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Panel: And What Weight Do They Have? Agency Guidance Not Eligible for Chevron Deference and Court Dispositions Not Selected For Publication

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I. Introduction

A. The principal subject of this panel is the deference a court (in particular the Tax Court) must accord (1) agency (principally the Department of the Treasury and the Internal Revenue Service) guidance that is not due the highest level of deference under Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), and (2) judicial dispositions that are not officially published and, thus, may not be intended to have the force of stare decisis.

B. A subsidiary subject is whether a taxpayer may rely on guidance (e.g., an IRS letter ruling) that the IRS does not intend for the guidance of taxpayers generally.

C. The outline is intended to list many common forms of guidance and unpublished forms of court dispositions, set forth some rules, raise some questions, and make some suggestions.

II. Agency Guidance

A. Introduction

1. In Chevron, 467 U.S. at 843-844, the Supreme Court held: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

2. In United States v. Mead Corp., 533 U.S. 218, 226-227 (2001), the Supreme Court held that "administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."

3. To deserve Chevron deference, the agency must intend guidance to have the force of law. Mead, 533 U.S. at 226-227. The Secretary's use of notice-and-comment rulemaking procedures under section 553 of the Administrative Procedures Act (APA), 5 U.S.C. 553 (2014), to issue guidance is generally indicative that the agency intends the guidance to have the force of law, and guidance issued under those procedures normally will be accorded Chevron deference. See Mead, 533 U.S. at 230.

4. An agency may issue guidance without using notice-and-comment procedures. Section 553(b)(A) of the Administrative Procedures Act provides that, except as required by another statute, the notice-and-comment procedure "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" (without distinction, interpretive rules). 5 U.S.C. sec. 553(b)(A). In general, an interpretive rule is a rule "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015) (quoting Shalala v. Guernsey Mem. Hosp., 514 U.S. 87, 99 (1995) (internal quotation marks omitted)). "Interpretive rules * * * do not have the force and effect of law and are not accorded that weight in the adjudicatory process." Id.

5. In Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011), the Supreme Court confirmed that the framework for judicial review of agency action established in Mead is fully applicable in the context of tax law: "The principles underlying our decision in Chevron apply with full force in the tax context." It also confirmed that tax law is subject to the same principles of administrative law applicable in other areas of Federal law. See id.

6. In Mead, the Supreme Court made clear that courts are not to disregard agency guidance not deserving Chevron deference.

Such guidance is to be given a level of deference determined under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Mead, 533 U.S. at 227-228. In Skidmore, 323 U.S. at 140, the Court held that agency rulings, interpretations, and opinions, while not controlling authority, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

B. Auer v. Robbins

1. A special case is presented when an agency issues guidance interpreting one of its own regulations. Generally, such guidance has the force of law.

2. In Auer v. Robbins, 519 U.S. 452, 461 (1997), the Supreme Court held that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation" (internal quotation marks omitted; quoting, indirectly, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). In Auer, the agency's interpretation came in the form of its legal brief.

3. There are exceptions to that general rule. In Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012) (citations and internal quotation marks omitted), the Supreme Court said:

"Deference is undoubtedly inappropriate, for example, when the agency's interpretation is plainly erroneous or inconsistent with the regulation. And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation does not reflect the

agency's fair and considered judgment on the matter in question. This might occur when the agency's interpretation conflicts with a prior interpretation or when it appears that the interpretation is nothing more than a convenient litigating position or a post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack."

4. In CSI Hydrostatic Testers Inc., v. Commissioner, 103 T.C. 398, 409 (1994) (a pre-Auer case, but recognizing Seminole Rock), aff'd, 62 F.3d 136 (5th Cir. 1995), the Tax Court said: "[U]nless an agency's interpretation of a statute or a regulation is a matter of public record and is an interpretation upon which the public is entitled to rely when planning their affairs, it will not be accorded any special deference." the Commissioner was claiming deference for a private letter ruling. Id. at 409, n.10.

5. In Perez v. Mortg. Bankers Ass'n, 135 S. Ct. at 1206, the Supreme Court rejected a line of cases holding that only by notice-and-comment rulemaking may an agency amend or repeal an interpretive rule. It held: "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." Id. Responding to the association's argument that the agency's (Dept. of Labor's) initial interpretive rule (favoring the association and interpreting a notice-and-comment regulation) was entitled to deference under Auer, the Court answered that, even when an agency's interpretation gets deference, "it is the court that ultimately decides whether a given regulation means what the agency says." Id. at 1208 n.4. With respect to that caveat, Justice Scalia, concurring in the judgment, observed that: "So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference compels the reviewing court to 'decide' the text means what the agency says." Id. at 1212. He concludes: "Interpretive rules that command deference do have the force of law. * * * By

deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures." Id. He makes reference to the provisions of APA sec. 706 that "'the reviewing court shall * * * interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.'" Id. at 1211 (emphasis added by Justice Scalia). He would abandon Auer in favor of "applying the Act [APA] as written." Id. at 1213.

C. Chenery Doctrine

1. The Chenery doctrine is an administrative-law principle that says that a reviewing court may uphold an agency's action only on the grounds upon which the agency relied when it acted: "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (describing the Court's holding in SEC v. Chenery Corp., 318 U.S. 80, 95 (1943)).

2. The Commissioner's action in reliance on a regulation may be challenged under the Chenery doctrine if not consistent with the basis and purpose of the regulation. See, e.g., Carpenter Family Investments, LLC, v. Commissioner, 136 T.C. 373, 380 (2011).

3. Section 553(c) of the APA provides that, as part of the rulemaking process, the agency "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. 553(c). Treasury regulations are usually preceded by a preamble that sets forth the basis and purpose of the regulation and that may assist in considering a challenge under the Chenery doctrine to the Commissioner's reliance on the regulation. E.g., Carpenter Family Investments, LLC, v. Commissioner, 136 T.C. at 380-81 ("From the preambles to the

temporary and final regulations, we isolate two discrete grounds that respondent can possibly adduce as bases upon which his regulatory project purports to rest" [internal quotation marks omitted]).

4. The Chenery doctrine may also provide grounds to challenge an administrative determination if, in court, the Commissioner relies on grounds other than those on which the determination was made. E.g., Antioco v. Commissioner, T.C. Memo. 2013-35 (determination to proceed with collection following CDP hearing).

D. Published Guidance

1. Introduction

a. The IRS publishes guidance (published guidance) that it intends for the information, and guidance of taxpayers, IRS officials, and others. It also releases other guidance (released guidance) that may be taxpayer specific and that it does not intended for general reliance. Released guidance may be made public pursuant to Internal Revenue Code (Code) section 6110[1] or pursuant to provisions of the Freedom of Information Act, 5 U.S.C. 552 (2014).

b. As a practical matter, much IRS guidance is available from the IRS Electronic Reading Room. http://www.irs.gov/uac/Electronic-Reading-Room

2. Treasury Regulations

a. Treasury regulations may satisfy the Mead standards for Chevron deference. See, e.g., Mayo, 562 U.S. 44 (employment tax regulation issued pursuant to notice-

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[1]Hereafter, unless otherwise indicated, all section references are to the Code.

and-comment rulemaking classifying medical students working 40 or more hours a week as full-time employees accorded Chevron deference).

b. Treasury regulations generally go through notice-and-comment procedures. See 26 CFR sec. 601.601(a)(2), Statement of Procedural Rules.

c. The Secretary issues regulations under either the authority given to him by section 7805(a) to "prescribe all needful rules and regulations for the enforcement of [the Code]" (general-authority regulations) or under authority given to him in specific Code sections to issue regulations necessary for some more narrow purpose (specific-authority regulations), e.g., sec. 1502(a) consolidated return regulations.

d. In Mayo, 562 U.S. at 45, the Supreme Court concluded that general-authority regulations do not receive less deference than specific-authority regulations.

e. Questions Raised:

(1) If not issued pursuant to notice-and-comment procedures, may a Treasury regulation be accorded Chevron deference? See Mead, 533 U.S. at 230-231 (acknowledging cases of Chevron deference to agency guidance not pursuant to notice-and-comment procedures).

(2) Are all regulations issued pursuant to notice-and-comment procedures, accorded the force of law? See 5 U.S.C. sec. 553(d)(2) (excepting interpretative rules from the notice-and-comment procedures of the APA).

(3) What deference is owed to temporary regulations,

generally issued without notice and comment?

(4) Are proposed regulations accorded any deference

(5) Has Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, called into question Auer v. Robbins, 519 U.S. 452 and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410.

(6) Can the IRS's failure to issue regulations prevent application of a provision (particularly if the Code contains a grant of rule-making authority)? Apparently not, at least for taxpayer-beneficial Code provisions. See, e.g., Francisco v. Commissioner, 119 T.C. 317, 324 (2002), aff'd, 370 F.3d 1228 (D.C. Cir. 2004).

(7) If regulations defining a statutory term or phrase have not been issued, may a definition interpreting the term or phrase be imported from another provision of the statute? "Where the same words or phrase appear within a text, they are presumed to have the same meaning." Rand v. Commissioner, 141 T.C. 376, 385 (2013) (citing Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); see also, e.g., Bodzy v. Commissioner, 321 F.2d 331, 335 (5th Cir. 1963) (the provisions of the Code should be interpreted similarly where similar language is used in related code provisions), rev'g and remanding T.C. Memo. 1962-40.

3. Revenue Rulings

a. Introduction

(1) "A Revenue Ruling is an official interpretation by the Service that has been published in the Internal Revenue Bulletin." Sec. 601.601(d)(2)(i)(a), Statement of Procedural Rules.

(2) The default rule is that revenue rulings are retroactive in effect. Section 7805(b)(8) provides: "The Secretary may prescribe the extent, if any, to which any ruling * * * relating to the internal revenue laws shall be applied without retroactive effect." Section 601.601(d)(2)(v)(c), Statement of Procedural Rules, provides that, with limited exceptions, revenue rulings apply retroactively unless the ruling contains a specific statement indicating the extent to which it is not retroactive.

(3) It can be difficult to dispute the Commissioner's authority to apply a ruling retroactively. See, e.g., Gehl Co. v. Commissioner, 795 F.2d 1324 (7th Cir. 1986), aff'g in part, setting aside in part T.C. Memo. 1984-667; Becker v. Commissioner, 85 T.C. 291, 294 (1985) (if retroactive, reviewed for an abuse of discretion; e.g., unfair disparity of treatment of similarly situated taxpayers).

(4) It is implicit in section 7805(b) that the Secretary may amend or revoke a ruling when he determines that it erroneously interprets the applicable legal principle. However, sec. 601.601(d)(2)(v)(c), Statement of Procedural Rules, provides: "Where Revenue Rulings revoke or modify rulings previously published in the Bulletin the authority of section 7805(b) of the Code ordinarily is

invoked to provide that the new rulings will not be applied retroactively to the extent that the new rulings have adverse tax consequences to taxpayers."

(5) In Dixon v. United States, 381 U.S. 68, 73 (1965), the Supreme Court held that the Commissioner may correct a mistake of law (i.e., withdraw a ruling retroactively)"even where a taxpayer may have relied to his detriment on the Commissioner's mistake." The Commissioner's exercise of that authority is subject to an abuse of discretion standard. See Burleson v. Commissioner, T.C. Memo. 1994-364 ("Relevant considerations include whether or to what extent the taxpayer justifiably relied on the prior position and whether retroactive application would create an inordinately harsh result."); see also Gehl Co. v. Commissioner, 795 F.2d 1324 (retroactive application of a regulation).

b. Reliance

(1) In general, taxpayers may rely on revenue rulings in determining the tax treatment of their own transactions. Section 601.601(d)(2)(v)(e), Statement of Procedural Rules, provides:

"Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published Revenue Ruling to the facts of their particular cases. However, since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers,

Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. They should consider the effect of subsequent legislation, regulations, court decisions, and revenue rulings."

(2) The Tax Court has prohibited the Commissioner from arguing against a revenue ruling. In Rauenhorst v. Commissioner, 119 T.C. 157, 170-171 (2002), the Court said:

"Although we do not question the validity of the opinions of this Court and the Courts of Appeals upon which respondent relies, we are not prepared to allow respondent's counsel to argue the legal principles of those opinions against the principles and public guidance articulated in the Commissioner's currently outstanding revenue rulings." (Footnote omitted.)

See also Dover v. Commissioner, 122 T.C. 324, 350 (2004). It appears that in both Rauenhorst, 119 T.C. at 173, and Dover, 122 T.C. at 339, the taxpayer specifically relied on the revenue rulings in question in planning their transactions. Does Rauenhorst extend to situations in which the taxpayer learns of the revenue ruling after the transaction is complete? See Chief Counsel Notice CC-2003-014 (May 8, 2003), 2003 WL 24016799 (citing Rauenhorst and stating: "Our litigating positions should be derived from, and consistent with, the Internal Revenue Code and our published

guidance."); Rev. Proc. 64-22, 1964-1 C.B. 689 (a statement of principles of tax administration including the instruction that the IRS should never raise an issue in audit or in litigation that is "inconsistent with an established Service position.").

(3) Revenue rulings may figure in a defense to a section 6662 accuracy-related penalty. Thus, a revenue ruling may constitute "substantial authority" within the meaning of section 6662(d)(2)(B)(i), or it may provide "a reasonable basis", within the meaning of section 6662(d)(2)(B)(ii)(II). See sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs. (revenue rulings and revenue procedures are authorities for purposes of determining substantial authority under section 6662(d)(2)(B)(i) of the Code.); sec. 1.6662-3(b)(3), Proced. & Admin. Regs. (return position based on one or more authorities set forth in sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs., will generally satisfy "reasonable basis" standard).

(4) Disregard of a revenue ruling may trigger an accuracy-related penalty on account of "disregard of rules or regulations". See sec. 6662(a) and (b)(1). Section 1.6662-3(b)(2), Proced. & Admin. Regs., provides that the term "rules or regulations" includes "revenue rulings or notices". That regulation provides, however, that a taxpayer who takes a position contrary to a revenue ruling or notice has not disregarded the ruling or notice "if the contrary position has a realistic possibility of being sustained on its merits." "In determining whether a realistic possibility of being sustained on its merits exists for return positions, the regulations defining the realistic possibility standard refer to

the same list of authorities on which taxpayers may rely for substantial authority under the provisions for substantial understatement penalty." Candyce Martin 1999 Irrevocable Trust v. United States, 822 F. Supp. 2d 968, 1015 (N.D. Cal. 2011), aff'd in part, rev'd in part, 739 F.3d 1204 (9th Cir. 2014).

(5) Reliance on a revenue ruling may also aid in establishing a section 6664(c) reasonable cause defense to sections 6662 and 6663 penalties. See also sec. 6664(d)(3)(B) ("substantial authority").

c. Deference

(1) Section 601.601(d)(2)(v)(d), Statement of Procedural Rules, provides: "Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose."

(2) On occasion, the IRS issues a notice setting forth the contents of a proposed revenue ruling and soliciting comments. See, e.g., Notice 2009-64, 2009-36 I.R.B. 307 (proposing a revenue ruling that would hold that tangible assets used in converting corn to fuel grade ethanol are properly included in a particular asset class for depreciation purposes); Notice 2002-31, 2002-1 C.B. 908 (providing the contents of a proposed ruling concerning the employment taxation and reporting of nonqualified stock options and nonqualified deferred compensation transferred to a former spouse incident to a divorce). Does that suggest that a ruling so promulgated is entitled to Chevron

deference?

(3) If a revenue ruling is not to be accorded Chevron deference under the standards applied in Mead, 533 U.S. 218, must it be accorded any deference?

(4) It would seem that, pursuant to Mead, 533 U.S. at 227-228, a revenue ruling is to be given the weight determined under Skidmore; i.e., weight determined by its "power to persuade", which "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140.

(5) Bootstrapping revenue rulings, issued to support the Commissioner's position in litigation, probably will not satisfy the standards for Skidmore deference. See, e.g., AMP Inc. v. United States, 185 F.3d 1333, 1338-39 (Fed. Cir. 1999) ("A revenue ruling issued at a time when the IRS is preparing to litigate is often self-serving and not generally entitled to deference by the courts. * * * This is especially true when the ruling cites no authority and is inconsistent with regulations and other pronouncements of the IRS.").

4. Revenue Procedures

a. "A Revenue Procedure is a statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Code and related statutes or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge." Sec. 601.601(d)(2)(i)(b), Statement

of Procedural Rules.

b. Similar questions as with respect to revenue rulings.

c. Are the questions (particularly relating to deference) different if the regulations authorize the Commissioner to issue revenue procedures? See, e.g., sec. 1.274-5(g)(1), Income Tax Regs. (giving Commissioner discretion to prescribe rules in which expense allowances following reasonable business practices will be regarded as equivalent to substantiation by adequate records).

5. Notices and Announcements

a. "A notice is a public pronouncement by the Service that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law." Chief Counsel Directives Manual (CCDM) 32.2.2.3.3. (08-11-2004); see also Internal Revenue Manual (IRM) pt. 4.10.7.2.4.1(1)(B) (01-01-2006)

b. "An announcement is a public pronouncement that has only immediate or short-term value." CCDM 32.2.2.3.4. (08-11-04); see also IRM pt. 4.10.7.2.4.1(1)(A) (01-01-2006 ("Announcements can be relied on to the same extent as revenue rulings and revenue procedures."). As to short-term value of an announcement, see Ann. 85-113, 1985-31 I.R.B. 31, announcing new rules addressing withholding and reporting on noncash fringe benefits, which by its terms supercedes the regulations issued under section 3501(b), but, oddly, without citing that section. The announcement states: "Taxpayers may rely on these guidelines until the issuance of regulations that will supersede Notice 726 issued in January 1985, and the temporary and proposed regulations published in the Federal Register on January 7 and February 20, 1985."

No superceding regulations have yet been issued.

c. May taxpayers rely on notices and announcements as a defense to penalties? See sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs. (notices, announcements, and other administrative pronouncements published by the IRS in the Internal Revenue Bulletin are authorities for purposes of determining substantial authority under section 6662(d)(2)(B)(i) of the Code.)

d. Must courts accord notices and announcements any deference? Based on Mayo and Mead, the Skidmore test would seem to apply to those documents.

e. Should Rauenhorst v. Commissioner, 119 T.C. 157, be applied to notices and announcements? See Chief Counsel Notice CC-2003-014 (May 8, 2003), 2003 WL 24016799 (including "IRB notices * * * [and] announcements" among the final guidance that Chief Counsel will not contradict.).

6. Notices of Acquiescence and Actions on Decision

a. A notice of acquiescence is an announcement by the IRS indicating whether it will follow a significant adverse decision. An action on decision (AOD) is an internal document prepared within the Chief Counsel's office reflecting the judgment of what announcement should be made. See IRM 4.10.7.2.9.8.1(1) (01-01-2006); CCDM 36.3.1.1.1. (03-14-2013).

b. Notices of acquiescence and AODs are published in the Internal Revenue Bulletin and are available in the Electronic Reading Room. CCDM 36.3.1.1(2) (03-14-2013).

c. The internal AOD is intended to provide controlling

guidance to IRS personnel working similar issues in other cases. See, e.g., 2013-7 I.R.B. 483, 2013 WL 485861, (announcing the Commissioner's nonacquiescence in Patel v. Commissioner, 138 T.C. 395 (2012) .

d. The Commissioner can modify, amend, or revoke his acquiescence and make such changes retroactive generally or with respect to certain taxpayers. See Dixon v. United States, 381 U.S. 68, 72-73 (1965).

e. As a defense to penalties, see sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs. (AODs issued after Mar. 12, 1981 are authority for purposes of determining substantial authority under section 6662(d)(2)(B)(i) of the Code).

7. Forms and Instructions

a. May a taxpayer rely on a form or instruction contrary to the Code or contrary to other published guidance?

b. Are forms and instructions accorded any level of deference? See J. Beghe's concurrence in Francisco v. Commissioner, 119 T.C. at 334-335, addressing Secretary's failure to issue regulations under then section 931(d)(2) and citing Publication 570 as providing instructions on how to complete Form 4563. Notably, though, in United States v. Quality Stores, 134 S. Ct. 1395 (2014), the Supreme Court pointedly and completely ignored the fact that the forms and instructions issued immediately following Congress's adoption of Code section 3402(o)(2) specifically stated that all the types of layoff benefits described in that provision were exempt from FICA taxes, even though they were subject to Federal income tax withholding.

8. Publications; e.g., Publication 17, Your Federal Taxes

Same questions.

9. Frequently Asked Questions[2]

Same questions.

10. News Releases

Same questions.

11. Fact Sheets

Same questions.

12. Other Published Guidance

E. Released Guidance Open to the Public Pursuant to Section 6110(a)

1. In General

a. Section 6110(a) provides: "General rule.--Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe."

b. "The term 'written determination' means a ruling, determination letter, technical advice memorandum, or Chief Counsel advice." Sec. 6110(b)(1)(A).

c. The term "background file document" is defined in section 6110(b)(2).

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[2]http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers

2. Letter rulings

   a. "A 'letter ruling' is a written determination issued to a taxpayer * * * in response to the taxpayer's written inquiry, filed prior to the filing of returns or reports that are required by the tax laws, about its status for tax purposes or the tax effects of its acts or transactions." Rev. Proc. 2015-1, 2015-1 I.R.B. 1, sec. 2.01.

   b. Letter rulings may be relied on by the person to whom issued, subject to limitations. Generally not revoked retroactively unless found to be in error, there has been a change in the law, or there has been a material change in the facts. Id. sec. 11.

   c. The Internal Revenue Bulletin states: "Unpublished rulings will not be relied on, used, or cited by Service personnel in disposition of other cases." E.g., 2015-4 I.R.B., unnumbered page 2.

   d. As a defense to penalties, see sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs. (Letter rulings issued after Oct. 31, 1976 are authority for purposes of determining substantial authority under section 6662(d)(2)(B)(i) of the Code.)

   e. Taxpayer reliance on letter rulings and other released guidance is addressed infra.

3. Determination Letters

   a. "A 'determination letter' is a written determination * * * that applies the principles and precedents previously announced by the Service to a specific set of facts." Id. sec. 2.03.

   b. A determination letter has the same effect as a letter

ruling. See id. sec. 12.

4. Technical advice memoranda (TAMs)

a. A TAM is legal advice from the Chief Counsel to the Commissioner responding to a request for assistance on any technical or procedural question that develops during any proceeding before the IRS. See Rev. Proc. 2015-2, 2015-1 I.R.B. 105.

b. May taxpayers rely on TAMs? See sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs. (TAMs issued after Oct. 31, 1976 are authority for purposes of determining substantial authority under section 6662(d)(2)(B)(i) of the Code.).

5. Chief Counsel Advice

a. "[W]ritten advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel" that is issued to Service or Chief Counsel personnel in the field interpreting or concerning a "revenue provision." Sec. 6110(i)(1). See CCDM 33.1.2.1 (08-11-2004), Legal Advice in General.

b. Types: program manager advice, associate memoranda, field legal advice, litigation guideline memoranda; older forms, GCMs, office memoranda, various bulletins (e.g., tax litigation bulletins).

c. As a defense to penalties, see sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs. (GCMs issued after March 12, 1981, and pre-1955 published GCMs are authority for purposes of determining substantial authority under section 6662(d)(2)(B)(i) of the Code.).

6. May a taxpayer other than the taxpayer to whom a written

determination is directed rely on the determination or cite it as precedent?

a. Section 6110(k)(3) provides in part: "Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent."

b. However, in Rowan Cos. v. United States, 452 U.S. 247, 261 n.17 (1981), the Supreme Court relied on a series of letter rulings to show that the Commissioner did not interpret the term "wages" consistently. Letter rulings also may be cited to demonstrate the long-standing administrative interpretation of a relevant statutory provision. Hanover Bank v. Commissioner, 369 U.S. 672, 686 (1962) ("[A]lthough the * * * [taxpayers] are not entitled to rely upon unpublished private rulings which were not issued specifically to them, such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws." (footnote omitted)).

c. Does "no use as precedent" = "no reliance", so that a written determination may not be accorded Skidmore deference? Mayo and Mead, would seem to lead to the conclusion that a written determination should be evaluated under the same Skidmore standards that apply to revenue rulings, revenue procedures, notices and announcements (i.e., the power to persuade).

7. Does a taxpayer have the right to claim the same treatment given to another taxpayer in a written determination?

a. In pertinent part, the APA provides that a court reviewing an agency action shall hold unlawful and set aside agency action that is arbitrary and capricious. 5 U.S.C. 706(2)(A). It is impermissible for an agency to treat similarly situated parties differently without a satisfactory

and reasoned explanation for such treatments. See, e.g., Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd., 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld."). In Mayo, 562 U.S. at 55, the Supreme Court held that tax law is subject to the same principles of administrative law applicable in other areas of Federal law. See also Cohen v. United States, 650 F.3d 717, 723 (D.C. Cir. 2011) ("The IRS is not special in this regard; no exception exists shielding it--unlike the rest of the Federal Government--from suit under the APA.").

b. Also, in Int'l Bus. Mach. Corp. v. United States, 343 F.2d 914, 924 (Ct. Cl. 1965), a pre- section 6110(k)(3) case, in which the Court of Claims suggested that letter rulings might be used to demonstrate that the Commissioner had abused his discretion under then section 7805(b) by issuing rulings that treated competing taxpayers differently. The case has been read narrowly. See, e.g., Florida Power & Light Co. v. United States, 375 F.3d 1119, 1124 (Fed. Cir. 2004).

c. Does this analysis suggest that the Commissioner should be required to change his views prospectively when he issues guidance (even regulations) reversing prior guidance?

F. Released Guidance Made Public Other Than Pursuant to Section 6110

1. Closing agreements

a. An agreement between the Service and a taxpayer on a specific issue or liability pursuant to section 7121.

b. It is final unless fraud, malfeasance, or misrepresentation of a material fact can be shown. See sec. 7121(b).

c. Specific types of closing agreements.

(1) Advanced pricing agreements

(2) Prefiling agreements

2. Information letters

a. "[A] statement * * * that calls attention to a well-established interpretation or principle of tax law (including a treaty) without applying it to a specific set of facts." Rev. Proc. 2015-1, sec. 2.04.

b. The revenue procedure states: "An information letter is advisory only and has no binding effect on the Service." Id.

c. The I.R.S. makes the information letters available to the public under the Freedom of Information Act. Id.

3. Coordinated Issue Papers

4. Appeals Settlement Guidelines

5. Audit Techniques Guides

6. IRS Training Manuals

7. Internal Revenue Manual

a. The IRM defines its function as follows: "The IRM is the primary, official source of instructions to employees relating to the organization, administration and operation of the IRS. The IRM contains directions for employees to

carry out their responsibilities in administering IRS obligations." IRM 1.11.6.3 (04-17-2014)

b. May a taxpayer require the IRS to comply with the IRM? "Noncompliance with the manual does not render an action of the IRS invalid. * * * Procedures in the Internal Revenue Manual are intended to aid in the internal administration of the IRS; they do not confer rights on taxpayers." Carlson v. United States, 126 F.3d 915, 922 (7th Cir. 1997); see also Thompson v. Commissioner,140 T.C. 173, 193 n.16 (2013) ("it is a well-settled principle that the Internal Revenue Manual does not have the force of law, is not binding on the IRS, and confers no rights on taxpayers"; internal quotation marks omitted).

c. Is the IRM binding on IRS personnel? What recourse if the interpretation is unreasonable?

d. Is the IRM entitled to Skidmore deference? "The I.R.S.'s interpretations of the Internal Revenue Code as set out in the I.R.M are entitled to Skidmore deference, i.e., deference commensurate with the thoroughness, validity, consistency and persuasiveness of the IRS's analysis. See Matz v. Household Intern. Tax Reduction Inv. Plan, 265 F.3d 572, 575 (7th Cir. 2001)." Highland Capital Mgmt., L.P. v. United States, No. 14-MC-0174-P1 CM, 2014 WL 5068592, at *6 (S.D.N.Y. Oct. 9, 2014). In Matz, 265 F.3d at 575, the Court of Appeals, following Mead, tested the IRS's position in an amicus brief for its power to persuade under Skidmore, 323 U.S. 134.

8. Examination and Appeals Communications

a. Communications to taxpayers during examinations or appeals hearings or in closing documents citing unpublished positions of the national office as authority for the exam or appeals position.

b. May the taxpayer rely on such guidance, at least for avoidance of penalties? See Xcel Energy, Inc. v. United States, 237 F.R.D. 416, 419 (D. Minn. 2006) ("We have found no authority for the proposition that the internal ruminations of IRS agents, during an administrative consideration of the taxpayer's tax liability, could serve, however slightly, as the 'substantial authority' required by Section 6662(d)(2)(B)(i)". But see sec. 31.3401(a)(8)(A)-1(a)(1), Employment Tax Regs., addressing reasonable belief as to whether a payment is a wage ("The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief").

9. Other Guidance (An Alphabet Soup of Initials)

a. ECCs–E-mail Chief Counsel Advice.

b. FAQs–Frequently Asked Questions.

c. FSAs–Filed Service Advice.

d. ITAs–IRS Technical Assistance.

e. LGMs–Litigation Guideline Memos.

f. PMTAs–Program Manager Technical Assistance.

g. PTAMs–Private Technical Advice Memos.

h. SCAs–Service Center Advice.

10. Treasury Guidance

a. FAQs and notices appearing on the Treasury's (not the IRS's) website.

b. Note that, for example, the Troubled Asset Relief

Program guidance published as "Notice 2008-PSSFI",[3] and "Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009", U.S. Treasury, Office of Fiscal Assistant Secretary, July 2009, Revised March 2010, April 2011,[4] are technically not "authority" (for substantial authority purposes) because they were not "notices, announcements, and other administrative pronouncements published by the Service in the Internal Revenue Bulletin." See sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs.

11. Authority

a. The question of whether released guidance is "authority" (for substantial authority purposes) applies generally to the guidance items described supra.

b. Sec. 1.6662-4(d)(3)(iii), Proced. & Admin. Regs., includes among the authorities that may be considered for determining whether there is substantial authority for the tax treatment of an item "Internal Revenue Service information or press releases; and notices, announcements and other administrative pronouncements published by the Service in the Internal Revenue Bulletin."

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[3]http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/executive-comp/Documents/Exec%20Comp%20PSSFI%20Notice%20Revised.pdf

[4]http://www.treasury.gov/initiatives/recovery/Documents/B%20Guidance%203-29-11%20revised%20(2)%20clean.pdf

III. Unpublished Judicial Dispositions

A. Introduction

1. The Tax Court is a court with national jurisdiction over litigation involving the interpretation of the Federal tax statutes. Anderson v. Commissioner, 123 T.C. 219, 326 (2004), aff'd, 137 Fed. Appx. 373 (1st Cir. 2005). The Court has always believed that Congress intended it to decide cases uniformly, regardless of where, in its nationwide jurisdiction, they may arise. Lawrence v. Commissioner, 27 T.C. 713, 718 (1957), rev'd, 258 F.2d 562 (9th Cir. 1958). However, maintaining uniformity has proved difficult since appeals from the Tax Court may lie to any of the 11 numbered U.S. circuit courts of appeals or to the U.S. Court of Appeals for the District of Columbia Circuit. See sec. 7482(b). Indeed, the Court may not always know in which venue an appeal from a case may lie. Section 7482(b)(2) permits the parties in all cases to appeal by mutual agreement to any of the identified courts of appeals. Also, more than one petitioner in a case may have the right to appeal, and each may have the right to appeal to a different court of appeals. The Tax Court faces unique questions of stare decisis, and it faces difficult problems in the practice of comity. Where an appellate court decision is squarely on point and an appeal lies to that court alone, the Tax Court applies the doctrine articulated in Golsen v. Commissioner, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971), and binds itself to that decision.

2. But does the Golsen doctrine apply to all such decisions? Over 88% of Federal appellate court decisions are "unpublished",[5]

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[5] See United States Courts, Judicial Business of the United States Courts, at tbl. B-12, available at http://www.uscourts.gov/uscourts/Statistics/ JudicialBusiness/2014/appendices/B12Sep14.pdf (last visited March 29, 2015). In this outline, we use the term "unpublished" to describe appellate dispositions that do not appear in the Federal Reporter, although such dispositions are unofficially

and the Tax Court has not been clear on the weight, if any, it accords those decisions. Because the appeals courts diverge widely on how they treat their own unpublished decisions, that somewhat difficult question becomes even more nuanced for the Tax Court to answer.

3. This portion of the outline looks at Federal appellate court rules on unpublished dispositions as well as how the Tax Court treats those dispositions. It then considers the weight that the Tax Court accords its own unpublished dispositions. Finally, it considers unpublished dispositions as a defense to penalties. This portion of the outline is based substantially on Andrew R. Roberson & Randolph K. Herndon, Jr., "The Precedential and Persuasive Value of Unpublished Dispositions", 66 The Tax Executive 83 (May-Jun 2014).

4. Useful Terms

   a. Precedent: "[A] decided case that furnishes a basis for determining later cases involving similar facts or issues." Black's Law Dictionary 1295 (9th ed. 2009)

   b. Binding precedent: "A precedent that a court must follow. • For example, a lower court is bound by an applicable holding of a higher court in the same jurisdiction.--Also termed authoritative precedent; binding authority." Id. at 1295-1296.

   c. Persuasive precedent: "A precedent that is not binding on a court, but that is entitled to respect and careful

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published not only online but also in printed volumes such as West's Federal Appendix. We also use the term to describe Tax Court Memorandum and Summary Opinions and Tax Court orders, the texts of which do not appear in the U.S. Tax Court Reports, although such dispositions also are unofficially published not only online (including by the Tax Court) but in volumes by commercial publishers.

consideration. • For example, if the case was decided in a neighboring jurisdiction, the court might evaluate the earlier court's reasoning without being bound to decide the same way." Id. at 1296.

d. Stare decisis: "The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."

"The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases." [Id. at 1537 (citation omitted).]

B. Unpublished Dispositions of the U.S. Courts of Appeals

1. Publication–the 1973 Model Rule

a. In 1973, the Advisory Council on Appellate Justice recommended limiting the publication of opinions and prohibiting the citation of unpublished opinions.[6] A model rule based on the report provides:

(1) Opinions should not be designated for publication unless:

(a) The opinion establishes a new rule of law or

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[6]The recommendations can be found at National Center for State Courts, NCSC library eCollecton, at (http://cdm16501.contentdm.oclc.org/cdm/ref/collection/appellate/id/33 (last visited Feb. 3, 2015).

alters or modifies an existing rule;

(b) The opinion involves a legal issue of continuing public interest;

(c) The opinion criticizes existing law; or

(d) The opinion resolves an apparent conflict of authority.

(2) Opinions marked not designated for publication shall not be cited as precedent by any court or in any brief or other materials presented by any court.

2. Circuit Rules

a. Model Rule

(1) The model rule provided a framework for the U.S. courts of appeals to adopt their own local rules on unpublished dispositions.

(2) Those rules can be grouped into three categories: (1) publication rules, (2) citation rules, and (3) precedential value rules.

b. Publication Rules by Circuit

(1) Model rule provided template for some (4th, 5th, 6th, 9th, and D.C.).[7]

(2) Others crafted own rule (1st, 2nd, 3rd, 10th, and

[7] See 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1; 6TH Cir. I.O.P. 32.1(b)(1); 9TH CIR. R. 36-2.

Federal).[8]

(3) No guidance (7th, 8th, and 11th).[9]

c. Citation Rules by Circuit

(1) Rule 32.1(a), Fed. R. App. P., provides:

"(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and

(ii) issued on or after January 1, 2007."

(2) Rule 32.1(a) is prospective, and circuit courts differ on whether to apply the rule retroactively. There is, thus, not uniformity among the circuits on the citation of unpublished dispositions.

d. Circuit Rules on Precedential Status

(1) While Rule 32.1 sought uniformity with respect to the citation of unpublished dispositions, the Advisory Committee Comment to that rule expressly noted that it provided no guidance regarding their precedential status. It states:

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[8] See 1ST. CIR. R. 36.0(b)(1); 2ND CIR. I.O.P. 32.1.1; 3D CIR. I.O.P. 5.1-5.3; 10TH CIR. R. 36.1 and .2; D.C. CIR. R. 36(c)).

[9] See 7TH CIR. R. 32.1; 8TH CIR. R. 47.5.4; 11TH CIR. R. 36-2.

"Rule 32.1 is extremely limited. * * * It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the citation of federal judicial dispositions that have been designated as 'unpublished' or 'non-precedential'– whether or not those dispositions * * * are precedential in some sense."

(2) Precedential Status Differs Among the Circuits

(a) Rules fall across a spectrum; some circuits give no weight, some give persuasive weight, some appear open to doing so, and others say they are precedent.

(b) Four circuits appear to accord no weight to unpublished dispositions: Second,[10] Third,[11] Seventh,[12] and Ninth.[13]

(c) Five circuits indicate that unpublished dispositions, while falling short of binding precedent, may be considered as persuasive authority or for their persuasive value:

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[10]2D CIR. R. 32.1.1(a).

[11]3D CIR. I.O.P. 5.7.

[12]7TH CIR. R. 32.1(b).

[13]9TH CIR. R. 36-3(a).

First,[14] Eighth,[15] Tenth,[16] Eleventh,[17] and Federal.[18]

(d) Two circuits, while not giving any explicit instructions on how they view their unpublished dispositions, implicitly suggest that they may give weight to their unpublished dispositions: Fourth[19] and Sixth.[20]

(e) Two circuits grant precedential status to all of their unpublished dispositions issued during certain time periods: Fifth[21] and D.C.[22]

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[14] 1ST CIR. R. 32.1.0(a).

[15] 8TH CIR. R. 32.1A.

[16] 10TH CIR. R. 32.1(A).

[17] 11TH CIR. R. 36-2.

[18] FED. CIR. R. 32.1(d).

[19] 4TH CIR. Rs. 32.1, 36.3.

[20] 6TH CIR. R. 32.1(a).

[21] 5th CIR. R. 47.5.3 and .4 (pre 1996 unpublished opinions).

[22] D.C. CIR. R. 32.1(b)(1)(A)-(B) (post 2001 unpublished dispositions).

e. Tax Court Treatment of Appellate Court Unpublished Dispositions

(1) Under the Golsen doctrine, is the Tax Court bound by an unpublished circuit court disposition?

(2) Although not necessary to answer that question, the following describes the Tax Court's evolution of the Golsen doctrine. As stated supra, appeals from the Tax Court may run to any of the numbered U.S. circuit courts of appeal or to the Court of Appeals for the District of Columbia Circuit. See sec. 7482(b). In Lawrence v. Commissioner, 27 T.C. 713, 716-717 (1957), rev'd, 258 F.2d 562 (9th Cir. 1958), the Tax Court considered what it should do when an issue comes before it a second time, after a court of appeals has reversed a prior Tax Court decision on the same point. The Court decided that, while certainly it should consider the reasoning of the reversing court of appeals, it ought not follow the decision if it believed it incorrect. Id.; see also Lardas v. Commissioner, 99 T.C. 490, 494 (1992) (explaining Lawrence doctrine). In Golsen v. Commissioner, 54 T.C. 742 (1970), the Court created a narrow exception to the Lawrence doctrine, applicable when a case in the Tax Court is appealable to a court of appeals that previously has taken a position on precisely the same issue. Without conceding that it lacked the authority to render a decision inconsistent with any court of appeals (including the one to which an appeal would lie), the Court recognized that it would be futile and wasteful to do so where it surely would be reversed. Lardas v. Commissioner, 99 T.C. at 495 (explaining Golsen). Pursuant to the Golsen doctrine, the Tax Court will follow a court of appeal's decision that is squarely on point where

appeal from the Tax Court's decision lies to that court of appeals and to that court alone. Golsen v. Commissioner, 54 T.C. at 757; see also Lardas v. Commissioner, 90 T.C. at 495 (cautioning that, "bearing in mind our obligation as a national court, * * * we should be careful to apply the Golsen doctrine only under circumstances where the holding of the Court of Appeals is squarely on point").

(3) Although a few Tax Court cases have noted the interplay between the Golsen doctrine and unpublished circuit court dispositions, the Tax Court has not been clear in articulating the precedential value, if any, given to those dispositions.

(4) A few Tax Court cases have declined to treat as binding precedent under the Golsen doctrine unpublished circuit court dispositions. In Ruegsegger v. Commissioner, 68 T.C. 463, 466-467 (1977), the Tax Court had to decide a question that, previously, it had decided one way (case 1) and then another way (case 2, overruling case 1). The Court was inclined to follow case 2, but the Commissioner (who favored the case 1 result) raised the Golsen doctrine because case 1 had been affirmed by the Second Circuit (the venue for appeal), although only in open court and without an opinion. Because, pursuant to a Second Circuit rule, the affirmance had no precedential value, the Tax Court declined to apply the Golsen doctrine. See also Rubinow v. Commissioner, 75 T.C. 486, 491 n.5 (1980) (Golsen doctrine does not apply to open-court affirmance of district court case from the Second Circuit), aff'd, 679 F.2d 873 (2d Cir. 1981). In Bennett Land Co. v. Commissioner, 70

T.C. 904, 907 n.3 (1978), the Tax Court declined to apply the Golsen doctrine to a Ninth Circuit affirmance by unpublished disposition of a district court judgment without mentioning how the Ninth Circuit would treat the affirmance.

(5) The Golsen doctrine aside, it is difficult to determine from Tax Court cases what weight, if any, the Court accords as a matter of comity to appellate court unpublished dispositions. For example, in Ewing v. Commissioner, 122 T.C. 32, 35 n.3 (2004), rev'd, 439 F.3d 1009 (9th Cir. 2006), the Court rejected the Commissioner's argument that, in reviewing his denial of the taxpayer's request for innocent spouse relief, the Court should restrict itself to the administrative record. The Court noted that in three appellate cases the Commissioner had taken a position contrary to his position in the case before the Court and that each of those appellate courts had upheld the Commissioner's position (i.e., that the hearing before the court should not be limited to the administrative record). The Court did not ascribe any weight to those cases, and it noted that they were "unpublished" and "not binding precedent". Id. By contrast, in Robinette v. Commissioner, 123 T.C. 85, 96 (2004), rev'd, 439 F.3d 455 (8th Cir. 2006), in extending the Ewing principle to collection due process cases, the Court quoted a Ninth Circuit unpublished disposition to support its position that a de novo scope of review was "established practice and procedure".

f. A Suggested Approach for The Tax Court in Dealing with Unpublished Circuit Court Dispositions

(1) Where Unpublished Disposition Squarely on Point and Where Appeal of Case Sub Judice Lies Solely to that Court (i.e., Golsen Doctrine Factors Present)

(a) Look to circuit rules to determine (1) with respect to pre-2006 unpublished dispositions, whether they may be cited and (2) what weight, if any, the circuit court accords to unpublished dispositions.

(b) If the circuit rule prohibits citation of the disposition, then the Golsen doctrine is inapplicable, since it can be assumed that the disposition is not the "clearly established position" of the circuit. See Lardas v. Commissioner, 99 T.C. at 495 (clarifying that the Golsen doctrine should be applied only if "a reversal would appear inevitable[ ] due to the clearly established position of the Court of Appeals to which an appeal would lie").

(c) Apply Golsen doctrine to unpublished dispositions that are treated as the law of the circuit (e.g., pre-1996 unpublished dispositions of the Fifth Circuit and post-2001 unpublished dispositions of the D.C. Circuit).

(d) In some circuits, unpublished dispositions are not accorded binding precedence but are nevertheless considered as persuasive "authority" or for their persuasive "value" (First, Eighth, Tenth, and Eleventh). Some

circuits do not provide any explicit guidance on the weight accorded to unpublished dispositions but implicitly suggest that they may be considered as persuasive (Fourth and Sixth). Applying the Golsen doctrine to those dispositions would seem inappropriate because, as discussed supra, the disposition is not the "clearly established position" of the circuit. Lardas v. Commissioner, 99 T.C. at 495.

(e) Finally, four circuits (Second, Third, Seventh, and Ninth Circuits) specifically provide that unpublished dispositions do not have any "precedential effect" (or use a similar term) and do not even suggest that such dispositions may be even persuasive precedent. For those circuit's unpublished dispositions, it would seem even more clear that applying the Golsen doctrine would be inappropriate.

(2) General Rule for Addressing Unpublished Circuit Court Dispositions When Golsen Doctrine Inapplicable

(a) No Tax Court Rule prohibits the citation of unpublished circuit court dispositions or addresses the weight that the Court may accord them.

(b) But for application of the Golsen doctrine, no circuit court disposition has binding precedence for the Tax Court. See Lardas v. Commissioner, 99 T.C. at 495 ("It should be emphasized that the logic behind the Golsen doctrine is not that we lack the authority to

render a decision inconsistent with any Court of Appeals (including the one to which an appeal would lie), but that it would be futile and wasteful to do so where we would surely be reversed.").

(c) The Tax Court may accord unpublished appellate court dispositions persuasive precedence.

(d) See, e.g., Isley v. Commissioner, 141 T.C. 349, 363 n.5 (2013), where the Tax Court considered the weight to be accord to two unpublished circuit court dispositions, one, United States v. Jackson, 511 Fed. Appx. 200 (3d Cir. 2013), from the Third Circuit, whose local rules, the Court said, "do not specifically address the precedential value of its unpublished opinions", and the other, Faust v. United States, 28 F.3d 105 (9th Cir. 1994), from the Ninth Circuit, which, the Court said, "does not generally treat its post [should be "pre"]-January 1, 2007, unpublished opinions as precedent." The Court said: "Barring written stipulation to the contrary, the venue for appeal of this case would be the Court of Appeals for the Eighth Circuit. * * * We are not so much concerned with the application of the principles of stare decisis to the two cases as we are with the persuasiveness of their reasoning." Isley v. Commissioner, 141 T.C. at 363 n.8 (emphasis added).

C. Unpublished Tax Court Dispositions

1. Reporting, Publicity, and Publication

a. The series "United States Tax Court Reports" (Reports) is published by the Government Printing Office. Volumes appear semiannually and contain the full text of reports (opinions) of the Tax Court other than those designated memorandum opinions, summary opinions, or bench opinions. Proceedings disposed of on memorandum opinions are listed at the end of each volume alphabetically by name of the petitioner and memorandum opinion number (e.g., T.C. Memo. 2015-1).

b. Opinions reported in full text in the Reports are commonly referred to as either "TC opinions" or "Division opinions" (referring to the separation of the Tax Court into divisions; see sec. 7444(c)).

c. In part, the Reports are published in response to the requirement in section 7459(a) that the Tax Court shall "report" upon any proceeding instituted before it. Section 7459(b) provides: "The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions."

d. Section 7461 provides that "all reports of the Tax Court * * * shall be public records open to the inspection of the public."

e. In pertinent part, section 7462 provides: "The Tax Court shall provide for the publication of its reports at the Government Printing Office [GPO] in such form and manner as may be best adapted for public information and use".

f. Apparently, the Tax Court believes that setting forth the petitioner's name and case number of each memorandum opinion (which is a public record) satisfies the section 7462 publication requirement: "in such form and manner as may be best adapted for public information and use".

g. Summary opinions (in small tax cases; less than $50,000) need not be included in the Reports, see sec. 7463(a); likewise, bench (oral) opinions, see sec. 7459(b).

2. Citation The Tax Court Rules do not prohibit the citation of unpublished Tax Court dispositions.

3. Precedential Status

a. Division Opinions

(1) The Tax Court generally treats Division opinions as binding precedents. See, e.g., State Bank v. Commissioner, 111 T.C. 210, 213 (1998) aff'd, 214 F.3d 1254 (10th Cir. 2000) ("The doctrine of stare decisis generally requires that we follow the holding of a previously decided case, absent special justification.").

(2) That is in contradistinction to the rule governing Federal district courts, which do not apply the doctrine of stare decisis to other district court cases. E.g., Erkfritz v. Janssen Pharm., L.P., No. 4:06CV419HEA, 2006 WL 950202, at *1 (E.D. Mo. Apr. 10, 2006) ("The Court is cognizant that the opinions of district courts have no stare decisis effect.").

b. Memorandum Opinion

(1) The scope of memorandum opinions is addressed neither in the Code nor in the Tax Court Rules of Practice and Procedure. In a Tax Court press release (June 26, 2012), available at http://www.ustaxcourt.gov/ press/062612.pdf, announcing a uniform method of citing pages in memorandum opinions ("which are not officially published"), the Court described such opinions as "generally * * * [addressing] cases which do not involve novel legal issues and in which the law is settled or the result is factually driven."

(2) Memorandum opinions predominate the Court's disposition of cases. Volumes 138 and 139 of the Reports, for example (covering 2012), report 51 cases disposed of by Division opinion and 359 proceedings disposed of upon memorandum opinions.

(3) The official position of the Tax Court appears to be that memorandum opinions are not binding precedent. E.g., Huffman v. Commissioner, 126 T.C. 322, 350 (2006), aff'd, 518 F.3d 357 (6th Cir.2008); Dunaway v. Commissioner, 124 T.C. 80, 87 (2005); Nico v. Commissioner, 67 T.C. 647, 654 (1977), aff'd in part, rev'd in part on other grounds, 565 F.2d 1234 (2d Cir. 1977); Bergdale v. Commissioner, T.C. Memo. 2014-152, at *15 n.5.

(4) Yet, the foregoing authority notwithstanding, Tax Court case law, from decades past to recent days, simultaneously affirms a significant persuasive value for memorandum opinions. E.g., McGah v. Commissioner, 17 T.C. 1458, 1459-1460 (1952), rev'd, 210 F.2d 769 (9th Cir. 1954); Convergent

Techs., Inc. v. Commissioner, T.C. Memo. 1995-320, 1995 WL 422677. For example, after reiterating that a memorandum opinion was not "controlling precedent", the Court opined that "given the substantial similarity of the factual foundation", there was "no reason why we should not follow the same analytical approach that we utilized" in the memorandum. Convergent Techs., Inc. v. Commissioner, 1995 WL 422677, at *8. The Court's periodic use of test case procedures communicates a like implication, as does the marked scarcity of times in which the Court has expressly declined to follow a memorandum opinion, and, even then, typically only after a contrary appellate result or change in the law. E.g., Stewart v. Commissioner, 127 T.C. 109, 116 (2006) (court-reviewed report).

(5) The Tax Court should clarify (1) the criteria for disposing of a case by memorandum opinion and (2) the weight to be accorded to such opinions.

(6) Perhaps memorandum opinions should be eliminated.

c. Small Tax Cases (S Cases)

(1) If the amount in dispute is $50,000 or less for a taxable year, taxpayers filing in the Tax Court can elect to have their cases treated as an S case. See sec. 7463(a).

(2) While S cases do not typically present novel issues of law, undoubtedly some S cases do raise novel issues or involve analysis that practitioners may wish to bring to the Court's attention in other cases or that the Court, itself, may wish to consider.

(3) The Tax Court has no published rule regarding the precedential value of summary opinions (issued in S cases).

(4) Congress has provided, however, in section 7463(b), that decisions in small tax cases "shall not be treated as a precedent for any other case."

(5) Does "no treatment as precedent" = "no reliance", so that a summary opinion may not be accorded persuasive precedence ("respect and careful consideration")? Such an approach would be consistent with those circuits that do not accord any precedential weight to their unpublished dispositions and do not provided that they may even be persuasive. On the other hand, not treating a summary opinion as binding precedent does not deprive the opinion of the persuasive power of its reasoning and conclusions.

(6) In O'Donnabhain v. Commissioner, 134 T.C. 34, 52 (2010), involving gender reassignment procedures and a question of what is cosmetic surgery, the majority acknowledged that there "appear[ed] to be no cases of precedential value interpreting the cosmetic surgery exclusion of section 213(d)(9)" but acknowledged that a summary opinion did indeed construe the term "cosmetic" for purposes of applying that section. Pointing to section 7463(b)'s prohibition on treating the case as "precedent", the majority did not again mention the case nor did it examine its reasoning.

(7) In Reifler v. Commissioner, T .C. Memo. 2013-258, at *17 n.8, the Court found a summary opinion brought to its attention by the taxpayer to

be inapposite but noted that, although section 7463(b) precludes summary opinions from being treated as precedent in any other cases, "our Rules do not prohibit the citation of Summary Opinions, so that we may give consideration to our reasoning and conclusions in such opinions to the extent that they are persuasive."

(8) Summary opinions are subject to Tax Court review procedures similar to those imposed on regular and memorandum opinions. See Rule182, Tax Court Rules of Practice and Procedure. Is there any reason to accord them less deference than memorandum opinions?

d. Tax Court Orders

(1) With respect to orders, Rule 51(f), Tax Court Rules of Practice and Procedure, provides: "Orders shall not be treated as precedent, except as may be relevant for purposes of establishing the law of the case, res judicata, collateral estoppel, or other similar doctrine."

(2) Does the prohibition extend to citing (bringing to the attention of the Court) an order?

e. Defense to Penalties

May a taxpayer rely on a court's unpublished disposition in defense to a penalty? Section 1.6662-4(d)(3)(iii), Income Tax Regs., includes "cases" for purposes of determining whether there is "authority" for substantial-authority purposes. The like inclusion of private letter rulings leads to the conclusion that unpublished court dispositions ought be accorded equivalent status.

IV. Partial Bibliography

A. Articles

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3. Amandeep S. Grewal, "The Un-Precedented Tax Court, 101 Iowa L. Rev. __ (forthcoming, Issue 5, 2016).

4. Andrew R. Roberson & Randolph K. Herndon, Jr., "The Precedential and Persuasive Value of Unpublished Dispositions", 66 The Tax Executive 83 (May-June 2014).

5. Mitchell Rogovin & Donald L. Korb, "The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century; A View From Within", 46 Duquesne Law Review 323 (2008).

6. Patrick J. Smith, "Perez v. Mortgage Bankers Association: Are There Now Four Votes on the Supreme Court to Overrule Auer?", Procedurally Taxing Blog (March 10, 2015), http://www.procedurallytaxing.com/?s=perez.

7. Patrick J. Smith, "Quality Stores and the Status of Revenue Rulings", 140 Tax Notes 1089 (2013).

8. Patrick J. Smith, "Life After Mayo: Silver Linings", 131 Tax Notes 1251 (2011).

B. Other

Rev. Proc. 64-22, 1964-1 C.B. (Part 1) 689 ("Statement of some principles of Internal Revenue tax administration.").

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