

NO. 00-71217

Oral Argument Scheduled for December 3, 2001

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**RICHARD D. and ELIZABETH K. WARREN,**

**Petitioners-Appellees**

v.

**COMMISSIONER OF INTERNAL REVENUE,**

**Respondent-Appellant**

---

**ON APPEAL FROM THE DECISION  
OF THE UNITED STATES TAX COURT**

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**AMICI CURIAE SUPPLEMENTAL BRIEF**

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in support of the affirming of the  
decision of the United States Tax Court*

NO. 00-71217

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**STATUS**

This matter is scheduled for oral argument at 9:00 a.m., December 3, 2001,  
in Pasadena, California.

**SUMMARY OF ARGUMENT**

The court ordered the parties to brief the applicability of a recent United  
States Supreme Court decision, *United States v. Mead Corp.*, 121 S. Ct. 2164

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(2001). The Amici believe that the *Mead* decision has no relevance to the present proceeding because the Commissioner failed to preserve the error at the lower court. In addition, Rev. Rul. 71-280 fails all tests requiring deference.

## ARGUMENT

ISSUE NO. 1. Whether the Tax Court erred by failing to give any deference to Rev. Rul. 71-280.

The Tax Court did not err when it followed the litigants' lead and did not give any deference to the revenue ruling. Consistent with its practice, the Tax Court did not cite any revenue ruling as authority for its decision. It simply followed the lead of the Commissioner who also did not cite a revenue ruling as authority for disposition of the case. See Respondent's Tax Court Brief at p. 17, n.2. Without making the argument to the trial court, the argument is waived. *Coady v. Commissioner*, 213 F.3d 1187 (9<sup>th</sup> Cir. 2001).

At its strongest inference, the *Mead* decision stands for the proposition that the court should give deference to the Commissioner's revenue rulings under the standards announced in *Skidmore v. Swift*, 323 U.S. 134 (1944). The *Skidmore* standard states that agency rulings are simply a body of experience and informed judgment to which litigants and court may properly resort for guidance. *Id.* at 141. It then states several factors to consider when using agency rulings, but concludes with the catchall factor of "all those factors which give it the power to persuade."

*Id.* The Ninth Circuit uses a similar standard: "Revenue rulings 'constitute a body of experience and informed judgment to which courts may properly resort for guidance.'" *Gladden v. Commissioner*, 262 F.3d 851, 853 n.1 (9<sup>th</sup> Cir. 2001) (quoting *Lucky Stores v. Commissioner*, 153 F.3d 964, 966 n.4 (9<sup>th</sup> Cir. 1998)).

In its brief to the Tax Court, the Commissioner chose to cite his revenue ruling as the Commissioner's position and not as authority. See Brief of Respondent at p. 17, n. 2. Obviously, the *Skidmore* factors never become applicable when the litigants do not find the ruling persuasive. Apparently, the Commissioner did not believe that his revenue ruling deserved any deference because he did not ask for any deference. Only on appeal does the Commissioner change his mind and suddenly assert that the revenue ruling is entitled to deference.

### ***SKIDMORE* FACTORS**

Assuming the issue was not waived and assuming the failure to cite the revenue ruling as authoritative is not conclusive, then *Skidmore* requires a detailed analysis. This detailed analysis will confirm that the parties were correct when they did not rely on Rev. Rul. 71-280, 1971-2 C.B. 92. According to the *Skidmore* opinion, the following factors should guide the analysis.

Thoroughness evident in the Commissioner's consideration

Rev. Rul. 71-280 is simply an exercise in statutory interpretation, yet the Commissioner does not resort to or follow the traditional statutory analysis. In Heen, *Plain Meaning, the Tax Code, and Doctrinal Incoherence*, 48 Hastings L.J. 771 (1997), Prof. Heen gives a detailed analysis of how courts have conducted statutory interpretation of the Internal Revenue Code. The Commissioner's analysis in Rev. Rul. 71-280 does not meet any of the standards used by the courts.

Generally, the courts do not go beyond the meaning of a statute unless the statute is ambiguous. The Commissioner does not explain how Section 107 is ambiguous, nor does the Commissioner explain why he resorts to statutory interpretation when the statute is unambiguous. When a statute is ambiguous, the court may review the regulations that interpret the statute. The Commissioner fails to cite or use his regulation in interpreting the statute. Next, the courts use the legislative history to aid in interpreting the statute. In Rev. Rul. 71-280, the Commissioner began and ended his analysis by reviewing the legislative history behind the 1954 amendment to Section 107. As a result, the Commissioner's analysis was not very thorough and should not be relied upon.

Validity of its reasoning

Normally, statutory interpretation begins with a review of the applicable statute. But the Commissioner skips this step entirely. Instead, he reasons that

Congress intended to establish a cap of the fair rental value based solely on the legislative history. The revenue ruling quotes the Senate Finance Committee report that states that the new housing allowance should not be treated more favorably than the pre-existing housing allowance. The revenue ruling does not explain how his interpretation supports the statute. The Commissioner does not reconcile his interpretation of the statute with his previously issued regulation that expressly allows the cash payment for a down payment to be counted. Assuming the revenue ruling represents the best interpretation of the statute, the Commissioner fails to explain this huge omission from his regulation that was issued eleven years ago. In sum, the Commissioner's reasoning fails because he started at the wrong place and fails to follow it through the applicable authorities. Since the revenue ruling contradicts the express wording of the statute, the revenue ruling should not be, and is not, relied upon by the Commissioner or any court.

Consistency with earlier and later pronouncements

The revenue ruling is inconsistent with the previously issued Treas. Reg. Section 1.107-1(c).

In sum, the Commissioner either waived the request for deference by not making that argument at the Tax Court or the Commissioner believed that it was not persuasive, removing it from consideration under the *Skidmore* precedent. Under a *Skidmore* analysis, the revenue ruling still fails to provide support for the

Commissioner. As a result, *Mead* is irrelevant to the Tax Court's consideration.

ISSUE NO. 2. Whether this Court should remand the case so the Tax Court can determine, in the first instance, how much deference is warranted.

This Court should not remand the case to the Tax Court because it is presented with a pure issue of law: statutory interpretation. While the law of this circuit is that the trial court may consider revenue rulings when they are helpful, if the litigants do not cite the revenue as helpful, a trial court may properly ignore the revenue ruling.

This court is in the same position as the Tax Court. It may choose the level of confidence that it is willing to place in a revenue ruling that the Commissioner did not believe was worthy of deference.

### CONCLUSION

The rule in this circuit court of appeals that failure to raise an argument with the trial court waives the right to raise it on appeal remains unaffected by the *Mead* decision. The *Mead* decision also does nothing to change the law as it applies to the status of the revenue rulings. Simply stated, the *Mead* decision does

not change the law that the Tax Court interpreted. The Tax Court met all applicable standards.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE  
with NOVEMBER 13, 2001 ORDER

It is hereby certified that the Amici Curiae Supplemental Brief is less than 7,000 words.

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FRANK SOMMERVILLE

CERTIFICATE OF SERVICE

It is hereby certified that service of this supplemental brief has been made on counsel for the appellees and counsel for the *amici curiae* by sending a copy thereof by Federal Express to each of them on this 20th day of November, 2001, properly addressed as follows:

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