Appellate Jurisdiction over Single-Year Issues in Multi-Year Tax Cases

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Suppose that the IRS finds a deficiency in your federal income tax for a three-year period. Rather than paying thousands of dollars in alleged back taxes, you decide to challenge the IRS by filing a petition for a re-determination of the deficiencies in the Tax Court. The Court dismisses one of the three claims as untimely and the IRS demands payment of the ten thousand dollars it assessed against you for that year. You suspect that the Tax Court erred in dismissing the claim. Although the judge has not resolved the two remaining claims, can you appeal the dismissal of the single-year claim?

If the petition had been filed in district court, the answer would be simple—you would ask the judge for a Rule 54(b) certification in order to appeal the decision. In Tax Court, however, your right to an immediate appeal depends upon the circuit in which you are litigating.

A circuit split exists over the ability of a litigant to appeal a Tax Court decision that fails to dispose of all the issues presented in a taxpayer's multi-claim petition. In a tax case, each individual year is treated as a separate claim; thus, a case involving multiple years is considered a multi-claim suit.¹ In district court, a de-

¹ B.A. 1996, Duke University; J.D. Candidate 2002, University of Chicago.

¹ See Yaeger v Commissioner, 801 F2d 96, 98 (2d Cir 1986), quoting Commissioner v Sunnen, 333 US 591, 598 (1948) (each tax year "is the origin of a new liability and of a separate cause of action").
cision regarding a single claim in a multi-claim suit is appealable only if the judge certifies the appeal under Federal Rule of Civil Procedure 54(b) ("Rule 54(b)). There is no equivalent rule, however, in the Tax Court. Consequently, the right to appeal a Tax Court decision in these circumstances is not as clear as it is in district courts. The debate over the right of appeal begins with 26 USC § 7482(a), the statute that grants appellate courts jurisdiction to review Tax Court decisions.

Courts have interpreted § 7482(a) in different ways, creating a circuit split. The Second, Fifth, Sixth, Seventh, and Ninth Circuits hold that a litigant does not have an automatic right to appeal a Tax Court decision that fails to resolve every year of a multi-year suit ("majority rule"). Circuits that adhere to the majority rule agree that no automatic right to appeal exists, but there is disagreement as to whether the Tax Court can certify a decision for appeal with a Rule 54(b)-type order. The Second and Sixth Circuits hold that a taxpayer may not appeal a decision rendered on a single-year claim of a multi-year suit until the Tax Court has ruled on all the claims in the suit. Under the Second

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2 See Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, 10 Federal Practice and Procedure § 2653 at 25 (West 3d ed 1998) (stating "[u]nless the court makes the express determination and direction required by [Rule 54(b)], a partial disposition of the action is not ripe for review"); FRCP 54(b) reads:

When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

However, see note 17 for exceptions to the rule that "only final decisions are appealable." This Comment assumes that the decisions discussed herein do not fall under any of those exceptions and hence, the only way to appeal a single-year claim in a multi-year suit is through Rule 54(b) certification.

3 See Jacob Mertens, Jr., 14 The Law of Federal Income Taxation § 51:12 at 51-29 (Clark Boardman Callaghan 1997) (explaining that the Tax Court "lacks a certification procedure analogous to Rule 54(b)").

4 26 USC § 7482(a)(1) (1994) ("The United States Courts of Appeals . . . shall have 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.").

5 See Yaeger, 801 F2d at 97 (rejecting an appeal of an individual claim of multi-claim suit). See also Nixon v Commissioner, 167 F3d 920, 920 (5th Cir 1999) (same); Schrader v Commissioner, 916 F2d 361, 363 (6th Cir 1990) (per curiam) (same); Shepherd v Commissioner, 147 F3d 633, 635-36 (7th Cir 1998) (same); Brookes v Commissioner, 163 F3d 1124, 1127-28 (9th Cir 1998) (same).

6 See Yaeger, 801 F2d at 98 (holding that "the Tax Court's entry of a formal decision document terminating a proceeding renders the action appealable and that appeal of an order concerning only one of several tax years is premature"); Schrader, 916 F2d at 363 (agreeing with the Second Circuit that "Tax Court decisions are appealable only if they dispose of an entire case").
and Sixth Circuit holdings, a taxpayer must make an immediate payment on any deficiency stemming from the particular year on which the Tax Court has ruled. In other words, when the court dismisses a single-year claim of a multi-year suit, the taxpayer must make a payment to satisfy the ruling on the dismissed year. The Fifth, Seventh and Ninth Circuits agree with this rule, but allow a taxpayer to appeal if the Tax Court issues a Rule 54(b)-type order certifying a decision on a single-year claim of a multi-year suit for appeal. If the Tax Court certifies the decision for appeal, the taxpayer need not cure the deficiency immediately, but rather can wait until the appellate court reviews the decision.

The First Circuit and the D.C. Circuit do not follow the majority rule, and instead hold that an appeal does lie when a Tax Court disposes of one or some, but not all, of the claims in a multi-claim suit. Such an appeal does not require a Rule 54(b)-type order or certification from the Tax Court (the “minority rule”). Under the minority rule, a taxpayer does not have to cure a deficiency until the appellate court renders a decision.

Part I of this Comment provides an overview of appellate procedure, both in district courts and the Tax Court, and discusses Rule 54(b) and its history. Part II analyzes the applicable case law.

The remainder of this Comment argues that the majority rule—in particular, the Second and Sixth Circuits’ position prohibiting any appeal of decisions on single-year claims in multi-
year suits—is the most tenable approach to this issue. More specifically, Part III analyzes the different methods of statutory construction courts use to interpret § 7482(a). Part IV examines both the "final decision" rule of appellate review and the variations within the majority rule by highlighting the differences between the Second and Sixth Circuits on the one hand, and the Fifth, Seventh and Ninth Circuits on the other. This Comment concludes that the position of the Second and Sixth Circuits is the strongest one, and therefore, no appeal should lie for a Tax Court decision rendered on a single-year claim of a multi-year suit.

I. OVERVIEW OF APPELLATE REVIEW

The United States Tax Court adjudicates disputes between taxpayers and the IRS. Once the Tax Court renders a decision, the parties can seek appellate review. Section 7482(a) of Title 26 provides that the United States Courts of Appeals have jurisdiction to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."

A. The Final Decision Rule

In general, the final decision rule dictates when a party may appeal the decision of a district court. The relevant statute, 28 USC § 1346(a)(1), provides that the United States Courts of Appeals have jurisdiction to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."

13 26 USC § 7482(a)(1).
15 See id § 1.05(d) at 10 ("Final decisions of the Tax Court . . . are appealed to the circuit court . . .").
16 26 USC § 7482(a)(1) (emphasis added).
17 See Charles Wright, Arthur Miller, and Edward Cooper, 15A Federal Practice and Procedure § 3907 at 268-69 (West 2d ed 1992) ("For two centuries, the final judgment rule has been the heart of appellate jurisdiction in the federal system."). There are exceptions to the final decision rule, though they are inapplicable to this Comment. The first, codified at 28 USC § 1292(a) (1994), permits an appeal of district court decisions "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." The tax cases discussed in this Comment do not involve injunctions. Another exception to the final decision rule is the "collateral order doctrine" which, under Cohen v Beneficial Industrial Loan Corp, applies to issues completely separate from the merits of a multi-claim suit and effectively unreviewable on appeal from a subsequent final judgment. 337 US 541, 546 (1949). This exception is also inapplicable to the appeals under consideration here, for these decisions are reviewable at a later time, and involve issues on the merits. See InverWorld, Ltd v Commissioner, 979 F2d 868, 873 (DC Cir 1992) (weighing injustice to the taxpayer in hearing an appeal now or waiting for the resolution of all claims). See also Yaeger v Commissioner, 801 F2d 96, 98 (2d Cir 1986) (considering whether efficiency interests cut in favor of hearing an appeal immediately or delaying until a final disposition of all claims). Thus, in arguing that only final decisions are ap-
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USC § 1291, confers on appellate courts "jurisdiction of appeals from all final decisions of the district courts."\(^{18}\) The Supreme Court in *Catlin v United States*\(^{19}\) defined a final decision as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."\(^{20}\) Thus, under the final decision rule, once the Tax Court decides a case on the merits, the litigants are free to appeal immediately. The concept of finality, however, is not always easy to decipher.\(^{21}\) In determining whether a decision is final, courts look at a number of factors, including "whether the appeal might subsequently be rendered moot, whether there is a possibility of self-correction by the judge whose decision is on appeal, whether hearing the appeal risks interrupting an ongoing proceeding, and whether alternatives to immediate review exist."\(^{22}\)

In addition, the final decision rule rests on a strong policy rationale. The rule favors deferring appellate review to allow trial court proceedings to continue uninterrupted.\(^{23}\) This policy permits trial courts to eliminate some issues that a party might have appealed prior to a determination of other matters in the case.\(^{24}\) Through such elimination, the rule prevents disruption and reduces delay and expense for litigants.\(^{25}\)

Despite these salutary goals, application of the final decision rule can create problems in multiple-claim litigation because it forces parties to wait until the end of a lawsuit to bring an ap-
peal, which may take years. The Supreme Court recognized this problem and responded by promulgating Rule 54(b).

B. History of Rule 54(b)

Prior to congressional ratification of the Federal Rules of Civil Procedure in 1938, courts applied the single-judicial-unit rule to determine whether an order was final and, therefore, appealable. At common law, courts considered each case a single-judicial-unit. In practice, this meant that litigants had a right to only one appeal from any case, no matter how many claims were involved. Under this rule, a litigant could appeal a judgment only if it was "final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."

The enactment of the Federal Rules of Civil Procedure allowed for more liberal joinder of parties and claims. As a result,
it was felt that to deny an immediate appeal from the disposition of an identifiable and separable portion of a highly complex action might result in an injustice. The Supreme Court addressed this situation by promulgating Rule 54(b), which adopted "the notion of the adjudication of a single 'claim' as a basis for the entry of a judgment." Rule 54(b) thus gave litigants the ability to appeal the disposition of a single claim in a multi-claim suit.

Courts and litigants encountered difficulty interpreting the original language of Rule 54(b) because the rule did not provide any guidance for determining what constituted a final order. Without such guidance, litigants were unable to clearly determine which decisions would be deemed final. As a result, litigants had to appeal any and all rulings. Otherwise they risked the possibility that a court would deem an earlier ruling to be a final decision, and that the time for appeal had already expired.

In response to this problem, the Supreme Court amended Rule 54(b) in 1946. The amended text reads:

When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Courts were thus given the power to certify a decision for appeal on one or several of the claims in a multi-claim suit without having to wait for a final decision on every claim involved. However, without the "express determination" of the court that "there [was]
no just reason for delay," a party could not appeal a partial disposition of an action.\textsuperscript{40}

In 1956, the Supreme Court upheld the validity of the amended Rule 54(b) in \textit{Sears, Roebuck & Co v Mackey}.\textsuperscript{41} The Court stated that "[t]he amended rule adapts the single-judicial-unit theory so that it better meets the current needs of judicial administration."\textsuperscript{42} The \textit{Mackey} Court also clarified that Rule 54(b) in no way relaxed the finality requirement.\textsuperscript{43} The amended rule simply "provide[d] a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on all the claims in the case."\textsuperscript{44} The changes adopted in the 1946 amendments to Rule 54(b) have withstood the test of time, as the rule has remained unchanged through the most recent update of the Federal Rules of Civil Procedure.\textsuperscript{45}

C. Appellate Review of Tax Court Decisions

Under the procedural rules of federal district courts, a decision rendered on fewer than all claims in a multi-claim suit is only appealable if the district judge certifies the decision for immediate appeal under Rule 54(b).\textsuperscript{46} The Tax Court, however, has its own rules of practice and procedure.\textsuperscript{47} Most rules are similar to the rules used by the district courts; however, a few rules are substantially different due to the specialized nature of the Tax Court.\textsuperscript{48} For example, the Tax Court rules neither define what constitutes a final decision for appellate purposes, nor do they

\textsuperscript{40} Id. See also Wright, Miller, and Kane, 10 \textit{Federal Practice and Procedure} § 2653 at 24–25 (cited in note 2); Charles Wright, \textit{Law of Federal Courts} 742 (West 5th ed 1995). This assumes that the order does not fall under one of the exceptions discussed in note 17.

\textsuperscript{41} 351 US 427, 438 (1956).

\textsuperscript{42} Id.

\textsuperscript{43} Id at 435 (stating that Rule 54(b) "does not relax the finality required of each decision").

\textsuperscript{44} Id.

\textsuperscript{45} See FRCP 54(b).

\textsuperscript{46} Wright, Miller, and Kane, 10 \textit{Federal Practice and Procedure} § 2653 at 25 (cited in note 2) (stating that "[u]nless the court makes the express determination and direction required by the rule [54(b)], a partial disposition of the action is not ripe for review"). Once again, this assumes that the order does not fall under one of the exceptions discussed in note 17.

\textsuperscript{47} See Taylor, et al, \textit{Tax Court Practice} § 1.06 at 10 (cited in note 14).

\textsuperscript{48} Id at 11 (stating that the Tax Court rules are "loosely modeled on the Federal Rules of Civil Procedure," but some of its structures are "unique"). See also Mertens, 14 \textit{Federal Income Taxation} § 51:12 at 51-29 (cited in note 3) (discussing the lack of a procedural analogue in the Tax Court to Rule 54(b) of the Federal Rules of Civil Procedure).
provide a procedural analogue to Rule 54(b). The language of the statutes simply provides that review of Tax Court decisions be conducted "in the same manner ... as decisions of the district courts." Some circuits have read this language to require the Tax Court to use appellate procedures identical to those used in the district courts, while other courts dispute this interpretation. Due to the lack of clarity and guidance in the Tax Court rules, circuit courts disagree as to litigants' ability to appeal single-year claims in a multi-year suit.

II. CASE LAW ANALYSIS

The circuit split revolves around litigants' ability to appeal Tax Court decisions. The majority of circuits hold that no automatic appeal lies for Tax Court decisions rendered on single-year claims in multi-year suits. This section will look more closely at the case law on both sides of the debate.

A. The Majority Rule: No Automatic Appeal

A majority of circuits hold that a decision by the Tax Court must dispose of all years in a multi-year suit before a litigant can automatically appeal a decision as to any single year. In *Yaeger v Commissioner*, the Second Circuit held that Tax Court decisions

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49 See Mertens, 14 Federal Income Taxation § 51:12 at 51-29 (cited in note 3) (stating that the Tax Court "lacks a certification procedure analogous to Rule 54(b)," and "[i]t is unclear when a 'decision' of the Tax Court has been rendered"). See also Bodnar, 72 Wash U L Q at 535-37 (cited in note 26) (discussing the fact that the Tax Court statutes do not define 'decision,' or contain a procedural analogue to FRCP 54(b)).

50 26 USC § 7482(a)(1).

51 See, for example, *Yaeger v Commissioner*, 801 F2d 96, 98 (2d Cir 1986) (stating that "[a]ccepting jurisdiction of a Tax Court ruling dismissing a cause of action relating to a single tax year would not be review 'in the same manner'... as review... in the district courts").

52 See, for example, *InverWorld, Ltd v Commissioner*, 979 F2d 868, 874 (DC Cir 1992) (holding that "in the same manner" was intended "only to alter the scope of review" as opposed to requiring specific procedures).

53 See *Nixon v Commissioner*, 167 F3d 920, 920 (5th Cir 1999) (holding that "unless the Tax Court enters a separate Rule 54(b)-type order... this court lacks jurisdiction to hear an appeal"); *Shepherd v Commissioner*, 147 F3d 633, 636 (7th Cir 1998) (dismissing an appeal for lack of jurisdiction because Tax Court failed to enter a Rule 54(b)-type judgment); *Brookes v Commissioner*, 163 F3d 1124, 1129 (9th Cir 1998) (agreeing with the Seventh Circuit that "appellate jurisdiction over Tax Court decisions should... require compliance with the standards of Rule 54(b)"). But see *InverWorld*, 979 F2d at 871-75 (granting jurisdiction to hear an appeal on a single claim of a multi-claim suit); *Commissioner v Smith Paper, Inc*, 222 F2d 126, 128-29 (1st Cir 1955) (same).

54 801 F2d 96 (2d Cir 1986).
were "appealable only if they disposed of an entire case." The
decision focused on § 7482(a), the statute that grants appellate
courts jurisdiction to review the decisions of the Tax Court. According
to the court, a determination on "a cause of action relating
to a single tax year [of a multi-year suit] would not be review
' in the same manner' as review of non-jury actions in the district
courts." The order on appeal in *Yaeger* "would, absent certifica-
tion under Fed. R. Civ. P. 54(b), be an unappealable interlocutory
order" in a district court. Since the Tax Court "lacks a certifica-
tion procedure analogous to Rule 54(b)," and "each tax year . . . is
not the basis of a separate appeal," it would not be possible to
hear an appeal on a single-year claim of a multi-year suit without
violating the language of § 7482(a).

The *Yaeger* court also rested its holding on policy grounds.
Specifically, the court worried that multiple appeals might arise
from a single multi-year tax case and increase the already over-
burdened appellate workload. The court also stated that "allow-
ing immediate appeal of a Tax Court determination regarding a
single year while other years in the same proceeding are still
pending might create confusion as to the proper time to file an
appeal." Thus, the court in *Yaeger* focused on promoting judicial
efficiency by limiting appellate review to cases where the Tax
Court disposed of all claims in a multi-year suit.

In *Schrader v Commissioner*, the Sixth Circuit followed the
Second Circuit, holding that an order pertaining to only one year
of a multi-year suit was not appealable. The court gave two rea-
sons for its decision. First, an order pertaining to only one year of
a multi-year suit did not bring the entire case to conclusion;
therefore, it would not be considered final. Second, the court
noted that its decision would not hinder taxpayers because a liti-

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55 Id at 98.
56 See id (applying the language of § 7482(a)).
57 Id, quoting 26 USC § 7482(a).
58 *Yaeger*, 801 F2d at 97.
59 Id at 97-98.
60 See id at 98 (discussing the "compelling interest" courts have "in avoiding multiple
appeals from the same proceeding").
61 See id (acknowledging the "unnecessary workload and delays" multiple appeals
would generate).
62 *Yaeger*, 801 F2d at 98.
63 916 F2d 361 (6th Cir 1990) (per curiam).
64 See id at 363, citing *Yaeger*, 801 F2d at 98 (adopting the reasoning of the Second
Circuit).
65 *Schrader*, 916 F2d at 363 (the order "[o]bviously . . . does not dispose of the entire
case" and therefore is not a final decision).
gant would have the opportunity to “challeng[e] the Tax Court’s order . . . upon resolution of the remaining claims.”66 The Sixth Circuit reasoned that the benefits of denying appeal until the disposition of all claims far outweighed any possible detriment to defendant taxpayers.67

In Shepherd v Commissioner,68 the Seventh Circuit partially adopted the holdings in Yaeger and Schrader.69 The Shepherd court analyzed the Tax Court’s order as to a single-year claim as if it were a partial disposition from a district court.70 When a district court renders judgment on some claims in a multi-claim suit, an appeal will lie “only if the district judge had entered a separate judgment on those claims [being appealed] under Fed. R. Civ. P. 54(b).”71 In Shepherd, the fact that the plaintiff had not asked the Tax Court to certify the decision on the single-year claim meant that it was not appealable.72

Shepherd differs dramatically from the holdings of the Second and Sixth Circuits on the issue of finality. The Second and Sixth Circuits held that the Tax Court decisions at issue were not final, and under the final decision rule, were not appealable at any time prior to disposition of the entire case.73 Under this approach, Rule 54(b) would not provide a means of appeal in Tax Court cases, because under the rule courts can certify only final decisions for appeal.74 The Seventh Circuit, on the other hand, held that decisions rendered on a single-year claim in a multi-year suit should be considered final, and therefore a Tax Court

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66 Id.
67 See id at 363. See also, United States v Michigan, 901 F2d 503 (6th Cir 1990) (determining finality “requires that ‘the inconvenience and costs of piecemeal review’ be weighed against ‘the danger of denying justice by delay’”), quoting Gillespie v United States Steel Corp, 379 US 148, 152 (1964).
68 147 F3d 633 (7th Cir 1998).
69 See id at 635–36 (dismissing an appeal for lack of a Rule 54(b) certification but stating that an appeal could be granted pursuant to such a certification).
70 See id at 634–35 (“[O]ne way to pose the precise issue in this case is to ask whether, were this a refund suit and the district court had decided against the taxpayer with respect to some of the years for which he was seeking a refund but had yet to resolve the taxpayer’s liability with respect to another year encompassed by the complaint, we would have jurisdiction over an appeal from the order dismissing some of the refund claims.”).
71 Id at 635.
72 Shepherd, 147 F3d at 635–36.
73 See Yaeger, 801 F2d at 98; Schrader, 916 F2d at 363.
74 See FRCP 54(b) (the rule applies to “the entry of a final judgment as to one or more but fewer than all of the claims”) (emphasis added).
could use Rule 54(b) to certify a single-year determination for appeal.\footnote{Shepherd, 147 F3d at 634–35. The court compared the case to an analogous case in district court. The court held that if the case was a refund suit in district court and the court "had decided against the taxpayer with respect to some of the years for which he was seeking a refund but had yet to resolve the taxpayer's liability with respect to another year," an appeal from an order dismissing some refund claims would be appealable "only if the district judge had entered a separate judgment on those claims under FRCP 54(b)." But in stating that the lower court had available Rule 54(b), the Seventh Circuit implied that these decisions should be considered final decisions, for Rule 54(b) can only be used to certify final decisions.}

Even though the Tax Court rules contain no equivalent to Rule 54(b), the Shepherd Court stressed that Rule 1(a) of the Rules of Practice and Procedure of the United States Tax Court conferred authority on the Tax Court to issue Rule 54(b)-type certifications.\footnote{See id at 635. Rule 1(a) provides:

Where in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.} According to the Seventh Circuit, Rule 1(a) "empower[s] [the Tax Court] to enter" a Rule 54(b)-type order "if the case satisfied the criteria of that rule."\footnote{Shepherd, 147 F3d at 635.} The Tax Court would therefore be able to employ a Rule 54(b)-type procedure to certify final decisions for appeal.\footnote{See id (stating that if petitioner asked for a Rule 54(b)-type order, "the court would have been empowered to enter it").}

The Fifth Circuit concurred with the Seventh Circuit in Nixon v Commissioner.\footnote{167 F3d 920, 920 (5th Cir 1999) (expressly adopting the reasoning articulated in Shepherd).} The court stated that it lacked jurisdiction to hear an appeal from the disposition of a single-year claim in a multi-year suit "unless the Tax Court enter[ed] a separate Rule 54(b)-type order."\footnote{Id.} A Rule 54(b)-type order can only be entered for final decisions; therefore, the Nixon court implicitly held that Tax Court decisions rendered on single-year claims in a multi-year suit should be considered final.\footnote{Id. It is implicit because Rule 54(b) can only be used to appeal final decisions; see note 75.}

B. The Minority Rule: Permitting Automatic Appeal

In direct contrast to the majority position, at least two courts have held that parties may appeal Tax Court decisions absent a
Rule 54(b) certification, even if the decision does not dispose of the entire case. In *Commissioner v Smith Paper,* the First Circuit held that a party could appeal a Tax Court decision disposing of one or more, but not all, joined claims. The court suggested that a Tax Court decision on one year in a multi-year suit was appealable even though an appellate court may not deem that decision final. The *Smith Paper* decision has not received extensive recognition because various courts rejected the First Circuit's interpretation of "decision" under § 7482.

More recently, in *InverWorld v Commissioner,* the D.C. Circuit held that a party could appeal the disposition of a single-year claim in a multi-year suit absent a certification from the Tax Court, regardless of whether the order disposed of the entire case. The court reasoned "that the injustice to the taxpayer (as well as the inconvenience to the Commissioner and the Tax Court) caused by delaying an appeal from what is essentially a dismissal of InverWorld's claim far outweighs the possible inconvenience to an appellate court in hearing two separate appeals." The *InverWorld* court was troubled by the realization that if it denied jurisdiction over the appeal, InverWorld would have to pay the entire deficiency at issue prior to appellate review of what could turn out to be an incorrect ruling. Based on these policy considerations, the circuit court held that the Tax Court's

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82 222 F2d 126 (1st Cir 1955).
83 Id at 128–29.
84 Id at 129.
85 See Bodnar, 72 Wash U L Q at 536 n 39, 537–38 (cited in note 26). In *Smith Paper,* the First Circuit relied on language in § 7459(c), holding that "the word 'decisions' of the Tax Court has a meaning of art; it refers only to two kinds of judicial action by the Tax Court, viz., (1) 'dismissing the proceeding' pending before it, whether for lack of jurisdiction or otherwise, or (2) formally determining a deficiency, or lack of a deficiency." 222 F2d at 129. Courts have criticized this limited interpretation of "decisions." See *Louisville Builders Supply Co v Commissioner,* 294 F2d 333, 336–37 (6th Cir 1961) (stating "the words 'decisions of the Tax Court' as contained in Section 7482(a) should not be construed to have meaning only as such meaning may be found within the narrow confines of Section 7459(c)"). See also *Estate of Smith v Commissioner,* 638 F2d 665, 668 (3d Cir 1981) (stating "no satisfactory reasoning has emerged in the Smith line of cases to explain why its restrictive approach to appealability is required by statute or by policy"); *InverWorld,* 979 F2d 868, 872 (DC Cir 1992) ("We can find no reason to believe that the definition of decision in § 7459(c) ... in any way meant to limit appellate jurisdiction.").
86 979 F2d 868 (DC Cir 1992).
87 Id at 871.
88 Id at 873.
89 Id (affirming that a denial of jurisdiction over the appeal would force InverWorld to "immediately pay an entire deficiency without review of a potentially erroneous Tax Court determination").
decision here was a final judgment, and should be appealable. The D.C. Circuit did not require, however, that the Tax Court issue a Rule 54(b) certification in order for the appeal to move forward.

The D.C. Circuit thus created a bright-line rule allowing a party to appeal a disposition of less than all claims in a petition without the need for a Rule 54(b) order. The court further decided that a bright-line rule would "provide the explicit guidance litigants and the Commissioner seek." The court declared that without a bright-line rule, "confusion among taxpayers and lawyers would result," specifically because litigants would be unable to determine the proper time to file an appeal. In arriving at its decision, the D.C. Circuit balanced the taxpayer's interest against the interest of judicial economy. However, the D.C. Circuit eschewed the use of this balancing test in calling for a bright-line rule that granted an immediate appeal of any disposition of a single-year claim in a multi-year suit.

C. The Ninth Circuit: A Convert to the Majority Position

When it first considered this issue, the Ninth Circuit followed the minority position of the First and D.C. Circuits. In Wilson v Commissioner, the court held that even without a decision on all of the original claims, a taxpayer could immediately appeal a Tax Court order that denied a petition to contest an additional deficiency for lack of jurisdiction without a Rule 54(b) certification. The Ninth Circuit "implicitly agreed with the First Circuit [in Smith Paper] that parties may immediately appeal Tax Court decisions that do not dispose of the entire case.

Recently, in Brookes v Commissioner, the Ninth Circuit reversed its broad adoption of the minority rule. The court held

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90 See InverWorld, 979 F2d at 875 ("There is no question that the Tax Court's decision in this case is final.").
91 Id at 875.
92 See id.
93 Id at 873.
94 InverWorld, 979 F2d at 873.
95 Id.
96 Id at 873–75.
97 564 F2d 1317 (9th Cir 1977).
98 Id at 1318.
99 Bodnar, 72 Wash U L Q at 538 (cited in note 26).
100 163 F3d 1124 (9th Cir 1998).
101 Id at 1129 ("We must qualify the holding in Wilson and require that the same procedures for appellate review of district court cases be applied to Tax Court cases.").
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that under the Supreme Court’s decision in Steel Co v Citizens For A Better Environment, the jurisdictional holding in Wilson was an invalid determination of “hypothetical jurisdiction.” The Brookes court argued that Wilson employed hypothetical jurisdiction because it “allowed appellate reviewability [sic] of separate tax years in a multi-year claim without any certification as to the finality of the order.” The holding in Brookes required a Rule 54(b)-like certification for any appeal of separate tax years in a multi-year tax case. Because the litigant in Brookes had not requested the Tax Court to certify the order for appeal, the Ninth Circuit denied appellate review. In requiring a 54(b)-type certification, the Ninth Circuit implied that decisions rendered on single-year claims in a multi-year suit should be considered final. This holding is analogous to the holding of the Seventh Circuit in Shepherd.

III. STATUTORY INTERPRETATION OF § 7482(A):
DEBUNKING INVERWORLD

One of the major debates in this circuit split is over how to interpret § 7482(a), which requires that the Tax Court resolve disputes “in the same manner” as district courts. There is no equivalent to Rule 54(b) in the Tax Court rules. Strictly speaking, this means that a party cannot appeal a decision on a single-

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103 See Brookes, 163 F3d at 1128 (stating that the Wilson holding allowing “appellate reviewability of separate tax years in a multi-year claim without any certification as to the finality of the order” is a determination of hypothetical jurisdiction because it “enables a court to resolve contested questions of law when its jurisdiction is in doubt”), quoting Steel Co, 523 US at 101. Steel Co can be seen as the Supreme Court’s strong reaction against:

the position embraced by several Courts of Appeals, which find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied.

Steel Co, 523 US at 93. The Ninth Circuit was a leading proponent of this practice. Id at 94.
104 Brookes, 163 F3d at 1128 (emphasis added).
105 Id at 1129.
106 Id.
107 See Brookes, 163 F3d at 1129 (“We agree with the Seventh Circuit that appellate jurisdiction over Tax Court decisions should be modeled on appellate jurisdiction over district court decisions and require compliance with the standards of Rule 54(b).”).
108 See 26 USC § 7482(a).
109 See Mertens, 14 Federal Income Taxation § 51:12 at 51-29 (cited in note 3) (stating that the Tax Court “lacks a certification procedure analogous to Rule 54(b),” and “[i]t is unclear when a ‘decision’ of the Tax Court has been rendered”).
year claim in a multi-year suit "in the same manner" as an appeal from a district court, because an appeal from a district court decision will lie only if it is certified under Rule 54(b).\textsuperscript{110}

The \textit{InverWorld} court relied on the legislative history of § 7482(a) in declaring that "the 'in the same manner' phrase was not intended to bind the courts to any particular procedure for determining which final decisions are immediately appealable."\textsuperscript{111} Thus, the D.C. Circuit reasoned that an appeal could be heard on a Tax Court decision rendered on a single claim of a multi-claim suit, even if the Tax Court used an appeal process that differed from the process used in district court.\textsuperscript{112}

Given the current circuit split, it is apparent that there are multiple ways to interpret "in the same manner."\textsuperscript{113} The starting point for this inquiry is to examine the different methods of statutory interpretation courts use in their analyses. This section will discuss two methods of statutory interpretation, the textualist and intentionalist methods, and how the courts at issue used these approaches to reach their conclusions. The analysis that follows will show that under both a textualist and intentionalist approach, § 7482(a) should be read to deny litigants an automatic right to appeal decisions rendered on a single-year claim of a multi-year tax suit.

A. Textualism versus Intentionalism

Two of the most commonly used approaches to statutory interpretation are textualist and intentionalist methods.\textsuperscript{114} Circuit courts have used both of these approaches in attempts to interpret and apply § 7482(a).\textsuperscript{115} Before analyzing particular tax cases,
a brief discussion of these two approaches to statutory interpretation will be helpful.

When applying the textualist method, courts rely, for the most part, on the plain words of the statute to determine its meaning. Textualism is "more oriented to statutory language and assertedly 'objective' meaning of statutory text than to the collective subjective intent behind the legislation." A textualist will generally eschew the use of external sources, unless the statutory text is "ambiguous or leads to an apparently absurd result."

The intentionalist approach uses evidence of legislative intent to interpret statutes. An intentionalist considers evidence of legislative intent even when a statute appears clear on its face. Materials an intentionalist might consult include committee reports and congressional floor statements.

missing a cause of action relating to a single tax year would not be review "in the same manner" as review in district courts).

116 See Eskridge, Frickey, and Garrett, Legislation and Statutory Interpretation at 228 (cited in note 114) (stating that under Scalia's textualist approach, "the meaning an ordinary speaker of the English language would draw from the statutory text is the alpha and omega of statutory interpretation"). See also Bank One Chicago v Midwest Bank & Trust Co, 516 US 264, 279 (1996) (Scalia concurring) ("In my view a law means what its text most appropriately conveys, whatever the Congress that enacted it might have 'intended.' The law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.").


118 See Michael P. Healy, Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of Pepper v Hart, 35 Stan J Intl L 231, 234 (1999). See also Eskridge, Frickey, and Garrett, Legislation and Statutory Interpretation at 228 (cited in note 114) (noting that under the textualist approach, "[w]hen the text is relatively clear, interpreters should not even consider other evidence of specific legislative intent or general purpose").

119 See Eskridge, Frickey, and Garrett, Legislation and Statutory Interpretation at 213 (cited in note 114) (the intentionalist theory of statutory interpretation has "traditionally emphasized legislative intent as the object or goal of statutory interpretation"). See also Commissioner v Engle, 464 US 206, 223 (1984) (noting that the "true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part"), quoting Helvering v Morgan's, Inc, 293 US 121, 126 (1934); Healy, 35 Stan J Intl L at 233 (cited in note 118) (stating that the intentionalist approach "seeks to interpret legislation based on legislative intent").

120 Healy, 35 Stan J Intl L at 234 (cited in note 118) (avowing that intentionalists "will consider any evidence of legislative intent, including both text and legislative history, to find the meaning of apparently clear statutes").

121 See Schacter, 51 Stan L Rev at 6 (cited in note 117) (stating that under the traditional intentionalist approach, "judges may legitimately consult materials like committee reports or floor statements in the search for intent . . .").
Proponents of these two approaches have waged heated debates. Advocates of intentionalism believe that "examination of circumstances preceding enactment may give interpreters a clearer understanding of how the legislature would have wanted the particular statutory question resolved." Intentionalists argue that their method allows courts to more closely approach what legislatures actually intended in the statute.

On the other hand, advocates of textualism argue that interpreting congressional intent exceeds the judicial function. They contend that:

[It is not the court's function 'to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.]

Another argument textualists make against the use of legislative history is that it promotes judicial activism. Textualists believe intentionalism invites judges to make decisions based on particular policy preferences, rather than on "neutral principles of law." Finally, textualists believe that use of legislative history "essentially elevate[s] to the status of 'law' that which has not survived the rigors of bicameralism and presentment mandated by Article I." Textualists are mainly concerned with the use of

122 Compare Frank H. Easterbrook, Statutes' Domains, 50 U Chi L Rev 533, 539 (1983) ("To delve into the structure, purpose, and legislative history of the original statute is to engage in a sort of creation. It is to fill blanks.") with Earl Maltz, Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach, 63 Tulane L Rev 1, 13 (1988) ("The intentionalist approach is not . . . a vestige of 'mechanical jurisprudence' or the product of a purely formalist approach to statutory interpretation.").


124 See id (asserting that intentionalists believe "examination of circumstances preceding enactment may give interpreters a clearer understanding of how the legislature would have wanted the particular statutory question resolved").


126 See Schacter, 51 Stan L Rev at 7 (cited in note 117) (stating that "judicial use of legislative history enables and perhaps encourages judicial activism").

127 Id.

128 Id at 8–9.
congressional floor debates, committee reports, and other materials that are part of the creation of federal statutes.\footnote{Id (discussing the fact that “committee reports, floor speeches, and the like are frequently written by unelected staffers who, in turn, often work with lobbyists acting on behalf of interest groups”).}

B. Interpreting § 7482(a): Two Approaches, the Same Result

The textualist and intentionalist interpretation of § 7482(a) both lead to the same conclusion: no automatic appeal lies for a Tax Court disposition on a single-year claim in a multi-year suit. In other words, under either a textualist or intentionalist interpretation of § 7482(a), the InverWorld decision is untenable. Section 7482(a) clearly grants appellate courts jurisdiction to review decisions “in the same manner” as decisions from district courts. Under a textualist interpretation, “in the same manner” would be construed to limit the means of appellate review to the exact means available to litigants in district court cases. In a district court case, appellate review of a single-year claim in a multi-year suit can occur only if the district court certifies the single-year claim for appeal under Rule 54(b).\footnote{See Mackey, 351 US at 435–36 (holding that “for ‘one or more but less than all’ multiple claims to become appealable, the district court must make both ‘an express determination that there is no just reason for delay’ and ‘an express direction for the entry of judgment’”). See also Wright, Miller, and Kane, 10 Federal Practice and Procedure § 2653 at 25 (cited in note 2).} A Tax Court cannot certify its decision under Rule 54(b) because there is no Rule 54(b) in Tax Court procedures. Thus, under a textualist interpretation, an appeal should not be allowed because review of a single-year claim in a multi-year suit simply cannot occur in the same manner as appellate review of a similar district court decision.\footnote{See Yaeger, 801 F2d at 98 (holding that “[a]ccepting jurisdiction of a Tax Court ruling dismissing a cause of action relating to a single tax year would not be review ‘in the same manner’ 26 USC § 7482(a), as review of non-jury actions in the district courts”).}

The InverWorld court used an intentionalist approach in interpreting § 7482(a).\footnote{See InverWorld, 979 F2d at 874 (discussing the need to investigate legislative history of § 7482(a)).} The court took umbrage with the textualist interpretation of the statute, which “is based on the false premise that ‘in the same manner’ refers to the availability of an immediate appeal.”\footnote{Id.} Instead, the D.C. Circuit turned to the legislative history in interpreting the statute, and determined that Congress intended only to alter the scope of review over Tax
Court decisions.\textsuperscript{134} The \textit{InverWorld} court also determined from the legislative history of § 7482(a) that Congress did \textit{not} intend to force the Tax Court to use a particular appellate procedure, such as a Rule 54(b)-type order.\textsuperscript{135}

Despite the \textit{InverWorld} court's holding to the contrary,\textsuperscript{136} the intentionalist approach does not support the conclusion reached in that decision. The legislative history of § 7482(a) does not clearly support the \textit{InverWorld} court's interpretation. Congress gave some insight into its intentions in the floor statements discussing § 7482(a):

The present bill amends the law that is interpreted in the \textit{Dobson} decision and restores to the circuit courts of appeal the power to review Tax Court decisions in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.\textsuperscript{137}

This floor statement indicates that Congress's intent in enacting § 7482(a) was to overcome the Supreme Court's holding in \textit{Dobson v Commissioner},\textsuperscript{138} and restore appellate courts' pre-\textit{Dobson} power to review decisions.\textsuperscript{139}

\textit{Dobson} limited the jurisdiction of appellate courts over decisions of the Tax Court.\textsuperscript{140} The ruling limited appellate review of Tax Court decisions to questions of law, and denied review for questions of fact.\textsuperscript{141} No similar distinction existed for appellate review of district court cases,\textsuperscript{142} thus, \textit{Dobson} was a major departure from the standards of appellate review at that time.

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\textsuperscript{134} Id., discussing Judicial Code and Judiciary, Hearings on HR 3214 before the Committee on the Judiciary, 80th Cong, 2d Sess 8500–01 (June 16, 1948), reprinted in 94 Cong Rec H 8501 (statement of Congressman Reed).
\textsuperscript{135} \textit{InverWorld}, 979 F2d at 874.
\textsuperscript{136} See id at 874.
\textsuperscript{137} Hearings on HR 3214, 94 Cong Rec H at 8501 (cited in note 134).
\textsuperscript{138} 320 US 489 (1943).
\textsuperscript{139} Hearings on HR 3214, 94 Cong Rec H at 8500–01 (cited in note 134) (noting "it seems desirable to enlarge upon the brief statement in the Senate committee report with respect to that provision so that there can be no question about the intent of Congress. Section 36 of the bill, as it passed in the Senate, removes all traces of the Dobson decision.").
\textsuperscript{140} Id at 8501, discussing \textit{Dobson}, 320 US 489 (noting that \textit{Dobson} limited appellate review of Tax Court decisions to questions of law, and denied review for questions of fact).
\textsuperscript{141} See \textit{Dobson}, 320 US at 502 (holding that when the appellate court “cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand”).
\textsuperscript{142} See Hearings on HR 3214, 94 Cong Rec H at 8500–01 (cited in note 134) (stating that “review of Tax Court decisions by circuit courts of appeal had always been construed to grant the same scope of review over Tax Court decisions as over decisions of the United
\end{flushleft}
The InverWorld court acknowledged that Congress added "in the same manner" to § 7482(a) explicitly in response to the Dobson decision. According to the InverWorld court, "in the same manner" was intended simply to counteract Dobson and give appellate courts the same scope of review over Tax Court decisions as they had over district court decisions. The InverWorld court stated that the language was not intended to hold appellate courts to the exact same procedures for review of the Tax Court and district courts. This was a rejection of the Shepherd and Nixon holdings, both of which required the Tax Court to use the procedural rules for appellate review used in district court cases, that is, to use Rule 54(b) certification. According to the InverWorld court, Congress's goal was to harmonize the scope of review accorded to Tax Court and district court decisions. Even if this was what Congress generally intended, it does not address whether the intent was to harmonize the scope of review with the pre-54(b) or the post-54(b) Federal Rules of Civil Procedure.

C. The Interrelationship of Rule 54(b) and § 7482(a)

The Supreme Court adopted the original version of Rule 54(b) in 1939 and amended it in 1946. The amended rule took effect in 1948 and is still in force today. The current Rule 54(b) thus went into effect the same year that Congress amended § 7482 to include "in the same manner." This is an important fact in analyzing whether Congress's intent was to harmonize the scope of review with the pre-54(b) or the post-54(b) Federal Rules of Civil Procedure.

There are three ways to view Rule 54(b) and its possible interrelationship with § 7482(a). First is an expressio unius argu-
The `expressio unius' canon of statutory interpretation holds that "the expression of one thing suggests the exclusion of all others." In taking an `expressio unius' approach, one would argue that if the drafters of § 7482(a) were fully cognizant of the amended Rule 54(b), the adoption of § 7482(a), without the addition of a Tax Court procedural rule analogous to Rule 54(b), would imply that Congress did not wish to give the Tax Court the ability to certify partial decisions for appeal. Review would be done "in the same manner" as review in a district court that did not have Rule 54(b). Without Rule 54(b), a district court could only review decisions that disposed of an entire case. By this reasoning, "in the same manner" would prohibit review until the Tax Court disposed of an entire case, as the Second and Sixth Circuits have asserted.

Second, the drafters of § 7482(a) may not have been aware of the amendment to Rule 54(b) and its implications for the statute. This is also a plausible view, especially given that the major Supreme Court decision defining Rule 54(b) was not issued until 1956, eight years after Congress amended § 7482(a). Thus, the drafters of § 7482(a) might not have recognized the significance of Rule 54(b), and how it affected the appealability of single-year claims in multi-year suits.

If the drafters of § 7482(a) were unaware of the amended Rule 54(b), it most likely would be a mistake to assume that appeals of Tax Court decisions rendered on single-year claims in a multi-year suit should be granted without a Rule 54(b) certification, as the minority rule holds. If the drafters were unaware of Rule 54(b), or were not familiar with how the rule changed the scope of appellate review of district courts' decisions, then the intent of the framers should be read to endorse the manner of review with which they were familiar at the time. Prior to the adoption of Rule 54(b), courts granted appeals under the single-year claims in multi-year suits.

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151 The complete terminology is `expressio unius est exclusio alterius'.
152 See Eskridge, Frickey, and Garrett, Legislation and Statutory Interpretation at 255 (cited in note 114).
153 See Wright, Miller, and Kane, 10 Federal Practice and Procedure § 2653 at 25 (cited in note 2) (noting that partial disposition of the action is not ripe for review without the express determination required by Rule 54(b)).
154 See Yaeger, 801 F2d at 98 (stating that "Tax Court decisions are appealable only if they dispose of an entire case"). See also Schrader, 916 F2d at 363 (adopting Yaeger).
155 See Mackey, 351 US at 427 (1956).
156 See Hearings on HR 3214, 94 Cong Rec H at 8501 (cited in note 134) (adding "in the same manner" language in 1948).
157 See InverWorld, 979 F2d at 875. See also Part II B.
judicial-unit theory.\textsuperscript{158} Under this rule, only a decision resolving every claim in a suit could be appealed, for only entire cases qualified as single judicial units.\textsuperscript{159} Thus, if Congress was unaware of Rule 54(b), they likely included the "in the same manner" language in § 7482(a) in order to adopt the scope of review with which they were familiar prior to Rule 54(b): the single-judicial-unit rule.

This interpretation accepts the \textit{InverWorld} court’s understanding of congressional intent for § 7482(a), for Congress would have successfully harmonized the scope of appellate review over Tax Court and district court decisions.\textsuperscript{160} However, under this interpretation the single-judicial-unit theory of appellate review would apply, under which \textit{InverWorld} is clearly incorrect, as the theory did not allow for appeals of single-year claims in multi-year suits.\textsuperscript{161}

The third possibility is that Congress intended appellate jurisdiction over Tax Court decisions to track changes in the scope of appellate review over decisions of the district courts. Under this theory, the Tax Court could avail itself of rules, such as Rule 54(b), that expand the scope of appellate review over district court decisions, even if the rules were adopted after Congress added “in the same manner” to § 7482(a).

Although this interpretation of § 7482(a) is plausible, there is no mention of such a theory in the floor statements addressing § 7482(a).\textsuperscript{162} Nevertheless, when read together with Rule 1(a) of the Rules of Practice and Procedure of the United States Tax Court,\textsuperscript{163} § 7482(a) does appear to allow the Tax Court to use new Federal Rules of Civil Procedure, even if the rules are not explicitly adopted in the Tax Court regulations. If Tax Court rules can track changes made to district court procedural rules, then comparison between when Congress enacted Rule 54(b) and when it enacted § 7482(a) is virtually irrelevant. Section 7482(a) would allow the Tax Court to use the procedural rules of district courts, no matter when they were enacted.

\begin{itemize}
\item \textsuperscript{158} See Wright, Miller, and Kane, 10 \textit{Federal Practice and Procedure} § 2653 at 19 (cited in note 2).
\item \textsuperscript{159} \textit{Mackey}, 351 US at 431.
\item \textsuperscript{160} See \textit{InverWorld}, 979 F2d at 874 (stating that Congress intended to alter the scope of review so that review of Tax Court decisions would be the same as review of district court decisions).
\item \textsuperscript{161} See id at 875.
\item \textsuperscript{162} See Hearings on HR 3214, 94 Cong Rec H at 8500–01 (cited in note 134).
\item \textsuperscript{163} See note 76 for text of Rule 1(a).
\end{itemize}
Even if one accepts the theory that Congress intended for the Tax Court rules to track changes to district court procedural rules, *InverWorld* is still incorrectly decided. The *InverWorld* court adopted a procedure that is unavailable in district court: the ability to grant an appeal for a single-year claim in a multi-year suit without a Rule 54(b) certification.\(^{164}\) In district court, a disposition of a single-year claim in a multi-year suit can only be appealed if the district court judge certifies the decision under Rule 54(b).\(^{165}\) Thus, the theory that the Tax Court may adopt district court procedural rules when "there is no applicable rule of procedure"\(^{166}\) still refutes *InverWorld*.

*InverWorld* is thus flawed under all three of the possible interrelationships between Rule 54(b) and § 7482(a). The expressio unius approach prohibits review until the Tax Court disposes of an entire case. The second approach follows the single-judicial-unit theory of appellate review, so it too would prohibit review until the Tax Court disposed of an entire case. The *InverWorld* decision fails under these two approaches simply because the D.C. Circuit granted the appeal prior to the disposition of the entire case. The third approach calls for the expansion of appellate jurisdiction over Tax Court decisions to track concomitant changes in the scope of appellate review over decisions of the district courts. This gives the Tax Court the power to certify decisions for appeal under Rule 54(b). *InverWorld* did not require a Rule 54(b) certification however, so it is clear that the *InverWorld* decision is flawed under all three approaches.

**IV. JUDICIAL EFFICIENCY AND THE FINAL DECISION RULE**

The three interpretive approaches just discussed fail to address the distinction between the holdings of the Second and Sixth Circuits and those of the Fifth, Seventh and Ninth Circuits. These two groups of holdings are distinguishable not on the manner of appeal suggested but rather on whether decisions rendered on single-year claims in multi-year suits are appealable at all.\(^{167}\) The fundamental difference between these courts is over the issue of finality: is the disposition of a single-year claim in a multi-year suit considered a final decision for appellate purposes? The

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\(^{164}\) See *InverWorld*, 979 F2d at 875.

\(^{165}\) See Wright, Miller and Kane, 10 *Federal Practice and Procedure* § 2653 at 25 (cited in note 2).

\(^{166}\) Tax Ct R Prac and Proc 1(a).

\(^{167}\) See discussion in Parts II A and II C.
Fifth, Seventh and Ninth Circuits assert that such a disposition is indeed a final decision, and hence appealable if the Tax Court follows the Rule 54(b) certification process. The Second and Sixth Circuits hold that such a disposition is not a final decision, and therefore not appealable.

Determining whether a decision is final for appellate purposes is not a simple task. Commentators have described this area of the law as “an unacceptable morass” and “a kind of crazy quilt of legislative and judicial decisions.” In Gillespie v United States Steel Corp, the Supreme Court adopted a balancing test to aid courts in determining whether a decision is final for purposes of appellate review. Five of the seven circuits that ruled on the issue addressed in this Comment have held that a decision rendered on a single-year claim of a multi-year suit is a final decision for appellate purposes. Of these five circuits, the InverWorld court is the only one that addressed the reasoning behind the holding in regard to finality.

A. InverWorld and Finality

In InverWorld, the D.C. Circuit held that a disposition on a single-year claim in a multi-year suit constituted a final decision and was subject to immediate review, even without Rule 54(b) certification. As the law stands today, however, a final decision on a single claim of a multi-claim suit in district court is not appealable without Rule 54(b) certification. The InverWorld holding therefore expands appellate review over Tax Court decisions beyond the scope of review that exists for district court decisions.

The D.C. Circuit based the InverWorld decision on its interpretation of Sears Roebuck & Co v Mackey. However, the court’s
reading of Mackey is not immune from criticism. In Mackey the Supreme Court held that the dismissal of some claims in a multi-claim suit may constitute a final decision for the purposes of appeal. The Court went on to state that the scope of appellate review "is limited expressly to multiple claims actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal." In order for these claims to be "found otherwise ready for appeal," the district court must certify the claim for appeal.

The Supreme Court compared the role of a district court to a "dispatcher" that "determine[s] ... the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." The InverWorld court downplayed the role of the district court in its analysis of finality, implying that under Mackey a dismissed claim may be appealed without certification. Since Mackey requires certification of a claim by the district court for an appeal to lie, the InverWorld court incorrectly held appealable the uncertified dismissal of a single-year claim in a multi-year suit.

B. The InverWorld Balancing Test

The InverWorld court also argued that judicial efficiency supported the position that appeals should lie for partial dispositions of multi-year suits. To reach this conclusion, the court

179 Mackey, 351 US at 432 ("Some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on all the claims.").
180 Id at 435 (emphasis added).
181 Id at 435–36.
182 Id.
183 See InverWorld, 979 F2d at 872–75. The InverWorld court cited Mackey for the proposition that "dismissal of some but not all joined claims is final under § 1291." Id at 872. However, the court failed to address the district court's role in determining finality until a later portion of the opinion discussing the congressional intent behind § 7482(a). Id at 872, 874–75. The court admitted that the system it adopted would "be different from [appellate] review of district court decisions because in the district court the trial judge has essentially unreviewable discretion to determine which final decisions can be appealed immediately." Id at 875. Instead of adopting a system where a Tax Court judge has similar discretion, the D.C. Circuit chose to make all such decisions immediately appealable without any certification, a "more liberal appeal rule" that the court felt was "broadly consistent with Congress's intent." Id.
184 See Mackey, 351 US at 435–36 (holding that in order to appeal decisions rendered on some but less than all claims, the district court must make both "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment").
185 See InverWorld, 979 F2d at 873 (holding that "the injustice to the taxpayer (as well as the inconvenience to the Commissioner and the Tax Court) caused by delaying an ap-
balanced "the injustice to the taxpayer" in disallowing appeal of a partial disposition with "the possible inconvenience to an appellate court" of allowing such appeals prior to the resolution of an entire multi-year suit. The court determined that a taxpayer's rights were more likely to be infringed if appellate review was not granted.

The problem with the InverWorld test is not that the court used it to resolve the particular dispute before it, but that the court went a step further and established a bright-line rule allowing for automatic appeal of partial dispositions in all cases, without a Rule 54(b) certification. In other words, the court applied a balancing test and determined that judicial efficiency supported its decision, and then proceeded to create a bright-line rule that precluded the use of its own balancing test in subsequent cases.

C. The Gillespie Balancing Test

In crafting its bright-line rule, the InverWorld court relied upon the predecessor to its balancing test, the Gillespie test, adopted by the Supreme Court in 1964. In Gillespie, the Court articulated a test for determining finality that weighed "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Clearly, judicial efficiency is central to determining whether a decision is final, and finality is crucial given the role it plays in determining whether an order is appealable. However, the Court also warned that:

[O]ur cases long have recognized that whether a ruling is "final"... is frequently so close a question that... either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all
marginal cases coming within what might well be called the "twilight zone" of finality. Because of this . . . the requirement of finality is to be given a "practical rather than a technical construction."\textsuperscript{193}

The Gillespie test eschewed the use of a bright-line rule like the one used in InverWorld,\textsuperscript{194} and ordered courts to make a "practical" determination based on particular facts when making a finality determination.\textsuperscript{195} The InverWorld court, in applying a bright-line rule, predetermined an outcome for all future cases.\textsuperscript{196} This contravenes Gillespie, which requires courts to determine finality on a case-by-case basis.\textsuperscript{197}

The InverWorld court stated that a bright-line rule would better serve the interests of litigants.\textsuperscript{198} However, at least one other court has taken issue with this assertion.\textsuperscript{199} A bright-line rule allowing for appeal does not necessarily benefit the interests of the courts, either.\textsuperscript{200} In some instances, a court could be forced to hear multiple appeals from the same tax proceeding.\textsuperscript{201} The fact that there are strong judicial efficiency arguments both supporting and refuting the InverWorld bright-line rule simply reinforces the Supreme Court's holding in Gillespie that a balancing test should be used to determine appealability on a case-by-case basis; it also weakens the InverWorld court's claim that a bright-line rule is absolutely necessary.\textsuperscript{202}

\textsuperscript{194} See InverWorld, 979 F2d at 873 (discussing the need for "bright-line rule that allows for appeal from denial of jurisdiction over one but not all the separate claims in a petition").
\textsuperscript{195} See Gillespie, 379 US at 152 (holding that "the requirement of finality is to be given a 'practical rather than a technical construction'"), quoting Cohen \textit{v} Beneficial Industrial Loan Corp, 337 US at 541, 546 (1949).
\textsuperscript{196} See InverWorld, 979 F2d at 873.
\textsuperscript{198} InverWorld, 979 F2d at 873.
\textsuperscript{199} See, for example, Yaeger, 801 F2d at 98 (holding that "allowing immediate appeal of a Tax Court determination regarding a single-year while other years in the same proceeding are still pending might create confusion as to the proper time to file an appeal").
\textsuperscript{200} See id (holding that "courts have a compelling interest in avoiding multiple appeals from the same proceeding").
\textsuperscript{201} See Schrader, 916 F2d at 363 (holding that there is a "compelling interest in avoiding multiple appeals from a single proceeding whenever possible").
\textsuperscript{202} InverWorld, 979 F2d at 873.
D. The Split Among the Majority

Like the D.C. Circuit in InverWorld, the Fifth, Seventh and Ninth Circuits also held that dispositions on single-year claims in multi-year suits should be considered final for appellate purposes.\footnote{See Nixon, 167 F3d at 920; Shepherd, 147 F3d at 636; Brookes, 163 F3d at 1129. These cases, in holding that an appeal would lie pursuant to a Rule 54(b) certification, imply that dispositions on single-year claims of multi-year suits should be considered final decisions, for only final decisions can be certified under Rule 54(b). See also note 75 and accompanying text.} Whereas the InverWorld court held a decision rendered on a single-year claim of a multi-year suit automatically appealable, these three courts required the Tax Court to issue a Rule 54(b)-type certification in order to render the decisions appealable. The Second and Sixth Circuits, however, have come to the opposite conclusion.\footnote{See Yaeger, 801 F2d at 98. See also Schrader, 916 F2d at 363.} Those courts held that dispositions of single-year claims in multi-year suits should not be considered final, and hence are unappealable prior to a decision on every issue in a given case.\footnote{Yaeger, 801 F2d at 98; Schrader, 916 F2d at 363.}

The Yaeger court defended holding the disposition of single-year claims unappealable on the grounds of judicial efficiency.\footnote{See Yaeger, 801 F2d at 98 (emphasizing judicial efficiency).} In Yaeger, the court stressed two points: first, courts have a "compelling interest" to avoid the delays and the increased workload that would result from hearing multiple appeals from a single proceeding; second, allowing an appeal of a single-year claim while decisions on other years are still pending could create confusion for litigants.\footnote{Id.} In Schrader, the Sixth Circuit agreed that appellate courts should try to avoid hearing multiple appeals from a single case.\footnote{Schrader, 916 F2d at 363 (stating that there exists a "compelling interest in avoiding multiple appeals from a single proceeding whenever possible").} With the federal appellate caseload already overburdened,\footnote{See Brendan Stephens, Officials Analyze Increase in Federal Court Filings, Chi Daily L Bull 1 (Dec 11, 1998) (discussing the significant increase in the federal caseload over the last several years). There was a 5 percent increase in the number of filings in U.S. Courts of Appeals from 1993 to 1997. Id.} any attempt at lightening this load should be looked upon as a benefit to the judicial system.

The Fifth, Seventh and Ninth Circuits implicitly hold that an order disposing of a single-year claim in a multi-year suit is a final decision, since these courts allow for an appeal pursuant to a Rule 54(b) certification, and such a certification may only be is-
The Fifth Circuit’s opinion in \textit{Nixon} simply adopts the reasoning of the Seventh Circuit in \textit{Shepherd}, as does the Ninth Circuit in \textit{Brookes}. \textsuperscript{211} The Seventh Circuit asserted that the same order rendered in an analogous district court case would be final for appellate purposes, but the court failed to give a reason for this holding. \textsuperscript{213}

The issue of finality hinges upon judicial efficiency. The Second and Sixth Circuits rightfully attack the possibility of separately hearing multiple appeals from the same lawsuit; \textsuperscript{214} it certainly is not efficient for an appellate court to hear separate appeals for each year of a multi-year suit. On the other hand, if an appeal is not granted until all claims have been decided, and the appellate court reverses the holding of the Tax Court on the one year being appealed, a second, fully-litigated trial would be necessary. \textsuperscript{215} It is apparent that the judicial efficiency arguments are highly debatable, and there is not necessarily a clear resolution to this complicated debate.

E. Trying to Resolve the Issue of Finality

One possible solution, as the Seventh Circuit highlighted in \textit{Shepherd}, \textsuperscript{216} is for the Supreme Court to act pursuant to its power under the Rules Enabling Act to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States District Courts.” \textsuperscript{217} In particular, the Court could enact rules to “define when a ruling of a district court is final for the purposes of appeal.” \textsuperscript{218} According to the Seventh Circuit, the ref-

\textsuperscript{210} See discussion in Parts II A and II C.

\textsuperscript{211} See \textit{Nixon}, 167 F3d at 920 (“We expressly adopt the sound reasoning articulated in Judge Posner’s decision for the Seventh Circuit in \textit{Shepherd}.”).

\textsuperscript{212} See \textit{Brookes}, 163 F3d at 1128. The court discusses the finality requirement earlier in its opinion, id at 1126–27, but fails to draw its own conclusions as to the finality of Tax Court decisions rendered on single-year claims of multi-year suits, instead adopting \textit{Shepherd} as “the most definitive interpretation of Tax Court jurisdiction.” Id.

\textsuperscript{213} See \textit{Shepherd}, 147 F3d at 634–35.

\textsuperscript{214} See \textit{Yaeger}, 801 F2d at 98 (holding that “[c]ourts have a compelling interest in avoiding multiple appeals from the same proceeding and the unnecessary workload and delays those appeals would inevitably generate”). See also \textit{Schrader}, 916 F2d at 362.

\textsuperscript{215} See \textit{InverWorld}, 979 F2d at 873 (“Should we delay review but ultimately overturn the Tax Court’s jurisdictional finding, a second trial would be necessary.”).

\textsuperscript{216} \textit{Shepherd}, 147 F3d at 636 (noting that the Supreme Court has authority, under the Rules Enabling Act, to define finality with respect to Tax Court rulings).


\textsuperscript{218} 28 USC § 2072(c).
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ference to "district court" in § 2072(c) should "not [be] read . . . as a bar to a rule defining the finality of Tax Court rulings . . . ."219

The Supreme Court should act soon to resolve this conflict. If the decision is left to the circuits, appellate procedure will continue to vary from circuit to circuit.220 In order to harmonize appellate procedure and the rights of litigants, the courts need a definitive answer as to whether single-year claims are final decisions for appellate purposes.221

Until the Supreme Court acts, courts should follow the lead of the Second and Sixth Circuits and refuse to allow immediate appeals of single-year determinations in multi-year suits on the grounds that such determinations are not final. The debate, however, cannot be resolved on the issue of judicial efficiency alone—it is apparent that there are strong efficiency arguments for declaring that these determinations are final or not final.222

One issue that cuts in favor of the Second and Sixth Circuits is the experience of the Tax Court. Congress created the Tax Court in response to the inadequacy of existing institutions "for adjudicating in an acceptable manner the disputes growing out of the changed conditions brought on by the new taxes" which had emerged during World War I.223 The Tax Court has limited jurisdiction to hear only federal tax cases, and it has its own rules of practice.224 Given the expertise of the Tax Court and the ever-changing complexity of the United States Tax Code, appellate courts should defer to the Tax Court whenever possible. One way appellate courts could defer to the Tax Court is to force litigants to delay appeals until a decision has been rendered on all claims in a proceeding.

A counterargument to the Second and Sixth Circuit rule is that a litigant must immediately pay a deficiency once the Tax Court has issued a decision, regardless of whether there are other claims still before the court.225 The InverWorld court highlighted

219 Shepherd, 147 F3d at 636.
220 See Part II for a discussion of the circuit split.
221 One danger is that courts will use the Gillespie balancing test to determine finality and their decision will focus more on what is at stake for the litigant, as opposed to the inconvenience to courts. In this case, there is the distinct possibility that individual taxpayers will be denied review because their personal stake is small compared to a case like InverWorld, which involved large corporations.
222 See Part IV D for a discussion of the various arguments supporting judicial efficiency.
224 Taylor, Tax Court Practice § 1.06 at 10 (cited in note 14).
225 See InverWorld, 979 F2d at 873.
this fact as a reason to grant appellate review without delay.\footnote{226} Under the Second and Sixth Circuits’ rule, a litigant will have to cure a deficiency immediately if there is a disposition of a single-year claim in a multi-year suit and will have to wait until the Tax Court disposes of the remaining claims before bringing an appeal.\footnote{227}

However, in Tax Court litigants need not cure alleged deficiencies in order to get into court in the first place.\footnote{228} A litigant can bring suit in Tax Court before paying anything to the IRS.\footnote{229} This differs from procedure in district courts and the Court of Federal Claims, where in order to obtain access to the court “the taxpayer is required to make full payment” to the IRS prior to filing a claim.\footnote{230} Thus, litigants already receive a benefit by bringing suit in Tax Court—the ability to bring suit prior to paying off the deficiency. Forcing the litigant to pay after a decision is rendered, and prior to an appeal, should therefore be seen not as a penalty, but rather as the revocation of a discretionary benefit previously bestowed. Had the same suit been brought in district court, the litigant would have had to cure the deficiency simply to get into court in the first place. Thus, the concern the InverWorld court expresses as to the immediate payout of deficiencies should not be seen as affecting the viability of the Second and Sixth Circuits’ rule.

One final argument in support of the Second and Sixth Circuits’ position is that deferring review best captures the policy rationale behind the final decision rule.\footnote{231} The final decision rule “strikes a presumptive balance in favor of deferring review.”\footnote{232} With the current backlog in the federal courts,\footnote{233} the policy rationale of the final decision rule should be the guiding force behind any changes to appellate procedure.

\footnote{226} Id.
\footnote{227} Id. See also Part II A.
\footnote{228} See Taylor, Tax Court Practice § 3.02 at 39 (cited in note 14).
\footnote{229} Id.
\footnote{230} Id.
\footnote{231} See Wright, Miller and Cooper, 15A Federal Practice and Procedure § 3907 at 273–74 (cited in note 17). The policy rationale behind the final decision rule is to defer appellate review to allow trial court proceedings to continue uninterrupted. See Part I A for further discussion.
\footnote{232} Wright, Miller and Cooper, 15A Federal Practice and Procedure § 3907 at 273–74 (cited in note 17).
\footnote{233} See note 209 and accompanying text.
The Second and Sixth Circuits have the strongest argument in this debate; therefore, Tax Court decisions rendered on single-year claims in multi-year suits should not be appealable. Section 7482(a) does not support the minority position, regardless of which method of statutory interpretation an appellate court employs. Further eroding the minority position is the fact that a district court decision rendered on one claim of a multi-claim suit cannot be appealed without a Rule 54(b) certification. Thus the minority rule stretches appellate jurisdiction over Tax Court decisions beyond the scope of review for analogous district court decisions.

The Fifth, Seventh and Ninth Circuits concur with the minority position and hold that dispositions of single-year claims in multi-year suits should be considered final for appellate purposes. Unlike the First and D.C. Circuits, however, these three circuits require a Rule 54(b) certification before hearing an appeal. Unlike the First and D.C. Circuits, the Fifth, Seventh, and Ninth Circuits are thus immune from the criticism that they allow appeals in a manner that differs drastically from appellate procedure in district court. The major issue then becomes whether appellate courts should consider Tax Court dispositions of single-year claims in multi-year suits as being final decisions, and thus, appealable under Rule 54(b).

Determining finality is not a simple process, and there are strong arguments for both sides. Nevertheless, the Tax Court's expert knowledge and experience in tax cases renders the Second and Sixth Circuits' position the more attractive of the two viewpoints. The position of the Second and Sixth Circuits is the correct one: Tax Court decisions rendered on single-year claims of multi-year suits should not be considered final decisions and, hence, cannot be appealed.