reservation property (determined without regard to subparagraph (A)(ii)) which—

(III) is placed in service in connection with the taxpayer’s active conduct of a trade or business within an Indian reservation. Such term **includes, but is not limited to**, roads, power lines, water systems, railroad spurs, and communications facilities.

175 Soil and water conservation expenditures; endangered species recovery expenditures

(c) **Definitions**

For purposes of subsection (a)—

(1) The term “expenditures which are paid or incurred by him during the taxable year for the purpose of soil or water conservation in respect of land used in farming, or for the prevention of erosion of land used in farming, or for endangered species recovery” means expenditures paid or incurred for the treatment or moving of earth, **including (but not limited to)** leveling, grading and terracing, contour furrowing, the construction, control, and protection of diversion channels, drainage ditches, earthen dams, watercourses, outlets, and ponds, the eradication of brush, and the planting of windbreaks. Such term shall include expenditures paid or

incurred for the purpose of achieving site-specific management actions recommended in recovery plans approved pursuant to the Endangered Species Act of 1973. Such term does not include—

190 Expenditures to remove architectural and transportation barriers to the handicapped and elderly

(b) **Definitions**

For purposes of this section—

(3) **Handicapped individual**

The term “handicapped individual” means any individual who has a physical or mental disability (**including, but not limited to**, blindness or deafness) which for such individual constitutes or results in a functional limitation to employment, or who has any physical or mental impairment (**including, but not limited to**, a sight or hearing impairment) which substantially limits one or more major life activities of such individual.

509 Private Foundation defined

(d) **Definition of support**

For purposes of this part and chapter 42, the term “support” **includes (but is not limited to)**—

...

Such term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset, or the value of exemption from any Federal, State, or local tax or any similar benefit.

513 Unrelated trade or business

(2) **Qualified public entertainment activities**

For purposes of this subsection—

(A) **Public entertainment activity**

The term “public entertainment activity” means any entertainment or recreational activity of a kind traditionally conducted at fairs or expositions promoting agricultural and educational purposes, **including, but not limited to**, any activity one of the purposes of which is to attract the public to fairs or expositions or to promote the breeding of animals or the development of products or equipment.

...

(3) **Qualified convention and trade show activities**

(A) **Convention and trade show activities**

The term “convention and trade show activity” means any activity of a kind traditionally conducted at conventions, annual meetings, or trade shows, **including, but not limited to**, any activity one of the purposes of which is to attract persons in an industry generally (without regard to membership in the sponsoring organization) as well as members of the public to the show for the purpose of displaying industry products or to stimulate interest in, and demand for, industry products or services, or to educate persons engaged in the industry in the

development of new products and services or new rules and regulations affecting the industry.

613 Percentage depletion

(b) **Percentage depletion rates**

The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

...

(7) **14 percent**

All other minerals, **including, but not limited to**, aplite, barite, borax, calcium carbonates, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, mollusk shells (including clam shells and oyster shells), phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (1)(B) does not apply) bauxite, flake graphite, fluorspar, lepidolite, mica, spodumene, and talc (including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 percent for any such other mineral (other than slate to which paragraph (5) applies) when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term "all other minerals" does not include—

851 Definition of regulated investment company

...

(b) **Limitations**

A corporation shall not be considered a regulated investment company for any taxable year unless—

(1) it files with its return for the taxable year an election to be a regulated investment company or has made such election for a previous taxable year;

(2) at least 90 percent of its gross income is derived from—

(A) dividends, interest, payments with respect to securities loans (as defined in section 512 (a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the Investment Company Act of 1940, as amended) or foreign currencies, or other income (**including but not limited to** gains from options, futures or forward contracts) derived with respect to its business of investing in such stock, securities, or currencies, and

901 Taxes of foreign countries and of possessions of United States

(e) Foreign taxes on mineral income

(2) **Foreign mineral income defined**

For purposes of paragraph (1), the term "foreign mineral income" means income derived from the extraction of minerals from mines, wells, or other natural deposits, the processing of such minerals into their primary products, and the transportation,

distribution, or sale of such minerals or primary products. Such term **includes, but is not limited to**—

955 Withdrawal of previously excluded subpart F income from qualified investment

(b) **Qualified investments in foreign base company shipping operations**

(1) **In general**

For purposes of this subpart, the term “qualified investments in foreign base company shipping operations” means investments in—

(A) any aircraft or vessel used in foreign commerce, and

(B) other assets which are used in connection with the performance of services directly related to the use of any such aircraft or vessel.

Such term **includes, but is not limited to**, investments by a controlled foreign corporation in stock or obligations of another controlled foreign corporation which is a related person (within the meaning of section 954 (d)(3)) and which holds assets described in the preceding sentence, but only to the extent that such assets are so used.

1253 Transfers of franchises, trademarks and trade names

(a) **General rule**

A transfer of a franchise, trademark, or trade name shall not be treated as a sale or exchange of a capital asset if the transferor retains any significant power, right, or continuing interest with respect to the subject matter of the franchise, trademark, or trade name.

(b) **Definitions**

For purposes of this section—

(1) **Franchise**

The term “franchise” includes an agreement which gives one of the parties to the agreement the right to distribute, sell, or provide goods, services, or facilities, within a specified area.

(2) **Significant power, right, or continuing interest**

The term “significant power, right, or continuing interest” **includes, but is not limited to**, the following rights with respect to the interest transferred:

4942 Taxes on failure to distribute income

(g) **Qualifying distributions defined**

(2) **Certain set-asides**

(B) **Requirements**

An amount set aside for a specific project shall meet the requirements of this subparagraph if at the time of the set-aside the foundation establishes to the satisfaction of the Secretary that the amount will be paid for the specific project within 5 years, and either—

(i) at the time of the set-aside the private foundation establishes to the satisfaction of the Secretary that the project is one which can better be accomplished by such set-aside than by immediate payment of funds, or

(ii)

(I) the project will not be completed before the end of the taxable year of the foundation in which the set-aside is made,

(II) the private foundation in each taxable year beginning after December 31, 1975 (or after the end of the fourth taxable year following the year of its creation, whichever is later), distributes amounts, in cash or its equivalent, equal to not less than the distributable amount determined under subsection (d) (without regard to subsection (i)) for purposes described in section 170 (c)(2)(B) **(including but not limited to** payments with respect to set-asides which were treated as qualifying distributions in one or more prior years), and

(III) the private foundation has distributed **(including but not limited to** payments with respect to set-asides which were treated as qualifying distributions in one or more prior years)...

...

(D) Reduction in distribution amount

If, during the taxable years in the adjustment period for which the organization is a private foundation, the foundation distributes amounts in cash or its equivalent which exceed the amount required to be distributed under clause (ii)(II) of subparagraph (B) **(including but not limited to** payments with respect to set-asides which were treated as qualifying distributions in prior years), then for purposes of this subsection the distribution required under clause (ii)(II) of subparagraph (B) for the taxable year shall be reduced by an amount equal to such excess.

5002 Definitions-

(a) In general

For purposes of this chapter—

(5) Processor

(B) Rectifier, bottler, etc., included

The term “processor” **includes (but is not limited to)** a rectifier, bottler, and denaturer.

5006 Determination of tax

(a) Requirements

(1) In general

Except as otherwise provided in this section, the tax on distilled spirits shall be determined when the spirits are withdrawn from bond. Such tax shall be determined by such means as the Secretary shall by regulations prescribe, and with the use of such devices and apparatus **(including but not limited to** tanks and pipelines) as the Secretary may require. The tax on distilled spirits withdrawn from the bonded premises of a distilled spirits plant shall be determined upon completion of the gauge for determination of tax and before withdrawal from bonded premises, under such regulations as the Secretary shall prescribe.

7624 Reimbursement to State and local law enforcement agencies

(a) Authorization of reimbursement

Whenever a State or local law enforcement agency provides information to the Internal Revenue Service that substantially contributes to the recovery of Federal taxes imposed with respect to illegal drug-related activities (or money laundering in connection with such activities), such agency may be reimbursed by the Internal Revenue Service for costs incurred in the investigation (**including but not limited to** reasonable expenses, per diem, salary, and overtime) not to exceed 10 percent of the sum recovered.

AS CAN BE SEEN, A LOT OF EXCEPTIONS PROVE THE "LIMITED EXPANSION" RULE. So next time you see some nonsense reference to [Latham and Sullivan](#), or some other effort by a DOJ hack, "tax attorney" or judge to assert, or riff off, the proposition that "includes" without modifier ISN'T a term providing only for limited expansion confined to the class illustrated and distinguished by the examples enumerated and extending to nothing else, and pretending that it should be read as "but not limited to" instead, *read 'em the riot act and rip 'em a new one*. They're lying in hopes of screwing you, and you shouldn't stand for it.

NOTE: See [this article](#) for an in-depth discussion of how "includes" is presented in tax law and interpreted by the courts, and how it is deployed in key areas of law to provide maximum latitude for application of the tax to its proper objects while simultaneously confining the tax to nothing BUT its proper objects.

