


DENIS KLEINFELD,
Petitioner,

ELECTRONICALLY FILED

v. Docket No. 11576-17

COMMISSIONER OF INTERNAL REVENUE,
Respondent

# PETITIONER'S MOTION TO TAKE JUDICIAL NOTICE

UNITED STATES TAX COURT

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| DENIS KLEINFELD, Petitioner, | : | Case No.: 11576-17 |
| vs. | : | |
| COMMISSIONER OF INTERNAL REVENUE, Respondent. | : | |

**MOTION FOR THE FULL COURT TO HOLD WHAT OPINION CONTROLLS IN A FRACTURED FULLY REVIEWED OPINION**

**COMES NOW** the Petitioner, by and through undersigned counsel, hereby moves pursuant to this Court's inherent powers to hold what opinion controls in a fractured fully reviewed opinion of this Court. In support thereof the Petitioner states as follows.[1]

## BACKGROUND

On January 29th this Court issued its opinion in *Coffey v. Comm'r*, 150 T.C. No. 4 (Jan. 29, 2018). The *Coffey* opinion has an opinion by Judge Holmes (*see* slip op. at p. 3-59), and opinion by Judge Thornton (*see* slip op. at p. 60-70), and a dissenting opinion by Chief Judge Marvel (*see* slip op. at p. 71-76).

[1] Counsel for Respondent objects to the requested relief.



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Judges Holmes' opinion was joined by Foley, Vasquez, Gustafson, and Buch, *JJ.*; Judges Thornton's opinion was joined by Gale, Goeke, Paris, Kerrigan, Pugh, and Ashford, *JJ.*, and with Judge Gustafson (with the exception as to the word "only" in the first line of the concurring opinion and the phrase "if not the reasoning" in the last sentence of the concurring opinion).

Chief Judge Marvel's dissenting opinion was joined by Morrison, Lauber, and Nega, *JJ.*

## DISCUSSION

The undersigned is unsure of how to read this Court's *Coffey* opinion as this Court (to the best of the undersigned's research) has not indicated how to read fractured full division decisions of this Court, nor do this Court's rules shed any light on the matter.[2] To that end, the undersigned has discussed the *Coffey* opinion with other members of the private bar and they were likewise confused (the undersigned expects that those in public service might also be confused as well).

As the undersigned sees it, this Court entered a 5-7-4 decision, but leaves open the following questions:

[2] The understands that the Court has IOPs, but those IOPs as not publicly available (in contrast to other courts such as the Third Circuit). This Court should consider making its IOPs public.


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A. Does Judge Holmes' opinion carry the day when it had only 5 judges signing on to it?

B. Shouldn't Judge Thornton's opinion be the controlling since it had 7 judges signing on to it?

C. Judge Gustafson voted twice, i.e., he signed on to both the Holmes and the Thornton opinions. Is that possible? If so, does one vote weigh more heavily than the other?

D. Does Judge Thornton's opinion (which is the most taxpayer friendly) control since it is well settled that courts interpret revenue laws in favor of the taxpayer—a principle known as the "strict construction doctrine." *Bowers v. N.Y. & Albany Lighterage Co.*, 273 U.S. 346, 350 (1927); *see also Royal Caribbean Cruises, Inc. v. United States*, 108 F.3d 290, 294 (11th Cir. 1997) ("This interpretation is consistent with the general rule of construction that ambiguous tax statutes are to be construed against the government and in favor of the taxpayer.").

E. What impact, if any, does the Supreme Court's opinion in *Marks v. United States*, 430 U.S. 188 (1977) have on this Court's jurisprudence?

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The undersigned submits that when this Court addresses a case of statutory interpretation (which the majority, if not all, of this Court's fully reviewed decision will be given that this Court's role is to interpret the Internal Revenue Code and the



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attendant Treasury Regulations) the "strict construction doctrine" dictates that the most taxpayer friendly (which may not be on the widest grounds) is the controlling opinion. *See Bowers, supra.* Thus, in respect to the *Coffey* decision Judge Thornton's opinion is the controlling opinion.

However, if this Court were to reject the undersigned proposed resolution, this Court should adopt a bright-line rule that the opinion that garners the most votes is the controlling opinion. Thus, in respect to *Coffey,* Judge Thornton's opinion would also control.

As to Judge Gustafson voting twice – the undersigned is at a loss as to how to address that. However, in the *Coffey* case if one removes Judge Gustafson's vote from the Thornton opinion, the Thornton opinion would have 6 votes, which would still be more than the 5 votes for the Holmes opinion. In all events, this Court should address the possibility of multiple votes by its judges as such a circumstance is highly likely to occur in the future.

As to the Supreme Court's *Marks* decision, it appears that this Court has never cited, let alone addressed, whether *Marks* applies to it. The undersign submits that it should not, given that the Supreme is the court of last review and not a trial court like this Court. The D.C. Circuit has

> interpreted *Marks* to mean that, to be binding as representing the narrowest grounds for decision, an opinion must represent a common


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> denominator of the Court's *reasoning* it must embody a position implicitly approved by at least five Justices who support the judgment. (emphasis added). Under *Marks*' "narrowest grounds" approach, for an opinion to be controlling it must contain a "controlling rationale." "*Marks* is workable ... only when one opinion is a logical subset of other, broader opinions." Otherwise, the en banc court reasoned, "[i]f applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law." So, "[w]hen ... one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic." According to the en banc court, *Marks* applies when "the concurrence posits a narrow test to which the plurality *must necessarily agree as a logical consequence* of its own, broader position." (emphasis added).

*United States v. Duvall*, 740 F.3d 604–605 (D.C. Cir. 2013) (Rodgers, *J.* concurring in the denial or rehearing *en banc*) (internal citations omitted); see also

But the "narrowest grounds" approach is problematic for this Court to employ. *First*, the "narrowest grounds" approach is a means to interpret caselaw, not statutes. Thus, to the extent that there is a tension between "strict construction doctrine" and the "narrowest grounds" approach the two must be harmonized, and this Court must employ the "strict construction doctrine" to determine which opinion is most taxpayer friendly.

*Second*, the Supreme Court did not hold in *Marks* that lower court fractured decisions (i.e., Court of Appeals or this Court) are subject to *Marks*. *Marks* was limited to Supreme Court decisions and, in all events, has not been expanded to trial courts


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such as this Court. This Court should not attempt to graft a court of final review interpretive jurisprudence onto a trial court.

*Third*, the animating reasoning behind *Marks* is vertical stare decisis and lower courts obligations to follow Supreme Court rulings. This Court has no obligation to follow its prior rulings. This stands in stark contrast to Court of Appeals and Supreme Court rulings, which bind this Court. Accordingly, as vertical stare decisis cannot work on this Court's own case law, the *Marks* decision cannot control. In turn, this means that the "narrowest grounds" approach cannot (and should not) be applied to this Court's fractured fully reviewed decisions.

*Fourth*,

> on rare occasions, [Supreme Court] splintered decisions have no "narrowest" opinion that would identify how a majority of the Supreme Court would resolve all future cases. *Marks* itself did not have reason to specifically address that situation. But in that situation, the necessary logical corollary to *Marks* is that lower courts should still strive to decide the case before them in a way consistent with how the Supreme Court's opinions in the relevant precedent would resolve the current case.

*Duvall*, 740 F.3d at 611 (Kavanaugh, *J.* concurring in the denial of rehearing en banc). This problem with *Marks* is yet another reason why it should not be applied to this Court. How should this Court "strive to decide the case before them in a way consistent with how [this] Court's opinions in the relevant precedent would resolve the current case?" Why would this Court *strive* to decide a case in a way that would comport with


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its own caselaw? Why wouldn't this Court just decide a case in a way that it is correct since it need not interpret its own case law, rather it can create its own case law. At bottom, the analytical construct of *Marks* is ill-suited to a trial court that can create and interpret its own case law.

*Fifth*, the *Golsen* Rule would wreak havoc if this Court were to adopt *Marks*. Because the Courts of Appeals "cases interpreting *Marks* have not been a model of clarity," *United States v. Davis*, 825 F.3d 1014, 1021 (9th Cir. 2016), this Court would have to interpret *Marks* via extant circuit case law to determine how this Court is to read its own fractured precedent. Such would simply be unworkable. This is especially so given that there is a circuit-split regarding how to apply *Marks* as the D.C. Circuit[3] and the Ninth Circuit[4] have taken a "logical-subset" approach, while the others used a results-oriented test.[5] The caselaw interpreting *Marks* is a mess, and this Court should not import such a mess into its jurisprudence.

*Sixth*, the *Marks* decision has received substantial academic criticism. *See* Mark A. Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court*

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[3] *See United States v. Epps*, 707 F.3d 337 (D.C. Cir. 2013).

[4] *See Davis, supra.*

[5] *See Planned Parenthood of Se. Pennsylvania v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992); *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006).



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*Plurality Decisions*, Vol. 42 DUKE LAW REVIEW 419 (Nov. 1992);[6] Ryan C. Williams, *Questioning* Marks: *Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 799 (2017) ("The conceptual confusion surrounding *Marks* presents an important practical challenge for lower courts.").

*Seventh*, On December 8, 2017, the Supreme Court has granted cert. in *Hughes v. United States*, case no. 17-155,[7] presenting the following questions:

> 1. Whether this Court's decision in *Marks* means that the concurring opinion in a 4-1-4 decision represents the holding of the Court where neither the plurality's reasoning nor the concurrence's reasoning is a logical subset of the other.
> 2. Whether, under *Marks*, the lower courts are bound by the four-Justice plurality
> opinion in *Freeman*, or, instead, by Justice Sotomayor's separate concurring opinion with which all eight other Justices disagreed.
> 3. Whether, as the four-Justice plurality in *Freeman* concluded, a defendant who enters into a Fed. R. Crim. P. 11(c)(1)(C) plea agreement is generally eligible for a sentence reduction if there is a later, retroactive amendment to the relevant Sentencing Guidelines range.

Thus, even the Supreme Court has recognized that the *Marks* decision needs some clarification.

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[6] *Available at* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3205&context=dlj (last accessed Feb. 14, 2018).

[7] *Available at* https://www.supremecourt.gov/qp/17-00155qp.pdf (last accessed Feb. 14, 2018).



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*Finally*, as the foregoing illustrates, "The Supreme Court has recognized that applying a rule of law from its fragmented decisions is often more easily said than done." *United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009) (internal citations omitted); *see also Nichols v. United States*, 511 U.S. 738, 745 (1994) (the *Marks* rule has been "more easily stated than applied.").

If this Court desires to issue rulings which the American public can tell what the law is in respect to the omnipresent Internal Revenue Code, it must create a bright-line rule, which *Marks* does anything but.

## CONCLUSION

**WHEREFORE,** for the reasons stated above, this Court should state how the American public is to interpret a fractured opinion from the full Court.

Respectfully Submitted,

/s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III
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