THE LOOPHOLE THAT WOULD NOT DIE: A CASE STUDY IN THE DIFFICULTY OF GREENING THE INTERNAL REVENUE CODE

by
Lawrence Zelenak[*]

Congress and the Treasury have commissioned the National Academy of Sciences (NAS) "to undertake a comprehensive review of the Internal Revenue Code of 1986 to identify the types of and specific tax provisions that have the largest effects on carbon and other greenhouse gas emissions and to estimate the magnitude of those effects." The hope of the proponents of the NAS carbon audit is that Congress, once informed of the results of the audit, will respond by "greening" the Internal Revenue Code. This Essay cautions that a more environmentally friendly Code will not necessarily follow from the legislative consciousness-raising of the carbon audit. It offers the story of the "SUV loophole" as a case study in the difficulty of removing environmentally offensive provisions from the tax laws, even when Congress is well aware of the existence of those provisions.

I. INTRODUCTION: THE CHALLENGE OF GREENING THE CODE

In 2008 Congress directed the Secretary of the Treasury to: "enter into an agreement with the National Academy of Sciences [NAS] to undertake a comprehensive review of the Internal Revenue Code of 1986

[*] Pamela B. Gann Professor of Law, Duke University.

to identify the types of and specific tax provisions that have the largest effects on carbon and other greenhouse gas emissions and to estimate the magnitude of those effects."[1] The legislation called for the NAS to submit its report (carbon audit) to Congress by October 4, 2010, but the $1.5 million required to fund the study was not appropriated until December 2009.[2] The report is now not expected until late 2011. The hope of the proponents of the carbon audit, of course, is that once the NAS has highlighted "the potential for changes in the tax code to reduce carbon emissions,"[3] Congress will respond by "greening" the Internal Revenue Code.

The carbon audit is certainly a worthwhile project. Some of the ways in which the current tax laws may contribute to global warming are far from obvious,[4] and making Congress aware of such non-obvious effects is a necessary first step in persuading Congress to amend the Code to alleviate those effects. I am sure, however, that the proponents of the carbon audit are under no illusions that the greening of the Code will follow readily once Congress's consciousness has been raised by the NAS study. My own view is pessimistic; I doubt if any Code provisions that encourage the emission of greenhouse gases will be repealed in the aftermath of the carbon audit.

In support of that view, this Essay offers—as a case study in the difficulty of removing environmentally offensive tax breaks from the Code—the story of the "SUV loophole." Most taxpayers who buy expensive vehicles for business use are subject to strict limitations on their allowable cost-recovery deductions, but a small business owner who buys a sport utility vehicle with a gross vehicle weight of more than 6,000 pounds (making it environmentally objectionable even relative to other

---

[1] Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, § 117, 122 Stat. 3807, 3831 (2008). I have previously offered the NAS my unsolicited advice as to how it should select Code provisions for inclusion in the carbon audit. *See* Lawrence Zelenak, *Tax Expenditures and the Carbon Audit*, 122 TAX NOTES 1367 (2009) (proposing that the NAS include in the audit any existing tax provision satisfying two criteria: (1) that there is a technically and politically plausible alternative to the current provision, and (2) that the current provision and the alternative to it would have significantly different effects on greenhouse gas emissions).

[2] *See* § 117, 122 Stat. at 3831; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 4, 123 Stat. 3034, 3159 (2009).

[3] Press Release, Earl Blumenauer, Reps. Blumenauer, McDermott, and Neal Highlight House Passage of New Direction Energy Policy (May 20, 2008), *available at* http://blumenauer.house.gov/index.php?option=com_content&task=view&id=1322.

[4] For example, the home mortgage interest deduction may encourage suburban sprawl, which leads to longer commutes in single-occupant vehicles, which leads to increased carbon dioxide emissions. *See* Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1370–71 (2000); Richard Voith, *Does the Federal Tax Treatment of Housing Affect the Pattern of Metropolitan Development?*, BUS. REV., Mar./Apr. 1999, at 3, 3–6.

SUVs)[5] may immediately deduct $25,000 of its cost under the small business expensing rules of section 179 of the Code.[6] A business taxpayer paying $60,000 in 2011 for a new Cadillac sedan could claim a first-year cost-recovery deduction of $11,060.[7] But if the taxpayer instead bought—at the same price and in the same year—a new Cadillac Escalade SUV (gross vehicle weight 7,300 pounds), he would be able to deduct the entire $60,000 cost in 2011.[8] These 2011 results are affected by the temporary "bonus depreciation" rules of section 168(k). Under the permanent rules (that is, in the absence of section 168(k)), a taxpayer buying a sedan would be entitled to a first-year deduction of only $3,060,[9] and a taxpayer buying an SUV would be entitled to a first-year deduction of $32,000—$25,000 under section 179 and another $7,000 derived by the application of the cost-recovery rules of section 168 to the remaining $35,000 of the cost of the vehicle.[10]

Although the SUV loophole is neither the most economically significant nor the most environmentally damaging of the Internal Revenue Code's offenses against the environment, it is among the most transparent and the most outrageous. Whether viewed from the perspective of tax policy, energy policy, or environmental policy, it is simply and obviously indefensible.[11] Consider tax policy first. The limitations on deductions for the business use of luxury automobiles (imposed by section 280F) are designed to avoid "subsidiz[ing] the element of personal consumption associated with the use of very expensive automobiles."[12] The personal consumption element inherent in the Escalade is every bit as significant as the personal consumption element inherent in the sedan, yet the tax system does nothing to avoid subsidizing that consumption. As for energy policy: At a time when reducing the United States' dependence on foreign oil is widely viewed

[5] *See infra* Part II.A.

[6] I.R.C. § 179 (2006).

[7] Rev. Proc. 2011-21, 2011-12 I.R.B. 560, 561 tbl.1 (March 21, 2011); I.R.C. § 168(k)(2)(F)(i).

[8] He could either (1) deduct $25,000 under section 179 and the remaining $35,000 under section 168(k)(5), or (2) simply deduct the entire $60,000 under section 168(k)(5).

[9] Rev. Proc. 2011-21, *supra* note 7, at 562 tbl.3.

[10] *See* Rev. Proc. 87-57, 1987-2 C.B. at 696 tbl.1.

[11] One of the best policy critiques of the SUV loophole appeared several year ago in these pages. *See* Carrie M. Dupic, *The SUV Tax Loophole: Today's Quintessential Suburban Passenger Vehicle Becomes Small Businesses' Quintessential Tax Break*, 9 LEWIS & CLARK L. REV. 669 (2005).

[12] STAFF OF J. COMM. ON TAXATION, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 599 (1984).

as a matter of national security,[13] the tax subsidy for low-mileage SUVs[14] encourages increased dependence on foreign-source energy. The effects of large SUVs on global warming are straightforward. Burning gasoline produces the greenhouse gas carbon dioxide, and low-mileage vehicles produce more carbon dioxide per mile than more fuel-efficient vehicles. On a scale of zero (worst) to ten (best), the Environmental Protection Agency gives the Escalade a "greenhouse gas score" of three.[15] For comparison, a Cadillac CTS sedan (with a six-cylinder engine and semi-automatic transmission) has a score of six.[16]

In addition to being indefensible on the merits, the SUV loophole would seem to have little going for it politically. The loophole owes its existence to a historical accident, rather than to a legislative decision to subsidize purchasers of SUVs.[17] It is difficult to imagine a tax provision better suited to generating outrage among the general public. The provision itself is easily understood, the objections to it are obvious and visceral, and once outrage has been generated it can be rekindled by every sighting of a large SUV. The loophole was thoroughly exposed and derided by the national media as early as 2002;[18] the George W. Bush administration publicly favored its repeal;[19] the Alliance of Automobile Manufacturers made no attempt to defend it;[20] and a number of legislators targeted it for repeal.[21] And yet, even with the stars seemingly perfectly aligned for its repeal, the SUV deduction survives. Commenting in 2002 on the possible repeal of the SUV loophole, Dan Becker, the director of the Sierra Club's global-warming and energy program, demonstrated both prescience and a capacity for understatement by noting that "tax breaks are typically tough to erase once they are on the books."[22] If Congress has not seen fit to repeal the tax subsidy for purchasers of large SUVs, how likely is it that other provisions—

---

[13] *See* Richard N. Haass, *Foreward* to COUNCIL ON FOREIGN RELATIONS, NATIONAL SECURITY CONSEQUENCES OF U.S. OIL DEPENDENCY, at xi–xii (Indep. Task Force Rep. No. 58, 2006).

[14] The Environmental Protection Agency estimates the Escalade's mileage at 14 miles per gallon city, and 20 miles per gallon highway. The EPA's mileage estimates for all new vehicle models are available at THE OFFICIAL U.S. GOVERNMENT SOURCE FOR FUEL ECONOMY INFORMATION, http://www.fueleconomy.gov/.

[15] GREEN VEHICLE GUIDE, http://www.epa.gov/greenvehicles/Index.do.

[16] *Id.*

[17] *See infra* Part II.A.

[18] *See infra* Part II.B.

[19] *See infra* text accompanying note 66.

[20] *See infra* text accompanying note 67.

[21] *See infra* text accompanying note 46.

[22] Jeffrey Ball & Karen Lundegaard, *Tax Breaks for the Merely Affluent: Quirk in Law Lets Some SUV Drivers Take Big Deduction*, WALL ST. J., Dec. 19, 2002, at D1.

seemingly far less politically vulnerable than this one—will be repealed in response to the carbon audit of the Internal Revenue Code?

II. THE STORY OF THE SUV LOOPHOLE

A. A Loophole is Born

Congress enacted the section 280F restrictions on depreciation deductions for "luxury automobiles" in 1984.[23] The restrictions did not apply, however, to any vehicle with a gross vehicle weight of more than 6,000 pounds.[24] Qualifying for the exception produced two benefits. First, the taxpayer could use the usual accelerated cost-recovery rules of section 168, rather than being relegated to delayed cost recovery under section 280F.[25] Second, a small business taxpayer could claim an immediate deduction under section 179 for up to $5,000 of the cost of the vehicle.[26] The exception was self-evidently based on the congressional assumption that a taxpayer's choice of a vehicle weighing more than three tons would be based solely on business concerns; no one would derive personal consumption benefits from such a behemoth. As of 1984, that assumption was basically correct. The first SUV—in the modern sense of a vehicle designed for, and marketed to, suburban families as an alternative to a car—was the 1984 Jeep Cherokee (introduced in late 1983).[27] Its gross vehicle weight was 4,629 pounds.[28] At the time the luxury automobile deduction restrictions were enacted, there was no car-substitute SUV with a gross vehicle weight of more than 6,000 pounds. In the absence of such a vehicle, Congress was right to assume that the use of a vehicle weighing more than 6,000 pounds would be based on business needs, rather than on personal preferences.

That assumption was eventually undermined by changes in the tastes of the American driving public. The SUV as an alternative to a car surged in popularity in the late 1980s and throughout the 1990s. In 1975, large SUVs constituted only 0.1% of all new light-duty vehicles sold in the United States; the market share of large SUVs rose to 0.5% by 1988, and

[23] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 179, 98 Stat. 494, 713 (1984).

[24] The current version of the exception, which applies to any "truck or van" with a gross vehicle weight of more than 6,000 pounds, is codified at I.R.C. § 280F(d)(5)(A) (2006).

[25] *See* § 179, 98 Stat. at 713.

[26] *See id.* § 13, at 505.

[27] KEITH BRADSHER, HIGH AND MIGHTY: SUVS—THE WORLD'S MOST DANGEROUS VEHICLES AND HOW THEY GOT THAT WAY 37, 40 (2002).

[28] Tori Tellem, *1984–1988 Jeep Cherokee/Wagoner XJ: Killing off Jeep's Biggest Success*, JP MAGAZINE, Feb. 2009, http://www.jpmagazine.com/featuredvehicles/154_0609_1984_to_1988_jeep_cherokee_and_wagoner/index.html.

skyrocketed to 11.8% by 2006.[29] Over the same period that the large SUV was becoming the personal-use vehicle of choice for many drivers, Congress was increasing the tax advantage of the exemption from the luxury automobile deduction restrictions. The maximum deduction under section 179 reached $24,000 in 2002, and $25,000 in 2003.[30]

B. *The Loophole Thrives on Exposure*

The SUV deduction remained a bit of tax arcana, known only to a limited number of small business owners and their accountants, until a story appeared in the December 18, 2002 edition of the *Detroit News*.[31] The story described a healthcare consultant, Karl Wizinsky, who bought a Ford Excursion for $47,000 and claimed a deduction for $32,000 of the purchase price; he explained that he chose the Excursion "because it was a pretty hefty deduction."[32] The story noted the tension between the SUV deduction and "other national goals, such as . . . reducing U.S. dependence on foreign oil and cutting greenhouse gasses."[33] The story cited Taxpayers for Common Sense (a self-described "independent and non-partisan voice for taxpayers")[34] for its estimate that the deduction cost the Treasury "between $840 million and $987 million for every 100,000 [deduction-eligible] vehicles sold to businesses."[35] It noted that 38 models of light trucks (a classification covering vans and pickups, in addition to SUVs) were heavy enough to qualify for the tax break, and that 3.8 million light trucks had been sold in 2001.[36]

The national media quickly picked up the story. Within the next few days, stories describing and criticizing the SUV deduction appeared in the *Wall Street Journal* (noting that "a tax break that was at least partly intended to help farmers buy pickup trucks is now being applied to today's quintessential suburban passenger vehicle"),[37] the *New York Times* (describing three internists sharing a practice, each of whom had purchased a deduction-eligible SUV, and quoting the remark of a spokesperson for an environmental organization that "Congress needs to

[29] ROBERT M. HEAVENRICH, ENVTL. PROT. AGENCY, EPA 420-R-06-011, LIGHT-DUTY AUTOMOTIVE TECHNOLOGY AND FUEL ECONOMY TRENDS: 1975 THROUGH 2006, at 21 (2006).

[30] Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1111(a), 110 Stat. 1755, 1758 (1996).

[31] Jeff Plungis, *SUV, Truck Owners Get a Big Tax Break: Loophole Allows Hefty Write-Off for Vehicles*, DETROIT NEWS, Dec. 18, 2002, at C1.

[32] *Id.*

[33] *Id.*

[34] TAXPAYERS FOR COMMON SENSE, http://www.taxpayer.net/.

[35] Plungis, *supra* note 31, at C1.

[36] *Id.*

[37] Ball & Lundegaard, *supra* note 22, at D1.

step up and close this loophole"),[38] National Public Radio (interviewing a spokesperson for Taxpayers for Common Sense, who favored the repeal of the deduction),[39] and ABC World News Tonight with Peter Jennings (featuring the reporter's observation, "[a]t a time when the nation's priorities are to improve gas mileage and reduce dependence on foreign oil, the government has instead provided an incentive for just the opposite, the biggest, least efficient SUVs available").[40] A *Los Angeles Times* editorial advocated repeal of the SUV loophole "[t]o rein in the wasteful symbolism of this law."[41]

In early January 2003, a columnist for the *Atlanta Journal-Constitution* described the SUV deduction as "[s]ound[ing] too good to be true," and predicted its imminent demise: "So if you're planning to take advantage of this deal, do it soon. I don't think it will be around much longer."[42] It seemed a reasonable prediction at the time, but it could not have been more wrong. A few days earlier, President Bush had proposed tripling the section 179 deduction ceiling, from $25,000 to $75,000.[43] Nothing in the President's proposal was SUV-specific—it applied to all section 179-eligible assets, and there is no indication that he was thumbing his nose at the critics of the SUV deduction—but enactment of the proposal would have hugely increased the existing tax preference for large SUVs over cars and smaller SUVs. It did not take the *Detroit News* long to call attention to that aspect of the proposal with a front-page story.[44] The story quoted the reaction of an excited Hummer dealer—either engaging in hyperbole or displaying an imperfect understanding of the effect of a tax deduction—"Oh, you've got to be kidding . . . . That would make a Hummer practically free."[45] Senator Barbara Boxer quickly leaped into the fray, introducing a bill (co-sponsored by Senators Hillary Clinton and Charles Schumer) to subject SUVs weighing over 6,000

[38] Danny Hakim, *In Tax Twist, Big Vehicles Get the Bigger Deductions*, N.Y. TIMES, Dec. 20, 2002, at C1 (quoting one of the internists, "I have one partner who just did it with a Suburban").

[39] Interview by Bob Edwards with Aileen Roder of Taxpayers for Common Sense, *A Tax Loophole that Allows Business Owners to Depreciate SUVs More Quickly than Cars* (NPR radio broadcast Dec. 26, 2002).

[40] *SUV Loophole Benefits Wealthy,* (ABC World News Tonight broadcast Dec. 27, 2002) (transcript on file with the Lewis & Clark Law Review).

[41] *Loopholes as Big as an SUV*, L.A. TIMES, Dec. 28, 2002, at Cal. Metro 22.

[42] Clark Howard, *Jump on Giant 'SUV Tax Break' While You Can*, ATLANTA J.-CONST., Jan. 9, 2003, at 3NW.

[43] *Excerpts from Bush's Speech on His Proposal to Stimulate the Economy*, N.Y. TIMES, Jan. 8, 2003, at A14.

[44] *See* Jeff Plungis, *SUV Tax Break May Reach $75K: Environmentalists Bash Bush Plan*, DETROIT NEWS, Jan. 20, 2003, at A1.

[45] *Id.*

pounds to the luxury automobile deduction restrictions.[46] According to the *Detroit News*, the Joint Committee on Taxation estimated that Senator Boxer's proposal would increase federal tax revenues by almost $1.3 billion over ten years.[47]

The *Washington Post* reported that, according to an unnamed "senior Republican tax aide," the Senate was interested in closing the SUV loophole.[48] Although the tax bill passed by the Senate did not repeal the SUV deduction, the aide indicated that the loophole had "slipped through as the Senate hurried to pass a bill," and that the Senate negotiators in the conference committee would push for repeal of the deduction.[49] They must not have pushed hard enough, however, because the SUV deduction was intact when the bill emerged from the conference committee.[50] The President's section 179 proposal fared much better, with Congress one-upping the President. Instead of tripling the section 179 ceiling to $75,000, the Jobs and Growth Tax Relief Reconciliation Act of 2003 quadrupled the ceiling to $100,000 (for 2003, 2004, and 2005).[51]

Automobile manufacturers took the tax break into account in designing their vehicles. A spokesman for General Motors told the *Wall Street Journal* that Cadillac responded to dealer complaints about the gross vehicle weight of its SRX model by having its engineers "re-evaluate the vehicle's capabilities so that it would qualify for the tax break."[52] The *Washington Post* reported a car dealer's observation that many new SUV models were just over 6,000 pounds, and his suspicion that "automakers have their eyes on the tax code."[53]

[46] Barbara Boxer, *Boxer Bill Would Limit Depreciation of SUVs*, TAX NOTES TODAY, Feb. 13, 2003, *available at* LEXIS 2003 TNT 30-126; Edward Epstein, *2 Senators Seek Controls on Gas-Guzzling SUVs: Plans by Boxer, Feinstein Face Uphill Battle*, S.F. CHRON., Jan. 30, 2003, at A2.

[47] Jeff Plungis, *SUV Tax Break May Grow: Loophole that Small-Business Owners Use to Buy Trucks Expected to Jump to $100,000*, DETROIT NEWS, May 16, 2003, at B1.

[48] Jonathan Weisman, *President Supports House Tax Bill: Move Seen as Effort to Speed Measure*, WASH. POST, May 21, 2003, at A1.

[49] *Id.*

[50] *See* H.R. REP. NO. 108-126 (2003) (Conf. Rep.).

[51] Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 202, 117 Stat. 752, 757.

[52] Neal E. Boudette & Karen Lundegaard, *SUV Tax Break for Businesses is Likely to End*, WALL ST. J., Oct. 7, 2004, at D6. After the engineers' tinkering, the 2004 SRX model had a gross vehicle weight of 6,008 pounds. *2004 Cadillac SRX*, CARS.COM, http://www.cars.com/cadillac/srx/2004/specs/.

[53] Jonathan Weisman, *Businesses Jump on an SUV Loophole; Suddenly $100,000 Tax Deduction Proves a Marketing Bonanza*, WASH. POST, Nov. 7, 2003, at A1.

C. *The Status Quo Ante Restored*

Opponents of the SUV deduction were quick to criticize its quadrupling. According to the *Wall Street Journal*, critics claimed the enhanced deduction was "inconsistent with the Bush administration's avowed commitment to reducing U.S. dependence on foreign oil."[54] The *Los Angeles Times* editorialized: "It's bad enough that giant SUVs guzzle gas and pollute the air. Congress should halt the ridiculous practice of the government paying people to buy them."[55] Commenting on the widespread criticism, *Automotive News* noted that one would never guess from the news coverage that the revenue cost of the enhanced SUV deduction was less than 0.5% of the tax legislation's total revenue reduction: "If news stories were a proper gauge, we would have to conclude that the most important provision of the giant tax-cut bill that President Bush signed last week was what the reformers call 'the SUV loophole' or 'the Hummer deduction.'"[56]

The clamor appeared to have some effect on the Senate. In October 2003 the Senate Finance Committee voted to re-impose a $25,000 ceiling on the section 179 deduction for SUVs (while retaining the $100,000 section 179 ceiling for all other assets).[57] The Committee explained its rationale for reducing the ceiling:

> [T]he Committee understands that some taxpayers are using section 179 to lower the cost of purchasing certain types of vehicles (1) that are not subject to the luxury automobile limitations imposed by Congress and (2) for which the specific features of such vehicle are not necessary for purposes of conducting the taxpayer's business. The Committee is concerned about such market distortions and does not believe that the United States taxpayers should subsidize a portion of such purchase.[58]

Senator Boxer remarked that she would prefer "clos[ing] the SUV loophole entirely," but that she was "at least relieved that the Committee acted to repeal the expansion of the loophole enacted earlier this year."[59] House negotiators rejected the Senate's loophole-tightening provision,[60]

[54] Stephen Power, *A Tax Break as Big as a Big SUV*, WALL ST. J., May 27, 2003, at D2.

[55] *A Hummer-Sized Loophole*, L.A. TIMES, May 30, 2003, at Cal. Metro 14.

[56] Harry Stoffer, *SUV Passions Overflow in Tax Debate*, AUTOMOTIVE NEWS, June 2, 2003, at 14.

[57] Rob Wells, *Personal Finance—Tax Report: SUV Write-Off Goes Into Reverse*, WALL ST. J., Oct. 9, 2003, at D2.

[58] S. REP. NO. 108-192, at 195 (2003).

[59] Wells, *supra* note 57.

[60] Richard Simon, *Energy Bill Could Pass House Today; Republicans Pack the Measure with State Perks as Cost Estimates of Tax Breaks Reach $23 Billion*, L.A. TIMES, Nov. 18, 2003, at A14.

however, and as 2003 ended the $100,000 deduction ceiling remained in the Code. Sales figures suggested small business owners were responsive to the tax incentive. Dealers sold more than 101,000 full-sized and luxury SUVs in January 2004, a 51% increase over sales in January 2003.[61]

Strong sentiment for reeling in the deduction persisted in the Senate. During the October 2004 House-Senate negotiations on the American Jobs Creation Act, Senator Don Nickles—an Oklahoma Republican about to retire from the Senate—offered an amendment to reduce the SUV deduction under section 179 to $25,000 (while retaining the $100,000 ceiling for other assets, including vans and pickup trucks).[62] Senator Nickles had been "converted" on the issue by his car-dealer son, who called the $100,000 SUV deduction a "rip-off."[63] According to the *Washington Post*, Ways and Means Committee Chairman Bill Thomas "mocked [Nickles'] proposal"[64]—unfortunately, the story provided no details on the nature of the mockery—but the amendment eventually prevailed in conference and became law.[65] The amendment's cause was presumably aided by a letter from Treasury Secretary John Snow indicating that "[t]he Administration supports complete elimination of the 'SUV tax loophole,' except for cases where there is a demonstrated legitimate business need for a large Sport Utility Vehicle."[66] The Alliance of Automobile Manufacturers did not object to Nickles' amendment (although its spokesman indicated it would have preferred eliminating the tax disparity between SUVs and other vehicles by making all vehicles eligible for the $100,000 ceiling).[67] The Joint Committee on Taxation estimated that tightening of the loophole would increase revenues by $137 million in 2005 and $136 million in 2006.[68]

Among those who had opposed the $100,000 deduction ceiling, opinions differed as to whether reducing the ceiling to $25,000 solved the problem. Keith Ashdown of Taxpayers for Common Sense claimed that "[t]his fixes what is probably the biggest outrage in the tax code."[69]

---

[61] Jim Hopkins, *SUV Sales Climb on Tax Loophole*, USA TODAY, Feb. 11, 2004, at 3B.

[62] Dustin Stamper, *Luxury SUV Loophole Curbed in ETI Bill*, TAX NOTES TODAY, Oct.15, 2004, *available at* LEXIS 2004 TNT 200-3.

[63] James Toedtman, *Closing $100G Loophole*, NEWSDAY, Oct. 26, 2004, at A46.

[64] Jonathan Weisman, *Tobacco Rider Adds Fire to Debate over Corporate Tax Bill: Buyout, Regulation Keys in Latest Fight*, WASH. POST, Oct. 6, 2004, at A4.

[65] *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 910, 118 Stat. 1418, 1659 (2004).

[66] John Snow, *Snow Shares Administration's Views on ETI Repeal Bill with Top Taxwriters*, TAX NOTES TODAY, Oct. 6, 2004, *available at* LEXIS 2004 TNT 194-19.

[67] Harry Stoffer, *Tax Bill Losses Outnumber Wins: Congress Cuts Tax Credits for Hybrids, Fuel Cells*, AUTOMOTIVE NEWS, Oct. 11, 2004, at 8.

[68] Stamper, *supra* note 62.

[69] Jeff Plungis, *Bill Curbs SUV Tax Write-Off: The Break for Small-Business Owners is Trimmed to $25,000 instead of $100,000*, DETROIT NEWS, Oct. 7, 2004, at 1B.

His statement was somewhat surprising, in light of the fact that two years earlier, when the SUV deduction ceiling had been $25,000, his organization had strenuously called for complete repeal of the tax favoritism for large SUVs.[70] Senator John McCain remarked on the floor of the Senate that the SUV tax break "is not as bad as it used to be, but it is still too expensive and should be eliminated."[71] National Public Radio commentator Connie Rice included "The Fat SUV Tax Break Preservation Provision" on her list of the "Top 10 Outrages of the Corporate Tax Bill."[72]

Other than some news coverage of taxpayers buying SUVs in December 2004[73]—to take advantage of the $100,000 deduction ceiling before it expired—the SUV deduction has attracted little attention from the media since October 2004. Some members of Congress have continued to press for the elimination of the deduction, but without success. In a reversal of the situation in 2003 and 2004—when the House (with a Republican majority) was the obstacle to legislation to reduce or eliminate the deduction—in 2007 and 2008, the House (with a Democratic majority) passed bills repealing the deduction, but the Senate failed to act. Complete repeal of the SUV deduction was included in a renewable energy and energy conservation bill passed by the House in August 2007, but the Bush White House threatened a veto (not because of the SUV provision) and the bill died in the Senate.[74] The House passed a very similar renewable energy and energy conservation bill—also featuring complete repeal of the SUV deduction—in February 2008, but the White House again promised a veto and the bill again died in the Senate.[75]

III. CONCLUSION

In many ways, the SUV deduction seemed especially vulnerable to repeal. It had originated as an accidental subsidy. It favored a product that was disliked and resented by many Americans. It managed

[70] Interview with Aileen Roder, *supra* note 39.

[71] 150 CONG. REC. 23,288 (2004) (statement of Sen. John McCain).

[72] Connie Rice, *Top 10 Outrages of the Corporate Tax Bill*, NAT'L PUB. RADIO (Oct. 20, 2004), http://www.npr.org/templates/story/story.php?storyId=4117683.

[73] *See, e.g.*, Michelle Higgins, *Big Tax Break Prompts SUV Sales: Shoppers Scramble to Buy Before Dec. 31 Deadline; What It Takes to Qualify*, WALL ST. J., Dec. 23, 2004, at D6.

[74] H.R. 2776, 110th Cong. § 206 (2007); 153 CONG. REC. H9951 (daily ed. Aug. 4, 2007) (passage of H.R. 2776); White House, Office of Mgmt. & Budget, *White House Threatens Veto of House Energy Bills*, TAX NOTES TODAY, Aug. 6, 2007, *available at* LEXIS 2007 TNT 151-61.

[75] H.R. 5351, 110th Cong. § 203 (2008); 154 CONG. REC. H1131 (daily ed. Feb. 27, 2008) (passage of H.R. 5351); Meg Shreve, *House Passes Energy Tax Package*, TAX NOTES TODAY, Feb. 28, 2008, *available at* LEXIS 2008 TNT 40-1.

simultaneously to constitute bad tax policy, bad energy policy, and bad environmental policy, in ways easily understood by the general public. It received extensive negative media coverage. The Bush administration (which seldom met a tax break it did not like) favored its repeal, and automobile manufacturers made no attempt to defend it. If Congress has not managed to repeal the SUV deduction, it seems unlikely that the results of the carbon audit will inspire Congress to repeal other—seemingly less vulnerable—environmentally damaging provisions of the federal tax code.

On the other hand, the increase in the section 179 ceiling from $25,000 to $100,000 may have worked strongly in favor of the deduction's survival. The public outcry over the deduction seemed to demand *some* legislative response, and in the absence of the increase in the ceiling, the only obvious response would have been elimination of the loophole. Given the ceiling increase, however, Congress could satisfy the demand for some sort of action merely by returning the loophole to its original $25,000 level. Those with short memories—including, apparently, Taxpayers for Common Sense—would not recall that less than two years earlier they had been outraged by a $25,000 section 179 deduction for a large SUV.[76] Perhaps the Duke of York ("he marched them up to the top of the hill and marched them down again") aspect of the story was crucial to the deduction's survival. If so, the story may tell us little about the likely fate of other environmentally objectionable provisions of the Internal Revenue Code. One might also point out, as an additional reason for optimism, that Congress did manage in 2008 to modestly reduce tax deductions for the oil and gas industry, thus proving that reductions in anti-green tax subsidies are not absolutely impossible.[77]

[76] The satisfaction of Taxpayers for Common Sense with the return of the loophole to its original (and previously objectionable) size is reminiscent of the Yiddish folk tale about the man who asks his rabbi for help with the overcrowding problem in his house. The rabbi tells the man to move his farm animals into the house. This, of course, only makes the problem worse. When the rabbi later tells the man to take the animals out of the house, the man is overjoyed that his house no longer seems crowded—even though it is just as crowded as when he first asked the rabbi for help. For a fine telling of the story in an illustrated children's book, see MARGOT ZEMACH, IT COULD ALWAYS BE WORSE (1976). My thanks to Neil Buchanan for suggesting the analogy between the story of the SUV loophole and the story of the man with the overcrowded house.

[77] Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, §§ 401–02, 122 Stat. 3807, 3851–54 (2008) (limiting the domestic production activities deduction for income attributable to oil and gas production, and revising the foreign tax credit rules applicable to foreign oil and gas income). *See* J. COMM. ON TAXATION, 110TH CONG. ESTIMATED BUDGET EFFECTS OF THE "ENERGY IMPROVEMENT AND EXTENSION ACT OF 2008," SCHEDULED FOR CONSIDERATION ON THE SENATE FLOOR ON SEPTEMBER 23, 2008., at 4–5 (JCX-70-08R, 2008) (estimating the revenue effect of the two provisions, combined, at approximately $7 billion over ten years).

I am not wholly persuaded by the case for optimism. Despite the unusual Duke of York aspect of the SUV provision, it is hard to escape the conclusion that, all things considered, the SUV loophole was about as politically vulnerable as any anti-green tax break is ever likely to be. If that conclusion is correct, then the prospects for the greening of the Internal Revenue Code are not good. Part of the problem is a mindset, shared by a significant number of members of Congress, that tax increases are always bad, and that any closing of a loophole—no matter how unjustified the loophole may be—is a tax increase and thus must be resisted.[78] Of course, political conditions are always changing, and (as the investment advisors say) past performance is no guarantee of future results. Increasing political concerns about budget deficits may make closing the loophole more attractive in the next few years than it was in the previous decade. Perhaps conditions in the not-too-distant future will be favorable for not only the repeal of the SUV loophole, but for the repeal of many other non-green tax provisions as well. One can always hope.

[78] *See, e.g.*, *SUV Loophole Provision to Face Stiff House Fight in FSC Negotiations*, 3 INSIDE FUELS & VEHICLES, Apr. 23, 2004 ("[A]ttempts to shrink the loophole have so far been unconvincing to House Republicans who view the provision as a tax increase, a House source said.").