FEATURE:
ESTATE PLANNING & TAXATION

By **Conrad Teitell, Daniel G. Johnson** & **Katherine A. McAllister**

Legal Underpinnings for Formulating (And Defending) Estate Plans

Finding your way through the tax law maze of authorities

A U.S. Supreme Court Justice's comment on an important criminal law rule is instructive.

In January 1843, Daniel M'Naghten, suffering from delusions of persecution, had a fancied grievance against Prime Minister Robert Peel. He traveled to London to assassinate him but mistakenly shot Peel's secretary, Edward Drummond, who died from the wound several days later.[1]

M'Naghten was found not guilty by reason of insanity. As Lord Chief Justice Tindal put it: ". . . the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing; or, if he did know it, that he was not aware he was doing what was wrong." Thus the birth of the "M'Naghten[2] rule" in England, which a number of our states follow.

In 1952, *The Times of London* ran a series of articles on the M'Naghten rule. Supreme Court Justice Felix Frankfurter complimented *The Times of London* on the article, having only one criticism: They misspelled M'Naghten's name, spelling it M'Naughten instead of M'Naghten.[3]

The Times of London answered by citing a list of authorities that included: "The lunatic himself, signing a letter produced at the trial—M'Naughten (as reported in *The Times of London*)."[4]

Justice Frankfurter responded: "To what extent is a lunatic's spelling even of his own name to be deemed an authority?"[5]

When formulating (and defending) estate plans, practitioners need a thorough understanding of the weight to be given to the various "authorities" on which they hang their hats, whether the authority is a U.S. Supreme Court decision, a private letter ruling or one of the many authorities in between—for example, Tax Court decisions, Tax Court Memorandum decisions, district court decisions, circuit court decisions, Technical Advice Memoranda (TAMs), proposed Treasury regulations, final Treasury regulations or Internal Revenue Service publications.

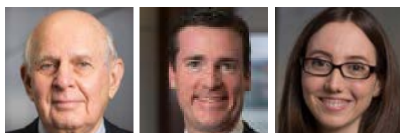
Caveat advisor: Don't overlook state and local rules—not to mention tax treaties.

Whirlwind Tour of Authorities

Finding the appropriate authority for a position can be daunting. First, there's the Internal Revenue Code, several thousand pages long and densely worded.[6] But, the IRC is only the tip of the "IRSberg." The IRS issues a wide variety of information designed to help taxpayers comply with the IRC—ranging from regulations to phone responses.

Not all IRS guidance is created equal; on some, taxpayers can rely and on others, they can't. And, the courts struggle with how much deference to give to different types of IRS guidance.[7] Moreover, the reported decisions addressing tax disputes emanate from a number of different courts, some having great fluency with tax matters and others that encounter tax disputes only occasionally. To support his position—and not be forced to hang up his hat—the practitioner needs to understand all forms of guidance to avoid relying on an "authority" that ain't one.

From left: **Conrad Teitell** is chairman of the national charitable planning group, **Daniel G. Johnson** is a principal and **Katherine A. McAllister** is an associate, all in the Stamford Conn. office of Cummings & Lockwood



IRC and Treasury Regulations

The bedrock of tax authority is the IRC of 1986, as amended. Enacted by Congress, it provides the statutory authority for federal taxation and vests the power to enforce that legislation with the Treasury.[8] The IRC establishes the role of the Commissioner of Internal Revenue within the Treasury, whose statutory duties include the power to "administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party," and any other appropriate duties that the Secretary of the Treasury may prescribe.[9]

Chevron pointed to political accountability in addition to agency expertise as a justification for its conclusions.

Some IRC sections expressly authorize the IRS to issue regulations to enforce those sections.[10] IRC Section 7805 goes further still, empowering the Secretary to "prescribe all needful rules and regulations" to enforce the taxation regime codified by the legislature in the IRC. Regulations in the former camp, as an express delegation from Congress, are deemed "legislative regulations," whereas those enacted under IRC Section 7805's catch-all authority—into which category the majority of the Treasury regulations fall—are termed "interpretive regulations."[11] Taken together, these regulations, promulgated by the Commissioner with the Secretary's approval, are second only to the IRC for a practitioner seeking support for his position. Reason: They're published pursuant to the Administrative Procedure Act of 1946 (APA) with the Secretary's imprimatur.[12] The APA requires that the IRS provide prior notice to the public of proposed regulations and that the public have an opportunity to submit written comments.[13] The final regulations must not only be published in the Federal Register in advance of their effective date, but also be accompanied by a statement describing the basis and purpose of the regulations and respond to the public comments.[14]

The tax practitioner can look to proposed regulations as guidance, but not authority. Proposed regulations ordinarily contain a proposed effective date, which may be a number of days after the regulations are published in final form in the Federal Register or some other measure.[15] However, courts consistently decline to defer to proposed regulations because, as the U.S. Court of Appeals for the Sixth Circuit has opined, "the promulgating agency has not had the benefit of administrative hearings or of comments from interested persons concerning the advisability of modifying the proposed regulation or adopting it as final."[16] The Office of the Chief Counsel (OCC) of the IRS has endorsed this view and further restricted the OCC from taking any position that's inconsistent with a proposed regulation.[17]

An issue regarding regulations. They're issued by the IRS, which, on the one hand, has unique experience with the IRC and arguably enjoys the best position from which to draft regulations designed to encourage voluntary compliance with the IRC. On the other hand, allowing the IRS to issue regulations that might bind a court's interpretation of the IRC raises the concern that the IRS might, as a direct participant in tax controversies involving the regulations, use that power to resolve issues in its favor by issuing amended regulations.[18] The Supreme Court initially resolved this concern in favor of federal administrative agencies in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[19] deferring to the Environmental Protections Agency's interpretation of the statute it was empowered by Congress to enforce. In *Chevron*, the court identified the limited role of courts on encountering regulations:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in

> the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[20]

Chevron pointed to political accountability in addition to agency expertise as a justification for its conclusion.[21] The rationale is that regulations are a preferable means for resolving statutory ambiguity because the executive branch is supervising the agency issuing them, whereas the most obvious alternative, the judiciary, isn't accountable to the electorate.[22] In addition, agencies are presumed to have a degree of subject matter expertise that renders them, rather than courts of general jurisdiction, in a better position to apply their governing statutes to address concrete issues of governance within their domains.[23] As a result, *Chevron* limited the role of the judiciary in reviewing regulations to ensuring that the interpretation of the agency was permissible.

In the decades following *Chevron*, practitioners grappled with whether *Chevron's* rule would be made applicable to the IRS, as a sense of tax exceptionalism surrounded the IRS and its rulemaking.[24] In *Mayo Foundation for Medical Education and Research v. United States*,[25] however, the Supreme Court unanimously confirmed that "(t)he principles underlying our decision in *Chevron* apply with full force in the tax context."[26] The Supreme Court made it clear that there would be no exception for the tax arena: "We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."[27] In the wake of *Mayo*, there's no room for further confusion concerning the deferential role of the judiciary when it encounters a regulation in a tax dispute; unless a court finds that the IRS has interpreted the IRC in an unreasonable manner, it will defer to the expertise of the agency tasked with the IRC's enforcement.[28]

Comment: Thus, when a regulation favors the IRS' position, you can be sure it won't hold the Mayo!

Rulings, Procedures and Notices

After regulations, the next tier of IRS guidance is limited to:

- **Revenue procedures:** Official statements published in the Internal Revenue Bulletin (IRB) that either affect the rights or duties of taxpayers or other members of the public under the IRC and related statutes, treaties and regulations or, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.[29]
- **Public pronouncements:** May contain guidance involving substantive interpretations of the IRC or other provisions of the law.[30] The IRS often uses notices to inform the public about its current views on issues it may later cover by regulation and to "solicit public comments on issues under consideration, in connection with non-regulatory guidance, such as a proposed revenue procedure."[31]

Historically, the Tax Court adhered to the traditional view that revenue rulings were merely the position of a litigating party (the IRS) and not substantive authority, and most courts of appeals agreed.

- **Revenue rulings:** Official interpretations by the IRS of the IRC, related statutes, tax treaties and regulations that are published in the IRB. They represent the IRS' conclusions on how the law is applied to specific facts.[32] Commentators give revenue rulings much attention. They're hybrids. Like regulations, they apply generically rather than to a single recipient, and they're issued by the same individuals in the OCC who prepare regulations.[33] Like PLRs, revenue rulings are released without public participation.[34]

Historically, the Tax Court adhered to the traditional view that revenue rulings were merely the position of a litigating party (the IRS) and not substantive authority, and most courts of appeals agreed.[35] In the wake of *Chevron* and *Mayo*, however, many courts have drawn the opposite conclusion, and taxpayers generally can rely on revenue rulings and expect that they'll receive

deference from the judiciary.[36] It would be an understatement to say that the Tax Court isn't fully on board with this approach: "We are not bound by revenue rulings, and the weight (if any) that we afford them depends upon their persuasiveness and the consistency of the Commissioner's position."[37] However, the Tax Court has refused to grant the same latitude to the IRS: "We cannot agree that the Commissioner is not bound to follow the revenue rulings in Tax Court proceedings. Indeed, we have on several occasions treated revenue rulings as concessions by the Commissioner where those rulings are relevant to our disposition of the case."[38] Only a few days after having its wrist slapped by the Tax Court in this manner, the OCC endorsed the Tax Court's conclusion and confirmed that the IRS

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will never take a position inconsistent with published guidance or proposed regulations.[39] In sum: "So long as the published guidance remains on the books, the OCC will follow it."[40]

IRS' Informal Views

Beyond these formal sources of statutory and regulatory authority, the IRS also makes available an impressive array of unpublished guidance and written determinations. The public inspection rules of IRC Section 6110 or the Freedom of Information Act require the IRS to do so.[41] "Written determinations" under IRC Section 6110(b)(1)(A) refer to a variety of IRS documents, ranging from letters tailored to a particular taxpayer's request (PLRs), internal legal guidance provided to one of IRS' branch offices (TAMs) or guidance from the Chief Counsel of the IRS (Chief Counsel Advice (CCAs)).[42] The IRS also routinely issues statements announcing that it will follow—or decline to follow—a court holding that runs contrary to its position (actions on decision (AODs)). Although these sources signal the IRS' views, generally, they aren't "authority."

PLRs and Letters

A taxpayer can often ask the IRS to interpret the tax laws and apply them to his specific circumstances or apply for relief to correct a missed regulatory election (under the procedures specified in the first revenue procedure published by the IRS every year).[43] The IRS' resulting determination, known as a PLR,[44] is generally binding on the taxpayer who requested it[45] but doesn't have precedential value under IRC Section 6110(k)(3).[46] The taxpayer can disregard his PLR and then litigate with the IRS. But, obtaining a PLR isn't an inexpensive proposition; the applicable IRS fees range from $2,200 to $50,000, depending on the nature of the request.[47] Furthermore, the legal fees involved are ordinarily substantial in light of the research required to prepare a PLR request, which is roughly similar to the research required to prepare an opinion letter.

If a taxpayer requests a PLR on a legal issue that's well settled, the IRS may instead respond with an "information letter."[48] That letter is a statement of general information issued by an associate office or director that calls attention to a well-established interpretation or principle of tax law (including a tax treaty) without applying it to a specific set of facts. Thus, it isn't a "written determination" under IRC Section 6110(b)(1)(A). A taxpayer may also request a determination letter instead of a PLR, that is,

> [A] written determination issued by an IRS Director that applies the principles and precedents previously announced by the IRS to a specific set of facts . . . issued only when a determination can be made based on clearly established rules in a statute, a tax treaty, the regulations, a conclusion in a revenue ruling, or an opinion or court decision that represents the position of the Service.[49]

TAMs

A taxpayer may also request technical advice on tax matters under a procedure specified in the IRB.[50] An associate office gives that advice in a memorandum responding to a field office's request for guidance in applying law to facts under unclear circumstances. For the requested advice to be given, the question raised:

> . . . must be on the interpretation and proper application of tax laws, tax treaties, regulations, revenue rulings, notices, or other precedents to a specific set of facts that concerns the treatment of an item in a period under examination or appeal.[51]

Because the resulting memorandum is considered a "written determination," its precedential status is restricted under IRC Section 6110(k)(3).

CCAs

Written advice or instructions to field employees of the IRS issued by the national office of the Chief Counsel that conveys a legal interpretation or position of the IRS concerning any revenue provision is referred to as a "CCA."[52] A CCA can address a particular fact pattern or provide more general guidance that would apply to a range of taxpayers. A CCA has effectively replaced a Field Service Advice.

AODs

The IRS, like other litigants, sometimes fails to persuade a court of its positions. When a trial court or intermediate appellate court renders a decision adverse to the government and that decision isn't appealed, the IRS may elect to issue an AOD, stating whether it intends to follow the holding in future cases. The IRS does this if it determines that an announcement will help its personnel address similar future situations.[53] If the IRS intends to follow the principle in future cases with similar facts, it will announce its "acquiescence" or, if it has concerns with the reasoning of the adverse opinion, its "acquiescence in result only."[54] But, if the IRS disagrees with the result and doesn't intend to follow it in controversies with similar facts, it will announce its "nonacquiescence."[55] In one notable instance, the IRS not only acquiesced in a Tax Court decision, but also issued a revenue ruling to clarify why it did so, thereby identifying the boundaries within the opinion that the IRS would recognize as a safe harbor for future transactions.[56]

If the disagreement is with a federal court of appeals, however, "the IRS will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit."[57] When an AOD represents a change in the IRS' litigating position, a Chief Counsel Notice will typically announce that change. Although AODs aren't defined as "written determinations" within the meaning of IRC Section 6110(b)(1)(A), they nevertheless present a similar problem for the taxpayer seeking to rely on them; they provide a helpful gauge of the IRS' likely position on a given issue, but the IRS is free to alter its litigating position.[58]

Taken together, these unpublished materials present a dizzying array of potential sources of guidance for those seeking support for a tax position. But, the quantity of available advice shouldn't be mistaken for its reliability. With many of these forms of guidance made available on the IRS' own website—arguably more readily accessible to the general public than traditional legal research materials hidden behind an online paywall or in a distant law library[59]—both taxpayers and practitioners might be alarmed to read the Tax Court's conclusion in *Bobrow v. Commissioner* concerning all such guidance issued by the IRS: "[T]axpayers rely on IRS guidance at their own peril."[60] In *Bobrow*, the taxpayer sought relief from the imposition of an IRS penalty for an income tax underpayment based on an IRS publication, but was informed that the publication in question was "not binding precedent."[61] While some might conclude that the taxpayer in *Bobrow* wasn't deserving of protection based on an IRS publication that contained an error, as he was a partner in the tax transactions group at a large and well-respected law firm and the former general counsel for CBS,[62] it's important to note that the Tax Court would have reached the same conclusion had the taxpayer in *Bobrow* been unsophisticated.

The potential cause for concern is that the majority of taxpayers who rely on IRS guidance aren't nearly as sophisticated as the taxpayer in *Bobrow*, and the majority of the guidance that they receive isn't binding on the IRS. In part, this reflects the reality of the IRS' mission; its contact with the public is staggering. For example, in 2013—the latest available statistics—the IRS responded to 8.4 million taxpayer letters about proposed adjustments to their tax accounts and received about 109 million telephone calls.[63] The good news for the fisc is voluntary compliance remains high. Approximately 98 percent of the revenue collected by the IRS is paid on time and voluntarily; only 2 percent results from IRS enforcement actions.[64] The bad news is the clouds on the horizon: According to the most recent statistics, only 61 percent of callers to a customer service representative got through, and they waited an average of 17.6 minutes

on hold (a significant decline from 2004, when 87 percent of callers were successful and waited an average of 2.6 minutes[65]); 53 percent of correspondence hadn't received a response within the times established by the IRS;[66] and the IRS training budget has been reduced by 87 percent, from approximately $172 million in 2010 to approximately $22 million in 2013.[67]

The IRS issues a wide range of guidance through less formal channels: instructions accompanying tax forms;[68] the *Internal Revenue Manual* (which is an operating manual for IRS activities);[69] news releases; and oral responses to telephone calls by individual taxpayers.

A taxpayer seeking to challenge an IRS determination generally has three venues from which to choose in filing a suit.

In many instances, the IRS alerts taxpayers that these materials can't be relied on for guidance. Most practitioners recognize the boilerplate[70] at the end of every PLR warning: "This document may not be used or cited as precedent."[71] Conversely, taxpayers who call the IRS, regardless of their level of sophistication, don't receive a warning that the answers to their questions can't be relied on. Some people suggest that the IRS replicate the PLR warning in some of its other less formal public guidance, including telephone calls.[72]

A disclaimer doesn't always do the trick for the IRS. Despite the clear import of IRC Section 6110(k)(3)'s warning, some case law suggests that the non-precedential nature of PLRs and other unpublished guidance isn't absolute. In its 1962 decision in *Hanover Bank v. Comm'r*, the Supreme Court defended a taxpayer's use of PLRs as persuasive authority, noting that:

> . . . although the petitioners are not entitled to rely upon unpublished private rulings which were not issued specifically to them, those rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws.[73]

Other cases suggest that more fundamentally, constitutional concerns impose a "duty of consistency" that would prohibit the IRS from treating similarly situated taxpayers in a disparate manner.[74] Taken together, these cases suggest that the IRS' unpublished authority, although not binding on the IRS, is nevertheless valuable as persuasive authority for a practitioner seeking to justify a transaction based on the IRS' prior positions.

Comment: "The life of the law has not been logic: it has been experience"[75] — Supreme Court Justice Oliver Wendell Holmes, Jr. He might have added, "It has also been exceptions."

The Courts

When the IRS and taxpayers can't resolve controversies through administrative channels, the judicial system takes over. A taxpayer seeking to challenge an IRS determination generally has three venues from which to choose in filing a suit: federal district courts, the U.S. Court of Federal Claims or the U.S. Tax Court. The overwhelming majority of taxpayers—more than 95 percent—opt to sue in the Tax Court.[76] Why? Unlike in the other two venues, a deficiency assessed by the IRS needn't be paid before bringing a suit in the Tax Court.[77] Nevertheless, a district court may be a better venue for the taxpayer seeking to have questions of fact decided by a jury instead of a federal jurist, as jury trials in tax matters are available only in district court.[78]

Tax Court opinions. A Tax Court decision's precedential value depends on the type of opinion:

- *Summary opinions*, issued in "small" tax matters involving amounts in controversy of $50,000 or less, may be neither appealed nor cited as precedent under IRC Section 7463. Taxpayers, even if not lawyers, can argue their cases in most courts.[79] Generally, they hire counsel. But in the "Small Claims" Tax Court, taxpayers often argue their own cases, and those trials are "conducted as informally as possible"[80] with streamlined procedures to account for the significant number of cases involving self-represented parties.[81]
- *Bench opinions*, which are rendered orally by a

judge, can't be relied on as precedent, although those opinions may be used to assert doctrines such as res judicata or collateral estoppel.[82]

- *Memorandum opinions*, issued in cases involving amounts over $50,000 that don't involve novel legal issues may be relied on as precedent and appealed, but aren't published in the Tax Court's official records; nevertheless, commentators note that the Tax Court itself appears to avoid citing these opinions as precedents.[83]
- *Regular division opinions*, otherwise known as Tax Court opinions, are published in the *Tax Court Reports* and are the preferred authority cited by the Tax Court itself.[84]

The determination whether an opinion is released as a regular or memorandum opinion, and therefore the resulting precedential value of the opinion, rests with the Chief Judge of the Tax Court.[85] Practitioners should look to regular division opinions, instead of memorandum opinions, to support their positions whenever and wherever possible.

With the exception of summary opinions in small tax matters, which are final, decisions of the Tax Court may be appealed; ditto for decisions by district courts and the Court of Federal Claims.[86] IRC Section 7482 grants the U.S. Courts of Appeals:

> . . . exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari. . . .

Appeals from the district courts are heard in the circuits "embracing" the districts; appeals from the Court of Federal Claims are heard before the Court of Appeals for the Federal Circuit.[87] To select the appropriate court of appeals to hear an appeal from the Tax Court, IRC Section 7482 directs litigants to consider the taxpayer's residence, principal place of business and related factors; if none applies, the Court of Appeals for the District of Columbia is the appropriate venue.[88]

Cases decided by a circuit court are binding on the lower courts within that circuit but are merely persuasive authority in the other courts. Likewise, the Tax Court views itself bound by a circuit court holding "squarely [on] point where appeal from [its] decision lies to that Court of Appeals and to that court alone,"[89] but those decisions aren't binding in similar cases before the Tax Court when the appeal lies in a different circuit court.

Tax appeals before the Supreme Court. A decision by a court of appeals is final, absent a grant of certiorari from the Supreme Court.[90] Historically, the Supreme Court has the reputation of allowing greater deference to tax opinions emanating from the Tax Court. This reputation stems from a number of sources, including the *Dobson* rule, which arose in a decision by Justice Robert H. Jackson (who served as Chief Counsel for the Bureau of Internal Revenue and as Assistant Attorney General of the Tax Division of the Department of Justice[91]), which restricted the Supreme Court's review of Tax Court decisions to questions involving "clear-cut mistakes of law."[92] Many commentators had speculated that the Supreme Court's and other courts' inclination to defer to the Tax Court stemmed from the complexity of the IRC, as described by Judge Learned Hand:

> In my own case the words of such an act as the Income Tax . . . merely dance before my eyes in a meaningless procession; cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.[93]

However, the *Dobson* rule had a short life. Congress amended the IRC in 1948 to provide that Tax Court decisions should be reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."[94] In a 1974 dissent, Justice William O. Douglas recognized the repeal of the *Dobson* rule, but did so with notable remorse: "*Dobson* was short-lived, as Congress made clear its purpose that we were to continue on our leaden-footed pursuit of law and justice in this field."[95]

The Supreme Court may no longer expressly defer to the Tax Court in tax matters, but the same can't be said of certain matters of state law that intersect with federal tax. The issues include property rights

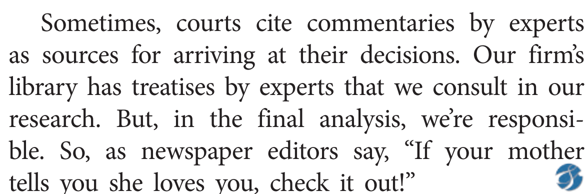
determined under state law that affect the application of the federal estate tax. In its 1967 decision in *Comm'r v. Estate of Bosch*, the Supreme Court clarified that when state courts of last resort have spoken regarding matters of state law, their rulings are entitled to deference in federal courts.[96] But, sometimes it's *Bosch* humbug. When state trial courts or intermediate appellate courts rule on these issues but the highest state courts remain silent, the rulings are merely entitled to "due weight," but not deference.[97] In *Bosch*, in which the Supreme Court addressed two issues of federal estate taxation that hinged on determinations of property rights under interpretations of state law, the reasoning led the Supreme Court to conclude that the federal courts weren't bound to follow the decisions of the Connecticut Probate Court or a New York State trial court when evaluating state law with federal tax implications.[98] Subsequent cases have suggested, however, that the holding in *Bosch* may be limited to the estate tax context. As the Ninth Circuit noted in its 2004 decision in *United States v. Boulware*:

> [w]hat effect, if any, *Bosch* has outside the context of the estate tax statute is unclear. The Fifth Circuit has held that the relevance of a state court's judgment to the resolution of a federal tax question will vary, depending on the particular tax statute involved as well as the nature of the state proceeding that produced the judgment.[99]

Nevertheless, practitioners seeking authority for their arguments would be well advised not to overlook state supreme court decisions when their federal tax theories are grounded in principles of state law.

In the Wings

In addition to nailing down tax rules, practitioners should look at what's going on in the wings—for example, state laws on investment diversification, definition of income and qualifications of trustees and executors. And, specify the state law that governs to avoid conflict-of-law issues.



Sometimes, courts cite commentaries by experts as sources for arriving at their decisions. Our firm's library has treatises by experts that we consult in our research. But, in the final analysis, we're responsible. So, as newspaper editors say, "If your mother tells you she loves you, check it out!"

Endnotes

1. John P. Martin, "The Insanity Defense: A Closer Look," *The Washington Post* (Feb. 27, 1998).
2. Variously spelled M'Naghten, M'Naughten and McNaghten.
3. Bernard L. Diamond, "On the Spelling of Daniel M'Naghten's Name," 25 *Ohio St. L.J.* 84, 85 (1964).
4. *Ibid.*, at p. 86.
5. *Ibid.*, at p. 87.
6. The precise length of the Internal Revenue Code has been the subject of popular debate, with some claiming that the IRC is in excess of 70,000 pages. *See, e.g.*, Jason Russell, "Look at How Many Pages are in the Federal Tax Code," *Washington Examiner* (April 15, 2015) (asserting that there are 74,608 pages in the IRC); Michelle Ye Hee Lee, "Ted Cruz's Claim that the IRS Tax Code Has More Words Than the Bible," *The Washington Post* (March 11, 2015) (critiquing Ted Cruz's claim that "we ... have more words in the ... [C]ode than there are in the Bible—not a one of them as good"). But, as other commentators have pointed out, the references to a 70,000 page IRC actually refer to the CCH Standard Federal Tax Reporter, a multi-volume resource that includes the IRC, regulations, legislative history and many other resources that tax practitioners may review. The IRC itself, however, makes up only a small portion of its 74,000 pages. *See, e.g.*, "Break It Down: NPR Reporters Fact Check The Republican Debate," *Morning Edition, NPR News* (Nov. 11, 2015), *www.npr.org/sections/itsallpolitics/2015/11/11/455568737/break-it-down-npr-reporters-fact-check-the-republican-debate*; Andrew L. Grossman, "Is the Tax Code Really 70,000 Pages Long? No, not even close," *Slate* (April 2014), *www.slate.com/articles/news_and_politics/politics/2014/04/how_long_is_the_tax_code_it_is_far_shorter_than_70_000_pages.html*.
7. Linda Galler, "Judicial Deference to Revenue Rulings: Reconciling Divergent Standards," 56 *Ohio St. L.J.* 1037 (1995).
8. IRC Sections 7801, 7805.
9. IRC Section 7803.
10. *See Goldman v. Commissioner*, 497 F.2d 382, 383 (6th Cir. 1974), *citing* 1 *Mertens, Law of Federal Income Taxation*, Section 3.20, at p. 41 (Rev. ed. 1969) ("When ... Congress has expressly delegated authority to the Commissioner to promulgate regulations under a specific Code section, the resulting legislative regulations are accorded even greater weight than that normally accorded interpretative regulations").
11. IRC Section 7805; Frank A. Mayer, III and Ahmad M. Hajj, "Executive Order 13563 and the United States Supreme Court's Decision in *Mayo*: Impact on Current and Upcoming Dodd-Frank Rulemakings," *Banking & Fin. Services Pol'y Rep.* (June 2011), at p. 1 (discussing legislative and interpretive regulations and observing that "[m]ost Treasury Department regulations are considered interpretive in nature").

    As one treatise puts it, however, "the distinction between legislative and interpretative regulations is often blurred in practice." *See* Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, Section 110.4.2 (2015).
12. *Ibid.*, Section 110.5.1.

13. 5 U.S.C. Section 553(b), (c).
14. 5 U.S.C. Section 553(b), (c), (d).
15. Naftali Z. Dembitzer, "Beyond the IRS Restructuring and Reform Act of 1998: Perceived Abuses of the Treasury Department's Rulemaking Authority," 52 *Tax Law* 501, 506 (1999).
16. *Mearkle v. Comm'r*, 838 F.2d 880, 883 (6th Cir. 1988).
17. IRS CCN CC-2003-014.
18. Mitchell M. Gans, "Deference and the End of Tax Practice," 36 *Real Prop. Prob. & Tr. J.* 731, 733 (2002).
19. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 18 467 U.S. 837 (1984).
20. *Ibid.*, at pp. 842-43 (1984) (footnotes omitted).
21. Gans, *supra* note 18 at p. 748.
22. *Chevron, supra* note 19, at p. 866.
23. The agency expertise argument hasn't received universal acceptance. *See* Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989 *Duke L.J.* 511, 514 (discussing court's frequent reliance on agency expertise as a justification for deference, but suggesting the need for a "search for something beyond relative competence").
24. Gans, *supra* note 18, at p. 732; *cf.* Kelsey C. Mellette, "The Service and the APA in *Dominion Resources, Inc. v. United States*: A Chance at Redefinition and Mandating Administrative Law Universality," 66 *Tax Law* 819 (2013) (observing that: "[a]lthough administrative law principles are intended to apply generally to all agencies, the Treasury has failed to follow many Administrative Procedure Act (APA) procedural requirements"); Kristin E. Hickman, "Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements," 82 *Notre Dame L. Rev.* 1727, 1728 (2007) (describing the Treasury's historically "strange relationship" with the APA).
25. *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44 (2011).
26. *Ibid.*, at p. 55.
27. *Ibid.*, at p. 56.
28. *Ibid.*
29. Revenue Procedure 89-14.
30. *Internal Revenue Manual* Section 32.2.2.3.2.
31. Bittker and Lokken, *supra* note 11, at Section 110.5.1.
32. *Supra* note 30, at Section 32.2.2.3.1.
33. Galler, *supra* note 7, at p. 1045.
34. *Ibid.*, at p. 1042.
35. *Ibid.*, at p. 1056; *see generally* Benjamin J. Cohen and Catherine A. Harrington, "Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?" 51 *Tax Law* 675 (1998).
36. Emily Cauble, "Detrimental Reliance on IRS Guidance," *Wis. L. Rev.* 421, 443 (2015).
37. *Elkins v. Comm'r*, 140 T.C. 86, 125 (2013).
38. *Rauenhorst v. Comm'r*, 119 T.C. 157, 171 (2002).
39. IRS CCN CC-2002-043.
40. *Ibid.*
41. 5 U.S.C. Section 552.
42. IRC Section 6110(b)(1)(A) defines "written determination" as "a ruling, determination letter, technical advice memorandum, or Chief Counsel advice." *See generally* Bittker and Lokken, *supra* note 11, at Section 110.5.1.
43. Rev. Proc. 2015-1, 2015-I I.R.B. 1; Treas. Regs. Section 301-9100.
44. The first letter ruling—*The Scarlet Letter*—in the colonies was issued to Hester Prynne. Back then you had to wear the ruling on your chest. Today, under the Freedom of Information Act, all facts that might identify the recipient are removed before publication.
45. This binding effect assumes that the facts as submitted by the taxpayer in the ruling request are complete and accurate and haven't been materially altered at the time the ruling is issued.
46. IRC Section 6110(k) provides in relevant part: "(3) Precedential status.—Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent."
47. Rev. Proc. 2015-1, 2015-I I.R.B. 1, Appendix A.
48. *Ibid.*, Section 2.04.
49. *Ibid.*, Section 2.03.
50. Rev. Proc. 2015-2, 2015-I I.R.B. 90, Section 5.
51. *Ibid.*, Section 3.
52. Martin J. McMahon, Jr. and Lawrence A. Zelenak, *Federal Income Taxation of Individuals, Second Edition*, Section 46:05.
53. 2015–41 I.R.B. 493.
54. *Ibid.*
55. *Ibid.*
56. Revenue Ruling 78-197.
57. *Ibid.*; *see Internal Revenue Manual* Section 36.3.1.4.
58. *Internal Revenue Manual* Section 36.3.1.1-13.
59. *See* Erik Eckholm, "Harvard Law Library Readies Trove of Decisions for Digital Age," *The New York Times* (Oct. 28, 2015), at p. A15 (observing that: "[t]hough the primary [legal] documents are formally in the public domain, many are not put online in a convenient format, if at all. . . . Legal groups spend anywhere from thousands of dollars a year, for a small office, to millions, for a giant firm, using commercial services like Westlaw and LexisNexis to find cases and trace doctrinal strands").
60. *Bobrow v. Comm'r*, 107 T.C.M. (CCH) 1110 (2014).
61. *Ibid.*
62. *Ibid.*
63. Taxpayer Advocate Service, *2013 Annual Report to Congress*, Volume One, Most Serious Problems, p. 20.
64. *Ibid.*, at p. 21.
65. *Ibid.*, at p. 27.
66. *Ibid.*, at p. 20.
67. *Ibid.*, at p. 21.
68. Dashiell C. Shapiro, "Can Taxpayers Rely on IRS Form Instructions?" 2015 *TNT* 221-10 (Release Date: Oct. 19, 2015) (Doc 2015-22199).
69. Bittker and Lokken, *supra* note 11, at Section 110.5.1.

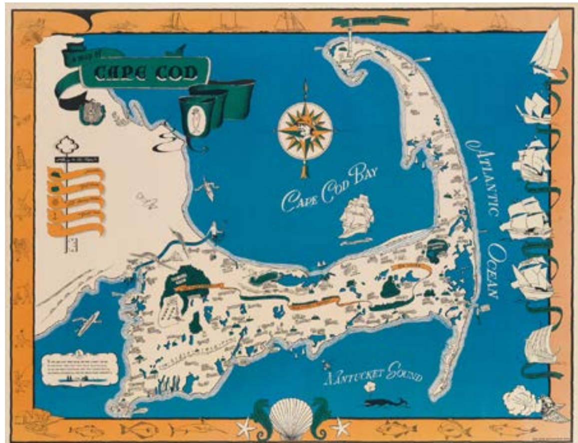
70. Why do we call such provisions "boilerplate"? The answer may stem from 19th century journalism. According to Michael Quinion, a contributor to the *Oxford English Dictionary* and the publisher of the *World Wide Words* newsletter:

    In the latter part of the nineteenth century, news agencies and syndicates in the United States would regularly send out material to the many small-town papers across the country. To make it as simple to use as possible, the text was supplied ready to typeset on matrices (commonly abbreviated to mats), squeezed paper moulds created by stereotyping, from which type could be cast locally. All the printer had to do was slot it into the right place on the page, often first cutting the mould with scissors in a brutally crude form of editing to fit the text to the space.

    It is . . . likely that these pre-formed slabs of text reminded editors and printers of the standard-sized metal plates that were supplied by iron foundries to riveters constructing steam boilers.

    Because the syndicated material was often third-rate filler stuff, or semi-disguised advertising puffs, boilerplate quickly came to mean hackneyed or unoriginal writing, a meaning very close to that of stereotype itself.

    Michael Quinion, "Boilerplate," *World Wide Words, www.worldwidewords.org/qa/qa-boi1.htm.*
71. *See* IRC Section 6110(k)(3); Cauble, *supra* note 36, at 441.
72. Cauble, *supra* note 36, at p. 466.
73. *Hanover Bank v. Comm'r*, 369 U.S. 672, 686, (1962).
74. *See, e.g., Int'l Bus. Machines Corp. v. United States*, 343 F.2d 914, 924 (Ct. Cl. 1965), distinguished by Technical Advice Memorandum 200405005 (Jan. 30, 2004) and recommendation regarding acq., SUBJECT: *International Business Machines Corp. v. United States*, AOD-2012-02 (IRS AOD Sept. 13, 2012) and nonacq., IRS Announcement Relating to: *Int'l Bus. Machines Corp.* IRS Announcement Relating to: United States, 2012-40 I.R.B. 422 (IRS ACQ 2012).
75. Oliver Wendell Holmes, Jr., *The Common Law*, 1 (1881).
76. Leandra Lederman, "(Un)Appealing Deference to the Tax Court," 63 *Duke L.J.* 1835, 1836-37 (2014). Lederman suggests that another reason for the disparity relates to the fact that the IRS' deficiency notices refer to the Tax Court appellate procedure but are silent as to other channels, possibly channeling self-represented litigants into the Tax Court by default. *Ibid.*, at p. 1837.
77. *Ibid.*
78. *Ibid.*
79. One notable exception is the U.S. Supreme Court, which in 2013 enacted the controversial Rule 28.8, which restricts oral argument to lawyers. *See* Will Baude, "Supreme Court Rule 28.8 may be invalid," *The Washington Post* (Feb. 10, 2014), *www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/10/supreme-court-rule-28-8-may-be-invalid/* (asserting that Rule 28.8 violates the self-representation guarantees of 28 U.S.C. Section 1654); Will Baude, "Further thoughts on the (statutory) right to argue pro se at the Supreme Court," *The Washington Post* (Feb. 17, 2014) (considering potential arguments harmonizing Rule 28.8 with 28 U.S.C. Section 1654, but concluding that the rule remains "quite legally questionable").
80. U.S.T.C. Rules of Practice & Procedure, Rule 174.
81. *See* "Small tax case procedure for disputed amounts not over $50,000, and for employment status disputes," 34 *Am. Jur.2d Federal Taxation* Section 71403.
82. 14 *Mertens Law of Fed. Income Tax'n* Section 50:6.
83. *Ibid.*
84. *Ibid.*
85. Bittker and Lokken, *supra* note 11, "Tax Court—Organization and Jurisdiction," at Section 115 in *Federal Taxation of Income, Estates & Gifts.*
86. IRC Sections 7463, 7482; U.S.T.C. *supra* note 80, at Rule 190.
87. 28 U.S. Code Sections 1294, 1295.
88. IRC Section 7482.
89. *Golsen v. Comm'r*, 54 T.C. 742, 757 (1970) *aff'd sub nom. Golsen v. Comm'r*, 445 F.2d 985 (10th Cir. 1971).
90. 28 U.S.C.A. Section 1254.
91. Lederman, *supra* note 76, at p. 1846.
92. *Dobson v. Comm'r*, 320 U.S. 489 (1943).
93. Learned Hand, "Thomas Walter Swan," 57 *Yale L.J.* 167, 169 (1947).
94. Act of June 25, 1948, ch. 646, Section 36, 62 Stat. 869, 991 (codified as amended at IRC Section 7482(a)(1) (2012)).
95. *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 19 (1974) (Douglas, J. dissenting).
96. *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967).
97. *Ibid.*
98. *Ibid.*
99. *United States v. Boulware*, 384 F.3d 794, 804 (9th Cir. 2004) (quoting *Estate of Warren v. Comm'r*, 981 F.2d 776, 781 (5th Cir. 1993)).



SPOT LIGHT

On Holiday

"A Map of Cape Cod" (27 in. by 36 in.) by Paul Paige, sold for $1,250 at Swann Auction Galleries' Rare & Important Travel Posters sale in New York on Nov. 19 2015. Created as a promotional map of Cape Cod, the poster features airports, golf courses, yacht clubs and other points of interest, indicated by small symbols.