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Stay Schemin': Tax Court's Recent Ruling on Credit Card Rewards and the Impact this Ruling Has on Future Rewards Programs

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Stay Schemin': Tax Court's Recent Ruling on Credit Card Rewards and the Impact this Ruling Has on Future Rewards Programs

Cover Page Footnote
* J.D. Candidate, 2023, University of Georgia School of Law; MAcc, 2016, University of Georgia; BBA, 2015, University of Georgia. I would like to thank Professor Gregg Polsky for his guidance and advice, which made this Note possible. I would also like to thank the Editorial and Executive Board Editors for their assistance.

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STAY SCHEMIN': TAX COURT'S RECENT RULING ON CREDIT CARD REWARDS AND THE IMPACT THIS RULING HAS ON FUTURE REWARDS PROGRAMS

Hunter Davis *

Beyond the utility of actual "credit," the most important perk cardholders seek to capitalize on are the rewards that each cardholder's particular credit card offers. Cardholders look for the most bang for their buck in terms of rewards and points. Ranging from frequent flyer miles to cash back to everything in between, rewards programs have expanded and diversified rapidly over the past several decades, and consumers cannot get enough. So much so that the question of whether, and when, consumer loyalty rewards should be taxable has arisen and persists today.

The Internal Revenue Service (IRS) and the Tax Court have been presented with opportunities to address the taxability of what appears to be "clear accessions to wealth," and thus taxable gross income. Yet, the Tax Court and the IRS have both failed to make the first move to end this deferential dance, as each body believes its counterparty to be responsible. Whose responsibility is it? Will the taxman finally prevail in this arena, or will cardholders, even scheming cardholders, continue to take the money and run? This Note examines the Tax Court's most recent consumer loyalty rewards case, Anikeev*, and the question of which governmental entity has the onus to make the first move to settle this enduring tax question.*

* J.D. Candidate, 2023, University of Georgia School of Law; MAcc, 2016, University of Georgia; BBA, 2015, University of Georgia. I would like to thank Professor Gregg Polsky for his guidance and advice, which made this Note possible. I would also like to thank the Editorial and Executive Board Editors for their assistance.

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I. INTRODUCTION

"Is this going to be separate or all on one check?" the restaurant waiter asks a table of eight millennials who just engulfed six burritos, four tacos, two cups of queso, one large bowl of guacamole and a couple pitchers of house margaritas. Prior to 2009, the response to this waiter's question would have likely been a resounding "separate." Although credit card rewards programs were well established by 2009,[1] customers were more hesitant then to cough up their card for the entire dinner bill—foregoing the opportunity to accumulate the rewards points.[2] Taking on the entire bill would require either undesired effort to track down their friends for reimbursement via cash or check or considerable trust in a friend's willingness to cover "the next beer or dinner." With the rise of peer-to-peer mobile payment service applications, like Venmo, Apple Pay, and Cash App, over the last decade,[3] customers are likely now more willing to accept one check for the table (and appease the waiter's preference). Customers, especially those who are "rewards-savvy," will now eagerly debate who gets to be the lucky one to put their credit card down for the entire bill. The question has become "Who wants the points?"

Credit cards have been around for years: In 1950, the Diners Club credit card was the first "modern credit card" and "the first credit card accepted by more than one merchant."[4] In 1986, Sears "introduced the first Discover card, which became the first rewards credit card," meaning that it "offer[ed] cardholders a small rebate on purchases."[5] Since the 1980s, credit card use has continued to soar amongst consumers, and the benefits offered by different credit

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[1] *See* MICHAEL A. TURNER, CREDIT CARD REWARDS: CONTEXT, HISTORY, AND VALUE 8 (Aug. 2012) (noting that the credit card industry introduced a "broader array of loyalty rewards and programs" in the 1980s).

[2] *See* Andrew Latham, *2021 Consumer Credit Card Industry Study*, SUPERMONEY (Sept. 3, 2022), https://www.supermoney.com/studies/credit-card-industry-report/ ("[C]redit cards have become America's most popular payment method.").

[3] *See* Megan M. La Belle & Heidi Mandanis Schooner, *Fintech: New Battle Lines in the Patent Wars?*, 42 CARDOZO L. REV. 277, 315 (2020) ("Payment services have been transformed by mobile wallets (e.g., Apply Pay, Google Pay, PayPal) and peer-to-peer transfers (e.g., Venmo, Square, Zelle).").

[4] Latham, *supra* note 2.

[5] *Id.*

card companies have continued to increase as competition to obtain and retain cardholders' business has fiercely intensified.[6] In what is seemingly an unlimited array of credit card options available to consumers,[7] the different types of rewards and perks associated with each credit card can make or break a consumer's willingness to apply for a certain card and remain loyal to it. But, in reality, is this assertion just an oversimplification of a heavily saturated market? Do the specific perks credit card companies and banks offer with their particular cards *really* influence consumers' decisions to opt for one card over a competing card? According to the 2018 Total System Services, Inc. (TSYS) U.S. Consumer Payment Study, reward offerings are the "most attractive credit card feature for consumers."[8] Thus, it would appear that the types of offers for each credit card heavily influence consumers in deciding between the options.

As rewards offered by credit cards have become more commonplace to consumers, cardholders' incentives and their attentiveness to accumulating the best and as many rewards as possible has increased. Websites and companies largely dedicated to providing insights into which cards offer consumers the best rewards based on spending behavior are on the rise.[9] For example, WalletHub provides quick snapshots of the rewards rates for certain spending with promoted credit cards and the introductory bonus offers available for those promoted cards.[10] Resources like these websites have made it easier for consumers to navigate the complexities of consumer rewards programs and have provided

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[6] *See, e.g.*, *id.* (noting that as recently as 2016 the Chase Sapphire Reserve card "offer[ed] an impressive $1,500 worth of rewards to new cardholders as a sign-up bonus").

[7] *See, e.g.*, *Credit Card Offers*, WALLETHUB (Oct. 4, 2022), https://wallethub.com/credit-cards/ (listing various credit card options available for consumers including Chase Freedom Unlimited, Discover it Secured Card, Blue Cash Preferred Card from American Express, Wells Fargo Active Cash Card, Capital One Platinum Card, and more).

[8] *See* Latham, *supra* note 2 (noting that seventy-nine percent of respondents claimed "types of rewards" as the most attractive credit card feature in the 2018 Consumer Payment Study).

[9] *See, e.g.*, THE POINTS GUY, https://thepointsguy.com (last visited Oct. 28, 2022) (educating consumers on the specific rewards different credit cards can provide); NERDWALLET, https://www.nerdwallet.com/the-best-credit-cards (last visited Oct. 28, 2022) (categorizing which credit cards are best for consumers based on spending habits).

[10] *See Credit Card Offers, supra* note 7 (delineating the rates for different cards).

guidance enabling cardholders to obtain the most benefits that they can.

Whenever consumers seemingly accumulate benefits on a "free" basis, however, the government will not be very far behind. As Benjamin Franklin once stated, "In this world nothing can be said to be certain, except death and taxes."[11] As taxpayers have accumulated more and more benefits over the years through rewards programs, including credit card rewards, the Tax Court, the Internal Revenue Service (IRS), and Congress have taken a closer look at whether these benefits should constitute taxable income.[12] In a recent Tax Court case over credit card rewards, the court determined whether taxpayers' specific scheme to obtain a surplus of—what they hoped to be *tax-free*—cash constituted an accession to wealth that should be considered taxable gross income.[13]

This Note analyzes the court's holding and reasoning in *Anikeev v. Commissioner* and considers the potential ramifications of the Tax Court's conclusion for cardholders and the IRS moving forward. Part II begins by providing a historical account of the types of transactions and rewards the IRS and the Tax Court have considered taxable in relation to rewards programs and, more specifically, credit card rewards programs. This Part then details the facts and background of the *Anikeev* case that led to the court's holding and reasoning.

Part III evaluates the holding and reasoning of the *Anikeev* case and details potential pitfalls of the Tax Court's ruling, including its characterization of Visa debit and gift cards as products or services and the potential that other taxpayers may use the indirect method that the Anikeevs used in their rewards scheme to avoid tax liability based on the court's ruling. This Part will also consider whether the

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[11] Letter from Benjamin Franklin to Jean-Baptiste Le Roy (1789); *see also* United States v. Estate of Romani, 523 U.S. 517, 520 (1998) (quoting Benjamin Franklin as the Court highlights the government's requirement that taxes be paid prior to other debts owed).

[12] *See, e.g.*, Shankar v. Comm'r., 143 T.C. 140 (2014) (considering whether Citibank "Thank You Points" accumulated by the taxpayer and redeemed for an airline ticket constituted taxable gross income).

[13] *See* Anikeev v. Comm'r., T.C. Memo. 2021-23, at *2–3 (noting that the Anikeevs used the accumulated reward points to offset their outstanding credit card balances and redeem any remaining points for Amazon gift cards).

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IRS's failure to pursue its initial tax basis reduction argument was an avoidable mistake.

Finally, Part IV concludes that, despite the Tax Court's first step in attempting to address the historically tax free accumulation of credit card rewards, the court ultimately failed to deter future manipulations of credit card rewards programs, such as the one implemented by the Anikeevs. This failure, however, stems from the Department of Treasury and the IRS's unwillingness to assist the Tax Court by promulgating regulations or issuing revenue rulings, respectively, on when consumer loyalty rewards are taxable. Part IV highlights the deflection game that the IRS and the Tax Court have played over the years and emphasizes that the responsibility falls on the IRS to bolster this area of tax law that is sorely lacking.

II. BACKGROUND AND HISTORY OF CREDIT CARD REWARDS PROGRAMS

Why is there controversy surrounding rewards associated with loyalty programs, especially credit card programs? If one was to ask an Average Joe on the street whether the points he earns with his credit card should be taxed, he would likely respond, "Absolutely not." To many Americans, it would be shocking that this is even a controversy; on the surface, reward points, accumulated as a result of the use of credit cards, are not clearly synonymous with compensation for sales or employee salaries (i.e., cash inflows for products sold or services rendered that are commonly known to be taxable).[14] Despite the limited scope that many Americans apply genuinely or wishfully to the question of what is taxable, however, the IRS *broadly* defines gross income for income tax purposes as "all income from whatever source derived."[15] In 1955, the Supreme Court of the United States further clarified what constitutes gross income: All "accessions to wealth, clearly realized," result in gross

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[14] *See* 26 U.S.C. § 61(a) (codifying that gross income includes "[c]ompensation for services" and "[g]ross income derived from business").

[15] *See id.* (codifying that gross income also includes items beyond compensation, such as "gains derived from dealings in property," "interest," "rents," "royalties," and "dividends," to name a few).

income.[16] Thus, it seems rather intuitive—once one is aware of the definition of gross income—that an accumulation of credit card points, which can be converted to cash, flights, hotel accommodations, and many other benefits,[17] is a clearly realized accession to wealth. Nevertheless, Congress and, as a result, the Tax Court, have been reluctant "to address the taxability of frequent flyer credits" and other benefits earned through credit card rewards programs.[18] One reason for the reluctance stems from the treatment of rebates: "Generally, rebates paid to credit card customers . . . and rebates on items purchased . . . are treated as a reduction in the purchase price and so aren't includible in the cardholder's or customer's gross income."[19] Because credit card reward points can be cashed in for items such as discounted flight prices, the rebates, or "discounts," on those flights are not considered gross income. Beyond rebates, however, additional factors contribute to the reluctance of Congress and the Tax Court to address benefits earned through credit card rewards. To better examine this hesitation, the following sections provide a brief history of consumer rewards programs and of the Tax Court's rulings in relation to rewards programs.

A. HISTORY OF CONSUMER REWARDS PROGRAMS

Rewards programs, including credit card rewards, are so commonplace now[20] that it is hard to imagine a world where these

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[16] Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). The decision in *Glenshaw Glass* reinforced Congress's broad construction of taxable income by holding that recovery of punitive damages is taxable income. *See id.* ("The mere fact that the payments were extracted from the wrongdoers as punishment for unlawful conduct cannot detract from their character as taxable income to the recipients.").

[17] *See* Adam McCann, *Credit Card Points Guide*, WALLETHUB (Jan. 17, 2022), https://wallethub.com/edu/cc/how-do-credit-card-points-work/50906 (highlighting the various items for which credit card points may be redeemed).

[18] Darrell L. Oliveira, *The Taxability of Frequent Flyer Credits Earned by Employees: Why the IRS Has Remained Silent on the Issue*, 4 U. PA. J. LAB. & EMP. L. 643, 649 (2002). For further illustration of the historical reluctance by the IRS and the Tax Court to address the issue of taxation in relation to frequent flyer credits, see *id.* at 647–49.

[19] *Treatment as Reduction in Purchase Price*, [Income] Fed. Tax Coordinator 2d (RIA), ¶ J-1391 (1984).

[20] *See* Latham, *supra* note 2 (noting that "three out of every four American consumers has a card" and that "[r]ewards are the most attractive feature for consumers").

do not exist. While the earliest origins of consumer rewards appeared in the late 1800s with stamp trading, rewards programs have evolved to a "more contemporary and sophisticated practice of points for purchase."[21] While people acknowledge a smaller airline as the creator of the "first mileage-based frequent flyer program," American Airlines was the first major airline to establish a frequent flyer program in 1981.[22] Other major airlines quickly followed suit within the same year.[23] The AAdvantage rewards program offered by American Airlines provided travelers with reward miles that could be converted into discounted future flights, hotel stays, and other products.[24] Due to the success of these airline rewards programs, other industries, including banks and credit card companies, wanted a piece of the consumer loyalty pie.[25] As more and more consumers participated in the frequent flyer miles programs and credit card rewards programs, the benefits consumers obtained from conversion of their accumulated miles and credit card points increased.[26] Consequently, where taxpayers accumulate benefits, which naturally appear as accessions to wealth, the IRS will not sit idly by.

B. HISTORY OF CONSUMER REWARDS LITIGATION

The taxability of consumer rewards has always been viewed as an anomaly to the IRS and the Tax Court's *modus operandi*.[27] As

[21] Sheri Wight, *Not So Rewarding: The Tax Implications for Bank Reward Points in the Loyalty Industry After* Shankar v. Commissioner, 21 NEXUS: CHAP. J.L. & POL'Y 91, 94 (2016).

[22] *See* Eric Rosen, *40 Years of Miles: The History of Frequent Flyer Programs*, THE POINTS GUY (May 20, 2021), https://thepointsguy.com/guide/evolution-frequent-flyer-programs/ (highlighting that American Airlines AAdvantage program was created a couple of years after the initial Texas International Airlines' frequent flyer program).

[23] *See id.* (noting that Delta Airlines and United Airlines quickly unveiled their own mileage programs after the unveiling of the AAdvantage program).

[24] *See* Wight, *supra* note 21, at 95 (discussing the benefits of the AAdvantage program).

[25] *See id.* ("[I]n 1986, Discover Financial Services established the popular 'cash back' program used by many banks today. Moreover, after Discover's entry into the loyalty market, credit cards quickly joined the game with Citibank and American Express introducing miles for purchase schemes.").

[26] *See* Rosen, *supra* note 22 (detailing the evolution of and the currently available massive rewards).

[27] *See* Oliveira, *supra* note 18, at 643 (noting that the IRS's "inaction is surprising given . . . the well-known nature of the IRS to tax everything within its powers").

noted previously, the IRS has always taken a *broad* approach to what constitutes gross income.[28] Benefits obtained through conversion of credit card reward points and frequent flyer miles, such as discounted (or even free) flights, hotel stays, products, and cash back, are seemingly "accessions to wealth" under the broad definition of taxable gross income. The Tax Court and the IRS, however, have been quite reluctant to uphold and enforce these benefits as taxable, as illustrated through the following judicial rulings.[29]

One of the earliest cases in which the Tax Court considered whether rewards were taxable was *Charley v. Commissioner*.[30] Although the Ninth Circuit confirmed the Tax Court's holding that employer-provided frequent flyer miles converted to cash constituted taxable income,[31] the court deflected on the government's ongoing consideration of the tax treatment of frequent flyer bonus programs as it refused to enforce the negligent, underpayment penalty sustained by the Tax Court.[32] Despite acknowledging that these employer-provided miles were additional compensation and constituted taxable income, the Ninth Circuit elected to passively punt to the IRS to enforce this finding and mandate that these benefits be included in taxpayers' gross income.[33]

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[28] *See* 26 U.S.C. § 61(a) (stating that gross income is "all income from whatever source derived"); *see also* Comm'r. v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (reinforcing Congress's broad definition of taxable gross income by constructing gross income as "undeniable accessions to wealth, clearly realized").

[29] *See infra* notes 30–45 and accompanying text.

[30] 91 F.3d 72 (9th Cir. 1996).

[31] *See id.* at 74 (ruling that employer-provided frequent flyer miles are just like compensation to employee and therefore are taxable); *see also* § 61(a)(1) (listing "compensation for services, including fees, commissions, fringe benefits, and similar items" in the definition of gross income); Old Colony Tr. Co. v. Comm'r., 279 U.S. 716, 731 (1929) (reinforcing the notion that taxable gross income can come in any form, including an employer compensating an employee by paying the employee's taxes).

[32] *See Charley*, 91 F.3d at 75 (putting the onus back on the IRS: "There is no showing that the conventional personal use of frequent flyer miles in the late 1980s gave rise to taxable income under then-current IRS policy").

[33] *See* Oliveira, *supra* note 18, at 649 ("The case clearly demonstrates the reluctance of the IRS, the Tax Court, and the Ninth Circuit to address the taxability of the frequent flyer credits. . . . Instead, each chose to shy away from a topic that was, and continues to be, highly controversial.").

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The IRS further cemented its reluctance to tax frequent flyer miles when it issued I.R.S. Announcement 2002-18, which notified taxpayers that it "will not assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel."[34]

What is driving this apparent "'Don't Ask, Don't Tell' policy on 'income' from these reward points"?[35] Darrell Oliveira discusses three key mechanical concerns that the IRS, Congress, and the Tax Court all share when considering the enforcement of taxing reward points: valuation, timing, and administrative difficulties.[36] Congress, the IRS, the Tax Court, and legal scholars have considered various taxation methods in an attempt to settle the valuation, timing, and administrative difficulties associated with taxing these rewards, yet, none have identified a solution for a standard taxation method on these rewards.[37] For example, is the fair market value (FMV) of these rewards the appropriate measure to tax as gross income?[38] If so, at what point in time: FMV of the rewards as they are earned or when they are converted?[39] Based on personal experience, it is difficult to assess the true value of rewards like accumulated Delta SkyMiles. Market fluctuations in flight prices often make it difficult to assess the true value of one's SkyMiles as a specific number of points that can be converted for discounts on flights. Moreover, these inquiries merely address the

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[34] Announcement 2002-18, 2002-10 I.R.B. 621 (limiting *Charley* to its facts and thus reassuring concerned taxpayers that the accumulation and holding of employer provided frequent flyer miles would not be taxed).

[35] Wight, *supra* note 21, at 96.

[36] *See* Oliveira, *supra* note 18, at 650–51 (introducing the idea that the valuation, timing, and monitoring issues have stumped the IRS and Tax Court in determining how to apply taxes to consumer loyalty points).

[37] *See id.* at 651–52, 667 (highlighting the valuation, timing, and monitoring complexities of taxing frequent flyer miles, but ultimately concluding "it is no wonder that the Service has not taken action").

[38] *See id.* at 651 (providing an example of the questions the IRS, the Tax Court, and Congress have continued to grapple with to demonstrate the continuous uncertainty surrounding the valuation of loyalty reward points for tax purposes).

[39] *See id.* at 660 (providing two possibilities to answer the "interesting question" of when an individual's rewards become taxable: "when the credits are earned or accumulated" and "when the credits are redeemed or used") .

valuation, timing, and administrative difficulties of considering the taxation on frequent flyer miles.

The Tax Court was faced with another opportunity to address consumer promotional awards in 2014. In *Shankar v. Commissioner*, Citibank issued the taxpayers a Form 1099-MISC for "Other Income" worth $668, which is what Citibank claimed was FMV for a plane ticket that the taxpayers redeemed when converting their accumulated 50,000 Citibank "Thank You Points."[40] This case involved a wholly separate issue from the *Charley* case because the issue in *Shankar* was whether the taxpayer's accumulated "Thank You Points," awarded for opening and maintaining a bank account with Citibank and ultimately redeemed for an airline ticket, were taxable.[41] The Tax Court ruled that this premium for opening and maintaining a bank account, converted to an airline ticket, was taxable as Other Income because the court equated the receipt of an airline ticket to interest income (i.e., an item of gross income).[42]

While this appears to be a shift in the Tax Court's stance on the taxability of rewards points, it is essential to note that the *Shankar* case is *specific* to rewards offered from banks in exchange for customers opening and maintaining accounts with the bank.[43] Moreover, the uniqueness of the facts in *Shankar* is further illustrated by Citibank's "unprecedented behavior" at this time: Citibank was the first of its peers to issue taxpayers' 1099 forms for these bank account rewards.[44]

The "Don't Ask, Don't Tell" policy was seemingly still in place after the *Shankar* ruling. Although the IRS, Congress, and the Tax Court have been considering taxation on various rewards programs

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[40] *See* Shankar v. Comm'r., 143 T.C. 140, 147 (2014) (providing the background for the dispute).

[41] *See id.* at 147–48 (noting that this case did not involve a question of whether "frequent flyer miles attributable to business or official travel" were taxable, like in *Charley*, but rather a question of whether "a premium [in return] for making a deposit into, or maintaining a balance in, a bank account" was taxable).

[42] *See id.* at 148 ("In general, the receipt of interest constitutes the receipt of gross income. Receipt of the airline ticket constituted receipt of an item of gross income." (citing 26 U.S.C. § 61(a)(4))).

[43] *See supra* note 41 and accompanying text.

[44] *See* Wight, *supra* note 21, at 99, 103 (noting that, although Citibank was the first to issue Form 1099s for these bank account rewards, Bank of America followed suit).

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for quite some time, the Ninth Circuit's ruling in *Charley*, the I.R.S. Announcement 2002-18, and the Tax Court's ruling in *Shankar* do not provide taxpayers clear indications of whether their loyalty rewards are taxable or not. Sheri Wight summarized this current taxpayer confusion well: "In the current scheme of reward programs, taxpayers may be confused on whether to follow the IRS bulletin [Announcement 2002-18] instigating this non-enforcement 'Don't Ask, Don't Tell' policy or to follow recent events and the *Shankar* decision, and thus report the income for fear of the audit process."[45] Despite confusion for taxpayers, the Tax Court was afforded another opportunity in 2021 to provide taxation clarity on a specific aspect of loyalty rewards: credit card rewards converted to cash.[46]

C. FACTS OF *ANIKEEV V. COMMISSIONER*

The tax court decided *Anikeev* in February 2021, making this ruling the most recent chapter in the ongoing saga that could be loosely characterized as "how to handle loyalty rewards from a tax perspective." Mr. and Mrs. Anikeev intended to scheme the credit card rewards program to accumulate as many rewards points as possible and thereby use the rewards to offset their credit card bills.[47] The Anikeevs used American Express (AMEX) credit cards, which offered Blue Cash Rewards points to cardholders in return for eligible purchases,[48] to purchase Visa debit and gift cards and money orders to convert the money orders into cash by immediately depositing the orders into their personal bank account.[49] Through this scheme, the taxpayers accumulated thousands of Blue Cash Rewards Dollars that the taxpayers used as statement credits to offset their credit card bills and retain the surplus as tax-free cash—

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[45] *Id.* at 102.

[46] *See* Anikeev v. Comm'r, T.C. Memo. 2021-23, at *1 (providing the principal issue via respondent's argument that "petitioners must recognize additional income . . . on the basis of rewards that petitioners acquired from American Express" for purchases of gift cards, debit cards, and money orders).

[47] *See id.* at *2–3 (identifying the taxpayers' scheme which made up the claims in this case).

[48] *See id.* at *1–2 (explaining how the Blue Cash Rewards program worked).

[49] *See id.* at *3 (explaining the steps the taxpayers took to carry out their scheme).

or so they hoped.[50] In this case, the Tax Court again failed to solidify comprehensive guidelines through judicial precedent for consumers regarding the taxability of consumer loyalty rewards. If gross income really is "all income from whatever source derived"[51] and "all accessions to wealth, clearly realized," should be included in gross income,[52] then the cash the Anikeevs generated from their manipulation of the Blue Cash Rewards points should be considered taxable by both the Tax Court and the IRS.

III. WHY THE TAX COURT'S FAILURE TO ENSURE JUSTICE IN *ANIKEEV* IS DUE TO THE IRS'S CONTINUOUS RELUCTANCE TO ADDRESS THIS AREA OF TAX LAW

The Tax Court in *Anikeev* once again elected to abstain from providing specific guidelines for cardholders as to when loyalty rewards are taxable and when they are not.[53] To understand the ramifications of this decision on future credit card schemes and what it means for cardholding taxpayers moving forward, it is essential to first understand the intricacies of the differing holdings and reasonings from *Anikeev*.

A. HOLDINGS AND REASONINGS OF *ANIKEEV V. COMMISSIONER*

The Tax Court was tasked with determining whether the conversion of accumulated Blue Cash Rewards points into cash constituted a taxable event.[54] The Tax Court in *Anikeev* bifurcates its holding and reasoning by analyzing the taxpayers' use of their AMEX credit cards.[55] The taxpayers in the *Anikeev* case used two methods to ultimately obtain cash deposits in their bank account: (Method 1) direct purchases of money orders and (Method 2) indirect purchases of money orders (i.e., by first buying Visa prepaid gift and

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[50] *See id.* at *2–3 (noting how the taxpayers used their substantial amount of Rewards Dollars).

[51] 26 U.S.C. § 61(a).

[52] Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

[53] *See supra* section II.C.

[54] *See Anikeev*, T.C. Memo. 2021-23, at *6 (noting that "the focus of [the] inquiry" is not the "receipt of Reward Dollars upon the purchase of their Visa gift cards but the transformation of the cards into cash equivalents").

[55] *See id.* at *5 (noting the general structure of the court's opinion).

debit cards and subsequently purchasing money orders to deposit into their bank accounts).[56]

1. Two Holdings in Anikeev. The Tax Court concluded that the Rewards Dollars earned from the direct purchases of money orders under Method 1 constituted a taxable event and should be recognized in the taxpayers' gross income.[57] The Tax Court, however, did not rule in favor of the IRS for Method 2 because it concluded that the Rewards Dollars earned from the Anikeevs' initial purchase of Visa prepaid gift and debit cards to purchase subsequent money orders (i.e., Method 2) did not constitute a taxable event.[58] This second holding represented a moral victory for the Anikeevs and potentially other credit card rewards enthusiasts.

How could the Tax Court arrive at two different conclusions on what is a very similar scheme implemented by the taxpayers? The only difference between the two methods the taxpayers used in their attempt to game the system was that Method 2 incorporated an intermediate step. Rather than immediately purchasing money orders as performed under Method 1, the taxpayers purchased Visa debit and gift cards *first* before purchasing money orders to ultimately deposit into their bank accounts under Method 2. What was the rationale for the different conclusions for the two methods?

2. The Tax Court's Reasoning for Method 1. Under Method 1, the Anikeevs used their AMEX cards to directly purchase money orders, which they immediately deposited into their bank accounts.[59] The Tax Court ruled that the Blue Cash points earned from direct purchases of money orders with their AMEX cards were taxable because the points earned were a direct result of buying cash

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[56] *See id.* at *7 (describing the two different methods used by the Anikeevs and noting that these require separate analyses).

[57] *See* James Damon, Michael M. Lloyd & S. Michael Chittenden, *Making a Point: Tax Court's Anikeev Decision Challenges Longstanding IRS Policy on Credit Card Rewards,* TAX WITHHOLDING & REPORTING BLOG (May 5, 2021), https://www.twrblog.com/2021/05/making-a-point-tax-courts-anikeev-decision-challenges-longstanding-irs-policy-on-credit-card-rewards/ (agreeing with the IRS's view that direct purchases of money orders were cash equivalents and that any rewards earned from this method constituted an accession to wealth).

[58] *See Anikeev*, T.C. Memo. 2021-23, at *7 (noting that, unlike the direct purchases of money orders used in Method 1, "Visa gift cards are not redeemable for cash").

[59] *See supra* section III.A.

equivalents.[60] The Tax Court determined that the taxpayers were essentially obtaining rewards, which would be subsequently used by the taxpayers to offset their AMEX outstanding balances and hopefully render a surplus of tax-free cash,[61] by merely buying *cash* to deposit into their bank accounts. In other words, the Anikeevs obtained cash from the purchase of money orders with their credit cards, which would not constitute a taxable event alone. The Anikeevs, however, were additionally reaping the rewards offered by AMEX by using their credit cards to facilitate the purchases of the money orders[62]: Cash in through buying money orders, and cash in again by using their Blue Cash Rewards to offset their outstanding credit card balance and redeem for other benefits.[63] In the court's mind, this was a clear accession to wealth and constituted a taxable event.[64]

Gross income may be realized in any form, including cash.[65] Because the taxpayers were realizing cash in two manners under Method 1 (i.e., depositing cash via purchased money orders and offsetting their credit card liability and retaining any remaining cash), the taxpayers therefore had a clearly realized accession to wealth. Further, the Tax Court noted that, under the terms of the AMEX Blue Cash Rewards Program, purchases of cash equivalents are specifically excluded from eligible purchases.[66] Even credit card companies attempt to prevent consumers from manipulating their rewards programs by accumulating rewards for purchases of cash equivalents.[67]

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[60] *See* Damon et al., *supra* note 57 (explaining the Tax Court's rulings and the IRS's arguments against the rulings).

[61] *See Anikeev*, T.C. Memo. 2021-23, at *2 (noting that the Anikeevs used the accumulated points to offset their outstanding credit card balances and redeem any remaining points for Amazon gift cards).

[62] *See supra* section III.A.

[63] *See supra* note 61 and accompanying text.

[64] *See Anikeev*, T.C. Memo. 2021-23, at *1 (identifying the court's conclusion with respect to Method 1).

[65] *See* Treas. Reg. § 1.61-1(a) (as amended in 1957) ("Gross income includes income realized in any form, whether in money, property or services.").

[66] *See Anikeev*, T.C. Memo. 2021-23, at *1–2 (noting that "[e]ligible purchases were purchases made on the card for goods and services" and not cash equivalents).

[67] *See id.* (illustrating AMEX's attempt to limit consumers ability to manipulate the Blue Cash Rewards Program by restricting eligible purchases to certain goods and services).

3. The Tax Court's Reasoning for Method 2. Using their AMEX credit cards, the Anikeevs also purchased Visa debit and gift cards under Method 2.[68] The Anikeevs purchased these Visa debit and gift cards for the sole purpose of using them to purchase subsequent money orders of which they again immediately deposited into their bank accounts.[69]

The inclusion of this intermediate step was apparently sufficient to warrant a different conclusion from Method 1 because the Tax Court concluded that the rewards accumulated by the initial purchase of Visa debit and gift cards prior to purchasing money orders—or cash equivalents—were not taxable.[70] The Tax Court differentiated the two holdings based on the item that the taxpayers *initially* purchased with their AMEX credit cards.[71] Under Method 2, the taxpayers first purchased Visa debit and gift cards.[72] Because Visa debit and gift cards could not be deposited into a bank account like money orders, the Tax Court determined that the "nature of the Visa gift cards" was sufficiently different from that of money orders, concluding that a separate holding was appropriate under Method 2.[73] The Tax Court instead viewed Visa gift cards as "products."[74] Because the AMEX rewards were accumulated on the initial purchase of products (i.e., Visa gift cards), no clear accession to wealth occurred here in contrast to the immediate purchase of money orders under Method 1.

The Tax Court concluded that accumulations of reward points on the purchase of products "constitute rebates excludible from taxable income."[75] Referencing Revenue Ruling 76-96,[76] the Tax Court

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[68] *See supra* section II.C.

[69] *See supra* section II.C.*3*.

[70] *See Anikeev*, T.C. Memo. 2021-23, at *7 (differentiating Method 1 and 2 by noting that "Visa gift cards have product characteristics" and are unlike money orders because "Visa gift cards are not redeemable for cash").

[71] *See id.* (explaining the distinguishing factors of the Tax Court's holdings).

[72] *See supra* section III.A.

[73] *See* Damon et al., *supra* note 57 ("[T]he court seems to have determined that the Visa gift card[s] were not cash equivalents.").

[74] *See Anikeev*, T.C. Memo. 2021-23, at *7 (explaining that Visa gift cards "provide a consumer service embodied in a simple plastic card for convenience").

[75] Damon et al., *supra* note 57.

[76] *See* Rev. Rul. 76-96, 1976-1 C.B. 23 (providing guidance on the impact rebates have on the purchase price of a product). Another difficult analysis under current law is the

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highlighted that "purchase incentive[s] such as credit card rewards" are considered rebates, which are "not treated as gross income but as a reduction of the purchase price of what is purchased."[77] Because the nature of the items *initially* purchased was different between the two methods used by the taxpayers (i.e., cash equivalents versus products), the court ruled that the accumulation of reward points from the initial purchases of Visa gift cards, despite how the taxpayers planned to use those gift cards, were nontaxable.[78]

B. WHY IT MATTERS

The taxpayers in the *Anikeev* case intentionally manipulated the rewards program to accumulate as many credit card rewards as possible.[79] Both methods utilized by the Anikeevs were for the sole purpose of ultimately getting cash in their hands that they hoped would be tax-free.[80] Whether they directly purchased money orders to immediately deposit into their bank accounts or first purchased Visa debit and gift cards to then buy money orders, the goal of the two methods was the same: accumulate maximum amounts of AMEX reward points without having a net cash outflow spent on products or services. Regardless of the method used, the intent was plainly to scheme the rewards program.

Furthermore, the terms and conditions of the AMEX Blue Cash Rewards program explicitly state that "purchases or reloading of prepaid cards, or [] purchases of any cash equivalents" are not included as eligible purchases.[81] It seems unjust that the taxpayers can implement a relatively simple scheme and not be held accountable for manipulating the rewards program, avoiding taxation on clear accessions to wealth. What appears like injustice, however, does not always dictate how the courts will rule on a case, and *Anikeev* is a prime example of when other factors in a case can

calculation of gain and, thus, gross income when rebates exceed annual credit card fees thereby reducing a taxpayer's basis below zero.

[77] *Anikeev*, T.C. Memo. 2021-23, at *6.

[78] *See id.* at *7 (explaining the differences in taxability for cash equivalents and products).

[79] *See id.* at *5 (describing that the petitioners "cleverly and relentlessly manipulat[ed] the Rewards Program").

[80] *See id.* at *2–3 (emphasizing the motives behind the taxpayers' rewards scheme).

[81] *Id.* at *2.

outweigh the sense of justice. At initial glance, the Tax Court's split holding may even appear like a win-win for both sides, but the Anikeevs walked away with the greater victory: the court notes that the vast majority of their purchases were Visa gift cards under Method 2.[82]

While the Tax Court emphasizes that this holding is specific to the facts of this case,[83] the holding leaves open the opportunity for other reward schemes to occur, especially for taxpayers who imitate the Anikeevs' methods. The Tax Court even noted that the Anikeevs' scheme may not have been brought to the IRS's attention had the Anikeevs not made the volume of purchases they did and obtained the extremely high level of accumulated points as they had.[84] The possibility that other cardholders could imitate Method 2 at a much lower frequency—therefore avoiding the IRS's attention—is concerning.

The Tax Court, however, in an unsurprising fashion, seems to blame the IRS for its own failure in securing an outright win over the scheming Anikeevs. It faults the IRS's primary argument under Method 2 and notes that, if the IRS had pursued its initial argument it had asserted pre-trial, sufficient justice may have been served on the scheming taxpayers.[85] Instead, the IRS pursued its cash equivalents argument, which concerned the Tax Court and led to the IRS's failure to secure a victory under Method 2.[86]

1. Problematic Argument by the IRS for Method 2 Purchases Due to Administrative Burdens and Speculation Required for Future Consumer Loyalty Program Tax Cases. The Tax Court concluded that the Visa debit and gift cards were not cash equivalents; instead, the Tax Court characterized these items as "products or services."[87] Because of this characterization, the Tax Court

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[82] *See* Damon et al., *supra* note 57 (highlighting that the "IRS will recoup a relatively small percentage of the taxes it had pursued," given that the accumulated rewards through Method 2 purchases were ruled as nontaxable).

[83] *See Anikeev*, T.C. Memo. 2021-23, at *8 ("These holdings are based on the unique circumstances of this case.").

[84] *See id.* at *5 ("[H]ad Mr. Anikeev not been so successful in his efforts he likely would have been ignored by the IRS.").

[85] *See id.* (describing the IRS's pre-trial argument as "more compatible" with the IRS credit card reward policy).

[86] *See infra* section III.B.*1*.

[87] *See infra* note 97 and accompanying text.

determined that the reward points accumulated on the direct purchases of the Visa debit and gift cards were nontaxable because the reward points earned on these purchases were actually rebates, reducing the basis (or cost) of the purchased items, rather than accessions to wealth accumulated by buying cash equivalents.[88] The Tax Court's holding and reasoning for Method 2 begs the question: Are Visa debit and gift cards appropriately characterized as "products" or "services" rather than "cash equivalents"?

While the Tax Court agreed with the taxpayers' position that Visa gift cards should be considered products or services, the IRS's position at trial was that the Visa gift cards were cash equivalents.[89] The IRS argued that the Tax Court must consider the "intended use of the cards" to evaluate whether these items were products or services, or cash equivalents.[90] This contention, however, is where the IRS likely squandered its potential to secure an outright win in this case.

What is the concern with focusing on the intended use of the items purchased? First, the Tax Court noted that AMEX did not even prohibit the Anikeevs from accumulating these points on these Visa gift cards.[91] The terms and conditions of the Blue Cash Rewards Program specifically listed cash equivalents as an ineligible purchase for earning rewards.[92] AMEX, however, did not withhold reward points from the Anikeevs on their purchases of Visa gift cards, which signifies that AMEX did not consider these cash equivalents.

Second, and more importantly, the IRS's contention that the intended use of the items should be considered in determining whether Visa gift cards are cash equivalents is a difficult assessment for the Tax Court to bear. The IRS in this case has the luxury of hindsight bias. It is established that the Anikeevs used

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[88] *See supra* section III.A.*3*.

[89] *See Anikeev*, T.C. Memo. 2021-23, at *5 (juxtaposing the IRS's characterization of Visa debit and gift cards with the taxpayers' contention that these items should be characterized as goods and services).

[90] *Id.*

[91] *See id.* at *6 ("American Express treated such purchases as eligible for Reward Dollars throughout the years at issue. Respondent ignores this, implying that the purchases should not have qualified for Reward Dollars.").

[92] *See id.* at *2 (noting that "cash equivalents" were explicitly excluded as an eligible purchase under the Blue Cash Rewards Program).

their AMEX cards to purchase Visa gift cards, which they subsequently used to purchase money orders to deposit into their bank accounts.[93] But retrospective knowledge is not always available.

Consider what the IRS proposes: The Tax Court should rule in favor of the IRS under Method 2 because the intended use of the Visa gift cards purchased—to subsequently purchase money orders—should determine the characterization of those Visa gift cards as cash equivalents.[94] If the Tax Court agreed with the IRS's proposition and ruled in favor of this reasoning, would this be a troublesome judicial precedent moving forward?

In an arena of tax law without significant guidelines, a ruling of this nature would create headaches for both the Tax Court in future consumer loyalty program tax cases and the IRS in enforcing this judicial precedent in their examination of concerning tax returns. In essence, if the intended use of purchased items is the focal point of determining whether an item is a cash equivalent, then this would require the same administrative burdens that the Tax Court, the IRS, and Congress have sought to avoid in this arena of law. This would require the IRS and the Tax Court to monitor and potentially trace multiple chains of purchases seeking to capture the actual intended purpose of the initial purchase. This would be an administrative nightmare that is no better than the timing, monitoring, and valuation issues associated with taxing frequent flyer miles.[95]

Additionally, would a precedent such as this proposed ruling require the IRS to speculate on taxpayers' plans for purchased gift cards using credit cards? Let's consider a hypothetical. John Doe uses his AMEX credit card to purchase gift cards prior to Christmas. At the end of the calendar year, those purchased gift cards have not been redeemed for anything. John Doe, however, has earned AMEX reward points, which he subsequently uses to offset part of his outstanding monthly credit card bill. If John Doe files his annual tax return, would he technically be liable for tax evasion if he fails to include those rewards in his taxable gross income for the year?

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[93] *See supra* section II.C.

[94] *See Anikeev*, T.C. Memo. 2021-23, at *5 (identifying the IRS's focus was on the "later use of the gift cards to purchase money orders").

[95] *See supra* section II.B.

This hypothetical demonstrates that the IRS and the Tax Court would not have sufficient knowledge to determine whether tax evasion occurred. Specifically, it would require the IRS to speculate as to what John Doe was planning to use those gift cards for. Were the gift cards going to be gifts to nieces and nephews for Christmas? Or was John Doe merely planning to use those gift cards to buy money orders to subsequently deposit into his bank account?

While this hypothetical is a simplified, small-scale example, it does exemplify the concern that this type of strict guideline would impose upon the Tax Court and the IRS. Basing the determination of whether purchased items are cash equivalents on the intended use of those items would create headaches for the Tax Court and the IRS. The Tax Court recognized this concern and therefore did not concur with the IRS's "intended use" argument.[96] The court ultimately agreed with the taxpayers' assertion that the Visa gift cards were products or services.[97]

While the Tax Court was reluctant to establish this particular judicial precedent in this arena of tax law, it implied that the IRS could have potentially secured a sweeping victory if it had pursued the position it took—with respect to Method 2—in its initial pre-trial memorandum.[98]

2. The Alternative Argument for Method 2—The IRS's Initial Pre-Trial Argument. The Tax Court emphasized that the IRS could have levied justice on the Anikeevs by exploring another argument under Method 2.[99] In its pre-trial motion, the IRS initially asserted that "the Anikeevs should be taxed on gains arising from their purchase of money orders with Visa gift cards."[100] The IRS claimed that the accumulated AMEX reward dollars from the purchases of Visa gift

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[96] *See Anikeev*, T.C. Memo. 2021-23, at *5 ("Respondent argues that the gift cards are cash equivalents because of petitioners' intended use of the cards to purchase money orders.").

[97] *See* Damon et al., *supra* note 57 ("Ultimately, the court, considering the nature of the Visa gift cards, determined that they constitute a product subject to favorable tax treatment under Revenue Ruling 76-96. In particular, the court appeared to base its decision on the fact the Visa gift cards were not redeemable for cash or eligible for deposit into a bank account.").

[98] *See Anikeev*, T.C. Memo. 2021-23, at *5 ("[The IRS] declined to pursue an alternative position, and we should not assume to do it for [them].").

[99] *See id.* (discussing the observation that the IRS did not explore an alternative argument).

[100] Damon et al., *supra* note 57.

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cards represented reductions in the costs of those Visa gift cards, reducing the cost basis in those gift cards for tax purposes.[101]

Lower cost basis results in potentially higher taxable gains when the property is subsequently sold. Under I.R.C. § 1011(a), the adjusted basis for calculating gains or losses is based on the property's initial basis.[102] Therefore, if the initial tax basis of the Visa gift cards was reduced, then the Anikeevs could have had a gain on subsequent purchases with those gift cards. This is the exact argument the IRS initially made in its pre-trial memorandum.[103] As James Damon notes, the IRS initially argued that the Anikeevs would have had taxable gain when they subsequently used their Visa gift cards to purchase money orders due to their reduced cost basis in the gift cards.[104] The IRS, however, opted to drop this argument in favor of the "intended use" argument as a test for determining what constituted "cash equivalents."[105]

While the Tax Court does not explicitly state that the tax basis-gain argument would have prevailed, it does imply that the IRS should have continued to pursue this contention by calling out the IRS's pre-trial memorandum argument.[106] By even mentioning this alternative contention, the Tax Court seeks to provide itself some leeway with its holding under Method 2.

The IRS recognizes that it seems unjust to let the Anikeevs walk away with tax-free cash under Method 2.[107] It is unwilling, however, to establish a judicial precedent that requires an examination of the intended use of items purchased to determine whether those items

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[101] *See id.* (explaining the IRS's theory behind its pre-trial memorandum assertion).

[102] *See* 26 U.S.C. § 1011(a) ("The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis . . . .").

[103] *See* Damon et al., *supra* note 57 (discussing the IRS's theory for how the Anikeevs could have received gains on subsequent purchases by using the gift cards).

[104] *See id.* (explaining the IRS's assertion that the reduced basis in the Visa gift cards would be less than the value of the money orders purchased and, therefore, this difference would represent a taxable gain for the Anikeevs).

[105] *See* Anikeev v. Comm'r, T.C. Memo. 2021-23, at *5 ("[The IRS] argues that the gift cards are cash equivalents because of petitioners' intended use of the cards to purchase money orders.").

[106] *See id.* at *5 (identifying that the "[IRS] declined to pursue an alternative position" that could have been compatible with IRS policy with no explanation for why the position was abandoned).

[107] *See* Damon et al., *supra* note 57 (discussing the IRS's contention that the Anikeevs incurred a taxable gain, which should have to be paid, when they used the gift cards).

are cash equivalents versus products and services. The IRS's "intended use" contention under Method 2 puts the Tax Court in the uncomfortable position of ruling in favor of the Anikeevs under Method 2 because the IRS failed to retain its initial gain-tax basis argument. Therefore, it appears the Tax Court intentionally identifies the IRS's failure to pursue this argument to alleviate the blame upon the Tax Court. This implies that, had the IRS continued to pursue its initial pre-trial contention, a different outcome—specifically, a more just outcome—could have occurred: The Anikeevs would not have completely avoided taxation under Method 2 as they would have been taxed at least on the gain due to the reduced basis of the Visa gift cards.

C. MOVING FORWARD IN THIS AREA OF TAX LAW

Other taxpayers could imitate the Anikeevs' Method 2 on a much smaller scale and avoid the wrath of the IRS.[108] If the IRS and the Tax Court were not previously aware of this scheme of technical tax evasion, it is on their radars now. Further, while the ruling for Method 2 seems unjust given the clear intention of the Anikeevs to manipulate this rewards program, the Tax Court, through dicta, essentially encouraged the IRS to pursue the tax basis-gain argument for any future, similar tax cases.[109] While the Tax Court does not explicitly state that this argument would have enabled the IRS to prevail under the Method 2 holding, it strongly implies that this would have been the outcome. The Tax Court has provided the IRS with an argument it considers more persuasive than the "intended use" test attempted by the IRS in the *Anikeev* case.

While this helpful suggestion for future consumer loyalty taxation cases would likely be specific to facts similar to the *Anikeev* case, it is a step toward preventing cardholders from manipulating these programs to obtain significant rewards without owing taxes on these clear accessions to wealth. The Tax Court's opinion in *Anikeev* does not solve the timing and valuation difficulties associated with attempting to tax frequent flyer rewards and the

[108] *See supra* section III.B.

[109] *See Anikeev*, T.C. Memo. 2021-23, at *5 ("[The IRS] later abandoned this [tax-basis gain] position, although it would appear to be more compatible with the rationale of the IRS credit card reward policy.").

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Tax Court's dicta stresses the tax basis-gain argument as an option to impose taxation on accumulated rewards of this type (i.e., rewards similar to Blue Cash Reward Dollars).

IV. CONCLUSION

If all "accessions to wealth, clearly realized," result in gross income,[110] then did the Tax Court fail in its holdings? From a strict statutory interpretation lens, yes, the Tax Court failed. The Anikeevs increased their wealth by depositing money orders into their bank accounts and by offsetting their credit card liability with accumulated rewards and retaining the surplus as extra cash to either deposit into their accounts or use for further purchases.[111] Without taxation occurring on the double accumulation of cash, the Anikeevs walked away unblemished by the taxman, took the money, and ran—at least under Method 2. The Tax Court, however, is not solely responsible for what appears to be an unjust ruling: the IRS is also to blame. The IRS and Congress have not carried their weight in assisting the Tax Court in these cases due to continued reluctance to establish concrete enforcement for the taxation of consumer loyalty rewards.

The IRS and the Tax Court have continued this enduring cat-and-mouse game in the consumer loyalty rewards arena of tax law for quite some time, and neither have taken ownership of establishing guidelines for consumers, leaving cardholders uncertain as to what benefits and rewards are taxable.[112] Instead, the IRS and the Tax Court continue to defer to each other as to who should be responsible for establishing when consumer loyalty rewards are taxable and when they are not. Why do they continue to defer to each other? The administrative burdens of valuing the rewards and of determining the appropriate timing of when to tax these rewards have been the consistent deterrent throughout the history of this particular area of tax law. Neither the IRS nor the Tax Court want to absorb these burdens.

The deeper, underlying root of this deferring relationship, however, is that both the IRS, along with Congress, and the Tax

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[110] Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).
[111] *See supra* section III.C.
[112] *See supra* section II.B.

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Court believe their counterparty branch of government is responsible for declaring when consumer loyalty rewards are taxable. The Tax Court's decisions in the early consumer loyalty tax cases exhibit significant judicial restraint.[113] The IRS, in the same vein, continues to uphold the "Don't' Ask, Don't Tell" policy, which has characterized this arena of tax law for years, by issuing I.R.S. Announcement 2002-18 and bringing cases to the court in hopes that the judiciary will develop a sweeping judicial precedent on these rewards.[114] This deferring relationship has continued today with the *Anikeev* opinion.[115] While it appears that the punting between the IRS and the Tax Court will not end in the near future, the IRS in the *Anikeev* case takes a step forward, even if a small one, in its implied suggestion to the IRS to follow its initial argument, the tax basis-gain argument, in similar cases moving forward. But this slight glimmer of guidance for the IRS to follow is specific to cases such as *Anikeev*, which involve cash rewards programs. The frequent flyer consumer rewards cases still face the valuation and timing concerns previously described.[116]

The Tax Court, in avoiding what it deems as judicial activism, has repeatedly deferred to the Legislature and the IRS to establish a taxation standard for consumer loyalty programs.[117] While the *Anikeev* case was another opportunity for the Tax Court to establish judicial precedent in this area of law, it was still handcuffed by the lack of concrete regulations on the taxation of credit card reward points.[118] The IRS must take affirmative action in establishing guidelines through revenue rulings in this area of law, especially given the array of rewards programs offered to cardholders today. If the Department of Treasury issues specific regulations or, at a minimum, if the IRS issues revenue rulings, this will provide the Tax Court ammunition to address manipulative schemes such as

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[113] *See supra* section II.B.

[114] *See supra* section II.B.

[115] *See Anikeev*, T.C. Memo. 2021-23, at *8 ("We hope that [the IRS] polices the IRS policy in the future in regulations or public pronouncements rather than relying on piecemeal litigation.").

[116] *See* Oliveira, *supra* note 18, at 650–63 (highlighting that the valuation and timing issues have stumped the IRS and Tax Court).

[117] *See supra* section II.B.

[118] *See Anikeev*, T.C. Memo. 2021-23, at *8 (urging the IRS to embrace its regulatory power and basing the holding on incompatibilities with IRS policy).

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those employed by the Anikeevs. The Department of Treasury and the IRS has at its disposal the resources and time to craft better regulations and revenue rulings, respectively, than the Tax Court, which is provided evidence specific to individual cases at a time. The onus is on the IRS, not the Tax Court.

Despite the need to issue concrete regulations in this area of law, however, the IRS can still ensure justice in cases such as the *Anikeev* case. Although the IRS faltered in its "intended use" argument, the Tax Court reminded the IRS of the other tool it has in its back pocket—tax basis-gain argument—to ensure complete tax evasion does not occur.[119] Tax basis is an essential tool that the IRS can leverage in evaluating whether taxpayers have taxable gain. Despite the Visa gift cards being deemed products, the IRS could have still recovered tax dollars if they had pursued the tax basis-gain claim they initially argued in their pre-trial memorandum.[120]

Therefore, to ensure justice is served in the next scheming taxpayer case, the IRS should provide the Tax Court assistance—and provide cardholders more certainty—by issuing more concrete guidelines in this area of tax law. Additionally, the IRS should remember the tax basis-gain tool it can utilize in situations such as the *Anikeev* case.

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[119] *See supra* note 109 and accompanying text.
[120] *See supra* section III.C.

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