

Should Courts Require the Internal Revenue Service to be Consistent?

LAWRENCE ZELENAK *

Introduction

An administrative agency must follow its precedents or offer a reasoned explanation for departing from them; a court, faced with a departure from agency precedents which the agency does not satisfactorily explain and justify, will usually require the agency to adhere to its own precedents.¹ What applies to other agencies, however, does not necessarily apply to the Internal Revenue Service. The Service takes the position that it need not treat similarly situated taxpayers consistently, and the courts have generally accepted the Service's contention.²

The Service's claim for exemption from the requirement of administrative consistency is not as outrageous as it may seem. Two considerations peculiar to the Service support its position. First, the cases which impose a duty of consistency on other agencies are overwhelmingly concerned with situations where an agency's statutory mandate gives it broad discretion, and the agency could take any of several different positions without violating its governing statute.³ By contrast, most of the positions taken by the Service are interpretations of detailed statutes which vest the Service with little discretion in implementation.⁴ The question of whether a court should impose a duty of consistency on the Service arises when the Service asserts a position against one taxpayer which is justified under the court's interpretation of the relevant provisions of the Internal Revenue Code, but which the Service has not asserted and does not intend to assert against other similarly situated taxpayers. To impose a duty of consistency in those situations is to give taxpayers lenient treatment that is not justified under the substantive law. This is not a problem with the cases involving agencies given broad discretion by statute, since in those cases courts can require agencies to

* LAWRENCE ZELENAK is assistant professor of law, Lewis and Clark Law School. The author is grateful to PROFESSOR ARTHUR BANFIELD of the University of Iowa College of Law for his comments on an earlier draft, and to LEE GAONAS, a student at Lewis and Clark Law School, for his assistance in the preparation of the article.

¹ See *infra* text accompanying notes 5-22.

² See *infra* text accompanying notes 30-84.

³ See *infra* text accompanying notes 5-22.

⁴ See *infra* text accompanying notes 23-29.

adhere to their precedents without violating the governing law. This distinction could explain and justify the Service's refusal to recognize a duty of consistency to taxpayers.

Second, section 6110(j)(3) of the Internal Revenue Code states that private letter rulings issued by the Service "may not be used or cited as precedent." This could mean that private letter rulings issued to other taxpayers may not be used to show inconsistency on the part of the Service. If so, the Code itself relieves the Service of the duty of consistency.

I do not believe these special circumstances justify exempting the Service from the duty of administrative consistency. This article examines the administrative duty of consistency, and discuss the peculiar problems involved in imposing such a duty on the Service. It argues that a court should be willing to impose a duty of consistency even when the result of imposing the duty runs counter to that court's interpretation of the substantive law. Finally, it concludes that section 6110(j)(3) does not prohibit the use of private letter rulings to demonstrate the Service's inconsistency.

Duty of Administrative Consistency

In the second edition of his *Administrative Law Treatise*, Professor Davis cites numerous cases from all the courts of appeal in support of his assertion: "The dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them."⁵

⁵ K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 8.9, at 198 (2d ed. 1978) [hereinafter cited as DAVIS]. Davis discusses this issue again in greater detail where he notes that Supreme Court support for a duty of consistency is lukewarm. 4 DAVIS at § 20.11. Cases cited by Davis in support of a duty of consistency include *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973) (plurality opinion); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *McHenry v. Bond*, 668 F.2d 1185 (11th Cir. 1982); *R.K.O. Gen., Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982); *Chisholm v. Defense Logistics Agency*, 656 F.2d 42 (3d Cir. 1981); *Hatch v. Federal Energy Regulatory Comm'n*, 654 F.2d 825 (D.C. Cir. 1981); *Baltimore & A.R.R. v. Washington Metropolitan Transit Comm'n*, 642 F.2d 1365 (D.C. Cir. 1980); *Niedert Motor Serv., Inc. v. United States*, 583 F.2d 954 (7th Cir. 1978); *Otter Tail Power Co. v. Federal Energy Regulatory Comm'n*, 583 F.2d 399 (8th Cir. 1978), *cert. denied*, 440 U.S. 950 (1979); *Squaw Transit Co. v. United States*, 574 F.2d 492 (10th Cir. 1978); *Ohio Fast Freight, Inc. v. United States*, 574 F.2d 316 (6th Cir. 1978); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529 (2d Cir. 1977); *Greyhound Corp. v. ICC*, 551 F.2d 414 (D.C. Cir. 1977); *Contractors Transp. Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976); *Frozen Food Express, Inc. v. United States*, 535 F.2d 877 (5th Cir. 1976); *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976); *Sirbo Holdings, Inc. v. Commissioner*, 509 F.2d 1220 (2d Cir. 1975); *NLRB v. Silver Bay Local Union* 962, 498 F.2d

The basic rationale of the consistency requirement is that fairness demands that agencies treat similarly situated parties in the same manner. Inconsistency has been said to undermine the integrity of the administrative process.⁶ Of course, this rationale only applies when parties truly are similarly situated; therefore, an agency can always satisfy the duty of consistency by demonstrating a meaningful factual distinction between parties.⁷ Also, the duty should not be applied so rigidly as to prohibit an agency from correcting a mistake⁸ or making a reasoned change of policy.⁹ For this reason, an agency can satisfy its duty if it is willing to renounce its inconsistent precedents. So the duty of consistency serves as judicial ground for decision when, and only when, an agency has been unable to distinguish and is unwilling to renounce its apparently inconsistent precedents.¹⁰ If an agency cannot distinguish and will not disavow its precedents, then a court requires the agency to adhere to those precedents in the case at hand.

The source or sources of the consistency requirement are not entirely clear. It is probably best understood as a doctrine of administrative common law.¹¹ Judicial references, in discussions of the duty of consistency, to the "rule of law"¹² and "elementary tenet[s] of adminis-

26 (9th Cir. 1974); *International Union v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

For other discussions of the duty of consistency, see W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW*, 393-95 (7th ed. 1979); B. SCHWARTZ, *ADMINISTRATIVE LAW* § 10.19 (2d ed. 1984).

⁶ *Hatch v. Federal Energy Regulatory Comm'n*, *supra* note 5, 654 F.2d at 835.

⁷ The difference must be one that is relevant in light of the governing statute. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, *supra* note 5, 412 U.S. at 808-09 (plurality opinion).

⁸ *Sirbo Holdings, Inc. v. Commissioner*, *supra* note 5, 509 F.2d at 1222.

⁹ *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, *supra* note 5, 412 U.S. at 808 (plurality opinion); *Greyhound Corp. v. ICC*, *supra* note 5, 551 F.2d at 416; *Greater Boston Television Corp. v. FCC*, *supra* note 5, 444 F.2d at 852.

¹⁰ Agencies must "either follow, distinguish or overrule their own precedent." *Chisholm v. Defense Logistics Agency*, *supra* note 5, 656 F.2d at 47.

¹¹ "Perhaps about nine-tenths of American administrative law is judge-made law, and the other tenth is statutory. . . . Most of it is common law in every sense, that is, it is law made by judges in absence of relevant constitutional or statutory provision, although some of the common law has been codified." 1 DAVIS, *supra* note 5, § 2.18, at 140. Davis also states; "Not merely old administrative law but much recently-made administrative law is common law, for it is not based on intent expressed either in the Constitution or in a statute." 2 *id.* § 7.19, at 92.

¹² *Baltimore & A.R.R. v. Washington Metropolitan Area Transit Comm'n*, *supra* note 5, 642 F.2d at 1370; *Office of Communication of United Church of Christ v. FCC*, *supra* note 5, 560 F.2d at 532; *Greyhound Corp. v. ICC*, *supra* note 5, 551 F.2d at 416; *Columbia Broadcasting Sys. v. FCC*, 454 F.2d 1018, 1025-26 (D.C. Cir. 1971); *Greater Boston Television Corp. v. FCC*, *supra* note 5, 444 F.2d at 852.

trative law”¹³ suggest this, as do the frequent failures of the courts to cite statutory authority for the doctrine. A court desiring to cite statutory support for the doctrine could, however, determine that a congressional requirement of agency consistency is implicit in the statutes governing a particular agency.¹⁴ Finally, in extreme cases of invidious discrimination based on such factors as race or religion, inconsistent treatment may violate the fifth amendment.¹⁵

*Greyhound Corp. v. ICC*¹⁶ is typical of the cases cited by Professor Davis. Greyhound challenged orders of the Interstate Commerce Commission requiring Greyhound to obtain prior ICC approval of all of its securities transactions.¹⁷ The court noted that the orders appealed from were inconsistent with past agency decisions, and remanded the case to the agency for reconsideration.¹⁸ The court explained that either course of action—requiring or not requiring Greyhound to obtain prior agency approval of securities transactions—was permissible under the governing statute,¹⁹ but the agency must nevertheless adequately explain the decision to depart from its established precedents.²⁰

¹³ *International Union v. NLRB*, *supra* note 5, 459 F.2d at 1341; *Columbia Broadcasting Sys. v. FCC*, *supra* note 12, 454 F.2d at 1026.

¹⁴ This is suggested by Justice Marshall's comments in his plurality opinion in *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, *supra* note 5, 412 U.S. at 807-08 (citation omitted):

A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.

There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms.

Besides the statutes dealing with particular agencies, another possible statutory source for the doctrine comes from the Administrative Procedure Act, which directs a reviewing court to set aside agency action found to be arbitrary or capricious. 5 U.S.C. § 706(2)(A) (1982). See *Chisholm v. Defense Logistics Agency*, *supra* note 5, 656 F.2d at 47; *Squaw Transit Co. v. United States*, *supra* note 5, 574 F.2d at 494, 496; *Contractors Transp. Corp. v. United States*, *supra* note 5, 537 F.2d at 1162.

¹⁵ Unlike the fourteenth amendment, which applies to the states, the fifth amendment applicable to the federal government, has no equal protection clause. However, “the Fifth Amendment's Due Process Clause prohibits the federal government from engaging in discrimination that is ‘so unjustifiable as to violate due process.’” *Rostker v. Goldberg*, 453 U.S. 57, 62 n.3 (1981) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975), in turn quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

¹⁶ 551 F.2d 414 (D.C. Cir. 1977).

¹⁷ *Id.* at 415-16.

¹⁸ *Id.* at 416.

¹⁹ “Of course, the agency is free to make reasoned changes in its policies.” *Id.* at 416.

²⁰ *Id.* at 418.

Since the court in *Greyhound* determined that the statute governing the agency's actions granted the agency discretion to adopt either the policy it was attempting to apply against Greyhound, or the policy represented by its past decisions, the court's only concern was that the agency exercise its discretion in a consistent manner.²¹ This is true of virtually all of the cases cited by Professor Davis as establishing a duty of administrative consistency. Either the policy of the agency's precedents or the policy being applied against the litigating party would be a permissible exercise of discretion under the governing statute, as long as the agency's duty of consistency is fulfilled.²²

Applying a Duty of Consistency to the Internal Revenue Service

Crucial Difference

Professor Davis remarks: "Of all the agencies of the government, the worst offender against sound principles of administrative consistency may be the Internal Revenue Service."²³ He argues that the same duty of consistency that applies to other agencies should apply to the Service.²⁴ He harshly characterizes, almost ridicules, the Service's position: "Its basic attitude is that because consistency is impossible, an effort to be consistent is unnecessary; therefore it need not consider precedents, and it may depart from precedents without explaining why."²⁵

There is a crucial difference, however, between the cases noted by Professor Davis as establishing the duty of administrative consistency and the Service's situation. Virtually all of the cited cases involve statutory grants of authority giving broad discretion to the agencies; in these situations, a court can require agency adherence to precedent (if the

²¹ "This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them." *Id.* at 416.

²² The only two exceptions are *Sirbo Holdings, Inc. v. Commissioner*, 509 F.2d 1220 (2d Cir. 1975), and *Baltimore & A.R.R. v. Washington Metropolitan Transit Comm'n*, 642 F.2d 1365 (D.C. Cir. 1980). *Sirbo Holdings* involved the Internal Revenue Service, and is discussed in text accompanying notes 73-84. *Baltimore & A.R.R.* involved a statute which did not grant the agency a range of discretion. The agency had changed its interpretation of the statute without explaining the reason for the change. The court remanded the case to the agency for an explanation of the reason for the change in its interpretation of the statute. The court hoped the agency's explanation would be helpful to the court in determining the correct interpretation of the statute. The opinion indicated that following the remand, the case should be decided on the basis of the correct interpretation of the statute (as influenced by the agency's explanation), not on the basis of the doctrine of administrative consistency. 642 F.2d at 1373.

²³ 2 DAVIS, *supra* note 5, § 8:12, at 206.

²⁴ *Id.* at § 8:12.

²⁵ *Id.* at § 8:12, at 208-09.

agency fails to distinguish and declines to disavow its precedent) without countermanding the statutory command of Congress. But the vast majority of the cases involving the Service is different. Congress, in the Internal Revenue Code, has defined what is and what is not includable in or deductible from income. The Service views its task as determining and applying the one true meaning of that statute,²⁶ not as exercising discretion in deciding what federal income tax policy should be.²⁷

The first step taken by a court in applying a duty of administrative consistency may be to remand the case to the agency for an explanation of its departure from its own precedent. This can be done even if the applicable statute is of the one true meaning variety (rather than one granting the agency a wide range of discretion), if the court thinks an explanation from the agency will help the court in determining that one true meaning.²⁸ What would happen after a case had come back from remand, if the Service had failed to distinguish and declined to disavow its contrary precedents? If the court were serious about requiring the Service to be consistent, it would hold that the taxpayer in the case at issue must be treated in the same way the Service had treated all other similarly situated taxpayers. But what about the court's own interpretation of the substantive law? If the court agreed with the taxpayer and the Service's precedents on the proper interpretation of the relevant Code provisions, it could decide in the taxpayer's favor without even mentioning a

²⁶ The Service's "Statement of Principles of Internal Revenue Tax Administration," printed at the beginning of every *Cumulative Bulletin*, states:

It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief he is "protecting the revenue." The revenue is properly protected only when we ascertain and apply the true meaning of the statute.

1983-1 C.B. ii (previously published as Rev. Proc. 64-22, 1964-1 (Part 1) C.B. 689).

²⁷ In some instances, the Code expressly authorizes the Service to exercise discretion. See, e.g., I.R.C. § 6661(c) ("The Secretary may waive" the substantial understatement penalty of § 6661(a), in certain circumstances); § 7805(b) ("The Secretary may prescribe the extent, if any, to which any ruling or regulation . . . shall be applied without retroactive effect"); § 446(b) ("If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income"); § 453(e)(7) (general rule that a second disposition of installment method property by a related person triggers recognition of gain by the original seller does not apply if the absence of a principal purpose of tax avoidance is established "to the satisfaction of the Secretary"). These are the exceptions, however. The bulk of the Code states in detail the substantive law of federal taxation, and does not grant the Service broad discretion to determine federal tax policy.

²⁸ *Baltimore & A.R.R. v. Washington Metropolitan Transit Comm'n*, *supra* note 22.

duty of consistency. But if the court believed the proper interpretation of the law was that advanced by the Service in the present litigation, and that the Service's precedents and the position of the taxpayer were wrong, then, the court could enforce a duty of consistency only at the cost of not following its interpretation of the Code. In the context of a Code provision with one true meaning which is adverse to a taxpayer, a court can require the Service to be consistent only by giving the taxpayer a tax break which Congress did not intend to give him. This dilemma does not exist in the cases establishing the duty of consistency in the exercise of administrative discretion; precisely because administrative discretion is involved, courts can require those agencies to adhere to their precedents without thereby violating any statutory mandate laid down by Congress. Thus, it does not automatically follow from the cases cited by Professor Davis that a duty of consistency should be imposed on the Service.²⁹

Courts and Service Duty of Consistency

Supreme Court

The courts are in a muddle as to when, if ever, a duty of consistency should be imposed on the Service. In his concurrence in *United States v. Kaiser*,³⁰ Justice Frankfurter stated:

The Commissioner cannot tax one and not tax another without some rational basis for the difference. And so, assuming the correctness of the principle of "equality," it can be an independent ground of decision that the Commissioner has been inconsistent, without much concern for whether we should hold as an original matter that the position the Commissioner now seeks to sustain is wrong.

When that passage is read in the context of the entire concurrence, it is clear that Justice Frankfurter is merely stating, and not adopting, the argument of the taxpayer in *Kaiser*. Since he determined that the taxpayer had not been the victim of unequal treatment at the hands of the Commissioner, Justice Frankfurter did not have to reach the question of whether inequality of treatment could, in fact, serve as an independent ground of decision.³¹ Still, his efforts to demonstrate the absence of unequal treatment suggest he took seriously the proposition that disparate treatment could serve as an independent ground of decision, without regard to the proper interpretation of the applicable Code provisions.

²⁹ Except, perhaps, in situations such as those mentioned in note 27, involving the exercise by the Service of discretion conferred by statute.

³⁰ 363 U.S. 299, 308 (1960).

³¹ *Id.* at 314.

Tax Court

The Tax Court has frequently considered, and has usually rejected, taxpayers' arguments based on inequality of treatment. For example, in *Teichgraeber v. Commissioner*,³² the taxpayer sought discovery of private letter rulings issued to other taxpayers, hoping they would show that the Service had discriminated against him.³³ The court denied the request, noting that it was questionable whether the rulings would be relevant to the taxpayer's case.³⁴ In other cases, the Tax Court has stated that (1) the Service's treatment of other taxpayers is not relevant, and (2) each case must be decided by applying the Code, as interpreted by the Tax Court, to the facts of the case.³⁵

On the other hand, the Tax Court has sometimes admitted there may be something to the equality principle while declining to apply it to the case at hand. In *Davis v. Commissioner*,³⁶ Professor Davis sought disclosure of private letter rulings issued to other taxpayers in an attempt to show that the Service's treatment of Professor Davis was inconsistent with its treatment of other similarly situated taxpayers.³⁷ The court managed to avoid deciding whether a duty of consistency should be applied to the actions of the Service by finding procedural defects in the disclosure request.³⁸ Citing *Teichgraeber* and numerous other cases, the court remarked: "It has long been the position of this court that our responsibility is to apply the law to the facts before us and determine the tax liability of the parties before us; how the Commissioner may have treated other taxpayers has generally been considered irrelevant in making that determination."³⁹ The court was careful, however, not to reject the duty of consistency argument out of hand: "Although the implementation of the position advocated by Mr. Davis would present many problems, those problems may not be insurmountable, and the notion of equal justice has strong appeal in our society and might lead to the conclusion that his position should ultimately be adopted."⁴⁰

Perhaps encouraged by the court's willingness to leave the door open a crack, Professor Davis returned to the Tax Court two years later, with

³² 64 T.C. 453 (1975).

³³ *Id.* at 455-56.

³⁴ *Id.* at 456.

³⁵ *E.g.*, *Grant-Jacoby, Inc. v. Commissioner*, 73 T.C. 700, 709-10 (1980); *Penn-Field Indus. v. Commissioner*, 74 T.C. 720, 722 (1980); *Malinowski v. Commissioner*, 71 T.C. 1120, 1128 (1979).

³⁶ 65 T.C. 1014 (1976).

³⁷ *Id.* at 1021.

³⁸ *Id.* at 1023-24.

³⁹ *Id.* at 1022 (citations omitted).

⁴⁰ *Id.* at 1023.

another allegation of unequal treatment.⁴¹ The court again rejected his request for disclosure of certain private letter rulings which might have demonstrated inconsistent treatment of taxpayers.⁴² But, again, the court declined to slam the door. While the court did not accept "petitioner's view . . . that, irrespective of substantive issues, if he is not accorded like treatment with other taxpayers, the resulting discrimination would render nugatory any governing code sections because of respondent's inconsistency,"⁴³ it did "recognize that in certain cases material might be relevant in establishing whether respondent has violated a duty of consistency owed to a taxpayer."⁴⁴ In several other cases, the Tax Court has left open the question of whether a duty of consistency should be imposed on the Service.⁴⁵

Apparently, only in *Vesco v. Commissioner*⁴⁶ has the Tax Court elevated the duty of consistency over the demands of the substantive law. Members of Mr. Vesco's family occasionally occupied what otherwise would have been empty seats on business flights of the company jet.⁴⁷ The Service contended the value of these flights constituted a taxable fringe benefit to Mr. Vesco.⁴⁸ Both parties agreed that this type of fringe benefit had not generally been considered includable in taxable income, but the court noted the Service's "very logical argument" that such a benefit could be considered income "under the broad definition of in-

⁴¹ *Davis v. Commissioner*, 69 T.C. 716 (1978).

⁴² Professor Davis gave an example of a case where the duty of consistency should prevail over the substantive law of the Code, in a passage from a memorandum quoted by the court:

Here is an example: Let us assume that X is a faculty member of a university, which pays the tuition of X's children at another university, and that the IRS rules that X must pay an income tax on the amount of the tuition. Let us further assume that the Tax Court would hold that X has income in the amount of the tuition. If X challenges the IRS ruling in the Tax Court, could the Court hold in X's favor, even if the Court agrees that the amount of the tuition is taxable? We submit that the answer may be yes, if further facts are added. If the taxpayer by using § 6110 demonstrates that in hundreds of cases prior to X's case and in hundreds of cases after X's case, the IRS has ruled that such tuition payments are not taxable, and if the IRS has given no explanation for singling out X for different treatment, then the Tax Court should hold that X has been denied equal justice.

Id. at 719 n.5.

⁴³ *Id.* at 720.

⁴⁴ *Id.* at 721. The court's example of a violation of the duty of consistency was when the Commissioner exercised discretion "in such a manner that only one taxpayer is affected."

⁴⁵ *See, e.g., Jaggard v. Commissioner*, 76 T.C. 222, 225-27 (1981); *Cocker v. Commissioner*, 68 T.C. 544, 558 n.10 (1977).

⁴⁶ 39 T.C.M. (CCH) 101 (1979).

⁴⁷ *Id.* at 129.

⁴⁸ *Id.* at 129-30.

come in section 61.”⁴⁹ With amazingly little difficulty, and without any citation of authority on the consistency issue, the court stated: “We do not here determine the validity of respondent’s argument if his long-standing practice were changed as to all taxpayers. We merely hold that respondent’s practice in effect in 1971 should be applied to petitioner on the same basis as it is applied to other taxpayers.”⁵⁰ The precedential value of *Vesco* may be weak: It is only a memorandum decision, and the court did not seem to realize what a sensitive issue it was so off-handedly deciding, but it is indisputably an instance of the Tax Court imposing a duty of consistency on the Service.

Court of Claims

Perhaps the most famous case imposing a duty of consistency on the Service is the decision of the Court of Claims in *International Business Machines Corp. v. United States*.⁵¹ IBM and Remington Rand competed in the manufacture, sale, and leasing of computers.⁵² In 1955, Remington Rand requested and received from the Service a private letter ruling that its computers were not subject to the federal excise tax on the sale or lease of business machines.⁵³ IBM learned of this ruling, and immediately requested a similar ruling as to its own computers.⁵⁴ For more than two years, the Service failed to act on IBM’s request; finally, it wrote IBM that its computers were subject to the excise tax.⁵⁵ At about the same time, the Service revoked Remington Rand’s ruling, but prospectively only. The result of the Service’s action was that for several years IBM’s computers were subject to the excise tax, while Remington Rand’s were not.⁵⁶ IBM sued for a refund of excise taxes paid. It conceded that its computers were business machines subject to the excise tax, but argued that it was entitled to exemption from the tax for the same period that Remington Rand had enjoyed an exemption.⁵⁷

The court agreed with IBM, basing its decision on section 7805(b) of the Code,⁵⁸ which gives the Service discretion to prescribe whether

⁴⁹ *Id.* at 129.

⁵⁰ *Id.* at 130.

⁵¹ 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966).

⁵² *Id.* at 915–16.

⁵³ *Id.* at 916.

⁵⁴ *Id.*

⁵⁵ *Id.* at 916–17.

⁵⁶ *Id.* at 916.

⁵⁷ *Id.* at 917.

⁵⁸ “The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.” I.R.C. § 7805(b).

or not rulings and regulations are to be applied retroactively.⁵⁹ Under the circumstances, the court held, the Commissioner had abused his discretion under section 7805(b) by retroactively applying the unfavorable ruling letter to IBM.⁶⁰

Despite its ringing language in favor of a requirement of equal treatment,⁶¹ the *IBM* decision does not stand for the proposition that a court can generally enforce a duty of consistency if doing so conflicts with the demands of the substantive tax law. In fact, the court acknowledged that "our tax law often takes [the] stance" that "taxpayers can[not] avoid liability for a proper tax by showing that others have been treated generously, leniently, or erroneously by the Internal Revenue Service—each individual must rest . . . on the validity of his own position, under the applicable taxing provision, independently of the others'."⁶²

The court based its decision squarely on section 7805(b). The Service has discretion, under section 7805(b), to apply rulings retroactively. When the Service chooses to make an unfavorable ruling prospective, it is exercising statutorily granted discretion under section 7805(b) not to apply its unfavorable interpretation of the Code to periods prior to the ruling. Since section 7805(b) involves an explicit statutory grant of discretion, a court can require the Service to be consistent in the exercise of that discretion, without at the same time contravening the intent of Congress as expressed in the Code.⁶³ In other words, a case involving section 7805(b) is a range of discretion case, analogous to the cases cited by Professor Davis as establishing the duty of administrative consistency, and thus there is no problem of contravening the substantive law by applying a duty of administrative consistency.⁶⁴

This is not to say that *IBM* was correctly decided. The grant of discretion to the Service in section 7805 to apply rulings prospectively was primarily, perhaps exclusively, intended for the situation where a favorable regulation or ruling on which a taxpayer has reasonably relied (either a private ruling addressed to the taxpayer or a published revenue ruling addressed to all taxpayers generally) is being revoked, and it is appropriate to exclude retroactive application to protect reliance in-

⁵⁹ 343 F.2d at 919–25.

⁶⁰ *Id.* at 921.

⁶¹ *Id.* at 923: "For all tax rulings, it is important that there be like treatment to those who should be dealt with on the same basis."

⁶² *Id.* at 919.

⁶³ But see *infra* the discussion of § 7805(b) in text accompanying notes 109–11.

⁶⁴ The Supreme Court has indicated, in dictum, that consistency of treatment is an important consideration in determining whether the Commissioner has abused his discretion under § 7805(b): "[T]he Commissioner, having dealt with petitioner upon the same basis as other automobile clubs, did not abuse his discretion." *Automobile Club v. Commissioner*, 353 U.S. 180, 186 (1957).

terests.⁶⁵ The court's invocation in *IBM* of section 7805(b) in a situation involving neither a regulation, nor a previous letter ruling to the taxpayer, nor a previous revenue ruling, is highly dubious.⁶⁶ Perhaps for this reason, later cases have limited *IBM* to its peculiar facts.⁶⁷ But, even accepting it on its own terms, *IBM* remains a section 7805(b) case; it is not authority for enforcing a duty of consistency against the Service in cases not involving an express statutory grant of discretion.

Other cases from the Court of Claims imposing a duty of consistency on the Service also involve section 7805(b). In *Exchange Parts Co. v. United States*,⁶⁸ for example, the Service issued a revenue ruling holding that the manufacturer's excise tax applied to certain items and revoking earlier rulings that had held that the tax did not apply.⁶⁹ The new ruling announced that revocation would be prospective only, except that any taxes paid before the effective date of the new ruling would not be refunded.⁷⁰ The court noted (citing the predecessor to section 7805(b)) that the Commissioner had the discretion to make the new ruling retroactive or prospective only, but held that he had abused that discretion by discriminating against those who had paid the taxes.⁷¹

⁶⁵ Comment, *Limits on Retroactive Decision Making by the Internal Revenue Service: Redefining Abuse of Discretion in Section 7805(b)*, 23 U.C.L.A. L. REV. 529, 532 (1976).

⁶⁶ The crucial distinction is that the Service invites taxpayers to rely on letter rulings issued to them, and to rely on revenue rulings, while it condemns reliance on letter rulings issued to other taxpayers. See Rev. Proc. 83-1, § 17.05, 1983-1 C.B. 545, 556, *superseded by* Rev. Proc. 84-1, 1984-1 I.R.B. 10 (Jan. 3), and Reg. § 601.201(1)(5) (letter rulings issued to the taxpayer); Rev. Proc. 78-24, § 7.01(3), (5), 1978-2 C.B. 503, 504-05 (retroactivity of and reliance on revenue rulings); and Rev. Proc. 83-1, § 17.01, 1983-1 C.B. 545, 555-56, *superseded by* Rev. Proc. 84-1, 1984-1 I.R.B. 10 (Jan. 3), and Reg. § 601.201(1)(1) (letter rulings issued to other taxpayers).

⁶⁷ Cases refusing to extend *IBM* include *Shakespeare Co. v. United States*, 389 F.2d 772 (Ct. Cl. 1968); *Bookwalter v. Brecklein*, 357 F.2d 78 (8th Cir. 1966); *Knetsch v. United States*, 348 F.2d 932 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 957 (1966); *Bornstein v. United States*, 345 F.2d 558 (Ct. Cl. 1965).

⁶⁸ 279 F.2d 251, 253-54 (Ct. Cl. 1960).

⁶⁹ *Id.*

⁷⁰ *Id.* at 254.

⁷¹ *Id.* The court relied, in part, on its earlier decision, on similar facts, in *Connecticut Ry. & Lighting Co. v. United States*, 142 F. Supp. 907 (Ct. Cl. 1956).

The Eleventh Circuit recently cited *Exchange Parts* in holding that the Service abused its discretion under § 7805(b) by applying retroactively a revenue ruling that revoked a revenue ruling favorable to taxpayers. *Baker v. United States*, 55 AFTR2d 85-509 (11th Cir. 1984). In 1962, the Service issued a revenue ruling holding that a taxpayer's educational expense deduction need not be reduced by the amount of educational benefits received tax-free from the Veterans Administration (VA). The Service later modified that ruling with a 1980 revenue ruling holding that flight training expenses were not deductible to the extent the taxpayer received tax-exempt educational benefits from the VA allocable to those expenses. The Service did not exercise its discretion under § 7805(b) to limit the 1980

Neither *IBM* nor *Exchange Parts* stands for the proposition that administrative consistency can generally be an independent ground for decision, overriding the substantive law; rather, they deal only with the Commissioner's exercise of discretion under section 7805(b). On the other hand, the cases certainly do not foreclose the possibility of a general duty of consistency.⁷²

Sirbo Holdings

Among the most promising seeds from which an Internal Revenue Service duty of consistency might grow is Judge Friendly's opinion for the Second Circuit in *Sirbo Holdings, Inc. v. Commissioner*.⁷³ There, the taxpayer contended that it was entitled to capital gains treatment on receipt from its tenant of \$125,000 in satisfaction of the tenant's obligation to restore leased premises to their prelease condition, while the Service argued that the payment was ordinary income.⁷⁴ The Tax Court had held for the Service.⁷⁵ Judge Friendly was troubled by the fact that in a Tax Court case decided only two months after the Tax Court decision in *Sirbo Holdings*, the Service had conceded capital gains treatment for a payment almost identical in nature.⁷⁶ He remarked that "the Commissioner has a duty of consistency toward similarly situated taxpayers; he cannot properly concede capital gains treatment in one case and, without adequate explanation, dispute it in another having seemingly identical facts which is pending at the same time. . . . [T]axpayers . . . are entitled to a non-discriminatory administration of the tax

ruling to prospective application. In a 1983 revenue ruling, the Service revoked the 1962 ruling as to all deductions allocable to tax-free VA educational benefits, but exercised its discretion under § 7805(b) to make the revocation nonretroactive. The Eleventh Circuit held that, in light of the nonretroactivity of the 1983 ruling, the Service abused its discretion under § 7805(b) by making the 1980 ruling retroactive. While *Baker* reflects a strong judicial desire that the Service treat similarly situated taxpayers consistently, it is, like *IBM*, a § 7805(b) case; and, like *IBM*, it is not authority for imposing a duty of consistency on the Service in cases not involving an express statutory grant of discretion.

See also *Baker v. Commissioner*, 55 AFTR2d 85-516 (3d Cir. 1984), remanding to the Tax Court a case with facts similar to *Baker* for reconsideration in light of the *Baker* analysis of the scope of the Service's discretion under § 7805(b).

⁷² The decision of the Court of Claims in *Xerox Corp. v. United States*, 656 F.2d 659 (Ct. Cl. 1981), can be read as imposing a duty of consistency on the Service. It is discussed below in text accompanying notes 195-206, in connection with the question of whether letter rulings can be used to demonstrate inconsistency.

⁷³ 476 F.2d 981 (2d Cir. 1973). The opinion is discussed at length in Comment, *New Limitations on the Scope of Discretion of the Commissioner of Internal Revenue*, 54 B.U.L. REV. 425 (1974).

⁷⁴ 476 F.2d 982-83.

⁷⁵ *Id.* at 983.

⁷⁶ *Id.* at 987.

laws.”⁷⁷ The Court of Appeals remanded the case to the Tax Court for further proceedings, with instructions to the Tax Court to require the Commissioner to explain and justify his apparently inconsistent position.⁷⁸

On the return of the case to the Second Circuit, following the remand, Judge Friendly noted that the Service had explained to the Tax Court that its concession of capital gains treatment in the other case had not been considered policy, but was an error.⁷⁹ Judge Friendly considered that an adequate explanation: “While even-handed treatment should be the Commissioner’s goal, . . . perfection in the administration of such vast responsibilities cannot be expected. . . . The making of an error in one case, if error it was, gives other taxpayers no right to its perpetuation.”⁸⁰ This reflects the fact that “we goofed” is a sufficient response to a challenge based on alleged administrative inconsistency. If the Service is willing to renounce its inconsistent precedents, the goals of the consistency requirement have been achieved (although the goals of the taxpayer seeking the benefit of those precedents obviously have not).⁸¹

The unanswered question is: What would the Second Circuit have done if the Service had been unable to distinguish and unwilling to renounce its precedents? Would the Second Circuit have enforced a duty of consistency if that led to a result at odds with the court’s interpretation of the substantive law of capital gains? Judge Friendly’s first *Sirbo Holdings* opinion gives conflicting signals on that question. He suggests that there are times when being consistent is more important than being right.⁸² But, later in his opinion, he remarks that (1) the capital gains question is one of law for the Second Circuit to decide, and (2) the purpose of the remand is to obtain the benefit of the considered view of the Tax Court on this question before deciding it.⁸³ This may mean that an explanation of the apparent inconsistency is only for the purpose of better elucidating the question of law, and that the court will ultimately resolve the case on the basis of its interpretation of the substantive law, not on the basis of whether the Service has been inconsistent.

While the two *Sirbo Holdings* opinions do not clearly elevate the duty

⁷⁷ *Id.* (citations omitted).

⁷⁸ *Id.* at 989 n.10.

⁷⁹ *Sirbo Holdings, Inc. v. Commissioner*, 509 F.2d 1220, 1222 (2d Cir. 1975).

⁸⁰ *Id.* (citations omitted).

⁸¹ *See, e.g., Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977); *Sirbo Holdings, Inc. v. Commissioner*, *supra* note 79.

⁸² “[T]axpayers . . . are entitled to a non-discriminatory administration of the tax laws.” 476 F.2d at 987.

⁸³ *Id.* at 989.

of consistency over the substantive law, they do contain indications that such an elevation might sometimes be appropriate.⁸⁴

Should There Be a Duty of Consistency?

An Initial Reaction

The cases do not foreclose the possibility of imposing a duty of consistency on the Service. Both Justice Frankfurter, in *United States v. Kaiser*,⁸⁵ and Judge Friendly, in the first *Sirbo Holdings* opinion,⁸⁶ took the idea seriously; and the Tax Court was careful to leave the possibility open in its *Davis* opinions⁸⁷ and actually imposed such a duty in *Vesco*.⁸⁸ Since the cases neither establish nor reject a duty of consistency on the Service, the question remains whether that duty should be imposed. It is not dispositive that cases have imposed a duty of consistency on other agencies because those cases do not involve the problem of whether a court should require consistency at the cost of failing to apply the court's interpretation of the substantive law.

I believe that there are circumstances in which it is appropriate for courts to require the Service to afford one taxpayer the same favorable treatment it has given all other similarly situated taxpayers, even if the treatment is inconsistent with that mandated by Congress. The facts of *Vesco* are an example of an appropriate situation for elevating consistency over the substantive law. If the Service has not taxed, and has no intention of taxing, any other taxpayers on the value of relatives' trips on business flights of company jets, then it seems fundamentally unfair to allow the Service to tax Mr. Vesco, regardless of whether the trips fall within the broad sweep of the section 61 definition of gross income.

⁸⁴ Judge Oakes cited the Second Circuit's first *Sirbo Holdings* opinion in support of his position that "consistency over time and uniformity of treatment among taxpayers are proper benchmarks from which to judge IRS actions," in his concurrence in *Ogiony v. Commissioner*, 617 F.2d 14, 18 (2d Cir.), *cert. denied*, 449 U.S. 900 (1980). He felt, however, that the taxpayers had not made a sufficient showing of inconsistency to trigger application of a duty of consistency. The opinion suggests that Judge Oakes would have been willing to require consistency over adherence to the substantive law, if the taxpayers had made a more convincing showing of inconsistency.

These are not the only cases that could be cited in support of the proposition that the Internal Revenue Service should be subject to a duty of consistency. Several of these cases, including *Xerox Corp. v. United States*, 656 F.2d 659 (Ct. Cl. 1981), and *Niles v. United States*, 710 F.2d 1391 (9th Cir. 1983), are discussed below in the text accompanying notes 173-206, in the context of whether § 6110(j)(3) prohibits the use of private letter rulings to prove Service inconsistency.

⁸⁵ 363 U.S. 299 (1960).

⁸⁶ 476 F.2d 981 (2d Cir. 1973).

⁸⁷ 65 T.C. 1014 (1976), and 69 T.C. 716 (1978).

⁸⁸ 39 T.C.M. (CCH) 101 (1979).

I find equally compelling Professor Davis' hypothetical in which a college faculty member has his child's tuition at another college paid by his employer.⁸⁹ Even if a court interprets section 61 to include such a fringe benefit in gross income, it should hold for the taxpayer if the Service has issued and continues to issue private letter rulings to other taxpayers, stating that those tuition payments are not taxable. I admit that my response is a visceral reaction; other people's viscera may react differently. Still, I think there are good reasons to seek equal justice over strict adherence to the substantive law.

Judicial Deference to Interpretative Regulations

On close analysis, the distinction between the range of discretion cases in which the duty of consistency has been established, and the one true statutory meaning cases involving the Service, is more apparent than real.

The Supreme Court has not acknowledged any bright line distinction between a statute granting broad discretion to an agency and a statute leaving an agency with the one task of discovering its one true meaning. In *National Muffler Dealers Association v. United States*, the question was whether the Association qualified as a tax-exempt "business league" described in section 501(c)(6) of the Code.⁹⁰ The answer depended, in the Court's view, on whether the regulations defining that term were valid.⁹¹ One might suppose that this was a classic one true meaning case, but the Court did not treat it that way. Instead, it stated that the term "business league" was so general as to make an interpretative regulation appropriate, and that the Court should defer to the interpretative regulation if it "implement[s] the congressional mandate in some reasonable manner."⁹² The Court relied on section 7805(a) of the Code, which gives the Secretary of the Treasury and the Commissioner of Internal Revenue the task of prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code.⁹³ One policy served by this deference to the Service, the Court noted, was ensuring that "like cases will be treated alike."⁹⁴ The Court concluded that the Commissioner's interpretation was reasonable, and that it should therefore be upheld. "The choice among reasonable interpretations," it explained, "is for the Commissioner, not the courts."⁹⁵ This does not mean that the Com-

⁸⁹ 69 T.C. at 719 n.5. See *supra* note 42.

⁹⁰ 440 U.S. 472, 473 (1979).

⁹¹ *Id.* at 476-77.

⁹² *Id.* (quoting *United States v. Cartwright*, 411 U.S. 546, 550 (1973), in turn quoting *United States v. Correll*, 389 U.S. 299, 307 (1967)).

⁹³ *Id.* at 477.

⁹⁴ *Id.*

⁹⁵ *Id.* at 488. Accord *United States v. Correll*, *supra* note 92, 389 U.S. at 307;

missioner has unlimited discretion in interpreting the Code,⁹⁶ but it does mean that the Commissioner's discretion in choosing among reasonable interpretations is considerable.

Regulations interpreting the Code—for instance, the regulations involved in *National Muffler Dealers*—are commonly known as interpretative regulations; they are contrasted with so-called legislative regulations, which are exercises of discretion delegated by Congress to an agency to make law, in effect, in a particular area.⁹⁷ Duty of consistency cases concerning other agencies have usually involved statutory grants of discretion similar in scope to provisions authorizing legislative regulations,⁹⁸ while most duty of consistency challenges to the Service have involved the narrower range of discretion associated with interpretive regulations. The Service's range of discretion in merely interpreting the Code is less than when it is operating under a broad statutory grant of authority to, in effect, make law.⁹⁹ The difference, however, is one of degree, not of kind.¹⁰⁰

There will be cases, then, in which a court should defer to a reasonable interpretative regulation, although, in the absence of such a regulation, the court might have interpreted the statute differently. As long as the Service's interpretation is within the range of reasonable interpretations, *National Muffler Dealers* teaches that a court should defer to that

Bingler v. Johnson, 394 U.S. 741, 749–51 (1969); Commissioner v. Portland Cement Co., 450 U.S. 156, 168–69 (1981).

⁹⁶ In *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981), the Court reaffirmed the principles of *National Muffler Dealers*, but found the particular regulations involved invalid, for “fail[ing] to implement the congressional mandate in a consistent and reasonable manner.” The Supreme Court has also invalidated Treasury regulations for this reason in *United States v. Cartwright*, *supra* note 92; *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1981); and *Commissioner v. Engle*, 104 S. Ct. 597 (1984).

⁹⁷ 4 B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS*, ¶ 1104.2 (1981) [hereinafter cited as BITTKER]. Examples in the Code of authorizations to adopt legislative regulations include § 385 (authorized to prescribe regulations for determining whether an interest in a corporation is stock or debt) and § 1502 (authorization to prescribe regulations for determining the consolidated income of affiliated groups).

⁹⁸ See *supra* cases cited in note 5.

⁹⁹ As the Supreme Court remarked in *Rowan Cos. v. United States*, “[b]ecause we . . . can measure the Commissioner's interpretation against a specific provision in the Code, we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision.” 452 U.S. at 253 (citations omitted). Accord *United States v. Vogel Fertilizer Co.*, *supra* note 96, 455 U.S. at 24–25.

¹⁰⁰ As Professor Bittker remarks, “in practice the distinction between legislative and interpretative regulations is often blurred, and the supposedly diverse standards of review tend to converge and even to coalesce.” 4 BITTKER, *supra* note 97, at ¶ 1104.2, at 110–30 (footnotes omitted).

interpretation, even if that is not the interpretation the court finds most compelling.

The deference to the Service's interpretations called for by *National Muffler Dealers* is limited to interpretations expressed in regulations. Private letter rulings, and even published revenue rulings, are usually afforded little or no deference by the courts.¹⁰¹ The justification for this less respectful treatment of rulings than of regulations is that regulations are an exercise of the power granted by section 7805(a) to the Secretary of the Treasury to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code, while rulings are not.¹⁰² Regulations merit some deference because they are exercises of a power expressly conferred by section 7805(a), while rulings deserve little or no deference because they are not issued under the authority of section 7805(a).¹⁰³

Thus, a court need not defer to a reasonable Service position expressed only in rulings, if the Service's position conflicts with the court's own view of the meaning of the statute involved. My point is more modest. Suppose a court is forced to choose between applying its interpretation of the Code, and enforcing consistency by requiring the Service to follow lenient letter rulings issued to other taxpayers. It will often be the case that, even though the court disagrees with the position taken by the rulings, the court would have found the position sufficiently reasonable to require judicial deference, if it had been expressed in a regulation, instead of in private letter rulings. In that situation, it seems hypertechnical to worry about violating the will of Congress by requiring the Service to be consistent. And, by requiring consistency, the court will be implementing the important policy identified by the Supreme Court in *National Muffler Dealers*, that "like cases . . . be treated alike."¹⁰⁴

¹⁰¹ *Id.* at ¶ 110.5.4. The Service itself admits that revenue rulings "do not have the force and effect of Treasury Department Regulations." Rev. Proc. 78-24, § 7.01(4), 1978-2 C.B. 503, 505. The Tax Court's statement in *Estate of Lang v. Commissioner*, 64 T.C. 404, 406-07 (1975), *modified*, 613 F.2d 770 (9th Cir. 1980), that a "revenue ruling . . . is simply the contention of one of the parties to the litigation, and is entitled to no greater weight," is typical of judicial attitudes. However, a consistent administrative practice of long standing, represented by revenue rulings and litigated cases, has been held to have probative value in interpreting the Code. *Fribourg Navigation Co. v. Commissioner*, 383 U.S. 272, 279-86 (1966).

¹⁰² Treasury regulations are approved by the Secretary, but rulings are not. Reg. § 301.7805-1(a) (regulations); Rev. Proc. 78-24, § 3.01, 1978-2 C.B. 503, 504 (rulings). See *Browne v. Commissioner*, 73 T.C. 723, 730-31 (1980) (Hall, J., concurring).

¹⁰³ *Browne v. Commissioner*, *supra* note 102, 73 T.C. at 730-31 (Hall, J., concurring).

¹⁰⁴ 440 U.S. at 477.

Service's Practical Discretion to Be Lenient

There is another reason why the distinction between the range of discretion cases involving other agencies, and the one true meaning cases involving the Service, is more apparent than real. There is virtually no judicial review of a Service decision to be lenient. If the Service takes a position that it will not treat a particular item as income, or that it will allow a particular deduction, for practical purposes, that decision becomes the substantive law. This is because such a position cannot be challenged in court. Taxpayers directly affected will not challenge the position because it is favorable to them. The Service will not, of course, challenge its own position. Third parties may sue to prevent Service leniency toward other taxpayers (either out of high public mindedness or because the taxpayers favored by the lenient position are competitors), but such suits are almost always dismissed for lack of standing.¹⁰⁵ While Congress may have the power to create standing for third party challenges to lenient Service positions,¹⁰⁶ the power has not been exercised.

Although the Code does not expressly grant the Service the discretion to decline to interpret the Code in a way which would extract every last permissible ounce of taxpayer flesh, the effect of the lack of third-party standing to challenge lenient Service positions is to give the Service this discretion. If, as a practical matter, the Service has discretion to in-

¹⁰⁵ *Allen v. Wright*, 104 S. Ct. 3315 (1984) (parents of black children attending public school lacked standing to sue the Service to compel it to apply stricter standards in determining whether private schools are ineligible for tax-exempt status because of racially discriminatory practices); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (indigents and their representatives lacked standing to challenge Service's ruling that hospitals denying service to indigents could qualify for exemption); *Lugo v. Miller*, 640 F.2d 823 (6th Cir. 1981) (standing denied on facts similar to *Eastern Kentucky*); *American Soc'y of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978) (organization of travel agents lacked standing to challenge Service's failure to tax income from travel programs sponsored by certain religious, charitable, and educational organizations); *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (plaintiffs lacked standing to challenge Service rulings allowing American oil companies to claim foreign tax credits, even though one plaintiff was a competitor of the favored companies). *But see* *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (holding some plaintiffs had standing to challenge Service's grant of exempt status to Roman Catholic organizations allegedly engaged in lobbying activities inconsistent with tax-exempt status). See Comment, *Constitutional Law—Standing to Challenge IRS Actions Benefiting Competitors—American Society of Travel Agents, Inc. v. Blumenthal; Tax Analysts and Advocates v. Blumenthal*, 31 RUTGERS L. REV. 339 (1978); Note, *Competitor Standing to Challenge IRS Practices*, 47 U. CIN. L. REV. 109 (1978); Note, *Standing to Challenge Treatment of Competitors*, 19 WM. & MARY L. REV. 808 (1978).

¹⁰⁶ Asimow, *Standing to Challenge Lenient Tax Rules: A Statutory Solution*, 57 TAXES 483, 492–501 (1979).

terpret the Code leniently, then the case of the Service is not so different, after all, from that of the many agencies which have been held to a duty of consistency. The Service—in reality, if not in theory—has discretion to be lenient in its interpretations of the Code. If the Service exercises this discretion, it seems only fair that the Service should exercise this discretion consistently. It should not be allowed to interpret the Code strictly against a few taxpayers, while being lenient to other similarly situated taxpayers.

It seems to me that a court can decide a case in a taxpayer's favor on the basis of a consistency requirement, even when the court's interpretation of the substantive law supports the Service's litigating position, without necessarily subverting the intent of Congress. This is because the structure for judicial review of Service positions—a structure Congress most likely has the power to change¹⁰⁷—gives the Service the discretion to be lenient. If Congress has acquiesced in a system which permits the Service to interpret the Code leniently, lenient interpretations do not necessarily contravene the will of Congress. It follows that a judicially enforced consistency requirement need not subvert congressional intent. A consistency requirement merely ensures that the Service does not discriminate when it exercises its discretion to be lenient; if the Service can choose to be lenient without violating the will of Congress, a judicially enforced consistency requirement would violate the will of Congress only if one ascribes to Congress the unlikely intent to allow the Service to discriminate among similarly situated taxpayers when it chooses to be lenient.¹⁰⁸

I should make clear what I am *not* saying. I am not saying that once the Service has interpreted a Code section in a particular manner, it must continue to interpret it that way forever. The Service is always free to renounce a lenient interpretation, replacing it with a strict interpretation, as long as it does so for all similarly situated taxpayers and the strict interpretation is justified by the statute. The duty of consistency should merely prevent the Service from strictly interpreting the Code to the disadvantage of one or a few taxpayers, while continuing the lenient interpretation as to everyone else.

Exercises of Discretion Under Section 7805

It still may sound rather radical to suggest that anything should override a court's interpretation of the substantive tax law, even on grounds

¹⁰⁷ *Id.*

¹⁰⁸ "The basic principle may be this: When the IRS exercises its discretion not to tax even when it has power to tax, it must do so evenhandedly, and all federal courts that decide tax cases have a responsibility for correcting a flagrant departure from evenhandedness." *David v. Commissioner*, 69 T.C. 716, 719 n.5 (1978) (quoting petitioner's memorandum).

of fairness. Yet, the Service itself routinely allows equitable considerations to prevail over its interpretation of the substantive law, when it exercises its discretion under section 7805(b) to make rulings nonretroactive. It is the Service's usual policy not to apply retroactively a revenue ruling unfavorable to taxpayers, if it revokes a favorable ruling,¹⁰⁹ and similarly not to apply retroactively a revocation of a favorable private letter ruling (but the nonretroactivity applies only to the recipient of the letter ruling).¹¹⁰ And, at times, courts will hold a failure to limit the revocation of a favorable ruling to prospective application to be an abuse of the Service's discretion under section 7805(b).¹¹¹ In these cases, the Service's view is that the later ruling is the proper interpretation of the law. If the only concern were to interpret and apply the Code correctly, all rulings would have retroactive effect, so that the later interpretation would apply to all cases. Yet Congress' grant of discretion to the Service in section 7805(b), and the Service's exercise of that discretion to limit retroactive application of its rulings, are recognitions that there are times when it is more important to protect the interests of taxpayers who have reasonably relied on prior incorrect rulings, than it is to apply the proper interpretation of the Code in every case. Fairness—the protection of reliance interests—is deemed more important than application of the correct statutory interpretation.

Situations involving section 7805(b) are distinguishable from duty of consistency cases, in that section 7805(b) is an express statutory grant of discretion to protect reliance interests, while there is no such express permission to treat consistency with such deference. Section 7805(b) does demonstrate, however, that the idea of allowing considerations of fairness to prevail over technical accuracy is not a new one.

Estoppel of the Service

More closely analogous to a judicially imposed duty of consistency, because they are not based on any statutory provision, are the cases

¹⁰⁹ Rev. Proc. 78-24, § 7.01(3), 1978-2 C.B. 503, 504.

¹¹⁰ Rev. Proc. 83-1, § 17.05, 1983-1 C.B. 545, 556, *superseded by* Rev. Proc. 84-1, 1984-1 I.R.B. 10 (Jan. 3); Reg. § 601.201(1)(5) (letter rulings issued to the taxpayer). *Id.* at 83-1, § 17.01, 1983-1 C.B. at 555-56, *superseded by* Rev. Proc. 84-1, 1984-1 I.R.B. 10 (Jan. 3); Reg. § 601.201(1)(1) (letter rulings issued to other taxpayers).

¹¹¹ *See* *Lanson, Inc. v. Commissioner*, 622 F.2d 774 (5th Cir. 1980); *Lesavoy Found. v. Commissioner*, 238 F.2d 589 (3d Cir. 1956); *supra* text accompanying notes 51-72. The scope of the Service's discretion under § 7805(b) is examined in *Nolan & Thuronyi, Retroactive Application of Changes in IRS or Treasury Department Position*, 61 TAXES 777 (1983); *Comment, Limits on Retroactive Decision Making by the Internal Revenue Service: Redefining Abuse of Discretion Under Section 7805(b)*, 23 U.C.L.A. L. REV. 529 (1976).

which apply estoppel or quasi-estoppel against the Commissioner.¹¹² Estoppel and quasi-estoppel have been applied against the Service, although the courts have been reluctant to do so.¹¹³ In the Ninth Circuit's view,

It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict the injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context. But as long as the concept of estoppel retains any validity it is conceivable that such situations might arise.¹¹⁴

Cases which apply estoppel or quasi-estoppel against the Service take the position that fairness—protection of reasonable reliance—can be more important in compelling circumstances than applying the proper interpretation of the statute. Enforcement of a duty of consistency proceeds from the same premise, except the fairness issue concerns equal treatment rather than reliance.

A Rare Event

I expect that judicial enforcement of consistency at the expense of substance would be a rare event. In most cases, the Service will be able to distinguish apparently inconsistent precedents, or will renounce those precedents. In fact, a significant virtue of a consistency requirement is that it forces the Service to focus on and resolve inconsistencies that might otherwise go unnoticed. Only in a few cases will the Service be unable to distinguish and unwilling to renounce its apparently inconsistent treatment of similarly situated taxpayers. Those cases will be of two types. First is the case where the Service attempts to distinguish the present case from its allegedly inconsistent treatment of other taxpayers,

¹¹² See, e.g., *United States v. Lucienni D'Hotelle*, 558 F.2d 37 (1st Cir. 1977); *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974); *Walsonavich v. United States*, 335 F.2d 96 (3d Cir. 1964); *Simmons v. United States*, 308 F.2d 938 (5th Cir. 1962); *United States v. Lindner*, 307 F.2d 262 (10th Cir. 1962); *Reineman v. United States*, 301 F.2d 267 (7th Cir. 1962).

¹¹³ "Although the doctrines of estoppel and quasi-estoppel are applicable against the Commissioner, it is well established that these doctrines should be applied against him with the utmost caution and restraint." *Estate of Emerson v. Commissioner*, 67 T.C. 612, 617 (1977). Quasi-estoppel has been applied when the taxpayer has been able to prove a misrepresentation made by the Service directly to him, reasonable reliance on his part, unconscionable detriment as a result, and the absence of other adequate relief. Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487, 494-503, 523 (1964).

¹¹⁴ *Schuster v. Commissioner*, 312 F.2d 311, 317 (9th Cir. 1962).

but the court finds the proposed distinction meaningless.¹¹⁵ Second, and probably more rare, is the situation where the Service's position in the present case is a total lark, perhaps the result of overzealousness on the part of a Service employee involved in the case.¹¹⁶ In those few cases, equal treatment under the law is an important enough principle to justify elevating the duty of consistency over the court's interpretation of the Code.

Can Private Letter Rulings Be Used to Demonstrate Service Inconsistency?

Introduction

A taxpayer may attempt to demonstrate the Service's alleged inconsistency in several ways: (1) He may be able to show the Service has conceded a point of law in other litigation,¹¹⁷ (2) he may be able to cite inconsistent published revenue rulings,¹¹⁸ or (3) he may even be able to obtain an admission from the Service that its current position represents a departure from past practice.¹¹⁹ On the other hand, the mere failure to audit other taxpayers should not constitute a redressable inconsistency, since failing to audit a return does not amount to an admission by the Service that the legal interpretations reflected on the return are correct.¹²⁰

Private letter rulings would seem to be the primary means of demonstrating Service inconsistency because they are numerous, readily ob-

¹¹⁵ For a successful attempt by the Service to distinguish allegedly inconsistent precedents, see Justice Frankfurter's concurrence in *United States v. Kaiser*, 363 U.S. 299 (1960), discussed in the text accompanying notes 30 and 31. For an unsuccessful attempt, see *Niles v. United States*, 710 F.2d 1391 (9th Cir. 1983), discussed in the text accompanying notes 182-206.

¹¹⁶ An example of this may be *Vesco v. Commissioner*, 39 T.C.M. (CCH) 101 (1979), discussed *supra* in text accompanying notes 46-50.

¹¹⁷ *Sirbo Holdings, Inc. v. Commissioner*, 476 F.2d 981 (2d Cir. 1973), discussed *supra* in text accompanying notes 73-84, is an example. This is a tricky area, however, since strategic concessions in litigation may not reflect the Service's considered view on the merits of an issue. Treusch, *Litigation Policy of the Chief Counsel's Office in Civil Tax Cases*, 36 TAXES 958, 960-61 (1958).

¹¹⁸ In his concurrence in *United States v. Kaiser*, *supra* note 115, 363 U.S. at 309, Justice Frankfurter concluded that the published rulings cited by the taxpayer were not inconsistent with the Service's position in *Kaiser*.

¹¹⁹ *Vesco v. Commissioner*, *supra* note 116.

¹²⁰ "The fact that all taxpayers or all areas of the tax law cannot be dealt with by the Internal Revenue Service with equal vigor and that there thus may be some taxpayers who avoid paying the tax cannot serve to release all other taxpayers from their obligation." *Wagner v. United States*, 387 F.2d 966, 972 (Ct. Cl. 1967). See also, 4 BITTKER, *supra* note 97, ¶ 110.1, at 110-8: "If . . . the taxpayer is simply the random victim of an unusually thorough audit, the claim that others got away scot-free usually gets nowhere."

tainable, thoroughly indexed, and represent the Service's considered views on the merits of the questions of law addressed.¹²¹ However, section 6110(j)(3) states that a private letter ruling "may not be used or cited as precedent" (unless the Secretary of the Treasury otherwise establishes by regulations). Does this provision prevent the use of private letter rulings to demonstrate Service inconsistency? Professor Davis thinks it does.¹²² While the answer is far from clear, I believe the more reasonable interpretation of section 6110(j)(3) is that it does not prevent the use of private letter rulings to demonstrate a violation of the duty of consistency. Rather, section 6110(j)(3) was intended to do only one thing: make it clear that taxpayers are not entitled to rely on letter rulings issued to other taxpayers.

Admittedly, the language of section 6110(j)(3) is poorly chosen, if it is only supposed to refer to reliance. The statute does speak of precedent, not of reliance. If precedent were given its common meaning, in accord with the doctrine of stare decisis,¹²³ then, section 6110(j)(3) probably would prohibit the use of letter rulings to show inconsistency. The duty of consistency is an administrative analog of stare decisis. A court will, under the doctrine of stare decisis, follow, distinguish, or (infrequently) overrule its own precedents,¹²⁴ and the duty of consistency imposes analogous standards on agencies. A natural reading, then, of "may not be used or cited as precedent" in section 6110(j)(3) would include a prohibition on the use of letter rulings to show inconsistent treatment. My response to this natural reading is that the legislative history of section 6110(j)(3), the Service's own use of letter rulings since 1976, and judicial citations to letter rulings since 1976, strongly suggest the apparent meaning of the statute is not its true meaning.

¹²¹ It took Commerce Clearing House 54 microfiche cards, each reproducing approximately 300 pages, to publish all the letter rulings issued in 1983. Letter rulings are printed or summarized, and are indexed by several private publishers. Because they represent the Service's considered views on the merits of the questions of law addressed, letter rulings are unlike litigating concessions, which may not reflect the Service's position on the merits of an issue, and failures to audit, which clearly do not reflect the Service's view of the merits.

¹²² 2 DAVIS, *supra* note 5, § 8:12, at 212.

¹²³ BLACK'S LAW DICTIONARY 1261 (5th ed. 1979) defines stare decisis, in part, as: "Policy of courts to stand by precedent and not to disturb settled point." *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142-80 (1921); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 62-120 (1960); R. POUND, LAW FINDING THROUGH EXPERIENCE AND REASON 23-43 (1970).

¹²⁴ The Supreme Court has noted: "Stare decisis does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980).

History of Section 6110(j)(3)

The Service has issued private letter rulings for decades.¹²⁵ A taxpayer about to engage in a transaction can request a letter ruling to obtain the Service's view of its tax consequences.¹²⁶ Since 1954, the Service has ordinarily permitted recipients of letter rulings to rely on those rulings.¹²⁷ If the Service later determines a ruling was in error, it will exercise its discretion under section 7805(b) to make its revocation of the ruling prospective only, thus protecting the reliance interest of the recipient of the ruling.¹²⁸ The Service has always, however, refused to protect reliance on rulings issued to other taxpayers.¹²⁹ If the Service revokes a position reflected in letter rulings, it will use its discretion under section 7805(b) to protect only the recipients of the rulings; as to all other taxpayers, the revocation will have retroactive effect.¹³⁰

Revenue rulings are like letter rulings in that they are the Service's explanation of how the Code applies to a particular set of facts.¹³¹ Unlike letter rulings, however, revenue rulings are officially published in the Service's *Cumulative Bulletins*, and are addressed to all taxpayers.¹³² The Service encourages all taxpayers to rely on revenue rulings,¹³³ and represents that the revocation or modification of a revenue ruling will not ordinarily be retroactively applied to any taxpayer's detriment.¹³⁴

The Service considers itself bound by an erroneous revenue ruling, as to all taxpayers, until it is revoked. But the Service considers itself bound by an erroneous letter ruling only as to the taxpayer to whom it is directed. Because of the more widespread effect of a mistaken revenue ruling, revenue rulings are subjected to more stringent review within the Service before release than are letter rulings.¹³⁵ An erroneous letter ruling benefiting only one taxpayer is not nearly as dis-

¹²⁵ Holden & Novey, *Legitimate Uses of Private Letter Rulings Issued to Other Taxpayers—A Reply to Gerald Portney*, 37 TAX LAW. 337, 338-40 (1984).

¹²⁶ See generally Reg. § 601.201, especially § 601.201(b)(1).

¹²⁷ Holden & Novey, *supra* note 125, at 340.

¹²⁸ Reg. § 601.201(1); Rev. Proc. 82-37, § 17.05, 1982-1 C.B. 491, 502.

¹²⁹ Holden & Novey, *supra* note 125, at 340. The regulations state: "A taxpayer may not rely on an advance ruling issued to another taxpayer." Reg. § 601.201(1)(1).

¹³⁰ Reg. § 601.201(1)(5).

¹³¹ Reg. § 601.201(a)(2), (6).

¹³² Reg. § 601.201(a)(6).

¹³³ Rev. Proc. 78-24, § 7.01(5), 1978-2 C.B. 503, 505. In addition, the introduction to every *Cumulative Bulletin* states that revenue rulings "may be used as precedents." *E.g.*, 1983-2 C.B. iii.

¹³⁴ Rev. Proc. 78-24, § 7.01(3), at 504.

¹³⁵ Portney, *Letter Rulings: An Endangered Species?*, 36 TAX LAW. 751, 755 (1983).

turbing to the Service as an erroneous revenue ruling benefiting all taxpayers.

Before 1976, the Service attempted to keep letter rulings confidential. The only taxpayers aware of the contents of a ruling were the recipient and anyone with whom the recipient chose to share the ruling. However, courts had twice ordered the release of certain letter rulings, pursuant to the Freedom of Information Act.¹³⁶ Section 6110, added to the Code by the Tax Reform Act of 1976,¹³⁷ specifically provided for public inspection of private letter rulings and other written determinations of the Service,¹³⁸ provided safeguards to prevent the disclosure of the identity of recipients of rulings,¹³⁹ removed written determinations of the Service from the jurisdiction of the Freedom of Information Act,¹⁴⁰ and provided that letter rulings and other written determinations "may not be used or cited as precedent."¹⁴¹

It is the meaning of that last phrase that is crucial to the question of whether letter rulings issued to other taxpayers can be used to show inconsistent treatment. The regulations are of no help; they merely repeat the words of the statute.¹⁴² The legislative history is more informative.

The Senate Finance Committee's Report explains the decision to provide for the nonprecedential status of letter rulings:

Under present administrative rules, a private letter ruling . . . is not to be used as a precedent by the IRS or any person. If all publicly disclosed written determinations were to have precedential value, the IRS would be required to subject them to considerably greater review than is provided under present procedures. The committee believes that resulting delays in the issuance of determinations would mean that many taxpayers could not obtain timely guidance from the IRS and the rulings program would suffer accordingly. Consequently, both the committee amendment and the House bill codify the present administrative rules by providing that determinations which are required to be made open to public inspection are not to be used as precedent.¹⁴³

¹³⁶ *Fruehauf Corp. v. Internal Revenue Serv.*, 522 F.2d 284 (6th Cir. 1975), *vacated on other grounds*, 429 U.S. 1085 (1977); *Tax Analysts & Advocates v. Internal Revenue Serv.*, 505 F.2d 350 (D.C. Cir. 1974), *modifying* 362 F. Supp. 1298 (D.D.C. 1973).

¹³⁷ Tax Reform Act of 1976, Pub. L. No. 94-455, § 1201(a), 90 Stat. 1660 (codified at I.R.C. § 6110).

¹³⁸ I.R.C. § 6110(a).

¹³⁹ I.R.C. § 6110(c).

¹⁴⁰ I.R.C. § 6110(1).

¹⁴¹ I.R.C. § 6110(j)(3).

¹⁴² Reg. § 301.6110-7(b).

¹⁴³ S. REP. No. 938, 94th Cong., 2d Sess. 311 (1976). Nearly identical language appears in H.R. REP. No. 658, 94th Cong., 1st Sess. 322-23 (1975).

This explains why taxpayers' reliance on letter rulings issued to other taxpayers should not be protected. If all taxpayers could rely on all letter rulings—as all taxpayers can rely on all revenue rulings—no doubt, the Service would feel compelled to subject letter rulings to the same intensive review revenue rulings receive, and the rulings program would suffer. These consequences would not follow from merely allowing taxpayers to use letter rulings to show inconsistent treatment; that use of letter rulings does not permit taxpayers to rely on those rulings. The Service can always adhere to the duty of consistency by explaining that the inconsistent rulings were wrong, and by disavowing the positions it had taken.¹⁴⁴ Since allowing taxpayers to use letter rulings to prove inconsistent treatment does not bind the Service to those rulings as to anyone except their recipients, the concerns expressed in the committee report do not apply to the use of letter rulings to show unequal treatment. Letter rulings used to show inconsistency would not have the binding effect of revenue rulings, and would not need the stringent review given to revenue rulings. Interpreting section 6110(j)(3) in light of the justification offered for it, the provision appears to preclude only protected reliance on letter rulings by taxpayers other than the rulings' recipients.¹⁴⁵

The committee report makes sense only as a discussion of protected reliance on rulings issued to other taxpayers, and yet it speaks, not in terms of reliance, but in terms of “precedent” and “precedential value.” The only possible conclusion—other than that the report makes no sense—is that the language is imprecise. When the report refers to use of rulings as precedent, it must mean protected reliance on rulings by taxpayers other than recipients, and nothing else. If, in the context of the report, precedent means reliance, then it follows that precedent also means reliance in the provision the committee is explaining.

It is probably unrealistic to say that there was any congressional intent, one way or the other, on the precise question of whether letter rulings could be used to bring the duty of consistency into play, because the case law supporting the existence of such a duty on the part of the Service was even more sparse then than it is now. My point is, rather, that section 6110(j)(3) appears to be directed at the narrow question of reliance; thus, it can fairly be interpreted to prohibit nothing but reliance.¹⁴⁶

¹⁴⁴ See *supra* text accompanying notes 5–22.

¹⁴⁵ Professor Davis agrees that the stated purpose of the provision applies only to reliance, but nevertheless believes the language of the statute clearly prohibits use of letter rulings to show unequal treatment as well. DAVIS, *supra* note 5, at § 8:12.

¹⁴⁶ Some commentators have argued that reliance on letter rulings by nonrecipients should be protected, at least in some circumstances. See Braubach, *Letter*

The force of this argument depends largely on the nature of the unspecified "present administrative rules" which the report says are codified by section 6110(j)(3). Those unspecified rules were probably section 601.201(1)(1) of the regulations. A committee print prepared in 1975 by the staff of the Joint Committee on Internal Revenue Taxation,¹⁴⁷ which was influential in the treatment of private letter rulings in the 1976 Tax Reform Act,¹⁴⁸ stated: "Under present law, a private ruling cannot be used by a taxpayer other than the person to whom it was issued. (regulation section 601.201(1)(1))."¹⁴⁹ The cited regulation was probably the "prior administrative rules" referred to by the report. The relevant language in section 601.201(1)(1) was the same then as it is now: "A taxpayer may not rely on an advance ruling issued to another taxpayer." If this is what section 6110(j)(3) was designed to codify, then section 6110(j)(3) deals with reliance, and nothing else. It does not prohibit the use of letter rulings to demonstrate unequal treatment.¹⁵⁰

Rulings: A Proposal, 12 TAX NOTES 315 (1981); Braubach, *Letter Rulings and Section 6110(j)(3): What Does the Future Hold?*, 9 J CORP. TAX'N 74 (1982); Braubach, *A Pilot Program of Limited Letter Ruling Reliance*, 23 TAX NOTES 107 (1984); Note, *Public Reliance Necessarily Follows From the Public Disclosure of Private Letter Rulings*, 10 U. Tol. L. Rev. 985 (1979). Section 6110(j)(3) permits the Secretary of the Treasury to establish by regulation for the precedential use of designated letter rulings.

¹⁴⁷ STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., 1ST SESS., PRIVATE LETTER RULINGS (Comm. Print 1975) [hereinafter cited as COMMITTEE PRINT].

¹⁴⁸ 2 DAVIS, *supra* note 5, § 8:12, at 210-11.

¹⁴⁹ COMMITTEE PRINT, *supra* note 147, at 16.

¹⁵⁰ The COMMITTEE PRINT's discussion of the "precedential value" of private letter rulings also supports this interpretation of § 6110(j)(3):

Under present law, a private ruling cannot be used by a taxpayer other than the person to whom it was issued. (Reg. § 601.201(1)(1)). . . .

If this policy were to be reversed and letter rulings were to be used as precedent, then it would appear the IRS will be required to give them the same exhaustive review presently accorded revenue rulings, and that this process of review would result in delay and a reduced number of rulings.

If rulings do not have precedential value, they may be issued without exhaustive review because their consequences apply only to one taxpayer. In this way, the system as a whole can withstand errors in publicized rulings, because the effect of the error would be limited to a substantial extent by the fact that the ruling would not be applied by taxpayers generally. . . .

. . . .
In order to maintain the present advantages of the ruling system to both the IRS and taxpayers, the committee may wish to consider explicitly adopting a rule establishing the lack of precedent of private rulings.

COMMITTEE PRINT, *supra* note 147, at 16.

Like the Report of the Senate Committee on Finance, *supra* note 143, this uses the language of precedence, but makes sense only as a discussion of reliance. A ruling used to demonstrate inconsistency need not "be applied by taxpayers

Service's Internal Use of Letter Rulings

The Service's internal use of letter rulings prior to 1976 was described in detail by Judge Robinson in *Tax Analysts & Advocates v. Internal Revenue Service*,¹⁵¹ a suit for disclosure of certain rulings brought under the Freedom of Information Act. For filing purposes, the Service divided its letter rulings into two categories.¹⁵² Rulings with no significant reference value were placed in an historical file, arranged alphabetically by taxpayer's name, and maintained for four years.¹⁵³ The historical file was not indexed.¹⁵⁴ Letter rulings considered to have reference value for internal purposes were placed in a permanent reference file, along with judicial opinions and published revenue rulings, and the reference file was organized by code section and indexed.¹⁵⁵ Whether rulings in the reference file were used by the Service as precedent was an important issue in the case, because the Service argued that the rulings were not subject to disclosure under the Freedom of Information Act if they were not relied upon by the Service as precedent.¹⁵⁶ The court found that the Service personnel referred to rulings in the reference file to find underlying authorities and reasoning when preparing letter rulings, and even revenue rulings, on similar issues.¹⁵⁷ If the underlying authorities had not changed, and the facts were sufficiently similar, the new ruling would reach the same conclusions as the reference ruling; reference rulings were important tools in the Service's pursuit of its goal of uniformity and correctness.¹⁵⁸

Based on these findings the court held that the Service did, in fact, use letter rulings as precedent.¹⁵⁹ It made no difference to the court that reference rulings were not necessarily slavishly followed, "for precedent is often only persuasive rather than controlling."¹⁶⁰ Nor did it matter that the Service sometimes reversed its position: "Just as within the Court system, the highest responsible authority within the agency is not

generally," because the Service can meet its duty of consistency by announcing the ruling was a mistake. Only a ruling on which all taxpayers are entitled to rely must "be applied by taxpayers generally." Thus, the COMMITTEE PRINT, like the Finance Committee's report, suggests § 6110(j)(3) is aimed solely at the problem of reliance, despite its use of the language of precedent.

¹⁵¹ 362 F. Supp. 1298 (D.D.C. 1973), *modified*, 505 F.2d 350 (D.C. Cir. 1974).

¹⁵² *Id.* at 1301.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1301-02.

¹⁵⁵ *Id.* at 1302.

¹⁵⁶ *Id.* at 1302-03.

¹⁵⁷ *Id.* at 1305.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1306.

¹⁶⁰ *Id.*

bound to follow a 'precedent' which on thorough examination he concludes is ill-founded or no longer appropriate."¹⁶¹

Before 1976 the Service's practice was to use private letter rulings in the reference file as precedent, in the sense that those rulings would be followed unless they were distinguishable on their facts, or they were determined to be ill founded. This use, which the court concluded was used as precedent, is the same as the use which would be made of letter rulings in judicially enforcing a duty of consistency, except for the voluntary nature of the Service's attempt to achieve consistency by referring to previous letter rulings. The duty of consistency requires an agency to follow, distinguish, or renounce its precedents; prior to 1976, the Service was attempting to do this voluntarily (but did not want to be required to do so).

What the Service was doing before 1976, and what the duty of consistency advocated here would require of the Service, are identical practices, except for the question of voluntariness versus compulsion. Nothing in the legislative history of section 6110(j)(3) states that the Service could not continue to make the same internal use of letter rulings as it had before enactment of section 6110(j)(3). To the contrary, the legislative history indicated section 6110(j)(3) was intended to preserve the status quo concerning the nonprecedential status of letter rulings.¹⁶² So, there is no reason to think that Congress intended section 6110(j)(3) to halt the Service's practice of making internal reference use of letter rulings, even though Judge Robinson had considered that a precedential use. And if section 6110(j)(3) does not prohibit that use, it can scarcely prohibit the use of letter rulings in the connection with the judicial imposition of a duty of consistency on the Service, since the two uses are the same, except for the presence or absence of compulsion.

This argument would lose much of its force if, in response to the enactment of section 6110(j)(3), the Service had stopped its internal use of letter rulings as aids in attaining consistency. But the practice has continued, demonstrating the Service's view that the prohibition of section 6110(j)(3) on the use of rulings as precedent does not extend to the use of rulings in striving for consistency.

Most private letter rulings are issued under the jurisdiction of the Service's Associate Chief Counsel (Technical).¹⁶³ The internal admin-

¹⁶¹ *Id.*

¹⁶² "Consequently, the Act codifies the prior administrative rules." S. REP. NO. 938, 94th Cong., 2d Sess. 309 (1976), *reprinted in* 1976-3 C.B. 347.

¹⁶³ Rev. Proc. 84-1, 1984-1 I.R.B. 10 (Jan. 3). Rulings relating to firearms taxes are under the jurisdiction of the Bureau of Alcohol, Tobacco and Firearms, and rulings relating to employee plans and exempt organizations are under the

istrative rules of the Associate Chief Counsel (Technical), printed in the *Internal Revenue Manual*, provide that where a letter ruling has been issued on a particular question, a decision not to follow that ruling should be made "only after the most careful research and analysis and consideration at appropriately higher levels of review."¹⁶⁴ The *Manual* goes on to specify in detail the administrative review required when consideration of an issue indicates that a previous letter ruling should be reversed or modified.¹⁶⁵ The precise review required depends on the

jurisdiction of the Assistant Commissioner (Employee Plans and Exempt Organizations).

¹⁶⁴ 6 CCH INTERNAL REVENUE MANUAL (Audit) ch. 762.3, at 7285-95.

¹⁶⁵ *Id.* at (Admin.) ch. (11)152(2)-(8), at 35,107:

(2) When consideration of a particular issue indicates that a revenue ruling, revenue procedure, a long-standing holding of a Branch in rulings or technical advice memorandums, or a previously issued ruling or technical advice memorandum that is not a position of long-standing but is one that was signed by the Branch Chief or higher authority should be reversed or substantially modified, further work on that particular issue will be suspended. A memorandum will be prepared from the Branch Chief to the Division Director setting forth:

- (a) Administrative history of the position;
- (b) Effect of changes in the law, if any, on the position (include citations or excerpts of pertinent provisions of Committee Reports);
- (c) Effect of court decisions, if any, on the position;
- (d) Factors that are causing particular concern;
- (e) Recommended position that should be taken; and
- (f) Basis or rationale for the proposed change in position.

(3) The memorandum will also include an approval line for the signature of the Division Director. The case file or files will be attached to the memorandum and forwarded to the Director for consideration.

(4) If the Director approves the Branch Recommendation, the case file will be returned to the originating Branch and the approval memorandum will serve as the basis for a revenue ruling project. The underlying ruling letter or technical advice memorandum should be prepared for release simultaneously with publication of the revenue ruling in the *Internal Revenue Bulletin*.

(5) If a document involving a change of position or holding is referred to Chief Counsel in accordance with IRM(11)170, the referral memorandum will include a statement that a change in a position or holding is involved, and a copy of the memorandum prepared in accordance with (2) preceding will be attached.

(6) When consideration of a ruling request or technical advice request indicates that the holding will be substantially different from the holding in a previously issued letter ruling or technical advice memorandum signed for, but not by, the Branch Chief that is not a position of longstanding, a memorandum to the Branch Chief following the format in (2) preceding will be prepared. If the Branch Chief decides that the proposed holding should supersede the holding in the earlier ruling letter or technical advice memorandum, issuance of the ruling letter or technical advice memo may be suspended by the Branch Chief pending publication of a revenue ruling. The Division office should be notified of the proposed change in position.

(7) When consideration of a ruling request or technical advice request indicates that the holding will be substantially different from the holding in a previ-

level of authority of the official responsible for the previous ruling, and on whether the previous ruling represents a long-standing administrative interpretation. The unifying theme, however, is that a tentative decision not to follow a previously issued letter ruling must be approved by higher authority within the Service.

As it did before the enactment of section 6110(j)(3),¹⁶⁶ the Service continues to maintain an indexed reference file for private letter rulings deemed to have "significant future reference value because of the issues involved."¹⁶⁷ When a letter ruling adopts a position contrary to that of an earlier reference ruling with indistinguishable facts,¹⁶⁸ the *Manual* provides for the removal of the earlier ruling from the reference file if it has no further reference value.¹⁶⁹ The new ruling requires review "at least one level higher than the level at which final action was taken on the reference case."¹⁷⁰

All of this may suggest that the Service uses letter rulings—at least letter rulings in the reference file—as precedent. But the *Manual* insists that the Service does not. Immediately after the rules setting forth the requisite review procedures of a proposal not to follow a previous letter ruling, the *Manual* states: "Unpublished rulings . . . are not to be relied on, used, or cited by any official or employee of Technical as precedents in the disposition of other cases."¹⁷¹ How can this be reconciled with the *Manual* provisions requiring consideration of previous rulings? The prohibition of reliance is consistent with the other *Manual* provisions, if it simply means that previous rulings need not be followed

ously issued letter ruling or technical advice memorandum that is not a position of longstanding but is one that was signed by the Branch Chief or higher authority, a memorandum to the Division Director following the format in (2) and (3) preceding will be prepared. If the Division Director decides that the proposed holding should supersede the holding in the earlier ruling letter or technical advice memorandum, issuance of the ruling letter or technical advice memo may be suspended by the Division Director pending publication of a revenue ruling. If the earlier letter ruling or technical advice memorandum was signed by the Division Director or higher authority, the recommended change should be brought to the attention of the Assistant Commissioner.

(8) The same procedures outlined in (6) and (7) preceding apply to a recommendation for a change in position resulting from a source other than a request for ruling or technical advice.

¹⁶⁶ *Tax Analysts & Advocates v. Internal Revenue Serv.*, 362 F. Supp. 1298 (D.D.C. 1974), *modified*, 505 F.2d 350 (D.C. Cir. 1974).

¹⁶⁷ 6 CCH INTERNAL REVENUE MANUAL (Admin.) ch. (11)633.82(5)(b), at 35,658.

¹⁶⁸ This would be done only after the administrative review required by § (11) 152 of the *Internal Revenue Manual*. See *supra* notes 164 and 165.

¹⁶⁹ 6 CCH INTERNAL REVENUE MANUAL (Admin.) ch. (11)633.82(6)(a), at 35,658.

¹⁷⁰ *Id.* at 35,659.

¹⁷¹ *Id.* at ch. (11)153, at 35,107.

blindly; they may be revoked if they were in fact erroneous. And the prohibition against citing previous letter rulings does not prevent internal reference to earlier rulings, as long as they are not cited in the letter rulings sent to taxpayers.¹⁷²

Internal reference to earlier rulings continues today. The Service's internal procedures permit—in fact, require—the consideration of previous letter rulings. The system is designed to ensure that the Service follows, distinguishes, or renounces its earlier rulings. And the Service finds nothing in this system inconsistent with the mandate of section 6110(j)(3). Use of letter rulings by taxpayers to demonstrate inconsistency would serve as a backup to the Service's internal procedures. On those few occasions when the Service's internal safeguards fail, courts could, by referring to private letter rulings, require the Service to follow, distinguish, or renounce its precedents. If the Service is right—as I think it is—that its internal use of letter rulings does not violate section 6110(j)(3), then it is difficult to understand how judicial use of letter rulings for the same purpose could contravene the statute.

Judicial Citations to Letter Rulings

Since 1976

The Supreme Court has not interpreted section 6110(j)(3) to prohibit all citations to letter rulings by taxpayers other than their recipients. The issue in *Rowan Cos. v. United States*¹⁷³ was whether meals and lodging furnished to an employee for the convenience of the employer were wages for purposes of the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA).¹⁷⁴ The Treasury Department regulations provided that such meals and lodging were wages for FICA and FUTA purposes.¹⁷⁵ The Supreme Court mentioned a number of factors to be considered in determining the validity of Treasury regulations, including whether the Service had been consistent in its interpretation of the statute, and how much scrutiny Congress had devoted to the regulations during the statute's reenactments.¹⁷⁶ The government contended that its current regulations were valid because, among other reasons, they were consistent with an

¹⁷² The *Manual's* rules for the conduct of income tax audits by the Service's district offices take a similar approach to letter rulings, stating that private letter rulings "shall not be used as precedents in the disposition of other cases but may be used as a guide with other research material in formulating a district office position on an issue." *Id.* at (Audit) ch. 424(14), 3(3), at 7309-229.

¹⁷³ 452 U.S. 247 (1981).

¹⁷⁴ *Id.* at 248.

¹⁷⁵ *Id.* at 250.

¹⁷⁶ *Id.* at 253, quoting *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979).

unbroken line of regulations and rulings since 1940, and Congress implicitly endorsed those regulations and rulings when it reenacted FICA and FUTA in the Internal Revenue Code of 1954.¹⁷⁷ The court rejected this argument, because it found that the Service's position since 1940 had not been consistent.¹⁷⁸ In demonstrating this inconsistency, the Court cited private letter rulings treating meals and lodging furnished for the convenience of the employer as not being FICA and FUTA wages.¹⁷⁹ The Court cited section 6110(j)(3) for the proposition that the rulings had no precedential value, but said they could nevertheless be used as evidence of the Service's actions.¹⁸⁰ Having rejected all the government's arguments, the Court held the regulations invalid.¹⁸¹

The *Rowan* Court used private letter rulings as an aid in determining the validity of the Service's interpretative regulations. The rulings showed that the Service's interpretation had not been consistent, and so they served as one factor in undermining the validity of the regulations. The issue of whether the Service was subject to a judicially enforceable duty of consistency did not arise, since the Court's interpretation of the statute compelled a decision in the taxpayer's favor. The Court's opinion indicates that not all uses of private letter rulings by nonrecipients violate section 6110(j)(3), but it does not indicate whether use of rulings to demonstrate a breach of a duty of consistency is permissible.

Two lower court decisions, however, offer some support for the use of letter rulings to show that the Service has violated its duty of consistency.

In *Niles v. United States*, medical care following a head injury had left 11-year-old Kelly Niles a quadriplegic.¹⁸² A jury awarded him a lump sum of over \$4 million for his injuries.¹⁸³ In defending against an appeal based on the alleged excessive size of the award, Niles' attorney presented a detailed hypothetical itemization of the award, with \$1,588,176 allocated to future medical expenses, and the appeals court

¹⁷⁷ *Id.* at 258.

¹⁷⁸ *Id.* at 260-62.

¹⁷⁹ *Id.* at 261-62 n. 17.

¹⁸⁰ *Id.* The Supreme Court had cited letter rulings much earlier, in *Hanover Bank v. Commissioner*, 369 U.S. 672, 686-87 n.20 (1962). There, the Court used the cited rulings as evidence of the Service's interpretation of the Code, in support of the statutory construction adopted by the Court. The Court emphasized, however, that taxpayers were not entitled to rely on letter rulings issued to other taxpayers. The importance of *Rowan* was the Court's indication that such use of letter rulings remained proper following the enactment of § 6110(j)(3).

¹⁸¹ *Id.* at 263.

¹⁸² 710 F.2d 1391, 1392 (9th Cir. 1983).

¹⁸³ *Id.*

affirmed the jury's award of damages.¹⁸⁴ Niles excluded the entire award from income under the authority of section 104(a)(2) of the Code, as damages received on account of personal injuries.¹⁸⁵

The Service did not contest the applicability of section 104(a)(2). However, the Service did object when, in later years, Niles claimed medical expense deductions. The Service's argument was that section 213(a) only allows a deduction for medical expenses "not compensated for by insurance or otherwise," and that these expenses had been compensated for by the lump-sum damage award.¹⁸⁶ Adopting the hypothetical allocation used by Niles' counsel in defending the damage award, the Service took the position that Niles could not deduct any medical expenses until their total amount exceeded \$1,588,176.¹⁸⁷

The Ninth Circuit noted that the Service had never before attempted to allocate a portion of a lump-sum damage award to future medical expenses in order to deny medical expense deductions; in fact, the administrative practice of nonallocation dated back to 1922.¹⁸⁸ In demonstrating the continuous nature of the Service's approval of nonallocation, the court cited two private letter rulings from the 1960's.¹⁸⁹ The court cited *Rowan* for the proposition: "Letter rulings have no precedential force, but they are competent evidence of administrative practice."¹⁹⁰ Relying heavily on the Service's consistent and long-standing administrative practice of nonallocation, evidenced in part by letter rulings, the court ruled in the taxpayer's favor.¹⁹¹

The court was careful to explain that its holding was consistent with its interpretation of the will of Congress; in so doing, it relied heavily on the presumption that Congress had consented to a well known administrative practice of long standing.¹⁹² Thus, the case does not, by its terms, approve the imposition of a duty of consistency on the Service, or the use of letter rulings to demonstrate inconsistency. Nevertheless, the case has strong elements of consistency analysis. As one would expect in a consistency case, the Service attempted to distinguish its apparently inconsistent precedents. The court found the suggested distinction—that in none of the precedents had the taxpayer, on appeal, defended the lump-sum award by offering a hypothetical allocation of

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1393.

¹⁸⁹ *Id.* at 1393–94.

¹⁹⁰ *Id.* at 1394 n.4.

¹⁹¹ *Id.* at 1395.

¹⁹² *Id.*

part of the award to medical expenses—to be without merit.¹⁹³ Also, the court emphasized its disapproval of the way the Service had changed its position: “A sudden departure from this entrenched administrative practice of non-allocation may not be taken by the fortuitous occasion of a single audit.”¹⁹⁴ This suggests that a change in position might have been acceptable if it had taken the form of a revenue ruling or a regulation. If it had, the court could be assured that the new position would be applied to all taxpayers from that point forward. Disapproval of the use of litigation arising from an audit as a means of changing a long-standing position is based on the great potential for inconsistency inherent in that technique.

The *Niles* court managed to avoid having to choose between the duty of consistency and the will of Congress by finding that both pointed in the taxpayer’s favor. Nevertheless, the court was greatly concerned with issues of consistency, and was willing to cite private letter rulings to demonstrate inconsistency. It is a small step from *Niles* to a decision expressly imposing a duty of consistency, and using letter rulings to test whether this duty has been fulfilled.

In fact, the Court of Claims had already taken that step, in *Xerox Corp. v. United States*.¹⁹⁵ Xerox provided copying machines to federal, state, and local governments, and to tax-exempt organizations.¹⁹⁶ Although those machines would normally be eligible for the investment tax credit (ITC), the Code provided that property used by governmental units and certain tax-exempt organizations was not eligible for the credit.¹⁹⁷ The Service had ruled, in both public revenue rulings and private letter rulings, that property made available to a tax-exempt or governmental customer as part of a service could qualify for the credit, because such property was not considered to be used by the customer.¹⁹⁸ The trial judge agreed with Xerox that its machines were eligible for the credit because they were an integral part of a service to its customers.¹⁹⁹ In reaching that conclusion, the trial judge cited and discussed three letter rulings, without so much as a mention of section 6110(j)(3).²⁰⁰

The Court of Claims panel adopted the trial judge’s opinion and

¹⁹³ *Id.* at 1394–95.

¹⁹⁴ The court also said: “This court does not look favorably upon an administrative change in ‘a principle of taxation so firmly entrenched in our jurisprudence,’ *Commissioner v. Greenspun*, 670 F.2d 123, 126 (9th Cir. 1982), particularly when that change is sought by means of adjudication in a particular audit.” *Id.* at 1394.

¹⁹⁵ 656 F.2d 659 (Ct. Cl. 1981).

¹⁹⁶ *Id.* at 661.

¹⁹⁷ *Id.* at 664–65.

¹⁹⁸ *Id.* at 671–74.

¹⁹⁹ *Id.* at 677–78.

²⁰⁰ *Id.* at 673–74.

added a few comments of its own. The court stated that it had "the right to consider the Service's rulings, both formal and informal,"²⁰¹ in deciding whether the copiers qualified for the credit. While acknowledging that letter rulings have no precedential force, the court stated "they are helpful . . . in ascertaining the scope of the 'service' doctrine adopted by the Service and in showing that that doctrine has been regularly considered and applied by the IRS."²⁰²

The court could have simply stated that the statutory ITC provisions required the service doctrine, and that Xerox qualified for the credit under that statutorily mandated doctrine. It did not. Instead, it announced: "Having adopted and maintained the 'service' doctrine, the IRS cannot now disavow it because it leads to the taxpayer's result. . . . Nor can the Government arbitrarily limit the doctrine in ways not properly foreshadowed in the Service's own formulation of it."²⁰³

The court thus applied a duty of consistency to the Service.²⁰⁴ Without regard to whether the service doctrine (a rule favorable to taxpayers) could legitimately be found in the statute, the court required the Service to apply the doctrine to Xerox in a way consistent with that in which it had applied the doctrine to other taxpayers.²⁰⁵ Since the Service had not chosen to renounce the doctrine, the court required the Service to follow its own rulings. Those rulings included not only published revenue rulings, but private letter rulings as well. In the opinion of the Court of Claims, then, use of private letter rulings to show a violation of the duty of consistency is not forbidden by section 6110(j)(3).

It is too early to tell whether *Niles* and *Xerox* are aberrations, or the beginning of a long line of cases using letter rulings to impose a duty of consistency on the Service. I believe that there is nothing in section 6110(j)(3) to prohibit this use, and *Xerox* and *Niles* suggest the courts may ultimately agree.²⁰⁶

²⁰¹ *Id.* at 660.

²⁰² *Id.* at 660 n.3.

²⁰³ *Id.* at 660 (footnote omitted).

²⁰⁴ In fact, the court expressly declined to delve into the merits of the Service doctrine: "[I]t is well to stress, at the outset, that, although the statute and regulations do not say that property made available as an integral part of a service is entitled to [ITC] status . . . , the Internal Revenue Service has developed that position and defendant does not quarrel with it in any way." *Id.* at 660

²⁰⁵ "Nor can the Government now arbitrarily limit the doctrine." *Id.*

²⁰⁶ In addition to *Niles* and *Xerox*, the concurring and dissenting opinion of Judge Goffe in *Keller v. Commissioner*, 79 T.C. 7, 51 (1982), *aff'd*, 725 F.2d 1173 (8th Cir. 1984), and the concurring opinion of Judge Oakes in *Ogiony v. Commissioner*, 617 F.2d 14 (2d Cir.), *cert. denied*, 449 U.S. 900 (1980), support the use of letter rulings to demonstrate inconsistency. The Tax Court majority in *Keller* supported the Service's attempt to apply a distortion of income test to the deductibility of prepaid intangible drilling costs (IDCs). Judge Goffe cited two private letter rulings allowing deductions for prepaid IDCs, without

Conclusion

The courts require most agencies to be consistent. Agencies must follow, distinguish, or renounce their precedents.

The Internal Revenue Service, however, has resisted the imposition of such a duty, with considerable success. The argument for exempting the Service is that the sole function of the court in a tax case is to apply its interpretation of the Internal Revenue Code to the facts of the case, and that the Service's prior treatment of other taxpayers is, therefore, irrelevant. While this argument has some plausibility, it is insufficient justification for allowing the Service to discriminate among similarly situated taxpayers. A court can, and in fairness should, require the Service to be consistent—even if the result of requiring consistency is to grant a taxpayer a benefit the court does not believe the substantive Code provisions afford him.

The most valuable evidence of Service inconsistency is private letter rulings. Despite section 6110(j)(3), which provides that private letter rulings are not to be "used or cited as precedent," taxpayers should be able to use letter rulings issued to other taxpayers to show that the Service has been inconsistent.

applying a distortion of income test. 79 T.C. at 54. "It is difficult," he complained, "to understand why the Commissioner continues to issue rulings in which he allows taxpayers to deduct IDC without mentioning distortion of income while, at the same time, he asks this Court to delve into the murky distortion of income test." *Id.* at 60.

In *Ogiony*, Judge Oakes noted the taxpayers' claim that the Service had issued a letter ruling inconsistent with the Service's position in *Ogiony*. 617 F.2d at 17. He expressed his view that "uniformity of treatment among taxpayers [is a] proper benchmark from which to judge IRS actions." *Id.* at 18. He found taxpayers' allegations of inconsistent treatment insufficient to cast real doubt on the validity of the Service's action. *Id.* His opinion suggests, however, that the Service should be held to a duty of consistency and that taxpayers should be able to use letter rulings to prove violations of that duty.