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SULLIVAN, J., dissenting in part and concurring in the result. The majority holds that General Statutes § 12-701 (a) (19)[1] incorporates the federal tax benefit rule into Connecticut's income tax statutes, but that the plaintiffs are not entitled to the benefit of that rule in this case. I would hold that, while the dollar amount of “adjusted gross income . . . as determined for federal income tax purposes”; General Statutes § 12-701 (a) (19); reflects the operation of the *federal* tax benefit rule, there is no separate Connecticut tax benefit rule.

The majority concludes that it would “hamstring our legislature” to require it to anticipate and identify each doctrine of federal tax methodology that it wishes to incorporate into Connecticut tax statutes. I believe, however, that the majority has usurped the legislative function by incorporating a federal tax methodology, namely, the federal tax benefit rule, into § 12-701 (a) (19) when there is no indication that the legislature contemplated the incorporation of any such rule. In each case relied on by the majority in support of its stated principle that this court has “construed general statutory references to the federal tax code as incorporating federal tax principles into our statutes,” this court had found in the particular statute under review: (1)

an explicit reference to federal tax law; (2) a term that requires interpretation by reference to general tax concepts; and (3) *some* indication that the legislature intended the term under review to be interpreted in light of federal tax concepts. See, e.g., ***Ruskewich*** v. ***Commissioner of Revenue Services***, 213 Conn. 19, 25–27, 566 A.2d 658 (1989) (construing statutory language "after due allowance for losses and holding periods," noting that "the legislature clearly intended that losses be accounted for when net gain is computed," that "[t]he only guidance the legislature [gave] on how to account for losses [was] through its reference to federal tax law" and that statute made "repeated reference to federal tax code," and holding that federal tax concepts applied for purposes of treating capital loss carryovers under Connecticut capital gains tax [internal quotation marks omitted]); ***Harper*** v. ***Tax Commissioner***, 199 Conn. 133, 138–39, 506 A.2d 93 (1986) (considering whether sale of patent should be treated as sale of capital asset for purposes of statute governing Connecticut capital gains tax, which explicitly refers to federal tax code, and holding that federal tax concepts applied); see also ***Kellems*** v. ***Brown***, 163 Conn. 478, 505–507, 313 A.2d 53 (1972), appeal dismissed, 409 U.S. 1099, 93 S.Ct. 911, 34 L. Ed. 2d 678 (1973) (noting that "it is obvious that the legislature intended to incorporate and adopt" federal tax concepts and that statute shows a clear intent to adopt federal tax methodology, and holding that federal tax concepts apply for purposes of construing terms "occurring" and "net gains" in statute governing Connecticut capital gains tax [internal quotation marks omitted]).

In contrast to those cases, there is no explicit reference to the federal tax code in the income tax statute at issue in this case. Rather, the statute refers to "adjusted gross income . . . as determined for federal income tax ***purposes***." (Emphasis added.) General Statutes § 12-701 (a) (19). For reasons set forth more fully later in this dissenting opinion, I believe that this phrase simply refers to a number, not a methodology. Accordingly, I do not believe that the statute contains any term, phrase or concept that requires interpretation by reference to the federal tax code. Therefore, I am not persuaded that the cases relied on by the majority support its conclusion that § 12-701 (a) (19) incorporates federal tax methodology. Rather, that statute incorporates the specific number derived from that methodology.

The majority holds that, even though § 12-701 (a) (19) makes no explicit reference to the federal tax code, much less to the tax benefit rule, "[i]t is clear. . . that the federal tax benefit rule is incorporated into § 12-701 (a) (19) as a part of the definitional phrase 'adjusted gross income' . . . ." The issue, however, is not whether the *federal* tax benefit rule will operate to exclude from taxation under the Connecticut statute

income covered by the exclusionary aspect of the federal rule, or to include income covered by the inclusionary aspect of the rule. There is no dispute that it will. This is because, pursuant to 26 U.S.C. § 111,[2] the exclusionary aspect of the federal tax benefit rule, such income is not included in the calculation of federal adjusted gross income that is reported on the federal tax return, on which the Connecticut income tax is imposed, as such reported income is modified, for Connecticut income tax purposes, pursuant to the modification provisions of General Statutes § 12-701 (a) (20).[3] Likewise, under the operation of the inclusionary aspect of the federal tax benefit rule, federal adjusted gross income will include recovered losses subject to the rule. The issue in this case is whether, after gross income is adjusted for purposes of the federal income tax, including adjustments to gross income pursuant to 26 U.S.C. § 111, the adjusted gross income reported on the federal income tax return may be adjusted further pursuant to a *Connecticut* tax benefit rule for Connecticut income tax purposes. I do not see any reason why it should be.

The following hypothetical, which is somewhat simpler than the facts of this case, illustrates one ramification of the majority's holding: A taxpayer, in year one, incurs a loss and receives a federal tax benefit because his income is reduced by that loss. For some reason, however, he receives no Connecticut tax benefit from the loss.[4] In year two, the taxpayer recovers the loss. The taxpayer must pay federal income tax on the recovered income in year two, pursuant to the inclusionary aspect of the tax benefit rule. Under the majority's holding, however, because the taxpayer received no Connecticut tax benefit in year one, he may exclude the recovered income for Connecticut income tax purposes in year two. Accordingly, the adjusted gross income reported on the taxpayer's federal income tax return in year two would have to be modified on his Connecticut income tax return to reflect the exclusion of the recovered loss for Connecticut income tax purposes.

I do not see how such a modification could be "for federal income tax purposes" pursuant to § 12-701 (a) (19). Furthermore, nothing in General Statutes (Rev. to 1993) § 12-701 (a) (20), as amended by Public Acts 1993, No. 93-74, § 39, and Public Acts, Spec. Sess., May, 1994, No. 94-4, § 26, suggests that such a modification was contemplated by the legislature. In that portion of the statute, the legislature, in defining " 'Connecticut adjusted gross income,' " provided eighteen specific modifications to adjusted gross income, not including any modification equivalent to the federal tax benefit rule. As the majority notes, this court repeatedly has held "that deductions from otherwise taxable income are a matter of legislative grace and hence are strictly construed against the taxpayer. . . . Thus, in order for the taxpayers to prevail in their challenge of the commissioner's disallowance of [their] claimed deductions,

they must establish clearly and unambiguously the right to claim a deduction . . . ."[5] (Citations omitted; internal quotation marks omitted.) *Bolt Technology Corp.* v. *Commissioner of Revenue Services*, 213 Conn. 220, 227–28, 567 A.2d 371 (1989); see footnote 7 of the majority opinion. I believe that the deduction for a taxpayer's windfall recovery of a previous loss for Connecticut income tax purposes, pursuant to the exclusionary aspect of a Connecticut tax benefit rule, should be a matter of legislative grace, not of judicial fiat. In my view, the plaintiffs in this case have not established any statutory basis for such a deduction.

The majority suggests, and I do not necessarily disagree, that the tax benefit rule is a matter of "common sense" and that it is " 'an equitable doctrine.' " The majority also enumerates several policy justifications for the rule.[6] See part III of the majority opinion. This court previously has indicated, however, that "the fairness of [Connecticut's] tax [statutes] is within the prerogative of the legislature, and not of this court." *Yaeger* v. *Dubno*, 188 Conn. 206, 213, 449 A.2d 144 (1982). Whether the federal tax benefit rule may be a sensible or equitable rule is irrelevant in determining whether the legislature intended to incorporate such a rule in Connecticut income tax statutes. There is no reason to believe that the legislature had any such intention. Additionally, I would note that there may be other unforeseen, adverse consequences to incorporating the entire body of federal income tax methodology into the phrase "adjusted gross income . . . as determined for federal income tax purposes." General Statutes § 12-701 (a) (19). Accordingly, I believe that that phrase simply means what it says: adjusted gross income as determined for purposes of calculating the taxpayer's federal income tax. In other words, it is the adjusted gross income reported on the taxpayer's federal income tax form.

My conclusion is supported by a comparison of Connecticut Form CT-1040 for the 1994 tax year, issued by the department of revenue services, with United States Individual Income Tax Return Form 1040 for the same tax year. The Connecticut form does not require the taxpayer to calculate federal adjusted gross income in accordance with the federal methodology. Rather, line 1 of the Connecticut form, which provides, "Federal Adjusted Gross Income (from Federal Form 1040, Line 31 or Form 1040A, Line 16, or Form 1040EZ, Line 3)," simply requires the taxpayer to report the line item amount calculated on the federal form. It fairly may be assumed that the legislature was aware of the form and content of the 1994 Connecticut Form CT-1040. The legislature has never suggested that that form was inconsistent with the intent of the tax legislation that it was designed to implement. When the legislature is aware of an agency's interpretation of a statute and is silent concerning that interpretation, this court "con-

strue[s] the legislative silence as legislative concurrence in that interpretation. That legislative concurrence is presumptive evidence of the correctness of the administrative interpretation. . . . This presumptive evidence of correctness we add to the persuasive effect normally given to an administrative interpretation. Coupled, these two considerations outweigh any arguments that might be advanced for a contrary interpretation.'' (Citation omitted; internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Public Utilities Control Authority*, 176 Conn. 191, 199, 405 A.2d 638 (1978).

In summary, I do not believe that the legislature intended to incorporate a Connecticut tax benefit rule into the Connecticut income tax statutes. Accordingly, I dissent in part. To the extent that the majority upholds the trial court's disallowance of the plaintiffs' claimed deduction under the tax benefit rule, I concur in the result.

[1] General Statutes § 12-701 (a) (19) provides: '' 'Adjusted gross income' means the adjusted gross income of a natural person with respect to any taxable year, as determined for federal income tax purposes.''

[2] Title 26 of the United States Code, § 111, provides in relevant part: ''Gross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter. . . .'' 26 U.S.C. § 111 (1994).

[3] See footnote 8 of the majority opinion for the text of the relevant revision of General Statutes § 12-701 (a) (20).

[4] This can occur, even without the loss, because modifications to the taxpayer's income, pursuant to § 12-701 (a) (20), may reduce the taxpayer's income to an amount not subject to the imposition of the income tax.

[5] The majority states that the existence of a Connecticut tax benefit rule for purposes of determining Connecticut adjusted gross income ''does not involve any determination of the existence, or nonexistence, of an exemption or deduction, inasmuch as the proper methodology for determining adjusted gross income predates, in the chronology of our income tax scheme, the question of exemptions or deductions.'' Footnote 7 of the majority opinion. I recognize that the federal tax benefit rule does not involve the determination of the existence or nonexistence of an exemption or deduction inasmuch as a recovered loss is not treated as a deduction under the exclusionary aspect of the rule; it simply is not considered income. See 26 U.S.C. § 111 (1994). The majority begs the question, however, when it states that the existence of a Connecticut tax benefit rule does not involve the determination of the existence of an exemption or deduction. The majority assumes what it should demonstrate: that § 12-701 (a) (19) incorporates the methodologies of the federal income tax scheme, as distinct from the number derived from those methodologies.

Unlike the federal income tax scheme, Connecticut's income tax statutes do not make a distinction between nonincome items and deductions. Section 12-701 (a) defines adjusted gross income as ''adjusted gross income . . . for federal income tax purposes''; General Statutes § 12-701 (a) (19); and then provides for eighteen specific modifications to that number for purposes of calculating Connecticut adjusted gross income. See General Statutes (Rev. to 1993) § 12-701 (a) (20), as amended by Public Acts 1993, No. 93-74, § 39, and Public Acts, Spec. Sess., May, 1994, No. 94-4, § 26. I believe that if the taxpayer wishes to modify adjusted gross income for some purpose unrelated to federal tax purposes, and the modification results in a reduction in taxable income for Connecticut income tax purposes, the taxpayer clearly and unambiguously must establish the right to make that modification. *Bolt Technology Corp.* v. *Commissioner of Revenue Services*, 213 Conn. 220, 227–28, 567 A.2d 371 (1989).

[6] I would point out, however, that there may be sound reasons why the legislature would not want to adopt such a rule. First, because the dollar amount of adjusted gross income reported on a taxpayer's federal income tax return already reflects the operation of the federal tax benefit rule, the state and the taxpayer will generally, although, as the facts of this case

suggest, not always, obtain the benefits of the rule, even without the operation of a separate Connecticut rule. Thus, the policy reasons supporting the federal rule are not as compelling when advanced in support of a Connecticut rule. Second, it appears that the use of a specific dollar amount from the federal income tax form, as opposed to the incorporation of the entire methodology for calculating that dollar amount, makes the determination of adjusted gross income for Connecticut income tax purposes vastly simpler for both the taxpayer and the state.