NOTE
THE TAX COURT REVISITS THE *GOLSEN* RULE: *LARDAS V. COMMISSIONER*

In *Lardas v. Commissioner*,[1] the Tax Court reexamined the *Golsen* doctrine[2] and in doing so clarified the instances when it will be bound by circuit court decisions. The substantive issue in *Lardas* was whether the return referenced by section 6501(a),[3] which provides for a three-year period for assessment of a deficiency by the Service, was the individual taxpayer's return or the trust's return when losses from property held in trust were in dispute.[4] The Tax Court held that the proper reference point for the statute of limitations was the individual's return. Since the taxpayers had relied on a circuit court decision that was contrary to this holding, the Tax Court needed to explain why the *Golsen* doctrine did not apply.

This Note describes the Tax Court's rationale. In addition, it discusses how the Tax Court's new interpretation of the *Golsen* doctrine will influence a taxpayer's choice of forum, and several of the policy aspects of the decision.

I. BACKGROUND

A. *Pre*-Golsen *History*

Under section 7482(a),[5] appeal from a Tax Court decision lies to the federal circuit court of appeals to which an appeal would lie if the taxpayer had litigated the matter as a refund suit in a federal district court. The venue of federal district courts in tax refund suits is based on the residence of the taxpayer.[6] Thus, the legal residence of the taxpayer at the time the Tax Court petition is filed determines which appellate court will hear an appeal.[7]

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[1]99 T.C. 490 (1992).

[2]Golsen v. Commissioner, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971) (holding that the Tax Court will follow circuit court decisions with which it disagrees only if the appeal in the current case lies to that circuit and if the decision is squarely in point).

[3]Section 6501(a) states, "[T]he amount of any tax imposed by this title shall be assessed within 3 years after the return was filed."

[4]The issue of which return is referred to in section 6501(a) was settled in Bufferd v. Commissioner, 113 S. Ct. 927 (1993), which held that the return referred to in section 6501(a) is the return of the individual taxpayer. For a discussion of the statute of limitations issue, see Deborah J. Lotstein, Note, *Statute of Limitations for Partnership and S Corporation Items Prior to TEFRA: Which Return Starts It Running?*, 45 TAX LAW. 1059 (1992).

[5]Section 7842(a) provides in pertinent part:

> The United States Courts of Appeals, other than the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgement of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

[6]28 U.S.C. § 1402 (1993).

[7]Section 7482(b)(2) allows venue in any appellate court if the parties so stipulate.

Because, unlike federal district courts, the Tax Court is a court of national jurisdiction, appeals from its decisions may lie to any of the several circuit courts of appeals. When the Tax Court has been reversed by an appellate court, and the same issue is before the Tax Court in a second case, it is faced with the question whether it should alter its result and accede to the appellate position in the first case, or continue to follow its original position in the present case.[8]

Prior to its decision in *Golsen*, the Tax Court considered its mandate to apply the tax law uniformly to mean it should deferentially disregard appellate opinions with which it differed.[9] It reasoned:

> [The Tax Court] must thoroughly reconsider the problem in light of the reasoning of the reversing appellate court and, if convinced thereby, the obvious procedure is to follow the higher court. But if still of the opinion that its original result was right, a court of national jurisdiction to avoid confusion should follow its own honest beliefs until the Supreme Court decides the point.[10]

Thus, the Tax Court made it clear that it did not consider itself bound by circuit court decisions.[11]

This view of its judicial mandate was much criticized.[12] In *Stacey Manufacturing*, the Sixth Circuit strongly rebuked the Tax Court. The court stated, "The Tax Court is not lawfully privileged to disregard and refuse to follow, as the settled law of the circuit, an opinion of the court of appeals of that circuit."[13] The jurisdictional issue has never been heard by the Supreme Court, and the conflict between the Tax Court and the circuit courts is still unsettled.

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[8]The same quandary is posed if the appellate court has spoken on the same issue in an appeal from a district court refund suit, the appeal from the Tax Court's current case lies to the same circuit, and the Tax Court disagrees with the appellate precedent.

[9]Lawrence v. Commissioner, 27 T.C. 713, 716 (1957), *rev'd*, 258 F.2d 562 (9th Cir. 1958).

[10]*Id.*

[11]One reason advanced by the Tax Court was that there were times when it reversed itself in light of an appellate court's decision, only to find itself later reversed by the Supreme Court. *Id.* at 717. *See also* William J. Lemp Brewing Co. v. Commissioner, 18 T.C. 586 (providing an example of when the Tax Court changed position in light of circuit court); De Soto Sec. Co. v. Commissioner, 25 T.C. 175 (1955), *rev'd*, 235 F.2d 409 (7th Cir. 1956) (Tax Court changed its position in light of a circuit court decision, and was then reversed by the circuit court).

[12]*See, e.g.*, Stacey Mfg. v. Commissioner, 237 F.2d 605, 606 (6th Cir. 1956); Sullivan v. Commissioner, 241 F.2d 46, 47 (7th Cir. 1957), *aff'd*, 356 U.S. 27 (1958); *cf. Hearings on S. 2041 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pt. 2, 158 (1968) (testimony of Sheldon Cohen, then Commissioner of the Service, in support of the *Lawrence* approach).

[13]*Stacey Mfg.*, 237 F.2d at 606. In *Stacey*, the court further stated that "the mere fact that [the Tax Court] is a court having jurisdiction in tax cases throughout the United States does not establish the Tax Court as superior in any aspect to United States District Courts." 237 F.2d at 606. *But see* Sirbo Holdings, Inc. v. Commissioner, 476 F.2d 981, 989 (2d Cir. 1973) (post-*Golsen* remand to the Tax Court to reconsider it without being bound by circuit court's prior decision). In *Sirbo*, the Second Circuit found that the prior case was not squarely in point, and observed that the Tax Court only needs to follow a court of appeals decision which is squarely in point.

B. *The* Golsen *Case*

Golsen v. Commissioner[14] involved an insurance policy designed primarily to provide tax advantages to policy owners. The Tenth Circuit, to which the Tax Court decision would be appealable, had already held against these policies on the ground that such policies lacked economic substance.[15] The Tax Court in *Golsen* applied the circuit court's past decision, and in doing so explicitly overruled *Lawrence*. The court stated:

> [I]t is our best judgment that better judicial administration requires us to follow a Court of Appeals decision which is *squarely in point* where appeal from our decision lies to that Court of Appeals and to that court alone. . . . [W]e think that where the Court of Appeals to which appeal lies has already passed upon the issue before us, *efficient and harmonious judicial administration* calls for us to follow the decision of that court.[16]

However, even after *Golsen*, the Tax Court continues to assert that it follows a court of appeals decision only in the interest of "harmonious judicial administration," and not because it is bound by the appellate court's decision.[17]

II. THE *LARDAS* CASE

In *Lardas*, the Service disallowed losses from two grantor trusts, but the notices of deficiency were issued more than three years after the grantor trusts' returns were filed. Since the taxpayers (*i.e.*, the trusts' grantors) had consented to an extension of the assessment period for their individual returns, there was no statute of limitations problem for differences related to the individuals' returns.[18] However, no similar extensions had been granted for the trusts' returns. The Service argued that the section 6501(a) requirement that any tax be assessed within three years after a return is filed applied to the return of the individual

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[14]54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

[15]Goldman v. Commissioner, 403 F.2d 776, 778 (10th Cir. 1968).

[16]*Golsen*, 54 T.C. at 757 (emphasis added). Based on *Golsen*, it is now possible for two taxpayers to have the same factual situation and receive different outcomes from the Tax Court. *See* Martin D. Ginsburg, *Making Tax Law Through the Judicial Process*, 70 A.B.A. J. 74, 75 (1984). For example, two airline pilots took similar tax deductions. One then moved to Florida. The Tax Court followed precedent and held for the New Yorker, but against the Floridian since there was no precedent in the Fifth Circuit. Fausner v. Commissioner, 55 T.C. 620 (1971) (involving the New York pilot); Hitt v. Commissioner, 55 T.C. 620 (1971) (involving the Florida pilot).

[17]In *Lardas*, the Tax Court stated:

> It should be emphasized that the logic behind the *Golsen* doctrine is not that we lack the authority to render a decision inconsistent with any Court of Appeals (including the one to which an appeal would lie), but that it would be futile and wasteful to do so where we would surely be reversed.

99 T.C. at 495.

[18]*Id.* at 490-91.

and not to the return of the trust.[19]

The taxpayer argued that the Ninth Circuit's decision in *Kelley v. Commissioner*,[20] holding that the relevant return for purposes of section 6501 was the return of the source entity and not that of the individual taxpayer, was controlling because the appeal of *Lardas* would lie to that circuit. As a result, the statute of limitations had run on the applicable return—the trust's return—and consequently the Service was barred from collecting the tax.[21]

Because *Kelley* involved an issue factually similar to that presented in *Lardas*, under the *Golsen* doctrine the Tax Court either needed to follow *Kelley* or find that *Kelley* was not squarely in point. In distinguishing *Kelley*, the Tax Court further defined the *Golsen* doctrine and explained when a prior case is to be treated as squarely in point.[22]

Kelley and *Lardas* were substantively dissimilar in that *Kelley* dealt with an S corporation, and *Lardas* dealt with grantor trusts. They were conceptually similar in that the income-generating enterprises in each (*i.e.*, the S corporation and grantor trusts) were not themselves taxpayers, but only pass-through entities; the actual taxpayers were the S corporation's shareholders and the trusts' grantors. Each entity was required to file an information reporting return; each payer of tax was required to file an income tax return on which was entered items of income, deduction, and credit derived from the entity.

The issue in *Kelley* was whether the statute of limitations was determined at the entity or the individual level; the issue in *Lardas* was the same. Accordingly, since the Ninth Circuit held that the measuring return was that of the entity, the Tax Court was faced—in a case in which appeal ran to the Ninth Circuit—with determining whether the Ninth Circuit's result was compelling when the entity was not an S corporation.

In *Kelley*, the Ninth Circuit determined that the applicable return for purposes of section 6501(a) was that of the S corporation. In order to reach this conclusion, the Ninth Circuit examined the interplay between sections 6037 and 6501(a). The court relied on section 6037 to find that a subchapter S corporation's return

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[19]If section 6501(a) applied to the trust returns, then the Service would be barred from determining a deficiency by the three-year statute, and the individuals would not be responsible for the tax. If the provision applied to the individual grantors' returns, however, then the statutory notice of deficiency would be timely.

[20]877 F.2d 756 (9th Cir. 1989). This case was subsequently overturned by the Supreme Court in *Bufferd*. *See supra* note 4.

[21]*Lardas*, 99 T.C. at 493-94.

[22]It was not necessary for the Tax Court to address the *Golsen* doctrine. In the past, the Tax Court had criticized the decision in *Kelley* and refused to apply it unless the appeal was to the Ninth Circuit and the case dealt specifically with a subchapter S corporation. *See* Fehlhaber v. Commissioner, 94 T.C. 863, 871 (1990) (rejecting *Kelley* and holding that the controlling return was that of the taxpayer and not the S corporation); Siben v. Commissioner, 69 T.C.M. 524, 524 (CCH), T.C.M. ¶ 90,435 at 2117 (P-H) (1990), *aff'd*, 930 F.2d 1034 (2d Cir. 1991) (rejecting the holding in *Kelley* for partnerships); Stahl v. Commissioner, 96 T.C. 798, 803 (1991) (distinguishing *Kelley* and refusing to apply it to partnerships even though the case was appealable to the Ninth Circuit); Bartol v. Commissioner, 63 T.C.M. 2324, 2327 (CCH), T.C.M. ¶ 92,141 at 658-59 (RIA) (1992) (rejecting *Kelley* for trusts).

must be treated similarly to an ordinary corporate return.[23] It concluded that since an ordinary corporation's income tax returns cannot be challenged after three years, then the same must be true for an S corporation's returns, and held that the Service cannot adjust a shareholder's return based on barred modifications to an S corporation's return.

The Tax Court explained, however, that section 6037 applies specifically to S corporations and not to the grantor trusts at issue in *Lardas*. This fact led the court to question whether the Ninth Circuit would interpret section 6501(a) the way it did in *Kelley* when section 6037 was inapplicable.[24]

Because of the possibility that the Ninth Circuit might interpret section 6501(a) differently in light of the fact that section 6037 was not involved, the *Lardas* court determined it was not bound by its *Golsen* rule.[25] Since the *Golsen* doctrine only requires the Tax Court to apply an appellate decision which is squarely in point, if a taxpayer shows another possible interpretation of the appellate court's decision then the Tax Court need not apply it.[26]

Though perhaps subtly, *Lardas* appears to signal a change in the Tax Court's approach in applying the *Golsen* rule. Prior to *Lardas*, the Tax Court determined that better judicial administration required it to follow decisions that were squarely in point.[27] After *Lardas*, the court now appears to focus on whether it would be "futile to decide this case as we think right."[28] "Better judicial administration" implies a deference to the appellate court, while "futile" implies that the court will follow precedent only if it is has no choice but to view the appellate case as involving the same issue on indistinguishable facts.[29]

The decision in *Lardas* implies that even if a prior circuit court decision is very similar to a case pending in the Tax Court, the circuit court case may not be considered squarely in point by the Tax Court if it believes that there is some chance that its own position will prevail. Thus, when either party in the Tax Court is faced with a seemingly favorable prior appellate decision in the circuit to which appeal will lie, the tactic in dealing with that decision is twofold. First, the party will naturally attempt to persuade the court that the rationale of the appellate precedent is persuasive. In addition, the favored party will try to demonstrate to the Tax Court that the appellate court would rely on the precedent. The party burdened by the earlier appeals decision will, of course, argue the other side of the coin.

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[23]The appellate court interpreted section 6037 to mean that "an S corporation's return must be treated, for purposes of the statute of limitations, as a return filed by a regular corporation." *Kelley*, 877 F.2d at 759.

[24]*Lardas*, 99 T.C. at 496-97.

[25]The dissent found that *Kelley* was controlling and squarely in point. It believed that the ability of the Service to adjust the tax liability at the source was the central issue in both cases and that the policy considerations which led to this finding should not be limited to subchapter S corporations. *Id.* at 504 (Gerber, J., dissenting).

[26]*Lardas*, 99 T.C. at 495-98.

[27]*Golsen*, 54 T.C. at 757.

[28]*Lardas*, 99 T.C. at 498.

[29]The facts in *Golsen* were almost identical to those in *Goldman*. Both cases involved the same issue, the same insurance company, and the same type of insurance policy. *Golsen*, 54 T.C. at 756.

Accordingly, the *Lardas* opinion puts both parties in the interesting position of attempting to predict accurately how the appellate court would decide the case to be appealed, and to persuade the Tax Court as to that outcome. That puts considerable importance on the *Lardas* opinion's treatment of what amounts to a squarely-in-point appellate decision.

Taken together, the majority opinion and the dissent suggest several views. One view is that for a case to be squarely in point, there must be no other acceptable alternative reading of the circuit court's decision, and it must be futile to decide the case in any other manner.[30] Another view, however, is that the Tax Court should find a case squarely in point if the rationale behind the two cases is similar and if it is likely that the appellate court will uphold the previous decision.

III. IMPACT OF *LARDAS* ON FORUM CHOICE

A number of factors combine to determine which of the three available fora is most favorable to the taxpayer, given the fact that the forum is ordinarily the choice of the taxpayer.[31] One of the primary factors involves the use of precedent—both that of the trial court and that of the court to which an appeal may lie. The *Lardas* gloss on the *Golsen* rule must now be taken into account by the taxpayer bent on litigation seeking redetermination of a proposed deficiency or a refund.

The residence of the taxpayer at the time the initial pleading is filed ordinarily determines the circuit court to which an appeal will lie.[32] Aside from the fact that occasionally an appeals court will give extraordinary deference to the Tax Court's perceived expertise in federal tax matters,[33] the taxpayer cannot simply assume the Tax Court will follow a prior decision of the controlling circuit to the same extent the federal district court would.[34]

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[30]*Lardas*, 99 T.C. at 495-98.

[31]A taxpayer can file tax cases in the Tax Court, the district court, or the Court of Federal Claims. Federal law does not require taxpayers who file in the Tax Court to pay any deficiency until the decision is rendered. I.R.C. § 6213. However, taxpayers that file in district court or the Court of Federal Claims must pay any deficiency and then sue for a refund. I.R.C. §§ 7421, 7422. In district court, the taxpayer or the government is entitled to a jury trial. This may be advantageous to taxpayers in cases that engender laypersons' sympathy, but may be beneficial to the government when the taxpayer is a large, profitable corporation, or when the case involves indications of fraud.

[32]*See supra* Part I.A. When the parties so stipulate, venue is available in any appellate court. I.R.C. § 7482(b)(2).

[33]Inverworld, Ltd. v. Commissioner, 979 F.2d 868, 875 (1992) ("[T]he Tax Court deserves some deference for its significant expertise."); Estate of Schnack v. Commissioner, 848 F.2d 933, 935 (1988) ("[D]eference to the Tax Court's expertise on narrow technical issues may be appropriate in some cases."); Elliotts, Inc. v. Commissioner, 715 F.2d 1241, 1245 (1983) ("We accord deference to the Tax Court's special expertise.").

[34]*See* Cottrell v. Commissioner, 72 T.C. 489, 494 (1979) (finding an appellate case not squarely in point when the taxpayers interest in the appellate case was a remainder interest subject to divestiture and the interest in the Tax Court case was a remainder interest not subject to divestiture), *rev'd*, 628 F.2d 1127 (8th Cir. 1980) (finding the case squarely in point). *See also* Jeffrey L. Patterson & Susan B. Hughes, *The Golsen Rule 18 Years Later*, 20 TAX ADVISER 122, 130 (1989) (concluding that the Tax Court often does not apply *Golsen* when urged to do so by the taxpayer).

The Tax Court willingly follows precedent when it agrees with the decision of the appellate court, but it is often reluctant to do so when it disagrees, particularly when there has been a split among the circuits. Therefore, although precedent from the relevant circuit may directly support a particular view, the Tax Court may nonetheless choose not to follow the decision if it has previously been reluctant to do so when deciding cases from other circuits. Other things being equal, a better option might be to bring the suit in district court, which is more likely to follow the precedent.

In this situation, even if the taxpayer manages to maximize forum choice, the taxpayer only gains an advantage in the lower court. If he files in district court, he must first pay the tax and then sue for a refund. Even if he wins his case in district court and the district court finds the appellate case controlling, the taxpayer may still be faced with an appeal by the Service. If the Service is likely to appeal, the taxpayer will be in the same position as if he had filed in the Tax Court except that he will have already paid the tax and will be going into the appeal having won in the district court.

For this reason, the main advantage of forum choice is in cases in which: (1) the Service is not using the case as a test case and is therefore likely to accept the lower court decision; or (2) the Service thinks its chances for success on appeal are very slim.[35]

Another option for forum choice advantage arises when there is a circuit court opinion that is not helpful to the taxpayer's case. In this regard, the Tax Court might be more willing than the district court to distinguish the case and not apply the decision of the circuit court. Since the Tax Court requires that the decision be squarely in point and will only be bound by the decision if there is no other acceptable reading of the decision, the taxpayer may have far more leeway in the Tax Court to distinguish the past decisions.

However, the taxpayer still only gains a forum advantage in the lower court. The appeal from the Tax Court decision lies to the same court as the appeal from the district court's decision. If the Service is serious about the issue, the taxpayer will still find himself in the court of appeals and that court will surely be more inclined to apply its own past decisions. Again, the real advantage of forum choice in this situation is that the taxpayer will not have to pay the tax up front and the Service may decide to appeal another case in another circuit as a test case.

IV. OTHER IMPLICATIONS OF THE *GOLSEN* DOCTRINE

Lardas and *Golsen* are attempts by the Tax Court to deal with a situation that is unique in our legal system. The Tax Court is a court of national jurisdiction, but its decisions are reviewed by circuit courts that have geographic, rather than

[35]The Internal Revenue Manual states, "Occasionally the appeals officer is faced with an issue where the 'Golsen Rule' is applicable. . . . In cases where the 'Golsen Rule' is applicable, the appeals officer should consult with District Counsel as promptly as possible to determine the amount of litigation activity in other circuits and other relevant information on the Service's posture on the issue(s) involved." I.R.M 8642.4.

national, jurisdiction. There is a need to balance the Tax Court's interest in applying the tax law uniformly with the traditional appellate interests of the circuit courts. The Tax Court believes that tax law should be applied uniformly throughout the nation regardless of the federal appellate court venue in which the taxpayer resides,[36] and appellate courts believe they have a right to expect that an inferior court will follow their decision.[37]

The Tax Court viewed the *Golsen* doctrine as a necessary exercise in "efficient and harmonious judicial administration."[38] It weighed efficiency against the court's position as a court of national jurisdiction, and recognized that it was inefficient to require a party to appeal a decision that was certain to be overturned on appeal.[39] It determined that judicial efficiency outweighed its own institutional and jurisdictional goals.

A. *Legislative Action*

When Congress originally created the predecessor to the Tax Court, the Board of Tax Appeals, as an executive agency,[40] it established review procedures for the board's decisions, and these procedures were intended to conform as much as possible to those of the district courts.[41] As the court in *Lawrence* suggests, Congress did desire uniformity regarding tax law, but Congress suggested that uniformity should be derived from consultations among circuit court judges, rather than by an independent Tax Court.[42] Congress believed both in the need for uniformity in the application of the tax law, and in the need to give deference

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[36]There is a question of why it is essential for tax laws to be more uniform than other national laws. Other federal statutes are interpreted by the appellate courts, and these statutes are often interpreted differently in each of the circuits. The Supreme Court reviews these circuit conflicts in its discretion and acts no differently in tax matters. Tax law would be equally uniform if the Tax Court applied precedent in a manner similar to the district courts. The Supreme Court would then, just as they do now, decide the national law when the circuits are in conflict. For a good discussion of this matter, see Holden, *infra* note 44, at 642.

[37]*Stacey Mfg.*, 237 F.2d at 606 (stating that the Tax Court is not lawfully privileged to disregard and refuse to follow an opinion of the court of appeals for that circuit); *Sullivan*, 241 F.2d at 47 (holding that a decision by the Tax Court that overrules a decision of the court of appeals is not consonant with the responsibilities of the respective tribunals involved); Holt v. Commissioner, 266 F.2d 757, 758 (2d Cir. 1955) ("We seem to play at hide-and-go-seek with the Tax Court."), *cert. denied*, 350 U.S. 982 (1956).

[38]*Golsen*, 54 T.C. at 757.

[39]The Tax Court stated in *Lardas*:

> In such a case, it would appear a virtual certainty that the nonprevailing party will appeal and secure a reversal from the Court of Appeals. In such a circumstance, the application of the *Lawrence* doctrine would ensure the waste of substantial resources, both of the taxpayer and of the court system, and, ultimately achieve nothing.

99 T.C. at 494.

[40]HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 59 (1989). In 1969, the Tax Court was converted from an executive agency to an Article I legislative court. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730-36 (1969).

[41]H.R. REP. No. 1, 69th Cong., 1st Sess. 19 (1926) ("The procedure is made to conform as nearly as may be to the procedure in the case of an original action in a federal district court.").

[42]*Id.* at 20.

to the circuit courts; however, it failed to provide any specific method for reconciling those two concerns.

One suggestion to solve the problem has been proposed by the Federal Courts Study Commission to reform the Tax Court.[43] In its report, the Commission recommended changing the Tax Court by creating an Article III appellate division of the Tax Court with exclusive jurisdiction over tax issues, or in the alternative, creating a national appellate court to oversee the Tax Court, while keeping the district courts as an alternative forum for tax disputes.[44] This proposal has not been embraced by Congress, however, and has found considerable opposition from tax practitioners.[45]

B. *Supreme Court Action*

The Supreme Court has been reluctant to settle the dispute between the Tax Court and the courts of appeals.[46] However, the Supreme Court recently addressed the jurisdiction and authority of the Tax Court in *Freytag v. Commissioner*,[47] and held that the Tax Court was an Article I court, similar to federal district courts.[48] In doing so, the court rejected an argument that the Tax Court was only a department under the executive branch.[49]

The Tax Court is now uniquely positioned in our legal system. It is not an Article III court, and it is not an executive agency. This gives some support to the Tax Court's assertion that it is a court of national jurisdiction with unique responsibilities and therefore is not required to follow the decisions of the appellate courts. If the Tax Court is not an Article III court, then maybe the appellate courts do not have direct control over the Tax Court.

Equally possible, however, is the idea that *Freytag* stands for the proposition

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[43]JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMM. 69-73 (1990) [hereinafter FEDERAL COURTS REPORT].

[44]*Id.* at 69-71. *See also* Martin D. Ginsburg, *Commentary: The Federal Courts Study Committee on Claims Court Tax Jurisdiction*, 40 CATH. U.L. REV. 631 (1991); *cf.* James P. Holden, *The Federal Courts Study Committee Has Not Made the Case for Its Proposed Overhaul of the Tax Litigation Process*, 40 CATH U.L. REV. 639 (1991).

[45]Holden, *supra* note 44; *ABA Tax Section Criticizes Centralized Tax Court Proposal*, TAX NOTES TODAY (Mar. 5, 1990) (LEXIS, FEDTAX, TNT file, elec. cit. 90 TNT 63-17) (letter from James P. Holden, American Bar Association, expressing the ABA's opposition to the proposal); *Nims' Statement Before ABA Tax Section Opposes National Court of Tax Appeals*, TAX NOTES TODAY (Feb. 2, 1990) (LEXIS, FEDTAX, TNT file, elec. cit. 90 TNT 30-9); FEDERAL COURTS REPORT, *supra* note 43, at 71-72.

[46]The Court declined certiorari in *Golsen*. 404 U.S. 940 (1971). In *Sullivan v. Commissioner*, 241 F.2d 46, 47 (7th Cir. 1957), *aff'd*, 356 U.S. 27 (1958), the appellate court strongly criticized the Tax Court stating "a decision by one judge of the Tax Court, which, in effect, overrules a decision of the court of appeals in the circuit in which both cases arose, is not consonant with the responsibilities of the respective tribunals involved." Though the Supreme Court granted certiorari, it did not address the jurisdictional issue.

[47]111 S. Ct. 2631, 2645 (1991).

[48]*Freytag*, 111 S. Ct at 2645-46; *see* Lawrence M. Stratton, Jr., Note, *Special Trial Judges, the Tax Court and the Appointments Clause: Freytag v. Commissioner*, 45 TAX LAW. 497 (1992).

[49]*Freytag* was only a five to four decision. The dissent found the Tax Court to be a department in the executive branch and the Chief Judge to be the department head. *Freytag*, 111 S. Ct. at 2651 (Scalia, J., dissenting).

that the Tax Court's function is similar to that of district courts. As the Supreme Court said in *Freytag:* "The Tax Court's function and role in the federal judicial scheme closely resembles those of the federal district courts, which indisputably are 'Courts of Law.' Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs."[50] If the Supreme Court views the Tax Court as a court similar to the district courts, one consequence of that interpretation is that the Tax Court may be expected to apply the law of appellate courts just as a district court would.[51]

C. *Tax Court's Jurisdiction*

Another policy concern is that the Tax Court may have actually weakened its jurisdiction through its attempt to consolidate tax policy. Because the Tax Court might not follow a favorable appellate decision of the circuit court to which the case is appealable, taxpayers may choose other fora. As taxpayers seek relief in other courts, the Tax Court will hear fewer of the conflicting cases and have less ability to create a uniform body of tax law. In those cases in which taxpayers choose to litigate in the Tax Court first (in order to obtain the advantage of not prepaying the tax) and then appeal, the court will likely be viewed more as a preliminary hurdle to litigation rather than as a final arbiter of choice.

V. CONCLUSION

The Tax Court's recent decision in *Lardas* clarifies when the court will apply circuit court decisions, and suggests that it will apply them less frequently. Although a less deferential standard in applying precedent from circuit courts will promote uniformity in Tax Court decisions, it is unlikely to have a significant impact on the broader body of *all* case law, because decisions of the Tax Court are appealable to twelve different courts of appeals—each of which is comprised of a number of different judges. For this reason, efficient judicial administration and concerns for uniformity would both be better served by a standard that is more, not less, inclined to honor precedent.

Donald B. Tobin

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[50]*Freytag*, 111 S. Ct. at 2645.

[51]Though outside the scope of this Note, *Lardas* may not only be a case refining the *Golsen* doctrine, but may also be an attempt by the Tax Court to reassert its independence after the Supreme Court's decision in *Freytag*. This idea is strengthened by the Tax Court's recent decision in *Estate of Mueller v. Commissioner*, in which the Tax Court again reasserted its authority. 101 T.C. No. 37 at 4496 (CCH), 281 (RIA) (Dec. 13, 1993). In *Mueller*, the Tax Court held that it had the power to consider the affirmative defense of equitable recoupment and rejected past cases that suggested the court did not have this authority. *Id.* at 4501 (CCH), 286 (RIA). In addition, the concurrence stressed that the Tax Court is the court of choice for tax disputes and that it "exercise[s] a portion of the judicial power of the United States." *Id.* at 4502 (CCH), 286 (RIA) (Halpern, J., concurring).