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REINTERPRETING THE ROLE OF SPECIAL TRIAL JUDGES THROUGH STANDARDS OF REVIEW

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CHRISTOPHER M. PIETRUSZKIEWICZ

I. INTRODUCTION ........................................................................................................2
II. HISTORY OF THE TAX COURT ............................................................................4
III. ROLE OF THE SPECIAL TRIAL JUDGE ............................................................7
IV. STANDARDS OF REVIEW ....................................................................................14
   A. HISTORICAL STANDARD OF REVIEW OF SPECIAL
      TRIAL JUDGES BY TAX COURT JUDGES .................................................15
V. UNCERTAINTY OF “DUE REGARD” AND “PRESUMED TO BE CORRECT”
   STANDARD OF REVIEW ....................................................................................18
   A. 1983 MODIFICATION OF TAX COURT RULES ........................................21
   B. THE SUPREME COURT DECISION IN BALLARD ....................................25
   C. 2005 MODIFICATION OF THE TAX COURT RULES ...............................26
VI. LANGUAGE AND ITS APPLICATION TO STANDARDS OF REVIEW ............27
   A. LIMITED GRADATIONS OF STANDARDS OF REVIEW .......................28
   B. LIMITED STANDARDS OF REVIEW IN OTHER CONTEXTS ..................31
   C. THE CHOICE OF A STANDARD OF REVIEW IN THE
      TAX COURT CONTEXT ..................................................................................33
   D. THE AMBIGUITY OF THE CURRENT STANDARD OF REVIEW
      IN THE TAX COURT .....................................................................................36
   E. AN APPROPRIATE STANDARD OF REVIEW OF PROPOSED
      FINDINGS OF FACT BY A SPECIAL TRIAL JUDGE ................................39
VII. CONCLUSION ........................................................................................................41

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I. INTRODUCTION

Standards of review define the scope of power between judicial actors, each functioning within a statutory or rule-based scheme and carrying out specified responsibilities under that system. In the articulation of a standard of review, words are insufficient to objectively measure any standard. Because of the lack of objective measurement, the words used to describe a standard of review could be viewed as irrelevant and perhaps indistinguishable.

While the words may be indistinguishable, it is the uniformity of terms that promotes consistency in application. It is, of course, impossible to pinpoint the definition of the traditional standards of review such as “clearly erroneous” or “abuse of discretion,” however, courts are nonetheless able to apply these standards because they are universal and commonly articulated.

That is not to say that it is impossible to apply non-traditional standards of review. It is, however, because of the imprecision of language and the lack of an objective measurement that it is unrealistic for an infinite number of non-traditional standards of review to exist. Standards of review should be limited to a familiar set of traditional review mechanisms.¹

In 2005, the Supreme Court, in Ballard v. Commissioner,² decided arguably the most significant procedural tax case since its 1960 decision in Flora v. United States that required a taxpayer to pay the full amount of an income tax assessment before challenging the validity of the assessment in federal district court.³ As a result of the decision

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³ Flora v. United States, 362 U.S. 145, 149-51 (1960). A more recent procedurally significant case decided by the United States Tax Court was Golsen v. Commissioner, 54 T.C. 742 (1970), aff’d, 445 F.2d 985 (10th Cir. 1971). Prior to Golsen, the Tax Court was not required to follow the precedent of any circuit, including the circuit in which a taxpayer’s case arose. Andre L. Smith, Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality, 58 TAX LAWYER 361, 375 (2005). In Golsen, the Tax Court eliminated, in large part, forum shopping in tax cases and advanced the concept of “intra-circuit uniformity” that required the Tax Court to follow the decision of the court of appeals to which an appeal would lie. Golsen, 54 T.C. at 757. Because an appeal of a decision of the Tax
in *Ballard*, the United States Tax Court modified its procedural rules to avoid a likely challenge to its current practice on due process grounds. Under these rules, the Tax Court adopted a non-traditional standard of review that requires the Tax Court to give “[d]ue regard . . . to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.”

The standard of review adopted by the Tax Court does not fit within customary matrix inasmuch as it uses non-traditional terms to define a standard of review. By not applying terminology with which courts interact frequently, consistency in the application of a standard of review is not possible.

The interpretation of the ambiguous rule concerning the deference associated with a recommendation of the special trial judge is just as significant as the decision of the Supreme Court in *Ballard*. Approximately 95% of all tax cases are litigated in the Tax Court.

Court and a Federal district court is to the circuit court of appeals based on the residence of the taxpayer, a taxpayer in a particular jurisdiction, after *Golsen*, could institute an action in either Federal district court or the Tax Court and both courts would be bound by the same precedent. See 26 U.S.C. § 7482(b).

4 TAX CT. R. 183(d) (2007). Rule 183(d) of the Tax Court provides in pertinent part that –

> The [Tax Court] Judge to whom the case is assigned may adopt the Special Trial Judge’s recommended findings of fact and conclusions of law, or may modify or reject them in whole or in part, or may direct the filing of additional briefs, or may receive further evidence, or may direct oral argument, or may recommit the recommended findings of fact and conclusions of law with instructions. The Judge’s action on the Special Trial Judge’s recommended findings of fact and conclusions of law shall be reflected in the record by an appropriate order or report. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

5 In fiscal year 2005, the United States Tax Court had 24,941 cases pending while the Federal district courts had 751 cases pending and the Court of Federal Claims had 496 cases pending. In that same year, the United States Tax Court had 24,658 cases petitioned while the federal district courts had 225 and the Court of Federal Claims had 165 cases. Presentation of Office of Chief Counsel, Internal Revenue Service at
Since 1974, over 1,500 cases involved a report of a special trial judge. Because of the magnitude of cases subject to review under this ambiguous rule, attention to its contours is, in many cases, determinative of the result.

The ambiguous question lies principally in the last sentence of Rule 183(d). The standard of review described therein is, at best, vague, and, at its worst, provides for a conflicting method of review. The immediate question raised by the standard of review, in the context of the entire Rule 183(d) scheme, is whether the standard to be applied is (1) a de novo standard of review, (2) a clearly erroneous standard of review, or (3) a non-traditional standard of review resulting from a hybrid of the traditional standards of review.

The appropriate standard of review is a clearly erroneous standard of review. However, whether the language supports this interpretation is admittedly speculative. Rule 183 should to be amended to reflect a standard of review that comports with traditional notions of appellate review.

II. HISTORY OF THE TAX COURT

In 1895 in Pollock v. Farmers' Loan & Trust Co., the Supreme Court determined that taxes on income from property were unconstitutional as direct taxes that were not levied apportionately. The effect of this decision was that that an income tax was not possible until ratification of the Sixteenth Amendment. On February 25, 1913, and four and one-half years after its submission to the state legislatures, the Sixteenth Amendment was ratified by the necessary three-quarters

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7 157 U.S. 429, aff’d on reh’g, 158 U.S. 601 (1895).
of the states which reversed *Pollock* and made constitutional unapportioned federal income taxes.\(^8\)

As a result of the Sixteenth Amendment and the choice by Congress to provide a forum to challenge tax deficiencies asserted by the Bureau of Internal Revenue prior to payment of the taxes asserted, the predecessor to the United States Tax Court was created and began as the Board of Tax Appeals in 1924. The Board of Tax Appeals was designated as “an independent agency in the executive branch of the Government.”\(^9\) Decisions of the Board of Tax Appeals were appealed

\(^8\) As a result of the Sixteenth Amendment, Congress may impose taxes on income without having to apportion all taxes collected from each state based on the relation of population of each state to the national population.

As of February 25, 1913, 36 of the 48 states ratified the Sixteenth Amendment. The Sixteenth Amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Sixty-first Congress on the 12th of July, 1909, and was declared, in a proclamation of the Secretary of State, dated the 25th of February, 1913, to have been ratified by 36 of the 48 States. The dates of ratification were: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 30, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 3, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Kansas, February 18, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected it earlier); Wisconsin, May 26, 1911; New York, July 12, 1911; Arizona, April 6, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; New Mexico, February 3, 1913.

Ratification was completed on February 3, 1913 and announced by the Secretary of State on February 25, 1913. The amendment was subsequently ratified by Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected it on March 2, 1911).

The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island, and Utah.

\(^9\) Revenue Act of 1924, Pub. L. No. 68-176,§900, 43 Stat. 253, 336-38. Absent the creation of a forum to challenge deficiencies asserted by the Bureau, a taxpayer could pay the tax asserted and bring an action for a refund in either the United States Court of Claims or federal district court. This basic tri-part structure continues in existence today. HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 62 (1979).
to the district courts.\(^\text{10}\) Findings of fact by the Board of Tax Appeals were prima facie evidence.\(^\text{11}\) Two years later, in the Revenue Act of 1926, Congress provided for appeals of decisions of the Board of Tax Appeals to the various circuit courts of appeal.\(^\text{12}\) In that same Act, Congress limited the scope of review of appeals, providing that the circuit courts may modify or reverse a decision of the Board of Tax Appeals “if the decision of the Board is not in accordance with the law.”\(^\text{13}\)

In 1942, the Board of Tax Appeals was renamed the “Tax Court of the United States”\(^\text{14}\) and continued as an independent, executive branch agency.\(^\text{15}\) In 1969, Congress reclassified the Tax Court of the United States as a legislative court under Article I of the Constitution and the court was renamed “The United States Tax Court.”\(^\text{16}\) The Tax Court had jurisdiction to adjudicate specific income, excess profits, estate, and gift tax disputes prior to payment of taxes by a taxpayer.\(^\text{17}\) These adjudications are made by nineteen judges of the Tax Court, each serving a fifteen year term.\(^\text{18}\) The Tax Court judges are “appointed by the President, by and with the advice and consent of the Senate.”\(^\text{19}\) While appeals from a decision of the Tax Court are made to the circuit court of appeals based on the residence of the taxpayer.\(^\text{20}\)

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\(^\text{13}\) Revenue Act of 1926, Pub. L. No. 69-20, § 1003(b), 44 Stat. 9, 110.


\(^\text{15}\) See Martin v. Comm’r, 358 F.2d 63, 64 (7th Cir. 1966).


\(^\text{20}\) 26 U.S.C. § 7482(b) (effective December 31, 1997).
III. ROLE OF THE SPECIAL TRIAL JUDGE

In 1928, the American Bar Association recommended to Congress that the Board of Tax Appeals be permitted to hire special masters to assist the Board in collecting evidence and in preparing findings of fact.\(^{21}\) In 1943, the presiding judge of the Tax Court was given the authority to designate commissioners to assist in finding facts.\(^{22}\) Without substantial modification, this authority continued as §7456(c) of the Internal Revenue Code of 1954. In 1969, full-time commissioners were appointed for an undetermined period.\(^{23}\) At this time, a small case procedure was first enacted that, if elected by the taxpayer and approved by the Tax Court, provided for special, less formal procedures to be used if the amount in controversy was not more than $1,000.\(^{24}\) A decision in small tax cases could not be issued by a commissioner but, instead, was required to be issued by a Tax Court judge.\(^{25}\) The small case amount increased to $1,500 in 1972.\(^{26}\)

In 1978, and at the same time that the small case threshold was increased to $5,000, commissioners were first given the authority to write opinions in small tax cases using a streamlined procedure for case resolution.\(^{27}\) The Tax Reform Act of 1978 also delegated to

\(^{21}\) Report of the Special Committee on Federal Taxation, 53 A.B.A. REP. 398, 400 (1928). This model follows the Court of Claims model that authorized the Court of Claims to appoint its own commissioners. W. Cowen, The United States Court of Claims – A History, 216 Ct. Cl. 90-95, 177 (1978).

\(^{22}\) Revenue Act of 1943, Pub. L. No. 78-235, §503, 58 Stat. 21, 72 (1943), amending §1114 of the Internal Revenue Code of 1939. Congress permitted the presiding judge “from time to time by written order [to] designate an attorney from the legal staff of the court to act as a commissioner in a particular case. * * * [to] proceed under such rules and regulations as may be promulgated by the [Tax] court.” H. Rep. No. 871, 78th Cong., 1st Sess. (1943), 1944 C.B. 901, 954.


\(^{27}\) Revenue Act of 1978, Pub. L. No. 95-600, §502(a)(1) and (b), 92 Stat. 2763, 2879 (1978). The Tax Reform Act of 1984 increased this threshold amount from $5,000 to
commissioners the authority to issue decisions in declaratory judgment proceedings.  

In 1982, the authority of commissioners to issue decisions on behalf of the Tax Court was again expanded to include any case, whether or not under the small case procedure, in which the amount of the disputed deficiency did not exceed $5,000.  The Miscellaneous Revenue Act of 1982 also consolidated the three types of cases in which a commissioner was authorized to issue a decision on behalf of the Tax Court in § 7456(d) of the Internal Revenue Code of 1954.  

The Tax Reform Act of 1984 changed the maximum amount in dispute provision from $5,000 to $10,000 and commissioners became special trial judges.  The Tax Reform Act of 1984 also clarified the responsibilities of special trial judges and expanded the powers of a special trial judge to hear “any other proceeding that the chief judge [of the Tax Court] may designate.”

Section 7456(d) became §7443A of the Internal Revenue Code of 1986.\(^{34}\) As a result, after 1986, § 7443A provided the sole authority for cases to be heard by a special trial judge --

(b) Proceedings which may be assigned to special trial judges.-- The chief judge may assign—

(1) any declaratory judgment proceeding,

(2) any proceeding under section 7463,

(3) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463) nor the amount of any claimed overpayment exceeds $10,000, and

(4) any other proceeding which the chief judge may designate, to be heard by the special trial judges of the court.

Beginning in 1984, a special trial judge was required to issue a report and recommendation for the catch-all “any other proceeding which the chief judge may designate.” In this circumstance, the report and recommendation was considered by and acted upon by one of the presidentially appointed Tax Court judges and a decision of the Tax Court was issued by a Tax Court judge.\(^{35}\)

The Supplemental Report of the Committee on Ways and Means notes that the reason for adding paragraph (4) to Section 7443A(b) is that “[t]he committee wishes to clarify that additional proceedings may be assigned to [Special Trial Judges] so long as a Tax Court judge must enter the decision.”\(^{36}\) The Committee explained that the new provision was designed to allow the “Chief Judge of the Tax Court to assign any proceeding to a special trial judge for hearing and to write proposed opinions, subject to review and final decision by a Tax Court judge, regardless of the amount in issue. However, special trial judges will not


be authorized to enter decisions in this latter category of cases."

Similarly, the Conference Report provided that "[t]he House Bill also provides that other proceedings may be assigned to be heard by [special trial judges], but no decision with respect to these proceedings may be made by a [special trial judge]."

It was at the same time that paragraph (4) was added to § 7443(A)(b) that Congress also amended §7443A(c) to provide that a special trial judge was authorized to enter decisions only in those proceedings assigned under paragraphs (1), (2) and (3) of §7443A(b).

Before 1984, present § 7443A permitted special trial judges to enter decisions in any proceeding assigned to them. However, after Congress amended § 7443A(c) in 1984, special trial judges were limited to entering decisions in the proceedings described only in subsection (b)(1), (2) and (3).

Conversely, reports in cases assigned under subsection (b)(4) were required to be reviewed and acted upon by a presidentially appointed judge of the Tax Court. In addition, where appropriate, the Chief

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39 Section 7443A(c) provided--

(c) AUTHORITY TO MAKE COURT DECISIONS. -- The court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), or (3) of subsection (b), subject to such conditions and review as the court may provide.

40 Special trial judges, then called commissioners, could issue a decision on behalf of the Tax Court in declaratory judgment proceedings, cases in which the amount in dispute was not in excess of $5,000 and cases using the streamlined, small case procedure in which the dispute was not in excess of $5,000. 26 U.S.C. § 7456(d) (1984).
41 TAX Ct. R. 183(b) provided that “… the special trial judge shall submit his report, including his findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Division of the Court.”
Judge of the Tax Court could direct that the report of the special trial judge be reviewed by the entire Tax Court.\textsuperscript{42}

The Internal Revenue Service Restructuring and Reform Act of 1998 increased the small case threshold to $50,000\textsuperscript{43} and added authority in § 7443A(b)(4) for special trial judges to hear collection due process cases under §6220 and §6330.\textsuperscript{44} Correspondingly, the “any other proceeding” provision was redesignated as § 7443A(b)(5).

In 2006, the Pension Protection Act of 2006 added, as § 7443A(b)(5), the authority for special trial judges to determine employment status provided that the amount of employment taxes in dispute is $50,000 or less for each calendar quarter.\textsuperscript{45} As a result of this addition, previous § 7443A(b)(5) which provided the authority for the Chief Judge of the Tax Court to designate “any other proceeding” to a special trial judge was redesignated from § 7443A(b)(5) to § 7443A(b)(6).

Finally, the Tax Relief and Health Care Act of 2006 added, as § 7443A(b)(6), the authority for special trial judges to review the payment of rewards for the information that leads to the detection and punishment of persons guilty of violating internal revenue laws under § 7623(b)(4).\textsuperscript{46} Because of this amendment, previous § 7443A(b)(6), a the section that provided authority for the Chief Judge of the Tax Court to designate “any other proceeding” to a special trial judge, was redesignated from § 7443A(b)(6) to § 7443A(b)(7).

\textsuperscript{42} 26 U.S.C. § 7460(b) (2007). It provides that “[t]he report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court.”


After these modifications, current § 7443A permits the Chief Judge of the Tax Court to assign seven types of cases to a special trial judge. In each of the first six types of cases that can be heard by a special trial judge, the special trial judge is authorized to issue a decision of the Tax Court.\textsuperscript{47} In this context, a special trial judge can be assigned a declaratory judgment proceeding,\textsuperscript{48} any proceeding under § 7463,\textsuperscript{49} any

\begin{footnotesize}
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\item\textsuperscript{47} 26 U.S.C. § 7443A(c) (2007).
\item\textsuperscript{49} 26 U.S.C. § 7443A(b)(2) (2007). The small case procedure is governed under the specific rules of § 7463 as opposed to the general Rules of the Tax Court. Section 7463 provides in pertinent part that—
\begin{enumerate}
\item In general.—In the case of any petition filed with the Tax Court for a redetermination of a deficiency where neither the amount of the deficiency placed in dispute, nor the amount of any claimed overpayment, exceeds—
\begin{enumerate}
\item $50,000 for any one taxable year, in the case of the taxes imposed by subtitle A,
\item $50,000, in the case of the tax imposed by chapter 11,
\item $50,000 for any one calendar year, in the case of the tax imposed by chapter 12, or
\item $50,000 for any 1 taxable period (or, if there is no taxable period, taxable event) in the case of any tax imposed by subtitle D which is described in section 6212(a) (relating to a notice of deficiency),
\end{enumerate}
\end{enumerate}
at the option of the taxpayer concurred in by the Tax Court or a division thereof before the hearing of the case, proceedings in the case shall be conducted under this section. Notwithstanding the provisions of section 7453, such proceedings shall be conducted in accordance with such rules of evidence, practice, and procedure as the Tax Court may prescribe. A decision, together with a brief summary of the reasons therefor, in any such case shall satisfy the requirements of sections 7459(b) and 7460.
\item Finality of decisions.—A decision entered in any case in which the proceedings are conducted under this section shall not be reviewed in any other court and shall not be treated as a precedent for any other case.
\end{itemize}
\end{footnotesize}

* * * * *

\begin{itemize}
\item Additional cases in which proceedings may be conducted under this section.—At the option of the taxpayer concurred in by the Tax Court or a division thereof before the hearing of the case, proceedings may be conducted under this section (in the same manner as a case described in subsection (a)) in the case of—
proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463) nor the amount of any claimed overpayment exceeds $50,000, any proceeding under section 6320 or 6330, any proceeding under § 7436(c), and any proceeding under § 7623(b)(4). In each of the above cases, a special trial judge

(1) a petition to the Tax Court under section 6015(e) in which the amount of relief sought does not exceed $50,000, and
(2) an appeal under section 6330(d)(1)(A) to the Tax Court of a determination in which the unpaid tax does not exceed $50,000.


50 26 U.S.C. § 7443A(b)(3) (2007). Section 6330 provides notice and opportunity for hearing before levy. Section 6330 provides the requirements to be satisfied by the Internal Revenue Service prior to the issuance of a levy. A taxpayer may request a hearing by an impartial appeals officer within the Internal Revenue Service Office of Appeals. 26 U.S.C. § 6330(b)(1) and (3) (2007). Review of the determination by the Office of Appeals may be judicially reviewed --

(d) Proceeding after hearing.--

(1) Judicial review of determination.--The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(2) Jurisdiction retained at IRS Office of Appeals.--The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding--

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.

26 U.S.C. § 6330(d). Section 6320 provides Notice and opportunity for hearing upon filing of notice of lien by the Internal Revenue Service. The judicial review procedures are the same procedures as under § 6330 except for review under § 6330(d)(2)(B). 26 U.S.C. § 6320(c) (2007).


is authorized to issue a decision of the Tax Court.\textsuperscript{54} In such a case, there is no standard to review of a decision of the special trial judge because Tax Court Rule 183 applies only to recommended findings of fact and conclusions of law of a special trial judge that are reviewed by a Tax Court judge. As a result, a discussion of these provisions beyond mere identification is not necessary.

In the last type of proceeding that may be referred to a special trial judge -- any other proceeding which the chief judge may designate -- the special trial judge is not authorized to issue a decision of the Tax Court.\textsuperscript{55} Section 7443A(b)(4) was added in 1984 and is currently designated as § 7443A(b)(7).\textsuperscript{56} Under § 7443A(b)(7), special trial judges may "take testimony, conduct trials, [and] rule on the admissibility of evidence," but "lack authority to enter a final decision."\textsuperscript{57} After a special trial judge issues findings of fact and conclusions of law, a Tax Court judge, in issuing a decision on behalf of the Tax Court, shall give “[d]ue regard . . . to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct."\textsuperscript{58}

IV. STANDARDS OF REVIEW

Standards of review delineate the scope of power between a Tax Court judge and a special trial judge. The scope of review of decisions of judicial actors is not a new question. Beginning with the Constitution over 200 years ago, the question first surfaced with a provision that provides that the “supreme court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.”\textsuperscript{59} In the context of the

\begin{itemize}
\item 54 26 U.S.C. § 7443A(c) (2007) which provides that “[t]he court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), (3), (4), (5), or (6) of subsection (b), subject to such conditions and review as the court may provide.”
\item 55 26 U.S.C. § 7443A(c).
\item 58 TAX CT. R. 183 (2007).
\item 59 U.S. CONST. art. III, § 2 cl. 2.
\end{itemize}
relationship between a special trial judge and a Tax Court judge, the standard of review defines the depth of review of a report issued by a special trial judge.

A. HISTORICAL STANDARD OF REVIEW OF SPECIAL TRIAL JUDGES BY TAX COURT JUDGES

After 1984, special trial judges were, for the first time, statutorily required to produce a report and recommendation to be acted upon by a presidentially appointed Tax Court judge in proceedings not specifically listed in § 7443A(b). As enacted in 1984, in those cases in which the special trial judge was required to produce a report and recommendation, the Tax Court judge (a division) to whom the matter was assigned for decision was governed by Tax Court Rule 182.

Tax Court Rule 182, enacted in 1974, required the Tax Court judge to give “due regard” and “presumed to be correct” consideration to the proposed findings of fact of the trial judge based on the ability of the special trial judge to observe the credibility of witnesses. Moreover, Rule 182 required the special trial judge to “serve[]” the report, including any “findings of fact and opinion” on the parties and provide the parties with an opportunity to file briefs with the Tax Court setting forth their “exceptions” to the report and to request argument on the issues addressed in the exceptions.60

The statutory enactment mandating a report and recommendation in 1984 is statutorily inconsistent with a Tax Court Rule, enacted in 1974, that requires a Tax Court judge to give “due regard” and “presumed to be correct” significance to a report of a special trial judge. From 1974 through 1984, there appears to be no statutory authorization for a special trial judge to hear any case that would be reviewed by a Tax Court judge.

Until 1984, a special trial judge was delegated by statute with an ability to hear only declaratory judgment proceedings, small case procedure cases and those cases which, at that time, did not exceed $5,000. In each of those three types of cases, a special trial judge was authorized to issue a decision on behalf of the Tax Court. In other

60 TAX Ct. R. 182(a), (b), (c), (d) (1974).
words, the decision of a special trial judge was not subject to review by a Tax Court judge and, therefore, there was no reason for a standard of review to exist for proposed determinations by a special trial judge.

Until 1984, there existed only the lingering effects of the 1928 recommendation by the American Bar Association that the Board of Tax Appeals be permitted to hire special masters to assist the Board in collecting evidence and in preparing findings of fact.\(^{61}\) In 1943, the presiding judge of the Tax Court was given the authority to designate commissioners to assist in the finding of facts.\(^{62}\) This authority continued as §7456(c) of the Internal Revenue Code of 1954 and, in 1984, commissioners became special trial judges and § 7456 became § 7443A.

Until 1984, then, no authority existed for a special trial judge to provide a report and recommendation; a special trial judge, previously a special master and commissioner, could assist in preparing findings of fact but could not issue a recommendation for resolution of a matter.

Notwithstanding the lack of statutory authorization, Tax Court Rule 182, enacted in 1974, gave each party an opportunity to file briefs, “including . . . proposed findings of fact and legal argument”\(^{63}\) and that “the commissioner shall file his report, including his findings of fact and opinion” on the parties.\(^{64}\) Finally, the parties were given an opportunity to file briefs with the Tax Court setting forth their “exceptions of law or of fact” to that report and to request argument on the issues addressed in the exceptions.\(^{65}\)

\(^{61}\) Report of the Special Committee on Federal Taxation, 53 A.B.A. REP. 398, 400 (1928). This model follows the Court of Claims model that authorized the Court of Claims to appoint its own commissioners. W. Cowen, The United States Court of Claims – A History, 216 Ct. Cl. 90-95, 177 (1978).

\(^{62}\) Revenue Act of 1943, Pub. L. No. 78-235, §503, 58 Stat. 21, 72 (1943), amending §1114 of the Internal Revenue Code of 1939. Congress permitted the presiding judge “from time to time by written order [to] designate an attorney from the legal staff of the court to act as a commissioner in a particular case. * * * [to] proceed under such rules and regulations as may be promulgated by the [Tax] court.” H. Rep. No. 871, 78th Cong., 1st Sess. (1943), 1944 C.B. 901, 954.


\(^{64}\) Tax Ct. R. 182(b) (1974) (emphasis added).

While there was no statutory authority for a special trial judge to issue a recommendation, it is nonetheless clear that the practice of the Tax Court, contrary to statutory authorization, was to assign any proceeding to a special trial judge who would, in turn, produce a report and recommendation which would be reviewed by a Tax Court judge and the Tax Court judge would issue a decision on behalf of the Tax Court.

Tax Court Rule 182, a deference rule which was unnecessary under that statutory scheme, was nonetheless necessary based on the

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**Post-Trial Procedure**

Except in small tax cases (see Rule 183) or as otherwise provided, the following procedure shall be observed in cases tried before a commissioner:

(a) Proposed Findings and Briefs: Each party shall file his initial brief, including his proposed findings of fact and legal argument, within 60 days after the date on which the trial is concluded, unless otherwise directed. A party thereafter desiring to file a responsive brief shall do so, including any objections to any proposed findings of fact, within 30 days after the expiration of the period for filing the initial brief, unless otherwise directed. With respect to the content, form, number of copies, and other applicable requirements, the proposed findings of fact and the briefs shall conform to the provisions of Rule 151.

(b) Commissioner's Report: After all the briefs have been filed by all the parties or the time for doing so has expired, the commissioner shall file his report, including his findings of fact and opinion. A copy of the report shall forthwith be served on each party.

(c) Exceptions: Within 45 days after service of the commissioner's report, a party may file with the Court a brief setting forth any exceptions of law or of fact to that report. Within 30 days of service upon him of such brief, any other party may file a brief in response thereto. In any brief filed pursuant to this paragraph, a party may rely in whole or in part upon the briefs previously submitted by him to the commissioner under paragraph (a) of this Rule 182. Unless a party shall have proposed a particular finding of fact, or unless he shall have objected to another party's proposed finding of fact, the Court may refuse to consider his exception to the commissioner's report for failure to make such a finding desired by him or for inclusion of such finding proposed by the other party, as the case may be.

(d) Oral Argument and Decision: The Division to which the case is assigned may, upon motion of any party or on its own motion, direct oral argument. The Division inter alia may adopt the commissioner's report or may modify it or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions. Due regard shall be given to the circumstance that the commissioner had the opportunity to evaluate the credibility of witnesses; and the findings of fact recommended by the commissioner shall be presumed to be correct.
practice of assigning any case to a special trial judge. In 1984, it appears that Congress finally provided statutory authorization for a special trial judge to hear “any other proceeding” and codified statutorily a practice engaged in by the Tax Court that predates its authorization by ten years.

Notwithstanding the absence of statutory authorization, in 1976, the Tax Court issued United States Tax Court General Order Number 5 that, while not citing legislative authorization, nonetheless explains why Tax Court Rule 182 was necessary. Under this general order and Rule 180 of the Tax Court Rules of Practice and Procedure, the Tax Court assigned additional cases to special trial judges.66

According to the Tax Court, this new delegation was necessary “in order to dispose of pending cases more promptly and efficiently. To accomplish those objectives, it was decided that additional cases should be assigned to the Special Trial Judges of the Court for trial or other disposition.”67 As such, the Tax Court began assigning additional cases to special trial judges provided that those cases “involve[ed] relatively small deficiencies.”68

For these cases, a “Special Trial Judge shall prepare his proposed findings of fact and opinion and submit them to the Chief Judge, or to another Judge designated by him for that purpose. The proposed findings of fact and opinion of the Special Trial Judge shall not constitute the findings of fact and opinion of the Court unless reviewed and adopted by the Judge to whom the case is assigned, and the report is approved by the Chief Judge.”69

V. UNCERTAINTY OF “DUE REGARD” AND “PRESUMED TO BE CORRECT” STANDARD OF REVIEW

66 See United States Tax Court General Order Number 5 (1976). Under Rule 180 of the Tax Court Rules of Practice and Procedure, “[t]he Chief Judge may from time to time designate a Special Trial Judge . . . to deal with any matter pending before the Court in accordance with these Rules and such directions as may be prescribed by the Chief Judge.

67 United States Tax Court General Order Number 5 (1976).

68 United States Tax Court General Order Number 5 (1976).

69 United States Tax Court General Order Number 5 (1976).
When enacted, it is unclear what the language "due regard" and "presumed to be correct" was intended to convey. The Committee notes provide, however, that the rule was intended to treat special trial judges similar to trial judges of the Court of Claims. In fact, then Rule 182(d) of the Tax Court was modeled on Rule 147(b) of the former Court of Claims. The “due regard” and "presumed to be correct" language was based on terminology from Rule 147(b) which provided --

"The court may adopt the [trial judge's] report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the [trial judge] to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the [trial judge] had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the [trial judge] shall be presumed to be correct." 

As interpreted by the Court of Claims, Rule 147(b) required that the findings of fact of the trial judge be given respectful attention. The adoption by the Tax Court of the Court of Claims rule and, because the report of the special trial judge was made available to the parties and subject to briefing prior to a decision by the Tax Court judge, it appears that the rule contemplated a standard of review similar to a traditional appellate style review function, albeit using non-traditional terms.

A note to the Tax Court Rule in 1974, however, does not fit such an interpretation. The note provides that –

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70 Rules of Practice and Procedure of the United States Tax Court with Committee Notes 130 (1979).
71 TAX CT. R. 182 note, 60 T.C. 1150 (review procedures of the Tax Court "comparable" to review procedures used in the Court of Claims).
73 See Hebah v. United States, 456 F.2d 696, 698 (Ct. Cl. 1972) (challenger must make "a strong affirmative showing" to overcome the presumption of correctness that attaches to trial judge findings).
The decision of a case is made by a Judge, and the rule expands the alternatives available in reviewing the determinations of the commissioner as embodied in his report. The Judge, to whom the case is assigned, may take any action he deems appropriate for a proper disposition of the case, even with respect to the commissioner's findings of fact, although they are accorded special weight insofar as those findings are determined by the opportunity to hear and observe the witnesses.\(^{74}\)

From enactment through 1983, the Tax Court reviewed approximately 680 reports of special trial judges.\(^{75}\) Of those cases, the Tax Court failed to adopt the report of the special trial judge in six cases and reversed the decision of the special trial judge in one case.\(^{76}\) In fourteen additional cases, the Tax Court adopted the opinion of the STJ with minor modification.\(^{77}\)

\(^{74}\) TAX Ct. R. 182(b) note (1974).


While the deference level for appellate type reviews appears heightened by these statistics, the Tax Court’s ascribed standard is suggestive of a non-existent appellate review standard consistent with the note in the 1974 rule. In interpreting the “due regard” and “presumed to be correct” language, the Tax Court, in Rosenbaum v. Commissioner,78 determined that Rule 182 required that it give "due regard to the circumstance that the Special Trial Judge had the opportunity to see and evaluate the credibility of witnesses," "the presumptive correctness of the Special Trial Judge's report does not impair nor dilute our duty of bearing the ultimate responsibility for determining matters before us."79 As such, the Tax Court appeared to retain primary decisional authority with little regard for the report of the special trial judge.

A. 1983 Modification of Tax Court Rules

In 1983, the Tax Court amended Rule 182 and renumbered it as Rule 183. In this amendment, the Tax Court deleted the requirement that the report of the special trial judge be served on the parties and correspondingly deleted the portion of the rule that permitted the parties to file objections to the report of the special trial judge.

As such, in 1983, the rule provided that –

The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.80

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78 45 T.C.M. (CCH) 825, 827 (1983).
79 Id.
80 TAX CT. R. 183(c) (1983).
The amendments did not change, however, the action that could be taken by a Tax Court judge with respect to the report and recommendation by the special trial judge. In that sense, the Tax Court judge could adopt, modify, or reject the report and recommendation in whole or in part.

Interestingly, Rule 182, as enacted in 1974, contained the “due regard” and “presumed to be correct” language just as the amended Rule 183 contains identical language. As a result, the Tax Court judge continues to consider the credibility assessments of the special trial judge.81 The rule change made it unclear what standard of review, if any, should be accorded the report of the special trial judge.82 One interpretation of the rule change is that the deletion of the requirement to provide a copy of the report to the parties eliminated the traditional appellate review of decisions of lower tribunals.83 If, however, the intent of the rule change was to eliminate the standard of review, it is confounding to retain the “due regard” and “presumed to be correct” language in Rule 183.

The Committee notes offer no explanation or rationale for the removal of the ability of the parties to receive a copy of the report of the special trial judge or object prior to entry of a decision by a Tax Court judge.

A second interpretation is that the rule change was a reaction by the Tax Court to the standard of review that was squarely considered on appeal in Rosenbaum and the Tax Court’s attempt to blunt the issue. In Rosenbaum v. Commissioner, the special trial judge produced a report and the Internal Revenue Service objected.84 The Tax Court judge

81 TAX CT. R. 182(a), (b), (c) and (d) (1974).
82 The Tax Court claimed that, even after the rule change, the authority of a special trial judge conformed to the powers of a trial judge in the Court of Claims. See First Western Gov’t Sec. Inc. v. Comm’r, 94 T.C. 549, 558 (1990), aff’ed; Samuels, Kramer & Co. v. Comm’r, 930 F.2d 975 (2d Cir.), cert. denied, 502 U.S. 957 (1991).
83 See Freytag v. Comm’r, 904 F.2d 1011, 1015 n.8 (5th Cir. 1990) (change in Tax Court rules “confirms that the Tax Court’s relationship with its special trial judges cannot be analogized to typical appellate review”), aff’d, 501 U.S. 868 (1991).
84 45 T.C.M. (CCH) 825 (1983).
relied on the findings of the special trial judge but drew inferences that were contrary to those of the special trial judge.\textsuperscript{85}

In reversing \textit{Rosenbaum v. Commissioner}, the D.C. Circuit, in \textit{Stone v. Commissioner}, interpreted the “due regard” and “presumed to be correct” language to equate to a clearly erroneous standard of review.\textsuperscript{86} As a result, the D.C. Circuit determined that, if a Tax Court judge declines to adopt the findings of the special trial judge, those findings must be “clearly erroneous.” According to \textit{Stone}, the findings of the special trial judge must carry special weight insofar as those findings are determined by the opportunity to hear and observe the witnesses.\textsuperscript{87} By removing the ability of the parties to access the report of the special trial judge and the corresponding objections to the report, challenges similar to those in \textit{Rosenbaum} could not be considered, thereby insulating the Tax Court from subsequent appellate review of its review of findings by a special trial judge.

The Second Circuit in \textit{Samuels, Kramer & Co. v. Commissioner}\textsuperscript{88} offered another explanation. The Second Circuit explained that the change in the Tax Court Rules was the result of a modification of the Internal Revenue Code in 1984 as part of the Tax Reform Act of 1984.\textsuperscript{89}

Before 1984, special trial judges were authorized to hear cases specifically designated by statute and, in those cases, special trial judges were able to render a decision on behalf of the Tax Court.\textsuperscript{90} In

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} 865 F.2d 342, 345-47 (D.C. Cir. 1989), rev'g sub nom. \textit{Rosenbaum v. Comm'r}, 45 T.C.M. (CCH) 825. \textit{See, e.g.}, 35 Am.Jur.2d Fed. Tax Enforcement § 905 (2002) (“The Tax Court is required to review a special trial judge’s factual findings according to the clearly erroneous standard, and cannot overturn a special trial judge’s ruling on the basis that the Tax Court finds the testimony credited by the trial judge to be unbelievable.”); 20A Federal Procedure, L.Ed., Internal Revenue § 48:1274 (2000) (same); but see \textit{Tax Court Litigation}, 630-2nd Tax Mgmt. Portfolio at A-49 n. 599 (1997) (“The D.C. Circuit (but not the Tax Court) has taken the position that the level of deference is to review the Special Trial Judge’s draft opinion on a ‘clearly erroneous’ standard.”).


\textsuperscript{88} 930 F.2d 975 (2d Cir.), \textit{cert. denied}, 502 U.S. 957 (1991).

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} \textit{Id at 981.}
1984, special trial judges were given statutory authority to hear any case assigned by the Chief Judge of the Tax Court but a decision was to be entered by a Tax Court Judge.\(^91\) However, because special trial judges were assigned cases and issued a report before they were authorized to do so by statute, the 1984 statutory change was labeled a mere technical amendment.\(^92\) This statutory change has no bearing on the change to Rule 183 of the Tax Court Rules and, therefore, fails to explain the rationale for the elimination of the notice and objection procedure previously permitted by Tax Court Rule 182.

The government has consistently maintained since the decision by the D.C. Circuit in *Stone* that review by the Tax Court judge of a report by a special trial judge does not contemplate a clearly erroneous standard of review. Two years after *Stone*, the Commissioner, in *Freytag v. Commissioner*, contended that the Tax Court rules provide that a Tax Court judge may adopt, modify, or reject the special trial judge's report in whole or in part, may request additional briefing, and "may receive further evidence." According to the Commissioner, such broad authority over the report of the special trial judge is "flatly inconsistent with ‘clear error’ review."\(^93\)

Instead, the Commissioner asserted that the rule requires that the Tax Court judge "to start with the facts found by the special trial judge" but that "the Tax Court judge to whom the case is assigned ‘controls the outcome of the case,’ notwithstanding the presumption of correctness."\(^94\) This position remained consistent in its brief to the Supreme Court in *Ballard v. Commissioner*, asserting that “the

\(^91\) *Id.*


\(^93\) Brief for the Respondent at 19, Freytag v. Comm’r, 501 U.S. 868 (1991) (No. 90-762). *See* Estate of Kanter v. Comm’r, 337 F.3d 833, 841 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part), *rev’d*, Ballard v. Comm’r, 544 U.S. 40 (2005) ("The Tax Court thus acts as the original finder of fact . . . [T]he STJ’s inability to decide cases limits the amount of deference that the Tax Court, as the original factfinder, must pay to those preliminary findings.").

government has long regarded *Stone* as wrongly decided." In fact, Judge Cudahy, in the *Estate of Kanter v. Commissioner*, agreed that the clearly erroneous deference standard does not apply.

**B. The Supreme Court Decision in Ballard**

According to the Supreme Court in *Ballard*, from 1983 through 2005, the Tax Court itself did not disclose whether the decision of a Tax Court judge, “in fact ‘modif[ies]’ or ‘reject[s]’ [the special trial judge’s] initial report ] in whole or in part.” Instead, the decision of the Tax Court judge begins with the “stock statement that the Tax Court judge ‘agrees with and adopts the opinion of the [special trial judge].’” As a result, the public and/or the parties are not made aware if or how the decision of the Tax Court judge modifies, rejects, or upholds the report and recommendation of the special trial judge.

The practical implications of the amendments, however, were more extraordinary. Since the amendment in 1983 through the rule change in 2005, there were no instances in the 880 cases in which a special trial judge issued a report and recommendation that the Tax Court modified or rejected the report and recommendation.

This is because, since 1983, the Tax Court judge treated the report and recommendation of the special trial judge as a draft of an opinion that will, after a collaborative effort with the Tax Court judge, be adopted as the public opinion of the Tax Court.}

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96 337 F.3d at 877 (Cudahy, J. concurring in part and dissenting in part).

97 *Ballard*, 544 U.S. at 46 (citing TAX CT. R. 183(c)) (emphasis added).


99 *Ballard*, 544 U.S. at 46.

100 *Kanter*, 337 F.3d at 876 (Cudahy, J., dissenting). "Never, in any instance since the adoption of the current Rule 183 that I could find, has a Tax Court judge not agreed with and adopted the [special trial judge's] opinion." *Kanter*, 337 F.3d at 876 (Cudahy, J., dissenting). *See* Stephanie Francis Cahill, *Tax Judges Decide Cases They Do Not Hear*, 1 No. 37 A.B.A. J. E-Report 3 (Sept. 27, 2002) (between 1994 and 2002, there were 700 cases which the report and recommendation of the special trial judge was adopted).
ultimately be adopted by the Tax Court. After completion of this collaborative process, the Tax Court judge issues a decision in all cases that agrees with and adopts the report and recommendation of the special trial judge. The extent to which the original report and recommendation of the special trial judge is modified or rejected is not known. Stated simply, this process did not follow the rules as adopted by the Tax Court in Rule 183.

More importantly, it is impossible to determine the standard by which the Tax Court affords a report and recommendation of the special trial judge “due regard” and “presumed to be correct” deference, particularly in the instance in which the Tax Court judge participated in its production. As a result, there is no record of how the Tax Court viewed the standard of “due regard” and “presumed to be correct.”

C. 2005 Modification of the Tax Court Rules

As a result of the decision of the Supreme Court in Ballard and the likelihood that a subsequent challenge that the Tax Court did not follow its rules would be made on due process grounds, the Tax Court, in 2005, again modified its rules. Under the modified rules, the parties may submit briefs to the special trial judge after trial. The special trial judge shall file recommended findings of fact and conclusions of law, with copies served on each of the parties. The parties then have the opportunity to file written objections to the recommended findings of fact and conclusions of law. Under Tax Court Rule 183(d), --

The Judge to whom the case is assigned may adopt the Special Trial Judge's recommended findings of fact and conclusions of

101 Ballard, 544 U.S. at 57.
102 Id.
103 The rules were effective September 20, 2005. 2005 US Order 51 (C.O. 51) (Sept. 21, 2005).
104 TAX Ct. R. 183(a) (2005).
105 TAX Ct. R. 183(b) (2005).
106 TAX Ct. R. 183(c) (2005).
law, or may modify or reject them in whole or in part, or may
direct the filing of additional briefs, or may receive further
evidence, or may direct oral argument, or may recommit the
recommended findings of fact and conclusions of law with
instructions . . . Due regard shall be given to the circumstance
that the Special Trial Judge had the opportunity to evaluate the
credibility of witnesses, and the findings of fact recommended
by the Special Trial Judge shall be presumed to be correct.

The modification of Rule 183, based on the Supreme Court’s
decision in Ballard, was to recommit, with minor changes, the Tax
Court procedures to the pre-1983 amendments. As a result, the
implications of the “due regard” and “presumed to be correct” language
again become significant. From 1983 thorough 2005, the “due regard”
and “presumed to be correct” language remained as part of the Tax
Court rules but, in practice, its impact was meaningless. Presumably,
the Tax Court will follow its reincarnated procedure under Rule 183
which specifically calls into question how the findings of fact and
conclusions of law of the special trial judge are viewed by a Tax Court
judge.

VI. LANGUAGE AND ITS APPLICATION TO STANDARDS OF REVIEW

In the articulation of a deference standard, language is not a
sufficient basis for defining a standard. Further, a standard of review is
not susceptible to objective certainty. Because of the lack of
objectivity, it is the uniformity of terms that promotes consistency in
application. In this circumstance, a non-definable, non-customary
standard may lead to confusion and a lack of uniformity in application.
In such a case, the cost of associating with a non-traditional standard
would likely outweigh the benefit of creating such a standard and
utilizing such standards in light of the established, customary standards
would prove unrealistic.

While the seeming need to be precise may suggest that more rather
than less standards of review are necessary, such a conclusion in this

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107 Clermont, supra note 1, at 1148.
108 Id.
context demonstrates a lack of sophistication. Instead, the magnification of intricacy which is complicated in application demonstrates a lack of responsibility and, therefore, is unappealing. It is because of the imprecision of language and the unrealistic view that infinite degrees can exist that standards of review should be limited to a familiar set of gradations.

A. LIMITED GRADATIONS OF STANDARDS OF REVIEW

Judge Alvin Rubin describes the standard of review as "the decibel level at which the appellate advocate must play to catch the judicial ear." More concretely, a standard of review reflects the degree to which the original decisionmaker must be wrong for a reviewer to reverse the original decision. Traditionally, judicial review utilizes three standards – de novo, clearly erroneous, and abuse of discretion.

In short, de novo review applies to questions of law. The de novo standard of review is the least restrictive to reviewing courts as it provides no degree of deference and permits a reviewing court to determine the correct resolution of an issue on its own accord. In essence then, de novo review is no deference at all but is a judicial determination of an issue entirely independent of prior resolution. Under a de novo standard, a reviewing court is “willing to reverse a [prior] conclusion of law solely on the basis that it believes that conclusion to be incorrect.”

109 Id at 1151.
111 Clermont, supra note 1, at 1148.
113 Clermont, supra note 1, at 1126.
117 Id.
The clearly erroneous standard of review applies to questions of fact and gives a significant amount of deference to the trier of fact. Under the clearly erroneous standard of review, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In other words, a reviewing court will not substitute its judgment for the judgment of the trier of fact notwithstanding that had the appellate court been sitting as a trial court, it may have reached a different finding.

The primary difference between these two standards is based on the role of the trier of fact and the role of a reviewing court. Triers of fact have the benefit of hearing testimony and can better assess the credibility and demeanor of witnesses. Reviewing courts merely have an opportunity to review the record created by the trier of fact and do not have the ability to observe the demeanor of a witness or make a determination of credibility.

Compared to the de novo standard of review and the clearly erroneous standard of review, the third standard – abuse of discretion – provides the highest degree of deference to a determination by the trial court. Under this standard, an abuse of discretion occurs when an

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120 Id at 573 (quoting U.S. Gypsum Co., 333 U.S. at 395; clearly erroneous standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.").
121 Anderson, 470 U.S. at 574 (if determination of fact finder "is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").
122 Nishikawa v. Dulles, 356 U.S. 129, 143 (1958) (Harlan, J., dissenting) (appellate court should not substitute its judgment for that of the trial courts on factual questions because the trial court had the opportunity to hear and observe the testimony of witnesses).
123 Id (Harlan, J., dissenting).
adjudicator fails to exercise sound, reasonable, and legal decision-making skills.\textsuperscript{124}

This standard applies to the discretionary functions of a trial court and has been applied in the following circumstances -- inadequacy or excessiveness of jury verdicts;\textsuperscript{125} exclusion of scientific evidence;\textsuperscript{126} evidentiary rulings;\textsuperscript{127} rulings concerning motions for new trial;\textsuperscript{128} application of judicial estoppel;\textsuperscript{129} awards of prejudgment interest;\textsuperscript{130} the type of sanctions imposed;\textsuperscript{131} an award of attorneys' fees as compensation;\textsuperscript{132} jury instructions;\textsuperscript{133} the award of court costs;\textsuperscript{134} the issuance of injunctions;\textsuperscript{135} rulings on set-off;\textsuperscript{136} a motion to transfer;\textsuperscript{137}


\textsuperscript{126} Joiner, 522 U.S. at 137.

\textsuperscript{127} See Koster v. Trans World Airlines, Inc., 181 F.3d 24, 32 (1st Cir. 1999); Walker v. Columbia Univ., No. 98-9333, slip op. (2d Cir. June 30, 1999); McQueeny v. Wilmington Trust Co., 779 F.2d 916, 921 (3d Cir. 1985); Bartley v. Euclid, Inc., 158 F.3d 261, 267 (5th Cir. 1998); United States v. Morales, 108 F.3d 1031, 1035 (9th Cir. 1997); Gilbrook v. City of Westminster, 177 F.3d 839, 858 (9th Cir. 1999); Wilson v. Merrell Dow Pharm., 160 F.3d 625, 629 (10th Cir. 1998).

\textsuperscript{128} McClain v. Owens-Corning Fiberglass Corp., 139 F.3d 1124, 1126 (7th Cir. 1998); Osteguin v. S. Pac. Transp. Co., 144 F.3d 1293, 1295 (10th Cir. 1998).


\textsuperscript{132} Spegon v. Catholic Bishop of Chi., 175 F.3d 544, 550 (7th Cir. 1999); Connolly v. Nat'l Sch. of Bus. Serv., 177 F.3d 593, 595 (7th Cir. 1999); Flores v. Shalala, 49 F.3d 562, 567 (9th Cir. 1995); Robinson v. City of Edmond, 160 F.3d 1275, 1280 (10th Cir. 1998).

\textsuperscript{133} Broaddus v. Fla. Power Corp., 145 F.3d 1283, 1288 (11th Cir. 1999).

\textsuperscript{134} Spegon, 175 F.3d at 555.

\textsuperscript{135} Grossbaum v. Ind.-Marion County Bldg. Auth., 100 F.3d 1287, 1291 (7th Cir. 1996); A.C.L.U. v. City of Las Vegas, No. 98-15853, 98-15970, slip op. at 1 (9th Cir.
the relation-back of pleadings, matters of comity and abstention in determining trial court jurisdiction, and the unilateral mistake doctrine.

The standards of judicial review define the scope by which an appellate or reviewing court must defer to the trier of fact. In this context, the standards of review are three – de novo review, review under the clearly erroneous standard, and the abuse of discretion standard. The limited use of non-traditional terms also arises in other well-known contexts.

B. LIMITED STANDARDS OF REVIEW IN OTHER CONTEXTS

The standards of legislative review define the method by which the judicial branch must assess whether a statute is constitutional. In the review of legislative activity, there are only three traditional standards of legislative review -- strict scrutiny, intermediate scrutiny, and

138 In re Bozeman, 226 B.R. 627, 630 (B.A.P. 8th Cir. 1998).
139 Stock W. Corp. v. Taylor, 964 F.2d 912, 918 (9th Cir. 1992).
140 Roberts & Schaeffer Co. v. Hardaway Co., 152 F.3d 1283, 1292 (11th Cir. 1998).
142 An intermediate level of scrutiny applies to quasi-suspect classifications and does not require the same type of heightened scrutiny that is applicable to suspect classifications or fundamental rights. Under a intermediate scrutiny test, the statutory classification must be substantially related to an important governmental objective.
rational basis.\(^{143}\) In each of these cases, non-traditional notions of review are limited and the standards of review are necessarily limited to the traditional standards.


144 The preponderance standard is the prevailing standard in civil trials to resolve question of fact and typically involves a monetary dispute between private parties. Addington v. Texas, 441 U.S. 418, 423 (1979). Because society in general has a minimal concern with the end result in disputes between private individuals, the burden of proof is a preponderance of the evidence, thus having litigants equally share the risk of error. Id.


146 “Beyond a reasonable doubt” is the standard by which the government must prove each element of the alleged crime. In re Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt before the government can punish with a serious deprivation of liberty through criminal or juvenile delinquency sanctions).
characterizes the three standards as “what (a) probably has happened, or (b) what highly probably has happened, or (c) what almost certainly has happened.”\cite{147} Just as in the standards applicable to judicial review of legislative activity, the standards of proof also limit the gradations of proof to the traditional three, and avoid standards not consistently applied by courts.

C. THE CHOICE OF A STANDARD OF REVIEW IN THE TAX COURT CONTEXT

Because the findings of a special trial judge do not fall within the discretionary function discussed above and thus do not implicate the abuse of discretion standard of review, the two traditional standards of review applicable to reports of a special trial judge are the de novo standard of review and the clearly erroneous standard of review. Under the de novo standard, the Tax Court makes an independent determination and retains for the Tax Court the ability to make a determination notwithstanding a recommendation of the special trial judge.\cite{148} Thus, a special trial judge gathers evidence and makes a recommendation to the Tax Court. The Tax Court utilizes the evidence gathered by the special trial judge and may supplement it by the receipt of additional evidence but, in either case, is free to disregard the recommendation of the special trial judge as if the recommendation did not exist.

Under the clearly erroneous standard of review, a level of discretion is given a special trial judge and the Tax Court does not alter a recommendation unless it holds a “definite and firm conviction that a mistake has been committed.”\cite{149} Utilizing such a standard, the Tax

\begin{footnotesize}
\footnote{147} McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242, 246-47 (1944).


\end{footnotesize}
Court must accept the determination of facts of the special trial judge as correct unless clear evidence suggests an alternative.\textsuperscript{150}

As such, a clearly erroneous standard of review would not entitle the Tax Court to “reverse the finding of the [special trial judge] simply because it is convinced that it would have decided the case differently.”\textsuperscript{151} Consequently, the role of the Tax Court under a clearly erroneous standard of review is “not to decide factual issues de novo.”\textsuperscript{152} Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.\textsuperscript{153}

The “due regard” language in the Tax Court rules, however, poses significant complications. Because it is not a commonly utilized standard of review, it is subject to wide interpretation and even wider speculation. Does it equate with clear error and, if so, why choose language other than “clearly erroneous?” Does it mean that Tax Court judges must be “cognizant that the [special trial judge] had the opportunity to evaluate the credibility of witnesses?”\textsuperscript{154}

It certainly appears that the Rule contemplates a substantive standard of review inasmuch the word “shall” appears twice in describing the method by which a Tax Court judge reviews the work of a special trial judge -- “Due regard \textit{shall} be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge \textit{shall} be presumed to be correct.”\textsuperscript{155}

\textsuperscript{150} \textit{U.S. Gypsum Co.}, 333 U.S. at 395.
\textsuperscript{151} \textit{Anderson}, 470 U.S. at 573.
\textsuperscript{153} \textit{United States v. Yellow Cab Co.}, 338 U.S. 338, 342 (1949) (“Such a choice between two permissible views of the weight of evidence is not ‘clearly erroneous.’”). \textit{See Inwood Labs., Inc. v. Ives Labs., Inc.}, 456 U.S. 844 (1982). In more colorful language, the Seventh Circuit equated the clearly erroneous standard and permitting reversal only if decision is “wrong with the force of a five-week old, unrefrigerated dead fish.” \textit{Parts and Elec. Motors v. Sterling Elec.}, 866 F.2d 228, 233 (7th Cir. 1989).
\textsuperscript{155} \textit{TAX CT. R.} 183 (2007).
The latter interpretation appears to be the explanation in the Tax Court note explaining the additional language in 1974 stating that "[t]he decision of a case is made by a [Tax Court] Judge, and the rule expands the alternatives available in reviewing the determinations of the commissioner as embodied in his report. The [Tax Court] Judge, to whom the case is assigned, may take any action he deems appropriate for a proper disposition of the case, even with respect to the commissioner's findings of fact, although they are accorded special weight insofar as those findings are determined by the opportunity to hear and observe the witnesses." 156 Thus, notwithstanding the "due regard" and "presumed correct" language, the Tax Court intended to retain full decisional authority over cases under the new rule.

The primary problem is that the Tax Court and the Internal Revenue Service in the Ballard litigation maintained inconsistent positions on the “due regard” and the “presumed to be correct” language. In its opposition to a grant of certiorari, the Internal Revenue Service argued that the deference rule in Rule 183 does not require the Tax Court to give any deference to the findings of the special trial judge. 157 In fact, the Commissioner argued that “Rule 183 simply does not embody a ‘standard of review’ in the traditional sense.” 158 Instead, the Commissioner argued that Rule 183 merely instructs the regular judge "to be cognizant that the [special trial judge] had the opportunity to evaluate the credibility of witnesses." 159

Later during this litigation, the Commissioner noted that the Tax Court itself, at the time of enactment in 1974, required a Tax Court judge to give “special weight [to the findings of a special trial judge]

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156 Tax Ct. R. 182(b) note (1974).
157 Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 15, Estate of Kanter v. Comm’r, 544 U.S. 40 (2005) (No. 03-1034). (“Rule 183 does not require regular judges of the Tax Court to review the recommended findings of a special trial judge under a "clearly erroneous" or other deferential standard of review.”)
158 Brief for the Respondent in Opposition to Petition for Writ of Certiorari, supra note 157, at 15.
159 Brief for the Respondent in Opposition to Petition for Writ of Certiorari, supra note 157, at 15.
insofar as those findings are determined by the opportunity to hear and observe the witnesses.”160

Any argument that the removal of the disclosure language and an opportunity to provide exception to the report of a special trial judge eliminated the standard of review does not comport with the language left unaltered in Rule 183. If the Tax Court intended to substantively change the Rule and eliminate the standard of review, it could have and should have eliminated the “presumed to be correct” and “due regard” language from the Rule rather than a circumspect elimination of the disclosure and exception language.

D. THE AMBIGUITY OF THE CURRENT STANDARD OF REVIEW IN THE TAX COURT

The standard of review adopted by the Tax Court under Rule 183 does not fit within customary matrix because it uses non-traditional terms to define a standard of review. In Universal Camera, Justice Jackson described deference to agency findings but the reasoning is equally applicable to the degree of deference a Tax Court judge should give to findings of a special trial judge.

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.161

By not applying terminology with which courts interact frequently, consistency in application of a standard which provides conflicting messages is not possible. While it is impossible to pinpoint the definition of preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt, courts are nonetheless able to apply these standards because they are universal and commonly articulated.

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160 Brief for the Respondent in Opposition to Petition for Writ of Certiorari, supra note 157, at 27 (citing TAX Ct. R. 182(b) note (1974)).

This same customary application holds true for strict scrutiny, intermediate scrutiny, and rational basis. Such is the case with applying a deferential standard. Courts frequently interact with standards such as de novo and clearly erroneous. If nothing else, consistency occurs because of the sheer repetition in application. Such is not the case with novel creations such as a standard which combines “due regard” and “presumed to be correct.”

If indeed “due regard” and “presumed to be correct” mean “clearly erroneous,” the use of the “clearly erroneous” terminology would eliminate ambiguity in application. If, on the other hand, “due regard” and “presumed to be correct” contemplate a “de novo” review, then the language used clearly fails to convey its meaning.

Congress created impossible standards of proof for courts to interpret and, in those instances, courts have called Congress to task as not confining its intent within the currently acceptable experience of the courts and uniform application of policy. In the context of burden of proof, a number of intermediate standards beyond the traditional preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt, have emerged and court decisions assessing the varying degrees of the traditional standards have been less than satisfying.

For example, under § 357(b) of the Internal Revenue Code, the assumption of a liability does not preclude non-recognition treatment unless the principal purpose for the assumption was to avoid Federal income tax on the exchange or if the assumption was not a bona fide business purpose. In this context, the taxpayer bears the burden of proof by the “clear preponderance of the evidence.” The latest decision applying this standard, Black & Decker, mentions the standard but does not attempt to explain how the two standards merge. The

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163 26 U.S.C. § 357(b) (2007). Treas. Reg. 1.357-1(c) (as amended in 1961) provides the Treasury’s gloss on the contradictory standard of § 357(b) and makes it unmistakably inferior – by providing that a “taxpayer must prove his case by such a clear preponderance of all the evidence that the absence of a purpose to avoid Federal income tax . . . is unmistakable.” See Gamino, supra note 162, at 523-24.

Seventh and Eleventh Circuits find such a standard impossible to administer which “conflates ‘clear and convincing evidence’ with ‘preponderance of the evidence’ to yield ‘clear preponderance of the evidence.’”165

Similarly, under an arbitration clause for a pension program, 29 U.S.C. § 1401(a)(3)(A) provides that “any determination made by a plan sponsor . . . is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.”166 In attempting to understand the meaning of this provision, the Supreme Court found it impenetrable, noting that "[o]ne might as intelligibly say, in a trial court, that a criminal prosecutor is bound to prove each element probably true beyond a reasonable doubt.”167

Conflicting standards, however, are not limited to congressional authorship. In analyzing a decision by the Sixth Circuit which established a “reasonable probability” standard, the Supreme Court reversed and remanded because that standard required “an exceedingly small showing.”168 Justice Blackman, concurring in judgment, referred to the new, reasonable probability standard as “particularly puzzling.”169


165 Trs. of the Cent. Pension Fund of the Int’l Union of Operating Eng’rs & Participating Employers v. Wolf Crane Serv., Inc., 374 F.3d 1035, 1037 (11th Cir. 2004) (quoting Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers’ Pension Plan, 3 F.3d 994, 998 (7th Cir. 1993)). See Gamino, supra note 162 at 523.


It is one thing for clumsy draftsmanship to occur at a congressional level, but it is inexcusable for a court, which often must divine the meaning of a standard of review to create one which produces results that are ambiguous.\textsuperscript{170}

It appears, however, that in the context of the standard of review under Tax Court Rule 183, the Tax Court is giving itself wide discretion to interpret a report and recommendation just as it always has – whether disclosed as it was required prior to 1983 and again in 2005 or protected from disclosure between 1983 and 2005. That is, the Tax Court will adopt a report with which it agrees and will modify a report with which it does not under the guise of an ambiguous standard of review. This simply should not be.

E. AN APPROPRIATE STANDARD OF REVIEW OF PROPOSED FINDINGS OF FACT BY A SPECIAL TRIAL JUDGE

There must be an operational, substantive standard that measures what “due regard” and “presumed to be correct” mean. In the absence of an appropriate fix by the Tax Court, the Tax Court, and the circuit courts reviewing a decision of the Tax Court should make the appropriate standard of review transparent. I argue that the standard should be the traditional, “clearly erroneous” standard of review.

In dicta, the Supreme Court in \textit{Ballard} suggested that the standard is closer to a clearly erroneous standard than a de novo standard. According to the Court, the origin of Rule 183 was based on Court of Claims Rule 147(b) which “require[d] respectful attention to the trial

judge’s findings of fact.”171 At the time of the adoption of the Tax Court Rule in 1974, the Court of Claims reviewed credibility determinations using a clearly erroneous standard of review.172

Further, in *Hebah v. United States*, the Court of Claims required a “strong affirmative showing” to reverse a finding based on “presumed to be correct” language.173 While not specifically adopting a clearly erroneous standard of review, it is clear that the standard contemplated was not de novo. In this case, however, the dissent demonstrates the problem with this standard. The dissent would require a “strong reason” to reverse, and only where “we are convinced that the preponderance of the evidence goes against the trier’s determination.”174 The dissent’s use of a conflicting standard points to the obvious problem with the standard -- it would require a “strong reason” but yet applies a de novo standard of review.

Even in the litigation which precipitated the change in Rule 183, the Eleventh Circuit, after remand from the Supreme Court case in *Ballard*, struck the collaborative opinion of the special trial judge and the Tax Court judge, reinstated the original report of the special trial judge, and required a review by a new Tax Court judge in which the Tax Court judge was to review the original report of the special trial judge as correct unless “manifestly unreasonable.” Certainly, this standard is not contemplated by Tax Court Rule 183 nor suggested at any point since the “due regard” and the “presumed to be correct” language was adopted by the Tax Court in 1974.175

Further, the Court noted that former Rule 182 (now Rule 183) of the Tax Court Rules accords “special weight” to the findings of the

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173 *Hebah*, 456 F.2d at 698.
174 Id at 710.
175 See Sheryl Stratton, *Pressure Mounts on Tax Court in Kanter, Ballard, and Lisle Cases*, 2005 TNT 226-1 (Nov. 25, 2005). The Fifth Circuit required a new Tax Court judge to give “due regard” to the credibility determinations of the special trial judge and presume that the findings of fact were correct unless “manifestly unreasonable.” *Id.*
special trial judge “insofar as those findings are determined by the opportunity to hear and observe the witnesses.”

This rule thus recognizes that the special trial judge, who hears the witnesses and examines the evidence at trial, will have a complete view of the case. The most likely interpretation of the 1983 amendments was to blunt the decision of the D.C. Circuit in *Stone* which interpreted the “due regard” and “presumed to be correct” language to equate to a clearly erroneous standard of review. According to the D.C. Circuit, if a Tax Court judge declines to adopt the findings of the special trial judge, those findings must be “clearly erroneous.” By removing the ability of the parties to access the report of the special trial judge and the corresponding objections to the report, challenges similar to those in *Rosenbaum* could not be considered, thereby insulating the Tax Court from subsequent appellate review of its review of findings by a special trial judge.

**VII. CONCLUSION**

With the re-adoption of the pre-1983 rules, the “clearly erroneous” interpretation is persuasive. In determining facts, “[o]ne of the essential elements of the determination . . . is the weighing and appraising of the testimony.” This is particularly true on assessing credibility of witnesses and should not be discarded on review by a reviewer that was not present – “only the trial judge can be aware of the

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177 *Ballard*, 544 U.S. at 59.

178 *Stone v. Comm’r*, 865 F.2d 342, 345-47 (D.C. Cir. 1989), rev’g sub nom. *Rosenbaum v. Comm’r*, 45 T.C.M. (CCH) 825, 827 (1983). See, e.g., 35 Am.Jur.2d Fed. Tax Enforcement § 905 (2002) (“The Tax Court is required to review a special trial judge’s factual findings according to the clearly erroneous standard, and cannot overturn a special trial judge’s ruling on the basis that the Tax Court finds the testimony credited by the trial judge to be unbelievable.”); 20A Federal Procedure, L.Ed., Internal Revenue § 48:1274 (2000) (same); *but see Tax Court Litigation*, 630-2nd Tax Mgmt. Portfolio at A-49 n. 599 (1997) (“The D.C. Circuit (but not the Tax Court) has taken the position that the level of deference is to review the Special Trial Judge’s draft opinion on a ‘clearly erroneous’ standard.”).

variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”

If a de novo standard or some unarticulated standard as de “novo plus” is adopted, it becomes difficult to attach any importance to the “presumed to be correct” language in Rule 183 and any significance to the “due regard” language that is provided for credibility evaluations by the special trial judge.

The clearly erroneous standard is based on the assumption that the Tax Court judge simply reviews the record in the case before the special trial judge. However, Rule 183(c) contemplates that the Tax Court judge may also conduct additional proceedings such as rehearing testimony or taking additional testimony. In those circumstances, the Tax Court judge is in a position to assess credibility or otherwise draw separate, distinct conclusions based on personal involvement in the litigation. A clearly erroneous standard is inappropriate, but only with respect to factual matters that result from or can be drawn from the rehearing or the taking of additional testimony. When the factual findings of the special trial judge are not linked to the involvement by the Tax Court judge in the subject litigation should remain undisturbed unless those findings are clearly erroneous.

180 Anderson v. City of Bessemer City, 470 U.S. at 564, 575 (1985). In courts of equity, review of cases contemplates a de novo standard of review. However, courts of equity, nonetheless, adopted a clearly erroneous standard with respect to facts because the original fact finder had the opportunity to see and evaluate the credibility of witnesses, an important benefit not available to an appellate court. Charles E. Clark and Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. Chi. L. Rev. 190, 208 (1937), citing Fienup v. Kleinman, 5 F.2d 137 (8th Cir. 1925); Unkle v. Wills, 281 Fed. 29 (8th Cir. 1922); Butte and Superior Copper Co. v. Clark Mo. Realty Co., 248 Fed. 609 (9th Cir. 1918), *cert. denied*, 247 U.S. 516 (1918); Silver King Coalition Mines Co. v. Consol. Mining Co., 204 Fed. 166 (8th Cir. 1913); Lilienthal v. McCormick, 117 Fed. 89 (9th Cir. 1902); Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co., 104 Fed. 243 (8th Cir. 1900). Dating to the 1930s, many statutes governing the creation of New Deals administrative adjudicators created the same clearly erroneous deference. Clark and Stone, supra, at 208.

181 See Stone, 865 F.2d at 347.