

What Has the U.S. Tax Court Been Doing? An Update

By James S. Halpern

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A. Introduction

The title of my talk is: “What Has the United States Tax Court Been Doing? An Update.” It is an update because, in June 1945, J. Edgar Murdock, presiding judge of the Tax Court of the United States, authored an article in the *American Bar Association Journal* entitled: “What Has the Tax Court of the United States Been Doing?”¹ In considering what to talk about today, it struck me that, as almost three quarters of a century has passed since Judge Murdock’s report, it would not be rushing things if I provided an update.

First, let me assure you that much remains unchanged. The Tax Court continues to serve a unique and important role in the Federal government’s tax collection process. The Court provides an impartial tribunal for the adjudication of tax disputes before assessment of the tax (and the government’s ability to invoke its powerful extrajudicial means of seizing property to satisfy tax debts). It also creates a body of precedents that interpret Federal tax law uniformly across the country. The Court’s fundamental role has not changed since Judge Murdock wrote in 1945. Indeed, it has not changed since Congress created the Court’s predecessor, the Board of Tax Appeals, in 1924. But while our fundamental role has not changed, we have changed some of the specific ways we carry out that role. Congress has also enhanced our status as a tribunal independent of the tax collector and has given us new jurisdictions that expand our unique and critical role as a prepayment forum.

The Tax Court’s post-1945 history can be characterized as a period of change within continuity. For instance, Congress has changed some of the formal

characteristics of the Court to dispel any perception of partiality. In 1969, Congress eliminated the Court’s designation as an executive branch agency and established the newly named United States Tax Court (a change made to conform to the general way in which Federal courts are named) as an article I (or legislative) court.² In 2015, to reemphasize our independence, Congress added to our governing statute, the Internal Revenue Code, the following sentence: “The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.”³ But those changes, while not insignificant, did not change the Court’s fundamental role: It (like its predecessor) has never been controlled by those charged with collecting taxes.

Also, the aspect of our fundamental role as a prepayment forum has only been enhanced by Congress’ repeated additions to our jurisdiction. We may now review a so-called innocent spouse’s claim for equitable relief outside of our traditional deficiency jurisdiction,⁴ and a taxpayer may now appeal to us the Commissioner’s determination to proceed with collection following a so-called collection due process (CDP) hearing.⁵

The expansion of our jurisdiction into review of discretionary and equitable agency determinations has brought to the fore questions of the scope and standard of review to be applied to those determinations and has made it more difficult for the Court

²Tax Reform Act of 1969, Pub. L. No. 91-172, section 951, section 7441, 83 Stat. 487, 730 (codified as amended at I.R.C. section 7441 (2012)). As discussed below, the Court was originally established in 1924 as the Board of Tax Appeals, “an independent agency in the executive branch of the Government.” Revenue Act of 1924, ch. 234, section 900(k), 43 Stat. 253, 338. The Board’s name was, without any change in its status, changed to the Tax Court of the United States by the Revenue Act of 1942, ch. 619, section 504, section 1100, 56 Stat. 798, 975.

³Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, section 441, section 7441, 129 Stat. 3040, 3126. S. Rep. No. 114-14, at 10 (2015), explains the sentence added to I.R.C. section 7441 as being necessary to remove any uncertainty about the independence of the Tax Court caused by statements in *Kuretski v. Commissioner*, 755 F.3d 929 (D.C. Cir. 2014), that the Tax Court is not part of the Article III Judicial Branch and is an independent executive agency.

⁴See I.R.C. section 6015(e), (f). Unless otherwise indicated, all references and citations to sections of the Internal Revenue Code (I.R.C.) are to the Internal Revenue Code of 1986, as amended.

⁵See I.R.C. section 6330(d)(1).

¹31 A.B.A. J. 297 (1945).

to maintain its traditional aloofness from the Administrative Procedure Act (APA).

The Court's own initiatives in recent years to provide greater access to low-income and *pro se* taxpayers have facilitated taxpayers' opportunities to be heard before assessment and collection.

Developments since 1945 have included two noteworthy changes in the way the Court establishes a uniform body of precedents. One change is doctrinal, and the other is practical. The doctrinal change, creation of the *Golsen* doctrine, involved a limited change to the Court's previously articulated doctrine, that the Court should decide all cases as it thought right.⁶ *Golsen* holds that the Tax Court will follow a court of appeals' 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.⁷ I believe that Judge Murdock would have readily accepted the *Golsen* doctrine.

The second, practical, change is the Court's increasing practice of citing its own memorandum opinions as precedential. Judge Murdock would be less likely to have approved that development. The classification of opinions by precedential weight serves an important signaling function. The Court's relatively indiscriminate citation of memorandum and division opinions risks confusion and frustrates the signaling function that classification ought to achieve. I propose that the Court return to its historical custom of not citing memorandum opinions as legal precedent.

Looking to the future, planned reductions in IRS taxpayer assistance may increase taxpayers' resort to the Tax Court. While we strongly support measures to maintain and increase taxpayer access to the Tax Court, cutbacks in programs that encourage resolution of controversies at the administrative level may prove to be inefficient.

Before expanding on the aspects of the Tax Court's post-1945 history that I have summarized, I would like to spend a few minutes discussing the origin of the Court's predecessor, the Board of Tax Appeals, and the purposes it was created to serve. I will also discuss the development of certain aspects of the Court's procedures, such as the Court's conference procedure. That discussion will pave the way for particular consideration of how, for the most part, the post-1945 changes that I have outlined serve Congress' purposes in creating the Board of Tax Appeals and its successor, the United States Tax Court.

⁶See *Lawrence v. Commissioner*, 27 T.C. 713, 717 (1957), *rev'd*, 258 F.2d 562 (9th Cir. 1958).

⁷*Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

Also, before proceeding, I would like to acknowledge my debt to Professors Harold Dubroff and Brant J. Hellwig for their superb study of the Tax Court's historical origins and its evolution as a court. Their work, "The United States Tax Court, An Historical Analysis," revised and expanded second edition, was commissioned by the Tax Court and was published by the Government Printing Office in 2014.⁸ It is an invaluable resource both for students of the history of the Tax Court and for practitioners exploring the origins of the Court's jurisdictions and the history of its procedures.

B. Origin and Enduring Aspects

1. Origin and purposes of the Board of Tax Appeals. The significance of Congress' establishment of the Board of Tax Appeals in 1924 to provide an impartial prepayment forum for the resolution of tax disputes and to create a uniform body of precedents cannot be overstated.

It has long been recognized that the sovereign may act extra-judicially to collect a tax debt. The usual rule in tax disputes is "payment first and litigation afterwards."⁹ The reason for the usual rule is clear: "Taxes are the lifeblood of government."¹⁰ The Supreme Court used that phrase in a 1935 case dealing with equitable recoupment of an estate tax payment.¹¹ It used the phrase to explain why the sovereign is not restricted to an action at law to collect an unpaid tax and may act administratively to collect the tax:

[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.¹²

And while due process may require at least post-collection judicial review of the taxpayer's

⁸Harold Dubroff & Brant J. Hellwig, *The United States Tax Court, An Historical Analysis* (2d ed., rev. & expanded 2014).

⁹*E.g.*, *Appeal of Everett Knitting Works*, 1 B.T.A. 5, 6 (1924).

¹⁰I must acknowledge that my thoughts on this particular point and on the procedural due process aspects of tax collection were stirred by the National Taxpayer Advocate's, Nina E. Olson's, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection* (Jan. 23, 2010), reprinted in 63 *Tax Law.* 227 (2010).

¹¹*Bull v. United States*, 295 U.S. 247, 259 (1935).

¹²*Id.* at 259-60.

liability,¹³ the Supreme Court made clear in a Civil War era income tax case that the Constitution's promise that no person shall be deprived of property without due process of law does not prevent the Federal government's extra-judicial seizure and sale of a taxpayer's property to satisfy his tax debt.¹⁴

The Commissioner of Internal Revenue has long been vested by Congress with extraordinary powers to enforce tax collection by distraint.¹⁵ Recognizing that the lack of any right to litigate the liability before collection might seem wrong or unnecessarily harsh, the Supreme Court nevertheless stated in 1880 that it was for Congress to correct any perceived evil.¹⁶

With the advent of the modern income tax in 1913,¹⁷ and the addition of a complex excess profits tax in 1917,¹⁸ and in light of the explosive growth in the need for revenues brought on by the World War, it became clear that some form of independent review of contested tax-deficiency determinations was desirable before the Commissioner could assess the deficiency and take administrative action to collect the professed debt.

Between 1918 and 1924, a succession of pre-assessment reviewing bodies within the Bureau of Internal Revenue proved to be unsuccessful.¹⁹ Charles D. Hamel, the first chairman of the Board of Tax Appeals, humorously illustrated the problem with review by the Bureau as follows:

A New York magistrate once took a cab from the Grand Central station to his court house. The cabby overcharged him and threatened him with dire casualty if he did not pay the sum demanded. The judge paid him, and as he entered the court house he instructed a policeman standing in the doorway to arrest the cabby and bring him into the court. He then went in and ascended the bench, and presently the policeman appeared in front of him with the cabby. When the cabby looked up and recognized the man on the bench he said:

"Holy Moses, judge and complainant, what kind of a show have I got."²⁰

Chairman Hamel believed that the attitude of the cabby had been that of a great number of taxpayers who had deficiencies in tax assessed against them by subordinates of the Commissioner and whose only appeal before paying the deficiency had been to the Commissioner or his subordinates. Taxpayers, he believed, did not trust that any internal review procedure could be impartial because of the Commissioner's natural zeal to collect as much revenue as possible and his and his subordinates' inclination, therefore, to decide all doubtful questions against the taxpayer.²¹

Congress established the Board of Tax Appeals in 1924.²² Three principal factors were important in shaping the 1924 legislation giving rise to the Board.²³ As I have already noted, those three factors have continued to shape the role of the Board and its successor.

The first was Congress' recognition of the need for expert and impartial review of tax disputes. The Board was thus created as an independent agency of the executive branch rather than as part of the Treasury Department.²⁴

The second was Congress' desire to have a tribunal that would create a uniform body of precedents that would aid in the future interpretations of the tax law. As a result, the Board was required to publish its reports and to conduct its proceedings publicly in accordance with judicial-type procedures.²⁵

The third was Congress' conviction that taxpayers should have the opportunity to litigate the question of tax liability before the disputed tax had to be paid.

The act creating the Board gave taxpayers the right to appeal the Commissioner's determination of a tax deficiency to the Board before the Commissioner could assess the deficiency and take administrative action to collect it.²⁶ The act provided that no part of any deficiency determined by the Commissioner but disallowed as such by the Board could be assessed. Instead, the Commissioner would have to begin a proceeding in court, without

¹³"Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931).

¹⁴*Springer v. United States*, 108 U.S. 586, 593 (1880).

¹⁵See, e.g., I.R.C. sections 6321 (assessed and unpaid taxes become a lien on the taxpayer's property), 6331 (levy and distraint), 6335 (sale of seized property). Suits to restrain assessment or collection of tax are prohibited; see also I.R.C. section 7421(a) ("Prohibition of suits to restrain assessment or collection.").

¹⁶*Springer v. United States*, 108 U.S. at 594.

¹⁷Act of Oct. 3, 1913, ch. 16, section II(A)(1), 38 Stat. 114, 166.

¹⁸Act of Mar. 3, 1917, ch. 159, section 201, 39 Stat. 1000, 1000-01.

¹⁹See Dubroff & Hellwig, *supra* note 8, at 38-48.

²⁰Charles D. Hamel, *The United States Board of Tax Appeals*, 2 Nat'l Income Tax Mag. 293 (1924).

²¹*Id.*

²²See Revenue Act of 1924, ch. 234, section 900(a), 43 Stat. 253, 336.

²³See Dubroff & Hellwig, *supra* note 8, at 271.

²⁴Revenue Act of 1924 section 900(k), 43 Stat. at 338.

²⁵*Id.* section 900(h).

²⁶*Id.* section 274(a), 43 Stat. at 297.

assessment, for collection of the amount disallowed.²⁷ Thus, creation of the Board marked a significant concession of power by Congress, reversing the almost timeless rule that, in dealing with the sovereign over taxes: “payment first and litigation afterwards.”²⁸

2. Success of the board. The popularity of the prepayment forum that Congress created in 1924 was obvious from the beginning. During the Board of Tax Appeal’s first fiscal year, ending in 1925, the Board docketed 5,220 cases, closed 1,702 cases, and was left with 3,518 cases pending.²⁹ The Board was not in 1925, and the Court is not now, the only venue in which a taxpayer may, in the first instance, litigate a tax dispute with the Federal government. A refund action may be brought in the United States district courts or in the United States Court of Federal Claims.³⁰ IRS Chief Counsel statistics for FY 2015 show a total of approximately 31,200 tax cases pending in the Tax Court, district courts, and the Court of Federal Claims.³¹ Of that total, approximately 97 percent were pending in the Tax Court, approximately 2 percent were pending in the district courts, and approximately 0.6 percent were pending in the Court of Federal Claims.³²

The Tax Court is the forum in which the vast majority of first-instance Federal tax litigation is brought for the simple reason that invoking the Court’s deficiency jurisdiction generally stops the Commissioner from assessing and collecting a deficiency in tax until the opportunity to petition the Court has expired or, if a petition is filed, the Court’s determination of a deficiency becomes final.³³

Originally, the jurisdiction of the Board covered only income, estate, gift, and excess profits taxes.³⁴ Then, as now, there were other taxes, mainly excise taxes, that were not subject to pre-assessment judicial review, apparently because those taxes raised little revenue and because Congress thought that the questions arising under them were too insignificant to warrant pre-assessment review. In some

circumstances those taxes are now subject to Tax Court prepayment review pursuant to our authority to review CDP determinations.

3. A uniform body of precedents. One of Congress’ purposes in creating the Board of Tax Appeals was to have an adjudicatory body that would create a uniform body of precedents that would aid in future interpretations of Federal tax law. Uniformity, in the sense of consistency, could be achieved only if the Board were to speak with one voice and were to remain consistent in its opinions over time. Congress’ answer to the consistency issue was to include in the Board’s governing statute a review procedure that, after some clarification, has remained mostly unchanged since 1928.³⁵ The Board bound itself to its prior opinions by following the doctrine of *stare decisis*.³⁶

The 1928 Act, provided, as does the Internal Revenue Code today, that a division of the Court (which divisions for many years have consisted of only one member) shall hear and make a determination with respect to the proceeding or motion before the Court and its report of such determination “constitutes its final disposition of the proceeding.”³⁷ The division’s report is then open for the full Court to review if the Chief Judge so directs.³⁸ If so reviewed, the Court will make its own report; if not so reviewed, the division’s report will become the report of the Court after 30 days.³⁹ Thus, uniformity among the divisions of the Court, which, in the first instance, are charged with disposing of proceedings initiated before the Court, is achieved either by a division report that, by default, becomes the report of the Court after 30 days without the Chief Judge having directed Court review or by the displacement of the division’s report by a report of the Court following the Chief Judge’s direction for review. Indeed, if a division’s report is referred for review by the Chief Judge, the division report will be no part of the record of the case.⁴⁰ In any event, *all* reports of the Tax Court are reports of the Court

²⁷*Id.* section 274(b).

²⁸*E.g., Appeal of Everett Knitting Works*, 1 B.T.A. 5, 6 (1924).

²⁹Dubroff & Hellwig, *supra* note 8, at 905.

³⁰See 28 U.S.C. sections 1346(a)(1) (district courts), 1491(a)(1) (United States Court of Federal Claims) (2012).

³¹Office of Chief Counsel, Internal Revenue Serv. (CC:FM: PMD:MA), Presentation to the American Bar Association Tax Section Court Procedure Committee, FY 2015 data, 3 (2016).

³²*Id.*

³³See I.R.C. section 6213(a). Some prepayment (or partial-payment) actions are heard by a bankruptcy court on an objection to an IRS proof of claim or in an adversary proceeding. See 11 U.S.C. section 505(a) (2012).

³⁴Revenue Act of 1924, ch. 234, sections 274, 308, 312, 316, 900, 43 Stat. 253, 297, 308, 310, 312, 336.

³⁵Compare Revenue Act of 1928, ch. 852, section 601, sections 906, 907(a), (b), 45 Stat. 791, 871-72, with I.R.C. sections 7459, 7460.

³⁶See, e.g., *Security State Bank v. Commissioner*, 111 T.C. 210, 213 (1998) (“The doctrine of *stare decisis* generally requires that we follow the holding of a previously decided case, absent special justification.”), *aff’d*, 214 F.3d 1254 (10th Cir. 2000); *Allen v. Commissioner*, B.T.A.M. (P-H) para. 33,071 (1933) (“Under the doctrine of *stare decisis* we follow our own decisions until reversed by some appellate court, or until we conclude we were in error.”).

³⁷Compare Revenue Act of 1928 section 601, section 906(a), with I.R.C. section 7460(a).

³⁸I.R.C. section 7460(b).

³⁹*Id.*

⁴⁰*Id.*

and are *not* reports by individual judges or divisions of the Court. Congress, thus, assured that the Court speaks with one voice.

By the way, the term “report” for what in another court might be called a judgment, decision, or opinion originated in the Revenue Act of 1928, as a substitute for the term “decision.”⁴¹ That change in terminology, which was not intended as a significant change in substance, was made in part to dispel the public’s misunderstanding of the nature of the Board’s review of a division’s disposition of a proceeding assigned to it.⁴² Some outside the Board considered that review to be the equivalent of a *de novo* hearing on the merits, at which they demanded the right to be heard.⁴³ Congress strove to dispel that misunderstanding by amendments in the Revenue Act of 1928, which clearly indicate the internal nature of the review procedure and the finality of a division’s disposition of a proceeding assigned to it.⁴⁴

And what of a party wishing to be heard in any Court review of a division’s report? Both the taxpayer and the Secretary must be given notice and opportunity to be heard on any proceeding instituted before the Tax Court.⁴⁵ And as to any demand by a party to participate in Court review, since 1928 the statute has specifically provided that, if the parties have been given the opportunity to be heard before a division of the Court, they shall have no notice of, nor the opportunity to be heard during, Court review of a report, “except upon a specific order of the chief judge.”⁴⁶ I know of no such order ever having been issued.

Finally, the term “decision” is used in the statute today to refer to the order entered by the Court specifying the amount of a deficiency or the disposition of certain other types of cases over which we have jurisdiction.⁴⁷ And it is entry of decision, not promulgation of a report, that starts the clock running on the time to appeal a decision.⁴⁸

Conference procedures today resemble the procedures reported by Judge Murdock in 1945.⁴⁹ And while, during the first two years of the Board’s existence, in order to achieve a high degree of adherence to Board precedents, the entire Board

reviewed *all* reports,⁵⁰ the volume of cases soon made that impracticable.⁵¹ Reports the Chief Judge designates for review are circulated among the judges for study during the week before a conference scheduled for that review. At the conference, the report is discussed and voted upon. If adopted, it is, like all of our reports, subject to editing for style consistent with the Court’s style manual. It is then published along with any concurring or dissenting opinions. If not adopted, the authoring judge is offered the opportunity to rewrite the report and to present the rewritten report for review. If the authoring judge declines the opportunity, the Chief Judge assigns to another judge the task of submitting a report. To the extent relevant to the legal analysis used in the revised report, facts as found by the judge officiating at the trial of the case are accepted by the judge assigned to draft a new report, and only issues of law are reconsidered.⁵² As finally adopted, the report is published along with any dissenting and concurring opinions.

In a 2001 law review article, then Chief Judge Mary Ann Cohen provided insight into the principles that guide a Chief Judge’s exercise of discretion to cause review of a division report. I will not repeat what she said here, but I have included it in a footnote.⁵³

4. Memorandum opinions. The Board of Tax Appeals began issuing memorandum opinions in late 1927,⁵⁴ one year before Congress expressly authorized the practice in the Revenue Act of 1928.⁵⁵ The

⁵⁰J. Gilmer Korner, *The United States Board of Tax Appeals*, 11 A.B.A. J. 642, 643 (1925).

⁵¹See Dubroff & Hellwig, *supra* note 8, at 88-89.

⁵²See, e.g., *A.E. Staley Mfg. Co. & Subsidiaries v. Commissioner*, 105 T.C. 166, 181 n.1 (1995) (“The trial portion of this case was conducted by Judge Mary Ann Cohen, and the facts are as found by Judge Cohen.”), *rev’d and remanded*, 119 F.3d 482 (7th Cir. 1997).

⁵³As then Chief Judge Cohen explained:

We use certain rules of thumb. Court review is directed if the report proposes to invalidate a regulation, overrule a published Tax Court case, or reconsider, in a circuit that has not addressed it, an issue on which we have been reversed by a court of appeals. . . .

Court review is also directed in cases of widespread application where the result may be controversial, where the Chief Judge is made aware of differences in opinion among the judges before the opinion is released, or, occasionally, where a procedural issue suggests the desirability of obtaining a consensus of the judges. Court review is not available on motion of the parties, before or after the opinion has been released.

Mary Ann Cohen, *How to Read Tax Court Opinions*, 1 Hous. Bus. & Tax L.J. 1, 5-6 (2001).

⁵⁴See Dubroff & Hellwig, *supra* note 8, at 750.

⁵⁵Revenue Act of 1928, ch. 852, section 601, section 907(b) 45 Stat. 791, 872.

⁴¹See Revenue Act of 1928 section 601, *amending* Revenue Act of 1926, ch. 27, sections 906(b), 907(b), 44 Stat. 9, 106-07.

⁴²See Dubroff & Hellwig, *supra* note 8, at 755 n.197, 757-58.

⁴³*Id.*

⁴⁴See S. Rep. No. 70-960, at 37-38 (1928), *as reprinted in* 1939-1 C.B. (Part 2) 409, 435; H.R. Rep. No. 70-1882, at 21 (1928), *as reprinted in* 1939-1 C.B. (Part 2) 444, 452.

⁴⁵I.R.C. section 7458.

⁴⁶*Id.*; see also Revenue Act of 1928, section 601, section 907(a).

⁴⁷See I.R.C. section 7459(c).

⁴⁸I.R.C. section 7483.

⁴⁹Murdock, *supra* note 1, at 298.

two recognizable features of those early memorandum opinions are that they are very brief and, unlike today's, they include no subheadings.⁵⁶ In that respect, those early memorandum opinions meet the definition of a "memorandum opinion" as: "[A]n opinion that briefly reports the court's conclusion, usu. without elaboration because the decision follows a well-established legal principle or does not relate to any point of law."⁵⁷

A few of the early memorandum opinions were published in the B.T.A. reporter.⁵⁸ The usual practice, however, was, as it is now, to set forth in an end-of-volume list in the official reporter each proceeding disposed of by memorandum opinion. The number of such dispositions was small in the early years. For approximately the first half of 1929, we reported 31 docket numbers as "Disposed of Upon Memoranda."⁵⁹ By 1945, however, the quantity of memorandum dispositions had increased dramatically. In the last 8 months of 1945, the rechristened Tax Court of the United States listed 324 docket numbers as "Proceedings Disposed of Upon Memorandum Opinions,"⁶⁰ which, if annualized, is 486 docket numbers so disposed of.

In Judge Murdock's 1945 A.B.A. Journal article, he addressed the intended scope of memorandum opinions as follows: "Memorandum Opinions . . . are *supposed* to be limited to those having no value as precedent. They include any case decided solely upon the authority of another, cases involving subjects already well covered by opinions appearing in the bound volumes of the reports, failure of proof cases, and *some others*."⁶¹ He added: "Doubts as to whether a case should be in memorandum form or printed are resolved in favor of printing."⁶² Finally, he invited counsel finding some precedent of value in a memorandum opinion to cite it in his brief.⁶³

⁵⁶See, e.g., *McDonald Printing Co. v. Commissioner*, B.T.A.M. (P-H) para. 28,013 (1928); *Powers House Co. v. Commissioner*, B.T.A.M. (P-H) para. 28,011 (1928).

⁵⁷*Memorandum Opinion*, Black's Law Dictionary (10th ed. 2014).

⁵⁸In the 1928-1930 volumes of the B.T.A. Reporter, I have identified the following eleven published items with the heading "Memorandum Opinion": 10 B.T.A. 3 (1928); 12 B.T.A. 865 (1928); 12 B.T.A. 1195 (1928); 13 B.T.A. 552 (1928); 15 B.T.A. 608 (1929); 16 B.T.A. 1437 (1929); 16 B.T.A. 1069 (1929); 18 B.T.A. 919 (1930); 18 B.T.A. 1044 (1930); 20 B.T.A. 222 (1930); 20 B.T.A. 808 (1930).

⁵⁹15 B.T.A. 1453 (1929); 16 B.T.A. 1474-75 (1929).

⁶⁰5 T.C. 1389-91 (1945).

⁶¹Murdock, *supra* note 1, at 299 (emphasis added).

⁶²*Id.*

⁶³*Id.*

In the mid 1940s, it was not the Tax Court's custom to cite memorandum opinions.⁶⁴ Nevertheless, it made perfect sense for Judge Murdock to invite counsel to cite memorandum opinions to the Court if counsel deemed the opinion to contain some precedent of value so that the Court could take into account how it had decided the same question in the past.

C. Post-1945 Changes in the Court

By the time Judge Murdock reported in 1945, the enduring aspects of the Tax Court as an impartial, pre-assessment judicial forum responsible for developing a uniform body of case law had been established. Post-1945 changes for the most part only strengthen those enduring aspects.

1. Low-income and self-represented taxpayers. Let me begin my discussion of those changes by reporting on what the Court, together with the Commissioner, practitioners, and others, has been doing to make the Tax Court more accessible to self-represented taxpayers, who constitute the majority of petitioners seeking relief from the Court.

Petitioners appearing *pro se* filed 82 percent of all of the petitions received by the Tax Court in FY 2015. Many of those petitioners elected to have their proceedings conducted pursuant to a simplified procedure for taxpayers with disputes involving \$50,000 or less who elect that procedure.⁶⁵ Such so-called small tax cases are heard subject to relaxed rules of procedure and evidence, the results are not subject to appeal by either party, the cases may be resolved with a decision and a brief summary of the reasons therefore, and the cases may not serve as precedent.⁶⁶ In FY 2015, 48 percent of the Court's cases were filed as small tax cases. But Congress' edict for a simplified procedure for relatively small-dollar disputes does not by itself solve the problems faced by low-income, often self-represented, petitioners. Many still need help in what may be a first-time, and often intimidating, appearance before a court.

Over 40 years ago, tax practitioners began to assist self-represented petitioners before the Tax

⁶⁴See, e.g., *Monroe v. Commissioner*, 7 T.C. 278, 286 n.4 (1946), in which, in response to the taxpayer's citation of a memorandum opinion in support of his argument, we observed: "[I]t is contrary to the custom of the Tax Court to cite memorandum opinions, and when such opinions are cited in briefs, they are not ordinarily referred to in a printed opinion of the Court because such opinions represent only a decision on facts upon rules of law already established."

⁶⁵See I.R.C. section 7463.

⁶⁶*Id.* (a), (b).

Court.⁶⁷ Taxpayer assistance efforts received a significant boost in 1998 when Congress enacted Internal Revenue Code section 7526.⁶⁸ Section 7526 authorizes the Secretary of the Treasury to make grants of matching funds to assist “qualified low income taxpayer clinics.”⁶⁹ Qualified low-income taxpayer clinics are organizations described in the statute that, among other things, represent low-income taxpayers in Federal tax disputes for free or for a nominal fee.⁷⁰ In February 2016, the IRS announced \$10.72 million in 2016 matching grants to 129 clinic recipients.⁷¹

At our 74 trial locations, clinic representatives and volunteer bar representatives appear at the calendar call and are available to offer advice to and, possibly, to assist self-represented petitioners. It is standard procedure at the start of the calendar call for the presiding judge to introduce those practitioners and to invite self-represented petitioners to meet with one. We will then delay calling that petitioner’s case until the meeting is completed.

We have endeavored to make our Web site informative and useful for low-income taxpayers. Under the tab “Taxpayer Information,” on our Web site, we provide detailed information about initiating and conducting a Tax Court case, including a video walking a taxpayer through the steps from receiving a deficiency notice to appealing an adverse decision.⁷² One section of the video dramatizes portions of a trial, so that the taxpayer can see what will be expected of him at trial.

We have modified our pretrial procedures to better inform low-income petitioners of the pendency of their cases and to facilitate interaction between the petitioner and clinic representatives. We include a standard notice with our mailings to petitioners notifying them of local clinics. We notify low-income petitioners of local clinics three times before calendar call.

2. Expanding jurisdiction. I would like next to discuss our expanded jurisdiction and some issues that expansion has presented.

From the Court’s beginning until the 1970s, our jurisdiction was principally to redetermine deficiencies in income, estate, and gift taxes. Beginning in

the 1970s, Congress added to our jurisdiction new subject matters and new forms of relief. In 1974, Congress gave us the authority to issue declaratory judgments relating to the qualification of retirement plans for advantageous tax treatment.⁷³ In 1976, Congress added authority for us to issue declaratory judgments with respect to the status and classification of certain tax-exempt organizations,⁷⁴ which authority was expanded in 2015 to include the status and classification of all section 501(c) and (d) organizations.⁷⁵ Also in 1976, Congress authorized us to review IRS refusals to abate interest in collection cases⁷⁶ and to order the Secretary to release the identity of persons to whom written determinations pertain.⁷⁷ In 1982, Congress authorized us to award taxpayers reasonable administrative and litigation costs.⁷⁸ More recently, Congress has given us authority to review taxpayer challenges to a wide array of agency actions, including adjustments to partnership tax returns,⁷⁹ collection actions,⁸⁰ employment status determinations,⁸¹ innocent spouse relief determinations,⁸² whistleblower claims,⁸³ and passport denials and revocations for seriously tax-delinquent taxpayers.⁸⁴

Particularly noteworthy is Congress’ 1998 addition to our jurisdiction of the authority to review the Commissioner’s decision following a CDP hearing to proceed by lien or levy to deprive a taxpayer of

⁷³Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, section 1041(a), 88 Stat. 829, 949 (codified as amended at I.R.C. section 7476).

⁷⁴Tax Reform Act of 1976, Pub. L. No. 94-455, section 306, 90 Stat. 1520, 1717 (codified as amended at I.R.C. section 7428).

⁷⁵Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, section 406(a), section 7428(a)(1), 129 Stat. 2242, 3120.

⁷⁶Tax Reform Act of 1976 section 1212, 90 Stat. at 1712 (codified as amended at I.R.C. section 6404).

⁷⁷Tax Reform Act of 1976 section 1201(a), 90 Stat. at 1660 (codified as amended at I.R.C. section 6110(d)(3)).

⁷⁸Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, section 292, 96 Stat. 324, 572 (codified as amended at I.R.C. section 7430).

⁷⁹*Id.* section 402(a), 96 Stat. at 653-55, 656-57 (codified as amended at I.R.C. sections 6226, 6228(a)).

⁸⁰Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-205, section 3401, 112 Stat. 683, 747-50 (codified as amended at I.R.C. sections 6320, 6330).

⁸¹Taxpayer Relief Act of 1997, Pub. L. No. 105-34, section 1231, 111 Stat. 788, 1020-23 (codified as amended at I.R.C. section 7436).

⁸²Internal Revenue Service Restructuring and Reform Act of 1998 section 3201, 112 Stat. at 734 (codified as amended at I.R.C. section 6015).

⁸³Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, section 406(a), section 7623, 120 Stat. 2922, 2958-59 (codified at I.R.C. section 7623(b)(4)).

⁸⁴Fixing America’s Surface Transportation (FAST) Act, Pub. L. No. 114-94, section 32101(a), 129 Stat. 1729, 1749 (codified at I.R.C. section 7345).

⁶⁷See Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 Tax Law. 3 (2013).

⁶⁸Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, section 3601, 112 Stat. 685, 774-76.

⁶⁹I.R.C. section 7526(a).

⁷⁰See *id.* (b)(1).

⁷¹Internal Revenue Serv., IR-2016-32, IRS Announces Low Income Taxpayer Clinic Grant Recipients (Feb. 26, 2016).

⁷²*Taxpayer Information*, United States Tax Court, http://www.ustaxcourt.gov/taxpayer_info_intro.htm (last visited May 2, 2016).

his property in satisfaction of his tax debt.⁸⁵ Generally, tax collection questions arise separately from, and subsequent to, the determination of the taxpayer's liability for the tax. If the taxpayer did not receive a statutory notice of deficiency for the tax or otherwise have the opportunity to dispute his tax liability, then the taxpayer may raise in a CDP hearing not only strictly collection matters but also the taxpayer's underlying liability for the tax.⁸⁶ Congress thus extended our jurisdiction as a prepayment forum to non-deficiency taxes that, previously, escaped judicial review except in a refund procedure or, perhaps, in a bankruptcy action.⁸⁷

A principal difference between our legacy jurisdiction and our new areas of jurisdiction is that our new jurisdictions often require us to review equitable determinations and exercises of agency discretion. Our jurisdiction to consider CDP claims⁸⁸ and to review agency determinations of innocent spouse status⁸⁹ exemplify those aspects of our expanded jurisdiction.

In reviewing agency actions, Federal district courts generally look to the APA, which establishes the default standards for judicial review of agency rulemaking, adjudication, and other forms of agency action.⁹⁰ The Tax Court, however, has for the most part held itself aloof from the APA, declaring in 2004 that “[t]he APA has never governed proceedings in the Court (or in the Board of Tax Appeals).”⁹¹ I believe that not to be true for the reasons Judge Holmes and I stated in *Ewing v. Commissioner*.⁹² Briefly, the IRS is an agency within the meaning of the APA,⁹³ and, under the APA, a person “aggrieved” by the IRS’s action is, thus, “entitled to judicial review . . . in a court of the

United States”⁹⁴ so long as the IRS action is “reviewable by statute” or is otherwise “final agency action for which there is no other adequate remedy in a court.”⁹⁵ The Tax Court is “a court of the United States”⁹⁶ and, for review of the IRS’s actions, a “reviewing court” subject to the APA’s judicial review provisions.⁹⁷ The APA’s default provisions apply to a court’s review of agency action unless Congress has directed otherwise by statute.⁹⁸

The APA addresses both the *standard* and *scope* of a court’s review of agency action.⁹⁹ The default *standard* for review is the familiar abuse of discretion standard.¹⁰⁰ The APA provides two exceptions to that default standard. First, it commands that a reviewing court must set aside agency action “unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.”¹⁰¹ Second, with respect to formal rulemaking, formal adjudication, and other actions “on the record of an agency hearing provided by statute,” it commands that agency action “unsupported by substantial evidence” must be set aside.¹⁰²

The APA suggests that the default *scope* of review is the record made before the administrative agency.¹⁰³ And, if the record before the agency does not support the agency action, or there are other defects in the record, the proper remedy is to remand the action to the agency for additional investigation or explanation.¹⁰⁴

⁹⁴*Id.* section 702.

⁹⁵*Id.* section 704.

⁹⁶*Id.* section 702; see *Freytag v. Commissioner*, 501 U.S. 868, 888 (1991) (holding that the Tax Court is a “Cour[t] of Law” under the appointments clause). Recently, the Court of Appeals for the D.C. Circuit rejected a constitutional challenge to the President’s removal power for Tax Court judges, holding that the Tax Court is not a court exercising the Article III “judicial power of the United States” when deciding cases but, rather, it is an Article I legislative court exercising Article II executive powers when deciding cases. *Kuretski v. Commissioner*, 755 F.3d 929, 943 (D.C. Cir. 2014). Albeit as dicta, the court dispels the fear that the Tax Court is, itself, an “agency” and not “a court of the United States” for purposes of the APA. *Id.* at 944.

⁹⁷5 U.S.C. section 706.

⁹⁸See *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999) (“[A] reviewing court must apply the APA’s court/agency review standards in the absence of an exception.”).

⁹⁹See 5 U.S.C. section 706.

¹⁰⁰*Id.* section 706(2)(A) (providing that the reviewing court must set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

¹⁰¹*Id.* section 706(2)(F).

¹⁰²*Id.* section 706(2)(E).

¹⁰³See *id.* section 706(2) (flush language); see also *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (Where the standard of review under 5 U.S.C. section 706(2)(A) is abuse of discretion, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

¹⁰⁴*Fla. Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985).

⁸⁵Internal Revenue Service Restructuring and Reform Act of 1998 section 3401(a) (liens), (b) (levy), 112 Stat. at 746-50 (codified as amended at I.R.C. sections 6320 & 6330, respectively). In 2006, Congress made us the exclusive court to hear such appeals. Pension Protection Act of 2006, Pub. L. No. 109-280, section 855, section 6330(d), 120 Stat. 780, 1019.

⁸⁶See I.R.C. section 6330(c)(2)(B).

⁸⁷See Dubroff & Hellwig, *supra* note 8, at 482 & n.246.

⁸⁸See I.R.C. section 6330(d).

⁸⁹See I.R.C. section 6013(e).

⁹⁰See 5 U.S.C. sections 701-706 (2012).

⁹¹*Robinette v. Commissioner*, 123 T.C. 85, 96 (2004), *rev’d*, 439 F.3d 455 (8th Cir. 2006); accord *Porter v. Commissioner*, 130 T.C. 115, 117 (2008) (“Since its enactment in 1946 the APA has generally not governed proceedings in this Court (or in its predecessor, the Board of Tax Appeals).”).

⁹²122 T.C. 32, 56-71 (2004) (Halpern and Holmes, JJ., dissenting), *rev’d in part, vacated in part*, 439 F.3d 1009 (9th Cir. 2006). See also Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 Minn. L. Rev. 221 (2014), for an illuminating discussion of the Tax Court and the APA’s default judicial review standards.

⁹³5 U.S.C. section 701(b)(1).

To be sure, the APA's governance of the Tax Court review of IRS actions does not mean that the standard of review is always abuse of discretion or the scope of review is always no wider than the administrative record. Those are the default standards, and the pertinent question in considering the Tax Court's exercise of a particular area of its jurisdiction is whether by statute Congress has expressly overridden the default standard.

A petition for the redetermination of a deficiency in tax is a petition for the review of an agency action that should be governed by the APA.¹⁰⁵ Both the Tax Court¹⁰⁶ and the courts of appeals¹⁰⁷ appear to agree that such petitions are subject to a *de novo* standard of review that is not delimited by the administrative record. And while that position may be viewed as having been grandfathered under the APA,¹⁰⁸ the IRS's governing statute provides considerable evidence that Congress intended the Tax Court to depart from the APA default standards.¹⁰⁹ That does not mean that the APA does not apply to deficiency cases. The APA still governs, but the default standards give way to the alternative judicial review provisions governing trials of factual issues mandated by the agency's governing statute: The administrative record does not delimit the scope of review (trial *de novo*), and the standard of review is *de novo* (unwarranted by the facts).¹¹⁰

A significant addition to our jurisdiction is our authority to review the Commissioner's denial of equitable relief to so-called innocent spouses.¹¹¹ The statute does not provide the scope or standard of our review. After initially determining in 2002 that the appropriate *standard* of review is abuse of discretion,¹¹² we determined in 2004 that, while the

appropriate standard of review is abuse of discretion, we apply that standard (*i.e.*, determine whether the Commissioner abused his discretion) on the basis of a *de novo* record.¹¹³ In 2009, we concluded that, as a result of a change in the applicable statute, we must review the Commissioner's decision with "a *de novo* standard of review as well as a *de novo* scope of review."¹¹⁴ The Federal courts of appeals are not in agreement as to what standards apply to the Tax Court's review of equitable innocent spouse claims.¹¹⁵

We also review the Commissioner's determinations in CDP cases.¹¹⁶ Again, the statute does not provide the scope or standard of our review. We have relied on legislative history and not on the APA default to determine that the *standard* of review is abuse of discretion when the underlying liability is not at issue.¹¹⁷ Nor do we follow the APA default with respect to *scope* of review, holding that in some instances we are not limited to the administrative record.¹¹⁸ We have been reversed on that latter decision.¹¹⁹

Congress has provided neither the scope nor the standard of review with respect to our new jurisdiction to review the Commissioner's certifications relating to passport denials and revocations for seriously tax-delinquent taxpayers.¹²⁰ Likewise, Congress has provided neither the scope nor the standard of review with respect to our jurisdiction to review whistleblower award determinations.¹²¹

The Supreme Court has addressed when a reviewing court may depart from the APA's default standards for review of an agency action.¹²² "Recognizing the importance of maintaining a uniform

¹⁰⁵5 U.S.C. section 703, addressing the form and venue of a proceeding for judicial review of an agency action, includes the "special statutory review proceeding relevant to the subject matter in a court specified by statute." Recently, in *Ax v. Commissioner*, 146 T.C. No. 10, slip op. at 15 (T.C. Apr. 11, 2016), referring to 5 U.S.C. section 703, we stated: "A deficiency case is one such 'special statutory review proceeding', and the Tax Court is the 'court specified by statute.'"

¹⁰⁶See, e.g., *Ewing v. Commissioner*, 122 T.C. 32, 38 (2004), *rev'd in part, vacated in part*, 439 F.3d 1009 (9th Cir. 2006) ("Under section 6213(a) and its predecessors, we (and earlier, the Board of Tax Appeals) have 'redetermined' deficiencies *de novo*, not limited to the Commissioner's administrative record, for more than 75 years.").

¹⁰⁷See *Wilson v. Commissioner*, 705 F.3d 980, 1003 n.3 (9th Cir. 2013) (Bybee, J., dissenting) (citing cases in support of the notion that "[t]he Tax Court's review of tax deficiencies has, for largely historical reasons, been held to be *de novo*").

¹⁰⁸See *id.*

¹⁰⁹See Hoffer & Walker, *supra* note 94, at 255-56.

¹¹⁰5 U.S.C. section 706(2)(F) (2012).

¹¹¹I.R.C. section 6015(e)(1)(A), (f).

¹¹²*Jonson v. Commissioner*, 118 T.C. 106, 125 (2002), *aff'd on other grounds*, 353 F.3d 1811 (10th Cir. 2003).

¹¹³*Ewing v. Commissioner*, 122 T.C. 32, 43-44 (2004) ("the APA record rule does not apply to section 6015(f) determinations in this Court"), *rev'd in part, vacated in part*, 439 F.3d 1009 (9th Cir. 2006).

¹¹⁴*Porter v. Commissioner*, 132 T.C. 203, 206-10 (2009).

¹¹⁵The D.C. and Fifth Circuits agreed with the Tax Court's 2002 position that abuse of discretion is the proper standard of review. *Mitchell v. Commissioner*, 292 F.3d 800, 807 (D.C. Cir. 2002); *Cheshire v. Commissioner*, 282 F.3d 326, 338 (5th Cir. 2002). A divided Eleventh Circuit agreed with the Tax Court's 2004 position that the Tax Court is not bound by the record rule. *Commissioner v. Neal*, 557 F.3d 1262, 1268-76 (11th Cir. 2009). A divided Ninth Circuit upheld the Tax Court's current position, *i.e.*, *de novo* standard and scope of review. *Wilson v. Commissioner*, 705 F.3d 980 (9th Cir. 2013).

¹¹⁶I.R.C. section 6330(d)(1).

¹¹⁷See *Goza v. Commissioner*, 114 T.C. 176, 181-82 (2000).

¹¹⁸E.g., *Robinette v. Commissioner*, 123 T.C. 85, 95-101 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006).

¹¹⁹*Robinette v. Commissioner*, 439 F.3d at 459-62; see also *Murphy v. Commissioner*, 469 F.3d 27, 30-31 (1st Cir. 2006).

¹²⁰I.R.C. section 7345(c).

¹²¹*Id.* section 7623(b)(4).

¹²²See *Dickinson v. Zurko*, 527 U.S. 150 (1999).

approach to judicial review of administrative action," the Court has instructed reviewing courts to "apply the APA's court/agency review standards in the absence of an exception" in the agency's governing statute.¹²³ To depart from an APA default standard, the agency's organic statute must show "more than a possibility of a . . . [different] standard, and indeed more than even a bare preponderance of evidence"; the exception "must be clear."¹²⁴

It is difficult any longer plausibly to argue that the Tax Court is aloof from the APA default judicial review standards. In *Mayo Foundation for Medical Education & Research v. United States*,¹²⁵ one question was the deferential standard of review to be applied to tax regulations. A unanimous Supreme Court held that *Chevron*¹²⁶ deference applies with full force to tax regulations, stating that it was "not inclined to carve out an approach to administrative review good for tax law only," and noting that it had "expressly [r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action."¹²⁷ Recently, in *Ax v. Commissioner*,¹²⁸ although stopping short of acknowledging that the Tax Court is a reviewing court for purposes of the APA, we acknowledged that a deficiency case is a "special statutory review proceeding" within the meaning of APA section 703 and that the Tax Court is, within the meaning of that provision, the "court specified by statute."¹²⁹ Although acknowledging only that our decision "in a deficiency case" is not at odds with APA section 706, the report is evidence that we are rethinking our absolutist stand that the APA does not govern proceedings in the Tax Court.¹³⁰

One final thought with respect to the APA. Many years ago, when I was a young tax lawyer, I asked an older, more experienced tax practitioner whether the APA was of much relevance to Federal tax law. He said it was not, because, if it was, we would know something about it. Times have changed. It is time for the Tax Court to concede error and to

consider itself bound by the APA's judicial review procedures — just like all of the other Federal courts that review Federal agency action.

3. Golsen doctrine. In 1970, the Tax Court made a doctrinal change in how we establish a uniform body of precedents. We are a court with national jurisdiction, and we have always understood Congress to have intended us to decide cases uniformly, regardless of where, in our national jurisdiction, the case may arise.¹³¹ However, maintaining uniformity has proved difficult since, with respect to appeals, Congress inverted the triangle so that, from a single national jurisdiction, Tax Court appeals spread out among 12 courts of appeals, each for a different circuit, or portion, of the United States.¹³² Moreover, appellate venue may not be certain because the statute permits parties in all cases to appeal by mutual agreement to any of those appellate courts.¹³³ 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.¹³⁴

Early on, the Tax Court concluded that it "should decide all cases as it thought right."¹³⁵ In 1957, in *Lawrence v. Commissioner*, we surveyed the history of that position and reconsidered what we should do when an issue comes before the Court a second time, after a court of appeals has reversed a prior Tax Court decision on the same point.¹³⁶ We decided that, while certainly we should consider the reasoning of the reversing court of appeals, we ought not follow the decision if we believed it incorrect.¹³⁷ Thus, we could adhere to our own precedent under the doctrine of *stare decisis*, even when reversed on appeal.

In 1970, in *Golsen v. Commissioner*,¹³⁸ we created a narrow exception to the *Lawrence* doctrine, applicable when a case in the Tax Court is appealable to a court of appeals that has taken a position on precisely the same issue. Without conceding that we

¹²³*Id.* at 154.

¹²⁴*Id.* at 154-55; see also Hoffer & Walker, *supra* note 94, at 244.

¹²⁵562 U.S. 44 (2011).

¹²⁶*Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹²⁷*Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. at 55 (quoting *Dickinson v. Zurko*, 527 U.S. at 154).

¹²⁸146 T.C. No. 10 (T.C. Apr. 11, 2016).

¹²⁹*Id.* slip op. at 15.

¹³⁰See, e.g., *Robinette v. Commissioner*, 123 T.C. 85, 96 (2004) ("The APA has never governed proceedings in the [Tax] Court (or in the Board of Tax Appeals)."), *rev'd*, 439 F.3d 455 (8th Cir. 2006); *Porter v. Commissioner*, 130 T.C. 115, 117 (2008) ("Since its enactment in 1946 the APA has generally not governed proceedings in this Court (or in its predecessor, the Board of Tax Appeals).").

¹³¹*Lawrence v. Commissioner*, 27 T.C. 713, 718 (1957), *rev'd*, 258 F.2d 562 (9th Cir. 1958).

¹³²I.R.C. section 7482(a) establishes jurisdiction for review of Tax Court decisions in the "United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit)." Section 7482(b) prescribes venue.

¹³³See I.R.C. section 7482(b)(2).

¹³⁴See, e.g., *Estate of Israel v. Commissioner*, 108 T.C. 208, 226 (1997) (Tax Court not bound by *Golsen* since I.R.C. section 7482(b)(1) allowed for multiple possible venues where co-executors resided in different circuits), *rev'd and remanded sub nom. Estate of Israel v. Commissioner of I.R.S.*, 159 F.3d 593 (D.C. Cir. 1998).

¹³⁵See *Lawrence v. Commissioner*, 27 T.C. at 717.

¹³⁶*Id.*

¹³⁷*Id.* at 719-20; see also *Lardas v. Commissioner*, 99 T.C. 490, 494 (1992) (explaining *Lawrence* doctrine).

¹³⁸54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

lacked the authority to render a decision inconsistent with any court of appeals (including the one to which an appeal would lie), we recognized that it would be futile and wasteful to do so where it surely would be reversed.¹³⁹ Pursuant to the *Golsen* doctrine, the Tax Court will follow a court of appeals' 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.¹⁴⁰

The *Golsen* doctrine, properly understood, is grounded *not* on recognition of the court of appeals' decision as binding precedent *but*, instead, is grounded in notions of efficiency and "better judicial administration"¹⁴¹ — that is, the recognition that it would be futile and wasteful to render a decision that would surely be reversed.¹⁴² Thus, *Golsen* does not bind us to follow precedent that we may judge to have lost its vitality yet has not been overruled or precedent that allows itself of some distinction. In *Lardas v. Commissioner*,¹⁴³ for instance, we did not follow a circuit precedent when it was not clear to us that the circuit court would disagree with our analysis.

In *Golsen*, we crafted only a narrow exception to *Lawrence*. In *Lawrence*, Judge Murdock, the author of that report, admonished us: "Stick to your guns!" *Golsen* amended that admonition only slightly; we now say: "Stick to your guns (except where it would be futile)!" Judge Murdock might readily have accepted *Golsen's* gloss on the *Lawrence* doctrine.

4. Memorandum opinions. Since Judge Murdock reported in 1945, the Court's practice with respect to memorandum opinions has changed dramatically. Memorandum opinions have come to predominate Tax Court decision making, and published reports are exceptional. More illuminating than to compare the absolute numbers of proceedings that in any year we disposed of by memorandum opinions is to look at the changing *ratio* of memorandum opinions to published reports.¹⁴⁴ The annual number of published reports has fallen precipitously as the annual number of

memorandum opinions has increased, so that the ratio of published to unpublished reports has decreased dramatically. I set forth in an appendix a breakdown at ten year intervals and for the last five years of the number of published reports versus memorandum opinions. The trend is an increasing ratio of memorandum opinions to published reports. In 1935, the ratio was almost equal, 1.36 memorandum opinions to one published report. In 2015, it was 8.13 memorandum opinions to each published report.

Not only has the ratio of memorandum opinions to published reports increased dramatically, but the Court has abandoned its custom of not citing memorandum opinions and, indeed, has made changes that facilitate their citation.

In April 1954 we began numbering memorandum opinions serially, *e.g.*, T.C. Memo. 1954-1, T.C. Memo. 1954-2, and so forth. Since September 1995, we have made our memorandum opinions accessible on our Web site. In June 2012, we announced a uniform method of citing pages in memorandum opinions and stated that we would follow the announced method for spot-citing memorandum opinions.¹⁴⁵ With minor exceptions, our memorandum opinions no longer briefly report a conclusion without elaboration. Almost all memorandum opinions are subdivided into "Findings of Fact" and "Opinion" or "Background" and "Discussion."

The official position of the Tax Court appears to be that, with respect to memorandum opinions, we are not bound by the doctrine of *stare decisis*.¹⁴⁶ Yet, that position notwithstanding, Tax Court case law, for decades, has simultaneously affirmed a significant persuasive value for memorandum opinions.¹⁴⁷ For example, in one memorandum opinion,

one proceeding (*i.e.*, docket entry) can be addressed in a single memorandum opinion. Likewise for published opinions.

¹⁴⁵See Press Release, United States Tax Court, The Tax Court Announces a Uniform Method of Spot-citing Memorandum Opinions (June 26, 2012) (available at *Press Releases*, United States Tax Court, <http://ustcintranet/press.htm> (last visited May 2, 2016)). We described memorandum opinions much as Judge Murdock did in 1945, *viz.*, "generally . . . [addressing] cases that do not involve novel legal issues and in which the law is settled or the result is factually driven."

¹⁴⁶*E.g.*, *Huffman v. Commissioner*, 126 T.C. 322, 350 (2005) ("memorandum opinions are not binding"), *aff'd*, 518 F.3d 357 (6th Cir. 2008); *Dunaway v. Commissioner*, 124 T.C. 80, 87 (2005) (memorandum opinions "not binding precedent"); *Nico v. Commissioner*, 67 T.C. 647, 654 (1977) (memorandum opinions not "controlling precedent"), *aff'd in part, rev'd in part on other grounds*, 565 F.2d 1234 (2d Cir. 1977); *Singer v. Commissioner*, T.C. Memo. 2016-48, 2016 WL 985580, at *14 (memorandum opinions are "nonbinding precedent").

¹⁴⁷*E.g.*, *McGah v. Commissioner*, 17 T.C. 1458, 1459-60 (1952), *rev'd*, 210 F.2d 769 (9th Cir. 1954); *Convergent Techs., Inc. v. Commissioner*, T.C. Memo. 1995-320, 1995 WL 422677.

¹³⁹*Id.* at 756-57; see also *Lardas v. Commissioner*, 99 T.C. at 495 (explaining *Golsen*).

¹⁴⁰*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").

¹⁴¹*Golsen v. Commissioner*, 54 T.C. at 757.

¹⁴²*Lardas v. Commissioner*, 99 T.C. at 495.

¹⁴³*Id.*

¹⁴⁴In changing focus from proceedings disposed of by memorandum opinions in any period to the number of memorandum opinions in that period, it must be kept in mind that the number of memorandum opinions may be less since more than

(Footnote continued in next column.)

after declaring that another memorandum, “being a memorandum opinion of . . . [the] Court,” was “not controlling precedent,” we 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 that other memorandum opinion.¹⁴⁸ Recently, in a fiduciary liability case, we grappled with the question of who bore the burden of proof as to the estate’s insolvency.¹⁴⁹ Not only did we cite to several memorandum opinions provided by both sides on that question of law because of the lack of a dispositive division opinion, but we designated the resulting report apparently settling that question of law as a nonprecedential memorandum opinion.¹⁵⁰

The classification of opinions by precedential weight serves an important signaling function. The Court’s relatively indiscriminate citation of memorandum and published opinions risks confusion and frustrates the signaling function that classification ought to achieve. In both cases cited above, the *prior* memorandum opinions that the Court found persuasive were misclassified since there was no underlying published report on which they relied. The *resulting* memorandum opinions were misclassified for the same reason.

I do not, however, favor as a solution that we end the confusion by ending the use of memorandum opinions, publishing *all* of our reports in the Tax Court reports. We enjoy a large volume of cases, and, truly, many of them fit Judge Murdock’s description of cases fit for memorandum opinions because they are governed by another case, or by well-settled published reports of the Court, or involve a failure of proof. There are of course other cases fit for disposition by unpublished report, and, by custom and necessity, the Chief Judge must make that decision. We should maintain our classification system because it serves a useful “signaling” function, advising readers of the significance we give to our opinions.

I do, however, favor reviving the custom of our not citing memorandum opinions. A possible exception is where the Court is distinguishing a prior memorandum opinion to show that, contrary to a party’s argument, the Court’s present decision is not inconsistent with its prior application of settled law.

If no published report can be found to support a point of law, then a judge should set forth the analysis of any relevant memorandum opinions,

but he should indicate the report for publication in order that the precedential value of his analysis adopted from the memorandum opinions be established as authoritative precedent subject to appropriate deference under the doctrine of *stare decisis*.

The Chief Judge reviews and classifies all reports and can assure that we adhere to our revived custom of not citing memorandum opinions. Undoubtedly, she will keep in mind Judge Murdock’s admonition that doubts as to whether a case should be in memorandum form or printed are resolved in favor of printing.

Implementing my suggestion will take time, but I think that we can recover the ground that we have lost in far fewer years than it took for us to lose it.

D. What the Future May Hold

Before I close, I would like to say just a few things about the IRS’s plans for the future of tax administration. As reported by the National Taxpayer Advocate, Nina Olson, the IRS has directed significant resources to creating a “future state” plan that details how the agency will operate in the next five years.¹⁵¹ Implicit in the plan, she reports, “is an intention on the part of the IRS to substantially reduce telephone and face-to-face interaction with taxpayers.”¹⁵² Taxpayers will be encouraged to interact with the agency through online accounts or with the assistance of third parties like tax return preparers or tax software companies.¹⁵³ She worries that that approach will increase compliance costs for millions of taxpayers and, as taxpayers lose their ability to speak with IRS employees either by telephone or at walk-in centers, will increase taxpayer frustration with the system.¹⁵⁴ She notes that, while some pre-filing contacts may require only generic answers, post-filing contacts are almost always account-specific and require IRS employees to study the details of the taxpayer’s account to respond.¹⁵⁵

So, what is the implication for the Tax Court? As taxpayers grow frustrated with the IRS, they are likely to turn to the Tax Court for relief, where filing fees are minimal and the service is personal. Indeed, recent comments by the IRS’s Chief Counsel may be a harbinger. Tax Analysts reported on March 14, 2016, that IRS Chief Counsel William J. Wilkins had announced plans to hire additional attorneys who

¹⁴⁸*Convergent Techs., Inc. v. Commissioner*, T.C. Memo. 1995-220, 1995 WL 422677, at *8.

¹⁴⁹See *Singer v. Commissioner*, T.C. Memo. 2016-48.

¹⁵⁰*Id.*

¹⁵¹2015 Nat’l Taxpayer Advoc. Ann. Rep. vol. 1, at 3 (can be found at <http://www.TaxpayerAdvocate.irs.gov/2015AnnualReport>; last visited, May 3, 2016).

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴*Id.* at 3-4.

¹⁵⁵*Id.* at 4.

will work on the Tax Court's small-case docket.¹⁵⁶ Mr. Wilkins attributed the increase to an uptick in the number of small cases, although he could not say whether the uptick was temporary or permanent. My suspicion is that, given taxpayer frustration with budget-driven IRS service curtailments, the uptick is permanent.

Recourse to the Tax Court is a high-cost alternative to resolving disputes that, in many cases, could more efficiently be resolved by telephonic or face-to-face contact within the agency.

E. Conclusion

Since Judge Murdock reported in 1945, our history has been one of change within continuity. Our unique role of providing an impartial, prepayment judicial forum responsible for developing a uniform body of case law has been continued and enhanced. Congress has added to our jurisdiction, and we, together with others, have facilitated access to the Tax Court for low-income and unrepresented taxpayers. We are adjusting to our new responsibilities to review equitable determinations and exercises of

¹⁵⁶William R. Davis, "IRS to Hire More Attorneys to Handle Small-Case Docket," *Tax Notes*, Mar. 14, 2016, p. 1282.

agency discretion. I hope that we will reconsider our reliance on memorandum opinions.

My last quarter century as a judge on the United State Tax Court has been the highlight of my professional career. What other kind of job is there that lets you wear a costume to work, listen to stories all day, and write endings.

F. Appendix

Ratio of T.C. Published Reports to Memorandum Opinions			
Year	Published	Memorandum	Ratio
1935	344	467	1 to 1.36
1945	261	385	1 to 1.48
1955	274	336	1 to 1.23
1965	134	328	1 to 2.45
1975	205	373	1 to 1.82
1985	137	630	1 to 4.60
1995	64	610	1 to 9.53
2005	34	299	1 to 8.79
2011	47	300	1 to 6.38
2012	42	360	1 to 8.57
2013	38	296	1 to 7.79
2014	45	259	1 to 5.76
2015	31	252	1 to 8.13
Totals	1,656	4,895	1 to 2.96