HOW TO READ TAX COURT OPINIONS

Mary Ann Cohen

It is a special privilege for me to be here today for several reasons. First, I am honored to initiate the anticipated annual lecture series sponsored by your Corporate & Taxation Law Society. Second, my earliest career choice was to be a teacher; therefore, I enjoy the opportunity to trade the courtroom for the lecture hall. Of course there is an advantage to the courtroom, where the black robe and gavel discourage too overt dissent from my viewpoint. Third, this may be an opportune time to discuss the function and structure of the United States Tax Court. It seems to me that the attention of the tax policy makers and the corporate world is focusing on the extent that so-called “corporate tax shelters” require special efforts to determine whether tax liabilities are being correctly reported by the business segment of the economy. In the past few years, the Court has tried and decided many cases involving reallocation of income among members of international corporate families. More recently, you
have seen perhaps a half-dozen cases where transactions of well-known corporations have been disregarded as lacking in economic substance or business purpose, notwithstanding the big-name investment bankers, accounting firms, or lawyers involved in planning the transactions. I will leave it to your professors to discuss specific cases. My purpose today is to describe the Tax Court operations so that you have some background that will help you read and analyze our opinions, thus better preparing you to discuss them with clients who are considering the applicability of certain holdings in certain cases to transactions that they have completed or are contemplating.

The primary reason why I wanted to be a teacher was that many of my teachers, from elementary school through law school, made lasting impressions on me. I will always remember my first-year contracts class. Almost all of the semester was spent on a single case; however, every day the facts of the case changed a little bit, and we talked about what new arguments or theories could be made based on the changes. This was also, of course, my introduction to the Socratic method.

The history is relevant because it explains a mission of mine that started a few years ago when one of my opinions was under broad attack by commentators within and without the academic setting. That is, I want to remind tax professionals who read our opinions that we are a trial court, bound by the evidence in a case and not free to state simply the issue and then decide what the result should be.


3. See generally 26 U.S.C. § 7441 (1994) (establishing the United States Tax Court as a court of record under Article I of the United States Constitution); 26 U.S.C. § 7453 (1994) (stating except in the case of proceedings conducted under § 7436(c) or § 7463, the
I will begin with an explanation of the structure and opinion review processes of the Court, which, for the most part, are found in the Internal Revenue Code. The United States Tax Court was created as the Board of Tax Appeals by the Revenue Act of 1924. Major changes were made to its status in 1942 and 1969. As a consequence, the Tax Court is now well established as a court of record created under Article I of the Constitution, a so-called legislative court. In the 1991 case of Freytag v. Commissioner, the Supreme Court held that the Tax Court was a court of law for purposes of the Appointments Clause of the Constitution. The opinions in Freytag examine the history of the Court and its unique status.

Tax Court officers include nineteen presidentially appointed judges. Currently, we also have senior judges serving on recall and special trial judges appointed under the statute by the Chief Judge. Practically all S cases (cases in which the amount involved for each year is less than $50,000, and in which simplified procedures are elected but no right to appeal exists) and regular cases under $10,000 are heard by special trial judges. The judges come from diverse backgrounds.

proceedings of the Tax Court and its divisions shall be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia; Freytag v. Commissioner, 501 U.S. 868, 891 (1991) (stating that the Tax Court’s function and role in the federal judicial scheme closely resemble those of the federal courts).


5. See 17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4102 (2d ed. 1988) (chronicling that in 1942 the Board of Tax Appeals was changed to the Tax Court and that the Tax Reform Act of 1969 changed the name of the court to the United States Tax Court and declared that it was established under Article I of the Constitution).


7. Freytag, 501 U.S. at 889–90 (holding that an Article I court can be a court of law); see also id. at 901 (Scalia, J., concurring in part and concurring in the judgment) (declaring that he did not agree with the Court’s conclusion that the Tax Court is a “Court of Law” within the meaning of the Appointments Clause).

8. See id. at 890–92 (expounding the judicial functions and role of the Tax Court); see also id. at 911–12 (Scalia, J., concurring in part and concurring in the judgment) (emphasizing the executive characteristics of the Tax Court).


10. Id. § 7447 (1994).

11. Id. § 7443A (1994).

12. See Small Tax Court Cases—Has Their Time Come?, 1999 TAX NOTES TODAY 83-1 (1997) (emphasizing that the benefit of a taxpayer electing S case status is that it is decided under relaxed evidentiary and trial procedures that result in a speedier disposition, but that S case decisions are not appealable). The statute vests broad authority in the Chief Judge, and assignments by category and of specific cases are made and adjusted from time to time as a means of allocating caseload among the judicial
like myself, have private practice experiences. Others have
government experience, whether with the IRS, Justice
Department, Treasury Department, or staff of the tax-writing
committees of Congress.14 Most, like your alumnus Juan F.
Vasquez, have a combination of experiences.15

We are a national court headquartered in our own building
in Washington, D.C. Most of the cases are tried in one of the
approximately seventy cities outside of Washington to which the
judicial officers travel individually to conduct trials. For
example, in Texas we sit in Houston, Dallas, San Antonio, El
Paso, and Lubbock. Well over half of all cases and about 90% of
small tax cases are filed by taxpayers not represented of record
by counsel. While over 80% of the dollars are in perhaps 3% of
the cases, opinions have to be issued in all cases.16 However, a
bench opinion is rendered at the time of trial if the facts and the
law are clear.17 Relatively few cases are decided by bench
opinion.18

The truly unique aspect of the Tax Court is the statutorily
prescribed process by which the opinions of the judicial officers
are subjected to internal review.19 Once a judicial officer returns
from a trial session, he or she prepares a “report” (in the

13. See James Edward Maule, Instant Replay, Weak Teams, and Disputed Calls: An
“at any given time the Tax Court judges have represented a cross-section of the various
background experiences”).

14. See id. at 408, 413–15 (commenting that twelve of forty-two judges examined
had “backgrounds consisting of service, predominantly or exclusively, with the Treasury,
IRS, or Justice Department”).

15. See id. (showing that of the forty-two judges examined, most judges had a
combination of government and private practice experience).

all its findings of fact, opinions, and memorandum opinions”).

17. See id.; 20 FED PROC., L. ED. § 48:1104 (1983) (instructing that “the judge has
discretion to state orally his findings of fact or opinion if he is satisfied as to the factual
conclusions to be reached in the case and that the law to be applied thereto is clear”).

18. See U.S. Tax Court Fiscal Year Statistical Information: Report of Opinions Filed
(find that out of the 11,684 opinions rendered by the Tax Court and its divisions
during this period, 923 were published opinions, 6,335 were memorandum opinions, 806
were regular bench opinions, 863 were small tax case bench opinions, and 2,757 were
small tax case summary opinions).

judge or division must submit a report that becomes the opinion of the Tax Court unless
the Chief Judge subjects the report to further review).
statutory language), usually after the submission of briefs by the parties. As you can imagine, few pro se write good briefs; but unfortunately, few lawyers write good briefs. With the assistance of one or two law clerks, the trial judge prepares the report that is intended to become the opinion in the case. Under the statute, the report of the trial judge becomes the opinion of the court unless, within thirty days of the date the report is submitted to the Chief Judge, the Chief Judge refers the case for review by the nineteen presidentially appointed judges. Thus, the Chief Judge has a unique role that is not analogous to situations in other courts.

Candidly, the Chief Judge does not perform this task alone. Obviously, law clerks are not used to review opinions of other judges. I do have the assistance of counsel and deputy counsel, who have many years of experience. They preliminarily review reports for problems, consistency with other cases, and thoroughness in considering applicable authorities. They also make a recommendation as to whether a report should be reviewed by the full court, published as a Tax Court opinion (or “division opinion”) in the Tax Court Reports, or released as memorandum opinions that are published only by commercial publishers. All S cases are resolved by summary opinions, which, by statute, are not precedents and should not be cited as authority. Thus, summary opinions are not regularly provided to the publishers or posted on the Court’s web page. We discourage publication of these opinions so as not to mislead people as to their precedential value.

In any event, under the statute the Chief Judge classifies opinions in regular cases. 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

20. See id. § 7459(a) (1994) (requiring that a tax judge prepare a report upon any proceeding instituted before the Tax Court); see also id. § 7460(a) (1994) (requiring a division to make a report of any determination which constitutes its final disposition of a proceeding before it).
21. See id. § 7459(a) (1994) (stating that the decision of a tax judge made in accordance with the report of the Tax Court shall become the opinion of the Tax Court).
22. Id. § 7460(b) (1994).
23. Cf., 28 U.S.C. § 45 (1994) (stating that the Chief Judge of the U.S. Circuit Court of Appeals has precedence and presides over any session of the court he attends, rather than reviewing the opinions of the other circuit judges).
24. 26 U.S.C. § 7463(b) (West Supp. 1999); see also id. § 7463(b) (1994).
been reversed by a court of appeals. Here I should explain a concept that you will see referred to in our opinions as the Golsen rule, based on a case titled, naturally, Golsen v. Commissioner.\textsuperscript{27} As I mentioned, we are a national court.\textsuperscript{28} Under the statute, our opinions are appealable to the Court of Appeals for the Circuit in which an individual taxpayer's residence or an entity's principal place of business is located.\textsuperscript{29} Thus, if the taxpayer resides in Texas, the decision is appealable to the Court of Appeals for the Fifth Circuit.\textsuperscript{30} If the Fifth Circuit reverses us on a legal issue and the issue comes up again, we are not bound to follow the law of the Fifth Circuit.\textsuperscript{31} Under Golsen, we will follow the law of the Fifth Circuit if the same issue comes up again in a case appealable to the Fifth Circuit.\textsuperscript{32} The rationale for this rule is to avoid forcing a party to appeal when, presumably, the result of the appeal is predictable because the Fifth Circuit will follow its own precedent.\textsuperscript{33} However, if the case involves a resident of New Mexico or Oklahoma, for example, and is thus appealable to the Tenth Circuit and that circuit has not addressed the issue, we will submit the case to court review to decide whether we will follow the Fifth Circuit's opinion or follow our own prior view.\textsuperscript{34}

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.

Finally, it is a misnomer to refer to court-reviewed opinions as \textit{en banc}, to the extent that that term implies judges sitting together to hear arguments by the parties. The court conference

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\item \textsuperscript{27} 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971).
\item \textsuperscript{28} Lawrence, 27 T.C. at 716.
\item \textsuperscript{29} 26 U.S.C. § 7482(b) (1994).
\item \textsuperscript{30} Id.
\item \textsuperscript{31} See Lawrence, 27 T.C. at 713 (declaring that the Tax Court, after reversal by a Court of Appeals, "must reconsider the point in the light of the reversing opinion and then decide whether to adhere to its original views or accept the views of the reversing court"); \textit{but see Golsen}, 54 T.C. at 751 (declaring that the Court will follow a "Court of Appeals decision which is squarely on point where appeal from our decision lies to that Court of Appeals and to that court alone").
\item \textsuperscript{32} Golsen, 54 T.C. at 751.
\item \textsuperscript{33} See Ruegsegger v. Commissioner, 68 T.C. 463, 465 (1977) (stating that "the Court of Appeals to which an appeal lies will follow its own prior opinion on the issue in question").
\item \textsuperscript{34} See Golsen, 54 T.C. at 757 (concluding that the Tax Court shall remain able to foster uniformity by giving effect to its views in cases appealable to courts whose views have not yet been expressed).
\end{itemize}
where opinions are reviewed is attended only by the judges, who sit around a conference table without robes, and the Clerk of the Court, who records votes. Neither the parties nor the law clerks are ever present.

When reading Tax Court opinions, you should consider why an opinion is released as a memorandum opinion instead of a published Tax Court opinion, or division opinion. Division opinions officially published by the court are those in which a legal issue of first impression is decided, a legal principle is applied or extended to a recurring factual pattern, a significant exception to a previously announced general rule is created, or there are similarly significant and precedentially valuable cases. On the other hand, cases involving application of familiar legal principles to routine factual situations, nonrecurring or enormously complicated factual situations, obsolete statutes or regulations, straightforward factual determinations, or arguments patently lacking in merit will be classified as memorandum opinions. Fraud cases or valuation cases are usually prime examples of memorandum opinions. However, an opinion may be designated for publication if it adopts or rejects a particular methodology or an unusual argument of one of the parties that may recur in other cases. On the other hand, an


36. See, e.g., Trompeter v. Commissioner, 111 T.C. 57, 61 (1998) (listing memorandum cases in this supplemental memorandum opinion reaffirming that the Tax Court has consistently held that the fraud penalty does not apply without an underpayment); Illes v. Commissioner, 62 T.C.M. (CCH) 728, 732–33 (1991), aff’d, 982 F.2d 163 (6th Cir. 1992) (observing in this memorandum opinion that when valuation is an integral factor in disallowing deductions and credits, § 6659 is applicable); Mosteller v. Commissioner, 52 T.C.M. (CCH) 758, 761 (1986), aff’d, 841 F.2d 1123 (4th Cir. 1988) (observing in this memorandum opinion that where fraud must be proven to lift the bar of the statute of limitations, the court will not address the correctness of the deficiency unless and until fraud has been proven); Schroeder v. Commissioner, 16 T.C.M. (CCH) 707, 720–21 (1957), aff’d, 291 F.2d 649 (8th Cir. 1961) (observing in this memorandum opinion that a pattern of substantial underreporting is an example of circumstantial evidence that establishes fraudulent intent); Wolfe v. Commissioner, 13 T.C.M. (CCH) 22, 23 (1954) (noting in this memorandum opinion that a prospective change in zoning is an element that certainly can be taken into account in determining value).

37. See, e.g., Simplot v. Commissioner, 112 T.C. 130, 172–73 (1999) (noting in this published opinion the difficulty in valuing shares of unlisted stock in large family-controlled corporations and the proper methodology for valuing the premium for voting rights in these situations); Odend’Hal v. Commissioner, 95 T.C. 617, 622 (1990) amended by LEXIS Slip Op. (T.C. Dec. 12, 1990) (finding in this published opinion that under § 6621(c)(4) the court only has limited jurisdiction to determine the portion (if any) of a deficiency which is a substantial underpayment attributed to a tax motivated transaction); Newhouse v. Commissioner, 94 T.C. 193, 245 (1990) nonacq. in result, 1991-2 C.B. 1 (stating in this published opinion that the choice of the appropriate valuation methodology for a particular stock is, in itself, a question of fact); Randolph v. Commissioner, 67 T.C. 481, 485 (1976) (holding in this published opinion that under the
opinion may be so factually intense that it is not feasible to distill from it useful precedents even if it is one of many similar cases and, therefore, is released as a memorandum opinion.  

Another thing to note is that we always attach our own headnotes to officially published Tax Court opinions. The headnote is carefully designed to set out distinguishing facts. With respect to memorandum opinions, judges may or may not attach headnotes, and we are frequently at the mercy of commercial publishers. As you know, our cases are digested by certain publications on a daily basis. It amazes me how frequently the digest or summary of a case expresses the exact opposite of the holding in the case. I urge you not to rely exclusively on electronic research or digests that are necessarily abbreviated, prepared on a rush basis, and result in much less thorough work than I expect from good lawyers.

This brings me back to my personal mission, which is to enlighten the law review authors, commentators and pundits, as well as tax professionals who are using our opinions in their daily work, about the importance of the trial court’s responsibilities to decide a case based on the evidence in the record, taking account of the arguments timely made by the parties to the case and not giving any consideration to the out-of-court opinions of others. After all, the Code of Ethics for Federal Judges, Canon 3 among others, emphasizes that “a judge should . . . not be swayed by partisan interests, public clamor, or fear of criticism.” A judge cannot consider information provided ex parte and cannot obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge without giving notice to the parties and affording them the opportunity to respond. My personal

unusual facts of the case the additional expense petitioner incurred in restricting their diets to chemically uncontaminated food is an expense incurred for medical care and is deductible to the extent allowable under § 213).

38. See, e.g., Investment Research Assoc. v. Commissioner, 78 T.C.M. (CCH) 951 (1999) (700 page opinion from special trial judge that consolidates twenty-eight cases and resolves forty-one issues to determine each petitioner’s tax deficiencies, tax additions, penalties, and increased interest).

39. See Small Tax Court Cases—Has Their Time Come?, supra note 12 (describing the availability of memorandum and regular opinions through commercial and nonprofit publishers); WILLIAM G. HARRINGTON, LAWYER’S GUIDE TO ONLINE DATABASES 106–07 (1986) (commenting on the availability of a tax newsletter that contains abstracts of federal tax developments in the courts).

40. See MODEL CODE OF JUDICIAL CONDUCT Canon 3 (B)(2) (1990). “A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.” See id.

41. See MODEL CODE OF JUDICIAL CONDUCT Canon 3 (B)(7)(b) (1990). “A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.”
belief is that it is inappropriate to give too much deference to what others, including distinguished professors, have written on an issue unless the issue is addressed because it is part of the arguments briefed by a party. Now I come to my main point, which is to urge that you carefully read the whole Tax Court opinion looking for special facts or procedural events or clues as to arguments not made by the parties. You should analyze the importance of the trial judge’s opportunity both to observe the witnesses and to read the exhibits. You should also consider whether the case involves one of the following:

1. expert witnesses,

2. fact witnesses whose testimony was credible and unimpeached (although unusual),

3. fact witnesses or documentary evidence characterized as fabricated or unworthy of belief,

4. a case submitted on fully stipulated facts,

5. an issue of first impression requiring interpretation of ambiguous language of a statute,

6. attempted extension of apparently clear language to a situation not reasonably contemplated by Congress.

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42. See, e.g., Simplot, 112 T.C. at 172-73 (evaluating the methodology used by both petitioner’s and respondent’s expert witnesses and choosing respondent’s methodology to determine the fair market value of petitioner’s shares of stock).

43. See, e.g., Cook v. Commissioner, 92 T.C. 793, 796, 800–01 (1989), aff’d, 909 F.2d 1155 (8th Cir. 1990) (noting a witness’ credibility and discussing lack of contradictory evidence or witness).

44. See, e.g., Dobrich v. Commissioner, 74 T.C.M. (CCH) 985, 993 (1997), opinion supplemented by, 75 T.C.M. (CCH) 1687 (1998), and aff’d, 188 F.3d 512 (9th Cir. 1999) (finding that petitioners fabricated and obtained false documents to substantiate a claim for a § 1031 replacement property exchange); Nell v. Commissioner, 51 T.C.M. (CCH) 1219, 1223–24 (1986) (finding that petitioner’s testimony at trial was vague, evasive, and frequently contradictory, leading the court to believe that the testimony was not credible); Krampf v. Commissioner, 46 T.C.M. (CCH) 627, 632–33 (1983) (determining that petitioner’s witness fabricated testimony to avoid a §2,500 increase to petitioner’s net worth).

45. See, e.g., Letts v. Commissioner, 109 T.C. 290, 302–03 (1997) (holding that even though the facts in the case were fully stipulated, the facts were still in dispute because the estates had made inconsistent factual representations).

46. See, e.g., U.S. Padding Corp. v. Commissioner, 88 T.C. 177, 181–88 (1987), aff’d, 865 F.2d 750 (6th Cir. 1989) (interpreting that the “laws of such country” within § 1504(d) include administrative practices and policies and are not limited to explicit constitutional or statutory provisions, rules, or regulations).

47. See, e.g., Odend’Hal, 95 T.C. at 620–23 (1990) (holding that § 6621(c)(4) does not
7. pursuit by the Internal Revenue Service of an industry-wide issue or a decedent’s estate valuation where the litigation appears to be driven by the amount of revenue potential involved (currently such issues are inventory accounting and family limited partnerships). 48

8. pursuit by a taxpayer of an issue based on change of prior position or acquiescence by the Internal Revenue Service, 49

9. appellate opinions or statutory changes since the last Tax Court opinion on the issue, 50

10. a pro se taxpayer who may not have made arguments seen by a tax professional, in a situation where raising the issue sua sponte would have been prejudicial to respondent and unjustified in the context of the case, 51 or

11. refusal to consider an issue raised late in the proceedings. 52

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give the tax court jurisdiction to take into consideration whether a portion of a prior assessment was attributable to a tax-motivated transaction, and that petitioners simply closed their eyes to the statute’s plain language when making their argument).

48. See, e.g., Honeywell Inc. v. Commissioner, 64 T.C.M. (CCH) 437, 441 (1992) (describing and discussing the Industry Specialization Program as an effort to provide for a consistent and effective method of identifying and treating major, recurring issues in an industry); Osteopathic Medical Oncology and Hematology v. Commissioner, 113 T.C. No. 26, 1999 WL 1051964 (1999) (holding that drugs used in a business that is in the nature of a medical service provider are not “merchandise under sec. 1.471-1, Income Tax Regs”); Reichardt v. Commissioner, 114 T.C. No. 9, 2000 WL 230358 (2000) (dealing with the use of family limited partnerships in conjunction with revocable family trust).

49. See, e.g., Dalby v. Commissioner, 46 T.C.M. (CCH) 892, 893 (1983) (discussing petitioner’s argument that its reliance on Commissioner’s prior position estops Commissioner from assessing a deficiency in the petitioner’s federal income tax); Oak Knoll Cellar v. Commissioner, 68 T.C.M. (CCH) 412, 419 (1994) (stating that the Commissioner’s mere acquiescence in the treatment of an item in prior years does not preclude adjustment in later years).


51. See, e.g., Seidenfeld v. Commissioner, 69 T.C.M. (CCH) 1848 (raising the issue of loss due to fire even if it is prejudicial to respondent).

52. See, e.g., Sundstrand Corp. v. Commissioner, 96 T.C. 226, 347 (1991) (agreeing with petitioner’s argument that it would be substantially prejudiced should the court permit respondent to raise a new legal theory late in the trial); Neely v. Commissioner, 85 T.C. 934 (1985) (refusing to consider an issue not raised in the deficiency notice or the pleadings, stating that it was untimely raised).
Remember, as Judge Tannenwald wrote in an oft-cited opinion, *Diaz v. Commissioner:* \(^{53}\) “the distillation of truth from falsehood . . . is the daily grist of judicial life.” \(^{54}\) By the way, *Diaz* would be another good example for teaching about the importance of evidence in a case.

I am not suggesting that such cases will be decided one way or the other, but only that one of the factors mentioned may explain why the trial judge was or was not persuaded to reach an unexpected result or the Chief Judge did or did not direct court review. Hopefully, better understanding of the process by which opinions are promulgated within this uniquely structured court will give you greater insight into and confidence in the body of law created by it. These insights should also help you be sure you are on solid ground when advising a client.

\(^{53}\) 58 T.C. 560 (1972), *acq. in result,* 1972-2 C.B. 2 (concerning the fact-intensive determination of the ownership of Mexican national lottery tickets, the winnings from which were claimed by the IRS to have not been properly reported on a United States tax return).

\(^{54}\) *Id.* at 564.

\(^{55}\) *See id.* at 564-65 (noting that the substantial amount of evidence presented at trial concerning the petitioner’s family life added a perspective that helped the court find in favor of the petitioner, even though other objective evidence could have supported an opposite finding).