1986

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Original Citation
Deborah A. Geier, The Emasculated Role of Judicial Precedent in the Tax Court and Internal Revenue Service, 39 Oklahoma Law Review 427 (Fall 1986)

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THE EMASCULATED ROLE OF JUDICIAL PRECEDENT IN THE TAX COURT AND INTERNAL REVENUE SERVICE

DEBORAH A. GEIER

Introduction

Consider the 1974 cases of Doehring v. Commissioner and Puckett v. Commissioner. Doehring and Puckett were 50 percent co-owners of a regulated loan company under the Tennessee Industrial Loan and Thrift Act (Tennessee Act). Although the company timely elected to be taxed under subchapter S, the Commissioner of Internal Revenue contended that service charges such as those authorized under the Tennessee Act constituted interest, thus terminating the subchapter S election by operation of law. Doehring, a resident of Missouri, was within the jurisdiction of the Eighth Circuit Court of Appeals, while Puckett, a resident of Alabama, was within the jurisdiction of the Fifth Circuit. The Eighth Circuit had not addressed the issue; the Fifth Circuit had held lending or finance companies to be exempt from the termination of election provisions.

Both Puckett and Doehring challenged the Commissioner's deficiency ruling in the United States Tax Court, a trial court of national jurisdiction. Imagine the feeling of gross inequity Doehring must have experienced when

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1. 33 T.C.M. (CCH) 1035 (1974).
2. 33 T.C.M. (CCH) 1038 (1974).
3. In general, subchapter S of the Internal Revenue Code allows certain small business corporations to elect to avoid a corporate-level tax in most situations. The statutory scheme provides for tax treatment similar to that of partnerships and partners under subchapter K. See generally J. Eustice & J. Kuntz, Federal Income Taxation of Subchapter S Corporations (1982).
5. Taxpayers challenging a deficiency have their choice of three trial forums: the United States Tax Court, the United States Claims Court, and the various federal district courts. In both the Claims Court and federal district court, the taxpayer must first pay the alleged tax liability and then sue for a refund. See I.R.C. § 7422 (1982). The taxpayer need not pay the tax in advance to sue in the Tax Court, the most common forum for tax litigation today. See I.R.C. §§ 7451-65 (1982). As of 1969, more than 80 percent of tax cases were litigated in the Tax Court. See H. Duboff, The United States Tax Court: An Historical Analysis 211 n.327 (1979). See generally Marvel, Forum Selection in Federal Tax Litigation, 8 Litigation 39 (1982) (analyzing the salient factors in choosing the appropriate forum).
the Tax Court ruled against him, but in favor of his co-owner. Although contrary to its own thinking on the issue, the Tax Court felt constrained in Puckett’s case to follow the prior Fifth Circuit precedent. In Doehring’s case, the Tax Court ignored the Fifth Circuit precedent and ruled as it saw fit. Under what authority can the Tax Court, a trial court subordinate to twelve circuit courts of appeals, ignore circuit precedents? What is the cost of such a practice in terms of uncertainty, lack of uniformity, inefficient judicial administration, and loss of taxpayer confidence in a system dependent upon voluntary compliance? Such cases as Doehring and Puckett undermine taxpayers’ perceptions of the tax system’s overall logic and fairness.

The story would have been further complicated if the Internal Revenue Service (Service) had decided to nonacquiesce in the Tax Court’s decision in

6. 33 T.C.M. at 1038.
7. Id. at 1040.
A similarly egregious outcome occurred in the Tax Court cases of Fausner v. Commissioner, 55 T.C. 620 (1971) and Hitt v. Commissioner, 55 T.C. 628 (1971). Both Fausner and Hitt were airline pilots who drove to work at New York airports. Each carried 40-pound flight bags containing equipment required by the U.S. government and their employer airlines. Since public transportation was inadequate, both taxpayers would have driven to work even if their flight bags were not prohibitively heavy to carry on public transit. Nevertheless, both taxpayers attempted to deduct their traveling expenses as ordinary and necessary business expenses under I.R.C. § 162.

Fausner resided within the jurisdiction of the Second Circuit, and the Fausner court ruled in favor of the taxpayer on the basis of precedent. In Sullivan v. Commissioner, 368 F.2d 1007 (2d Cir. 1966), the Second Circuit had held that a taxpayer may deduct the portion of driving costs reasonably allocable to the transportation of tools, even though he would have driven had he not needed to carry his tools.

Hitt, on the other hand, was denied his deduction since he moved to Texas before initiating his litigation, and there was no controlling Fifth Circuit precedent on the issue. With no case directly on point in the circuit to which the taxpayer could appeal, the Tax Court felt free to rule as it thought correct. The Tax Court disagreed with Sullivan and held no deduction was available.

9. More than twenty-five years ago, one commentator noted:

This conflict between the Tax Court and the circuit courts of appeals involves more than a mere dispute among forums as to proper statutory constructions. It exposes a jurisprudentially unhealthy situation in which the law is unevenly enforced and in which there is no finality until the Supreme Court speaks. The resultant atmosphere of unfairness and uncertainty affects the rights of all taxpayers, whether or not they resort to the courts.

Note, Controversy Between the Tax Court and Courts of Appeals: Is the Tax Court Bound by the Precedent of its Reviewing Court?, 7 DUKE L.J. 45, 50-51 (1957).
11. The Service announces its position, whether an acquiescence or a nonacquiescence, only with regard to issues won by the taxpayer. In cases with multiple issues, an acquiescence or nonacquiescence relates only to issues decided adversely to the government. For example, if a decision is favorable to the government on the first issue and unfavorable on the second, an acquiescence or nonacquiescence would be called for only with respect to the second. Furthermore, an “acquiescence in decision” or “in result” means the Service accepts the conclusion
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Puckett. A similarly situated Alabama resident would have been forced to relitigate the same issue, even though both the controlling Fifth Circuit precedent and the Tax Court had found in favor of the taxpayer on the same issue. Although the Service did not issue a nonacquiescence in Puckett, the hypothetical case illustrates some of the problems associated with the Service's nonacquiescence practice. Under what authority can the Service refuse to follow Tax Court decisions? Similarly, under what authority can the Service refuse to follow circuit court decisions through its practice of issuing Revenue Rulings which state that it will not follow certain circuit court decisions?

It may be true that conflicts between the Tax Court and circuit courts and between the Service and both the Tax Court and circuit courts are few in absolute number. These conflicts, however, illustrate the most serious problem with the current system of tax dispute resolution: it provides for the possibility of easily generating a conflict that encourages taxpayers and the Internal Revenue Service to assert positions contrary to existing precedent. Certainty and predictability within the tax field are compromised when the Tax Court ignores certain circuit court precedents and because the Service feels itself bound only by Supreme Court decisions. Uncertainty encourages

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10. See supra note 14, at 549. See id. at 550 for an illustrative example of protracted uncertainty with regard to the taxability of state troopers' meal allowances. In brief, the Tax Court first held in 1953 that such meal allowances were taxable. Hyslope v. Commissioner, 21 T.C. 131 (1953). Over the next twenty-four years, the various circuit courts agreed or disagreed with the Tax Court. The Third, Eighth, and Tenth Circuits disagreed, holding that these allowances were nontaxable. Saunders v. Commissioner, 215 F.2d 768 (3d Cir. 1954); United States v. Morelan, 356 F.2d 199 (8th Cir. 1966); United States v. Keeton, 383 F.2d 429 (10th Cir. 1967). The First Circuit and initially the Fifth agreed with the Tax Court. Wilson v. United States, 412 F.2d 694 (1st Cir. 1969); Magness v. Commissioner, 247 F.2d 740 (5th Cir. 1957), cert. denied, 355 U.S. 931 (1958). The Fifth Circuit, however, later changed its mind. United States v. Barrett, 321 F.2d 911 (5th Cir. 1963). Finally, the Supreme Court resolved the issue in 1977 by affirming the original position of the Tax Court that such allowances are taxable. Commissioner v. Kowalski, 434 U.S. 77 (1977).
litigation, which, according to former Tax Court Chief Judge Tannenwald, is the Tax Court's most pressing problem. 

This article examines the two entities most culpable in contributing to this lack of coherence and certainty: the Tax Court and the Internal Revenue Service. Part I discusses the structural and decision-making evolution of the Tax Court as well as the most common recommendation for change—the creation of a National Court of Tax Appeals. Part II examines the nonacquiescence practice of the Internal Revenue Service and the current state of the law with respect to intracircuit nonacquiescence. The article concludes that an expanded concept of stare decisis can alleviate many of the problems without the massive structural change entailed in the creation of a National Court of Tax Appeals.

I. The Tax Court

The Tax Court's current attitude toward circuit court precedent is a product of an incremental evolution responding to narrow concerns. The scheme is not the end result of a grand master plan that should remain untouched. 

According greater respect to circuit court decisions is consistent with the direction in which the Tax Court has been developing.

Structural and Decision-making Evolution

The Revenue Act of 1924

The Board of Tax Appeals, predecessor of the Tax Court, was created in 1924. 

The Board provided a means of preassessment adjudication of tax disputes. 

A December 17, 1923 letter from Secretary of the Treasury Andrew Mellon to William Green, Chairman of the Ways and Means Committee, described the proposal:

A board of tax appeals is created to hear all appeals from the assessment of additional income and estate taxes, which will sit locally in the various judicial circuits throughout the country. The cases of both the Government and the taxpayer are presented before the board which acts impartially and the practice there is similar to that before the Interstate Commerce Commission. Upon a decision in favor of the Government, the additional tax can be assessed by the Commissioner of Internal Revenue and the taxpayer is left


17. See H. Friendly, Federal Jurisdiction: A General View 161 (1973) ("The structure for the judicial determination of disputes over United States taxes incapable of resolution at the administrative level is the result of history rather than logic.").


19. Many consider this the chief impetus behind the creation of the Board. See Ginsberg, Is the Tax Court Constitutional?, 35 Miss. L.J. 382, 382-83 (1964).
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... to his remedy in the courts for a recovery of the tax. If the decision is in favor of the taxpayer, the Commissioner may not assess the tax but is left to his remedy in the courts in a suit to collect the additional tax. In a hearing in the courts, the findings of the board shall be taken as prima facie evidence of the facts contained therein.20

The reference to the Interstate Commerce Commission makes clear that the Board was to be viewed not as a court but rather as an administrative agency. In fact, as the proposal was initially drafted, the Board was to be independent of the Bureau of Internal Revenue, but "established within the Department of the Treasury."21 As finally enacted, however, the 1924 legislation designated the Board as "an independent agency in the executive branch."22

The Revenue Act of 1926

The Revenue Act of 1926 further refined the Board.23 Although certain officials advocated transforming the Board into a court,24 and although the committee reports were replete with descriptions of the jurisdiction of the Board as essentially judicial rather than administrative,25 Congress declined to make the Board of Tax Appeals a court of record. What Congress did do, however, was to make decisions of the Board of Tax Appeals reviewable by the circuit courts of appeals.26 This obviated the needless duplication of trials inherent under the 1924 procedures.27

This seemingly simple solution to the problem of duplicative trials gave rise to the problem which is the subject matter of this article.28 The Tax Court occupied, and continues to occupy, a unique position in the tax litigation struc-

21. Id. at 52, 55.
22. Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 338. The judicial characteristics of the Board were recognized even then. In signing the Revenue Act of 1924 into law, President Coolidge remarked, "The provisions of the bill, however, with reference to the Board, make it in its essentials practically a court of record." Reprinted in H. Dubroff, supra note 5, at 66.
27. See H. Dubroff, supra note 5, at 116-18.
28. This solution prompted a three-year controversy with respect to the constitutionality of the prescribed appellate procedure. There was some doubt whether Board actions constituted a case or controversy reviewable by article III courts. See H. Dubroff, supra note 5, at 122-24. Review of the agency record formed below was feared to be a legislative or administrative duty not within the purview of article III courts. The committee reports accompanying the 1926 Act argued that Board decisions are judicial decisions and hence review of them would not constitute an impermissible imposition of a nonjudicial duty. Id. at 123. The Supreme Court settled any doubt in Old Colony Trust v. Commissioner, 279 U.S. 716 (1929), by concluding that Board decisions satisfied case or controversy requirements, notwithstanding that the Board was not a "court" but an "executive or administrative board." Id. at 725; H. Dubroff, supra note 5, at 124.
It is a single court with nationwide trial jurisdiction. From this single inferior tribunal, appeal fans out to twelve coordinate courts of appeals, forming what has been referred to as an inverted pyramid structure. This is contrary to the normal appellate pyramid where a number of trial courts are subject to a single appellate court at the apex. As early as 1933, the problem inherent in such a system became apparent, prompting one commentator to label it "an anomalous and topsy-turvy appellate system." Since the twelve courts of appeals are of coordinate rank, they are free to disagree among themselves. This raises the question as to the extent the single Tax Court is bound by a particular court of appeals ruling.

1942—The Board Becomes a Court in Name

The Revenue Act of 1942 changed the name of the Board of Tax Appeals to the Tax Court of the United States, and changed the statutory designation of Board "members" to "judges." Yet, no amendment was sought

29. The tax litigation structure as a whole has been subject to criticism. It was said more than forty years ago: "If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 Courts with original jurisdiction, 11 appellate bodies of coordinate rank, and only a discretionary review of relatively few cases by the Supreme Court." R. Magill, The Impact of Federal Taxes 209 (1943).

30. Although the Tax Court is a single court based in Washington, D.C., Tax Court Rules 40 and 177 permit the taxpayer to request the place of trial. A single Tax Court judge will travel to the requested location, and the trial is usually held in the local federal courthouse. Marvel, supra note 5, at 41.

This practice of using the local federal courthouse was one of the many reasons forwarded for renaming the Board of Tax Appeals in 1942 to the Tax Court of the United States. Those in control of court space throughout the country were reluctant to permit administrative hearings in their facilities. The prohibition extended to the Board as well since it was an administrative body in name. See H. Dubroff, supra note 5, at 178.


32. Id.

33. See infra notes 58-66 & 73-88 and accompanying text.


35. The House had originally adopted the name "United States Tax Court." The change to "Tax Court of the United States" was made at the request of the publisher Commerce Clearing House. One of its series of books is entitled "United States Tax Cases," and the publishing house was concerned about the identity of initials of the court and the books. See H. Dubroff, supra note 5, at 184. Apparently no such concern was voiced in 1969 when the name was finally changed to the "United States Tax Court."

36. The impetus for this change came from the members' discomfort at being inadvertently addressed as "judge." A letter from Board Chairman Murdock to Colin Stam, chief of staff of the Joint Committee on Internal Revenue Taxation, contained the following observation:

It is frequently necessary, during the course of a trial and at other times, for persons to address Members of the Board. Practitioners and others have been at a loss to find any convenient title which is at the same time proper. They are sometimes embarrassed in this connection and the situation is always awkward. The fact of the matter is that they do not choose to use any such proper title as Mr. or Member. Occasionally, Commissioner is heard, but, generally, for their own convenience, persons address the Members as Judges. This puts the Members in a false and uncomfortable position which seems entirely undesirable for a tribunal of the dignity and importance of the Board. The change in name would immediately relive this situation.
to alter the status of the court as an agency in the executive branch. Chairman Murdock, whose tenure on the Board/Tax Court from 1926 to 1961 was longer than any other person, played a key role in the passage of the 1942 Act. He cited three principal reasons for the name change. First, it would reduce public confusion; second, it would allow the Board to enforce its own processes; and third, it would "validate the generally recognized view that the Board was a court in everything but name."

Although seemingly innocuous, the name-change proposal was vehemently opposed by Attorney General Biddle. He regarded the proposal as the "first step in a concerted effort to change the Board into a full-fledged court." Furthermore, he disagreed that the Board was a court in everything but name, citing the Supreme Court designation of the Board as an "administrative body," its statutorily limited jurisdiction, its lack of ability to enforce its decisions, and its lack of the inherent powers of a court, such as the contempt power. Nevertheless, Chairman Murdock's proposal carried the day.

1943—Dobson v. Commissioner

The 1926 Act had defined the scope of appellate review of Tax Court decisions by the circuit courts as the "power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require." The 1926 committee reports evidence an intent to restrict appellate review "to what are commonly known as questions of law." The confines of this mandate remained unquestioned until the 1943 landmark decision by the Supreme Court in Dobson v. Commissioner.

Dobson involved taxpayers who sold stock at a loss in years in which their deductions exceeded their income, so no benefit was obtained from the loss deductions. Several years later, the taxpayers successfully sued the sellers of

Id. at 179. Upon passage of the Act, Chairman Murdock remarked, "I am . . . frank and glad to acknowledge that I will take great personal satisfaction from having the right to be called Judge, and to be relieved of the embarrassment which I have heretofore felt when so frequently people address me by that unauthorized title." Id. at 184.

Another change enacted at this time was the so-called Dingell amendment which provided for lay practice before the Board. See id. at 182. It provided that "no qualified person shall be denied admission to practice before . . . [the Tax Court] because of his failure to be a member of any profession or calling." Revenue Act of 1942, ch. 619, § 504(b), 56 Stat. 957 (now I.R.C. § 7452).

37. H. Dubroff, supra note 5, at 177.
38. Id.
39. Id. at 178. See also supra notes 30 & 36 and accompanying text for two additional subsidiary reasons.
40. H. Dubroff, supra note 5, at 179.
41. Id. at 180.
42. See supra note 28.
43. H. Dubroff, supra note 5, at 180.
44. Revenue Act of 1926, ch. 27, § 1003(b), 44 Stat. 110.
46. 320 U.S. 489 (1943), reh'g denied, 321 U.S. 231 (1944).
the stock for fraud and Securities Act violations. The recoveries plus the proceeds from the stock sales totaled less than the purchase price of the stock. After submission on stipulated facts, the Board of Tax Appeals ruled the recoveries excludable from income by applying the "tax benefit" doctrine. The Eighth Circuit reversed, holding that each tax year must stand on its own.

The Supreme Court reversed the Eighth Circuit, affirming the Tax Court. In doing so, however, Justice Jackson's celebrated opinion changed the complexion of appellate review of Tax Court decisions. By limiting reviewable questions to isolated and pure questions of law, the Supreme Court substantially narrowed the appellate review of Tax Court decisions. Mixed questions of law and fact were made nonreviewable. Moreover, nonreviewable questions of fact were expansively defined to include the Tax Court's application of the tax benefit doctrine, since, the Court concluded, it was not a rule of law but only "a question of proper tax accounting." In distinguishing questions of law from fact, the Court stated, "[W]hen the [reviewing] court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand." Thus, the Supreme Court created by fiat a strong presumption in favor of the Tax Court.

The Dobson doctrine garnered few proponents. Commentators noted the disparity between the statutory standard of "not in accordance with law" and the Dobson standard of "clear-cut mistake of law." They questioned the characterization of accounting matters as questions of fact. Finally, Dobson complicated the review process since a threshold determination was required as to whether the Tax Court question was reviewable. Congress finally reacted in 1948 by making the scope of review in appeals from Tax Court decisions the same as in appeals from district court decisions tried without a jury.

1957—Lawrence v. Commissioner

The question raised but left unanswered by the Revenue Act of 1926—the extent to which the single Tax Court is bound by a particular court of appeals ruling—was finally confronted by the Tax Court in Lawrence v. Com-

48. Harwick v. Commissioner, 133 F.2d 732, 735-37 (8th Cir. 1943).
49. 320 U.S. at 507.
50. Id. at 506-07.
51. Id. at 502.
52. See, e.g., Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact, 57 Harv. L. Rev. 753 (1944). But see Nevitt, Achieving Uniformity Among the 11 Courts of Last Resort, 34 Taxes 311 (1956) (eight years after Dobson's demise, the author advocating a return to limited review of Tax Court decisions).
53. See supra note 44 and accompanying text.
54. See H. Duboff, supra note 5, at 383.
56. H. Duboff, supra note 5, at 383-84.
58. See supra notes 28-33 and accompanying text.
Although appellate jurisdiction was in the Ninth Circuit, the Tax Court refused to follow Ninth Circuit precedent favorable to the taxpayers. The primary reason advanced by the Tax Court for its position was its perceived statutory mandate to create uniformity:

The Tax Court has always believed that Congress intended it to decide all cases uniformly, regardless of where, in its nationwide jurisdiction, they may arise, and that it could not perform its assigned functions properly were it to decide one case one way and another differently merely because appeals in such cases might go to different Courts of Appeals. Congress, in the case of the Tax Court, "inverted the triangle" so that from a single national jurisdiction, the Tax Court appeals would spread out among 11 Courts of Appeals, each for a different Circuit or portion of the United States. Congress faced the problem in the beginning as to whether the Tax Court jurisdiction and approach was to be local or nationwide and made it nationwide. Congress expected the Tax Court to set precedents for the uniform application of the tax laws, insofar as it would be able to do that.60

Both commentators61 and courts62 criticized the Tax Court practice of not following circuit court precedent that would control the disposition of the case on appeal. A practical criticism was that the financial position of the taxpayer became significant. One who can afford to pay the deficiency and sue for a refund in the district court obtained the advantage of the favorable circuit court precedent at trial. One who was relegated to prepayment challenge in the Tax Court was forced to pursue a costly appeal to reach the same ultimate and foregone conclusion.63

59. 27 T.C. 713 (1957), rev'd per curiam, 258 F.2d 562 (9th Cir. 1958). Prior Tax Court cases had also declined to follow applicable precedent of the reviewing court of appeals. See, e.g., Joan Carol Corp. v. Commissioner, 13 T.C. 83, 85 (1949), rev'd per curiam, 180 F.2d 751 (2d Cir. 1950); Brooklyn Nat'l Corp. v. Commissioner, 5 T.C. 892, 895 (1945), aff'd, 157 F.2d 450 (2d Cir. 1946), cert. denied, 329 U.S. 733 (1946). However, it was not until Lawrence that the Tax Court position was explicitly asserted and rationalized, and it is that case which lends its name to the doctrine.

60. 27 T.C. at 718.

61. See, e.g., Del Cotto, The Need for a Court of Tax Appeals: An Argument and a Study, 12 BUFFALO L. REV. 5, 8-10 (1962); Ferguson, supra note 25, at 368-70; Note, Status of a Controversy: The Tax Court, the Courts of Appeals, and Judicial Review, 32 OHIO ST. L.J. 164, 165-68 (1971); Comment, Heresy in the Hierarchy: Tax Court Rejection of Court of Appeals Precedents, 57 COLUM. L. REV. 717, 719-23 (1957).

62. See cases cited in H. DUBROFF, supra note 5, at 390-91 n.725: Sullivan v. Commissioner, 241 F.2d 46, 47 (7th Cir. 1957), aff'd, 356 U.S. 27 (1958) ("[A] decision by one judge of the Tax Court, which, in effect, overrules a decision of the court of appeals in the circuit in which both cases arose, is not consonant with the responsibilities of the respective tribunals involved."); Stacey Mfg. Co. v. Commissioner, 237 F.2d 605, 606 (6th Cir. 1956) (per curiam) ("[T]he Tax Court . . . is not lawfully privileged to disregard and refuse to follow . . . the settled law of the circuit."); Holt v. Commissioner, 226 F.2d 757, 758 (2d Cir. 1955) ("We seem to play at hide-and-go-seek with the Tax Court in these . . . cases.").

63. See Note, supra note 61, at 167.
A theoretical criticism of the Tax Court's argument that its duty was to create uniformity was "manifest in the improbability of its assumed position in the inverted point of the triangle." Although some legislative history of the 1924 and 1926 acts would support the Tax Court position if read in a vacuum, the effect of the structural appeals process created makes such an inference implausible. In addition, the statutory demise of Dobson lent credence to the position that uniformity concerns were not intended to isolate the Tax Court from circuit court review on the same grounds as the district courts. Since each circuit court would generally follow its own precedent, it was, and is, structurally impossible for the Tax Court to be the protector of uniformity. A trial court with original jurisdiction, subject to review and reversal, simply cannot create uniformity.

The Tax Reform Act of 1969

Between 1943 and 1969, there were several failed attempts to establish article III status for the Tax Court and its judges. A project to revise and codify title 28 of the United States Code, dealing with the federal judicial system, began in 1943. Judge Justin Miller of the D.C. Circuit Court of Appeals and formerly of the Board of Tax Appeals suggested incorporation of the pre-existing Tax Court provisions into the revised title 28, settling the court's status as an article I or legislative court. Article III status was considered a political impossibility at the time. However, the bill died without House action in 1946.

The plea was renewed in 1947, but opposition from three sources defeated it. From the administration, the Departments of Justice and Treasury opposed it. Their chief disagreement with the proposal was, and continues to be, representation of the government before the Tax Court. Since 1926, Treasury has generally represented the government in all Tax Court proceedings, and it does not wish to relinquish this role. Yet, since 1933, the Justice Department has represented the government in virtually all other court proceedings and has argued that it would assume the function of representing the government in the Tax Court should it be integrated into the system of federal courts. Consequently, neither department has supported integration.

Congressional opposition emanated from the House Ways and Means Committee and the Senate Finance Committee, which would lose their legislative control over the Tax Court to the House and Senate Judiciary Committees.

The last bastion of continued opposition had its source in the schism between accountants, who wanted to continue to represent taxpayers before the court under the Dingell amendment (discussed supra), and the bar, which felt that continuation of that practice after integration would constitute the

64. Ferguson, supra note 25, at 369.
65. Id.
66. Id.
67. See H. Dubroff, supra note 5, at 184-213, from which the following synopsis in the text is adapted. See also Ginsberg, supra note 19; Gribbon, Should the Judicial Character of the Tax Court be Recognized?, 24 Geo. Wash. L. Rev. 619 (1956) (discussing the constitutionality of the Tax Court).
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unauthorized practice of law. Similar bills were introduced in 1948 and 1949 but succumbed to the same pressures which defeated the 1946 and 1947 bills.

The only attempt between 1949 and 1967 to incorporate the Tax Court into the judiciary resulted from a 1955 report from the Hoover Commission and its Task Force on Legal Services and Procedure. It recommended that the Tax Court be removed from the executive branch and incorporated into an Administrative Court of the United States which would deal with labor, trade, and tax matters. The American Bar Association opposed the Hoover Commission’s recommendation, and, in conjunction with the Tax Court, drafted legislation incorporating the Tax Court into title 28 as an article III court. Although introduced in Congress in 1958 and 1959, the bills never proceeded.

The last effort to confer article III status on the Tax Court began in 1967 when the chairmen of the congressional tax committees, Representative Mills and Senator Long, introduced identical bills in the House and Senate. Hearings were conducted by Senator Tydings over a two-year period, and the proposal garnered the support of the American Bar Association, tax practitioners, and academicians. Yet, the historical problems persisted, particularly the issue of government representation in Tax Court proceedings. The hearings turned toward broad tax litigation reform considerations when the Justice Department challenged the existing system of providing three separate trial forums. The consideration of these collateral issues deflected attention away from the article III status issue. Finally, Earl Warren, the Chief Justice of the United States and head of the Judicial Conference, opposed article III status for the Tax Court. Since chances for article III status had become increasingly bleak, an alternative was submitted in 1969 providing for legislative court status under article I.

After these failed attempts, the Tax Court became a legislative court under article I.68 The Tax Court is no longer an independent agency of the executive branch. It enjoys the power to punish contempt of its authority and shares the same assistance in carrying out its powers as is enjoyed by other federal courts.69 The judicial term of office was extended from twelve to fifteen years, and retirement at full pay was provided those who are not reappointed after serving the full term.70 Retirement benefits were liberalized to be more analogous to those provided district court judges.71 Finally, the court’s name was changed to the United States Tax Court to be consistent with the usual format used for federal courts.72

1970—Golsen v. Commissioner

In Golsen v. Commissioner,73 the Tax Court stated that “[n]otwithstanding a number of considerations which originally led us to [Lawrence], it is

69. See H. Dubroff, supra note 5, at 213.
70. Id.
71. Id.
72. Id.
73. 54 T.C. 742 (1970), aff’d, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971).
our best judgment that better judicial administration requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone.4 Lawrence was overruled.7 The Golsen court noted that some decisions involving two or more taxpayers are appealable to more than one circuit.6 However, the court declined to decide what the Tax Court should do in that event.7

The Tax Court changed its Lawrence position in the interest of "efficient and harmonious judicial administration,"8 not because it believed its earlier position was incorrect.9 Some have noted that Golsen was decided less than a year after the Tax Court's change in status from an independent agency of the executive branch to an article I court of record. They have postulated that perhaps the Tax Court's heightened sensitivity to its newly recognized judicial role prompted Golsen. The Tax Court changed its Lawrence position in the interest of "efficient and harmonious judicial administration," not because it believed its earlier position was incorrect. Some have noted that Golsen was decided less than a year after the Tax Court's change in status from an independent agency of the executive branch to an article I court of record. They have postulated that perhaps the Tax Court's heightened sensitivity to its newly recognized judicial role prompted Golsen. However, whether due to a realization that a trial court subject to appellate review by multiple courts cannot ensure uniformity or whether due to a deference to the circuit courts because of its newly acquired legislative court status, the Golsen rule reflects the current Tax Court attitude toward circuit court precedent.8

Since Golsen, there have been two cases in which the Tax Court relied upon precedent from circuits other than the taxpayer's home circuit, even though

74. Id. at 757.
75. Id. at 757-58.
76. Id. at 758.
77. See, e.g., the cases of Puckett and Doehring, supra notes 1-7 and accompanying text, and Fausner and Hitt, supra note 8. When one circuit is silent and the other has spoken, the Tax Court has apparently decided it may deal with the taxpayer whose circuit is silent as it sees fit, rather than following the precedent that will govern his coplaintiff's case. The ramifications of this policy are highlighted in the particularly problematical case of tax deficiencies against a partnership's members, since the partners are liable in their individual capacities for the tax due on income generated by the partnership. Although the decision relates to a single transaction, a Tax Court decision may be appealable to different courts of appeals, depending upon the residences of the partners. See Note, supra note 61, at 169. See, e.g., Ginsburg v. United States, 396 F.2d 983, 986 (Ct. Cl. 1968); Morse v. United States, 371 F.2d 474, 482 (Ct. Cl. 1968); Freeland v. Commissioner, 35 T.C.M. (P-H) ¶ 66,283, aff'd, 393 F.2d 573 (9th Cir. 1968). Commonly referred to as the Sam Berger Investment Company Case, the several decisions resulted in different results, for members of the same partnership. However, note that different trial forums were utilized in that case.
78. 54 T.C. at 757.
80. See H. Duboff, supra note 5, at 394; Note, supra note 61, at 170.
the Tax Court disagreed with the precedent in principle. In *Bankers Union Life Insurance Co. v. Commissioner,* the Tax Court followed four circuits with which it disagreed, even though the taxpayer's appeal did not lie to any of them: "[A]t times the best way for us to promote uniformity is to bow to higher authority . . . particularly where there are no appellate courts supporting our views." Even without the specter of several adverse appellate decisions, the Tax Court has abided by an opinion issued by a nonreviewing court. In *Bradford v. Commissioner,* the Tax Court abandoned its earlier position on the strength of only one circuit court decision that was not written by the circuit to which the taxpayer would appeal. These cases may represent the promise of the future.

**Recommendations for Change**

**National Court of Tax Appeals**

Many commentators advocate the creation of a National Court of Tax Appeals. Although usually directed toward relieving intercircuit conflict, the proposal would also solve the problems created when the Tax Court ignores precedent of a circuit to which the particular taxpayer would not appeal. Since appeal from the Tax Court would always be to the National Court of Tax Appeals, *Golsen* would require the Tax Court to adhere to the single circuit court's precedents.

Those opposing such a plan usually posit two arguments. First, since the tax law is so complex, there is some merit in having the issue percolate through the various circuit courts. The Supreme Court benefits from the various viewpoints and thus is more likely to reach the "right" result when it settles the conflict. The second argument involves a philosophical disagree-

82. See generally Comment, supra note 81, at 239-40; Pastor & Porcano, supra note 79, at 231.
84. An appeal, if taken, would have gone to the Tenth Circuit, which had not yet spoken on the issue. *Id.* at 675.
85. *Id.*
86. Comment, supra note 81, at 239.
87. 60 T.C. 253 (1973). There was a stinging dissent by Judge Drennan, *Id.* at 261-63.
88. See *infra* note 147 and text following in that section.
89. See generally Mixon, supra note 14, for a concise review of the proposal's history. See also *infra* notes 99-131 and accompanying text.
90. But cf. Craig, *Federal Income Tax and the Supreme Court: The Case Against a National Court of Tax Appeals,* 1983 Utah L. Rev. 679, 735 (opposing the proposal in part because the Supreme Court has done "a good job substantively with tax cases").
91. See, e.g., Prettyman, *A Comment on the Traynor Plan for Revision of Federal Tax Procedure,* 27 Geo. L.J. 1038 (1939); comments of former Commissioner of Internal Revenue Randolph Thrower, 10 Tax Notes 731, 732 (1980) ("I think the proponents of this proposition have failed to mention the value that has been obtained for our tax law from the honing and turning and polishing of the law that has been derived from the positions and principles frequently developed by the various circuits approaching an issue from their different positions and with different factual situations."); comment of Charles M. Walker, representing the American Bar Association, 9 Tax Notes 679 (1979) (circuit conflicts result in "more mature consideration of the issue").
ment between the "generalists" and the "specialists." One commentator states: "One of the most repeated criticisms of a single court of tax appeals is that judges who serve on such a court would be (or would quickly become) mere technicians, well-versed in the intricacies of the Code but out of touch with other areas of law." Generalists contend that justice according to the strict letter of the Internal Revenue Code is tempered with mercy when delivered by a generalist judge on a circuit court of appeals.

The supporters of a National Court of Tax Appeals readily counter these criticisms. As for finding the "right" answer, they usually cite Justice Brandeis' celebrated comment from his dissent in *Burnet v. Coronado Oil & Gas Co.*: "In most matters it is more important that the applicable rule of law be settled than that it be settled right." A lengthy quotation from a 1940 article by Stanley Surrey is worth repeating:

> Many a tax question is no nearer a "right" decision after four or five circuit courts of appeals have battled over it than when the first court pronounced its judgment. All that has happened is that each of the several reasonable but contradictory positions has been given the stamp of judicial approval. Meanwhile a confused Bureau [of Internal Revenue] and bewildered taxpayers, who would be quite content to adjust themselves to the first decision if it were left unchallenged, are forced to struggle along as best they can until the Supreme Court selects one of the available alternatives and it becomes the "right" answer, at least until Congress acts."

Of interest in this regard are the findings of two students who studied seventy-eight civil tax decisions of the Supreme Court spanning a ten-year period from 1956 to 1966. The Court expressly noted fifty-six conflicts, and at least 50 percent of those conflicts were resolved in favor of the first circuit to address the issue.

With respect to the criticism against specialist judges, some argue that specialist judges are needed in the tax field. A few contend that tax lawyers

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93. 285 U.S. 393, 406 (1932). See also Note, *supra* note 9, at 51 n.31 ("Generally both the taxpayer and the Commissioner only want a rule, and in many cases one would be as good as another.").

> But much of our tax law is special in an unfortunate way. Much of it has little if anything to do with the good sense or comprehension of the wellsprings of human conduct at which generalist judges ought to excel. The tax law has become an exquisitely intricate game played to arcane, often conflicting rules that often lack moorings in any discernible policy. Any lawyer or judge who has faced a three-party or a non-simultaneous like-kind exchange transaction, or an acquisitive cor-
ROLE OF JUDICIAL PRECEDENT

and judges are, in fact, generalists. Still others suggest that the National Court of Tax Appeals be staffed with generalist judges who rotate from either the district courts or the circuit courts for specified terms.

Among more than a score of proposals for a National Court of Tax Appeals forwarded within the last sixty years, five fairly represent the array and will be briefly reviewed. They consist of the 1938 proposal by Judge Roger Traynor, the oft-cited 1944 article by Dean Erwin N. Griswold, the 1973 proposal by Judge Henry J. Friendly, the 1975 proposal by H. Todd Miller, and the most recent congressional proposal introduced by Senator Kennedy in 1979.

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It is high time that tax lawyers rise up to defend themselves against the charge that tax work is narrowing and stifling. On the contrary, it seems difficult to find a field which leads practitioners more widely through the whole fabric of the law. A tort lawyer is a tort lawyer, and a corporation lawyer is a corporation lawyer. But a tax lawyer must deal constantly not only with statutes and committee reports and regulations, but also with questions of property, contracts, agency, partnerships, corporations, equity, trusts, insurance, procedure, accounting, economics, ethics, philosophy. He must be broad in his background and in his outlook, if he is to deal effectively with the manifold problems which make up the modern field of tax law. There is no reason to expect that a judge in this field should become narrow and technical and specialized. Tax lawyers who express such a fear do not do justice to the intellectual potentialities of their chosen field.

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Judge Traynor advocated extensive revision of both the administrative and judicial procedures used for the resolution of tax controversies. The reform proposals were so extensive that they were likely intended to stir the debate mechanism rather than to provide definitive solutions. Tax controversies would be removed from the jurisdiction of the district courts, court of claims, and circuit courts of appeals. Administrative procedures would be modified, and if these procedures failed to settle the controversy, the case would go before the Board of Tax Appeals. Appeal would lie only to a single Washington-based Court of Tax Appeals, consisting of specialist judges.

Critics questioned the overemphasis of conflict and uncertainty in the current tax system, the absence of generalist judges at both the trial and the appellate levels, the inability of a single nationwide tribunal to appreciate local law, the elimination of trial by jury through removal of district court jurisdiction, and the elimination of the benefits obtained by having more than one circuit court consider an issue. Sensitive to the heated opposition generated by Traynor's proposal six years earlier, Dean Griswold's plan contemplated only the creation of a National Court of Tax Appeals. No changes were advocated with respect to the trial forums or administrative procedures. Rather, he perceived the development of authoritative rules to guide the administrative process as the paramount concern. The new court would generally consist of nine appointed judges who would ride circuit around the country, sitting as often as possible en banc.

A vocal and powerful critic of the Griswold plan was Robert N. Miller of the Committee on Federal Judicial and Administrative Procedures of the Section of Taxation of the American Bar Association. Upon the recommendation of Miller's committee, the ABA passed a resolution in 1945 con-
demning the Traynor and Griswold proposals as "not in the public interest." Miller cited a time study completed by Madaline Remmlein in arguing that the creation of a National Court of Tax Appeals would do little to shorten the delay in settling tax issues. He argued a traveling court sitting en banc would prove too burdensome and challenged the use of specialist judges.

Judge Friendly's 1973 proposal was reminiscent of Judge Traynor's plan. He suggested eliminating district court and claims court jurisdiction over tax disputes, routing all tax claims into the Tax Court. Appeals from the Tax Court would lie solely to a newly created National Court of Tax Appeals. The decisions of the new court would be nonreviewable by the Supreme Court except for constitutional issues.

The 1975 H. Todd Miller proposal essentially resembled the Griswold proposal with the exception that the court would be composed of both temporary and permanent judges. The temporary judges would be appointed for four-year terms and selected from among the district court and circuit court judges. Presumably, the court's composition was intended to appease both the generalists and the specialists.

The 1979 Kennedy proposal went a step beyond the Miller proposal, providing that the eleven-member National Court of Tax Appeals would consist entirely of current courts of appeal judges appointed for staggered three-year terms. The judges would sit on three-member panels and would travel to each of the circuits. The American Bar Association criticized the Senate bill as a "tired proposal that would only result in the isolation of the tax appeals process from the moderating and refining influences of civil litigation." The administration witnesses, John M. Samuels, Treasury's tax legislative counsel, and Maurice Rosenberg, Assistant Attorney General for Judicial Improvements, conditioned their support on reducing the number of judges as well as providing for at least some permanent appointments. Samuels argued that "the absence of judges with substantial tax expertise would

119. Miller, Griswold's Answer, supra note 116, at 304-05.
120. Id. at 305-06.
121. Id. at 306.
122. H. FRIENDLY, supra note 17, at 168-71.
123. Id. at 161-68.
124. Id. at 166-68.
125. See Miller, supra note 100, at 249-51.
126. Id. at 250.
128. Id.
130. Id.
vitiates the principal benefits to be gained by a centralized appellate court."

The bill did not proceed.

An Alternative Proposal

Although the uncertainty and inequity which results from the Tax Court practice of following only the precedent of the circuit to which the particular taxpayer would appeal has been widely recognized, the only solution that has been repeatedly and regularly advocated is the creation of a National Court of Tax Appeals that would have jurisdiction of all appeals from tax decisions. Whatever the merits of this solution, it has repeatedly failed to gain popular support and is not likely to be implemented in the near future. In the meantime, the problems created by the current system not only continue but are exacerbated by the dramatic increase in tax litigation, one of the very products of the uncertainty the system provokes. The vicious circle continues.

Many of these problems would diminish if the Tax Court were required to follow circuit court precedent, even precedent of a circuit court other than that to which the particular taxpayer would appeal in those cases where the taxpayer's home circuit is silent with respect to the issue. This rule recognizes that the Tax Court is a trial court, inferior on the structural hierarchy to the circuit courts of appeals, and it should be bound by their appellate decisions. In those cases where the taxpayer's home circuit is silent, and two or more circuit courts have opposing precedents, the Tax Court should be free to choose among them what it considers to be the preferable rule, but not to disregard them all in favor of its own unique theory. The structural integrity of the judicial system would be thereby enhanced, and the development of tax law would become more orderly, uniform, and certain.

Not only is this proposal easier to implement than the more dramatic creation of a National Court of Tax Appeals, it also achieves many of the same advantages within the existing structure. This recommendation would necessarily reduce the "percolation" of issues since the Tax Court would follow the first court of appeals to address the issue. However, it would not eliminate all percolation since each circuit court would still be free to decide

131. Id.
132. See supra notes 89-131 and accompanying text.
133. See supra note 16 and accompanying text.
134. See supra notes 91 & 93-95 and accompanying text.
135. In passing, H. Todd Miller notes the possibility of having the first court of appeals decision on an issue be determinative, but concluded that "'[i]f one is willing to be bound by the first appellate level decision, it would seem more sensible to establish a single court to render such decisions.'" Miller, supra note 100, at 240. However, he was envisioning the first circuit decision as also binding other circuits as well as the trial courts. This author's proposal refers only to the stare decisis effect of an appellate court on the Tax Court as a trial court subject to its jurisdiction. Furthermore, Miller's statement minimizes the difficulties attendant in establishing a National Court of Tax Appeals. It is just as defensible to assert that if one is willing to be bound by the first appellate level decision, there is no need to bother with a National Court of Tax Appeals.
the issue as it sees fit. Because there often is no "right" answer in tax law, the end result may be just enough percolation to guard against absurd results as well as to increase certainty and predictability.

Because of the appellate structure, it has never been possible for the Tax Court alone to achieve uniformity. Since Golsen, it has become even more impossible because the Tax Court abides by circuit court precedent in some cases and not in others, depending upon the fortuity of the taxpayer's residence. It makes more sense systemically for the Tax Court to abide by notions of precedent of appellate courts and to defer to them. The end result would be greater uniformity, but with the impetus and direction set by the circuit courts rather than a trial court. After all, the traditional focus of trial courts has been not on the growth and symmetry of the law but rather on the orderly and just resolution of a dispute between two parties. The appellate courts, however, have historically been charged with the development of the law.

The concept of stare decisis means that lower courts are bound by precedents established by courts that may review their decisions. The Tax Court is subject to review by all the circuit courts, unlike district courts, which can never be subject to review outside their home circuits. This critical distinction between the district court forum and the Tax Court has not been fully appreciated. That only one circuit may review a Tax Court decision as it relates to a single taxpayer should not obscure the fact that the Tax Court as an entity is still subject to review by all the other circuits. Hence, the Tax Court should be cognizant of all circuit court precedent in every case, with the taxpayer's home circuit controlling if it has spoken.

This alternative is also consistent with the history of the Tax Court. The trend has been to place the Tax Court within the traditional federal judicial framework. The Tax Court's decision-making evolution has mirrored its structural evolution. The court matured from an administrative body of the executive branch to a court, recognizing its subordination to certain circuit court precedent. Its early administrative charge of providing national uniformity was apparent in the fact that no appeal from a Board decision was initially provided. Although that situation was rectified two years after its creation, the notion persisted. Tax Court decisions were given a presumption of correctness and were to be rarely overturned by circuit courts. This chapter closed just as the Board of Tax Appeals was made a court in name, although not in status. The decisions of the newly named Tax Court were now to be

136. See supra notes 91 & 93-95 and accompanying text.
137. See Ferguson, supra note 25, at 370.
139. See supra note 20 and accompanying text.
140. See supra notes 26-27 and accompanying text.
141. See supra notes 44-51 and accompanying text.
142. See supra notes 34-43 and accompanying text.
given no more respect than a district court decision.\textsuperscript{143} Therefore, the Tax Court was resoundingly condemned when it renounced circuit court precedent in \textit{Lawrence}.\textsuperscript{144} When the Tax Court was finally removed from the executive branch and made a court of record,\textsuperscript{145} it recognized at last that better judicial administration requires adherence to circuit court precedent that would control the case on appeal.\textsuperscript{146} The Tax Court has even stepped beyond \textit{Golsen} and recognized circuit court precedent which would not control the particular case at hand on appeal,\textsuperscript{147} and it is in this area that Congress should act. It is time to take the final step. Congress should \textit{require} the Tax Court to take cognizance of all circuit court precedents in all cases.

II. \textit{The Internal Revenue Service}

Congress may have the first word and the courts the second, but the Commissioner has the last when exercising the power to nonacquiesce in the precedential value of lower court decisions.\textsuperscript{148}

\textit{The Practice of Acquiescence and Nonacquiescence}

Where does the "power to nonacquiesce" originate? It is not statutorily authorized\textsuperscript{149} and is "in large degree an historical accident."\textsuperscript{150} Former Chief Counsel Rogovin describes the accident as follows:

The Revenue Act of 1924 provided that the Commissioner had one year to appeal from an adverse decision of the Board of Tax Appeals. A taxpayer receiving a favorable opinion from the Board of Tax Appeals was not at all sure of the finality of the opinion until the appeal period had run. To aid the petitioner, the Service began to issue acquiescences in the Board of Tax Appeals cases. Where the Service acquiesced it simply meant the Commissioner had determined not to appeal the case. When the Commissioner nonacquiesced this signaled his intention to appeal. Two years later, the statute was amended to allow for appeals directly to the court.

\textsuperscript{143} See \textit{supra} notes 52-57 and accompanying text.
\textsuperscript{144} See \textit{supra} notes 58-66 and accompanying text.
\textsuperscript{145} See \textit{supra} notes 67-72 and accompanying text.
\textsuperscript{146} See \textit{supra} notes 73-81 and accompanying text.
\textsuperscript{147} See \textit{supra} notes 82-88 and accompanying text.
\textsuperscript{149} In fact, there is even some early evidence from the Solicitor of Internal Revenue that Board of Tax Appeals decisions (predecessor to the Tax Court) should be binding upon the Internal Revenue Service:
\textquote{[I]t is very desirable that a new line of precedent be created which is likewise \textit{binding upon the Bureau} and the taxpaying public—a line of authority which all may see and follow, whether within or without the Bureau. The service being performed by the Board of Tax Appeals in this regard can be most important.\textsuperscript{150}}

Hartson, \textit{The Board of Tax Appeals in Its Relation to the Bureau of Internal Revenue}, 3 \textit{Nat'l Inc. Tax Mag.} 215, 238 (1925) (emphasis added), quoted in \textit{H. Dubroff, supra} note 5, at 106.

of appeals. Previously appeals lay in the district court and the appeal time was shortened to six months. In 1932, the present rule of three months as time for appeal was instituted.\footnote{151} Thus, the current Service practice of acquiescing or not acquiescing in Tax Court decisions originated as a means to inform petitioning taxpayers whether a Board decision in their favor would be appealed.\footnote{152} It has long since outgrown this purpose, yet the practice continues. In fact, in 1978, the Commissioner nonacquiesced in more than half of the Tax Court decisions it lost.\footnote{153}

Although published acquiescences and nonacquiescences as such are limited to Tax Court decisions, the Service also periodically publishes Revenue Rulings\footnote{154} and technical information releases\footnote{155} in which it states it "will not follow" certain circuit court and Claims Court decisions. Furthermore, documents are internally circulated within the Service establishing the Commissioner's position on all cases lost in the district courts, courts of appeals, and Claims Court.\footnote{156} Thus, the Internal Revenue Service feels itself bound only by Supreme Court decisions.\footnote{157} The Service claims to follow a "two circuit" rule of thumb, which means that it will adhere to a judicial interpreta-

\footnote{151. Id., quoted in Rodgers, supra note 148, at 1005 n.16, and Note, The Commissioner's Nonacquiescence, 40 S. Cal. L. Rev. 550, 551 n.6 (1967).}


153. See Rodgers, supra note 148, at 1001.

154. See, e.g., Rev. Rul. 85-143, 1985-2 C.B. 55 ("The Internal Revenue Service will not follow the opinion of the United States Court of Appeals in Roemer v. Commissioner, 716 F.2d 693 (9th Cir. 1983), rev'g 79 T.C. 398 (1982)."); Rev. Rul. 76-345, 1976-2 C.B. 134 ("The Internal Revenue Service has been requested to state whether it will follow in other cases the decision of the United States Court of Claims in the case of Washington Post Company v. United States, 405 F.2d 1279 (1969). . . . [T]he Service will not follow the decision in the Washington Post Company case as a precedent in the disposition of similar cases.").

A Lexis search conducted in December of 1985 revealed 125 such revenue rulings, 25 of which were issued in the last five years.

155. See, e.g., Tech. Info. Rel. 773, 7 Stand. Fed. Tax Rep. (CCH) ¶ 6751 (1965) ("The United States Internal Revenue Service . . . announced that it will not follow the decision of the United States Court of Appeals for the Ninth Circuit in the case of Maxwell Hardware Co. v. Commissioner, 343 F.2d 713 (1965).")

156. Prior to the 1981 decision in Taxation With Representation Fund v. IRS, 646 F.2d 666 (D.C. Cir. 1981), the Service refused requests under the Freedom of Information Act, 5 U.S.C. § 552 (1982), for this information. The District of Columbia Circuit held that completed general counsel's memoranda (GCMs), technical memoranda (TMs), and "Actions on Decisions" (AODs) prepared by the Tax Litigation Division and forwarded to the Chief Counsel of the IRS are not exempted from disclosure under the "deliberative process" privilege of the Freedom of Information Act. 5 U.S.C. § 552(b)(5) (1982). However, GCMs that were never distributed throughout the agency, TMs pertaining to proposed but unapproved treasury decisions or regulations, AODs recommending appeals of pending cases, and GCMs, TMs, and AODs for which disclosure is sought at a "predecisional stage" are exempt from disclosure. 646 F.2d at 681-84.

157. The Service does admit its subservience to the Supreme Court, notwithstanding the oft-cited story of "the neophyte . . . employee who, when confronted with a decision of the Supreme Court, said 'I'm not aware of acquiescence by the Commissioner in that decision'". Dwan, Administrative Review of Judicial Decisions: Treasury Practice, 46 Colum. L. Rev. 581, 594 n.45, cited in Rodgers, supra note 148, at 1008 n.38.
The articulated justification for nonacquiescence is certainty and uniformity in the administration of the tax law. At the same time, the Service does not deny attempts to produce a conflict among the circuits so as to bring a case before the Supreme Court in the hope of a favorable resolution. Moreover, the Service simply cannot create uniformity in the present system where tax disputes are appealable to many different courts of appeals.

The most reasonable justification for the acquiescence and nonacquiescence program is the facilitation of tax planning. Yet, the taxpayer cannot rely on an acquiescence because the Supreme Court has held in *Dixon v. United States* that an acquiescence can be retroactively withdrawn at any time. The issue in *Dixon* was whether original issue discount was entitled to capital gains treatment under the 1939 Code. The taxpayer argued that he justifiably relied on a Service acquiescence in a favorable Tax Court decision that was not withdrawn until three years after the disputed tax year. Citing section 7805(b) of the Code, the Supreme Court held that the Commissioner is empowered to maintain his position until the Court of Appeals affirms the Tax Court decision and that an acquiescence is not authoritative.

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161. See *id.* at 279. See also *Rodgers, supra* note 148, at 1022; Note, *supra* note 151, at 555.


163. 381 U.S. 68 (1965).

164. *Id.* at 70.


166. Section 7805(b) reads: "Retroactivity of Regulations or Rulings—The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."
to withdraw an acquiescence retroactively, even where the taxpayer may have detrimentally relied on the Commissioner's mistake of law:

This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would appear that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due.167

The Court characterized the Internal Revenue Bulletins as "merely guidelines for Bureau personnel."168 Therefore, not only does the acquiescence procedure fail to fulfill its original justification of providing appeal notice,169 it also cannot be relied upon by taxpayers in tax planning.170

While a modern justification for the practice is difficult to articulate, the problems it engenders are clear. Just like Tax Court ignorance of circuit court precedent,171 it contributes to the prolonged period of time during which an issue remains unsettled. It also increases the volume of litigation as the Service repeatedly litigates an issue, attempting to secure a favorable result from at least one court.172 The most easily identified loser is the taxpayer with a small claim that is not economically worth pursuing. For example, assume a Los Angeles taxpayer has both favorable Ninth Circuit precedent and favorable Tax Court precedent justifying his position on a $100 disputed tax. The Service issues a nonacquiescence in the Tax Court decision or publishes a Revenue Ruling stating it will not follow the Ninth Circuit decision. Even though precedent is clearly in the taxpayer's favor, it is certainly more expensive to pursue litigation than to settle with the Service.173

Several commentators recognize the problems created by the Commissioner's acquiescence procedure. However, the chief remedy advanced is,174 again, the creation of a National Court of Tax Appeals.175 Most of the proposals,

167. 381 U.S. at 73.
168. Id.
169. See supra notes 149-152 and accompanying text.
170. But see Note, supra note 151, at 552 ("[A]cquiescences have proven to be generally reliable.").
171. See supra part I, "The Tax Court."
172. "Service personnel must apply the ruling when it works to a taxpayer's disadvantage." Rodgers, supra note 148, at 1023-24.
173. Cf. Note, supra note 158, at 278 and Note, supra note 151, at 553. Forcing the taxpayer to litigate to reach a foregone conclusion was part of the criticism directed to the Tax Court's former practice, as articulated in Lawrence, of ignoring circuit court precedent that would control the case on appeal. See supra notes 58-66 and accompanying text.
174. See, e.g., Miller, supra note 100, at 234-52; Note, supra note 158, at 279; Rodgers, supra note 148, at 1035-38.
175. See supra notes 89-131 and accompanying text.
however, fail to recognize that this may not resolve the situation. The goal of this proposal is to decrease the need for the program by decreasing the ability to generate conflicts. Nevertheless, the Service may continue to issue nonacquiescences in Tax Court decisions and disagree with the decisions of the new national appellate court, even though it would be more difficult to reap the benefits of nonacquiescence. The Service does not feel itself bound by circuit courts when there are twelve of them; it may not feel itself bound when there is only one.

An alternative proposal advanced is actually to expand the acquiescence program, requiring a published position with respect to every decision of every court, but this proposal has merit only if Dixon is statutorily reversed. The goal of this proposal is to give some meaning and justification to the practice if it is to exist. With an expanded acquiescence program and the ability to rely on the rulings, the practice would facilitate tax planning. However, these proposals fail to remedy the problem the Los Angeles taxpayer had—a nonacquiescence to controlling precedent in his favor may force him to litigate to reach a foregone result.

A proposal aimed at decreasing the practice of nonacquiescence while not totally eliminating it is to codify the two-circuit rule. This suffers from the same defect as the last proposal. The taxpayer residing within the single circuit that has decided an issue favorably to the taxpayer, but in which the Commissioner nonacquiesces, may have to litigate to reach his preordained conclusion.

The foregoing demonstrates that the single most troublesome area with the Commissioner’s nonacquiescence is in the case of intracircuit nonacquiescence because that instance may force a taxpayer to litigate to reach a result already dictated by precedent. It is this practice to which this article now turns.

176. But see Rodgers, supra note 148, at 1038. Recognizing the propensity of the Service to continue its nonacquiescence, Rodgers proposes that Congress include within the legislation creating the new court an amendment providing for nonacquiescence only “after having decided to appeal the Tax Court decision to the United States Court of Tax Appeals.” Id.

It is unclear what benefit such an amendment would provide. A nonacquiescence in a Tax Court decision, if it is affirmed by the single appellate tribunal, is subject to the same criticism as is illustrated by the example in the text accompanying notes 172-173. It forces the taxpayer to litigate when there is clear circuit court precedent in his favor in the circuit court to which he would appeal. A nonacquiescence in a Tax Court decision which is later reversed by the appellate tribunal would be superfluous.

177. See supra notes 163-170 and accompanying text.

178. See, e.g., Note, The Old Tax Court Blues: The Need for Uniformity in Tax Litigation, 46 N.Y.U. L. Rev. 970, 984 (1971); Note, supra note 151, at 566-67 (arguing an expanded acquiescence practice only as an alternative to a National Court of Tax Appeals).

179. See supra note 173 and accompanying text.

180. See supra note 158 and accompanying text. This suggestion was made by Hugh Calkins in Panel Discussion, supra note 106, at 28. His proposal would not only bind the Service after two circuit courts of appeals settle an issue in the same manner, it would also bind the remaining courts of appeals. Id. Since the several courts of appeals are of coordinate rank, however, the second prong of this proposal may be difficult to justify.
Intracircuit Nonacquiescence and the Mendoza Decision

Administrative intracircuit nonacquiescence by the Social Security Administration (SSA) has recently come under heavy fire both in the courts and in commentary. Critics have condemned the practice with virtual unanimity. Beginning in 1981, the SSA accelerated the rate of review of the status of disability-payment recipients and removed thousands of beneficiaries from the disability rolls. Throughout the country, former beneficiaries challenged the SSA’s criteria for terminating benefits. By March of 1984, every circuit court of appeals except for the District of Columbia had ruled that the procedural standards used by the SSA in evaluating whether to terminate someone from receiving disability payments were “inadequate, invalid, or contrary to the Social Security Act.” Yet, the Secretary of Health and Human Services refused to acquiesce in these circuit court decisions and continued to apply the same standards within these circuits in terminating benefits. This finally led to direct challenge of the nonacquiescence practice itself.

Lopez v. Heckler, for example, was a class action challenging the Secretary’s policy of nonacquiescence on the grounds that it violated separation of powers principles, stare decisis, and the plaintiffs’ right to due process. Citing Marbury v. Madison, the Central District of California reiterated that it is “emphatically the province and duty of the judicial department to say what the law is.” The court continued:

Governmental agencies, like all individuals and other entities, are obliged to follow and apply the law as it is interpreted by the


183. The SSA did not exercise intracircuit nonacquiescence until the Reagan administration took office. See Note, Intracircuit Nonacquiescence, supra note 182, at 603 n.139.

184. Id. at 585.

185. Id.

186. Id.

187. See cases cited in note 181 supra.


189. 572 F. Supp. at 28.

190. 5 U.S. (1 Cranch) 137, 177 (1803).

The Ninth Circuit upheld an injunction against the Secretary.\(^{193}\) The separation of powers arguments carried the day. In the most recent case on the matter, the Southern District of New York also cited separation of powers arguments to condemn the practice.\(^{194}\)

In addition to the functional argument that the executive branch must comply with the law as interpreted by the judicial branch,\(^{195}\) there is a compelling equal protection argument as well. Intracircuit nonacquiescence creates one set of rules for those wealthy and fortunate enough to procure legal representation and another set of rules for those who do not have the means to pursue the action in court to obtain the benefits of the favorable precedent.\(^{196}\) Finally, common law concepts of stare decisis argue against the concept of intracircuit nonacquiescence.\(^{197}\)

Notwithstanding these practical and constitutional concerns, the SSA has maintained that *United States v. Mendoza* supports intracircuit nonacquiescence.\(^{198}\) In *Mendoza*, the Supreme Court held that offensive nonmutual collateral estoppel\(^ {199}\) cannot be asserted against the government as it can be against a private litigant. Among other reasons, the Court felt that to rule otherwise

\(^{192}\) Id. at 29-30.

\(^{193}\) 725 F.2d 1489, 1510 (9th Cir. 1984).

\(^{194}\) The judiciary's duty and authority, as first established in *Marbury*, "to say what the law is" would be rendered a virtual nullity if coordinate branches of government could effectively and unilaterally strip its pronouncements of any precedential force. We agree with those courts which have interpreted and applied the principles underlying *Marbury* in intracircuit nonacquiescence cases to mean that an administrative agency cannot routinely be permitted to apply and enforce a rule against persons residing within a circuit whose Court of Appeals has announced a rule to the contrary. Stieberger v. Heckler, 615 F. Supp. 1315, 1357 (S.D.N.Y. 1985).

\(^{195}\) But see Note, *Intracircuit Nonacquiescence, supra* note 182, at 595 ("*Marbury* did not decide, however, who besides the litigants before the court had to yield to the law as declared. . . . What future effect an agency must give to a court's declarations is less clear.").


\(^{197}\) See Note, *Intracircuit Nonacquiescence, supra* note 182, at 595-97. Cf. Rodgers, *supra* note 148, at 1015-21 (asserting that the Commissioner's nonacquiescence to a decision supporting the taxpayer's claim is contrary to stare decisis).

\(^{198}\) 464 U.S. 154 (1984). The case involved a Filipino national who filed a petition for naturalization under the Nationality Act of 1940. Mendoza claimed the government's administration of the Act denied him due process of law. Both the Central District of California and the Ninth Circuit held the government was collaterally estopped from litigating the constitutional issue, since the Northern District of California had previously held against the government on the same issue in a case brought by other Filipino nationals. *Id.* at 155-58.

\(^{199}\) The Court defined collateral estoppel as follows: "[O]nce a court has decided an issue of fact or law necessary to its judgment, that judgment is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *Id.* at 158. It is used offensively "when a plaintiff seeks to foreclose a defendant from relitigating an issue the defen-
would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.200

The SSA claims that this case allows the government to freely relitigate an issue, even within a circuit that had previously held against the government.201

The courts202 and commentators203 disagree with the SSA's assertion.

It is one thing to say, as the Court did in *Mendoza*, that the government cannot be precluded from ever relitigating an issue once it is decided adversely; it is quite another to assert the legal authority to regularly disregard circuit court decisions with which it disagrees by refusing to apply them in subsequent cases within the same circuit.204

The abolition of intracircuit nonacquiescence does not preclude the government from relitigating an issue ever again. It simply precludes the government from relitigating in a circuit that has already held to the contrary. The other circuits are fair game. Although nonmutual collateral estoppel may not be asserted against the government, stare decisis is still applicable, and it is this doctrine that prohibits intracircuit nonacquiescence. The distinction, though significant, is subtle.205 In both cases, a litigant seeks the benefit of precedent.206 However, in offensive nonmutual collateral estoppel, any decision in any court throughout the country could estop an agency, whereas stare decisis creates binding law only within a jurisdiction.207

The persuasive case lodged against the practice of intracircuit nonacquiescence in the SSA context also supports an argument that IRS Revenue Rulings, stating the Service will not follow certain circuit court cases, should be ineffective against taxpayers in that circuit. Such rulings should have efficacy only as a planning tool for residents of other silent circuits, putting
them on notice that the government will likely challenge the issue in their circuit. To make the planning tool effective, Congress should abolish the power to retroactively withdraw an acquiescence.208

Unlike the Social Security cases,209 Mendoza would seem to allow Service nonacquiescence in Tax Court decisions because a forced acquiescence to the first decision of a trial court with national jurisdiction would preclude further trial litigation, precisely the outcome forbidden by Mendoza. The district court and Claims Court forums would be unavailable to relitigate the issue because once the Tax Court holds against the Service with respect to a particular issue, taxpayers would always resort to that forum. However, a nonacquiescence in a Tax Court decision should not apply to a taxpayer in a circuit with precedent in conformity with the Tax Court opinion; in effect, the Service is nonacquiescing in the circuit court position in that case. In other words, where the Tax Court follows home circuit court precedent under Golsen,210 consistent with current practice, a nonacquiescence to the Tax Court decision should have no effect on a taxpayer in that circuit under the reasoning of the Social Security cases prohibiting intracircuit nonacquiescence.

Mendoza precludes a more sweeping proposal that all IRS nonacquiescences should be prohibited because forced acquiescence in all unfavorable decisions would bar the Service from ever relitigating an issue. The first unfavorable resolution of an issue would bind the Service in all jurisdictions. A statutory reversal of Mendoza and the abolition of all nonacquiescence would be unworkable. For example, two circuit courts could still come to different outcomes when the first circuit decision is favorable to the Service and another taxpayer challenges the Service on the same issue in a second circuit. It would

208. In discussing the SSA cases and the practice of nonacquiescence, two recent law review notes lump the IRS nonacquiescence practice together with nonacquiescence by the SSA and the National Labor Relations Board (NLRB). See Note, Administrative Nonacquiescence, supra note 182, at 147-48; Note, Intracircuit Nonacquiescence, supra note 182, at 584, 588-89. However, IRS nonacquiescence is patently distinguishable from SSA and NLRB nonacquiescence. As noted previously, the IRS publishes acquiescences and nonacquiescences only with respect to decisions of the Tax Court, a trial court of national jurisdiction. See supra note 152 and accompanying text. NLRB and SSA nonacquiescences, on the other hand, refer to decisions of the circuit courts, which are appellate courts of limited geographic jurisdiction. These notes fail to appreciate this basic difference in the administrative nonacquiescence practice of the IRS as opposed to the SSA and NLRB. In fact, the authors seem to confuse IRS nonacquiescence with the Tax Court practice of ignoring circuit precedent. The Tax Court is not affiliated with the Service, see supra part I of this article, and the court's practice of ignoring circuit court precedent must not be confused with the IRS practice of not acquiescing in Tax Court decisions.

Although the Service does not formally nonacquiesce in circuit court opinions, it has published Revenue Rulings and issued technical information releases which state the Service will not follow certain circuit court opinions, effectively nonacquiescing in those opinions. See supra notes 154-157 and accompanying text. Furthermore, a Tax Court nonacquiescence is tantamount to intracircuit nonacquiescence when a taxpayer's home circuit agrees with the Tax Court decision in which the Service nonacquiesces. To this extent, the examination of the SSA cases and the impact of Mendoza is instructive.

209. See supra notes 163-170 and accompanying text.

210. See supra notes 73-88 and accompanying text.
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be impossible for the Service to conform to both opposing decisions. The rule advocated herein, that each circuit’s rule governs the outcome within its own jurisdiction until the Supreme Court settles the issue, not only is easily implemented, it makes better sense. Allowing some reconsideration of an issue is healthy.211

Conclusion

Considering the immense amount of time, paper, ink and sweat which goes into the compilation of tax services, reports, compendiums, digests, citators, indices, summaries, textbooks, letters, guides, and miscellaneous doodads, it would seem basic that beneath this skyscraping edifice there must be a bedrock of principle to act as a support. A small amount of tunneling soon convinces the observer to his horror that the bedrock is about as solid as Swiss cheese.212

Such is the plight of judicial precedent in our tax system. The Tax Court ignores certain circuit court decisions. The Internal Revenue Service ignores certain Tax Court decisions as well as circuit court, Claims Court, and district court decisions. The taxpayer is left searching for any port in a storm. The particular port is not so important; the taxpayer simply would like to know for certain that a port exists and what its location is. Such certainty is denied him. Understandably, the taxpayer is becoming disillusioned with those responsible for the unnavigable waters.

The problem has been the subject of debate for more than sixty years. The most commonly recommended solution is the creation of a National Court of Tax Appeals. Such respected legal scholars as Judges Traynor and Friendly and Dean Griswold have advocated this remedy. The proposals have repeatedly gone unheeded, and the problems are compounding.

An infusion of respect for judicial precedent and the common law concept of stare decisis, although not as glamorous as the creation of a new court, would serve taxpayers well in alleviating the inequity, uncertainty, and litigiousness inherent in our fragmented system of tax administration and dispute resolution. The existing judicial structures could be maintained. All that needs to be done is for Congress to enact legislation.

First, Congress should require the Tax Court to follow circuit court precedent, even if the taxpayer does not reside within the circuit that has considered the issue. After all, the Tax Court is a trial court, not an appellate court, and it is subject to the jurisdiction of all twelve circuit courts of appeals. Since the circuit courts may still disagree among themselves, the law would not become frozen with the first resolution of an issue. However, predictability would be vastly improved.

211. Compare this author’s proposal for Tax Court reform, supra notes 134-136 and accompanying text, which also allows for disagreement among the circuits.
212. Marcosson, supra note 138, at 137.
Second, taxpayers should be protected from intracircuit nonacquiescences in circuit court decisions and nonacquiescences in Tax Court decisions consistent with favorable circuit court precedent of the taxpayer’s home circuit. Taxpayers should not be required to litigate to reach a foregone conclusion. The Tax Court abandoned this practice in *Golsen*, and the Service should also abandon it.

Third, the result in *Dixon* should be statutorily overruled by depriving the Service of the power to retroactively withdraw acquiescences. Such withdrawals should be allowed prospectively only. This would give meaning to the practice of acquiescence by enhancing tax planning.\(^{213}\)

These recommendations are not a cure for all the problems created by our current tax administration system. It is doubtful that a cure exists that does not also have its own set of side effects. There seems to be a built-in inertia when it comes to major overhaul. The present proposals are relatively simple to implement and are consistent with traditional principles of judicial administration. It is time for lower courts and administrative agencies to recognize the superior place appellate courts occupy in the scheme of tax administration.

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213. Nothing advocated in this article would limit the power of taxpayers to take positions contrary to published acquiescences and nonacquiescences, assuming there is a reasonable basis for considering the IRS to be wrong.