

A Square Peg in a Round Hole: The *Golsen* Rule in S Cases

By Saul Mezei and Joseph Judkins

Saul Mezei is an associate in the Washington office of Bingham McCutchen LLP. Joseph Judkins is an associate in the Washington office of Baker & McKenzie. Both are former Tax Court law clerks who maintain a keen interest in the court. The authors thank Ronald L. Buch Jr. and Prof. Carlton M. Smith for their comments and C. Terrell Ussing for his research.

The Tax Court has applied the *Golsen* rule in S cases for decades without ever explaining why. This article examines the issue and suggests that the court change its practice and articulate its position in a rule.

This article addresses the interplay between two watershed events in Tax Court history, both of which occurred in a four-month span more than 40 years ago — Congress’s enactment of special procedures for small tax cases (S cases) and the Tax Court’s adoption of the self-imposed restraint announced in *Golsen v. Commissioner*,¹ or the so-called *Golsen* rule, under which the Tax Court applies the precedent of the circuit court of appeals to which its decision is appealable. Although the Tax Court has applied the *Golsen* rule in S cases for decades, it apparently has never publicly articulated a rationale for that practice. That omission is a real and growing concern, as S cases now account for nearly half the Tax Court’s docket² and application of the rule in S cases significantly extends *Golsen* beyond its well-known and limited purpose. An examination of the topic is long overdue.³

After providing background on S cases, the adoption and subsequent development of the *Golsen* rule, and the Tax Court’s historical practice of applying the *Golsen* rule in S cases, we set forth the arguments for and against applying *Golsen* in

those cases. We ultimately conclude that the scales tip in favor of nonapplication of the rule. Recognizing that four decades of institutional practice may prove to be an insurmountable obstacle, we recommend that at a minimum, the Tax Court amend its Rules of Practice and Procedure to provide clarity to taxpayers and their representatives as well as to the IRS lawyers who represent the commissioner before the Tax Court.

S Cases

Concerned that the formal and complex nature of Tax Court proceedings served as a barrier to many taxpayers with “small claims,” on December 30, 1969, Congress enacted section 7463 as part of the Tax Reform Act of 1969, the same law that transformed the Tax Court from an independent executive agency into a court of record under Article I of the Constitution. At a taxpayer’s election, section 7463 provides for special, less-formal proceedings in S cases — those in which the deficiency and penalties in dispute do not exceed \$50,000 for any single tax year.⁴ In 1968 the Tax Court itself had adopted special simplified procedures for small tax cases that provided for a simplified petition, early assignment to a trial calendar, informal trial procedures, and a waiver of the briefing requirement.⁵ However, those measures proved insufficient to Congress, which was concerned that the statutory requirement that the Tax Court apply the same evidentiary standard in all cases (regardless of the amount in dispute) would continue to result in overly formal proceedings for small cases.⁶ The

⁴The \$50,000 jurisdictional amount is exclusive of interest in deficiency cases. Congress has increased that amount four times since it enacted section 7463 — from \$1,000 to \$1,500 in 1972; to \$5,000 in 1978; to \$10,000 in 1984; and to \$50,000 in 1998. The rules differ slightly in non-deficiency cases. For example, in a case involving a petition from the denial of innocent spouse relief, the amount of relief sought (including penalties and interest) cannot exceed \$50,000. Section 7463(f)(1). In an appeal of a determination in a collection action, the total unpaid tax for all years at issue (including penalties and interest) cannot exceed \$50,000. Section 7463(f)(2).

⁵Harold Dubroff, “The United States Tax Court: An Historical Analysis (Part VI: Trial and Post-Trial Procedure),” 42 *Alb. L. Rev.* 191, 233 n.402 (1978).

⁶*Id.* Section 7453 requires the Tax Court to conduct its proceedings in accordance with the rules of evidence applicable in non-jury trials in the District Court for the District of Columbia.

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

²Note to Tax Court Rule 173.

³The only detailed examination of the topic we found is Prof. Carlton Smith’s article titled “Does the Tax Court’s Use of Its *Golsen* Rule in Unappealable Small Tax Cases Hurt the Poor?” 11 *J. Tax Prac. & Proc.* 35 (Feb.-Mar. 2009).

media heralded the S case procedures as an attempt to “give the small taxpayer a chance to tackle the IRS on an even footing”⁷ and “the answer to every taxpayer’s dream.”⁸

Electing S case status represents a significant trade-off — the taxpayer forgoes the right to appeal the Tax Court’s decision in exchange for relaxed evidentiary and procedural rules.⁹ Relaxed proceedings can be a boon to taxpayers, as the court may admit evidence that it otherwise might have excluded on evidentiary grounds (for example, hearsay or authentication). The admission of that evidence can sometimes swing the outcome in the taxpayer’s favor. Additional benefits of S status include the availability of trial sessions in more cities (approximately 15 more than regular cases) and more expeditious disposition of the case.¹⁰

Opinions in S cases are non-precedential¹¹ and are labeled “summary opinions,” presumably because section 7463 requires that the court provide a “decision, together with a brief *summary* of the reasons therefor.”¹²

As part of TRA 1969, Congress also added section 7456(c), which empowered the chief judge of the Tax Court to appoint commissioners to assist in the handling of small tax cases.¹³ Four commissioners were soon appointed. Because they lacked authority to render actual judgments, a regular Tax Court judge oversaw the newly created Small Tax Case

Division and approved its decisions.¹⁴ Judge Howard A. Dawson Jr. was the first to act in that capacity.¹⁵

Congress eventually redesignated commissioners “special trial judges” and empowered them to render judgments in S cases.¹⁶ Today, special trial judges continue to decide many S cases. The court’s internal review process for summary opinions is similar to its normal, pre-issuance opinion review process: The judge prepares a report (essentially a draft opinion), which is submitted to all judges for review before issuance.

S cases now account for more than 40 percent of the cases pending before the Tax Court.¹⁷ And that’s just for cases in which an S election was made. When coupled with cases eligible for S status, the number is significantly greater: 22,700 of the 29,600 cases pending before the court at the end of fiscal year 2010, or more than three-quarters of all pending cases.¹⁸

Development of the *Golsen* Rule

Under the appellate structure that applies to the Tax Court — a court of nationwide jurisdiction — its decisions are appealable to 12 intermediate appellate courts whose authority is geographically limited.¹⁹ Because uniformity in the application of tax laws is desirable, the Tax Court has always been confronted by the issue of when, if ever, it is bound by the precedent of a court of appeals.

The *Golsen* rule addresses that by instructing the Tax Court to apply the holding of an appellate court narrowly to avoid summary reversal. It is a self-imposed, pragmatic rule that spares litigants a needless appeal when an intermediate appellate court would surely reverse the Tax Court on a previously decided matter of law. Although now axiomatic, the Tax Court did not articulate the *Golsen* rule until 1970, more than 45 years into its

⁷Frederick Andrews, “A Sympathetic Ear: U.S. Tax Court Tries to Give the Little Guy a Chance to Fight Back,” *The Wall Street Journal*, Feb. 4, 1971.

⁸“Now: A Break for the Small Taxpayer,” *U.S. News and World Report*, Feb. 22, 1971, at 46.

⁹Although an S designation can be removed by the court at any time before decision, the intricacies of the removal process and the issues surrounding it are beyond the scope of this article.

¹⁰Christopher J. Badum, “The Small Tax Case Procedure: How It Works — Does It Work?” 4 *Fordham Urban Law J.* 385, 394 (1975). The Tax Court’s website provides that “S case trials are held in about 15 more cities than are regular cases.” See http://www.ustaxcourt.gov/taxpayer_info_start.htm (last visited Dec. 17, 2011).

¹¹See section 7463(b). It is not clear whether an opinion in an S case precludes re-litigation of the same issues between the taxpayer and the IRS in a later case (*i.e.*, whether the doctrine of collateral estoppel applies). Although the Tax Court has avoided deciding on the issue, at least two judges believe the answer is yes. See *Mitchell v. Commissioner*, 131 T.C. 215 (2008).

¹²Section 7463(a) (flush language) (emphasis added).

¹³That was the first time the Tax Court was authorized to appoint full-time commissioners. Congress had previously authorized the appointment of a Tax Court staff attorney to act as a commissioner on a case-by-case basis. In 1986 subsections (d) and (e) of section 7443A were substituted for section 7456(c).

¹⁴General Order No. 2, 54 T.C. VI (1970).

¹⁵Samuel B. Sterrett, “Small Tax Cases,” *Taxes — The Tax Magazine*, Oct. 1972, at 624. Sterrett, a Tax Court judge, succeeded Dawson as head of the court’s Small Tax Division.

¹⁶As part of TRA 1986, Congress gave the Tax Court chief judge the discretion to assign special trial judges in “any other proceeding.”

¹⁷See American Bar Association Tax Court Procedure Committee, 2011 Presentation, available at <http://www.americanbar.org/content/dam/aba/events/taxation/taxiq-11may-184.authcheckdam.pdf> (last visited Dec. 17, 2011).

¹⁸*Id.*

¹⁹There are 13 circuit courts of appeals, but Tax Court decisions are not appealable to the U.S. Court of Appeals for the Federal Circuit.

existence.²⁰ Before then, the Tax Court followed its own precedent even when appellate reversal was virtually assured.

Judge J. Edgar Murdock said as much in *Lawrence v. Commissioner*.²¹ Murdock exerted a powerful influence on the Tax Court during his 42 years there. He was first appointed to the Board of Tax Appeals in 1926, just two years after its creation; he remained in active status for 35 years and served in senior status for another seven years. For 10 of his 42 years on the court, he was chair, presiding judge, or chief judge. Throughout his lengthy tenure, he helped to shape the court's precedent and lay the foundation for its place in the federal judiciary.²²

When Murdock wrote the court-reviewed opinion in *Lawrence*, he reasoned that Congress designed the Tax Court to create consistent case law to guide taxpayers throughout the United States in their compliance with federal tax law: "Congress expected the Tax Court to set precedents for the uniform application of the tax laws, insofar as it would be able to do that."²³ Precedent that varied by appellate circuit would undermine that goal of uniformity and prevent the Tax Court from achieving its congressionally mandated purpose: The

court "could not perform its assigned functions properly were it to decide one case one way and another differently merely because appeals in such cases might go to different Courts of Appeals."²⁴ Murdock added that in matters of tax, the judicial world was in a sense turned upside down: "Congress, in the case of the Tax Court, 'inverted the triangle' so that from a single national jurisdiction, the Tax Court appeals would spread out among 11 Courts of Appeals, each for a different circuit or portion of the United States."²⁵

On that analytical foundation, the Tax Court built what came to be known as the *Lawrence* rule, which generally required the Tax Court to follow its own precedent in deciding cases before it, even when appellate courts had decided the same issue. Based on the court's nationwide jurisdiction in matters of tax litigation and the need for uniformity, Murdock said, "With all due respect to the Courts of Appeals, [the Tax Court] cannot conscientiously change unless Congress or the Supreme Court so directs."²⁶

The Tax Court decided *Lawrence*, however, in an atmosphere of appellate uncertainty. The iteration of section 7482 then in effect determined the appellate forum based primarily on where the taxpayer filed the return at issue.²⁷ As Murdock said, "The Tax Court never knows, when it decides a case, where any subsequent appeal from that decision may go, or whether there may be an appeal."²⁸

Congress alleviated some of that uncertainty in 1966, when it revised section 7482 to clarify that in general, appeals from the Tax Court lie to the court of appeals that covers the taxpayer's residence or principal place of business when the petition was

²⁰Although we refer to it as the Tax Court, historians will be quick to point out that that wasn't always the court's name. As originally incarnated, it was named the U.S. Board of Tax Appeals (Board), and designated an independent agency of the executive branch. The Board's "members" became "judges" in 1945, when Congress changed the Board's name to the Tax Court of the United States. And in 1969 Congress again changed its name to the U.S. Tax Court, finally designating it as an Article I court of record.

²¹27 T.C. 713 (1957), *rev'd*, 258 F.2d 562 (9th Cir. 1958).

²²We're in good company in recognizing Murdock's contributions. Notably, Judge Learned Hand paid tribute to Murdock, who wrote the Tax Court's order in *American Coast Line Inc. v. Commissioner*, 6 T.C. 67 (1946), *aff'd*, 159 F.2d 665 (2d Cir. 1947). And, more importantly for present purposes, Hand was careful to recognize the particular expertise of the Tax Court, even when the court refused to follow pertinent appellate precedent:

Finally, so far as concerns our review of the Tax Court, as distinct from its own decision as to its jurisdiction, the case seems to us especially proper for the application of the doctrine that, even as to matters of law unmixed with fact, we are to yield unless our conviction to the contrary is strong. . . . It is of course not our province to fix the distribution of judicial power; least of all are we in a position to measure the higher authority which the Tax Court's constant occupation in its special field should give to its rulings, as distinct from ours in our sprawling jurisdiction. We can think of no legal question as to which we ought more readily yield than that at bar; in that thicket of verbiage, through which we have been forced to cut a way, it must surely be an advantage to have been familiar with other tangles of the same general sort; and, while it is the pleasure of Congress to express itself, may well be grateful that we are permitted to put our hand into those of accredited pathfinders.

²³27 T.C. at 718.

²⁴*Id.*

²⁵27 T.C. at 718. At the time, Tax Court decisions were appealable to 11 courts of appeals. The number increased to 12 in 1981 when some districts in Alabama, Florida, and Georgia were split off from the Fifth Circuit to form the Eleventh Circuit.

²⁶*Id.* at 720.

²⁷Until Congress amended the statute in 1966, appeals from the Tax Court generally were made "to the Court of Appeals for the circuit in which is located the office to which was made the return of the tax in respect of which the liability arises." See section 7482 of the Internal Revenue Code of 1954.

²⁸27 T.C. at 718. Some of the uncertainty referred to by Murdock is because the law permits the parties to stipulate to appeal the Tax Court's decision to any court of appeals (except the Federal Circuit, which lacks jurisdiction to review Tax Court decisions). He also gave various examples of instances in which a Tax Court decision was appealable to multiple circuits (*e.g.*, a corporate distribution to shareholders in multiple jurisdictions and a question of whether the distribution is a dividend).

filed with the Tax Court.²⁹ That gave the court clearer vision of the appellate picture and the law that bound the parties.

Murdock left the Tax Court at the end of 1968. By April 1970 the court had articulated a narrow exception to the *Lawrence* rule. In *Golsen*, the Tax Court held that in the interest of “efficient and harmonious judicial administration” it would depart from the *Lawrence* rule and follow an appellate decision that was squarely on point where appeal of the Tax Court decision was to that court of appeals alone.³⁰

Not long after the Tax Court created the *Golsen* exception, Judge Henry Friendly of the Second Circuit commented on its scope: “The Tax Court fulfills its duties under [*Golsen*] if it respects decisions of a court of appeals to which appeals will be taken and should be free to voice its disagreement with statements not essential thereto.”³¹

That general principle is fundamental to understanding the Tax Court’s interaction with appellate precedent based on the narrow restrictions of the *Golsen* rule. The Tax Court need not follow the same analysis provided by intermediate appellate courts. Instead, it must reach only the same conclusion that the appellate court would, and it can arrive at that end based on its own legal interpretations, as long as its decision comports with the narrow principle of law that prevails in the pertinent court of appeals.

Later, the Tax Court further clarified the rationale underlying *Golsen*. In *Lardas v. Commissioner*,³² the Tax Court, sitting in conference, said the *Lawrence* rule made little practical sense “where a case in the Tax Court is appealable to a Court of Appeals that previously has taken a position on precisely the same issue.” If the Tax Court took a contrary position in those circumstances, the losing party would appeal and win, thus wasting time, money, resources, and ultimately achieving nothing. The court went on to reiterate the rule’s narrowness: “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.”³³

²⁹Yet uncertainty still prevails in many situations. See James Bamberg, “A Different Point of Venue: The Plain Meaning of Section 7482(b)(1),” 61 *Tax Law.* 445 (2008).

³⁰54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971).

³¹*Sirbo Holdings v. Commissioner*, 476 F.2d 981, 989 (2d Cir. 1973) (emphasis added).

³²99 T.C. 490, 494 (1992).

³³*Id.* at 495.

The Tax Court Applies *Golsen* in S Cases

To provide the Tax Court ample time to institute procedures for dealing with S cases, Congress made section 7463 effective January 1, 1971. The Tax Court began issuing summary opinions that year. Summary opinions issued between 1971 and 2000 were never published, although copies of those opinions do exist. In fact, the Tax Court retains paper copies of all summary opinions from that era. We requested and were granted permission to review them.³⁴

Some of the earliest summary opinions applied the *Golsen* rule, but without any explanation for why it applies in an unappealable case. For example, in a 1972 case³⁵ involving substantiation of business expenses of taxpayers who resided in New York, the Tax Court applied Second Circuit precedent, saying that the case fell within the ambit of *LaForge v. Commissioner*, 434 F.2d 370 (2d Cir. 1970), and was “governed by it, since it too is in the Second Circuit.” In another early summary opinion involving Vermont taxpayers and a circuit split over the meaning of “home” for purposes of deducting travel expenses, the court felt compelled by *Golsen* to apply Second Circuit precedent that was “squarely in point.”³⁶

The Tax Court’s practice of applying the *Golsen* rule in S cases without explanation continues today. Since the Tax Court first began publishing summary opinions in 2001, it has cited *Golsen* in at least 22 of those opinions.³⁷ Yet because the court also decides S cases by bench opinion and order, and because — even in published opinions — it sometimes applies circuit court precedent without explicitly citing *Golsen*, we cannot say with certainty how often the court in fact relies on *Golsen* in deciding S cases.³⁸ In an order recently published in *Amundson v. Commissioner*, the court said, “In general, we follow the rule of law in the U.S. Circuit Court of Appeals to which our decisions are appealable, see *Golsen* . . . even if as here, the decision is not appealable.”³⁹ The court

³⁴Because of the sheer volume of summary opinions involved (Ussing estimated between 12,000 and 13,000 opinions), we only made it through 1973. Even in those early opinions, the Tax Court applied the *Golsen* rule in S cases.

³⁵*Hern v. Commissioner*, T.C. Summ. Op. 1972-15.

³⁶*Miner v. Commissioner*, T.C. Summ. Op. 1972-151.

³⁷The figure is based on a December 17 search of Westlaw’s database of the Tax Court’s summary opinions for references to “*Golsen*.”

³⁸For the first time in its history, on June 17 the Tax Court began publishing orders. Within a week, it published an order denying an IRS motion to dismiss for lack of jurisdiction in which it relied on *Golsen* and applied the precedent of the U.S. Court of Appeals for the Fourth Circuit. See *Amundson v. Commissioner*, Dkt. No. 24594-105 (June 23, 2011).

³⁹*Id.*

has made similar proclamations in several fairly recent summary opinions.⁴⁰ Although the court's practice seems well established, the underlying rationale for that practice remains a mystery.

Golsen Can Alter the Outcome of S Cases

Whether the Tax Court applies its own precedent or that of the appellate courts in S cases is important because the Tax Court's practice can affect small taxpayers. Take, for instance, the recent controversy over the regulatory limitations period for equitable innocent spouse relief. In *Lantz v. Commissioner*,⁴¹ the Tax Court invalidated a regulation that imposed a two-year limitations period on claims under section 6015(f).⁴² The commissioner appealed the Tax Court's decision in *Lantz* and similar cases. Ultimately, all three appellate courts to decide the issue — the Third, Fourth, and Seventh circuits — reversed the Tax Court.⁴³

Because almost half the cases involving claims for section 6015(f) relief were S cases, the Tax Court's choice to apply the *Golsen* rule would have altered the result in those cases.⁴⁴ If the Tax Court followed its own precedent, then the two-year limitations period was invalid, and taxpayers could proceed despite the lapse of time. But if the Tax Court followed appellate precedent (in the Third, Fourth, and Seventh circuits), then the case would be dismissed on procedural grounds. Many taxpayers in small tax cases could easily have been affected based entirely on the court's choice to apply the *Golsen* rule.

⁴⁰See, e.g., *Paquin v. Commissioner*, T.C. Summ. Op. 2010-120, Doc 2010-18497, 2010 TNT 161-11 ("Although this case was tried as a small tax case subject to sec. 7463(b) and is not appealable, this Court generally applies the law of the circuit to which an appeal would normally lie if the case were appealable."); *Fitzpatrick v. Commissioner*, T.C. Summ. Op. 2009-102, Doc 2009-15474, 2009 TNT 129-32 ("This Court generally applies the law in a manner consistent with the holdings of the Court of Appeals to which an appeal of its decision would lie . . . even in cases subject to sec. 7463(b)").

⁴¹132 T.C. 131 (2009), Doc 2009-7979, 2009 TNT 65-8, *rev'd*, 607 F.3d 479 (7th Cir. 2010), Doc 2010-12604, 2010 TNT 110-17.

⁴²In *Lantz*, once the court invalidated the regulation and permitted the case to proceed, the commissioner stipulated that the taxpayer was not liable for income tax, an addition to tax, or a penalty and that she was entitled to a refund.

⁴³See *Lantz*, 607 F.3d 479; *Mannella v. Commissioner*, 631 F.3d 115 (3d Cir. 2011), Doc 2011-1183, 2011 TNT 13-10, *rev'g*, 132 T.C. 196 (2009), Doc 2009-8425, 2009 TNT 69-21; *Jones v. Commissioner*, 642 F.3d 459 (4th Cir. 2011), Doc 2011-12907, 2011 TNT 114-9, *rev'g*, No. 17359-08 order and decision (May 28, 2010).

⁴⁴The Tax Court did not openly address this issue in the section 6015(f) context, perhaps because before the chance arose, the IRS abandoned the regulatory limitations period and stated that it would no longer seek to apply it in any pending litigation.

The Case for Applying *Golsen* in S Cases

Because the Tax Court has never articulated its rationale for applying the *Golsen* rule in S cases, we can only surmise why it has done so.

First, there is no indication — from Congress or otherwise — that an S election should act to alter the legal precedent the court would generally apply. Applicable legal precedent is precisely that, whether in a regular case or an S case.

Second, applying *Golsen* in S cases allows the court to apply the same law to similarly situated taxpayers. For instance, consider two neighbors in Los Angeles, both of whom have tax deficiencies based on the same tax item — but one owes \$50,000, and the other \$50,001. Both petition the Tax Court. Consistent with section 7463, the first taxpayer elects S case status, and the second travels the regular case route. Further assume that Ninth Circuit precedent would uphold the deficiency determination, but the Tax Court has adopted a contrary rule that would lead to a no-deficiency decision. If the Tax Court does not follow the Ninth Circuit rule in the S case proceeding and instead applies its own rule, then the taxpayer with the \$50,000 deficiency wins. And if the Tax Court follows the Ninth Circuit rule in the regular case, then the taxpayer with the \$50,001 deficiency loses. So, even though the substantive tax issue is the same, and even though the amount of the deficiency differs only by \$1, two neighbors are taxed in a radically different manner. Uniformity and consistency, which form the foundation of Tax Court jurisprudence, are obliterated.

In this example, the Ninth Circuit's precedent disfavors the taxpayer. But the opposite could just as easily be true. That is, the Tax Court could create taxpayer-unfavorable precedent, but pertinent appellate precedent could provide a taxpayer-favorable result. In that circumstance, unless the Tax Court followed appellate precedent, then the taxpayer would suffer the consequences of unfavorable precedent. Further, in an S-case world without the *Golsen* rule, Tax Court judges are arguably given broader discretion to mete out justice at whim.

Third, if the *Golsen* rule does not apply in S cases, less sophisticated taxpayers could be harmed. Take two taxpayers, both of whom are alleged to owe \$55,000 based on deficiency determinations regarding the same two tax items — but one of the items causes a \$5,000 deficiency and the other a \$50,000 deficiency. Based on facts similar to the first example, if one taxpayer knows that the pertinent appellate precedent is not favorable, then he could settle the \$5,000 item with the IRS, take a notice of deficiency with regard to the \$50,000 item, and then file an S case with the Tax Court. If the second taxpayer is not as well versed in the applicable precedent, then he may simply take a notice on the

entire \$55,000 deficiency and file a regular case in the Tax Court. That potentially offers a choice of forum within a forum, allowing more sophisticated or better advised petitioners to manipulate the system to their advantage.

Fourth, application of the *Golsen* rule in S cases fosters predictability — that is, the ability of the parties to know what law will be applied in their cases. If the Tax Court declines to follow the *Golsen* rule in S cases, then it is left almost entirely to its own devices. In one situation, it may follow its own precedent. In another, it may choose to follow the rule of the circuit court to which the case would be appealable if it were a regular case. In yet another situation, the Tax Court could follow the precedent from an entirely different circuit court, which may have reached a result different from that of both the Tax Court and the (ordinarily) pertinent appellate court. Without *Golsen*, individual judges are left to develop their own individualized small case jurisprudence, which they may follow (or disregard) as they please. That creates enormous uncertainty for taxpayers.

Fifth, there's consistency with past case law. That might initially seem absurd, considering that S cases are, by statutory mandate, not precedent in any other case. Yet for more than 40 years the Tax Court has applied *Golsen* in S cases. We can only assume, albeit without evidentiary support, that this is not the result of chance but rather a carefully reasoned decision that followed soon after the creation of the small tax division. Even though summary opinions are not precedential, the Tax Court's consistent application of the *Golsen* rule has created a reasonable expectation that it will continue to do so, absent some explicit statement to the contrary.

Finally, in the event that an S case is redesignated as a regular case before the Tax Court's decision, then the parties will not be surprised. Suppose that a taxpayer elects S status with the reasonable expectation that the matter will be tried using simplified procedures. Next, assume that appellate precedent favors the government. In a world in which the *Golsen* rule does not apply in S cases, there is additional reason for the chief counsel attorney to seek to remove S case designation (that is, solely to reap the benefit of favorable appellate precedent). That could deprive the taxpayer of the ability to present the details of his case without the formalisms and burdens of the Federal Rules of Evidence.⁴⁵

⁴⁵After *Lantz*, the IRS Office of Associate Chief Counsel (Procedure and Administration) announced that in S cases involving the aforementioned two-year regulatory limitations

(Footnote continued in next column.)

The Case Against Applying *Golsen* in S Cases

The *Golsen* rule represents efficient jurisprudence in appealable cases, where it spares the parties the expense of an unnecessary appeal. Yet contrary to its stated rationale, the Tax Court applies *Golsen* in small tax cases, which, by statute, are not appealable. In the words of Prof. Carlton Smith, "The stated logic of *Golsen* is to avoid an automatic judicial reversal by a circuit court. The logic has no application whatsoever in an unappealable case."

None of the arguments that we've devised in favor of applying *Golsen* in S cases justifies applying the rule outside the boundaries created by the Tax Court in *Golsen* and *Lardas*. The argument that applicable legal precedent is precisely that assumes the conclusion. Circuit court precedent does not bind the Tax Court unless the latter faces summary reversal as a result of not applying circuit court precedent, which is impossible in an S case.

The intra-circuit uniformity point is a non-starter. We accept that the nonapplication of *Golsen* would allow for the seemingly bizarre: forum shopping within a single forum. But Congress created the S case regime to exist outside arbitrary circuit boundaries. Instead, small taxpayers were to be treated similarly to other small taxpayers regardless of where they reside. Moreover, ignoring the "accident of geography" dovetails with the Tax Court's charter to provide a consistent body of tax precedent that applies uniformly across the nation. Congress remains free to amend that charter in the event of perceived abuse.

The predictability point is no more compelling. As S cases are not subject to appeal, Tax Court judges are already largely free to do as they please. The sole pre-decision check on a Tax Court judge's whim in an S case is the court's internal review process. And that check generally does not apply to bench opinions, which are handed down without being circulated to the rest of the judges for review and comment. In other words, the nonapplication of *Golsen* in S cases will afford Tax Court judges no more freedom than the almost unlimited freedom they already possess. Nor is the court's long and consistent application of the inapplicable *Golsen* rule in S cases reason to continue applying it.

The abusive removal argument fares no better. The Tax Court can easily prevent that abuse by simply denying the government's motion to remove the S designation. Indeed, the court should do so if it feels the government is seeking to deprive the taxpayer of the informality of S case procedures

period on section 6015(f) relief, IRS attorneys would move to remove the S designation. See CC-2010-011, *Doc 2010-13823*, 2010 TNT 120-19.

simply to compel the court to apply circuit precedent that is at loggerheads with its own.

A Viable Third Alternative: The Option?

The court's options are not limited to applying its own precedent or that of the appellate court to which its decision would have been appealable were it not an S case. Smith has suggested that when presented with a conflict, the court should apply the precedent that favors the taxpayer. Although we understand that that practice would benefit small taxpayers, we don't consider it an advisable (or viable) option.

However, that argument has some appeal. If the Tax Court and circuit court are split on the legal issue, it is reasonable to assume it is a close call. In that case, why not give the small taxpayer the benefit of the doubt? After all, Congress enacted the S case procedures to assist small taxpayers.

The answer is that the clarity and certainty of a principled approach that favors neither party is critical to maintaining the Tax Court's judicial integrity. Otherwise, why stop at requiring it to choose between its own precedent or that of the circuit to which its decision would have been appealable were it not an S case? Why not ignore the law and simply decide in favor of the taxpayer on equitable grounds? Ignoring the law and arbitrarily favoring one party paves the way for systemic abuses. For instance, when the fisc is starved for revenue, why shouldn't the Tax Court shift direction and consistently decide in favor of the government? The point is that a bright-line rule that does not favor either party is the better option. And it is the only option the court would ever endorse as a practical matter, for it would not want to be viewed as acting arbitrarily or as a party advocate.

The bottom line: While the relaxed atmosphere of an S case offers small taxpayers many benefits, those benefits should not extend to allow the court to pick and choose applicable legal precedent.

Conclusion

Whenever the court must choose between its own precedent and that of a court of appeals, it faces an unresolvable conundrum — no matter what it does, it cannot assure the existence of a uniform body of tax precedent. If the Tax Court chooses to ignore intermediate appellate precedent and apply only its own precedent in S cases, then taxpayers who otherwise are similarly situated will be subjected to differing legal standards based solely on whether the case is litigated using S case procedures or regular case procedures. Likewise, if the Tax Court applies the *Golsen* rule in S cases, then it will sacrifice the uniformity that it seeks to create and maintain through its own body of judicial precedent. And if the court opts for some other

approach, such as applying *Golsen* in S cases based on the whim of the authoring judge, then uniformity would be even harder to maintain.

Crucially, the court's solution affects the integrity of the *Golsen* rule. Applying the rule in S cases dilutes its meaning whenever the court legitimately invokes it in regular cases. Indeed, *Golsen*, as a narrow exception to the *Lawrence* rule, is itself a self-imposed limitation on the court's ability to maintain a uniform body of tax precedent. By invoking *Golsen* out of context, the court is rendering its meaning opaque and is even casting doubt on the underlying reasons for the rule.

Based on the Tax Court's stated rationale, the *Golsen* rule should not apply in S cases. Because decisions in S cases are not appealable, there is never concern for summary reversal based on the court's failure to follow appellate precedent that is squarely on point. The court's current practice transcends the relatively narrow limitations that it imposed on itself in *Golsen*, *Lardas*, and several other regular cases. Moreover, it is perplexing that while the court has gone to great lengths to stress the *Golsen* rule's limited application, it has simultaneously applied the rule when it has good reason to not do it. To preserve the *Golsen* rule's integrity, and to promote the court's goal of achieving a uniform body of tax precedent, the sounder practice would be for the court to ignore *Golsen* in S cases.

Given the court's long-standing, unexplained practice of applying *Golsen* in S cases and the uncertainty it fosters, we recommend that the court provide clear guidance on the issue. Congress has given the court broad authority to articulate the rules that apply in small tax cases: "Notwithstanding the provisions of section 7453, such proceedings shall be conducted in accordance with such rules of evidence, practice, and procedure as the Tax Court may prescribe."⁴⁶ And the Tax Court has used that authority and made rules.⁴⁷

To provide clarity on the matter, the Tax Court should articulate its position in a rule. Indeed, it could amend Rule 174 of its Rules of Practice and Procedure to provide that "in deciding cases under section 7463, the Tax Court shall apply its own precedent. The decisions of the courts of appeals shall not be treated as precedent in small tax cases."

Or not. If the court believes that there are compelling reasons to apply the *Golsen* rule in S cases, then it should clearly present its justifications and publicly establish the standards that govern application of tax precedent in S cases. Whatever path

⁴⁶See section 7463(a).

⁴⁷See U.S. Tax Court Rules of Practice and Procedure, rules 170-175.

COMMENTARY / VIEWPOINTS

the Tax Court chooses to follow, it should mark that path clearly so that thousands of small taxpayers, their representatives, and the IRS will know how to navigate the thicket of law that may — or may not — apply.

EO Tax Today.

*As dedicated to the
nonprofit tax world
as you are.*

Now you can get daily comprehensive coverage of the nonprofit tax world. See news highlights affecting federal, state, and international non-profits updated as events happen. Get a weekly e-mail recap, a database of searchable full text documents and more.

Visit taxanalysts.com for more details.

eo tax today[®]

taxanalysts[®] *The experts' experts.*SM