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## The Precedential and Persuasive Value of **Unpublished Dispositions**



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# The Precedential and Persuasive Value of Unpublished Dispositions

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In planning and reporting the treatment of transactions for Federal tax purposes, taxpayers and their advisors must review and analyze the Internal Revenue Code ("Code"), legislative history, Treasury Regulations ("Regulations"), Internal Revenue Service ("IRS") guidance (both public and private), and case law. This article focuses on unpublished opinions, which sometimes contain legal analyses of fact patterns that are similar to transactions either being considered by a taxpayer or challenged by the IRS.

Most tax cases are decided by the United States Tax Court ("Tax Court"). As a trial court of national jurisdiction, the Tax Court encounters unique questions surrounding the application of *stare decisis* and the practice of comity. Where an appellate court decision is squarely on point and an appeal lies to that court alone, the Tax Court applies its *Golsen* rule and binds itself to that decision. But does the *Golsen* rule really extend to all such decisions? Over 80% of federal appellate court decisions are "unpublished"<sup>1</sup> — and the Tax Court has not been entirely clear on the weight, if any, it will accord to such decisions. Because federal appellate courts diverge widely on how they treat their own unpublished dispositions, that somewhat difficult question becomes even more nuanced for the Tax Court to answer.

This article first examines the federal appellate courts' local rules on unpublished dispositions as well as how the Tax Court treats these dispositions. It then discusses the weight the Tax Court gives to its own "unpublished" dispositions and the level of deference, if any, that the Tax Court extends to decisions of district courts. Finally, the article looks at reliance on unpublished dispositions in the planning context, particularly with respect to a defense against the imposition of penalties.

## Unpublished Appellate Court Opinions

Today, unpublished opinions are a common judicial tool for disposing of cases. However, "[f]rom the dawn of the twentieth century until the mid-1970s," the mantra of the federal judiciary was "full publication, strong precedent, and unfettered citation."<sup>2</sup> In 1973, the Advisory Council on Appellate Justice drafted a report that recommended limiting the publication of opinions to those that met a certain defined standard, and recommended that those not designated for publication should not be cited as precedent. It proposed the following model rule to guide the publication determination (the "Model Rule"):<sup>3</sup>

### 1. Standard for Publication

An opinion of the [court] shall not be designated for publication unless:

- a. The opinion establishes a new rule or law or alters or modifies an existing rule; or
- b. The opinion involves a legal issue of continuing public interest; or

- c. The opinion criticizes existing law; or
- d. The opinion resolves an apparent conflict of authority.

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5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked Not Designated for Publication. Opinions marked Not Designated for Publication shall not be cited as precedent by any court or in any brief or other materials presented to any court.

The Model Rule provided a framework for the federal appellate courts in adopting their own local rules on unpublished dispositions. These rules can be grouped into three categories: (1) Publication Rules; (2) Citation Rules; and (3) Precedential Value.

## Publication Rules by Circuit

The Model Rule provided a template for some circuits; others have significantly added or modified those standards. The circuits can be grouped into three general categories:

- Those that have largely adopted the Model Rule considerations (Fourth)<sup>4</sup> (including those that have added a few additional classifications (Fifth, Sixth, Ninth, and D.C.)<sup>5</sup>);
- Those that have created their own formulations of what may lead to publication (First and Second and Federal)<sup>6</sup> (although some provide relatively nebulous guidance (Third and Tenth)<sup>7</sup>); and
- Those that offer no guidance on whether a decision should be published (Seventh, Eighth, and Eleventh).<sup>8</sup>

## Citation Rules by Circuit

Once a court decides that it will not officially publish a disposition, the corresponding question arises regarding the extent that case may be subsequently cited. Up until 2007, circuit courts had widely disparate rules regarding citation of unpublished opinions, with some flatly prohibiting judges and lawyers from even citing to them. In 2007, however, Federal Rule of Appellate Procedure 32.1 ("Rule 32.1") was enacted. It provides:

- (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
  - (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
  - (ii) issued on or after January 1, 2007.

Due to its prospective nature, circuit court rules differ on whether to apply Rule 32.1 retroactively:



- The Third, Fifth, Eleventh, and Federal Circuits do not provide any rules that explicitly modify Rule 32.1;<sup>9</sup>
- The Second, Seventh, and Ninth Circuits rely on Rule 32.1 but explicitly forbid citation of unpublished opinions prior to January 1, 2007;<sup>10</sup>
- The Fourth and Eighth Circuits disfavor citation of a pre-January 1, 2007 unpublished opinion, but allow it if such an opinion bears on a material issue and no published opinion would serve as well;<sup>11</sup>
- The First and D.C. Circuits remove Rule 32.1's prospective limitation at least as to their own circuit's unpublished opinions (though the D.C. Circuit substitutes an earlier date);<sup>12</sup> and
- The Sixth and Tenth Circuits give full retroactive effect to Rule 32.1.<sup>13</sup>

In sum, Rule 32.1 has fallen short of its goal of bringing uniformity to the citation of unpublished dispositions.

### Circuit Rules on Precedential Value of Unpublished Dispositions

While Rule 32.1 sought uniformity with respect to the *citation* of unpublished opinions, the Advisory Committee Comment to that rule expressly noted that it provided no guidance regarding their *precedential status*:

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

With that lack of guidance, it is not surprising that federal appellate courts also deviate on the weight, if any, given to unpublished opinions.<sup>14</sup>

- On one end of the spectrum, four circuits appear to accord no weight to unpublished opinions (or a circuit's equivalent thereof) and do not even hint that they may hold any persuasive weight.
  - The Second Circuit, which issues either unpublished summary orders or published opinions, states that "[r]ulings by summary orders do not have precedential effect."<sup>15</sup>
  - The Third Circuit first decides whether an opinion should be designated as precedential, and that decision determines whether an opinion gets published. In other words, the precedential question precedes the publication question. The Third Circuit designates an opinion as "precedential" or "not precedential" depending on whether such opinion "has precedential or institutional value."<sup>16</sup> If it does not, but rather only has value "to the trial court or the parties," it is designated as "not precedential."<sup>17</sup> And the Third Circuit "by tradition does not cite to its not precedential opinions as authority."<sup>18</sup>

- The Seventh Circuit issues only published opinions and unpublished orders. While all opinions "constitute the law of the circuit," all orders "are not treated as precedents."<sup>19</sup>
- The Ninth Circuit simply states that its "[u]npublished dispositions and orders ... are not precedent."<sup>20</sup>
- Five circuits indicate that unpublished opinions, while falling short of binding precedent, may be considered as persuasive authority or for their persuasive value.<sup>21</sup>
  - The First Circuit will not consider its own "unpublished judicial opinion[s], order[s], judgment[s], or other written disposition[s] ... as binding precedent"; it will "consider such dispositions for their persuasive value."<sup>22</sup>
  - The Eighth Circuit states that unpublished opinions "are not precedent" (without any modifier such as "binding"); however, it also does not foreclose consideration of them because they can be cited to the court if they have "persuasive value on a material issue and no published opinion of this court or another court would serve as well."<sup>23</sup>
  - Similarly, the Tenth Circuit states that while "[u]npublished decisions are not precedential," they still "may be cited for their persuasive value."<sup>24</sup>
  - The Eleventh Circuit provides that while its "[u]npublished opinions are not considered binding precedent ... they may be cited as persuasive authority."<sup>25</sup>
  - The Federal Circuit allows for its judges "to look to a non-precedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent."<sup>26</sup>
- Two circuits, while not giving any explicit instructions on how they view their unpublished dispositions, implicitly suggest that they may give weight to their unpublished dispositions.
  - While the Fourth Circuit disfavors *citation* to pre-January 1, 2007 unpublished dispositions, it explicitly provides that a party may cite to one if that party believes that it "has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well."<sup>27</sup> It also distinguishes an unpublished disposition from a mere summary opinion, which is only issued when "all judges on a panel ... agree following oral argument that an opinion in a case would have no precedential value."<sup>28</sup>
  - The Sixth Circuit freely permits citation to unpublished dispositions (waives Rule 32.1's prospective limitation),<sup>29</sup> and distinguishes them from its "Dispositions in Open Court" (which occur when "each judge of the panel believes that a written opinion would serve no jurisprudential purpose"<sup>30</sup>). Thus, it is not unreasonable to assume that the Sixth Circuit is open to viewing them as having persuasive power.
- Two circuits grant precedential status to all of its unpublished decisions issued during a certain time period.

- o The Fifth Circuit treats all of its unpublished opinions issued before January 1, 1996 as “precedent.”<sup>31</sup> Such opinions issued on or after January 1, 1996, however, are “not precedent.”<sup>32</sup>
- o The D.C. Circuit provides that its unpublished dispositions (other than sealed dispositions) issued on or after January 1, 2002 “may be cited as precedent”; however, such dispositions issued before that date “are not to be cited as precedent.”<sup>33</sup>

Thus, how federal appellate courts treat their unpublished dispositions falls all across the spectrum: some give no weight, some give persuasive weight, some appear open to doing so, and others treat them as precedent. Taxpayers and their counsel would be well-advised to examine which appellate court’s law applies to their transaction if the only guidance from that circuit is an unpublished disposition.

### Tax Court Treatment of Appellate Court Unpublished Dispositions

As a court of national jurisdiction, how is the Tax Court impacted by the appellate courts’ diverging views on the treatment of unpublished dispositions? First, as it relates to the precedential value that the Tax Court accords to unpublished dispositions from a circuit to which a particular case is appealable, and second, as alternatives that the Tax Court can consider in deciding the weight, if any, it should give to a subset of its own unpublished dispositions—its summary opinions.

No statute or rule requires the Tax Court to adhere to decisions of a particular appellate court. However, for the sake of judicial efficiency, the Tax Court chooses to bind itself to decisions from the appellate court to which the case before it is appealable (the “appealable circuit”).<sup>34</sup> This policy is derived from the 1970 case, *Golsen v. Commissioner*.<sup>35</sup> The Tax Court has “emphasized ... the logic behind the *Golsen* doctrine”:

[It] 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. Accordingly, 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.<sup>36</sup>

While the *Golsen* rule is firmly established, its application to (and effect on) unpublished dispositions from the appealable circuit is not entirely clear. Although a few Tax Court decisions have noted the interplay between the *Golsen* rule and unpublished dispositions, the court has not consistently applied a rule to determine the precedential value, if any, given to such dispositions.

The first known post-*Golsen* decision that broached this issue was *Ruegsegger v. Commissioner*.<sup>37</sup> In that 1977 decision—appealable to the Second Circuit—the Tax Court noted that its 1975 decision in *Sylvan v. Commissioner*<sup>38</sup> had overruled its 1971 decision

in *Rappaport v. Commissioner*.<sup>39</sup> Because the Second Circuit in 1972, however, had affirmed *Rappaport* in open court without an opinion, the issue in *Ruegsegger* was whether the Tax Court was bound by that affirmance under the *Golsen* rule. The Tax Court decided that it was not. In support of its decision, the Tax Court cited the Second Circuit’s local rule that “indicated that its affirmances in open court without opinion have no precedential value whatever.”<sup>40</sup> Because that affirmance did not have any precedential value in the Second Circuit, the Tax Court did “not feel bound to follow it” under the *Golsen* rule and instead followed its own later opinion in *Sylvan*.<sup>41</sup> The Tax Court has cited to *Ruegsegger* for this issue on various occasions. In *Estate of Rubinow v. Commissioner*, it re-affirmed that the *Golsen* rule did not apply to open court affirmances from the Second Circuit.<sup>42</sup> In *Bennett Land Co. v. Commissioner*, the Tax Court declined to apply the *Golsen* rule to an unpublished disposition from the Ninth Circuit—without even mentioning how the Ninth Circuit itself would treat it.<sup>43</sup>

In other cases, the Tax Court has not been so definitive. While the Tax Court in *Collegiate Cap & Gown Co. v. Commissioner* cited to *Ruegsegger* in “question[ing] the necessity” of applying the *Golsen* rule to an unpublished order from the Seventh Circuit, it ultimately punted on the issue.<sup>44</sup> It similarly sidestepped the issue in *Succession of Brown v. Commissioner*.<sup>45</sup> There, the court noted that the parties had cited an unpublished opinion from the Fifth Circuit, with the Commissioner arguing that the decision was subject to the *Golsen* rule. Because the court reached the same result as that unpublished opinion, it was “not necessary” to determine whether it was bound by that unpublished opinion under *Golsen*.<sup>46</sup>

Assuming *arguendo* that unpublished dispositions do not bind the Tax Court under its *Golsen* rule, it is difficult to decipher what weight, if any, the Tax Court accords to such dispositions. This is illustrated by a series of Tax Court opinions that decided the standard and scope of its review of certain IRS determinations.

A starting point is the Tax Court’s 2004 decision in *Ewing v. Commissioner*.<sup>47</sup> There, a fractured court rejected the Commissioner’s argument that, under the Administrative Procedures Act (“APA”), the Tax Court—when determining a taxpayer’s eligibility for innocent spouse relief under section 6015(f)—may not consider evidence outside of the administrative record (scope of review). The majority noted that the Commissioner had taken the contrary position in three appellate cases, and each of those three decisions upheld the Commissioner’s position.<sup>48</sup> However, the Tax Court majority noted that since those three opinions were “unpublished,” they were “not binding precedent.”<sup>49</sup> A concurring opinion in *Ewing* did not necessarily treat an unpublished Seventh Circuit order, *Bratcher v. Commissioner*,<sup>50</sup> as binding precedent, but it did prominently cite it to support the notion that the APA’s judicial review procedures do not supplant those of the Tax Court<sup>51</sup>—even though the Seventh Circuit prohibited citation to them at that time.<sup>52</sup>

A citation to that same unpublished Seventh Circuit order re-appeared in *Porter v. Commissioner* (*Porter I*), where the Tax Court grappled with the identical scope of review issue that it did in *Ewing*.<sup>53</sup> In re-affirming *Ewing* after reversal by the Ninth Circuit, the *Porter I* majority cited to *Bratcher* in a footnote to support the proposition that “the APA does not supersede specific statutory provisions



for judicial review.”<sup>54</sup> A concurring opinion, in addition to citing *Bratcher*, cited the Ninth Circuit’s unpublished affirmance of the Tax Court’s decision in *Sharon v. Commissioner*,<sup>55</sup> as support for the view that “courts have uniformly held that deficiency proceedings in the Tax Court are de novo and not governed by the APA.”<sup>56</sup>

In extending the *Ewing* principle to its review of collections due process determinations under section 6330, the Tax Court majority in *Robinette v. Commissioner*<sup>57</sup> quoted a Ninth Circuit unpublished disposition to support its position that a *de novo* scope of review was “established practice and procedure.”<sup>58</sup> A dissent criticized the majority’s holding as an “unwarranted extension of” *Ewing*.<sup>59</sup> It questioned whether the *de novo* review scope was so established, noting that the majority cited five nonprecedential Tax Court memorandum opinions as well as “an unpublished opinion” from the Ninth Circuit that “devote[d] two sentences to the ‘scope of review’ issue.”<sup>60</sup>

In sum, it is difficult to glean from these cases what weight, if any, the Tax Court gives to appellate court unpublished dispositions. This is a fundamental question that taxpayers and their counsel need to address because there is always the chance that a case will end up in the appellate court and be subject to that court’s rules. Based on the differing standards among the appellate courts, there may be a framework for the Tax Court to adopt with respect to the precedential value of such opinions. For any given case, the Tax Court could first look to the appealable circuit’s local rules to determine the precedential value, if any, that such circuit gives to the unpublished disposition at issue. The Tax Court then could apply that local rule, if any, to the case before it. This closely parrots the method that *Rueggegger* used with respect to the Second Circuit summary order at issue.

There are at least three possible applications after reviewing the appealable circuit’s local rule. First, the Tax Court could apply the *Golsen* rule to unpublished dispositions that are treated as the law of the circuit, such as pre-1996 decisions in the Fifth Circuit and post-2001 decisions in the D.C. Circuit. Even if the Tax Court disagrees with such dispositions, it could follow them when they squarely address the point at issue.

For circuits where unpublished opinions fall short of binding precedent but are nevertheless considered as persuasive “authority” or for their persuasive “value” (First, Eighth, Tenth, and Eleventh),<sup>61</sup> and for circuits that do not provide any explicit guidance on the weight accorded to unpublished dispositions but implicitly suggest that they may be considered as persuasive (Fourth and Sixth), the Tax Court could take a similar middle-of-the-road approach. While applying the *Golsen* rule would not be appropriate here because the unpublished disposition is not the “clearly established position” of the appealable circuit,<sup>62</sup> the Tax Court could give such a decision the same level of deference that the appealable circuit might give it—that is, it likely could be given some persuasive weight.

This approach would be similar to how the Tax Court views IRS revenue rulings. Although not bound by revenue rulings, it evaluates them with *Skidmore*<sup>63</sup> deference.<sup>64</sup> Under a *Skidmore* evaluation, “[t]he weight [given to an agency’s informed] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.”<sup>65</sup> Although a federal appellate court is not part of the executive branch and does not necessarily have tax expertise, the Tax Court could apply the other factors—the opinion’s thoroughness, validity, and consistency (with other opinions from that circuit)—in determining how much weight to give to the unpublished disposition.

On the other end of the spectrum are those circuits that specifically provide that unpublished dispositions do not have “precedential effect” (or use a similar term) and do not even suggest that such dispositions contain even persuasive value. For opinions of these circuits (Second, Third, Seventh, and Ninth Circuits), the Tax Court should have no qualms about according them no weight.

Adopting the appealable circuit’s treatment of the effect of its own unpublished dispositions would promote judicial efficiency, and thus comport with the spirit of the *Golsen* rule. It would also remove uncertainty to taxpayers and their counsel in planning transactions where the tax treatment is addressed in whole or in part by an unpublished disposition.

## Nonprecedential Tax Court Opinions

The varying appellate court views on the weight they accord to their own unpublished dispositions provide different models for the Tax Court on the deference, if any, it should give to its own unpublished opinions. The Tax Court has two sets of unpublished opinions: memorandum opinions and summary opinions.

### Memorandum Opinions

Memorandum opinions, “unlike the Opinions that the Court publishes in its Tax Court Reports [technically called “division opinions” but more commonly referred to as “T.C. opinions”], generally address cases which do not involve novel legal issues and in which the law is settled or the result is factually driven.”<sup>66</sup> While not considered precedential,<sup>67</sup> “they are often cited by litigants, and the court (though not bound by these opinions) does not regard these opinions lightly.”<sup>68</sup> Indeed, it is rare to find a non-T.C. opinion that has rejected the reasoning of a prior memorandum opinion. Given the paucity of T.C. opinions compared to memorandum opinions issued,<sup>69</sup> taxpayers have significantly more memorandum opinions to draw upon to provide support for their position. Thus, while some experienced practitioners have previously espoused that memorandum opinions are “probably better viewed as persuasive authorities,”<sup>70</sup> it likely would be a serious mistake for a taxpayer to ignore one that is on point,<sup>71</sup> especially if the facts of it are substantially similar to the case at hand.<sup>72</sup>

A memorandum opinion’s chain of review strengthens the argument that the Tax Court will follow its reasoning and analysis in a future case. All “reports” that ultimately become the opinion (either memorandum or T.C.) of the Tax Court undergo an internal review process.<sup>73</sup> This process generally involves review by the Chief Judge, with the assistance of counsel and deputy counsel, before designation of the case as either a memorandum or T.C. opinion. After this level of review, and assuming the Chief Judge does not designate the case for full-court review, the opinion is returned to the authoring Judge to address any comments by the Chief Judge.

The Tax Court's practice is to circulate memorandum opinions to all of the Tax Court judges for review and comment at least 24 hours prior to their proposed release. If two or more active judges have concerns about an opinion, the Chief Judge will generally halt the release of the opinion and, if those concerns cannot be alleviated, will refer the opinion for review before all of the Tax Court's active judges. Thus, there is "substantial work by law clerks, clerical staff, and the Office of the Reporter of Decisions, as well as other Judges" to prepare an opinion for public release.<sup>74</sup>

### Summary Opinions

While both Tax Court judges and attorneys cite to memorandum opinions as a standard practice, citing summary opinions—opinions disposing of small tax cases ("S cases")—causes more apprehension. That hesitation derives from the language of the Code.

Congress created S cases to "make[] access to the court system easier and less costly for taxpayers with small claims."<sup>75</sup> If the amount in dispute is \$50,000 or less for a taxable year, taxpayers filing in Tax Court may elect to have their case treated as a "small tax case."<sup>76</sup> While S cases generally do not present novel issues of law, some summary opinions provide "insightful and illuminating discussions of the law or applications of facts to law" that practitioners may desire to cite in appropriate cases.<sup>77</sup> Although the Tax Court has no published rule regarding the precedential nature of summary opinions, Congress has stated that such decisions "shall not be reviewed in any other court and shall not be treated as a precedent for any other case."<sup>78</sup>

But does the prohibition on treating a summary opinion "as a precedent" mean the Tax Court cannot—or should not—rely on one for support in a subsequent case? Reasonable minds can differ. Support for "no treatment as a precedent" = "no reliance" can be found by examining the term "precedent" as defined in Black's Law Dictionary.<sup>79</sup> The various types of "precedent" defined therein include both "binding" ("A precedent that a court must follow")<sup>80</sup> and "persuasive" ("A precedent that is not binding on a court, but that is entitled to respect and careful consideration").<sup>81</sup> Thus, under such an understanding of the term "precedent," the Tax Court not only is prohibited from using summary opinions as a precedent that it "must follow" but also from using them as "a precedent ... that is entitled to respect and careful consideration." Such an approach would be consistent with those circuits that do not accord any precedential weight to their unpublished dispositions and do not provide that they might even be persuasive.

That was the treatment the Tax Court appeared to give to a summary opinion in the well-publicized case of *O'Donnabhain v. Commissioner*.<sup>82</sup> The Tax Court majority acknowledged that there "appear[ed] to be no cases of precedential value interpreting the cosmetic surgery exclusion of section 213(d)(9)" but acknowledged that a summary opinion did indeed construe the term "cosmetic" for purposes of applying section 213(d)(9).<sup>83</sup> However, the majority pointed to section 7463(b)'s prohibition on treating the case "as precedent."<sup>84</sup> The court did not mention that summary opinion again, completely ignoring its reasoning.

On the other hand, even assuming *arguendo* that summary opinions are not "entitled to respect and careful consideration," that

does not necessarily preclude the Tax Court from considering their reasoning as instructive. In other words, consistent with some appellate courts, the Tax Court could rely on a well-articulated summary opinion and cite it accordingly. In that sense, this approach would look a bit like a *Skidmore*-type deference: a summary opinion's persuasive power would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later [opinions]."<sup>85</sup>

A recent Tax Court memorandum opinion suggested a very similar approach. In *Reifler v. Commissioner*,<sup>86</sup> the taxpayers had cited a summary opinion in support of their argument that a joint return signed by one spouse is a valid return for period of limitations purposes.<sup>87</sup> While the taxpayers acknowledged that the summary opinion did "not carry precedential weight," they asserted that it was "probative" because it confirmed the position they were taking.<sup>88</sup> Although the court found the summary opinion "inapposite," it noted the potential persuasive power of summary opinions: "While sec. 7463(b) precludes our Summary Opinions' being treated as precedent in any other cases, our Rules do not prohibit the citation of Summary Opinions, so that we may give consideration to our reasoning and conclusions in such opinions to the extent that they are persuasive."<sup>89</sup> Thus, if a summary opinion provides a thorough consideration of an issue, and that issue has not previously been addressed in a T.C. or memorandum opinion, the Tax Court may have discretion to consider such an opinion in a later case on that same issue. Indeed, at least one summary opinion has provided a "thorough analysis," knowing that, because it was deciding an issue of first impression, its analysis would likely be used in a subsequent case.<sup>90</sup>

Even though summary opinions are not appealable to circuit courts, they are subject to intra-court review similar to memorandum and T.C. opinions. Congress has authorized Tax Court special trial judges to issue decisions, "subject to such conditions and review as the court may provide."<sup>91</sup> And the Tax Court does provide such a reviewing mechanism; after trial, a special trial judge prepares a summary of facts and reasons for the proposed disposition of the case, and that report is submitted for review "to the Chief Judge, or, if the Chief Judge shall so direct, to a Judge or Division of the Court."<sup>92</sup> This is "very similar to the procedure in regular cases ... in that the report is submitted before the decision is entered."<sup>93</sup> Judge Holmes' concurrence in *Mitchell v. Commissioner* explains the purpose of such review:

[T]he purpose of reviewing summary opinions, whether drafted by special or regular or senior judges, surely is the same as the purpose of reviewing regular Tax Court opinions—more eyes to check for typos or infelicities of expression or bits of illogic of the "oh-of-course-how-could-I-have-overlooked-it" variety. And, very occasionally, for suggestions of legal questions to refer to the full Court to increase the uniform and accurate application of tax law in the country.<sup>94</sup>

The fact that a summary opinion is subject to pre-release review (similar to memorandum opinions and unpublished dispositions issued by three judge panels on federal appellate courts<sup>95</sup>) is



another reason that the Tax Court may have discretion to consider the persuasive value of a summary opinion, especially when no other T.C. or memorandum opinion is on point.

### District Court Dispositions (and Tax Court's Treatment Thereof)

Unlike federal appellate courts which issue decisions by three-judge panels,<sup>96</sup> "the judicial power of a district court," by statute, "may be exercised by a single judge."<sup>97</sup> Thus, the independent power, and duty, to apply the law rests with each individual district court judge.<sup>98</sup> Thus, a district court decision—prior to its release—does not generally undergo any level of review outside of that judge's chambers.

Each district court judge also decides whether to publish an opinion.<sup>99</sup> However, such judge does not face the same challenges as federal appellate courts do when making this decision because a district court judge's decision to publish does not generally bear on its subsequent precedential value. That is so because district court opinions are technically not precedential.<sup>100</sup> In other words, "district courts typically do not assign greater persuasive or *stare decisis* value to published opinions, nor less value to unpublished decisions (at least not overtly)."<sup>101</sup> Not only do district courts eschew the view that any of their decisions should be treated as binding precedent, they generally accord them very little value. Whether published or unpublished, district courts tend to give "little or no deference to the prior precedent of that same district court."<sup>102</sup> Thus, "[d]eprived of any significant *stare decisis* effect, district court decisions adjudicate present controversies but do not create law for future cases."<sup>103</sup> The same is generally true for decisions from the Court of Federal Claims.<sup>104</sup>

As a general rule, the Tax Court gives district court opinions no greater deference than other federal district courts would generally give them.<sup>105</sup> As the Tax Court recently noted, federal district court opinions "do not constitute binding precedent in this Court."<sup>106</sup> At most, if a district court's analysis is well-reasoned and thorough, the Tax Court will find it persuasive.<sup>107</sup> In other words, the Tax Court gives little, if any, deference to district court decisions.<sup>108</sup>

### Unpublished Opinions and Penalty Protection

Even if a court does not look favorably upon certain unpublished dispositions in determining a taxpayer's liability, that does not necessarily mean those dispositions should have no impact in the tax planning context. In other words, taxpayers should consider whether they can rely on such dispositions to provide substantial authority for penalty protection purposes.

Section 6662 imposes a 20% accuracy-related penalty on the portion of an underpayment that is attributable to, among other things, a substantial understatement of tax. However, that penalty will not be imposed for such substantial understatement if "there is or was substantial authority" for the position that gives rise to the substantial understatement or if there is a "reasonable basis" for the position being taken and that position is adequately disclosed.<sup>109</sup> The general "reasonable cause defense" is also available for all section 6662 penalties, although this article does not address its potential application to situations involving unpublished dispositions.

A taxpayer has substantial authority for a tax-return position when, taking into account all relevant authorities, the authorities favoring the taxpayer's proposed treatment are substantial when weighed against any contrary authorities.<sup>110</sup> The regulations provide a comprehensive list of authorities that may be considered for purposes of this determination, and that list includes "court cases."<sup>111</sup> The weight given to any one authority, including a court case, depends on its "relevance,"<sup>112</sup> "persuasiveness,"<sup>113</sup> and the "type of document providing the authority."<sup>114</sup>

However, a court case "does not continue to be an authority to the extent that it is overruled or modified, implicitly or explicitly, by a body with the power to overrule or modify" it.<sup>115</sup> For example, "a district court opinion on an issue is not an authority if overruled or reversed by the United States Court of Appeals for such district."<sup>116</sup> That said, "a Tax Court opinion is not considered to be overruled or modified by a court of appeals to which a taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of the court of appeals."<sup>117</sup>

The question remains whether "court cases" encompasses unpublished dispositions at the appellate and trial court levels. The regulation, by using the general term "court cases" (and giving examples of what that term does not include), does not prohibit considering such dispositions in determining whether substantial authority exists for the tax treatment of an item. Further supporting the notion that such dispositions should be considered, the regulation's list of authorities to consider in the substantial authority determination includes many written determinations (such as private letter rulings) that cannot be cited as precedent under section 6110(k)(3). And, Tax Court memorandum opinions have repeatedly been relied on by appellate courts to determine that a taxpayer has substantial authority.<sup>118</sup> Finally, by analogy to IRS private guidance, the fact that Tax Court summary opinions "shall not be treated as a precedent for any other case" (or the fact that a circuit's local rules indicate that certain unpublished dispositions should not be treated as a precedent) certainly does not preclude the use of such unpublished dispositions in the substantial authority determination.

The jurisdictional guidance provided by the regulations also informs this question. That guidance states that "[t]he applicability of court cases to the taxpayer by reason of the taxpayer's residence in a particular jurisdiction is *not* taken into account in determining whether there is substantial authority for the tax treatment of an item."<sup>119</sup> In other words, for the substantial authority determination, dispositions arising from courts outside of the taxpayer's appealable circuit should be considered,<sup>120</sup> even if adverse authority exists in the taxpayer's own circuit.<sup>121</sup> Notwithstanding that provision, that regulation also provides that "there is substantial authority for the tax treatment of an item if the treatment is supported by *controlling precedent* of a United States Court of Appeals to which the taxpayer has a right to appeal with respect to the item."<sup>122</sup> Thus, even if adverse authority exists outside of the taxpayer's circuit, a taxpayer can establish substantial authority for the tax treatment of the item at issue based solely on "controlling precedent" in an appealable circuit.

While that guidance does not explicitly reference unpublished dispositions, certain terminology used in the regulation supports

considering unpublished dispositions in the substantial authority analysis. When listing the authorities to consider in the substantial authority analysis, the regulation used the term "court cases"; however, when creating a safe harbor to establish substantial authority, the regulation uses the term "controlling precedent." The variation in terms within the same regulation suggests that, while only "controlling precedent" from an appealable circuit can *per se* establish substantial authority, non-controlling precedent arising from courts of all circuits (including unpublished appellate and district court dispositions and Tax Court summary opinions) should at least be considered in determining whether substantial authority is present.<sup>123</sup>

One argument is that the proper question should not be *whether* unpublished dispositions are considered in the substantial authority analysis but rather *how much* weight they should be accorded. On one hand, analyzing the "type of document" for substantial authority purposes, an unpublished disposition only given persuasive value (or less) by its circuit may likely not be given the same weight compared to a published disposition (that is binding precedent). On the other hand, under the "persuasiveness" analysis, an unpublished disposition that provides a very thorough analysis on the item in dispute may be given as much (or even more weight) than a binding published opinion that only provides a terse statement on that item. Indeed, if that published disposition simply affirms the lower court for the reasons stated therein, that decision might be less persuasive than an unpublished disposition that reaches its conclusion by cogently applying the law to the pertinent facts.


As noted above, a taxpayer can also avoid the substantial understatement penalty if there is a reasonable basis for the position being taken and that position is adequately disclosed. Because the reasonable basis standard is met if the return position is "reasonably based on one or more of the authorities" used in the substantial authority test,<sup>124</sup> courts tend to use the results from the substantial authority analysis and apply it to the reasonable basis analysis.<sup>125</sup> It should be noted that a taxpayer can satisfy the reasonable basis standard based on only one such authority, even if that authority by itself may not satisfy the substantial authority standard. The takeaway here is that, for purposes of penalty protection, taxpayers (and practitioners advising them) should not ignore unpublished dispositions when analyzing the tax treatment of a certain item.

### Using Unpublished Dispositions on Audit

The IRS does not have a published position on the use of unpublished dispositions by its personnel in challenging the tax treatment of a transaction or the use by taxpayers to defend such treatment. The weight an IRS employee gives to an unpublished disposition can vary greatly depending on the existence (or lack thereof) of other authorities, the type of other authorities, and perceived strengths and weaknesses of each party's position. Naturally, whether the unpublished disposition supports the IRS's position can also be a factor. For example, experience shows that a revenue agent may rely on an unpublished ruling, written determination, or case that supports the IRS's position while dismissing, under the auspices of section 6110(k)(3) or case law indicating that unpub-

lished dispositions are not precedential, other guidance adverse to the position. A different agent, however, might accept the premise of an unpublished ruling or case adverse to the IRS's position. Because unpublished guidance reflects the IRS's administrative practice<sup>126</sup> and some courts have indicated the persuasive value of unpublished cases, it is appropriate and wise to consider using them on audit to defend the tax treatment of a transaction.

### Conclusion

The extent to which taxpayers can rely on unpublished dispositions to support the tax treatment of a transaction and to avoid penalties is not settled law. In assessing the positive and negative impact of such dispositions, taxpayers and their advisors should take into account the Tax Court's position, venue for appeal and the corresponding local rules, and the thoroughness and validity of the reasoning presented. 

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1. See United States Courts, Judicial Business of the United States Courts, at tbl. S-3, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S03Sep12.pdf>. This article uses the term "unpublished" to describe opinions that do not appear in the *Federal Reporter*, although such opinions are unofficially published not only online but also in printed volumes such as West's *Federal Appendix*.
2. David R. Cleveland, *Local Rules in the Wake of Federal Appellate Procedure* 32.1, 11 J. APP. PRAC. & PROCESS 19, 22 (2010).
3. See Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice, *Standards for Publication of Judicial Opinions* (Fed. J. Ctr. 1973). The Committee was composed of prominent lawyers, law professors, and judges.
4. See 4TH CIR. R. 36(a).
5. See 5TH CIR. R. 47.5.1; 6TH CIR. I.O.P. 32.1(b)(1); 9TH CIR. R. 36-2; D.C. CIR R. 36(c)(2).
6. See 1ST CIR. R. 36.0(b)(1); 2ND CIR. I.O.P. 32.1.1(a); FED. CIR. I.O.P. 10.4.
7. See 3D CIR. I.O.P. 5.1-5.3; 10TH CIR. R. 36.
8. See 7TH CIR. R. 32.1; 8TH CIR. I.O.P. IV.B; 11TH CIR. R. 36-2.
9. 3D CIR. I.O.P. 5.7; 5TH CIR. R. 47.5.4; 11TH CIR. R. 36-2; FED CIR. R. 32.1(c). *But cf.* 11TH CIR. I.O.P. 7 ("The court generally does not cite to its 'unpublished opinions' because they are not binding precedent." (emphasis added)).
10. See 2D CIR. R. 32.1.1(b)(2); 7TH CIR. R. 32.1(d); 9TH CIR. R. 36-3(c).



11. See 4TH CIR. R. 32.1; 8TH CIR. R. 32.1A.
12. See 1ST CIR. R. 32.1.0(a); D.C. CIR R. 32.1(b).
13. See 6TH CIR. R. 32.1(a); 10TH CIR. R. 32.1(C).
14. Whether Article III of the Constitution prohibits a court from limiting the precedential value of its own opinions is outside the scope of this article. Compare *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (Arnold, J.) (holding court's rule declaring unpublished opinions non-precedential violated Article III's definition of "judicial power"), vacated as moot on reh'g en banc, 235 F.3d 1054 with *Hart v. Massanari*, 266 F.3d 1155, 1168-69 (9th Cir. 2001) (Kozinski, J.) (holding court's no-citation, no-precedent rule for unpublished dispositions constitutional)). In any event, Judge Kozinski's findings in *Hart* that counsel violated local rules by citing a Ninth Circuit unpublished disposition and could be subject to sanctions should be noted by taxpayers residing in that circuit.
15. 2D CIR. R. 32.1.1(a).
16. 3D CIR. I.O.P. 5.2.
17. 3D CIR. I.O.P. 5.3.
18. 3D CIR. I.O.P. 5.7.
19. 7TH CIR. 32.1(b).
20. 9TH CIR. R. 36-3(a) (except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion).
21. There may be daylight between the terms "persuasive authority" and "persuasive value." Cf. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 791-92 (2012).
22. 1ST CIR. R. 32.1.0(a).
23. 8TH CIR. R. 32.1A.
24. 10TH CIR. R. 32.1(A).
25. 11TH CIR. R. 36-1.
26. FED. CIR. R. 32.1(d).
27. 4TH CIR. R. 32.1.
28. 4TH CIR. R. 36.3.
29. 6TH CIR. R. 32.1(a).
30. 6TH CIR. R. 36.
31. 5TH CIR. R. 47.5.3.
32. 5TH CIR. R. 47.5.4 (except for purposes of res judicata, collateral estoppel, law of the case, or other similar situations). In 2006, the Fifth Circuit deleted language in that rule which stated "an unpublished opinion may ... be persuasive." That deletion raises the question as to what, if any, value the Fifth Circuit now gives to such opinions. However, an argument in favor of still according them some persuasive weight can be supported when comparing them to its "Affirmances Without Opinion," which are explicitly accorded no precedential value. See 5TH CIR. R. 47.6.
33. D.C. CIR. R. 32.1(b)(1)(A)-(B).
34. While the taxpayer's residence usually determines the appellate venue, sec. 7482(b)(1)(A), the parties can stipulate to the contrary, sec. 7482(b)(2).
35. 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).
36. *Lardas v. Commissioner*, 99 T.C. 490, 495 (1992).
37. 68 T.C. 463 (1977).
38. 65 T.C. 548 (1975).
39. 55 T.C. 709 (1971), *aff'd in open court without opinion*, 456 F.2d 1335 (2d Cir. 1972).
40. *Rueggsegger*, 68 T.C. at 466.
41. *Id.* at 467.
42. 75 T.C. 486, 490 n.5 (1980).
43. 70 T.C. 904, 907 n.3 (1978).
44. T.C. Memo. 1978-226, 1978 Tax Ct. Memo LEXIS 290, at \*16 n.4.
45. T.C. Memo. 1989-133, 1989 Tax Ct. Memo LEXIS 133.
46. *Id.* at \*22-\*23.
47. 122 T.C. 32 (2004), *rev'd* 439 F.3d 1009 (9th Cir. 2006), *superseded by statute as stated in Wilson v. Commissioner*, 705 F.3d 980, 993 n.19 (9th Cir. 2013).
48. *Ewing*, 122 T.C. at 35 n.3.
49. *Id.* The Tax Court majority did not opine on their persuasive weight, if any.
50. 1997 U.S. App. LEXIS 21894 (7th Cir. June 5, 1997) (order).
51. See *Ewing*, 122 T.C. at 51 (Thornton, J., concurring) (citing *Bratcher* while acknowledging it was as "unpublished opinion").
52. See 7TH CIR. R. 53(b)(2) (1997) (now rescinded); *see also*, e.g., Robert Timothy Reagan, *Citing Unpublished Opinions in Federal Appeals*, at 209 & n.97 (Fed. J. Ctr. 2005).
53. 130 T.C. 115 (2008). Tax Court majority in *Porter I* held firm to the *Ewing* principle and decided to continue to employ a *de novo* scope of review. Subsequently, in *Porter v. Commissioner*, 132 T.C. 203 (2009) (*Porter II*), the Tax Court held that the appropriate standard of review in section 6015(f) cases was also *de novo*. A dissent in *Porter II* noted the concern that the Tax Court was not only overruling its own precedent (the Tax Court had previously reviewed the denial of innocent spouse relief under an abuse of discretion standard), but also "fail[ed] to recognize the opinions of six Courts of Appeals that have affirmed [its] practice of holding a trial *de novo* in section 6015(f) cases and then applying the abuse of discretion standard of review." *Id.* at 223 (Wells, J., dissenting). Three of those six decisions cited (from the Third, Sixth, and the Ninth) were unpublished dispositions affirming Tax Court decisions.
54. *Porter I*, 130 T.C. at 118 n.3.
55. 1991 U.S. App. LEXIS 31395 (9th Cir. Jan. 9, 1992), *aff'g without published opinion* T.C. Memo. 1990-604. The notice on this opinion states that "this disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir. R. 36-3."
56. *Porter I*, 130 T.C. at 130 (Vasquez, J., concurring).
57. 123 T.C. 85 (2004), *rev'd* 439 F.3d 455 (8th Cir. 2006).
58. *Id.* at 96 ("[T]he 'record review' provisions of the Administrative Procedures Act ... do not apply to the Tax Court." (emphasis in original) (quoting *Holliday v. Commissioner*, 57 Fed. Appx. 774 (9th Cir. 2003), *aff'g* T.C. Memo. 2002-67)).
59. *Id.* at 123 (Halpern and Holmes, JJ., dissenting).
60. *Id.* at 125 (Halpern and Holmes, JJ., dissenting).
61. While the Federal Circuit also falls in this group, this article does not include it here because Tax Court decisions are not appealable to it.
62. See *Lardas*, 99 T.C. at 495 (clarifying the *Golsen* rule should be applied only if "a reversal would appear inevitable, due to the clearly established position of the Court of Appeals to which an appeal would lie").
63. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
64. See *Taproot v. Admin. Servs., Inc. v. Commissioner*, 133 T.C. 202 (2009), *aff'd*, 679 F.3d 1109 (9th Cir. 2012). Although the government (most notably in cases handled by the Department of Justice attorneys, not Chief Counsel attorneys) has sometimes argued for *Chevron* deference for revenue rulings, it is currently embracing *Skidmore* as the appropriate

- standard. See Marie Sapirie, *DOJ Won't Argue for Chevron Deference for Revenue Rulings*, Official Says, 131 TAX NOTES 674 (May 16, 2011).
65. *Skidmore*, 323 U.S. at 140.
66. United States Tax Court, Press Release (June 26, 2012), available at <http://www.ustaxcourt.gov/press/062612.pdf>.
67. See, e.g., *Armstrong v. Commissioner*, 139 T.C. 468, 482 (2012); *Newman v. Commissioner*, 68 T.C. 494, 502 n.4 (1977). Indeed, over 50 years ago, the Tax Court's practice was to prohibit even citing to memorandum opinions as authority. See *McGah v. Commissioner*, 17 T.C. 1458, 1459 (1952).
68. See Levine, Peyser, and Weintraub, 630-4th T.M., *Tax Court Litigation*, at A-77.
69. In 2013, there were 38 T.C. opinions and 296 memorandum opinions. In 2012, there were 42 T.C. opinions and 360 memorandum opinions. And in 2011, there were 47 T.C. Opinions and 300 memorandum opinions. See United States Tax Court, Opinions Search, available at <http://www.ustaxcourt.gov/UstcInOp/asp/HistoricOptions.asp>.
70. Peter A. Lowy, Juan F. Vasquez Jr., and Jaime Vasquez, Citing Unpublished Opinions in Tax Court Proceedings, 114 TAX NOTES 171, 176 (Jan. 15, 2007).
71. See, e.g., Judge Thomas B. Wells, *Thomas B. Wells, Chief Judge of the United States Tax Court, Interviewed by Jerald David August*, 4 BUS. ENT. 18 (WG&L Nov/Dec 2002) (noting that, while "more consideration and weight are given to division opinions," for "both planning and litigation, both division opinions and memorandum opinions should be considered"); see also *Sicard v. Commissioner*, T.C. Memo. 1996-476 (relying on a memorandum opinion and noting that "[r]espondent did not attempt to distinguish, or even discuss, that [memorandum opinion] in the posttrial briefs").
72. See *Mosterin v. Commissioner*, T.C. Memo. 1995-419, 1995 Tax Ct. Memo LEXIS 424, at \*19 ("[R]espondent argues that [two cases] are mere memorandum opinions, without precedential weight. We recently said about another memorandum opinion that it, 'being a memorandum opinion of this Court, is not controlling precedent', but that, 'given the substantial similarity of the factual foundation of' the two cases, we would 'follow the same analytical approach that we utilized in' the prior memorandum opinion in deciding the later case.") (quoting *Convergent Techs., Inc. v. Commissioner*, T.C. Memo. 1995-320, 1995 Tax Ct. Memo LEXIS 321, at \*21-\*22)). At least one federal appellate court has expressly accorded deference to them. See *Kornman & Assocs., Inc. v. U.S.*, 527 F.3d 443, 460 n.16 (5th Cir. 2008) ("Although tax court memorandum opinions have no precedential value in tax court, we have previously relied upon them, which indicates that they hold some persuasive value.").
73. See secs. 7459, 7460; Judge Mary Ann Cohen, *How To Read Tax Court Opinions*, 1 HOU. BUS. & TAX L. J. 1, 4-5 (2001).
74. *Wnuick v. Commissioner*, 136 T.C. 498, 511 (2011).
75. *Mitchell v. Commissioner*, 131 T.C. 215, 224 (2008) (Holmes, J., concurring).
76. Sec. 7463(a). "The S designation has benefits for taxpayers who choose it – they get relaxed rules of evidence and procedure, a longer list of cities from which to choose a place of trial, and usually a speedier decision." *Mitchell*, 131 T.C. at 224 (Holmes, J., concurring).
77. Lowy, Vasquez, and Vasquez, *supra* note 70, at 177.
78. Sec. 7463(b). Even though summary opinions are not appealable, the Tax Court applies the *Golsen* rule in S cases.
79. Black's Law Dictionary provides two primary definitions of "precedent": (1) "The making of law by a court in recognizing and applying new rules while administering justice"; and (2) "A decided case that furnishes a basis for determining later cases involving similar facts." BLACK'S LAW DICTIONARY 1295 (9th ed. 2009).
80. *Id.* at 1296. Black's Law Dictionary indicates that the term "binding precedent" may also be termed "binding authority." *Id.* Thus, it would appear that, in this context, the terms "precedent" and "authority" are interchangeable. Under such a view, a change in 2007 that the Tax Court made in all of its summary opinions may not be that significant. Up until approximately February 2007, the first paragraph of all summary opinions had a sentence substantially identical to the following: "The decision to be entered is not reviewable by any other court, and this opinion should not be cited as authority." See, e.g., *Roiland v. Commissioner*, T.C. Summ. 2007-22 (Feb. 14, 2007) (Panuthos, C.S.T.J.) (emphasis added). However, by April 2007, the last clause in that sentence had changed: "[T]he decision to be entered is not reviewable by any other court, and this opinion should not be treated as precedent for any other case." See, e.g., *Mackey v. Commissioner*, T.C. Summ. 2007-61 (Apr. 23, 2007). (Panuthos, C.S.T.J.) (emphasis added). If "precedent" and "authority" have identical meanings, then this change can be solely attributed to the Tax Court choosing to adopt the focus of Rule 32.1, which beginning in January 2007 barred Article III courts from having a no-citation rule. (The Tax Court is an Article I court.) That said, it is unclear why the Tax Court did not simply change its language to state that summary opinions "should not be treated as authority for any other case." Cf. Wells, *supra* note 71 ("Summary opinions are opinions issued in S cases, which by statute are not precedential and are not considered by the court as authority.") (2002 statement of then-Chief Judge Wells). By not only changing the word "cited" to "treated," but also changing the word "authority" to "precedent," it could be inferred that the Tax Court views the terms "precedent" and "authority" as having different meanings.
81. BLACK'S LAW DICTIONARY, *supra* note 79, at 1296.
82. 134 T.C. 34 (2010).
83. *Id.* at 52 & n.28.
84. *Id.* at 52 n.28.
85. *Skidmore*, 323 U.S. at 140. Because of the tax expertise of Tax Court judges, such an opinion by a Tax Court judge may have a stronger "power to persuade" than an unpublished disposition issued by a generalist appellate court panel or federal district judge. On the other hand, because of the substantial majority of S cases involve *pro se* taxpayers and lack formal briefing, Tax Court judges often don't have the benefit of well-developed arguments from the parties. Cf. *Armstrong* 139 T.C. at 505 (Holmes, J., dissenting) ("[I]t appears—as is so often true in subjects where *pro se* taxpayers predominate—that we did not have any argument from any of the parties in any of the cases [previously interpreting the statutory term at issue] about broad or narrow readings of [that statutory term].").
86. T.C. Memo. 2013-258.
87. *Id.* at \*17, n.8.
88. *Id.*
89. *Id.* In *Rand v. Commissioner*, 141 T.C. No. 12 (2013), the Tax Court was faced with a penalty issue that had not been squarely addressed in any T.C. or Memorandum Opinions, but had been addressed in three



Summary Opinions. Although both parties brought these cases to the court's attention in their briefs, and the taxpayer made the same persuasiveness argument adopted in *Reifler*, the summary opinions were not mentioned by the court.

90. *Cutts v. Commissioner*, T.C. Summ. 2004-8 ("Because the netting question is an issue of first impression under section 7872, we dropped the ball in allowing this case to retain its designation as a small tax case.... Through our inadvertence and respondent's failure to object, we failed to exercise our power prior to trial to remove the small tax case designation.... Even though our opinion is not precedential and should not be cited as authority, we provide a thorough analysis."). S cases that present an issue of first impression may be stripped of their small tax case status by the court "on its own motion or on the motion of a party to the case." See TAX CT. R. 171(d); see also, e.g., *Armstrong v. Commissioner*, Docket No. 28738-09, Order (Feb. 14, 2012) (removing S designation after "the Court noticed an issue which may be important in other cases" and speaking with the parties about such removal).
91. Sec. 7443A(c).
92. TAX CT. R. 182.
93. *Mitchell*, 131 T.C. at 235 (Holmes, J., concurring).
94. *Id.* at 236 (Holmes, J., concurring) (footnote omitted).
95. The Tax Court appears to more widely circulate its summary opinions prior to release compared to the practice of certain federal appellate courts with respect to pre-release circulation of unpublished dispositions. See, e.g., 3D CIR. I.O.P.5.7 ("[Not precedential] opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.").
96. See 28 U.S.C. § 46(b)-(c).
97. 28 U.S.C. § 132(c). The same is true in the Court of Federal Claims. See 28 U.S.C. § 174(a).
98. See, e.g., *Chimie v. PPG Indus., Inc.*, 218 F.R.D. 416, 420 (D. Del. 2003) ("[W]hile I have the greatest respect for my colleagues in the district, my duty now is to apply the law as fairly and logically as I understand it.").
99. District court opinions are published in either the Federal Supplement or the Federal Rules of Decisions. While district court judges tend to abide by the same formal publication guidelines proposed in 1973 for appellate courts, because of the wide discretion that a district court judge holds, "[t]he publication decision is nevertheless a function of additional influences as well." Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 137 (2004); see *id.* at 137 (finding that "the presence in a lawsuit of a large corporation or law firm, quintessential powerful, well-placed actors in the economic arena, influences judges to publish the opinion").
100. See, e.g., *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) ("[T]here is no such thing as the 'law of the district.' Even where the facts of a prior district court case are, for all practical purposes, the same as those presented to a different district court in the same district, the prior resolution of those claims does not bar reconsideration by this Court of similar contentions. The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another. Where a second judge believes that a different result may obtain, independent analysis is appropriate." (citation omitted)); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987) ("[D]istrict judges in this circuit must not treat decisions by other district judges, in this and a *fortiori* in other circuits, as controlling, unless of course the doctrine of *res judicata* or of collateral estoppel applies.... [T]he responsibility for maintaining the law's uniformity is a responsibility of appellate rather than trial judges...."); *Nat'l Union Fire Ins. Co. v. Allfirst Bank*, 282 F. Supp. 2d 339, 351 (D. Md. 2003) ("Of course, no decision of a district court judge is technically binding on another district court judge, even within the same district.").
101. *Mead*, *supra* note 21, at 803; see also *id.* (noting that "district judges have rejected requests to publish or not to publish a decision for the reason that it has no change on its precedential value").
102. *Id.* at 789. While "[h]istorically, district judges extended great deference to the prior decisions within their district ... as the circuit courts began to impose stronger versions of *stare decisis* on themselves, district courts began to depart more readily from their precedent. Today, if intra-district precedent is even noted in an opinion, it is dismissed with little difficulty." *Id.* at 801-02.
103. *Id.* at 789.
104. See *W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994) ("Court of Federal Claims decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court. Thus, a Court of Federal Claims decision directed to one claim brought by a party does not create binding precedent for a separate claim—even a separate claim from the same party." (internal citations omitted)); *Compare Grapevine Imports, Ltd. v. United States*, 77 Fed. Cl. 505 (Fed. Cl. July 17, 2007) (overstatement of basis does not trigger extended six-year statute of limitations set forth in section 6501(e)(1)(A)) with *Salman Ranch Ltd. v. United States*, 79 Fed. Cl. 189 (Fed. Cl. Nov. 9, 2007) (overstatement of basis does trigger extended six-year statute of limitations set forth in section 6501(e)(1)(A)).
105. That is, they will "be entitled to no more weight than their intrinsic persuasiveness merits." *Colby*, 811 F.2d at 1124.
106. *Advo, Inc. v. Commissioner*, 141 T.C. No. 9, 2013 U.S. Tax Ct. LEXIS 29, at \*29-\*30 n.11 (2013); accord *Friedman v. Commissioner*, T.C. Memo. 2010-45.
107. See *FPL Group, Inc. v. Commissioner*, T.C. Memo. 2005-208. The Court of Federal Claims treats Tax Court decisions in the same manner. See *Salem Financial, Inc. v. United States*, Opinion and Order on Plaintiff's Motion to Alter or Amend Judgment, No. 1:10-cv-00192 (Fed. Cl., Jan. 7, 2014) (noting that a Tax Court decision "is not controlling authority," and "[a]t best ... provides persuasive authority").
108. An interesting question is how the Tax Court would approach a situation where a summary opinion conflicts with a district court opinion. Unlike district court opinions, each summary opinion is reviewed by at least one other Tax Court judge before release, and each opinion, like opinions from the federal appellate courts, is issued from the entire court. Moreover, whereas district court judges generally do not see many tax cases on their full and fast-paced dockets, Tax Court judges have developed an expertise on a complex subject matter. Indeed, prior to the amendment of section 7482 in 1948, review of Tax Court decisions was to be extremely limited and deferential under the Dobson principle. See *Inverworld, Ltd. v. Commissioner*, 979 F.2d 868, 874 (D.C. Cir. 1992). Perhaps some Supreme Court Justices would like to see a return to this practice. E.g., Transcript of Oral Argument at 41, *PPL Corp. v. Commissioner* (Feb. 20, 2013) (No. 12-43) (Breyer, J.) ("[O]n the [legal question at issue], there isn't authority, but, I mean, if I'm quite honest about how I think about it, I think the people in the tax court

- actually, usually, know more about it than the judges who are not on the tax court. And so when I get an opinion and the tax court all thinks one thing and then the court of appeals is thinking something else and it's highly technical, I -- I tend to be tempted to say, well, the tax courts deserve something.").
109. Sec. 6662(d)(2)(B).
  110. Treas. Reg. § 1.6662-4(d)(3)(i). This is an objective standard – a taxpayer's belief that there is substantial authority for the tax treatment of an item is not relevant. *Id.*
  111. Treas. Reg. § 1.6662-4(d)(3)(iii); *see also* Int. Rev. Man. 20.1.5, Ex. 20.1.5-8 (Jan. 24, 2012).
  112. For example, an authority is not particularly relevant if it is "materially distinguishable on its facts, or is otherwise inapplicable to the tax treatment at issue." Treas. Reg. § 1.6662-4(d)(3)(ii).
  113. In other words, an authority's thoroughness is considered; an "authority that merely states a conclusion ordinarily is less persuasive than one that reaches its conclusion by cogently relating the applicable law to pertinent facts." *Id.*
  114. As an example, "a revenue ruling is accorded greater weight than a private letter ruling addressing the same issue." *Id.*
  115. Treas. Reg. § 1.6662-4(d)(3)(iii).
  116. *Id.* The corollary of this example is that at least some district court dispositions (that are not overruled) should be considered in the substantial authority analysis.
  117. *Id.* That regulation does not differentiate between the types of appealable Tax Court opinions (e.g. a division opinion compared to a memorandum opinion).
  118. *See, e.g., Osteen v. Commissioner*, 62 F.3d 356, 359-60 (11th Cir. 1995), *aff'g* in part and *rev'g* in part T.C. Memo. 1993-519; *Norgaard v. Commissioner*, 939 F.2d 874, 878-81 & nn. 3-4 (9th Cir. 1991), *aff'g* in part and *rev'g* in part T.C. Memo. 1989-390.
  119. Treas. Reg. § 1.6662-4(d)(3)(iv)(B) (emphasis added).
  120. *See Long Term Capital Holdings v. United States*, 330 F. Supp. 2d 122, 203 n.105 (D. Conn. 2004) (noting the "textbook example would be the taxpayer's reliance in a refund suit filed in one circuit on application of precedent from another to undisputed facts where the Government urges application of conflicting precedent from yet a third circuit and all agree that no precedent control"), *aff'd*, 150 Fed. Appx. 40 (2d Cir. 2005).
  121. *See id.* at 204 & n.107 (noting that the "clear and pre-existing on-point authority of" two cases in the appealable circuit "does not count against [the taxpayer] in the substantial authority calculus" (citing Treas. Reg. § 1.6662-4(d)(3)(iv)(B))).
  122. Treas. Reg. § 1.6662-4(d)(3)(iv)(B) (emphases added).
  123. Cf. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, at 170-173 (2012) (discussing the canon of "Presumption of Consistent Usage" which presumes that not only a "word or phrase ... bear[s] the same meaning throughout a text" but also that "a material variation in terms suggests a variation in meaning").
  124. Treas. Reg. § 1.6662-3(b)(3).
  125. *See, e.g., Sharp v. Commissioner*, T.C. Memo. 2013-290, at \*15 ("Petitioner's reasonable basis argument fails for the same reason that her substantial authority argument fails."); *Klamath Strategic Inv. Fund, LLC v. United States*, 472 F. Supp. 2d 885, 902 (E.D. Tex. 2007) ("As discussed in the previous section, there was 'substantial authority' to rely on [the tax professionals'] opinions, and, therefore, the 'reasonable basis' standard has been met."), *vacated in part on other grounds*, 568 F.3d 537 (5th Cir. 2009).
  126. *See, e.g., Rowan Cos., Inc. v. United States*, 452 U.S. 247, 261 n.17 (1981); *Estate of Cristofani v. Commissioner*, 97 T.C. 74, 84 n.5 (1991).