JUDGE IRVING L. GOLDBERG AND THE FEDERAL TAX LAW*

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* For further details on the cases and statistics discussed in this article, see the Texas Tech Law Review's website at www.TexasTechLawReview.org.

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I. INTRODUCTION

From 1966 to 1995, Irving Goldberg served as a judge on the United States Court of Appeals for the Fifth Circuit.[1] With a judicial service beginning when many were retiring, Goldberg became a United States

1. *See* Patrick E. Higginbotham, *Irving L. Goldberg Memorial*, 73 TEX. L. REV. 973, 974 (1995).

circuit judge at sixty years of age.[2] Goldberg took senior status fourteen years later in 1980, at age seventy-four.[3] In 1995, at age eighty-nine, Goldberg's judicial career ended.[4] He died judging.[5]

Goldberg's first opinion was published in Volume 369 of the Federal 2nd Reporter on November 30, 1966.[6] His last opinion was published in Volume 45 of the Federal 3rd Reporter in February 1995, some two weeks following his death.[7]

For twenty-nine years, this unique man contributed significantly to the business of judging, with opinions touching virtually all aspects of jurisprudence, from the usual subject areas of criminal, wrongful death, torts, oil and gas, labor, banking, and securities law to the more narrow subjects of admiralty, bankruptcy, customs duties, and school law. The years of Goldberg's judicial career were extraordinary cultural times.[8] During this period, the Fifth Circuit experienced the maturation of the desegregation cases from schools to public accommodations, the explosion of litigation pursuing newly created statutory remedies, the blossoming of individual civil rights legal remedies, and, finally, a litigation avalanche. The Fifth Circuit's legacy in the decades following 1960 includes civil rights and desegregation. Once he began judging, Judge Goldberg participated in those issues.[9] Reading Judge Goldberg's opinions in civil rights and desegregation cases and his many reversals of the southern United States district courts, one feels the pulse of changing times. A cursory review of the 4,150 cases listed that Goldberg participated in while on the panel reveals a panorama of cases reflecting social unrest, societal change, and even revolution.[10] The singular impression left from this table of cases is the breadth of issues that the Fifth Circuit judges and Goldberg confronted.

This Article concerns Goldberg's tax opinions. Goldberg's contributions as a circuit judge are significant, but less known is his connection with federal tax law.[11] Like Henry Friendly of the Second

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2. *See* Lawrence J. Vilardo & Howard W. Gutman, *With Justice from One: Interview with Hon. Irving L. Goldberg*, 17 LITIG., Spring 1991, at 16, 21 [hereinafter Vilardo & Gutman, *With Justice from One*].

3. *See* Higginbotham, *supra* note 1, at 974.

4. *See* Baccus v. Parrish, 45 F.3d 958, 959 n.* (5th Cir. 1995).

5. *See id.*

6. St. Regis Paper Co. v. Jackson, 369 F.2d 136 (5th Cir. 1966).

7. *Baccus*, 45 F.3d at 959 n.* As stated in the opinion, "Judge Goldberg authored this opinion before his death on February 11, 1995." *Id.*

8. *See* Samuel Issacharoff, *Judging in the Time of the Extraordinary*, 47 HOUS. L. REV. 533 (2010) (providing a review of Judge John Brown and his contributions during the same era as Judge Goldberg).

9. *See* Lawrence J. Vilardo & Howard W. Gutman, *The Honorable Irving L. Goldberg: A Place in History*, 49 SMU L. REV. 1, 7 (1995) [hereinafter Vilardo & Gutman, *A Place in History*].

10. *See* William D. Elliott, *Judge Goldberg's Decisions*, TEX. TECH L. REV., http://www.Texas TechLawReview.org.

11. *See infra* Part III.

Circuit, Richard Posner of the Seventh Circuit, and a few other circuit judges who have developed a unique reputation and perhaps even a close identity with a certain area of law, Irving Goldberg placed his personal stamp on federal tax law.[12] The broader subject of Goldberg's judicial career awaits further scholarship.

II. BIOGRAPHICAL SKETCH

The life of Irving L. Goldberg is worthy of biography. His life spanned the Twentieth Century, literally: Goldberg was born June 29, 1906, in Port Arthur, Texas, and died February 11, 1995, in Dallas, Texas.[13] Goldberg's Port Arthur upbringing was reflected in his speaking voice, with an accent hinting of his southeast Texas roots. Goldberg was married to Marian Goldberg, who predeceased Judge Goldberg in 1993.[14]

His principal secondary education was at the University of Texas at Austin, where he earned a B.A. degree in 1926. Soon after, he enrolled at Harvard Law School, where he earned his L.L.B. in 1929, at age twenty-three, on the eve of the Great Depression.[15]

Goldberg's first few years after law school were marked by frequent change.[16] He commenced his private law practice in Beaumont, Texas, in 1929, with the firm of Smith, Crawford & Combs.[17] In 1930, he was practicing alone in Houston, Texas, and in 1931, he moved to Tyler, Texas.[18] Goldberg's move to Tyler, Texas, was prompted by family.[19] Marian Goldberg's uncle, Harris A. McLasky, had an active law practice there and recruited Goldberg to help with legal work brought on by the oil boom.[20] During this time, Goldberg met and developed a life-long friendship with Lyndon Johnson.[21] Johnson was a congressman from the Austin area from 1937 until January 3, 1949.[22]

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12. *See infra* Part VII.

13. *Biographical Directory of Federal Judges: Goldberg, Irving Loeb*, U.S. CTS., http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryofJudges.aspx (last visited Nov. 27, 2013).

14. *See* Higginbotham, *supra* note 1, at 974.

15. Vilardo & Gutman, *A Place in History*, *supra* note 9, at 6; Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 19–20. One of Goldberg's classmates at Harvard was Alger Hiss. Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 20. ("I respected Alger Hiss. Alger was quiet but smart. He was reserved and measured in what he said. He spoke when called upon and always responded intelligently. I remember one session when I was carrying on with a torts professor and Alger came to my rescue. He did it mildly, but profoundly and effectively.")

16. *See infra* notes 17–27 and accompanying text.

17. Higginbotham, *supra* note 1, at 974.

18. Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 4.

19. *See id.*

20. Higginbotham, *supra* note 1, at 974.

21. *Id.* at 974–75.

22. *Johnson, Lyndon Baines*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS., http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000160 (last visited Nov. 27, 2013).

In 1932, Goldberg moved to Dallas and first worked as in-house counsel for The Murray Company, a maker of cotton gins.[23] Along with Martin Winfrey, he formed the law firm of Winfrey & Goldberg in 1934.[24] World War II interrupted his life, as it did with so many, when in 1942, at age thirty-six, Goldberg was drafted into the United States Navy, in which he served until 1946.[25] He was first assigned to the Office of General Counsel of the Navy, and later to the House Committee on Naval Affairs, thanks to his relationship with Johnson.[26] From 1946 to 1966, Goldberg again practiced law in Dallas, Texas.[27] Upon his return to Dallas, Goldberg started practicing with J. Cleo Thompson, and in 1950, he formed Goldberg, Fonville, Gump & Strauss, which today is the law firm of Akin Gump.[28]

There is an old saying that a person is only appointed to the federal bench if he knows a United States senator, but to be appointed to the Supreme Court, he must know the President. Though written about to some degree, what is not commonly known is that Irving Goldberg and Lyndon Johnson had a close relationship spanning many years.[29]

Lyndon Johnson nominated Goldberg to the Fifth Circuit in June 1966, and he took office one month later, on July 22, 1966.[30] His active service on the Fifth Circuit continued until January 31, 1980, when Goldberg took senior status, and continued until February 11, 1995, when he died.[31] Goldberg was sixty years of age when appointed to the Fifth Circuit.[32] Today, being sixty years old has been thought by many to disqualify one

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23. Vilardo & Gutman, *A Place in History*, *supra* note 9, at 4.

24. Higginbotham, *supra* note 1, at 975.

25. *See id*.

26. Vilardo & Gutman, *A Place in History*, *supra* note 9; Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 18.

27. Higginbotham, *supra* note 1, at 975.

28. *See id.* at 974.

29. *See generally* Leslie Klaassen & Howard Srebnick, *A Special Concurrence*, 49 SMU L. REV. 11 (1995) (recounting one law clerk's experiences with Judge Goldberg); Vilardo & Gutman, *A Place in History*, *supra* note 9, at 5 (discussing the formation and thriving relationship between Johnson and Goldberg).

30. Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing* Brown*'s Mandate*, 78 TUL. L. REV. 2207, 2265 (2004). Goldberg was nominated by Lyndon B. Johnson on June 28, 1966, to a new seat created by Pub. L. No. 89-372, 80 Stat. 75 (1966), and confirmed by the Senate on July 22, 1966. Friedman, *supra*, at 2265. In response to the Fifth Circuit's increasingly expanding caseload, Congress had authorized three additional positions on the court in 1964, making it the nation's largest court of appeals. Act of June 18, 1968, Pub. L. No. 90-347, 82 Stat. 184; Act of Mar. 18, 1966, Pub. L. No. 89-372, 80 Stat. 75. President Lyndon Johnson filled these new positions in 1966 with Irving L. Goldberg (Texas), Robert A. Ainsworth, Jr. (Louisiana), and Bryan Simpson (Florida). Friedman, *supra*, at 2265. Two additional roster changes occurred that year when President Johnson promoted District Judge John C. Godbold of Alabama to replace Judge Rives, with whom Godbold had practiced law at the beginning of Godbold's career and who had retired from active service, and District Judge David W. Dyer to fill the slot vacated by the retirement of Warren Jones. *Id.* Goldberg was confirmed by the Senate on July 22, 1966, and received commission the same day.

31. *Biographical Directory of Federal Judges: Goldberg, Irving Loeb*, *supra* note 13.

32. *See id.*

from being appointed as a federal judge.[33] Conventional wisdom would hold that to appoint a sixty-year-old to the bench would mean that the judge would be expected to have a decade or so of active judicial service, an insufficient time to leave an impactful judicial record.[34] Yet, in Goldberg's time, many of the Fifth Circuit judges were in their late fifties, and a few, like Goldberg, were sixty years of age or older when appointed.[35]

A most remarkable aspect of Judge Goldberg's life is what happened to him on the day of the Kennedy assassination—Friday, November 22, 1963.[36] Goldberg and his wife were planning to attend the luncheon honoring President Kennedy after the parade in downtown Dallas.[37] They went to the Market Hall early but noticed that the preparations for the luncheon were not proceeding normally.[38] Upon inquiry, Goldberg and his wife learned that there had been an incident—a shooting—and the luncheon was to be canceled.[39] They went home, where upon arrival, Goldberg received the telephone call of a lifetime.[40]

As Lyndon Johnson waited in the close confines of the Parkland Hospital waiting room, he was told of Kennedy's death—which occurred only a few feet away in a trauma room.[41] Johnson was driven quickly to Air Force One at Love Field.[42] Lyndon Johnson called Irving Goldberg from Air Force One.[43] Amidst the unfathomable clamor facing Johnson at that crucial, tense moment, Johnson reached out to one man.[44] Johnson called Goldberg.[45] In what could not have been more than a ten-minute

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33. *Frequently Asked Questions*, U.S. CTS., http://www.uscourts.gov/common/FAQS.aspx (last visited Nov. 27, 2013). As an aside, Johnson appointed Sarah T. Hughes to the United States District Court in Dallas when she was age sixty-five—she was born on August 2, 1896; sworn-in as United States District Judge October 17, 1962; retired in 1975 (thirteen years); and served as senior judge until 1982 (twenty years after being sworn in). Barefoot Sanders, *Foreword to* DARWIN PAYNE, INDOMITABLE SARAH: THE LIFE OF JUDGE SARAH T. HUGHES v–vii (2004). She served actively until seventy-nine years of age and stopped senior status at age eighty-six. *Id.* at 392–94.

34. *See Frequently Asked Questions*, *supra* note 33; *see also* Stephen B. Burbank et al., *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 17–19 (2012) (explaining the relationship between judges' ages and the decisions that correspond).

35. *Court History: Index to Judges' Biographies*, U.S. CT. APPEALS: FIFTH CIRCUIT LIBR. SYS., http://www.lb5.uscourts.gov/CourtHistory/JudgesBio/Defaul.aspx (last visited Nov. 27, 2013).

36. Vilardo & Gutman, *A Place in History*, *supra* note 9, at 2 (summarizing the captivating story of that day); Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 16 (detailing the events of that special day for the first time). Messrs. Vilardo and Gutman were Goldberg clerks (1980–1981). Vilardo & Gutman, *A Place in History*, *supra* note 9, at 1 n.a1

37. Vilardo & Gutman, *A Place in History*, *supra* note 9, at 2.

38. *Id.*

39. *Id.* at 2–3.

40. *Id.*

41. *Vice President Lyndon B. Johnson, Daily Diary: November 22, 1963*, LBJ PRESIDENTIAL LIBR., http://www.lbjlibrary.net/collections/daily-library.html (last visited Nov. 27, 2013).

42. *Id.*

43. Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 17.

44. *Id.*

45. *Id.*

phone call, Johnson and Goldberg had an extraordinary conversation.[46] Johnson had questions and turned to his lawyer and friend, Irving Goldberg, for answers:[47]

(1) Johnson wanted to know how he was to become President. Goldberg told Johnson that was he was President automatically upon Kennedy's death by constitutional devolution.[48] Johnson did not have to do anything, he was President at that moment.

(2) Johnson asked Goldberg if he needed to be sworn in to be President. Goldberg answered, recalling the swearing-in procedure of Calvin Coolidge, in a remote cabin, following the death of Warren Harding, "[Y]ou are President right now, but it is right that it should be memorialized by some formality with witnesses."[49]

(3) Johnson asked who should swear him in. Goldberg answered: "You want someone who's an officeholder, a judge, someone who has an office with some stature."[50]

(4) Johnson asked who Goldberg would suggest. Goldberg suggested United States District Judge Sarah Hughes because she was "a woman, a Democrat, a supporter of yours, and a fine judge."[51]

(5) Johnson asked Goldberg to locate Judge Sarah Hughes and get her to Air Force One, which was sitting on the tarmac at Love Field. Goldberg explained to Johnson that the President of the United States would be better served by asking the Secret Service, the FBI, the Service, or the Army to find Judge Sarah Hughes, but, reluctant to argue with the new President, Goldberg told Johnson that he would do his best to locate Judge Hughes. Johnson asked Goldberg to also come to Love Field in order to meet him on Air Force One.[52]

Of course, the rest is history.

All the more remarkable is that Goldberg, confronting his own grief over the shocking news of Kennedy's killing, along with the rest of the country, without hesitation and without having to research anything, drew upon his lifetime of training, experience, and deep reservoir of knowledge to immediately give Johnson, in that brief, ten-minute phone call, direct and clear answers to his important questions.[53] Facing the crisis of the ages, Goldberg performed brilliantly.

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46. *Id.*
47. *Id.*
48. U.S. CONST. art. II, §1, cl. 6.
49. Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 17.
50. *Id.*
51. *Id.*
52. *Id.* Goldberg called the then-United States Attorney in Dallas, Barefoot Sanders, who located Judge Hughes. *Id.* Goldberg and his wife drove to Love Field but were denied admittance to the presidential airplane and returned home. *Id.*
53. *Id.*

Even after the passage of many years, Goldberg's conversation with Johnson at that moment of unique urgency, remains extraordinary. In response to Johnson's penetrating questions, Goldberg responded with clear thinking, providing soon-to-be President Johnson with legal erudition and sound advice.

III. STATISTICS

The statistics represent one level of analysis of Goldberg's judicial career generally, and his contribution to federal tax law specifically. These are sterile facts, providing less satisfaction as compared to reading the color, verve, heart, and passion of Goldberg's actual writings, but nevertheless, the empirical statistics for Judge Goldberg are impressive. Because his career spanned twenty-nine years, one would expect a large number of decisions, but seeing the actual numbers is startling, and the statistics are surprising.

From 1966 to 1995, Goldberg sat on 4,151 judicial panels, or an average of 143 judicial panels per year. He wrote the majority opinion for 805 cases, or an average of twenty-seven majority opinions per year. In addition to these 805 cases, he wrote 158 dissenting opinions and fifty-two concurring opinions. Of the total 805 cases in which Goldberg wrote an opinion, dissent, or concurrence, eighty-seven, or 4.48% of these cases, were tax cases. Goldberg sat on thirty-seven three-judge district court panels. Goldberg authored the opinion for the en banc Fifth Circuit four times, the first of which occurred for a tax case in 1968, during his second year of judicial service.[54] After the Eleventh Circuit split in 1980, Goldberg sat on forty-five panels in the Eleventh Circuit and wrote thirteen opinions, two of which were in tax cases.

A. Types of Decisions

Of the total number of panels on which Goldberg sat, some 57% of the decisions represented regular decisions and almost 6% were en banc decisions of the entire Fifth Circuit. The panels made a surprisingly high percentage of per curiam decisions for various reasons, including the making of a per curiam decision for simple cases not warranting a full decision and as a result of pressure on the court from the high volume of docket cases. The panel used per curiam decisions to process as many of the simpler cases as possible.

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54. *See* United States v. Cocke, 399 F.2d 433 (5th Cir. 1968) (en banc) (showing the opinion Goldberg authored in 1968).

TABLE 1.

Goldberg: Types of Decision	**Number**	**Percent**
Regular	2,384	57.53%
Per Curiam	1,505	36.32%
By Court	9	0.22%
En Banc	246	5.94%
Total	4,144	100.00%

B. Types of Opinions

Of the 4,151 judicial panels, Goldberg wrote 805 opinions. He dissented 15.5% of the time and concurred 5.3% of the time.

TABLE 2.

Goldberg: Type of Opinion	**Number**	**Percent**
Opinion	805	79.15%
Dissent	158	15.54%
Concurrence	54	5.31%
Total	1,017	100.00%

In tax cases, Goldberg's predominate type of decision was a regular decision.

TABLE 3.

Goldberg Tax Cases: Type of Decision	**Number**	**Percent**
Regular	78	89.66%
Per Curiam	0	0.00%
En Banc	2	2.30%
Dissent	4	4.60%
Concurrence	3	3.45%
Total	87	100.00%

C. Case Treatment

Goldberg voted to affirm only 51.21% of the time. He voted to reverse a lower court's decision, including remanding and rendering decisions, 20.31% of the time.

TABLE 4.

Goldberg Case Treatment	**Number**	**Percent**
Affirmed	2,113	50.90%
Affirmed, Remanded	13	0.31%
Reversed	210	5.06%
Reversed, Remanded	617	14.86%
Reversed, Rendered	16	0.39%
Remanded	74	1.78%
Affirmed, Reversed, Remanded	191	4.60%
Affirmed, Reversed	65	1.57%
Appeal Dismissed	1	0.02%
Other	851	20.50%
Total Confirmed	4,151	100.00%

In the eighty-seven tax cases in which Goldberg wrote an opinion, dissenting or concurring, Goldberg's vote to affirm a lower court's decision decreased to 47.5% of the cases, while his reversal percentage increased to 25% of the cases.

TABLE 5.

Goldberg Tax Cases: Treatment	**Number**	**Percent**
Affirmed	38	47.50%
Affirmed, Remanded	1	1.25%
Reversed	9	11.25%
Reversed, Remanded	9	11.25%
Reversed, Rendered	2	2.50%
Remanded	0	0.00%
Affirmed, Reversed, Remanded	9	11.25%
Affirmed, Reversed	0	0.00%
Appeal Dismissed	0	0.00%
Other	12	15.00%
Total Confirmed	80	100.00%

D. The Winner and Loser

Goldberg voted with the Service 72.6% of the time and taxpayers 15% of the time—the rest of the tax cases had mixed results.

TABLE 6.

Goldberg Tax Case: Winner	**Number**	**Percent**
IRS	61	72.62%
Taxpayer	13	15.48%
Mixed	10	11.90%
Total	84	100.00%

Goldberg wrote opinions in eighty-four tax cases, averaging almost three tax case opinions per year; however, he participated in eighty-seven tax cases total.[55] Goldberg's first tax opinion was *United States v. Parker* in 1967, which concerned whether a sale of stock should be ordinary income or capital gain.[56] Goldberg's last tax opinion was *United States v. Kellogg*, a 1994 case that concerned a question of bankruptcy taxation.[57] Goldberg wrote two tax opinions en banc.[58]

IV. GOLDBERG AND HIS LAW CLERKS

Goldberg's relationship with his law clerks deserves special mention. Goldberg employed sixty-six clerks during his judicial tenure.[59] One could expect a federal judge's law clerks to honor their judge, but Judge Goldberg's relationship with his clerks was unique.[60] Following Goldberg's death in 1995, some of his former clerks published tributes to him.[61] These tributes or interviews with former Goldberg clerks indicate the deep bond that existed between Goldberg and his clerks.[62] To this day, Goldberg's clerks have retained a special feeling for the man, transcending the norm.

The clerks' daily lives with Judge Goldberg were a continual conversation. Before oral argument—if there were to be oral argument—a clerk would be assigned a case and would prepare a memorandum in anticipation of oral argument.[63] Following the conference by the panel immediately at the end of the hearing, Goldberg would return to his chambers and describe the case to his clerks, providing an initial analysis, sometimes writing up a short memorandum, and then turning the clerk loose on the case.[64]

The legal briefs were read, of course, but Goldberg wanted original research.[65] The lawyers' briefs were only starting points in the analysis of

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55. *See infra* text accompanying notes 74–76.

56. *See* United States v. Parker, 376 F.2d 402 (5th Cir. 1967).

57. *See* United States v. Kellogg (*In re* W. Tex. Mktg. Corp.), 12 F.3d 497 (5th Cir. 1994).

58. *See* Biedenharn Realty Co. v. United States, 526 F.2d 409 (5th Cir. 1976) (en banc); *Cocke*, 399 F.2d 433.

59. See the complete listing of Goldberg clerks, *infra* APPENDIX 3.

60. *See, e.g.*, Lee M. Simpson, *A Tribute to Judge Irving L. Goldberg*, 73 TEX. L. REV. 981, 982 (1995). Lee Simpson clerked for Judge Goldberg from 1973–1974. *Id.*

61. *See* Klaassen & Srebnick, *supra* note 29, at 11; William R. Pakalka, *The Many Loves of Irving L. Goldberg*, 12 FIFTH CIRCUIT REP. 103 (1994); Simpson, *supra* note 60, at 982; Vilardo & Gutman, *A Place in History*, *supra* note 9; Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 16; Diane P. Wood, *Tribute to Judge Irving L. Goldberg: The Consumate Humanist*, 73 TEX. L. REV. 977 (1995).

62. *See* Klaassen & Srebnick, *supra* note 29, at 11; Pakalka, *supra* note 61, at 603; Simpson, *supra* note 60, at 981; Vilardo & Gutman, *A Place in History*, *supra* note 9, at 16; Villardo & Gutman, *With Justice from One*, *supra* note 2, at 1; Wood, *supra* note 61, at 977.

63. *See* Klaassen & Srebnick, *supra* note 29, at 14.

64. *See id.*

65. *See id.*

the case.[66] The clerks would prepare first drafts of the opinions, but this was not done in isolation. Goldberg and the clerk would have conversations about particular precedent and what the clerk thought about a certain issue or issues on which the clerk was focusing. A close collaboration between judge and law clerk is evident.

The sizeable volume of cases filed in the Fifth Circuit meant that opinions needed to be timely. There was a rough time-marker maintained by the Fifth Circuit clerk and each individual judge on the court—ninety days from the initial submission. After the initial draft by one clerk, the other clerk would read it. A common practice, apparently, was for Judge Goldberg to take drafts of opinions home at night so that Mrs. Goldberg, a grammarian of some skill, could lend her hand at grammatical improvement of the writing. Judge Goldberg would return the opinion draft to the clerk with Mrs. Goldberg's editorial marks on it with a laugh, indicating that the draft had been "grammerized."

Goldberg invested substantial personal time with his clerks.[67] There was the routine ritual of morning and afternoon coffee with his clerks in his chambers in Dallas, during which conversations would naturally cover the business at hand, but would also cover other subjects, including the clerks' personal lives and families.[68] Many other guests would drop in regularly to join in the coffee and conversation.[69] Lawyers from Judge Goldberg's old law firm, now Akin Gump, would often join the coffee time.[70] In the years before the current United States courthouse at 1100 Commerce Street in Dallas, Texas, was constructed, Judge Goldberg's chambers were in the old Post Office Building on Pacific and Ervay Streets, across the street from the Republic Bank Building, where Akin Gump's offices were located.[71] The Akin Gump lawyers were often seen crossing the street for coffee with Judge Goldberg and the clerks.[72]

Goldberg treated his clerks as family. He dined with them often, including on Saturdays.[73] Clerks reminisced about having lunches and breakfasts with Judge Goldberg almost as a daily routine.[74] Goldberg relied

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66. Interview with Clarice Davis (Sept. 17, 2012); Interview with Byron Eagan (Dec. 18, 2012); Interview with Linn Williams (Dec. 18, 2012); *see* Tex. Oil & Gas Corp. v. United States, 466 F.2d 1040, 1046 (5th Cir. 1972) ("The parties have submitted their own theories of this case, and we find ourselves in the not too unusual position of rejecting large parts of both theories.").

67. *See* Klaassen & Srebnick, *supra* note 29, at 12.

68. *See id.*

69. *See*, *e.g.*, Wood, *supra* note 61, at 978.

70. *See*, *e.g.*, Klaassen & Srebnick, *supra* note 29, at 13.

71. *See* Noah Jeppson, *Rebirth of the U.S. Post Office & Courthouse*, UNVISITED DALL. (June 1, 2012), http://www.unvisiteddallas.com/archives/2032; *see also Dallas*, AKIN GUMP, http://www.akingump.com/en/locations/dallas.html (last visited Nov. 28, 2013).

72. *See*, *e.g.*, Klaassen & Srebnick, *supra* note 29, at 13.

73. *See*, *e.g.*, Wood, *supra* note 61, at 978.

74. *Id.*

on one of his clerks to drive him from his home to the courthouse and to return him home in the evening, allowing additional time to visit with them.

For the year or so that was the clerks' tenure with Judge Goldberg, they fell into his gravitational orbit. The clerks were employees, but also became colleagues and friends, with a personal relationship lasting a lifetime.[75] Goldberg's clerks have achieved substantial accomplishments in life—notable and impressive—yet these men and women cherish their position as a "Judge Irving Goldberg law clerk" with particular reverence.[76] No doubt, this reservoir of special feeling reinforces the uniqueness of this special man.

The Goldberg clerks also recalled how later in life, after their service, they would regularly receive phone calls from Goldberg to discuss how their careers were going.[77] The impression left is that if the clerks moved on with their lives and did not talk over important issues with Judge Goldberg, Goldberg would feel slighted. Goldberg even attended the weddings of his clerks.[78]

Goldberg generally had two clerks each year, but in Goldberg's first two years on the bench, he had only one law clerk each year, with a second part-time law clerk paid from the budget of the United States Marshall.[79] Starting in 1972, and continuing until he took senior status in 1980, the number of Goldberg clerks increased to three, with an occasional part-time law student.[80] When Goldberg took senior status in 1980, his clerk allotment was reduced to two clerks.[81] Because Goldberg worked until the end of his life, his last clerks were with him until the end.[82]

V. GOLDBERG VIEWPOINTS

A. On Writing

Goldberg's judicial opinions reveal the man—humorous, colorful, warm, engaging, and fascinating. His interesting opinions drew this author to the man. The personality of Irving Goldberg jumps off of the page of his

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75. *See*, *e.g.*, *id.* at 979.

76. *See*, *e.g.*, Klaassen & Srebnick, *supra* note 29, at 13.

77. *See*, *e.g.*, Simpson, *supra* note 60, at 981.

78. Interview with Linn Williams (Dec. 18, 2012) (recounting how Williams cleared his upcoming wedding with Goldberg and how Goldberg drove from Dallas to Oklahoma City to attend the wedding); *see also* E-mail from Linn Williams (Dec. 18, 2012) (on file with author).

79. Interview with Larry J. Spaulding (Sept. 17, 2012).

80. *E.g.*, Interview with Miriam Ackels (served as a legal assistant while in law school and immediately thereafter).

81. *See Biographical Directory of Federal Judges: Goldberg, Irving Loeb*, FED. JUD. CENTER, http://www.fjc.gov/public/home.nsf/hisj (last visited Jan. 21, 2014); *see also* Vilardo & Gutman, *With Justice from One*, *supra* note 2.

82. *See Biographical Directory of Federal Judges: Goldberg, Irving Loeb*, FED. JUD. CENTER, *supra* note 81.

writing. Those whose professional obligations require them to incessantly read judicial opinions of all kinds cannot help but be grateful for judges such as Irving Goldberg, who make the judicial opinion a field of discussion, humorous expression, and sheer entertainment.[83] To be sure, there are not many judges whose writing style is so notable or is equal to the uniqueness of Judge Goldberg.

In his 1983 interview with Professors Deborah J. Barrow and Thomas G. Walker, [84] preparatory to their book on the splitting of the Fifth Circuit into two circuits,[85] Judge Goldberg spoke of his view of opinion writing:

> I tell all of my prospective law clerks, you come to this office knowing this much—that an opinion in this office does two things of equal importance. It is a deciding document and a teaching tool. And if it doesn't do both of them equally well, it fails. . . . The teaching tool infuses the knowledge of the area so that the next case, he gets the benefit of not only how you applied it, but the reasons for it.[86]

Brevity is not a characteristic attached to a Goldberg opinion. Of writing, Goldberg said:

> [When] we write here, we use all of the tools of writing, sarcasm, wit, humor, metaphor, anything that gives it verve, gives it movement, gives it sharpness. Otherwise, you're writing in a vacuum. I am dead set against, just violently opposed to these lecturers that go to all these seminars and tell them how they can write shorter opinions. Why don't just invest in stamps and stamp "Affirmed." Let the guys figure it out. . . . Why waste all of their time saying nothing . . . ?[87]

Goldberg challenged his clerks on their writing:

> I tell my clerks: Your X generation is better educated than mine. The reason for that is that you have been exposed to more disciplines and more intensive knowledge of the disciplines than I know something about. But this is true except for one thing—that is writing. You don't know how to write. That you do not know how to write is not your fault. You have been taught ever since you could hold a crayon in a cradle—succinctness, brevity, and shortness of expression were the end all and the be all of

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83. *See* Vilardo & Gutman, *A Place in History*, *supra* note 9, at 1 (listing the clerks during the 1980–1981 term).

84. Interview by Deborah J. Barrow & Thomas G. Walker with Irving L. Goldberg, in Dallas, Tex. (Dec. 1983) (audio on file with author).

85. DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1988).

86. Interview with Irving L. Goldberg, *supra* note 84.

87. *Id.*

> writing. It just happens that it isn't true. I'm sorry but that's it. When you come here . . . we are trying to write for posterity.[88]

Goldberg was confident and passionate when discussing his writing:

> West Publishing Company will never go broke as long as I'm on the bench. That's one thing they can be assured of. There's nobody that's going to make me shorten my opinions . . . . I do not object to repetition in opinions. This comes as a great shock to everyone listening . . . . My philosophy is to say it once, say it twice, and then get on your knees and pray that they understand it . . . .[89]

In another interview, Goldberg similarly described his writing philosophy:

> If the subject matter merits it, then I think an opinion should be a crusading force in the particular area of jurisprudence. Anything a judge can employ that will make an opinion more crusading, that will make it more effective, that will make it more memorable, assists the process. An opinion should have not only a beginning and an end, but a future.
>
> For these reasons, you use wit; you use humor; you use allusions to literature and history, metaphors, similes, and anything else that will work. Don't be afraid of words. The words make you live, make you go. Lawyers say that succinctness is the end-all and be-all of life, but the real end-all and be-all is to make life interesting, make people respond, make them laugh. Use all the tools you can to do that. Use verbs. Verbs are active. Make it talk, make it walk.[90]

B. On Per Curiam and Unpublished Opinions

In his twenty-nine years on the Fifth Circuit, Goldberg participated in 1,505 per curiam opinions.[91] He did not like per curiam or unpublished opinions, as he expressed plainly: "I am against per curiam opinions. First of all, I admit, I am not an expert in writing them. I don't know how to say anything in a single paragraph."[92]

Goldberg also had an opinion about unpublished opinions.[93] He disliked them:

> A lot of the cases were frivolous. I am absolutely opposed to unpublished opinions. You just have got to stand up for [your opinions]. You can cite them . . . . I don't understand this . . . . I join unpublished opinions . . . but

88. *Id.*
89. *Id.*
90. Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 22.
91. *See supra* Part III.A.
92. Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 22.
93. *Id.*

> I never wrote one. My name's on there. Do what you want to about it. Impeach me. Maybe you should.[94]

C. On Rule 21

The Fifth Circuit adopted several administrative solutions to the problem of growing case loads, such as screening, disposition without oral argument, and especially Rule 21—affirmance without opinion.[95] Goldberg expressed his view of these solutions:

> We have gone a little far. When I came on the court, every case hit the argument calendar. Then they came with this Rule 21. . . . We need to be very careful. Some of the cases are very tough. If you give a Rule 21, nobody knows why except that it is right. It's right because it's right. A rose is a rose. Gertrude Stein type of situation. I don't get excited by it, though, I don't get up and make a big speech about it. A lot of mechanical things they have done are very good.[96]

D. On Administrative Matters

Goldberg hoped for more help in his work:

> Contrary to what a lot of judges think . . . I am not the least bit afraid of support or help in an office. A very famous judge thought it would create a bureaucracy. That depends upon who the chief is. . . . I would cut the Rule 21 situations down by having a little more help or use my staff attorneys differently.[97]

E. On Impact of the Chief Judge

Goldberg worked with six Chief Judges during his time on the bench.[98]

Elbert Tuttle	1960–1967
John Brown	1967–1979
James P. Coleman	1979–1981
John C. Godbold	1981–1981
Charles Clark	1981–1992
Henry A. Politz	1992–1999

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94. *See also id.* ("And I don't like unpublished opinions.").

95. *See generally* Note, *Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 COLUM. L. REV. 77, 88–92 (1973). For an extended discussion of the operation of Rule 21, see *NLRB v. Amalgamated Clothing Workers of Am., AFL-CIO Local 990*, 430 F.2d 966 (5th Cir. 1970).

96. Interview with Irving L. Goldberg, *supra* note 84.

97. *Id.*

98. *See generally id.*

In his 1983 interview, Goldberg evaluated their work and offered his feelings about these men (except for Politz):[99]

Elbert Tuttle

> The Chief Judge really does not have as much influence as you might think. They all acted differently, but they all had different problems and different times. I started out with Judge [Elbert] Tuttle, for one year, who was wonderful. One of the greatest, finest, human beings that ever lived . . . . He would actively engage in getting the senior judges to participate . . . . He would beg them to come to meetings. He would solicit their opinions in the meetings . . . . That was very, very important. At that time, I didn't think much about it . . . . He understood each judge has his own prerogatives. He was very respectful of that. He let him run his own affairs in his own way. He was very wonderful about that. You can go all over the United States and you'll never find a finer man, with greater integrity, with a greater sense of what the judicial system should be. You'll never find anyone better than he.[100]

John Brown

> Then you had [John] Brown, who was an activist, he was a mover and a doer and he liked big conferences. . . . Brown loved meetings. Didn't hurt us. I'm not sure it did a lot of good. It probably was a factor in . . . the collegiality. In those days, he was a very outgoing, extroverted individual. He lived an extroverted life. Judicially, he wanted action. He wanted movement. . . . His coats and his jackets, his ties, and all, played that part in giving color to the Circuit. . . . He said, he dropped the phrase . . . I can't remember how he did it, whether he used the word "hippie" or not, but he came close, if he did. I remember I really fixed him. I said, "I would remind the judge that the sartorial heterodoxy of one generation is the orthodoxy of the next. I would doubt in the last generation we had cerise color shirts and alligator shoes, but on the other hand, I'm not so sure that all of the jeans are that horrible, that they imply criminality . . . ." Those were the days when we had a lot of hirsuted men running around.[101]

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99. *Id.*

100. *Id.*

101. *Id.* (referring to Goldberg's dissent in *United States v. Colbert*, 474 F.2d 174 (5th Cir. 1973), ten years prior to the interview). Goldberg dissented with the following memorable quote, responding to Brown's reference to a "hippie" in his concurrence:

> I refuse to join my brothers as a pallbearer at the funeral of the Fourth Amendment in this Circuit. Although I find, rather disconcertingly, that my funeral dirge is a solo, nonetheless, I believe very strongly that the Court has erred in vacating the panel decision and affirming the district court's denial of the motion to suppress . . .
>
> . . . .
>
> . . . . I do not subscribe to the thesis that every contemporary sartorial or tonsorial heterodoxy gives the cop on the beat the right to search, as the Chief Judge implies. Today we say that

James C. Coleman

> Then [James C.] Coleman, who was chief judge of the State of Mississippi, had a different kind of court, different kind of people, different kind of problems. He let the court go pretty well on its own. He didn't try any . . . strong arm methods.[102]

John C. Godbold

> We had [John C.] Godbold for a period. He was a wonderful human being, great guy. I understand making a great judge over there [in the 11th Circuit]. Dear friend of mine. Very close. We agree on a lot of things.[103]

Charles C. Clark

> [Charles C.] Clark came in next. Clark is a very fine administrator. He is never behind. Everything is done with clock-like precision. And that's necessary considering as much as work as we get done. Clark is as fine an administrator as this court will ever have as Chief Judge. He is on top of the ball all the time . . . . He responds to everything and immediately . . . . He's running a good Circuit. He does not believe in excessive meetings. They are run in a very organized manner. That's a very important factor . . . . He would get A+ in this area in my grading of being a chief judge.[104]

VI. FIFTH CIRCUIT HISTORY

A. The Fifth Circuit Up to Goldberg's Appointment

In 1966, when Irving Goldberg was appointed, the Fifth Circuit had jurisdiction over the six states of the Deep South: Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas.[105] This region had undergone substantial change since 1950, but it was only a prelude of what was to

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> "hippie dress" is evidentiary of probable cause. Tomorrow, perhaps we will say that green patent-leather shoes, cerise shirts, or even bow ties, because of their nonconformity to prevailing norms, are also probative. I fail to see any limits to the dangerous implication in the Chief Judge's opinion. The fact that the police saw these men carrying briefcases and saw one of them discard something, later found to be a few shotgun shells does not, in my opinion, constitute probable cause to search the briefcases. A mere suspicion, even if valid, does not necessarily constitute probable cause.

United States v. Colbert, 474 F.2d 174, 179, 189 (5th Cir. 1973) (Goldberg, J., dissenting).

102. Interview with Irving L. Goldberg, *supra* note 84.

103. *Id.*

104. *Id.*

105. *See generally* BARROW & WALKER, *supra* note 85; JACK BASS, UNLIKELY HEROES (1981); HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891–1981 (1984); FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978).

come.[106] The entire United States population had increased 25% from 1950 to 1964, but the population of the Fifth Circuit had increased by one-third.[107] The workload of the Fifth Circuit had increased substantially since 1950, and by the time Goldberg assumed his judgeship, the Fifth Circuit was the busiest circuit court in the country.[108] "[A]ppeals increased twofold from 1960 to 1964 and doubled again from 1965 to 1970."[109] Additionally, the Fifth Circuit carried the heaviest workload per judge of any United States appeals court.[110] By 1963, the national average for federal appellate courts was sixty-nine cases per judge, but the Fifth Circuit load was ninety-seven cases per judge.[111]

The nature of the cases before the Fifth Circuit was among the most complex of all the circuit courts and at the cutting edge of the nation's societal issues.[112] All aspects of the court's docket increased at an alarming rate, but especially in the acutely divisive issues such as civil rights, "school desegregation, voting rights, jury and employment discrimination."[113] The 1964 Civil Rights Act and the 1965 Voting Rights Act introduced new causes of action. In the words of Professors Walker and Barrow:

> Major school desegregation cases became routine for the Fifth Circuit during the period (1965–70). The court issued more than twice as many school desegregation decisions (164) as it had in the previous decade of implementing *Brown v. Board of Education of Topeka* (1954) and *Brown II* (1995). The Justice Department entered sixty-six school desegregation cases during 1966, double the number filed in 1965. In just one year (1969), "the Fifth Circuit handed down 166 opinion orders involving eighty-nine separate school districts."[114]

As described by Walker and Barrow, by the time Goldberg took his seat, a "Pandora's box" of civil rights issues appeared before the Fifth Circuit.[115] Desegregation issues spilled into public accommodations, amusement parks, nongovernmental establishments, and jury discrimination cases.[116] "Ninety-one percent of civil rights cases commenced nationwide in 1965 were handled by the district courts within the Fifth Circuit."[117]

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106. *See* BARROW & WALKER, *supra* note 85, at 122.
107. *Id.*
108. *Id.* at 4.
109. *Id.* at 122. By 1963, the court had witnessed a 51% increase in cases filed in the prior three years. *Id.* at 4.
110. *Id.*
111. *Id.*
112. *Id.* at 122.
113. *Id.*
114. *Id.* at 123 (footnotes omitted) (quoting READ & MCGOUGH, *supra* note 105).
115. *Id.*
116. *Id.*
117. *Id.*

Although important, civil rights issues were usually a small portion of the overall Fifth Circuit docket.[118] For example, criminal cases represented from 17% to 25% of the Fifth Circuit docket.[119] The due process explosion in United States legal development was seen first-hand in the case load of the court.[120]

The years 1965 and 1966 also witnessed a significant change in the judges on the court.[121] At the beginning of 1965, the nine-member Fifth Circuit Court was missing two members.[122]

TABLE 7. Fifth Circuit as of January 1, 1965

Seat	Name	Service Began
1	Wisdom, John Minor	06/27/1957
2	(Vacant upon death of Ben Cameron)	
3	Brown, John R.	7/27/1955
4	(Vacant; Joseph Hutcheson took senior status)	
5	Rives, Richard	05/03/1951
6	Jones, Warren	04/22/1955
7	Tuttle, Elbert	08/04/1954
8	Bell, Griffin B.	10/05/1961
9	Gewin, Walter P.	10/05/1961

Over the next two years, the Fifth Circuit would change in major ways. The court would expand to thirteen judges.[123] Lyndon Johnson would add four new judges and fill the two vacancies.[124] The Fifth Circuit expanded from seven judges serving in active duty on January 1, 1965, to thirteen judges by the end of 1967.[125]

The year 1966 was a year of substantial change.[126] Three judges took office on July 22, 1966.[127] Judge Robert A. Ainsworth was the tenth judge to join the court.[128] Irving Goldberg joined the court as its eleventh judge.[129] John C. Godbold replaced Richard T. Rives, who had retired on February 15, 1966.[130]

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118. *Id.* at 25.
119. *Id.*
120. *Id.*
121. *Id.* at 132–34.
122. *Id.* at 132.
123. *Id.* at 134.
124. *Id.*
125. *Id.* at 141. In 1965, James P. Coleman replaced Judge Cameron (who had died), and Homer Thornberry replaced Judge Joseph Hutcheson (who had retired). *Id.* at 132.
126. *Id.* at 141.
127. *Id.* at 138.
128. *Id.*
129. *Id.* at 135.
130. *Id.*

On July 22, 1966, the Fifth Circuit was composed of the following judges:[131]

TABLE 8. Fifth Circuit as of July 22, 1966

Seat	Name	Service Began	Age at Start	Age on 07/22/1966
1	Wisdom, John Minor	06/27/1957	52	61
2	Coleman, James P.	07/26/1965	52	52
3	Brown, John R.	07/27/1955	46	56
4	Thornberry, Homer	07/01/1965	56	57
5	Godbold, John Cooper	07/22/1966	46	46
6	Jones, Warren L.	04/21/1955	59	71
7	Tuttle, Elbert P.	08/04/1954	57	68
8	Bell, Griffin B.	10/05/1961	43	48
9	Gewin, Walter P.	10/05/1961	53	61
10	Ainsworth, Robert A.	07/22/1966	56	56
11	Goldberg, Irving L.	07/22/1966	60	60

John Simpson was appointed on November 3, 1966, to a twelfth position.[132] Judge Jones took senior status on February 17, 1966, and was replaced by David Dyer on September 18, 1966.[133] At the end of 1966, the Fifth Circuit was composed of the following judges:[134]

TABLE 9. Fifth Circuit as of January 1, 1967

Seat	Name	Service Began
1	Wisdom, John Minor	06/27/1957
2	Coleman, James P.	07/26/1965
3	Brown, John R.	07/27/1955
4	Thornberry, Homer	07/01/1965
5	Godbold, John Cooper	07/22/1966
6	Dyer, David W.	08/25/1966
7	Morgan, Lewis R.	07/25/1968
8	Bell, Griffin B.	10/05/1961
9	Gewin, Walter P.	10/05/1961
10	Ainsworth, Robert A.	07/22/1966
11	Goldberg, Irving L.	07/22/1966
12	Simpson, John M.	11/03/1966

131. *Id.* at 134–39.
132. *Id.* at 136.
133. *Id.* at 135.
134. *Id.* at 134–39.

At age sixty, Goldberg was not the oldest member of the court, but he was considered old to be commencing his service at that age. Of the ten judges on the court when Goldberg began his judicial service, all started their service on the court before the age of sixty.[135] In July 1966, it was unforeseen that Judge Goldberg would serve on the court with vigor for the next twenty-nine years.

Of the original ten judges serving when Goldberg was appointed, five of them were transferred to the Eleventh Circuit on October 1, 1981—Godbold, Jones, Tuttle, Gewin, and Ainsworth—but their service continued for many years thereafter.[136]

The striking aspect of the information on this chart is the longevity of the judges, especially when the period of senior service is counted. As will be seen, Judge Goldberg's years of senior status from 1980 to 1995 were vigorously productive.

An issue that occupied the minds of many before Goldberg in the Fifth Circuit was the splitting of the court into two courts. Of course, in 1980, the Eleventh Circuit was created out of the Fifth Circuit, but prior to 1966, especially during the period 1963–1964, actual attempts had been made to accomplish the split.[137] By 1966, when Goldberg came to the Fifth Circuit, as he explained, "a truce had somehow been arranged and it was not the subject of burning discussion."[138] Judge Goldberg felt that the Fifth Circuit was not producing timely opinions. The court had a heavy docket, as the number of cases filed on an annual basis exceeded the number of dispositions, so that the pending case load was growing, but the "truce was abrogated . . . by consensuality."[139] The issue of the split of the Fifth Circuit lay dormant for several years during which "the court grew in number, as the case load enlarged, [and] as the problems of the Fifth Circuit proliferated," and then there was legislation and agitations for action.[140]

Goldberg was against the actual split that had occurred in 1980.[141] He said in his 1983 interview:

> I don't think the Cassandras were correct in thinking the world was coming to an end if [the Fifth Circuit] does not split. I don't think the panacea has been attained by the split. I don't think each of the circuits is

135. *Id.* at 144.

136. *Id.* at 241.

137. *Id.* This book is the seminal work on the subject of the splitting of the Fifth Circuit into two courts of appeal. *Id.*

138. Interview with Irving L. Goldberg, *supra* note 84.

139. *Id.*; *see* BARROW & WALKER, *supra* note 105, at 122 n.1.

140. Interview with Irving L. Goldberg, *supra* note 84.

141. *Id.*

> any better than it was before. But equally nor do I believe that it is any worse.[142]

B. The Fifth Circuit During Goldberg's Years of Service

During the fourteen years from 1966 to 1980, Judge Goldberg was in active status, and in the twenty-nine years of total judicial service on the court, from 1966 to 1995, the Fifth Circuit changed a great deal.[143]

The following information indicates the growth of the court from and after 1966:[144]

March 18, 1966	Four temporary judgeships authorized for the Fifth Circuit.[145]
June 18, 1968	The four temporary judgeships created in 1966[146] were made permanent and two additional judgeships were authorized for the Fifth Circuit.[147]
October 20, 1978	Eleven additional judgeships authorized for the Fifth Circuit.[148]
October 14, 1980	The Fifth Circuit Court of Appeals Reorganization Act divided the Fifth Circuit into two circuits, reorganizing the judicial districts of Mississippi, Louisiana, Texas, and the Canal Zone as a new Fifth Circuit and Alabama, Georgia, and Florida as the Eleventh Circuit. The act transferred all judges whose official duty stations were located within the Eleventh Circuit to the court of appeals for that circuit. Of the twenty-six judgeships authorized for the former Fifth Circuit, fourteen were assigned to the new Fifth Circuit and twelve to the Eleventh Circuit.[149]
September 27, 1979	The Fifth Circuit's appellate jurisdiction over the Canal Zone terminated when Congress abolished

142. *Id.*

143. *See* WALKER & BARROW, *supra* note 105.

144. *History of the Federal Judiciary: U.S. Court of Appeals for the Fifth Circuit*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_05.html (last visited Nov. 28, 2013).

145. Act of Mar. 18, 1966, Pub. L. No. 89-372, 80 Stat. 75.

146. *Id.* (authorizing four temporary judgeships).

147. Act of Jun. 18, 1968, Pub. L. No. 90-347, 82 Stat. 184.

148. Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629.

149. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 1 (1980)).

	the United States District Court for the Canal Zone, effective March 31, 1982.[150]
July 10, 1984	Two additional judgeships were authorized for the Fifth Circuit, increasing the number of judges to sixteen.[151]
December 1, 1990	One additional judgeship was authorized for the Fifth Circuit, increasing the number of judges to seventeen.[152]

The total numbers of judges during Goldberg's years of service were:[153]

Year	**Judges**
1966	13
1968	15
1978	26
1980	14
1984	16
1990	17

Claude F. Clayton was appointed on October 27, 1967, to the thirteenth judgeship position.[154] The court remained in this configuration for two years until 1969, when two new judgeships were created.[155] Harold Carswell was appointed on May 12, 1969, and Joe M. Ingraham was appointed on December 18, 1969, at age sixty-six, the oldest person to have been appointed to the court.[156] Charles Clark was appointed on October 17, 1969, to replace Claude Clayton, who had died suddenly on July 4, 1969, after only a year and a half of service.[157] Carswell resigned the following

150. Act of Sept. 27, 1979, Pub. L. No. 96–70, 93 Stat. 452.

151. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended 28 U.S.C. § 152 (1984)).

152. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

153. *History of the Federal Judiciary*: *U.S. Court of Appeals for the Fifth Circuit*, *supra* note 144.

154. *Biographical Directory of Federal Judges: Clayton, Claude Feemster*, FED. JUD. CENTER, http://www.fjc.gov/servlet/n/GetInfo?iid=451&cid=999&ctype=na&instate=na (last visited Nov. 28, 2013).

155. *History of the Federal Judiciary: U.S. Court of Appeals for the Fifth Circuit*, *supra* note 144.

156. *Biographical Directory of Federal Judges: Clayton, Claude Feemster*, *supra* note 154.

157. *Id.*

year and was replaced by Paul Roney on October 16, 1970.[158] At the end of the decade, the Fifth Circuit active judges consisted of:[159]

TABLE 11. Fifth Circuit as of January 1, 1970

Seat	Name	Service Began
1	Wisdom, John Minor	06/27/1957
2	Coleman, James P.	07/26/1965
3	Brown, John R.	07/27/1955
4	Thornberry, Homer	07/01/1965
5	Godbold, John Cooper	07/22/1966
6	Dyer, David W.	08/25/1966
7	Morgan, Lewis R.	07/25/1968
8	Bell, Griffin B.	10/05/1961
9	Gewin, Walter P.	10/05/1961
10	Ainsworth, Robert A.	07/22/1966
11	Goldberg, Irving L.	07/22/1966
12	Simpson, John M.	11/03/1966
13	Morgan, Lewis R.	07/25/1968
14	Carswell, Harold	06/20/1969
15	Ingraham, Joe M.	12/18/1969

The 1970s witnessed many changes to the Fifth Circuit. In October 1979, President Jimmy Carter was given eleven seats to fill on the court.[160]

The split of the Fifth Circuit into the Eleventh Circuit was approved on October 1, 1981.[161] Alabama, Georgia, and Florida were moved to the new court, along with twelve judges, leaving seventeen judges on the Fifth Circuit.[162]

VII. OPENING THE CASE WITH STYLE

A notable characteristic of Irving Goldberg's opinions generally, and his tax opinions, specifically, are his opening lines. Considering that Goldberg authored some eight hundred opinions over his twenty-nine years of judging and that these opinions are replete with the Goldberg turn of

158. *Id.* Judge Carswell was nominated to the Supreme Court on January 19, 1970 but was rejected by the Senate on April 6, 1970. Judge Carswell resigned from the Fifth Circuit on April 20, 1970. Associated Press, *G. Harold Carswell; Rejected for U.S. High Court*, L.A. TIMES (Aug. 1, 1992), http://articles.latimes.com/1992-08-01/news/mn-4281-1-g-harrold-carswell.

159. *See History of the Federal Judiciary: U.S. Court of Appeals for the Fifth Circuit*, *supra* note 144.

160. *Biographical Directory of Federal Judges*, 1789–Present, FED. JUD. CENTER, www.fjc.gov/public/home.nsf/hisj (last visited Nov. 28, 2013).

161. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.

162. *Id.*

phrase, one could write an entire article just on Goldberg's phrases and expressions.

For example, in a non-tax case concerning Kentucky Fried Chicken, Judge Goldberg opened his opinion with one of his more memorable expressions:

> This case presents us with something mundane, something novel, and something bizarre. . . . [T]he bizarre element is the facially implausible—some might say unappetizing—contention that the man whose chicken is "finger-lickin" good has unclean hands.[163]

This Article, however, is limited to Goldberg's contribution to federal tax law and, therefore, attention will remain focused on tax cases, despite the tempting invitation to broaden the discussion to all of his opinions.

Often unusual, frequently literary, and commonly humorous, Judge Goldberg placed his personal stamp on a decision with his beginning words.[164] The following passages are a selection of tax opinion excerpts in chronological order.[165] The entirety of each case is not analyzed here, but the passages do offer some entertaining language, or "Goldbergisms."[166] As the years passed, Goldberg's use of the case opening became bolder.[167]

A. Strauss v. United States

An opinion written at the beginning of his judicial service in the case of *Strauss v. United States* enabled Goldberg to address the proper jury instruction to support a charge of tax evasion:

> In this appeal Strauss complains of errors ranging from the egregious to the picayune. In reversing we discuss the egregious in the expectation that the picayune will not be repeated. . . .
>
> Strauss's financial gyrations as detailed in the record are complicated, but in view of our disposition we need not follow every personal and corporate pirouette. If financial obfuscation could as a matter of law be equated with tax evasion, the finding of guilt here would be unassailable, but a jury on proper instructions must find more than darkness or shadows.[168]

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163. Ky. Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 372 (5th Cir. 1977) (internal quotation marks omitted).

164. *See*, *e.g.*, *id.*

165. *See infra* Part VII.A–O.

166. *See infra* Part VII.A–O.

167. *See infra* Part VII.A–O.

168. Strauss v. United States, 376 F.2d 416, 417 (5th Cir. 1967).

B. Wien's Estate v. Commissioner

The decision of *Wien's Estate v. Commissioner* involved estate tax implications of the simultaneous death of a husband and wife and ownership of life insurance policies payable to each other.[169] Goldberg's opening signals his rejection of the argument of both sides:

> The taxpayers and the government both seek us to referee this mortal combat involving the taxation of life insurance policies. We have examined both sides in their polarization and, forsaking their extreme positions, pitch our tent of conclusion midway between their extremes. Thus in remanding we satisfy neither party in our solution to this necrological dilemma.[170]

C. Lee v. United States

The case of *Lee v. United States* was an ordinary tax case involving the level of proof required by the Service to prove fraud in the understatement of income:

> This is an appeal by the government from an adverse ruling on taxpayers' suit to harvest a refund of taxes paid under protest. Using "net worth statements" to demonstrate an unexplained flowering of taxpayers' wealth, the government sought to show that the luxuriating of financial seedlings into larger plants was attributable to the receipt of unreported monetary nutrients. In order to avoid a statute of limitations barrier to tax liability, the government was required to prove fraud in the understatement of income. The trial judge was unpersuaded as to that threshold point and accordingly entered judgment for taxpayers. At the government's urging, however, we have unearthed indications that the trial judge misconceived some of the evidence and misapprehended its effect, and we therefore remand the case for reconsideration of the evidence.[171]

D. Stock v. Commissioner

The 1977 case of *Stock v. Commissioner* involved the common question of whether periodic payments from a divorced husband to his former wife should be income:

> If it is true that an unhappy marriage is a zero-sum game, it is no less true that the financial arrangements incident to the marriage's dissolution

169. Wien's Estate v. Comm'r, 441 F.2d 32, 53 (5th Cir. 1971).
170. *Id.* at 33.
171. Lee v. United States, 466 F.2d 11, 13 (5th Cir. 1972) (footnote omitted).

> perpetuate that game. And when a marriage made in heaven plummets to earth, the postlapsarian ceremonies are presided over by that most fallen of angels, the Commissioner of Internal Revenue. In this case we must decide whether payments made by David Stock to his former wife, Shara, were periodic alimony payments for purposes of § 71.[172]

E. Schenk v. Commissioner

In *Schenk v. Commissioner*, the Service denied a farmer a deduction for pre-paid fertilizer:

> "To every thing there is a season, and a time to every purpose under the heaven: A time to be born, and a time to die; a time to plant, and a time to pluck up that which is planted;" a time to purchase fertilizer, and a time to take a deduction for that which is purchased. In this appeal from a Tax Court decision, we are asked to determine when the time for taking a fertilizer deduction should be.[173]

F. Texas Farm Bureau v. United States

Goldberg continued his farmer metaphor seen in *Schenk* in *Texas Farm Bureau v. United States*, a debt–equity case arising from loans between related non-profit corporations:

> With Congress' dedicated cultivation, the tax code has prospered and thrived, achieving a rate of growth that tillers of non-legislative soil would be hard-pushed to match. Despite the code's phenomenal size and detail, courts must still contend with a particularly persistent and pesterous ambiguity. The problem lies not in separating the seed from the chaff, but in telling debt from equity.[174]

G. USLIFE Title Ins. Co. of Dallas ex rel. Mathews v. Harbison

In *USLIFE Title Insurance Co. of Dallas ex rel. Mathews v. Harbison*, the issue was whether the government justifiably asserted responsible office penalties under § 6672 even though the underlying tax had been collected:

> An old saying has it that the art of taxation consists in so plucking the goose as to get the most feathers with the least hissing. The practice of taxation, however, is seldom pretty. In this case, appellee's hissing roused

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172. Stock v. Comm'r, 551 F.2d 614, 615 (5th Cir. 1977) (footnote omitted).

173. *See* Schenk v. Comm'r, 686 F.2d 315, 316 (5th Cir. 1982) (quoting *Ecclesiastes* 3:1–2 (King James)).

174. *See* Tex. Farm Bureau v. United States, 725 F.2d 307, 308 (5th Cir. 1984).

> the district court to condemn the Internal Revenue Service for overzealous plucking.[175]

H. Texas Oil & Gas Corp v. United States*: Tax Liens and UCC*

In *Texas Oil & Gas Corp. v. United States*, the issue involved the relationship of the UCC and the law of tax liens:

> We enter with some trepidation the tortured meanderings of federal tax lien law, intersected now by the somewhat smoother byway of the Uniform Commercial Code. Standing at this vantage point in the instant case, we must decide the disposition of a fund of the taxpayer–debtor's accounts receivable that is claimed both by the Government under its tax lien authority and by the lender under the aegis of the Uniform Commercial Code.[176]

I. Citizen's National Bank of Waco v. United States

The issue in *Citizen's National Bank of Waco v. United States* was whether the holding period for property could be tacked (or added to transferor's holding period) in a part-gift, part-sale transaction.[177] The principal issue in the case was largely factual, and arguably not complicated in a legal sense: "In this tax case we are confounded by the jargon of the regulations, unassisted by guiding case law, and confronted with an enacting environment singularly unilluminating."[178]

J. United States v. Winthrop

The case of *United States v. Winthrop* concerned capital gains versus ordinary income arising out of the sale of subdivided real estate: "Finding ourselves engulfed in a fog of decisions with gossamer like distinctions, and a quagmire of unworkable, unreliable, and often irrelevant tests, we take the route of ad hoc exploration to find ordinary income."[179]

K. Citizens & Southern National Bank v. United States

The *Citizens & Southern National Bank v. United States* case involved the marital deduction when there is a will contest:

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175. *See* USLIFE Title Ins. Co. of Dall. ex rel. Mathews v. Harbison, 784 F.2d 1238, 1239 (5th Cir. 1986).

176. *See* Tex. Oil. & Gas Corp. v. United States, 466 F.2d 1040, 1043 (5th Cir. 1972).

177. *See* Citizen's Nat'l Bank of Waco v. United States, 417 F.2d 675, 676 (5th Cir. 1969).

178. *Id.*

179. *See* United States v. Winthrop, 417 F.2d 905, 906 (5th Cir. 1969).

> In this tax dispute we have been summoned to interpret the estate tax marital deduction. While simple in concept, that provision has become more complex with each encrusting precedent. The taxpayers herein seek further complication of that encrustation, requesting this Court to incorporate into the marital deduction provisions the law guiding quilled conveyances of medieval times. However, tax provisions generally are not native to the niceties of conveyancing of yore. Preferring that a taxing statute be given a contemporary construction, we refuse to harken back to terms and terminologies whose origins are far removed from the modern phenomenon of estate taxation.[180]

L. Pacific Coast Music Jobbers, Inc. v. Commissioner

In *Pacific Coast Music Jobbers, Inc. v. Commissioner*, the issue was a purported Subchapter S election:

> We are asked to construe a contractual arrangement purportedly falling under the tax aegis Subchapter S. In construing the underlying contracts and their tax implications, we must view the situation practically and realistically. There are also technical considerations. A taxpayer cannot simply enter a telephone booth and change into his Subchapter S suit. He must file a specific written election to be so taxed. It is admitted that appellant taxpayer did not so elect; nevertheless, he seeks the power to leap tall tax requirements at a single bound.[181]

M. Producers Supply & Tool Company v. United States

Goldberg's opinion in *Producers Supply & Tool Co. v. United States* is one of his forays into oil and gas taxation.[182]

> Hopefully we return to our last encounter with the so-called ABC transaction, endemic to oil and gas taxation, but now buried in the statutory graveyard marked "repealed." Because the transactional facts of this case were consummated before ABC's statutory rigor mortis set in, we must clinically exhume and examine the vital organs of the ABC corpus, to try to come to a diagnostic conclusion as to whether or not the alphabetical contrivance can meet our pre-1969 tests for validity.[183]

N. Randall v. H. Nakashima & Co.

The case of *Randall v. H. Nakashima & Co.* involved the question of whether a partially executed contract right was attachable by the UCC and a

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180. *See* Citizens & S. Nat'l Bank v. United States, 451 F.2d 221, 222–23 (5th Cir. 1971).
181. *See* Pac. Coast Music Jobbers, Inc. v. Comm'r, 457 F.2d 1165, 1166 (5th Cir. 1972).
182. *See* Producers Supply & Tool Co. v. United States, 465 F.2d 787, 788 (5th Cir. 1972).
183. *Id.* (citation omitted) (citing I.R.C. § 636 (2012)).

federal tax lien.[184] "In this case we re-enter the tortured meanderings of federal tax lien law, intersected now by the somewhat smoother byway of the Uniform Commercial Code."[185]

O. United States v. Kellogg

Goldberg's last tax opinion, *United States v. Kellogg (In re West Texas Marketing Corp.)*, written in 1994, concerned the res judicata effect on a settlement agreement between the taxpayer and the Service, despite the fact that the settlement agreement did not specify the exact dollar amount of the settlement, but provided the means by which the final amount owed by the parties could be calculated.[186]

> This case makes plain the proposition that Kellogg does not have a monopoly on flakes. Indeed, it is Kellogg's opponent, the United States Government acting through the Internal Revenue Service ("IRS") which has committed two scoops of errors, allowing a case which should have been a snap, to dissolve into a series of crackles and pops. In the serial antics of this case, the government has repeatedly failed to determine the actual tax refund owed to the debtor, West Texas Marketing Corporation, and has sugar frosted the refund, overpaying by a considerable amount.[187]

VIII. CAPITAL GAIN OR ORDINARY INCOME: INCOME FROM SUBDIVIDED REAL ESTATE

Judge Goldberg wrote three classic opinions concerning capital gains versus ordinary income arising out of the sale of subdivided real estate.[188] If the taxpayer is a dealer in real estate, then the property is not a capital asset, and the property is taxed as ordinary income.[189] If the taxpayer is an investor, then the taxpayer is selling a capital asset and is entitled to capital gain taxation.[190]

The triad of subdivision cases, *United States v. Winthrop*, *Biedenharn Realty Co. v. United States*, and *Suburban Realty Co. v. United States*, involved prolonged liquidation of large real estate tracts combined with various degrees of organized subdivisions and platting, including streets, sewers, electricity, and some form of organized sales of lots.[191]

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184. Randall v. H. Nakashima & Co., 542 F.2d 270, 271 (5th Cir. 1976).

185. *Id.*

186. United States v. Kellogg (*In re* W. Tex. Mktg. Corp.), 12 F.3d 497, 499–500 (5th Cir. 1994).

187. *Id.* at 498.

188. *See* Suburban Realty Co. v. United States, 615 F.2d 171, 172 (5th Cir. 1980); Biedenharn Realty Co. v. United States, 526 F.2d 409, 410 (5th Cir. 1976) (en banc); United States v. Winthrop, 417 F.2d 905, 906 (5th Cir. 1969).

189. *See* I.R.C. § 1221 (2012).

190. *See id.*

191. *See* cases cited *supra* note 188. Goldberg also authored a fourth case involving the dealer

The relevant statute excludes from capital assets "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."[192] The general idea is that capital gain is appropriate when appreciation causes gain in the property, while ordinary income is required when the efforts of the taxpayers, through organized sales, subdividing, etc., caused the profits.[193]

Of these three cases, *Biedenharn* is the most important, but it builds on the earlier *Winthrop*.[194] The third case, *Suburban Realty Co.*, applies the two earlier cases as a coda to the triad and guides future appellate courts; even today, appellate courts use *Suburban Realty Co.* as a guide.[195]

A. United States v. Winthrop

In *Winthrop*, the taxpayer inherited land near Tallahassee, Florida, that had been family land for a century.[196] The inheritance occurred variously from 1932 to 1960.[197] In the post-war era, Tallahassee was growing, as were many southern cities, and it gradually enveloped the Winthrop property.[198] From the beginning of the taxpayer's ownership of the land, he started subdividing and improving the property and then selling lots as home sites.[199] When one subdivision was finished, the taxpayer would start improving the next subdivision.[200] The taxpayer bore the cost of the improvements, such as surveys, streets, and installation of utilities.[201] The taxpayer himself sold the lots. Over the long period of subdivision and sales (1936–1963), the taxpayer sold 456 lots, the income from which represented 52% of the taxpayer's total income.[202]

The *Winthrop* case involved tax years 1959–1963, during which the taxpayer reported his income from the real estate activity as ordinary income.[203] The taxpayer died in 1963.[204] His widow amended the 1959–1963 tax returns, changing the reporting of the real estate income from

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versus investor dichotomy. *Slappey Drive Industrial Park v. United States* is principally a debt–equity case, but involves subdivision issues that build on *Winthrop* and *Biedenharn Realty Co.* and finds ordinary income arising from the business of real estate development. *Slappey Drive Indus. Park v. United States*, 561 F.2d 572, 587 (5th Cir. 1977). "Under these circumstances the *Biedenharn* analysis and *Winthrop* factors require ordinary income treatment." *Id.*

192. I.R.C. § 1221(a)(1).
193. *See id.*
194. *See* Biedenharn Realty Co. v. United States, 526 F.2d 409, 416 (5th Cir. 1976) (en banc).
195. *See* Suburban Realty Co. v. United States, 615 F.2d 171, 176–77 (5th Cir. 1980).
196. *See* United States v. Winthrop, 417 F.2d 905, 906 (5th Cir. 1969).
197. *Id.*
198. *See id.*
199. *See id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *See id.* at 907.
204. *Id.*

ordinary income to capital gain, taking the position that the deceased taxpayer was an investor, not a dealer.[205] The district court agreed with the taxpayer and upheld the refunds.[206]

Goldberg's opinion reversed the district court and found that the income should be considered ordinary income.[207] He started off his opinion, as was his wont, with distinctive language to set the stage:

> We must emerge with a solution to the "old, familiar, recurring, vexing and ofttimes elusive" problem described by Judge Brown in Thompson v. Commissioner of Internal Revenue . . . concerning capital gains versus ordinary income arising out of the sale of subdivided real estate. Finding ourselves engulfed in a fog of decisions with gossamer like distinctions, and a quagmire of unworkable, unreliable, and often irrelevant tests, we take the route of ad hoc exploration to find ordinary income.[208]

Before Goldberg turned his attention to the substantive issue in the case, he took up the procedural question of the standard of appellate review.[209] The issue, while abstract, proved to be one of the important aspects of this case.[210] The trial court's conclusions over ultimate facts are reviewed by the appellate court under the "clearly erroneous" standard.[211] Questions of law determined by the trial court are reviewed by the appellate court de novo.[212] Goldberg determined in his opinion that an appellate court can accept as true the findings of the trial court.[213] When the facts in the case were undisputed, Goldberg wrote that the judicial function required the court to reach a legal conclusion: "we are called upon to reason and interpret. This is the law obligation of the court as distinguished from its fact finding duties."[214] Goldberg viewed the ultimate issue in the case as a question of law, despite the factually intensive nature of the inquiry.[215] This issue proved contentious in the later cases.[216]

Recognizing the highly factual nature of the inquiry, Judge Goldberg sets the stage in his unique way for his analysis of the facts:

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205. *Id.*
206. *Id.*
207. *Id.* at 910–11.
208. *Id.* at 906 (quoting Thompson v. Comm'r, 322 F.2d 122, 123 (5th Cir. 1963)).
209. *See id.* at 910–11.
210. *See id.* at 911–12.
211. *See id.* at 910 (internal quotation marks omitted).
212. *See id.* at 909–10.
213. *Id.*
214. *Id.* at 910. Goldberg cited prior Fifth Circuit precedent to a similar effect. *E.g.*, Galena Oaks Corp. v. Scofield, 218 F.2d 217, 217 (5th Cir. 1954).
215. *Winthrop*, 417 F.2d at 910.
216. *See* Suburban Realty Co. v. United States, 615 F.2d 171, 180 (5th Cir. 1980); Biedenharn Realty Co. v. United States, 526 F.2d 409, 414–15 (5th Cir. 1976) (en banc).

> In analyzing a case of this sort no rubrics of decision or rubbings from the philosopher's stone separate the sellers garlanded with capital gains from those beflowered in the garden of ordinary income. Each case and its facts must be compared with the mandate of the statute. In so doing we note that the enunciations of the Supreme Court are clarion as they enjoin us to construe narrowly the definition of a capital asset and as a corollary interpret its definitional exclusions broadly.[217]

Goldberg subdivided the broad issue of whether Winthrop was a dealer in real estate into three discrete questions.[218] Goldberg would return to these discrete questions in each of his later opinions confronting subdivided real estate.[219] The three discrete issues were (1) whether "Winthrop held the property 'primarily for sale' as that phrase is used in § 1221";[220] (2) whether the sales were made "in the ordinary course of the taxpayer's trade or business" (i.e., "whether the taxpayer's activities constituted a trade or business");[221] and (3) whether the sales were ordinary.[222]

The legacy of Goldberg's *Winthrop* opinion is his condensing of the factors used in prior cases to only seven factors.[223] These have come to be known, at least in the Fifth Circuit, as the Winthrop factors:

> (1) the nature and purpose of the acquisition of the property and the duration of the ownership;
> (2) the extent and nature of the taxpayer's efforts to sell the property;
> (3) the number, extent, continuity and substantiality of the sales;
> (4) the extent of subdividing, developing, and advertising to increase sales;
> (5) the use of a business office for the sale of the property;
> (6) the character and degree of supervision or control exercised by the taxpayer over any representative selling the property; and
> (7) the time and effort the taxpayer habitually devoted to the sales.[224]

The first legal test of whether the property was held "primarily for sale" was easily dispensed with because the undisputed facts were that the taxpayer had no other motivation but the sale of the inherited property.[225]

The second test was whether the taxpayer's activities constituted a trade or business, which Goldberg determined that they did.[226] The facts

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217. *Winthrop*, 417 F.2d at 911.
218. *See id.* at 911–12.
219. *See Suburban Realty Co.*, 615 F.2d at 178; *Biedenharn Realty Co.*, 526 F.2d at 416.
220. *Winthrop*, 417 F.2d at 911.
221. *Id.*
222. *See id.* at 912.
223. *See id.* at 909–10.
224. *Id.* at 910 (citing Smith v. Dunn, 224 F.2d 353, 356 (5th Cir. 1955)).
225. *Id.* at 911 (internal quotation marks omitted).
226. *See id.* at 911–12.

revealed a substantial enterprise spanning a quarter of a century and producing over half of the taxpayer's income during the period.[227] While acknowledging that capital gains are not obtainable only by being a static holder of property, Goldberg said, "the flexing of commercial muscles with frequency and continuity, design and effect does result in disqualification [from capital gain treatment] because it indicates one has entered the business of real estate sales."[228] Goldberg observed that Mr. Winthrop used informal sales methods, but he sold numerous properties.[229] The purchasers were his customers.[230] Winthrop was in a trade or business.[231]

Third, Goldberg found the sales of real estate to be ordinary in the course of Mr. Winthrop's business by considering the relevant "chronology and . . . history to determine if the sales of lots to customers were the usual or a departure from the norm."[232]

Winthrop started selling lots from the start of his ownership and the sales process continued for twenty-five years.[233] Goldberg concluded that making such sales was the sole purpose of Winthrop's business.[234] The taxpayer's subdividing activities were "*not adventitious, but on the contrary [were] consistently advertent.*"[235] Goldberg thus found dealer status and ordinary income.[236]

B. Biedenharn Realty Co. v. United States

For the second time in his long judicial career, Judge Goldberg wrote for the entire court, en banc, though divided, in a tax case styled *Biedenharn Realty Co. v. United States*.[237] In contrast with *Winthrop*, in which the underlying facts had been undisputed, in *Biedenharn*, Goldberg faced a confusing record.[238] Goldberg spent more than the usual amount of space undertaking a factual review.[239] As first signaled in *Winthrop*,

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227. *Id.* at 911.
228. *Id.*
229. *See id.* at 912.
230. *See id.*
231. *See id.*
232. *Id.*
233. *See id.*
234. *Id.*
235. *Id.* (emphasis added).
236. *See id.*
237. *See* Biedenharn Realty Co. v. United States, 526 F.2d 409, 409 (5th Cir. 1976) (en banc). Goldberg's first en banc opinion was also in a tax case, *United States v. Cocke*, 399 F.2d 433, 433 (5th Cir. 1968) (en banc), discussed *infra* Part IX.E. Goldberg also wrote the en banc opinion in *Sands v. Wainwright*, 491 F.2d 417, 417 (5th Cir. 1973) (en banc), a criminal case involving prison issues, and *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295, 295 (5th Cir. 1977) (en banc), which involved First Amendment issues.
238. *See Biedenharn*, 526 F.2d at 410.
239. *See id.* at 410–14.

Goldberg reiterated that the standard of review of the appellate court was not the clearly erroneous standard, but rather, plenary review.[240]

The common facts resembled those in *Winthrop*.[241] The realty was composed of 978 acres (called Hardtimes Plantation), which was purchased by the taxpayer in 1935.[242] The southern city was Monroe, Louisiana.[243] From 1939 to 1966, the taxpayer created three subdivisions out of the property, using 185 of the 978 acres and ultimately selling 208 subdivided lots in 158 sales.[244] For the years at issue, 1964–1966, thirty-seven lots were sold and were at issue in the case.[245]

The record reflects substantial real estate activity during the 1935–1966 period apart from the real estate sales at issue in the case.[246] Some 477 lots were otherwise sold during this long period.[247] Judge Goldberg characterized the taxpayer's real estate sales as frequent and abundant.[248] Before the taxpayer sold the thirty-seven lots at issue, taxpayer added drainage, water, sewage, and electricity.[249] Brokers were utilized to help sell the lots.[250]

Judge Goldberg began the analysis portion of the opinion by pointing out the factual nature of the inquiry, with the result being that the forty years of Fifth Circuit precedent on this real estate capital gain–ordinary income issue were not easily reconciled.[251] Nevertheless, Goldberg expressed hope that his opinion would set "forth some general, albeit inexact, guidelines for the resolution of many of the § 1221(1) cases,"[252] without attempting to:

> reconcile all past precedents or assure conflict-free future decisions. Nor do we hereby obviate the need for ad-hoc adjustments when confronted with close cases and changing factual circumstances. Instead, with the hope of clarifying a few of the area's mysteries, we more precisely define

240. *Id.* at 416 n.25.
241. *See id.* at 410–14.
242. *Id.* at 411.
243. *Id.*
244. *Id.*
245. *Id.* at 411, 413.
246. *Id.* at 412.
247. *Id.*
248. *Id.* The dissenters did not agree with Goldberg's conclusion that the standard of review was plenary, or de novo, and not clear error. *See id.* at 424–27 (Gee, J., dissenting). As will be discussed, Judge Gee, who dissented here, later authored *Byram v. United States*, which overruled this point. *Id.* at 424; *see infra* notes 315–17.
249. *Biedenharn*, 526 F.2d at 413 (majority opinion).
250. *Id.* at 418.
251. *Id.* at 414.
252. *Id.* at 415.

> and suggest points of emphasis for the major *Winthrop* delineated factors as they appear in the instant controversy.[253]

The critical facts attracting Goldberg's greatest interest and turning his conclusion towards an ordinary income result were the taxpayer's real estate sales activities, with particular emphasis on the frequency and substantiality of those activities.[254] Looking at the trend of Fifth Circuit cases, especially *Winthrop*, Goldberg stressed the ordinary income result when dispositions of subdivided property extended over a long period of time, such as in the instant case.[255] These activities allowed the court to find a trade or business, and that the sales of the lots were held "primarily for sale" in the "ordinary course of his trade or business."[256]

Of secondary importance to Goldberg was the subdividing activity, including broker sales, which buttressed the taxpayer's sales effort.[257] The taxpayer approached marketing in somewhat of a unique manner by taking advantage of the property's premier and visible location by road construction, adding utilities, and staking off subdivided parcels to demonstrate to the drive-by public how the subdivision would appear.[258] Recognizing that this "inherent notice" is not always present, Goldberg included these efforts as part of the solicitation spectrum.[259]

Goldberg did not think the extensive use of brokers to sell the subdivided lots, as in the instant case, was sufficient to insulate the taxpayer from ordinary income treatment.[260] The taxpayer retained decision-making power over price setting and credit policies.[261] The brokers did not completely take over the sales effort in this case, a factor that was important in earlier capital gain precedent.[262]

The District Court found capital gains treatment appropriate because the taxpayer essentially liquidated the property over a long period of time.[263] The Service argued, and Goldberg so found, that the taxpayers entered the real estate business to dispose of what was formerly investment property.[264] Goldberg acknowledged the taxpayer's investment intent in

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253. *Id.*
254. *See id.* at 416.
255. *See id.*
256. *Id.* at 414 (internal quotation marks omitted), 416 (quoting Phillip D. Levin, *Capital Gains or Income Tax on Real Estate Sales*, 37 B.U. L. REV. 165, 170 n.29 (1957)) (internal quotation marks omitted).
257. *Id.* at 418.
258. *Id.*
259. *See id.*
260. *Id.* at 418–19.
261. *See id.* at 419.
262. *Id.*
263. *Id.*
264. *See id.* at 420.

acquiring the property, but clarified that "investment purpose has no built-in perpetuity nor a guarantee of capital gains forever more."[265]

Judge Goldberg discounted prior precedent because of the ad-hoc nature of prior decisions and his view that not all precedent need be reconciled or harmonized.[266] Nevertheless, he felt that the court had a responsibility to "giv[e] future direction with respect to the much controverted role of prior investment intent."[267] To be sure, Goldberg said, original or prior investment intent in acquiring and holding real estate:

> [E]ndures in controlling fashion notwithstanding continuing sales activity. We doubt that this aperture, where an active subdivider and improver receives capital gains, is very wide; yet we believe it exists. We would most generally find such an opening where the change from investment holding to sales activity results from unanticipated, externally induced factors which make impossible the continued pre-existing use of the realty.[268]

Goldberg would not go as far as the government wanted in claiming that investment intent is never relevant.[269] The taxpayer will not be granted "carte blanche to undertake intensely all aspects of a full blown real estate business. Instead, in cases of forced change of purpose, [it] will continue to utilize the *Winthrop* analysis discussed earlier but will place unusually strong taxpayer-favored emphasis on *Winthrop*'s first factor."[270]

In the case, Goldberg concluded that the taxpayer voluntarily changed intent.[271] The rest of the facts overwhelmed original intent: "However wide the capital gains passageway through which a subdivider with former investment intent could squeeze, the Biedenharn Realty Company will never fit."[272]

Thus, Goldberg summarized the role of investment intent:

> We cannot write black letter law for all realty subdividers and for all times, but we do caution in words of red that once an investment does not mean always an investment. A simon-pure investor forty years ago could by his subsequent activities become a seller in the ordinary course four decades later. The period of Biedenharn's passivity is in the distant past; and the taxpayer has since undertaken the role of real estate protagonist. The Hardtimes Plantation in its day may have been one thing, but as the plantation was developed and sold, Hardtimes became by the very fact of

265. *Id.* at 421.
266. *See id.* at 414.
267. *Id.* at 421.
268. *Id.*
269. *See id.* at 422.
270. *Id.*
271. *See id.*
272. *Id.*

> change and activity a different holding than it had been at its inception. No longer could resort to initial purpose preserve taxpayer's once upon a time opportunity for favored treatment.[273]

The dissent felt that Goldberg departed from his earlier *Winthrop* opinion by stressing certain factors over the totality of the factors.[274] Goldberg was challenged by the dissent for emphasizing improvements in the list of factors.[275]

C. Suburban Realty Co. v. United States

The last in the triad of subdivided real estate capital gain–ordinary income cases was *Suburban Realty Co.*, which involved facts similar to the other two cases, except that this case was not a liquidation case, as were the prior cases.[276] The taxpayer acquired a one-fourth interest in 1,742.6 acres on the north side of Houston, in the path of expansion in the late 1930s.[277]

The tax years in question were 1968–1971, and at issue were the tax consequences resulting from the sales of six tracts of unimproved real estate.[278] From 1939 to 1971, the taxpayer made 244 real estate sales, of which ninety-five were unplatted and unimproved property and 149 were from platted property restricted to residential sales.[279] In each of the thirty-three years, there was at least one sale, and in some years, four or more sales.[280] A substantial majority of taxpayer's income from the period was from real estate sales of these properties.[281]

The favorable factors in the case, from the taxpayer's perspective, were that the taxpayer undertook no development or subdivision activity.[282] The unfavorable factors to the taxpayer were that the taxpayer engaged in no continuous business activity apart from real estate sales.[283]

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273. *Id.* at 423–24.
274. *See id.* at 427 (Gee, J., dissenting).
275. *See id.*
276. *See* Suburban Realty Co. v. United States, 615 F.2d 171, 173 (5th Cir. 1980).
277. *See id.*
278. *See id.*
279. *See id.* at 174.
280. *See id.*
281. *See id.*
282. *See id.*
283. *See id.* As an interesting point of reference, Gerald Haddock, currently of Fort Worth, Texas, was the tax lawyer at Fulbright who argued this case on appeal. Telephone Interview with Gerald Haddock (Feb. 1, 2012). Mr. Haddock recalls that Goldberg was the chief judge of the panel and was exceedingly active in questioning counsel. *Id.* In fact, Haddock states that he did not get more than one minute into his argument before Judge Goldberg peppered him with questions. *Id.* Haddock remembers being challenged by a hypothetical from Goldberg that drew the liquidation distinction into sharp focus, obviously indicating Goldberg's interest on whether the precedent, arising out of liquidation cases, would support a taxpayer-favorable outcome in this case. *Id.*

A continuing point raised in Goldberg's opinion in *Suburban Realty Co.* is the standard of appellate review: a "clearly erroneous" or "plenary review" standard, which had been present in *Winthrop* and *Biedenharn*.[284] Facing Goldberg were two lines of Fifth Circuit authority.[285] Ever the pragmatist, Judge Goldberg did not worry about the deep, historical differences between the two appellate review standards: "We need not here psychoanalyze the nightmares of characterization that have fascinated professors of civil procedure: the distinctions between historical, evidentiary, subsidiary, and ultimate facts are too fine for useful discussion."[286]

He concluded that the taxpayer's purpose in holding the property was a factual question, as was the predominate purpose, while whether there was a trade or business and the standard over what constitutes a trade or business was a mixed question of law and fact.[287] The ultimate conclusion was based on these preceding questions of law and fact; whether the property was "held primarily for sale to customers in the ordinary course of his trade or business" would be answered by the subsidiary questions.[288] In any case, Goldberg wrote that "appellate review of a trial court's application of the answers to the subsidiary questions to arrive at the ultimate conclusion is plenary."[289]

Goldberg took the analysis back to the statutory moorings.[290] He indicated a belief that the generous quantity of case precedent, which focused on factors, had somewhat lost sight of the statutory framework.[291] Also, by grounding the analysis on the statute, the relevance of the factors cited in *Biedenharn* becomes relevant.[292] The principal inquiries demanded by the statute, as stated by Goldberg, were then and still are today "1) was taxpayer engaged in a trade or business, and, if so, what business? 2) was taxpayer holding the property primarily for sale in that business? [and] 3) were the sales contemplated by taxpayer 'ordinary' in the course of that business?"[293]

Goldberg then tied this together with the *Winthrop* factors, as applied in *Biedenharn*:

> A taxpayer who engages in frequent and substantial sales is almost inevitably engaged in the real estate business. The frequency and

284. *See Suburban Realty Co.*, 615 F.2d at 180 (internal quotation marks omitted).
285. *See id.*
286. *See id.*
287. *See id.* at 180–81.
288. *See id.*
289. *Id.* at 181 n.28.
290. *See id.* at 178.
291. *See id.*
292. *Id.*
293. *Id.*

> substantiality of sales are highly probative on the issue of holding purpose because the presence of frequent sales ordinarily belies the contention that property is being held "for investment" rather than "for sale." And the frequency of sales may often be a key factor in determining the "ordinariness" question.[294]

Development activity and improvement, while relevant to developer status, is peripherally relevant to the ordinariness statutory requirement and is less conclusive than substantiality and frequency of sales.[295]

Goldberg found solicitation and advertising efforts to be relevant to a trade or business and holding purpose, but the absence of these factors is not conclusive to the essential statutory questions.[296] As Goldberg reminds, one can be in the real estate business and need not "engage in promotional exertions in the face of a favorable market."[297]

At this point in the opinion, Goldberg confronted the ultimate question of whether the taxpayer was in the real estate business, a question that he found relatively simple because the facts demonstrated a thirty-three year period of real estate activity involving 244 sales, averaging seven sales per year.[298] The fact that other opinions might have been closer to the line did not concern Goldberg.[299] In this case, the answer was clear.[300] Goldberg did not find a need to define the line.[301]

The inquiry into the correct moment to measure the purpose of holding property was an important part of the *Suburban Realty Co.* decision.[302] Judge Goldberg did not accept the taxpayer's argument that the time at which to determine the taxpayer's purpose was when the property was sold, for, as Goldberg stated, "[a]t the very moment of sale, the property is certainly being held 'for sale.'"[303] Goldberg articulated the moment to measure taxpayer's purpose as being "at some point before he decided to make the sale in dispute."[304] He did not find any Supreme Court or Fifth Circuit precedent governing this issue.[305] For the instant case, Goldberg did

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294. *Id.*
295. *Id.* at 178–79.
296. *Id.* at 179.
297. *Id.* (quoting Biedenharn Realty Co. v. United States, 526 F.2d 409, 418 (5th Cir. 1976)) (internal quotation marks omitted).
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *See id.* at 182–83.
303. *Id.* at 182.
304. *Id.*
305. *Id.* at 183. The court stated that *Commissioner v. Tri-S Corp.* was said to be in accord with Goldberg's approach in *Suburban Realty Co. Id*. at 183 n.35 (citing Comm'r v. Tri-S Corp., 400 F.2d 862, 863–64 (10th Cir. 1968)).

not think a resolution of this issue was warranted, because the taxpayer's primary purpose in holding the real estate was for sale.[306]

The final part of Judge Goldberg's opinion in *Suburban Realty Co.* involved the question of whether the policies motivating Congress to allow a lower tax rate for capital gains warranted a capital gains conclusion in the case, despite the plain language of § 1221.[307] Profits arose from market forces and the operation of a real estate business.[308] Both categories of profits were present in the case.[309] Looking back to Supreme Court guidance, Goldberg found admonitions to construe the term "capital asset" narrowly.[310] Further, he found clear Supreme Court guidance to tax everyday business operational profits as ordinary income.[311] Thus, Goldberg held for ordinary income.[312]

The triad of *Winthrop*, *Biedenharn*, and *Suburban Realty Co.* has maintained a continuing vitality through current times.[313] The issue of subdivided real estate as ordinary income versus capital gains ebbs and flows in the later cases, and the reliance of later courts on Goldberg's decisions continues.[314]

In 1983, Judge Gee, writing in *Byram v. United States* reversed Goldberg's ruling from the three earlier subdivided real estate cases concerning the standard of review.[315] Based on Supreme Court precedent from a civil rights case, Gee wrote that the issue of intent to hold or sell subdivided real estate lots is a pure question of fact. [316] Factual questions are reviewed by the appellate court under a clear error standard.[317]

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306. *Id.* at 183 n.36.

307. *Id.* at 186.

308. *Id.*

309. *Id.*

310. *Id.* (internal quotation marks omitted) (citing Comm'r v. Gillete Motor Transp., Inc., 364 U.S. 130, 134 (1960)).

311. *Id.* (citing *Gillete Motor Transp., Inc.*, 364 U.S. at 130; Corn Prods. Ref. Co. v. Comm'r, 350 U.S. 46, 52 (1955)).

312. *Id.* at 187.

313. *See supra* Part VIII.A–C.

314. Reed v. United States, No. 3:05-CV-1836-M, 2006 WL 1152719 (N.D. Tex. May 2, 2006), *aff'd sub nom. In re* Bio-Med Servs. Corp., 239 F. App'x 34 (5th Cir. 2007) (Bankr. N.D. Tex. 2006); *e.g.*, *In re* Bio-Med Servs. Corp., 96 A.F.T.R.2d (RIA) 2005-5534 (Bankr. N.D. Tex. 2005); Flood v. Comm'r, 104 T.C.M. (CCH) 217 (2012).

315. Byram v. United States, 705 F.2d 1418, 1424 (5th Cir. 1983).

316. *Id.* at 1422–23; *see, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 274 (1982).

317. *Byram*, 705 F.2d at 1425. The attorney for Byram, Michael L. Cook of Austin, Texas, told the author that neither he nor the Government in *Byram* anticipated the standard of review issue and neither of them had heard of the *Swint* case. Interview with Michael L. Cook (Dec. 15, 2012). At oral argument, Judge Gee asked counsel if either side knew *of Swint* and neither did. *Id.* Judge Gee asked for supplemental briefing on the issue. *Id.* Cook was surprised at the emphasis on the issue in the final decision. *Id.*

IX. OIL & GAS TAXATION

The area of oil and gas taxation is an important part of the tax jurisprudence of Judge Goldberg.[318] Even for experienced tax lawyers, oil and gas taxation is arcane.[319] With Judge Goldberg, one has a feeling that he enthusiastically embraced these cases.[320]

A. ABC Cases

A mineral production payment is a royalty limited by time or amount.[321] The production payment is a right to a specific share of production from the property—or a sum of money in lieu thereof—when production occurs, secured by an interest in the minerals that are the source of payment, and the production payment is usually interest-bearing.[322] Depending on how a production payment is created, it is either a carved-out production payment or a retained production payment, which may then be sold to a third party in a so-called "ABC transaction."[323]

The House Committee Report on the 1969 bill that later became I.R.C. § 636 described the problem as follows:

> Assume that A sells an operating business to B—the business may be an oil well, or it may be an apartment building. However, assume that A retains the right to a production payment—a payment equivalent to the current price of a specified number of barrels of oil—or in the case of the apartment building, a mortgage, which is not much different from the production payment. Then suppose that A sells the production payment or mortgage to C.
>
> From A's standpoint, the two transactions are treated the same—they both result in a capital gain—or, loss—to A depending upon his cost to other basis whether it is the apartment building or oil well which is being sold.

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318. *See infra* Part IX.A–E.

319. Milton Dauber, *Oil and Gas for the Passive Investor—Tax and Business Considerations*, *in* 25TH INST. ON OIL & GAS L. & TAXATION 419, 455 (Armine, Carol Ernst ed., 1974) ("We in the oil industry are proud to assert that the body of tax law relating to oil and gas is a world unto itself, unlike anything dreamed of in the philosophies of conventional tax lawyers."). The taxation of oil and gas has, in fact, been long regarded as a specialized field with its own peculiar attendant problems relating to extraction and marketing. *See* Charles O. Galvin, *The "Ought" and "Is" of Oil-and-Gas Taxation*, 73 HARV. L. REV. 1441, 1462 (1960); *see also* Comm'r v. Brown, 380 U.S. 563, 575–78 (1965) (discussing the sui generis nature of oil and gas case law), *superseded by statute as stated in* Henry E. & Nancy Horton Bartels Trust for the Benefit of the Univ. of New Haven, 209 F.3d 147, 152 (2d Cir. 2000).

320. *See infra* Part IX.A–E.

321. Martin M. Van Brauman, *The Reasonable Expectation Requirement for Oil an Gas Production Payments After* Yates v. Commissioner, 22 ST. MARY'S L.J. 39, 42–43 (1990).

322. *See id.* at 44–45.

323. *See* I.R.C. § 636 (2012); *Taxing the ABC Transaction: A Suggested Approach*, 114 U. PA. L. REV. 588, 588 (1966).

> However, the similarity between the oil well and the apartment building ends here. In the case of the apartment building, all of the rental income after ordinary expenses and depreciation is taxable income to B and he must pay off the mortgage out of "after tax" dollars.[324]

The taxpayer normally realizes gross income from the property when the mineral is extracted and sold.[325] Nevertheless, the Supreme Court in *Commissioner v. P.G. Lake, Inc*. held that the sale of a carved-out mineral payment resulted in the realization of ordinary income in advance of extraction.[326] Before enactment of the Tax Reform Act of 1969, this approach afforded the operator an opportunity to control the time of receipt of income, which proves advantageous in some circumstances, such as when a property is producing little taxable income so that the 50% limitation of § 613 greatly reduces the amount of depletion allowable.[327] By selling the production expected over a future period for cash, a taxpayer could concentrate the income therefrom in one year so that 50% of the taxable income from the property would be sufficient to allow the full percentage rate of gross income in that year to be deductible as depletion.[328] The treatment of production payments was changed radically, however, by § 636 relating to the tax treatment of mineral production payments.[329] Section 636 deals with carved-out production payments and retained production payments on the sale or lease of a mineral property.[330]

A non-Goldberg opinion involving an ABC transaction played a significant role in the two Goldberg opinions discussed here, involved similar facts, and will be briefly reviewed.[331] In *Holbrook v. Commissioner*, A conveyed various undivided interests in oil, gas, and other mineral and leasehold interests to B, reserving a production payment of $34,857.43, plus 6.5% interest per year on the unliquidated balance payable out of 80% of the minerals produced from the assigned interests.[332] Simultaneously, A conveyed the reserved production payment to C.[333] C then borrowed $34,512.31 from a bank, payable within one year in eleven installments at 6% interest and secured by a deed of trust covering the production payment.[334] At the same time, B executed and delivered to the bank, in consideration for the bank's loan to C, a "take out" letter that provided that B would locate a purchaser for C's note or would purchase the note himself

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324. H.R. REP. No. 91-413 (pt. 1), at 140 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1645, 1790–93.
325. *Id.*
326. Comm'r v. P.G. Lake, Inc., 356 U.S. 260, 265–66 (1958).
327. *See* I.R.C. §§ 611(a) (2012), 613(a) (2012).
328. *See, e.g.*, I.R.C. §§ 611(a), 613(a).
329. *See* I.R.C. § 636 (2012).
330. *Id.*
331. Holbrook v. Comm'r, 450 F.2d 134 (5th Cir. 1971).
332. *Id.* at 135.
333. *Id.*
334. *Id.*

on demand.[335] B's "take out" letter was to become effective within twelve months and the purchase price was to "equal the unpaid balance of the note plus all accrued but unpaid interest."[336] If it did call upon the "take out" letter, the bank agreed to assign its security interest in the production payment to B or to the purchaser, whom B had agreed to locate.[337] As in the instant case, B was never called upon to fulfill the terms of the "take out" letter, and the letter was eventually retired,[338] as is usual in these transactions.[339] B did not have any proprietary interest in C.[340]

In *Holbrook*, the Fifth Circuit held that B's right of subrogation was prima facie evidence that B retained no economic interest in the oil, and therefore was not taxable on the production payment.[341] The court did not read the *Commissioner v. Estate of H.W. Donnell* decision, discussed below, to say that any additional security provided by B would shift C's reliance on the production payment for repayment.[342] The issue dividing the panel in *Holbrook* was who had the burden of proving that B's right of subrogation against C was economically substantial.[343] The majority concluded the burden fell on the government.[344] The dissent argued that the taxpayer should prove that the subrogation right had economic substance.[345]

Some of Goldberg's opinions involve pre-1969 law and the issue of whether the purchaser of a production payment has acquired an economic interest (the payments on which must be excluded from the seller's depletable gross income), which proves uncertain.[346]

B. Commissioner v. Estate of H.W. Donnell

In the *Donnell* decision, Goldberg sets the stage:

> In this case we engage the occult mysteries of oil and gas taxation regarding intangible drilling and development costs, depletion, and that alphabetical mystique, the ABC transaction.[347]

For many, once they read the facts and Goldberg's decision, they will be in hearty agreement with the judge.[348]

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335. *Id.*
336. *Id.* at 135–36.
337. *Id.* at 136.
338. *Id.* at 139.
339. *See, e.g.*, Glover v. United States, 349 F. Supp. 239, 244 (N.D. Tex. 1972).
340. *Holbrook*, 450 F.2d at 136.
341. *Id.* at 142–43.
342. *See id.* at 139; Comm'r v. Estate of H.W. Donnell, 417 F.2d 106, 114 (5th Cir. 1969).
343. *See Holbrook*, 450 F.2d at 142–43 (Tuttle, J., dissenting).
344. *Id.* at 143.
345. *Id.*
346. *See, e.g.*, United States v. Cocke, 399 F.2d 433, 435 (5th Cir. 1968) (en banc).
347. *Estate of H.W. Donnell*, 417 F.2d at 108.

The case concerned whether the taxpayers should have been entitled to certain deductions and exclusions from taxable income taken by the taxpayers in computing their income from two of these leases during the years 1959 through 1963.[349] The first lease, the Ephriam Lease, involved taxpayers who owned an undivided 1/2 of a 7/8ths working interest.[350] Eleven wells were surfaced on this lease.[351] In October 1962, the Texas Railroad Commission ordered four of these wells shut-in because it was discovered that the wells were bottomed in producing oil sands which were outside the vertical extensions of the surface boundaries of the Ephriam leasehold.[352]

The second lease, the Fleming Lease, involved the sale by Fleming of certain mineral interests to Donnell, with Fleming reserving certain production payments payable out of a certain percentage of the production.[353] Fleming then sold the reserved production payments to Calm Corporation, and Calm borrowed the full amount of its obligation to Fleming from a bank.[354] As security for the loan, Calm tendered a deed of trust that conveyed the production payments to a trustee for the bank.[355] Donnell simultaneously agreed with the bank that he would, at the bank's request, purchase the unpaid balance of Calm's note or the unliquidated balance of the production payment.[356] Donnell was never requested to make either purchase and the production payment was paid in full.[357] During the payout period, 85% of all income from the Fleming Lease was paid to the bank to pay Calm's loan.[358] Donnell, the taxpayer during the period at issue, included in his income only 15% of the production of the property.[359]

The Service determined that Donnell should have included in his income 100% of the property's production, not just 15%.[360] The Service based its finding on Donnell's take-out letter, asserting that by its terms, Donnell assumed all risk of loss from a failure of the lease to pay off the production payment and thereby acquired a depletable interest in the minerals and constructively received the income produced by the sale of those minerals.[361]

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348. *See id.* at 108–16.
349. *Id.* at 108.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.* at 113.
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*

The taxpayer engaged in an ABC transaction, which meant that the taxpayer acquired a working interest in an oil lease for cash, plus a production payment reserved to the seller, payable out of 85% of the production, plus interest of 6.5%.[362] The seller sold his reserved production payment to a corporation, which borrowed the purchase price from a bank and conveyed the production payment in trust as security for the loan.[363] Donnell agreed in writing that, if requested, he would purchase the unpaid balance of the corporation's note to the bank or the unliquidated balance of the production payment from the corporate purchaser.[364] The court concluded that Donnell had no right of subrogation against the purchaser and bore the ultimate risk of loss.[365] Accordingly, the court held that because the purchaser of the production payment was not required to look solely to production to recoup its investment, the economic interest was in Donnell and not in the purchaser or the bank.[366] The court based its opinion on the Supreme Court's decision in *Anderson v. Helvering*, in which the Court concluded that the holder of a production payment did not have an economic interest because the contract provided for payment to the production payment holder out of proceeds "which might be derived from oil and gas produced from the properties and from the sale of fee title to any or all of the land conveyed."[367] The Court concluded that the reservation of this additional type of security provided an alternate source of payment, contrary to the second prong of the economic interest test in *Palmer v. Bender*, which requires a taxpayer to look solely to the extraction of oil or gas for a return of capital.[368]

C. Producers Supply & Tool Company v. United States

Producers Supply & Tool Co. v. United States involved another variation on the ABC transaction.[369] Perkins sold his oil and gas properties to Northwest, which was a wholly owned subsidiary of the taxpayer, Producers Supply.[370] The taxpayer and Northwest were treated as one entity for the case.[371] Perkins reserved a production payment in the amount of $2.2 million plus interest to be paid from 80% of production from the assigned interests.[372] Perkins then simultaneously sold the production

362. *See id.* at 109.
363. *See id.* at 113.
364. *Id.*
365. *Id.*
366. *See id.* at 115.
367. Anderson v. Helvering, 310 U.S. 404, 405–06 (1940).
368. *Id.* at 412–13; Palmer v. Bender, 287 U.S. 551 (1933).
369. *See* Producers Supply & Tool Co. v. United States, 465 F.2d 787 (5th Cir. 1972).
370. *Id.* at 788.
371. *See id.*
372. *Id.*

payment to FW Enterprises for $2.2 million, paid $550,000 cash, and gave $1.65 million in a note.[373] FW Enterprises borrowed the cash from a bank and gave the bank a first lien on the production payment.[374] As FW Enterprises received income from the production payment, it applied the proceeds to service the debt at the bank.[375]

The following year, in 1957, FW Enterprises borrowed another $550,000 from the bank and paid this money to Perkins, who assigned his lien on the production payment to the bank to secure FW Enterprises' second loan.[376] Then, FW Enterprises repeated the loan and cash payment for an additional $500,000.[377] Northwest Oil Company and FW Enterprises agreed to reduce the percentage of production reserved to Northwest from 85% to 60%, extending the payout period.[378] Northwest Oil also gave the bank a take-out letter under which Northwest agreed that it would find a buyer for the last portion of the obligation to FW Enterprises, or pay the amount itself.[379] The production payment was sufficient to satisfy the loans.[380]

For the tax years 1964–1965, the taxpayers, Producers and Northwest, did not report income from the production payment; the taxpayers claimed that they did not own an interest in the oil.[381] The twist in the case was the take-out letters.[382] Traditional ABC transactions required Northwest to look solely to the production payment for a return of its capital.[383]

Goldberg expressed doubt over the precedent facing him:

> If we had this corpus on the operating table for the first time, we might make the incisions regarding economic interest in a different place and manner. But the incisions have already been made and the stitches removed by Holbrook and the denial of en banc consideration.[384]

He viewed *Holbrook*, *Donnell*, and *Producers Supply* as involving similar facts.[385] The guaranty given to the bank had the practical effect of eliminating risk to the bank and C from loss or production was insufficient to liquidate the production payment.[386] The guaranty in the cases, indeed

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373. *Id.*
374. *Id.*
375. *Id.* at 789.
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. Comm'r v. Sw. Exploration Co., 350 U.S. 308, 314 (1956).
384. *Producers Supply & Tool Co.*, 465 F.2d at 791.
385. *Id.*
386. *See id.*

any guaranty from a third party, is that the B party in the ABC transactions—or Northwest and Producers in the case—said Goldberg, operates to protect the lender and the borrower from loss, which leads to the conclusion that "neither the bank nor [C] looked *solely* to the oil production for a return on their investments; each could look to taxpayer [B]."[387]

In *Producers Supply*, the take-out letter was part of a refinancing and did not first appear until one year after the initial transaction.[388] In *Holbrook*, the take-out letter was simultaneous with the bank's deed of trust, which suggested to Goldberg "tax gimmickry."[389] Goldberg and his panel decided that the government did not discharge its burden of proof that B's (i.e., Northwest's and Producers') right of subrogation against FW Enterprises was without economic substance, but remanded the case to afford the government the opportunity to prove that there was no economic substance to the subrogation.[390]

To conclude his opinion in *Producers Supply*, Goldberg wrote of his skepticism of *Holbrook* and *Donnell*, the controlling precedent guiding him:

> Judicial candor compels us to state that the *Holbrook* panel's interpretation of ABC transactions and of Commissioner of Internal Revenue v. Estate of Donnell . . . is, at least arguably, wrong. But we must, like the light brigade, charge half-a-length on and apply *Holbrook*. Despite canons to the left of it and canons to the right of it, this case must be reversed and remanded.[391]

The lasting effect of Goldberg's opinions in *Donnell* and *Producers Supply* was muted by the 1969 congressional reforms reflected in § 636 of the Internal Revenue Code, which formally made a production payment a loan bearing interest.[392] The intent of Congress in enacting § 636 was to prevent taxpayers from purchasing a capital interest in mineral property with borrowed funds and then paying off the loan with before-tax dollars instead of after-tax dollars, which the purchasers of other types of real estate must do.[393]

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387. Holbrook v. Comm'r, 450 F.2d 134, 138 (5th Cir. 1971).
388. *Producers Supply & Tool Co.*, 465 F.2d at 792.
389. *See id.* at 792; *Holbrook*, 450 F.2d at 135.
390. *See Producers Supply & Tool Co.*, 465 F.2d at 792.
391. *Id.* at 793 (citation omitted).
392. I.R.C. § 636(a) (2012).
393. H.R. REP. NO. 91-413, at 138–41 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1645, 1789–93.

D. Carried Interests

An important category of tax cases decided by Judge Goldberg involves oil and gas carried interests.[394] A brief explanation of carried interests is needed before delving into the particular cases.

The interests involved in an oil and gas property are varied, but generally are bifurcated into operating and nonoperating interests.[395] The working interest is the fundamental oil and gas interest, for it is burdened with the essential obligations of an oil and gas well, such as the obligation to pay royalties to the landowner; to make various promises incident to the oil and gas lease; to comply with the multiple regulatory requirements imposed by the local, state, and federal governments; to incur costs and liabilities of operating the oil and gas well; to exploit the petroleum reserves within the leased premise; and to control or grant the right to control the activities for exploring, developing, and producing the oil and gas properties.[396] The nonoperating interests are also important and generally enjoy the right to share in either current or future production from the oil and gas well.[397] The nonoperating interest is called such because it does not entitle its owner to control operations of the well or property.[398] Nonoperating interests can be overriding royalties, production payments, net profits interests, and carried interests.[399]

A carried interest in oil and gas transactions is created by two or more working interest owners.[400] One owner agrees to advance the costs of development of an oil and gas well on behalf of the other owner for a period of time, retaining the right to fully recover such advances from any future production accruing to the other's interests.[401] The owner making the advances is referred to as the "carrying party," and the owner for whom advances are made is known as the "carried interest."[402] In a practical sense, the costs that are advanced and attributable to the carried interest are paid for out of oil and gas production attributable to that interest.[403]

Judge Goldberg explains a carried interest transaction as well as anyone:

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394. *See, e.g.*, United States v. Cocke, 399 F.2d 433 (5th Cir. 1968).

395. Gary B. Conine, *Rights and Liabilities of Carried Interest and Nonconsent Parties in Oil and Gas Operations*, *in* 37th ANNUAL INST. ON OIL & GAS L. & TAXATION (J. Holgred ed., 1986).

396. *See id.* at 3-2.

397. *See id.* at 3-2 to 3-3.

398. *See id.* at 3-3.

399. *See id.* at 3-3 to 3-4.

400. *See id.* at 3-11.

401. Bolack v. Sohio Petroleum Co., 475 F.2d 259, 260 n.1 (10th Cir. 1973); Conine, *supra* note 395, at 3-11.

402. *See* Estate of H.H. Weinert v. Comm'r, 294 F.2d 750, 750 n.1 (5th Cir. 1961).

403. *See* Conine, *supra* note 395, at 3-11.

> In any carried interest transaction, one of the owners of the working interest in property is willing to advance the funds necessary for drilling of wells and development of production of oil or gas, and to look only to the other owner's share of production for the other owner's contribution to such costs. The party who puts up the money is called the carrying party because he risks his entire investment against the possibility that there will not be enough production to reimburse him for his costs. The other party is called the carried party because he takes no risks. The carried party agrees to wait until the carrying party has recouped his drilling and development costs out of production before he takes any payments on his share. The carried party is not personally liable for any costs and loses nothing if there is no production.[404]

In the customary situation, when the development and current operating costs have been recouped by the carrying party, the carried interest arrangement terminates.[405] After the arrangement ends, the carried and carrying parties revert back to the normal arrangement, whereby they jointly own the working interest and share in the costs of production.[406] When the costs advanced by one party have been recouped, the obligation of the carrying party to further advance costs ceases.[407] In a short-handed way, this is the break-even point.[408]

With different types of contractual arrangements in the oil and gas business, the carried interest arrangement varies.[409] The obligation to advance costs may end at a specified point in the operations of the well, such as the casing point.[410] Or, the period for recoupment of the costs may extend beyond the break-even point, or payout, thus permitting the carrying party to recover multiple expenses incurred for the carried party.[411] The recovered costs may be fixed in amount, or perhaps, may be unrecovered costs.[412]

Most commonly, three types of varied carried interests emerge to grant the carrying party rights, thus entitling the carrying party to production attributable to the carried interest during the period that the expenses involved are recouped.[413] These three conventional forms of carried

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404. United States v. Cocke, 399 F.2d 433, 436 (5th Cir. 1968) (en banc).

405. *See* Conine, *supra* note 395, at 3-11.

406. *See id.* at 3-11 to 3-12.

407. *See id.* at 3-12.

408. *See id.*

409. *See id.*

410. *See* Berryhill v. Marshall Exploration, Inc., 420 F. Supp. 198, 201–02 (W.D. La. 1976); Conine, *supra* note 395, at 3-12.

411. *See* Conine, *supra* note 395, at 3-12.

412. *See id.*

413. *See* J.S. Abercrombie Co. v. Comm'r, 7 T.C. 120, 124–25 (1946), *aff'd*, 162 F.2d 338 (5th Cir. 1947), *overruled in part by* United States v. Cocke, 399 F.2d 433 (5th Cir. 1968).

interests are named for leading cases, all of which were decided within a short time of each other.[414]

(1) The carrying party is granted a security interest in the working interest of the carried party.[415] The carrying party is deemed to have made a loan recoverable only from the production of the property.[416] All production proceeds are received by the carrying party until cost recovery; the carried interest was thought to be a recovery of the advance payment and not income to the carrying party, but to the carried party.[417] These are *Abercrombie*-type carried interests.[418]

(2) The carrying interest party is conveyed a production payment burdening the carried interest party's working interest.[419] These are *Herndon*-type carried interests.[420] The carried party might assign 75% of the working interest, together with an oil payment carved out of his retained 25% interest.[421] The oil payment would be equal in amount to the share of development costs attributable to the carried party's working interest, plus operating costs during the period of payout of the oil payment.[422] This method gives the carrying party title to two properties, namely, his fraction of the working interest and the oil payment.[423] The carrying party agrees to drill and will recoup his costs from his oil payment and working interest, and thereafter (using our percentages) would be restricted to a deduction of three-fourths of the intangible development costs and the ability to capitalize only three-fourths of his equipment costs.[424] The remaining 1/4 of each type of cost is capitalized on the basis of the oil payment.[425]

(3) The carrying party is transferred the working interest for a limited time until the recovery of expenses is complete.[426] These are *Manahan*-type carried interests and are probably the most popular.[427] The carried party or lessee assigns the entire working interest to the carrying party of the driller, subject to a reversionary interest after

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414. *See id.*
415. *See id.*
416. *See id.*
417. *See id.*
418. *See id.*
419. Herndon Drilling Co. v. Comm'r, 6 T.C. 628 (1946), *acq*., 1946-2 C.B. 3 (regarding deductibility of intangibles), *nonacq*., 1946-2 C.B. 6 (regarding creation of two separate properties in leasehold and oil payment interests).
420. *See id.*
421. *See id.*
422. *See id.*
423. *See id.*
424. *See id.*
425. *See id.*
426. Manahan Oil Co. v. Comm'r, 8 T.C. 1159, 1159–62 (1947).
427. *See id.*

> the carrying party has recovered his operating costs out of the net revenues from well production. Such reversionary interest might consist of 25% on the carrying party's 75%, and expenses and deductions would also be shared in those percentages.[428] Should the carrying party never recover his costs, the reversionary interest never takes effect. Under *Manahan*, the agreement is not divisible; the working interest earned is not attained merely by any case value given but is specifically dependent upon the promise to drill and develop the property.[429]

In all three types of carried interests, the development and operating costs attributable to the carried interest are assumed by the carrying party, and the carried party gives up his right to production or production proceeds attributable to his interest until those costs, or a multiple thereof, are recovered by the carrying party—this being the break-even or payback point.[430] The carried party in *Abercrombie* and *Herndon* arrangements retains a present possessory interest in the working interest (i.e., the operating rights) and carves out of his working interest a nonoperating interest in production or production proceeds for the carrying party.[431] In contrast, the carried party in the *Manahan* arrangement conveys his entire working interest, including operating rights and rights to production, but retains a future reversionary interest.[432] The working interest will revert to him only if and when payout (or some other specified recovery of costs or multiple thereof) occurs.[433]

E. United States v. Cocke

The differences between the three types of carried interests involve different mineral titles.[434] From all appearances, each form of carried interest has the same economic effect, but there was a time when the Service imposed different tax consequences on each type of carried interest, differentiating the tax outcomes based on mineral titles.[435] This was the situation when Judge Goldberg wrote his first en banc opinion for the Fifth Circuit in *United States v. Cocke*.[436]

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428. *See id.*

429. Rodger Curnow, *The Evolution of the Mineral Pool of Capital Investment Doctrine*, 39 OKLA. L. REV. 627, 652–53 (1986).

430. *See* J.S. Abercrombie Co. v. Comm'r, 7 T.C. 120, 124–25 (1946), *aff'd*, 162 F.2d 338 (5th Cir. 1947), *overruled in part by* United States v. Cocke, 399 F.2d 433 (5th Cir. 1968) (en banc).

431. *See id.*

432. *See Manahan Oil Co.*, 8 T.C. at 1159–62.

433. Lawrence P. Terrell, *Overriding Royalties and Like Interests – A Review of Nonoperating Lease Interests*, 33B ROCKY MTN. MIN. L. INST. (Apr. 1993, Oil & Gas Royalties on Non-Federal Lands).

434. *See J.S. Abercrombie Co.*, 7 T.C. at 124–25.

435. *See Cocke*, 399 F.2d at 435–38.

436. *See id.* at 435.

Cocke owned an undivided interest in leases, along with another operator, Humble.[437] They entered into a joint operating agreement.[438] The first transaction was an unlimited carried interest; however, the case is not clear as to the nature of the second transaction.[439] Humble, as operator, was to advance all funds, incur all the costs for development, and look to production from its interest and part of Cocke's interest for recoupment of the costs.[440] Humble was the carrying party and Cocke was the carried party.[441]

Cocke included in taxable income the part of his income that Humble used to pay Cocke's share of the costs of drilling and development and also claimed the proportionate part of deductions for percentage depletion, intangible drilling and development costs, and depreciation for tangible equipment attributable to such income.[442] Judge Goldberg effectively summarized what was at stake in the case:

> The battle in this case is really over the right to the deduction accompanying the income during the recoupment period. The Internal Revenue Code provides premiums in the form of depreciation and depletion to be awarded in connection with oil and gas operations. The same deductions cannot be taken by two parties. We here must determine which of the two is to be the beneficiary of the largesse. Our answer is the more intrepid of the two. Humble here made the essential contribution of risk capital for the enterprise. When the agreements were signed, Humble received from the Cockes the right to use the first oil produced to recoup that capital.[443]

The triad of tax attributes in the case included depletion, depreciation, and intangible drilling and development costs.[444] Judge Goldberg succinctly described how these three attributes related to each other:

> Though both the government and the Cockes urge upon us the sodality of a unified triumvirate of depletion, depreciation, and intangible drilling and development costs, we have quested for any difference among them which would yield different results in this case. We now conclude, however, that depreciation and intangible drilling and development costs are subservient satellites of depletion in situations involving carried interests, and that, as

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437. *Id.* at 438.
438. *Id.* at 439.
439. *See id.* at 438–39.
440. *Id.* at 439.
441. *See id.* at 436, 438–39; OWEN L. ANDERSON ET AL., HEMINGWAY OIL AND GAS LAW AND TAXATION 706–07 (4th ed. 2004).
442. *Cocke*, 399 F.2d at 440.
443. *Id.* at 452 (footnote omitted).
444. *Id.* at 446.

> the spoils go to the victor, so these deductions go to the rightful depleter.[445]

Goldberg, writing for the entire Fifth Circuit, refused to be controlled by title.[446] Tax consequences, Goldberg determined, should be controlled by the substance of the transaction, not its form.[447] Goldberg wrote one of his classic passages:

> Pedantic adherence to medieval enfeoffments—which are relics of an age of surface use of lands and are alien to vertical and subterranean ownerships—is worthless and indeed harmful. It requires the same fictionalizing and logic-chopping which became notorious during the attempts to fit new causes of action into the old forms of action. Success in such endeavors is as fugacious as the oil and gas in question.[448]

Goldberg's opinion held that the taxpayer, Cocke, had no economic interest in the oil that produced the income in the case despite Cocke having title.[449] He explained that, "during the period of the recoupment the carried party[, Cocke,] gets no income and no deductions for depletion or depreciation, and that all income and deductions go to the carrying party[, Humble]."[450] No income retained by a carrying party is taxable to the carried party.[451] Goldberg persuasively wrote, and the entire Fifth Circuit held, that income from mines or wells is taxable only to the party who bears the risks and costs to produce oil and gas; likewise, tax deductions for such costs can be taken only by the party who actually paid or incurred them.[452] Goldberg wrote:

> The argumentative justification for liberality in taxation of oil and gas is that such liberality encourages and emboldens the fiscally timid to exploit the hidden resource. It rewards the risk taker. Here Humble risked the exploration and development costs. If tax emoluments are to be granted, it would be cynicism in the name of economic bravery to give the tax break to the economic observer.[453]

The legacy of Goldberg's opinion in *Cocke* is that economic substance rules taxation, not title.[454] Time and time again throughout Goldberg's

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445. *Id.*
446. *Id.* at 444–45.
447. *Id.* at 441–42.
448. *Id.* at 442.
449. *Id.*
450. *See id.* at 436.
451. *See id.* at 438–45.
452. *Id.* at 441–44.
453. *Id.* at 452.
454. *See id.* at 441–42, 445–46.

judicial opinions in tax cases, he looked for the substance of a transaction.[455]

Another aspect of the *Cocke* decision is the overruling of *Abercrombie*, which had been governing law in the Fifth Circuit, if not nationally, for fifteen years.[456] Further, the *Abercrombie* case was retroactively overruled.[457]

The *Cocke* decision influenced other courts,[458] but mostly the marketplace appears to have stopped using *Abercrombie*-type carried interests. Following the *Cocke* decision, the Service formally adopted Goldberg's rationale in Revenue Ruling 71-207.[459] The Service now treats all three carried interest arrangements essentially as *Manahan*-type arrangements.[460] The carrying party is entitled to deduct intangible drilling costs proportionate to his share of the operating interest during the payout period.[461] The form of the carried interests is of no moment.[462]

X. DEFINITION OF PROPERTY FOR TAX PURPOSES

The role of property in federal taxation is among the most fundamental of all tax concepts. Income from property is taxed to the property owner. At death, the property owner's estate is taxed. If property is transferred for value, then the owner of the transferred property realizes gain or loss. A line of Goldberg opinions focuses on the concept of property questions such as: Does the taxpayer own property on which a tax lien can attach? Does the taxpayer own property that is includable in the taxpayer's gross estate? When Judge Goldberg writes about these central tax questions in his tax opinions, his judicial logic is in full flower.

A. First Victoria National Bank v. United States

The decision of *First Victoria National Bank v. United States* is a classic Irving Goldberg opinion—basic concepts are combined with the arcane.[463] The fundamental tax principle decided in the case is whether "rice history acreage," a technical term, was includable in a gross estate for federal estate tax purposes—unsurprisingly, an issue of first impression in the Fifth Circuit.[464] Goldberg's pen gives a detailed and penetrating

455. *See id.* at 441–42.
456. *See id.* at 441–46.
457. *Id.* at 450–52.
458. *E.g.*, Marathon Oil Co. v. Comm'r, 838 F.2d 1114 (10th Cir. 1987).
459. Rev. Rul. 71-207, 1971-1 C.B. 160.
460. *See id.*
461. *Id.*
462. *See id.*
463. *See* First Victoria Nat'l Bank v. United States, 620 F.2d 1096, 1096–1107 (5th Cir. 1980).
464. *Id.* at 1104 (internal quotation marks omitted).

explanation of rice acreage allotments.[465] What begins as a seemingly routine tax case becomes, in the skilled hand of Irving Goldberg, an entertaining and educational walk through federal agriculture crop regulation and federal tax law. Judge Goldberg's writing emanates a sense of exuberance.

In *First Victoria National Bank*, the deceased taxpayer was a rice farmer who died on July 4, 1973.[466] For many years, the decedent had been awarded rice allotments under the federal agriculture system.[467] At his death, the decedent had finished with his 1972 allotments—the year preceding his death—but he also received rice allotments for 1973, which he allocated, as required, to the farms on which he intended to produce rice the next year.[468] After his death, the decedent's estate received a rice allotment for the following year.[469] The bank executor for the decedent filed Form 706, Estate Tax Return, for the decedent's estate, but did not include in the decedent's gross estate either the value of the decedent's interests in the rice allotment program or the value of the rice crop growing on the date of his death.[470]

Upon examination of the estate tax return, the Service included both the allotment and crop in the decedent's estate.[471] Following the notice of deficiency, the estate paid the tax deficiency and brought an action to recover the deficiency tax paid, claiming that the rice allotment was not property and, alternatively, that it had no value.[472] The district court held for the decedent's estate, finding (1) that the rice allotment for 1973 had been allocated and thus became part of the rice crop, which was included in the estate; (2) that the decedent's rice history was not property within the scope of the estate tax; and (3) that there had been no transfer of the rice allotment upon the decedent's death.[473] The Service appealed the district court's decision to the Fifth Circuit.[474]

Goldberg's opinion first addressed the issue of rice allotments.[475] He wrote an erudite explanation of United States agricultural subsidies in general and rice allotments in particular.[476] Admitting that the rice allotment program, as it existed from 1938 to 1975, when it was revamped, was "a fairly complicated statutory and regulatory scheme," Goldberg

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465. *Id.* at 1096–1101.
466. *Id.* at 1101.
467. *Id.*
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.* at 1101–02.
472. *Id.* at 1102.
473. *Id.* (citing First Victoria Nat'l Bank v. United States, 443 F. Supp. 865, 869–70 (S.D. Tex. 1978), *rev'd*, *First Victoria Nat'l Bank*, 620 F.2d 1096).
474. *See id.*
475. *Id.* at 1096–1101.
476. *Id.*

clearly explained the twin notions of allotments.[477] There are both producer allotments and farm allotments.[478] The producer allotment method was in use during the years at issue.[479] The Texas rice acreage was apportioned to rice producers based on past rice production, expected future production, and a variety of other factors, with goals that included preventing rice surpluses and maintaining price stability.[480] The term "rice history acreage," Goldberg explained, gives a property owner a right to apportion rice acreage based on prior production.[481] The farm owner can transfer this right to his heirs or others.[482] If the rice history acreage is transferred to non-heirs, then a set of conditions must be fulfilled.[483] A "producer rice allotment" is an annual award giving a rice producer the right to grow and market a number of acreages of rice for a given year free of penalty.[484] Goldberg explained that rice history acreage, by contrast, is an interest entitling a property owner "to be apportioned rice acreage as if the owner himself had produced in prior years the rice that was produced in those years by the transferor of the interest."[485]

After explaining these fundamental concepts pertinent to the federal government's regulation of rice production, Goldberg then turned to the tax questions: Did the decedent have a property right at his death, and is rice history acreage property?[486]

In the hands of any other judge, a discussion of the meaning of property could be mundane. For Irving Goldberg, considering a bedrock issue of what is property provides a launching pad for a rhetorical flight, and fly Goldberg does:

> Documentation of the history and derivation of many interests which are today denominated "property" would require philosophers, professors of jurisprudence, and scholars of economics to call upon their full erudition and exegetic talents. The shelves of our jurisprudence are tomed with obituaries of species of property long ago tolled. Announcements of the nascence of other species which were unheard of and unspeculated upon centuries ago populate further volumes.
>
> Although the varieties of property may not be infinite, any attempt to enumerate every species of property would beggar the mind and intellect of even the wisest of persons. Avoiding this Sisyphian endeavor, we embark on a Delphian one. As we begin, we must remind ourselves that

477. *Id.* at 1096.
478. *Id.* at 1097.
479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.* at 1098.
483. *Id.*
484. *Id.*
485. *Id.* at 1097 (internal quotation marks omitted).
486. *Id.* at 1102.

> "property" is an expansionist term. Its mooring is contemporary rather than historical.
>
> The attempt to define "property" is an elusive task. There is no cosmic synoptic definiens that can encompass its range. The word is at times more cognizable than recognizable. It is not capable of anatomical or lexicographical definition or proof. It devolves upon the court to fill in the definitional vacuum . . . .[487]

The obscure nature of rice history acreage invites other Goldberg esoterica, requiring the reader to bring along a legal dictionary:

> Some kinds of property known to the English common law never made the transatlantic voyage to our shores. Other kinds have died out over the years, and new forms have taken their place. Blackstone once attempted to enumerate the varieties of incorporeal hereditaments, listing ten: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents. Even these ten could be further subdivided; the general term advowson, for example, includes advowson appendant, advowson in gross, advowson presentative, advowson donative, advowson collactive, advowson of the moiety of the church, a moiety of advowson, and advowson of religious houses.[488]

Goldberg then transitioned to the current case by observing that "law or custom may create property rights where none were earlier thought to exist," citing the right to publicity as an example.[489] Property is normally transferable, can be levied upon to satisfy a judgment, may be protected by courts, and cannot be taken away without due process of law.[490] Property may lack some of these attributes, but may, nonetheless, remain property, as Goldberg wrote:

> Possible revocability is not a destroyer. "Ifs," "maybes," modifiers, and contingencies might negate the concept of property. But we must be certain that the analysis is a pragmatic one, not a theoretical one. So long as an interest is not chimerical, it should fall within the broad reach of the taxing statute.[491]

The estate tax intends to reach property that conceptually did not exist when the estate tax was conceived.[492]

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487. *Id.*
488. *Id*. at 1103 (footnote omitted) (citation omitted).
489. *Id.*
490. *See id.* at 1103–04.
491. *Id*. at 1104.
492. *See id.*

> When property rights have come into existence since the statute's enactment, the generalized term must be expounded, and the terrain cartographed, by laborers in the fields of law and government. The economy and many of the elements of life today are different than they were even a generation or less ago. . . . The tax gatherer is directed to seek out the esoterics of ownership and reap his share of an individual's harvest of bundles of rice upon his demise.[493]

Goldberg spent the first two-thirds of his opinion preparing the ground, so to speak, before addressing the facts of the case.[494] At death, the decedent owned rice history acreage entitling him for the period following his death to potentially receive allotments, thus permitting him to plant and produce rice.[495] The decedent thus owned two things—a current year acreage allotment and a production history, which Goldberg concluded implicate different property rights: "The former interest creates no vested right which lasts beyond the current year; the latter, however, survives from year-to-year."[496]

The right derived from the decedent's production history was enforceable in equity and was "transferable, devisable, and descendible."[497] The intangible property right considered in this case, a rice history acreage, was compared to goodwill or a contingent contract.[498] The intangible rights could disappear but retain value because they could lead to "future assets of more concrete value."[499] Further, the rights are transferable for value.[500] Thus, Goldberg concluded that the rice history acreage is property and therefore includable in the decedent's gross estate.[501]

The legacy of *First Victoria National Bank* is surprisingly limited. It has received only nine citations in subsequent cases and a slightly larger number of academic references.[502] This lack of attention is probably due to the obscure nature of the underlying property right.[503]

The opinion is classic Goldberg—erudite, scholarly, and practical. He illustrates how to construct a persuasive case for taxing something that at first glance might not be property, but in the skillful hands of Irving Goldberg, is compellingly taxable.[504]

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493. *Id.*
494. *See id.* at 1096–1101.
495. *See id.* at 1099–1101.
496. *Id.* at 1106.
497. *Id.*
498. *See id.* at 1106–07.
499. *Id.* at 1106.
500. *Id.* at 1107.
501. *See id.* at 1107–08.
502. *See, e.g.*, Wendy C. Gerzog, *Contingencies and the Estate Tax*, 5 FLA. TAX REV. 49, 58 (2001).
503. *See First Victoria Nat'l Bank*, 620 F.2d at 1104.
504. *See id.* at 1106–08.

B. Randall v. H. Nakashima & Co.

The 1976 decision of *Randall v. H. Nakashima & Co.* primarily involved questions of tax lien priority, but of interest in this case is Judge Goldberg's finding of a property right.[505] The precise issue in the case was not normally encountered: Could a federal tax lien attach as a partially executed contract right?[506]

The contract at issue in the case was a three-way agreement involving Hambric, North American Telephone Corporation (NATC), and Nakashima —the principal shareholder of NATC.[507] Nakashima agreed to convey a PBX telephone system to Hambric in exchange for 5,000 shares of NATC stock owned by Hambric—2,000 of which were conveyed at the time of the agreement.[508] Nakashima signed a bill of sale to Hambric conveying the telephone system, but conditioned the sale upon Hambric completing the conveyance of 3,000 shares of NATC stock within two days.[509] Hambric previously pledged his NATC shares to Randall for a loan, so in order to complete his transaction, Hambric needed to obtain the release of Randall's security interest.[510] Hambric, therefore, conveyed his interest in the telephone system to Randall's company, AITC, and in exchange, Randall released the security interest in the remaining NATC shares.[511] In the end, Nakashima had 5,000 shares of NATC stock from Hambric, and AITC owned the telephone system.[512]

The fly in the ointment was the Service.[513] Before the transaction, the Service filed federal tax liens against Hambric.[514] The Service claimed its lien rights in the telephone system, now owned by AITC.[515] The issue was whether Hambric had property rights over the telephone system to which the federal tax lien attached.[516] Judge Goldberg again confronted a fundamental issue—ownership of property.[517] This case presented a unique twist because Hambric never had full title to the telephone system.[518] Instead, Hambric only possessed a contract right, subject to conditions.[519] Hambric did not have any rights to the telephone system until he conveyed

505. *See* Randall v. H. Nakashima & Co., 542 F.2d 270, 273 (5th Cir. 1976).
506. *See id.* at 271.
507. *See id.* at 271–72.
508. *See id.* at 271.
509. *See id.*
510. *See id.* at 271–72.
511. *See id.*
512. *See id.* at 272.
513. *See id.*
514. *Id.*
515. *Id.*
516. *See id.* at 271.
517. *See id.*
518. *See id.*
519. *Id.*

5,000 shares to Nakashima.[520] Hambric did not own the telephone system when he conveyed it to AITC.[521] Thus, Goldberg confronted an executory contract (a partially executed contract) to discern whether a property right existed.[522]

Goldberg built his logic in the case upon three elements.[523] First, a contract right was property under state law, even under a partially completed contract.[524] Second, Goldberg found a property right that he believed "accord[ed] with common sense and effectuate[d] the intent of Congress relative to the tax lien provisions."[525] Legislative history clearly indicated that Congress wanted concepts in the Uniform Commercial Code (UCC) to adjust the tax law.[526] The UCC treated contract rights as property.[527]

Third, some precedent existed to support the conclusion that a property right existed.[528] In *United States v. Hubbell*, the Fifth Circuit held that an unliquidated claim in tort was property, just as any unliquidated contract claim would be.[529] The Ninth Circuit also held that a partially executed contract right was property despite an attempt to assign it away.[530]

Hambric primarily argued that he never had title to the telephone system because he assigned his rights to AITC.[531] Goldberg was unwilling to be bound by formalities of title.[532] Goldberg penetrated and dispensed with this argument in favor of a "realistic perspective on modern commercial transactions" by finding realizable value.[533] Goldberg found a property right because NATC and AITC were willing to negotiate for this value.[534] At the moment of the first leg of the contract, NATC received 2,000 shares.[535] Further, AITC was willing to receive the telephone system for release of the remaining 3,000 shares.[536] Realizable value was given for

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520. *Id.*
521. *See id.* at 271–72.
522. *See id*. at 274.
523. *See infra* notes 524–30 and accompanying text.
524. *Randall*, 542 F.2d at 273–74.
525. *Id.* at 274.
526. *Id.*
527. *Id.*
528. *See id.* at 274–75.
529. *Id.* at 275 (citing United States v. Hubbell, 323 F.2d 197, 200 (5th Cir. 1963)).
530. *Id.* (citing Seaboard Sur. Co. v. United States, 306 F.2d 855, 859 (9th Cir. 1962)). Goldberg distinguished possible contradicting authority. *Id.* at 275–76 (citing *In re* Halprin, 280 F.2d 407, 410 (3d Cir. 1960)).
531. *Id.* at 277.
532. *See id.* at 277–78.
533. *See id.* at 274, 277.
534. *See id.* at 274.
535. *Id.*
536. *See id.* at 271–72.

the telephone system.[537] Therefore, Goldberg found a property right, and title did not determine the outcome.[538] He wrote:

> In ancient days, the acquisition or alienation of property was governed by a formalism that marked by seal and solemnity the passing of title. In our own day, the electronic impulse must substitute for a handshake and a computer print-out for a seal. We locate property not through the nomenclature of title, but through the realities of the marketplace. The pertinent question in this case is, "was the interest of the taxpayer in the PBX system bargainable, was it transferable, did it have value?" We answer in the affirmative.[539]

The opinion cautioned that an executory contract, standing alone, might not constitute property, but that only in this case, the partially executed contract right was property.[540] Goldberg made clear: "A bundle of rights to contractual consideration need not have present existentiality in order to be 'property'; such rights may operate in the future as long as they have value in the present."[541] Goldberg's realizable value approach to finding a property right enjoys continued reference in cases even in modern times.[542]

The legacy of Goldberg's opinion in *Randall* rests in three areas.[543] First, later cases often cite Goldberg's memorable line when describing the pertinent question to address: "was the interest of the taxpayer . . . bargainable, was it transferable, did it have value?"[544] Second, later cases use Goldberg's opinion and his "bundle of rights" quote above as an example to extend the reach of the federal tax lien to reach contingent property interests or contract rights.[545] Finally, cases cite the decision as an example of a court considering the relationship of federal and state law in determining to what property a tax lien can attach.[546] Courts cited the *Randall* case some forty times during the period extending to 2005.[547] The

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537. *See id.* at 274.

538. *Id.* at 275–78.

539. *Id.* at 278.

540. *Id.* at 277 n.13.

541. *Id.*

542. *See, e.g.*, United States v. Ruff, 179 B.R. 967, 973–74 (M.D. Fla. 1995), *aff'd*, 99 F.3d 1559 (11th Cir. 1996); Bigheart Pipeline Corp. v. United States, 600 F. Supp. 50, 53 (N.D. Okla. 1984), *aff'd*, 835 F.2d 766 (10th Cir. 1987).

543. *See infra* notes 544–48 and accompanying text.

544. *Randall*, 542 F.2d at 278 (internal quotation marks omitted); *see, e.g.*, 21 W. Lancaster Corp. v. Main Line Rest., Inc., 790 F.2d 354, 357 (3d Cir. 1986); Nikirk v. United States, 92 A.F.T.R.2d (RIA) 6486 (D. Ariz. 2003).

545. *See, e.g.*, United States v. Towne, 406 F. Supp. 2d 928, 936 (N.D. Ill. 2005); *Ruff*, 179 B.R. at 970; United States v. Morey, 821 F. Supp. 1438, 1442 (W.D. Okla. 1993); *Bigheart Pipeline Corp*., 600 F. Supp. at 53; Kirk v. United States (*In re* Kirk), 100 B.R. 85, 87 (Bankr. M.D. Fla. 1989).

546. *See, e.g.*, J. A. Wynne Co. v. R. D. Phillips Constr. Co., 641 F.2d 205, 207–08 (5th Cir. 1981).

547. *See, e.g.*, *Towne*, 406 F. Supp. 2d at 936.

decision is a pioneering decision illustrating how nontraditional property rights can be reached by the federal tax lien.[548] Other decisions applied Judge Goldberg's concepts to the point that the application of the federal tax lien to contingent interests, contract rights, and partially executed contracts is now commonplace instead of unique and striking, as it was when Goldberg wrote this opinion.[549]

XI. TAX LIEN PRIORITY DISPUTES

A. Texas Oil & Gas Corp. v. United States

Standing in the light of modern times, Goldberg's opinion in *Texas Oil & Gas Corp. v. United States* might not seem significant. When Goldberg wrote his opinion in 1972, however, the case was notable. Goldberg did not have abundant precedent available to him.[550] Additionally, Congress had only recently enacted the tax lien statute governing the case.[551] In rejecting the arguments of both parties, Goldberg struck his own path.[552] The opinion has proven to be important.[553]

The case involved four parties:

(1) Hilton Blackmon, the delinquent taxpayer, owed the Service nearly $55,000.[554] Mr. Blackmon performed oil and gas services for Texas Oil & Gas Corp. and was owed around $14,690 for these services.[555]

(2) Pecos Bank, one of the two actual parties in interest, loaned money under an accounts receivable factoring agreement dated March 25, 1967, and attempted to collect the $55,000 in delinquent taxes from Mr. Blackmon.[556]

(3) The Service, the second real party in interest, attempted to collect the $55,000 in delinquent taxes from Mr. Blackmon by filing a tax lien against him on February 27, 1970, and also by levying Texas Oil & Gas Corp. on monies owed to Mr. Blackmon for his services.[557]

(4) Texas Oil & Gas Corp., which was only nominally a party.[558] The corporation owed Mr. Blackmon monies for the services

548. *See Randall*, 542 F.2d at 277–78.
549. *See, e.g.*, *Towne*, 406 F. Supp. 2d at 936.
550. *See* Tex. Oil & Gas Corp. v. United States, 466 F.2d 1040, 1040 (5th Cir. 1972).
551. *See id.* at 1047.
552. *See id.* at 1046–47.
553. *See, e.g.*, Rice Inv. Co. v. United States, 625 F.2d 565, 567–68 (5th Cir. 1980).
554. *Tex. Oil & Gas Corp.*, 466 F.2d at 1043.
555. *Id.*
556. *Id.* at 1044.
557. *Id.* at 1043–44.
558. *Id.* at 1043.

> he had provided the company in September, October, and November of 1970.[559]

Mr. Blackmon borrowed funds from Pecos Bank under a line-of-credit-type loan arrangement.[560] Present accounts receivable existed for services previously rendered to Texas Oil & Gas Corp.[561] As Blackmon performed work for Texas Oil & Gas Corp., the receivable came into existence, and the bank's security interest attached without the bank having to take additional steps.[562]

When the bank agreed to loan Blackmon money in 1967, the Service had not filed its tax lien (which was later filed in 1970), so the bank enjoyed senior creditor status over Blackmon's present and future receivables.[563] In fact, at the time of the loan, Blackmon had not even contracted with Texas Oil & Gas Corp. for his services.[564] Blackmon contracted for his services in September of 1970 and worked for Texas Oil & Gas Corp. in September, October, and November of 1970.[565]

The conflicting priority over rights to Mr. Blackmon's accounts receivable existed when the Service levied on Texas Oil & Gas Corp., claiming rights to the receivables.[566] In order to remove itself from the middle of the conflicting claims of the Service and the bank, Texas Oil & Gas Corp. filed an interpleader action.[567] The bank had a prior senior security interest in the receivables.[568] Yet the Service asserted senior rights over these same future receivables, even though the Service was not first-in-time.[569] The Service argued that the bank could not have a security interest in an asset that did not exist.[570] Therefore, the Service claimed its federal tax lien was filed when Blackmon performed future work and when the future receivables came into existence.[571]

The bank, on the other hand, argued that it had done everything required under Texas law to gain a security interest in future receivables.[572] Texas law granted the bank a seniority interest in the future receivables when the loan agreement was signed.[573] In the bank's view, when the receivables came into existence—after the taxpayer performed the

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559. *Id.*
560. *See id.* at 1044.
561. *See id.*
562. *See id.*
563. *See id.*
564. *See id.*
565. *Id.*
566. *Id.* at 1043.
567. *See id.*
568. *Id.* at 1044.
569. *See id.*
570. *See id.* at 1046–47.
571. *See id.* at 1048–49.
572. *See id.* at 1048.
573. *See id.* at 1049.

services—the federal tax lien and its security interest attached to the receivables at exactly the same moment; as a result, the bank felt that the Service and the bank should divide the receivable proceeds.[574]

One of Judge Goldberg's trademarks is rejecting the arguments of the parties and delving into a deeper or more refined look at the case. Goldberg did precisely this as he wrote: "The parties have submitted their own theories of this case, and we find ourselves in the not too unusual position of rejecting large parts of both theories."[575]

Due to an absence of direct precedent, Goldberg reviewed the long and ambiguous history of Supreme Court tax lien priority cases.[576] He explained (1) the progression of Supreme Court precedent from various priority cases, including cases in which the taxpayer was insolvent, (2) that the requirement of actual possession or reduction to judgment allowed a private lien to defeat a federal tax lien, and (3) the choateness doctrine was applied to private liens—not just statutory liens.[577] Judge Goldberg's background discussion introduced the common law choateness concept and reviewed the Supreme Court's treatment of choateness over the years.[578]

Goldberg read Supreme Court precedent to require federal courts to interpret a state-created lien in the face of federal law as a federal question.[579] The bank argued that its debt should be senior to the Service's claim because it acted pursuant to Texas law to perfect a security interest in the monies owed to Blackmon from Texas Oil & Gas Corp.[580] Goldberg acknowledged the argument, but held that the federal question was whether the lien was acquired or choate in the federal sense of the term.[581] Under federal law, the bank's lien on future receivables was not choate or specific enough at the moment when the federal tax lien notice was filed or within forty-five days thereafter.[582] The bank could not maintain a senior claim on assets that had not come into existence.[583] To quote Judge Goldberg:

> However "complete" a lender's perfection may be under state recording laws and however "specific" state law might deem that interest to be, it is federal law that determines the extent to which that state determination will protect a private lien from a federal tax lien. It appears clear from the case law that an account receivable not yet "acquired" at the time of the filing of a tax lien because the final transaction creating the account

574. *See id.* at 1050, 1052.
575. *Id.* at 1046.
576. *See id.* at 1044–46.
577. *See id.* at 1045.
578. *See id.* at 1045–46.
579. *See id.* at 1049–50.
580. *See id.* at 1049.
581. *See id.* at 1050.
582. *See id.* at 1051.
583. *See id.* at 1049.

> receivable was not yet in existence cannot be considered choate, save for those accounts receivable now protected by section 6323(c).[584]

Next, Goldberg considered the 1966 tax lien reform legislation and held the loan arrangement was a "commercial transactions financing agreement" within § 6323(c)(2)(A)(i) and thus was protected against a federal tax lien only to the extent that funds were advanced and property was acquired within forty-five days after the Service filed a notice of tax lien.[585] The tax lien was filed February 27, 1970, and therefore, Goldberg concluded that no receivables were acquired within forty-five days from that date, or April 13, 1970.[586] As mentioned, the taxpayer did not contract with Texas Oil & Gas Corp. for several more months.[587] Therefore, by the time Mr. Blackmon agreed to work for Texas Oil & Gas Corp. in the fall of 1970, the Service was his senior creditor.[588]

Two major principles were decided by the Goldberg decision in *Texas Oil & Gas Corp.*:[589]

(1) Accounts receivable exist for purposes of § 6323 and the choateness doctrine at the time the services giving rise to the accounts receivable are performed.[590] At that precise moment, the Service was the senior creditor.[591]

(2) The common law choateness doctrine has continued validity under the 1966 Tax Lien Act.[592]

On the second point, subsequent courts were influenced by this holding.[593] In *Rice Investment Co. v. United States*, for example, the court

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584. *Id.* at 1051.

585. *See id.* at 1048–52 (internal quotation marks omitted).

586. *See id.* at 1051.

587. *See id.* at 1044.

588. *See id.*

589. *See infra* text accompanying notes 590–92.

590. *Tex. Oil & Gas Corp.*, 466 F.2d at 1050–52 (stating that the accounts receivable were not acquired for purposes of tax lien statutes, and thus were not choate, when the taxpayer–debtor lacked a contract to perform services and had not rendered services to create a debt owing to the taxpayer before the government filed notice of a tax lien; "the bank's security interest could not finally attach until the accounts receivable came into existence, that is, until the services were rendered and the debt became owing").

591. *See id.*

592. *See id.* at 1052–54.

593. *See, e.g.*, Rice Inv. Co. v. United States, 625 F.2d 565, 567, 571–73 (5th Cir. 1980). For a brief moment, the Fifth Circuit confused Goldberg's point that the common law choateness doctrine survived the 1966 legislation when it decided *Aetna Insurance Co. v. Texas Thermal Industries, Inc. See* Aetna Ins. Co. v. Tex. Thermal Indus., Inc., 591 F.2d 1035, 1038 (5th Cir. 1979) (per curiam). The court stated: "We therefore conclude, and hold, that whatever role the 'choateness' rule of federal common law may play in other contexts, it has been supplanted by the provisions of § 6323 with respect to tax lien priority questions as to which that statute provides an unambiguous federal law answer." *Id*. (footnote omitted). *Aetna* did not cite to Goldberg's opinion in *Texas Oil and Gas Corp.*; however, *Aetna* made no attempt to overrule *Texas Oil and Gas Corp*. *See id.*; *see also* Metro. Nat'l Bank v. United States, 901 F.2d 1297, 1304 n.3 (5th Cir. 1990) ("*Aetna* involved a nonfederal lien that was clearly entitled to priority under the Tax Lien Act and in that respect may be distinguishable from the

referred to Goldberg's decision in *Texas Oil and Gas Corp.* as an example of "federal standards of choateness employed as a tool for statutory interpretation of § 6323 where the collateral was an account receivable."[594]

Goldberg's opinion in *Texas Oil & Gas Corp.* has been cited some eighty times, extending to 2011.[595] The predominate basis for citing his decision is the rule that accounts receivable that come into being after a federal tax lien attaches to the assets that generate them do not trump the tax lien.[596] Other courts use his exposition of the history of the competition between federal tax liens and private liens as a way to educate.[597] Yet other courts introduce Goldberg's memorable lines about "tortured meanderings" as an introductory expression to consideration of other issues.[598] Despite some limited academic criticism on Goldberg's point that choateness survived the 1966 tax lien reforms, his *Texas Oil & Gas Corp.* opinion stands among his most important.[599]

B. United States v. Crittenden

Some five years after *Texas Oil & Gas Corp.*, Goldberg wrote again in a priority dispute in the case of *United States v. Crittenden*, which involved a dispute over a tractor between two competing creditors: the Farmer's Home Administration (FHA) and a mechanic.[600] While not a tax case, strictly speaking, the *Crittenden* decision is included in this discussion because Goldberg's decision draws importantly upon the Tax Lien Act of

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nonfederal liens involved in *Rice* and *Texas Oil*."); Southern Rock, Inc. v. B & B Auto Supply, 711 F.2d 683, 689 (5th Cir. 1983) ("We have already held that choateness 'has been supplanted by the provisions of § 6323 with respect to tax lien priority questions as to which that statute provides an unambiguous federal law answer.'" (quoting *Aetna*, 591 F.2d at 1038)). *Southern Rock, Inc.* also cited *Rice Investment*, but did not cite *Texas Oil & Gas Corp.*, except in passing. *See Southern Rock, Inc.*, 711 F.2d at 685.

594. *Rice Inv. Co.*, 625 F.2d at 571 n.19.

595. *See, e.g.*, *id.* at 567, 571 n.19, 571–73.

596. *See, e.g.*, Bloomfield State Bank v. United States, 644 F.3d 521, 523 (7th Cir. 2011).

597. *See, e.g.*, *Rice Inv. Co*., 625 F.2d at 565–69, 572–73.

598. *See, e.g.*, Plymouth Sav. Bank v. United States, 187 F.3d 203, 206 (1st Cir. 1999) (quoting Tex. Oil & Gas Corp. v. United States, 466 F.2d 1040, 1043 (5th Cir. 1972)) (internal quotation marks omitted).

599. Recent Case, *Secured Transactions—Federal Tax Lien Act of 1966—A Security Interest in an Account Receivable Is Inchoate and Subordinate to a Federal Tax Lien Where the Account Receivable Is Acquired By the Debtor More Than 45 Days After Notice of the Tax Lien is Filed*—Texas Oil & Gas Corp. v. United States, 466 F.2d 1040 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 1367 (1973), 86 HARV. L. REV. 1570, 1572 (1973). Academic interest in the case has been favorable. *See, e.g.*, Patricia Nassif Fetzer, *The Purchase Money Security Interest and the Federal Tax Lien: A Proposal for Legislative Change*, 36 HASTINGS L.J. 873 (1985); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1965 (1994); Timothy R. Zinnecker, *When Worlds Collide: Resolving Priority Disputes Between the IRS and the Article Nine Secured Creditor*, 63 TENN. L. REV. 585, 688 (1996).

600. United States v. Crittenden, 563 F.2d 678, 679 (5th Cir. 1977), *vacated by* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

1966, applicable precedents decided in the tax lien priority disputes, and Goldberg's own opinions (e.g., *Texas Oil & Gas Corp.*).[601]

The farmer, Ralph Bridges, borrowed monies from the FHA in 1970 and 1972, granting the FHA a security interest in his crops and selected farm equipment, including a tractor.[602] The FHA's security interest was duly recorded on February 2, 1972.[603] Later, the tractor needed repairing and farmer Bridges took it to Crittenden Tractor Company some six times in 1972 and 1973.[604] The repair expenses remained unpaid, and thus, Crittenden retained possession of the tractor.[605] On February 4, 1974, farmer Bridges filed for bankruptcy.[606] After discharge, the FHA demanded the tractor, which Crittenden refused to turn over, and the FHA filed suit to gain possession.[607] The district court ruled that the mechanic's claims to the tractor were superior to the FHA's claims, even though they arose after the FHA filed the security agreement.[608] On appeal, the first principal issue concerned choice of law.[609] Following earlier precedent in the Fifth Circuit, Goldberg upheld the use of federal law in resolving issues in FHA loan transactions.[610] Federal law, guided by state law principles (Georgia UCC law), governed the adequacy of the collateral description in the FHA loan financing statement.[611] Goldberg held this choice of law was adequate, and federal law governed resolution of the priority dispute between the FHA and the mechanic.[612] The priority dispute was the heart of the case.[613]

The following is Goldberg's overview description of what was at issue:

> We are called upon here to referee a feud among the family of federalism over the priority of liens and must determine the pater familias recognizing that siblings have their say and that rules of primogeniture have no strict applicability. In this process we can freely adopt or adapt the decision to the exigencies of federal and state law in tandem, in controvention [sic], and in cooperation. Determining the appropriate federal rule is a nettlesome problem, and while we should recognize and

601. *See id.* at 683–90.
602. *Id.* at 680.
603. *Id.*
604. *Id.*
605. *Id.*
606. *Id.*
607. *Id.*
608. *Id.* at 679.
609. *Id.* at 680–81, 683.
610. *Id.* at 683 (citing United States v. Hext, 444 F.2d 804 (5th Cir. 1971)).
611. *Id.* at 680–81.
612. *Id.*
613. *Id.* at 679.

> advance federal interests, we must be careful lest the federal government be meddlesome when it is not necessary and essential.[614]

The FHA contended its security interest should be senior to the mechanic's lien because it perfected its security interest through filing on February 2, 1972, and on that date, the mechanic's lien was inchoate and unspecific.[615] Under the governing principle of "first in time is the first in right," its lien was superior to any inchoate liens.[616] Goldberg acknowledged that when the FHA filed its financing statement, the mechanic Crittenden had not even begun his repairs to the tractor.[617] Therefore, on the date of filing, the mechanic's lien did not even exist, and perforce, the mechanic's lien was inchoate.[618] Goldberg described his view of the choateness doctrine: "Choateness is a doctrine of presagement. The natality of a lien can come subsequent to its conception, and the lien is inchoate while it is in the gestational stage."[619]

Drawing on tax lien priority situations, Goldberg sought guidance from the Internal Revenue Code.[620] Where the FHA's federal tax lien was in competition with Crittenden's mechanic's lien, Goldberg observed that the mechanic's lien would be the senior claim.[621] Goldberg described the Congressional policy behind § 6323(b)(5), granting a mechanic's lien priority over an earlier filed security interest, as follows: "The prior secured creditor's interests are not prejudiced by granting the mechanic's lien superpriority status because the value of the secured party's collateral is usually enhanced by at least the amount of the lien."[622]

Here, continuing a theme he had written into earlier decisions, Goldberg noted that a court can set aside the principle of first in time, first in right in favor of a more compelling equity—in this case, protecting the mechanic or repairman.[623] As Goldberg wrote, "We therefore choose not to give primacy to the doctrine of first in time, first in right. In evolving the law of liens we meet many complex problems which are not solvable by

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614. *Id.* at 683.

615. *Id.* at 683–84.

616. *Id.* at 684 (quoting United States v. Equitable Life Assurance Soc'y, 384 U.S. 323, 327 (1966); United States v. Pioneer Am. Ins. Co., 374 U.S. 84, 87 (1963); United States v. New Britain, 347 U.S. 81, 85 (1954)) (internal quotation marks omitted).

617. *Id.* at 684 n.11.

618. *Id.*

619. *Id.* at 684.

620. *See id.*

621. *Id.* (citing I.R.C. § 6323(b)(5) (2012)).

622. *Id.* at 687.

623. *Id.* ("When such a transaction—whether it be the repair of an automobile or the harvesting and ginning of cotton—increases the value of the property, we think Congress intended that the workers' security be protected against the federal tax lien." (quoting Citizens Co-op Gin v. United States, 427 F.2d 692, 698 (5th Cir. 1970))).

apothegmatic conclusions or maxims of easy verbalization, but which challenge profound analysis."[624]

Goldberg found, however, that the repairman did not maintain continuous possession.[625] Over a twelve-month period, Crittenden, the mechanic, repaired the tractor six times.[626] Crittenden returned the tractor to its owner after each of the repairs until the final repair, when he kept the tractor.[627] Georgia UCC law and I.R.C. § 6323(b)(5) require continuous possession for a mechanic's lien to be a superior claim.[628] As such, Goldberg held Crittenden's mechanic's lien superior only for the last repair, when Crittenden maintained continuous possession.[629] Though he seemingly tried to do so, Goldberg could not find any authority supporting Crittenden's constructive possession regarding the earlier repairs when Crittenden returned the tractor.[630]

The Supreme Court vacated the *Crittenden* decision in *United States v. Kimbell Foods, Inc.*[631] In *Kimbell Foods, Inc.*, the Court held that while federal law governs a lien's priority in FHA lending transactions, federal law should incorporate nondiscriminatory state laws.[632] Writing for the Court, Justice Thurgood Marshall confronted two conflicting Fifth Circuit cases: *Crittenden* and *Kimbell Foods, Inc. v. Republic National Bank of Dallas*.[633]

The *Republic National Bank* case involved a similar United States government contractual lien, but instead of an FHA loan as in *Crittenden*, this case involved an SBA loan.[634] A local grocer, O.K. Super Markets, borrowed monies in 1968 from Kimbell Foods, Inc. using its merchandise and equipment as collateral.[635] The two security agreements included future advances from Kimbell to the grocer as coming under the security agreement protection.[636]

In 1969, the grocer borrowed monies from Republic National Bank of Dallas using as collateral the same property specified in Kimbell Foods'

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624. *Id.* at 688.
625. *Id.* at 691–92.
626. *Id.* at 680.
627. *Id.*
628. *Id.* at 691–92 (citing I.R.C. § 6323(b)(5) (2012); GA. CODE ANN. § 11-9-333 (2011); U.C.C. § 9-310 (2000)).
629. *Id.*
630. *Id.*
631. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979).
632. *See id.*
633. *See generally id.* The Court affirmed *Kimbell Foods, Inc. v. Republic Nat'l Bank* and vacated *Crittenden. Id.*; Kimbell Foods, Inc. v. Republic Nat'l Bank of Dall., 557 F.2d 491 (5th Cir. 1977), *aff'd*, *Kimbell Foods, Inc.*, 440 U.S. 715; *Crittenden*, 563 F.2d 678, *vacated by Kimbell Foods, Inc.*, 440 U.S. 715.
634. *Republic Nat'l Bank of Dall.*, 557 F.2d at 493–94.
635. *Id.* at 493.
636. *Id.*

earlier security agreements.[637] The grocer used the bank loan to pay off the earlier Kimbell Foods credit, but Kimbell continued to advance credit sales to the grocer, relying on the future advances clause in the earlier security agreements.[638] Meanwhile, the grocer defaulted on the bank loan.[639] The grocer closed its business and sold its assets, escrowing sale proceeds until the parties resolved the competing priority claims.[640] The bank claimed its security interest was superior to the SBA lien.[641] The Fifth Circuit held that traditional "first in time, first in right" principles should apply to the case, but would not apply traditional choateness rules to Kimbell Foods' indebtedness.[642] Instead, the court fashioned a new rule: the first competing creditor to satisfy the UCC perfection requirements achieved priority.[643] The choateness test used in resolving competing claims to a federal tax lien was thought by the Fifth Circuit panel not to apply when the federal government had a consensual private lien, as was the case here.[644] The court concluded that Kimbell Foods' future advances were superior to the bank's loan.[645]

The Supreme Court first upheld the primacy of federal law in governing the cases.[646] The federal guarantee in an SBA loan or FHA loan warrants allowing federal law to control.[647] Instead of a uniform national rule of priority, Marshall wrote that state law is a sufficient basis for federal law to determine priority:

> We are unpersuaded that, in the circumstances presented here, nationwide standards favoring claims of the United States are necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors. Because the state commercial codes "furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s]," we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions.[648]

The Court would not equate the interests of the federal government in tax collection matters to voluntary liens.[649] When the United States loans

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637. *Id.* at 493–94.
638. *Id.* at 494–97.
639. *Id.*
640. *Id.* at 493–94.
641. *Id.* at 494.
642. *Id.* at 502.
643. *Id.* at 504.
644. *Id.* at 501–04.
645. *Id.* at 504–05.
646. United States v. Kimbell Foods, Inc., 440 U.S. 715, 726–27 (1979).
647. *Id.* at 727.
648. *Id.* at 729 (alteration in original) (citation omitted) (quoting United States v. Standard Oil Co. of Cal., 332 U.S. 301, 309 (1947)).
649. *Id.* at 733–34.

money or guarantees loans it stands in a different place than when it is using the force of law to collect delinquent taxes.[650] In Justice Marshall's words, "The United States is an involuntary creditor of delinquent taxpayers, unable to control the factors that make tax collection likely. In contrast, when the United States acts as a lender or guarantor, it does so voluntarily, with detailed knowledge of the borrower's financial status."[651]

Marshall refused to subject federal contractual liens to the doctrines developed in the tax lien area for fear of upsetting the stability of the settled private commercial loan practices.[652] Therefore, Marshall, writing for the Court, took what he described as the prudent course in adopting the "readymade body of state law as the federal rule of decision."[653] In *Kimbell Foods*, the Court recognized that the Fifth Circuit had determined that Texas law gave preference to Kimbell Foods' lien and affirmed that decision.[654] In *Crittenden*, the Court felt Goldberg failed to decide two essential questions:

(1) "[W]hether and to what extent Georgia treats repairman's liens as superior to previously perfected consensual liens," and
(2) Whether "the FHA's financing statement [was sufficient] under Georgia law."[655]

The Court therefore ordered a remand back to the Fifth Circuit to have these questions answered.[656] The Supreme Court did not reject the Fifth Circuit *Crittenden* opinion, but asked Judge Goldberg and his panel to elaborate further on the underlying state law.[657]

On remand to the Fifth Circuit, Judge Goldberg wrote a succinct opinion, briefly reviewing what he called a "quagmire" and a "leap-frogging history" of Georgia lien law.[658] Of importance, Georgia enacted legislation patterned after UCC model language providing for a superpriority for mechanic's liens but failed to explicitly repeal prior law, resulting in confusion.[659] Goldberg chose to follow the 1972 changes:

> Without clear instruction from the Georgia courts or legislature as to the current status of this leap-frogging history of lien law in its state, we see no reason why we should not apply the most basic principle of statutory

650. *Id.* at 734.
651. *Id.* at 736.
652. *Id.* at 739.
653. *Id.* at 740.
654. *See id.*
655. *Id.*
656. *Id.*
657. *See id.*
658. United States v. Crittenden, 600 F.2d 478, 479 (5th Cir. 1979) (quoting United States v. Crittenden, 563 F.2d 678, 688 n.17 (5th Cir. 1977)), *superseded by statute as stated in* Nations Bank of Tenn. N.A. v. Hardwick Carpets Int'l, Inc., 506 S.E.2d 174 (Ga. Ct. App. 1998).
659. *Id.* at 480.

> interpretation, (not to mention, of leap-frog itself). That principle, of course, is that the last leap wins.[660]

The result was that Goldberg upheld *Crittenden*'s last repair invoice as being senior to the secured creditor's lien because the mechanic had continuous possession of the tractor for the entire period of repair.[661] The mechanic completed the earlier repairs and returned the tractor to the farmer–owner each time.[662] As to the second issue on remand, Goldberg found the property description in the FHA financing statement adequate under Georgia law.[663]

C. Citizens Co-op Gin v. United States

Congressional reform of the federal tax lien law commenced in 1966, the same year that Judge Goldberg began his judicial service.[664] Among the statutory reforms was a revision to the priority scheme of federal tax liens' relationship to various other liens, especially those of holders of competing security interests.[665] Naturally, therefore, Judge Goldberg would likely face cases of first impression having to do with tax lien priority disputes.[666] *Citizens Co-op Gin v. United States* is such a case.[667]

The delinquent taxpayers, J.B. and Leola Marion, were cotton farmers.[668] In the spring of 1968, the couple purchased cottonseed from Co-op Gin and planted it.[669] The Service filed a notice of tax lien against the Marions on July 16, 1968, in Lubbock and Hockley Counties, Texas.[670] When the seed was ready to harvest in October 1968, the Marions contracted with a harvester, Rackler, to harvest, strip, and deliver the cotton to Citizens Co-op Gin.[671] The gin gave Rackler a gin ticket evidencing delivery of the cotton.[672] The gin then continued the process by cleaning the cotton, separating the seed from the cotton lint, pressing, bagging, and banding the cotton.[673] Afterwards, the bagged cotton was delivered to a

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660. *Id.* at 479–80.
661. *See id.* at 481.
662. *Id.* at 480.
663. *Id.* at 481.
664. *See* Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 709 (1987); William T. Plumb, Jr., *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 YALE L.J. 605, 605 (1968).
665. *See* Plumb, *supra* note 664, at 605.
666. *See* Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125 (codified in scattered sections of the I.R.C.); S. Rep. No. 89-1708 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3722, 3722.
667. *See* Citizens Co-op Gin v. United States, 427 F.2d 692 (5th Cir. 1970).
668. *Id.* at 694.
669. *Id.*
670. *Id.*
671. *Id.*
672. *Id.*
673. *Id.*

warehouse for storage.[674] In return, the storage facility gave the gin storage negotiable warehouse receipts.[675]

Ordinarily, the gin was expected to negotiate the warehouse receipt, deduct its gin fees, pay the storage costs and farm labor, and then remit the net proceeds to the Marions.[676] The Service, however, levied on the gin on November 7, 1968, and interrupted the process.[677] The Service demanded the warehouse receipts, and the gin responded with an interpleader action.[678]

I.R.C. § 6323(b)(5) was at issue here; this section provides protection for third parties against a filed notice of a federal tax lien with respect to tangible personal property that is secured under local law for the reasonable price of repair or improvement of property, if the holder of the repairmen's lien continually possesses the property from the time the local lien arises.[679] Judge Goldberg described the salutary purpose of § 6323(b)(5):

> The remedial purpose of the legislation, however, is quite clear. The statute was designed to protect those who add value to the government's tax lien by repairing or improving the property at their own expense in money or labor and who could not be expected to search the tax lien records.[680]

Goldberg first considered the rights of the harvester and gin under Texas law, and he found that both possessed equitable liens against the cotton for the amount of their charges, which would enjoy priority over an earlier-filed security interest.[681]

The government nevertheless argued that these equitable liens were merely equitable and not possessory under Texas law; in order to be senior to the filed notice of federal tax lien, the government urged that Texas law must entitle the third party claimants the right to withhold delivery of the cotton to the owner until payment was made.[682] Goldberg, however, departed from the government's arguments.[683]

Goldberg analyzed the agreement among the parties—albeit an implied agreement—and found that the implied understanding was that the harvester and gin would possess the cotton until paid, legalizing their continued possession.[684] Goldberg was not persuaded that Congress, by

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674. *Id.*
675. *Id.*
676. *Id.*
677. *Id.*
678. *Id.*
679. *See id.* at 695 (citing I.R.C. § 6323(b)(5) (2012)).
680. *Id.*
681. *Id.* at 695–96.
682. *Id.* at 696.
683. *See id.*
684. *See id.*

enacting § 6325(b)(5), was protecting third parties depending upon the vagaries of various state laws.[685] Goldberg felt the statute only required an examination of "a lien under local law" and not merely one requiring or depending upon possession.[686] Therefore, Goldberg concluded that the local lien of the harvester and gin was sufficient to defeat the Service.[687]

The harvester's possession was challenged because he turned over the cotton to the gin.[688] Goldberg concluded that the "the gin's possession was possession for Rackler."[689] Goldberg expected there would have otherwise been an absurd result.[690] Both the harvester and the gin improved the cotton and fulfilled the statutory purpose.[691] Goldberg said, "In circumstances where the improvement requires a *chain* of improvers, we think the possession of one is the possession of all so long as those in the chain intend to withhold the property from the owner until the improvement charges against the property are satisfied."[692] Similarly, Goldberg found the exchange of the cotton for the warehouse receipt to be constructive possession when "delivery of the receipt is symbolic and legal delivery of the goods."[693]

Goldberg's opinion in *Citizens Co-op Gin* is a liberal opinion, meaning that he stretched to find an implied agreement among the harvester and gin concerning continued possession, finding the harvester's possession continued after handing the cotton to the gin, and holding that the warehouse receipts were, in effect, possession of the cotton.[694] Goldberg felt that other courts might have gone the other way, but as he saw the situation, a broad interpretation of the statute was appropriate:

> Faced as we are, however, with the task of construing a relatively new statute having a remedial purpose, we feel justified in giving the statute a broad interpretation which will achieve that purpose. The fact that the instant case arises in the context of an agricultural setting rather than an industrial atmosphere does not render the priority law inapplicable. The statute was designed to protect the small businessman who operates informally, depending upon an oral agreement and his possession to enforce his claim for a reasonable fee for services which rendered the

685. *See id.*
686. *Id.* (internal quotation marks omitted).
687. *See id.*
688. *See id.*
689. *Id.*
690. *See id.* at 697.
691. *See id.*
692. *Id.*
693. *Id.*
694. *See id.* at 696–98.

> property more valuable. He is not expected to check the tax lien notices before he proceeds to work.[695]

Goldberg concluded that the harvester and the gin depended upon community customs, despite the absence of a written contract.[696] The time and method of payment were left to custom in this informal transaction.[697] The gin retained control of the property until payment.[698] Therefore, the harvester and gin came within the protection Congress afforded in § 6323(b)(5).[699] Both the harvester and gin's liens were granted senior status to the earlier filed IRS tax lien.[700] Goldberg noted, "To hold otherwise would create injustice and hardship, a result contrary to the remedial purposes of the statute. We therefore reject the Commissioner's narrow interpretation and grant superpriority status to both Rackler and the gin."[701]

There has been only limited citation to the *Citizen's Co-op Gin* decision.[702] The cited rule for the case is that an equitable lien can gain priority over the federal tax lien.[703] The limited citation, of course, may be because of the limited number of cases arising with this unusual fact pattern.[704] Equitable liens are not found in common practice.

XII. COURT HOLDING DOCTRINE & IMPUTED SALES

Judge Goldberg wrote two opinions concerning application of the imputed sale rule, or as it is referred to by tax lawyers, the *Court Holding* doctrine.[705] The concept of imputed sales is a bedrock tax principle.

In *Commissioner v. Court Holding Co.*, a landmark 1935 tax case, the Supreme Court imputed a sale by corporate shareholders of what was formerly a corporate asset to the corporation, with the tax result that gain

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695. *Id.* at 698.
696. *Id.*
697. *Id.*
698. *Id.*
699. *Id.*
700. *Id.*
701. *Id.* As a final issue, Goldberg would not extend the superiority protection of I.R.C. § 6323(b)(5) to the attorneys' fees of the harvester and gin. *Id.* at 699. Goldberg did not find that Texas law extended the protection of an equitable lienholder to include attorneys' fees, absent a specific contract to this effect. *Id.* Nevertheless, Goldberg remanded the case to allow the trial court to determine Texas law. *Id.* at 700.
702. *See, e.g.*, United States v. Crittenden, 563 F.2d 678, 681 (5th Cir. 1977), *vacated by* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).
703. *Id.* (citing *Citizens Co-op Gin*, 427 F.2d at 698).
704. *See Citizens Co-op Gin*, 427 F.2d at 693.
705. *See* Baumer v. United States, 580 F.2d 863, 865 (5th Cir. 1978); Hines v. United States, 477 F.2d 1063, 1064 (5th Cir. 1973).

from the sale was attributed to the corporation.[706] It is a bedrock tax case penetrating tax law time and time again, but only minimally applying in corporate liquidations in recent times.[707] The presence of the *Court Holding* case continues to be felt in various areas of the tax law.[708]

In 1940, the Supreme Court decided a second case, *United States v. Cumberland Public Service Co.*, affirming a Court of Claims decision that refused to attribute a shareholder sale of assets to the corporation.[709] In *Cumberland*, the shareholders tried to sell their corporation's stock, but the buyer refused to buy the stock.[710] The shareholders of the corporation then offered to acquire the equipment from the corporation by liquidating the corporation and selling the assets.[711] The Service attributed the gain from the sale to the corporation.[712] The Court of Claims refused to impute the gain, finding that the sale had been made by the shareholders, not the corporation.[713] In affirming the Court of Claims, the Supreme Court emphasized the fact that the corporation had in fact been liquidated, as well as the importance of the ultimate finding of the lower court that the sale in question was made by the shareholders rather than by the corporation itself.[714]

Drawing on the distinction between *Court Holding* and *Cumberland*, the Supreme Court acknowledged that "the distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial when the corporation is closely held."[715]

Judge Goldberg wrote two opinions applying the *Court Holding* doctrine.[716] Both of the cases are factually intensive and thus not normally notable.[717] In *Hines v. United States*, however, the court extended *Court Holding* to non-liquidating distributions and created the "active participation" test for evaluating imputation arguments.[718] In the second case, *Baumer v. United States*, Goldberg extended *Hines*, and thus *Court*

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706. *See* Comm'r v. Court Holding Co., 324 U.S. 331, 334 (1945), *superseded by statute as stated in* I.R.C. § 337 (2012), *and as recognized in* Eckerd Corp. v. United States, 37 Fed. Cl. 713, 720 (1997).

707. *See, e.g.*, Enbridge Energy Co. v. United States, 553 F. Supp. 2d 716, 726 (S.D. Tex. 2008).

708. *See id.*

709. *See* United States v. Cumberland Pub. Serv. Co., 338 U.S. 451, 456 (1950).

710. *Id.* at 452.

711. *Id.*

712. *Id.* at 453.

713. *Id.* at 455.

714. *Id.* at 454–55.

715. *Id.*

716. *See* Baumer v. United States, 580 F.2d 863, 865 (5th Cir. 1978); Hines v. United States, 477 F.2d 1063, 1064 (5th Cir. 1973).

717. *See Baumer*, 580 F.2d at 866–69; *Hines*, 477 F.2d at 1064–67.

718. *See Hines*, 477 F.2d at 1069–70.

Holding, even further by discerning an implicit finding in the lower court of no active corporate participation.[719]

A. Hines v. United States

The *Hines* case involves the typical fact pattern seen in *Court Holding*-type cases.[720] A family real estate corporation attempted to sell Georgia timberland and, after exploring possible sale transactions, decided upon distributing the timberland to shareholders, who would then sell the property to a prospective buyer.[721] Avoiding corporate-level taxation was an important motivator for the transaction structure.[722] The Service imputed the gain on the sale to the family real estate corporation.[723] In the subsequent refund suit, the district court explicitly found that the corporation had not negotiated the sale of the timberland prior to transferring the land to the shareholders, but nevertheless imputed the sale to the corporation.[724] Believing that *Court Holding* justified an imputation of the asset sale to the corporation, the district court held in favor of the Service.[725]

Judge Goldberg, writing for the Fifth Circuit panel, reversed the district court and held in favor of the taxpayer.[726] Despite the government's argument that imputation of the sale to the corporation was proper when the transfer was made by an ongoing concern (not in liquidation), in anticipation of a sale by the corporation, and with no valid business motives aside from tax avoidance, Goldberg focused on the specific fact finding by the lower court that the shareholders sold the land, not the corporation.[727] The touchstone for Goldberg's determination was whether the corporation actively participated in the sale that produced the income to be imputed.[728] Thus, Goldberg's opinion held that "the proceeds of the sale of property distributed by a corporation to its shareholders should be imputed to the corporation only if the sale was in fact made by the corporation, not by the shareholders."[729]

The *Hines* decision was noteworthy because Goldberg determined that a liquidation of the corporation is not essential to a finding that the sale was

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719. *See Baumer*, 580 F.2d at 866–69.

720. *See Hines*, 477 F.2d at 1064–67, 1068 (citing Comm'r v. Court Holding Co., 324 U.S. 331, 334 (1945)), *superseded by statute as stated in* Griffin v. United States, 42 F. Supp. 2d 700 (W.D. Tex. 1998).

721. *Id.* at 1064–65.

722. *Id.* at 1065.

723. *Id.* at 1067.

724. *Id.*

725. *Id.*

726. *Id.* at 1072.

727. *Id.* at 1071–72.

728. *Id.*

729. *Id.* at 1069.

by shareholders other than the corporation.[730] As Goldberg stated, again in his own style:

> [W]e do not think it proper to attempt to plug that loophole by conjuring up visions of corporate sales where no corporate activities justify such images. The tax loophole in this situation is not based upon imputation or non-imputation of corporate sales, but the aperture exists because distributions of appreciated property by a deficit corporation are not deemed distributions in the nature of dividends. We are not nearly so certain as the Internal Revenue Service, which administers the Code, that absent imputation the passage is marked "no trespassing" into the domains of ordinary income taxation under the facts of this case, but the government takes a different position. Under the law and regulation, who are we to say nay, though as pathfinders we may have reached a different result.
>
> *Court Holding* has not been judicially elasticized to the degree that the government argues and its tentacles have to a large extent been amputated. Moreover, we do not believe that it is our function to play loop the loop for the government because of some result oriented tax theory.[731]

Goldberg closes *Hines* with a sharp eye on the facts:

> Though we detect symptoms of imputation, we must have a proven pathology and not merely a visceral reaction before we can find that taxpayer's receipts are attributable to Peeler Realty without significant corporate selling kinetics. The wailing cry of the government is that the distribution of Peeler Realty's timberland does not receive ordinary income taxation absent imputation, and so it will bemoan our holding that imputation is impossible absent a finding that the corporation effectuated or participated in the sale of the timberlands.[732]

In a passage most often quoted from *Hines*, Goldberg stated the essential point:

> [T]he *sine qua non* of the imputed income rule is a finding that the corporation actively participated in the transaction that produced the income to be imputed. Only if the corporation in fact participated in the sale transaction, by negotiation, prior agreement, postdistribution activities, or *participated* in any other significant manner, could the corporation be charged with earning the income sought to be taxed. Any

730. *See id.*
731. *Id.* at 1071 (footnote omitted).
732. *Id.* at 1072.

> other result would unfairly charge the corporation with tax liability for a transaction in which it had no involvement or control.[733]

Not satisfied to conclude *Hines* with merely a judicial decision, Goldberg directed attention at the end of his *Hines* opinion to the tax loophole attributable to distributions of appreciated corporate property to shareholders.[734] Goldberg wrote that Congress, not the courts, should plug this loophole, which ultimately happened in 1986:

> We feel, however, that the government's lachrymosity and lamentations should arise from the fact that Congress has deemed that the distribution of appreciated property by a deficit corporation does not of itself produce ordinary income for the recipient shareholder. This Court will not make sellers out of nonsellers when the government coffers should be enriched, if at all, by making recipients of appreciated assets ordinary-income taxpayers. It is for Congress to make that decision, and until it does we read *Court Holding* and its progeny as dealing with corporate activities and not with the problem of receipts by taxpayers in the nature of dividends. We therefore remit to the lawmakers the duty of codifying, for as the shoemaker sticks to his last, we must stick to our special role of interpreting the words of Congress.[735]

B. Baumer v. United States

Four years after *Hines*, Goldberg wrote the opinion in *Baumer v. United States*, applying *Hines* in another context involving a grant of an option to purchase a one-half interest in corporate land to the son of a sole shareholder for nominal consideration.[736] The father owned the corporation, and the son received the option.[737] The land was later sold with the shareholder reporting one-half of the gain on the sale.[738] The lower court found the granting of the option to be a constructive dividend to the father.[739] The case involved questions of constructive dividend, valuation of the option, and imputation of the sale of realty to the corporation.[740]

The Goldberg opinion reviewed the lower court's fact determination for any finding of imputation of the later sale of the realty to the corporation.[741] He determined the lower court found that the corporation

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733. *Id.* at 1069–70.

734. *Id.* at 1072.

735. *Id.*; *see* Tax Reform Act of 1986, I.R.C. § 336 (2012) (plugging the loophole pointed out by Goldberg for distributing corporate property).

736. Baumer v. United States, 580 F.2d 863, 865 (5th Cir. 1978).

737. *Id.* at 866.

738. *Id.*

739. *Id.* at 867.

740. *Id.* at 865–66.

741. *Id.* at 871.

was not involved in the sale, that the option was distributed to the son before a sale of property was contemplated, that the son was personally involved in development activity increasing value of the property, and that the son negotiated himself for the sale of the property.[742] Goldberg thought these findings were "ample evidence" to support the lower court holdings.[743] Further, Goldberg understood the lower court's conclusions of law to implicitly hold that the corporation did not actively participate in the sale, thus bringing the case within the scope of *Court Holding* and *Hines*.[744] Goldberg expressed his unwillingness to extend *Court Holding* too far, when the proper solution rested with Congress:

> Thus where corporate property is distributed to a shareholder pursuant to a valid option, and the sale of that property is, in reality, negotiated and consummated by the shareholder rather than by the corporation, the courts are not permitted to impute the income from that sale to the corporation. Just as we may not inoculate transactions infected by the *Court Holding* selling virus, we may not allow that virus to reach epidemic proportions in response to the government's lamentations that its coffers are ailing and ill-nourished. Such decisions are best left to Congress.[745]

The 1986 tax reforms included taxing appreciated assets at the corporate level whether the assets are distributed to shareholders who sold them or are sold by the corporation.[746] This legislative change rendered both *Court Holding* and *Cumberland* largely obsolete, but the doctrine lives on in various forms, including the form over substance doctrine, the step transaction doctrine, and the assignment of income principle.[747]

XIII. SUBSTANCE VERSUS FORM

If there is a core doctrine pervading the tax opinions of Judge Goldberg, it is pragmatism—an unwillingness to let artificial distinctions drive tax consequences.[748] In his twenty-nine years on the Fifth Circuit, Judge Goldberg had a sharp eye for the substance of the transaction, as the

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742. *Id.*

743. *Id.*

744. *Id.* at 871 n.14.

745. *Id.* at 874–75. Goldberg also held that the bargain purchase was deemed taxable to the father when the option was exercised because that was when it first had an ascertainable value. *Id.* at 886.

746. *See* Mark R. Siegel, *Recognizing Asset Value and Tax Basis Disparities to Value Closely-Held Stock*, 58 BAYLOR L. REV. 861, 866–67 (2006).

747. *See, e.g.*, Martin Ice Cream Co. v. Comm'r, 110 T.C. 189, 215 (1998) (holding in favor of the taxpayer on the Service's assertion that shareholders' sale should be attributed to the corporation under *Court Holding*); Robert P. Rothman & David B. Buss, *New Techniques to Melt Away Corporate-Level Tax; Or the Service Takes a Licking in* Martin Ice Cream, 26 J. CORP. TAX'N 3, 6–8 (1999).

748. *See, e.g.*, *Baumer*, 580 F.2d at 866.

following discussion of *Redwing Carriers, Inc. v. Tomlinson* and *Rushing v. Commissioner* reveals.[749]

A. Redwing Carriers, Inc. v. Tomlinson

In *Redwing Carriers*, the taxpayer attempted to create two transactions instead of one purchase and sale to avoid the effects of an I.R.C. § 1031 like-kind exchange.[750] The taxpayer wanted to incur a capital gain on the sale of trucks and obtain a higher adjusted basis on the purchase of new trucks, thereby obtaining enhanced depreciation deductions.[751] Judge Goldberg refused to permit one transaction to be divided into two transactions.[752]

The taxpayer, Redwing Carriers, Inc., was a truck hauler company.[753] The owner of Redwing also owned a GMC truck dealership.[754] The 1958 transaction was structured so that the dealership purchased twenty-eight new GMC trucks with cash, and Redwing sold twenty-seven used GMC trucks to GMC for cash in a separate transaction.[755] Normally, the twenty-seven trucks would be traded-in for the new truck purchases.[756] Similar transactions were executed in the two later tax years, 1959 and 1961.[757]

The taxpayer's goal in structuring the transaction in this manner was to enable the dealership to compute its depreciation based on its cash purchase price for the trucks, undiminished by any trade-ins.[758] The price at which Redwing sold the used trucks to GMC exceeded Redwing's adjusted basis or even value.[759] The taxpayer needed to have two transactions to achieve its tax goals.[760] Trial testimony indicated that GMC viewed the transactions as one purchase of new trucks, plus trade-ins of the old trucks.[761] Further, GMC paid a higher price for the used trucks because it computed its profits from the purchase and sale as one computation.[762]

In finding the substance to be one transaction, Goldberg refused to let form control over substance:

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749. *See infra* notes 750–810 and accompanying text.

750. Redwing Carriers, Inc. v. Tomlinson, 399 F.2d 652, 656 (5th Cir. 1968). The tax years in the case preceded depreciation recapture, introduced in 1962 by the addition of I.R.C. § 1245, which would have mooted the taxpayer's proposed transaction structure. *See id.* at 654.

751. *Id.* at 656.

752. *Id.* at 659.

753. *Id.* at 655.

754. *Id.*

755. *Id.*

756. *Id.*

757. *Id.*

758. *Id.* at 655–56.

759. *Id.*

760. *Id.* at 656.

761. *Id.* at 655.

762. *Id.*

> In substance, the sale was in bondage to the purchase and the purchase indissolubly dependent upon the sale. If Redwing had not carried out the agreement to buy the new trucks, the auto makers would have had no juristic obligation to purchase the used trucks. The buying and selling were synchronous parts meshed into the same transaction and not independent transactions.[763]

Numerous facts suggested transactional unity: The same man controlled both Redwing Carriers and the truck dealer handled all negotiations for both entities.[764] Both entities used the same address on the checks used in the transactions.[765] GMC delivered new trucks to Redwing even if designated to go to the dealership.[766] The district court found the two contracts dependent on one another between the sale of new trucks and the trade-ins of the old trucks.[767]

Goldberg found support for the treatment of the transaction as one transaction from Treasury Regulations, IRS rulings,[768] and legislative history.[769] Supreme Court and Fifth Circuit precedent supported the idea that courts should look for the reality of a transaction, not a paper shell.[770] Judge Goldberg concluded the *Redwing Carriers* opinion by stating his core view of substance over form:

> Taxation is transactional and not cuneiform. Our tax laws are not so supple that scraps of paper, regardless of their calligraphy, can transmute trade-ins into sales. Although Redwing's transfers may have been paper sales, they were actual exchanges. A taxpayer may engineer his transactions to minimize taxes, but he cannot make a transaction appear to be what it is not. Documents record transactions, but they do not always become the sole criteria for transactional analysis.[771]

What Goldberg held was that an exchange transaction requires "contractual interpendency."[772] It is the essential holding that has given *Redwing Carriers* its continued vitality.[773] The case continues to be cited and relied upon.[774]

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763. *Id.* at 656.
764. *Id.* at 655.
765. *Id.*
766. *Id.*
767. *Id.*
768. *See* Treas. Reg. § 1.1031(a)–1(c) (1991); Rev. Rul. 61-119, 1961-1 C.B. 395.
769. *See Redwing Carriers, Inc.*, 399 F.2d at 656–57.
770. *See* Comm'r v. Court Holding Co., 324 U.S. 331, 334 (1945), *superseded by statute as stated in* Griffin v. United States, 324 U.S. 331 (1945); United States v. Henderson, 375 F.2d 736, 740 (5th Cir. 1967).
771. *Redwing Carriers, Inc.*, 399 F.2d at 659.
772. *Id.*
773. *See id.*
774. *See, e.g.*, Ocmulgee Fields, Inc. v. Comm'r, 613 F.3d 1360, 1364 (11th Cir. 2010).

B. Rushing v. Commissioner

In *Rushing v. Commissioner*, Goldberg, writing for the Fifth Circuit, respected an installment sale to an intermediary if the seller did not directly or indirectly have control over the proceeds of the ultimate sale or possess the economic benefit from the sale.[775] The taxpayers voted to liquidate their corporation, after which they created irrevocable trusts for the benefit of their children.[776] The taxpayers sold their stock to the independent trustee in exchange for cash and installment promissory notes.[777] The Service challenged the right of taxpayers to report their gain on the installment basis.[778] Goldberg held for the taxpayers, writing:

> [A] taxpayer may, if he chooses, reap the tax advantages of the installment sales provision if he actually carries through an installment sale, even though this method was used at his insistence and was designed for the purpose of minimizing his tax. . . . [A] taxpayer certainly may not receive the benefits of the installment sales provisions if, through his machinations, he achieves in reality the same result as if he had immediately collected the full sales price, or, in our case, the full liquidation proceeds. As we understand the test, in order to receive the installment sale benefits the seller may not directly or indirectly have control over the proceeds or possess the economic benefit therefrom.[779]

Goldberg relied upon Supreme Court precedent, in which the Court denied installment sale benefits to a seller who arranged for an intermediate corporation that he wholly controlled to collect the full sales price from the buyer and pay it to him in installments.[780] The Court focused on control, actual command over the property taxed, whether or not such command had been exercised through specific retention of legal title or creation of a new equitable, but controlled, interest and interposition of a subservient agent.[781]

To Goldberg, the selection of an independent trustee meant that the taxpayer did not control the proceeds.[782] The Tax Court found the trustee to be independent.[783] Based on this critical finding, Goldberg held that the installment sale to the trust was a valid transaction.[784] Because "[a]n autonomous entity [i.e., a trust] controlled the proceeds, and no right of recapture inured to the benefit of the taxpayers," and because the "taxpayers

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775. Rushing v. Comm'r, 441 F.2d 593, 598 (5th Cir. 1971).
776. *Id.* at 594.
777. *Id.*
778. *Id.* at 597.
779. *Id.* at 593, 598.
780. *Id.* at 597 (citing Griffiths v. Helvering, 308 U.S. 355, 356–58 (1939)).
781. *Griffiths*, 308 U.S. at 357.
782. *Rushing*, 441 F.2d at 598.
783. *Id.*
784. *Id.*

retained no effective benefit or control over the liquidation dividend," the taxpayers were not taxed on the liquidation proceeds and were permitted to recognize the gains on their stock sales under the installment sale method.[785]

The Service argued that this was an assignment of income, but Judge Goldberg did not accept the argument because full price was paid for the transferred asset:

> At the outset we feel compelled to state what this case is not about. . . . [T]his is not a case where one taxpayer has attempted to shift the gain to a second taxable entity in order to reap the benefits of the second entity's lower tax rate. The price the trusts paid the taxpayers for the stock was the full value of the stock, including the appreciation in value which would be realized upon liquidation. We therefore find the Commissioner's reliance upon the anticipatory assignment of income theory entirely misplaced simply because no income was assigned.[786]

The Service took strong exception to *Rushing*.[787] The Service believed that when a taxpayer transfers property to an intermediary under the installment method and the facts indicate that the taxpayer prearranged for a subsequent sale by the intermediary, the substance and realities of the event govern and the taxpayer should be considered in receipt of payments in the appropriate year of sale.[788] Facts such as the chronological sequence and time proximity of events and negotiations between the taxpayer, intermediary, and ultimate purchaser are relevant to a determination of whether the series of transactions is prearranged.[789] Additionally, these facts are useful in determining whether the prearrangement was initiated or controlled by the taxpayer claiming the benefit of the installment sale provisions.[790]

Until 1980, when Congress enacted legislation that reversed *Rushing*, the Service continued to look for cases suitable to challenge Goldberg's opinion.[791] One example is *Goodman v. Commissioner*, in which the taxpayers desired to sell an apartment building and—on the advice of tax counsel—structured the transaction as an intermediate sale to six irrevocable trusts for the benefit of taxpayers' children, followed by a sale to the ultimate purchaser.[792] Taxpayers were trustees of the trusts, which

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785. *Id.*

786. *Id.* at 597.

787. A.O.D. 1983-36 (Nov. 10, 1983); A.O.D. 1981-68 (Feb. 17, 1981).

788. A.O.D. 1981-68 (Feb. 17, 1981).

789. *Id.*

790. *Id.*

791. *See* I.R.C. § 453(e) (2012) (Section 453(e) reversed *Rushing* when enacted as part of the Installment Sales Revision Act of 1980, Pub. L. No. 96-471, 94 Stat. 2247.).

792. Goodman v. Comm'r, 74 T.C. 684, 691 (1980), *aff'd without a written opinion*, 673 F.2d 1332 (7th Cir. 1981), *and nonacq.*, 1981-2 C.B.I.

had been created by taxpayers' parents (the grandparents) several years earlier.[793] The trusts were funded with assets of substantial value.[794] Taxpayers negotiated with prospective purchasers as trustees.[795] On March 15, 1973, taxpayers individually contracted to sell the apartments to themselves as trustees of the trusts for $3,750,000, with $100,000 payable at closing and the balance payable on or before April 30, 1993, with interest at the rate of 6.65%, payable monthly.[796] The taxpayers, as trustees, entered into a contract of sale the following day with David E. Dick, who later assigned his rights under the contract to Cathedral Real Estate Co., Inc.[797] The purchase price was $3,850,000 ($100,000 in broker's commissions), $600,000 of which was payable at closing, and the balance payable in equal monthly payments over twenty-five years with interest at a rate of 8% per year.[798]

The Tax Court relied on *Rushing* and respected the sale to the trusts.[799] The Service did not appeal *Goodman* because:

- "[T]he trusts had been in existence for some time";
- The trusts "were not created by" taxpayers;
- The trusts "had substantial other assets"; and
- The "sale . . . would have qualified for installment sale treatment if made directly by" taxpayers.[800]

Many courts diverged from Goldberg's decision in *Rushing* on the issue of assignment of income when taxpayers have given away their stock rather than selling it.[801] In cases in which the taxpayers have given away their stock, courts have found that the gain on the liquidation was already earned at the time of the gift and, thus, was taxable to the assignor.[802]

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793. *Id.* at 687.

794. *Id.*

795. *Id.* at 691.

796. *Id.*

797. *Id.* at 692–94.

798. *Id.* at 692–93.

799. *Id.* at 700, 706. *Goodman* was appealable to the Fifth Circuit. A.O.D. 1981-68 (Feb. 17, 1981). For Tax Court cases appealed to circuits other than the Fifth Circuit, see Weaver v. Comm'r, 71 T.C. 443 (1978), *aff'd*, 647 F.2d 690 (6th Cir. 1981); Roberts v. Comm'r, 71 T.C. 311 (1978), *aff'd*, 643 F.2d 654 (9th Cir. 1981), and Pityo v. Comm'r, 70 T.C. 225 (1978) (appealable to the 11th Circuit).

800. A.O.D. 1981-68 (Feb. 17, 1981).

801. *See* Vaughn v. Comm'r, 81 T.C. 893, 909 (1983); *Estate of* Sidles v. Comm'r, 65 T.C. 873, 889–90 (1976).

802. *See generally* Kinsey v. Comm'r, 477 F.2d 1058, 1059 (2d Cir. 1973) (holding that distributions had already been made in liquidation); Hudspeth v. United States, 471 F.2d 275, 276 (8th Cir. 1972) (holding that shareholders already adopted a liquidation plan); Allen v. Comm'r, 66 T.C. 340 (1976) (discussing an anticipatory assignment of liquidation proceeds); Ronald H. Jensen, *Schneer v. Commissioner: Continuing Confusion Over the Assignment of Income Doctrine and Personal Service Income*, FLA. TAX REV. 623, 671 n.222 (1993) (citing Jones v. United States, 531 F.2d 1343 (6th Cir. 1976)) (discussing prevention of liquidation). In the earlier cases, the courts relied in part on the fact that the donees lacked the power to block unilaterally the scheduled liquidations. *Kinsey*, 477 F.2d at 1063; *Hudspeth*, 471 F.2d at 279. The later cases, however, held that this factor was not decisive and found that under the "realities and substance" test, the liquidations were virtually certain to occur in

Congress acted in 1980 to reverse cases such as *Rushing*.[803] Generally, the Installment Sales Revision Act of 1980 requires the parent (seller) in a *Rushing*-type transaction to report gain if the property is resold for cash by the related buyer within two years.[804] Section 453(e) provides restrictions on dispositions between related parties.[805] If any person disposes of property to a related person, as defined by § 453(e)—referred to as the first disposition—and before the person making the first disposition receives all payments with respect to the disposition and the related person disposes of the property—referred to as the second disposition—then, for purposes of the section, the amount realized with respect to such second disposition is treated as being received at the time of the second disposition by the person making the first disposition.[806] Following 1980, Congress continued to restrict the availability of installment reporting and curbed specific abusive practices.[807]

After 1980, the tax result in *Rushing* would be different; the taxpayer would have recognized gain at the time the children's trusts recognized gain, which was upon liquidation.[808] The statutory change concerned sales to related parties.[809] For sales to unrelated parties, *Rushing* remains intact.[810]

C. Kuper v. Commissioner

Judge Goldberg had another occasion to write on substance over form in *Kuper v. Commissioner*, which he succinctly summarized: "Once again we confront taxpayers who have taken a circuitous route to reach an end more easily accessible by a straightforward path. Looking to substance

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those cases, even though the donees possessed sufficient stock to prevent the liquidations had they so desired. *Jones*, 531 F.2d at 1345–46 (internal quotation marks omitted) (explaining that donees, together with shareholders other than donor, could stop liquidation); *Allen*, 66 T.C. at 347–48 (stating that donee received controlling stock interest).

803. *See* Installment Sales Revision Act of 1980, Pub. L. No. 96-471, 94 Stat. 2247.

804. *See id.* Prior to the 1980 Act, I.R.C. § 453 contained all of the statutory rules pertaining to installment sales. *Cf. id.* In the interest of simplification, the 1980 Act divided the installment rules into three categories, each with its own section of the Code. *See id.* Rules relating to sales of real estate and casual sales of personal property were set forth in I.R.C. § 453, rules relating to dealer sales of personal property in I.R.C. § 453A, and rules relating to dispositions of installment obligations in I.R.C. § 453B. *See generally* David F. Shores, *Closing the Open Transaction Loophole: Mandatory Installment Reporting*, 10 VA. TAX REV. 311, 315 (1990) (discussing the Act).

805. I.R.C. § 453(e) (2012).

806. *See generally* MARK LEVINE & LIBBI SEGEV, REAL ESTATE TRANSACTIONS TAX PLANNING & CONSEQUENCES § 515 (2011 ed.) (discussing the calculations of installment sales).

807. *See* Shores, *supra* note 804, at 316 (discussing post-1980 legislative reforms).

808. *See id.*

809. *See id.*

810. *See id.*

rather than form, we decide that the instant transactions must be taxed for what realistically they are—an exchange of stock and a dividend."[811]

The case involved three brothers who owned an auto dealership and a real estate company, which leased land and buildings to the dealership.[812] The brothers launched a transaction to eliminate stock ownership of one of the brothers, George, from the dealership.[813]

- The three brothers contributed stock in the realty company to the dealership, thus, momentarily making the realty company a wholly owned subsidiary of the dealership.[814]
- The dealership contributed cash to the realty company on the same day.[815]
- The following day, the dealership redeemed George's stock in the dealership by transferring 100% of the stock of the realty company to George.[816]

The other two brothers (James and Charles) treated these transactions as (1) a nontaxable contribution of the realty company to the dealership; (2) a nontaxable cash contribution by the dealership to the realty company; and (3) a total redemption of George's dealership stock, which was taxable at the corporate level and to George individually.[817] Neither James nor Charles reported any personal income from the aforementioned transactions.[818] The Service asserted that the transactions should have been taxed as (1) a taxable exchange of James's and Charles's realty company stock for George's dealership stock, and (2) a constructive dividend from the dealership to James and Charles.[819]

Goldberg held that a transaction in which a corporation became a wholly owned subsidiary for one day, followed by the exchange of its shares for shares in the parent, was, in substance, an exchange by the shareholders of shares in both corporations.[820] Goldberg wrote:

> In taxation, as in other areas, we take care not to miss the larger forest while too narrowly focusing on the component trees. Thus, of necessity, we have remained alert to the wider vision, lest by a process of artificial atomization, the taxpayer find his way to a tax haven not intended by our lawmakers.[821]

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811. Kuper v. Comm'r, 533 F.2d 152, 153 (5th Cir. 1976).
812. *Id.* at 153–54.
813. *See id.* at 154.
814. *Id.*
815. *Id.*
816. *Id.*
817. *Id.*
818. *Id.* at 154–55.
819. *Id.* at 155.
820. *See id.* at 160–61.
821. *Id.* at 163.

As Goldberg wrote the concluding paragraph in *Kuper*, he signaled his continued commitment to upholding substance instead of form:

> Assuredly, a real business purpose—the need to separate ownership interests in Kuper Volkswagen—motivated the overall transaction here. But it cannot support the specific route followed. Clearly this conclusion is proper for the presence of business discordance cannot be permitted to justify whatever tax construct petitioners deem most beneficial to their tax liability. Were this not the rule, the Commissioner would be left defenseless against the clever tinkerers of the code who by exalting form over substance subvert the purposes inherent in our revenue statutes.[822]

Goldberg's decision in *Kuper* has maintained vitality.[823] Tax shelter litigation of modern times has cited Goldberg's message that the form of a transaction is not to be respected when larger tax objectives control the form.[824]

XIV. FRAUD PENALTY; INDIRECT PROOF METHODS

A. Webb v. Commissioner

The 1968 decision in *Webb v. Commissioner* is a garden-variety tax fraud case.[825] The taxpayer owned and operated liquor stores and appeared challenged to keep adequate books and records.[826] The taxpayer did not maintain a complete sales journal or cash receipts book.[827] Some cash sales were not deposited in his bank account.[828] His banking records were incomplete.[829] The Service reconstructed taxpayer's income by using a 25% mark-up from the cost of goods sold.[830] The Service considered the taxpayer's cost of sales to be the most determinable financial information.[831] Goldberg affirmed the use of the percentage mark-up method, as well as imposition of the fraud penalty.[832] The decision is straightforward.

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822. *Id.*

823. *See* Southgate Master Fund, L.L.C. v. United States, 659 F.3d 466, 482 n.50 (5th Cir. 2011); Associated Wholesale Grocers, Inc. v. United States, 927 F.2d 1517, 1523 (10th Cir. 1991); Sec. Indus. Ins. Co. v. United States, 702 F.2d 1234, 1244 (5th Cir. 1983) (stating that the step transaction doctrine is a corollary to substance over form).

824. *See Southgate Master Fund, L.L.C.*, 659 F.3d at 479.

825. Webb v. Comm'r, 394 F.2d 366 (5th Cir. 1968).

826. *Id.* at 367–68.

827. *Id.* at 368–69.

828. *Id.*

829. *Id.*

830. *Id.* at 370.

831. *Id.* at 371.

832. *Id.* at 367.

What makes *Webb* worthy of mention is that it has been cited hundreds of times.[833] Later courts appear drawn to the Goldberg language; most commonly cited is the following passage: "We can indulge in no presumption to penalize even an errant taxpayer, but we do not believe that this tutelage interdicts us to forego ineluctable inferences and common sense."[834]

Later cases also cite a common legal point from *Webb*, which Goldberg described in the following two paragraphs:

> As this Court previously held, there are no adequate records from which the Plaintiffs' income can be calculated because the Plaintiffs dealt strictly in cash, and the records (the cash register receipts) have been destroyed. As the Fifth Circuit has stated, while the absence of adequate records "does not give the Commissioner carte blanche for imposing Draconian absolutes," such absence does weaken any critique of the Commissioner's methodology. Indirect methods are by their very nature estimates and courts reject the notion that the IRS should have checked their calculations by other methods.
>
> Arithmetic precision was originally and exclusively in the hands of the [taxpayers]. As in Webb, the [taxpayers] did not have to add or subtract; rather they had simply to keep papers and data for others to do the work. The consequences of this duty are no less applicable in a case where Plaintiffs have paid the tax and now seek a refund. Having defaulted in this duty, Plaintiffs cannot, in essence, "frustrate the Commissioner's reasonable attempts by compelling investigation and recomputation under every means of income determination."[835]

Later cases also cite other Goldberg statements:

(1) Taxpayers who fail to keep adequate records are in no position to be "hypercritical" of the Service's labor.[836]
(2) Where a taxpayer's books and records are incomplete or do not accurately reflect income, the Service is authorized to use whatever

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833. *See, e.g.*, Yoon v. Comm'r, 135 F.3d 1007 (5th Cir. 1998). As of August 1, 2011, Westlaw reported that 641 cases have cited *Webb*, in addition to administrative decisions and secondary materials. *Citing references to* Webb v. Comm'r, *394 F.2d 366 (5th Cir. 1968)*, WESTLAW NEXT, https://a.next.westlaw.com (search "394 F.2d 366"; then click the "Citing References" tab) (last visited Aug. 1, 2011).

834. *E.g.*, Loftin & Woodard, Inc. v. United States, 577 F.2d 1206, 1235 (5th Cir. 1978) (quoting *Webb*, 394 F.2d at 380).

835. Kikalos v. United States, 313 F. Supp. 2d 876, 878–79 (N.D. Ind. 2003) (citations omitted) (quoting *Webb*, 394 F.2d at 373), *rev'd and remanded by* 408 F.3d 900 (7th Cir. 2005); *see, e.g.*, Erickson v. Comm'r, 937 F.2d 1548 (10th Cir. 1991); Bradford v. Comm'r, 796 F.2d 303 (9th Cir. 1986); Beck v. Comm'r, 82 T.C.M. (CCH) 738 (2001).

836. *See, e.g.*, Barragan v. Comm'r, 65 T.C.M. (CCH) 2091, 2091 (1993) (citing *Webb*, 394 F.2d at 372), *aff'd without published opinion*, 69 F.3d 543 (9th Cir. 1995).

method it deems appropriate to reconstruct the taxpayer's income.[837]

(3) The requisite finding for the Service to impose a fraud penalty, Goldberg wrote, requires that the Service "prove affirmatively by clear and convincing evidence actual and intentional wrongdoing on the part of the [taxpayer] with a specific intent to evade the tax,"[838] and a taxpayer cannot be held to have committed civil tax fraud when the understatement of tax results from inadvertence, negligence, or honest errors.[839] Goldberg wrote in *Webb* that in proving fraud, the Service must make its proof by clear and convincing evidence, but this burden can be discharged by circumstantial evidence because "[t]ax evaders seldom leave tracks and therefore circumstances can be convincing."[840]

B. Lee v. United States

The case of *Lee v. United States* concerns the proof required by the Service to prove fraud in the understatement of income.[841] In reversing the district court, Goldberg wrote of the effect of the district court misconceiving the effect of some evidence.[842] The Service was barred by limitations from asserting a claim for understatement of income against the taxpayer, unless the Service could prove fraud.[843] The Service used an indirect method to prove fraud—the net worth method.[844] In its proof, the Service made errors: (1) computing cash on hand, (2) overstating inventory, and (3) failing to show taxable character of income.[845] In reversing the district court, Goldberg held that a fraud penalty could be present even in the face of some Service computational error.[846] Goldberg wrote:

> The general misapprehension of evidence we have here discerned was the giving of almost controlling weight to the discovery of errors in the government's computations. The presence of accounting or mathematical errors should lead to readjustment of the figures but should not lead ipso facto to the conclusion that the government cannot prevail. Failure to

837. *Webb*, 394 F.2d at 371–72; *see* I.R.C. § 446(b) (2012).

838. *Webb*, 394 F.2d at 378 (quoting Eagle v. Comm'r, 242 F.2d 635, 637 (5th Cir. 1957)) (internal quotation marks omitted).

839. *Id.* at 377.

840. *Id.* at 378, 380; *e.g.*, Candela v. United States, No. 76-789, 1979 WL 1524, at *5 (E.D. Wis. Dec. 27, 1979), *rev'd*, 635 F.2d 1272 (7th Cir. 1980).

841. Lee v. United States, 466 F.2d 11, 14 (5th Cir. 1972) (reversing an unpublished district court opinion).

842. *Id.* at 15–16.

843. *Id.* at 14.

844. *Id.* at 15.

845. *Id.* at 14.

846. *Id.* at 16–17.

> prove the full amount of unreported income alleged to exist does not preclude a finding that there may be a lesser amount of unreported income, which might support an inference of fraud by clear and convincing evidence.[847]

Further, Goldberg said that the district court erred in seeking mathematical inexactitude in a net worth computation:

> Although the government's burden is a heavy one, it is not a millstone of impossible carriage. The extent of the understatement of income may be a mystery, but this is not synonymous with insolvability. We believe the trial court donned the robes of a mathematician and operated under a mistaken theory that he had to find computerized certainty in the understatement before he could conclude fraud. While he must discern a plot, he need not reconstruct every line of the scenario.[848]

In remanding the case, Goldberg instructed the lower court to reconsider the evidence:

> On remand the learned trial judge should not expect the government to weigh with exactitude every stone in the lode or account for every penny in the hoard. Substantiality, albeit imprecise, in the understatement of income is sufficient to carry the day. We remand this case to allow the court below to reconsider the evidence in the light of the directions herein contained.[849]

Goldberg's decision in *Lee* continues to be cited in current times.[850] The combination of the ruling that the Service does not have to present mathematical precision in offering a fraud net worth case and his rhetorical style assured that his opinion would continue to draw attention, even in 2012, some forty years later.[851]

XV. WAIVERS OF LIMITATIONS PERIODS

A. United States v. Newman

In *United States v. Newman*, the issue was whether a waiver of limitations agreement between the Service and the taxpayer replaced the general six-year limitations for collection (which is now ten years).[852]

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847. *Id.*
848. *Id.* at 17.
849. *Id.*
850. *E.g.*, Canton v. Comm'r, 103 T.C.M. (CCH) 1488, 1490 (2012).
851. *Id.*
852. United States v. Newman, 405 F.2d 189, 191 (5th Cir. 1968).

Judge Goldberg's opinion affirmed the lower court in barring the Service's collection action for limitations reasons.[853]

The time periods in the case were surprisingly long, even by the Service's standards.[854] The first assessment was on November 21, 1945.[855] Some twenty-one years later, the Service filed suit to collect this tax.[856] Indeed, Judge Goldberg's description of the extended period of the case captures the point: "The government through homogenization of the statute of limitations, waivers, and offers in compromise would give itself twenty-one years to file this suit to collect these taxes. In so doing, the government has given itself a limitations period of truly Rip Van Winkle proportions."[857]

There were a series of assessments, but Goldberg used only one assessment to illustrate the issue in the case.[858]

- November 21, 1945: Assessment;
- November 12, 1946: Offer in compromise;
- September 17, 1947: Rejection of offer in compromise;
- May 2, 1951: Taxpayer signed a waiver agreement extending the limitations period to December 31, 1955;
- June 23, 1953: Taxpayer made another offer in compromise;
- June 9, 1954: Offer in compromise rejected;
- July 23, 1954: Taxpayer made third offer in compromise;
- December 31, 1955: Expiration of limitation period, per waiver;
- June 6, 1961: Another offer in compromise (rejected July 14, 1961);
- June 7, 1962: Another offer in compromise (rejected April 14, 1964);
- January 20, 1966: Suit filed.[859]

The issue in the case involved the interrelationship between the waiver agreement to a specific date, December 31, 1955, and the offers in compromise, which suspended the limitations period.[860]

Section 6502 (as applicable in the case) provided:

> (a) *Length of Period*.- Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
> (1) within 6 years after the assessment of the tax, or

853. *Id.* at 200.
854. *See id.* at 192.
855. *Id.*
856. *Id.*
857. *Id.* at 190.
858. *Id.* at 191.
859. *Id.* at 192.
860. *Id.* at 198–200.

> (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).[861]

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.[862]

Judge Goldberg found that subsections 6502(a)(1) and (2) were mutually exclusive alternatives; thus, when the parties executed an agreement, the six-year period "became functus officio and ceased to have any relevance in the determination of the timeliness of the government's action."[863]

Thus, Goldberg held that the offers in compromise suspended the limitations period (whether the six-year period or the date certain period in the waiver).[864] At the point when the effect of the suspension introduced by the offer in compromise ends, which is one year after the offer is rejected, then reference is made to the date certain of the wavier.[865] As Judge Goldberg described, "[i]f that date has not arrived, the government's cause of action is still viable; but if the *date certain* has passed, the government's cause of action is barred by limitations."[866]

The arguments the government presented included fears of causing havoc within the Service's procedures, but Judge Goldberg responded in his usual style:

> Limitations statutes, however, are not cadenced to paper tidiness and litigant convenience. Time dulls memories, evidence and testimony become unavailable, and death ultimately comes to the assertion of rights as it does to all things human. . . . Furthermore, the computation method which the government asks us to embrace is as perplexing as any yet suggested and is far more intricate than that which we adopt here. Thus, even if the fears of the government be pertinent, we do not believe that we are making it more difficult for the Internal Revenue Service to focus its watchful eye.[867]

The Service responded to *Newman* by changing its forms.[868] In General Counsel Memorandum 36926, the Service indicated:

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861. *Id.* at 197 n.7.
862. *Id.*
863. *Id.* at 197–98.
864. *Id.* at 199.
865. *Id.*
866. *Id.*
867. *Id.* at 200.
868. I.R.S. Gen. Couns. Mem. 36,926 (Nov. 15, 1976).

> An analysis of *Newman v. United States* . . . has, however, lead [sic] us to the conclusion that the language of Form 900 should be altered in order to parallel the language contained in Form 872. The Fifth Circuit in *Newman* interpreted the interplay between a tax collection waiver, the language of which was substantially similar to that utilized in the present Form 900, and an offer in compromise. The court in *Newman* concluded that if a taxpayer and the Service have agreed by the execution of Form 900 to extend the statute to a specific date, that date is controlling and the Service cannot use the period the offer was under consideration to extend the statute while the collection waiver is effective. An Action on Decision, dated March 10, 1969, stated that the Service will follow the Fifth Circuit's guidelines in *Newman* . . . [and] the *Newman* A.O.D. will be revised.
>
> . . . .
>
> In any event, whether or not the court in *Newman* was correct . . . we recommend that the following language be added to the Form 900 in order to avoid the problems encountered in *Newman*, since if any question about the effect of the Form 900 were to arise again, undoubtedly a court would look to the specific language of the form. We suggest adding:
>
> > except that if taxpayer(s) makes an offer in compromise on or before that date, then the time for making any collection shall be further extended beyond that date by the number of days the offer is pending and for one year thereafter.
>
> We believe that the above language would clarify the Service's position on this matter and properly represent the effect of Treas. Reg. § 301.7122-1(f) on *Code* § 6502(a)(2).[869]

Perhaps Judge Goldberg smiled knowing that his opinion led the Service to create a tax form to deal with it.

XVI. SALES, EXCHANGES & BASIS

A. Citizen's National Bank of Waco v. United States

The issue confronting Judge Goldberg in his 1976 opinion in *Citizen's Nat'l Bank of Waco v. United States* was whether the holding period for property could be tacked (i.e., added-on) in a part-gift, part-sale transaction.[870] Under § 1223, the holding period for an asset includes the time the taxpayer held other property or the time another taxpayer held the same or other property.[871] Such a tacking of holding periods is most commonly allowed when the property is received in a non-recognition transaction (e.g., a reorganization exchange or a gift).[872]

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869. *Id.*
870. Citizen's Nat'l Bank of Waco v. United States, 417 F.2d 675, 676 (5th Cir. 1969).
871. *Id.* at 677.
872. *Id.* at 678.

Section 1223(2) provides that if the transferee's basis is determined in whole or in part by reference to the basis of the prior holder, such as in a gift, the holding period of the prior holder may be added to the holding period of the transferee.[873] For property acquired by gift, the adjusted basis in the hands of the donee is determined by reference to the basis of the donor, increased by gain or decreased by loss, as recognized by the donor upon transfer of property.[874] Section 1223(2) refers to "the same basis in whole or in part" as that of the transferor; this language embraces situations when a donor's basis is increased under § 1015(d) to take account of the gift tax paid on the transfer, as well as a basis that has been adjusted during the donee's ownership by capital outlays or depreciation deductions.[875]

The basic transaction in the case involved stock in an investment company that had been pledged to secure a loan of $500,000.[876] The owners created trusts for their children and transferred the stock to the trust.[877] Within six months, the investment company was liquidated and company assets were distributed to the trust.[878] The trustees reported the gain on the liquidation of the company as a long-term capital gain, with the stock shown to have been acquired on the date the stock was acquired by the settlors of the trust.[879]

The Service asserted short-term capital gain using Regulation § 1.1015-4, which provided "that the transferee's basis in property acquired in a part gift part sale transaction shall be the greater of (1) the amount paid by the transferee or (2) the transferor's adjusted basis."[880] The service argued that referring to the donor's basis does not make the final determination of the basis, thus, § 1223(2) does not apply; therefore, there is no tacking of holding period in the donee's hands.[881] Facing Judge Goldberg was whether Regulation § 1.1015-4 was valid.[882]

Despite the fact that a part-gift, part-sale transaction determines the basis by reference to the donor's basis increased by the gain on the transaction attributable to the part of the transaction involving a part-sale,[883] the subject regulation determined basis by reference to the amount paid for the stock, if greater than donor's basis.[884] Goldberg closely examined the effect of the regulation insofar as the basis determination was concerned

873. I.R.C. § 1223(2) (2012).
874. I.R.C. § 1015 (2012).
875. I.R.C. § 1223(2).
876. *Citizen's Nat'l Bank of Waco*, 417 F.2d at 676.
877. *Id.*
878. *Id.*
879. *Id.*
880. *Id.* at 678.
881. *Id.*
882. *See id.* at 678–79.
883. I.R.C. § 1015(b) (2012).
884. *Citizen's Nat'l Bank of Waco*, 417 F.2d at 679.

and could not see a difference from the statutory wording.[885] But Goldberg found an important difference when tacking was concerned.[886] The regulations eliminated tacking in a part-gift, part-sale transaction, which Goldberg felt exceeded statutory authority.[887] In his words:

> Since both the gift and the sale subsections of § 1015 employ words which would permit tacking, and since neither subsection makes any distinction in this regard between a transferee who pays more than his grantor's basis and one who does not, we think that such a distinction in the regulation pertaining to a part gift part sale transaction is unreasonable and inconsistent with the statute. We therefore hold that the trustee in the instant case is entitled to tack the settlors' holding periods to that of the trusts and that to the extent Treas. []Reg. 1.1015-4 would prevent such it is invalid.[888]

Goldberg made clear that his opinion was limited to the effect of the regulation on tacking rights, and not the part of the regulation concerning basis determination, stating, "we would be less than candid if we did not indicate at this point that after our brief trip into the labyrinth of the Treasury Regulations we emerged with grave doubts concerning the validity of the basis determination method prescribed by 1.1015-4."[889]

Not surprisingly, the Service objected to Goldberg having invalidated one of its regulations, but the Service maintained it would continue to apply the invalidated regulation.[890] For the Service to ignore a circuit court opinion is not an everyday occurrence. The Service stated that the Fifth Circuit would not have tacked the holding period if the transfer had not been in trust.[891] The Service's statement does not find any support in Goldberg's opinion.

The effect of *Citizen's National Bank of Waco* is surprisingly limited, considering Goldberg's decision invalidated a Treasury regulation.[892] Most often, the case is cited for the proposition that a "[r]egulation which is in conflict with . . . the statute is, to the extent of the conflict[,] . . . invalid."[893]

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885. *Id.*

886. *Id.* at 680.

887. *Id.*

888. *Id.*

889. *Id.* The sole case relied upon for support was *Turner v. Commissioner*. Turner v. Comm'r, 49 T.C. 356 (1968), *aff'd* Comm'r v. Turner, 410 F.2d 752 (6th Cir. 1969), *nonacq.* 1971-2 C.B. 1.

890. I.R.S. Tech. Advice Mem. 7752001 (Aug. 25, 1977).

891. *Id.*

892. *Citizen's Nat'l Bank of Waco*, 417 F.2d at 680.

893. *Id.* at 679 (quoting Scofield v. Lewis, 251 F.2d 128, 132 (5th Cir. 1958)) (internal quotation marks omitted); *e.g.*, Tutor-Saliba Corp. v. Comm'r, 115 T.C. 1, 8 (2000); Minahan v. Comm'r, 88 T.C. 492, 504 (1987).

No other circuit court opinion appears citing Goldberg's opinion.[894] The regulations remained in effect, even after the decision.[895]

XVII. TAX ACCOUNTING

A. Grogan v. United States*: Section 481*

The 1973 decision of *Grogan v. United States* involved adjustments to income arising from a change in accounting period, particularly when a partnership is formed.[896] The statute at issue was § 481, which basically provided that no item should be omitted or duplicated as a result of a change of method of accounting or reporting income.[897] For items on hand when the 1954 Code was enacted, § 481 did not require inclusion if the taxpayer did not initiate a change of accounting method after 1954.[898]

Goldberg's decision reversed the district court and determined that the partnership was not a new entity distinct from the sole proprietorship previously maintained and, therefore, it was able to exclude the pre-1954 amounts from income.[899] Characteristically, Goldberg looked for legislative purpose and found that "the policies implicit in the statute are better served by allowing taxpayer to exclude from consideration in the year of change those partnership inventories and receivables that were previously owned by taxpayer and that were on hand before the statute took effect in 1954."[900]

The taxpayer in the case was a chicken farmer who used the cash method of accounting.[901] On December 31, 1954, the taxpayer had accounts receivable totaling $86,957 for poultry, $172,545 for feed and chickens furnished to contract growers, and $2,000 of feed inventory.[902] In 1962, taxpayer formed a partnership with his brother, in which they served as the trustee of some trusts for taxpayer's children.[903] The Service later invoked § 481(a) to include all receivables, even those existing on December 31, 1954, in income as part of a required change of accounting method to the accrual method.[904]

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894. *Citing References* to Citizen's Nat'l Bank of Waco v. United States *417 F.2d 675 (5th Cir. 1969)*, WESTLAW NEXT, http://westlawnext.com (Search "417 F.2d 675"; then follow "Citing References" tab and narrow by "Cases").

895. *Citizen's Nat'l Bank of Waco*, 417 F.2d at 680.

896. Grogan v. United States, 475 F.2d 15 (5th Cir. 1973).

897. I.R.C. § 481 (2012); *Grogan*, 475 F.2d at 17.

898. *Grogan*, 475 F.2d at 17.

899. *Id*. at 16, 21.

900. *Id.* at 16.

901. *Id.* at 18.

902. *Id.*

903. *Id.*

904. *Id.*

Goldberg considered the legislative policy of § 481 to include preventing items from not being taxed incident to a change in accounting method, but not for pre-1954 amounts when a taxpayer owned the amounts before 1954 and did not initiate the change.[905] Forming a partnership was a change requiring inclusion of receivables into income.[906]

Of course, the opportunity facing Goldberg to write a tax opinion involving a chicken farmer was also too much to let pass, considering his fondness for all things agricultural:

> In wrestling with this problem, the Congress knew that a cut-off date would involve a windfall. It may not have measured meteorologically the statute's tornadic impact in every case, and it may not have forecast this exact chicken-farmer case. But the Congressional scissor-hold that threw out pre-1954 inventories and receivables was not a foul throw—it was a permissible pinning down, openly seen and openly arrived at by the Congress, of all such future amounts. Congress knew that there were golden eggs that it would neither count nor recoup, but in order to pluck the feathers of varying hues from all future pullets with equity when accounting changes were made, either voluntarily or forced, Congress decided that a few Grogans would be able to feather their nests. A temporary disequilibrium was to be permitted in order to establish a future certainty and tranquility when the winds of accounting changes swept the tax atmosphere.[907]

Goldberg reversed the district court and held the taxpayer should not be taxed on the receivables existing before the 1954 Code was enacted and, thus, grounded his decision on legislative intent.[908]

XVIII. NAKED ASSESSMENTS AND THE COMMISSIONER'S DETERMINATION OF INCOME

Two of Judge Goldberg's decisions in 1977 and 1991 concern the Service's determination that a taxpayer has income based on limited information.[909] These cases are important because they reign in the Service from the outer reaches of naked assessments.[910] The Service is required to determine a tax deficiency before asserting one against a taxpayer.[911] After determining a deficiency, the Service is required to notify the taxpayer of the determined deficiency and the taxpayer has the right to then petition the

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905. *Id.* at 17.
906. *Id.* at 20–21 (footnote omitted).
907. *Id*. at 21.
908. *Id.*
909. Portillo v. Comm'r, 932 F.2d 1128 (5th Cir. 1991); Carson v. United States, 560 F.2d 693 (5th Cir. 1977).
910. *Portillo*, 932 F.2d at 1135–36; *Carson*, 560 F.2d at 699–700.
911. I.R.C. § 6212(a) (2012).

Tax Court to redetermine the deficiency.[912] When the Service determines a deficiency, a form of due process is observed in that the Service specifies for the taxpayer the amount of the deficiency or provides sufficient information necessary to compute the deficiency.[913] The deficiency determination the Service asserts in the notice of deficiency is presumed to be correct, and the taxpayer has the burden of proving it to be wrong.[914] To quote Judge Goldberg, "Remarkably few cases have considered what requirements must be met before the I.R.S. can say that it has made a 'determination.'"[915] In both of these cases, separated by fourteen years, Goldberg confronts the outer limits of the Service's determinations.[916]

A. Carson v. United States

In *Carson v. United States*, the issue involved the excise tax on wagering income.[917] In the decision, Goldberg, writing for the Fifth Circuit, stated that the Service must "provide some predicate evidence connecting the taxpayer to the charged activity if effect is to be given [to the] presumption of correctness."[918] Goldberg further noted that without that evidentiary foundation, minimal though it may be, an assessment—appropriately called a "'naked' assessment"—may not be supported even when the taxpayer is silent.[919] He stated that "[m]ore specifically, the presumption of correctness notwithstanding, a wagering excise tax assessment cannot stand without some evidence tending to support an inference that the taxpayer engaged in gambling activities during the period assessed."[920]

The following passage is among the most oft-quoted of all Goldberg expressions.[921] He wrote that the Service must provide minimal evidence of the activity to which the tax determination relates:

> Neither tax collection in general nor wagering activities in particular, however, have ever been thought wholly to excuse the government from providing some factual foundation for its assessments. The tax collector's presumption of correctness has a herculean muscularity of Goliathlike

912. I.R.C. §§ 6212(a), 6213(a) (2012).
913. I.R.C. § 6212(a).
914. Welch v. Helvering, 290 U.S. 111, 115–16 (1933).
915. *Portillo*, 932 F.2d at 1132 (*citing* Scar v. Comm'r, 814 F.2d 1363 (9th Cir. 1987)) (representing, perhaps, the leading case finding that the Service failed to make a determination based upon taxpayer's tax return).
916. *See infra* text accompanying Parts XVIII.A–B.
917. Carson v. United States, 560 F.2d 693, 696 (5th Cir. 1977).
918. *Id.* at 697.
919. *Id.* at 696 (quoting United States v. Janis, 428 U.S. 433, 441 (1976)).
920. *Id.* (quoting Gerado v. Comm'r, 552 F.2d 549, 554 (3d Cir. 1977)).
921. *Id.*

> reach, but we strike an Achilles' heel when we find no muscles, no tendons, no ligaments of fact.[922]

Law enforcement officials raided the taxpayer on January 15, 1972, and seized betting slips, which were subsequently turned over to the Service.[923] Based on the seized slips, the Service projected a volume of wagering activity and assessed the wagering tax for two periods, August 1971–January 1972 and August 1970–December 1970 (later expanded to January 1971).[924] Proof at trial focused exclusively on the taxpayer's gambling activity for the 1971–1972 period.[925] There was virtually no proof of gambling activity for the 1970–1971 period.[926]

Guided by two cases—one in the Second Circuit and one in the Third Circuit[927]—Goldberg invalidated the assessment for the 1970–1971 tax period because of the absence of evidence and wrote that "[u]nder the guidelines set forth in *Gerardo* and *Pizzarello*, the assessment in the case at bar for August 1970–January 1971 must stand condemned. The record is utterly lacking in evidence that would support an inference the taxpayer operated a gambling business during those months."[928]

The Service relied upon its presumption of correctness, which Goldberg rejected, stating instead that "[s]uch a position, which would support the most arbitrary of assessments so long as the taxpayer found himself unable to prove a negative, frequently difficult in quite innocent circumstances, does not become the government's agents, and we readily reject it."[929]

For the 1971–1972 tax period, Goldberg found the Service's proof sufficient to support the assessment.[930]

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922. *Id.*

923. *Id.* at 694.

924. *Id.*

925. *See id.* at 694–95.

926. *See id.* at 695.

927. Gerardo v. Comm'r, 552 F.2d 549, 554 (3d Cir. 1977); Pizzarello v. United States, 408 F.2d 579, 583 (2d Cir. 1969).

928. *Carson*, 560 F.2d at 697.

929. *Id.* at 698.

930. *See id.* 698–99. In rejecting one taxpayer argument that betting slips for one week in January were equally divided between basketball and football and should not extend to August because that was the beginning of football season, Goldberg wrote:

> We may take notice of the fact that Texans have long regarded basketball, like weightlifting and education, primarily as something with which to entertain football players during the off-season, certainly not as a legitimate object of attention while titans battle on the gridiron. Nevertheless, a proper theory does support the government's assessment. The $36,000 of wagers reflected in the week's records seized in January may be viewed as a whole, a week's bets divided quite naturally in January almost evenly between football and basketball. That volume of betting could well have remained constant throughout the assessed period, though at the beginning the bets would have been predominantly on football games.

B. Portillo v. Commissioner

In contrast to *Carson*, which involved gambling income, the issue in *Portillo v. Commissioner* involved income from legal sources.[931] Goldberg's decision held that the deficiency determination was arbitrary and erroneous because the Service failed to substantiate that the taxpayer received the unreported income shown on the Form 1099.[932] The Service assessed a deficiency based solely on a Form 1099, even when the third party who submitted the Form 1099 could not verify the payments to the taxpayer reported on the form.[933]

On his 1984 joint income tax return, Portillo reported gross receipts from Navarro, a contractor, for services rendered.[934] For 1984, Navarro filed a Form 1099 reporting payments to Portillo.[935] During 1984, Portillo was a self-employed painting subcontractor who conducted his affairs in cash.[936] He contended that he prepared the 1984 income tax return from his records, but that his records were incomplete or missing.[937] The Service determined that Portillo failed to report income on his 1984 income tax return.[938] "Although Portillo acknowledged that he inadvertently neglected to report" some income in the form of checks from Navarro, Portillo denied receiving additional cash income from Navarro as the Service had determined and the Form 1099 had shown.[939]

At trial, Navarro stated that Portillo performed work for him in 1984.[940] Navarro said that he computed the amount he reported as paid to Portillo on a Form 1099 in 1984 from his records but that they had been discarded.[941] Navarro also testified that although he made some payments to Portillo by check, at the request of Portillo, he made additional payments in cash.[942] Evidence was introduced at trial that the examination report reflected the auditor's belief that Portillo was paid less than the amount shown on the Form 1099.[943]

Id. at 699–700. Because the Service had sufficient evidence to tie the taxpayer to gambling during the later period, the taxpayer bore the burden of producing refuting evidence, which the taxpayer failed to do. *See id.*

931. *See* Portillo v. Comm'r, 932 F.2d 1128, 1130–31 (5th Cir. 1991).
932. *Id.* at 1132–34.
933. *Id.* at 1133–34.
934. *Id.* at 1130–31.
935. *Id.* at 1131.
936. *Id.* at 1130.
937. *Id.* at 1130–31.
938. *Id.* at 1131.
939. *Id.*
940. *See id.* at 1130–31.
941. *Id.* at 1131.
942. *Id.*
943. *Id.*

The Tax Court found Navarro's testimony reliable and credible and Portillo's contention that he received no additional cash payments from Navarro unpersuasive.[944] Thus, the Tax Court concluded that Portillo had failed to meet his burden of proof on the issue and sustained the respondent.[945]

The taxpayer appealed, and the Fifth Circuit reversed.[946] Judge Goldberg stated that the Service merely matched Navarro's Form 1099 with Portillo's Form 1040, arbitrarily decided to attribute veracity to Navarro's Form, and assumed that Portillo's Form 1040 was false.[947] Goldberg also stated that, in this situation, the Service had some duty to investigate Navarro's "bald assertion" of payment and to determine if books, receipts, or other records supported Navarro's position.[948] The Fifth Circuit found that the Service's determination that Portillo had received unreported income was, in effect, naked and lacked factual foundation.[949]

Goldberg's opinion held that the presumption of correctness did not apply to the statutory notice.[950] The Service's flaw was that "the Commissioner failed to substantiate, by any other means, such as analyzing Portillo's cash expenditures or his source and application of funds, [the] charge that Portillo received unreported income."[951] Concluding that the statutory notice was clearly arbitrary and erroneous, Goldberg reversed the Tax Court's judgment regarding unreported income and remanded for the limited purpose of recalculating the net tax, interest, and penalties due from Portillo in accordance with his opinion.[952]

The most important aspect of Goldberg's decision in *Portillo* is extending the *Carson* test to legal income.[953] Goldberg started with the *Carson* test and then went further, specifically ruling that the requirements set forth by *Carson* apply "whether the unreported income was allegedly obtained legally or illegally."[954]

The Service vigorously disagreed with *Portillo*.[955] Although the Service initially decided that "it is our position that Portillo should be narrowly confined to Form-1099 situations," it later decided to reject *Portillo*.[956]

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944. *See id.* at 1130–31.
945. *Id.* at 1131.
946. *Id.* at 1135.
947. *Id.* at 1134.
948. *Id.*
949. *Id.*
950. *Id.*
951. *Id.*
952. *Id.* at 1135.
953. *See id.* at 1133.
954. *Id.*
955. F.S.A. 1992 FSA Lexis 198 (Aug. 6, 1992).
956. *Id.*

> The Service does not agree with the holding of the Fifth Circuit in *Portillo*. It will continue to rely on information returns in generating notices of deficiency and will seek to limit the application of the *Portillo* reasoning to factually identical cases in the Fifth Circuit, as discussed below. In general, the Service opposes any attempt to shift the burden of proof.[957]

In 1996, Congress added § 6201(d), which provides that when a taxpayer challenges a deficiency based solely on third party information returns, the Service "shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return."[958] According to Professor Bryan Camp, Congress enacted § 6201(d) after the Service refused to follow *Portillo* and subsequent circuit court decisions came to similar conclusions.[959]

XIX. ESTATE TAX

A. Citizens & Southern National Bank v. United States

In *Citizens & Southern National Bank v. United States*,[960] the case arose out of a will drafted before decedent's marriage.[961] The decedent left a surviving spouse and a child by a prior marriage.[962] The will did not mention his marriage and, as a result, under Georgia law, the decedent's marriage to his surviving spouse was revoked as a matter of law.[963] State law, in effect, created a partial intestate succession with the only son inheriting, subject only to a one-third life estate in the surviving spouse, or alternatively, the surviving spouse electing a dower interest (an undivided one-half interest).[964] The surviving spouse and only son settled their differences in an agreement in which the spouse agreed to receive a cash amount in exchange for her election rights.[965] The widow had informally elected a dower interest.[966] The estate took a marital deduction for the dower interest of the surviving spouse.[967]

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957. Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 262 n.150 (2009) (quoting Litigation Guideline Memorandum, The Presumption of Correctness in Cases Where the Service Relies in Whole or in Part on an Information Return as Evidence of an Omission of Income, 1994 LGM LEXIS 10 (I.R.S. LGM 1994)) (internal quotation marks omitted).

958. I.R.C. § 6201(d) (2012).

959. Camp, *supra* note 957, at 262.

960. Citizens & S. Nat'l Bank v. United States, 451 F.2d 221 (5th Cir. 1971).

961. *Id.*

962. *Id.* at 223.

963. *Id.*

964. *Id.*

965. *Id.*

966. *Id.*

967. *Id.*

The issue in the case was the amount of the marital deduction.[968] The estate claimed that the widow took the dower interest and then sold the interest to the son for the cash amount.[969] The Service argued that the maximum marital deduction was the cash amount.[970] Goldberg, writing for the court, upheld the Service's determination.[971] Although affirming the district court, Goldberg relied upon a different statutory provision than used by the lower court.[972]

The district court adopted the Service's argument that the surviving spouse had, in effect, disclaimed any interest in the estate greater than the cash amount.[973] Goldberg instead considered the "will contest" regulation, which provided:

> If as a result of a controversy involving the decedent's will, or involving any bequest or devise thereunder, his surviving spouse assigns or surrenders a property interest in settlement of the controversy, the interest so assigned or surrendered is not considered as having "passed from the decedent to his surviving spouse."[974]

Ever the pragmatist, Goldberg looked past the form to the substance of the settlement agreement.[975] On its face, the widow had agreed to transfer to her stepson her dower rights or interest in the Georgia property in exchange for the cash amount.[976] But Goldberg thought the form of the agreement was less important than the substance.[977] What the agreement did, in substance, was relinquish all of her rights in the estate.[978] Goldberg wrote, "Agreements generally take on many hues and colors, but our task is not to litmus those colors, but rather to determine that the combination of words in their general coloration mean settlement in modern parlance in terms of the intention and purpose of the marital deduction."[979]

Goldberg was unwilling to let the contract language control taxation.[980] Even though the widow conveyed her rights to her stepson, Goldberg looked for the essence of the agreement.[981] In his words:

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968. *Id.*
969. *Id.* at 224.
970. *Id.*
971. *Id.* at 228.
972. *Id.* at 227–28.
973. I.R.C. § 2056(d)(1) (2012); *Citizens & S. Nat'l Bank*, 451 F.2d at 224.
974. *Citizens & S. Nat'l Bank*, 451 F.2d at 224–25 (quoting Treas. Reg. § 20.2056(e)–2(d)(1) (1958)).
975. *Id.* at 225–26.
976. *Id.* at 223.
977. *Id.* at 225.
978. *Id.*
979. *Id.*
980. *Id.*
981. *Id.*

> The fact that the instrument involved in this litigation is broad gauged cannot be controlling. Settlement language employed by lawyers is designed to be all encompassing, releasing substantive rights in variegated capacities which are often fanciful and fantastic. Lawyers' caution in devising instruments of such broad coverage does not write the tax law, and we conclude that the existence of words of conveyance does nothing to alter the essential character of the agreement as a settlement of the decedent's estate.[982]

A requirement of the pertinent regulation is that a controversy exist.[983] Goldberg interpreted this requirement liberally, believing a controversy exists when substantially adverse parties, represented by counsel, settle their differences.[984] In Goldberg's words, "We do not think, however, that the regulation encompasses only those settlements achieved at the end of an Armageddon. It is clear in this case that the respective interests of the widow and her stepson were substantially adverse."[985]

The will contest regulations also require that the settlement concern decedent's will.[986] The settlement agreement concerned the widow's intestate share, which was, arguably, outside of the decedent's will, but Goldberg interpreted the requirement strictly.[987] Relying on an earlier Second Circuit case that interpreted a settlement agreement regarding a will controversy between a widow and her stepdaughters, Goldberg found the settlement agreement in the case to amount to a settlement of a will contest.[988] In Goldberg's way of thinking:

> For purposes of the regulation, we are at a loss to discern why a settlement of a controversy involving an estate, a portion of which passes by intestate succession, should be treated any differently than a settlement concerning only property which has been disposed of by means of a testamentary document. We think that the Second Circuit's broad interpretation of the regulation is entirely proper and we conclude that because the settlement agreement in the instant case "resolv[ed] a controversy over the decedent's property," the regulation requires that the property surrendered by the widow not be considered as having passed to her from the decedent.[989]

Courts have mostly followed the *Citizens & Southern National Bank* decision.

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982. *Id.*
983. *Id.*
984. *Id.* at 225–26.
985. *Id.*
986. *Id.* at 226.
987. *Id.*
988. *Id.*; *see* U.S. Trust Co. of N.Y. v. Comm'r, 321 F.2d 908, 911 (2d Cir. 1963).
989. *Citizens & S. Nat'l Bank*, 451 F.2d at 227 (alteration in original) (quoting *U.S. Trust Co. of N.Y.*, 321 F.2d at 911).

B. Bel v. United States

In *Bel v. United States*, decided a month after *Citizens & Southern National Bank*—by the same panel—Goldberg confronted the transfer of an accidental death policy.[990] Many refer to Judge Goldberg's *Bel* decision as a seminal case.[991] Goldberg held that the insured's gross estate should include all proceeds of the most recent one-year renewal of a travel accident policy.[992]

In *Bel*, the decedent purchased a life insurance policy on himself and paid the premiums out of community funds.[993] The decedent designated his three children as owners and beneficiaries of the policy proceeds.[994] The executors of the decedent's estate did not include the policy proceeds in the estate tax return of the decedent's gross estate, and the Service assessed a deficiency.[995] The estate argued that because Congress specifically rejected a premium payment test for determining whether a decedent's gross estate includes insurance policy proceeds under § 2042, a premium payment test should not determine whether a decedent's gross estate includes a transfer under § 2035(a).[996] Goldberg disagreed, finding that the scope of transfers in the decedent's gross estate under § 2042 and § 2035(a) were not equivalent:

> In arguing that this court should affirm the lower court's ruling that no part of the insurance proceeds is includable in the decedent's gross estate, the taxpayers would have us apply a section of the Code dealing with lemons (section 2042), to one pertaining to oranges (section 2035[a]). Section 2042, which deals strictly with life insurance, provides, *inter alia*, that a decedent's gross estate shall include the value of the proceeds of life insurance policies on which the decedent possessed at his death any of the incidents of ownership. However, section 2035[a] provides that *all property* which is transferred in contemplation of death is includable in a decedent's gross estate. We do not think that [sections 2042 and 2035(a)] were designed or conceived to be read in *pari materia*. They came into being at different times, their respective targets were diverse, and we perceive no philosophic confluence to twin them.[997]

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990. Bel v. United States, 452 F.2d 683, 686 (5th Cir. 1971), *superseded by statute as stated in* Estate of Perry v. Comm'r, 927 F.2d 209 (5th Cir. 1991).

991. Lawrence Brody & Richard L. English, Section 2035(d), 818-2nd TAX MGMT. PORT. (BNA) A-10 (2006).

992. *Bel*, 452 F.2d at 690.

993. *Id.* at 686–87.

994. *Id.*

995. *Id.*

996. *Id.* at 688–90.

997. *Id.* at 690.

Goldberg, therefore, determined that § 2042 and the incidents-of-ownership test were irrelevant to the application of § 2035.[998] Goldberg's focus instead was on what decedent transferred.[999] Goldberg wrote:

> We think our focus should be on the control beam of the word "transfer." The decedent, and the decedent alone, beamed the accidental death policy at his children, for by paying the premium he designated ownership of the policy and created in his children all of the contractual rights to the insurance benefits. These were acts of transfer. The policy was not procured and ownership designated and designed by some goblin or hovering spirit. Without John Bel's conception, guidance, and payment, the proceeds of the policy in the context of this case would not have been the children's. His actions were not ethereally, spiritually, or occultly actuated. Rather, they constituted worldly acts which by any other name come out as a "transfer."[1000]

Goldberg's pattern is to look for the substance, not the form, of a transaction.[1001] The children applied for and owned the policies, according to the paperwork arranged by the taxpayer.[1002] In substance, however, Goldberg found that the policy was transferred by decedent.[1003] The importance of the *Bel* case is Goldberg's expansive, perhaps realistic, view of a transfer.[1004] Goldberg found that had the decedent purchased the policy and transferred it to his children, then that would have been "functionally indistinguishable" from what was in fact done.[1005]

A secondary issue in *Bel* concerned the same issue seen in *Citizens & Southern National Bank*, namely, whether a transfer arising from a settlement agreement qualifies for the marital deduction.[1006] In his will, decedent left his widow an amount inconsistent with Louisiana forced-heirship laws.[1007] The family entered into an agreement by which the children waived their heirship rights.[1008] The Service limited the marital deduction to that amount that should have passed to the surviving spouse under the Louisiana statutes, despite the family agreement.[1009] Goldberg diverged from the lower court on the issue of whether the settlement agreement arose in the context of a controversy.[1010] In *Citizens & Southern*

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998. *Id.*
999. *See id.* at 691–92.
1000. *Id.*
1001. *See id.*
1002. *Id.* at 686–87.
1003. *Id.* at 687.
1004. *See id.* at 687–91.
1005. *Id.* at 692.
1006. *See id.*; Citizens & S. Nat'l Bank v. United States, 451 F.2d 221, 225–26 (5th Cir. 1971).
1007. *Bel*, 452 F.2d at 692.
1008. *Id.*
1009. *Id.*
1010. *See id.* at 692–93.

National Bank, Goldberg wrote of the requirement of a controversy in the marital deduction regulations.[1011] In *Bel*, Goldberg did not find the requisite adverse interests, but remanded for the lower court to determine the issue.[1012]

The longevity of the *Bel* decision was limited in view of 1981 legislative changes to § 2035.[1013] Prior to 1981, § 2035(c) of the Code provided generally that the value of a decedent's gross estate "shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the 3-year period ending on the date of decedent's death."[1014] In the Economic Recovery Tax Act of 1981 (ERTA), Congress carried forward § 2035(a) but added § 2035(d)—a new section—to the Code, limiting the application of the three-year rule of § 2035(a) with respect to the estates of decedents dying after December 31, 1981.[1015] Section 2035(d)(1) provided that, in general, the three-year rule of § 2035(a) no longer applied.[1016] Section 2035(d)(2), however, captioned "Exceptions for certain transfers," stated that § 2035(d)(1) itself "shall not apply to a transfer of an interest in property which is included in the value of the gross estate under section 2036, 2037, 2038, 2041, or 2042 or would have been included under any such sections if such interest had been retained by the decedent."[1017] By virtue of § 2035(d)(2), therefore, the rule of § 2035(a), requiring that transfers within three years of death be brought back into the gross estate, was continued for the transfers described in § 2035(d)(2).[1018] These changes effectively overruled the *Bel* decision regarding transfers relating to a life insurance policy, such as premium payments.[1019] The Service has maintained, however, that even after 1981, constructive transfers from a decedent's estate continue to be included in the estate, indicating continued application of *Bel* and similar cases, but the Service chose to stop litigating the issue in light of adverse post-1981 precedent.[1020]

Later decisions have rejected the *Bel* reasoning in the context of an insurance trust when cash was given to an insurance trust, which then used

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1011. *See Citizens & S. Nat'l Bank*, 451 F.2d at 222–23.

1012. *See Bel*, 452 F.2d at 692–94.

1013. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, 317, § 424 (codified in scattered sections of the I.R.C.).

1014. Tax Reform Act of 1976, § 2001, Pub. L. No. 94-455, 90 Stat. 1520, 1848.

1015. *See* Economic Recovery Tax Act of 1981 § 424.

1016. *See id.*

1017. *Id.*

1018. *Id.*

1019. *See* Estate of Perry v. Comm'r, 931 F.2d 1044, 1046 (5th Cir. 1991) (stating that *Bel* has been effectively overruled by legislative changes).

1020. A.O.D. 1991-12 (Jan. 18, 1991). As the Service acknowledged, some courts disagree with its conclusions. Estate of Perry v. Comm'r, 59 T.C.M. (CCH) 65 (1990), *aff'd*, 927 F.2d 209 (5th Cir. 1991); Estate of Headrick v. Comm'r, 93 T.C. 171 (1989), *aff'd*, 918 F.2d 1263 (6th Cir. 1990); *see* Estate of Leder v. Comm'r, 89 T.C. 235 (1987), *aff'd*, 893 F.2d 237 (10th Cir. 1989).

the cash to purchase insurance policies.[1021] Other decisions have built on the *Bel* case by including insurance titled in an insurance trust in the taxpayer's estate when, using an agency theory, the taxpayer–decedent was held to control the trust.[1022]

C. Keeter v. United States

In *Keeter v. United States*, the issue was whether the surviving spouse possessed a general power of appointment when she possessed the right to choose an option in an insurance policy, which the previously deceased husband conveyed to the surviving spouse's "executors or administrators."[1023] Judge Goldberg held that the surviving spouse held a power of appointment, and therefore, was required to include the insurance assets in the estate of the surviving spouse.[1024]

The deceased husband purchased life insurance policies on his own life, providing that after the husband's death, the surviving spouse was to receive interest on the insurance proceeds for her life, and at her death, the principal and accrued interest in the policy proceeds were to be paid to the surviving spouse's "executors or administrators."[1025] Upon the surviving spouse's death, her will left her property to her daughters in equal shares.[1026]

What Goldberg looked for, as is so often the case with his approach in tax cases, is the substance of the transaction.[1027] Goldberg wrote:

> We often preach that taxation is practical and realistic. As we search for substance over form, once in a while our preachments become prattle in application as a "greyness" enters our decisions. But we find the government's claim here to be endowed with unusual pellucidity and the taxpayer's claim to be unusually factitious. Without a quiver of equivocation, we conclude that an insurance settlement option which granted the proceeds from the life insurance of the decedent taxpayer's husband to "the executors or administrators" of the decedent is includable in her gross estate as a general power of appointment for the purpose of computing estate taxes.[1028]

To the argument that the spouse's estate offered—that the spouse's power to distribute the policy proceeds came from the will, not the

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1021. *See* Hope v. United States, 691 F.2d 786, 792 (5th Cir. 1982).

1022. *See* Detroit Bank & Trust Co. v. United States, 467 F.2d 964 (6th Cir. 1972); *see also* Estate of Kurihara v. Comm'r, 82 T.C. 51, 60–61 (1984) (adopting an agency theory of inclusion).

1023. Keeter v. United States, 461 F.2d 714, 716 (5th Cir. 1972) (internal quotation marks omitted).

1024. *Id.* at 716, 720.

1025. *Id.* at 716 (internal quotation marks omitted).

1026. *Id.*

1027. *Id.*

1028. *Id.*

policies—Goldberg responded: "The executor's argument is unrealistic at best, conclusory at worst. We conclude that the making of a will was merely a conduit, not a rheostat, in the legal authority that ran between the decedent and the insurance option."[1029]

Goldberg further explained that the surviving spouse, not her previously deceased husband, had been granted the power to direct the fund.[1030] The husband created the general power of appointment when he arranged for his surviving spouse to have the right to decide how to distribute the fund, even if the spouse's decision were to be in her will.[1031] Goldberg wrote: "We would add that a grant of distributory suzerainty over a fund is a general power of appointment within the habitat of the estate tax if the decedent holds the power to direct the funds freely and without restriction, regardless of the *source* of the fund."[1032]

XX. SUBCHAPTER S CORPORATION

A. Pacific Coast Music Jobbers, Inc. v. Commissioner

Pacific Coast Music Jobbers, Inc. v. Commissioner is an ordinary tax case not warranting special mention—except for Judge Goldberg's rhetorical flourishes.[1033] Goldberg's writing places this case on the honor roll of notable Goldberg decisions.[1034]

The case involved a bootstrap acquisition of shares combined with intricate contractual provisions between corporate shareholders designed, in effect, to sell shares to one of them while delaying the closing of the sale, which would enable corporate distributions to be retained by selling shareholders for a period of years—all occurring after a purported Subchapter S election.[1035] The contractual provisions were designed to allow selling shareholders to be paid by corporate earnings, which were supposedly taxed to the selling shareholders via the Subchapter S election.[1036] Unfortunately, the Subchapter S election was defective in that the requirements for consent by the purchasing shareholder were not met.[1037] As Goldberg wrote, the taxpayer did not satisfy the specific election requirements:

1029. *Id.* at 717.
1030. *Id.* at 718.
1031. *Id.*
1032. *Id.*
1033. *See* Pac. Coast Music Jobbers, Inc. v. Comm'r, 457 F.2d 1165, 1167–73 (5th Cir. 1972).
1034. *See id.*
1035. *Id.* at 1167.
1036. *Id.* at 1168–69.
1037. *Id.* at 1169.

> A taxpayer cannot simply enter a telephone booth and change into his Subchapter S suit. He must file a specific written election to be so taxed. It is admitted that appellant taxpayer did not so elect; nevertheless, he seeks the power to leap tall tax requirements at a single bound.[1038]

The payout arrangements, along with the Subchapter S election, were an attempt to convert corporate earnings into a purchase price for shares.[1039] Goldberg found that the stock's record ownership, standing alone, is not determinative regarding the question of who is required to include dividends attributable to the stock.[1040] Beneficial ownership is the controlling factor of share ownership.[1041] Goldberg wrote: "Our conclusion does not rest solely on the schedule of payments outlined in the supplementary agreement, but rather on an overall analysis of who held the greatest number of the incidents of ownership that attended Pacific's stock after the 1962 contracts."[1042]

Goldberg expressed concern over Subchapter S rules' complexity: "In conclusion, the contours and curvatures of the figure S as shaped by the Code will not permit ambidextrous shareholdings. We cannot permit the S to become even more contorted and stretched than it already is."[1043]

Goldberg's opinion pierced complex earn-out contracts:

> The Tax Court, in a thorough and able opinion, saw the opacity of the payout arrangement, and our appellate vista confirms its conclusion that the willowy S was abandoned when Hansen assumed corporate suzerainty but did not himself elect. Hansen might have tried to remain an absentee pretender for the five years of the escrow, but he chose instead to claim his throne by exercising his own business acumen through the instrumentality of his vassals.[1044]

XXI. AMORTIZATION OF INTANGIBLE PROPERTY

A. Houston Chronicle Publishing Co. v. United States

Houston Chronicle Publishing Co. v. United States dealt with the purchase of a newspaper and the separability of customer subscription lists from goodwill.[1045] The Goldberg opinion rejected the government

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1038. *Id.* at 1166.
1039. *Id.* at 1167–68.
1040. *Id.* at 1170.
1041. *Id.* at 1173.
1042. *Id.* at 1170.
1043. *Id.* at 1173.
1044. *Id.*
1045. Hous. Chronicle Publ'g Co. v. United States, 481 F.2d 1240, 1242 (5th Cir. 1973). Two other issues were present in the case, but are not discussed here. *Id.* at 1242–43. The importance of the case lies in the subscription list issue. *See id.* at 1243–44.

argument that the mass asset rule prevented amortization of customer lists.[1046] It is this rejection of the mass asset rule that makes Goldberg's *Houston Chronicle* decision well known.[1047]

Decided in 1973, Goldberg's decision came at a point in time far removed from the tax law of today.[1048] Today, § 197 provides for the amortization of certain intangible assets.[1049] In 1973 and before—including 1966, the tax year involved in the case—the only rule governing the amortization of intangible assets was Regulation § 1.167(a)-3, which explicitly excluded goodwill from the class of amortizable assets.[1050] The principal common law rule was the longstanding mass asset rule, which prohibited amortization of certain intangible assets that are part of a single, self-regenerating asset without a determinable useful life or, alternatively, are indistinguishable from goodwill.[1051]

From the district court, certain facts were clear.[1052] The Houston Chronicle acquired a local newspaper without the intention of continuing to publish it.[1053] The subscription list of the acquired newspaper was thought to be valuable because it furnished names and addresses of potential subscribers to the Houston Chronicle.[1054] The jury found that a portion of the purchase price was allocable to subscription lists, which had a useful life of five years.[1055]

First, Goldberg dispatched all of the cases in which taxpayers failed to prove the prerequisites for amortizability—of which there were many.[1056] Then he considered the line of cases in which the intangible asset was linked to goodwill to the extent that it could not be separated from goodwill.[1057] Goldberg did not find that these goodwill cases held that subscription lists are non-amortizable as a matter of law; rather, the prior cases treated the issue as a factual question of "*whether* the limited and ascertainable lives of the intangibles had been proven by sufficient competent evidence."[1058]

The main thrust of the government's case on appeal was that the mass asset rule required denying amortization deductions, but Goldberg found the mass asset rule applicable when the intangible asset sought to be

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1046. *Id.* at 1244.
1047. Newark Morning Ledger Co. v. United States, 507 U.S. 546, 558 (1993).
1048. *See Hous. Chronicle Publ'g Co.*, 481 F.2d at 1240.
1049. *See* I.R.C. § 197 (2012).
1050. *See* Treas. Reg. § 1.167(a)-3 (1960); *Hous. Chronicle Publ'g Co.*, 481 F.2d at 1245.
1051. *See, e.g.*, Appeal of the Danville Press, Inc., 1 B.T.A. 1171, 1171–72 (1925) (applying the mass asset rule to hold that unexpired newspaper subscriptions were a single, non-depreciable asset).
1052. *See Hous. Chronicle Publ'g Co.*, 481 F.2d at 1243–44.
1053. *Id.*
1054. *Id.*
1055. *Id.* at 1244–45.
1056. *Id.* at 1245–47.
1057. *Id.* at 1247–49.
1058. *Id.* at 1249.

amortized was "inextricably" linked to goodwill, which occurred when it "possess[ed] the same qualities as goodwill, possess[ed] no determinable useful life and ha[d] self-regenerating capability."[1059] Goldberg did not agree and did not read the mass asset cases as controlling.[1060]

He found most of the cases applying the mass asset rule a failure of proof by the taxpayer, not a per se rule of non-amortizability when the intangible assets and goodwill were both present.[1061] Instead, Goldberg wrote the critical passage in the decision:

> [W]e are convinced that the "mass asset" rule does not prevent taking an amortization deduction if the taxpayer properly carries his dual burden of proving that the intangible asset involved (1) has an ascertainable value separate and distinct from goodwill, and (2) has a limited useful life, the duration of which can be ascertained with reasonable accuracy.[1062]

He characterized the taxpayer's burden as "perhaps extremely difficult" but noted the cases in which the taxpayer discharged its burden of proof.[1063] Goldberg then found that the subscription lists in the case satisfied § 167(a) requirements, and therefore:

> [N]ewspaper subscription lists such as those before us are intangible capital assets that may be depreciated for tax purposes if taxpayer sustains his burden of proving that the lists (1) have an ascertainable value separate and distinct from goodwill, and (2) have a limited useful life, the duration of which can be ascertained with reasonable accuracy.[1064]

Reviewing the jury verdict in the district court, he found the evidence presented to the jury to be sufficient to support the jury verdict.[1065]

In concluding the case, Goldberg summarized his view that the mass asset rule should not encompass all subscription lists within goodwill: "Judicial tolerance compels us to say that many jurists and scholars could diagnose tax non-depreciability in the muscles and tendons of list transactions. We reject, however, the establishment of a *per se* rule and a monolithic 'mass asset' theory that would amalgamate all subscriptions lists with goodwill."[1066]

Goldberg wrote that amortization turns on the facts:

1059. *Id.* (internal quotation marks omitted).
1060. *Id.*
1061. *Id.* at 1240–50.
1062. *Id.* at 1250.
1063. *Id.*
1064. *Id.* at 1251.
1065. *Id.* at 1253.
1066. *Id.*

> Our view—that amortizability for tax purposes must turn on factual bases—is more in accord with the realities of modern business technology in a day when lists are bartered and sold as discrete vendible assets. Extreme exactitude in ascertaining the duration of an asset is a paradigm that the law does not demand. All that the law and regulations require is reasonable accuracy in forecasting the asset's useful life.[1067]

In the instant case, though, Goldberg believed the taxpayer had discharged its burden:

> The burden to prove that an asset qualifies for tax amortizability is cast upon the taxpayer, and this taxpayer has manfully carried that heavy load as weighed by the jury. After studying the Code, Regulations, cases, testimony, and the jury's verdict, all in the light of the trial judge's meticulously thorough instructions, we can find no Achilles heel to the amortizability of these subscription lists.[1068]

In 1974, the Service promulgated Revenue Ruling 74-456, generally throwing in the towel following *Houston Chronicle*.[1069] The Service ruled that customer-based intangibles are generally in the nature of goodwill, representing "the customer structure of a business, their value lasting until an indeterminate time in the future."[1070] Nonetheless, it acknowledged that, "in an unusual case," the taxpayer may prove that the "asset or a portion thereof does not possess the characteristics of goodwill, is susceptible of valuation, and is of use to the taxpayer in its trade or business for only a limited period of time."[1071] Under these circumstances, the Service recognized the possibility that the customer-based intangible asset could be depreciated over its useful life.[1072]

In 1993, some twenty years after *Houston Chronicle*, the Supreme Court decided *Newark Morning Ledger Co. v. United States*, which involved the same issue of newspaper subscription lists of an acquired newspaper.[1073]

The Court applied a two-prong test similar to the one Goldberg applied in *Houston Chronicle* and concluded that any intangible asset having "a limited useful life and an ascertainable value" is subject to amortization and "[b]y definition . . . is not 'goodwill.'"[1074]

1067. *Id.* at 1253–54.
1068. *Id.* at 1254 (footnote omitted).
1069. *See* Rev. Rul. 74-456, 1974-2 C.B. 65, 66.
1070. *Id.*
1071. *Id.*
1072. *Id.*
1073. Newark Morning Ledger Co. v. United States, 507 U.S. 546, 549 (1993).
1074. *Id.* at 565 n.13.

The Court acknowledged the important role that Goldberg's decision in *Houston Chronicle* played in the development of the law in this area.[1075] "Since 1973, when *Houston Chronicle* clarified that the availability of the depreciation allowance was primarily a question of fact, taxpayers have sought to depreciate a wide variety of customer-based intangibles. The courts that have found these assets depreciable have based their conclusions on carefully developed factual records."[1076]

If a taxpayer could prove that a particular asset could be valued and that it had a useful life, then the Court in *Newark Morning Ledger Co.* allowed amortization.[1077] The Court found that the taxpayer had satisfied its burden of establishing the value and useful life of the subscriber contracts, and thus, the taxpayer was allowed the claimed depreciation deductions for the value assigned to the contracts.[1078] The Supreme Court cautioned, however, that with regard to tax deductions relating to customer-based intangibles, a taxpayer's burden of proof "often [would] prove too great to bear."[1079]

The importance of Goldberg's *Houston Chronicle* decision lies in the analytical framework he constructed for allowing taxpayers to amortize subscription lists.[1080] After his 1973 decision, the case law changed, not so much in the outcomes, but in the nature of the opinions.[1081] Post-1973 cases, including *Newark Morning Ledger Co.*, followed Goldberg's approach of asking whether the taxpayer discharged its burden of proof in proving a valuable asset with a measurable useful life.[1082] Goldberg's *Houston Chronicle* opinion has experienced a long life.[1083]

XXII. GOLDBERG IN DISSENT

In all of the tax cases in which Goldberg participated on the panel, he dissented twice. Goldberg dissented eighty-nine times in the nine hundred cases on which he wrote something, either the opinion, the concurrence, or the dissent. Therefore, these two dissents will be discussed.

1075. *See id.* at 560.
1076. *Id.*
1077. *See id.* at 566.
1078. *Id.* at 570.
1079. *Id.* at 566.
1080. Hous. Chronicle Publ'g Co. v. United States, 481 F.2d 1240, 1250 (5th Cir. 1973).
1081. *See, e.g.*, *Newark Morning Ledger Co.*, 507 U.S. at 546.
1082. *See, e.g.*, *id.* at 566.
1083. *See Hous. Chronicle Publ'g Co.*, 481 F.2d at 1240.

A. Conole v. Commissioner

In *Conole v. Commissioner*, the Fifth Circuit adopted the Tax Court opinion as its own and affirmed.[1084] Goldberg dissented in part, and concurred in part, on the issue of leasehold improvements being charged to lessor's income. This is a small case involving a small issue, yet Goldberg goes to the trouble to dissent from a per curiam opinion.

B. Martin v. Commissioner

Goldberg's dissent in *Martin v. Commissioner* ranks among his most vigorous of dissents.[1085] The case involved whether the use of funds from a tax-free loan did or did not constitute a taxable benefit.[1086] The majority held that it did not, relying on *Dean v. Commissioner*, and issued a short opinion affirming the Tax Court.[1087] The majority indicated the persuasive nature of Goldberg's dissent: "Despite the persuasive reasons offered by the dissenting views, we are unwilling to disturb Dean, at this late date, and we therefore affirm." Goldberg began his dissent with strong words:

> While I am in agreement with much of the result reached by the majority decision, I must vigorously dissent. I do so with respect, but with an even greater sense of bewilderment and astonishment. I cannot join in my brethren's blatant and completely needless abdication of their judicial responsibility, in choosing to transform a transient mistake into an error of law for perpetuity. Neither my frustration nor the wrongfulness of such abdication can be assuaged by the straw men erected by the majority to justify their decision.[1088]

XXIII. DISPATCHING THE LOSER WITH STYLE

There is a sub-genre of Judge Goldberg's decision writing that warrants special mention. The way in which Goldberg dispatched the loser of the case is among his most interesting writing. Most of the time, of course, when the court tells the loser that the case outcome was unfavorable, the message delivered is short and sweet, but with Judge Goldberg, such a moment was an opportunity to "wax lyrical."

1084. Conole v. Comm'r, 473 F.2d 1037, 1038 (5th Cir. 1973) (per curiam) (Goldberg, J., dissenting in part, concurring in part).

1085. *See* Martin v. Comm'r, 649 F.2d 1133, 1134–45 (5th Cir. 1981) (Goldberg, J., dissenting).

1086. *See id.* at 1133.

1087. *Id.* (citing Dean v. Comm'r, 35 T.C. 1083 (1961)). The case involved three Tax Court decisions consolidated on appeal in one case. *See generally* Creel v. Comm'r, 72 T.C. 1173 (1979); Zager v. Comm'r, 72 T.C. 1009 (1979); Martin v. Comm'r, 39 T.C.M. (CCH) 531 (1979).

1088. *Martin*, 649 F.2d at 1134 (Goldberg, J., dissenting).

For example, in *Donelon v. New Orleans Terminal Co.*, which was not a tax case, Judge Irving Goldberg used humor to explain why the plaintiffs could not pursue state court remedies:

> Appellants themselves issued the invitations to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now that the dance is over, appellants find themselves unhappy with the judging of the contest. They urge us to reverse and declare that "Good Night Ladies" should have been played without the partial summary judgment having been granted and without the preliminary injunction having been issued. This we have declined to do, and in so doing we note that this is not The Last Tango for the Parish. Appellants still have an encore to perform and their day in court is not yet over.[1089]

To read the selected passages that follow, limited to tax opinions, one almost feels sorry for the loser, in a perverse way. After Goldberg finished writing the penultimate decision, the reader knew that some effort went into delivering the message.[1090] If one is to lose in the Fifth Circuit, at least there is some merit in receiving the business end of the decision with the style and grace characteristic of Goldberg's writing.[1091]

Quite often, the cases containing entertaining Goldberg writing are not worthy of special mention. The unimportant cases are included here for the entertainment value in reading how Judge Goldberg delivered the telling blow.[1092]

A. Webb v. Commissioner*: Tax Fraud*

In affirming a determination of tax fraud by the Tax Court in *Webb v. Commissioner*, Goldberg explained why the taxpayer's conviction must stand:

> We can indulge in no presumption to penalize even an errant taxpayer, but we do not believe that this tutelage interdicts us to forego ineluctable inferences and common sense. This is not a case of criminal tax fraud where we must be satisfied that guilt was shown "beyond a reasonable doubt." We assume that common sense can be the possession of the unsophisticated, the unschooled, and the unlettered. Webb, though not privileged to have the other ingredients, was in possession of common sense. He must have, by the exercise of common sense, known that the figures used in his tax return were serious understatements of his

1089. Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1114 (5th Cir. 1973).
1090. *See id.*
1091. *See id.*
1092. *See infra* Parts XXII.A–M.

> obligations to his government. Innocent falsity is generally improbable; here it is impossible.[1093]

B. Woodward Iron Co. v. United States*: Changing Method of Accounting*

Goldberg affirmed the lower court's decision for the Service in *Woodward Iron Co. v. United States*.[1094] He examined legislative history and concluded that § 461(c), added in 1954, created "the most ingenious paradox again—the congressional 'innovation' allowing taxpayers to elect a ratable method of accounting 'would not affect' the taxpayer at bar if no election were made and thus would unilaterally change its method to the lump sum method."[1095]

In a flourish, Goldberg dispatched the taxpayer to the dustbin:

> The taxpayer's excursion into analytical jurisprudence meets several tests of sophistry but none of reality. It borders on naiveté to believe that Congress, seeking to favor ratability in its legislative process, sub silentio sanctified lump-summing. Likewise untenable is the taxpayer's thesis that those using the ratable method before 1954 could use it after 1954 only by (1) getting off the ratable method and then (2) electing to get back on. It is exactly this saga of the peripatetic taxpayer which Section 446(e) attempts to prevent by requiring Commissioner approval of change.[1096]

In considering examinations of legislative history, Goldberg found that Congress intended to "open the door to ratable deductors," but the taxpayer's belief that § 461(c) prevented it from using the ratable method was inconsistent with the legislative history.[1097] In harmonizing congressional enactment, Goldberg concluded his opinion with his view of harmonizing legislative history: "[o]ur tax laws are not perfect paradigms and our Congress not omniscient in the field. Despite an arguable inconsistency, there can be no doubt that Congress intended to prevent distortion, not to create it."[1098]

1093. Webb v. Comm'r, 394 F.2d 366, 380 (5th Cir. 1968) (citation omitted).

1094. Woodward Iron Co. v. United States, 396 F.2d 552, 557 (5th Cir. 1968), *aff'g* 254 F. Supp. 835 (N.D. Ala. 1966). Counsel for taxpayer was Meade Whitaker, who later served as Tax Legislative Counsel (1969–1970), IRS Chief Counsel (1973–1977), and United States Tax Court judge (1981–1995). *Id.* at 553; *Former and Current Members of the Board of Tax Appeals and Former and Current Judges of the Tax Court*, TAX CT. JUDGES BIOS, http://vls.law.vill.edu/prof/maule/taxcourt/bio_list.htm (follow the "Meade Whitaker" hyperlink) (last visited Nov. 28, 2013).

1095. *Woodward Iron Co.*, 396 F.2d at 556–57.

1096. *Id.* at 557.

1097. *Id.*

1098. *Id.* (footnote omitted).

C. Mississippi Valley Portland Cement Co. v. United States*: Cooperative Deducting Dividends*

In *Mississippi Valley Portland Cement Co. v. United States*, a case involving unsuccessful attempts to deduct patronage dividends, Goldberg delivered the defeat for the taxpayer thusly: "We, like the district court, cannot sanction a masquerade wherein a dividend is costumed in the habiliments of a patronage dividend. The judgment of the court below is affirmed."[1099]

D. Lee v. United States*: Proof in Net Worth Fraud Case*

In *Lee v. United States*, a case concerning the Service's attempt to prove fraud in an understatement of income by the net worth method, Goldberg's opinion reversed the district court's ruling because it permitted errors in accounting and math even with a finding of unreported income.[1100] He wrote of what is required of government proof:

> Although the government's burden is a heavy one, it is not a millstone of impossible carriage. The extent of the understatement of income may be a mystery, but this is not synonymous with insolvability. We believe the trial court donned the robes of a mathematician and operated under a mistaken theory that he had to find computerized certainty in the understatement before he could conclude fraud. While he must discern a plot, he need not reconstruct every line of the scenario.[1101]

E. Cornell-Young Co. v. United States*: Qualification of a Pension Plan*

In *Cornell-Young Co. v. United States*, Goldberg affirmed the district court's disqualification of a pension plan adopted without having first obtained Service approval. He concluded his opinion by describing the Service's role in approving pension plans:

> In dissecting a pension plan, each part may be found to be letter perfect. The Commissioner, however, is directed to take a synoptic view to determine if the whole is discriminatory. A discriminatory whole might well exist even though it consists of flawless parts. The Commissioner is not, after all, a pension plan automaton with a statutory checklist that he can mechanistically apply to every case. Even if a plan checks out, if its circulation is directed primarily towards the head, with only minor

1099. Miss. Valley Portland Cement Co. v. United States., 408 F.2d 827, 828 (5th Cir. 1969).
1100. Lee v. United States, 466 F.2d 11, 13–15 (5th Cir. 1972).
1101. *Id.* at 17.

> seepages downward, the Commissioner can, and should, declare the plan thrombotic.[1102]

F. Cornelius v. Commissioner*: Sub-S Loans and Repayments*

In *Cornelius v. Commissioner*, taxpayers had made sizeable loans to their Sub-S corporation in the fall of 1966 and repaid the loans in the spring of 1967.[1103] The taxpayers were farmers who used the loans for crop financing in the fall of each year.[1104] On December 31, 1966, the Sub-S corporation experienced a net operating loss that was passed through to the shareholders–taxpayers.[1105] The net operating loss reduced the basis for taxpayers' stock to zero and reduced the basis of the shareholder debt to a partial degree.[1106] In the spring of 1967, after the crop was sold, the corporation repaid the loan.[1107] This practice continued with another crop loan in the fall of 1967.[1108] The issue in the case was the tax consequence of the loan repayment.[1109] The Service argued that the loan repayment in the spring of 1967 was ordinary income because the loan repayment exceeded the taxpayers' basis in the loans, which had been reduced in 1966 as a result of the net operating loss.[1110] Taxpayers argued variously that (1) the shareholder loans were equity so that the income in 1967 increased basis in stock, and thus, the loan repayment did not exceed basis of the stock, and (2) the 1967 loan in the autumn should have been netted against the loan repayment in the spring, before determining tax consequence.[1111]

When a court acknowledges the creativity of argument of counsel, this is an indication that what follows is not good for that counsel.[1112] Goldberg followed suit in *Cornelius*: "We find taxpayers' contentions provocative and imaginative, but in the final analysis unpersuasive, and we affirm."[1113]

Goldberg acknowledged the relative newness of the Subchapter S tax regime, enacted in 1958, with many areas replete with questions but no answers, but he limited the court's inquiry: "On this appeal our duty is not to map all of the remaining uncharted territory, but to shape the juridical sinuosities of Subchapter S to the narrow problem before us—the

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1102. Cornell-Young Co. v. United States, 469 F.2d 1318, 1326 (5th Cir. 1972).
1103. Cornelius v. Comm'r, 494 F.2d 465, 466–68 (5th Cir. 1974).
1104. *Id.* at 466.
1105. *Id.* at 466–67.
1106. *Id.* at 467.
1107. *Id.* at 468.
1108. *Id.*
1109. *See id.* at 469.
1110. *Id.* at 468.
1111. *Id.*
1112. *See id.*
1113. *Id.*

interrelated tax effect of a small business corporation's net operating loss and its repayment of shareholder loans."[1114]

Taxpayers argued that their shareholder debt was, in fact, stock or equity, but Goldberg held taxpayers to their own legal structure.[1115] He acknowledged: "This Court has never hesitated to pierce the paper armor of a taxpayer's characterization of a particular transaction in order to reach its true substance."[1116]

But most of the time, it is the Service asking for form to be ignored in favor of substance. Here, Goldberg felt taxpayers should be bound by their chosen legal structure.[1117]

Finding no error by the Tax Court in deciding the tax consequences of the various transactions, eventually Goldberg rejected all of the taxpayers' arguments.[1118] In deflating the taxpayers' balloon, Goldberg expressed sympathy:

> We are not entirely unsympathetic to taxpayers' lament that Subchapter S has been a stern tax master. Taxpayers may have suffered substantially less immediate tax liability had they continued to operate their farming business as a partnership rather than as a Subchapter S corporation. On the other hand, taxpayers fared at least as well under Subchapter S as they would have by conducting their operations in the form of a non-electing corporation.[1119]

Goldberg noted the complexities of Subchapter S, but he correctly directed those criticisms to Congress, not the courts:

> Ours has been the more mundane assignment of contouring the codified curlicues of Subchapter S to the Code's synoptic minutiae. Being mere mortals unendowed with cosmic tax wisdom, we have performed our task as well as our fallible mentalities and compositions will permit. In so doing we have detected no fatal flaw in the Tax Court's decision.[1120]

G. United States v. Second National Bank of North Miami*: Dishonored Check to the Service*

The decision of *United States v. Second National Bank of North Miami* turned on a direct application of a statute resulting in a victory for the Service.[1121] Medallion Electric was an electrical subcontractor working on

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1114. *Id.*
1115. *Id.* at 470.
1116. *Id.* at 471.
1117. *Id.*
1118. *Id.*
1119. *Id.* at 472.
1120. *Id.*
1121. United States v. Second Nat'l Bank of N. Miami, 502 F.2d 535, 549 (5th Cir. 1974).

the construction of a shopping mall in Dade County, Florida.[1122] The general contractor was named the Hannon Company.[1123] After experiencing financial difficulties, including payroll checks being returned unpaid, Medallion and Hannon made an arrangement with the bank.[1124] Hannon would issue its check to the bank and Medallion jointly.[1125] Medallion would then purchase 190 money orders from the bank.[1126] These were used to pay the workers.[1127] In October of 1970, Hannon issued a check to Medallion's account for the purpose of facilitating another round of individual money orders for payroll, and the bank did immediately credit Medallion's account with Hannon's check but nevertheless issued the 190 money orders.[1128] To settle a tax delinquency, Medallion gave the 190 money orders to the Service, not to its workers.[1129] Hannon learned of this change and stopped payment on its originating check, which had not cleared.[1130] The bank, having issued the money orders, correspondingly stopped payment on them.[1131] When the Service attempted to present the money orders, payment was denied.[1132] Hannon paid the workers.[1133]

The United States sued the bank under § 6311(b)(2) of the Code, which creates bank liability for money orders issued to the Service and not duly paid.[1134] Goldberg found the case resolved by a direct application of § 6311(b)(2), with the result that the bank was liable for the dishonored money orders.[1135] The bank complained of the harsh result of the case, but Goldberg felt that Congress spoke clearly on imposing bank liability when enacting § 6311(b).[1136]

Among the arguments made by the bank was that the equities of the facts warranted the court to protect the bank from liability.[1137] Goldberg would not accept this argument:

> On the basis of the evidence in this case we are unwilling to quarrel with the trial judge's belief that conduct insufficiently malignant to deprive a party of holder in due course status is likewise an inadequate reason for refusing to grant an equitable remedy. Whether the contamination of one

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1122. *Id.* at 537.
1123. *Id.*
1124. *Id.*
1125. *Id.* at 538.
1126. *Id.*
1127. *Id.*
1128. *Id.*
1129. *Id.*
1130. *Id.*
1131. *Id.*
1132. *Id.*
1133. *Id.*
1134. *Id.* at 538–39.
1135. *Id.* at 540.
1136. *Id.*
1137. *Id.* at 547.

> seeking equity justifies the chancellor in turning a deaf ear is, in the first instance, for the chancellor to decide; we see nothing in the conduct of the IRS agents that should have compelled him to call the men pariahs.[1138]

Goldberg delivered the message—that the Service prevailed—with style:

> This case has required us to explore one of the lesser known chambers in a labyrinthine Internal Revenue Code honeycombed with obscure passageways. But if unfamiliar and infrequently visited, section 6311(b)(2) may be understood without the specialized tools of statutory speleology. Framed in relatively straightforward English, its meaning is readily apparent; and though the unwary may find it a trap, passage around the danger is marked by accepted commercial practices and established principles of the law of negotiable instruments. Our federal tax code may appear to operate with a rigidity that makes its collectors bereft of human pity, conscience, or compassion; its operation is also an illustration that ours is a government of laws, not men.[1139]

H. Dennis v. Commissioner*: Note Payments in Section 351 Transactions*

The decision of *Dennis v. Commissioner* concerned the continual taxpayer converting ordinary income into capital gain.[1140] The transaction involved transferring some patents to a corporation in a § 351 exchange, a tax-free transaction.[1141] The taxpayer wanted payments on the note to come within § 453, and thus, the payments would be capital gains.[1142] In other words, the taxpayer wanted the benefit of § 351, non-recognition treatment, for some parts of the transaction and not for other parts.[1143] The Goldberg opinion held that a § 351 transfer negates § 453 in that a § 351 transfer to a corporation controlled by the transferor in exchange for stock or securities in that corporation does not qualify for treatment under § 453.[1144] The case is not noteworthy except for the stylistic manner in which Goldberg wrote the opinion.

Goldberg first refused to accept the taxpayer's argument that the note was outside the scope of § 351's non-recognition treatment and was part of an open transaction. He wrote:

> Taxpayer's note is an animal in the Internal Revenue Code zoo, but *Hertwig* caged it in section 351 and not in an "open transaction." There

1138. *Id.* at 548.
1139. *Id.* at 549.
1140. *See* Dennis v. Comm'r, 473 F.2d 274, 278 (5th Cir. 1973).
1141. *See id.* at 277–79.
1142. *See id.*
1143. *See id.* at 284–85.
1144. *Id.* at 285.

> are no interconnecting avenues of ingress or egress to facilitate the mating suggested by taxpayer. Section 351 cannot be bred with an "open transaction" to create the hybrid which taxpayer proposes. This hybridizing of the Code would sectionalize the transaction to fit taxpayer's particular tax theory at his particular chosen point of time. The Code may not be a paradigm of coherence, but it has far too much basic consistency to permit this result. A section 351 security may be like a chameleon in that under certain conditions it can look like an evidence of an "open transaction," but it cannot be more than one thing at one time. If it could, the Internal Revenue Code would indeed be an endangered species.[1145]

Having rejected the taxpayer's argument, Goldberg delivered the ultimate message—the taxpayer's arguments failed and payments on the note were ordinary income:

> In this tax conundrum taxpayer constructs an ingenious but solecistic argument. He seeks abode in various combinations of sections of the Code, but his structure founders because the superstructure of the Code clearly architected another design. Taxpayer builds to a capital gains structure, but as we engineer the transaction we find a house of ordinary income. Where the foundation is a note of 150 parts coming from a section 351 tax-free transaction, the note cannot be renovated by any codal carpentry into a section 453 transaction or into an "open transaction." Taxpayer has constructed perhaps a thing of beauty to behold, but his shining palace housing capital gains proves to be built upon foundations of sand. The note that emanated from *Hertwig* was a section 351 security. We are not at liberty to denominate it otherwise.[1146]

I. City of Woodway, McLennan County, Texas v. United States*: Depreciation Recapture*

In *City of Woodway, McLennan County, Texas v. United States*, Goldberg quickly rejected the taxpayer's arguments and held that the municipality was subject to depreciation recapture on disposition of assets of a private water-supply company.[1147] He served up a cautionary reminder of the dividing line between tax planning and tax evasion, no doubt chilling to taxpayers and taxpayer's counsel: "By urging that we honor the form of these transactions over their substance, taxpayers teeter on the thin line between a legitimate attempt to avoid taxes and an illegitimate attempt to escape them."[1148]

1145. *Id.* at 286.
1146. *Id.* at 287.
1147. *See* City of Woodway, McLennan Cnty., Tex. v. United States, 681 F.2d 975, 981–82 (5th Cir. 1982).
1148. *Id.* at 976.

Goldberg complimented the taxpayer's counsel on his argument, almost always a sign of impending defeat. Even Goldberg's compliments come with style and humor: "Taxpayer's argument is certainly ingenious. . . . 'A dog who thinks he is man's best friend is a dog who obviously has never met a tax lawyer.'"[1149]

J. Pacific Coast Music Jobbers, Inc. v. Commissioner*: Subchapter S Earnings*

In *Pacific Coast Music Jobbers, Inc. v. Commissioner*, a bootstrap acquisition of shares was combined with intricate contractual provisions between corporate shareholders designed to, in effect, sell shares to one while delaying the closing of the sale of another.[1150] This was done to enable corporate distributions to be retained by selling shareholders for a period of years, all occurring after a purported Subchapter S election.[1151] The contractual provisions were designed to allow selling shareholders to be paid by corporate earnings, which were supposedly taxed to the selling shareholders via the Subchapter S election.[1152] Unfortunately, the Subchapter S election was defective in that the requirements for consent by purchasing shareholders were not met.[1153]

The payout arrangements, along with the Subchapter S election, were an attempt to convert corporate earnings into purchase price for shares.[1154] Goldberg's decision dictated that record ownership of stock, standing alone, is not determinative of the question of who is required to include dividends attributable to the stock.[1155] Beneficial ownership is the controlling factor of share ownership.[1156]

Goldberg's opinion pierced the complex earn-out contracts and stated:

> The Tax Court, in a thorough and able opinion, saw the opacity of the payout arrangement, and our appellate vista confirms its conclusion that the willowy S was abandoned when Hansen assumed corporate suzerainty but did not himself elect. Hansen might have tried to remain an absentee pretender for the five years of the escrow, but he chose instead to claim his throne by exercising his own business acumen through the instrumentality of his vassals.[1157]

1149. *Id.* at 979 & n.11 (quoting FRAN LEBOWITZ, SOCIAL STUDIES 56 (1981)).
1150. Pac. Coast Music Jobbers, Inc. v. Comm'r, 457 F.2d 1165 (5th Cir. 1972).
1151. *See id.* at 1167.
1152. *Id.* at 1167–68.
1153. *Id.* at 1169.
1154. *Id.* at 1167.
1155. *See id.* at 1166.
1156. *See id.* at 1170–71.
1157. *Id.* at 1173.

K. Moyer v. Mathas*: Substance Over Form*

In *Moyer v. Mathas*, a purchaser of land from a delinquent taxpayer (of federal taxes) became, himself, a tax delinquent (of ad valorem taxes).[1158] After the purchaser bought the land from the seller, the United States obtained a default judgment against seller for the assessed tax liabilities and interest.[1159] Years later, the local authorities conducted two tax deed sales of two of the properties purchaser bought from the seller, both of which produced a surplus of sale proceeds in excess of the ad valorem taxes burdening the property.[1160] The federal government sought to foreclose its tax lien against the seller on the excess sale proceeds.[1161] The case arose out of purchaser's attempt to claim for himself the excess sale proceeds in the tax deed sales.[1162]

The purchaser argued that the government was untimely in its foreclosure action.[1163] The relevant period for bringing a judicial action to enforce a tax lien was six years from assessment.[1164] The purchaser attempted to find support for the position in the Federal Tax Lien Act of 1966, which post-dated controlling Fifth Circuit precedent, but Goldberg dismissed the purchaser's arguments, writing:

> And having followed every stitch in its Mother Hubbard hem, we unraveled no thread that binds either litigant's theory. While we are neither endowed with necromantic talents nor are we soothsayers of many congressional minds, we are nonetheless convinced that the 1966 Act left unaltered the six-year limitation provision of section 6502(a).[1165]

The purchaser also attempted to attack the tax assessment against the seller, but on this score, res judicata was invoked by Goldberg.[1166] The judgment obtained by the federal government against the seller was an adjudication of the seller's tax liability, even though it was obtained by default judgment.[1167] Because the purchaser was in privity with the seller, having purchased the land from the seller, Goldberg held that res judicata

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1158. Moyer v. Mathas, 458 F.2d 431, 432 (5th Cir. 1972).
1159. *Id.*
1160. *Id.*
1161. *Id.* at 433.
1162. *Id.* at 432–33.
1163. *Id.* at 433.
1164. *Id.*
1165. *Id.* at 434 (citing Hector v. United States, 255 F.2d 84, 85 (5th Cir. 1958)); *see* Federal Tax Lien Act of 1966, Pub. L. No. 89–719, §§ 101, 6323(b)(6), 80 Stat. 1125, 1125–26 (amending the enforceability of federal tax liens against real property).
1166. *Moyer*, 458 F.2d at 434.
1167. *Id.*

barred the purchaser from re-litigating the validity of the tax assessments.[1168] Goldberg wrote of res judicata:

> The magnitude of our tax exactions, the multifariousness of the structure's configurations, and its almost universal impact demand rigidity, lest the system breed litigation with concomitant, incessant, and ceaseless babble. Once the tax has been assessed and liens attach, much as we would like to relax these stentorian and perduring concepts in the name of equity, the entire tax tower would topple unless we apply with little remorse the rules of limitations, time fixation, res judicata, and similar jurisprudential tools having terminality as their goal. Of course, we must be certain that a third party does not become prey to the traps and tricks in the tax collector's bag. But at the same time we must assure the tax gatherer that his gatherings be both speedy and unevadable, with a just and honorable finis for the tax and the taxer.[1169]

L. Keeter v. United States*: General Power of Appointment*

Keeter v. United States presented the question of whether the surviving spouse possessed a general power of appointment when she was given the right to choose an option in an insurance policy that had been given from the previously deceased husband to the surviving spouse's "executors or administrators."[1170] Judge Goldberg held that the surviving spouse held a power of appointment, and therefore, was required to include the insurance assets in her estate.[1171]

The deceased husband's life insurance policy provided for his surviving spouse to receive interest on the insurance proceeds in the event of the husband's death; in the event of her death, the principal and accrued interest in the policy proceeds were to be paid to the surviving spouse's "executors or administrators."[1172] Upon death of the surviving spouse, her will left her property to her daughters in equal shares.[1173]

Consistent with his prior approach in tax cases, Goldberg looked to the substance of the transaction to reach a decision.[1174] Goldberg held for the government in a unique passage:

> We often preach that taxation is practical and realistic. As we search for substance over form, once in a while our preachments become prattle in application as a "greyness" enters our decisions. But we find the government's claim here to be endowed with unusual pellucidity and the

1168. *Id.*
1169. *Id.* at 435.
1170. Keeter v. United States, 461 F.2d 714, 716 (5th Cir. 1972) (internal quotation marks omitted).
1171. *Id.*
1172. *Id.*
1173. *Id.*
1174. *See, e.g.*, *id.* (noting the search for practicality in tax law).

> taxpayer's claim to be unusually factitious. Without a quiver of equivocation, we conclude that an insurance settlement option which granted the proceeds from the life insurance of the decedent taxpayer's husband to "the executors or administrators" of the decedent is includable in her gross estate as a general power of appointment for the purpose of computing estate taxes.[1175]

The spouse's estate's argument was that the spouse's power to distribute the policy proceeds came from the will, not the policies, and Goldberg responded: "The executor's argument is unrealistic at best, conclusory at worst. We conclude that the making of a will was merely a conduit, not a rheostat, in the legal authority that ran between the decedent and the insurance option."[1176]

Goldberg went further, stating that the surviving spouse, not her previously deceased husband, had been granted the power to direct the fund.[1177] The husband created the general power of appointment when he arranged for his surviving spouse to have the right to decide how to distribute the fund, even if the spouse's decision was to be in her will.[1178] Goldberg wrote:

> We would add that a grant of distributory suzerainty over a fund is a general power of appointment within the habitat of the estate tax if the decedent holds the power to direct the funds freely and without restriction, regardless of the *source* of the fund.[1179]

M. Salley v. Commissioner*: Insurance Policy Loans*

In *Salley v. Commissioner*, the taxpayer borrowed substantial amounts from a controlled insurance company, paying interest on the loans.[1180] The insurance policies provided for an annual guaranteed return, which the taxpayers were entitled to take.[1181] Instead of taking these returns, the taxpayers borrowed sums equivalent to these guaranteed returns or against the cash value of the policies.[1182] Concomitantly, the taxpayers received substantial amounts as nontaxable insurance dividends, resulting in a net, out-of-pocket expenditure of $7,000 and interest deductions of $50,000.[1183] Judge Goldberg, writing for the Fifth Circuit, found no economic substance to the transaction, no payment for the money's use or forbearance, and no

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1175. *Id.*
1176. *Id.* at 717.
1177. *Id.* at 718.
1178. *Id.*
1179. *Id.*
1180. Salley v. Comm'r, 464 F.2d 479, 480 (5th Cir. 1972).
1181. *Id.* at 481.
1182. *Id.*
1183. *Id.* at 482.

business purpose.[1184] By borrowing the guaranteed annual returns, the taxpayers created large interest deductions while allowing their annual returns to accumulate on the insurance company books.[1185] The annual premiums about equaled the annual returns.[1186] Goldberg pierced this arrangement, stating:

> Neither Houston National nor taxpayers received any substantial new funds from this premium/loan duet, played to the tune of the guaranteed annual returns. Houston National received only taxpayers' 4% interest on the "loans" of the guaranteed annual returns, while taxpayers received only substantial interest deductions from the "loans." In no sense can it be said that taxpayers paid any "interest" to Houston National as "compensation for the use or forbearance of money . . . ."[1187]

Goldberg dispatched this circular arrangement when he said:

> In sum, taxpayers have produced and directed a choreography of some stylistic contrivance and ingenuity. It appears that taxpayers' dance with Houston National was not an arms-length cha-cha after all, but rather a clinched two-step. Like the Tax Court, we conclude that taxpayers' performance at its outset should have been declared a turkey and trotted off the stage of tax deductibility.[1188]

XXIV. CLOSING THE OPINION

The unique parts of Goldberg opinions are the openings and the closings. His personality appears repeatedly in his opinions.[1189] Earlier, this Article discussed a selected group of Goldberg opinions highlighting his opening phrases.[1190] What follows are a selection of the more interesting and entertaining Goldberg tax opinions with notable closings.

A. Estate of Haverlah v. United States

In *Estate of Haverlah v. United States*, Goldberg's decision reversed the district court in a case questioning whether a charitable remainder interest was sufficiently ascertainable to enable the estate to take a charitable deduction in view of the trustees' power of invasion.[1191]

1184. *Id.* at 484–85.
1185. *Id.*
1186. *Id.* at 485.
1187. *Id*. (citation omitted) (quoting Deputy v. DuPont, 308 U.S. 488 (1940)).
1188. *Id.* at 486.
1189. *See supra* Parts VII, XXIII.
1190. *See supra* Part VII; *infra* Part XXIV.
1191. Estate of Haverlah v. United States, 464 F.2d 512, 519 (5th Cir. 1972).

Goldberg held for the government and introduced a bit of maritime flavor to his opinion when he said:

> While recognizing that some testators could escape taxation between the barbs and the wire of the regulatory fences established by legislative edict, we hasten to note that Congress in its wisdom has required at a minimum some certitude in the relaxation of estate taxes for charitable purposes. The trustee in this case was given an itinerary that directed him to be so charitable to the non-charitable beneficiaries that he could legitimately cargo to H. L. Brown & Associates, Inc., all of the assets of the Haverlah trust. We do not think that Congress intended a captain to have this navigational latitude. The statutes and regulations, painted with a judicial gloss, dictate that some testamentary clutching and restraint must engine the trust estate with an assured certainty that the charity will receive the testator's largesse at journey's end. In this case the plaintiff's plenteous power to pirate the cargo on its trust journey rendered unascertainable the value of the charitable remainder for statutory exclusion from estate taxation. Therefore, the judgment of the district court is reversed, and the case is remanded with directions to dismiss the plaintiff's complaint."[1192]

B. United States v. Newman

Upon reading Goldberg's opinion in *United States v. Newman*, a case involving the statute of limitations and waivers of limitations, one is struck by the absence of anything special in the case—except for an extraordinary time lapse in the facts and Goldberg's writing style.[1193] The Service sought to collect a tax twenty-one years after the first assessment, which Goldberg characterized as "a limitations period of truly Rip Van Winkle proportions."[1194] Goldberg's decision affirmed the district court's holding that the government was barred by limitations from collecting the tax.[1195]

Goldberg's close, speaking of the importance of limitation periods in tax procedure, is perhaps the most interesting part of the case:

> Limitations statutes, however, are not cadenced to paper tidiness and litigant convenience. Time dulls memories, evidence and testimony become unavailable, and death ultimately comes to the assertion of rights as it does to all things human. Furthermore, the computation method which the government asks us to embrace is as perplexing as any yet suggested and is far more intricate than that which we adopt here. Thus, even if the fears of the government be pertinent, we do not believe that we

1192. *Id.*
1193. United States v. Newman, 405 F.2d 189, 189 (5th Cir. 1968).
1194. *Id.* at 190.
1195. *Id.* at 200.

> are making it more difficult for the Internal Revenue Service to focus its watchful eye.[1196]

C. Rose v. United States

In *Rose v. United States*, the issue confronting Goldberg and the rest of the panel was whether several life insurance policies could be included in a decedent's estate.[1197] The policies were held in a trust—of which the decedent acted as trustee—for the benefit of the decedent's children.[1198] Goldberg agreed with the district court that the decedent held incidents of ownership over the policies, despite holding those rights in a fiduciary capacity, and thus, the insurance was includable in the decedent's estate.[1199]

Goldberg closed his opinion with his stylistic manner of explaining why the insurance was taxed in the decedent's estate:

> Congress through § 2042 has given discrete statutory treatment to policies of insurance. Sections 2036, 2037, 2038, 2041, and 2042 may be consanguineous, but each has an individual personality with genetic variations. These provisions developed from a common design to tax testamentary harvests, and they reach common sorts of decedent controls. As the caselaw cross-pollinations—or pari materia interpretations—establish: Rose the insured and possessor of incidents of ownership, is Rose, even though garlanded by leaves of trusteeship. Each section is not identical, however. Life insurance is a specie of its own, it occupies a special place in the tax field, and we cannot simply graft terms from one provision onto another. Whether the insurance sheaves found in the decedent's hands are selected stalks from once-larger bundles, or whether they represent all that the taxpayer ever cultivated from the seed he had, the Congressional direction is to tax whatever is possessed at the end of the season.[1200]

D. A. Duda & Sons, Inc. v. United States*: Peat and Muck*

In the decision of *A. Duda & Sons, Inc. v. United States*, the taxpayer was denied depletion or depreciation deductions for peat topsoil that was "subsiding through oxidation as a natural consequence of having been drained for cultivation" and was denied capital gains for the sale of cattle not held for breeding.[1201] In other words, depreciation was disallowed for subsiding peat soil because it was part of the land.[1202] While the decision is

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1196. *Id.* (citation omitted).
1197. *See* Rose v. United States, 511 F.2d 259, 260–61 (5th Cir. 1975).
1198. *Id.*
1199. *See id.* at 265.
1200. *Id.*
1201. A. Duda & Sons, Inc. v. United States, 560 F.2d 669, 670, 679–80 (5th Cir. 1977).
1202. *See id.* at 679.

an ordinary one in many ways, Goldberg's concluding portions of the decision are anything but ordinary:

> In pronouncing our benediction denying legislative grace upon Duda's subsiding soil, we hope we have not been insensitive to Duda's invocation of its legal rights. The taxpayer invoked the blessings of the Code with spiritual vigor, but we find nothing in its revelations to convince us that Duda is entitled to the dispensations for which it prayed.
>
> Depletion and depreciation are blessings granted or withheld from taxpayers based upon the Code and its regulations. Neither source of law is a paragon of consistency, logic or equity. Taxation is practical and pragmatic, not always pure and perfect in its exactions.[1203]

Goldberg then expressed his views on the differences between the judicial and legislative branches.[1204] As has been observed throughout this Article, Goldberg could not pass up anything agricultural:

> Had we reached a different result in this ruckus over peat and muck, we are confident our decision would have underlain many strata of future decisions with respect to depletion or depreciation of land and its constituents. The ingenuity of the tax mind is boundless and it does not recede or subside with the passing years. Granting depletion or depreciation could easily be extrapolated by these ingenuities into situations that the most informed imaginations of today cannot contemplate. Congress is fertile of imagination and prolific of pen, and if it desires to afford depletion deductions for a non-extractive enterprise, it will do so. In light of the legislative history of § 611 and the regulations promulgated thereunder, we do not think it has yet done so.[1205]

E. Moyer v. Mathas

There is a category of Goldberg decisions that are notable only for their language. *Moyer v. Mathas*, a res judicata case, falls into this category.[1206]

Goldberg dismissed the purchaser's arguments, writing:

> And having followed every stitch in its Mother Hubbard hem, we unraveled no thread that binds either litigant's theory. While we are neither endowed with necromantic talents nor are we soothsayers of many

1203. *Id.* at 682.
1204. *See id.*
1205. *Id.*
1206. *See* Moyer v. Mathas, 458 F.2d 431 (5th Cir. 1972). See the detailed discussion of *Moyer*, *supra* notes 1158–64.

> congressional minds, we are nonetheless convinced that the 1966 Act left unaltered the six-year limitation provision of section 6502(a).[1207]

The purchaser also attempted to attack the tax assessment against the seller, but on this score res judicata was invoked by Goldberg.[1208] The judgment obtained by the federal government against the seller was an adjudication of the seller's tax liability, even though it was obtained by default judgment.[1209] Because the purchaser was in privity with the seller, having purchased the land from the seller, Goldberg held that the purchaser was barred by res judicata from re-litigating the validity of the tax assessments. Goldberg wrote of res judicata:

> The magnitude of our tax exactions, the multifariousness of the structure's configurations, and its almost universal impact demand rigidity, lest the system breed litigation with concomitant, incessant, and ceaseless babble. Once the tax has been assessed and liens attach, much as we would like to relax these stentorian and perduring concepts in the name of equity, the entire tax tower would topple unless we apply with little remorse the rules of limitations, time fixation, res judicata, and similar jurisprudential tools having terminality as their goal. Of course, we must be certain that a third party does not become prey to the traps and tricks in the tax collector's bag. But at the same time we must assure the tax gatherer that his gatherings be both speedy and unevadable, with a just and honorable finis for the tax and the taxer.[1210]

XXV. CONCLUSION

Judge Goldberg enjoyed being a Fifth Circuit judge, which is apparent from reading his opinions. His stylistic and lively language reveals his enthusiasm, as well as his rich erudition and scholarship.[1211] Goldberg said about his time on the Fifth Circuit:

> The past eighteen years of my life have undoubtedly been the happiest. Whether I agree or disagree with my colleagues, has had absolutely had nothing to do with my happiness, and my enjoyment of the work. I hope that I have made a contribution, but I have enjoyed attempting to make it. I have convictions, they're strongly held and strongly expressed, everybody expects them to be, and I have lived my life that way of where I

1207. *Moyer*, 458 F.2d at 431.
1208. *Id.*
1209. *Id.*
1210. *Id.* at 435.
1211. *See* Klaassen & Srebnick, *supra* note 29, at 12.

> had to do it, everybody knew. I have very often been in the minority, but I never backed off of saying what I believed in strong language.[1212]

The subject of Irving Goldberg in any respect is too big of a subject to summarize. His personality, his love of people, his passion for life and the law, his empathy for the less fortunate, and in the words of two of his clerks, "his heart," are too big to fit into a short, tidy conclusion.[1213]

The residual feeling from endeavoring to find a keyway to the tax jurisprudence of Irving Goldberg, though, is not based on legal analysis. What one carries away after studying Judge Goldberg is the man. With Irving Goldberg, heart mattered.[1214] He was an emotional man who was devoted to the law and to what he did; he cared about his clerks, his family, and his friends.[1215] He stayed interested in his clerks for his entire life, talking to many, if not most, of them on a regular basis—attending their weddings, sharing meals, or talking on the telephone.[1216] While Goldberg lived, his clerks would call him and talk over the choices and plans of their respective lives.[1217]

Goldberg's jurisprudence over his twenty-nine years of judicial service is writ large. In his tax cases, Goldberg certainly left his mark because of his writing, his stylistic language, and his turn of phrase—but there is more.[1218] He strived for the substance of the transaction. His tax opinions looked for reality. A pragmatic judge, Goldberg decided tax issues grounded on the legislation, to be sure; but moreover, he decided tax issues based on the purpose of the statute. Interestingly, most of the time, Goldberg held for the Service.[1219]

Goldberg looked at a tax case with an eye to substance over form.[1220] The attempts by taxpayers to obtain capital gains as opposed to ordinary income when subdividing and improving large tracts of real estate pierced the numerous precedents and distilled the cases into what became the *Winthrop* factors—the leading test that has been used by future courts.[1221] His triad of decisions in the subdivision cases have marked the way for the Fifth Circuit—and beyond—for years.[1222]

In cases looking for whether something was a property right, such as an arcane rice allotment history or future or partially earned receivable, his

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1212. Interview with Irving L. Goldberg, *supra* note 84.
1213. Klaassen & Srebnick, *supra* note 29, at 11.
1214. *See id.*
1215. *See id.* at 13.
1216. *See id.*
1217. *See id*
1218. *See* Vilardo & Gutman, *With Justice from One*, *supra* note 2, at 22.
1219. *See supra* Part III.D.
1220. *See supra* Part XXIII.K.
1221. *See supra* Part III.D.
1222. *See supra* Part VIII.A–C.

penetrating analysis looked for whether there was transferability or value, and he usually found a property right.[1223]

When taxpayers used multiple steps in a transaction and attempted to have the transaction taxed in discrete parts, Goldberg went to the heart of the transaction and applied the taxation to the transaction's substance.[1224] Attempts by supposedly creative taxpayers to structure a transaction with intermediate parties, multi-step purchases and sales, and the like proved unsuccessful before Judge Goldberg.[1225]

In oil and gas tax cases, the creativity of the tax lawyers in structuring financing devices met with the singular focus of Goldberg in determining what was the essence—the substance—of the transaction.[1226] He was unhesitant to overturn Fifth Circuit precedent to tax the substance of the transaction.[1227]

When the issue was whether there was sufficient evidence to tie a taxpayer to a taxable activity, Goldberg decided cases based on a sharp examination of the record.[1228] He challenged the Service's imposition of a tax if there was insufficient evidence.[1229] He would not accept naked assessments.[1230]

Even when the underlying case record was complicated, Goldberg's trained eye, from years as a practicing lawyer, found sufficient proof to sustain the issue, such as his holding that a taxpayer satisfied his burden in proving that he was entitled to amortize customer lists from acquisitions of newspaper companies and when the statute of limitations expired following a waiver.[1231]

Any consideration of Irving Goldberg as a judge, whether in tax cases or otherwise, will certainly lead to his words, his stylistic writing, and his linguistic verve. Whether at the opening or conclusion of a case, when dispatching an adverse decision to the loser in the case or breaking through an intricate legal argument to find the essence of something, Goldberg wrote powerfully.[1232] This unique writing style was his and his alone. No law clerk added these words. His erudition has been placed on full display for all to read. In his writing, Goldberg placed his individualistic stamp on his work for all who come after to see and enjoy.

1223. *See*, *e.g.*, First Victoria Nat'l Bank v. United States, 620 F.2d 1096, 1108 (5th Cir. 1980) (finding a property right in rice history acreage).

1224. *See* discussion *supra* Part XIII.A–C.

1225. *See* discussion *supra* Part XIII.A–C.

1226. *See supra* text accompanying notes 1214–16.

1227. *See supra* text accompanying note 1196.

1228. *See* discussion *supra* Part XVIII.A–B.

1229. *See* discussion *supra* Part XVIII.A–B.

1230. *See* discussion *supra* Part XVIII.A–B.

1231. *See* discussion *supra* Part XXI.A.

1232. *See* discussion *supra* Parts VII, XXIII, and XXIV.

There was so much to this man. His humor, his enjoyment of his work, his acute intellect, and his ability to find the essence, were all among his outstanding qualities as a federal appellate judge. Nevertheless, apart from Goldberg's judicial contributions to tax law or some other area of the law, or the feelings of those who worked most closely with him, the empirical and subjective evidence available to evaluate Irving Goldberg leads inexorably to the conclusion that he was an extraordinary man. In Irving Goldberg, a special person passed this way.

APPENDIX 1. AUTHOR'S NOTE

Essentially, Judge Goldberg has accompanied me on my career. I was initially drawn to Judge Goldberg on account of his decisions in the tax lien area while I was preparing the case of *Rodgers v. United States* and my writing of *Federal Tax Collections, Liens, and Levies*.[1233] In conversation, Judge Robert M. Hill, formerly of the Fifth Circuit and previously a United States district judge for the Northern District of Texas, piqued my interest in Judge Goldberg by describing his personality and uniqueness. Judge Hill drew particular attention to Judge Goldberg's opinions, especially when the issue was federal tax law. As a result, I have followed Judge Goldberg's opinions for thirty years.[1234]

At the end of Goldberg's life, I argued *Estate of Hudgins v. Commissioner* to a Fifth Circuit panel that included Judge Goldberg, but he died before the opinion was written and circulated.[1235] When I learned Judge Goldberg had died shortly after the oral argument, I wondered wistfully how different the outcome in the case might have been if he had lived.

1233. Rodgers v. United States, 461 U.S. 677 (1983), *remanded to* 712 F.2d 990 (5th Cir. 1983); WILLIAM D. ELLIOTT, FEDERAL TAX COLLECTIONS, LIENS, AND LEVIES (2d ed. 2013).

1234. *See generally* BERNARD WOLFMAN, JONATHAN L. F. SILVER & MARJORIE A. SILVER, DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES (1975) (providing an additional influence and triggering the specific idea for this Article).

1235. *See generally* Estate of Hudgins v. Comm'r, 57 F.3d 1393 (5th Cir. 1995).

APPENDIX 2. JUDGE GOLDBERG'S TAX OPINIONS

	Case Style	Cert	Citation	Date	Type	Opinion By	Judge 1	Judge 2	Dissent	Concur	Result	Winner	Issue(s)
1	U.S. v. Parker	None	376 F.2d 402	14-Apr-67	Regular	Goldberg	Gewin	Spears			Rev'd, rem'd	IRS	Tax
2	Strauss v. U.S.	None	376 F.2d 416	24-Apr-67	Regular	Goldberg	Gewin	Spears			Rev'd, rem'd	TP	Tax
3	Webb v. C.I.R.	None	394 F.2d 366	23-Apr-68	Regular	Goldberg	Rives	Ainsworth			Aff'd	IRS	Tax
4	Woodward Iron Co. v. U.S	None	396 F.2d 552	20-Jun-68	Regular	Goldberg	Rives	Dyer			Aff'd	IRS	Tax
5	Blackstone Realty Co. v. C.I.R	None	398 F.2d 991	12-Jul-68	Regular	Goldberg	Coleman	Hannay			Aff'd	IRS	Tax
6	United States v. Cocke	394 U.S. 922 (1969)	399 F.2d 433	31-Jul-68	en banc	Goldberg					Rev'd	IRS	Tax
7	Redwing Carriers, Inc. v. Tomlinson	None	399 F.2d 652	22-Aug-68	Regular	Goldberg	Bell	Dyer			Aff'd	IRS	Tax
8	Merritt v. C.I.R.	None	400 F.2d 417	23-Aug-68	Regular	Goldberg	Godbold	Simpson			Aff'd	IRS	Tax
9	Gefen v. U.S.	393 U.S. 1119 (1969)	400 F.2d 476	15-Oct-68	Regular	Goldberg	Clayton	Hannay			Aff'd	IRS	Tax
10	Gillis v. U.S.	None	402 F.2d 501	15-Oct-68	Regular	Goldberg	Clayton	Hannay			Aff'd, Rev'd	TP	Tax
11	U.S. v. Newman	None	405 F.2d 189	12-Dec-68	Regular	Goldberg	Godbold	Simpson			Aff'd	TP	Tax
12	U.S. v. Gordon	None	406 F.2d 332	13-Jan-69	Regular	Goldberg	Clayton	Hannay			Aff'd, rev'd, rem'd	Mixed	Tax
13	Mississippi Val. Portland Cement Co. v. U.S.	395 U.S. 944 (1969)	408 F.2d 827	14-Mar-69	Regular	Goldberg	Ainsworth	Spears			Aff'd	IRS	Tax
14	Tyler v. Tomlinson	None	414 F.2d 844	29-Jul-69	Regular	Goldberg	Wisdom	Thornberry			Aff'd, rev'd, rem'd	IRS	Tax
15	Citizen's Nat. Bank of Waco v. U.S.	None	417 F.2d 675	3-Oct-69	Regular	Goldberg	Coleman	Skelton			Aff'd	TP	Tax
16	C.I.R. v. Donnell's Estate	None	417 F.2d 106	10-Oct-69	Regular	Goldberg	Morgan	Lieb			Aff'd, rev'd, rem'd	IRS	Tax
17	U.S. v. Winthrop	None	417 F.2d 905	22-Oct-69	Regular	Goldberg	Brown	Gewin			Rev'd	IRS	Tax
18	Cox v. U.S.	None	421 F.2d 576	7-Jan-70	Regular	Goldberg	Bell	Atkins			Aff'd, rev'd	IRS	Tax
19	Jenkins v. U.S	400 U.S. 829 (1970)	428 F.2d 538	20-Apr-70	Regular	Goldberg	Dyer	Carswell			Rev'd	IRS	Tax
20	Citizens Co-Op Gin Co. v. U.S.	400 U.S. 992 (1971)	427 F.2d 692	16-Jun-70	Regular	Goldberg	Wisdom	Ingraham			Aff'd, Rev'd	Mixed	Tax
21	Wien's Estate v. C. I. R	None	441 F.2d 32	12-Apr-71	Regular	Goldberg	Tuttle	Wisdom			Rev'd, rem'd	Mixed	Tax
22	Rushing v. C. I. R.	None	441 F.2d 593	19-Apr-71	Regular	Goldberg	Dyer	Grooms			Aff'd	TP	Tax
23	Citizens and Southern Nat. Bank v. U.S	None	451 F.2d 221	10-Nov-71	Regular	Goldberg	Gewin	Dyer			Aff'd	IRS	Tax
24	Bel v. U.S	406 U.S. 919 (1971)	452 F.2d 683	9-Dec-71	Regular	Goldberg	Gewin	Dyer			Aff'd, rem'd	IRS	Tax
25	Pacific Coast Music Jobbers, Inc. v. C.I.R.	None	457 F.2d 1165	22-Mar-72	Regular	Goldberg	Brown	Morgan			Aff'd	IRS	Tax
26	Moyer v. Mathas	None	458 F.2d 431	6-Apr-72	Regular	Goldberg	Brown	Morgan			Aff'd	IRS	Tax
27	Keeter v. U.S	None	461 F.2d 714	14-Apr-72	Regular	Goldberg	Brown	Morgan	Brown		Rev'd	IRS	Tax
28	Etter Grain Co. v. U.S.	None	462 F.2d 259	26457	Regular	Simpson	Goldberg	Dyer		Goldberg	Aff'd	IRS	Tax

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29	Bintliff v. U.S.	None	462 F.2d 403	21-Jun-72	Regular	Goldberg	Brown	Morgan			Aff'd, rev'd	IRS	Tax
30	Salley v. C. I. R	None	464 F.2d 479	24-Jul-72	Regular	Goldberg	Brown	Morgan			Aff'd	IRS	Tax
31	Haverlah's Estate v. U. S	409 U.S. 1061 (1972)	464 F.2d 512	27-Jul-72	Regular	Goldberg	Dyer	Simpson			Rev'd	IRS	Tax
32	Producers Supply & Tool Co. v. U. S.	None	465 F.2d 787	15-Aug-72	Regular	Goldberg	Brown	Morgan			Rev'd, rem'd	IRS	Tax
33	Lee v. U.S	None	466 F.2d 11	6-Sep-72	Regular	Goldberg	Brown	Morgan			Rev'd, rem'd	IRS	Tax
34	Texas Oil & Gas Corp. v. U. S	10 U.S. 929 (1973)	466 F.2d 1040	7-Sep-72	Regular	Goldberg	Bell	Roney			Aff'd	IRS	Tax
35	Cornell-Young Co. v. U.S	None	469 F.2d 1318	5-Dec-72	Regular	Goldberg	Coleman	Godbold			Aff'd	IRS	Tax
36	Dennis v. C. I. R.	None	473 F.2d 274	17-Jan-73	Regular	Goldberg	Rives	Thornberry			Aff'd	IRS	Tax
37	Conole v. C. I. R.	None	473 F.2d 1037	9-Feb-73	Per Curiam -		Ainsworth	Ingraham	Goldberg		Aff'd	IRS	Tax
38	Grogan v. U.S	None	475 F.2d 15	16-Mar-73	Regular	Goldberg	Gewin	Dyer			Rev'd, rem'd	TP	Tax
39	Hines v. U.S	None	477 F.2d 1063	2-May-73	Regular	Goldberg	Rives	Morgan			Rev'd	TP	Tax
40	Houston Chronicle Pub. Co. v. U.S	414 U.S. 1129 (1974)	481 F.2d 1240	6-Jul-73	Regular	Goldberg	Bell	Simpson			Aff'd	IRS	Tax
41	White Castle Lumber & Shingle Co., Ltd. v. U.S.	None	481 F.2d 1274	26879	Per curiam	Goldberg	Clark	Roney		Goldberg	Aff'd	IRS	Tax
42	Cornelius v. C. I. R	None	494 F.2d 465	16-May-74	Regular	Goldberg	Tuttle	Bell			Aff'd	IRS	Tax
43	Rushton v. C. I. R	None	498 F.2d 88	26-Jul-74	Regular	Goldberg	Bell	Clark			Aff'd	IRS	Tax
44	U.S. v. Second Nat. Bank of Miami	421 U.S. 912 (1975)	502 F.2d 535	4-Oct-74	Regular	Goldberg	Wisdom	Lynne			Aff'd	IRS	Tax
45	Rose v. U. S	None	511 F.2d 259	11-Apr-75	Regular	Goldberg	Thornberry	Godbold			Aff'd	IRS	Tax
46	**In re Durensky**	**None**	**519 F.2d 1024**	**18-Sep-75**	**Regular**	**Goldberg**	**Clark**	**Gee**			**Appeal dism'd**	**IRS**	**Bankruptcy**
47	Biedenharn Realty Co., Inc. v. U.S.,	429 U.S. 819 (1976)	526 F.2d 409	26-Jan-76	en banc	Goldberg	Brown	Gee	Gee	Roney	Rev'd	IRS	Tax
48	Kuper v. C. I. R.	None	533 F.2d 152	9-Jun-76	Regular	Goldberg	Dyer	Roney			Aff'd, rev'd	IRS	Tax
49	Randall v. H. Nakashima & Co., Ltd.	None	542 F.2d 270	12-Nov-76	Regular	Goldberg	Rives	Gee			Aff'd, rev'd, rem'd	IRS	Tax
50	Stock v. C.I.R.	None	551 F.2d 614	27-Apr-77	Regular	Goldberg	Clark	Fay			Aff'd	IRS	Tax
51	A. Duda & Sons, Inc. v. U. S.,	None	560 F.2d 669	7-Oct-77	Regular	Goldberg	Hill	Kerr			Rev'd, rem'd	IRS	Tax
52	**Wilson v. C. I. R.**	**None**	**560 F.2d 687**	**11-Oct-77**	**Regular**	**Goldberg**	**Tuttle**	**Clark**			**Aff'd, rev'd, rem'd**	**IRS**	**Tax**
53	Carson v. U. S.	None	560 F.2d 693	11-Oct-77	Regular	Goldberg	Tuttle	Clark			Aff'd, rev'd, rem'd	Mixed	Tax
54	Slappey Drive Indus. Park v. U.S.	None	561 F.2d 572	19-Oct-77	Regular	Goldberg	Tuttle	Roney			Aff'd	IRS	Tax
55	Anderson, Clayton & Co. v. U. S.	436 U.S. 944 (1978)	562 F.2d 972	11-Nov-77	Regular	Goldberg	Tuttle	Clark			Aff'd, rev'd, rem'd	IRS	Tax

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56	**U.S. v. Crittenden**	**436 U.S. 903 (1978)**	**563 F.2d 678**	**21-Nov-77**	**Regular**	**Goldberg**	**Tjoflat**	**Wyatt**			**Aff'd, rev'd, rem'd**	**TP**	**Tax**
57	Baumer v. U.S	None	580 F.2d 863	25-Sep-78	Regular	Goldberg	Wisdom	Rubin			Aff'd, rev'd, rem'd	Mixed	Tax
58	Morrison v. C. I. R.	None	611 F.2d 98	29251	Per curiam	Goldberg	Rubin	Politz			Aff'd	IRS	Tax
59	Suburban Realty Co. v. U.S.	449 U.S. 920 (1980)	615 F.2d 171	7-Apr-80	Regular	Goldberg	Fay	Anderson			Aff'd	IRS	Tax
60	Reese v. C. I. R.	None	615 F.2d 226	8-Apr-80	Regular	Goldberg	Wisdom	Henderson			Rev'd, rem'd	IRS	Tax
61	First Victoria Nat. Bank v. U.S.	None	620 F.2d 1096	9-Jul-80	Regular	Goldberg	Wisdom	Henderson			Aff'd, vac, rem'd	Mixed	Tax
62	Curtis v. C. I. R	None	623 F.2d 1047	13-Aug-80	Regular	Goldberg	Garza	Reavley			Aff'd	IRS	Tax
63	United Sand and Gravel Contr., Inc. v. U.S	None	624 F.2d 733	22-Aug-80	Regular	Goldberg	Garza	Reavley			Aff'd	TP	Tax
64	Martin v. C. I. R	None	649 F.2d 1133	6-Jul-81	Regular	Tate	Goldberg	Reavley	Goldberg		Aff'd	TP	Tax
65	Bank of Coushatta v. U.S	None	650 F.2d 75	6-Jul-81	Regular	Goldberg	Clark, C	Reavley			Aff'd	IRS	Tax
66	Williams v. U.S	None	680 F.2d 382	14-Jul-82	Regular	Goldberg	Brown	Gee			Aff'd	IRS	Tax
67	City of Woodway, McLennan Co., Tex. v. U.S	None	681 F.2d 975	4-Aug-82	Regular	Goldberg	Brown	Politz			Aff'd	IRS	Tax
68	Schenk v. C. I. R	None	686 F.2d 315	20-Sep-82	Regular	Goldberg	Brown	Politz			Aff'd	TP	Tax
69	Hills v. C. I. R.	None	691 F.2d 997 (11	30270	Regular	Goldberg	Hill	Hatchett	Hatchett		Rev'd, ren'd	IRS	Tax
70	Louisiana Credit Union League v. U.S	None	693 F.2d 525	14-Dec-82	Regular	Goldberg	Williams	Garwood		Garwood	Rev'd	IRS	Tax
71	Security Indus. Ins. Co. v. U.S.	None	702 F.2d 1234	22-Apr-83	Regular	Goldberg	Brown	Higginbotham			App. Dism'd	IRS	Tax
72	Texas Farm Bureau v. U.S.	469 U.S. 1106 (1985)	725 F.2d 307	21-Feb-84	Regular	Goldberg	Clark	Politz			Rev'd	IRS	Tax
73	**Knight-Ridder Newspapers, Inc. v. U.S.**	**None**	**743 F.2d 781 (11**	**30958**	**Regular**	**Goldberg**	**Tjoflat**	**Clark**			**Aff'd**	**IRS**	**Tax**
74	Interfirst Bank Dallas, N.A. v. U.S.	475 U.S. 1081 (1986)	769 F.2d 299	26-Aug-85	Regular	Goldberg	Politz	Williams			Rev'd	IRS	Tax
75	USLIFE Title Ins. Co. of Dallas v. Harbison	None	784 F.2d 1238	14-Mar-86	Regular	Goldberg	Randall	Johnson			Aff'd, rev'd	TP	Tax
76	Keado v. U.S.	None	853 F.2d 1209	1-Sep-88	Regular	Goldberg	Garwood	Jolly			Aff'd, rev'd, rem'd	TP	Tax
77	Heasley v. C.I.R	None	902 F.2d 380	5-Jun-90	Regular	Goldberg	Politz	Jones			Rev'd, rem'd	Mixed	Tax
78	Dillon v. C.I.R.	None	902 F.2d 406	5-Jun-90	Regular	Goldberg	Reavley	Higginbotham			Aff'd	Mixed	Tax
79	Dresser Industries, Inc. v. C.I.R.	None	911 F.2d 1128	19-Sep-90	Regular	Goldberg	Gee	Williams			Rev'd, aff'd, rem'd	TP	Tax
80	Jones v. C.I.R	None	927 F.2d 849	2-Apr-91	Regular	Goldberg	Jolly	Weiner			Aff'd	IRS	Tax
81	Turnbull v. U.S	None	929 F.2d 173	22-Apr-91	Regular	Goldberg	Jolly	Weiner			Aff'd	Mixed	Tax
82	Portillo v. C.I.R	see note	932 F.2d 1128	11-Jun-91	Regular	Goldberg	Jolly	Weiner			Aff'd	Mixed	Tax

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83	Green v. C.I.R	507 U.S. 908 (1993)	963 F.2d 783	22-Jun-92	Regular	Goldberg	Duhe	Barksdale			Rev'd, rem'd	IRS	Tax
84	Apache Bend Apartments, Ltd. v. U.S.	None	964 F.2d 1556	25-Jun-92	Regular	Goldberg	Jolly	Weiner			Vac'd, rem'd	IRS	Tax
85	Miles Production Co. v. C.I.R	None	987 F.2d 273	1-Apr-93	Regular	Goldberg	Jolly	Wiener			Aff'd	TP	Tax
86	U.S. v. Shanbaum	None	10 F.3d 305	3-Jan-94	Regular	Goldberg	Jones	Duhe			Rev'd, Rem'd	IRS	Tax
87	U.S. v. Kellogg (In re West Texas Mark. Corp)	None	12 F.3d 497	31-Jan-94	Regular	Goldberg	Jones	Duhe			Aff'd	IRS	Tax

APPENDIX 3. JUDGE GOLDBERG'S CLERKS

Clerkship Years	**Clerk 1**	**Clerk 2**	**Clerk 3**
1966–1967	Daniel Joseph	Linda A. Wertheimer[1236]	
1967–1968	James H. Wallenstein	Larry H. Spalding[1237]	
1968–1969	Byron Egan	Robert Goodfriend	
1969–1970	Roderick Surratt [deceased]	Clarice Davis	
1970–1971	Raymond Wheeler	Clarice Davis	
1971–1972	Raymond Dahlberg	Linn Williams	
1972–1973	William Pakalka	Hon. Robert I. Richter	Vincent O'Rourke
1973–1974	Robert Cohan	Lee Simpson	Michael Byrd
1974–1975	Chris Lipsett	Jay Urwitz	Edward Hand
1975–1976	Hon. Diane Wood	John H. Fleming	Gary Rosenthal
1976–1977	Alan Blankenheimer	Patrick R Cowlishaw	Hon. Robert Hinkle
1977–1978	Bruce R. Genderson	Alan Weisbard	Ted Stein [deceased]
1978–1979	Patricia A. Campbell	Bruce P. Howard	David A. Strauss
1979–1980	Tony Glen Powers	Gary A. Herrmann	David M. Frankford
1980–1981	Lawrence J. Vilardo	Howard W. Gutman	N. Kathleen Friday
1981–1982	Robin M. Shapiro	Jenny Ann Sternbach	
1982–1983	Rebecca Hurley	Hon. David Godbey	

1236. Part-time
1237. Part-time

1983–1984	Manley W. Roberts	Robert B. Hawk
1985–1986	Markus [Mark] Penzel	Charles Collier
1986–1987	Joshua D. Sarnoff	Anthony Herman
1987–1988	Helen M. Hubbard	Ted Janger
1988–1989	Gregory L. Poe	Pam Johnston
1989–1990	Peter John Fucci	Katherine J. Henry
1990 (summer)	Michael Weber	Tamera Piety
1990–1991	Jonathan Handel	Jean H. Bender
1991–1992	Howard M. Srebnick	Leslie Klaassen
1992–1993	Ofer Sharone	Louisa Smith
1993–1994	Scott McElhaney	Brian G. Albert
1994–1995	Jeff Goldfarb	Orlando DoCampo