# The Misapplication of the Golsen Rule in United States Tax Court Small Cases

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**ABSTRACT**

The United States Tax Court exists to adjudicate taxpayer disputes . For too long, the application of the Golsen Rule contradicts the Tax Court's mission in small cases. The Golsen Rule provides the Court with the use of precedent that has been established within that particular circuit to the case being adjudicated. The utilization of precedent is also applied in the small "S" court cases. Small cases are those in dispute that are equal to or less than $50,000 and are brought before the court at the request of the taxpayer with the caveat that the taxpayer may not appeal the decision. As the Golsen Rule requires that the Tax Court apply the ruling of other cases in that circuit to the small "S" case, the utilization of precedent may have the potential effect of the Court limiting a thorough examination of the taxpayer's issues. In the "S" case, the taxpayer usually is pro-se (self-represented) and the rules of evidence are softened to accommodate the lack of legal knowledge of the taxpayer. With less tax sophistication, frequently less financial knowledge, fact patterns that are unique but not well explained and coupled with no opportunity for appeal, the application of the "Golsen Rule" may be unjust and a potential denial of Due Process to the taxpayer.

Keywords: Golsen Rule, Small Tax Court Procedure, Due Process, Tax Court Mission, Relaxed Rules to Evidence, Tax Court, Precedent, "S" Case

## INTRODUCTION

The United States Tax Court has been applying the *Golsen* rule to its cases for more than forty years.[1] Generally speaking, the *Golsen* rule requires that if the United States Court of Appeals to which an appeal would be made in a given case before the Tax Court has already established precedent on a legal issue to be decided by the Tax Court, then the Tax Court will adhere to that precedent in making its ruling.[2] There appears to be no dispute as to the *Golsen* rule's applicability to regular Tax Court cases since those cases are appealable to the Court of Appeals; however, the Tax Court has also historically applied the *Golsen* rule to those cases in which the small case designation (commonly calls "S cases") has been elected, even though there is no appeal from these cases.[3] This paper will examine the apparent justification for applying the *Golsen* rule to S cases and ultimately recommend that this practice should end.

## CHAPTER ONE: THE UNITED STATES TAX COURT

### Brief Overview

The United States Tax Court is a court of record established by Congress under Article I of the United States Constitution.[4] Upon a determination of a tax deficiency by the Commissioner of Internal Revenue, the taxpayer may dispute the tax deficiency in the Tax Court before paying any disputed amount.[5] There are nineteen presidentially appointed judges of the Tax Court, and the court also makes use of "senior judges" (former judges whose terms have ended) and "special trial judges" (appointed by the chief judge of the Tax Court).[6] All of the judges are deemed to be experts in the field of tax.[7] With respect to regular Tax Court cases, either the taxpayers or the Commissioner may take an appeal to the appropriate circuit of the United States Court of Appeals, which is generally determined utilizing the circuit in which the taxpayer's residence or principal place of business resided when the petition was filed with the Tax Court.[8]

1. Saul Mezei and Joseph Judkins, *A Square Peg in a Round Hole: The Golsen Rule in S Cases*, (2012), 347, available from www.morganlewis.com/~/media/files/docs/archive/golsen_sarticle_6842pdf.ashx (accessed December 9, 2015).
2. *See Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).
3. Mezei, *Square Peg*, 347.
4. United States Tax Court, *About the Court*, available from www.ustaxcourt.gov/about.htm (accessed December 9, 2105).
5. Ibid.
6. Ibid.
7. Ibid.
8. Ibid.

**Small Cases**

Of particular importance to the issue at hand are the Tax Court's S cases. In 1969, Congress amended the Internal Revenue Code in order to create a new proceeding within the Tax Court designed for cases with relatively small amounts in dispute.[9] Congress created I.R.C. Section 7643 as part of the Tax Reform Act of 1969, which permits taxpayers, with the consent of the Tax Court, to have deficiency cases decided under relaxed rules of procedure and evidence if the deficiency and penalties in dispute do not exceed $50,000 for any single tax year.[10] Such cases are considered "small cases" (and denoted with an "S" at the end of their docket numbers) and commonly known as S cases, and their relaxed rules of procedure and evidence can serve as a benefit to those taxpayers who proceed *pro se*.[11] Given the relatively small amount of deficiencies and penalties which may be in dispute in order for a case to qualify for a S case proceeding, it may not make economic sense for the taxpayer to be represented by counsel as professional fees may make up a disproportionally large amount of any potential savings. By removing at least some of the need for an attorney or an authorized professional to help the taxpayer navigate the procedural and evidentiary map, *pro se* taxpayers may stand a greater chance of success in S cases than they otherwise would.[12]

However, I.R.C. Section 7463(b) provides the trade-off for the relaxed rules of procedure and evidence. Section 7463(b) provides that "[a] decision entered in any case in which the proceedings are conducted under this section shall not be reviewed in any other court and shall not be treated as a precedent for any other case."[13] The trade-off is clear – decisions in S cases may not be appealed or used as future legal precedence. The Tax Court's decisions in these cases are final, and since they do not have any precedential value, the judges are seemingly granted broad discretion in its decision-making from case to case.

The Tax Court's decisions in S cases are considered "summary opinions," which is consistent with Section 7463(b)'s requirement that the Tax Court in an S case enter a decision "together with a brief summary of the reasons therefore."[14] Generally speaking, the cases are tried by one of the special trial judges.[15]

The number of S cases has grown dramatically over the years.[16] Cases in which the taxpayer has made an S case election now make up nearly half of the total cases filed in the Tax Court, with an even greater percentage of cases eligible for such treatment.[17]

**Legal Precedent**

While the Tax Court is a "national court," decisions which arise from the Tax Court's regular procedure cases may be appealed to the Court of Appeals.[18] As a result, there can be

9. Mezei, *Square Peg*, 347.
10. Mezei, *Square Peg*, 347.
11. Mezei, *Square Peg*, 347.
12. Mezei, *Square Peg*, 348.
13. I.R.C. § 7463(b).
14. Ibid.
15. Mezei, *Square Peg*, 348.
16. Ibid.
17. Ibid.

confusion with respect to whether the Tax Court should follow its own precedent in making its decisions or that of the Court of Appeals where an appeal of the Tax Court's decision would lie. The Tax Court has addressed the issue in at least two cases – *Lawrence v. Commissioner*[19] and *Golsen v. Commissioner*.[20] These cases are examined further below.

*Lawrence v. Commissioner*

In *Lawrence*, the Tax Court considered whether the Commissioner was barred by the applicable statute of limitations from collecting a deficiency against the petitioners caused by an excessive omission from the petitioner's gross income.[21] The Tax Court's precedent suggested that the statute of limitations was not a bar to the assessment and collection of the deficiency, but a then-recent decision by the Court of Appeals for the Ninth Circuit (to which the case could go on appeal) suggested precedent within the Court of Appeals to the contrary.[22]

The Tax Court set about outlining its rationale as to why it should follow its own precedent and not that of the Court of Appeals for the Ninth Circuit. The Tax Court noted that it is "a court of national jurisdiction" and in order "to avoid confusion should follow its own honest beliefs until the Supreme Court decides the point."[23] In other words, the Tax Court believed that its mandate was to decide cases "as it thought right" regardless of any contrary opinion by the applicable intermediate appellate court.[24]

> The *Lawrence* court best summarized its position on the issue in the following paragraph:
> The Tax Court has always believed that Congress intended it to decide all cases uniformly, regardless of where, in its nationwide jurisdiction, they may arise, and that it could not perform its assigned functions properly were it to decide one case one way and another differently merely because appeals in such cases might go to different Courts of Appeals. Congress, in the case of the Tax Court, "inverted the triangle" so that from a single national jurisdiction, the Tax Court appeals would spread out among 11 Courts of Appeals, each for a different circuit or portion of the United States. Congress faced the problem in the beginning as to whether the Tax Court jurisdiction and approach was to be local or nationwide and made it nationwide. Congress expected the Tax Court to set precedents for the uniform application of the tax laws, insofar as it would be able to do that.[25]

The decision of the *Lawrence* court was clear – it determined that the Tax Court should adhere to its own precedent in deciding a legal issue in a case before it, even in the event that the applicable appellate court may have already opined on such legal issue to the contrary. The *Lawrence* court recognized its place as a national court and opined that its role was to establish uniformity of decisions within the Tax Court itself, effectively ignoring any precedent that may have been developed by appellate circuit courts. As the *Lawrence* court noted, it would be

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18. Ibid.
19. 27 T.C. 713 (1957).
20. 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).
21. *See Lawrence*, 27 T.C. at 713.
22. Ibid., 717.
23. Ibid., 719.
24. Ibid., 718.
25. Ibid., 719.

improper for it to "decide one case one way and another differently merely because appeals in such cases might go to a different Courts of Appeals."[26]

*Golsen v. Commissioner*

However, the Tax Court established a significant exception to its holding in *Lawrence* with its decision in *Golsen*. In *Golsen*, the petitioner purchased a life insurance policy from the Western Security Life Insurance Company and attempted to deduct a $12,441.40 payment made to Western Security under I.R.C. Section 163 as "interest paid . . . on indebtedness."[27] The Commissioner disallowed the deduction and as a result determined a deficiency of $2,918.15.[28] The Tax Court ruled in favor of the Commissioner.[29]

In crafting its decision, the Tax Court relied heavily upon the precedent established by the Court of Appeals for the Tenth Circuit in *Goldman v. United States*.[30] The *Goldman* case involved the same insurance company and a very similar fact pattern to that in *Golsen*.[31] The Tax Court found the *Goldman* case to be on point, but the court's analysis of the precedence established because *Goldman* and *Golsen* are in the same judicial circuit is what makes the case notable. The Tax Court noted it was "in any event bound by *Goldman* since it was decided by the Court of Appeals for the same circuit within which the present case arises."[32] The Tax Court recognized that its decision was in contrast to its holding in the *Lawrence* case, but it created the following distinction:

> Notwithstanding a number of the considerations which originally led us to that decision [in *Lawrence*], it 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. Section 7482(a), I.R.C. 1954, charges the Court of Appeals with the primary responsibility for review of our decisions, and we 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.[33]

However, the *Golsen* court did not completely eradicate the purpose of the Tax Court's decision in *Lawrence*, which was in part to promote a consistent application of the Internal Revenue Code. The Golsen decision further opined that:

> We shall remain able to foster uniformity by giving effect to our own views in cases appealable to courts whose views have not yet been expressed, and, even where the relevant Court of Appeals has already made its views known, by explaining why we agree or disagree with the precedent that we feel constrained to follow.[34]

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26. Ibid., 718.
27. *Golsen*, 54 T.C. at 752.
28. Ibid., 744.
29. Ibid., 759.
30. 403 F.2d 776 (C.A. 10).
31. *Golsen*, 54 T.C. at 757.
32. Ibid.
33. Ibid., 758.
34. Ibid., 758.

Thus was born what has become known as the *Golsen* rule – in the instance when the Court of Appeals to which an appeal from a Tax Court decision would be made in a particular case has already established legal precedent on an issue, the Tax Court will follow such legal precedent in making its ruling. However, while the Tax Court is required to reach the same conclusion as the Court of Appeals, it is not required to adhere to the same analysis utilized by the appellate court in making its ruling, and in fact it may express disapproval with the legal precedent it is required to follow.[35]

The reason behind the *Golsen* rule is clear – it is one of judicial efficiency.[36] Quite simply, if the Tax Court takes a position on an issue that is contrary to precedent established by the Court of Appeals for the circuit in which the case resides, then the Tax Court process is an exercise in futility and a waste of time and money since the losing party would appeal and the Tax Court would be immediately overruled.[37]

The applicability of the *Golsen* rule to regular Tax Court proceedings is not in dispute – such regular cases are appealable, thereby invoking the purpose and intent of the *Golsen* rule. However, as previously discussed, the Tax Court's S cases are not appealable, yet the Tax Court has also applied the *Golsen* rule to S cases.[38]

## CHAPTER TWO: THE *GOLSEN* RULE AND S CASES

### Current Use of the *Golsen* Rule in S Cases

The primary rationale for the adoption of the *Golsen* rule in Tax Court cases was to avoid an essentially automatic reversal of a Tax Court decision by the Court of Appeals. In light of this rationale, it would seem that the *Golsen* rule would be inapplicable to S cases since such cases cannot be appealed to the Court of Appeals. However, this does not appear to be the current practice.

To the contrary, the Tax Court has consistently applied the *Golsen* rule in S cases, from as far back as 1972 to the present day.[39] For example, in the recent S case *Beech v. Commissioner*,[40] the Tax Court considered whether the petitioner received taxable income when she received a death benefit distribution of $35,358 from her mother's individual retirement account.[41] The distribution from her mother's individual retirement account was distributed

35. Ibid.
36. Mezei, *Square Peg*, 348.
37. The Tax Court in *Lardas v. Commissioner*, 99 T.C. 490 (1992), more recently expounded that the holding in *Lawrence* would be impracticable "where a case in the Tax Court is appealable to a Court of Appeals that previously has taken a position on precisely the same issue." The *Lardas* court further explained that the *Golsen* rule does not mean that the Tax Court "[lacks] 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 [the Tax Court] would surely be reversed."
38. Mezei, *Square Peg*, 348.
39. Ibid., 350.
40. T.C. Summary Opinion 2012-74.
41. Ibid.

directly to the petitioner, and the petitioner then deposited the funds into her own individual retirement account.[42] Petitioner maintained that the distribution should be tax-free because "rollover treatment" should be afforded to the transfer.[43] The Tax Court held that such treatment could not be afforded to the transfer and found that the entire $35,358 distribution was taxable income to the petitioner.[44]

In the Tax Court's summary opinion, it evaluated one of the petitioner's arguments for excluding the distribution from taxable income, which involved the doctrine of substantial compliance.[45] Rather than evaluating the use of the doctrine in light of the Tax Court's treatment, the *Beech* court instead considered the use of the doctrine in light of its treatment by the Court of Appeals for the Ninth Circuit, which is the appellate court that would have heard an appeal of the decision if it was not an S case.[46] Additionally, the Tax Court's decision included a footnote which read as follows:

> But for sec. 7463(b), an appeal of this case would lie with the Court of Appeals for the Ninth Circuit. See sec. 7482(b)(1)(A). Therefore, the Court follows the law of that circuit. See Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971).[47]

In another recent Tax Court S case, the Tax Court again invoked the *Golsen* rule even though no appeal could be taken from its decision. In *Bakken v. Commissioner*,[48] the petitioner was a police officer who was injured in the line of duty.[49] For a period of time, the petitioner received disability benefits, but these benefits were later changed and classified as retirement distributions by his employer.[50] Notwithstanding, the petitioner did not report, as taxable, the benefits received, and the Service determined a $5,834 income tax deficiency resulting from the benefits.[51]

The Tax Court found in favor of the petitioner, relying primarily upon a decision from the Court of Appeals for the Ninth Circuit.[52] The Tax court included both a footnote and language within its decision that made it clear that it relied upon precedent established by the Court of Appeals pursuant to the *Golsen* rule. In its footnote, the Court provided that:

> Although under sec. 7463(b) this case is not appealable, we afford petitioners the same result that they would have obtained in their particular appellate circuit, which in this case is the Court of Appeals for the Ninth Circuit.[53]

42. Ibid., 3.
43. Ibid., 5.
44. Ibid., 8.
45. Ibid., 6.
46. Ibid., 7.
47. Ibid.
48. T.C. Summary Opinion 2011-55.
49. Ibid., 2.
50. Ibid., 3.
51. Ibid., 2.
52. Ibid., 7.
53. Ibid., 7.

The Court went even a step further within the body of its decision. The Court specifically provided that it was bound by the *Golsen* rule, stating that "[u]nder Golsen v. Commissioner . . . we follow the Court of Appeals [for the Ninth Circuit's] decision in Picard v. Commissioner . . . ."[54]

These cases are not aberrations. Moreover, the use of the *Golsen* rule in S cases is not simply academic – it can have a significant and meaningful impact on the outcome of those cases, thereby making it a matter of importance as to whether the rule should be applicable.

**Impact of the Golsen Rule on S Cases**

There are two recent cases that illustrate the relevance of determining whether S cases should be bound by the *Golsen* rule like regular Tax Court cases: *Lantz v. Commissioner*[55]and *Rand v. Commissioner*.[56]

In *Lantz*, the petitioner's former husband, a dentist, was arrested for Medicare fraud, convicted, and imprisoned.[57] The petitioner and her former husband were married for only a few years, and there was no evidence that she was aware of her husband's fraudulent activity.[58] The petitioner and her husband filed a joint return, and the Internal Revenue Service, after determining that the couple's last joint income tax return before the husband's arrest understated their federal income tax liability, assessed them more than $900,000 in additional income tax, penalties, and interest.[59] The husband died prior to the Internal Revenue Service collecting the assessment, and as a result the Service applied an income tax refund due to the petitioner against her joint and several liability with respect to the assessed amount.[60] The petitioner then applied for innocent-spouse relief, but the Service denied her request because the petitioner had not filed for such relief within two-years from the date that the Service had sent her the notice of intent to file a levy on her and her husband's property.[61] Treasury had previously adopted a regulation that imposed such a two-year deadline on filing for innocent-spouse relief.[62]

The Tax Court invalidated the regulation which imposed the two-year deadline for filing for innocent-spouse relief, and the Service appealed the case to the Court of Appeals for the Seventh Circuit.[63] The Court of Appeals ultimately reversed the Tax Court and upheld the two-year limitation imposed by the regulation.[64]

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54. Ibid., 8.
55. 132 T.C. 131 (2009), *rev'd*, 607 F.3d 479 (7th Cir. 2010).
56. 141 T.C. 376 (2013).
57. *Lantz*, 132 T.C. at 3.
58. Ibid.
59. Ibid.
60. Ibid., 4.
61. Ibid., 5.
62. Ibid., 6.
63. Ibid., 33.
64. 608 F.3d 479 (2010). The Service has since issued Notice 2011-70, 2011-32 I.R.B. 135, in which the Service elected to enlarge the period of time for taxpayers to request innocent-spouse relief under Section 6015(f).

Although the Service eventually issued a Notice that it would no longer enforce the two-year limitation, the difference in opinion between the Tax Court and the Court of Appeals for the time period between the Tax Court's decision and the filing of the Notice could have caused different outcomes for taxpayers, particularly since almost half of the claims involving Section 6015(f) claims are S cases. If a similar case as *Lantz* came before the Tax Court as a S case in the Seventh Circuit, and if the Tax Court did not follow the *Golsen* rule and used its own precedence, then the taxpayer would not be bound by the two-year limitation; on the other hand, if the Tax Court did follow the *Golsen* rule, then the two-year limitation would apply. It is obvious that a taxpayer could have vastly different results in a S case depending upon whether the *Golsen* rule is applicable.

The Tax Court's recent decision in *Rand* illustrates a similar problem. In *Rand*, the petitioners and the Service disagreed on the amount of I.R.C. Section 6662 accuracy-related penalty due from the petitioners.[65] The petitioners had filed a joint income tax return improperly claiming three refundable credits: an earned income credit, an additional child tax credit, and a recovery rebate credit.[66] Upon the elimination of the aforementioned credits, the petitioner and the Service agreed that the petitioner's tax liability was $144.00.[67] However, while the parties agreed that an accuracy-related penalty under Section 6662(a) was applicable, they did not agree on how the penalty should be calculated.[68]

Section 6662(a) imposes the accuracy-related penalty on any underpayment of tax, and Section 6664(a) defines "underpayment" as the amount by which a tax imposed by the Internal Revenue Code exceeds the excess of the sum of the amount shown as tax by the taxpayer on his return, plus the amounts not so shown previously assessed, over the amount of rebates made.[69] The parties were in dispute as to the amount of the "underpayment" for calculation of the accuracy-related penalty, with the Service taking the position that the disallowed refundable credits should be taken into account when considering the tax shown on the petitioner's tax return, but that that the tax shown on the return could be less than zero (i.e., a negative amount).[70]

The Tax Court concurred that that the disallowed refundable credits should be taken into account when ascertaining the income tax shown on the return, but it held that the disallowed refundable credits could not reduce the petitioner's tax shown on their tax return below zero.[71] As a result, the calculation of the accuracy-related penalty was limited by using no less than zero for the amount shown on the petitioner's tax return.[72]

The Service ultimately elected to accept the Tax Court's decision and agreed thereafter in its Notice 2014-007 to calculate the accuracy-related penalty under Section 6662(a) as outlined by the Tax Court, at least "pending any future guidance."[73] However, if the Service had instead elected to pursue an appeal of the Tax Court's decision to the Court of Appeals (or if it does so in

65. *Rand*, 141 T.C. at 377.
66. Ibid.
67. Ibid., 380.
68. Ibid.
69. I.R.C. § 6662(a).
70. *Rand*, 141 T.C. at 380.
71. Ibid., 405.
72. Ibid., 405.
73. *See* Notice, CC-2014-007.

a future case as its "pending any future guidance" caveat suggests that it may), and if the decision issued by the Court of Appeals reversed the Tax Court, then whether the Tax Court would utilize the *Golsen* rule for future S cases would again become a very relevant issue.

The type of refundable credits in the *Rand* case would likely be overwhelmingly relevant in S cases given the relatively low-income taxpayers who would utilize such credits. If the Service had elected to appeal the Tax Court's decision in *Rand* and the Court of Appeals for the relevant circuit had reversed the Tax Court, and given that the majority of these cases would be heard as S cases, then whether the Tax Court would have applied the *Golsen* rule in S cases could have resulted in differing outcomes. As it stands, the Service could always withdraw its Notice accepting the Tax Court's accuracy-penalty calculation, and then appeal a Tax Court case that utilizes the same methodology as the *Rand* court, so whether the *Golsen* rule is applicable to S cases could still be relevant even to this particular issue. It is clearly a matter that needs to be resolved.

## CHAPTER THREE: RATIONALE FOR APPLYING THE *GOLSEN* RULE IN S CASES

There are certainly logical arguments to be made that the Tax Court should apply the *Golsen* rule in S cases, many of which are set forth in a recent article on the issue titled *A Square Peg in a Round Hole: The Golsen Rule in S Cases* written by Saul Mezei and Joseph Judkins.[74] However, all of these arguments are clearly rebuttable.

### The Tax Court's Legal Precedent Should Remain the Same

The first argument presented in the Mezei and Judkins paper is that an S election should not serve to change the legal precedent that the Tax Court would generally apply, i.e., the precedent created by the application of the *Golsen* rule.[75] This argument falls short. As previously discussed, *Golsen* is clear that the primary purpose of its holding is to ensure judicial efficiency in Tax Court cases by avoiding Tax Court decisions which will most assuredly be reversed by an appeal to the Court of Appeals. Section 7463(b) makes it clear that decisions in S cases are not subject to appeal. As such, there is no legal requirement that creates any precedent for the Tax Court to apply the *Golsen* rule to S cases.[76]

The Tax Court has taken its own holding in the *Golsen* case and misapplied it. The *Golsen* case was not an S case with no right of appeal – to the contrary, it was a regular Tax Court case that was appealable to the Court of Appeals. The *Golsen* court explicitly held that "better judicial administration requires [it] to follow a Court of Appeals decision which is squarely in point where appeal from [the Tax Court's] decision lies to that Court of Appeals and to that court alone."[77] This is not the case with an S case, which Congress explicitly provided is a non-appealable case. The Tax Court in *Golsen* made it clear that the *Golsen* rule would apply only to appealable Tax Court cases, and any interpretation otherwise is interpreting the *Golsen* decision in the wrong light.

74. Mezei, *Square Peg*, 347.
75. Ibid., 351.
76. Ibid., 352.
77. *Golsen*, 54. T.C. at 758.

**Similarly Situated Taxpayers Should be Treated the Same**

The second argument set forth in the Mezei and Judkins paper is that the application of the *Golsen* rule in S cases would permit similarly situated taxpayers to be treated the same.[78] For example, if two neighbors have nearly identical factual scenarios, but one neighbor has a $50,000 deficiency while the other has a $51,000 deficiency, the neighbors should not have different legal precedent applicable to their respective cases simply because one neighbor may have his case decided through the S case procedure while the other may have his case decided via the regular Tax Court process.[79] To allow otherwise, the argument goes, would promote forum shopping by taxpayers between the S case procedure and the regular case procedure.[80]

The simple response to this argument is that this type of "forum shopping" is what Congress intended by creating the S case framework.[81] It is not the Tax Court's role to make sure that all of the petitioners in the same circuit are treated similarly. Notwithstanding, by enacting a rule across all S cases (i.e., that the *Golsen* rule should not be applied), the Tax Court is indeed treating similarly situated taxpayers the same – all taxpayers with tax deficiencies within the S case threshold would be treated the same on a national level, with the same jurisdictional cap on deficiency cases and bound by the S case rules. In fact, there is an argument to be made that the court system already encourages forum shopping, even by those taxpayers in the same circuit, since rather than filing a case in the Tax Court prior to an assessment (and then being subject to the Tax Court jurisdiction and perhaps the applicable Court of Appeals appellate jurisdiction for the taxpayer's circuit), the taxpayer could instead pay the proposed deficiency, file a refund claim, and then ultimately bring suit in the United States Court of Federal Claims, which follows the precedent of the Court of Appeals for the Federal Circuit, or bring suit in the United States District Court.[82]

Since the current judicial system (aside from any consideration regarding S cases) permits "forum shopping," and since this may also result in different treatment between taxpayers in different economic situations (i.e., those taxpayers who can afford to pay the deficiency and then sue for a refund versus those taxpayers who cannot afford to pay the deficiency and must bring suit in the Tax Court), the Tax Court should not concern itself with rectifying this situation by applying the *Golsen* rule in S cases in order to discourage forum shopping with the Tax Court itself.

**Less Sophisticated Taxpayers Could Be Harmed**

The third argument presented in the Mezei and Judkins paper is that not applying the *Golsen* rule in S cases would provide an advantage to sophisticated taxpayers or those taxpayers

78. Ibid., 351.
79. Ibid.
80. Ibid.
81. Ibid., 352; Carlton Smith, *Does the Tax Court's Use of Its Golsen Rule in Unappealable Small Tax Cases Hurt the Poor?*, (December 2008), available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321464 (accessed December 9, 2015).
82. Ibid.

represented by counsel.[83] Taxpayers could manipulate payment of their deficiency to essentially allow forum shopping between S case procedures and regular case procedures.[84]

The forum shopping issue was addressed above – it is not an issue that the Tax Court should concern itself with. Congress has seemingly blessed the ability of taxpayers to engage in forum shopping, and it is not the Tax Court's place to stifle it by incorporating the *Golsen* rule in S cases.

**The Court Should Foster Predictability**

The fourth argument presented in the Mezei and Judkins paper is that if the *Golsen* rule is applied to S cases then it will lead to greater predictability with respect to the law that will be applied to a taxpayer's case.[85]

This argument fails because S case decisions may not be appealed. As a result, there is no truly effective means of ensuring that Tax Court judges follow any particular body of law in S cases, whether the *Golsen* rule was applicable or not. These judges would continue to have great freedom in crafting their decisions.[86]

**Maintain Consistency with Past Practice**

The fifth argument presented in the Mezei and Judkins paper is that continuing to apply the *Golsen* rule in S cases will maintain consistency with past practice over the past forty years.[87] This is perhaps the weakest argument yet.

Continuing to apply the *Golsen* rule because it has been done in the past is quite frankly not a reason at all – it is akin to the "we should keep doing it this way because that is the way that we have always done it" argument, without truly evaluating whether there is a good reason to keep doing so. Times change and further analysis may sway view and decision-making. If applying the *Golsen* rule to S cases is not the best choice for a host of reasons, then the Tax Court cannot be afraid to question its past practice and right a wrong, rather than continuing a bad practice that could have far-reaching negative impact.

**Prevent Abusive Removal Attempts**

The last argument presented in the Mezei and Judkins paper is that in the event that the *Golsen* rule is not applicable to an S case, but the appellate authority that would otherwise be applicable to the case is in favor of the Service, then the Service would be motivated to try and remove the S designation.[88] Besides potentially losing the benefit of the less favorable precedent, the taxpayer could also potentially lose the benefit of relaxed rules of procedure and evidence in making his case.[89]

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83. Mezei, *Square Peg*, 351.
84. Ibid.
85. Ibid., 352.
86. Ibid.
87. Ibid.
88. Ibid.
89. Ibid.

Ultimately, the Tax Court has the discretion to deny the Service's motion to remove the S designation, which it may do in the event that it feels that the Service's removal would be unduly prejudicial to the taxpayer.[90] The Tax Court can protect taxpayers from unjustified attempts by the Service to try and remove S case designation by simply denying any such efforts. Given the protection afforded to taxpayers against an improper removal, this is certainly not a legitimate reason to apply the *Golsen* rule to S cases.

## CHAPTER FOUR: CONCLUSION

### The Eleventh Circuit

The Eleventh Circuit adheres to the *Golsen* rule, and the Tax Court applies the *Golsen* rule to its regular cases which are appealable to the Court of Appeals for the Eleventh Circuit.[91] Additionally, the Tax Court has applied the *Golsen* rule in S cases which, but for their designation as an S case, would be appealable to the Court of Appeals for the Eleventh Circuit.[92]

### Recommendations

It is clear based upon the above analysis that there are no compelling reasons for the Tax Court to apply the *Golsen* rule in S cases. So what is the solution?

Carlton Smith, former Clinical Associate Professor of Law at the Benjamin N. Cardozo School of Law, recommends that the Tax Court institute a taxpayer-friendly rule which he believes would benefit the poor and middle class.[93] Smith recommends in S cases that the Tax Court judges choose either the precedent of the Tax Court or the precedent of the circuit to which the case would otherwise be appealable under a regular Tax Court case, whichever would be more favorable to the taxpayer.[94] Smith's justification is that a split in authority suggests that the issue is a "close call" and should, therefore, favor the taxpayer, and it would avoid the need for the taxpayer to retain an attorney or professional authorized to practice before the Tax Court in order to navigate the system to obtain the most favorable precedent for his client.[95]

Mezei and Judkins prudently dismiss that recommendation.[96] Permitting the Tax Court judge in an S case to advocate for the taxpayer and choose precedence that, in the judge's opinion, is most advantageous to the taxpayer destroys the Tax Court's judicial integrity.[97] Such a power would rob the Service of its right to have Tax Court disputes resolved by an unbiased arbiter – one who can look objectively at the law and make an objective decision.[98] Despite

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90. Ibid.
91. *See Campbell v. Commissioner*, 134 T.C. 20 (2010); *see also Boree v. Commissioner*, T.C. Memo. 2014-85.
92. *See Cutts v. Commissioner* and *American Tank & Vessel, Inc. v. Commissioner*, T.C. Summary Opinion 2004-8.
93. Smith, *Hurt the Poor*, 10.
94. Ibid.
95. Ibid., 11.
96. Mezei, *Square Peg*, 353.
97. Ibid.
98. Ibid.

Smith's best intentions and attempt to develop a unique solution, this particular solution would undercut the credibility of the Tax Court.

Change is rarely easy, particularly with a judicial system that is set in its ways. Regardless of how long the Tax Court may have been doing the "wrong" thing by applying the *Golsen* rule in S cases, it is time to correct it. Doing so will make the Tax Court consistent with its own ruling in Golsen and allow it to comply with the intent of Section 7463.

The Tax Court should be clear about its stance on this issue – the Tax Court should amend its rules for S cases to make it clear that the *Golsen* rule will not be applied in S cases. If the Tax Court position happens to concur with that of the applicable circuit of the Court of Appeals to which the case would have otherwise been appealable, so be it – but the Tax Court should have the freedom to develop that position on its own without being constrained by the Court of Appeals.

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