The United States Tax Court

An Historical Analysis

Harold Dubroff & Brant J. Hellwig

Second Edition
Revised and Expanded

Preface and Acknowledgements

From the Original Edition:

The United States Tax Court has played a key role in the development of Federal tax law since its founding as the Board of Tax Appeals in 1924. For this reason, and because of its unusual procedures and judicial status, we determined that it would be useful if a comprehensive study were prepared dealing with the history and evolution of the Court. To this end a grant was arranged to permit Professor Harold Dubroff of Albany Law School to undertake the project. Although members of the Court reviewed Professor Dubroff's manuscript from time to time, the content of the study is solely the responsibility of Professor Dubroff and should not be taken to reflect the views of the Court or any of its Judges.

Work on the Tax Court project was commenced in 1974 and concluded in 1977. As the various parts of the study were completed, they were published in the Albany Law Review. * * *

We believe that the study is an important piece of scholarly work which will be useful to both the Tax Court and the public in providing insight into the forces which created and shaped the Court, its procedures and its jurisdiction. We appreciate the efforts of the Albany Law Review in publishing the study and permitting Commerce Clearing House, Inc. to photocopy its issues, thereby making possible a wide public distribution at a modest cost.

C. Moxley Featherston, Chief Judge
United States Tax Court

Howard A. Dawson, Jr. Judge
United States Tax Court

Washington, D.C.
1979

The concept of a history of the United States Tax Court largely came from Judge Howard A. Dawson, Jr., then Chief Judge, and I wish to express my gratitude to him for the suggestion that I undertake the project and for the continuing help and support he furnished me as the work progressed. Without his involvement, this study would not have been possible.

Other judges of the Court have also furnished their assistance during the course of the work, and I wish to acknowledge my gratitude to them as well. In particular, I would like to thank Chief Judge Moxley Featherston, who made completion of the study possible, and Judge Charles R. Simpson, who gave unstintingly of his time in reviewing manuscripts. Additionally, Judge Bolon B. Turner, who served as a member of the Board of Tax Appeals, and later as a judge of the United States Tax Court from 1937 to 1971, was of great assistance in providing me with valuable insights into events which transpired during his long and productive tenure.

With respect to the research and writing of the book, several former students provided valuable research assistance. Joseph R. Cook and Dan S. Grossman deserve special thanks for their part in the preparation of Parts V, VI, and VII [of the original edition.] Other former students whom I wish to thank are Chris Boe, Judith L. Needham, and Kim Oster.

This book was originally published in six separate issues of the Albany Law Review, and I am grateful for the editorial assistance provided by three generations of law review members. My association with former Editor-in-Chief Joseph H. Reynolds and former Managing Editor Gary Centola is one which I will not soon forget.

Finally, I would like to thank my secretary, Iris Baum, whose persistent good humor and cooperative spirit in the face of innumerable drafts and redrafts were a constant source of wonder to me.

Harold Dubroff

Albany, New York
1979

Second Edition:

Following the publication of the original edition of this text, Professor Dubroff published supplemental articles in the Albany Law Review that brought the Tax Court study current to 1988. The original and supplemental articles authored by Professor Dubroff represent a unique source of detailed information about the Tax Court's history and the development and expansion of the Tax Court's jurisdiction. In 2010, the Court concluded that it would be appropriate to undertake a comprehensive update of Professor Dubroff's original work in this field.

Accordingly, the Court arranged for Professor Brant Hellwig of the Washington and Lee University School of Law to draft the second edition of the text. The second edition updates the material originally authored by Professor Dubroff and addresses important developments at the Tax Court, including the considerable expansion of the Court's jurisdiction subsequent to the publication of Professor Dubroff's work.

Work on the second edition commenced in 2010 and concluded in 2013. As a general matter, the second edition strives to bring the material current to the beginning of 2013. The content of the revised text is solely the responsibility of Professor Hellwig and should not be taken to reflect the views of the Court or any of its Judges.

The Court appreciates the willingness of Professor Dubroff, Albany Law Review, and CCH to graciously release any claim to the copyright so that the second edition could be undertaken.

Michael B. Thornton, Chief Judge
United States Tax Court

John O. Colvin, Judge
United States Tax Court

Washington, D.C.
2014

Judge John O. Colvin, then Chief Judge of the United States Tax Court, approached me in 2009 with an exciting albeit daunting proposition: updating the seminal text authored by Professor Dubroff on the Tax Court's historical origins and its evolution as a court. I accepted, and the second edition of the text is the product of that effort. The original manuscript understandably served as a valuable source of information about the Tax Court, and it is an honor to bring the text in line with more recent developments.

The second edition leaves largely intact the first four Parts of the original text, which provide a remarkably detailed history of the creation of Board of Tax Appeals through the congressional chartering of the United States Tax Court as a court of record established under article I of the Constitution. Part V is a new chapter devoted to the judicial consideration of the Tax Court's constitutional status that culminated in the Supreme Court's 1991 decision in *Freytag v. Commissioner*.

Whereas the original text addressed procedural matters following the discussion of the historical development of the Court, the second edition at this point turns to an examination of the Court's jurisdiction. This portion of the text represents the largest source of new material. In addition to incorporating various aspects of the supplemental articles authored by Professor Dubroff in the 1980s, the second edition details the numerous ways in which Congress has expanded the Tax Court's jurisdiction in recent times. Whereas the original text devoted a single, lengthy chapter to the Tax Court's jurisdiction, the second edition breaks this material into three chapters. Part VI addresses foundational aspects of the Court's jurisdiction, such as its deficiency and refund jurisdiction. Part VII examines a number of innovations in the Tax Court's jurisdiction that, broadly speaking, are intended to improve the efficiency of tax litigation. Lastly, Part VIII explores the jurisdiction of the Tax Court to review the administration of a variety of recently created taxpayer rights.

Following the examination of the Tax Court's jurisdiction, the second edition turns to a discussion of Tax Court procedure. Part IX is devoted to pretrial matters, Part X to trial procedure, and Part XI to post-trial considerations. Part XII is a new chapter devoted to the position of the Special Trial Judge. Part XIII concludes by addressing the various means by which the Court provides institutional support to self-represented taxpayers.

In the course of this project, I have received considerable support from several of the Court's Judges and members of its professional staff. I greatly appreciate the encouragement and guidance I have received from Chief Judge Michael B. Thornton and Judge John O. Colvin. I wish to extend a particular note of gratitude to Special Trial Judge Daniel A. Guy, Jr. In addition to generously devoting his time in reviewing drafts of the manuscript, he largely oversaw the project on behalf of the Court. Andrea Blake and Audrey Nutt of the Court's staff devoted significant effort to this project by providing drafts of updates on discrete topics, and I greatly appreciate their contributions.

Additionally, I am grateful for the research assistance I received from law students over the years I worked on this project. One former student, Christopher Hines, significantly improved the text through his editorial efforts. As a final matter, I commenced work on this project while a member of the Law School faculty at the University of South Carolina and concluded it while a member of the Law School faculty at Washington and Lee University. I thank both institutions for their support.

Brant J. Hellwig

Lexington, Virginia
2014

The United States Tax Court
An Historical Analysis

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PART I

ORIGINS OF THE TAX COURT

As with most institutions, the Tax Court, which was created in 1924 as the Board of Tax Appeals, originated in response to an existing need. In its case the need was created by the combination of two factors. The first of these was the development of the federal income and profits taxes and their emergence during World War I as the preeminent devices for financing the operations of Government. The second was the inadequacy of preexisting institutions, both administrative and judicial, for adjudicating in an acceptable manner the disputes growing out of the changed conditions brought on by the new taxes.

A. Development of the Income Tax

Although the Tax Court has had other duties, the principal reason for its creation was, and its main function has always been, the adjudication of disputes involving the federal income and profits taxes.[1] For this reason, the history of the court must start with the development and early history of the modern income tax.[2]

In present times, federal income taxes are of such a pervasive and significant influence that it is easy to forget that these taxes did not exist for

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[1] In the course of its history, the Tax Court has also had jurisdiction to redetermine deficiencies in estate and gift taxes, and excise taxes on foundations. Additionally, for a period of almost three decades, it had jurisdiction to redetermine excessive profits under the Renegotiation Acts. The jurisdiction of the Tax Court is more particularly described in Parts VI through VIII.

[2] Much of the material dealing with the development of the income tax and the early administrative problems faced by the Bureau of Internal Revenue was derived from secondary sources. These sources are identified below and, in general, will not be cited further. BORIS I. BITTKER AND LAWRENCE M. STONE, FEDERAL INCOME, ESTATE AND GIFT TAXATION (4th ed. 1972); ROY G. BLAKEY & GLADYS C. BLAKEY, THE FEDERAL INCOME TAX (1940); BUREAU OF INTERNAL REVENUE, THE WORK AND JURISDICTION OF THE BUREAU OF INTERNAL REVENUE (1948); JOHN C. CHOMMIE, THE INTERNAL REVENUE SERVICE (1970); LOUIS EISENSTEIN, THE IDEOLOGIES OF TAXATION (1961); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); INTERNAL REVENUE SERVICE, INCOME TAXES 1862–1962: A HISTORY OF THE INTERNAL REVENUE SERVICE (1962); RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES (1954); SIDNEY RATNER, AMERICAN TAXATION (1942); 1 STANLEY S. SURREY, WILLIAM C. WARREN, PAUL R. MCDANIEL & HUGH J. AULT, FEDERAL INCOME TAXATION (1972); Bolon B. Turner, *The Tax Court of the United States, its Origin and Function, in* THE HISTORY AND PHILOSOPHY OF TAXATION 31 (1955) [hereinafter cited as Turner].

much of the country's history. The colony of New Plymouth had imposed a rudimentary income tax as early as 1643 and other colonies and later some states had made use of such taxes in the 17th and 18th centuries. However, the first federal income tax was not imposed until the latter half of the 19th century. Prior to that time, the small revenue needs of the Federal Government were primarily satisfied by tariffs, although internal excise taxes and the sale of public lands also played some part in financing the Government.

The most important factor in the development of the income tax has, unfortunately, been the financial exigencies attendant on the state of war. Toward the end of the War of 1812, Alexander J. Dallis, Secretary of Treasury, recommended enactment of an inheritance and income tax that he thought could "be easily made to produce $3 million." However, the war ended before the proposal could be enacted and the following half-century of relative peace resulted in little further attention being paid to income taxation. That peace was shattered by the Civil War, which created unprecedented revenue needs not capable of being fulfilled by traditional techniques. Government expenditures jumped from $67 million in 1861 to $475 million in 1862, $715 million in 1863, $865 million in 1864, and $1.3 billion in 1865, an increase of 19 fold in only five years.[3] During the war, most revenue was raised by public debt financing, and budget deficits amounted to more than two-thirds of the Union's expenditures for the years 1862–65.

The Government fell into such an unfortunate financial position as a result of a combination of factors. First, the war had an unexpectedly high cost because the Confederate armies proved to be a more formidable adversary than the initially optimistic Union forces estimated. Second, the Lincoln administration was not particularly adept in public finance. Many years before his election, Lincoln himself conceded that he "had no money sense" and did not "fret" over the subject. His Secretary of the Treasury for the initial war years, Salmon P. Chase, was similarly ungifted. Chase's principal interests were in military and political affairs, and he relied heavily on a noted financier of the day, Jay Cooke, to raise revenue through the sale of government bonds. Finally, the United States since its inception had been a country of low government expenditures and correspondingly low taxes. By 1860 tax revenues had reached a high of only $56 million, and in most prior years the budget was in surplus. Against this background, neither the Congress nor the citizenry were well equipped to cope with

[3] Statistical data contained herein was derived from the following sources: COMM'R OF INTERNAL REVENUE, STATISTICS OF INCOME FOR 1941 pt. 1 at 270 (1945) (corporate return statistics, 1909–41); JOINT ECONOMIC COMMITTEE, THE FEDERAL TAX SYSTEM: FACTS AND PROBLEMS 1964, 88th Cong., 2d Sess. 214–15 (1964) (individual return statistics, 1913–61); 1962 TREAS. ANN. REP., FINANCES, 508–15 (1963) (government receipts and expenditures 1789–1962).

financing the staggering new expenditures, which exceeded $2 million per day for the war alone.

Nevertheless, the need for new and increased taxes soon became painfully apparent since the major existing revenue source, tariffs, was clearly inadequate to satisfy the revenue requirements. Some favored supplementing tariffs only with direct taxes on real estate apportioned among the states according to population, as required by the Constitution. However, representatives of the Western states felt that this would unduly favor the Northeast where it was thought there existed a heavier concentration of wealth in proportion to population. In response to this pressure, Congress adopted in 1861, and implemented in 1862, the first federal income tax as part of a multi-faceted program of taxation.[4]

This first income tax was a modest one. It exempted incomes below $600, and taxed amounts above that level at a rate of only 3% from $600 to $10,000 and at a rate of 5% on income above $10,000.[5] In its first year it raised only $2.7 million as opposed to government expenditures for the year of more than $700 million. Subsequently, as the need for revenues mounted, the tax rates were increased. By 1865, the rates stood at 5% on income from $600 to $5,000 and 10% on income above $5,000.[6] This was to be the high water mark of income taxation for more than 50 years. With the end of the Civil War the exemption was enlarged and the rates reduced, and finally, effective in 1872, the income tax was repealed.[7]

At no time did the Civil War income tax represent as significant a source of government revenues as the modern day income taxes. The lowest yield occurred in 1863 when $2.7 million was raised, and the highest yield occurred in 1866 when $73 million was raised. This is to be contrasted with total revenues in those years of $113 million and $559 million, respectively. By 1872, the last year of the tax, its yield had declined to $14 million as against total revenues of $374 million. But despite its relative unimportance as a source of revenue, the income tax attracted a considerable amount of attention during this period.

At the time of its adoption, the income tax was generally supported as a necessary step in solving the financial needs of the war. The end of the war

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[4] Act of August 5, 1861, ch. 45, § 49, 12 Stat. 309; Act of July 1, 1862, ch. 119, § 89, 12 Stat. 473.

[5] Act of July 1, 1862, ch. 119, § 90, 12 Stat. 473.

[6] Act of March 3, 1865, ch. 78, 13 Stat. 479. In the interim between 1862 and 1865, the tax had been increased to 5% on income between $600 and $5,000, 7½% on income between $5,000 and $10,000, and 10% on income in excess of $10,000. Act of June 30, 1864, ch. 173, § 116, 13 Stat. 281.

[7] Act of July 14, 1870, ch. 255, § 6, 16 Stat. 257. In 1867, the exemption was increased to $1,000 and the rate reduced to 5%. Act of March 2, 1867, ch. 169, § 13, 14 Stat. 478. In 1870, the exemption was further increased and the rate further reduced to $2,000 and 2½%, respectively. Act of July 14, 1870, ch. 255, §§ 6, 8, 16 Stat. 257–58.

and the reestablishment of regular surpluses of revenue over expenditures brought increasing pressure for reduction and finally repeal of the tax. Primarily, this pressure came from the banking and commercial interests of the Northeast, which much preferred tariffs to income taxes since the former had the double advantage of being taxes on consumption and providing domestic products with a competitive advantage. The income tax had its defenders who strenuously argued that taxation based exclusively on consumption was unjust because it imposed disproportionately heavy taxes on persons of lower income who by necessity consumed a higher percentage of their income than persons with large incomes.

Despite these arguments, the anti-income tax forces prevailed essentially because of their greater political power both as lobbyists and propagandists. They argued that the tax was superfluous in periods of surplus, that it was inequitable in many of its provisions, and that it necessitated the creation of an inquisitorial enforcement bureaucracy which proved to be inefficient and subject to political influence.

The quarter of a century following the repeal of the income tax was a period of considerable social ferment in the United States. A severe financial panic occurred in 1873 and was immediately followed by a devastating depression. The farmers of the South and the West were particularly hard hit during these years by declining prices for their products with no corresponding decline in the prices they had to pay for supplies, storage, and transportation. Economic power became concentrated in banks, railroads, and various other industrial and commercial interests. Against this background a strong agrarian and populist movement developed to challenge the power of the Northeast. Among the important objectives of these groups were cheap money, regulation or destruction of the monopolies, and the imposition of an income tax.

Reinstitution of the income tax had been proposed by Southern and Western congressmen throughout the post-Civil War period. It was not until 1894, however, that a coalition of Populists and Southern and Western Democrats succeeded in engineering its passage as part of a program to reduce tariffs and tax the rich.[8] The measure was totally congressional in its initiation and passage. President Cleveland, who favored reduced tariffs but opposed passage of an income tax, allowed it to become law without his signature.

The tax, which was miniscule by modern standards (2% of the income of individuals and corporations, with an exemption of $4,000), was bitterly opposed by the Eastern establishment, who viewed it as the opening salvo in a class war of poor against rich. They found substantiation for their fears in the new measure itself which exempted from tax all but the wealthiest 2 percent of the population, whereas under previous taxes this same group paid only 2 percent of the total revenues generated. Moreover, if a 2% tax

[8] Act of August 27, 1894, ch. 349, § 27, 28 Stat. 553.

on incomes above $4,000 could be imposed, nothing would prevent imposition of a 20% tax on incomes above $40,000. It is not surprising, therefore, that the rhetoric employed was extreme. In polite society the tax was referred to as radical; in other circles it was characterized as an adventure in "socialism, communism and devilism" devised by "the professors with their books, the socialists with their schemes," and "the anarchists with their bombs."

These, of course, were not charges of impressive legal weight, and when the validity of the tax reached the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*,[9] the tax was challenged principally on three constitutional grounds: (1) that it constituted a direct tax which did not meet the constitutional requirement that such measures be apportioned among the states on the basis of population;[10] (2) that because it exempted incomes below $4,000, it violated the constitutional requirement that taxes be uniform throughout the United States;[11] and (3) that it impinged on the rights of state and local governments by taxing the interest on obligations issued by these bodies.[12] Although the Supreme Court previously had indicated that direct taxes included only land and capitation taxes,[13] and had upheld the constitutionality of the Civil War income taxes,[14] it nonetheless ultimately concluded in *Pollock* that taxes on income from real and personal property were direct taxes within the meaning of the Constitution, that the Federal Government could not validly tax the obligations of state and local governments, and that the 1894 tax was so infected with unconstitutionality that it was totally void.[15] The *Pollock* decision has been severely criticized by students of constitutional law and others; nevertheless, it had the effect of delaying general income taxation in the United States for almost two decades.

The beginning of the twentieth century witnessed important social and political changes in the United States. Public attention was increasingly focused on the abuses of economic power characteristic of the time. Extreme poverty among workers, exploitation of labor generally and child labor in particular, increasing concentration of wealth, and monopolistic and corrupt practices of corporate giants were all issues that were colorfully ventilated by a new form of journalism, "muckraking." Powerful new

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[9] 157 U.S. 429, *rehearing* 158 U.S. 601 (1895).

[10] U.S. CONST. art. I, § 9.

[11] U.S. CONST. art. I, § 8, cl. 1.

[12] *Cf.* U.S. CONST. Amend. X.

[13] Hylton v. United States, 3 U.S. (3 Dall.) 171, 174 (1796).

[14] Springer v. United States, 102 U.S. 586 (1880).

[15] The Court did not pass on the question of whether the uniformity clause was violated. Later, it was established that uniformity meant geographic uniformity rather than rate uniformity—rates could be progressive so long as the same rates applied equally throughout the nation. Knowlton v. Moore, 178 U.S. 41 (1900).

political leaders emerged, such as Robert LaFollette and Theodore Roosevelt, who were sensitive to these issues. These events had an impact on the question of income taxation and gave it a new respectability. Perhaps the best illustration of this rested in remarks of President Roosevelt in 1906 on the occasion of the laying of the cornerstone of a new office building for the House of Representatives.

> [The President] made a flamboyant Fourth-of-July speech for ten minutes, an uplift speech for fifteen, skinned the muckrakers within an inch of their lives, and delivered a few light taps on Democratic ribs. The mouths of the eminent Republican magnates were spread in smiles reaching from ear to ear. They were having the time of their lives, when suddenly, without any connection whatever with anything he had said, apropos of nothing, he declared vehemently for both a graduated income tax and a graduated inheritance tax. The Democrats were jubilant and applauded hilariously, while the smiles froze on the faces of the Republicans. They would not have been more astonished if he had struck them betwixt the eyes with a maul. They had to pinch themselves to see if they were awake. The President seemed to be delighted with the sensation he had created and the consternation he had wrought among Republican statesmen. Their curses on him for that speech were not only deep, but loud.[16]

Roosevelt continued to make statements supporting a graduated income tax, but took little if any affirmative action to secure its adoption. Nevertheless, the fact that a Republican President would even philosophically support such a measure did much to defuse the temper of the debate—one could hardly accuse the President of being a "bomb throwing anarchist." Furthermore, Roosevelt's successor, William Howard Taft, gave campaign speeches expressing support for such a tax when demanded by revenue needs. In his view an income tax could be devised which would be constitutional notwithstanding the *Pollock* decision. As with Roosevelt, Taft did not initiate an income tax program and it has been suggested that his public enthusiasm for the tax was manufactured as a shrewd ploy to steal the thunder of his Democratic rival, William Jennings Bryan, who was an outspoken advocate of income taxation.

Yet, it was during the Taft Administration that the seed of the modern income tax was planted. This is ironic because during this period Republicans, traditionally hostile to the measure, controlled not only the White House but the House of Representatives and the Senate as well. The irony is explained by the character of the congressional Republican delegation which had changed from earlier years. Midwestern Republican

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[16] 1 CHAMP CLARK, MY QUARTER CENTURY OF AMERICAN POLITICS 440 (1920).

progressives such as LaFollette and Cummins had recently entered the Senate and forged an alliance with Democrats favorable to income taxation. During the Senate consideration of the Payne-Aldrich Tariff Bill, this coalition actively pressed for inclusion of a general graduated income tax. The Republican hierarchy opposed the measure but could not control the insurgents within their party. Ultimately, in an effort to save the tariff legislation and also to prevent an open breach within the Republican party, President Taft effected a grudging compromise. Taft had come to change his mind on the question of whether *Pollock* would be overruled by the Supreme Court and felt that the more prudent course was to amend the Constitution to permit an income tax without apportionment. A proposal for such an amendment constituted one element of his compromise plan. The second element of the plan was the immediate enactment of a corporation excise tax measured by corporate income. Taft felt that such a tax would not be a direct tax and could withstand constitutional attack. Although the Taft proposal was opposed by a few diehard advocates of an immediate general income tax, it was reluctantly backed by the conservative Republicans who saw it as the lesser of two evils. This support, along with the approval of the moderate pro-income tax forces, was sufficient for passage.[17]

The corporation income tax, which was 1% of taxable income in excess of $5,000, was upheld by the Supreme Court in 1911.[18] As anticipated by Taft, the Court distinguished the *Pollock* case on the ground that the levy was indirect since it was imposed on the privilege of doing business as a corporation and not on the income from property. That the tax was *measured* by income from property was not a constitutional defect, even though a tax imposed directly on such income might be invalid.

By 1913, two thirds of the states had approved the Sixteenth Amendment, which provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The debate concerning the Amendment was a lively one, but approval was assured because of the new respectability of the income tax and because the more numerous and less wealthy elements of society believed such a tax would shift a greater portion of the tax burden onto the wealthy. The arguments against the proposed amendment, that it would permit the taxation of state and local bonds and that the income tax would be difficult to administer and produce a nation of liars, were of insufficient persuasive force to stanch the flow of popular support.

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[17] Act of August 5, 1909, ch. 6, § 38, 36 Stat. 112.

[18] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

One month after final ratification of the income tax amendment, Woodrow Wilson assumed the Office of President. Although Wilson was not an advocate of free trade, he was decidedly hostile to what he saw as the excesses of the existing tariff system, both in its adverse effect on competition and in its use as an indirect tax on consumption. Similar sentiments were commonplace in Congress. By the fall of 1913, legislation had been adopted substantially cutting the tariff schedules and, more importantly, imposing a general income tax to balance the lost customs revenues.[19] Conservatives actively opposed adoption of the income tax, but it was an idea whose time had come (for the third time) and the anti-tax forces did not even succeed in their efforts to eliminate progressive rates. They did, however, have some success in moderating the rates of tax. The 1913 legislation provided a 1% normal tax on taxable income of individuals in excess of $3,000 ($4,000 in the case of married persons) plus a graduated surtax.[20]

Surtax	
Rate	Income
1%	$20,000 – $50,000
2%	$50,000 – $75,000
3%	$75,000 – $100,000
4%	$100,000 – $250,000
5%	$250,000 – $500,000
6%	Over $500,000

Thus, the maximum rate of tax on individuals was 7% on taxable income above $500,000. Corporations were subject to a flat rate of 1% on all their taxable income.[21]

In addition to providing relatively low rates, which produced only $28 million of revenue in the first year, the 1913 tax also contained a generous exemption, with the result that for 1913 only 358,000 individual income tax returns were filed in a nation with a population of 97 million. However, the upcoming war was to change drastically the character of the income tax.

In 1914, World War I broke out in Europe. Initially committed to a policy of neutrality, President Wilson by the spring of 1917 was compelled to ask Congress for a declaration of war against Germany. The war had a staggering impact on the financial affairs of the United States. One of the first casualties was the customs receipts that soon dwindled as a result of trade reduction. This was a significant setback to a nation that in 1913 still derived almost one-half of its government revenues from these sources.

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[19] Act of October 3, 1913, ch. 16, 38 Stat. 114.

[20] *Id.* §§ II(A), (C), 38 Stat. 166, 168.

[21] *Id.* § II(A)(1), 38 Stat. 166.

The diminution in these revenues was felt as early as 1914 and resulted in the enactment of the War Revenue Bill of 1914,[22] which levied various internal excise taxes to make up for the lost revenue.

Of course, even more significant was the staggering growth of expenditures required of a nation at war. The cost of operating the Government grew from approximately $700 million in each of the years 1913–16, to $2 billion in 1917, $13 billion in 1918 and $19 billion in 1919. For 1914 there was a deficit of $400,000; for 1919, the deficit was $13 billion.

Although Wilson's hopes for neutrality were not finally extinguished until 1917, he foresaw the possibility of American involvement as early as 1915, and toward that end the United States commenced a military expansion program in 1916. The income tax was to play an increasingly important role in financing both the military preparedness program and the costs of subsequent entry into the war.

Within a period of three years, the Revenue Acts of 1916,[23] 1917,[24] and 1918[25] (the latter being enacted in 1919 but made retroactive to January 1, 1918) escalated the income tax on individuals to a normal tax computed as follows:

Normal Tax

Rate	Income
6 %	$2,000 – $6,000
12 %	Over $6,000

Additionally, there was imposed a surtax ranging from 1% on income in excess of $5,000 to 65% on income in excess of $1,000,000.[26] Thus, the maximum rate was 77%, which was 1,100% greater than the maximum rate prevailing from 1913–1916. Corporate tax rates also advanced spectacularly. By 1918, corporations were paying a tax of 12% on net income,[27] plus a profits tax escalating from 30% to 80% of so-called excess profits or war profits.[28]

The excess profits tax was introduced by the Act of March 3, 1917,[29] just one month prior to the declaration of war against Germany. Although the March 3 legislation was soon to be superseded by the War Revenue Act

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22 Act of October 22, 1914, ch. 331, 38 Stat. 745.
23 Revenue Act of 1916, ch. 463, 39 Stat. 756.
24 War Revenue Act of 1917, ch. 63, 40 Stat. 300.
25 Revenue Act of 1918, ch. 18, 40 Stat. 1057.
26 Revenue Act of 1918, ch. 18, § 211, 40 Stat. 1062.
27 *Id.* § 230(a)(1), 40 Stat. 1076.
28 *Id.* § 301(a), 40 Stat. 1088.
29 Ch. 159, § 201, 39 Stat. 1000.

of 1917, enacted October 3, 1917,[30] the excess profits tax itself persisted until it was repealed by the Revenue Act of 1921.[31] It was later to reappear during World War II and the Korean War. The tax had the dual purpose of curbing war profiteering and raising revenue from those best able to afford to pay a larger share of tax. The tax was a complicated one in that it required the measurement of excess profits. Whether such profits were measured by income in excess of a percentage of capital[32] or by profits in excess of those from a prior base period,[33] the determination created many uncertainties and disputes.[34] These difficulties were to play an important part in providing the impetus for the creation of the Board of Tax Appeals.

The effect of the wartime revenue measures on the importance of income taxes was impressive. Government revenue rose from $780 million in 1916 to $6.7 billion in 1920. As a result of the wartime revenue acts, receipts from income and profits taxes over this same period rose from $125 million to $3.9 billion. In 1916, they represented 16 percent of receipts; by 1920, this percentage had risen to 55 percent.

These spectacular increases were accompanied by a corresponding, and universally recognized, increase in the complexity of the law.[35] One indication of this appeared in the increased length of the succeeding acts. Excluding the tariff and excise provisions, the 1913 Act took up only 16 pages in the Statutes at Large, the 1916 Act took up 22 pages, and the 1918 Act required 53 pages. This increase in statutory length mirrored the substantive evolution of the tax law. Several important and complicating provisions were added by the 1916 legislation: the term "dividend" was defined for the first time;[36] taxpayers were permitted to report income on a method other than the cash method of accounting;[37] losses incurred in a transaction for profit were made deductible even though not incurred in a trade or business;[38] detailed statutory treatment was provided for nonresident aliens;[39] the income of estates and trusts was subjected to tax

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[30] Ch. 63, 40 Stat. 300.

[31] Revenue Act of 1921, ch. 136, § 1400(a), 42 Stat. 320.

[32] Revenue Act of 1918, ch. 18, §§ 301, 312, 40 Stat. 1088, 1091 (relating to excess profits tax).

[33] *Id.* §§ 301, 311, 40 Stat. 1088, 1090 (relating to war profits tax).

[34] *Hearings Pursuant to S. Res. 168 Before the Senate Select Comm. on Investigation of the Bureau of Internal Revenue*, 68th Cong., 1st Sess., pt. 1 at 132 (1924) (statement of David H. Blair, Comm'r of Int. Rev.) [hereinafter cited as Senate Select Comm. Hearings].

[35] *See, e.g.,* Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 120–21 (1924) (statement of David H. Blair, Comm'r of Int. Rev.); Turner, *supra* note 2, at 32.

[36] Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 757.

[37] *Id.* § 8(g), 39 Stat. 763.

[38] *Id.* § 5(a), 39 Stat. 759. It was later held that no such losses were allowed under the 1913 Act. Mente v. Eisner, 266 F. 161 (2d Cir. 1920).

[39] Ch. 463, § 6, 39 Stat. 760.

for the first time;[40] and the class of organizations exempt from tax was substantially increased.[41] The most important change from earlier law effected by the 1917 Act was, of course, the addition of the excess profits tax.[42] The Act provided for the filing of consolidated returns for excess profits tax purposes,[43] which added some complexity. The 1918 Act also contained many important amendments: consolidated returns were authorized for both income and profits tax purposes;[44] substantial modifications were made in the profits tax;[45] provision was made for the nonrecognition of gain in connection with corporate reorganizations;[46] authority was given to the Bureau to require the taking of inventories;[47] a provision for the carryover of net operating losses was added;[48] and a special amortization deduction was authorized for war facilities.[49]

With the end of the war and the return of surplus revenues, pressure for reduction in the income taxes became overwhelming. In addition to eliminating the excess profits tax, the Revenue Act of 1921 substantially reduced the individual and corporate income tax rates.[50] Even with the

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[40] *Id.* § 2(b), 39 Stat. 757.

[41] *Id.* § 11, 39 Stat. 766.

[42] War Revenue Act of 1917, ch. 63, § 201, 40 Stat. 303.

[43] Revenue Act of 1921, ch. 136, § 1331, 42 Stat. 319 (construing provisions of Revenue Act of 1917).

[44] Revenue Act of 1918, ch. 18, § 240(a), 40 Stat. 1081.

[45] *See* H.R. REP. NO. 65-767, at 15–21 (1918); S. REP. NO. 65-617, at 11–15 (1918).

[46] Revenue Act of 1918, ch. 18, § 202(b), 40 Stat. 1060.

[47] *Id.* § 203, 40 Stat. 1060.

[48] *Id.* § 204, 40 Stat. 1060.

[49] *Id.* §§ 214(a)(9), 234(a)(8), 40 Stat. 1067, 1078.

[50] The 1921 Act provided a normal tax on married individuals (ch. 136, §§ 210, 216(c), 42 Stat. 233, 242) as follows:

Normal Tax

Rate	Income
4%	$2,000 – $6,000
8%	Over $6,000

In the case of a single person, these rates were 4% on income from $1,000–$5,000, and 8% on income in excess of $5,000. In the case of a married couple with income of not more than $5,000, the exemption was $2,500 instead of $2,000. The individual surtax rates ranged from 1% of income over $6,000 to 50% of income in excess of $200,000. Ch. 136, § 211, 42 Stat. 233. For the transition year 1921, these rates ranged from 1% on income in excess of $5,000 to 65% on income in excess of $1 million.

Although the tax rate on corporations was increased from 10% to 12½% for years following 1921 (§ 230, 42 Stat. 252), a $2,000 exemption (§ 236(b), 42 Stat. 257) and the elimination of the excess profits tax resulted in corporations being reduction of rates in 1921, and the later reductions that were to take place during the 1920's, the income tax had firmly established itself as the principal device for financing government activities. Since 1918, receipts from the income (individual and corporate) and excess profits taxes have rarely yielded less than half of annual government receipts; in some years they have yielded considerably more than half.[51]

B. Inadequacy of Preexisting Adjudicative Institutions

The income and excess profits taxes of the World War I period placed an enormous strain on the Bureau of Internal Revenue and, to a lesser extent, on the federal courts. In the first place, the taxes were considerably more complicated than any other revenue device previously utilized by the Federal Government. This problem was recognized at the very beginning of the modern income tax. A friend who complained to Senator Elihu Root of the complexities of the 1913 Act elicited the following response:

> I guess you will have to go to jail. If that is the result of not understanding the Income Tax Law I shall meet you there. We shall have a merry, merry time, for all of our friends will be there. It will be an intellectual center, for no one understands the Income Tax Law except persons who have not sufficient intelligence to understand the questions that arise under it.

Even the income tax of the Civil War period, while much simpler than the later measures, was not without its complexities. For example, Abraham Lincoln, an able lawyer of his day, overpaid his 1864 income tax by $1,250, which sum was ultimately refunded to his estate in 1872.

The excess profits tax was, if anything, even more complicated than the income tax. Dr. Thomas S. Adams, a distinguished political economist, professor at Yale University, adviser to the Treasury Department, and fervent supporter of income taxation, urged repeal of the profits tax in 1921 on the ground that its continuation would inevitably lead to the breakdown of tax administration and the repeal of the income tax as well.

In addition to their complexity, the income taxes of the World War I period affected vast numbers of people. The lowering of exemptions resulted in a staggering increase in the number of returns filed. Until 1917,

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subject to less overall tax than under the 1918 Act. *See supra* notes 27–28 and accompanying text.

[51] However, in recent years, social insurance taxes have represented an increasing share of federal revenue, reaching as high as 42.3% in 2010. *See* STAFF OF THE JOINT COMM. ON TAX'N, OVERVIEW OF THE FEDERAL TAX SYSTEM AS IN EFFECT FOR 2012, JCX-18-12, app. A-3 (Comm. Print 2012).

the number of income tax returns filed by individuals did not exceed 450,000 for any single year. In 1917, this number increased to 3.5 million and by 1920 more than 7 million individual income tax returns were being filed. Not until 1925 did the number of filings fall below 6 million.

Finally, the experience of the last century has demonstrated that, regardless of the detail provided, it is impossible to draft an income tax statute that clearly provides for all factual circumstances. Accordingly, in addition to the taxing statute, an income tax system requires a sophisticated administrative body to collect the tax and provide interpretations of the statute. As shall be seen, such a body cannot be built overnight.

1. Dilemma of the Bureau

Revenue legislation in the United States dates back almost as far as the formation of the Republic. The first July 4th after adoption of the Constitution was marked by the enacting of a duty on goods, wares, and merchandise imported into the United States.[52] This enactment even preceded establishment of the Treasury Department.[53] Numerous revenue measures followed, but until the Civil War these were almost exclusively tariffs. Only during two brief periods was there resort to internal taxation: 1791–1802 and 1813–1817.[54] This sparing use of internal taxation seems to have been consistent with the intention of the framers of the Constitution, who felt that such techniques should be utilized only in exceptional circumstances,[55] reminiscent as they were of the hated excises imposed in the pre-revolutionary period by the British Parliament. Moreover, internal taxation was not popular with the public and the first imposition of internal excises on distilled spirits gave rise to an insurrection by Pennsylvania farmers in the summer of 1794.

During each of the early periods of internal taxation, an office of Commissioner of the Revenue was created to administer the levies. However, the office was abolished each time the internal duties were repealed.[56] The modern Internal Revenue Service traces its lineage to the legislation imposing the income tax of 1862 and the various other internal taxes that were established to finance the Union's war effort.[57] The first Commissioner appointed under the 1862 legislation, George Boutwell, worked industriously to establish the organization, regulations and forms

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52 Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24.

53 Act of September 2, 1789, ch. 12, 1 Stat. 65.

54 For a detailed account of these measures, see BUREAU OF INTERNAL REVENUE, THE WORK AND JURISDICTION OF THE BUREAU OF INTERNAL REVENUE 5–28 (1948) [hereinafter cited as BUREAU OF INTERNAL REVENUE].

55 THE FEDERALIST NO. 35, at 93-95, 124–25 (R.P. Fairfield ed. 1966).

56 BUREAU OF INTERNAL REVENUE, *supra* note 54.

57 Act of July 1, 1862, ch. 119, § 1, 12 Stat. 432.

necessary for tax administration. Within six months, the Bureau had grown from a staff of one (Mr. Boutwell) to an organization of almost 4,000 employees.[58]

In view of the enormous responsibilities suddenly thrust upon the organization, it was not surprising that in its early years the Bureau was far from an unqualified success. The United States Revenue Commission established in 1865 to study the raising of tax revenues and the efficiency of tax administration concluded that "in point of organization and administration, . . . [the Bureau] is very far from what it should be."[59] The cited weaknesses of the Bureau included the following: lack of policy making authority; inadequate pay; appointments based on patronage rather than ability; and political interference with its decisions.[60]

The income tax of the Civil War period was repealed effective 1872,[61] and most of the other internal taxes imposed to finance the War were repealed by 1877. Nevertheless, the Bureau continued in existence to administer the remaining internal taxes and those thereafter enacted, such as the taxes on alcoholic beverages and tobacco.[62] Additionally, it was given charge of various non-revenue regulatory measures such as the bounty for United States sugar producers, the certification of Chinese laborers, and the taxes on opium and oleomargarine.

The imposition of the corporation income tax in 1909 and the general income tax in 1913 added new duties to the Bureau, and created a concomitant growth in its size. But the changes wrought by the early income tax acts were small compared to those of the World War I revenue legislation. As a result of the introduction of the excess profits tax and the expansion of the income tax, there was a more than ten-fold increase in the number of returns filed. The Bureau was buried under a mountain of paper. Because it was the policy of the Bureau to review virtually each return filed,[63] and because the laws under which the returns were filed were considerably more complicated than any previous tax measures, monumental problems of administration arose. The turmoil that ensued persisted for a decade.

The years 1917 through 1919 witnessed almost complete paralysis of the Bureau. The personnel of the Washington office increased from 585 in

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[58] INTERNAL REVENUE SERVICE, INCOME TAXES 1862–1962: A HISTORY OF THE INTERNAL REVENUE SERVICE 7 (1962) [hereinafter cited as INTERNAL REVENUE SERVICE].

[59] *Id.* at 11.

[60] *Id.*

[61] Act of July 14, 1870, ch. 255, § 6, 16 Stat. 257.

[62] *See* Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 120 (1924) (statement of David H. Blair, Comm'r of Int. Rev.); INTERNAL REVENUE SERVICE, *supra* note 58, at 12.

[63] *See* 1919 COMM'R OF INT. REV. REP. 18.

1917 to 4,088 in 1919,[64] but few of the Bureau's staff were equipped with the special legal, accounting, and engineering background necessary to assess the accuracy of millions of the returns filed.[65] Particularly troublesome were questions of property valuation on which depended deductions for depreciation, amortization, and depletion, and on which invested capital was computed for excess profits tax purposes.[66] According to some, there were not sufficient trained people in the entire country to satisfactorily audit the returns that poured in during the war period.[67] As a result, only the simplest returns, approximately 40 percent of the total, were processed before 1920.[68] Massive recruitment efforts were begun in 1919, and 1,000 auditors were hired in the first six months of the year.[69] However, before they could commence work, the auditors required four to six months of training in a discipline in which there were few teachers and no textbooks.[70] Moreover, even after training, the solution of the difficult questions presented under the wartime revenue acts eluded the grasp of many. The problem was compounded by the fact that taxpayers also had difficulty understanding the new laws, and frequently their accounting records, especially in the case of the profits taxes, were inadequate.[71] This made the settlement of many cases difficult because of the Bureau's insistence on absolute accuracy in the computation of tax liability.[72]

Throughout its history, the Bureau has been plagued with personnel problems. Levels of compensation prevailing in the private sector for tax competency generally have been higher than in the Government. This was especially true during the World War I period, when the Bureau had difficulty attracting employees from a labor market already reduced by virtue of the war effort.[73] Even more troublesome was the fact that when the Bureau succeeded in hiring and training an able agent, the effort served only to make his skills that more marketable, and the chances were that he

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[64] ROY G. BLAKEY & GLADYS C. BLAKEY, THE FEDERAL INCOME TAX 540 (1940).

[65] Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 3, 121 (1924) (testimony and statement of David H. Blair, Comm'r of Int. Rev.).

[66] *Id.* at 121; TREASURY DEP'T, SURVEY OF THE ADMINISTRATION OF INCOME AND EXCESS-PROFITS TAXES, Vol. III at 21 (1927) [hereinafter cited as TREASURY DEP'T SURVEY].

[67] Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 3 (1924) (remarks of Senator Jones).

[68] *Id.* at 121 (statement of David H. Blair, Comm'r of Int. Rev.).

[69] *Id.*

[70] *Id.* at 121, 132.

[71] *Id.* at 121.

[72] TREASURY DEP'T SURVEY, *supra* note 66, at 4.

[73] Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 3 (1924) (testimony of David H. Blair, Comm'r of Int. Rev.).

would soon leave for greener pastures.[74] Morale within the Bureau was poor, and the chances for promotion slight.[75] Employee turnover was a severe problem, especially since it was greatest among the highest paid and most skilled Bureau personnel.[76] The scope of the problem is revealed by the fact that in 1920, 50 percent of the personnel of the Income Tax Unit, which had primary responsibility for income and excess profits tax matters,[77] either resigned or were discharged.[78] The average tenure at that time was approximately one year, and when the training period is taken into account, the time actually spent on Bureau work by the average employee was six to eight months. Additional problems were generated because of periodic scandals involving corrupt agents. When disclosed, these practices

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[74] *Id.* at 132.

[75] *See* 1923 COMM'R OF INT. REV. REP. 6.

[76] 1919 COMM'R OF INT. REV. REP. 32.

[77] The operation of the Income Tax Unit was described as follows:

> The Income Tax Unit is the agency of the Bureau of Internal Revenue for administering the income and profits tax laws. Its duties are:
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> (a) To prepare regulations for the administration of laws relating to taxes on income and profits;
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> (b) To conduct correspondence relating to the subject matter of income and profits taxes;
>
> (c) To receive from collectors of internal revenue all returns covering taxes on income and profits;
>
> (d) To audit and verify returns and consider and dispose of reports relating to returns or questions appertaining thereto;
>
> (e) To assess all original and additional income and profits taxes;
>
> (f) To assemble and audit certificates of ownership;
>
> (g) To review and dispose of claims for abatement and refund of income and profits taxes;
>
> (h) To compile statistics relating to income and profits taxes; and
>
> (i) To control and operate all field forces verifying income and profits tax returns.
>
> The audit work consists of handling all income and excess-profits tax returns of corporations, partnerships, fiduciaries, and individual income-tax returns wherein the income is in excess of $5,000, filed under three separate and distinct revenue acts. All returns filed for the year 1917 were audited and handled by the Income Tax Unit's forces, both in Washington and in the field. For all years subsequent to the year 1917 all individual income tax returns with an income of less than $5,000 were audited in the offices of the collectors of internal revenue.

Senate Select Comm. Hearings*, supra* note 34, pt. 1 at 130–31 (1924) (statement of David H. Blair, Comm'r of Int. Rev.).

[78] George Maurice Morris, *The Organization of the Federal Income Tax Unit*, NAT'L INC. TAX MAG. 9 (June, 1923); *see also* TREASURY DEP'T SURVEY, *supra* note 66, at 35, 155.

occasionally required the discharge of auditors and reorganization of review sections.[79]

It is therefore small wonder that an enormous backlog soon accumulated. In April, 1921, approximately 25 percent of the 1917 returns and 50 percent of the 1918 returns were still pending. As late as 1924, more than 300,000 returns for the tax years 1917–20 remained unaudited. Moreover, these unreviewed cases represented the larger and more complicated returns.[80] Not until 1927 could Treasury report that the Bureau was "*practically current*" with the processing of returns.[81] The Bureau publicly recognized that it was falling behind in audits, and combined a plea for adequate personnel with a statement of the importance of prompt review of returns.

> Were the millions of dollars assessable upon revenue agents' discoveries left out of the question, it is still important that such examinations and audits as are to be made, both out of and in the office, should be made with a reasonable degree of promptness after the returns are filed. After a year or two books are destroyed, the details of transactions forgotten, and the returns themselves become "ancient history," so that an attempt to verify a return or check it up with any available records is attended with difficulty, is often unsatisfactory, and may result in an injustice to the taxpayer or to the Government. Nothing has more served to render the income-tax law unpopular or subject its administration to unfavorable criticism than this one thing of delay in the examinations and audits. The remedy lies through an efficient and sufficient working force to bring the work up to date and keep it current which force will, in the additional tax which it uncovers and causes to be assessed, repay the Government its costs many times over.[82]

Criticism of the backlog was common during the early 1920's. Some criticism was mild:

> [T]o date there have been six general Revenue Acts placed on the statute books since 1913. This is an average of one new law for every two years. Each successive Act is more comprehensive and probably more complicated than its predecessor. Under these

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[79] *Income Tax Unit Stirred by Graft Exposures*, NAT'L INC. TAX MAG. 28 (Dec. 1923).

[80] REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 9–10; Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 5, 131 (1924) (testimony and statement of David H. Blair, Comm'r of Int. Rev.).

[81] TREASURY DEP'T SURVEY, *supra* note 66, at 2.

[82] 1917 COMM'R OF INT. REV. REP. 22.

> conditions it is not surprising that the Treasury Department is considerably behind with the audit of returns.[83]

Other commentators were not so understanding:

> All those familiar with the situation at Washington are agreed that if the income tax is to be preserved its friends will have to make a vigorous fight for better administration. Delay has become almost a scandal. Many of the 1917 and 1918 taxes are not yet finally adjusted, and it is beginning to impress some people that this is one of the ways by which enemies of the income tax propose to kill it. Friends of the income tax should insist that its administration be placed upon an efficient basis, so that it may not be discredited and discarded as a result of indirection. Congress has appropriated funds enough for administration and it is a question of either ability or inclination.[84]

In addition to its personnel problems and the attendant backlog, the Bureau during this period struggled with other problems of administering the income and profits taxes. Since the situation with which it was faced was unprecedented, these problems were most often solved on a trial and error basis. The pervasive influence of the backlog contributed to the creation of some of these problems and also may have been influential in the selection of erroneous solutions for other problems.

Early income tax administration was characterized by the policy of centralizing the audit function in Washington. All returns for tax years through 1917 were forwarded to Washington for audit.[85] For tax years following 1917, an increasing number of returns were initially audited in the field before being sent to Washington, but as late as tax year 1925 all corporate returns and all returns of individuals showing gross income in excess of $25,000 were still being forwarded directly to Washington.[86] There seems to have been two reasons for centralization. First, the scarcity of trained auditors to deal with the complexities of the new laws created strong pressures for maximizing the efficiency of the available work force. Initially it was felt that this could best be accomplished by concentrating a specialized and more sophisticated force in the central office, rather than

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[83] 1 WALTER E. BARTON & CARROLL W. BROWNING, BARTON'S FEDERAL TAX LAWS CORRELATED, Vol. 1, v (2d ed. 1925).

[84] H.C. McKenzie, *A Look Ahead into Prospective Tax Legislation*, NAT'L INC. TAX MAG. 12 (Nov. 1923).

[85] 1920 COMM'R OF INT. REV. Rep. 9.

[86] TREASURY DEP'T SURVEY, *supra*, note 66, at 10–11.

spreading it abroad in the field.[87] Second, centralization was justified as a means of assuring the development of a uniform and detailed body of precedent that would serve as a guide for the disposition of future cases.[88] A policy instituted in 1918 directed at increasing the benefits of centralization by specializing auditors within industrial classifications[89] was apparently unsuccessful and was abandoned in 1924.[90]

Although it was always recognized that centralization was a temporary expedient,[91] the policy had serious drawbacks. Questions frequently arose in an audit that could not be answered from the taxpayer's return. In most cases the taxpayer's residence or office was outside the Washington area and an attempt was made to resolve these questions by correspondence. This proved to be a cumbersome procedure that materially added to the time and expense necessary to audit a return.[92] The situation was equally burdensome to the Government and the taxpayer. As a partial solution to the problem, initial efforts were made at decentralization by which the basic audit responsibility was maintained in Washington, with field agents obtaining desired information directly from the taxpayer.[93] Later, the entire responsibility for the initial audit was shifted to the field with the central office reserving authority to verify field actions.[94] This latter phase was completed in 1927. It was believed that as the field agents became more proficient fewer instances would arise when the Washington office would be required to reverse field judgments.[95]

Unquestionably, decentralization was necessary and desirable, but the early attempts to combine centralized auditing functions with the activities of field agents generated organizational problems. In many instances the Bureau was unable to coordinate its operations,[96] and it was not uncommon for determinations of field agents to be overruled in Washington with the result that taxpayers were audited several times with respect to the same tax year. The problem was heightened by the Bureau's willingness to reopen an audit whenever an error was suspected or a new administrative position was

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[87] 1918 COMM'R OF INT. REV. REP. 18–21; *see also* REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 6 (1923).

[88] 1920 COMM'R OF INT. REV. REP. 9; 1919 COMM'R OF INT. REV. REP. 18–19.

[89] 1918 COMM'R OF INT. REV. REP. 18–21.

[90] 1924 COMM'R OF INT. REV. REP. 8.

[91] 1920 COMM'R OF INT. REV. REP. 9–10; 1919 COMM'R OF INT. REV. REP. 36.

[92] REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 7 (1923).

[93] Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 135 (1924) (statement of David H. Blair, Comm'r of Int. Rev.).

[94] TREASURY DEP'T SURVEY, *supra* note 66, at 10–11.

[95] 1919 COMM'R OF INT. REV. REP. 36.

[96] This problem was even recognized, although delicately, by the Bureau. *Id.* at 36–38.

taken with respect to an issue involved in a return.[97] A popular pastime of the day was the recounting of horror stories growing out of these problems.[98]

> A comparatively small concern in an inland city far from Washington filed its 1917 return and paid tax thereon. Later it found that it had omitted certain income and filed an amended return. After correspondence additional tax was assessed and paid. In 1920 an office audit was made and the company advised of an additional assessment of some $20,000.00. The company with its attorney, who was not very well versed in tax matters, went to Washington. As a result of a hearing, the additional assessment was reduced to $10,000.00 and as stated by the president of the company, this additional tax, while it was feld [sic] to be unjust, was paid "with tears in their eyes."
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> In 1922 a field examination was had and the field agent reported that an over assessment of approximately $10,000.00 had been made and recommended a refund. The company was about to declare an extra dividend when it was advised by an A-2 letter that the field agent was in error, that there was no refund, and $18,000.00 more was due. The company engaged experts and at a considerable expense in the compiling of evidence and after several hearings at Washington and considerable time succeeded in having the additional assessment eliminated and a refund of some $6,000.00 ordered. There was no doubt in the minds of the company or its representatives but that the refund should have been the full $10,000.00 recommended by the field agent.[99]

The problem of multiple audits attracted considerable attention.[100] By 1921 the practice was considered to be so abusive that the Revenue Act of 1921 specifically prohibited unnecessary examinations or more than one inspection of a taxpayer's books for a taxable year unless the taxpayer requested the additional audit or the Commissioner, after investigation,

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[97] REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 4 (1923).

[98] *E.g.*, C.P.A. MAG. (June, 1923); NAT'L INC. TAX MAG. 14–15 (July, 1923); 67 CONG. REC. 3855–57 (1926).

[99] NAT'L INC. TAX MAG. 24–25 (July, 1923).

[100] *Id.*; *see also* H.R. REP. NO. 67-350, at 16 (1921); S. REP. NO. 67-275, at 31 (1921); REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 4 (1923); 67 CONG. REC. 3855–57 (1926); 63 CONG. REC. 217 (1922); 61 CONG. REC. 5202, 5855 (1921).

notified the taxpayer that the additional examination was necessary.[101] In 1923, on the recommendation of the Tax Simplification Board, the Commissioner ordered that closed returns should not be reopened in the absence of fraud or gross error.[102] These actions did not completely ameliorate the problem, as evidenced by the fact that in 1926 an attempt was made, albeit unsuccessful, to make the legislation even more restrictive by absolutely barring more than two audits with respect to the same year.[103]

Another troublesome practice characteristic of the World War I period was the omission of any procedure by which a taxpayer could obtain an administrative hearing before being assessed for an underpayment of tax. Until 1921, the statute did not require such a hearing or, indeed, require notice that an assessment was contemplated, before the tax was assessed. Once the tax was assessed and notice and demand for payment made, the statute provided that the tax be paid forthwith; in the absence of such payment the Bureau could commence collection proceedings such as distraint and levy on the taxpayer's property.[104] Inasmuch as the decision to assess was frequently made by auditors in Washington, a few taxpayers never even received informal notice in advance of an actual assessment.[105]

The absence of any right for an administrative appeal of a determination of underpayment led to an unfortunate practice prevalent between 1919 and 1921. The Bureau had fallen far behind in the auditing of returns, and it was felt that many of the returns contained errors that if corrected would result in greatly increased revenues needed for the war effort. To obtain this revenue as promptly as possible, the Bureau embarked on a program of superficially auditing large numbers of returns, disallowing all questionable deductions, and immediately assessing the additional tax.[106] Besides raising large amounts of revenue, it was hoped that this practice would result in the closing of many unaudited returns and thereby reduce the backlog. The Bureau believed that any errors made through this procedure could be subsequently corrected either by claims for refund or claims in abatement.

A claim for refund was precisely what its name implied. A taxpayer who had paid more tax than he felt was due could file a claim for refund with the Commissioner. An audit would then be made, and the tax would be refunded if the Commissioner determined the claim to be meritorious. If,

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101 Revenue Act of 1921, ch. 136, § 1309, 42 Stat. 310 (now codified at I.R.C. § 7605(b)).

102 Order of Comm'r of Internal Revenue, Jan. 20, 1923, quoted in REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 4, 15 (1923).

103 *See* H.R. REP. NO. 69-356, at 55 (1926).

104 *See* Revenue Act of 1918, ch. 18, §§ 250(b), (d), (e), 40 Stat. 1083; Revenue Act of 1916, ch. 463, § 9(a), 39 Stat. 763; H.R. REP. NO. 67-350, at 14–15 (1921).

105 *See* Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 35 (1924) (testimony of James G. Bright, Deputy Comm'r of Int. Rev.).

106 1919 COMM'R OF INT. REV. REP. 38; Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 133–34 (1924) (statement of David H. Blair, Comm'r of Int. Rev.).

on the other hand, the Commissioner rejected the claim or did not approve it within a certain period of time, the taxpayer could commence a suit in either district court or the Court of Claims to recover the excessive tax.[107]

The claim in abatement, on the other hand, was not a procedure to secure a refund of tax paid. Rather, the procedure permitted the taxpayer to administratively appeal an assessed tax prior to paying the assessment. The claim in abatement was initially a purely administrative creation[108] that permitted a taxpayer to defer payment if he provided a bond for the payment of the tax and any interest or penalties thereon.[109] The claim was required to be supported by affidavits of the taxpayer and the Commissioner was to presume that the assessment was correct in considering the validity of the claim. The claim in abatement was not, however, a completely adequate solution for a taxpayer who believed he had erroneously been assessed. It was not permitted with respect to an assessed tax that had been administratively reviewed. Once administrative action was completed, the assessed tax would have to be paid. Furthermore, although the cost of a bond was less than the tax assessed, the cost was not insubstantial and could not be recovered even if the assessment was abated. Moreover, taxpayers in financial straits might not be able to obtain a bond at all, with the result that they were not able to avail themselves of the abatement procedure. Finally, the filing of a claim in abatement was no guarantee that collection efforts would be suspended; if the collector in his discretion felt collection of the tax was in jeopardy, he could collect the tax regardless of the fact that a claim in abatement was filed. In such a case, the taxpayer was consigned to a remedy based on a claim for refund. The claim in abatement became less important with the enactment of section 250(d) of the Revenue Act of 1921,[110] which provided, in most cases, for pre-assessment review of tax deficiencies

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[107] *See infra* notes 142–197 and accompanying text.

[108] A limited statutory claim in abatement was provided by the Revenue Act of 1918 in the case of deductions resulting from a "material reduction . . . of the value of the inventory . . . or from the actual payment after the close of [the] . . . year of rebates in pursuance of contracts entered into during such year upon sales made during such year." Revenue Act of 1918, ch. 18, §§ 214(a)(12), 234(a)(14), 40 Stat. 1068, 1079. The Revenue Act of 1924 abolished claims in abatement except those made with respect to jeopardy assessments. Revenue Act of 1924, ch. 234, § 279, 43 Stat. 300.

[109] Treas. Reg. 45, Art. 1032 (1921); I.T. 1869, II-2 CUM. BULL. 244 (1923). The statutory basis for the claim in abatement was Rev. Stat. § 3220 (1873), which provided the Commissioner with authority to refund taxes erroneously assessed or collected. Treas. Reg. 45, Art. 1031 (1921). Procedures for filing claims in abatement went back at least as far as 1879. *See* TREASURY DEP'T, Series 7, No. 14 (1879), revised as Treas. Reg. 14 (1903).

[110] Ch. 136, § 250(d), 42 Stat. 265.

within the Bureau. When such review was available, no claim in abatement could be made.[111]

Despite its shortcomings, the claim in abatement procedure resulted in the failure of the abbreviated audit and assessment policy. Instead of paying the tax assessed, many taxpayers filed claims in abatement with the result that little additional revenue was collected. Other taxpayers who paid the assessment filed claims for refund. Returns temporarily closed by assessment of additional tax had to be reopened for a complete audit of the merits of the claims in abatement and claims for refund.[112]

This unfortunate episode in the history of tax administration made apparent the undesirability of summary assessments.[113] The Revenue Act of 1921 provided a partial answer to this vexing problem by requiring the Commissioner to give the taxpayer notice of his intention to assess and an opportunity, within 30 days after notice was mailed by registered letter, to file an administrative appeal.[114] The appeal would afford the taxpayer an opportunity for a hearing, and no assessment could be made until the appeal was concluded. Significantly, however, the statute permitted the Commissioner to assess without notice or opportunity for hearing if he believed that the ensuing delay would jeopardize collection of the amount due.

As a result of the audit backlog and the operation of the statute of limitations on assessment, even after the enactment of the 1921 provision, many taxpayers did not obtain the opportunity for an administrative hearing prior to assessment. The early revenue acts provided a period of either three, four, or five years from the filing of the return within which an underpayment of tax could be assessed.[115] After the period expired, no further tax could be demanded. In many cases the expiration of the statutory period would become imminent before the audit was completed, and, until 1926, the running out of the statutory period was considered justification for making a jeopardy assessment[116] unless the taxpayer agreed to an extension of the period.[117] The assessment, not based on a well-considered audit, would be exaggerated by resolving every questionable

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[111] T.D. 3269, I-1 CUM. BULL. 303, 304 (1922).

[112] Senate Select Comm. Hearings*, supra* note 34, pt. 1 at 134 (1924) (statement of David H. Blair, Comm'r of Int. Rev.).

[113] *Id.* at 135.

[114] Ch. 136, § 250(d), 42 Stat. 265.

[115] Revenue Act of 1916, ch. 463, §§ 9(a), 14(a), 39 Stat. 763, 772 (three years); Revenue Act of 1918, ch. 18, § 250(d), 40 Stat. 1083 (five years); Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 265 (four years for returns filed for 1921 and later years and five years for returns filed for prior years).

[116] I.T. 1333, I-1 CUM. BULL. 305 (1922); TREASURY DEP'T SURVEY, *supra* note 66, at 31.

[117] Senate Select Comm. Hearings*, supra* note 34, pt. 1 at 35 (1924) (testimony of Dr. T. S. Adams).

issue against the taxpayer.[118] These assessments were in many cases additionally burdensome because, coming many years after the tax period in issue, the taxpayer's economic situation had deteriorated with the result that the assessment spelled financial ruin, unless the taxpayer was in a position to defer payment of the tax by filing a claim in abatement.[119] A post-war business recession served to heighten this effect.[120]

A final problem that emerged in the early years of the administration of the modern income tax concerned the application and publication of precedents. One source of precedents, court decisions construing the tax laws, provided useful guidelines to the Bureau and taxpayers. But court-made law accumulates slowly, and frequently the judicial resolution of an issue is not finally settled until reviewed by the Supreme Court. In the case of complex statutory provisions, such as income and profits taxes, many questions of statutory interpretation arise, and resolution of these questions solely by the courts is inadequate.

Another source of precedents was Treasury decisions and regulations, which were published guidelines of interpretation of the statute and represented the most persuasive authority that could be issued by the Treasury Department. The early income and profits tax acts were both vague and unrealistic on many important points; legislative correction of these deficiencies was, in many cases, impracticable, and the publication of regulations was employed with some success to fill the void.[121] Particularly notable in this regard was the assembling of a task force known as the Excess Profits Tax Advisers, a group of experts who worked with Treasury staff to draft regulations dealing with the difficult problems raised by the first excess profits taxes.[122]

But the promulgation of regulations was itself a time consuming process, and regulations, like court decisions, could not adequately answer the myriad questions arising under the statutes. Naturally, the Bureau in reviewing returns was engaged in a continuous process of interpreting and applying the statute. Rulings generated in the audit process were recorded

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118 *See id.*

119 *See* Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 139 (1924) (statement of David H. Blair, Comm'r of Int. Rev.). It was the general practice of the Bureau to permit claims in abatement with respect to jeopardy assessments. Kingman Brewster, *Procedure and Practice on appeal from the Action of the Income Tax Unit*, *in* PROCEEDINGS OF THE SIXTEENTH ANNUAL CONFERENCE ON TAXATION OF THE NATIONAL TAX ASSOCIATION 322, 327 (1923) [hereinafter cited as Brewster]. However, a taxpayer without substantial resources might not be able to take advantage of a claim in abatement because of the bond requirement. *See supra* notes 108–111 and accompanying text.

120 *See* Turner, *supra* note 2, at 32–33.

121 1918 COMM'R OF INT. REV. REP. 9.

122 *Id.*; George O. May, *Accounting and the Accountant in the Administration of Income Taxation,* 47 COLUM. L. REV. 377, 380–82 (1947).

by the Bureau and served as precedent in future cases.[123] However, these rulings of the Bureau were rarely made available to the public prior to 1922, and, prior to 1925, publication was on a sporadic basis.[124] The pressures of disposing of the backlog of cases were such that there was simply no time either to issue rulings on prospective or hypothetical situations or to reduce such rulings to publishable written form on a systematic basis.[125] Additionally, the Bureau during this period exercised considerable caution in publishing positions that had not been fully considered in the regulation-making process.[126] Despite these justifications, the existence of secret rulings[127] aroused a good deal of criticism.

In early 1926 the Senate Select Committee on Investigation of the Bureau of Internal Revenue reported that the absence of published rulings had resulted in a variety of problems:

> 1. Information for the guidance of the employees of the income tax unit is so incomplete that gross discrimination results from the failure to apply uniform principles to similar cases.
>
> 2. Taxpayers, in many instances, have failed to claim allowances granted others similarly situated.
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> 3. To secure the benefit of unpublished precedents, taxpayers are forced to employ former employees of the income tax unit to advise and represent them in tax cases.
>
> 4. Their exclusive possession of information as to the unpublished precedents and practices of the income tax unit has placed an artificial premium upon the value of the services of ex-employees which enables them to demand and receive immense fees for information which should be freely available to everybody.
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> 5. This artificial premium, thus placed upon the exclusive information possessed by the employees of the Income Tax Unit, and the opportunity thus afforded for highly lucrative outside

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[123] 1920 COMM'R OF INT. REV. REP. 9.

[124] *See* Senate Select Comm. Hearings, *supra* note 34, pt. 17 at 3643–44 (1925) (testimony of C.R. Nash, Ass't to the Comm'r of Int. Rev.).

[125] "If you turn these committeemen loose to write opinions they would want to write a real judicial opinion." Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 30 (1924) (testimony of David H. Blair, Comm'r of Int. Rev.); 1919 COMM'R OF INT. REV. REP. 17.

[126] 1919 COMM'R OF INT. REV. REP. 16–18.

[127] "[W]e have a list of secret rulings . . . " Senate Select Comm. Hearings, *supra* note 34, pt. 1 at 30 (1924) (testimony of David H. Blair, Comm'r of Int. Rev.).

> employment, is the cause of the extraordinary turnover among the employees of the unit and of the difficulty experienced by the unit in retaining the services of competent employees at salaries within the range of the salaries paid by the Government for comparable service.
>
> 6. The failure to consider closed cases as precedents and to publish the principles and practices followed in closed cases as precedents has deterred the formation of a body of settled law and practice. The unsettled state of the law and practice has encouraged the filing of claims for allowances and require the constant rediscussion and reconsideration of questions, which should be settled by precedents established by closed cases.
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> 7. The fact that a ruling will be published and the benefit of its principles claimed by taxpayers similarly situated is the strongest possible deterrent against making unsound rulings.
>
> 8. During the course of the hearings there has been a great deal of evidence tending to show that it is the policy of the bureau to fix taxes by bargain rather than by principle. Rulings based upon bargains cannot be published as precedents. The best and most persistent trader gets the lowest tax and gross discrimination is the inevitable result of such a policy.[128]

In evaluating these criticisms it is important to note that the Select Committee was dominated by senators, particularly Senator James Couzens of Michigan, who were hostile to virtually every aspect of the tax policy of Secretary of the Treasury, Andrew Mellon. The Committee was spawned in a period of intense anti-Bureau sentiment, its activities were highly controversial, and the criticism on both sides was frequently bitter.[129] It is generally believed that personal animosity was behind a deficiency of $9.5 million asserted against Senator Couzens in respect of the sale by him of a large block of stock in the Ford Motor Co.[130] Ironically, Senator Couzens found salvation in a ruling of the Board of Tax Appeals,[131] an agency that Secretary Mellon was largely responsible for creating.[132]

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128 S. REP. NO. 69-27, at 7–8 (1926).

129 *E.g.*, 65 CONG. REC. 2387–90, 6224 (1924).

130 ROY G. BLAKEY & GLADYS C. BLAKEY, THE FEDERAL INCOME TAX 552–57 (1940); RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 150 (1954).

131 Couzens v. Commissioner, 11 B.T.A. 1040 (1928). For a detailed account of the feud between Senator Couzens and Secretary Mellon, see George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787 (2013).

132 *See* Part II.

In view of the many problems encountered in administering the new taxes, it is not surprising that the Bureau in the post-World War I years was the subject of continuing investigation and criticism. Undoubtedly some of the criticism was politically inspired, but much of it was well founded. This is not to say that these shortcomings were the result of incompetent or venal management; to the contrary, it would appear that many of the officials involved in tax administration were men of great ability.[133] The inadequacies resulted from the enormity of the task of creating an administration for a mass income and profits tax in a short period of time and in the absence of an adequate supply of trained manpower. Regardless

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[133] In a healthy spirit of partisanship, endorsements of Administration officials occasionally got out of hand:

> At the head of the Treasury Department is a farsighted financier, the greatest Secretary of the Treasury since Alexander Hamilton. Under his leadership financial order has come out of chaos. Liberty bonds that were lingering around 86¾ cents on the dollar under Democratic mismanagement were brought to par under the Mellon policies. Debts that had piled mountain high under the Democratic policies of extravagance were paid off at the rate of $2,000,000 per day while other nations were piling up more debts every day. The financial record made by the administrations of Presidents Harding and Coolidge is unsurpassed in the annals of history. This success is very largely due to the wise policies and farsighted genius of Andrew W. Mellon, of Pittsburgh. There is widespread demand for the enactment of legislation for the reduction of taxes. The Mellon plan is known in every hamlet in the land and uncounted millions look to Congress for its enactment. It is the hope of the enemies of this plan that one result of the so-called investigation of the Treasury Department will be the crippling of the Mellon tax-reduction plan. By innuendo against Mr. Mellon it is hoped to break down the Mellon plan.
>
> The work which President Coolidge and his Cabinet are carrying forward is the work planned and so well begun by President Harding. Warren Harding—how fine and frank and honorable he was! The poisoned arrows of malice lie broken at his feet. There is only pity and disgust for the cowardly cur who would seek to cast suspicion on his motives, or leave scandal on the doorstep of the tomb. In the few short months of his administration more great problems were grappled with and solved than ever before in a like period of our history.

65 CONG. REC. 7432 (1924) (address by Senator Frank B. Willis [Rep., Ohio] at Americus Club banquet, Pittsburgh, Apri1 26, 1924).

Politics aside, it would appear that there was general respect for the integrity and efficiency of Treasury and Bureau officials. *See, e.g.*, 65 CONG. REC. 2622 (1924) (remarks of Mr. Young); R.H. MONTGOMERY, EXCESS PROFITS TAX PROCEDURE 13 (1921); *see also* George O. May, *Accounting and the Accountant in the Administration of Income Taxation*, 47 COLUM. L. REV. 377, 379–81, 384–85 (1947) (lauding the work prior to the close of World War I of lawyers and accountants in administering and improving the tax laws; the article, however, decried the rise of what was viewed as excessive legalism following the war).

of the reasons, however, there can be no doubt that problems existed and that these problems supplied an important impetus for the creation of various bodies to investigate and correct the abuses of early tax administration. These bodies included the Excess-Profits Tax Advisers,[134] the Excess-Profits Tax Reviewers,[135] the Advisory Tax Board,[136] the Committee on Appeals and Review,[137] the Tax Simplification Board,[138] the Senate Select Committee on Investigation of the Bureau of Internal Revenue,[139] the Joint Committee on Internal Revenue Taxation,[140] and the United States Board of Tax Appeals.[141]

The purpose of the Board of Tax Appeals, as it ultimately evolved, was a narrow one, to assure that in most cases a taxpayer could obtain an independent review of the assertions of a tax deficiency before the deficiency would be assessed and collected. But before the legislative history of the Board is detailed, it is necessary to consider two additional features of income tax administration extant at the time. The first of these was the judicial remedy for challenging Bureau action. The inadequacy of

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[134] *See supra* notes 121–122 and accompanying text; *infra* notes 203–205 and accompanying text.

[135] *See infra* notes 202–212 and accompanying text.

[136] *See infra* notes 213–221 and accompanying text.

[137] *See infra* notes 221–265 and accompanying text.

[138] *See infra* notes 258–259 and accompanying text.

[139] *See supra* notes 128–132 and accompanying text.

[140] The Joint Committee, a standing committee of Congress, was created by the Revenue Act of 1926, ch. 27, § 1203, 44 Stat. 127 (now codified at I.R.C. §§ 8001–23). Its duties were:

> (1) To investigate the operation and effects of the Federal system of internal-revenue taxes;
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> (2) To investigate the administration of such taxes by the Bureau of Internal Revenue or any executive department, establishment, or agency charged with their administration;
>
> (3) To make such other investigations in respect of such system of taxes as the Joint Committee may deem necessary;
>
> (4) To investigate measures and methods for the simplification of such taxes, particularly the income tax;
>
> (5) To publish, from time to time, for public examination and analysis, proposed measures and methods for the simplification of such taxes and to make to the Senate and the House of Representatives, not later than December 31, 1927, a definite report thereon, together with such recommendations as it may deem advisable; and
>
> (6) To report, from time to time, to the Committee on Finance and the Committee on Ways and Means and, in its discretion, to the Senate or the House of Representatives, or both, the results of its investigations, together with such recommendations as it may deem advisable.

Revenue Act of 1926, ch. 27, § 1203(c), 44 Stat. 127 (now codified at I.R.C. § 8022).

[141] Revenue Act of 1924, ch. 234, § 900, 43 Stat. 336.

these procedures was a key element in providing the need for a body such as the Board of Tax Appeals. The second feature was the character of the administrative remedy available to forestall erroneous Bureau action. The administrative bodies and procedures established within the Bureau in the World War I and immediate post-war periods were the direct ancestors of the Board of Tax Appeals.

2. The Judicial Remedy

For those taxpayers who believed themselves aggrieved by erroneous Bureau action, judicial review was available. Before 1924 such review was generally restricted to one of two types of refund suits: (1) an action of mixed legal ancestry against the collector of internal revenue to whom the disputed tax was paid; and (2) a statutory action under the Tucker Act against the United States. These proceedings were virtually exclusive, and only in extraordinary cases could taxpayers obtain judicial review of a tax determination of the Bureau prior to actual payment of the tax.[142]

The common law right to sue a tax collector for refund of wrongfully collected taxes was first recognized by the Supreme Court in 1836, in the case of *Elliott v. Swartwout*.[143] The action was maintainable against the collector personally and was in assumpsit for money had and received. Because the liability of the collector was considered to be that of an agent who had wrongfully collected a tax for his principal, the Court held that the action would only lie if the collection of the tax was protested by the payor at the time of its payment to the collector.[144] Absent such protest, the agent would not be on notice that his claim to the taxes was questioned and would not be entitled to withhold the payments from his principal. Of course, without its consent, the principal was immune from suit as a sovereign. This immunity extended as well to virtually all suits to restrain the assessment or collection of a tax.[145] Thus, refund suits against

142 The claim in abatement did not permit judicial review prior to collection of the tax. Rather, it permitted the continuation of administrative review of a matter after the tax was assessed, but before it was collected. *See supra* notes 108–111 and accompanying text.

143 35 U.S. (10 Pet.) 137; *see also* Bend v. Hoyt, 38 U.S. (13 Pet.) 263 (1839).

144 35 U.S. (10 Pet.) at 156. Although not clearly stated, there was some suggestion that a protest lodged following payment of the tax to the collector but prior to its transmission to the Treasury would also be adequate. *Id.* at 154.

145 Since 1867 this bar has been statutory, Act of March 2, 1867, ch. 169, § 10, 14 Stat. 475 (now codified at I.R.C. § 7421(a)), but the statute was apparently merely a restatement of previously recognized doctrine. *See* Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509 (1932); Louisiana v. McAdoo, 234 U.S. 627, 632 (1914); Minnesota v. Hitchcock, 185 U.S. 373, 388 (1902); Belknap v. Schild, 161 U.S. 10, 17 (1896); Boeing Air Transport Inc. v. Farley, 75 F.2d 765, 768 (D.C. Cir. 1935); Note, 13 N.C. L. REV. 265 (1935).

collectors generally were the sole judicial recourse of taxpayers prior to the creation of the Court of Claims in 1855 and the enactment of the Tucker Act in 1887.

Although not clearly entitled by law to do so, following the decision in *Elliott v. Swartwout* collectors routinely refrained from paying taxes over to the Treasury when collected under protest.[146] It soon developed that these funds were being unlawfully converted by the collectors for their personal purposes. In 1839, Congress enacted legislation requiring the payment of the taxes into the Treasury regardless of the fact that they were collected under protest but requiring the Secretary of the Treasury to refund taxes paid under protest when such taxes were shown to be excessive.[147] As a result of this legislation, the Supreme Court in *Cary v. Curtis*[148] held that if a collector was not free to retain protested taxes, he could not be personally accountable in assumpsit. The basis of the action was a promise implied in law to repay sums wrongfully taken. Because the new legislation made it illegal for collectors to pay the tax to anyone but the Government, no promise could be implied to the taxpayer. "[T]he law . . . never implies a promise to do an act contrary to duty or contrary to law."[149] After the decision in *Cary v. Curtis*, there was a short period of time in which a serious question existed as to whether any judicial remedy was recognized for the review of the legitimacy of tax collections. The Court in *Cary v. Curtis* expressly refused to rule on this question.[150] Although the subject has been treated in dicta, the Supreme Court has never had to face the question of whether Congress could, consistently with due process, withdraw all judicial review over tax matters. The dicta has not been altogether consistent, so it is not clear how the question would be resolved.[151] Happily, however, 36

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[146] *See* Cary v. Curtis, 44 U.S. (3 How.) 236, 240, 261–62 (1845).

[147] Act of March 3, 1839, ch. 82, § 2, 5 Stat. 348.

[148] 44 U.S. (3 How.) 236 (1845).

[149] *Id.* at 251.

[150] "The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry." *Id.* at 250.

[151] *Compare* Graham & Foster v. Goodcell, 282 U.S. 409, 430 (1931) (indicating that some form of judicial remedy for illegal tax exactions must be afforded) *with* Anniston Mfg. Co. v. Davis, 301 U.S. 337, 341–43 (1937); Bull v. United States, 295 U.S. 247, 259 (1935); Kentucky R.R. Tax Cases, 115 U.S. 321, 331 (1885); McMillen v. Anderson, 95 U.S. 37, 41 (1877) (each indicating that no constitutional right to judicial review exists). In a broader article examining the constitutional status of the Tax Court against the separation-of-powers aspect of article III of the Constitution, Professor Deborah Geier has characterized the Tax Court's small tax case procedures contained in § 7463 as presenting "the most troubling aspect of the Tax Court's current jurisdiction in article III terms" because those procedures necessitate a pre-trial waiver of any appellate review, much less appellate review before an article III tribunal. *See* Deborah A. Geier, *The Tax Court, Article III, and*

days after *Cary v. Curtis* was decided, Congress in effect overruled it by passing legislation providing that nothing in the 1839 legislation should be construed to eliminate the right to sue collectors for customs duties paid under protest.[152] The legislation also provided that to preserve the action, the taxpayer's written protest setting forth his objections had to accompany or precede the disputed tax payment. In 1924, the requirement of protest at the time of payment as a condition of maintaining suit for refund was eliminated. Thenceforth suit could be commenced after a claim for refund was denied or after six months from the filing of the claim, whichever came earlier.[153] The claim itself could generally be filed up to four years after payment of the disputed tax.[154]

As might be expected, the early cases dealing with refund actions against collectors all involved customs duties. The first case involving internal taxes was *City of Philadelphia v. Collector*,[155] an 1866 decision in which the city contested a tax imposed upon illuminating gas. The Court held that, as with the case of customs duties, actions in assumpsit would lie against a collector of internal revenue taxes for wrongfully collected amounts. The principal difficulty encountered by the Court in reaching this conclusion was that as with customs collections, collectors of internal revenue were required to pay their tax collections to the Treasury regardless of any protest as to the legality of the collections.[156] The collector argued that this provision required reasoning similar to *Cary v. Curtis* because, unlike the case with customs, there was no explicit statutory provision recognizing assumpsit actions in the case of internal taxes. The Court, however, rejected this argument on the ground that other statutory provisions dealing with removal of tax proceedings from state to federal courts[157] and directing the Commissioner to pay judgments against collectors[158] indicated congressional recognition that the assumpsit action should be recognized.

Until the corrective legislation following *Cary v. Curtis*, there was no statutory provision bearing on refund suits against the collector. For this reason the action could be said to have arisen under common law. In fact, this was clearly the position of the Supreme Court.[159] As time passed, however, the nature of the refund action became murky. Some courts held that the action was a statutory form of remedy against the United States

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the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory, 76 CORNELL L. REV. 985, 1032 (1991).

[152] Act of Feb. 26, 1845, ch. 22, 5 Stat. 727.

[153] Revenue Act of 1924, ch. 234, § 1014, 43 Stat. 343.

[154] *Id.* § 1012, 43 Stat. 342.

[155] 72 U.S. (5 Wall.) 720.

[156] Act of March 3, 1863, ch. 74, § 18, 12 Stat. 725.

[157] Act of March 2, 1833, ch. 57, § 3, 4 Stat. 633.

[158] Act of June 30, 1864, ch. 173, § 44, 13 Stat. 239; Act of March 4, 1863, ch. 74, § 31, 12 Stat. 729.

[159] Cary v. Curtis, 44 U.S. (3 How.) 236, 239–40 (1845).

with the collector the nominal defendant,[160] and others have taken the view that it remained a common law action against the collector personally.[161]

Unfortunately, the nature of the refund action was not a purely academic problem, and several questions arose that turned on this difficult issue. The issues that arose included: whether a decision in a refund action against a collector would be res judicata in a subsequent action against the United States;[162] whether a suit could be maintained against the collector holding office when the action was commenced, when the collector who had actually collected the tax had left office or died;[163] and whether interest could be recovered against a collector in a refund action although a sovereign, absent consent, is generally not liable therefor.[164] The answers

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[160] Flora v. United States, 362 U.S. 145, 151–58 (1960); George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 383 (1933); Wickwire v. Reinecke, 275 U.S. 101, 105–06 (1927); Arnson v. Murphy, 109 U.S. 238, 243 (1883); Collector v. Hubbard, 79 U.S. (12 Wall.) 1, 14, 16 (1870); Curtis's Adm'x v. Fiedler, 67 U.S. (2 Black) 461, 479 (1862); William T. Plumb, Jr., *Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685, 688–91 (1947) [hereinafter cited as Plumb].

[161] *See* Smietanka v. Indiana Steel Co., 257 U.S. 1, 4 (1921); Sage v. United States, 250 U.S. 33, 36–38 (1919); Patton v. Brady, Ex'x, 184 U.S. 608, 614, 15 (1902); Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75, 77 (1872); M. Carr Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 IOWA L. REV. 312, 328–29 (1963) [hereinafter cited as Ferguson].

[162] Before 1942, the rule had developed that res judicata and collateral estoppel could not be invoked in a refund action against the United States with respect to a prior judgment in a suit against a collector. Thus a taxpayer who had lost a suit against a collector was not barred from suing the United States on the same issue for the same or different tax years. United States v. Nunnally Inv. Co., 316 U.S. 258 (1942); Bankers Pocohantas Coal Co. v. Burnet, 287 U.S. 308 (1932); Sage v. United States, 250 U.S. 33 (1919). On the other hand, a judgment in a suit against the United States or the Commissioner was a bar to a later action against a collector. Tait v. Western Md. Ry., 289 U.S. 620, 626–27 (1933). In 1942, the Internal Revenue Code of 1939 was amended to apply estoppel when the refund action against the collector occurred first. Revenue Act of 1942, ch. 619, § 503, 56 Stat. 956 (now codified at I.R.C. § 7422(c)).

[163] Smietanka v. Indiana Steel Co., 257 U.S. 1 (1921) (suit must be maintained against collector who was in office when tax was collected, even if at the time suit was commenced he had left office); Patton v. Brady, Ex'x, 184 U.S. 608, 615 (1902) (if collector dies while suit is pending, action may be revived against his estate); Smith v. Hoey, 153 F.2d 846 (2d Cir. 1946) (collector died, suit commenced against his executrix); Swenson v. Thomas, 68 F. Supp. 390 (N.D. Tex. 1946). These rulings were predicated on the suit being personal against the collector. *Contra,* Flora v. United States, 362 U.S. 145, 151–52 (1960).

[164] Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75, 77 (1872) (interest permitted on refund from collector from time of payment to time of judgment); Mellon v. United States, 36 F.2d 609, 610 (D.C. Cir. 1929) (in absence of statute, no interest on refund after issuance of certificate requiring United States to pay judgment against collector; United States then became liable for refund but, in absence of

given to these questions were never wholly satisfactory.[165] As a result, the refund action against a collector was beset by procedural uncertainties and criticism.[166] In 1966, it was discontinued by act of Congress.[167]

Refund suits directly against the United States first became available in 1855 with the creation of the Court of Claims.[168] However, until 1866, the decisions of the Court of Claims were advisory and required approval by Congress.[169] With the enactment of the Tucker Act in 1887,[170] refund suits against the United States were permitted in either the Court of Claims or the district courts.[171] The essential features of suit in the Court of Claims have remained essentially unchanged since 1866. No jury trial is available, and no monetary limitation is imposed as a condition of jurisdiction. Until 1982, an appeal from a Court of Claims decision lay only with the Supreme Court. Currently, an appeal from the Court of Federal Claims lies with the Court of Appeals for the Federal Circuit.[172]

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waiver of sovereign immunity, was not liable for interest). Statutory provisions enacted between 1921 and 1928 secured to taxpayers the right to interest on refunds from the time the overpayment was made to 30 days prior to refund, without regard to whether the refund was recovered in a refund action against a collector or against the United States. Revenue Act of 1921, ch. 136, § 1324, 42 Stat. 316; Revenue Act of 1926, ch. 27, § 1117, 44 Stat. 119; Revenue Act of 1928, ch. 852, § 615(a), 45 Stat. 877. Until this legislation was enacted interest was not recoverable in a refund suit under the Tucker Act against the United States. The basis for permitting the recovery of interest against collectors was that the action was personal.

[165] *See* Ferguson, *supra* note 161, at 327–31; Plumb, *supra* note 160, at 685.

[166] *See* Plumb, *supra* note 160.

[167] Act of November 2, 1966, Pub. L. No. 89-713, § 3(a), 80 Stat. 1108.

[168] Act of February 24, 1855, ch. 122, 10 Stat. 612.

[169] In 1863, Congress attempted to grant the power to render final decision to the Court of Claims and permit appeals to the Supreme Court therefrom. Act of March 3, 1863, ch. 92, 12 Stat. 765. In 1865, the Supreme Court in Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865), concluded the legislation was deficient because judgments of the Court would be paid only upon further action by the Secretary of the Treasury and Congress. Act of March 3, 1863, ch. 92, § 14, 12 Stat. 768. Accordingly, the Court refused to review decisions of the Court of Claims. In 1866, the offensive provisions were removed. Act of March 17, 1866, ch. 19, 14 Stat. 9. *See* Williams v. United States, 289 U.S. 553, 561–64 (1933).

[170] Act of March 3, 1887, ch. 359, 24 Stat. 505 (now codified at 28 U.S.C. §§ 1346, 1491).

[171] Suits up to $1,000 were to be brought in district court, and suits of more than $l,000 but not more than $10,000 in circuit court. Act of March 3, 1887, ch. 359, § 2, 24 Stat. 505.

[172] The Federal Courts Improvement Act of 1982 replaced the Court of Claims with the U.S. Court of Claims (renamed the U.S. Court of Federal Claims in 1992), and established the U.S. Court of Appeals for the Federal Circuit. The Court of Appeals for the Federal Circuit was given jurisdiction to hear appeals from Federal district courts in matters of copyright, patent, and trademarks. Additionally, the

On the other hand, refund actions against the United States in district court have undergone significant modifications. Unlike the situation with respect to refund actions against collectors, jury trial was not initially available in district court suits against the United States and there could be no allowance of costs to the taxpayer. In 1954, jury trial was authorized;[173] in 1966, costs in favor of the taxpayer were permitted.[174] Additionally, the subject matter jurisdiction of the district courts has changed. Originally, these actions could only be brought if the amount in controversy did not exceed $10,000,[175] but in 1921 jurisdiction was expanded to permit suits against the United States, regardless of the amount at issue, if the collector had died before action was commenced.[176] Apparently this amendment was based on uncertainty over the question of whether a suit against a deceased collector could be commenced against his estate.[177] In 1925 the statute was further liberalized to remove any dollar limitation if the collector was out of office at the time the suit was commenced.[178] These amendments obviated the venue difficulties of a taxpayer living in, say, Minnesota who wished to sue in district court for the recovery of more than $10,000, when, by the time suit was commenced, the collector of the disputed tax had retired to Florida. Suit could be brought under the Tucker Act and venue based upon the residence of the taxpayer.[179] Finally, in 1954, all dollar restrictions in district court actions were lifted.[180]

The diversity of judicial remedies for excessive tax collections, each of which had its own peculiarities, was sometimes the source of difficulties for taxpayers. Most troublesome were suits against collectors, because the action had to be maintained against the particular collector to whom the

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Court of Appeals for the Federal Circuit was designated as the primary court of appeals for the territorial courts and the reconstituted Court of Claims. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 105(a), 122–133, 96 Stat. 25, 36–41 (1982) (amending 28 U.S.C. §§ 171–173, 1291, 1292, 1295, 1491–1507).

[173] Act of July 30, 1954, ch. 648, § 1, 68 Stat. 589 (now codified at 28 U.S.C. § 2402).

[174] Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308 (now codified at 28 U.S.C. § 2412).

[175] Act of March 3, 1887, ch. 359, § 2, 24 Stat. 505.

[176] Revenue Act of 1921, ch. 136, § 1310, 42 Stat. 310.

[177] H.R. REP. NO. 67-486, at 57 (1921); 61 CONG. REC. 7506–07 (1921) (remarks of Senator Jones). In *Flora v. United States*, 362 U.S. 145, 151–52 (1960), the Court assumed that such an action could not be commenced. At least one commentator has taken a different view of the matter. Plumb, *supra* note 160, at 692.

[178] Act of February 24, 1925, ch. 309, 43 Stat. 972.

[179] Act of March 3, 1887, ch. 359, § 5, 24 Stat. 506 (now codified at 28 U.S.C. § 1402(a)).

[180] Act of July 30, 1954, ch. 648, § 1, 68 Stat. 589 (now codified at 28 U.S.C. § 1346(a)(1)).

disputed tax was paid. An error in selecting the proper defendant could result in dismissal of the action at a time when the statute of limitations barred commencement of another action.[181] Nevertheless it is probably true that the introduction of a new tax tribunal, the Board of Tax Appeals, would not have been considered necessary had the existing judicial remedies not shared two common drawbacks. First, neither permitted suit to enjoin or restrain the assessment or collection of tax.[182] Second, each required full payment of the tax as a condition of maintaining suit.[183] Throughout the entire history of tax litigation, these limitations on the jurisdiction of the district courts and the Court of Federal Claims have remained generally constant.

A limited exception, "narrow but ill defined"[184] on the bar to restraining tax collections has been recognized, but only in those exceptional cases in which it appears that there is no basis in law for the assessment and collection of the tax would result in irreparable injury to the taxpayer.[185] Even rarer have been those suits in which the taxpayer has been permitted to seek refund of a tax when less than the full tax assessed has been paid.[186] Although it has been suggested that an exception based on similar grounds to those which permit restraining assessment or collection should be recognized in refund suits,[187] the most definitive pronouncement of the Supreme Court on the issue indicates a flat bar on refund suits unless the

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[181] *See* Wolinsky v. United States, 271 F.2d 865 (2d Cir. 1959); Buhl v. Menninger, 251 F.2d 659 (6th Cir. 1958); Hammond-Knowlton v. United States, 121 F.2d 192 (2d Cir. 1941).

[182] *See supra* note 145.

[183] *See* Flora v. United States, 362 U.S. 145 (1960).

[184] Ferguson, *supra* note 161, at 324.

[185] *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), is the leading authority in this area, and the doctrine has been applied in a score of other cases. The constitutionality of the 1894 income tax act was tested in equitable proceedings, but the relief requested was not an injunction against the collection of the tax, but rather an injunction of the corporate taxpayer, of which the petitioner was a shareholder, barring it from paying an unconstitutional tax. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 553–54, *rehearing*, 158 U.S. 601 (1895).

More recently, Congress has confirmed that taxpayers may seek to enjoin the assessment and collection of a tax that serves as the subject of a notice of deficiency during the period in which the taxpayer may petition the Tax Court for a redetermination of the deficiency. *See* I.R.C. § 6213(a). If the taxpayer has petitioned the Tax Court for a redetermination of the subject tax, the Tax Court possesses concurrent jurisdiction with the Federal district courts to issue an injunction. For a discussion of Tax Court's jurisdiction in this context, see Part VI.A.3.

[186] *See* Flora v. United States, 362 U.S. 145, 170–75 (1960).

[187] Ferguson, *supra* note 161, at 336.

entire tax has been paid.[188] The general denial of access to the federal courts absent full payment of the disputed tax has been continued in the Declaratory Judgment Act. When it was pointed out that as originally enacted in 1934,[189] declaratory judgments were available in tax matters,[190] Congress promptly amended the Act to exclude controversies "with respect to Federal taxes."[191] Except as subsequently superseded by statute,[192] this bar has been applied without exception.[193]

Apparently this scheme of judicial review worked well enough for the first century and a quarter of the Republic. This is not remarkable when it is considered that, prior to World War I, federal taxes were generally neither high nor complicated. The War Revenue Act of 1917 and succeeding acts effected drastic changes in the level of taxation, the degree of complexity of tax laws and the number of individuals and businesses covered. When combined with the administrative difficulties being encountered by the Bureau of Internal Revenue, these acts created an entirely different situation.[194] The scope of the problem was suggested by the increase in the number of refund suits being brought in district court. As of June 30, 1917, there were 472 district court civil tax cases pending that involved the United States.[195] By June 30, 1924, this number had more than tripled to 1,507.[196]

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188 Flora v. United States, 362 U.S. 145 (1960). For a critique of the full-payment rule of *Flora*, see Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 FLA. ST. L. REV. 205, 267–71 (2013).

189 Federal Declaratory Judgment Act of 1934, ch. 512, 48 Stat. 955, *as amended*, 28 U.S.C. §§ 2201–02.

190 Frank J. Wideman, *Application of the Declaratory Judgment Act to Tax Suits,* 13 TAXES 539 (1935).

191 Revenue Act of 1935, ch. 829, § 405, 49 Stat. 1027.

192 Congress has more recently permitted taxpayers to seek declaratory judgments on discrete issues of federal taxation. *See, e.g.,* I.R.C. § 6234 (Tax Court jurisdiction to issue declaratory judgment concerning adjustment of losses on an oversheltered partnership tax return); I.R.C. § 7428 (Tax Court jurisdiction to issue a declaratory judgment regarding the classification or status of any organization formed under §§ 501(c)(3), 170(c)(2), 509(a), 4942(j)(3), or 521(b)); I.R.C. § 7476 (Tax Court jurisdiction to determine initial or continuing qualification of retirement plan under §§ 401 or 403); I.R.C. § 7477 (Tax Court jurisdiction to issue declaratory judgment concerning the value of taxable gift); I.R.C. § 7478 (Tax Court jurisdiction to determine whether interest on prospective government bonds will be entitled to the § 103(a) exclusion from gross income); I.R.C. § 7479 (Tax Court jurisdiction to determine whether an estate qualifies for deferred payment of estate tax pursuant to § 6166). The Tax Court's expanded declaratory judgment jurisdiction is examined in Part VII.A.

193 *See* Ferguson, *supra* note 161, at 325.

194 *See* CHARLES D. HAMEL, PRACTICE AND EVIDENCE BEFORE THE U.S. BOARD OF TAX APPEALS 4–5 (1938); Turner, *supra* note 2, at 32.

195 1918 ATT'Y GEN. ANN. REP.

Although no figures are available, it is reasonable to assume that a similar increase occurred in refund actions against collectors. The Attorney General commented on burgeoning tax litigation in his 1924 report.

> There has . . . been a marked increase in the number of [tax] cases . . . handled in the courts. A great many cases which arose out of the business prosperity of the war era have furnished and are still furnishing quite a volume of tax litigation. These cases involve not only large sums of money but extremely important principles. Their decision is making for a greater certainty in the administration of the various revenue acts which is highly desirable not only from the standpoint of the taxpayer but as an aid to efficient administration of the law.[197]

Despite the general satisfaction expressed by the Attorney General with respect to the situation, the increasing litigiousness of taxpayers resulted from changed circumstances that demanded provision for a remedy not theretofore available—independent review of tax determinations without the requirement of payment. As will be seen in succeeding pages, the Bureau had for several years struggled with the problem of providing full and impartial pre-assessment review. Whether such review was either full or impartial was a matter of some question, but there could be no question that it was not independent.

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[196] 1925 ATT'Y GEN. ANN. REP. Listed below are the number of civil tax cases involving the United States pending at the close of fiscal years 1912–32. (Source 1913–1933 ATT'Y GEN. ANN. REPS.)

Year	*No. of Cases*	*Year*	*No. of Cases*
1912	633	1923	1,185
1913	604	1924	1,507
1914	631	1925	1,751
1915	590	1926	1,872
1916	495	1927	2,144
1917	472	1928	3,136
1918	560	1929	3,303
1919	705	1930	3,468
1920	795	1931	3,056
1921	1,238	1932	2,787
1922	1,777		

[197] 1924 ATT'Y GEN. ANN. REP. 82.

3. Pre-Assessment Review Within the Bureau

Until 1921, the law permitted the Bureau to summarily assess and collect whatever amount of tax it deemed proper.[198] Neither notice nor opportunity for hearing was required by the statute prior to assessment. Thus, taxpayers who felt aggrieved by Bureau action could have been restricted to obtaining redress solely by way of a refund suit.

However, it would have been shortsighted to administer the tax law in this manner. The income and profits taxes, which raised the bulk of the revenue necessary for the war effort, were not designed to be coercively extracted. The initiative was with the taxpayer to make out his return and remit the tax. Without his active cooperation, the system would have been wholly inoperable. A citizenry that perceived the tax collection system as arbitrary could hardly be expected to cooperate.

The Bureau was obviously concerned with its public image and endeavored to foster a positive attitude towards tax administration. One step along these lines was the formulation of the claim in abatement, which permitted a taxpayer to obtain a full *administrative* review of an assessment without the necessity of paying the disputed tax.[199] Another action designed to bolster public confidence in the system was the enlisting of distinguished private citizens to participate in the drafting of rules and regulations under the new laws.[200] Finally, and perhaps most importantly, the Bureau and Congress embarked on a program which stemmed from early recognition of a need for a procedure to afford taxpayers pre-assessment administrative review on disputed matters before a sophisticated group of experts. The need for such review was widely perceived. Income and profits taxes had become of great personal importance to many taxpayers. The Bureau, as a result of its spectacular growth, had lost some of its earlier efficiency, and it was generally felt that inexperienced government auditors were making numerous errors, most of them in favor of the Bureau. These errors frequently resulted in erroneous summary assessments that had disastrous consequences for taxpayers.[201] There resulted a succession of reviewing bodies that was ultimately to culminate in establishment of the Board of Tax Appeals.

Because the excess profits tax, first imposed in 1917,[202] was probably the most complex and troublesome of the new measures, it is not surprising that the first such body was charged with resolving the knotty problems it

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198 *See supra* note 104 and accompanying text.

199 *See supra* notes 108–111 and accompanying text.

200 *See supra* notes 121–122 and accompanying text; *infra* notes 203–205 and accompanying text.

201 *See* Albert L. Hopkins, *The United States Board of Tax Appeals*, 12 A.B.A. J. 466, 466–67 (1926) [hereinafter cited as Hopkins].

202 Act of March 3, 1917, ch. 159, § 201, 39 Stat. 1000.

raised. The Excess Profits Tax Reviewers, established in 1918, was largely dominated by the same men who had comprised the Excess Profits Tax Advisers,[203] a group of distinguished lawyers, accountants, and businessmen, appointed by the Secretary of the Treasury to assist the Commissioner in drafting excess profits tax regulations. The chairman of the Advisers was Dr. T. S. Adams. Other notable members were Arthur A. Ballantine, who was later to become the Solicitor of the Internal Revenue Service and Under Secretary of the Treasury, and J. E. Sterrett, a noted accountant and later a member of the Tax Simplification Board.[204] The Commissioner appeared well satisfied with the technique of public participation in tax administration.

> The appointment of the excess-profits tax advisers had the immediate effect of inspiring confidence in the purpose of the Department to administer the law with due regard for established business practices and with proper consideration of the effect the large rates of tax would have upon business activities. The tide of general criticism that had arisen against the law was stemmed, and the Bureau began to receive innumerable expressions of confidence and offers of cooperation and assistance from accountants, lawyers, bankers, and business men [sic] throughout the country.[205]

The Excess Profits Tax Reviewers, successors to the Advisers, were principally concerned with giving expeditious review to two types of cases.[206] The first of these were cases arising under section 209 of the Revenue Act of 1917, which provided a separate formulation of excess profits tax liability in the case of a business that had "no invested capital or not more than a nominal capital."[207] Obviously, the proper application of this statute to a particular taxpayer could be quite difficult, but because of the importance of the question in the computation of tax liability, the Commissioner felt it should be resolved in any case in which it was raised before any assessment was made.[208]

The second type of case concerning the Excess Profits Tax Reviewers was even more difficult. Section 210 of the Revenue Act of 1917[209] authorized the Secretary of the Treasury to estimate a taxpayer's invested capital, when such capital could not otherwise satisfactorily be computed,

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[203] 1918 COMM'R OF INT. REV. REP. 13.

[204] George O. May*, Accounting and the Accountant in the Administration of Income Taxation,* 47 COLUM. L. REV. 377, 380–81 (1947).

[205] 1918 COMM'R OF INT. REV. REP. 9

[206] 1918 COMM'R OF INT. REV. REP. 12–13

[207] Ch. 63, 40 Stat. 307.

[208] 1918 COMM'R OF INT. REV. REP. 12.

[209] Ch. 63, 40 Stat. 307.

on the basis of invested capital employed by other taxpayers "in a like or similar trade or business." As with the section 209 cases, the Commissioner felt this to be a question of such basic importance that it had to be resolved before any assessment could be made.

The Excess Profits Tax Reviewers held formal "hearings" in a "large number" of these cases at which taxpayers were permitted to present their views.[210] Presumably, the Commissioner acted in accordance with the Reviewers recommendations.

The Commissioner never intended that the Reviewers would be a permanent body. Rather, its purpose was to serve as a vehicle for providing experience in these matters to the Bureau personnel assigned to work with the Reviewers, with such personnel to be absorbed into other administrative units within the Bureau organization.[211] The Excess Profits Tax Reviewers apparently ceased functioning as a separate unit in 1919,[212] but it was replaced by a group with broader jurisdiction, the Advisory Tax Board.

Section 1301(d) of the Revenue Act of 1918[213] provided for the creation of the Board, composed of no more than six members appointed by the Commissioner with the approval of the Secretary of the Treasury. Membership was largely drawn from the Reviewers and included Dr. Adams, Mr. Sterrett, Fred T. Field, a distinguished Boston lawyer later to serve as Chief Justice of the Supreme Judicial Court of Massachusetts, Stuart W. Cramer, a businessman and engineer, and Luther F. Speer, formerly Deputy Commissioner of Internal Revenue.[214]

The jurisdiction and function of the Advisory Tax Board was described by statute as follows:

> The Commissioner may, and on the request of any taxpayer directly interested shall, submit to the Board any question relating to the interpretation or administration of the income, war-profits or excess-profits tax laws, and the Board shall report its findings and recommendations to the Commissioner.[215]

The Advisory Tax Board had a more formalized procedure than its predecessors.[216] In order for a taxpayer to bring an appeal to the Board, he must first have received a determination of the Income Tax Unit. The

[210] 1918 COMM'R OF INT. REV. REP. 13.

[211] *Id.*

[212] 1919 COMM'R OF INT. REV. REP. 12–13.

[213] Ch. 18, 40 Stat. 1141.

[214] 1919 COMM'R OF INT. REV. REP. 14.

[215] Revenue Act of 1918, ch. 18, § 1301(d)(2), 40 Stat. 1141.

[216] The rules of procedure before the Board were set forth in Treas. Reg. 45, Arts. 1701–02.

request for Board review was required to be made within 30 days of notification to the taxpayer of the decision of the Income Tax Unit. Evidence could not be adduced before the Board that had not been brought to the attention of the Income Tax Unit. Although Board consideration of a question did not take the form of a judicial proceeding, taxpayers were permitted, in the discretion of the Board, to orally argue their cases.

The Board was given a statutory life of two years, but the Commissioner was authorized to dissolve it earlier with the approval of the Secretary. The Commissioner exercised this authority on October 1, 1919, some six months after the Board was organized.[217] In the words of the Commissioner, it had become "necessary for the members of the Board to return to their own personal affairs, from which they had only temporarily separated themselves."[218] Publicly, the Commissioner praised the Board:

> The members of the Board have rendered, through a period of heavy administrative pressure and strain, assistance of great value. Their constant endeavor has been to assist in the upbuilding within the Bureau of regular units designed to render permanently the special service which they have provided in a period of emergency.[219]

However, in view of the sudden termination of the Advisory Tax Board, it would seem that the Commissioner regarded the body with somewhat less affection than he professed. This may well have been due to its quasi-independent nature. Its successor, the Committee on Appeals and Review, was purely a Bureau creation and was fully staffed by Bureau personnel.

Due to its brief tenure, the Board did not have an important quantitative impact on the adjudication of tax controversies. It heard only 54 cases brought before it by taxpayer request. Additionally, it considered 75 questions submitted by the Commissioner and examined 112 legal opinions of the Solicitor of Internal Revenue, the latter being an officer of the Justice Department who acted as legal adviser to the Commissioner.[220]

Nevertheless, the Advisory Tax Board did play a significant role in the development of the adjudication of tax controversies. It was the first body of statutory origin to have as its principal function the review of determinations made by the regular Bureau organization. It was staffed by

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[217] The Revenue Act of 1918 was not enacted until February 24, 1919, and the Board was organized on March 13, 1919. Brewster, *supra* note 119, at 325–26.

[218] 1919 COMM'R OF INT. REV. REP. 13–14.

[219] *Id.* at 13.

[220] *Id.* The office of Solicitor of Internal Revenue was abolished by the Revenue Act of 1926. Revenue Act of 1926, ch. 27, § 1201(a), 44 Stat. 126. The duties of that office were thereafter reposed in the Treasury Department in a newly created office, General Counsel for the Bureau of Internal Revenue.

persons of considerable expertise and assured the opportunity for a hearing to any taxpayer meeting the requirements of its procedural rules.

Simultaneously with the discontinuance of the Advisory Tax Board, the Commissioner created the Committee on Appeals and Review to carry on the work of the Board.[221] During the entire period of its existence, the Committee on Appeals and Review was a part of the Bureau of Internal Revenue. Although it was separate from the Income Tax Unit, which had general charge of administering the income and profit taxes, it was staffed by former members of the Unit who were either lawyers, accountants, or engineers.[222] The Committee was directly responsible to the Commissioner and could act only in an advisory capacity. Thus, the Commissioner was theoretically free to disregard Committee recommendations.[223]

Although a matter was usually considered by a single member initially, the Committee functioned as a collegial body, and before any recommendation was made to the Commissioner, several members of the Committee would meet to approve the recommendation.[224] In the early years, the full Committee would meet to approve each recommendation of a member.[225] Later, when the number of members increased and the Committee was divided into subcommittees, each subcommittee would meet to approve recommendations of subcommittee members; thereupon the recommendation would be forwarded to the chairman of the full committee for his review.[226] These procedures were an important feature of Committee operations and were apparently felt to be necessary to assure uniformity in Committee recommendations. They were later to be carried forward by the Board of Tax Appeals.[227]

Aside from its creation, the most important single event in the life of the Committee was the enactment of section 250(d) of the Revenue Act of 1921.[228] As previously described, Congress had become dissatisfied with the power of the Bureau to summarily assess additional taxes without giving the taxpayer either notice of, or the opportunity for a hearing with respect to, the assessment.[229] Once notice of the assessment was given to the taxpayer he was required to either promptly pay the tax or file a claim in

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[221] 1920 COMM'R OF INT. REV. REP. 14–15.

[222] Brewster, *supra* note 119, at 327.

[223] *But see infra* notes 249–253 and accompanying text.

[224] A. E. Graupner, *The Operation of the Board of Tax Appeals*, 3 NAT'L INC. TAX MAG. 295 (1925) [hereinafter cited as Graupner]; Clarence A. Miller, *The United States Board of Tax Appeals: Its Jurisdiction and Practice,* 11 A.B.A. J. 169 (1925) [hereinafter cited as Miller].

[225] 1922 COMM'R OF INT. REV. REP. 15.

[226] Brewster, *supra* note 119, at 330.

[227] *See* Part II.

[228] Ch. 136, 42 Stat. 265.

[229] *See supra* notes 104–114 and accompanying text.

abatement secured by a bond. Section 250(d) of the 1921 Act radically revised this procedure by providing:

> If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: *Provided*, that in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing.

The Committee was the body chosen to afford the review required by the 1921 Act, and its workload changed dramatically. In fiscal year 1922, the Committee received 1,148 appeals from taxpayers.[230] This was an increase from 971 and 434 appeals received in the two preceding years.[231] In 1923, 3,889 appeals were received,[232] and in 1924 there was a further increase to 4,879.[233]

As a result of these events, several important changes were made in the Committee. Of major importance was the increase in the size of the Committee. For its first two years of existence it was composed of five members.[234] In 1922 its membership was increased to ten, and in 1923 there was a further increase to 20.[235] During the latter part of its operation the Committee was divided into six subcommittees of three members each, comprised of a lawyer, an accountant, and an engineer.[236]

There were other important changes in the operation of the Committee. Throughout its existence the Committee had two functions that had carried over from the Advisory Tax Board: (1) to hear appeals initiated by taxpayers; and (2) to serve in an advisory capacity to the Commissioner with

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230 1922 COMM'R OF INT. REV. REP. 15.
231 1921 COMM'R OF INT. REV. REP. 15; 1920 COMM'R OF INT. REV. REP. 15.
232 1923 COMM'R OF INT. REV. REP. 8.
233 1924 COMM'R OF INT. REV. REP. 10.
234 1920 COMM'R OF INT. REV. REP. 15; 1921 COMM'R OF INT. REV. REP. 14.
235 1922 COMM'R OF INT. REV. REP. 15; 1923 COMM'R OF INT. REV. REP. 9.
236 Brewster, *supra* note 119, at 327.

respect to the preparation of Treasury decisions, regulations, and rulings. In its early years, the Committee's non-appeal function was significant; it reviewed many administrative rulings for the Commissioner and additionally served in an advisory capacity to other Bureau personnel. A significant amount of its time was taken up by consideration of questions arising during the pendency of audits by the Income Tax Unit. After enactment of the Revenue Act of 1921, however, the overwhelming portion of the Committee's work soon became the consideration of section 250(d) cases.[237] The duties of the Committee became "more closely confined to . . . [those] of a purely appellate body."[238] The increasing workload was also reflected in an increase in the number of smaller cases brought before the Committee. This increase led to the creation in 1923 of the Special Committee on Appeals and Review, which only considered cases involving deficiencies of less than $2,500.[239] This Special Committee, consisting of only four members, disposed of 3,058 cases in its first and only year of operation.[240] Another form of specialization had started in the previous year with the establishment of the Committee on Review and Appeals, which reviewed estate tax cases.[241]

Until 1923, hearings before the Committee could be held only in Washington, D.C. The increased number of section 250(d) cases, and especially the presence of a large number of cases involving relatively small deficiencies, induced the Committee to dispatch subcommittees to hear cases involving taxpayers located west of the Mississippi. In 1923 and 1924, these subcommittees heard more than 500 cases in Kansas City, Los Angeles, Portland, St. Paul, and San Francisco.[242] As with the practice of collegially deciding cases, this circuit riding aspect of the Committee was to be carried forward as an important and distinctive characteristic of the Board of Tax Appeals.[243]

In its later years, the Commissioner referred to the Committee as a "quasi-judicial body of appellate jurisdiction."[244] Emphasis must be placed on the word "appellate" because unlike the Board of Tax Appeals, the Committee was not a fact finder. The taxpayer generally was permitted to introduce evidence to the Committee only in affidavit or documentary form and could not adduce evidence that had not been considered by the Income

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[237] *Compare* 1922 COMM'R OF INT. REV. REP. 15, *with* 1923 COMM'R OF INT. REV. REP. 8–9.

[238] 1923 COMM'R OF INT. REV. REP. 8; *See also* A.R.M. 219, III-1 CUM. BULL. 319(1924).

[239] 1924 COMM'R OF INT. REV. REP. 11.

[240] *Id.*; Brewster, *supra* note 119, at 327.

[241] 1923 COMM'R OF INT. REV. REP. 11–12.

[242] 1923 COMM'R OF INT. REV. REP. 9; 1924 COMM'R OF INT. REV. REP. 11–12.

[243] *See* Part II.

[244] 1923 COMM'R OF INT. REV. REP. 8.

Tax Unit.[245] The Committee could in its discretion accept new evidence, but if it did so, it was free to resubmit the case to the Unit.[246]

Throughout its history, the Committee operated under general rules of procedure and afforded taxpayers the opportunity for an oral hearing.[247] If no oral hearing was desired, the matter could be submitted on the written record alone. Briefs on behalf of the taxpayer could also be submitted in addition to oral argument.[248] Until 1924, the rules applicable to committee practice provided that if the case involved a question of law, the Solicitor of Internal Revenue was to designate two members of his office to "sit with the Committee . . . for the purpose of hearing the appeal."[249] The Solicitor's Office could then "if the Solicitor so desires" make a "recommendation" to the Committee "in the form of an opinion or memorandum."[250] However, it was not contemplated that the proceeding was to be an adversary one between the Solicitor and the taxpayer, with the Committee sitting as the impartial arbiter. This impression is confirmed by the fact that until 1924 the Solicitor of Internal Revenue reviewed Committee decisions on behalf of the Commissioner and readily exercised authority to amend or reverse them.[251] In 1924, this practice was discontinued, and the determination of the Committee with respect to an appeal became the final determination of the Bureau and could only be reopened as a result of a subsequent change in law or regulations.[252] Significantly, once this change in practice was effected, the rules no longer called for the Solicitor's representatives to "sit" with the Committee.[253] As a result of its nonadversarial and informal nature, Committee proceedings frequently became negotiating sessions; in these cases, Committee recommendations were no more than settlements of disputed issues rather than judicial determinations of legal questions.[254]

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245 A.R.M. 219, III-1 CUM. BULL. 319, 319–120 (1924).

246 *Id.*

247 Requirements for perfecting and prosecuting an appeal to the Committee were published. *E.g.*, T.D. 3492, II-1 CUM. BULL. 170 (1923); O.D. 709, 3 CUM. BULL. 370 (1920); A.R.M. 219, III-1 CUM. BULL. 319 (1924).

248 A.R.M. 219, III-1 CUM. BULL. 319 (1924); O.D. 709, 3 CUM. BULL. 370 (1920).

249 O.D. 709, 3 CUM. BULL. 370 (1920).

250 *Id.*

251 REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 2 (1923).

252 A.R.M. 219, III-1 CUM. BULL. 319, 320 (1924); T.D. 3492, II-1 CUM. BULL. 170, 171 (1923).

253 *Id.*

254 Graupner, *supra* note 224, at 295; Miller, *supra* note 224, at 169.

With the creation of the Board of Tax Appeals, section 250(d) of the Revenue Act of 1921 was repealed[255] and the Committee on Appeals and Review was abolished.[256] New provision was made for prosecuting an appeal within the Bureau prior to the issuance of a deficiency notice, which was a condition precedent to petitioning the Board of Tax Appeals.[257] The Committee had, however, left its mark. In many respects the Board of Tax Appeals was a continuation of the Committee. Moreover, several former members of the Committee were to join the Board. In fact, the first Chairman of the Board, Charles D. Hamel, had come to that office directly from the chairmanship of the Committee on Appeals and Review.

Pressures for the replacement of the Committee with the Board were largely the result of two factors. First and most importantly, the Committee was not independent of the Bureau of Internal Revenue. The Tax Simplification Board, created by the Revenue Act of 1921[258] to investigate the administration of the internal revenue laws, made a detailed study of the Committee and identified lack of independence as its principal weakness. In discussing its recommendation to discontinue the Solicitor's power to countermand determinations of the Committee, the Board stated:

> This recommendation and the investigation which preceded it and the discussion which followed it convinced practically everyone who participated in the discussions that it would never be possible to give to the taxpayer the fair and independent review to which he is of right entitled as long as the appellate tribunal is directly under, and its recommendations subject to the approval of, the officer whose duty it is to administer the law and collect the tax. As long as the appellate tribunal is part and parcel of the collecting machinery it can hardly maintain the attitude essential to a judicial tribunal. It is the situation which was developed in this way that leads our Board to make the recommendation relative to the establishment of a board of tax appeals hereinafter set forth.[259]

The difficulty was heightened by the fact that three separate administrative bodies were formulating tax rulings—the Income Tax Unit, the Solicitor of Internal Revenue, and the Committee on Appeals and Review. In many cases, the rulings were unpublished; they were also frequently inconsistent. Yet Bureau reviewing agencies felt compelled to follow earlier rulings, regardless of their merits, when they favored the

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[255] Revenue Act of 1924, ch. 234, § 1100(a), 43 Stat. 352.

[256] 1924 COMM'R OF INT. REV. REP. 12.

[257] T.D. 3616, III-2 CUM. BULL. 275 (1924).

[258] Ch. 136, § 1327, 42 Stat. 317.

[259] REPORT OF TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 4 (1923).

Government. To be effective as a creator of precedent for the guidance of the Bureau and taxpayers, many felt that the expert reviewing body had to be independent of the Bureau and free to disregard earlier administrative rulings.[260]

It was also observed that regardless of their good faith, the members of the Committee on Appeals and Review could hardly ignore the fact that a determination by them in favor of the taxpayer precluded further review of the question of tax liability. The Bureau would not and could not seek to challenge its own determination before an independent judicial body. On the other hand, a determination in favor of the Bureau did not foreclose a taxpayer from pursuing his judicial remedies. For this reason, doubtful questions were believed to be regularly disposed of by the Committee in favor of the bureau, even though at least some statistical data supported the conclusion that the Committee favored taxpayers more frequently than not.[261]

The second criticism of the Committee which had an important impact on the legislation creating the Board of Tax Appeals dealt with the nature of the proceedings. They were not adversarial, they were not public, they did not permit the introduction of new evidence, and they were not conducted pursuant to traditional judicial standards of practice and procedure. During this period, many people were highly suspicious of large refunds of tax made by the Bureau that had come to public attention.[262] Although these suspicions may have largely been the result of political opportunism, it was nonetheless true that the informal and secret nature of the Committee permitted them to flourish in the first place. The Bureau was on the horns of a dilemma. On the one hand, it was excoriated for "negotiating" tax liability and not applying the letter of the law equally to everyone.[263] On the other hand, the Bureau was criticized for insisting on absolute correctness in every assessment—a practice that some felt to be the fundamental curse of the administrative quagmire of the World War I period.[264] The creation of the Board represented a victory for those forces of righteousness demanding absolute precision and equal applicability of the law without fear or favor. However, the controversy did not terminate in 1924, and the

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[260] *See* Hopkins*, supra* note 201, at 467.

[261] R. MONTGOMERY, EXCESS PROFITS TAX PROCEDURE 12–13 (1921); *see also* H.R. REP. NO. 68-179, at 7–8 (1924); S. REP. NO. 68-398, at 8–9 (1924); Miller, *supra* note 224.

[262] *See, e.g.*, Sully, *Those Refunded Millions*, SATURDAY EVENING POST, June 21, 1924, at 36, 156.

[263] S. REP. NO. 69-27, at 8 (1926) (Report of the Senate Select Committee on Investigation of the Bureau of Internal Revenue); *see also* Graupner, *supra* note 224, whereas it was charged that this procedure resulted in undue delays.

[264] *See* TREASURY DEP'T SURVEY, *supra* note 66, at 4–5.

Administration, which favored some flexibility in the administration of the law, was to reassert this position in the future.[265]

[265] *Id.*; *see also* statement of President Coolidge in signing the Revenue Act of 1924, quoted at Part II, note 97; *Hearings on Revenue Revision*, *1925, Before the Ways and Means Committee*, 69th Cong., 1st Sess. 932–33 (1925) (testimony of A.W. Gregg, Solicitor of the Bur. of Int. Rev.).

PART II

CREATION OF THE BOARD OF TAX APPEALS: THE REVENUE ACT OF 1924

A. The Revenue Act of 1924

In March 1923, William Green of Iowa, Chairman of the Ways and Means Committee, requested that Secretary of the Treasury Andrew Mellon appoint an ad hoc committee to study revision of the Revenue Act of 1921.[1] Thus were initiated the steps that led to enactment of the Revenue Act of 1924,[2] legislation that was to be the most sophisticated tax measure theretofore adopted. The committee was specifically directed to prepare recommendations to remove "inequities" in the existing tax law, to close "loopholes" that permitted evasion and fraud, and to "simplify" tax administration. In compliance with the request, the Secretary appointed a committee composed of A.W. Gregg, a precocious tax wizard of 24 who was the Special Assistant to the Secretary, had formerly been Chairman of the Special Committee on Appeals and Review, and was later to become Solicitor and General Counsel to the Commissioner; William S. Moorehead, a Pittsburgh attorney then serving as Chairman of the Tax Simplification Board; and J.G. Bright, Deputy Commissioner of Internal Revenue in charge of the Income Tax Unit. The committee was assisted in its task by the units of Treasury and the Bureau that were concerned with tax matters. Working with the committee on behalf of Congress were Middleton Beaman and Fredrick P. Lee, directors of the Legislative Drafting Services in the House and Senate.[3] The committee regularly consulted Secretary Mellon and Under Secretary of the Treasury Garrard B. Winston; final responsibility for the draft was, of course, with the Secretary.[4]

By the fall of 1923, the ad hoc committee had completed most of its task and on November 10, 1923, Secretary Mellon sent a letter to Chairman

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[1] For a discussion of this revision effort, *see Hearings on H.R. 6715, Before the Comm. on Finance,* 68th Cong., 1st Sess. 1–8 (1924) [hereinafter cited as 1924 Senate Hearings].

[2] Ch. 234, 43 Stat. 253.

[3] The Legislative Drafting Service had been created in 1918. Revenue Act of 1918, ch. 18, § 1303, 40 Stat. 1141. In the Revenue Act of 1924, its name was changed to the Office of the Legislative Counsel. Ch. 234, § 1101, 43 Stat. 353.

[4] Garrard Winston, *Changes Made by the Revenue Act of 1924,* PROCEEDINGS OF THE SEVENTEENTH ANNUAL CONFERENCE ON TAXATION OF THE NATIONAL TAX ASSOCIATION 265 (1924) [hereinafter cited as Winston].

Green outlining a comprehensive tax program.[5] Subsequently, on December 17, 1923, Secretary Mellon sent Chairman Green draft legislation of the Treasury proposals, which the Ways and Means Committee immediately began to consider.[6] Some six months later, the Revenue Act of 1924 became law. The provisions of the Act that ultimately emerged from the Mellon proposals were described as divisible into three parts: (1) political; (2) structural; and (3) administrative.[7]

The political aspects of the legislation included the rates of income and estate taxes, the imposition of the gift tax, and the publicity of tax returns.[8] Naturally it was these provisions, and especially the question of income tax rates, that attracted the most attention.

President Coolidge and Secretary Mellon believed the 1921 Act rates were excessive. In their view, high tax rates destroyed initiative, encouraged tax evasion and avoidance, and reduced the flow of capital into economically productive activities. The effect of such taxation was to encourage investment in the tax exempt securities of state and local governments, which the President and the Secretary regarded as nonproductive. They were alarmed that a continuation of this trend would not only reduce tax revenues, but would also have catastrophic consequences for the economy. The key element of the "Mellon plan," as the Treasury proposal came to be known, was the substantial reduction of income taxes paid by individuals—a 25% reduction in the normal tax and a 50% reduction in the surtax. Under the 1921 Act, the maximum individual tax rate was 58% on incomes in excess of $200,000;[9] under the Mellon plan, the maximum rate would have been reduced to 31% on incomes in excess of $100,000. Additionally, the Mellon plan increased the level at which the surtax became effective from $6,000 to $10,000, and provided an "earned income" credit equal to 25% of the tax attributable to such income.

Even though tax reduction was politically popular in some quarters, the Mellon plan aroused considerable opposition from liberals who viewed the proposal as class legislation in favor of the rich. Neither side had the power to completely work its will, and compromise was inevitable. The earned income credit and the normal tax reduction were enacted substantially as

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[5] Filed at the U.S. Tax Court in "Revenue Act of 1924: Memoranda and Correspondence."

[6] A copy of the covering letter is filed at the U.S. Tax Court in "Revenue Act of 1924: Memoranda and Correspondence" [hereinafter cited as Mellon Letter]. The December 17, draft legislation was printed for the Ways and Means Committee on December 28, 1923, and designated as Committee Print No. 1 [hereinafter cited as 1924 Administration Bill].

[7] Winston, *supra* note 4.

[8] *Id.* at 266.

[9] Revenue Act of 1921, ch. 136, §§ 210–211, 42 Stat. 233.

proposed by the Secretary,[10] but the surtax was cut by 20% instead of 50%,[11] and the maximum tax rate came to 46% instead of the 31% proposed by Mellon.

Additional setbacks were suffered by the Administration in the area of estate and gift taxes. Mellon regarded these taxes as enemies of prosperity because they directly reduced capital; he therefore opposed any increase in the estate tax, originally enacted in 1916, and also opposed adoption of a gift tax. However, he failed to achieve his goal, and the Act not only included a gift tax[12] but also increased the estate tax by 60% at each tax bracket.[13]

Finally, over strenuous Treasury opposition, the Revenue Act of 1924 required the Commissioner to publish lists of each person filing an income tax return and the amount of tax paid.[14] Additionally, congressional committees, state officials, and, upon order of the President, the public were given access to the returns themselves.[15] As will be seen below, the same impulses that led to the elimination of tax return confidentiality were also to play an important part in molding the procedural rules that would govern the Board of Tax Appeals.

It is interesting in connection with these publicity provisions to consider the curious reversal of ideological roles that occurred over the years. By the latter half of the twentieth century, the cause of confidentiality of tax information had been identified with the liberal position supporting strict respect for Fourth and Fifth Amendment rights. Those urging broader dissemination of tax information had been regarded as conservative in preferring the interest of efficient criminal investigation.[16] In 1924,

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[10] Revenue Act of 1924, ch. 234, § 209, 43 Stat. 263 (earned income credit). Mellon recommended a normal tax of 3% of the first $4,000 of net income, and 6% of net income above $4,000. As enacted the normal tax was 2% on the first $4,000 of income, 4% on the next $4,000, and 6% on net income in excess of $8,000. *Id.* § 210(a), 43 Stat. 264.

[11] *Id.* § 211(a), 43 Stat. 265.

[12] *Id.* §§ 319–324, 43 Stat. 313.

[13] *Compare* Revenue Act of 1921, ch. 136, § 401, 42 Stat. 277 (25% of net estate in excess of $10 million), *with* Revenue Act of 1924, ch. 234, § 301(a), 43 Stat. 303 (40% of net estate in excess of $10 million). For a thorough account of the circumstances leading to the publicity provisions included in the 1924 Act, see George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787 (2013).

[14] Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253.

[15] *Id.* § 257(a), 43 Stat. 293.

[16] For discussion of the issue of return confidentiality, see STAFF OF THE JOINT COMM. ON TAX'N, STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL

however, the positions of those then identified as liberals and conservatives were reversed. The liberals, led by Senator George Norris, were suspicious that some wealthier members of society were not paying their fair share of taxes, either because of loopholes in the law or because of chicanery by Administration officials.[17] The activity of the Couzens committee, which was commissioned to investigate the Bureau of Internal Revenue during this period, was a pointed illustration of the liberals' concern.[18] Disclosure of who was paying how much tax would give them an opportunity to validate their suspicions. On the other hand, the conservatives of the Coolidge administration opposed publicity of tax information on the ground that it would encourage tax evasion; taxpayers who might otherwise be willing to pay their taxes would be reluctant to do so if as a consequence they were required to open their private financial affairs to public scrutiny.[19]

The "structural changes" effected by the 1924 Act were largely noncontroversial and were adopted substantially as proposed by Mellon. The more important of these changes were a limitation on the reduction of tax as a result of capital losses to 12%—the maximum rate of tax for capital gains;[20] a disallowance of interest and net loss deductions to the extent attributable to tax exempt interest income;[21] and a substantial revision of the corporate reorganization provisions.[22]

The Treasury proposal also suggested numerous administrative changes, such as a revision of the statute of limitation provisions, a requirement that tax exempt income be reported for statistical purposes, and a clarification of the situations in which consolidated returns were authorized.[23] Most of these were adopted as proposed; however, one administrative proposal, the creation of a board of tax appeals, aroused considerable controversy.[24]

REVENUE SERVICE RESTRUCTURING AND RELIEF ACT OF 1998, JCS-1-00 (Comm. Print 2000) (two volumes); *Hearings on Tax Reform Before the Ways and Means Comm.*, 94th Cong., 1st Sess. 699–716 (1975) (testimony and statement of Professor Meade Emory).

[17] *See* 65 CONG. REC. 1207–09 (1924).

[18] *See* Part I, notes 128–129 and accompanying text; S. REP. NO. 69-27 (1926) (report of the Couzens committee). For the riveting backstory of the events leading to the formation of the Couzens committee, see Yin, *supra* note 13.

[19] *See* Winston, *supra* note 4, at 266.

[20] Revenue Act of 1924, §§ 208(b), (c), 43 Stat. 263.

[21] *Id.* §§ 206(a)(5), 214(a)(2), 234(a)(2), 43 Stat. 260, 270, 283.

[22] *Id.* § 203, 43 Stat. 256.

[23] Winston, *supra* note 4, at 270–71.

[24] *See* 1924 Senate Hearings*, supra* note 1, at 1.

B. The Administration Proposal for a Board of Tax Appeals

In his December 17, 1923 letter to Chairman Green, Secretary Mellon described the proposal for creation of the Board of Tax Appeals as follows:

> A board of tax appeals is created to hear all appeals from the assessment of additional income and estate taxes, which will sit locally in the various judicial circuits throughout the country. The cases of both the Government and the taxpayer are presented before the board which acts impartially and the practice there is similar to that before the Interstate Commerce Commission. Upon a decision in favor of the Government, the additional tax can be assessed by the Commissioner of Internal Revenue and the taxpayer is left to his remedy in the courts for a recovery of the tax. If the decision is in favor of the taxpayer, the Commissioner may not assess the tax but is left to his remedy in the courts in a suit to collect the additional tax. In a hearing in the courts, the findings of the board shall be taken as *prima facie* evidence of the facts contained therein.[25]

Creation of a board of tax appeals had been advocated before the 1923 Treasury proposal. As early as 1920, the American Mining Congress had proposed creation of such a body.[26] The United States Chamber of Commerce also had been an early advocate of a body independent of Treasury to adjudicate tax controversies.[27] In 1922, Senator Atlee Pomerene introduced a bill to create a "United States Court of Appeals on internal revenue questions." It was Senator Pomerene's hope that such a court would assure taxpayers that they were getting a "square deal" and would also serve to terminate the secrecy cloaking Bureau rulings and procedures.[28]

Perhaps the most influential recommendation came from the Tax Simplification Board, which had been created by the Revenue Act of 1921 to investigate the administration of the internal revenue laws.[29] The Board was composed of three members representing the public who were appointed by the President, and three members representing the Bureau who were selected from the Bureau by the Secretary of the Treasury.[30]

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[25] Mellon Letter, *supra* note 6, at 3.

[26] *See Hearings on Revenue Revision, 1924, Before the House Comm. on Ways and Means*, 68th Cong., 1st Sess. 436–37 (1924) [hereinafter cited as 1924 House Hearings].

[27] *Id.* at 459.

[28] 62 CONG. REC. 8913–14 (1922).

[29] Ch. 136, § 1327, 42 Stat. 317.

[30] *Id.* § 1327(a).

Many of the Board's suggestions were adopted by the Bureau.[31] Among its most important recommendations were those designed to improve the operation of the Committee on Appeals and Review.[32] However, the Tax Simplification Board was convinced that there were definite limits on the possible improvements that could be made in the operation of the Committee. Because the Committee was a part of the Bureau of Internal Revenue, it could never function as a truly judicial body and could not provide a completely adequate solution to the problem of pre-assessment review.[33] Accordingly, the final report of the Tax Simplification Board contained a fairly detailed proposal for the creation of the Board of Tax Appeals.[34] It was not surprising that the recommendation contained in the

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[31] These reforms included various improvements in the operation of the Committee on Appeals and Review, limitations on reopening closed cases, requiring information returns with respect to dividends, and improving tax forms. REPORT OF THE TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 2–6 (1923).

[32] For example, as a result of a Tax Simplification Board suggestion, the Solicitor of Internal Revenue ceased to have review powers over Committee on Appeals and Review recommendations. *Id.* at 3–4.

[33] *See* Part I, note 259 and accompanying text.

[34] The proposal read as follows:

> In the foregoing portion of our report dealing with the recommendations made touching the procedure of the committee on appeals and review, we adverted to the anomaly of providing for an appeal by a taxpayer from an additional assessment of taxes proposed to be made by the Commissioner of Internal Revenue and prescribing that this appeal be taken to the officer who had announced his intention of making the additional assessment. The function of the Commissioner of Internal Revenue is to assess and collect the taxes. This function is administrative and not judicial. The appeal given to the taxpayer from the action or proposed action of the commissioner should be to a judicial body independent of the commissioner. It should be borne in mind that this appeal by the taxpayer must be heard and decided before the additional tax is collected. It is, therefore, important that the appellate tribunal be so constituted that its decisions may be made expeditiously and its work kept approximately current with the appeals which are taken to it. If this were not so, the collection of the public revenue would be seriously impeded. It is, therefore, essential that the number of persons on the board of tax appeals may be increased or decreased according to the influx of work. To insure the proper functioning of the board so as not to impede the collection of revenue, it would seem advisable that the appointments to the board be made by the Secretary of the Treasury. Adequate salaries should be provided to secure the services of able men, for the questions that will come before them will be difficult and will involve large sums. In establishing such an appellate body, the following essentials should be borne in mind:

Mellon plan bore a striking similarity to this proposal, since William S. Moorehead, Chairman of the Tax Simplification Board, and J.G. Bright, a representative of the Bureau on the Board, were both members of the ad hoc committee established by Secretary Mellon to draft the Revenue Act of 1924.

Under the Administration proposal, the Board of Tax Appeals was to be established within the Treasury Department, but separate from the Bureau of Internal Revenue.[35] The Secretary of the Treasury was given authority to appoint as many members, numbering between seven and 28, as he deemed necessary.[36] From these members, the Secretary would designate a chairman.[37] Also reserved to the Secretary of the Treasury was the power to approve the selection of the Board divisions and chiefs thereof,[38] and the power to approve procedural rules adopted by the Board.[39]

The members were to be appointed for terms of ten years except that to secure rotation in office, the Secretary could designate original appointments for terms of two, four, six, or eight years.[40] The members were to be compensated at $10,000 per year,[41] a rather large sum that

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> (a) The board's decision should be independent and not subject to review by the Commissioner of Internal Revenue;
>
> (b) Its proceedings should be informal;
>
> (c) Its membership should be capable of expansion or contraction in order to dispose of the work;
>
> (d) The members should be appointed by the Secretary of the Treasury.
>
> If a taxpayer is dissatisfied with the decision of the board of tax appeals he should be required to pay his tax, but should still have the opportunity of bringing a suit in court to recover back the amount paid. If the Government is dissatisfied with the decisions of the board, it should be permitted to bring suit in court to collect the asserted tax liability, but should not be permitted summarily to assess and collect the tax.
>
> It is the belief of our board that if such a tribunal were established taxpayers would feel that they would receive a fair and impartial hearing before being required to pay any additional tax assessments. We believe that the law creating the board should be so drafted as to permit the members to function in groups in various parts of the United States.

REPORT OF THE TAX SIMPLIFICATION BOARD, H.R. DOC. NO. 68-103, at 10–11 (1923).

[35] 1924 Administration Bill, *supra* note 6, § 1000(a).

[36] *Id.*

[37] *Id.*

[38] *Id.* § 1000(b).

[39] *Id.* § 1000(e).

[40] *Id.* § 1000(a).

[41] *Id.*

compared favorably to the $8,000 salary of court of appeals judges and the $7,500 salary of district court judges and congressmen.[42]

Under the Administration bill, the jurisdiction of the Board was to be limited to cases in which a deficiency had been declared in income, profits, or estate taxes.[43] Within 30 days after the Commissioner sent notification of a deficiency by registered mail, the taxpayer could petition the Board for a redetermination of the deficiency.[44] The Board also was to have jurisdiction over cases involving jeopardy assessments in which claims in abatement had been filed.[45] The Board was to have no jurisdiction over refund cases.

Decisions of the Board were not to be final determinations as to tax liability. A decision in favor of the taxpayer would preclude the Government from summary assessment procedures, but within one year the Government could institute a court proceeding to collect any additional tax it believed was due.[46] Conversely, a decision by the Board in favor of the Government would permit the immediate assessment and collection of the tax, but the taxpayer could, after paying the tax, file a claim for refund, and if it was disallowed, institute a refund action in either district court or the Court of Claims.[47] In any further judicial proceedings, the factual findings of the Board were to be accepted as *prima facie* evidence.[48]

Board proceedings under the Administration bill were to be informal with decisions "made as quickly as practicable."[49] No provision was made for trial by jury; fact finding was to be solely by members of the Board. Written findings of fact were to be made in each case, but no written opinions were required unless otherwise ordered by the Chairman.[50] The Chairman, with the approval of the Secretary, was authorized to appoint three-member divisions and chiefs thereof to hear cases.[51] Decisions by such divisions would be final unless within 30 days the Chairman directed full Board review.[52] The headquarters of the Board was to be in

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[42] *See* 65 CONG. REC. 3283, 7694 (1924).

[43] 1924 Administration Bill, *supra* note 6, § 1000(c).

[44] *Id.* § 274(a).

[45] *Id.* §§ 279, 312, 1000(c).

[46] *Id.* § 274(b).

[47] The 1924 Administration Bill, *supra* note 6, did not contain a specific provision authorizing a refund suit following an unfavorable Board determination. However, it was clearly the intent of the Administration that such a remedy be available. Mellon Letter, *supra* note 6, at 3.

[48] 1924 Administration Bill, *supra* note 6, § l000(d).

[49] *Id.* § 1000(e).

[50] *Id.*

[51] *Id.* § 1000(b).

[52] *Id.*

Washington, but the Board or its divisions could sit throughout the United States at the direction of the Chairman.[53]

The Administration proposal was not revolutionary; rather in most respects it was simply a codification of the then existing Committee on Appeals and Review. Both supporters and critics of the proposal recognized this fact.[54] The two most important changes were that the body was to be removed from Commissioner supervision to Secretary of the Treasury supervision, and that the members were to receive a substantial increase in salary. Congressional consideration of the proposal, however, led to more fundamental changes.

C. Controversy and Modifications

Secretary Mellon was probably surprised by the controversy surrounding his proposal for the Board of Tax Appeals; later, he was to be displeased by the Board as it finally emerged from Congress. Two central characteristics of the proposal proved ultimately to be unacceptable to a majority of Congress. These were the degree of control to be exercised by the Secretary over the Board, and the informality of Board procedures. The debate stirred by these two features will be discussed in detail in the following pages. Additionally, other aspects of the Administration proposal, although not as fundamental as independence and informality, also proved to be controversial and of continuing importance. They are also hereafter discussed.

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[53] *Id.* § 1000(e).

[54] The following excerpts from the Congressional Record reflect this understanding:

> As originally drawn in the Treasury Department, it was merely, in my opinion, an increase in salaries of those who make up the present arrangement. . . .

65 CONG. REC. 3283 (1924) (remarks of Mr. Garner).

> The reason why this board is being appointed is because we are unable to keep the proper class of men in the departments at this time on the salaries that are paid down there.

Id. at 3282 (remarks of Mr. Green, Chairman, House Comm. on Ways and Means).

> Now, you are not by this bill creating a new board, as someone said. We have appeal boards down at the Treasury now. What we are proposing is to make a better board, make better procedure, protect the taxpayer, and give him a chance to have his rights passed upon inexpensively, quickly and properly.

Id. at 3284 (remarks of Mr. Young).

1. Independence

Under the Administration proposal, the Board of Tax Appeals was to be "established within the Department of the Treasury." The Secretary of the Treasury would determine the number of members between seven and 28; he was to have plenary power to appoint members without the approval of the Senate and, at least initially, to designate their terms of office between two and ten years; he could designate the Board's Chairman; and his approval was to be required for procedural rules adopted by the Board as well as for the selection of divisions and division chiefs. Although not explicitly stated in the proposal, there could be implied a power of the Secretary to remove Board members at will.

Some believed that the Mellon plan envisioned an independent Board and that subsequent congressional amendments were merely clarifications.[55] However, it is difficult to believe on the basis of the Administration bill that Secretary Mellon did not intend to retain substantial control over the Board. Few executives wish to preside over the reduction in size or influence of their organization. As Secretary of the Treasury, Mellon had at least indirect control of the Committee on Appeals and Review, which was part of the Bureau of Internal Revenue. It was contemplated that the Board of Tax Appeals would replace the Committee, and a fully independent Board would result in a net loss of power to the Treasury.

One can only speculate as to the other motives behind the Treasury proposal to locate the Board within the Department. Possibly, the experience with the Advisory Tax Board was a consideration. The Advisory Tax Board, organized on March 13, 1919, pursuant to the Revenue Act of 1918, was disbanded by the Commissioner some six months later.[56] Although not formally independent of the Bureau and the Treasury, the Board was composed of distinguished personalities from academe, law, accounting, and business. The Commissioner professed great faith in and gratitude for the work done by the Advisory Tax Board, but the circumstances surrounding its elimination were somewhat suspicious; possibly the Commissioner and the Secretary found a

[55] Congressman George Young (R. N.D.), a senior member of the Ways and Means Committee who supported the amendment, stated the following:

> I want to be perfectly fair, and I think if you will read over the original draft carefully you will come to the conclusion that it was designed that this board was to be an independent board, but the Ways and Means Committee thought it could be strengthened and be made more specific and certain, so there was some added language.

Id. at 2622.

[56] For a discussion of the Advisory Tax Board, see Part I, notes 213–221 and accompanying text.

quasi-independent, quasi-judicial body not to their taste. Mellon, of course, was not in office during the period of existence of the Advisory Tax Board, but he may well have been influenced by any real or imagined defects from which it suffered.

Mellon's proposal to make the Board of Tax Appeals independent from the Bureau of Internal Revenue but not from the Treasury was defended by some outside the Department,[57] but was viewed generally as an incomplete solution to the problem.[58] Of principal concern was the plenary power of the Secretary to appoint and remove members of the Board. Some feared the Secretary would be heavily influenced in his selection by the advice of the Income Tax Unit, which would recommend men sympathetic to the position of the Bureau.[59] If these men were also former employees of the Bureau, additional problems might be encountered by their lack of objectivity due to their training and experience.[60] Additionally, concern was expressed that the implied power of the Secretary to remove Board members at will would lead to pressure on the Board to favor the Treasury in its decisions. John Nance Garner, ranking Democrat on the Ways and Means Committee, summed up the problem in his characteristically blunt fashion.[61]

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[57] Mellon's proposal was supported by the National Industrial Conference Board and the President of the United States Chamber of Commerce. Memorandum of National Industrial Conference Board, Dec. 18, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24;* Letter from President of U.S. Chamber of Commerce to Secretary Mellon, May 29, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*; *see also The New Tax Board*, 3 C.P.A. MAG. 31 (1924).

[58] *See generally* 65 CONG. REC. 2684 (1924) (remarks of Mr. Chindblom); *see also* 1924 House Hearings, *supra* note 26, at 108, 460–62.

[59] *See* 1924 House Hearings, *supra* note 26, at 108.

[60] 1924 House Hearings, *supra* note 26, at 462, 468 (remarks of Mr. Garner and Mr. Gore); *Conflict Over Choice of Members for Board of Tax Appeals,* 2 NAT'L INC. TAX MAG. 218 (1924). There were also those who believed that appointment to the Board by the President was not a completely adequate solution. If the President was the chief tax collector, a decision by a Board member in favor of the Government would be a decision in favor of the President. 1924 House Hearings, *supra* note 26, at 461. It was also feared that Presidential appointments would be based on patronage rather than ability. 65 CONG. REC. 2614 (1924) (remarks of Mr. Jeffers); *see also id.* at 2684 (remarks of Mr. Chindblom).

[61] 65 CONG. REC. 3282 (1924). For a less colorful expression of this same sentiment, see 1924 House Hearings, *supra* note 26, at 460 (statement of Edward Gore, American Institute of Accountants).

> [I]f they did not decide cases to suit . . . he [the Secretary of the Treasury] could kick them out and get somebody who would.

There were even some cynics who felt that Secretary Mellon had a personal interest in being able to appoint the members of the Board so they would be able to pass favorably on questions of great import to the Secretary's personal fortune.[62]

In addition to the problem of appointment and removal of Board members by the Secretary, troublesome questions were raised concerning conflicts of interest. As long as Treasury employees and, in the case of the Solicitor of Internal Revenue, representatives of Treasury, continued to appear both before and behind the bench, many believed that an impartial hearing would be impossible since these men would feel it their duty to collect the maximum amount of taxes possible. An appellate board could only hear both sides objectively if it was completely free of any possible pressure or loyalty to the collection agency.[63] The basis for this criticism

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[62] The following remarks capture such cynicism:

> But the joker in the proposal was that the bill provided that the members of this tribunal should all be appointed by the Secretary of the Treasury, not to be confirmed by the Senate or anybody else.
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> If that had gone through, it would have meant that Mr. Mellon would have been able to provide soft berths for as many as 28 of his friends at $10,000 per each annum, and it would have been up to those men to pass on the income-tax questions concerning and involving Mr. Mellon's own great interests. Mr. Mellon and his family are heavily interested in more than half a hundred great corporations.
>
> Would it have been a fair proposition for a man in his position to have been able to personally name the members of a board of tax appeals, and not only name all the members of the board but keep the board within the Treasury Department where it would have been under his own direct and personal control and where it would have had to pass on questions coming up in connection with the many great interests in which the Secretary is himself heavily interested financially?
>
> It was a monstrous proposal for him to make, and, with all due respect to Mr. Mellon, I must say that I think he had his nerve when he made it. While dealing out only a small amount of relief to people of modest incomes and to the small taxpayers of the country, Mr. Mellon certainly did propose to hand himself a nice, large, juicy portion.

65 CONG. REC. 2614 (1924) (remarks of Mr. Jeffers).

[63] *See id.* at 3284 (remarks of Mr. Young), 2684, 3285 (remarks of Mr. Chindblom).

> When you appear now before one of these divisions of the committee on appeals and review you find yourself in the presence of a set of gentlemen who are, first, as representing the Treasury Department, selected for the purpose of getting all the taxes they can possibly lay against the taxpayer.

could be found in the experience with the Committee on Appeals and Review. The Committee as it operated was a negotiation panel rather than a judicial tribunal. Treasury's only representative before the Committee was, in effect, the Committee members themselves.[64] Although under the new plan it was anticipated that the proceedings would be adversarial and the Government would be represented before the Board by the Solicitor of Internal Revenue, an officer of the Justice Department,[65] the taint of bias by Board members was not completely obviated.

Another problem related to the Committee on Appeals and Review was the widespread belief that the Committee maintained a policy of resolving all doubts against the taxpayer.[66] Under the procedure existing prior to the 1924 Act, if the Committee ruled against the Income Tax Unit and in favor of the taxpayer, the Unit had no recourse to the courts to collect any additional taxes that it believed were due. On the other hand, if the decision was in favor of the Government, the taxpayer could pay the tax and institute an action in the courts for refund. Thus, the only way for the Bureau to get a day in court on a contested issue was to rule against the taxpayer in the first instance. Some feared that the policy would continue with a new Treasury board even though the Mellon plan did provide an opportunity for judicial review of decisions in favor of taxpayers.[67] It was probably their feeling that members of a Treasury dominated Board would be influenced by a natural reluctance to take another agency of Treasury to court.

Finally, rumors abounded that a successful career in the Treasury Department would be aided by the collection of a large amount of tax. These rumors were officially denied, but they may have been believed by

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> They are the party in interest; they are the plaintiff and the prosecutor; they are the court and the jury. When they have rendered their decision, they are the beneficiaries, the judgment or decree creditor, and they are the sheriff and the marshal making the execution and enforcing the collection; and what show has the taxpayer? You might say that the members of the committee ought to be independent of their relations with the department. I am sure they are as fair to the taxpayer as they can be, but they know that their action will determine how much revenue the Government will get.

Id. at 3285 (remarks of Mr. Chindblom).

[64] *See id.* at 2622, 3284 (remarks of Mr. Young); 1924 House Hearings, *supra* note 26, at 468.

[65] 65 CONG. REC. 2622 (1924) (remarks of Mr. Young).

[66] For a typical example of such a charge and denial, see 1924 House Hearings, *supra* note 26, at 468; *see also* 65 CONG. REC. 3285 (1924) (remarks of Mr. Chindblom).

[67] *See* 65 CONG. REC. 3285 (1924) (remarks of Mr. Chindblom); 1924 House Hearings, *supra* note 26, at 466–67 (testimony of Edward Gore, American Institute of Accountants).

some, and if the Board was left in the Treasury it would always be subject to the charge that ambitious members would seek to gain favor for future promotions by deciding cases against taxpayers.[68] In the final analysis, whether all such charges, fears and suspicions were well grounded was not the issue. The proposal for the Board of Tax Appeals largely was motivated by popular concerns for adequate pre-assessment review.[69] To assuage popular concern and assure that these things could not occur, it was necessary to put the Board beyond the immediate control of Treasury.[70]

The first congressional body to consider the Mellon plan was the 25-member Ways and Means Committee of the House of Representatives. Republicans, numbering 14, were a majority of the Committee, and all but one were in basic sympathy with the Secretary.[71] As a result, the bill reported from Committee bore a great similarity to the Administration proposal. Representative James W. Collier (Miss.), the second ranking Democrat on the Committee, later described its executive session deliberations:

> [W]hen it came to any material section of this bill I will never forget the maddening monotony of "Mr. Chairman, I move that the section as written in the draft be passed."
>
> Did it pass, Mr. Chairman? Does the shipwrecked mariner sigh for a peaceful haven? Does the drooping flower open its petals to breathe the dew of heaven? [laughter.][72]

Nevertheless, the rate structure proposed in the bill did arouse opposition, and no majority of the entire Committee could be found for any single formula. As a result, Chairman Green decided to exclude Democrats from Committee sessions and present the bill as a party measure. Green, who himself was not in complete agreement with the Mellon plan rates, wanted to secure a bill that had reasonable prospects of

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[68] *See* 1924 House Hearings*, supra* note 26, at 469 (testimony of Edward Gore, American Institute of Accountants).

[69] *See id.* at 466–67.

[70] *See* 65 CONG. REC. 3285 (1924) (remarks of Mr. Chindblom); 1924 House Hearings*, supra* note 26, at 466–67. As proposed and passed, the 1924 Act gave either party the right to institute court action after an adverse decision. Thus, the Board could not foreclose the Government from further litigation by virtue of a decision in favor of the taxpayer. *See supra* notes 46–48 and accompanying text.

[71] James A. Frear (R. Wis.) was considered a "radical." For a detailed description of the legislative history of the Revenue Act of 1924, see ROY G. BLAKEY & GLADYS C. BLAKEY, THE FEDERAL INCOME TAX 223–50 (1940).

[72] 65 CONG. REC. 2495 (1924).

success for passage in the full House and Senate. In both of these bodies opposition to the Administration proposals was stronger than in the Committee. But 11 of his Republican colleagues would not budge on the rate issue, and Chairman Green had to settle for a bill that made only four changes in the Mellon plan. One of these changes involved making the Board of Tax Appeals independent of Treasury and, in view of the general intransigence of the Mellon supporters on the Committee, was indicative of the widespread distrust of a Treasury dominated Board.[73]

As the bill was reported by the Committee, the Board was to be an independent body not within the Treasury Department.[74] Appointments to the Board were to be made by the President and removal from the Board could only be for "inefficiency, neglect of duty, or malfeasance in office." The Chairman was to be designated biennially by the Board, not by the Secretary. Finally, procedural rules of the Board and the selection of divisions and division chiefs were not to require approval of the Secretary.

The amendments made by the Ways and Means Committee bearing on the independence of the Board were retained in the Act as it finally passed, and were augmented by two other amendments; one made on the House floor that required the advice and consent of the Senate to Presidential appointments to the Board,[75] and the other made on the Senate floor that permitted the Board to make its own arrangements for housing, clerical help, supplies, etc., if not suitably provided by the Secretary.[76]

2. Procedure

The Administration proposal was vague on the subject of Board practice and procedure, providing only that

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[73] The other changes agreed to were: (1) providing a 25% income tax rebate on 1924 taxes; (2) defining earned income (for purposes of the earned income credit) as being all income below $5,000, but limiting earned income to $20,000; and (3) elimination of "nuisance" taxes in addition to the repeals suggested by the Administration.

[74] The bill as reported by Ways and Means did not specifically locate the Board in a particular branch of government; rather, it simply removed language from the Administration bill establishing the Board within Treasury. H.R. REP. NO 68-179, at 8 (1924). Statutory language making the Board an agency in the executive branch was added by a Senate amendment. 65 CONG. REC. 7837 (1924).

[75] 65 CONG. REC. 3285–86 (1924).

[76] As passed by the House, the bill required the Secretary to provide general administrative services for the Board. Concerned that the Secretary might use this power to reduce the independence of the Board, the Senate permitted the Board to make its own arrangements if the Secretary did not "suitably" provide for these matters. 65 CONG. REC. 7837 (1924).

> [n]otice and an opportunity to be heard shall be given the taxpayer and the Commissioner by the Board and a decision shall be made as quickly as practicable. The proceedings of the Board shall be informal and in accordance with such rules as the Board, with the approval of the Secretary, may prescribe. The opinions of the Board (other than findings of fact) shall not be in writing unless the chairman so orders. The findings of fact in each case shall be reported in writing.[77]

The implication was that the proceedings were to be adversary because notice and an opportunity to be heard were required to be given to the Commissioner, as well as the taxpayer.[78] In this sense, the proposal was a departure from preexisting practice of the Committee on Appeals and Review. Another departure from preexisting practice was the requirement that Board's findings of fact (but not opinions) be rendered in writing. This was necessary in light of the new provision that factual findings of the Board were to be considered prima facie evidence in any further judicial proceedings.[79] The procedural changes from past practice, however, were more apparent than real. A central feature of the proposal was that the proceedings were to be informal, which was characteristic of practice before the Committee on Appeals and Review. In Mellon's view and in the view of his supporters on this question, informality of proceedings was necessary if the Board was to cope with its large work load in an expeditious manner—"[a] delay of justice is often a denial of justice, particularly in disputes involving large sums of money."[80] Because proceedings were to be informal, it probably also was true that they were to be closed to the public, like those of the Committee on Appeals and Review.

The Ways and Means Committee, the Finance Committee, and the House were agreed that the need to expedite tax controversies was of foremost importance and accepted the Treasury proposal for informal proceedings conducted under rules adopted by the Board.[81] As the bill moved through the Senate, however, the virtue of informality was

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[77] 1924 Administration Bill, *supra* note 6, § 1000(e).

[78] *See* H.R. REP. NO. 68-179, at 8 (1924); S. REP. NO. 68-398, at 9 (1924). *But see infra* notes 230–232 and accompanying text.

[79] 1924 Administration Bill, *supra* note 6, § 1000(d).

[80] 65 CONG. REC. 2684 (1924) (remarks of Mr. Chindblom).

[81] *See* Revenue Bill of 1924, as reported by Senate Finance Comm. § 900(h). The Treasury had originally proposed that the rules adopted by the Board should be subject to the approval of the Secretary. This provision was removed by the House Ways and Means Committee as part of the revision that removed the Board from the Treasury Department.

questioned on the ground that "[w]hat the taxpayer now wants from the tax board of appeals is quality of decision — not quantity."[82] In this view the absence of the requirement for formal procedure and written opinions was an invitation to arbitrary action.[83] The Democratic minority of the Senate Finance Committee agreed with this criticism of the Administration proposal, and when the bill reached the Senate floor, Senators Jones (D. N. Mex.) and Walsh (D. Mont.) led a fight to amend the bill to conform Board proceedings more closely to those of a judicial body.[84] Among the changes they proposed were removal of the reference to an informal procedure, insertion of a provision that the Board should prescribe its own rules of both procedure and evidence, and introduction of a requirement that all testimony before the Board be reduced to writing.

Of equal interest to the advocates of judicial procedure was the need for provisions that would make Board proceedings and reports matters of public record. The publicity proposals were part and parcel of the general controversy over tax information disclosure; it was hoped that in this way suspicions that had been generated concerning the Bureau of Internal Revenue would not carry forward to the Board.

> My contention is that whenever there is a controversy between the Government and a taxpayer which is being decided, the proceedings leading up to that decision should be public proceedings . . . .
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> * * *
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> To say that all that should be done in secret is obnoxious to every thing which we have been taught regarding judicial procedure as American citizens under our great system of jurisprudence . . . . [Proceedings and records should be] open to public inspections, so that we may understand the facts upon which decisions are reached, and the taxpayers in the country may have an opportunity to know just how it all happens.[85]

It was argued that opinions, as well as findings of fact, should be in writing and that they should be published so the pressure of public scrutiny could be enlisted in aid of obtaining decisions based on sound reasoning. Publication would also aid formation of a body of precedent to guide the Bureau and taxpayers.[86] Admittedly, such a procedure might reduce the

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[82] 1924 Senate Hearings, *supra* note 1, at 390 (statement of Frank Lowson, American Institute of Accountants).

[83] *See id.* at 389.

[84] 65 CONG. REC. 8132–34 (1924).

[85] *Id.* at 8133 (remarks of Senator Jones); *see also* 1924 House Hearings, *supra* note 26, at 108.

[86] 65 CONG. REC. 8133 (1924) (remarks of Senator Walsh).

quantity of cases that could be decided, but in contrast, it would also reduce erroneous decisions, which some saw resulting from the Income Tax Unit's "rules forcing a quantity production."[87] The Senate insurgents won a total victory, and each of their proposals was incorporated in the bill as it passed the Senate.[88]

What was the view of the Administration to these changes? In the first place, it must be recognized that although Secretary Mellon was the dominant force in tax policy during this period, there were other officials who did not share his enthusiasm for the original proposal for the Board of Tax Appeals. In particular, Nelson Hartson, Solicitor of Internal Revenue, and Charles D. Hamel, Chairman of the Committee on Appeals and Review, believed the whole concept for a Board of Tax Appeals was ill-advised.[89] These officials believed that the replacement of the Committee on Appeals and Review by the Board would seriously jeopardize the expeditious handling of the pending 39,000 appeals that had been filed under § 250(d) of the 1921 Act[90] and the additional appeals being currently filed, which numbered more than 150 per week. The reasons for their foreboding were twofold. In the first place, the Board was to have somewhat broader jurisdiction than the Committee. The Committee had no responsibility for cases involving less than $2,500 or for estate tax controversies, but the Board, under the Administration proposal, was to have jurisdiction in both these categories. Secondly, and of even greater significance, was the proposal that the factual findings of the Board be given prima facie weight in any subsequent judicial proceedings. No such status was accorded to findings of the Committee. The Board would thus be additionally burdened by a responsibility to make written factual findings of sufficient particularity and with a sufficient degree of care that would be accepted by the courts. Accordingly, the productivity of the Board, even if a full complement of 28 members was appointed, would be substantially less than that which could be achieved by the Committee.[91] The criticisms

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[87] 1924 Senate Hearings, *supra* note 1, at 390 (statement of Frank Lowson, American Institute of Accountants).

[88] 65 CONG. REC. 8134 (1924).

[89] Memorandum from Charles D. Hamel to C.R. Nash, Ass't to the Comm'r, May 5, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24* [hereinafter cited as Hamel Memorandum]; Memorandum from Nelson Hartson to Garrard B. Winston, Under Sec'y of the Treasury, April 30, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*.

[90] Ch. 136, 42 Stat. 265.

[91] The text of Chairman Hamel's memorandum was as follows:

> At the present time the Committee on Appeals and Review has on hand approximately 1,900 cases. For the week ending April 26 we received 211

by Chairman Hamel and Solicitor Hartson were made before the Senate took action to make Board proceedings even more cumbersome. With the adoption of the Senate amendments, they had cause for even more alarm, and Solicitor Hartson concluded that the "Board as now provided for can not function satisfactorily," and the "collection of the revenues will . . . be seriously interfered with . . . ."[92]

> cases, and for the week ending May 3 approximately 277. For the past 10 weeks we have received an average of approximately 165 cases per week. As you know, there are in protest in the Unit at the present time approximately 39,000 cases. A large part of those cases will ultimately find their way either to the Committee on Appeals and Review or to the Board of Tax Appeals, if created. It should be remembered also that of the cases which the Committee now has on hand, and which it is receiving, [all] involve amounts of $2,500 or more. Cases under that amount are being considered by the Special Committee. We are working at top speed in the Committee and, for a considerable time, have been disposing of approximately 100 cases per week on an average. This production is secured with a Committee of approximately twenty men. The language of the provision relating to the proposed Board of Tax Appeals clearly contemplates that cases should be heard by divisions, consisting of three members. It is also contemplated that the findings of the Board shall be prima facie evidence of the facts therein stated. The procedure indicated is bound to slow up the production of cases. The actual hearing of cases, with the provision here contemplated as to the findings of facts, will take a much longer time than is now taken and will also require more time on the part of members in the consideration of the records which may be made in connection with cases. Taking into account only the income tax cases which may be before the Board, it is very likely that not more than eight of its divisions can hear and dispose of such cases. If it may be assumed that each division may hear and dispose of ten cases a week, it would be able to dispose of only eighty cases a week. As a practical matter when one contemplates the large amount of time that is bound to be taken in connection with some cases, I very seriously doubt whether the Board can dispose of more than fifty cases per week.
>
> However, it must be borne in mind that the cases are now coming up at the rate of 160 cases per week or more and it is my opinion that the number of cases per week will, for some time, increase rather than diminish. The very creation of a Board, such as is contemplated, will tend to encourage appeals and thereby increase the number of cases to be heard.

Hamel Memorandum, *supra* note 89.

[92] Memorandum from Nelson Hartson to Garrard B. Winston, Under Sec'y of the Treasury, May 21, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*. The memorandum is quoted below:

> I believe as a practical matter the Board as now provided for can not function satisfactorily. As now drawn the Bill provides that all appeals filed

Messrs. Hamel and Hartson were not, however, the only officials displeased with the emerging legislation. Secretary Mellon himself was irate at congressional tinkering with his proposal, and on May 5, 1924, he wrote Chairman Reed Smoot of the Senate Finance Committee.

> The Board of Tax Appeals is to take over the work of the twenty-one members of the Committee on Appeals and Review. The Board will have more cases to pass on and a less informal practice, and, therefore, greater delay upon each case than at present . . . . The amendments made to the bill ignore practical administration. Responsibility for the failure of the Board of Tax Appeals to meet the needs of the public and to protect the rights of the taxpayer and the Government must rest with Congress. I am of the opinion that unless the Board is restored to somewhat its original form, the entire provision should be stricken out and the present practice, unsatisfactory as it may be, permitted to continue.[93]

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under Sections 274, 313 and 317 shall be heard before this Board. This jurisdiction is so broad as to permit of a case being taken to the Board on practically every controverted question pending in the Bureau. Twenty-eight men sitting in groups of three can not possibly decide cases with sufficient speed to permit of the satisfactory working out of the plan. Substantial delays must occur when the Board is required to hold public hearings; to observe rules of evidence; to reduce the testimony to writing; and to report its findings of fact and decision in writing. The collection of the revenues will, I believe, be seriously interfered with because of the necessity for the Bureau of Internal Revenue to pass its cases through the long process of procedure on appeal before additional assessments can be made. It seems apparent that if an appeal is to be allowed a taxpayer, the production of the appellate body must be substantially equal to that of the auditing branches of the Bureau. Unless the Board can keep up with the Bureau there will occur a vast accumulation of cases which will work seriously to the detriment of the Government and prompt and efficient administration of the law will be utterly impossible. Considering that the present Committee on Appeals and Review, with a more restricted jurisdiction than that of the proposed Board of Appeals and with an informal procedure permitting of greater speed in the determination of cases, I fail to see how the proposed Board can begin to meet the task imposed upon it. Under the proposed plan, findings of fact in each case are required to be in writing and are made prima facie evidence in court proceedings. Bearing in mind the advantages afforded by the evidentiary presumption granted to the findings of the Board, both the taxpayer and the Commissioner would undoubtedly present the evidence in any case in great detail and insist upon voluminous findings of fact, thus greatly delaying final disposition of the case.

[93] National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24* [hereinafter cited as Mellon].

Reference in the Secretary's letter to "less informal practice" and "greater delay" is somewhat obscure because it was not until three days after the date of his letter to Chairman Smoot that the Senate made the first substantial modification in the practice and procedure provisions of the bill.[94] Perhaps Secretary Mellon was aware of the intended Jones-Walsh amendment and was attempting to forestall it. Alternatively, he may have been displeased with the separation of the Board from the control of the Secretary of the Treasury and was using practice and procedure as a make-weight argument to kill the provision entirely. Despite the opposition fueled by the Jones-Walsh amendment, the House-Senate conference on the 1924 bill generally adopted the Jones-Walsh approach that Board proceedings be judicial in nature and subject to public inspection. The only retrenchment was the limitation that in cases in which the amount in controversy was not more than $10,000, no written opinion would be required and testimony need not be reduced to writing.[95] The conference recommendation was adopted by the House and Senate.[96]

President Coolidge signed the Revenue Act of 1924 into law on June 2, 1924. However, he shared the views of those officers of the Treasury

[94] 65 CONG. REC. 8132–34 (May 8, 1924).

[95] H.R. REP. NO. 68-844, at 30 (1924).

[96] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337, provided:

> Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe. It shall be the duty of the Board and of each division to make a report in writing of its findings of fact and decision in each case, and a copy of its report shall be entered of record and a copy furnished the taxpayer. If the amount of tax in controversy is more than $10,000 the oral testimony taken at the hearing shall be reduced to writing and the report shall contain an opinion in writing in addition to the findings of fact and decision. All reports of the Board and its divisions and all evidence received by the Board and its divisions (including, in cases where the oral testimony is reduced to writing, the transcript thereof) shall be public records open to the inspection of the public. The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

Department who felt that Congress had destroyed a good idea. In a message delivered by the President at the time of signing, he stated:

> Criticism of the income tax and a large part of the dissatisfaction with it is the result of delay and uncertainty in the final determination of a taxpayer's liability. Taxes can usually be paid within a short time after the receipt of the income on which the tax is based without serious embarrassment. The payment, however, of a large additional tax on income received several years previous and which may have since its receipt either been wiped out by subsequent losses or invested in nonliquid assets may force a taxpayer into bankruptcy and often causes financial sacrifice and hardship. Provision should be made for the prompt and final determination of a taxpayer's liability and such was the purpose in the suggestion for a Board of Tax Appeals.
>
> The provisions of the bill, however, with reference to the Board, make it in its essentials practically a court of record. The Board is to be bound by formal rules of evidence and procedure. In each case a formal record must be prepared and all oral testimony in cases involving more than $10,000 must be reduced to writing and an opinion in addition to the findings of fact and a decision must be written. A taxpayer is entitled to appeal to the Board before any assessment can be made. . . . This Board of Appeals, . . . burdened with rules of procedure and evidence and forced to prepare a record, a finding of fact, and a decision in practically every case, will be unable to handle the business which will come to it. The result will be greater delay in the final settlement of tax cases, and may ultimately result in the complete breakdown of the administrative machinery for the collection of taxes.[97]

With the benefit of hindsight, it can safely be said that the President's gloomy prognosis for the Board was unjustified.

3. Personnel

A considerable amount of controversy attended those provisions of the Mellon plan dealing with the membership of the Board. The Administration proposal specified a Board of between seven and 28

[97] National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24* [hereinafter cited as Statement of President Coolidge].

members, serving for ten year terms at salaries of $10,000 per year.[98] To stagger members' terms of office, the bill provided the Secretary to designate two, four, six, eight or ten-year terms for the initial appointees.[99] Appointments were to be made by the Secretary solely on the grounds of fitness for office, but no restrictions were placed on the Secretary in removing members from office.

As part of the amendments making the Board an independent body, the Ways and Means Committee modified the bill to specify that members be appointed by the President rather than the Secretary,[100] and that removal from office could only be for inefficiency, neglect of duty, or malfeasance in office.[101] Some felt that additional assurance of an independent Board would be furnished by a requirement that Board appointments be subject to the advice and consent of the Senate. The Ways and Means Committee had considered and rejected such an amendment "with almost complete unanimity," fearing that the Board would become a "political football."[102] Nevertheless, a majority of the House sided with the view that Senate consideration would prevent the appointment of individuals "subject to ulterior influences,"[103] and the requirement of Senate approval was added on the House floor.[104] All these amendments were retained in the final Act.

In addition to the amendments bearing on the independence of the Board, amendments dealing with the number of Board members, their terms of office, their compensation, and the question of whether former members would be permitted to engage in a tax practice upon the expiration of their service, were the subject of some controversy.

The Ways and Means Committee and the full House accepted the recommendation of the Administration with respect to the number of Board members and their terms of office.[105] The House agreed that fluctuating membership between seven and 28 was desirable to take account of varying workloads that the Board would have. It was felt that initially, because of the backlog of wartime taxes, especially the profits taxes, a large Board would be required, but as the backlog was discharged a smaller number of members would suffice.[106]

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[98] 1924 Administration Bill, *supra* note 6, § 1000(a).

[99] *Id.*

[100] *See* H.R. REP. NO. 68-179, at 8 (1924).

[101] Section 900(a), 1924 Revenue Bill as reported by the Committee on Ways and Means to the House of Representatives, 65 CONG. REC. 3280–81 (1924).

[102] 65 CONG. REC. 3285 (1924).

[103] *Id.* at 3286 (remarks of Mr. Larsen).

[104] *Id.* at 3285–86.

[105] H.R. REP. NO. 68-179, at 8 (1924).

[106] *See* 1924 Senate Hearings, *supra* note 1, at 24 (testimony of A.W. Gregg); H.R. REP. NO. 68-179, at 45 (1924).

Some House members unsuccessfully objected to large Board membership on the ground that the upper limit would soon be reached and, in the nature of bureaucracies everywhere, would never be diminished. The result would be an unnecessarily costly and cumbersome body perpetuated indefinitely.[107] It was also argued that if the Supreme Court could function with nine members, no inferior judicial body should require more.[108] These views had a more persuasive impact in the Senate Finance Committee, and the bill reported by it provided for a permanent Board of only seven members. However, under the Committee bill, for the first two years the Board was to be composed of 28 members, a number believed sufficient to deal with the backlog.[109] The terms of all 28 members were to expire two years after enactment of the 1924 legislation, and the seven members thereafter designated were to have staggered terms, with their successors having ten year terms.[110] These provisions were adopted by the full Senate and became part of the Revenue Act of 1924.[111]

The modifications reflected various attitudes toward both the Board and the federal income taxes. Chairman Green was later to observe that Congress initially viewed the Board as something of an experiment;[112] the limited tenure of the first members and the fairly small "permanent" size of the Board demonstrate this view. Additionally, in a nation that recently emerged from a costly war, there were many who believed the large and complex wartime taxes were merely an unpleasant, but temporary, necessity, and once the disputes arising from the measures were settled, income and profits taxes would become just a painful memory. Evidence of this attitude could be found in the direction of Mellon policy, which was toward lower and lower taxes. However, just as the Board came to be viewed as a successful experiment, future events established the income tax as an important and permanent part of the fiscal affairs of the nation. The tax was not to become a truly mass tax until World War II, but the fact that its burden was mostly felt by persons of higher income did not result in the elimination of disputes arising under it.[113]

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[107] 65 CONG. REC. 3283 (1924) (remarks of Mr. Blanton).

[108] *Id.* at 3288 (remarks of Mr. McKeown).

[109] S. REP. NO. 68-398, at 42 (1924).

[110] *Id.* at 42; H.R. 6715, 68th Cong., 1st Sess. § 1000(b) (1924) as reported by the Senate Comm. on Finance.

[111] Ch. 234, § 900(b), 43 Stat. 336.

[112] 67 CONG. REC. 524 (1926).

[113] *See* Part I, note 196 (indicating a steady increase in civil tax litigation in the federal courts). As reflected in Appendix A, the volume of litigation in the Board dropped significantly after 1928; thereafter until the late 1970s, litigation levels before the Board and Tax Court remained relative stable. Even with the advent of the mass income tax in World War II there was no startling increase in the number

A recurring problem of personnel management which drew attention during the consideration of the 1924 legislation involved the use by Government employees of their special knowledge and expertise for private gain. As previously discussed, during and after World War I, the administration of federal taxes was in a state of considerable disarray. The income and profits taxes were in their infancy, and the public at large had little reliable information on the policies and procedures of the Bureau of Internal Revenue. For this reason, former employees of the Bureau were able to command substantial fees for using their special information to aid clients involved in tax controversies before the Bureau. With Bureau salaries and morale comparatively low, the opportunities of private practice encouraged a disruptively high turnover of personnel, and occasionally resulted in frauds being perpetrated.[114]

Congressional reaction to these problems found expression in an amendment, offered by Congressman LaGuardia and adopted by the House, that barred former members of the Board, for a two-year period following the termination of their membership, from practicing before the Board, before any official of the Treasury, or with any firm of lawyers, accountants, or agents practicing before the Board or the Treasury.[115] In the Senate, the provision was narrowed somewhat to only forbid practice by former Board members before the Board and the Bureau of Internal Revenue.[116]

Secretary Mellon was very much opposed to the limitation on practice, on the ground that a two-year term, when combined with the practice limitations, would make it difficult to attract able individuals to the Board.[117] This criticism had some impact; the conference committee and

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of tax cases, although there has been a general upward trend. The Tax Court's caseload increased significantly in the late 1970s and throughout the 1980s, largely as a result of a spike in tax shelter litigation. Case filings tapered off in the late 1990s and hit historic lows at the turn of the century. Thereafter, the volume of annual filings gradually returned the 30,000 range, where they currently remain.

[114] *See generally* Sully, *Those Refunded Millions*, SATURDAY EVENING POST, June 21, 1924, at 36, 156.

[115] 65 CONG. REC. 3286–87 (1924). An effort was made by Representative Blanton to broaden the amendment to cover not only former Board members but also all former employees and officials of the Treasury Department. Impetus for the broadened amendment came from disclosure that former Secretary of the Treasury McAdoo accepted a retainer of more than $100,000 with respect to a matter pending before Treasury when he was Secretary. Although there was substantial support for the Blanton amendment, it was stricken as not germane. *Id.*

[116] S. REP. NO. 68-398, at 42–43 (1924).

[117] *See* Mellon, *supra* note 93.

Congress modified the restriction to apply only to members appointed following the terms of the original two-year members.[118]

One of the most controversial aspects of the Administration bill was the annual salary of $10,000. The Secretary and his supporters justified this relatively large amount ($2,000 more than circuit court judges and $2,500 more than district court judges)[119] on the ground that a substantial salary was necessary to attract and retain members of sufficient expertise and experience to creditably discharge the functions of the Board. Government personnel problems had been particularly acute among the more skilled workers who could procure much higher compensation working for private interests. The Committee on Appeals and Review was a case in point, and its members averaged just one year of service.[120] The generous proposed salary was largely a response to this experience.

On the other hand, there was substantial congressional opposition to the $10,000 figure. Some outspoken opponents of the Administration held the view that the proposal envisioned a well-padded sinecure for friends of Secretary Mellon on an agency which would do little work to justify the expense.[121] But even more moderate congressmen were disturbed by the prospect of paying Board members vastly more money than was currently paid to employees of the Bureau for substantially the same work. For example, members of the Committee on Appeals and Review were receiving between $5,000 and $6,000, and other Bureau employees eligible for appointment to the Board were making as little as $2,000. Salary increases of from 100 percent to 500 percent were felt by many to be unjustified.[122] The fact that the Mellon plan called for higher salaries than those paid to most federal judges (including those sitting on appellate courts), to most state governors, and to all congressmen did little to help the Administration's cause.[123] Although some federal officials were receiving equivalent or larger salaries than that proposed for the Board (I.C.C. commissioners – $12,000; F.T.C. members – $10,000; Federal Farm Loan Board members – $10,000),[124] the disparity between the proposed salary and that being paid to federal appellate judges was termed "inexcusable," "contrary to the entire system," and "perfectly ridiculous."[125]

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[118] H.R. REP. NO. 68-844, at 30 (1924); Revenue Act of 1924, ch. 234, § 900(c), 43 Stat. 337.

[119] *See* 65 CONG. REC. 3283, 7694 (1924).

[120] *Id.* at 3285 (remarks of Mr. Chindblom).

[121] *Id.* at 3283 (remarks of Mr. Blanton).

[122] *Id.* at 3281–82, 7694.

[123] *Id.* at 3281, 3283, 7694.

[124] *Id.* at 3281.

[125] *Id.* at 3282, 7694.

Finally, some questioned the Administration's premise that the compensation was justified in light of the expertise required of Board members. It was noted that membership on the Board did not even require legal training or experience. Senator Norris, for one, was of the opinion that a Board member required less skill than a judge of a court with more general jurisdiction.

> A district judge receives $7,500 a year and has to pass upon all kinds of litigation that comes before him . . . . He has to be versed in all branches of jurisprudence and of law. The members of the proposed tax court are going to become, after they have been educated by serving for a while, experts in tax matters only; they will have nothing else to do.
>
> The man who has the qualifications of a district judge possesses qualifications much superior to the qualifications necessary to fill one of these places, and the judge of a court of appeals more yet, so there is not anything involved in this work that requires a salary superior to that of our judges.[126]

The progress of the salary provision through Congress was erratic. The Ways and Means Committee reported the bill with a $10,000 salary.[127] Chairman Green strongly supported the provision on the House floor, contending that he would rather the Board be entirely eliminated from the bill than have a limitation on members' salaries that would prevent its achieving the desired objective.[128] Additional support for the $10,000 salary was voiced by Congressman Chindblom, who had been an outspoken opponent of tying the Board to the Treasury. He argued that although no federal employee was being adequately compensated, that fact should not defeat equitable salaries for members of the new Board.[129] Nevertheless, the full House was not sufficiently impressed with the necessity of the $10,000 figure, especially when the Administration was taking a generally conservative position with respect to federal spending,[130] and lowered the salary to $7,500.[131] The Senate Finance Committee restored the $10,000 salary,[132] but Senator Norris led a floor fight to again reduce it to $7,500.[133] Chairman Smoot and Senator Jones, unlikely allies, combined forces to

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126 *Id.* at 7695 (remarks of Senator Norris).
127 H.R. REP. NO. 68-179, at 8 (1924).
128 65 CONG. REC. 3281–82 (1924).
129 *Id.* at 3285.
130 *Id.* at 3282–83 (remarks of Messrs. Garner and Blanton).
131 *Id.* at 3285.
132 S. REP. NO. 68-398, at 42 (1924).
133 65 CONG. REC. 7694–95 (1924).

oppose the Norris amendment,[134] but those favoring the lower salary prevailed.[135]

Congressional amendments with respect to salary and limitations on practice by Board members disturbed Secretary Mellon as much as any of the other amendments and, along with the procedural changes, led him to request withdrawal of the whole Board idea.

> As the bill now stands in the Senate, the pay has been reduced to $7500, the term of office to two years, and there has been inserted a provision that no member of the Board may practice before the Board or the Treasury Department within two years after cessation of his employment as a member of the Board. Under these conditions no capable lawyer would be willing to accept a position on the Board. He would have only a short term, at moderate pay, and be deprived for two years after his term ceased from a profitable branch of practice in which he was particularly expert. True, the Board could be filled, but only with indifferent or inexperienced members. With such members the Board could not perform the work assigned to it.[136]

4. Jurisdiction

In light of the importance of jurisdiction, it is somewhat surprising that little controversy was stirred by the rather restricted jurisdiction accorded the Board under the Administration proposal. The Mellon plan provided for Board review only with respect to income, estate, and excess profits taxes, and only for such taxes imposed under the Revenue Acts of 1916–24.[137] There existed in 1924 a myriad of other internal revenue taxes,[138] but

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[134] *Id.*

[135] *Id.* at 7695. The Administration bill had also been generous with respect to per diem travelling expenses for Board members and employees. It had provided a $10 allowance for members and an $8 allowance for other employees. 1924 Administration Bill, *supra* note 6, § 1000(h). The usual per diem in other government agencies was $4, and Congress ultimately lowered the Administration provision to $7 for Board members and $4 for employees. 65 CONG. REC. 331, 7837 (1924).

[136] Mellon, *supra* note 93.

[137] 1924 Administration Bill, *supra* note 6, §§ 274, 279, 280, 308, 312, 316, 1000(c). The language of the statute was not clear that the Board was to have jurisdiction over deficiencies asserted under prior acts, providing only that taxes under such acts should be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations . . . as in the case of the taxes imposed by this title." *Id.* § 280. The Board soon held that this provision was

since they raised comparatively little revenue and aroused practically no public interest, the Administration apparently felt that any questions concerning them were too insignificant to warrant pre-assessment review.[139] Congress agreed, and the only modification made with respect to reviewable taxes was the addition of gift tax controversies.[140] That the Mellon bill did not provide for such review was perfectly understandable—no gift tax was included in the Mellon plan, it was wholly a congressional creation in the Revenue Act of 1924 and was passed over the strenuous opposition of the Administration.[141]

The jurisdiction of the Board under the Administration proposal and the ensuing legislation was further limited by the procedural requirements for obtaining Board review. The Board was restricted to cases arising in one of two ways. First and most important, the Board could hear taxpayer appeals filed in response to deficiency notices mailed by the Commissioner.[142] "Deficiency" was a term of art meaning generally, then as now, the excess of tax due over the amount conceded as due by the taxpayer.[143] Second, the Board was given jurisdiction to hear appeals from decisions of the Commissioner with respect to jeopardy assessments for which claims in abatement were filed by the taxpayer.[144]

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sufficient to give it jurisdiction over such deficiencies when they were asserted after passage of the 1924 Act. Gutterman Strauss Co., 1 B.T.A. 243 (1924).

[138] Although the Revenue Act repealed many of the excise taxes that had been imposed by prior legislation, there remained a great many of these provisions, including taxes on tobacco, admissions, dues, automobiles, tires, cameras, coin operated machines, mahjong sets, artistic works, jewelry, corporate stock, boats, narcotics, and many other items and occupations. Revenue Act of 1924, ch. 234, Tit. IV–VII, 43 Stat. 316.

[139] *See* Dana Latham, *Jurisdiction of the United States Board of Tax Appeals Under the Revenue Act of 1926*, 15 CAL. L. REV. 199, 202 (1927) [hereinafter cited as Latham].

[140] Revenue Act of 1924, ch. 234, § 324, 43 Stat. 316.

[141] *See* statement of President Coolidge, *supra* note 97, at 1; 65 CONG. REC. 3173 (1924).

[142] 1924 Administration Bill, *supra* note 6, § 274(a). Under the bill, the time for appeal was thirty days from the date the deficiency notice was mailed. This period was extended to sixty days as the result of an amendment adopted on the House floor. 65 CONG. REC. 2969–70 (1924).

[143] 1924 Administration Bill, *supra* note 6, § 273. Then (as now) the definition of deficiency was somewhat more complex than is indicated above because account must be taken of situations in which prior deficiencies for the same year were assessed on the one hand, and taxes were rebated on the other. Revenue Act of 1924, ch. 234, §§ 273, 307, 43 Stat. 296, 308 (now codified at I.R.C. § 6211).

[144] 1924 Administration Bill, *supra* note 6, §§ 279, 312, as enacted, Revenue Act of 1924, ch. 234, §§ 279, 312, 43 Stat. 300, 310.

Authorization for jeopardy assessments, which formed a part of the Revenue Act of 1921,[145] was continued in the 1924 Act as a means of immediately assessing a tax if collection would be jeopardized by delay. Under the 1924 Act, a jeopardy assessment could be made, either before or after the mailing of the deficiency notice and at any time before a final decision of the Board.[146] If the taxpayer paid the assessment, the Board would lose jurisdiction to determine the correctness of the deficiency determination since the deficiency, if any, ceased to exist after payment.[147] However, the taxpayer could, in lieu of paying the assessment and pursuing his relief by way of refund litigation, file a claim in abatement which, if accompanied by a bond approved by the collector and in an amount not exceeding double the amount of the claim in abatement, would stay collection of the tax pending disposition of the claim. If the Commissioner denied the claim, the taxpayer could, within 60 days of the mailing of the notice of denial of the claim, file an appeal with the Board contesting the denial.[148]

Congress accepted virtually all aspects of the Administration proposal as to the jurisdiction of the Board. The most significant change was a House floor amendment extending from 30 to 60 days the time within which a taxpayer could appeal a deficiency determination or the denial of a claim in abatement.[149]

The limited jurisdiction of the Board stirred a small amount of Congressional debate. Some felt that the proposal was unduly restrictive in limiting Board review to deficiencies and claims in abatement. In the House, Congressman Jeffers argued for a Board of much broader jurisdiction than that proposed by the Administration. According to Mr. Jeffers, the Board should be a watchdog agency over the Bureau with an obligation to investigate, even on its own initiative, "anything like fraud, favoritism, gross error . . . and the board should have power to redetermine the tax in any such case. . . ."[150] If adopted, the Jeffers proposal would have substantially broadened Board powers from adjudication to include investigation and prosecution of a wide range of abuses. Had his suggestions been adopted, it is probable the Board would not have been able to carry on, as efficiently as it did, the determination of tax

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[145] Ch. 136, § 250(d), 42 Stat. 265.

[146] Revenue Act of 1924, ch. 234, §§ 274(d), 308(d), 43 Stat. 297, 309.

[147] *Cf.* Everett Knitting Co., 1 B.T.A. 5 (1924). *But see* California Associated Raisin Co., 1 B.T.A. 1251 (1925); Northwestern Mut. Life Ins. Co., 1 B.T.A. 767 (1925); California Associated Raisin Co., 1 B.T.A. 314 (1925).

[148] Revenue Act of 1924, ch. 234, §§ 279, 312, 43 Stat. 300, 310.

[149] 65 CONG. REC. 2969–70 (1924).

[150] *Id.* at 2614.

controversies. This proposal did not attract any significant support, even though substantial anti-Bureau sentiment prevailed in Congress.

In the Senate some support was marshaled for a different sort of broadening of the proposed jurisdiction. In hearings before the Finance Committee and on the floor of the Senate, proposals were made to grant Board jurisdiction in proceedings involving refund claims as well as deficiencies. Thus, taxpayers who had already paid a disputed tax could seek refund in the Board as well as in district court and the Court of Claims.[151] The arguments in favor of providing refund jurisdiction to the Board were not insubstantial. A principal objective of the Board was to provide a more expeditious and less costly remedy than was available in the other courts, and some saw little reason why Board review should be granted to taxpayers who had not yet paid a disputed tax and withheld from those who had.[152] Senator McKellar proposed an amendment that would have extended refund jurisdiction to the Board in cases involving more than $10,000, and had it been adopted, the structure of tax litigation might have developed very differently. Under the proposal, claims for refund of more than $10,000 were to be referred to the Board automatically, and the Board's finding would be binding on Treasury.[153] The amendment was strongly opposed by Senator Smoot, chairman of the Finance Committee, on the ground that it would increase the Board's caseload by 5,000,000 cases. Senator McKellar was more than a little incredulous about this figure because there were only 4,300,000 taxpayers in the country, the vast majority of whom did not earn $10,000 a year, much less pay disputed tax of that amount. Senator Smoot's figure indicated that refund claims had been filed totaling more than $50 billion. Yet, between 1913 and 1924 internal tax revenues totaled only $29 billion. Nevertheless, Senator Smoot was adamant about the figure, and the amendment was withdrawn.[154] The exchange between Senators Smoot and McKellar is an instructive example of one type of debating technique:

> Mr. SMOOT. I do not think that even the Senator will ask that . . . [expansion of Board jurisdiction] be agreed to when he knows what it means.

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[151] Under the Administration proposal, the Board did not have jurisdiction over a tax that had been paid. Even if Board jurisdiction had been properly invoked upon the mailing of a deficiency letter, any payment of the disputed tax prior to a decision of the Board would strip it of power to decide the case. This aspect of the proposal was continued in the final Act. *See* Northwestern Mut. Life Ins. Co., 1 B.T.A. 767 (1925).

[152] *See* 1924 Senate Hearings, *supra* note 1, at 343, 389.

[153] 65 CONG. REC. 7696 (1924).

[154] *Id.* at 7696–97.

Mr. MCKELLAR. I think I do know what it means.

Mr. SMOOT. This is what it means: It means that instead of having 28 judges we will have over 300 judges. We have over 5,000,000 claims pending now, and if they are all to go —

Mr. MCKELLAR. Mr. President, it relates only to claims of over $10,000.

Mr. SMOOT. I know that it relates to claims of over $10,000. Could 400 judges handle it? I am sure we would have to have at least 300 before the expiration of the time fixed in the amendment. I know the Senator has not studied the question. In fact, when I looked at it myself first I did not know how many claims there were.

Mr. MCKELLAR. How many claims did the Senator say there were?

Mr. SMOOT. Over 5,000,000.

Mr. MCKELLAR. Of over $10,000 each?

Mr. SMOOT. Of over $10,000.

Mr. MCKELLAR. In taxes?

Mr. SMOOT. These claims

Mr. MCKELLAR. I asked the Senator's assistant, the gentleman from the Treasury Department, to give me the facts and he said he could not do it, that it would take him some time to find them.

Mr. SMOOT. That was as to claims and abatements. That is quite different from this amendment. This amendment relates to any claim, refund, or abatement.

Mr. MCKELLAR. There are how many?

Mr. SMOOT. Over 5,000,000.

Mr. MCKELLAR. Above $10,000?

Mr. SMOOT. Above $10,000.

Mr. MCKELLAR. That involves quite a large amount of money.

Mr. SMOOT. It certainly does.

Mr. MCKELLAR. Five million claims of over $10,000 each? I am sure the Senator can not be accurate in his statement.

Mr. SMOOT. All I know is that I have been informed by the department, since reading the amendment, that that is the fact. I asked for the information, and that is what they told me.

Mr. MCKELLAR. Has the Senator any information he can put in the RECORD from the department that there are over — did the Senator say 10,000,000?

Mr. SMOOT. Five million.

Mr. MCKELLAR. That there are more than 5,000,000 claims of over $10,000 each?

Mr. SMOOT. We can get the information for the Senator by tomorrow.

Mr. MCKELLAR. I ask to be allowed to have the amendment go over until we can get the facts.

Mr. SMOOT. There is no necessity of that. If there were half that number, we have not enough judges. We are not going to provide 200 judges.

Mr. OVERMAN. The Senator certainly did not mean 5,000,000 claims?

Mr. MCKELLAR. That would mean $50,000,000,000 —

Mr. SMOOT. I do not mean that.

Mr. MCKELLAR. I am sure the Senator could not mean that.

Mr. SMOOT. I do not mean in dollars at all; I mean in claims.

* * * * *

Mr. MCKELLAR. If there were 5,000,000 claims of $10,000 each in taxes, it would be something so stupendous that the mind of man could hardly conceive it. I am sure the Senator from Utah [Mr. SMOOT], who is generally accurate and who accused me of not knowing what my amendment meant, has his facts sadly mixed on this proposition. I challenge him to bring the facts from the Treasury Department. The Treasury Department can give them.

Mr. SMOOT. I have already stated to the Senator that I have not made a personal examination into those claims, and no one else has done so outside of the Treasury Department; but the Treasury Department officials tell me that there are over 5,000,000 claims which would be affected by this amendment. It is impossible to have enough judges to handle those claims. Of course, there is nothing to many of the claims. There probably is nothing to 98 per cent of them. But the taxpayers have a right to file claims. They make the claims, and I refer to claims to abatement as well.

For the reasons I have given, I hope the amendment will not be agreed to.

5. Effect of Board Decision

A key feature of the Administration proposal provided that Board decisions were only final on the issue of summary assessment, and not with respect to the question of liability. Thus, the Government, if it lost before the Board, could not summarily assess additional tax; however, the Government could, within one year, commence a court action for collection of any amount disallowed as a deficiency by the Board.[155] Conversely, if the Government prevailed before the Board, the deficiency

[155] 1924 Administration Bill, *supra* note 6, § 274(b), *as enacted*, Revenue Act of 1924, ch. 234, § 274(b), 43 Stat. 297.

would be immediately assessed and collected.[156] Although the taxpayer could not directly appeal the Board decision to a higher court, he could file a claim for refund. If the claim was either denied or was not acted on within six months, the taxpayer could then commence a refund action in a district court or the Court of Claims.[157] In any further court proceedings, the Board's decisions were to be taken as prima facie evidence of the facts found by the Board.[158]

Since Mellon envisioned a Board that would conduct informal hearings, it was entirely appropriate that its decisions should not be appealable but rather should be subject to collateral review. However, in light of the congressional amendments, particularly those with respect to practice and procedure, it is somewhat surprising that serious consideration was not given to making Board decisions final with a right of appeal. Nevertheless, no such modification was advanced, and the Mellon proposal on this point was adopted by Congress virtually without change.

A Senate amendment was added to the bill that, if retained in the final Act, would have substantially changed the effect of Board decisions that were adverse to the taxpayer. The amendment, introduced by Senator Reed of Missouri, put the initiative with the Government to collect disputed deficiencies. If the Board determined a deficiency, the tax would be assessed and the taxpayer notified thereof. Within 30 days of the mailing of the notice, the taxpayer could file a statement admitting so much of the deficiency as he felt was due. If the deficiency determined by the Board exceeded this amount, the Government could collect the excess only by commencing a district court action that the taxpayer could defend on substantive grounds. Interest of six percent would be added by the court to any judgment affirming a deficiency, and a penalty of 25% could be added if the court found the taxpayer's defense to be frivolous. The Government could apply to the district court for security to be given by the taxpayer if reasonable grounds existed for believing that collection of any judgment rendered for the Government would be jeopardized by the fraudulent or wrongful act of the taxpayer.[159]

Senator Reed of Missouri, who introduced the amendment, admitted that he had drawn it before he knew of the proposal for a Board of Tax Appeals.[160] Nevertheless, the Senate adopted it to enable the House-Senate

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156 *Id.*

157 *See* Revenue Act of 1924, ch. 234, § 1014, 43 Stat. 343; H.R. REP. NO. 68-179, at 8 (1924); S. REP. NO. 68-398, at 42 (1924).

158 1924 Administration Bill, *supra* note 6, § 1000(d), *as enacted,* Revenue Act of 1924, ch. 234, § 900(g), 43 Stat. 337.

159 65 CONG. REC. 8108–09 (1924).

160 *Id.* at 8114.

conference to study the proposal and consult Treasury.[161] In fact, the only true advocate of the proposal was Senator Reed. The provision was excised by the conference,[162] so the amendment itself was not of great importance. The debates, however, illustrated congressional suspicion of the Board.

The proposal was intended to cure what Senator Reed saw as the existing evil of the power of Treasury to make an ex parte assessment of additional tax, long after the close of the taxable period. This assessment could force an individual or a business, unprepared for the additional tax, into bankruptcy or subject it to distraint on its property without a chance to have a court hearing on the issue. The amendment was to give the taxpayer his day in court.[163] The principal argument against the Reed amendment was that the Board of Tax Appeals would solve the problem. Senator Reed, however, did not see the Board's hearing as the equivalent of a day in court and apparently did not believe that the Board would be truly independent.

> If the board works as perfectly as my friend from Utah (Senator Smoot) hopes it will, the taxpayer would in very few instances be obliged to go to court; but if it does not work perfectly, and if the taxpayer is really aggrieved, he will have his day in court according to the rules of law and evidence; otherwise he is remitted merely to the decision of a subdivision of a board created in the Treasury Department out of such material as they may be able to get, and that board is quite as likely to err as the boards that were voluntarily set up without any particular law or any law whatever to warrant their creation.[164]

The provision was also seen as having a certain salutary effect on the Board's deliberations. Knowing that the case would go to court if they decided against the taxpayer, Board members might be more likely to be fair and just, rather than assuming an arbitrary position toward the taxpayer.[165]

Although Senator Reed alone defended the amendment, it is apparent that others shared some of his views on the Board.[166] This attitude was understandable since the Board was an untried body that in its initial conception was merely a successor to the Committee on Appeals and Review. This same skepticism led to the more constructive amendments that secured the Board's independence from the Treasury (an amendment

161 *Id.* (remarks of Senator Jones of N. Mex.).
162 H.R. REP. NO. 68-844, at 23 (1924).
163 65 CONG. REC. 8108–10 (1924).
164 *Id.* at 8111.
165 *Id.*
166 *See* 67 CONG. REC. 524 (1925) (remarks of Chairman Green).

of which Senator Reed was apparently unaware) and provided a more formalized procedure.[167]

D. The Board from 1924–1926

When its first members assembled to be sworn in on July 16, 1924, there was considerable uncertainty as to both the Board's prospects for success and the support it would receive from the Administration and Congress. President Coolidge had signed the Revenue Act of 1924 into law on June 2, 1924, but he did so with serious reservations. In the view of his Administration, the Board was to be created for the purpose of moving the review function from the Bureau to the Treasury Department. Congress, of course, went much further than this and, in the words of President Coolidge, made the Board "in its essentials practically a court of record."[168] The President felt that these changes would so burden the Board with procedural, evidentiary, and other formalistic rules that it would be unable to cope expeditiously with its expected caseload. "The result will be greater delay in the final settlement of tax cases, and may ultimately result in the complete breakdown of the administrative machinery for the collection of taxes."[169] Not surprisingly, the President's views were shared not only by Secretary Mellon[170] and A.W. Gregg, special assistant to Secretary Mellon,[171] but also by Administration supporters on the Hill.[172] The same view was reiterated more moderately by Under Secretary of the Treasury, Garrard B. Winston, at the organizational meeting at the Board on July 16, 1924. He warned that "there is great danger that . . . [the] Board may be overwhelmed" because of its formalistic procedure and therefore urged the new members to organize quickly under rules that would permit the speedy settlement of cases.[173]

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[167] *See supra* notes 55–97 and accompanying text.

[168] *See* Statement of President Coolidge, *supra* note 97.

[169] *Id.*

[170] Mellon, *supra* note 93.

[171] Undated statement of A.W. Gregg, c. 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*.

[172] 65 CONG. REC. 9540 (1924) (remarks of Mr. Mills); *see also id.* at 9545 (remarks of Mr. Tilson).

[173] Treasury Department, press release, July 16, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24* [hereinafter cited as Winston Press Release].

Of course, many people disagreed with these appraisals and felt that the Board had been strengthened by the amendments.[174] Indeed, some even believed that Congress had not gone far enough and that the Board should have been made, in all respects, a court.[175] Oddly enough, within a little more than a year, the very same Administration that had excoriated Congress for legislation that might lead to the breakdown of tax administration was to admit the error of its ways and to urge Congress to take additional steps to make the Board a court.[176]

There were also those who believed that creation of the Board of Tax Appeals, no matter how constituted, would do little to relieve the fundamental problems of tax administration. In the view of these observers, only improved performance by the Bureau could solve the problem, and such improvement would obviate the need for the Board.[177] They perceived the complexity of the law and the inefficiency and arbitrariness created by the personnel policies of the Bureau as the real culprits in the tax administration crisis. Unless these problems were solved, creation of the Board would achieve little good. Thus, Chairman Green of the Ways and Means Committee supported the Board only because he felt the proposed $10,000 salary would be sufficient to attract and hold competent personnel. He did not regard the other aspects of the proposal as likely to relieve the problem and took the position that if the recommended salary for Board members was reduced he would favor eliminating the Board entirely.[178]

To a large extent, these critics failed to appreciate the limited objective of the Board. It was not intended by itself to solve all the problems associated with tax administration. A more realistic appraisal of the Board's function was given by its first Chairman, Charles D. Hamel.

> It must not be expected that the Board can in itself reduce or remove the complexities that are inseparable from the administration of any tax law similar to the laws which have been enacted since the adoption of the 16th Amendment. It will afford an independent tribunal for the consideration of questions which grow out of a valid difference of opinion as to the correctness of the findings of the

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[174] *See*, *e.g.,* 65 CONG. REC. 3284 (1924) (remarks of Mr. Young); *id.* at 9544 (remarks of Mr. Treadway); *id.* at 9546 (remarks of Mr. Hawley).

[175] 1924 House Hearings, *supra* note 26, at 112 (testimony of Mr. Ely Goldsmith).

[176] *Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means*, 69th Cong., 1st Sess. 932 (1925) [hereinafter cited as 1925 House Hearings].

[177] 1924 House Hearings, *supra* note 26, at 409; 65 CONG. REC. 3282 (1924) (remarks of Mr. Garner); *id.* at 3283–84 (remarks of Mr. Blanton).

[178] 65 CONG. REC. 3282 (1924).

> Bureau of Internal Revenue in any given case, and to that degree it will assist in the equitable and just collection of the tax and ensure that the rights of the taxpayer are duly protected and observed.[179]

In the first hectic months following its creation, the Board moved toward fulfilling this objective.

1. Selection of Members

The first step in organizing the Board was the selection of its members. The Revenue Act of 1924 did not specify the qualifications for Board membership; it merely directed that selection be based "solely on the grounds of fitness to perform the duties of the office."[180] On July 2, 1924, President Coolidge selected the first 12 members of the Board.[181] Seven were "from the public" and five were "from the Bureau of Internal Revenue."[182]

<u>From the Public</u>:	
Adolphus E. Graupner (R)	California
J.S.Y. Ivins (R)	New York
John M. Sternhagen (R)	Illinois
Sumner L. Trussell (R)	Minnesota
John D. Marquette (D)	Washington, D.C.
W.C. Lansdon	Kansas
A.E. James (R)	New York
<u>From the Bureau</u>:	
Charles D. Hamel (R)	North Dakota
Jules Gilmer Korner, Jr. (R)	North Carolina
Benjamin H. Littleton (D)	Tennessee
Charles P. Smith (R)	Massachusetts
Charles M. Trammell (D)	Florida

The Board members met for the first time on July 16, 1924, in the office of Under Secretary Winston, where they took the oath and officially assumed office.[183] Congress was not then in session, so the Senate could

[179] Letter from Charles D. Hamel to Carlyle S. Baer, dated December 29, 1924, pp. 22–23, filed at the U.S. Tax Court in "Revenue Act of 1924: Memoranda and Correspondence."

[180] Revenue Act of 1924, ch. 234, § 900(b), 43 Stat. 336.

[181] N.Y. Times, July 3, 1924, at 8, col. 3.

[182] *See* Winston Press Release, *supra* note 173.

[183] B.T.A. Conference Minutes, July 16, 1924.

not confirm the nominations, but pursuant to a concurrent resolution of the House and Senate approved June 3, the new appointees could be compensated for services rendered prior to Senate approval.[184]

The political affiliation of the first members is noted parenthetically in the same manner used by Secretary Mellon when he recommended the appointment of these individuals to President Coolidge.[185] Of course, party affiliation was not a statutory criterion of appointment, but it should not be surprising that Presidents have tended to select appointees for the Board and the Tax Court from the ranks of their own parties.

Occasionally political and professional considerations merged in the selection (or non-selection) of members. In 1929, Mr. Walter S. Hallanan, then a member of the Republican National Committee, wrote Secretary Mellon concerning a prospective appointee.

> I have learned that Mr. L.S. Echols of Charleston, W. Va., is endeavoring to secure appointment as a member of the Board of Tax Appeals.
>
> Mr. Echols has only recently been deposed here as postmaster of the City of Charleston upon the recommendations of Senator Goff, Senator Hatfield and myself. He has consistently opposed the Republican ticket and I feel that it would be most unfortunate for him to have any recognition from the administration at Washington.
>
> Mr. Echols was formerly employed in my office during my term as State Tax Commissioner of West Virginia. He has no particular capacity for this work and, aside from this fact, is indolent and entirely lacking in any elements of aggressiveness.
>
> I am writing this letter with a view to calling your attention to the matter and protesting against any favorable consideration being given to the application which I understand has been filed by Mr. Echols. I am sure that both United States Senators from West Virginia feel the same way concerning him. Any appointment given him would operate to place a premium on party infidelity.[186]

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[184] N.Y. TIMES, June 4, 1924, at 2, col. 4.

[185] Letter, July 2, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*.

[186] May 2, 1929, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1928–32*.

On March 18, 1925, an additional four members were appointed:[187]

William R. Green, Jr.	Iowa
Percy W. Phillips	New York
Logan Morris	Utah
William D. Love	Texas

A mild flurry of protest accompanied the naming of these members. Mr. Green was the son of Chairman Green of the Ways and Means Committee; Mr. Love was a former law partner of Representative Garner, ranking Democrat on Ways and Means; Mr. Morris was a former secretary to Senator Smoot, chairman of the Senate Finance Committee; and Mr. Phillips was recommended by Senator Wadsworth, a member of the Finance Committee. Some smelled a political deal in the appointments, but because no one disputed the qualifications of the new appointees and because Chairman Green and Representative Garner frequently disagreed with the Administration over tax policy, the controversy quickly subsided and the nominations were confirmed by the Senate on the same day they were announced.[188]

The additional four appointments brought the total membership of the Board to 16, but almost immediately, Chairman Hamel resigned[189] for reasons of health and inadequate compensation.[190] In August, 1925, C.R. Arundell of Oregon was appointed, but Mr. Ivins resigned one month thereafter and Board membership remained at 15 until 1926.[191]

The 1924 Act authorized a membership of up to 28 for two years, and it seems clear that initially it was contemplated the Board would be at full authorized membership.[192] That this did not come to pass seems to have been the result of two factors. First, the short two-year term of office for the initial members, combined with a relatively low rate of compensation, made it difficult to recruit qualified personnel. Second, it quickly became apparent that although a Board of 28 members could hear more cases than a smaller body, a large number of members would make the work of the Board unwieldy. Until July of 1926, the entire Board reviewed all decisions

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187 N.Y. TIMES, March 19, 1925, at 4, col. 6.

188 *Id.*

189 1925 House Hearings*, supra* note 176, at 864 (testimony of Chairman Korner).

190 *Id.* at 922 (testimony of Mr. Hamel).

191 2 B.T.A. iii.

192 N.Y. TIMES, July 17, 1924, at 18, col. 1.

before their promulgation.[193] The purpose of this practice was to assure a high degree of uniformity to Board precedents.[194] This was considered a very important feature of the Board, and it was felt that a body considerably larger than 15 or 16 could not practicably review all cases decided by the members.[195] The questions of the appropriate qualifications of members, the composition of the Board, and the selection procedure were the subject of considerable interest in 1924 and later years.[196] It will be recalled that a central issue in the legislative evolution of the 1924 Act was the selection procedure. The Administration proposed that members be selected by the Secretary of the Treasury. As part of the congressional amendments designed to assure an independent Board, this authority was given instead to the President. Nevertheless, the Treasury Department played a major role in the selection of the first Board members. Solicitations and recommendations for appointment were referred to Secretary Mellon and his subordinates.[197] On July 2, 1924, the date on which the President announced the first appointments, Secretary Mellon sent a letter to the President listing twelve individuals "whom you may desire to appoint."[198] These twelve individuals in fact comprised the original appointments. Additionally, evidence exists that the Bureau of Internal Revenue itself had some influence in the selection of members.[199]

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[193] 1925 House Hearings, *supra* note 176, at 861 (testimony of Chairman Korner). After June 1926, the Board became more selective in the cases it would review. *See* B.T.A. Conference Minutes, June 23, 1926.

[194] J. Gilmer Korner, *The United States Board of Tax Appeals,* 11 A.B.A. J. 642, 643 (1925) [hereinafter cited as Korner].

[195] J.S.Y. Ivins, *What Should Congress do with the Board of Tax Appeals*, 3 NAT'L INC. TAX MAG. 391 (1925) [hereinafter cited as Ivins].

[196] *Board of Tax Appeals Prepares for Early Hearings,* 2 NAT'L INC. TAX MAG. 247–48 (1924).

[197] *See generally* letters dated 1924–29, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–32*.

[198] National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*.

[199] *See, e.g.,* Memorandum from Under Secretary of the Treasury Winston to Commissioner Blair, August 1, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*.

> Robert S. Lovett, at present one of the Assistant Attorney Generals, wants to be a member of the Board of Tax Appeals. I attach a statement of his qualifications. I think he would make an ideal type of man . . . . Will you remember to bring his name up, particularly when we are considering the balance of the members?

The part played by the Treasury in the selection process was widely known[200] and, in some circles, disapproved. Accountants were particularly distressed, and Edward Gore, president of the American Institute of Accountants, wrote President Coolidge in September, 1924, arguing that the legislative history of the 1924 Act indicated that Treasury should have no influence in the selection of Board members. He warned that the public would lose confidence in the new agency if such influence persisted.[201] Treasury's answer to this criticism was that the Board was an independent agency and its members, in discharging their duties, would not be affected by the selection procedure.[202]

Treasury might have added that although Congress removed the direct authority of the Secretary to appoint Board members, it did not prohibit the President from consulting the Secretary and giving whatever weight he desired to the Secretary's recommendations. Moreover, because Treasury was virtually the only government agency having direct contact with tax experts, that Department was the most obvious source of information on the competence of proposed members.

It is likely that most of those who objected to Treasury's influence in the selection of members were really concerned about the experience and professional background of the persons selected rather than the selection process. Soon after the enactment of the 1924 legislation, a controversy erupted over whether persons who had served at Treasury or the Bureau should be eligible for appointment. Some felt that such experience would give an anti-taxpayer bias that would be inconsistent with the duties of the Board; others felt that a Treasury background was virtually a sine qua non for having the degree of expertise necessary for Board membership.[203] The controversy reached the White House, and the President attempted a compromise by appointing five members from the Bureau and seven from the public. The compromise, however, did little to appease those who did

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[200] "I do not think there is any doubt that the personnel was largely selected in the first instance by the Treasury Department and recommended to the President, who made the appointments." Albert L. Hopkins, *The United States Board of Tax Appeals,* 12 A.B.A. J. 466, 471 (1926) [hereinafter cited as Hopkins].

[201] September 8, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24.* Not all accountants believed that Treasury should have no influence in the selection of members. *The New Tax Board,* 3 C.P.A. MAG. 31 (1924).

[202] Letter from Secretary Mellon to C.B. Slemp, Sec'y to President Coolidge, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24.*

[203] *Conflict Over Choice of Members for Board of Tax Appeals,* 2 NAT'L INC. TAX MAG. 218 (1924); N.Y. Times, June 17, 1924, at 31, col. 1; *see also The New Tax Board,* 3 C.P.A. MAG. 31 (1924).

not want former Treasury people on the Board.[204] While it was true that only five appointees came to the Board directly from service with the Bureau, of the remaining seven, three had been Bureau employees before entering the private sector,[205] and two others had been employed by State taxing agencies.[206] Adding salt to the wound, the first chairman of the Board, Charles D. Hamel, had up to the time of his appointment been chairman of the Bureau's Committee on Appeals and Review. At the organization meeting of the Board on July 16, Under Secretary Winston suggested Hamel's election as chairman.[207] No other nominations were made and Hamel was unanimously elected.[208] It was rumored that the appointees had to give assurances that they would support Hamel for chairman in order to gain appointment.

Because the Board was conceived to protect taxpayers from arbitrary Bureau action, domination of the Board by former employees of the "oppressor" was particularly irksome. The Treasury and the Board strove to dispel the notion that the Board was "pro-Government," but the idea persisted. The New York Times editorialized in favor of selecting for membership "those who have to obey the law rather than . . . those who administer it."[209] The same sentiment was expressed more colorfully by a Toledo attorney in a letter to C. Bascom Slemp, Secretary to President Coolidge.

> [I]t is not possible to cure a sheep killing dog by tying a ribbon around his neck nor . . . is [it] possible to reform a tax hound by giving him a position of apparent independence of the Bureau.[210]

Another source of dissatisfaction stemmed from the fact that, with one exception (Lansdon), all the Board appointees were lawyers. Today it is taken for granted that a necessary qualification for appointment to the Tax Court is a legal background, but the situation in 1924 was considerably different. In the first place, throughout the early years of the income and

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[204] *See*, *e.g.,* Letter from Roy P. Logan, Retail Merchants Assoc., to President Coolidge, July 25, 1924, filed at the U.S. Tax Court in "Personnel: Memoranda & Correspondence."

[205] Sternhagen, Trussell, and Marquette.

[206] Ivins and Graupner.

[207] Winston Press Release, *supra* note 173.

[208] B.T.A. Conference Minutes, July 16, 1924.

[209] August 2, 1924, at 8, col. 3.

[210] Letter from Edwin Marshall, Sept. 17, 1924, National Archives Building. Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*. In 1926, the Senate passed a resolution that future appointees should not have served at Treasury within two years of their appointment.

profits taxes, accountants had dominated tax practice.[211] Second, the members of the Committee on Appeals and Review were in large part accountants and engineers. The Board was perceived by many as a successor to the Committee, and it was not understood why the membership of the Board was almost exclusively drawn from the bar.

During this period, accounting organizations actively petitioned for the selection of accountants and engineers to the Board.[212] Lawyers were criticized as being both overly technical and insufficiently grounded in practical experience with commercial transactions and practices.[213] That these petitions went unheeded probably should not be attributed to anti-accountant sentiment at Treasury. The presence of several non-lawyers on the Committee on Appeals and Review until its dissolution in 1924 indicates that no such bias existed. As a matter of fact, had Congress adhered to the Administration proposal in creating the Board, it is likely that lawyer dominance would not have developed. As much was said by Secretary Mellon when he wrote that

> the original recommendations for a Board of Tax Appeals contemplated an administrative body somewhat of the character of the board of referees which handles British income tax matters. Such a board properly would be made up of lawyers, accountants, and business men and would adjust tax questions with the taxpayers in a commonsense way around the table. Congress, however, modified the proposal by creating a court in which taxes are to be litigated. The requirements for membership on a court are knowledge of the law, experience in litigation, and appreciation of the value of evidence. The training of a member of the court, therefore, should be essentially legal.[214]

It is unlikely that these words did much to soothe the outraged sensibilities of the accountants.

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211 *See infra* note 234 and accompanying text.

212 *See, e.g.,* Letter from Frank Lowson, Chairman, Comm. on Fed. Legislation, American Inst. of Accountants, to Calvin Coolidge, Sept. 20, 1924, containing resolutions of State accounting societies of Delaware, Indiana, Kentucky and Ohio, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*.

213 *See* George O. May, *Accounting and the Accountant in the Administration of Income Taxation,* 47 COLUM. L. REV. 377 (1947).

214 Letter from Secretary Mellon to C. Bascom Slemp, Sept. 22, 1924, National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax – Board of Tax Appeals 1923–24*.

The prognosis for the Board in the summer and fall of 1924 was gloomy. In addition to the dissatisfaction of the Administration with the type of body Congress had created, large segments of the accounting profession, and to a lesser extent, the legal profession, were displeased by the close connection of the first Board members with Treasury, the influence of Treasury in their selection, and the absence of accountants, engineers, and businessmen from the Board. Undoubtedly the first members of the new agency were well aware that if they fell behind with their caseload, Treasury could argue that it was correct all along in urging the creation of an informal hearing agency rather than a quasi-judicial body. The probable result would be a drastic change in the character of the Board. Moreover, if the Board permitted the appearance of Treasury bias in its proceedings or decisions, taxpayer representatives would be up in arms and the Board's continued existence would be jeopardized. In short, the Board was confronted with a situation in which it had to prove itself to a disgusted Treasury and a suspicious public.

2. Rules of Practice and Procedure

Describing the status of the Board on the date its first 12 members were sworn in, Chairman Korner stated:

> At that time there was nothing in the way of a board except the members who were just sworn in. We had no quarters, no furniture, no cases, and no business. We had nothing, and the first thing to do was to get quarters. Tentative arrangements had been made for that purpose and soon after organization a lease was signed and we went into quarters in the Investment Building at Fifteen and K Streets. I might say that under the act the commissioner began sending out the so-called statutory deficiency letters very soon after the passage of the act. The board was not organized, as you will note, until about six weeks after the passage of the act. We realized that there were a great many taxpayers who did not know where to send their appeals and that they would be denied relief and the right of appeal unless they were forthwith instructed and given information as to how and where such appeals should be prepared and sent.
>
> Accordingly, the most urgent thing for us was the question of procedure, more particularly with reference to the style and manner of bringing appeals. Therefore, we went to work and organized

ourselves into committees at once and started to work out our procedure.[215]

The Board set to work formulating its procedural rules on July 17, 1924,[216] and after only ten days of "almost continuous session"[217] its first rules of practice and procedure were released.[218] The new rules, numbering 26, covered nine printed pages and dealt with the essential subjects: eligibility to practice, pleadings, briefs, motions, hearings, subpoenas, testimonial and documentary evidence, depositions, written interrogatories, and stipulations. Included in the rules were forms suggested by the Board for petitions, applications for admission to practice, subpoenas, and orders to take depositions.

In formulating the rules, the most important policy question that the Board had to consider was whether practice should be formal or informal. The statute was specific as to certain matters: notice and an opportunity for a hearing had to be afforded taxpayers and the Commissioner; hearings were required to be open to the public, and reports of the Board and evidence received by the Board were to be public records; findings of fact had to be in writing in all cases; in cases involving more than $10,000, a written opinion was required and oral testimony had to be reduced to writing; and the Board was to provide for publication of its reports "in such form and manner as may be best adapted for public information and use."[219] Beyond this the statute only stated that "proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe."[220] Thus, such matters as the requirement for and the nature of pleadings and briefs, the conduct of Board hearings, and the evidentiary rules to be applied were, on the face

215 1925 House Hearings, *supra* note 176, at 856. The committees and their composition were:

Preliminary Procedure	*Trial Procedure*
Ivins	Graupner
Marquette	Korner
Littleton	Trussell
Pleadings	*Evidence*
Sternhagen	Smith
James	Trammell
Trammell	Lansdon

B.T.A. Conference Minutes, July 17, 1924.

216 B.T.A. Conference Minutes, July 17, 1924.

217 Hamel, *The U.S. Board of Tax Appeals*, 3 C.P.A. MAG. 273, 275 (1924).

218 N.Y. TIMES, July 28, 1924, at 20, col. 4.

219 Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

220 *Id.*

of the statute, left to Board discretion. Several considerations, however, compelled the Board to conclude that its practice rules should generally conform to the formal requirements of judicial procedure.

In the first place, the legislative history of the 1924 Act strongly supported this conclusion. The Administration proposal had specified that Board proceedings were to be informal, and the House retained this prescription. However, the bill was amended on the Senate floor to remove the reference to informal procedure and to add requirements of publicity, written opinions, and recorded testimony.[221] Debate in the Senate indicated that it was the intent of these amendments to provide a judicial procedure.[222] The Senate changes were retained in the final Act and were interpreted by virtually all, including President Coolidge, to require the formality associated with a court of record.[223]

Although the legislative history of the Act alone sufficiently demonstrated the need for a judicial procedure, there were other equally persuasive considerations in support of that conclusion. Of these, the most important was the fact that the Board was established as an independent agency.[224] An independent Board would have no access to Treasury files; thus, it could not peruse them privately, listen to the taxpayer's version of the controversy, and render a decision. Instead, it could only make a judgment on the basis of what the parties themselves presented on the record. Such a record could best be compiled in a judicial format.[225] Additionally, the Board's function was inherently judicial—deciding cases. Based on "the experience of all courts since the beginning of civilization,"[226] it was determined that although formal procedure might slow up an individual trial, generally it accelerated the handling of large numbers of cases and preserved uniformity.[227] Because the findings of the Board would be prima facie evidence in a future trial of the same issues, those findings had to be made in accordance with a legal record and be supported by legal evidence.[228] In sum, the Board concluded that stricter rules than those of the Committee on Appeals and Review would best accommodate the conflicting demands of speed, accuracy, and justice.[229]

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221 *See supra* notes 81–88 and accompanying text.

222 65 CONG. REC. 8133 (1924) (remarks of Senator Jones of N. Mex.).

223 *See supra* note 97 and accompanying text.

224 Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 338.

225 *See* Charles D. Hamel, *The United States Board of Tax Appeals,* 2 NAT'L INC. TAX MAG. 293, 295 (1924) [hereinafter cited as Hamel].

226 Ivins, *supra* note 195, at 392.

227 *Id.*

228 *See* Hamel, *supra* note 225, at 295–96.

229 Kingman Brewster, *Some Observations Relating to the Board of Tax Appeals,* 3 NAT'L INC. TAX MAG. 251 (1925) [hereinafter cited as Brewster].

At the same time that the Board was pondering the question of whether a formal or informal procedure should be adopted, Treasury was considering a parallel problem under the new law. The statute required that the Board provide an *opportunity* for a hearing to the Commissioner,[230] but did not require that the Commissioner take advantage of the opportunity. The question then was whether the Commissioner should appear in every case before the Board. Under the original Administration proposal for the creation of the Board, it was contemplated that the Commissioner would not be required to appear in every case and that he would not be prejudiced by his inaction.[231] Rather, the Board would consider these cases on the basis of Bureau files. Since under the proposal the Board was to be a part of Treasury, there was no impediment to access by the Board to Bureau files. The Treasury evidently gave serious consideration to following the same plan as originally contemplated even though the Board, as created, was independent of Treasury and was to follow a formal judicial procedure. Ultimately, however, it was decided that the Commissioner should appear in every case lest the Board decide that his failure to appear should be treated as tantamount to a default.[232]

The fact that proceedings were to be essentially judicial raised a novel question concerning requirements for practice before the Board. In proceedings within the Bureau, taxpayers were permitted to be represented by persons of good moral character who were either attorneys or certified public accountants, or could otherwise ". . . show satisfactory educational qualifications and evidence of an ability to understand tax questions . . . ."[233] One of the first questions the Board had to decide was whether to adopt this liberal rule. Tax practice had historically been open, and for that reason many tax agents appearing before the Committee on Appeals and Review were either certified public accountants or persons who were not formally qualified in any profession. Indeed, in the early years tax practice was dominated by non-attorneys.[234] Because the Board in some sense was an extension of the Committee on Appeals and Review, the expectations of many would be disappointed if the practice requirements were tightened. On the other hand, unlike the Committee on Appeals and Review, the Board was to operate under rules of judicial procedure. If Congress had

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230 Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

231 Nelson Hartson, *The Board of Tax Appeals in its Relation to the Bureau of Internal Revenue*, 3 NAT'L INC. TAX MAG. 215, 216 (1925) [hereinafter cited as Hartson]. It is not clear that Congress understood that the Commissioner would not appear in every case. *See* H.R. REP. NO. 68-179, at 8 (1924); S. REP. NO. 68-398, at 9 (1924).

232 Hartson, *supra* note 231.

233 Circular 230, II-2 CUM. BULL. 372, 373 (1923).

234 *See* Korner, in 7 ASS'N OF THE BAR OF THE CITY OF N.Y., LECTURES ON LEGAL TOPICS 3, 5–7 (1929).

indeed created a court, albeit naming the tribunal a "Board," cogent reasons supported limiting practice to attorneys. Practice before courts traditionally had been limited to lawyers whose specialized training was necessary to enable them to deal with highly technical questions of evidence and judicial procedure. Moreover, if the Board adhered to the Bureau position, it would have to prescribe and administer detailed standards for admission to practice before the Board. A practice limited to attorneys could more simply be geared to whether an applicant was licensed by a recognized licensing authority.

The problem was a knotty one. Its resolution could not be deferred, however, because the Board would be unable to hear appeals until it had determined who would be eligible to prosecute the appeals. Accordingly, one of the first rules of practice announced by the Board dealt with admission to practice.[235] In a spirit of compromise, the Board provided that attorneys and certified public accountants were eligible to practice.[236] The rule had the benefit of continuing the Treasury practice of relying on the relatively simple criteria of prior professional licensing. However, as with any compromise, approval was not universal; some took the position that practice should be open to all "qualified" members of the public and others believed practice should be restricted to lawyers.[237]

Aside from the question of whether the Board would adopt formal or informal procedural rules, the most important question faced in the new

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[235] N.Y. TIMES, July 21, 1924, at 14, col. 6.

[236] B.T.A. RULE 2 (July, 1924 ed.). Of course a taxpayer was permitted to represent himself. Similarly, a partner could represent his partnership, and a corporate officer could represent his corporation.

[237] *Should the Board of Tax Appeals Modify its Rules of Practice?*, 2 NAT'L INC. TAX MAG. 270 (1924). Initially, many certified public accountants took advantage of their privilege to practice, and the Board experienced a certain degree of difficulty because of their unfamiliarity with the rules of judicial procedure. Nevertheless, the rule with respect to eligibility to practice remained basically unchanged until 1942 when by congressional decree, the Board (at that time renamed the Tax Court of the United States) was required to admit any "qualified person" to practice. Revenue Act of 1942, ch. 619, § 504(b), 56 Stat. 798 (now codified at IRC § 7452). Curiously, the effect of this amendment was, as a practical matter, to restrict Tax Court practice to attorneys because the court quickly adopted a rule requiring all non-lawyers, including certified public accountants, to pass an examination to qualify for admission. TAX CT. R. 2 (December 15, 1942 ed.) (now TAX CT. R. 200). Thus, in 1942, 230 certified public accountants were admitted to practice under the old rule. In 1943, after adoption of the new rule, only two non-lawyers gained admittance. In modern times, representation of clients before the Tax Court is largely undertaken by attorneys. From 2004 to 2012, only 37 non-attorney practitioners were admitted to practice before the Tax Court. During that same period, the Tax Court admitted 9,738 attorneys.

rules was the burden of proof. In refund actions in the courts, taxpayers generally had the burden of proving that they had overpaid their taxes and were entitled to a refund.[238] The Board adopted the same rule in its proceedings[239] for two reasons. First, the taxpayer as the petitioner was alleging that the Commissioner had erred in asserting a deficiency in tax. Because he was challenging action of the Commissioner, the taxpayer under traditional evidentiary concepts would have the burden of proving the error.[240] Second, the rule was seen as particularly appropriate in tax cases because the evidence necessary to determine the accuracy of the deficiency was almost always in the possession of the taxpayer. Therefore, the taxpayer more easily than the Commissioner could adduce the evidence before the Board.[241] In this regard, James Ivins, an original member of the Board and the draftsman of the burden of proof rules, contended that more than 24 of 25 cases decided for the Commissioner would have been decided differently if the taxpayer did not have the burden of proof.[242]

> If you are going to . . . [shift the burden of proof onto the Commissioner] you might as well repeal the income tax law and pass the hat, because you will practically be saying to the taxpayer, "How much do you want to contribute toward the support of the Government?" and in that case they would have to decide for themselves.[243]

Despite efforts by the Board to make its procedural rules as simple as possible, these rules were criticized in some quarters as being overly technical.[244] Although there are few today who would support this charge, it was nevertheless true that the Board encountered early difficulties with adherence to its rules, primarily as a result of the early practitioners' unfamiliarity with the new procedures.[245] This was particularly true in the case of pleadings and evidence.

Pleadings, originally fashioned to expedite business, paradoxically were the greatest cause of delay until taxpayer representatives became familiar with Board rules. Although the function of the Board was a mixture of

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238 *See*, *e.g.*, Germantown Trust Co. v. Lederer, 263 F. 672, 673 (3d Cir. 1920).

239 B.T.A. RULE 20 (July, 1924 ed.).

240 *See* 1925 House Hearings, *supra* note 176, at 907–08 (testimony of former member Ivins).

241 *Id.* at 908.

242 *Id.*

243 *Id.* at 907.

244 *See id.* at 938.

245 Ruslander, *Practice Before the United States Board of Tax Appeals,* 3 C.P.A. MAG. 248 (1924).

appellate and *nisi prius* courts, the Board believed that if the practice of either type of court were wholeheartedly adopted, proceedings could be subject to delay before issue was joined and the case made ready for hearing.[246] Thus, a hybrid form of initial pleading, to be filed by the taxpayer, was prescribed that combined the functions of summons or notice of appeal, of complaint, and of an opening argument.[247] This pleading, the petition, required concise assignments of error in the Commissioner's deficiency determination and statements of fact and law to substantiate them.[248] The petition was to be "complete in itself, so as fully but briefly to inform the Board of the issues to be presented."[249] A unique aspect of Board practice was that all papers, including pleadings, were not served by parties but rather by the Board itself through its docket office. This was felt to simplify and expedite procedure.[250]

Difficulties arose principally because many petitioners were unaware of the independence of the Board from the Treasury and the Bureau. Many petitioners apparently assumed the Board was privy to Bureau files and thus familiar with the details of their case. This resulted in the filing of many insufficient petitions and led the Board to publicly urge compliance with the rules in hopes of stemming the tide of defective petitions.[251] Typical incomplete filings were mere notices of appeals or conclusions that the tax was erroneous. It was reported by a former member of the Board that "between 30 and 40 percent of the petitions filed are highly defective."[252] In its statements, the Board emphasized its judicial character and affirmed that "[t]he statute clearly contemplates a trial before the Board and each case must be decided upon the record made before it by the parties."[253] Probably as a result of difficulties with pleading, the first amendment to the Board's procedural rules provided for motions in respect of the petition. Such motions, which included the motion to make more definite and certain, to strike out, and to dismiss, were intended to take the place of the demurrer, which was losing favor.[254]

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[246] Hamel, *supra* note 225, at 296.

[247] *Id.; see also* A.E. Graupner, *The Operation of the Board of Tax Appeals,* 3 NAT'L INC. TAX MAG. 295 (1925) [hereinafter cited as Graupner].

[248] B.T.A. Rule 5 (July, 1924 ed.).

[249] *Id.*

[250] *See* B.T.A. RULES 7, 10, 25 (July, 1924 ed.); Graupner, *supra* note 247, at 296.

[251] *Rules Ignored Halt Tax Appeals,* Washington Evening Star, Aug. 20, 1924, at 2, col. 4.

[252] 1925 House Hearings*, supra* note 176, at 916 (testimony of former member Ivins).

[253] *Appeals to the Board of Tax Appeals Must Comply With the Rules,* 2 NAT'L INC. TAX MAG. 285 (1924).

[254] Hamel, *supra* note 225, at 296.

A further difficulty, also related to widespread ignorance of the Board's independent status, stemmed from the improper addressing of mail intended for the Board. The problem became so acute that the Board felt impelled to issue a press release urging taxpayers not to address mail intended for the Board to "any other Department or Bureau." In the case of the petition, this could be disastrous. Unless the Board received the petition within 60 days from the date on which the notice of deficiency was mailed, jurisdiction was irretrievably lost.[255]

The responsive pleading to the petition, required to be filed in behalf of the Commissioner, was the answer. The required specificity of the answer has been a bone of contention since the earliest days of the Board's existence.[256] The first rules prescribed that the answer should be drawn to admit or deny each material allegation of fact in the petition, and to set forth any new matters of fact and propositions of law on which the Commissioner relied.[257] The Commissioner initially took the position that he needed to enter only a general denial to raise any issue supporting the deficiency determination.[258] Basing his argument on a theory of presumptive weight for the Bureau's findings, he denied responsibility to take any position or to give any reason as a basis for his determination.[259] The Board did not completely agree with this position, and it soon amended its rules to require the answer to "fully and completely . . . advise the taxpayer and the board of the nature of the defense."[260]

In these early days, the situation with respect to evidentiary rules was also troublesome. The Revenue Act of 1924 empowered the Board to prescribe its own rules of evidence,[261] but the Board chose not to publish a comprehensive statement of such rules to be followed in tax appeals. Rather, it chose to adopt judicial rules of evidence and began applying these rules in its earliest cases.[262] The decision to require formal rules for the presentation and acceptance of evidence was grounded on the statutory provisions that defined the Board and its work.

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255 Press Release, January 23, 1925, filed at the U.S. Tax Court in "Organizing the Board: Memoranda and Correspondence."

256 Homer Sullivan, *Procedure Before the United States Board of Tax Appeals,* 2 NAT'L INC. TAX MAG. 325, 326 (1924) [hereinafter cited as Sullivan]; *cf.* Caldwell, *Tax Court Procedure: Problems but not Pitfalls,* 27 N.Y.U. INST. ON FED. TAX'N 1435, 1439–40 (1969).

257 B.T.A. RULE 9 (July, 1924 ed.).

258 Sullivan, *supra* note 256, at 326.

259 *Id.* at 361–62.

260 B.T.A. RULE 9 (as amended, Sept. 3, 1924).

261 Ch. 234, § 900(h), 43 Stat. 337.

262 *E.g.,* Bruce & Human Drug Co., 1 B.T.A. 342 (1925); Lee Sturgess, 2 B.T.A. 69 (1925); Harlan A. Allen, 2 B.T.A. 794 (1925).

Because the Board was statutorily established as independent, its record had to be independently compiled. Thus, the Board stressed that "[w]hat has been submitted to or considered by the Bureau of Internal Revenue is beyond the ken of this Board . . . . [E]vidence that has been presented before any other department of the Government must be reintroduced before this Board before we can consider it."[263] The Board was also compelled by statute to prepare findings of fact that would be given prima facie weight on appeal before appellate courts.[264] To justify such respect for its findings and to cut down on the number of appeals that might ensue from a belief that different evidence could produce a different result, the Board felt the need to require evidence that would be competent before a court. Because of the absence of a jury, the strictest rules were felt to be an unnecessary impediment to full presentation of facts,[265] but it nevertheless remained true that the general equity rules of evidence were applicable.[266]

Despite the Board's best efforts to clarify the difference between its formal procedures and those applicable before the Bureau, practitioners, both lawyers and non-lawyers alike, were often lax about proving the facts they had alleged in their petitions and about proving them with competent evidence. The contrast between practice before the Board and before the Treasury was clearly demonstrated in the case of a taxpayer who attempted to "negotiate" a $400 expense deduction without any records on the grounds that for someone in his financial and social bracket such a deduction was reasonable and fair. This was an approach that was unacceptable to the Board because it was a request for a finding without proof. "We can not indulge in conjecture," concluded the Board, and refused relief to the taxpayer.[267]

The Board was troubled over the early insufficiencies of pleading and proof that it encountered, and attempted, through its decisions and through articles and speeches by members, to educate the public about its rules. An example of the Board's attempt to proselytize the tax bar was a lengthy explanation of the fine art of pleading and preparing a case given to the American Institute of Accountants by Chairman Korner.[268] He urged the parties to stipulate or admit facts that were uncontested, but failing such an agreement, he cautioned that it was the petitioner, the party with the burden of proof, who was required to present evidence. Among the items offered by taxpayers that could not be considered as evidence were petitions, briefs,

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[263] J.M. Lyon, 1 B.T.A. 378, 379 (1925).

[264] Revenue Act of 1924, ch. 234, §§ 900(g), (h), 43 Stat. 337, 338.

[265] Korner, *supra* note 194, at 643.

[266] *See* Part X, notes 43–55 and accompanying text.

[267] J.M. Lyon, 1 B.T.A. 379, 380 (1925).

[268] J.G. Korner, Jr., *Practice Before the United States Board of Tax Appeals,* 3 NAT'L INC. TAX MAG. 220 (1925).

Bureau rulings, unauthenticated documents and letters, arguments of counsel, mathematical computations, and unsupported valuation appraisals.[269] When limited to such data, the Board was unable to make any findings of fact and could only consider the issues on the basis of the petition, resolving all issues against the taxpayer.[270]

3. The Board in Operation

With the adoption of its procedural rules, the Board got down to the business of hearing and deciding appeals. The general procedure that the Board followed was succinctly described by Chairman Korner in several speeches and articles he authored in an attempt to familiarize the public with the operations of the new agency.

> Upon the receipt of an appeal from a taxpayer it is given a number and then docketed.[271] A copy of the petition is forthwith served upon the Solicitor of Internal Revenue, who is the law officer of the Commissioner. The Solicitor is given 20 days in which to answer or move in respect to the petition. When the Solicitor has thus answered or filed a motion in respect to the petition, a copy thereof is forwarded to the taxpayer by registered mail, and thereupon the case is considered at issue in the board. When issue is thus joined, the appeal is transferred to a Day Calendar for hearing, and set at a day not less than fifteen days hence. The Commissioner is notified of this date, and the taxpayer is also notified by registered mail.

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[269] Findlay Dairy Co., 2 B.T.A. 917 (1925); M. Fischman, 2 B.T.A. 717 (1925); Lee Sturgess, 2 B.T.A. 69 (1925); Emily Wood, 1 B.T.A. 957 (1925); Elmer E. Scott, 1 B.T.A. 445 (1925).

[270] In response to continued evidentiary difficulties, the Board revised Rule 18 to provide specifically that:

> Where there is a joinder of issue on questions of fact the provisions of this rule relative to submission without argument shall not relieve the party upon whom rests the burden of proof, of adducing at the hearing proper evidence in support of his contention. Pleadings do not constitute evidence and where issues of fact are joined, failure to adduce supporting evidence will be taken as ground for dismissal.

B.T.A. RULE 18 (Sept. 27, 1924 ed.).

[271] Initially, the docket office of the Board rejected petitions that on their face showed that they were filed more than sixty days after the mailing of the notice of deficiency, but this practice was soon discontinued, and it was left to the Solicitor to move the dismissal of such petitions. *See* B.T.A. Conference Minutes, March 13, 1925.

At 9:30 A.M. on each hearing day the parties litigant, with their counsel and witnesses, assemble in one of the hearing rooms of the board. At that time the Chairman calls the calendar for that day, and notes the appearances and readiness of the parties to go forward with the appeals set for that day. The appeals in which issue is joined on motions of one kind or another are separated from those appeals in which issue is joined on the merits.

The appeals involving motions are all assigned to one division for disposition.[272] This is done in the interest of expedition and economy of time. The cases which are for hearing on the merits are then assigned for hearing to the divisions, in the order of their appearance on the Day Calendar. One appeal is assigned to each division sitting. The remaining appeals which have been announced as ready are held in abeyance, and are thereafter assigned to divisions in the order in which they appear on the Day Calendar and as the divisions become vacant. That is to say, as soon as a division has completed the first hearing assigned to it, the chairman is notified and the next appeal on the list is assigned to that division. In this manner the divisions are kept busy throughout the day, or until the hearings for that day are completed.

In the division the hearings are conducted substantially as in the courts, except that there is no jury. Because there is no jury, the strict rules of evidence obtaining in law courts are relaxed, and the rules of evidence observed are more nearly those obtaining in courts of equity. The taxpayer has the opening and closing of the case, both as to evidence and as to argument. Counsel for both parties make opening statements in which are outlined the nature of the

[272] The 1924 Act authorized the chairman to divide the Board into divisions and appoint division chiefs. Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337. The Board heard its first few cases en banc (John H. Parrott, 1 B.T.A. 1 (1924), Everett Knitting Works, 1 B.T.A. 5 (1924)) but soon concluded that its work would be expedited if the statutory authority were utilized. On September 3, 1924, Chairman Hamel created three divisions, excluding himself from membership on each. Memorandum, Sept. 3, 1924, filed at the U.S. Tax Court in "Organizing the Board: Memoranda & Correspondence."

Division No. 1	Division No. 2	Division No. 3
Mr. Ivins, Chief	Mr. James, Chief	Mr. Graupner, Chief
Mr. Korner	Mr. Sternhagen	Mr. Lansdon
Mr. Marquette	Mr. Trammell	Mr. Littleton
	Mr. Trussell	Mr. Smith

appeal, the points in controversy, and the respective contentions of the parties. The taxpayer then proceeds with the introduction of his evidence. This may be by witnesses who are sworn and placed on the witness stand, or by competent and authenticated documents. The testimony of witnesses is reported by a court reporter, and transcribed and made a part of the record.[273] Documents and other exhibits which are admitted as evidence are identified, marked, and received into the record. The rules of the board provide for the taking of evidence by deposition on either oral or written interrogatories. The practice in this respect is similar to that obtaining in court. An order for the taking of depositions issues from the board upon application therefor made in accordance with the rules.

At the close of the evidence, argument is heard on behalf of both parties and the case is then taken as submitted. In cases in which either or both parties desire to file written briefs, the time for such filing is granted, and the case is deemed submitted at the expiration of the time allowed for that purpose.

When a case has been submitted, the division which has heard it takes the case under advisement and reaches an agreement as to the proper decision. Thereupon the division prepares a report, which consists of the findings of fact, the decision and an opinion, if an opinion is required or is deemed necessary. This report is mimeographed, and a copy sent to each member of the board for consideration and study.

The statute provides that a division decision shall become the decision of the board at the expiration of thirty days unless within that time the chairman shall refer the decision for consideration by the whole board. Up to the present time the practice has been followed by the chairman of referring every case to the whole board for adoption. This is to preserve uniformity of decisions, and at the same time to allow each appeal to have the benefit of consideration by every board member. As stated before, the division decision is sent to each member, who studies it, and if he is in disagreement he prepares a statement of his views relative thereto.

On Friday and Saturday of each week the board meets and discusses the proposed opinions submitted by divisions during the

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[273] The statute only required the recording of testimony in cases in which the amount in controversy exceeded $10,000. Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337. The Board, however, soon concluded that disputes as to evidence could be minimized if the testimony in all cases was reduced to writing. 1925 House Hearings, *supra* note 176, at 912 (testimony of former member Ivins).

> preceding week. At these meetings the fullest discussion of each case is gone into, and thereafter a vote is taken on a motion to adopt. To this date every decision and opinion which has been adopted has had this consideration and discussion by the board.
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> When the board has reached a decision in an appeal, a certified copy thereof is forwarded to the taxpayer, and likewise one to the Commissioner of Internal Revenue.[274]

An important purpose in creating the Board was to offer taxpayers located outside Washington, D.C., the opportunity to dispute adverse tax determinations prior to assessment. In its later years, the Committee on Appeals and Review attempted to fill this need and did, in fact, dispatch members to Western and Midwestern cities.[275] Apparently, however, Congress felt this policy could be further advanced by the Board,[276] and the statute specifically provided that

> the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board, and of its divisions, shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.[277]

The Board was well aware of the importance ascribed to field hearings and sent letters to all petitioners informing them of their right to a hearing at as convenient a location as was practicable and soliciting their wishes in the matter.[278] Nevertheless, the requests for hearings outside Washington accumulated slowly, and it was not until May, 1925, almost a year after the Board's creation, that the first division was sent forth from Washington.[279] The first field session was a lengthy one. The division sat for a week in Milwaukee, ten days in St. Paul, a week in Seattle, a week in Portland, a

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[274] Speeches before the American Bar Association, Sept. 1925, the U.S. Chamber of Commerce, May, 1925, Bar Assoc. of N.Y.C., October, 1925, and the American Assoc. of Ice and Refrigeration, June, 1925; *see also* J. Gilmer Korner, *The United States Board of Tax Appeals,* 11 A.B.A. J. 642, 643 (1925); J.G. Korner, Jr., *The Responsibility of the Bar in Income Tax Practice*, 3 NAT'L INC. TAX MAG. 359, 361 (1925).

[275] *See* 1924 COMM'R OF INT. REV. REP. 11–12.

[276] *See* S. REP. NO. 68-398, at 9 (1924).

[277] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[278] 1925 House Hearings, *supra* note 176, at 864.

[279] *Id.*

month in San Francisco, and a month in Los Angeles.[280] In October, 1925, a second division went to St. Louis for a month and then to Kansas City for another month.[281] Although these may seem lengthy sessions, it was nonetheless true that the vast bulk of cases were being heard in Washington, where trials were conducted virtually on a daily basis.[282] Apparently, there were several reasons contributing to the relatively small demand for field hearings. First, the original 12 members of the Board, expecting 16 additional members to be appointed, at first indicated that no plans for field hearings would be finalized until the anticipated appointments were made.[283] Second, the Board itself may have discouraged requests for hearings outside Washington by announcing that cases heard in the field, "[d]ue to loss of time in travelling and difficulties of administration," would not be heard and decided as expeditiously as cases heard in Washington.[284] Third, the bulk of the tax bar was concentrated in Washington and other Eastern cities. These attorneys and accountants undoubtedly preferred to try their cases closer to their homes than to the homes of their clients. Finally, the number of field hearing requests was affected by the location of the Board's petitioners. For example, one-quarter of the Board's petitions came from taxpayers in New York and Pennsylvania, yet these States had only approximately 16 percent of the Nation's population.[285]

Despite the fact that field sessions were less numerous than originally anticipated, it soon became apparent that there would be plenty of work to keep the Board busy. Petitions came in slowly at first—only three were docketed in July 1924, and 120 in the following month—but soon increased. In the two-year period commencing in July 1924, 18,087 petitions were docketed, an average of 753 per month.[286] In one month, April 1925, a total of 2,371 petitions were docketed as the result of a mass mailing of deficiency notices by the Bureau to forestall the anticipated expiration of the period of limitations.[287]

As with the number of petitions, the number of hearings increased rapidly. The Board heard three cases in August 1924, 18 cases in

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[280] *Id.* at 864–55.

[281] *Id.* at 865.

[282] *See supra* note 273 and accompanying text.

[283] *See* 2 NAT'L INC. TAX MAG. 304 (1924).

[284] 2 NAT'L INC. TAX MAG. 331 (1924).

[285] *Id.* at 863; 1 BUREAU OF CENSUS REP., Fourteenth Decennial Census, 13, 15 (1920).

[286] Statistical data with respect to Board of Tax Appeals furnished by United States Tax Court, Statistics and Reports Section.

[287] *See The Congestion of Tax Cases Before the Board of Tax Appeals,* 4 NAT'L INC. TAX MAG. 303, 304–05 (1926).

September, 80 cases in October, 93 cases in November, and 123 cases in December.[288] Because there were only three divisions during this period, each division heard an average of 41 cases in December, almost two for each working day in the month. Chairman Korner was not guilty of exaggeration in asserting that by December 1924, the Board was "running under fairly full sails."[289]

In October 1925, the House Ways and Means Committee conducted hearings on legislation that was to become the Revenue Act of 1926. At that time the Board was able to report that 8,417 petitions had been filed since July 1924 and that dispositions had been made in 3,627 of these appeals.[290] In almost one-half of the remaining 5,000 docketed cases, issue had not yet been joined; the remaining cases were listed on either the field or day calendars.[291]

The Board had thus accomplished an enormous amount of work in its first 16 months of existence. In addition to promulgating rules of practice, thousands of cases had been docketed and were being expeditiously handled. One interesting statistic was that the number of cases docketed with the Board closely approached the total number of civil cases filed in 25 U.S. district courts, having 54 judges, during the same period.[292] Additionally, members of the Board, and especially the chairmen, were regularly speaking and writing articles to familiarize the public with the new agency. On one occasion Chairman Hamel even delivered a speech on radio concerning the operations of the Board.

The Board accomplished its work only by dint of the most extraordinary efforts of its members. Hearings were regularly held late into the evenings; one even ran to 1 a.m. The Board devoted virtually every Friday and Saturday, and frequent evenings, to meetings at which the members would review the decisions of the three divisions. The actual decisions were written up by members on evenings that the Board was not meeting and on Sundays.[293] This frantic pace took its toll. Chairman Hamel resigned in the spring of 1925, and Mr. Ivins resigned in the summer of that year, partly because they feared that their health would be permanently impaired if they continued working under these conditions.[294]

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288 1925 House Hearings, *supra* note 176, at 859.
289 *Id.*
290 *Id.* at 862.
291 *Id.*
292 67 CONG. REC. 1129 (1925) (remarks of Mr. Beedy).
293 *Id.* at 861.
294 *Id.* at 922.

4. Success of the Board

The extraordinary efforts made by the Board did not go unrecognized.[295] It will be recalled that the legislation creating the Board was initially criticized by the Administration; also, members of the accounting profession were less than enthusiastic about the first appointments. For these reasons and because of the importance of its work, there was intense interest in how the Board went about its business.[296] The record of the Board bore this scrutiny well. By the fall of 1925, commentary was appearing that was virtually unanimous in its praise of the independence and accomplishments of the new agency. These endorsements came not only from those expected to be well disposed toward the Board, such as former Chairman Hamel[297] and former member Ivins,[298] but also from sources not connected with the Board, such as the Committee on Federal Taxation of the American Bar Association.

> We want . . . [the Ways and Means Committee] to know that . . . [the Board] is probably the most popular tribunal that has been created by Congress for some time. It functions speedily. It functions definitely and openly. It is untrammeled by any questions of administrative expediency, and its decisions have been uniformly independent, regardless of whether they are for the taxpayer or for the Commissioner.[299]

Even more to the credit of the Board, many of its chief critics in 1924 became its fervent supporters in 1925. Chairman Green, who had serious

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[295] In its report on the Revenue Bill of 1926, the Ways and Means Committee observed that

> [t]he work of the Board has been uniformly praised by taxpayers, tax attorneys, and the Treasury Department. Representatives of the American Bar Association informed the committee that the Board functions speedily and definitely, is untrammeled by questions of administrative expedience, and renders decisions that are uniformly independent.

H.R. REP. NO. 69-1, at 17 (1925); *see also* S. REP. NO. 69-52, at 34 (1926).

[296] Brewster, *supra* note 229.

[297] 1925 House Hearings*, supra* note 176, at 922.

[298] Ivins, *supra* note 195, at 392.

[299] 1925 House Hearings*, supra* note 176, at 882 (testimony of George M. Morris); *see also id.* at 66 (testimony of James A. Emery, National Association of Manufacturers); Lyle T. Alverson, *Has the Board of Tax Appeals Failed?,* 4 NAT'L INC. TAX MAG. 337, 359, 362 (1926); Brewster, *supra* note 229, at 251, 273; Hopkins, *supra* note 200, at 468; Latham, *supra* note 139, at 200–01; Willis W. Ritter, *Pitfalls in Practice Before the Board of Tax Appeals,* 3 NAT'L INC. TAX MAG. 297 (1925).

reservations concerning the Board when the 1924 Act was passed,[300] later observed that creation of the Board "was the first time I had ever known one act of Congress that seemed to meet with general approval."[301] Representative Ogden Mills of New York, the President's chief spokesman on the Ways and Means Committee, had argued in 1924 that the congressional amendments had "wrecked" the Board.[302] In 1925, his opinion changed and he called the Board "an unqualified success."[303] Accountants and accounting organizations had been openly hostile to the Board when they learned that Treasury was playing a central role in the selection of members, and had become even more outraged when the members appointed were virtually all lawyers, most of whom had been trained at the Bureau.[304] Edward Gore, president of the American Institute of Accountants, had been deeply troubled that a Treasury-selected Board would lack independence and public confidence.[305] However, within 13 months, he said that the Board "was the outstanding achievement of the 1924 Act" and was "composed of men who are intent upon doing their full duty by the Government and by the taxpayer."[306]

Plaudits were not, however, limited to congressional and private sector sources. Secretary Mellon, Solicitor Hartson, and Special Assistant Gregg all opposed the congressional amendments to the original Administration proposal.[307] In 1925, they were all to recant.[308]

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[300] *See supra* note 178 and accompanying text.

[301] 67 CONG. REC. 524 (1925); *see also Proceedings of Dinner Given in Honor of Board of Tax Appeals,* 4 NAT'L INC. TAX MAG. 233, 240 (1926) (remarks of Mr. Green) [hereinafter cited as Honorary Dinner Proceedings].

[302] 65 CONG. REC. 9540.

[303] 67 CONG. REC. 558.

[304] *See supra* notes 201–214 and accompanying text.

[305] *See supra* note 201 and accompanying text.

[306] 1925 House Hearings*, supra* note 176, at 877. Another distinguished accountant, Dr. Joseph Klein, an adviser to the Treasury, taking another tack, admitted that although he initially believed that the Board should have been made a part of Treasury, he later saw "the light." *Id.* at 851. Addressing the Ways and Means Committee, he stated that "you have builded [*sic*] a wonderful body and that body ought to be preserved." *Id.; see also* Honorary Dinner Proceedings, *supra* note 300, at 238–40 (remarks of Dr. Klein).

[307] *See supra* notes 89–96 and accompanying text.

[308] Andrew Mellon, as befitted a Secretary of Treasury, took his crow in a moderate dose.

> The Board of Tax Appeals was intended to be a short cut to an impartial determination of tax liability. In the 1924 revenue act it was made an independent establishment, with quite formal rules of procedure. This was a complete departure from the original idea. The board has, however, been

The high praise lavished on the Board in 1925 was due to several factors. First, despite being bound to formal judicial procedure, it had managed through dint of extraordinary efforts to keep current with its caseload. Not only the members, but the clerical and professional staff of the Board regularly worked overtime in order to achieve this objective. The

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> extremely valuable in the establishment of precedents which have aided the bureau in the determination of similar cases of other taxpayers.

1925 House Hearings*, supra* note 176, at 10.

Solicitor Hartson had been unable to comprehend how the Board, as created by Congress, could possibly cope with its workload, yet he was later to write:

> [t]he prompt way in which the Board was organized and the rapidity with which it began to hear appeals and dispose of them are matters of record and constitute a splendid tribute to the industry and ability of the membership of that organization.

Hartson, *supra* note 231, at 215.

Possibly the greatest tribute to the Board was paid by A.W. Gregg, who had played a central role in drafting the 1924 Administration bill as Special Assistant to Secretary Mellon, and who was later made Solicitor of Internal Revenue.

> When the act was first passed the President expressed some doubt — I know the Treasury Department felt considerable doubt — as to whether any body could take over and properly perform the task which Congress had placed upon the board. The reduction of salary and the reduction of the term of office, we thought, would make it very difficult to get men, and I want to say right here that I do not think it would ever have been possible to get the type of men who were secured for the board had it not been for the fact that there was pioneer work to be done, a great work to be done, and men of ability were willing, for inadequate salaries and for short terms of office, to take over that task as a matter, really, of pride.
>
> The board immediately after the passage of the act had no organization. Of course the personnel had not been selected. Appeals began coming in immediately. It was then that everyone doubted whether the board could perform the task which was placed on it.
>
> I think I am in a position where I can praise the work of the board — having been, at least theoretically, representing one side of every case before it — better than almost anyone else. They have handled the work before them in such a way that they have received the very sincere admiration of attorneys and taxpayers who have seen the work of the board and its opinions, as well as of the Treasury Department. I think that what they have done deserves the appreciation of Congress. They have really done a wonderful piece of work in getting started, producing, and establishing the precedents that they have. It seems to me that in order to be able to carry out what they have begun so well, they should be made a court in name as well as in fact, and that provision should be made which will enable the board to secure the services of competent men; and that provision, it seems to me, should be for a long term of office with adequate salary.

1925 House Hearings*, supra* note 176, at 932–33.

Board's staff was largely drawn from the ranks of Treasury and there is every indication that they were selected carefully.[309] Several observers noted a certain special spirit among the earliest Board members and staff,[310] probably in large part due to a combination of the Board's newness and the fact that the mighty and supposedly knowledgeable had predicted an early and ignominious end for the infant agency. Perhaps there was some significance in the fact that two of the earliest appointments to the Board staff were Misses Ruff and Ready.[311]

The second element in the success of the Board was that it was able to demonstrate to a doubting public that, although its membership was largely composed of former Bureau employees, it could successfully maintain its independence from Treasury. The Board consciously refrained from compiling statistics as to the number of cases won by taxpayers and the number won by the Government.[312] The Board believed that its job was to decide cases on the merits, not to award a certain percentage of decisions to the Government or taxpayers. Had statistics of this nature been kept, this objective might have been blurred. Moreover, a substantial number of cases, if not a majority, were not won completely by either the Government or the taxpayer. In these decisions the tax would be computed somewhere between the opposing positions. For this reason, statistics would be difficult to compile and unreliable. Despite the absence of detailed case by case statistics, it was apparent that a substantial number of Board decisions favored taxpayers. In the three-year period between July 1924 and July 1927, for example, the Board decided 11,000 cases; the total deficiencies claimed by the Commissioner in these cases were $209 million. The Board determined deficiencies of only $87 million. A good deal of reduction in deficiencies probably resulted from concessions by the Commissioner rather than from decisions by the Board, but there could be no doubt that the Board was deciding a substantial number of cases for taxpayers. Edward Gore of the American Institute of Accountants observed that

> [a]s I understand it, the proportion of findings in favor of the taxpayer has been sufficiently high to thoroughly justify all the representations that were made on behalf of the taxpayer, and it has been proven that nearly half the time the commissioner has been wrong in his conclusions.[313]

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309 1925 House Hearings, *supra* note 176, at 922.

310 *Id.* at 852, 922, 932–33.

311 Letters from Robert C. Tracy, Sec'y to the Board, to Commissioner Blair, August 30, 1924, November 12, 1924, filed at the U.S. Tax Court in "Personnel: Memoranda & Correspondence."

312 1925 House Hearings, *supra* note 176, at 862–63.

313 *Id.* at 877.

The final factor that assured the Board's success was its contribution toward the formation of a body of precedent for the interpretation of the tax laws.[314] The problem of tax precedent had been troubling. Much of the precedent relied on by the Bureau was contained in unpublished rulings. The existence and use of these rulings was a source of controversy[315] and undoubtedly led to the congressional insistence that Board proceedings be public and its opinions be open to inspection.[316] But Bureau rulings were criticized on more grounds than their secrecy. By 1925, published and unpublished rulings numbered in the thousands,[317] and it was conceded by former Solicitor Hartson, under whose reign many of these rulings had been amassed, that a large number of the rulings were poorly considered because of the time pressure under which they were issued, that in many cases inconsistent rulings existed on the same point, and that even employees of the Bureau had difficulty applying the vast number of the rulings because they could not be located.[318] For these reasons, Mr. Hartson concluded that

> [i]t may be high time to wipe the slate clean and start over again . . . [I]t is very desirable that a new line of precedent be created which is likewise binding upon the Bureau and the taxpaying public — a line of authority which all may see and follow whether within or without the Bureau. The service being performed by the Board of Tax Appeals in this regard can be made most important.[319]

Mr. Hartson might have added that the Board could not well have fulfilled its precedent-making role without the modifications that Congress had made to the original Administration proposal. The fact that Board proceedings were public and that its rulings were disseminated helped create respectability for its precedents. Additionally, the Board's rule-making function undoubtedly would have been impeded if it had been located in the Treasury Department. In such a case, there would have been a serious question whether the Board could effectively overrule Bureau rulings with which it disagreed. Moreover, even if a Treasury-located Board could overrule Bureau rulings, there would be considerable doubt as to its powers with respect to Treasury Decisions, which were the weightiest

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314 *Id.* at 10 (testimony of Secretary Mellon); Hartson, *supra* note 231, at 217, 238.

315 *See* Part I, notes 123–132 and accompanying text.

316 *See supra* notes 81–88 and accompanying text.

317 Hartson, *supra* note 231, at 217.

318 *Id.* at 217, 238.

319 *Id.* at 238.

authority that Treasury could issue. In one of its earliest decisions,[320] the Board chose to disregard a Treasury Decision denying depreciation deductions for leaseholds.[321] Had the Board been a branch of Treasury, it probably could not have taken this action.[322]

To fulfill its precedent-setting function, it was important that Board decisions successfully stand public and Treasury scrutiny. There was general agreement that the early rulings of the new agency bore this scrutiny very well;[323] by October 1925, the Bureau had filed nonacquiescences in only 13 Board decisions.[324]

The widespread approval that greeted the first months of the Board's operation did not signify a general belief that the 1924 legislation had created either a perfect Board or a perfect system for adjudicating tax disputes prior to assessment. There were varied and conflicting proposals for improvements, and the Revenue Act of 1926 made fundamental changes in the Board. These proposals and changes will be described in the succeeding chapter. Nevertheless, the Board was an experiment that seemed to be working.

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[320] Grosvenor Atterbury, 1 B.T.A. 169 (1924).

[321] T.D. 3414, I-2 CUM. BULL. 90 (1922).

[322] Letter from Charles Hamel to Thomas C. Lavery, Jan. 3, 1925, p. 3, filed at the U.S. Tax Court in "Revenue Act of 1924: Memoranda and Correspondence."

[323] 1925 House Hearings, *supra* note 176, at 831 (testimony of Dr. Joseph Klein, New York Society of Certified Public Accountants), 877 (testimony of Edward Gore, American Institute of Accountants), 882 (testimony of George Morris, Special Comm. on Tax'n of the American Bar Association), 932–33 (testimony of A.W. Gregg, Solicitor of Internal Revenue), 937–38 (testimony of Dr. T. S. Adams, Yale University); Brewster, *supra* note 229, at 252; Hopkins, *supra* note 200, at 297; Honorary Dinner Proceedings, *supra* note 300.

[324] 1925 House Hearings, *supra* note 176, at 931.

PART III

THE REVENUE ACT OF 1926: IMPROVING THE BOARD OF TAX APPEALS

The Board of Tax Appeals, which had been created by the Revenue Act of 1924, was the object of close attention during its first few months of operation.[1] Inevitably, comment began to appear with respect to how the new agency might be improved. These suggestions found expression in the legislative process culminating in the enactment of the Revenue Act of 1926.

A. The Revenue Act of 1926

President Coolidge and Secretary Mellon were not completely satisfied with the Revenue Act of 1924. Income tax rates had not been sufficiently reduced, the estate tax had been increased, a gift tax had been imposed over their opposition, and Congress had provided for publicity of persons filing income tax returns and the amount of tax they paid. However, the Administration was by no means resigned to accepting indefinitely these legislative defeats, and the years 1925 and 1926 provided them with an opportunity to correct the shortcomings of the 1924 legislation.

Coolidge had won an impressive victory over the Democrats in the 1924 elections, a victory which to some extent was undoubtedly attributable to public approval of the Administration's economic and tax policies. Further, the death of Robert LaFollette Sr. in 1925, removed an articulate critic of the Administration and left the Republican progressives without their most influential leader. As a result, the new version of the Mellon plan, which was presented in the fall of 1925 to the Ways and Means Committee, encountered little opposition.

The principal components of the plan were: (1) reduction in the normal and surtax rates of the individual income tax;[2] (2) repeal of the estate tax;[3] (3) repeal of the gift tax;[4] and (4) repeal of the provision requiring the publication of the income tax paid by every taxpayer.[5]

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[1] Kingman Brewster, *Some Observations Relating to the Board of Tax Appeals*, 3 NAT'L INC. TAX MAG. 251 (1925).

[2] *Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means*, 69th Cong., 1st Sess. 5–6 (1925) [hereinafter cited as 1925 House Hearings].

[3] *Id.* at 6–7.

[4] *Id.* at 7–8.

[5] *Id.* at 8–9.

These proposals were accompanied by a vigorous propaganda campaign.[6] Particularly notable were the activities of an organization initially known as the American Bankers' League and later called the American Taxpayers' League, which formed "tax clubs" in every state to advocate the Coolidge position that taxes must be "scientifically revised downward."[7] Significantly, two of the most active tax clubs were located in Iowa and Texas, the home states of William Green, Republican Chairman of the Ways and Means Committee, and John Garner, the Committee's ranking Democratic member. Both men had objected to several aspects of the Mellon plan and were particularly opposed to repeal of the estate tax.[8]

A majority of the press, the public and the Congress favored the Administration proposals, and the Revenue Act of 1926, enacted on February 26, 1926,[9] differed little from Secretary Mellon's recommendations. Income tax rates were reduced, especially at the higher income levels, to provide a maximum tax of 25% as opposed to the maximum rate of 46% under the 1924 Act;[10] the gift tax was repealed;[11] and publication of the income tax paid by taxpayers was eliminated.[12] The only significant setback suffered by the Administration was the failure of Congress to repeal the estate tax. Congressmen Green and Garner managed to keep the tax alive by agreeing to lower rates and an increased credit for state death taxes.[13]

Quite obviously, the Board of Tax Appeals, which directly affected a limited number of people, did not arouse the same degree of public interest as the issues discussed above. Nevertheless, in light of the Board's newness and the controversy that attended its creation in 1924, it attracted some attention.

The Administration had proposed in 1923 that the Board be created as an informal hearing body within Treasury. However, Congress changed this plan to make the Board an independent agency in the executive branch that was generally required to follow formal judicial procedures.[14]

Initially, the Administration view was that these changes would hinder the Board in the discharge of its duties and might even result in the total

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[6] RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 137 (1954).

[7] SIDNEY RATNER, AMERICAN TAXATION 424 (1942).

[8] ROY G. BLAKEY & GLADYS C. BLAKEY, THE FEDERAL INCOME TAX 253–54 (1940) [hereinafter cited as BLAKEY & BLAKEY].

[9] Ch. 27, 44 Stat. 9.

[10] *Compare* Revenue Act of 1926, ch. 27, §§ 210–211, 44 Stat. 21–23, *with* Revenue Act of 1924, ch. 234, §§ 210–211, 43 Stat. 264–67.

[11] Revenue Act of 1926, ch. 27, § 1200(a), 44 Stat. 125.

[12] *Id.*

[13] *See* BLAKEY & BLAKEY, *supra* note 8, at 251–54, 257, 269–70; H.R. REP. NO. 69-1, at 14–15 (1925); H.R. REP. NO. 69-356, at 49–50 (1926).

[14] *See* Part II, notes 55–97 and accompanying text.

breakdown of tax administration. Nevertheless, when the Board began operation, it soon won general approval from the public, and the Administration's early criticism of the Board changed to support. In connection with the 1926 legislation, Secretary Mellon made no detailed recommendation on the subject of the Board. "It is in the interests of the Treasury only to see that there is in existence a board of capable men with the ability to decide tax questions fairly and promptly."[15] His only two specific proposals were that the number of Board members be continued at no less than 16 (under the 1924 Act, the authorized membership was to be automatically reduced to seven as of June 2, 1926[16]) and that Congress resist suggestions to increase the scope of Board jurisdiction. These were considered necessary to permit the Board to expeditiously handle its workload.[17]

Both these matters were considered in connection with the 1926 legislation. Additionally, certain other issues arose that many believed deserved legislative attention. These included the questions of court status for the Board, finality of Board decisions, and several matters relating to the membership of the Board and Board procedures. These issues too were addressed in the 1926 Act, and the basic structure of the Board that emerged has changed little over the years.

B. Status of the Board

Against the advice of the Administration, Congress had created the Board in 1924 as an "independent agency in the executive branch"[18] rather than as a division of Treasury. After the Board began operation, it immediately became clear that President Coolidge was correct in characterizing the Board as virtually indistinguishable from a court. Yet the body was called a "board," not a "court," and was located in the executive branch of Government, not the judicial.

In general, courts of the United States are bodies either created by, or pursuant to, article III of the Constitution. Such courts are frequently referred to as constitutional or article III courts. Their judges are protected by life tenure during good behavior and a guarantee of no diminution of compensation while in office.[19] Jurisdiction of these courts is limited to cases and controversies.[20]

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15 1925 House Hearings, *supra* note 2, at 10 (testimony of Secretary Mellon).

16 Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 336.

17 1925 House Hearings, *supra* note 2, at 10.

18 Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 338.

19 U.S. CONST. art. III provides in part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior

Although these courts have historically been the most important federal judicial agencies, as early as 1828, the Supreme Court recognized the existence of other bodies that adjudicated controversies in a manner similar to constitutional courts but were not created pursuant to article III.[21] These bodies, referred to as legislative or article I courts, are created in furtherance of the powers reserved to Congress by the Constitution.[22] The judges are not protected by tenure and compensation guarantees. Further, the jurisdiction of these bodies is not limited to cases and controversies.

In 1924, Congress clearly did not desire to accord the Board constitutional court status; the statute specifically placed the Board in the executive branch of Government and denied its members life tenure. More difficult was the question of whether the Board was a legislative court. Apparently, Congress did not consider the issue. Undoubtedly, this was due to the fact that until 1929, the only legislative courts expressly recognized by the Supreme Court were courts created in furtherance of the congressional powers to administer the territories and the District of Columbia.[23] Thus, in creating the Board as an agency in the executive branch, Congress may have believed that it was employing the only alternative available to constitutional court status. Whether the Board should be considered to have been created as a legislative court, in light of subsequent developments in the decisional law, is impossible to answer definitively. Even today, when considerable literature exists on the distinction between article I and article III courts, virtually no attention has been paid to the distinction, if any, between an article I court and an independent agency in the executive branch performing purely judicial functions.[24]

> Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, upon their Authority; . . . to Controversies to which the United States shall be a party; . . . .

[20] *Id.* § 2.

[21] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

[22] *Id.* at 546.

[23] U.S. CONST. art. I, § 8, cl. 17, art. IV, § 3. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923). In 1929, the Supreme Court recognized the Court of Customs Appeals as a legislative court. Ex parte Bakelite Corp., 279 U.S. 438 (1929).

[24] At least one commentator has suggested that no meaningful distinction exists between administrative agencies that exercise adjudication powers and non-article III courts. *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 201 (1983) ("Despite several

Although the question of judicial status for the Board was ignored in 1924, by the time Congress began consideration of the Revenue Bill of 1926, certain officials, notably A.W. Gregg, Solicitor of Internal Revenue, were contending that the Board should be transformed from an independent agency in the executive branch into a court.[25] Those supporting court status relied for the most part on the practical benefits that would be derived from the change. First, they argued that the existing status of the Board was misleading the public, many of whom believed that the Board was part of the Bureau of Internal Revenue. In addition to fostering doubts in the minds of the uninformed with respect to the Board's impartiality, this misapprehension undoubtedly encouraged the erroneous assumption that the Board's procedures were, like those within the Bureau, informal. By changing the Board to a court, confusion would be reduced with a concomitant improvement in public confidence in tax administration and a decrease in the number of procedural errors by practitioners.[26]

Second, judicial status for the Board might help attract and retain capable members. The term of office of the original members under the 1924 Act lasted only until June 2, 1926,[27] and some believed that such an abbreviated tenure served to discourage interest in appointment to the Board.[28] The 1924 Act provided that members appointed after June 2, 1926, would serve for terms of up to ten years, but there were some who believed even this would be inadequate.[29] Life tenure during good behavior would be automatically guaranteed if the Board was made an article III court; a provision for life tenure without court status would raise constitutional questions.[30]

Third, the question of finality of Board decisions was related to its status. Under the 1924 Act, Board decisions were subject to collateral attack by either the Government or taxpayers. The Board had

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differences in both appearance and operation, their work cannot be functionally or theoretically distinguished." (citations omitted)).

[25] 1925 House Hearings, *supra* note 2, at 933; *see also id.* at 914 (testimony of former member Ivins).

[26] 1925 House Hearings, *supra* note 2, at 916 (testimony of former member Ivins). Of course, this shortcoming could be remedied by simply renaming the Board a court without otherwise changing its character as an independent agency in the executive branch. This approach was taken in 1942, ch. 619, § 504, 56 Stat. 957. However, there were other objections to the nonjudicial status of the Board that could not be so easily satisfied.

[27] Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 336.

[28] 1925 House Hearings, *supra* note 2, at 884 (testimony of George Morris, Am. Bar Ass'n), 938–39 (testimony of Dr. T. S. Adams).

[29] *Cf.* 1925 House Hearings, *supra* note 2, at 939 (testimony of Dr. T. S. Adams).

[30] *See infra* notes 189–191 and accompanying text.

demonstrated its competence and independence, and many believed that permitting de novo review of Board cases in the federal courts wasted the time and money of both taxpayers and the Government.[31] By making the Board a court, its decisions would be assured of the finality reserved for judicial action.

Fourth, if the Board were made a court, it would be invested with certain judicial powers that would ease its problems of administration and expedite its proceedings. An example of this problem involved the power of the Board to subpoena witnesses and evidence and to order depositions. Although the 1924 Act authorized such action by the Board,[32] it did not provide any direct means by which the Board could enforce its own process. Thus, if a witness refused to appear in response to a subpoena, enforcement would require recourse to a federal court for an order compelling attendance. Only if this order were disobeyed could the non-appearance be punished by contempt in a further federal court proceeding.[33] On this basis former Board member James S.Y. Ivins argued the Board's powers to subpoena were too cumbersome to be enforced against an unwilling witness.[34] If the Board were made a court, it could itself punish contempt of its process.

Fifth, some observers believed that the federal courts were not properly acknowledging the precedents established by the Board.[35] Indeed, many federal judges in these early days may not even have known of the existence of the Board. Making the Board a court would result in greater recognition of its decisions and would further the important congressional purpose of developing a uniform body of precedents interpreting the tax laws.

Finally, the argument was made that the Board functioned like a court and this fact should be recognized by according it full judicial status.[36] Its jurisdiction was limited to disputes that qualified as cases or controversies

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[31] 1925 House Hearings, *supra* note 2, at 935 (testimony of A.W. Gregg, Solicitor of Internal Revenue).

[32] Revenue Act of 1924, ch. 234, § 900(i), 43 Stat. 338.

[33] James S.Y. Ivins, *What Should Congress Do With the Board of Tax Appeals?*, 3 NAT'L INC. TAX MAG. 391, 410 (1925) [hereinafter cited as Ivins].

[34] *Id.*

[35] Memorandum as to reasons for conversion of Board of Tax Appeals into a court, c. 1925, filed at the U.S. Tax Court in "Revenue Act of 1926: Memoranda and Correspondence."

[36] 1925 House Hearings, *supra* note 2, at 928 (testimony of former Chairman Hamel), 933 (testimony of A. W. Gregg, Solicitor of Internal Revenue); Ivins, *supra* note 33, at 393. The literature is replete with statements that the Board of Tax Appeals was a court in everything but name. *E.g.*, Dana Latham, *Jurisdiction of the United States Board of Tax Appeals Under the Revenue Act of 1926*, 15 CAL. L. REV. 199, 201, 203 (1927) [hereinafter cited as Latham].

under article III of the Constitution,[37] its practice and procedure conformed to judicial forms, and its members comported themselves with the independence and in the style customary to courts. Possibly, only an accident of history resulted in the Board being made an agency in the executive branch instead of a court in 1924. Because of the Administration proposal that the Board be made a part of Treasury, legislative attention was focused on the question of independence from Treasury. Had the broader aspects of the independence question been as carefully considered, Congress might have concluded that an agency engaged in adjudicating tax disputes should not be located in the executive branch of Government.

Substantial sentiment existed among Board members in favor of obtaining full federal court status, and in the late summer of 1925, several Board members drafted a proposal along these lines for submission to Congress.[38] Apparently, the proposal had the support of Treasury officials, including Secretary Mellon.[39] However, it soon became clear to friends of the Board that Congress, traditionally hostile to creating judicial offices, was not amenable to such a change.[40] Additional opposition came from accountants who feared that their privilege to practice before the Board would be withdrawn if it were made a court.[41] As a result of this opposition, neither the Ways and Means Committee nor the Finance Committee, both generally favorably inclined toward the Board, recommended any change in the Board's name or its status,[42] and no serious proposal along these lines was advanced in either the House or Senate. Not until 1942 would the Board's name be changed to the Tax Court,[43] and almost one-half century elapsed before Congress recognized the inadvisability of having "one executive agency . . . sitting in judgment on the determinations of another executive agency."[44] With this recognition the Tax Court was established as a legislative court.[45]

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[37] *See* Revenue Act of 1924, ch. 234, § 900(e), 43 Stat. 337; General Equipment Co., 2 B.T.A. 804 (1925).

[38] Letter from A.E. Graupner to J.G. Korner, Aug. 28, 1925, filed at the U.S. Tax Court in "Revenue Act of 1926: Memoranda & Correspondence" [hereinafter cited as Graupner].

[39] *Id.*; *see also* 1925 House Hearings, *supra* note 2, at 932 (testimony of A.W. Gregg, Solicitor of Internal Revenue).

[40] 1925 House Hearings, *supra* note 2, at 935 (remarks of Mr. Garner).

[41] Letter from H.E. Lumsford, President of American Society of Certified Public Accountants, to certified public accountants, November 9, 1925, filed at the U.S. Tax Court in "Revenue Act of 1926: Memoranda & Correspondence."

[42] H.R. REP. NO. 69-1, at 17–21 (1925); S. REP. NO. 69-52, at 34–38 (1926).

[43] Revenue Act of 1942, ch. 619, § 504, 56 Stat. 957.

[44] S. REP. NO. 91-552, at 302 (1969).

[45] Tax Reform Act of 1969, Pub. L. No. 91–172, § 951, 83 Stat. 730 (*amending* IRC § 7441).

Although Congress was unwilling to transform the Board into a court, an effort was made in the 1926 Act to accord the Board more judicial attributes. The compromises thus affected made the agency considerably more court-like.

C. Appeals and Finality

Under the 1924 Act, Board decisions were only final with respect to the question of summary assessment; they were not final on the question of liability.[46] Thus, if the taxpayer prevailed in the Board, the Government could not summarily assess the tax but could commence a new action in federal court for a readjudication of whether a deficiency existed. If it obtained a favorable judgment, the deficiency could then be assessed. If the Government prevailed in the Board, the tax would be immediately assessed, but the taxpayer could sue for refund of tax paid pursuant to the assessment. Any action commenced after the Board proceeding would be de novo, although the Board's factual findings would be prima facie correct. In other words, no appeal was possible from a decision by the Board, but such a decision could be reviewed collaterally.

Several congressional concerns might explain this cumbersome statutory scheme. The first of these was related to the question of the Board's independence from Treasury. The congressional committees studying the legislation stated that by permitting the Commissioner to obtain de novo review of an unfavorable decision, the Act would relieve "the board from the responsibility of finally passing upon questions involving large amounts and removes the necessity for a decision in favor of the Government in order to force the issues into court."[47] An obvious connection existed between this rationale and one of the basic considerations that originally led to the proposal to create the Board: the belief that the Committee on Appeals and Review and other agents of the Bureau of Internal Revenue took unjustifiably pro-Government positions because of their knowledge that an administrative decision in favor of the taxpayer could not be reviewed independently whereas a decision in favor of the Government could be challenged by the taxpayer in court by way of a refund action.[48] Even though the 1924 legislation established the Board as an independent executive agency, its historical roots in the Committee on Appeals and Review evidently caused concern that the Board might be no more independent than its predecessor.

Because this concern would have been equally satisfied by permitting direct appeal of Board decisions, an alternative, and perhaps more realistic,

[46] *See* Part II, notes 155–159 and accompanying text.
[47] H.R. REP. NO. 68-179, at 8 (1924); S. REP. NO. 68-398, at 9 (1924).
[48] H.R. REP. NO. 68-179, at 8 (1924); S. REP. NO. 68-398, at 8–9 (1924).

explanation of the provision for a trial de novo was that it constituted a vestigial trace of the original Administration proposal to make the Board an informal hearing division within the Treasury Department.[49] Naturally, appellate court review of the determinations of such an agency would have been inappropriate.[50] The provision requiring that Board proceedings be judicial in nature was not added until the 1924 Revenue Bill reached the Senate floor, and at that late date few may have realized the desirability of making a corresponding change in the appeal procedure.

Finally, the Board, as conceived by the 1924 Act, was regarded by many as either an experiment or as a temporary expedient necessary to deal with the administrative difficulties created by the wartime taxes.[51] Undoubtedly, these feelings concerning an untried body played some part in molding the provision for de novo review of Board decisions. If the Board proved unsuccessful, taxpayers would not be unduly prejudiced by utilizing the Board procedure because they would retain their rights to a complete judicial remedy by way of a refund action.

After only a year of operation, the Board was recognized as filling an important need that was likely to continue indefinitely, and attention was directed to the inefficiency of the collateral review procedure in the 1924 Act. Under that Act, each tax case could be litigated in two trial tribunals (first in the Board, then on a retrial in district court) and in two appellate courts (first in a court of appeals on appeal from a district court decision, and then in the Supreme Court).[52] Under these circumstances, a Board proceeding was characterized as "little more than a preliminary skirmish, a run for luck."[53] Even granting the fact that few tax cases reached the Supreme Court, a taxpayer, who because of inclination or necessity desired to defer paying a disputed tax as long as possible and therefore chose to

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[49] *See* Part II, notes 25–54 and accompanying text.

[50] *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT, § 16.03 (3d ed. 1972) [hereinafter cited as DAVIS].

[51] *See* 67 CONG. REC. 524 (1925) (remarks of Mr. Green). Under the 1924 Act, the authorized membership of the Board for the first two years was 28, but after this initial period it was to decline to seven. Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 336. A.W. Gregg, representing Treasury at the Senate Finance Committee hearings on the 1924 Act, indicated that the business of the Board would be significantly reduced after it disposed of the excess profits tax cases growing out of the World War I period. *Hearings on H.R. 6715 Before the Comm. on Finance*, 68th Cong., 1st Sess. 24 (1924).

[52] If the collateral proceeding had been commenced in the Court of Claims, there would have been no appeal to a court of appeals. Rather, at that time, decisions of the Court of Claims were appealable only to the Supreme Court. [Currently, decisions of the United States Court of Federal Claims are appealable to the United States Court of Appeals for the Federal Circuit. *See* Part I, note 172 and accompanying text.]

[53] Blair v. Curran, 24 F.2d 390, 392 (lst Cir. 1928).

petition the Board, could be required to plead his case in three separate tribunals before receiving a final adjudication. Virtually all who considered the problem believed this to be unduly burdensome.[54] Additionally, since members of the Board were selected, at least in part, on the basis of their special expertise in taxation and financial matters, full-blown relitigation of their decisions was inappropriate and unnecessary.[55] Finally, the system under the 1924 Act was seen as contrary to sound judicial procedure because collateral attack permitted cases to be moved from a specialized court to a generalized court; "we go from an informed tribunal to an uninformed tribunal."[56]

For these reasons, the 1926 Act provided for direct appellate review of Board decisions in the Courts of Appeals,[57] the particular court in which the appeal would lie being prescribed by statutory venue rules.[58] Further appeal

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[54] 67 CONG. REC. 525 (1925) (remarks of Chairman Green); *id.* at 3755 (1926) (remarks of Senator David Reed of Pennsylvania); 1925 House Hearings*, supra* note 2, at 917 (testimony of former member Ivins). *But see infra* note 57.

[55] *See* H.R. REP. NO. 69-1, at 19–20 (1925); S. REP. NO. 69-52, at 36–37 (1926).

[56] 1925 House Hearings*, supra* note 2, at 894–95 (testimony of George Morris); *see also* H.R. REP. NO. 69-1, at 19 (1925); S. REP. NO. 69-52, at 36 (1926); 67 CONG. REC. 558 (1925) (remarks of Mr. Mills).

[57] Revenue Act of 1926, ch. 27, §§ 1001, 1003(a), 44 Stat. 109. The procedure ultimately enacted followed the recommendation of the tax committees of both Houses. H.R. REP. NO. 69-1, at 19–20 (1925); S. REP. NO. 69-52, at 36–37 (1926). As a result of a floor amendment, the bill as passed by the Senate provided for appeals from Board decisions to district courts, thence to courts of appeals, and thence, possibly, to the Supreme Court. 67 CONG. REC. 3754–58 (1926). The sponsor of the amendment, Senator James Reed of Missouri, believed it was desirable because it permitted taxpayers to take appeals of Board decisions in courts closer to their homes. *Id.* at 3755 (1926). The amendment was opposed on the ground that it would increase litigation. *Id.* (remarks of Senator David Reed of Pa.). The House-Senate conference removed the James Reed amendment. H.R. REP. NO. 69-356, at 26, 54 (1926).

[58] Revenue Act of 1926, ch. 27, § 1002, 44 Stat. 110. These rules could have substantive importance because the position of the various courts of appeals might differ with respect to the same issue, and the success of the taxpayer or the Government in a case might well then depend on appellate venue. Moreover, the rules could have procedural significance if an appeal was filed with the wrong appellate court and by the time the error was discovered it was too late to perfect an appeal to the proper court. Thus, to avoid many disputes and errors, it was important that the venue rules be unambiguous and easily understood.

The 1926 Act provided, in effect, four separate venue rules depending mainly on the nature of the taxpayer. First, in the case of an individual, proper venue was in the court of appeals for the circuit of which the individual was an inhabitant, or if the individual was not an inhabitant of any circuit, in the Court of Appeals of the District of Columbia. *Id.* § 1002(a). Second, in the case of a person other than an individual or a corporation, i.e., a trust or estate, proper venue was in the circuit could be obtained in the Supreme Court either upon certiorari issued upon the petition of a party or upon certificate of question by a court of appeals.[59] The appellate proceedings provided by the Act were the

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court for the circuit in which the collector of the tax to whom such person made the return was located, or, if no return was made, in the Court of Appeals of the District of Columbia. *Id.* § 1002(b). Third, in the case of a corporation, venue was determined under a three-tier rule: if the corporation had no principal place of business or principal office or agency in the United States, venue was in the Court of Appeals of the District of Columbia; if the corporation had such a place of business, office, or agency, venue was in the circuit court for the circuit in which was located the collector of tax to whom such corporation made the return, or, if no return was made, in the Court of Appeals of the District of Columbia. *Id.* § 1002(b), (c). Finally, the statute provided that "in the case of an agreement between the Commissioner and the taxpayer, [proper venue would be in] . . . the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement." *Id.* § 1002(d).

These rules may seem both comprehensive and comprehensible; they aroused no controversy at the time they were enacted. Nevertheless, problems soon emerged in their interpretation and they were revised in 1934. Revenue Act of 1934, ch. 277, § 519, 48 Stat. 760.

[59] The statutory provision could have been more clearly drafted:

> The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (*except as provided in section 239 of the Judicial Code, as amended*); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, *in the manner provided in section 240 of the Judicial Code, as amended.*

Revenue Act of 1926, ch. 27, § 1003(a), 44 Stat. 110 (emphasis supplied).

A cursory reading of this provision might indicate that Supreme Court review could only be by way of certiorari. However, § 239 of the Judicial Code provided for certification of questions to the Court by the courts of appeals, and § 240 provided for review by certiorari. Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938. Clearly, the implication was that both types of review could be had. In fact, one leading appeal from an early Board decision was reviewed by the Supreme Court as a certified question. *See* Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); *see also* Commissioner v. Independent Life Ins. Co., 288 U.S. 592 (1933).

Regrettably, the current codification perpetuates, and perhaps even increases, the ambiguity:

> The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, *except as provided in section 1254 of Title 28 of the United States Code*, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, *in the manner provided in section 1254 of Title 28 of the United States Code.*

exclusive means of review. Decisions of the Board became final six months after decision if no petition for review was filed.[60] Thereafter no other court could restrain collection of the tax or order that it be refunded.[61] In any further litigation, such as for collection of the tax, a final decision of the Board would be res judicata.[62]

With respect to the scope of appellate review, the statute specified that the Courts of Appeals and the Supreme Court

> shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.[63]

The reports of the Ways and Means and Finance Committees indicated that this language was intended to limit judicial review to questions of law,[64] a limitation comparable to that provided in appeals from determinations of the Federal Trade Commission.[65] The committees identified "questions of law" as including

> questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence. . . .[66]

The American Bar Association recommended that factual findings of the Board be accorded only prima facie weight;[67] Congress rejected this

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I.R.C. § 7482(a) (emphasis supplied). Section 1254 of title 28 includes the successor of both §§ 239 and 240 of the old Judicial Code. It is thus even less clear now whether the reference to review by certiorari is meant to be exclusive.

60 Revenue Act of 1926, ch. 27, §§ 1001, 1003(a), 1005(a)(1), 44 Stat. 109, 110.

61 Rev. Stat. § 3224 (1873); Revenue Act of 1926, ch. 27, § 284(d), 44 Stat. 67 (now codified at I.R.C. § 6512(a)); *see also, e.g.,* Baglivo v. Commissioner, 235 F. Supp. 493 (E.D. Pa. 1964).

62 *See, e.g.,* United States v. Bottenfield, 442 F.2d 1007 (3d Cir. 1971).

63 Revenue Act of 1926, ch. 27, § 1003(b), 44 Stat. 110.

64 H.R. REP. NO. 69-1, at 19–20 (1925); S. REP. NO. 69-52, at 36–37 (1926).

65 1925 House Hearings, *supra* note 2, at 894.

66 H.R. REP. NO. 69-1, at 19–20 (1925); S. REP. NO. 69-52, at 36 (1926).

67 The ABA made the following proposal:

> The findings of the board shall be prima facie evidence of the facts therein stated. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure

position on the ground that "the complicated and technical facts governing tax liability require a determination by a body of experts,"[68] a determination which should not be disturbed if supported by "at least some evidence."[69] Except for the ABA proposal, the scope of review question attracted little attention in 1926. Some two decades later, however, a serious controversy on this matter surfaced as the result of the Supreme Court decision in *Dobson v. Commissioner*.[70]

An important question that had to be confronted in connection with the new appellate procedure was the extent to which it would be permitted to be used by taxpayers simply as a means of delaying the payment of tax. Even under the 1924 Act, which did not provide appeal rights, many cases were being filed with the Board solely to delay collection of the tax.[71] With the granting of appeal rights, the danger of abuse was enhanced.

Although the delay problem was a serious one, the 1926 Act did not eliminate the ban on assessment or collection prior to Board determination.[72] However, if the decision of the Board was adverse to the taxpayer, an appeal of the adverse decision would not bar assessment or collection unless the taxpayer filed a bond with the Board on or before the date of filing of the appeal. The bond was to secure the payment of any tax

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> to adduce such evidence in the proceedings before the board, the court may order such additional evidence to be taken before the board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The board may modify its findings as to the facts or make new findings by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original decision with the return of such additional evidence.

1925 House Hearings, *supra* note 2, at 893–94.

[68] H.R. REP. NO. 69-1, at 19 (1925); S. REP. NO. 69-52, at 36 (1926).

[69] H.R. REP. NO. 69-1, at 20 (1925); S. REP. NO. 69-52, at 36 (1926).

[70] 320 U.S. 489 (1943), *rehearing denied*, 321 U.S. 231 (1944). *See* Part XI.H.8.

[71] 1925 House Hearings, *supra* note 2, at 912 (testimony of former member Ivins), 937 (testimony of A. W. Gregg, Solicitor of Internal Revenue). In the case of tax years prior to 1921, these delay tactics were even more advantageous to taxpayers, since the 1924 Act did not provide interest charges for late payment. *Id.* at 937; S. REP. NO. 69-52, at 33 (1926). This, of course, was a great inducement to use the Board procedure to increase the term of what amounted to an interest free loan. The 1926 Act eliminated this problem by providing that thenceforth interest was to be paid on all deficiencies regardless of the year to which they related. Revenue Act of 1926, ch. 27, § 283(d), 44 Stat. 64.

[72] Revenue Act of 1926, ch. 27, §§ 274(a), (b), 44 Stat. 55. An exception to this bar was made for so-called jeopardy assessments if the Commissioner believed collection of the tax would be jeopardized by delay in assessment. *Id.* § 279, 44 Stat. 59.

and interest thereon ultimately determined to be due.[73] The statute required Board approval of the surety for the bond and permitted the Board to fix the amount of the bond up to twice the deficiency on appeal.[74] The dual policies of the statute were to require payment or assurance of payment of any deficiency ultimately found due, and to discourage appeals from Board decisions simply to defer the day on which accounts had to be settled.[75] Another provision of the 1926 Act aimed at preventing the abuse of Board proceedings authorized the Board to impose a $10 fee for filing petitions.[76] Additionally, the Board, the Courts of Appeals, and the Supreme Court were provided with power to impose penalties or damages in appeals instituted merely for delay.[77]

The committee reports and congressional debates on the 1926 Act evidenced a particular concern with respect to the constitutionality of the new appellate procedure.[78] This concern probably stemmed from the 1923 decision in *Keller v. Potomac Electric Co.*[79] In *Keller*, the Supreme Court had refused jurisdiction granted it by statute to review a finding of the Public Utility Commission of the District of Columbia in a rate-making case. The Court found that its duties under the statute required review of the entire record below and, in effect, substitution of its discretion for that of the agency. The Court concluded that these duties, which permitted it "to

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[73] *Id.* § 1001(c), 44 Stat. 109. As originally reported to the House, the bill provided that no assessment was permitted until all rights of appeal were exhausted. H.R. REP. NO. 69-1, at 10 (1925). A committee amendment on the House floor eliminated this generous provision in order to conform the treatment of the taxpayer who had lost before the Board and was appealing, with the treatment of the taxpayer against whom a jeopardy assessment had been made. 67 CONG. REC. 896–97, 1136 (1925).

[74] Moreover, the Act also permitted the appellate court to require security in addition to the specific bond requirements. Revenue Act of 1926, ch. 27, § 1001(e), 44 Stat. 110.

[75] This policy has remained in effect up to the present. *See* I.R.C. §§ 7482(c), 7485.

[76] Revenue Act of 1926, ch. 27, § 1000, amending Revenue Act of 1924, § 904, 44 Stat. 106 (now codified at I.R.C. § 7451). The maximum fee that may be imposed by the Tax Court currently stands at $60.

[77] Revenue Act of 1926, ch. 27, §§ 1000 (*amending* Revenue Act of 1924, § 911), 1004, 44 Stat. 109, 110 (now codified at I.R.C. §§ 6673, 7482(c)(4)).

[78] H.R. REP. NO. 69-1, at 20 (1925); S. REP. NO. 69-52, at 37 (1926); 67 CONG. REC. 3756–57 (1926) (exchange between Senator David Reed of Pennsylvania and Senator Cummins of Iowa).

[79] 261 U.S. 428. That the *Keller* case was a matter of concern is indicated by commentary which appeared after the enactment of the 1926 legislation. Joseph Kahn, *The Status of the United States Board of Tax Appeals as a Judicial Body*, 7 NAT'L INC. TAX MAG. 135, 137–38 (1929); Joseph Kahn, *The Judicial Status of the Board of Tax Appeals*, 7 NAT'L INC. TAX MAG. 175, 177 (1929).

change present conditions and to guide future action,"[80] were essentially legislative or administrative, and did not involve a "case or controversy" within the meaning of article III of the Constitution.

The Board of Tax Appeals was technically an independent agency in the executive branch, and there was apparently some question whether its actions were reviewable by article III courts. During the Senate's consideration of the 1926 Act, Senator Albert B. Cummins expressed the "very gravest doubts" whether an article III court could directly review the decisions of an adjudicative body, the members of which were not afforded the protections of article III.[81] Theretofore, orders of the Interstate Commerce Commission and the Federal Trade Commission were reviewable in the federal courts, but so far as the Senator was concerned such review was not in the nature of a direct appeal as was being provided in the case of the Board.[82]

The committee reports on the 1926 Act revealed that Senator Cummins was not alone in his concern for the constitutionality of the appellate review procedure. These reports read very much like briefs in favor of sustaining the validity of the statute. Of particular interest was the implied distinction of *Keller* on the ground that the administrative action to be reviewed in tax matters was mandatory and not discretionary.

> In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy such as injunction, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency

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[80] 261 U.S. at 440.

[81] 67 CONG. REC. 3756 (1926).

[82] *Id.* This same observation was made in James Craig Peacock, *An Anomalous and Topsy-Turvy Appellate System*, 19 A.B.A. J. 11 (1933). No such distinction was made by the Supreme Court when it, in 1929, approved the constitutionality of the appellate procedure; in fact, the Court cited the experience with the Interstate Commerce Commission and the Federal Trade Commission as support for its holding. Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 722–23 (1929).

> decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either question of law or fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.
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> The principles discussed in the preceding paragraph are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, as in the importation of merchandise and the admission of aliens. In adhering to such principles the committee is of the opinion that it is establishing an appellate procedure that is unquestionably constitutional.[83]

One senses in this excerpt a desire to clarify the view that, at least as far as Congress was concerned, the *Keller* decision was not to be interpreted as precluding appellate review of administrative fact finding. Although appellate review was limited under the statute to questions of law, that limitation was made for policy reasons and not on constitutional grounds.[84]

Three years later the constitutionality of these provisions was upheld by the Supreme Court in *Old Colony Trust v. Commissioner*.[85] Without citing the *Keller* decision, the Court concluded that review of Board decisions had all the necessary requisites of a constitutional case or controversy. Although in the view of the Court, the Board was not a "court" but was rather an "executive or administrative board,"[86] appeals from its decisions involved

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[83] S. REP. NO. 69-52, at 37 (1926); *see also* H.R. REP. NO. 69-1, at 20 (1925).

[84] History has vindicated the judgment of the tax committees. In 1948, Congress expressly provided for the same review of factual determinations of the Tax Court as is accorded to findings of a district court sitting without a jury. Act of June 25, 1948, ch. 646, § 36, 62 Stat. 991. No challenge to this provision has ever been sustained. Although the area is not completely settled, it would seem that Congress, or, in appropriate cases, the courts, may undertake broad factual review of administrative fact finding. *See* DAVIS, *supra* note 50, at §§ 29.01, 29.07, 29.09; *see also* Administrative Procedure Act, ch. 324, § 10(e), 60 Stat. 243 (1946) (now codified at 5 U.S.C. § 706(2)(E)), providing that a reviewing court must set aside administrative findings if "unsupported by substantial evidence."

[85] 279 U.S. 716 (1929).

[86] *Id.* at 725. This view of the Board did not, in *Old Colony*, result in treating the Board's decisions differently from those of a "court." Occasionally, however, there has been a different result. Blair v. Oesterlein Mach. Co., 274 U.S. 220 (1927) (Supreme Court refused to pass on issue not raised below, partly because the proceeding originated in an administrative agency rather than a court); Lasky v. Commissioner, 235 F.2d 97 (9th Cir. 1946), *aff'd per curiam*, 352 U.S. 1027 (1957)

adverse parties disputing substantive claims based on federal law, and it was not constitutionally significant whether the federal courts had jurisdiction to review de novo the decisions of the Board or only could exercise appellate jurisdiction based on a record made before the Board.[87]

D. Jurisdiction

1. Exclusivity of Board Jurisdiction

Under the 1924 Act, the taxpayer had several alternative forums to contest tax liability. If a deficiency was asserted, he could either petition the Board for redetermination[88] or pay the tax and sue for refund in a district court or the Court of Claims.[89] If no deficiency was asserted but the taxpayer concluded that he had overpaid his tax voluntarily, he could claim a refund, and if it was not allowed he could sue for refund in either district court or the Court of Claims, but not in the Board.[90] Early versions of the Revenue Bill of 1926 proposed drastic changes in this system of review by limiting the availability of refund actions and expanding the areas of exclusive Board jurisdiction.

In hearings before the Ways and Means Committee, taxpayer representatives urged that Board jurisdiction be expanded to include refund claims. Board procedures were cheaper, quicker, and less complicated than those applicable in other courts, and taxpayers who had paid a disputed tax should be entitled to these benefits.[91] Chairman Green was inclined to agree with this position.[92] Secretary Mellon and Solicitor Gregg, however, opposed such a change on the ground that the Board was not equipped to handle the increased workload that would result—some 78,000 active claims for refund were pending within the Bureau, and theoretically all

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(since Tax Court was an administrative agency and not a court, it had no equitable powers to vacate a decision after it became final).

[87] 279 U.S. at 724–25. *Old Colony* involved a case in which the taxpayer was appealing from an unfavorable decision of the Board, and was, at the same time, questioning the constitutionality of the procedure. The procedure involved when the Government is the appealing party has also been sustained against the contention that no case or controversy exists when the dispute is between two agencies of the Government (the Board of Tax Appeals and the Bureau of Internal Revenue), as when the Board's decision was favorable to the taxpayer. Commissioner v. Liberty Bank and Trust Co., 59 F.2d 320 (6th Cir. 1932).

[88] Revenue Act of 1924, ch. 234, § 274, 43 Stat. 297.

[89] *See* Part I, notes 142–197 and accompanying text.

[90] *Id.*; Part II, notes 142–144 and accompanying text.

[91] 1925 House Hearings*, supra* note 2, at 849 (testimony of D.A. Smith, American Paper and Pulp Assoc.), 854 (testimony of Dr. Joseph J. Klein).

[92] *Id.* at 849. *But see* 67 CONG. REC. 524 (1925) (remarks of Chairman Green).

these claims could end up before the Board if its jurisdiction were expanded.[93] Moreover, the Board had been established principally to afford a day in court to the taxpayer before he was required to pay his tax; in refund cases, the tax had already been paid, and the reason for a hearing before the Board was eliminated.[94]

Apparently, the Ways and Means Committee and the House saw merit in both positions, and the bill as reported to and passed by the House attempted to find a middle ground. The Board would not be given jurisdiction of refund claims then before the Bureau. However, with limited exceptions, in the case of future deficiency determinations, a taxpayer's only remedy would be to use the Board procedure.[95] Thus, taxpayers would not be permitted the option of paying a deficiency and then suing for refund in district court or the Court of Claims. Moreover, once the Commissioner had asserted a deficiency for a tax year, all questions of tax liability for that year could only be litigated before the Board. If a taxpayer against whom a deficiency was asserted believed that not only was no deficiency due but that he had overpaid his tax for the year, he would be required to submit the questions of the deficiency and the overpayment to the Board.

Although the refund action in district court and the Court of Claims was not completely abolished by the House bill (it would continue to be available in cases in which no deficiency notice was issued),[96] the Senate Finance Committee concluded that the House provision barring recourse to traditional forums in refund cases was "too drastic."[97] Accordingly, it restored the prior practice of permitting the taxpayer who had received a deficiency notice the option of either filing a petition with the Board, or

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[93] 1925 House Hearings, *supra* note 2, at 10, 934; *see also id.* at 923–24 (testimony of former Chairman Hamel).

[94] *Id.* at 934.

[95] As passed by the House, § 281(d) of the bill provided:

> If the Commissioner has notified the taxpayer of a deficiency, or has made . . . [a jeopardy assessment], the right of the taxpayer to file a petition with the Board of Tax Appeals and to appeal from the decision of the Board to the courts shall constitute his sole right to contest the amount of the tax for the taxable year in respect of which the Commissioner has determined the deficiency, and, whether or not he files a petition with the Board, no credit or refund in respect of such tax shall be made and no suit for the recovery of any part of such tax shall be maintained in any court . . .

The principal exceptions to the bar on refunds were: (1) if the Board, having obtained jurisdiction as the result of the mailing of a deficiency notice, determined an overpayment, or (2) if the taxpayer could prove the notice of deficiency was not received by him within 45 days from the date it was mailed.

[96] H.R. REP. NO. 69-1, at 10, 13–14 (1925).

[97] S. REP. NO. 69-52, at 25–26 (1926).

paying the tax and suing for refund in either district court or the Court of Claims.[98] In conference the House receded from its position.[99]

If enacted, the House proposal would have had a profound influence on tax litigation by requiring that virtually all tax controversies be heard by the Board. But this was not the only jurisdictional issue dealt with, and several other jurisdictional amendments were actually effected by the 1926 legislation. Although none of them were controversial, they were of some significance and were the most complicated features of the new legislation dealing with the Board.[100]

2. Effect of Payment and Limited Refund Jurisdiction

The 1926 Act adopted two important jurisdictional changes involving the related subjects of the effect of payment on the Board's power to review a deficiency assertion and the jurisdiction of the Board to consider whether an overpayment of tax had been made. The Board had held that, under the 1924 Act, it lost jurisdiction of any case in which the deficiency asserted by the Commissioner was paid by the taxpayer prior to the time the Board rendered its decision.[101] The Board's only authority was to determine the existence of a deficiency; if the asserted deficiency was paid, the Board had nothing to decide. Similarly, since no deficiency was involved, the Board had held that the 1924 legislation gave it no authority to decide whether a taxpayer was entitled to a refund of tax.[102]

The first of these rulings burdened those taxpayers who wished to avail themselves of the Board procedure but wanted to forestall the running of interest on any deficiency ultimately found by paying the tax asserted in the deficiency notice. Such a taxpayer could use the Board procedure or pay the tax; the taxpayer could not do both. The second ruling made the Board procedure cumbersome for the taxpayer against whom a deficiency was asserted but who believed that not only was no deficiency due, but also that the taxpayer had overpaid the tax. The taxpayer could contest the asserted deficiency before the Board but could obtain a refund only by instituting an action in district court or the Court of Claims—even though the deficiency related to the same year as the overpayment or the same issue.

The House version of the bill, which virtually abolished separate refund proceedings, provided the Board with jurisdiction to determine all questions

[98] *Id.*

[99] H.R. REP. NO. 69-356, at 48–49 (1926).

[100] For contemporary descriptions of these changes, *see* Latham, *supra* note 36; Herman T. Reiling, *Changes in the House Bill Affecting Taxable Income*, 4 NAT'L INC. TAX MAG. 6 (1926); Willis W. Ritter, *Jurisdiction of the Board of Tax Appeals Under Act of 1926*, 4 NAT'L INC. TAX MAG. 128 (1926).

[101] Northwestern Mut. Life Ins. Co., 1 B.T.A. 767 (1925).

[102] Everett Knitting Works, 1 B.T.A. 5 (1924).

of tax liability for the tax year in issue, including whether the taxpayer was entitled to a refund.[103] Conversely, the bill permitted the Board to determine a greater deficiency than that initially asserted by the Commissioner in the deficiency notice and authorized the Board to prescribe rules governing "under what conditions and at what times" the Commissioner could assert the additional tax.[104]

Senate amendments eliminated the Board's exclusive jurisdiction over tax years for which a deficiency notice was issued. The taxpayer's option of either contesting the deficiency before the Board, or paying the deficiency and seeking a refund by way of suit in either district court or the Court of Claims was preserved. The Senate, however, did not completely revert to the statutory scheme that existed under the 1924 Act. In the first place, the Senate substantially adopted the House provision granting the Board plenary jurisdiction to redetermine tax liability with respect to any year for which a petition was filed. Thus, the Board could determine a greater deficiency than was initially asserted if the additional amount was claimed by the Commissioner at or before the Board hearing, or it could find that no deficiency existed and that the taxpayer had overpaid his tax for the year

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[103] The text of the House version of the bill is reproduced below:

> If the Board of Tax Appeals finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer . . . .

H.R. 1, 69th Cong., 1st Sess. § 281(e) (1925), as passed by the House, *as enacted*, Revenue Act of 1926, ch. 27, § 284(e), 44 Stat. 67. This statute, as amended, is now codified at I.R.C. § 6512(b)(1).

[104] H.R. 1, 69th Cong., 1st Sess. § 274(e) (1925), as passed by the House. The final version of the Act made no reference to the Board's power to make rules governing the assertion of greater deficiencies. Revenue Act of 1926, ch. 27, § 274(e), 44 Stat. 56 (now codified at I.R.C. § 6214(a)). Nevertheless, in its first revision of its rules of practice and procedure after enactment of the 1926 Act, the Board amended the rule with respect to the burden of proof to put the burden on the Commissioner "in respect of any new matter of fact pleaded in his answer . . . ." B.T.A. RULE 30 (April 1, 1926 ed.)

with a resulting entitlement to a refund or credit.[105] These provisions were retained in the final version of the Act. [106]

Additionally, the Senate bill provided that a taxpayer could waive the restrictions on assessment and collection imposed during the pendency of a Board proceeding, and pay the asserted deficiency. Such a waiver would not prevent the taxpayer from receiving a refund or credit of tax as a result of a Board determination that the deficiency was less than that asserted by the Commissioner.[107] This amendment permitted a taxpayer to forestall the running of interest by paying the asserted deficiency without thereby depriving the Board of jurisdiction to decide the proper amount of tax due. The conference accepted the amendment.[108]

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[105] H.R. 1, 69th Cong., 1st Sess. §§ 274(e), 284(e) (1926), as passed by the Senate. Under the House bill, the Commissioner was not restricted to raising the deficiency at or before the Board hearing. This was believed to be unjust as not giving sufficient opportunity to the taxpayer to rebut the claim for additional tax. 67 CONG. REC. 3376 (1926).

[106] Revenue Act of 1926, ch. 27, §§ 274(e), 284(e), 1001, 1005, 44 Stat. 56, 67, 109, 110. These provisions, as amended, are now codified at I.R.C. §§ 6214(a), 6512(b)(1).

[107] H.R. 1, 69th Cong., 1st Sess. § 274(d) (1926), as reported by the Senate Finance Comm. provided as follows:

> The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to wave the restrictions provided in subdivision (a) of this section on the assessment and collection of the whole or any part of the deficiency. Such waiver shall not bar the taxpayer from receiving a credit or refund under subdivision (e) of section 284 if the decision of the Board which has become final determines an overpayment of tax in respect of the year to which the waiver relates.

The House bill did not deal specifically with the question of whether Board jurisdiction would be lost if the contested deficiency was paid by the taxpayer prior to the time the Board rendered its decision. The Board was given exclusive jurisdiction over any year with respect to which a deficiency notice was issued and could, if no deficiency was found, determine an overpayment of tax that would be refunded or credited to the taxpayer. However, as used in the bill, "deficiency" seemed to refer only to the deficiency originally determined by the Commissioner, and the language was at least susceptible to the interpretation that no overpayment could be determined if at least some portion of the deficiency was correct. Thus, if the Commissioner determined a deficiency of $1,000 that the taxpayer paid before the rendition of the Board decision, and the Board determined a deficiency of $1, arguably no overpayment of $999 could be determined by the Board because there was a deficiency. H.R. 1, 69th Cong., 1st Sess. § 281(e) (1925), as passed by the House.

[108] H.R. REP. NO. 69-356, at 40 (1926); Revenue Act of 1926, ch. 27, § 274(d), 44 Stat. 56 (now codified at I.R.C. § 6213(d)).

3. Jeopardy Assessments

Other important jurisdictional changes from the 1924 Act were made with respect to jeopardy assessments. In general, both the 1924 and 1926 Acts provided that a deficiency could be neither assessed nor collected until 60 days following the mailing of a deficiency notice, and, if a petition was filed with the Board with respect to the notice, the bar on assessment and collection was further extended until the Board rendered its decision.[109]

In spite of the general policy of forbidding the Commissioner from assessing or collecting a deficiency before the taxpayer was afforded an opportunity for a hearing before the Board, an exception was necessary in those cases in which a delay in assessment would jeopardize collection of the tax. Circumstances jeopardizing collection could arise in cases in which fraud was suspected or an imminent bankruptcy could deplete the assets of the taxpayer necessary to pay the asserted tax.[110] To prevent disruptions in tax collections for these reasons, the 1924 and 1926 Acts authorized the Commissioner to make jeopardy assessments regardless of whether a deficiency notice had been sent to the taxpayer and regardless of whether the question of liability for the tax assessed was pending before the Board.[111] The jeopardy assessment could vary from the deficiency asserted in a deficiency notice, if any, and could be made up to the time when the decision of the Board became final.[112] The action of the Commissioner in

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[109] Revenue Act of 1924, ch. 234, § 274(a)–(c), 43 Stat. 297; Revenue Act of 1926, ch. 27, § 274(a)–(c), 44 Stat. 55.

Under the 1924 Act, a taxpayer aggrieved by a premature assessment was not given any express statutory remedy, and in one case, it was held that no injunction could be obtained against an illegal assessment. Joseph Garneu Co. v. Bowers, 8 F.2d 378 (S.D.N.Y. 1925). *Contra* Lafayette Worsted Co. v. Page, 6 F.2d 399 (D.R.I. 1925). *See* Rev. Stat. § 3224 (1873) (now codified at I.R.C. § 7421(a). In the 1926 Act, this problem was eliminated by a provision authorizing an injunction against a premature assessment or collection. Revenue Act of 1926, ch. 27, §§ 274(a), 508(d), 44 Stat. 55 (now codified at I.R.C. § 6213(a)).

[110] *See* 1 LAURENCE F. CASEY, FEDERAL TAX PRACTICE § 2.18 (1955). Until 1926, the Commissioner also viewed the expiration of the period of limitations on assessment as jeopardizing collection of the tax. *See* Part I, notes 114–120 and accompanying text.

[111] Revenue Act of 1924, ch. 234, § 274(d), 43 Stat. 297; Revenue Act of 1926, ch. 27, § 279, 44 Stat. 59.

[112] Revenue Act of 1924, ch. 234, § 274(d), 43 Stat. 297; Revenue Act of 1926, ch. 27, § 279(c)–(e), 44 Stat. 59. Under the 1926 Act, the Board decision was not technically final until rights of appeal had been exhausted, but no jeopardy assessment could be made after a petition for review of a Board decision was filed. *Id.* § 279(e), 44 Stat. 60. Generally, the 1926 Act prevented the Commissioner from sending a second deficiency notice for the same year if a petition was filed with the Board with respect to the first notice. *Id.* § 274(f), 44 Stat. 56. By employing the

issuing jeopardy assessments, although not originally subject to review, withstood constitutional attack.[113]

Under the 1924 Act, a taxpayer against whom a jeopardy assessment had been made could contest the assessment in one of two ways. First, the taxpayer could pay the assessment and pursue the standard refund procedure before the Bureau and the courts.[114] This procedure precluded a hearing before the Board. Alternatively, the taxpayer could file a claim in abatement with the Bureau accompanied by a satisfactory bond in an amount up to twice the amount of the claimed abatement.[115] Collection of the tax would then be stayed pending Bureau consideration of the claim.[116] The Commissioner was required to notify the taxpayer of his decision, and if the claim was denied in whole or in part the taxpayer could, within 60 days of the mailing of notice of the denial of the claim, petition the Board

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jeopardy assessment device, the Commissioner could avoid this prohibition since the jeopardy assessment could be more or less than the deficiency originally asserted. *Id.* § 279(c), 44 Stat. 59. The only limitation imposed on this power provided that after the Board had rendered a decision, the jeopardy assessment could be no more than the deficiency determined by the Board. *Id.* § 279(d), 44 Stat. 60.

113 Phillips v. Commissioner, 283 U.S. 589 (1931); *see also* S. REP. NO. 69-52, at 27 (1926); Couzens v. Commissioner, 11 B.T.A. 1040 (1928); California Associated Raisin Co., 1 B.T.A. 1251 (1925). However, through two opinions issued in the mid-1970's, the Supreme Court raised concerns over the constitutional adequacy of the then-existing procedures for challenging a jeopardy assessment. *See* Laing v. United States, 423 U.S. 161, 185–88 (1976) (Brennan, J., concurring) (raising Fifth Amendment Due Process concerns that were avoided by the majority's statutory construction); Commissioner v. Shapiro, 424 U.S. 614, 629 (1976) (noting that "the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of pre-deprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made"). Shortly after these decisions, Congress enacted § 7429 as part of the Tax Reform Act of 1976 to provide taxpayers with additional procedural protections in this setting. To start, the statute provides taxpayers with a right to an administrative review of the jeopardy assessment. *See* I.R.C. § 7429(a)(2), (3). As originally enacted, taxpayers could seek judicial review of this administrative proceeding (or lack thereof) in Federal district court only. *See* I.R.C. § 7429(b)(2). As modified in 1988, the statute now permits taxpayers to seek judicial review in the Tax Court if the taxpayer had previously invoked the court's deficiency jurisdiction with respect to the tax liability that serves as the subject of the assessment. *See* I.R.C. § 7429(b)(3). The Tax Court's jurisdiction in this setting is discussed in more detail in Part VI.C.1.

114 Revenue Act of 1924, ch. 234, §§ 281(a), 1011, 1012, 1014, 43 Stat. 301, 342, 343.

115 *Id.* § 279(a), 43 Stat. 300.

116 *Id.*

to review the Commissioner's action.[117] Collection of the tax would continue to be stayed until the Board's decision.[118] If the claim was allowed by the Board, the Commissioner could initiate suit in court to collect the tax that had been assessed, but the Commissioner could not collect the tax before obtaining a favorable judgment.[119] If the Board, on the other hand, denied the claim, the tax would be immediately collected and the taxpayer could pursue a refund action.[120] Thus, under a textual reading of the 1924 Act, the only means by which a taxpayer could obtain a Board hearing was to file a claim in abatement, accompanied by a bond.[121] Board review would be predicated not on the determination of a deficiency, but rather on the denial of the claim in abatement.

In its version of the 1926 Revenue Bill, the House, which had eliminated federal court refund actions even with respect to jeopardy assessments,[122] generally retained the claim in abatement procedure that had applied under the 1924 Act.[123] However, because this procedure was to be the only means of obtaining judicial review of jeopardy assessments, and because not all taxpayers could obtain bonds, claims in abatement were permitted to be filed even if not accompanied by a bond.[124] In such a case the tax would be collected and the Bureau would then review the merits of the claim. If the claim was denied, the taxpayer could appeal to the Board, and if the Board allowed the claim, the collected tax would be refunded to the taxpayer.

The House bill continued the 1924 Act feature predicating Board review of a jeopardy assessment on the denial of a claim in abatement. Such review was distinct from review of a deficiency determination, and once a jeopardy assessment was made, all prior Board proceedings with respect to a deficiency notice would be terminated. Because the House bill allowed a jeopardy assessment any time before a decision of the Board became final or an appeal from a Board decision was perfected,[125] some cases could

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117 *Id.* § 279(b).

118 *Id.* § 279(a).

119 *Id.* § 279(b).

120 *Id.*

121 *Id.* *But see* California Associated Raisin Co., 1 B.T.A. 1251 (1925); Northwestern Mut. Life Ins. Co., 1 B.T.A. 767 (1925); California Associated Raisin Co., 1 B.T.A. 314 (1925).

122 *See supra* notes 91–95 and accompanying text.

123 H.R. 1, 69th Cong., 1st Sess. §§ 274(d), 279 (1925), as passed by the House.

124 67 CONG. REC. 897 (1925).

125 As passed by the House, the bill provided that a jeopardy assessment, in any amount, could be made at any time prior to a decision by the Board with respect to the tax year. H.R. 1, 69th Cong., 1st Sess. § 274(d) (1925). Moreover, even after a decision by the Board, a jeopardy assessment could be made until the earlier of the expiration of the 90-day appeal period, or the filing of an appeal bond, although in

require two hearings in the Board, one hearing with respect to the original deficiency notice and a later hearing based on the denial of a claim in abatement.

The Senate approved of late jeopardy assessments because collection of tax could become jeopardized at any time, and, to protect the revenues, summary assessment would have to be allowed until either completion of the judicial proceedings or until an appeal bond was filed.[126] However, the claim in abatement procedure would be unnecessarily complicated for a taxpayer required to bring his case to the Board twice.[127] Moreover, the procedure was to some extent a waste of time because it required administrative review of a jeopardy assessment that had already been approved. Accordingly, the Senate bill substituted a streamlined procedure for obtaining Board review of taxes subject to a jeopardy assessment. If the assessment was made prior to the mailing of a deficiency notice, the Senate bill required the Commissioner to mail such a notice within 60 days after making the assessment.[128] The taxpayer could then file a petition with the Board based on that notice and the Board would proceed to determine tax liability for the year.[129] If, on the other hand, the jeopardy assessment was made after a deficiency notice had been sent, the assessment would not terminate Board jurisdiction based on the original notice, and the Board's proceeding would simply continue.[130] No jeopardy assessment could be made after the Board's decision became final or was appealed to a court of appeals.[131] Regardless of when the jeopardy assessment was made, the taxpayer was extended the option of either paying the tax assessed or staying payment by filing a satisfactory bond.[132] Whether or not a bond was filed would not affect Board jurisdiction; as under the House bill, if the assessment was paid, the Board proceeding would become in effect a refund action. As a result of these changes, the claim in abatement became unnecessary and was abolished.[133] The conference committee on the 1926

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such a case the amount of the assessment could not exceed the deficiency found by the Board. *Id.* Thus, jeopardy assessments were permitted even after the Board proceeding was virtually completed.

[126] *See* S. REP. NO. 69-52, at 27 (1926).

[127] *Id.* at 26–27.

[128] H.R. 1, 69th Cong., 1st Sess. § 279(b) (1926), as passed by the Senate.

[129] *Id.* §§ 274(a), 279(c).

[130] *Id.* § 279(c).

[131] *Id.* § 279(d).

[132] *Id.* § 279(f).

[133] *Id.* § 279(k).

Revenue Bill accepted the Senate modifications,[134] and a procedure was thereby established that remained in place for decades.[135]

E. Members

The provisions of the 1926 Act concerning appeals and jurisdictional matters were of long-lasting importance to the Board, but they aroused little controversy compared to those aspects dealing with Board membership—the number of members, their salary, tenure, background, appointment and removal, and the restrictions on their practice after they left office.

To some extent the concern about these matters related to the efficiency and productivity of the Board. In its first months of existence, the Board managed to keep pace with its workload, but the number of cases being

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[134] H.R. REP. NO. 69-356, at 42 (1926).

[135] Revenue Act of 1926, ch. 27, § 279, 44 Stat. 59 (now codified, as amended, at I.R.C. §§ 6861, 6863). [As part of the Tax Reform Act of 1976, Congress enacted § 7429 to provide for administrative and judicial review of jeopardy assessments. These provisions, and the Tax Court's limited jurisdiction in this setting, are discussed in Part VI.C.]

In addition to the provisions described above, various other jurisdictional changes were initiated in 1926 that have persisted to the present. These included:

1. A determination that an additional tax was due because of a "mathematical error appearing upon the face of the return" was not to be appealable to the Board and was subject to summary assessment. Revenue Act of 1926, ch. 27, § 274(f), 44 Stat. 56 (now codified at I.R.C. § 6213(b)(1)).

2. In redetermining a deficiency for a tax year, the Board could consider facts with relation to tax liability for other years, but could not redetermine tax liability for such other years. *Id.* § 274(g) (now codified at I.R.C. § 6214(b)).

3. The Board could determine the applicability of penalties, additional amounts, and additions to tax, as well as tax liability. *Id.* § 274(e) (now codified at I.R.C. § 6214(a)). The Board had held that it possessed such jurisdiction under the 1924 Act, *see* Gutterman Strauss Co., 1 B.T.A. 243 (1924), but the issue was not free of doubt.

4. Upon the adjudication of bankruptcy or the appointment of a receiver, the Commissioner was directed to assess tax deficiencies immediately, and the taxpayer was not permitted to petition the Board for redetermination. Revenue Act of 1926, ch. 27, § 282(a), 44 Stat. 62 (now codified at I.R.C. § 6871).

5. The period for filing a petition after the mailing of the deficiency notice was extended by one day if the last day of the regulation period fell on a Sunday. *Id.* § 274(a), 44 Stat. 55 (now codified at I.R.C. § 6213(a)).

6. The Board could increase the deficiency above the amount originally determined by the Commissioner, but the increased amount could not be asserted by the Commissioner in a further deficiency notice if a petition to the Board was filed with respect to the first notice. Rather, the increased amount would have to be asserted to the Board at or before the hearing. *Id.* §§ 274(e), (f), 44 Stat. 56 (now codified at I.R.C. §§ 6212(c), 6214(a)).

brought was increasing dramatically and doubts were expressed whether the Board could continue to be effective if it became burdened with an unmanageable backlog.[136] The number and quality of members would bear directly on the dispatch with which cases could be considered and disposed.

1. Number of Members

The 1924 Act authorized the appointment of up to 28 members for a two-year period ending June 2, 1926,[137] at which time the terms of all the members appointed during the initial period were to expire and the permanent membership of the Board was to be reduced to seven.[138] Despite the authorization for 28 members during the two-year period, only 12 persons were originally appointed to the Board, and at no time did the membership exceed 16.[139]

By 1925, most observers were agreed that a seven-member Board would be insufficient, and debate centered on how many more than that figure would be needed. Although some support existed for maintaining the authorized Board membership at 28, at least temporarily,[140] a consensus soon developed for a somewhat smaller number. The Administration, while not taking a definitive position on the issue, contended that membership should be no less than 16.[141] This view was publicly supported by Board Chairman Korner, who doubted that the Board could function with less than its current membership of 15[142] and suggested that 16 would be preferable.[143]

Because the Board was generally expected to encounter difficulties in keeping current with its caseload, it is somewhat surprising that only minimal support developed for providing a membership substantially in excess of 16. Even strong supporters of the Board rejected the idea of a larger membership because of the effect it would have on the Board's mode of operation.[144] The Board held regular meetings to review decisions prior

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136 Nelson T. Hartson, *The Board of Tax Appeals in its Relation to the Bureau of Internal Revenue*, 3 NAT'L INC. TAX MAG. 215, 216–17 (1925).

137 Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 336.

138 *Id.* §§ 900(a), (b).

139 *See* Part II, notes 180–191 and accompanying text.

140 1925 House Hearings, *supra* note 2, at 66 (testimony of James Emery, Nat'l Ass'n of Mfrs.), 81 (statement of N.Y. State Soc'y of C.P.A.'s).

141 *Id.* at 10 (testimony of Secretary Mellon).

142 *Id.* at 868.

143 *Id.* at 873. There could then be sufficient personnel for five separate three member divisions in addition to the chairman. *See also id.* at 883 (testimony of George Morris, Am. Bar Ass'n).

144 Ivins, *supra* note 33, at 391; 1925 House Hearings, *supra* note 2, at 883 (testimony of George Morris, Am. Bar Ass'n). In the summer of 1925, a legislative

to their promulgation,[145] because decisions rendered in this manner would likely be well considered and not in conflict with earlier precedent. A large membership might reduce the Board's ability to function in this manner.

> The committee doubts whether any number in excess of 16 could continue to meet informally and avoid getting into the dangerous realm of requiring a formal procedure, thereby turning its judicial discussions into a form of parliamentary meeting conducted under artificial rules.[146]

Additionally, maintaining a 16-member Board would permit the reappointment of the existing members, who were favorably viewed by the public, but would not so increase the size of the body that new appointments might change its character.[147]

Not everyone was of the view that the Board should be composed of 16 members or more. Some critics contended that the Board should be smaller, and proposals were made for six, seven, eight, ten, and twelve members. These proposals were based on diverse grounds. Some felt that the increase in tax litigation was due to problems within the Bureau, "the officious agents who stir up tax questions and then keep them pending and pending and pending for the purpose of keeping themselves in positions and drawing their salaries."[148] If the Bureau were managed properly, these abuses would cease and the volume of tax litigation would be reduced dramatically. Others believed that the best solution to the problem of tax administration was to improve the law by creating an income tax that by virtue of its simplicity and clarity would not generate many disputes. Such improvement would obviate the necessity of "multiplying staffs and benches of lawyers."[149] Finally, there were those who argued that although

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committee of the Board suggested a permanent membership of 19. *See* Graupner, *supra* note 38. Its concern was to have enough members to deal with the increasing caseload. However, this proposal was never advanced in public.

145 H.R. REP. NO. 69-1, at 18 (1925); S. REP. NO. 69-52, at 34–35 (1926).

146 H.R. REP. NO. 69-1, at 18 (1925); S. REP. NO. 69-52, at 34–35 (1926).

147 1925 House Hearings, *supra* note 2, at 884 (testimony of George Morris, Am. Bar Ass'n).

148 67 CONG. REC. 1127 (1925) (remarks of Mr. Edwards). Mr. Edwards preferred a Board of six, eight, or ten members. *Id.* at 1128.

149 S. REP. NO. 69-52, Part 2, at 13 (1926). The report of the Finance Committee minority recommended a Board of 12 to be reduced to seven within five years. Congressman Edwards, an advocate of reducing Government spending by eliminating unnecessary commissions, boards, and bureaus, warned that Americans might find themselves in the position of a man lynched by a lawless mob around whose neck a placard had been hung "I am in statu quo."

> The people from around the country gathered and viewed the situation, but they could not make out this Latin: "Statu quo." They sent for the

there were bound to be many uncertainties in the tax law, the volume of case precedents that was being accumulated would soon answer most of the questions raised by the statute. When that happened, the number of cases would diminish, and a smaller Board would be sufficient.[150] Board supporters confronted these arguments by pointing out that tax litigation was increasing and showed no sign of lessening in the foreseeable future.[151] Additionally, a reduction in the number of Board members might jeopardize the practice of holding hearings outside Washington, D.C. These hearings were considered an important function of the Board, but they reduced its efficiency. A small Board might not be able to continue them.[152]

In the final analysis, the controlling consideration was probably that the Board seemed successful with its current membership and any congressional tinkering would be unlikely to improve it. Accordingly, a membership of 16 was proposed by both tax committees[153] and incorporated in the bills as passed by the House and the Senate. The only disagreement between the two bodies on this issue related to a Senate amendment authorizing the President to reduce the number of members in the event of a decrease in the volume of tax litigation.[154] The Senate amendment was rejected in conference,[155] and the authorized membership of the Board/Tax Court remained at 16 until 1981.

Citing the expanded jurisdiction of the Tax Court and the growth of complex tax litigation in the tax shelter arena,[156] Congress in 1980 increased

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> justice of the peace, the wise man of the community, to come over and interpret the Latin. The old justice came over, with his dictionary, viewed the remains, took in the situation, and said: "That is Latin, and the best I can make out of it is it means, in this case, 'I am in a hell of a fix.'"

67 CONG. REC. 1127 (1925).

[150] 67 CONG. REC. 3749 (1926) (remarks of Senator King).

[151] *Id.* at 1128 (remarks of Messrs. Green and Garrett).

[152] *Id.* at 3749 (remarks of Senator George).

[153] H.R. REP. NO. 69-1, at 18 (1925); S. REP. NO. 69-52, at 34 (1926).

[154] Pursuant to the Senate bill, the President was authorized to reduce by executive order the number of members of the Board if he determined that the functions of the Board could be performed by less than the number of members then in office. After the promulgation of such an order, no further appointments to the Board could be made until its membership was reduced below the number of members specified in the order. H.R. 1, 69th Cong., 1st Sess. § 1000, *amending* Revenue Act of 1924, § 901(c) (1926), as reported to and passed by the Senate; S. REP. NO. 69-52, at 35 (1926).

[155] H.R. REP. NO. 69-356, at 53 (1926); Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 900, 44 Stat. 105 (now codified at I.R.C. § 7443(a)).

[156] S. REP. NO. 96-933, at 2 (1980).

the membership of the Tax Court from 16 to 19.[157] As part of the same legislation, Congress dropped the statutory prohibition on individuals being appointed to Tax Court bench after attaining age 65.[158] In addition to expressing concern that the prohibition could deprive the court of experienced personnel, Congress noted the incongruity of the provision with federal policies against age discrimination.[159] These legislative changes to the contours of the Tax Court bench took effect on February 1, 1981.[160]

2. Compensation of Members

The 1924 Act had set Board members' compensation at an annual rate of $7,500,[161] despite a strong Administration plea that the figure should be $10,000.[162] In 1925, a renewed effort was made to have the compensation increased.

Some were opposed to increasing Board members' pay, especially in the Senate, where a provision to retain the $7,500 salary was defeated 41 to 19.[163] The sponsor of the provision, Senator King, objected to the increase on the ground that many of the Board members came from the Bureau where they earned at most $6,000. Moreover, Senator King could not conceive of a proposal to pay Board members, who the Senator referred to as "young boys," more than district court judges.[164]

Most sentiment, however, favored an increase. Witnesses testifying before the Ways and Means Committee in 1925 were unanimous in the view that compensation should be raised to attract and retain qualified members, a serious problem because of the opportunities for lucrative

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157 Pub. L. No. 96-439, § 1(a), 94 Stat. 1878 (1980).

158 *Id.* § 1(b).

159 S. REP. NO. 96-933, at 2–3.

160 Pub. L. No. 96-439, § 1(c), 94 Stat. 1878.

161 Revenue Act of 1924, ch. 234, § 900(b), 43 Stat. 336.

162 *See* Part II, notes 119–135 and accompanying text.

163 67 CONG. REC. 3881–82 (1926).

164 Senator King explained his position in the following terms:

> I think it is unfair. It may not be defended it seems to be by any Senator. I am willing that they shall receive the same compensation that is now received by the district judges of the United States, to wit, $7,500 per annum. This salary is more than is received by the judges of the supreme court of a majority of the States of the Union. Why these young boys, many of who went into the bureaus as young boys 22 or 23 years of age and have been there only a few years, should be transplanted to these positions and then receive more than the Federal judges of the United States, many of who are lawyers of distinction and character and ability and who have been practicing their profession for 20 or 30 years, surpasses my comprehension.

Id. The average age of the 15 Board members in 1925 was 45 years.

private practice.[165] Two highly qualified members of the original Board had left after only brief tenures, but they might have remained if the compensation had been more generous.[166] The $7,500 salary was characterized as "a pittance" that made "it quite impossible, judged by ordinary standards, for [a member] properly to maintain and support his family."[167] George Morris, representing the American Bar Association, suggested that "as long as we pay them $7,500 a year, they all ought to resign."[168] Congressman Ogden Mills took a broader view of the situation:

> I venture to say that the historian of the future will be amazed at the lack of emphasis which has been placed upon adequate [tax] administration in the United States during this period, and the utter failure and unwillingness to provide the proper salaries and the conditions necessary to retain the extraordinarily competent men which the Treasury Department has secured from time to time, only to see them just pass through the Treasury, acquire an education in tax matters and then become tax experts in private employment.[169]

George Morris and former Board member Ivins favored an increase to $12,000.[170] Former Chairman Hamel was a little more conservative and estimated that a $10,000 salary should be sufficient.[171] The $10,000 figure was apparently the compensation favored by most Board members. The Board privately proposed to Administration and congressional officials that members' compensation be raised to $12,000; however, this was "done with the full knowledge that it will not be likely to pass but with the purpose of getting a compromise raise to $10,000."[172]

Advocates of higher compensation regularly drew comparisons with members of the Interstate Commerce Commission, the United States Shipping Board, and the Federal Reserve Board, who received salaries of

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165 *See* 1925 House Hearings, *supra* note 2, at 852–53, 885–87, 922; *see also* 67 CONG. REC. 524 (1925) (remarks of Chairman Green); *id.* at 558 (remarks of Mr. Mills).

166 "I can say frankly to you that $12,000 would have kept me on the job, but I doubt if any less would." 1925 House Hearings, *supra* note 2, at 920–21 (testimony of former member Ivins). "If the salary had been $10,000 a year, with a term of at least 15 years, giving some feeling of permanency, I do not believe that those two would have resigned. I think I would not have resigned." *Id.* at 928 (testimony of former Chairman Hamel referring to the resignations of Mr. Ivins and himself).

167 *Id.* at 852 (testimony of Dr. Joseph J. Klein).

168 *Id.* at 885.

169 67 CONG. REC. 558 (1925).

170 1925 House Hearings, *supra* note 2, at 886, 920–21.

171 *Id.* at 928.

172 Graupner, *supra* note 38.

$12,000, and members of the Federal Trade Commission, the Federal Farm Loan Board, and the Railway Labor Board, who received $10,000.[173] On the other hand, district court judges received only $7,500.[174] The Ways and Means Committee settled on a salary of $10,000,[175] and this figure was ultimately enacted.[176]

3. Tenure of Members

The question of term of office stirred the greatest controversy of all the Board provisions. Under the 1924 Act, the terms of the original members were to expire on June 2, 1926; the tenure of the first seven members appointed after June 2, 1926, were to be staggered,[177] but the succeeding terms were set at a uniform period of ten years.[178]

Members of the Board, who were privately seeking full article III status, naturally favored life tenure.[179] In hearings before the Ways and Means Committee, this position was advanced by two distinguished witnesses—Solicitor of Internal Revenue A.W. Gregg, one of the principal draftsmen of the 1924 Act, and Dr. T. S. Adams, an economist and academician who was an important figure in the early development of the income tax.[180] Several reasons were advanced for life tenure. First, a limited term of office was frequently cited as a reason for the difficulty of attracting qualified members.[181] Monetary compensation provided to Board members was low compared to what they could obtain in private practice, and tenure security was considered a necessary countervailing inducement.[182] Additionally, tenure guarantees were seen as a means of protecting the independence of the Board. No evidence existed that the Board had ever succumbed to outside influence, but the protection was nevertheless deemed desirable in

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[173] H.R. REP. NO. 69-1, at 18 (1925); S. REP. NO. 69-52, at 5 (1926).

[174] 67 CONG. REC. 3881 (1926) (remarks of Senator King).

[175] H.R. REP. NO. 69-1, at 18 (1925).

[176] Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 901(a), 44 Stat. 106.

[177] Staggering the terms, which prevented a simultaneous change in the entire Board membership, was believed to be necessary to assure the stability of the Board, an important objective in view of the value associated with its precedent-setting function. *See* 1925 House Hearings, *supra* note 2, at 884 (testimony of George Morris, Am. Bar Ass'n).

[178] Revenue Act of 1924, ch. 234, § 900(b), 43 Stat. 336.

[179] *See supra* note 38 and accompanying text.

[180] 1925 House Hearings, *supra* note 2, at 932 (testimony of Solicitor Gregg), 939 (testimony of Dr. T. S. Adams). The Committee on Taxation of the American Bar Association, however, proposed a 16-year term as adequate. *Id.* at 884.

[181] *E.g.*, Ivins, *supra* note 33, at 391.

[182] 1925 House Hearings, *supra* note 2, at 938–39 (testimony of Dr. T. S. Adams).

view of the sensitivity of matters passed on by the Board and the members' vulnerability to pressure from both private and governmental sources.[183] Finally, life tenure was also supported on the basis of an analogy to the Board of General Appraisers (later to become the Customs Court and, later hence, the United States Court of International Trade), the members of which held appointment during good behavior.[184] Because the Board of General Appraisers had a similar function in respect to customs duties as the Board of Tax Appeals did in respect to internal taxes, members of the latter body should have the same benefits as those of the former. This was especially true, it was argued, since the work of the Board of Tax Appeals was more important.[185]

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[183] The Board dealt with issues involving hundreds of millions of dollars, and its judgments ought not be subject to extraneous pressure. This point was emphasized by Ogden Mills, who saw the danger to the Board's independence coming from both private and governmental sources.

> These men know that at some time or other they are going to be subjected to two kinds of pressure, the one, political pressure, exerted, it may be, in the guise of a congressional investigation committee that years after they have exercised their best discretion and judgment may challenge that discretion and judgment on a set of facts which might justify two conclusions; the other of a different kind – pressure that may come from powerful and dissatisfied taxpayers. You are not going to get the best kind of service from those men unless you say to them, "Gentlemen, we have picked you because you are competent, we have picked you because you know the law, we are going to trust you, and we are going to assure you that as long as you use your best ability, as long as you are competent the United States Government will see to it that you have that security which will enable you at all times and in the most difficult cases to give the kind of decision that will be prompted not by fear of political or other pressure, but by your own judgment and conscience."

67 CONG. REC. 732 (1925). The allusion in Congressman Mills' remarks to congressional investigating committees undoubtedly had particular reference to the then current activities of the Couzens' committee in the Senate, which was investigating the operation of the Bureau of Internal Revenue. *See* Part I, notes 128–132 and accompanying text.

[184] The Board of General Appraisers was created in 1890. Act of June 10, 1890, ch. 407, § 12, 26 Stat. 136. Its members were granted life tenure in 1908. Act of May 27, 1908, ch. 205, § 3, 35 Stat. 406. In 1926, it was renamed the Customs Court. Act of May 28, 1926, ch. 411, § 1, 44 Stat. 669. As a result of the Customs Courts Act of 1980, the court was subsequently renamed the United States Court of International Trade. *See* Pub. L. No. 96-417, § 101, 94 Stat. 1727 (1980).

[185] H.R. REP. NO. 69-1, at 18 (1925); 67 CONG. REC. 732 (1925) (remarks of Mr. Mills).

The Ways and Means Committee was generally friendly towards the Board of Tax Appeals,[186] and it was therefore not surprising that the Committee recommended granting Board members tenure during good behavior.[187] What may have been surprising, however, especially to the members of the Committee, was the profound opposition that the proposal encountered.

Several arguments were advanced against life tenure. First, the Constitution provided life tenure for federal court judges but made no such provision for any other officials. On this basis, Representative Collins argued that the framers intended to restrict life tenure to those for whom it was specifically reserved.[188] The argument could be supported by the general structure of the Constitution, under which the executive and legislative branches were essentially under political control while the judicial branch alone was insulated from such control. To grant life tenure to an executive branch employee was to insulate him from the public responsibility inherent in the political process. Either unaware that members of the Board of General Appraisers had been accorded life tenure,[189] or believing that Board to be an article III court, Representative Collins found evidence for his position in the fact that the proposal was unprecedented.[190]

Opponents of life tenure also pointed out that the provisions of the 1924 Act, while not providing indefinite tenure to members, did guarantee terms of ten years. They argued that because this amount of time would span more than two presidential administrations, appointees were sufficiently insulated from the effects of inappropriate political pressure.[191] Some even challenged the desirability of an independent Board on the ground that each Administration is accountable for the activities of the executive branch and should be in a position to control its activities through personnel of its own choice.[192]

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186 The Committee had figured prominently in the creation of the Board, and its ranking Republican and Democratic members were closely tied to certain members of the Board. Chairman Green was the father of William R. Green Jr., and ranking Democrat John N. Garner was a former Law partner of William D. Love. *See* Part II, notes 188–189 and accompanying text. Moreover, witnesses appearing before the Committee in 1925 were uniformly favorable toward the Board and its work. *See* 67 CONG. REC. 524 (1925) (remarks of Mr. Green).

187 H.R. REP. NO. 69-1, at 18 (1925).

188 67 CONG. REC. 1130–31 (1925).

189 Act of May 27, 1908, ch. 205, § 3, 35 Stat. 406.

190 67 CONG. REC. 1130 (1925).

191 *Id.* at 715 (remarks of Mr. Johnson).

192 *See id.* at 1131 (remarks of Mr. Collins). One Senator observed, "I have been one of those who believed that to a very great extent to the victor belongs the spoils, and I think that each administration ought to have people within it who are

Finally, there were those who observed that any move toward indefinite tenure was premature. The taxes that formed the basis of Board jurisdiction were relatively new, and their future was uncertain. The Board itself was only two years old and had been instituted on an experimental basis. Although it seemed to be successfully filling what appeared to be a continuing need, the possibility existed that Congress might decide to discontinue its activities. Were it to do so, the Government would be faced with the problem of "a number of governmental wards whose salaries we can not get rid of even though we may want to install another or a better system of handling these tax appeals."[193]

To a considerable extent, the validity of the pro and con arguments on life tenure was obscured by the ambiguous status of the Board itself. If the Board was viewed as a judicial body, its members ought to have been provided with the independence ordinarily associated with courts. Because the Board was functioning like a court without any of the traits ordinarily associated with an administrative body, there was solid support for the position of the Ways and Means Committee. On the other hand, few congressmen advocated making the Board a court in form as well as in substance. Even the Ways and Means Committee bill continued the status of the Board as an independent agency in the executive branch.[194] Because of this refusal to recognize the Board as a court, a strong argument could be made against providing protections to Board members that historically had been generally reserved for courts. Theoretically, the question was a close one—as a practical matter, the decisive considerations were probably based on less lofty considerations.

It is frequently difficult to convince a congressman, who has to run for reelection every two or six years, that some offices of the Government should be free of accountability to the people or their elected representatives. Although the Constitution authorizes the creation of such offices, many people cannot escape the feeling that there is something fundamentally undemocratic in life tenure. Accordingly, much of the debate on tenure focused on considerations that would be equally applicable to lifetime appointments to the Supreme Court as well as to the Board of Tax Appeals. Congressman Doughton, for example, maintained that "to hold a member on, drawing full pay, when on account of age or disability he is unable to perform the duties of his office in a proper and satisfactory manner . . . [is] an unwise and indefensible policy."[195] The life tenure proposal was also criticized as "un-American, un-Democratic . . .

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in sympathy with it and its policies." *Id.* at 3791 (1926) (remarks of Senator Harrison).

193 *Id.* at 1131 (remarks of Mr. Collins).

194 *See supra* notes 38–42 and accompanying text.

195 67 CONG. REC. 665 (1925).

un-Republican" and "extremely vicious."[196] "[I]t breeds and nurtures autocracy. It is the womb of despotism."[197] One member, who did "not believe in a life-term office for the judiciary, particularly for judges of inferior courts,"[198] asserted that life tenure was obnoxious to the "genius and spirit of American institutions."[199]

These views were apparently shared by an overwhelming majority of the House.[200] Rather than suffer certain defeat on the floor, the Ways and Means Committee offered an amendment to its own bill eliminating tenure during good behavior and substituting a 14-year term for Board members, with the initial members having staggered terms of from eight to 14 years.[201] The amendment was adopted by a vote of 200 to 10.[202]

In the Senate, the Finance Committee reported the bill preserving the ten-year term of office provided in the 1924 Act, believing that this tenure in combination with a $10,000 salary would be sufficient to retain the

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[196] *Id.* at 1133 (remarks of Mr. Lazier); *see also id.* at 1127 (remarks of Mr. Edwards).

[197] *Id.* at 1133 (remarks of Mr. Hill).

[198] *Id.* at 731 (remarks of Mr. Garrett).

[199] *Id.*

[200] *Cf. id.* at 1125 (remarks of Chairman Green). The unpopularity of life tenure is further illustrated by the following quotes.

> It undermines the structure of our free institutions. It strikes at the very heart of the Republic. Carried to its logical conclusion, it means autocracy, despotism and tyranny. Let us strike it from this bill or announce that the words, "a government of the people, by the people, and for the people" are but barren sounds and that democracy has been stifled and time has barred appeal.

Id. at 1133 (remarks of Mr. Hill).

> [I]t will only be a short time before this body will be setting aside the judgment of the legislative branch of the Government on questions of legislation; and the partisan press and the party leaders whose views this board will reflect, will declare their actions to be finalities and point to its immaculate wisdom and purity. Statutes will be enacted which they will declare inoperative and this "August tribunal" will be referred to as if endowed with a wisdom unknown to the rest of mankind on tax questions.

Id. at 1131 (remarks of Mr. Collins).

> If this board is to be created and its members hold office for life, you create an office-holding aristocracy and destroy the incentive for young men to qualify themselves for this service. This proposal is the essence of bureaucratic government, and as Archibald Allison said nearly 100 years ago, in discussing conditions in France, that tyranny may be exercised by bureaus as well as by kings and autocrats.

Id. at 1134 (remarks of Mr. Lozier).

[201] *Id.* at 1125.

[202] *Id.* at 1135.

services of "competent men."[203] Efforts were made on the Senate floor to reduce the term to five[204] or six[205] years, and the latter proposal failed passage by only two votes.[206] In the conference between the House and Senate, a compromise of 12 years was reached[207] and adopted in the final legislation.[208] The 12-year term of office remained until 1969, when, as part of the amendments effected by the Tax Reform Act of 1969, it was increased to 15 years.[209]

4. Removal of Members

Under the 1924 Act, the exclusive statutory basis for removal of members was on the grounds of "inefficiency, neglect of duty, or malfeasance in office."[210] Only the President could exercise the power of removal and only for the reasons specified. This removal provision had been inserted in 1924 as a means of further ensuring the independence of the Board from the Treasury Department.[211] The 1926 Revenue Bill, as reported by the Ways and Means Committee, contained substantially the same removal procedure but additionally provided that removal could be effected only after "notice and opportunity for hearing."[212]

During the consideration of the 1926 bill, questions were raised concerning the propriety of the removal provision in light of the status of the Board. If the offices were judicial, as some believed, then life tenure should be provided and removal should be exclusively by impeachment in the House and trial in the Senate.[213] If, on the other hand, the members were executive officers, they should not have life tenure, and their removal should be by the President for any cause.[214]

An amendment was offered on the House floor to strike out the restrictions on presidential removal on the theory that a Board member

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203 S. REP. NO. 69-52, at 35 (1926).

204 67 CONG. REC. 3748 (1926).

205 *Id.* at 379l.

206 *Id.* at 3792.

207 H.R. REP. NO. 69-356, at 53 (1926).

208 Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 901(b), 44 Stat. 106

209 Pub. L. No. 91-172, § 952(b), 83 Stat. 730 (amending I.R.C. § 7443(e)).

210 Revenue Act of 1924, ch. 234, § 900(b), 43 Stat. 336.

211 *See* Part II, notes 55–76 and accompanying text.

212 H.R. 1, 69th Cong., 1st Sess. § 1000, *amending* Revenue Act of 1924, § 901 (1925).

213 67 CONG. REC. 1130 (1925) (remarks of Mr. Summers).

214 *Id.* at 1128 (remarks of Mr. Garret). Arguably, however, even if the Board was purely executive in nature, the fact that Senate approval was necessary for appointment to the Board might justify restricting the power to remove to cases in which the Senate concurred. *See id.* at 1132–33 (remarks of Mr. Collins).

might not be chargeable with inefficiency, neglect of duty, or malfeasance, yet be unfit for office, and the President ought to have the power to remove him.[215] The amendment was rejected concurrently with modification of the tenure provision,[216] and the two actions appear interrelated. Although few congressmen were able to support life tenure for Board members,[217] considerable sentiment existed in favor of protecting the Board insofar as possible from political pressure.[218] Retaining the limited removal provision was a middle ground for accommodating the two positions, and a further illustration of the ambiguous status of the Board. As stated above, the procedure was open to criticism on constitutional grounds, but the criticism was relatively insubstantial, since the members of several preexisting agencies were similarly protected.[219] The provision has remained in the law to the present day.[220]

5. Restrictions on Practice

The 1924 Act provided that no member, after leaving the Board, could practice before either the Bureau or the Board for a period of two years.[221] The limitation was only applicable to those members appointed after the expiration of the two-year temporary Board.[222] Thus, Chairman Hamel and member Ivins, who had left the Board in 1925, were unaffected by the restriction. The provision had been inserted at the prompting of Congressman LaGuardia, who like others was concerned with the problem

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215 *Id.* at 1133.

216 *Id.* at 1135.

217 *See supra* notes 200–202 and accompanying text.

218 *See*, *e.g.*, 67 CONG. REC. 1134–35 (1925) (remarks of Mr. Mills).

219 These agencies included the Board of General Appraisers, the Railroad Labor Board, the Federal Farm Loan Board, the Federal Reserve Board, the Federal Trade Commission, the Interstate Commerce Commission, the United States Tariff Commission, and the United States Shipping Board. *Id.* at 1135.

220 I.R.C. § 7443(f). In the course of the appeal of the Tax Court's decision in *Kuretski v. Commissioner*, T.C. Memo. 2012-262 (generally rejecting the taxpayers' challenges to the Commissioner's determination to proceed with a proposed levy), the taxpayers contended that § 7443(f) is unconstitutional because the prospect of the President removing a Tax Court judge, who exercises the judicial power of the United States, violates separation-of-powers principles. *See* Brief for Appellants, Kuretski v. Commissioner, Case No. 13-1090 (D.C. Cir. 2013). The taxpayers therefore sought a declaration that § 7443(f) is unconstitutional and a remand of their case to be heard before an adjudicator who was not subject to the removal power. At the time of publication, the Court of Appeals for the District of Columbia Circuit had heard oral argument but had not issued its opinion in the case.

221 Revenue Act of 1924, ch. 234, § 900(c), 43 Stat. 337.

222 *Id.*

of former government employees using their position and experience in public service for purposes of private gain.[223] High turnover had been disrupting the operations of the Treasury Department—it had been termed "the Nation's scandal"—and many felt that if the opportunity for capitalizing on the special expertise obtained in government work were removed the problem could be alleviated.[224] Deferring the effective date of the provision had largely defused the issue in 1924, but it attracted an increasing amount of attention in the ensuing months.

At the hearings of the Ways and Means Committee on the 1926 Revenue Bill, several witnesses addressed the problem,[225] and most agreed that the restriction should be eased. Curiously, while the arguments in favor of the restriction were based on retaining the services of competent personnel, the critics of the limitation opposed it on virtually the same ground—that its effect would be to make recruitment more difficult since more flies could be caught "with honey than with vinegar."[226] According to former member Ivins, the practice restriction amounted to a "dishonorable discharge" from service on the Board and was "calculated to deter anyone with the requisite qualifications from accepting appointment."[227] Other critics of the restriction argued that members remained on the Board because of "devotion to service" rather than because of the practice limitation.[228] Moreover, the practice limitation may well have played a part in the early resignation of two members of the original Board, and if the limitation was retained, other members of the Board might resign to retain the right to practice their profession.[229] Finally, the argument was made that federal judges were not forbidden to practice before the courts of which they were formerly members, and no special considerations existed in the case of the Board to merit a different treatment.[230] True, certain former employees of the Treasury were able to capitalize on the inside information they had acquired; but this was not the case with Board members. The Board was independent of Treasury, and Board members' familiarity with cases they worked on was derived from evidence introduced in public proceedings.

Opponents of the practice limitations contained in the 1924 Act advanced several alternative proposals. One group suggested that the

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223 *See* Part II, notes 114–118 and accompanying text.

224 *See* 1925 House Hearings*, supra* note 2, at 853 (remarks of Mr. Garner).

225 1925 House Hearings*, supra* note 2, at 81–82, 852–53, 884–85, 918, 929.

226 *Id.* at 853 (testimony of Dr. Joseph Klein).

227 Ivins, *supra* note 33, at 394.

228 1925 House Hearings*, supra* note 2, at 852 (testimony of Dr. Joseph Klein).

229 *Id.* at 853, 918.

230 *Id.* at 852 (testimony of Dr. Joseph Klein), 885 (testimony of George Morris, Am. Bar Ass'n)

restriction be eliminated entirely.[231] Others proposed that a retired Board member only be barred from participating in a matter that was before the Board during his term in office.[232] A third position was that the restriction could be eased, but its purpose retained, if it were only applied in the case of a member who failed to serve out his term.[233] Although the Ways and Means Committee was generally sympathetic toward the Board, it chose not to adopt any of these proposals. Rather, as reported by the Committee, the 1926 bill provided that a retired member would not be permitted to practice before the Board for a four-year period after leaving office, and if a member were removed from office for inefficiency, neglect, or malfeasance, the member would be forever barred.[234] In one sense, the Committee provision was a relaxation of the restriction contained in the 1924 Act because it did not bar a former member from practice before the Bureau. On the other hand, it extended the period of ineligibility to practice before the Board from two to four years, and indefinitely if the member was removed for cause. The provision was a pointed illustration of the depth of the concern over high turnover, and apparently followed a proposal by Dr. T. S. Adams that the retention of the practice limitation would not prejudice recruiting competent personnel in view of the $10,000 salary and life tenure that was provided by other portions of the bill.[235]

When the Committee members recognized that the life tenure provision would not pass the House floor, they offered an amendment reducing tenure to 14 years and eliminating the four-year bar on practice by former members.[236] Tying elimination of the practice limitation to the elimination of life tenure was opposed by some members of the House, who believed that the restriction should be retained in any event.[237] However, the lopsided margin by which the Committee amendment was adopted (200 to ten)[238] indicated that most agreed with Chairman Green's response to a die-hard advocate of practice limitations. "If the gentleman wants to fix things so we can not get any good men on the board, that would be one way of doing it."[239]

Thus, as passed by the House, the bill only prohibited Board practice by members who had been removed for cause. The provision was retained in

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231 *Id.* at 884–85.

232 *Id.* at 82, 854.

233 *Id.* at 919.

234 H.R. 1, 69th Cong., 1st Sess. § 1000, *amending* Revenue Act of 1924, § 902 (1926), as reported to the House.

235 *See* H.R. REP. NO. 69-1, at 18 (1925).

236 67 CONG. REC. 1125 (1925).

237 *Id.* at 1126 (remarks of Mr. Lozier).

238 *Id.* at 1135.

239 *Id.* at 1126.

the final Act,[240] and, with one modification, has remained the rule to the present.[241]

6. Background of Members

The controversy that surrounded the activities of members when they terminated their service on the Board was mirrored by the concern over the background of appointees. For example, one proposal was made to require a bipartisan Board, with no more than nine members selected from any one political party.[242] The membership of various other executive agencies was restricted in this manner, and the argument was made that the same policy should apply to the Board. The proposal was not adopted, principally on the ground suggested by Chairman Green that the Board functioned as a court and limitation of the political affiliations of judicial appointments was inappropriate.[243] Rather ingenuously, Chairman Green also stated that the politics of the members of the Board were both irrelevant and unknown.[244] Although Chairman Green's profession of ignorance may have been honest, available evidence indicates that the Administration took a keener interest in the subject.[245]

Another source of concern over the background of Board members related to the suspicion that appointments were made on the basis of favoritism. "[A] remarkable number . . . [are] related to distinguished gentlemen in the public service."[246] The four members who were appointed in March of 1925 all had apparently close ties to members of the Ways and Means Committee or the Finance Committee. Opposition erupted when the nominations were announced, but quickly diminished, and the appointments were expeditiously confirmed.[247] The memory nevertheless apparently still rankled some, although no specific proposal was made to legislate an end to the practice.

The greatest concern over the background of Board members related to their past employment by Treasury or by the Solicitor of Internal Revenue,

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240 Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 902, 44 Stat. 106.

241 I.R.C. § 7443(g). In 1953, when retired pay was provided for Tax Court judges, a proviso was inserted requiring a judge to forfeit retired pay if, after retirement, he obtains employment with the Federal Government or performs "legal or accounting services in the field of Federal taxation . . . ." I.R.C. § 7447(f)(2), *added by* Act of Aug. 7, 1953, ch. 352, 67 Stat. 482.

242 67 CONG. REC. 1126 (1925) (remarks of Mr. Moore).

243 *Id.*

244 *Id.*

245 *See* Part II, notes 180–188 and accompanying text.

246 67 CONG. REC. 3752 (1926) (remarks of Sen. Reed).

247 *See* Part II, notes 187–188 and accompanying text.

an official of the Justice Department, who was the legal counsel of the Commissioner.[248] When the first appointments to the Board were announced in the summer of 1924, a wave of protest issued from accountants and, to a lesser extent, lawyers.[249] They felt that the purpose of Congress in removing the Board from the Treasury Department and making it an independent executive agency would be thwarted if Treasury played a part in selecting appointees for the Board. Even more damaging would be a Board dominated by former employees of the tax collection system, supposedly imbued with a pro-Government bias, and of the first 12 appointees, five came directly from employment with Treasury or the Solicitor, three had been so employed previously, and two had been officials of state taxing agencies.[250]

After the Board began operation, the furor soon subsided. By the time congressional consideration of the 1926 Revenue Bill had begun, accounting and legal associations were unanimous in their respect for the independence of the Board.[251] Nevertheless, the issue revived when the bill reached the Senate floor, where an amendment was adopted with no discussion that would have made ineligible for appointment to the Board any person who within two years had been an "attaché" of the Bureau; the provision was made inapplicable to those then members of the Board.[252] Although there was apparently strong support for the amendment in the Senate, the provision was deleted by the House-Senate conference,[253] and no such limitation was contained in the Act as finally passed.

The controversy seemed to have ended with the enactment of the 1926 legislation in February of that year. However, on May 26, 1926, it again surfaced with the announcement of the names of the 16 individuals whom President Coolidge nominated for appointment to the Board.[254] Thirteen of the nominees were holdovers from the old Board of 15, and their nominations did not arouse opposition.[255] The two members who were not

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[248] The 1926 Act eliminated the position of Solicitor and replaced it with the General Counsel for the Bureau of Internal Revenue, an official of the Treasury Department. Revenue Act of 1926, ch. 27, § 1201, 44 Stat. 126.

[249] *See* Part II, notes 196–214 and accompanying text.

[250] *See* Part II, notes 203–210 and accompanying text.

[251] *See* Part II, notes 295–306 and accompanying text.

[252] 67 CONG. REC. 3754 (1926) (amendment offered by Sen. Glass).

[253] H.R. REP. NO. 69-356, at 53 (1926).

[254] *Thirteen Members of Board of Tax Appeals Reappointed*, 4 NAT'L INC. TAX MAG. 206 (1926).

[255] These individuals were: Charles Rogers Arundell, William R. Green Jr., Jules Gilmer Korner Jr., William C. Lansdon, Benjamin H. Littleton, William D. Love, John J. Marquette, Logan Morris, Percy W. Phillips, Charles P. Smith, John M. Sternhagen, Charles M. Trammell, and Sumner L. Trussell. *Id.*

reappointed, A.E. Grapnel and Albert E. James, both Republicans,[256] were widely rumored to have been passed over because of their differences of opinion with the Board's Chairman, Jules Gilmer Korner, concerning "administrative matters."[257] Of the three new appointees, two had no Bureau affiliation and were noncontroversial.[258] The third, however, John B. Milliken, was an Assistant Solicitor of Internal Revenue, and his nomination provoked the fury of the Senators who had originally led the effort to prohibit appointment of former employees of the Bureau. These Senators, led by Carter Glass of Virginia and George W. Norris of Nebraska, believed that the Milliken nomination was inconsistent with the expressed "judgment of the Senate,"[259] and a resolution was proposed to express "the sense of the Senate" that future appointments to the Board should only be made in accordance with the provisions of the Senate amendment that had been eliminated by the conference from the 1926 Act.[260] The resolution sparked rather lengthy debate and afforded an opportunity for Senator Norris to repeat, in a different context, the same points he made in 1924 in successfully arguing for reduction of the salaries of Board members from $10,000 to $7,500.[261]

> Considerable has been said at various times, in conversations and otherwise, to the effect that the members of this board ought to be experts, and that they ought to come from a bureau that is dealing with tax questions. I want to say just a few words about that point.
>
> These men are going to occupy positions which are easier to fill than that any judge anywhere in the United States of general jurisdiction now occupies, so far as work is concerned. In any State court in this Union a judge of general jurisdiction, who tries a

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[256] *See* Part II, note 182 and accompanying text.

[257] 67 CONG. REC. 10817–18 (1926).

[258] J. Edgar Murdock was formerly an assistant district attorney in Westmoreland County, Pennsylvania; Ernest H. Van Fossan had been the Director of Claims for the U.S. Shipping Board. *Thirteen Members of Board of Tax Appeals Reappointed*, 4 NAT'L INC. TAX MAG. 206 (1926).

[259] 67 CONG. REC. 10812 (1926) (remarks of Mr. Glass).

[260] S. Res. 242, 69th Cong., 1st Sess. (1926). As introduced, the resolution provided:

> *Resolved*, That it is the sense of the Senate that hereafter no person who has been an attaché of the United States Bureau of Internal Revenue should be appointed to any vacancy on the Board of Tax Appeals until at least two years have elapsed since such official connection with said Bureau.

67 CONG. REC. 10764 (1926).

Some question existed whether the resolution, if adopted, would apply to the Milliken nomination, which was then before the Senate for confirmation. The intent that it would not was made clear. *Id.* at 10814, 10816, 10818.

[261] *See* Part II, notes 126–135 and accompanying text.

> criminal case to-day, a civil case to-morrow, a tax case the next day, and a replevin case the day after that, as far as work is concerned, as far as study is concerned, has more work to do than anyone of these appointees. As far as ability is concerned, it requires at least as much, because the jurisdiction of such a judge covers a world of subjects and a great deal of ground upon which technicalities may arise.
>
> These men are going to adjudicate one law, practically, pass on one statute, and the questions which arise under it. Even though he had never read the statute, any lawyer in a few days' time could easily become familiar with it and be able to fill completely and entirely all the requirements of a position on this board.[262]

The author of the resolution, Senator Glass, believed that it should be prospective only and should not apply to the 16 nominations that had been recently presented for Senate confirmation.[263] Senator Norris, on the other hand, believed that if the principle behind the resolution was sound, it should be applied to the current nominations as well, and he offered an amendment to that effect.[264] A third alternative, offered by Senator Heflin,

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[262] 67 CONG. REC. 10813 (1926).

[263] *See supra* note 260.

[264] 67 CONG. REC. 10813 (1926). One highlight of the debate was an interchange between Senator Norris and an opponent of the amendment, Senator Ashurst, who believed that since a provision similar to S. Res. 242 had been removed from the 1926 Act, the resolution should not be retroactive:

> Mr. ASHURST. . . . I wish it distinctly understood that no one who has served a day in the Senate with the esteemed Senator from Nebraska would think of him for a moment in connection with any purpose other than that moved by a high order of statesmanship. But I do say, if the Senator will pardon me further, and this will appeal to the logic of my friend, whom I recognize as a logician, that the Senate first went on record as opposed to nominating for membership on the Tax Appeals Board men in the bureau. The Senate went on record in that fashion, did it not?
>
> Mr. NORRIS. Yes; it went on record.
>
> Mr. ASHURST. The next and only action taken by the Senate since that time upon the same subject was the action recalling that first action —
>
> Mr. NORRIS. Oh, no.
>
> Mr. ASHURST. Otherwise the amendment would be in the law to-day.
>
> Mr. NORRIS. I do not agree with the Senator in that statement.
>
> Mr. ASHURST. It required action on the part of the Senate before we could dispose of that matter.
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> Mr. NORRIS. The Senate did recede; I admit that.
>
> Mr. ASHURST. Is not the Senator, therefore, bound to admit that the previous action on this subject by the Senate cancelled and recalled its prior action?
>
> Mr. NORRIS. No; I do not admit that.
>
> Mr. ASHURST. Then we did not take any action at all.

would have barred appointment of any person who had, during the previous two-year period, worked as a "tax expert" for "private" interests.[265] The resolution was adopted, but without the Norris and Heflin modifications.[266] On the following day, the Senate confirmed the new nominations to the Board, including that of Mr. Milliken.[267]

For almost four years, there was adherence to the terms of the Senate resolution; four new Board members were appointed to succeed retiring members, and none had served with the Bureau within two years of their appointment.[268] Then, in 1930, the President nominated the first woman Board member, Annabel Matthews, who was on the staff of the Interpretative Division of the General Counsel to the Commissioner. Amidst statements that her case was not to be a precedent for the future, and justifications based on her replacement of a member who had come to the Board from the Solicitor's office, her nomination was confirmed.[269] Following Matthews' appointment, several individuals joined the Board and Tax Court after recent service with Treasury with no resulting controversy.[270]

F. Practice and Procedure

By its terms, the 1924 Act left the resolution of most procedural and evidentiary issues to the discretion of the Board.[271] But despite the broad latitude granted in the statute, the Board felt constrained to adopt, in general, judicial forms of procedure.[272] Provisions for pleadings were based on those prevailing in courts, and similar provisions were made for

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Mr. NORRIS. I will concede the Senator has a right to take that view of it.

Mr. ASHURST. Then I will have to withdraw some of the praise which a moment ago I gave the Senator as a logician. [Laughter.]

Mr. NORRIS. The Senator can not get me to agree to something that I do not believe in by calling me a logician. [Laughter.]

Id. at 10815.

[265] *Id.* at 10813, 10816-17.

[266] *Id.* at 10818.

[267] N.Y. TIMES, June 9, 1926, at 22, col. 8.

[268] The appointees during this period were Eugene Black, Stephen J. McMahon, Herbert F. Seawell, and Forest D. Siefkin.

[269] *See* 8 NAT'L INC. TAX MAG. 105 (1930).

[270] Those judges included Craig S. Atkins, Howard A. Dawson Jr., William M. Fay, Clarence V. Opper, Irene Feagin Scott, Charles R. Simpson, Norman O. Tietjens, Russell E. Train, and Bolon B. Turner. Today, it is common for individuals to join the Tax Court bench from private practice, from the staffs of congressional tax committees, or from the Service.

[271] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[272] *See* Part II, notes 219–229 and accompanying text.

motions, briefs, depositions, calendars, subpoenas, and admission to practice.[273] The Board adopted judicial standards for the receipt of evidence,[274] and, as in federal court tax proceedings, imposed the burden of proof on the taxpayer.[275] In 1926, some attention was directed to these matters, but the new legislation made few changes.

Minor criticism had been directed at the Board for its adoption of judicial rules of practice and procedure.[276] Because the Board was formally at least an agency in the executive branch, many persons who were familiar with practice before the Bureau of Internal Revenue expected Board procedure to continue the informality that had obtained before the Income Tax Unit and the Committee on Appeals and Review.[277] The adoption of formal practice requirements left these expectations unfulfilled, and the unfamiliarity of many tax practitioners, particularly accountants, with judicial forms of procedure led to costly errors by taxpayers' representatives. Arguably the purpose in creating the Board was subverted when faulty pleadings, failures of proof, or other formalistic irregularities resulted in a large number of otherwise meritorious cases being lost on purely procedural grounds. A further difficulty with formal procedures was found in the additional time required for the Board's consideration and disposition of cases.[278] Certainly, informal procedures would be more expeditious. Moreover, the publicity associated with the judicial type proceedings required by the 1924 Act[279] was criticized as forcing taxpayers to choose between unattractive alternatives—either pay the tax or disclose private financial and business matters to creditors and competitors.[280]

Comment was also directed at the Board rule requiring the taxpayer to bear the burden of proving the deficiency erroneous, and some argued that because the Government was the party seeking to impose an additional tax, it should be required to show some rational basis for the proposed action.[281] In less than dazzling displays of legal erudition, it was alleged that placing the burden of proof on the taxpayer was "contrary to established

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[273] *See generally* B.T.A. Rules of Practice and Procedure (July, 1924 ed.).

[274] *See*, *e.g.*, Bruce & Human Drug Co., 1 B.T.A. 342 (1925); Lee Sturgess, 2 B.T.A. 69 (1925); Harlan A. Allen, 2 B.T.A. 794 (1925).

[275] B.T.A. RULE 20 (July, 1924 ed.).

[276] 1925 House Hearings*, supra* note 2, at 937–38, 943–44; *Should the Board of Tax Appeals Modify its Rules of Practice?*, 2 NAT'L INC. TAX MAG. 270 (1924).

[277] *See* Part II, notes 244–269 and accompanying text.

[278] 1925 House Hearings*, supra* note 2, at 943 (testimony of L.R. Gottlieb, Nat'l Industrial Conference Board).

[279] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[280] 1925 House Hearings*, supra* note 2, at 943–44 (testimony of L.R. Gottlieb, Nat'l Industrial Conference Board).

[281] *See id.* at 877 (testimony of Edward Gore, American Institute of Accountants).

legal practice"[282] and violated the Anglo-Saxon presumption of innocence.[283]

Finally, controversy was created by the Board's rule permitting practice by attorneys and certified public accountants.[284] The Bureau did not restrict the persons who could practice before it so long as the applicant was of good moral character and could demonstrate "satisfactory educational qualifications and evidence of an ability to understand tax questions . . . ."[285] For this reason some argued that admission to practice before the Board should be more liberal.[286] However, the Board's judicial procedure led others to conclude that the admission rules were too liberal and only attorneys should be permitted to practice.[287]

Criticism on these counts was relatively sparse and ineffectual, and no serious effort was launched to undo either the court-like practice before the Board or the compromise effected with respect to admission to practice. If anything, the difficulties encountered by the Board in requiring conformance to its rules strengthened the position of those who argued that the Board should be made a court in name as well as substance.[288] If this had been done, confusion concerning the nature of the Board would have been reduced and persons practicing before it would have better understood that the informal procedures applied in the Bureau were not to be used.

No change in the Board's general rules of practice and procedure were made as a result of the 1926 Act. In the view of Chairman Korner, none were necessary because the 1926 amendments, although significant in other areas, did not materially affect the conduct of Board proceedings.[289] Nevertheless, controversy did arise in connection with the Board's rule on admission to practice.[290] Because Board decisions could be appealed directly to the circuit courts after the 1926 Act, there was some question as to the propriety of permitting certified public accountants to continue to

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282 *Id.* at 849 (testimony of D.A. Smith, American Paper and Pulp Assoc.). In fact, the rule was well established in the federal courts that taxpayers had the burden of proof in refund actions. *See, e.g.,* Germantown Trust Co. v. Lederer, 263 F. 672 (3d Cir. 1920).

283 *Id.* at 877 (testimony of Edward Gore, American Institute of Accountants).

284 B.T.A. RULE 2 (July, 1924 ed.). *See Should the Board of Tax Appeals Modify its Rules of Practice?,* 2 NAT'L INC. TAX MAG. 270 (1924).

285 Circular 230, II-2 CUM. BULL. 372, 373 (1923).

286 *Should the Board of Tax Appeals Modify its Rules of Practice?*, 2 NAT'L INC. TAX MAG. 270, 271 (1924).

287 *Id.* at 271, 277.

288 *See supra* note 25 and accompanying text.

289 J. Gilmer Korner, *Procedure in the Appeal of Tax Cases Under the Revenue Act of 1926,* 4 NAT'L INC. TAX MAG. 413, 415 (1926) [hereinafter cited as Korner].

290 *Id.* at 415–16.

represent taxpayers before the Board. Only attorneys were admitted to practice in the circuit courts, and a taxpayer who was represented in the Board by an accountant would have to retain an attorney if the case were appealed. Obviously some duplication of effort and additional expense would attend such a change of counsel. Moreover, since the proceeding on appeal would not be de novo, as it had been under the 1924 Act, the record compiled in the Board would be of great importance in the ultimate outcome of the case. All but one of the members of the Board were lawyers,[291] and apparently they generally believed that attorneys were better able than accountants to prepare a record before the Board that would withstand appellate scrutiny.[292] Nevertheless, probably as the result of pressure from accounting associations, no change was made in the rule permitting accountants to practice. That this decision was arrived at reluctantly was indicated by Chairman Korner's suggestion that an accountant would only be justified in appearing for a client before the Board if the accountant could determine in advance that the client would be willing to abide by an unfavorable decision of the Board and that the Government would be unlikely to appeal if the Board decision went against it.[293] Obviously, not many cases could meet these requirements.

The only significant statutory amendment in 1926 with respect to Board procedure related to the rules of evidence to be applied. Despite statutory authority in the 1924 Act to develop its own rules of evidence,[294] the Board refused to do so. As was pointed out by Chairman Green of the Ways and Means Committee, it would have been impracticable for the Board to "write a treatise on evidence."[295] Rather, the Board concluded that it must follow evidentiary rules generally accepted by courts.[296] Because its proceedings did not involve juries, the Board chose to adopt the liberal rules of evidence applicable in equity proceedings.[297] But these rules were neither codified nor uniform, and because they differed from jurisdiction to jurisdiction, the Board had the problem of identifying the particular rules to follow. Apparently, the Board chose to follow generally the evidentiary rules applicable in the particular jurisdiction in which a case was tried.[298] Most

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[291] W. C. Lansdon, who served on the Board from 1924–34, was an economist and journalist. He was the only non-lawyer ever appointed to the Board/Tax Court.

[292] *See* Korner, *supra* note 289.

[293] *Id.*

[294] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[295] 67 CONG. REC. 1143 (1925).

[296] *See* Part II, notes 261–265 and accompanying text.

[297] *See* 1925 House Hearings*, supra* note 2, at 929 (testimony of former Chairman Hamel).

[298] *See* Memorandum from Thomas C. Lavery to Robert H. Jackson, General Counsel, c. August, 1935, filed at the U.S. Tax Court in "Evidence."

cases were tried in the District of Columbia,[299] and as a result those rules were most often applied. In any event, the particular rules applied were not of critical importance under the 1924 Act, because Board decisions were not final and could be collaterally reviewed in district court or the Court of Claims.[300]

The changes made in the 1926 Act with respect to the appealability of Board decisions made the identification of applicable evidentiary rules more important. Board decisions were no longer subject to collateral review; once the jurisdiction of the Board was invoked, it would serve as the exclusive trial forum.[301] For this reason, the proper factual development of a case before the Board was essential—errors by counsel or the Board could no longer be corrected in a subsequent proceeding. Moreover, rulings by the Board on the admissibility of evidence were clearly within the scope of appellate review,[302] and a more certain identification of the applicable evidentiary rules became essential.[303]

Accordingly, the 1926 Act removed the reference to Board determination of rules of evidence and required the Board to follow the rules applied "in courts of equity of the District of Columbia."[304] Equity rules were selected because they were the most permissive in admitting evidence.[305] More specifically, the equity rules applicable in the District of Columbia were chosen over the equity rules applicable in the federal court for the district in which the Board happened to hear an appeal because each district court applied the rules of evidence of the state in which it sat.[306] To require the Board to apply 48 different rules of evidence depending on where it tried a case was felt to be too onerous a burden to impose.[307]

G. Division Decisions and Expediting the Board's Workload

The Bureau of Internal Revenue's Committee on Appeals and Review, which was the forerunner of the Board of Tax Appeals, had generally

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[299] *See* Part II, notes 270–284 and accompanying text.

[300] *See supra* note 46 and accompanying text.

[301] *See supra* notes 57–62 and accompanying text.

[302] *See* H.R. REP. NO. 69-1, at 19–20 (1925); S. REP. NO. 69-52, at 36 (1926).

[303] *See* 67 CONG. REC. 1144 (1925) (remarks of Mr. Mills).

[304] Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 907(a), 44 Stat. 107.

[305] 67 CONG. REC. 1144 (1925) (remarks of Mr. Green).

[306] *See id.* (remarks of Mr. Mills). The Supreme Court, pursuant to Rev. Stat. § 862 (1873), provided for the evidentiary rules to be followed in trials in equity. Federal Equity Rule 46.

[307] 67 CONG. REC. 1144 (1925) (remarks of Mr. Green).

functioned in divisions comprised of three committee members.[308] Probably the Committee could have processed more cases had it used single-member divisions, but certain advantages were gained by collegial review of cases. This was especially true in the case of the Committee, the members of which were divided among lawyers, accountants, and engineers whose different fields of expertise could be brought to bear in the solution of problems. Because the Committee's proceedings were not public and because it functioned pursuant to informal procedures, the inefficiency inherent in having three committee members consider a single case never presented a critical problem. The Committee managed to stay relatively current with its heavy workload.[309]

The original Administration proposal for the creation of the Board of Tax Appeals sought generally to perpetuate the character and procedures of the Committee on Appeals and Review; it provided for informal procedures and for the designation of divisions and division chiefs.[310] Without stating so directly, the proposal indicated that divisions would be comprised of at least three members.[311]

Congress, however, modified the Mellon plan to make the Board's functions more nearly judicial than those of the Committee;[312] not only were written findings of fact required in every case, as proposed by the Administration,[313] but written opinions were required as well whenever the amount in controversy exceeded $10,000.[314] Additionally, Board proceedings had to be open to the public and conducted in accordance with judicial standards of procedure.[315] Even though these modifications virtually assured that membership on the Board would be confined to

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[308] For a discussion of the Committee on Appeals and Review, see Part I, notes 221–256 and accompanying text.

[309] *See* Part II, note 91.

[310] Committee Print No. 1 of the Revenue Bill of 1924, 68th Cong., 1st Sess. § 1000(b), (e) (Dec. 19, 1923) [hereinafter cited as 1924 Administration Bill].

[311] *Id.* § 1000(b) provided:

> The chairman, with the approval of the Secretary, may from time to time divide the Board into divisions and assign the members thereto, and designate a chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than three members, the chairman may assign other members thereto, or he may direct the division to proceed with the transaction of business.

As a result of action to make the Board independent of Treasury, Congress eliminated from the bill the power of the Secretary to approve the selection of division and division chiefs. *See* Part II, notes 55–76 and accompanying text.

[312] *See* Part II, notes 77–97 and accompanying text.

[313] 1924 Administration Bill, *supra* note 310, § 1000(e).

[314] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[315] *Id.*; *see also* Part II, notes 84–88 and accompanying text.

lawyers,[316] the portion of the Administration proposal authorizing the creation of divisions was retained.[317] Its retention may have resulted either from a failure to recognize that the inter-disciplinary nature of the Committee would not be carried forward and therefore no benefit would be derived from multi-member divisions, or from a belief that sounder decisions could be obtained through a collegial process even when the background and training of the judicial officers were similar.

Although the statute provided for the creation of divisions, it clearly indicated that decisions could be made by the full Board as well.[318] Chairman Hamel initially refrained from exercising his authority to create divisions, with the result that the first few cases were heard en banc.[319] By the end of the summer of 1924, it was apparent that the Board would not be able to handle the numerous cases coming up for trial if the en banc practice was retained, and in September Mr. Hamel divided his 12-member Board into three divisions—one division had three members[320] and two others had four members each.[321] With the appointment of four additional members in March 1925, a fourth division was created.[322] The Chairman of the Board, who had important administrative and review responsibilities, was excluded from membership on a division.

As the number of appeals to the Board increased, the issue of division size soon emerged as part of a general concern with productivity. A great many small cases were being filed, [323] and the question was raised whether special small case divisions should be established having only a single member.[324] Obviously, a greater number of cases could be disposed of in this manner, but ambiguities in the 1924 Act created doubt as to whether

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[316] *See* Part II, notes 213–215 and accompanying text.

[317] Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337.

[318] *Id.* §§ 900(e), (f).

[319] John H. Parrott, 1 B.T.A. 1 (1924); Everett Knitting Works, 1 B.T.A. 5 (1924).

[320] Division No. 1 was comprised of Mr. Ivins, Chief, Mr. Korner, and Mr. Marquette. Memorandum from Chairman Hamel, September 3, 1924, filed at the U.S. Tax Court in "Organizing the Board: Memoranda & Correspondence."

[321] Division No. 2 was comprised of Mr. James, Chief, Mr. Sternhagen, Mr. Trammell, and Mr. Trussell. Division No. 3 was comprised of Mr. Graupner, Chief, Mr. Lansdon, Mr. Littleton, and Mr. Smith. *Id.*

[322] Memorandum from Chairman Hamel, March 28, 1925, filed at the U.S. Tax Court in "Divisions."

[323] More than 30% of the appeals filed involved deficiencies of less than $500. *See* 1925 House Hearings, *supra* note 2, at 887 (testimony of George Morris).

[324] Small cases were so troublesome that some Board members were privately urging that Board jurisdiction be limited to cases involving deficiencies of more than a certain amount, say $500. *See* Graupner, *supra* note 38. Politically, of course, this proposal was unacceptable and it was never advocated seriously in public. *Cf.* 1925 House Hearings *supra* note 2, at 887–89 (testimony of George Morris).

divisions of less than three were authorized.[325] Because of uncertainty over this question, no special small case divisions were established.[326]

With the congressional consideration of the Revenue Bill of 1926, a proposal was advanced to eliminate any inference that divisions must be comprised of more than a single member.[327] Supporters of the proposal argued that one-member divisions would enable the Board to hear more cases both in Washington and in the field by increasing the number of divisions; that individual members would be able to devote more time to the consideration of cases with a resulting increase of decisions; and that the Board as a whole would be able to review more division decisions because of the reduced burden on the individual members.[328] The House adopted the proposal but required that decisions by single-member divisions be reviewed by the entire Board.[329] Obviously, the proviso attached to single-member divisions was a vestige of the belief in the value of collegial decisions. The Senate, probably at the urging of the Board, adopted the authorization for single-member divisions without the requirement of Board review.[330] The Senate version prevailed in conference.[331] Although the roots of the single-member division proposal lay in the concern over small cases, no limitation was imposed on the use of small divisions.

Four months after the passage of the 1926 Act, the Board adopted a "plan of reorganization," which had as its foundation the institution of one-member divisions.[332] By this time a substantial backlog of cases had developed, and the problem of productivity was becoming acute. More than 11,000 cases were pending before the Board and new appeals averaged

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[325] Ivins, *supra* note 33, at 410; *see also supra* notes 310–317 and accompanying text.

[326] A practice soon developed to ameliorate the rigors of the three-member division requirement. Hearings before divisions were frequently held before a single member of the division who would then report to the full division, which would then render a decision that would be reviewed by the full board. 1925 House Hearings, *supra* note 2, at 890 (interchange between Chairman Green and George Morris).

[327] *Id.* at 887 (testimony of George Morris), 912 (testimony of James Ivins).

[328] *See* Korner, *supra* note 289, at 416.

[329] *See* H.R. REP. NO. 69-356, at 53 (1926).

[330] *See id.*

[331] *Id.* The 1926 Act simply provided that the Chairman was authorized to "divide the Board into divisions of one or more members . . . ." Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 906(a), 44 Stat. 106 (now codified at I.R.C. § 7444(c)).

[332] Memorandum from Chairman Korner to members of the Board, June 11, 1926, filed at the U.S. Tax Court in "Divisions" [hereinafter cited as Reorganization Memorandum].

800 to 900 per month.[333] In contrast, for fiscal 1926, the Board had managed to dispose of cases at the rate of slightly more than 300 per month.[334]

There was considerable concern on the Board with its growing docket of cases.[335] From a purely personal point of view, the members must have viewed with some alarm the increasing popularity of their new agency. Throughout the first two years of the Board's existence, they had invested enormous time in discharging their duties. It is doubtful that they had much time or energy to devote to their personal lives.[336] One can well imagine their frustration at being unable to decrease the backlog with these efforts. But aside from the personal sacrifices required, they also recognized the danger to the Board if it became so overwhelmed with work that it could not discharge its statutory mandate to decide cases "as quickly as practicable."[337] Some persons professing to be friendly to the Board were already beginning to call for modifications in the law that would decrease the importance of the Board in tax litigation. For example, one proposal was made to give the federal district courts concurrent jurisdiction with the Board to redetermine deficiencies.[338] Naturally, Board members opposed such a plan,[339] because its adoption might well have resulted in the Board's immediate obsolescence. To forestall these proposals some action was necessary to make the Board more efficient.

Part of the workload problem was beyond the control of the Board. For example, many taxpayers were appealing from deficiency assertions that were clearly proper.[340] The Board hoped that the newly authorized imposition of a $10 filing fee[341] would decrease the number of frivolous appeals, and, in fact, evidence soon indicated that the filing fee was reducing appeals by 25 percent.[342]

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333 *Id.* at 1–2.

334 *See* Part II, note 113.

335 Chairman Korner, for example, referred to "a feeling of serious apprehension among the members as to the ability of the Board to stem the tide" of cases pending. Memorandum from Chairman Korner to members of the Board, June 12, 1926, filed at the U.S. Tax Court in "Divisions."

336 *See* Part II, notes 291–293 and accompanying text.

337 Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 907(a), 44 Stat. 107 (now codified at I.R.C. § 7459(a)).

338 Lyle T. Alverson, *Has the Board of Tax Appeals Failed?*, 4 NAT'L INC. TAX MAG. 337, 358 (1926).

339 *See* Letter from J. Gilmer Korner to Chairman Green, No. 24, 1926, pp. 2, 5, filed at the U.S. Tax Court in "Revenue Act of 1926: Memoranda & Correspondence."

340 Reorganization Memorandum, *supra* note 332, at 4.

341 Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 904, 44 Stat. 106.

342 Reorganization Memorandum, *supra* note 332, at 2, 4.

Another cause of the growing backlog could be attributed to audit practices in the Bureau. Many conferees in the Income Tax Unit were hesitant to settle cases on a basis acceptable to taxpayers. They were probably concerned that their careers would be retarded if they became known as pro-taxpayer. The availability of the Board procedure undoubtedly encouraged this practice since an aggrieved taxpayer would have a further appeal before having to pay a disputed tax. Additionally, many appeals resulted from the issuance of deficiency notices to preserve the Bureau's position in the face of an imminent tolling of the statute of limitations. Finally, many erroneous deficiencies were asserted as a result of field audits that were not reviewed by the generally more competent staff located in the Bureau's central office in Washington.[343] Interestingly, decentralization of the audit function during this period was being urged as a means of reducing the Bureau's backlog of unaudited returns.[344] The errors thereby spawned served to increase the Board's backlog.

The Board received assurances that Treasury was endeavoring to solve these problems,[345] but Chairman Korner was convinced that the Board must take steps of its own to increase the number of cases it could handle.[346] To this end the Board adopted two significant procedural changes. First, the four multi-member divisions were replaced by 16 single-member divisions.[347] An indication of how quickly the backlog problem developed was that, under the reorganization plan, single-member divisions were to hear all appeals, even though the authorization for these divisions was justified principally as a means of disposing of small cases.

The second procedural modification involved Board review of division decisions. Up until this time, the entire Board reviewed every decision prior to its promulgation.[348] The statute had never required such review,[349] but the importance of uniformity of decision was believed to make the practice necessary. Board review, however, consumed considerable time, and Chairman Korner believed that a great number of cases simply involved the

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343 *Id.* at 4.

344 *See* Part I, notes 85–95 and accompanying text.

345 Reorganization Memorandum, *supra* note 332, at 5–6. For example, the General Counsel had established a special section to settle cases involving less than $1,000. *Id.*

346 *Id.* at 7.

347 Memorandum from Chairman Korner to members of the Board, June 25, 1926, filed at the U.S. Tax Court in "Divisions."

348 *See* 1925 House Hearings, *supra* note 2, at 860 (testimony of Chairman Korner).

349 Both the 1924 and 1926 Acts provided a division decision would become final if Board review was not directed by the Chairman within 30 days. Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337; Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 906(b), 44 Stat. 106.

application of well-established precedents to disputed facts. In these situations, he urged that review by the full Board was unnecessary and proposed that the Board should employ an expert, to be called either a "coordinator" or "administrative assistant," to review division decisions and make recommendations as to whether they deserved consideration by the entire Board.[350] Chairman Korner, however, was not prepared to dispense altogether with collegial review, and a further element of his plan was the grouping of single-member divisions into "parts" comprised of three divisions. Division decisions would be reviewed by the parts much as they had been formerly reviewed by the entire Board; the decisions would then be forwarded to the Chairman and the coordinator, who would determine on a case by case basis whether full Board review was necessary.[351]

Although the Board members had no objection to the use of single-member divisions,[352] a majority were unwilling to accept the Korner proposal insofar as it eliminated the necessity for full Board review of division decisions.[353] The legislative history of the 1926 Act indicated that Congress believed Board review to be of the utmost importance[354] and little sentiment existed in favor of thwarting congressional expectations.[355] Accordingly, a compromise was struck. The services of a coordinator would not be retained and the Chairman would continue to refer all division decisions to the full Board for review. However, the proposal to group the single-member divisions into parts would be retained, and the parts would be given the additional duty of recommending to the Chairman whether a case should be given "full consideration by the Board" or should be promulgated without "exhaustive Board consideration."[356] Hopefully, this procedure would reduce the burden on the Board while preserving the practice deemed so important by Congress.

The system thus adopted was retained for only a year. In the spring of 1927, the Board changed to an approach similar to that originally proposed

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350 Reorganization Memorandum, *supra* note 326, at 10–16.

351 *Id.*

352 The creation of the divisions was, under the statute, solely within the province of the Chairman. Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 906(a), 44 Stat. 106.

353 B.T.A. Conference Minutes, June 23, 1926.

354 "The committee . . . is of the opinion that the great value of the board lies in its practice in meeting regularly for common discussion and consideration of opinions prepared and proposed to be issued." H.R. REP. NO. 69-1, at 18 (1925).

355 As with the selection of divisions, the decision to call for Board review was, under the statute, within the discretion of the Chairman. Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 906(b), 44 Stat. 106. Thus, Chairman Korner could have enforced his will on the Board. That he did not is indicative of the collegial nature of the Board.

356 B.T.A. Conference Minutes, June 23, 1926.

by Chairman Korner. Division decisions would be reviewed by the parts and then forwarded to the Chairman who would decide whether full Board review would be desirable. If cases were reviewed by the full Board, such would be indicated in the published reports. If no Board review was given, the names of the members of the part that had considered the case would be printed with the report of the case.[357] Five years later, with the abolition of parts, the present system was adopted, under which division decisions are forwarded directly to the Chief Judge who then determines whether or not the full court should review.[358]

The benefits of the streamlined procedure soon became apparent, and the number of cases disposed of by the Board increased from 3,900 in 1926 to 5,400 in 1927.[359] With the elimination of the necessity for Board review in every case, further efficiencies were achieved, and in 1928 the Board disposed of 7,100 cases.[360]

H. Conclusion

The creation of the Board in 1924 and the statutory modifications accomplished in 1926 were responsive to a basic need of tax administration: the provision of a procedure for pre-assessment adjudication of tax disputes. As has been described in this and the preceding parts of the study, controversy surrounded the determination of the best means of filling this need; hence, the statutory rules concerning the Board resulted from a series of compromises. But even though the statutory structure of the Board did not completely conform to the views of any single group, certain general characteristics of the new agency could be identified, characteristics which in large measure have remained unchanged over the years.

The most important of these characteristics resulted from the recognition that the adjudicating body should be independent of the agency charged with the collection function. The Board was spawned in a period of general disfavor with the Bureau of Internal Revenue, which was experiencing considerable difficulty in coping with the administrative problems created by the new broad-based income and profits taxes.[361] Among the Bureau's real or imagined defects were inefficiency, arbitrariness, and favoritism. The original Administration proposal for creation of the Board provided that the Board would be independent of the Bureau, but would remain a part of the Treasury Department.[362] Such a

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357 B.T.A. Conference Minutes, May 31, 1927, June 3, 1927.
358 B.T.A. Conference Minutes, April 1, 8, 1932.
359 *See* Part II, note 113.
360 *Id.*
361 *See generally* Part I, notes 52–141 and accompanying text.
362 *See* Part II, notes 25–54 and accompanying text.

connection with the Bureau, albeit indirect, proved unacceptable to Congress. The Board ultimately was established separate from both Treasury and the Bureau as an independent agency in the executive branch of Government.[363] It retained this status for almost half a century. Although its members originally had been chosen largely on recommendations from Treasury officials and it has had to work closely with the tax collection agency (which has been a party in every one of its tax proceedings), the Board and later the Tax Court has striven to maintain its independence in both substance and appearance. Its success in this endeavor is suggested by the fact that throughout its history no serious charge of conscious partiality has ever been leveled against it.[364] The issue of independence has continued to be a major theme of Tax Court affairs and was largely responsible for the court's change of status in 1969 from an independent agency in the executive branch to a legislative court.[365] This issue also figured prominently in the provision of the Tax Court with its own building in 1974. Until that time, for most of its history, the

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363 *See* Part II, notes 55–97 and accompanying text.

364 Occasionally, critics have contended that the court's lack of full judicial status may cause it to unconsciously favor the Government. *See* B. Anthony Billings, D. Larry Crumbley & L. Murphy Smith, *Are U.S. Tax Court Decisions Subject to the Bias of the Judge?*, 55 TAX NOTES 1259 (1992); Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 997–99 (1991); Daniel Ginsberg, *Is the Tax Court Constitutional?*, 35 MISS. L.J. 382 (1964); *see also* J. Edward Maule, *Instant Replays, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Bias*, 66 TENN. L. REV. 351, 355–63 (1999) (recounted the then-existing charges that the Tax Court decisions exhibited bias in favor of the Government). Not surprisingly, a few Tax Court judges have gone on record to dispute allegations of bias. *See* David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 25–26, 28 (1995) (describing why it is "myopic to derive any meaningful conclusion of bias based solely on statistics of the prevailing party in the Tax Court," concluding that taxpayers "need not have any anxiety with respect to claims of alleged pro-government bias" at the Tax Court); Theodore Tannenwald, Jr., *The United States Tax Court: Yesterday, Today, and Tomorrow*, 15 AM. J. TAX POL'Y 1, 5 (1998) (describing the characterization of the Tax Court as a pro-Government tribunal as "a canard that has existed for a long time"). In a 1999 article, Professor James Maule undertook an empirical examination of whether a pro-Government bias exists at the Tax Court, one that focused on the resolution of issues by the Tax Court that present the opportunity for the exertion of bias, rather than focusing on overall case outcomes than can have a variety of contributing causes. Maule, *supra* at 365–67. He concluded that no pro-Government bias exists. *Id.* at 425–26.

365 Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (amending I.R.C. § 7441).

Board/Tax Court[366] had been physically located in the Internal Revenue Building.

A second characteristic of the Board/Tax Court has involved the nature of its proceedings. The Coolidge Administration favored informal proceedings as a means of expediting the Board's work,[367] but Congress insisted on the more formal practice of courts.[368] In Congress' view the interests of precision, publicity of proceedings, and the establishment of a cohesive body of precedents were of paramount importance and could only be achieved by a judicial-type body. Undoubtedly, the strictures of formal procedures have slowed the handling of cases, and the problem of backlog has plagued the Board/Tax Court almost from the first. Nevertheless, the tax laws are of such intrinsic complexity that the need for a specialized "court" to resolve disputes and formulate interpretations has not been questioned since 1924. The Board/Tax Court has continuously operated pursuant to judicial procedures and its member/judges,[369] especially in recent times, usually have been selected from the swelling ranks of the tax bar. Efforts to increase the efficiency with which tax disputes are adjudicated generally have been restricted to improvements of administrative procedures within the Bureau/Service[370] and increased reliance on streamlined judicial procedures that encourage pre-trial settlements.[371]

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[366] Any effort to describe events spanning the history of the Board of Tax Appeals and the Tax Court is met with a formidable problem of nomenclature. In 1942, the name of the Board of Tax Appeals was changed to the Tax Court of the United States. Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 957. At that time, "members" of the Board became "judges" of the court. *Id.* The "Chairman" of the Board was changed to the "Presiding Judge" of the court. *Id.* In 1948, the "Presiding Judge" became the "Chief Judge." Act of June 25, 1948, ch. 646, § 32, 62 Stat. 991. In 1969, the "Tax Court of United States" became the "United States Tax Court." Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951, 961, 83 Stat. 730, 734. Adding to the confusion, in 1953, the Bureau of Internal Revenue became the Internal Revenue Service. *See* INTERNAL REVENUE SERVICE, INCOME TAXES 1862–1962: A HISTORY OF THE INTERNAL REVENUE SERVICE 26–27 (1962).

[367] *See* Part II, notes 77–80 and accompanying text.

[368] *See* Part II, notes 81–88 and accompanying text.

[369] *See supra* note 366.

[370] *Id.*

[371] An exception to the general requirement of formal judicial procedures was the institution of a small tax case procedure in 1969. Act of Dec. 30, 1969, Pub. L. No. 91-172, § 957(a), 83 Stat. 733 (amending I.R.C. § 7463). In cases in which the procedure is applicable, no appeal is permitted from the Tax Court decision and formal procedural rules are relaxed. *See* TAX CT. R. 174 (July 6, 2012 ed.). The Tax Court's small tax case procedures are discussed in Part XIII.A.

Related to the Board/Tax Court's judicial "nature" is a third characteristic of court status. Over the years, attempts have been made to accord it full article III court status.[372] Although other specialized courts have been established under article III,[373] Congress has consistently resisted similar proposals with respect to the Board/Tax Court. The Board/Tax Court has always performed an exclusively judicial function, and the failure to fully recognize this fact has created certain ambiguities. In general, the response of Congress has been to provide the Board/Tax Court with an increasing number of court indicia while withholding formal recognition. For example, in 1926 Congress provided for appeal of Board decisions rather than collateral review;[374] in 1948 the law was further amended to make clear that Tax Court decisions would be reviewed on appeal under the same standards applicable to decisions by district courts sitting without juries.[375] In the case of Tax Court judges, a similar evolution has occurred; in 1953 a pension system was provided similar to that applicable to federal judges,[376] and 16 years later a form of modified life tenure was granted to Tax Court judges.[377] The most significant softening of the congressional refusal to recognize the judicial status of the Board/Tax Court was accomplished by the Tax Reform Act of 1969, which changed the Tax Court from an independent agency in the executive branch to a court established under article I.[378] Despite the fact that some questions may still be raised concerning the court's status,[379] the compromise effected in 1969 would appear to have settled the court's status for the foreseeable future.

A fourth important characteristic of the Board/Tax Court has involved its jurisdictional role within the general tax litigation structure. Prior to 1924, tax controversies could be tried in either district court or the Court of

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372 *See*, *e.g., supra* notes 18–45 and accompanying text.

373 For example, the United States Court of International Trade (successor to the Board of General Appraisers, which later became the Customs Court) enjoys article III status. Similarly, the Court of Claims once held article III status. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962). [However, as part of the Federal Courts Improvement Act of 1982, Congress replaced this tribunal with the United States Court of Claims (later renamed the United States Court of Federal Claims), which Congress established as an article I legislative court. *See* Pub. L. No. 97-164, § 171(a), 96 Stat. 25, 27 (1982).]

374 Revenue Act of 1926, ch. 27, § 1001, 44 Stat. 109.

375 Act of June 25, 1948, ch. 646, § 36, 62 Stat. 991.

376 Act of Aug. 7, 1953, ch. 352, 67 Stat. 482.

377 Tax Reform Act of 1969, Pub. L. No. 91-172, § 954(a), 83 Stat. 730 (amending I.R.C. § 7447(b)(3)). Under the new law, a Tax Court judge who is not reappointed will be entitled to a full judicial pension if he has notified the President of his willingness to accept reappointment.

378 *Id.* § 951 (amending I.R.C. § 7441).

379 *See* Harold Dubroff, *Federal Taxation*, 1973/74 ANN. SURVEY OF AM. LAW 265, 272–85 (1974).

Claims.[380] Payment of the disputed tax and disallowance of a claim for refund served as a prerequisite to the jurisdiction of these courts. With the creation of the Board in 1924, taxpayers for the first time could obtain an adjudication of tax liability in advance of the necessity for payment. This fundamental change was effected as an addition to the existing system and not as part of a general overhaul of the entire litigating structure. Thus, the jurisdiction of district courts and the Court of Claims continued to be limited to refund claims. Conversely, the Board's jurisdiction was restricted to redetermining deficiencies; it was given no authority to review the merits of refund claims. In 1926, the Board was given a limited degree of refund jurisdiction,[381] and, more recently, taxpayers have been permitted to seek declaratory relief in the Tax Court with respect to certain matters.[382] But in general the structure created in 1924 has remained to the present despite criticism that it provides taxpayers with too much opportunity for forum shopping and impedes the development of uniform interpretations of the tax laws.

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[380] *See* Part I, notes 142–197 and accompanying text.

[381] *See supra* notes 101–108 and accompanying text. In 1988, Congress provided the Tax Court with authority to order payment of any refund it determined. *See* I.R.C. § 6512(b)(2) (enacted as part of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6244(a), 102 Stat. 3342, 3750). This outwardly judicial component of the Tax Court's expanded jurisdiction is discussed in Part VI.B.

[382] Act of September 2, 1974, Pub. L. No. 93-406, § 1041(a), 88 Stat. 949, *adding* I.R.C. § 7476 (qualification of certain deferred compensation plans). For a discussion of the Tax Court's declaratory judgment jurisdiction, see Part VII.A.

PART IV

THE BOARD BECOMES A COURT

The evolution of the name and status of the Tax Court has occurred in a three-stage process. The court was originally established in 1924 as the Board of Tax Appeals, "an independent agency in the executive branch of the Government."[1] In 1942, the name of the Board was changed to the Tax Court of the United States, but despite its new title the court's status as an agency of the executive branch was not disturbed.[2] Finally, in 1969, the court was established as a legislative court under article I of the Constitution, and its name was changed to the United States Tax Court.[3]

To the uninitiated these changes in the status and name of the court may seem of minor significance. They had little effect on the court's function and powers.[4] Moreover, since the protections afforded to most federal judges only apply to courts created pursuant to article III of the Constitution,[5] the changes had only minor impact on the status of Tax Court judges.[6] Nevertheless, the changes made in the name and status of the court have been highly controversial and provide an insight into the role of this tribunal as perceived by the Congress, the Departments of Treasury and Justice, the tax bar, and the court itself.

A. The Board of Tax Appeals from 1924 to 1942

The original proposal to create the Board of Tax Appeals was submitted to Congress in late 1923 by Secretary of the Treasury Andrew Mellon. It provided that the Board would be an agency of the Treasury Department,

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[1] Revenue Act of 1924, ch. 234, §§ 900(a), (k), 43 Stat. 336, 338.

[2] Revenue Act of 1942, ch. 619, § 504, 56 Stat. 957.

[3] Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730, *amending* INT. REV. CODE OF 1954, § 7441. For a discussion of the meaning of the term "legislative court" see notes 65–69 and accompanying text *infra*.

[4] As part of the legislation establishing the Tax Court pursuant to article I, the court was given power to enforce its own process and to punish contempt. *Id.* § 956, 83 Stat. 732 (adding the provision now codified at I.R.C. § 7456(c)).

[5] These protections include tenure during good behavior and undiminished compensation while in office. U.S. CONST. art. III, § 1.

[6] The 1969 Act increased the terms of office of Tax Court judges to 15 years (formerly terms had been 12 years) and provided for full judicial pensions to judges who are not reappointed after the expiration of their terms, provided they notify the President prior to such expiration that they are willing to accept reappointment. *Id.* §§ 952(b), 954(a), 83 Stat. 730 (amending I.R.C. §§ 7443(e), 7447(b)).

independent of the Bureau of Internal Revenue,[7] which would review tax deficiency assertions pursuant to informal procedures.[8] In the view of Treasury, such a body would combine the advantages of impartiality with expeditious disposition of the troublesome number of disputes arising under the tax laws.[9] Congress, which was well aware of shortcomings in the administration of the tax laws, adopted in general the proposal for creation of the Board, but in doing so made substantial modifications.[10] Most importantly, Congress insisted that the Board be independent of Treasury and that it follow the formal procedures of courts rather than the informal practice generally applicable in the Bureau.[11]

Although independence and judicial procedures are characteristics shared by all federal courts, the legislative history of the 1924 Act does not disclose that any congressional consideration was given to according the Board full court status. The only alternatives Congress considered in this regard were (1) the Administration's proposal that the Board be a division of the Treasury Department; (2) the House-passed version of the bill, which, while not creating the Board as a full-fledged federal court,[12] removed statutory reference to the status of the Board and eliminated the Secretary of the Treasury's control over the Board; and (3) the Senate version of the bill, ultimately enacted, which retained the House provisions but added that the Board was "an independent agency in the executive branch of the Government."[13] The provision added by the Senate was apparently inserted at the suggestion of Middleton Beaman, House Legislative Counsel, to provide for the treatment of the Board's financial accounts by the General Accounting Office.[14]

The first effort to remove the Board from the executive branch and formally declare it to be a court was made in connection with the consideration of the Revenue Act of 1926.[15] By this time the Board had

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[7] The name of the Bureau of Internal Revenue was changed to the Internal Revenue Service in 1953. INTERNAL REVENUE SERVICE, INCOME TAXES 1862–1962: A HISTORY OF THE INTERNAL REVENUE SERVICE 26–27 (1962).

[8] *See* Part II, notes 25–54 and accompanying text.

[9] *Id.* at notes 77–80 and accompanying text.

[10] *Id.* at notes 55–167 and accompanying text.

[11] *Id.* at notes 55–97 and accompanying text.

[12] The Board could not have been a full federal court under the House bill because members of the Board were provided with tenure for a term of years—not good behavior as required under article III of the Constitution. Moreover, although not controlling, the fact that the House bill did not change the name of the Board to a court indicated the absence of intention to create a court.

[13] Part II, notes 55–76 and accompanying text.

[14] Letter from Presiding Judge Turner to Roswell Magill, June 17, 1947, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[15] Ch. 27, 44 Stat. 9.

been in existence for more than a year, its judicial character was clearly manifested by the procedures it had adopted, and its work was favorably viewed by lawyers, accountants, businessmen, and the Treasury.[16] At the suggestion of A.W. Gregg, who was then Solicitor of Internal Revenue as well as an adviser and protégé of Secretary Mellon, the Board organized a committee to formulate legislative proposals with respect to its status and operations.[17] Among the changes proposed by the committee was replacement of the Board with a "Court of Tax Appeals," a court of record, the members of which would serve during good behavior.[18] Secretary Mellon and the Treasury Department privately supported the Board's proposal for court status.[19] However, when Mellon later testified before the Ways and Means Committee at its hearing on the Revenue Bill of 1926, his comments with respect to the Board were quite general and did not include any reference to making the Board a court.[20] Subsequently during the hearings, Solicitor Gregg suggested that the Board be made a court,[21] but he did not press the suggestion after being informed by Representative Garner, ranking Democrat on the Ways and Means Committee, that there was great reluctance in Congress to create additional federal courts with tenured judges.[22] The Board itself did not publicly urge that it be formally changed to a court, and no version of the 1926 bill contained such a provision.

Even though no serious congressional consideration was given to making the Board a court, the Board's peculiar status as "a court in all but name"[23] did have an impact on the 1926 legislation, and in several respects the Revenue Act of 1926 was a response to suggestions that if full court status for the Board was infeasible, an effort should be made to provide the Board with as many court attributes as possible.[24] These suggestions were based on the widespread view that the Board was successfully functioning as a judicial body, and could be even more successful if it were made more court-like. To some extent Congress proved willing to adopt this

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[16] Part II, notes 270–323 and accompanying text.

[17] *See* Letter from A.E. Graupner to J. Gilmer Korner, Aug. 28, 1925, filed at the U.S. Tax Court in "Revenue Act of 1926: Memoranda & Correspondence."

[18] *Id.*

[19] *Id.*

[20] *Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means*, 69th Cong., 1st Sess. 10 (1925) [hereinafter cited as 1925 House Hearings].

[21] *Id.* at 932–33, 935–36.

[22] *See id.* at 935 (remarks of Mr. Garner).

[23] FINAL REP. OF THE ATT'Y GEN'S COMM. ON ADMIN. PROC. IN GOV'T AGENCIES, S. Doc. No. 77-8, at 205 (1941).

[24] 1925 House Hearings, *supra* note 20, at 935–36 (testimony of Solicitor A.W. Gregg).

approach.[25] Of major importance, Board decisions were made directly appealable to the courts of appeals and from these courts, on certiorari, to the Supreme Court; in the absence of an appeal, Board decisions were final and not subject to collateral attack.[26] Additionally, the requirement that Board proceedings conform to judicial standards of procedure and evidence was clarified;[27] the Board was given power to dismiss cases for procedural defects without the necessity of written findings of fact and opinions,[28] and it was authorized to impose filing fees.[29]

These changes did not, however, meet all the criticisms that had been leveled against the Board's status as an agency of the executive branch. The Board still had a name that obscured the nature of its activities. As a result, many taxpayers who were unfamiliar with the Board assumed it functioned like an administrative body rather than like a court and were thereby led into procedural errors.[30] Additionally, the Board lacked judicial powers of trial courts generally to enforce subpoenas and punish contempt. Enforcement of the Board's process could only be obtained in United States district court, a cumbersome procedure that reduced the efficiency of the Board's operation.[31] Finally, the usual constitutional guarantees of independence accorded to federal judges—tenure during good behavior and compensation undiminished while in office—were not applicable to the Board.[32] There was some suggestion that the absence of the constitutional protections might subject Board members to inappropriate pressures from governmental and private sources.[33] Additionally, the absence of life tenure and the prestige associated with the federal judiciary were thought by some

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[25] *See* Bolon B. Turner, *The Tax Court of the United States, its Origin and Function, in* THE HISTORY AND PHILOSOPHY OF TAXATION 31, 37–38 (1955) [hereinafter cited as Turner].

[26] Revenue Act of 1926, ch. 27, §§ 1001, 1005, 44 Stat. 109, 110; *see also* Part III, notes 46–87 and accompanying text.

[27] *See* Turner, *supra* note 25, at 37.

[28] Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 907(b), 44 Stat. 107.

[29] *Id.* § 1000, *amending* Revenue Act of 1924, § 904, 44 Stat. 106; *see also* Part III, notes 46–87 and accompanying text.

[30] *See* Part III, notes 25–26 and accompanying text.

[31] *See, e.g.,* Revenue Act of 1924, ch. 234, § 1025(a), 43 Stat. 348; *see also* Part III, notes 32–34 and accompanying text.

[32] The Ways and Means Committee recommended that the 1926 Act provide members of the Board with life tenure. H.R. REP. NO. 69-1, at 18 (1925). Congress, however, rejected this proposal and instead provided a term of office of 12 years. Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 901(b), 44 Stat. 106; *see also* Part III, notes 177–209 and accompanying text.

[33] 67 CONG. REC. 732 (1925) (remarks of Mr. Mills).

to make it difficult to induce able people to accept membership on the Board.[34]

In spite of these criticisms, during the next 16 years the issue of Board status received legislative attention only once. In 1928, a decision of the Court of Appeals for the Seventh Circuit indicated that the Board's duties included investigating as well as adjudicating tax disputes, and thus it should consider evidence other than that which was introduced by the parties.[35] This ruling was clearly contrary to the legislative purpose in creating the Board,[36] but the confusion of the Seventh Circuit was understandable in view of the Board's formal status as an agency of the executive branch. The decision provoked an immediate congressional reaction. The Revenue Bill of 1928, as it passed the House, provided that no Board decision should be modified or reversed because of the failure of the Board to consider evidence that was not adduced at the hearing.[37] The Senate shared the House view that the functions of the Board were purely judicial, but it believed the provisions of existing law clearly indicated that the decision of the Seventh Circuit was erroneous.[38] Accordingly, the Senate excised the House provision. The Senate opinion prevailed. As enacted, the Revenue Act of 1928 made no reference to the question on the assumption, which proved correct, that future courts would heed the congressional view clearly expressed in the committee reports.[39]

The limited amount of consideration given to formally establishing the Board as a court in these early years is somewhat surprising since virtually no precedent existed for making a body like the Board an agency of the executive branch. By 1924, several independent executive agencies had been created, such as the Interstate Commerce Commission and the Federal Trade Commission,[40] which had adjudicatory functions. These agencies, however, were distinguishable from the Board, because the former agencies also performed functions that were clearly administrative in nature,

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[34] *See* Part III, notes 27–30, 177–185 and accompanying text.

[35] Although the case was not identified by name in later congressional criticisms of it, it was apparently Chicago Ry. Equip. Co. v. Blair, 20 F.2d 10 (7th Cir. 1927). *See* Turner, *supra* note 25, at 43.

[36] *See* Part II, notes 77–97 and accompany text.

[37] H.R. REP. NO. 70-2, at 30–31 (1927); H.R. REP. No. 70-1882, at 21–22 (1928).

[38] S. REP. NO. 70-960, at 38 (1928).

[39] H.R. REP. NO. 70-1882, at 21–22 (1928).

[40] The Interstate Commerce Commission was created in 1887 (Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 383 (formerly codified at 49 U.S.C. § 11 (1971)), but was later abolished in 1995 (Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995)). The Federal Trade Commission was created in 1914 (Act of Sept. 26, 1914, ch. 311, § 1, 38 Stat. 717 (now codified at 15 U.S.C. § 41)).

such as investigation and rule-making.[41] Obviously, such bodies could not appropriately be lodged in the judicial branch of Government. The Board, on the other hand, was to perform only judicial duties, and no constitutional problems would have been presented by the functions of the Board had it been made a court.

The closest existing parallel to the Board of Tax Appeals was the Board of General Appraisers, later to become the Customs Court, which had been created in 1890.[42] Like the Board of Tax Appeals, the Board of General Appraisers was created to adjudicate disputes concerning revenue matters.[43] Also like the Board of Tax Appeals, the Board of General Appraisers had a name that obscured its judicial function.[44] However, unlike the Board of Tax Appeals, the status of the Board of General Appraisers was not clearly defined by law. No provision in the statute stated whether the Board of General Appraisers was an executive agency or a court, and, initially, no mention was made of the tenure of its members.[45] In 1908, tenure during good behavior was provided by statute for Board of General Appraisers members, as was the power to punish contempt.[46] Both of these were characteristic of court status. On the other hand, the President could remove Board members for neglect, malfeasance, or inefficiency,[47] which did not accord with the rule that article III judges could only be expelled from office by impeachment in the House and trial in the Senate for high crimes and misdemeanors.[48] As a result of these apparent inconsistencies, no definitive conclusion could be drawn with respect to the status of the Board of General Appraisers.[49]

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[41] Act of Feb. 4, 1887, ch. 104, §§ 12, 13, 24 Stat. 383 (previously codified at 49 U.S.C. §§ 12, 13 (Interstate Commerce Commission) but later repealed by the Interstate Commerce Commission Termination Act of 1995)); Act of Sept. 26, 1914, ch. 311, §§ 5, 6, 38 Stat. 719 (now codified at 15 U.S.C. §§ 45, 46 (Federal Trade Commission)).

[42] Act of June 10, 1890, ch. 407, § 12, 26 Stat. 136; Act of May 27, 1908, ch. 205, §§ 1, 3, 35 Stat. 403, 406; Act of Aug. 5, 1909, ch. 6, § 12, 36 Stat. 98; Act of Sept. 21, 1922, ch. 356, § 518, 42 Stat. 972. The Board of General Appraisers was changed to the Customs Court in 1926. Act of May 28, 1926, ch. 411, § 1, 44 Stat. 669.

[43] Act of June 10, 1890, ch. 407, §§ 13, 14, 26 Stat. 136.

[44] Its name was not changed to the Customs Court until May 28, 1926, three months after enactment of the Revenue Act of 1926. Act of May 28, 1926, ch. 411, § 1, 44 Stat. 669.

[45] Act of June 10, 1890, ch. 407, § 12, 26 Stat. 136.

[46] Act of May 27, 1908, ch. 205, § 3, 35 Stat. 406.

[47] *Id.*

[48] U.S. CONST. art II, § 4.

[49] In 1894, an opinion of the Attorney General concluded that the General Appraisers were officers of the Treasury Department. 21 OP. ATT'Y GEN. 85 (1894). This ruling, however, preceded legislation that gave them life tenure and

Clearly, in both the 1924 and 1926 Acts, Congress did not allow any similar ambiguity to arise in the case of the Board of Tax Appeals. By statute the Board was expressly made a part of the executive branch of Government and the term of office of its members was limited to a definite number of years.[50] Legislative history does not directly disclose the factors that figured in the failure of Congress to provide court status for the Board. However, several possible explanations may be suggested. First, the Board was not to be a court in the traditional sense; juries would not be available, jurisdiction would be highly specialized and based solely on statute, and one of the parties, the Commissioner, would be the same in every one of its proceedings.[51] Of course, these were characteristics shared with other bodies that arguably were courts, such as the Court of Claims.[52] Nonetheless, the fact that in some respects the Board of Tax Appeals did not conform to the popular image of a court probably was significant to some members of Congress.

Second, the income and profits taxes were relatively new and undoubtedly many hoped they would not be permanent.[53] On that note, the Board itself generally was regarded as experimental.[54] If the taxes were repealed, or if the Board proved to be a failure in coping with the situation it was created to address, its discontinuance would be simplified if its members were not accorded tenure during good behavior. Of course, the

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judicial powers to punish contempt. *See supra* note 46 and accompanying text. In 1929, the Supreme Court indicated in dicta that the status of the Customs Court was still subject to question after its name change. Ex parte Bakelite Corp., 279 U.S. 438, 457–58 (1929). In 1956, Congress declared the Customs Court to be an article III court, and there was good reason to believe the Supreme Court would honor that declaration. Act of July 14, 1956, ch. 589, 70 Stat. 532; Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[50] Revenue Act of 1924, ch. 234, §§ 900(b), (k), 43 Stat. 336, 338; Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, §§ 900, 901(b), 44 Stat. 105, 106.

[51] *See* Glidden Co. v. Zdanok, 370 U.S. 530, 589 (1962) (Douglas, J., dissenting) (arguing that such courts are not comprehended by article III).

[52] Not until 1933 was it settled that the Court of Claims was a legislative court. Williams v. United States, 289 U.S. 553 (1933). In 1962, the court's status was resettled when it was held to be an article III court following a congressional declaration to this effect in 1953. Act of July 28, 1953, § 1, ch. 253, 67 Stat. 226; Glidden Co. v. Zdanok, 370 U.S. 530 (1962). However, the Federal Courts Improvement Act of 1982 replaced the Court of Claims with the U.S. Court of Claims (renamed the U.S. Court of Federal Claims in 1992), which Congress designated as an article I court. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105(a), 96 Stat. 25, 26–28 (1982) (codified at 28 U.S.C. § 171).

[53] *See* Letter from Robert Ash to Harold Dubroff, June 4, 1975, filed at the U.S. Tax Court in "Revenue Act of 1924: Memoranda & Correspondence."

[54] *See* Part II, note 112 and accompanying text.

Constitution would probably be satisfied if the judges of a defunct article III tribunal were transferred to another court,[55] but it was generally expected that the expertise of Board members would be restricted to tax matters and therefore would not be suitable for courts of general jurisdiction.[56]

Third, elevation to court status would most immediately benefit Board members and, in the ordinary course, they would be the ones who would actively seek the change. However, when the Revenue Bill of 1924 was being considered, there were no Board members yet appointed. A potent source of support for court status therefore was lacking. By the fall of 1925, when Congress began consideration of the Revenue Bill of 1926, the Board did have a membership "constituency" that sought court recognition.[57] However, the Board was in its infancy, and though it found support for its cause in the Coolidge Administration,[58] this was not sufficient to overcome the traditional reluctance of Congress to create offices of indefinite tenure.[59]

Fourth, the time and manner of the congressional treatment of legislation concerning the Board made unlikely any consideration of making it a court. The House of Representatives, which considered the Revenue Bill of 1924 before the Senate, modified the Administration proposal so as to make the Board independent of Treasury.[60] But since the House retained that part of the Treasury proposal that provided for informal procedures,[61] court status would have been inappropriate. When the bill reached the Senate floor, a successful effort was made to require the Board to conform to judicial procedures.[62] But by this time the Board's independence was apparently considered assured, and the possibility of providing it with the constitutional protections associated with article III was not even raised. The issue of the Board's independence received scant attention two years later during consideration of the Revenue Bill of 1926.[63] To some extent, the Board's prospects for court status at that time were diminished by the high praise lavished on it for its impartiality in the first

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[55] Such a procedure was employed when Congress abolished the Commerce Court in 1913. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 560–61 (1962).

[56] *See* 67 CONG. REC. 524 (1925)(remarks of Mr. Green); 65 CONG. REC. 7695 (1924) (remarks of Senator Norris).

[57] *See supra* notes 17–18 and accompanying text.

[58] *See supra* notes 19–21 and accompanying text.

[59] *See* Part III, notes 186–209 and accompanying text.

[60] *See* Part II, notes 71–76 and accompanying text.

[61] *Id.* at notes 77–81 and accompanying text.

[62] *Id.* at notes 82–97 and accompanying text.

[63] *See* Part III, notes 38–45 and accompanying text.

years of its existence.[64] With the disappearance of the controversy over the Board's independence, a potent argument for court status was removed.

Finally, the location of the Board in the executive branch was probably influenced by the then-existing state of decisional law with regard to the recognition and classification of judicial bodies. Today, ample authority exists for the proposition that courts created by or pursuant to article III of the Constitution, termed either constitutional courts or article III courts, are not the only types of courts that may carry out judicial functions of the Federal Government.[65] Other types of courts, termed either legislative courts or article I courts, are permitted to perform a variety of specialized judicial activities. Article I courts, not being subject to the requirements of article III, may have jurisdiction over matters that are not cases or controversies, and their judges are not protected by the guarantees of tenure during good behavior and undiminished compensation. As early as 1828, the Supreme Court recognized the validity of legislative courts created to carry out judicial activities in the territories.[66] By 1924, legislative courts were also sanctioned for the District of Columbia.[67] Until 1929, however, territorial and District of Columbia courts were the only types of legislative courts expressly recognized by the Supreme Court. In that year, the Court decided the case of *Ex parte Bakelite Corp.,*[68] which, in holding the Court of Customs Appeals to be a legislative court, broadly construed the congressional power to create such bodies with respect to

> various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.
>
> Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems

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[64] *See* Part II, notes 294–323 and accompanying text.
[65] *See*, *e.g.*, Palmore v. United States, 411 U.S. 389 (1973).
[66] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).
[67] *See* Keller v. Potomac Elec. Co., 261 U.S. 428 (1923).
[68] 279 U.S. 438 (1929).

> proper, even to requiring that the suits be brought in a legislative court specially created to consider them.[69]

Were the *Bakelite* decision available in 1924 and 1926 when major legislation with respect to the Board was considered, Congress might well have chosen to adopt the article I approach. However, in the absence of that decision and with the uncertainty of the boundaries of the legislative court doctrine, denominating and creating the Board as a "court" may have been viewed as tantamount to providing article III status. This, of course, would have been incompatible with the refusal of Congress to provide life tenure to Board members.[70] With the identification of the broadened legislative court doctrine in 1929, the issue of court status for the Board might have been opened for reconsideration were it not for the decision in that same year of *Old Colony Trust Co. v. Commissioner*,[71] in which the Supreme Court approved the constitutionality of providing appeals from Board decisions to the courts of appeals and then to the Supreme Court. In the course of its opinion, the Court also indicated approval of the Board's status as "an executive or administrative board."[72]

Old Colony presented the Court with the opportunity to hold that the Board, although denominated an agency of the executive branch, was in effect a legislative court. However, it chose not to do so, perhaps as a result of the approval in *Bakelite*, decided two weeks earlier, of the broad discretion of Congress to provide for the adjudication of disputes "arising between the government and others."[73] As a result, the status of the Board/Tax Court until 1969 was always subject to some question.[74] On the basis of *Old Colony*, many concluded that the Board's status was indistinguishable from any other agency of the executive branch—in effect, it was an administrative body.[75] However, others argued that its functions,

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[69] *Id.* at 451–52 (footnotes omitted).

[70] *See supra* note 59.

[71] 279 U.S. 716 (1929).

[72] *Id.* at 725.

[73] Ex Parte Bakelite Corp., 279 U.S. 438, 45l (1929).

[74] In 1969, the court was established as a legislative court. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730, *amending* I.R.C. § 7441. Even after this change, some questions could be raised concerning the court's status. *See* Harold Dubroff, *Federal Taxation*, 1973–74 ANN. SURVEY OF AMER. L. 265, 272–85 (1974) [hereinafter cited as Dubroff].

[75] Dobson v. Commissioner, 320 U.S. 489, 495 (1943) (referring to the Tax Court as an "administrative tribunal"); 1 J. MOORE, FEDERAL PRACTICE, ¶ 0.4[3], at 66 (2d ed. 1948); Letter from Francis Biddle, Attorney General to Rep. Robert L. Doughton, July 3, 1942, reprinted in *Hearings on H.R. 7378 Before the Senate Comm. on Finance*, 77th Cong., 2d Sess. 2,299 (1942).

powers, and duties compelled treating it as a legislative court.[76] Support for this view could be found in the fact that the Board was in most material respects similar to the Court of Customs and Patent Appeals and the Court of Claims, both of which had been held to be legislative courts.[77] Still, others argued that in view of the importance of the Board's duties and the primacy of the constitutional principle of separation of powers, the Board should be recognized as an article III court.[78]

B. The Tax Court of the United States – An Independent Agency in the Executive Branch of the Government

The years 1926 through 1940 did not witness any significant effort to change either the name or status of the Board of Tax Appeals. The decisiveness with which the 1926 life tenure proposal was defeated and Congress' refusal at that time even to consider full court status for the Board undoubtedly discouraged even the most optimistic Board supporters from publicly broaching the subject. Additionally, the economic depression of the 1930's, if anything, increased congressional hostility to creating judicial offices of privilege in a society beset by uncertainty.[79] Finally, the Supreme Court had in several opinions at least implicitly approved the constitutionality of an agency of the executive branch performing judicial functions[80] and thereby eliminated a potentially compelling reason for change.[81]

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[76] Turner, *supra* note 25, at 38–46.

[77] Williams v. United States, 289 U.S. 553 (1933) (Court of Claims); Ex parte Bakelite Corp., 279 U.S. 438 (1929) (Court of Customs and Patent Appeals). Following congressional declarations that these tribunals were article III courts, the Supreme Court ruled that they had constitutional court status. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962); *see also* Dubroff, *supra* note 74, at 275–79.

[78] Daniel L. Ginsberg, *Is the Tax Court Constitutional?*, 35 MISS. L. J. 382 (1964) [hereinafter cited as Ginsberg].

[79] Evidence of this view could be found in legislation adopted during this period reducing the compensation of judges not protected by article III. The Legislative Appropriation Act of 1932, ch. 314, § 107(a)(5), 47 Stat. 402, reduced judicial salaries of non-article III judges to a maximum of $10,000. This act was the subject of *Williams v. United States*, 289 U.S. 553 (1933), in which it was held that the Court of Claims was a legislative, not a constitutional, court, and therefore the salaries of its judges could be reduced.

[80] Phillips v. Commissioner, 283 U.S. 589, 599–600 (1931); Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 725 (1929); Williamsport Wire Rope Co. v. United States, 277 U.S. 551, 265–65 (1928); Blair v. Oesterlein Machine Co., 275 U.S. 220, 225–227 (1927); Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 121–22 (1926).

[81] Although not widespread, the view was held by some that the 1926 legislation was unconstitutional in permitting direct appellate review in the federal courts of

By 1941, however, the depression was ending and the memory of the 1926 defeat of formal court recognition was fading. A time had been reached when the Board and its supporters in Congress, the Administration, and the bar could resume efforts to conform the status and perquisites of the "Board" to its judicial nature. Probably few foresaw in 1941 that these efforts would ultimately span a period of almost three decades and would be marked by as many failures and frustrations as successes.

1. The Revenue Act of 1942 – the Board of Tax Appeals is Renamed the Tax Court of the United States

In 1941, Board members and their supporters apparently believed that the Board's best chance for elevation to court status lay in its similarity to the Customs Court, formerly named the Board of General Appraisers. Like the Board of Tax Appeals, the Customs Court adjudicated disputes with respect to revenue legislation, its procedures were judicial in nature, it functioned without juries, and its jurisdiction was highly specialized.[82] Also like the Board, the Customs Court had started out as part of the executive branch[83] and with a name that belied its true nature and duties. Yet Congress had seen fit in due course to accord the Customs Court a court name,[84] if not a full court status,[85] and also to accord its judges life tenure,[86]

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findings by the Board, since the latter was an agency of the executive branch. 67 CONG. REC. 3756 (1925) (remarks of Senator Cummins); *see also* James Craig Peacock, *An Anomalous and Topsy-Turvy Appellate System*, 19 A.B.A. J. 11 (1933). This view was rejected by the Supreme Court in *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929).

[82] *See supra* notes 42–49 and accompanying text.

[83] Although not specified in the statute, the status of the General Appraisers as Treasury officials was recognized in an early opinion of the Attorney General. 21 OP. ATT'Y GEN. 85 (1894).

[84] Act of May 28, 1926, ch. 411, § 1, 44 Stat. 669.

[85] Even under the 1926 legislation, the right to remove judges of the Customs Court was reposed in the President. If these judges were article III judges, removal should only be by impeachment in the House and conviction in the Senate. The judicial status of the Customs Court has never been passed on by the Supreme Court, and although it seems clear that the body is today a full article III court, Congress having specifically provided such in 1956 (Act of July 14, 1956, ch. 589, § 1, 70 Stat. 532), its status in 1941 was far from clear. In 1929, in *Ex parte Bakelite Corp.*, 279 U.S. 438, the Supreme Court had said in dicta of the Customs Court:

> Formerly [the Customs Court] . . . was the Board of General Appraisers. Congress *assumed* to make the board a court by changing its name. There was no change in powers, duties or personnel. The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties. But its functions, although mostly quasijudicial, were all

judicial-type retirement provisions,[87] and powers to preserve order, to compel the attendance of witnesses and the production of evidence, and to punish contempt.[88]

Relying on the analogy to the Customs Court, Board of Tax Appeals Chairman C. Rogers Arundell, in April 1941, sought Treasury support for a legislative proposal that Board members be provided with life tenure and retirement provisions similar to those applicable to Customs Court judges.[89] Apparently, informal support for the proposal was obtained from Administration officials, such as Assistant Secretary of the Treasury John L. Sullivan and Commissioner of Internal Revenue Guy Helvering, as well as from influential members of the tax bar, such as Professor Roswell Magill of Columbia University and George Morris of the American Bar Association.[90] However, there is no evidence that the Board was ever able to gain approval of the proposal from either Administration officials of cabinet rank or influential members of Congress, and this undoubtedly explains why no legislative action was initiated on the matter.

In spite of this early defeat, the Board continued to seek at least partial recognition as a court, and in 1942, having set aside its proposal for judicial tenure and retirement, it concentrated its efforts on securing legislation that would provide the Board with a court name. By this time, the Board had a new Chairman, John Edgar Murdock, who was to play the predominant role in securing approval of the 1942 change. Judge Murdock served on the Board/Tax Court from 1926 to 1961, the second longest tenure of any judge of the Tax Court.[91] Noted for his terse opinions,[92] Judge Murdock was aggressive and blunt. With the beginning of consideration of the legislation that was to become the Revenue Act of 1942,[93] Chairman

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> susceptible of performance by executive officers and had been performed by such officers in earlier times.

Id. at 457–58 (emphasis supplied) (footnotes omitted).

[86] Act of May 27, 1908, ch. 205, § 3, 35 Stat. 406.

[87] Act of Sept. 21, 1922, ch. 356, § 518, 42 Stat. 973.

[88] Act of May 27, 1908, ch. 205, § 3, 35 Stat. 406.

[89] Letter from C. Rogers Arundell to Assistant Secretary of the Treasury John L. Sullivan, April 1, 1941, filed at National Archives Building, Records of the Treasury Dep't, Record Group 56, *Tax—Board of Tax Appeals 1933–42*.

[90] *See* Letter from Professor Roswell Magill to C. Rogers Arundell, April 24, 1941, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence."

[91] Judge Howard A. Dawson, Jr. was appointed to the Tax Court bench in 1962 and is still serving at the time this text was revised in 2014.

[92] This is illustrated by a story, which may be more fable than fact, involving a petitioner who concluded his argument before Judge Murdock with the statement, "as God is my judge I do not owe this tax." The judge is reputed to have replied, "He isn't, I am, and you do."

[93] Ch. 619, 56 Stat. 798.

Murdock actively sought support from both congressional and Administration sources for a proposal to change the name of the Board of Tax Appeals to the United States Tax Court. Among the officials he solicited were Randolph Paul, then Assistant to the Secretary of the Treasury and a principal draftsman of the 1942 Act, Colin Stam, the powerful chief of staff of the Joint Committee on Internal Revenue Taxation,[94] and Dean Acheson, a personal friend and then Assistant Secretary of State.[95] Most importantly, Chairman Murdock found a strong supporter on Capitol Hill: Wesley Disney, a member of the Ways and Means Committee, was the brother of Richard L. Disney who served on the Board and Tax Court from 1936 to 1951. Congressman Disney actively supported the proposal in the House. Due to the substantial opposition that developed to the plan, this support proved to be essential.[96]

Chairman Murdock was at pains to point out that the proposal only related to changing the name of the Board to the United States Tax Court and changing the statutory designation of Board "members" to "judges." No amendment was sought with respect to the status of the Board as an agency in the executive branch, or with respect to the term of office, compensation, or retirement provisions of Board members.[97] Quite clearly, the reception of the 1941 proposal of Chairman Arundell to accord Board members life tenure and judicial retirement indicated that little sympathy then existed for such changes.

Chairman Murdock advanced several reasons for the name change.[98] Among these were arguments that had been raised in 1926 when the Board first attempted to secure full court status. The change (1) would reduce confusion among the public with respect to the Board's judicial procedures and would reduce the number of errors spawned by the belief that, because it was an agency of the executive branch, its practice was informal; (2) would enable the Board to be given the power to enforce its own processes and thereby reduce delays in those cases in which enforcement had to be

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[94] Letter from Chairman Murdock to Randolph Paul, Feb. 14, 1942, on file with the office of Tax Legislative Counsel, U.S. Treas. Dep't [hereinafter cited as Paul, Feb. 14, 1942]; Letter from Chairman Murdock to Colin Stam, Feb. 28, 1942, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda &: Correspondence" [hereinafter cited as Stam].

[95] Letter from Chairman Murdock to Dean Acheson, May 26, 1942, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence."

[96] *See* Letter from Chairman Murdock to Representative Disney, Oct. 22, 1942, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence" [hereinafter cited as Disney, Oct. 22, 1942].

[97] *See* Paul, Feb. 14, 1942, *supra* note 94, at 5.

[98] *See* Stam, *supra* note 94 and accompanying memorandum.

sought in United States district court;[99] and (3) would validate the generally recognized view that the Board was a court in everything but name.[100]

Additionally, several new reasons were developed in support of the name change. First, Chairman Murdock contended that the difficulties the Board was experiencing in obtaining the use of hearing rooms in many of the 50 cities in which it held trials could be reduced by simply naming the Board a court. The nature of Board proceedings was judicial and courtrooms were the most appropriate sites for trials. But many providers of court space throughout the country were, according to Chairman Murdock, reluctant to permit administrative hearings to be carried on in their facilities since such hearings were generally informal ones "to which large and undesirable crowds [were] attracted" and at which "smoking" was permitted.[101] Accordingly, many courtrooms were unavailable to administrative bodies; since the Board was such a body in name, it was frequently covered by the ban on the ground that if an exception was made in its case the provider of the courtroom space would be subjected to criticism for favoritism. Further support was found for the change of name in the fact that proposals had been made to give the Board concurrent jurisdiction, with the district courts and the Court of Claims, over refund litigation,[102] and to accord the Board power to designate trial commissioners to conduct hearings, receive evidence, and make findings of fact with respect to certain unusual cases.[103] Chairman Murdock believed that these changes, made in the name of furthering the goal of providing taxpayers with their traditional "day in court," would be more appropriate if the Board were called a court.[104] Finally, Chairman Murdock frankly admitted that a change of name, which would designate "members" of the Board as "judges" of the Tax Court, would ease a constant source of embarrassment.

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[99] This argument was not persuasive and was later dropped. If the purpose of the legislation was to simply change the name of the Board, presumably no change in the Board's inherent powers would be effected and it would not thereby be invested with the general powers of courts to enforce orders. Thus, legislation would be necessary to permit the Board to enforce its orders, and such legislation could as easily give the "Board of Tax Appeals" the power to enforce its orders as it could the "United States Tax Court."

[100] FINAL REP. OF THE ATT'Y GEN'S COMM. ON ADMIN. PROC. IN GOV'T AGENCIES, S. Doc. No. 77-8, at 205 (1941); Joseph Kahn, *The Status of the United States Board of Tax Appeals as a Judicial Body*, 7 NAT'L INC. TAX MAG. 135, 136 (1929); Dana Latham, *Jurisdiction of the United States Board of Tax Appeals Under the Revenue Act of 1926*, 15 CAL. L. REV. 199, 201, 203 (1927); John D. Martin, *The Problem of Reducing the Volume of Published Opinions*, 28 A.B.A. J. 528, 530 (1942).

[101] *See* Stam, *supra* note 94, accompanying memorandum, at 5.

[102] *See* Paul, Feb. 14, 1942, *supra* note 94.

[103] *Id.*

[104] Stam, *supra* note 94, accompanying memorandum at 7.

> It is frequently necessary, during the course of a trial and at other times, for persons to address Members of the Board. Practitioners and others have been at a loss to find any convenient title which is at the same time proper. They are sometimes embarrassed in this connection and the situation is always awkward. The fact of the matter is that they do not choose to use any such proper title as Mr. or Member. Occasionally, Commissioner is heard, but, generally, for their own convenience, persons address the Members as Judges. This puts the Members in a false and uncomfortable position which seems entirely undesirable for a tribunal of the dignity and importance of the Board. The change in name would immediately relieve this situation.[105]

Innocuous as the proposal to change the Board's name might seem to be, it drew substantial opposition. One uncharitable observer who believed the proposal emanated from "nothing more than a little vanity" suggested constitutional infirmities in naming an agency of the executive branch a "court."[106] The most formidable opposition to the change came from Francis Biddle, then Attorney General. Initially under the impression that the proposed legislation would make the Board into a full-fledged federal court, the Attorney General wrote Secretary of the Treasury Henry Morgenthau expressing his disapproval of the measure.[107] In the view of the Attorney General, the Board was operating well as an executive agency; changing it to a court would simply create confusion and cause the Board to lose the desirable flexibility with which it had operated in the past.[108] Additionally, the need for such a change should be demonstrated publicly, and no hearings were ever held on the proposal with cogent arguments advanced for creating the Board as a court. Finally, if the Board were

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[105] *Id.* at 8–9.

[106] Letter from Robert Klepinger to Chairman George, Aug. 20, 1942, reprinted in *Hearings on H.R. 7378 Before the Senate Comm. on Finance*, 77th Cong., 2d Sess. 2300–01 (1942) [hereinafter cited as 1942 Senate Hearings].

[107] Letter, June 5, 1942, reprinted in 1942 Senate Hearings, *supra* note 106, at 2298. The view that the Board sought court status in 1942 was, although erroneous, widespread. *See Hearings on H.R. 3214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. 210 (1948) (testimony of Maurice Austin) [hereinafter cited as 1948 Senate Hearings]. Judge Turner categorically denied this rumor, which seems to have been based on Attorney General Biddle's misunderstanding. *Id.* at 280–81.

[108] The Attorney General did not specify in which regards the Board benefitted from the flexibility associated with its non-court status. In fact, the Board had since its inception functioned pursuant to judicial procedures. *See* Part II, notes 77–97, 168–293, and accompanying text.

changed to a court, the Attorney General would be obliged to assert responsibility for representing the Government in its proceedings.[109] Since 1926, the Treasury Department had represented the Commissioner before the Board and this was not objectionable to the Attorney General only so long as the Board remained an agency of the executive branch, not a court.[110]

When the Attorney General discovered that the Board had proposed merely to change its name and not its status, he was not appeased—if anything, his opposition seemed stronger and he expressed it to the chairmen of both the House Ways and Means Committee and the Senate Finance Committee.[111] In his view, a "court" operating in the executive branch would be an incongruity, and a proposal to create such a body was so illogical that it could only be regarded as the first step in a concerted effort to change the Board into a full-fledged court. He also contested the assertion that the Board was a court in everything but name. In this regard, he pointed out that the Supreme Court had described the Board as an "administrative body,"[112] that its jurisdiction was limited by statute,[113] that it lacked the authority to enforce its decisions,[114] and that it did not possess the inherent powers of a court. Finally, the Attorney General argued that no convincing reasons had been furnished for changing the Board's name, and that the probable result of such a change would be to breed confusion among the public and additional litigation over the bona fides of a "court" located in the executive branch of Government.

Chairman Murdock was aware of the Attorney General's views concerning the change of the Board's name.[115] In an effort to dilute this

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[109] Executive Order No. 6166, promulgated in 1933, generally provided that the Justice Department would represent the Government in the federal courts.

[110] Between 1924 and 1926, the Solicitor of Internal Revenue, an official of the Justice Department, represented the Government before the Board of Tax Appeals. The Revenue Act of 1926 abolished the Solicitor's office and transferred its duties to a new office at the Treasury Department, General Counsel for the Bureau of Internal Revenue. Ch. 27, § 1201(a), 44 Stat. 126.

[111] Letter from Attorney General Biddle to Chairman Doughton, July 3, 1942, reprinted in 1942 Senate Hearings, *supra* note 106, at 2299 [hereinafter cited as Biddle]; Letter from Attorney General Biddle to Chairman George, July 24, 1942, reprinted in 1942 Senate Hearings, *supra* note 106, at 2297–98 [hereinafter cited as George].

[112] Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 725 (1929).

[113] This was not a persuasive reason for contending that the Board was not a court inasmuch as every inferior United States court has a statutorily prescribed jurisdiction, and even the Supreme Court has some of its jurisdiction determined by statute.

[114] United States ex rel. Girard Co. v. Helvering, 301 U.S. 540, 542 (1937).

[115] Letter from Chairman Murdock to Randolph Paul, May 30, 1942, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence."

opposition while the bill was pending before the Ways and Means Committee, he urged Treasury to make good on the informal support for the proposal that it had already manifested. Characteristically, the manner in which Chairman Murdock conveyed this request to Randolph Paul was direct.

> You have told me that you personally approve of . . . [the proposal] and that the Secretary [of the Treasury] also approves of it. The Board is grateful for this support from the Treasury and we are looking to you to present the matter to the Ways and Means Committee before it closes its deliberations on the present bill.[116]

Randolph Paul had not misrepresented his "personal" views to Chairman Murdock—Paul was an admirer of the Board of Tax Appeals and probably believed that it should have been accorded full court status.[117] Nevertheless, it would have been unseemly for two important executive departments to differ over a rather minor issue and Treasury yielded to the deep feelings of the Attorney General; accordingly, when the name change was considered by the Ways and Means Committee in executive session, Treasury joined Justice in opposing approval of the provision.[118]

Despite these formidable adversaries, the Ways and Means Committee adopted the change in its version of the bill (undoubtedly a result of the support of Congressman Disney), and this version was subsequently adopted by the full House.[119] Following the Ways and Means deliberations, Randolph Paul wrote Chairman Murdock congratulating the Board on its victory and indicating regret that Treasury was obliged to officially oppose the proposal before the Committee.[120] Chairman Murdock, who had become a student of the legislative process, responded with the suggestion

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[116] *Id.*

[117] In 1954, Paul was to write:

> In point of fact the Board . . . exercises functions similar to those of a Federal district trial court without a jury. It is difficult at this late date to imagine how our tax system could have survived many of its tribulations without the aid of this safety valve and judicial arrangement for the disposition of tax controversies.

RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 136 (1954).

[118] Letter from Henry Morgenthau to Francis Biddle, July 2, 1942, National Archives Building, Records of the Treas. Dep't, Record Group 56, *Tax—Board of Tax Appeals 1933–42*; Letter from Randolph Paul to Chairman Murdock, July 3, 1942, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence" [hereinafter cited as Paul, July 3, 1942].

[119] H.R. REP. NO. 77-2333, at 60, 172–73 (1942); H.R. REP. No. 77-2586, at 21, 72 (1942).

[120] Paul, July 3, 1942, *supra* note 118.

that "when the whole thing is over I hope to have some interesting discussion with you on the general subject of legislation and how it comes about, or doesn't come about."[121]

Under the House bill, the name of the Board was to be changed to the "United States Tax Court," its members were to be designated "judges," and the position formerly denominated "chairman" would be changed to "presiding judge."[122] The change would not affect the status, jurisdiction, powers or duties of the Board, or the tenure of its members; the Government would continue to be represented in Tax Court proceedings by the Chief Counsel for the Bureau of Internal Revenue, an official of the Treasury Department.[123]

In addition to the name change, the House bill incorporated a related change that was not recommended by the Board. Sponsored by Representative John Dingell, a member of the Ways and Means Committee, a provision was inserted in the bill which provided that "[n]o qualified person shall be denied admission to practice before . . . [the Tax Court] because of his failure to be a member of any profession or calling."[124] Pursuant to a Board rule dating back to 1924, only lawyers and certified public accountants were eligible to represent taxpayers before the Board.[125] Congressman Dingell, however, was under the impression that professional status had not been requisite for practice before the Board, and he desired assurance that the change in name of the Board would not provide the Board with an occasion to restrict practice to lawyers or any other professional group.[126] Congressman Dingell's erroneous understanding of prior Board practice was soon corrected by Chairman Murdock, but the Congressman continued to support the provision in the interest of not jeopardizing the means of livelihood of qualified tax practitioners solely by reason of their lack of professional status.[127]

The form of the bill that reached the Senate was objectionable to both Chairman Murdock and Attorney General Biddle. Chairman Murdock took strong exception to the House provision with respect to lay practice before the Board. He conveyed his views to Senator Walter George, Chairman of the Finance Committee, and urged that the Senate delete the provision

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[121] Letter from Chairman Murdock to Randolph Paul, July 7, 1942, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence."

[122] H.R. REP. NO. 77-2333, at 172 (1942).

[123] *Id.*

[124] H.R. 7378, 77th Cong., 2d Sess. § 504(b) (1942) as reported to and passed by the House.

[125] B.T.A. RULE 2 (July, 1942 ed.).

[126] 88 CONG. REC. 6335–36 (1942).

[127] *See* Letter from Chairman Murdock to Senator George, Aug. 10, 1942, reprinted in 1942 Senate Hearings, *supra* note 106, at 2304.

because it would do a disservice to both the public and the Board.[128] Formerly, the Board had relied on professional licensing as the criteria for admission to its bar. By this means it was relieved of the responsibility to investigate independently the intellectual and ethical qualifications of applicants. The new provision would require the Board to make such investigations, and Chairman Murdock feared that such a duty would impose an unduly heavy burden. Additionally, Chairman Murdock pointed out that the Board's rules on eligibility to practice should not be primarily directed to protecting the means of livelihood of would-be tax practitioners. Rather, the object of the rules should be to protect the public from inadequate representation before the Board; membership in the legal or accounting profession had traditionally been regarded as the best means of assuring adequate representation. He did not believe that the Board's own efforts to determine qualifications to practice could be as efficient. The result would be poorer representation for taxpayers.

Attorney General Biddle was equally displeased with the House bill.[129] For the reasons expressed above,[130] he continued to maintain that the name of the Board should not be changed. He found additional support for this position in the House provision opening practice to all qualified individuals. Lay practice before an administrative body was entirely appropriate in his view, but to permit such practice before a body denominated a court was an anomaly that could only add to the confusion engendered by the proposed name change.

Chairman Murdock actively sought the support of the Finance Committee for both the name change and the elimination of the open-practice provision.[131] He received a sympathetic hearing from Chairman George,[132] but ultimately the Finance Committee yielded to the Biddle position and eliminated the House provision changing the Board's name.[133] This modification was accepted, and the Senate version of the bill that went to the House-Senate conference made no change in preexisting law with respect to either the name of the Board or its rules on eligibility to practice.[134] However, in the conference Chairman Murdock's efforts were partially rewarded when Senator George successfully urged the Senate

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128 *Id.*; *see also* Letter from Chairman Murdock to Representative Disney, Aug. 10, 1942, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence" [hereinafter cited as Disney, Aug. 10, 1942].

129 George, *supra* note 111.

130 *See supra* notes 111–114 and accompanying text.

131 Disney, Aug. 10, 1942, *supra* note 128.

132 *Id.*

133 H.R. 7378, 77th Cong., 2d Sess. (1942), as reported by the Senate Finance Comm.

134 H. R. REP. NO. 77-2586, at 72 (1942).

conferees to accept, virtually unchanged, the House provisions dealing with the Board.[135] In this version the bill passed both the House and Senate.[136]

In only one minor respect did the final version of the 1942 Act fail to conform to the original House bill. Whereas the House had adopted a change of name to "United States Tax Court," the conference committee bill, and the version ultimately enacted, adopted the name "Tax Court of the United States."[137] Apparently, the change was incorporated at the request of Commerce Clearing House, a publisher of law books.[138] Commerce Clearing House included in its tax services a series of books entitled "United States Tax Cases," and it was concerned that if the Board was named "United States Tax Court," confusion would result due to the identity of the initials of the court and the books.

Although the 1942 Act retained the so-called Dingell amendment,[139] on balance, the new legislation represented a significant victory for those who viewed the Board as "a court in everything but name"—a victory made all the more sweet in the overcoming of the Justice and Treasury Department opposition. One can easily sense Chairman Murdock's gratification in the remarks he addressed to his friend and principal supporter on the Hill, Representative Disney:

> I am . . . frank and glad to acknowledge that I will take great personal satisfaction from having the right to be called Judge, and to be relieved of the embarrassment which I have heretofore felt when so frequently people address me by that unauthorized title.[140]

2. Attempts to Incorporate the Tax Court into the Federal Judicial System

In opposing the 1942 legislation changing the name of the Board of Tax Appeals to the Tax Court of the United States, Attorney General Biddle observed that the measure was simply a first step in a calculated design to make the Board a full-fledged federal court.[141] Although the name change could be justified on independent grounds,[142] most Board members would

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[135] Letter from Chairman George to Chairman Murdock, Oct. 26, 1942, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence."

[136] Revenue Act of 1942, ch. 619, § 504, 56 Stat. 957.

[137] *Id.*; H. R. REP. NO. 77-2586, at 21 (1942).

[138] *See* Letter from Presiding Judge Turner to Judge Maris, Nov. 9, 1946, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[139] Revenue Act of 1942, ch. 619, § 504(b), 56 Stat. 957 (now codified at I.R.C. § 7452).

[140] Disney, Oct. 22, 1942, *supra* note 96.

[141] Biddle, *supra* note 111.

[142] *See supra* notes 98–105 and accompanying text.

probably have agreed with the Attorney General as to their ultimate objective. The point at which the opposing forces disagreed was the desirability of such a change. Oddly, however, the next major effort to elevate the court's status was initiated without the court's instigation or even knowledge.

In 1943, the House of Representatives undertook a project to revise and codify into positive law title 28 of the United States Code, dealing with the federal judicial system.[143] For the most part, the codification effort dealt with noncontroversial matters and was directed toward eliminating inconsistencies in prior law and providing an authoritative code that could be relied on to be complete and current.[144] Nevertheless, the task was a formidable one, and the committees of the House which considered the matter[145] were assisted in the undertaking by an advisory committee of distinguished members of the bench and bar.[146]

In early 1945, during the deliberations of the advisory committee, Judge Justin Miller of the Court of Appeals for the District of Columbia, formerly a member of the Board of Tax Appeals,[147] raised the subject of the Tax

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[143] *Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 80th Cong., 1st Sess., ser. 2, at 6 (1947) (testimony of Mr. Keogh) [hereinafter cited as 1947 House Hearings].

[144] *Id.*

[145] Originally, the codification was assigned to the Committee on Revision of the Laws. In 1946, that Committee was abolished, and its work was taken over by the Judiciary Committee. 1948 Senate Hearings, *supra* note 107, at 531 (testimony of Charles Zinn).

[146] Charles Zinn was general counsel to the committees. John F. X. Finn of the New York Law Revision Commission was its special counsel. An advisory committee was also assembled to assist in the work, and it consisted of Judge Floyd Thompson, former chief justice of the Illinois Supreme Court; Justin Miller, former member of the Board of Tax Appeals and the Court of Appeals for the District of Columbia; Judge John B. Sanborn of the Court of Appeals for the Eighth Circuit; Walter P. Armstrong, former president of the American Bar Association; Professor John Dickinson of the University of Pennsylvania; Judge John Parker of the Court of Appeals for the Fourth Circuit; Judge Alexander Holtzoff of the U.S. District Court for the District of Columbia; and Professor James Moore of Yale Law School. In addition to the advisory committee, the United States Judicial Conference and the Supreme Court appointed panels to assist in the revision effort. These panels consisted of Chief Justice Harlan F. Stone and Justices Felix Frankfurter and William O. Douglas of the Supreme Court; Judge Albert Maris of the Court of Appeals for the Third Circuit; Judge Clarence Galston, district court judge of the eastern district of New York; and Judge William Smith, district court judge of the district of New Jersey. H.R. REP. No. 80-308, at 2–4 (1947); H.R. REP. No. 79-2646, at 2–4 (1946).

[147] Judge Miller resigned from the Board in 1937. In 1945, Judge Miller resigned from the Court of Appeals to become President of the Association of

Court and suggested that the provisions dealing with the court should be incorporated into the revised title 28.[148] Judge Miller argued that because the court was a judicial tribunal, both its codification in the Internal Revenue Code[149] and its status as an agency of the executive branch of Government were inappropriate.[150]

Moreover, judges of the court should be provided with the same life tenure and other emoluments as were applicable to judges of the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court.[151] Apparently, most members of the advisory committee favored the idea.[152] However, Judge Alexander Holtzoff, a member of the advisory committee and then an Assistant Attorney General,[153] and representatives of the Internal Revenue Bureau questioned what effect the change would have on the rules regarding representation of the Government before the court. This question resulted in the initial rejection of the proposal.[154] As discussed below, the question of the appropriate agency to represent the Government has never been resolved to the satisfaction of all. Ultimately, however, the House Committee on Revision of the Laws, which initially considered the legislation, concluded that a jurisdictional dispute between Justice and Treasury should not prevent recognition of the Tax Court's true nature. In the middle of 1946, when it reported the bill to revise title 28, the Committee recommended that the Tax Court be removed from title 26 and placed in title 28.[155] This bill died without House action when the 79th Congress adjourned.[156] The Committee on Revision of the Laws was abolished by the Legislative Reorganization Act of 1946,[157] but its work on code revision was continued in the 80th Congress by the Committee on the Judiciary, and in 1947 substantially similar bills were introduced and

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Broadcasters. However, he remained as a member of the advisory committee to revise title 28.

[148] Memorandum prepared by Judge Arundell, February 1945, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence" [hereinafter cited as Arundell].

[149] INT. REV. CODE of 1939, § 1100 *et seq.*

[150] Arundell, *supra* note 148.

[151] *Id.*

[152] *Id.*

[153] Judge Holtzoff was appointed to the U.S. District Court for the District of Columbia in 1945.

[154] Arundell, *supra* note 148; Letter from Judge Miller to Presiding Judge Murdock, June 25, 1945, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[155] H.R. 7124, 79th Cong., 2d Sess. §§ 271–277 (1946); H.R. REP. NO. 79-2646, 79th Cong., at A38–40 (1946).

[156] 1947 House Hearings, *supra* note 143, at 9–10.

[157] Ch. 753, 60 Stat. 812.

reported to the House that incorporated the same general provisions with respect to the Tax Court.[158]

Judge Miller had originally proposed that the Tax Court should be granted the same status and perquisites as the other federal courts of specialized jurisdiction.[159] As the title 28 revision bills were reported to the House, however, the only major change recommended was that the provisions governing the court be moved from the Internal Revenue Code to title 28 and that the existing statutory language with respect to the court's status as an agency of the executive branch be eliminated.[160] That this action was based more on political reality rather than theoretical purity is evidenced by suggestions in the committee reports that Congress might wish to consider providing tenure during good behavior to Tax Court judges as was provided to the judges of most other federal courts.[161] This suggestion, however, received scant attention, and at no time was any significant effort made to do more than incorporate pre-existing provisions governing the court into title 28. The effect of the legislation merely would have been to settle the court's status as an article I court.[162]

In view of the political impossibility of attaining article III status, the judges of the court approved of the change. Judge Murdock was Presiding Judge when the proposal was first advanced in 1945, and he initiated action to obtain support from the American Bar Association.[163] In mid-1945, Judge Bolon B. Turner succeeded Judge Murdock as Presiding Judge.[164] Judge Turner, an affable Arkansan, served on the Board and Tax Court from 1934 to 1971. Having participated in the drafting of the 1924 and 1934 Revenue Acts, Judge Turner was no stranger to the legislative process, and he devoted considerable energy to shepherding the title 28 proposal through Congress. In this regard, he participated in the proceedings of the advisory committee in drafting the recodification,[165] prepared memoranda

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[158] H.R. 2055, 80th Cong., 1st Sess. §§ 271–277 (1947); H.R. 3214, 80th Cong., 1st Sess. §§ 271–277 (1947); H.R. REP. NO. 80-308, at A39–41 (1947).

[159] *See* Arundell, *supra* note 148.

[160] H.R. REP. NO. 80-308, at A 39–41 (1947); H.R. REP. NO. 79-2646, at A38–40 (1946).

[161] H.R. REP. NO. 80-308, at A 40 (1947); H.R. REP. NO. 79-2646, at A38–39 (1946).

[162] There were those who believed that even without such legislation, the court was for all practical purposes an article I court. Turner, *supra* note 25.

[163] Letters from Presiding Judge Murdock to Weston Vernon Jr., Esq. (formerly Chairman of the American Bar Ass'n Section on Taxation, 1942–43) Feb. 14, 1945, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[164] Judge Turner became Presiding Judge on July 1, 1945. *See* 5 T.C. ii (1945).

[165] *See* Letter from Presiding Judge Turner to Eugene Keogh, Nov. 30, 1945, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

for congressional use detailing the history of the court and the reasons supporting the change,[166] and gave testimony before congressional committees advancing the court's position.[167] A fervent supporter of court status, and an expert on both the federal judicial system and the history of the Tax Court, Judge Turner had no difficulty in articulating reasons for the proposal.[168] Many of the arguments he relied on had already been used in 1926 and 1942.[169] Chief among these was the contention that the judicial nature of the court was solidly established after more than two decades of operation, and many authoritative statements could be assembled evidencing virtual universal recognition of this fact.[170] In fact, Congress

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[166] *See* Memoranda prepared by Judge Turner dated May 29, 1947, June 11, 1947, June 12, 1947, June 30, 1947, May 19, 1948, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[167] 1948 Senate Hearings, *supra* note 107, at 41–68, 280–301; *Hearings on H.R. 3113, Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 34–47 (1949) [hereinafter cited as 1949 House Hearings].

[168] *See* Turner, *supra* note 25.

[169] *See supra* notes 98–105 and accompanying text; Part III, notes 25–37 and accompanying text.

[170] A memorandum prepared in June, 1946, by Judge Leech and filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence" provides some of this authority.

> The judicial functions of this Court, it is thought, are fully recognized by both Houses of Congress. The Committee on Ways and Means in its Report of December 7, 1927, 70th Cong., 1st sess., states:
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> > . . . The committee is of the opinion that the Board's function is purely judicial, and in order to clarify the situation, has provided that no decision of the Board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the Board or any of its divisions has failed to consider evidence not adduced before the Board or division. At the same time the committee has provided that the rules of practice and procedure of the Board shall, just as the Federal equity rules, have the force and effect of law.
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> The Senate Report No. 960, 70th Cong., 1st sess., states:
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> > In view of certain expressions in a recent court opinion, the House bill in section 601 provides that no decision of the Board shall be modified or reversed because the Board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the Board for subsequent proceedings in accordance with law, the existing provisions of law clearly contemplate judicial, not administrative, procedure on the part of the Board and the committee can see no need of further legislation on this subject. It is not the duty of the Board to make investigations of tax cases but

during this period gave real recognition to the court's judicial character by

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to decide the case on the basis of evidence properly placed before it by the Commissioner and the taxpayer.

In fact, only two years after its creation, the Report of the Ways and Means Committee (1926 Revenue Bill) stated:

> Since its organization in July, 1924, there have been 8,417 appeals filed with the Board up to October 24 of this year, [1926] involving an aggregate amount of $134,000,000. . . .
>
> . . . No other court in the world tries cases which in the aggregate involve such great amounts. . . .

Mr. Justice Jackson in *Dobson v. Commissioner*, 320 U.S. 489, thus describes the Court:

> The court is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized and so complex as to be the despair of judges. . . .

Professor Erwin N. Griswold of the Harvard Law School, in the Harvard Law Review of October 1944, says of this Court:

> At the present time, most of the tax cases which get into court start in the Tax Court of the United States. Congress has, of course, declared that the Tax Court is "an independent agency in the executive branch of the government." This is a polite fiction that may once have served a purpose. The Tax Court is in organization, tradition, and function a judicial body, and should be treated as such in any survey of judicial review in tax cases.

As was said by Mr. Justice Frankfurter in *Bingham et al. v. Commissioner*, 325 U.S. 365:

> . . . Congress has invested the Tax Court with primary—and largely with ultimate—authority for redetermining deficiencies. It is a tribunal to which mastery in tax matters must be attributed. The authority which Congress has thus given the Tax Court involves the determination of what really happened in a situation and what it means in the taxing world. In order to redetermine deficiencies the Tax Court must apply technical legal principles. . . .

The late Chief Justice Stone, in *Blair v. Oesterlein Co.*, 274 U.S. 220, said:

> . . . An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character. . . .

In *American Woolen Co. v. White*, 56 Fed. (2d) 716, it was said:

> . . . This board, with the right of a judicial review of its decision granted by the statutes, afforded the plaintiff a forum with full authority and jurisdiction in which it could have, a judicial determination as to every question involved in its tax liability for the year in question. . . .

including it within the judicial salary legislation of 1946,[171] and providing compensation for its judges at the same rate applicable to judges of United States district courts.[172] When the salary bill was introduced in the House, it did not include provision for Tax Court judges.[173] In an unusual and apparently unsolicited action, Chief Justice Stone met with the sponsor of the bill and sought to convince him to amend the bill and expand its coverage.[174] The Chief Justice was aware that the Tax Court was technically an agency of the executive branch and not part of the federal judiciary, but he did not believe that this fact should bar recognition of the type and quality of work performed by the court.

> For a long time we have been reviewing their decisions and I can tell you out of my experience that they not only perform judicial service but that they do it well. I hope that you will reconsider and amend your bill so that it will include them.[175]

Despite the intervention of the Chief Justice, the salary bill as passed by the House did not cover Tax Court judges.[176] Nevertheless, as a result of efforts by Presiding Judge Turner, it was so amended in the Senate, and since then the salaries of Tax Court judges have been identical to those of United States district court judges.[177]

In addition to arguments based on judicial attributes, advocates of the proposal could point to problems that the court was encountering as a result of its technical status as part of the executive establishment. Some of these were merely annoyances, as when the court was required to respond to inquiries from supervisory or budgetary agencies that were routinely sent to administrative bodies and often were wholly inappropriate when applied to the court.[178] Two other problems were more substantial and figured

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171 Act of July 31, 1946, ch. 704, 60 Stat. 716.

172 *Id.* § 1.

173 *See* 93 CONG. REC. A3280 (1947) (remarks of Mr. Hobbs).

174 *Id.* The bill was sponsored by Congressman Sam Hobbs, who did not believe that legislation dealing with the salaries of federal judges should provide for the compensation to be paid to members of an agency of the executive branch. Congressman Hobbs was, however, a strong supporter of legislation to change the formal status of the Tax Court and incorporate it into the federal judicial establishment. *Id.* at A3279–81.

175 *Id.* at A3280.

176 *Id.*

177 Since 1969, this has been an explicit provision of the Internal Revenue Code. Act of December 30, 1969, Pub. L. No. 91-172, § 953, 83 Stat. 730, *amending* I.R.C. § 7443(c).

178 An example of this was an inquiry addressed to administrative bodies, and the Tax Court, by the Bureau of the Budget pursuant to the Reorganization Act of

prominently in the polemics surrounding the codification of title 28. The first of these involved the 1943 Supreme Court decision in *Dobson v. Commissioner*,[179] in which the Court had ruled that, in light of the expertise of the Tax Court and its status as an administrative body, appellate courts should strictly adhere to the statutory admonition limiting review of Tax Court decisions to errors of law.[180] In this regard, a unanimous Court, speaking through Justice Jackson, ruled that "when the [reviewing] court cannot separate the elements of a decision so as to identify a clear-cut

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1945. The court was asked for its recommendations, along with reasons therefor, with respect to the following subjects:

> The functions of the court which should be abolished;
>
> The functions, agencies, or parts of agencies which properly should be transferred to the court;
>
> The functions and units of the court which more appropriately belong in another department or establishment; and
>
> The functions or units of the court which should be consolidated or transferred from one part of the court to another part and which the court lacks statutory authority to consolidate or transfer.

Letter from Presiding Judge Turner to Harold Smith, Director, Bureau of the Budget, Jan. 25, 1946, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence." Never one to pass up the opportunity to proselytize an official to his point of view, Judge Turner concluded his response to the inquiry as follows:

> It has been my purpose in outlining the organization of the Court and its functions to bring to your attention the fact that the Tax Court is not in any true sense an administrative or executive department, but by the nature and purposes served and the work done, is a part of the judicial scheme of the Government. In connection therefore, with the plan under the Reorganization Act of improving the administration of the Executive Branch of the Government no change in the Tax Court under any of the four headings outlined in your letter suggests itself or appears to be pertinent or desirable. It is believed, however, that much confusion would be avoided and that the Tax Court in its functioning could operate more effectively and efficiently if it were placed in the Judiciary where its purposes and functions indicate that it should be, rather than in the Executive Branch of the Government where it is technically placed by statute. It is not clear, however, that your request for recommendations together with drafts of suitable reorganization provisions contemplates the submission of recommendations or drafts designed to effect changes not wholly within the Executive Branch of the Government. We are not, therefore, submitting the draft of any plan nor of any legislation with respect to the Tax Court.

Id.

179 320 U.S. 489, *rehearing denied*, 321 U.S. 231 (1944).

180 INT. REV. CODE of 1939, § 1141, *as amended*, act of June 25, 1948, ch. 646, § 36, 62 Stat. 991; *see also* Part XI.H.8.

mistake of law, the decision of the Tax Court must stand."[181] Appellate review of Tax Court decisions after *Dobson* thus was considerably more restricted than review of the decisions of district court judges sitting without juries, the findings of which could be reversed or modified if "clearly erroneous."[182] The *Dobson* decision aroused criticism from bar groups as well as from lower appellate courts,[183] and some supporters of incorporating the Tax Court into the federal judiciary noted that the *Dobson* problem was directly related to the court's anomalous status as one of the executive branch agencies.[184] The decisions of such agencies were generally subject to more limited appellate review than the decisions of federal trial courts sitting without juries, and *Dobson* was a natural, if erroneous, extension of the illogical placement of the Tax Court in the executive branch.

A second problem resulting from the court's peculiar status was even more serious than *Dobson*. The Administrative Procedure Act, which had been enacted in 1946,[185] provided rules governing decision-making by administrative bodies. The purpose of the Act was to provide procedural protections to persons affected by government action and to minimize the risks of abuse of bureaucratic discretion.[186] During congressional consideration of the Act, the question had arisen whether, in light of its application only to executive agencies and not to courts, its provisions would apply to the Tax Court. An opinion of the Attorney General concluded that the Act would be inapplicable to the Tax Court and, apparently on this basis, the statute did not specify that the Tax Court was a court for purposes of the Act.[187] Despite this authority, the Court of Appeals for the Sixth Circuit was convinced that the position of the Attorney General was erroneous and announced that the provisions of the Act applied to Tax Court proceedings.[188] The Sixth Circuit never had to

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[181] 320 U.S. at 502.

[182] *See* Commissioner v. Duberstein, 363 U.S. 278 (1960); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

[183] *E.g.*, 1948 Senate Hearings, *supra* note 107, at 167–73 (testimony of W.A. Sutherland); Brooklyn Nat. Corp. v. Commissioner, 157 F.2d 450, 452–53 (2d Cir. 1946).

[184] 93 CONG. REC. 8387 (1947) (remarks of Mr. Robsion); Daniel M. Gribbon, *Should the Judicial Nature of the Tax Court Be Recognized?,* 24 GEO. WASH. L. REV. 619, 622 (1956) [hereinafter cited as Gribbon].

[185] Act of June 11, 1946, ch. 324, 60 Stat. 237.

[186] *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT, § 1.04 (3d ed. 1972).

[187] S. REP. NO. 79-752, at 38 (1945); *see also* Note, *Effect of the Administrative Procedure Act on Decisions of the Tax Court*, 2 TAX L. REV. 103 (1946).

[188] Lincoln Elec. Co. v. Commissioner, 162 F.2d 379, 382 (1947). The Sixth Circuit repeated these views in *Lawton v. Commissioner*, 164 F.2d 380, 383–84 (1947). *See also* Dawson v. Commissioner, 163 F.2d 664, 667 (1947).

face the issue of precisely how the Administrative Procedure Act should be applied to the Tax Court; however, it was clear that if the Act was applied, the court would have to make substantial modifications to its procedures. For example, the Act required that the findings of an administrative hearing officer be served upon the parties who could then demand a hearing before the entire membership of the agency.[189] Neither the Board nor the Tax Court had ever provided parties with a hearing before the entire membership, and in 1927 the Board had ceased its practice of reviewing all reports of the divisions;[190] only those cases deemed significant were referred by the Presiding Judge to the conference, and these constituted a minority of the cases handled by the court.

Judge Turner argued that if the Administrative Procedure Act was applied to the court, most of the judges' time would be taken up with hearing appeals from determinations of the initial hearing officials. This would probably require the cessation of the practice then followed of having the original trial before a member of the court; commissioners would have to be appointed for this task. The resulting procedure would be cumbersome and would result in the court being able to handle far fewer cases than before.[191] By locating the court in title 28 and outside the reach of the Administrative Procedure Act, the problem would be alleviated.

These reasons for change attracted strong support among members of the judiciary, the bar, and Congress.[192] One potent supporter of the proposal was Congressman John M. Robsion of Kentucky, chairman of the Judiciary Subcommittee that considered the title 28 revision legislation. He summarized the position in favor of incorporation of the court into the federal judiciary as follows:

> It seems to me that there can be no question but that the provisions relating to the Tax Court properly belong in the Judicial Code because it is clear that the Court is strictly judicial in nature. Let us consider . . . what would be the result of leaving them out of the Judicial Code in view of the provisions of the Administrative Procedure Act. If that body is not a court but a purely administrative agency it would come within the purview of the

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189 Act of June 11, 1946, ch. 324, § 8, 60 Stat. 237.

190 Part III, notes 357–358 and accompanying text. At no time, however, did full court review of division reports include a hearing for the parties.

191 Memorandum prepared by Presiding Judge Turner, "Attention-Special," June 12, 1947, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda and Correspondence;" *see also* Memorandum prepared by Judge Murdock "14 Tax Court Questions," Dec. 1947, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

192 *See, e.g.*, Gribbon, *supra* note 184; 93 CONG. REC. 8385 (1947) (remarks of Mr. Robsion).

> Administrative Procedure Act. Of course, in the view of the Attorney General, . . . the term "court" includes the Tax Court and similar courts and the act does not apply to their procedure nor affect their requirements nor resort thereto. . . .
>
> However, because the provisions relating to the Tax Court are not now in the Judicial Code considerable confusion has arisen regarding its status and the status of litigants.[193]

Although the court and its supporters had no difficulty perceiving the desirability of the proposed transfer to the judiciary, there were those who did not share this view. Among these were persons prominent in the Administration, in the Congress, and in the ranks of tax practitioners, and they constituted a formidable obstacle to adoption of the proposal.

Lack of Administration enthusiasm for the proposal was prevalent within both the Treasury and Justice Departments. Attorney General Biddle had actively opposed both federal court status and the name change for the Board of Tax Appeals in 1942, and had enlisted the support of Secretary of the Treasury Morgenthau in this view.[194] With changes in the heads of these Departments (Tom Clark succeeded Biddle in 1945, and John W. Snyder succeeded Morgenthau in 1946), the Administration's attitude toward court status for the Tax Court moderated temporarily to the point that, in April 1947, Attorney General Clark indicated that he had no objection to the proposal.[195] Treasury also signified that it did not oppose the legislation.[196] However, neither Department appeared at hearings to urge passage or in any way publicly endorsed the measure apart from indicating that they had no objection to its adoption. Opposition continued to be strong among some non-cabinet rank officials, particularly in the Justice Department.[197] Indeed, in the spring of 1949, while Clark was still

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[193] 93 CONG. REC. 8387 (1947).

[194] *See supra* notes 107–118 and accompanying text.

[195] Letter from Tom Clark to Earl Michener, Chairman, House Judiciary Comm., April 17, 1947, reprinted in H.R. REP. NO. 80-308, at 8 (1947).

[196] 93 CONG. REC. 8385 (1947) (remarks of Mr. Robsion).

[197] For example, on May 16, 1947, one month after Attorney General Clark had expressed no objection to the proposal, a 43-page memorandum was prepared by I. Henry Kurtz, a Justice Department attorney, for Sewell Key, Assistant Attorney General, Tax Division, which took the position that making the Tax Court a federal court would, in effect, have created new judicial offices that would have required new presidential appointments. This, of course, could have resulted in a complete change of court personnel and would have made the legislation unacceptable to the court. Memorandum prepared by I. Henry Kurtz, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence." The memorandum was in accordance with Sewell Key's position and that of members of his division, which had consistently opposed court status for the Tax Court.

Attorney General, a proposed report of the Justice Department opposing incorporation of the Tax Court into title 28 was delivered to the Bureau of the Budget.[198] Available evidence indicates that Attorney General Clark remained steadfast in his acquiescence to the title 28 proposal and that the proposed report, not having his personal approval, was not finalized.[199] However, soon after Clark's resignation in the summer of 1949 to become an Associate Justice of the Supreme Court, the Justice Department formally changed its position and once again opposed legislation to integrate the Tax Court into the federal judicial system.[200]

Attorney General Biddle had expressed several reasons for his opposition in 1942,[201] but the basic reasons for the reluctance of Justice and Treasury to support the proposal centered on the question of representation of the Government before the Tax Court. In 1924, when the Board of Tax Appeals was created, the Solicitor of Internal Revenue, an official of the Justice Department, was the legal representative of the Commissioner and in this capacity represented the Government in Board proceedings. As part of the Revenue Act of 1926, the position of Solicitor was abolished and its functions transferred to the newly created General Counsel for the Bureau of Internal Revenue, who was an official of the Treasury Department.[202] Curiously, this transfer of the Commissioner's legal representative did not occasion any opposition from the Attorney General, apparently because the move was supported by Secretary Mellon, the most influential member of the Coolidge cabinet. Alexander W. Gregg was the Solicitor of Internal Revenue at this time, and he was a protégé of Mellon and had formerly been his special assistant. The transfer resulted in Gregg being brought back under the direct supervision of Mellon and also made possible a significant pay increase for Gregg.[203]

Since 1926, Treasury had represented the Government in all Tax Court proceedings, with the exception of the highly specialized renegotiation cases

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Letter from Presiding Judge Turner to Charles Hamel, Sept. 22, 1948, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

198 *See* Memorandum from Mr. Kirby to Mr. Lynch, June 13, 1949, filed in the Office of Tax Legislative Counsel, U.S. Treas. Dep't.

199 *See* Letter from Presiding Judge Kern to Erwin Griswold, Sept. 8, 1949, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

200 *See* Letter from Peyton Ford, Assistant to the Attorney General, to Emanuel Cellar, Chairman, House Judiciary Comm., March 14, 1950, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence" [hereinafter cited as Ford].

201 *See supra* notes 107–114 accompanying text.

202 Revenue Act of 1926, ch. 27, § 1201(a), 44 Stat. 126.

203 The 1926 Act provided a salary to the General Counsel for the Bureau of $10,000. *Id.* As Solicitor, Gregg could not have earned more than $7,500. The Classification Act of 1923, ch. 265, § 13, 42 Stat. 1492.

that were handled by the Justice Department.[204] If the status of the Tax Court was changed, the whole issue of representation of the Government would have to be reopened. Treasury, which had represented the Commissioner for more than two decades, was strongly opposed to relinquishing that role.[205] It could argue with some justification that its litigation responsibilities in the Tax Court were part of its overall jurisdiction to collect revenue and set Administration tax policy. If it lost this function, the discharge of its duties might become more difficult because of the problem of coordinating litigation policy with another Department. On the other hand, the Justice Department had, since 1933, represented the Government in virtually all court actions.[206] Although several regulatory agencies represented themselves in judicial proceedings, Justice's litigating role had never been seriously questioned in connection with the Department's representation of the Government in refund actions or in appellate proceedings following Tax Court determinations.[207] If the Justice Department's role in these proceedings had never proved troublesome, why should its representation of the Government in Tax Court proceedings create any additional problems? Many officials in the Justice Department therefore took the position that the crucial distinction was between judicial and administrative proceedings. So long as the Tax Court was characterized as an agency of the executive branch, Justice should not object to Treasury representation of the Government position. However, if the Tax Court was to be integrated into the system of federal courts, even as an article I court, Justice should assume the function as the Government's lawyer.[208]

These opposing positions had an important influence on the attitudes that Justice and Treasury adopted toward the proposal for federal court status. They had no strong objection to the status quo and had no particular desire to become involved in an inter-Department dispute. As a result, neither Department ever gave the proposal its active support, support which would have been valuable in counteracting opposition from other sources.

In addition to the lack of Administration enthusiasm, the proposal also suffered from limited but vociferous opposition in Congress. As with the Treasury-Justice situation, this opposition was largely the product of

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[204] The court's former renegotiation jurisdiction is detailed in Appendix C.

[205] *See* 93 CONG. REC. 8385 (1947) (remarks of Mr. Robsion).

[206] Exec. Order No. 6166.

[207] Prior to the promulgation of Exec. Order No. 6166, the Bureau of Internal Revenue generally represented the Government in district court refund actions. *Hearings on S. 2041 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 90th Cong., 2d Sess. pt. 2, at 170 (1968) (testimony of Professor M. Carr Ferguson) [hereinafter cited as 1968 Senate Hearings].

[208] Ford, *supra* note 200.

jurisdictional concerns. Since its creation in 1924 as the Board of Tax Appeals, the court had always been within the general legislative province of the congressional tax committees, the Ways and Means Committee in the House and the Finance Committee in the Senate. If the court were to be incorporated in title 28 and removed from title 26, it would then come under the supervision of the House and Senate Judiciary Committees. Many members of the Ways and Means Committee were particularly concerned about such a change; additional opposition emanated from the technical staff of the Joint Committee on Internal Revenue Taxation, headed by Colin Stam.[209] When the bill to revise title 28 and incorporate the Tax Court therein came to the House floor, where it passed by 342 to 23, 14 of the no votes were cast by Ways and Means Committee members.[210] Most vocal of the congressional critics of the measure was Representative John Dingell, a member of the Ways and Means Committee who had sponsored the adoption of the 1942 provision guaranteeing admission to practice before the court of all "qualified" persons regardless of their membership in any profession.[211]

In articulating the concern of congressional opponents, Mr. Dingell expressed the fear that Tax Court procedures would become formalistic if the change were adopted and that the court's ability to dispose of cases rapidly would be decreased.[212] Additionally, Mr. Dingell deeply believed in permitting non-attorneys to practice before the court and, indeed, to become members of the court, and he felt these privileges would be jeopardized if the tribunal were incorporated into the federal judiciary.[213] The difficulties raised by the *Dobson* case and the Administrative Procedure Act were conceded by Mr. Dingell to be serious, but he believed that these were isolated problems that could appropriately be dealt with by specific legislation without disturbing the court's status as an agency in the executive branch.[214] Mr. Dingell concluded that the proposal was nothing more than an effort by Tax Court judges to satisfy their vanity and was unjustified in light of the fact that tax administration would suffer as a result.[215]

Were the congressional opposition and the lack of Administration enthusiasm described above the only obstacles to incorporating the court

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209 *See* Letter from Robert N. Miller to Presiding Judge Turner, June 13, 1947, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

210 93 CONG. REC. 8392 (1947). It should be noted that nine members of the committee voted for the bill, and among these was Wilbur D. Mills, who would later support article III status for the Tax Court. *See infra* note 305 and accompanying text.

211 *See supra* notes 124–127 and accompanying text.

212 1949 House Hearings, *supra* note 167, at 49–50.

213 *Id.* at 50–51.

214 *Id.*

215 93 CONG. REC. 8388 (1947).

into the federal judiciary, the measure might have been adopted. However, in addition to these difficulties, the supporters of the proposal found themselves whipsawed between the concern of accountants that they be permitted to continue to represent taxpayers before the court, and the belief of bar groups that if the Tax Court were formally made a court, such continuation would constitute the unauthorized practice of law.

The root of this problem could be traced back to 1924, when in one of its first announced rules, the Board of Tax Appeals provided for admission of attorneys and certified public accountants to its practice.[216] Probably, the Board would have preferred to restrict its bar to lawyers, but due to the significant role that accountants had played in the development of administrative tax practice, the fact that the Board was at least technically a part of the executive branch, and the significant political influence of accounting associations, the exclusion of all accountants from practice was infeasible. Accordingly, the compromise was struck to exclude from practice only those accountants who had not been professionally licensed. A large number of certified public accountants exercised their privilege to be admitted to practice before the Board/Tax Court. By 1948, 7,310 had been admitted to its bar, compared to admissions of 28,707 attorneys.[217] Nevertheless, most accountants recognized that their training did not equip them to prosecute cases in a judicial context[218] and relatively few actually practiced. As a result, the great majority of cases were handled by either lawyers alone or lawyers assisted by accountants.[219] The emphasis on judicial rules of procedure, the technical nature of the tax laws, the importance in tax cases of general legal doctrines relating to property, contracts, corporations, trusts, and estates, and the inability of accountants to represent clients in appellate proceedings, probably all contributed to lawyer domination of Board/Tax Court practice. The results in those cases in which accountants attempted to try cases before the Board were not wholly satisfactory, and on more than one occasion the Board considered restricting its bar to attorneys.[220] Yet because so few accountants actually tried cases, the rule permitting accountant practice was not modified by the Board prior to the adoption of the Revenue Act of 1942 and the so-called

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[216] B.T.A. RULE 2 (July, 1924 ed.).

[217] 1948 Senate Hearings*, supra* note 107, at 60 (testimony of Presiding Judge Turner).

[218] 1949 House Hearings*, supra* note 167, at 37 (testimony of Presiding Judge Turner).

[219] For example, from 1924 to 1931, accountants appeared in only 4% of the cases docketed with the Board, and in that same period only 14.8% of accountants enrolled with the Board appeared before it in any capacity. 1948 Senate Hearings*, supra* note 107, at 51 (testimony of Presiding Judge Turner).

[220] 1949 House Hearings*, supra* note 167, at 41–42 (testimony of Presiding Judge Turner).

Dingell amendment, permitting practice before the Tax Court by all qualified persons regardless of their professional standing.[221]

Following the adoption of the Dingell amendment, the Tax Court substantially revised its rule respecting admission to practice. Whereas practice privileges formerly had been virtually automatically conferred on attorneys and certified public accountants, under the new rule only attorneys were given this treatment.[222] All other persons, including accountants, would be eligible to practice before the court only if they passed an examination to be administered by the court.[223] The court believed this result was demanded by the statutory language restricting practice to "qualified" persons. Since by background and training there was no reason to suppose that a certified accountant was any more qualified to try court cases than a noncertified accountant, the court concluded that it could be rightly accused of discrimination if it continued to admit automatically the former group to practice while insisting that the latter group pass an examination.[224]

The new rule had an immediate and dramatic effect. Prior to 1943, 7,300 certified public accountants had been admitted to practice under the original rule, but in the six-year period between 1942 and 1948, a total of only 12 persons qualified for enrollment in the Tax Court bar as a result of passing the examination.[225] As would be expected, many certified public accountants were angered by the interpretation the court placed on the Dingell amendment,[226] and the new rule probably served to exacerbate professional jealousies between accountants and lawyers.

The proposal to incorporate the Tax Court into the federal judiciary rekindled the inter-professional dispute and proved to be the most controversial aspect of the legislation. Essentially two alternative proposals were presented to Congress. One version retained the language of the Dingell amendment and therefore authorized the continuation of non-attorney practice.[227] The other version prospectively allowed the court to determine qualifications to practice, but contained a "grandfather"

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[221] Ch. 619, § 504(b), 56 Stat. 957. *See supra* notes 124–136 and accompanying text.

[222] TAX CT. R. 2 (Feb. 9, 1943 ed.).

[223] *Id.*

[224] 1949 House Hearings*, supra* note 167, at 43 (testimony of Presiding Judge Turner).

[225] 1948 Senate Hearings*, supra* note 107, at 59–60 (testimony of Presiding Judge Turner).

[226] *See id.* at 211 (testimony of Maurice Austin, American Inst. of Accountants).

[227] H.R. 3214, 80th Cong., 1st Sess. § 2560 (1947), as passed by the House and referred to the Senate Judiciary Committee.

provision permitting non-attorneys previously admitted to Tax Court practice to continue to represent clients before the court in the future.[228]

Neither version of the bill obtained the unqualified support of either accountant or lawyer groups. Naturally, the continuation of the Dingell amendment was totally unacceptable to bar associations.[229] They had opposed non-attorney practice before the court when it was an agency of the executive branch, and their opposition was even stronger if the court was to be incorporated into the federal judiciary. In their view, such a rule would expressly condone an activity that traditionally constituted the unauthorized practice of law. Somewhat surprisingly, in addition to bar groups, some accountant associations opposed the title 28 proposal even with the Dingell amendment retained.[230] They did not see the benefit to be derived from changing the status of the court and feared that the direction of the legislation toward fuller court recognition would ultimately lead to a repeal of the Dingell amendment and the banning of practice by all but lawyers.[231]

If the accountants were divided on the merits of the legislation with the Dingell amendment retained, they were unanimous in their opposition to the alternate proposal, which left the qualifications of practitioners to the discretion of the court and protected only existing members of the Tax Court bar with a grandfather clause.[232] Accountants had little doubt that such a rule would inevitably result in the court barring all but attorneys from practicing before it. Statements by Tax Court judges indicated this was not an unrealistic fear.[233] Many accountants recognized that they were generally not as well qualified to try Tax Court cases as were lawyers. Nevertheless, they contended that they could better serve their clients, many of whom they represented in administrative proceedings before the Bureau, if they could continue their representation to at least the pre-trial stages of Tax Court proceedings.[234] Frequently, the most realistic

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[228] H.R. 3113, 81st Cong., 1st Sess. §§ 13(b), 14(b) (1949).

[229] *E.g.,* 1948 Senate Hearings*, supra* note 107, at 88 (testimony of John Randall, American Bar Ass'n).

[230] *Id.* at 271–72 (testimony of George Carlson, California Society of Certified Public Accountants). Most accounting organizations, on the other hand, had no objection to incorporating the court into the federal judiciary so long as the Dingell amendment was retained. *See id.* at 231 (statement of American Inst. of Accountants).

[231] *Id.* at 274–76 (testimony of George Carlson).

[232] *See, e.g.,* 1949 House Hearings*, supra* note 167, at 8 (testimony of Spencer Gordon, American Inst. of Accountants).

[233] 1948 Senate Hearings*, supra* note 107, at 52–56 (testimony of Presiding Judge Turner).

[234] *Id.* at 221–26 (testimony of Maurice Austin, American Inst. of Accountants).

settlement negotiations occurred after a Tax Court petition was filed, and accountants felt that taxpayers should not have to be put to the trouble and expense of hiring attorneys to pursue what they saw as merely an extension of the administrative procedure.

Bar groups felt strongly that these views were unjustified. They could perceive no adequate reason why the commencement of a court proceeding involving tax liability should not call for the same legal skills than would the commencement of any other kind of court action.[235] The depth of these views is indicated by the fact that the American Bar Association refused to endorse unqualifiedly one version of the bill that proposed to place the grandfather provision in the text of title 28, and only grudgingly approved a later version that would have enacted the provision in uncodified form as a transitional rule.[236]

The effort to incorporate the Tax Court into title 28, which spanned more than four years, ultimately ended in failure. Two bills to revise and codify title 28 were reported favorably by committees of the House of Representatives.[237] Both bills provided for the Tax Court to become part of the federal judicial establishment.[238] The first of these, H.R. 7124, died without House action at the end of the 79th Congress. The second bill, H.R. 3214, was passed by the House under suspension of the rules by the vote of 342 to 23,[239] the major opposition coming from Congressman Dingell and other members of the Ways and Means Committee, despite the addition, on the House floor, of the Dingell amendment protecting the rights of non-attorneys to practice before the court.[240] When the bill reached the Senate, it was referred to a subcommittee of the Senate Judiciary Committee chaired by Senator Forrest Donnell. Senator Donnell probably favored the proposal for changing the status of the Tax Court, but he felt obliged to provide ample time for interested parties to express their views publicly.[241] Extensive hearings therefore were held on H.R. 3214

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235 *Id.* at 175–76 (testimony of Cuthbert Baldwin, Louisiana State Bar Ass'n); H.R. REP. NO. 81-1138, at 4–5 (1949).

236 1949 House Hearings, *supra* note 167, at 52–53 (statement of American Bar Ass'n).

237 H.R. 7124, 79th Cong., 2d Sess. (1946) (reported by Committee on Revision of the laws), H.R. REP. NO. 2646, 79th Cong., 2d Sess. (1946)); H.R. 3214, 80th Cong., 1st Sess. (1947) (reported by committee on the Judiciary, H.R. REP. NO. 80-308 (1947)).

238 H.R. 7124, 79th Cong., 2d Sess. §§ 271–277 (1946); H.R. 3214, 80th Cong., 1st Sess. §§ 271–277 (1947).

239 93 CONG. REC. 8392 (1947).

240 *Id.* at 8384.

241 Letter from Presiding Judge Turner to Judge Albert Maris, March 25, 1948, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

before it was reported to the Senate floor.[242] As a measure of the controversy engendered by the Tax Court proposal, although it constituted only a small part of the recodification of title 28, most of the hearings were concerned with the question of whether Tax Court practice should be restricted to attorneys. The delay in holding and concluding public hearings resulted in H.R. 3214 not receiving final committee consideration until the last few days of the 80th Congress.[243] Because of the procedural rules of the Senate, the bill could only reach the Senate floor for a vote by way of the consent calendar, which permitted any Senator to bar consideration of the bill by objection.[244] The Judiciary Committee had been advised by one of its members that if the Tax Court provision remained in the bill as reported he would object to the bill's consideration on the Senate floor.[245] Not wishing to delay passage of the remainder of H.R. 3214, which was unobjectionable to all, the committee excised all Tax Court provisions from the bill it reported except for one amendment reversing the rule in the *Dobson* case.[246] The bill as reported passed the Senate,[247] and this version also passed the House,[248] although the House Judiciary Committee reaffirmed its support for changing the status of the Tax Court at the earliest practical date.[249]

Following passage of H.R. 3214, other bills were introduced in the 80th and 81st Congress to amend title 28 to incorporate the Tax Court.[250] In 1949, hearings on one of these bills, H.R. 3113, were held by a subcommittee of the Judiciary Committee,[251] but the problems that had arisen earlier were apparently still present.[252] The bill was favorably reported from committee by unanimous vote,[253] and a rule was secured for its introduction on the House floor.[254] However, the bill was never

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[242] 1948 Senate Hearings, *supra* note 107.

[243] *See* Letter from Presiding Judge Turner to Attorney General Clark, June 17, 1948, at 14, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[244] *Id.*

[245] *Id.*; Memorandum from Judge Turner to Judge Dawson, April 13, 1967, at 1, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[246] S. REP. NO. 80-1559, at 2 (1948).

[247] 94 CONG. REC. 7930 (1948).

[248] *Id.* at 8501 (1948).

[249] *Id.*

[250] H.R. 7154, 80th Cong., 2d Sess. (1948); H.R. 2447, 81st Cong., 1st Sess. (1949); H.R. 3113, 81st Cong., 1st Sess. (1949).

[251] 1949 House Hearings, *supra* note 167.

[252] *See id.* at 7 (testimony of Spencer Gordon, representing American Institute of Accountants).

[253] H.R. REP. NO. 81-1138 (1949).

[254] H.R. REP. NO. 81-1301 (1949).

calendared for consideration by the House and ultimately died at the end of the 81st Congress.

The collapse of the effort to incorporate the Tax Court into the newly recodified title 28 represented the nadir of the struggle for court status. The court and its supporters could justifiably believe that their cause was just. In the words of one court, "[t]he Tax Court . . . [was] for all practical purposes a judicial tribunal operating in the federal judicial system."[255] Support for this position could even be found among opponents of judicial status, many of whom believed that the Administrative Procedure Act should not apply to the court and that its decisions should be reviewed under the same standards applicable to district court decisions.[256] These opponents also readily conceded that the court had compiled a splendid record for impartially and expertly adjudicating controversies within its jurisdiction.[257] Yet, recognition of its court status was denied because of controversies that, especially to a judicial mind, must have seemed wholly irrelevant.

Defeat of a similar proposal in connection with the 1926 legislation was followed by a long period of diminished interest in the status question[258]

[255] This is an excerpt from Judge Maris's opinion in *Stern v. Commissioner*, 215 F.2d 701, 707–08 (3d Cir. 1954). In elaborating this view, Judge Maris wrote:

> But although Congress in the Internal Revenue Code has continued to call the tribunal "an independent agency in the Executive Branch of the Government" it has at the same time more realistically designated it as a court and its members as judges. And it is the fact that from its inception as the Board of Tax Appeals in 1924 it has operated only as a judicial tribunal in adjudicating controversies as to tax liabilities arising between taxpayers and the Government. Its powers are wholly judicial in character. It has never been given any administrative powers or functions nor has it ever had any investigatory, regulatory or policy-making duties or powers. Since the passage of the Revenue Act of 1926 its decisions have been final and reviewable only on the record by the United States courts of appeals. Since 1948 the scope of that review has been the same as in the case of like decisions of the district courts. The Tax Court is thus for all practical purposes a judicial tribunal operating in the federal judicial system. Whether it is a legislative court created by Congress under Article I, section 8, of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of the Government is, therefore, merely a matter of legal semantics since, whatever it may be called, it is an "independent" judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government but only by the federal appellate courts.

[256] *See supra* note 214 and accompanying text.

[257] *See* 1949 House Hearings, *supra* note 167, at 48–49; Letter from Francis Biddle to Henry Morgenthau, June 5, 1942, reprinted in 1942 Senate Hearings, *supra* note 106, at 2298.

[258] *See supra* notes 79–81 and accompanying text.

and, not surprisingly, the same result followed the events of 1945 to 1949. Between 1949 and 1967, only one minor effort was made to incorporate the Tax Court into the judiciary. This followed the report of the Commission on Organization of the Executive Branch of the Government, known as the Hoover Commission, which was established in 1953.[259] The Hoover Commission and its Task Force on Legal Services and Procedure concluded that the Tax Court was a judicial body and, as such, should be moved from the executive branch to the judiciary as part of an Administrative Court of the United States with jurisdiction to adjudicate disputes dealing with labor, trade, and tax matters.[260] Although the Tax Court and its supporters welcomed the Hoover Commission finding that the court properly belonged in the judiciary, the proposal to incorporate the court into an Administrative Court that would deal with other specialized questions of administrative law was regarded as unfortunate.[261] Since judges of such a court would be required to hear cases in several disparate fields and could not be expected to be experts in each, many believed that the expertise of the Tax Court would inevitably be lost. This effect would be heightened by an increased unwillingness of tax experts to accept appointment to such a court if they were required to hear unrelated cases, as well as make the financial sacrifice frequently attendant on leaving the private sector for government service.

The American Bar Association agreed with these criticisms of the Hoover Commission report and, in conjunction with the Tax Court, drafted proposed legislation to incorporate the Tax Court into title 28 as an article III court, independent of any administrative court having non-tax jurisdiction.[262] The proposal was introduced in Congress by Senator Hennings in 1958 and 1959, in connection with proposals to create separate courts for tax, labor, and trade matters.[263] Considerable care went into drafting the legislation, but apparently little effort was made to enlist

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[259] Act of July 10, 1953, ch. 184, 67 Stat. 142.

[260] COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE; A REPORT TO THE CONGRESS ON LEGAL SERVICES AND PROCEDURE, 85–88 (1955): COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE, 246–56 (1955).

[261] Gribbon, *supra* note 184; Letter from Chief Judge Murdock to Daniel Gribbon, June 18, 1956, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[262] *See* DOYLE, REPORT IN EXPLANATION OF S. 3796, 85th CONG., 2d SESS., c. 1958, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[263] S. 3796, S. 3797, S. 3798, 85th Cong., 2d Sess. (1958); S. 1274, 86th Cong., 1st Sess. (1959).

supporters in Congress or the Administration. Accordingly, the bills never proceeded beyond introduction.

Although the effort made to elevate the status of the Tax Court in the 1950s was half-hearted, a more serious and successful campaign was initiated during this period to provide Tax Court judges with the benefits of judicial-type retirement provisions. Tax Court judges, as employees of the executive branch, were covered by the Civil Service retirement system, but because benefits under this system depended on a lengthy period of federal service, in many cases it was inadequate.[264] This was especially true for those judges who came to the court from private life without many years of prior government work. Since few were wealthy, they were compelled to remain on the court for personal financial reasons when age and health considerations might otherwise have led them into retirement.[265] As a result, the average age of Tax Court judges had increased substantially. For example, in 1925, the average age of members of the Board of Tax Appeals was 45; in 1952, the average age of judges of the Tax Court had risen to 60, with three judges over 70. Some of the judges had suffered debilitating illnesses but simply could not afford to retire to make way for those younger and healthier.[266] Recognition of these problems in other courts had led Congress to provide pensions for all judges except those of the Tax Court.[267] The Section of Taxation of the American Bar Association believed that the situation was not only inequitable but could lead to a serious weakening of the court because of the declining productivity of its judges.[268] Accordingly, in 1951, the Section formed a Committee on Retirement Benefits for Tax Court Judges to study the problem.[269] The committee, composed entirely of former Board of Tax Appeals members, was chaired by Edgar J. Goodrich, who served on the Board from 1931 to 1935 and was a successful Washington attorney.[270] The committee, with the support of various allies, such as Randolph Paul,[271] Arthur Krock,[272] the

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264 H.R. REP. NO. 83-846, at 2–4 (1953); S. REP. NO. 83-675, at 2–4 (1953).

265 Krock, *A Harsh Exclusion from Social Security*, N.Y. TIMES, March 21, 1952 at 22, col. 5 [hereinafter cited as Krock].

266 *Id.*

267 *See* H.R. REP. NO. 83-846, at 2–3 (1953).

268 *See* Section of Taxation Bulletin, March, 1953, at 19.

269 Letter from Morton Fisher, Chairman, Section of Taxation, to Edgar Goodrich, March 15, 1951, filed at the U.S. Tax Court in "Material of ABA Comm."

270 The other members of the committee were: Charles Hamel, James Ivins, Albert James, Jules Korner, Logan Morris, Percy Phillips, and C. M. Trammell. *Id.*

271 Letter from Randolph Paul to Arthur Krock, March 4, 1952, filed at the U.S. Tax Court in "Material of ABA Comm."

272 Krock, *supra* note 265.

American Institute of Accountants,[273] and the Treasury Department,[274] was singularly successful, and in two years secured legislation incorporating most of its recommendations. Specifically, the legislation permitted Tax Court judges to retire with pay after either 18 years of service or 10 years of service and attainment of age 70.[275]

The enactment of the pension legislation could not, however, obscure the fact that in the matter of formal recognition of judicial status, the court's only advance since its creation in 1924 had been the change of name effected by the 1942 legislation. It remained for a new generation of Tax Court judges to attempt once again to have the Tax Court properly recognized as a court, not an agency of the executive branch.

C. The United States Tax Court – A Court of Record Established Under Article I of the Constitution

The evolution of the status of the Tax Court began to take a decisive turn in 1967, when, at the request of the court, identical bills were introduced in the House and Senate by the chairmen of the congressional tax committees.[276] The bills, H.R. 10100, introduced by Chairman Wibur D. Mills, and S. 2041, introduced by Chairman Russell B. Long,[277] reorganized the Tax Court as part of the federal judicial system. Like H.R. 3214 and H.R. 3113 some 20 years earlier, the Mills-Long bills proposed to incorporate the Tax Court in title 28; unlike the earlier bills, however, the effect of H.R. 10100 and S. 2041 was to make the Tax Court an article III

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273 H.R. REP. NO. 83-846, at 4 (1953).

274 *Id.*

275 Act of Aug. 7, 1953, ch. 352, 67 Stat. 482. The ABA committee originally proposed that the legislation also provide for dependents of judges. This aspect of the proposal was rejected, but was later enacted in 1961. Act of Oct. 4, 1961, Pub. L. No. 87-370, 75 Stat. 796.

276 Letter from Chief Judge Tietjens to Chairman Mills, March 27, 1967, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence;" *Hearings on S. 2041 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 23 (1967) (testimony of Senator Long) [hereinafter cited as 1967 Senate Hearings]. The bills had been originally drafted by the legislative committee of the Tax Court.

277 H.R. 10100, 90th Cong., 1st Sess. (1967); S. 2041, 90th Cong., 1st Sess. (1967). S. 2041 was cosponsored in the Senate by Senator Carl Curtis. H.R. 10100 and S. 2041 are hereinafter referred as the Mills-Long bills. Of the two bills, S. 2041 was the more significant since, as described below, it served as the impetus for the initiation for public hearings by the Tydings subcommittee of the Senate Committee on the Judiciary. *See infra* notes 301–341 and accompanying text. No hearings were ever held and no committee report was ever issued with respect to H.R. 10100.

court.[278] Thus, the bills accorded Tax Court judges tenure during good behavior and eliminated the statutory provision permitting removal of judges by the President for "inefficiency, neglect of duty, or malfeasance in office."[279] The transition of the court to an article III court was not to be immediate, however, because the bills provided for the continuation in office of existing judges for the remainder of their 12-year terms.[280] Other significant provisions of the new bills (1) granted the court powers to preserve order, to compel the attendance of witnesses, to compel the production of evidence;[281] (2) required that Tax Court procedural rules conform "as nearly as practicable" to the Federal Rules of Civil Procedure;[282] (3) authorized the Chief Justice of the Supreme Court to designate Tax Court judges to perform judicial duties on district courts and courts of appeals;[283] and (4) authorized the Tax Court to appoint up to ten commissioners to perform such duties as the Chief Judge might require, including the hearing of small claims cases.[284] Finally, on the sensitive issue of representation, the bill provided that the Government would continue to be represented by the Chief Counsel for the Service,[285] and that taxpayers would be represented by those authorized to do so by the court's rules of practice, but that persons formerly admitted to practice before the court would continue to be eligible to practice.[286]

As might be expected, many of the arguments in favor of the Mills-Long bills resembled those brought forth during earlier debates over similar proposals.[287] Thus, recognition of court status was advocated on the ground that the Tax Court functioned as a judicial body, not as an agency of the executive branch,[288] and that the court's non-judicial status was misleading to the public and could erode taxpayer confidence in a system that relied heavily on voluntary taxpayer compliance.[289] Additionally, judicial status would permit the court to punish contempt and enforce its

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[278] 113 CONG. REC. 17646 (1967) (remarks of Senator Long).

[279] Grounds and procedure for removing Tax Court judges were, and are, contained in I.R.C. § 7443(f). The provision for life tenure was contained in § 2 of S. 2041, adding § 274(a) to title 28.

[280] Mills-Long bills, *supra* note 277, § 26.

[281] *Id.* § 25(a), *proposing to add* 28 U.S.C. § 2651.

[282] *Id.* § 25(a), *proposing to add* 28 U.S.C. § 2652.

[283] *Id.* § 4, *proposing to add* 28 U.S.C. § 293(e).

[284] *Id.* § 17(a), *proposing to add* 28 U.S.C. § 911.

[285] *Id.* § 13(a), *proposing to add* 28 U.S.C. § 527.

[286] *Id.* § 27.

[287] *See supra* notes 23–34, 98–105, 168–191, and accompanying text.

[288] 1967 Senate Hearings, *supra* note 276, at 30 (testimony of Harry Mansfield, American Bar Ass'n), 93, 101 (statement of Chief Judge Drennen).

[289] *Id.* at 35–36 (statement of Harry Mansfield); 113 CONG. REC. 17646 (1967) (remarks of Senator Long); 114 CONG. REC. 29843 (1968) (remarks of Senator Tydings).

own orders,[290] and would eliminate controversies such as those involving the Administrative Procedure Act and the *Dobson* case, which had their roots in the court's anomalous "administrative setting."[291] The increased prestige of the Court and the provision of life tenure for its judges would also make recruiting top caliber people for judgeships easier.[292] In addition to these "traditional" arguments, new considerations were raised which reflected more recent concerns. First, the court, for several years, had been under pressure to conform its rules of practice and procedure to those of the federal district courts, especially with regard to pretrial discovery techniques.[293] Some advocates of H.R. 10100 and S. 2041, which specifically provided for movement in the direction of conformance,[294] supported the bills on the ground that court status would facilitate such a change.[295] Second, as described more fully below, consideration of the bills resulted in serious attention being given to the question of complete overhaul of the tax litigating system.[296] Some of the proposals made in this regard would have increased the importance of the district courts and the Court of Claims in relation to the Tax Court. Making the Tax Court an article III court would permit the assignment of its judges to these other courts, which would thereby benefit in handling the increased workloads.[297] Finally, some taxpayers had recently challenged the constitutionality of the Tax Court, arguing that the court's non-judicial status violated the principle of separation of powers.[298] Although the court's constitutionality had been sustained by several decisions of the courts of appeals,[299] the issue,

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[290] 113 CONG. REC. 17646 (1967) (remarks of Senator Long); 114 CONG. REC. 29843 (1968) (remarks of Senator Tydings).

[291] 113 CONG. REC. 17646 (1967) (remarks of Senator Long).

[292] 1967 Senate Hearings, *supra* note 276, at 35 (statement of Harry Mansfield, American Bar Ass'n).

[293] *See, e.g.*, Michael Kaminsky, *The Case for Discovery Procedure in the Tax Court*, 36 TAXES 498 (1958).

[294] Mills-Long bills, *supra* note 277, § 25(a), *adding* 28 U.S.C. § 2652(a).

[295] 1967 Senate Hearings, *supra* note 276, at 37–38 (testimony of Harry Mansfield, American Bar Ass'n); 114 CONG. REC. 29843 (1968) (remarks of Senator Tydings).

[296] *See infra* notes 314–333 and accompanying text.

[297] Mills-Long bills, *supra* note 277, § 4, *proposing to add* 28 U.S.C. § 293(e); 114 CONG. REC. 29843 (1968) (remarks of Senator Tydings).

[298] *See* Ginsberg, *supra* note 78.

[299] Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636 (5th Cir. 1966); Martin v. Commissioner, 358 F.2d 63 (7th Cir. 1966); Willmut Gas & Oil Co. v. Fly, 322 F.2d 301 (5th Cir. 1963); Standard Hosiery Mills v. Commissioner, 249 F.2d 469 (4th Cir. 1957).

especially in light of a 1962 decision of the Supreme Court,[300] was not entirely free of doubt. The enactment of the bills would put such arguments to rest.[301]

The principal public forum for discussion of the status of the Tax Court was hearings conducted over a two-year period by a subcommittee, chaired by Senator Joseph Tydings, of the Senate Committee on the Judiciary.[302] Support at the hearings for the proposal to establish the Tax Court under article III came from the Tax Court itself,[303] from Senator Roman Hruska, ranking Republican on the Tydings committee,[304] from Chairman Mills,[305] from the American Bar Association,[306] and from tax practitioners and academicians.[307]

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300 Glidden Co. v. Zdanok, 370 U.S. 530 (1962). For a discussion of the implications of the *Glidden* case on the Tax Court, *see* Dubroff, *supra* note 74, at 277–80.

301 As introduced, H.R. 10100 and S. 2041 did not immediately grant life tenure to all Tax Court judges. Rather, they provided that as the terms of sitting judges expired, tenured judges would be appointed. Mills-Long bills, *supra* note 277, § 26. For this reason, some expressed doubts as to the validity of the proposed legislation, but it was generally conceded that drafting changes could eliminate this problem. 1967 Senate Hearings, *supra* note 276, at 36–37 (statement of Harry Mansfield, American Bar Ass'n).

302 The subcommittee, formally known as the Subcommittee on Improvements in Judicial Machinery, held hearings on Tax Court status in 1967, 1968, and 1969. 1967 Senate Hearings, *supra* note 276; 1968 Senate Hearings, *supra* note 207; *Hearings on* S. 1973, *S. 1974, S. 1975, S. 1976, S. 1977, S. 1978, S. 1979*, *Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) [hereinafter cited as 1969 Senate Hearings].

In its later sessions, the subcommittee focused on the problems of the tax litigation system as a whole. Senator Tydings himself introduced several alternative proposals to deal with the broader problem (S. 4143–4149, 90th Cong., 2d Sess. (1968); S. 1973–1979, 91st Cong., 1st Sess. (1969)), and the issue of constitutional status for the Tax Court assumed a role of only collateral importance. *See* 115 CONG. REC. 10439–40 (1969) (remarks of Senator Tydings).

303 1967 Senate Hearings, *supra* note 276, at 88 (testimony of Chief Judge Drennen); 1968 Senate Hearings, *supra* note 207, at 130 (testimony of Chief Judge Drennen, Judge Fay, and Judge Tannenwald); 1969 Senate Hearings, *supra* note 302, at 428 (testimony of Chief Judge Drennen).

304 1968 Senate Hearings, *supra* note 207, at 141–42.

305 1967 Senate Hearings, *supra* note 276, at 11; 1968 Senate Hearings, *supra* note 207, at 136.

306 1967 Senate Hearings, *supra* note 276, at 30 (letter from Orison Marden, American Bar Ass'n).

307 *Id.* at 57 (statements of Charles Davis, Rupert Gresham, Brian Holland, Hart Spiegel, and Laurens Williams), 71 (letter from Professor Alan Polasky); 1968 Senate Hearings, *supra* note 207, at 151 (statement of Harry Mansfield, American Bar Ass'n); 1969 Senate Hearings, *supra* note 302, at 183 (testimony of Bruce Lane,

But despite the substantial support for article III status, most of the problems that had blocked judicial status for the court in the past persisted. One constant, and seemingly insoluble, problem was the issue of representation of the Government in Tax Court proceedings. Treasury, the traditional representative of the Commissioner before the Tax Court, was loath to give up that role; Justice, the traditional representative of the Government before the federal courts, opposed making the Tax Court a full-fledged court unless it could assume full responsibilities of representation.[308]

In Treasury's view, its continued representation of the Government before the Tax Court was vital for two reasons. First, the Office of the Chief Counsel, as part of the same Department as the Internal Revenue Service, could work closely with the Service in settling Tax Court cases. Because more than 80 percent of the cases docketed with the court were disposed of by settlement, this relationship was central to the court's ability to continue to handle expeditiously its workload.[309] Second, Treasury perceived its litigating role in the court as necessary to its more general function of setting Administration tax policy. If Justice were given control of this function, litigating positions might be adopted on the narrow ground of winning a particular case rather than establishing cohesive and uniform precedents.[310] These objectives were considered so important that even though the bills providing article III status for the Tax Court specifically provided for representation by the Chief Counsel,[311] and even though there was substantial sentiment among Treasury officials for enhancing the prestige of the court,[312] the Department felt obliged to oppose H.R. 10100 and S. 2041 on the chance that making the Tax Court a full constitutional court could ultimately lead to Justice usurpation of its role.[313]

American Bar Ass'n), 246 (statement of John Jones), 248 (testimony of Luther Avery), 269 (testimony of C.W. Wellen), 308–09 (statement of Professor Alan Polasky), 334–35 (testimony of Marvin Garbis), 348 (testimony of Professor Richard Pugh), 352 (testimony of John Sexton).

[308] 1967 Senate Hearings, *supra* note 276, at 45–46 (statement of Mitchell Rogovin, Assistant Attorney General, Tax Division), 79 (statement of Fred Smith, General Counsel, Treasury Dep't).

[309] *Id.* at 79.

[310] 1968 Senate Hearings, *supra* note 207, at 163–64 (testimony of Sheldon Cohen, Comm'r of Int. Rev.).

[311] Mills-Long bills, *supra* note 277, § 13(a), *proposing to add* 28 U.S.C. § 527; S. 4144, 90th Cong., 2d Sess. § 111(a) (1968), *proposing to add* 28 U.S.C. § 527; S. 1974, 91st Cong., 1st Sess. § 111 (1969), *proposing to add* 28 U.S.C. § 527.

[312] 1968 Senate Hearings, *supra* note 207, at 116 (testimony of Sheldon Cohen, Comm'r of Int. Rev.).

[313] 1967 Senate Hearings, *supra* note 276, at 91 (testimony of Chief Judge Drennen).

The Justice Department, represented at the Tydings hearings by Mitchell Rogovin, Assistant Attorney General, Tax Division, also opposed enactment of the Mills-Long bills,[314] but in doing so placed surprisingly little public emphasis on the bills' delegation of litigating responsibilities to Treasury. On this question, the suggestion of Justice was that Congress leave to executive order the disposition of the representation issue.[315] The major concern of the Justice Department was that the entire structure of the system by which tax disputes were litigated was suspect.[316] Tax cases could be tried in three separate systems of trial forums, each with different procedures, attitudes, and jurisdictional requirements. Appeals from the trial level courts could be taken to eleven intermediate appellate tribunals, which frequently disagreed with one another, and to a single court of final review which had a legendary distaste for tax cases. In these circumstances the existing system was subject to criticism as being unfair to taxpayers, unfair to the Government, and inconsistent with the goal of establishing a uniform and rational body of interpretations of the tax laws.[317] Accordingly, Justice urged that legislative action with respect to the Tax Court was premature and should await the outcome of a comprehensive Department study of reform possibilities.[318]

This position was well received by Senator Tydings and immediately changed the tenor of the debate over article III status for the Tax Court.[319] In the early hearings virtually all attention was directed toward the issue of Tax Court status, but after the Justice position was announced, the major emphasis shifted to far more general questions, such as whether the trial of tax cases should be restricted to a single court system, whether concurrent jurisdiction to hear deficiency and refund cases should be given to more than one court system, and whether a single court of appeals should be established to provide the sole intermediate review of all tax cases.

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[314] Assistant Attorney General Rogovin spoke for Justice at the Tydings hearings, but other officials of Justice may not have entirely agreed with his views. Solicitor General Erwin Griswold had been a long-time supporter of incorporating the court into the federal judiciary and it is unlikely that his position on this question had changed over the years.

[315] 1967 Senate Hearings, *supra* note 276, at 45–46 (statement of Mitchell Rogovin).

[316] *Id.* at 40–46.

[317] *See, e.g.,* ROSWELL MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1943).

[318] 1967 Senate Hearings, *supra* note 276, at 46. Assistant Attorney General Rogovin testified at the 1967 Hearings that the Department had "taken steps to initiate [such] a study." *Id.* at 51.

[319] Senator Tydings, who did not attend the 1967 hearings held by his committee on S. 2041, when it was felt that the only issue was the status of the Tax Court, became a champion of reform of the entire litigating structure in later years. *See* 114 CONG. REC. 29842–44 (1968) (remarks of Senator Tydings); 115 CONG. REC. 10439–40 (1969) (remarks of Senator Tydings).

These were questions of considerable complexity, and the Tydings hearings soon became a forum for widely disparate and irreconcilable positions. For example, the Rogovin report to the Tydings subcommittee manifested a preference for a system in which all trial jurisdiction in tax cases would be given to the district courts.[320] This would eliminate forum shopping by taxpayers as well as end the system's built-in bias against those who could not afford to pay a disputed tax and were therefore forced to litigate in the Tax Court.[321] It would also provide a judicial remedy in a familiar forum close to the taxpayer's home. Since the Tax Court would be eliminated, such a change would probably result in the Justice Department's obtaining control over all tax litigation.

On the other hand, most tax practitioners favored retention of the Tax Court but urged that it and the district courts, and possibly the Court of Claims,[322] be given concurrent jurisdiction in all tax cases.[323] This would result in the granting of refund jurisdiction to the Tax Court and deficiency jurisdiction to the district courts and, possibly, the Court of Claims. Although such a change would increase the ability of taxpayers to select the most favorable forum, it would eliminate the existing discrimination against taxpayers who could not afford to pay the tax before litigating and were thus barred from district court and the Court of Claims, which could only entertain refund actions.[324]

Still a third position on the issue of reform emerged from the Treasury Department. Although Treasury was receptive to some proposals for

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[320] Although not explicitly stated, a comparison of the study's discussion of reform alternatives indicates that this was the Justice view. 1968 Senate Hearings, *supra* note 207, at 120–25.

[321] Jurisdiction of the district court and the Court of Claims is predicated on prior full payment of the disputed tax. Thus, some taxpayers, because of inadequate resources, may be foreclosed from litigating in these forums. *See* Part I, notes 143–198 and accompanying text.

[322] Some practitioners suggested that to simplify the tax litigating structure, the tax jurisdiction of the Court of Claims should be eliminated. 1969 Senate Hearings, *supra* note 302, at 224 (testimony of Jerry Hamovit), 246 (statement of John Jones), 248 (testimony of Luther Avery), 277 (statement of C. W. Wellen), 348 (testimony of Professor Richard Pugh). The Court of Claims opposed loss of its tax jurisdiction, and was supported in this by several practitioners. *Id.* at 427 (statement of Chief Judge Cowen, Court of Claims), 313 (testimony of Professor Richard Pugh), 332 (statement of Marvin Garbis), 408 (statement of John Sexton).

[323] *See* testimony and statements collected in note 322, *supra*.

[324] After the conclusion of the Tydings hearings, the Tax Section of the American Bar Association endorsed the position of concurrent jurisdiction with article III status for the Tax Court. *Report of Comm. on Court Procedure for the Tax Court*, 23 TAX LAWYER 706 (1970).

change,[325] it strongly opposed any change in the existing structure tending to reduce the importance of the Tax Court, which it believed was the most important forum for establishing tax precedents to guide both the Service and taxpayers.[326] For this reason Treasury opposed the proposal for exclusive tax jurisdiction in the district courts that, of course, presupposed the elimination of the Tax Court.[327] This proposal did not appear to have wide support.[328] There were, however, numerous proponents of concurrent jurisdiction of the Tax Court and the district courts, and Treasury also opposed this plan on the ground that it would have substantial impact on the number of cases going to the Tax Court. Juries were available in district court, the Federal Rules of Civil Procedure applicable to district court proceedings were more familiar to many practitioners than were Tax Court procedures, and district courts were generally more geographically accessible to taxpayers than the Tax Court, which sat in only 60 locations throughout the country and generally heard motions only in Washington. Finally, whether true or false, many were under the impression that district courts were more favorable to taxpayers than the Tax Court.[329] These factors all pointed toward taxpayers preferring to litigate in district court. Yet the overwhelming bulk of tax cases were litigated in the Tax Court.[330] Treasury believed that the major reason for this was the fact that only the Tax Court had jurisdiction to redetermine deficiency assertions, and that if such jurisdiction was given to district courts the business of the Tax Court would be substantially reduced.[331]

With the new direction of the Tydings hearings, it was inevitable that the cause of article III status for the Tax Court would suffer. Chief Judge Drennen and other supporters of the Tax Court, including the Tax Section of the American Bar Association, Senator Hruska, and Chairman Mills, continued to urge that the original proposal be enacted expeditiously since the controversy over more substantial changes in the tax litigating structure

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325 In this regard, Commissioner Thrower testified that the Service was considering several reforms. These were: (1) modification of procedures to speed up administrative action; (2) legislative modification of the *Flora* rule; (3) legislative reversal of the *Lawrence* rule; (4) article III or article I status for the Tax Court. 1969 Senate Hearings*, supra* note 302, at 463–67.

326 *Id.* at 448–51 (testimony of Randolph Thrower, Comm'r of Int. Rev.), 469–76 (testimony of K. Martin Worthy, Chief Counsel for Int. Rev.).

327 *Id.* at 476 (testimony of K. Martin Worthy).

328 *Id.*

329 *Id.* at 487–88.

330 In the years preceding the 1969 hearings, more than 80% of tax cases were litigated in the Tax Court. *Id.* at 470.

331 *Id.* at 477–78.

assured that no prompt action in this direction could be taken.[332] Apparently Senator Tydings supported the Tax Court in this matter,[333] but Justice and Treasury, for their own reasons, refused to endorse article III status. Without their support the proposal had little chance of passage.

Other opposition further dimmed the prospects for passage of the Mills-Long bills. Senator Long, who had himself introduced S. 2041 "by request,"[334] appeared at the Tydings hearings to testify that although he continued to support several features of the bill,[335] he had serious reservations concerning its most important aspect—establishing the court under article III.[336] Senator Long recognized the desirability of enhancing the independent image of the court, and to this end favored moving the court out of its headquarters in the Internal Revenue Service Building, where it had been housed for several decades, into its own courthouse.[337] However, he could not support making it an article III court. Such action might eventually lead to Justice Department representation of the Government in its proceedings and the exclusion of non-lawyers from its bar. Both of these consequences would, in the Senator's view, be regrettable. Moreover, article III status required tenure during good behavior for Tax Court judges, and, like many other congressmen, Senator Long was fundamentally opposed to such a guarantee because it could result in the refusal by a judge to apply faithfully the enactments of Congress, secure in the knowledge that his position would not thereby be jeopardized. Senator Long did not oppose the tradition of generally reappointing Tax Court judges when their terms expired;[338] nevertheless, he believed that periodic review of a judge's fitness to continue in office was healthy. Although Senator Long was the only witness to express these views at the Tydings hearings, there is little doubt that they had wide support in Congress.

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[332] 1968 Senate Hearings*, supra* note 207, at 130 (testimony of Chief Judge Drennen), 136 (letter from Chairman Mills to Senator Tydings), 151 (statement of Harry Mansfield, American Bar Ass'n).

[333] The Tydings subcommittee favorably reported S. 2041 to the full Senate Judiciary Committee. However, no further action was taken on the bill. 115 CONG. REC. 10439 (remarks of Senator Tydings).

[334] 1967 Senate Hearings*, supra* note 276, at 23.

[335] These included: granting the court subpoena and contempt power; permitting the expanded use of commissioners, especially in small tax cases; and conforming the Tax Court retirement plan to the provisions applicable to other judges. *Id.* at 24.

[336] *Id.* at 23.

[337] *Id.* at 22.

[338] Since 1924, only three members of the Board and Tax Court had ever been refused reappointment. *Id.* at 22.

Finally, article III status for the Tax Court was also opposed by the United States Judicial Conference.[339] Composed of the Chief Justice of the Supreme Court, the chief judges of each judicial circuit, the Chief Judge of the Court of Claims, the Chief Judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit, the Judicial Conference met annually to consider the problems and procedures of the United States courts and to recommend legislation to Congress.[340] As Chief Justice of the Supreme Court, Earl Warren was the head of the Judicial Conference in the late 1960s, and he opposed article III status for the Tax Court. Apparently his feeling and that of a majority of the Conference was that full court status was inappropriate for a tribunal with such a specialized jurisdiction as the Tax Court.[341] Although lacking direct legislative authority, the Judicial Conference exerted considerable influence in Congress, especially with the judiciary committees that had jurisdiction over S. 2041.

The period of 1967 to 1969 was one of considerable frustration for the Tax Court. Two decades had passed since the previous major effort to incorporate the court into the judiciary, but apparently little had changed except for the addition of a new opponent of judicial status, the Judicial Conference, and the failure of an old adversary, the accounting profession, to make its views known publicly.[342] By mid-1969 the court and its supporters had concluded that the prospects for enactment of article III status were remote.[343] Accordingly, an alternative proposal, H.R. 13494,[344] was introduced by Chairman Mills in the summer of 1969, providing for the court to be established as a court under article I of the Constitution. As an article I tribunal, the court would have to forego the constitutional

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[339] Letter from William Foley, Deputy Director, Administrative Officer of the United States Courts, to Emanuel Celler, Chairman, House Judiciary Committee, March 4, 1968, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[340] 28 U.S.C. § 331.

[341] *See* Letter from Chief Judge Drennen to Chief Justice Warren, Feb. 28, 1969, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[342] No accountant or accounting organization appeared to testify at the Tydings hearings. In the quarter of a century since the adoption of the Dingell amendment, few non-lawyers had gained admission to the Tax Court bar, and apparently accountants had become resigned to their de facto exclusion from practice. 1967 Senate Hearings, *supra* note 276, at 89.

[343] Letter from Chief Judge Drennen to Judge Robert Ainsworth Jr., June 20, 1969, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence;" Letter from Chief Judge Drennen to Chairman Mills, Nov. 20, 1969, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

[344] 91st Cong., 1st Sess. (1969).

guarantees of life tenure and undiminished compensation, as well as the prestige associated with full constitutional court status. Nevertheless, H.R. 13494 had several advantages. Of primary importance, the court would no longer be an independent agency of the executive branch of the Government. Formal judicial status would help eliminate the misapprehension of many that the court was simply an extension of the administrative procedures of the Internal Revenue Service; it would also relieve the court of the necessity of satisfying administrative procedures that were not appropriate to its function. Even as late as 1969, the question of the applicability of the Administrative Procedure Act to the Tax Court had not been definitively resolved, even though it had been first raised more than two decades earlier.[345] The bill also authorized the court to punish contempt of its authority by fine or imprisonment, and provided that in carrying out its powers the court would have the same assistance as is provided generally to federal courts. The term of office of judges would be increased from 12 to 15 years, and although automatic reappointment was not provided, a judge who was not reappointed after serving 15 years could retire with full pay. This was a novel approach to the problem of judicial tenure, and permitted the forced retirement of judges without formal removal proceedings, while guaranteeing financial independence to those so retired. Provisions dealing with retirement benefits and survivor benefits were liberalized to provide greater uniformity with the treatment of district court judges. The bill also changed the name of the court to the United States Tax Court, following the general form by which federal courts are named, which form had been disregarded in 1942 when the Board of Tax Appeals was renamed the Tax Court of the United States.[346] The final, and perhaps most appealing aspect of H.R. 13494, was its acceptability to most of the opponents of S. 2041. The amendments contained in the bill only affected the Internal Revenue Code and made no changes in title 28. Thus, the issue of representation of the Government was not raised to the same degree as in prior bills that would have incorporated the court into the judicial code. As a result, the Treasury Department indicated its approval of the bill,[347] and the proposal ceased to be a matter of concern to the Judicial Conference. Moreover, even though the bill increased the term of office of Tax Court judges from 12 to 15 years, tenure during good behavior was not applicable and the major concern of Senator Long and those sharing his view was eliminated. Finally, the bill made no change in the Dingell amendment and thus was not offensive to accountants, who in

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345 *See supra* notes 185–191 and accompanying text.

346 *See supra* notes 137–138 and accompanying text.

347 Letter from Paul Eggers, Treasury General Counsel, to Chairman Mills, c. 1969, filed at the U.S. Tax Court in "79th–91st Cong.: Memoranda & Correspondence."

prior times had vociferously objected to permitting the court to prescribe its own rules with respect to eligibility to practice.

H.R. 13494 was noncontroversial, and its major supporters in Congress, chairmen Mills and Long, felt no need to hold public hearings on the subject. The provisions of the bill were quietly inserted into the Tax Reform Act of 1969 by the Senate Finance Committee in executive session[348] and became law on December 30, 1969.[349] The only significant departure the enacted provision made from H.R. 13494 was the proviso that for a judge who was not reappointed to be eligible for retirement at full pay, he would have to notify the President in writing of his willingness to accept reappointment between nine and six months prior to the expiration of his term.[350]

D. Questions Concerning Constitutional Status of the Court's Jurisdiction

Soon after the enactment of the 1969 legislation, the constitutional propriety of the Tax Court was challenged by the taxpayer in *Burns, Stix Friedman & Co. v. Commissioner*.[351] The taxpayer in *Burns* contended that the creation of the Tax Court as a court of record that exercised the judicial power of the United States violated the doctrine of separation of powers because its judges were not afforded the protections of lifetime tenure and undiminished salary required by article III.

Noting that several circuit courts had expressed approval of the statutory creation of the Tax Court when the court remained an executive agency,[352] the Tax Court posed the following question:

> Did the provisions of the Tax Reform Act of 1969 so change the status and function of the Tax Court that it is now exercising the "judicial powers" referred to in article III and must be established as an article III court with its judges having the tenure and compensation protection provided in section 1 of article III?[353]

The court resolved this question in the negative with relative ease, citing the continuation of the court's basic jurisdiction through the enactment of the 1969 legislation, the limitation of the court's jurisdiction by statute, and the

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348 *See* S. REP. NO. 91-552, at 301–05 (1969).

349 Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951–962, 83 Stat. 730.

350 *Id.* § 954(a), *adding* I.R.C. § 7447(b)(3).

351 57 T.C. 392 (1971).

352 *See id.* at 395 (citing Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636 (5th Cir. 1966); Martin v. Commissioner, 358 F.2d 63 (7th Cir. 1966); Willmut Gas & Oil Co. v. Fly, 322 F.2d 301 (5th Cir. 1963); Standard Hosiery Mills v. Commissioner, 249 F.2d 469 (4th Cir. 1957)).

353 *Id.*

court's lack of jurisdiction to exercise the broad common law concept of "judicial power."[354] The court then buttressed its affirmation of its constitutional legitimacy on a series of Supreme Court decisions approving the broad authority of Congress to create non-article III tribunals to adjudicate disputes involving the Government as a party.[355] Although concluding that the cases supported the authority of Congress to establish the Tax Court as a legislative court outside of article III, the Tax Court nonetheless acknowledged that the cases did not do so unequivocally: "[U]nfortunately, rather than being conclusive of the issue before us, [the cases] reveal the diversity of opinion that still exists on the subject."[356]

The *Burns* decision was reviewed by the court without dissent. A concurring opinion filed by Judge Raum and joined by four other judges was more vigorous in its defense of the Tax Court's constitutionality:

> Nothing in the 1969 legislation made unconstitutional that which was valid prior thereto. . . . [T]he action of Congress in describing the Court as being established as a legislative court under article I and in endowing it with some comparatively minor additional powers was not of such nature as to alter the basic character of the Court as it existed prior thereto. . . . The Court was a constitutional judicial body prior to the 1969 Act and the validity of its continued existence was not affected by the Act.[357]

The decision of the Tax Court in *Burns* was not appealed. For that matter, it is doubtful that the constitutional authority of the Tax Court to adjudicate cases within its statutory jurisdiction would be questioned by the circuit courts or the Supreme Court. Nonetheless, commentators have continued to explore whether the scope of the Tax Court's article I jurisdiction impermissibly encroaches on the independence of the Judiciary as protected by article III.[358] More recent examinations of this

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[354] *See id.* at 396. The Tax Court did not view its judicial character as mandating that it be chartered under article III:

> The fact that the Tax Court has characteristics of a court and performs its functions in a judicial manner, as we think it does, . . . and has no legislative administrative, or advisory powers, does not necessarily mean that it must be established under Article III of the Constitution.

Id.

[355] *See id.* at 396–400 (citing and analyzing Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Williams v. United States, 289 U.S. 553 (1933); Ex parte Bakelite Corp., 279 U.S. 438 (1929)).

[356] *Id.* at 397.

[357] *Id.* at 402 (Raum, J., concurring).

[358] These questions typically have been raised in the context of examinations of the expansions of the Tax Court's statutory jurisdiction or in connection with the

constitutional issue focus on a trio of cases issued by the Supreme Court in the 1980's, the first of which held that ancillary jurisdiction over state law claims afforded to federal bankruptcy courts established under article I was unconstitutional.[359] In general terms, these cases evidenced the Court's intention to move away from a rigid set of disputes that could be adjudicated before a non-article III tribunal[360] and toward an analysis that balanced the institutional interests of an independent Judiciary against the interests of Congress in providing innovative dispute resolution fora.[361] In

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consideration of reforms that would further elevate that primacy of the Tax Court in the tax adjudication process. *See, e.g.,* Diane L. Fahey, *The Tax Court's Jurisdiction Over Due Process Collection Appeals: Is it Constitutional?*, 55 BAYLOR L. REV. 453 (2003); Deborah L. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985 (1991).

[359] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985); Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986).

[360] In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court addressed a challenge to the constitutionality of the portion of the Bankruptcy Act of 1978 that conferred upon federal bankruptcy judges (who are appointed to serve terms of 14 years) jurisdiction over state law claims that related to a title 11 proceeding. Stressing the "fundamental principle" that the judicial power of the United States is vested in article III courts, a plurality opinion authored by Justice Brennan and joined by three other Justices recognized three historical exceptions in which judicial power could be constitutionally exercised outside of the article III realm: (1) territorial courts; (2) courts-martial; and (3) cases involving the adjudication of "public rights." *Id.* at 63–70. This third exception, as the Court explained, applies to matters between the Government and third parties that could be resolved exclusively within either the executive or legislative branch. That being the case, there can be no constitutional objection to those branches establishing court-like tribunals for purposes of resolving such disputes. *See id.* at 68. The plurality opinion contrasted public rights cases from disputes concerning private rights, the latter of which the opinion described as resting "at the core of the historically recognized judicial power." *Id.* at 70. Accordingly, the Court concluded that such private right disputes could not be adjudicated by bankruptcy judges who lacked lifetime tenure and salary protection. *Id.* at 71–72.

[361] In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Supreme Court upheld a binding arbitration provision under federal law against an article III challenge. While the Court could have justified its holding on the public-rights doctrine outlined in the plurality opinion in *Northern Pipeline*, the Court in *Thomas* explained that the application of article III should be informed by "practical attention to substance rather than doctrinaire reliance on formal categories." *Id.* at 568. Focusing on the right at issue and the congressional motivation in granting it, the Court upheld the arbitration regime on grounds that it did not threaten "the independent role of the Judiciary in our constitutional scheme." *Id.* at 590.

Commodity Futures Tradition Commissioner v. Schor,[362] the last in the aforementioned trio, the Supreme Court articulated the balancing test in the following terms:

> In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. Although such rules might lend a greater degree of coherence to this area of law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[363]

Tasked with determining whether Congress could permissibly confer jurisdiction to the Commodity Futures Tradition Commission to adjudicate state law counterclaims raised in connection with a claim for reparations brought against a professional broker (pursuant to a statutory dispute-resolution regime), the Court in *Schor* determined that the balancing of interests weighed in favor of Congress.[364]

The balancing test articulated by the Supreme Court in *Schor* provides sufficient grounds for a reviewing court to uphold the constitutionality of the Tax Court's jurisdiction if it were ever challenged. Factors weighing in favor of the constitutionality of the Tax Court include the court's limited statutory jurisdiction to resolve disputes relating to federal taxation; the availability of an article III refund forum at the trial level; and the prospect of appellate review of its decisions by article III regional circuit courts.[365]

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[362] 478 U.S. 833 (1986).

[363] *Id.* at 851 (citations omitted).

[364] Specifically, the Court found that the agency's exercise of jurisdiction over a state law claim "as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication [did] not contravene separation of powers principles or Article III." *Id.* at 857.

[365] This last factor is not available for taxpayers who qualify for and elect to proceed under the Tax Court's small case procedures. *See* I.R.C. § 7463(b)

While countervailing points certainly can be made,[366] a reviewing court would not likely decide the matter in a vacuum. Context is critical, and that context includes a Tax Court that has exercised its statutory jurisdiction as an article I tribunal for well over 40 years. Faced with a balancing test, it is not likely that a reviewing court would interpret the scales in such a way as to render decades' worth of decisions from the Tax Court constitutionally illegitimate. Hence, while the constitutional foundation of the Tax Court's jurisdiction may not be immutable, it is by no means precarious.[367]

E. Proposals to Consolidate Tax Litigation Before the Tax Court

Of course, a straightforward means of eliminating any lingering concerns over the constitutionality of the Tax Court's jurisdiction is to establish the court under article III of the Constitution. While there has been no stand-alone proposal to afford the Tax Court article III status as it is presently constituted, article III status was considered by the Federal Courts Study Committee in 1990 as part of its proposal to restructure the federal tax controversy landscape. The deliberations and recommendations of this committee are discussed below.

As part of the Judicial Improvements and Access to Justice Act,[368] Congress in 1988 authorized Chief Justice Rehnquist to appoint a 15-person committee to comprehensively investigate issues plaguing the federal court system and to make recommendations for improvement.[369] The resulting Federal Courts Study Committee was comprised largely of judges from the federal bench, attorneys in private practice, and members

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(rendering Tax Court decisions in this setting final). Professor Geier has noted that the constitutionality of the Tax Court's jurisdiction is most vulnerable in this setting, commenting that the preservation of this helpful portion of the Tax Court's jurisdiction may be the most compelling reason to grant article III status to the court. *See* Geier, *supra* note 358, at 1025–32.

[366] *See* Geier, *supra* note 358, at 989, 1016–25 (examining the Tax Court's jurisdiction in light of *Schor* and its companion cases, and finding that the court, as currently constituted, does not survive a "principled application of article III doctrine"). As one factor that would weigh against the Tax Court in the application of the balancing test, Congress' departure from article III in this setting appears to be largely a product of political expediency in the broader goal of moving the Tax Court out of the Executive Branch.

[367] That said, it is not only appropriate but wise to consider the limitations on non-article III adjudication when considering expansions of the Tax Court's precedent or the elimination of alternative article III fora. *See, e.g.,* Fahey, *supra* note 358; Geier, *supra* note 358.

[368] Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[369] *Id.* at §§ 102, 103, 102 Stat. at 4644.

of Congress.[370] After receiving testimony and conducting public hearings for roughly a year, the committee released tentative recommendations near the end of 1989.

One of the committee's proposals would have restructured the prevailing federal tax controversy landscape by elevating the role of the Tax Court. The committee was disturbed by the availability of three separate trial-level fora in which to litigate a tax dispute, finding that such a regime encouraged forum shopping and operated in a manner unfair to certain taxpayers (presumably those who lacked the financial means to pay the asserted deficiency to pursue refund litigation outside of the Tax Court).[371] The committee therefore proposed to make the Tax Court's dominant jurisdiction over the litigation of tax disputes nearly exclusive. Specifically, the Tax Court would serve as the exclusive forum for the trial disputes concerning tax liability, whether originating in the deficiency or refund posture.[372] The proposal would have constrained the jurisdiction of the federal district courts over tax matters considerably, leaving those courts with jurisdiction over criminal tax cases and enforcement actions only.[373] By implication, the jurisdiction of the Court of Claims in the federal tax arena would have been abolished altogether.

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[370] The committee was chaired by Judge Joseph F. Weis, Jr., of the Circuit Court of Appeals for the Third Circuit. The remaining 14 committee members included: J. Vincent Aprile II (General Counsel of the Kentucky State Dep't of Public Advocacy); Jose A. Cabranes (Judge, District Court for the District of Connecticut); Keith M. Callow (Chief Justice, Supreme Court of Washington); Levin H. Campbell (Chief Judge, Court of Appeals for the First Circuit); Edward S.G. Dennis, Jr. (Assistant Attorney General, Criminal Division, United States Dep't of Justice); Charles E. Grassley (United States Senator); Morris Harrell (attorney in private practice); Howell T. Heflin (United States Senator); Robert W. Kastenmeier (member of the United States House of Representatives); Judith N. Keep (Judge, District Court for the Southern District of California); Rex E. Lee, Jr. (President, Brigham Young University); Carlos J. Moorhead (member of the United States House of Representatives); Diana Gribbon Motz (attorney in private practice); and Richard Posner (Judge, Court of Appeals for the Seventh Circuit). Federal Courts Study Committee, Report of the Federal Courts Study Committee app. B (Apr. 2, 1990) [hereinafter FCSC Final Report].

[371] FCSC Final Report, *supra* note 370, at 69.

[372] *Id.* at 70. The practical effect of the proposed expansion of the Tax Court's jurisdiction would have been modest from a macro perspective, as the committee observed that the Tax Court already handled 95% of tax disputes. Federal Courts Study Committee, Tentative Recommendations for Public Comment 30 n.20 (Dec. 22, 1989) [hereinafter FCSC Tentative Recommendations]. Accordingly, the proposal envisioned the addition of only one or two additional Tax Court judges at the trial level. FCSC Final Report, *supra* note 370, at 70.

[373] *Id.*

The proposal from the Federal Court Study Committee did not stop with a restructuring of tax adjudication at the trial level. The committee was troubled by the sheer number of courts possessing intermediate appellate jurisdiction over tax disputes, with appeals from the Tax Court and federal district courts being heard by twelve regional courts of appeals and appeals from the Court of Claims being heard by the Federal Circuit Court of Appeals.[374] Finding this structure detrimental to the development of a uniform body of tax law, the committee proposed the creation of an appellate division within the Tax Court. This division would hear all appeals from the trial division of the Tax Court, which would amount to the majority of all intermediate appeals, given the proposed expansion of the Tax Court's trial-level jurisdiction.[375] In this manner, the Federal Courts Study committee endorsed the persistent calls for the creation of a national court of tax appeals.[376]

The Federal Court Study Committee originally proposed that the Tax Court, with its expanded trial-level jurisdiction and its newly conferred appellate jurisdiction, be constituted as an article III tribunal.[377] Interestingly, the committee tapped into the theme of perceived Treasury Department influence over the court as a justification for the provision of article III protections:

> Article III status of the judges should insulate them from undue influence by the Treasury Department and would thus eliminate the need to provide taxpayers with "competitive" alternatives in the federal district courts and in the Claims Court.[378]

Perhaps seeking to avoid the turf battles that contributed to defeat of past attempts to confer article III status on the Tax Court, the committee's tentative proposal contemplated the maintenance of a division of labor among governmental agencies in the tax controversy setting. The Internal Revenue Service would continue to represent the Government before the

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[374] *Id.* at 69–70; FCSC Tentative Recommendations, *supra* note 372, at 30.

[375] The proposal contemplated the addition of five judges to staff the appellate division. FCSC Final Report, *supra* note 370, at 70.

[376] Indeed, the committee found the creation of an appellate division in the Tax Court to hear all tax appeals to be the more important of the two proposals, as the committee offered this proposal as an alternate, stand-alone provision in the event Congress did not wish to pursue the suggested restructuring of the trial level adjudication. *Id.*

[377] FCSC Tentative Recommendations, *supra* note 372 at 30.

[378] *Id.* at 31. Although not mentioned, article III status for the newly envisioned Tax Court would have foreclosed constitutional objections resulting from the elimination of the federal district court as a venue for the adjudication of tax liability.

trial division of the Tax Court, whereas the Department of Justice would represent the Government before the appellate division.[379]

Proposed article III status for the trial level division of the newly conceived Tax Court was not included among the committee's final recommendations. Rather, only the judges of the appellate division were to be afforded the protections of lifetime tenure and salary protection under article III.[380] The apparent justification for the revision was concern raised by members of the committee that the new article III Tax Court may be asked to resolve federal issues beyond the federal taxation arena when presented with cases involving related non-tax federal questions,[381] and that a specialist court presumably would not be well-equipped to do so.

Conceding that its proposed restructuring of the federal tax adjudication landscape would do little to ease the workload of federal district and appellate courts,[382] the committee nonetheless found the reforms worth pursuing. Of the various articulated benefits of the proposal, the committee found the prospect of increasing the quality and uniformity of tax adjudication most compelling.[383] The proposed reforms served as a vote of confidence in the Tax Court. The committee observed that the Tax Court was the only available forum that possessed the "the time and sufficiently substantial volume of tax litigation to develop expertise in one of the most specialized and technically demanding fields in American jurisprudence."[384] However, the committee's proposed reform of the federal tax adjudication landscape did not enjoy unanimous support. A dissenting statement authored by Edward S.G. Dennis Jr. (of the Department of Justice) and joined by four other committee members

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[379] *Id.*

[380] FCSC Final Report, *supra* note 370, at 70.

[381] FCSC Tentative Recommendations, *supra* note 372, at 31.

[382] FCSC Final Report, *supra* note 370, at 70.

[383] The committee touted the following benefits of the proposed reforms in the following terms:

> These changes . . . would rationalize federal tax adjudication, reduce forum-shopping, relieve workload pressures on the existing Article III appellate courts, and reduce the pressure on the Supreme Court to grant certiorari in tax cases to resolve intercircuit conflicts. Above all, they would increase the quality and uniformity of tax adjudication by shifting it form overworked judges sitting in a large number of diverse courts to a single court of highly trained specialists.

Id.

[384] *Id.* The proposals of the Federal Courts Study Committee in this setting and the articulated justifications for such proposals are remarkably consistent with an article proposing restructuring of the civil tax litigation system published by Tax Court Judge Dawson expressing his individual views. *See* Howard A. Dawson, Jr., *Should the Federal Civil Tax Litigation System Be Restructured?*, 40 TAX NOTES 1427 (1988).

(including Senator Grassley and Congressman Moorhead) touted the benefits of the existing regime. In particular, the dissenting group found the "genius" of the existing regime to rest in the effective blending of specialist and generalist elements, which it found to be efficient and "perceptively fair."[385] Indeed, this group of committee members appeared heavily influenced by how the proposed reforms would be received by the public, expressing their grave concern that the centralization of tax litigation in a specialized court "would leave the American taxpayers with the impression that the judicial system is remote and unresponsive."[386] To bolster its position, the dissenting group highlighted the opposition of institutional segments of the tax bar to the proposals, including the Internal Revenue Service, the Treasury Department, the Claims Court, and the American Bar Association—and even the Tax Court itself.[387]

The concerns articulated by the dissenting faction of the Federal Courts Study Committee evidently prevailed. The implementing legislation proposed by Congress did not include any of the committee's proposals concerning the litigation of federal civil tax disputes.[388] Accordingly, the landscape of federal tax adjudication remains in central respects largely consistent with the compromise reached by Congress in the Tax Reform Act of 1969.

F. Subsequent Developments Consistent With Judicial Status

By chartering the United States Tax Court as a court of record established under article I of the Constitution through the Tax Reform Act of 1969, Congress supplied the court with a judicial form to match its long-held character as a judicial arbiter. Although the true effect of the legislation initially was subject to some doubt, the Supreme Court through

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[385] FCSC Final Report, *supra* note 370, at 72.

[386] *Id.*

[387] FCSC Final Report, *supra* note 370, at 71. The attribution of opposition to the Tax Court as a body appears to have been an overstatement. To start, it is doubtful that the Tax Court would have articulated an institutional position on the matter. Furthermore, at the time, Judge Dawson had recently expressed his private support for the consolidation of trial-level adjudication of tax disputes before the Tax Court and for the creation of a national court of tax appeals. *See* Dawson, *supra* note 384. However, around the same period, Judge Sterrett expressed his disapproval of a national court of tax appeals. *See* Michael S. Moriarty & R. Eliot Rosen, *An Interview with Former Tax Court Chief Judge Sterrett*, 41 TAX NOTES 910 (1988).

[388] *See* Federal Courts Study Group Implementation Act of 1990, H.R. 5381, 101st Cong. (1990). For that matter, none of the implementing legislation became law. Although the bill passed the House of Representatives, the Senate failed to take action on the legislation.

its opinion in *Freytag v. Commissioner*[389] (detailed in Part V below) confirmed that the Tax Court "exercises judicial, rather than executive, legislative, or administrative power,"[390] and that the court stands "independent of the Executive and Legislative Branches."[391] Hence, following the 1969 legislation, the Tax Court emerged as a body no longer subject to, what in the circumstances was, the demeaning characterization as an executive agency. Judges of the court, although not guaranteed life tenure, can be reasonably assured of reappointment until they reach retirement age (even if the reappointment process has become protracted in recent years[392]), at which time a judicial-type pension is available to them. Because the court is a creature of the Internal Revenue Code rather than title 28 of the United States Code, it is subject to the legislative jurisdiction of the congressional tax-writing committees that are familiar with the work of the court. The Tax Court submits its budget requests directly to Congress and has a considerable amount of flexibility in establishing its internal administrative procedures.[393] Many of these practical advantages would be lost if the Tax Court were afforded article III status.

Through a combination of statutory enactments and actions taken by the Tax Court, Congress and the court have steadily implemented policies making the Court more closely resemble other federal courts. For instance, soon after enactment of the 1969 provisions, the Tax Court determined that its notices, orders, rules, and other public documents were no longer required to be published in the Federal Register pursuant to the

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[389] 501 U.S. 868 (1991).

[390] *Id.* at 890–91

[391] *Id.* at 891.

[392] *See* Danshera Cords, *Tax Court Appoints and Reappointments: Improving the Process*, 46 U. RICH. L. REV. 501 (2012).

[393] In the original edition of this text, Prof. Dubroff opened the sentence above with the following clause: "As a legislative body performing judicial functions, ..." However, that characterization came before the Supreme Court in *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991), described the Tax Court as being "independent of the Executive and Legislative Branches." Furthermore, as reflected in the recent case of *Kuretski v. Commissioner*, – F.3d – (D.C. Cir. 2014) (Docket No. 13-1090), the location of the Tax Court in the constitutional scheme of government is subject to dispute. [The *Freytag* and *Kuretski* decisions are discussed in Part V.] Nonetheless, given Prof. Dubroff's contemporaneous research of the 1969 Tax Reform Act and, in particular, its effect on the Tax Court, Prof. Dubroff's characterization of the Tax Court as a "legislative body" is noteworthy.

In light of the insertion of this editorial comment and in the sake of completeness, this footnote in the original text provided as follows: "The fact that, despite efforts over many years, the court was only able to secure its own courthouse after the 1969 changes is ample evidence of the benefit of its new status."

Administrative Procedure Act, and it ordered deletion of the provisions dealing with the court from the Code of Federal Regulations.[394] More recent developments in the transition of the Tax Court's status to an article I court are detailed below.

1. Court Security

In 2008 Congress amended § 7456(c) and 28 U.S.C. § 566 to make the Tax Court a protectee of the United States Marshals Service (USMS) to an extent equivalent to article III courts, and to provide that the USMS retains final authority regarding security requirements for the Tax Court.[395] Section 7456(c) authorizes the Chief Judge of the Tax Court to request the United States Marshal for any district in which the Tax Court is sitting to attend a session of the Tax Court in that district. Legislative history underlying the amendment to § 7456(c) states that enhanced security for the Tax Court was warranted in the light of several acts of violence in 2005 and 2006 that resulted in the deaths of employees, judges, and judicial family members of courts other than the Tax Court.[396]

2. Tax Court Personnel System

When the Board of Tax Appeals was established in 1924, its governing statutes provided that its employees were subject to personnel provisions primarily applicable to employees of the Executive Branch.[397] Section 7471 authorized the Tax Court to appoint, in accordance with provisions of title 5 governing appointment in the competitive service, employees as necessary to operate the court. In 2010 Congress approved, and on January 4, 2011, President Obama signed into law, amendments to § 7471(a) authorizing the Tax Court to appoint employees, generally, without regard to title 5.[398] The statute, as amended, authorized the court to establish an independent personnel system[399] and directed the court, to the extent feasible, to align its employees' pay to that of similarly situated employees in article III courts.[400]

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394 *See* 35 Fed. Reg. 12462 (1970).

395 I.R.C. § 7456(c) and 28 U.S.C. § 566(a) were amended by the Court Security Improvement Act of 2007, Pub. L. No. 110-177, §§ 101, 102, 121 Stat. 2534, (signed into law on January 7, 2008).

396 H. REP. NO. 110-218, at 828 (2007).

397 Pub. L. No. 68-176, § 900(k). The same provision appears in the 1925 Statutes at Large as § 1222 of the Internal Revenue Code.

398 I.R.C. § 7471(a)(1)–(3); Pub. L. No. 111-366, § 1(a), 124 Stat. 4063 (2011).

399 *See* STAFF OF THE JOINT COMM. ON TAX'N, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 111TH CONGRESS, pt. 20 (2011).

400 *Id.*; I.R.C. § 7471(a)(4).

The provision became effective on October 9, 2011, when the Court Conference of the Tax Court adopted the independent personnel system.[401]

3. Codes of Conduct and Public Disclosures

On August 29, 1985, the Court Conference adopted resolutions that the Court would follow the Code of Conduct for United States Judges as the basis for the ethical standards applicable to all Tax Court judges and be guided by the rulings of the Judicial Conference of the United States applying the ethical standards. On June 21, 1991, then Chief Judge Arthur L. Nims, III wrote to Judge Walter K. Stapleton, chair of the Committee on Codes of Conduct of the Judicial Conference of the United States, stating that Tax Court judges wished to have the Committee on Codes of Conduct act as their "supervising ethics office" within the meaning of titles III and IV of the Ethics Reform Act of 1989.[402] That request was subsequently granted. Effective January 1, 2007, the Tax Court made the Code of Conduct for Judicial Employees applicable to all the court's employees. On July 16, 2009, the Court Conference clarified that the Codes of Conduct for Judges and Judicial Employees apply "as amended as then in effect", making revisions in these Codes automatically apply to Tax Court judges and employees.

On April 26, 2007, the Court Conference adopted the private seminars disclosure policy established in September 2006 by the Judicial Conference of the United States.[403] As a result, the public may obtain information from the Tax Court's website about nongovernmental education programs attended by the court's judges for which the seminar provider pays or reimburses judges' expenses.[404] These reports are available for 3 years on the Tax Court's website.

4. E-Government Act

The E-Government Act,[405] enacted in 2002, does not expressly apply to the Tax Court. In 2006, however, the Tax Court voluntarily began to meet the standards set by the E-Government Act for other federal entities.[406]

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401 *See* Pub. L. No. 111-366, § 1; Tax Court Personnel Manual (adopted on October 9, 2011).

402 Pub. L. 101-194, 92 Stat. 1824.

403 *See* http://www.uscourts.gov/Press_Releases/judbrappc906c.pdf.

404 *See* http://www.ustaxcourt.gov/press/042607.pdf.

405 Pub. L. 107–347, 116 Stat. 2899 (2002).

406 *See* Rules Comm. Note, TAX CT. R. 27, 135 T.C. 395, 396 (2008). For a detailed discussion of the subject, see Appendix G.

5. Admissions and Discipline

Notwithstanding the developments by which the operation of the Tax Court has become more consistent with that of other federal courts, the Tax Court remains unique with respect to ability of non-attorneys to represent taxpayers before it. Nonetheless, the Tax Court has adopted more formal procedures for admissions to practice before the court and for disciplining members of the Tax Court bar for professional misconduct. After reviewing allegations of professional misconduct by members of the court's Bar, the Admissions Committee submits recommendations to the Chief Judge regarding the proper course of action in individual cases.[407] The court issues periodic press releases on its Web site announcing its disciplinary actions. No less than every two years, the Admissions Committee conducts the court's written examination for non-attorneys seeking admission to the court's bar.[408]

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[407] *See* TAX CT. R. 201(a) (July 6, 2012 ed.) (stating that practitioners before the Court shall carry on their practice in accordance with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association).

[408] *See* TAX CT. R. 200(a)(3) (July 6, 2012 ed.).

PART V

A JUDICIAL EXAMINATION OF THE TAX COURT'S CONSTITUTIONAL NATURE: *FREYTAG V. COMMISSIONER*

In *Freytag v. Commissioner*,[1] the Supreme Court addressed a challenge to the constitutional validity of the appointment of special trial judges of the Tax Court. The taxpayers, whose cases had been selected as test cases in wide-ranging litigation concerning the same tax shelter transaction, challenged the validity of the assignment of their cases to a special trial judge for hearing and preparation of a preliminary report. In addition to contending that the assignment was not authorized by statute, the taxpayers argued that the Chief Judge's statutory authority to appoint special trial judges failed to comply with the Appointments Clause of the Constitution. After dispensing with the taxpayers' statutory argument, the Court unanimously held that the appointment of special trial judges complied with the constitutional limitations on the appointment power. Hence, from a narrow perspective, the decision clarifies that the Tax Court's use of special trial judges[2] does not suffer from constitutional infirmity.

The *Freytag* decision, however, has significance to the Tax Court far beyond its relatively narrow holding. Resolution of the Appointments Clause challenge required the Supreme Court to examine the role of the Tax Court in the constitutional structure of government. On this issue, the Supreme Court was sharply divided. A five-Justice majority of the Court upheld the appointment on grounds that the Tax Court constituted one of "the Courts of Law" under the Constitution. In reaching this determination, the Court stressed the exclusively judicial nature of the Tax Court and declared that the court exercises a portion of the judicial power of the United States. The Supreme Court's affirmation of the Tax Court's status within the federal judicial scheme in *Freytag* later would lead the Tax Court to revisit the scope of its ancillary equitable jurisdiction. For instance, in *Estate of Branson v. Commissioner*, the Tax Court rejected prior case law interpreting its equitable powers narrowly, citing *Freytag* to support its determination that the Tax Court "should be properly viewed as exercising full judicial power within its limited subject matter jurisdiction."[3]

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[1] 501 U.S. 868 (1991).

[2] The office of the special trial judge is discussed in Part XII.

[3] 113 T.C. 6, 11 (1999). The invocation of *Freytag* as supporting the Tax Court's equitable powers first appeared in Judge Halpern's concurring opinion in *Estate of Mueller v. Commissioner*, 101 T.C. 551 (1993). The Tax Court's equitable jurisdiction is discussed in Part VI.D.

In determining that the Tax Court constituted a "Court of Law" for constitutional purposes, the Supreme Court in *Freytag* laid to rest any lingering ambiguity concerning the Tax Court's relationship with the Executive Branch following its establishment as an article I court through the Tax Reform Act of 1969. The Court confirmed that Congress accomplished what it set out to do in the legislation—to terminate the court's status as an executive agency sitting in judgment of another. In so doing, the Court rejected the determination of the Second Circuit Court of Appeals in the companion case of *Samuels, Kramer & Co. v. Commissioner*[4] that the Tax Court's designation as an article I court of record in the 1969 legislation accomplished nothing apart from changing the label used to refer to the institution.

This part explores the litigation in *Freytag* and *Samuels, Kramer* that culminated in the Supreme Court's decision in *Freytag*. The full landscape of the litigation reveals a number of interesting developments, including a complete reversal of the Government's position once the Solicitor General assumed responsibility for litigating the cases on behalf of the Commissioner. Additionally, neither party to the case endorsed the rationale adopted by the majority of the Supreme Court. Rather, the Tax Court's inclusion in "the Courts of Law" under the Appointments Clause was advanced only through an amicus brief submitted by Erwin N. Griswold, ostensibly acting in his individual capacity.

A. Developments Before the Tax Court

The *Freytag* litigation concerned the tax consequences of straddle investments in futures contracts pertaining to government-backed mortgage securities. All told, the litigation relating to this shelter transaction involved roughly 3,000 taxpayers against whom approximately $3 billion in deficiencies had been asserted.[5] The *Freytag* litigation before the Tax Court, however, concerned ten test cases that had been selected for consolidated discovery, briefing, trial, and opinion. Trial of the test cases began before Judge Richard C. Wilbur in November of 1984, but the trial was periodically postponed on account of Judge Wilbur's illness. In November of 1985, Chief Judge Samuel Sterrett of the Tax Court assigned Special Trial Judge Carlton D. Powell to preside over the trial as an evidentiary referee. The proceedings were videotaped for the benefit of Judge Wilbur, permitting him to observe the proceedings from his home. At this point in the case, Judge Wilbur anticipated that he would prepare the factual findings and opinion in the case when he recovered. However, Judge

[4] 930 F.2d 975 (2d Cir. 1991).

[5] *See* Brief for Petitioner at 11 & 24, Freytag v. Commissioner, 501 U.S. 868 (1991).

Wilbur's continued illness eventually forced him to retire from his full-time position as judge in April of 1986, whereupon he assumed senior status. In July of 1986, Chief Judge Sterrett notified the parties that he intended to assign the case to Special Trial Judge Powell pursuant to what was then § 7443A(b)(4) for the preparation of findings of fact and opinion,[6] unless the parties objected. All but one of the taxpayers (whose case was severed) consented to the assignment, on the condition that either Judge Wilbur or Chief Judge Sterrett would bear responsibility for entering the decision in the case.[7]

Trial of the consolidated cases before the Tax Court in *Freytag* was fairly complex. The trial lasted 14 weeks, yielding 9,000 pages of transcripts and over 3,000 exhibits.[8] Special Trial Judge Powell, who already had presided over nine weeks of the trial in his capacity as evidentiary referee before being formally assigned the case, prepared a report that eviscerated the straddle investment strategy at issue on the merits. Special Trial Judge Powell determined that the component transactions of the shelter did not constitute bona fide transactions for federal income tax purposes; rather, the transactions were properly disregarded as illusory.[9] Alternatively, Special Trial Judge Powell found that even had the transactions at issue been economically meaningful, the taxpayers nonetheless would not be entitled to claimed losses because the taxpayers lacked the requisite profit motive.[10] In addition to sustaining the deficiencies, Special Trial Judge Powell upheld the imposition of a negligence penalty.[11] Judge Powell concluded his report by issuing a reminder to future counsel concerning the standards imposed by the Tax Court Rules of Practice and Procedure for

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[6] At that time, § 7443A(b)(4) permitted the chief judge of the Tax Court to assign "any other proceeding which the chief judge may designate" to a special trial judge, in addition to the types of cases enumerated in prior portions of § 7443A(b). However, pursuant to § 7443A(c), the special trial judge lacked authority to enter the final decision in a § 7443A(b)(4) case. Hence, the special trial judge's report had to be submitted to a presidentially appointed judge of the Tax Court for proposed adoption.

[7] *See* Freytag v. Commissioner, 904 F.2d 1011, 1014 (5th Cir. 1990); Brief for Petitioner at 8, Freytag v. Commissioner, 501 U.S. 868 (1991).

[8] Freytag v. Commissioner, 501 U.S. 868, 871 n.1 (1991) (citing statements of taxpayers' counsel at oral argument).

[9]Freytag v. Commissioner, 89 T.C. 849, 875 (1987). In describing the claimed economic consequences of the underlying straddle transactions, the report commented that "[t]he wearing of judicial robes does not require that we take leave of common sense." *Id.* at 878.

[10] *Id.* at 876.

[11] *See id.* at 887–89.

signing a pleading, as well as the broader duty that counsel owe the court to decline to litigate unmeritorious claims.[12]

On October 21, 1987, Chief Judge Sterrett issued an order assigning the case to himself for disposition. On the same day, Chief Judge Sterrett adopted the report of Special Trial Judge Powell in full.

The same shelter transaction arrived before the Tax Court a few years later in *First Western Government Securities, Inc. v. Commissioner*,[13] a case concerning the promoter of the straddle investment strategy. Chief Judge Arthur L. Nims, III assigned the case to Special Trial Judge Powell pursuant to then § 7443A(b)(4) to hear the case and to prepare a preliminary report. Having the benefit of Special Trial Judge Powell's prior report in *Freytag*, the taxpayers in *First Western* understandably moved to vacate the assignment of their cases. In addition to contending that the assignment was not permitted under then § 7443A(b)(4) (which the Court rejected as inconsistent with the statutory text and congressional intent),[14] the taxpayers objected to the assignment on constitutional grounds. Specifically, the taxpayers contended that assignment of their case to a special trial judge was not permissible because the appointment of special trial judges by the Chief Judge of the Tax Court failed to comply with the Appointments Clause of article II of the Constitution. That provision provides as follows:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[15]

The taxpayers in *First Western* focused on the first half of the Appointments Clause, contending that a special trial judge of the Tax Court constituted a principal officer of the United States. Because special trial judges were appointed by the chief judge of the Tax Court instead of by the President (with the advice and consent of the Senate), their appointments were invalid, or so the argument went. The Service argued from the opposite side of the spectrum, contending that the Appointments Clause

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[12] *See id.* at 890–91 (quoting Tax Court Rule 33(b) and citing Rule 3.1 of the ABA Model Rules of Professional Conduct (1983 ed.)).

[13] 94 T.C. 549 (1990).

[14] *See id.* at 553–56. The taxpayers' narrow interpretation of § 7443A(b)(4) and its rejection by the Tax Court and other appellate courts is addressed in Part XII.C.

[15] U.S. CONST. art. II, § 2, cl. 2.

had no application whatsoever to the appointment of special trial judges. Drawing on the Tax Court's prior practice of appointing attorneys from its legal staff to perform the functions of commissioners (who were later designated as special trial judges), the Service contended that special trial judges constituted "lesser functionaries subordinate to officers of the United States" in the parlance of the Appointments Clause.[16] In other words, the Service contended that the special trial judges merely assisted the court in an employee capacity when hearing cases assigned to them pursuant to § 7443A(b)(4). In the Service's view, special trial judges in this setting were not officers of any sort for purposes of the Constitution.

The Tax Court rejected the positions of both parties and resolved the matter in the space between the two. The court first determined that special trial judges constituted officers of the United States rather than employees, citing the significant authority that special trial judges possess to enter final decisions in certain cases and to hear any case assigned to them.[17] However, the Tax Court did not believe that special trial judges rose to the level of principal officers, citing the following limitations on the position: the chief judge possesses authority to appoint and remove special trial judges; the duties of special trial judges are defined by the order issued by the chief judge assigning a particular case to them; and special trial judges may enter final decisions only in a narrow, statutorily defined range of cases.[18] These limitations—not to mention the unstated but inescapable practical consequences of finding special trial judges to be principal officers under the Appointments Clause—led the Tax Court to conclude that special trial judges constituted inferior officers for this purpose. As such, their appointment would comply with the Appointments Clause so long as (1) the Tax Court constituted one of "the Courts of Law" under the Clause that acted through its chief judge, or (2) the Tax Court constituted a "Department" with the chief judge as its "Head."

Both the taxpayers and the Commissioner in *First Western* recognized that an article III court constituted one of the "Courts of Law" for purposes of the Appointments Clause. The issue was whether the two were

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[16] Respondent's Objection to Petitioner's Motion for the Assignment of This Case to a Presidentially Appointed Judge of the United States Tax Court, at 11–14 (Jan. 16, 1990) [hereinafter "Respondent's Objection"]. Alternatively, the Service argued that if the special trial judges were officers for Appointments Clause purposes, their appointments were valid on grounds that (a) the Tax Court constituted one of the Courts of Law capable of appointing inferior officers, or (b) the chief judge of the Tax Court constituted the Head of a Department capable of appointing inferior officers. *See id.* at 15–22 (Court of Law argument), 22–24 (Head of Department argument).

[17] *First Western*, 94 T.C. at 557.

[18] *See id.* at 558.

synonymous. The Tax Court observed that the question constituted one of first impression.[19]

The taxpayers contended that "the Courts of Law" under the Appointments Clause stood as a reference to the Judicial Branch, which is limited to courts established under article III of the Constitution. The Commissioner, on the other hand, contended that the scope of "the Courts of Law" under the Appointments Clause was broad enough to include article I courts that performed exclusively judicial functions. The Tax Court was clearly troubled by the narrow interpretation offered by the taxpayers. Citing its prior history as an independent agency within the Executive Branch, the court noted that its ability to appoint special trial judges previously stood unquestioned. However, if congressional establishment of the Tax Court as an article I court through the Tax Reform Act of 1969 did not bring the Tax Court within one of "the Courts of Law" for Appointments Clause purposes, then the 1969 legislation would have had the anomalous effect of rendering the court powerless to appoint special trial judges or, for that matter, its own clerk of court.[20] The Tax Court found this conclusion "untenable."[21] Citing the Supreme Court's prior explanation in *Williams v. United States* that legislative courts "possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution,"[22] the Tax Court in *First Western* determined that it constituted one of "the Courts of Law" under the Appointments Clause based on its judicial nature.[23]

The decision of the Tax Court in *First Western* was reviewed by the entire court without a single dissent or separate opinion. Nonetheless, noting the importance of the resolution of the Appointments Clause issue to its operations, the court certified the matter for interlocutory appeal. Less than a year later, the Second Circuit Court of Appeals would affirm the Tax Court in *Samuels, Kramer & Co. v. Commissioner*,[24] but only pursuant to a

[19] *See id.* at 560.

[20] *See id.* at 563.

[21] *Id.* Interestingly, the Tax Court in *First Western* never appeared to give any consideration to the possibility that the Tax Court could continue to serve as a department within the Executive Branch. Perhaps the court viewed the intent of Congress to terminate the Tax Court's status as an independent administrative agency through the Tax Reform Act of 1969 as so obvious as to not warrant further comment.

[22] 289 U.S. 553, 566–67 (1933).

[23] *First Western*, 94 T.C. at 564 ("Because the powers exercised by the Tax Court are judicial powers, not legislative powers, Tax Court judges are judicial officers, not legislative officers.").

[24] 930 F.2d 975 (2d Cir. 1991).

widely disparate interpretation of the Tax Court's standing in the Appointments Clause framework.

B. Decisions at the Courts of Appeals

Before the Second Circuit could weigh in on the matter, the Fifth Circuit Court of Appeals issued its decision in the appeal of the *Freytag* case.[25] There, the taxpayers raised an Appointments Clause challenge to the referral of their cases to a special trial judge for the first time. The Fifth Circuit refused to entertain this argument, holding that the taxpayers had waived any constitutional objection to the assignment of their cases to the special trial judge when they consented to the assignment.[26] The Fifth Circuit then proceeded to sustain the Tax Court's decision on the merits.

After the Fifth Circuit issued its decision in *Freytag* in which it avoided addressing the Appointments Clause issue on the merits, the Second Circuit heard oral argument in the appeal of the Tax Court's decision in *First Western*. The appeal before the Second Circuit was captioned *Samuels, Kramer & Co. v. Commissioner*.[27] In terms of placing the Second Circuit's decision in *Samuels, Kramer* in the context of the *Freytag* litigation that would proceed to the Supreme Court, the Supreme Court granted the taxpayers' writ of certiorari in *Freytag* after the Second Circuit heard oral argument in *Samuels, Kramer*. The Second Circuit issued its opinion months later, in advance of the Supreme Court's definitive opinion in *Freytag*.

Before turning to the substance of the Second Circuit's decision in *Samuels, Kramer*, it is worth highlighting the individuals primarily responsible for litigating the appeal. The taxpayers were represented by Kathleen Sullivan, a constitutional law expert who at the time was a professor at Harvard Law School (and who would later become Dean of Stanford Law School). On the other side, the Government was represented by Kenneth W. Starr in his capacity as Solicitor General. Among others assisting the Solicitor General was John G. Roberts, Jr., Deputy Solicitor General and future Supreme Court Chief Justice. Yet perhaps the most intriguing participant in the *Samuels, Kramer* appeal was Erwin N. Griswold, former Solicitor General and a former long-serving Dean of Harvard Law School. Dean Griswold filed an amicus brief in his individual capacity.

Dean Griswold initially attempted to appear in a representative capacity on behalf of the chief judge, the judges, and the senior judges of the Tax Court. These judges sought leave to participate in the appeal as *amici curiae* after being informed by individuals in the Department of Justice that the Government would seek to have the Tax Court's decision in *Samuels, Kramer*

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[25] *See* 904 F.2d 1011 (5th Cir. 1991).

[26] *See id.* at 1015 n.9.

[27] 930 F.2d 975 (2d Cir. 1991).

affirmed solely on the basis that the chief judge constituted the "Head" of a "Department" under the Appointments Clause.[28] Although the Government had prevailed at the Tax Court on the basis that the Tax Court constituted one of the Courts of Law under the Appointments Clause capable of appointing inferior officers, the Government intended to abandon this rationale on appeal. The various judges of the Tax Court therefore sought to participate in the appeal to preserve the argument that the Tax Court constituted one of the Courts of Law. The Department of Justice objected to the request, contending that the Attorney General and officers of the Department of Justice were the only parties authorized to conduct litigation in which the United States, an agency, or officer thereof was interested.[29] However, the Government did not oppose the participation of Dean Griswold in the case altogether; the Government stated that it would not object to the filing of an amicus brief by Dean Griswold in his individual capacity, whether on his own accord or at the invitation of the court.[30] Dean Griswold thereafter moved to file a brief as *amicus curiae* on his own behalf, which was granted.

The basis for the interest of the judges of the Tax Court in participating in the appeal of the *Samuels, Kramer* decision turned out to be well founded. The Commissioner—no longer represented by the IRS Office of Chief Counsel but instead by the Solicitor General on behalf of the Department of Justice—modified its position considerably. For the first time, the Commissioner endorsed the taxpayers' position that "the Courts of Law" under the Appointments Clause referred exclusively to the article III courts that make up the Judicial Branch. The Government thereby abandoned the basis on which it had prevailed before the Tax Court below. Dean Griswold, in his position as *amici curiae*, supplied the lone voice contending that the Tax Court constituted a Court of Law capable of appointing its

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[28] *See* Affidavit in Support of Motion For Leave to File A Brief As Amici Curiae and For an Extension of Time at 2, Samuels, Kramer & Co. v. Commissioner, Nos. 90-4060 and 90-4064 (2d Cir. Aug. 10, 1990).

[29] *See* Letter from Shirley D. Peterson, Assistant Attorney General (Tax Division) to Elaine B. Goldsmith, Clerk, U.S. Court of Appeals for the Second Circuit at 1–2, Samuels, Kramer & Co. v. Commissioner, No. 90-4060 (2d Cir. Aug. 17, 1990). [Dean Griswold privately complained about the Government's position, contending that it reflected the Department of Justice's "current mechanical state of mind." Letter from Erwin N. Griswold to Professor Laurence H. Tribe, May 31, 1991.] The taxpayer objected as well, contending that the participation of the judges of the Tax Court in an appeal of a decision issued by the Tax Court was not appropriate. *See* Memorandum in Opposition to Motion of the Judges of the United States Tax Court for Leave to File Brief as Amici Curiae, For Extension of Time, and For Permission to Participate in Oral Argument, Samuels, Kramer & Co. v. Commissioner, Nos. 90-4060 and 90-4064 (2d Cir. Aug. 15, 1990).

[30] *See* Letter from Shirley D. Peterson, *supra* note 29, at 2.

inferior officers. As discussed below, the Second Circuit favored the Commissioner's newly minted position.

The Second Circuit in *Samuels, Kramer* began its Appointments Clause analysis by agreeing with the Tax Court's determination that special trial judges constituted inferior officers under the provision. The court was not troubled by the limitations imposed on special trial judges hearing cases pursuant to § 7443A(b)(4). Rather, the court stressed the considerable authority that the special trial judge exerts in that capacity: conducting trials, receiving testimony, making evidentiary rulings, and enforcing compliance with discovery orders. The court found this level of responsibility and discretion to be inconsistent with employee classification.[31]

Given the status of special trial judges as inferior officers of the United States, their appointment would be constitutional only if the chief judge of the Tax Court constituted the "Head" of a "Department" under the Clause, or if the Tax Court constituted one of "the Courts of Law" that acted through its chief judge. The Second Circuit rejected the amicus' arguments in favor of the latter. The court found no indication that the Framers contemplated any courts other than those created under article III when it identified "the Courts of Law" as a potential repository of appointment power.[32] And although no precedent existed addressing whether "the Courts of Law" under the Appointments Clause could encompass an article I court, the Second Circuit noted that its article III-exclusive interpretation had the benefit of complying with the Supreme Court's prior paraphrasing of the provision. In *Buckley v. Valeo*,[33] the Supreme Court examined the authority of Congress to designate commissioners to the Federal Elections Commission. In the course of its analysis, the Court described the operation of the Appointments Clause as follows: "Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by *the Judiciary*."[34] Noting that "the Judiciary" had been consistently interpreted as referring to judges who enjoyed the political protections of article III, the Second Circuit concluded that only courts that possessed the article III attributes could exercise the judicial power of the United States.[35]

Dean Griswold as *amicus curiae* argued against the maintenance of a formal distinction between article I and article III courts. He contended that "the Courts of Law" for purposes of the Appointments Clause should encompass any court of record authorized by Congress to adjudicate

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[31] *Samuels, Kramer*, 930 F.2d at 985–86.
[32] *See id.* at 989.
[33] 424 U.S. 1 (1976).
[34] *Id.* at 132 (emphasis added).
[35] *Samuels, Kramer*, 930 F.2d at 989.

cases.[36] On that note, he emphasized the Tax Court's exclusively judicial role—a characterization the Second Circuit did not dispute.[37] Instead, the court rejected the notion that adjudicatory function alone sufficed to render a body a Court of Law. The Second Circuit explained that a purely functional analysis could disturb the Constitution's separation of powers framework, an approach the court believed could lead to "untenable results,"[38] even if threat to the constitutional scheme posed in the present case were "minimal."[39]

The Second Circuit's refusal to treat the Tax Court as a Court of Law under the Appointments Clause did not portend victory for the taxpayer. The court went on to adopt the Commissioner's position that the Tax Court constituted a "Department" under the Clause that acted through the chief judge as its "Head." The Second Circuit opened its explanation by noting the Tax Court's origins as the Board of Tax Appeals, an independent agency within the Executive Branch. That status did not change when Congress renamed the Board the "Tax Court of the United States" in 1942. Although Congress established the Tax Court as a court of record under article I of the Constitution as part of the Tax Reform Act of 1969, the Second Circuit did not view the legislation as effecting meaningful change to the Tax Court's constitutional status. The Second Circuit found nothing in the legislation itself that necessitated a determination that Congress had removed the court from the Executive Branch. Additionally, the court read the Senate report accompanying the 1969 legislation as failing to demonstrate congressional intent to cease the Tax Court's classification as an administrative agency.[40] In the Second Circuit's view, the practical effect of the Tax Reform Act of 1969 on the Tax Court was paltry. The legislation merely changed the name of the Tax Court once again, this time from the Tax Court of the United States to the United States Tax Court.[41]

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[36] *See id.* at 988.

[37] The Second Circuit conceded the amicus' premise in the following terms:

> We do not dispute Amicus' factual assertions. Indeed, we acknowledge that the Tax Court performs many functions similar to those performed by Article III courts. The judges of the Tax Court hear evidence, make rulings, review briefs, and render opinions that are binding on the parties and appealable to the Courts of Appeals.

Id. at 990.

[38] *Id.*

[39] *Id.* at 987–88.

[40] *See id.* at 991. On this point, it bears observing that the Senate report explained the effect of the legislation as establishing the Tax Court as "an Article I court *rather than* an executive agency." S. REP. NO. 91-552, at 303 (1969) (emphasis supplied).

[41] *See Samuels, Kramer*, 930 F.2d at 991 (characterizing the legislation as "renaming this adjudicatory body").

The court bolstered its determination that Congress "did little more than change the label to be used" when referring to the Tax Court by citing the congressional directive that the reconstituted Tax Court represented a continuation of the court as it existed prior to the legislation.[42]

The Second Circuit supported its conclusion that the Tax Court constituted a department "associated"[43] with the Executive Branch by citing several connections between the two. Perhaps the most persuasive connection rested in the President's ability not only to appoint judges of the Tax Court, but also to remove them pursuant to § 7443(f). Even though the grounds for removal were limited to "inefficiency, neglect of duty, or malfeasance in office," and even though the targeted judge would possess the right to notice and a public hearing before being removed, the Second Circuit concluded the judges of the Tax Court "ultimately remain answerable to the President and are not wholly divorced from his oversight."[44] To the extent the Appointments Clause is intended not only to divest Congress of the power to appoint officers to positions it creates, but, from a larger perspective, to maintain a balance of power between the three branches of government,[45] the President's continuing oversight of the Tax Court judges provided the strongest justification for treating the Tax Court as continuing to reside within the Executive Branch.[46]

Although recognizing that the Appointments Clause question before it was "not susceptible to easy analysis," the Second Circuit in *Samuels, Kramer* provided a thorough brief for why the Tax Court should be regarded as continuing to reside in the Executive Branch notwithstanding its establishment as an article I court. To the extent the Tax Court possessed an institutional desire to be regarded as part of the federal judicial regime, the Second Circuit's determination that the Tax Reform Act of 1969 accomplished "little more than chang[ing] the label" used to refer to the court had to come as a dispiriting blow.[47] Yet, to the extent the Tax Court preferred to be slotted alongside article III courts for purposes of determining its appointment power, it possessed a second, more definitive

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[42] *See id.* (citing the Tax Reform Act of 1969, Pub. L. No. 91-172, § 961, 83 Stat. 487, 735).

[43] *Id.*

[44] *Id.* at 993.

[45] *See id.* at 988 ("The provisions of Article II incorporate the principle of separation of powers . . . .").

[46] As a final matter, the Second Circuit seized on the source of the power to appoint special trial judges to support its position. The court interpreted Congress' decision to vest the power in the chief judge of the Tax Court, as opposed to the Tax Court as a body, as evidencing Congress' apparent belief that the chief judge constituted the head of his department for Appointments Clause purposes. *See id.* at 993.

[47] *Id.* at 991.

opportunity to obtain this characterization when the Supreme Court heard the taxpayers' appeal in the *Freytag* case.

C. The Supreme Court Decision

The principal advocates before the Supreme Court when it considered the appeal of the Fifth Circuit's decision in *Freytag* were identical to those before the Second Circuit in *Samuels, Kramer*. Kathleen Sullivan represented the taxpayers, Kenneth Starr represented the Government in his capacity as Solicitor General (with John G. Roberts, Jr., arguing the case as Deputy Solicitor), and Erwin Griswold submitted a brief as *amicus curiae* on his own behalf.[48] Due to the participation of Sullivan, Roberts, and Griswold, the litigation before the Supreme Court in *Freytag* has been characterized as a "three-way clash of the titans."[49]

The case provided the Supreme Court the opportunity to address the taxpayers' challenge to the constitutional validity of the Tax Court's use of special trial judges, an issue that no court had addressed in the *Freytag* line of cases. The taxpayers in *Freytag* raised the Appointments Clause challenge for the first time on appeal of the Tax Court decision, and the Fifth Circuit determined that the taxpayers had waived any constitutional objection by consenting to the assignment of their cases to the special trial judge. Based on the posture of the case, the Supreme Court could have easily avoided the constitutional question as well. However, the Second Circuit's intervening decision in *Samuels, Kramer* effectively negated that option—that is, unless the Court largely agreed with the Second Circuit's analysis of the issue.[50]

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[48] The case was argued by Kathleen Sullivan, on behalf of the taxpayer, and John Roberts, Jr., who represented the Solicitor General's office as Assistant Solicitor. Erwin Griswold sought leave to participate in oral argument of the case in his capacity as *amicus curiae*, but his request was denied. Dean Griswold did not take the denial lightly. In a letter to Justice Blackmun following the decision in *Freytag*, he expressed his frustration in the following manner:

> The latter [motion to participate in oral argument] was denied, despite the clear precedent of the appearance to present argument some thirty years ago in the cases involving the Court of Claims and the Court of Customs and Patent Appeals. I must confess that I was rather annoyed with this, since it meant that there was no one who would present argument in support of what I call the "classical" position. The British, I think, have long maintained a relationship between bench and bar which would have welcomed my appearance.

Letter to the Honorable Harry A. Blackmun from Erwin N. Griswold at 3, Dec. 20, 1991. [Copy of letter on file with author; original in Harvard Law Library.]

[49] *See* Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court's Separation of Powers Strike Out in* Freytag, 12 NEV. L.J. 691, 693 (2012).

[50] Indeed, the four-Justice concurring opinion in the case favored passing on the constitutional question by affirming the Fifth Circuit's decision on the issue of

Had the Court affirmed the Fifth Circuit on the waiver issue, the Second Circuit's decision in *Samuels, Kramer* would have served as the definitive interpretation of the Tax Court's status within the constitutional framework.

The Supreme Court therefore first had to decide if it would entertain the taxpayers' Appointments Clause challenge on the merits. The majority of the Court did so in fairly short order. The Court noted that the constitutional challenge questioned the validity of the underlying Tax Court proceeding in the case. Additionally, the Court observed that the case implicated the interests of the judiciary in "'maintaining the constitutional plan of separation of powers.'"[51] These considerations, coupled with its characterization of the taxpayers' challenge as a serious one,[52] prompted the Court to declare the proceeding "one of those rare cases" in which it would consider a matter that had not been raised below.[53]

Turning to the merits of the alleged Appointments Clause violation, the Court first addressed whether the appointment of special trial judges implicated the Constitution in the first place. Noting that the special trial judges in the Tax Court first took the form of staff attorneys who were appointed to assist the judge in the disposition of cases, the Commissioner contended that special trial judges hearing cases pursuant to § 7443A(b)(4) constituted employees whose hiring fell outside the scope of the Appointments Clause. Because the special trial judge could not enter a decision in these cases, the judge constituted a mere assistant to the Tax Court judge in hearing evidence and preparing a proposed opinion, or so the argument went.

Like every court before it, the Supreme Court refused to treat special trial judges as mere employees. The Court explained that the characterization ignored the significant duties performed and considerable discretion exercised by special trial judges in § 7443A(b)(4) cases, which included conducting a trial, ruling on admissibility of evidence, evaluating the credibility of witnesses, and preparing the initial proposed report in the case.[54] Additionally, the Commissioner's argument produced the disconcerting prospect of special trial judges having dual status—officers when they heard cases in which they could enter the final decision under § 7443A(b)(1)–(3), but employees when hearing cases under § 7443A(b)(4). The Court concluded that if special trial judges constituted officers for any purpose, their appointment had to comply with the Appointments Clause.

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waiver. *See Freytag*, 501 U.S. at 892–93 (Scalia, J., concurring). As discussed below, the concurring opinion then proceeded to endorse an analysis of the constitutional issue consistent with that of the Second Circuit.

[51] *Id.* at 880 (quoting Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962)).

[52] *See id.* at 883.

[53] *Id.* at 880.

[54] *Id.* at 881–82.

Accordingly, the Court determined that special trial judges constituted "inferior Officers" whose appointment was subject to the restrictions of the Appointments Clause.

Having found the Appointments Clause implicated, the text of the provision presented two options for compliance: (1) the chief judge could constitute the "Head" of a "Department" within the executive branch; or (2) the Tax Court could constitute one of "the Courts of Law." If neither of these characterizations were appropriate, the taxpayers would prevail on their claim that the appointment of the special trial judge was constitutionally infirm.

Reversing course from its position before the Fifth Circuit,[55] the Commissioner advanced the executive branch approach for compliance with the Appointments Clause. The Commissioner arrived at this position through a process of elimination. The Tax Court clearly was not a legislative body under article I. And because the Tax Court was not an article III court whose judges enjoyed lifetime tenure and salary protection, the Commissioner contended that it did not constitute one of "the Courts of Law" under the Appointments Clause. Accordingly, the Commissioner contended that the Tax Court continued to reside within the Executive Branch of article II where it originated, even though it conceded that the Tax Court's fit there "may not be a perfect one."[56] Having settled on the article II approach, the Commissioner interpreted the scope of a "Department" under the Appointments Clause as including any independent component of the Executive Branch. Because the Tax Court stood as an independent body, the Commissioner contended that it constituted a department under the Appointments Clause with the chief judge as its head.

The taxpayers were less concerned with identifying the Tax Court's position in the tripartite governmental structure and more interested in articulating what the Tax Court was not. The taxpayers agreed with the Commissioner that "the Courts of Law" under the Appointments Clause were limited to article III courts—the only courts mentioned in the Constitution. However, they disagreed that the Tax Court remained within the Executive Branch. The legislative history accompanying the Tax Reform Act of 1969 provided plenty of support for this position. In particular, Congress commented that the Tax Court's status as an executive agency, "no matter how independent, raises questions in the minds of some as to whether it is appropriate for one executive agency to be sitting in

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[55] Although the Fifth Circuit did not address the taxpayers' Appointments Clause challenge, the Commissioner on brief took the position that the Tax Court constituted a "Court of Law" under the Appointments Clause. *See* Brief for Erwin N. Griswold as Amicus Curiae at 11 n.8, Freytag v. Commissioner, 501 U.S. 868 (1991) (citing briefs before the Fifth Circuit).

[56] Brief for Respondent at 41, Freytag v. Commissioner, 501 U.S. 868 (1991).

judgment on the determinations of another executive agency."[57] Finding it "anomalous to continue to classify it with quasi-executive agencies that have rulemaking and investigatory functions,"[58] Congress viewed the legislation as rendering the Tax Court "an article I court *rather than* an executive agency."[59] Accordingly, to conclude that the Tax Court continued to reside in the Executive Branch following the Tax Reform Act of 1969 would be tantamount to characterizing this portion of the legislation as wholly ineffectual.

After arguing that the Tax Court was not part of the Executive Branch and not part of the Judiciary, counsel for the taxpayers was pressed on where the Tax Court fit within the federal structure. Taxpayers' counsel did not provide an affirmative answer. Instead, she reiterated that the Tax Court was neither legislative, executive, nor judicial, and she concluded her response by positing that "perhaps Congress should not create entities that are outside the tripartite structure of government."[60]

Erwin Griswold, arguing on brief as *amicus curiae*, challenged the point of agreement between the taxpayers and the Commissioner: that "the Courts of Law" under the Appointments Clause were limited to those courts established under article III of the Constitution. Noting that no such express limitation appeared in the relevant text, Griswold contended that the phrase should be afforded a "fair and natural construction" that would encompass all courts that "administer, interpret, and apply the laws of the United States."[61] From this perspective, the Tax Court possessed the requisite judicial nature. As noted by Griswold, the Tax Court exercised judicial power in resolving disputes between taxpayers and the Government; its decisions were not subject to intermediate review by Federal district courts but, instead, were appealable to the courts of appeals in the same manner as a district court decision; and Congress supplied the court with power to enforce its orders and punish contempt. In this manner, Griswold advocated a functional interpretation of "the Courts of Law" under the Appointments Clause, one that did not turn on the derivation of the court's charter.

With these three approaches on the table, the Supreme Court began its analysis of the Appointments Clause issue by dismissing the Commissioner's position that the chief judge of the Tax Court served as the head of a department within the Executive Branch. The Court noted that for the Commissioner's argument to prevail, it was incumbent upon the Commissioner to demonstrate not only that the Tax Court was part of the

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[57] S. REP. NO. 91-552, at 302 (1969).

[58] *Id.*

[59] *Id.* at 303 (emphasis supplied).

[60] Transcript of Oral Argument at 27, Freytag v. Commissioner, 501 U.S. 868 (1991).

[61] Brief of Amicus Curiae at 7, Freytag v. Commissioner, 501 U.S. 868 (1991).

Executive Branch but also that the court rose to the level of a Department therein.[62] Having framed the argument in these terms, the Court opened its analysis by simply stating "We are not so persuaded."[63]

The Court did not identify at the outset whether it found only one or both of the conjunctive elements of the Commissioner's argument to be lacking. Yet the Court began its analysis by examining the more narrow point—the scope of a "Department" for purposes of the Appointments Clause. The Court began its explanation by exploring the definition of a "Department" for this purpose. The Court explained that interpreting "Department" as including *any* independent component of the federal administrative regime would permit wide dissemination of the appointment power that the Appointments Clause was intended to foreclose. Yet drawing a precise boundary on the scope of a "Department" proved difficult. The Court viewed the term as referring to Cabinet-level agencies and, in addition, "Cabinet-like" departments within the Executive Branch that Congress designated as departments.[64]

The Court's analysis of the scope of a "Department" under the Appointments Clause in *Freytag* was somewhat curious, as that issue required resolution only if the Court determined that the Tax Court continued to reside in the Executive Branch. After concluding its discussion of the more narrow element of the Commissioner's argument (whether the Tax Court could qualify as a Department), the Court in *Freytag* appeared to turn its attention to the broader premise—that is, whether the Tax Court remained in the Executive Branch in any capacity. The Court explained that, even if it were not persuaded that the Commissioner's suggested interpretation of the scope of a Department under the Appointments Clause did not contravene the intended meaning of the term and did not threaten to diffuse the appointment power (in other words, even if the Court were to accept the Commissioner's contention that the definition of a Department could encompass the Tax Court),[65] the Court explained that it "still could not accept [the Commissioner's] treatment of the intent of Congress . . . ." At this point in the opinion, the Court did not specifically identify the Commissioner's treatment of the intent of Congress that it was rejecting. Nonetheless, at the outset of its discussion of this issue, the Court characterized the Commissioner's position in the following

[62] *Freytag*, 501 U.S. at 885–86.

[63] *Id.* at 886.

[64] *Id.* at 885. Years later, the Supreme Court interpreted a "Department" under the Appointments Clause as including the Securities and Exchange Commission on grounds that the commission constituted "a freestanding component of the Executive Branch," that was "not subordinate to or contained within any other such component." Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3163 (2010).

[65] *See Freytag*, 501 U.S.at 887.

terms: "[T]he Commissioner argues that § 7441 simply changed the status of the Tax Court within [the Executive Branch]. It did not remove the body to a different branch or change its substantive duties."[66] The Commissioner's treatment of the intent of Congress that the Court declared it could not accept therefore appears to be that Congress did not remove the Tax Court from the Exectuive Branch through the Tax Reform Act of 1969. The Court's subsequent explanation supports this interpretation. Quoting the Senate Report that accompanied the 1969 legislation, the Court noted that Congress enacted the legislation "with the express purpose of 'making the Tax Court an Article I court rather than an executive agency.'"[67] Additionally, the Court recounted that Congress found it "'anomalous to continue to classify' the Tax Court with executive agencies,"[68] in light of the dubious propriety of "'one executive agency' [the pre-1969 tribunal] to be sitting in judgment on the determinations of another executive agency [the IRS].'"[69]

The Court in *Freytag* evidently viewed its references to the legislative materials accompanying the Tax Reform Act of 1969 as self-explanatory. The Court never expressly declared that Congress removed the Tax Court from the Executive Branch, nor did it offer a concluding sentence of any sort to this paragraph. Rather, in the subsequent paragraph, the Court in *Freytag* concluded its entire discussion of the Commissioner's two-pronged argument by returning to the more narrow ground: "The Tax Court is not a 'Department[t].'"[70] Nothwithstanding the absence of an express resolution of the Executive Branch issue, it is difficult to faithfully read the *Freytag* Court's rejection of the Commissioner's interpretation of congressional intent as not indicating its view that Congress removed the Tax Court from the Executive Branch when it "transform[ed]" the Tax Court into a court of record established under article I.[71]

After concluding that the Tax Court was not a Department within the Executive Branch—effectively overruling the Second Circuit's decision in *Samuels, Kramer* in the process—the Court in *Freytag* next turned to the

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[66] *Id.* at 885.

[67] *Id.* at 887 (quoting S. REP. NO. 91-552, at 303 (1969)).

[68] *Id.* at 887–88 (quoting S. REP. NO. 91-552, at 303 (1969)).

[69] *Id.*at 888.

[70] *See id.* (referring to the "clear intent of Congress to transform the Tax Court into an Article I legislative court").

[71] Indeed, the only way to read this portion of the *Freytag* opinion otherwise would be to interpret the Tax Court as constituting a body within the Executive Branch that was not an agency. However, the Court in *Freytag* never attempted to make such a distinction. Additionally, such an interpretation—that Congress changed the status of the Tax Court within the Executive Branch—would have represented an endorsement of the Commissioner's interpretation of congressional intent, rather than a refusal to accept it.

second avenue for finding that the appointment of special trial judges was constitutionally permissible: that the chief judge of the Tax Court acted on behalf of one of "the Courts of Law" under the Appointments Clause. The Court dispensed with the contention that this term was limited to courts chartered under article III, noting the absence of any express limitation to that effect. Additionally, the Court found its prior paraphrasing of the Appointments Clause in *Buckley v. Valeo*, wherein the Court stated that the Appointments Clause permitted appointment of inferior officers by "the President alone, by the heads of departments, or by the Judiciary,"[72] to be non-binding. The *Buckley* case did not purport to resolve the scope of "the Courts of Law" under the Appointments Clause; rather, the Court in *Buckley* examined the Appointments Clause to determine whether Congress could appoint commissioners to the Federal Elections Commission. Hence, the scope of judicial exercise of the appointment power was not at issue. Having eschewed any implicit article III limitation on "the Courts of Law," the Court in *Freytag* interpreted the term as referring to *any* court that exercised the judicial power of the United States—power that Congress could choose to confer upon a legislative court.[73]

At this stage in the analysis, the only question remaining was whether the Tax Court exercised the judicial power of the United States. Focusing on the nature of the Tax Court and its functions (as suggested by Dean Griswold as amicus), the Court in *Freytag* unequivocally resolved this question in the affirmative:

> The Tax Court exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government. By resolving these disputes, the court exercises a portion of the judicial power of the United States.
>
> The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions.
>
> The Tax Court's functions and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." Furthermore the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs. It has authority to punish contempt by fine or imprisonment, 26 U.S.C. § 7456(c); to grant certain injunctive relief, § 6213(a); to order the Secretary of the Treasury to refund an

[72] *Id.* at 890 (quoting Buckley v. Valeo, 424 U.S. 1, 132 (1976)).
[73] *See id.* at 888–90.

> overpayment determined by the court, § 6512(b); and to subpoena and examine witnesses, order production of documents, and administer oaths, § 7456(a). All these powers are quintessentially judicial in nature.
>
> The Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made Tax Court decisions subject to review in the federal district courts. Rather, like the judgments of the district courts, the decisions of the Tax Court are appealable only to the regional United States courts of appeals, with ultimate review in this Court. The courts of appeals, moreover, review those decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury". § 7482(a). This standard of review contrasts with the standard applied to agency rulemaking by the courts of appeals under . . . the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).[74]

Given the Tax Court's exclusively judicial role in the federal system, the Court in *Freytag* held that it constituted a "Court of Law" under the Appointments Clause. Accordingly, the chief judge's appointment of special trial judges on behalf of the Tax Court complied with the constitutional limitations on the dissemination of the appointment power.[75]

The concurring opinion, authored by Justice Scalia and joined by three other Justices, also would have upheld the validity of the appointment of special trial judges against the taxpayers' Appointments Clause challenge if pressed to address the issue on the merits (which the concurrence was disinclined to do).[76] However, the concurring Justices would have done so under the Executive Branch approach advocated by the Commissioner.[77] Although the concurrence would have selected a different rationale to achieve the same result, the concurrence did not view the matter as an inconsequential parsing of obscure constitutional doctrine. Rather, the

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[74] *Id.* at 890–91.

[75] By determining that the Tax Court constituted one of "the Courts of Law" for purposes of the Appointments Clause rather than a "Department" within the Executive Branch, the Supreme Court in *Freytag* created a legitimate constitutional objection to the President's authority to remove Judges of the Tax Court pursuant to § 7443(f). If the Tax Court is no longer an executive agency, then the President's removal power may well be viewed as unconstitutional on separation-of-powers grounds. *See* Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court's Separation of Powers Strike Out in* Freytag, 12 NEV. L.J. 691, 693 (2012) (suggesting that, following *Freytag*, § 7443(f) is subject to constitutional challenge on separation-of-powers grounds).

[76] *Id.* at 892–901 (Scalia, J., concurring).

[77] *Id.* at 901.

concurring opinion characterized the majority's willingness to treat an article I court as one of "the Courts of Law" under the Appointments Clause as being "both wrong and full of danger for the future of our system of separate and coequal powers."[78]

Beyond the textual interpretation of "the Courts of Law" as including only those courts envisioned and referenced in the Constitution (that is, those chartered under article III), the concurring opinion found support for this contextual interpretation in the purpose of the Appointments Clause itself. The Appointments Clause was chiefly designed to preclude Congress from exercising the power to appoint officers to the governmental bodies it created. In the view of the concurrence, only judges of article III courts possessed the requisite protections—that is, lifetime tenure and salary protection—to resist congressional encroachment on its appointment power.[79] The concurring Justices charged that interpreting "Courts of Law" under the Appointments Clause to include courts that lack these protections "utterly destroys this carefully constructed scheme."[80]

Not surprisingly, the concurring Justices were not enamored with the functional approach to determining the constitutional status of an adjudicative body. Believing that "the judicial power of the United States"—the identical phrase that appears at the outset of article III—could be exercised only by those judges who enjoyed the political protections of article III status, the concurrence eschewed function in favor of identity of the adjudicator.[81] Accordingly, the concurring Justices had no trouble viewing the Tax Court as a purely adjudicative body. They simply were not willing to admit this group of "adjudicative decisionmakers" into the judicial circle.[82]

It is worth noting that the interpretation of the Appointments Clause favored by the concurring opinion offered the path of least resistance for the Supreme Court in *Freytag*. After all, none of the actual parties to the litigation contended that the Tax Court constituted a Court of Law for purposes of the Appointments Clause, and the Second Circuit Court of Appeals had already adopted the position that the chief judge served as the head of a "Department" within the Executive Branch. A resolution on these grounds by the Supreme Court therefore would not have come as a

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[78] *Id.*

[79] *Id.* at 907–08. In contrast, the Second Circuit had described the "potential for disruption to our constitutional scheme" posed by the issue in this context as "minimal." Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975, 988 (2d Cir. 1991).

[80] *Freytag*, 501 U.S. at 908.

[81] *Id.* at 911.

[82] *Id.* at 911 ("Where adjudicative decisionmakers do not possess life tenure and a permanent salary, they are 'incapable of exercising any portion of the judicial power.'").

surprise, and had the majority adopted this rationale, the Supreme Court's decision in the case would have proved unanimous. It is therefore interesting that a five-Justice majority eschewed this approach in favor of characterizing the Tax Court as one of "the Courts of Law" for constitutional purposes. Perhaps a majority of the Supreme Court was reluctant to adopt an exclusionary stance with respect to legislative courts—that a court of record established by Congress to perform exclusively adjudicative functions nonetheless did not rise to the level of a "Court of Law" under the Constitution simply because its judges lacked preferred article III status.

However, questioning of the Commissioner's counsel at oral argument suggests that a more practical consideration may have been at play. The Court appeared keenly interested in the ramifications on the status of the Tax Court's chief judge if the Tax Court were regarded as a department within the Executive Branch:

> QUESTION: May I ask how is the chief judge of this court appointed?
>
> MR. ROBERTS: The chief judge is elected by the regular judges on a --
>
> QUESTION: And is that -- is that a valid method of appointing a head of a department in the executive branch?
>
> MR. ROBERTS: No challenge has been raised to that --
>
> QUESTION: Well, I know no challenge has been raised, but under your argument it is clearly invalid, is it not, because the appointment was not made by the head of a department?
>
> MR. ROBERTS: Well, it would have to be considered, not only a separate office, but what the chief -- the -- the attributes of the chief judge that are different from --
>
> QUESTION: Well, surely the chief judge is an officer of the United States.
>
> MR. ROBERTS: The chief judge is an officer of the United States. The question is is the difference between the chief judge and a regular judge, does that require a --
>
> QUESTION: Well, it gives him the authority to appoint assistant trial judges.

MR. ROBERTS: Yes.

QUESTION: That's a pretty importance difference, I guess.

MR. ROBERTS: Well, it is -- it is a difference. It is not, as I say -- it has not been presented or briefed --

QUESTION: But under your argument it is clear that the present appointment of the chief judge of the court is invalid I think?

MR. ROBERTS: Well, with respect, Your Honor, I'm not sure that that is clear. It's an issue that has not --

QUESTION: I know it hasn't been raised, but I'm trying to think of the implications of accepting your argument.

MR. ROBERTS: Well, we would have to look at all the added authority --

QUESTION: Can you give me a reason why, consistent with your argument, that the appointment could be valid -- the appointment by his colleagues as chief judge?

MR. ROBERTS: Well, one question would be is whether or not his additional authorities are such as require a separate appointment.

QUESTION: I see.

MR. ROBERTS: And it may be, for example, that the head of a collegial body does not have to have a separate appointment particularly here where the collegial body acts together in electing him. He may be more in the nature of a -- I don't know if it's a chairman or -- or a --

QUESTION: But not a head of a department with authority to appoint assistant trial judges?

MR. ROBERTS: Well, he is clearly the head of this -- of this department. There's no question about that. He doesn't --

QUESTION: He became head by collegial action that did not have to comply with the appointments clause?

> MR. ROBERTS: Well, it's a complicated question -- answer, but perhaps -- and I'm thinking --
>
> QUESTION: A question we can entirely avoid if we assume it's a court of law.[83]

If the chief judge of the Tax Court, as the head of a Department within the Executive Branch, had not been properly appointed,[84] it would follow that the validity of all action taken in the name of the Tax Court by any one of its chief judges could be called into question. Hence, the issue implicated much more than the validity of the appointments of special trial judges. The challenge to the appointment of the chief judge of the Tax Court was not raised in the *Freytag* litigation, but such a challenge would remain around the corner.[85] The majority of the Court in *Freytag* apparently anticipated the next shoe to drop under the Executive Branch approach, and wished to avoid it altogether.

D. Postscript

Not surprisingly, the Supreme Court's decision in *Freytag* characterizing the Tax Court as one of the "Courts of Law" under the Constitution was warmly received by the Tax Court. The judges were imminently grateful to Dean Griswold for his role in the litigation. Chief Judge Arthur Nims, author of the Tax Court's decision in *First Western*, invited Dean Griswold and his wife to a luncheon at the court in his honor. Chief Judge Nims opened the invitation with the following acknowledgement:

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[83] Transcript of Oral Argument at 52–55, Freytag v. Commissioner, 501 U.S. 868 (1991). The transcript of the oral argument in the case does not reveal which Justice undertook this line of questioning, but the audio recording suggests that it was Justice Stevens (who joined the majority opinion in the case).

[84] If the Tax Court were a "Department" within the Executive Branch, presumably the appointment of the chief judge as its "Head" would have to be made by the President with the advice and consent of the Senate. *See* U.S. CONST. art. II. § 2, cl. 2.

[85] Subsequent case law suggests that a challenge to the validity of the election of a duly appointed judge of the Tax Court to the position of chief judge of the court may not have been fruitful. In *Weiss v. United States*, 510 U.S. 163 (1994), the Supreme Court addressed whether the Appointments Clause required a commissioned military officer to receive a second appointment as a military judge before assuming judicial duties at the trial or appellate level in such capacity. The Court held that the additional appointment was not required on constitutional grounds, reasoning that the role of a military judge is sufficiently germane to that of a military officer. *Id.* at 176. Under a standard of germaneness, one would expect that the role of chief judge of the Tax Court is sufficiently similar to that of a regular judge of the Tax Court to not require a separate appointment.

> I wanted to formally thank you personally and on behalf of the Tax Court for giving us the benefit of your knowledge, wisdom, and prestige in connection with our travails in Samuels, Kramer in the Second Circuit and Freytag in the Supreme Court. I, for one, am certain that we would not ultimately have prevailed but for your superlative efforts.[86]

After attending the event, Dean Griswold expressed lament for the narrow breadth of the "victory" in a letter thanking Chief Judge Nims for hosting the affair:

> It [the decision] was too close for comfort, and I am chagrined that I was not able to attract more than five votes for a proposition which it seems to me was well settled long ago, and then again in the cases some forty or fifty years ago involving the Court of Claims, the Court of Customs and Patent Appeals, and the Federal Courts in the District of Columbia.
>
> . . .
>
> It was a real pleasure to have the opportunity to support the Tax Court in these cases. I particularly appreciate the help you gave in your thorough and careful opinion, and in your conversation while the case was making its way to the Supreme Court.[87]

Dean Griswold later conveyed his dismay at the margin of the Supreme Court's majority decision directly to Justice Harry Blackmun who, as the author of the majority decision, likely provided a friendly audience. Dean Griswold remarked as follows:

> Of course, I liked the opinion, and the result, even though it was by such a slim margin. As one reads your opinion, it is hard to escape the thought that it was prepared as a dissenting opinion, and that you must have been so persuasive that you won over one or more votes after your opinion was circulated. If so, I join with the judges of the Tax Court in appreciation. They are a fine group of people, who work hard, and judicially. They are, indeed, in my view,

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[86] Letter from Arthur L. Nims, III, Chief Judge of the United States Tax Court to Dean Erwin N. Griswold, June 28, 1991. The author gratefully acknowledges Professor Tuan Samahon, who shared this letter and other documents referenced below that he obtained in connection with his research on an article on the *Freytag* decision. *See* Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court's Separation of Powers Strike Out in* Freytag, 12 NEV. L.J. 691 (2012).

[87] Letter from Erwin N. Griswold to the Honorable Arthur L. Nims, III, July 10, 1991.

> one of the better judicial tribunals in the country. It seems odd to me that they should have had to go through this proceeding more than twenty years after Congress had done its best to establish the court as an Article I court, pursuant to long-standing decisions of your Court. (I could hear Felix moaning in his grave. He was the one who introduced me to this general area of the law.)
>
> I have doubtless said too much. I will say no more.[88]

E. Conclusion

The *Freytag* litigation may have technically concerned the constitutional validity of the appointment of special trial judges by the Chief Judge of the Tax Court, but the Supreme Court's resolution of this issue turned on its interpretation of the Tax Court's role in the federal system. Although the Court did not articulate a home for the Tax Court within the tripartite governmental structure,[89] the strong implication from the Court's rejection of the Commissioner's argument in the case and the Court's recitation of the legislative history accompanying the Tax Reform Act of 1969 is that Congress effectively removed the Tax Court from the Executive Branch by chartering the institution as a court of record under article I of the Constitution.[90] While the Supreme Court in *Freytag* was not prepared to

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[88] Letter to the Honorable Harry A. Blackmun from Erwin N. Griswold at 3, Dec. 20, 1991. [Copy of letter on file with author; original in Harvard Law Library.]

[89] Indeed, the Tax Court may have no such home. *See* Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1199 (2008) (observing that the Tax Court "is 'neither fish nor fowl'—it is no longer an agency, but it is not a member of the judicial branch of government").

[90] This aspect of the *Freytag* decision has not been universally embraced by later serving Justices of the Supreme Court. In a 2005 case concerning the Tax Court's procedures for reviewing a report issued by a special trial judge, Justice Breyer made the following remarks at oral argument:

> JUSTICE BREYER: What -- what is -- can I ask you a really esoteric administrative law question, which I have never been able to figure out? It's probably relevant, but I -- this [the Tax Court] is an agency. That's what -- my great tax professor -- Ernie Brown, used to say there is no Tax Court. He says, the Board of Tax Appeals shall be known as the Tax Court. What he meant by that is it's not -- it isn't the Tax Court, just known as. So -- so this is an agency, an administrative agency.

Transcript of Oral Argument at 25, Ballard v. Commissioner, 544 U.S. 40 (2005). While it is worth noting that Justice Breyer graduated from Harvard Law School in 1964 (several years before Congress established the Tax Court as an article I court through the Tax Reform Act of 1969), Justice Breyer's understanding that the Tax Court constitutes an executive agency appears intentional rather than anachronistic.

include the Tax Court in the federal Judiciary,[91] the Court declared that the Tax Court is independent of the Executive and Legislative Branches and that it exercises a portion of the judicial power of the United States. The *Freytag* decision therefore provided a powerful affirmation of the Tax Court's judicial character.

F. Subsequent Development: *Kuretski v. Commissioner*

Just prior to the publication of the second edition of this text, the D.C. Circuit Court of Appeals had reason to examine the constitutional nature of the Tax Court in *Kuretski v. Commissioner*.[92] The taxpayers in *Kuretski* invoked the Tax Court's jurisdiction to review an adverse determination in the collection due process setting, and the Tax Court largely sustained the Service's determination.[93] In addition to appealing the merits of the Tax Court's decision, the taxpayers in *Kuretski* raised a constitutional objection to the Tax Court proceedings below. Specifically, the taxpayers contended that the authority of the President to remove a Tax Court judge for "inefficiency, neglect of duty, or malfeasance in office" pursuant to § 7443(f) violated the principle of separation of powers embedded in the Constitution. The Supreme Court's decision in *Freytag* served as the foundation for their argument: Because the Tax Court exercises a "portion of the judicial power of the United States,"[94] the taxpayers contended that the President's authority under § 7443(f) impermissibly subordinated the

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In *Federal Marine Commissioner v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Supreme Court held that the doctrine of sovereign immunity precluded a federal agency from adjudicating a complaint lodged by a private party against a nonconsenting State for violations of federal law, basing its decision in part on the similarity between the administrative adjudication regime at issue and civil litigation in federal courts. *See id.* at 757–59 ("[T]he similarities between FMC proceedings and civil litigation are overwhelming."). In his dissenting opinion, Justice Breyer explained that administrative agencies, even so-called "independent" agencies, are not part of the Legislative or Judicial Branches of government; rather, such bodies "are more appropriately considered to be part of the Executive Branch." *Id.* at 773 (Breyer, J., dissenting). Justice Breyer supported this point with the first of several favorable citations to Justice Scalia's dissenting opinion in *Freytag*. Justice Breyer was not alone in this view. His dissenting opinion was joined by Justices Stevens, Souter, and Ginsburg.

[91] Indeed, such a characterization would have transgressed the longstanding interpretation of the "Judiciary" as synonymous with courts that enjoy the political protections provided by article III.

[92] -- F.3d -- (D.C. Cir. 2014) (Docket No. 13-1090).

[93] *See* T.C. Memo. 2012-262, 104 T.C.M. (CCH) 295.

[94] Freytag v. Commissioner, 501 U.S. 868, 891 (1991).

Tax Court's exercise of judicial power to an executive officer.[95] The taxpayers therefore sought a remand of their case to the Tax Court with instructions for new proceedings to be conducted before an adjudicator no longer subject to the removal power.

In a case of first impression, the D.C. Circuit Court of Appeals held that § 7443(f) did not infringe the constitutional separation of powers. While the court's reluctance to undermine the legitimacy of every Tax Court decision issued since the Tax Reform Act of 1969 may have been understandable, the court's rationale for its holding was somewhat surprising. Rather than addressing whether an "interbranch" removal power of the qualified sort contained in § 7443(f) raised constitutional concerns, the D.C. Circuit instead rejected the premise of the taxpayers' argument—that is, that the President's removal power under § 7443(f) implicated two branches of government. The court did so by asserting that the Tax Court "exercises Executive authority as part of the Executive Branch."[96] Having thus characterized the removal power at issue as of the "intrabranch" variety, the separation of powers argument fell by the wayside.

The D.C. Circuit in *Kuretski* recognized that the Supreme Court's decision in *Freytag* posed something of an obstacle to its holding, noting that the *Freytag* case "adds a wrinkle to what otherwise would be a straightforward analysis."[97] Conceding that the Court in *Freytag* declared that the Tax Court exercises a portion of the judicial power of the United States, the D.C. Circuit in *Kuretski* determined that the Court had employed the concept of judicial power in an enlarged, "overarching" sense to refer to adjudication through adversarial proceedings by any unit of the federal government.[98] Similarly, the D.C. Circuit was not troubled by the Supreme

[95] The prospect that § 7443(f) violated the separation of powers doctrine was raised by Prof. Tuan Samahon, as part of his article criticizing the Supreme Court's decision in *Freytag*. *See* Samahon, *supra* note 49, at 695–96. Interestingly, Prof. Samahon served as counsel to the Kuretskis before the D.C. Circuit, and he argued their case on appeal.

[96] *Id.* slip op. at 2. The Fourth Circuit Court of Appeals has similarly characterized the Tax Court as part of the Executive Branch following the *Freytag* decision, indeed citing *Freytag* for the proposition that the Tax Court "is a Court of Law despite being part of the Executive Branch." South Carolina State Ports Auth. v. Federal Maritime Com'n, 243 F.3d 165, 171 (4th Cir. 2001). The Executive Branch characterization, however, was not repeated when then case proceeded to the Supreme Court. *See* Federal Maritime Com'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002).

[97] *Kuretski*, slip op. at 18.

[98] *Id.* slip op. at 19–20. This is consistent with Justice Scalia's interpretation of the majority opinion in *Freytag*: "'The judicial power,' as the Court uses it, bears no resemblance to the constitutional term of art we are all familiar with, but means

Court's statement in *Freytag* that the Tax Court remained "independent of the Executive . . . Branch[]."[99] Rather, the D.C. Circuit understood the Supreme Court to have made this statement to describe the Tax Court's functional independence, rather than speaking to the court's constitutional status.[100]

In addition to addressing what appeared to be contradictory guidance from the Supreme Court in *Freytag*, the D.C. Circuit analogized the Tax Court to the Court of Appeals for the Armed Forces. Both courts were created by Congress pursuant to its article I powers, and Congress cited the then Court of Military Appeals as an example when chartering the Tax Court as a court of record under article I through the Tax Reform Act of 1969. The D.C. Circuit in *Kuretski* then cited the Supreme Court's observation in the 1997 case of *Edmond v. United States*[101] that "it is clear that [the Court of Appeals for the Armed Forces] is within the Executive Branch."[102]

The determination of the D.C. Circuit Court of Appeals in *Kuretski* that the Tax Court exercises executive authority as part of the Executive Branch of government stands in considerable tension with the Supreme Court's decision in *Freytag*. Indeed, the *Kuretski* decision aligns more closely with the rationale of the concurring opinion in *Freytag* authored by Justice Scalia and joined by three other Justices.[103] The *Kuretski* case therefore may present the Supreme Court with an opportunity to clarify its decision in *Freytag* and, in the process, once again examine the constitutional nature of the Tax Court.

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only 'the power to adjudicate in the manner of courts.'" *Freytag*, 501 U.S. at 908 (Scalia, J., concurring in part).

[99] *Id.* at 891.

[100] *See Kuretski*, slip op. at 24.

[101] 520 U.S. 651 (1997).

[102] *Id.* at 664–65 n.2.

[103] *See Freytag*, 501 U.S. at 908 (Scalia, J. concurring in part and concurring in judgment) ("Despite this unequivocal text [introduction to Article III], the Court sets forth the startling proposition that 'the judicial power of the United States is not limited to the judicial power defined in Article III.'"). As discussed in *supra* note 90~~85~~, other Justices continue to appear sympathetic to Justice Scalia's minority position in *Freytag*.

PART VI

FOUNDATIONAL PARAMETERS OF TAX COURT JURISDICTION

The major jurisdiction of the Tax Court, since its creation in 1924 as the Board of Tax Appeals,[1] has involved the redetermination of tax deficiency assertions by the Commissioner of Internal Revenue.[2] Since then, the court has remained the primary judicial body in which a taxpayer may litigate the question of liability in advance of having to pay the disputed tax.[3] In general, the procedure is for a taxpayer who has received a deficiency notice to file a petition with the court within a prescribed time period for review of the deficiency determination.[4] During the pendency of the Tax Court proceeding, the Commissioner is forbidden to assess or collect, without the taxpayer's permission, any additional tax.[5] If the taxpayer does not file the requisite petition with the court, or if a petition is filed but the court finds in favor of the Commissioner, the tax will be assessed and steps then may be taken by the Commissioner to collect the assessed amount.[6]

Measured by number of cases, the most important element of the court's deficiency jurisdiction has, since 1924, involved deficiencies with respect to income taxes.[7] Of less numerical significance have been

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[1] Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 336.

[2] *Id.* §§ 274(a), 308(a), 43 Stat. 297, 308 (now codified at I.R.C. § 6213(a)).

[3] *See* I.R.C. § 7421(a). Federal bankruptcy courts possess concurrent jurisdiction with the Tax Court to review unadjudicated determinations of tax deficiencies asserted against a debtor who has sought federal bankruptcy protection. *See* 11 U.S.C. § 505(a)(1), (2) (providing that the bankruptcy court "may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid," provided the matter was not adjudicated prior to the commencement of the bankruptcy proceeding); *see also* Stephen W. Sather, *Tax Issues in Bankruptcy*, 25 ST. MARY'S L.J. 1364, 1397–1401 (1994) (describing the concurrent jurisdiction of the bankruptcy court and the Tax Court in this context and, in particular, the bankruptcy court's power to determine the venue in which the proceeding will go forward).

[4] Under the 1924 Act, the period for filing a petition was 60 days. Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297. Present law requires filing within 90 days, unless the notice is addressed to someone outside the United States, in which case the filing period is extended to 150 days. I.R.C. § 6213(a).

[5] Revenue Act of 1924, ch. 234, § 274(a)–(c), 43 Stat. 297 (now codified at I.R.C. § 6213(a)).

[6] *Id.* § 274(b)–(c).

[7] *Id.* § 274(a).

controversies involving deficiencies in excess profits, estate, and gift taxes.[8] The court has also had jurisdiction of these matters since 1924.[9]

Although jurisdiction to redetermine deficiencies has been the most important aspect of the business of the Tax Court, its jurisdiction has, from time to time, included other subjects.[10] Since 1926, the court has had the power to determine overpayments of tax and therefore a taxpayer's entitlement to a refund with respect to those tax years properly before the court in connection with a deficiency dispute.[11] Some efforts have been made to expand the court's refund jurisdiction, but these have not been successful.[12] From the time of its inception, the court also could review disputes arising as a result of jeopardy assessments.[13] This arena witnessed significant change, occasioned as a result of both decisional[14] and statutory law.[15] This Part will review the history and development of the foregoing jurisdictional matters, which make up the foundation of the Tax Court's modern jurisdiction. Additionally, attention will be given to certain quasi-jurisdictional questions that have arisen by virtue of the court's unusual status, first as an agency of the executive branch and, since 1969, as a legislative court. These involve the authority of the court to enforce its judgments and process, and to punish contempt; the power of the court to determine the constitutionality of the tax laws; and the applicability in Tax Court proceedings of doctrines rooted in equitable principles.

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8 *Id.* §§ 280, 308(a), 324, 43 Stat. 301, 308, 316.

9 *Id.*

10 For example, in 1943, the court was given jurisdiction to redetermine excessive profits under the renegotiation acts applicable to government contractors. Revenue Act of 1943, ch. 63, § 701(e), 58 Stat. 86. [This jurisdiction was withdrawn from the Tax Court and given to the Court of Claims in 1971. Act of July 1, 1971, Pub. L. No. 92-41, § 3, 85 Stat. 98.] Also in 1943, the Tax Court succeeded to the jurisdiction of the United States Processing Tax Board of Review to adjudicate controversies concerning the refund of amounts collected under the depression-inspired processing tax, Revenue Act of 1942, ch. 619, § 510, 56 Stat. 967, which had been declared unconstitutional by the Supreme Court. *See* United States v. Butler, 297 U.S. 1 (1936). These aspects of the Tax Court's former jurisdiction are detailed in Appendix C.

11 Revenue Act of 1926, ch. 27, § 284(e), 44 Stat. 67 (now I.R.C. § 6512(b)).

12 *See infra* notes 296–326 and accompanying text.

13 Revenue Act of 1924, ch. 234, §§ 274(d), 279, 43 Stat. 297, 300 (now codified at I.R.C. §§ 6861–6864).

14 Laing v. United States, 423 U.S. 161 (1976).

15 Tax Reform Act of 1976, Pub. L. No. 94-455, § 1204(a), 90 Stat. 1695; Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6237, 102 Stat. 3741–43.

A. Deficiency Jurisdiction

Three principal factors were important in shaping the 1924 provisions dealing with the Board of Tax Appeals. The first of these was the recognition of the necessity for expert and impartial review of tax disputes. This recognition led to the creation of the Board as an independent agency of the executive branch rather than as part of the Treasury Department.[16] The second factor was the desire for procedural rules that would tend to assure accurate decisions and would lead to the creation of a uniform body of precedents that would aid in future interpretations of the tax laws. As a result, Board proceedings were required to be conducted publicly in accordance with judicial-type procedures.[17] The third major factor, which was largely responsible for shaping the jurisdictional provisions dealing with the Board, was the conviction that taxpayers should be given the opportunity to litigate the question of tax liability in advance of the time when the disputed tax had to be paid.

Before 1924, taxpayers could obtain administrative review of tax disputes within the Bureau of Internal Revenue prior to the necessity for payment.[18] However, judicial review of such disputes was restricted to suits, originating in district court or the Court of Claims, for refund of taxes erroneously collected.[19] To bring such suits, the taxpayer had to pay the full amount of the tax in dispute[20] and then file a claim for refund with the Bureau. The Bureau then either had to deny the claim or fail to act on the claim within six months.[21] In the years following the end of World War I, this limitation on access to independent review was particularly troublesome. The income and profits taxes had generated a tremendous amount of revenue for the war years,[22] but they were new and complex provisions that the Bureau of Internal Revenue was ill-equipped to administer.[23] As a result, audits took many years to conclude, inconsistencies arose in the positions that the Bureau took on various issues, and many disputes arose with taxpayers. These disputes frequently involved taxpayers who had suffered financial reverses since the end of the war, and, for them, the necessity of paying high taxes based on wartime revenue was ruinous.[24] Pre-assessment review might not relieve the

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[16] *See* Part II, notes 55–76 and accompanying text.

[17] *See infra* notes 79–96 and accompanying text.

[18] *See* Part I, notes 197–265 and accompanying text.

[19] *See* Part I, notes 142–197 and accompanying text.

[20] *See* Part I, notes 182–193 and accompanying text.

[21] Revenue Act of 1921, ch. 136, § 1318, 42 Stat. 314.

[22] *See* Part I, notes 23–36 and accompanying text.

[23] *See* Part I, notes 93–195 and accompanying text

[24] Bolon B. Turner, *The Tax Court of the United States, Its Origins and Functions*, in THE HISTORY AND PHILOSOPHY OF TAXATION 31, 32–33 (1955).

ultimate necessity of payment, but it would at least afford taxpayers protection against ill-advised Bureau action based on erroneous interpretations of the law. As a consequence of this concern, the jurisdiction of the Board was framed to provide for the availability of an independent, judicial-type review between the initial determination by the Bureau that additional tax was due, and the time of assessment of such tax. The Board's jurisdiction and its procedure for reviewing deficiency determinations were immediately successful, and few modifications have proved necessary.

1. Taxes Subject to the Tax Court's Deficiency Jurisdiction

The taxes subject to the deficiency jurisdiction of the Board/Tax Court have never included the entire gamut of federal taxes. Even in 1924, when the federal tax system was less sophisticated than it is now, many types of taxes were not covered by the Board's deficiency jurisdiction. These included all external taxes, as well as many internal excise taxes on specified goods and activities. In fact, only four types of taxes were made subject to the Board's jurisdiction: the excess profits, income, estate, and gift taxes.[25]

The reasons for so limiting the Board's jurisdiction are not difficult to identify. In the case of external taxes, exclusion from the Board's jurisdiction undoubtedly resulted from the fact that an elaborate system of judicial review of such taxes had been established in specialized courts for many years,[26] and there was no inclination to abolish such system. The internal excise taxes excluded from the Board's jurisdiction were relatively simple and did not directly affect many taxpayers.[27] Moreover, the Bureau had been administering these taxes for a relatively long period of time without significant difficulty.[28] Certainly, whatever problems existed with these taxes did not occasion the degree of public criticism associated with the income and profits taxes. Finally, and most significantly, the subject matter of the Board's jurisdiction was influenced by the purpose of the original Administration proposal from which the legislation creating the Board originated. In proposing creation of the Board, Secretary of the Treasury Mellon generally sought a mere continuation of the Committee on

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[25] Revenue Act of 1924, ch. 234, §§ 274(a), 280, 308(a), 324, 43 Stat. 297, 301, 308, 316.

[26] The Board of General Appraisers (later to become the Customs Court and, later hence, the United States Court of International Trade), established in 1890, and the Court of Custom Appeals (later to become the Court of Custom and Patent Appeals and, later hence, the United States Court of Appeals for the Federal Circuit), established in 1909, were created to review the legality of customs exactions. *See* Glidden v. Zdanok, 370 U.S. 530, 558 (1962).

[27] Part II, notes 137–141 and accompanying text.

[28] See Part I, notes 52–62 and accompanying text.

Appeals and Review, which had been operating as part of the Bureau of Internal Revenue since 1919.[29] The only major changes sought by the proposal were to change the name of the committee to the Board of Tax Appeals; to remove the committee from within the organization of the Bureau and make it a separate agency of the Treasury Department; to provide higher salaries than those paid to members of the committee; and to make the findings of the Board prima facie evidence in any subsequent federal court proceeding involving the disputed tax.

Congress saw fit to modify the Administration proposal in several respects to assure the Board's independence and judicial character.[30] However, Congress gave no consideration to expanding the Board's jurisdiction from what was proposed. The Committee on Appeals and Review only heard cases originating in the Income Tax Unit of the Bureau.[31] The exclusive responsibility of this Unit was for income and profits taxes. A body similar to the Committee on Appeals and Review was established in 1922 to hear cases originating in the Estate Tax Unit and was called the Committee on Review and Appeals.[32] This similarity likely accounted for the proposal to include the estate tax within the Board's jurisdiction. The Administration did not propose to assign gift tax cases to the Board, but this was due to the fact that prior to 1924 no gift tax existed. The gift tax was enacted in 1924 only over the strenuous objections of the Administration.[33] Including the gift tax within the Board's jurisdiction was natural given that the tax largely was designed to supplement the income and estate taxes by preventing avoidance through inter vivos gifts.[34]

Since 1924, there have been only limited changes in the taxes subject to the Board/Tax Court's deficiency jurisdiction. No part of the jurisdiction originally given with respect to excess profits, income, estate, and gift taxes has been withdrawn, except to the extent that the profits and gift taxes have been, from time to time, repealed and reenacted.[35] On the other hand, the

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[29] 1920 COMM'R OF INT. REV. REP. 14–15; Part II, notes 25–54 and accompanying text.

[30] *See* Part II, notes 55–97 and accompanying text.

[31] 1920 COMM'R OF INT. REV. REP. 14–15; Part I, notes 221–257 and accompanying text.

[32] 1923 COMM'R OF INT. REV. REP. 11–12.

[33] *See* Part II, notes 12–13 and accompanying text.

[34] *See, e.g.*, CHARLES L.B. LOWNDES, ROBERT KRAMER & JOHN H. MCCORD, FEDERAL ESTATE AND GIFT TAXES 640 (3d ed. 1974).

[35] The first excess profits tax was enacted in 1917 and eliminated in 1921. Act of Mar. 3, 1917, ch. 159, § 201, 39 Stat. 1000; Revenue Act of 1921, ch. 136, §§ 301(a), 1400(a), 42 Stat. 272, 320. A declared value excess profits tax, first imposed as part of the National Industrial Recovery Act, was in effect from 1933 to 1946. Ch. 90, § 216(a), 48 Stat. 208 (1933); Revenue Act of 1945, ch. 453, § 202, 59 Stat. 574. From 1940 to 1946, an additional excess profits tax was imposed as a

passage of years has witnessed the addition of a number of separate and alternative income taxes to the Board/Tax Court's jurisdiction. This expansion has been the result of the Board/Tax Court's broad jurisdiction over all types of income taxes.[36] Beyond this, the only other change has been the addition to the court's deficiency jurisdiction of certain excise taxes imposed by chapters 41, 42, 43, and 44 of the Internal Revenue Code. The first such tax, added by the Tax Reform Act of 1969,[37] provides for certain taxes to be imposed on private foundations, both with respect to their investment income and with respect to certain activities that Congress deemed inconsistent with the tax preferences accorded such organizations.[38] Five years later, as part of the Employee Retirement Income Security Act of 1974,[39] Congress added a series of excise taxes to assure compliance with greatly expanded regulation of employee benefit plans and individual retirement accounts.[40] As was true with the taxes on private foundations, these taxes were not primarily revenue raising devices, but were designed to prevent the abuse of favorable tax treatment accorded by other provisions of the Code. In the Tax Reform Act of 1976,[41] two additional specialized excises were added, one on excessive lobbying

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result of World War II. Second Revenue Act of 1940, ch. 757, § 710(a), 54 Stat. 975; Revenue Act of 1945, ch. 453, § 122(a), 59 Stat. 568. The Korean War gave impetus for the enactment of a fourth excess profits tax in 1950; this tax was eliminated for tax years beginning on or after Jan. 1, 1954. Excess Profits Tax Act of 1950, ch. 1199, § 430(a), 64 Stat. 1137; Act Extending Excess Profits Tax Until Dec. 3, 1953, ch. 202, 67 Stat. 175 (1953). The gift tax was originally enacted in 1924. Revenue Act of 1924, ch. 234, § 319, 43 Stat. 313. It was repealed by the Revenue Act of 1926, ch. 27, § 1200(a), 44 Stat. 125, but was reenacted by the Revenue Act of 1932, ch. 209, § 501(a), 47 Stat. 245 (now codified at I.R.C. § 2501), and has been in effect since then.

[36] The deficiency jurisdiction of the Board/Tax Court always has been stated broadly enough to include all income taxes. *Cf.* Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297 ("If . . . there is a deficiency in respect of the tax imposed by this title. . . ."); I.R.C. § 6213(a) ("no assessment of a deficiency in respect of any tax imposed by subtitle A. . . ."). Illustrations of income taxes added since 1924 are: minimum tax (Tax Reform Act of 1969, Pub. L. No. 91-172, § 301(a), 83 Stat. 580); maximum tax (*id.* § 804(a), 83 Stat. 685); "wringer tax" (*id.* § 101(a), 83 Stat. 492 (adding I.R.C. § 507(c))); personal holding company tax (Revenue Act of 1934, ch. 277, § 351(a), 48 Stat. 751); net investment income tax (Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1402, 124 Stat. 1060–63).

[37] Pub. L. No. 91-172, 83 Stat. 487.

[38] *Id.* § 101(b), 83 Stat. 498 (adding I.R.C. §§ 4940–4948).

[39] Pub. L. No. 93-406, 88 Stat. 829.

[40] *Id.* §§ 1013(b), 2001(f), 2002(d)–(e), 2003(a), 88 Stat. 920, 955, 966, 967, 971 (adding I.R.C. §§ 4971–4975).

[41] Pub. L. No. 94-455, 90 Stat. 1520.

activities of public charities,[42] and the other on real estate investment trusts that fail to distribute at least 75 percent of their income by the close of their taxable year.[43] This limited set of excise taxes within the Tax Court's deficiency jurisdiction has grown considerably over time. Chapters 41 through 44 of the Code now encompass §§ 4911 through 4982, which includes among other items an excise tax on black lung trust benefits, on political expenditures of § 501(c)(3) organizations, and taxes on certain distributions from donor-advised funds. The most recent addition to the category of excise taxes within the Tax Court's deficiency jurisdiction is the tax imposed on high cost employer-sponsored health plans created as part of the Patient Protection and Affordable Care Act of 2010.[44]

As with the other taxes subject to Tax Court jurisdiction, disputes involving these excise taxes can be litigated either in the Tax Court through a deficiency proceeding[45] or in district court or the Court of Federal Claims through a refund suit.[46] The legislative history accompanying the excise tax legislation does not directly reveal congressional motivation in providing Tax Court jurisdiction over these measures. Presumably, the same factors present in 1924 were believed to apply; that is, the taxes are complex and may involve substantial liability which, absent the opportunity for pre-assessment review, would impose undue financial hardship. Given that the primary purpose of these excise taxpayers is to channel taxpayer behavior, the Tax Court's deficiency jurisdiction in this setting is rarely invoked.

2. Deficiency Jurisdiction: Procedural Requirements

The procedure by which the Tax Court's deficiency jurisdiction may be invoked has remained generally unchanged since 1924. In essence, three statutory requirements must be met: (1) determination by the Commissioner of a deficiency,[47] (2) notification to the taxpayer of such deficiency determination,[48] and (3) filing of a petition by the taxpayer with the court for redetermination of the deficiency within the prescribed period.[49] The first two requirements are intertwined in a practical sense, as the requirement of a deficiency notice involves identification of a deficiency in tax, determination thereof by the Commissioner, and notification to the

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[42] *Id.* § 1307(b), 90 Stat. 1722 (adding I.R.C. § 4911).

[43] *Id.* § 1605(a), 90 Stat. 1754 (adding I.R.C. § 4981).

[44] Pub. L. No. 111-148, § 9001, 124 Stat. 119, 847–53 (2010).

[45] I.R.C. § 6213.

[46] 28 U.S.C. § 1346 (1970).

[47] I.R.C. §§ 6211(a) (definition of "deficiency"), 6212(a) (phrasing the "determination" of a deficiency as a prerequisite to the issuance of a statutory notice).

[48] I.R.C. § 6212(a)–(b).

[49] I.R.C. § 6213(a).

taxpayer. Although the deficiency determination and notice are prerequisites to jurisdiction, the taxpayer actually invokes deficiency jurisdiction through the timely filing of a petition; the deficiency notice alone cannot serve as the basis of jurisdiction.[50]

a. Determination of a Deficiency

Jurisdiction of the Tax Court initially requires the determination of a deficiency. "Deficiency" was first defined in the Revenue Act of 1924, which created the Board of Tax Appeals.[51] Prior thereto there was no necessity for such a term of art, and reference was made instead to the difference between the amount paid and the amount that should have been paid.[52] Following additional revisions in the Revenue Act of 1944,[53] the statutory definition has remained virtually unchanged, representing the expression of a simple formula: the excess of the sum of (1) tax liability plus rebates over (2) the sum of the amount shown as due on the return plus previously assessed deficiencies.[54] The term applies only to taxes that may be the subject of Tax Court jurisdiction.[55] In the years since 1924, the interpretation of the definition of a deficiency has posed little difficulty for courts.[56]

The fact that a deficiency exists is not equivalent to the determination of a deficiency by the Commissioner. A deficiency exists as a definitional matter in any situation in which taxes have been underassessed,[57] but only the Commissioner's determination of a deficiency provides the predicate

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[50] Commissioner v. Stewart, 186 F.2d 239, 241 (6th Cir. 1951).

[51] Revenue Act of 1924, ch. 234, § 273, 43 Stat. 296.

[52] The Revenue Act of 1918 employed a general phrase to convey the concept of deficiency: "If the amount already paid is less than that which should have been paid . . . ." Revenue Act of 1918, ch. 18, § 250(b), 40 Stat. 1083. The word "deficiency" first appeared in the Revenue Act of 1921. Revenue Act of 1921, ch. 136, § 250(b), 42 Stat. 265.

[53] Revenue Act of 1944, ch. 210, § 271(a), 58 Stat. 245.

[54] I.R.C. § 6211(a).

[55] *Id.* §§ 6211(a), 6213(a).

[56] *See* Oesterlein Mach. Co., 1 B.T.A. 159, 161 (1924) (providing that the definition of a deficiency makes no distinction between a deficiency "arising under one section of the title and that arising under any other section of the title"); Paccon, Inc. v. Commissioner, 45 T.C. 392, 396 (1966) (stating that "[i]t is the existence of a deficiency at the date of the sending of the notice of deficiency that confers jurisdiction" on the court); Murphree v. Commissioner, 87 T.C. 1309 (1986) (explaining that the disallowance of a refundable tax credit gives rise to a deficiency); Spurlock v. Commissioner, 118 T.C. 155 (2002) (holding that the amount of tax shown on substitute return prepared by the Service represents a deficiency).

[57] Moore v. Cleveland Ry. Co., 108 F.2d 656, 659 (6th Cir. 1940).

for Tax Court jurisdiction.[58] The function of the court is to decide whether the deficiency as determined is correct; a finding that the Commissioner erred in computing a deficiency does not negate the court's jurisdiction.[59]

In the early years of the Board, considerable attention was directed to the question of what constitutes a "determination" of a deficiency by the Commissioner.[60] In general, the issue has been viewed as a question of fact that turns on the existence of a communication from the Commissioner to the taxpayer setting forth a final administrative determination.[61] Thus, it has been held that the determination of a deficiency is the Commissioner's final decision as to the amount of tax owed. From the Commissioner's viewpoint, it is the termination of an existing administrative controversy with the taxpayer.[62] The 15-day and the 30-day letters, tentative statements of Service opinion during the course of administrative consideration, do not represent final determinations by the Commissioner. They merely notify the taxpayer of a proposed deficiency.[63] Explanatory letters or letters acknowledging receipt of communications from the taxpayer do not constitute determinations.[64] Similarly, jurisdiction cannot be conferred by a

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[58] Hannan v. Commissioner, 52 T.C. 787, 791 (1969).

[59] H. Milgrim & Bros., Inc. v. Commissioner, 24 B.T.A. 853, 854 (1931); O'Meard v. Commissioner, 11 B.T.A. 101 (1928), *rev'd on other grounds*, 34 F.2d 390 (10th Cir. 1929).

[60] Dana Latham, *Jurisdiction of the United States Board of Tax Appeals Under the Revenue Act of 1926*, 15 CAL. L. REV. 199, 210 (1927) [hereinafter cited as Latham]; Willis W. Ritter, *Jurisdiction of The United States Board of Tax Appeals,* 3 NAT'L INC. TAX MAG. 133 (1925) [hereinafter cited as Ritter]. In *Couzens v. Commissioner*, 11 B.T.A. 1040 (1928), the Board of Tax Appeals described the "determination" requirement in the following terms:

> [T]he statute clearly contemplates that before notifying the taxpayer of a deficiency and hence before the Board can be concerned, a determination must be made by the Commissioner. This must mean a thoughtful and considered determination that the United States is entitled to an amount not yet paid. If the notice of deficiency were other than the expression of a *bona fide* official determination, and were, say, a mere formal demand or an arbitrary amount as to which there were substantial doubt, the Board might easily become merely an expensive tribunal to determine moot questions and a burden might be imposed on taxpayers of litigating issues and disproving allegations for which there had never been any substantial foundation.

Id. at 1159–60 (quoted in Scar v. Commissioner, 814 F.2d 1363, 1369 (9th Cir. 1987)).

[61] Latham, *supra* note 60, at 210; Ritter, *supra* note 60, at 137.

[62] Terminal Wine Co., 1 B.T.A. 697 (1935).

[63] Mohawk Glove Corp., 2 B.T.A. 1247 (1925); Fidelity Ins. Agency, 1 B.T.A. 86 (1924).

[64] Terminal Wine Co., 1 B.T.A. 697 (1925).

letter that merely advises the taxpayer of the right to appeal.[65] A determination of a deficiency can be made even if no return for the disputed tax is filed.[66] In accordance with the general rule of Tax Court practice, the taxpayer has the burden of proving that the Commissioner has determined a deficiency and that the court has jurisdiction.[67]

For a considerable period of time, the jurisdictional requirement that the Commissioner "determine" a deficiency appeared to have been subsumed into the requirement that the Commissioner notify the taxpayer of the asserted deficiency. This unified approach was aided in large part by the Tax Court's explanation in *Greenberg's Express v. Commissioner*[68] that, as a general rule, it would not "look behind a deficiency notice to examine the evidence used or the propriety of the [Commissioner's] motives or of the administrative policy or procedure involved in making his determinations."[69] However, the Ninth Circuit Court of Appeals breathed new life into the determination requirement through its 1987 decision in *Scar v. Commissioner*.[70] The Service in *Scar* sent the taxpayers a notice of deficiency that provided the taxpayers' names and address, the taxable year at issue, and the amount of the asserted deficiency. In addition, the Service attached an explanation of the proposed changes to the notice that identified a tax shelter transaction different from the shelter transaction in which the taxpayers had actually participated (with the mistake apparently resulting from an administrative coding error).[71] On these facts, the Ninth Circuit reversed the court-reviewed opinion of the Tax Court below upholding the validity of the notice.[72] Explaining that the determination requirement has "substantive content," the Ninth Circuit concluded that the Commissioner's mistaken basis for the deficiency identified in the statutory notice precluded the requisite determination, which in turn negated the Tax Court's jurisdiction.[73]

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[65] Rateau, Battu, Smoot Co., 1 B.T.A. 354 (1925) (A letter informed the taxpayer of a decision of the Commissioner, not specifically a deficiency determination, and mistakenly advised the taxpayer of the right to appeal.).

[66] Hartman v. Commissioner, 65 T.C. 542 (1975); Muncaster v. Commissioner, T.C. Memo. 1976-17, 35 T.C.M. (CCH) 61.

[67] Page v. Commissioner, 297 F.2d 733, 734 (8th Cir. 1962).

[68] 62 T.C. 324 (1974).

[69] *Id.* at 327–28. The Tax Court recognized an exception to not looking behind the notice of deficiency in situations in which there existed "substantial evidence of unconstitutional conduct" on the Government's part. *Id.* at 328. However, even in such instances, the notice of deficiency would not be rendered invalid; rather, the appropriate remedy would entail a shifting of the burden of proof. *See id.* at 330.

[70] 814 F.2d 1363 (9th Cir. 1987).

[71] *Id.* at 1364–65.

[72] *See* Scar v. Commissioner, 81 T.C. 855 (1983).

[73] *Scar*, 814 F.2d 1369–70.

Not long after the Ninth Circuit issued its decision in *Scar*, the Tax Court interpreted the decision as applying only in instances in which the notice of deficiency *on its face* contained evidence that the Commissioner failed to make a determination of a deficiency with respect to the taxpayer.[74] The Ninth Circuit subsequently endorsed this circumscribed interpretation of *Scar*.[75] Hence, the emphasis on the determination requirement in *Scar* may be misleading, as the instances in which the notice of deficiency belies a determination with respect to the taxpayer presumably will be few and far between. Nonetheless, taxpayers have not been deterred from frequently invoking the *Scar* decision as a basis for contending that a notice of deficiency is invalid.[76]

b. Deficiency Notice

Once the Commissioner determines a deficiency, the Code authorizes the Commissioner to send a notice thereof to the taxpayer by either certified or registered mail.[77] The notice advises the taxpayer that the Commissioner intends to assess a deficiency against the taxpayer and provides an opportunity to have the determination reviewed by the Tax Court before assessment.[78] The notice of deficiency, frequently referred to as a "90-day letter," derives its popular name from two distinct attributes. First, the taxpayer is allowed 90 days (unless the notice is addressed to a taxpayer outside the United States)[79] after the notice is mailed to file a petition with the Tax Court for redetermination of the deficiency.[80] Second, the Commissioner's power to assess and collect an asserted tax deficiency is suspended for the 90-day period or, if the taxpayer files suit, until a final decision of the court with respect to the deficiency.[81] Thus, in

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[74] *See* Campbell v. Commissioner, 90 T.C. 110, 113 (1988).

[75] Clapp v. Commissioner, 875 F.2d 1396, 1402 (9th Cir. 1989) (citing the Tax Court's opinion in *Campbell* for the proposition that "[o]nly where the notice of deficiency reveals on its face that the Commissioner failed to make a determination is the Commissioner required to prove that he did in fact make a determination").

[76] *See*, *e.g.*, Bokum v. Commissioner, 992 F.2d 1136 (11th Cir. 1993); Cross v. Commissioner, T.C. Memo. 2012-344, 104 T.C.M. (CCH) 750; Freedman v. Commissioner, T.C. Memo. 2010-155, 100 T.C.M. (CCH) 43.

[77] I.R.C. § 6212(a).

[78] Bauer v. Foley, 404 F.2d 1215, 1220 (2d Cir. 1968), *modified on other grounds*, 408 F.2d 1331 (2d Cir. 1969); Commissioner v. Stewart, 186 F.2d 239, 240 (6th Cir. 1951).

[79] In this situation the period is 150 days. I.R.C. § 6213(a).

[80] *Id.*

[81] *Id.* Shapiro v. Secretary of State, 499 F.2d 527, 531 (D.C. Cir. 1974), *aff'd*, 424 U.S. 614 (1976); S. REP. NO. 69-52, at 26 (1926). *But see* I.R.C. § 7485(a).

general, the Commissioner cannot assess or collect a deficiency without first issuing a notice of deficiency.[82]

The statute does not describe the notice of deficiency in detail. This vagueness has fostered litigation regarding the scope, form and content of the notice, the address to which it must be mailed, and whether, to be valid, the notice must be received by the taxpayer. With respect to the scope of the notice, one problem that has arisen involves the combination in a single notice of an over-assessment and a deficiency. Since enactment of the Revenue Act of 1926, it has been clear that each taxable year is independent so far as jurisdiction of the Tax Court is concerned.[83] Therefore, if the Commissioner determines in a single notice a deficiency for one year and an over-assessment of tax for another year, there is no offsetting of one amount against the other, and the court has jurisdiction over the year for which a deficiency is determined.[84] The problem is more complicated if a notice of deficiency contains, for the same year, both an over-assessment with respect to one tax and a deficiency with respect to another. In this situation, determinations with respect to separate taxes of the same type generally are offset and Tax Court jurisdiction is available only if a net deficiency exists. In this regard, all income taxes are considered to be of the same type and therefore subject to netting. For example, in one case involving the Revenue Act of 1936, a deficiency of normal corporate tax and an over-assessment of undistributed profits tax resulted in a net over-assessment. Consequently, the Board had no deficiency jurisdiction with respect to either tax.[85] Similarly, under the 1939 Code, an over-assessment in income tax was netted against additions to tax determined as a result of nonpayment, because both taxes were imposed under the income tax chapter.[86] A net over-assessment resulted and Tax Court jurisdiction was denied.[87]

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[82] I.R.C. § 6213(a). The general rule does not, however, apply to jeopardy and termination assessments. I.R.C. §§ 6851(b), 6861(b); *see infra* notes 339–540 and accompanying text.

[83] Cornelius Cotton Mills, 4 B.T.A. 255 (1926).

[84] *Id.*

[85] Union Tel. Co. v. Commissioner, 41 B.T.A. 152 (1940).

[86] Myers v. Commissioner, 28 T.C. 12 (1957).

[87] Organizational changes in the 1954 Code removed the additions to tax provision from the income tax subtitle. However, a statutory provision required continuation of this netting procedure with respect to a tax subject to deficiency procedures. *See* I.R.C. § 6659 (prior to repeal in 1989); Granquist v. Hackleman, 264 F.2d 9 (9th Cir. 1959) (interpreting former I.R.C. § 6659). Section 6665 currently addresses this issue by providing that additions to tax, additional amounts, and penalties imposed by Chapter 68 of the Internal Revenue Code generally shall be assessed, collected, and paid in the same manner as taxes.

On the other hand, taxes of different types are treated independently, and each may be the subject of Tax Court deficiency jurisdiction. For example, the Revenue Act of 1934 subjected both income tax and excess profits tax to Board deficiency jurisdiction;[88] yet, because these two taxes were imposed by different titles of the Revenue Act, they were treated separately for jurisdictional purposes. A single deficiency notice containing both a deficiency determination with respect to one and an over-assessment with respect to the other entitled the taxpayer to deficiency jurisdiction over the one tax for which a deficiency had been determined regardless of the net determination.[89]

(1) Content of Notice

Because the statute provides no particular form for the deficiency notice,[90] a second type of dispute has arisen involving the adequacy of a communication from the Service as a basis for the filing of a petition. The Commissioner occasionally seeks dismissal of a case on the ground that the letter sent to the taxpayer was not a deficiency notice and consequently the taxpayer was not entitled to invoke the jurisdiction of the Tax Court.[91] However, cases questioning the sufficiency of a notice do not always involve attacks by the Commissioner on the notice. In early years, the Board itself occasionally raised the issue and dismissed a case for lack of jurisdiction.[92] In other cases, the taxpayer in effect challenges his right to file a petition with the court. He may have any one of several motives. These include a desire to invalidate the determination thereby avoiding an

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[88] Revenue Act of 1934, ch. 277, §§ 272, 702(b), 48 Stat. 741, 771.

[89] Emeloid Co. v. Commissioner, 14 T.C. 1295 (1950), *rev'd on other grounds*, 189 F.2d 230 (3d Cir. 1951); Will County Title Co. v. Commissioner, 38 B.T.A. 1396 (1938).

[90] I.R.C. § 6212(a).

[91] Lerer v. Commissioner, 52 T.C. 358 (1969) (granting the Commissioner's motion to dismiss for lack of jurisdiction on the basis that a "Form 7900" letter sent by ordinary mail to a bankrupt was not a deficiency notice); Estate of Schmalstig v. Commissioner, 43 B.T.A. 433 (1941) (granting the Commissioner's motion to dismiss for lack of jurisdiction on the rationale that a letter sent to executors of an estate advising that their claim for refund was rejected was not a valid deficiency notice).

[92] American Bag Co. v. Commissioner, 16 B.T.A. 774 (1929) (dismissing the case on Board initiative on the rationale that a letter was not a statutory deficiency notice); F. H. Moyer, 1 B.T.A. 75 (1924) (determining a letter received by the taxpayer to be simply the results of a preliminary audit by the collector's office and not a valid deficiency notice).

immediate adjudication on the merits,[93] an attempt to escape the usual burden of proof placed upon the petitioner,[94] and, frequently, an attempt to negate the tolling of the statute of limitations otherwise occasioned by the issuance of a valid notice of deficiency (which, if successful, often will result in the expiration of the limitations period for assessing the disputed tax).[95]

Because of the variety of forms the notice may take, its sufficiency must be judicially determined on a case-by-case basis from the specific language used in the letter.[96] To start, the letter need not be in a particular form,[97] and no mention must be made of the right to appeal.[98] In the absence of specific statutory requirements, courts were left to define the minimum information necessary for a statutory notice of deficiency to be valid. Case law established the following requirements: the communication must identify the taxpayer and the taxable year or years involved, indicate that a deficiency has been determined, and specify the amount of the deficiency.[99]

The minimal requirements of the statutory notice of deficiency often left taxpayers without a sufficient understanding of the grounds for the Commissioner's adjustment, and this informational deficit rendered the formulation of responsive strategies more difficult. As early as 1924, the suggestion was made that the statute be amended to require the Commissioner to set forth in the notice each adjustment and a

[93] Brown v. Commissioner, 18 B.T.A. 859, 867 (1930) (rejecting taxpayers' argument that the Commissioner's notice was not a valid determination because not sufficiently definite).

[94] Mayerson v. Commissioner, 47 T.C. 340, 348–49 (1966) (rejecting taxpayer's contention "that the statutory notice of deficiency was so vague and indefinite that it did not constitute a determination, and that therefore no burden of proof was placed upon" the taxpayer).

[95] *See, e.g.*, Ventura Consol. Oil Fields v. Rogan, 86 F.2d 149, 153 (9th Cir. 1936) (finding that, because the Commissioner's letter was not a valid deficiency notice, the period of limitations had expired and assessment of any deficiencies for the period at issue was foreclosed).

[96] Estate of Schmalstig v. Commissioner, 43 B.T.A. 433, 438 (1941).

[97] Estate of Yaeger v. Commissioner, 889 F.2d 29, 35 (2d Cir. 1989) ("The statute does not specify the form or content of the notice."); Abrams v. Commissioner, 787 F.2d 939, 941 (4th Cir. 1986); *Ventura Consol. Oil Fields*, 86 F.2d at 153; *see also* Olsen v. Helvering, 88 F.2d 650, 651 (2d Cir. 1937) (providing that the purpose of the statutory notice "is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough").

[98] *Ventura Consol. Oil Fields*, 86 F.2d at 153.

[99] *See Estate of Yaeger*, 889 F.2d at 35; Donley v. Commissioner, 791 F.2d 383, 384 (5th Cir. 1986).

corresponding rationale.[100] Congress finally responded in 1988 by enacting the predecessor to § 7522(a).[101] This provision, effective for notices issued after January 1, 1990, requires the notice of deficiency not only to identify the amounts of any tax, interest, additional amounts, additions to tax, and penalties alleged to be due, but also to "describe the basis for" such adjustments. The conference report accompanying the legislation indicated the perhaps obvious intention of the provision to improve taxpayer understanding of the Commissioner's determinations: "The conferees believe that all correspondence should be sufficiently clear to enable a taxpayer to understand an IRS question about a tax return as well as any adjustments or penalties applied to a tax return."[102] Although Congress directed the Service to be more descriptive in the notice, it failed to supply a consequence for the Service's failure to do so. Indeed, perhaps anticipating routine challenges to the validity of statutory notices on these grounds, Congress specifically provided that an inadequate description would not operate to render a notice invalid.[103] The Tax Court, however, refused to interpret the Government's failure to comply with the § 7522(a) directive as being devoid of consequence altogether. In the court-reviewed opinion of *Shea v. Commissioner*,[104] the court held that if the notice of deficiency fails to describe the basis for the deficiency determination and the basis for the determination requires the admission of additional evidence (that is, evidence different than that necessary to resolve the deficiency determinations that were adequately described in the notice), the Commissioner would bear the burden of proof with respect to the new basis.[105] The court found the situation sufficiently analogous to the Commissioner's assertion of a new matter not initially raised in the notice of deficiency to incorporate the same burden-shifting consequences under Tax Court Rule 142(a)(1).[106]

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[100] Milton W. Dobrzensky, *Practitioners Criticize 30-Day and 90-Day Letters as Vague and Non-Specific*, 7 J. TAX'N 34 (1957).

[101] *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6233(a), 102 Stat. 3341, 3735.

[102] H.R. REP. NO. 100-1104, at 219 (1988).

[103] *See* I.R.C. 7522(a) ("An inadequate description . . . shall not invalidate the notice.").

[104] 112 T.C. 183 (1999).

[105] *Id.* at 197. The Service issued a nonaquiescence to this aspect of the *Shea* decision. I.R.S. Action on Decision 2000-08 (Oct. 30, 2000).

[106] *See id.* at 190–97. This approach was earlier suggested by Judge Raum in *Ludwig v. Commissioner*, T.C. Memo. 1994-518, 68 T.C.M. (CCH) 961. Raising the question of what remained of the Commissioner's obligation to describe the basis for the deficiency determination under § 7522(a) in light of the statutory directive that failure to do so would not invalidate the notice, the opinion posited the following: "Perhaps this Court could fashion some sort of remedy for the taxpayer, such as imposing the burden of proof, or at least the burden of going

Congress most recently addressed the content of the notice of deficiency as part of the IRS Restructuring and Reform Act of 1998.[107] Concerned with the harsh consequences faced by taxpayers who failed to file a petition for redetermination on a timely basis (namely, the Tax Court's absence of jurisdiction that generally foreclosed a pre-payment forum), [108] Congress directed the Service to assist the taxpayer with the calculation of the petition filing deadline. Specifically, through an uncodified provision in the broader legislation, Congress required the Service to specify in the notice of deficiency the last day on which the taxpayer could file a timely petition with the Tax Court.[109] Contemplating the possibility that the Service could miscalculate such date, Congress permitted the taxpayer to rely on the Service's calculation. Through the addition of a fourth sentence to § 6213(a), Congress provided that any petition filed by the taxpayer on or before the date specified in the notice of deficiency as the last date for timely filing would be treated as having been timely filed—even if that date otherwise fell outside of the § 6213(a) filing window.[110]

Although Congress addressed the consequences of a miscalculation of the last date for filing a petition with the Tax Court, it did not address the consequences resulting from the Service's failure to provide any filing date on the notice of deficiency as statutorily directed.[111] Not surprisingly, the Service issued notices of deficiency that simply failed to include the last date for timely filing of the petition in the period immediately following the

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forward, on the Government." *Id.* at 963. However, because the disputed adjustment favored the taxpayers, the opinion left the matter open for later resolution.

[107] Pub. L. No. 105-206, 112 Stat. 685 (1998).

[108] *See* S. REP. NO. 105-174, at 90 (1998).

[109] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3463(a), 112 Stat. 685, 767 (1998). That provision reads as follows:

> (a) IN GENERAL.—The Secretary of the Treasury or the Secretary's delegate shall include on each notice of deficiency under section 6212 of the Internal Revenue Code 1986 the date determined by such Secretary (or delegate) as the last day on which the taxpayer may file a petition with the Tax Court.

[110] *Id.* § 3463(b), 112 Stat. at 767 (amending I.R.C. § 6213(a)). Note that this provision operates only to the benefit of the taxpayer. If the Service miscalculates the last date for filing a petition with the Tax Court by understating the term of the filing period, that miscalculation does not serve to shorten the filing period prescribed by law. *See* Burke v. Commissioner, T.C. Summ. Op. 2007-200.

[111] On the other hand, Congress did not expressly state that the failure to comply with the statutory mandate would not be a basis for invalidating the notice of deficiency, as it did under § 7522 with respect to that statute's requirement that the notice of deficiency describe the basis for the deficiency. *See* I.R.C. § 7522(a) ("An inadequate description under the preceding sentence shall not invalidate such notice.").

effective date of the 1998 legislation. Taxpayers attempted to seize upon this defect as grounds for invalidating the notice, but to no avail. In the first such case, *Smith v. Commissioner*,[112] the taxpayers filed their petition within the 90-day period provided by § 6213(a) (as generally described in the notice of deficiency) notwithstanding the Service's failure to provide the last possible filing date in the original notice. [113] The Tax Court rejected the taxpayers' contention that failure of the notice to include the filing date rendered the notice invalid under these circumstances, citing the absence of prejudice to the taxpayers.[114]

The holding of the *Smith* case left open the question of whether the Service's failure to provide the last date for filing a Tax Court petition could render a notice invalid where the taxpayer's petition was not timely filed. The Tax Court addressed this more difficult scenario through a reviewed decision in *Rochelle v. Commissioner*.[115] The taxpayer in *Rochelle* filed his petition 56 days after expiration of the 90-day period provided by § 6213(a). In resolving the taxpayer's first contention that the Service's failure to provide the filing date rendered the notice invalid, the court stressed that Congress sought to address the severe consequences resulting from a taxpayer's miscalculation of the 90-day filing period when it required the Service to include such date in the notice.[116] Because the taxpayer did not contend that the filing of his petition over 50 days after the expiration of the 90-day filing period resulted from a miscalculation thereof, the court determined that the statutory directive provided in the 1998 legislation did not require invalidating the notice under those circumstances.

The taxpayer in *Rochelle* alternatively argued that the amendment to § 6213(a)—treating as timely any petition filed on or before the date specified by the Service in the notice of deficiency—operated to excuse his late filing. Under the taxpayer's theory, the failure of the notice to specify the last date for filing a petition with the Tax Court would render any petition timely, regardless of when filed. The court rejected this alternative argument on both textual and policy grounds. As a textual matter, the

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[112] 114 T.C. 489 (2000), *aff'd*, 275 F.3d 912 (10th Cir. 2001).

[113] Although the original notice of deficiency left the date for filing the Tax Court petition blank, the Service subsequently issued a notice to the taxpayers providing the filing date approximately one month before expiration of the filing period. *Id.* at 490.

[114] *Id.* at 491–92; *see also* Smith v. Commissioner, 275 F.3d 912, 915 n.3 (10th Cir. 2001) (stating that even in the absence of a petition date, "the relevant inquiry is whether the error prejudiced the taxpayer."); Elings v. Commissioner, 324 F.3d 1110 (9th Cir. 2003) (similarly refusing to invalidate a notice of deficiency that failed to include the last date for filing a petition on grounds that the taxpayer, who filed a timely petition, suffered no prejudice).

[115] 116 T.C. 356 (2001), *aff'd*, 293 F.3d 740 (5th Cir. 2002).

[116] *Id.* at 360–61.

remedial amendment to § 6213(a) requires the actual specification of a filing date with which the taxpayer complied, and the notice contained no such date.[117] As a matter of policy, the amendment to § 6213(a) was intended to protect taxpayers who detrimentally relied on misinformation provided by the Service. Because the Service simply failed to provide the date for filing the petition (as opposed to supplying an incorrect date), no prospect of detrimental reliance existed.[118] Having found the last sentence of § 6213(a) inapposite, the court dismissed the case for want of a timely filed petition.

The Service in *Rochelle* ultimately suffered no consequence from failing to comply with its statutory obligation to calculate the last date for filing the petition for redetermination. While this result may seem less than satisfactory, the Fifth Circuit affirmed the decision by adopting the opinion of the Tax Court majority below.[119] Nonetheless, because both the trial level and appellate opinions stressed the length of the taxpayer's delinquency in filing the petition, these decisions do not necessarily foreclose a taxpayer who genuinely miscalculates the last date of the filing period in the absence of the statutorily required guidance from obtaining some measure of relief.[120]

Also as part of the IRS Restructuring and Reform Act of 1998, Congress amended § 6212(a) to require the notice of deficiency to inform the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and to provide the location and phone number of such office.[121] As in the case of the required provision of the last date for timely filing a Tax Court petition, the statute does not address the consequence of the notice not containing the requisite information concerning the taxpayer advocate. Hence, the Tax Court was left once again to address a taxpayer's argument that failure to provide statutorily required information rendered the notice invalid. In *John C. Hom & Associates, Inc.*,[122] the notice of deficiency at issue contained the requisite notice of the taxpayer's right to contact the local office of the taxpayer advocate. However, in lieu of providing the location and phone number of such office, the notice of deficiency instead directed the taxpayer to a website where such information could be obtained. On these facts, the taxpayer contended that the notice of deficiency was statutorily deficient. The Tax Court disagreed.

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[117] *Id.* at 362.

[118] *Id.* at 363.

[119] Rochelle v. Commissioner, 293 F.3d 740 (5th Cir. 2002).

[120] *See, e.g.*, Rochelle v. Commissioner, 116 T.C. at 360–61 (Chabot, J., dissenting) ("All this leaves for another day the question of what to do with the case of a late filing pro se lay petitioner, who might be suffering from cognitive deficit, dyscalculia, or other disability.").

[121] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1102(b), 112 Stat. 685, 703 (1998).

[122] 140 T.C. 210 (2013).

In addition to stressing the "minor and technical" nature of the error at issue,[123] the court emphasized the absence of prejudice to the taxpayer.[124]

(2) Mailing of Notice

Another area of controversy concerns the mailing of the notice of deficiency. The purpose of the mailing requirement is to prescribe a procedure that will ordinarily result in the taxpayer's timely receipt of the notice. Nonetheless, the language of the statute sometimes precludes disputes from being resolved in accord with this purpose.

Since 1958, the Code has authorized the notice to be mailed to the taxpayer's last known address by either registered or certified mai1.[125] Prior thereto, the only authorized method was by registered mail. The Tax Court considered registered mail a jurisdictional necessity and held letters invalid that were sent by unregistered mail or delivered manually.[126] This view, however, was not accepted by all the courts of appeals.[127]

The last known address has been interpreted to mean the last address known to the Treasury[128]—that is, the address that the Service reasonably believes the taxpayer wishes it to use.[129] Ordinarily, the last known address is that shown on the taxpayer's return, even if it is erroneous, if the Service has not been informed by the taxpayer in writing of another permanent address or a temporary address of a definite duration to which all communications should be sent.[130]

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[123] *Id.* at 214.

[124] The taxpayer never alleged that he attempted to contact the taxpayer advocate, and the court determined that he easily could have obtained the appropriate contact information through the website link. *Id.* at 215.

[125] Technical Amendments Act of 1958, Pub. L. No. 85-866, § 89(b), 72 Stat. 1665 (amending I.R.C. § 6212(b)).

[126] Hamilton v. Commissioner, 13 T.C. 747, 749 (1949); Roger J. Williams, 13 T.C. 257, 258–59 (1949); John A. Gebelein, Inc. v. Commissioner, 37 B.T.A. 605, 606 (1938); Day v. Commissioner, 12 B.T.A. 161, 163 (1928).

[127] Berger v. Commissioner, 404 F.2d 668, 673 (3d Cir. 1968); Cohn v. United States, 297 F.2d 760, 772 (9th Cir. 1962); Boren v. Riddell, 241 F.2d 670 (9th Cir. 1957).

[128] Berafeld v. Campbell, 188 F. Supp. 505 (N.D. Tex. 1959), *aff'd*, 290 F.2d 475 (5th Cir. 1961).

[129] Sorrentino v. Ross, 425 F.2d 213, 215 (5th Cir. 1970); Butler v. District Director, 409 F. Supp. 853, 856 (S.D. Tex. 1975); Kennedy v. United States, 403 F. Supp. 619, 623 (W.D. Mich. 1975), *aff'd mem.*, 556 F.2d 581 (6th Cir. 1977).

[130] In *Abeles v. Commissioner*, 91 T.C. 1019 (1988), the Tax Court held that "a taxpayer's last known address is that address which appears on the taxpayer's most recently filed return, unless [the Commissioner] has been given clear and concise notification of a different address." *Id.* at 1035; *see also* Delman v. Commissioner, 384 F.2d 929, 933 (3d Cir. 1967); De Welles v. United States, 378 F.2d 37, 40 (9th

In most cases, the concept of last known address is construed strictly against the taxpayer. Thus, a properly addressed 90-day letter sent by registered or certified mail is valid even though never received or returned unclaimed.[131] In this regard, it is important to note that there is no statutory requirement that the notice actually be received by the taxpayer.[132] Conversely, an improperly addressed notice that never reaches the taxpayer or is not timely received is clearly invalid.[133] However, a deficiency notice that is actually received by the taxpayer without prejudicial delay generally will be valid even though the address used by the Service was not exactly the last known address.[134] Thus, 90-day letters that were actually received by taxpayers have been held valid despite the fact that they were mailed to the wrong house number or wrong street address, or were sent without specific authorization to the taxpayer's attorney instead of to the taxpayer's

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Cir. 1967); Clodfelter v. Commissioner, 57 T.C. 102, 106 (1971), *aff'd*, 527 F.2d 754 (9th Cir. 1975); McCormick v. Commissioner, 55 T.C. 138, 141–42 (1970). Revenue Procedure 2010-16, 2010-19 I.R.B. 664, provides guidance on how the Service determines a taxpayer's last known address and what notices are sufficient to change it. As a general rule, the Service determines the taxpayer's last known address by reference to the address reflected on the most recently filed and properly processed return. Rev. Proc. 2010-16, § 2.02. A taxpayer may change this address by providing "clear and concise notification of a different address," *see id.*, and the Service has promulgated Form 8822 for this purpose.

[131] Pfeffer v. Commissioner, 272 F.2d 383 (2d Cir. 1959); Cataldo v. Commissioner, 60 T.C. 522, 524 (1973), *aff'd per curiam*, 490 F.2d 550 (2d Cir. 1974); Helfrich v. Commissioner, 25 T.C. 404 (1955).

[132] I.R.C. § 6212; Bauer v. Foley, 287 F. Supp. 343 (W.D.N.Y.), *rev'd on other grounds*, 404 F.2d 1215 (2d Cir. 1968), *opinion supplemented*, 408 F.2d 1331 (2d Cir. 1969).

[133] Kennedy v. United States, 403 F. Supp. 619 (W.D. Mich. 1975), *aff'd mem.*, 556 F.2d 581 (6th Cir. 1977); O'Brien v. Commissioner, 62 T.C. 543, 549–50 (1974); Wilson v. Commissioner, 16 B.T.A. 1280, 1288 (1929); Walter G. Morgan, 5 B.T.A. 1035, 1038 (1927).

[134] *See* Patmon & Young Prof'l Corp. v. Commissioner, 55 F.3d 216, 217 (6th Cir. 1995); Borgman v. Commissioner, 888 F.2d 916, 917 (1st Cir. 1989); Pugsley v. Commissioner, 749 F.2d 691, 692–93 (11th Cir. 1985); Clodfelter v. Commissioner, 527 F.2d 754, 757 (9th Cir. 1975); Commissioner v. Stewart, 186 F.2d 239, 241 (6th Cir. 1951); Lifter v. Commissioner, 59 T.C. 818, 823 (1973). In these instances, courts are divided on whether the 90-day period for filing a petition for redetermination with the Tax Court commences with the mailing of the notice of deficiency or the date on which the taxpayer obtains actual notice of the deficiency determination. *See, e.g.*, Delman v. Commissioner, 384 F.2d 929 (3d Cir. 1967) (determining that the period for filing a petition runs from the time of the date of mailing); Gaw v. Commissioner, 45 F.3d 461 (D.C. Cir. 1995) (determining that the period for filing a petition runs from the date taxpayer receives actual notice of the determination); *see also* Terrell v. Commissioner, 625 F.3d 254 (5th Cir. 2010) (describing the circuit split on this issue).

last known address.[135] In this regard, it also should be noted that other types of errors that do not result in prejudice to the taxpayer do not generally result in invalidating the notice. Thus, taxpayers have lost challenges to 90-day letters based on an incorrect spelling of the taxpayer's name and on an issuance of the notice by an Internal Revenue Service official other than the appropriate district director.[136]

(3) Rescission of Notice

Once a notice of deficiency has been issued, the Service may rescind the notice with the consent of the taxpayer.[137] A formal rescission is required for this purpose, meaning that the mutual consent of the parties to the rescission must be objectively apparent.[138] Further consideration of the taxpayer's case, coupled with the Commissioner's concession of a portion of the previously determined deficiency, is not sufficient to effect a rescission.[139]

As a general matter, a rescinded notice of deficiency is treated as a nullity by way of § 6212(d). A taxpayer may not petition the Tax Court for a redetermination based on a rescinded notice; a rescinded notice does not implicate the limitations regarding credits, refunds, and assessments provided by §§ 6213(a) and 6512(a); and a rescinded notice does not implicate the restrictions on the issuance of a subsequent notice under § 6212(c)(1). However, a rescinded notice of deficiency maintains significance in one important respect: The running of the period of limitations on assessment is suspended under § 6503 for the period during

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[135] Whitmer v. Lucas, 53 F.2d 1006 (7th Cir. 1931), *vacated per curiam*, 285 U.S. 529 (1932) (notice of deficiency addressed to incorrect house number but actually delivered to correct address); Brzezinski v. Commissioner, 23 T.C. 192 (1954) (notice of deficiency sent by registered mail to taxpayers in care of their attorney).

[136] Wessel v. Commissioner, 65 T.C. 273 (1975); Pendola v. Commissioner, 50 T.C. 509 (1968); Perlmutter v. Commissioner, 44 T.C. 382 (1965), *aff'd,* 373 F.2d 45 (10th Cir. 1967).

[137] *See* I.R.C. § 6212(d) (applicable to notices issued after December 31, 1986). The Service announced its procedures for rescinding a notice of deficiency and the instances in which it will do so in Revenue Procedure 98-54, 1998-2 C.B. 531.

[138] *See* Powell v. Commissioner, T.C. Memo. 1998-108, 75 T.C.M. (CCH) 1994; Hesse v. Commissioner, T.C. Memo. 1997-333, 74 T.C.M. (CCH) 180; Slattery v. Commissioner, T.C. Memo. 1995-274, 69 T.C.M. (CCH) 2953. Parties generally reflect their mutual consent to the rescission of a notice of deficiency through the use of Form 8626, captioned "Agreement to Rescind Notice of Deficiency."

[139] *See* Hesse v. Commissioner, T.C. Memo. 1997-333, 74 T.C.M. (CCH) 180; Powell v. Commissioner, T.C. Memo. 1998-108, 75 T.C.M. (CCH) 1994; Mullings v. Commissioner, T.C. Memo. 1997-114, 73 T.C.M. (CCH) 2186.

which the rescinded notice was outstanding.[140] Congress inserted this express directive into § 6212(d) in 1988,[141] providing the following example in the legislative record:

> [A]ssume that six months remain to run on the statute of limitations with respect to a return when the IRS issues a statutory notice of deficiency. Issuance of this notice suspends the statute of limitations. If the IRS and the taxpayer agree to rescind the statutory notice, then as of the date the notice is rescinded, the statute of limitations again begins to run and (in this example) six months remain until the statute expires.[142]

Accordingly, a rescinded notice of deficiency will not operate to the detriment of the Commissioner.

c. Petition

Timely filing of a petition by the taxpayer is the third procedural requisite of deficiency jurisdiction.[143] Evaluating this requirement necessitates the determination of the following four important factors: (1) the date that commences the filing period; (2) the date that terminates the filing period; (3) whether the document is filed within the applicable period; and (4) whether the document filed is adequate as a petition to initiate the appeal. Little controversy has surrounded determination of the date that commences the filing period. Since 1924, the statute has expressed this date with reference to the date that the notice is mailed.[144] Utilization of the word "received" in place of "mailed" was considered initially but was rejected on the ground that it would have created a situation in which the Bureau would be compelled to prove that the addressee actually received the deficiency notice.[145] The definition of the word mailed was settled by the Board in 1925 by reference to the dictionary meaning; accordingly, the

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140 I.R.C. § 6212(d) ("Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding.").

141 Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1015(m), 102 Stat. 3342, 3572 (1988), 1988-3 C.B. 1, 232.

142 H.R. REP. NO. 100-795, at 364–65 (1988).

143 I.R.C. § 6213(a).

144 Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297 (now I.R.C. § 6213(a)).

145 65 CONG. REC. 2969 (1924). Today it is established that mailing of the notice can be proved using evidence of standard mailing procedure combined with evidence that such procedure was followed in the situation at issue. Cataldo v. Commissioner, 60 T.C. 522, 524 (1973).

filing period commences on the actual date of mailing and not the postmark that the letter bears.[146]

Identification of the termination of the filing period has been more controversial. Under the 1924 Revenue Act, the filing period expired 60 days after the mailing of the deficiency notice.[147] Almost immediately, cases arose that tested the Board's willingness to liberally construe the statute. Taxpayers argued that if the sixtieth day fell on a Saturday, Sunday, or legal holiday, then the period should be extended to compensate for the contraction of the filing period.[148] The statute, however, did not expressly extend the filing period in such an event, and the Board strictly construed the statute to preclude such a result.[149] The harshness of these holdings was called to the attention of Congress, and the Revenue Act of 1926 provided for a one-day extension if the filing period terminated on a Sunday.[150] Eight years later, at the urging of the American Bar Association,[151] Congress granted a similar one-day extension in the case of legal holidays.[152] Additionally, the basic filing period was expanded to 90 days.[153] The extra 30 days was considered necessary to accommodate taxpayers who resided long distances from Washington. Moreover, Congress hoped that the longer period would reduce the number of litigated cases, as the parties

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146 United Tel. Co., 1 B.T.A. 450, 451 (1925).

147 Revenue Act of 1924, ch. 237, § 274(a), 43 Stat. 297; *see also* United Tel. Co., 1 B.T.A. 450, 452 (1925); CHARLES D. HAMEL, PRACTICE AND EVIDENCE BEFORE THE U.S. BOARD OF TAX APPEALS 86 (1938) [hereinafter cited as HAMEL]; Willis W. Ritter, *Pitfalls in Practice Before the Board of Tax Appeals*, 3 NAT'L INC. MAG. 297, 298 (1925) [hereinafter cited as Ritter].

148 *E.g.*, Southern Cal. Loan Ass'n, 4 B.T.A. 223, 226 (1926); Sam Satousky, 1 B.T.A. 22, 24 (1924).

149 Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297; Southern Cal. Loan Ass'n, 4 B.T.A. 223, 226 (1926); Sam Satousky, 1 B.T.A. 22, 24 (1924).

150 Revenue Act of 1926, ch. 27, § 274(a), 44 Stat. 55; *Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means,* 69th Cong., 1st Sess. 82 (1925) (statement of the New York Society of C.P.A.'s). The Senate favored excluding Sundays and legal holidays completely from the computation of the filing period, but this proposal was rejected. *See* H.R. REP. NO. 69-356, at 39 (1925).

151 *A.B.A. Federal Tax Recommendations*, 11 TAXES 340, 343 (1933).

152 Revenue Act of 1934, ch. 277, § 501, 48 Stat. 755. To extend the statutory period, the legal holiday had to be a legal holiday in the District of Columbia. The current list of such holidays includes the following: New Year's Day, Birthday of Martin Luther King, Jr., Inauguration Day, Washington's Birthday, District of Columbia Emancipation Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. *See* TAX CT. R. 25(b).

153 Revenue Act of 1934, ch. 277, § 501, 48 Stat. 755.

would have more time to reconcile their differences.[154] The 90-day period remained intact until 1942, when Congress extended the period to 150 days if the deficiency notice was addressed to a taxpayer located outside the United States.[155] The exigencies of World War II, especially with respect to taxpayers in Hawaii, supplied the rationale for the 60-day extension, which was deemed necessary to afford all taxpayers an equivalent opportunity to invoke the Tax Court's jurisdiction.[156] In 1945, Congress once again liberalized the filing period by providing an extension if the filing period

[154] H.R. REP. NO. 73-704, at 34 (1933).

[155] Revenue Act of 1942, ch. 619, § 168, 56 Stat. 876. The Tax Court initially gave a very limited interpretation of the phrase, "[i]f the notice is addressed to a person outside the States of the Union," by holding that the 150-day filing period would only apply to individuals "who were so outside the area designated on some settled business and residential basis, and not on a temporary basis." Hamilton v. Commissioner, 13 T.C. 747, 753 (1949). The Second Circuit, in *Mindell v. Commissioner*, 200 F.2d 38, 39 (2d Cir. 1952), disagreed with the Tax Court and held that temporary absence outside the designated area was sufficient to obtain the benefit of the extended filing period. Subsequently, the Tax Court, in *Estate of Krueger v. Commissioner*, 33 T.C. 667, 668 (1960), modified its earlier holding in *Hamilton* and followed the approach of the Second Circuit. *See generally* Jim R. Carrigan, *Tax Crimes–Statute of Limitations–Tolling Provision,* 11 TAX L. REV. 137, 148 (1956).

[156] *See* S. REP. NO. 77-1631, at 154 (1941); Letter from E.R. Cameron to Board of Tax Appeals, Aug. 3, 1942, filed at the U.S. Tax Court in "Jurisdiction: Memoranda & Correspondence;" Letter from Presiding Judge Murdock to Randolph Paul, Aug. 18, 1942, filed at the U.S. Tax Court in "Jurisdiction: Memoranda & Correspondence;" Letter from Presiding Judge Murdock to Colin Stam, Aug. 18, 1942, filed at the U.S. Tax Court in "Jurisdiction: Memoranda & Correspondence." Now that Hawaii and Alaska are states, taxpayers there are no longer allowed the extra 60 days as previously allowed under Treas. Reg. § 301.6213-1(a)(1) (1959).

The Revenue Act of 1942 also provided relief for Americans who were involved in the war effort, by providing a continuous extension of the filing period for persons outside the Americas. They were given 90 days from the date when they were no longer considered to be continuously outside the Americas to file a petition. Revenue Act of 1942, ch. 619, § 507(a), 56 Stat. 961. *See* S. REP. NO. 77-1631, at 252 (1941); *see also* Report of the Special Comm. on Taxpayers Affected by Enemy Activities, ABA TAXATION SECTION 79, 80 (1942). Prior to passage of the Revenue Act of 1942, the Board of Tax Appeals had been considering numerous proposals for preserving the rights of these taxpayers to file a petition. *See* Memorandum from Bolon B. Turner, Rules Comm. Chairman, to the Rules Comm., c. 1942, filed at the U.S. Tax Court in "Petitions: Memoranda & Correspondence" [hereinafter cited as Turner, 1942]; Memorandum from Bolon B. Turner, Rules Comm. Chairman, to the Rules Comm., Dec. 15, 1942, filed at the U.S. Tax Court in "Petitions: Memoranda & Correspondence."

terminated on a Saturday.[157] The Board's hesitancy to extend, without specific statutory authorization, the filing period when the last day fell on a weekend or holiday was mirrored by its reluctance to treat the timely mailing of a petition as the equivalent of timely filing. In this regard, the Board soon adopted a rule requiring that a petition actually be received during business hours on or before the final day of the filing period to be considered timely.[158] As a result, petitions not actually received within the jurisdictional period would be dismissed even though the taxpayer could show that they had been mailed in adequate time to reach the Board within the prescribed period.[159] The harsh results in these cases occasionally led appellate courts to reverse dismissals for lack of jurisdiction. These reversals generally were based on a presumption that petitions timely mailed were received by the addressee in the ordinary course of the mail.[160] This presumption enabled the appellate courts to examine the reason for the untimely receipt of the petition. If the untimely receipt could be attributed to the employees of either the Board/Tax Court or the Postal Service, then the appellate courts were more willing to find a timely filing. In the few cases that held the Board/Tax Court had improperly dismissed the petition, the usual explanations of the result were either that the negligence of governmental employees could not deprive taxpayers of their right to file a petition,[161] or that there was a constructive filing because the governmental employees were acting as agents of the Board/Tax Court.[162]

The relief afforded by the appellate decisions was sporadic, and petitions generally would be considered filed only on receipt. This result was criticized on policy grounds as creating risks that were beyond taxpayers' control and as discriminating against those located long distances from Washington.[163] Accordingly, recommendations that Congress provide a

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[157] Act of Dec. 29, 1945, ch. 652, § 203, 59 Stat. 673.

[158] B.T.A. RULES 5–6 (July, 1924 ed.). *See* DiProspero v. Commissioner, 176 F.2d 76, 77 (9th Cir. 1949); Lewis-Hall Iron Works v. Blair, 23 F.2d 972, 974 (D.C. Cir. 1927); Estate of Stebbins v. Commissioner, 40 B.T.A. 613, 615 (1939), *aff'd*, 121 F.2d 892 (D.C. Cir. 1941); Sam Satousky, 1 B.T.A. 22, 23 (1924).

[159] Edward Barron Estate Co. v. Commissioner, 93 F.2d 751, 753 (9th Cir. 1937); Poyner v. Commissioner, 81 F.2d 521, 522 (5th Cir. 1936); Chambers v. Lucas, 41 F.2d 299 (D.C. Cir. 1930); Estate of Stebbins v. Commissioner, 40 B.T.A. 613, 615 (1939), *aff'd*, 121 F.2d 892 (D.C. Cir. 1941).

[160] Detroit Automotive Prod. Corp. v. Commissioner, 203 F.2d 785 (6th Cir. 1953); Central Paper Co. v. Commissioner, 199 F.2d 902, 904 (6th Cir. 1952); Arkansas Motor Coaches v. Commissioner, 198 F.2d 189, 191 (8th Cir. 1952).

[161] Central Paper Co. v. Commissioner, 199 F.2d 902, 904–05 (6th Cir. 1952); Arkansas Motor Coaches v. Commissioner, 198 F.2d 189, 191 (8th Cir. 1952); *see also* Palcar Real Estate Co. v. Commissioner, 131 F.2d 210, 213 (8th Cir. 1942).

[162] McCord v. Commissioner, 123 F.2d 164, 165 (D.C. Cir. 1941).

[163] Tobias Weiss, *When is a Petition "Filed" in the Tax Court?*, 8 TAX L. REV. 473 (1953).

uniform filing event that would eliminate the hazards of the mail were advanced.[164] Congress responded in 1954 by declaring that the United States postmark date stamped on the cover of the mailing envelope would be deemed the date of filing if the petition was received at the Tax Court subsequent to the statutory period.[165] Four years later Congress refined the procedure to provide relief in two other situations.[166] If the petition was lost in the mail, registration or certification was deemed prima facie evidence of delivery.[167] If the envelope did not contain a postmark, the date of registration or certification was deemed the postmark date.[168]

Congress has since modernized these provisions. In 1996, Congress directed that certain private delivery services shall be treated in the same manner as United States mail, with the date recorded or marked by the private delivery service being treated as a postmark by the United States Postal Service.[169] Additionally, Congress authorized the Treasury to treat delivery by private service carriers as equivalent to mailing by registered or certified mail.[170]

The strict approach of the Board/Tax Court to the question of when the petition must be filed has not generally carried over into the area of what constitutes a petition. The policy in the latter situation has been to accept "almost any type of paper indicating a protest of or dissatisfaction with the respondent's determination that a deficiency is due."[171] In cases in which a petition is jurisdictionally adequate but otherwise defective, the court generally issues an order to show cause directing the taxpayer to cure the defects, usually within 60 days.[172] In the absence of such an order, an

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164 *Id.* The American Bar Association formally recommended that Congress amend the statute to provide that timely mailing by registered mail is equivalent to timely filing. Report of the Comm. on Tax Court Procedure, ABA TAXATION SECTION 80 (1951). The ABA defended the proposal by claiming that because the deficiency notice was sent by registered mail, the law should permit the taxpayer to file a petition in the same manner. *Id.*

165 I.R.C. § 7502. In *Cespedes v. Commissioner*, 33 T.C. 214 (1959), the Tax Court held that a foreign postmark would not satisfy the statutory standard.

166 Technical Amendments Act of 1958, Pub. L. No. 85-866, § 89, 72 Stat. 1665 (amending I.R.C. § 7502(c)).

167 I.R.C. § 7502(c)(1)(A).

168 I.R.C. § 7502(c)(1)(B).

169 I.R.C. § 7502(f)(1) (added by Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1210, 110 Stat. 1452, 1474 (1996)).

170 I.R.C. § 7502(f)(3) (added by Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1210, 110 Stat. 1452, 1474 (1996)).

171 Turner, 1942, *supra* note 156, at 4. *See generally* HAMEL, *supra* note 147, at 91; Ritter, *supra* note 147, at 297.

172 Carstenson v. Commissioner, 57 T.C. 542 (1972); Howard P. Locke, *Motions and Certain Other Procedures in the Tax Court of the United States*, 41 TAXES 391, 400–01 (1963). Board policy in this regard was expressed as follows: "after

amended petition may be filed as a matter of course any time prior to the filing of the Commissioner's answer.[173] After the answer is filed, however, the taxpayer must obtain either the Commissioner's consent or leave of the court to file an amended petition.[174]

The policy of accepting defective petitions for jurisdictional purposes proved troublesome in two areas. In several cases the amended petition raised issues that were not included in the original petition.[175] Few difficulties arose in this connection if the amended petition was filed within the original filing period.[176] The question was more difficult if the amended petition was filed subsequent to the termination of the filing period.[177] The Board/Tax Court accepted jurisdiction over these amended petitions on the theory that the filing date of the amended petition related back to the filing date of the original petition.[178] However, if the amended petition contained

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advising the taxpayer or his counsel of the requirement as to form of a proper petition, [the Board] has permitted the perfection of the petition long after the expiration of the statutory period on which jurisdiction is based." Turner, 1942, *supra* note 156.

In the Board's early years, petitions were divided into separate categories for administrative purposes. Imperfect timely petitions were duly docketed, and the taxpayer was given an opportunity to perfect. When an imperfect and untimely petition was received, there was no "hard and fast rule" to be followed, but the policy was to docket all questionable appeals and let the jurisdictional issue be raised by motion. If an otherwise proper petition was addressed to the Commissioner rather than the Board, and subsequently was delivered untimely to the Board by the Commissioner, it was sent back to the Service "because the burden of explaining to the taxpayer why papers may not have been filed on time ought to be carried by the Commissioner and not the Board." Finally, proper petitions were docketed and filed. Memorandum from Chairman Hamel to Mrs. Howard, Jan. 22, 1925, filed at the U.S. Tax Court in "Petitions: Memoranda & Correspondence."

[173] *Compare* B.T.A. RULE 17 (Jan. 1, 1935 ed.) *with* TAX CT. R. 41(a) (July 6, 2012 ed.); *see also* Kruegar Broughton Lumber Co. v. Commissioner, 18 B.T.A. 1270 (1930); Peruna Co. v. Commissioner, 11 B.T.A. 1180 (1928).

[174] *Compare* B.T.A. RULE 17 (Jan 1, 1935 ed.) *with* TAX CT. R. 41(a) (July 6, 2012 ed.).

[175] *E.g.*, Citizens Mut. Inv. Ass'n v. Commissioner, 46 B.T.A. 48 (1942); Thompson v. Commissioner, 10 B.T.A. 57, 60–61 (1928); Wald v. Commissioner, 8 B.T.A. 1003, 1005 (1927).

[176] If the amended petition was filed within the original filing period, any issues raised in the amended petition were timely.

[177] *E.g.*, Fletcher Plastics, Inc. v. Commissioner, 64 T.C. 35, 39–41 (1975); Estate of Archer v. Commissioner, 47 B.T.A. 228 (1942).

[178] *See* Fletcher Plastics, Inc. v. Commissioner, 64 T.C. 35, 39–41 (1975); Estate of Archer v. Commissioner, 47 B.T.A. 228 (1942); Citizens Mut. Inv. Ass'n v. Commissioner, 46 B.T.A. 48 (1942).

allegations relating to taxes[179] or years[180] not assailed in the original petition, the Board/Tax Court, although accepting jurisdiction generally, refused to entertain the new issues.[181]

The second difficulty involved the filing of eleventh hour telegraphic and cable communications.[182] Although the members of the Board generally did not question the basic policy of accepting defective petitions for jurisdictional purposes, several favored a re-examination of the application of the policy to these last-minute petitions.[183] The occasion for re-examination was provided by the decision in *McCord v. Commissioner*,[184] in which the Board's dismissal of an untimely telegraphic petition was reversed due to the Board's customary method of handling such petitions. Western Union had Board instructions to send all telegraphic petitions over the government wire service. Because that service was occupied with higher priority messages, the petition in *McCord* was not timely received. Under these circumstances, the appellate court held the petition timely filed.[185] In response, the Board discontinued accepting such petitions for even jurisdictional purposes.[186]

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[179] Estate Archer v. Commissioner, 47 B.T.A. 228 (1942); Citizens Mut. Inv. Ass'n v. Commissioner, 46 B.T.A. 48 (1942).

[180] O'Neil v. Commissioner, 66 T.C. 105 (1976): Fletcher Plastics, Inc. v. Commissioner, 64 T.C. 35, 39 (1975); Krome v. Commissioner, 16 T.C.M. (CCH) 782 (1948), *vacating* Krome v. Commissioner, 7 T.C.M. (CCH) 413 (1948); I. Frank Sons v. Commissioner, 22 B.T.A. 40, 41 (1931); Thompson v. Commissioner, 10 B.T.A. 57, 60–61 (1928); Wald v. Commissioner, 8 B.T.A. 1003, 1005 (1927); J. W. Teasdale & Co. v. Commissioner, 5 B.T.A. 1244, 1246 (1927).

[181] The 1974 rules expressly prohibited including years and taxes in the amended petition which are different from those contested in the original petition. TAX CT. R. 41(a) and accompanying Rules Comm. Note (Jan. 1, 1974 ed.). The current rule is stated more generally, providing that "[n]o amendment shall be allowed after the expiration of the time for filing the petition . . . which would involve conferring jurisdiction on the Court over a matter which otherwise would not come within its jurisdiction under the petition as then on file." TAX CT. R. 41(a) (July 6, 2012 ed.)

[182] *See* McCord v. Commissioner, 123 F.2d 164 (D.C. Cir. 1941); Estate of Stebbins v. Commissioner, 40 B.T.A. 613 (1939), *aff'd*, 121 F.2d 892 (D.C. Cir. 1941); Edward Barron Estate Co. v. Commissioner, 34 B.T.A. 1256 (1936), *aff'd* 93 F.2d 751 (9th Cir. 1937); Rosenberg v. Commissioner, 32 B.T.A. 618 (1935); Statler v. Commissioner, 27 B.T.A. 342 (1932).

[183] Edward Barron Estate Co. v. Commissioner, 34 B.T.A. 1256, 1257 (1936) (Leech concurring); *id.* at 1257 (Turner, dissenting).

[184] 123 F.2d 164 (D.C. Cir. 1941).

[185] *Id.*

[186] B.T.A. RULE 7 (June 1, 1942 ed.); Memorandum from Tracy, Board Secretary, to Chairman Murdock, Feb. 17, 1942, filed at the U.S. Tax Court in "Petitions: Memoranda & Correspondence."

A problem that potentially implicates the issues surrounding validity of a deficiency notice and those concerned with proper filing of the petition arises when a taxpayer receives a seemingly defective 90-day letter. A taxpayer who wishes to test the validity of a deficiency notice may do so by utilizing one of three procedures. The first two procedures concern the Tax Court. The taxpayer may file a petition with the Tax Court on a timely basis and then move for dismissal for lack of jurisdiction.[187] This approach carries the risk that the Tax Court will conclude that the taxpayer waived any defects in the notice by filing a timely petition.[188] However, timely filing does not operate as a blanket waiver of all defects in a statutory notice; the taxpayer may obtain a dismissal for lack of jurisdiction upon a showing that there is a defect of sufficient magnitude.[189] If the taxpayer wishes to avoid the prospect of waiver, a second approach is to file the petition after expiration of the relevant filing period and then move for dismissal based on an invalid notice.[190] Although two grounds exist for dismissal in this setting, the Tax Court will first address the validity of the notice of deficiency and dismiss on that ground (in favor of the taxpayer) if the notice is found to be defective.[191] This approach represents something

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[187] *See, e.g.*, Lifter v. Commissioner, 59 T.C. 818 (1973).

[188] *See* Commissioner v. Stewart, 186 F.2d 239 (6th Cir. 1951); Olsen v. Helvering, 88 F.2d 650 (2d Cir. 1937); Lifter v. Commissioner, 59 T.C. 818 (1973); Kay Mfg. Co. v. Commissioner, 18 B.T.A. 753 (1930), *aff'd*, 53 F.2d 1083 (2d Cir. 1931); Whiting v. Commissioner, T.C. Memo. 1984-142, 47 T.C.M. (CCH) 1334.

[189] Bernie v. Commissioner, 16 T.C. 861, 862 (1951); Walter G. Morgan, 5 B.T.A. 1035 (1927).

[190] *See*, e.g., Mulvania v. Commissioner, 769 F.2d 1376 (9th Cir. 1985). In *Mulvania*, the Service mailed the taxpayer a notice of deficiency on the final day of the period of limitations on assessment. The notice was not addressed properly, and the notice was returned to the Service as undeliverable. On the same day the Service mailed the notice of deficiency to the taxpayer, it mailed a copy to the taxpayer's accountant. The accountant informed the taxpayer of the notice within the 90-day period for filing a petition for redetermination. However, believing the notice to be invalid, the taxpayer did not originally seek to invoke the Tax Court's jurisdiction. Roughly two years later, the taxpayer reconsidered and filed a petition for redetermination with the Tax Court, contesting that the Service failed to issue a valid notice of deficiency prior to the expiration of the period of limitations on assessment. The Ninth Circuit Court of Appeals affirmed the Tax Court's determination that the notice was invalid. The appellate court concluded that the Service "is not forgiven for its clerical errors or for mailing notice to the wrong address unless the taxpayer, through his own actions, renders the Commissioner's errors harmless." *Id.* at 1380.

[191] *See* Pietanza v. Commissioner, 92 T.C. 729, 735–36 (1989), *aff'd without published opinion*, 935 F.2d 1282 (3d Cir. 1991) (explaining that, "if jurisdiction is lacking because of respondent's failure to issue a valid notice of deficiency, we will dismiss the case on that ground, rather than for lack of a timely filed petition").

of a gamble. If the defect in the notice does not warrant invalidation, the taxpayer will be foreclosed from litigating on a prepayment basis. The third approach is to wait for collection activity and then to seek an injunction in district court against assessment and collection on the ground that no valid deficiency notice has been issued.[192] If the taxpayer takes either of the latter two options but is not successful, the taxpayer, having not invoked the jurisdiction of the Tax Court, may sue for a refund in the Federal district court or in the Court of Federal Claims after the deficiency has been assessed and collected.[193]

3. Jurisdiction to Restrain Premature Assessment and Collection

If a taxpayer invokes the jurisdiction of the Tax Court through the timely filing of a petition for a redetermination of a deficiency in tax that is subject to the procedures of § 6213(a), the Service may not assess the deficiency or institute collection proceedings until the decision of the Tax Court becomes final.[194] Although statutory exceptions exist to permit the Service to assess the deficiency when collection of the underlying tax appears in jeopardy,[195] the Service occasionally proceeds with assessment and collection on a premature basis in instances where those statutory exceptions are not implicated. Originally, a taxpayer aggrieved by the Service's violation of the prohibition on assessment and collection under § 6213(a) was forced to seek injunctive relief before the Federal district court.[196] Depending on the reviewing court, a taxpayer may have been required to establish more than a violation of § 6213(a) to obtain injunctive relief. Certain courts required the taxpayer to establish additionally the traditional prerequisites to injunctive relief—that is, the prospect of irreparable injury and the absence of an adequate remedy at law.[197]

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[192] *Id.*; 28 U.S.C. § 1346(a)(1). This approach also carries risk, as the district court may not agree that the notice is defective. If the court finds the notice to be valid and the taxpayer did not file a timely petition, access to Tax Court deficiency jurisdiction will have been lost.

[193] I.R.C. § 6213(a).

[194] *Id.*

[195] Specifically, § 6213(a) provides exceptions for termination assessments under §§ 6851 and 6852, and jeopardy assessments under § 6861.

[196] *See* Kamholz v. Commissioner, 94 T.C. 11, 15 (1990), *action on dec.*, 1991-20 (Aug. 5, 1991), *acq. in part*, 1991-2 C.B. 1.

[197] *See* Cool Fuel, Inc. v. Connett, 685 F.2d 309, 313–14 (9th Cir. 1982) (showing of an irreparable injury necessary to avail injunctive relief under § 6213(a)); Gunn v. Mathis, 157 F. Supp. 169, 178 n.4 (W.D. Ark. 1957) (showing of an irreparable injury unnecessary because § 6213(a) does not require it as a prerequisite for injunctive relief).

Believing that both taxpayers and the Government would benefit from litigating related issues in the same forum,[198] Congress amended § 6213(a) in 1988 to provide the Tax Court with concurrent jurisdiction to enjoin the premature assessment and collection of any tax that is the subject of a timely filed petition pending before the Tax Court.[199] The penultimate sentence of § 6213(a) establishes the limits of the Tax Court's jurisdiction in this context. The court is authorized to enjoin an assessment or collection action only if a timely petition for the redetermination of a deficiency has been filed. Even then, the deficiency that the Service has prematurely assessed or attempted to collect must serve as the subject of the petition for redetermination.[200] However, the statute is silent on the finer aspects of the Tax Court's exercise of jurisdiction in this setting. Specifically, the statute does not designate which party bears the burden of establishing a violation of § 6213(a) necessary for the court to restrain assessment or collection, nor does the statute address the standard of proof that must be satisfied by the party carrying the burden.

The Tax Court first addressed the exercise of its jurisdiction to restrain assessment and collection of a deficiency under § 6213(a) in the 1990 case of *Kamholz v. Commissioner*.[201] After noting the dearth of guidance concerning the burden and standard of proof, the court set out to resolve these issues even though they were not raised by the parties.[202] The court declined to follow the general practice of placing the burden of proof on the taxpayer, noting that two justifications for this approach were absent in this setting. First, unlike the regular deficiency setting in which the taxpayer possesses superior knowledge of facts relating to his tax liability, in this setting the Service possessed superior access to the facts central to the court's determination. Specifically, the Service was in the best position to

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198 S. REP. NO. 100-309, at 16 (1988).

199 Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, §§ 6226, 6243(a), 102 Stat. 3342, 3730, 3749 (1988) (providing Tax Court jurisdiction under § 6213(a) as part of the Omnibus Taxpayer Bill of Rights). The Tax Court's jurisdiction took effect on November 11, 1988. *Id.* § 6243(c), 102 Stat. at 3750. The court's ability to order a refund of any amount collected within the prohibited period was provided by Congress a decade later, taking effect on July 22, 1998. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3464(a), (d), 112 Stat. 685, 767 (1998); *see also* S. REP. NO. 105-174, at 91 (1998).

200 I.R.C. § 6213(a); TAX CT. R. 55; *see also* Kamholz v. Commissioner, 94 T.C. 11, 15 (1990) (holding no jurisdiction over deficiencies for years that are not the subject of timely filed petitions pending before the court).

201 94 T.C. 11 (1990). In so doing, the court relied heavily on its decision in *Williams v. Commissioner*, 92 T.C. 920 (1989), in which the court examined these issues in the context of the court's expanded jurisdiction to review the Service's determination to sell seized property under § 6863(b)(3)(C).

202 *Kamholz*, 94 T.C. at 15–16.

determine if the deficiency it proposed to assess and collect served as the subject of the deficiency proceeding before the court.[203] Second, the Service was not operating under exigent circumstances, as the challenged assessment was not made pursuant to the available jeopardy procedures.[204] Accordingly, the court determined that if the taxpayer's motion to restrain assessment and collection under § 6213(a) satisfies a minimal threshold of establishing grounds that are "plausible and believable," the Service bears the burden of proving that the assessments it intends to collect are not the subject of the deficiency proceedings before the court.[205] The Service must carry this burden by a preponderance of the evidence.[206] With these ground rules established, the court concluded that the Service failed to carry its burden of establishing that the tax it prematurely assessed and intended to collect did not serve as the subject of the relevant deficiency proceeding.

Having determined that the Service violated the prohibition on assessment provided in § 6213(a), the Tax Court in *Kamholz* next addressed whether the violation alone served as a sufficient basis to grant the requested injunctive relief.[207] Specifically, the court considered whether the taxpayer must also establish the prospect of irreparable injury and the absence of an adequate legal remedy for the injunction to be issued. Notwithstanding the permissive language employed by the statute,[208] the court concluded that those traditional requirements for injunctive relief were inapposite in this setting. Reasoning that the taxpayer selected a legal remedy by virtue commencing an action with the court to redetermine the asserted deficiencies, the court characterized the issue of whether the taxpayer would suffer irreparable injury if collection were not enjoined as "irrelevant."[209] Emphasizing the unambiguous statutory directive precluding collection actions until a decision of the Tax Court becomes final, the court found the Service's failure to prove that the assessments to be collected were not the subject of cases pending before the court to be "sufficient grounds" for issuing an injunction.[210]

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203 *Id.* at 16.

204 *Id.*

205 *Id.* at 16–17.

206 *Id.* at 17.

207 *Id.* at 19.

208 *Id.* (noting that § 6213(a) provides that the Tax Court "may" enjoin assessment and collection).

209 *Id.*

210 *Id.* Because it believes that Congress did not intend for a taxpayer always to be required to prove an irreparable injury and an absence of an adequate legal remedy before the Tax Court could issue an injunction, the Service has acknowledged the court's discretion to grant injunctive relief under § 6213(a). I.R.S. Action on Decision 1991-20 (Aug. 5, 1991).

B. Refund Jurisdiction

Under the 1924 Act, the jurisdiction of the Board of Tax Appeals generally was restricted to redetermining deficiencies in tax.[211] No provision was made for the Board to declare a taxpayer's entitlement to a refund of taxes already paid. Initially, this restriction seemed sensible in view of the principal consideration that formed the basis of the Board's jurisdiction—providing an opportunity for independent review without requiring payment of the disputed tax.[212] Because remedies already existed for taxpayers who believed they had overpaid their taxes,[213] there was no manifest necessity to provide refund jurisdiction to the Board.

With the beginning of operations by the Board, however, it became apparent that strict adherence to the deficiency jurisdiction limitation produced unfortunate results in at least two distinct situations. The first resulted from a Board ruling that it lost jurisdiction of an appeal if the asserted deficiency was paid prior to the rendition of its decision.[214] Payment of the disputed tax eliminated the deficiency. Because Board jurisdiction was limited to redetermining deficiencies, such payment made the controversy nonjusticiable. In one respect this ruling was advantageous to the taxpayer, because it permitted the taxpayer to defeat unilaterally the Board's jurisdiction at any time prior to a decision. Thus, if a taxpayer anticipated an unfavorable Board decision, which would be prima facie evidence in further judicial proceedings to recover amounts paid pursuant to the Board's decision,[215] the taxpayer could pay the asserted deficiency and thereby foreclose the prospect of an adverse ruling on the merits. On the other hand, the ruling operated against the taxpayer who wished to litigate before the Board but also desired to pay the deficiency to forestall the running of interest. So long as the tax was paid before the decision of the Board, the opportunity for Board review was lost, even if such payment was made after the filing of a proper petition or after a Board hearing.

The second problem with strict limitation of deficiency jurisdiction was that it prevented full resolution of tax disputes by the Board, even in cases in which its jurisdiction was properly invoked. For example, the Commissioner might determine a deficiency in tax based on excessive depreciation deductions. The taxpayer, on the other hand, might believe

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211 Revenue Act of 1924, ch. 234, §§ 274(a)–(b), 308(a)–(b), 900(e), 43 Stat. 297, 308, 337. In addition to its deficiency jurisdiction, the Board also had jurisdiction under the 1924 Act to allow or disallow claims in abatement with respect to jeopardy assessments. *Id.* §§ 279(b), 312(b), 900(e), 43 Stat. 300, 316, 337.

212 H.R. REP. NO 68-179, at 7–8 (1924); S. REP. NO. 68-398, at 8–9 (1924).

213 *See* Part I, notes 142–197 and accompanying text.

214 Northwestern Mut. Life Ins. Co., 1 B.T.A. 767 (1925).

215 Revenue Act of 1924, ch. 234, § 900(g), 43 Stat. 337.

that the depreciation he originally claimed for the year was too small. Under the 1924 Act, if the taxpayer chose to petition the Board, he would be entitled only to an adjudication as to whether the depreciation originally claimed was excessive. Even if a necessary implication of the Board ruling was that the taxpayer claimed too little depreciation, the Board could not determine that there had been an overpayment of tax or that the taxpayer was entitled to a refund.[216] To obtain such an adjudication, the taxpayer would have to commence a separate refund proceeding. Thus, not permitting the Board to consider fully the tax liability with respect to tax years properly before it could have the dual effect of discouraging some taxpayers from appealing to the Board, and requiring others, who did choose to litigate before the Board, to bring separate proceedings to obtain full relief.

Although early proposals to give the Board full refund jurisdiction[217] and to restrict the availability of other forums to resolve tax disputes were rejected,[218] the Revenue Act of 1926 did eliminate the major problems that had resulted from strict limitation of the Board's jurisdiction to deficiency disputes. The two provisions were of major importance. First, the Act provided for limited refund jurisdiction. If a taxpayer petitioned the Board to redetermine a deficiency assertion, and the Board found that no deficiency existed, it also could determine that the taxpayer had made an overpayment of tax for the year in question.[219] In such a case, the statute directed that, when the decision of the Board became final, the amount of the overpayment "shall . . . be credited or refunded to the taxpayer . . . ."[220] Second, provision was made permitting a taxpayer to waive the restrictions on assessment and collection that were imposed during the pendency of a Board proceeding, and to pay all or any part of the asserted deficiency.[221] Such payment would stop the running of interest on any deficiencies ultimately determined by the Board.[222]

In combination, the two provisions were designed to permit the payment of the deficiency assertion prior to the rendition of a Board decision, without the loss of Board jurisdiction that had resulted under the 1924 Act. Although this purpose clearly emerges from the legislative

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216 Everett Knitting Works, 1 B.T.A. 5 (1924).

217 *Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means,* 69th Cong., 1st Sess. 849 (1925) (testimony of D. A. Smith, American Paper and Pulp Ass'n) [hereinafter cited as 1925 Hearings].

218 *See* Part III, notes 103–106 and accompanying text.

219 Revenue Act of 1926, ch. 27, §§ 284(e), 319(c), 44 Stat. 67, 84 (now codified at I.R.C. § 6512(b)(1)).

220 *Id.*

221 *Id.* § 274(d), 44 Stat. 56 (now codified at I.R.C. § 6213(d)).

222 *Id.* § 274(j) (now codified at I.R.C. § 6601(a), (c))

history of the 1926 Act,[223] some confusion in the application of these provisions arose during the ensuing decade with respect to payments made by the taxpayer after the filing of the petition. Some members of the Board believed that in such a case, if the Board ultimately determined that the original deficiency was erroneous, a decision of overpayment would be inappropriate because the overpayment did not exist at the time that the petition was filed; in their view, only a decision of no deficiency would be proper in such circumstances.[224] As a result, some taxpayers, who were inclined to pay the deficiency during the pendency of the Board proceeding failed to do so, fearing that, should they ultimately prevail, the Board decision would not determine an overpayment.[225] Accordingly, in the Revenue Act of 1938, Congress reaffirmed its original intention by adding statutory language clearly indicating that a determination of overpayment was proper even if the overpayment was made after the filing of the petition to the Board.[226]

The grant of overpayment jurisdiction was tied closely to the broader purpose of the 1926 Act to provide the Board with plenary power to redetermine tax liability for any tax year properly before it.[227] Thus, in addition to giving the Board jurisdiction to determine an overpayment, the 1926 Act also provided it with the corollary power to determine a deficiency greater than that originally asserted by the Government if a claim for the increased amount was made by the Commissioner at or before the Board hearing or rehearing.[228] Other 1926 amendments also served to assure that the Board remedy, once invoked, would be exclusive. In this connection, the Commissioner generally was barred from determining additional deficiencies with respect to a tax over which the Board had jurisdiction.[229] The Commissioner therefore could not issue further deficiency notices but was limited to submitting a claim to the Board as

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223 S. REP. NO. 69-52, at 27 (1926); H.R. REP. NO. 69-356, at 40 (1926).

224 H.R. REP. NO. 75-1860, at 49 (1938); *Hearings on Revision of Revenue Laws, 1938, Before the House Comm. on Ways and Means*, 75th Cong., 3d Sess. 449 (1938) (statement of the American Bar Ass'n) [hereinafter cited as 1938 Hearings].

225 1938 Hearings, *supra* note 224, at 449.

226 Revenue Act of 1938, ch. 289, § 322(d), 52 Stat. 545.

227 *See* H.R. REP. NO. 73-704, at 37–38 (1934).

228 Revenue Act of 1926, ch. 27, §§ 274(e), 308(e), 44 Stat. 56, 75 (now codified at I.R.C. § 6214(a)). There was some uncertainty as to whether the Board had this power under the 1924 Act, which made no specific reference to the problem. *Compare* HAMEL, *supra* note 147, at 65 *with* Latham, *supra* note 60, at 217–18.

229 Revenue Act of 1926, ch. 27, § 274(f), 44 Stat. 56 (now codified at I.R.C. § 6212(c)). The only exceptions to this rule were in cases of fraud, of additional deficiencies asserted to the Board at or before the hearing or rehearing, and of jeopardy assessments. *Id.*

mentioned above.[230] Once the Board hearing or rehearing was complete, no further deficiencies could be asserted.[231] Conversely, the taxpayer also was bound by Board decisions by virtue of a provision that generally precluded refunds, credits or suits therefor with respect to a tax over which the Board had jurisdiction, except to the extent that the Board determined an overpayment.[232]

The provisions of the 1926 Act dealing with the jurisdiction of the Board with respect to overpayments and additional deficiencies and with regard to the exclusivity, once invoked, of the Board remedy provided a generally equitable and workable framework for tax litigation. Nevertheless, several aspects of this jurisdiction have attracted varying degrees of attention over the years.

1. Statute of Limitations on Overpayment Determinations

Most of the legislative activity dealing with overpayment jurisdiction has concerned the question of whether, if an overpayment exists, credit or refund of such overpayment is barred by the statute of limitations. Two statutory changes in this arena bear note. The 1926 Act mandated credit or refund only if filing of claim therefor or filing of the petition to the Board (whichever was first) occurred within the generally applicable statute of limitations period for refunds.[233] In this connection, the Board soon held that its jurisdiction was limited to determining overpayments; it could neither order the Commissioner to credit or refund taxes, nor determine whether the overpayment claim was timely.[234] Thus, even after the Board had determined an overpayment, the taxpayer could not be assured of receiving credit or refund. The Bureau could refuse credit or refund if it concluded the credit or refund was time barred.[235] Moreover, even if no

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230 *See supra* note 228.

231 *See supra* note 229 and the exceptions noted therein.

232 Revenue Act of 1926, ch. 27, § 284(d), 44 Stat. 67 (now codified at I.R.C. § 6512(a)). The only exceptions to this rule were in the cases of amounts collected in excess of the determination of the Board and amounts collected after the applicable period of limitations had expired. *Id.*

233 *Id.* § 284(e) (now codified at I.R.C. § 6512(b)(3)).

234 *E.g.*, Dickerman & Englis, Inc., 5 B.T.A. 633 (1926). This implicit limitation on the Tax Court's jurisdiction proved longstanding. In *Morse v. United States*, 494 F.2d 876 (9th Cir. 1974), the appellate court interpreted the absence of express authority under § 6512(b)(1) to order payment of a refund as implying that such authority did not exist. *See id.* at 879 ("[T]he Tax Court has no jurisdiction to order or to deny a refund.") (citing United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540, 542 (1937); Robbins Tire & Rubber Co. v. Commissioner, 53 T.C. 275, 279 (1969); Rosenberg v. Commissioner, T.C. Memo. 1970-201, 29 T.C.M. (CCH) 888).

235 National Fire Ins. Co. v. United States, 52 F.2d 1011 (Ct. Cl. 1931).

time bar existed, refund could be denied if the taxpayer had outstanding liabilities against which the overpayment would be credited.[236] In unusual cases, both credit and refund might be denied by the Bureau on the basis of equitable considerations.[237] The Board had no jurisdiction over any of these matters, and if disputes arose between a taxpayer and the Bureau, the taxpayer's only recourse was to pursue a refund suit in district court or the Court of Claims.[238] The Board's lack of jurisdiction to determine questions of time limitations with regard to overpayments was anomalous in light of its ability to consider the effect of the statute of limitations on deficiency questions. In hearings on the Revenue Bill of 1928, the Association of the Bar of the City of New York called attention to this peculiarity in the law and proposed that the statute be amended to extend Board jurisdiction to determine whether the right to credit or refund was time barred.[239] The 1928 legislation did not adopt this proposal, but it later was incorporated into the Revenue Act of 1934[240] when Treasury came out in favor of the revision.[241] The amendment, however, made no change in the Board's inability to order a credit or refund. In this regard, the Board's jurisdiction remained limited to determining an overpayment that was not time barred.[242] If the Commissioner insisted on crediting (rather than refunding) an overpayment, or refused to do either on the basis of equitable considerations, judicial review could be obtained only in the federal courts.[243]

Related to the question of the Board's power to determine questions under the statute of limitations was the more fundamental problem of whether any limitation period should be applied to overpayment

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[236] Empire Ordinance Corp. v. Harrington, 249 F.2d 680 (D.C. Cir. 1957).

[237] United States v. Helvering, 301 U.S. 540 (1937); Empire Ordinance Corp. v. Harrington, 249 F.2d 680 (D.C. Cir. 1957).

[238] In this connection, it has been held that an action for mandamus generally will not be entertained, because a refund suit provides an adequate remedy. *See supra* note 237.

[239] *Hearings on Revenue Revision, 1927–28, Before the House Comm. on Ways and Means*, Interim 69th–70th Cong. 468–69 (1927).

[240] Ch. 277, § 322(d), 48 Stat. 751.

[241] *Hearings on Revenue Revision, 1934, Before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 151 (1934) [hereinafter cited as 1934 Hearings].

[242] Rosenberg v. Commissioner, T.C. Memo. 1970-201, 29 T.C.M. (CCH) 888, 891–92, *aff'd*, 450 F.2d 529 (l0th Cir. 1971); Robbins Tire & Rubber Co. v. Commissioner, 53 T.C. 275, 279 (1969); Jones v. Commissioner, 34 B.T.A. 280 (1936).

[243] *See supra* note 237; *see also* Morse v. United States, 494 F.2d 876, 879 (9th Cir. 1974); Robbins Tire & Rubber Co. v. Commissioner, 53 T.C. 275, 279 (1969); H.R. REP. NO. 100-1104, at 231, 1988-3 C.B. 473, 721 ("[I]f the IRS fails to refund or credit an overpayment determined by the Tax Court, the taxpayer must seek relief in another court.").

determinations. In congressional hearings in 1932 and 1934, the American Bar Association argued that it was inequitable to condition the granting of a credit or refund on any statutory period whatsoever.[244] Its reasoning was based on a comparison to the additional deficiency provision that permitted the Board to determine such additional amounts so long as a claim therefor was asserted by the Commissioner at or before the Board hearing or rehearing.[245] Because the statute of limitations on assessment and collection of deficiencies tolled during the Board proceeding, if the original deficiency notice were timely there would be no time bar applicable to any additional deficiencies determined by the Board.[246] The ABA contended that if no time bar existed on additional deficiencies, none should be placed on credit or refund of overpayments; once the Board's jurisdiction was properly invoked, no statute of limitations should restrict its authority.

Congress proved to be unreceptive to this suggestion, and in time the ABA position, as a result of later court decisions, evolved into a more modest proposal. If a Board petition was filed before a claim for refund, the time of filing the petition controlled the time bar.[247] Thus, in such cases, a vital question was when the petition was filed, and in this regard the courts had adopted a rule requiring reference to the time of filing of the petition which first alleged an overpayment.[248] This interpretation of "petition" for purposes of overpayment was predicated on a Supreme Court decision holding that, for statute of limitations purposes, an amended claim for refund asserting a new and unrelated ground did not relate back to the date of filing of the original claim.[249] Thus, even if the taxpayer's original petition was filed within the statutory period for refund or credit, no such allowance would be made if the assertion of an overpayment first was made in an amended petition filed after the expiration of the limitations period. Again reasoning from rules applicable to additional deficiencies, the ABA argued that since the Commissioner could amend his pleadings to claim more taxes through the time of trial, the taxpayer should have the same privilege, with the overpayment claim relating back to the date of filing of the original petition.[250] In 1942, Congress agreed with the ABA

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[244] *Hearings on Revenue Revision, 1932, Before the House Comm. on Ways and Means*, 72d Cong., 1st Sess. 354, 360, 362–63 (1932) (testimony of Richard Doyle) [hereinafter cited as 1932 Hearings]; 1934 Hearings, *supra* note 241, at 194–95.

[245] *See supra* note 228 and accompanying text.

[246] Revenue Act of 1926, ch. 27, §§ 274(a), 277(b), 44 Stat. 55, 58.

[247] *Id.* § 284(d), 44 Stat. 67.

[248] *E.g.*, Denholm & McKay Co. v. Commissioner, 41 B.T.A. 986 (1940), *rev'd on other grounds*, 132 F.2d 243 (1st Cir. 1942).

[249] United States v. Garbutt Oil Co., 302 U.S. 528 (1938); United States v. Andrews, 302 U.S. 517 (1938).

[250] *Hearings on Revenue Revision, 1941, Before the House Comm. on Ways and Means,* 77th Cong., 1st Sess. 466–67 (1941) (testimony of George Morris); *Hearings on*

objective, and the statute was amended to allow credit or refund if the mailing of the deficiency notice that resulted in the Board proceeding was within the statutory period of the overpayment.[251] Thus, whether or not the original petition claimed an overpayment, a claim therefor would not be time barred if such claim could have been validly made at the time of mailing of the deficiency notice.[252]

The overall goal of coordinating the limitations period on overpayment claims in the Tax Court with that of other refund fora became problematic in the context of late filed returns. In situations where the taxpayer does not file a refund claim prior to the mailing of the notice of deficiency and the taxpayer seeks an overpayment of tax paid before such date, § 6512(b)(3)(B) limits the amount of any overpayment determined by the Tax Court to the amount the taxpayer could have obtained through traditional refund litigation. Although the statute provides that the overpayment is determined as if the taxpayer had filed a claim for refund on the date of the mailing of the notice of deficiency, this rule begged the question of what look-back period applied under § 6511—the amount of tax paid three years prior to the hypothetical refund claim (assuming the taxpayer subsequently filed a return) under § 6511(b)(2)(A), or the amount of tax paid two years prior to the hypothetical refund claim under § 6511(b)(2)(B)? The Tax Court consistently held that the two-year lookback period applied,[253] and most circuit courts of appeals agreed.[254] However, the Fourth Circuit Court of Appeals in *Lundy v. Commissioner*[255] reversed the Tax Court by holding that the three-year look-back period applied because the taxpayer ultimately filed a tax return claiming the refund. The Supreme Court granted certiorari to resolve the resulting circuit court conflict, and it subsequently reversed the Fourth Circuit by reinstating the Tax Court's application of the two-year look-back period.[256] The Supreme Court grounded its decision in a textual analysis of § 6511(b). If the taxpayer failed to file a tax return prior to the mailing of the notice of deficiency, it was not possible to determine if the taxpayer's hypothetical

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Revenue Revision, 1942, Before the House Comm. on Ways and Means, 77th Cong., 2d Sess. 168 (1942) (testimony of Morton Fisher) [hereinafter cited as 1942 Hearings].

[251] Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 877.

[252] I.R.C. § 6512(b)(3)(B).

[253] *See, e.g.,* Allen v. Commissioner, 99 T.C. 475 (1992); Galuska v. Commissioner, 98 T.C. 661 (1992); Berry v. Commissioner, 97 T.C. 339 (1991).

[254] Richards v. Commissioner, 37 F.3d 587 (10th Cir. 1994); Allen v. Commissioner, 23 F.3d 406 (6th Cir. 1994); Davison v. Commissioner, 9 F.3d 1358 (2d Cir. 1993); Galuska v. Commissioner, 5 F.3d 195 (7th Cir. 1993).

[255] 45 F.3d 856 (4th Cir. 1995), *rev'g*, T.C. Memo. 1993-278, 65 T.C.M. (CCH) 3011.

[256] Commissioner v. Lundy, 516 U.S. 235 (1996).

claim for refund (occurring upon the mailing of the notice of deficiency) was filed within three years of the filing of the tax return so as to trigger the three-year look-back period under § 6511(b)(2)(A). Simply put, there was no reference point (filing of the return) for determining if the predicate to the three-year look-back period had been satisfied. With the three-year look-back period under § 6511(b)(2)(A) foreclosed, only the two-year look-back period provided by § 6511(b)(2)(B) remained as an option.

The Supreme Court's holding in *Lundy* had the unfortunate practical effect of precluding a taxpayer invoking the Tax Court's overpayment jurisdiction from obtaining a refund of certain taxes (namely, those paid in the third year preceding the mailing of the notice of deficiency) that the taxpayer could have pursued by filing the return and then pursuing refund litigation outside the Tax Court. As part of the Taxpayer Relief Act of 1997, Congress amended § 6512(b) by adding flush language to address the *Lundy* anomaly. The statute now provides that if the taxpayer failed to file a return prior to the mailing of the notice of deficiency and the notice of deficiency is mailed during the third year after the due date of the tax return, the look-back period for determining the amount of the overpayment determination shall be three years.[257]

2. Resolution of Potential Concurrent Overpayment Jurisdiction

Another problem occasioned by the Board's power to determine overpayments resulted from the overlapping jurisdiction of the Board with that of the district courts and the Court of Claims. Because the district courts and the Court of Claims also possessed authority to determine overpayments of tax, it was theoretically possible for the same tax dispute to be adjudicated by both the Board and a district court or the Court of Claims. However, the problem of overlapping jurisdiction was limited. Once a petition with respect to a tax was filed with the Board, no action could thereafter be instituted for credit or refund except with respect to overpayments determined by the Board.[258]

Occasionally, however, the Commissioner issued a deficiency notice with respect to a tax that was already the subject of refund litigation. No provision of law barred the assertion of such deficiencies, and the statute did not, in such cases, limit the taxpayer's right to appeal to the Board.[259] In fact, if the taxpayer did not appeal to the Board, the deficiency could be assessed and collected after the expiration of the period for petitioning the

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[257] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1282(a), 111 Stat. 788, 1037 (1997) (amending I.R.C. § 6512(b)).

[258] Revenue Act of 1926, ch. 27, § 284(d), 44 Stat. 67. *See supra* note 232 and accompanying text.

[259] *See id.* § 274, 44 Stat. 55.

Board.[260] Moreover, until 1954, the statute did not limit the authority of the Board, the district courts, or the Court of Claims to pursue the litigation to its conclusion. As a result, it was theoretically possible for both the Board and another court to render decisions not only with respect to the same tax, but also, if an overpayment was alleged to the Board on the same basis as the refund action, with respect to the same issue.

The potential for confusion resulting from this concurrent jurisdiction was minimized by two factors. First, in the event of separate proceedings with respect to the same tax liability, either tribunal could properly stay its proceedings until the conclusion of proceedings in the other.[261] Second, it was suggested that the decision of the tribunal to first decide the case would, presumably on the basis of res judicata, bind the other.[262] However, these factors were not a total solution to the problem. Although either tribunal could stay its proceedings until the conclusion of proceedings in the other, it was held that such stays were a matter within the discretion of each body.[263] Thus, duplicative proceedings could be carried on contemporaneously in both tribunals. Moreover, it was not clear whether the first decision would control the second in all cases. Prior to 1942, the courts had held that decisions in refund suits against collectors of internal revenue were not res judicata in later proceedings involving either the United States or the Commissioner.[264] Thus, if a refund suit against a collector, involving a tax already the subject of a Board proceeding, was decided first, the Board presumably would not be bound by the earlier decision, and it was possible to have conflicting decisions by the Board and the district court with respect to the same tax on the same taxpayer. Congress corrected this situation in the Revenue Act of 1942, and res judicata now applies to determinations involving the same tax regardless of the technical difference of the party assuming the position of the Government.[265]

[260] *See id.* § 274(a).

[261] Camp v. United States, 44 F.2d 126 (4th Cir. 1930).

[262] *Id.*

[263] Morris Plan Indus. Bank of New York v. Commissioner, 151 F.2d 976 (2d Cir. 1945); Ellis v. Commissioner, 14 T.C. 484 (1950).

[264] United States v. Nunnally Inv. Co., 316 U.S. 258 (1942); Bankers Pocahontas Coal Co. v. Burnet, 287 U.S. 308 (1932); Sage v. United States, 250 U.S. 33 (1919); *see also* William T. Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685, 693 (1947). Curiously, if the case involving the United States or the Commissioner was decided first, it would be res judicata in later proceedings involving the collectors. *Id.*

[265] Revenue Act of 1942, ch. 619, § 503, 56 Stat. 956 (now codified at I.R.C. § 7422(c)).

The possibility for concurrent jurisdiction problems to arise was substantially reduced by a provision included in the 1954 Code revision.[266] The amendment applies only if a refund proceeding in district court or the Court of Federal Claims is pending but has not yet proceeded to trial by the time of issuance of a deficiency notice with respect to the same tax at issue in the refund action. In such a case, the refund action is stayed upon mailing of the notice of deficiency for the period of time in which the taxpayer can petition the Tax Court and for 60 days thereafter. If the taxpayer petitions the Tax Court, then the district court or the Court of Federal Claims, as the case may be, automatically loses jurisdiction of the refund action to the extent jurisdiction over that dispute is acquired by the Tax Court. On the other hand, if no petition is filed with the Tax Court, the Government is permitted to counterclaim in the refund action within the period of the stay, even though the normal period for asserting a counterclaim may have expired. In the event of such a counterclaim, the taxpayer has the burden of proof on all issues except fraud.

Several features of the 1954 provision bear note. First, it applies only if the refund action has not proceeded to trial by the time of issuance of the notice of deficiency. Since the Commissioner may issue a deficiency notice at any time during the course of the refund action, and since the taxpayer is privileged to file a petition to the Tax Court in response thereto, the possibility for concurrent jurisdiction still exists.[267] However, this possibility is now far more limited, and with the application of res judicata to the first judgment, should not prove troublesome. Second, whether or not the Government counterclaims in the refund action, if the taxpayer fails to petition the Tax Court, the deficiency may be assessed and collected.[268] Thus, the taxpayer's exercise of his option to pursue a remedy in either the refund action or the Tax Court will have an important effect on the assessment and collection of the tax. Finally, in rare cases, different burden of proof rules may apply depending on whether the taxpayer takes the case to the Tax Court or continues the refund proceeding. The statute provides that in the event that the Government interposes a counterclaim, the burden of proof on the issues raised will be on the taxpayer, "except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax."[269] The 1954 committee reports indicate a congressional intention to provide the same burden of proof rules in the refund proceeding as would have applied had the taxpayer petitioned the Tax Court.[270] However, at least two types of issues, other than fraud, exist with

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[266] I.R.C. § 7422(e).

[267] *See* Zeeman v. United States, 395 F.2d 861, 865–66 (2d Cir. 1968).

[268] Bar L Ranch, Inc. v. Phinney, 400 F.2d 90 (5th Cir. 1968).

[269] I.R.C. § 7422(e).

[270] H.R. REP. NO. 83-1337, at A431 (1954); S. REP. NO. 83-1622, at 610–11 (1954).

respect to which the Government normally bears the burden of proof in both Tax Court and refund proceedings. These are the issue of the illegality of bribes, kickbacks, or other payments for purposes of denying deductions for payments against public policy,[271] and the issue of whether a foundation manager has "knowingly" participated in activities subjecting him to certain taxes applicable to private foundations.[272] Additionally, both of these special burden of proof rules were introduced after 1954,[273] and a difficult question of statutory interpretation would be presented by a counterclaim raising these issues in circumstances to which the special concurrent jurisdiction statute is applicable.[274]

3. Authority to Order Refund of Overpayment

Recognizing the additional burden faced by taxpayers who were required to seek enforcement of Tax Court overpayment determinations in alternate fora,[275] Congress remedied the shortcoming in the Tax Court's jurisdiction as part of the Technical and Miscellaneous Revenue Act of 1988.[276] Through the enactment of § 6512(b)(2),[277] Congress supplied the Tax Court with supplemental jurisdiction to order the refund of an overpayment, together with interest thereon.[278] The court's jurisdiction to order payment

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[271] I.R.C. § 162(c)(1)–(2).

[272] I.R.C. § 7454(b).

[273] The special burden of proof rules for nondeductible illegal payments resulted from amendments made by the Tax Reform Act of 1969 and the Revenue Act of 1971. Tax Reform Act of 1969, Pub. L. No. 91-172, § 902(b), 83 Stat. 710; Revenue Act of 1971, Pub. L. No. 92-178, § 310(a), 85 Stat. 525. The foundation manager provision originated in the Tax Reform Act of 1969. Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(j)(57), 83 Stat. 532.

[274] Section 7491 also operates to shift the burden of proof to the Government in certain situations. However, this provision applies to "any court proceeding," *see* I.R.C. § 7491(a)–(c), and thereby avoids any conflict with the 1954 provision by trumping it.

[275] *See* S. REP. NO. 100-309, at 17 (1988) ("The committee believes that if the Tax Court determines that a taxpayer is due a refund and the IRS fails to issue that refund, the taxpayer should not have to incur the additional time, trouble, and expense of enforcing the Tax Court's decision in another forum. Rather, the taxpayer should be able to enforce the decision in the court that entered the decision.").

[276] Pub. L. No. 100-647, 102 Stat. 3342.

[277] *Id.* § 6244(a), 102 Stat. at 3750.

[278] The underlying "overpayment" determined under § 6512(b)(1) may include payments of interest in excess of that owed. *See* Estate of Baumgardner v. Commissioner, 85 T.C. 445, 452 (1985). However, the "interest" referenced under § 6512(b)(2) is that owed with respect to the determined overpayment. The Tax Court's authority under § 6512(b)(2) to order the refund of interest owed on a

of a refund does not arise unless the Commissioner fails to refund the overpayment within 120 days following the date on which the Tax Court's decision becomes final.[279] At that point, the taxpayer may invoke the Tax Court's supplemental jurisdiction by motion. In this manner, the enactment of § 6512(b)(2) enhanced the judicial economy of overpayment litigation before the Tax Court.

Congress clarified certain aspects of the Tax Court's authority to order refund payments through the Taxpayer Relief Act of 1997.[280] To start, Congress addressed the appellate review of a Tax Court order disposing of a motion to refund an overpayment under § 6512(b)(2). Through the addition of the second sentence to the statute, Congress specified that a Tax Court order in this setting is reviewable in the same manner as a decision of the Tax Court.[281]

Additionally, Congress clarified that the Tax Court's authority under § 6512(b)(2) does not extend to reviewing the merits of any credit or offset that reduces the amount of the refund paid to the taxpayer.[282] Through the enactment of § 6512(b)(4), Congress expressly denied the Tax Court jurisdiction to review or restrain any credit or offset to the amount of a determined overpayment made by the Commissioner pursuant to § 6402(a).

The interaction of § 6512(b)(2) and (b)(4) appears relatively straightforward. The Tax Court may order payment of a determined refund, but the Commissioner may apply the refund against other outstanding liabilities of the taxpayer free from Tax Court review. However, these two provisions do not always operate in such clean fashion—particularly when the liability the Commissioner seeks to apply as a § 6402(a) offset falls within the potential scope of the Tax Court's overpayment jurisdiction under § 6512(b)(1). The Tax Court faced this conundrum in *Estate of Smith v. Commissioner*.[283]

Following the entry of the Tax Court's initial decision in the *Estate of Smith* litigation determining a deficiency in estate tax, the taxpayer-estate remitted payment of the deficiency plus an amount intended to cover estimated underpayment interest. Years later, the case was back before the Tax Court on remand following the first appeal in the case. The Tax Court then issued a final decision determining an "overpayment in estate tax" of

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§ 6512(b)(1) overpayment is somewhat curious, given that the Tax Court lacks jurisdiction to determine the interest owed on such an overpayment. *See* Harrison v. Commissioner, T.C. Memo. 1994-614, 68 T.C.M. (CCH) 1438, 1441 ("[W]e are unable to enter a decision for interest on an overpayment.").

[279] *See* Mitchell v. Commissioner, T.C. Memo. 1990-213, 59 T.C.M. (CCH) 486, 487 (denying petitioner's motion to order refund of overpayment as premature).

[280] Pub. L. No. 105-34, 111 Stat. 788.

[281] *Id.* § 1451(a), 111 Stat. at 1054.

[282] *See* H.R. REP. NO. 105-220, at 732 (1997), 1997-4 C.B. (vol. 2) 1457, 2202.

[283] 123 T.C. 15 (2004).

$238,847, which was based on the parties' stipulated computation submitted pursuant to Rule 155 of the Tax Court Rules of Practice and Procedure.[284] The stipulated estate tax liability provided in the Rule 155 computation was, in turn, based on the allowance of an estate tax deduction for underpayment interest that had not yet been paid by the estate. However, the parties did not take the estate's outstanding interest obligation into account in arriving at the bottom-line $238,847 overpayment. Evidently, the customary practice at that time was to address only overpayments of the subject tax as part of the Rule 155 computation, with interest obligations being later determined by reference to this amount.[285]

Following entry of the Tax Court's decision adopting the Rule 155 computation, the Commissioner first offset $85,337 of assessed but unpaid interest against the $238,847 overpayment and remitted only the $153,510 balance to the estate. The estate objected to the offset and invoked the Tax Court's jurisdiction under § 6512(b)(2) to enforce the Tax Court's determination of a $238,847 overpayment under § 6512(b)(1).

At first glance, resolution of the case appeared clear. The Commissioner possessed the authority to offset the estate's outstanding interest liability against the refund owed to the estate pursuant to § 6402(a), and § 6512(b)(4) precluded the Tax Court from restraining or reviewing this offset. However, the estate argued that the "overpayment . . . of estate tax" determined by the Tax Court under § 6512(b)(1) necessarily included any interest due on the estate tax liability, based in part on the directive in § 6601(e) that the term "tax" is to include interest thereon.[286] In this regard, the Tax Court had previously held in *Estate of Baumgardner v. Commissioner* that its jurisdiction to determine an overpayment in tax pursuant to § 6512(b)(1) extended to underpayment interest paid in excess of that properly owed.[287] Hence, the estate argued that because the Tax Court's determination of an overpayment of estate tax under § 6512(b)(1) encompassed the taxpayer's assessed but unpaid interest obligations, any attempt by the Commissioner to apply the $238,847 determined overpayment against the estate's outstanding interest liability undermined the court's express authority to order a refund of the overpayment pursuant to § 6512(b)(2).

In a reviewed opinion, the Tax Court sided with the taxpayer-estate. The majority found §§ 6402(a) and 6512(b)(4) inapposite in this context,

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284 *Id.* at 17.

285 *See id.* at 48 (Goeke, J., dissenting) (noting a "longstanding practice, followed by parties in many of our cases, to submit agreed computations of overpayments without interest"); *id.* at 56 (Holmes, J., dissenting) (noting that the IRS had developed "an almost-unbroken custom of using Rule 155 to reach agreement on the amount of tax (rather than tax plus interest) owed").

286 *See* 123 T.C. at 22.

287 85 T.C. 445 (1985).

reasoning that these provisions apply only to the application of an overpayment to tax liabilities *other than* those that served as the subject of the overpayment decision.[288] Agreeing that the estate's assessed but unpaid interest obligation should have been factored into the Rule 155 overpayment computation, the majority reasoned that permitting the Commissioner to reduce the refund by the outstanding interest obligation would effectively allow the Commissioner "to disregard the amount of the overpayment in our final decision."[289]

On appeal, the Fifth Circuit reversed in favor of the Commissioner.[290] From a definitional standpoint, the Fifth Circuit concluded that the Tax Court's determination of an "overpayment" of tax under § 6512(b)(1) need not always include underpayment interest due on the underlying tax liability[291]—even though the Tax Court may determine an overpayment of interest as part of its § 6512(b)(1) overpayment jurisdiction in certain situations.[292] The appellate court supported its holding by referring to § 7481, which permits the Tax Court to determine overpayments or underpayments of interest after the court has first determined an overpayment in the underlying tax pursuant to § 6512(b)(1).[293] Hence, the statutory scheme suggests that not all interest determinations need be addressed in the initial § 6512(b)(1) overpayment determination.

From a factual standpoint, the Fifth Circuit found that the Tax Court's overpayment determination did not extend to the estate's unpaid interest liability, because the parties did not factor this liability into the Rule 155 stipulation incorporated into the Tax Court's judgment.[294] Hence, whereas the Tax Court effectively treated the $238,847 overpayment as encompassing all items that fell within its § 6512(b)(1) overpayment jurisdiction (which it interpreted as including assessed but unpaid interest), the Fifth Circuit viewed the Tax Court's determination as extending only to those items actually addressed in the parties' overpayment stipulation. Because the parties' Rule 155 calculation of the estate tax overpayment failed to account for the estate's unpaid interest obligation, the Fifth Circuit held that the Tax Court exceeded its authority under § 6512(b)(2) by attempting to restrain the Commissioner from offsetting the interest liability

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[288] *Id.* at 26.

[289] *Id.* at 27.

[290] 429 F.3d 533 (5th Cir. 2005).

[291] *Id.* at 538.

[292] *Id.* at 538–39 (citing Estate of Baumgardner v. Commissioner, 85 T.C. 445 (1985)). Although not explicit, the Fifth Circuit appeared to draw the line at interest that may be incorporated into an overpayment determination to interest that had been assessed *and paid* at the time of the overpayment calculation.

[293] *Id.* at 538 (citing I.R.C. § 7481(c)(1) and (c)(2)(B)). For a discussion of the Tax Court's jurisdiction under § 7481, see Part VII.D.

[294] *Id.* at 539.

against the refund due. Rather, the court determined that § 6512(b)(4) specifically barred the Tax Court from restraining the Commissioner's offset.

The Fifth Circuit's reversal of the Tax Court in *Estate of Smith* does not necessarily resolve the potential conflict between § 6512(b)(2) and (b)(4) in future cases. While the Tax Court must observe the decision in cases appealable to the Fifth Circuit under the *Golsen* rule, the court is free to follow its precedent in cases appealable to other circuit courts of appeals.[295]

4. Proposals to Expand Refund Jurisdiction

As discussed above, the boundaries of the Board/Tax Court's limited refund jurisdiction were established early and have changed relatively little over the years. Nevertheless, starting in 1924 proposals have been made to grant full refund jurisdiction to the Board/Tax Court,[296] and these

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[295] The Fifth Circuit's decision in *Estate of Smith* points to a means of avoiding the potential conflict between § 6512(b)(2) and (b)(4) altogether, by limiting the Tax Court's overpayment determination under § 6512(b)(1) to those liabilities actually addressed by the parties in their Rule 155 computation—rather than extending the determination to all items that the parties could have (and perhaps should have) addressed in their stipulation. On the other hand, the Tax Court's reviewed opinion in *Estate of Smith* certainly encourages the Commissioner to include all assessed interest obligations (and other assessed additions to tax) in the Rule 155 computation to avoid the prospect of effectively waiving collection of those obligations.

[296] *E.g., Hearings on H.R. 6715 Before the Senate Comm. on Finance*, 68th Cong., 1st Sess. 388–89 (1924) (statement of Frank Lowson, American Institute of Accountants, arguing for refund jurisdiction on the ground that it would provide a speedy and inexpensive forum for adjudicating refund claims that was not otherwise available); 1925 Hearings, *supra* note 217, at 849 (testimony of D.A. Smith, American Paper and Pulp Ass'n, arguing that taxpayers who had already paid a disputed tax should have the same right of appeal to the Board as those who were contesting an asserted deficiency); 1932 Hearings, *supra* note 244, at 363–64 (statement of Comm. on Federal Taxation of the American Bar Ass'n, arguing that the Board's lack of refund jurisdiction resulted in unnecessary duplicative litigation); 1942 Hearings, *supra* note 250, at 95 (testimony of Randolph Paul, Tax Adviser to the Secretary of the Treasury); *Hearings on S. 1973, S. 1974, S. 1975, S. 1976, S. 1977, S. 1978, S. 1979, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 194–95 (1969) (testimony of Bruce S. Lane, Chairman, Comm. on Court Procedure, Tax Section, American Bar Ass'n) [hereinafter cited as 1969 Hearings].

During consideration of the Revenue Act of 1924, Senator McKellar proposed an amendment that automatically would have given jurisdiction to the Board of all refund claims in excess of $10,000. *See* Part II, notes 151–154 and accompanying text. Senator McKellar persisted for several years in making the proposal, which proposals have persisted to the present time as part of the broader controversy over restructuring the entire system of tax litigation. Although none of these proposals has been adopted, several bear mention as important phases in the evolution of attitudes towards tax administration and litigation in general, and the Board/Tax Court in particular.

Probably the most serious attention given to the full refund jurisdiction proposal came in 1942, as a result of testimony before the Ways and Means Committee by Randolph Paul, then Tax Adviser to the Secretary of the Treasury.

> The jurisdiction of the Board of Tax Appeals is limited to proceedings arising under a deficiency letter issued by the Commissioner. While the Board has authority to find an overpayment in certain cases, it does not possess any general authority to hear refund claims. The Board is a tribunal specially skilled in tax matters and there is no sound reason for denying to taxpayers the opportunity to present their refund claims to such a forum. As the great bulk of tax cases are presently tried before the Board of Tax Appeals, the addition of refund jurisdiction will not unduly burden the Board. It is therefore suggested that an appropriate procedure be devised under which the Board may hear refund cases if the taxpayer desires to utilize that forum instead of the district courts or the Court of Claims.[297]

The refund jurisdiction proposal was not new in 1942. The American Bar Association among others for years had been making the same recommendation.[298] Moreover, Treasury had been considering the proposal for several years. In 1938, Stanley Surrey, then an attorney at Treasury, authored a memorandum proposing broad changes in the entire structure of judicial review of tax controversies.[299] Among his proposals was that the Board of Tax Appeals should be given exclusive jurisdiction of tax litigation at the trial level, with respect to both deficiency and refund disputes.[300] In his view, the relatively small amount of tax litigation before the district courts and the Court of Claims did not justify their continued role in such

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never gained substantial support. *See* 1932 Hearings, *supra* note 244, at 355–56 (testimony of Richard S. Doyle, American Bar Ass'n).

[297] 1942 Hearings, *supra* note 250, at 95.

[298] *E.g.,* 1932 Hearings, *supra* note 244, at 363 (statement of Comm. on Federal Taxation of the American Bar Ass'n).

[299] Memorandum from Stanley S. Surrey entitled "Proposed Changes in Method of Judicial Review of Income, Estate and Gift Tax Cases," Sept. 13, 1938, filed in the Office of Tax Legislative Counsel, U.S. Treas. Dep't [hereinafter cited as Surrey].

[300] *Id.* at 2–3.

cases. Unlike the other forums, the Board was established as an expert body to deal with disputes under the highly involved tax laws; the development of refund litigation in the district courts in particular had led to unnecessary procedural complexity; and the numerous trial forums hindered the development of a uniform body of precedents and permitted forum shopping by taxpayers. Jury trials were not available in the Board, but this was not perceived as a difficulty; in 1936 and 1937 there were only six jury trials in refund actions.[301] Sound arguments could be advanced in favor of the Surrey proposal, but there were obvious political problems with its adoption. Although the organized bar had for several years supported refund jurisdiction for the Board, it would be unlikely to agree to a change that would reduce taxpayers' flexibility in seeking the most receptive forum.[302] Moreover, the elimination of refund actions in district court and the Court of Claims would undoubtedly precipitate a struggle between the Justice and Treasury Departments for control of trial level tax litigation.[303]

The Paul recommendation contemplated concurrent jurisdiction of refund litigation in the Board, the district courts, and the Court of Claims, and therefore did not suffer to the same degree from the political problems raised by the Surrey proposal. The Board, the staff of the Joint Committee on Internal Revenue Taxation, and bar groups all supported the proposal,[304] and Treasury set to work drafting legislation to embody concurrent jurisdiction.[305] It was apparently during the drafting process that the problem emerged which was to prove the undoing of the proposal. This was the question of recoupment.[306] Since 1926, the tax laws had provided that the Board in determining tax liability for a year with respect to which a deficiency notice was issued could consider facts relating to other years, but had no jurisdiction to determine whether the tax for other years was

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301 *Id.* at 3.

302 *See infra* note 321 and accompanying text.

303 For a description of this struggle in connection with proposals to incorporate the Board/Tax Court into the federal judiciary, s*ee* Part IV, notes 193–207, 301–332 and accompanying text.

304 Letter from Chairman Murdock to Randolph Paul, Feb. 14, 1942, filed in the Office of Tax Legislative Counsel, U.S. Treas. Dep't; Memorandum from Mr. Graves to Mr. Wales, Apr. 10, 1945, filed in the Office of Tax Legislative Counsel, U.S. Treas. Dep't [hereinafter cited as Graves].

305 Memorandum entitled "Proposal to Extend the Jurisdiction of the Board of Tax Appeals to Refund Cases Involving Income, Estate, and Gift Taxes," Apr. 7, 1942, filed in the Office of Tax Legislative Counsel, U.S. Treas. Dep't [hereinafter cited as Memorandum].

306 *Id.* at 8–9; Graves, *supra* note 304, at 1–2.

underpaid or overpaid.[307] Accordingly, the Board had no power to invoke the doctrine of equitable recoupment, which would permit parties to offset tax liability from time barred years against the liability determined by the Board for the year properly before it.[308] On the other hand, no such statutory provision applied in district court or Court of Claims refund actions, and under limited circumstances recoupment was permitted.

If the Board was not permitted to invoke the doctrine of recoupment, taxpayers would be given the "whip hand."[309] That is, in circumstances in which they believed themselves entitled to recoupment they could take their refund actions to district court or the Court of Claims. On the other hand, if the Government had a recoupment claim, taxpayers could bring their refund suit in the Board. Obviously, such an option for the taxpayer could not be sympathetically regarded by Treasury. The alternative was to amend the statute to permit the Board to apply recoupment in the same circumstances that the doctrine was permitted to be invoked in district court and the Court of Claims. Several reasons were advanced against this solution, the principal one being that it would be inappropriate to grant the Board power to invoke recoupment since it did not have full judicial status.[310]

The recoupment problem led to the removal of the refund proposal from the 1942 legislation at an early stage of consideration.[311] The proposal was revived within Treasury in 1945, but even though it then was pointed out that the recoupment problem was insubstantial, there apparently was insufficient interest to generate any explicit legislative proposals.[312]

A quarter of a century after Randolph Paul expressed Treasury's support for full refund jurisdiction for the Board, the proposal again surfaced as part of a general debate concerning the entire structure of tax litigation. In 1967, bills were introduced in the House and Senate that proposed incorporation of the Tax Court into the federal judiciary as an article III

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307 Revenue Act of 1926, ch. 27, § 274(g), 44 Stat. 56 (now codified at I.R.C. § 6214(b)).

308 *See* Section D.3.a of this Part.

309 Memorandum, *supra* note 305, at 8.

310 *Id.* at 8–9. The evolving history of the Tax Court's jurisdiction to apply the doctrine of equitable recoupment, resolved by the express grant of recoupment jurisdiction in 2006, is recounted in Section D.3.a of this Part.

311 Graves, *supra* note 304, at 1–2.

312 It was argued that the severity of the recoupment problem was exaggerated since Tax Court jurisdiction was limited to determining overpayments. It could not order refunds—such an order could only be made by a district court or the Court of Claims, and in such a proceeding the Government would be free to raise the recoupment question. *Id.*

court.[313] Senator Joseph Tydings, chairman of a subcommittee of the Senate Judiciary Committee, convened hearings on the Senate bill, which made no change in the court's limited jurisdiction to determine overpayments for years with respect to which a deficiency notice was issued.[314] Although the purpose of the hearings initially was limited to the question of Tax Court status, the focus soon changed as a result of a proposal by the Justice Department that legislation regarding the Tax Court also should address fundamental problems of tax litigation.[315]

For many years a variety of critics had questioned the means by which tax disputes were settled.[316] A taxpayer confronted with an adverse Service position had the choice of several trial forums. He could petition the Tax Court for redetermination of deficiency assertions of the Commissioner, and if he did so he would not be required to pay the disputed tax until completion of the Tax Court proceeding. Alternatively, the taxpayer, if he first paid the tax, could sue for refund in either district court or the Court of Claims. If he chose district court, the taxpayer would have a local forum with jury trial available; on the other hand, the Court of Claims was similar to the Tax Court in that it was a national forum headquartered in Washington, D.C. that could not provide a jury trial. Different rules of procedure obtained in the three forums, and commentators noted different proclivities in the application of substantive rules of tax law.[317] Thus, the taxpayer had considerable latitude in selecting the most hospitable forum.

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[313] H.R. 10100, 90th Cong., 1st Sess. (1967); S. 2041, 90th Cong., 1st Sess. (1967). This development is discussed at length in Part IV, at text accompanying notes 303–334.

[314] *Hearings on S. 2041 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. (1967) [hereinafter cited as 1967 Hearings]; *Hearings on S. 2041 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968) [hereinafter cited as 1968 Hearings]; 1969 Hearings*, supra* note 296.

[315] 1967 Hearings, *supra* note 314, at 40–46 (statement of Mitchell Rogovin, Ass't Att'y Gen., Tax Division, Dep't of Justice).

[316] *See*, *e.g.*, Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 IOWA L. REV. 312 (1963) [hereinafter cited as Ferguson]; Surrey, *supra* note 299.

[317] *See*, e.g., Walter T. Beaman, *When Not to go to the Tax Court: Advantages and Procedures In Going to District Court,* 7 J. TAX'N 356 (1957); William H. Bowen, *Discovery in Tax Court: Why Not Follow the Federal Rules?*, 44 A.B.A. J. 129 (1958); Marvin J. Garbis, *Choosing Your Forum in Civil Tax Litigation,* 15 PRAC. LAW. 41 (1968); Marving J. Garbis & Robert L. Frome, *Selecting the Court for the Optimum Disposition of a Tax Controversy,* 27 J. TAX'N 216 (1967); Max J. Hamburger, *Choice of Forum for Litigation: The United States Tax Court,* 32 N.Y.U. INST. ON FED. TAX'N 1315 (1974); Max J. Hamburger, *The Trial of a Tax Court Case: Some Practical Reflections,* 30 N.Y.U. INST. ON FED TAX'N 1 (1972); Lester M. Ponder, *Trial Court Litigation—Tax Court, Court of Claims and District Court—A Practicing Lawyer's View,* 21 U.S.C. TAX INST. 117 (1969).

This system of trial litigation was criticized as unnecessarily complex and unfair to both the Government and the taxpayer. The numerous trial forums were not bound by the precedents of the others, and conflicting rules frequently emerged that hindered the uniform application of the tax laws. Moreover, the interest of predictability, vital in tax planning, was undermined. Forum shopping by taxpayers was permitted to the prejudice of the Government, but the forum shopping privilege was discriminatory, as only those who could afford to pay the tax in advance of litigation could choose a forum other than the Tax Court. The appellate structure also had attracted considerable controversy.[318] Eleven different courts of appeals reviewed decisions of the Tax Court and the district courts, and their decisions periodically were in conflict with each other as well as with the Court of Claims, the decisions of which at the time were only reviewable, as were the decisions of the courts of appeals, by the Supreme Court. The Supreme Court took few tax cases, and many issues that had received extensive judicial attention in the lower courts remained unresolved for many years.

Obviously, these problems were far broader than the issue of refund jurisdiction for the Tax Court. Nevertheless, refund jurisdiction did play a role in various broad reform proposals. In its report to the Tydings committee, the Justice Department suggested the possibility of eliminating multiple trial forums.[319] In this regard, Justice seemed to favor exclusive tax jurisdiction in the district courts, but it also raised the possibility of giving such exclusive jurisdiction to the Tax Court.[320] A concomitant of removing tax jurisdiction from the district courts and the Court of Claims, under this approach, would be to accord full refund jurisdiction, as well as deficiency jurisdiction, to the Tax Court. On the other hand, tax practitioners and the American Bar Association opposed the elimination of multiple trial forums, and instead endorsed the concept of full concurrent jurisdiction among the forums.[321] As with the Justice view, this would mean adding full refund jurisdiction to deficiency jurisdiction in the case of the Tax Court. In the case of the district courts and the Court of Claims, the bar proposal would entail adding deficiency jurisdiction to the extant refund jurisdiction. The Treasury view differed from that of both Justice and the private tax bar. Treasury believed that the Tax Court was the most important forum for resolving tax disputes and establishing a workable and uniform body of tax precedents.[322] Thus, it opposed any alternative which would lead to the elimination of the Tax Court or the reduction of its influence. Obviously,

[318] *See* Part XI.H.
[319] 1968 Hearings, *supra* note 314, at 120–23.
[320] *Id.* at 122–23.
[321] *See* Part IV, notes 321–323 and accompanying text.
[322] *See* Part IV, notes 324–330 and accompanying text.

the Justice preference for exclusive district court jurisdiction was unacceptable to Treasury. Moreover, Treasury opposed the proposal for full concurrent jurisdiction because, in its view, such a system would inevitably lead to the transfer of much tax litigation to the district courts. In this connection, Treasury argued that the additional refund cases that would come to the Tax Court would not nearly offset the loss of deficiency litigation to the district courts and the Court of Claims. Most refund litigation did not result from unwitting overpayments of tax, but rather was the consequence of conscious decisions by taxpayers to pay deficiency assertions to bring their case in district court or the Court of Claims.[323] Although there could be no accurate prediction of the number of taxpayers who would prefer to litigate deficiency disputes in district court or the Court of Claims, Treasury believed their number to be substantial.[324]

The Tydings committee deliberations ended on a non-conclusive note, and no changes in the tax litigation structure were enacted.[325] In effect, the Treasury view favoring retention of the status quo prevailed. Although the organized bar continued to support full concurrent jurisdiction,[326] subsequent years have witnessed little legislative activity either to expand the Tax Court's refund jurisdiction or to introduce deficiency jurisdiction to the district courts or the Court of Federal Claims.

The most recent proposal of significance touching on the refund jurisdiction of the Tax Court was that advanced by the Federal Courts Study Committee in 1990. This 15-person committee, the composition of which was determined by the Chief Justice of the United States pursuant to authorization contained in the Judicial Improvements and Access to Justice Act,[327] was organized to comprehensively investigate issues plaguing the federal court system and to make recommendations for improvement.[328] The committee issued tentative recommendations near the end of 1989,[329] followed by final recommendations in early 1990.[330]

With respect to the jurisdiction of the Tax Court, the committee recommended that the vast majority of federal tax litigation be consolidated before this body. Disturbed by the availability of three separate trial fora in

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[323] *See* 1969 Hearings, *supra* note 296, at 476–78 (statement of K. Martin Worthy, Chief Counsel, Internal Revenue Service).

[324] *Id.*

[325] *See* Part IV, notes 301–332 and accompanying text.

[326] Report of Comm. on Court Procedure, *reprinted in* 23 TAX LAW. 706 (1970).

[327] Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[328] *Id.* at §§ 102, 103, 102 Stat. at 4644. For further details on the composition of the Federal Courts Study Committee, see Part IV.E.

[329] Federal Courts Study Committee, Tentative Recommendations for Public Comment (Dec. 22, 1989) [hereinafter FCSC Tentative Recommendations].

[330] Federal Courts Study Committee, Report of the Federal Courts Study Committee (Apr. 2, 1990) [hereinafter FCSC Final Report].

which to litigate a dispute over tax liability and, in particular, the forum-shopping such a regime fostered, the committee recommended that the Tax Court serve as the exclusive trial level forum for disputes concerning tax liability—whether originating in the deficiency or refund posture.[331] The proposal would have constrained the jurisdiction of the Federal district courts over tax matters considerably, leaving those courts with jurisdiction over criminal tax cases and enforcement actions only.[332] By implication, the jurisdiction of the United States Claims Court in the federal tax arena would have been abolished altogether.

Of the various articulated benefits of the proposal, the committee found the prospect of increasing the quality and uniformity of tax adjudication most compelling.[333] The proposed restructuring of the federal tax controversy landscape served as a vote of confidence in the Tax Court. The committee observed that the Tax Court was the only available forum that possessed "the time and sufficiently substantial volume of tax litigation to develop expertise in one of the most specialized and technically demanding fields in American jurisprudence."[334] However, the committee's proposed reform of the federal tax adjudication landscape did not enjoy unanimous support. A dissenting statement touted the benefits of the existing regime. In particular, the dissenting group found the "genius" of the existing regime to rest in the effective blending of specialist and

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[331] *Id.* at 70. As discussed more fully in Part IV.E., the tentative recommendations of the committee envisioned the newly constituted Tax Court as an article III tribunal. FCSC Tentative Recommendations, *supra* note 329, at 30. Proposed article III status for the trial level of the Tax Court, however, did not survive to be included in the committee's final recommendations. FCSC Final Report, *supra* note 330, at 70.

[332] *Id.*

[333] The committee touted the following benefits of the proposed reforms in the following terms:

> These changes . . . would rationalize federal tax adjudication, reduce forum-shopping, relieve workload pressures on the existing Article III appellate courts, and reduce the pressure on the Supreme Court to grant certiorari in tax cases to resolve intercircuit conflicts. Above all, they would increase the quality and uniformity of tax adjudication by shifting it from overworked judges sitting in a large number of diverse courts to a single court of highly trained specialists.

Id.

[334] *Id.* The proposals of the Federal Courts Study Committee in this setting and the articulated justifications for such proposals are remarkably consistent with an article proposing restructuring of the civil tax litigation system published by Tax Court Judge Dawson expressing his individual views. *See* Howard A. Dawson, Jr., *Should the Federal Civil Tax Litigation System Be Restructured?*, 40 TAX NOTES 1427 (1988).

generalist elements, which it found to be efficient and "perceptively fair."[335] Indeed, this group of committee members appeared heavily influenced by how the proposed reforms would be received by the public, expressing grave concern that the centralization of tax litigation in a specialized court "would leave the American taxpayers with the impression that the judicial system is remote and unresponsive."[336] To bolster its position, the dissenting group highlighted the opposition of institutional segments of the tax bar to the proposals, including the Internal Revenue Service, the Treasury Department, the Claims Court, and the American Bar Association—and even the Tax Court itself.[337]

The concerns articulated by the dissenting faction of the Federal Courts Study Committee evidently prevailed. The implementing legislation proposed by Congress did not include any of the committee's proposals concerning the litigation of federal civil tax disputes.[338] Accordingly, the landscape of federal tax adjudication remains in central respects largely consistent with the compromise reached by Congress in the Tax Reform Act of 1969.

C. Jeopardy Jurisdiction

In the great majority of disputes between the taxpayer and the Internal Revenue Service, collection of contested tax revenues will not be endangered by the administrative and judicial remedies ordinarily employed to reach a resolution in the matter.[339] If administrative procedures do not result in a settlement, the Government typically sends a notice of deficiency

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335 FCSC Final Report, *supra* note 330, at 72.

336 *Id.*

337 FCSC Final Report, *supra* note 330, at 71. The attribution of opposition to the Tax Court as a body appears to have been an overstatement. To start, it is doubtful that the Tax Court would have articulated an institutional position on the matter. Furthermore, at the time, Judge Dawson had recently expressed his private support for the consolidation of trial-level adjudication of tax disputes before the Tax Court and for the creation of a national court of tax appeals. *See* Dawson, *supra* note 334. However, around the same period, Judge Sterrett expressed his disapproval of a national court of tax appeals. *See* Michael S. Moriarty & R. Eliot Rosen, *An Interview with Former Tax Court Chief Judge Sterrett*, 41 TAX NOTES 910 (1988).

338 *See* Federal Courts Study Group Implementation Act of 1990, H.R. 5381, 101st Cong. (1990). For that matter, none of the implementing legislation became law. Although the bill passed the House of Representatives, the Senate failed to take action on the legislation.

339 *See* Note, *Jeopardy Terminations Under 6851: The Taxpayer's Rights and Remedies*, 60 IOWA L. REV. 644 (1975); Note, *Jeopardy Assessments: The Sovereign's Stranglehold*, 55 GEO. L.J. 701 (1967).

to the taxpayer.[340] The deficiency notice informs the taxpayer that a final determination of additional tax liability has been made,[341] and that the Internal Revenue Service will assess and begin collection procedures in 90 days.[342] During the subsequent 90-day period, however, the Internal Revenue Service is barred from assessing the deficiency,[343] and if the taxpayer petitions the Tax Court for a redetermination of the deficiency, the ban on assessment and collection is extended until the court renders its decision.[344] If the taxpayer waives the right to litigate on a prepayment basis before the Tax Court by not acting within the 90-day period, but fails to pay the tax, the Service then may issue a notice of assessment and demand for payment. Ten days after issuance of such notice and demand, the Service may levy upon the taxpayer's property.[345]

There are, however, situations in which the collection of tax revenues would be jeopardized by use of the procedures outlined above. For example, the taxpayer may contemplate leaving the country or disposing of his assets before the usual deficiency procedures have been instituted or completed.[346] These situations may arise in respect of either past or current tax years.[347]

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340 I.R.C. § 6212(a); Treas. Reg. § 301.6212-1(a).

341 I.R.C. §§ 6211, 6212(a). A deficiency is defined as:

> the amount by which the tax imposed by Subtitle A or B, or Chapter 41, 42, 43, or 44 exceeds the excess of—
>
> (1) the sum of
>
> (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus
>
> (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (b)(2), made.

I.R.C. § 6211.

342 I.R.C. § 6213(a).

343 I.R.C. § 6213(a), (c). If assessment is made prior to the time that the taxpayer has to appeal to the Tax Court, suit may be brought in a district court to enjoin the assessment and collection of the assessment. I.R.C. § 6213(a). The provisions of I.R.C. § 7421 are necessarily inapplicable.

344 I.R.C. § 6213(a). If assessment is made prior to the decision of the Tax Court, the taxpayer may sue to enjoin such assessment. *Id.*

345 I.R.C. §§ 6213(c), 6331(a).

346 I.R.C. §§ 6851, 6861, 6862, 6871.

347 I.R.C. § 6851; STAFF OF THE JOINT COMM. ON TAX'N, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 364 (1976); *see also* Laing v. United States, 423 U.S. 161 (1976); Clark v. Campbell, 501 F.2d 108, 121 (5th Cir. 1975); Rambo v. United States, 492 F.2d 1060, 1064 (6th Cir. 1974); Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969).

Accordingly, the power immediately to assess and collect jeopardized tax revenues has been given to the Internal Revenue Service.[348] In situations in which the Commissioner believes that jeopardy of tax exists for a year (either current or past) with respect to which a return is not yet due, he is authorized to make an immediate assessment of tax for such year and such tax is made immediately due and payable.[349] This procedure is referred to as a termination assessment.[350] If the Commissioner believes that jeopardy of tax exists for a prior year for which a return has been filed or is past due, the usual prohibition against assessment and collection until completion of normal deficiency procedures is waived.[351] The Internal Revenue Service immediately may, upon determining that a deficiency exists, assess and collect the deficiency.[352] This procedure is referred to as a jeopardy assessment.[353]

The relationship of these provisions to the jurisdiction of the Board/Tax Court has been the subject of conflicting judicial interpretation and statutory amendment.[354] Originally, jurisdiction of the Board to hear an appeal in respect of a jeopardy assessment was invoked by a complicated

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[348] For completed tax years in which a return has been filed, or a return is past due, the procedures set out in § 6861 are controlling. For current years or years in which a return is not yet due, assessment is provided by § 6851. *See infra* notes 478–544 and accompanying text. This text will not deal with jeopardy assessments under § 6862, as such assessments are not within the jurisdictional purview of the Tax Court. In addition, assessments under § 6871, concerning claims for income, estate, and gift taxes in bankruptcy and receivership proceedings will not be discussed.

[349] I.R.C. § 6851(a).

[350] *Id.*

[351] I.R.C. § 6861(a). I.R.C. § 6863(a) provides:

> When an assessment has been made under section 6851, 6852, 6861, or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary, within such time as may be fixed by regulations prescribed by the Secretary, a bond equal to the amount as to which the stay is desired . . . .

Treas. Reg. § 301.6863-1(a)(1)–(2) provides that a bond may be made at any time before collection is authorized by levy under § 6331(a) or after authorization under § 6331(a) but prior to actual collection, or in the discretion of the district director, after any such levy has been made.

[352] I.R.C. §§ 6861, 6331. Unlike the normal assessment procedures, where ten days must pass before collection, in the jeopardy situation, the usual ten-day waiting period for payment can be waived and the Service can simultaneously, with the assessment, levy and collect the assessment. I.R.C. § 6331(a).

[353] I.R.C. § 6861.

[354] *E.g., compare* Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840 (1938) *with* Laing v. United States, 423 U.S. 161 (1976); *see also* Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969).

procedure of claim in abatement and bond.[355] Numerous difficulties with respect to the abatement procedure led to its abandonment in 1926.[356] In its place was substituted a simpler procedure. A taxpayer against whom a jeopardy assessment had been made would be able to appeal to the Board in the same manner as the regular deficiency taxpayer. To effect such a procedure, the Commissioner was required to send the taxpayer a deficiency notice within 60 days of the making of the assessment.[357] Although this procedure has remained essentially unchanged to the present,[358] several issues have confronted the court in the application of this provision. Among these have been the court's jurisdiction to review the propriety of the Commissioner's action in making a jeopardy assessment,[359] the validity of a jeopardy assessment if a deficiency notice is not mailed within 60 days,[360] the amount of a deficiency notice based upon a jeopardy assessment if a prior deficiency notice has been mailed,[361] and whether a deficiency notice issued in connection with an invalid jeopardy assessment may form the basis of Tax Court jurisdiction.[362]

The jurisdiction of the Board/Tax Court to redetermine termination assessments was, until 1976, unsettled.[363] The early provision permitting the Commissioner to terminate a taxpayer's taxable year and to declare a tax immediately due and owing, made no provision with respect to either assessment or issuance of a deficiency notice that would be required for Tax Court review.[364]

The few early cases applying the termination provision turned on the question of whether the termination assessment authority was derived under the general assessment provision or the jeopardy assessment provision.[365] Resolution of this question depended on whether a tax due upon a terminated year constituted a deficiency.[366] If the terminated tax

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[355] Revenue Act of 1924, ch. 234, § 279(a), 43 Stat. 300.

[356] *See infra* notes 392–412 and accompanying text.

[357] Revenue Act of 1926, ch. 27, § 279, 44 Stat. 59 (now codified at I.R.C. § 6861).

[358] *Compare* Revenue Act of 1926, ch. 27, § 279, 44 Stat. 59 *with* I.R.C. § 6861.

[359] *See* California Associated Raisin Co., 1 B.T.A. 1251 (1924). Substantial changes in taxpayer remedies in respect of review of the Commissioner's decision to make a jeopardy assessment were expected in 1976. *See infra* notes 429–437 and accompanying text.

[360] *See infra* notes 460–464 and accompanying text.

[361] *See infra* notes 467–471 and accompanying text.

[362] *See infra* notes 454–459 and accompanying text.

[363] *See infra* notes 483–518 and accompanying text.

[364] Revenue Act of 1918, ch. 18, § 250(g), 40 Stat. 1084; Revenue Act of 1921, ch. 138, § 250(g), 42 Stat. 267; Revenue Act of 1924, ch. 234, § 282, 42 Stat. 302; Revenue Act of 1926, ch. 27, § 285, 44 Stat. 59.

[365] *See* Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840 (1938).

[366] *See*, *e.g.*, Laing v. United States, 423 U.S. 161 (1976).

was considered a deficiency, the jeopardy provision that required the mailing of a deficiency notice would have to be complied with for the termination assessment to be valid.[367] A wide range of judicial interpretation, culminating in the Supreme Court decision in *Laing v. United States,*[368] and an increased use of termination assessments, particularly in an antinarcotics program,[369] led to a major revision of the termination provision in 1976.[370]

1. Jeopardy Assessments

Prior to 1921, the right to pre-assessment review of a disputed tax was unavailable to the taxpayer.[371] If the Bureau determined that an additional tax was due, the tax was assessed, and the taxpayer could attack the assessment only by paying the tax and bringing a subsequent suit for refund.[372] Because taxpayers were not permitted to contest the tax prior to payment, there was no need for a jeopardy assessment procedure.[373]

Dissatisfaction with the harshness of a "pay first, litigate later" regime led Congress, in 1921, to authorize an administrative procedure within the Bureau of Internal Revenue by which taxpayers could question disputed deficiencies in taxes before assessment.[374] However, if the Bureau believed that future collection of the deficiency would be prejudiced by the delay that would result from the use of the pre-assessment procedure, it was permitted to circumvent the procedure.[375] In such event, assessment could be made at any time without the necessity of the review procedure.[376]

Various difficulties with the administrative remedy authorized in 1921 prompted Congress in 1924 to make a number of important changes in taxpayer prepayment remedies.[377] The Revenue Act of 1924 provided that "if, in the case of any taxpayer, the Commissioner determined that there

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[367] *Id.*

[368] *Id. See infra* notes 511–518 and accompanying text.

[369] *See* Stephen E. Silver, *Terminating the Taxpayer's Taxable Year: How IRS Uses It Against Narcotics Suspects*, 40 J. TAX'N 110 (1974).

[370] *See infra* notes 519–540 and accompanying text.

[371] *See* Revenue Act of 1918, ch. 18, § 250(b), (d)–(e), 40 Stat. 1083; Revenue Act of 1916, ch. 463, § 9(a), 39 Stat. 763; H.R. REP. NO. 67-350, at 14–15 (1921).

[372] *See* Part I, notes 142–197 and accompanying text.

[373] *See id.*

[374] Revenue Act of 1921, ch. 138, § 250, 42 Stat. 264. For discussion of this material, see Part I.B.3.

[375] Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 265.

[376] *Id.*

[377] *See* H.R. REP. NO. 68-179, at 7–8 (1924); S. REP. NO. 68-398, at 8–9 (1924); Albert L. Hopkins, *The United States Board of Tax Appeals,* 12 A.B.A. J. 466, 466–67 (1926); Clarence A. Miller, *The United States Board of Tax Appeals,* 11 A.B.A. J. 169 (1925).

was a deficiency" in the tax imposed by the Revenue Act, the Commissioner would be required to mail a notice of that determination to the taxpayer.[378] Within 60 days of mailing of the notice, the taxpayer would be entitled to file an appeal with the Board of Tax Appeals.[379] If the taxpayer petitioned the Board for review of the Commissioner's determination, assessment and collection of the tax would be stayed, pending the Board's final determination of tax liability.[380]

There were situations, however, in which pre-assessment review might endanger future collection of tax deficiencies.[381] Accordingly, the jeopardy assessment procedure, established three years earlier, was continued and the Commissioner thereby was permitted to assess and collect a deficiency immediately—bypassing the procedure set out for the ordinary assessment and collection of a deficiency.[382] In recognition of the fact that a jeopardy situation could arise at different times during regular deficiency procedures, the Act provided that a jeopardy assessment could be made before or after the mailing of a deficiency notice, during the pendency of Board litigation, or at any time prior to the time that the Board's decision became final.[383] The jeopardy assessment could vary in amount from a deficiency notice sent prior to the jeopardy determination.[384]

A taxpayer confronted by a jeopardy assessment could contest the assessment in one of two ways. First, he could pay the assessment and institute refund procedures.[385] Alternatively, if the taxpayer desired Board review, a complicated abatement procedure was available.[386] The taxpayer could file a claim in abatement with the Bureau, accompanied by a satisfactory bond in an amount up to twice the assessment.[387] Collection of the tax would be stayed pending Bureau consideration of the claim. Notification of the Bureau's decision was required, and if the claim was denied in whole or part, the taxpayer could petition the Board to review the Commissioner's action within 60 days of the denial.[388] Collection of the tax would be stayed further until the Board's decision.[389] Board review would,

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[378] Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297.

[379] *Id.* §§ 274, 900(a)–(h), 43 Stat. 297, 336.

[380] *Id.* § 274.

[381] *Id.* §§ 274(a), 279, 43 Stat. 297, 300. *See* ROBERT HIESTER MONTGOMERY, INCOME TAX PROCEDURE 284 (1926); Latham, *supra* note 228.

[382] Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297.

[383] *Id.* §§ 274(d), 279, 43 Stat. 300.

[384] *Id.* § 274(d).

[385] Revenue Act of 1924, ch. 234, §§ 281(a), 1011–1012, 1014, 43 Stat. 301, 342, 343.

[386] *Id.* § 279(a), 43 Stat. 300.

[387] *Id.*

[388] *Id.* § 279(b).

[389] *Id.* § 279(a).

therefore, be based upon the denial of the claim in abatement, and not upon an appeal from a deficiency notice.[390] In any event, whether the taxpayer pursued the refund or the Board's abatement procedure, the jeopardy assessment provisions achieved their objectives—payment, either voluntarily, by collection, or guaranteed by bond, prior to any independent review.[391]

Certain difficulties arose in respect of the claim in abatement procedure. If the jeopardy assessment was made prior to the mailing of a deficiency notice, Board jurisdiction could result only from a denial of a claim in abatement.[392] A taxpayer who was unable to secure the appropriate amount of a bond, which was required to accompany the claim in abatement, would be deprived of a hearing before the Board.[393] If the Bureau collected by distraint or levy prior to the filing of a claim in abatement, the taxpayer also would be deprived of Board review.[394] Moreover, if the taxpayer voluntarily paid the assessment, no hearing before the Board was possible under the 1924 Act because the Board could not determine overpayments or order refunds.[395]

A more confusing situation arose if a deficiency notice had been mailed prior to the making of a jeopardy assessment. Under the provisions of the 1924 Act, the Board had jurisdiction to redetermine deficiencies but had no power to determine overpayments.[396] If an action was pending before the Board, and a jeopardy assessment was made with respect to that deficiency, the assessment of the deficiency would, under a strict reading of the statute, terminate whatever deficiency existed and thus deprive the Board of jurisdiction based upon the earlier deficiency notice.[397] Voluntary payment or collection by distraint or levy was theoretically not necessary to terminate the Board's jurisdiction.[398] Thus, the Bureau could succeed in terminating Board jurisdiction, if an action were pending, or potential Board jurisdiction, if a deficiency notice had been mailed and a petition had not been filed, merely by making a jeopardy assessment.[399]

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390 *Id.*

391 *Id.*

392 *Id.* §§ 274(d), 279.

393 *Id.*; National Tank & Export Co., 3 B.T.A. 1217, 1220 (1926); Clois L. Greene, 2 B.T.A. 148, 149 (1925); California Associated Raisin Co., 1 B.T.A. 1251, 1252 (1925).

394 Latham, *supra* note 228, at 219. *But see* California Associated Raisin Co., 1 B.T.A. 314, 315 (1925); Oakdale Coal Co., 1 B.T.A. 773, 774 (1925).

395 California Associated Raisin Co., 1 B.T.A. 314, 315 (1925); ROBERT HIESTER MONTGOMERY, INCOME TAX PROCEDURE 503 (1926).

396 Revenue Act of 1924, ch. 234, §§ 274, 900(a)–(h), 43 Stat. 297, 336.

397 *Id.* §§ 273–274, 279, 43 Stat. 296–297, 300.

398 Latham, *supra* note 228, at 212–14.

399 *Id.*

The Board, however, was unwilling to permit such unilateral action on the part of the Bureau to destroy Board jurisdiction after a deficiency notice had been mailed and the taxpayer had petitioned the Board for review.[400] Some taxpayers might be unable to secure the bond necessary for the abatement procedure, and if a jeopardy assessment could prevent the Board from completing action on a case already before it, the purpose for which the Board was created would be subverted.[401] Accordingly, the Board, in an early decision, stated in dictum that once Board jurisdiction was invoked by a timely petition appealing from a deficiency determination, the Board's jurisdiction could not be terminated by a unilateral Bureau jeopardy assessment unless the taxpayer voluntarily paid the tax.[402] This position defied the clear import of the statutory definition of a deficiency and would have resulted in an extension of the Board's jurisdiction beyond its limited deficiency jurisdiction. The dictum, however, never figured in the disposition of a case. In the two-year period between 1924 and 1926, the situation was not presented to the Board, and 1926 legislation radically altered the procedure.[403]

Apart from the jurisdictional problems that confronted the court, the claim in abatement procedure failed to achieve its objective—a prompt review of the underlying deficiency. First, if a jeopardy assessment was made after the conclusion of a Board hearing but prior to a final decision, it was possible that two hearings might result; the first hearing to determine the deficiency and the second to review the denial of a claim in abatement.[404] This was possible because the Commissioner could assert a jeopardy assessment before the Board's decision became final. Further, since the Commissioner already had determined that a jeopardy assessment was necessary, the requirement that the taxpayer first seek Bureau review of the jeopardy determination was repetitive.[405]

In response to the difficulties generated by the jeopardy assessment provisions of the 1924 Act, a less complicated and more streamlined system

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[400] *See* California Associated Raisin Co., 1 B.T.A. 314 (1925), *rev'd and dismissed*, California Associated Raisin Co., 1 B.T.A. 1251 (1925); ROBERT HIESTER MONTGOMERY, INCOME TAX PROCEDURE 493 (1926).

[401] California Associated Raisin Co., 1 B.T.A. 314, 316 (1925).

[402] *Id.*; *see also* Northwestern Mut. Life Ins. Co., 1 B.T.A. 767 (1925).

[403] In the original California Raisin case, the Board had applied its holding to maintain jurisdiction after a jeopardy assessment was made. 1 B.T.A. 314, 315. In a subsequent decision, 1 B.T.A. 1251 (1925), the Board, although indicating its approval of its earlier legal holding, reversed and dismissed for want of jurisdiction because the facts indicated that the petitioner had never received a deficiency notice on which proper jurisdiction could be based. *Id.* at 1251–52.

[404] *See* S. REP. NO. 69-52, at 26–27 (1926).

[405] *See* Revenue Act of 1924, ch. 234, § 279, 43 Stat. 300.

was substituted by the Revenue Act of 1926.[406] Under the revised rules, if a jeopardy assessment was made prior to the issuance of a deficiency notice, the Commissioner was required to mail a deficiency notice in respect of the assessment within 60 days.[407] The taxpayer then could file a petition with the Board based on that notice, in the same manner as a regular deficiency determination.[408] The Board then would determine the tax liability for the year in question. If, however, the jeopardy assessment was made subsequent to the mailing of a deficiency notice, the assessment would not serve to terminate Board jurisdiction based on the original notice.[409] Whether the jeopardy assessment was made prior to the mailing of the deficiency notice or subsequent thereto, the taxpayer had the option of paying the assessment or staying collection by filing a satisfactory bond.[410] In neither case would the taxpayer lose his right of appeal to the Board.[411] In effect, if the assessment was paid, the Board action would become one for refund.[412]

Although the need to protect revenues provided ample justification for the jeopardy assessment procedure, the potential for abuse remained ever present. First, the possibility always existed that the Commissioner might err either in the computation of the deficiency or in the determination of jeopardy. Another problem sometimes encountered was the use of jeopardy assessments to toll the statute of limitations; the same tolling of the statute could be effected by the issuance of a deficiency letter, but the Service occasionally used the more drastic jeopardy procedure for this purpose.[413]

The difficulties engendered by misuse of the jeopardy procedure were compounded by the Bureau's position that once a jeopardy assessment was made, it could not be abated except by judicial determination that there had been an over-assessment of tax.[414] Thus, if subsequent facts indicated that the assessment had been improperly made or new facts came to light that

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[406] Revenue Act of 1926, ch. 27, § 279, 44 Stat. 59 (now codified at I.R.C. §§ 6861, 6863).

[407] *Id.* § 279(b).

[408] *Id.* §§ 274(a), 279(c).

[409] *Id.* § 279(c).

[410] *Id.* § 279(f), (j).

[411] *Id.* § 279.

[412] *Id.*

[413] *See* Veeder v. Commissioner, 36 F.2d 342 (7th Cir. 1929); Foundation Co. v. United States, 15 F. Supp. 229 (Ct. Cl. 1936); Couzens v. Commissioner, 11 B.T.A. 1040, 1158 (1928); ROBERT HIESTER MONTGOMERY, INCOME TAX PROCEDURE 284 (1926).

[414] The statutory language of the jeopardy provision did not indicate whether a jeopardy assessment, once made, could be abated. Revenue Act of 1926, ch. 27, § 279, 44 Stat. 59.

dispelled any belief that jeopardy of revenues was imminent, the Bureau would not abate the assessment. The Bureau maintained this position even after 1938, when an amendment to the jeopardy provision was adopted that seemed to authorize administrative abatement.[415] In 1954, congressional intent with regard to jeopardy assessment abatement was clarified by a provision that authorized the Commissioner to abate a jeopardy assessment, or any unpaid portion thereof, to the extent that he believed the assessment to be excessive in amount.[416] The statute was silent, however, as to the method by which a taxpayer could secure such abatement. Experience with the provision indicates that taxpayer use of the provision had been minimal, probably due to the lack of a delineated procedure.[417]

In view of the difficulties of securing abatement of jeopardy assessments, many believed that some form of expedited judicial review of the propriety of such assessments was necessary.[418] The Board, however, in one of its earliest decisions, held that it was without power to adjudicate whether the circumstances upon which the Commissioner acted were such as to denote jeopardy and justify his belief.[419] This position was supported by the legislative history of the Revenue Act of 1926.[420] Thereafter, in 1928 Hearings before the Ways and Means Committee, many tax practitioners urged that the Board be given jurisdiction to adjudicate whether the Commissioner's determination of jeopardy was proper.[421] Such proposals were not adopted.[422]

Continued attempts by taxpayers to have the Board and other courts examine the underlying factual basis for the jeopardy determination met with failure;[423] in 1931, the Supreme Court implicitly approved the

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[415] Revenue Act of 1938, ch. 289, § 819(e), 52 Stat. 580, *amending* Revenue Act of 1926, ch. 27, § 279(f), 44 Stat. 59.

[416] I.R.C. § 6861(c).

[417] *Id. See* Note, *Jeopardy Assessments*: *The Sovereign Stranglehold*, 55 GEO. L.J. 701, 707 (1967); *see also* Treas. Reg. § 301.6861-1(e).

[418] *See*, *e.g.*, H.R. REP. NO. 94-658, at 302–03 (1975); S. REP. NO. 94-938, at 363–64 (1976); *Hearings on Revenue Revision*, *1928*, *Before the Comm. on Ways and Means*, 70th Cong., 1st Sess. 466–67, 530–32, 543–44, 547 (1928) (statement of H. Satterlee, Ass'n of the Bar of the City of New York); *Hearings on Revenue Revision*, *1928*, *Before the Senate Finance Comm.*, 70th Cong., 1st Sess. 22, 298–99, 338 (1928) (statements of H. Satterlee, A.A. Ballantyne and W.A. Staub).

[419] California Associated Raisin Co., 1 B.T.A. 1251 (1925).

[420] *See* S. REP. NO. 69-52, at 27 (1926); H.R. REP. NO. 69-356, at 43 (1926).

[421] *Hearings on Revenue Revision*, *1928*, *Before Comm. on Ways and Means*, 70th Cong., 1st Sess. 466–67, 530–32, 543–44 (1928); *Hearings on Revenue Revision, 1928, Before the Senate Finance Comm.*, 70th Cong., 1st Sess. 22, 298–99, 338 (1928).

[422] *See* Revenue Act of 1928, ch. 852, 45 Stat. 791.

[423] *See*, *e.g.*, Darnell v. Thomlinson, 220 F.2d 894 (5th Cir. 1955); Human Eng'r Inst. v. Commissioner, 61 T.C. 61, 65 (1973); Continental Prod. Co., 20 B.T.A. 818, 828 (1930); Couzens v. Commissioner, 11 B.T.A. 1040, 1158 (1928).

constitutionality of the jeopardy assessment procedure in *Phillips v. Commissioner*.[424] The primary reason offered by the courts and the Board for their refusal to review the propriety of a jeopardy determination was that adequate remedies, in both the Board and federal courts, were ultimately available to review the underlying deficiency.[425] In addition, three other considerations undoubtedly prompted courts to decline such review. First, the taxpayer could initiate abatement procedures before the Bureau.[426] Second, injunctive relief against assessments traditionally had been strictly limited.[427] Third, the availability of pre-assessment review in non-jeopardy situations was a privilege accorded certain taxpayers and did not require all taxpayers to be subject to favored treatment.[428]

Fifty years of continued judicial affirmation of administrative discretion came to an end in 1976. In *Commissioner v. Shapiro*,[429] the Supreme Court rejected the Government's position that "it has no obligation to prove that the seizure has any basis in fact no matter how severe or irreparable the injury to the taxpayer and no matter how inadequate his eventual remedy in the Tax Court."[430]

Prompted by the *Shapiro* decision, Congress, in the Tax Reform Act of 1976, changed the jeopardy procedure under § 7429 to require the Commissioner to send the taxpayer a written statement of the information upon which the Service relies in making the assessment within five days of the making of that assessment.[431] Within 30 days after the statement is furnished to the taxpayer, the taxpayer may request the Service to determine if the making of the assessment is reasonable and if the amount assessed is appropriate.[432] In making these determinations, the Service is required to

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[424] 283 U.S. 589 (1931).

[425] *See*, *e.g.*, Salisbury v. United States, 356 F.2d 822 (D.C. Cir. 1966); Lloyd v. Patterson, 242 F.2d 742 (5th Cir. 1957); Adler v. Nicholas, 70 F. Supp. 514 (D. Colo. 1946), *rev'd on other grounds,* 166 F.2d 674 (10th Cir. 1948).

[426] I.R.C. § 6861(g).

[427] For a limited exception developed by judicial rule, see *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962).

[428] *See* Phillips v. Commissioner, 283 U.S. 589, 594–95 (1931); Ginsburg v. United States, 278 F.2d 470, 472 (1st Cir. 1960).

[429] 424 U.S. 614 (1976), *aff'g sub nom.* Shapiro v. Sec'y of State, 499 F.2d 527 (D.C. Cir. 1974).

[430] 424 U.S. at 629–30.

[431] Tax Reform Act of 1976, Pub. L. No. 94-455, § 1204(a), 90 Stat. 1695 (adding I.R.C. § 7429). *See* H.R. REP. NO. 94-658, at 302 (1976); S. REP. NO. 94-938, at 363–64 (1976). As a result of the Internal Revenue Service Restructuring and Reform Act of 1998, the Chief Counsel of the IRS or such Counsel's delegate must approve every jeopardy or termination assessment, as well as every levy to be made before 30 days after notice and demand for payment. *See* Pub. L. No. 105-206, § 3434, 112 Stat. 685, 760 (1998) (enacting I.R.C. § 7429(a)(1)(A)).

[432] I.R.C. § 7429(a)(2)–(3).

consider information obtained after the assessment.[433] If the Service finds the assessment inappropriate, it may abate the assessment in whole or in part.[434] If the taxpayer is not satisfied with the Service's determination, the taxpayer may, within 30 days after notification by the Service, bring an action for judicial review of the Commissioner's determination.[435]

As originally enacted, judicial review of agency determinations under § 7429 was limited to the Federal district courts. The decision to place expedited review under the jurisdiction of the district courts and not the Tax Court was based in large part on a belief that taxpayers would find it more convenient to bring such an action in their local district courts.[436] Speedy review of the propriety of jeopardy assessments in the Tax Court would require either the taxpayer to come to Washington or the court to make extraordinary arrangements for a circuit hearing.[437]

However, the exclusivity of district court jurisdiction in this setting did not prove long lasting. As part of the Technical and Miscellaneous Revenue Act of 1988,[438] Congress granted the Tax Court concurrent jurisdiction to review determinations concerning jeopardy assessments and levies in limited circumstances. If a taxpayer has already invoked the deficiency jurisdiction of the Tax Court for a tax year that serves as the subject of a subsequent jeopardy assessment or levy, the taxpayer is permitted to seek judicial review of the assessment or levy by motion filed in the underlying deficiency proceeding.[439] If the Tax Court is available as a forum, its jurisdiction to review a jeopardy assessment or levy is subject to the same terms and limitations as that of the district court, which are described below.

Within 20 days of commencement of the action, the reviewing court must make an independent, de novo determination as to the issues considered by the Internal Revenue Service.[440] That is, the court must determine whether the assessment or levy is reasonable under the

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[433] S. REP. NO. 94-938, at 365 (1976).

[434] *See* S. REP. NO. 94-938, at 364 n.5 (1976).

[435] I.R.C. § 7429(b)(1).

[436] S. REP. NO. 94-938, at 366 (1976).

[437] *Id.*

[438] Pub. L. No. 100-647, § 6237, 102 Stat. 3342, 3741–43 (1988).

[439] I.R.C. § 7429(b)(2)(B). Pursuant to Rule 56 of the Tax Court Rules of Practice and Procedure, a taxpayer in this posture invokes the court's jurisdiction by filing either a "Motion for Review of Jeopardy Assessment" or a "Motion for Review of Jeopardy Levy." If the Tax Court determines that it lacks jurisdiction to hear the taxpayer's motion because its deficiency jurisdiction has not been previously invoked for a tax and year that serves as the subject of the jeopardy assessment or levy, the court will transfer the civil action to the appropriate Federal district court. *See* I.R.C. § 7429(e)(2).

[440] I.R.C. § 7429(b)(2).

circumstances and, with respect to assessments, whether the amount assessed is appropriate under the circumstances.[441] In such proceedings, the Government has the burden of proving that the making of the assessment is reasonable,[442] and the taxpayer has the burden of proving that the amount of the assessment is unreasonable.[443] In this regard, the Government is required to provide a written statement containing any information relating to its determination of the amount assessed.[444] The standard by which "reasonableness" in this setting must be determined is unavoidably imprecise. However, the Tax Court has articulated certain parameters for evaluating this standard, explaining that reasonableness must be established by a standard of proof that is something more than "not arbitrary or capricious" but something less than "substantial evidence."[445]

In determining whether the assessment is appropriate, the court is not expected to pass on ultimate tax liability; the determination of the propriety of the assessment will have no effect on the determination of correct tax liability in a subsequent proceeding.[446] Accordingly, the Tax Court's jurisdiction to make a determination under § 7429(b) has no effect on the determination of the tax liability that serves as the subject of the underlying deficiency proceeding.[447]

If the court finds in favor of the taxpayer, it may order the Secretary to release the levy, to abate the assessment, or to redetermine the amount assessed.[448] In addition, the court is provided broad authority to "take such further action as the court finds appropriate."[449] The court's determination in this setting is final; no appellate review is permitted.[450]

Judicial review under § 7429(b) is not open ended. Rather, the taxpayer may commence a judicial proceeding to review a jeopardy assessment or levy only within the following window: the *earlier* of (1) 90 days after the Service notifies the taxpayer of its determination concerning its administrative review of the assessment or levy, or (2) the 16th day after the

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441 I.R.C. § 7429(b)(3).

442 I.R.C. § 7429(g)(1). If the Service fails to file a timely response to the taxpayer's motion seeking judicial review, the court may shift this burden of proof to the Service as a sanction for the delay. *See* Gaw v. Commissioner, T.C. Memo. 1995-373, 70 T.C.M. (CCH) 336.

443 I.R.C. § 7429(g)(2).

444 *Id.*

445 McWilliams v. Commissioner, 103 T.C. 416, 422 (1994) (citations omitted).

446 I.R.C. § 7429(b)(2)(A)–(B); *see also* S. REP. NO. 94-938, at 365 (1976).

447 *See* Gaw v. Commissioner, T.C. Memo. 1995-373, 70 T.C.M. (CCH) 336, 337 ("A section 7429 review is a summary proceeding; we are not determining the taxpayer's correct tax liability.").

448 I.R.C. § 7429(b)(4).

449 *Id.*

450 I.R.C. § 7429(f).

taxpayer requested the administrative review be undertaken.[451] These filing requirements are central to the subject matter jurisdiction of the court, and they may not be waived—even with the consent of the Service.[452] Hence, the failure of the Service to promptly respond to the taxpayer's request for an administrative review of the jeopardy assessment or levy does not serve to extend the period for judicial review of the matter.[453]

With the exception of the provisions supplying judicial review of the propriety of a jeopardy assessment, the procedures established in 1926 have remained essentially unchanged.[454] However, various jurisdictional questions have arisen, particularly with respect to the procedural regularity of the assessment and its relation to the notice of deficiency and Tax Court proceedings. A prerequisite for the making of a jeopardy assessment is a final determination that a deficiency exists.[455] If such determination is not made, the assessment is a nullity and may be enjoined by a district court.[456] The application of this doctrine in the Tax Court, however, is problematic. Since a jurisdictional prerequisite to review by the Tax Court is the sending of a deficiency notice, the taxpayer will not be in a position to request that the Tax Court invalidate an assessment until he is in receipt of a deficiency notice based on that assessment.[457] If a final determination is made subsequent to the jeopardy assessment but prior to the issuance of the deficiency notice, the assessment may be held invalid, but the deficiency notice will stand independent of the assessment and the taxpayer will be subject to a court determination of the deficiency.[458] In the event the court finds the assessment improper, the Commissioner is empowered to make a new assessment, so the net effect will be a continuation of the old assessment.[459]

Assuming that the jeopardy assessment is based upon a final determination of deficiency, such assessment can be made prior to the institution of regular deficiency procedures.[460] In such event, the Code requires the mailing of a deficiency notice within 60 days after

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[451] I.R.C. § 7429(b)(1).

[452] *See* Green v. Commissioner, 121 T.C. 301 (2003).

[453] *See id.* at 307 ("We do not interpret section 7429(b)(1) to allow for the filing of a civil action 90 days from the date of respondent's administrative determination in this case.").

[454] *Compare* Revenue Act of 1926, ch. 27, §§ 274, 279, 44 Stat. 5559 *with* I.R.C. §§ 6861, 6863.

[455] I.R.C. § 6861(a).

[456] *See* United States v. Bonaguro, 294 F. Supp. 750 (E.D.N.Y. 1968).

[457] *See* I.R.C. §§ 6211–6213, 6851, 6861.

[458] *See* Teitelbaum v. Commissioner, 40 T.C. 223, 226–27 (1963).

[459] I.R.C. § 6861(a); *see also* Berry v. Commissioner, 11 T.C.M. (CCH) 301, 314 (1952).

[460] I.R.C. § 6861(b).

assessment.[461] If the deficiency notice is not mailed, the assessment is a nullity and the taxpayer may sue in a district court to enjoin collection.[462] Obviously, the failure to send a deficiency notice will block any appeal to the Tax Court.[463] If the deficiency notice is sent subsequent to the 60-day period, the assessment may be invalid, but the deficiency notice will be valid, and such notice provides the necessary prerequisite for ordinary deficiency jurisdiction.[464]

Jurisdictional questions also may arise with respect to the use of jeopardy assessments near the time that the period of limitations on assessment and collection is about to expire. If the assessment is made within 60 days of the date on which the period of limitations runs, and the deficiency notice thereupon is not mailed until after the period has expired but prior to the expiration of 60 days from the date of assessment, the assessment is valid and the Tax Court will have jurisdiction to redetermine the deficiency.[465] If the assessment is made within 60 days of the date on which the period of limitations expires and the deficiency notice is not mailed until after the period has expired and after 60 days from the date of the assessment, the assessment is invalid. Because the period of limitations has expired, judgment must be entered for the taxpayer.[466]

The jeopardy assessment also may be made subsequent to the sending of a deficiency notice.[467] In that event, the Code provides that the assessment may be for a greater or lesser amount than the original deficiency notice.[468] If the jeopardy assessment is greater in amount than the original deficiency on which it is based, the second deficiency notice, required to be mailed within 60 days of the assessment, cannot exceed the amount stated in the original deficiency notice, provided the taxpayer already has petitioned the Tax Court for a redetermination of the original deficiency.[469] Any increase in the deficiency that the Commissioner wishes to assert must be made at the hearing before the court.[470] This approach

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[461] *Id.*; Treas. Reg. § 301.6861-l (c).

[462] Laing v. United States, 423 U.S. 161 (1976); Harris v. United States, 412 F. Supp. 24 (E.D. Mich. 1976); Williams v. United States, 373 F. Supp. 71 (D. Nev. 1973).

[463] *See* Mason v. Commissioner, 210 F.2d 388 (5th Cir. 1954).

[464] Teitelbaum v. Commissioner, 40 T.C. 223, 226–27 (1963).

[465] *See* Brown-Wheeler Co. v. Commissioner, 21 B.T.A. 755 (1930); American Felt Co. v. Commissioner, 18 B.T.A. 509 (1929).

[466] *E.g.*, Cornwell v. Commissioner, 15 B.T.A. 1309 (1929); Reese v. Commissioner, 15 B.T.A. 1261 (1929).

[467] I.R.C. § 6861(c).

[468] *Id.*

[469] I.R.C. §§ 6212(c), 6214(a).

[470] *Id.*

appropriately places the burden of proof in respect to the additional deficiency on the Government.[471]

If the jeopardy assessment is made subsequent to the decision of the court, the assessment cannot be for an amount greater than the determination of the court.[472] Had the Government asserted a jeopardy assessment prior to the court's decision, the Government would have been required to abate its jeopardy assessment to the amount of deficiency finally determined.[473]

If the decision of the Tax Court has become final, either by the passage of 90 days from the date of decision or by exhaustion of appeal rights, a jeopardy assessment will not be permitted.[474] Since immediate assessment is permissible, there is no need for a jeopardy provision to insure revenue collection.[475] Similarly, no jeopardy assessment may be made during the pendency of an appeal from a Tax Court decision.[476] Rather, in such instances, the taxpayer must file a bond securing payment of the ultimate liability to forestall assessment and collection of a deficiency determined by the court.[477]

2. Termination Assessments

The termination provision first appeared in the Revenue Act of 1918.[478] It permitted the Bureau to terminate a taxpayer's current tax year before its completion and to declare taxes, for the abbreviated period, immediately due and payable. Similarly, such an assessment could be made for any preceding year for which a return was not yet due. To make such a determination, the Bureau had to conclude that there existed certain prejudicial activity by the taxpayer that threatened the future collectability of taxes.[479] The termination provision did not specifically authorize the Commissioner to assess the taxes for the terminated year. Rather, assessment authority was derived from the general assessment provision, which applied to both terminated and normal tax years.[480] In the event of

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471 TAX CT. R. 142 (July 6, 2012 ed.). For an analysis of the burden of proof in respect of increased deficiencies asserted at trial, *see* Part X.C.3.

472 I.R.C. § 6861(d).

473 I.R.C. § 6861(f).

474 I.R.C. § 6861(e).

475 I.R.C. § 6213(a).

476 I.R.C. § 6861(e).

477 I.R.C. § 7485; TAX CT. R. 192 (July 6, 2012 ed.).

478 Revenue Act of 1918, ch. 18, § 250(g), 40 Stat. 1084 (now codified at I.R.C. § 6851).

479 *Id.*

480 Revenue Act of 1918, ch. 18, § 3176, 40 Stat. 1147 (now codified at I.R.C. § 6201).

an assessment, the taxpayer was required to pay the tax and institute refund procedures if the taxpayer believed that such assessment was erroneous.[481] No pre-assessment review was available in the case of a normal or terminated tax year assessment.[482]

The termination provision continued unchanged through the Revenue Acts of 1921, 1924, and 1926,[483] which effected major changes in taxpayer pre-assessment remedies and in jeopardy assessments.[484] The termination provision was theoretically similar to the jeopardy assessment, but no cross-reference between the statutes existed.[485] If the termination taxes were to be assessed within the jeopardy assessment provision, then the Board, by virtue of the requirement that a deficiency notice be mailed within 60 days of assessment, could have jurisdiction to review the termination determination. If such provision did not apply, Board review would be precluded, and the taxpayer would be forced to pursue available refund remedies. In determining whether the jeopardy assessment provision applied, a threshold question had to be answered: Were the taxes due upon a terminated tax year the equivalent of a deficiency?[486] If the taxes were a deficiency, the jeopardy assessment provision would apply. If the taxes were not a deficiency, then the jeopardy assessment provision, which required the determination of a deficiency as a necessary prerequisite for the making of an assessment, was inapplicable.[487]

Little if any use of the termination provision was made immediately subsequent to the enactment of the 1926 legislation.[488] As a result, the Board and other courts were not confronted with this issue until 1938.[489] In *Ludwig Littauer & Co. v. Commissioner,*[490] the taxpayer had received a

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[481] Revenue Act of 1918, ch. 18, § 250(b), 40 Stat. 1083.

[482] *See* Part I.B.2.

[483] *Compare* Revenue Act of 1921, ch. 136, § 250(g), 42 Stat. 266 *with* Revenue Act of 1924, ch. 234, § 282, 43 Stat. 302 *and* Revenue Act of 1926, ch. 27, § 285, 44 Stat. 68.

[484] *Compare* Revenue Act of 1921, ch. 138, § 250(d), 42 Stat. 265 *with* Revenue Act of 1924, ch. 234, §§ 279, 400, 43 Stat. 300, 316 *and* Revenue Act of 1926, ch. 27, §§ 274, 279, 1000, 44 Stat. 55, 59, 109.

[485] *See*, *e.g.*, Revenue Act of 1924, ch. 234, §§ 274(d), 282, 43 Stat. 297, 302; Revenue Act of 1926, ch. 27, §§ 274, 279, 285, 44 Stat. 55, 59, 68; *see also* H.R. REP. NO. 68-179 (1924); S. REP. NO. 68-398 (1924); H.R. REP. NO. 68-844 (1925); S. REP. NO. 69-52 (1926); H.R. REP. NO. 69-356 (1926).

[486] *See* I.R.C. § 6211.

[487] Revenue Act of 1926, ch. 27, §§ 274(a), 279, 282, 44 Stat. 55, 59, 68.

[488] *See* Schreck v. United States, 301 F. Supp. 1265, 1276 (D. Md. 1969); Thomas L. Kummer, *Code Section 6851 – "Termination of Taxable Year" – Application and Function Within the Internal Revenue Code of 1954,* 9 WAKE FOREST L. REV. 381, 382 (1973).

[489] 37 B.T.A. 840 (1939).

[490] *Id.*

notice of termination and demand for the payment of taxes. The taxpayer immediately appealed to the Board, basing jurisdiction on the notice of termination, which the taxpayer believed to be equivalent to a deficiency notice. The Commissioner moved to dismiss the petition for lack of jurisdiction.[491] The Board recognized that both the termination provision and the jeopardy assessment provision were concerned with the collection of jeopardized revenues. However, the Board viewed the termination situation "as presupposing a more exigent situation of jeopardy" than that governed by the jeopardy assessment provision.[492] In the absence of an explicit statutory mandate, the Board concluded that the taxes due upon a termination were not the equivalent of a deficiency and that, therefore, the deficiency notice procedure did not apply.[493] Without the necessity of a deficiency notice, the jeopardy assessment provision, with its Board review and procedural safeguards, was inapplicable. Implicit in the Board's opinion was the belief that the termination provision itself provided the basis for assessment.[494] The decision in *Littauer* was reaffirmed by the Tax Court in 1951 in *Puritan Church–The Church of America v. Commissioner*.[495]

Use of the termination provision in the 30 years subsequent to *Littauer* was infrequent.[496] In fact, by 1969, there existed only seven reported cases dealing with the termination provision.[497] In most of these cases, the question presented to the Board in *Littauer* was not at issue.[498] In that year, however, major changes were foreshadowed by the decision in *Schreck v. United States*.[499] Unlike the situation in *Littauer*, in which the taxpayer sought redetermination of a "deficiency" before the Board, the taxpayer in *Schreck* requested a district court to enjoin collection of a termination assessment because of the Service's failure to provide a deficiency notice under the jeopardy assessment provision.[500] Emphasizing the clear congressional

[491] *Id.* at 840.

[492] *Id.* at 841.

[493] *Id.* at 842.

[494] *Id.*

[495] 10 T.C.M. (CCH) 485, 494 (1951), *aff'd per curiam*, 209 F.2d 306 (1953).

[496] *See* Schreck v. United States, 301 F. Supp. 1265, 1276 (D. Md. 1969).

[497] United States v. Rochelle, 384 F.2d 748 (5th Cir. 1967); Carlo v. United States, 286 F.2d 841 (2d Cir. 1961); Rogan v. Mertens, 153 F.2d 937 (9th Cir. 1946); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966); Fancher v. United States, 10 A.F.T.R.2d 5925 (D.S.D. 1962); United States v. Johansson, 8 A.F.T.R.2d 6001 (S.D. Fla. 1961), *aff'd in part and rem'd in part*, 336 F.2d 809 (5th Cir. 1964); Puritan Church–The Church of America, 10 T.C.M. (CCH) 485 (1951), *aff'd per curiam*, 209 F.2d 306 (D.C. Cir. 1953).

[498] *E.g.,* Rogan v. Mertens, 153 F.2d 937 (9th Cir. 1946) (taxpayers voluntarily paid the termination assessment and merely sued for a refund).

[499] 301 F. Supp. 1265 (D. Md. 1969).

[500] *Id.* at 1267. If the Commissioner follows the procedures established under normal deficiency or jeopardy situations, no injunction against assessment or

policy of providing the normal taxpayer with an opportunity to litigate prior to assessment, and providing the jeopardy taxpayer with substantial procedural safeguards, as well as an opportunity for Tax Court review, the court concluded that the power to assess a termination deficiency arose under the general jeopardy provision.[501] Accordingly, collection was enjoined.[502]

Shortly after the taxpayer victory in *Schreck*, the Internal Revenue Service instituted a program to disrupt the distribution of narcotics through the rigorous enforcement of all available tax statutes.[503] As part of this program, the Service made expanded use of the termination provision.[504] Under this procedure, the Service was able to effectively tie up a taxpayer's assets for many months.[505] In addition, a taxpayer subject to a termination assessment had to pay the assessment to prevent seizure of assets in the collection process. Unlike the situation with respect to jeopardy assessments, the Government was able to sell the seized assets prior to any judicial determination of the liability for the terminated tax period.[506]

The increased use of the termination provision in combating the narcotics trade led to a large number of taxpayer challenges to the

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collection may be instituted. I.R.C. § 7421. If the Commissioner fails to send a deficiency notice within 60 days of making a jeopardy assessment, the prohibition against injunctive relief is not applicable. I.R.C. §§ 6213(a), 686l(b).

[501] 301 F. Supp. at 1280. The court was particularly concerned over the lack of safeguards for seized property under a § 6851 termination; the slowness of refund procedures; the lack of review of the propriety of the termination; and the lack of the power to abate the termination. *Id.* at 1279–81.

[502] *Id.* at 1284. The court, in enjoining collection, held that the termination taxpayer was entitled to a deficiency notice when his tax year was terminated pursuant to the termination provision. *Id.* The court, in examining the legislative development of the termination and jeopardy provision, rejected the Government's argument that the termination provision provided independent assessment authority. *Id.* at 1271.

[503] *See generally* Silver, *supra* note 369; Thomas L. Kummer, Comment, *Code Section 6851 — "Termination of Taxable Year" — Application and Function Within the Internal Revenue Code of 1954,* 9 WAKE FOREST L. REV. 381, 382 (1973); Note, *Jeopardy Terminations Under Section 6851*, 60 IOWA L. REV. 644, 645 (1975); John McQuagge Fite, *Narcotic Offenders and the Internal Revenue Code: Sheathing the Section 6851 Sword*, 28 VAND. L. REV. 363 (1975).

[504] *See* Silver, *supra* note 369.

[505] *See supra* note 503.

[506] Prior to the amendments of § 6851 in 1976, assets seized by the Service were subject to immediate sale. I.R.C. § 6851(a) (prior to amendment by Tax Reform Act of 1976, Pub. L. No. 94-455, § 1201(b)(1), 90 Stat. 1525, 1696).

termination procedures employed by the Commissioner.[507] Following the approach taken by the taxpayer in *Schreck,* these challenges took the form of suits in district court to enjoin collection.[508] Since such relief was available in situations in which the Commissioner was required to send a deficiency notice but had failed to do so,[509] the question whether a termination tax was a deficiency arose once again. The proliferating litigation brought forth a variety of arguments on both sides of the question, as well as a divergence of judicial opinions.[510] The Supreme Court resolved these differences through its 1976 decision in *Laing v. United States*.[511] The Court held that the tax due upon a terminated tax year constituted a deficiency. Accordingly, the tax was assessable under the jeopardy assessment provisions and subject to Tax Court review.[512]

The language of the statute defining a deficiency, the Court concluded, did not limit a deficiency to the completion of a normal tax year.[513] Rather, a deficiency could arise whenever a tax year was terminated and the tax was declared due.[514] Termination brought the tax year to a close and was the equivalent, for all practical purposes, of the end of a normal tax year.[515] The taxpayer was required to file a return upon termination,[516] and in the absence of a return, the tax declared due was a deficiency.[517] The termination deficiency, being a tax in jeopardy, was assessable under the jeopardy assessment provision. The Court found further support for this conclusion in the absence of any legislative history indicating that Congress intended harsher treatment for taxpayers subject to termination assessments than for those subject to jeopardy assessments.[518]

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[507] *See*, *e.g.*, Laing v. United States, 364 F. Supp. 469 (D. Vt. 1973), *aff'd*, 496 F.2d 853 (2d Cir. 1974); Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex. 1972), *aff'd*, 501 F.2d 108 (5th Cir. 1974).

[508] *See supra* note 507. Because the Tax Court took the position with respect to termination assessments that the notice of termination did not amount to a deficiency notice, jurisdiction before the court could not be invoked. *See* Jones v. Commissioner, 62 T.C. 1 (1974).

[509] I.R.C. § 6213(a).

[510] *See*, *e.g.*, Laing v. United States, 496 F.2d 853 (2d Cir. 1974); Hall v. United States, 493 F.2d 1211 (6th Cir. 1974); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974); Irving v. Gray, 479 F.2d 20 (2d Cir. 1973).

[511] 423 U.S. 161 (1976).

[512] *Id.* at 183–84.

[513] *Id.* at 175.

[514] *Id.*

[515] *Id.*; *see also* Sanzoqano v. Commissioner, 60 T.C. 321 (1973).

[516] I.R.C. § 443(a). If the taxpayer failed to file a return, the Service would prepare a return for the taxpayer pursuant to § 6020(a).

[517] 423 U.S. at 175.

[518] *Id.* at 183.

Increased utilization of termination assessments in combating narcotics traffic and the resulting divergent judicial views on this trend had focused congressional attention on the inadequacies of the termination procedure.[519] As a result, and prior to the Supreme Court decision in *Laing*, the Ways and Means Committee approved legislation to provide an expedited judicial review of the propriety of a termination assessment (as opposed to the accuracy of the amount assessed) and to prevent the Internal Revenue Service from selling any seized property before or during the pendency of such review.[520] The Committee believed that such expedited review would be more appropriate than a requirement that the taxpayer receive a deficiency notice because, under the latter requirement, the Tax Court might have to make multiple determinations for a single year.[521] Such difficulties would arise in situations in which the taxpayer received income subsequent to a termination, since, under existing law, the Service was not permitted to reopen a taxable year until its normal end.[522] Additionally, with the provision for expedited review of the propriety of the termination, the judicial remedy in the refund procedure was viewed as adequate.[523]

After the bill had passed the House and while it was before the Senate Finance Committee, the Supreme Court in *Laing* held that following a termination assessment, the Service had to send a deficiency notice within 60 days and follow the procedures specified for jeopardy assessments.[524] The Senate Finance Committee was disturbed by the implications of *Laing*,[525] believing the case would create the procedural difficulties that the House had attempted to avoid.[526] In addition, the requirement of multiple short tax years could create serious administrative problems for the Service and could result in detriment to taxpayers whose income tax liability might be greater because of the multiple years.[527] Nevertheless, although the Finance Committee subscribed to the general objectives of the House bill, it did not completely agree with its mechanics.[528] Thus, the bill made certain changes in the operation of the expedited review procedure.[529] In addition, it was deemed necessary to amend the termination provision if the *Laing*

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519 *See* H.R. REP. NO. 94-658, at 302 (1975); S. REP. NO. 94-938, at 362 (1976).

520 H.R. REP. NO. 94-658, at 303 (1975). The procedure was to be applicable to both jeopardy and termination assessments. *Id.*

521 H.R. REP. NO. 94-658, at 303 (1975).

522 *Id.* at 304.

523 I.R.C. § 7422.

524 423 U.S. 161 (1976).

525 S. REP. NO. 94-938, at 366 (1976).

526 *Id.*

527 *Id.* at 366–67.

528 *Id.* at 366.

529 *Id.* *See infra* notes 530–538 and accompanying text for a discussion of those changes.

decision was not to be followed.[530] In accordance with the Committee's version of the bill,[531] the Senate amended the termination provision to provide independent assessment authority.[532] Second, it was provided that the making of a termination assessment did not terminate a taxable year, create a deficiency, or require the Service to issue a notice of deficiency within 60 days of assessment.[533] Third, the statutory language relating to the reopening of a taxable year was eliminated.[534] Thus, the taxable year would continue until its normal end.[535] These changes apparently were intended to have the effect of treating amounts assessed and collected in a manner similar to estimated taxes.[536]

The Senate, however, decided to allow a taxpayer who had been subject to a termination assessment to contest the ultimate issue of tax liability in the Tax Court at the end of his normal tax year.[537] Thus, under the Senate bill, the Service would have been required to send the taxpayer a notice of deficiency within 60 days of the due date of a tax return for the full year or the date on which the return was filed.[538] The Senate amendments to the House bill were accepted in conference[539] and were subsequently enacted as part of the Tax Reform Act of 1976.[540]

Because the procedures governing termination assessments have been brought into line with those governing jeopardy assessments, these assessment procedures are subject to the same regime of judicial review. Hence, the Tax Court theoretically possesses concurrent jurisdiction with the Federal district courts to review the propriety of the termination assessment as well as the amount so assessed pursuant to § 7429(b)(2)(B).[541] However, because the Tax Court's jurisdiction in this setting is predicated upon a petition for redetermination having been filed before the termination assessment, the court's jurisdiction likely constitutes a null set. A termination assessment applies only to the current or preceding taxable

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[530] S. REP. NO. 94-938, at 367 (1976).

[531] *Id.* at 366–67.

[532] I.R.C. § 6851(a).

[533] *Id.*

[534] *Id.*

[535] S. REP. NO. 94-938, at 367 (1976).

[536] *Id.*

[537] *Id.*

[538] I.R.C. § 6851(b).

[539] H.R. REP. NO. 94-1515, at 485 (1976).

[540] Tax Reform Act of 1976, Pub. L. No. 94-455, § 1204(b)(1)–(2), (d), 90 Stat. 1696–99.

[541] Note that § 7429(b)(2)(B) refers to judicial review of an assessment or levy that is subject to the review procedures of § 7429 in general, which includes termination assessments under § 6851.

year,[542] and the Service is required to mail the notice of deficiency for the full taxable year within 60 days of the later of the due date of the taxpayer's return for such year or the date on which the return for such year was filed.[543] Hence, the mailing of the notice of deficiency in this setting therefore will *follow* the making of the termination assessment, negating the condition to the Tax Court's jurisdiction. The Tax Court's rules envision jeopardy assessments alone; the rules do not address the court's review of a termination assessment.[544]

3. Review of Proposed Sale of Property Obtained Through Jeopardy or Termination Assessment

If the Service makes a jeopardy or termination assessment of tax under § 6851 (termination assessment), § 6852 (termination assessment based on political expenditures of § 501(c)(3) organizations), or § 6861 (jeopardy assessment) in advance of the issuance of a statutory notice of deficiency, the Service is prohibited from selling property seized in connection with the assessment until a notice of deficiency for the assessed tax is issued and the period for filing a petition for redetermination with the Tax Court expires.[545] If the taxpayer files a petition with the court, the prohibition on the sale of seized property is extended until the decision of the court becomes final.[546] In this manner, sale of property obtained in connection with a jeopardy or termination assessment generally is stayed during the period during which assessment would have been prohibited under the normal procedures. However, exceptions exist to the prohibition on sale. Pursuant to § 6863(b), the Service may sell the seized property during this period if the taxpayer consents to the sale, if the Service determines that the cost of conserving and maintaining the property will greatly reduce the proceeds of the sale, or if the property is perishable or otherwise likely to greatly decline in value if kept on hand.[547]

Prior to 1989, a taxpayer who sought to challenge the Service's determination that property seized in connection with a jeopardy or

542 I.R.C. § 6851(a).

543 I.R.C. § 6851(b),

544 *See* TAX CT. R. 56 (July 6, 2012 ed.).

545 *See* I.R.C. § 6863(b)(3)(A)(ii). In the context of a jeopardy assessment, the Service must issue the notice of deficiency within 60 days of the assessment. I.R.C. § 6861(b). In the context of a termination assessment, the Service must issue the notice of deficiency within 60 days of the due date of the return for the year to which the assessment relates or the date on which the taxpayer files such return, whichever occurs later. I.R.C. § 6851(b).

546 *See* I.R.C. § 6863(b)(3)(A)(iii).

547 *See* I.R.C. § 6863(b)(3)(B) (incorporating in part property described in § 6336).

termination assessment could be sold pursuant to one of the § 6863(b) exceptions was forced to seek redress in Federal district court.[548] This was the case even though the underlying tax liability was pending before the Tax Court.[549] Additionally, the prospect of obtaining relief through the district courts was complicated by the § 7421 prohibition on suits to restrain the assessment or collection of tax.[550] Recognizing the difficulties that taxpayers faced in this context and believing that both taxpayers and the Service would benefit from the availability of an additional forum for review,[551] Congress supplied an avenue for Tax Court review of § 6863(b)(3)(B) determinations as part of the Technical and Miscellaneous Revenue Act of 1988.[552] Through the enactment of § 6863(b)(3)(C), Congress provided the Tax Court with jurisdiction to review the Commissioner's determination that property seized in a jeopardy or termination assessment could be sold pursuant to the exceptions contained in § 6863(b)(3)(B), provided the Tax Court's jurisdiction to review the underlying tax liability giving rise to the jeopardy or termination assessment had already been properly invoked.

The statutory guidance on the Tax Court's jurisdiction in this setting is scant. Interestingly, the statute provides that either party—the taxpayer or the Service—may invoke the court's jurisdiction to review the Service's determination that a sale of seized property is permitted under § 6863(b)(3)(B).[553] Hence, in addition to providing an avenue for taxpayers to stay a sale of seized property, § 6863(b)(3)(C) provides the Service with a means of seeking judicial approval of its determination that an exception permitting the sale is available. Apart from this point, the statute merely provides that an order disposing of a motion under § 6863(b)(3)(C) shall be reviewed in the same manner as a decision of the Tax Court.[554] In this manner, Congress left the finer points of the Tax Court's jurisdiction in this setting to be resolved by the court itself.

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[548] *See* Miravalle v. Commissioner, 105 T.C. 65, 68–69 (1995). If disinclined to contest the Service's determination, taxpayers could stay the sale of seized property by posting bond pursuant to § 6863(a).

[549] *See id.*

[550] *See, e.g.,* Smith v. Flinn, 261 F.2d 781 (8th Cir. 1958), *modified and reh'g denied*, 264 F.2d 523 (8th Cir. 1959); Zion Coptic Church v. United States, 489 F. Supp. 35 (S.D. Fla. 1980).

[551] S. REP. NO. 100-309, at 17–18 (1988).

[552] Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, §§ 6226, 6245(a), 102 Stat. 3730, 3750–51 (adding subsection (b)(3)(C) to § 6863 as part of the Omnibus Taxpayer Bill of Rights). The Tax Court's jurisdiction to stay sales of seized property under § 6863(b)(3)(C) took effect on February 8, 1989, 90 days after the date of the enactment of the legislation. *Id.* § 6245(b), 102 Stat. 3752.

[553] I.R.C. § 6863(b)(3)(C).

[554] *Id.*

The Tax Court's first opportunity to explore the bounds of its jurisdiction under § 6863(b)(3)(C) came shortly after the effective date of the provision in the 1989 case of *Williams v. Commissioner*.[555] Through a reviewed opinion without dissent, the court in *Williams* tackled a number of issues not directly addressed by the statute. To start, the court interpreted review of the Service's determination under § 6863(b)(3)(B) as including the authority to issue a temporary stay of the sale if appropriate.[556] Finding that courts possess inherent authority to issue orders deemed necessary and prudent to the proper resolution of cases within their jurisdiction, the court reasoned that the ability to stay a proposed sale temporarily—to allow the parties to present evidence and submit written arguments—was essential to the Tax Court's exercise of authority to review the determination that a sale was permitted.[557] The *Williams* court's articulation of authority inherent in its jurisdiction to review a § 6863(b)(3)(B) determination is currently reflected in Rule 57 of the Tax Court Rules of Practice and Procedure, which permits the court to issue a temporary stay of the sale to provide adequate time to consider the motion, to stay the sale for a specific period or until a specific date, to stay the sale until appropriate safeguards are implemented, and to provide "such other temporary, extended, or permanent relief as may be appropriate under the circumstances."[558]

The court in *Williams* next addressed three issues of critical practical importance in the disposition of motions seeking review of § 6863(b)(3)(B) determinations: the allocation of the burden of proof in this setting; the standard of review to be employed by the court in reviewing the Commissioner's determination; and the scope of evidence the court may consider as part of its review. Contrasting this scenario to that of the deficiency setting (where the taxpayer possesses knowledge of the information on which the tax liability rests), the court noted that the Commissioner occupied the dominant position in this setting. Among other factors, the court noted that the Commissioner maintains physical possession or control of the seized property, initiates the sale of the property, and determines the scheduling and condition of sale. The taxpayer, on the other hand, may have little time to develop evidence to support his position.[559] As a result of these unique factors, the court reasoned that if a taxpayer requests a stay of a proposed sale on grounds

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[555] 92 T.C. 920 (1989), *action on dec.,* 1992-07 (Dec. 16, 1991), *nonacq.,* 1991-2 C.B. 1 n.7.

[556] *Id.* at 932.

[557] *Id.*

[558] TAX CT. R. 57(g)(1)(A) (July 6, 2012 ed.). However, the Tax Court in *Williams* was careful to warn taxpayers that temporary stays could not be expected as a matter of right. *See Williams*, 92 T.C. at 933 ("Temporary stays will not be granted automatically. We will be selective as warranted by the circumstances.").

[559] *Id.* at 934–35.

that are "plausible and believable," the Commissioner bears the burden of proving that the determination to sell the seized property was proper by a preponderance of the evidence.[560]

With respect to the standard of review to be employed in reviewing the Commissioner's determination that a sale of the seized property is permitted under § 6863(b)(3)(B), the Tax Court in *Williams* dismissed the contention that it could take action only upon finding that the Commissioner's determination rose to the level of an abuse of discretion.[561] The court supported its holding by pointing to the objective standards set out by Congress in § 6863(b)(3), standards that provided the Commissioner little in the way of discretion.[562] Although the court in *Williams* did not explicitly make this point, presumably the court's review of a § 6863(b)(3)(B) determination is undertaken on a de novo basis.[563]

As a final matter, the court in *Williams* addressed the appropriate scope of review. Noting that nothing in the statute serves to limit the range of evidence the court may consider in undertaking its review of the Commissioner's determination in this setting, the court curtly held that it could consider all affidavits, appraisals, and other appropriate information.[564] Hence, the court's review in this setting is not limited to the evidence contained in the administrative record. This broad scope of review is now reflected in Rule 57.[565]

The potential time-sensitive nature of the Tax Court's review of a § 6863(b)(3)(B) determination necessitates prompt action by the parties if the court is to have a meaningful opportunity to conduct its review. Section 6863(b)(3)(C) is silent on temporal requirements and other procedural matters in this context. As described below, Rule 57 fills this gap.

The Tax Court's jurisdiction in this regard is commenced by filing a motion in the underlying deficiency proceeding. The Commissioner may

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[560] *Id.* at 935.

[561] *Id.* at 936.

[562] *Id.* at 937.

[563] The Service has since reaffirmed its position that the appropriate standard of review in this context is one of abuse of discretion. Accordingly, the Service contends that a taxpayer requesting a stay of the sale of seized property carries the burden of proving that the Service abused its discretion in determining that the sale is authorized pursuant to § 6863(b)(3)(B). I.R.S. Action on Decision 1992-07 (Dec. 16, 1991).

[564] *Williams*, 92 T.C. at 937.

[565] *See* TAX CT. R. 57(g)(2) (July 6, 2012 ed.) ("[T]he Court may consider such appraisals, affidavits, valuation reports, and other evidence as may be appropriate, giving due regard to the necessity of acting on the motion within a brief period of time.").

file at any time if a date for the proposed sale has not been scheduled.[566] If a date for the proposed sale has been scheduled, the movant must file within a prescribed period of no less than 15 days before the date of the proposed sale and no more than 20 days after receiving the § 6335(b) notice of sale.[567] If the motion is filed outside of the prescribed period, it will be considered dilatory unless the movant shows good reason for not filing within the period.[568] To discourage gamesmanship attributable to the intentional delay of a motion to review a § 6863(b)(3)(B) determination, Rule 57 makes clear that the dilatory nature of the motion will be taken into consideration in disposing of the motion.[569] On this note, the Tax Court in *Williams* warned that "eleventh-hour filing will not be allowed by the Court . . . absent special circumstances, such as late notice to petitioner."[570] After a motion is filed, the opposing party must respond within a brief 10-day window from the date on which the motion was received by the court.[571]

D. Scope of Judicial Powers

The legal status of the Tax Court has been described extensively in a previous chapter.[572] The Board of Tax Appeals was created in 1924 as an independent agency in the executive branch of the Government.[573] In 1942, its name was changed to the Tax Court of the United States, but its location in the executive branch remained unchanged.[574] Finally, in 1969 the court was removed from the executive branch and made a court of record under article I—a legislative court.[575] Despite the delay of Congress in formally recognizing the court as a judicial body, the Board/Tax Court has throughout its history operated as a court, not an executive agency. It has never rendered advisory opinions, nor has it ever functioned in an administrative, investigative, regulatory, or policymaking capacity.

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566 TAX CT. R. 57(a)(2)(A) (July 6, 2012 ed.).

567 TAX CT. R. 57(a)(2)(B)(i) (July 6, 2012 ed.).

568 TAX CT. R. 57(a)(2)(B)(ii) (July 6, 2012 ed.).

569 TAX CT. R. 57(g)(4); *see also* Williams v. Commissioner, 92 T.C. 920, 932 (1989) ("[L]ast-minute filing effectively prevents orderly review of legal and factual issues raised by the parties unless a temporary stay is issued.").

570 *Williams*, 92 T.C. at 932.

571 TAX CT. R. 57(d)(2).

572 *See* Part IV.

573 Revenue Act of 1924, ch. 234, § 900(a), (k), 43 Stat. 336, 338.

574 Revenue Act of 1942, ch. 619, § 504, 56 Stat. 957.

575 Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (amending I.R.C. § 7441). In its 1991 opinion in *Freytag v. Commissioner*, 501 U.S. 868 (1991), the Supreme Court confirmed that, following the 1969 legislation, the Tax Court is "independent of the Executive and Legislative Branches." *Id.* at 891. The *Freytag* case is discussed in detail in Part V.

Moreover, since 1926, its decisions have been accorded the finality of judicial bodies, with appeals permitted only to the federal courts.[576]

Nevertheless, the functional judicial character of the Board/Tax Court did not mean that all its attributes were judicial. Questions regarding powers that were thought of as inherently judicial were especially troublesome. Could the court enforce its own judgments or hold parties in contempt? As an independent agency of the executive branch, could the court rule on the validity of statutes that the executive branch was charged with enforcing? Did the court have power to grant equitable remedies such as equitable recoupment? The Tax Court's ability to apply equitable principles to matters within its jurisdiction was significantly bolstered by the Supreme Court's decision in *Freytag v. Commissioner*,[577] in which the Court observed that the Tax Court exercises its judicial power "in much of the same ways as federal district courts exercise theirs."[578] In addition to describing legislative developments with respect to equitable recoupment, this section traces the evolving understanding of the Tax Court's broader equitable powers.

1. Enforcement Powers

The legislation creating the Board of Tax Appeals gave it a number of procedural powers, including those permitting it to administer oaths, examine witnesses, take depositions, and require the attendance and testimony of witnesses and the production of evidence.[579] The statute, however, did not give the Board many other important powers typically accorded a judicial body. Foremost among these was the power to render final judgments. Decisions of the Board would be accepted only as prima facie evidence in subsequent judicial proceedings,[580] but neither party was precluded from further de novo litigation as a result of a Board proceeding.[581] Other judicial powers were withheld as well. These included powers to enforce subpoenas,[582] to hold witnesses and others in contempt,[583] to order depositions before an action was instituted,[584] to grant

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576 Revenue Act of 1926, ch. 27, §§ 1001, 1003(a), 1005(a)(1), 44 Stat. 109, 110.

577 501 U.S. 868 (1991).

578 *Id.* at 891. Perhaps even more profoundly, in resolving the Appointments Clause challenge before it, the Supreme Court in *Freytag* declared that the Tax Court exercises "a portion of the judicial power of the United States." *Id.* The *Freytag* decision is analyzed in Part V.

579 Revenue Act of 1924, ch. 234, § 900(i), 43 Stat. 338.

580 *Id.* § 900(g), 43 Stat. 337.

581 Part II, notes 155–158 and accompanying text.

582 *See* 1925 House Hearings, *supra* note 217, at 913 (testimony of James Ivins).

583 *See id.*

relief from final judgments,[585] to utilize the office of the United States Marshall,[586] and to otherwise compel compliance with its rules.[587] Thus, in 1924, although the Board could receive evidence and make findings thereon, it had no power to apply a remedy or enforce either its process or decisions.

The Revenue Act of 1926 significantly expanded the powers of the Board by according finality to its decisions.[588] No longer could Board decisions be reviewed by the Bureau of Internal Revenue or collaterally attacked in the federal courts. Unless a Board decision was appealed directly to the federal courts of appeals, it would bind the parties.[589]

But despite this expansion of Board jurisdiction, no change was made by the 1926 Act with respect to the other disabilities mentioned above. These remained for more than four decades and were a constant irritant to the Board/Tax Court.[590]

The most significant of these disabilities was the Board's lack of power to enforce its own subpoenas through the contempt power. In the 1927 decision in *Blair v. Oesterlein Machine Co.*,[591] the Supreme Court had upheld the Board's power to issue subpoenas. However, enforcement of the subpoena in that case was effected in federal court, not in the Board. This was in accordance with the general understanding that the statute did not permit the Board to compel compliance with its own process.[592] The lack of this power resulted from the Board's exclusion from status as a federal

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[584] Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333 (6th Cir. 1961).

[585] Lasky v. Commissioner, 235 F.2d 97 (9th Cir. 1956), *aff'd per curiam,* 352 U.S. 1027 (1957).

[586] *See* 1967 Hearings, *supra* note 314, at 60 (joint statement of Charles Davis, Rupert Gresham, H. Brian Holland, Hart Spiegel, and Laurens Williams).

[587] *Id.*

[588] Revenue Act of 1926, ch. 27, §§ 1001, 1003(a), 1005(a)(1), 44 Stat. 109, 110.

[589] *See, e.g.,* United States v. Bottenfield, 442 F.2d 1007, 1008 (3d Cir. 1971).

[590] Although for most purposes the Board was without enforcement powers, exceptions did exist. A type of reverse enforcement power was sustained in *MacRae v. Riddell*, 350 F.2d 291 (9th Cir. 1965), in which the Ninth Circuit held that the Tax Court could cancel a subpoena, although it could not independently enforce it. Moreover, since 1926, the Board/Tax Court has had statutory authority to impose damages of up to $500 in cases of appeals brought merely for purposes of delay. Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 109, *amending* Revenue Act of 1924, ch. 234, § 900, 43 Stat. 336 (now codified at I.R.C. § 6673). The damage provision was suggested by James Ivins as a means of reducing the Board's workload by discouraging frivolous appeals. James Ivins, *What Should Congress Do with the Board of Tax Appeals?*, 3 NAT'L INC. TAX MAG. 391, 410 (1925).

[591] 275 U.S. 220.

[592] *See, e.g .,* 1925 House Hearings*, supra* note 217, at 913 (testimony of James Ivins).

court. Had such status been accorded, the contempt power would have existed even without statutory authority because it is a power that is inherent in courts.[593]

Obviously, a procedure that required resort to another tribunal for enforcement was cumbersome, particularly when the matter related to such "housekeeping" concerns as were necessary for the orderly disposition of cases. Of course, the occasions when resort to enforcement powers would be helpful were relatively rare. However, they did occasionally arise, as in the famous *Mellon*[594] case, in which the Union Trust Company of Pittsburgh refused to comply with a Board subpoena, causing a delay of seven months in the proceedings while the Government sought and obtained enforcement in district court.[595] Granting the Board/Tax Court enforcement powers would tend to reduce the delay and inconvenience necessitated by resort to the district courts. Moreover, it could be argued that the mere existence of such powers would stimulate parties to comply with process without compulsion.[596]

In addition to the direct benefits of enforcement powers, there was also the fact that such powers generally are associated with judicial bodies.[597] Most if not all courts had such powers, and their denial to the Board/Tax Court, at least slightly, diminished its judicial attributes.

For these reasons, the Board/Tax Court and those supporting the view that it should be treated as a court, generally referred to its lack of power to enforce subpoenas as something that required legislative change, preferably by full incorporation of the court into the federal judiciary.[598] These views were expressed as early as 1926 and continued to be pressed in connection with legislation dealing with the Board/Tax Court.[599] Nevertheless, it was not until 1969, when the court was established as an article I court, that it was finally given the same enforcement powers as those accorded district

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593 *E.g.*, Michaelson v. United States, 266 U.S. 42, 65–66 (1924).

594 Mellon v. Commissioner, 36 B.T.A. 977 (1937).

595 Memorandum from Chairman Murdock in re Changing from "Board" to "Court" the name of the United States Board of Tax Appeals, Feb. 1942, at 6, filed at the U.S. Tax Court in "Revenue Act of 1942: Memoranda & Correspondence."

596 *Id.* at 7.

597 The contempt power, for example, has long been thought to be an inherent power of courts. *See*, *e.g.,* RONALD L. GOLDFARB, THE CONTEMPT POWER 9–25 (1963).

598 One notable exception to this was Senator Russell Long, who was generally a supporter of measures to enhance the prestige and efficiency of the court. Although Senator Long favored granting the court contempt powers, he opposed its full incorporation into the federal judiciary because that would necessitate the granting of life tenure to its judges. *See* Part IV, notes 15–34, 97–99, 162–168, 275–300 and accompanying text.

599 *Id.*

courts in regard to contempt and the carrying out of its writs and orders.[600] The availability of such powers further enhanced the court's status as a judicial body.

2. Power to Review Constitutionality of Laws

The power to review the constitutionality of congressional acts is frequently thought of as the quintessential judicial function. Since the Board/Tax Court was formally at least a part of the executive branch until 1969,[601] the question could be raised as to its authority to refuse to apply a statute it believed to be unconstitutional. The same question might even be raised now that the court is established under article I.[602]

On the other hand, the Board/Tax Court has never functioned as an administrative or legislative body. Rather, it has always performed solely judicial duties. In the case of other judicial bodies, such duties invariably comprehend the power to refuse to apply a statute that violates the Constitution. In view of the actual nature of the Board/Tax Court, should the theoretical objection to constitutional review by an executive or legislative body preclude it from performing this judicial function? Since the earliest days of the Board, the answer to this question has been a cautious "no."

One would expect that cases involving constitutional questions would be among the first decided by the Board. Actually, however, it would appear that the Board did not face any such questions until a little more than two years after its formation. In that instance the Board, prior to the preparation of an opinion in the case involved, faced the question of whether it could refuse to apply a statute that it was convinced was unconstitutional. By a vote of nine to five, the Board in conference decided that it could, notwithstanding the argument of the minority that an agency of the executive branch could not declare an action of Congress invalid.[603] Ultimately, however, it developed that the Board was premature in considering the question of its power to pass on constitutionality, because when the opinion in the particular case was written there was no necessity of considering the validity of any of the statutes involved.[604]

In the next case in which a constitutional issue was raised, the Board also was able to dispose of the matter without addressing the question of its

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[600] Tax Reform Act of 1969, Pub. L. No. 91-172, § 956, 83 Stat. 732 (adding I.R.C. § 7456(d)). The court first exercised this power in Ryan v. Commissioner, 67 T.C. 212 (1976), *aff'd*, 568 F.2d 531 (7th Cir. 1977).

[601] Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (amending I.R.C. § 7441).

[602] *Id.*

[603] B.T.A. Conference Minutes, Sept. 8, 1926.

[604] Una Libby Kaufman, 5 B.T.A. 31 (1926).

power of review.[605] The case concerned transferee liability under section 280 of the Revenue Act of 1926,[606] which provided that such liability should be assessed, collected, and paid in the same manner as deficiencies in tax. Because the statute under attack by the petitioners was jurisdictional, the Board was able to dispose of the case on the ground that a party could not be heard to attack the validity of a statute invoked by that party to be heard.[607]

Several months later, however, the Board was confronted with a case in which the validity of a tax statute was squarely presented. The case of *Independent Life Ins. Co. of America v. Commissioner*[608] involved the question of whether an income tax could apply to the rental value of property owned and occupied by the taxpayer. Both the Government and the taxpayer urged the Board to consider the constitutionality of the statute[609] (the Government argued in favor of its validity, the taxpayer against), and the Board, over three dissenting members, agreed to make the consideration.[610] Upon examination, the Board concluded that the provision was unconstitutional since rental value was not income within the meaning of the sixteenth amendment. This finding was affirmed in the Sixth Circuit Court of Appeals[611] and reversed in the Supreme Court.[612] Neither appellate court directly passed on the propriety of the Board's action in reviewing the constitutionality of the provision, although the Sixth Circuit mentioned the problem indirectly:

> The court is not concerned with whether the Board of Tax Appeals was authorized to pass upon the constitutionality of these enactments. A decision by us upon that question would not decide this case. We are, however, required to consider and determine whether the decision of the board that respondent had overpaid its income taxes for the years involved was "in accordance with law." In the discharge of this duty the court is called upon to determine for itself whether section 245(b) . . . was a valid enactment. If it was not, the finding of the board, which may be construed as a finding that no additional tax was due, would obviously have been correct,

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[605] Cappellini v. Commissioner, 14 B.T.A. 1269 (1929).

[606] Ch. 27, 44 Stat. 61.

[607] 14 B.T.A. at 1272, *citing inter alia* Great Falls Mfg. Co. v. Attorney General, 124 U.S. 581, 598–99 (1888). *But see* Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636, 637 (5th Cir. 1966).

[608] 17 B.T.A. 757 (1929) *aff'd*, 67 F.2d 470 (6th Cir. 1933), *rev'd,* 292 U.S. 371 (1934).

[609] 17 B.T.A. at 764, 765.

[610] 17 B.T.A. at 765.

[611] 67 F.2d 470 (6th Cir. 1933).

[612] Helvering v. Independent Life Ins. Co. of America, 292 U.S. 371 (1934).

> regardless of the power of the board to pass upon the constitutionality of the act of Congress.[613]

Since the decision in *Independent Life Ins. Co.*, the Board/Tax Court never has refused to consider the question of the validity of statutes involved in cases before it. As with other judicial bodies, however, rules of construction have evolved to limit strictly the cases in which congressional enactments will be held invalid. Thus, if a statute may be interpreted in different manners, an interpretation will be adopted that makes it constitutional in preference to one that makes it unconstitutional.[614] Moreover, a presumption of validity attaches to any congressional act that must be countered by a party seeking to overturn it.[615] Further, a party cannot take advantage of a statute and then be heard to question its validity.[616] Finally, questions of constitutionality must be clearly and specifically raised; a general attack on the validity of a statute will not be entertained.[617] In addition to these rules of construction, which have in some form been adopted by courts in general,[618] the Board, recognizing its status as an agency in the executive branch, fashioned another rule of construction.

> While the Board will consider [the issue of constitutionality] . . . the unconstitutionality of any provision of the tax law must clearly appear before the Board, as part of the executive branch of the Government, would be justified in holding that it should not be enforced. If after consideration there remains a substantial doubt, the law should be followed until the doubt is dispelled by a court decision.[619]

Of course, even as limited, the prospect of an agency of the executive branch reviewing the validity of acts of the legislative branch was troublesome to some, and the Board's early decisions in this regard were

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[613] Commissioner v. Independent Life Ins. Co. of America, 67 F.2d 470, 471 (6th Cir. 1933) (citations omitted), *rev'd on other grounds*, 292 U.S. 371 (1934).

[614] Independent Life Ins. Co. of America, 17 B.T.A. 757, 764 (1929), *aff'd*, 67 F.2d 470 (6th Cir. 1933), *rev'd on other grounds*, 292 U.S. 371 (1934).

[615] *Id.* at 767–68.

[616] Cappellini v. Commissioner, 14 B.T.A. 1269, 1272 (1929).

[617] Dillon v. Commissioner, 20 B.T.A. 690, 691 (1930).

[618] *E.g.*, Fleming v. Nestor, 363 U.S. 603, 617 (1960) (presumption of constitutionality); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1936) (interpretation in favor of constitutionality); Buck v. Kuykendall, 267 U.S. 307, 316–17 (1925) (accepting benefits estops challenge); Stanhurf v. Sipes, 335 F.2d 224, 228–29 (8th Cir. 1964) (pleading of challenge).

[619] *See*, *e.g.,* O'Shaughnessy v. Commissioner, 21 B.T.A. 1046, 1049 (1930).

not unanimous.[620] However, the practice was soon accepted without dissent.

There can be little doubt that the Board/Tax Court's position with regard to its power of constitutional review is correct. Its basic work, determining the correctness of deficiency assertions, cannot be accomplished by simply examining the tax statutes in a vacuum. To properly interpret these statutes, resort must be made to case law, administrative interpretations, and congressional policy as evidenced by legislative history. Examination of these sources is fully consistent with the duties of judicial bodies in general. Moreover, just as a correct evaluation of the merits of a deficiency demands judicial techniques of statutory interpretation, it also requires, in appropriate cases, consideration of whether the law that a party invokes is valid. A deficiency cannot be correct if it is predicated on an invalid statute. That a non-article III tribunal may exercise judicial functions cannot now be questioned, even though the exercise of such functions in a particular instance may result in a decision unfavorable to the executive or legislative branch.[621] Little reason supports circumscribing these functions to encompass only statutory interpretation.

The structure of tax litigation lends further support to the court's power of constitutional review. Since 1926, any party aggrieved by a Board/Tax Court decision has been accorded an absolute right of appeal to the federal courts of appeals, and from there, on certiorari, to the Supreme Court.[622] Regardless of whether the Tax Court may review the constitutionality of legislation, it seems clear that the appellate courts may do so.[623] Thus, the Tax Court will never necessarily be the final arbiter of constitutionality in any particular case. Yet, if the Tax Court was barred from considering such an issue, an adequate trial and factual record might be unavailable to the appellate court, making its decision, as a practical matter, difficult or impossible.

In view of the potent arguments favoring constitutional review in the Tax Court, its unusual status as a non-article III court has not, since the early days of the Board of Tax Appeals, been seriously advanced as a

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620 Independent Life Ins. Co. of America v. Commissioner, 17 B.T.A. 757, 775 (1929) (members Marquette, Morris and Van Fossan, dissenting), *aff'd*, 67 F.2d 470 (6th Cir. 1933), *rev'd on other grounds*, 292 U.S. 371 (1934); Cappellini v. Commissioner, 14 B.T.A. 1269, 1280, 1282 (1929) (members Marquette, Phillips and Siefkin, concurring).

621 *See* Williams v. United States, 289 U.S. 553 (1933); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

622 Revenue Act of 1926, ch. 27, § 1003, 44 Stat. 110 (now codified at I.R.C. § 7482).

623 *See* Commissioner v. Independent Life Ins. Co. of America, 67 F.2d 470, 471 (6th Cir. 1933), *rev'd on other grounds*, 292 U.S. 371 (1934).

justification for limiting its powers in this regard. Since its change in status to a court established under article I, the Tax Court has continued to entertain constitutional objections to the laws without comment on its power to do so as a part of the legislative branch.[624] No appellate decision has ever questioned the practice, and little occasion for such criticism has arisen. On that note, following the decision in *Independent Life Ins. Co.*, the Board/Tax Court has not found any act of Congress to be unconstitutional.

3. Equitable Powers

As with all federal courts other than the Supreme Court, the Tax Court is a statutory creation with a specified jurisdiction.[625] However, because of its status as an article I court and its prior history as an independent agency within the executive branch, there have been some inconsistencies regarding the court's judicial attributes—attributes which other courts need not be specifically granted by statute but which are inherent in judicial status. Thus, for example, as has been pointed out, the Board of Tax Appeals/Tax Court originally was not regarded as having the inherent judicial contempt power[626] but has exercised since its earliest days the power to review the constitutionality of tax laws.[627] This tension between judicial and non-judicial attributes also exists in the area of equitable jurisdiction.

Statutes dealing with the Board of Tax Appeals and the Tax Court have never directly specified whether it could exercise equitable powers as a general proposition. The question has, however, arisen in several contexts. In some instances the request for equitable relief is obviously groundless, as in the case of a taxpayer who urged the court to promulgate an equitable deduction for the cost of home improvements to offset a required inclusion in gross income of a prize awarded on the basis of such improvements.[628] The court has consistently rejected arguments of this sort, which in reality

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[624] *See, e.g.*, Shepherd v. Commissioner, 115 T.C. 376 (2000) (addressing challenge to constitutionality of the application of the gift tax); Byrd Investments v. Commissioner, 89 T.C. 1 (1987) (addressing challenge to application of TEFRA partnership procedures as violating Fifth Amendment Due Process protections); Allum v. Commissioner, T.C. Memo. 2005-177, 90 T.C.M. (CCH) 74 (addressing challenge to § 104(a)(2) as unconstitutionally vague); Cole v. Commissioner, T.C. Memo. 1975-144, 34 T.C.M. (CCH) 680, 682 (1975) (addressing argument that limitations on dependency deductions violated constitutional protections).

[625] The Constitution provides for "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[626] *See supra* notes 591–600 and accompanying text.

[627] *See supra* notes 601–624 and accompanying text.

[628] *See* Paxman v. Commissioner, 50 T.C. 567, 576 (1968).

represent pleas for remedial legislation.[629] Requests for the application of equitable doctrines traditionally applied by other courts have had more substance. The subjects that have occasioned the most interest in this regard are equitable recoupment and equitable estoppel. The Tax Court's experience with these two remedies has shaped the bounds of the Tax Court's equitable jurisdiction.

a. Equitable Recoupment

Equitable recoupment, a doctrine developed and applied by both the courts of common law and equity,[630] permits one party (usually the defendant) to reduce a claim against it by asserting a claim in its favor related to the same transaction on which its adversary seeks judgment. With respect to tax litigation, by far the most important aspect of recoupment is that it permits the revival of a claim otherwise barred by an expired statutory limitation period. However, the doctrine's exception to the statute of limitations is narrow in scope. The tax to be recouped must relate to the same transaction, item, or event as that before the court for the open year, and the otherwise stale claim may serve only to offset the liability resulting from the related and timely claim. The primary purpose of the recoupment doctrine's deviation from the strong interest represented by the statute of limitations is to avoid inequitable windfalls that otherwise would result from the inconsistent tax treatment of a common transaction.[631]

Equitable recoupment in the tax context traces its origins to the 1935 Supreme Court decision in *Bull v. United States*.[632] The *Bull* case concerned the estate of a decedent who was a member of a service partnership. The partnership agreement provided that the estate of a deceased partner was entitled to receive that partner's proportionate share of profits for the balance of the year in which the partner died. The Commissioner determined that the decedent's gross estate included the post-mortem share of earnings paid to the estate, and the estate paid the resulting estate tax deficiency. Years later, the Service further determined that the post-mortem share of earnings also constituted income to the estate. After paying the resulting income tax, the estate sued to have this amount

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[629] *E.g.,* Hays Corp. v. Commissioner, 40 T.C. 436 (1963), *aff'd*, 331 F.2d 422 (7th Cir. 1964).

[630] *See* David N. McConnell, *The Doctrine of Recoupment in Federal Taxation,* 28 VA. L. REV. 577, 579–84 (1942).

[631] *See* Estate of Mueller v. Commissioner, 101 T.C. 551, 552 (1993) (reviewing contours of the recoupment doctrine).

[632] 295 U.S. 247 (1935).

refunded, contending that the overpayment of estate tax should serve as a credit against the income tax liability.[633]

Agreeing that the Government had mistakenly collected more estate tax than was properly due, the Court reasoned that retention of the excess tax would be "against morality and conscience,"[634] later reiterating that the "unjust retention" of amounts collected by mistake "is immoral and amounts in law to a fraud on the taxpayer's rights."[635] Having framed the matter in these terms, the Court unsurprisingly sidestepped the Commissioner's invocation of the statute of limitations on refund claims. The Court first reasoned that the estate tax overpayment would have provided a defense to the Government's attempt to pursue an income tax deficiency:

> If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained, notwithstanding the statute of limitations had barred an independent suit against the government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.[636]

Having articulated the affirmative defense of equitable recoupment in the deficiency setting, the Court determined that the remedy should not be lost simply due to the differing procedural posture of the case. Recoupment therefore permitted the taxpayer-estate in *Bull* to credit a time-barred overpayment of estate tax against the income tax liability arising out of the

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[633] The underlying inconsistency in tax treatment at issue in *Bull*—that is, inclusion of post-mortem profits in both the estate tax and income tax bases—is curious when viewed in hindsight. Under current law, a decedent's gross estate for estate tax purposes includes the fair market value of the decedent's vested right to receive a future payment of income, *see* Rev. Rul. 55-123, 1955-1 C.B. 443, and this amount also is included in the gross income of the party who collects it (reduced by the marginal estate tax attributable to the item). *See* I.R.C. § 691(a), (c). Indeed, the Commissioner in *Bull* argued that there existed no inconsistency in the tax treatment of the post-mortem profits. The Court disagreed, apparently troubled by the inclusion of the same nominal figure in both tax bases (without reduction for the tax liability attributable to either). *See Bull*, 295 U.S. at 257. The Court ultimately agreed that the estate's entitlement to the post-mortem profits paid in respect of the decedent's interest was not properly subject to estate taxation.

[634] *Id.* at 260.

[635] *Id.* at 261.

[636] *Id.* at 262.

same transaction, yielding a refund of income tax that, standing alone, had not been overpaid.

Subsequent case law refined the doctrine of equitable recoupment in the tax setting. In *Stone v. White*,[637] the Supreme Court permitted recoupment of a time-barred deficiency in income tax owed by beneficiaries on account of trust distributions against the trustee's claim for a refund of income tax paid in error with respect to the distributed amounts. The case therefore demonstrates not only that equitable recoupment can benefit taxpayer and Government alike, but also that the doctrine can be invoked by or asserted against related taxpayers affected by a common transaction. In contrast to the expansive application of recoupment in *Stone*, the Court in *Rothensies v. Electric Storage Battery Co.*[638] attempted to cordon the breadth of the doctrine. After characterizing the *Bull* and *Stone* decisions as evidencing the limited scope of the recoupment doctrine in the tax setting,[639] the Court explained that recoupment did not permit the tax consequences of one transaction to be offset against another—an interpretation the Court warned "would invite a search of the taxpayer's entire tax history for items to recoup."[640] Rather, the Court explained that the doctrine permitted only a *single* transaction to be examined in all respects, to facilitate a judgment "that does justice in view of the one transaction as a whole."[641]

In its most recent formulation, the doctrine of equitable recoupment requires the party invoking its application to establish the following elements: (1) the overpayment or deficiency for which recoupment is sought by way of offset is barred by the expiration of the period of limitations; (2) the time-barred overpayment or deficiency arose out of the same transaction or is attributable to the same item or taxable event as the matter properly before the court; (3) the transaction, item, or taxable event has been subject to two taxes; and (4) if the transaction, item, or taxable event involves more than one taxpayer, there is a sufficient identity of interest among the taxpayers to permit their treatment as one.[642] If these elements are satisfied, the doctrine permits the time-barred overpayment or deficiency to be applied as an offset to the sought after payment. Consistent with its purpose of preventing windfalls resulting from inconsistent tax treatment, equitable recoupment does not permit the

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[637] 301 U.S. 532 (1937).

[638] 329 U.S. 296 (1946).

[639] *Id.* at 299.

[640] *Id.* at 302.

[641] *Id.* at 299. Accordingly, the Court did not permit the taxpayer to offset a time-barred refund for excise tax in prior years against the income tax attributable to the taxpayer's timely prosecution of excise tax refunds in later years.

[642] Menard, Inc. v. Commissioner, 130 T.C. 54, 62–63 (2008) (citing, among other authority, United States v. Dalm, 494 U.S. 596, 604–05 (1990)).

invoking party to recover the excess, if any, of the time-barred claim remaining after application of the offset.[643]

The authority of the Board of Tax Appeals and the Tax Court to consider claims of equitable recoupment has a long history, one marked both by evolving judicial interpretation and statutory responses. Courts struggled in grafting the equitable remedy into the statutory jurisdiction of the Board and Tax Court, which generally was limited to determining deficiencies or overpayments of taxes that were the subject of the taxpayer's petition for redetermination. Although Congress affirmatively addressed the Tax Court's jurisdiction over equitable recoupment in 2006,[644] the development in the case law leading to the statutory clarification provides insight into the larger question of the extent of the court's equitable powers in general.

The Revenue Act of 1924 expressed the jurisdiction of the Board in terms of determining deficiencies,[645] a formulation that implied the lack of power to consider tax liabilities other than those disputed with respect to the particular tax at issue. Nevertheless, a case soon arose that indicated the Board's attitude that recoupment fell within its province. In *Barry v. Commissioner*,[646] the Commissioner had determined an income tax overpayment of $805 for the year 1920 and a deficiency of $12,149 for 1921. The taxpayer petitioned the Board and sought to reduce the amount of the 1921 deficiency by showing that the Commissioner had not allowed the taxpayer sufficient depreciation deductions for 1920 and 1921. The Commissioner argued that the Board could not consider the amount of the overpayment for 1920, if any, because no deficiency notice had been issued with respect to that year. The Commissioner fashioned the taxpayer's position as a claim for a refund—a claim that was clearly beyond the jurisdiction of the Board. Without specifically referring to the doctrine of recoupment, the Board concluded that because the Commissioner was authorized to credit the overpayment for 1920 against the 1921 liability (and, in fact, had done so with respect to the overpayment of $805),[647] the question of the taxpayer's deficiency for 1921 comprehended the question of whether the overpayment for the earlier year was in fact greater than that

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643 *See* O'Brien v. United States, 766 F.2d 1038, 1049 (7th Cir. 1985).

644 *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 858, 120 Stat. 1020.

645 Revenue Act of 1924, ch. 234, § 274(a)–(b), 43 Stat. 297 (now codified at I.R.C. §§ 6214–6215).

646 1 B.T.A. 156 (1924); *see also* Henry Myer Thread Mfg. Co., 2 B.T.A. 665 (1925); Fort Orange Paper Co., 1 B.T.A. 1230 (1925); R.A. Tuttle Co., 1 B.T.A. 1218 (1925); Banna Mfg. Co., 1 B.T.A. 1037 (1925); Hickory Spinning Co., 1 B.T.A. 409 (1925).

647 *Id.* at 158 (noting the Commissioner's authority under the Revenue Act of 1918, § 252, 40 Stat. 1085).

determined by the Commissioner. The Board's opinion did not mention whether a claim for refund for 1920 would have been time-barred and therefore did not consider the effect of such a fact on its jurisdiction.

Although the *Barry* case did not assert the Board's power to consider a claim for recoupment in express terms, such a power was implied in its holding.[648] Movement in this direction, however, was expressly terminated by the Revenue Act of 1926. Section 274(g) of the legislation provided:

> The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.[649]

The committee reports accompanying the 1926 Act do not disclose whether Congress intended to withdraw the power of equitable recoupment from the Board.[650] However, that was the effect of the provision. In 1926, the Board expressly recognized that *Barry* had been overruled by statute,[651] and thereafter the Board refused to entertain taxpayers' invocations of the recoupment doctrine—even while noting that it found the equitable arguments compelling.[652] In denying recoupment, the Board repeatedly cited the statutory prohibition on determining overpayments or underpayments for any year other than that with respect to which the

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648 *But see* Gress Mfg. Co., 3 B.T.A. 977 (1926) (holding that Board lacks jurisdiction to examine tax year not audited by Commissioner for purposes of determining possible existence of refund to be applied against claimed deficiency).

649 Revenue Act of 1926, ch. 27, § 274(g), 44 Stat. 56 (now codified at I.R.C. § 6214(b)).

650 The only reference to the provision was in the report of the Ways and Means Committee:

> Subdivision (g) [of section 274] limits the jurisdiction of the Board in determining a deficiency to the taxable year with respect to which the deficiency is claimed, and provides that while the Board shall consider any facts with relation to the taxes for other taxable years that may be necessary to correctly redetermine the amount of the deficiency, the Board shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

H.R. REP. NO. 69-1, at 11 (1925).

651 *See* Cornelius Cotton Mills, 4 B.T.A. 255, 256 (1926) (noting that, pursuant to intervening legislation, "the Board no longer has the jurisdiction exercised in the *Barry* appeal").

652 *See* Heyl v. Commissioner, 34 B.T.A. 223, 226–28 (1936).

deficiency notice was issued.[653] Without such a determination, the Board could not conclude that an amount existed to be recouped.

The Supreme Court first addressed the Board's jurisdiction over claims of equitable recoupment in *Gooch Milling & Elevator Co. v. Commissioner*.[654] The Commissioner in *Gooch Milling* determined that the taxpayer had overvalued its inventory as of the close of its 1935 tax year. The revaluation yielded a deficiency for 1936 and an overpayment for 1935. As refund on the overpayment was barred by the statute of limitations, the taxpayer petitioned to have the 1935 overpayment offset against the 1936 deficiency. The Eighth Circuit reversed the Board's ruling that it lacked jurisdiction to grant such relief.[655] Narrowly interpreting the 1926 provision, the circuit court held that justice required the use of recoupment.[656] The court's opinion hinted that even if the Board lacked jurisdiction to entertain recoupment claims, the appellate court was not so limited.[657]

The Supreme Court granted certiorari and upheld the original Board ruling.[658] Declaring that "[t]he Internal Revenue Code, not general equitable principles, is the mainspring of the Board's jurisdiction,"[659] the Court focused its analysis on the Board's statutory grant of jurisdiction. The Board could determine a deficiency or overpayment only for the year for which the taxpayer petitioned for review of a proposed deficiency assessment. And although the predecessor of § 6214(b) permitted the Board to consider facts from other years to correctly redetermine the tax liability for the year before it, the provision denied the Board jurisdiction to determine whether tax for any other such year had been overpaid or underpaid. In light of this "clear and unambiguous" legislative pattern,[660] the Court viewed resolution of the taxpayer's recoupment claim under these provisions as a straightforward matter.[661] The Court observed that no aspect of the taxpayer's 1935 tax year was relevant to determining the

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653 *See* Gould-Mersereau Co. v. Commissioner, 21 B.T.A. 1316, 1328 (1931); Pederson v. Commissioner, 14 B.T.A. 1089, 1119 (1929); B.T. Couch Glue Co. v. Commissioner, 12 B.T.A. 1321, 1325 (1928); Anderson v. Commissioner, 12 B.T.A. 1111, 1137 (1928); Dickermann & Ellis, Inc., 5 B.T.A. 633, 635 (1926); Cornelius Cotton Mills, 4 B.T.A. 255, 256 (1926); R.P. Hazzard Co., 4 B.T.A. 150, 151 (1926).

654 10 B.T.A.M. (Prentice Hall) ¶ 41,563 (1941), *rev'd*, 133 F.2d 131 (8th Cir. 1943), *rev'd,* 320 U.S. 418 (1943).

655 133 F.2d at 138.

656 *Id.* at 136–37.

657 *Id.* at 138. As discussed in *infra* note 663, the prospect of an appellate court granting relief not available to the Tax Court while sitting in review of a Tax Court decision was first implicitly and later explicitly foreclosed by the Supreme Court.

658 320 U.S. 418 (1943).

659 *Id.* at 422.

660 *Id.* at 420.

661 *Id.* ("The Board's want of jurisdiction to apply the doctrine of equitable recoupment is manifest from these statutory provisions.").

taxpayer's 1936 deficiency that was before the Board. The taxpayer's attempt to employ the 1935 overpayment as an affirmative defense to the 1936 deficiency necessitated a determination of whether an overpayment for 1935 existed in the first place, and the court found this preliminary determination to be foreclosed by the "absolute and unequivocal language" of the proviso contained in the predecessor of § 6214(b).[662] The Court therefore concluded that permitting the Board to apply equitable recoupment in this instance would contravene the express will of Congress.[663]

Subsequent to the *Gooch Milling* decision, the Tax Court, during its initial phase as an executive agency, maintained the position that it lacked authority to apply equitable recoupment. While the primary justification continued to rest in the statutory scheme governing its jurisdiction, including the prohibition contained in the 1926 legislation on determining an overpayment or underpayment in tax for periods not before the court,[664] the failure of Congress to accord the court equitable jurisdiction provided an additional but less frequently cited ground.[665]

The Tax Reform Act of 1969 reconstituted the Tax Court as an article I court,[666] and arguments existed to support the proposition that legislative courts may be invested with the same judicial powers as are provided to

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[662] *Id.* at 421.

[663] *Id.* By reversing the circuit court's ruling in *Gooch*, the Supreme Court not only clarified the extent of the Board's limited jurisdiction, but also implicitly established that the circuit courts were similarly restricted in hearing Board appeals. Subsequent to the *Gooch* decision, two circuit courts expressly held that they were bound by the Tax Court's limited jurisdiction in this arena. *See* Taylor v. Commissioner, 258 F.2d 89, 93 (2d Cir. 1958); Vanderberge v. Commissioner, 147 F.2d 167, 168 (5th Cir. 1945). The Supreme Court resolved this matter definitively in *Commissioner v. McCoy*, 484 U.S. 3, 6 (1987), where it held that an appellate court sitting in review of a decision of the Tax Court lacks jurisdiction to decide an issue that was not the subject of the Tax Court proceeding or to grant relief that was beyond that available to the Tax Court.

[664] *See* Estate of Van Winkle v. Commissioner, 51 T.C. 994, 999–1000 (1969); Vandenberge v. Commissioner, 3 T.C. 321, 327–28 (1944), *aff'd*, 147 F.2d 167 (5th Cir. 1945); *see also* Rothensies v. Electric Battery Co., 329 U.S. 296, 303 (1946) (citing *Gooch Milling* for the proposition that the Tax Court lacks jurisdiction to hear claims of equitable recoupment).

[665] *See* Miller v. Commissioner, 39 T.C. 940, 953 (1963), *aff'd*, 333 F.2d 400 (8th Cir. 1964); Estate of Stein v. Commissioner, 37 T.C. 945, 956 (1962); Estate of Garber v. Commissioner, 17 T.C.M. (CCH) 646, 650–51 (1958), *aff'd*, 271 F.2d 97 (3d Cir. 1959); Vandenberge v. Commissioner, 3 T.C. 321, 328 (1944), *aff'd*, 147 F.2d 167 (5th Cir. 1944).

[666] Pub. L. No. 91-172, § 951, 83 Stat. 730.

article III courts, including equitable powers.[667] However, the Tax Court initially did not use its reconstituted status as an article I court as grounds to reconsider its equitable jurisdiction.[668] Rather, the court continued to adhere to the holding of *Gooch Milling* that it lacked jurisdiction to apply the recoupment doctrine.[669] The court's steadfast position was understandable given the statutory bar to determining overpayments or underpayments for years other than those covered by the deficiency notice.[670] Indeed, in light of the Supreme Court's reliance on this ground in *Gooch Milling*, Professor

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[667] *See* Note, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133, 161 (1962); Note, *The Judicial Power of Federal Tribunals Not Organized Under Article Three*, 34 COLUM. L. REV. 746, 747–48 (1934); Note, *The Court of Claims: Judicial Power and Congressional Review*, 46 HARV. L. REV. 677, 680–81 (1933); *see also* David F. Shores, *Article I Status for the Tax Court*, 25 TAX LAW. 335, 340–41 (1972). Although the issue of equitable powers was not explicitly raised in *Bull v. United States*, 295 U.S. 247 (1935), the Supreme Court therein applied equitable recoupment in a case originating in the Court of Claims. The decision in *Bull* came two years after *Williams v. United States*, 289 U.S. 553 (1933), in which the Supreme Court held the Court of Claims to be a legislative court.

[668] Perhaps the Tax Court's failure to do so reflected the prevailing view that the transformation of its status to an article I court did not affect its equitable jurisdiction. In *Continental Equities, Inc. v. Commissioner*, 551 F.2d 74 (5th Cir. 1977), the Fifth Circuit addressed the Tax Court's jurisdiction to entertain claims of equitable recoupment and provided the following assessment of the change in the court's status from executive agency to legislative court:

> Prior to the enactment of the Tax Reform Act of 1969, the Tax Court did not possess equity jurisdiction. . . .
>
> [T]here is no evidence in the text of the Act that Congress meant to expand the Tax Court's jurisdiction to encompass equitable claims. We cannot believe that Congress would modify the powers of the Tax Court in such a significant way without mentioning what it was doing. . . .
>
> It does not follow from the fact that the Tax Court is now an Article I "legislative court" that it possesses or was intended to possess the full judicial power, extending to "all cases, in law and equity," that is vested in "constitutional courts" created by Congress under Article III, which it had not possessed before.

Id. at 83–84 (footnotes and citations omitted). Yet as discussed in text accompanying *infra* notes 702–712, the Tax Court and other appellate courts later would adopt a more expansive view of the Tax Court's judicial power as an article I court.

[669] *See* Estate of Schneider v. Commissioner, 93 T.C. 568, 570 (1989); Phillips Petroleum Co. v. Commissioner, 92 T.C. 885, 888–90 (1989); Poiner v. Commissioner, 86 T.C. 478, 490–91 (1986), *aff'd in part and rev'd in part*, 898 F.2d 917 (3d Cir. 1988). This view was shared by the Service. Rev. Rul. 71-56, 1971-1 C.B. 404, 405 ("[T]he Tax Court lacks jurisdiction to consider a plea of equitable recoupment.").

[670] I.R.C. § 6214(b).

Dubroff reasonably predicted in the 1979 preliminary edition of this text that "it is unlikely that any change will be made in the Tax Court's view with respect to recoupment."[671]

While the question of the Tax Court's jurisdiction to apply the recoupment doctrine appeared definitively resolved in the negative, the Tax Court continued to grapple with the scope of its authority to exercise equitable powers in other contexts. The court's reviewed opinion in *Woods v. Commissioner*[672] supplied the most thorough examination of this broader issue, and the case later would prove instrumental in the court's reconsideration of its authority to entertain equitable recoupment claims.

The taxpayer's invocation of the statute of limitations on assessment as an affirmative defense provided the procedural framework for the court's decision in *Woods*. The court found as a factual matter that the parties' private agreement to extend the statute of limitations (which, on its face, was ineffective in doing so) reflected a mutual mistake. The Tax Court therefore proposed to reform the agreement to accurately reflect the intentions of the parties. Yet, because reformation constitutes an equitable remedy, the Tax Court in *Woods* first considered whether it possessed jurisdiction to exercise equitable powers in this manner.

The court in *Woods* began its analysis by citing numerous instances in which it had applied equitable principles or theories to decide matters over which it possessed jurisdiction. The list included waiver, duty of consistency, estoppel, substantial compliance, abuse of discretion, laches, and the tax benefit rule.[673] In light of this historical review, the court surmised that it was empowered to apply equitable principles to dispose of cases properly before it.[674] At the same time, the court in *Woods* recognized the Supreme Court's prior statement in *Commissioner v. McCoy* that the Tax Court "is a court of limited jurisdiction and lacks general equitable powers."[675] However, the Tax Court in *Woods* did not interpret this statement as prohibiting its exercise of equitable powers across the board. Rather, the court interpreted the absence of general equitable authority as simply meaning that it could not expand its statutorily prescribed jurisdiction on equitable grounds.[676] The following observation by Judge Hamblen, quoted by the court in *Woods*, succinctly captures the court's interpretation of its equitable jurisdiction: "'While we cannot expand our jurisdiction through equitable principles, we can apply equitable principles

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[671] HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 487–88 (1979).

[672] 92 T.C. 776 (1989).

[673] *Id.* at 784.

[674] *Id.* at 784–85.

[675] 484 U.S. 3, 7 (1987).

[676] *Woods*, 92 T.C. at 785.

in the disposition of cases that come within our jurisdiction.'"[677] On these terms, the court's application of reformation in *Woods* was proper. The exercise of reformation was necessary to resolve the taxpayer's affirmative defense to an estate tax deficiency over which the court possessed undisputed jurisdiction.[678]

The Tax Court in *Woods* further supported its authority to exercise equitable powers to resolve matters within its jurisdiction by reference to the statutory scheme articulated in §§ 7422(e), 6512(a), and 7481. Characterizing these provisions as serving "to channel tax litigation into the Tax Court, to make our decisions binding, and to preclude relitigation of the same issues in another forum," the court concluded that Congress did not intend to restrict the court's application of equitable principles to resolve cases absent an express limitation to that effect.[679]

The Tax Court's affirmation of its limited authority to exercise equitable powers in *Woods* may have appeared to conflict with the then-prevailing view that it lacked jurisdiction to entertain claims of equitable recoupment. The two positions, however, were not inconsistent. The Board of Tax Appeals, the Tax Court, and the Supreme Court all had interpreted § 6214(b) (or its predecessor) as a statutory prohibition on the court's application of equitable recoupment. While the Tax Court's want of jurisdiction over the equitable recoupment remedy appeared settled even in light of *Woods*, the Supreme Court shortly thereafter conveyed an apparent willingness to reconsider the issue through its 1990 decision in *United States v. Dalm*.[680]

The taxpayer in *Dalm* served as the executor of a decedent's estate, receiving commissions for her services. In addition to these commissions, the taxpayer received considerable sums by way of gift from the decedent's brother on which the taxpayer paid the resulting gift tax. The Service later determined that the purported gifts constituted additional fees for the taxpayer's services as executor, and asserted a resulting income tax deficiency. The taxpayer petitioned the Tax Court for a redetermination, and the parties reached a settlement reflecting reduced income tax deficiencies for the years at issue.

Immediately after settling the income tax dispute, the taxpayer in *Dalm* filed a refund claim seeking recoupment of the gift tax paid with respect to the transfers. However, the limitations period for prosecuting a refund of the gift tax had long expired. The district court agreed with the

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[677] *Id.* at 784–85 (quoting Berkery v. Commissioner, 90 T.C. 259, 270 (1988) (Hamblen, J., concurring)).

[678] Under this analysis, the extent of the Tax Court's supplemental jurisdiction turns on the scope of issues that may be raised as an affirmative defense to the imposition of a tax over which the court possesses jurisdiction to review.

[679] *Id.* at 788–89.

[680] 494 U.S. 596 (1990).

Commissioner's denial of the claim based on expiration of the limitations period, explaining that the recoupment doctrine could not support the maintenance of an independent suit to recover a time-barred refund of the very tax to be recouped.

After the Sixth Circuit Court of Appeals reversed the district court's dismissal of the refund claim, the Supreme Court granted certiorari and reinstated the district court's disposition of the case. In so doing, the Court carefully explained why its decision in *Bull v. United States* did not support the taxpayer's position: equitable recoupment operated only to permit a time-barred claim to offset a *separate* tax over which the reviewing court possessed jurisdiction.[681] The separate tax in this case—the taxpayer's income tax deficiencies—had been resolved in the Tax Court proceeding prior to the filing of the time-barred claim for refund of the gift tax. Hence, the district court was not asked to review any tax other than that for which the taxpayer sought recoupment. The Supreme Court noted that it had not previously allowed recoupment to serve as "the sole basis for jurisdiction,"[682] and the Court rejected the taxpayer's invocation of recoupment as a stand-alone exception to the bar posed by the expiration of the limitations period on refund claims.

The Court's holding in *Dalm* was consistent with the limited scope of the recoupment remedy and, hence, not particularly remarkable. The surprising aspect of the decision came in the Court's statements regarding the taxpayer's handling of her recoupment claim. The Court observed that the taxpayer chose to litigate the income tax deficiency before the Tax Court, where she did not attempt to recoup her gift tax liability.[683] Of course, the taxpayer's failure to raise her recoupment claim before the Tax Court did not stem from oversight but instead from recognition of the court's then-established lack of jurisdiction to hear such claims.[684] Yet rather than conceding the inability of the Tax Court to consider the taxpayer's claim of recoupment, the Court dropped the following disclaimer in a footnote: "We have no occasion to pass upon the question whether Dalm could have raised a recoupment claim in the Tax Court."[685] This somewhat dry statement intimated the existence of ambiguity concerning the Tax Court's jurisdiction over recoupment.

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[681] *Id.* at 606–07.

[682] *Id.* at 608.

[683] *Id.* at 611.

[684] Justice Stevens' dissent notes that the taxpayer's counsel believed that no recoupment claim could be had in the Tax Court. *Id.* at 615 n.3 (Stevens, J., dissenting). The Commissioner shared this view, contending that the taxpayer had effectively waived her recoupment claim by choosing to litigate the matter before the Tax Court. *See id.* at 615 (quoting the Government's reply brief).

[685] *Id.* at 611 n.8.

Writing in dissent, Justice Stevens took the question of the Tax Court's potential jurisdiction a step further. After commending the majority for reserving the issue of the Tax Court's jurisdiction over recoupment claims, Justice Stevens contemplated the prospect of the Tax Court possessing such jurisdiction:

> Of course, if this Court were eventually to decide the reserved issue by holding that the Tax Court has jurisdiction to hear an equitable recoupment claim, today's decision would become a complete dead letter. No taxpayer would have any reason to litigate the deficiency and the recoupment issues separately, and in any event a judgment upon the former would bar a subsequent suit upon the latter under the doctrine of res judicata.[686]

Hence, the Court appeared to retreat considerably from the certainty of its prior determination in *Gooch Milling* that the Tax Court's statutory jurisdiction unequivocally foreclosed consideration of recoupment claims.

To the extent the Court's decision in *Dalm* could be interpreted as an invitation for the Tax Court to revisit its jurisdiction to address claims of equitable recoupment, the Tax Court accepted the invitation in *Estate of Mueller v. Commissioner*.[687] In a prior proceeding in *Estate of Mueller*, the court had determined a deficiency in estate tax based on an increase in the value of shares of a closely held company included in the decedent's gross estate. Faced with this deficiency, the estate amended its petition to raise a time-barred overpayment of income tax by the legatee of the stock as an affirmative defense. Reconsidering its jurisdiction to address recoupment claims "in light of *Dalm*,"[688] the court determined that it possessed authority to consider equity-based defenses—including equitable recoupment—to a claim over which the court possessed jurisdiction.[689]

In a reviewed opinion, the court explained that consideration of the taxpayer's equitable recoupment claim did not require the exercise of jurisdiction beyond the statutory grant to redetermine the estate tax deficiency before it. The court reasoned that the recoupment claim, as an affirmative defense to the estate tax deficiency, was "part of the entire action over which we have jurisdiction,"[690] relying heavily on its then-recent decision to this effect in *Woods v. Commissioner*. Yet despite the strength of

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[686] *Id.* Justice Stevens raised the prospect of distinguishing the Court's prior decision in *Gooch Milling* on the ground that the opinion considered recoupment only in the context of a time-barred overpayment relating to a year *other than* the year in dispute.

[687] 101 T.C. 551 (1993).

[688] *Id.* at 553.

[689] *Id.* at 557.

[690] *Id.* at 556.

the *Woods* precedent, the court in *Estate of Mueller* nonetheless had to contend with the question of whether § 6214(b) constituted a statutory denial of such jurisdiction, as the Supreme Court in *Gooch Milling* had previously determined. The court resolved this point by revisiting the circumstances surrounding the 1926 legislation introducing the predecessor of § 6214(b)—in particular, the Board's decision in *Barry v. Commissioner*.[691] The court explained that although the Board in *Barry* had granted the taxpayer's request to apply a time-barred overpayment as a setoff to the deficiency before it, the *Barry* case did not concern or address the doctrine of equitable recoupment. The time-barred overpayment at issue in *Barry* was attributable to depreciation deductions that bore no relation to the deficiency the taxpayer petitioned the Board to review.[692] After clarifying the circumstances of the *Barry* decision, the court in *Estate of Mueller* found nothing in the 1926 legislative response to *Barry* or in the legislative materials accompanying its passage to indicate congressional intent to deny the Board jurisdiction over equitable recoupment.[693] In light of this background, the court essentially concluded that subsequent decisions construing § 6214(b) or its predecessor as foreclosing Tax Court consideration of equitable recoupment claims—including the Supreme Court's decision in *Gooch Milling*—had misconstrued the statute.[694] Alternatively, the Tax Court found *Gooch Milling* inapposite on grounds that § 6214(b) literally does not apply to the redetermination of an estate tax deficiency.[695] Although the court's treatment of Supreme Court precedent in *Estate of Mueller* may appear surprising when considered in isolation, the court undoubtedly was emboldened to re-examine its equitable recoupment jurisdiction by the apparent willingness of the Supreme Court to do the same in *Dalm*.

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[691] 1 B.T.A. 156 (1924). For discussion of the *Barry* decision, see *supra* notes 646–653 and accompanying text.

[692] Estate of Mueller v. Commissioner, 101 T.C. 551, 559 (1993).

[693] *Id.*

[694] The Tax Court did not do so directly. Instead, after noting that the Supreme Court in *Gooch Milling* had determined that the Board lacked jurisdiction to allow a time-barred overpayment of income tax to be offset against a related income tax deficiency (in other words, equitably recouped), the court interpreted *Gooch Milling* as "not preventing the Tax Court from considering the affirmative defense of equitable recoupment when it is properly raised in a timely suit for redetermination of a tax deficiency over which we have jurisdiction." *Id.* at 560.

[695] *Id.* However, even while attempting to continue the distinction where the taxpayer sought to recoup an estate tax overpayment against an income tax liability, the Tax Court later conceded that it had determined in *Estate of Mueller* that equitable recoupment would be available "in any event"—that is, even if the literal terms of § 6214(b) could not be avoided—in a common transaction scenario. *See* Estate of Bartels v. Commissioner, 106 T.C. 430, 434 (1996).

The Tax Court's reconsideration of its jurisdiction to entertain claims of equitable recoupment in *Estate of Mueller* was not well received by the Sixth Circuit Court of Appeals. Reviewing the court's consideration of the taxpayer's recoupment claim on the merits and its determination that the remedy was not available,[696] the Sixth Circuit technically affirmed. However, the circuit court did so on the basis that the Tax Court lacked jurisdiction to consider the recoupment claim in the first place.[697] In the court's view, § 6214(b) made it "abundantly clear" that the Tax Court's jurisdiction was limited to determining only the deficiency before it, a proposition the court found to be additionally supported by § 6512(b).[698] The court further cited the Tax Court's want of general equitable powers as precluding the extension of its statutory jurisdiction to address equitable remedies such as recoupment.[699] In short, the Sixth Circuit restated the analysis of the Supreme Court in *Gooch Milling* in updated form.[700] The court was not timid in its assessment of the Tax Court's newly found jurisdiction, contending that it "fl[ew] in the face of unambiguous statutory language as well as 50 years of Supreme Court precedent."[701]

The Tax Court did not allow the initial and emphatic appellate rejection of its equitable recoupment jurisdiction to shake its stance. Applying the *Golsen* rule, the court affirmed its position in *Estate of Mueller* in three cases that were appealable to different circuit courts. The first case was *Estate of Bartels v. Commissioner*,[702] a case appealable to the Seventh Circuit. Although the taxpayer in *Estate of Bartels* asserted a time-barred overpayment of estate

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[696] 107 T.C. 189 (1996). The court denied the recoupment claim because, even though the value of the decedent's stock originally yielded an estate tax deficiency against which the estate sought to recoup the related income tax overpayment, the Commissioner subsequently allowed a credit for tax on prior transfers that yielded an estate tax overpayment. Because the recoupment claim could no longer offset a claim for tax due, the court determined the remedy to be inapposite.

[697] 153 F.3d 302 (6th Cir. 1998).

[698] *Id.* at 305.

[699] *Id.*

[700] *Id.* at 306. Whereas the Tax Court had attempted to distinguish *Gooch Milling* based on the failure of § 6214(b) to reference estate taxes, the Sixth Circuit found the reasoning of the case to be "just as applicable to the determination of estate tax deficiencies as it is to the determination of income tax deficiencies." *Id.*

[701] *Id.* at 307. For a modern evaluation of the Tax Court's equitable jurisdiction advancing a similarly narrow interpretation, see Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357 (2001).

[702] 106 T.C. 430 (1996). Specifically, the court emphasized the words "the tax" in the portion of § 6214(b) providing that the Tax Court "shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter," and interpreted this reference as restricting application of the phrase to determinations of income tax or gift tax for other periods.

tax as an offset to a related income tax deficiency (as opposed to the inverse scenario in *Estate of Mueller*), the court nonetheless continued to find § 6214(b) inapposite. The court explained that the jurisdiction-limiting proviso of § 6214(b) referred only to the income tax or gift tax that served as the subject of the court's primary determination in the statute's opening clause.[703] However, the Court did not rest its decision on this narrow interpretation of § 6214(b) alone. The court observed that it previously had reasoned in *Estate of Mueller* that equitable recoupment would apply "in any event"—that is, even if the tax to be recouped consisted of income tax or gift tax from a time-barred period—if those taxes arose in a same-transaction scenario,[704] and endorsed this broader view of its recoupment jurisdiction.[705]

The Court's next opportunity to affirm its authority to apply equitable recoupment came in *Estate of Branson v. Commissioner*,[706] a case consisting of facts paralleling those of *Estate of Mueller*. In addition to restating points made in prior decisions, the Tax Court in *Estate of Branson* noted that the Sixth Circuit, in reaching a contrary result, failed to consider that *Gooch Milling* interpreted the jurisdiction of the Board of Tax Appeals—not that of the Tax Court as an article I court.[707] The court then quoted the Supreme Court's observation in *Freytag v. United States* that the Tax Court "'exercises its judicial power in much the same way as the federal district courts exercise theirs.'"[708] Based on this statement and the court's holding in *Woods*, the court asserted that the Tax Court "should be properly viewed as exercising full judicial power within its limited subject matter jurisdiction."[709] The Ninth Circuit Court of Appeals endorsed this view, affirming the Tax Court's decision and declaring that the Tax Court could exercise the "full range of equitable principles generally granted to courts that possess judicial powers" within the sphere of its statutorily defined

[703] *Id.* at 434.

[704] *Id.*

[705] Although the *Estate of Bartels* decision was not reviewed by the Seventh Circuit, the decision of that circuit court in *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572 (7th Cir. 1999), suggests that any such review would have been favorable. That case, which concerned the Tax Court's jurisdiction to apply equitable estoppel, declared any contention that the Tax Court lacked authority to do so because of its status as a court of limited jurisdiction to be "fatuous." *Id.* at 578. Instead, the Seventh Circuit observed that the present day Tax Court operates "pretty indistinguishably" from a Federal district court with respect to cases within the Tax Court's jurisdiction. *Id.*

[706] 113 T.C. 6 (1999), *aff'd*, 264 F.3d 904 (9th Cir. 2001).

[707] *Id.* at 10–11.

[708] *Id.* at 11 (quoting Freytag v. Commissioner, 501 U.S. 868, 891 (1991)).

[709] *Id.* at 11.

jurisdiction.[710] In addition to noting the parallels between the judicial power of the Tax Court and that of a Federal district court,[711] the circuit court went on to stress the practical ramifications of its decision. If the Tax Court were determined to lack jurisdiction over recoupment claims, less affluent taxpayers who found it necessary to litigate in the court's exclusive prepayment forum effectively would be required to waive any recoupment claims for the privilege of doing so.[712]

The Tax Court's final opportunity to affirm its jurisdiction to apply equitable recoupment came in *Estate of Orenstein v. Commissioner*.[713] Because the case was appealable to the Eleventh Circuit, the *Golsen* rule required the court to address *Continental Equities, Inc. v. Commissioner,*[714] a decision of the former Fifth Circuit (which, at the time, included what is now the Eleventh Circuit). The taxpayer in *Continental Equities* contended that the Tax Court should have addressed its plea to recoup time-barred overpayments of income tax by related corporations stemming from the Commissioner's adjustment of interest deductions under § 482. The Fifth Circuit dispensed with this argument through the following:

> [T]he conclusion that the 1969 Tax Reform Act did not grant the Tax Court equitable jurisdiction is inescapable. The courts that have addressed the issue are in agreement without [sic] conclusion that the Tax Court still does not possess jurisdiction over equitable claims.[715]

Although *Continental Equities* appeared to foreclose the court's proposed application of equitable recoupment in *Estate of Orenstein*, the Tax Court was not convinced that the case constituted binding precedent on appeal. The court cited the factual dissimilarities of the cases, the staleness of the *Continental Equities* decision in light of the passage of two decades in which views of the Tax Court's jurisdiction evolved, and, most significantly, the Eleventh Circuit's intervening decision in *Bokum v. Commissioner*.[716] The circuit court in *Bokum* affirmed the Tax Court's authority to apply the

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[710] 264 F.3d 904, 908 (9th Cir. 2001).

[711] *See id.* at 911 (observing that the Tax Court, "within its specialized jurisdiction, 'operates pretty indistinguishably from a federal district court,'" quoting Flight Attendants Against UAL Offset v. Commissioner, 165 F.3d 572, 578 (7th Cir. 1999)).

[712] *Estate of Branson*, 264 F.3d at 911. The Ninth Circuit noted the related analysis of the Eleventh Circuit in *Bokum v. Commissioner*, 992 F.2d 1136 (11th Cir. 1993), that taxpayers would be put to a similar inequitable election if the Tax Court were determined to lack jurisdiction to exercise equitable estoppel. *Id.* at 911–12.

[713] T.C. Memo. 2000-150, 79 T.C.M. (CCH) 1971.

[714] 551 F.2d 74 (5th Cir. 1977).

[715] *Id.* at 84 (citations omitted).

[716] 992 F.2d 1136 (11th Cir. 1993).

doctrine of equitable estoppel and, in so doing, endorsed the distinction that the Tax Court possessed authority to apply equitable principles in cases properly before it even though it lacked authority to expand its statutory jurisdiction on equitable grounds.[717] Because the Eleventh Circuit had essentially adopted the Tax Court's conception of its equitable jurisdiction in this manner, the Tax Court in *Estate of Orenstein* determined itself to be unbridled by precedent in its continued application of equitable recoupment. The Tax Court's decision in *Estate of Orenstein* was not appealed.

Against this backdrop of developing and conflicting judicial interpretations of the Tax Court's jurisdiction to entertain claims of equitable recoupment, Congress attempted to bring clarity to the field. Its first attempt consisted of a provision in the Senate version of the Technical and Miscellaneous Revenue Act of 1988 providing that the Tax Court's jurisdiction would extend to "any counterclaim, set-off, or equitable recoupment against (or for) the taxpayer."[718] However, Congress dropped this provision at the conference level without explanation.[719]

As part of the Taxpayer Relief and Refund Act of 1999,[720] Congress offered a more circumscribed provision. Through a provision captioned "Confirmation of Authority of Tax Court To Apply Doctrine of Equitable Recoupment," Congress proposed the addition of the following sentence to § 6214(b):

> Notwithstanding the preceding sentence, the Tax Court may apply the doctrine of equitable recoupment to the same extent that it is available in civil tax cases before the district courts of the United States and the United States Court of Federal Claims.[721]

However, the legislation did not survive a presidential veto made for reasons unrelated to the Tax Court.

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[717] *Id.* at 1140.

[718] S. 2238, 100th Cong., § 785 (1988). The conference committee report describes the Senate amendment as follows:

> The Tax Court is granted jurisdiction over tax refund actions against the IRS where there is already pending and awaiting submission for disposition by a judge a deficiency action in the Tax Court, and where the issue in the refund action is related by subject matter to the deficiency action or the result in either of the two actions will affect the amount in controversy in the related action.

H.R. REP. NO. 100-1104, at 234 (1998).

[719] *Id.*

[720] H.R. 2488, 106th Cong. (1999).

[721] *Id.* § 1343(a).

Congress returned in 2006 with an identical proposed amendment to § 6214(b) raised in light of the split that had then developed among the circuit courts of appeals.[722] This time, the amendment was enacted as part of the Pension Protection Act of 2006.[723] The legislative history accompanying the amendment indicates that Congress enacted the provision both to resolve the existing conflict among the circuit courts over the Tax Court's jurisdiction and to provide simplification benefits to both taxpayers and the IRS (that presumably would follow from the Tax Court's ability to address recoupment claims).[724]

The Tax Court had occasion to interpret the scope of its jurisdiction under § 6214(b), as amended, in *Menard, Inc. v. Commissioner*.[725] In an earlier proceeding, the Tax Court in *Menard* determined income tax deficiencies on grounds that compensation paid to its chief executive officer and principal shareholder was not reasonable and constituted disguised dividends. In response to this determination, the taxpayer corporation sought to recoup the hospital insurance tax paid by the corporation and the officer-shareholder under §§ 3101(b) and 3111(b) with respect to amounts originally characterized as compensation. By the time the Tax Court considered the taxpayer's recoupment claim, the period of limitations for filing a refund claim of the hospital insurance tax had expired.

The Commissioner did not dispute the amount by which the taxpayers had overpaid the hospital insurance tax. Nonetheless, the Commissioner contended that the Tax Court lacked jurisdiction to consider the recoupment claim on the basis that the court generally lacks jurisdiction to determine a deficiency or overpayment of hospital insurance tax.[726] As a matter of statutory interpretation, the Commissioner contended that the

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[722] *See* S. REP. NO. 109-336, at 97 (2006) (noting the conflict between the Sixth Circuit Court of Appeals in *Estate of Mueller* and the Ninth Circuit Court of Appeals in *Estate of Branson*).

[723] Pub. L. No. 109-280, § 858(a), 120 Stat. 1020 (2006). The amendment was effective for any matter pending before the Tax Court for which the decision had not become final (within the meaning of § 7481) as of the August 17, 2006 date of enactment. *Id.* § 858(b). Although Congress fashioned the amendment as a confirmation of the Tax Court's jurisdiction and the legislative history supports the confirmation motivation, *see* S. REP. NO. 109-336, at 97 (2006), a literal reading of the "notwithstanding" clause of the addition to § 6214(b) suggests the existence of a contrary directive in the statute in its prior form.

[724] S. REP. NO. 109-336, at 97 (2006).

[725] 130 T.C. 54 (2008).

[726] *Id.* at 58. The court conceded that it lacked original jurisdiction over the hospital insurance tax, and that any possible secondary jurisdiction to determine the amount of this tax under § 7436 was not available due to the absence of a determination regarding worker classification. *Id.* at 60–61. For a discussion of the Tax Court's secondary jurisdiction over hospital insurance tax and other employment taxes under § 7436, see Part VII.B.

second sentence of § 6214(b) (providing Tax Court jurisdiction over equitable recoupment) served only as an exception to the first sentence, which denied the Tax Court jurisdiction to determine an overpayment or underpayment in tax otherwise within the court's jurisdiction for a period not before the court. In short, the Commissioner did not read the second sentence of § 6214(b) as permitting consideration only of time-barred claims relating to taxes otherwise within the Tax Court's jurisdiction.

The Tax Court was not persuaded. As a textual matter, the court found the Commissioner's restricted interpretation of the second sentence of § 6214(b) contrary to the statutory text confirming "in the broadest of terms" the court's authority to apply the doctrine of equitable recoupment to the same extent the remedy is available in civil tax cases before the Federal district courts and the Court of Federal Claims.[727] The court further explained that a literal interpretation of the statutory text—one that confirmed the Tax Court's jurisdiction to entertain recoupment claims based on all internal revenue taxes—advanced the legislative goals of the amendment by offering "clarity and a meaningful measure of simplification in that both parties can be confident that the Court may provide a complete remedy for a given taxable year."[728] In this manner, the court in *Menard* held that there existed no condition to the court's application of the doctrine of equitable recoupment that it possess original or subject matter jurisdiction over the tax that the Commissioner or the taxpayer seeks to recoup.

As interpreted by the Tax Court in *Menard*, the statutory "confirmation" of the Tax Court's jurisdiction to entertain claims of equitable recoupment contained in § 6214(b) actually served to expand the court's recoupment jurisdiction. The provision not only clarified that the court could address claims relating to periods outside those covered by the statutory notice of deficiency for recoupment purposes, the provision further allowed the court to determine the taxpayer's liability for a tax outside of the court's original jurisdiction.

Although the 2006 amendment to § 6214(b) proved expansive in its grant of recoupment jurisdiction, the accompanying legislative history did not provide a ringing endorsement of the Tax Court's equitable jurisdiction in general terms. The Senate Report provided the following qualifier in its explanation of the provision: "No implication is intended as to whether the Tax Court has the authority to continue to apply other equitable principles in deciding matters over which it has jurisdiction."[729] Thus, at a minimum,

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[727] *Id.* at 66.

[728] *Id.* at 67.

[729] S. REP. NO. 109-336, at 97 (2006).

Congress passed on the opportunity to affirm the Tax Court's broader articulation of its equitable jurisdiction in *Woods*.[730]

b. Equitable Estoppel

Cases in which parties have invoked the doctrine of equitable estoppel provide a cleaner framework for examining the equitable jurisdiction of the Board of Tax Appeals and the Tax Court because, unlike equitable recoupment, no statute exists to potentially restrict the court's jurisdiction to entertain these claims.[731] Instead, the scope of the court's jurisdiction to address claims grounded in equitable estoppel and related theories has been determined through judicial exploration alone.

Generally speaking, a once restrictive view of the Tax Court's jurisdiction has given way to a general acceptance of the court's ability to address claims grounded in estoppel. A 1964 article addressing the jurisdiction of the Tax Court (prior to its reconstitution as an article I court) reflected the once-restrictive view of the court to adjudicate claims of estoppel by closing its discussion of the matter with the following admonition: "The moral is clear. Other factors being equal, a case involving these issues in a dominant manner should not be brought to the Tax Court."[732] However, the prevailing view of the court's jurisdiction in

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730 On the other hand, the inference the legislative history cautions against may not be a positive one regarding the Tax Court's equitable jurisdiction. The Tax Court had determined that it possessed jurisdiction to apply equitable recoupment in cases over which it had jurisdiction in *Estate of Mueller* based in large measure on its holding in *Woods*. Hence, the amendment to § 6214(b) expressly granting the court equitable recoupment jurisdiction could be interpreted as a determination that the reasoning in *Woods* did not adequately support the court's exercise of such jurisdiction. From a broader standpoint, any statutory grant of equitable jurisdiction to the Tax Court reinforces the view that the court may not exercise equitable powers outside of the statutory sphere. *See, e.g.*, Lederman, *supra* note 701, at 398 ("[I]f the Tax Court is going to apply equitable principles, it must find a specific source of the power to do so."). While the statement that the legislation is not intended to have any implication for the Tax Court's authority to continue to apply other equitable principles could be interpreted as protecting the Tax Court's non-statutory equitable jurisdiction, the qualifier in the legislative history accompanying the amendment to § 6214(b) does not convey this sense of affirmation.

731 As discussed in text accompanying *supra* notes 647–671, § 6214(b) and its predecessor at one point were interpreted as a statutory bar to the ability of the Board of Tax Appeals and the Tax Court to entertain claims of equitable recoupment. However, that view no longer prevails.

732 Theodore S. Lynn & Mervyn S. Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487, 520 (1964).

this area has changed considerably. The Tax Court in numerous instances has addressed claims of equitable estoppel without questioning its jurisdiction to do so, while at other times doing so after first affirming its jurisdiction. Similarly, several Circuit Courts of Appeals have assumed the Tax Court possesses jurisdiction to adjudicate estoppel claims, while others have expressly confirmed the Tax Court's jurisdiction in this arena.

This section traces the major developments in the jurisdiction of the Board of Tax Appeals and the Tax Court to entertain claims of equitable estoppel. Yet before doing so, this section reviews the doctrine of equitable estoppel and related claims in the tax setting for context.

The application of the doctrine ordinarily involves a decision not to follow general principles of the tax law because of the equities in a particular case. Courts therefore are cautious in its use. As is the case with recoupment, the doctrine of estoppel has its roots in both law and equity and has been applied by both types of courts.[733] The Pomeroy treatise defines equitable estoppel as:

> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.[734]

The treatise goes on to enumerate the elements generally required for its application: (1) conduct amounting to a misrepresentation or concealment of a material fact; (2) actual or imputed knowledge of the misrepresentation by the party to be estopped; (3) absence of knowledge of the facts by the party in whose favor estoppel is applied; (4) intention or expectation of the party to be estopped that the representation or concealment will be acted upon by the other party; (5) reliance by the party seeking the estoppel; and (6) detriment to the party seeking the estoppel resulting from his reliance.[735] The elements of classical estoppel are obviously closely related to fraud; some courts in fact have required a fraudulent intention to apply

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[733] 3 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 802 (5th ed. by Spencer S. Symons 1941) [hereinafter cited as POMEROY].

[734] *Id.* § 804.

[735] *Id.* § 805; *see also* Graff v. Commissioner, 74 T.C. 743, 761 (1980) (citing these "traditional elements" of equitable estoppel), *aff'd*, 673 F.2d 784 (5th Cir. 1982); Illinois Addressograph Mfg. Co. v. Commissioner, 31 B.T.A. 498, 504–05 (1934) (Murdock, J., concurring) (citing estoppel factors from earlier edition of Pomeroy treatise); 15 MERTENS LAW OF FEDERAL INCOME TAXATION § 60:03 (2003 ed.) [hereinafter cited as MERTENS] (listing the same six factors for estoppel).

estoppel.[736] But even without such a requirement, the basic elements themselves are so restrictive that if the doctrine was limited to these circumstances it would be applicable only in rare cases against taxpayers and virtually never against the Government.[737]

Nevertheless, cases arise in which one or more of the above elements are absent, but in which "equitable" considerations dictate the application of some form of estoppel to prevent a party from deriving an unconscionable benefit from his adversary's reliance on a misrepresentation. As a result, the courts from time to time have recognized a doctrine related to traditional estoppel, but in which one or more of the traditional elements have been relaxed or eliminated.[738] Nomenclature reflecting the modified doctrine includes pseudo-estoppel,[739] quasi-estoppel,[740] duty of consistency,[741] abuse of discretion,[742] and waiver.[743] An exposition of the varied circumstances in which the doctrine has been recognized is beyond the scope of this work. Suffice it to say that the principal relaxation of traditional estoppel requirements concerns knowledge of the misrepresentation by the person against whom the estoppel is invoked.[744]

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[736] POMEROY, *supra* note 733, at § 805.

[737] Lynn & Gerson, *supra* note 732, at 488.

[738] MERTENS, *supra* note 735, at § 60:05; Lynn & Gerson, *supra* note 732, at 488–89.

[739] Schwartz v. Commissioner, 40 T.C. 191, 193 (1963).

[740] Eagan v. United States, 80 F.3d 13, 17 (1st Cir. 1996); Lewis v. Commissioner, 18 F.3d 20, 26 (1st Cir. 1994); Mayfair Minerals, Inc. v. Commissioner, 56 T.C. 82, 89 (1971), *aff'd per curiam*, 456 F.2d 622 (5th Cir. 1972).

[741] Eagan v. United States, 80 F.3d 13, 17 (1st Cir. 1996); Herrington v. Commissioner, 854 F.2d 755, 758 (5th Cir. 1988); Orange Sec. Corp. v. Commissioner, 131 F.2d 662, 663 (5th Cir. 1942); Estate of Letts v. Commissioner, 109 T.C. 290, 297 (1997); LeFever v. Commissioner, 103 T.C. 525, 543 (1994), *aff'd*, 100 F.3d 778 (10th Cir. 1996); Mayfair Minerals, Inc. v. Commissioner, 56 T.C. 82, 89 (1971), *aff'd per curiam*, 456 F.2d 622 (5th Cir. 1972); Bartel v. Commissioner, 54 T.C. 25, 29 (1970).

[742] Gold Nugget Inc. v. Commissioner, 83 T.C. 28, 42–43 (1984); Automobile Club of Mich. v. Commissioner, 353 U.S. 180, 184 (1957); Lesavoy Foundation v. Commissioner, 238 F.2d 589, 594 (3d Cir. 1956); Stevens Bros. Foundation v. Commissioner, 39 T.C. 93, 106–08 (1962), *modified*, 324 F.2d 633 (3d Cir. 1963).

[743] Aero Rental v. Commissioner, 64 T.C. 331, 338 (1975); Eisenstadt Mfg. Co., 28 T.C. 221, 233–34 (1957).

[744] *See* Herrington v. Commissioner, 854 F.2d 755, 758 (5th Cir. 1988); Wichita Coca-Cola Bottling Co. v. United States, 152 F.2d 6, 8 (5th Cir. 1946); Underwood v. Commissioner, 63 T.C. 468, 477–78 (1975), *aff'd*, 535 F.2d 309 (5th Cir. 1976); Mayfair Minerals, Inc. v. Commissioner, 56 T.C. 82, 88 (1971), *aff'd per curiam*, 456 F.2d 622 (5th Cir. 1972); Estate of Kingdon v. Commissioner, 9 T.C. 838, 844 (1947); 10 MERTENS, *supra* note 735, at §§ 60:11 to 60:17. *But see* Wobber Bros. v.

Because of the difficulty of discussing estoppel in the abstract in tax cases, it may be useful to give illustrations of cases in which the doctrine has been applied. In *Bartel v. Commissioner*,[745] the taxpayer and his controlled corporation had in prior years treated corporate payments to the taxpayer as loans. In a later year, in connection with the liquidation of the corporation and when the earlier years apparently were closed by the statute of limitations, the taxpayer sought to recharacterize these payments as compensation, which would reduce the tax upon the liquidation. On the basis of equitable considerations, the Tax Court applied a duty of consistency to the taxpayer to estop him from maintaining that the payments were in substance anything other than loans.

The modified doctrine of equitable estoppel frequently has been applied against taxpayers.[746] However, courts are far more reluctant to apply the doctrine against the Government, particularly in the tax setting.[747] In *Estate of Emerson v. Commissioner*, the Tax Court explained that "[a]lthough the doctrines of estoppel and quasi-estoppel are applicable against the Commissioner, it is well established that these doctrines should be applied against him with utmost caution and restraint."[748] With respect to the application of estoppel against the Government in general, the Supreme Court has explained that precluding the Government from enforcing the law based on the conduct of its agents would undermine "the interest of the

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Commissioner, 35 B.T.A. 890, 892 (1938) (innocent mistake on tax return does not serve as basis for estoppel against taxpayer).

745 54 T.C. 25 (1970).

746 *See* Wichita Coca-Cola Bottling Co. v. United States, 152 F.2d 6 (5th Cir. 1946); Orange Sec. Corp. v. Commissioner, 131 F.2d 662 (5th Cir. 1942); Ryan v. Alexander, 118 F.2d 744 (10th Cir. 1941); Commissioner v. New York Trust Co., 54 F.2d 463 (2d Cir. 1931); Specialized Systems, Inc. v. United States, 792 F. Supp. 577 (M.D. Tenn. 1992); Erickson v. United States, 309 F.2d 760 (Ct. Cl. 1962); Sangers Home for Chronic Patients, Inc. v. Commissioner, 72 T.C. 105 (1979); Bartel v. Commissioner, 54 T.C. 25 (1970); Benoit v. Commissioner, 25 T.C. 656 (1955), *rev'd*, 238 F.2d 485 (1st Cir. 1956); Flynn v. Commissioner, 35 B.T.A. 1064 (1937).

747 Kennedy v. United States, 965 F.2d 413, 417 (1992); Schuster v. Commissioner, 312 F.2d 311 (9th Cir. 1962); *see also* United States v. Asmar, 827 F.2d 907, 911 n.4 (3d Cir. 1987) (detailing the various standards for applying equitable estoppel against the Government by the Circuit Courts of Appeals). It is recognized generally that application of estoppel against the Government is less frequent than application of the doctrine against taxpayers. *See* 10 MERTENS, *supra* note 735, at § 60:18.

748 67 T.C. 612, 617 (1977); *see also* Kronish v. Commissioner, 90 T.C. 684, 695 (1988); Boulez v. Commissioner, 76 T.C. 209, 214–15 (1981), *aff'd*, 310 F.2d 209 (D.C. Cir. 1987); Graff v. Commissioner, 74 T.C. 743, 761 (1980), *aff'd* 673 F.2d 784 (5th Cir. 1982).

citizenry as a whole in obedience to the rule of law."[749] As applied to the Commissioner in particular, estoppel could jeopardize the public interest in preserving the fisc through the efficient collection of revenue.[750]

While instances of estoppel against the Government are unusual, they do exist. In *Schuster v. Commissioner*,[751] transferee liability was asserted by the Commissioner against a bank on the basis of the includibility of an inter vivos trust, of which it had been trustee, in the gross estate of the settlor. The Service, after being fully apprised of the existence and terms of the trust originally had taken the position on audit that the trust was not includible in the settlor's gross estate, and on the basis of that representation, the bank had distributed the assets of the trust. The Government subsequently changed its position with respect to the includibility of the trust assets in the gross estate, but the statute of limitations barred assessment and collection of additional tax from the estate. Accordingly, the Government sought recovery against, among others, the bank as transferee. The Ninth Circuit, reversing the Tax Court, applied estoppel against the Government to preclude collection of any additional tax because of the strength of the "[b]ank's equitable interest"[752] and the unwarranted loss it would suffer if the Government were allowed to prevail. Estoppel was applied absent a knowing misrepresentation by the Government,[753] and in a case in which the misrepresentation was arguably one of law rather than fact. While it is firmly established that estoppel can be applied only to misrepresentations of fact (and not law),[754] the well-

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749 Heckler v. Community Health Services, 467 U.S. 51, 60 (1984) (not adopting but also not foreclosing an absolute rule barring estoppel against the Government); *see also* Shuster v. Commissioner, 312 F.2d 311, 317 (9th Cir. 1962) ("Congress's legislative authority should not be readily subordinated to the action of a wayward or unknowledgeable administrative official."); Couzens v. Commissioner, 11 B.T.A. 1040, 1148 (1928) (explaining that the application of estoppel against the Commissioner would cause individual tax liabilities to turn on conduct of a particular Government officer rather than on the uniform law prescribed by Congress).

750 *See* Reynolds v. Commissioner, 861 F.2d 469, 474 (6th Cir. 1988); *Shuster*, 312 F.2d at 317.

751 312 F.2d 311 (9th Cir. 1962), *modifying* First W. Bank & Trust Co., 32 T.C. 1017 (1959).

752 312 F.2d at 318.

753 A finding of knowledge or imputed knowledge would have been required for application of the traditional doctrine of estoppel. *See supra* note 735 and accompanying text.

754 Automobile Club of Mich. v. Commissioner, 353 U.S. 180, 183 (1957); Beer v. Commissioner, 733 F.2d 435, 437 (6th Cir. 1984); Estate of Vitt v. United States, 706 F.2d 871, 874 (8th Cir. 1983); Graff v. Commissioner, 74 T.C. 743, *aff'd*, 673 F.2d 784 (5th Cir. 1982).

known difficulty of isolating these elements, especially as to questions of mixed law and fact, renders the scope of the doctrine uncertain.[755]

The application of equitable estoppel and its variants by the Board of the Tax Appeals and the Tax Court has been somewhat uncertain over the years. The court has applied the doctrine to taxpayers in several cases,[756] and it has entertained claims of estoppel against the Government but found the necessary elements lacking.[757] However, in two decisions predating the Tax Court's reconstitution as an article I court, the court rejected the taxpayer's invocation of estoppel against the Government on grounds that it lacked equity jurisdiction.[758] In the latter of these cases, *Schwartz v. Commissioner*, the Tax Court relied on the Supreme Court's decision in *Gooch Milling* in rejecting the taxpayer's claim of pseudo-estoppel:

> We cannot adopt such an assertion here. This Court is a statutory body of limited jurisdiction, and we do not have the powers of a court of equity. . . . We cannot and do not adopt the asserted doctrine of pseudoestoppel.[759]

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[755] *See*, *e.g.*, KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT ch. 30 (3d ed. 1972).

[756] *E.g.*, Graff v. Commissioner, 74 T.C. 743 (1980), *aff'd*, 673 F.2d 784 (5th Cir. 1982); Bartel v. Commissioner, 54 T.C. 25 (1970); Hollman v. Commissioner, 38 T.C. 251, 260 (1962); Bialock v. Commissioner, 35 T.C. 649 (1961); Benoit v. Commissioner, 25 T.C. 656 (1925), *rev'd*, 238 F.2d 485 (1st Cir. 1956); Flynn v. Commissioner, 35 B.T.A. 1064 (1937).

[757] Boulez v. Commissioner, 76 T.C. 209 (1981), *aff'd*, 810 F.2d 209 (D.C. Cir. 1987); Estate of Emerson v. Commissioner, 67 T.C. 612 (1977); Schwager v. Commissioner, 64 T.C. 781, 788–89 (1975); Underwood v. Commissioner, 63 T.C. 468, 477–78 (1975), *aff'd*, 535 F.2d 309 (5th Cir. 1976); Fortugno v. Commissioner, 41 T.C. 316, 323–24 (1963), *aff'd*, 353 F.2d 429 (3d Cir. 1965); Saigh v. Commissioner, 36 T.C. 395, 423–24 (1961); Diggs v. Commissioner, T.C. Memo. 1959-99, 18 T.C.M. (CCH) 443, 445, *aff'd*, 281 F.2d 326 (2d Cir. 1960); Kenyon Instrument Co. v. Commissioner, 16 T.C. 732, 739–40 (1951); South Chester Tube Co. v. Commissioner, 14 T.C. 1229, 1235 (1950); Agricultural Sec. Corp. v. Commissioner, 39 B.T.A. 1103, 1114 (1939), *aff'd*, 116 F.2d 800 (9th Cir. 1941); Stein-Bloch Co. v. Commissioner, 23 B.T.A. 1162, 1166–68 (1931); United States Trust Co. of New York v. Commissioner, 13 B.T.A. 1074, 1077–78 (1928); Couzens v. Commissioner, 11 B.T.A. 1040, 1151 (1928); Hayes v. Commissioner, 7 B.T.A. 936, 944–45 (1927).

[758] *See* Schwartz v. Commissioner, 40 T.C. 191, 193–94 (1963); Lorain Ave. Clinic v. Commissioner, 31 T.C. 141, 164 (1958); *see also* Stevens Bros. Foundation, Inc. v. Commissioner, 39 T.C. 93, 108 (1962) (expressly avoiding jurisdictional question by finding elements of estoppel lacking), *modified*, 324 F.2d 633 (8th Cir. 1963).

[759] Schwartz v. Commissioner, 40 T.C. 191, 193 (1963) (citations omitted).

However, the determination that the Tax Court lacked jurisdiction to entertain claims based on equitable estoppel and related theories absent specific statutory authorization is suspect. Congress has supplied the court with jurisdiction to, among other things, redetermine deficiencies in tax.[760] The redetermination contemplated clearly comprehends a judicial format, and in this context it seems entirely appropriate that in exercising its authority, absent some specific statutory bar, the Tax Court should apply the same doctrines and rules of construction as would any other court.

Among other cases, the Tax Court in *Schwartz* relied on the Supreme Court's decision in *Gooch Milling & Elevator Co. v. Commissioner*,[761] in which the Court held that the Board could not apply the doctrine of equitable recoupment because it was a creature of statute and "[t]he Internal Revenue Code, not general equitable principles, is the mainspring of" its jurisdiction.[762] However applicable *Gooch Milling* may at first appear to be to the estoppel problem, there are important distinctions that can be drawn. *Gooch Milling* involved a specific jurisdictional provision barring the Board from applying recoupment.[763] No similar provision exists with respect to estoppel. Additionally, the provision prohibiting recoupment was in the nature of a limitation on the Board's subject matter jurisdiction, precluding the determination of overpayments or underpayments for any year other than the one for which a deficiency notice was issued. Such restrictions on jurisdiction of the federal courts traditionally have been scrupulously observed as limitations on judicial power, regardless of equitable considerations.[764] Application of estoppel, on the other hand, neither extends nor contracts subject matter jurisdiction; it is simply a doctrine employed to decide a case already properly before the court. Finally, even if *Gooch Milling* should be read as generally limiting the Board's power to exercise equitable powers, the present applicability of such a restriction is now open to considerable doubt. Since 1969 the Tax Court has been a legislative court organized under article I of the Constitution,[765] and it has been recognized in several instances that legislative courts have inherent power to exercise judicial functions.[766]

The Tax Court's rare expressions of its lack of jurisdiction to address claims of equitable estoppel no longer reflect the prevailing view. As mentioned above, subsequent to those decisions, the court has repeatedly

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[760] I.R.C. §§ 6213(a), 7442.

[761] Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943).

[762] *Id.* at 422.

[763] *See supra* notes 648–649 and accompanying text *supra*.

[764] *See generally* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 7 (3d ed. 1976).

[765] Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (amending I.R.C. § 7441).

[766] *See supra* note 667 and accompanying text.

entertained invocations of estoppel by the taxpayer and Government alike, merely assuming rather than examining its jurisdiction to do so.[767] Appellate courts adopted a similar approach of presuming the Tax Court's jurisdiction in this context.[768] Later, appellate courts expressly endorsed the jurisdiction of the Tax Court to address estoppel related arguments. In *Reynolds v. Commissioner*,[769] the Sixth Circuit cited the Tax Court's jurisdiction to apply the doctrine of equitable estoppel as a basis for finding that the court was empowered to apply the doctrine of judicial estoppel against the Government. Shortly thereafter, the Eleventh Circuit in *Bokum v. Commissioner* reasoned that the Tax Court "must have the power to consider an equitable estoppel claim, if considering the claim is necessary to the appropriate disposition of the claim before it,"[770] noting that the taxpayer would be unable to litigate an estoppel claim on a deficiency basis if the case were otherwise.[771]

However, the Seventh Circuit in *Flight Attendants Against UAL Offset v. Commissioner*[772] supplied the most definitive and extensive assertion of the Tax Court's jurisdiction to address claims grounded in equitable estoppel. Writing for the panel, Judge Posner placed considerable emphasis on the judicial nature of the Tax Court following its transformation from an executive agency to a legislative court:

> The argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable estoppel because it is a court of limited jurisdiction is fatuous. *All* federal courts are courts of limited jurisdiction. We are given no reason to suppose that statutes of limitations are intended to be administered differently in the Tax Court than in the federal district courts, which share jurisdiction in federal tax cases with the Tax Court. It is true that the predecessor

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[767] *See id.*

[768] *See* Bokum v. Commissioner, 992 F.2d 1136, 1140 (11th Cir. 1993) (citing Young v. Commissioner, 926 F.2d 1083, 1090 (11th Cir. 1991); Graff v. Commissioner, 673 F.2d 784, 785 (5th Cir. 1982); Warner v. Commissioner, 526 F.2d 1, 2 (9th Cir. 1975); Estate of Geiger v. Commissioner, 352 F.2d 221, 224, 230 (8th Cir. 1965)).

[769] 861 F.2d 469 (6th Cir. 1988). The Sixth Circuit's decision in *Reynolds* confirming the ability of the Tax Court to apply both equitable estoppel and judicial estoppel is noteworthy in comparison to that court's decision in *Estate of Mueller v. Commissioner*, 153 F.3d 302 (6th Cir. 1998), holding that the Tax Court is without jurisdiction to apply the doctrine of equitable recoupment. These two decisions can be reconciled on the basis that § 6214(b)—prior to its amendment in 2006—supplied a statutory bar to the Tax Court's recoupment jurisdiction.

[770] 992 F.2d 1136, 1140 (11th Cir. 1993).

[771] *Id.* at 1140–41.

[772] 165 F.3d 572 (7th Cir. 1999).

> bodies to the Tax Court, such as the Board of Tax Appeals, were administrative agencies having more limited powers than a regular court. But the present Tax Court operates pretty indistinguishably from a federal district court. It differs in some respects—it has specialized jurisdiction, obviously, and its judges are not Article III judges. But none of the differences bear on whether the court is empowered to recognize defenses to the statute of limitations. In context, the Supreme Court's dictum in *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam), that the Tax Court lacks "general equitable powers" means only that the Tax Court is not empowered to override statutory limits on its power by forgiving interest and penalties that Congress has imposed for nonpayment of taxes—but then no court is, unless the imposition would be unconstitutional.
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> Without citing *McCoy* or *United States v. Dalm*, 494 U.S. 596, 611 and n.8 (1990), which reserves the issue of the Tax Court's equitable powers, the Supreme Court in *Freytag v. Commissioner*, *supra*, 501 U.S. [868] at 891 [(1991)], pointed out that the Tax Court has been given injunctive and other equitable powers; and numerous cases affirm the Tax Court's power to enforce equitable principles, such as contract reformation and judicial estoppel, without express congressional authorization. We are at a loss to understand why equitable tolling and equitable estoppel shouldn't be among the equitable principles applicable to proceedings in the Tax Court. *Bokum v. Commissioner*, [992 F.2d 1136, 1140-41 (11th Cir. 1993)], holds that they are among them. The overlap between the district court's jurisdiction over refund suits and the Tax Court's jurisdiction over deficiency suits—both jurisdictions exclusive, but the taxpayer allowed to choose between them—makes it anomalous and confusing to multiply distinctions between the doctrines in the two types of courts.[773]

The Seventh Circuit's opinion supplies the most definitive word on the Tax Court's jurisdiction to entertain estoppel related claims and, for that matter, the Tax Court's equitable jurisdiction in general. In short, the Tax Court as a judicial body may entertain equitable claims arguments that arise in the course of resolving cases that fall within its statutory grant of jurisdiction, unless specifically precluded from doing so by statute. Accordingly, taxpayers no longer need avoid the Tax Court to preserve their equitable arguments.

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[773] *Id.* at 578 (citations omitted). *But see* Lederman, *supra* note 701, at 398, 411–12 (contending that judicial economy does not provide an adequate basis for extending the equitable jurisdiction of the Tax Court beyond that expressly authorized by Congress).

PART VII

ENHANCING THE EFFICIENCY OF TAX ADJUDICATION: INNOVATION IN REMEDIES AND PROCEDURES

The Tax Court's traditional jurisdiction over deficiencies and overpayments continues to make up the bulk of its workload. However, recognizing that taxpayers at times had pressing disputes with the Service that did not result in an immediate increased tax liability, Congress established and has periodically expanded the jurisdiction of the Tax Court to issue declaratory judgments. In addition to providing new spheres of Tax Court jurisdiction, Congress has taken a number of steps to improve the efficiency of tax adjudication. These improvements often took the form of procedural enhancements, as in the case of the unified partnership audit procedures enacted in 1982. Other measures have conferred supplemental jurisdiction to the Tax Court, permitting taxpayers to resolve issues relating to both the underlying tax liability and the resulting interest obligations in one proceeding before the court—obviating the need for the taxpayer to resort to an alternate forum to resolve disputes over interest. This Part addresses expansions of the Tax Court's jurisdiction and alterations to its procedures aimed at improving the tax adjudication regime.

A. Declaratory Judgments

With the important exception of the Tax Court's deficiency jurisdiction, Congress traditionally has been unwilling to provide judicial tax remedies other than for refund of taxes already paid. Thus, the tax laws generally bar suit to restrain assessment or collection of taxes,[1] and consistent with this goal, the courts have refused to entertain refund litigation in the absence of full payment of the disputed tax.[2] These limitations are based on the policy that unlimited judicial remedies for aggrieved taxpayers could unduly hamper the orderly collection of government revenues.[3]

With the enactment of the Declaratory Judgment Act of 1934,[4] the question arose whether the policy against liberal remedies in tax disputes had been eroded. The broad statutory language was soon interpreted to permit declaratory judgments with respect to tax matters even though

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[1] I.R.C. § 7421(a).

[2] *E.g.,* Flora v. United States, 362 U.S. 145 (1960).

[3] *See id.* at 175.

[4] Ch. 512, 48 Stat. 955, *as amended*, 28 U.S.C. §§ 2201–2202.

injunctive relief continued to be unavailable.[5] Given the similarity of declaratory and injunctive relief, Congress, at the suggestion of the Justice Department, fairly promptly amended the Declaratory Judgment Act to preclude its application "with respect to Federal taxes."[6]

1. Early Subjects of Declaratory Judgment Jurisdiction

The bar on declaratory relief in tax controversies was rigidly observed for nearly four decades.[7] However, it became apparent as years passed that, in certain cases, existing remedies were inadequate to afford taxpayers a practical judicial remedy. These matters typically involved situations in which taxpayers were reluctant to proceed with planned activities in the absence of advance approval of the Service. For example, the benefits available with respect to qualified pension and profit-sharing plans were not by statute dependent on advance approval of the Service.[8] However, the statutory provisions governing these plans were complex and open to divergent interpretations, and the risks involved in implementing and funding a plan without such approval were great. If the Service chose to contest a plan's qualification, judicial review was available; but if the Service ultimately prevailed, the tax benefits would be lost. Moreover, even if the taxpayer ultimately prevailed, delays and expense incurred in administrative and judicial litigation would offset the tax advantages of instituting the plan. As a consequence, most taxpayers tailored their plans to meet Service requirements, whether or not they agreed that such requirements were in accordance with law. The problem was compounded since the absence of litigation resulted in little in the way of judicial interpretations, which made Service pronouncements even more important. Additionally, the traditional remedies failed to provide employees with an opportunity to support or challenge the qualification of a plan. Although employees were directly affected by such plans, a deficiency or refund dispute generally would involve only the employer; employees lacked standing to participate in such litigation as parties.[9]

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[5] Penn v. Glenn, 10 F. Supp. 483 (W.D. Ky. 1935), *appeal dismissed*, 84 F.2d 1001 (6th Cir. 1936).

[6] Revenue Act of 1935, ch. 829, § 405, 49 Stat. 1027; 6A MOORE'S FEDERAL PRACTICE ¶ 57.18 (2d ed. 1974) [hereinafter cited as MOORE'S].

[7] *See* M. Carr Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 IOWA L. REV. 312, 325 (1963).

[8] H.R. REP. NO. 93-807, at 105 (1974).

[9] *Id.* at 106.

a. Qualification of Retirement Plans

As a result of these concerns, Congress, in the Employee Retirement Income Security Act of 1974,[10] provided the Tax Court with authority to issue declaratory judgments with regard to controversies arising from Internal Revenue determinations or Internal Revenue failure to make determinations, as to the initial and continuing qualification of employee retirement plans.[11] In the instance of a controversy surrounding an Internal Revenue determination, the Tax Court proceeding must be initiated by filing a pleading before the 91st day following the day after the mailing of the disputed determination.[12] Conversely, if the controversy results from the failure of Internal Revenue to make a determination, the Tax Court proceeding cannot be commenced before the expiration of 270 days following the request for such determination.[13] The legislation provides that an action for a declaratory judgment may be commenced in the Tax Court by the employer, the plan administrator, an employee who is an "interested party," or the Pension Benefit Guaranty Corporation.[14] To assure that interested party employees are given the opportunity to participate in both administrative and judicial proceedings regarding plan qualification, the statute further provides that the court may hold a petition to be "premature" unless the petitioner has complied with notice provisions, provided by Treasury regulation, for such parties.[15] Tax Court decisions generally are appealable to the court of appeals for the circuit in which the employer's principal place of business, principal office or agency is located.[16]

In general, the declaratory judgment provision with respect to retirement plans is similar to the Declaratory Judgment Act of 1934.[17] It provides for a judicial determination of rights in situations in which the traditional monetary remedy is inadequate. To preclude adjudication of disputes that do not constitute cases or controversies within the meaning of the Constitution, the 1974 legislation, as is the case with the Declaratory Judgment Act, expressly makes the procedure applicable only in cases of an

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[10] Pub. L. No. 93-406, 88 Stat. 829.

[11] *Id.* § 1041(a), 88 Stat. 949 (adding I.R.C. § 7476).

[12] I.R.C. § 7476(b)(5).

[13] I.R.C. § 7476(b)(3).

[14] I.R.C. § 7476(b)(1).

[15] I.R.C. § 7476(b)(2).

[16] I.R.C. § 7482(b)(1)(C).

[17] The committee report of the Ways and Means Committee states that "[i]t is anticipated that the normal rules of the Federal courts as they relate to declaratory judgments are to be applicable under the Tax Court declaratory judgment procedure." H.R. REP. NO. 93-807, at 108 (1974).

"actual controversy."[18] This requirement is incorporated in the statute by a provision barring maintenance of the action unless the disputed plan has been put into effect.[19] The procedure is also identical to the Declaratory Judgment Act in specifying that declaratory relief "may" be provided.[20] In connection with the Declaratory Judgment Act, the permissive "may" has been interpreted to allow the denial of declaratory relief, otherwise within the jurisdiction of the court, if in the exercise of its discretion the court finds such relief to be inappropriate.[21] Reasons for denying relief have been based on several grounds; among these are that a better alternative remedy exists,[22] that declaratory relief will neither settle the issue in dispute nor terminate the controversy giving rise to the action,[23] and that the procedure is being employed as a method of procedural fencing.[24] Although the legislative history of the 1974 enactment and the Tax Court rules are silent on the significance of "may," presumably the same interpretation given the Declaratory Judgment Act will be applied to the Tax Court provision.[25]

Despite the basic similarity with the federal Declaratory Judgment Act, several aspects of the Tax Court's declaratory judgment jurisdiction in this setting are peculiar to the Tax Court. The first of these concerns is the necessity of exhaustion of administrative remedies as a prerequisite for obtaining declaratory relief. Unlike the federal Declaratory Judgment Act, which is broadly stated and contains no explicit reference to the doctrine of exhaustion,[26] the Tax Court provision specifically precludes the issuance of a declaratory judgment unless the petitioner has exhausted the available remedies within the Internal Revenue Service.[27] In case of Service inaction, the statute requires the expiration of 270 days from the time of the ruling

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[18] I.R.C. § 7476(a); 28 U.S.C. § 2201.

[19] I.R.C. § 7476(b)(4). Softening this requirement somewhat, the statute provides that "[a] plan or amendment shall not be treated as not being in effect merely because under the plan the funds contributed to the plan may be refunded if the plan (or the plan as so amended) is found to be not qualified." *Id.*

[20] I.R.C. § 7476(a); 28 U.S.C. § 2201.

[21] *See generally* MOORE'S, *supra* note 6, at ¶ 57.08.

[22] Cunningham Bros. v. Bail, 407 F.2d 1165 (7th Cir. 1969); Larson v. General Motors Corp., 134 F.2d 450 (2d Cir. 1943); Gregory v. United States Bd. of Parole, 308 F. Supp. 258 (W.D. Mo. 1969); Zenie Bros. v. Miskend, 10 F. Supp. 779 (S.D. N.Y. 1935).

[23] EDWIN BORCHARD, DECLARATORY JUDGMENTS 299 (2d ed. 1941).

[24] *See* Kerotest Mfg. Co. v. C-O Two Co., 342 U.S. 180 (1952); Cunningham Bros. v. Bail, 407 F.2d 1165 (7th Cir. 1969); Independent Tape Merchants Ass'n v. Creamer, 346 F. Supp. 456 (M.D. Pa. 1972).

[25] With regard to the court's unwillingness to grant declaratory relief in the case of a better alternative remedy, *see infra* notes 101–104 and accompanying text.

[26] 28 U.S.C. §§ 2201–2202.

[27] I.R.C. § 7476(b)(3).

request before exhaustion of remedies can be found to exist.[28] Although the exhaustion doctrine is applied to cases arising under the Declaratory Judgment Act, the doctrine in these cases is based on equitable principles.[29] Courts have held on this basis that the exhaustion doctrine may be waived[30] or that proceedings may be stayed pending completion of administrative remedies.[31] Because the Tax Court provision is statutory and expressed in mandatory language, the court has interpreted it to require exhaustion as a jurisdictional prerequisite for maintenance of a proceeding.[32] In connection with satisfaction of this requirement, the committee reports indicate that the petitioner must have availed himself of all appeal rights within the Internal Revenue Service and have complied with all Service requirements for obtaining a ruling such as supplying information necessary for the ruling process.[33] In the case of a petition by an employee who did not receive initial notice of the Service's determination procedure, the exhaustion requirement will be satisfied if the employee exhausts all remedies available after receiving such notice of the determination proceeding.[34]

A second aspect peculiar to the Tax Court declaratory judgment procedure in this setting involves the nature of the evidence that may be adduced for purposes of the proceeding. Although the statute is silent on this point, the Tax Court rules generally provide that the court's determination is to be based on the administrative record before the Service.[35] Although the rules provide that the court may permit a party to introduce evidence outside of this administrative record "for good cause shown,"[36] the court's explanation of this exception indicates that it will be interpreted narrowly. The court envisioned the exception applying only to permit the introduction of disputed facts necessary to establish the court's

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[28] *Id.* The statute is phrased in the negative:

> A petitioner shall not be deemed to have exhausted his administrative remedies with respect to a failure by the Secretary to make a determination with respect to initial qualification or continuing qualification of a retirement plan before the expiration of 270 days after the request for such determination was made.

Id. No implication is intended that the expiration of the 270 day period will be the equivalent of exhaustion. Even after such expiration, exhaustion will not have occurred if the petitioner did not otherwise satisfy the requirements of exhaustion. H.R. REP. NO. 93-807, at l09 (1974).

[29] *See* MOORE'S, *supra* note 6, at ¶ 57.16.

[30] Tucker v. Alexander, 275 U.S. 228 (1927).

[31] Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).

[32] TAX CT. R. 210(c)(4) (July 6, 2012 ed.).

[33] H.R. REP. NO. 93-807, at 109 (1974).

[34] *Id.*

[35] TAX CT. R. 217(a) (July 6, 2012 ed.).

[36] *Id.*

jurisdiction.[37] By contrast, the procedure under the Declaratory Judgment Act does not contain any general rule limiting evidence to the administrative record; rather, evidence ordinarily receivable at any trial is permitted to be introduced.[38] The more restrictive approach in the Tax Court is predicated on language in the committee reports indicating that the court's function in declaratory judgment proceedings is simply to review the accuracy of Service determinations and not generally to inquire into the qualification of retirement plans.[39] Thus, the administrative record and the reasons advanced by the Service for its position generally mark the boundaries of the proceeding, and it is assumed that these cases will be resolved without the necessity of a trial.[40]

The general approach of resolving these disputes based on the administrative record, however, does not apply to cases involving the revocation of qualified status of a retirement plan or, as later described, cases involving the revocation of exempt status of an employee trust, the valuation of a gift, or the eligibility of an estate to pay the estate tax on an installment basis.[41] In those cases, a disposition will be made on the basis of the administrative record alone only if the parties agree that the record developed before the Service contains all facts relevant to the resolution of the case and such facts are not in dispute.[42]

A third noteworthy item with regard to declaratory judgment proceedings in the Tax Court involves the question of burden of proof. The Senate version of the Employee Retirement Income Security Act provided special statutory burden of proof rules for declaratory judgment proceedings.[43] Generally, the burden of proof would be on the petitioner,

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[37] In promulgating this exception, the court explained that there did not appear at the time "any circumstances under which a trial will be held except as to disputed jurisdictional facts or to resolve the disagreement between the parties as to the contents of the administrative record." *See* Rules Comm. Note, TAX CT. R. 217(a) (July 1, 1977 ed.), 68 T.C. 1048. Hence, the exception was inserted "merely out of an abundance of caution to provide for the possibility of a trial on other facts or the presentation of evidence in the event that a situation not now contemplated might arise in which a trial would be appropriate." *Id.*

[38] *See* FED. R. CIV. P. 57.

[39] H.R. REP. NO. 93-807, at 108 (1974); *see also* Rules Comm. Note, TAX CT. R. 210(a) (July 1, 1977 ed.), 68 T.C. 1048.

[40] *See* TAX CT. R. 217(b) (July 6, 2012 ed.).

[41] TAX CT. R. 210(b)(8), 217(a) (July 6, 2012 ed.). With respect to proceedings involving revocations, the exception exists because such determinations usually are made on the basis of the Service's independent investigation rather than on the basis of information furnished by the applicant for the determination. Rules Comm. Note, TAX CT. R. 217(a) (July 1, 1977 ed.), 68 T.C. 1048.

[42] TAX CT. R. 217(a) (July 6, 2012 ed.).

[43] H.R. REP. NO. 93-1280, at 331 (1974); S. REP. NO. 93-383, at 116 (1973).

as is the case in most Tax Court proceedings.[44] However, the burden would be on the Commissioner with respect to grounds that were not advanced in the Commissioner's determination.[45] Thus, if the Commissioner changed the grounds of the determination, or if Commissioner had not issued a determination, the Commissioner would, at least partially, bear the burden of proof. The House bill eliminated the statutory burden of proof passed by the Senate, and left the formulation of burden of proof rules to the Tax Court.[46] The House provision ultimately prevailed, and no reference to burden of proof is contained in the legislation as enacted.[47]

Tax Court rules originally promulgated pursuant to the declaratory judgment provision contained rather elaborate burden of proof provisions that generally followed the policy of the Senate bill.[48] In all cases the burden of proof rested on the petitioner with respect to establishing the elements of jurisdiction.[49] Thus, the petitioner had to establish that a petition was filed within the statutory period, that the disputed plan was in effect, and that administrative remedies had been exhausted.[50] The remaining application of the burden of proof depended upon whether the Commissioner had issued a determination on which the proceeding was based. If such a determination had been issued and it concluded that a plan did not qualify, the burden of proof was placed on the party challenging such determination as to any ground specified in the determination.[51] If a determination that a plan did not qualify was defended on a ground not specified in such determination, the party seeking to defend the determination bore the burden of proof as to the new ground.[52] If the Commissioner had determined that a plan did qualify, any party challenging such determination bore the burden of proof on every ground on which the Commissioner relied to establish that the plan did not qualify.[53] If the Commissioner had not issued a determination, any party, including the Commissioner, seeking to establish that the plan did not qualify, bore the burden of proof on every ground relied on to establish such nonqualification.[54]

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[44] *See supra* note 43.
[45] *Id.*
[46] H.R. REP. NO. 93-1280, at 331 (1974); H.R. REP. NO. 93-807, at 108 (1974).
[47] I.R.C. § 7476; H.R. REP. NO. 93-1280, at 331 (1974).
[48] TAX CT. R. 217(c)(1) (July 1, 1977 ed.).
[49] TAX CT. R. 217(c)(1)(i) (July 1, 1977 ed.).
[50] TAX CT. R. 210(c) (July 1, 1977 ed.).
[51] TAX CT. R. 217(c)(1)(i) (July 1, 1977 ed.).
[52] TAX CT. R. 217(c)(1)(ii) (July 1, 1977 ed.).
[53] TAX CT. R. 217(c)(1)(i) (July 1, 1977 ed.).
[54] TAX CT. R. 217(c)(1)(i)(B) (July 1, 1977 ed.).

The Tax Court deleted the burden of proof provisions applicable to this and other areas of its declaratory judgment jurisdiction in 2003.[55] The court did so out of an abundance of caution, recognizing that the burden of proof provisions introduced through the enactment of § 7491 in 1998[56] could apply to declaratory judgment actions. Whether this is in fact the case is not readily clear. On one hand, the scope of the general rule under § 7491(a) appears broad enough to encompass declaratory judgment proceedings before the Tax Court, as it applies to "any court proceeding."[57] However, the provision has potential effect only if the taxpayer produces credible evidence with respect to a factual issue "relevant to ascertaining the liability of the taxpayer" for income taxes or for estate and gift taxes.[58] As a declaratory judgment does not bear, at least immediately, on the tax liability of the taxpayer, an argument exists that § 7491 is inapposite in this setting. Indeed, to date, the court has managed to avoid squarely addressing whether § 7491(a) applies to declaratory judgment proceedings.[59] Nonetheless, stating that it did not "wish to suggest by Rule that [§ 7491] does not apply" in this context,[60] the court deleted the burden-of-proof regime under former Rule 217(c) altogether.

Even assuming § 7491 applies to declaratory judgment proceedings before the Tax Court, the provision does not purport to resolve all burden of proof questions. Rather, the general provision of § 7491(a) places the burden of proof on the Commissioner if the taxpayer first produces "credible evidence" with respect to a factual issue relevant to ascertaining the taxpayer's liability for any income tax or estate and gift tax,[61] and even then only if a series of limitations does not apply.[62] Section 7491(a) therefore does not purport to articulate a broadly applicable general rule

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[55] *See* 120 T.C. 639–41 (2003) (amending Tax Court Rule 217 with a general effective date of June 30, 2003).

[56] *See* Internal Revenue Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3001(a), 112 Stat. 726–27 (enacting I.R.C. § 7491). The scope and application of § 7491 is addressed in Part X.C.4.

[57] I.R.C. § 7491(a).

[58] *Id.*

[59] In a retirement plan qualification proceeding, the court in *Hollen v. Commissioner*, T.C. Memo. 2011-2, 101 T.C.M. 1004, stated that it "need not decide whether § 7491(a) applies to declaratory judgment actions such as this," citing the taxpayer's failure to argue the applicability of the provision. *Id.* at 1005 n.3. Similarly, in an action concerning an organization's ability to receive deductible contributions, the court similarly avoided the question. *See* South Community Ass'n v. Commissioner, T.C. Memo. 2005-285, 90 T.C.M. 568, 570 n.5 ("We need not and do not decide whether sec. 7491(a)(1) applies in the setting of a declaratory judgment action such as we have here.").

[60] Rules Comm. Note, TAX CT. R. 217 (June 30, 2003 ed.), 120 T.C. 641.

[61] I.R.C. § 7491(a).

[62] *See* I.R.C. § 7491(b).

regarding the placement of the burden of proof. In declaratory judgment actions following the elimination of Tax Court Rule 217(c) concerning a challenge to an adverse agency determination, the court has placed the burden of proof on the taxpayer (as was the case under former Tax Court Rule 217(c)(1)(i)) under general principles.[63] Accordingly, the burden-of-proof regime established under former Rule 217(c) may prove persuasive in resolving future questions regarding the default allocation of the burden of proof in declaratory judgment proceedings, should the allocation prove critical to the disposition of the case.

b. Qualification of Tax Exempt Organizations and Classification of Private Foundations

The exception to the general bar on declaratory judgments in tax matters was further broadened by the Tax Reform Act of 1976.[64] This legislation added to the permissible subjects of declaratory judgment action disputes concerning the status of certain tax exempt organizations to which contributions are deductible.[65] The purpose for and the pattern of the 1976 legislation closely resemble those involved in the earlier provision authorizing declaratory judgments in the case of retirement plans.

The purpose of the exempt organization provision is virtually identical to that for retirement plans. Although the statute generally does not require prior administrative approval of tax exempt status, most organizations seek such determinations to assure themselves and their contributors that donations to the organization will be tax deductible.[66] Moreover, because of the extremely unfavorable consequences that attend the denial or revocation of exempt status, most organizations accede to Service views with regard to their organization and operation. As is true with retirement plans, these considerations have resulted in comparatively little judicial litigation and an absence of precedent to guide both taxpayers and the

[63] *See* Hollen v. Commissioner, T.C. Memo. 2011-2, 101 T.C.M. 1004, 1005; South Community Ass'n v. Commissioner, T.C. Memo. 2005-285, 90 T.C.M. 568, 570.

[64] Pub. L. No. 94-455, 90 Stat. 1520.

[65] I.R.C. § 7428. The legislation also provided declaratory judgment jurisdiction for disputes concerning the taxability of certain transfers of property from the United States. The provision, formerly codified in § 7477, was repealed for transfers and exchanges after 1984. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 131(e)(1), 98 Stat. 664. A detailed analysis of this former provision is provided in the original edition of this text. *See* HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 465–67 (1979).

[66] H.R. REP. NO. 94-658, at 283 (1975); S. REP. NO. 94-938, at 585 (1976). I.R.C. § 508(a) requires most § 501(c)(3) organizations, organized after Oct. 9, 1969, to apply for Service approval of exempt status.

Service. Difficulties occasioned by these problems have attracted the critical comment of both the Supreme Court[67] and the Commissioner of Internal Revenue.[68]

In several respects the procedures for declaratory judgments for exempt organizations are identical to those for retirement plans. Thus, the time limits for commencing the proceeding are the same for both types of proceedings—within 91 days following the day after the mailing of a determination[69] or, if the Service makes no determination, no earlier than 270 days after the filing of the original determination request.[70] Additionally, each provision states that the court "may" make a declaration with regard to the dispute[71] and thus leaves open the exercise of discretion in cases in which a declaratory judgment, although authorized under the letter of the law, would be inappropriate. In each type of proceeding, exhaustion of administrative remedies is a jurisdictional prerequisite for commencing suit,[72] and the same provision permitting flexible use of special trial judges is applicable to each type of proceeding.[73]

In other respects the two procedures have minor differences that mainly reflect the various types of substantive issues involved. Thus, the category of permissible petitioners in exempt organization proceedings is limited to the organization the status of which is in question.[74] The necessity of an actual controversy is common to both types of proceedings, but the requirement is satisfied differently in each. In the case of retirement plans, the statute requires that the plan be adopted;[75] for exempt organizations, the organization in question must be in existence.[76] The general limitation of evidence to the administrative record also is common to both procedures. The primary exception to the limitation is that extrinsic facts may be introduced with respect to the question of the court's jurisdiction.[77] Also excepted in the case of retirement plans is evidence with respect to the revocation of a plan's qualified status and revocation of exempt status of an

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[67] Commissioner v. "Americans United" Inc., 416 U.S. 752, 774 (1974) (Blackmun, J., dissenting); Bob Jones Univ. v. Simon, 416 U.S. 725, 749–50 (1974).

[68] Randolph W. Thrower, *I.R.S. Is Considering Far Reaching Changes in Ruling on Exempt Organizations*, 34 J. TAX'N 168 (1971).

[69] I.R.C. §§ 7428(b)(3), 7476(b)(5), 7477(b)(4).

[70] I.R.C. §§ 7428(b)(2), 7476(b)(3), 7477(b)(2).

[71] I.R.C. §§ 7428(a), 7476(a), 7477(a).

[72] I.R.C. §§ 7428(b)(2), 7476(b)(3), 7477(b)(2).

[73] I.R.C. §§ 7476(c), 7477(c).

[74] I.R.C. § 7428(b)(1).

[75] I.R.C. § 7476(b)(4).

[76] I.R.C. § 7428(b)(1); TAX CT. R. 210(c)(2)(C) (July 6, 2012 ed.).

[77] TAX CT. R. 217(a) and accompanying Rules Comm. Note (July 1, 1977 ed.), 68 T.C. 1048.

employee's trust.[78] In the case of exempt organizations, new evidence may be introduced in connection with a determination that revokes exempt status, or that determines status as a private foundation or as a private operating foundation.[79]

Although the two provisions have many areas of similarity, some differences remain. One area of difference, at least partially necessitated by the different nature of the substantive disputes, is the subject matter of the court's review. With respect to retirement plans, the court may review: (1) the Service's determinations with respect to the initial or continuing qualification of a plan;[80] and (2) the Service's failure to make determinations with respect to the initial or continuing qualification of a plan, but only if the dispute concerning continuing qualification arises from a plan amendment or termination.[81] In the case of exempt organizations, the court may review: (1) the Service's determinations with respect to the initial or continuing qualification of an organization as a charitable organization, a private foundation, or a private operating foundation;[82] and (2) the Service's failure to make determinations with respect to such initial or continuing qualification.[83] Although the language of the provisions in this regard appears to be quite similar (taking into account the different substantive issues involved), a dispute emerged concerning one aspect of the retirement plan provision. In a 1976 decision, *Sheppard & Myers, Inc. v. Commissioner*,[84] the Tax Court held that the 1974 statute gave it no jurisdiction to review a determination by the Commissioner that revoked the qualified status of a retirement plan. The court's decision was based on committee reports accompanying the legislation, which indicated that the court's jurisdiction was limited to controversies arising from initial qualification of a plan, plan amendments, and plan terminations.[85] The revocation in *Sheppard & Myers* did not result from any of these matters. However, committee reports on the Tax Reform Act of 1976, which authorized declaratory judgments with respect to exempt organizations,[86] provided as follows:

> *As is the case regarding retirement plans (under sec. 7476)* the courts are to have jurisdiction to determine whether the Service has correctly concluded that a previously exempt organization has lost its

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[78] *See supra* notes 41–42 and accompanying text.
[79] TAX CT. R. 210(b)(10), 217(a) (July 6, 2012 ed.).
[80] I.R.C. § 7476(a)(1).
[81] I.R.C. § 7476(a)(2).
[82] I.R.C. § 7428(a)(1).
[83] I.R.C. § 7428(a)(2).
[84] 67 T.C. 26 (1976).
[85] H.R. REP. NO. 93-807, at 343 (1974).
[86] *See* Pub. L. No. 94-455, § 1306, 90 Stat. 1520 (adding I.R.C. § 7428).

> charitable donee status because of changes in operation, changes in the governing law, changes in the governing instrument, etc.[87]

Thus, the committee reports indicated a congressional intent that both the retirement plan and exempt organization provisions permit review of Internal Revenue Service determinations revoking favorable treatment. The court in *Sheppard & Myers* did not note these committee reports, even though the 1976 legislation was enacted at approximately the same time as the promulgation of the case.[88] Whether this was because of oversight or because the court did not accept the committee's interpretation of the 1974 legislation is unknown.

Not long after the decision in *Sheppard & Myers* was issued, Congress signaled its disapproval of the Tax Court's narrow interpretation of its jurisdiction. Citing the committee reports accompanying the 1976 legislation excerpted above, the Senate Finance Committee in 1978 explained that Congress intended for the Tax Court to possess jurisdiction over cases concerning the revocation of a prior favorable determination by the Service in the retirement plan setting.[89] Although the technical corrections bill proposing to make this grant of jurisdiction express in light of *Sheppard & Myers* was not enacted, Tax Court rules issued subsequent to the enactment of the 1976 legislation nonetheless indicate that the court recognizes its jurisdiction over revocation disputes in general.[90]

In addition to differences with regard to the subject matter and scope of review of the declaratory judgment provisions governing retirement plan actions and exempt organizations, the procedure with regard to the latter has three other distinct characteristics. First, unlike retirement plans, the Tax Court's primary jurisdiction to review determinations with regard to exempt organizations is not exclusive. Proceedings seeking declaratory judgments with regard to these matters may be initiated as well in either the Court of Claims or the United States District Court for the District of Columbia.[91] A degree of consistency in the procedural rules applied by the three fora is expected since the committee reports provide that the burden of proof rules in all declaratory actions regarding exempt organizations

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[87] S. REP. NO. 94-938, at 589 (1976) (emphasis supplied); H.R. REP. NO. 94-658, at 286 (1975).

[88] The opinion in *Sheppard & Myers* was filed on Oct. 6, 1976. The Tax Reform Act was enacted on Oct. 4, 1976.

[89] *See* S. REP. NO. 95-745, at 65–66 (1978), accompanying the Technical Corrections Act of 1978, H.R. 6715, 95th Cong. (1977). The bill passed the House of Representatives and then was reported to the Senate out of the Senate Finance Committee. Thereafter, no action was taken on the bill.

[90] TAX CT. R. 210(b)(10), 212, 217(a) (July 6, 2012 ed.); Rules Comm. Note, TAX CT. R. 213(a), 217(a) (July 1, 1977 ed.), 68 T.C. 1042–43, 1048.

[91] I.R.C. § 7428(a).

should conform, to the extent practicable, to those adopted by the Tax Court for retirement plan actions.[92]

A second unique aspect of the exempt organization provision deals with interim relief for such organizations in connection with charitable status. The Service maintains a list of those organizations that it has determined are eligible to receive deductible contributions, and the Service now makes this list available to the public in an electronically searchable format.[93] A contributor to such an organization can be assured of the deductibility of contributions so long as the Service's determination is not publicly revoked or suspended.[94] Since the Service's revocation or suspension of an organization's tax-exempt status is an administrative action that may be judicially overridden, Congress provided in the 1976 legislation that, in certain circumstances, donors may be assured of the deductibility of contributions to an organization even though the Service revokes or suspends its advance assurance of deductibility.[95] In order to be eligible for the continued assurance of charitable status, the organization must institute the declaratory judgment proceeding within the statutory period.[96] If it does so, then even if the court determines that the Service determination was correct, deductible contributions of up to $1,000 per taxpayer (treating husband and wife as one taxpayer) will be permitted during the pendency of litigation.[97] The provision may only apply to individual contributors[98] who do not share any responsibility for the revocation of charitable status.[99] Naturally, if it is judicially determined that the Service determination was incorrect, the $1,000 limitation will not apply.[100]

A final area of interest that may or may not be unique to exempt organizations deals with the issue of duplicative litigation. To illustrate, suppose that at the same time the Commissioner issues a determination revoking an organization's exempt-charitable status the Commissioner also asserts a deficiency in income tax based on the withdrawal of such status. The taxpayer commences an action for a declaratory judgment that the

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[92] H.R. REP. NO. 94-658, at 285–86 (1975); S. REP. NO. 94-938, at 588 (1976).

[93] The Internal Revenue Service no longer publishes Publication 78, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code*. Rather, the Service now provides this information through an on-line search tool entitled "Exempt Organizations Select Check," *available at* http://www.irs.gov/Charities-&-Non-Profits/Exempt-Organizations-Select-Check.

[94] Rev. Proc. 72-39, 1972-2 C.B. 818.

[95] I.R.C. § 7428(c).

[96] I.R.C. § 7428(c)(1)(B).

[97] I.R.C. § 7428(c)(2)(A).

[98] *Id.*

[99] I.R.C. § 7428(c)(3).

[100] H.R. REP. NO. 94-648, at 287 n.8 (1975); S. REP. NO. 94-938, at 589 n.8 (1976).

revocation of favorable status was incorrect and also either files a petition with the Tax Court contesting the deficiency determination or pays the deficiency and initiates a refund action to recover the tax paid. Because of the choice of forum with regard to exempt organization declaratory judgments, these actions may be in the same or in different courts. The issue of exempt status probably will be the same in both the declaratory judgment and deficiency or refund proceeding, and the question arises whether both proceedings should proceed simultaneously or whether one proceeding should be stayed or dismissed pending completion of the other. The problem, similar to that which could formerly occur if the Commissioner issued a deficiency notice with respect to a year for which a refund proceeding had already been instituted,[101] is addressed in the committee reports under the 1976 Act:

> This provision is intended to facilitate relatively prompt judicial review of the specified types of exempt organization issues; it is not intended to supplant the normal avenues of judicial review (redetermination of a deficiency or suit for refund of taxes) where those normal procedures could be expected to provide opportunities for prompt determinations. Consequently, it is expected that the courts will not entertain a declaratory judgment suit with regard to a period for which a notice of deficiency has already been issued, except upon a showing by the organization that the declaratory judgment route is likely to substantially reduce the time necessary to attain a final judicial review of the Service's determination. Also, it is expected that in general a court which has accepted pleadings in a declaratory judgment proceeding will yield to a court which has accepted pleadings in a redetermination of deficiency or a tax refund suit, unless the proceedings in the declaratory judgment suit are so far along that it would facilitate interests of prompt justice for the latter court to yield to the former. The committee's decisions are not to be permitted to create conflicting determinations on the parts of different trial courts with regard to any of the questions that may be determined in a declaratory judgment suit; nor are the committee's decisions to operate so as to require duplication of effort on the part of parties, witnesses, or courts.[102]

The committee reports thus generally require that the actual tax controversy (whether it be in the form of a deficiency or refund proceeding) take precedence over the declaratory judgment action. Although the directive in the committee reports is not reflected specifically

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[101] *See* Part VI.B.2.

[102] H.R. REP. NO. 94-658, at 286 (1975); S. REP. NO. 94-938, at 588–89 (1976).

in the statute, no technical problems should be presented to the court acting in accordance with congressional desires inasmuch as the statute leaves ample room for judicial discretion in providing that the court "may" issue a declaratory judgment.[103]

Because the legislative history with regard to multiple actions expressly deals only with exempt organization declaratory judgments,[104] a question remains as to the treatment of this issue in connection with proceedings involving retirement plans. In the case of retirement plans, the possibility of dual actions would exist in a case in which an employer implements a plan in an unqualified manner and then seeks a favorable ruling. A denial of qualified status by the Service could be accompanied by an assertion of a deficiency based on disallowance of deductions to the employer or taxation of trust income. Theoretically, both a declaratory judgment and a deficiency or refund proceeding could be commenced.

c. Tax-Exempt Status of Certain Government Obligations

The Tax Court's declaratory judgment jurisdiction arose in the 1970s, and the last grant of jurisdiction during this period provided the Tax Court with authority to determine if interest paid on prospective obligations issued by State and local governments would be excluded from the gross income of the recipient pursuant to § 103.[105] The need for this declaratory judgment procedure provided by § 7478 is perhaps obvious. Although the exclusion from gross income will inure to the benefit of the bondholder, the availability of the exclusion determines the nominal interest rate provided under the instrument (thereby allowing the bond issuer to capture at least a portion of the benefit of the gross income exclusion). Simply put, the bond cannot be adequately priced until the tax-exempt status is established, and any lack of clarity concerning the tax treatment of the bond interest would make placement of the bonds difficult if not impossible.[106] The § 7478 procedure therefore allows the prospective issuer of the

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[103] I.R.C. § 7428(a). *See supra* notes 20–25 and accompanying text.

[104] *See supra* note 102.

[105] *See* Revenue Act of 1978, Pub. L. No. 95-600, § 336(a), 97 Stat. 2763, 2841 (adding § I.R.C. 7478). In its original form, the statute authorized the Tax Court to determine if prospective obligations were "described in section 103(a)." Congress amended the statute in 1988 to be more precise, identifying the issue to be whether the interest on such obligations would be "excludable from gross income under section 103(a)." *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1013(a)(42)(A)–(B), 102 Stat. 3544–45.

[106] *See* S. REP. NO. 95-1263, at 150 (1978) (noting that the uncertainty surrounding the potential determination that the bond interest could not be excluded from gross income "invariably makes it impossible to market the bonds").

bonds—the only party permitted to invoke the procedure[107]—to litigate the proper tax treatment of the bond interest prior to the bonds being issued. Following issuance, the bond issuer is no longer permitted to litigate the tax treatment of the interest paid to the bondholders.[108] The Tax Court's jurisdiction under § 7478 is permissive.[109] As in other areas of declaratory relief, the court requires the existence of an actual controversy before exercising its jurisdiction under this provision. In this context, the Tax Court requires at a minimum the prospective issuer to have adopted a resolution authorizing the issuance of the bonds under State or local law prior to commencing a proceeding under § 7478.[110]

As a procedural matter, a prospective bond issuer may not commence a proceeding under § 7478 until the Service has made a determination concerning the tax treatment of the interest to be paid under the prospective bond or has failed to make such a determination.[111] Additionally, the court is precluded from issuing a declaratory judgment under the provision unless it determines that the issuer has exhausted all available administrative remedies within the Service.[112] The issuance of an adverse notice of determination generally indicates that the prospective bond issuer has exhausted all available administrative remedies.[113] In that case, the issuer must commence the proceeding under § 7478 within 90

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[107] *See* I.R.C. § 7478(b)(1). Additional parties may not be joined in this context. *See* TAX CT. R. 215(c) (July 6, 2012 ed.).

[108] The Tax Court lacks jurisdiction under § 7478 to review the tax treatment of interest paid under state or local municipal bonds that already have been issued. Village of Brown Deer v. Commissioner, 86 T.C. 59 (1986). In 1988, the Senate proposed to amend § 7478 to permit the declaratory judgment procedure to be invoked by issuers of outstanding bonds (in addition to prospective bond issuers). *See* S. REP. NO. 105-174, at 52–53 (1998). This provision was dropped at the conference committee, however, in lieu of a directive to the Service to amend its administrative procedures to permit bond issuers to appeal adverse determinations with respect to existing bonds to the IRS Office of Appeals as a matter of right. *See* H.R. REP. NO. 105-599, at 248 (1998).

[109] The statute provides that the court "may" make a declaration concerning the tax treatment of the interest to be paid under the bond. I.R.C. § 7478(a) (flush language) ("the court may make a declaration . . ."); *see also* I.R.C. §§ 7428(a), 7476(a) (each employing permissive language).

[110] TAX CT. R. 210(c)(2) (July 6, 2012 ed.).

[111] I.R.C. § 7478(a)(1), (2).

[112] I.R.C. § 7478(b)(2). Revenue Procedure 88-32, 1988-1 C.B. 833, provides guidance on the steps an issuer must take to obtain a ruling from the Service in this setting. In general terms, the issuer must request a determination that is accompanied by a "complete and detailed statement" of all facts relating to the prospective obligations. *Id.* § 3.

[113] *Id.* § 6.02(1).

days of the mailing of the notice of determination.[114] If the Service fails to make a determination, the issuer generally will be considered to have exhausted all available administrative remedies upon the expiration of 180 days after the request for a determination was made,[115] provided the issuer has taken "all reasonable steps to secure such determination."[116] Accordingly, the prospective bond issuer cannot manufacture Tax Court jurisdiction through dilatory conduct that deprives the Service of the information necessary to make the requested determination. Once the 180-day period has expired, the bond issuer may commence a proceeding under § 7478 at any time.

Whereas resolution of declaratory judgment proceedings concerning the qualification of retirement plans and the tax exempt status of organizations is presumptively limited to the administrative record,[117] the Tax Court contemplates a broader scope of review in the § 7478 setting. In disposition of a government obligation proceeding, the Tax Court Rules anticipate that the administrative record will be "augmented by additional evidence to the extent the Court may direct."[118]

One distinguishing characteristic of declaratory judgment actions concerning the tax treatment of interest paid under State and local government bonds concerns the appeal of a Tax Court decision in this setting. Appeal in these cases does not rest with the circuit court of appeals in which the prospective issuer resides; rather, all appeals of actions maintained under § 7478 are reviewable only by the Court of Appeals for the District of Columbia.[119]

2. Expansions of Declaratory Judgment Relief

Following the establishment and expansion of the Tax Court's declaratory judgment jurisdiction in the 1970s, the court's jurisdiction on this front remained fairly stable for the next two decades.[120] However, Congress significantly expanded the court's declaratory judgment

[114] I.R.C. § 7478(b)(3).

[115] Rev. Proc. § 88-32, § 6.02(2).

[116] I.R.C. § 7478(b)(2).

[117] *See* TAX CT. R. 217(a) (July 6, 2012 ed.).

[118] *Id.*

[119] I.R.C. § 7482(b)(3).

[120] The most significant change in the declaratory judgment arena during this period related to the elimination of the Tax Court's jurisdiction over disputes concerning the taxability of certain transfers of property from the United States. The provision, formerly codified in § 7477, was repealed for transfers and exchanges after 1984. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 131(e)(1), 98 Stat. 664.

jurisdiction through the Taxpayer Relief Act of 1997.[121] This legislation provided the court with declaratory judgment jurisdiction over the valuation of gifts, the qualification of a decedent's estate to pay tax on a deferred basis under § 6166, and adjustments to an "oversheltered" tax return that did not operate to increase the taxpayer's current tax liability. The first two areas of expanded jurisdiction are addressed below. As adjustments to oversheltered returns arise in connection with distributive shares of losses from business entities taxed as partnerships, this material will be addressed later in this Part under the broader topic of innovations in the partnership procedures.[122]

a. Declaratory Judgments Concerning Gift Tax Valuations

Prior to the enactment of § 7477, donors of property often lacked recourse to challenge the Service's determination concerning the gift tax value of transferred property. Specifically, any increase in the tentative gift tax resulting from a determined increase in the value of transferred property would be absorbed by application of the donor's unified credit against the gift tax—that is, until the donor's cumulative lifetime taxable gifts exceeded the considerable amount of transfers shielded by the credit.[123] Until the donor reached that limit, the absence of a deficiency in gift tax precluded the Tax Court's general deficiency jurisdiction, and the donor could not invoke the refund jurisdiction of federal courts to recover a tax that was never paid. However, this is not to suggest that the Service's determination of an increase in the value of a gift was immaterial. Once the period of limitations expired, the increased value would be binding upon the taxpayer for purposes of determining the tax consequences of the donor's future gifts[124] as well as the estate tax liability due in the donor's estate.[125]

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[121] Pub. L. No. 105-34, 111 Stat. 788 (1997).

[122] Declaratory relief in the context of an oversheltered return is discussed in Section C.4 of this Part.

[123] *See* I.R.C. § 2505(a). When § 7477 was enacted in 1997, the prevailing unified credit for gift tax purposes permitted a transferor to make $600,000 of taxable gifts (that is, gifts in excess of the annual gift tax exclusion under § 2503(b)) over the donor's lifetime without the payment of gift tax. At that time, however, the credit was scheduled to increase incrementally to shield gift tax on lifetime taxable gifts of $1 million. Under current law in 2013, the amount of cumulative lifetime gifts that are shielded from gift taxation by the unified credit stands at $5.25 million.

[124] *See* I.R.C. § 2502(a) (donor's annual gift tax determined by calculating the difference between (a) the gift tax on all of the donor's current and prior year gifts and (b) the gift tax on the donor's prior year gifts), § 2504(c) (valuing gifts made in prior years at their value as finally determined for gift tax purposes).

As part of the Taxpayer Relief Act of 1997, Congress addressed the above-described anomaly through the enactment of § 7477.[126] If an actual controversy exists regarding the Service's determination of the value of a gift and the determination does not result in a deficiency or an increased payment of tax, the Tax Court may make a declaration of the contested value.[127] The Tax Court's declaration of gift tax value carries the force and effect of a regular Tax Court decision, and is reviewable in the same manner.[128]

The Tax Court's jurisdiction to do so may be invoked only by the donor,[129] and then only if the donor satisfies certain conditions. To start, the donor must invoke the Tax Court's jurisdiction in a timely manner. Once the Service sends the donor a notice of determination concerning the value of a gift,[130] the donor must petition the Tax Court before the 91st day following the date of mailing.[131] In addition to this procedural requirement, § 7477 precludes the Tax Court from entering a declaratory judgment until the donor has exhausted all available administrative remedies.[132] While the statute does not elaborate on what is required of the taxpayer in this regard, presumably the condition requires the taxpayer to pursue a protest of the determined gift tax value with the IRS Office of Appeals, as outlined in the § 7477 regulations.[133]

b. Declaratory Judgments Concerning Qualification for Section 6166 Elections

Although payment of federal estate tax generally is due nine months following the death of the decedent, Congress recognized that prompt payment of estate tax could pose an economic hardship on estates holding interests in closely held businesses. Through § 6166(a), Congress has authorized an estate to elect to pay the estate tax on a deferred, installment

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[125] *See* I.R.C. § 2001(b) (including a decedent's adjusted taxable gifts in the tax base for estate tax purposes), § 2001(f) (valuing gifts to be included in tentative estate tax base at their value as finally determined for gift tax purposes).

[126] Pub. L. No. 105-34, § 506(c), 111 Stat. 788, 855–56 (1997).

[127] I.R.C. § 7477(a); *see also* Treas. Reg. § 301.7477-1(a) (interpreting the Tax Court's jurisdiction as being predicated on an adjustment in value that will not result in a gift tax deficiency or a refund of gift tax).

[128] I.R.C. § 7477(a).

[129] I.R.C. § 7477(b)(1). Joinder of additional parties is not permitted. TAX CT. R. 215(c) (July 6, 2012 ed.).

[130] The Service typically provides its determination through the issuance of a Letter 3569. *See* Treas. Reg. § 301.7477-1(b)(2).

[131] I.R.C. § 7477(b)(3); *see also* TAX CT. R. 210(c)(3) (July 6, 2012 ed.).

[132] I.R.C. § 7477(b)(2); *see also* TAX CT. R. 210(c)(4) (July 6, 2012 ed.).

[133] *See* Treas. Reg. § 301.7477-1(b)(1).

basis if the value of the closely held business exceeds 35 percent of the value of the adjusted gross estate. If the estate qualifies for the election, it can defer the initial installment of tax for five years past the due date, and the estate can spread the succeeding installments over ten years.[134]

Prior to the enactment of the declaratory judgment procedure provided in § 7479 in 1997,[135] an estate had little recourse if the Service determined that the estate was ineligible to pay the estate tax on an installment basis under § 6166. The Tax Court lacked jurisdiction to review the Service's determinations concerning the estate's qualification under § 6166,[136] leaving the estate to pay the tax on a present basis and to pursue a refund of such payment.[137] This approach, however, required the estate to incur the hardship resulting from its relative illiquid position—the very problem that Congress sought to ameliorate through the enactment of § 6166.[138]

Accordingly, Congress provided the Tax Court with jurisdiction under § 7479(a) to make a declaratory judgment regarding an estate's qualification to make an election under § 6166 or an estate's continued qualification to defer payment pursuant to § 6166 in the case of an actual controversy involving the Service's determination (or failure to make a determination) of those issues. The court's declaratory jurisdiction may be invoked only by

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[134] *See* I.R.C. § 6166(a)(3).

[135] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 505(a), 111 Stat. 788, 854 (1997). Congress contemplated providing the Tax Court with jurisdiction to issue declaratory judgments concerning an estate's qualification to pay the estate tax on a deferred basis under § 6166 through proposed legislation in 1981, *see* H.R. REP. NO. 97-201, at 182–83 (1981), but the provision did not survive to enactment.

[136] *See* Estate of Sherrod v. Commissioner, 82 T.C. 523 (1984) (holding that the Tax Court lacks jurisdiction to review the Service's determination that an estate was not eligible to make a § 6166 election); Estate of Meyer v. Commissioner, 84 T.C. 560 (1985) (following *Estate of Sherrod* even though the Service's denial of the estate's § 6166 election resulted in increased estate tax attributable to the denial of an administrative expense deduction attributable to the interest owed on the would-be installments).

[137] The estate's ability to pursue refund litigation in this context was by no means clear, as certain courts determined that the action was foreclosed by the Anti-Injunction Act of § 7421(a). *See* Bauersfeld v. United States, 74 A.F.T.R.2d 6598 (D. Kan. 1994) (holding challenge to denial of § 6166 election barred by Anti-Injunction Act). *But see* Parrish v. Loeb, 558 F. Supp. 921 (C.D. Ill. 1982) (suit to challenge Service's reversal of the estate's § 6166 eligibility not barred by Anti-Injunction Act, based in part on estoppel grounds).

[138] *See* H.R. REP. NO. 105-148, at 358 (1997); STAFF OF THE JOINT COMM. ON TAX'N, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1997, JCS-23-97, at 74 (1997) (explaining that Congress enacted § 7479 to provide estates "access to the courts to resolve disputes over an estate's eligibility for the section 6166 election, without requiring potential liquidation of the assets the installment provisions of section 6166 are designed to protect").

the estate or any person who has assumed the obligation to make the § 6166 installment payments of tax.[139] The petitioner must invoke the Tax Court's jurisdiction by filing a petition before the 91st day following the Service's mailing of the notice of determination concerning the estate's qualification under § 6166.[140]

Even if the Tax Court's jurisdiction is invoked in a timely manner, the court may not make a declaration unless it first determines that the petitioner has exhausted all available administrative remedies.[141] The statute presumes the petitioner has done so if the Service fails to make a determination within 180 days after the petitioner requested such determination be made, provided the petitioner has taken all reasonable steps in a timely manner to secure the determination.[142] Beyond this statutory presumption, Revenue Procedure 2005-33[143] provides guidance on the steps a taxpayer-estate must take to be considered to have exhausted all available administrative remedies. Most significantly, if the Service makes a preliminary determination that the estate does not qualify for the § 6166 election, the estate must request a conference with the IRS Office of Appeals. The request must be submitted in writing within 30 days of the mailing of the preliminary determination. Furthermore, the estate must "participate fully" in the Appeals conference, which includes providing all information relevant to the § 6166(a) election that is requested by the Service.[144] In the event the Service does not issue a preliminary determination or if the Service does not hold the requested Appeals conference, a taxpayer-estate that receives a final notice of determination will be considered to have exhausted its administrative remedies without participating in the Appeals conference.[145]

The Tax Court's jurisdiction under § 7479 has been most extensively analyzed by the court in *Estate of Roski v. Commissioner*.[146] In that case, the Service had denied the estate's § 6166(a) election through the application of a bright-line rule that a § 6166(a) election would not be granted unless the estate posted a § 6165 bond or agreed to a special lien under § 6324A as a means of securing the estate's payment obligation. The Commissioner contended that the Tax Court lacked jurisdiction to review its determination to impose a bond or lien requirement in the case, arguing that the court's declaratory jurisdiction was limited to examining whether the estate satisfied

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139 I.R.C. § 7479(b)(1); *see also* TAX CT. R. 210 (July 6, 2012 ed.) (setting forth procedure for declaratory judgment actions before the Tax Court).

140 I.R.C. § 7479(b)(3).

141 I.R.C. § 7479(b)(2).

142 *Id.*

143 2005 C.B. 1231.

144 *Id.* § 4.01(b)(2), 2005 C.B. at 1232.

145 *Id.* § 4.03, 2005 C.B. at 1233.

146 128 T.C. 113 (2007).

the conditions to make the election under § 6166(a) or whether the grounds for termination of the election under § 6166(g) were implicated. The court rejected this narrow interpretation of its declaratory judgment jurisdiction, holding instead that its jurisdiction extended to reviewing the Service's broader determination that the estate was not entitled to § 6166 relief—for any reason.[147] Having asserted its jurisdiction to review the Service's determination, the court set aside the Service's determination on the basis that the bright-line application of a bonding requirement that was not included in the statute constituted an arbitrary abdication of agency discretion.[148]

B. Review of Worker Classification Determinations

Similar to the expansion of the Tax Court's declaratory judgment jurisdiction, Congress provided the court with jurisdiction to resolve disputes concerning the classification of service providers for federal employment tax purposes as part of the Taxpayer Relief Act of 1997.[149] Pursuant to § 7436(a), the Tax Court may review a determination by the Secretary that (1) one or more individuals providing services to the taxpayer constitute employees for federal employment tax and income tax withholding purposes,[150] or (2) that the taxpayer is not entitled to the beneficial tax treatment provided by § 530(a) of the Tax Reform Act of 1978 with respect to such individuals.[151] The Tax Court's review of the

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[147] *See id.* at 123–24.

[148] *Id.* at 130–31.

[149] Pub. L. No. 105-34, § 1454(a), 111 Stat. 788, 1055 (enacting I.R.C. § 7436).

[150] As a general rule, the determination of whether a service provider constitutes an employee for federal tax purposes as opposed to an independent contractor is made with reference to common law principles for determining the presence of an employer-employee relationship. *See* I.R.C. § 3121(d)(2) (defining employee for FICA tax purposes as an individual who has the status of an employee "the usual common law rules in determining the employer-employee relationship"); Treas. Reg. § 31.3401(c)-1(b) (detailing common law factors to be considered in determining whether a worker is an employee for federal income tax withholding purposes); *see also* STAFF OF THE JOINT COMM. ON TAX'N, PRESENT LAW AND BACKGROUND RELATING TO WORKER CLASSIFICATION FOR FEDERAL TAX PURPOSES, JCX-26-07, at 2–5 (2007) (describing common law analysis). For a list of 20 factors identified by the Service as relevant under the common law test, see Revenue Ruling 87-41, 1987-1 C.B. 296.

[151] As explained by the Staff of the Joint Committee on Taxation, *supra* note 150, at 5–6, § 530 of the Tax Reform Act of 1978 (§ 530) generally permits a taxpayer to treat a service provider as not being an employee for employment tax purposes regardless of the status of the service provider under the prevailing common law analysis unless the taxpayer has no reasonable basis for treating the service provider as an independent contractor. *See* Revenue Act of 1978, Pub L.

Secretary's determination proceeds on a de novo basis,[152] and a determination by the Tax Court is reviewed in the same manner as a decision of the Tax Court.[153]

The jurisdiction of the Tax Court in this context is predicated upon the making of a worker classification determination by the Service and, if notice of the determination is sent by certified or registered mail, the taxpayer's filing of a petition with the court within 90 days of such mailing.[154] Once the determination has been made and notice has been mailed to the taxpayer, § 7436 generally extends the benefits of deficiency litigation to the federal employment tax arena. The Service is precluded from assessing or collecting the employment tax attributable to an adverse worker classification determination until the period for seeking a determination by the Tax Court expires or, if the Tax Court's jurisdiction is invoked, until the court's decision in the matter becomes final.[155]

Section 7436 contains a few context-specific provisions. To start, the only party permitted to file a petition with the Tax Court for a determination of worker classification is the person for whom the relevant services were performed.[156] The putative employee or other potentially affected party therefore is precluded from disputing the determination before the Tax Court. Additionally, § 7436 bars consideration of subsequent changes to the taxpayer's employment tax treatment of the service provider. Specifically, if during the pendency of the § 7436 proceeding the taxpayer changes the federal employment tax treatment of a service provider whose employment tax status is involved in the proceeding

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No. 95-600, § 530(a), 92 Stat. 2763, 2885. For years after 1978, relief under § 530 is available only if (1) all federal returns required to be filed by the taxpayer with respect to the service provider for the relevant period have consistently treated the service provider as not being an employee and (2) the taxpayer and any predecessor has not treated any individual holding a position substantially similar to the service provider as an employee for employment tax purposes for periods after 1977. Section 530 originally was enacted as a short-term measure to provide Congress sufficient time to legislatively address issues relating to worker classification. However, the provision was extended indefinitely in 1982. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248 , § 269(c), 96 Stat. 552–53.

[152] *See* H.R. REP. NO. 105-220, at 734 (1997) (explaining the Tax Court's review is not limited to the administrative record).

[153] I.R.C. § 7436(a).

[154] I.R.C. § 7436(b)(2); *see also* TAX CT. R. 290(c) (July 6, 2012 ed.).

[155] *See* I.R.C. § 7436(d)(1) (incorporating principles of § 6213(a) into § 7436 proceedings). Prior to the enactment of § 7436, judicial review of the Service's assessment of employment taxes necessitated the payment of the tax in dispute followed by a refund proceeding in the Federal district court or the Court of Federal Claims. *See* Henry Randolph Consulting v. Commissioner, 112 T.C. 1, 3 n.2 (1999).

[156] I.R.C. § 7436(b)(1).

or that of a person holding a similar position, the Tax Court may not take such change into account in determining whether the Commissioner's worker classification determination is correct.[157]

The taxpayer may elect, with the Tax Court's consent, to apply the small case procedures under § 7463 to the worker classification proceeding, provided that the employment tax in dispute does not exceed $50,000 for each calendar quarter involved.[158] In that event, the chief judge may assign the proceeding to be heard by a special trial judge of the court.[159] A determination by the Tax Court in a § 7436 proceeding that is heard under the small case procedures is not reviewable by any other court, and such a determination has no precedential value.[160]

As originally enacted, § 7436 limited the jurisdiction of the Tax Court to reviewing the relevant worker classification determinations made by the Secretary.[161] In *Henry Randolph Consulting v. Commissioner*,[162] the court determined that its jurisdiction under § 7436(a) did not extend to determining the *amount* of employment tax owed by the taxpayer. Congress corrected this defect in 2000, retroactively extending the Tax Court's jurisdiction under § 7436(a) to determine the proper amount of employment tax that results from the worker classification determination.[163] The Tax Court's jurisdiction to determine the amount of the taxpayer's employment tax obligations is, in a sense, ancillary. The court does not possess jurisdiction to determine employment tax liabilities as a stand-alone matter; rather, the court first must possess jurisdiction to review the

[157] I.R.C. § 7436(b)(3). This provision is reminiscent of Federal Rule of Evidence 407, barring the admissibility of evidence of subsequent remedial measures.

[158] I.R.C. § 7436(c)(1).

[159] I.R.C. § 7443A(b)(5) (as added by the Pension Protection Act of 2006, Pub. L. No. 109-280, § 857(a), 120 Stat. 1020).

[160] I.R.C. § 7436(c)(2).

[161] In *Neely v. Commissioner*, 115 T.C. 287 (2000), the Tax Court on its own motion addressed whether the original grant of jurisdiction under § 7436(a) extended to determining whether the Commissioner's determination of worker classification status was barred by the § 6501 statute of limitations on assessment. The court resolved this question in the affirmative, reasoning that its jurisdiction to review worker classification determinations necessarily extended to any affirmative defense the taxpayer may properly raise (such as the limitations period) in response to the worker classification determination.

[162] 112 T.C. 1 (1999).

[163] I.R.C. § 7436(a), as amended by the Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 314(f), 114 Stat. 2763A–643. The 2000 amendment was made retroactive to the original August 5, 1997 effective date of the statute. *Id.* § 314(g).

Secretary's worker classification determination.[164] However, in *Evans Publishing, Inc. v. Commissioner*,[165] the Tax Court reasoned that it possessed jurisdiction to determine the employment tax obligations attributable to a worker classification determination made by the Commissioner in an answer filed in the § 7436 proceeding relating to service providers whose status was not addressed in the original worker classification determination notice. Citing the incorporation of the principles of § 6214(a) into the § 7436 arena by § 7436(d)(1), the court analogized the subsequent additional worker classification determination to the Commissioner's assertion of a deficiency greater than that asserted in the statutory notice.[166] Accordingly, the issuance of a Notice of Determination of Worker Classification from the Commissioner does not necessarily serve to cap the taxpayer's employment tax exposure for the periods at issue.

C. Innovations in Partnership Proceedings

Perhaps no one field of tax law has seen a greater level of procedural innovation in pursuit of greater adjudicative efficiency than the income taxation of partnerships. As described below, as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[167] Congress implemented an ambitious procedural framework for adjusting tax items generated at the partnership level that flow through to be reported at the partner level. The intricate framework, in turn, led Congress to provide an alternative streamlined procedure for "electing large partnerships."[168] Additionally, operation of the TEFRA partnership procedures gave rise to the need for another arena of declaratory judgment jurisdiction for the Tax Court, this

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[164] *See* Menard v. Commissioner, 130 T.C. 54, 60–61 (court lacked jurisdiction to redetermine Medicare tax liability due to absence of a determination concerning worker classification); Salazar v. Commissioner, T.C. Memo. 2006-7, 91 T.C.M. (CCH) 659 (court lacked jurisdiction to redetermine employment tax liabilities due to absence of a valid notice of determination concerning employment status).

[165] 119 T.C. 242 (2002).

[166] *Id.* at 247. However, similar to deficiencies asserted in excess of that contained in the statutory notice, the Commissioner bears the burden of proof with respect to worker classification determinations for service providers not addressed in the original determination letter. *Id.* at 245 (Commissioner conceding that he bears burden of proof); *see also* TAX CT. R. 142(a) (July 6, 2012 ed.).

[167] Pub. L. No. 97-248, §§ 401–407, 96 Stat. 324, 648–71 (adding I.R.C. §§ 6221–6232); *see also* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 714(p)(1), 98 Stat. 494, 964 (adding I.R.C. § 6233 to the partnership provisions); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1941(b)(1), 102 Stat. 1107, 1323 (repealing I.R.C. § 6232, dealing with the application of the TEFRA rules to windfall profits tax).

[168] This alternative reporting and audit regime is discussed below in Section C.3 of this Part.

one governing proposed adjustments to a partner's tax return that would not generate a deficiency in tax due to the partner's distributive share of partnership losses or deductions (which create an "oversheltered return").[169] This Section discusses the TEFRA partnership procedures and subsequent procedural developments spawned by this framework.

1. Uniform Partnership Proceedings Under TEFRA[170]

Prior to the procedural changes enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[171] the Service faced an often difficult task in determining the tax liability of partners.[172] Because there was no requirement of consistency between the partnership and its partners' returns, adjustments in the tax liability of partners were made while the Service was auditing each individual partner rather than during an audit of the partnership as a whole.

A significant burden was placed on the Service by requiring it to audit each partner independently.[173] The statutory period within which the Service could assess a tax against a partner was measured by reference to the filing of the partner's income tax return.[174] If the Service identified a questionable partnership item on a particular partner's return, and if the Service desired to extend the statutory period for assessing a tax regarding that item on the returns of all the partners, the Service would have to obtain a waiver from each partner; the partnership had no authority to execute such a waiver.[175] Obtaining the necessary waiver was particularly difficult in cases involving large partnerships whose partners were located in many

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[169] The aspect of Tax Court's declaratory judgment jurisdiction is discussed below in Section C.4 of this Part.

[170] This Section represents a condensed and slightly modified version of Professor Dubroff's prior extensive analysis of the TEFRA partnership procedures and the Tax Court rules implementing them. *See* Harold Dubroff & Charles M. Greene, *Recent Developments in the Business and Procedures of the United States Tax Court; Part Six: Partnership Proceedings*, 52 ALB. L. REV. 163 (1987).

[171] Pub. L. No. 97-248, §§ 401–407, 96 Stat. 324, 648–71 (adding I.R.C. §§ 6221–6232); *see also* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 714(p)(1), 98 Stat. 494, 964 (adding I.R.C. § 6233 to the partnership provisions); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1941(b)(1), 102 Stat. 1107, 1323 (repealing I.R.C. § 6232, dealing with the application of the TEFRA rules to windfall profits tax).

[172] STAFF OF THE JOINT COMM. ON TAX'N, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, at 268 (1982) [hereinafter JCT Explanation].

[173] JCT Explanation, *supra* note 172, at 267–68; John B. Palmer, III, *TEFRA Treats Partnerships as Separate Entities Under its New Rules*, 58 J. TAX'N 34, 34 (1983).

[174] JCT Explanation, *supra* note 172, at 267.

[175] *Id.*; *see also* Palmer, *supra* note 173, at 34.

jurisdictions, a difficulty exacerbated by the fact that Service efforts were frequently impeded by inadequate and erroneous data on partnership returns.[176] Consequently, the period of limitations could expire with regard to some partners while others would have to pay an additional tax.[177]

In addition to the substantial administrative burden created by the requirement of independent audits, the Service could also become involved in separate judicial proceedings with respect to the partners, with each such proceeding generally being conclusive only with respect to the partners who were parties to the litigation.[178] Any partner who disagreed with the administrative determination of a partnership item could select separately among three trial-level courts in which to litigate.[179] Taxpayers found that settlements on partnership issues were sometimes difficult to obtain. Unless an agreement could be reached that allowed the Service to treat partnership items uniformly for all partners, the Service had little incentive to settle with one partner when it might be forced to litigate the same issue with others.[180] Thus, the determination of partnership tax liability often resulted in the unnecessary duplicate expenditures of manpower as well as administrative and judicial resources.[181]

With the rise of large tax-shelter partnerships in the 1970s, the Service's burden intensified.[182] Encouraged by the problems encountered by the Service in organizing effective audits, many promoters of tax-shelter partnerships took aggressive reporting positions.[183] The Service increased its efforts to audit these partnerships but contended that partnership-level proceedings were needed as a solution to its problems.[184]

Through TEFRA, Congress sought to ease the burdens arising from the determination of the tax liability of partners by providing, with certain exceptions,[185] for unified administrative and judicial proceedings at the

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[176] Palmer, *supra* note 173, at 34.

[177] JCT Explanation, *supra* note 172, at 268.

[178] *Id.* at 267; *see also* Palmer, *supra* note 173, at 34.

[179] Tax litigation may be initiated by the taxpayer in either the Tax Court, the Federal district court, or the Court of Federal Claims.

[180] JCT Explanation, *supra* note 172, at 268.

[181] *Id.*; *see also* Palmer, *supra* note 173, at 34.

[182] Palmer, *supra* note 173, at 34.

[183] *Id.*

[184] *Id.*

[185] An exception exists, for example, in the case of a partner whose "partnership items" have become "nonpartnership items." In such a case, the tax liability of the partner would be determined apart from any partnership proceeding. *See infra* notes 62–78 and accompanying text.

partnership level.[186] The unified procedures apply generally to partnerships[187] and, through 1996, they applied to S corporations as well.[188]

Under TEFRA, the partnership is treated as a distinct entity for determining the tax liability of its partners. By providing for uniform audits and judicial proceedings in regard to "partnership items,"[189] Congress hoped to prevent the inconsistent treatment of partners with respect to the same item and to avoid the duplicative use of administrative and judicial resources.[190] The TEFRA procedures provide that a representative partner, referred to as the tax matters partner (TMP), will guide the partnership through consolidated administrative and judicial proceedings. This benefits the individual partners, who need not participate in the proceedings unless they so choose but who may nonetheless take part in any favorable settlement. It also benefits the Service by permitting it, in general, to bind every partner to the result in a single administrative and judicial proceeding that directly involves only one or a limited number of partners. The following discussion explores many of the details governing administrative and judicial review of the tax liability of partners as established by TEFRA.

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[186] I.R.C. § 6221 (1982).

[187] I.R.C. §§ 6221, 6231(a)(1) (1982). Certain small partnerships are excluded from the TEFRA provisions unless they elect to have the procedures apply to them. I.R.C. § 6231(a)(1)(B).

[188] Sections 6241 through 6245 formerly provided that the partnership administrative and judicial procedures applied to S corporations, except to the extent modified or made inapplicable by regulations. However, Congress repealed these provisions through the Small Business Job Protection Act of 1996. *See* Pub. L. No. 104-188, § 1307(c)(1), 110 Stat. 1755, 1781 (1996). The repeal took effect for tax years beginning after December 31, 1996. As discussed in Section C.2 below, a simplified S corporation procedure was enacted in its place. Given the demise of the mass-marketed tax shelter industry, the need for the TEFRA audit procedures in the partnership setting may too have passed. *See* Steve R. Johnson, *Reforming Federal Tax Litigation: An Agenda*, 41 FLA. ST. L. REV. 205, 258–64 (2013) (contending that the TEFRA procedures are no longer necessary and, indeed, are counterproductive as a result of their complexity).

[189] The statute defines "partnership item" in the following manner:

> the term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

I.R.C. § 6231(a)(3).

[190] JCT Explanation, supra note 172, at 268.

a. Statute of Limitations

Generally, the period for assessing any partner with a tax attributable to partnership items is no less than three years from the date the partnership return is filed or, if later, the last day for filing the return.[191] By executing an agreement with the Service, any partner may, prior to the expiration of the statutory period, extend such period in regard to himself.[192] By executing an agreement with the Service, the TMP may extend the statutory period with respect to all partners.[193] Accordingly, a partner subject to the TEFRA provisions may be subject to different statutes of limitations as to partnership and nonpartnership items with respect to the same tax year.

b. Administrative Proceedings

In the absence of an inconsistency with the partnership return[194] or a mathematical or clerical error[195] on the partnership return, the Service generally is precluded from assessing any deficiencies against a partner with respect to a partnership item until partnership-level administrative proceedings are completed.[196] The Service is required to mail notice of the beginning and completion of the proceedings to each partner whose name

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[191] I.R.C. § 6229(a). If the partnership items of any partner become nonpartnership items before the expiration of the statutory period applicable to partnership items, the period of limitations will not expire before one year from the date the items become nonpartnership items. I.R.C. § 6229(f).

[192] I.R.C. § 6229(b)(1)(B).

[193] *Id.*

[194] A partner is required to either: (1) treat partnership items on his return consistently with their treatment on the partnership return; or (2) notify the Service of any inconsistency. I.R.C. § 6222(a), (b). If the partner fails to notify the Service of an inconsistency on his return, the Service may, without an administrative proceeding, adjust the partner's return to make the returns consistent. I.R.C. § 6222(c). Failure to observe the consistency requirement may subject a partner to an addition to tax. *See* I.R.C. § 6222(d).

[195] The Service may adjust a partner's return to correct a mathematical or clerical error without a partnership-level proceeding unless that partner files, within 60 days of the mailing of the notice of the correction, a request that the correction not be made. I.R.C. § 6230(b).

[196] I.R.C. § 6225(a). Section 6225 prohibits the Service from assessing any asserted deficiency against a partner before the expiration of 150 days after mailing of the "final partnership administrative adjustment" (FPAA), or if a proceeding is commenced in the Tax Court, until the decision of the court has become final. In addition, § 6223(a) requires that the Service mail notice to specified partners of the beginning of an administrative proceeding and a FPAA "resulting from any such proceeding:" I.R.C. § 6223(a).

and address has been furnished to it.[197] An exception to the notice requirement exists for partners with less than one percent interest in a partnership that has more than 100 partners, unless a group of such partners with an aggregate of five percent or more interest in the partnership profits combine for the purpose of notice.[198] In this event, the "5-percent group"[199] must designate one of their members to receive notice, and the Service is required to send notice to that partner.[200]

All partners possess the right to participate in administrative proceedings,[201] and any partner may enter into a separate settlement with the Service.[202] If the Service enters into a settlement agreement with a partner in regard to partnership items, it must also settle on "consistent"[203] terms with any other partner who so requests.[204] Generally, a settlement agreement between the Service and one partner does not bind any other partners who were not party to the agreement.[205] However, partners who are not entitled to notice may be bound by the TMP if the TMP expressly

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[197] I.R.C § 6223(a). Notice of the beginning of a partnership proceeding must be mailed at least 120 days before a FPAA is mailed to the tax matters partner (TMP). I.R.C. § 6223(d)(1). Generally, the Service will use the names, addresses, and profit interest shown on the partnership return. I.R.C. § 6223(c)(1). A partner is not entitled to notice unless the Service has received, at least 30 days before notice is mailed to the TMP, sufficient information to enable the Service to determine that such partner is entitled to notice and to provide such notice to the partner. I.R.C. § 6223(a).

[198] I.R.C. § 6223(b).

[199] I.R.C. § 6231(a)(11) (defining a "5-percent group" as a group of partners who collectively possessed an interest in partnership profits of five percent or more).

[200] I.R.C. § 6223(b)(2).

[201] I.R.C. § 6224(a).

[202] I.R.C. § 6224(c)(1).

[203] I.R.C. § 6224(c)(2); *see also* Treas. Reg. § 301.6224(c)-3(b)(1) (providing guidance on what constitutes a consistent settlement).

[204] I.R.C. § 6224(c)(2). The TMP presumably would inform the other partners of any separate settlement agreement entered into between the Service and an individual partner. Since there does not appear to be any general requirement that either the Service, or a partner with whom it settles, notify the TMP of such settlement, it may be difficult to charge the TMP with a duty to notify partners of all settlements with the Service. In cases docketed in Tax Court, Rule 248(c) requires the Service to notify the TMP within seven days of any settlement agreement with a partner. TAX CT. R. 248(c)(2) (July 6, 2012 ed.).

[205] I.R.C. § 6224(c)(1). The TMP may enter into a stipulated decision with the Service after a petition is filed with the Tax Court and all partners will be bound by the decision. The signature of the TMP serves as a certification that no partner with an interest in the outcome of the action objects to entry of the decision. TAX CT. R. 248(a) (July 6, 2012 ed.).

states that the agreement shall bind the other partners,[206] and if such partners have not filed a statement denying the TMP's authority to bind them 30 days prior to the agreement between the TMP and Service.[207] Because the TMP is generally required to keep all partners informed of the progress of administrative proceedings, [208] presumably such partners would be aware of any agreement entered into between the Service and the TMP prior to the time it was made. Whether such partners would learn of the agreement 30 days before the day on which the agreement is entered into is unclear. To protect themselves from being bound by a settlement between the TMP and the Service, non-notice partners may file a statement denying the TMP's authority to bind them at the beginning of administrative proceedings.

c. The Tax Matters Partner

Generally, a tax matters partner serves as the representative of the partnership in administrative and judicial proceedings.[209] The TMP may be designated by the partnership in accordance with the regulations.[210] In the absence of such a designation, the statute provides that the general partner having the largest interest in the partnership will be considered the TMP.[211] If no TMP is designated by the partnership and the Service concludes that it is impracticable for the largest-interest general partner to be designated as the TMP, the Service may designate a partner of its choice to represent the partnership.[212] The regulations require that the person designated as the TMP for a taxable year have been a general partner during that taxable year or at the time the designation is made.[213]

The TMP is required to keep all partners informed of the progress of administrative and judicial proceedings.[214] This includes informing partners not entitled to notice from the Service of the beginning of administrative proceedings.[215] It also includes informing both notice and non-notice partners with respect to a closing conference with the examiner, proposed

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[206] I.R.C. § 6224(c)(3)(A).

[207] I.R.C. § 6224(c)(3)(B).

[208] *See* I.R.C. § 6223(g).

[209] *See, e.g.,* I.R.C. §§ 6223(g), 6225(a), 6226(a), (b), 6227(b), 6228(a); Rev. Proc. 88-16, 1988-1 C.B. 691.

[210] I.R.C. § 6231(a)(7)(A).

[211] I.R.C. § 6231(a)(7)(B).

[212] I.R.C. § 6231(a)(7) (flush language); *see also* Treas. Reg. § 301.6231(a)(7)-1(o) (providing conditions under which it is impracticable for the largest-interest general partner to be designated as the TMP).

[213] Treas. Reg. § 301.6231(a)(7)-1(b)(1).

[214] I.R.C. § 6223(g).

[215] Treas. Reg. § 301.6223(g)-1(a)(1).

adjustments, appeal rights, protest requirements, scheduling information regarding an appeals conference, Service acceptance of any settlement offer, any consent binding all partners to the extension of the period of limitations, the filing of any request for administrative adjustment on behalf of the partnership, the filing by any partner of a petition for judicial review, and any appeal and final judicial determination.[216] However, the failure of the TMP to provide any required notice does not affect the validity of any administrative or judicial determination.[217]

d. Partnership and Nonpartnership Items

Only "partnership items" are determined at the partnership level and therefore subject to partnership-level proceedings.[218] Partnership items are those income tax items designated by regulations as more appropriately determined at the partnership level, rather than the partner level.[219] Also treated as partnership items are factors affecting the determination of a partnership item, such as the partnership's accounting practices and the legal and factual bases of the partnership items.[220] Partnership items include the partnership aggregate and each partner's share of income, credit, gain, loss, and deductions of the partnership; expenditures that are nondeductible in computing taxable income; tax-exempt income; partnership liabilities; and contributions to and distributions from the partnership.[221]

Certain nonpartnership items may be affected by partnership items, and the tax treatment of such "affected items"[222] will thus depend on a partnership-level determination.[223] The Tax Court has identified two types of affected items: (1) those that are affected items only because of a computational adjustment that cannot be made until a partnership-level proceeding is completed; and (2) those that require a factual determination at the partner level. In the former case, the Service may make a "computational adjustment"[224] necessary to reflect items determined in the

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216 Treas. Reg. § 301.6223(g)-1(b)(1).

217 I.R.C. § 6230(f).

218 I.R.C. § 6221.

219 I.R.C. § 6231(a)(3).

220 Treas. Reg. § 301.6231(a)(3)-1(b).

221 Treas. Reg. § 301.6231(a)(3)-1(a)(1), (4).

222 An "affected item" is "any item to the extent such item is affected by a partnership item." I.R.C. § 6231(a)(5).

223 *See* N.C.F. Energy Partners v. Commissioner, 89 T.C. 741 (1987); Maxwell v. Commissioner, 87 T.C. 783 (1986).

224 A computational adjustment is "the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item." I.R.C. § 6231(a)(6). The usual procedures associated with assessing a tax deficiency

partnership-level proceeding, without issuing a notice of deficiency.[225] In the latter case, the Service must mail a notice of deficiency to the partner determining any deficiency attributable to "affected items."[226] If a notice of deficiency has already been mailed to a partner for the particular taxable year in issue, the Service is not precluded from mailing a second notice with respect to affected items for that taxable year.[227]

If treating certain items as partnership items will interfere with the effective and efficient enforcement of the tax laws, the Service may treat those partnership items as nonpartnership items.[228] The circumstances under which such authority may be exercised are termination assessments, jeopardy assessments, criminal investigations, indirect methods of proof of income, foreign partnerships, and other areas determined by regulation to present special enforcement concerns.[229] Other situations in which partnership items may or will be considered nonpartnership items occur when the Service has entered into a settlement agreement with a partner with respect to such items,[230] or fails to provide required notice to a partner of the beginning or termination of partnership-level administrative proceedings.[231]

The Service may mail a partner notice that the partnership items of that partner will be considered nonpartnership items if (1) such partner has notified the Service that there is an inconsistency between that partner's return and the partnership return, and (2) such partner has not, as of the

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do not apply to the assessment or collection of a computational adjustment. I.R.C. § 6230(a)(1). Excepted from this general rule is any deficiency attributable to (1) "affected items which require partner level determinations"; or (2) "items which have become nonpartnership items and are described in section 6231(e)(1)(B)." I.R.C. § 6230(a)(2).

225 I.R.C. § 6230(a)(1).

226 I.R.C. § 6230(a)(2)(B).

227 I.R.C. § 6230(a)(2)(C).

228 I.R.C. § 6231(c)(2).

229 I.R.C. § 6231(c)(1).

230 I.R.C. § 6231(b)(1)(C).

231 I.R.C. §§ 6223(e), 6231(b)(1)(D). Section 6223(e) governs generally the effect of the failure of the Service to provide required notice. If the partnership proceedings are finished at the time the Service mails notice of the administrative proceedings, the partner may elect to have any adjustment or court decision apply to him or he may participate in any settlement. I.R.C. § 6223(e)(2). If he does not so elect, the partnership items of such partner will be considered nonpartnership items. *Id.* If the proceedings are still going on at the time the partner receives untimely notice, the partner will be a party to the proceeding unless he elects to settle or to have his partnership items treated as nonpartnership items. I.R.C. § 6223(e)(3).

date such notice is mailed, filed a request for administrative adjustments that would make the items consistent.[232]

If a partnership item becomes a nonpartnership item before the expiration of the period of limitations for assessing a tax imposed with respect to that item on the affected partner, the period for assessing a tax attributable to such item will not expire before one year from the date the item becomes a nonpartnership item.[233]

e. Final Partnership Administrative Adjustment and Petition for Readjustment

If the parties are unable to reach an agreement during administrative proceedings, the Service is required to mail to those partners entitled to notice a final partnership administrative adjustment (FPAA) resulting from the proceedings.[234] The FPAA is the equivalent of a "notice of deficiency" and is a prerequisite to the assessment of a tax attributable to partnership items.[235] The Service is precluded from assessing a deficiency against a partner for 150 days following mailing of the FPAA or, if an action is brought in the Tax Court, until a final decision.[236] In the absence of fraud, malfeasance, or misrepresentation of a material fact, only one FPAA may be mailed to a partner for a partnership taxable year.[237]

During the 90 days immediately subsequent to the mailing of the FPAA, the TMP, and only the TMP, may commence an action to review the FPAA by filing a "petition for readjustment" in the Tax Court, the Court of Federal Claims, or the district court for the district in which the

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[232] I.R.C. § 6231(b)(2)(A). Notice that the partnership items will be treated as nonpartnership items must be mailed before notice of the beginning of administrative proceedings is mailed to the TMP. I.R.C. § 6231(b)(3).

[233] I.R.C. § 6229(f).

[234] I.R.C. § 6223(a)(2).

[235] *See* I.R.C. § 6212. As explained by the Tax Court,

> The FPAA is to the litigation of partnership items and affected items pursuant to the partnership audit and litigation provisions of section 6221 et seq., what the statutory notice of deficiency is to tax controversies before this Court that involve respondent's determination of a deficiency, i.e., it is the notice to affected taxpayers that respondent has made a final administrative determination for particular tax years. Issuance of a FPAA is a prerequisite to an assessment arising out of partnership items or affected items.

Clovis I v. Commissioner, 88 T.C. 980, 982 (1987) (citation omitted).

[236] I.R.C. § 6225(a).

[237] I.R.C. § 6223(f). *Cf.* I.R.C. § 6212(c) (similar restriction on deficiency letters).

partnership's principal place of business is located.[238] Any partner with an interest in the outcome may participate in the action.[239]

If the TMP does not file a petition to review a FPAA during the 90-day period immediately subsequent to its mailing, any "notice partner"[240] or "5-percent group"[241] may file a petition in the above-mentioned forums within the next 60 days.[242] Even if the TMP fails to file a petition for readjustment within the 90-day period following the mailing of a FPAA, he may, as a "notice partner," file a readjustment petition during the succeeding 60-day period.[243] If several actions are commenced in different forums during the 60-day period, the first action brought in the Tax Court will have priority.[244] If one or more actions are commenced but none are brought in the Tax Court, the first action brought will proceed.[245] Even though the TMP fails to bring an action during the 90-day period, the TMP may nonetheless intervene in any action brought by another partner.[246]

As a jurisdictional prerequisite to filing a "petition for readjustment" in a district court or the Court of Federal Claims, the partner filing, including the TMP, must deposit with the Service an amount equal to that partner's increased tax that would result from treating the FPAA as correct.[247] In the case of a petition filed by a 5-percent group, the deposit requirement applies to each member of the group.[248] If the TMP does not petition for a readjustment during the 90-day period following mailing of the FPAA, and if during the succeeding 60-day period a petition is filed in the district court or the Court of Federal Claims, the deposit required by such petition will be refunded on request of the taxpayer if during the 60-day period a petition is also filed in the Tax Court.[249] The refund is allowed because only the Tax Court proceeding will go forward.[250] If, however, the 150-day period expires and either no readjustment action is commenced or a readjustment action proceeds in a district court or the Court of Federal Claims, the

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238 I.R.C. § 6226(a).

239 I.R.C. § 6226(c)(2).

240 I.R.C. § 6231(a)(8).

241 I.R.C. § 6231(a)(11).

242 I.R.C. § 6226(b)(1).

243 *See* Barbados #6 Ltd. v. Commissioner, 85 T.C. 900 (1985) (court-reviewed opinion holding that even though the TMP failed to file a petition during the 90-day period, it qualified as a notice partner and was not precluded from filing a petition in that capacity during the remainder of the 150-day period).

244 I.R.C. § 6226(b)(2).

245 I.R.C. § 6226(b)(3).

246 I.R.C. § 6226(b)(6).

247 I.R.C. § 6226(e)(1).

248 *Id.*

249 I.R.C. § 6226(e)(2).

250 *Id.*

Service may not only apply the deposited amounts against the deficiency of the depositor, but may assess and collect deficiencies from the other partners while a decision on the merits is pending.[251] Essentially, then, a petition for readjustment of a FPAA is converted into a refund action if brought in the district court or the Court of Federal Claims. Thus, the Tax Court, which was created to provide a forum for the taxpayer to contest a tax deficiency asserted by the Service prior to paying the tax, remains the only forum in which a taxpayer may challenge an alleged tax deficiency before paying it.

All partners who have an interest in the outcome of the litigation will be bound by a decision of the court, whether the action is commenced by the TMP, a notice partner, or a 5-percent group.[252] A decision of the court will not apply, however, to (1) a partner who has previously settled with the Service, (2) a partner who has received notice that partnership items for a taxable year will be treated as nonpartnership items in regard to that partner, or (3) a partner to whom the Service has failed to provide required notice of the proceeding before a final decision of the court.[253]

f. Requests for Administrative Adjustment and Petition for Adjustment

Essentially, the request for an administrative adjustment (RAA) is a formal request that the Service make the requested adjustment or commence a partnership-level proceeding to determine the proper treatment of the items in issue.[254] Generally, a partner is not allowed to commence an action for refund of an overpayment attributable to a partnership item unless such partner has filed a RAA in respect of such item with the Service.[255] However, if an overpayment is attributable to

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[251] I.R.C. § 6225(a).

[252] I.R.C. § 6226(c)(1). The dismissal of an action brought under the partnership provisions will be considered as a decision by the court that the FPAA is correct. I.R.C. § 6226(h). An exception is provided if the case is dismissed on the grounds that an action in another court has priority.

[253] I.R.C. §§ 6226(d)(1)(A), 6231(b)(1), 6223(e)(2).

[254] *See* John B. Palmer, III, *How the TEFRA Partnership Procedures Affect Partners' Adjustments and Limitations*, 58 J. TAX'N 74, 74 (1983) [hereinafter Palmer Part II]. Any partner, including the TMP, may file a request for an administrative adjustment of partnership items, provided that it is filed within three years after the later of either the date on which the partnership return was filed or the last day for doing so. I.R.C. § 6227(a)(1). No bar exists on filing a RAA during administrative proceedings. Palmer Part II, *supra*, at 74. However, a partner may not file a RAA after a FPAA has been mailed to the TMP. I.R.C. § 6227(a)(2).

[255] I.R.C. § 7422(h); *see also* Palmer Part II, *supra* note 254, at 74.

certain types of erroneous computations by the Service,[256] or to a failure by the Service to make a previously determined refund,[257] a partner may file a claim for refund without filing a RAA.

Although any partner may file a RAA with the Service,[258] only the TMP may do so on behalf of the partnership.[259] If the TMP requests that the treatment shown on the RAA be substituted for the treatment of partnership items on the partnership return, the Service may treat the changes shown on the RAA as corrections of mathematical or clerical errors without holding a partnership-level proceeding.[260] These adjustments, however, do not apply to any partner who within 60 days after notice of the correction of error is mailed files a request that the adjustments not be made.[261] In such a case, the Service would probably be forced to hold partnership-level proceedings in regard to the requested changes.[262]

If the Service does not treat a RAA filed by the TMP as a substituted return, it may, without conducting any partnership proceeding, make all the requested adjustments resulting in credit or refund to partners.[263] In this event, the adjustments will not apply to a partner whose partnership items are being treated as nonpartnership items.[264] The Service may also conduct a partnership proceeding in response to a RAA filed by the TMP,[265] or, if it chooses, take no action at all on the request.[266] If the Service decides to hold a partnership-level proceeding in regard to a RAA filed by the TMP, it must provide notice to all those partners entitled to notice of the beginning

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256 I.R.C. §§ 6230(c)(1)(A), 7422(h). The erroneous computational adjustments referred to are those necessary to (1) conform the partner's return to the partnership return, and (2) apply a settlement, a FPAA or a court decision to the partner.

257 I.R.C. §§ 6230(c)(1)(B), 7422(h). The refunds referred to are those resulting from a settlement, a FPAA or a court decision.

258 I.R.C. § 6227(a).

259 I.R.C. § 6227(c). *Cf.* Palmer Part II, *supra* note 254, at 74 (suggesting that the TMP may *only* file a RAA on behalf of the partnership).

260 I.R.C. §§ 6227(c)(1), 6230(b).

261 I.R.C. § 6230(b)(2).

262 *See* Palmer Part II, *supra* note 254, at 74.

263 I.R.C. § 6227(c)(2)(A)(i).

264 I.R.C. § 6227(c)(2)(B). One difference between treating a RAA as a substituted return and simply providing the requested refund or credit is that, in the case of the former alternative, the Service may assess any additional tax appearing on the RAA without issuing a FPAA, simply by treating the adjustment as the correction of a mathematical or clerical error. *See* I.R.C. §§ 6225(a), 6227(c)(1), 6230(b)(1).

265 I.R.C. § 6227(c)(2)(A)(ii).

266 I.R.C. § 6227(c)(2)(A)(iii).

and completion of the administrative proceedings.[267] Although only the TMP may file a RAA on behalf of the partnership, any other partner, apparently including the TMP,[268] may file a RAA on his own behalf.[269] When a RAA is filed on behalf of an individual partner, the Service may (1) process the request in the same manner as a claim for credit or refund of items that are not partnership items, (2) assess any additional tax resulting from the requested adjustment, (3) provide notice to the requesting partner that all partnership items to which the request relates will be treated as nonpartnership items, or (4) conduct a partnership proceeding.[270]

If all or part of a RAA filed on behalf of the partnership by the TMP is not allowed by the Service, the TMP, and only the TMP, may file a petition for an adjustment of the partnership items in the Tax Court, the Court of Federal Claims, or the district court for the district in which the partnership's principal place of business is located.[271] Generally, this petition may be filed during the 18-month period commencing six months after filing the RAA,[272] but the TMP may not petition for judicial review of a RAA after the Service has mailed notice of the beginning of administrative proceedings in regard to the partnership year to which the petition relates.[273]

A petition for adjustment may not be filed after a FPAA has been mailed to the TMP.[274] Moreover, if the Service mails a FPAA to the TMP *after* a petition for review of a RAA has been filed but *before* the hearing of that petition, then the petition will be treated as one for readjustment of the FPAA, rather than a review of the adjustments requested in the RAA.[275] In

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[267] I.R.C. § 6223(a).

[268] *See* I.R.C. § 6227(c). Because the TMP acts as a fiduciary, *see* Computer Programs Lambda, Ltd. v. Commissioner, 89 T.C. 198, 205 (1987), a TMP filing such a request on his own behalf to the detriment of the partnership (for example, if the period of limitations for filing by other partners expires) presumably could be subject to damages.

[269] I.R.C. § 6227(a), (d).

[270] I.R.C. § 6227(d).

[271] I.R.C. § 6228(a)(1).

[272] I.R.C. § 6228(a)(2)(A); *see also* TAX CT. R. 249 (July 6, 2012 ed.) (action for adjustment of partnership items will be treated as an action for readjustment of partnership items). The TMP and the Service can agree to extend this time period. I.R.C. § 6228(a)(2)(D). If the Service mails notice of the beginning of administrative proceedings before two years expires following filing of the RAA, but fails to mail a FPAA before the three-year limitation for assessing an additional tax expires, *see* I.R.C. § 6229(a), then the period for filing a petition for review of a RAA will be extended at least six months beyond the period prescribed for making assessments of tax. I.R.C. § 6228(a)(2)(C).

[273] I.R.C. § 6228(a)(2)(B).

[274] I.R.C. § 6228(a)(3)(A).

[275] I.R.C. § 6228(a)(3)(B).

this event, the deposit otherwise required in the district court or the Court of Federal Claims Court for review of a FPAA is not required.[276]

If the TMP files an adjustment petition on behalf of the partnership, all partners with an interest in the outcome will be considered parties to the action and, thus, will be bound by a decision of the court.[277] Any partner wishing to participate in the action must be allowed to do so by the court with jurisdiction over the case.[278]

Judicial review of the RAA is limited to those disallowed partnership items that were included in the RAA and items that the Service may have asserted as offsets to the adjustments requested by the TMP.[279] In a situation in which the RAA petition is converted into a hearing on a FPAA mailed prior to the RAA hearing, judicial review includes any issues raised in the FPAA.[280] There are no provisions prohibiting the filing of multiple RAAs or petitions in regard to the RAAs—the statute provides that no judicial determination with respect to a partnership item raised in a RAA filed by the TMP will be a bar to any adjustment in any other partnership item.[281]

Any partner, other than the TMP acting on behalf of the partnership, seeking to petition for judicial review of all or any part of a RAA that was disallowed by the Service must follow the usual refund procedures pursuant to § 7422.[282] Thus, a refund action based on a RAA filed by a partner other than the TMP, or filed by the TMP on his own behalf, may not be brought in the Tax Court, but must be brought in district court or Court of Federal Claims, and all the partnership items at issue will be treated as nonpartnership items.[283] Such an action is barred after a partnership proceeding has begun,[284] and is subject to the same time limits as an adjustment petition filed on behalf of the partnership by the TMP.[285]

If the Service mails notice to a partner that all partnership items to which a RAA relates will be treated as nonpartnership items, judicial review is available in a refund action under § 7422 within two years of mailing of the notice.[286] It appears that a partner to whom such notice is mailed may bring a refund action, even if the Service subsequently initiates partnership

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276 *Id.*
277 I.R.C. § 6228(a)(4)(A)(i).
278 I.R.C. § 6228(a)(4)(A)(ii).
279 I.R.C. § 6228(a)(5).
280 *See* I.R.C. § 6228(a)(3)(B), (a)(5).
281 I.R.C. § 6231(e)(2); *see also* Palmer Part II, *supra* note 254, at 75 .
282 I.R.C. § 6228(b)(2)(A)(i).
283 I.R.C. § 6228(b)(2)(A)(ii).
284 I.R.C. § 6228(b)(2)(C).
285 I.R.C. § 6228(b)(2)(B).
286 I.R.C. § 6228(b)(1).

proceedings or the TMP files a RAA and an adjustment petition with respect to the RAA.[287]

g. Relationship Between Partnership Proceedings and Regular Proceedings

The legislative history of the uniform partnership audit and litigation procedures indicates that Congress intended that proceedings regarding partnership and nonpartnership tax deficiencies remain separate.[288] In some cases, however, the procedures for assessing personal tax deficiencies and the procedures for assessing deficiencies attributable to partnership items may necessarily interact. For example, if the partnership items of a partner become nonpartnership items, then any tax deficiency attributable to those must be determined in regular deficiency proceedings.[289]

As a prerequisite to assessing and collecting taxes attributable to nonpartnership items (regular proceedings), the Service is required to mail a notice of deficiency informing the taxpayer of the administrative determination of tax liability.[290] Following the mailing of such notice, the taxpayer has 90 days in which to petition the Tax Court for a redetermination of the deficiency.[291] The Service may not assess or collect the alleged deficiency until the 90-day period has expired or, if a petition is filed with the Tax Court, until a final decision of the Court.[292]

If the taxpayer does not file a petition with the Tax Court during the 90-day period and the Service subsequently collects the tax, the taxpayer may commence an action for refund in a district court or the Court of Federal Claims, provided he has first filed a refund claim with the Service.[293] Here lies a significant difference between partnership and regular proceedings. Following the mailing of a FPAA, the partners have only one opportunity for judicial review of the partnership items—the 150-day period provided by § 6226.[294] For partners other than the TMP, only the

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[287] *See* Palmer Part II, *supra* note 254, at 75.

[288] *See* H.R. REP. NO. 97-760, at 409, 611 (1982).

[289] I.R.C. § 6230(a)(2)(A)(ii).

[290] *See* I.R.C. §§ 6211(a), 6212(a).

[291] I.R.C. § 6213(a). If the notice of deficiency is addressed to a taxpayer outside the United States, the period for petitioning the Tax Court is extended to 150 days. *Id.*

[292] *Id.* Exceptions to the restrictions on assessment of a deficiency are provided in the case of termination assessments of income tax, I.R.C. § 6851(a), and jeopardy assessments of income, estate, gift, and certain excise taxes, I.R.C. § 6861(a).

[293] I.R.C. § 7422(a).

[294] *See* I.R.C. § 6226(a), (b)(1). This premise assumes (1) that the Service has held administrative proceedings and provided notice of the beginning and

last 60 days of the 150-day period are available for filing a petition for readjustment.[295] If no petition for readjustment is filed during the 150-day period, the Service may collect the tax and, with limited exceptions, the partners may not thereafter seek a refund or otherwise petition for judicial review.[296]

h. The Problem of Affected Items

Unique questions of interaction between the regular deficiency procedures and the partnership procedures occur in the case of "affected items."[297] The final resolution of disputes over affected items have to await a partnership-level determination.[298] In some cases, the Service may merely make a computational adjustment conforming the tax treatment of the affected item with that of the affecting partnership item.[299] In others, the Service must issue a notice of deficiency to resolve questions regarding the affected item at the partner level.[300] Ordinarily, if the Service has mailed the taxpayer a notice of deficiency and the taxpayer files a petition with the Tax Court for a particular tax year, the Service is prohibited from determining any additional deficiency for such year.[301] However, if the treatment of an affected item depends on a partnership-level determination, the Service is authorized to issue an additional notice of deficiency with respect to such item at the partner level.[302] It is not difficult to hypothesize a case in which a taxpayer might receive a first notice of deficiency, a FPAA (in effect, itself a notice of deficiency), and a second notice of deficiency covering affected items—all related to the same taxable year and all subject to separate judicial proceedings. Moreover, if the taxpayer is a partner in more than one partnership, there may be separate FPAAs, and separate notices of deficiency for affected items, related to each partnership.

The Tax Court examined the interaction between partnership-level proceedings and regular proceedings in cases involving "affected items" in

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completion of the proceedings to the partners entitled to notice, and (2) that the partnership items of a partner have not become nonpartnership items. *See generally* I.R.C. §§ 6223(a), 6228(b)(1).

[295] I.R.C. § 6226(b)(1).

[296] *See* I.R.C. § 7422(h).

[297] An "affected item" is defined as "any item to the extent such item is affected by a partnership item." I.R.C. § 6231(a)(5).

[298] *See* N.C.F. Energy Partners v. Commissioner, 89 T.C. 741, 744–45 (1987); Maxwell v. Commissioner, 87 T.C. 783 (1986).

[299] *N.C.F. Energy Partners*, 89 T.C. at 744.

[300] *Id.* at 745.

[301] I.R.C. § 6212(c).

[302] I.R.C. § 6230(a)(2)(C).

Maxwell v. Commissioner,[303] a case reviewed in conference. Mr. and Mrs. Maxwell and eleven others were partners in VIMAS, LTD. (VIMAS), a limited partnership with Mr. Maxwell as the general partner and the TMP.[304] In February 1985, the Service began a partnership-level audit of VIMAS; the requisite notice of the beginning of the administrative proceedings was properly mailed to the notice partners.[305] Subsequently, in April 1985, before a FPAA was mailed to VIMAS but *after* partnership-level proceedings regarding partnership items of VIMAS were commenced, the Service mailed a statutory notice of deficiency to the Maxwells determining deficiencies and additions to tax for their 1979, 1980, 1981, and 1982 taxable years.[306] The 1982 deficiency was partially attributable to the disallowance of the Maxwell's distributive share of the loss and investment tax credit claimed by VIMAS for 1982.[307] The 1979 and 1980 deficiencies resulted from disallowance of investment tax credit carryback from 1982.[308] The Service also determined additions to tax against the Maxwells for the deficiency years.[309] Since the Service had not yet mailed a FPAA determining partnership items of VIMAS, the Tax Court had no jurisdiction to readjust the VIMAS partnership items, and the Service was precluded from assessing a tax attributable to these items until a FPAA was issued.[310]

The Maxwells filed a timely petition for the redetermination of the deficiencies determined against them, and the Service promptly moved to strike from the petition the deficiencies and additions to tax arising from the adjustment of the VIMAS items, alleging that they were, in fact, partnership items and the Tax Court thus lacked jurisdiction for readjustment.[311] The Service's posture amounted to a concession that it was not justified in including the partnership items in the notice of deficiency. Its motion to strike may have been motivated by the fact that Mr. Maxwell, as TMP, had consented to extend the statute of limitations as to VIMAS subsequent to the mailing of the notice of deficiency.[312]

The Tax Court stated that "[t]his case presents the dichotomy between, on the one hand, the procedures applicable to the determination and redetermination of *deficiencies* and, on the other hand, the procedures applicable to the administrative adjustment and judicial readjustment of

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303 87 T.C. 783 (1986) (court reviewed).
304 *Id.* at 785.
305 *Id.* at 786.
306 *Id.* at 785.
307 *Id.*
308 *Id.*
309 *Id.*
310 *Id.* at 789; I.R.C. § 6225(a).
311 *Maxwell*, 87 T.C. at 784, 786.
312 *Id.* at 786.

partnership items."[313] In TEFRA, Congress intended to separate partnership audit and litigation procedures from proceedings regarding nonpartnership tax matters.[314] Application of this policy was central to the court's disposition of the Service's motion to strike.

First, the Tax Court held that the loss and the investment tax credit claimed for 1982 were partnership items and were thus outside the jurisdiction of the court until a FPAA was mailed.[315] Second, the court held that,

> [a]lthough the existence or amount of the carryback cannot be determined without reference to the VIMAS, LTD. investment tax credit to which VIMAS, LTD. partners were entitled for 1982, the amount of credit to be carried back is not a "partnership item" because a partnership does not take into account any carryback for any taxable year. Rather, the carryback is peculiar to each partner's own tax posture.[316]

The court further held, however, that the carryback was an "affected item" because "its existence or amount is 'affected by' the investment tax credit that is a partnership item."[317] Since affected items depend on partnership-level determination, those items could not be tried as part of the personal tax case, and had to await the outcome of the partnership proceeding.[318]

Third, the court considered whether the additions to tax for the deficiency years should be considered partnership or nonpartnership items.[319] The court noted that the additions to tax asserted against the petitioners for negligence would, if sustained, apply to the entire deficiencies for the year and could be attributable either to a negligent partnership reporting position or to the partner's own negligent reporting

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313 *Id.* at 787 (emphasis in original).

314 *Id.* Legislative history provides the following guidance:

> Existing rules relating to administrative and judicial proceedings, statutes of limitations, settlements, etc., will continue to govern the determination of a partner's tax liability attributable to nonpartnership income, loss, deductions, and credits. Neither the Secretary nor the taxpayer will be permitted to raise nonpartnership items in the course of a partnership proceeding nor may partnership items, except to the extent they become nonpartnership items under the rules, be raised in proceedings relating to nonpartnership items of a partner.

H.R. REP. NO. 97-760, at 611 (1982).

315 *Maxwell*, 87 T.C. at 790.

316 *Id.*

317 *Id.*

318 *Id.*

319 *Id.* at 79l.

position.[320] In order to conform to congressional intent that partnership tax issues be resolved without hindering, or being hindered by, the resolution of nonpartnership tax issues, the Tax Court announced that it would "treat[] as an 'affected item' (1) any addition to tax for negligence found in the partnership action or (2) where negligence is found in the personal case, any increased addition to tax on a deficiency resulting from partnership adjustments."[321] The court held:

> As an "affected item," the addition to tax for negligence resulting from partnership reporting positions cannot be an issue joined in a partner's personal tax case because a deficiency determined by reference to such an affected item requires a partnership level determination—i.e., whether the partnership reported partnership items negligently. Such affected items cannot be considered in the course of deciding petitioners' personal case without trespassing the line of demarcation drawn by Congress between the audit and litigation of partnership tax matters and the resolution of all other tax items of the partner. Any other principle would inextricably tie the two together and remove the statutory dichotomy whenever an addition to tax affected by partnership items has been determined by respondent.[322]

The 90-day letter mailed by the Service was thus invalid as to the VIMAS items, and the Tax Court dismissed those items for lack of jurisdiction.[323]

In *Maxwell*, the dichotomy existing between the partnership procedures and the procedures for determining deficiencies in a taxpayer's personal tax case worked to the detriment of the taxpayer. The striking of the partnership items and affected items from the petition resulted in the collapse of a settlement that the petitioners believed they had constructed.[324] In some cases, however, the dichotomy described above may work to the advantage of the taxpayer. If, for example, the Service fails to mail notice of the beginning or end of partnership-level administrative proceedings to a partner entitled to notice, that partner has the option of participating on consistent terms in any settlement between the Service and the other partners, accepting the terms of the FPAA, or, if a final court decision is reached in regard to the partnership items, applying such decision.[325] Alternatively, such a partner may elect to have the partnership items to which the proceedings relates treated as

[320] *Id.* at 791–92.
[321] *Id.* at 792.
[322] *Id.* at 793.
[323] *Id.* at 793.
[324] *Id.* at 786, 793.
[325] I.R.C. § 6223(e).

nonpartnership items.[326] In such a case, any deficiency attributable to these items will have to be determined in regular deficiency proceedings, and such a partner may be able to achieve a more advantageous settlement overall than would have otherwise been possible.

In *N.C.F. Energy Partners, Bingham Petroleum, Inc. v. Commissioner*,[327] the Tax Court was again presented with a motion by the Service to strike affected items from a petition for lack of jurisdiction. Here, however, the motion was submitted in the context of a partnership proceeding.[328] The Service argued that additions to tax determined in regard to partnership adjustments were "affected items" that could not be determined in partnership proceedings but only in subsequent partner-level proceedings.[329] On the other hand, the petitioner, asserting that the Service erred in determining the additions to tax, contended that, although the additions to tax were "affected items," Congress intended that questions regarding partnership adjustments be resolved in a single partnership-level proceeding "even though the computation of the amounts due from each partner cannot be made at the partnership level."[330] If the motion to strike the additions to tax were granted, the petitioner argued, the result would be the unnecessary and duplicate litigation that Congress intended to prevent.[331] The Tax Court disagreed.[332]

The court identified two types of affected items: (1) items that are affected items simply because a computational adjustment is required after the partnership-level proceeding is completed; and (2) items that require additional factual determinations at the partner level following the partnership proceeding.[333] Both types of affected items require adjustments *subsequent* to a partnership proceeding and cannot be tried either as part of the partnership proceeding or a prior personal tax case.[334]

> Petitioner's contention that resolving all issues relating to the partnership in a single proceeding effectuates Congress' intent is . . . erroneous. Congress enacted the partnership audit and litigation procedures . . . to provide a unified proceeding for determination of the tax treatment of items of partnership income, loss, deductions,

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[326] *Id.* Depending on whether partnership proceedings have finally terminated when the Service mails notice of the proceedings, the partner's option may be either to elect consistent treatment or to elect nonpartnership item treatment. *Id.*

[327] *Maxwell*, 89 T.C. 741 (1987).

[328] *Id.* at 742.

[329] *Id.* at 743.

[330] *Id.*

[331] *Id.*

[332] *Id.* at 746–47.

[333] *Id.* at 744.

[334] *Id.* at 744–45.

> and credits. A partnership proceeding is designed to resolve only disputes over the proper treatment of *partnership items*. Congress, moreover, recognized the need to preserve this rule by providing separately for determining deficiencies attributable to nonpartnership items or to affected items.
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> . . . .
>
> We appreciate petitioner's concern for avoiding repetitive litigation. We doubt, however, that the litigation will be repetitive; it has been organized by statute to avoid chaotic and disparate results. Any future litigation will not be repetitive of the partnership level proceeding. The doctrine of res judicata will apply to preclude the parties from relitigating any issue already resolved in the partnership proceeding . . . .[335]

As part of the Taxpayer Relief Act of 1997,[336] Congress fundamentally altered the handling of penalties under the TEFRA audit procedures and, in the process, overturned the result reached by the Tax Court in *N.C.F. Energy Partners*. In particular, Congress amended § 6221 to expressly provide that "the applicability of any penalty, addition to tax, or additional item which relates to an adjustment to a partnership item" shall be determined along with all partnership items in a partnership-level proceeding.[337] Consistent with this approach, Congress precluded the Tax Court from considering penalties and similar items in a partner-level deficiency proceeding.[338] Instead, the 1997 amendments left the individual partner to raise any partner-level defense through a claim for refund.[339] The report of the House Ways and Means Committee explained the justification for these changes as follows:

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335 *Id.* at 746–47 (emphasis in original) (citations omitted).

336 Pub. L. No. 105-34, 111 Stat. 787. The Tax Court provided a thorough explanation of the 1997 amendments to the penalty jurisdiction of the Tax Court in the TEFRA unified audit procedures setting in *Tigers Eye Trading, LLC v. Commissioner*, 138 T.C. 67, 88–93 (2012).

337 *Id.* § 1238(a), 111 Stat. at 1026 (amending I.R.C. § 6221). Congress correspondingly expanded the scope of judicial review following the filing of a petition for review of a final partnership administrative adjustment to include "the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment of a partnership item." *Id.* § 1238(b)(1), 111 Stat. at 1026 (amending I.R.C. § 6226(f)).

338 *Id.* § 1238(b)(2), 111 Stat. 1026–27 (amending I.R.C. § 6230(a)(2)(A)(i)).

339 *Id.* § 1238(b)(4), 111 Stat. 1027 (addition I.R.C. § 6230(c)(1)(C), which permits a partner to file a claim for refund on the grounds that Secretary "erroneously imposed any penalty, addition to tax, or additional amount which relates to an adjustment of a partnership item").

> Many penalties are based upon the conduct of the taxpayer. With respect to partnerships, the relevant conduct often occurs at the partnership level. In addition, applying penalties at the partner level through deficiency procedures following the conclusion of the unified proceeding at the partnership level increases the administrative burden on the IRS and can significantly increase the Tax Court's inventory.[340]

In this manner, Congress proved receptive to the judicial economy points asserted by the taxpayer in the *N.C.F. Energy Partners* case.

2. Tax Treatment of Subchapter S Items

Prior to their repeal by the Small Business Job Protection Act of 1996,[341] §§ 6241 to 6244 provided a corporate-level audit regime for subchapter S corporations similar to the TEFRA uniform audit procedures that apply in the partnership context. The repeal of these procedures in the S corporation context became effective for corporate tax years beginning after December 31, 1996. [342] Congress' stated justification for repealing the S corporation audit procedures was its belief that the TEFRA-like provisions should not apply to entities with a limited number of owners.[343]

In lieu of the repealed audit procedures applicable to S corporations, Congress enacted § 6037(c) to require shareholders of an S corporation to treat any "subchapter S item"[344] in a manner consistent with the treatment of such item on the corporation's informational return.[345] The shareholder is relieved of this consistency requirement only if the shareholder files a statement with the Service that identifies the inconsistency.[346]

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[340] H.R. REP. NO. 105-148, at 594 (1997).

[341] Pub. L. No. 104-188, § 1307(c)(1), 110 Stat. 1755, 1781 (1996).

[342] *Id.* § 1317, 110 Stat. at 1787.

[343] H.R. REP. NO. 104-586, at 87 (1996). By way of reference, the 1996 legislation increased the maximum number of shareholders of an S corporation from 35 to 75. Pub. L. No. 104-188, § 1301, 110 Stat. at 1777.

[344] A "subchapter S item" is defined as any tax item of an S corporation to the extent that regulations provide that the tax treatment of such item is more appropriately determined at the corporate level.

[345] I.R.C. § 6037(c)(1).

[346] I.R.C. § 6037(c)(2)(A).

3. Electing Large Partnership Provisions

Also as part of the Taxpayer Relief Act of 1997,[347] Congress created a simplified informational reporting and audit regime for "electing large partnerships"—that is, entities classified as partnerships for purposes of subchapter K with more than 100 owners in the prior taxable year that elect to be subject to the modified procedures.[348] The primary theme of these modifications was to tilt further toward the entity treatment of partnerships, recognizing that investments in large partnerships often are indistinguishable from those made in corporate stock.[349] On the informational reporting side, the modified procedures provided in §§ 771 through 777 significantly reduced the number of tax items that the partnership must separately report to its partners. This simplified regime was intended to reduce the reporting burden placed on partners while assisting the Service in matching partnership items on partners' individual returns.[350] As discussed below, the statutory departure from the TEFRA audit procedures for electing large partnerships also was intended to reduce the administrative burden imposed on partners, while enhancing the Service's ability to effectively audit partnerships having numerous owners.

The audit procedures governing electing large partnerships are contained in §§ 6240 through 6255. Perhaps the most significant aspect of the modified regime relates to the consistency of reporting required by the partnership and its owners. Under the TEFRA audit procedures, a partner may take a reporting position inconsistent with that of the partnership so long as the partner provides the Service with a statement identifying the inconsistency.[351] This option is not available to partners of an electing large partnership. Rather, partners are required to treat each partnership item in a manner consistent with the reporting of that item on the partnership return, and the Service may treat any failure to do so as a mathematical or clerical error on the part of the partner.[352]

The modified audit procedures that apply to electing large partnerships severely constrain the participation of partners in the audit process. Whereas a partner is entitled to notice of partnership-level proceedings

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[347] Pub. L. No. 105-34, §§ 1221–1224, 111 Stat. 788, 1001–19 (1997). These provisions took effect for partnerships having taxable years ending on or after December 31, 1997. *Id.* § 1226, 111 Stat. at 1020.

[348] *See* I.R.C. § 775 (providing definition of an electing large partnership for purposes of the subchapter K flow-through regime); I.R.C. § 6255 (incorporating the definition of an electing large partnership under § 775 for purposes of the modified audit procedures).

[349] *See* H.R. REP. NO. 105-148, at 571.

[350] *See id.* at 571–72.

[351] I.R.C. § 6226(a), (b)(1).

[352] I.R.C. § 6241(a), (b).

under the TEFRA audit procedures, the Service is not required to notify a partner of an electing large partnership that a partnership-level administrative proceeding has been commenced or that a final administrative adjustment has been made.[353] Additionally, a partner of an electing large partnership lacks the right to participate in settlement conferences concerning the partnership-level proceeding,[354] and the partner may not seek an administrative adjustment or a refund of the partner's separate tax liability—both of which represent departures from the TEFRA model. The electing large partnership provisions therefore envision an administrative proceeding between the Service and the partnership alone that can achieve conclusive results.

The adjustments resulting from the partnership-level administrative proceedings are designed to minimize the effect at the partner level. Under the TEFRA procedures, any adjustment relating to a partnership item must be taken into account at the partner level for the taxable year to which the adjustment relates. In contrast, the electing large partnership provisions adopt an integration model that generally operates on a going-forward basis. Rather than incorporating the adjustment on the partners' returns for the taxable year to which the adjustment relates, an adjustment made in the course of an electing large partnership proceeding is taken into account at the partner level for the taxable year in which the adjustment "takes effect."[355] In other words, the adjustment is treated as a partnership item arising in the year of the adjustment.[356]

The choice to take partnership-level adjustments into account at the partner level on a going-forward basis under the electing large partnership

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353 I.R.C. § 6245(b)(1); H.R. REP. NO. 105-220, at 673 (1997); *cf.* I.R.C. § 6223(a) (requirement that Service provide partners notice of partnership-level proceedings under TEFRA audit procedures).

354 H.R. REP. NO. 105-220, at 671 (1997); *cf.* I.R.C. § 6224(a) (right of partner to participate in partnership-level proceedings under TEFRA audit procedures).

355 I.R.C. § 6242(a)(1). As a general rule, a partnership-level adjustment in this context takes effect in the taxable year in which the adjustment is made or is finally determined. I.R.C. § 6242(d)(2). If the partnership-level adjustment triggers an adjustment in a taxable year following the one to which the adjustment relates but prior to the year of the adjustment (e.g., disallowance of deduction in favor of capitalization, which in turn gives rise to cost recovery deductions), only the net adjustment is considered to take effect in the year of the adjustment. I.R.C. § 6242(a)(3).

356 I.R.C. § 6242(a)(1). An exception exists in the event the adjustment relates to the relative distributive shares of the partners. An alteration of a partner's distributive share of partnership tax items under § 704(b) (e.g., one made because the allocation provided in the partnership agreement lacks substantial economic effect and is not otherwise consistent with the partners' interests in the partnership) must be taken into account by the partner for the taxable year to which the adjustment relates. I.R.C. § 6241(c)(2)(A).

provisions creates the possibility for a partner to benefit from the adjusted items without facing the consequence of the adjustment. To do so, the partner must exit prior to the year in which the partnership-level adjustment takes effect—an outcome that is altogether plausible given the protracted nature of administrative proceedings conducted at the partnership level. Conversely, partners who have joined the entity in the interim may suffer the detriment of a partnership-level adjustment without ever enjoying the original tax benefit.

To avoid highlighting the consequence at the partner level, an electing large partnership may elect to not take the adjustment into account as a partnership item for the year of adjustment and instead pay an imputed tax resulting from the adjustment.[357] The downside of centralizing the effect of the adjustment at the entity level is the forfeiture of the marginal tax rate profile of the partners. The imputed tax is calculated based on the highest marginal rate in effect under § 1 (individual rates) or § 11 (corporate rates) for the year of the adjustment.[358] Whereas the partnership may elect to pay an imputed tax attributable to the adjusted item, the partnership is required to pay any interest or penalties that relate to the adjustment.[359] The partnership's exposure to penalties is determined by treating the partnership in the same manner as an individual.[360] In this manner, the electing large partnership procedures avoid the confusion over whether defenses to the assertion of penalties must be raised and resolved in the partnership proceeding or at the partner level—an issue that at one point caused a considerable level of consternation under the regular TEFRA audit regime.[361]

An electing large partnership may contest a proposed partnership adjustment either before the Tax Court, the Federal district court, or the

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[357] I.R.C. § 6242(a)(2)(A).

[358] I.R.C. § 6242(b)(4)(A).

[359] I.R.C. § 6242(b)(1). The payment of interest or penalties by the partnership will not give rise to a deduction. I.R.C. § 6242(e).

[360] I.R.C. § 6242(b)(3).

[361] *See, e.g.*, Tigers Eye Trading, LLC v. Commissioner, 138 T.C. 67 (2012); Petaluma FX Partners, LLC v. Commissioner, T.C. Memo. 2012-42, 103 T.C.M. (CCH) 1769. The Supreme Court eliminated any ambiguity in the regular TEFRA audit procedures on this issue in *United States v. Woods*, 134 S. Ct. 557 (2013). In *Woods*, the Court explained that the trial court possessed jurisdiction under § 6226(f) to determine the applicability of the valuation misstatement penalty (and, indeed, any penalty) that could result from the adjustment of a partnership item, even if imposing the penalty also would require determining affected or non-partnership items such as a partner's basis in the partnership interest. *Id.* at 564. The court noted that this approach avoided duplicative proceedings and the potentially inconsistent results of partner-level determinations of an issue that applied equally to all of the partners. *Id.* at 564–65.

Court of Federal Claims.[362] In keeping with the theme of limiting partner involvement in the proceedings, only the partnership may petition for such judicial review; unlike the TEFRA audit procedures, a judicial proceeding to review the partnership-level adjustment may not be commenced by a partner alone. Pursuant to § 6247(a), the partnership must file a petition for readjustment within 90 days of the mailing of the notice of partnership adjustment by the Service. This period of limitations on the filing of a petition serves as the only jurisdictional prerequisite for Tax Court review.[363] However, to litigate before the Federal district court or Court of Claims, the partnership also must deposit with the Service a good faith estimate of the imputed tax under § 6242(b) attributable to the partnership item adjustment, together with any interest and penalties resulting from such adjustment, on or before the date on which the petition for readjustment is filed.[364] Accordingly, the Tax Court serves as the sole judicial forum in which to challenge a partnership-level adjustment on a pre-payment (technically, pre-deposit[365]) basis. Once a court acquires jurisdiction to review a partnership-level adjustment, the reviewing court may review all partnership items to which the notice of adjustment relates, even if those items are not contested by the partnership.[366] Additionally, the court may review the allocation of partnership items among the partners for that year, as well as the applicability of any penalty or addition to tax.[367]

The electing large partnership provisions also provide a procedure for a partnership to pursue a refund attributable to a partnership item. Pursuant to § 6251, a partnership may request an administrative adjustment of partnership items within three years after the later of the date the partnership return was filed or the date the return was due (determined without regard to extensions), provided the Service has not first issued the partnership a notice of adjustment.[368] If the Service disallows any part of the requested administrative adjustment, the partnership may seek judicial review in the Tax Court, the federal district court, or the Court of Federal Claims.[369] The petition for adjustment under § 6252 is not timely unless it is filed after six months from the date on which the request for administrative adjustment was filed with the Service, but before two years of such date.[370] A benefit of invoking judicial review through the § 6252

[362] I.R.C. § 6247(a).

[363] *See* TAX CT. R. 300(c)(1) (July 6, 2012 ed.).

[364] I.R.C. § 6247(b)(1).

[365] I.R.C. § 6247(b)(2) (clarifying that the required deposit is not treated as a payment of tax).

[366] I.R.C. § 6247(c).

[367] *Id.*

[368] I.R.C. § 6251(a), (c)(1).

[369] I.R.C. § 6252(a); *see also* TAX CT. R. 300(c)(2) (July 6, 2012 ed.).

[370] I.R.C. § 6252(b).

refund procedure is that the scope of the court's review is limited to the adjustment requested by the partnership that is not allowed by the Service, as well as any items the Service asserts as an offset to the requested adjustment. Unlike a petition for readjustment of partnership items, the reviewing court may not consider all partnership items for the year to which the predicate notice of adjustment relates. The partnership's ability to limit the scope of judicial review is forfeited if the Service issues the partnership a notice of adjustment under § 6245(b) before a hearing is held on the partnership's petition for adjustment under § 6252(a). In that case, the § 6252 petition filed by the partnership is retroactively converted to a petition for readjustment of partnership items under § 6247,[371] which in turn expands the scope of judicial review.

4. Declaratory Judgments Relating to "Oversheltered" Returns

The TEFRA partnership-level audit procedures created a potential trap for the Government with respect to its ability to assess a deficiency in tax relating to a taxpayer's nonpartnership items. Because a taxpayer's distributive share of loss from a partnership subject to the TEFRA procedures is not subject to adjustment until the conclusion of the TEFRA proceeding, a proposed adjustment in tax relating to the taxpayer's nonpartnership tax items could prove meaningless in isolation. That is, any additional taxable income resulting from the adjustment of nonpartnership items could continue to be fully offset by the amount of the partnership loss claimed on the return, negating any deficiency in tax. If the proposed adjustments to the nonpartnership items later proved meaningful as a result of a reduction in the distributive share of loss achieved through the successful prosecution of a TEFRA proceeding, assessment of the resulting deficiency likely would be barred by the expiration of the period of limitations on assessment.

Prior to 1989, the Service left itself exposed to the incongruent application of the TEFRA partnership procedures and the normal deficiency procedures through its practice of assuming the propriety of all TEFRA partnership items when examining a taxpayer's return. However, in the 1989 case of *Munro v. Commissioner*,[372] the Service attempted to shift this risk of loss to the taxpayer. The Service in *Munro* took the position that, in determining a deficiency in tax at the individual level, it could assume that its proposed adjustments to partnership items subject to the TEFRA proceedings were correct for "computational purposes" only.[373] In

[371] I.R.C. § 6252(c)(2).
[372] 92 T.C. 71 (1989).
[373] *Id.* at 73.

this manner, the Service determined the deficiency in tax at the individual level based on its best-case resolution of the TEFRA litigation.

The Tax Court was not willing to indulge the Commissioner to this extent, holding that TEFRA partnership adjustments proposed by the Commissioner could not be taken into account in the deficiency proceeding.[374] Nonetheless, the Tax Court's resolution of this issue in *Munro* remained largely favorable to the Service. Stressing the statutory directive that partnership items are to be kept separate from the taxpayer's individual proceeding and resolved solely at the partnership level, the court reasoned that deficiency proceedings relating to the taxpayer must address nonpartnership items exclusively. Accordingly, the court held that partnership items subject to the TEFRA procedures were to be ignored in their entirety in the deficiency proceeding.[375] In the context of a taxpayer claiming a distributive share of loss from a partnership, the Tax Court's approach in *Munro* prevented the Service's adjustment of nonpartnership items from being "sheltered" by a partnership loss claimed on the return.[376]

Congress did not react favorably to the approach adopted by the Tax Court in *Munro*.[377] As part of the Taxpayer Relief Act of 1997,[378] Congress enacted § 6234 to "overrule" *Munro* and to allow the Service to reinstate its original practice of computing a taxpayer's deficiency by assuming that all partnership items whose tax treatment had not been finally determined in a TEFRA proceeding were correctly reported on the taxpayer's return.[379] However, in doing so, Congress supplied a mechanism to prevent the Service from being whipsawed by the expiration of the period of limitations in cases where the tax treatment of partnership items on the taxpayer's return did not withstand scrutiny. Section 6234 does so by creating a declaratory judgment procedure in the Tax Court pertaining to an "oversheltered return"—that is, a return that shows no taxable income for

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[374] *Id.* at 74.

[375] *Id.* ("[P]artnership items must be ignored in deficiency proceedings, which relate exclusively to nonpartnership items.").

[376] While the mutually exclusive treatment of partnership and nonpartnership items in *Munro* would generally favor the Service, the conference committee report accompanying the enactment of § 6234 explains that the approach could operate to the detriment of the Service if the partnership items consisted of income items rather than losses. H.R. REP. NO. 105-148, at 585–86 (1997).

[377] In particular, Congress viewed the prospect of a taxpayer having to pay a deficiency attributable to nonpartnership item adjustments that later would be offset by partnership losses that were upheld in a TEFRA proceeding (generating a refund for the taxpayer) as effectively denying the taxpayer the ability to litigate the partnership items on a prepayment basis. *Id.* at 586.

[378] Pub. L. No. 105-34, § 1231, 111 Stat. 788, 1020–23 (1997).

[379] H.R. REP. NO. 105-148, at 586 (1997).

the taxable year while also showing a net loss from partnership items.[380] Pursuant to this procedure, if the Service proposes an adjustment with respect to the nonpartnership items of a taxpayer that would have given rise to a deficiency in the absence of partnership items reported on the taxpayer's return that are subject to the TEFRA partnership proceedings, the Service may issue a "notice of adjustment" to reflect its determination.[381]

In many respects, the notice of adjustment is subject to the same restrictions and triggers the same procedures as a notice of deficiency.[382] In particular, the notice must be mailed prior to the expiration of the period of limitations on assessment of a deficiency,[383] and the taxpayer has the same period (generally 90 days) to petition the Tax Court for a redetermination of the proposed adjustments.[384] If the taxpayer files a petition for review, the Tax Court has jurisdiction to make a "declaration" with respect to the taxpayer's nonpartnership items for the taxable year to which the notice of adjustment relates.[385] The Tax Court's declaration in this context has the same force and effect as a decision of the court and is subject to appellate review in the same manner.[386]

Adjustments to the nonpartnership items of a taxpayer that are obtained through the § 6234 declaratory judgment procedure do not trigger an immediate tax liability. Rather, these adjustments are preserved to be taken into account upon the resolution of the TEFRA partnership-level proceeding. The heart of the § 6234 response to the whipsaw problem

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380 I.R.C. § 6234(b). The procedural details of § 6234 declaratory judgment proceedings are addressed in Rules 310 through 316 of the Tax Court Rules of Practice and Procedure.

381 I.R.C. § 6234(a).

382 Indeed, in certain situations, a notice of adjustment issued under § 6234 will be treated as a notice of deficiency under § 6212. This conversion occurs if, following the mailing of the notice of adjustment but prior to the expiration of the period for petitioning the Tax Court for review, the treatment of any partnership item for the taxable year is finally determined or the item ceases to be a partnership item and a deficiency can be determined with respect to the items that serve as the subject of the notice of adjustment. I.R.C. § 6234(g)(3). Additionally, if the Service mistakenly issues a notice of adjustment pursuant to § 6234 in lieu of a notice of deficiency under § 6212 and vice versa, the mistakenly issued notice shall be treated as the type of notice that should have been issued. *See* I.R.C. § 6234(h).

383 I.R.C. § 6234(e)(1).

384 I.R.C. § 6234(c). The Service is barred from making an assessment of the deficiency during this filing period and, if a petition is filed with the Tax Court, until the decision of the Tax Court becomes final. I.R.C. § 6234(e)(3).

385 I.R.C. § 6234(c). If the taxpayer fails to invoke the Tax Court's jurisdiction to review the notice of adjustment, the determination made by the Service set forth in the notice shall be considered correct as a general rule. I.R.C. § 6234(d)(1).

386 I.R.C. § 6234(c).

identified in *Munro* lies in § 6234(g), which permits the adjustments with respect to nonpartnership items to be taken into account upon resolution of the partnership-level proceedings free of any restriction otherwise imposed by the statute of limitations on the assessment of a deficiency.

Because the issuance of a notice of adjustment does not lead to the imposition of an immediate tax liability (and, indeed, may never lead to an additional tax liability if the taxpayer's claimed treatment of partnership items is sustained through the partnership-level proceedings), a taxpayer does not have an immediate financial incentive to contest the Service's determination reflected in the notice of adjustment. If the taxpayer fails to petition the Tax Court for redetermination of the items addressed in the notice of adjustment, the determinations reflected in the notice are deemed to be correct as a general rule.[387] However, in recognition of the diminished incentive for the taxpayer to invoke the Tax Court's jurisdiction in this context,[388] this general rule does not apply if the taxpayer pursues a claim for refund of the tax attributable to the items that were adjusted in the § 6234 proceeding.[389] In this manner, the taxpayer is permitted to take a wait-and-see approach with respect to the determination concerning nonpartnership items reflected in the notice of adjustment. The price for such hindsight, however, is the forfeiture of a prepayment forum in which to later contest that determination.

D. Supplemental Tax Court Jurisdiction

Through legislation originally enacted in 1988, Congress responded to two anomalies in proceedings before the Tax Court relating to interest on an underlying tax liability.

Through the enactment of § 7481(c), Congress expanded the Tax Court's jurisdiction to provide the court with jurisdiction over determinations of interest relating to a deficiency determination made by the court. The goal of this legislation was to permit a taxpayer who had previously invoked the Tax Court's jurisdiction to resolve the taxpayer's resulting liability for interest without having to resort to another forum.

Through the enactment of § 7481(d), Congress addressed a conundrum arising from interest paid on payments of estate tax deferred pursuant to § 6166. Because interest could not be deducted as an administrative expense for estate tax purposes in advance of actual payment, the court in

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[387] I.R.C. § 6234(d)(1).

[388] H.R. REP. NO. 105-148, at 587 (1997) ("Although a refund claim is not generally permitted with respect to a deficiency arising from a TEFRA proceeding, such a rule is appropriate with respect to a defaulted notice of adjustment because taxpayers may not challenge such a notice when issued since it does not require the payment of additional tax.").

[389] I.R.C. § 6234(d)(2).

§ 6166 cases was essentially forced to keep the estate tax case open until the last installment of estate tax had been paid. Section 7481(d) provides a procedure tailored to address this issue, one that permits the court to enter a decision and then subsequently modify it solely on account of later payments of interest.

These two areas of supplemental jurisdiction are addressed below.

1. Post-Decision Interest Determinations

The Tax Court's jurisdiction to redetermine deficiencies does not authorize the court to make determinations concerning interest, as the definition of a deficiency does not extend to interest thereon.[390] Beyond this definitional matter, interest is not assessable by the Commissioner with respect to a deficiency until the Tax Court's redetermination decision becomes final.[391] Hence, the question of interest owed on a deficiency does not ripen until the Tax Court concludes its jurisdiction over the matter.[392] In the refund setting, the Tax Court possesses jurisdiction under § 6512(b) to determine if the taxpayer has made an overpayment, and interest may be part of an overpayment if the interest was paid prior to the time the overpayment was claimed.[393] However, the overpayment jurisdiction of the Tax Court does not extend to the determination of interest owed upon an overpayment once determined.[394]

Recognizing the absence of Tax Court jurisdiction over interest determinations in the deficiency setting, Congress attempted to address the defect through the enactment of § 7481(c) as part of the Technical and

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[390] *See* I.R.C. § 6211(a).

[391] *See* Commissioner v. Estate of Kilpatrick, 140 F.2d 887 (6th Cir. 1944) (in a deficiency proceeding, "interest is assessable under the statute only after the Board has acted"). As explained by the Tax Court in *Estate of Baumgardner v. Commissioner*, 85 T.C. 445, 452 (1985), interest under § 6601 does not accrue on a deficiency but rather on an underpayment, and an underpayment of tax does not arise until a deficiency is assessed or assessable. Where the Tax Court's deficiency jurisdiction has been invoked, § 6213(a) restrains assessment of a deficiency until the Tax Court decision becomes final.

[392] Congress provided the following explanation of the prevailing landscape prior to the introduction of § 7481(c) in 1998:

> Following a decision by the Tax Court, the IRS assesses the entire amount redetermined as the deficiency by the Tax Court and adds to the deficiency interest computed at the statutory rate. If the taxpayer disagrees with the IRS' interest computation, however, the Tax Court does not have jurisdiction to resolve that dispute.

H.R. REP. NO. 100-1104 at 232 (1998).

[393] *Estate of Baumgardner*, 85 T.C. at 452.

[394] *Id.* at 453 ("[W]e remain unable to enter a decision for interest upon an overpayment.").

Miscellaneous Revenue Act of 1988.[395] In its original form, § 7481(c) permitted the taxpayer to file a subsequent petition with the Tax Court for a determination that the interest assessed by the Commissioner under § 6215 with respect to a deficiency exceeded the amount of interest properly due. To invoke the court's jurisdiction in this subsequent proceeding, the taxpayer first had to pay the entire amount of the deficiency plus the interest claimed by the Commissioner, and the taxpayer then had to file a petition within one year of the date on which the original decision of the Tax Court became final. In that event, the Tax Court possessed jurisdiction solely to determine whether the taxpayer had made an overpayment of interest.[396]

As part of the Taxpayer Relief Act of 1997, Congress streamlined and clarified the Tax Court's jurisdiction under § 7481(c).[397] Rather than requiring the taxpayer to file a subsequent petition with the Tax Court, Congress fashioned the court's jurisdiction under § 7481(c) as supplemental to the original proceeding that the taxpayer could invoke by motion.[398] Additionally, Congress clarified that the Tax Court's jurisdiction under § 7481(c) extended not only to interest determinations made with respect to a deficiency in tax (where the taxpayer had first paid the deficiency and all interest claimed by the Commissioner) but also to interest determinations arising in the context of refund litigation under § 6512(b).[399] Section 7481(c) therefore authorizes the Tax Court to determine if the taxpayer has overpaid interest on a deficiency or if the Secretary has underpaid interest on an overpayment. If the court finds either scenario implicated, the

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[395] Pub. L. No. 100-67, § 6246(a), 102 Stat. 3751 (enacting § 7481(c)). Section 7481(c) applied to the assessment of deficiencies redetermined by the Tax Court after the November 10, 1988 effective date of the legislation.

[396] I.R.C. § 7481(c) (prior to amendment by the Taxpayer Relief Act of 1997).

[397] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1452(a), 111 Stat. 1452–53. The amendment had an effective date of August 5, 1997, but that effective date did not refer to a particular action. *See id.* § 1452(b), 111 Stat. 1453. In *Hallmark Cards, Inc. v. Commissioner*, 111 T.C. 266, 270 (1998), the court reasoned that the statute as amended "undoubtedly" applied to motions to redetermine interest filed after the effective date of the amendment.

[398] I.R.C. § 7481(c)(1); *see also* H.R. REP. NO. 105-148 at 638 (1997) ("A motion, rather than a petition, is a more appropriate pleading for relief in these cases.").

[399] I.R.C. § 7481(c)(2)(B). Congress couched this amendment as a "clarification" of the Tax Court's jurisdiction under § 7481(c). *See* H.R. REP. NO. 105-220, at 732–33 (1997) ("The House bill also clarifies that the Tax Court's jurisdiction to redetermine the amount of interest under section 7481(c) does not depend on whether the interest is underpayment interest or overpayment interest."). However, the clarification was more in the nature of an expansion, as the statute prior to its amendment made no mention of overpayment interest.

court's determination is treated under § 6512(b) as a determination of an overpayment of tax.[400]

The Tax Court does not serve as the exclusive forum to resolve disputes regarding the determination of underpayment or overpayment interest.[401] Yet, once invoked, the Tax Court's jurisdiction under § 7481(c) to redetermine interest becomes exclusive—just as it does in other areas.[402] Similarly, the court may not decline to exercise its jurisdiction to redetermine interest once its supplemental jurisdiction has been properly invoked.[403] In *Hallmark Cards, Inc. v. Commissioner*,[404] the taxpayer sought to dismiss its motion for a redetermination of interest under § 7481(c) following the issuance of adverse Tax Court authority in another case. Pointing to the specific reference in § 6512(a) to a petition to redetermine interest under § 7481(c), the court reasoned that Congress intended for a motion under § 7481(c) to have the same effect as the filing of a petition to redetermine a deficiency. Accordingly, the court denied the taxpayer's motion to withdraw on grounds that the court was obligated to dispose of the matter on the merits.[405]

Ordinarily, a proceeding to redetermine interest under § 7481(c) can be resolved on the record supporting the Tax Court's final decision in the case.[406] Nonetheless, Tax Court Rule 261(d) contemplates the possibility of a "bona fide factual dispute" that will require an additional evidentiary hearing. The court therefore may accept new facts to resolve interest determination disputes, provided the substance of the court's final decision concerning the underlying deficiency or overpayment remains unchanged.[407] In that regard, the court's jurisdiction under § 7481(c) is not limited to determining the applicable interest rates for the relevant

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[400] I.R.C. § 7481(c)(3). The Tax Court's redetermination of interest under § 7481(c) is reviewable in the same manner as a decision of the Tax Court. *Id.*

[401] *See* Exxon Mobil Corp. v. Commissioner, 136 T.C. 99, 110 (2011).

[402] *See* I.R.C. §§ 6512(a), 7422(e).

[403] *Cf.* § 7459(d) (decision of Tax Court dismissing proceeding for redetermination of deficiency considered its decision that the deficiency is that determined by the Secretary); *see also* Coninck v. Commissioner, 100 T.C. 495, 498 (1993) ("This Court . . . is not free to 'deny its jurisdiction' once it has attached by means of a valid petition.").

[404] 111 T.C. 266 (1998).

[405] *Id.* at 272 (citing Estate of Ming v. Commissioner, 62 T.C. 519 (1974) (denying taxpayer's motion to withdraw petition for redetermination of deficiency without prejudice) and Dorl v. Commissioner, 57 T.C. 720 (1972) (denying taxpayer's motion to remove case from the Tax Court to the U.S. District Court)).

[406] *See* TAX CT. R. 261(d) (July 6, 2012 ed.) (making this observation).

[407] *See* Bankamerica Corp. v. Commissioner, 109 T.C. 1, 8–9 (1997) ("[W]e note that the existence of a final decision does not tie our hands in this case. . . . [A]s long as we do not change the substance of the final decision, we are free to act under section 7481(c).").

periods—a position advanced by the Commissioner in *Exxon Mobil Corp. v. Commissioner*[408] to no avail. The court in *Exxon Mobil* explained that determining the amount of interest under § 7481(c) requires the court to analyze not only the applicable interest rate but also the relevant principal amount and length of time such amount remained outstanding. The court's jurisdiction under § 7481(c) therefore necessarily extends to resolving the various items that factor in the interest determination.[409]

The Tax Court's decision in *Exxon Mobil* also addressed the extent to which the Tax Court may consider facts relating to years that are not before the court in the § 7481(c) proceeding. The taxpayer in *Exxon Mobil* invoked the court's jurisdiction under § 7481(c) to determine interest netting under § 6221(d) for overpayment years before the court in the § 7481(c) proceeding based on prior underpayments in years not before the court. The Tax Court resolved the matter by analogizing to § 6214(b). Section 6214(b) authorizes the court to consider facts relating to taxable years not before the court in redetermining a deficiency for a year over which the court possesses jurisdiction, while making clear that the ability to consider facts from other years does not extend the court's jurisdiction to those years. The Tax Court in *Exxon Mobil* incorporated the § 6214(b) rule into the § 7481(c) arena, explaining that merely considering the underpayments of tax in years prior to those before the court in the § 7481(c) proceeding did not require the court to disturb the determination of those underpayments. Accordingly, the factual record available to the Tax Court in redetermining interest under § 7481(c) is not necessarily limited to the taxable years over which the court possesses § 7481(c) supplemental jurisdiction.

2. Continuing Jurisdiction Over Estate Tax Cases

If an estate is entitled to defer payment of estate tax under § 6166(a), the deferred tax payments accrue interest under § 6601.[410] The estate's future interest obligation created a hurdle to the Tax Court entering a final decision in an estate tax deficiency case, as highlighted in *Estate of Bailly v. Commissioner*.[411] The estate in that case had elected to defer payment of the estate tax under § 6166(a) and sought to deduct its future interest expense under § 6601 as an administrative expense for estate tax purposes. In a prior proceeding, the Tax Court determined that the estate could deduct this interest only as the interest was paid. However, if the Tax Court had entered a final decision in the proceeding, the estate would be precluded

[408] 136 T.C. 99 (2011).
[409] *Id.* at 114.
[410] *See* I.R.C. § 6166(f).
[411] 81 T.C. 949 (1983).

under § 6512(a) from pursuing a refund of estate tax resulting from deductions attributable to future interest payments. To avoid the harsh result of the estate forfeiting administrative expense deductions, the court in *Estate of Bailly* agreed to postpone entry of its decision in the case until the final § 6166 installment payment was due or paid, whichever occurred first.[412]

In reaching this resolution of the conundrum raised in *Estate of Bailly*, the Tax Court remarked that a congressional solution was required.[413] Congress obliged by introducing § 7481(d) as part of the Technical and Miscellaneous Revenue Act of 1988.[414] Pursuant to § 7481(d), the Tax Court is authorized to enter a decision regarding an estate tax deficiency and later reopen the case upon the taxpayer's motion solely to modify the court's decision to reflect the estate's entitlement to an administrative expense deduction under § 2053 on account of the estate's payment of interest on the deferred estate tax obligation.

To invoke this special procedure, the taxpayer estate must file a motion with the court after the entry of decision but before that decision becomes final requesting that the court retain its official case file.[415] Thereafter, the taxpayer estate may move the court to modify its decision to reflect the consequences of a later interest payment by filing a proposed form of decision along with its motion.[416] If the Service disagrees with the estate's motion, it must file a response along with its proposed form of decision within 60 days.[417] Motions to modify a decision pursuant to § 7481(d) generally are resolved without an evidentiary hearing, unless one is required due to the existence of a bona fide factual dispute.[418]

The practical effect of the § 7481(d) procedure has been limited significantly by subsequent estate tax legislation. In 1997, Congress amended § 2053 to disallow an administrative expense deduction for interest accruing on payments of federal estate tax that are deferred pursuant to § 6166.[419] Hence, the problem that gave rise to the § 7481(d) congressional remedy has been eliminated. Nonetheless, payments of interest attributable to deferred payments of estate, inheritance, or succession taxes levied at the state or local level may give rise to subsequent administrative expense deductions that necessitate the § 7481(d) procedure. The provision therefore has lasting, albeit limited, relevance.

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412 *Id.* at 958.

413 *See id.*

414 Pub. L. No. 100-647, § 6247(a), 102 Stat. 3342, 3751–52 (1988).

415 TAX CT. R. 157 (July 6, 2012 ed.).

416 *See* TAX CT. R. 262(a) (July 6, 2012 ed.).

417 TAX CT. R. 262(c) (July 6, 2012 ed.).

418 TAX CT. R. 262(d) (July 6, 2012 ed.).

419 *See* I.R.C. § 2053(c)(1)(D), added by The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 503(b)(1), 111 Stat. 788, 853 (1997).

PART VIII

TAX COURT PROMINENCE IN JUDICIAL REVIEW OF TAXPAYER RIGHTS

Congress has steadily expanded the jurisdiction of the Tax Court beyond its traditional province to determine deficiencies and overpayments following the Government's issuance of a notice of deficiency. The court's expanded jurisdictional reach at times stems from Congress seeking to provide a greater degree of oversight of administrative action. The Tax Court's jurisdiction to restrain premature assessments under § 6213(a) and to review jeopardy assessments under § 7429, previously discussed in connection with the court's deficiency jurisdiction,[1] present two such examples. More often, the court's jurisdiction has been expanded in connection with the creation of new taxpayer rights, a series of which have been introduced in recent decades. Having created the right, Congress often is not content to entrust the administration of the right to the Service alone. Congress therefore typically provides for the availability of judicial review of agency determinations and, increasingly, the Tax Court is designated as the forum for such review. The Tax Court's jurisdiction to review denials of innocent spouse relief, determinations made in response to a collection due process hearing, denials of requests for reimbursement of costs incurred in contesting the Service's position at the administrative level, and determinations of whistleblower awards all fall within this category. This Part will explore these and other provisions that fall within the broad umbrella of taxpayer rights, detailing the remedy provided by Congress and the Tax Court's jurisdiction to enforce it.

A. Disclosure Actions

Since enactment of the Freedom of Information Act in 1967,[2] increasing attention has focused on Internal Revenue Service policies with regard to the confidentiality of its rulings.[3] Except for a small minority of rulings that are published in the Internal Revenue Bulletin (and which are, in published form, devoid of reference to the specific taxpayer and transaction involved), these interpretations at one point had been treated as confidential by the

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[1] These provisions are discussed in Part VI.A. and VI.C., respectively.

[2] Pub. L. No. 90-23, 81 Stat. 54 (codified at 5 U.S.C. § 552 (1977)).

[3] *See* Fruehauf Corp. v. Internal Revenue Serv., 522 F.2d 284 (6th Cir. 1975), *vacated*, 429 U.S. 1085 (1977); Tax Analysts & Advocates v. Internal Revenue Serv., 505 F.2d 350 (D.C. Cir. 1974).

Service.[4] Justification for confidentiality was based on the fact that public disclosure of the identity of taxpayers and their transactions would discourage taxpayers from seeking rulings[5] and might violate provisions of the Code prohibiting publication of tax returns.[6] Additionally, even if private rulings were sanitized by removal of references to the taxpayer and transaction involved, publication would be inappropriate because the great number of such rulings precluded the type of careful review that would justify their use as precedent. Although the Service generally treats the specific transaction giving rise to a private ruling in accordance with its determination,[7] it does not feel constrained to maintain a consistent position with regard to other taxpayers or even other transactions involving the same taxpayer.[8]

Several questions emerged with regard to ruling confidentiality. First, it was maintained that the private ruling procedure operated unfairly since, despite Service precautions, sophisticated tax practitioners frequently knew the position adopted by the Service in these determinations.[9] Such a system of privileged access to government pronouncements did not bolster public confidence in the equity of the tax laws. Second, the secrecy surrounding private rulings led to suspicions that the tax laws were not being administered uniformly as to all taxpayers.[10] These suspicions, whether or not well-founded, also had disturbing implications for public confidence. Finally, questions were raised with regard to the legality, under the Freedom of Information Act, of barring public access to administrative interpretations of the tax laws.[11] Courts began to hold that statutory provisions barring the publication of tax returns did not justify withholding public access to private rulings under the Freedom of Information Act.[12]

To address these problems, Congress enacted § 6110 as part of the Tax Reform Act of 1976,[13] providing a comprehensive legislative scheme prescribing procedures for Internal Revenue Service disclosure of rulings. Additionally, the legislation created specific judicial remedies for persons objecting to Service action with regard to disclosure.[14] In this regard,

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[4] H.R. REP. NO. 94-658, at 312 (1975); S. REP. NO. 94-938, at 303 (1976).

[5] *See* H.R. REP. NO. 94-658, at 317 (1975); S. REP. NO. 94-938, at 309 (1976).

[6] I.R.C. §§ 6103, 7213.

[7] Treas. Reg. § 601.201(*l*)(5).

[8] Treas. Reg. § 601.201(*l*)(1), (6).

[9] H.R. REP. NO. 94-658, at 314 (1975); S. REP. NO. 94-938, at 305 (1976).

[10] *See supra* note 9.

[11] *See supra* note 3.

[12] Fruehauf Corp. v. Internal Revenue Serv., 522 F.2d 284 (6th Cir. 1975), *vacated*, 429 U.S. 1085 (1977); Tax Analysts & Advocates v. Internal Revenue Serv., 505 F.2d 350 (D.C. Cir. 1974).

[13] Pub. L. No. 94-455, § 1201(a), 90 Stat. 1520, 1660 (1976).

[14] *Id.*

remedies are provided for those objecting to disclosure[15] as well as for those seeking additional disclosure.[16]

Pursuant to § 6110, the Commissioner is required to make available for public inspection written determinations as well as so-called "background file documents."[17] The latter consist of communications, written or otherwise, between the Service and others, regarding a determination; they include the ruling request, materials submitted in support of the request, and other communications from the taxpayer and others.[18]

The statute provides various exceptions to the general directive of disclosure.[19] Of primary importance, the Commissioner is directed to excise from the public record the name, address, and other identifying details of any person identified in the determination or background file documents.[20] Also excepted from disclosure is certain material dealing with foreign policy and national defense,[21] material excepted from disclosure by specific statutory provision not contained in title 26,[22] trade secrets,[23] material "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"[24] certain material connected with agencies responsible for the supervision of financial institutions,[25] and geological material concerning wells.[26] Codifying earlier practice, the statute also provides that rulings will have no precedential weight unless otherwise provided by the Service.[27]

The procedure for disclosure of determinations is automatic. Upon issuance of a determination, the Service is required to mail notification of its intention to disclose to the person to whom the determination pertains.[28] As indicated above, the statute requires that portions of the determination be excised from that which is made public.[29] Pursuant to statutory directive, procedures must be established by the Service under which disputes regarding the excisions may be resolved administratively within a

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[15] *See* I.R.C. § 6110(f)(3).

[16] *See* I.R.C. § 6110(d)(3),(f)(4).

[17] I.R.C. § 6110(a).

[18] I.R.C. § 6110(b)(2).

[19] I.R.C. § 6110(c).

[20] I.R.C. § 6110(c)(1). This exception does not apply to persons identified as third-party contacts. I.R.C. § 6110(c)(1), (d)(1). *See infra* notes 37–40 and accompanying text.

[21] I.R.C. § 6110(c)(2).

[22] I.R.C. § 6110(c)(3).

[23] I.R.C. § 6110(c)(4).

[24] I.R.C. § 61l0(c)(5).

[25] I.R.C. § 61l0(c)(6).

[26] I.R.C. § 6110(c)(7).

[27] I.R.C. § 6110(k)(3).

[28] I.R.C. § 6110(f)(1).

[29] *See supra* notes 19–26 and accompanying text.

60-day period from the mailing of notice.[30] If the person to whom the determination pertains does not commence suit in the Tax Court within the 60-day period to restrain disclosure,[31] the determination is made available for public inspection between 75 and 90 days after mailing of the notice of intention to disclose.[32] If disputes regarding disclosure cannot be resolved administratively and a Tax Court suit to restrain disclosure is commenced, the determination will be made available for public inspection, in accordance with the court's decision, within 30 days after that decision becomes final.[33]

The procedure for disclosure of background file documents parallels that for determinations with one exception. Instead of automatic initiation of the disclosure procedure as accompanies the issuance of a determination, background file documents will not be made available for inspection unless a written request is made therefor.[34] Upon the receipt of such request, the Service must mail notification of an intention to disclose to any person to whom the determination pertains,[35] and from that point on the procedure for disclosure is the same as that for determinations.[36]

As a protection against impropriety and undue influence in the ruling procedure, special disclosure rules are provided for so-called third party contacts.[37] The statute requires that a written notation be made on the determination open to public inspection of any communication with the Service by any person, other than the taxpayer or his representative, with regard to the determination.[38] Such notation identifies the contacting party by category only (e.g., congressional, White House, Treasury, trade association, etc.), and not by name.[39] Despite this limitation and the usual limitations on disclosing the names of those involved in a determination, the statute requires the Service to disclose the identity of third party contacts as part of the background file documents.[40]

In connection with the disclosure provisions, Congress authorized three distinct judicial proceedings. The first of these, mentioned above, provides for actions to restrain disclosure.[41] The Tax Court has exclusive jurisdiction

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[30] I.R.C. § 6110(f)(2)–(3).

[31] I.R.C. § 6110(f)(3).

[32] I.R.C. § 6110(g)(1)(A).

[33] I.R.C. § 6110(g)(1)(B).

[34] I.R.C. § 6110(e), (f)(1); S. REP. NO. 94-938, at 310 (1976).

[35] I.R.C. § 6110(f)(1).

[36] I.R.C. § 6110(f)(3), (g).

[37] I.R.C. § 6110(d).

[38] I.R.C. § 6110(d)(1).

[39] *Id.*; S. REP. NO. 94-938, at 308 (1976).

[40] I.R.C. § 6110(a), (b)(2), (c); S. REP. NO. 94-938, at 308 (1976).

[41] I.R.C. § 6110(f)(3). To aid the Service in complying with § 6110, a request for a private letter ruling must be accompanied by a statement (a "deletions

of these actions, which may be initiated by any person "to whom a written determination pertains . . . or who has a direct interest in maintaining the confidentiality of any such written determination or background file document" and who disagrees with a Service refusal to make deletions in material to be opened to public inspection.[42] Such an action must be instituted within 60 days after the mailing by the Service of a notice of intention to disclose.[43]

A second category of proceeding authorizes actions to obtain additional disclosure.[44] Initial jurisdiction for these actions is in either the Tax Court or the United States District Court for the District of Columbia, and they may be commenced by any person who seeks additional disclosure with respect to any determination or background file document.[45] Such an action must be instituted within three years after any portion of the determination is opened for public inspection.[46]

A final action is authorized in connection with the special provisions dealing with third-party contacts.[47] As stated above, the existence of a third-party contact must be noted on any determination made public with the category of the contacting party.[48] Additionally, the Code requires that the name of the contacting party be made available on request as part of the background file documents.[49] A further provision authorizes a court action to compel disclosure of the identity of any person to whom the determination pertains.[50] Such an action may be brought by any person in either the Tax Court or the United States District Court for the District of Columbia.[51] Disclosure of identity will be ordered if the court concludes that evidence exists "from which one could reasonably conclude that an impropriety occurred or undue influence was exercised . . . by or on behalf

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statement") of the items that should be redacted from the version of the ruling to be made public. *See* Rev. Proc. 2007-4, § 9.02(9), 2007-1 C.B. 118, 133.

[42] I.R.C. § 6110(f)(3)(A). However, this remedy does not authorize a taxpayer to enjoin public disclosure of a determination in its entirety. *See* Anonymous v. Commissioner, 134 T.C. 13 (2010) (rejecting taxpayer argument that the Administrative Procedure Act permitted the Tax Court to enjoin publication of a private letter ruling).

[43] *Id.*

[44] I.R.C. § 6110(f)(4).

[45] I.R.C. § 6110(f)(4)(A).

[46] The three-year statute of limitations is not provided for in the statute. *Id* Rather, this restriction is found only in the accompanying legislative materials. *See* S. REP. NO. 94-938, at 314 (1976); H.R. REP. NO. 94-658, at 324 (1975).

[47] I.R.C. § 6110(d).

[48] *See supra* notes 38–39 and accompanying text.

[49] *See supra* note 40 and accompanying text.

[50] I.R.C. § 6110(d)(3).

[51] *Id.*

of" the person whose identity is sought.[52] The court also may order the disclosure of other deleted material if it finds such material to be in the "public interest."[53] This type of action must be commenced within three years after the determination is initially opened for public inspection.[54]

The doctrine of exhaustion of administrative remedies figures in two of the three proceedings. The statute requires the establishment of administrative procedures with regard to disclosure,[55] and specifically requires the exhaustion of remedies for actions to restrain disclosure[56] and actions to obtain additional disclosure.[57] The Tax Court rules specify that exhaustion is a jurisdictional prerequisite for bringing these types of actions.[58] The statute does not, however, provide for the exhaustion of administrative remedies in the case of third-party contact actions. The court apparently has not adopted the position that, in these cases, exhaustion is necessary,[59] or even desirable.[60]

A question may be anticipated with regard to exhaustion of administrative remedies in actions to restrain disclosure. The statute clearly requires exhaustion, but it also requires that the Tax Court action be commenced within 60 days after the Commissioner mails the notice of intention to disclose.[61] This relatively short period may be incompatible with the time required for full exhaustion of administrative remedies, and the court may have to adopt a liberal policy with regard to the exhaustion requirement in order not to bar the institution of Tax Court proceedings.

Although the objectives of the three proceedings differ, in several respects they parallel one another. For example, one aspect common to all three actions is that they may involve the interests of persons other than those who figure directly in the initiation of the proceedings. Thus, an action to restrain disclosure may be commenced by any person to whom a determination pertains or who has a direct interest in preserving the

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[52] *Id.*

[53] *Id.*

[54] I.R.C. § 6110(d)(4).

[55] I.R.C. § 6110(f)(2).

[56] I.R.C. § 6110(f)(3)(A)(iii).

[57] I.R.C. § 6110(f)(4)(A).

[58] TAX CT. R. 220(c)(1), (2)(C) (July 6, 2012 ed.).

[59] *See* TAX CT. R. 220(c)(3) (July 6, 2012 ed.).

[60] The petition in a third-party contact action need not contain a statement that the petitioner has exhausted administrative remedies. TAX CT. R. 221(e) (July 6, 2012 ed.). *Cf.* Rules Comm. Note, TAX CT. R. 221(d)(6) (Aug. 1, 1977 ed.), 68 T.C. 1055 (indicating that a statement of exhaustion of remedies is necessary in some circumstances, not relating to third-party contact actions, even if the statute does not require such exhaustion as a condition of suit).

[61] I.R.C. § 6110(f)(3)(A).

confidentiality of the determination or background file documents.[62] To preserve the rights of all such parties and reduce the potential for multiple suits, the statute requires the Commissioner, within 15 days of receiving a petition in an action to restrain disclosure, to mail notice of the commencement of the action to any person to whom the determination pertains (other than the petitioner in the action).[63] Any person to whom such notice is given may intervene in the proceeding but may not thereafter institute an independent action to restrain disclosure with respect to any determination or background file document that is the subject of the original action.[64]

Similar notice and intervention provisions are applicable to actions to obtain additional disclosure and third-party contact actions. In the case of an action to obtain additional disclosure, the Commissioner, within 15 days after service of notice of the petition, is required to mail notice of the filing of the petition to any person who is identified by name and address in any determination or background file document that is the subject of the petition.[65] Any person so notified may intervene in the proceeding.[66] Failure to intervene carries significant risk, as the statute relieves the Commissioner of the responsibility of defending the action if such notice is sent.[67] As a result, the additional disclosure can be obtained without objection. If the Commissioner elects not to defend the action, Tax Court rules require the Commissioner to give notice thereof to every person notified of the filing of the petition, who may intervene within 30 days after mailing of the notice of the Commissioner's election.[68] The notice and intervention provisions applicable to actions to obtain additional disclosure are incorporated by reference into third-party contact actions, with the requirement that notice be given to both the person whose identity is subject to disclosure and the person who made the third-party contact.[69] The statute is unclear as to the effect of giving the notice on the Commissioner's duty to defend this type of action, but the Tax Court

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[62] I.R.C. § 6110(f)(3)(A)(i).

[63] I.R.C. § 6110(f)(3)(B).

[64] *Id.*

[65] I.R.C. § 6110(f)(4)(B). The statute does not require notification of persons just identified by name. One wonders whether this is consistent with the purpose to permit parties to demonstrate the need for confidentiality. Obviously, notification would be a hardship for the Commissioner if no address is given, but query whether this is a burden that the Commissioner ought to shoulder to protect rights to anonymity.

[66] *Id.*

[67] *Id.*

[68] TAX CT. R. 225(b) (July 6, 2012 ed.).

[69] I.R.C. § 6110(d)(3).

apparently has taken the position that the Commissioner must defend the action even if notice is given.[70]

A unique aspect, insofar as the Tax Court is concerned, of the disclosure procedures has to do with the anonymity of parties and the confidentiality of court proceedings and documents. Since 1924, the statute has provided that the proceedings of the court and evidence adduced before it are to be open to the public.[71] Such openness has been regarded as important in assuring public confidence in the fairness of the court's decisions.[72] In the case of disclosure actions, however, the ultimate issue for decision is whether certain material should be kept confidential. Obviously, the proceedings to determine that question cannot be fully public without defeating the very purpose of the litigation. Accordingly, the statute provides that intervenors in actions to obtain additional disclosure and in third-party contact actions, and petitioners and interveners in actions to restrain disclosure, may proceed anonymously if appropriate.[73] Although there is no specific indication in either the statute or the Tax Court rules as to the meaning of "appropriate" for this purpose,[74] the issue should not prove troublesome in light of the statutory purpose to preserve confidentiality in the absence of either an uncontested Service determination or a final court decision.

The Tax Court rules provide that a party who proceeds anonymously shall be designated as "Anonymous."[75] Such party is required to submit a separate paper, accompanying his initial pleading, stating his name and address and the basis for anonymity.[76] Consistent with the prospect of proceeding anonymously, the statute authorizes the court to adopt rules providing for the confidentiality of disclosure proceedings.[77] In this connection, court rules require that petitions and all other papers submitted to the court in a disclosure action are to be kept in a confidential file and not opened for public inspection unless specifically permitted by the court.[78] Additionally, the rules provide for the issuance of court orders

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[70] *Cf.* TAX CT. R. 225(b) (July 6, 2012 ed.) (suggesting that only in actions to obtain additional disclosure may the Commissioner elect not to defend).

[71] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337 (now codified at I.R.C. §§ 7458, 7461); *see also* Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 917 (1985) ("As a general rule, common law, statutory law, and the United States Constitution support the proposition that official records of all courts, including this Court, shall be open and available to the public for inspection and copying.").

[72] *See* 65 CONG. REC. 8133 (1924) (remarks of Sen. Jones).

[73] I.R.C. § 6110(d)(3), (f)(3)(B), (f)(4)(B).

[74] *See* TAX CT. R. 227 (July 6, 2012 ed.).

[75] TAX CT. R. 227(c) (July 6, 2012 ed.).

[76] *Id.*

[77] I.R.C. § 6110(f)(6).

[78] TAX CT. R. 228(a) (July 6, 2012 ed.).

barring public access to the hearings, testimony, evidence, and reports involved in a disclosure case.[79] The court has recognized that most disclosure cases will involve related material, some of which may be public and other of which may be in dispute.[80] The court generally expects to keep all such material confidential during the course of an individual litigation, because of the difficulty of maintaining an ongoing two-file system.[81] However, once litigation is completed, the court contemplates establishing such a system by court order that would divide the material into two separate files, one of which would be available to the public.[82]

In general, the statute and Tax Court rules adopt burden of proof rules that favor disclosure. Thus, in actions to restrain disclosure, the burden of proof is on the party seeking restraint.[83] In actions to obtain additional disclosure, the burden of proof is on the party (the Commissioner or an intervenor) who opposes additional disclosure.[84] An exception to this bias in favor of disclosure applies in third-party contact actions seeking disclosure of the identity of the person to whom a determination pertains. Likely due to the drastic nature of the remedy sought (identification of the person involved in a ruling)[85] and the serious charge of misconduct that must necessarily be involved in the case,[86] the burden rests on the petitioner to establish the reasonable conclusion of an impropriety or undue influence by or on behalf of the person sought to be identified.[87] No rule has yet been expressed with regard to the burden of proof in third-party contact actions that seek disclosure of material other than the identity of the person to whom the ruling pertains.[88] The statute provides that the court may order such disclosure if it is in the "public interest."[89] Notes to the Tax Court rules expressly reserve decision on this matter.[90]

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[79] TAX CT. R. 228(b) (July 6, 2012 ed.).

[80] Rules Comm. Note, TAX CT. R. 228 (Aug. 1, 1977 ed.), 68 T.C. 1060.

[81] *Id.*

[82] *Id.*

[83] H.R. REP. NO. 94-658, at 324 (1975); S. REP. NO. 94-938, at 313 (1976); TAX CT. R. 229(b) (July 6, 2012 ed.); *see also* I.R.C. § 6110(f)(4)(A).

[84] I.R.C. § 6110(f)(4)(A); H.R. REP. NO. 94-658, at 325 (1975); S. REP. NO. 94-938, at 314 (1976); TAX CT. R. 229(a) (July 6, 2012 ed.).

[85] I.R.C. § 6110(d)(3).

[86] *Id.*

[87] TAX CT. R. 229(c) (July 6, 2012 ed.).

[88] Rules Comm. Note, TAX CT. R. 229 (Aug. 1, 1977 ed.), 68 T.C. 1061.

[89] I.R.C. § 6110(d)(3).

[90] Rules Comm. Note, TAX CT. R. 229 (Aug. 1, 1977 ed.), 68 T.C. 1061 (noting that the absence of a specific rule in this context of disclosures in furtherance of the public interest "is not to be taken as indicative of where the burden of proof lies in respect of such issue"). Nonetheless, under the articulated general rule, the burden of proof would appear to rest on the petitioner seeking disclosure. *See* TAX

A final feature common to all three types of disclosure proceedings involves appellate review. Generally, decisions in all types of actions may be appealed only to the Court of Appeals for the District of Columbia.[91] This applies to both decisions of the Tax Court and the United States District Court for the District of Columbia.[92] According to the committee reports, an exception to this rule applies in appeals from the Tax Court if, in the words of these reports, the Commissioner and "the person involved [agree] to review by another court of appeals (sec. 7482(b))."[93]

B. Relief from Spousal Joint and Several Liability

Section 6013(a) permits married couples to file a single tax return reporting their income on a joint basis.[94] While joint reporting of income by spouses can yield considerable tax savings through the application of broadened marginal rate brackets,[95] the filing of a joint return carries a potentially significant practical disadvantage. Pursuant to § 6013(d)(3), each spouse bears joint and several liability for the tax attributable to the couple's combined income. The imposition of joint and several liability upon spouses to a joint return can prove particularly inequitable at times, such as when one spouse was unaware of income generated by the other that was not disclosed on the return.[96] In cases where the "consenting" spouse did

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CT. R. 229 (July 6, 2012 ed.) (incorporating the approach under Rule 142 unless an exception applies).

[91] I.R.C. § 7482(b)(1) (providing appellate venue for appeals from the Tax Court); 28 U.S.C. § 1291(a) (providing appellate venue for appeals from the United States district courts).

[92] *See supra* note 91.

[93] H.R. REP. NO. 94-658, at 324–25 (1975); S. REP. NO. 94-938, at 313–14 (1976).

[94] Congress first introduced the joint return in 1918. *See* Revenue Act of 1918, § 223, 40 Stat. 1057, 1074. Following disputes concerning the extent of each spouse's liability, Congress subsequently clarified that spouses to a joint return bore joint and several liability for the resulting tax 20 years later. *See* Revenue Act of 1938, Pub. L. No. 75-289, § 51(b), 52 Stat. 447, 476.

[95] The income tax savings from the application of a beneficial rate structure did not originate as a trade-off for the imposition of joint and several liability. Rather, the beneficial marginal rate structure for married couples filing jointly was not introduced until 1948, ten years after the statutory imposition of joint and several liability. *See* Revenue Act of 1948, Pub. L. No. 80-471, § 301, 62 Stat. 110, 114; *see also* Bryan T. Camp, *The Unhappy Marriage of Law and Equity in Joint Return Liability*, 108 TAX NOTES 1307 (2005) (detailing origins of joint income tax reporting).

[96] *See* S. REP. NO. 91-1537, at 2 (1971) (noting instances of "grave injustice" where "the innocent spouse has been deserted by her husband and the funds gained by embezzlement or theft have been squandered and spent by the wrongdoer").

not know or have reason to know of the couple's true combined income, that spouse necessarily lacked knowledge of the financial exposure the spouse assumed by signing the joint return.

Prior to 1971, relief from joint and several liability was afforded on extremely narrow grounds that pertained to the propriety of the joint return itself. For instance, a spouse who signed a joint return under duress[97] or by mistake[98] could be exempted from joint and several liability on the theory that no joint return had been effectively filed. In 1971, Congress introduced the first remedial doctrine aimed at absolving a spouse of joint and several liability through the enactment of § 6013(e).[99] Commonly referred to as "innocent spouse" relief, § 6013(e) primarily required the consenting spouse to establish the existence of a substantial understatement of income attributable to the other spouse of which the consenting spouse lacked knowledge or reason to know. Accordingly, a spouse could seek § 6013(e) relief only as an affirmative defense in a deficiency proceeding.

Congress restructured and expanded the innocent spouse provisions through the enactment of § 6015 as part of the IRS Restructuring and Reform Act of 1998.[100] First, Congress modified and restated the relief formerly provided by § 6013(e) through § 6015(b). Congress then provided an additional avenue for obtaining relief from joint and several liability relating to a deficiency. Through § 6015(c), a spouse whose marriage has ended—not only legally but also functionally through the failure to maintain a common household—may elect to have a separate determination of that spouse's liability for the deficiency. In addition to these remedies in the deficiency setting, Congress provided an open-ended remedy from joint and several liability that extends to self-reported but unpaid taxes. Pursuant to § 6015(f), the Service may determine that it is inequitable to hold a requesting spouse liable for any portion of a deficiency or tax liability based on the facts and circumstances of the case.

In addition to clarifying and expanding the innocent spouse relief provisions, Congress expressly addressed the Tax Court's jurisdiction in this context through § 6015(e). This Section first outlines the evolution of the innocent spouse provisions before examining the Tax Court's jurisdiction to determine a requesting spouse's entitlement to relief.

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[97] Furnish v. Commissioner, 262 F.2d 727 (9th Cir. 1958). Current law continues to treat a return filed under duress as not constituting an effective joint return. *See* Treas. Reg. § 1.6013-4(d).

[98] Payne v. Commissioner, 247 F.2d 481 (8th Cir. 1957).

[99] Pub. L. No. 91-679, 84 Stat. 2063 (1971).

[100] Pub. L. No. 105-206, § 3201(a), 112 Stat. 734 (1998).

1. Relief Under Former Section 6013(e)

The first innocent spouse statute, § 6013(e), applied from 1971 until it was superseded by the enactment of § 6015 in 1998. Prior to 1984, § 6013(e) provided relief from joint and several liability only in cases where the deficiency was attributable to an omission from gross income. Congress amended § 6013(e) in 1984 to expand the scope of available relief to deficiencies resulting from erroneous claims of deduction, credit, or basis.[101] In its post-1984 form, § 6013(e) provided relief from joint and several liability resulting from the filing of a joint return where the following conditions were satisfied: (1) there existed a "substantial understatement" of tax on the return that was attributable to "grossly erroneous items" of the other spouse; (2) the requesting spouse established that, in signing the return, he did not know and did not have reason to know of the existence of the substantial understatement; and (3) it was inequitable to hold the requesting spouse liable for the deficiency in tax attributable to the substantial understatement.[102] If the requesting spouse carried his burden of establishing these elements,[103] he was entitled to relief from joint and several liability for the tax attributable to the substantial understatement only.[104] The statute did not provide a remedy for joint and several liability of unpaid tax attributable to items reported on the joint return.

The definition of a "substantial understatement" turned on the basis for the understatement. With respect to omissions from gross income, an understatement was substantial if it exceeded $500.[105] However, if the understatement was attributable to an erroneous deduction, credit, or statement of basis, the understatement had to exceed a stated percentage of the requesting spouse's gross income for the preadjustment year—generally 25 percent.[106] The innocent spouse remedy therefore was not only limited to deficiencies in tax, but often to deficiencies of considerable amounts.

A "grossly erroneous item" attributable to the non-requesting spouse referred to an unreported item of gross income or a claim of deduction, credit, or basis for which there existed "no basis in fact or law."[107] Given that a spouse could seek relief under § 6013(e) only in the course of a deficiency proceeding, this requirement placed a consenting spouse in an

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[101] *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 424, 98 Stat. 494, 801–03 (1984).

[102] I.R.C. § 6013(e), as amended by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 424, 98 Stat. 494, 801–03 (1984).

[103] *See* Shea v. Commissioner, 780 F.2d 561, 565 (6th Cir. 1986).

[104] I.R.C. § 6013(e)(1)(D) (1984).

[105] I.R.C. § 6013(e)(3) (1984).

[106] I.R.C. § 6013(e)(4) (1984). The 25 percent figure applied if the spouse's adjusted gross income for the pre-adjustment year exceeded $20,000.

[107] I.R.C. § 6013(e)(2) (1984).

awkward litigating position. The requesting spouse was effectively forced to choose between contesting the underlying deficiency on the merits (an approach surely favored by the other spouse) or conceding the deficiency and pursuing § 6013(e) relief. Advancing both theories in the alternative would undermine the latter, as any argument that the contested item of gross income, deduction, credit, or basis did not give rise to a deficiency necessarily undermined the § 6013(e) condition that no basis in law or fact existed to support the position.

Litigation under § 6013(e) frequently turned on whether the requesting spouse possessed knowledge or reason to know of the substantial understatement in signing the joint return. From the outset, the requesting spouse's failure to comprehend the tax consequences of a transaction did not serve as a basis for establishing the absence of knowledge of the understatement.[108] The knowledge contemplated by § 6013(e) did not pertain to "knowledge of the tax consequences of the transaction but rather knowledge of the transaction itself."[109] Knowledge of the transaction giving rise to the substantial understatement therefore was tantamount to knowledge of the understatement for innocent spouse relief purposes.[110] The Tax Court applied this same "knowledge of the transaction" standard to all innocent spouse cases, regardless of whether the substantial understatement was attributable to an omission of income or an erroneous deduction.[111] Certain courts of appeals, however, adopted a more lenient standard in the context of erroneous deduction cases. For example, the Ninth Circuit Court of Appeals in *Price v. Commissioner*[112] explained that any knowledge of the transaction giving rise to the deduction did not alone preclude innocent spouse relief.[113] Rather, according to this view, the relevant inquiry was whether the spouse knew or had reason to know "that

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108 *See* Sanders v. United States, 509 F.2d 162, 169 (5th Cir. 1975); McCoy v. Commissioner, 57 T.C. 732, 734 (1972).

109 Quinn v. Commissioner, 524 F.2d 617, 626 (7th Cir. 1975).

110 Jonson v. Commissioner, 118 T.C. 106, 115 (2002) (citing Purcell v. Commissioner, 826 F.2d 470, 473–74 (6th Cir. 1987)). Other courts viewed knowledge of the transaction giving rise to the deficiency as supplying constructive knowledge of the substantial understatement as opposed to actual knowledge. *See, e.g.,* Price v. Commissioner, 887 F.2d 959, 964 (9th Cir. 1989) (reasoning that "if a spouse knows virtually all of the facts pertaining to the transaction" giving rise to the substantial understatement, then "she is considered as a matter of law to have reason to know of the substantial understatement"). The difference is a matter of semantics, however, as either actual or constructive knowledge of the substantial understatement was sufficient to preclude innocent spouse relief.

111 *See* Bokum v. Commissioner, 94 T.C. 126, 151 (1990); *see also* Park v. Commissioner, 25 F.3d 1289 (5th Cir. 1994).

112 887 F.2d 959 (9th Cir. 1989).

113 *Id.* at 963 n.9.

the deduction would give rise to a substantial understatement."[114] Intimate knowledge of the transaction giving rise to the erroneous deduction could supply knowledge that the claimed deductions were not proper; superficial knowledge of the transaction did not.

If the requesting spouse was sufficiently unaware of the transaction that gave rise to the substantial understatement, the inquiry turned to whether the spouse "had reason to know" the return contained the understatement. Courts approached this inquiry from the standpoint of an objective third party. That is, a spouse possessed the prohibited constructive knowledge if "a reasonably prudent person in her position at the time she signed the return could be expected to know that the return contained the substantial understatement."[115] The following factors informed the constructive knowledge inquiry: (1) the requesting spouse's level of education, (2) such spouse's involvement in the couple's business and financial affairs, (3) the presence of lavish or out-of-the ordinary consumption patterns, and (4) the level of evasiveness and deceit perpetrated by the other spouse concerning the couple's finances.[116]

In the context of substantial understatements attributable to erroneous deductions, courts articulated an additional basis for constructive knowledge of the understatement. Even if the requesting spouse did not possess reason to know of the understatement under the factors outlined above, the spouse may have known sufficient facts to put him on notice that the understatement existed. This "on notice" element of the constructive knowledge inquiry generally was triggered by the sheer size of the claimed deduction.[117] If a reasonably prudent person would have questioned the legitimacy of the deduction, the spouse was charged with whatever knowledge such an inquiry would reveal.[118]

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114 *Id.* at 963; *see also* Reser v. Commissioner, 112 F.3d 1258, 1267 (5th Cir. 1997); Resser v. Commissioner, 74 F.3d 1528, 1536 (7th Cir. 1996) (each following *Price*).

115 *Price*, 887 F.2d at 965.

116 *See, e.g.*, Stevens v. Commissioner, 872 F.2d 1499, 1505 (11th Cir. 1989).

117 *See* Levin v. Commissioner, T.C. Memo. 1987-67, 53 T.C.M. (CCH) 6, 8–9 (explaining that a spouse cannot qualify for innocent spouse relief "simply by turning a blind eye to—by preferring not to know of—facts fully disclosed on the return, of such a large nature as would reasonably put such spouse on notice that further inquiry would need to be made"). A requesting spouse could not avoid the duty to inquire by failing to know the extent of the deductions by failing to review the return. Rather, the spouse was charged with knowledge of the items reflected on the return. *See* Hayman v. Commissioner, 992 F.2d 1256, 1262 (2d Cir. 1993).

118 *See* Reser v. Commissioner, 112 F.3d 1258, 1267–68 (5th Cir. 1997). A requesting spouse could satisfy the duty to inquire by questioning the other spouse about the accuracy of the relevant item and receiving a plausible explanation. *See, e.g.,* Estate of Killian v. Commissioner, T.C. Memo. 1987-365, 53 T.C.M. (CCH) 1438, 1441.

The final hurdle to § 6013(e) relief rested in the evaluation concerning the equity of imposing joint and several liability for the substantial understatement on the requesting spouse. Certain of these factors overlapped with the constructive-knowledge inquiry—that is, whether the requesting spouse benefitted significantly from the understatement through consumption patterns that exceeded customary support.[119] Other equitable considerations included in the spouse's well-being at the time relief was sought, such as whether the spouse had been deserted by the other spouse and whether the spouse would suffer economic hardship in the absence of relief.[120]

2. Section 6015(b) Relief

As part of the IRS Reform and Restructuring Act of 1998, Congress enacted § 6015 to address relief from spousal joint and several liability in a more comprehensive fashion. The statute, which superseded § 6013(e), applies to taxes that arose after June 22, 1998, and to tax liabilities attributable to a prior period that remained unpaid as of such date. Generally speaking, Congress intended the enactment of § 6015 to make innocent spouse relief more broadly available.[121]

The first avenue to relief under § 6015 represents a modified version of the relief formerly offered under § 6013(e). Pursuant to § 6015(b), relief from joint and several liability is available if: (1) an "understatement" of tax attributable to "erroneous items" of one individual filing the joint return existed on the return; (2) the other spouse filing the return, in signing the return, did not know and had no reason to know of the understatement; and (3) taking into account all of the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax attributable to the understatement.[122]

While the terms of § 6015(b) largely mirror those of former § 6013(e), the statutory replacement contains slight modifications designed to expand

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[119] *See* Purcell v. Commissioner, 86 T.C. 228, 242 (1986) (noting that, under regulations then in effect, the presence of a significant benefit beyond normal support served as a factor to be considered in weighing the equities), *aff'd*, 826 F.2d 470 (6th Cir. 1997).

[120] *See* Treas. Reg. § 1.6013-5(b) (prior to removal by T.D. 9003 (July 18, 2002), 2002-2 C.B. 294); *see also* Terzian v. Commissioner, 72 T.C. 1164, 1173 (1979) (desertion); Estate of Klein v. Commissioner, 63 T.C. 585, 593 (1975) (economic hardship); Michaels v. Commissioner, T.C. Memo. 1995-294, 69 T.C.M. (CCH) 3056, 3060 (1995) (economic hardship).

[121] *See* H.R. REP. NO. 105-364, pt. 1, at 60–62 ("The bill generally makes innocent spouse status easier to obtain."); *see also* H.R. REP. NO. 105-599, at 53 (1998); S. REP. NO. 105-174, at 65, 68 (1998).

[122] I.R.C. § 6015(b)(1).

the availability of relief. For instance, § 6015(b) potentially applies to any understatement of tax attributable to the other spouse;[123] the understatement no longer need be "substantial" as formerly required by § 6013(e).[124] Additionally, § 6015(b) dropped the requirement that the understatement related to "grossly erroneous" items of the other spouse. Instead, the understatement need only relate to "erroneous" items, which eliminates this additional restriction as a practical matter.[125]

The remaining conditions to relief under § 6015(b) match those of former § 6013(e), with the most significant being the requirement that the requesting spouse have neither actual nor constructive knowledge of the understatement in signing the return. In issuing regulations under § 6015(b), the Treasury Department explained that the standards for determining knowledge or reason to know that were developed under § 6013(e) were to apply in interpreting § 6015(b).[126] In *Cheshire v. Commissioner*,[127] the Tax Court reasoned that the constructive knowledge inquiry applicable under former § 6013(e)(1)(C) extended to § 6015(b)(1)(C) in the context of an omission of income. Accordingly, the taxpayer's knowledge of the transaction that gave rise to the omitted income precluded § 6015(b) relief.[128] In affirming the Tax Court decision, the Fifth Circuit Court of Appeals reasoned that cases interpreting the knowledge or reason to know standards under § 6013(e)(1)(C) remain instructive for purposes of § 6015(b).[129]

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[123] I.R.C. § 6015(b)(1)(C) (cross referencing the definition of an understatement under § 6662).

[124] The requirement that the understatement be substantial under § 6013(e) posed a meaningful constraint in the context of omitted income cases due to the percentage floor (generally 25 percent). Additionally, the requirement imposed an administrative burden upon the requesting spouse through the necessity of calculating such spouse's adjusted gross income for the pre-adjustment year for purposes of determining the baseline against which the understatement would be measured.

[125] An "understatement" in tax presumably will be attributable to an "erroneous" item of income that should have been correctly stated on the return.

[126] *See* T.D. 9003 (July 18, 2002) (preamble to final regulations interpreting § 6015); *see also* Butler v. Commissioner, 114 T.C. 276, 283 (2000) ("[C]ases interpreting old section 6013(e) remain instructive as to our analysis of whether a taxpayer 'knew or had reason to know' of an understatement pursuant to new section 6015(b).").

[127] 115 T.C. 183 (2000).

[128] This approach is confirmed by the regulations. *See* Treas. Reg. §§ 1.6015-2(c), 1.6015-3(c)(2)(i)(A). Regulation § 1.6015-2(c), which addresses knowledge of an "understatement," incorporates the actual knowledge standard of Regulation § 1.6015-3(c)(2), which clarifies when a requesting spouse possesses actual knowledge of an erroneous "item" giving rise to a deficiency.

[129] Cheshire v. Commissioner, 282 F.3d 326, 333 n.15 (5th Cir. 2002).

The regulations articulate a different standard for determining when a requesting spouse possessed knowledge of an understatement in tax attributable to an erroneous deduction or credit. Knowledge of the deduction or credit giving rise to the understatement alone is not sufficient. Instead, the spouse must possess knowledge of the facts pertaining to the claimed deduction or credit that render the item not allowable as a legal matter.[130] Note that this standard does not raise ignorance of the law as a permissible defense for the requesting spouse. Instead, the inquiry focuses on whether the spouse knew sufficient facts that, if he also possessed adequate knowledge of prevailing law, would have led him to determine that the deduction or credit was not proper.

The regulations articulating the standard for constructive knowledge of an understatement incorporate themes that prevailed in case law interpreting § 6013(e). Relevant factors include the requesting spouse's educational background and business experience, the extent of the requesting spouse's participation in the activity that resulted in the erroneous item, the couple's financial condition, and whether the erroneous item represented a departure from patterns established in prior years.[131] Yet the regulations also incorporate aspects of the "on notice" element of constructive knowledge that developed under § 6013(e) in the context of erroneous deduction cases. On this front, relevant factors include the amount of the erroneous item in relation to other items and whether the requesting spouse failed to inquire, at or before signing the return, about items on the return or omitted from the return that a reasonable person would question.[132]

Knowledge or reason to know of a substantial understatement under former § 6013(e) constituted an all-or-nothing proposition. Actual or constructive knowledge of any portion of the understatement presumably was sufficient to deny relief to the requesting spouse. Section 6015(b) provides an avenue of limited relief in this setting. If the requesting spouse would have qualified for relief but for the requirement that he not know or have reason to know of the understatement, the spouse may be entitled to partial relief from joint and several liability if he established that he did not know or have reason to know *of the full extent* of the understatement.[133] In that case, the spouse will be relieved of joint and several liability for the tax attributable to the portion of the understatement of which he lacked actual

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130 Treas. Reg. §§ 1.6015-2(c), 1.6015-3(c)(2)(i)(B)(1). If the claimed deduction was fictitious or inflated, innocent spouse relief is prohibited if the spouse actually knew that the expenditure was not incurred or not incurred to the inflated extent. Treas. Reg. § 1.6015-3(c)(2)(i)(B)(2).

131 Treas. Reg. § 1.6015-2(c).

132 *Id.*

133 I.R.C. § 6015(b)(2).

or constructive knowledge, together with interest and penalties attributable to that portion of the understatement.[134]

3. Section 6015(c) Relief

Congress broadened the availability of innocent spouse relief when the Service sought to collect from one spouse a deficiency in tax attributable to an erroneous item of the other spouse at a point when the marriage had dissolved. If the requesting spouse is no longer married to or is legally separated from the spouse with whom he filed a joint return, or if two spouses were not members of the same household at any point during the prior 12 months, the requesting spouse could elect to limit his liability to the portion of the deficiency properly allocable to him. In short, the requesting spouse could elect separate reporting for the item giving rise to the deficiency.[135] Considerations of equity in holding the requesting spouse jointly and severally liable for the deficiency are not relevant under § 6015(c); rather, they are presumed satisfied in the context of dissolved marriages.

The statute phrases the relief afforded by § 6015(c) as a matter of right. However, the requesting spouse is not entitled to make the apportionment election if the Service demonstrates that the requesting spouse had actual knowledge, at the time the requesting spouse signed the joint return, "of any item giving rise to a deficiency" not allocable to the requesting spouse.[136] This standard reflects two significant deviations from the knowledge standard of § 6015(b). First, whereas § 6015(b) requires the requesting spouse to establish the absence of actual or constructive notice, § 6015(c) places the burden on the Commissioner to demonstrate that the requesting spouse possessed *actual* knowledge of the erroneous item. Constructive knowledge is not relevant under § 6015(c). Second, the subject of the prohibited knowledge under § 6015(c) differs from that under § 6015(b), at least linguistically. Under § 6015(b), the requesting spouse may not possess actual or constructive knowledge of the "understatement" of tax. However, the subject of the actual knowledge inquiry of § 6015(c) is the "item that gives rise to the deficiency." Before regulatory guidance was issued under § 6015(c), the Tax Court wrestled with whether Congress intended the linguistic distinction to be substantive.

In the court-reviewed opinion in *Cheshire v. Commissioner*,[137] the majority effectively equated the knowledge standards of § 6015(b) and (c) by

[134] *Id.*

[135] Section 6015(d) sets forth the mechanism for determining the portion of the deficiency allocable to the requesting spouse for this purpose.

[136] I.R.C. § 6015(c)(3)(C).

[137] 115 T.C. 183 (2000).

interpreting knowledge of an "item giving rise to a deficiency" under the latter as requiring "an actual and clear awareness . . . of the existence of an item which gives rise to the deficiency."[138] The primary dissenting opinion contended that actual knowledge of an "item giving rise to a deficiency" necessitated knowledge that the treatment of the item on the return was *incorrect*, an interpretation that found support in statements contained in the legislative record.[139] For example, the report of the Senate Finance Committee accompanying the enactment of § 6015(c) provided that "if the IRS proves that the electing spouse had actual knowledge that an item on a return is incorrect, the election will not apply to the extent any deficiency is attributable to such item."[140] The majority opinion of the Tax Court viewed this legislative explanation as merely providing an example of when § 6015(c) relief was not appropriate, rather than establishing a heightened knowledge requirement to be satisfied in this context. The majority's interpretation of § 6015(c) was affirmed by the Fifth Circuit,[141] and later regulatory guidance adopted the same approach of equating the standards for actual knowledge under § 6015(b) and (c).

4. Section 6015(f) Relief

Congress intended to make innocent spouse relief more widely available through the enactment of § 6015, and perhaps the most significant relief-expanding provision is provided by § 6015(f). This provision represents a relief mechanism of last resort. To the extent relief is not available to a requesting spouse under § 6015(b) or (c), Congress empowered the Secretary to grant discretionary relief from joint and several liability resulting from the filing of a joint return if, taking into account all the facts and circumstances, the Secretary determined that it was inequitable to hold the requesting spouse liable for "any unpaid tax or any deficiency (or any portion of either)." Hence, the discretionary innocent spouse relief authorized by § 6015(f) applies not only to deficiencies in tax, but also to taxes on self-reported income that remain unpaid.

The Service has articulated standards to guide the exercise of its discretion in Rev. Proc. 2013-34,[142] a revenue procedure providing guidance for a requesting spouse seeking relief under § 6015(f). Among other things, the Service announced that it will make streamlined determinations concerning the grant of discretionary relief under § 6015(f) if the following conditions are satisfied: (1) the requesting spouse is divorced, legally

138 *Id.* at 195.
139 *Id.* at 203 (Colvin, J., dissenting).
140 S. REP. NO. 105-174, at 59 (1998).
141 282 F.3d 326 (5th Cir. 2002).
142 2013-43 I.R.B. 397 (Sept. 16, 2013) (superseding guidance formerly contained in Rev. Proc. 2003-61, 2003-2 C.B. 296).

separated, or has not shared the same household with the other spouse for 12 months on the date relief is sought; (2) the requesting spouse will suffer economic hardship if relief is not granted; and (3) the requesting spouse had no knowledge or reason to know that there was an understatement or deficiency on the joint return, or that the other spouse would not or could not pay the underpayment of tax shown on the joint return.[143] The Service also articulated a non-exhaustive list of factors relevant to the exercise of administrative discretion under § 6015(f) in situations where streamlined relief was not available. In addition to the three factors mentioned above, the list of considerations also includes: (1) if relief is sought for a deficiency in tax, whether the spouse knew or had reason to know of the deficiency (clarifying that actual knowledge of the deficiency will no longer be weighted more heavily than any other factor); (2) whether the nonrequesting spouse has a legal obligation to pay the outstanding liability under a divorce decree or agreement; (3) whether the requesting spouse received significant benefit beyond normal support from the unpaid tax or item giving rise to the deficiency; and (4) whether the requesting spouse made a good faith effort to comply with the tax laws in later years. Additional factors that weigh only in favor of relief include: (1) whether the nonrequesting spouse abused the spouse requesting relief, and (2) whether the requesting spouse was in poor mental or physical health at the point of signing the return or requesting relief.

5. Procedure for Requesting Innocent Spouse Relief

To seek relief from joint and several liability, a requesting spouse must file a Form 8857, Request for Innocent Spouse Relief (And Separation of Liability and Equitable Relief). To the extent the Service requires additional information to evaluate the claim, the Service will request that the spouse complete Form 12510, Questionnaire for Requesting Spouse. To speed resolution of the claim, a requesting spouse may file both forms together.

If a spouse who has made a claim for § 6015 relief dies prior to its resolution, the estate of such spouse may step into the decedent's shoes and pursue the request for relief. In addition, the executor of a spouse's estate may file the *initial* claim for innocent spouse relief on the spouse's behalf, provided the decedent had satisfied all of the conditions for eligibility at the time of his death.[144]

If the requesting spouse seeks relief under § 6015(b) or (c), the Service will evaluate the claim under the other avenues of relief provided by § 6015. However, if the requesting spouse seeks innocent spouse relief under § 6015(f) alone, the Service will not expand its evaluation of the claim

[143] *Id.* § 4.02.

[144] *See* Rev. Rul. 2003-36, 2003-1 C.B. 849.

beyond the consideration of the merits of discretionary relief on equitable grounds.[145] For that reason, the requesting spouse is well advised to advance all potential bases for § 6015 relief in a single claim.

A spouse's claim for relief under § 6015 can be disregarded as premature and disallowed as untimely. A spouse must wait until the spouse receives a notification of an audit or a letter or notice from the Service indicating the potential existence of an outstanding liability for that year.[146] Hence, a requesting spouse need not wait until the issuance of a statutory notice of deficiency to pursue his § 6015 remedies. Yet, the spouse cannot wait indefinitely to pursue innocent spouse relief either. The statute expressly limits claims for relief under § 6015(b) and (c) to those made within two years after the date on which the Secretary begins collection activities.[147] Although the Service originally incorporated the same two-year statute of limitations to claims for equitable relief under § 6015(f) by regulation,[148] the Service ultimately relented following extensive litigation concerning the validity of this regulatory approach.[149] Through publication of Notice 2011-70,[150] the Service expanded the period within which individuals could request equitable relief pursuant to § 6015(f) to encompass any period for

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[145] Treas. Reg. § 1.6015-1(a)(2).

[146] Treas. Reg. § 1.6015-5(b)(5); *see also* I.R.C. § 6015(c)(3)(B) (spouse may make election under § 6015(c) "at any time after a deficiency for such year is asserted . . .").

[147] I.R.C. § 6015(b)(1)(E), (c)(3)(B).

[148] Treas. Reg. § 1.6015-5(b)(1).

[149] The Commissioner's administrative incorporation of the two-year statute of limitations for perfecting a claim for relief under § 6015(b) and (c) to claims for equitable relief under § 6015(f) was not well received by the Tax Court. In *Lantz v. Commissioner*, 132 T.C. 131 (2009), a divided court determined that the requirement of Regulation § 1.6015-5(b)(1) that a requesting spouse file a claim for relief under § 6015(f) no later than two years after the date of the first collection activity represented an invalid interpretation of the statute. The Court interpreted the failure of Congress to a limitations period under § 6015(f) as intentional, which in turn foreclosed the imposition of a limitations period by regulation. *Lantz*, 132 T.C. at 138–41. Additionally, the court determined that the adoption of a statute of limitations for claims under § 6015(f) that was no more lenient than the limitations period applicable to claims under § 6015(b) and (c) ran counter to the express intention of Congress to more liberal relief through the former. *Id.* at 144.

The Tax Court's critical view of the regulatory two-year statute of limitations on commencing claims for equitable relief under § 6015(f) was not shared by a number of circuit courts of appeals. The Seventh Circuit reversed the Tax Court in *Lantz*, see *Lantz v. Commissioner*, 607 F.3d 479 (7th Cir. 2010), and others circuits followed suit. *See* Jones v. Commissioner, 642 F.3d 459 (4th Cir. 2011); Mannella v. Commissioner, 631 F.3d 115 (3d Cir. 2011), *rev'g* 132 T.C. 196 (2009).

[150] 2011-32 I.R.B. 135.

which the statute of limitations on collection remained open.[151] Accordingly, if the Service can collect the disputed tax, a spouse can request § 6015(f) equitable relief.

The Commissioner's failure to uphold its statutory obligation to provide a taxpayer with notice of his rights under § 6015 may serve to toll equitably the statute of limitations for requesting relief under that section. Through a non-codified provision of the IRS Restructuring and Reform Act of 1998,[152] Congress required the Service to include a notice of an individual's rights under § 6015 as part of any collection-related notices. In *McGee v. Commissioner*,[153] the Tax Court addressed the ramifications of the Service's failure to do so. The Service in *McGee* had offset a refund owed to the taxpayer against taxes that remained unpaid under a joint return filed by the taxpayer with her husband. The Service sent the taxpayer two notices of the offset, neither of which informed the taxpayer of her right to seek relief under § 6015. The taxpayer ultimately filed a claim for discretionary relief under § 6015(f) in response to a notice of a federal tax lien, but the claim was filed more than two years after the taxpayer received the notices of offset. Finding that the refund offset constituted a collection action that commenced the filing period, the Tax Court nonetheless determined that the Service was estopped from treating the taxpayer's claim for relief under § 6015(f) as untimely on account of its own failure to timely inform the taxpayer of her rights.[154]

6. Tax Court Jurisdiction

The Tax Court possesses jurisdiction to determine whether a requesting spouse is entitled to relief from joint and several liability under § 6015 through a number of avenues. Consistent with historic practice, a spouse may raise § 6015 relief as an affirmative defense in a petition for redetermination of a deficiency.[155] A taxpayer also may raise "appropriate

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[151] If the requesting spouse seeks a refund of tax, a claim for relief under § 6015(f) can be brought at any time within the period of limitations on refunds provided by § 6511. *Id.*

[152] *See* Pub. L. No. 105-206, § 3501(b), 112 Stat. 734, 770 (1998).

[153] 123 T.C. 314 (2004).

[154] *See id.* at 319–20.

[155] Butler v. Commissioner, 114 T.C. 276, 287–88 (2000); *see also* TAX CT. R. 39 (July 6, 2012 ed.) (requiring taxpayers to specifically plead any matter constituting an avoidance or affirmative defense to the Commissioner's determination of a deficiency). The availability of statutory relief under § 6015 also may be raised as an affirmative defense in a petition filed under § 6404(h)(1) to review the Commissioner's failure to abate interest. *See* Estate of Wenner v. Commissioner, 116 T.C. 284, 287–88 (2001).

spousal defenses" as part of a collection due process hearing.[156] In addition to these standard vehicles for Tax Court review and consistent with the purpose of making innocent spouse relief more accessible, Congress created a procedure by which the Tax Court could address § 6015 relief in a stand-alone proceeding. Pursuant to § 6015(e)(1), a spouse may petition the Tax Court for a determination of the "appropriate relief available" under § 6015 in either of the following two instances: (1) a deficiency has been asserted against the spouse and the spouse elects relief under § 6015(b) or (c), or (2) the spouse requests equitable relief under § 6015(f).[157]

To invoke the Tax Court's jurisdiction to determine the availability of statutory relief under § 6015 in a stand-alone proceeding, a spouse generally must wait until the Commissioner mails the spouse a notice of final determination of relief.[158] However, if the spouse has elected relief under § 6015(b) or (c) or has requested equitable relief under § 6015(f) and the Commissioner fails to act within six months, the spouse may petition the Tax Court after the expiration of the six-month period.[159] Once either of these conditions to Tax Court jurisdiction has been satisfied, the requesting spouse has until 90 days following the mailing of the notice of final determination to invoke the court's jurisdiction under § 6015(e) through the filing of a petition.[160]

The Tax Court's jurisdiction to review agency denials of relief under § 6015(f) has a storied history of its own. In its original form, § 6015(e)(1)(A) provided that "[i]n the case of an individual who elects to have subsection (b) or (c) apply . . .[t]he individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the

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[156] *See* I.R.C. §§ 6320(c) (incorporating terms of hearing set forth in § 6330(c)), 6330(c)(2)(A)(i) (permitting the taxpayer to raise "appropriate spousal defenses" in collection due process hearing). The collection due process protections are discussed below in Section D of this Part.

[157] I.R.C. § 6015(e)(1)(A). The terms of the grant of jurisdiction indicate that the Tax Court is not limited to reviewing the Commissioner's determination regarding relief from joint and several liability. Rather, once invoked, the Tax Court's jurisdiction under § 6015 allows the court to render a decision regarding the requesting spouse's rights under § 6015. As discussed in detail below, this suggests that the Tax Court's standard of review in this context is de novo. Consistent with this approach, remand of an innocent spouse determination under § 6015 to the Commissioner for further consideration or development is not permissible. *See* Friday v. Commissioner, 124 T.C. 220, 222 (2005).

[158] I.R.C. § 6015(e)(1)(A)(i)(I).

[159] I.R.C. § 6015(e)(1)(A)(i)(II).

[160] I.R.C. § 6015(e)(1)(A)(ii). Tax Court Rules 320 through 325 provide the procedural framework that governs stand-alone proceedings under § 6015(e).

appropriate relief available to the individual under this section . . . ."[161] In *Fernandez v. Commissioner*,[162] the taxpayer requested relief under § 6015(b), (c), and (f), all of which the Commissioner denied. The taxpayer petitioned the Tax Court for a determination of her joint and several liability through a stand-alone proceeding commenced under § 6015(e). The Commissioner contended that the court lacked jurisdiction to review the agency's denial of relief under § 6015(f) on the basis that the predicate for filing the petition (that is, the taxpayer elects the benefits of § 6015(b) or (c)) limited the court's jurisdiction to these potential grounds for relief. The court rejected this interpretation, reasoning that the statutory directive to determine relief available to the petitioning spouse "under this section" encompassed all avenues of relief provided by § 6015.[163] In this regard, *Fernandez* reaffirmed the holding of *Butler v. Commissioner*,[164] a decision issued by the court earlier in the same year in which the court declared, "We find nothing in section 6015(e) that precludes our review of respondent's denial of equitable relief to petitioner."[165]

Not long after the issuance of the *Fernandez* and *Butler* decisions, Congress amended the predicate of § 6015(e)(1) to read "[i]n the case of an individual *against whom a deficiency has been asserted* and who elects to have subsection (b) and (c) apply . . . ."[166] The Tax Court confronted the amended statute in *Ewing v. Commissioner*,[167] a case in which the requesting spouse invoked the Tax Court's jurisdiction under § 6015(e) to review the Commissioner's denial of equitable relief under § 6015(f) for a self-reported but unpaid tax. The majority of a divided court in *Ewing* noted that Congress intended the statutory amendment merely to clarify the proper timing of a request for relief for an under-reported tax–specifically, that the taxpayer need not wait until an assessment or a formal notice of deficiency but instead could pursue relief at any time after which a deficiency in tax was asserted (which could occur as early as the examination process).[168] Finding that Congress did not intend to limit the court's jurisdiction over claims for equitable relief under § 6015(f), the majority in *Ewing* determined that it possessed jurisdiction to review the Commissioner's denial of

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161 I.R.C. § 6015(e)(1)(A) (prior to amendment by the Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, app. G, § 313, 114 Stat. 2763, 2763A-641 to 643.)

162 114 T.C. 324 (2000).

163 *See id.* at 331.

164 114 T.C. 276 (2000).

165 *Id.* at 289.

166 Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, app. G, § 313, 114 Stat. 2763, 2763A-641 to 643 (2001) (emphasis added).

167 118 T.C. 494 (2002).

168 *See id.* at 504–05 (analyzing H.R. REP. NO. 106-1033, at 1023 (2000)).

§ 6015(f) relief even in the absence of an asserted deficiency.[169] The Ninth Circuit Court of Appeals, however, rejected this reading of the statute. In fairly short order, the appellate court reasoned that the Tax Court's interpretation of § 6015(e)(1) could not be reconciled with the "plain language" of the statute requiring both the assertion of a deficiency against the taxpayer and the taxpayer's filing of an election under § 6015(b) or (c).[170]

Following the Ninth Circuit's reversal of the Tax Court in *Ewing*, the status of the Tax Court's jurisdiction to review denials of equitable relief under § 6015(f) was uncertain at best. The Eighth Circuit Court of Appeals adopted the Ninth Circuit's position in *Bartman v. Commissioner*,[171] and the Second Circuit Court of Appeals in *Maier v. Commissioner*[172] openly questioned the Tax Court's position even before the Ninth Circuit reversal. Recognizing the adverse appellate landscape and stressing the desirability for geographic-neutral interpretation of the law, the Tax Court abandoned its position in *Ewing* through the 2006 decision in *Billings v. Commissioner*.[173] In the process, the Tax Court noted the anomaly resulting from the apparently unintentional limitation on the court's jurisdiction to hear § 6015(f) cases in stand-alone proceedings brought under § 6015(e). Fortunately, this point was not lost on Congress. Shortly after the *Billings* decision was issued, Congress amended § 6015(e)(1) to provide unequivocally that the Tax Court possesses jurisdiction in stand-alone proceedings where the requesting spouse seeks relief under § 6015(f) alone.[174]

If either spouse filing the joint return commences a suit for a refund, the Tax Court is immediately divested of jurisdiction to determine the scope of available innocent spouse relief under § 6015(e) to the extent the district court or the Court of Federal Claims acquires jurisdiction over the taxable years that serve as the subject of the refund action.[175] In that case,

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[169] *Id.* at 505. Interestingly, the Tax Court's interpretation of § 6015(e)(1) was supported both by the taxpayer and by the Commissioner at this stage of the litigation.

[170] Ewing v. Commissioner, 439 F.3d 1009, 1013 (9th Cir. 2006). The Commissioner abandoned its prior interpretation of the statute, arguing against the Tax Court's jurisdiction for the first time on appeal.

[171] 446 F.3d 785 (8th Cir. 2006).

[172] 360 F.3d 361 (2d Cir. 2004).

[173] 127 T.C. 7 (2006).

[174] Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. C, § 408, 120 Stat. 2922, 3061 (2006) (amending § 6015(e)(1) to provide jurisdiction "[i]n a case of an individual against whom a deficiency has been asserted and who elects to have subsection (b) or (c) apply, or in the case of an individual who requests equitable relief under subsection (f)").

[175] I.R.C. § 6015(e)(3).

jurisdiction over the § 6015(e) petition would transfer to the refund court, consolidating the litigation in one proceeding.

7. Standard and Scope of Review

With respect to a requesting spouse's election to obtain relief from joint and several liability under § 6015(b) or (c), the Tax Court reviews the Commissioner's determination under a de novo standard—a standard of review consistent with the determination of the existence and extent of a deficiency.[176] The court originally concluded that the Commissioner's exercise of discretion under § 6015(f) was entitled to greater deference owing to the discretionary nature of § 6015(f) itself. Accordingly, the court reviewed denials of § 6015(f) relief for abuse of discretion,[177] which obligated the requesting spouse to establish that the denial was arbitrary, capricious, or without sound basis in law or fact.[178] However, the Tax Court revisited the issue of the appropriate standard of review to be applied in reviewing denials of § 6015(f) equitable relief in light of Congress' 2006 amendments to § 6015(e) through the case of *Porter v. Commissioner*.[179] Noting that Congress expressly provided the Tax Court with jurisdiction "to *determine* the appropriate relief available" under § 6015 when the taxpayer had sought and been denied equitable relief under § 6015(f),[180] the court reasoned that a de novo standard of review was consistent with the de novo standard of review exercised by the court to "determine" the existence of any overpayment under § 6512(b) or to "redetermine" a deficiency under §§ 6213(a) and 6214(a).[181] The court further stressed that nothing in § 6015(e) limits the standard of review to one of an abuse of discretion, a limitation that Congress expressly imposed in other contexts.[182]

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176 *See* Nihiser v. Commissioner, T.C. Memo. 2008-135, 95 T.C.M. (CCH) 1531 (2008).

177 *See* Cheshire v. Commissioner, 115 T.C. 183, 198 (2000).

178 Jonson v. Commissioner, 118 T.C. 106, 125 (2002); *see also* Alt v. Commissioner, 119 T.C. 306, 311 (2002) (requesting spouse bears burden of proof). *But see* Wiener v. Commissioner, T.C. Memo. 2008-230, 96 T.C.M. (CCH) 227 (abuse of discretion standard not warranted where notice of determination failed to provide analysis or cite factual determinations capable of review).

179 132 T.C. 203 (2009). Concurring opinions issued in a prior decision in the *Porter* case devoted to the scope of the Tax Court's review under § 6015(f) raised the prospect that § 6015(f) determinations should not be reviewed under an abuse-of-discretion standard. *See* Porter v. Commissioner, 130 T.C. 115, 142–44 (Goeke, J., concurring) & 144–46 (Wherry, J., concurring) (2008).

180 *See* I.R.C. § 6015(e)(1)(A) (emphasis added).

181 *Porter*, 132 T.C. at 208.

182 *Id.* (noting statutory amendment to § 6404(e) granting Tax Court jurisdiction to determine whether the Commissioner's failure to abate interest constituted "an abuse of discretion").

Accordingly, the Tax Court concluded that it would apply the same de novo standard of review in determining the rights of a requesting spouse to relief under § 6015, regardless of the specific form of § 6015 relief at issue.

Apart from determining the level of deference to be afforded to the Commissioner's determination (standard of review), the appropriate scope of review—that is, what evidence the Tax Court could consider in making its determination in a § 6015(e) proceeding—also warranted judicial attention. The Tax Court at all times applied a de novo scope of review that permitted consideration of evidence beyond the administrative record in determining the availability of relief under § 6015(b) or (c).[183] However, with respect to determinations considering the availability of equitable relief under § 6015(f), the Commissioner contended that the Administrative Procedure Act (APA)[184] operated to limit the scope of Tax Court review to evidence contained in the administrative record. The Tax Court rejected this restriction in its second divided opinion in *Ewing v. Commissioner*,[185] and the court later reaffirmed this position in the first divided opinion in *Porter v. Commissioner*.[186] The court first highlighted that the APA did not govern the Tax Court in its jurisdiction to redetermine a deficiency under §§ 6213 and 6214(a) or to determine an overpayment of tax under § 6512. In each of these contexts, the Tax Court conducts trials on a de novo basis at which the court may consider all relevant evidence—not just that developed in the administrative record. Citing the similarity of the grant of jurisdiction under § 6015(e)(1)(A) to "determine" the scope of relief available to the requesting spouse under § 6015, the court concluded that Congress intended the court to provide the same trial de novo in making its determinations under § 6015(e).[187] In this manner, the Tax Court adopted a uniform scope of review with respect to all forms of relief under § 6015. This approach was subsequently endorsed by the Eleventh Circuit Court of Appeals.[188]

In 2013, the Service conceded both the standard of review and the scope of review issues. A notice issued by the Office of Chief Counsel provided that attorneys representing the Service no longer would contend that (1) the Tax Court should review administrative denials of requests for innocent spouse relief under § 6015(f) only for an abuse of discretion, or (2) the Tax Court should limit the scope of its review to evidence contained in

183 *See Porter*, 132 T.C. at 210 (noting this practice).
184 5 U.S.C. §§ 551–559, 701–706.
185 122 T.C. 32 (2004).
186 130 T.C. 115 (2008).
187 *See Ewing*, 122 T.C. at 37–39; *Porter*, 130 T.C. at 117–19.
188 Commissioner v. Neal, 557 F.3d 1262, 1276 (11th Cir. 2009).

the administrative record.[189] Hence, both aspects of the Tax Court's decision in *Porter* have prevailed.[190]

8. Rights of the Nonrequesting Spouse

If a claim for relief from joint and several liability is made under § 6015, the Service must provide notice of the claim to the other spouse to the joint return to allow that spouse to provide information bearing on the merits of the requesting spouse's claim.[191] As the nonrequesting spouse will remain jointly and severally liable for the entire tax liability attributable to the joint return, this notice provides the nonrequesting spouse with the opportunity to oppose the effective increase in his individual exposure for the liability attributable to the joint return. In addition to notifying the nonrequesting spouse of the existence of a § 6015 claim on behalf of the other spouse, the Service also must notify the nonrequesting spouse of any determination rendered with respect to the claim.[192]

If a spouse makes an election for relief under § 6015(b) or (c) or requests equitable relief under § 6015(f), the Tax Court is obligated to provide the nonrequesting spouse with adequate notice of the action and an opportunity to intervene in the matter.[193] With respect to stand-alone proceedings commenced by the requesting spouse under § 6015(e), Tax Court Rule 325 implements this directive. The rule obligates the Commissioner to provide notice of the filing of the petition under § 6015(e) within 60 days of the service of the petition and to file with the court a copy of the notice with an attached certificate of service.[194] The Commissioner's notice must advise the nonrequesting spouse of his intervention rights and the period within which they must be exercised, which is 60 days from the date the notice is served on the nonrequesting spouse.[195]

In *Corson v. Commissioner*,[196] the Tax Court concluded that the rights afforded to the nonrequesting spouse under § 6015(e)(4) were not limited to stand-alone proceedings commenced by the requesting spouse under § 6015(e). Reasoning that the rights of the nonrequesting spouse should not differ based on the procedural route by which the requesting spouse

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[189] Chief Counsel Notice 2013-011, at 1 (June 7, 2013).

[190] Consistent with the Tax Court's holding that denials of requests for innocent spouse relief under § 66015(f) are subject to a de novo standard and scope of review, the court has declined to remand such cases to the Service for further administrative development. *See* Friday v. Commissioner, 124 T.C. 220, 222 (2005).

[191] I.R.C. § 6015(h)(2); Treas. Reg. § 1.6015-6(a)(1).

[192] Treas. Reg. § 1.6015-6(a)(2).

[193] I.R.C. § 6015(e)(4).

[194] TAX CT. R. 325(a) (July 6, 2012 ed.).

[195] TAX CT. R. 325(b) (July 6, 2012 ed.).

[196] 114 T.C. 354 (2000).

pursued innocent spouse relief, the court permitted the nonrequesting spouse to contest the grant of § 6015(c) relief that the requesting spouse raised as an affirmative defense in a deficiency proceeding against both spouses. The Tax Court followed this approach in a slightly different context in *King v. Commissioner*,[197] where the requesting spouse raised § 6015 relief as an affirmative defense in a deficiency proceeding against her individually. The court in *King* clarified that the nonrequesting spouse is entitled to notice and an opportunity to intervene to challenge the grant of innocent spouse relief in any case where a spouse requests relief under § 6015, regardless of its procedural origin.[198]

The Tax Court in *Van Arsdalen v. Commissioner*[199] faced an interesting question not likely contemplated by Congress in enacting § 6015(e)(4): What if the nonrequesting spouse desired to intervene *to support* the grant of innocent spouse relief? Noting the absence of any posture-related limitation in § 6015 and the neutrality of the terms of Tax Court Rule 325, the court allowed the nonrequesting spouse to be heard in support of his former wife.[200]

C. Jurisdiction to Review Denials of Interest Abatement

Interest on an underpayment of tax accrues from the last date prescribed for payment at statutorily defined rates, compounded daily.[201] Given the length of time necessary to resolve tax disputes, the interest owed on the disputed tax liability can pose a considerable financial burden. Prior to 1986, the Service lacked the authority to abate the assessment of interest in situations where an error on its part caused the taxpayer to incur additional interest charges. Instead, a reduction in the interest charge could be accomplished only through a compromise of the underlying tax liability. Recognizing the need to provide the Service with a measure of discretion in this area, Congress enacted § 6404(e) as part of the Tax Reform Act of 1986.[202] In its original form, § 6404(e)(1) granted the Service discretion to abate the assessment of interest on any deficiency "attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service . . . in performing a ministerial act."[203] Congress did not envision that the provision would be used "routinely" to avoid the payment

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[197] 115 T.C. 118 (2000).

[198] *Id.* at 124.

[199] 123 T.C. 135 (2004).

[200] *Id.* at 141.

[201] I.R.C. § 6601(a); *see also* I.R.C. §§ 6621(a)(2) (interest rate on underpayments), 6622(a) (interest compounded on a daily basis).

[202] *See* Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762 (1986).

[203] I.R.C. § 6404(e)(1), as originally enacted by the Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762 (1986).

of interest; rather, Congress intended the remedy to be employed "in instances where failure to abate interest would be widely perceived as grossly unfair."[204]

Taxpayers who saw their requests for interest abatement under § 6404(e) denied by the Service understandably sought judicial recourse, but originally to no avail. Courts consistently held that § 6404(e)(1) vested the Secretary with complete discretion to abate the assessment of interest and that the exercise of this discretion was not subject to judicial review.[205] Against this backdrop, Congress in 1996 supplied the Tax Court with jurisdiction to determine whether the Secretary's failure to abate interest under § 6404 constituted an abuse of discretion through what is now designated § 6404(h).[206] If the Tax Court finds the requisite abuse of discretion, it is authorized to order an abatement; to the extent the taxpayer has previously paid the abated interest, the Tax Court possesses jurisdiction to determine an overpayment.[207] The jurisdictional grant extends to all requests for abatement made after the July 30, 1996 effective date of the legislation, which the Tax Court interpreted as including any requests for interest abatement pending with the Service that had not been denied by such date.[208] Consistent with the terms of § 6404(h), the Supreme Court has determined that the Tax Court constitutes the exclusive judicial forum for review of adverse interest abatement determinations.[209]

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[204] H.R. REP. NO. 99-426, at 844 (1985); S. REP. NO. 99-313, at 208 (1986).

[205] In *Selman v. United States*, 941 F.2d 1060 (10th Cir. 1991), the Tenth Circuit Court of Appeals concluded "that the language, structure and legislative history of I.R.C. § 6404(e)(1) indicate that Congress meant to commit the abatement of interest to Secretary's discretion." *Id.* at 1064. Accordingly, the court determined that the Administrative Procedure Act precluded judicial review. *Id.*; *see also* Argabright v. United States, 35 F.3d 472, 476 (9th Cir. 1994); Bax v. Commissioner, 13 F.3d 54, 58 (2d Cir. 1993); Horton Homes, Inc. v. United States, 936 F.2d 548, 554 (11th Cir. 1991); 508 Clinton Street Corp. v. Commissioner, 89 T.C. 352, 356 (1987).

[206] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 302(a), 100 Stat. 1457–58 (1996) (enacting I.R.C. § 6404(g)). Section 6404(g) was redesignated first as § 6404(i) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, §§ 3305(a), 3309(a), 112 Stat. 743, 745, and subsequently as § 6404(h) by the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-34, § 112(d)(1)(B), 115 Stat. 2435 (2002).

[207] I.R.C. § 6404(h)(1), (h)(2)(B) (incorporating rules similar to those of § 6512(b)).

[208] *See* Banat v. Commissioner, 109 T.C. 92, 94–95 (1997). The interpretation of the effective date provision in *Banat* sensibly protected taxpayers who did not file a subsequent and apparently superfluous request with the Service.

[209] *See* Hinck v. United States, 550 U.S. 501 (2007). The Court rejected the argument that the articulation of a standard for reviewing the Service's denial of interest abatement in § 6404(h) (the absence of which prior courts had cited as a

Section 6404(h) imposes a host of conditions to the jurisdiction of the Tax Court. From a procedural standpoint, Tax Court jurisdiction is predicated upon (1) the issuance of a final notice of determination not to abate interest, and (2) the taxpayer's filing of a petition for review within 180 days of the mailing of such notice.[210] Similar to the statutory notice of deficiency, the notice of determination under § 6404(h) has been described as the taxpayer's "ticket" to the Tax Court.[211] Note that the taxpayer's access to Tax Court review in this setting could be denied if the Commissioner simply fails to issue the notice of determination. Whereas Congress anticipated this possibility in the innocent spouse context by permitting the requesting spouse to file a petition with the Tax Court once six months had passed from the filing of the administrative request for relief,[212] no such stop-gap means in invoking Tax Court review is provided under § 6404(h).

Given the central role the determination letter occupies in the Tax Court's jurisdiction to review denials of interest abatement requests, the scope of written communications from the Service that constitute a final determination for § 6404 purposes has been a source of dispute. In *Bourekis v. Commissioner*,[213] the Tax Court declined to treat a notice of deficiency issued under § 6213(a) as a final notice of determination for § 6404 purposes where the taxpayer had not made a formal request for interest abatement and where the Commissioner did not intend for the statutory notice to address interest abatement matters.[214] In *Wright v. Commissioner*,[215] the Tax Court similarly determined that a petition to review a final notice of determination issued in the context of a collection due process proceeding under § 6330 did not provide the court with jurisdiction to review the Commissioner's denial of interest abatement. However, the Second Circuit Court of Appeals reversed.[216] Because the taxpayer in *Wright* had raised the

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basis for concluding that interest abatement determinations under § 6404(e) were immune from judicial review) operated to supply other federal courts with jurisdiction to review § 6404 interest abatement determinations.

[210] I.R.C. § 6404(h)(1); *see also* TAX CT. R. 280(b) (July 6, 2012 ed.).

[211] *See* Bourekis v. Commissioner, 110 T.C. 20, 26 (1998). By statutory directive, rules similar to those of § 6213 apply for purposes of determining the date of mailing of the final notice of determination. I.R.C. § 6404(h)(2)(A). Hence, the final notice of determination is valid if mailed to the taxpayer's last known address; actual receipt of the notice by the taxpayer is immaterial. *See* Gati v. Commissioner, 113 T.C. 132, 134 (1999)

[212] *See* I.R.C. § 6015(e)(1)(A)(i)(II).

[213] 110 T.C. 20 (1998).

[214] The *Bourekis* decision effectively serves as a confirmation that the Tax Court's deficiency jurisdiction generally does not extend to the determination of interest under § 6601.

[215] T.C. Memo. 2006-273, 92 T.C.M. (CCH) 525.

[216] 571 F.3d 215 (2d Cir. 2009).

prospect of interest abatement under § 6404(e) in the course of the collection due process hearing, the Second Circuit reasoned that the notice of determination under § 6330—which did not grant the requested interest abatement—necessarily constituted a final notice of determination not to abate interest. And because the taxpayer had filed his petition for review of the collection due process determination within the 180-day period specified in § 6404(h)(1), the Second Circuit concluded that the procedural prerequisites to the Tax Court's jurisdiction to review § 6404 determinations had been satisfied.

Beyond these procedural requirements, the Tax Court's jurisdiction to review denials of interest abatement under § 6404 is available only to those taxpayers who satisfy the net worth requirements of § 7430(c)(4)(A)(ii) as of the date of the filing of the Tax Court petition.[217] Generally speaking, this provision limits Tax Court review under § 6404 to individuals whose net worth does not exceed $2 million and to business entities having a net worth not exceeding $7 million.[218] Responding to the taxpayer's argument that the net worth limitation on the Tax Court's jurisdiction under § 6404 violated the equal protection standard of the Fifth Amendment, the Seventh Circuit Court of Appeals reasoned that Congress may have imposed the limitation because it determined that taxpayers with a greater net worth would be better positioned to avoid the accrual of interest charges by making an advance payment or posting a cash bond during the course of the controversy.[219]

Once the Tax Court's jurisdiction under § 6404(h) has been properly invoked, the court is authorized to determine whether the Service's failure to abate interest under § 6404 constitutes an abuse of discretion.[220] Yet before reviewing the exercise of the Commissioner's discretion under § 6404(e), the Tax Court first must determine if the prerequisites to interest abatement under that provision are satisfied. Specifically, the taxpayer must

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[217] I.R.C. § 6404(h)(1).

[218] I.R.C. § 7430(c)(4)(A)(ii) (incorporating the net worth requirements of § 2412(d)(2)(B)).

[219] Estate of Kuntze v. Commissioner, 233 F.3d 948, 954–55 (7th Cir. 2000).

[220] Although the Tax Court's jurisdiction to review interest abatement denials typically is associated with requests made under § 6404(e), the grant of Tax Court jurisdiction permits it to review the Secretary's failure to abate interest "under this section." I.R.C. § 6404(h)(1). The Tax Court in *Woodral v. Commissioner*, 112 T.C. 19, 22–23 (1999), therefore held that its jurisdiction under § 6404(h) is not limited to reviewing cases arising under § 6404(e) but instead extends to reviewing the Commissioner's failure to abate interest under all subsections of § 6404. As a result, the court in *Woodral* determined that it possessed jurisdiction to determine whether the Commissioner's failure to abate interest under § 6404(a) constituted an abuse of discretion.

demonstrate the existence of an unreasonable error or delay by an employee of the Service in performing a ministerial or managerial act.

A "ministerial" act for this purpose constitutes a procedural or mechanical act that does not involve the exercise of judgment or discretion and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place.[221] A ministerial act does not include a decision concerning the proper application of federal tax law or other federal or state law.[222] Additionally, the mere passage of time alone does not establish error or delay in performing a ministerial act.[223]

As part of The Taxpayer Bill of Rights 2, Congress expanded the ranges of unreasonable errors or delays potentially giving rise to § 6404(e) interest abatement to include "managerial" as well as "ministerial" acts.[224] A "managerial act" means an administrative act that involves a temporary or permanent loss of records or the exercise of judgment or discretion relating to personnel management during the processing of a taxpayer's case.[225] Additionally, a managerial act for this purpose does not extend to a general administrative decision, such as the Service's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system.[226] Legislative history suggests that an unreasonable error or delay from a managerial act would include the loss of records by the Service, personnel transfers, extended illnesses, extended personnel training, or extended leave.[227]

Assuming the existence of an unreasonable error or delay in the performance of a ministerial or managerial act, interest abatement is available only if no significant aspect of such error or delay is attributable to the taxpayer.[228] Even then, the error or delay will not be taken into account until after the Service contacted the taxpayer in writing with respect to the deficiency or payment.[229] If the taxpayer is successful in establishing the

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221 Hull v. Commissioner, T.C. Memo. 2014-36, 107 T.C.M. (CCH) 1203 (citing Treas. Reg. § 301.6404-2(b)(2)).

222 *See* Corson v. Commissioner, 123 T.C. 202, 207 (2004).

223 *See* Cosgriff v. Commissioner, T.C. Memo. 2000-241, 80 T.C.M. (CCH) 156, 158.

224 *See* Pub. L. No. 104-168, § 301(a) (1996), 110 Stat. 1457.

225 Paneque v. Commissioner, T.C. Memo. 2013-48, 105 T.C.M. (CCH) 1301 (citing Treas. Reg. § 301.6404-2(b)(1)).

226 *Id.*

227 *See* H.R. REP. NO. 104-506, at 27 (1996).

228 I.R.C. § 6404(e)(1) (flush language).

229 *Id.* The limitation has been applied to deny interest abatement for any period preceding the receipt of notification from the Service. *See, e.g.*, Krugman v. Commissioner, 112 T.C. 230, 239 (1999); Matthews v. Commissioner, T.C. Memo. 2008-126, 95 T.C.M. (CCH) 1486, 1490; *see also* H.R. REP. NO. 99-426, at 844

requisite error or delay, the taxpayer also must establish a correlation between the error or delay and a specific period for which interest abatement is sought.[230]

Only if the Tax Court finds that the various conditions to the abatement of interest under § 6404(e)(1) are satisfied will the court proceed to examine whether the Commissioner's failure to abate interest constitutes an abuse of discretion. To prevail under this standard of review, the taxpayer must establish that the Commissioner exercised his discretion "arbitrarily, capriciously, or without sound basis in fact or law."[231] While the Commissioner's determination is afforded considerable deference, the Commissioner is not entitled to complete latitude in this context. In *Jacobs v. Commissioner*,[232] the Tax Court explained that the Commissioner must explain the basis for the exercise of his discretion:

> If we were to uphold the Commissioner's determination not to abate interest where the Commissioner has not clearly explained the basis for the exercise of that discretion, we would be condoning a review framework that would encourage the Commissioner to provide as little information as possible about the handling of cases during the period of the abatement request and about the inquiry in response to that request. We do not believe that Congress had that kind of review process in mind when it enacted section 6404 and provided this Court jurisdiction . . . to review, for abuse of discretion, the Commissioner's determination not to abate interest.[233]

Accordingly, the Commissioner's failure to provide support for his determination alone may constitute the requisite abuse of discretion that permits the Tax Court to reverse the denial of interest abatement.

(1985) ("The provision applies only to failures to perform ministerial acts that occur after the taxpayer has been contacted by the IRS."). Note that, through the enactment of § 6404(g), Congress now requires the Secretary to suspend the imposition of interest if (1) the taxpayer files a timely return and (2) the Secretary fails to provide notice to the taxpayer specifically stating the taxpayer's liability and the basis therefor within 36 months of the later of the date on which the return is filed or the due date for filing the return (determined without regard to extensions).

[230] *See* Mekulsia v. Commissioner, T.C. Memo. 2003-138, 85 T.C.M. 1303, 1309.

[231] *See* Lee v. Commissioner, 113 T.C. 145, 149 (1999); Woodral v. Commissioner, 112 T.C. 19, 23 (1999). The burden of proof rests on the taxpayer. TAX CT. R. 142(a) (July 6, 2012 ed.).

[232] Jacobs v. Commissioner, T.C. Memo. 2000-123, 79 T.C.M. (CCH) 1835, 1840.

[233] *Id.* at 1841; *see also* Bucaro v. Commissioner, T.C. Memo. 2009-247, 98 T.C.M. (CCH) 388, 393.

D. Review of Determinations in Collection Due Process Proceedings

The grant of jurisdiction to review administrative determinations made in the course of collection due process proceedings constitutes one of the most significant modern developments in the operation of the Tax Court. Since the creation of the collection due process regime as part of the Internal Revenue Service Restructuring and Reform Act of 1998,[234] the Tax Court has seen the volume of cases arising in the collection due process context increase to roughly five percent of its overall docket.[235] Given the number of division opinions concerning the court's jurisdiction in the collection due process setting and, in particular, the number of these cases yielding court-reviewed divided opinions, the perceived portion of the court's resources allocated to these cases perhaps exceeded this statistical evidence. As discussed below, the wealth of division opinions in this context was predictable in light of the scant statutory framework. The court's exploration of its collection due process jurisdiction reveals the difficulties the court faced in reconciling this new role with its tradition of conducting de novo proceedings in the deficiency setting.

1. The Government's Summary Collection Powers

Prior to the enactment of the seminal 1998 legislation, the Service could exercise its administrative collection remedies without the prospect of judicial oversight or intervention. The Service's administrative collection procedures are summarized as follows: Within 60 days of assessing a tax, the Service must provide the taxpayer with written notice stating the amount of the unpaid liability and demanding payment of same.[236] If the taxpayer fails to make payment following demand, a lien on all of the taxpayer's property—real and personal—arises in favor of the Service.[237] The lien is effective retroactively from the date of assessment,[238] and no further action is required on the part of the Service to establish its interest in the taxpayer's property. However, if the Service intends for its lien to be effective against a wide range of creditors, including third-party purchasers for value and judgment lien creditors, the Service must record a formal Notice of Federal Tax Lien.[239] If the taxpayer fails to make payment of the

[234] Pub. L. No. 105-206, § 3401, 112 Stat. 685, 747–50 (1998).

[235] This estimate is based on statistical information provided by the Tax Court for years 2006 to 2012.

[236] I.R.C. § 6303(a).

[237] I.R.C. § 6321.

[238] I.R.C. § 6322.

[239] I.R.C. § 6323(a), (f). Given the potential economic hardship imposed on the taxpayer resulting from the recording of a Notice of Federal Tax Lien, the

tax within ten days of the notice and demand for payment, the Service may proceed to levy against the property subject to the tax lien.[240] However, prior to levying on the taxpayer's property, the Service must provide the taxpayer with 30 days advance notice of its intent to do so.[241] The notice of intent to levy must convey a litany of statutorily enumerated information, including the procedures relating to the proposed levy and alternatives the taxpayer may pursue to avoid it.[242] Compliance with these procedures would allow the Service to seize the taxpayer's property and to sell it through a public sale for the purpose of satisfying the taxpayer's outstanding obligation.[243]

The Service's administrative collection procedures outlined above were not subject to judicial review. In the 1931 case of *Phillips v. Commissioner*,[244] the Supreme Court explained that "summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained," so long as opportunity for a later judicial determination of the taxpayer's rights is afforded.[245] Hence, once the Service exercised its broad collection powers, the taxpayer was relegated to prosecuting a suit for a refund of the collected tax.[246]

After conducting public hearings in 1997 and 1998 at which witnesses recounted sensational tales of governmental abuse in the exercise of its administrative collection powers,[247] Congress was determined to recalibrate

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Service does not do this automatically. Rather, the Service will endeavor to work out a payment arrangement with the taxpayer, and the Service will inform the taxpayer of the negative consequences that the notice will have on the taxpayer's business operations and credit rating. *See* LEANDRA LEDERMAN & STEPHEN W. MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE 561 (3d ed. 2009).

[240] I.R.C. § 6331(b).

[241] I.R.C. § 6331(d)(2).

[242] I.R.C. § 6331(d)(4).

[243] I.R.C. § 6331(b); *see also* I.R.C. § 6335 (providing procedures for administrative sale of seized property).

[244] 283 U.S. 589 (1931).

[245] *Id.* at 595 (cited in Robinette v. Commissioner, 439 F.3d 455, 458 (8th Cir. 2006)); *see also* Bull v. United States, 295 U.S. 247, 261 (1935) (noting that a taxpayer's recourse for unjust administrative action is a suit for restitution).

[246] *See* Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 26–31 (2004) (detailing the breadth of the Government's collection powers and noting the limited remedy available to taxpayers prior to enactment of the 1998 legislation).

[247] *See IRS Oversight: Hearings Before the Senate Comm. on Finance,* 105th Cong. (1998); *Practices and Procedures of the Internal Revenue Service: Hearings Before the Senate Comm. on Finance*, 105th Cong. (1997). Professor Bryan Camp recounts the sensational nature of these hearings, which included witnesses testifying behind screens and with the aid of voice disguising technology. *See* Camp, *supra* note 246, at 81. Much of the testimony offered at these hearings concerning governmental

the balance of power in the tax collection setting. In particular, Congress sought to provide taxpayers with rights against the Service similar to those one would possess in dealing with a private creditor.[248] Congress did so by introducing the collection due process procedures as part of the IRS Restructuring and Reform Act.[249] As described below, the procedures provide taxpayers the opportunity for a pre-deprivation administrative hearing (commonly referred to as a "collection due process hearing") to contest the proposed collection action,[250] with the resulting administrative determination being subject to judicial review.

2. The Pre-Deprivation Administrative Hearing

Two avenues exist to a collection due process hearing. If the Service files a Notice of Federal Tax Lien with respect to the taxpayer's property, the Service is required under § 6320 to notify the taxpayer within five days of doing so of the taxpayer's right to request a collection due process hearing. Whereas the notice of collection due process rights required by § 6320 follows the filing of the tax lien, § 6330 requires the Service to provide the taxpayer with advance notice of the right to a collection due process hearing prior to proceeding with a levy. The Service is prohibited from levying on the taxpayer's property during the period in which the taxpayer may request the collection due process hearing.[251] If the taxpayer requests a hearing in a timely manner, the prohibition on the proposed levy generally extends until the hearing is conducted, and the period for judicial review expires.[252]

The window for requesting a collection due process hearing is fairly narrow—generally, 30 days from the issuance of the collection due process notice.[253] If the taxpayer makes a timely request for a hearing,[254] the

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abuse of its administrative collection powers was later discredited. *Id.* (citing General Accounting Office, Report to the Chairman, Comm. on Finance, U.S. Senate, Tax Administration: Investigation of Allegations of Taxpayer Abuse and Employee Misconduct ¶ 2 (1999)).

[248] *See* S. REP. NO. 105-174, at 67 (1998).

[249] Pub. L. No. 105-206, § 3401, 112 Stat. 685, 747–50 (1998).

[250] For a thorough discussion of the nature of the collection due process hearing, see Danshera Cords, *How Much Process is Due? I.R.C. Sections 6230 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51 (2004).

[251] I.R.C. § 6330(a)(2).

[252] I.R.C. § 6330(e)(1). If the underlying tax liability is not in dispute and if the court determines that the Service has shown good cause not to suspend levy, the prohibition will be lifted during the appeal of the determination in the collection due process hearing. I.R.C. § 6330(e)(2).

[253] I.R.C. § 6330(a)(3)(B). If the taxpayer's collection due process notice is issued in response to the filing of lien notice under § 6320, the 30-day period for requesting a hearing does not start until the expiration of the five-day period in

taxpayer is entitled to a hearing at the IRS Office of Appeals before an impartial officer who has had no prior involvement with respect to the uncollected tax.[255]

Section 6330(c) outlines the parameters of a collection due process hearing. The taxpayer may raise "any relevant issue" relating to the unpaid tax or the proposed levy at the hearing, and the statute specifically references appropriate spousal defenses, challenges to the appropriateness of the collection actions, and possible collection alternatives (including, among other things, installment agreements and offers in compromise) as possible considerations.[256] As a general rule, the taxpayer may not use the collection due process hearing as an opportunity to contest the underlying tax liability.[257] However, this general rule does not apply if the taxpayer did not receive a notice of deficiency or if the taxpayer did not "otherwise have an opportunity to dispute" the underlying tax liability.[258] The Tax Court had the occasion to interpret this latter exception in *Montgomery v. Commissioner*.[259]

The taxpayers in *Montgomery* reported considerable income resulting from the exercise of stock options on their joint return. However, the taxpayers failed to remit payment of this liability in full, due in part to the drastic decline in the value of the stock that gave rise to the option-exercise

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which the Service is required to provide the taxpayer with notice of the lien. I.R.C. § 6320(a)(3)(B).

[254] If the taxpayer fails to request a hearing in a timely manner, the Service nonetheless will conduct an "equivalent hearing." *See* Treas. Reg. §§ 301.6320-1(i)(1), 301.6330-1(i)(1). However, the granting of an equivalent hearing does not operate as waiver of the 30-day filing requirement. *See* Kennedy v. Commissioner, 116 T.C. 255, 262 (2001). Accordingly, collection action is not required to be suspended during the pendency of the equivalent hearing. Treas. Reg. §§ 301.6320-1(i)(2), Q&A I4, 301.6330-1(i)(2), Q&A I4.

[255] I.R.C. §§ 6320(b)(3), 6330(b)(3).

[256] I.R.C. § 6330(c)(2).

[257] An offer in compromise based on doubt as to the taxpayer's liability for the underlying tax constitutes a challenge to the underlying tax liability itself. *See* Baltic v. Commissioner, 129 T.C. 178 (2007). Hence, the failure of an Appeals officer to consider such an offer does not constitute an abuse of discretion when the underlying tax liability is not properly at issue in the collection due process hearing.

[258] I.R.C. § 6330(c)(2)(B); *see also* Treas. Reg. § 301.6330-1(e)(2) Q&A E2 (providing guidance on the meaning of "opportunity to dispute"). If a taxpayer receives a notice of deficiency and fails to petition for Tax Court review, the taxpayer is precluded from contesting the underlying deficiency in the collection due process hearing pursuant to § 6330(c)(2)(B). *See* Goza v. Commissioner, 114 T.C. 176, 183–84 (2000). The willingness of an Appeals officer to receive evidence concerning the underlying tax liability does not operate as a waiver of the jurisdictional bar. *See* Behling v. Commissioner, 118 T.C. 572, 579 (2002).

[259] 122 T.C. 1 (2004).

income. The Service summarily assessed the self-reported tax pursuant to § 6201(a)(1) and eventually pursued collection by means of levy. In advance of the taxpayers' pre-levy collection due process hearing, the taxpayers indicated that they intended to file an amended return recalculating the stock option income and reflecting the taxpayers' entitlement to a refund for the year at issue. Interestingly, the Appeals officer responded that the taxpayers would be able to contest the underlying tax liability at the hearing, given that the taxpayers had not received a notice of deficiency and did not otherwise have the opportunity to dispute the tax.[260] However, after the taxpayers failed to file the amended return within a reasonable time, the Appeals officer issued a notice of determination permitting the levy to proceed. Prior to appealing to the Tax Court, the taxpayers filed the amended return claiming entitlement to a refund. The Tax Court in *Montgomery* therefore had to determine if the ability to contest the underlying tax liability in the course of a collection due process proceeding under § 6330(c)(2)(B) extended to self-reported obligations.

The Commissioner viewed the taxpayers' argument that they should be permitted to contest self-reported obligations in the collection due process setting as "nonsensical."[261] In the Commissioner's view, § 6330(c)(2)(B) was intended to permit a taxpayer to challenge a tax liability asserted by the Government that the taxpayer had not had the ability to contest—not amounts the taxpayers originally conceded were owed. The majority of the Tax Court, however, was not persuaded. Interpreting the statute according to its plain language, the court determined that the taxpayers in *Montgomery* had not been afforded "a prior administrative or judicial opportunity" to challenge the amounts assessed by the Service.[262] Hence, the second alternative condition to the application of § 6330(c)(2)(B) was satisfied. From a policy perspective, the majority found nothing wrong with providing taxpayers the opportunity to correct self-inflicted reporting errors at the collection due process stage.[263] The Service came around to this view, first acquiescing in the *Montgomery* decision[264] and later adopting its holding by regulation.[265]

As a narrow matter of statutory interpretation, the holding of *Montgomery* may not appear remarkable. However, the larger effect of the decision was significant. Traditionally, taxpayers who over-reported their income tax liability were forced to pay the self-reported tax and then pursue a refund before the federal district court or the Court of Federal Claims. Although

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260 *Id.* at 3.
261 *Id.* at 6–7.
262 *Id.* at 8–9.
263 *Id.* at 9–10.
264 A.O.D. 2005-03 (Dec. 19, 2005).
265 *See* Treas. Reg. § 301.6330-1(e)(1).

the Tax Court possessed jurisdiction to determine an overpayment, that jurisdiction was ancillary to and predicated upon the court's deficiency jurisdiction. The court's interpretation of § 6330(c)(2)(B) in *Montgomery* fundamentally altered these prevailing norms by permitting the taxpayer to contest a self-reported liability on a pre-payment basis before the Tax Court.[266] Of course, a taxpayer seeking this procedural advantage must wade into the Government's administrative collection process to obtain it.

Turning to the mechanics of the collection due process hearing itself, the statutory guidance is best described as sparse. Section 6330(c)(1) provides the lone statutory charge to the Appeals officer, which is to verify that the Service has satisfied the requirements "of any applicable law or administrative procedure."[267] The statute does not elaborate on the verification that must be obtained, but the legislative history provides that the Appeals officer is expected to verify that:

> (1) the revenue officer has verified the taxpayer's liability;
> (2) the estimated expenses of the levy and sale will not exceed the value of the property to be seized;
> (3) the revenue officer has determined that there is sufficient equity in the property to be seized to yield net proceeds from sale to apply to the unpaid tax liabilities; and
> (4) with respect to the seizure of assets of a going business, the revenue officer recommending the collection action has thoroughly considered the facts of the case, including the availability of alternative collection methods, before recommending the collection action.[268]

The list of verifications supplied by the legislative history was not intended to be exhaustive. Additional items to be verified include the issuance of the notice of deficiency (if appropriate), an internal record of the tax assessment, the timely issuance of the notice and demand for payment, and the provision of Notice of Intent to Levy.[269] The Appeals officer is not required to rely on a particular document to satisfy the § 6330(c)(1) verification obligation.[270] On that note, the Tax Court has held

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[266] The Tax Court addressed its ability to order a refund in the collection due process setting in *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006). *See infra* notes 345–352 and accompanying text.

[267] I.R.C. § 6330(c)(1).

[268] S. REP. NO. 105-174, at 68 (1998).

[269] *See* Trout v. Commissioner, 131 T.C. 239, 257–62 (2008) (Marvel, J., concurring) (quoting Chief Counsel Notice CC-2006-019 for the proposition that the appeals officer must verify "those things that the Code, Treasury Regulations, and the IRM require the Service to do before collection can take place").

[270] *See* Craig v. Commissioner, 119 T.C. 252, 262 (2002).

that reliance on Form 4340, Certificate of Assessments, Payments, and Other Specified Matters, to verify that a valid assessment occurred does not constitute an abuse of discretion where there exists no evidence of irregularity in the assessment process.[271] The verification obligation of § 6330(c)(1) does not create a right to discovery in the taxpayer, as the Tax Court has held that the Appeals officer is not obligated to provide a copy of the verification to the taxpayer.[272]

Congress expected that the Appeals officer would issue a written determination at the conclusion of the hearing.[273] Section 6330(c)(3) outlines the grounds on which the determination must be based. The first two relate to matters to be addressed at the hearing: (1) the verification of compliance with applicable law and administrative procedures that the Appeals officer is required to obtain under § 6330(c)(1);[274] and (2) any relevant issue relating to the proposed collection action (such as spousal defenses, appropriateness of collection actions, and alternatives to collection) or, if appropriate, the underlying tax liability pursuant to § 6330(c)(2).[275] The third ground, however, is the most intriguing, as it introduces a subjective balancing test that necessitates consideration of the effect of collection on the taxpayer. Specifically, the Appeals officer must consider whether the proposed collection activity "balances the need for efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."[276]

Prior to the promulgation of administrative guidance, the Tax Court was tasked with resolving practical questions concerning the nature of the collection due process hearing that the statute fails to address. In *Davis v. Commissioner*,[277] the court determined that the collection due process hearing constituted an informal proceeding, one consistent with historical practice of the IRS Office of Appeals prior to the enactment of the collection due process procedures.[278] Accordingly, the court held that a collection due

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[271] *See* Nicklaus v. Commissioner, 117 T.C. 117, 121 (2001) (reliance on Form 4340 by Appeals officer did not constitute an abuse of discretion).

[272] *See* Nestor v. Commissioner, 118 T.C. 162, 166 (2002).

[273] H.R. REP. NO. 105-599, at 266 (1998) ("The conferees expect the appeals officer will prepare a written determination addressing the issues presented by the taxpayer and considered at the hearing.").

[274] I.R.C. § 6330(c)(3)(A).

[275] I.R.C. § 6330(c)(3)(B).

[276] I.R.C. § 6330(c)(3)(C); *see also* Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 625 (6th Cir. 2005) ("This final balancing factor is novel in American tax law and injects into the calculus an equitable consideration for the taxpayer and his concerns.").

[277] 115 T.C. 35 (2000).

[278] *Id.* at 41.

process hearing does not entitle the taxpayer to subpoena witnesses to provide testimony under oath.[279]

Consistent with its informal nature, the collection due process "hearing" does not necessarily relate to a single proceeding before the IRS Office of Appeals. Rather, the hearing may consist of several meetings or other communications between the Appeals officer and the taxpayer, whether oral or in writing.[280] Indeed, a face-to-face meeting is not required in all cases. In *Katz v. Commissioner*,[281] the taxpayer was offered the opportunity for a face-to-face collection due process hearing at the nearest location of the IRS Appeals Office. The taxpayer declined to make the approximately one-hour commute, contending that he was entitled to have the hearing held in the city where he resided and where his witnesses were located. Citing the informal nature of the collection due process hearing and the taxpayer's failure to establish that the necessary travel would engender hardship, the court concluded that the telephonic communications between the taxpayer and the Appeals officer satisfied the hearing requirement.[282] Shortly thereafter, the Tax Court in *Lundsford v. Commissioner*[283] extended the holding of *Katz* by providing that a taxpayer who raises only frivolous arguments is not entitled to a face-to-face hearing.[284]

3. Judicial Review

Given that the collection due process protections of the IRS Reform and Restructuring Act were aimed at precluding perceived abuses in the Government's exercise of its administrative collection powers, Congress was not content in supplying an additional administrative hearing alone. Rather, Congress subjected the administrative hearing to judicial review. As originally proposed by the Senate Finance Committee, the Tax Court was to serve as the exclusive forum for appeals from collection due process hearings.[285] However, this provision was modified by the Conference

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279 *Id.* at 41–42.

280 *See* Ginsberg v. Commissioner, 130 T.C. 88, 92 (2008).

281 115 T.C. 329 (2000).

282 *Id.* at 336–37.

283 117 T.C. 183 (2001).

284 *Id.* at 189 (refusing to remand case back to IRS Office of Appeals for a hearing when the taxpayer intended to raise only frivolous arguments that the Tax Court had previously rejected). For a critique of the Tax Court's willingness to excuse the Service's failure to provide or conduct a collection due process hearing, *see* Danshera Cords, *How Much Process Is Due? I.R.C. § 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51 (2004).

285 *See* S. REP. NO. 105-174, at 68 (1998) ("The taxpayer may contest the determination of the appellate officer in the Tax Court by filing a petition within 30 days of the date of the determination.").

Committee, which provided that judicial review would lie with the federal district court "where appropriate."[286] In its original form, § 6330(d) split judicial review of collection due process determinations between the two courts based on whether the Tax Court normally possessed jurisdiction over the underlying tax liability.[287] In the event the taxpayer petitioned the incorrect court for review, Congress authorized the taxpayer to re-file with the proper court within 30 days after the original court determined that it lacked jurisdiction. This provision, intended to protect taxpayers who may not have been well versed in the traditional jurisdiction of the Tax Court, quickly became the subject of abuse. Taxpayers seeking to delay collection activity would intentionally file in the improper court, gaining the time it took for that court to conclude that it lacked jurisdiction plus the 30-day grace period for re-filing.[288] To avoid confusion relating to the mutually exclusive appellate fora and to avoid the intentional exploitation of this regime, Congress revised § 6330 in 2006 to vest the Tax Court with exclusive jurisdiction over all appeals of collection due process determinations—regardless of the underlying tax liability at issue.[289]

To invoke the jurisdiction of the Tax Court in the collection due process setting, the taxpayer must file a timely petition for review of the notice of

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[286] H.R. REP. NO. 105-599, at 266 (1998).

[287] While this was the effect of the original provision, the language Congress employed to accomplish the demarcation of these jurisdictional boundaries was not quite so clear. Section 6330(d)(1) in its original form is reproduced below:

> The person may, within 30 days of a determination under this section, appeal such determination—
>
> (A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter); or
>
> (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.
>
> If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

I.R.C. § 6330(d)(1) (1998); *see also* Moore v. Commissioner, 114 T.C. 171, 175 (2000) ("[W]e interpret section 6330(d)(1)(A) and (B) together to mean that Congress did not intend to expand the Court's jurisdiction beyond the types of taxes that the Court may normally consider.").

[288] *See* STAFF OF THE JOINT COMM. ON TAX'N, REPORT OF THE JOINT COMMITTEE ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998, JCX-53-03, at 88 (2003) ("Some taxpayers intentionally file in the wrong court, which creates a further delay.").

[289] *See* Pension Protection Act of 2006, Pub. L. No. 109-208, § 855(a), 120 Stat. 780, 1019 (amending I.R.C. § 6330(d)(1)). The statute as amended eliminated the grace period following a filing in an improper court. *Id.*

determination issued as a result of the collection due process hearing.[290] To be timely, the petition generally must be filed by the taxpayer within 30 days of the determination. However, if the taxpayer appeals the determination based on the claimed availability of innocent spouse relief under § 6015, the taxpayer has 90 days from the determination to pursue Tax Court review.[291]

Turning to the notice of determination, the Tax Court explained in *Offiler v. Commissioner* that "[t]he notice of determination provided for in section 6330 is, from a jurisdictional perspective, the equivalent of a notice of deficiency."[292] While § 6330 refers to a determination to be issued by the Appeals officer in connection with the due process hearing, Treasury Regulations clarify that Appeals must issue a "Notice of Determination" to each person who makes a timely request for a collection due process hearing.[293]

The caption of the document does not control whether its contents constitute a determination for purposes of § 6330. For instance, in *Craig v. Commissioner*,[294] the Appeals officer issued a "Decision Letter" to the taxpayer in connection with an equivalent hearing provided to the taxpayer based on the belief that the taxpayer failed to submit a timely request for a collection due process hearing. However, the Service improperly proceeded down the equivalent hearing path, because the taxpayer's request for a collection due process hearing was in fact timely. Under these facts, the Tax Court determined that the decision letter constituted a determination under § 6330 sufficient to invoke its jurisdiction.[295] The Tax Court in *Wilson v. Commissioner*[296] addressed the inverse scenario of that raised in *Craig*. The Service in *Wilson* issued a document captioned "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" following an equivalent hearing held in response to an untimely request for a collection due process hearing. The court in *Wilson*

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290 I.R.C. § 6330(d)(1); *see also* Goza v. Commissioner, 114 T.C. 176, 182 (2000) ("The Court's jurisdiction under section 6330 is contingent on the issuance of a valid notice of determination and a timely petition for review.").

291 *See* I.R.C. § 6015(e)(1)(A). However, pursuing an innocent spouse objection to the notice of determination does not extend the petition period for all claims. That is, if the taxpayer's petition is filed after the 30-day period provided by § 6330(d)(1), the Tax Court may review only the claims that relate to innocent spouse relief under § 6015. *See* Treas. Reg. § 301.6330-1(f)(2), Q&A F2.

292 114 T.C. 492, 498 (2000).

293 *See* Treas. Reg. § 301.6330-1(f)(1).

294 117 T.C. 252 (2002). Normally, a decision letter issued in response to an equivalent hearing provided in response to an untimely request for a collection due process hearing is not sufficient to invoke the Tax Court's jurisdiction. *See* Moorhous v. Commissioner, 116 T.C. 263, 270 (2001).

295 *Id.* at 259.

296 131 T.C. 47 (2008).

concluded that the taxpayer's failure to make a timely request for a collection due process hearing precluded a determination under § 6330, regardless of the caption of the document.[297] As a result, the Tax Court lacked jurisdiction in the case.[298]

The Tax Court originally vacillated on the degree of deference to be afforded to a notice of determination issued in the collection due process context. In *Meyer v. Commissioner*,[299] the court concluded that the notice of determination issued to the taxpayer was invalid on the basis that the taxpayer had not been offered an opportunity for a hearing prior to issuance of the determination.[300] However, roughly a year later, a divided Tax Court in *Lundsford v. Commissioner*[301] determined that it was improper to "look behind" the notice of determination in this manner.[302] Instead, the court imported into the collection due process arena the well-settled rule of not looking behind the notice of deficiency necessary to invoke the Court's deficiency jurisdiction.[303] The court's decision to overrule its prior decision in *Meyer* also was based on the "unjustified delay" that approach had engendered in the resolution of collection due process cases.[304] Rather than considering evidence bearing on the quality of the collection due process hearing provided to the taxpayer for the purpose of determining whether the predicate to its jurisdiction (a notice of determination) was satisfied, the court reasoned that such evidence was best considered in reviewing the determination on the merits. The court in *Lundsford* therefore held that a notice of determination would be respected as a jurisdictional prerequisite provided that nothing on the face of the notice raised a question concerning its validity.[305]

a. Standard of Review

The statute does not articulate a standard of review to be applied by the Tax Court in reviewing collection due process determinations. However, legislative materials accompanying the 1998 enacting legislation addressed this issue. As originally proposed in the Senate Finance Committee, the

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297 *Id.* at 52.

298 Note that the holding of *Wilson* constitutes a mere application of the well-settled principle that the Tax Court's lack of subject matter jurisdiction cannot be waived by the parties.

299 115 T.C. 417 (2000).

300 *Id.* at 422–23.

301 117 T.C. 159 (2001).

302 *Id.* at 163 ("Our analysis in *Meyer* improperly required us to look behind the notice of determination.").

303 *Id.* at 163–64.

304 *Id.* at 164.

305 *Id.* at 164–65.

Tax Court was expected to review the determination of the Appeals officer for abuse of discretion.[306] However, the Conference Committee addressed the appropriate standard of review in § 6330(d) cases at greater length, articulating a two-tier approach based on the subject of the officer's determination:

> Where the validity of the tax liability was properly at issue in the hearing, and where the determination with regard to the tax liability is part of the appeal, no levy may take place during the pendency of the appeal. The amount of the tax liability will in such cases be reviewed by the appropriate court on a de novo basis. Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion. In such cases, the appeals officer's determination as to the appropriateness of collection activity will be reviewed using an abuse of discretion standard of review.[307]

The Tax Court quickly adopted the approach outlined in the conference agreement, essentially treating it as a statutory directive.[308] When the underlying tax liability is properly at issue in a lien and levy proceeding, the court applies its traditional de novo standard of review that prevails in the court's deficiency jurisdiction. For matters not relating to the underlying tax liability, the court reviews the Appeals officer's determination for an abuse of discretion, which the court has explained occurs when the officer acts "arbitrarily, capriciously, or without sound basis in fact or law."[309]

b. Scope of Inquiry

As a general rule, the Tax Court's jurisdiction under §§ 6230 and 6330 is limited to determining if the filing of the lien or the proposed levy action is proper.[310] Accordingly, a taxpayer's failure to raise an issue during a

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[306] S. REP. NO. 105-174, at 68 (1998).

[307] H.R. REP. NO. 105-599, at 266 (1998).

[308] *See* Sego v. Commissioner, 114 T.C. 604, 610 (2000); Goza v. Commissioner, 114 T.C. 176, 181 (2000). For a discussion of how the Tax Court's abuse of discretion review in collection due process proceedings is unique when compared to traditional judicial review of agency action, see Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1194–1202 (2004).

[309] Woodral v. Commissioner, 112 T.C. 19, 23, (1999).

[310] *See* Chocallo v. Commissioner, T.C. Memo. 2004-152, 87 T.C.M. (CCH) 1432 (declining to entertain taxpayer's request that sanctions be imposed against the Service for attempting to collect a deficiency for which the Service failed to issue a notice of deficiency).

collection due process hearing generally will bar consideration of that issue by the Tax Court.[311]

The Tax Court addressed the ability of the taxpayer to raise additional challenges to the proposed collection action post hearing in *Giamelli v. Commissioner*.[312] At the collection due process hearing, the taxpayer informed the Appeals officer that he desired to enter into an installment agreement to satisfy his tax liability. The Appeals officer concluded that the installment agreement could not be consummated due to the taxpayer's failure to remain compliant with the estimated tax obligations for later years. The officer therefore issued a notice of determination to proceed with the proposed collection action. After filing a timely petition for review that raised the prospect of paying the tax liability on an installment basis, the taxpayer and the Service reached a settlement under which the Service agreed to accept the taxpayer's installment obligation and the taxpayer agreed to execute the appropriate decision document to submit to the court. However, before doing so, the taxpayer died in a car accident. The taxpayer's estate stepped into his shoes and sought to introduce evidence contesting the validity of the underlying tax liability.

In a reviewed opinion, the Tax Court rejected the taxpayer's claim as falling outside of its § 6330 jurisdiction. The court based its holding in *Giamelli* primarily on the text of the statute. Because the court is charged with reviewing the determination rendered by the Appeals officer as a result of the hearing, any claim or argument not raised at the hearing level could not be part of the determination being reviewed.[313] The court noted that this interpretation of the statute advanced valid policy objectives as well. An approach of not constraining Tax Court review to those issues raised at the hearing would permit taxpayers to divest the Appeals officer of any meaningful influence in the collection review process; in effect, the administrative hearing would amount to a procedural formality en route to a more encompassing proceeding before the Tax Court.[314] Accordingly, whereas the court had previously hinted that it could not reverse a collection due process determination based on arguments or issues not raised at the hearing level,[315] the court in *Giamelli* eliminated any such equivocation.

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[311] *See* Treas. Reg. § 301.6330-1(f)(2), Q&A F3; *see also* Magana v. Commissioner, 118 T.C. 488, 493 (2002) ("[G]enerally we consider only arguments, issues, and other matter that were raised at the collection hearing or otherwise brought to the attention of the Appeals Office.").

[312] 129 T.C. 107 (2007).

[313] *Id.* at 112–13.

[314] *Id.* at 115.

[315] *See* Magana v. Commissioner, 118 T.C. 488, 493 (2002) ("[G]enerally it would be anomalous and improper for us to conclude that respondent's Appeals Office abused its discretion under section 6330(c)(3) in failing to grant relief, or in

Not long after the *Giamelli* decision, the court clarified its holding in *Giamelli* through *Hoyle v. Commissioner*.[316] The taxpayer in *Hoyle* sought to challenge the Appeals officer's determination on the basis that the Service failed to comply with applicable law by not issuing the taxpayer a notice of deficiency. Even though the taxpayer did not raise this matter before the Appeals officer, the Tax Court determined that it nonetheless could review whether the Appeals officer verified compliance with applicable law and administrative procedures under § 6330(c) as part of its judicial review. The court's basis for distinguishing *Giamelli* rested in the statute governing the collection due process hearing. Pursuant to § 6330(c)(2), the Appeals officer is required to consider only those challenges to the proposed collection action (or, where appropriate, the underlying tax liability), that are raised by the taxpayer. Hence, the issues raised by the taxpayer at the hearing level serve to define the scope of the Appeals officer's determination that is subject to review. In contrast, § 6330(c)(1) requires the Appeals officer to verify compliance with applicable law and administrative procedures, regardless of whether the taxpayer presses this matter at the hearing level. Accordingly, subjecting the verification requirement to Tax Court review in all cases cannot prejudice the Government as a procedural matter.[317]

c. Scope of Evidentiary Record

A separate but related inquiry to the range of issues the Tax Court may consider in a collection due process hearing is the range of evidence the court may entertain. One of the more vexing questions for the Tax Court in resolving its expanded jurisdiction to review administrative determinations outside of the deficiency context is whether the court must limit the evidence it considers to that presented at the administrative level, and this issue has been particularly acute in the collection due process context.

The Service contends that, with limited exceptions, the Tax Court is limited to the administrative record in exercising its § 6330(d) jurisdiction.[318] On that note, the Service has described the scope of the administrative

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failing to consider arguments, issues, or other matter not raised by taxpayers or not otherwise brought to the attention of respondent's Appeals Office.").

[316] 131 T.C. 197 (2008).

[317] *See id.* at 201–02.

[318] *See* Chief Counsel Notice CC-2006-019, at 46 (Aug. 18, 2006) ("Generally, review of the procedural aspects of a CDP hearing is limited to the administrative record."). However, the Chief Counsel Notice recognizes the need to supplement the administrative record in cases where the record does not adequately describe the hearing process or where factual disputes exist concerning what occurred at the hearing level. *Id.*

record the Tax Court may consider in reviewing a collection due process determination as including the following:

> any oral communications with the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative, memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3).[319]

However, courts have noted problems of limiting review of collection due process determinations to the administrative record, as often there is little record to speak of. The Sixth Circuit Court of Appeals has explained the predicament as follows:

> Judicial review of collection due process hearings presents a real problem for reviewing courts. Congress overlaid the Restructuring and Reform Act on a previous system that involved very little judicial oversight. The result is a surprisingly scant record, comprised almost exclusively of the parties' appellate briefs and the Notice of Determination letter. No transcript or official record of the hearing is required and, accordingly, one rarely exists.[320]

Whereas federal district courts sitting in review of collection due process determinations considered themselves bound under principles of administrative law to limit the evidence they considered to the administrative record,[321] the Tax Court in *Robinette v. Commissioner*[322] concluded that it was not subject to any such limitation.

The taxpayer in *Robinette* presented an offer-in-compromise to the Service that considerably reduced his outstanding tax liabilities on the basis of doubt as to collectability. The Service accepted the offer in 1995 after including a host of conditions to the compromised liability, one of which obligated the taxpayer to comply with all provisions of the tax laws (including submitting returns on a timely basis) for five years from acceptance of the offer. The Service failed to receive a timely filed return from the taxpayer for the 1998 year. After contacting the taxpayer about

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319 Treas. Reg. § 301.6330-1(f)(2), A-F4.

320 Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621, 625 (6th Cir. 2005).

321 *See* Olsen v. United States, 414 F.3d 144 (1st Cir. 2005); Living Care Alternatives of Utica, Inc. v. United States, 411 F.3d 621 (6th Cir. 2005).

322 123 T.C. 85 (2004).

the missing return, the Service declared the offer-in-compromise in default and reinstated the taxpayer's tax liability in full. Thereafter, the Service sent the taxpayer a Notice of Intent to Levy, from which the taxpayer requested a due process hearing. As part of the telephonic collection due process hearing, the taxpayer's accountant explained that he had prepared the taxpayer's return, caused the taxpayer to sign it, and placed the return in the mail with appropriate postage on the filing deadline (a practice purportedly followed by the taxpayer and his accountant in prior years). The Appeals officer, however, would consider only a certified or registered mail receipt. Accordingly, the officer determined that he could not reinstate the offer-in-compromise and that the proposed collection activity should proceed.[323]

On appeal of the collection due process determination to the Tax Court, the taxpayer in *Robinette* sought to introduce evidence relating to the timely filing of his 1998 tax return, including among other things his testimony to that effect, evidence concerning the filing of prior years' returns, and his accountant's records on the date of alleged mailing. The Commissioner sought to exclude all such evidence that was not presented to the Appeals officer. A divided Tax Court sided with the taxpayer, holding that it was not bound by the Administrative Procedure Act (APA) in conducting its review of the Appeals officer's determination and, specifically, that the court's review was not limited to that evidence contained in the administrative record.[324] The Court justified its conclusion that the APA did not govern nor inform its review of collection due process determinations on a number of grounds, including but not limited to the following: (1) because the Tax Court's de novo procedures for reviewing actions taken by the Service were well established when the APA was enacted, these procedures constituted an "additional requirement . . . otherwise recognized by law" that the APA expressly declined to override;[325] (2) the APA constitutes a statute of general application that does not supersede statutory provisions for judicial review, and the Court's jurisdiction is based on a specific statutory framework;[326] (3) the legislative history accompanying the enactment of the collection due process regime failed to suggest that the APA applied to the Tax Court in this context or that the court's review was to be limited to the administrative record; and (4) the determination by the Tax Court in other contexts (e.g., innocent spouse relief, interest abatement) that its jurisdiction to review IRS determinations for abuse of discretion was not governed by the APA. Accordingly, the majority of the Tax Court in *Robinette* permitted

[323] *Id.* at 86–93.

[324] *Id.* at 95.

[325] *Id.* at 97 (citing 5 U.S.C. § 559 (2000)).

[326] *Id.* at 97–98.

consideration of testimony and other evidence that was not presented to the Appeals officer in resolving the taxpayer's appeal.[327]

The Tax Court's assertion of administrative review exceptionalism in *Robinette* did not withstand appeal. The Eighth Circuit Court of Appeals determined that judicial review of collection due process determinations by the Tax Court should be limited to consideration of the evidence contained in the administrative record.[328] While recognizing that the statute and legislative history failed to address the scope of evidence to be considered in a § 6330(d) proceeding, the appellate court interpreted this silence as suggesting that the APA and general principles of administrative law should govern. In particular, the court was not willing to read much into the Tax Court's tradition of conducting de novo proceedings in the deficiency setting:

> The Tax Court seemed to believe that because it traditionally has conducted *de novo* proceedings in deficiency proceedings, and because Congress did not change that practice when it passed the APA in 1946, Congress should likewise be presumed to have intended *de novo* proceedings in the Tax Court in connection with the review of decisions by an appeals officer under § 6330. We do not think the proposed conclusion follows from history. Collection due process hearings under § 6330 were newly-created administrative proceedings in 1998, and the statute provided for a corresponding new form of limited judicial review. The nature and purpose of these proceedings are different from deficiency determinations, and it is just as likely that Congress believed judicial review of decisions by appeals officers in this context should be conducted in accordance with traditional principles of administrative law. Indeed, that Congress provided for judicial review in either the Tax Court or a United States District Court, depending on the type of underlying tax liability involved, indicates that traditional principles of administrative law should apply.[329]

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[327] For commentary on the Tax Court's decision in *Robinette*, *see* Leslie M. Book, *CDP and Collections, Perceptions and Misperceptions*, 107 TAX NOTES 487 (Apr. 25, 2005); Danshera Cords, *Administrative Law and Judicial Review of Tax Collection Decisions*, 52 ST. LOUIS UNIV. L.J. 429 (2008); Diane L. Fahey, *Is the United States Tax Court Exempt From Administrative Law Jurisprudence When Acting as a Reviewing Court?*, 58 CLEV. ST. L. REV. 603 (2010); Christine K. Lane, *On-the-Record Review of CDP Determinations: An Examination of Policy Reasons Encouraging Judges to Stick to the Administrative Record*, 6 FLA. ST. U. BUS. L. REV. 149 (2007); Nick A. Zotos, *Service Collection Abuse of Discretion: What is the Appropriate Standard of Review and Scope of the Record in Collection Due Process Appeals?*, 62 TAX LAW. 223 (2008).

[328] Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006).

[329] *Id.* at 461.

The First Circuit in *Murphy v. Commissioner*[330] followed the lead of the Eighth Circuit in *Robinette*, holding that the administrative record rule applies to the Tax Court's consideration of a collection due process appeal. Although the Tax Court has not had occasion to revisit the matter in light of these appellate reversals, indications suggest that the Tax Court may not be willing to abandon its position in cases appealable to other circuits. In 2008, the Tax Court held in *Porter v. Commissioner*[331] that it is not limited to the administrative record when it determines if a taxpayer is entitled to innocent spouse relief under § 6015. In explaining its holding, the court distinguished the Eighth Circuit's decision in *Robinette* on the basis that the Tax Court's jurisdiction to determine a taxpayer's entitlement to innocent spouse relief differed qualitatively from its jurisdiction to review collection due process determinations. However, in the process of distinguishing the *Robinette* reversal, the Tax Court was careful to note that "no inference should be drawn that . . . we are changing our position in lien and levy cases as expressed in [the original *Robinette* decision]."[332] Hence, for the time being, taxpayers may have success in augmenting the administrative record when pursuing a collection due process appeal before the Tax Court.

The Tax Court addressed a much less controversial aspect of the evidentiary record it may consider in collection due process appeals in *Freije v. Commissioner*.[333] There, the Tax Court was forced to consider when, if ever, it could entertain evidence arising in a year other than the year that served as the subject of the notice of determination under review. The taxpayer in *Freije* remitted a payment to the Service that he intended to be applied to his 1997 tax liability, but the Service instead applied the payment to the taxpayer's outstanding liability for 1995. The taxpayer therefore appealed the Service's determination to proceed with levies to collect his unpaid 1997 liability, challenging the determination on the basis there remained no unpaid liability for the 1997 year.

The Service argued that its application of the taxpayer's remittance to his 1995 tax liability fell outside the jurisdiction of the Tax Court to review, as the taxpayer's 1995 liability was not the subject of the notice of determination. The court rejected this argument, noting that its jurisdiction to review the adverse collection due process determination necessarily included the jurisdiction to determine if the tax to be collected had in fact

[330] 469 F.3d 27 (1st Cir. 2006).

[331] 130 T.C. 115 (2008); *see also* Wadleigh v. Commissioner, 134 T.C. 280, 289 (2010) (declining the Commissioner's invitation to overrule its prior decision in *Robinette* because resolution of that issue not necessary to disposition of case).

[332] *Id.* at 120 n.6. Indeed, the Tax Court has reaffirmed its position in *Robinette* in cases appealable to other circuit courts of appeals. *See* Trainor v. Commissioner, T.C. Memo. 2013-14, 105 T.C.M. (CCH) 1108.

[333] 125 T.C. 14 (2005).

already been paid—an inquiry that could encompass facts beyond the year subject to the notice. Accordingly, the court held that its jurisdiction under § 6330(d) encompassed consideration of such facts and circumstances in nondetermination years as are necessary to determine the correct amount of unpaid tax for the determination year at issue.[334] The court went on to explain that this approach is consistent with the authorization under § 6214(b) to consider facts relating to other years to the extent necessary to determine the amount of a deficiency for a tax year before the court.[335]

d. Possible Outcomes

The Tax Court may sustain the determination of the Appeals officer on the basis that the determination as it relates to collection-related matters did not constitute an abuse of discretion or because the taxpayer's challenge to the underlying tax liability lacked merit. However, § 6330 fails to specify what action the Tax Court is to take if it finds the collection due process determination deficient.[336] For instance, the Appeals officer may have failed to perform the verification required by § 6330(c)(1), the officer may have not given sufficient consideration to collection-related matters raised by the taxpayer pursuant to § 6330(c)(2), or the officer may have failed to weigh sufficiently the concern that the proposed collection activity be no more intrusive than necessary as required under § 6330(c)(3)(C). Furthermore, the record before the Tax Court may not be sufficiently developed to permit the court to make these determinations.

If the court determines that the proposed levy action is improper, such as where the court finds that the verification requirements of applicable law have been satisfied was incorrect, the court may simply stay the proposed collection action.[337] On the other hand, if the court finds that the Appeals officer's determination to proceed with collection constituted an abuse of discretion, the court may remand the case to the Office of Appeals for

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[334] *Id.* at 27.

[335] *Id.* at 27–28.

[336] *See* Diane L. Fahey, *The Tax Court's Jurisdiction Over Due Process Collection Appeals: Is it Constitutional?*, 55 BAYLOR L. REV. 453, 479 (2003) ("Because I.R.C. section 6330(d)(1) does not provide for the Tax Court to remand or modify the Internal Revenue Service's determination, the Tax Court may be limited merely to stating that the Internal Revenue Service's proposed collection action is improper, with the result that the collection action remains in limbo until the Internal Revenue Service itself decides either to correct its procedural error or desist from collection altogether.").

[337] *See*, *e.g.*, Freije v. Commissioner, 125 T.C. 14, 37 (2005) (directing that the levy to collect the portion of an assessment for which no notice of deficiency had been issued "may not proceed").

reconsideration.[338] Presumably the Office of Appeals would heed the Tax Court's guidance and rectify the identified defects in the initial determination. Remand also serves as the appropriate remedy in cases where the court finds the record insufficient to enable meaningful review of the collection due process determination.[339]

Although nothing in § 6330 expressly contemplates the Tax Court's authority to remand a collection due process proceeding to the Office of Appeals, courts have operated under the assumption that the right exists.[340] Given the failure of the statute to address the prospect of remand, it is not clear if the remanding court retains jurisdiction over the proceeding to ensure compliance with its directive.[341] However, the Tax Court operates on the assumption that it retains jurisdiction over remanded proceedings. The Court explained this practice in *Wadleigh v. Commissioner*[342] as follows:

> We may under certain circumstances remand a case to the Commissioner's Appeals Office while retaining jurisdiction. The resulting section 6330 hearing on remand provides the parties with

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338 *See id.* at 33, 37 (finding that the Appeals officer's failure to credit the taxpayer's account with withholding credits and remittances that were improperly applied to other years constituted an abuse of discretion and therefore remanding determination for reconsideration); Harrell v. Commissioner, T.C. Memo. 2003-271, 86 T.C.M. (CCH) 378, 379 (remanding case to Appeals officer to enable taxpayer to consider installment agreement offered by the officer or to propose collection alternatives but prohibiting taxpayers from raising other issues).

339 *See, e.g.*, Wadleigh v. Commissioner, 134 T.C. 280 (remanding case to Office of Appeals because administrative record insufficient to properly evaluate whether the Appeals officer abused discretion in determining that levy on taxpayer's pension could proceed). One of the first examples of a court remanding for this purpose was *Mesa Oil, Inc. v. United States*, 86 A.F.T.R.2d 2000-7312 (D. Colo. 2000), wherein the district court remanded the case for development of the administrative record and, in particular, clarification of the reasoning behind the Appeals officer's determination that the § 6330(c)(3)(C) balancing test was satisfied. However, the Sixth Circuit in *Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621, 625 (6th Cir. 2005), described the remand in *Mesa Oil* as "an exception to the general practice of reviewing courts showing deference to Appeals Officers' conclusions regarding the [§ 6330(c)(3)(C)] balancing analysis."

340 *See, e.g.*, Lunsford v. Commissioner, 117 T.C. 183, 189 (2001) ("We do not believe that it is either necessary or productive to remand the case to IRS Appeals to consider petitioners' arguments."); *see also* Danshera Cords, *Collection Due Process: The Scope and Nature of Judicial Review*, 73 U. CIN. L. REV. 1021, 1040 (2005) (noting practice of courts remanding collection due process cases for further consideration by the Appeals officer or further development of record).

341 *See id.* (noting the confused state of the Tax Court's retained jurisdiction over remanded collection due process determinations and suggesting legislative clarity).

342 134 T.C. 280 (2010).

> an opportunity to complete the initial section 6330 hearing while preserving the taxpayer's right to receive judicial review of the ultimate administrative determination.[343]

When the Tax Court reviews the underlying tax liability as part of the § 6330(d) proceeding, the proceeding very much resembles the de novo proceedings the court regularly conducts as part of its deficiency jurisdiction. However, the court's remedial powers are not the same in the two settings. If a case arrives before the court through a petition for redetermination of a deficiency, the court possesses the jurisdiction to determine an overpayment for the year at issue and to order the overpayment to be refunded.[344] The Tax Court considered whether it possessed similar powers when sitting in review of collection due process determinations in *Greene-Thapedi v. Commissioner*.[345]

Greene-Thapedi concerned the Service's attempt to collect a taxpayer's outstanding income tax liability for 1992. Subsequent to the taxpayer's filing of her petition for review of the Appeals officer's adverse collection due process determination, the Service applied an overpayment from the taxpayer's 1999 year to the outstanding 1992 liability pursuant to § 6402(a), fully satisfying the 1992 liability. The Service therefore moved to dismiss the § 6330(d) proceeding as moot due to the absence of an unpaid tax liability, which the court granted. The court reasoned that it could not review the Service's application of its offset authority, because the § 6402 offset does not constitute a levy action that is subject to collection due process review.[346]

To continue pursuing her challenge to the 1992 deficiency (which served as the basis of her initial petition), the taxpayer amended her petition in the collection due process proceeding to assert a claim for a refund of amounts offset against the 1992 liability. The court dismissed her claim for lack of jurisdiction on grounds that the proposed levy that had given rise to the court's § 6330(d) jurisdiction had been abandoned by the Service. In a divided opinion, the court held that no basis existed for the taxpayer to challenge her 1992 income tax liability before the court.[347] Accordingly, the court dismissed the case as moot.[348]

However, before doing so, the majority in *Greene-Thapedi* explained that even if its § 6330 jurisdiction remained open to the taxpayer, the court

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343 *Id.* at 299 (citations omitted); *see also* Dalton v. Commissioner, 135 T.C. 393 (2010) (reviewing supplemental notice of determination issued as a result of a remand of the initial determination).

344 I.R.C. § 6512(b)(1), (2).

345 126 T.C. 1 (2006).

346 *Id.* at 7–8.

347 *Id.* at 8.

348 *Id.* at 14.

lacked the authority to determine an overpayment or to order a refund in the § 6330 context.[349] The court recounted the history of its overpayment jurisdiction in the deficiency setting, noting that Congress had narrowly proscribed its jurisdiction by statute. Additionally, the court noted that its overpayment jurisdiction in the deficiency setting did not carry an ancillary power to order the Service to refund the determined overpayment. Rather, this refund power was acquired by legislative grant only decades later, and even then the court's refund power was narrowly defined.[350] In light of the historical development of the court's circumscribed overpayment and refund jurisdiction in the deficiency setting, the court refused to interpret § 6330 as implicitly conferring upon the Tax Court the authority to determine an overpayment for the determination year at issue or the power to order the refund of such amount.[351] The taxpayer therefore was left to pursue refund litigation with respect to the 1992 tax liability in traditional refund fora.[352]

E. Reimbursement of Taxpayer Litigation and Administrative Costs

Section 7430 provides the prospect of a taxpayer obtaining reimbursement of reasonable litigation costs and administrative costs incurred in tax proceedings. The section provides the Tax Court with jurisdiction to order an award of such costs in docketed cases and, furthermore, to review a determination concerning an award at the administrative level. After providing a brief history of the fee-shifting landscape prior to the enactment of § 7430, this Section will detail the operation of the statutory remedy as well as the Tax Court's jurisdiction in this area.

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[349] *Id.* at 8–9.

[350] Additionally, the court noted that Congress amended its jurisdiction to review the Service's failure to abate interest under § 6404 by incorporating the court's overpayment jurisdiction through a cross-reference to § 6512(b) under § 6404(h)—further evidence that the court's overpayment jurisdiction and refund powers must be expressly authorized. *See id.* at 13.

[351] *Id.* at 11.

[352] Judge Colvin, agreeing with the result in *Greene-Thapedi*, wrote separately to note the judicial inefficiency of initially providing the court with jurisdiction to review the underlying tax liability for the determination only to allow that jurisdiction to be undercut through the fortuitous application of an overpayment offset. *Id.* at 14–15 (Colvin, J., concurring).

1. Pre-TEFRA Rules

Under the common law "American rule," each litigant is ordinarily responsible for paying his own costs of counsel.[353] This rule is rooted in the belief that losing parties should not be penalized for exercising the right to litigate, nor should the possibility of paying another party's attorney's fees hang guillotine-like over the heads of potential litigants so as to discourage resort to the courts.[354] The rule, however, is not without its exceptions.

Two narrow common law exceptions to the American rule[355] allow the federal courts to reallocate responsibility for paying the attorneys' fees of prevailing parties. First, if the losing party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons," the federal courts can assess the attorney's fees of the winning party against the loser.[356] Second, if the legal action of a successful litigant has conferred a benefit upon a group of persons, the attorney's fees of the prevailing litigant may be recovered from the other beneficiaries of the action or from a "common fund" created by a successful suit.[357] Traditionally, however, absent specific statutory or contractual authority, the doctrine of sovereign immunity and the distinctive language of section 2412 of title 28 of the United States Code,[358] barred the recovery of attorney's fees from the Government, even in cases

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[353] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Under the "English rule," England and many other countries generally award attorney's fees to the prevailing party. *Id.* at 247 n.18; Spencer v. N.L.R.B., 712 F.2d 539, 543 n.12 (D.C. Cir. 1983); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA L. REV. 636, 637 n.3, 639–40 (1974).

[354] *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); H.R. REP. NO. 96-1418, at 9 (1980); Comment, *supra* note 353, at 644.

[355] There are also numerous specific statutory exceptions to the American rule, authorizing awards of attorney's fees in cases commenced under statutes granting or protecting various federal rights. *See, e.g.*, 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 15 U.S.C. § 15a (Clayton Act); 15 U.S.C. § 77k(e) (Securities Act of 1933 (as amended)); 15 U.S.C. § 78i(e), 78r(a) (Securities Exchange Act of 1934 (as amended)); *see also* H.R. REP. NO. 96-1418, at 8 (listing additional statutory authorizations of attorney's fees).

[356] F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974) (footnote omitted). *Accord Alyeska*, 421 U.S. at 258–59; *Spencer*, 712 F.2d at 543.

[357] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391–93 (1970). *Accord Spencer*, 712 F.2d at 543 & n.13; H.R. REP. NO. 96-1418, at 8 (1980).

[358] Prior to its amendment in 1980, 28 U.S.C. § 2412 provided as follows: "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, *but not including the fees and expenses of attorneys*, may be awarded to the prevailing party in any civil action brought by or against the United States . . . ." 28 U.S.C. § 2412 (1966) (emphasis added), *prior to amendment by* Pub. L. No. 96-481, § 204(a), 94 Stat. 2321, 2327–29 (1980).

falling within the well-recognized "bad faith" and "common benefit" exceptions to the American rule.[359]

The American rule became the subject of increasing criticism in the early twentieth century.[360] Although a primary purpose of the American rule was to prevent excessive costs from discouraging litigation, the rule was "having the opposite effect."[361] Often the expected costs of a judicial contest exceeded the amount at stake, an anomaly that could preclude the commencement of well-founded suits.[362] Consequently, the federal courts began exercising their equity powers to fashion further exceptions to the American rule.[363] The most important of these exceptions was the "private attorney general" theory, under which successful litigants who aided in the enforcement of "important societal rights" could recover their costs of counsel.[364] Still, the doctrine of sovereign immunity and section 2412 of title 28 precluded recovery of attorney's fees from the Federal Government.[365]

In 1975, the Supreme Court ordered cessation in the federal courts of judicially innovated exceptions to the American rule.[366] In *Alyeska Pipeline Service Co. v. Wilderness Society*,[367] the Court held that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."[368] Absent specific statutory authority or unless the case fell within the "common benefit" or "bad faith" exceptions, the Supreme Court held that federal courts could not shift the costs of counsel away from the prevailing party.[369] Congress soon responded.

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[359] *Spencer*, 712 F.2d at 543–44.

[360] *Id.* at 544 n.14. The court listed a number of articles criticizing the American rule, including: William B. Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO L. REV. 202 (1966); Ewing O. Cossaboom, *Attorney's Fees as an Element of Damages*, 15 U. CIN. L. REV. 313 (1941); Comment, *supra* note 353, at 648–55; Note, *Distribution of Legal Expense Among Litigants*, 49 YALE L.J. 699 (1940).

[361] *See* H.R. REP. NO. 96-1418, at 9 (1980).

[362] *Id.*

[363] *See Spencer*, 712 F.2d at 544; Comment, *supra* note 353, at 657, 666–70.

[364] *Spencer*, 712 F.2d at 544; Barry S. Rutcofsky, *The Award of Attorney's Fees Under the Equal Access to Justice Act*, 11 HOFSTRA L. REV. 307, 309–10 (1982); Comment, *supra* note 353, at 657, 666–70.

[365] *See Spencer*, 712 F.2d at 543–44; Comment, *supra* note 353, at 679 n.255.

[366] *See Spencer*, 712 F.2d at 544.

[367] 421 U.S. 240 (1975).

[368] *Id.* at 262 (footnote omitted).

[369] *Spencer*, 712 F.2d at 544 (citing *Alyeska Pipeline Service Co.*, 421 U.S. at 247, 257–60, 271).

In 1976, in direct response to the Supreme Court's decision in *Alyeska*,[370] Congress enacted the Civil Rights Attorney's Fee Awards Act,[371] providing for the award of attorney's fees to prevailing parties other than the United States in civil actions, including tax cases.[372] The application of this act to tax litigation was limited, however, because it applied only to suits brought by or on behalf of the Federal Government. Because the petitioner in the Tax Court is always the taxpayer seeking the redetermination of a deficiency asserted by the Service or some other form of relief, the 1976 legislation had no effect on Tax Court litigation.[373] Following the American rule, the Tax Court refused to award attorney's fees or costs against the Government in the absence of a specific statutory provision conferring such authority.[374]

Four years later, Congress again expanded the circumstances in which attorney's fees could be recovered in litigation with the Government. The Equal Access to Justice Act (EAJA),[375] enacted in 1980, provided for the

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[370] S. REP. NO. 94-1011, at 4 (1976).

[371] Pub. L. No. 94-559, 90 Stat. 2641 (1976) (amending 42 U.S.C. § 1988).

[372] The legislation provided in pertinent part as follows:

> That the Revised Statutes section 722 (42 U.S.C. § 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Pub. L. No. 94-559, § 2, 90 Stat. 2641.

[373] *See* H.R. REP. NO. 97-404, at 10 (1981); Key Buick Co. v. Commissioner, 68 T.C. 178 (1977) (concluding that not only did the plain language of the 1976 Act exclude its application to the Tax Court, the legislative history of the Act was insufficient to support its application to Tax Court litigation), *aff'd*, 613 F.2d 1306 (5th Cir. 1980); *see also* Sharon v. Commissioner, 66 T.C. 515, 533–34 (1976) (holding that the Tax Court was without authority under 28 U.S.C. § 2412 to award costs to prevailing petitioner), *aff'd*, 591 F.2d 1273 (9th Cir. 1979).

[374] *See* Don Casey Co. v. Commissioner, 87 T.C. 847, 857 (1986); *Key Buick Co.*, 68 T.C. at 178 n.2; *Sharon*, 66 T.C. at 533–34.

[375] Pub. L. No. 96-481, § 204(a), 94 Stat. 2321, 2327–29 (1980) (amending 28 U.S.C. § 2412). Both the Civil Rights Attorney's Fees Awards Act and EAJA were intended to supplement numerous more specific provisions authorizing awards of attorney's fees in cases commenced under statutes granting or protecting various federal rights. For a list of statutes authorizing awards of attorney's fees, see *supra* note 355.

award of litigation costs in any civil action (except tort cases[376]) brought by or against the United States, unless the position of the Government was "substantially justified" or special circumstances made such an award unjust.[377] Under EAJA,[378] which expressly superseded the Civil Rights Attorney's Fees Awards Act as to tax litigation,[379] a party prevailing against the United States could recover attorney's fees and other reasonable costs, including "the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case."[380] No ceiling was placed on the total cost awards recoverable under EAJA, although individual items were limited: attorney's fees could not exceed a statutory hourly rate without the court finding a special justification, and the rate of expert witness fees could not be higher than those paid by the Government.[381] Additionally, parties had to meet certain economic requirements to be eligible for a litigation award under EAJA.[382]

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[376] 28 U.S.C. § 2412(d)(1)(A). However, the legislative history of the EAJA makes clear that it is to apply to cases involving constitutional torts. H.R. REP. NO. 96-1418, at 9 (1980); Rutcofsky, *supra* note 364, at 313.

[377] 28 U.S.C. § 2412(b), (d)(1)(A). Section 2412(b) authorizes the courts, unless prohibited by statute, to award attorney's fees and other expenses against the United States "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b). Thus, the "bad faith" and "common benefit" exceptions are made applicable to the Federal Government. However, § 2412(d)(1)(A) is even more sweeping because of the allowance of fees and expenses unless the position of the United States is "substantially justified." 28 U.S.C. § 2412(d)(1)(A).

[378] Pub. L. No. 96-481, §§ 201–208, 94 Stat. 2321, 2325–30 (1980).

[379] Pub. L. No. 94-559, 90 Stat. 2641 (1976), *amended by* Pub. L. No. 96-481, § 205(c), 94 Stat. 2321, 2330 (1980).

[380] 28 U.S.C. § 2412(d)(2)(A).

[381] *Id.* (setting the original reimbursable rate at $75 per hour, prior to amendment in 1996). In 1996, Congress increased the reimbursable hourly rate to $125. *See* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 232(b)(1), 101 Stat. 847, 863 (1996).

[382] 28 U.S.C. § 2412(d)(2)(B). As enacted, § 204 of EAJA limited the availability of litigation awards by defining a "party" as an individual whose net worth did not exceed $1 million at the time the action was filed; the sole owner of an unincorporated business, or a partnership, corporation, association, or organization (excluding § 501(c)(3) organizations) whose net worth did not exceed $5 million or who did not have more than 500 employees at the time the action was filed. Pub. L. No. 96-481, § 204, 94 Stat. 2321, 2329 (1980) (enacting 28 U.S.C. § 2412). The dollar amounts of the net worth ceilings for individuals and organizations have been raised to $2 million and $7 million respectively. I.R.C. § 2412(d)(2)(B) (as amended by Pub. L. No. 99-80, § 2(c)(1), 99 Stat. 183, 185 (1985)).

EAJA also was interpreted as being inapplicable to Tax Court litigation. The primary justification was that the legislation, enacted as part of title 28 of the United States Code concerning Article III courts, had no application to a legislative court established under Article I.[383] Thus, no matter how unreasonable the position of the Service, taxpayers prevailing in Tax Court proceedings continued to be unable to recover cost and fee awards, despite legislation providing access to litigation awards to taxpayers prevailing in cases brought in other federal forums.

2. Taxpayer Rights as Expanded by TEFRA

Believing that taxpayers should be entitled to litigation costs in tax cases in which the position of the Service is unreasonable, regardless of the forum involved,[384] Congress increased the availability of fee and cost awards in tax cases in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[385] Section 7430 expressly applies to Tax Court litigation,[386] and, as originally enacted, provided that a prevailing party[387] (not including the Government) may recover reasonable litigation costs in any action under the Internal Revenue Code brought by or against the United States.[388]

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[383] *See, e.g.*, Bowen v. Commissioner, 706 F.2d 1087 (11th Cir. 1983) (holding EAJA inapplicable to Tax Court litigation); McQuiston v. Commissioner, 78 T.C. 807 (1982) (holding the attorney's fee provisions of EAJA and section 1988 of the Civil Rights Act inapplicable to Tax Court litigation), *aff'd*, 711 F.2d 1064 (9th Cir. 1983).

[384] *See* H.R. REP. NO. 97-404, at 11 (1981).

[385] Pub. L. NO. 97-248, § 292, 96 Stat. 324, 572–74 (1982) (amending I.R.C. § 7430). The EAJA is superseded by TEFRA in actions to which § 7430 applies. *See id.* § 292(c), 96 Stat. at 573 (amending 28 U.S.C. § 2412(e)).

[386] I.R.C. § 7430(a)(2) (as originally enacted by TEFRA, Pub. L. No. 97-248, § 292(a), 96 Stat. 572). The express reference to litigation before the Tax Court is now contained in § 7430(c)(6).

[387] Section 7430 excludes creditors of the taxpayer from the definition of "prevailing party." I.R.C. § 7430(c)(4)(A); H.R. REP. NO. 97-404, at 12 (1981) (stating that creditors of a taxpayer would be ineligible for a litigation award under § 7430 in interpleaders, wrongful levy actions, and lien priority cases); *see also* Miller v. United States, 831 F. Supp. 1347 (M.D. Tenn. 1993) (explaining scope of creditor exception).

[388] I.R.C. § 7430(a)(1) (as originally enacted by TEFRA, Pub. L. No. 97-248, § 292(a), 96 Stat. 572). Prior to 1996, declaratory judgment proceedings generally were excluded from § 7430. I.R.C. § 7430(b)(3) (prior to amendment in 1996). As part of the Taxpayer Bill of Rights 2, this prohibition was removed, effective for proceedings after July 30, 1996. Pub. L. No. 104-168, § 704(a), (b), 110 Stat. 1452, 1464 (1996). Congress attributed the change to recognition that it was appropriate to treat declaratory judgment proceedings similar to other tax proceedings with

A variety of justifications animated the decision of Congress to enable prevailing taxpayers to recover attorney's fees in the Tax Court. First, because the majority of tax litigation occurs in the Tax Court, few taxpayers were able to obtain litigation awards under the earlier statutes.[389] Second, Congress hoped that § 7430 would deter abusive actions by the Service, as well as enable taxpayers to resist unjustified tax assertions regardless of their economic situation.[390] Finally, having different rules apply in the Tax Court, the district courts, and the Claims Court was thought to promote forum shopping, and Congress intended that one set of rules be applicable to litigation awards in all tax cases.[391]

In its concern with the then increasing case load of the Tax Court and the impact the TEFRA attorney's fees provisions might have in encouraging additional cases to be brought,[392] Congress originally limited the availability of litigation cost awards to cases in which the position of the Government was unreasonable.[393] Congress intended that this limitation reduce any incentive that might otherwise exist for a party to avoid settlement and the informal stipulation process in the hope of winning an award of litigation costs.[394]

Following the enactment of § 7430 in 1982, Congress made significant modifications to the statute through the Tax Reform Act of 1986[395] and

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respect to eligibility for reimbursement of costs and fees. H.R. REP. NO. 104-506, at 38 (1996).

389 H.R. REP. NO. 97-404, at 11 (1981).

390 *Id.*

391 *Id.*

392 *Id.*

393 *Id.*; I.R.C. § 7430(c)(2)(A)(i) (as originally enacted by TEFRA, Pub. L. No. 97-248, § 292, 96 Stat. 572). Currently, reimbursement of costs under § 7430 is foreclosed if the Government's position is "substantially justified." I.R.C. § 7430(c)(4)(B)(i). As part of the effort to deter frivolous Tax Court litigation, Congress also increased the maximum damage penalty from $500 to $5,000. I.R.C. § 6673 (as amended by TEFRA, Pub. L. No. 97-248, § 292(b), 96 Stat. 574); H.R. REP. NO. 97-404, at 11 (1981). The current ceiling on the § 6673 penalty stands at $25,000. I.R.C. § 6673 (as amended by Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7731(a), 103 Stat. 2106, 2400–02).

394 H.R. REP. NO. 97-404, at 11 (1981).

395 *See* Pub L. No. 99-514, § 1551, 100 Stat. 2085, 2752–53 (1986). Perhaps most significantly, the 1986 legislation converted § 7430 from a temporary provision to a permanent one. Pursuant to a sunset provision contained in the original legislation, the TEFRA rules applicable to attorney's fees ceased to apply to Tax Court proceedings commenced after December 31, 1985. Pub. L. No. 97-248, § 292(a), 96 Stat. 324, 572–74 (1982). The relatively short effective period was intended to give Congress time to review the operation and effect of § 7430 before deciding under what conditions, if any, it should be extended. *See* H.R. REP. NO. 97-404, at 11 (1981). In connection with their consideration of the Tax Reform

then through the Technical and Miscellaneous Revenue Act of 1988 (TAMRA).[396] Taken together, these amendments extended the application of § 7430 and liberalized its application to administrative proceedings before the Service. In particular, Congress extended the scope of recoverable expenses beyond reasonable litigation costs to include "reasonable administrative costs,"[397] and it directed that the position of the United States to be evaluated included the position taken during administrative proceedings.[398] Perhaps most significantly, Congress provided the Service with explicit authority to settle taxpayer's requests for litigation and administrative costs at the administrative level while providing for Tax Court review of such administrative determinations.[399] The scope of relief provided by § 7430 and the various conditions thereto are detailed below.

a. Exhaustion of Administrative Remedies

To qualify for an award of litigation or administrative costs under § 7430, the requesting taxpayers must have exhausted all available administrative remedies.[400] The term "administrative remedies" is not defined in the statute; however, the regulations interpreting § 7430 generally require that a taxpayer attempt to resolve the dispute in an Appeals office conference prior to filing a petition in the Tax Court.[401] The legislative history of § 7430 indicates that the requirement to exhaust administrative remedies "is intended to preserve the role that the administrative appeals process plays in the resolution of tax disputes."[402] A taxpayer who actively participates in, and discloses relevant information during, the administrative appeals process will be considered to have exhausted available administrative remedies.[403] The failure to so participate or disclose information could render the party ineligible for an award under § 7430.[404]

Act of 1986, the House and Senate proposed different amendments to extend § 7430. These differences were resolved in conference and the Internal Revenue Code of 1986 extended § 7430 indefinitely. Pub. L. No. 99-514, § 1551(g), 100 Stat. 2085, 2753 (1986).

396 *See* Pub. L. No. 100-647, § 6239, 102 Stat. 3342, 3743–46 (1988).

397 *Id.* § 6239(a), 102 Stat. 3743–44 (amending I.R.C. § 7430(a)).

398 *Id.*, 102 Stat. 3745–46 (amending I.R.C. § 7430(c)(7)).

399 *Id.* (amending I.R.C. § 7430(c)(4)(B), (f)).

400 I.R.C. § 7430(b)(1).

401 *See* Treas. Reg. § 301.7430-1(a), (b).

402 H.R. REP. NO. 97-404, at 13 (1981).

403 Treas. Reg. § 301.7430-1(b)(1)(i), (2).

404 *Id.*; *see also* Popham v. Commissioner, T.C. Memo. 1984-652, 49 T.C.M. (CCH) 323, 325–26 (assuming for purposes of a motion that taxpayers exhausted their administrative remedies because they did engage to some extent in

Taxpayers are not required to exhaust administrative remedies if "the court determines that, under the circumstances of the case, such requirement is unnecessary."[405] The legislative history accompanying the enactment of § 7430 provides that it would be inappropriate to require a taxpayer to pursue an administrative appeal in a case involving an issue that the Service "has identified as one which it will litigate in all cases."[406] Moreover, if the Service has informed the taxpayer that administrative remedies need not be pursued, or if the taxpayer does not receive a preliminary notice of deficiency (30-day letter) prior to receipt of the statutory notice of deficiency, the administrative remedies generally will be considered exhausted for the purposes of § 7430.[407]

In *Minahan v. Commissioner*,[408] the Service contended that the prevailing petitioners were ineligible for a litigation award under § 7430 on two

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conferences with the Appeals office, but did not allow recovery of litigation costs as taxpayers did not meet the statutory definition of "prevailing party").

[405] Phillips v. Commissioner, 88 T.C. 529, 533 n.6 (1987) (quoting H.R. REP. NO. 97-404, at 13 (1981)), *rev'd*, 851 F.2d 1492 (D.C. Cir. 1988). In *Phillips*, the petitioner, who had been issued a preliminary notice of deficiency, did not request an Appeals office conference prior to the issuance of the statutory notice of deficiency. The Service contended that the petitioner was ineligible for an award of attorney's fees because he had failed to exhaust the administrative remedies available to him. *Id.* Although the court noted that the Appeals office conference is a "necessary and important administrative remedy," the failure to request an Appeals office conference was not fatal to the petitioner's request for a litigation award in this case because the sole issue tried in the case (whether the petitioner was entitled to file a joint return) was not raised by the Service until *after* the case was docketed. *Id.* at 532. Additionally, the court took into consideration the Service's disregard for the petitioner's many attempts to negotiate prior to trial, and the disregard by the Service of the procedures it had announced it would follow in a Revenue Ruling. *Id.* at 533. *See Award of Attorney's Fees in Tax Cases: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 99th Cong., 1st Sess. 21–22 (1985) (statement of Jim Keightley, Associate Chief Counsel for Litigation, Internal Revenue Service) [hereinafter House Hearings].

[406] H.R. REP. NO. 97-404, at 13 (1981).

[407] *See* Popham v. Commissioner, T.C. Memo. 1984-652, 49 T.C.M. (CCH) 323 (citing Treas. Reg. § 301.7430-1(f)(1), (2)); *see also* Vasquez v. Commissioner, T.C. Memo. 2007-6, 93 T.C.M. (CCH) 660 (applying Treas. Reg. § 301.7430-1(f)(2) in situation where the taxpayer did not receive a 30-day letter). In these circumstances, the Service's failure to require exhaustion must not be due to action of the taxpayer, and the taxpayer must agree to participate in an Appeals office conference after the case is docketed. *See* Swanson v. Commissioner, 106 T.C. 76, 98–99 (citing predecessor of Treas. Reg. § 301.7430-1(f)(2)). Once the Tax Court case has been docketed, the taxpayer does not have to affirmatively request an Appeals office conference to exhaust administrative remedies; rather, the taxpayer simply must not refuse to participate in such conference. *Id.*

[408] 88 T.C. 492 (1987).

grounds: first, the petitioners failed to participate in an Appeals office conference; and second, the petitioners refused to extend the time for assessment of tax.[409] In a reviewed opinion, the court addressed the first argument by explaining that § 7430 "does not speak in terms of administrative remedies in the abstract, but rather focuses on 'the administrative remedies available to *such party* [the prevailing party] within the Internal Revenue Service.'"[410] Because the Service did not make an Appeals office conference available, the court held that it "was not an administrative remedy available to *these* petitioners" and, consequently, was not a remedy they had failed to exhaust.[411]

The second argument of the Service was submitted in reliance on regulations interpreting § 7430, which at the time provided that the administrative remedies of a taxpayer would not be considered exhausted in cases in which a taxpayer refused to extend the time in which to assess the tax.[412] The court rejected this argument as well, noting that "an extension of time for assessment is not an administrative remedy at all."[413] Noting that the Service could not use the regulations to add a restriction to § 7430 that was unsupported by the statute or its legislative history,[414] the court determined the regulations to be invalid to the extent they imposed consent to an extension of the statute of limitations as a condition to eligibility for an award of litigation costs.[415]

Almost a decade after *Minahan*, Congress believed a clarification of the court's decision in that case was necessary.[416] In 1996, Congress added the final sentence of § 7430(b)(1),[417] directing that any failure to agree to an extension of time for the assessment of tax not be taken into account in determining whether a taxpayer has exhausted administrative remedies available to him.[418]

b. Prevailing Party

A recovery of costs and fees under § 7430 is available only if the taxpayer qualifies as a "prevailing party" in the proceeding.[419] To be

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409 *Id.* at 503.

410 *Id.* (quoting I.R.C. § 7430(b)(1) (1986)) (emphasis added by court).

411 *Id.* (emphasis in original).

412 *Id.* at 501–02; *see* Treas. Reg. § 301.7430-1(b)(1)(i)(B), (f)(2)(i) (1985).

413 *Minahan*, 88 T.C. at 503.

414 *Id.* at 503, 505–08.

415 *Id.* at 508.

416 H.R. REP. NO.104-506, at 37–38 (1996).

417 Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 703(a), 110 Stat. 1452, 1464 (1996).

418 I.R.C. § 7430(b)(1); Treas. Reg. § 301.7430-1(b)(4).

419 I.R.C. § 7430(c)(4)(A).

considered a prevailing party, the taxpayer must substantially prevail with respect to the amount in controversy or must substantially prevail with respect to the most significant issue or set of issues presented.[420] In 1998, Congress supplied an alternate route for a taxpayer to be considered a prevailing party—generally, if the taxpayer's liability turns out to be equal to or less than the amount provided in a "qualified offer" presented to and rejected by the Government.[421] Under either approach, the taxpayer must file a timely motion for the award of costs and must satisfy certain financial eligibility requirements designed to limit the remedy to those lacking sufficient financial resources.[422] While these conditions relate to the taxpayer, the Government, through the manner in which it prosecutes the proceeding, can prevent the taxpayer from being considered a prevailing party for purposes of the statute. If the Government establishes that its position in the proceeding was "substantially justified," the taxpayer will not be considered a prevailing party for purposes of the statute.[423]

If the taxpayer requests reimbursement of costs under § 7430 in connection with the trial of the underlying tax issue, the court determines whether the taxpayer constitutes a prevailing party under the statute.[424] However, this determination will be made by the Service if the final determination with respect to the underlying liability for tax, interest, or penalty is made at the administrative level.[425] The determination made by the Service in the latter scenario is subject to Tax Court review.[426]

(1) Taxpayer Substantially Prevails

Generally, Congress intended that the decision on the amount in controversy be determinative as to whether a party has substantially prevailed in the proceeding.[427] To substantially prevail as to the amount in controversy, the taxpayer must establish that the deficiency is substantially less than the amount originally proposed, with no precise percentage

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[420] I.R.C. § 7430(c)(4)(A)(i); Treas. Reg. § 301.7430-5(a); *see also* H.R. REP. NO. 97-404, at 15 (1981).

[421] I.R.C. § 7430(c)(4)(E). This provision was enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998. *See* Pub. L. No. 105-206, § 3101(e)(1), 112 Stat. 685, 728–29 (1998).

[422] I.R.C. § 7430(c)(4)(A)(ii) (incorporating filing requirements and net worth requirements of 28 U.S.C. § 2412(d)(1)(B) and (d)(2)(B), respectively).

[423] I.R.C. § 7430(c)(4)(B).

[424] I.R.C. § 7430(c)(4)(C)(ii).

[425] I.R.C. § 7430(c)(4)(C)(i).

[426] I.R.C. § 7430(f)(2).

[427] H.R. REP. NO. 97-404, at 15 (1981).

governing this determination.[428] In *Andrews v. Commissioner*,[429] the court addressed an apparent close case based on the reduction in asserted deficiency alone—the Service had determined a deficiency of $13,214.49 and the parties entered into a stipulated decision in the amount of $7,737.42. The court's resolution of the case demonstrates that the underlying dollar amounts cannot be divorced from the issues presented in the proceeding. The court in *Andrews* held that the petitioners were clearly not the prevailing party with respect to the amount in controversy because even though the petitioners had succeeded in reducing the amount of income for employer-provided housing, the Service prevailed on the more important issue of whether those amounts constituted additional income.[430]

Congress recognized that a single case often involves several unrelated issues and that the most significant issue may involve a lesser dollar amount.[431] Thus, § 7430 provides that a party can also qualify as a prevailing party if he prevails on the most significant issue or set of issues presented.[432] An issue or set of issues that concerns a lesser dollar amount in the proceeding nonetheless may represent the most significant issue or set of issues if it objectively is viewed as such by the taxpayer or the Service. This could be the case when the issue or set of issues has significant implications for the taxpayer in other tax years or on other transactions, or if the issue or set of issues has a significant effect on related parties.[433]

(2) Government's Position Not Substantially Justified

As originally enacted, § 7430 permitted reimbursement of the taxpayer's litigation expenses only if the Government's position in the civil proceeding

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[428] *See* Dixson Int'l Serv. Corp. v. Commissioner, 94 T.C. 708 (1990) (taxpayer substantially prevailed when asserted deficiencies reduced from $850,000 to $15,000); Cassuto v. Commissioner, 93 T.C. 256 (1989) (taxpayers substantially prevailed when asserted deficiencies of $49,000 were settled for $4,600); Hall v. Commissioner, T.C. Memo. 1989-187, 57 T.C.M. (CCH) 232 (taxpayers substantially prevailed when final settlement represented 17 percent of asserted deficiency). *But see* Bragg v. Commissioner, 102 T.C. 715 (1994) (taxpayers did not substantially prevail when court upheld more than 70 percent of asserted deficiency).

[429] T.C. Memo. 1985-559, 50 T.C.M. (CCH) 1404.

[430] *Id.* at 1405–06.

[431] H.R. REP. NO. 97-404, at 15 (1981).

[432] I.R.C. § 7430(c)(4)(A)(i)(II) (added by TEFRA, Pub. L. No. 97-248, § 292(a), 96 Stat. 324, 572–74 (1982), and amended by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1551(d)(1), 100 Stat. 2085, 2752).

[433] *See* McCauley v. Commissioner, T.C. Memo. 2014-44 (citing Treas. Reg. § 301.7430-5(e)).

was "unreasonable."[434] Whether the Government's position violated this standard of reasonableness was to be made "based upon all the facts and circumstances surrounding the proceeding,"[435] and the taxpayer carried the burden of proof on this issue.[436] If the taxpayer failed to carry this burden, he was not considered a prevailing party for purposes of the statute.

In connection with the Tax Reform Act of 1986,[437] Congress amended § 7430 by changing the requisite standard concerning the Government's position in the proceeding. Instead of the Government's position being "unreasonable," Congress adopted the standard of "not substantially justified."[438] The amendment resulted in conforming § 7430 more closely to the standard for recovery in other civil actions involving the Government. This change in phrasing, however, did not effect a considerable change in substance.

In determining whether the position of the Service was unreasonable under TEFRA, the Tax Court looked to cases under EAJA, which requires that the Government's position be "substantially justified" if it is to avoid the payment of attorney's fees and other litigation costs in cases in which it does not prevail.[439] Some courts in EAJA litigation have considered the tests of "reasonableness" and "substantial justification" to be the same.[440] Others, however, have held that the language "substantially justified"

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[434] I.R.C. § 7430(c)(2)(A)(i), as enacted by TEFRA, Pub. L. No. 97-248, § 292(a), 96 Stat. 324, 572–74 (1982); *see also* H.R. REP. NO. 97-404, at 12 (1981) (describing the "unreasonable" standard as adopted by TEFRA). For a thorough discussion of the "unreasonable" standard under § 7430 as originally enacted and the interpretation of this standard by courts, see Harold Dubroff & Charles M. Greene, *Recent Developments in the Business and Procedures of the United States Tax Court; Part Three: Reimbursement of Taxpayer Litigation Costs*, 52 ALB. L. REV. 87, 98–101 (1987).

[435] Baker v. Commissioner, 83 T.C. 822, 828 (1984).

[436] I.R.C. § 7430(c)(2)(A)(i), as enacted by TEFRA, Pub. L. No. 97-248, § 292(a), 96 Stat. 324, 572–74 (1982); *see also* Frisch v. Commissioner, 87 T.C. 838, 840 (1986); DeVenney v. Commissioner, 85 T.C. 927, 930 (1985).

[437] Pub. L. No. 99-514, 100 Stat. 2085 (1986).

[438] *Id.* § 1551(d)(1), 100 Stat. 2752. However, as discussed in Section E.2.b.(3) below, the burden of proof remained on the taxpayer to establish that the Government's position was not substantially justified.

[439] *See* Rutana v. Commissioner, 88 T.C. 1329, 1333 (1987); Don Casey Co. v. Commissioner, 87 T.C. 847, 858–60 (1986); Baker v. Commissioner, 83 T.C. 822, 828 (1984), *vacated on other grounds*, 787 F.2d 637 (D.C. Cir. 1986).

[440] *See* Ashburn v. United States, 740 F.2d 843, 850 (11th Cir. 1984); Foster v. Tourtellotte, 704 F.2d 1109, 1111–12 (9th Cir. 1983); S & H Riggers & Erectors, Inc. v. O.S.H.R.C., 672 F.2d 426, 430 (5th Cir. 1982).

provides for a somewhat more liberal standard of recovery than would be required by an ordinary reasonableness standard.[441]

Although, recognizing "possible differences" between the "substantially justified" and "reasonableness" standards, the Tax Court has approved a formulation barring recovery of costs under either standard if the Government's "case had a reasonable basis both in law and fact."[442] The "substantially justified" standard does not require that the Government's case be based on a "substantial probability of prevailing."[443] Moreover, the Tax Court has stated that "[b]ecause the 'substantially justified' standard is not a departure from the 'reasonableness standard,'" the TEFRA legislative history remains an important source "for guidelines in evaluating respondent's position."[444]

Reflecting the relevance of reasonableness to the inquiry concerning whether the Government's position is substantially justified, the Tax Court has recently articulated the following standard for evaluating the Service's position: "The Commissioner's position is substantially justified if it has a reasonable basis in both fact and law and is justified to a degree that could

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[441] *See* Spencer v. N.L.R.B., 712 F.2d 539, 558–59 (D.C. Cir. 1983); American Academy of Pediatrics v. Heckler, 580 F. Supp. 436, 438 (D.D.C.), *vacated in part*, 594 F. Supp. 69 (D.D.C. 1984). The *Spencer* court considered the test under a "substantially justified" standard to be more liberal for recovery, in part, because under the Equal Access to Justice Act the language "reasonably justified" was rejected in favor of "substantially justified." *See Spencer*, 712 F.2d at 558.

[442] Don Casey Co. v. Commissioner, 87 T.C. 847, 859–60 (1986) (quoting H.R. REP. NO. 96-1418, at 11 (1980)); *see also* Cox v. Commissioner, 121 F.3d 390, 393 (8th Cir. 1997) (adopting the same standard); Barton v. United States, 988 F.3d 58, 59 (8th Cir. 1993) (same).

[443] *Don Casey Co.*, 87 T.C. at 859–60 (quoting H.R. REP. NO. 96-1418, at 11 (1980)).

[444] Sher v. Commissioner, 89 T.C. 79, 84 (1987), *aff'd*, 861 F.2d 131 (5th Cir. 1988); Hubbard v. Commissioner, 89 T.C. 792, 798 (1987). The House report on § 7430, as originally enacted, provided as follows:

> The Committee intends that the determination by the court on this issue is to be made on the basis of the facts and legal precedents relating to the case as revealed in the record. Other factors the committee believes might be taken into account in making this determination include, (1) whether the government used the costs and expenses of litigation against its position to extract concessions from the taxpayer that were not justified under the circumstances of the case, (2) whether the government pursued the litigation against the taxpayer for purposes of harassment or embarrassment, or out of political motivation, and (3) such other factors as the court finds relevant.

H.R. REP. NO. 97-404, at 12 (1981) (quoted in *Sher*, 89 T.C. at 84–85).

satisfy a reasonable person."[445] This determination is made in light of the available facts and controlling law that formed the basis of the Government's position. Hence, the Government's position, although reasonable when established, may become unreasonable when additional facts and changed circumstances arise.[446] Additionally, where the determination of the Service concerns an exercise of discretion (such as whether the taxpayer's method of accounting clearly reflects income), a finding that the Service abused its discretion does not necessarily mean that the Service's position was not substantially justified.[447] Lastly, the Service generally is not subject to an award of costs under § 7430 where the underlying issue represents one of first impression.[448]

Prior to 1998, the Government remained "free by law to relitigate prior lost issues in other circuits."[449] Concerned that the freedom to continue litigating issues previously resolved in favor of the taxpayer by other circuit courts of appeals placed an undue burden on taxpayers who were required to continue resisting the Government's position,[450] Congress acted to disincentivize this practice in 1998.[451] The statute now requires a reviewing court to take into account whether the Government has lost in courts of appeal for other circuits on "substantially similar issues" in evaluating whether the Government's position is substantially justified.[452]

As originally enacted by TEFRA, § 7430 did not specify the point at which the "position of the United States" to be evaluated under the statute took shape. Specifically, did the position of the Government include the position it took in administrative proceedings before commencement of the case, or was judicial consideration of the Government's position under § 7430 limited to the posture assumed during the litigation?[453] In *Baker v. Commissioner*,[454] the court relied on the specific language of the statute to support its conclusion that a taxpayer could not base recovery under § 7430

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445 Dalton v. Commissioner, T.C. Memo. 2011-136, 101 T.C.M. (CCH) 1653, 1656; *see also Hubbard*, 89 T.C. at 798 (explaining the "substantially justified" inquiry to be "essentially a test of reasonableness").

446 *See* Lippitz v. Commissioner, T.C. Memo. 2007-293, 94 T.C.M. (CCH) 330.

447 *See* Mid-Del Therapeutic Center, Inc. v. Commissioner, T.C. Memo. 2000-383, 80 T.C.M. (CCH) 894.

448 *See* Estate of Wall v. Commissioner, 102 T.C. 391 (1994).

449 Allbritton v. Commissioner, 37 F.3d 183, 185 (5th Cir. 1994).

450 S. REP. NO. 104-174, at 48 (1998).

451 *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3101(d), 112 Stat. 685, 728 (1998).

452 I.R.C. § 7430(c)(4)(B)(iii).

453 For a thorough discussion of this former issue, see Dubroff & Greene, *supra* note 434, at 106–13.

454 83 T.C. 822 (1984), *vacated on other grounds*, 787 F.2d 637 (D.C. Cir. 1986).

on an unreasonable administrative position taken by the Service.[455] At the time, the statute required that the "*position* of the United States *in the civil proceeding*" be unreasonable for the costs and fees of a prevailing taxpayer to be shifted to the Service.[456] According to *Baker*, "Congress clearly distinguished a civil proceeding from an administrative proceeding by including the requirement of exhaustion of administrative remedies in section 7430(b)(2) before an award may be made of costs incurred in the *subsequent* civil proceeding."[457]

Congress rejected the approach taken by the Tax Court in *Baker* by amending § 7430 as part of the Tax Reform Act of 1986 to permit a taxpayer to recover litigation costs incurred because of an unreasonable position taken by the Service during certain administrative stages of the dispute.[458] In its current form, the statute provides that the "position of the United States" for purposes of § 7430 includes the position taken by the Government in a judicial proceeding *and* the position taken by the Government in any administrative proceeding.[459] However, the position in the latter context is to be determined as of the earlier of the issuance of a notice of decision from the IRS Office of Appeals, or the date of the notice of deficiency.[460] Hence, not all conduct at the administrative level will serve

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[455] *Baker*, 83 T.C. at 827; *see* Wasie v. Commissioner, 86 T.C. 962, 967 (1986) (holding that costs awarded under section 7430 are . . . measured by looking at the reasonableness of respondent's position from the time of the filing of a petition").

[456] *Baker*, 83 T.C. at 826; (quoting I.R.C. § 7430) (emphasis added by court).

[457] *Id.* at 827 (emphasis added by court).

[458] Pub. L. No. 99-514, § 1551(e), 100 Stat. 2085, 2753 (1986). Section 7430(c)(4) as amended in 1986 provided that the term "position of the United States" includes "any administrative action or inaction by the District Counsel of the Internal Revenue Service (and all subsequent administrative action or inaction) upon which [the civil] proceeding is based." I.R.C. § 7430(c)(4)(B) (1986).

The Tax Court opposed the amendment because of its concern that the already overcrowded Tax Court docket would be further burdened. Letter from Chief Judge Sterrett to Ronald Pearlman, Assistant Treasury Secretary for Tax Policy (Oct. 9, 1985) (filed at U.S. Tax Court in Rules Committee: Litigation Costs). Chief Judge Sterrett argued that allowing the taxpayer to recover costs traceable to administrative proceedings would require the court to "go behind the statutory notice," and determine whether the Service had acted unreasonably when it first decided against the taxpayer. *Id.* The Tax Court had refused to inquire into the Service's actions prior to the filing of the petition and, according to Chief Judge Sterrett, requiring it to do so would "reverse the existing law of our Court which tries all cases before it as a de novo proceeding. *Id.*

[459] I.R.C. § 7430(c)(7). The court may consider the administrative and litigating positions of the Government together if the Commissioner maintains the same position throughout both stages of the proceedings. Maggie Mgmt. Co. v. Commissioner, 108 T.C. 430, 442 (1997).

[460] I.R.C. § 7430(c)(7)(B).

as grounds for a § 7430 award of costs. Hence, positions taken by the Service at the examination phase and when the matter is before the IRS Office of Appeals (prior to the issuance of a notice of decision) remain outside of the scope of the statute.

(3) Burden of Proof

As originally enacted, § 7430 placed the burden on the taxpayer to establish that it was the prevailing party, i.e., that it had substantially prevailed in regard to the amount in controversy or a significant issue and that the position of the Government was unreasonable.[461] Some commentators questioned placing the burden of proof on the taxpayer since the benefit of the provision would thus tend to be limited to cases in which the Service exhibited "egregious misconduct or bad faith."[462] In addition, such a standard was more stringent than that applicable in other civil actions involving the Government. Under EAJA, the burden rests on the Government to show that its position was substantially justified if it is to avoid the payment of costs and fees in cases in which it does not prevail.[463] Arguably, it would not be difficult for the Service to justify a position it has legitimately taken, because it has readily available the tax returns, audit reports, and other information on which its position was based.[464] Taxpayers, however, might be forced to resort to lengthy and expensive discovery procedures to obtain information demonstrating that the position of the Service was unjustified. Imposing the burden of proof would needlessly and inappropriately hinder efforts to obtain justifiable litigation awards.

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[461] I.R.C. § 7430(c)(2)(A)(i), as enacted by TEFRA, Pub. L. No. 97-248, § 292(a), 96 Stat. 324, 572–74 (1982); *see also* Frisch v. Commissioner, 87 T.C. 838, 840 (1986); DeVenney v. Commissioner, 85 T.C. 927, 930 (1985).

[462] I. Paul Mandelken, *Recovering Attorney's Fees in Tax Court Cases after TEFRA*, 57 FLA. B.J. 707, 710 (1983); *see* Louise L. Hill, *Attorneys' Fees Under the Tax Equity and Fiscal Responsibility Act of 1982 — A Reevaluation,* 29 TAX NOTES 203, 204–05 (1985).

[463] H.R. REP. NO. 96-1418, at 10. However, EAJA also makes the "bad faith" exception to the "American rule" statutory, *see* Pub. L. No. 96-481, § 204(a), 94 Stat. 2321, 2328 (1982) (now codified at 28 U.S.C. § 2412(c)(2)), and the party seeking recovery of litigation costs bears the burden of proof on the issue of bad faith. *See* Mary Ann Link, *Award of Attorney Fees in Tax Litigation,* 19 VAL. U. L. REV. 153, 172 (1985). Thus, parties seeking attorneys' fees under EAJA usually allege that the position of the Government was not substantially justified, rather than alleging bad faith. *Id.* at 172–73.

[464] The Government has taken the opposite position arguing that important tax records are often in the hands of the taxpayer. See House Hearings, *supra* note 405, at 29 (statement of Glen L. Archer, Jr., Asst. Attorney General, Tax Division, Dep't of Justice).

The Service and the Tax Court, however, were concerned that transferring the burden of proof from the taxpayer would interfere with the orderly operation of tax litigation.[465] First, because the matter at issue is usually a taxpayer's private financial transaction, the taxpayer has ready access to the facts that can illuminate and lead to the resolution of the questions surrounding the transaction.[466] Second, the Service and Tax Court expressed concern that placing the burden of justifying its position on the Service would tend to reduce taxpayer willingness to stipulate and settle cases; the greater likelihood of recovery that would result from a shifting of the burden of proof to the Service could prove to be a lure to taxpayers that might discourage pre-trial settlements and increase the burden on the court.[467] Despite Senate proposals to allocate the burden of proof to the Service,[468] Congress retained pre-existing law imposing the burden on the taxpayer through the Tax Reform Act of 1986.

Congress revisited the matter in 1996. Believing that it was appropriate for the Service to demonstrate that it was substantially justified in maintaining its position when the taxpayer substantially prevails,[469] Congress shifted the burden of proof on this issue to the Government.[470] Congress further believed that the Service should be required to follow published guidance and private guidance provided to taxpayers.[471] Accordingly, in addition to shifting to the Government the burden of proving that its position was substantially justified, Congress created a rebuttable presumption that the Government's position lacked substantial justification if it did not adhere to published guidance provided to the public (including regulations, revenue rulings, revenue procedures, information releases, notices, and announcements) or private guidance

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465 *See* House Hearings, *supra* note 405, at 14–15 (statement of Roscoe L. Egger, Jr., Commissioner, Internal Revenue Service); *see also* Letter from Chief Judge Sterrett to Ronald Pearlman, Assistant Treasury Secretary for Tax Policy (Oct. 9, 1985) (filed at U.S. Tax Court in "Rules Committee: Litigation Costs").

466 *See supra* note 464.

467 *See id.* If the taxpayer establishes facts supporting allegations that the Government has acted arbitrarily and capriciously, the burden will shift to the Government to prove its case. *See* House Hearings, *supra* note 405, at 10 (statement of Chief Judge Sterrett).

468 H.R. 3838, 99th Cong., 2d Sess., § 541(b), 132 CONG. REC. S8817, S8850 (daily ed. June 26, 1986) (subsequently deleted in conference); S. REP. NO. 313, 99th Cong., 2d Sess. 198–99 (1986) (reporting on Senate Finance Committee proposed amendments to section 541 of H.R. 3838, subsequently enacted as the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085).

469 H.R. REP. NO. 104-506, at 37–38 (1996).

470 Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 701(b), 110 Stat. 1463–64 (1996) (enacting I.R.C. § 7430(c)(4)(B)(i)).

471 H.R. REP. NO. 104-506, at 37–38 (1996).

(including private letter rulings, technical advice memoranda, and determination letters) issued to the taxpayer seeking § 7430 relief.[472]

(4) Qualification as Prevailing Party Through Qualified Offer

Believing that settlement of tax cases should be encouraged whenever possible, Congress looked to Rule 68 of the Federal Rules of Civil Procedure to craft an incentive for the Service to settle cases for appropriate amounts.[473] This exercise led Congress to enact the qualified offer provisions of § 7430 as part of the Internal Revenue Service Restructuring and Reform Act of 1998.[474] These provisions supply an alternate, less precarious route by which taxpayers may qualify as a prevailing party entitled to relief under the statute. In this context, whether the taxpayer substantially prevailed in the proceeding and whether the Service's position was substantially justified are immaterial.

Pursuant to § 7430(c)(4)(E), if a taxpayer makes a "qualified offer" to the Service to settle the tax dispute which the Service rejects, the taxpayer will be treated as a prevailing party if the Service later obtains a judgment equal to or less than the tax liability specified in the offer (disregarding interest).[475] A "qualified offer" is defined in § 7430(g) as a written offer to the United States made during a defined period beginning on the date the Service issues the first letter of proposed deficiency that permits the taxpayer to seek a conference before the IRS Office of Appeals and ending on the date 30 days in advance of the date the taxpayer's case is first set for trial.[476] The offer must specify the amount of the taxpayer's liability (determined without regard to interest). To put the Service on notice of the potential implications, the offer must be designated as a "qualified offer" under § 7430 at the time the offer is made. Finally, in order to give the Service sufficient time to evaluate the offer, the offer must remain outstanding for 90 days after the offer was made or until the date the trial in the case commences, whichever occurs first.[477]

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[472] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 701(b), 110 Stat. 1463–64 (1996) (enacting I.R.C. § 7430(c)(4)(B)(ii)).

[473] *See* S. REP. NO. 105-174, at 48 (1998).

[474] Pub. L. No. 105-206, § 3101(e), 112 Stat. 685, 728–29 (1998).

[475] A judgment for this purpose does not any judgment issued pursuant to a settlement, or a judgment issued in any proceeding in which the amount of tax liability is not at issue (such as a declaratory judgment action). I.R.C. § 7430(c)(4)(E)(ii). A taxpayer's subsequent settlement of the case therefor precludes recovery of administrative or litigation costs pursuant to the qualified offer provisions of § 7430.

[476] I.R.C. § 7430(g)(2).

[477] I.R.C. § 7430(g)(1)(D). The Service's rejection of the offer operates to close the period the qualified offer must remain open. *Id.* Accordingly, nothing in the

To the extent the qualified offer provisions of § 7430 offer taxpayers a streamlined means of recovering administrative and litigation costs, the streamlined procedure comes at a cost. In this context, recoverable administrative and litigation expenses are limited to those incurred on or after the date of the qualified offer.[478] This limitation encourages taxpayers to make qualified offers as early as possible in the proceeding, in keeping with the legislative goal of encouraging settlement of these cases.

c. Protraction of Proceedings

An award of reasonable administrative or litigation costs under § 7430 to which the taxpayer otherwise would be entitled is precluded to the extent attributable to any period during which the taxpayer "unreasonably protracted" the proceeding.[479] The taxpayer bears the burden of proving the absence of unreasonable protraction.[480] As a practical matter, this means that the taxpayer must include a statement in the motion for costs that the taxpayer did not unreasonably protract the proceedings,[481] and then defend against any such contention by the Service.

d. Financial Requirements

In contrast to EAJA,[482] § 7430 as enacted by TEFRA did not base a party's eligibility for an attorney's fee award on net worth. Rather, TEFRA

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qualified offer provisions entitles to Service to later accept a qualified offer that it previously rejected.

[478] I.R.C. § 7430(c)(4)(E)(iii)(II).

[479] I.R.C. § 7430(b)(3); *see also* Mearkle v. Commissioner, 90 T.C. 1256 (1988) (finding that taxpayer unreasonably protracted proceedings by refusing to accept full concession by the Service four months before trial); Nordvick v. Commissioner, 67 F.3d 1489, 1494 (9th Cir. 1995) (upholding determination that taxpayers unreasonably protracted proceedings by failing to promptly review the Service's calculations of their tax liability upon receipt after judgment). *But see* Mason v. Commissioner, T.C. Memo. 1998-400, 76 T.C.M. (CCH) 805 (holding that failure to sign proposed settlement document due to failure to reach agreement over litigation costs did not constitute unreasonable protraction of proceedings).

[480] *See* Swanson v. Commissioner, 106 T.C. 76, 85 (1996); TAX CT. R. 232(e) (July 6, 2012 ed.).

[481] *See* TAX CT. R. 231(b)(6) (July 6, 2012 ed.).

[482] As enacted, EAJA provided:

> (B) "party" means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 exempt from taxation

limited the amount recoverable under § 7430 to $25,000,[483] presumably providing a disincentive for wealthy persons to pursue litigation with the Government in the hopes of winning a litigation award. Apparently, Congress declined to include the economic eligibility requirements of EAJA in the TEFRA provisions because of the apprehension that such a requirement might create factual disputes which would further burden the courts.[484]

As part of the Tax Reform Act of 1986, Congress revised § 7430 by eliminating the cap on reimbursable costs; in its place, Congress based the eligibility of parties for an award of costs under § 7430 on their net worth.[485] This amendment sought to further congressional policy of conforming the standards for recovery of attorney's fees in tax and non-tax cases.[486] Under current levels, an award of costs under § 7430 generally is not available to individuals whose net worth exceeds $2 million or to businesses or organizations whose net worth exceeds $7 million and which have more than 500 employees at the time the action was commenced.[487] A taxpayer must supply proof of net worth when making a request for reimbursement of costs under § 7430,[488] and the failure to do so can cause the request to be denied.[489]

The net worth limitations under § 7430 created confusion concerning their application to estates of deceased taxpayers[490] and to individuals who filed joint returns.[491] Seeking to clarify the application of the net worth

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> under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed . . . .

Pub. L. No. 96-481, § 204, 94 Stat. 2321, 2329 (1980) (amended 1985).

[483] I.R.C. § 7430(b)(1) (1982).

[484] House Hearings, *supra* note 405, at 33 (statement of Glen L. Archer, Jr., Asst. Attorney General, Tax Division, Dep't of Justice).

[485] Pub L. No. 99-514, § 1551(a), 100 Stat. 2085, 2752 (1986).

[486] STAFF OF THE JOINT COMM. ON TAX'N, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 1298–99 (Comm. Print 1987).

[487] *See* I.R.C. § 7430(c)(4)(A)(ii) (incorporating net worth requirements of 28 U.S.C. § 2412(d)(2)(B)). Organizations that are tax exempt pursuant to § 501(c)(3) are exempted from the net worth limitation. 28 U.S.C. § 2412(d)(2)(B).

[488] *See* TAX CT. R. 231(b)(4).

[489] *See* Dixson Int'l Serv. Corp. v. Commissioner, 94 T.C. 708 (1990).

[490] *See, e.g.*, Boatman's First Nat'l Bank v United States, 723 F. Supp. 163, 169 (W.D. Mo. 1989) (finding the $7 million limit applicable to organizations governed the estate's qualification for a § 7430 award).

[491] *See, e.g.*, Hong v. Commissioner, 100 T.C. 88 (1993) (applying the $2 million limitation separately to each spouse).

requirements of § 7430 so as to avoid "needless litigation over procedural issues,"[492] Congress enacted § 7430(c)(4)(D) as part of the Taxpayer Relief Act of 1997.[493] This provision clarifies that an estate of a deceased individual must satisfy the $2 million net worth limitation as of the date of the decedent's death.[494] A trust also must satisfy the $2 million net worth limitation, as determined on the last day of the taxable year involved in the proceeding.[495] With respect to spouses filing joint returns, the amending legislation clarified that the $2 million limitation would be applied separately to each spouse.[496] Accordingly, if one spouse possesses a net worth in excess of $2 million but the other does not, an award of costs under § 7430 will be available for the qualifying spouse only. The 1997 legislation did not address the application of the net worth and size limitations under § 7430 to partnership actions brought under the TEFRA unified audit and litigation procedures,[497] and confusion persists as to whether the net worth limitations should be applied at the entity or partner level.[498]

e. Reimbursable Costs

(1) Reasonable Litigation Costs

In its original form, § 7430 limited a taxpayer's recovery to "reasonable litigation costs." Reimbursable litigation costs include the following: court fees; attorneys' fees; expenses of expert witnesses; and the costs of any study, analysis, engineering report, test, or project necessary to preparation of the taxpayer's case.[499]

Perhaps the most significant of these litigation costs is attorneys' fees. This category encompasses not only the rates charged by licensed attorneys representing the taxpayer, but also expenses attributable to paralegals and law clerks.[500] The fees charged by non-attorney representatives authorized to practice before the Tax Court also are recoverable under this category.[501] The statutory rate for recoverable attorney's fees is set at $125 per hour, as

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[492] H.R. REP. NO. 105-148, at 638–39 (1993).

[493] Pub. L. No. 105-34, § 1453(a), 111 Stat. 788, 1055 (1997).

[494] I.R.C. § 7430(c)(4)(D)(i)(I).

[495] I.R.C. § 7430(c)(4)(D)(i)(II).

[496] I.R.C. § 7430(c)(4)(D)(ii).

[497] *See* I.R.C. §§ 6226, 6228.

[498] *See* Foothill Ranch Co. Partnership v. Commission, 110 T.C. 94 (1998) (reasoning that the net worth limitations were to be applied at the partner level in this context).

[499] I.R.C. § 7430(c))(1).

[500] *See* O'Bryon v. Commissioner, T.C. Memo. 2000-379, 80 T.C.M. (CCH) 859.

[501] I.R.C. § 7430(c)(3)(A).

adjusted for increases in the cost of living from 1995.[502] As of 2013, the inflation-adjusted hourly rate stood at $190. [503]

The showing of a special factor by the taxpayer may serve to increase the rate for fees of a representative.[504] The limit on recoverable fees does not apply to a representative who qualifies as a "specially qualified representative" under the regulations.[505] A specially qualified representative is narrowly defined as a representative possessing distinctive knowledge or a unique and specialized skill that is necessary for adequate representation of the taxpayer in the proceeding.[506] The regulations clarify that knowledge of tax law and experience representing taxpayers before the Service do not constitute distinctive knowledge or a specialized skill set in this setting, while citing knowledge of patent law or international law as two examples of distinctive knowledge or skill sets that do qualify.[507]

For costs incurred before January 18, 1999, only one special factor was included in the statutory language of § 7430: the limited availability of qualified attorneys for the proceeding.[508] In 1998, Congress added two considerations that it believed justified the payment of higher hourly rates when determining reasonable costs: the difficulty of the issues presented in the case or the limited local availability of tax expertise.[509] To avail the special factor adjustment, a taxpayer must show that no specially qualified representative was available at the statutory rate. The taxpayer may do so by submitting an affidavit by the taxpayer or the taxpayer's counsel that a specially qualified representative who practices within a reasonable distance from the taxpayer's principal residence or office would normally charge a client similar to the taxpayer at a rate higher than the statutorily prescribed amount.[510]

Believing that the value of legal services rendered in pro bono representation of taxpayers should be recognized and that pro bono representation should be encouraged, and, further, that the Service should not be relieved of its obligation to bear reasonable administrative and litigation costs because representation was provided to the taxpayer on a

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[502] I.R.C. § 7430(c)(1)(B)(iii), (c)(1)(B) (flush language).

[503] Rev. Proc. 2012-41, § 3.25, 2012-45 I.R.B. 539.

[504] I.R.C. § 7430(c)(1)(B)(iii).

[505] *See* Treas. Reg. § 301.7430-4(b)(2)(ii).

[506] Treas. Reg. § 301.7430-4(b)(2)(ii).

[507] *Id.*; see also Estate of Cervin v. Commissioner, 200 F.3d 351 (5th Cir. 2000) (special factor justifying increased hourly rate requires nonlegal or technical abilities).

[508] *See, e.g.,* Pierce v. Underwood, 487 U.S. 552 (1988).

[509] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 § 3101(a)(2), 112 Stat. at 727–28 (1998) (amending I.R.C. § 7430(c)(1)(B)(iii)); *see also* H.R. REP. NO. 105-364, at 58 (1997).

[510] Treas. Reg. § 301.7430-4(b)(3)(iii)(C).

pro bono basis,[511] Congress expanded the scope of reimbursable costs under § 7430 into the pro bono arena.[512] Pursuant to § 7430(c)(3)(B), a court may award reasonable attorney's fees in excess of fees paid or incurred if the fees are less than the reasonable attorney's fees because an individual is representing the prevailing party for no fee or a nominal fee.[513] The exception for pro bono representation does not extend to attorneys who represent themselves in tax proceedings; the opportunity cost of the taxpayer-attorney's services remains unrecoverable.[514]

(2) Reasonable Administrative Costs

Passage of TAMRA in 1988 expanded the scope of expenses subject to a § 7430 award to include reasonable administrative costs.[515] In addition to administrative fees or similar charges imposed by the Service, the scope of reimbursable administrative expenses encompasses the same scope of professional fees (attorneys' fees, expert witness fees, etc.) that are capable of being reimbursed in the litigation setting, and the reasonableness of such administrative costs are determined in the same manner as that of litigation costs.[516]

The scope of reimbursable administrative costs is limited to those incurred on or after the earliest of (1) the date the taxpayer receives the notice of decision from the IRS Office of Appeals, (2) the date of the notice of deficiency, or (3) the date the Service sends the first letter of proposed deficiency that allows the taxpayer an opportunity to seek a conference with the IRS Office of Appeals (the 30-day letter).[517] For purposes of determining whether the Service's position in the

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[511] H.R. REP. NO. 105-364, at 58 (1997).

[512] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3101(c), 112 Stat. at 728 (1998).

[513] Any award pursuant to this exception must be paid to the individual who rendered the services or such individual's employer. I.R.C. § 7430(c)(3)(B).

[514] Frisch v. Commissioner, 8 T.C. 838 (1986).

[515] Pub. L. No. 100-647, § 6239, 102 Stat. 3743–46 (1988) (enacting I.R.C. § 7430(c)(2)).

[516] I.R.C. § 7430(c)(2)(B); *see also* H.R. REP. NO. 100-1104, at 225 (1988).

[517] I.R.C. § 7430(c)(2). The Internal Revenue Service Restructuring and Reform Act of 1998 added the third option (30-day letter) for costs incurred more than 180 days after July 22, 1998. Prior to that amendment, administrative costs could only be reimbursed from the earlier of the date of the notice of deficiency or the date the taxpayer received a decision from the IRS Office of Appeals. *See* Estate of Gillespie v. Commissioner, 103 T.C. 395, 396–98 (1994). The lack of the third demarcation point had been criticized by practitioners as not truly affording most taxpayers the opportunity to receive any administrative costs. *See* Taxation Section Los Angeles County Bar Association, *Legislative Recommendation to Amend the Internal Revenue Code Section 7430*, 89 TAX NOTES TODAY 127–24 (May 1, 1989).

administrative setting was substantially justified, the Service's position is established as of the earlier of either the date the taxpayer receives notice of decision from the IRS Office of Appeals, or the date of the notice of deficiency.[518]

A taxpayer may seek reimbursement for the costs of resolving the controversy and the costs to seek such reimbursement.[519] To do so, a taxpayer must submit an application with the Service for administrative costs within 90 days of the Service's final decision as to the tax, interest, or penalty.[520] As discussed below, the Service's determination in this setting is subject to Tax Court review.[521]

3. Tax Court Jurisdiction

   a. Review of Agency Determinations Concerning Administrative Costs

A taxpayer who seeks reimbursement from the Service of administrative costs pursuant to § 7430(b)(4) may seek Tax Court review of the resulting determination § 7430(f)(2). If the Service sends a notice of decision concerning the request for administrative expenses to the taxpayer by registered or certified mail, the taxpayer must file a petition for Tax Court review within 90 days of such mailing.[522] If the Service does not respond to a taxpayer's request for administrative costs within six months of its filing, the Service's failure to respond is deemed a decision denying such request.[523] The taxpayer may then petition the Tax Court for review, but is not subject to the 90-day limitations period for invoking the court's jurisdiction.

The court conducts its review generally in accordance with small tax case procedures of § 7463, except that the monetary limitations imposed by § 7463 do not apply.[524] Any decision of the court disposing of a petition for review of a determination concerning administrative costs is appealable in the same manner as a decision of the court.[525] Accordingly, unlike small

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[518] I.R.C. § 7430(c)(7).

[519] Maggie Management Co. v. Commissioner, 108 T.C. 430, 440 (1997) ("A motion for litigation costs may seek an award for certain expenses connected with the filing and prosecution of the motion . . . .").

[520] I.R.C. § 7430(b)(4).

[521] I.R.C. § 7430(f)(2).

[522] *Id.*

[523] *See* Bent v. Commissioner, T.C. Memo. 2009-146, 97 T.C.M. (CCH) 1825 (citing Treas. Reg. § 301.7430-2(c)(6)).

[524] I.R.C. § 7430(f)(2); *see also* TAX Ct. R. 274 (July 6, 2012 ed.).

[525] I.R.C. § 7430(f)(3).

tax cases, the decision in a petition for administrative costs will not be issued as a summary opinion.[526]

Relatively few opinions have addressed taxpayer claims for administrative costs brought pursuant to § 7430(f)(2). And in those cases, taxpayers have largely proven unsuccessful at pursuing their claims. One particularly difficult aspect of these claims is that the "position of the United States" that must be substantially justified does not include the Service's position at every stage of the administrative process. Rather, the position cannot exist prior to the earlier of the date the IRS Office of Appeals issues a notice of decision or the date the Service issues a notice of deficiency.[527] The taxpayers in *Rathburn v. Commissioner*[528] encountered this problem. The taxpayers never received a notice of deficiency, and the communication they received from an Appeals Officer did not rise to the level of a notice of decision contemplated by § 7430. Accordingly, the Service never took a position in the taxpayers' case, which in turn precluded the taxpayers from qualifying as prevailing parties under the statute.[529]

b. Motions to Recover Litigation or Administrative Costs in Docketed Cases

If the Tax Court's jurisdiction has been invoked in a proceeding concerning the underlying tax liability, a taxpayer seeking reimbursement of litigation and administrative costs under § 7430 does so by filing a written motion with the court.[530] The motion must be filed within 30 days of service on the parties of either an opinion resolving the substantive issues, or a transcript of the oral findings of fact and opinion.[531] If the parties have settled all other issues in the case, but do not agree on an award for reasonable administrative costs, then a motion for those costs must accompany the stipulation of settlement.[532]

It is important to emphasize that a claim for litigation or administrative costs under § 7430 "is to be made only after all of the other issues in the

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[526] *See* TAX Ct. R. 274 (July 6, 2012 ed.).

[527] *See* I.R.C. § 7430(c)(7).

[528] 125 T.C. 7 (2005).

[529] *Id.* at 14; *see also* Florida Country Clubs, Inc. v. Commissioner, 122 T.C. 73 (2004) (similarly holding that the taxpayer was not a prevailing party due to the failure of the Service to take a § 7430 position in the administrative proceeding); Kwestel v. Commissioner, T.C. Memo. 2007-135, 93 T.C.M. 1288 (same).

[530] *See* TAX CT. R. 231(b) (July 6, 2012 ed.).

[531] TAX CT. R. 231(a)(2)(A), (B) (July 6, 2012 ed.).

[532] TAX CT. R. 231(a)(2)(C) (July 6, 2012 ed.). For fully settled cases, including where the parties agree to the award of reasonable litigation and administrative costs, the parties include the amount of administrative costs in their stipulated decision filed with the court. TAX CT. R. 231(a)(1) (July 6, 2012 ed.).

case have been either settled by the parties or determined by the Court."[533] A claim for litigation or administrative costs which is included in the petition, or otherwise made before the decision on the merits of the case, will not be considered.[534]

The Tax Court addressed the ripeness of the taxpayer's claim for litigation and administrative expenses in *McWilliams v. Commissioner*.[535] The Service in that case had made a jeopardy assessment and levy against the taxpayer while his case was pending before the court. After finding that the Service failed to prove that the jeopardy assessment and levy was reasonable and pursuant to taxpayer's motion under § 7429, the court ordered the assessment abated and the levy released.[536] The taxpayer filed his motion for costs under § 7430 within 30 days of the decision concerning the § 7429 matter. However, several other issues related to the deficiency proceeding remained, none of which had been decided when the taxpayer filed his motion. The court reasoned that the jeopardy assessment decision was separate from the deficiency proceeding, and that its order concerning the jeopardy assessment and levy did not constitute an interlocutory ruling.[537] Consequently, the taxpayer's motion for costs attributable to the § 7429 proceeding was not premature.[538]

Following service of a motion for litigation or administrative costs, the Commissioner must file a written response within 60 days.[539] After the date for filing the Commissioner's response, the Service and the taxpayer are required to confer and attempt to reach an agreement regarding each of the allegations by the parties.[540] Nonetheless, once the Commissioner's response is received, the court may take action on the motion.[541] Ordinarily, the court will dispose of the motion without a hearing, unless there appears to exist a "bona fide factual dispute" that cannot be resolved

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[533] Rules Comm. Note, TAX CT. R. 231, 79 T.C. 1155 (1982); *see also* Stevenson v. Commissioner, T.C. Memo. 1986-207, 51 T.C.M. (CCH) 1050, 1061–62 n.14 (rejecting litigation cost claims included in petition); Roth v. Commissioner, T.C. Memo. 1986-20, 51 T.C.M. (CCH) 287, 289 n.6 (same).

[534] Tax Court Rules provide that "[a] claim for reasonable litigation costs shall not be included in the petition." TAX CT. R. 34(b) (July 6, 2012 ed.); *see also* Failla v. Commissioner, T.C. Memo. 1986-39, 51 T.C.M. (CCH) 355, 365 (1986) ("In general, the time for making such claims is after the substantive issues have been resolved. Should petitioners desire to pursue this matter, they must comply with Rules 230 and 231.")

[535] 104 T.C. 320 (1995).

[536] *Id.* at 321.

[537] *Id.* at 325–26.

[538] *Id.* at 326.

[539] TAX CT. R. 232(b) (July 6, 2012 ed.).

[540] TAX CT. R. 232(c) (July 6, 2012 ed.).

[541] TAX CT. R. 232(a)(1) (July 6, 2012 ed.).

otherwise.[542] The disposition of the motion for litigation costs will be included in the court's decision,[543] and an order which grants or denies a motion for a litigation award is subject to appeal in the same manner as a decision or judgment.[544]

The Tax Court's jurisdiction to resolve a party's motion for reasonable litigation or administrative expenses under § 7430 following the court's dismissal of the underlying proceeding for lack of jurisdiction presents an interesting issue. In the 1986 case of *Fuller v. Commissioner*,[545] the Tax Court refused to entertain a motion for an award of litigation costs after dismissal of a case for lack of jurisdiction due to an invalid statutory notice.[546] The Seventh Circuit Court of Appeals subsequently adopted a corresponding view when affirming an order of the Tax Court, holding that the court had no jurisdiction to hear a motion for an award of litigation costs when it did not have jurisdiction to consider the merits of the case.[547]

The *Fuller* decision did not prove long lasting. The Tax Court overruled it a year later in *Weiss v. Commissioner*.[548] The Service in *Weiss* moved to dismiss because of its failure to comply with the TEFRA partnership provisions.[549] The motion was granted and the petitioners moved for an award of litigation costs.[550] Although the Tax Court reserved judgment on whether the petitioner qualified for a litigation award, the court concluded that it had the authority to grant a motion for a litigation award if appropriate.[551] The court, in rejecting its prior position, stated that it had previously failed to properly consider the language "in any civil proceeding" that then appeared in the statute.[552] A case commences with the filing of a petition with the Tax Court and "[i]t is axiomatic that a case properly commenced is a civil proceeding."[553] According to *Weiss*, dismissal of an action "does not nullify the proceeding or void the petition," and the dismissal has binding legal effect to preclude assessing the deficiency

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542 TAX CT. R. 232(a)(2) (July 6, 2012 ed.).

543 I.R.C. § 7430(f)(1); TAX CT. R. 232(f) (July 6, 2012 ed.).

544 I.R.C. § 7430(f)(1).

545 T.C. Memo. 1986-33, 51 T.C.M. (CCH) 336. In *Fuller*, the notice of deficiency was invalid because it attempted to determine a deficiency for partnership items outside the procedures prescribed by §§ 6221–6233.

546 *Id.* at 337–38.

547 Sanders v. Commissioner, 813 F.2d 859, 861–62 (7th Cir. 1987).

548 88 T.C. 1036 (1987).

549 *Id.* at 1037.

550 *Id.* at 1037.

551 *Id.*

552 *Id.* at 1039–40 (analyzing I.R.C. § 7430(a) (1986)). The statute now refers to "court proceeding" that means "any civil action" brought in a court of the United States. I.R.C. § 7430(c)(6).

553 *Weiss*, 88 T.C. at 1039.

previously determined.[554] Having reasoned that a case does not lose its nature as a civil proceeding following dismissal for lack of jurisdiction, the court held that it had the authority under § 7430(a)(2) to award reasonable litigation costs.[555] The Tax Court's holding in *Weiss* was examined and adopted by the Ninth Circuit Court of Appeals in *Sponza v. Commissioner*.[556]

F. Review of Whistleblower Award Determinations

The ability of the Service to pay awards to informants who provide information concerning violations of the tax laws has a long history, with the origins of the whistleblower program tracing back to 1867.[557] Prior to 2006, the whistleblower program as reflected in § 7623 essentially amounted to a legislative grant of agency discretion.[558] The Service decided whether payment of an award was appropriate and, subject to relatively modest dollar-denominated statutory caps, the amount of any such award.[559] A disappointed informant possessed little if any recourse. Judicial review was thought to rest with the Court of Federal Claims, yet that court repeatedly held that it lacked subject matter jurisdiction to review denials of awards on grounds that the statute and implementing guidance did not create a

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[554] *Id.*

[555] *Id.*

[556] 844 F.2d 689 (9th Cir. 1988).

[557] For a historical perspective on the IRS Whistleblower Program, see Internal Revenue Service, *History of the Whistleblower/Informant Program* (2008), *available at* http://www.irs.gov/uac/History-of-the-Whilstleblower-Informant-Program; *see also* Dennis J. Ventry, Jr., *Whistleblowers and* Qui Tam *for Tax*, 61 TAX LAW. 357, 360–68 (2008).

[558] Prior to the amendment of the statute in 2006, § 7623 provided as follows:

> The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for—
>
> (1) detecting underpayments of tax, and
>
> (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,
>
> in cases where such expenses are not otherwise provided by law.
>
> Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

I.R.C. § 7623 (prior to amendment by Pub. L. No. 109-432, § 406(a)(1) (2006)).

[559] *See* Sarcena v. United States, 508 F.2d 1333, 1336 (Ct. Cl. 1975) ("It is clear . . . that the District Director has complete discretion in the first instance to determine whether an award should be made and, in the second, to fix what, in his judgment, amounts to adequate compensation."); *see also* Ventry, *supra* note 557, at 362 (noting that § 7623 awards were capped at $2 million under prior law, with the cap standing at $50,000 as late as 1989).

substantive right to monetary damages.[560] If the Government decided to pay a discretionary award to an informant, the amount of the award would not be disturbed unless the determination lacked a rational basis.[561]

Following the release of a report by the Treasury Inspector General for Tax Administration detailing shortcomings in the Whistleblower Program,[562] Congress overhauled § 7623 as part of the Tax Relief and Health Care Act of 2006.[563] Preserving the prior discretionary program in a slightly modified form in § 7623(a), the legislation introduced a non-discretionary award program through § 7623(b). Pursuant to this new provision, if the Commissioner proceeds with administrative or judicial action based on information provided by an informant, the informant is entitled to a minimum award of 15 percent of the collected proceeds—including penalties, interest, additions to tax, and other additional amounts—resulting from the action or from any settlement reached in response to the action.[564] While these awards are subject to a statutory cap of 30 percent of collected proceeds,[565] whistleblower awards under § 7623(b) are not subject to an absolute dollar-figure ceiling.

The non-discretionary whistleblower award program under § 7623(b) is not available across the board. The amount in dispute between the Government and the taxpayer to whom the disclosed information relates must exceed $2 million.[566] Furthermore, if the disclosed information pertains to an individual, the individual's gross income for the year at issue

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[560] In *Krug v. United States*, 168 F.3d 1307 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit explained that the existence of the whistleblower statute and administrative guidance concerning its application did not operate to create an implied-in-fact contract obligating the Government to pay an informant. Rather, a contractual obligation would arise only once the Government agreed to pay the informant a specific sum for the disclosed information. *Id.* at 1309; *see also* Destefano v. United States, 52 Fed. Cl. 291 (2002); Confidential Informant v. United States, 46 Fed. Cl. 1 (2000) (both holding that § 7623 did not constitute a money-mandating statute).

[561] *See* Saracena v. United States, 508 F.2d 1333, 1336 (Ct. Cl. 1975) (placing burden on plaintiff to establish the absence of a rational basis to support the Government's determination of amount of award); *see also Krug*, 168 F.3d at 1310 (suggesting that the Government's exercise of discretion to determine an award may not be subject to review at all based on administrative law norms).

[562] *See* Treasury Inspector General for Tax Administration, The Informants' Rewards Program Needs More Centralized Management Oversight, 2006-30-092 (June 6, 2006).

[563] Pub. L. No. 109-432, § 406, 120 Stat. 2922, 2958–60 (2006).

[564] I.R.C. § 7623(b)(1). This provision applies to information provided by the informant on or after the December 20, 2006 effective date of the amending legislation. Pub. L. No. 109-432, § 406(a)(1), 120 Stat. at 2960.

[565] *Id.*

[566] I.R.C. § 7623(b)(5)(B).

must exceed $200,000.[567] For cases that fail to satisfy these thresholds, the pre-existing discretionary award program of § 7623(a) remains available.

The amount of a non-discretionary award under § 7623(b) is subject to a host of potential reductions. In cases where the informant's disclosure constitutes a "less substantial contribution"[568] due to the Government's access to the information through other means, the Service may reduce the amount of the award (presumably to zero), and the award is subject to a considerably reduced cap of 10 percent of the collected proceeds.[569] Additionally, the informant's participation in the disclosed activity may adversely affect the amount of the award. The Commissioner is authorized to reduce any non-discretionary award under § 7623(b) upon a determination that the informant planned or initiated the actions that led to the underpayment of tax or violation of the tax laws. If the informant is criminally convicted for this behavior, the Commissioner must deny the award altogether.[570]

In addition to strengthening the rights of informants to monetary awards for their disclosures, the 2006 amendments to § 7623 addressed the prevailing absence of judicial review of award determinations. Pursuant to § 7623(b)(4), an informant may appeal any determination affecting a non-discretionary award under § 7623(b) to the Tax Court within 30 days of such determination.[571] In somewhat redundant fashion, the statute parenthetically affirms the Tax Court's jurisdiction to entertain such an appeal. Although the statute does not limit judicial review to the Tax Court in literal terms, the Court of Federal Claims has interpreted the Tax Court's jurisdiction as exclusive in this context.[572] The court justified this interpretation by pointing to the statute's singular provision of an appeal right to the Tax Court against the prevailing backdrop of the absence of judicial review of whistleblower award determinations.[573]

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[567] I.R.C. § 7623(b)(5)(A).

[568] A "less substantial contribution" concerns a disclosure based on allegations "resulting from a judicial or administrative hearing, from a government report, hearing, audit, or investigation, or from the news media." I.R.C. § 7623(b)(2)(A).

[569] *Id.*

[570] I.R.C. § 7623(b)(3).

[571] Tax Court review is available only for appeals from determinations that relate to information provided by the informant after the December 20, 2006 effective date of the amending legislation. Wolf v. Commissioner, T.C. Memo. 2007-133, 93 T.C.M. (CCH) 1273.

[572] *See* Dacosta v. United States, 82 Fed. Cl. 549 (2008).

[573] The Court of Federal Claims in *Dacosta* relied heavily on the Supreme Court decision in *Hinck v. United States*, 550 U.S. 501 (2007), in which the Court reasoned that the grant of jurisdiction to the Tax Court to review the Secretary's determinations concerning the abatement of interest under § 6404(e) was exclusive.

The Tax Court's jurisdiction under § 7623(b)(4) is predicated upon a determination by the Commissioner "regarding" a non-discretionary award under § 7623(b), followed by the filing of a petition within 30 days of such determination.[574] The issue of what constitutes a determination by the Commissioner in this setting therefore assumes critical importance. The 2006 legislation directed the Secretary to issue guidance concerning the operation of a Whistleblower Office to be administered by the Service.[575] The Commissioner did so through the issuance of Notice 2008-4[576] which, among other things, provides that the Whistleblower Office will send written correspondence to the informant once a final determination regarding the informant's claim has been made.[577] In most cases, this item of correspondence will serve as the predicate to the Tax Court's jurisdiction in this setting.

The Commissioner initially took the position that a determination giving rise to Tax Court jurisdiction under § 7623(b)(4) referred to a determination by the Service to make an award to the informant after the Whistleblower Office undertook administrative or judicial action in response to the disclosed information.[578] Under this interpretation, Tax Court review under § 7623(b)(4) would be limited to examining the amount of any award the Commissioner decided to issue. A decision to deny a § 7623(b) award altogether, on the other hand, would continue to escape judicial scrutiny.[579] The Tax Court rejected this narrow interpretation of a § 7623(b)

[574] The Tax Court Rules of Practice and Procedure governing review of whistleblower award determinations are contained in Rules 340 to 344. In a press release accompanying the issuance of these provisions, the Tax Court explained that, generally applicable statutory provisions, Tax Court Rule 103, and related case law provide authority for a petitioner seeking review of a whistleblower award determination to request to proceed anonymously and to seal the record in appropriate circumstances. See United States Tax Court, Press Release, Oct. 3, 2008, at 5.

[575] Pub. L. No. 109-432, § 406(b)(1), 120 Stat. 2959 (2006).

[576] 2008-1 C.B. 253; *see also* Internal Revenue Manual (IRM) pt. 25.2.2 (Dec. 30, 2008) (providing procedural guidance on the processing of whistleblower claims).

[577] 2008-1 C.B. at 256. Note that the determination of an informant's award may be made well in advance of payment, as awards are paid only out of collected proceeds.

[578] *See* Cooper v. Commissioner, 135 T.C. 70, 75 (2010); *see also* Friedland v. Commissioner, T.C. Memo. 2011-90, 101 T.C.M. (CCH) 1422, 1423.

[579] Pursuant to internal guidance, whistleblower claims will be denied if the information supplied by the claimant does not (1) identify a federal tax issue upon which the Service will act; (2) result in the detection of an underpayment of tax; or (c) result in the collection of proceeds. *See* Internal Revenue Manual pt. 25.2.2.12(2) (Dec. 30, 2008).

determination in *Cooper v. Commissioner*,[580] noting that the breadth of the jurisdictional grant to the Tax Court encompasses appeals of a determination to deny an award.

Borrowing from other areas of its expanded non-deficiency jurisdiction, the court in *Cooper* further explained that the form of the Service's determination was not dispositive. A determination with respect to a § 7623(b) award sufficient to implicate Tax Court review need only constitute a final administrative decision concerning the informant's whistleblower claim issued pursuant to established administrative procedures.[581]

The Tax Court examined the nature of the 30-day period for filing an appeal of a § 7623(b) award determination in *Friedland v. Commissioner*.[582] The petitioner in *Friedland* received four letters from the IRS Whistleblower Office in response to his claim. The first letter denied the petitioner's claim, providing generic justifications for the denial of whistleblower awards and asserting the absence of legal authority to provide a more specific explanation for the denial of the petitioner's claim. The subsequent three letters simply reaffirmed the initial denial determination and were issued in response to later inquiries from the petitioner concerning the denial or the petitioner's provision of additional information. One of these subsequent letters informed the petitioner that he could challenge the decision of the Whistleblower Office by writing "to the U.S. Court of Claim (sic)" in Washington, DC. The petitioner thereafter filed a complaint in the U.S. Court of Federal Claims, which that court subsequently dismissed for lack of subject matter jurisdiction. Approximately three weeks after this dismissal but over seven months after the Commissioner's issuance of the initial determination to deny a § 7623(b) award, the petitioner filed a petition to appeal the Commissioner's determination to the Tax Court. Recognizing that the petitioner "may have relied on the erroneous advice of the Whistleblower Office" and expressing its sympathy for the petitioner, the Tax Court determined that it lacked the authority to provide equitable relief.[583] The court found compliance with the 30-day filing period to be a

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[580] 135 T.C. at 70, 75 (2010) (citing STAFF OF THE JOINT COMM. ON TAX'N, TECHNICAL EXPLANATION OF H.R. 6408, THE "TAX RELIEF AND HEALTH CARE ACT OF 2006," at 89 (2006), which explained that an individual could appeal both the amount and the denial of an award to the Tax Court); *see also* Friedland v. Commissioner, T.C. Memo. 2011-90, 101 T.C.M. (CCH) 1422, 1423 (standing by holding in *Cooper*).

[581] 135 T.C. at 76. While this approach potentially expands the range of documents that can serve as the predicate to Tax Court review, this approach also necessarily expands the range of documents that can operate to commence the 30-day limitations period for invoking the Tax Court's jurisdiction.

[582] T.C. Memo. 2011-90, 101 T.C.M. (CCH) 1422.

[583] *Id.*

prerequisite to its jurisdiction to hear the appeal. Accordingly, the petitioner's failure to file his petition within the 30-day period following the Government's determination—however justified that failure may have been—deprived the court of subject matter jurisdiction.

Apart from establishing the predicate to and limitations period for pursuing an appeal of a § 7623(b) determination, the statute is silent on important aspects of the Tax Court's review in this setting. Specifically, the statute fails to address the level of deference the Tax Court should afford to the Commissioner's determination (standard of review), as well as the evidence the court may consider in fulfilling its appellate function (scope of review). One would expect determinations that are not the product of agency discretion under § 7623(b) (e.g., whether the information provided by the petitioner led to administrative or judicial action that resulted in the collection of tax so as to warrant a minimum award under § 7623(b)(1); whether the information provided constituted a "less substantial contribution" within the meaning of § 7623(b)(2)(A) warranting a reduced ceiling on the award percentage; whether the petitioner planned or initiated the actions that led to the underpayment of tax or violation of tax laws so as to warrant a reduction in the award under § 7623(b)(3)) will be reviewed by the Tax Court on a de novo basis. On the other hand, to the extent a determination under § 7623(b) rests in the discretion of the Commissioner (e.g., the determination concerning the particular percentage award to be paid within the 15 percent and 30 percent parameters of § 7623(b)(1); the appropriate amount of reduction in the amount of the award pursuant to § 7623(b)(2) or (b)(3)), a more deferential abuse-of-discretion standard of review would appear appropriate.

With respect to the proper scope of the Tax Court's review, the court announced its expectation that this issue would be resolved through case law when it issued the procedural rules governing whistleblower award review cases.[584] While decisions addressing the scope of the court's review in other contexts involving the expansion of the court's non-deficiency jurisdiction undoubtedly will prove relevant,[585] the breadth of issues

[584] *See* United States Tax Court, Press Release, Oct. 3, 2008, at 5 (noting the absence of "specific statutory direction" concerning whether whistleblower actions are to be decided based on the administrative record).

[585] *See, e.g.*, Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006) (holding that the Tax Court was limited to the administrative record in considering a taxpayer's "appeal" of a collection due process determination under § 6330(d)), *rev'g* 123 T.C. 85 (2004); Commissioner v. Neal, 557 F.3d 1262 (11th Cir. 2009) (holding that the Tax Court, in exercising authority to "determine" appropriate innocent spouse relief pursuant to § 6015(e), may conduct trial de novo); Porter v. Commissioner, 130 T.C. 115 (2008) (concluding that a determination of whether a spouse is entitled to equitable relief from joint and several liability is to be made based on a trial de novo). On this note, the fashioning of the Tax Court's

potentially affecting awards under § 7623(b)—which could include facts concerning the taxpayer to whom the supplied information relates—will complicate the scope of review determination in this setting.

In *Whistleblower 14106-10W v. Commissioner*,[586] the Tax Court addressed a taxpayer's request to maintain the confidentiality of his identity as he prosecuted an appeal of the Commissioner's denial of a whistleblower award. The petitioner in that case moved for a protective order requesting that the record in the case be sealed or, alternatively, that he be granted anonymity throughout the proceeding, fearing professional ostracism and harassment if his identity became known to his current employer.[587] As noted by the Tax Court in the case, § 7623 does not expressly address the privacy interests of whistleblowers or the parties to whom the whistleblower claims relate.[588] Shortly after revamping the whistleblower program in 2006, the House and the Senate approved legislation that would permit the Tax Court to seal portions of the record in these cases.[589] This provision was not enacted, however, as the larger legislative package failed to survive a presidential veto. Nonetheless, in promulgating the rules of practice and procedure to govern whistleblower cases, the court noted its ability to permit a petitioner to proceed anonymously and to seal the record when appropriate.[590] The Commissioner opposed the petitioner's request to preserve the confidentiality of his identity, contending that relinquishment of confidentiality was a natural consequence of the petitioner's decision to pursue judicial review of the adverse determination.[591]

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jurisdiction under § 7623(b) to entertain an "appeal" of a whistleblower determination award as opposed to making its own "determination" of the appropriate award may prove relevant to the evidence the court may consider in reviewing whistleblower award determinations.

586 137 T.C. 183 (2011).

587 *See id.* at 185. The petitioner's whistleblower claim related to his former employer.

588 *See id.* at 191.

589 As passed by the Senate on March 29, 2007, the U.S. Troop Readiness, Veterans' Health, and Iraq Accountability Act contained the following provision:

> Publicity of Appeals—Notwithstanding sections 7458 and 7461, the Tax Court may, in order to preserve the anonymity, privacy, or confidentiality of any person under this subsection [section 7463(b)], provide by rules adopted under section 7453 that portions of filings, hearings, testimony, evidence, and reports in connection with proceedings under this subsection may be closed to the public or inspection by the public.

H.R. 1591, 110th Cong., § 543(c).

590 *See* Rules Comm. Note, TAX CT. R. 340, 130 T.C. 586 (2008) (citing authority under "generally applicable statutory provisions, Rule 103, and related caselaw").

591 *See Whistleblower 14106-10W*, 137 T.C. at 205.

In ruling on the petitioner's motion, the court balanced the petitioner's legitimate privacy interest as a confidential informant[592] together with the nature and severity of the specific harm alleged to result from disclosure of the petitioner's identity against the harm to relevant social interests favoring publicity of the court's proceedings.[593] In evaluating the potential harm suffered by the petitioner through disclosure, the court noted that the absence of anti-retaliatory provisions in § 7623 made the prospect of harm particularly acute. Even though the petitioner's information related to a former employer, the court was persuaded that revealing the petitioner's identity could severely damage his standing in the professional community through which petitioner derived his livelihood.[594] Finding the competing social interests to be mixed,[595] the court specifically rejected the Commissioner's "take-it-or-leave-it" approach to confidentiality as likely having a chilling effect on claimants seeking judicial review of whistleblower award determinations as being at odds with the congressional purpose of promoting public confidence in the whistleblower program through the availability of judicial oversight.[596] Accordingly, the court ordered that any information that would tend to reveal the petitioner's identity be redacted from the record, as well as any information that would identify the subject of petitioner's whistleblower claim.[597] Believing these steps to be sufficient to address the petitioner's concerns, the court denied the more drastic remedy of sealing the entire record.[598]

The opinion in *Whistleblower 14106-10W* was reviewed by the court without dissent. However, a concurring opinion stated the view that the court will not automatically grant anonymity merely because the petitioner raises the prospect of resulting employment discrimination.[599] Accordingly, claimants seeking judicial review of adverse whistleblower award determinations must still weigh the imprecise prospect of identity disclosure in connection with invoking the Tax Court's jurisdiction in this setting.

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592 The court noted that the Service's policy to treat tax whistleblowers as confidential informants. *See id.* at 202 (citing relevant portions of the Internal Revenue Manual).

593 *Id.* at 203.

594 *Id.* at 203–04. The court noted that the Service's policy to treat tax whistleblowers as confidential informants. *See id.* at 202 (citing relevant portions of the Internal Revenue Manual).

595 *Id.* at 205.

596 *Id.* at 206.

597 *Id.*

598 *Id.* at 207.

599 *Id.* at 208 (Halpern, J., concurring).

PART IX

PRETRIAL PROCEDURE

On July 17, 1924, one day after the original Board of Tax Appeals members were sworn in, the Board undertook its first order of business, the drafting of its procedural rules. In view of its essentially judicial character, the adversarial nature of the proceedings over which it would preside, and the clear legislative intent that a court-like procedure be employed, the Board had little choice but to adopt generally formal procedural rules. Within this framework, however, Congress had given broad discretion to the Board to specify the particulars of the rules it would follow.

In formulating its rules regarding pretrial procedure, the Board was undoubtedly mindful of several important considerations. First, procedures had to be adopted to provide a documentary basis for the appeal. Both taxpayer and Government needed to be responsible for stating their respective positions in writing in a manner that would apprise the adverse party and the Board of the nature of the controversy. In this connection, the Board had to balance the interest of simplicity and brevity, which were important congressional goals in creating the Board procedure, with the conflicting interest in favor of a comprehensive statement of the case that would conform to judicial standards of pleading.

Second, the Board had to consider the time limits to be allotted to complete the various stages of the pretrial procedure. Important in this regard was the extent to which the Board should limit the time available to the parties to complete the various preliminary stages of the proceeding to ensure the expeditious preparation of a case for trial. Additionally, these rules needed to discourage use of the Board procedure simply for purposes of delay.

Third, it was essential that the Board's procedures encourage, to the extent practicable, pretrial settlements. The anticipation of a heavy caseload made such settlements critical.

Fourth, public concern with impartiality dictated that the Board quickly establish a reputation for even-handedness in its procedure, as well as its decisions. In both form and substance, the burdens and benefits of pretrial procedure had to be equitably apportioned.

Finally, the Board was required to conform its procedures to its jurisdictional limitations. Jurisdictional provisions required a timely appeal from the Commissioner's assertion of a deficiency.

Out of this blend of concerns, the Board's first rules of practice and procedure emerged on July 27, 1924, a product of an "almost continuous session"[1] since the members took office ten days earlier. Although these first rules covered the most important areas of pretrial concern, they were hardly the last word on Board procedure. From the outset, the Board demonstrated a willingness to consider suggestions for change.[2] In that regard, major efforts occasionally have been made to improve and refine the procedures under which the Board, and later the Tax Court, has operated. One such effort was initiated in 1937, with the creation of a joint committee composed of members of the Board and representatives of Treasury for the purpose of studying the Board's procedure and recommending improvements.[3] The conclusions of the joint committee were felt in a number of important areas. In 1974, the Tax Court adopted a comprehensive rules revision which substantially modified many of its rules of practice and procedure. Since then, the court has undertaken substantial revisions to its procedural rules, once in 2003,[4] and, not long thereafter, in 2008.[5] Hence, the initial willingness of the Board to consider changes to its procedural rules has proved long lasting.

In broad outline, pretrial procedure before the Tax Court is similar to that applicable in most trial courts. The opportunity for court review is initially provided by the Commissioner's issuance of a deficiency notice, which asserts that additional tax is due. This, in effect, provides the gravamen on which the cause of action is based. Within a statutory time period, the taxpayer has an opportunity to invoke the jurisdiction of the court by filing a petition. The pleading stage of the proceedings generally terminates with the Commissioner's responsive pleading, the answer, but occasionally the taxpayer may be required to reply to allegations in the answer. In addition to the pleadings, an aspect of Board/Tax Court pretrial procedure that traditionally has been of great importance is the stipulation. Stipulation of factual matters serves to narrow the issues in controversy, thereby saving time and expense for both the parties and the court as well as providing a basis for the settlement of many cases. The Tax Court

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[1] Press Release accompanying issuance of the Board's first rules of practice and procedure, July 28, 1924, filed at the U.S. Tax Court in "Organizing the Board."

[2] *Id.*

[3] The original members of the joint committee were members Arundell, Morris, and Murdock of the Board, and P.C. Alexander, Russell Ryan, and Stanley S. Surrey of Treasury. Treas. Dep't Press Release, May 11, 1937, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence;" REPORT OF THE JOINT COMMITTEE OF THE BOARD OF TAX APPEALS AND CHIEF COUNSEL'S OFFICE, Dec. 17, 1937, at 1, filed at the U.S. Tax Court in "Petition: Memoranda & Correspondence" [hereinafter cited as Joint Committee Report].

[4] *See* 120 T.C. 479–786 (2003).

[5] *See* 130 T.C. 345–614 (2008).

adopted rules for pretrial discovery somewhat reluctantly in the 1970s, and those provisions had a somewhat controversial historical development. These, the most significant aspects of pretrial procedure in the Tax Court, will be described in detail below.

A. The Deficiency Notice

The Code defines a deficiency as the excess of the sum of tax liability plus rebates over the sum of the amount shown as due on the return and previously assessed deficiencies.[6] If a deficiency exists with respect to taxes subject to the deficiency procedure, the Commissioner is authorized to send the taxpayer a notice of deficiency by registered or certified mail.[7] The notice serves several distinct purposes. First, it informs the taxpayer of the Commissioner's determination that additional tax is due.[8] Second, it suspends the Commissioner's assessment power for 90 days, or until a final decision of the Tax Court with respect to the deficiency, whichever comes later.[9] Third, it represents the taxpayer's "ticket to the Tax Court,"[10] since issuance of the deficiency notice is, in most cases, a prerequisite to Tax Court jurisdiction.[11] Additionally, within the context of Tax Court

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[6] I.R.C. § 6211(a).

[7] The taxes subject to the deficiency procedure are the income, estate, gift, public charity, private foundation, retirement plan and real estate investment trust taxes. I.R.C. § 6212(a). The Technical Amendments Act of 1958, Pub. L. No. 85-866, § 89(b), 72 Stat. 1665, amended § 6212(a) to authorize the Commissioner to send deficiency notices by either certified or registered mail. Prior thereto, the only authorized method was by registered mail, and the Tax Court considered registered mail a jurisdictional necessity. Hamilton v. Commissioner, 13 T.C. 747, 749 (1949); Williams v. Commissioner, 13 T.C. 257, 258 (1949); John A. Gebelein, Inc. v. Commissioner, 37 B.T.A. 605 (1938). In *Boren v. Riddell*, 241 F.2d 670 (9th Cir. 1957), however, the Ninth Circuit disagreed. The court held that authorizing registered mail did not preclude other methods that adequately informed the taxpayer. *Accord* Berger v. Commissioner, 404 F.2d 668, 673 (3d Cir. 1968); Cohen v. United States, 297 F.2d 760, 772 (9th Cir. 1962); Lifter v. Commissioner, 59 T.C. 818, 823 (1973). *Contra* Samuel Brodsky, *Adequacy of Notice of Deficiency,* 18 N.Y.U. INST. ON FED. TAX'N 997, 1005 (1960) [hereinafter cited as Brodsky].

[8] *E.g.*, Delman v. Commissioner, 384 F.2d 929, 933 (3d Cir. 1967); Commissioner v. Stewart, 186 F.2d 239, 241 (6th Cir. 1951); Commissioner v. New York Trust Co., 54 F.2d 463, 465 (2d Cir. 1931). *See generally* Note, *Incorrectly Addressed 90 Day Letters*, 7 TAX L. REV. 250 (1952).

[9] I.R.C. § 6213(a).

[10] Delman v. Commissioner, 384 F.2d 929, 934 (3d Cir. 1967); Corbett v. Frank, 293 F.2d 501, 502 (9th Cir. 1961).

[11] I.R.C. § 6213(a); TAX CT. R.13 (July 6, 2012 ed.).

litigation, another facet of the deficiency notice emerges, the role of the deficiency notice in pretrial Tax Court procedure.

This latter role was molded in the Board's early years by numerous confrontations between the Commissioner and taxpayers.[12] In these disputes the Board generally sided with the Commissioner, who regarded the deficiency notice as independent of the Board's pleading rules and beyond its power to control.[13] In an effort to reshape the role of the deficiency notice, countless complaints have been lodged that describe the deficiency notice as uninformative, demonstrate how the litigation procedure is adversely affected by these notices, and advocate numerous proposals for change.[14] Although these efforts have generally failed to

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[12] *See generally*, *e.g.*, Gossett v. Commissioner, 22 B.T.A. 1279, 1284 (1931), *aff'd,* 59 F.2d 365 (4th Cir. 1932); Carnrick v. Commissioner, 21 B.T.A. 12, 21 (1930); Coughlin v. Commissioner, 15 B.T.A. 515, 520 (1929); Levine Brothers Co. v. Commissioner, 5 B.T.A. 689 (1926); Clois L. Greene, 2 B.T.A. 148 (1925); Cleveland Home Brewing Co., 1 B.T.A. 87 (1924).

[13] *See generally* DISTRICT OF COLUMBIA BAR ASSOCIATION, REPORT OF THE COMMITTEE ON RELATIONS WITH THE TAX COURT OF THE UNITED STATES, March 31, 1948, at 10, 11, filed at the U.S. Tax Court in "Deficiency Notice: Memoranda & Correspondence" [hereinafter cited as D.C. Bar Report]; Randolph E. Paul, *A Plea For Better Tax Pleading*, 18 CORNELL L.Q. 507 (1933) [hereinafter cited as Paul]; Letter from A. Graupner to Board Chairman Black, May 25, 1937, filed at the U.S. Tax Court in "Deficiency Notice: Memoranda & Correspondence" [hereinafter cited as Graupner].

[14] SUBCOMMITTEE ON INTERNAL REVENUE TAXATION OF THE COMMITTEE ON WAYS AND MEANS, INTERNAL REVENUE ADMINISTRATION, 85th Cong., 1st Sess. 13, 48 (1957) [hereinafter cited as Subcommittee Report]; Report of the Comm. on Court Procedure, 19 ABA BULLETIN TAXATION SECTION 54 (1966) [hereinafter cited as ABA 1966]; Report of Comm. on Court Procedure, ABA TAXATION SECTION 114 (1957) [hereinafter cited as ABA 1957]; Report of Comm. on Court Procedure, ABA TAXATION SECTION 122 (1956) [hereinafter cited as ABA 1956]; Report of Comm. on Bureau Practice and Procedure, ABA TAXATION SECTION 106 (1954) [hereinafter cited as ABA 1954]; Report of Comm. on Bureau Practice and Procedure, ABA TAXATION SECTION 105 (1953) [hereinafter cited as ABA 1953]; Report of Comm. on Tax Court Procedure, ABA TAXATION SECTION ll2 (1947) [hereinafter cited as ABA 1947]; Robert Ash, *Factors in Selecting the Forum in Which to Litigate,* 12 N.Y.U. INST. ON FED. TAX'N 935, 938 (1954) [hereinafter cited as Ash]; Adam Y. Bennion, *Equivalents of Pre-Trial and Discovery Procedure in Tax Court of United States,* 11 U.S.C. TAX INST. 405, 409 (l959) [hereinafter cited as Bennion]; William H. Bowen, *Discovery in the Tax Court: Why Not Follow the Federal Rules?*, 44 A.B.A. J. 129 (1958) [hereinafter cited as Bowen]; Samuel Byer, *Limitation of Issues in Tax Litigation*, 18 N.Y.U. INST ON FED. TAX'N 1035 (1960) [hereinafter cited as Byer]; Arthur Groman and Hilbert P. Zarky, *Rules of Evidence in Tax Court of United States*, 10 U.S.C. TAX INST. 603, 610 (1958) [hereinafter cited as Groman]; Michael P. Oshatz, *Procedural Aspects of Practice Before the Tax Court: Including Small Claims Division, When and How to Use It*, 31 N.Y.U. INST ON FED. TAX'N 1471 (1973)

produce a more informative deficiency notice,[15] they have influenced the development of other procedures that tend to ameliorate the problem.

Under the statute, the deficiency notice has only a negligible connection with the Tax Court pleading structure. Issuance of the deficiency notice is, in most cases, a condition precedent to Tax Court jurisdiction, but it is not a pleading.[16] It neither confers jurisdiction nor commences the proceeding.[17] In fact, the notice is considered part of the administrative procedure of assessment and collection of revenues and, to that extent, its preparation is entirely within the province of the Internal Revenue Service.[18] For this reason, only the amount of the deficiency, as reflected in the adjustments, is essential to the pleadings.[19] The courts have consistently held that the Commissioner is not obligated to develop in the deficiency

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[hereinafter cited as Oshatz]; Paul, *supra* note 13; Lester M. Ponder, *Trial Court Litigation—Tax Court, Court of Claims and District Court: A Practicing Lawyers Views,* 21 U.S.C. TAX INST. 117, 126 (1969) [hereinafter cited as Ponder]; *Greater Attention to Procedural Safeguards Necessary to Protect Taxpayers,* 7 J. TAX'N 359 (1957); *Practitioners Criticize 30-day and 90-day Letters as Vague and Non-Specific,* 7 J. TAX'N 34 (1957); D.C. Bar Report, *supra* note 13, at 10–11; Graupner, *supra* note 13; *see also* Letter from John Hall, Deputy Assistant Secretary, to Edward C. Rustigan, Attorney, July 10, 1973, filed at the U.S. Tax Court in "Deficiency Notice: Memoranda and Correspondence" [hereinafter cited as Hall].

[15] In 1988, Congress finally responded to complaints concerning the relative dearth of information required of a valid deficiency notice. As part of the Technical and Miscellaneous Revenue Act of 1988, Congress enacted the predecessor to § 7522(a). *See* Pub. L. No. 100-647, § 6233(a), 102 Stat. 3341, 3735. This provision, effective for notices of deficiency issued after January 1, 1990, requires the statutory notice of deficiency not only to identify the amounts of any tax, interest, additional amounts, additions to tax, and penalties alleged to be due, but also to "describe the basis for" such adjustments. For further discussion of this provision, see Part VI.A.2.b.(1).

[16] Berger v. Commissioner, 404 F.2d 668, 673 (3d Cir. 1968); Delman v. Commissioner, 384 F.2d 929, 934 (3d Cir. 1967). *See* Groman, *supra* note 14, at 610; Paul, *supra* note 13, at 512–13; Arnold Raum, *Tax Court Litigation*, 9 U.S.C. TAX INST. 631, 640 (1957) [hereinafter cited as Raum].

[17] *E.g.*, Berger v. Commissioner, 404 F.2d 668, 673 (3d Cir. 1968); Delman v. Commissioner, 384 F.2d 929, 934 (3d Cir. 1967).

[18] Levine Brothers Co., 5 B.T.A. 689, 691–92 (1926); Southern California Loan Ass'n, 4 B.T.A. 223, 225 (1926); I.R.C. § 6212(a). This is further demonstrated by the Board/Tax Court's reluctance to promulgate rules regulating the content of the deficiency notice.

[19] *See* TAX CT. R. 34(b)(3) (July 6, 2012 ed.); Alexander Sprunt & Son, Inc. v. Commissioner, 64 F.2d 424, 427 (4th Cir. 1933); Luke v. Commissioner, T.C. Memo. 1964-76, 23 T.C.M. (CCH) 1022 (1964), *aff'd*, 351 F.2d 568 (7th Cir. 1965); Bair v. Commissioner, 16 T.C. 90, 98 (1951), *aff'd*, 199 F.2d 589 (2d Cir. 1952); Coughlin v. Commissioner, 15 B.T.A. 515, 520 (1929).

notice his rationale for the adjustments.[20] Although Congress in 1988 statutorily required the Commissioner to "describe the basis" for each adjustment in the notice of deficiency, Congress indicated that the failure to do so would not invalidate the notice.[21] In a similar vein, any theory of liability expressed in the deficiency notice will not necessarily constitute or confine the issues.[22] Despite the limited substance required of a valid deficiency notice, the Commissioner's deficiency determination is generally presumed by the Tax Court to be correct.[23] In many respects, the

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[20] Commissioner v. Forest Glen Creamery Co., 98 F.2d 968, 971 (7th Cir. 1938); Standard Oil Co. v. Commissioner, 43 B.T.A. 973, 998, (1941), *aff'd*, 129 F.2d 363 (7th Cir. 1942); Carnrick v. Commissioner, 21 B.T.A. 12, 21 (1930).

[21] *See* I.R.C. § 7522(a) (enacted by Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6233(a), 102 Stat. 3341, 3735). In *Shea v. Commissioner*, the Tax Court in a reviewed opinion determined that if the if the notice of deficiency fails to describe the basis for the deficiency determination and the basis for the determination requires the admission of additional evidence (that is, evidence different than that necessary to resolve the deficiency determinations that were adequately described in the notice), the Commissioner would bear the burden of proof with respect to the new basis. 112 T.C. 183, 197 (1999). The original edition of this text contained a thorough discussion of the tension between taxpayers' desire for additional information to be provided in the notice of deficiency and the minimalist requirements of the notice required under the statute, as upheld by the Board of Tax Appeals and the Tax Court. *See* HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 223–31 (1979).

[22] Bair v. Commissioner, 16 T.C. 90, 98 (1951), *aff'd*, 199 F.2d 589 (2d Cir. 1952); Gossett v. Commissioner, 22 B.T.A. 1279, 1284 (1931), *aff'd*, 59 F.2d 365 (4th Cir. 1932); Crowell v. Commissioner, 21 B.T.A. 849, 851 (1930), *aff'd*, 62 F.2d 51 (6th Cir. 1932); Carnrick v. Commissioner, 21 B.T.A. 12, 21 (1930); Coughlin v. Commissioner, 15 B.T.A. 515, 520 (1929). Although the theory of the deficiency notice will not prevent the Commissioner from raising other issues or theories after the taxpayer files a petition, the Commissioner may be required to affirmatively plead the issues in his answer if the new matter is inconsistent with the theory of the deficiency notice. *See infra* notes 239–294 and accompanying text.

[23] *E.g.*, Welch v. Helvering, 290 U.S. 111, 115 (1933); Albino v. Commissioner, 273 F.2d 450 (2d Cir. 1960); Eagle v. Commissioner, 242 F.2d 635 (5th Cir. 1957). In many instances, the burden of proof is placed upon the Commissioner either by statute or Tax Court rule. For example, the Commissioner has the burden of proof if the deficiency notice pertains to fraud (I.R.C. § 7454(a)), transferee liability (I.R.C. § 6902(a)), deductions against public policy (I.R.C. § 162(c)), accumulated earnings tax (I.R.C. § 534(a)), increased deficiencies asserted after the petition is filed, affirmative defenses, and new matter pleaded in the answer (TAX CT. R. 142(a) (July 6, 2012 ed.)). Additionally, Congress has provided that the general burden of proof can be shifted to the Commissioner in certain instances pursuant to § 7491(a). *See* Part X.C.4.

deficiency notice is a distinctive procedural device lacking a counterpart in the pleading structure of other forums.

Notwithstanding the limited theoretical significance of the deficiency notice, in practice it can play a vital role in the pleadings by informing the taxpayer why a deficiency has been determined.[24] Although the ultimate issue is tax liability, the decisive issues for pleading and trial purposes are the factual and theoretical foundations supporting the deficiency notice. Furthermore, in the great majority of cases, the Commissioner's rationale for determining a deficiency marks the boundaries of the conflict. Consequently, supplying this information in the deficiency notice, as required under § 7522(a), provides the taxpayer an opportunity to objectively evaluate the decision to contest the deficiency.[25] If the taxpayer elects to pursue litigation, the same information will aid in drafting the petition and in preparing for the trial of the case.[26]

B. The Petition

For matters within the Tax Court's deficiency jurisdiction,[27] the Commissioner's issuance of a deficiency notice forces the taxpayer to determine whether the Commissioner's determination is warranted.[28] A decision to contest the deficiency requires the taxpayer to choose between the alternative methods and forums.[29] The taxpayer's basic choice is whether to appeal to the Tax Court prior to payment of the deficiency, or to pay the tax, file a claim for refund and, following disallowance of the claim, sue for refund in either a Federal district court or the U.S. Court of Federal Claims.[30] If the former route is taken, the taxpayer must file a

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[24] *See*, *e.g.*, ABA 1966, *supra* note 14, at 56; Paul, *supra* note 13, at 517; Joint Committee Report, *supra* note 3.

[25] *E.g.*, Ash, *supra* note 14, at 938; Graupner, *supra* note 13, at 3.

[26] *E.g.*, Groman, *supra* note 14, at 611; Paul, *supra* note 13, at 519; Ponder, *supra* note 14, at 126.

[27] The scope of the Tax Court's deficiency jurisdiction is described in Part VI.A.

[28] *See* I.R.C. §§ 6211, 6212, 6213; TAX CT. R. 13 (July 6, 2012 ed.). *See* note 11 *supra*, for instances in which a deficiency notice is not a condition precedent to Tax Court jurisdiction.

[29] Cusack, *Federal Tax Procedure: Refund Claims and Suits*, 12 THE PRAC. LAW. 45 (Oct., 1966) [hereinafter cited as Cusack]; Marvin Joseph Garbis, *Choosing Your Forum in Civil Tax Litigation*, 15 THE PRAC. LAW. 41 (Jan., 1969) [hereinafter cited as Garbis]; Lester M. Ponder, *Trial Court Litigation–Tax Court, Court of Claims, and District Court–A Practicing Lawyer's Views*, 21 U.S.C. TAX INST. 117 (1969) [hereinafter cited as Ponder]; Arnold W. Reitze, Jr., *Choice of Forum in Tax Litigation,* 19 CASE W. RES. L. REV. 963 (1968) [hereinafter cited as Reitze].

[30] *See generally* Cusack, *supra* note 29; Ponder, *supra* note 29; Reitze, *supra* note 29.

petition with the Tax Court.[31] The petition has several important aspects.[32] First, the filing of a petition within the statutory period operates to confer jurisdiction on the court to redetermine the deficiency and precludes, during the pendency of the proceeding, assessment or collection of the deficiency by the Service.[33] Second, the petition is a pleading designed to provide the Tax Court and the Commissioner with "notice of the matters in controversy and the basis for . . . [the taxpayer's position]."[34] Finally, the petition has been important in efforts by the court over the years to reduce its backlog of cases. By helping to weed out those appeals which are meritless or filed for purposes of delaying the assessment of tax, the petition has reduced the court's workload.

1. Content of the Petition

In its role as a pleading, the petition has presented few problems. The Board's primary objective in promulgating a rule governing the contents of the petition was to assure that the pleading adequately informed the Board and the respondent of the issues in controversy.[35] To achieve this objective, the Board required that the petition be divided into five parts: jurisdictional allegations, assignments of error, factual allegations, propositions of law, and petitioner's verification.[36] During the period 1924 to 1926, the original rule was revised to require that the petition disclose

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[31] I.R.C. § 6213(a). The Revenue Act of 1924, which established the Board of Tax Appeals, did not provide a name for the taxpayer's pleading. Rather, the legislation simply referred to the pleading as an appeal. Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297. The Board settled on the name petition in its first rules of practice and procedure, B.T.A. RULE 5 (July, 1924 ed.), and Congress incorporated this terminology in the subsequent Revenue Acts. *Compare* Revenue Act of 1926, ch. 27, § 274(a), 44 Stat. 55, *with* I.R.C. § 6213(a).

[32] *See* CHARLES D. HAMEL, PRACTICE AND EVIDENCE BEFORE THE U.S. BOARD OF TAX APPEALS 89 (1938) [hereinafter cited as HAMEL].

[33] I.R.C. §§ 6213, 7442. The current Tax Court rules specifically list the jurisdictional requirements. *See* TAX CT. R. 13 (July 6, 2012 ed.). In 1948, the Tax Court received a recommendation that the court adopt a rule which informed the taxpayer of the jurisdictional requirements. However, the court rejected the proposed rule because it was "largely educational, rather than a subject for a rule. Rules can't tell people how to practice law." Memorandum to Judge Murdock, Rules Comm. Chairman, from V. Mersch, Tax Court Clerk, July 30, 1948, at 2, filed at the U.S. Tax Court in "Petition: Memoranda and Correspondence" [hereinafter cited as Mersch, 1948].

[34] TAX CT. R. 31(a) (July 6, 2012 ed.).

[35] B.T.A. RULE 5 (July, 1924 ed.).

[36] *Id.*

both the amount of the deficiency as determined by the Commissioner[37] and approximately what amount of the deficiency was in controversy.[38] A further modification served to conform the petition with the pleadings in other forums by excising the requirement of stating a proposition of law and adding a requirement of a prayer for relief.[39]

With the foundation of the rule firmly established by 1926, the Board left the principal components of the rule intact for nearly 50 years. The only revisions between 1926 and 1974 that did anything more than clarify or expound upon these original elements arose in response to specific legislation. For example, the Revenue Act of 1928 shifted the burden of proof from the taxpayer to the Commissioner in fraud and transferee liability cases.[40] Accordingly, the Board amended its rules to provide that the taxpayer need not state the facts sustaining an assignment of error if the Commissioner had the burden of proof.[41] Subsequent misinterpretation of this provision led to a revision emphasizing that an assignment of error by the petitioner was necessary to raise an issue, even though the Commissioner shouldered the burden of proof.[42]

Although the requirements for a proper petition seem clear enough, the Board/Tax Court has been continually plagued with petitions that fail to meet the specified standards. Perhaps the court's inclination to permit the curing of defective petitions for jurisdictional purposes removed what potentially could have been the strongest incentive to comply with the rule.[43] But the concern with providing taxpayers every opportunity to

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[37] B.T.A. RULE 5 (Jan. 1, 1925 ed.). In addition, the rule directed taxpayers to append a copy of the deficiency notice to the petition. *Id.*

[38] *Id.*

[39] B.T.A. RULE 5(f) (April 1, 1926 ed.).

[40] Revenue Act of 1928, ch. 852, §§ 601, 602, 45 Stat. 872 (now codified at I.R.C. §§ 7454, 6902(a)).

[41] B.T.A. RULE 5(c) (Feb. 1, 1931 ed.).

[42] B.T.A. RULE 5(d) (July 1, 1935 ed.). *See* TAX CT. R. 34(b) (Jan. 1, 1974 ed.); Rules Comm. Note, TAX CT. R. 34(b) (Jan. 1, 1974 ed.). The rule was also revised in 1967, to require that individual taxpayers include their legal residence, and that corporate taxpayers include their principal place of business in the petition. TAX CT. R. 7(c)(4)(B)(1) (Jan. 1, 1967 ed.). This change was prompted by legislation which placed venue for review of Tax Court decisions in the appropriate circuit court of appeals depending upon the legal residence of the taxpayer. Act of November 2, 1966, Pub. L. No. 89-713, § 3(c), 80 Stat. 1109 (amending I.R.C. § 7482(b)). *See* Memorandum to the Judges from Judge Raum, Rules Comm. Chairman, Dec. 22, 1966, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence."

[43] The decision to permit an amended petition depended upon the type of defect as well as the timeliness of the amended petition. Rules Comm. Note, TAX CT. R. 34(a) (Jan. 1, 1974 ed.).

exercise their statutory right to have the deficiency reviewed prior to payment presumably convinced the Board/Tax Court to take a less demanding view of the situation. Nevertheless, there was considerable dissatisfaction on the Board/Tax Court with the number of petitions that failed to comply with the rule. An illustration of this dissatisfaction can be found in the Board's introductory comment to its 1938 rules edition:

> Attention is called to the following: Many petitions filed with this Board are dismissed for lack of jurisdiction and for failure to comply with the Rules of Practice. It is therefore of great importance to petitioners that petitions be prepared and filed properly in accordance with statutory requirements and the provisions of the Rules of Practice.[44]

Naturally, most taxpayer representatives were generally aware that a petition should meet certain minimum standards. As a result, there was a steady stream of inquiries from taxpayers and, to a lesser extent, from Internal Revenue seeking information and advice about various aspects of the rule.[45] Because the Tax Court was a forum of national jurisdiction with

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[44] B.T.A. RULES, Introductory Comment (July 1, 1938 ed.).

[45] *See* Letter to Judge Murdock, Rules Comm. Chairman, from John W. Edwards, Acting Division Counsel, Internal Revenue Bureau, Aug. 15, 1946, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Edwards]; Mersch, 1948, *supra* note 33, at 1; Memorandum to the Judges from Presiding Judge Murdock, Oct. 14, 1948, at 2, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Murdock, 1948]; *see also* Memorandum to Judge Turner, Rules Comm. Chairman, from Howard Locke, Tax Court Clerk, March 13, 1959, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Locke].

On one occasion, John W. Edwards, Acting Division Counsel for the Bureau, wrote Judge Murdock requesting him to:

> [p]lease inform this office of the effective date of the amendment of Rule 6(d) of the Rules of Practice before the Board of Tax Appeals by the addition of this sentence: "Issues in respect of which the burden of proof is by statute placed upon the Commissioner will not be deemed to be raised by the petitioner in the absence of assignments of error in respect thereof."

Edwards, *supra*.

Judge Murdock, noted for his wit, responded:

> Dear Office:
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> I never wrote to an office before and I can't say that I enjoy it. Just some dingy dismal old room with no heat or life on Saturdays and Sundays! Just one of the drawers in the bureau! "Please inform this office" sounds so impersonal, sort of imperious.
>
> If some real live friendly flesh and blood person came upon the interesting question of when a certain sentence became a part of the Rules

its offices in Washington, D.C., many of the taxpayers making inquiries were forced to rely on telephonic and mail communications. The format of the rule apparently made precise inquiries difficult which, in turn, required that the court's response be exceedingly detailed and tedious.[46] Accordingly, an entreaty from the chief clerk culminated in the Tax Court's final attempt at making the rule more understandable.[47] The rule was restructured with separately numbered subparagraphs so that taxpayers would be better able to pinpoint the provision in question and the Clerk could respond more definitively to the question.[48]

In 1974, the Tax Court comprehensively revised its rules of procedure. The petition rule, however, remained basically unchanged with one notable exception: the petitioner's verification requirement was eliminated.[49] Until then, verification, which originally had been required in the Board's first rules of practice,[50] had been one of the more controversial aspects of the petition. If taxpayers were not questioning a particular application of the verification rule,[51] they were questioning the basic need for the procedure itself.[52]

An early expression of the Board's attitude towards verification was contained in its response to a practitioner's request that the verification requirement be waived in view of his special circumstances. His clients

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> of Practice and would really appreciate being advised as to the correct answer, it would be in the Rules revised to July 1, 1935, as part of Rule 5(d). But just some cold old office—Ugh! I can't bring myself to answer.
>
> Sorry

Letter from Presiding Judge Murdock to "Office," Aug. 20, 1946, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence."

[46] Mersch, 1948, *supra* note 33, at 1. *See* TAX CT. R. 7 (Nov. 3, 1947 ed.).

[47] Mersch, 1948, *supra* note 33, at 1.

[48] *Id.*; Murdock, 1948, *supra* note 45. *Compare* TAX CT. R. 7 (Nov. 3, 1947 ed.), *with* TAX CT. R. 7 (Dec. 15, 1948 ed.). Apparently, restructuring the rule did not produce the desired result because eleven years later the court clerk recommended that the subparagraphs in the rule be eliminated. Locke, *supra* note 45.

[49] Rules Comm. Note, TAX CT. R. 34(b) (Jan. 1, 1974 ed.); TAX CT. R. 34(b) (Jan. 1, 1974 ed.). *See generally* Laurence Goldfein and Richard A. Levine, *Tax Court Proposes Far Reaching Changes in its Rules of Practice and Procedure*, 37 J. TAX'N 66, 67 (1972) [hereinafter cited as Goldfein]; J. Earl Epstein, *Proposed Rules of the Tax Court: A Panel Discussion,* 26 TAX LAW. 377, 379 (1973) [hereinafter cited as Panel Discussion].

[50] B.T.A. RULE 5(f) (July, 1924 ed.).

[51] *E.g.*, Letter to Chief Judge Tietjens from Donald Libert, attorney, January 11, 1965, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Libert].

[52] *E.g.*, *Report of the Comm. on Tax Court Procedure*, ABA TAXATION SECTION 81 (1951) [hereinafter cited as ABA, 1951].

were scattered members of an Osage Indian tribe who had little or no knowledge of the pertinent facts of their case, and their verification would have been difficult to obtain. The Board's denial of the request emphasized that the purpose of the rule was to afford the Board some measure of assurance that the taxpayer, and not the taxpayer's representative, had made the decision to appeal.[53] Subsequently, however, the rigors of the verification rule were somewhat relaxed.

In 1931, the verification requirement was eased to permit a duly appointed attorney in fact to verify the petition, provided that the attorney in fact acted pursuant to an unrevoked power of attorney and that the petitioner was absent from the United States.[54] The purpose of this relaxation was to ease the burden in those situations in which communications between the taxpayer and his counsel took place by mail and therefore satisfaction of the timely filing requirement would be difficult.[55]

A second, seemingly insignificant change in the verification rule, which also occurred in 1931, later proved troublesome as it led to a controversy concerning the interaction between verification and the Board's jurisdiction with regard to fiduciaries. The revision permitted a petition filed by a fiduciary to be verified by only one fiduciary so long as it was signed by a majority of the other fiduciaries.[56] Seven years later, in 1938, the Board's dismissal of a petition for not complying with the rule was reversed in *Baldwin v. Commissioner*.[57] The Ninth Circuit Court of Appeals concluded that Congress had contemplated providing each executor with a separate right to file a petition since each executor was individually liable for any deficiency. The court refused to allow the Board to condition the exercise

[53] Letter to Chairman Hamel from T. Leahy, attorney, Feb. 17, 1925, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence;" Letter to T. Leahy, attorney, from Chairman Hamel, Feb. 21, 1925, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence."

[54] B.T.A. RULE 5(g) (Feb. 1, 1931 ed.).

[55] *See* Letter to the Board from Samuel Ansell, Aug. 22, 1924, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence."

[56] B.T.A. RULE 5(g) (Feb. 1, 1931 ed.); *see also* B.T.A. RULE 5(g) (Feb. 1, 1932 ed.); Memorandum to Members Black, Matthews, and Tramell, from Member Murdock, Rules Comm. Chairman, May 19, 1931, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence;" Memorandum to Member Murdock, Rules Comm. Chairman, from Chairman Morris, May 5, 1931, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence;" Memorandum to the Board from Member Murdock, Rules Comm. Chairman, June 3, 1931, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence."

[57] 94 F.2d 355 (9th Cir. 1938).

of the right by requiring a majority of executors to sign or verify the petition.[58]

The Board's reaction to the decision was mixed. Some members disagreed with the appellate court's opinion that if two or more executors were involved each had a separate right to file a petition.[59] Furthermore, they contended that since this was the first case in which the rule was seriously challenged, the Board should postpone any revision until it was certain of the necessity for such action.[60] Others generally agreed with the Ninth Circuit's decision[61] and recommended the rule be revised along lines which would require taxpayers to proffer a satisfactory explanation for a majority of the fiduciaries failing to join in the petition.[62] A third faction, which ultimately prevailed, took a middle course. They recognized that the general purpose of the rule, which was to promote orderly procedure by refusing to entertain a petition if "a majority of the fiduciaries are unwilling to commit themselves to the proceeding,"[63] was a worthwhile objective. However, they believed that this objective could be accomplished without the necessity of having a majority of the fiduciaries either sign or verify the petition. Their recommendation, which was adopted, was to substitute a

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[58] *Id.* at 356–57. Revenue Act of 1926, ch. 27, § 308, 44 Stat. 75 (now codified at I.R.C. §§ 6212(a), 6213(a)), authorized the Commissioner to send a notice to "the executor" and, in turn, gave "the executor" the right to appeal to the Board. The fact that all statutory references were in the singular could give rise to an inference that an executor could file an appeal whether his co-executor consented or not.

[59] Memorandum to Members of the Board from Member Murdock, Rules Comm. Chairman, Jan. 4, 1939, at 3, 4, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Murdock, 1939]; Memorandum to Members of the Board from Member Murdock, April 4, 1938, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Murdock, April, 1938]; Memorandum to Members of the Rules Comm. from Member Murdock, Rules Comm. Chairman, March 30, 1938, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Murdock, March, 1938].

[60] Murdock, April, 1938, *supra* note 59, at 2, 3.

[61] Memorandum to Members of the Board from Member Harron, April 5, 1938, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Harron, 1938]; Memorandum to Members of the Rules Comm. from Member Harron, Rules Comm. Member, March 30, 1938, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Harron]; *see also* Murdock, 1939, *supra* note 59.

[62] Murdock, 1939, *supra* note 59, at 3.

[63] *Id.* at 3, 4; Murdock, April, 1938, *supra* note 59, at 2.

requirement that a verification "contain a statement that the fiduciaries signing and verifying have authority to act for the taxpayer."[64]

In addition to controversy over the operation of the verification rule, the mechanics of verifying a petition frequently proved troublesome. Until 1969 the Board/Tax Court was an agency in the executive branch, and consequently subject to a statute that precluded a person acting as a notary public and counsel in the same case before an executive department.[65] It was not uncommon for an unwary practitioner to be automatically disqualified from continuing to represent his client for notarizing his client's petition.[66]

The problems created by the verification requirement ultimately led the American Bar Association, in 1951, to recommend that the Tax Court eliminate verification.[67] This recommendation did not produce any immediate change. However, in 1974, with no fanfare or even official explanation, verification was eliminated[68] as a "nuisance requirement without adequate compensatory benefits."[69] Nevertheless, the Tax Court has reserved the right to selectively require verification if, in its discretion, it is deemed advisable.[70] The elimination of the automatic verification

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[64] B.T.A. RULE 6(h) (Mar. 1, 1940 ed.); Murdock, 1939, *supra* note 59, at 3–4. Apparently the Board contemplated staying the proceeding until the executor who filed the petition without obtaining the signature or verification of a majority of the co-executors established his authority in a local court to act for the estate. *See* Memorandum to Member Murdock from the Board Secretary, Jan. 3, 1939, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence." At the same time, the Board added a provision that would require a person filing a petition on behalf of a corporation to verify his authority to act for the corporation. B.T.A. RULE 6(h) (Mar. 1, 1940 ed.).

[65] Act of June 29, 1906, ch. 3616, 34 Stat. 622 (codified at D.C. Code, Title 1, § 1-501 (1973)). This statute was subsequently interpreted to apply to all notaries who practice before executive departments. 26 Op. ATTY. GEN. 236, 238–39 (1907). The Board/Tax Court acknowledged that it was subject to the statute by including a restriction to that effect in its rules. TAX CT. R. 7(c)(4)(D) (Sept. 16, 1968 ed.). *See* Memorandum to Judge Raum, Rules Comm. Chairman, from Leonard Messinger, law clerk, Jan. 22, 1965, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence." The statute applies to executive departments only and, in 1969, § 7441 was amended to change the Tax Court's status to a legislative court. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730. Thereafter, the restriction on notaries acting as counsel in the same case was no longer a statutory necessity, but merely required by the Tax Court's rules. TAX CT. R. 7(c)(4)(D) (Jan. 25, 1971 ed.).

[66] Libert, *supra* note 51.

[67] ABA, 1951, *supra* note 52.

[68] TAX CT. R. 33(a) (Jan. 1, 1974 ed.); Rules Comm. Note, TAX CT. R. 33(a), 34(b) (Jan. 1, 1974 ed.).

[69] Panel Discussion, *supra* note 49.

[70] TAX CT. R. 33(a) (Jan. 1, 1974 ed.).

requirement conformed Tax Court practice to that applicable in district courts.[71]

2. Congestion of Appeals

A problem of continuing concern to the Board/Tax Court has been coping with the large number of petitions it receives.[72] Within months after the Board's creation, thousands of taxpayers elected to invoke its jurisdiction to redetermine the Commissioner's deficiency determination. Although most petitions were filed to obtain an impartial resolution of a bona fide dispute, many taxpayers viewed the redetermination procedure as a convenient method of delaying the assessment and collection of taxes.[73] Still others filed petitions for tactical reasons, considering such a maneuver an integral part of the settlement procedures.[74] Taxpayers, however, were not solely responsible for the burdensome number of appeals. The Bureau occasionally issued groundless deficiency notices, and this naturally increased the number of petitions filed.[75] Furthermore, the Bureau was not always willing to negotiate settlements in good faith, which meant more cases had to proceed to trial.[76]

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[71] FED. R. CIV. P. 11(a).

[72] *Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means*, 68th Cong., 1st Sess. 892–93, 906 (1925) (statement of George M. Morris), 912 (statement of James S. Ivins) [hereinafter cited as 1925 House Hearings]; Lyle T. Alverson, *Has the Board of Tax Appeals Failed?*, 4 NAT. INC. TAX MAG. 337 (1926) [hereinafter cited as Alverson]; George Maurice Morris, *American Bar Association Tax Revision Recommendations*, 3 NAT. INC. TAX MAG. 403, II; George Maurice Morris, *American Bar Association Tax Revision Recommendations*, 3 NAT. INC. TAX MAG. 403, 404 (1925) [hereinafter cited as Morris]; Percy W. Phillips, *Possible Methods of Eliminating Congestion of Tax Appeals*, 5 NAT. INC. TAX MAG. 243 (1927) [hereinafter cited as Phillips]; Forest D. Siefkin, *Has the Board of Tax Appeals Failed?* 5 NAT. INC. TAX MAG. 45, 46, 63–64 (1927) [hereinafter cited as Siefkin]; *Congestion of Tax Cases Before the Board of Tax Appeals*, 4 NAT. INC. TAX MAG. 303 (1926) [hereinafter cited as Congestion]; *see also* Appendix A (detailing the workload of the Board of Tax Appeals and Tax Court in terms of the number of cases docketed, closed, and pending in a given year).

[73] Morris, *supra* note 32, at 404; Congestion, *supra* note 32, at 304.

[74] Memorandum from Judge Turner, Rules Comm. Chairman, to Judge Dawson, Sept. 28, 1962, at 1, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Turner, 1962].

[75] 1925 House Hearings, *supra* note 72, at 895, 906 (statement of George M. Morris); Morris, *supra* note 72, at 404; Siefkin, *supra* note 72, at 46.

[76] *E.g.*, Letter to Member Morris, Joint Comm. Chairman, from Louis Goldberg, June 2, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Goldberg]; Letter to Chairman Black from

If the Board was to function as an effective forum for tax litigation, action was necessary to discourage the issuance of meritless deficiency notices and the filing of frivolous appeals, as well as to facilitate the disposition of bona fide appeals. Accordingly, over the years, a series of legislative measures and rule changes, designed to penalize taxpayers who file frivolous appeals and to hasten the disposition of bona fide controversies, have been implemented.

With reference to frivolous appeals, the response was immediate. In 1926, Congress authorized the Board to impose a filing fee of up to $10.[77] The Board promptly exercised this authority by imposing the maximum filing fee and requiring that it accompany the petition.[78] The rule, which was successful in reducing the number of appeals,[79] was initially interpreted to require payment of the filing fee as a jurisdictional necessity.[80] In 1927, however, the Board's dismissal of a petition for untimely payment of the fee was reversed by the Third Circuit Court of Appeals in *Weaver v. Blair*.[81] The circuit court held that there was no congressional intent to impose another jurisdictional requirement by giving the Board authority to impose a filing fee.[82] Thereafter, the Board discontinued the practice of returning the

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Byron Harris, May 29, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Harris]; Letter to Member Morris, Joint Comm. Chairman, from William Johnston, June 10, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Johnston]; Letter to Chairman Black from Walter Liebman, May 17, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Liebman]; Letter to Member Morris, Joint Comm. Chairman, from M. Matlock, May 29, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Matlock]; Letter to Member Morris, Joint Comm. Chairman, from S. Racine, May 26, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Racine].

[77] Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 904, 44 Stat. 106 (now codified at I.R.C. § 7451).

[78] B.T.A. RULE 8 (May 1, 1928 ed.).

[79] *See* Part III, notes 346–348 and accompanying text.

[80] In *John H. Weaver*, 5 B.T.A. 1298 (1926), *rev'd*, 19 F.2d 16 (3d Cir. 1927), the Board interpreted the rule providing that "[n]o such petition may be filed until such fee is paid to the Board, nor will the filing of any petition be antedated to a time prior to payment of such fee," as imposing another jurisdictional condition to the Board's consideration of the petition; *see also* Willis W. Ritter, *Jurisdiction of the Board of Tax Appeals Under the Act of 1926,* 4 NAT. INC. TAX MAG. 128 (1926).

[81] 19 F.2d 16 (3d Cir. 1927).

[82] *Id.*; *see also* Lewis-Hall Iron Works v. Blair, 23 F.2d 972 (D.C. Cir. 1972); Reliance Mfg. v. Blair, 19 F.2d 789 (7th Cir. 1927); Dwyer v. Commissioner, 18 B.T.A. 349, 351 (1929). These decisions were subsequently reflected in the Board's rules. B.T.A. RULE 8 (Feb. 1, 1931 ed.). In 1974, the Tax Court further amended the rule to expressly reserve the power to waive payment of the fee. TAX CT. R. 2(a) (Jan. 1, 1974 ed.).

petition to the taxpayer if it was not accompanied by the fee. Rather, the petition was retained and a notice was sent to remit the fee. If the fee was subsequently paid, the petition was deemed filed as of the original date of receipt.[83] If the fee was not forthcoming, the petition was dismissed.[84] In 1981, Congress raised the permissible fee for filing a petition to $60.[85] The Tax Court continues to impose the maximum filing fee, unless it grants the taxpayer's application for a waiver.[86]

A second legislative effort to discourage frivolous appeals resulted from an American Bar Association recommendation which advocated authorizing the Board to impose costs of up to $100 on either party if the appeal was found to be without merit.[87] The plan was aimed at taxpayers "who seem to think that [the Board's] procedure is simply a barricade to get behind in order to stop the assessment or the collection of taxes"[88] as well as defenses "made by the Commissioner which are without merit and where the taxpayer's contention from the evidence in the Commissioner's files should have been conceded."[89] Congress was apparently hesitant, however, to impose costs against the Government.[90] As a consequence, the Board was only authorized to penalize taxpayers "whenever it . . . [appeared] to the Board that proceedings before it . . . [had] been instituted by the taxpayer

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[83] Memorandum to Members of the Board from Chairman Littleton, May 5, 1927, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence."

[84] *Id.* The Board/Tax Court's practice was to tentatively deem the petition filed. However, the petition was not served on the Commissioner until the fee was paid. If the fee was never paid, then the proceeding would not be at issue since the Commissioner would not have filed an answer to the petition and, therefore, the petition would be dismissed. Bioff v. Commissioner, 47 B.T.A. 942, 944 (1942).

[85] *See* Economic Recovery Act of 1981, Pub. L. No. 97-34, § 751(a), 95 Stat. 349 (amending I.R.C. § 7451(a)).

[86] The Tax Court offers a form for the waiver, made available on the court's website at http://www.ustaxcourt.gov/forms/Application_for_Waiver_of_Filing_Fee.pdf.

[87] The proposal read as follows:

> VI. Imposition of Costs.—Recommended that power to be given to the Board to impose costs upon either party to the proceeding where the appeal or defense presented is found to be obviously without merit. A maximum limitation upon such costs should be one hundred dollars. If such costs are determined against the taxpayer they should be added to the deficiency found. If such costs are awarded against the Commissioner they should constitute a credit or refund to the appellant.

1925 House Hearings, *supra* note 72, at 906.

[88] *Id.* at 892.

[89] *Id.* at 906.

[90] *See id.* at 893.

merely for delay."[91] The Board/Tax Court originally used this power sparingly,[92] presumably due to fear that excessive use might intimidate taxpayers with bona fide disputes who would rather pay the deficiency than incur the risk of a penalty. However, both the frequency and the amount of § 6673 penalties have increased in modern times, as the court has resorted to the penalty to combat both frivolous filings and abusive invocation of the court's jurisdiction.[93]

For its part, the Board endeavored to discourage frivolous appeals by demanding that the taxpayer verify and his counsel sign the petition.[94] Such actions were deemed a certification that there was good reason to bring the appeal and that it was not frivolous or instituted for delay.[95] For willful violation of the rule, taxpayers were subject to the imposition of costs and their representatives were subject to disciplinary action, which included suspension and disbarment.[96]

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[91] Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 911, 44 Stat. 109 (now codified at I.R.C. § 6673); H.R. REP. NO. 69-1, at 19 (1925); S. REP. NO. 69-52, at 36 (1925). The ambiguous word "proceedings" was presumably used to permit an expansive interpretation of the provision, which would enable the Board/Tax Court to prevent taxpayers from using any of its rules for delay. *See generally* 1925 House Hearings, *supra* note 72, at 913 (testimony of James Ivins).

[92] *See* Bateman v. Commissioner, 34 B.T.A. 351, 370–71 (1936); W. E. Beckman Baker's Confectioners' Supply Co. v. Commissioner, 13 B.T.A. 860, 863–64 (1928). The Board did not exercise the power until 1933. Combs v. Commissioner, 28 B.T.A. 1216 (1933); *see also* Joe D. Hughes, 2 GEO. WASH. L. REV. 265 (1934). Another proposal aimed at decreasing the number of frivolous appeals would have required taxpayers to pay the tax or give a bond to secure payment prior to appealing to the Board. Letter to President Franklin Roosevelt, from Secretary of the Treasury Morgenthau, c. 1936, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Morgenthau]; Letter to Chairman Black from Robert Jackson, Counsel for the Bureau of Internal Revenue, Sept. 7, 1935, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" (hereinafter cited as Jackson). This proposal was not pursued, presumably because it was completely inconsistent with the original purpose for creating the Board to provide review of the Commissioner's deficiency determination prior to payment of the disputed tax.

[93] The origins of the § 6673 penalty and its expanded reach are addressed in Part X.D.

[94] B.T.A. RULE 5 (April 1, 1926 ed.); *see also* TAX CT. R. 33(b) (July 6, 2012 ed.) (providing the current rule)

[95] B.T.A. RULE 5 (April 1, 1926 ed.)

[96] *Compare* B.T.A. RULE 5 (April 1, 1926 ed.), *with* B.T.A. RULE 2 (April 1. 1926 ed.). The current rule expressly states that a willful violation of the rule may result in disciplinary action. *Compare* TAX CT. R. 33(b) (July 6, 2012 ed.), with TAX CT. R. 202 (July 6, 2012 ed.). To deter practitioners from persistently filing frivolous appeals, the American Bar Association recommended that the Board publish a

If the appeal embraced a bona fide controversy, the emphasis was on encouraging settlement. If settlement was not feasible, then the goal was to decrease the period between filing of the petition and ultimate resolution of the appeal. Congress considered a myriad of proposals for enhancing settlement, including a proposal by the Bureau advocating a mandatory protest procedure prior to the issuance of a deficiency.[97] The plan paralleled the Board's procedure in that the taxpayer would have 90 days to file a formal protest to a proposed deficiency.[98] Failure to file the protest within the allotted time obviated the need for a deficiency notice, and the Commissioner could forthwith assess and collect the tax.[99] If the taxpayer did file a formal protest, then the grounds and evidence in further litigation would be restricted to those raised during the protest proceedings unless good cause existed for a different result.[100]

However, Congress was not receptive to such basic changes in the structure of tax litigation,[101] and the only legislation to encourage settlement was the expansion of the filing period from 60 to 90 days.[102] The extra 30 days was considered helpful if the parties were to have sufficient time to reconcile their differences without resort to filing a petition.[103]

Implicit in the congressional reticence to dictate the settlement procedure has been the recognition that the stimulus for settlement would have to come primarily from Internal Revenue and Board/Tax Court initiatives. In the early years of tax administration, settlement did not seem to be one of the Bureau's highest priorities. The Bureau's tendency to drag its feet during settlement negotiations and the reluctance on the part of Bureau personnel to accept responsibility for the settlement decision were generally criticized.[104] Over the years, the Service's procedures have been extensively revised and refined to enhance the likelihood of settlement.[105]

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written reprimand to practitioners which would accompany the opinion. 1925 House Hearings*,* *supra* note 72, at 892 (statement of George Morris).

[97] Memoranda to Mr. Oliphant from Morrison Shafroth, Chief Counsel, June 4, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Shafroth].

[98] *Id.* at 1, 2.

[99] *Id.* at 2.

[100] *Id.* at 3.

[101] *See* Morgenthau, *supra* note 92.

[102] Revenue Act of 1934, ch. 277, § 501, 48 Stat. 755; H.R. REP. NO. 73-704, at 34 (1933).

[103] H.R. REP. NO. 73-704, at 34 (1933).

[104] Congestion, *supra* note 72, at 304–05; Goldberg, *supra* note 76; Harris, *supra* note 76; Johnston, *supra* note 76; Matlock, *supra* note 76; Racine, *supra* note 76; Turner, 1962, *supra* note 74, at 6.

[105] *See generally* Rev. Proc. 60-18, 1960-2 C.B. 988; Hugh F. Culverhouse, *Settlement Procedures Before the Bureau of Internal Revenue,* 11 ALA. LAW. 420 (1950);

For its part, the Board/Tax Court has been determined to dispose of as many appeals as possible by settlement. This goal has been principally advanced by the gradual evolution of a mandatory stipulation procedure, which has been credited with either contributing to or actually effectuating a settlement rate of approximately 70 percent.[106]

Although most petitions are disposed of by settlement, many cases are not so resolved. To deal with these cases, a series of diversified legislative and administrative measures aimed at expediting the disposition of bona fide appeals have been implemented. Legislatively, there have been three significant changes that, in their inception, were perceived as capable of accomplishing the desired goal. First, under the Revenue Act of 1924, the Chairman of the Board was authorized to divide the Board membership into divisions consisting of at least three members.[107] Admittedly, the use of three-member divisions was more efficient than having the Board hear every appeal en banc, but it was, nevertheless, an inefficient method of handling appeals. Many commentators were convinced that divisions smaller than three Board members would increase the Board's work product,[108] and, in 1926, Congress agreed. Accordingly, the Chairman of the Board was authorized to create divisions consisting of one or more

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Bruce Donaldson, *Techniques in Presenting and Settling a Case Before the Internal Revenue Service: District Conference; Appellate Division*, 27 N.Y.U. INST. ON FED. TAX'N 1343 (1969); Morris R. Friedman, *Techniques and Limitations in Dealing with a Conferee*, 22 N.Y.U. INST. ON FED. TAX'N 95 (1964); Benjamin H. Neblett, *Settlement Procedures in the Technical Staff and Division Counsel's Office*, 1 U.S.C. TAX INST. 369 (1949); Irving Rosenzweig, *Techniques and Limitations in Dealing with the Appellate Division*, 22 N.Y.U. INST. ON FED. TAX'N 109 (1964); Melvin L. Sears, *Revenue Procedure 60-18—New Techniques for the Early Consideration and Disposition of Tax Court Cases*, 36 WASH. L. REV. 373 (1961); Henry C. Stockell, Jr., *I.R.S. Presses for Disposition of Tax Court Cases Before Trial*, 14 J. TAX'N 180 (1961); Henry C. Stockell, Jr., *Pre-Session Conference Procedures are Increasing Settlements of Tax Court Cases*, 18 J. TAX'N 170 (1963); Clifford W. Stowe, *Audit Informal Conference and Appellate Procedures in the Reorganized Bureau*, 94 J. ACCOUNT. 298 (1952); Roger John Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes–A Criticism and a Proposal*, 38 COLUM. L. REV. 1393 (1938); Roger John Traynor & Stanley S. Surrey, *New Road Towards the Settlement of Federal Income, Estate and Gift Tax Controversies*, 7 LAW AND CONTEMPT. PROB. 336 (1940); James T. Wilkes, Jr., *Settlements Before Decision by the Tax Court*, 38 TAXES 827 (1960); H. Brian Holland et al., *Treasury Settlement Procedures, A Panel Discussion*, 50 TAXES 601 (1972).

[106] *See* Congestion, *supra* note 72, at 303; Phillips, *supra* note 72, at 268; Turner, 1962, *supra* note 74, at 6.

[107] Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337.

[108] 1925 House Hearings, *supra* note 72, at 887–88, 905–06 (statement of George Morris), 912 (testimony of James Ivins), 929–30 (testimony of Charles Hamel); Congestion, *supra* note 72, at 303.

members;[109] the Chairman immediately exercised such authority by creating one-member divisions.[110]

A second legislative change designed to increase the Tax Court's productivity was enacted in 1943.[111] The presiding judge was authorized to, and did, appoint commissioners (later to be designated special trial judges) for particular cases who would conduct the hearing and then submit proposed findings of fact to the court or the appropriate division.[112] If the proposed findings of fact were adopted, the judges of the court were relieved of the responsibility of conducting the hearing and preparing findings of fact. In this manner, more hearings could be held and more appeals resolved. Furthermore, the broadening scope of the special trial judge's duties, which now include presiding over pretrial conferences, hearing motions, writing proposed opinions, and entering decisions in certain cases,[113] has enhanced the Tax Court's efficiency in handling proceedings.

Finally, for many years commentators recommended that the creation of a small claims division would expeditiously dispose of petitions involving

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[109] Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 906(a), 44 Stat. 106 (now codified at I.R.C. § 7444(c)).

[110] HAMEL, *supra* note 32, at 157–59; William H. Bowen, *Interview of Tax Court Judge Turner, The Tax Court–What Every Tax Man Should Know*, 37 TAXES 117, 117–18 (1959); Phillips, *supra* note 72, at 244; Siefkin, *supra* note 72, at 64.

[111] Revenue Act of 1943, ch. 63, § 503, 58 Stat. 72 (originally codified at I.R.C. § 7456(c); now codified at I.R.C. § 7443A).

[112] *Id.*; H.R. REP. NO. 78-871, at 34, 71–72 (1943); S. REP. NO. 78-627, at 94 (1943); *see also* Memorandum to the Judges from Presiding Judge Murdock, June 7, 1944, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence"; Memorandum to the Judges of the Court from Judge Turner, Rules Comm. Chairman, June 7, 1944, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence."

After the proposed findings of fact were submitted to the court or a division thereof, and served upon both parties, the parties had 20 days to file exceptions which, would be considered by the division assigned the case. TAX CT. R. 48(c) (July 1, 1944 ed.). The parties were allowed 45 days from the filing of the Commissioner's proposed findings of fact to file briefs, and an additional 15 days to file reply briefs. TAX CT. R. 48(d) (July 1, 1944 ed.).

The idea of appointing commissioners was by no means new, having been suggested on numerous previous occasions. *E.g.*, Harris, *supra* note 76; Jackson, *supra* note 92; Morgenthau, *supra* note 92; Phillips, *supra* note 72, at 244; Joint Committee Report, *supra* note 3, at 28. The Tax Court's use of commissioners and special trial judges is addressed in Part XII.

[113] TAX CT. R. 181–182 (July 6, 2012 ed.). The scope of the special trial judge's authority, and the procedures to be followed both in cases in which the special trial judge may enter the decision and in cases in which the special trial judge may preside over the trial but not enter the decision, are detailed in Part XII.C–D.

sums below a prescribed threshold.[114] As a considerable number of petitions involve small amounts, many believed that informal disposition of these cases, conducted without the necessity of a formal trial, would substantially reduce the backlog of appeals.[115] In 1969, following the adoption of a special court rule dealing with small cases,[116] Congress created a small tax case procedure that permitted taxpayers to request, subject to an opposing motion by the Commissioner, a less formal resolution of the appeal if the amount in dispute was less than $1,000.[117] As described in more detail in Part XIII,[118] Congress has periodically raised the ceiling on the amount in dispute in cases subject to the small tax case procedure to its current generous level of $50,000.[119]

The reasons that motivated Congress to act in 1969, however, were not the same reasons that prompted the earlier proposals. In fact, the small tax case procedure was specifically enacted to make the Tax Court more accessible to taxpayers with small claims who might not otherwise have a practical opportunity to have an impartial tribunal pass upon the merits of the Commissioner's determination.[120] The increasing reach of the small tax procedure is a testament to the success of this measure in increasing taxpayer access to judicial review of adverse administrative determinations.[121] As a result, the small tax case procedure, which was

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[114] 1925 House Hearings, *supra* note 72, at 887, 905 (statement of George Morris); Letter to Member Morris, Joint Comm. Chairman, from S. Seidman, June 29, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Seidman, 1937].

[115] 1925 House Hearings, *supra* note 72, at 887, 905 (statement of George Morris); Seidman, *supra* note 114.

[116] *See* Anne S. Davidson, *Litigation in the Small Tax Case Division of the United States Tax Court–The Taxpayer's Dream?*, 41 GEO. WASH. L. REV. 538, 539 (1972).

[117] Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 733 (amending I.R.C. § 7463); S. REP. NO. 91-552, at 302 (1969); TAX CT. R. 36 (Dec. 30, 1970 ed.).

[118] The small tax case procedure is detailed in Part XIII.A.

[119] The most recent increase in the amount in dispute was also the most significant. As part of the Internal Revenue Service Restructuring and Reform Act of 1998, Congress increased the prevailing ceiling amount from $10,000 to $50,000. *See* Pub. L. No. 105-206, § 3103(a), 112 Stat. 731 (amending I.R.C. § 7463(a)).

[120] S. REP. NO. 91-552, at 302 (1969); *see also* William Drennen, *New Status of the Tax Court*, 29 N.Y.U. INST. ON FED. TAX'N 1017, 1023–30 (1971); Harold Dubroff, *Federal Taxation*, 1973–74 ANN. SURVEY OF AMER. LAW 265, 265–72 (1974) [hereinafter cited as Dubroff]; Ronald S. Naveen and Lance Eisenberg, *Small Cases in the Tax Court*, 57 A.B.A. J. 1235 (1971); Michael P. Oshatz, *Procedural Aspects of Practice Before the Tax Court: Including Small Claims Division, When and How to Use It*, 31 N.Y.U. INST. ON FED. TAX'N 1471, 1480–85 (1973); Samuel B. Sterrett, *Small Tax Cases*, 50 TAXES 624 (1972).

[121] The development and reach of the small tax case procedure provided under § 7463 is addressed in Part XIII.A.

originally perceived as a method of eliminating the backlog of appeals, may actually be responsible for increasing the number of petitions filed. Nevertheless, the streamlined procedures applicable to these cases[122] have resulted in an overall increase in court efficiency.

The Board/Tax Court endeavored to complement these legislative efforts by gradually developing more efficient and versatile procedures for handling appeals. One cause of delay in the disposition of many appeals centered around the Board's method of placing appeals on trial calendars.[123] Prior to 1938, all proceedings were, as a matter of course, initially placed on the Washington trial calendar.[124] A subsequent motion by the petitioner, which was subject to the Board's discretion, was necessary to place an appeal on a circuit calendar.[125] This practice occasioned considerable delay, especially in the case of many last minute motions seeking a change from one calendar to another.[126] The Board received several suggestions to revise this procedure[127] and, in 1938, substituted a procedure under which the petitioner could file with his petition a request to have the petition placed upon a particular calendar.[128] The Commissioner was likewise given an opportunity to file with his answer a request different from the taxpayer's.[129] The Board would then determine where the appeal would be heard "with due regard to any request filed and in accordance with the statutory provision that the time and place of trial shall be fixed 'with as

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[122] Dubroff, *supra* note 120, at 269–72.

[123] *See* Letter to Member Morris, Joint Comm. Chairman, from Julius Barnard, entitled Circuit Hearings, June 10, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Barnard, 1937]; Memorandum to Members of the Board, from Member Murdock, Rules Comm. Chairman, Nov. 12, 1937, at 10–12, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Rules Committee Report]; Memorandum entitled "Suggested Changes in Rules of Practice of the Board of Tax Appeals," from Stanley Surrey, c. 1937, at 1, 2, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Surrey]; Memorandum to Chairman Arundell, from Stanley Surrey, Nov. 4, 1937, at 2, 3, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Surrey, 1937].

[124] B.T.A. RULE 24 (Nov. 1, 1933 ed.); Rules Committee Report, *supra* note 123, at 10.

[125] Joint Committee Report, *supra* note 3, at 4–6; Rules Committee Report, *supra* note 123, at 10–12; Surrey, *supra* note 123, at 1–2; Surrey, 1937, *supra* note 123, at 2–3.

[126] *See supra* note 125; Barnard, 1937, *supra* note 123.

[127] *See supra* note 126.

[128] B.T.A. RULE 26 (July 1, 1938 ed.).

[129] *Id.*

little inconvenience and expense to the taxpayer as is practicable.'"[130] Any motions to change the place of hearing determined in accordance with the above procedure had to be submitted before notice of the time of the hearing had been mailed to the parties.[131] Subsequently, the procedure was further refined to deny the Commissioner the opportunity to file a request in his answer, except in cases in which the taxpayer failed to make a request with his petition.[132] Once a place of trial was designated, either party could file a motion to change the designated place of hearing, but such a motion had to be based on justifiable grounds.[133] The Tax Court deemed this change advisable because at these hearings, it was generally the case "that the respondent was not particularly concerned in having a place of hearing different from that desired by the petitioner."[134] The revised procedure removed this needless burden on the motions calendar as the hearing on conflicting requests, necessary under the prior procedure, was eliminated in many cases.[135]

Another potential method of reducing the number of appeals is the joint petition.[136] By this procedural device, a taxpayer with several deficiency notices, or several taxpayers with deficiency notices that present similar legal or factual questions, may file a single petition. Thus, if permitted, joint petitions would not only reduce the number of petitions and assure that similar cases be tried together, but they would also eliminate the necessity of a motion and hearing to consolidate.[137] Nevertheless, the Board/Tax Court, until recently, has been reluctant to permit joint petitions, for both statutory and pragmatic reasons. The tax laws grant "the taxpayer" the right to file a petition.[138] The use of the singular noun "taxpayer" raises the inference that joint petitions are not within the statutory intendment.[139]

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[130] *Id.* The statutory reference is to the Revenue Act of 1926, ch. 27, § 907(e), 44 Stat. 108 (now codified at I.R.C. § 7446).

[131] B.T.A. RULE 26 (July 1, 1938 ed.).

[132] TAX CT. R. 26 (Feb. 9, 1943 ed.).

[133] *Id.*; Memorandum to the Judges from Judge Turner, Rules Comm. Chairman, Jan. 15, 1943, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence" [hereinafter cited as Turner, 1943].

[134] Turner, 1943, *supra* note 133.

[135] *Id.* The current rule is substantially the same as the 1943 version of the rule. *Compare* TAX CT. R. 26 (Feb. 9, 1943 ed.), *with* TAX CT. R. 140, 174(a) (July 6, 2012 ed.); *see also* Appendix I, Form 5, TAX CT. R. (July 6, 2012 ed.), for a listing of the cities where the Tax Court regularly holds circuit hearings.

[136] Letter to Member Morris from Julius Barnard, entitled Consolidated Petitions, June 10, 1937, filed at the U.S. Tax Court in "Petitions: Memoranda and Correspondence."

[137] *Id.*

[138] *Compare* Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297, *with* INT. REV. CODE OF 1939, ch. 1, § 272(a), 53 Stat. 82, *and* I.R.C. § 6213(a).

[139] Powers v. Commissioner, 20 B.T.A. 753, 755 (1930).

Additionally, joint petitions could create procedural difficulties unless the parties could guarantee a continuing identity of issues as the appeal progressed.[140] The Commissioner's right to increase the deficiency as to any taxpayer, combined with the taxpayers' right to amend their petitions and proceed upon separate and distinct theories, convinced the Board/Tax Court to circumscribe the filing of joint petitions carefully.[141]

The application of this reasoning, however, depends to a great extent upon which type of joint petition is filed. Generally, there are three separate categories of joint petitions.[142] The first category includes any taxpayer who receives multiple deficiency notices.[143] The second category is comprised of multiple taxpayers who jointly receive a deficiency notice.[144] The third category consists of multiple taxpayers who receive separate deficiency notices.[145] Initially, as to each category, the Board steadfastly stood by its rule against joint petitions.[146] The gradual erosion of the rule that subsequently developed was, in part, due to criticism that the practice of demanding separate petitions in all cases was unnecessary as well as too expensive and time consuming. Notwithstanding that the Board/Tax Court ascribed its relaxation of the rule against joint petitions to benefits accruing to taxpayers, the benefits accruing to the Board/Tax Court in terms of fewer petitions, joint hearings, and joint opinions were equally obvious. The first relaxation occurred in 1940, when the Board allowed a single taxpayer to combine several deficiency notices in one petition.[147] The Board concluded that this type of petition was no different than a petition contesting a single deficiency notice issued with respect to different tax

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[140] *Id.* at 757.

[141] It should be noted that, in most cases involving joint petitions, the consequences of the Board/Tax Court's refusal to allow the petition did not prejudice the taxpayers. Generally, the taxpayers were permitted to file separate amended petitions and the filing date of these petitions related back to the original filing date of the joint petition. *See* Weisser v. Commissioner, 32 B.T.A. 755, 758–60 (1935); Sparrow v. Commissioner, 20 B.T.A. 865 (1930); Held v. Commissioner, 20 B.T.A. 863, 864 (1930); Powers v. Commissioner, 20 B.T.A. 753, 757 (1930).

[142] *See* TAX CT. R. 34(a), 61 (Jan. 1, 1974 ed.).

[143] *See* Egan v. Commissioner, 41 B.T.A. 204 (1940); TAX CT. R. 34(a). (Jan. 1, 1974 ed.); Rules Comm. Note, TAX CT. R. 34(a) (Jan. 1, 1974 ed.).

[144] *See* Bryant v. Commissioner, 33 T.C. 201 (1959); TAX CT. R. 34(a) (Jan. 1, 1974 ed.); Rules Comm. Note, TAX CT. R. 34(a) (Jan. 1, 1974 ed.).

[145] *See* TAX CT. R. 61 (Jan. 1, 1974 ed.); *see generally* Randolph F. Caldwell, Jr., *Tax Court Has New Rules of Practice and Procedure*, 59 A.B.A. J. 1301, 1302–03 (1973) [hereinafter cited as Caldwell, 1973]; Goldfein, *supra* note 49, at 66–67.

[146] *See* Weisser v. Commissioner, 32 B.T.A. 755, 758–60 (1935); Sparrow v. Commissioner, 20 B.T.A. 865 (1930); Held v. Commissioner, 20 B.T.A. 863, 864 (1930); Powers v. Commissioner, 20 B.T.A. 753, 757 (1930).

[147] Egan v. Commissioner, 41 B.T.A. 204 (1940).

years. The revision was of obvious benefit to taxpayers who otherwise would be forced to expend time and money drafting separate petitions and paying multiple filing fees.[148]

The Board/Tax Court was not so liberal in the case of joint petitions in the second and third categories, initially refusing to permit these joint petitions with one limited exception. If a deficiency notice was jointly issued to separate taxpayers, a joint petition could be filed only if the joint recipients were married, had filed a joint return, and presented a joint defense.[149]

Finally, in 1974, in what was heralded as "a welcome innovation" that could result in savings of time and expense for taxpayers and their counsel,[150] the Tax Court authorized the broad use of joint petitions[151] subject to discretion of the court to sever the claims if deemed appropriate.[152] In the case of a joint deficiency notice issued to separate taxpayers, the rules generally permit the filing of a joint petition.[153] If a joint petition is filed in connection with the issuance of separate deficiency notices to several taxpayers, the Tax Court initially allowed a joint petition only if "all or part of each participating party's tax liability arises out of the same transaction, occurrence, or series of transactions and occurrences and, in addition, there is a common question of law or fact relating to those parties."[154] However, effective July 1, 1990, the Tax Court eliminated the prospect of permissive prepetition joinder of taxpayers who received separate notices of deficiency. Instead, joinder of multiple parties generally was limited to instances in which the parties had been issued a single notice of deficiency.[155] The Tax Court explained its general elimination of permissive joinder in terms of administrative ease:

> The amendment is intended to alleviate the administrative burden that prepetition joinder of petitioners in deficiency and liability cases has placed on the Court. This burden has been particularly acute whenever counsel seeks to enter an appearance or withdraw as to

[148] *Id.* at 205.

[149] Bryant v. Commissioner, 33 T.C. 201 (1959).

[150] Report of Views of Members of the A.B.A. Section of Taxation, Special Subcommittee on Division of Tax Court Rules, *Proposed Rules of Practice and Procedure of the United States Tax Court*, 26 TAX LAW. 393, 394 (1973).

[151] TAX CT. R. 34(a), 61 (Jan. 1, 1974 ed.). *See* Caldwell, 1973, *supra* note 145; Goldfein, *supra* note 49.

[152] TAX CT. R. 34(a), 61(b) (Jan. 1, 1974 ed.).

[153] TAX CT. R. 34(a) (Jan. 1, 1974 ed.). This provision has remained substantially the same under the current rules. *See* TAX CT. R. 34(a) (July 6, 2012 ed.).

[154] TAX CT. R. 61(a) (Jan. 1, 1974 ed.).

[155] *See* TAX CT. R. 61(a), 93 T.C. 893 (1989).

> some, but not all, of the petitioners who have joined in the petition, or whenever a settlement has been reached as to some, but not all, of the petitioners.[156]

At the time it eliminated permissive prepetition joinder, the Tax Court clarified that a husband and wife who had been issued a notice or notices of deficiency in his or her individual capacity could nonetheless file a joint petition.[157] Hence, absent a single notice of deficiency issued to multiple parties, prepetition joinder of parties is now limited to spouses.

C. The Answer

After the taxpayer files a petition the initiative shifts to the Commissioner to file his responsive pleading, the answer, which functions to define the issues in controversy between the taxpayer and the Government. In the answer, the Commissioner admits or denies the petitioner's allegations and pleads affirmatively to the extent required by statute and court rule. One of the first questions that arose with respect to the answer was whether the Board could compel its filing by the Commissioner, and in default thereof enter judgment for the petitioner. Other questions of a less fundamental nature have also arisen over the years which have resulted in the answer being one of the most controversial aspects of Board/Tax Court practice. Important among these have been questions involving the Commissioner's practice of filing general denials and the necessity and consequences of affirmative allegations in the answer.

1. Filing Requirements

Originally, the rules of practice provided the Commissioner with 20 days to file an answer.[158] The Board soon concluded, however, that a longer period would be more conducive to informative pleading.[159] Consequently, in 1925, the period was extended to 60 days.[160] Although the original rules

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156 Rules Comm. Note, TAX CT. R. 61(a), 93 T.C. 864 (1989).

157 *See* TAX CT. R. 34(a)(1), 93 T.C. 867 (1989); *see also* Rules Comm. Note, TAX CT. R. 34(a)(1), 93 T.C. 867 (1989).

158 B.T.A. RULE 9 (July, 1924 ed.).

159 Press Release, United States Board of Tax Appeals, Nov. 24, 1925, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Press Release].

160 B.T.A. RULE 9 (Nov. 1, 1925 ed.). The Board expressed the following reasons for the revision: "[T]he time . . . for filing answer has been extended from twenty to sixty days in an effort to allow the Commissioner ample opportunity to consider the taxpayer's petition, assemble papers, and, if necessary, communicate

neglected to provide for amended pleadings,[161] the Board soon issued a revision to allow discretionary amendments upon timely motion.[162] Subsequently, the rule was further amended to permit amended answers as of right under limited circumstances.[163]

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with the Collector of Internal Revenue." Press Release, *supra* note 159. Every revision since 1925 has provided for a 60-day filing period. *See* TAX CT. R. 36(a) (July 6, 2012 ed.). However, in 1931, the 60-day period was suspended in response to a request by the Internal Revenue Bureau. The Bureau claimed, and the Board agreed, that a "temporary serious emergency" existed due to the unusually large numbers of petitions filed between March 1 and May 31, 1931, and that it would be exceedingly difficult to meet the 60-day limitation. Therefore, the filing period was expanded to six months for petitions filed between the two dates. Order suspending Rule 14, April 10, 1931, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence."

161 B.T.A. RULES (July, 1924 ed.).

162 B.T.A. RULE 13 (Sept. 27, 1924 ed.). The oversight was brought to the Board's attention in a letter responding to a request by the Board for suggestions and criticisms of the rules. Letter from William Spalding, attorney, to the United States Board of Tax Appeals, Aug. 5, 1924, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Spalding].

In 1926, the rule was amended to provide that "[u]pon motion made, the Board may, in its discretion, at any time *before the conclusion of the hearing*, permit a party to a proceeding to amend the pleadings to conform to the proofs." B.T.A. RULE 18 (April 1, 1926 ed.) (emphasis added). The phrase "before the conclusion of the hearing" paralleled a statutory provision which permitted the Commissioner to claim an increased deficiency "at or before the hearing." Revenue Act of 1926, ch. 27, § 273(e), 44 Stat. 56 (now I.R.C. § 6214(a)). Generally, the Commissioner was required to show cause for the amended answer, *Behan v. Commissioner*, 32 B.T.A. 1088, 1089 (1935), *aff'd*, 90 F.2d 609 (2d Cir. 1937), and, if affirmative relief were sought, the rules required a statement of the underlying facts to accompany the proposed pleading. Fair v. Commissioner, 27 T.C. 866, 875 (1957). *See* TAX CT. R. 14 (Aug. 15, 1955 ed.). The motions to amend were subject to the Board/Tax Court's discretion. *See* Henningsen v. Commissioner, 243 F.2d 954, 959 (4th Cir. 1957); Commissioner v. Erie Forge Co., 167 F.2d 71, 76 (3d Cir. 1948); Gemma v. Commissioner, T.C. Memo. 1967-208, 26 T.C.M. (CCH) 1024 (1967); Fifth Avenue Bank of New York v. Commissioner, 32 B.T.A. 701, 704 (1935), *aff'd*, 84 F.2d 787, 790 (3d Cir. 1936); Estate of Wickham v. Commissioner, 22 B.T.A. 1393, 1398 (1931), *aff'd*, 65 F.2d 527 (8th Cir. 1933); Gilman v. Commissioner, 18 B.T.A. 1277, 1283 (1930), *aff'd*, 53 F.2d 47 (8th Cir. 1931); Eagle Dye Works, 1 B.T.A. 638, 640 (1925).

163 TAX CT. R. 41(a) (July 6, 2012 ed.), provides in pertinent part:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. If the pleading is one to which no responsive pleading is permitted and the case has not been placed on a trial calendar, then a party may so amend it at any time within 30 days after it is served.

Alternatively, the Commissioner may file a motion to dismiss the petition. In the first major rules revision, the Board remedied its initial failure to afford the Commissioner this option and permitted a motion to be filed within 20 days after serving the petition.[164] After four years of experience under this rule, the Board expanded the filing period to 45 days, having concluded that a longer period was necessary for effective and efficient pleading.[165]

Although moving and answering were presented as alternatives,[166] the Commissioner could file both simultaneously without jeopardizing his rights under the motion if expressly reserved.[167] If, on the other hand, the Commissioner only filed a motion, the necessity of answering was suspended until disposition of the motion,[168] after which the Commissioner had a "reasonable period, ordinarily 60 days," to answer.[169]

The filing periods described above for moving and answering have withstood the test of time and are incorporated into the current rules.[170] It cannot be inferred, however, that these periods were always adequate. Under certain circumstances, extensions of time might be desirable and necessary. Consequently, the filing requirements were complemented by a procedure that permitted time extensions "for good and sufficient

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[164] *Compare* B.T.A. RULE 9 (July, 1924 ed.), *with* B.T.A. RULE 9 (Sept. 27, 1924 ed.).

[165] B.T.A. RULE 14 (May 1, 1928 ed.).

[166] *E.g.*, *compare* B.T.A. RULE 9 (Sept. 27, 1924 ed.), *with* TAX CT. R. 36(a) (Jan. 1, 1974 ed.).

[167] United States Trust Company, 1 B.T.A. 1086, 1087 (1925). *Cf.* TAX CT. R. 31(c) (July 6, 2012 ed.), which provides in pertinent part:

> (c) *Consistency*. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them would be sufficient if made independently, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may state as many separate claims or defenses as he has regardless of consistency or the grounds on which based.

[168] French & Co. v. Commissioner, 10 B.T.A. 665, 671 (1928).

[169] HAMEL, *supra* note 32, at 100. *See, e.g.*, Covert Gear Co., 4 B.T.A. 1025, 1027 (1926). B.T.A. RULE 20(b) (Dec. 15, 1948 ed.) formalized the procedure by providing:

> If a motion is filed or an order issued in respect to the adequacy of any petition, the time prescribed in Rule 14 shall begin to run from the date upon which the Court takes final action with respect to the motion or the order unless the Court orders otherwise.

[170] TAX CT. R. 36(a) (July 6, 2012 ed.).

cause."[171] The Commissioner made relatively frequent use of this extension procedure in fraud and transferee liability cases,[172] and at one point the Bureau recommended a general 90-day answering period in these cases.[173] Although the court conceded that an expanded filing period might reduce the number of such requests for extensions,[174] it declined to amend the rule until 1974 when, rather than expanding the answering period, both extension and contraction of all time periods were made discretionary with the court.[175]

On occasion the Commissioner failed to move or answer timely, or after an unsuccessful motion, failed to answer timely. The failure to provide for this contingency cannot be attributed to mere oversight. The Board was aware of speculation that, since both the Board and the Bureau were agencies in the executive branch and the extent of the Board's jurisdiction over the Bureau was unclear, it might not have the authority to compel an answer or to render a decision for the taxpayer on the basis of the Commissioner's failure to answer.[176] Presumably for this reason, the Board

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[171] B.T.A. RULE 12 (July, 1924 ed.). The motion had to be in writing and state the reasons why an extension was requested. The rule was amended in 1926 to provide specifically that it did not apply to the filing of a petition, and that "good and sufficient cause" had to be demonstrated. B.T.A. RULE 20 (April 1, 1926 ed.). *See generally* Shell Company of California v. Commissioner, 10 B.T.A. 1324 (1928); Shults Bread Co. v. Commissioner, 10 B.T.A. 268 (1928), *aff'd*, 37 F.2d 442 (D.C. Cir. 1929).

[172] Memorandum from R. Hertzog, to Chief Judge Kern, Aug. 10, 1953, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Hertzog]; Memorandum from Chief Judge Kern, to Judge Murdock, Rules Comm. Chairman, Aug. 14, 1953, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Kern, 1953].

[173] Hertzog, *supra* note 172.

[174] Kern, 1953, *supra* note 172.

[175] TAX CT. R. 25(c) (Jan. 1, 1974 ed.); Rules Comm. Note, TAX CT. R. 25(c) (Jan. 1, 1974 ed.). This flexibility has been retained in the current rule. *See* TAX CT. R. 25(c) (July 6, 2012 ed.). *Cf.* FED. R. CIV. P. 6(b)(1), which provides as follows:

> (b) EXTENDING TIME.
>
> (1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

The shorter moving and answering periods in federal district court may have also influenced the Tax Court to reserve the power to order shorter filing periods in appropriate cases. *See* FED. R. CIV. P. 12.

[176] Willis W. Ritter, *Pitfalls in Practice Before the Board of Tax Appeals*, 3 NAT. INC. TAX MAG. 297, 299–300 (1925) [hereinafter cited as Ritter, 1925].

chose to proceed cautiously rather than risk a confrontation. For example, the original rule which mandated that the Commissioner "shall file an answer"[177] was soon amended in favor of a more conservative approach which provided "the Commissioner shall have 20 days within which" to move or answer.[178] This change in wording was significant in its implied concession that the Board could not compel the Commissioner to answer. Additionally, the Board was reluctant, until 1931, to delineate expressly the consequences of the Commissioner's failure to answer.[179] Consequently, the Board had to improvise on a case-by-case basis when faced with the issue. At first, it seemed satisfied to grant discretionary time extensions that were not dependent upon timely motion.[180] An orderly procedure, however, demanded a less arbitrary and more definitive method of dealing with tax controversies. Furthermore, it was essential, for policy reasons, that the Board not only promulgate rules of procedure that fairly allocated the burden of pleading, but that the court also uniformly administer the rules.[181]

The Board received some guidance from the Court of Appeals for the District of Columbia in its decision in *Board of Tax Appeals v. United States ex rel. Shults Bread Co.*,[182] which severely restricted the available options. The Board had exercised its discretion to waive the time limitations by allowing the Commissioner to submit his pleading on a motion made subsequent to the filing period. In affirming the decision, the court of appeals stressed that the Commissioner had a statutory right to be heard,[183] and because there was no statutory requirement that the Commissioner file an answer, the Board's procedural rules could not limit that statutory right.[184] The

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177 B.T.A. RULE 9 (July, 1924 ed.).

178 B.T.A. RULE 9 (Sept. 27, 1924 ed.).

179 It is also possible that the Board was reluctant to promulgate a rule penalizing the Commissioner, because of the impropriety of anticipating an occasional failure to comply with the rules. *See* Letter from Judge Murdock, Rules Comm. Chairman, to E. Griswold, Dec. 11, 1947, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence."

180 Board of Tax Appeals v. U.S. ex rel. Shults Bread Co., 37 F.2d 442 (D.C. Cir. 1929); Leininger v. Commissioner, 19 B.T.A. 621 (1930), *rev'd*, 86 F.2d 791 (6th Cir. 1931), *rev'd*, 285 U.S. 136 (1932); Baldwin v. Commissioner, 14 B.T.A. 506, 507 (1928).

181 *See* Letter from R. Miller, Chairman, ABA Committee on Federal Taxation, to Member Murdock, Rules Comm. Chairman, April 22, 1937, p. 2, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Miller].

182 37 F.2d 442 (D.C. Cir. 1929).

183 Revenue Act of 1926, ch. 27, § 1000, *amending* Revenue Act of 1924, § 907(a), 44 Stat. 107 (now codified at I.R.C. § 7458).

184 37 F.2d at 443.

court concluded that the Commissioner's failure to answer would, under no circumstances, justify a default judgment.

> When the petition for redetermination was filed with the Board in the present case, the duty was imposed upon the Board to proceed with the case. The objections set forth in the petition to the findings of the Commissioner presented issues between petitioner and the Commissioner for redetermination by the Board, whether the Commissioner answered the petition or not. The issues thus presented by the petition, in the absence of answer, were such as must be supported by proof. In other words, there was not such a prima facie case as would authorize or justify a judgment in default. The jurisdiction to redetermine forbids such a judgment.[185]

Shortly thereafter, the Board promulgated a rule consistent with the *Shults Bread Co.* holding which nevertheless encouraged responsive pleading by the Commissioner. The rule stated that "[e]ach and every material allegation of fact set out in the petition and not denied in the answer . . . shall be deemed to be admitted."[186] On its face, this rule seemed preferable to the prior ad hoc procedure in two respects. First, the Board avoided the appearance of partiality towards the Commissioner since the sanctions imposed on the Commissioner for failing to answer paralleled the sanctions imposed on the petitioner for failing to reply.[187] Second, the rule provided the necessary element of certainty which was missing under its predecessor. Nevertheless, the rule was not particularly suited to the requirements of tax practice. The revenue losses likely to be suffered by the Government if an onerous consequence attached to the Commissioner's failure to answer could not be ignored.[188] As a result, there was less than vigorous enforcement of the rule, which in turn created resentment over the "habit of leniency to the Government which prevail[ed] in the Courts of this neighborhood."[189] Therefore, the rule was amended in 1938, in favor of a show cause procedure.[190]

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[185] *Id.* at 444.

[186] B.T.A. RULE 19 (Feb. 1, 1931 ed.).

[187] *Id.*; Miller, *supra* note 181.

[188] Miller, *supra* note 181.

[189] *Id.* *See generally* Brooklyn Union Gas Co. v. Commissioner, 22 B.T.A. 507 (1931), *aff'd*, 62 F.2d 505 (2d Cir. 1933); Leininger v. Commissioner, 19 B.T.A. 621 (1930), *rev'd*, 86 F.2d 791 (6th Cir. 1931), *rev'd*, 285 U.S. 136 (1932).

[190] B.T.A. RULE 18 (Jan. 1, 1938 ed.). The rule resembled a Bureau proposal which advocated a show cause hearing prior to the imposition of any penalty for failing to answer timely. Memorandum from R. Ryan, Joint Comm. Member, to Member Morris, Joint Comm. Chairman, May 14, 1937, at 1–2, filed at the U.S. Tax

To invoke the revised rule, the petitioner was required to file a motion advising the Board of the undenied factual allegations. The Commissioner then had to demonstrate that good cause existed to receive an extension; otherwise, the undenied allegations were deemed admitted. If the taxpayer neglected to file a motion within 45 days after the expiration of the 60-day period, the petition's factual allegations were deemed denied.[191] The interest in uniform application of the rules was satisfied since the same rule was applied in the case of a petitioner's failure to reply.[192] In 1955, the Board confined this procedure to the taxpayer's failure to reply,[193] and the pre-1938 procedure regarding answers was reinstated. The reinstated procedure provided that undenied factual allegations contained in the petition were to be deemed admitted, unless the court permitted a discretionary filing extension after a showing of good cause.[194]

The 1974 revision witnessed an abrupt departure from the traditional approach. The Tax Court, due to its change in status in 1969 to an article I court,[195] which presumably released it from the constraints of the *Shults* decision, instituted a procedure based on the Federal Rules of Civil Procedure.[196] The rule now permits the court to hold any party in default who has failed to comply with its rules.[197] Alternatively, the court may decide an issue against any party failing to comply with its rules who has the burden of proof, and the decision "shall be treated as a dismissal."[198] The effect of a decision "rendered upon a default or in consequence of a dismissal" will be an adjudication on the merits,[199] subject to being set aside, however, upon motion "for reason deemed sufficient by the Court."[200]

Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Ryan].

191 B.T.A. RULE 18 (Jan. 1, 1938 ed.).

192 *Id.*

193 TAX CT. R. 18 (Aug. 15, 1955 ed.).

194 TAX CT. R. 20 (Aug. 15. 1955 ed.). The Commissioner satisfied the good cause standard if the failure to file was not the result of willful misconduct and did not prejudice the taxpayer. Dixon v. Commissioner, 60 T.C. 802 (1973); Rea v. Commissioner, 60 T.C. 717 (1973); Estate of Quirk v. Commissioner, 60 T.C. 520 (1973).

195 Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730 (amending I.R.C. § 7441).

196 *Compare* FED. R. CIV. P. 41, 55, *with* TAX CT. R. 123 (Jan. 1, 1974 ed.).

197 TAX CT. R. 123(a) (July 6, 2012 ed.).

198 TAX CT. R. 123(b) (July 6, 2012 ed.).

199 TAX CT. R. 123(d) (July 6, 2012 ed.).

200 TAX CT. R. 123(c) (July 6, 2012 ed.).

2. The General Denial

The usual responsive pleading of the Commissioner has been a general denial.[201] The Commissioner's continued reliance on this pleading technique has aroused considerable criticism among the tax bar.[202] Notwithstanding a consensus that this format of pleading is counterproductive, it has persisted for decades.[203]

The emergence of the general denial as the Commissioner's standard responsive pleading cannot be attributed to the Board's failure to provide the requisite guidelines. By 1926, the rules directed the Commissioner to prepare an answer that informed the Board and the taxpayer of the nature of the defense.[204] In an effort to realize this objective, the rules required admissions and denials to be specific.[205] If strictly observed, this rule could have checked the developing trend towards the general denial; but there were numerous incentives which encouraged and practically dictated the opposite result.[206] First, strategies inherent in the adversarial system

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[201] *E.g.*, Ash, *supra* note 14, at 938; Paul, *supra* note 13, at 514; Letter from J. Barnard to Member Morris, Joint Comm. Chairman, June 10, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Barnard].

[202] *E.g.*, Ash, *supra* note 14, at 938; Paul, *supra* note 13, at 514; D.C. Bar Report, *supra* note 13, at 9–15.

[203] *E.g.*, Paul, *supra* note 13, at 514; D.C. Bar Report, *supra* note 13, at 9–15; Letter from J. Seidman, to H. Reiling, Assistant General Counsel's Office, Oct. 30, 1936, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Seidman, 1936]. *See infra* note 206.

[204] B.T.A. RULE 14 (April 1, 1926 ed.). This provision was first incorporated into the rules in 1924. B.T.A. RULE 9 (Sept. 27, 1924 ed.). The original rules merely required the Commissioner to admit or deny the petition's material factual allegations. B.T.A. RULE 9 (July, 1924 ed.).

[205] B.T.A. RULE 14 (April 1, 1926 ed.).

[206] *See* Robert Ash, *Guides in the Preparation of Protests, Briefs, and Tax Court Pleadings*, 4 N.Y.U. INST. ON FED. TAX'N 243, 258–59 (1946) [hereinafter cited as Ash]; Bennion, *supra* note 14, at 417–19; Randolph F. Caldwell, Jr., *Tax Court Procedure: Problems But Not Pitfalls*, 27 N.Y.U. INST. ON FED. TAX'N 1435, 1439 (1969) [hereinafter cited as Caldwell]; Martin D. Cohen, *Litigation Techniques That Increase Your Chances for Success in the Tax Court*, 35 J. TAX'N 340 (1971) [hereinafter cited as Cohen]; Goldfein *supra* note 49, at 67; Groman, *supra* note 14, at 611; Albert L. Hopkins, *The United States Board of Tax Appeals*, 12 A.B.A. J. 466, 468 (1926) [hereinafter cited as Hopkins]; Paul, *supra* note 13, at 514; Homer Sullivan, *Procedure Before The United States Board of Tax Appeals*, 2 NAT. INC. TAX MAG. 325, 326 (1924) [hereinafter cited as Sullivan]; Barnard, *supra* note 201; D.C. Bar Report, *supra* note 13, at 9–15; Joint Committee Report, *supra* note 3, at 22–23; Letter from Chairman Black to J. Seidman, Jan. 12, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Seidman, 1937]; Seidman, 1936, *supra* note 203; Letter from M. Teall, attorney, to

encouraged the Commissioner to keep the issues as elastic as possible.[207] If the answer was drafted in general and indefinite terms, it was less likely to be inconsistent with the deficiency determination, thus preventing a possible shift in the burden of proof.[208] Second, many petitions were drafted in such a manner "that it [was] difficult, if not impossible, to specifically admit or deny the allegations of those petitions without substantial prejudice to the Commissioner's case."[209] Third, the Chief Counsel's Office was understaffed, which made it difficult to allocate the time necessary to carefully draft a specific and informative answer.[210] Fourth, due to the internal stratification of the Chief Counsel's Office, the attorneys who drafted the answer were encountering the case for the first time. Their unfamiliarity with the facts[211] and lack of personal stake or responsibility in the case created pressures that tended to result in the filing of a general denial.[212] Finally, the Commissioner's practice of prefacing the

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Chairman Arundell, March 26, 1932, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Teall].

[207] Bennion, *supra* note 14; Groman, *supra* note 14.

[208] Bennion, *supra* note 14; Groman, *supra* note 14; *see also* B.T.A. RULE 30 (April 1, 1926 ed.).

[209] Joint Committee Report, *supra* note 3, at 22–23.

[210] *Id.*

[211] D.C. Bar Report, *supra* note 13, at 11; Paul, *supra* note 13.

[212] D.C. Bar Report, *supra* note 13, at 11. From 1924, to the present, there have been several indications that the Commissioner had issued instructions to file more informative answers. Statements in 1926 indicated that the earlier practice of filing general denials had been discontinued. Hopkins, *supra* note 206. In 1938, the Joint Committee's Report concluded: "[I]n this connection we are advised that the Chief Counsel has recently issued specific instructions to his attorneys to make every effort in that direction [improving answer's quality] and that there has already been substantial improvement." Joint Committee Report, *supra* note 3, at 23. In 1971, despite continuous criticism, the Chief Counsel stated his policy as follows:

> It has long been the position of this office that facts alleged in the petition which are known to be true by our attorneys should be admitted. Recently we have gone a step further and issued instructions to our trial attorneys that errors alleged in the petition to adjustments in the deficiency notice giving rise in part to the deficiency should also be admitted in the answer if, in fact, the statutory notice makes an incorrect determination as to any of the adjustments. In other words, if the Government was in error as to part of the determined deficiency, such error will be admitted in the answer rather than wait until the entire case is settled or the case tried as has been in the past the usual practice.

Letter from K. Martin Worthy, Chief Counsel, to M. Cohen, Sept. 8, 1971, in Cohen, *supra* note 206, n.4, at 340–41. The unending flow of criticism, however, makes these statements suspect.

general denial with "specifically" was tantamount to technical compliance with the rule, which made a successful challenge difficult.[213]

The respondent's failure to plead his position fully in the answer was encouraged by the Board's reluctance to take the requisite corrective measures.[214] For example, in the first appeal decided by the Board, *John H. Parrott*,[215] the petitioner moved to have a more specific answer filed. The Commissioner resisted, arguing that since the deficiency was presumptively correct, a general denial of the petition was the only answer necessary. The Board apparently acquiesced in the Commissioner's position,[216] and the practice of general denials was thus commenced. In 1924, soon after the decision in *Parrott*, the Board revised the answer rule to require that answers "fully and completely . . . advise the taxpayer and the board of the nature of the defense."[217] However, little change in actual practice resulted from this revision.[218] In 1926, the Board introduced the motion for a further and better statement of a pleading[219] which possessed the potential to arrest this trend. However, its potential went unrealized for almost 30 years. In the words of one disenchanted practitioner,

> [T]he rule sounds just dandy, but it does not work as it sounds. I have made numerous attempts to smoke out the Commissioner's position by attempting to invoke the rule, and have yet to succeed. And I cannot find any reported Board or Tax Court case which indicates the rule has ever helped a taxpayer.[220]

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213 Teall, *supra* note 206, at 1. *See generally* Ash, *supra* note 206.

214 Ash, *supra* note 206, at 258, 259; *see also* Caldwell, *supra* note 206, at 1439–41; Cohen, *supra* note 206, at 340–41; D.C. Bar Report, *supra* note 13.

215 1 B.T.A. 1 (1924). *See* Sullivan, *supra* note 206, at 326.

216 Sullivan, *supra* note 206, at 326.

217 B.T.A. RULE 9 (Sept. 27, 1924 ed.).

218 *E.g.*, Sullivan, *supra* note 206, at 326.

219 B.T.A. RULE 19 (April 1, 1926 ed.). There is some evidence that the Board, prior to this date, entertained such motions with respect to petitions. Charles D. Hamel, *The United States Board of Tax Appeals*, 2 NAT. INC. TAX MAG. 293, 296 (1926).

220 Ash, *supra* note 206, at 259. The procedure has been used successfully, however, especially in net worth fraud cases. Licavoli v. Commissioner, 15 T.C.M. (CCH) 862 (1956), *aff'd*, 252 F.2d 268 (6th Cir. 1958); Gerald J. Mehlman, *The Motion for a Further and Better Statement in Net Worth Fraud Cases*, 10 TAX L. REV. 267 (1954). *See generally* Bennion, *supra* note 14, at 412–15; Caldwell, *supra* note 206, at 1439–40; Herbert S. Mednick, *Pre-Trial Strategy in a Tax Case: Techniques and Limitations in Dealing with Regional Counsel*, 22 N.Y.U. INST. ON FED. TAX'N 125, 135–37 (1964) [hereinafter cited as Mednick]; Edward Pesin, *Techniques in Proving a Tax Case*, 17 N.Y.U. INST. ON FED. TAX'N 37, 45 (1959) [hereinafter cited as Pesin]; Arnold Raum, *Tax Court Litigation*, 9 U.S.C. TAX INST. 631, 641–43 (1957) [hereinafter cited as Raum]; Herbert L. Zuckerman, *Check List of Do's and Don'ts in*

In the view of many, the prevailing practice with regard to the answer had an adverse effect on the conduct of Tax Court proceedings by curtailing the necessary exchange of information.[221] Prior to 1974, the pleadings and stipulations were the primary methods of defining and narrowing the issues since discovery and admissions procedures were unavailable.[222] The general denial not only diminished the informational content of the answer, but also compelled the parties to place a heavier emphasis on alternate methods of narrowing the issues.[223] As a result, many taxpayers expended unnecessary time and money proving formal facts, facts the Commissioner knew to be true, which many times were actually contained in Government files.[224] Additionally, the Board/Tax Court was burdened with both an increased motion practice as taxpayers sought more informative answers, and with lengthier trials if the motion was denied and all the facts had to be formally proved.[225] Furthermore, the general denial had repercussions for the Commissioner who also had to devote more time to opposing taxpayer motions as well as participating in lengthier trials.

Handling a Tax Fraud Case, 29 N.Y.U. INST. ON FED. TAX'N 987, 1011 (1971) [hereinafter cited as Zuckerman]. However, as a result of the 1974 rules revision, the motion for a more definite statement has been restricted to cases in which such a statement is necessary in order for a responsive pleading to be framed. TAX CT. R. 51(a) (Jan. 1, 1974 ed.). *See infra* notes 229–232 and accompanying text.

[221] *See* Paul, *supra* note 13, at 514; D.C. Bar Report, *supra* note 13, at 10–15; Joint Committee Report, *supra* note 3, at 22–23.

[222] *See* Rules Comm. Note, TAX CT. R. 70, 71, 72, 73, 90 (Jan. 1, 1974 ed.).

[223] *Cf.* Joint Committee Report, *supra* note 3, at 22, 23.

[224] Paul, *supra* note 13, at 514; Joint Committee Report, *supra* note 3, at 22, 23; Teall, *supra* note 206. The following examples are illustrative:

> In one instance a taxpayer alleged under oath that he was married and had four children, all of which was denied. The petitioner was put to great trouble and expense in proving the simple facts by doctor's certificates, marriage certificate, absence of divorce, etc. In another case the taxpayer alleged under oath that he had filed certain tax returns in the Collector's Office of a distant state, which facts were denied. It required a great deal of trouble to prove those facts and it later developed that the Government attorney had the returns in his file all the time.

D.C. Bar Report, *supra* note 13, at 13.

[225] D.C. Bar Report, *supra* note 13; Joint Committee Report, *supra* note 3, at 22–23. To the extent facts were stipulated, however, the taxpayer's burden of proof was eased.

Initially, criticism of uninformative answers was directed mainly at the Commissioner,[226] but as time passed commentary tended to focus on proposals to reform Board/Tax Court practice. One suggestion called for verified answers. The Commissioner would have been required to certify that admitted allegations were true, and that denials were specifically premised on knowledge, information and belief, or insufficient information.[227] Another suggestion would have required the Commissioner to bear the taxpayer's cost of proving facts, when the respondent unreasonably refused to admit them.[228]

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[226] *See*, *e.g.*, Paul, *supra* note 13; Letter from J. Barnard to Member Morris, Joint Comm. Chairman, June 10, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence;" Joint Committee Report, *supra* note 3, at 22–23.

[227] Memorandum from Member Murdock, Rules Comm. Chairman, to Members Trammell, Black and Matthews, April 2, 1932, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence." The Board had previously rejected the idea on the grounds that the Commissioner had insufficient knowledge of the taxpayer's affairs. Teall, *supra* note 206. If the recommendation had been adopted, the following affidavit would have been required:

COUNSEL'S CERTIFICATE

> I hereby certify that I prepared the foregoing answer; that, in course of preparation thereof, I made, personally, a careful examination of the file of this case in the possession of the General Counsel for the Commissioner of Internal Revenue; that said answer specifically admits each and every allegation of fact of the petition which, from my knowledge or information of this case, I believe to be true; that each and every denial of fact in said answer made is based upon my belief that the allegation denied is in fact untrue, or else upon my own want of information, from said file or otherwise, sufficient to enable me to form a belief as to whether the allegation denied is in fact true or untrue; and that each and every affirmative allegation of fact made in said answer is believed by me to be true.

Teall, *supra* note 206.

[228] *See* Paul, *supra* note 13. This recommendation was based upon N.Y. CIV. PRAC. ACT § 323 which provided:

> *Admission of facts.* Any party, by notice in writing, given not later than ten days before the trial, may call on any other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. In case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the expenses incurred in proving such fact or facts must be ascertained at the trial and paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge, at any time, shall order or direct otherwise. Any admission made in pursuance of such notice is to be

The plethora of criticisms and proposals appeared to fall on deaf ears until 1956, when the Tax Court commenced a campaign against uninformative answers that gradually proliferated into a multi-faceted attack. The first major breakthrough occurred in *Licavoli v. Commissioner*,[229] in which the court gave notice that more specific pleading would be required. The Commissioner had failed to comply with a court order granting the taxpayer's motion for a further and better statement of the answer, and the court struck those pleadings which were the subject of the motion.[230] Thereafter, until 1974, a motion for a further and better statement was an integral part of taxpayers' arsenal for challenging general denials.[231] As a result of the 1974 rules revision, the motion for a further and better statement was generally confined to pleadings requiring a responsive pleading.[232] This change in practice, however, did not signal a termination of the Tax Court's efforts to compel informative answers.[233] Rather, it indicated an emphasis favoring a more diversified approach that allowed taxpayers to insist upon specific pleading and to ascertain the underlying factual basis of the answer. In 1974, the answering requirements were strengthened in three aspects, and these revisions have been carried forward in the present rules. First, the Commissioner must identify which allegations the Commissioner has insufficient information to either admit or deny.[234] Second, if only part of an allegation is denied, the part admitted

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> deemed to be made only for the purposes of the particular cause, matter or issue, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving the notice. The court or a judge, at any time, may allow any party to amend or withdraw any admission so made on such terms as may be just.

Cf. FED. R. CIV. P. 36, 37(c).

229 Licavoli v. Commissioner, 15 T.C.M. (CCH) 862 (1956), *aff'd*, 252 F.2d 268 (6th Cir. 1958).

230 *Id.*

231 *See* Bennion, *supra* note 14; Caldwell, *supra* note 206; Mednick, *supra* note 220; Raum, *supra* note 220; Zuckerman, *supra* note 220.

232 TAX CT. R. 51(a) (Jan. 1, 1974 ed.); Rules Comm. Note, TAX CT. R. 51(a) (Jan. 1, 1974 ed.); Estate of Allensworth v. Commissioner, 66 T.C. 33 (1976).

233 *Compare* TAX CT. R. 51(a) (Jan. 1, 1974 ed.), *with* TAX CT. R. 36, 70, 71, 72, 73, 90 (Jan. 1, 1974 ed.). In *Licavoli v. Commissioner*, 15 T.C.M. (CCH) 862, 864 (1956), *aff'd*, 252 F.2d 268 (6th Cir. 1958), the Tax Court indicated that one of the important considerations in its decision to make the motion for a further and better statement more readily available was the absence of discovery procedures. Now that both admission and discovery have been introduced into Tax Court procedure, the need for the motion for a further and better statement is diminished.

234 TAX CT. R. 36(b) (Jan. 1, 1974 ed.). *See* Goldfein, *supra* note 49, at 67. The allegation of facts which the Commissioner has insufficient information to admit or

and the part denied must be specified.[235] Third, although verification is not generally required, the court, in its discretion, reserves the right to require verification of any pleading.[236] The taxpayer can seek enforcement of the new pleading requirements by a motion to strike.[237] In addition to this remedy, the Tax Court introduced admission and discovery procedures that supplement both the pleadings and stipulations in narrowing the issues by making the factual basis of the Commissioner's litigating position available.[238]

3. Affirmative Allegations

Under certain circumstances, the Commissioner cannot be content with merely filing a general denial because affirmative pleading is mandated by statute or court rule. The importance of affirmative pleading lies principally in its relationship to the burden of proof rules.

The Board's original rules directed the Commissioner to "set forth any new matters of fact and any propositions of law" in the answer.[239] At the same time, the rules, without qualification, placed the burden of proof on the taxpayer.[240] By 1925, however, the Board made clear that, as to defenses and affirmative relief, the Commissioner would have the burden of proof.[241] In 1926, both the answer and burden of proof rules were amended to reflect this practice. The Commissioner was required to plead "new matters upon which [he] relies for defense or affirmative relief"[242] and the burden of proof for the new matter of fact affirmatively pleaded was shifted to the Commissioner.[243] These rules were not, however, entirely satisfactory. For example, strictly construed, the rules permitted the Commissioner to avoid the burden of proof as to fraud by simply raising

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deny are deemed denied. A similar proposal, which was rejected in 1948, provided in part:

> When the answer contains a denial of a fact alleged in the petition, the Commissioner shall state what the fact is or what he alleges the fact to be on information and belief, or that he is without any information of the fact which is denied.

D.C. Bar Report, *supra* note 13, at 15.

[235] TAX CT. R. 36(b) (Jan. 1, 1974 ed.).

[236] TAX CT. R. 33(a) (Jan. 1, 1974 ed.); Rules Comm. Note, TAX CT. R. 33(a) (Jan. 1, 1974 ed.).

[237] TAX CT. R. 52 (Jan. 1, 1974 ed.).

[238] TAX CT. R. 70, 71, 72, 73, 90 (Jan. 1, 1974 ed.).

[239] B.T.A. RULE 9 (July, 1924 ed.).

[240] B.T.A. RULE 20 (July, 1924 ed.).

[241] General Lead Batteries Co., 2 B.T.A. 392, 395 (1925); *see also* 1925 House Hearings, *supra* note 72, at 907.

[242] B.T.A. RULE 14 (April 1, 1926 ed.).

[243] B.T.A. RULE 30 (April 1, 1926 ed.).

the issue in the deficiency notice and thereby technically preventing any allegations of fraud in the answer being classified as new matter. The Board endorsed this approach until the Third Circuit Court of Appeals, in *Budd v. Commissioner*,[244] and Congress, in the Revenue Act of 1928,[245] declared the applicability of the common law rule, which required the party alleging fraud to prove it.[246]

Five years later, in 1931, the answer and burden of proof rules were once again amended,[247] and as revised remained unchanged until 1974. The Commissioner was directed to plead affirmatively in his answer in three instances: when the Commissioner alleged an affirmative defense, asked for affirmative relief, or by statute had the burden of proof.[248] A separate amendment was made in the burden of proof rule to provide that the taxpayer had the burden of proof "except as otherwise provided by statute and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent."[249] Clearly, as to matter with respect to which the Commissioner had the statutory burden of proof, the answer and burden of proof rules were consistent—the burden of pleading followed the burden of proof.[250] However, it was not clear that the allegations of "new matter pleaded in the answer" which caused a shift in the burden under the burden of proof rule were identical with the "defenses" and "affirmative relief" required to be affirmatively pleaded by the answer rule.[251] This difference in language created the potential for an incongruous interpretation of the two rules which could have resulted in the Commissioner being required to plead affirmatively without a corresponding shift in the burden of proof or vice versa. The need for identity in the terminology of both rules was brought to the Board's attention,[252] but apparently the Board was not

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[244] 43 F.2d 509 (3d Cir. 1930). *See* Kerbaugh v. Commissioner, 29 B.T.A. 1014, 1015–16 (1934), *aff'd.* 74 F.2d 749 (1st Cir. 1935).

[245] Revenue Act of 1928, ch. 852, §§ 601, 602, 45 Stat. 872 (now codified at I.R.C. §§ 7454, 6902(a)).

[246] This change in practice was reflected in the 1931 revision of both the answer and the burden of proof rules. B.T.A. RULES 14, 30 (Feb. 1, 1931 ed.).

[247] B.T.A. RULES 14, 30 (Feb. 1, 1931 ed.).

[248] B.T.A. RULE 14 (Feb. 1, 1931 ed.).

[249] B.T.A. RULE 30 (Feb. 1, 1931 ed.).

[250] *Compare* B.T.A. RULE 14 (Feb. 1, 1931 ed.), *with* B.T.A. RULE 30 (Feb. 1, 1931 ed.).

[251] *See, e.g.*, Samuel Byer, *Limitation of Issues in Tax Litigation*, 18 N.Y.U. INST. ON FED. TAX'N 1035 (1960); Memorandum to Member Arundell, Joint Comm. Chairman, c. 1937, at 1–2, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda and Correspondence" [hereinafter cited as Arundell]; Ryan, *supra* note 190, at 2–3; Surrey, *supra* note 123, at 2–3, 7–8; Surrey, 1937, *supra* note 123, at 4–5.

[252] Joint Committee Report, *supra* note 3, at 9; Ryan, *supra* note 190; Surrey, *supra* note 123; Surrey, 1937, *supra* note 123.

prepared at that time to commit itself to a complete integration of the rules.[253] Therefore, the distinctions, if any, between the two rules were left to case law.

Affirmative defenses pleaded in the answer, such as res judicata and waiver,[254] were clearly included in the term new matter and shifted the burden of proof to the Commissioner.[255] Analysis was not so simple, however, with regard to "affirmative relief." Allegations seeking affirmative relief, which also caused a shift in the burden of proof, were generally classified by case law into two basic categories: increased or different deficiencies,[256] and pleading new matter as distinguished from the broader burden of proof new matter.[257] The Bureau was well aware of the procedural disadvantages of shifting the burden and attempted to influence the Board's noncommittal position by commencing a campaign aimed at preventing a shift in the burden of proof in both cases, although it was generally recognized that both types of allegations should be pleaded.[258]

In the case of increased deficiencies, the Board was compelled by statute to allow the Commissioner to claim an increased deficiency at or before the hearing.[259] There was, however, no statutory provision mandating a shift in the burden of proof. The Bureau attempted to persuade the Board not to

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[253] *See* Joint Committee Report, *supra* note 3, at 9.

[254] *See* TAX CT. R. 39, 142 (Jan. 1, 1974 ed.).

[255] *E.g.*, Hull v. Commissioner, 87 F.2d 260, 262 (4th Cir. 1937); *see also* 1925 House Hearings, *supra* note 72, at 907; Surrey, *supra* note 123, at 7–8. The Tax Court's current rules expressly recognize that affirmative defenses must be pleaded and list those most common. *Compare* TAX CT. R. 39 (Jan. 1, 1974 ed.), *with* TAX CT. R. 142 (Jan. 1, 1974 ed.).

[256] *See, e.g.*, Estate of Tony Cordeiro v. Commissioner, 51 T.C. 195, 203 (1968); Beck Chemical Equipment Corp. v. Commissioner, 27 T.C. 840, 856 (1957); Rainbow Gasoline Corp. v. Commissioner, 31 B.T.A. 1050, 1060 (1935); Hemphill v. Commissioner, 25 B.T.A. 1351, 1356 (1932); Cook v. Commissioner, 25 B.T.A. 92, 95 (1932); Stewart & Bennett, Inc. v. Commissioner, 20 B.T.A. 850, 855 (1930); National Tea Co. v. Commissioner, 17 B.T.A. 1222, 1228–29 (1929). *See generally* 2 LAURENCE F. CASEY, FED. TAX PRAC. 14–19 (1955) [hereinafter cited as CASEY].

[257] The new matter generally referred to in the following cases had to be affirmatively pleaded and the Commissioner had to assume the burden of proof, but the new matter was not classified as increased or different deficiencies or an affirmative defense. *E.g.*, Estate of Falese v. Commissioner, 58 T.C. 895, 899 (1972); Estate of Gorby v. Commissioner, 53 T.C. 80, 91 (1969); Axelroad v. Commissioner, T.C. Memo. 1962-118, 21 T.C.M. (CCH) 626, 631 (1962); Cedar Valley Distillery, Inc. v. Commissioner, 16 T.C. 870, 879 (1951); Campbell v. Commissioner, 11 T.C. 510, 511 (1948); O'Meara v. Commissioner, 8 T.C. 622, 628 (1947).

[258] Ryan, *supra* note 190, at 2–3; Surrey, *supra* note 123, at 7–8; Surrey, 1937, *supra* note 123, at 4–5.

[259] Revenue Act of 1926, ch. 27, § 274(e), 44 Stat. 56 (now I.R.C. § 6214(a)).

shift the burden of proof in these cases, on the ground that the only difference between an original and increased deficiency was that the Commissioner issued the former, whereas the Appeals Division determined the latter.[260] The Board was not convinced; it reasoned that the respondent could "not consistently rely on" the presumption that the original determination was correct "and at the same time urge that the determination [was] wrong by asking for an increase."[261]

In the case of pleading new matter, however, the issues were considerably more complex due to severe definitional problems.[262] The Bureau anticipated the definitional problems inherent in the term "new matter" and attempted to convince the Board to make a clarifying revision that more specifically defined the term.[263] The Bureau's primary fear was that explanatory factual allegations pleaded in the answer would be classified as affirmative relief and would thereby be considered as new matter, which would shift the burden of proof.[264] The Board appreciated the definitional problems, but concluded that a better term than new matter was not available.[265] The Board felt that it would be inordinately difficult if not impossible to anticipate all allegations which might constitute new matter for purposes of affirmative relief.[266]

In retrospect, the Commissioner's apprehension—that explanatory factual allegations and new matter would be confused—appears to have been well founded in view of two distinct definitional problems with the term which subsequently arose. First, there were two kinds of new matter: *pleading* new matter and *burden of proof* new matter. The former had a very narrow definition, including only those affirmative relief allegations which were not categorized as increased or different deficiencies;[267] the latter had a

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[260] Surrey, 1937, *supra* note 123, at 4–5; *see also* Ryan, *supra* note 190, at 2–3.

[261] Cascade Milling & Elevator Co. v. Commissioner, 25 B.T.A. 946, 948 (1932); *see also* Papineau v. Commissioner, 28 T.C. 54, 57 (1957). The same analysis would apply to different deficiency adjustments that did not increase the actual amount of the deficiency. *See* CASEY, *supra* note 256, at 14–19.

[262] Joint Committee Report, *supra* note 3, at 9; Surrey, 1937, *supra* note 123, at 4–5.

[263] Surrey, *supra* note 123, at 7–8; Surrey, 1937, *supra* note 123 at 4–5.

[264] Ryan, *supra* note 190, at 2–3.

[265] *See* Joint Committee Report, *supra* note 3, at 9.

[266] *See* Arundell, *supra* note 251, at 1–2.

[267] *See* Estate of Horvath v. Commissioner, 59 T.C. 551, 556–57 (1973); Estate of Falese v. Commissioner, 58 T.C. 895, 899 (1972); Estate of Gorby v. Commissioner, 53 T.C. 80, 91 (1969); McSpadden v. Commissioner, 50 T.C. 478, 493 (1968); Sorin v. Commissioner, 29 T.C. 959, 969 (1958), *aff'd*, 271 F.2d 741 (2d Cir. 1959); Papineau v. Commissioner, 28 T.C. 54, 57 (1957); Tauber v. Commissioner, 24 T.C. 179, 185 (1955); Cedar Valley Distillery, Inc. v. Commissioner, 16 T.C. 870, 879 (1951).

very broad definition, encompassing all allegations in the answer which shifted the burden of proof other than statutory shifts in the burden of proof.[268] The confusion was exacerbated by the Board/Tax Court's failure in its published decisions to acknowledge the sense in which the term was being used.[269] Nevertheless, pleading new matter was consistently treated as new matter for purposes of the burden of proof.[270]

To the extent that the different definitions of new matter for purposes of pleading and burden of proof caused confusion, such confusion was eliminated in the 1974 rules revision by the complete integration of the answer and burden of proof rules.[271] Pursuant to that revision, the Commissioner is directed to plead affirmatively only when the Commissioner has the burden of proof.[272] The burden of proof is generally placed upon the taxpayer, with four exceptions.[273] Two of the exceptions, affirmative defenses[274] and statutory shifts in the burden of proof,[275] were expressly included in prior versions of the answer rule.[276] The other two exceptions, increased deficiencies[277] and new matter,[278] are the two categories of affirmative relief which, under prior answer rules, required affirmative pleading.[279] It should be noted that the 1974 rule revision confined the definition of new matter to the former pleading definition as a

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[268] B.T.A. RULE 30 (Feb. 1, 1931 ed.). *Compare* Estate of Falese v. Commissioner, 58 T.C. 895, 899 (1972) (pleading new matter); Estate of Gorby v. Commissioner, 53 T.C. 80, 91 (1969) (pleading new matter); Hull v. Commissioner, 87 F.2d 260, 261–62 (4th Cir. 1937) (affirmative defense) *with* Estate of Cordeiro v. Commissioner, 51 T.C. 195, 203 (1968) (increased deficiency); Markle v. Commissioner, 17 T.C. 1593, 1599 (1952) (increased deficiency); Rainbow Gasoline Corp. v. Commissioner, 31 B.T.A. 1050, 1060 (1935) (increased deficiency).

[269] *See supra* notes 267–268.

[270] *See supra* notes 256, 268.

[271] *Compare* TAX CT. R. 36(b) (Jan. 1, 1974 ed.), *with* TAX CT. R. 142(a) (Jan. 1, 1974 ed.).

[272] TAX CT. R. 36(b) (Jan. 1, 1974 ed.). *See* Rules Comm. Note, TAX CT. R. 36(b) (Jan. 1, 1974 ed.).

[273] TAX CT. R. 142(a) (Jan. 1, 1974 ed.).

[274] *Compare* TAX CT. R. 142(a) (Jan. 1, 1974 ed.), *with* TAX CT. R. 39 (Jan. 1, 1974 ed.).

[275] TAX CT. R. 142(a) (Jan. 1, 1974 ed.). The more common instances of the statutory shift in the burden of proof are also listed in the rule. TAX CT. R. 142(b), (c), (d), (e) (Jan. 1, 1974 ed.).

[276] *Compare* TAX CT. R. 142(a) (Jan. 1, 1974 ed.), *with* B.T.A. RULE 14 (Feb. 1, 1931 ed.).

[277] TAX CT. R. 142(a) (Jan. 1, 1974 ed.).

[278] *Id.*

[279] *Compare* TAX CT. R. 142(a) (Jan. 1, 1974 ed.), *with* B.T.A. RULE 14 (Feb. 1, 1931 ed.).

subdivision of affirmative relief, rather than the sweeping, all-inclusive definition of the term under previous burden of proof rules.[280]

The second problem involved defining when allegations in the answer constituted pleading new matter. The decision to classify these allegations as either explanatory factual allegations or pleading new matter, which, in turn, ultimately determined whether the issue would be entertained and who had the burden of proof, generally depended upon two factors: the timeliness of the allegations and their consistency with the deficiency notice.

If the allegations were made by answer or amended answer prior to the hearing, then the only real issue was whether the allegations were consistent with the general theory of the deficiency notice.[281] If the allegations were consistent with the deficiency notice, the burden of proof remained on the taxpayer since the allegation simply explained or expounded upon the general theory of the deficiency notice.[282] On the other hand, in the case of an inconsistency, the burden of proof was shifted to the Commissioner since the allegation constituted new matter.[283] The standard that guided the decisions, as explained in *Sorin v. Commissioner*,[284] was usually the specificity of the deficiency notice. Affirmative allegations were more likely to be classified as explanatory allegations, or in the court's terminology, a new theory (as opposed to a new matter), if the deficiency notice was phrased in vague and general terms.[285] On the other hand, new matter was a more typical conclusion if the deficiency notice pinpointed an exact reason for

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[280] *See* TAX CT. R. 36(b), 142(a) (Jan. 1, 1974 ed.); note 249 and accompanying text *supra*.

[281] Braunstein v. Commissioner, 36 T.C. 22, 68–69 (1961), *aff'd*, 305 F.2d 949 (2d Cir. 1962), *aff'd*, 374 U.S. 65 (1963); Estate of Scharf v. Commissioner, 38 T.C. 15, 27–28 (1962), *aff'd*, 316 F.2d 625 (7th Cir. 1963); Spangler v. Commissioner, 32 T.C. 782, 793–94 (1959); Papineau v. Commissioner, 28 T.C. 54, 57 (1957); Tauber v. Commissioner, 24 T.C. 179, 185 (1955); Security-First Nat'l Bank of Los Angeles v. Commissioner, 36 B.T.A. 633, 637 (1937).

[282] Braunstein v. Commissioner, 36 T.C. 22, 68–69 (1961), *aff'd*, 305 F.2d 949 (2d Cir. 1962), *aff'd*, 374 U.S. 65 (1963); Estate of Scharf v. Commissioner, 38 T.C. 15, 27–28 (1962), *aff'd*, 316 F.2d 625 (7th Cir. 1963); Spangler v. Commissioner, 32 T.C. 782, 793–94 (1959).

[283] Sorin v. Commissioner, 29 T.C. 959, 969 (1958), *aff'd*, 271 F.2d 741 (2d Cir. 1959); Papineau v. Commissioner, 28 T.C. 54, 57 (1957); Tauber v. Commissioner, 24 T.C. 179, 185 (1955); Cedar Valley Distillery, Inc. v. Commissioner, 16 T.C. 870, 879 (1951); Security-First Nat'l Bank of Los Angeles v. Commissioner, 36 B.T.A. 633, 637 (1937).

[284] 29 T.C. 959, 969 (1958), *aff'd*, 271 F.2d 741 (2d Cir. 1959). For discussion of the interpretation of a new matter in subsequent decisions, see Part X.C.3.

[285] *See supra* note 282.

the deficiency determination, because of the increased likelihood of inconsistency.[286]

If the Commissioner made the allegations in his opening statement, or any time thereafter, the Board/Tax Court generally approached the issue from one of two perspectives. First, the Board/Tax Court might decide that the taxpayer had no prior notice of the new allegations and, therefore, was prejudicially surprised.[287] Such a finding would preclude any consideration of the issue[288] and generally would become more likely the longer the Commissioner waited to raise the issue.[289] The other approach involved the usual new matter analysis with the correlative allocation of the burden of proof.[290]

The Tax Court has consistently refused to delineate by rule the circumstances under which affirmative allegations will be classified as new matter,[291] presumably for the same reasons it rejected the Bureau's proposal to that effect in 1937.[292] Nevertheless, the principle enunciated in *Sorin* appears to be a manageable standard. Furthermore, the Tax Court has clarified the analytic approach to new matter. In *Estate of Horvath v. Commissioner*,[293] the Tax Court combined the prejudicial surprise and new matter/new theory approaches into a two-part analysis. The court held that prior to a determination of the new matter issue, it must be decided if the taxpayer was prejudicially surprised. Only upon determining that the taxpayer was not prejudicially surprised will the Tax Court address the allocation of the burden of proof by venturing into the new matter/new theory dichotomy.[294]

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[286] *See supra* note 283.

[287] Allied Tube & Conduit Corp. v. Commissioner, T.C. Memo. 1975-281, 34 T.C.M. (CCH) 1218, 1223–24 (1975); Estate of Horvath v. Commissioner, 59 T.C. 551, 555–56 (1973); Nat Harrison Associates, Inc. v. Commissioner, 42 T.C. 601, 617 (1964); Theatre Concessions, Inc. v. Commissioner, 29 T.C. 754, 760–61 (1958); Baird v. Commissioner, 42 B.T.A. 970, 976 (1940).

[288] *See supra* note 287.

[289] Allied Tube & Conduit Corp. v. Commissioner, T.C. Memo. 1975-281, 34 T.C.M. (CCH) 1218, 1223–24 (1975).

[290] Estate of Falese v. Commissioner, 58 T.C. 895, 899 (1972); Estate of Gorby v. Commissioner, 53 T.C. 80, 91 (1969); McSpadden v. Commissioner, 50 T.C. 478, 493 (1968); Tauber v. Commissioner, 24 T.C. 179, 185 (1955); Cedar Valley Distillery, Inc. v. Commissioner, 16 T.C. 870, 879 (1951); Security-First Nat'l Bank of Los Angeles v. Commissioner, 36 B.T.A. 633, 637 (1937).

[291] *See* TAX CT. R. 36, 142 (July 6, 2012 ed.).

[292] *See supra* notes 263–266 and accompanying text.

[293] 59 T.C. 551 (1973).

[294] *Id.* at 555–56; *see also* Quick v. Commissioner, 110 T.C. 172 ("As with other amendments, we must consider whether granting respondent's motion will surprise and/or unfairly disadvantage petitioners."); Allied Tube & Conduit Corp. v.

D. The Reply

Prior to 1931, a reply was not considered essential to the expeditious disposition of tax controversies.[295] Issue was joined upon filing of the answer, and any affirmative allegations contained therein were deemed denied.[296] However, increased incidents of affirmative allegations in the answer, partially attributable to statutory amendments that placed the burden of proof on the Commissioner in fraud and transferee liability cases,[297] led the Board to institute a formal reply procedure in 1931.[298]

From 1931 to 1938, the reply provided an irrepressible source of controversy.[299] The Board, striving to adapt the reply concept to the

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Commissioner, T.C. Memo. 1975-281, 34 T.C.M. (CCH) 1218, 1223–24 (1975) (refusing to consider issue raised for the first time in post-trial briefing).

[295] *See, e.g.*, B.T.A. RULES (1924–1931 eds.).

[296] B.T.A. RULE 17 (April 1, 1926 ed.).

[297] Revenue Act of 1928, ch. 852, §§ 601, 602, 45 Stat. 871 (now codified at I.R.C. §§ 7454(a), 6902(a)).

[298] B.T.A. RULES 15, 17, 19 (Feb. 1, 1931 ed.). Revenue Act of 1928, ch. 852, §§ 601, 602, 45 Stat. 872 (now codified at I.R.C. §§ 7454(a), 6902(a)) (burden of proof on Commissioner in fraud and transferee cases).

[299] *See* Joint Committee Report, *supra* note 3, at 8–9; Letter from R. Miller, American Bar Ass'n Comm. on Fed. Tax. Chairman, to Member Murdock, Rules Comm. Chairman, April 22, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence" [hereinafter cited as Miller, April 22, 1937]; Letter from Member Murdock, Rules Comm. Chairman, to the General Counsel and American Bar Ass'n Comm. on Fed. Tax., Feb. 23, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence" [hereinafter cited as Murdock, Feb., 1937]; Letter from Member Murdock, Rules Comm. Chairman, to R. Miller, American Bar Ass'n Comm. on Fed. Tax. Chairman, April 23, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence" [hereinafter cited as Murdock, 1937]; Memorandum from Member Murdock, to Members of the Board, April 30, 1935, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence" [hereinafter cited as Murdock, 1935]; Memorandum from Member Murdock, Rules Comm. Chairman, to Chairman Black, Nov. 8, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence;" "Memorandum in re Rules," from Member Murdock, Rules Comm. Chairman, c. 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence" [hereinafter cited as Murdock]; Memorandum from Rules Comm. to the Board, Nov. 12, 1937, at 13, 14, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence" [hereinafter cited as Rules Comm.]; Ryan, *supra* note 190, at 2–3; Surrey, *supra* note 123, at 4; Surrey, 1937, *supra* note 123, at 3, 4.

peculiarities of tax practice,[300] vacillated among a spectrum of possibilities including a verified, compulsory reply, as well as the complete abolition of the procedure.[301] Ultimately, in a major revision effort in 1938, the Board settled on a compromise procedure that restricted the situations demanding a reply and simultaneously provided a compelling incentive to reply under the prescribed circumstances.[302]

At various times between 1938 and 1974, the Board/Tax Court attempted to clarify the 1938 procedure.[303] These revisions, like their predecessors, concentrated on filing requirements and the form and content of the reply. Whether these modifications were successful, however, is open to question.[304]

1. Filing

Filing encompasses three important and distinct issues: whether a reply is required, when it must be filed, and what sanctions result from a failure to file timely. Each of these questions was addressed by the 1931 and subsequent revisions.

a. Requirement to Reply

The 1931 revision directed the filing of a reply

> [i]f the answer of the Commissioner sets forth facts upon which he relies for affirmative relief, or contains a statement of the facts upon which he relies to sustain an issue in respect of which the burden of proof is placed upon him by statute. . . .[305]

The rule thus required a reply in two of the instances when the Commissioner had the burden of proof: when the Commissioner asked for affirmative relief in the answer, and when a statute placed the burden of proof on the Commissioner. The rule's application to the Commissioner's request for affirmative relief was relatively clear: If the Commissioner's answer asserted new matter or a new deficiency, either in addition to or in place of the original deficiency, a reply was mandatory.[306] In effect, the reply represented the taxpayer's initial pleading with respect to the new

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[300] *See*, *e.g.*, Surrey, *supra* note 123.

[301] *See*, *e.g.*, *id.*

[302] B.T.A. RULES 15, 18 (Jan. 1, 1938 ed.).

[303] TAX CT. R. 15, 18 (Aug. 15, 1955 ed.); TAX CT. R. 37 (Jan. 1, 1974 ed.).

[304] *See infra* notes 311–324 and accompanying text.

[305] B.T.A. RULE 15 (Feb. 1, 1931 ed.).

[306] If a reply was not filed, the affirmative allegations were deemed admitted. West Town State Bank v. Commissioner, 32 B.T.A. 531 (1935).

matter or deficiency and fulfilled a function similar to the petition. The major difference between the two was that the reply had no jurisdictional implications.

The rule was not that clear, however, when the answer contained allegations of fraud,[307] a matter on which the Commissioner, by statute, had the burden of proof.[308] The wording of the rule implied that a reply was necessary whenever fraud was in issue.[309] Nevertheless, the Board soon ruled that a reply would not be required if the Commissioner's answer simply repeated allegations of fraud originally contained in the notice of deficiency which the taxpayer had already denied in his petition.[310]

In 1955, further ambiguity was introduced by a revision that apparently required a reply whenever the answer contained material allegations of facts.[311] Despite the apparent breadth of the new rule, subsequent decisions made clear that the court's intent was only to require a reply if the answer

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[307] *E.g.* , Murdock, Feb., 1937, *supra* note 299.

[308] B.T.A. RULES 14, 30 (Feb. 1, 1931 ed.); Revenue Act of 1928, ch. 852, §§ 601, 602, 45 Stat. 871 (now codified at I.R.C. §§ 7454(a), 6902(a)). The other issue on which the Commissioner shouldered the burden of proof, transferee liability, apparently caused no controversy.

[309] *See* Statler v. Commissioner, 27 B.T.A. 342, 345 (1932). For an excellent discussion of when fraud is involved, see Kerbaugh v. Commissioner, 29 B.T.A. 1014 (1934), *aff'd*, 74 F.2d 749 (1st Cir. 1935).

[310] Beringer v. Commissioner, 29 B.T.A. 250, 251 (1933), wherein the Board stated "if the answer merely reiterates affirmatively matters already covered by his notice of deficiency and assailed by the petition, there is no requirement that the petitioner shall as to those matters file a reply, and his failure to do so is not prejudicial." In *Nicholson v. Commissioner*, 32 B.T.A. 977, 984 (1935), *aff'd*, 20 F.2d 978 (8th Cir. 1937), the Board extended this exception by not requiring a reply if the denial of fraud in the petition was germane to the contents of the deficiency notice and not anticipatory to the answer. However, if the petitioner did not deny fraud, but simply set up a defense in avoidance, then fraud was deemed admitted. Mauch v. Commissioner, 35 B.T.A. 617, 625 (1937), *aff'd*, 113 F.2d 555 (3d Cir. 1940).

[311] TAX CT. R. 15 (Aug. 15, 1955 ed.). This language was first suggested by Stanley Surrey in 1937 in the following proposed amendment:

> If the answer of the Commissioner sets forth allegations of fact, the petitioner shall, within 45 days after a copy of such answer is mailed to him or his counsel of record by registered mail, file a reply which shall contain:
> (1) A specific admission or denial of each material allegation of fact contained in the answer;
> (2) A clear and concise statement of any additional facts upon which he relies for defense.

Surrey, *supra* note 123.

contained material allegations which the Commissioner had the burden of proving.[312]

The rule, modified as part of the major rules revision of 1974, provided as follows:

> *Form and Content.* In response to each material allegation in the answer and the facts in support thereof on which the Commissioner has the burden of proof, the reply shall contain a specific admission or denial.[313]

Strictly construed, the rule failed to inform taxpayers under what circumstances a reply was required, because it only related to the form and content of the reply. But, when read in conjunction with the Tax Court Rules Committee note, it is evident that no change in practice was intended.[314] Consequently, a reply was required "after service . . . of an answer in which material facts are alleged."[315] The ambiguity of the previous rule, however, was removed, and it became clear that a reply was required only when the answer contains "material allegations . . . on which the Commissioner has the burden of proof. . . ."[316] The rule in its current form retains this approach.[317]

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312 Gilday v. Commissioner, 62 T.C. 260, 262 (1974); Gay v. Commissioner, T.C. Memo. 1966-237, 25 T.C.M. (CCH) 1220 (1966); Watson v. Commissioner, T.C. Memo. 1964-155, 23 T.C.M. (CCH) 927 (1964); Baglivo v. Commissioner, T.C. Memo. 1962-127, 21 T.C.M. (CCH) 663 (1962); Wolfe v. Commissioner, T.C. Memo. 1961-131, 20 T.C.M. (CCH) 655 (1961); Morris v. Commissioner, 30 T.C. 928 (1958); Accardi v. Commissioner, T.C. Memo. 1957-73, 16 T.C.M. (CCH) 311 (1957); Lugauskas v. Commissioner, T.C. Memo. 1957-56, 16 T.C.M. (CCH) 242 (1957). This conclusion is also supported by the 1974 rules revision that requires a reply only when the answer contains material allegations in respect of which the Commissioner has the burden of proof. TAX CT. R. 37(b) (Jan. 1, 1974 ed.). The official Note to the 1974 rules revision states that it made no change in the substance of the rule as modified in 1955. Rules Comm. Note, TAX CT. R. 37 (Jan. 1, 1974 ed.).

313 TAX CT. R. 37(b) (Jan. 1, 1974 ed.).

314 Rules Comm. Note, TAX CT. R. 37 (Jan. 1, 1974 ed.).

315 TAX CT. R. 15 (Aug. 15, 1955 ed.).

316 TAX CT. R. 37 (Jan. 1, 1974 ed.); Gilday v. Commissioner, 62 T.C. 260, 262 (1974). The 1931 answer rule required defenses as well as affirmative relief to be pleaded in the answer. B.T.A. RULE 14 (Feb. 1, 1931 ed.). The 1931 reply rule, on the other hand, only required the taxpayer to file a reply if the answer contained affirmative relief allegations. B.T.A. RULE 15 (Feb. 1, 1931 ed.). The natural inference was that a reply was unnecessary with respect to affirmative defenses. The 1955 revision of the reply rule, as subsequently interpreted, eliminated this confusion by requiring a reply in response to material factual allegations the Commissioner had the burden of proving. TAX CT. R. 15 (Aug. 15, 1955 ed.). *See*

b. Timely Filing

The 1931 revision established a clear timetable for replying. After the answer was sent to the petitioner by registered mail,[318] the rule provided that "the petitioner shall, within 45 days . . . file a reply."[319] Inexplicably, in 1955, the Tax Court removed this unambiguous direction and changed the rule to provide that "[t]he petitioner . . . shall have 45 days within which to file a reply. . . ."[320] Although no change in practice was intended, and subsequent interpretations should have eliminated any lingering doubts,[321] this wording was significant because its failure to instruct the taxpayer in express terms to reply was another potential source of misunderstanding. Perhaps a preoccupation with symmetry and consistency offers the best explanation, inasmuch as the wording paralleled the phrasing of the answer rule.[322] However, with respect to the answer, this phrasing was

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supra note 312. The current rule expressly requires a reply to affirmative defenses pleaded in the answer if the Commissioner files a motion requesting a reply. TAX CT. R. 37(b), 39, 142 (Jan. 1, 1974 ed.).

317 TAX CT. R. 37(b) (July 6, 2012 ed.).

318 B.T.A. RULE 15 (Feb. 1, 1931 ed.). In 1955, the registered mail requirement was dropped in favor of the methods of service contained in Rule 22. TAX CT. R. 15, 22 (Aug. 15, 1955 ed.).

319 B.T.A. RULE 15 (Feb. 1, 1931 ed.). All subsequent revisions have provided 45 days as the initial reply period.

320 TAX CT. R. 15 (Aug. 15, 1955 ed.).

321 *Compare* Gilday v. Commissioner, 62 T.C. 260, 262 (1974); Gay v. Commissioner, T.C. Memo. 1966-237, 25 T.C.M. (CCH) 1220 (1966); Myers v. Commissioner, T.C. Memo. 1966-238, 25 T.C.M. (CCH) 1228 (1966); Sauer v. Commissioner, T.C. Memo. 1964-74, 23 T.C.M. (CCH) 1019 (1964); Baglivo v. Commissioner, T.C. Memo. 1962-127, 21 T.C.M. (CCH) 663 (1962); Wolfe v. Commissioner, T.C. Memo. 1961-131, 20 T.C.M. (CCH) 655 (1961); Morris v. Commissioner, 30 T.C. 928 (1958); Lugauskas v. Commissioner, T.C. Memo. 1957-56, 16 T.C.M. (CCH) 242 (1957); Greene v. Commissioner, T.C. Memo. 1957-28, 16 T.C.M. (CCH) 133 (1957), *with* McDonald v. Commissioner, T.C. Memo. 1955-96, 14 T.C.M. (CCH) 327 (1955); Corinblit v. Commissioner, T.C. Memo. 1955-148, 14 T.C.M. (CCH) 545 (1955); Bowen v. Commissioner, T.C. Memo. 1954-92, 13 T.C.M. (CCH) 640 (1954); Herring v. Commissioner, T.C. Memo. 1953-77, 12 T.C.M. (CCH) 248 (1953); Berdine v. Commissioner, T.C. Memo. 1953-98, 12 T.C.M. (CCH) 324 (1953); Blankman v. Commissioner, T.C. Memo. 1952-338, 11 T.C.M. (CCH) 1166 (1952); Black v. Commissioner, 19 T.C. 474 (1952); Galvin v. Commissioner, 7 T.C.M. (CCH) 402 (1948); Downer v. Commissioner, 4 T.C.M. (CCH) 358 (1945); Weiss v. Commissioner, T.C. Memo. 1943-32, 1 T.C.M. (CCH) 447 (1943).

322 *Compare* TAX CT. R. 15(a) (Aug. 15, 1955 ed.) *with* TAX CT. R. 14(a) (Aug. 15, 1955 ed.). A second change made by the 1955 revision provides further evidence

purposefully adopted to avoid a confrontation regarding the Board's jurisdiction to compel the Commissioner to answer.[323] Although the Tax Court was not so constrained in the case of the reply, it reaffirmed its commitment to this language by including it in the 1974 revision.[324] The language persists today.[325]

c. Failure to Reply

The consequences attending the taxpayer's failure to reply, usually the result of misunderstanding[326] or ignorance,[327] framed one of the more sensitive issues facing the Board. Ultimately, it provided the impetus for change in this area.

The 1931 rule provided that "[e]ach and every allegation of fact . . . set out in the answer and not denied in the reply, where a reply is required by these Rules, shall be deemed to be admitted."[328] This rule proved highly controversial. Many practitioners opposed the imposition of penalties for failing to reply timely.[329] They challenged both the Board's power to relieve the Commissioner of his statutory burden of proof[330] and the propriety of a policy that placed such importance on a minor error.[331] In their view, the only discernible purpose of a reply was to facilitate framing the issues, and this could be accomplished regardless of how late it was filed.[332]

Even among those who approved of the Board's approach, there was considerable disagreement concerning the meaning of "deemed to be

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of a movement toward symmetry between the answer and reply. As an alternative to replying, the petitioner was permitted "30 days within which to move with respect to the answer." TAX CT. R. 15(a) (Aug. 15, 1955 ed.). A similar option had been made available to the Commissioner with respect to the petition 31 years earlier. B.T.A. RULE 9 (Sept. 27, 1924 ed.); TAX CT. R. 14(a) (Aug. 15, 1955 ed.). *See* Memorandum from Victor Mersch, Tax Court Clerk, to Judge Murdock, Rules Comm. Chairman, Oct. 6, 1949, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence" [hereinafter cited as Mersch]. In 1974, the Tax Court continued this trend by modeling the reply rule after the answer rule. *Compare* TAX CT. R. 36 (Jan. 1, 1974 ed.), *with* TAX CT. R. 37 (Jan. 1, 1974 ed.).

[323] *See supra* notes 176–200 and accompanying text.

[324] TAX CT. R. 37 (Jan. 1, 1974 ed.).

[325] TAX CT. R. 37(a) (July 6, 2012 ed.).

[326] *See generally* introductory Comment, B.T.A. RULES (Jan. 1, 1938 ed.); notes 346–348 and accompanying text *infra*.

[327] Ash, *supra* note 206, at 258.

[328] B.T.A. RULE 19 (Feb. 1, 1931 ed.).

[329] Miller, April 22, 1937, *supra* note 299; Murdock, *supra* note 299; Murdock, Feb., 1937, *supra* note 299.

[330] Murdock, Feb., 1937, *supra* note 299.

[331] Miller, April 22, 1937, *supra* note 299.

[332] *Id.*; Murdock, Feb. 1937, *supra* note 299, at 2.

admitted." Some read the phrase as requiring undenied factual allegations to be conclusively presumed admitted, thereby effectively relieving the Commissioner of the burden of proof.[333] They argued that the Board's statutory authority to promulgate its rules of procedure[334] would be subverted unless meaningful sanctions were imposed upon petitioners who, without cause, failed to reply timely.[335] Others interpreted "deemed to be admitted" as not totally foreclosing the petitioner on undenied allegations contained in the answer. They agreed that integrating a coercive element into the rule would expedite compliance. However, they questioned the efficacy of a conclusive presumption, claiming the benefits of the procedure were far exceeded by its disadvantages. In their view, affording the Commissioner a rebuttable presumption would be as effective in producing replies, would avoid inequitable and onerous results, and would be more defensible on appeal.[336]

Only a few cases involved the issue, and the Board was not compelled to adopt definitively either position.[337] This was primarily attributable to the rule that generally permitted the Board to accept untimely filings if the party could show "good and sufficient cause" for the delay.[338] The same savings provision was employed by the Board to relieve parties from the

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[333] Murdock, Feb., 1937, *supra* note 299.

[334] Revenue Act of 1926, ch. 27, § 907(a), 44 Stat. 107 (now codified at I.R.C. § 7453).

[335] Murdock, 1937, *supra* note 299; Murdock, Feb., 1937, *supra* note 299, at 2.

[336] Murdock, *supra* note 299; Murdock, Feb., 1937, *supra* note 299, at 1; *see also* Miller, April 22, 1937, *supra* note 299; Memorandum from Judge Murdock, Rules Comm. Chairman to Judge Raum, Tax Court Judge, March 3, 1953, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence" [hereinafter cited as Murdock, 1953].

[337] Prior to 1938, the Board had not decided whether a petitioner could present evidence on the issue of fraud after failing to reply. In *Statler v. Commissioner*, 27 B.T.A. 342, 344 (1932), the first case dealing with a failure to reply, the conclusive versus rebuttable presumption issue was not addressed. Rather, it was simply held that the undenied allegations were deemed admitted. *See also* Nicholson v. Commissioner, 32 B.T.A. 977 (1935); Kerbaugh v. Commissioner, 29 B.T.A. 1014, 1016 (1934), *aff'd*, 74 F.2d 749 (1st Cir. 1935); Beringer v. Commissioner, 29 B.T.A. 250, 251 (1933), in which the meaning of "deemed to be admitted" was not reached because the Board decided a reply was unnecessary. In *Mauch v. Commissioner*, 35 B.T.A. 617, 625 (1937), *aff'd*, 113 F.2d 555 (3d Cir. 1940), no reply was filed and the undenied allegations of fraud were deemed admitted. However, the Board also held that the evidence introduced by the Commissioner supported a finding of fraud. *Cf.* Murdock, Feb., 1937, *supra* note 299.

[338] B.T.A. RULE 20 (Feb. 1, 1931 ed.); Miller, April 22, 1937, *supra* note 299, at 4, 5; *see also* Murdock, 1937, *supra* note 299, at 1.

application of other controversial sanctions.[339] Nevertheless the solution afforded by the relief provision was not wholly satisfactory. "Good and sufficient cause" was inherently ambiguous, and its application by an individual Board member could well be affected by his view of the necessity for a timely reply. As a result, the consequences of a late reply were largely dependent upon which member presided at the hearing.[340] These vagaries in the application of the rule elicited considerable criticism[341] and, in 1937, in an effort to develop a universally acceptable procedure, the Board solicited recommendations from the Bureau and the tax bar.[342]

The Commissioner expressed indifference to the subtleties of the alternatives under consideration.[343] However, the Commissioner stressed that the uncertainty of the reply procedure was responsible for an inefficient allocation of time and money since Government attorneys had to be prepared to prove facts theoretically deemed admitted.[344] The Commissioner indicated support for any uniformly enforced procedure, including the abolition of the reply, but an inconsistently enforced procedure was intolerable.[345] On the other hand, Robert Miller, Chairman of the American Bar Association committee on federal taxation, was not as concerned with the uncertain application of the reply rule as with the apparent harsh implications of failure to reply timely. He sympathized with the plight of the practitioners who did not regularly practice before the Board and who were therefore unfamiliar with its procedural rules;[346] any procedure that did not account for this situation was, in Miller's view, ill-conceived.[347] Additionally, he argued that the usual reply was

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339 *E.g.*, *supra* notes 170–200 and accompanying text.

340 Murdock, *supra* note 299; Rules Comm., *supra* note 299, at 14.

341 Murdock, *supra* note 299; Rules Comm., *supra* note 299, at 14.

342 Murdock, Feb., 1935, *supra* note 299. The letter concluded: "[I]f the [present] rule is clear and not too harsh, it should stand. If it is clear but too harsh, then it ought to be modified. If the words 'deemed to be admitted' are not clear, the rule needs clarification." *Id.* at 3.

343 *See* Murdock, *supra* note 299, in which it was indicated that the Bureau supported treating undenied allegations as prima facie evidence. The tenor of its position was that any uniformly enforced procedure would be acceptable.

344 Joint Committee Report, *supra* note 3, at 9; Murdock, *supra* note 299; Rules Comm., *supra* note 299, at 14.

345 Murdock, *supra* note 299; Rules Comm., *supra* note 299, at 14.

346 Miller, April 22, 1937, *supra* note 299, at 2. It was claimed that the Board did provide compensatory relief under the 1931 procedure in two related fashions. The Board was "not disposed to be too strict where taxpayers and their representatives plead ignorance of the rules." Secondly, "most all rules of the Board [could] be waived by a Board Member if a good cause [was] shown for the violation of the rule." Murdock, 1937, *supra* note 299, at 1.

347 Miller, April 22, 1937, *supra* note 299, at 2.

tantamount to a general denial, and only a misguided procedure would elevate such an insignificant pleading to pivotal importance.[348]

The Board yielded in 1938, but in the process, reaffirmed its commitment to a reply procedure.[349] Ostensibly, the purpose of the revision was to enable Government attorneys to ascertain prior to trial whether fraud had to be proven.[350] However, the curious hybrid promulgated by the Board represented a compromise procedure obviously influenced by other considerations.[351] It satisfied the uniformity criterion of the Commissioner by providing an explicit procedure that specifically dealt with a failure to reply.[352] Simultaneously, it catered to Miller's specifications by restricting the adverse consequences of a failure to reply.[353]

The previous rule, which automatically deemed all undenied factual allegations admitted, was confined to cases in which a reply was filed which failed to deny such allegations.[354] A new, more complex, procedure was provided to deal with a failure to reply timely.

> [W]here a reply is required by these rules, but no reply is filed, the adverse party, within 45 days after the expiration of the time fixed by these rules for filing . . . the reply . . . may file a motion with the Board calling attention to the fact that the pleading has not been filed within the specified time and certain material allegations of fact have not been denied, and requesting the Board to enter its order that those particular undenied allegations shall be deemed to be admitted. The Board will serve a copy of this motion upon the other

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[348] Miller, April 22, 1937, *supra* note 299.

[349] B.T.A. RULES 15, 18 (Jan. 1, 1938 ed.).

[350] Joint Committee Report, *supra* note 3, at 9; Rules Comm., *supra* note 299, at 14. *Cf.* Murdock, *supra* note 299.

[351] In *Tucker, v. Commissioner*, T.C. Memo. 1952-27, 11 T.C.M. (CCH) 99, 102 (1952), the following reasons were advanced for the rule:

> That rule was designed to make sure that the petitioner would be made doubly aware, first by the service of the answer, and, second, by the service of the order to show cause, of the necessity of a reply if he had any basis for denying the allegations of the answer. Its purpose was also to require no further proof of fraud in cases in which the petitioner chose, by failing to deny the allegations, to require no evidentiary proof.

See Murdock, 1953, *supra* note 336.

[352] B.T.A. RULE 18 (Jan. 1, 1938 ed.); Joint Committee Report, *supra* note 3, at 9; Rules Comm., *supra* note 299, at 14.

[353] *Compare* B.T.A. RULE 18 (Jan. 1, 1938 ed.), *with* Miller, April 22, 1937, *supra* note 299.

[354] B.T.A. RULE 18 (Jan. 1, 1938 ed.).

> party and issue an order to show cause, returnable on or before a day certain.[355]

On its face, the rule seemed to require taxpayers to offer a satisfactory explanation for failing to reply timely, as a condition precedent to obtaining relief. However, this was not the intent of the provision. The Board contemplated affording taxpayers two unrestricted opportunities to reply.[356] If the petitioner did not take advantage of the initial filing period, then the Commissioner's motion would serve as an express reminder that unless a reply was forthcoming, specified undenied allegations would be presumptively deemed admitted.[357] Additionally, although subsequent

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[355] *Id.*

[356] *Cf.* Tucker v. Commissioner, T.C. Memo. 1952-27, 11 T.C.M. (CCH) 99, 102 (1952); Rules Comm., *supra* note 299, at 14. The intent of the rule, which was consistent with its interpretation, can be deciphered from the following:

> The Court realized that in cases where the Commissioner had the burden of proof, particularly in fraud cases, failure of a petitioner to know the rule requiring a reply might permit a decision on the pleadings that there was fraud and if it did not deny the petitioner his right to introduce proof to the contrary, at least it might work a great hardship on one every now and then. I think also there was some feeling that the Circuit Courts were not or would not be too happy in such a situation so the cumbersome procedure was adopted in order to bring the matter of the necessity of a reply definitely to the attention of the taxpayer whether or not he was smart enough to know that the rule required a reply.

Murdock, 1953, *supra* note 336.

> When needed, a reply is to be filed within 45 days of service of answer (Rule 15). If not filed, respondent within 45 days thereafter may move to hold the undenied allegations of the answer deemed admitted. But if the reply is then received, it is filed. Mr. Swecker observes that the time for reply is thus 90 days, with respondent and the Court sending a reminder that a reply is overdue.

Mersch, *supra* note 322, at 4.

It should be noted that the above description of the reply procedure is not entirely accurate. If a reply was not filed within the initial 45-day period, the Commissioner had another 45 days within which to file a motion. The taxpayer had until the return date of the motion to file the reply.

[357] *See* Berdine v. Commissioner, T.C. Memo. 1953-108, 12 T.C.M. (CCH) 344 (1953); Corcoran v. Commissioner, T.C. Memo. 1953-4, 12 T.C.M. (CCH) 89 (1953); Tucker v. Commissioner, T.C. Memo. 1952-27, 11 T.C.M. (CCH) 99, 102 (1952); Kawaguchi v. Commissioner, T.C. Memo 1946-91, 5 T.C.M. (CCH) 293 (1946). In the following cases, allegations of fraud, transferee liability, or increased deficiency were deemed admitted. *E.g.*, Edwards v. Commissioner, T.C. Memo. 1953-78, 12 T.C.M. (CCH) 249 (1953) (fraud); Herring v. Commissioner, T.C. Memo. 1953-77, 12 T.C.M. (CCH) 248 (1953) (fraud); Downer v. Commissioner, T.C. Memo. 1945-112, 4 T.C.M. (CCH) 358 (1945) (fraud); McGlue v.

interpretations of the rule did not directly address the issue, it was evident that any reply filed prior to the return date of the Commissioner's motion was considered timely.[358] If the Commissioner neglected to file the motion timely, undenied allegations were deemed denied without the benefit of a reply.[359] Notwithstanding the imprecision of the 1938 rule, from its inception the procedure was an unqualified success,[360] and has only been changed in minor respects.[361]

2. Content and Form

The content of the reply has never been controversial. The 1931 rule, which directed petitioners to file a reply containing "a specific admission or denial of each material allegation of fact contained in the answer" and any facts upon which he relied for defense,[362] went unaltered until the 1974 revision.[363] The absence of disputes with regard to content is somewhat

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Commissioner, 45 B.T.A. 761, 766 (1941) (fraud); Black v. Commissioner, 19 T.C. 474 (1952) (increased deficiency); Belford v. Commissioner, 11 T.C.M. (CCH) 1210 (increased deficiency); Blankman v. Commissioner, T.C. Memo. 1952-338, 11 T.C.M. (CCH) 1166 (1952) (increased deficiency); Galvin v. Commissioner, 7 T.C.M. (CCH) 402 (1948) (transferee liability).

[358] There is no case refusing to allow a taxpayer to file a reply prior to the return date of the show cause order.

[359] B.T.A. RULE 18 (Jan. 1, 1938 ed.).

[360] Judge Murdock's response to a suggestion that the rule be re-evaluated best illustrates the confidence in the rule. "I do not believe we have had any case since the adoption of the rule where the taxpayer has had any basis for complaint. The Commissioner does not find the rule too burdensome and I would be disposed to leave it as it is." Murdock, 1953, *supra* note 336.

[361] In 1955, the rule was clarified to expressly grant taxpayers the right to file the reply on or before the day fixed for the hearing of the Commissioner's motion. TAX CT. R. 18(c)(2) (Aug. 15, 1955 ed.). The 1974 revision also made minor changes in the phrasing of the rule, but the substance of the rule remained intact. *Compare* TAX CT. R. 18(c) (Aug. 15, 1955 ed.), *with* TAX CT. R. 37(c) (Jan. 1, 1974 ed.). In 1951, it was recommended that the procedure be simplified as follows:

> Whenever the answer of the respondent includes allegations which bring it within Rule 15, the said answer shall be entitled "ANSWER REQUIRING REPLY" and shall at the end thereof, in the lower left-hand corner, the name and address of the person upon whom the petitioner shall serve his reply.

Memoranda from V. Mersch, Tax Court Clerk, to Judge Kern, July 27, 1951, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence." However, this proposal was never adopted.

[362] B.T.A. RULE 15 (Feb. 1, 1931 ed.).

[363] *Compare* B.T.A. RULE 15 (Feb. 1, 1931 ed.), *with* TAX CT. R. 15(b), (Jan. 25, 1971 ed.).

surprising, since the phrasing of the rule paralleled the provision governing the answer.[364] The latter rule has been a constant source of irritation to the tax bar, which objects to the Commissioner's usual reliance on uninformative general denials in his answer.[365] In view of the widespread taxpayer ignorance of the Board/Tax Court's procedural rules, it is doubtful that taxpayers observed the reply rule any better than the Commissioner fulfilled the requirements of the answer rule.[366] Rather, the incongruity is probably attributable to the infrequent use of the reply and the fact that few commentators have espoused the Service's position on this matter.

In 1974, the rule underwent an extensive revision aimed at making the reply more informative.[367] The court attempted to restrict the use of the general denial by the following measures: (1) insisting that admissions and denials be specific; (2) requiring that taxpayers indicate whether they possess sufficient information to admit or deny allegations; (3) directing that petitioners qualify denials if only part of an allegation is denied; and (4) demanding that there be included a "clear and concise statement of every ground, together with the facts in support thereof, on which the petitioner relies affirmatively or in avoidance of any matter in the answer on which the Commissioner has the burden of proof."[368] The motivating force for this change is somewhat obscure. The normal impetus for revision, discontent with existing practice, was not present. The controversy over the answer,[369] combined with a determination to cast the contents of the answer and reply in the same mold,[370] were probably the decisive factors.

With respect to the form of the reply, the central issue has been whether verification should be mandatory. Initially, the Board did not consider verification of the reply necessary.[371] In 1935, movement towards verification began when the Board's Rules Committee recommended mandatory verification of the reply and answer.[372] The Board rejected the proposal, concluding the issue deserved further consideration.[373]

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364 *Compare* B.T.A. RULE 14 (Feb. 1, 1931 ed.), *with* B.T.A. RULE 15 (Feb., 1, 1931 ed.).

365 *See supra* notes 201–238 and accompanying text.

366 *See* CASEY, *supra* note 256, at 63, in which it is indicated that the Tax Court has not strictly enforced the rule relative to the content of the reply.

367 TAX CT. R. 36, 37 (Jan. 1, 1974 ed.).

368 *Id.* The rule that emerged from the 1974 rules revision remains substantially the same today. *See* TAX CT. R. 37 (July 6, 2012 ed.).

369 *See supra* notes 201–238 and accompanying text.

370 *Compare* TAX CT. R. 37 (Jan. 1, 1974 ed.), *with* TAX CT. R. 36 (Jan. 1, 1974 ed.); Rules Comm. Note, TAX CT. R. 37 (Jan. 1, 1974 ed.); Mersch, *supra* note 322, at 4; *see also supra* note 322 and accompanying text.

371 B.T.A. RULES (Feb. 1, 1931 ed.) did not mention verification of the reply.

372 Murdock, 1953, *supra* note 299, at 2.

373 *Id.*

Apparently there was little sentiment for requiring the Commissioner's pleadings to be verified, and in light of this fact it was deemed inexpedient to require verification of the petitioner's reply.[374]

The question was resolved in 1938[375] after strong lobbying by the Bureau of Internal Revenue for verification of the reply.[376] The Bureau, which opposed requiring verification of answers, had no difficulty in justifying the apparent disparity:

> [T]he requirement of verification would eliminate the denial of matters obviously true, thus obviating the need for proof of these matters, and would place the taxpayer on record in regard to factual matters. Although adoption of this suggestion would result in all of the petitioner's pleadings being verified while those of the Government would remain unverified, it was thought that the difficulties attending verification by the Government would justify a difference in treatment if verification of the reply was thought desirable.[377]

The Board, however, was well aware of the uproar certain to be heard if the proposal was adopted.

> [T]here would be considerable dissatisfaction among taxpayers and their counsel if this rule were adopted. Those persons might be expected to point to the inadequacy of the Commissioner's answers and to ask why additional burden should be placed upon the petitioner as to the pleadings, when by far the greater fault lies with the Commissioner, who not only does not verify his answers, but in too many instances files a general denial even denying facts he knows to be true.[378]

A suggestion from Robert Miller, who advocated verification of the reply and answer only after a showing of good cause,[379] ultimately provided the Board with a compromise procedure capable of maintaining a delicate balance between the competing considerations.[380] "[D]ifficulties attending

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374 *Id.*; Rules Comm., *supra* note 299 at 13; Surrey, 1937, *supra* note 123, at 3.

375 B.T.A. RULE 15 (Jan. 1, 1938 ed.).

376 *See* Ryan, *supra* note 190, at 2; Surrey, 1937, *supra* note 123, at 3; Surrey, *supra* note 123, at 4; *see also* Rules Comm., *supra* note 299, at 13.

377 Surrey, 1937, *supra* note 123, at 3.

378 Rules Comm., *supra* note 299, at 13.

379 Miller, April 22, 1937, *supra* note 299, at 5; Murdock, 1937, *supra* note 299.

380 B.T.A. RULE 15 (Jan. 1, 1938 ed.).

verification by the Government" ruled out verification of the answer,[381] but the Board accommodated most interests by requiring verification of the reply only if good cause was demonstrated.[382] In 1974, the court subjected all pleadings to a similar rule—verification is not required unless specifically directed by the court.[383]

E. Stipulations

The pretrial stipulation procedure has been described as "the bedrock of Tax Court practice;"[384] according to many, it is largely responsible for the court's ability to keep current with the thousands of cases docketed each year.[385] By eliminating the necessity of proof at trial with respect to uncontroverted issues of fact, pretrial stipulations result in savings of time and expense for both the court and the parties.[386] Moreover, the necessity of complying with the stipulation procedure forces opposing counsel to consult and to develop the facts of their case in advance of trial.[387] As a result, issues are perceived and litigating risks are evaluated at an early stage of the proceedings. Many observers believe that the high rate of pretrial settlements that obtains in the Tax Court[388] is largely due to this facet of its practice.[389]

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381 Surrey, 1937, *supra* note 123, at 3.

382 B.T.A. RULE 15 (Jan. 1, 1938 ed.).

383 TAX CT. R. 33 (Jan. 1, 1974 ed.).

384 Branerton Corp. v. Commissioner, 61 T.C. 691, 692 (1974).

385 JOHN P. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 139–41 (1969); Gerald D. Babbitt & William Morris, *An Introduction to the Tax Court of the United States*, 21 TAX LAW. 615, 626–28 (1967) [hereinafter cited as Babbitt & Morris]; Randolph F. Caldwell, Jr., *Tax Court Has New Rules of Practice and Procedure*, 59 A.B.A. J. 1301, 1304 (1973) [hereinafter cited as Caldwell, 1973]; John W. Kern, *The Process of Decision in the United States Tax Court*, 8 N.Y.U. INST. ON FED. TAX'N 1013, 1013 (1950); Memorandum from Judge Raum to Chief Judge Murdock, Dec. 14, 1959, at 2, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Raum, Dec. 14, 1959].

386 Charles D. Hamel, *The United States Board of Tax Appeals* , 2 NAT'L INC. TAX MAG. 293, 307 (1924); Willis W. Ritter, *Pitfalls in Practice Before the Board of Tax Appeals*, 3 NAT'L INC. TAX MAG. 297, 301 (1925).

387 Robert R. Veach, *Stipulating Facts in Tax Court*, 34 TAXES 669, 674 (1956) [hereinafter cited as Veach].

388 Throughout the history of the court, the rate of settlement has averaged between 70 percent and 90 percent of cases docketed.

389 Caldwell, 1973, *supra* note 385, at 1304; Percy W. Phillips, *Possible Methods of Eliminating Congestion of Tax Appeals*, 5 NAT'L INC. TAX MAG. 243, 270 (1927); Memorandum from Judge Raum, Rules Comm. Chairman, entitled "Pre-trial Procedure," Feb. 11, 1960, at 1, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence;" Memorandum from Judge Turner, Rules Comm.

Three related controversies have arisen throughout the history of the stipulation procedure in the Tax Court. The first involved whether stipulation procedures ought to be mandatory or permissive. Although the stipulation procedure was successful from its initial adoption on a purely voluntary basis, pressures grew to make the procedure even more efficient, and the court moved toward mandatory stipulation of undisputed facts in every case. With the adoption of mandatory stipulations, the controversy shifted to the question of what procedural forms would be most successful in requiring recalcitrant parties to stipulate. The direction here has been toward increasing the court's supervisory duties with respect to stipulations.

Finally, a good deal of attention has centered on the relationship of the stipulation procedure to the issue of pretrial discovery. The Federal Rules of Civil Procedure, adopted in 1938, provided for liberal pretrial discovery,[390] and subsequent changes in the federal discovery rules made them even more expansive.[391] Although these rules, which govern district

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Chairman, to the Judges of the Tax Court, Apr. 8, 1963, at 1, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence;" Memorandum from Judge Turner, Rules Comm. Chairman, to Judge Dawson, Sept. 28, 1962, at 3, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Turner, Sept. 28, 1962].

Judge Raum, a staunch supporter of the stipulation procedure, once observed that

> It may well be said therefore that we have a 'built-in' pretrial procedure that is productive of an astonishing amount of narrowing of issues, stipulating of facts, and settlement of entire cases. And our Rule 31 [prior to 1974, rule 31(b) prescribed the stipulation procedure] is either directly responsible for all of this or, at the very least is an important factor in the ultimate result.

Raum, Dec. 14, 1959, *supra* note 385, at 2.

390 FED. R. CIV. P. 26–37, 308 U.S. 645, 694–713 (1939).

391 *Id.* In 1970, the federal discovery rules underwent the first comprehensive review since 1938. Included in the amendments were the following changes:

> Scope of Discovery. New provisions are made and existing provisions changed affecting the scope of discovery: (1) The contents of insurance policies are made discoverable (Rule 26(b)(2)). (2) A showing of good cause is no longer required for discovery of documents and things and entry upon land (Rule 34). However, a showing of need is required for discovery of "trial preparation" materials other than a party's discovery of his own statement and a witness' discovery of his own statement; and protection is afforded against disclosure in such documents of mental impressions, conclusions, opinions, or legal theories concerning the litigation. (Rule 26(b)(3)). (3) Provision is made for discovery with respect to experts retained for trial preparation, and particularly those experts who will be called to testify at trial (Rule 26(b)(4)). (4) It is provided that interrogatories and requests for admission are not objectionable simply because they relate to matters of opinion or contention, subject of course to the supervisory

court proceedings, have never applied to the Board of Tax Appeals or the Tax Court,[392] there have always been those who believed the Tax Court should adopt its own discovery procedures.[393] For many years the Tax Court resisted the pressure to adopt pretrial discovery. This resistance was justified primarily on the basis of the stipulation procedure and its importance in the settlement of cases. Because stipulations were so successful, there was no need for broad discovery rules; moreover, the adoption of such rules might diminish the effectiveness of stipulations, a result to be avoided at all costs. Finally, in 1974, the court introduced pretrial discovery into its rules of practice.[394] However, this change was accompanied by the warning that pretrial discovery would not be permitted to encroach upon the stipulation procedure, and should be used only to supplement the stipulation process.[395]

1. Stipulations from 1924 to 1945

The Board's first rules of practice and procedure, adopted in 1924, contained provisions recognizing stipulations as part of the pretrial

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> power of the court (Rules 33(b), 36(a)). (5) Medical examination is made available as to certain nonparties (Rule 35(a)).

Advisory Committee's Explanatory Statement Concerning 1970 Amendments of the Discovery Rules (1970).

392 *See* Rule Making Act of 1934, ch. 651, 48 Stat. 1064; Starr v. Commissioner, 226 F.2d 721, 722 (7th Cir. 1955); Katz v. Commissioner, 188 F.2d 957, 959 (2d Cir. 1954).

393 Randolph F. Caldwell, Jr., *Tax Court Procedure: Problems but Not Pitfalls*, 27 N.Y.U. INST. ON FED. TAX'N 1435, 1443 (1969) [hereinafter cited as Caldwell, 1969]; Michael Kaminsky, *The Case for Discovery Procedure in the Tax Court*, 36 TAXES 498 (1958) [hereinafter cited as Kaminsky]; Converse Murdoch, *Discovery Against the United States in Civil Tax Proceedings*, 13 VILL. L. REV. 58, 59 (1967); Herman T. Reiling, *Procedure in Federal Tax Litigation*, 14 TAXES 598, 599 (1936) [hereinafter cited as Reiling].

394 TAX CT. R. 70 (Jan. 1, 1974 ed.).

395 TAX CT. R. 91(a)(2) (Jan. 1, 1974 ed.). Judge Raum remarked:

> An indispensable requirement of every well-tried case is a stipulation of facts. The Court has regarded this as the dominant objective of every case. The various procedures in Title VII through XI were not meant, in any way, to serve as a substitute for as complete a stipulation as the parties are able to agree upon. Rather, they were intended to assist in the development of facts prior to trial as early as possible in the litigation so as to strengthen the stipulation process and to minimize the last minute pressures that have characterized the formulation of a stipulation in the past.

J. Earl Epstein, *Proposed Rules of the Tax Court: A Panel Discussion Sponsored by the Section of Taxation, Annual Meeting—San Francisco*, Aug. 12, 1972, 26 TAX LAW. 377, 380 (1972) [hereinafter cited as *Panel Discussion*].

procedure.[396] As written, the early rules only provided for permissive stipulations and contained no procedure to effectuate the stipulation process. The initiative usually came from the party desiring to stipulate, who was largely at the mercy of the cooperative spirit of the opposing party. Nevertheless, even during this early period the Board recognized the importance of stipulations and attempted to induce agreements between the parties through informal pressures. Thus, the Board did not hesitate to express its disapproval when an entirely unstipulated appeal was presented for trial, and in such cases postponement of the hearing was not unusual.[397]

The early years witnessed important rulings respecting the requirements for valid stipulations and the purposes to which they could be applied. To be effective, the stipulation had to be signed by both parties and filed with the Board;[398] failure to comply with these formalities rendered the stipulation ineffective.[399] The Board also required the stipulation to be clear and concise since the Board refused to interpret ambiguous statements to the prejudice of either party.[400] On one occasion the Board rejected an argument that it should point out deficiencies in stipulations and provide counsel with an opportunity to correct them.[401] The Board's function was judicial, not inquisitorial; moreover, the management of its heavy workload required that it accept stipulations at face value.

Occasionally, parties attempted to stipulate matters that went beyond the proper province of the stipulation procedure. In this connection the Board ruled that jurisdictional defects, such as an untimely petition, could not be cured by stipulation.[402] Moreover, conclusions of law could not be stipulated since the Board would not permit the parties to restrict its power to decide legal issues.[403] Similarly, the Board would not be bound by a stipulation that was in contravention of statute.[404] Such a stipulation not only was violative of the statute, but also contravened the principle limiting stipulations to factual issues.

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[396] B.T.A. RULE 30 (July 1, 1924 ed.).

[397] 2 LAURENCE F. CASEY, FEDERAL TAX PRACTICE § 7.38 n.40 (1955).

[398] B.T.A. RULE 30 (July 1, 1924 ed.).

[399] *See* Cole v. Commissioner, 30 T.C. 665, 674 (1958).

[400] *See* Estate of Harse, 1 B.T.A. 1056, 1057 (1925).

[401] Ohio Clover Leaf Dairy Co. v. Commissioner, 9 B.T.A. 433, 434 (1927).

[402] *See* Blackstone v. Commissioner, 12 B.T.A. 456, 458–59 (1928); Mohawk Glove Corp., 2 B.T.A. 1247, 1247 (1925); Alfred C. Ruby, 2 B.T.A. 377, 378 (1925).

[403] Ohio Clover Leaf Dairy Co. v. Commissioner, 8 B.T.A. 1249, 1255 (1927); 2 LAURENCE F. CASEY, FEDERAL TAX PRACTICE § 7.38 n.41 (1955).

[404] Littauer v. Commissioner, 25 B.T.A. 21, 28 (1931).

Although it appeared as though the stipulation procedure generally functioned satisfactorily,[405] some proposals for improvement were made during the Board's early years.[406] One proposal advocated mandatory stipulations prior to the hearing with concomitant power in the Board to determine undisputed facts from an examination of the Commissioner's files should the parties fail to stipulate.[407] In addition to modifying the stipulation procedure, this proposal would have substantially changed the Board's function as a purely judicial, non-investigatory body. Because there was general approval of the Board's court-like nature, this proposal attracted little support.

The 1937 joint committee of the Board and Treasury, organized to study recommendations for facilitating the orderly disposition of cases,[408] sought reduction in Board congestion by procedural methods of eliminating uncontested issues. Initially, Treasury showed an inclination toward achieving this end by requiring stipulation in more cases.[409] Ultimately, however, most of the committee's work was directed to improvements in pleadings rather than stipulations. The committee also considered recommending that the Board adopt pretrial discovery patterned after the then proposed Federal Rules of Civil Procedure,[410] but this proposal was dropped when the Chief Counsel's Office withdrew its endorsement because of doubts concerning the Board's authority to enforce discovery rules.[411] Moreover, the committee was not convinced of any "immediate need" for such rules;[412] it concluded that in view of the Board's rules "on depositions, interrogatories, and production of documents, and the Commissioner's power to compel disclosure of information, further consideration of these suggestions may well be left for the future."[413]

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[405] *See* Forest D. Siefkin, *Procedural Methods of the Board of Tax Appeals*, 14 A.B.A. J. 365, 367 (1928).

[406] *Board of Tax Appeals*, 11 NAT'L INC. TAX MAG. 143, 143–44 (1933).

[407] *Id.*

[408] *See supra* note 3 and accompanying text.

[409] Treasury Dept. Press Service Release No. 10-25, at 2 (May 11, 1937).

[410] Preliminary Report of the Joint Committee of the Board of Tax Appeals and Chief Counsel's Office § 13, c. Dec. 17, 1937, filed at the U.S. Tax Court in "Pretrial Discovery: Memoranda & Correspondence."

[411] *Id.*

[412] Report of the Joint Committee of the Board of Tax Appeals and Chief Counsel's Office, Dec. 17, 1937, at 12, filed at the U.S. Tax Court in "Petition: Memoranda & Correspondence."

[413] *Id.*

2. The 1945 Revision

The first major revision of the stipulation procedure occurred in 1945 in response to specific problems raised by the renegotiation cases. Since 1942 a series of acts had provided for the renegotiation of government contracts to eliminate excessive profits of government contractors and subcontractors.[414] In 1943, a statutory procedure was established under which an administrative determination of excessive profits could be reviewed in a de novo proceeding in the Tax Court.[415] The Tax Court had exclusive jurisdiction in these cases until 1971, when such jurisdiction was then vested in the Court of Claims.[416] Most of the evidence in a renegotiation case consisted of books, reports, and other documents, which generally are undisputed. Due to the quantity of such documentary evidence, the Department of Justice, which represented the Government in renegotiation cases, moved the Tax Court in *Gifford Hill Pipe Co.*[417] to order an audit of the contractor that would be made available to the Government to aid in the preparation of its case.[418] The motion was granted and the procedure proved successful in expediting the case. As a result, the Justice Department thereafter proposed that the court require the full stipulation of facts in all renegotiation cases without resort to a motion and order.[419] The court also was impressed with the results in *Gifford Hill.* Yet, rather than promulgate a specific rule applicable only to renegotiation cases, the court elected to redraft the stipulation rule, thereby making the procedure applicable generally in the hope of reducing the number of "isolated cases"

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414 The first renegotiation act was enacted in 1942 as part of the Sixth Supplemental National Defense Appropriation Act, 1942. Act of Apr. 28, 1942, ch. 247, § 403, 56 Stat. 245. Renegotiation procedures have remained in the law since that time as the result of a series of temporary statutes that have been periodically extended. *See* REPORT BY THE STAFF OF THE JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, AN EVALUATION OF PROPOSALS TO EXTEND AND AMEND THE RENEGOTIATION ACT OF 1951, at 11–13 (1975).

415 Revenue Act of 1943, ch. 63, § 701(b), 58 Stat. 86, *amending* Sixth Supplemental National Defense Appropriation Act, 1942, ch. 247, § 403(e), 56 Stat. 246.

416 Act of July 1, 1971, Pub. L. No. 92-41, § 3, 85 Stat. 98, *amending* Renegotiation Act of 1951, ch. 15, 65 Stat. 21.

417 11 T.C. 802 (1948), *aff'd*, 180 F.2d 655 (5th Cir. 1950).

418 *See* Memorandum and Order, May 4, 1945, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence;" *see also* Memorandum from Presiding Judge Turner to the judges of the court, June 27, 1945, at 2, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Turner, June 27, 1945].

419 Turner, June 27, 1945, *supra* note 418, at 2.

in which attorneys appeared at the hearing prepared to enter extensive exhibits of books and accounts.[420]

As originally proposed, the revised rule stated that the court expected the parties to stipulate all evidence lending itself to stipulation, and "[a] party desiring to introduce such evidence must so *advise* his adversary. . . so that the parties may endeavor to stipulate the evidence to the fullest extent" possible.[421] The Chief Counsel was concerned that this wording would require the Government to effect full disclosure of evidence that it intended to introduce at trial.[422] The court responded to this problem by compromising its efforts to achieve mandatory stipulation. It continued the prior rule's seemingly permissive language that the parties *"may* agree upon any facts" prior to trial,[423] and substituted "shall confer with his adversary"[424] for the controversial "must so advise his adversary"[425] as to matters to be stipulated. However, at the same time, the court evidenced its determination to require stipulation by demanding that "both parties shall endeavor to stipulate evidence to the fullest extent to which either complete or qualified agreement can be reached."[426] The court's willingness to dilute the proposed rule reflected its misgivings concerning its power to enforce a mandatory stipulation procedure.[427] The legislation under which it operated provided it with no powers to coerce recalcitrant parties,[428] and it was an agency in the executive branch lacking the inherent powers of courts to enforce process and punish contempt.

The court further attempted to assume control of the procedure while reducing controversies by providing that an objection to materiality or relevancy would not be regarded as a proper excuse for refusal to stipulate.[429] The objection could be reserved in the stipulation or raised at the hearing.[430] This limitation on procedural objections to stipulations was

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420 *Id.* at 3.

421 *Id.* at 1.

422 Memorandum from Presiding Judge Turner to Judge Murdock, Rules Comm. Chairman, Oct. 1, 1945, at 1, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Turner, Oct. 1, 1945].

423 TAX CT. R. 31(b) (Nov. 1, 1945 ed.) (emphasis added).

424 *Id.*

425 Turner, June 27, 1945, *supra* note 418, at 1.

426 TAX CT. R. 31(b) (Nov. 1, 1945 ed.).

427 Turner, Sept. 28, 1962, *supra* note 389, at 2.

428 Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 105.

429 TAX CT. R. 31(b) (Nov. 1, 1945 ed.).

430 *Id.* Practitioners have been cautious of this rule, warning that rarely has the Tax Court refused to accept a fact once stipulated. Martin D. Cohen, *Litigation Techniques That Increase Your Chances for Success in the Tax Court*, 35 J. TAX'N 340, 341 (1971); Veach, *supra* note 387, at 671. The 1974 revision provided that "the court will consider any objection . . . made at the commencement of the trial or for good cause shown made during the trial." TAX CT. R. 91(d) (Jan. 1, 1974, ed.).

clearly proper inasmuch as the court, not the parties, was the proper arbiter of such controversies.

The new rule also dealt specifically with the problem of modification of a stipulation. The analogy of a stipulation to a bilateral contract is clear,[431] and the court traditionally had been reluctant to permit the qualification or withdrawal of a stipulation properly entered in the record.[432] However, criticism by the Chief Counsel of the harshness of a rule which required the parties to stipulate at their peril[433] led the court to reconsider its position. A review of relevant authorities[434] ultimately convinced it to allow modification, change, or withdrawal of a stipulation in those cases in which enforcement would be unconscionable or contrary to the interest of justice.[435]

Finally, in apparent recognition of a flaw in the original procedure that failed to provide a method for initiating the stipulation process, the court placed the burden on the party desiring to introduce the evidence sought to be stipulated.[436] By doing so, the court could ascertain which party was responsible for failing to initiate the procedure.

3. Putting Teeth into the Rule: 1955 Revision

The court's skepticism regarding its ability to compel compliance with a mandatory stipulation procedure forced it to disguise the mandate in 1945. The requirement that the parties "shall endeavor" to stipulate was couched in terms of the permissive "may agree" to a stipulation. The experience with the new rule, however, soon allayed the fears. In the words of Judge Turner:

> Due to our lack of power to enforce orders, we had our fingers crossed as to the reception of the new rule by the parties. Even so,

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431 *See* Saigh v. Commissioner, 26 T.C. 171, 177 (1956).

432 The Court's reluctance to permit the parties to alter a stipulation properly admitted in evidence is indicated by the fact that as originally proposed, the rule provided that "[e]vidence tending to qualify, change, or contradict any stipulated fact will not be received." Turner, June 27, 1945, *supra* note 418, at 1.

433 *See* Turner, Oct. 1, 1945, *supra* note 422, at 1.

434 *See id.*; Memorandum from A. Cypert, clerk, to Presiding Judge Turner, entitled "New Rule on Stipulations," Aug. 28, 1945, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence."

435 *See* TAX CT. R. 31(b) (Aug. 1, 1946, ed.), which provided that "[t]he Court may set aside a stipulation where justice requires, but will not receive evidence tending to qualify, change, or contradict any fact properly introduced into the record by stipulation."

436 *Id.*

> we decided to put on a bold front and couched the rule in mandatory terms. To our gratification and satisfaction it worked far beyond our fondest expectations.[437]

The tax bar's reception of the court's authority to promulgate such a rule was sufficiently favorable to enable the court to make a more daring revision in 1955. No longer uncertain respecting its power to require stipulation, the court announced that it "expect[ed] the parties to stipulate evidence to the fullest extent"[438] possible.

4. Revisions of the 1960s

Several factors contributed to the effectiveness of the pretrial stipulation procedure, all of which indicated it would enjoy continued success. The inherent advantages of stipulating, such as factual development of a case and greater likelihood of settlement, were incentives to stipulate. The stipulation procedure was also a convenient method of meeting the burden of proof, and parties so employing it could rely on the court not to interpret ambiguous stipulations to their detriment.[439] Finally, a party could not refuse to stipulate without being required to give an explanation to the court. An explanation satisfactory to the court was seldom heard,[440] and failure to stipulate had a tendency to arouse the court's displeasure, thereby "[placing] counsel in a bad light before his case" had started.[441]

Notwithstanding the inducements to stipulate and the expressions of approval of the procedure by its proponents, the 1950s and 1960s witnessed a mounting dissatisfaction with the status quo. Considerable criticism came from those who favored the adoption of liberal pretrial discovery.[442] These critics questioned the virtue of the court's exclusive reliance on stipulations as a means of pretrial preparation. In particular, they challenged the asserted importance of stipulations in the 70 percent to 90 percent settlement rate.[443] In their view, many of the cases clogging the court's calendar were only filed to gain a negotiating advantage and were

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[437] Turner, Sept. 28, 1962, *supra* note 389, at 2.

[438] TAX CT. R. 31(b) (Aug. 15, 1955 ed.).

[439] *See* Norfolk Nat'l Bank of Commerce & Trust v. Commissioner, 66 F.2d 48, 50 (4th Cir. 1933); Conservative Gas Co. v. Commissioner, 30 B.T.A. 552, 555 (1934).

[440] Veach, *supra* note 387, at 670–71.

[441] *Id.*

[442] William H. Bowen, *Discovery in the Tax Court: Why Not Follow the Federal Rules*, 44 A.B.A. J. 129 (1958); Kaminsky, *supra* note 393.

[443] *See* Turner, Sept. 28, 1962, *supra* note 389, at 6.

never intended to go to trial.[444] Thus, they contended the stipulation procedure played no part in the settlement of these cases.

Criticism, however, was not limited to those who advocated the adoption of pretrial discovery. An apparent oversight in the rule generated criticism from all quarters, and this oversight was ultimately corrected in a 1962 revision. The rule had failed to provide a procedure whereby a reluctant party could be forced to stipulate. Consequently, in numerous cases, the parties failed to stipulate in a meaningful manner, and the case went to trial with either a meaningless stipulation, or none at all.[445] At times, the failure to stipulate was the result of misunderstanding, so that one party would arrive at the call of the calendar thinking he and opposing counsel were in substantial agreement only to have the other party reject the proposal.[446] In other cases, either one or both of the parties had delayed committing themselves to a stipulation hoping to gain a tactical advantage.[447]

These difficulties may have been intensified because of the atmosphere prevalent at the Internal Revenue Service. In the waning months of the Truman Administration, a scandal involving the Service and the Tax Division of the Justice Department was disclosed.[448] The scandal, which

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[444] *Id.*

[445] *See* J. Earl Epstein, *The New Stipulating Procedures in the Tax Court*; *How They are Working*, 22 J. TAX'N 180, 181 (1965).

[446] Memorandum from Judge Turner, Rules Comm. Chairman, to the Judges of the Tax Court, Mar. 5, 1962, at 2, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Turner, Mar. 5, 1962].

[447] *Id.*

[448] In a 1951 letter to a federal judge, a retired intelligence agent of the Bureau of Internal Revenue alleged that perhaps as many as 63 percent of the tax evasion prosecutions recommended by Bureau intelligence units throughout the country were being stifled by senior officials in both the Bureau and the Department of Justice. Although not directly related to these allegations, a subcommittee of the Ways and Means Committee commenced work on June 1, 1951, to explore the activities and alleged improprieties of those charged with enforcement of the tax laws. Within a month of the subcommittee's first meeting, a rash of resignations by various Bureau officials had occurred. The investigations continued and the subcommittee, chaired by Representative Cecil R. King, a California Democrat, persisted in attempting to discover "why so many" tax fraud cases recommended for prosecution had been dropped at "higher levels."

The subcommittee's hearings attracted much publicity and generally were of a sensational nature. By the time the subcommittee had completed its assignment in 1952, its activities had proved to be a factor in the resignations, retirements upon request, or dismissals of approximately 200 persons within the Bureau. Of that number, 53 were said to have been forced out for accepting bribes or gratuities, 71 for such reasons as failure to discharge duties properly and rules infractions, 24 for involved officials at the highest levels of tax administration, suggested that special treatment had been obtained by favored taxpayers.[449] As a result of these disclosures the Service had, in the words of Judge Turner, taken an "awful kicking around" on the Hill and in the papers.[450] Subsequently, in an effort to dispel criticism, the Service began resolving most, if not all, doubts against the taxpayer which resulted in a noticeable increase in deficiencies and appeals.[451] Counsel for taxpayers complained that the Service was not auditing cases in good faith, but was "setting up claims for the purpose of chiseling taxpayers out of added amounts purely on a give and take basis."[452] Taxpayers responded by refusing to confer with government auditors and demanding immediate issuance of deficiency notices, hoping to gain a bargaining edge in settlement.[453] The Service, for its part, commonly failed to cooperate in the stipulation procedure.[454] In some cases, for example, the Government received a signed stipulation from the taxpayer and then neglected to file it with the court until calendar call, thereby reserving the power to repudiate at the eleventh hour.[455] As a result of these and other factors, many cases were called at calendar without facts being stipulated.[456]

Such problems strengthened the hand of those advocating either substantial change in the stipulation procedure or adoption of pretrial discovery. Initially, judges of the Tax Court were inclined to regard the pressure for formal pretrial discovery as "mostly noise,"[457] and continued to

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embezzlement of funds or government property, 21 for failure to pay proper tax, and five for falsification or distortion of government records and reports. Several high ranking government officials were among those implicated. Most notable were Joseph D. Nunan, Jr., Commissioner of the Bureau from 1944 to 1947, who was sentenced to five years imprisonment and fined $15,000 for income tax evasion; Daniel A. Bolich, former assistant commissioner, who was sentenced to five years imprisonment and fined $15,000 for conspiracy to obstruct justice; and T. Lamar Caudle, former Assistant Attorney General in charge of the Justice Department's Tax Division, who was removed from office for engaging in "outside activities . . . incompatible" with his duties. *See generally* NEWSWEEK, Nov. 26, 1951, at 30; TIME, Sept. 22, 1952, at 27; N.Y. TIMES, Apr. 15, 1955, at 48, col. 2; N.Y. TIMES, Aug. 4, 1954, at 46, col. 2; N.Y. TIMES, Dec. 26, 1952, at 1, col. 2.

[449] *See generally supra* note 448.

[450] Turner, Sept. 28, 1962, *supra* note 389, at 3.

[451] *Id.* at 3–4.

[452] *Id.* at 3.

[453] *Id.* at 4.

[454] *Id.*

[455] Bernard V. Lentz, *Tax Court Procedure: Pretrial Techniques Affecting Stipulations and Settlement*, 17 N.Y.U. INST. ON FED. TAX'N 125, 131 (1959).

[456] Turner, Mar. 5, 1962, *supra* note 396, at 2.

[457] Turner, Sept. 28, 1962, *supra* note 389, at 5.

extol the virtues of the existing stipulation rule.[458] However, as defects in the stipulation procedure became more obvious and pressure increased from taxpayers and the American Bar Association,[459] the court changed its view. In 1962, it acknowledged that the pretrial stipulation procedure needed reform. While some hoped for a major pretrial procedure revision, the court considered continued use of a strengthened stipulation procedure to be a better alternative.[460] The court believed that pretrial discovery would unnecessarily increase its workload by requiring it to intervene in many of those controversies constituting the 70 percent to 90 percent of the docketed cases which were resolved either by stipulation or settlement.[461] Furthermore, the court was convinced that stricter supervision would remedy the defects in the stipulation procedure in those cases in which it was not working because those who had previously attempted to resist the rule would be coerced into compliance.[462] At the same time, it considered this approach essential to avoid needlessly complicating the larger number of cases in which stipulations had always worked.[463]

The amendment allowed a party who wished to stipulate and found the opposing party uncooperative to obtain ex parte an order to show cause why the evidence sought to be stipulated should not be accepted for purposes of the case. The order would be granted upon motion made within 30 to 10 days before the scheduled trial date and was returnable at trial calendar call. As a part of the motion, the moving party was required to disclose the facts and evidence he desired to stipulate together with his sources so that his adversary would have sufficient information to make an informed and accurate stipulation.[464]

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[458] Raum, Dec. 14, 1959, *supra* note 385, at 2.

[459] "Indeed, certain members of the American Bar Association have been persistently urging the adoption of . . . [pretrial discovery] by the Tax Court, and their pressures may ultimately result in the A.B.A.'s taking a firm stand on this matter, recommending legislation to the Congress dealing with this subject." Raum, Dec. 14, 1959, *supra* note 385, at 1.

[460] Turner, Sept. 28, 1962, *supra* note 389, at 6–8; Turner, Mar. 5, 1962, *supra* note 446, at 4.

[461] Raum, Dec. 14, 1959, *supra* note 385, at 2; Turner, Sept. 28, 1962, *supra* note 389, at 6.

[462] Turner, Mar. 5, 1962, *supra* note 446, at 4.

[463] Turner, Sept. 28, 1962, *supra* note 389, at 6.

[464] The governing procedure provided as follows:

> (5) *Results of noncompliance by a party*. If at the date of issuance of trial notice in a case a party has failed to confer with his adversary, or has refused or failed to stipulate facts and evidence which are not in dispute or fairly should not be in dispute, as required under paragraph (2) hereof, and after trial notice, still fails or refuses to stipulate, the party proposing to stipulate

Both the Chief Counsel and the tax bar had pressured the court for an earlier return date, but the court insisted upon a return date at calendar call for a variety of reasons.[465] Of primary concern was the question of where such a motion would be heard. The demonstrable advantages of an earlier return date did not, in the court's opinion, justify a judge making a special trip to the place of the upcoming session to hear a motion.[466] On the other hand, an early return date in Washington was rejected on the ground that severe administrative difficulties would thereby be created. In the court's view, such a procedure would swamp the regular motions calendar and require special calendars,[467] a result the already overburdened court sought to avoid. Additionally, the court considered unsatisfactory having the Internal Revenue Service attorneys located in Washington handle an early return date[468] since these attorneys would not be the same attorneys with general responsibility for the cases.[469] Finally, a Washington return date would constitute a hardship for many taxpayers. Travel to Washington for these motions would be unnecessarily time consuming, inconvenient, and expensive.[470] Noting that taxpayers' counsel frequently complained about being required to come to Washington on procedural matters under the existing practice, the court concluded they would not react favorably to further travel.[471] In addition to the lack of an acceptable location to hold the hearings, the court had two other objections to an early return date. First, it questioned the necessity of such a procedure since a conscientious attorney would not run the risk of failing to stipulate after the issuance of

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> may within 30 days, but not less than 10 days prior to the date set for call of the case from a trial calendar, file with the Court a motion for an order to show cause why the facts and evidence covered in his proposal to stipulate should not be accepted as established for the purposes of the case. The facts and evidence covered by the motion shall be shown with particularity and by numbered paragraphs. The motion shall contain adequate references to the sources of the matter set forth, and where the sources of material are in possession or under control of the moving party, the motion shall also show that the opposing party has had reasonable access thereto. The motion shall be accompanied by proof of service on the opposing party or his counsel. Upon the filing of such motion, an order to show cause as moved shall be issued forthwith, unless the Court, in its discretion, directs otherwise, which order shall be returnable at the call of the case from the trial calendar.

TAX CT. R. 31(b)(5) (Dec. 28, 1962 ed.).

[465] Turner, Sept. 28, 1962, *supra* note 389, at 9.

[466] *Id.*

[467] *Id.* at 10.

[468] *Id.*

[469] *Id.*

[470] *Id.*

[471] *Id.*

an order to show cause, unless he had confidence in his ability to demonstrate why the order should not be made absolute.[472] Second, and probably most important, was the court's apprehension of getting involved in "formally refereeing the settlement of cases never intended for submission in the first place."[473] In the words of Judge Turner, the return date at calendar call was "the earliest date which [would] prevent our being roped in as referee in the 'horse trading' leading to settlement."[474]

These reasons were found unpersuasive by the tax bar which, within one month of the adoption of the revision, made a "demand that [the] [r]ule . . . be further amended to provide for *effective* admission of facts prior to *calendar call* . . . ."[475] The "demand," which was not entirely unexpected,[476] was in no uncertain terms.[477]

The major criticism of the revision was that it hindered counsel in their preparation for trial. The parties were anxious to know the results of the show cause order prior to the date of trial, so they could ascertain which facts would have to be proved;[478] the 1962 revision left the parties uncertain because it merely provided for a determination at trial. This uncertainty forced the parties to remain completely prepared to prove their case since they could not otherwise be assured of meeting their burden of proof. Usually the taxpayer was most inconvenienced, as the taxpayer generally had the burden of proof.

The controversy became so intense that the court decided to revise the stipulation procedure in June, 1963, a mere six months after the 1962 change. Although the court refused to provide every movant with a mandatory hearing on the order to show cause prior to the scheduled trial date, the new rule assured the parties of advance notice of the controversial material contained in the proposed stipulation.[479] This result was accomplished by requiring a response to the order prior to the trial date.

The earliest day at which a party might move for an order to show cause was moved back to the 15th day before calendar call rather than the 30th,

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[472] *Id.* at 8.

[473] *Id.*

[474] *Id.* at 10.

[475] Memorandum from Judge Raum to the Judges of the Tax Court, Dec. 28, 1962, at 1, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Raum, Dec. 28, 1962].

[476] "It is, of course, impossible to know with certainty just how a rule will work out in practice, and in certain respects, most everyone on the Rules Committee [had] his fingers crossed, so to speak, as to the results." Turner, Mar. 5, 1962, *supra* note 446, at 3.

[477] Raum, Dec. 28, 1962, *supra* note 475, at 2.

[478] *Id.* at 1–2.

[479] TAX CT. R. 31(b)(5) (Jan. 1, 1964, ed.).

with no further motions after the 35th day before trial, and a response thereto had to be filed within 25 days of receipt of the order; thus, if each party acted on the last possible day, all information would be exchanged at least 10 days before the call of the calendar. Generally, the hearing on the order was to be held at calendar call, but in a proper case, it could be held "at such earlier time and at such place as the Chief Judge in his discretion may fix."[480] The court instituted further changes in the 1963 revision to ensure that the procedure accomplished the maximum amount of agreement on facts. The party responding to a show cause order was required to list the matters which were not disputed. As to the partially disputed material, the party had to indicate that which was disputed and that which was not. Matters not disputed were deemed admitted.[481]

Prior to recommending the 1963 revision, the Tax Court rules committee solicited opinions from the Chief Counsel's office and the American Bar Association. Both supported the amendment.[482] However, the ABA endorsement proved to be short lived. In 1964, a special committee on the stipulation rule released a report criticizing the tendency of the rule to operate to the advantage of the Government.[483] Statistics indicated that in the two years of operation under the 1962 and 1963 revisions, 37 motions for an order to show cause had been filed, most of them by the Government in cases involving civil fraud penalties or complicated factual issues, and many of them in cases in which the taxpayer was appearing pro se.[484] The paucity of use by taxpayers' counsel could partially be explained by their unfamiliarity with the rule and its potential, but more troublesome reasons were perceived by the bar group. They suggested that taxpayers were reluctant to make a motion for fear of either alienating the Chief Counsel's office or triggering a motion from the Chief Counsel in response.[485] Moreover, the bar committee concluded that extensive use of the procedure by the Government indicated that the rule in operation "created an unintended imbalance in procedure and [gave] the Internal Revenue Service a tactical weapon to force acceptance of Regional

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480 *Id.*

481 *Id.*

482 Letter from C. Hauser, Chief Counsel, to Judge Raum, Rules Comm. Chairman, Apr. 2, 1963, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence;" Letter from Randolph Thrower, Chairman, A.B.A. Section of Taxation, to Judge Raum, Rules Comm. Chairman, Mar. 27, 1963, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence."

483 Report of the Special Subcomm. on TAX CT. R. 31(b)(5) of the Comm. on Court Procedure, ABA TAXATION SECTION, Nov. 4, 1964, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence."

484 *Id.* at 2–8.

485 *Id.* at 3.

Counsel's proposed stipulations of fact."[486] This was particularly so in pro se cases in which the taxpayer's inability to handle the procedural details might force him to accept the Government's proposed stipulation unless the court intervened on his behalf.[487]

Not all agreed that the ABA criticisms were well founded. In the first place, it was suggested that the statistics were inconclusive because two years was too short a test period to determine the rule's merits.[488] Furthermore, some considered the lack of use of the show cause order simply an indication of the parties' good faith in stipulating.[489] Additionally, whether the Government was unfairly employing the stipulation procedure at the expense of the pro se taxpayer was not susceptible of accurate measurement, as it involved a subjective analysis of complicated issues. The court took exception to the implication that it would condone abuse of the procedure.

> I'm sure it is not the intention of any member of the Court to permit the respondent to . . . take advantage of the *pro se* taxpayer . . . and I don't believe this is the policy of the Chief Counsel's office either. Whether it is the best thing to do or not I believe all of our judges tend to "protect" the *pro se* taxpayer; and I believe all of us would attempt to limit any order admitting facts to only such evidentiary facts about which there is no real dispute, eliminating conclusions, legal arguments, and ultimate facts, particularly in a *pro se* fraud case.[490]

Although the criticisms of the stipulation procedure were not universally accepted as correct, the ABA report did serve to strengthen the position of those favoring adoption of the pretrial discovery methods of the Federal Rules of Civil Procedure.[491] Nevertheless, the court persisted for another decade in its steadfast belief that the stipulation rule was better adapted to the special needs of tax litigation.[492]

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[486] *Id.* at 4.

[487] *Id.* at 12.

[488] Letter from Professor Polasky, University of Michigan, to Luther J. Avery, Chairman Special Subcomm., ABA Section of Taxation, July 17, 1964, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence."

[489] *Id.*

[490] Letter from Judge Forrester to L.J. Avery, Chairman Special Subcomm. on TAX CT. R. 31(b)(5), July 20, 1964, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence."

[491] Caldwell, 1969, *supra* note 393, at 1443; Jules Ritholz, *Diverse Views on Discovery in the Tax Court*, 21 TAX LAW. 639 (1968).

[492] *See supra* note 491.

5. 1974: Rule 31(b) Becomes Rule 91

When, in 1974, the court finally changed its stand against pretrial discovery, it did so as part of the first complete revision of its rules of practice and procedure. In connection with this endeavor, the court made several changes to the stipulation procedure, which, according to the Tax Court rules committee, were intended to result in stipulations being more "comprehensive, supported by affirmative action of the Court, and mandatory in all cases."[493]

The most important change requires parties to stipulate to more than just the "facts and evidence" required by the previous rule. Stipulations must now include "all matters not privileged which are relevant to the pending case . . . ."[494] Since the court's intent is to require stipulation of all undisputed matters having a bearing on the case, a stipulation is no longer objectionable because it contains opinions, contentions, or legal conclusions which require the application of law to fact.[495] The rule therefore reverses the court's traditional position that conclusions of law may not be stipulated. However, stipulations may not contain legal conclusions unrelated to the facts in issue,[496] and the 1974 rule revision did not change the principle prohibiting stipulations in contravention of statute.[497]

In addition to the broadened scope, certain other changes were made. Prior to 1974, the initiative for the commencement of the stipulation process was on the party desiring to introduce the facts sought to be stipulated.[498] Because the taxpayer generally had the burden of proof, the taxpayer usually was required to begin the stipulation procedure. The 1974 rule, however, placed the burden of stipulating evenly on both parties, commanding them to stipulate "without regard to where the burden of proof may be with respect to the matters involved."[499]

Another change was made in the perennially troublesome area of time limitations. Pursuant to the revised rule, parties could move for an order to show cause between 75 and 50 days before trial, and the response had to be served on the court and opposing counsel within 20 days of receipt; thus, the latest response date was 30 days before call of the case from the calendar.[500] In 1979, the court liberalized the time restrictions on the filing

493 Rules Comm. Note, TAX CT. R. 91(a)(1) (Jan. 1, 1974 ed.).
494 *Id.*; TAX CT. R. 91(a)(1) (Jan. 1, 1974 ed.).
495 Rules Comm. Note, TAX CT. R. 70(b), 91(a) (Jan. 1, 1974 ed.).
496 Rule Comm. Note, TAX CT. R. 70(b) (Jan. 1, 1974 ed.).
497 *See supra* note 404 and accompanying text.
498 *See supra* notes 424–427 and accompanying text.
499 TAX CT. R. 91(a)(1) (Jan. 1, 1974 ed.).
500 TAX CT. R. 91(f)(2) (Jan. 1, 1974 ed.).

of a motion to show cause in this setting. In particular, the court eliminated the reference to the 75-day period prior to trial as the earliest point at which a motion to show cause could be made.[501] Accordingly, such a motion now may be made at any point after the issuance of a trial notice.[502] Additionally, the court introduced a slight extension of the period by which the motion had to be made, moving such date back from 50 to 45 days prior to the call of the case from the trial calendar.[503]

With respect to the location and time of the hearing on the order to show cause, the 1974 revised rule proved more indefinite than its predecessor, which had provided that the hearing would generally be held at the call of the case from the trial calendar.[504] The 1974 rule, intended to afford greater flexibility,[505] provides that the hearing will be held at a time determined by the court.[506]

The 1974 rule contains more extensive and specific criteria covering the form and content of the motion for,[507] and response to,[508] a show cause order. Apparently, the intent here is to narrow as much as possible the areas of disagreement between the parties. A new provision, "intended to

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[501] TAX CT. R. 91(f)(1), 71 T.C. 1199.

[502] *See* Rules Comm. Note, TAX CT. R. 91(f)(1), 71 T.C. 1200.

[503] TAX CT. R. 91(f)(1), 71 T.C. 1199.

[504] TAX CT. R. 31(b)(5) (Jan. 1, 1971 ed.).

[505] Rules Comm. Note, TAX CT. R. 91(f)(2) (Jan. 1, 1974 ed.).

[506] TAX CT. R. 91(f)(2) (Jan. 1, 1974 ed.).

[507] TAX CT. R. 91(f)(1) (Jan. 1, 1974 ed.). Instead of setting out just the facts and evidence covered by the motion and the sources and their location, the 1974 rule revision required a moving party to

> (i) show with particularity and by separately numbered paragraphs each matter which is claimed for stipulation; (ii) set forth in express language the specific stipulation which the moving party proposes with respect to each such matter and annex thereto or make available to the Court and the other parties each document or other paper as to which the moving party desires a stipulation; (iii) set forth the sources, reasons, and basis for claiming, with respect to each such matter, that it should be stipulated; (iv) show that opposing counsel or the other parties have had reasonable access to those sources or basis for stipulation and have been informed of the reasons for stipulation; and (v) show proof of service of a copy of the motion on opposing counsel or the other parties.

Id.

[508] TAX CT. R. 91(f)(2) (Jan. 1, 1974 ed.). An answering party is now required to set forth the partial admissions he is willing to make and to submit variant wording or qualifications for stipulations he disputes. In this regard, the 1974 rule does not refer to "admissions and denials" but to "the part admitted and the part disputed," and thus by its very wording, encourages the attitude that the answer to the show cause order does not end the stipulation process. *Id.*

articulate present practice,"[509] deals with the failure to respond to a show cause order. If a party does not respond, in whole or in part, to a proposed stipulation, or the response is evasive, the rule deems that portion of the stipulation to be admitted.[510] On the other hand, the rule makes clear that no stipulation will be ordered with respect to a matter which, in the opinion of the court, is genuinely disputed.[511] In determining whether an issue is disputed, the court will not weigh opposing versions of the evidence unless one such version is patently incredible.[512]

The most significant change effected in the 1974 rule revision was the court's adoption of pretrial discovery by interrogatories and the production and inspection of papers and other things.[513] An influential factor in the court's decision to adopt discovery was the criticism evoked by the failure of the stipulation procedure, even after the 1963 revision, to provide the parties with a mechanism that guaranteed resolution of disputed stipulations prior to trial.[514] The opportunity for discovery at least makes available evidence concerning those matters that might have to be proved at trial in the absence of a stipulation. In this regard, it could be argued that pre-1974 Tax Court practice suffered doubly in comparison to the pretrial procedures applicable in district courts. Not only has liberal pretrial discovery long been available under the Federal Rules of Civil Procedure,[515] but those rules have also made stipulations available prior to trial under court supervised pretrial conferences at which the parties appear by court direction.[516]

The adoption of pretrial discovery, however, did not signal the court's abandonment of its historical reliance on the stipulation procedure. Of particular importance is the court's unique conception of the role of pretrial discovery. Whereas the federal rules emphasize discovery, the Tax Court continues to regard stipulations as being of paramount importance with discovery to be used only to supplement the stipulation procedure; the court has stated that discovery "should be regarded as [an aid] to stipulation,"[517] not an alternative. This position was illustrated when the court granted a motion by the Commissioner for a protective order to postpone his response to interrogatories until the parties had attempted to

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[509] Rules Comm. Note, TAX CT. R. 91(f)(3) (Jan. 1, 1974 ed.).

[510] TAX CT. R. 91(f)(3) (Jan. 1, 1974 ed.).

[511] TAX CT. R. 91(f)(4) (Jan. 1, 1974 ed.).

[512] *Id.*

[513] TAX CT. R. 70–73 (Jan. 1, 1974 ed.).

[514] *See supra* note 482 and accompanying text.

[515] FED. R. CIV. P. 26–37.

[516] FED. R. CIV. P. 16.

[517] *See supra* note 395.

stipulate. In its view, reliance on the pretrial discovery procedure prior to efforts to stipulate was an abuse of the discovery procedure.[518]

F. Pretrial Conferences

A pretrial conference is a meeting between the parties that is supervised by the court.[519] The procedure had its origins in necessity. Due to a tremendous backlog of cases prior to 1930 in the local courts in Detroit, the local judges decided to conduct conferences with the parties to determine which cases could be resolved without a trial.[520] From this beginning, the procedure was adopted as part of the Federal Rules of Civil Procedure in 1938[521] and subsequently became an important part of the pretrial procedure in Federal district courts.[522]

Shortly after the federal rules were adopted, the Board of Tax Appeals considered whether pretrial conferences would be compatible with its concept of pretrial procedure.[523] The Board's failure to adopt such a procedure indicates that it had concluded that pretrial conferences would not materially expedite the orderly disposition of tax controversies.[524] However, the apparent success of the new procedure[525] soon led to

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518 Branerton Corp. v. Commissioner, 61 T.C. 691 (1974).

519 *See generally* Alexander Holtzoff, *Pretrial Procedure in the District of Columbia*, 3 CATH. U. L. REV. 1 (1953) [hereinafter cited as Holtzoff]; Clarence L. Kincaid, *A Judges Handbook of Pre-Trial Procedure*, 17 F.R.D. 437 (1955) [hereinafter cited as Kincaid]; Report of the Committee on Pretrial Procedure to the Judicial Conference for the District of Columbia, May 24, 1941, filed at the U.S. Tax Court in "Pretrial Conference: Memoranda & Correspondence" [hereinafter cited as Judicial Conference]; Unsigned Memorandum to Chairman Arundell, Jan. 30, 1941, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence" [hereinafter cited as Arundell]; Memorandum from Richard Barker entitled "Pretrial Procedure in the Board of Tax Appeals," c. 1939, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda and Correspondence" [hereinafter cited as Barker].

520 Holtzoff, *supra* note 519, at 1–2; Judicial Conference, *supra* note 519, at 1–2.

521 FED. R. CIV. P. 16, 86, 308 U.S. 653, 684, 766 (1939).

522 *See generally* Judicial Conference, *supra* note 519, at 1–3; Kincaid, *supra* note 519, at 440; Note, *Developments in the Law–Discovery*, 74 HARV. L. REV. 940, 971 (1961).

523 Arundell, *supra* note 519; Barker, *supra* note 519.

524 The Tax Court did not adopt a rule authorizing pretrial conferences until 1963. *See* TAX CT. R. 28 (Jan. 1, 1964 ed.).

525 *See generally supra* note 522.

proposals for adoption of a pretrial conference procedure modeled after Rule 16 of the Federal Rules of Civil Procedure.[526]

In support of their proposals, the proponents of pretrial conferences, including the American Bar Association,[527] argued that a court supervised pretrial conference would enhance materially the prospects of a pretrial settlement.[528] In their opinion, as the parties were forced to deal with the issues during the course of these conferences, not only would the issues be narrowed, but the strengths and weaknesses of their respective cases would become more readily apparent.[529] As a result, the road to a compromise settlement would become more clear. But even in those cases in which an accord was not reached, the advocates of pretrial conferences urged that such a procedure would be beneficial.[530] In their view, a pretrial conference would enable the parties to get a better grasp on the issues while limiting and defining the scope of the inquiry at trial.[531] This, in turn, would lead to

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[526] *See* Report of the Committee on Court Procedure, ABA TAXATION SECTION 65, 67–68 (1958) [hereinafter cited as ABA 1958]; Report of the Committee on Court Procedure, ABA TAXATION SECTION, 114, 116 (1957) [hereinafter cited as ABA 1957]; Report of the Committee on Tax Court Procedure, ABA TAXATION SECTION 128 (1954); Report of the Committee on Tax Court Procedure, ABA TAXATION SECTION 128 (1949) [hereinafter cited as ABA 1949]; Report of the Committee on Tax Court Procedure, ABA TAXATION SECTION 110 (1948) [hereinafter cited as ABA 1948]; Report of the Committee on Tax Court Procedure, ABA TAXATION SECTION 112 (1947) [hereinafter cited as ABA 1947]; Adam Y. Bennion, *Equivalents of Pre-Trial and Discovery Procedure in Tax Court of United States*, 11 U.S.C. TAX INST. 405 (1959) [hereinafter cited as Bennion]; Report of the Committee on Relations with the Tax Court of the United States, District of Columbia Bar Association, Mar. 31, 1948, at 8–9, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence" [hereinafter cited as D.C. Bar Report]; Judicial Conference, *supra* note 519. *See generally* J. Edgar Murdock, *Tax Court is Fulfilling its Function; No Fundamental Changes Needed*, 8 J. TAX'N 106, 107 (1958) [hereinafter cited as Murdock]; Memorandum from Clarence Opper to Chief Judge Murdock, May 2, 1958, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence" [hereinafter cited as Opper]; Letter from T. D. Taubeneck to Chief Judge Murdock, May 6, 1958, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence."

[527] *See* ABA 1947, *supra* note 526.

[528] ABA 1957, *supra* note 526; Bennion, *supra* note 526, at 407–08; Barker, *supra* note 519; *see also* Arundell, *supra* note 519, at 1–2.

[529] ABA 1957, *supra* note 526; ABA 1948, *supra* note 526; ABA 1947, *supra* note 526; Arundell, *supra* note 519, at 1–2; Barker, *supra* note 519; D.C. Bar Report, *supra* note 526.

[530] *See, e.g.*, ABA 1948, *supra* note 526; ABA 1947, *supra* note 526; Arundell, *supra* note 519; Barker, *supra* note 519; D.C. Bar Report, *supra* note 526.

[531] Bennion, *supra* note 526, at 407–08; Arundell, *supra* note 519; D.C. Bar Report, *supra* note 526, at 8–9.

a more orderly presentation of the issues to the court.[532] Moreover, the likelihood of one party surprising his adversary would be diminished as both parties would be forced to show their hands during the course of negotiations.[533] This would be especially true if the court limited the scope of the controversy to matters raised at the conference.[534] Finally, it was argued that pretrial conferences would remedy defects in then existing pretrial procedure.[535] They noted that the pleadings often failed to define the issues and that the stipulation procedure was the only means available to correct this situation.[536] They viewed pretrial conferences as a welcome supplement to the then applicable pretrial procedure.[537]

Nevertheless, the Tax Court was not persuaded. First, the court noted that, on the average, 85 percent of docketed cases were settled by the parties without any help from the court and that there was no evidence that pretrial conferences would significantly enhance this settlement rate.[538] To the contrary, the court was concerned that such a procedure could actually decrease the settlement rate,[539] which would cause an intolerable increase in its workload considering the large backlog of cases. But even assuming the settlement rate would not be affected, the court was concerned that it would become entangled in cases that ordinarily would have been settled

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[532] *See supra* note 531.

[533] Bennion, *supra* note 526, at 407–08; Arundell, *supra* note 519.

[534] ABA 1947, *supra* note 526.

[535] *See generally* William H. Bowen, *Discovery in The Tax Court: Why Not Follow the Federal Rules?*, 44 A.B.A. J. 129 (1958) [hereinafter cited as Bowen]; Barker, *supra* note 519; D.C. Bar Report, *supra* note 526, at 8–9.

[536] *See generally* Bowen, *supra* note 535; ABA 1958, *supra* note 526, at 67–68; Barker, *supra* note 519; D.C. Bar Report, *supra* note 526, at 8–9; Murdock, *supra* note 526.

[537] ABA 1947, *supra* note 526; Barker, *supra* note 519; D.C. Bar Report, *supra* note 526.

[538] *See* Memorandum from Judge Raum, Rules Comm. Chairman, entitled "Pretrial Procedure," Feb. 11, 1960, at 1–3, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Raum, 1960]; Memorandum from Judge Raum, Rules Comm. Chairman, to the Chief Judge, Dec. 14, 1959, at 1–3, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Raum, 1959]; Memorandum from Judge Turner to the Judges of the Tax Court, Apr. 8, 1963, at 1, 5, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Turner]; Memorandum from Judge Turner to the Members of the Tax Court Rules Comm., Jan. 16, 1963, at 3, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Turner, 1963]; Memorandum from Judge Turner to Judge Dawson, Sept. 28, 1962, at 6–9, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence" [hereinafter cited as Turner, 1962].

[539] *See generally* note 538 *supra*.

without its intervention.[540] This attitude was premised on the belief that if the court gave its stamp of approval to pretrial conferences, many attorneys would indiscriminately use the procedure simply because it was available.[541]

Second, the court doubted whether the procedure was feasible administratively.[542] Although the Tax Court enjoyed national jurisdiction, its only permanent location was its headquarters was in Washington, D.C. Accordingly, it was not at all clear where a pretrial conference would be held.[543] If the trial was scheduled for some place other than Washington, D.C., then the parties, especially the taxpayer, would be inconvenienced if they were required to come to Washington only for the purpose of attending a conference.[544] On the other hand, if the judges were required to travel around the country in advance of the date set for trial, then the judges would suffer the inconvenience.[545]

Finally, the court was not convinced there was a need for court supervised pretrial conferences.[546] In the court's view, the stipulation procedure, which required the parties to meet on a continual, albeit informal, basis until they had reached a stipulation of facts, already sufficiently provided for pretrial conferences.[547]

Accordingly, the court refused to adopt a rule permitting pretrial conferences until 1963.[548] Its official position, which was announced in 1949 when the court rejected an ABA recommendation that it adopt pretrial conferences,[549] however, did not foreclose completely the possibility of pretrial conferences in individual cases.[550] Although the court expressly refused to adopt a formal rule providing for its participation in these conferences, it indicated that it would be amenable to holding a pretrial

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540 Raum, 1960, *supra* note 538, at 1–2; Raum, 1959, *supra* note 538, at 1–2; Turner, *supra* note 538; Turner, 1962, *supra* note 538, at 3.

541 Turner, *supra* note 538, at 3–4.

542 Letter from Chief Judge Murdock to District Court Judge Holtzoff, Feb. 14, 1957, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence" [hereinafter cited as Murdock, 1957]. *See generally* Memorandum from Chief Judge Tietjens to the Rules Comm., Feb. 15, 1963, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence" [hereinafter cited as Tietjens]; Turner, 1963, *supra* note 538, at 8–9.

543 *See generally* Opper, *supra* note 526; Turner, 1963, *supra* note 538, at 8–9.

544 *See generally* Turner, 1963, *supra* note 538.

545 Turner, 1963, *supra* note 538.

546 *E.g.*, Murdock, *supra* note 526; Murdock, 1957, *supra* note 542; Turner, *supra* note 538, at 6–9; Turner, 1963, *supra* note 538.

547 Raum, 1960, *supra* note 538, at 2; Raum, 1959, *supra* note 538, at 2.

548 TAX CT. R. 28 (Jan. 1, 1964 ed.).

549 ABA 1949, *supra* note 526.

550 ABA 1958, *supra* note 526; ABA 1949, *supra* note 526; Murdock, *supra* note 526.

conference in complicated cases, upon motion by either party.[551] The court reasoned that this halfway measure would allow it to avoid the risks it associated with a formal procedure and at the same time leave open the door to pretrial conferences in those cases in which the procedure might be beneficial.[552] Furthermore, since the court was uncertain about the need for a more formal procedure, the number of requests for pretrial conferences under this informal procedure could be used as a yardstick to measure that need.[553] Finally, although this compromise procedure provided far less than what had been requested, presumably the court hoped to appease the ABA and other proponents of pretrial conference to some extent by refraining from an outright rejection of the proposal.[554]

However, things did not work out as planned. The parties did not resort to the informal procedure,[555] perhaps because they were not aware that it was available, and the bar was not dissuaded from insisting upon a formal rule authorizing pretrial conferences.[556] This persistence, when combined with a total lack of opposition from the Government, provided the catalyst for reconsideration.[557] Some judges were concerned that the ABA might become impatient and seek the desired procedural changes directly from Congress.[558] Others were of the opinion that if the tax bar was convinced that pretrial conferences would expedite the disposition of tax controversies and the Government had no objection to such a procedure, then the court should seriously reconsider its position.[559] Nevertheless, there was a consensus among the judges, including those who desired to accommodate the tax bar, that the role of pretrial conference in the court's pretrial procedure would have to be carefully constructed and

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551 *See* note 550 *supra*.

552 *See* ABA 1958, *supra* note 526; Murdock, *supra* note 526.

553 *See* note 552 *supra*.

554 *See generally* ABA 1949, *supra* note 526; Murdock, *supra* note 526.

555 ABA 1958, *supra* note 526; Memorandum from Judge Raum, Rules Comm. Chairman, to the Judges of the Tax Court, Mar. 8, 1963, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence;" Murdock, *supra* note 526.

556 *See* ABA 1958, *supra* note 526, at 67–68; Murdock, *supra* note 526, at 107; Raum, 1960, *supra* note 538; Raum, 1959, *supra* note 538.

557 *See* Memorandum from Judge Drennen to the Judges of the Tax Court, Apr. 11, 1963, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence" [hereinafter cited as Drennen]; Memorandum from Judge Raum, Rules Comm. Chairman, to the Rules Comm., Dec. 28, 1962, filed at the U.S. Tax Court in "Pretrial Conferences: Memoranda & Correspondence;" Raum, 1960, *supra* note 538, at 1–3; Raum, 1959, *supra* note 538, at 1–3.

558 *See* Raum, 1959, *supra* note 538.

559 *See* Drennen, *supra* note 557.

narrowly circumscribed if the potential hazards of such a procedure were to be avoided.[560]

Eventually a majority of the court settled upon a compromise procedure which ultimately was adopted as Rule 28 in 1963.[561] In very broad language, Rule 28 authorized the court, upon its own or a parties' motion, to hold pretrial conferences in its discretion in appropriate cases.[562] However, the court's intent to relegate pretrial conferences to the narrow role of assisting parties to reach a stipulation or settlement only in those cases in which the informal conference required under the stipulation procedure proved unproductive was unmistakable.[563] In addition to demanding that the moving party demonstrate a good faith effort to comply with the mandatory stipulation procedure as a condition precedent to obtaining a pretrial conference,[564] the new rule warned the parties against treating pretrial conferences as a substitute for the conferences required under the stipulation procedure.[565]

As introduced in 1964, Rule 28 apparently struck an appropriate balance between competing considerations.[566] First, the rule silenced the court's critics. The ABA gave its "resounding endorsement"[567] to the rule and the Government "heartily endorsed"[568] it. Additionally, the court managed to strengthen the stipulation procedure by demanding that the parties resort to the stipulation procedure prior to seeking a pretrial conference.[569] In this connection, the prospect of a party explaining to the court why the informal stipulation conferences had not worked out, as a condition precedent to obtaining a pretrial conference, was an effective incentive to the adversary to make a good faith effort during the course of the stipulation conferences. Finally, and most importantly, the pretrial conference rule operated in such a manner that the court successfully avoided all of the pitfalls it had associated with pretrial conferences. The renewed emphasis on the

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[560] Tietjens, *supra* note 542.

[561] TAX CT. R. 28 (Jan. 1, 1964 ed.).

[562] TAX CT. R. 28(a) (Jan. 1, 1964 ed.).

[563] Raum, 1960, *supra* note 538, at 3; Raum, 1959, *supra* note 538, at 3; Turner, *supra* note 538, at 3–4; *see* TAX CT. R. 28(d) (Jan. 1, 1964 ed.).

[564] TAX CT. R. 28(d) (Jan. 1, 1964 ed.).

[565] *Id.*

[566] TAX CT. R. 28 (Jan. 1, 1964 ed.). As part of the 1974 revision to the Tax Court's Rules of Practice and Procedure, Rule 28 was renumbered as Rule 110. However, this change did not alter the substance of the rule. *See* Rules Comm. Note, TAX CT. R. 110, 60 T.C. 1125–26 (1974).

[567] Letter from Randolph Thrower, Chairman ABA Section of Taxation, to Judge Raum, Rules Comm. Chairman, Mar. 27, 1963, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence."

[568] Letter from Crane Hauser, Chief Counsel, to Judge Murdock, Apr. 11, 1963, filed at the U.S. Tax Court in "Stipulations: Memoranda & Correspondence."

[569] *See* TAX CT. R. 28(d) (Jan. 1, 1964 ed.).

informal stipulation conferences all but eliminated the need for a court supervised pretrial conference.[570] Accordingly, formal pretrial conferences have only been used sparingly[571] and, as a result, the court has not become involved in cases that are otherwise susceptible to settlement without its intervention.

G. Discovery

Pretrial discovery is the process by which the parties through a series of procedural devices "discover" the bases of their opponents' claims or defenses.[572] Over the years, depositions upon oral examination,[573] depositions upon written interrogatories,[574] interrogatories to the parties,[575] production of documents and things,[576] and admissions[577] have emerged as the primary discovery tools.[578] In 1974, the Tax Court finally incorporated some of these discovery devices into its pretrial procedure.[579] Although prior to 1974 pretrial discovery was not permitted, this result did not appear to be required by Board/Tax Court rules.[580] Beginning with the Board's original rules in 1924, three rules were susceptible to a construction that would have allowed pretrial discovery, and subsequent revisions of these rules over the next 49 years added nothing to expressly preclude such a construction.[581]

Original Rule 40, which authorized the Board to issue a subpoena requiring the production of documentary evidence, did not state whether it could be used for discovery purposes.[582] Perhaps the failure to provide for a pretrial return date of subpoenaed material precluded such a result;[583]

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[570] *See generally* LESTER M. PONDER, UNITED STATES TAX COURT PRACTICE AND PROCEDURE 112 (1976); Lester M. Ponder, *Tax Court, Court of Claims, and District Court—A Practicing Lawyer's View*, 21 U.S.C. TAX INST. 117, 127–28 (1969) [hereinafter cited as Ponder].

[571] *See* Turner, *supra* note 538, at 3.

[572] *See generally* Note, *Developments in the Law–Discovery*, 74 HARV. L. REV. 940 (1960) [hereinafter cited as *Developments*].

[573] *Id.* at 553–57; *see also* FED. R. CIV. P. 30.

[574] *Developments*, *supra* note 572, at 958–59; *see also* FED. R. CIV. P. 31.

[575] *Developments*, *supra* note 572, at 959–65; *see also* FED. R. CIV. P. 33.

[576] *Developments*, *supra* note 572, at 965–68; *see also* FED. R. CIV. P. 34.

[577] *Developments*, *supra* note 572, at 968–71; *see also* FED. R. CIV. P. 36.

[578] *See generally Developments*, *supra* note 572, at 942–71.

[579] *See* TAX CT. R. 70–73, 90, 100–04 (Jan. 1, 1974 ed.).

[580] *Developments*, *supra* note 572, at 1064–66.

[581] *Compare* B.T.A. RULES 40–42 (July, 1924 ed.), *with* TAX CT. R. 44–46 (Feb. 9, 1943 ed.), *and* TAX CT. R. 44–46 (Jan. 25, 1971 ed.).

[582] B.T.A. RULE 40 (July, 1924 ed.).

[583] *See id.*; *Developments*, *supra* note 572, at 1064.

whatever the reason, the subpoena was not used for discovery purposes.[584] Similarly, original Rules 41 and 42, which provided for depositions upon oral examination and written interrogatories respectively, did not provide whether they could be used for discovery.[585] Nevertheless, depositions were generally relegated to the role of perpetuating testimony of witnesses who for good cause were unable to testify at the trial.[586]

The absence of pretrial discovery in Board/Tax Court procedure became an increasingly controversial issue.[587] The debate evolved through three different phases and spanned a period of 50 years.

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584 *Developments*, *supra* note 572, at 1064.

585 *See* B.T.A. RULES 41–42 (July, 1924 ed.); *Developments*, *supra* note 572, at 1064.

586 *See* Rules Comm. Note, TAX CT. R. 70(a) (Jan. 1, 1974 ed.); Babbitt and Morris, *supra* note 385, at 627–28; Bowen, *supra* note 535, at 131; Harold Dubroff, *Federal Taxation*, 1973–74 ANN. SURVEY OF AMER. L. 265, 286 (1974) [hereinafter cited as Dubroff]; Ponder, *supra* note 570, at 131–32; *see also* LOYAL E. KEIR, THE PREPARATION AND TRIAL OF CASES IN THE TAX COURT OF THE UNITED STATES 66 (1955). In the past, the Tax Court had permitted the use of depositions to perpetuate testimony upon a showing of good cause before the petition was filed. However, the Tax Court ceased this practice after the Sixth Circuit Court of Appeals held in *Louisville Builders Supply Co. v. Commissioner*, 294 F.2d 333 (6th Cir. 1961), that the Tax Court did not have authority to allow depositions prior to the filing of the petition. *See* Marx v. Commissioner, 40 T.C. 1 (1963).

To obtain pretrial discovery, it has been argued unsuccessfully that the Federal Rules of Civil Procedure apply to the Tax Court, *see Starr v. Commissioner*, 226 F.2d 721 (7th Cir. 1955), that discovery procedures are constitutionally required as a matter of due process, *see id.* at 722, and that the discovery procedures are rules of evidence which must be followed by the Tax Court, *see generally* Kaminsky, *supra* note 393.

587 *See generally* note 586 *supra*; Bennion, *supra* note 526; William H. Bowen, *Tax Litigation–The Choice of Forums*, 9 TAX EXEC. 273, 277 (1957) [hereinafter cited as Bowen, 1957]; Caldwell, 1969, *supra* note 393, at 1443; Marvin J. Garbis & Robert L. Frome, *Selecting the Court for the Optimum Disposition of a Tax Controversy*, 27 J. TAX'N 216, 217 (1967) [hereinafter cited as Garbis & Frome]; Laurence Goldfein & Richard A. Levine, *New Tax Court Rules of Practice and Procedure: How They Work: Their Impact*, 40 J. TAX'N 2, 3–6 (1974) [hereinafter cited as Goldfein & Levine]; Laurence Goldfein & Richard A. Levine, *Tax Court Proposes Far Reaching Changes in its Rules of Practice and Procedure*, 37 J. TAX'N 66, 68–71 (1972) [hereinafter cited as Goldfein & Levine, 1972]; Arthur Groman & Hilbert P. Zarky, *Rules of Evidence in Tax Court of United States*, 10 U.S.C. TAX INST. 603, 612–13 (1958) [hereinafter cited as Groman & Zarky]; Converse Murdoch, *Discovery Against the United States in Civil Tax Proceedings*, 13 VILL. L. REV. 58, 66–69 (1967) [hereinafter cited as Murdoch]; *Proposed Rules of Practice and Procedure of the United States Tax Court—Report of Views of Members of the Section of Taxation Special Subcommittee on Revision of Tax Court Rules,* 26 TAX LAW. 393, 394–96 (1973) [hereinafter cited as ABA Subcommittee]; *Panel Discussion, supra* 395*;* Reiling*, supra* note 393*;* Jules Ritholz*, Diverse Views on Discovery*

The first phase of the debate commenced in 1924 and lasted until 1938. During this period, the absence of pretrial discovery was neither unique nor controversial. Many forums did not emphasize discovery in their pretrial procedure[588] and, as a result, there was presumably no expectation that the Board would or should allow discovery. However, by 1937, it was becoming apparent that the United States Supreme Court might adopt liberal pretrial discovery procedures as part of the proposed Federal Rules of Civil Procedure.[589] This prospect provided the catalyst for the Board to reevaluate its rules to determine if its pretrial procedure would be benefitted by pretrial discovery.[590] After carefully weighing various proposals, the Board elected to forego pretrial discovery, at least for the immediate future.[591] Although there was some discussion about the Board's authority to enforce discovery procedures,[592] the principal reason for abandoning the proposals was that "[n]o one experienced in the actual trial and preparation of cases before the Board [had] suggested that the adoption of these procedures would be desirable."[593] Accordingly, the Board decided to wait and see whether the Supreme Court adopted pretrial discovery before reconsidering its position.[594]

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in the Tax Court, 21 TAX LAW. 639 (1968) [hereinafter cited as Ritholz]; George L. Whitfield & Charles E. McCallum*, Burden of Proof and Choice of Forum in Tax Litigation*, 20 VAND. L. REV. 1179, 1180 (1967) [hereinafter cited as Whitfield & McCallum]; *Developments, supra* note 572, at 1064–66.

[588] *See generally Developments, supra* note 572, at 946–51.

[589] Report of the Joint Committee of the Board of Tax Appeals and Office of the Chief Counsel, Dec. 21, 1937, at 11–12, filed at the U.S. Tax Court in "Pretrial Discovery: Memoranda & Correspondence" [hereinafter cited as Joint Committee Report 1937]; Memorandum from S. Surrey to Member Arundell, Nov. 4, 1937, at 4, filed at the U.S. Tax Court in "Pretrial Discovery: Memoranda & Correspondence;" Memorandum from the Board's Rules Comm. to the Board, c. 1937, filed at the U.S. Tax Court in "Pretrial Discovery: Memoranda & Correspondence" [hereinafter cited as Rules Comm. Memo.].

[590] *See supra* note 589.

[591] Joint Committee Report 1937, *supra* note 589, at 11–12; Rules Comm. Memo., *supra* note 589. *See generally* memoranda from HTR to the Rules Comm., May 13, 14, 15, 1937, filed at the U.S. Tax Court in "Pretrial Discovery: Memoranda & Correspondence;" Memorandum, entitled "Suggested Rules Relating to Dispositions and Discovery Procedure," to the Rules Comm., c. 1937, filed at the U.S. Tax Court in "Pretrial Discovery: Memoranda & Correspondence," wherein various proposals are set forth.

[592] *See* Joint Committee Report 1937, *supra* note 589, at 11–12; Rules Comm. Memo., *supra* note 589.

[593] Rules Comm. Memo., *supra* note 589, at 2.

[594] Joint Committee Report 1937, *supra* note 589, at 11–12; Rules Comm. Memo., *supra* note 589, at 2.

Shortly thereafter, in 1938, the Supreme Court adopted the Federal Rules of Civil Procedure[595] which marked the beginning of the second stage of the pretrial discovery debate which lasted until 1963. In view of the pretrial discovery procedures incorporated into the new federal rules, the Board apparently did reconsider whether such devices should be incorporated into its pretrial procedure.[596] Nevertheless, it declined to do so. However, the success that these procedures enjoyed in Federal district courts and many state courts, which subsequently adopted similar procedures, radically changed the complexion of the debate as pretrial discovery was no longer considered an aberration.[597]

Viewed superficially, the majority of the commentary during this period seemed to favor the adoption by the Tax Court of at least some pretrial discovery procedures.[598] However, a closer analysis revealed that much of the sentiment favoring pretrial discovery, especially that advanced from the late 1940s to the early 1960s, was not premised as much on the merits of these procedures as it was based on a general dissatisfaction with the court's existing pretrial procedure.[599] Countless proposals were forthcoming which advocated a myriad of changes covering the entire spectrum of pretrial procedures. For example, some commentators looked to more informative pleadings and deficiency notices for the solution to pretrial problems.[600] Others sought a mandatory stipulation procedure with a pretrial return date for the order to show cause why a proposed stipulation should not be deemed admitted.[601] Still others pressed for the adoption of a pretrial conference procedure.[602] The plethora of recommendations to improve the court's pretrial procedure indicates that the debate over pretrial discovery during this period had become intertwined with the larger controversy over the entire pretrial procedure. It is not at all clear that those favoring pretrial discovery in the context of an otherwise meager pretrial procedure would also have advocated the adoption of pretrial discovery if the Tax Court had a full complement of other pretrial procedures.

By 1963, however, the Tax Court had made three important changes in its pretrial procedure that quelled the clamor for pretrial reform. First, in 1956, the Tax Court made it clear in *Licavoli v. Commissioner*[603] that the

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595 FED. R. CIV. P. 86, 308 U.S. 645, 766 (1939).

596 *See generally* Arundell, *supra* note 519; Barker, *supra* note 519.

597 *See generally Developments*, *supra* note 572.

598 *See generally* Bennion, *supra* note 526; Bowen, *supra* note 535; Bowen, 1957, *supra* note 587; Groman & Zarky, *supra* note 587; Kaminsky, *supra* note 393.

599 *See, e.g.,* Bowen, *supra* note 535; Kaminsky, *supra* note 393; *supra* notes 526 and 582; *supra* notes 437–477 and accompanying text.

600 *See supra* notes 201–238 and accompanying text.

601 *See supra* notes 414–477 and accompanying text.

602 *See supra* notes 525–565 and accompanying text.

603 15 T.C.M. (CCH) 862 (1956), *aff'd*, 252 F.2d 268 (6th Cir. 1958).

motion for a further and better statement of a pleading or defense[604] would be more readily available to cure flagrant abuses of the pleading rules. Second, the court gradually acceded to pressure to make the stipulation procedure more meaningful by making the procedure mandatory and providing for a pretrial return date for the motion to show cause why a proposed stipulation should not be deemed admitted.[605] Third, the Tax Court agreed to hold pretrial conferences in those cases in which it determined they would be beneficial.[606] As a result, much of the controversy over pretrial reform subsided and the proponents of pretrial discovery could no longer draw on indirect support from related problems. Rather, they would have to convince the court of the need for pretrial discovery based solely on the merits of these procedures.

The campaign from 1963 to 1974 to convince the court of the desirability of adopting pretrial discovery formed the final stage of the pretrial discovery debate.[607] During this period, the earlier consensus favoring liberal pretrial discovery was dissipated, and a formidable minority opinion opposing pretrial discovery had to be reckoned with and overcome.[608]

Those who favored the adoption of pretrial discovery enumerated several advantages of such procedures. First, they contended that discovery procedures would allow the parties to obtain evidence and leads for evidence while the facts and circumstances were still fresh in the minds of those involved.[609] In this way, it was argued, the parties would be able to preserve evidence and use it later during settlement negotiations or the actual trial, should the need arise.[610] Second, they urged that the process of discovering all of the relevant facts and circumstances helps to limit the scope of the controversy.[611] By the same token, obtaining this information

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[604] *See* TAX CT. R. 17(c) (Aug. 15, 1955 ed.).

[605] *See supra* notes 414–477 and accompanying text.

[606] *See supra* notes 525–565 and accompanying text.

[607] *See generally* ABA Subcommittee, *supra* note 587; Caldwell, 1969, *supra* note 393; Murdoch, *supra* note 587; *Panel Discussion*, *supra* note 395; Ritholz, *supra* note 587.

[608] *Compare* Bennion, *supra* note 526, at 405–08; Bowen, *supra* note 535; Groman & Zarky, *supra* note 587; Kaminsky, *supra* note 393; Reiling, *supra* note 393; *Developments*, *supra* note 572, at 1064–66; *with* Goldfein & Levine, *supra* note 587; Goldfein & Levine, 1972, *supra* note 587; Ponder, *supra* note 570.

[609] *See* Bowen, *supra* note 535, at 129; *Developments*, *supra* note 572, at 944–46, 1064–66.

[610] *See generally supra* note 609.

[611] *See* Bennion, *supra* note 526, at 407–08; Bowen, *supra* note 535, at 129–30, 132; Dubroff, *supra* note 586, at 286; *Developments*, *supra* note 572, at 944–46, 1064–66.

would facilitate defining the issues within the scope as limited.[612] Third, giving the parties access to all of the relevant factual information would make surprise less of a factor in determining the outcome of the controversy.[613] In this manner, decisions would more likely be consistent with the equities of the controversies.[614] Finally, the advocates of pretrial discovery argued that the inadequacy of the pleadings and the deficiency notice in defining the issues necessitated discovery.[615] Although the stipulation procedure and pretrial conferences provided some relief, they urged that a full complement of pretrial procedures was essential if the parties were to overcome the inadequacies of the pleadings.[616]

Depending upon whether a proponent of discovery was representing the position of the Government or the taxpayer, the need for and advantage of discovery procedures were perceived differently.[617] On the one hand, some argued that the Government and not the taxpayer needed pretrial discovery.[618] Unlike the normal civil suit in which the parties generally had prior dealings, the Government generally was not a party to the transactions giving rise to the alleged tax liability.[619] Moreover, the Government's access to information through its administrative investigatory powers was not deemed an adequate substitute for the more formal court authorized pretrial discovery procedures.[620] The administrative investigations were not conducted by trained trial attorneys who, theoretically, were better prepared to handle such discovery proceedings.[621]

On the other hand, those representing taxpayers contended that the taxpayer and not the Government had the greater need for discovery procedures and would also derive the greater benefit therefrom.[622] They acknowledged that in many cases the taxpayer was in possession of most of the relevant information.[623] However, they asserted that the existing procedure was in effect a one-way street since the Government effectively

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[612] *See supra* note 611.

[613] Bennion, *supra* note 526, at 407–08; Bowen, *supra* note 535, at 129–31; Dubroff, *supra* note 586, at 286; Ritholz, *supra* note 587, at 643; *Developments*, *supra* note 572, at 944–46, 1064–66.

[614] Dubroff, *supra* note 586, at 286.

[615] *See* Bowen, *supra* note 535, at 129–31; Kaminsky, *supra* note 393; Reiling, *supra* note 393; *Developments*, *supra* note 572, at 1064–65.

[616] *See generally supra* note 615; Bennion, *supra* note 526.

[617] Ritholz, *supra* note 587, at 642.

[618] Bowen, *supra* note 535, at 132; Reiling, *supra* note 393.

[619] *See supra* note 618.

[620] *Id.*; *see also* I.R.C. § 7602.

[621] Bowen, *supra* note 535, at 132.

[622] Kaminsky, *supra* note 393; *Developments*, *supra* note 572, at 1064–65.

[623] Bowen, *supra* note 535, at 132; Dubroff, *supra* note 586, at 287; *Developments*, *supra* note 572, at 1064–65.

had access to discovery proceedings through its administrative investigatory powers.[624] In their opinion, the addition of pretrial discovery to Tax Court procedure would provide a more balanced procedure.[625] Both parties would have similar access to pretrial discovery, but because the Government already had access to such proceedings through its administrative power, they claimed that the litigating position of the Government would not be enhanced materially.[626] Furthermore, they argued there was a real need for pretrial discovery in cases in which the Government relied on information obtained from sources other than the taxpayer.[627] In cases dealing with fraud, transferee liability or divorce, pretrial discovery was considered essential if the taxpayer was to have access to information to the same extent as the Government.[628]

All advocates of discovery rejected the criticism that such procedures would materially increase the court's workload.[629] They noted that the discovery rules could easily be drafted to minimize the court's participation in these procedures.[630] More importantly, however, they urged that issue formulation, the natural byproduct of discovery, not only would facilitate the orderly presentation of a case, but also would increase the likelihood of settlement as the parties would be forced to deal with the strengths and weaknesses of their respective cases.[631]

Opponents of discovery were not bereft of arguments to support their view. Most of their arguments did not address the advantages of discovery in terms of issue formulation; rather, they disputed that these advantages were sufficient to offset what they regarded as the insurmountable disadvantages of discovery proceedings to the parties and to the court.

First, they argued that the existing procedure provided a relatively uncomplicated and inexpensive format for the orderly disposition of tax controversies.[632] This format, they asserted, would be seriously disrupted by the addition of pretrial discovery.[633] If the Tax Court provided pretrial

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[624] Bowen, 1957, *supra* note 587, at 277; Ritholz*, supra* note 587, at 643.

[625] *See supra* note 624. *See generally* Bowen, *supra* note 535, at 129–32; Kaminsky, *supra* note 393; Ritholz, *supra* note 587, at 643.

[626] *See generally* Bowen, *supra* note 535, at 129–32; Bowen, 1957, *supra* note 587, at 277; Ritholz, *supra* note 587, at 643.

[627] *Developments, supra* note 572, at 1064–65.

[628] *Id.*

[629] Bennion, *supra* note 526, at 407–08; Bowen, *supra* note 535, at 131; Dubroff, *supra* note 586, at 287.

[630] *See* Bowen, *supra* note 535, at 131.

[631] *See id.* at 132; Dubroff, *supra* note 586, at 286–87.

[632] *See* Goldfein & Levine, *supra* note 587, at 3; *Panel Discussion*, *supra* note 395, at 387–89; Ritholz, *supra* note 587, at 641.

[633] *See supra* note 631.

discovery on any regular basis, both parties would, as a matter of course, be obliged to pursue discovery,[634] which would unnecessarily prolong the proceeding and invariably increase the cost of litigation.[635] Such a result would be especially burdensome in cases in which a negligible tax was involved or in the case of a pro se taxpayer.[636] Furthermore, critics were concerned about the great potential for abuse of discovery procedures, especially on the part of the Government which, in most cases, would not bear the same economic and time constraints confronted by taxpayers.[637]

Second, many commentators argued that pretrial discovery would adversely affect the nature of tax litigation.[638] They feared that pretrial discovery would foster laxity during the administrative process of auditing because of the knowledge that any errors or oversights during the administrative stage could be discovered and corrected during the litigating phase of the proceeding.[639] Furthermore, they were convinced that the existing compromise attitude engendered by the informal conferences required by the stipulation procedure would be supplanted by an inflexible combative attitude associated with formal discovery procedures.[640]

Third, and most important, was the apprehension that pretrial discovery would damage irrevocably the effectiveness of the stipulation procedure in producing settlements.[641] The stipulation procedure was considered primarily responsible for the 85 percent pretrial settlement rate of docketed cases.[642] If pretrial discovery encroached upon that settlement rate, it would place an intolerable burden on the Tax Court, which already faced a large backlog of cases. Regardless of whether the settlement rate was affected, the opponents of pretrial discovery were sure that these procedures would increase the court's workload.[643] In their view, the conclusion was inescapable that pretrial discovery would at the minimum increase the court's motion practice thereby involving the court in controversies that otherwise would have been settled without such intervention.[644]

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[634] *See* Goldfein & Levine, *supra* note 587, at 4; Ritholz, *supra* note 587, at 641.

[635] *See* Dubroff, *supra* note 586, at 287; Goldfein & Levine, *supra* note 587, at 3; *Panel Discussion*, *supra* note 395, at 388; Ritholz, *supra* note 587, at 641.

[636] Ritholz, *supra* note 587, at 641–42.

[637] Goldfein & Levine, *supra* note 587, at 3–4; Goldfein & Levine, 1972, *supra* note 587, at 68; Ritholz, *supra* note 587, at 640.

[638] *See* Dubroff, *supra* note 586, at 287; Goldfein & Levine, *supra* note 587, at 3–4; *Panel Discussion*, *supra* note 395, at 388–89; Ritholz, *supra* note 587, at 640–42.

[639] Goldfein & Levine, 1972, *supra* note 587, at 68.

[640] *See* note 637 *supra*.

[641] Goldfein & Levine, *supra* note 587, at 3–4.

[642] Dubroff, *supra* note 586, at 287; *Panel Discussion*, *supra* note 395, at 389.

[643] *See* Goldfein & Levine, 1972, *supra* note 587, at 68.

[644] *See* Dubroff, *supra* note 586, at 287; *Panel Discussion*, *supra* note 395, at 390.

Finally, they rejected the proposition that the parties' need for pretrial discovery was a sufficient justification for incurring the disruptive effects of discovery procedures. They observed that in most cases the Government had access to all of the necessary information through its administrative investigatory powers and that the taxpayers usually had all of the information in their possession from the outset.[645] Moreover, they asserted that to the extent the pleadings did not define the issues, the mythical gap in the Tax Court's pretrial procedure due to lack of pretrial discovery was more than filled by the administrative processes generally initiated prior to issuance of a deficiency notice, and the stipulation and pretrial conference procedures initiated, pursuant to Tax Court rules, subsequent to the filing of a Tax Court petition.[646]

1. Adoption of Discovery Procedures

Presumably because of the controversial nature of pretrial discovery, the Tax Court was reluctant to adopt such procedures. However, largely as a result of the Tax Reform Act of 1969, which settled its status as an article I court, the Tax Court embarked on a comprehensive reevaluation of its procedural rules.[647] This effort lasted nearly four years and culminated in adoption of a pretrial discovery procedure in 1974.[648]

The initial discovery rules adopted by the court were more limited than the Federal Rules. First, discovery was strictly limited in terms of who

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[645] *See* Garbis & Frome, *supra* note 587, at 217; Ponder, *supra* note 570, at 132; Whitfield & McCallum, *supra* note 587, at 1180.

[646] Babbitt and Morris, *supra* note 385, at 627–28; Bennion, *supra* note 526, at 405–12; Goldfein & Levine, *supra* note 587, at 3–4; Goldfein & Levine, 1972, *supra* note 587, at 68; Groman & Zarky, *supra* note 587, at 612–14.

[647] *Panel Discussion*, *supra* note 395, at 378. There is also some evidence that the Tax Court reevaluated the rules of procedure in 1967 as a result of certain proposed legislation aimed at making the Federal Rules of Civil Procedure applicable to the Tax Court as nearly as possible. *See* S. 2041, 90th Cong., 1st Sess. (1967); H.R. 10100, 90th Cong., 1st Sess. (1967); Joint Comm. Report from Judge Raum, Rules Comm. Chairman, to the Chief Judge, Sept. 8, 1967, filed at the U.S. Tax Court in "Pretrial Discovery: Memoranda & Correspondence;" Joint Comm. Report from Edward Radue to Judge Raum, Rules Comm. Chairman, Sept. 6, 1967, filed at the U.S. Tax Court in "Pretrial Discovery: Memoranda & Correspondence."

[648] TAX CT. R. 70–73, 90 (Jan. 1, 1974 ed.). For a contemporaneous discussion of these discovery rules, *see generally* LESTER M. PONDER, UNITED STATES TAX COURT PRACTICE AND PROCEDURES 104–12 (1976); Michael D. Annis, *The New Tax Court Rules*, 32 N.Y.U. INST. ON FED. TAX'N 1341 (1974); Dubroff, *supra* note 586, at 285–95; Robert J. Murray, *Tax Court Discovery: The Need for Restraint*, 53 TAXES 327 (1975) [hereinafter cited as Murray].

could be subject to the procedure.[649] Unlike the Federal Rules of Civil Procedure, the Tax Court did not allow discovery from nonparty third persons, except in the case of transferee liability.[650]

Second, in an effort to preserve the stipulation process as the mainstay of its pretrial procedure, the court's discovery rules required the parties to fully use their opportunities for informal consultation before resorting to formal discovery procedures.[651] In *Branerton Corp. v. Commissioner*,[652] the court refused to require the Service to answer petitioners' interrogatories since they had not first sought to obtain the information through informal consultation, even though the Service's counsel stated he was available for discussions.[653] Rule 70(a)(1), wrote Chief Judge Dawson, "means exactly what it says": discovery procedures should only be used after attempts have been made to obtain needed information through informal procedures and voluntary efforts.[654] The court has persistently enforced the informal consultation requirement since its adoption of pretrial discovery,[655] although, for a brief period, the admissions procedure[656] was held to be available without prior resort to any other procedure.[657]

Third, the court's approach provided only three discovery devices: admissions,[658] interrogatories, and production of documents and things.[659]

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[649] *Id.* at 384; TAX CT. R. 71–72, 90 (Jan. 1, 1974 ed.).

[650] *Compare* TAX CT. R. 70–73 (Jan. 1, 1974 ed.), *with* FED. R. CIV. P. 30–31, 34.

[651] TAX CT. R. 70(a), 60 T.C. 1097 (1973); *see* W. M. Drennen, *New Rules of Practice and Procedure of the United States Tax Court: How Are They Working?*, 27 U. FLA. L. Rev. 897, 905 (1975).

[652] 61 T.C. 691 (1974).

[653] *Id.* at 692.

[654] *Id.*

[655] *See*, *e.g.,* Odend'hal v. Commissioner, 75 T.C. 400, 404 (1980); International Air Conditioning Corp. v. Commissioner, 67 T.C. 89, 92–94 (1976).

[656] TAX CT. R. 90, 60 T.C. 1114–17 (1973). Any party may, without leave of court, serve on any other party a request for admission of the truth of relevant, nonprivileged matters or for the authenticity of a document. Failure to deny the request for admission or object thereto within 30 days of service results in an automatic admission. *Id.*

[657] In *Pearsall v. Commissioner*, 62 T.C. 94 (1974), the court held that the petitioner was not required to seek information informally before serving requests for admissions. A subsequent revision of the Tax Court rules made clear that the requirement of prior informal consultation applies to admissions requests, as well as to other discovery procedures. *See* TAX CT. R. 90(a), 71 T.C. 1198–99 (1978); *see also Odend'hal*, 75 T.C. at 404 (holding that *Pearsall* was no longer to be followed).

[658] TAX CT. R. 90, 60 T.C. 1114–17 (1973). "Technically, admissions are not considered a discovery device. . . . (Admissions were] put . . . in the Title with stipulations because a matter admitted may become a part of the record [in a case], whereas a matter discovered will not. However, . . . admissions are [often] used for purposes of discovery." Letter from Judge Simpson to Professor Harold Dubroff

Depositions, thought by some to be the most important of discovery devices,[660] were not allowed for the purpose of discovery.[661]

2. Expanding Discovery Techniques

Depositions were not included in the discovery procedures initially adopted by the Tax Court for fear that they would prove more burdensome than beneficial.[662] Specifically, the court was concerned that the costs of Tax Court litigation could rise dramatically if liberal use of depositions was allowed.[663] Additionally, the court, apprehensive that discovery might undermine and replace stipulation procedures and thus interfere with the efficient operation of the court,[664] concluded that allowing depositions in its initial adoption of pretrial discovery would be "too drastic a departure from present Tax Court practice."[665]

Those in favor of expanding discovery procedures in the Tax Court, however, considered the absence of depositions and other provisions for third-party discovery to be one of the most serious defects in Tax Court pretrial procedure.[666] It was argued that the use of depositions would aid in

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1, Nov. 4, 1986, filed at U.S. Tax Court in "Rules Committee: Discovery" (commenting on Professor Dubroff's proposed chapter on the amendments of the Tax Court rules); *see* Drennen, *supra* note 651, at 899; *see also* TAX CT. R. 70(a)(1), 60 T.C. 1097 (1973) (failing to list admissions as a method of discovery).

[659] TAX CT. R. 70–73, 60 T.C. 1097–1103 (1973).

[660] William H. Newton III, *The United States Tax Court: Should Discovery be Expanded?*, 33 U. MIAMI L. REV. 611, 616 (1979).

[661] *See* Rules Comm. Note, TAX CT. R. 80, 60 T.C. 1104 (1973). A deposition could be used for the limited purpose of preserving the testimony of a witness unable to appear. The Rules of Practice initially promulgated by the Board of Tax Appeals in 1925 allowed depositions for these purposes. B.T.A. RULES 41, 42, 1 B.T.A. 1293–94 (1925); *see also* TAX CT. R. 80–85, 60 T.C. 1103–14 (1973) (rules governing depositions). In *Estate of Haber v. Commissioner*, 91 T.C. 236 (1988), the court refused to authorize a deposition to preserve the testimony of a 38-year old accountant because he regularly engaged in risky sporting activities such as skydiving and motorcycle racing. *See* Masek v. Commissioner, 91 T.C. 1096 (1988); Reed v. Commissioner, 90 T.C. 698 (1988) (both cases evincing reluctance to order depositions for purposes of preserving testimony).

[662] TAX CT. R. 70(a) note, 60 T.C. 1097 (1973); Drennen, *supra* note 651, at 899. Depositions were long allowed for the purpose of preserving testimony of a witness unable to appear. *See supra* note 661.

[663] *See* Letter from Judge Simpson to Professor Harold Dubroff, *supra* note 658, at 1.

[664] Drennen, *supra* note 651, at 899.

[665] Rules Comm. Note, TAX CT. R. 70(a), 60 T.C. 1097 (1973).

[666] *See, e.g.,* Newton, *supra* note 660, at 632–36.

the fact-finding process and would lead to an increase in settlements rather than an erosion of the stipulation process.[667] Furthermore, after a few years in operation, it was contended that pretrial discovery in the Tax Court did not appear to have the ill effects on court practice that its opponents had envisioned.[668]

a. The Adoption of Rule 74: Consensual Depositions of Parties and Non-Parties

In 1979, proponents of more liberal Tax Court discovery met with some success when the court adopted Rule 74.[669] Rule 74 allows the taking of a deposition for the purpose of discovery from either a party or a non-party witness if "all the parties to a case" consent.[670] The reluctance of the court to expand its discovery provisions to include pretrial depositions was based primarily on the concern for the burden and cost imposed on litigants by deposition discovery. The court concluded that it had no reason to object if the parties themselves agreed that the deposition should be taken.[671]

Under Rule 74, the consent of the parties to a deposition must be filed in duplicate with the court.[672] Depositions are subject to the same time limits as the other discovery procedures and may not be commenced until 30 days after joinder of issue and must be completed 45 days prior to the date set for the call of the case from a trial calendar.[673] If a party wishes to depose a non-party witness, notice must be served upon that witness, and if the deposition is in the form of written questions,[674] a copy of the questions

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[667] *Id.* at 623.

[668] *Id.* at 633–34.

[669] 71 T.C. 1194–95 (1979).

[670] TAX CT. R. 74(a), 71 T.C. 1194 (1979) (now reflected in TAX CT. R. 74(b) (July 6, 2012 ed.)).

[671] *See* Letter from James B. Lewis, Chairman of Committee on Court Procedure, A.B.A. Section of Taxation, to Judge Simpson 1–2, July 1, 1985, filed at U.S. Tax Court in "Rules Committee: Discovery" (expressing views of individual members on proposed amendments to the rules of the Tax Court).

[672] TAX CT. R. 74(a), 71 T.C. 1194 (1979) (now reflected in TAX CT. R. 74(b) (July 6, 2012 ed.). The stipulation must include the names and addresses of the deponents, the time and place of the deposition, the officer before whom the deposition will be taken, and any provision desired with respect to expenses and fees. *Id.*; TAX CT. R. 81(d), 60 T.C. 1106 (1973).

[673] TAX CT. R. 70(a)(2), 71 T.C. 1191 (1979). Prior to the 1979 amendments, the deadline for completion of discovery was 75 days prior to the date set for the call of the case from a trial calendar. Former TAX CT. R. 70(a)(2), 60 T.C. 1097 (1973).

[674] Depositions upon written questions are "not favored, and . . . should not be taken in . . . absence of a special reason." TAX CT. R. 74(e), 71 T.C. 1194–95 (1979) (now reflected in TAX CT. R. 74(e)(2) (July 6, 2012 ed.).

must be attached.[675] A non-party witness may object to the deposition within 15 days after notice, and the burden is on the party seeking the deposition to move for an order with respect to the objection.[676] A transcript must be made of every deposition, but the transcript may not be filed until ordered or permitted by the court.[677]

b. The Adoption of Rule 75: Non-Consensual Depositions of Non-Parties

Rule 74 fell short of removing what some viewed as a major defect in Tax Court pretrial procedure—the inability of a party to obtain essential information from third persons absent the consent of the opposing party.[678] Although a party could obtain documents and things of third persons from another party so long as they were "in the possession, custody or control of the party on whom the request [was] served,"[679] the Tax Court rules contained no provision, absent the consent of the parties, for discovery directly from third persons.

The Service believed that the information obtainable under the Tax Court's discovery rules was insufficient for the development of cases and proposed that the court adopt a less restrictive rule that would allow discovery depositions from third persons.[680] A rule of this kind could be used to obtain information otherwise non-discoverable prior to trial and could avoid undeveloped cases and "repeated requests for continuances."[681] Depositions from non-parties could be particularly valuable to the Service in cases involving partnerships in which the petitioner was a limited partner,

[675] *Id.*

[676] TAX CT. R. 74(c), 71 T.C. 1194 (1979) (now reflected in TAX CT. R. 74(b)(3) (July 6, 2012 ed.).

[677] TAX CT. R. 74(d), 71 T.C. 1194 (1979) (now reflected in TAX CT. R. 74(e)(1) (July 6, 2012 ed.).

[678] Newton, *supra* note 660, at 622.

[679] TAX CT. R. 72(a)(1), 60 T.C. 1101 (1973).

[680] Letter from Stuart E. Seigel, Chief Counsel for the Internal Revenue Service, to Judge Raum 1–5, July 1, 1977, filed at U.S. Tax Court in "Rules Committee: Discovery" (recommending major revisions in the Tax Court's discovery rules); *see also* Office of Chief Counsel for the Internal Revenue Service, Statement of Background Facts Showing Possible Uses of Proposed Rule 75 (1982), filed at U.S. Tax Court in "Rules Committee: Discovery" (background information on Rule 75 and its uses).

[681] Office of the Chief Counsel for the Internal Revenue Service, *supra* note 680.

and a general partner, uninvolved in the litigation, was in possession of documents that were crucial to the case.[682]

The Service proposal generally was supported by the tax bar,[683] despite some concern that third-party depositions could be used routinely by the Service to substitute for audit-level investigations and could present a further and unnecessary burden on the court.[684] Tax Court judges generally agreed that some expansion of discovery procedures was needed.[685] Although records necessary to Tax Court litigation might be subpoenaed from third parties, subpoenas not returnable until trial often gave the parties inadequate time to examine the records and evaluate their positions.[686] Despite some judges' concern that the broad use of discovery depositions as allowed in other forums would result in protracted litigation, greater cost, and an increase in the workload of the Tax Court, the prevalent sentiment was that there existed sufficient need to warrant allowing third-party depositions in limited situations.[687]

Continuing its general expansion of discovery, the court in 1983 adopted Rule 75, which directly addressed the concerns of those who felt the court's third-party procedures were too restrictive. [Pursuant to the Tax Court's consolidation of the provisions governing depositions in 2010,[688] Rule 75 is currently designated as Rule 74(c).] From 1983 to 2010, Rule 75 provided for depositions in certain cases from non-party witnesses without either the consent of the deponent or of the other party or parties in the proceeding.[689] A deposition under such conditions represents an extraordinary method of discovery, and the procedure may be used only

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682 *Id.* To a large extent, the "entity-level" audit and litigation provisions of the Tax Equity and Fiscal Reform Act of 1982 eliminated this particular discovery problem. *See* Part VII.C (discussing the development of partnership-level proceedings).

683 Letter from Andrew W. Singer, Court Procedure Committee of the A.B.A. Section of Taxation, to Judge Simpson 2, Oct. 5, 1982, filed at U.S. Tax Court in "Rules Committee: Discovery" (informing the Tax Court of the favorable results of a poll of members of the Tax Court Procedure Committee concerning proposed discovery Rule 75).

684 *Id.* at 1.

685 Tax Court Rules Committee Minutes 1, Jan. 5, 1982, filed at U.S. Tax Court in "Rules Committee: Discovery" (noting that "some expansion" of the court's discovery depositions rule was desirable).

686 Memorandum from Judge Simpson to Chief Judge Tannenwald 2, Oct. 29, 1982, filed at U.S. Tax Court in "Rules Committee: Discovery" (discussing reasons why a broader discovery deposition rule was needed for the Tax Court).

687 *See id.* at 3.

688 *See* Section G.4 of this Part.

689 *See* TAX CT. R. 75, 79 T.C. 1140–41 (1982) (now reflected in TAX CT. R. 74(c) (July 6, 2012 ed.)). As described in text accompanying *infra* notes 773–776, Rule 75 was substantially revised in 2010.

when a non-party witness can give testimony or possesses documents or things that constitute discoverable material that are not otherwise obtainable through informal consultations or alternate means of discovery.[690]

To eliminate unnecessary judicial intervention, a non-consensual deposition may be taken without leave of the court.[691] The party desiring to take a deposition must give notice to every other party and to the non-party witness to be deposed.[692] Either a party or the non-party witness may object to the deposition within 15 days after notice by serving objections on the party seeking the deposition, and the burden is on the party desiring to take the deposition to move for an order in regard to the objections.[693]

The time span for taking a non-consensual deposition is more restrictive than that of the other discovery procedures.[694] Depositions under this provision may not be taken until "[a]fter a notice of trial has been issued or after a case has been assigned to a Judge or Special Trial Judge."[695] Both the Service and the bar expressed the concern that this restriction could curtail a party's ability to use the rule effectively.[696] Additionally, the Service contended that applying the same time frames to non-consensual

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[690] TAX CT. R. 75(b), 79 T.C. 1140 (1982) (now reflected in TAX CT. R. 74(c)(1) (July 6, 2012 ed.)).

[691] TAX CT. R. 75(a), 79 T.C. 1140 (1982) (now reflected in TAX CT. R. 74(c)(1) (July 6, 2012 ed.)); *see* Memorandum from Judge Simpson to Rules Committee, Jan. 11, 1982, filed at U.S. Tax Court in "Rules Committee: Discovery."

[692] TAX CT. R. 75(c), 79 T.C. 1140 (1982) (now reflected in TAX CT. R. 74(c)(2)(A) (July 6, 2012 ed.)).

[693] TAX CT. R. 75(d), 79 T.C. 1140 (1982) (now reflected in TAX CT. R. 74(c)(2)(B) (July 6, 2012 ed.)).

[694] "Discovery [under other discovery rules] shall not be commenced, without leave of Court, before the expiration of 30 days after joinder of issue . . . and shall be completed . . . no later than 45 days prior to the date set for call of the case from a trial calendar." TAX CT. R. 70(a)(2), 71 T.C. 1191 (1979).

[695] TAX CT. R. 75(a), 79 T.C. 1140 (1982) (now reflected in TAX CT. R. 74(c)(1) (July 6, 2012 ed.)).

[696] Letter from Kenneth W. Gideon, Chief Counsel of the Internal Revenue Service, to Judge Simpson 1–2, Mar. 4, 1982, filed at U.S. Tax Court in "Rules Committee: Discovery" (opining that the time frame for the use of Rule 75 was unrealistic and offering revisions to remedy the defects); Letter from John B. Jones, Jr., Vice Chairman of Government Relations, A.B.A. Section of Taxation, to Judge Simpson 1, Mar. 10, 1982, filed at U.S. Tax Court in "Rules Committee: Discovery" (pointing out that the members of the taxation section of the A.B.A. expressing views on the proposed deposition rule thought that the Service would gain most from the new rule).

depositions as applied to other discovery procedures would expedite discovery, as well as the settlement process.[697]

Nevertheless, the Tax Court concluded that a restricted time frame would enable the court to limit use of non-consensual depositions to the rare situations for which they were intended.[698] Since the identity of the judge who will conduct a trial session in the Tax Court is known at the time the notice of the trial session is issued, the trial judge's identity will be known in every case in which a witness is deposed under his procedure. The Tax Court, in this manner, intended to limit the use of non-consensual depositions to situations in which the trial judge could decide whether to compel a deposition to which a party had objected.[699]

In adopting Rule 75, the Tax Court emphasized that invocation of the rule would be appropriate only in those "extraordinary" situations in which all other formal and informal discovery procedures have been exhausted.[700] Adhering to this view, the court has held that a summary judgment motion could not be opposed on the ground that discovery was incomplete because a non-consensual deposition had not been taken.[701] The court granted the summary judgment motion because petitioners did not have a "pertinent discovery request . . . outstanding."[702] Although petitioners maintained that they should have been allowed to take Rule 75 depositions from certain witnesses, the court held that the petitioners should have subpoenaed the individuals they wanted to depose so that they could have appeared at the hearing on the motion for summary judgment; having failed to avail themselves of this "preferable alternative," and having failed to appear

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[697] Letter from Kenneth W. Gideon, Chief Counsel of the Internal Revenue Service, to Judge Simpson, *supra* note 696, at 2.

[698] *See* Tax Court Rules Committee Minutes, *supra* note 685, at 1–2.

[699] *See* Letter from Judge Simpson to Professor Harold Dubroff, *supra* note 658.

[700] The note accompanying Rule 75 provided as follows:

> Under the Rule, a discovery deposition may be taken only of a witness who is not a party to the case; the deposition of a party may be taken only upon consent of all parties under Rule 74. The new Rule 75 provides an extraordinary method of discovery which may be used only where the information sought cannot be obtained by informal consultation or by other discovery methods. For example, if the other requirements of the Rule are satisfied, a deposition might be taken under the Rule in a case involving the tax liability of a limited partner who does not have access to the books and records of the partnership, or where a bank or other person possesses records which are relevant to the tax liability of a party and are otherwise unavailable.

Rules Comm. Note, TAX CT. R. 75, 79 T.C. 1141–42 (1982).

[701] Brunwasser v. Commissioner, T.C. Memo. 1986-196, 51 T.C.M. (CCH) 1011, 1013, *aff'd without published opinion*, 833 F.2d 303 (3d Cir. 1987).

[702] *Id.* at 1013.

themselves at the hearing, petitioners were not entitled to a Rule 75 deposition.[703]

Rule 75 was not established for the routine deposing of key witnesses, and any party seeking to compel a deposition pursuant to the provision must convince the court of its necessity. A key element in this regard is whether the information sought could not be obtained through informal consultation.[704] Other factors may be whether the opposing party has refused to consent to a Rule 74 deposition and whether the subjects of the deposition possess critical information.[705]

In *DeLucia v. Commissioner*,[706] the Service had determined deficiencies and additions to tax for fraud[707] against a husband and wife who failed to indicate on their joint return income the husband derived from operating massage parlors and related activities. The Tax Court previously granted the Service's motion for summary judgment in regard to the husband's liability, but left open the substantive issue of whether the wife was entitled to the "innocent spouse" protection of what was then § 6013(e) of the Code.[708]

The Service contended that the husband was "no longer a party to this case, inasmuch as all issues concerning him ha[d] been concluded,"[709] and moved for the compulsory deposition of the husband as a non-party witness under Rule 75. The Service argued that in view of the fact that informal consultations with the petitioner-wife had proved "unfruitful" and that because the husband was "the only source of information available which could shed light on the matter concerning the innocent spouse status" of the wife, compulsory deposition of the husband was justified under Rule 75.[710] The petitioners responded that the husband was still a party to the case and thus would not qualify as a Rule 75 deponent.[711]

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703 *Id. Cf.* Durkin v. Commissioner, 87 T.C. 1329, 1401–03 (1986) (subpoena duces tecum returnable one week before trial after two years had passed since issuance of notice of deficiency was quashed due to its overly burdensome nature).

704 Ripley v. Commissioner, T.C. Memo. 1985-555, 50 T.C.M. (CCH) 1391, 1395.

705 *Id.*

706 *DeLucia*, 87 T.C. 804 (1986).

707 Section 6653(b) provides for the imposition of additions to tax for tax underpayments attributable to fraud.

708 *DeLucia*, 87 T.C. at 808. Under former § 6013(e), an "innocent spouse" signing a joint return was relieved from liability for tax underpayments attributable to the "grossly erroneous items" of the other spouse, if the innocent spouse "did not know and had no reason to know" of the understatement. I.R.C. § 6013(e)(1) (1986). This provision, as slightly revised, is now contained in § 6015(b).

709 87 T.C. at 810.

710 *Id.* at 809.

711 *Id.* at 811.

The Tax Court agreed with the petitioners.[712] The summary judgment order was interlocutory and unappealable[713] and no decision had yet been entered against the husband. The court stated that its jurisdiction over the husband continued until the entry of a final decision.[714]

Moreover, the court expressed reservations over whether Rule 75 discovery would be appropriate even if a final decision as to the husband had been entered by the Tax Court because "a party maintains his or her status as a party for other Internal Revenue Code provisions."[715] For example, the entry of a decision "triggers" the availability of Rule 162, under which a party may move to revise or vacate the court's opinion.[716] The entry of decision also initiates the 90-day period for appeal under § 7483.[717] The court held that if it were to ignore the restrictions of Rule 75, which only permits the depositions of non-party witnesses, it "would merely be assisting respondent [Commissioner] in circumventing both the literal language and the carefully limited objectives of our discovery rules."[718]

It is clear that the Tax Court will not allow non-consensual depositions to be used to avoid the restrictions of other rules of discovery.[719] One seeking to use this extraordinary method of discovery must first "pass the threshold requirement that the information it seeks to discover is

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[712] *Id.* The only alternative, the court noted, would be for all parties to consent to the deposition of the husband. *Id.* at 813.

[713] *Id.* at 811. The Tax Reform Act of 1986 added § 7482(a)(2)(A) of the Internal Revenue Code, which provides that "Courts of Appeals . . . [may], in their discretion, permit an appeal to be taken from [certain interlocutory orders of the Tax Court]." Tax Reform Act of 1986, Pub. L. No. 99-514, § 1558(a), 100 Stat. 2085, 2757–58, *overruling* Shapiro v. Commissioner, 632 F.2d 170 (2d Cir. 1980). *See* Rules Comm. Note, TAX CT. R. 193, 87 T.C. 1560 (1986).

[714] *DeLucia*, 87 T.C. at 812.

[715] *Id.* at 813.

[716] *Id.*

[717] *Id.*; I.R.C. § 7483.

[718] *DeLucia*, 87 T.C. at 813–14.

[719] *See* Estate of Van Loben Sels v. Commissioner, 82 T.C. 64, 68–69 (1984). In *Estate of Van Loben Sels*, the petitioner sought compulsory deposition of the Service's expert witnesses under Rule 75. The court noted that while Rule 70(b) did not specify the scope of discovery from opposing expert witnesses, Rule 71(d), an interrogatory provision, clearly did so. *Id.* at 68–69. Because Rule 71(d) allowed discovery of information regarding expert witnesses only from the opposing party, not from the experts themselves, the Tax Court refused to read the "extraordinary" Rule 75 to provide greater discovery than its more lenient counterparts. *Id.*; *see also* Howe v. Commissioner, T.C. Memo. 1985-213, 49 T.C.M. (CCH) 1396 (compulsory deposition of Service's expert witness disallowed under Rule 75 where material was not discoverable under the more general Rules 70 and 71).

discoverable within the meaning of Rule 70(b)."[720] Thus, until the provisions of Rule 75 were substantially modified in 2010,[721] a deposition taken in the absence of the consent of all the parties was not available with respect to matters adequately provided for in other rules.[722]

3. Discovery of Expert Witnesses

The original discovery procedures adopted by the Tax Court were limited with regard to expert witnesses. Rule 71(d)[723] provided that any party could require any other party, through the use of interrogatories, to identify any expert witness expected to be called to testify, giving such expert's name, address, occupation, and qualifications, and to provide a statement describing the subject and substance of the expert's anticipated testimony.[724] Because of the significance of expert testimony in many Tax Court cases, an argument could be made that discovery of experts should be expanded.[725]

In 1979, Rule 71(d) was amended to allow a party to furnish a copy of an expert's report in lieu of a statement presenting the subject and substance of the expert's report.[726] The amendment also added a requirement that each party submit to every other party and the court, at least 15 days prior to trial, a copy of all expert witness reports expected to be used in conjunction with expert testimony.[727]

Although the 1979 amendment marked an expansion of discovery procedures concerning expert witnesses, Rule 71 continued to limit discovery to information obtainable from the opposing party in the form of responses to interrogatories and experts' reports.[728] A compulsory deposition of an opposing expert witness was not allowed because of the limits already imposed by Rule 71.[729]

Several Tax Court judges felt that the requirements of Rule 71(d)(2), as amended in 1979, were unclear and therefore recommended that the rule be revised and clarified.[730] Specifically, these judges were unsure whether a

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720 *Estate of Van Loben Sels*, 82 T.C. at 68.

721 *See* Section G.4 of this Part.

722 *Id.* at 69.

723 TAX CT. R. 71(d), 60 T.C. 1100–01 (1973).

724 *Id.*

725 Newton, *supra* note 660, at 636.

726 TAX CT. R. 71(d)(1), 71 T.C. 1192 (1979).

727 TAX CT. R. 71(d)(2), 71 T.C. 1192–93 (1979).

728 Estate of Van Loben Sels v. Commissioner, 82 T.C. 64 (1984).

729 *Id.* at 69.

730 Memorandum from Judge Simpson to Chief Judge Sterrett 1, Sept. 11, 1985, filed at U.S. Tax Court in "Rules Committee: Discovery (discussing various

party should be required to submit an expert report to another party whose expert had not prepared a written report, or whether to preclude the oral testimony of an expert witness who had not done so.[731] A general consensus existed that a more "clear cut" rule was needed and that the provisions regarding expert reports should not be "'buried' in the rule dealing with interrogatories."[732] Dissatisfaction with Rule 71 was undoubtedly influenced by the fact that the Federal Rules of Civil Procedure contained extensive provisions with regard to discovery of expert opinion.[733]

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proposed rule changes and their benefits to the Tax Court procedure). As amended in 1979, Rule 71(d)(2) provided as follows:

> If not furnished earlier, each party who expects to call an expert witness shall furnish each other party and shall submit to the Court, not later than 15 days prior to the call of the trial calendar on which the case shall appear, a copy of all reports intended to be used in conjunction with the testimony of the witness at the trial of the case.

TAX CT. R. 71(d)(2), 71 T.C. 1192–93 (1979). In 1986, the court deleted the provisions of Rule 71(d)(2) pertaining to the preparation and exchange of expert reports and moved them to Rule 143(f) (later to be redesignated Rule 143(g)). Rule 71(d)(2) therefore now simply provides a cross-reference to the appropriate provision. *See* TAX CT. R. 71(d)(2), 143(g)(1) (July 6, 2012 ed.).

731 *See* Memorandum from Judge Cohen to Judge Simpson 1, Nov. 8, 1984, filed at U.S. Tax Court in "Rules Committee: Discovery" (expressing Judge Cohen's views on expert reports in Rule 71(d)(2)).

732 *Id.*; Tax Court Rules Committee Minutes, Jan. 24, 1985, filed at U.S. Tax Court in "Rules Committee: Discovery."

733 Prior to amendments in 1993, the Federal Rules of Civil Procedure addressed the discovery of expert witness opinion through Rule 26(b)(4). Under the then-existing regime, a party could, through interrogatories, require another party to identify any expert expected to testify, and provide the subject and substance of the expert's opinion, as well as the grounds upon which it is based. *See* FED. R. CIV. P. 26(b)(4)(A)(i) (prior to amendment in 1993). The court could, upon motion, order discovery regarding experts by other means available under the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 26(b)(4)(A)(ii) (prior to amendment in 1993). If an expert had been retained in anticipation of litigation but was not expected to be called at trial, an opposing party generally could discover information regarding that expert's opinion only "upon a showing of exceptional circumstances" which make it impracticable to obtain the information by other means. *See* FED. R. CIV. P. 26(b)(4)(B) (prior to amendment in 1993). The Federal rules required a party seeking discovery of expert material to pay a reasonable fee to the expert for the time spent in responding to a discovery request other than an interrogatory, "unless manifest injustice would result." Furthermore, a party seeking the discovery of information regarding an expert not expected to be called as a witness had to pay the other party a fair portion of the reasonable expenses and fees incurred by the "party in obtaining facts and opinions from the expert." The purpose of these provisions was to prevent one party from obtaining the

Although Tax Court judges generally agreed that the provisions regarding experts needed clarification, their views differed concerning the appropriate changes.[734] Some judges insisted that detailed reports from experts were necessary to educate the triers of fact; others contended that the requirement of a written report would penalize an expert who did not write well.[735] Most agreed that the judge should have the discretion to waive the requirement of a written report in appropriate cases. Additionally, although at least one judge expressed concern that the requirement of written reports from expert witnesses might be used by the Service to harass taxpayers by refusing to settle unless such reports were produced, it was also suggested that such a rule might instead encourage settlement.[736]

The Tax Court Rules Committee responded to suggestions regarding expert witness discovery by proposing, in 1985, an amendment to Rule 143.[737] Suggestions of the judges together with comments from the tax bar and the Service were taken into consideration in formulating the amendment.[738] Because the judges had "different views as to when a written report should be required," the amendment, although providing guidance for situations in which a report should be received, basically "enables each Judge to proceed as he sees fit."[739]

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benefit, without cost, of expert work for which the other party paid. *See* FED. R. CIV. P. 26(b)(4)(C) (prior to amendment in 1993).

In 1993, the Federal Rules of Civil Procedure shifted away from relying on interrogatories as the primary vehicle for discovery of expert witness opinion, finding that this approach "was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for the deposition of the witness." Adv. Comm. Note, FED. R. CIV. P. 26 (1993 Amendment). Rule 26 was therefore modified to require the preparation and disclosure of a detailed report of the expert witness that is intended to set forth the substance of the expert's direct testimony. *See* FED. R. CIV. P. 26(a)(2)(B).

[734] Tax Court Rules Committee Minutes, 2–4, Aug. 28, 1985, filed at U.S. Tax Court in "Rules Committee: Discovery" (expressing differing views of judges regarding expert reports and testimony).

[735] *Id.* at 2–3.

[736] *Id.* at 3.

[737] *See* TAX CT. R. 143(f), 85 T.C. 1134–35 (1985).

[738] Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 730, at 1; *see also* Tax Court Rules Committee Minutes, *supra* note 734, at 2–4 (expressing various views of judges on the changes in Tax Court procedures).

[739] Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 730, at 2.

a. Expert Reports

Rule 143(f) went into effect on July 1, 1986.[740] [As part of a restructuring of Rule 143 in 2010, Rule 143(f) was redesignated as Rule 143(g).[741]] The rule generally requires that expert witnesses prepare written reports for submission to the court and other parties, unless the court permits otherwise.[742] Expert testimony, without a written report, will ordinarily be excluded if such testimony deals with "third-party contacts, comparable sales, statistical data, or other detailed, technical information."[743] On the other hand, the court may dispense with the requirement of a written report if the expert testimony is limited to industry practice or rebuttal of other expert testimony.[744]

As contemplated under Rule 143(g), an expert report must give the qualifications of the expert as well as the expert's opinion and the facts or data on which it is based.[745] The report is required to set forth detailed reasons for the expert's conclusions and will be marked as an exhibit and received into evidence as the expert's direct testimony.[746] Additional direct testimony may be allowed for clarification of the report, to cover matters arising after the report's preparation, or at the court's discretion.[747] A strategy based on submitting incomplete reports and then attempting to "provid[e] substance of the expert's testimony through oral testimony" is unlikely to succeed.[748] The court may completely exclude the testimony of an expert failing to comply with the requirements of the rule unless the failure is for good cause and does not cause "undue prejudice" to the other

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[740] *See* Rules Comm. Note, TAX CT. R. 143(f), 85 T.C. 1136 (1986).

[741] *See* Rules Comm. Note, TAX CT. R. 143, 134 T.C. 360–62 (2010).

[742] Written reports from experts serve several important functions. "First, it requires both the expert and the attorney to prepare well in advance of trial" thus eliminating surprise and clarifying the actual need for discovery. George C. Pratt, *A Judicial Perspective On Opinion Evidence Under the Federal Rules*, 39 WASH. & LEE L. REV. 313, 322 (1982). Second, the submission of written reports from experts results in a savings of cost, time, and effort. For example, written reports allow opposing counsel, prior to trial, to focus on the weaknesses in an expert's testimony thus conserving judicial resources. *Id.* at 322–23.

[743] TAX CT. R. 143(g)(3) (July 6, 2012 ed.) (introduced as TAX CT. R. 143(f)(2), 85 T.C. 1135 (1979)).

[744] *Id.*

[745] TAX CT. R. 143(g)(1) (July 6, 2012 ed.) (introduced as TAX CT. R. 143(f)(1), 85 T.C. 1134–35 (1979)).

[746] *Id.*

[747] *Id.*

[748] Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 730, at 3.

party.[749] All reports prepared pursuant to the rule must be furnished to the court and to the other parties not later than 30 days prior to the call of trial calendar on which the case appears.[750]

When Rule 143(g) was introduced, members of the tax bar criticized the rule on various grounds.[751] Some were concerned that the comprehensive reports required under the rule would require counsel and parties to become more actively involved in the drafting of expert reports, thus making the submission of expert testimony in the Tax Court more "expensive and time consuming in comparison with other tax litigation forums."[752] Furthermore, it was suggested that at least some oral testimony might be necessary to evaluate an expert, particularly in the case of experts who do not routinely write detailed reports in the course of their business.[753] It was also observed that discovery of experts was more liberal in district court and Claims Court, neither of which required a written report as a prerequisite to testimony at the time Rule 143(g) was introduced.[754] Nonetheless, most practitioners who commented on Rule 143(g) supported it.[755]

In 2012, the court modified Rule 143(g) to require that expert reports contain the same information required under the corollary provision of Federal Rule of Civil Procedure 26(b)(4). Accordingly, in addition to stating the expert witness's opinions and the basis and reasons for them, the report also must state the qualifications of the witness (including a list of all publications authored by the expert within the prior 10 years), a list of cases

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[749] TAX CT. R. 143(g)(2) (July 6, 2012 ed.) (introduced as TAX CT. R. 143(f)(1), 79 T.C. 1134–35 (1979)). The opposing party would be unduly prejudiced if his ability to cross-examine the expert was "significantly impaired" or if the opposing party was denied the "reasonable opportunity" to obtain rebuttal testimony. *Id.* In 1989, the court increased the number of days before the call of the trial calendar that a party is required to submit an expert witness report to the court and other parties from 15 to 30, finding that the prior 15-day period did not afford sufficient time for thorough consideration of the report. *See* Rules Comm. Note, TAX CT. R. 143(f)(1), 93 T.C. 954 (1989). The court anticipated that the additional time for consideration of an expert report by the opposing party would occasion additional settlements. *Id.*

[750] TAX CT. R. 143(g)(2) (July 6, 2012 ed.) (introduced as TAX CT. R. 143(f)(1), 79 T.C. 1134–35 (1979)).

[751] *See* Letter from James B. Lewis, Chairman of Committee on Court Procedure, A.B.A. Section of Taxation, to Judge Simpson, July 1, 1985, filed at U.S. Tax Court in "Rules Committee: Discovery" (expressing views of individual members on proposed amendments to the rules of the Tax Court).

[752] *Id.* at 10–11.

[753] *Id.* at 13.

[754] *Id.* at 8.

[755] *Id.* at 11.

in which the witness has testified at deposition or at trial in the prior four years, and a statement of the compensation to the witness.[756] The 2012 revisions also followed Federal Rule of Civil Procedure 26(b)(4) by introducing Rule 70(c)(3), which protects from discovery drafts of expert witness reports as well as communications between counsel and the expert witness.[757]

b. Depositions of Expert Witnesses

As previously noted, the Tax Court discovery procedures as originally adopted and as amended in 1979 and 1986 afforded limited opportunity insofar as concerned expert witnesses. With nonconsensual discovery and compelled exchange of information circumscribed by the restrictions of Rules 71(d) and 143, depositions of expert witnesses were potentially available to litigants only upon consent through the vehicle of Rule 74.[758] In light of that situation, some members of the bar urged the Tax Court to expand its discovery provisions to permit nonconsensual depositions of expert witnesses.[759] Proponents argued that deposing an expert witness could reveal weaknesses in some experts' testimony and thus lead to more settlements, while opponents emphasized their concern that increased costs and burdens on the parties and the court would outweigh the small number of increased settlements.[760]

By 1989, the court's experience suggested that the time had come to permit depositions of expert witnesses, on both a consensual and a nonconsensual basis.[761] To that end, the court adopted Rule 76 effective July 1, 1990, stating in the accompanying note: "It is expected that such depositions will not only enhance trial preparation and hence the

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[756] TAX CT. R. 143(g)(1) and accompanying Rules Comm. Note, 139 T.C. 552–55 (2012).

[757] TAX CT. R. 70(c)(4) and accompanying Rules Comm. Note, 139 T.C. 534–39 (2012).

[758] *See* Estate of Van Loben v. Commissioner, 82 T.C. 64 (1984) (establishing the inapplicability of Rule 75 as a basis for compulsory depositions of expert witnesses); Howe v. Commissioner, T.C. Memo. 1985-213, 49 T.C.M. (CCH) 1396 (distinguishing Rules 74 and 75 in connection with depositions of expert witnesses).

[759] *See* Letter from James B. Lewis, Chairman of Committee on Court Procedure, A.B.A. Section of Taxation, to Judge Simpson, July 1, 1985, filed at U.S. Tax Court in "Rules Committee: Discovery" (expressing views of individual members on proposed amendments to rules of the Tax Court); Letter from Judge Simpson to Professor Harold Dubroff, *supra* note 658 (commenting on Professor Dubroff's proposed chapter on amendments of the Tax Court rules).

[760] *See* Letter from Judge Simpson to Professor Harold Dubroff, *supra* at 658; Letter from James B. Lewis, Chairman of Committee on Court Procedure, A.B.A. Section of Taxation, to Judge Simpson, *supra* at 759.

[761] *See* Rules Comm. Note, TAX CT. R. 76, 93 T.C. 910–911 (1989).

presentation of the evidence at trial, but will also increase the number of settlements in cases requiring the assistance of experts."[762] Rule 76(a)(1) made explicit that depositions of an expert witness upon consent of all parties to a case were available and would be governed by Rule 74.[763] Rule 76(a)(2) then proceeded to authorize the deposition of an expert witness without consent of all parties, but only pursuant to an order of the court as "an extraordinary method of discovery."[764] The balance of the rule set forth the conditions to frame its use. The scope of depositions under the rule is limited to the expert's training and to matters pertaining to the opinion being offered in his or her capacity as an expert.[765] Timing mirrors the more restrictive provisions governing non-consensual depositions in that depositions of expert witnesses may be taken only after a notice of trial has been issued or after a case has been assigned to a judge or special trial judge and within the time for completion of discovery under Rule 70(a)(2).[766] In general, the party desiring to depose an expert witness files a detailed written motion with the court and serves a copy on the expert witness and each other party.[767] Any objection or other response to the motion must be filed with the court within 15 days of service of the motion.[768] A disposition by order will follow, with or without hearing, specifying the parameters for conduct of the deposition and directing the witness to appear at the time, place, and date designated therein.[769] Alternatively, the court may take action sua sponte to order the taking of the deposition of an expert witness, without the predicate of a motion by a party.[770] The rule also addresses allocation of associated expenses, generally placing the burden on the party taking the deposition absent stipulation to the contrary.[771] The expense provision applies to expert depositions under

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762 Rules Comm. Note, TAX CT. R. 76, 93 T.C. 911.

763 The provisions governing the consensual deposition of an expert witness are now reflected in TAX CT. R. 74(b) (July 6, 2012 ed.).

764 The provisions governing the non-consensual deposition of an expert witness are now reflected in TAX CT. R. 74(c)(1), (4) (July 6, 2012 ed.).

765 TAX CT. R. 76(b) and accompanying Rules Comm. Note, 93 T.C. 911 (1989) (now reflected in TAX CT. R. 74(c)(4)(A) (July 6, 2012 ed.)).

766 TAX CT. R. 76(c) (now reflected in TAX CT. R. 74(c)(1) (July 6, 2012 ed.)).

767 TAX CT. R. 76(d)(1), (2) (now reflected in TAX CT. R. 74(c)(4)(B)(i) (July 6, 2012 ed.)).

768 TAX CT. R. 76(d)(3) (now reflected in TAX CT. R. 74(c)(4)(B)(ii) (July 6, 2012 ed.)).

769 TAX CT. R. 76(d)(3) (now reflected in TAX CT. R. 74(c)(4)(B)(ii) (July 6, 2012 ed.)).

770 TAX CT. R. 76(f) (now reflected in TAX CT. R. 74(c)(4)(C) (July 6, 2012 ed.)).

771 TAX CT. R. 76(g) (now reflected in TAX CT. R. 74(c)(4)(D) (July 6, 2012 ed.)).

both Rule 74 and 76, as does a further provision governing use of expert depositions for purposes other than discovery.[772]

4. Restructuring and Expansion of Deposition Procedures

The court significantly modified the procedures governing depositions for discovery purposes by merging existing Rules 74, 75, and 76 into a single new and expanded Rule 74. The revised Rule 74 became effective January 1, 2010. As highlighted in the accompanying note of the Rules Committee, the restructuring was undertaken "to improve clarity, eliminate redundancies, and streamline the Court's Rules. New Rule 74 contains provisions governing all depositions that may be taken for discovery purposes in Tax Court proceedings."[773] As revised, Rule 74 is structured in five principal paragraphs. Paragraph (a) outlines the general framework of the rule, providing a roadmap for its use. Paragraph (b) then covers depositions upon consent of the parties, essentially incorporating the operative text of the prior version of Rule 74. Paragraph (c) governs depositions without consent of the parties and is subdivided to address nonconsensual depositions of nonparty witnesses, of party witnesses, and of expert witnesses. The provisions directed to nonparty witnesses and to expert witnesses parallel those of former Rules 75 and 76, respectively. Paragraph (d) reprises the other potential uses of expert witness depositions, another feature of the former Rule 76. The final two paragraphs (e) and (f) set forth general and administrative provisions broadly applicable to all discovery depositions.

From a substantive perspective, the revised Rule 74 amended the existing authorization for discovery depositions to provide that a party could move to take the deposition of another party to the proceeding without that party's consent.[774] Additionally, the court, in exercise of its discretion, now may order the deposition of a party sua sponte.[775] Like other forms of nonconsensual depositions, the authorization to depose a party to the proceeding absent consent was characterized as an "extraordinary method of discovery," available only where information discoverable under Rule 70(b) cannot be obtained through informal communications or other means of discovery.[776]

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[772] TAX CT. R. 76(e), (g); *see also* Rules Comm. Note, TAX CT. R. 76, 93 T.C. 910–913.

[773] Rules Comm. Note, TAX CT. R. 74, 134 T.C. 337 (2010).

[774] *See* Tax Ct. R. 74(c)(3) (July 6, 2012 ed.); Rules Comm. Note, TAX CT. R. 74, 134 T.C. 337 (2010).

[775] *Id.*

[776] Rules Comm. Note, TAX CT. R. 74, 134 T.C. 337 (2010); *see also* TAX CT. R. 74(c)(1)(B) (July 6, 2012 ed.).

5. Limitations on the Use of Interrogatories

In 2009, in an effort to more closely align the Tax Court's pretrial discovery procedures with the Federal Rules of Civil Procedure, the court revised Rule 71(a) to conform with Federal Rule 33(a).[777] Beginning in 2010, a party to a Tax Court proceeding generally is limited to serving on another party 25 written interrogatories, including discrete subparts.[778] Interrogatories served on expert witnesses in accordance with Rule 71(d) are exempt from this general limitation.[779]

Prior to the adoption of this change, there existed no presumptive limit on the number of written interrogatories a party could serve on another.[780] The court perceived that a limit on written interrogatories should (1) encourage parties to exchange information without resorting to interrogatories, (2) improve the efficiency of the interrogatory process, and (3) permit the court to have greater discretion over the use of interrogatories.[781]

The limit is not intended to inhibit necessary discovery; therefore, the limit may be exceeded either by agreement of the parties or judicial intervention.[782] The court may grant a party's motion for leave to serve additional interrogatories provided that such grant does not run afoul of Rule 70(b)(2). The court will consider whether (1) the request is unreasonably cumulative or duplicative, or the information sought is obtainable from another source that is more convenient, less burdensome, or less expensive, (2) the party seeking additional interrogatories has had ample opportunity by discovery to obtain the information sought, and (3) the interrogatories are unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.[783]

6. Sanctions for Discovery Abuse

The Tax Court has generally insisted on compliance with its Rules of Practice and Procedure and has rendered decisions and orders against

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[777] Rules Comm. Note, TAX CT. R. 71, 134 T.C. 324 (2010).

[778] *Id.* at 325. The rule does not define a "discrete subpart." The Advisory Committee Notes to Federal Rule of Civil Procedure 33(a) provide guidance on how interrogatories are to be counted.

[779] TAX CT. R. 71(a), (d) (July 6, 2012 ed.).

[780] Rules Comm. Note, TAX CT. R. 71, 134 T.C. 324 (2010).

[781] *Id.*

[782] *Id.*

[783] *Id.* at 325.

noncomplying parties in numerous cases.[784] The Tax Court rules provide various sanctions for failure to comply with the court's discovery orders.[785] These rules are modeled on similar provisions in the Federal Rules of Civil Procedure,[786] and when the Tax Court interprets its discovery rules, it generally looks to federal court decisions interpreting the Federal Rules for guidance.[787]

a. Sanctions for Noncompliance with Court Order

After it has been determined that a party has failed to comply with a discovery order of the court, sanctions under Rule 104(c) are appropriate.[788] Dismissal of the action is one of the most severe sanctions available under

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784 *See, e.g.,* Rosenfeld v. Commissioner, 82 T.C. 105, 111 (1984); Odend'hal v. Commissioner, 75 T.C. 400, 404 (1980); International Air Conditioning Corp. v. Commissioner, 67 T.C. 89, 92–93 (1976); Branerton Corp. v. Commissioner, 61 T.C. 691, 692 (1974).

785 The Tax Court Rules of Practice and Procedure provide sanctions against parties who fail to obey a Tax Court discovery order. In such cases, the court may (1) treat the matter to which the order relates as being established; (2) refuse to allow the disobedient party to support designated claims or defenses or prevent particular matters from being introduced into evidence; (3) strike a pleading, render a judgment by default, or dismiss the case of the disobedient party; and/or (4) hold the disobedient party in contempt and award fees and expenses. TAX CT. R. 104(c) (July 6, 2012 ed.). Rule 104(b) allows a party to make a motion to the court to compel a party to answer, respond, or comply with a discovery request. TAX CT. R. 104(b) (July 6, 2012 ed.). The Tax Court may also invoke Rule 123 to dismiss a case against a petitioner who fails to prosecute, fails to comply with Tax Court rules or an order of the court, "or for other cause which the Court deems sufficient." TAX CT. R. 123(b) (July 6, 2012 ed.); *see, e.g.,* Levy v. Commissioner, 87 T.C. 794 (1986) (dismissing case under Rule 123(b) for failure to prosecute when petitioners never stipulated any facts or prepared for trial, despite the court's warnings); Freedson v. Commissioner, 67 T.C. 931 (1977), *aff'd*, 565 F.2d 954 (5th Cir. 1978) (dismissing case under Rule 123(b) in light of petitioners' bad faith and dilatory tactics).

786 Tax Court Rule 104(a) is adapted from Federal Rule of Civil Procedure 37(d). *See* Rules Comm. Note, TAX CT. R. 104(a), 60 T.C. 1124 (1973). Tax Court Rule 104(c) is derived from Federal Rule 37(b)(2). *See* Rules Comm. Note, TAX CT. R. 104(c), 60 T.C. 1124 (1973).

787 *See* Dusha v. Commissioner, 82 T.C. 592 (1984); Rosenfeld v. Commissioner, 82 T.C. 105, 116–17, 120 (1984); Owens-Illinois, Inc. v. Commissioner, 76 T.C. 493, 495–99 (1981); Zaentz v. Commissioner, 73 T.C. 469, 473–74 (1979); Freedson v. Commissioner, 67 T.C. 931, 935–38 (1977), *aff'd*, 565 F.2d 954 (5th Cir. 1978).

788 TAX CT. R. 104(c), 79 T.C. 1144–45 (1982), *amended by* 85 T.C. 1132–33 (1985).

either the Tax Court rules or the Federal Rules of Civil Procedure.[789] In construing Federal Rule 37(b)(2), the counterpart of Tax Court Rule 104(c)(3), the Supreme Court has held that dismissal is improper if the party's "failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the party]."[790] Prior to 1984, only one case, *Fox v. Commissioner*,[791] applied this standard for dismissal of cases under Tax Court Rule 104(c)(3).[792]

In *Fox*, the Seventh Circuit Court of Appeals upheld the Tax Court's dismissal of the taxpayer's petitions for failure to comply with the court's discovery order.[793] In so doing, the court interpreted Rule 104(c)(3) to preclude dismissal as a discovery sanction unless the failure to comply was (1) willful *and* in bad faith, and (2) there was a total failure to respond.[794] Some Tax Court judges saw these conditions for dismissal as "almost impossible . . . to satisfy" in most cases, even those that obviously should be dismissed.[795] The "total" failure to respond requirement was viewed by those judges as particularly "unwarranted."[796] They believed that, in some cases, a party might answer several discovery requests but fail to respond to the most significant requests that go to the "very heart of the case."[797] For example, a taxpayer who supplied "*any requested information*, such as his taxpayer identification number,"[798] might avoid dismissal under so strict a

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[789] *Dusha*, 82 T.C. at 599, 605–06. The authority of the court to deem matters admitted if not denied under Rule 90(c) can also be a severe sanction. *See* TAX CT. R. 90(c), 85 T.C. 1129–30 (1985). *See, e.g.,* Krock v. Commissioner, T.C. Memo. 1986-580, 52 T.C.M. (CCH) 1146 (petitioner's failure to answer admission requests resulted in admission of facts sufficient to satisfy Service's burden of proof on issue of fraud).

[790] Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958).

[791] 718 F.2d 251 (7th Cir. 1983).

[792] *Id.*

[793] *Id.* at 256. In *Fox,* the Service sought an order compelling the petitioners to answer its interrogatories and an order compelling the production of documents. *Id.* at 253. The court granted the motion after a hearing at which neither petitioners nor their counsel appeared. After the petitioners continued to refuse to comply with the court's order and with the Service's discovery requests, the Service moved for dismissal of the petitions, and after a hearing at which, again, neither the petitioners nor their counsel appeared, the motion for dismissal was granted. *Id.*

[794] *Id.* at 255.

[795] Memorandum from Judge Raum to Judge Simpson 1, Nov. 22, 1983, filed at U.S. Tax Court in "Rules Committee: Discovery" (discussing the desirability of amending the Tax Court Rules to overcome the effect of the *Fox* decision).

[796] *Id.*

[797] *Id.*

[798] Memorandum from Chief Judge Dawson, to Judges, Senior Judges, and Special Trial Judges 1, Jan. 19, 1984, filed at U.S. Tax Court in "Rules Committee:

standard.[799] In these situations, most Tax Court judges probably would agree that it should not be necessary to find a complete failure to respond in order to dismiss.[800]

In a memorandum to Tax Court judges circulated shortly after *Fox*, Chief Judge Dawson suggested that the judges might wish to limit that decision as precedent and rely on other cases interpreting the Federal Rules analogous to Tax Court rules, which upheld the dismissal of a case, even if there was not a total failure of compliance with a discovery order.[801] Although some judges recommended amending the Tax Court rules to make it clear that a "deliberate" failure to respond or a "total" failure to respond was not required before imposing sanctions under Rule l04(c)(3),[802] no such amendments were adopted; instead, the court employed the timely opportunity provided by *Dusha v. Commissioner*[803] to limit the *Fox* decision as precedent.

In *Dusha*, an opinion reviewed in conference, the court dismissed the case of a petitioner who refused to comply with a discovery request and a Tax Court discovery order on the grounds that the information sought by the respondent was not in his "*individual* possession, custody, or control."[804] The court explained that "[g]iven the nature of the information sought by respondent—petitioner's tax returns, bank accounts," as well as the petitioner's employment and compensation—the petitioner's refusal to comply was willful and in bad faith.[805] Of no small significance was the court's previous consideration and rejection of the petitioner's claims, arguments he insisted on repeating despite the court's warning that the arguments were frivolous.[806]

In dismissing *Dusha*,[807] the court discussed the Seventh Circuit's decision in *Fox*, earlier decisions in the Seventh Circuit, and decisions of other circuit courts and concluded that *Fox* failed to distinguish between Tax Court

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Discovery" (emphasis in original) (discussing the effect of Fox v. Commissioner, 718 F.2d 251 (7th Cir. 1983)).

[799] *Id.*

[800] *See* Memorandum from Judge Raum to Judge Simpson, *supra* note 795, at 2.

[801] Memorandum from Chief Judge Dawson, to Judges, Senior Judges, and Special Trial Judges, *supra* note 798, at 2–3.

[802] *See* Memorandum from Judge Raum to Judge Simpson, *supra* note 795, at 1–2.

[803] 82 T.C. 592 (1984).

[804] *Id.* at 596 (emphasis in original).

[805] *Id.* at 607.

[806] *Id.* at 608. The Tax Court may impose damages of up to $25,000 under § 6673 against taxpayers who assert frivolous arguments in defiance of Tax Court orders. *See* Part X.D.

[807] 82 T.C. 592 (1984).

Rules 104(a) and 104(c).[808] Under Rule 104(a) and its counterpart, Federal Rule 37(d), a complete failure to respond to a discovery request is necessary before the imposition of any sanctions.[809] On the other hand, Federal district courts had not permitted "minimal compliance"[810] to bar dismissal under Federal Rule 37(b)(2); similarly, the Tax Court refused to allow partial compliance to preclude dismissal of an action under Rule 104(c)(3).[811]

The distinction drawn in *Dusha* was justified by the different situations to which the rules were addressed. Tax Court Rule 104(c)(3) and Federal Rule 37(b)(2) provide for the imposition of sanctions *only* if a party has failed to comply with a discovery order issued by the court; in contrast, Tax Court Rule 104(a) and Federal Rule 37(d) provide for the imposition of sanctions in any case in which a party fails to attend a deposition, answer interrogatories, or respond to requests for inspection, whether or not a court order has been issued.[812]

Although conceding its distinction might be nothing more than "quibbling over a simple matter of semantics,"[813] the court in *Dusha* also disagreed with the requirement established by the court in *Fox* that noncompliance "be both willful and in bad faith."[814] The standard articulated by the Supreme Court and applied by the Tax Court in *Dusha* requires only "willfulness, bad faith, or any fault."[815] The court recognized that "dismissal is a sanction of last resort, not to be used indiscriminately,"[816] but explained that "here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the [trial] court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of

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808 *Id.* at 601; *see* Memorandum from Chief Judge Dawson, to Judges, Senior Judges, and Special Trial Judges, *supra* note 798; Memorandum from Joanne Hickcox to Judge Simpson 23, Dec. 6, 1983, filed at U.S. Tax Court in "Rules Committee: Discovery" (analyzing the *Fox* decision and its relation to discovery requests and court orders).

809 *Dusha*, 82 T.C. at 604. *See* Rules Comm. Note, TAX CT. R. 104, 60 T.C. 1124 (1973) (stating that paragraph (a) of Rule 104 is adapted from Rule 37(d) of the Federal Rules of Civil Procedure).

810 *Dusha*, 82 T.C. at 604.

811 *Id.*

812 *Id.* at 602–04. *Compare* TAX CT. R. 104(a), 79 T.C. 1144 (1982), *with* FED. R. CIV. P. 37(d); *compare* TAX CT. R. 104(c)(3), 79 T.C. 1145 (1982), *with* FED. R. CIV. P. 37(b)(2)(C) (essential elements substantially identical).

813 82 T.C. at 605.

814 *Id.* (emphasis in original).

815 *Id.*

816 *Id.*

such a deterrent."[817] The court has consistently adhered to the standard enunciated in *Dusha*.[818]

b. Expanded Procedures for Deterring Discovery Abuse

The Tax Court has proceeded cautiously in introducing and expanding the use of pretrial discovery and has repeatedly emphasized that formal pretrial discovery should not interfere with informal communication between the parties which can lead to stipulations and settlements. In 1985, the court strengthened its stance with rule amendments that permit it to limit unreasonable discovery, as well as to impose sanctions upon counsel who attempt to use discovery procedures for improper purposes.

Rule 70(b)(2), as amended in 1985, permits the court to limit discovery if (1) it is "unreasonably cumulative or duplicative" or if the information is readily obtainable from another source, (2) the party has already had "ample opportunity . . . to obtain the information sought," or (3) "the discovery is unduly burdensome or expensive."[819] This amendment followed a similar revision in the Federal Rules of Civil Procedure,[820] which was intended to "guard against discovery that is redundant or disproportionate to the amount of money or the importance of the issues at stake."[821] In limiting

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[817] *Id.* at 605–06 (quoting National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976)). The court stated that "dismissal is inappropriate where the litigant's failure to comply with the Court's order is based upon the proper exercise of a recognized privilege, such as the Fifth Amendment privilege against self-incrimination." *Id.* at 606. The assertion of the Fifth Amendment, however, must be based upon a possible danger of incrimination and not just used as a "blanket refusal." *Id.* Thus, the petitioner's repetition of self-incrimination arguments that were held to be frivolous at the hearing on the request for a discovery order justified dismissal. *Id.* at 606, 608.

[818] *See*, *e.g.,* Delaney v. Commissioner, T.C. Memo. 1985-73, 49 T.C.M. (CCH) 777, 779; Kuhn v. Commissioner, T.C. Memo. 1984-638, 49 T.C.M. (CCH) 265, 267; Romano v. Commissioner, T.C. Memo. 1984-568, 48 T.C.M. (CCH) 1472, 1474; Figura v. Commissioner, T.C. Memo. 1984-567, 48 T.C.M. (CCH) 1469, 1471; Wedeking v. Commissioner, T.C. Memo. 1984-530, 48 T.C.M. (CCH) 1283, 1286. In addition to being subject to Rule 104 sanctions, parties failing to comply with an order of the Tax Court may also be subject to damages of up to $25,000 under § 6673. *See* Part X.D (discussing development of the § 6673 penalty).

[819] TAX CT. R. 70(b)(2), 85 T.C. 1127 (1985). Following a restructuring of Rule 70 in 2012, these provisions are now contained in TAX CT. R. 70(c)(1) (July 6, 2012 ed.). *See* TAX CT. R. 70 and accompanying Rules Comm. Note, 139 T.C. 534 (2012).

[820] FED. R. CIV. P. 26(b).

[821] Rules Comm. Note, TAX CT. R. 70, 85 T.C. 1128 (1985).

discovery under Rule 70(b)(2), the court may act on its own initiative or pursuant to a motion under Rule 103.[822]

The Rule 70(b)(2) amendment had the support of the tax bar,[823] but the Service expressed concern as to how the court would interpret the rule's limitations on discovery.[824] The Service urged that the restrictions on discovery be confined to the litigation stage, so that the court would not deny otherwise reasonable discovery requests on the grounds that the information sought might have been obtained "more conveniently or less expensively" during the administrative process.[825] Perhaps in reaction to the perception that the Service was using discovery as a substitute for inadequate audits, the court declined to adopt the Service's suggestion.[826]

To further encourage parties to reduce discovery-related controversies, Rules 70(e) and 90(d) were also amended in 1985 to require that every discovery and admission request, response, or objection be signed by counsel, or by the party, if unrepresented.[827] The court hoped that these changes would deter both excessive discovery and resistance to reasonable discovery requests.[828]

The signature of counsel or the party certifies that the discovery request, response, or objection is made in good faith and not for any improper

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822 TAX CT. R. 70(b)(2), 85 T.C. 1127 (1985) (now reflected in TAX CT. R. 70(c)(1) (July 6, 2012 ed.)).

823 *See* Letter from James B. Lewis, Chairman of Committee on Court Procedure, A.B.A. Section of Taxation, to Judge Simpson, *supra* note 759, at 5–6.

824 *See* Letter from Fred T. Goldberg, Jr., Chief Counsel for Internal Revenue Service, to Judge Simpson 2, June 24, 1985, filed at U.S. Tax Court in "Rules Committee: Discovery."

825 *Id.*

826 *See* Durkin v. Commissioner, 87 T.C. 1329 (1986). In *Durkin*, the Tax Court quashed portions of a subpoena duces tecum in which the Service sought books and records of several non-parties who were only indirectly involved in the transactions at issue. *Id.* at 1401–03. The court refused to support the Service's subpoena on the grounds that "the requests were overly burdensome compared to their probative value." *Id.* at 1401. The court noted the apparent inadequate trial preparation by the Service and stated that "[t]he processes of this Court are simply not designed to be used to conduct a thorough investigation of a complex tax case." *Id.* at 1403.

827 TAX CT. R. 70(e), 90(d), 85 T.C. 1127–28, 1130–31 (1985). Following a restructuring of Rule 70 in 2012, Rule 70(e) is now designated as Rule 70(f). *See* Rules Comm. Note, TAX CT. R. 70, 139 T.C. 539 (2012).

828 Rules Comm. Note, TAX CT. R. 70, 85 T.C. 1128–29 (1985); Rules Comm. Note, TAX CT. R. 90, 85 T.C. 1132 (1985).

purpose, such as delay of the litigation.[829] If a certification is made in violation of this requirement, the court, upon motion or sua sponte, has the power to order a party or its counsel to pay resulting expenses as well as reasonable counsel fees to the other party.[830] Similar provisions allowing the court to levy costs and attorneys' fees on a party who submits a frivolous pleading or violates a court order were incorporated into Rules 33(b) and 104(c)(4).[831]

One judge recognized that sanctions historically imposed by the Tax Court such as "exclusion of evidence, deeming facts admitted, and dismissal of actions, often penalize the party when the real culprit is the counsel."[832] Thus, the court has altered its focus, placing the responsibility on counsel to act in good faith and indicating that sanctions will be imposed on counsel for violating this responsibility.[833]

H. Case Management Procedures

1. Joint Motion for Assignment of a Judge

The Tax Court permits parties in complex cases to jointly move the court to assign the case to a judge, before it is set for trial, if the parties believe the case cannot be conveniently tried on a regularly scheduled trial calendar.[834] The court expects that a joint motion for assignment of a case will be filed as soon as feasible after the case is at issue (i.e., the pleadings are closed) and should briefly set out the most significant issue(s), the amount in controversy, the requested place of trial, and any other relevant information the parties wish to bring to the court's attention.

2. Motions Practice

The Tax Court's Rules of Practice and Procedure provide that "an application to the Court for an order shall be by motion in writing, which shall state with particularity the grounds therefor and shall set forth the

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[829] TAX CT. R. 70(e), 90(d), 85 T.C. 1127–28, 1130–31 (1985). Following a restructuring of Rule 70 in 2012, this aspect of Rule 70 is now designated as Rule 70(f)(1).

[830] TAX CT. R. 70(e)(2), 90(d)(2), 85 T.C. 1128, 1131 (1985). Following a restructuring of Rule 70 in 2012, this aspect of Rule 70 is now designated as Rule 70(f)(2).

[831] TAX CT. R. 33(b), 104(c)(4), 85 T.C. 1125–26, 1132–33 (1985).

[832] Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 730, at 4.

[833] *Id.* at 4–5.

[834] *See* Press Release, United States Tax Court, Oct. 19, 1990 (issued by Chief Judge Arthur L. Nims, III).

relief or order sought."[835] The court may in its discretion dispose of a motion with or without directing that a written response be filed and with or without a hearing.[836]

If a hearing is set, the matter may be heard in Washington, D.C., or at some other location (such as the requested place of trial) which serves the convenience of the parties and the court.[837] Historically, motions generally were heard in Washington, D.C. In more recent years, motions are set for hearing at trial sessions in the city requested as the place of trial. In 2010, the court confirmed this change in practice by amending Rule 50(b)(2) to modify the phrase that hearings on motions "*normally will be held* in Washington, D.C." to read that hearings "*may be held* in Washington, D.C."[838]

The Rule change was accompanied by a change in court practices regarding Washington, D.C. motions sessions. Prior to 2010, motions on cases in the general docket (i.e., cases not yet calendared for trial) generally were calendared for hearing at a motions session in Washington, D.C. Beginning in 2010, general docket motions are screened internally by judges, set for hearing in the place of trial requested by the petitioner if factual testimony appears to be needed, or decided based upon the written submissions of the parties if factual testimony is not needed. Contrary to the historic practice, general docket motions are rarely calendared for hearing in Washington D.C.

If the motion is set for hearing, a party to the motion may, before or at the time of the hearing, submit a written statement (commonly referred to as "a Rule 50(c) statement") explaining the party's position together with supporting documents, and such statement may be submitted in lieu of or in addition to attendance at the hearing.[839]

3. Calendaring Cases for Trial

The court normally sets a case for trial after the Commissioner files an answer to the petition.[840] The court holds trial sessions in 74 cities, setting numerous trial sessions each year in larger cities such as Los Angeles and New York. The court schedules at least one trial session per year in smaller cities.

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[835] TAX CT. R. 50(a) (July 6, 2012 ed.).

[836] TAX CT. R. 50(b) (July 6, 2012 ed.).

[837] TAX CT. R. 50(b)(2) (July 6, 2012 ed.).

[838] *Id.* (emphasis added); *see also* Rules Comm. Note, 136 T.C. 612.

[839] TAX CT. R. 50(c) (July 6, 2012 ed.).

[840] A case normally is eligible to be set for trial after the answer is filed and any motions have either been disposed of or are ripe for hearing at the trial session.

The court schedules one-week or two-week trial sessions depending on the number of cases ready for trial in a particular city and other scheduling restraints. Until 1984, cases were calendared for trial after the parties filed status reports stating that they were ready for trial. Under this practice, some cases were not set for trial for several years. In 1985, in response to a dramatic increase in the number of case filings, the court began to expedite the process by automatically calendaring all cases for trial after the answer to the petition was filed.

Before 2008, the court calendared up to 75 regular cases and 100 small tax cases per week of trial session. Beginning with the Spring 2009 term, the maximum number of regular cases per week of session was increased to 100 and the number of small tax cases per week of session was increased to 125.

The court issues a Notice Setting Case For Trial (trial notice) to the parties five months before the trial session is scheduled to begin.[841] The five-month period is intended to give the parties ample opportunity to engage in settlement discussions and to prepare for trial. The trial notice includes the date and time for the calendar call and the courthouse address and courtroom number for the trial session. Calendar calls normally begin on Monday morning at 10:00 A.M. In addition to informing the parties that they are expected to be present and prepared for trial at the time of the calendar call, the trial notice is accompanied by a Standing Pretrial Order for regular tax cases[842] and a Standing Pretrial Notice for small tax cases.[843]

4. Standing Pretrial Order and Pretrial Memorandum

The Standing Pretrial Order has emerged as a central tool of case load management, one that defines the contours of pretrial practice before the Tax Court. The order is the culmination of the practice of many Tax Court judges who had established a practice of causing to be included in the "notice setting case for trial" (notice of trial) a memorandum from the court clerk describing the matters that the judge assigned to the calendar wished the parties to consider prior to trial.[844] As time progressed, some judges, becoming convinced that a judge-signed order would be more effective

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[841] Before 2007, the notice setting small tax cases for trial was sent three months before the trial session was scheduled to begin.

[842] The contents of the Standing Pretrial Order are discussed in detail below in Section H.4. of this Part.

[843] The contents of the Standing Pretrial Notice are discussed in detail below in Section H.5. of this Part. In small tax cases in which the taxpayer is not represented by counsel, the court also sends a "stuffer" notice that provides information about low-income taxpayer clinics operating in the city where the trial will be held. The stuffer notice program is described in Part XIII.B.2.

[844] *Id.*

than a memorandum from the clerk, began to substitute such orders for the clerk's memorandum.[845] Eventually, the Standing Pretrial Order evolved.

The Standing Pretrial Order is a device which seeks to encourage settlement negotiations and enhance the efficient management of cases which are ultimately tried.[846] This is accomplished by requiring the parties to meet prior to trial to prepare a stipulation and to file a report before trial that sets forth the parties, the issues, the witnesses, and a summary of the facts and legal issues in the case.[847] Originally, not all Tax Court judges were convinced of the utility of the Standing Pretrial Order.[848] In the past, orders issued by the different judges followed no standard pattern.[849] Apparently, the Tax Court has been reluctant to interfere in the case management styles of individual judges by incorporating a standard order into the Rules of Practice and Procedure or otherwise requiring adoption of a uniform order.[850]

Nonetheless, some judges encouraged the court to adopt a uniform Standing Pretrial Order.[851] Although the effect of the Standing Pretrial Order was difficult to measure, the judges who used the order were convinced that its benefits in providing for orderly case management outweighed the additional burdens on the judges.[852] Moreover, some believed that the increased burden placed on the parties by the Standing Pretrial Order, particularly on the attorneys in the Office of the Chief Counsel, would be eased if a standard order was used.[853]

In response to these concerns, Judge Mary Ann Cohen chaired an ad hoc committee investigating the practicality of the Tax Court's adoption of a standard Standing Pretrial Order.[854] Subsequently, on March 11, 1988, the Tax Court adopted a uniform order to be used during regularly scheduled trial sessions pending before regular and senior Tax Court judges.[855] In

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[845] *Id.*

[846] *See* Sterrett, *The U.S. Tax Court: Innovation and New Procedures Help in Managing Over 70,000 Cases*, 33 FED. B. NEWS & J. 120, 123 (1986).

[847] *Id.* at 122–23.

[848] *Id.* at 123.

[849] *Id.*

[850] *See* Meade Whitaker, *Some Thoughts on Current Tax Practice*, 7 VA. TAX REV. 421, 426 (1988).

[851] *See* Memorandum from Robert Armen, Deputy Counsel to Chief Judge, to Chief Judge Sterrett, Mar. 24, 1988, filed at U.S. Tax Court in "Rules Committee: Tax Court Inventory."

[852] *See* Whitaker, *supra* note 850, at 426.

[853] *Id.* at 423 n.7.

[854] *See* Memorandum from Robert Armen, Deputy Counsel to Chief Judge, to Chief Judge Sterrett, *supra* note 850.

[855] *See id.* The Standing Pretrial Order is not incorporated in the Tax Court Rules of Practice and Procedure, and individual judges who use it may adopt

1990, the Tax Court amended what is now Rule 131 to include a new paragraph (b) to recognize the regular practice of including a pretrial order with the notice of trial.[856] In describing the rule amendment, the court noted that the pretrial order was designed "to facilitate the orderly and efficient disposition of all cases on a trial calendar," while warning that the failure to comply with the directives in the order could subject a party or party's counsel to sanctions.[857]

The Standing Pretrial Order is attached to the Notice of Trial and informs parties of their responsibilities and of possible sanctions in the event of noncompliance.[858] The Order requires the parties to "begin discussing settlement and/or preparation of a stipulation of facts as soon as practicable."[859] The "soon as practicable" time specification is a departure from prior orders adopted on an individual basis, which typically placed a more certain limitation on the time within which parties should begin discussions.[860] The more flexible time period incorporated into the standard order may have been a concession to those judges who were concerned that a rigid time period would lead to unnecessary judicial involvement, because of motions for sanctions and the like.

The Standing Pretrial Order provides that "[v]aluation cases and reasonable compensation cases are generally susceptible of settlement, and the Court expects the parties to negotiate in good faith with this goal in mind."[861] The court encourages settlement of these cases because "a settlement by the parties usually results in a better decision at a much earlier date."[862] The court also expects a settlement of all minor issues so that judicial attention can be focused on issues worthy of the court's scrutiny.[863]

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variations as they see fit. For example, some judges may request additional information from the parties, such as that required by the Joint Case Status Report. *See* Whitaker, *supra* note 850, at 424. The Status Report identifies whether a case will probably or definitely go to trial, and estimates the length of the trial. *See id.* at 424 n.11.

The current Standing Pretrial Order adopted by the Tax Court appears in Appendix E; *see also* Whitaker, *supra* note850, at 445 (providing an early sample standing pretrial order).

856 TAX CT. R. 131(b) (July 6, 2012 ed.) (originally introduced as TAX CT. R. 132(b), 93 T.C. 946 (1990)); *see also* Rules Comm. Note, TAX CT. R. 132, 93 T.C. 947 (1990).

857 Rules Comm. Note, TAX CT. R. 132, 93 T.C. 947 (1990).

858 *See* Whitaker, *supra* note 850, at 422–23.

859 *See* Appendix E (Standing Pretrial Order).

860 *See id.*; *see also* Whitaker, *supra* note 850, at 445–46 app. A (for a sample Standing Pretrial Order requiring discussion to begin within 20 days).

861 *See* Appendix E (Standing Pretrial Order).

862 *See* Whitaker, *supra* note 850, at 435.

863 *See* Whitaker, *supra* note 850, at 445–46 app. A.

The parties are forewarned in the Standing Pretrial Order that non-compliance can lead to sanctions, including dismissal of the case of the non-complying party. Continuances will only be granted for good reason, even those requested upon joint motion.

The standardized Order requires that the parties stipulate all facts to the maximum extent possible. All documents and written evidence must be marked and stipulated in accordance with Rule 91(b), unless such evidence is to be used to impeach the credibility of a witness. Any non-stipulated documents which a party expects to use at trial (for purposes other than impeachment) must be identified in writing and exchanged by the parties no later than 14 days prior to the first day of the scheduled trial session. Failure to comply with the stipulation or the exchange requirement may result in the court's refusal to receive the documents into evidence.

A significant element of the Standing Pretrial Order is its requirement that a Pretrial Memorandum be prepared by each party in all cases in which a "basis of settlement" has not been reached.[864] The Pretrial Memorandum must be submitted to the court and the opposing party no less than 14 days before the first day of trial session.[865] The memorandum requires the parties to identify any witnesses expected to testify and to include a brief summary of their anticipated testimony. Witnesses not so identified will not be allowed to testify at trial without leave of court. As previously discussed, expert witnesses must prepare a written report that must be submitted to the judge and served on the other parties at least 30 days prior to the first day of trial session.[866] Failure to comply with this requirement may result in the exclusion of the expert's testimony.[867]

The Pretrial Memorandum must also include a summary of the facts of the case and a brief synopsis of applicable legal authorities, as well as any evidentiary problems expected to be encountered. By forcing the parties to focus on the issues, marshal the evidence, and articulate their arguments, the Pretrial Memorandum seeks to increase the possibility of settlement and to decrease the possibility that some significant aspect of the case may be

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[864] *See* Standing Pretrial Order, ¶ 3. The form Pretrial Memorandum adopted by the U.S. Tax Court is attached to the Standard Pretrial Order.

[865] On June 4, 2010, the court began requiring that the Pretrial Memorandum, which previously had been submitted to the trial judge, instead be submitted to the Clerk's Office for filing in all cases. Previously filing was discretionary with the judge. This change ensures retention of the Pretrial Memorandum conforms Tax Court procedures with those of other federal courts..

[866] *See* Standing Pretrial Order, ¶ 6. The Standing Pretrial Order, in this regard, reflects the requirements of Rule 143(g), to which it refers.

[867] *See* TAX CT. R. 143(g)(2) (July 6, 2012 ed.).

overlooked.[868] Even if the Standing Pretrial Order does not lead to the settlement of a particular case, it may nonetheless result in the more efficient use of trial time.[869]

If the parties reach a basis for settlement prior to trial, the Standing Pretrial Order requires that they submit a stipulated decision to the court before the first day of the trial session.[870] Additional time for filing the settled decision may be granted only if it is clear that a settlement has been agreed to by the parties and only if the parties are prepared to stipulate for the record the basis of the settlement and the reasons for the filing delay. Presumably, this restriction is intended to prevent stipulations from falling apart after the court grants additional time and to ensure that the request for additional time to file a stipulated decision is not used as a guise by a party in search of a continuance.

The Standing Pretrial Order should not be confused with the "pretrial conference" provided by Rule 110. A pretrial conference among the parties and the court may be requested by either party or by the court on its own motion.[871] Pretrial conferences are undertaken "with a view to narrowing issues, stipulating facts, simplifying the presentation of evidence, or otherwise assisting in the preparation for trial or possible disposition of the case in whole or in part without trial."[872] Pretrial conferences are not available if a party requesting the conference has not complied with the mandatory stipulation conferences of Rule 91[873] or if the request is frivolous or for the purpose of delay.[874]

5. Standing Pretrial Notice

In cases tried under the small tax case procedures of § 7463 or § 7436(c), the Tax Court provides a Standing Pretrial Notice in lieu of the Standing Pretrial Order. The Standing Pretrial Notice represents a more user-friendly version of the Order, in that it explains the meaning of key concepts such as "settlement" and "stipulations" while also providing the taxpayer with a check-list to prepare for trial.[875] In certain respects, the Standing Pretrial Notice also is less demanding. Rather than directing the parties to stipulate facts and documents that are not in dispute and to file a Pretrial Memorandum, the Standing Pretrial Notice states that the parties

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868 *See* Sterrett, *supra* note 846, at 123; 2 L. CASEY, FEDERAL TAX PRACTICE § 7.48(b) (1981).

869 *See* Sterrett, *supra* note 846, at 123.

870 *See* Appendix E (Standing Pretrial Order).

871 TAX CT. R. 110(b), (c) (July 6, 2012 ed.).

872 TAX CT. R. 110(a) (July 6, 2012 ed.).

873 *See* TAX CT. R. 110(d) (July 6, 2012 ed.).

874 *Id.*

875 *See* Appendix F (Standing Pretrial Notice).

"should" do so.[876] The softening of word choice reflected in the Standing Pretrial Notice is undoubtedly designed to make the process less intimidating for unrepresented taxpayers who frequently use the small tax case procedures.

6. Final Status Report

To further streamline pretrial case management, the court implemented the use of Final Status Reports in 2007. The Standing Pretrial Order directs the parties to submit a Final Status Report only if the status of the case as reported to the court in the Pretrial Memorandum has changed. For parties that receive a Standing Pretrial Notice, the court recommends that they submit a Final Status Report, if applicable.

The Final Status Report was developed as a simple means of informing the court of a last-minute settlement, or a change in the anticipated likelihood or length of trial.[877] The Report can be submitted either electronically on the court's website, by fax, or by mail. The court must receive it no later than 3 p.m. eastern time on the last business day before the case's calendared trial session begins. The submitting party must also send a copy of the Report to the opposing party and provide another copy to the opposing party at the calendar call, if the opposing party is present.

I. Alternative Dispute Resolution

In 1990, the Tax Court adopted Rule 124 to expressly authorize parties to resolve factual disputes by voluntary binding arbitration.[878] The court intended the rule to reflect pre-existing practice, noting that it had "consistently permitted" parties to resolve factual issues through binding arbitration when presented with the request.[879] The court articulated two purposes for adopting the Rule 124. First, the rule was intended to encourage the use of this alternative dispute resolution technique by informing parties of its availability.[880] Second, the rule provided for a basic arbitration procedure while setting forth minimum requirements for an order authorizing use of the procedure.[881] However, the court clarified that the articulation of basic procedure for binding arbitration was not intended to be exclusive: "[T]he Rule is not intended to be unduly restrictive or to discourage innovative and imaginative approaches to arbitration, nor is it

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[876] *See id.*

[877] *See* Press Release, United States Tax Court, Nov. 27, 2007.

[878] TAX CT. R. 124, 93 T.C. 943–44 (1989).

[879] Rules Comm. Note, TAX CT. R. 124, 93 T.C. 944 (1989).

[880] *Id.*

[881] *Id.*

intended to preclude voluntary non-binding arbitration."[882] Additionally, the court noted that the voluntary binding arbitration procedure was particularly well suited to resolve valuation disputes, although the court was careful to note that arbitration under Rule 124 applied without limitation to any factual dispute.[883]

Pursuant to the newly adopted Rule 124, the parties initiated the arbitration procedure through the filing of a joint motion.[884] The motion had to be accompanied by a joint stipulation that (1) identified the issues to be resolved, (2) included a statement that the parties would be bound by the arbitrator's findings, (3) identified the arbitrator or the process to be used to select one, (4) identified how the costs of the arbitration would be allocated, and (5) included a prohibition on ex parte communication with the arbitrator.[885] If the case had not already been assigned to a judge, the chief judge would assign the motion to a judge or special trial judge for disposition.[886] If the court granted the motion, the court would appoint the arbitrator along with any instructions the appointing judge deemed necessary or appropriate.[887] The arbitration process under Rule 124 was concluded by the filing of a report by the parties which stated the findings of the arbitrator and included any report or summary that the arbitrator may have prepared.[888]

Concerned that Rule 124 conveyed an air of exclusivity in favor of binding arbitration, the court retroactively amended the rule in 1998 to include a provision expressly stating that nothing in Rule 124 "shall be construed to exclude use . . . of other forms of voluntary disposition of cases, including mediation."[889] The court went a significant step further to remove arbitration as the focus of Rule 124 in 2011, when it changed the title of the rule to "Alternative Dispute Resolution."[890] In explaining the title change, the court noted that few arbitrations had been conducted in the 20 years since the adoption of Rule 124, compared to substantially more mediations.[891] More substantively, the court expanded the rule to include a section detailing the process for employing voluntary nonbinding

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882 *Id.*
883 *Id.* at 944–45.
884 TAX CT. R. 124(a), 93 T.C. 943 (1989).
885 TAX CT. R. 124(b)(1)–(2), 93 T.C. at 943–44.
886 TAX CT. R. 124(a), 93 T.C. at 943.
887 TAX CT. R. 124(b)(3), 93 T.C. at 944.
888 TAX CT. R. 124(b)(4), 93 T.C. at 944.
889 TAX CT. R. 124(b)(5), 109 T.C. 612–13 (1998).
890 TAX CT. R. 124, 136 T.C. 630–31 (2011).
891 Rules Comm. Note, TAX CT. R. 124, 136 T.C. at 631.

mediation.[892] The court continued to leave the door open for use of other dispute resolution methods.[893]

Under Rule 124(b) as revised, either party may move the court for permission to use voluntary binding mediation to resolve any issue in controversy—not just factual disputes.[894] It may be either a joint or unopposed motion that can be made any time after the case is at issue and before the case is final.[895] If the court grants the motion for mediation, an order granting the motion will set forth directions to the parties as the court considers appropriate.

The mediation is conducted in confidence. Any document or information exchanged pursuant to the mediation is not disclosed to anyone outside of the mediation. Therefore, any document, exhibit, or argument by the parties or counsel does not become part of the record in the case. However, as prescribed in the mediation order, a judge may determine that it is necessary to disclose certain information when a manifest injustice would otherwise occur, disclosure would help establish violation of a law, or the possible harm to the public health or safety outweighs maintaining the integrity of the mediation proceedings.

The parties may request that a judge or special trial judge act as a mediator, and the requested judge may so serve upon order of the chief judge.[896] At the conclusion of the mediation, to the extent the parties reach any agreement, the parties normally will formalize their agreement by filing a stipulated decision or a stipulation of settled issues. As the mediation is nonbinding, the mediator may not make rulings or impose a settlement upon the parties. Rather, the primary role of the mediator is to facilitate a settlement agreed to by the parties. When the parties reach a settlement through mediation, a contract has been formed.[897] A valid settlement therefore cannot be repudiated,[898] although the court can modify or set aside a settlement for good cause.[899] If the parties are unable to reach a settlement as a result of the mediation, the matter will be returned to the docket for trial in due course. The mediator will not communicate with the

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[892] TAX CT. R. 124(b), 136 T.C. at 630–31. The provisions governing voluntary binding arbitration were consolidated under Rule 124(a).

[893] TAX CT. R. 124(c), 136 T.C. at 31.

[894] *See* Rules Comm. Note, TAX CT. R. 124, 136 T.C. at 631 (clarifying that issues susceptible of resolution through mediation "are not limited to factual ones").

[895] *Id.*

[896] TAX CT. R. 124(b)(2), 136 T.C. at 631.

[897] *See* Dorchester Industries, Inc. v. Commissioner, 108 T.C. 320, 330 (1997); Estate of Halder v. Commissioner, T.C. Memo. 2003-84, 85 T.C.M. (CCH) 1051.

[898] *Dorchester Industries*, 108 T.C. at 330.

[899] *Id.* at 334–35.

trial judge with respect to any of the matters that occurred during the mediation.

Mediation has been used successfully by parties before the Tax Court. For instance, in *United Parcel Service of America, Inc. v. Commissioner*,[900] the parties severed a § 38 investment tax credit issue and mediated resolution. On remand from the U.S. Court of Appeals for the Eleventh Circuit, the parties further mediated complete resolution of the remaining issues over multiple years.

[900] T.C. Memo. 1999-268, 78 T.C.M. (CCH) 262, *rev'd and rem'd*, 254 F.3d 1014 (11th Cir. 2001).

PART X

TRIAL PROCEDURE

The principal organic legislation for the Board of Tax Appeals was contained in the Revenue Act of 1924 and the Revenue Act of 1926. These acts generally provided the Board with broad discretion to formulate its rules of practice and procedure. This discretion, in respect of pretrial procedures, was virtually unlimited. However, the extent of permissible discretion in respect of trial and post-trial procedures was qualified by congressional dictates. In fact, the trial and post-trial procedures were, and continue to be, largely shaped by statutory directives. This difference in approach probably was influenced by four considerations that reflected the special problems associated with trial and post-trial procedures.

First, because of the unique opportunity for pre-assessment review, the Board was viewed as potentially the principal trial body for tax controversies. To make such a forum attractive to litigants, it would be necessary to provide taxpayers with an adequate opportunity to be heard at convenient locations throughout the country. Second, the complexity of the legal and factual issues in tax controversies required that Board proceedings be conducted in accordance with relatively liberal rules of evidence. In this connection, it also was recognized that the triers of fact and law in Board proceedings should be individuals with specialized knowledge in tax law. Third, the nature of the tax system as a self-assessing mechanism, in which the relevant facts in most controversies would be in the possession of taxpayers, necessitated appropriate guidelines for determining who would bear the burden of proof. In most situations, such burden would be on the taxpayer, but the desirability for exceptions to this rule was recognized in certain situations. Finally, Congress believed that a principal value of the Board would be as a source of publicized precedents. This role, it was hoped, would (1) reduce the haphazard and conflicting quality of previous administrative and judicial interpretations, and (2) provide a basis by which the Government and the taxpayer would be able to agree to a settlement without the need of a judicial adjudication. The need for such a body of precedents could only be fulfilled if Board procedures assured well-reasoned and uniform decisions.

In response to these considerations, Congress established the Board of Tax Appeals as a national trial body with headquarters in Washington, D.C. The Chairman of the Board was directed to provide local hearings to minimize taxpayer inconvenience and expense. The 1924 Act left to the Board's discretion the promulgation of rules governing both evidence and burden of proof. The 1926 Act limited such discretion with respect to evidence, and later legislation did the same for certain burden of proof questions. In subsequent years, Board/Tax Court experience with such procedures has led to both statutory changes and revisions of Board/Tax Court rules. This Part will examine in detail the development and application of the procedures that govern proceedings before the Tax Court. Additionally, this Part will explore the Tax Court's authority to sanction parties and their counsel for, in general terms, failing to prosecute their proceeding before the court in good faith.

A. Place of Trial

In establishing the Board of Tax Appeals in 1924, Congress believed that pre-assessment review would only be effective if localized hearings were available to aggrieved taxpayers.[1] Local hearings would provide the taxpayer with the substantial convenience of having the Board come to the taxpayer rather than the expensive and time consuming process of going to Washington.[2] The availability of localized hearings would put the Board on a level of accessibility comparable with the Federal district courts in which most refund suits were instituted. Disagreement arose, however, over whether the Board's divisions were to be permanently located outside of Washington or were to ride circuit and return to Washington for the decision process.[3] The proponents of permanent, regional divisions outside Washington believed that such a structure would ensure a more rapid determination of tax appeals.[4] On the other hand, it was argued that the Board's function of establishing a uniform system of tax precedents would be impeded by permanent field divisions.[5] Such divisions would not benefit from other Board members' experience and would make full Board review of division decisions impracticable.[6]

The arguments in favor of a central Washington forum with divisions that would ride circuit prevailed, and the Revenue Act of 1924 authorized the Board's chairman to prescribe localized hearings "with a view to

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[1] *See* S. REP. NO. 68-398, at 9 (1924).

[2] Press Release from the U.S. Board of Tax Appeals, Oct. 8, 1924, filed at the U.S. Tax Court in "Field Divisions: Memoranda & Correspondence."

[3] *E.g.*, 65 CONG. REC. 2621 (1924) (remarks of Mr. Young); *see also* Lyle T. Alverson, *Has the Board of Tax Appeals Failed?*, 4 NAT'L INC. TAX MAG. 337 (1926) [hereinafter cited as Alverson].

[4] 65 CONG. REC. 2621 (1924) (remarks of Mr. Young).

[5] Charles D. Hamel, *The United States Board of Tax Appeals*, 2 NAT'L INC. TAX MAG. 293, 308 (1925) [hereinafter cited as Hamel]; *see also* Alverson, *supra* note 3, at 339.

[6] *Id.*; *see also* Hamel, *supra* note 5, at 308; J.S.Y. Ivins, *What Should Congress Do With the Board of Tax Appeals?*, 3 NAT'L INC. TAX MAG. 391 (1925).

securing reasonable opportunity to taxpayers to appear before the Board . . . with as little inconvenience and expense to taxpayers as is practicable."[7]

The Board initiated its circuit hearings in April, 1925, by sending a three-member division to the northwest and the Pacific coast.[8] Early success of the procedure was evidenced by an increased demand for such hearings and, as a result, the Board announced plans to extend circuit hearings to the eastern part of the country.[9] Nonetheless, the ability of the Board to send more than one division into the field was severely limited. This difficulty arose because the Board, composed of only 16 members, was required to have three members hear each appeal, those three members constituting a "division."[10] In light of the limited manpower, a suggestion was made to have testimony in the form of depositions taken outside of Washington by the law assistants of the Board.[11] However, the basis for this proposal was removed by the 1926 Revenue Act, which authorized segmenting the Board into 16 separate one-member divisions; thus, more divisions were available to meet the increased demand for localized hearings.[12]

Although the additional field divisions somewhat reduced the waiting period for a circuit hearing, a number of operational difficulties continued to plague the Board. An early difficulty confronted by the Board was its lack of an effective procedure to make prompt designation of cases to the circuit calendars. In this connection, the Board had adopted a rule that placed all cases upon the Washington calendar unless the parties requested a circuit hearing.[13] Many times, however, requests for calendar changes would not be received until after the Board had mailed a notice of a hearing in Washington.[14] The Board informally adopted a practice that placed the

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[7] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 338 (now codified at I.R.C. § 7446).

[8] Memorandum from Chairman Korner to members of the Board, Apr. 13, 1925, filed at the U.S. Tax Court in "Field Divisions: Memoranda & Correspondence;" Office Order, Apr. 25, 1925, filed at the U.S. Tax Court in "Field Divisions: Memoranda & Correspondence."

[9] *See* Letter from Chairman Korner to Secretary Mellon, May 24, 1926, at 8, filed at the U.S. Tax Court in "Divisions: Memoranda & Correspondence" [hereinafter cited as Korner Letter].

[10] For a discussion of the division structure, see Part XI.B.

[11] Korner Letter, *supra* note 9, at 8.

[12] Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 106, *amending* Revenue Act of 1924, ch. 234, § 900(c)–(f), 43 Stat. 337 (now codified at I.R.C. § 7444(c)). The membership of the Board and Tax Court remained at 16 until 1980, when Congress increased the number of Tax Court judges to 19. *See* Pub. L. No. 96-439, § 1(a), 94 Stat. 1878 (1980).

[13] B.T.A. RULE 24 (Apr. 1, 1926 ed.).

[14] *See* Preliminary Committee Report of the Joint Committee of Board and Treasury Personnel, c. 1937, at 2, filed at the U.S. Tax Court in "Field Divisions:

cases of all taxpayers residing on the Pacific coast on the circuit calendar, but this departure from the rule was insufficient to stem the delay in hearing cases elsewhere.[15] Nevertheless, serious consideration was not given to the problem until 1937,[16] when 75 percent or more of the cases initially set for hearing in Washington were ultimately placed upon the circuit calendar for hearing in the field.[17]

Various suggestions were offered to remedy the delay and unnecessary paperwork generated by the calendar practice. Some of the proposals were directed at pending cases; others suggested changing procedures for appeals filed in the future. As to pending cases, alternative suggestions were made to have the Board (1) make specific inquiry of each taxpayer, (2) place all cases on the field calendar and remove them to the Washington calendar only upon motion, or (3) notify taxpayers that the hearing would be in Washington unless the taxpayer notified the Board within set time limits.[18] The Board chose a compromise position and provided that all pending cases would be placed upon the calendar that the pleadings indicated would be most convenient for the parties, subject to change only if the parties notified the Board promptly.[19] As to subsequent appeals, the Board amended its rule in 1938 to require that the petition be accompanied by a statement expressing the petitioner's desire as to where the hearing should be held—either in Washington or at a location where the Board customarily held hearings.[20] The Bureau was also permitted, when filing its answer, to request a specific location for trial. The Board would then make a decision as to hearing location and notify the parties.[21] The Board typically observed the wishes of the taxpayer with regard to hearing location.[22] The Board

Memoranda & Correspondence" [hereinafter cited as Preliminary Committee Report].

[15] *Id.*

[16] The primary reason for the late date at which the Board dealt with this problem reflected the fact that in the early years of the Board only a small percentage of total cases heard by the Board were heard in the field. J. Gilmer Korner, *The United States Board of Tax Appeals*, 11 A.B.A. J. 642 (1925). Initially, the Board had indicated that cases heard in the field would not be heard as rapidly as cases in Washington. *See Tentative Plan for Hearing of Appeals Outside of Washington Drafted*, 2 NAT'L INC. TAX MAG. 331 (1924).

[17] Preliminary Committee Report, *supra* note 14, at 2.

[18] *Id.* at 3.

[19] Report of the Joint Committee of Board of Tax Appeals and Chief Counsel's Office, Dec. 17, 1937, at 5, filed at the U.S. Tax Court in "Field Divisions: Memoranda & Correspondence" [hereinafter cited as Joint Committee Report].

[20] B.T.A. RULES 25–26 (Jan. 1, 1938 ed.).

[21] *Id.*

[22] Statutory provisions mandated that preference be given the taxpayer in the selection of trial location. Revenue Act of 1926, ch. 27, § 907(e), 44 Stat. 108 (1926).

would permit a subsequent change if good cause was shown, on motion of either party, provided that the motion was made prior to mailing notice of hearing date to the parties.[23]

Thereafter, the procedure was further amended to limit the situations in which the Commissioner could file an initial request for hearing location with his answer.[24] With the exception of situations in which the petitioner failed to indicate a preference, the Commissioner was barred in the first instance from requesting a different location.[25] The provision for a subsequent motion to change the designated place of hearing was left unchanged.[26] However, in 1990, the Tax Court eliminated the hard deadline on filing a motion to change the place of trial. Instead of treating all motions made after the notice of time of trial had been issued as not timely filed, the court warned that motions made after the designation of the time of trial may be deemed dilatory and therefore denied unless the basis for the motion arose during the later time period or good cause existed for not making the motion sooner.[27]

Another problem in connection with field sessions was the difficulty in obtaining guaranteed courtroom space in which to hold hearings.[28] Prior to

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[23] B.T.A. RULE 26 (Jan. 1, 1938 ed.).

[24] TAX CT. R. 26 (Feb. 9, 1943 ed.).

[25] *Id.* The Tax Court deemed this change advisable because it believed that the Government was not concerned over where the hearing was held.

[26] *Compare* B.T.A. RULE 26 (Jan. 1, 1938 ed.) *with* TAX CT. R. 26 (Feb. 9, 1943 ed.).

[27] TAX CT. R. 140(c) (July 1, 1990 ed.), 93 T.C. 948–89 (1990). The present rule provides as follows:

RULE 140. PLACE OF TRIAL

> **(a) Requests for Place of Trial:** The petitioner, at the time of filing the petition, shall file a request for place of trial showing the place at which petitioner would prefer the trial to be held. If the petitioner has not filed such a request, then the Commissioner, at the time the answer is filed, shall file a request showing the place of trial preferred by the Commissioner. The Court will make reasonable efforts to conduct the trial at the location most convenient to that requested where suitable facilities are available. The parties shall be notified of the place at which the trial will be held.
>
> **(b) Form:** Such request shall be set forth on a paper separate from the petition or answer. See Form 5, Appendix I.
>
> **(c) Motion to Change Place of Trial:** If either party desires a change in the place of trial, then such party shall file a motion to that effect, stating fully the reasons therefor. Such motions, made after the notice of the time of trial has been issued, may be deemed dilatory and may be denied unless the ground therefor arose during that period or there was good reason for not making the motion sooner.

TAX CT. R. 140 (July 6, 2012 ed.).

[28] Joint Committee Report, *supra* note 19, at 19.

1937, the Board, with the exception of a brief period in New York City, had never been able to secure regularly assigned courtroom space in any city outside Washington.[29] This difficulty undoubtedly arose from both a lack of federal office space and reluctance on the part of some courts to view the Board as a judicial entity.[30] Thus, the Board was required to make temporary arrangements in each city in which it held circuit hearings. Such arrangements often proved time consuming and resulted in the Board experiencing considerable difficulty in arranging its circuit calendars.[31] These difficulties reduced the number of circuit hearings that might otherwise be desirable[32] and frequently precluded the Board from giving taxpayers, their counsel, and the Bureau adequate advance notice of hearings.[33]

In 1937, a joint committee of Board and Treasury personnel suggested that the Board direct efforts at securing additional courtroom space and that Treasury assist in these efforts.[34] Furthermore, the committee proposed that fixed schedules of periodic visits to certain cities be established.[35] In combination, these reforms would both reduce the delays in bringing cases to trial and provide counsel for both parties with sufficient advance notice of the hearing to permit them to prepare adequately their cases.[36] The Tax Court has been increasingly successful in procuring courtroom space. In numerous cities, particularly those that are visited frequently during the year, specific federal courtroom space has been designated for the court.[37] The availability of this space has probably been due to active procurement practices by the court, increased federal office

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[29] *Id.*

[30] *See id.*

[31] *Id.* at 20; *see also* Memorandum on Securing Accommodations, Nov. 10, 1937, filed at the U.S. Tax Court in "Field Divisions: Memoranda & Correspondence."

[32] Joint Committee Report, *supra* note 19, at 20.

[33] *Id.*

[34] *Id.* at 21. The Joint Committee, composed of members of the Board, Treasury, and Internal Revenue, was appointed to consider how contested deficiencies might be more effectively handled. *Id.* at 1.

[35] Preliminary Committee Report, *supra* note 14, at 5.

[36] *Id.*; *see also* Joint Committee Report, *supra* note 19.

[37] *See, e.g.*, Tax Court Conference Minutes, May 15, 1970, and Feb. 12, 1971; *see also* LESTER M. PONDER, UNITED STATES TAX COURT PRACTICE AND PROCEDURES 132 (1976). *But see* Report of Comm. on Court Procedure, ABA TAXATION SECTION (1971), *reprinted in* 25 TAX LAW. 598–99 (1972); Report of Comm. on Court Procedure, ABA TAXATION SECTION 128–29 (1949). The Committee on Court Procedure viewed the space problem as very acute in its 1971 report. In fact, the committee proposed that legislation be enacted that would require the General Services Administration to acquire office space in every major city for all travelling federal courts.

space, and legislative recognition of the court's judicial status in 1969.[38] The Tax Court presently conducts trial sessions in 74 cities spread over 46 states and the District of Columbia.[39] The court has dedicated courtroom space in 37 of these locations, and it borrows courtroom facilities in the remaining cities. Hence, even though the bulk of the Tax Court's work is performed at its headquarters in Washington, D.C., the court has a broad physical presence nationally to facilitate taxpayer access to its prepayment forum.

B. Evidence

Although the statutory provisions governing the rules of evidence in the Tax Court have been amended on several occasions,[40] there has been no change in the court's basic approach to admissibility problems. The court consistently has adhered to a practice of liberal admission of evidence, usually admitting evidence "not clearly inadmissible, and then decid[ing] its relevancy and weight, if any, after reviewing the entire record."[41] This practice reflects the belief that the court should provide the parties with an opportunity to develop the factual bases of their positions to the fullest extent possible.[42]

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[38] Tax Court Conference Minutes, May 15, 1970, and Feb. 12, 1971.

[39] TAX CT. R. Appendix I, Form 5 ("Request for Place of Trial"). The current available locations for Tax Court field hearings are reproduced in Appendix D.

[40] *Compare* Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337 *with* Revenue Act of 1926, ch. 27, § 907(a), 44 Stat. 106, Int. Rev. Code of 1939, ch. 5, § 1111, 53 Stat. 160, and I.R.C. § 7453.

[41] Lester M. Ponder, *Trial Court Litigation–Tax Court, Court of Claims and District Court: A Practicing Lawyer's View*, 21 U.S.C. TAX INST. 117, 134 (1969) [hereinafter cited as Ponder]; *see also* Martin D. Cohen, *Litigation Techniques That Increase Your Chances for Success in the Tax Court*, 35 J. TAX'N 340, 343 (1971); Arthur Groman & Hilbert P. Zarky, *Rules of Evidence in Tax Court of United States,* 10 U.S.C. TAX INST. 603 (1958); Max J. Hamburger, *Choice of Forum for Litigation: The United States Tax Court*, 32 N.Y.U. ANN. INST. ON FED. TAX'N 1315, 1325–28 (1974) [hereinafter cited as Hamburger]; Harry M. Harrington, Jr., *What are the Rules of Evidence Applicable in the Tax Court of the United States?*, 46 TAXES 471 (1968) [hereinafter cited as Harrington]; J. Gilmer Korner, *Procedure in the Appeal of Tax Cases Under the Revenue Act of 1926*, 4 NAT'L INC. TAX MAG. 413, 414–15 (1926) [hereinafter cited as Korner, 1926]; Albert Raum, *Tax Court Litigation*, 9 U.S.C. TAX INST. 631, 647 (1957) [hereinafter cited as Raum]; Henry D. Stevens, *Legal Evidence Before the Board of Tax Appeals*, 6 NAT'L INC. TAX MAG. 459, 460 (1928) [hereinafter cited as Stevens].

[42] Hamburger, *supra* note 41, at 1327–28; Thomas V. Lefevre, *The Trial of a Tax Court Case*, 27 N.Y.U. ANN. INST. ON FED. TAX'N 1449, 1499–1500 (1969) [hereinafter cited as Lefevre]; Ponder, *supra* note 41, at 133–34.

The earliest enactment dealing with the Board, the 1924 Revenue Act, empowered the Board to prescribe its own rules of practice and evidence.[43] Pursuant to this authority, the Board promulgated rules of practice in July, 1924, but specifically provided for only one small aspect of evidence admissibility, relating to ex parte affidavits.[44] Otherwise, the Board deemed it inadvisable to adopt specific and technical rules of evidence. The development of such rules would require time and effort better spent in dealing with the caseload that had developed quickly; moreover, the application of rigid evidentiary rules would interfere with the general, informal atmosphere the Board desired in its hearings.[45]

Despite the fact that no formal code of evidence was promulgated, the Board was not free to ignore judicial evidentiary standards in the interest of informality.[46] The 1924 Act required the Board's findings of fact in a case to be prima facie evidence in any subsequent proceeding in federal court.[47] It was therefore necessary to provide a record supported by adequate proof that would be cognizable by judicial bodies.[48]

In an attempt to effect a compromise between the desired informality and the statutory responsibility to present a prima facie record, the Board, in ruling on evidence admissibility, generally followed the evidentiary rules applicable in equity proceedings.[49] Under such rules, the Board could receive a wider spectrum of evidence than that admissible in proceedings at law.[50] The standard thus adopted was reasonable because Board proceedings, with their absence of jury trials, resembled equity more than law.[51]

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[43] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337 (now codified at I.R.C. § 7453).

[44] *See* B.T.A. RULE 31 (July, 1924 ed.) (banning use of ex parte affidavits as evidence unless opposing counsel consented to their introduction).

[45] Letter from Chairman Hamel to H. Mitchell, Oct. 8, 1924, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence."

[46] *See* J. Gilmer Korner, *Practice Before The United States Board of Tax Appeals*, 3 NAT'L INC. TAX MAG. 220, 221 (1925) [hereinafter cited as Korner, 1925].

[47] Revenue Act of 1924, ch. 234, § 900(g)–(h), 43 Stat. 337, 338.

[48] 65 CONG. REC. 2684 (1924) (remarks of Mr. Chindblom); Hamel, *supra* note 5, at 295.

[49] *See Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means*, 69th Cong., 1st Sess. 856–57 (1925); Memorandum from T.C. Lavery to R.H. Jackson, General Counsel, Internal Revenue Service, c. Aug. 1935, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence" [hereinafter cited as Jackson Memorandum]. *But see* Willis W. Ritter, *Pitfalls in Practice Before the Board of Tax Appeals*, 3 NAT'L INC. TAX MAG. 297, 298 (1925) [hereinafter cited as Ritter].

[50] J.S.Y. Ivins, *What Should Congress Do with the Board of Tax Appeals?*, 3 NAT'L INC. TAX MAG. 391, 392 (1925); Korner, 1925, *supra* note 46, at 221.

[51] Korner, 1925, *supra* note 46, at 221.

Nonetheless, the incentive to enforce rigidly even the equitable standards of evidence was hindered by the lack of direct appeal or review of the Board's decisions.[52] Subsequent action was de novo, and there was no occasion for the parties to preserve rights on appeal by way of exceptions to evidence and requests for findings.[53] The hearing before the Board was "little more than a preliminary skirmish, a run for luck."[54] Hence, strict use of equity rules was never enforced by the Board, and evidence was usually admitted for "what it was worth."[55]

The enactment of the Revenue Act of 1926 radically altered the existing procedure for judicial review of the Board's decisions.[56] No longer was the Board a forum for preliminary skirmishes,[57] and a party aggrieved by a decision of the Board could not bring a collateral action and have a trial de novo on issues of fact and law. The Act limited his right to a direct review of the Board's decision in a court of appeals.[58] With this provision for an appellate procedure, it became necessary that definite and consistent standards governing the admissibility of evidence before the Board be employed.[59] Several proposals were offered as to what standards should be used. One suggestion was that the Board develop its own rules of evidence in keeping with the provisions of the 1924 Revenue Act.[60] However, this approach was considered unfeasible as it would have required the Board to write a treatise on evidence.[61] Additionally, the prior two years had demonstrated that the Board, left to its own devices, had failed to adopt a consistent pattern of evidence admissibility.[62] Another proposal was for the Board to adopt rules of evidence prevailing in the United States district courts.[63] This proposal was objectionable since the district courts applied the rules of evidence of the particular state in which they were located,[64]

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[52] *See* Korner, 1926, *supra* note 41, at 414.

[53] Revenue Act of 1924, ch. 234, §§ 274(a)–(b), 900(g), 43 Stat. 297, 337.

[54] Blair v. Curran, 24 F.2d 390, 392 (1st Cir. 1928).

[55] Jackson Memorandum, *supra* note 49, at 3; *see also Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means,* 69th Cong., 1st Sess. 856–57 (1925); J. Emmett Sebree, *United States Board of Tax Appeals*, 7 TEMP. L.Q. 428, 432 (1933); Stevens, *supra* note 41, at 460. *But see* Walter W. Hammond, *The United States Board of Tax Appeals*, 11 MARQ. L. REV. 1, 9 (1925); Ritter, *supra* note 49, at 298.

[56] *Compare* Revenue Act of 1926, ch. 27, §§ 1001, 1003(a), 44 Stat. 109, 110 *with* Revenue Act of 1924, ch. 234, § 900(g)–(h), 43 Stat. 337, 338.

[57] Bolon B. Turner, *The Tax Court of the United States, Its Origin and Functions*, in THE HISTORY AND PHILOSOPHY OF TAXATION 31, 36 (1955).

[58] Revenue Act of 1926, ch. 27, §§ 1001, 1003(a), 44 Stat. 109, 110.

[59] 67 CONG. REC. 1144 (1925) (remarks of Mr. Mills).

[60] *Id.* at 1143 (remarks of Mr. Garrett).

[61] *Id.* at 1144 (remarks of Mr. Mills).

[62] *Id.*

[63] *Id.* at 1137.

[64] *Id.* at 1144.

and would therefore lead to inconsistent rules of evidence for the Board. A party's success in a case might depend upon the fortuitous location of where the Board was sitting when the case was heard.[65] Additionally, such a rule would be difficult for the Board to apply because it would require the application of 48 systems of evidentiary rules. The Board had experienced the difficulties with such a rule under the 1924 Act, pursuant to which parties occasionally argued that questions of admissibility be determined by the laws of evidence prevailing in the district where the hearing occurred.[66]

The difficulties with the foregoing proposals led Congress to require that the Board apply the rules of evidence of the courts of equity of the District of Columbia.[67] The Board would now have a single source of evidentiary precedents that was consistent with the general theory of admissibility the Board had employed during its first two years.[68]

Notwithstanding the expressed direction to follow the District of Columbia equity rules, the attitude of certain Board members toward strict application of evidentiary standards was not markedly changed, and evidence continued to be accepted on a "for what it was worth" basis.[69] Several factors contributed to this reluctance to apply strictly the required rules of evidence. The Board, in the view of certain members, was an executive agency and not a judicial body.[70] Additionally, some Board members believed it better to let everything in to prevent reversal and to ensure an adequate record for the higher court, even if evidence of dubious quality was admitted.[71] Unlike cases at law, improperly received evidence at

[65] *Id.* at 1137; Korner, 1926, *supra* note 41, at 414.

[66] Jackson Memorandum, *supra* note 49, at 4.

[67] Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 107, *amending* Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 338; 67 CONG. REC. 3530 (1925). At the time of the 1926 revision, "the Equity Court in the District of Columbia . . . [was] the Supreme Court of the District sitting in equity cases." Stevens, *supra* note 41, at 460. Pursuant to section 61 of the then D.C. Code, "the Supreme Court of the District [possessed] the same powers and [exercised] the same jurisdiction as the Circuit and district courts of the United States." *Id.* Section 1640 of the Code provided that the sources of evidence applicable in equity cases were the common law, principles of equity, and British statutes in force in Maryland on February 27, 1801, except insofar as they were inconsistent with, or replaced by some provision of the Code. *Id.* Other sources of evidence were the provisions of the Code, rules and decisions of the United States Supreme Court in reference to the District of Columbia's rules of evidence, rules and decisions of the court of appeals in the district, and rules and decisions of the supreme court of the district. *Id.*

[68] *See generally* Korner, 1926, *supra* note 41, at 414–15; Stevens, *supra* note 41, at 461.

[69] Jackson Memorandum, *supra* note 49, at 3.

[70] *Id.* at 29.

[71] *Id.*

the trial level in equity cases was not a basis for reversal.[72] On the other hand, the exclusion of proper evidence was reversible.[73] Finally, the Board felt pressured to accept some forms of improper evidence because this was frequently the only type of proof submitted by petitioners unfamiliar with the Board, who mistakenly believed that the Board was an agency of the Bureau of Internal Revenue and that its proceedings were therefore administrative in nature.[74]

In 1939, the statute governing the rules of evidence was amended for the second time. The new provision required that the Board follow the rules of evidence "applicable in courts of the District of Columbia in the type of proceedings which prior to September 16, 1938, were within the jurisdiction of the courts of equity of said District."[75] This change was necessitated by the promulgation of the Federal Rules of Civil Procedure in 1938, which provided for the merger of all law and equity cases into one form of civil action.[76] The new statutory provision was designed to prevent this merger from affecting the substantive rules of evidence before the Board; it had no other purpose and did not effect any change in pre-existing Board practice.[77]

Fifteen years later, as part of the 1954 Code revision, the reference to equity rules was dropped and the Tax Court (the Board had been renamed the Tax Court of the United States by the Revenue Act of 1942[78]) was required to follow the same evidentiary rules applicable in non-jury trials in the United States District Court of the District of Columbia.[79] The Tax

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[72] *Id.* at 30.

[73] Slayton v. Commissioner, 76 F.2d 497, 498 (1st Cir. 1935), *aff'g* 29 B.T.A. 931 (1934); R. Hoe & Co. v. Commissioner, 30 F.2d 630, 633–34 (2d Cir. 1929), *aff'g* 7 B.T.A. 1277 (1927); S.G. Sample Co. v. Commissioner, 23 F.2d 671, 672 (5th Cir. 1928), *rev'g* 5 B.T.A. 1034 (1927).

[74] John E. McClure, *Practice Before the United States Board of Tax Appeals*, 6 NAT'L INC. TAX MAG. 92 (1928).

[75] Int. Rev. Code of 1939, ch. 5, § 1111, 53 Stat. 160 (now codified at I.R.C. § 7453). The Board amended its rules to reflect the statutory change in its April 1, 1941 edition. *See* B.T.A. RULE 31(a) (Apr. 1, 1941 ed.).

[76] FED. R. CIV. P. 2.

[77] *But see* Letter from J. Hanes, Under Secretary of the Treasury, to Chairman Arundell, Mar. 15, 1939, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence," and Letter from Chairman Arundell to J. Hanes, Mar. 29, 1939, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence," wherein a recommendation by the Under Secretary to amend § 1111 of the 1939 Internal Revenue Code to provide that the proceedings of the Board be conducted in accordance "with the rules of evidence applicable in the courts of the District of Columbia" was endorsed by the Chairman.

[78] Revenue Act of 1942, ch. 619, § 504, 56 Stat. 957.

[79] I.R.C. § 7453. Subsequent to the statutory revision, the Tax Court revised Rule 31(a) of its Rules of Practice to provide that "the proceedings of the Court

Court, which had proposed the change to Congress, noted that there had been no separate courts of equity in the District of Columbia after September 16, 1938, and that the 1939 provision was the source of persistent concern among members of the tax bar.[80] The amendment, by removing the reference to an obsolete type of proceeding, would clarify the law and eliminate much of the confusion that then existed.[81]

Since the United States District Court of the District of Columbia was required to follow the guidelines specified in Rule 43(a) of the Federal Rules of Civil Procedure for the admissibility of evidence,[82] the Tax Court was also bound by this provision.[83] Prior to a significant revision that took effect in 1975,[84] Rule 43(a)[85] represented a significant departure from preexisting practice and resulted from dissatisfaction with the technical rules of common law evidence. The adoption of the rule signaled more expansive tests for the admissibility of evidence.[86] The rule provided that evidence was admissible if it met any of three standards: (1) the provisions

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and its divisions will be conducted in accordance with the rules of evidence applicable in trials without a jury in a United States District Court for the District of Columbia." TAX CT. R. 31(a) (Aug. 15, 1955 ed.).

[80] Memorandum from Rules Committee to the Tax Court, Jan. 6, 1954, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence."

[81] *Id.*

[82] Rule 1 of the Federal Rules of Civil Procedure provided that such rules "govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . ." FED. R. CIV. P. 1 (prior to amendment in 2007 in connection with general restyling of the Federal Rules of Civil Procedure).

[83] TAX CT. R. 143 (Jan. 1, 1974 ed.); Harry Graham Balter, *Rules of Evidence Applicable in Proceedings Before the Tax Court of the United States: Burden of Proof and Presumptions*, MARQ. 7TH ANN. INST. ON TAX'N 1, 2 (1956) [hereinafter cited as Balter]; Harrington, *supra* note 41, at 471–72; Ponder, *supra* note 41, at 134; Raum, *supra* note 41, at 647; Memorandum from E. Radue to Chairman of the Rules Committee, Sept. 6, 1967, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence;" Memorandum from R. Caldwell to Judge Raum, Chairman of the Rules Committee, Sept. 1, 1967, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence."

[84] *See* FED. R. CIV. P. 43, Advisory Comm. Notes – 1972 Amendments. The 1982 amendments to Rule 43 became effective on August 1, 1975. *See* Pub. L. No. 93-595, § 3, 88 Stat. at 1926, 1949.

[85] For a general discussion of the provisions of Rule 43(a) as then in effect, see CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 456–58 (3d ed. 1976). Rule 43 was revised significantly in 1972 when its general provisions were superseded by the detailed provisions of the then-new Federal Rules of Evidence.

[86] *See, e.g.*, Edwin Conrad, *Let's Weigh Rule 43(a)*, 38 VA. L. REV. 985, 987 (1952); Leonard C. Thompson, *Rule 43(a)—A Decadent Decade*, 34 CORNELL L. Q. 238 (1948); Note, *The Admissibility of Evidence in Federal Courts Under Rule 43(a)*, 46 COLUM. L. REV. 267 (1946).

of a federal statute providing for admissibility;[87] (2) the rules theretofore applied in federal courts in suits in equity; or (3) the rules of evidence in the courts of the state in which the federal court was sitting.[88] Since the District of Columbia is not a state, its evidentiary rules are not affected by state law.[89] Accordingly, the Tax Court had to base the admissibility of evidence on the remaining two provisions of former Rule 43(a). Of these, the standard of prior equity practice was by far the more important provision, since few federal statutes on evidence were then in existence.[90]

Courts declared the purpose of former Rule 43(a) to be in favor of admissibility rather than exclusion,[91] and the provision regarding prior equity practices was interpreted broadly.[92] As a result, broad latitude was accorded to the trial judge in his rulings on admissibility.[93] In this connection, federal courts did not view themselves as limited in the application of the provision to only those instances in which the same or substantially the same evidence was held to be admissible in pre-1938 decisions by federal equity courts.[94] Such prior courts considered other sources of law for their evidentiary rulings, and courts operating under Rule 43(a) did likewise, further increasing the scope of admissibility.[95] These

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[87] *E.g.*, 28 U.S.C. § 1732 (Supp. 1977) (business records statute).

[88] While state rules of admissibility are controlling in the federal courts under Rule 43(a), state exclusionary rules are not, and evidence admissible under either of the first two tests will be received even though the state courts have held otherwise. *See, e.g.*, Monarch Ins. Co. of Ohio v. Spach, 281 F.2d 401, 410 n.20 (5th Cir. 1960); Boerner v. United States, 117 F.2d 387, 391 (2d Cir. 1941).

[89] Harrington v. Commissioner, 48 T.C. 939, 954 (1967), *aff'd*, 404 F.2d 237 (5th Cir. 1968).

[90] CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 457 (3d ed. 1976).

[91] *See, e.g.*, Levitt v. H.J. Jeffries, Inc., 517 F.2d 523, 525 (7th Cir. 1975); Bair v. American Motors Corp., 473 F.2d 740, 744 (3d Cir. 1973); Bailey v. Kawasaki-Kisen K.K., 455 F.2d 392, 397 (5th Cir. 1972); Butler v. Southern Pac. Co., 431 F.2d 77, 79 (5th Cir. 1970); Wright v. Wilson, 154 F.2d 616, 617 (3d Cir. 1946); Dellefield v. Blocdel Realty Co., 128 F.2d 85, 93 (2d Cir. 1942).

[92] *E.g.*, United States v. 60.14 Acres of Land, 362 F.2d 660, 666 (3d Cir. 1966), wherein the court noted that:

> [if the provision were] to be limited to specific equity precedents the category would be of little significance for such precedents are few and inadequate. Moreover, they would establish no independent principles, for in evidence as elsewhere the maxim applies that equity follows the law. . . . To prevent the creation of precedents merely because one did not already exist would frustrate the liberal purpose of the Rule, and in light of equity's historic role in alleviating the rigidity of the common law, would render ironic the reference to proceedings in courts of equity.

[93] *See* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).

[94] *See* Monarch Ins. Co. of Ohio v. Spach, 281 F.2d 401 (5th Cir. 1960).

[95] In *Monarch*, the court stated that:

expansive views of the federal courts in interpreting the provisions of former Rule 43(a) lent support to the Tax Court's long established liberal evidentiary policy and supplied adequate justification for its continuance.[96]

Although the emphasis in former Rule 43(a) generally was conceded to be on admissibility, the vagueness of the "equity" standard necessarily led to varying interpretations.[97] Additionally, uncertainties developed with respect to the extent to which federal courts could formulate essentially new rules based on the equity standard.[98] As a result, an advisory committee was created by the Judicial Conference of the United States in 1965 to codify a system of federal rules of evidence.[99] Ten years later, Congress adopted the recommendations of the advisory committee for the federal court system.[100] Since these rules are applicable to the District Court for the District of Columbia,[101] they are applicable to the Tax Court as well, and the Tax Court, in its 1974 rules revision, provided for the applicability of the new rules in its proceedings.[102]

Although the Tax Court has never before been subject to a comprehensive code regulating the admissibility of evidence in its

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> in today's litigation with its endless complexities many of which are an outgrowth of our scientific age we would hardly think that a court instituted with all of the power the organic constitution could invest in it would have to stand helpless in the face of a new situation. Since it has vast duties and powers . . . surely such [a] court has the capacity to deal judicially with the manner of ascertaining the truth in a novel situation.

281 F.2d at 411.

96 *See* Hicks Co. v. Commissioner, 56 T.C. 982, 1014–15 (1971); *see also* Hamburger, *supra* note 41, at 1327; Ponder, *supra* note 41, at 133–34.

97 Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1286–87 (5th Cir. 1974).

98 *See, e.g.*, United States v. 60.14 Acres of Land, 362 F.2d 660 (3d Cir. 1966).

99 For a discussion of the historical background leading to the creation of the Advisory Committee, see KENNETH R. REDDEN & STEPHEN A. SALTZBURG, FEDERAL RULES OF EVIDENCE 1–5 (1975); *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73 (1962). Early recognition of the effect that a uniform rules of evidence scheme would have on the Tax Court is indicated in a letter from Chief Judge Tietjens to W. Shafroth, Secretary, Committee on Rules of Practice and Procedure, Mar. 18, 1963, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence," in which the Chief Judge advised Mr. Shafroth of the Tax Court's interest in the Advisory Committee.

100 Pub. L. No. 93-595, 88 Stat. 1926 (effective Aug. 1, 1975).

101 The Federal Rules of Evidence are applicable to proceedings in all courts of the United States. Fed. R. Evid. 101(a).

102 TAX CT. R. 143(a) (Jan. 1, 1974 ed.) provided that its rules "include the rules of evidence in the Federal Rules of Civil Procedure and any rules of evidence generally applicable in the Federal courts (including the United States District Court for the District of Columbia)." This provision remains in the current version of the rule.

proceedings, the federal evidentiary rules should have little practical effect on the court's traditional policy of liberal admission. Moreover, the Federal Rules of Evidence, with their increased bias in favor of admissibility, will narrow further any evidentiary distinctions that formerly existed between the Tax Court and other federal tribunals.[103]

The most recent change in the Tax Court's evidentiary rules occurred in 2009, when the court revised Rule 143 of its Rules of Practice and Procedure to prescribe testimony procedures that would more closely follow current Rule 43 of the Federal Rules of Civil Procedure. Rule 143 generally requires a witness to testify in open court. However, beginning in 2010, that requirement may be satisfied by contemporaneous transmission of testimony from a different location.[104] This alternate means of providing testimony is not available as of right; rather, the court may permit its use only where good cause in compelling circumstances is shown, and then only with "appropriate safeguards."[105]

The rule does not specify the form of transmission. However, the advisory committee notes to Rule 43 of the Federal Rules of Civil Procedure acknowledge that video transmission should be used where the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission.[106] The notes of the Rules Committee also recognize that audio transmission may be sufficient, particularly where the testimony is of less significance to the matters in dispute.[107]

In adopting the revision to its Rule 143, the Tax Court recognized that witnesses periodically are unable to attend a trial for a variety of unexpected reasons (such as accident or illness) but remain able to testify from another location.[108] Rescheduling the trial or hearing to accommodate such a witness could cause substantial delays and significant costs.[109] In such circumstances, the court recognizes that justice may be better served by

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[103] *See* Balter, *supra* note 83; Lefevre, *supra* note 42, at 1499. For a treatise-like review of the Tax Court's experience in applying the Federal Rules of Evidence, see Joni Larson, *Tax Evidence III: A Primer on the Federal Rules of Evidence as Applied by the Tax Court*, 62 TAX LAW. 555 (2009).

[104] TAX CT. R. 143(b) (July 6, 2012 ed.).

[105] *Id.* Based on the explanatory note to Rule 43 of the Federal Rules of Civil Procedure (on which the revisions to Tax Court Rule 143 were based), "appropriate safeguards" entail measures that ensure accurate identification of the witness and that protect the witness against influence by persons present at the location where the testimony is being provided. FED. R. CIV. P. 43, Adv. Comm. on Rules Notes–1996 Amendment.

[106] Rules Comm. Note, TAX CT. R. 143 (July 6, 2012 ed.), 134 T.C. 361 (2010).

[107] *Id.*

[108] *Id.*

[109] *Id.*

allowing the witness to testify by contemporaneous transmission. Such accommodation could be particularly useful where a risk exists that other, and perhaps more critical, witnesses may be unavailable at a later date. The Tax Court therefore employs courtroom technology to facilitate the receipt of remote testimony from a witness when necessary.[110]

C. Burden of Proof

The allocation of the burden of proof in proceedings before the Board of Tax Appeals and the Tax Court traditionally has been derived from common law principles, superseded by statutory directive in narrow instances only. However, Congress took a greater interest in burden of proof allocations through the enactment of § 7491 as part of the Internal Revenue Service Reform and Restructuring Act of 1998,[111] through which Congress imposed more extensive deviations from the prevailing norms to the benefit of the taxpayer. This Section first discusses the development of the general principles governing the allocation of the burden of proof in proceedings before the Board and the Tax Court and then details the manner in which § 7491 alters the pre-existing landscape.

1. Development of General Rule

Since the inception of the Board in 1924, the burden of proof in its proceedings has, as a general matter, been placed on the taxpayer.[112] Although little doubt about the propriety of placing this burden on the taxpayer has been expressed,[113] the rule itself has been difficult to define and apply.[114] Varying judicial interpretations have arisen as to the nature

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[110] *Id.* at 362.

[111] Pub. L. No. 105-206, § 3001(a), 112 Stat. 685, 727.

[112] *Compare* B.T.A. RULE 20 (July 1, 1924 ed.) *with* TAX CT. R. 142 (July 16, 2012 ed.).

[113] Rockwell v. Commissioner, 512 F.2d 882 (9th Cir. 1975); *Hearings on Revenue Revision*, *1925, Before the House Comm. on Ways and Means*, 69th Cong., 1st Sess. 907 (1925) [hereinafter cited as 1925 House Hearings]; Randolph E. Paul, *A Plea For Better Tax Pleading*, 18 CORNELL L.Q. 507, 517 (1933) [hereinafter cited as Paul].

[114] *See* Balter, *supra* note 83, at 19; Lawrence F. Casey, *A Case of Failure of Proof in the Tax Court*, 6 TAX L. REV. 227 (1951) [hereinafter cited as Casey]; George Craven, *Pre-Trial and Post-Trial Tax Court Practice*, 4 N.Y.U. ANN. INST. ON FED. TAX'N. 260, 263 (1946) [hereinafter cited as Craven]; Albert L. Hopkins, *The United States Board of Tax Appeals*, 12 A.B.A. J. 466, 468 (1926) [hereinafter cited as Hopkins]; Mark Marcossan, *The Burden of Proof in Tax Cases*, 29 TAXES 221 (1951); William Schwerdtfeger, *The Burden of Proof in the Tax Court*, 42 KY. L.J. 147, 149 (1954).

and extent of the taxpayer's burden of proof[115] and the relationship of the presumption of correctness to the burden of proof.[116] Likewise, in cases in which the burden of proof has been placed on the Commissioner, most notably in the cases of allegations of fraud[117] and requests for affirmative relief,[118] disagreement has arisen over the extent of the Commissioner's burden in proving the former[119] and in defining those situations that constitute the latter.[120]

The burden of proof on the taxpayer in Tax Court proceedings appears to consist of two distinct evidentiary burdens: first, the burden of going forward with sufficient evidence on an issue of fact to entitle the taxpayer to have the issue decided by the court on the basis of the evidence presented, and second, the burden of final persuasion that the evidence introduced at trial meets the requisite level of proof necessary to sustain the taxpayer's litigating position.[121] An additional factor in the taxpayer's burden of proof is the presumption of correctness accorded the findings contained in the deficiency notice.[122] Two divergent views on the

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[115] *Compare,* Cohen v. Commissioner, 266 F.2d 5, 11 (9th Cir. 1959) *with* Commissioner v. Smith, 285 F.2d 91, 95 (5th Cir. 1960).

[116] *Compare* Welch v. Helvering, 290 U.S. 111 (1933), *aff'g* 63 F.2d 976 (8th Cir.), *aff'g* 25 B.T.A. 117 (1932) *with* Fairmount Cemetery Ass'n v. Helvering, 79 F.2d 163, 164–65 (D.C. Cir. 1935), *rev'g and rem'g* 30 B.T.A. 740 (1934), *and* Hemphill Schools, Inc. v. Commissioner, 137 F.2d 961, 964 (9th Cir. 1943), *vacating and rem'g* 46 B.T.A. 1282 (1942).

[117] By statute, the Commissioner bears the burden of proof in any proceeding "involving the issue whether the petitioner has been guilty of fraud with intent to evade tax." I.R.C. § 7454(a); TAX CT. R. 142(b) (July 6, 2012 ed.).

[118] TAX CT. R. 142(a) (July 6, 2012 ed.).

[119] *Compare* Arlette Coat Co. v. Commissioner, 14 T.C. 751 (1950) *with* Miller v. Commissioner, 51 T.C. 915 (1969) *and* York v. Commissioner, 24 T.C. 742 (1955).

[120] *See* Balter, *supra* note 83, at 19; Samuel Byer, *Limitation of Issues in Tax Litigation*, 18 N.Y.U. ANN. INST. ON FED. TAX'N 1035 (1960); Richard Forman, *The Burden of Proof*, 39 TAXES 737 (1961) [hereinafter cited as Forman]; George L. Whitfield & Charles E. McCallum, *Burden of Proof and Choice of Forum in Tax Litigation*, 20 VAND. L. REV. 1179 (1967) [hereinafter cited as Whitfield & McCallum].

[121] *See* Balter, *supra* note 83, at 20–22; Herman H. Copelon, *Practical Problems on Burden of Proof in Civil Trials*, 10 N.Y.U. ANN. INST. ON FED. TAX'N 865, 868–70 (1951) [hereinafter cited as Copelon]; Bouldin S. Motherhead, *The Burden of Proof in Federal Tax Cases*, 14 CERT. PUB. ACCT. 286, 287 (1934); Theodore Ness, *The Role of Statutory Presumptions in Determining Federal Tax Liability*, 12 TAX L. REV. 321, 329 (1957) [hereinafter cited as Ness].

[122] Avery v. Commissioner, 22 F.2d 6 (5th Cir. 1927). "No reasonable taxpayer will quarrel with this special endowment of *correctness* bestowed upon the Commissioner's letters. It is historically well-founded and it is necessary as an aid to the collection of revenues . . . ." Paul, *supra* note 113, at 517. Note that the presumption of correctness does not attach if the Commissioner's determination is

presumption's effect upon the burden of proof have developed. The prevailing view is that the presumption is coextensive with the taxpayer's initial burden of going forward with the evidence.[123] Hence, the taxpayer must appear and introduce competent and substantial evidence that could support a finding in his favor,[124] or the court will dismiss the petition and determine the deficiency as specified by the Commissioner.[125] Accordingly, once the taxpayer has produced such evidence that could support a finding to the contrary, the presumption vanishes and the case must be decided upon the evidence presented.[126] The presumption is merely a procedural device, not a substitute for evidence and cannot survive the introduction by the taxpayer of countervailing evidence.[127] In this view, the presumption simply requires a threshold showing that a reasonable man *could* reach a conclusion favorable to the taxpayer.[128]

On the other hand, some early Board decisions indicated disagreement with this approach and instead viewed the presumption of correctness as

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proven to be arbitrary or careless. *See* Estate of Mitchell v. Commissioner 250 F.3d 696, 702 (9th Cir. 2001) (citing Cohen v. Commissioner, 266 F.2d 5, 11 (1959)). In such cases, not only does the presumption vanish, the burden rests on the Commissioner to establish the correct amount of tax owed. *Id.*

123 Rockwell v. Commissioner, 512 F.2d 882, 885 (9th Cir. 1975); Potts, Davis & Co. v. Commissioner, 431 F.2d 1222, 1225 (9th Cir. 1970), *aff'g* T.C. Memo. 1968-257; Barnes v. Commissioner, 408 F.2d 65, 68 (7th Cir. 1969); Gersten v. Commissioner, 267 F.2d 195, 199 (9th Cir. 1959), *aff'g in part and rem'g in part* 28 T.C. 756 (1957); A & A Tool & Supply Co. v. Commissioner, 182 F.2d 300, 304 (l0th Cir. 1950), *rev'g and rem'g* 8 T.C.M. (CCH) 473 (1949); Crude Oil Corp. of America v. Commissioner, 161 F.2d 809, 810 (10th Cir. 1947), *rev'g and rem'g* 6 T.C. 648 (1946); Hemphill Schools, Inc. v. Commissioner, 137 F.2d 961, 964 (9th Cir. 1943), *vacating and rem'g* 46 B.T.A. 1282 (1942); Starr v. Commissioner, T.C. Memo. 1976-289, 35 T.C.M. (CCH) 1291, 1293; Durovic v. Commissioner, 54 T.C. 1364, 1393 (1970), *aff'd in part and rev'd in part*, 487 F.2d 36 (7th Cir. 1973); Reiben v. Commissioner, T.C. Memo. 1959-91, 18 T.C.M. (CCH) 416, 418.

124 *E.g.*, Barnes v. Commissioner, 408 F.2d 65, 68 (7th Cir. 1969).

125 Section 7459 provides in pertinent part: "If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary." I.R.C. § 7459(d); *see also* TAX CT. R. 123 and 149(b) (July 6, 2012 ed.).

126 *See* Capital Blue Cross v. Commissioner, 431 F.3d 117, 128–29 (3d Cir. 2005); Barnes v. Commissioner, 408 F.2d 65, 68–69 (7th Cir. 1969); Federal Nat'l Bank of Shawnee, Oklahoma v. Commissioner, 180 F.2d 494, 497–98 (l0th Cir. 1950), *rev'g and rem'g* 8 T.C.M. (CCH) 534 (1949); Harrison v. Commissioner, 24 T.C. 46 (1955); *see also* Copelon, *supra* note 121, at 870; Ness, *supra* note 121, at 331.

127 Rockwell v. Commissioner, 512 F.2d 882, 885 (9th Cir. 1975); *see also* Balter, *supra* note 83, at 23; Copelon, *supra* note 121, at 868–69.

128 *See, e.g.*, Longino v. Commissioner, T.C. Memo. 2013-80, 105 T.C.M. (CCH) 1491; Starr v. Commissioner, T.C. Memo. 1976-289, 35 T.C.M. (CCH) 1291, 1294.

providing the source of the taxpayer's entire burden of proof.[129] These cases suggested that until the taxpayer successfully carried his ultimate burden of proof, the presumption remained a viable probative force.[130] Although the difference between the two views may be more apparent than real, especially in cases in which the judge is the sole trier of fact, the second approach generally has been rejected by the appellate courts.[131] The feeling of these courts is that equating the presumption with the burden of proof may result in improperly treating the presumption as evidence.[132] As a result, the Commissioner may be able to hide behind the deficiency notice in a doubtful case.[133] Additionally, such treatment of the presumption does not provide an incentive for the trial court to evaluate properly the evidence presented and supplies an easy escape hatch for judicial indecision.[134] More modern decisions issued by the Tax Court suggest that the approach of equating the presumption of correctness with the entire burden of proof has fallen by the wayside.[135]

The consequences of the taxpayer's successful overturning of the presumption have also been the subject of some judicial disagreement. Some appellate decisions have indicated that the burden of proof then shifts to the Commissioner to prove the deficiency.[136] This view has been

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[129] Hemphill Schools, Inc. v. Commissioner, 137 F.2d 961 (9th Cir. 1943), *vacating and rem'g* 46 B.T.A. 1282 (1942); Fairmount Cemetery Ass'n v. Helvering, 79 F.2d 163 (D.C. Cir. 1935), *rev'g and rem'g* 30 B.T.A. 740 (1934).

[130] Hemphill Schools, Inc. v. Commissioner, 137 F.2d 961, 963–64 (9th Cir. 1943).

[131] Barnes v. Commissioner, 408 F.2d 65, 68 (7th Cir. 1969); Gersten v. Commissioner, 267 F.2d 195, 199 (9th Cir. 1959), *aff'g in part and rem'g in part* 28 T.C. 756 (1957); A & A Tool & Supply Co. v. Commissioner, 182 F.2d 300, 303–04 (10th Cir. 1950), *rev'g and rem'g* 8 T.C.M. (CCH) 473 (1949); Hemphill Schools, Inc. v. Commissioner, 137 F.2d 961, 962–63 (9th Cir. 1943), *vacating and rem'g* 46 B.T.A. 1282 (1942); Fairmount Cemetery Ass'n v. Commissioner, 79 F.2d 163, 164 (D.C. Cir. 1935), *rev'g and rem'g* 30 B.T.A. 740 (1934).

[132] Hemphill Schools, Inc. v. Commissioner, 137 F.2d 961, 964 (9th Cir. 1943), *vacating and rem'g* 46 B.T.A. 1282 (1942); J.M. Perry & Co. v. Commissioner, 120 F.2d 123, 124 (9th Cir. 1941).

[133] *See* Fairmount Cemetery Ass'n v. Commissioner, 79 F.2d 163, 164 (D.C. Cir. 1935), *rev'g and rem'g* 30 B.T.A. 740 (1934).

[134] *See* Hemphill Schools, Inc. v. Commissioner, 137 F.2d 961, 964 (9th Cir. 1943), *vacating and rem'g* 46 B.T.A. 1282 (1942).

[135] *E.g.*, Durovic v. Commissioner, 54 T.C. 1364, 1393 (1970), *aff'd in part and rev'd in part*, 487 F.2d 36 (7th Cir. 1973); Longino v. Commissioner, T.C. Memo. 2013-80, 105 T.C.M. (CCH) 1491; Starr v. Commissioner, T.C. Memo. 1976-289, 35 T.C.M. (CCH) 1292.

[136] *See* Cohen v. Commissioner, 266 F.2d 5, 11 (9th Cir. 1959), *rem'g* 16 T.C.M. (CCH) 763 (1957); Clark v. Commissioner, 266 F.2d 698, 715 (9th Cir. 1959), *aff'g and rem'g* T.C. Memo. 1957-129. In these cases, the courts indicated that

criticized as running counter to the express language of the Tax Court rules, which place the burden of proof on the taxpayer, and has been rejected by the Tax Court and most appellate courts.[137] The prevailing view does not shift the burden of going forward until the evidence adduced by the taxpayer is so overwhelming that it would be sufficient not only to put the issue in dispute, but to have the court decide the issue in the taxpayer's favor on the ground that reasonable minds could not differ.[138] Since the negation of presumption indicates solely that the taxpayer's position *may* be correct,[139] the Commissioner is not required to introduce any evidence in his own behalf to prevail. The court may conclude that the taxpayer, although successful in reaching the threshold quantum of proof to require a decision on the evidence presented, has failed to carry his ultimate burden of persuasion.[140]

Although most cases agree that the taxpayer who has the burden of proof must always satisfy the burden of going forward with evidence to rebut the presumption, courts have been divided with regard to the question of what the taxpayer must demonstrate to satisfy the final burden of persuasion. Early decisions indicated that the burden was on the taxpayer not only to establish that the Commissioner's determination was erroneous, but also to produce sufficient evidence from which a correct determination of tax liability could be made.[141] For example, in *Burnet v.*

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destruction of the presumption shifts the burden of proof to the Commissioner. However, more recent cases clarify that a shift in the burden of persuasion to the Commissioner (requiring the Commissioner to establish the amount of the deficiency) occurs only when the taxpayer establishes that the determination contained in the notice of deficiency was arbitrary and erroneous. *See* Estate of Mitchell v. Commissioner, 250 F.3d 696, 702 (9th Cir. 2001); McCall v. Commissioner, T.C. Memo. 2009-75, 97 T.C.M. (CCH) 1370.

[137] *See* Rockwell v. Commissioner, 512 F.2d 882, 886 (9th Cir. 1975); United States v. Rexach, 482 F.2d 10, 16–17 (1st Cir. 1973); Durovic v. Commissioner, 54 T.C. 1364, 1393 (1970), *aff'd in part and rev'd in part*, 487 F.2d 36 (7th Cir. 1973).

[138] *See* Suarez v. Commissioner, 61 T.C. 841, 845 (1974); Durovic v. Commissioner, 54 T.C. 1364, 1393 (1970), *aff'd in part and rev'd in part*, 487 F.2d 36 (7th Cir. 1973); Reiben v. Commissioner, T.C. Memo. 1959-91, 18 T.C.M. (CCH) 416, 418.

[139] Niederkrome v. Commissioner, 266 F.2d 238, 241 (9th Cir. 1958), *aff'g in part and rem'g in part* T.C. Memo. 1956-255; A & A Tool & Supply Co., 182 F.2d 300, 304 (10th Cir. 1950), *rev'g and rem'g* 8 T.C.M. (CCH) 473 (1949); *see also* 2 LAWRENCE CASEY, FEDERAL TAX PRACTICE § 7.3, at 9 (1958).

[140] Starr v. Commissioner, T.C. Memo. 1976-289, 35 T.C.M. (CCH) 1291, 1294.

[141] *See* Mente v. Commissioner, 76 F.2d 965, 968 (5th Cir. 1935), *aff'g* 29 B.T.A. 804 (1934); Alexander Sprunt & Son, Inc. v. Commissioner, 64 F.2d 424, 427 (4th Cir. 1933), *aff'g and rev'g* 24 B.T.A. 599 (1931); Ohio State Mortgage Co. v. Commissioner, 22 B.T.A. 1162 (1931), *appeal dismissed*, 59 F.2d 1070 (6th Cir. 1932);

Houston,[142] the taxpayer was able to demonstrate that the deficiency was excessive but was unable to produce sufficient proof of the correct amount actually due. The Supreme Court, in a 1931 decision affirming the original deficiency stated: "The impossibility of proving a material fact upon which the right to relief depends, simply leaves the claimant upon whom the burden rests with an unenforceble [sic] claim, a misfortune to be borne by him . . . as a result of a failure of proof."[143]

Four years later, however, in the landmark case of *Helvering v. Taylor*,[144] the Supreme Court implicitly rejected its earlier position.[145] The Court stated that it could not "reasonably be held that he [a taxpayer] is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him."[146] Although such a stringent burden, the Court reasoned,[147] was applicable in refund suits in which the ultimate question presented for decision was the amount of overpayment,[148] nothing in the language of the Board's burden of proof rule, the statutory language defining the Commissioner's assessment procedures, or the companion legislative histories suggested such a burden for the taxpayer before the Board. The proper rule, the Court concluded, required the Board to redetermine the deficiency based upon the evidence presented, and not to require the taxpayer to prove the correct amount, or lose everything.[149]

Craven v. Commissioner, 21 B.T.A. 78 (1930); Brown v. Commissioner, 18 B.T.A. 859 (1930), *rev'd and rem'd in part and aff'd in part*, 54 F.2d 563 (1st Cir. 1931); Washer v. Commissioner, 12 B.T.A. 632 (1928), *aff'd*, 35 F.2d 1023 (2d Cir. 1929).

142 283 U.S. 223, 227 (1931), *rev'g* 39 F.2d 351 (3d Cir. 1930), *rev'g* 13 B.T.A. 279 (1928).

143 *Id.* at 228.

144 293 U.S. 507 (1935), *aff'g* 70 F.2d 619 (2d Cir. 1934), *rev'g and rem'g* 27 B.T.A. 1426 (1933).

145 293 U.S. at 510–15. Although the Court in *Taylor* did not in its decision specifically overrule *Burnet v. Houston*, 283 U.S. 223 (1931), it did distinguish the cases on which *Burnet* was based as being refund actions and stated that the burden in those cases was not to merely demonstrate that the assessment was erroneous but also to establish the exact amount to which the taxpayer was entitled.

146 293 U.S. at 515.

147 *Id.* at 514.

148 *See* Lewis v. Reynolds, 284 U.S. 281 (1932).

149 293 U.S. at 516. For application of the *Taylo*r rule, see Capital Blue Cross v. Commissioner, 431 F.3d 117, 128–29 (3d Cir. 2005); Rockwell v. Commissioner, 512 F.2d 882, 887 (9th Cir. 1975); Barnes v. Commissioner, 408 F.2d 65, 68 (7th Cir. 1969); Riss v. Commissioner, 374 F.2d 161, 164 (8th Cir. 1967), *aff'g* T.C. Memo. 1964-190; Grubb v. Commissioner, 315 F.2d 753 (6th Cir. 1963), *rev'g and rem'g* T.C. Memo. 1961-153; Commissioner v. Smith, 285 F.2d 91 (5th Cir. 1960), *aff'g* T.C. Memo. 1958-210; A & A Tool & Supply Co. v. Commissioner, 182 F.2d 300 (l0th Cir. 1950), *rev'g and rem'g* 8 T.C.M. (CCH) 473 (1949); Federal Nat'l Bank

Thus, in situations in which the taxpayer is unable to produce proof of the exact cost of property for an allowable loss deduction,[150] or the precise amount of an expenditure for some purpose encompassed within the deduction provisions of the Code,[151] but some reliable evidence is available from which a reasonable allowance can be approximated, the Tax Court generally will order a corresponding reduction of the deficiency.[152]

Despite the difficulties of identifying the nature of the burden on the taxpayer, the decision to place the burden of proof on the taxpayer has met with little controversy during the Board/Tax Court's existence.[153] When the Board, in promulgating its first rules of practice and procedure,[154] chose to place the burden of proof on the taxpayer, it was following a long recognized principle that administrative actions of Government are presumed correct.[155]

Nonetheless, limited criticism of this decision was expressed in hearings dealing with the 1926 Revenue Act. One witness asserted that the rule placing the burden of proof on the taxpayer was "contrary to the rule that obtains in any court outside of France . . . [in that] the taxpayer is required to come into court and prove he is innocent."[156] Another stated that

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of Shawnee, Oklahoma v. Commissioner, 180 F.2d 494, 497 (l0th Cir. 1950), *rev'g and rem'g* 8 T.C.M. (CCH) 534 (1949); National Weeklies, Inc. v. Commissioner, 137 F.2d 39, 42 (8th Cir. 1943), *aff'g* 43 B.T.A. 1209 (l941).

[150] Gutwirth v. Commissioner, 40 T.C. 666 (1963); Brown v. Commissioner, 24 T.C. 256 (1955); Abraham v. Commissioner, 9 T.C. 222 (1947).

[151] Cohan v. Commissioner, 11 B.T.A. 743 (1928), *aff'd in part and rev'd in part*, 39 F.2d 540 (2d Cir. 1930); *see also* Sharon v. Commissioner, 66 T.C. 515 (1976); Green v. Commissioner, 66 T.C. 538 (l976); Durovic v. Commissioner, 65 T.C. 480 (1975), for applications of the "Cohan" rule.

[152] The leading case in this area is *Cohan v. Commissioner*, 11 B.T.A. 743 (1928), *aff'd in part and rev'd in part*, 39 F.2d 540 (2d Cir. 1930). In *Cohan*, the Board upheld the Commissioner's disallowance of certain travel and entertainment expenses. On appeal, the Second Circuit stated that absolute certainty in the amount of an expense was usually impossible, and was unnecessary as the Board should make as close an approximation as it can, so long as the evidence indicated that the taxpayer had spent sums allowable as deductions. Although strict requirements for substantiation of travel and entertainment deductions are presently required under § 274(d), the "Cohan" rule has been broadly asserted by the Tax Court in other situations. *See generally* Casey*, supra* note 114, for a further analysis of the "Cohan" rule.

[153] *See supra* note 113.

[154] B.T.A. RULE 20 (July 1, 1924 ed.).

[155] Phillips v. Commissioner, 283 U.S. 589, 600 (1931).

[156] 1925 House Hearings*, supra* note 113, at 877. Mr. Gore, representing the American Institute of Accountants was adamant in his belief that the burden of proof should be on the Commissioner:

> It seems to us that if the Commissioner has a warrant for the proposition of an additional assessment, the proof ought to be at hand, before him, and

taxpayers, under threat of criminal and civil sanctions for filing false statements of taxable income should have their returns accorded a prima facie correct status,[157] and thus, the Commissioner, if he asserted a deficiency, should be required to disprove the validity of the return.[158]

Nonetheless, strong arguments existed against changing the established rule. The taxpayer was the party most familiar with the facts upon which he based his return and was considered to be in a better position to produce evidence supporting these facts if called upon to do so.[159] In this connection, there were those who gloomily predicted that if the burden of proof was placed on the Commissioner, 24 out of 25 cases otherwise won by the Commissioner would be lost.[160] In fact, one commentator was of the opinion that if the burden of proof was placed on the Commissioner, "[y]ou might as well repeal the income tax law and pass the hat, because you will practically be saying to the taxpayer, How much do you want to contribute toward the support of the government? and in that case they would have to decide for themselves."[161]

Moreover, the burden of proof rule in the Board closely corresponded to that applicable in refund actions in Federal district court and the Court of Claims, in which taxpayers had the burden of proving that they had overpaid their tax.[162] Additionally, since Congress was not constitutionally required to provide pre-assessment judicial-type review in tax disputes, limiting such review with restrictive procedural rules could not be regarded as unfair.[163] Finally, the taxpayer was the petitioner in Board litigation, and

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> having the proof, it is of no embarrassment for him to come before the Board of Tax Appeals and present the proof. We know of no reason why the right of the taxpayer should be sacrificed to the convenience of the Commissioner where it is a matter of the Commissioner contending that the taxpayer is wrong.

Id. at 877; *see also* Hopkins*, supra* note 114, at 470.

157 Hopkins*, supra* note 114, at 470.

158 1925 House Hearings*, supra* note 113, at 877 (testimony of Mr. Gore). The Senate, during its deliberations on the 1926 Act added a provision which made the return of the taxpayer prima facie evidence of its correctness. In conference, the amendment was rejected, the conference committee stating that such a provision would alter the burden of proof in Board cases and hence, would be inappropriate. H.R. REP. NO. 69-356, at 39 (1925).

159 1925 House Hearings*, supra* note 113, at 908, 930 (statements of Mr. Ivins and Mr. Hamel); *see also* John E. McClure, *Practice Before the U.S. Board of Tax Appeals*, 6 NAT'L INC. TAX MAG. 92 (1928).

160 1925 House Hearings*, supra* note 113, at 908 (statement of Mr. Ivins).

161 *Id.* at 907.

162 *Id.* at 908.

163 *See* Rockwell v. Commissioner, 512 F.2d 882, 887 (1975).

American jurisprudence has generally placed the burden of proof on the party invoking the jurisdiction of the tribunal.[164]

The advocates of the status quo were successful in maintaining the burden of proof rule originally promulgated in 1924.[165] In a 1989 opinion, the United States Claims Court succinctly summarized the standard allocation of the burden of proof in tax proceedings in the following terms:

> [The] presumption [of correctness] in favor of the Commissioner is a procedural device that requires the plaintiff to go forward with prima facie evidence to support a finding contrary to the Commissioner's determination. Once this procedural burden is satisfied, "the taxpayer must still carry [the] ultimate burden of proof or persuasion" on the merits. Thus, the plaintiff not only has the burden of establishing that the Commissioner's determination was *incorrect*, but also of establishing the merit of its claims by a preponderance of the evidence.[166]

2. Fraud

Prior to the enactment of § 7491,[167] the principal statutory exception to the general rule that places the burden of proof on the taxpayer concerned the issue of civil tax fraud.[168] However, the burden on the Commissioner to prove fraud has not always been provided by statute.[169] Under the 1924 Revenue Act, Congress provided the Board with the power to prescribe its own rules of practice, procedure, and evidence,[170] and in its first rules, the Board required that the taxpayer "shall open and close and the burden of proof shall be upon him."[171] Although in refund cases, the burden of proof with respect to fraud was upon the party alleging it; hence the Government had the responsibility of proving fraud. Yet early Board decisions indicated that Board members were following the straightforward language of the rule and were placing the burden of disproving fraud on the taxpayer.[172]

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[164] 1925 House Hearings*, supra* note 113, at 907–08 (statement of Mr. Ivins).

[165] *Compare* Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337 *with* Revenue Act of 1926, ch. 27, § 907(a), 44 Stat. 107.

[166] Danville Plywood Corp. v. United States, 16 Cl. Ct. 584, 593–94 (1989) (emphasis in original; internal citations omitted).

[167] Section 7491 is addressed in Section C.4 below.

[168] I.R.C. § 7454(a).

[169] *Compare* I.R.C. § 7454(a) *with* Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[170] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[171] B.T.A. RULE 20 (July 1, 1924 ed.).

[172] *See* Ginsburg v. Commissioner, 13 B.T.A. 417, 421 (1928), *appeal dismissed*, 48 F.2d 1074 (6th Cir. 1930); Humphreys v. Commissioner, 9 B.T.A. 656, 658

Few complaints were heard against this practice during the first two years of the Board's existence.[173] This lack of criticism may have stemmed from the fact that prior to 1926, an action before the Board was little more than a "preliminary skirmish,"[174] and a party aggrieved by a decision of the Board could bring a collateral action and have a trial de novo on issues of fact and law.[175] As a result of the 1926 legislation, however, the Board's decisions were no longer open to collateral attack; direct appellate review of the Board's decisions was substituted.[176] Nevertheless, the Board did not change its rule regarding burden of proof in fraud cases, and criticism was soon forthcoming.[177] The practice was condemned as inconsistent with fundamental concepts of Anglo-Saxon and American penal procedure,[178] under which the burden of proof in respect of fraud was invariably placed upon the party asserting it.[179] Additionally, there was reference to suspicions prevalent at the time that the Bureau occasionally alleged fraud in cases in which no evidence of fraud existed, simply to avoid the running of the period of limitations.[180]

(1927). *Cf.* F.W. Lukins, 3 B.T.A. 204, 209 (1925) (the Board stated that proof of fraud was upon the Commissioner in cases in which he had not asserted the penalty as part of the deficiency).

[173] An examination of the 1925 House Hearings, *supra* note 113, indicates that no specific suggestions were proposed concerning proof of fraud. Additionally, case law indicates that although the Board applied the presumption of correctness to an assertion of a fraud penalty in the notice of deficiency, and required the taxpayer to carry the burden of proof, the quantum of proof necessary to overturn any presumption of fraudulent intent was minimal. *See* Humphreys v. Commissioner, 9 B.T.A. 656, 658 (1927) (uncontradicted testimony of the taxpayer was sufficient to overcome the presumption of fraud).

[174] Blair v. Commissioner, 24 F.2d 390, 392 (1928).

[175] Bolon B. Turner, *The Tax Court of the United States, Its Origin and Function*, in THE HISTORY AND PHILOSOPHY OF TAXATION 31, 36 (1955).

[176] *Compare* Revenue Act of 1924, ch. 234, § 900(g), 43 Stat. 337 *with* Revenue Act of 1926, ch. 27, §§ 1001, l003(a), 44 Stat. 109, 110; *see also* CHARLES D. HAMEL, PRACTICE AND EVIDENCE BEFORE THE U.S. BOARD OF TAX APPEALS 168 (1938) [hereinafter cited as C. Hamel].

[177] Letter from ABA Special Committee on Federal Taxation to William Green, Chairman, Joint Tax Committee, June 15, 1927, filed at the U.S. Tax Court in "Burden of Proof: Memoranda & Correspondence;" *see also Appeal Procedures Changed*, 5 NAT'L INC. TAX MAG. 292 (1927); Hopkins, *supra* note 114, at 470.

[178] *Hearings on Revenue Revision*, *1928*, *Before the Senate Finance Comm.*, 70th Cong., 1st Sess. 25 (1928) [hereinafter cited as 1928 Senate Hearings]; *Hearings on Revenue Revision, 1928, Before the House Comm. on Ways and Means,* 70th Cong., 1st Sess. 527 (1928).

[179] *Id.* at 26.

[180] *Id.* at 25.

The analogy of the civil fraud provision to a criminal penalty was not lost on Congress,[181] and the statutory delegation of power given the Board to prescribe its rules of practice and procedure was modified by an express provision in the Revenue Act of 1928 that placed the burden of proving fraud on the Commissioner.[182] Even in the absence of the 1928 amendment, it is likely that the Board's original burden of proof rule as to fraud could not have persisted for long. In *Budd v. Commissioner*,[183] decided prior to the 1928 change, the Board decided the fraud issue adversely to the taxpayer by holding that he had not satisfied his burden of proof. On appeal, the Third Circuit reversed the Board,[184] holding that it was bound to follow the general principle of evidence that the party who alleges fraud must prove it.[185] The court reasoned that under the 1924 Revenue Act, which provided that the Board could promulgate its own rules of evidence and procedure, the Board had the power to alter such a basic principle.[186] However, the 1926 Revenue Act took away the power of the Board to formulate its own rules of evidence, and instead required the Board to look to the rules of evidence applicable in the equity courts in the District of Columbia.[187] Because the burden of proof rule was a rule of evidence,[188] and since equity courts in the District followed the traditional rule, the Board had no power to place the burden of disproving fraud on the taxpayer.[189] In the view of the Third Circuit, the 1928 amendment was merely declaratory of existing law.[190]

With the change in the burden of proof rule, situations arose in which the necessity of the Commissioner proving fraud was questioned.[191] First,

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[181] S. REP. NO. 70-960, at 38 (1928).

[182] Revenue Act of 1928, ch. 851, § 601, 45 Stat. 872, *amending* Revenue Act of 1926, ch. 27, § 907(a), 44 Stat. 107. For a discussion of the new statutory amendment and a proposed change in the Board's rules of practice to reflect the amendment, see Memorandum from Chairman Littleton to members of the Board, June 12, 1928, filed at the U.S. Tax Court in "Burden of Proof: Memoranda & Correspondence." In 1931, the Board revised its rule to reflect the change. *Compare* B.T.A. RULE 30 (Feb. 1, 1931 ed.) *with* B.T.A. RULE 30 (May 1, 1928 ed.).

[183] 12 B.T.A. 490 (1928).

[184] 43 F.2d 509 (3d Cir. 1930).

[185] *Id.* at 512.

[186] *See id.*

[187] *Id.*

[188] *See* Central Vt. Ry. Co. v. White, 238 U.S. 507 (1915).

[189] 43 F.2d at 512.

[190] *Id.* at 513.

[191] *See* Memorandum from J. Murdock, Chairman, Rules Committee, to Rules Committee, Feb. 23, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence;" Memorandum entitled "Suggestions Relating to Board Procedures and Functioning," c. 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence;" Memorandum from R.

if the taxpayer, ignoring Board pleading rules, failed to reply to an allegation of fraud asserted in the Commissioner's answer, would that failure to reply be deemed an admission of fraud and thereby relieve the Commissioner of his burden?[192] Second, if the taxpayer failed to appear at trial, should the decision of the Board dismissing the proceeding result in a determination as to the fraud penalty without the Commissioner offering proof on the issue?[193] The initial treatment of these questions was varied[194] and provided strong impetus for reconsideration of prevalent Board practices. As a result, the reply rule was modified substantially to prevent harsh results from a failure to respond.[195] Additionally, the Board rules committee suggested that the general practice of including the fraud penalty in the decision of the Board upon the taxpayer's default be expressly authorized by statutory amendment.[196] Although no such amendment has ever been enacted, subsequent decisions by the Board/Tax Court have uniformly included the fraud penalty without the Commissioner producing proof upon default by the taxpayer.[197]

Miller to J. Murdock, Chairman, Rules Committee, May 11, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence;" Letter from R. Miller to J. Murdock, Chairman, Rules Committee, Apr. 26, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence."

192 Under the Board's rules of practice, a reply to a statement of facts contained in the answer supporting issues in respect of which the burden of proof was placed on the Commissioner was required. B.T.A. RULE 15 (Feb. 1, 1931 ed.). Every material allegation set out in the answer and not denied in the reply, where a reply was required, would be deemed admitted. B.T.A. RULE 9 (Feb. 1, 1931 ed.). For an application of these rules, see *Statler v. Commissioner*, 27 B.T.A. 342, 345 (1932).

193 Memorandum from R. Miller to J. Murdock, Chairman, Rules Committee, Apr. 28, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence."

194 *See* Kerbaugh v. Commissioner, 29 B.T.A. 1014, 1017 (1934), *aff'd*, 74 F.2d 749 (lst Cir. 1935); Statler v. Commissioner, 27 B.T.A. 342, 345 (1932).

195 *Compare* B.T.A. RULE 18 (Jan. 1, 1938 ed.) *with* B.T.A. RULE 19 (Feb. 1, 1931 ed.).

196 Report of Board Members of Joint Committee, c. 1937, at 19, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence;" Letter from S. Surrey to L. Morris, Aug. 2, 1937, at 4, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence."

197 Doncaster v. Commissioner, 77 T.C. 334, 337 (1981); Gilday v. Commissioner, 62 T.C. 260, 262 (1974); Morris v. Commissioner, 30 T.C. 928, 929 (1958). *Cf.* Black v. Commissioner, 19 T.C. 474 (1953) (holding that the Commissioner's burden of proof was sustained by an order of the court that the undenied affirmative allegations contained in his amended pleading be deemed admitted by the taxpayer). Pursuant to the Tax Court rules, "when any party has failed to plead or otherwise proceed as provided by these Rules . . . such party may be held in default . . . on motion of another party. . . . Thereafter, the Court may

Apart from situations in which the taxpayer defaults and the Commissioner is spared the necessity of producing evidence, the burden of proof in respect of fraud requires that fraud be proved by more than a mere preponderance of the evidence.[198] The evidence must be of a clear and convincing nature[199] and must be more than suspicions or mere probability of dereliction.[200] In certain circumstances, however, the burden of proof may be met by a consistent pattern of income understatement over a number of years.[201] Additionally, conviction on criminal tax fraud charges,[202] either by a plea of guilty or after trial and verdict, conclusively establishes fraud for civil penalty purposes, and the taxpayer is collaterally estopped from introducing evidence on the issue for the same tax years.[203] Finally, conviction for willful failure to file a timely return,[204] without more, does not of itself establish the elements of fraud necessary to impose the civil penalty.[205]

3. New Matter

Perhaps the most controversial exception to the rule that the taxpayer bears the burden of proof involves "new matter" pleaded in the Commissioner's answer. Tax Court rules specify that the burden shall be on the Commissioner "in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in his answer."[206] Under the prior burden of proof rule, all of these categories were collectively described as "new

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enter a decision against the defaulting party upon such terms and conditions as the Court may deem proper . . . ." TAX CT. R. 123(a) (July 6, 2012 ed.).

198 *E.g.*, Miller v. Commissioner, 51 T.C. 915, 918 (1969); Gano v. Commissioner, 19 B.T.A. 518, 532–34 (1930).

199 TAX CT. R. 142(b) (July 6, 2012 ed.).

200 Shultze v. Commissioner, 18 B.T.A. 444, 447 (1929).

201 *Compare* Hounsell v. Commissioner, 9 T.C.M. (CCH) 611 (1950) *with* Arlette Coat Co. v. Commissioner, 14 T.C. 751 (1950); *see also* Paul P. Lipton, *Recent Civil Fraud Cases—Problems of Burden of Proof,* 31 TAXES 110 (1953).

202 I.R.C. § 7201.

203 Gammill v. Commissioner, 62 T.C. 607 (1974); Amos v. Commissioner, 43 T.C. 50 (1964), *aff'd*, 360 F.2d 358 (4th Cir. 1965); *see also* Harry Graham Balter, *Tax Court Switch: New Case Holds Criminal Conviction Proves "Fraud" in Civil Action*, 22 J. TAX'N 104 (1965). A conviction based on a nolo plea, however, does not conclusively establish fraud in a subsequent Tax Court proceeding. *See* Mickler v. Fahs, 243 F.2d 515 (5th Cir. 1965); Bell v. Commissioner, 320 F.2d 953 (8th Cir. 1963); *see also* John M. Bray, *Nolo Pleas in Tax Cases*, 26 TAX LAW. 435, 437 (1973).

204 I.R.C. § 7203.

205 Anderson v. Commissioner, T.C. Memo. 1973-155, 32 T.C.M. (CCH) 762; Arconti v. Commissioner, T.C. Memo. 1970-215, 29 T.C.M. (CCH) 945.

206 TAX CT. R. 142(a) (July 6, 2012 ed.).

matter."[207] Since the early years of the Board, this term has proven difficult to define and has been the subject of varying judicial interpretations.[208] Its trifurcation in the current rules has eased the problem to some degree, but by its nature, "new matter" is an elusive concept and will probably continue to be so.

Under the original rules of the Board, the burden of proof was on the taxpayer without exception.[209] Thus, strictly construing the language of the rule, the Commissioner could assert an increased deficiency from that originally claimed, and the burden of disproving the increased amount would remain on the taxpayer. Nonetheless, statements by Board members, both in decisions and in hearings before the Ways and Means Committee, indicated that the Board was shifting the burden of proof to the Commissioner if he requested such affirmative relief in his answer.[210] In 1926, the Board formally amended its rule to require that if "any new matter of fact" was pleaded in the Commissioner's answer,[211] the burden of proof in respect of the "new matter" would be on the Commissioner. A further change in the rule occurred in 1931, when the Board removed the words "of fact" as modifying "new matter."[212] Although the rule was to remain unchanged until the 1974 revision,[213] dissatisfaction with the wording of the rule surfaced as early as 1937 in deliberations of the Board's rules committee. At that time, various proposals were advanced to define "new matter" more precisely. One suggestion considered substitution of the term "additional deficiency" for "new matter."[214] Another suggestion

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[207] *Compare* TAX CT. R. 142(a) (Jan. 1, 1974 ed.) *with* TAX CT. R. 32 (Jan. 25, 1971 ed.).

[208] *See generally* Balter, *supra* note 83; Forman, *supra* note 120; Whitfield & McCallum, *supra* note 120.

[209] B.T.A. RULE 20 (July 1, 1924 ed.).

[210] General Lead Batteries Co., 2 B.T.A. 392, 395 (1925); 1925 House Hearings, *supra* note 113, at 907.

[211] *Compare* B.T.A. RULE 20 (July 1, 1924 ed.) *with* B.T.A. RULE 30 (Apr. 1, 1926 ed.).

[212] *Compare* B.T.A. RULE 30 (Apr. 1, 1926 ed.) with B.T.A. RULE 30 (Feb. 1. 1931 ed.).

[213] *Compare* B.T.A. RULE 30 (Feb. 1, 1931 ed.) *with* TAX CT. R. 32 (Jan. 25, 1971 ed.) *and* TAX CT. R. 142(a) (Jan. 1, 1974 ed.).

[214] Memorandum from S. Surrey, Joint Committee member, to L. Morris, Chairman, Joint Committee, Aug. 2, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence;" Memorandum from R. Ryan, Joint Committee member, to L. Morris, Chairman, Joint Committee, May 14, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence."

would have substituted "affirmative defenses" for "new matter."[215] These proposals, however, were rejected, primarily in the belief that they were too limiting and that other circumstances might also constitute "new matter."[216] Thus, the rules committee opted for the flexibility offered by continued judicial construction of the term.

As subsequently interpreted, "new matter" came to be comprised of four distinct categories: increased deficiencies, new adjustments, affirmative defenses, and new theories. The first and third of these categories were culled from "new matter" in the 1974 revision of the Tax Court rules and are now stated specifically in the burden of proof rule as situations in which the burden is on the Commissioner.[217] The second and fourth categories remain as elements of "new matter."

The first of the traditional pre-1974 categories of "new matter" involves the assertion in the Commissioner's answer or amended answer of an increased deficiency.[218] Thus, if the Commissioner originally determines a deficiency by disallowing one-half of a taxpayer's moving expense and subsequently asserts in the answer or amended answer that the entire moving expense should be disallowed, the burden of proving the additional deficiency rests with the Commissioner.

The second type of "new matter" arises if the Commissioner claims a new or different adjustment from that originally made in the deficiency notice.[219] For example, if the Commissioner disallows a moving expense deduction in the deficiency notice and subsequently asserts in the answer or amended answer that the moving expense is properly allowable, but a medical deduction is not, the Commissioner bears the burden of proof with respect to the disallowance of the medical deduction.

The Board/Tax Court has had little difficulty in its application of the first two categories. Since the deficiency notice is accorded a presumption of correctness, it would be theoretically inconsistent to allow the Commissioner to subsequently increase or change the original adjustments and still retain the benefit of the presumption as to the new or different

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[215] Memorandum to J. Murdock, Chairman, Rules Committee, Nov. 19, 1937, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence."

[216] Joint Committee Report, *supra* note 19, at 9.

[217] TAX CT. R. 142(a) (July 6, 2012 ed.).

[218] *E.g.*, Estate of Cordeiro v. Commissioner, 51 T.C. 195, 203 (1968); Estate of Schneider v. Commissioner, 29 T.C. 940, 956 (1958); Winston v. Commissioner, 15 T.C.M. (CCH) 477 (1956); Kimbell-Diamond Milling Co. v. Commissioner, 10 T.C. 7 (1948); Hull v. Commissioner, 18 B.T.A. 265, 266 (1929). *Accord*, Brook v. Commissioner, 28 T.C.M. (CCH) 346 (1969).

[219] *E.g.*, Tauber v. Commissioner, 24 T.C. 179 (1955); Cedar Valley Distillery, Inc. v. Commissioner, 16 T.C. 870 (1951); General Lead Batteries, 2 B.T.A. 392 (1925).

adjustments.[220] Additionally, the burden of proof traditionally has been placed on the party who requests affirmative relief in his pleadings.[221]

The third category comprises affirmative defenses asserted in the answer or amended answer. Such affirmative defenses include res judicata, collateral estoppel, estoppel, waiver, duress, fraud, and the statute of limitations.[222] Although the original burden of proof rule was silent as to affirmative defenses, it was clear that such defenses asserted in the answer were considered "new matter" and the burden of proof was accordingly shifted.[223]

The final category of "new matter" consists of those situations in which the Commissioner asserts in the answer or at trial a new or different reason for the same adjustment made in the deficiency notice.[224] Unlike the increased deficiency, different adjustment, or affirmative defense, the development of this category has been a more recent occurrence and denotes an expansive interpretation of "new matter" from the previous, more limited approach.[225] Early Board/Tax Court decisions indicated that the sole matter for decision was the correctness of the adjustment made to the taxpayer's income in the deficiency notice.[226] The issue was not conceived as being the sufficiency of the reasoning assigned in the deficiency notice for such adjustment.[227] In this connection, it was held that

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220 Cascade Milling & Elevator Co. v. Commissioner, 25 B.T.A. 946, 948 (1932); *see also* Papineau v. Commissioner, 28 T.C. 54, 57 (1957).

221 CHARLES TILFORD MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 337, at 785 (2d ed. 1972).

222 TAX CT. R. 39 and 142(a) (July 6, 2012 ed.).

223 Hull v. Commissioner, 87 F.2d 260, 261–62 (4th Cir. 1937); 1925 House Hearings*, supra* note 113, at 907; Memorandum entitled "Suggested Changes in Rules of Practice of the Board of Tax Appeals," c. 1937, at 7, filed at the U.S. Tax Court in "Responsive Pleadings: Memoranda & Correspondence;" Jackson Memorandum, *supra* note 49, at 22.

224 F.T.D. Florists, Inc. v. Commissioner, 67 T.C. 333 (1976); Jayne v. Commissioner, 61 T.C. 744, 748 (1974); Horvath v. Commissioner, 59 T.C. 551 (1973); Estate of Falese v. Commissioner, 58 T.C. 895 (1972); McSpadden v. Commissioner, 50 T.C. 478, 492–93 (1968); Estate of Scharf v. Commissioner, 38 T.C. 15 (1962), *aff'd*, 316 F.2d 625 (7th Cir. 1963); *see also* Estate of Emerson v. Commissioner, 67 T.C. 612 (1977).

225 *Compare* C. Hamel, *supra* note 176, at 141 n.51 *with* Rules Comm. Note, TAX CT. R. 142(a) (Jan. 1, 1974 ed.).

226 Estate of Finder v. Commissioner, 37 T.C. 411, 423 (1961); Fleischmann v. Commissioner, 40 B.T.A. 672 (1939); Chipley v. Commissioner, 25 B.T.A. 1103, 1106 (1932); Gossett v. Commissioner, 22 B.T.A. 1279, 1284 (1931), *aff'd*, 59 F.2d 365 (4th Cir. 1932); Brown v. Commissioner, 18 B.T.A. 859 (1930), *rev'd in part*, 54 F.2d 563 (1st Cir. 1931).

227 Bair v. Commissioner, 16 T.C. 90 (1951), *aff'd*, 199 F.2d 589 (2d Cir. 1952); Carnrick v. Commissioner, 21 B.T.A. 12 (1930).

the Commissioner need not assign any reason whatsoever for a specific adjustment.[228] So long as the Commissioner did not allege a new reason for the deficiency that would result in an increased deficiency or a new adjustment, he was free to assign any reason without concern that the burden of proof would shift.[229] For example, if the Commissioner had determined a deficiency by disallowance of a bad debt deduction and gave as his reason that the debt had been paid, he could, at trial, or in his answer, allege the additional reason that no debt had ever existed and the burden of proof as to both theories would remain on the taxpayer. Since the two reasons were directed at the same adjustment, the Board/Tax Court believed that this additional and different reason was not "new matter," even though different factual issues might be put in dispute.[230]

Nonetheless, subsequent commentary and judicial decisions suggest that such an approach does not withstand careful analysis.[231] "Burden of proof has meaning only in relation to disputed issues of fact."[232] Accordingly, modern Tax Court decisions have broken from the early line of cases and now indicate that in cases in which the Commissioner raises a new theory to sustain a deficiency, and such new theory necessitates the presentation of different evidence, the Commissioner shall bear the burden of proving any factual matter on which the new theory is based.[233] Thus, if the Commissioner asserts in the deficiency notice that a bad debt deduction is disallowed on the ground that the debt was paid, and subsequently raises the issue that no debt ever existed, the Commissioner would have the burden of proving the new allegation.

On the other hand, if the new position taken by the Commissioner merely clarifies or develops the original determination in a manner that is not inconsistent with the original position, the new theory does not rise to the level of a new matter that otherwise would operate to shift the burden

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[228] Standard Oil Co. v. Commissioner, 43 B.T.A. 973, 998 (1941), *aff'd*, 129 F.2d 363 (7th Cir. 1942).

[229] Estate of Scharf v. Commissioner, 38 T.C. 15 (1962), *aff'd*, 316 F.2d 625 (7th Cir. 1963); Bair v. Commissioner, 16 T.C. 90 (1951), *aff'd*, 199 F.2d 589 (2d Cir. 1952); Fleischmann v. Commissioner, 40 B.T.A. 672, 682 (1939).

[230] Fleischmann v. Commissioner, 40 B.T.A. 672, 682 (1939).

[231] Whitfield & McCallum, *supra* note 120, at 1186; *see also* Sanderling, Inc. v. Commissioner, 66 T.C. 743 (1976); Estate of Falese v. Commissioner, 58 T.C. 895 (1972).

[232] Whitfield & McCallum, *supra* note 120, at 1186.

[233] *See* Wayne Bolt & Nut Co. v. Commissioner, 93 T.C. 500 (1989); Achiro v. Commissioner, 77 T.C. 881 (1981); Estate of Emerson v. Commissioner, 67 T.C. 612 (1977); F.T.D. Florists, Inc. v. Commissioner, 67 T.C. 333 (1976); Sanderling, Inc. v. Commissioner, 66 T.C. 743 (1976); Horvath v. Commissioner, 59 T.C. 551 (1973); Estate of Gorby v. Commissioner, 53 T.C. 80 (1969).

of proof.[234] The bounds of when a new theory raised by the Commissioner will not be considered a new matter for burden-of-proof purposes were tested in *Sorin v. Commissioner*.[235] In *Sorin*, the Commissioner had determined a deficiency without providing any specific Code provision as a reason for his determination. At the hearing, the Commissioner raised a specific Code section as a more specific ground for his position.[236] In refusing to shift the burden of proof to the Commissioner, the court concluded that "when the determination is made in indefinite and general terms, and [the reason advanced] is not inconsistent with some position necessarily implicit in the determination itself . . .," no "new matter" is raised.[237] Such an approach has been criticized as encouraging overly broad and uninformative deficiency notices.[238]

4. Reassignment of Burden of Proof Pursuant to Section 7491

a. General Rule

As part of the Internal Revenue Service Restructuring and Reform Act of 1998,[239] Congress modified the prevailing burden-of-proof norms in tax cases through the enactment of § 7491. On its face, the most significant change introduced by the statute is the prospect of the taxpayer shifting the burden of proof to the Commissioner under § 7491(a)(1). Congress was concerned that individuals and small businesses stood at a disadvantage when forced to litigate against the Service, and that the general presumption of correctness in favor of the Commissioner contributed to that disadvantage.[240] Accordingly, Congress set out to craft an exception that would place the burden of proving factual matters on the Commissioner in cases where the individual or small business taxpayer cooperated with the Service and satisfied the relevant substantiation and recordkeeping requirements. The shifting of the burden of proof was believed to effectuate a better balance in the parties' relative litigating postures without encouraging tax avoidance.[241] Consistent with the motivation to level the

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234 Estate of Emerson v. Commissioner, 67 T.C. 612 (1977); Estate of Jayne v. Commissioner, 61 T.C. 744 (1974).

235 29 T.C. 959 (1958), *aff'd per curiam*, 271 F.2d 741 (2d Cir. 1961).

236 *Id.* at 968.

237 *Id.* at 969.

238 For an analysis of the deficiency notice, see Part VI.A.2.b.

239 Pub. L. No. 105-206, § 3001(a), 112 Stat. 685, 727. Section 7491 is applicable to court proceedings arising in connection with examinations commenced after the July 22, 1998 effective date of the legislation. *Id.* § 3001(c), 112 Stat. at 727.

240 *See* S. REP. NO. 105-174, at 44 (1998); H.R. REP. NO. 105-599 at 238 (1998).

241 S. REP. NO. 105-174, at 44 (1998).

litigating playing field, a shift in the burden of proof is available only to those non-individual taxpayers (specifically, corporations, partnerships, and trusts) whose net worth does not exceed $7 million.[242]

Section 7491(a)(1) imposes several conditions on the taxpayer's ability to shift the burden of proof, all of which the taxpayer bears the burden of establishing.[243] Most significantly, the taxpayer must introduce "credible evidence" with respect to a factual matter relevant to ascertaining the taxpayer's tax liability.[244] As explained in the report of the Senate Finance Committee, credible evidence for this purpose "is the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of correctness)."[245] Hence, the statute requires the taxpayer to satisfy the burden of production in order to shift the ultimate burden of proof (that is, the burden of persuasion) to the Commissioner.[246]

Not all evidence offered by the taxpayer contributes to the establishment of the credible evidence prerequisite. As the modifier "credible" indicates, only evidence that a court determines is worthy of belief will assist the taxpayer in satisfying the evidentiary prerequisite.[247] In that regard, the Senate Finance Committee specifically noted that "implausible factual assertions, frivolous claims, or tax protestor-type arguments" will not contribute to the establishment of credible evidence of the taxpayer's factual position.[248]

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[242] *See* I.R.C. § 7491(a)(2)(C) (incorporating net worth limitation of § 7430(c)(4)(C)(A)(ii), which in turn incorporates the definition of a party under the first sentence of 28 U.S.C. § 2412(d)(1)(B)).

[243] *See* Hibgee v. Commissioner, 116 T.C. 438 (2001). Additionally, the taxpayer must raise the prospect of § 7491(a)(1) at trial to permit the Commissioner to present evidence that the statutory conditions had not been satisfied. The taxpayer may not raise § 7491(a)(1) for the first time in post-trial briefing. *See* Estate of Deputy v. Commissioner, T.C. Memo. 2003-176, 85 T.C.M. (CCH) 1497.

[244] I.R.C. § 7491(a)(1).

[245] S. REP. NO. 105-174, at 45 (1998).

[246] *See* Philip N. Jones, *The Burden of Proof Under the '98 Act—Not Much Substance Under All That Smoke*, 90 J. TAX'N 133, 134 (Mar. 1999) (detailing distinction between burden or production and burden of persuasion in tax setting). Interestingly, Congress expressly employed the concept of "burden of production" in § 7491(c), which places the burden of production on the Commissioner with respect to penalties and additions to tax.

[247] *See* S. REP. NO. 105-174, at 45–46 (1998). As explained by the Eighth Circuit Court of Appeals in *Blodgett v. Commissioner*, 394 F.3d 1030, 1036 (8th Cir. 2005), the prospect of a court rejecting testimony as incredible is "not only fundamental since incredible testimony, axiomatically, cannot constitute credible evidence, but this concept is contained within the definition of credible evidence."

[248] *See* S. REP. NO. 105-174, at 45 (1998).

In addition to establishing credible evidence of the taxpayer's factual position, the taxpayer must satisfy a host of prerequisites enumerated in § 7491(a)(2) before the burden of persuasion will be shifted to the Commissioner. First, the taxpayer must comply with all substantiation requirements provided in the Code and the regulations issued thereunder.[249] The second prerequisite shares a similar documentation theme by requiring the taxpayer to maintain all of the records required by the Code and regulations.[250] As the first two prerequisites under § 7491(a)(2) appear to be legal requirements of the tax treatment sought by the taxpayer, they effectively amount to reminders rather than meaningful conditions to the potential burden shift under § 7491(a). A shift in the burden of proof concerning a factual matter relating to the tax treatment of an item is irrelevant if the claimed tax treatment is not permitted as a matter of law.

The third prerequisite is more intriguing. The taxpayer must "cooperate" with all reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews.[251] As explained in the legislative materials accompanying this provision, the notion of full cooperation for this purpose entails providing the Secretary with "reasonable assistance" in obtaining access and inspection of witnesses, information, and documents that are not within the taxpayer's control, even if the witnesses or other items are located in a foreign country.[252] Although not expressly stated in the statute, the legislative materials provide that a "necessary element" of the taxpayer's full cooperation with the Secretary is the taxpayer's exhaustion of his or her administrative remedies—including the exhaustion of any appeal rights provided by the Service.[253] However, the legislative materials clarify that a taxpayer will not be viewed as failing to cooperate for this purpose simply by refusing to extend the statute of limitations on assessment.[254] The "full cooperation" prerequisite therefore injects a measure of strategy into the litigation process: Does the cost to the taxpayer of (1) providing reasonable assistance to the Service in its fact gathering process and (2) fully exhausting available administrative remedies (including pursuing the case before the IRS Office of Appeals) justify the benefit to be achieved from the shift in the burden of proof?[255] Given the

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[249] I.R.C. § 7491(a)(2)(A); *see also* H.R. REP. NO. 105-599, at 239–40 (1998) ("[I]f a taxpayer required to substantiate an item fails to do so in the manner required (or destroys the substantiation), this burden of proof provision is inapplicable.").

[250] I.R.C. § 7491(a)(2)(B).

[251] *Id.*

[252] H.R. REP. NO. 105-364, at 56 (1998); S. REP. NO. 105-174, at 45 (1998).

[253] H.R. REP. NO. 105-364, at 56–57 (1998); S. REP. NO. 105-174, at 45 (1998).

[254] S. REP. NO. 105-174, at 45 (1998).

[255] *See* Jones, *supra* note 246, at 135 (detailing the downside to the taxpayer of seeking to comply with the § 7491(a) conditions).

limited benefit of the burden shift described below, the § 7491(a) calculus may not justify a change in taxpayer behavior.

Despite the apparent significance of shifting the burden of proof to the Commissioner under § 7491(a)(1), the provision appears to have had little practical effect.[256] The report of the Senate Finance Committee describes the potential payoff of § 7491(a)(1) as follows: "If after evidence from both sides, the court believes that the evidence is equally balanced, the court shall find that the Secretary has not sustained his burden of proof."[257] Hence, the shift in the burden of proof under § 7491(a)(1) will be meaningful only in the rare instance of an evidentiary tie. The provision therefore appears more symbolic than substantive.[258]

The Tax Court quickly fell into a practice of not addressing the merits of the taxpayer's contention that § 7491(a)(1) shifted the burden of proof to the Commissioner, noting that it was deciding the matter on the preponderance of the evidence. As a result, the court dispensed with the taxpayer's invocation of § 7491(a) as irrelevant. However, the Eighth Circuit Court of Appeals took issue with this practice in *Griffin v. Commissioner*.[259]

At trial, the Tax Court in *Griffin* determined that the taxpayers had produced no credible evidence that certain real estate tax payments made on behalf of their closely held corporations constituted ordinary and necessary expenses of the taxpayers' individual trades or businesses (separate and apart from the trades or businesses in which the corporations engaged). Accordingly, the court rejected the taxpayers' invocation of the burden shifting rule of § 7491(a).[260] Nonetheless, the court explained by way of footnote that even if the burden of proof had been placed on the Commissioner, "we would decide this issue in his favor based on the

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[256] *See* Janene R. Finley & Allan Karnes, *An Empirical Study of the Change in the Burden of Proof in the United States Tax Court*, 6 PITT L. REV. 61, 81 (2008) (concluding that "[o]verall, the change in the burden of proof in the Act did not have a statistically significant effect on those cases decided within the Tax Court when the taxpayer was an individual"). *But see* John R. Gardner & Benjamin R. Norman, *Effects of the Shift in the Disposition of Tax Cases*, 38 WAKE FOREST L. REV. 1357, 1374–75 (2003) (observing that it is "largely inconclusive" whether the taxpayer or the Government has fared better in terms of percentage victories following the legislation, but concluding that the shift in the burden of proof under § 7491 "likely" had a positive effect on taxpayers resulting from the reduction in the number of cases brought by the Government).

[257] S. REP. NO. 105-174, at 46 (1998).

[258] *See* Jones, *supra* note 246, at 135 ("Thus, it appears that the new shift in the burden of proof in credible evidence cases is an example of Congress claiming to have made a significant change for the benefit of taxpayers, without having made a significant change at all.").

[259] 315 F.3d 1017 (8th Cir. 2003).

[260] T.C. Memo. 2002-6, 83 T.C.M. (CCH) 1058, 1061–62.

preponderance of the evidence."[261] The Circuit Court of Appeals, on the other hand, held that the taxpayer's testimony supplied the requisite "credible evidence" required under § 7491(a)(1), and directed the Tax Court to explain how the Commissioner had met his burden of proving that the payments did not relate to an individual trade or business of the taxpayers.[262] The appellate court chided the Tax Court in the process, declaring, "It is not sufficient to summarily conclude that the outcome is the same regardless of who bears the burden of proof; if that were the case, § 7491(a) would have no meaning."[263] On remand, bound by the appellate court's determination that the taxpayers had introduced credible evidence of deductibility, the Tax Court held for the taxpayers on the basis that the Commissioner had not offered sufficient evidence to the contrary.[264]

Following its apparent injection of a measure of fortitude into the shifting of the burden of proof under § 7491(a)(1) in *Griffin*, the Eighth Circuit Court of Appeals addressed the practical consequence of a shift in the burden of proof—this time, however, in the context of a new matter—in *Polack v. Commissioner*.[265] As in *Griffin*, the Tax Court had concluded that it need not determine whether the burden of proof had been shifted to the Commissioner because the court decided the case on a preponderance of the evidence.[266] However, in *Polack*, the Eighth Circuit agreed. Without mentioning its prior decision in *Griffin*, the appellate court observed that "'[t]he shifting of an evidentiary burden of preponderance is of practical consequence only in the rare event of an evidentiary tie . . . .'"[267]

Recognizing an "apparent conflict in precedents on the significance of the shifting burden of proof," the Eighth Circuit resolved the conflict in *Blodgett v. Commissioner*.[268] In short, the panel in *Blodgett* favored the approach of *Polack*. The court explained as follows:

> There is a simple reason for our choice. In a situation in which both parties have satisfied their burden of production by offering some evidence, then the party supported by the weight of the evidence will prevail regardless of which party bore the burden of persuasion, proof or preponderance. Therefore, a shift in the

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[261] *Id.* at 1061 n.4.

[262] 315 F.3d at 1022.

[263] *Id.*

[264] Griffin v. Commissioner, T.C. Memo. 2004-64, 87 T.C.M. (CCH) 1084, 1086.

[265] 366 F.3d 608 (8th Cir. 2004).

[266] Polack v. Commissioner, T.C. Memo. 2002-145, 83 T.C.M. (CCH) 1811, 1814 n.7.

[267] *Polack*, 366 F.3d at 613 (quoting Cigaran v. Heston, 159 F.3d 355, 357 (8th Cir. 1998)).

[268] 394 F.3d 1030, 1039 (8th Cir. 2005).

> burden of preponderance has real significance only in the rare event of an evidentiary tie. Here, the record is clear, if the tax court did err in failing to shift the burden of proof, any error was harmless because the weight of the evidence supported a decision for the Commissioner.[269]

The Tax Court has endorsed the approach of the Eighth Circuit Court of Appeals in *Blodgett*. In *Knudsen v. Commissioner*,[270] the court declared that where the preponderance of the evidence served as the standard of proof and the preponderance of evidence favored one party, the court could decide the case "on the weight of the evidence and not on an allocation of the burden of proof."[271] This approach is consistent with the explanation in the legislative record accompanying the enactment of § 7491(a) that the provision would operate to the benefit of the taxpayer if the evidence presented by the parties were equally balanced.

b. Statistical Reconstruction Cases

Section 7491(b) places the burden of proof on the Commissioner with respect to any item of income of an individual taxpayer that the Commissioner reconstructs solely through the use of statistical evidence pertaining to unrelated taxpayers. As an example, if an individual taxpayer's income is reconstructed solely by reference to the average income of taxpayers in the area where the taxpayer resides, the Government will bear the burden of establishing the taxpayer's income by a preponderance of the evidence.[272] Given the tenuous relationship between the taxpayer's income and the statistical averages of data pertaining to unrelated taxpayers, the statutory placement of the burden of proof likely will render it more difficult for the Government to rely on such statistical data alone.[273] The probative value of the statistical data would need to outweigh any opposing evidence offered by the taxpayer. The existence of § 7491(b) therefore will discourage the Government from relying on such statistical evidence alone, and instead encourage the Government to bolster such statistical evidence with facts relating to the particular taxpayer before the court (such as a

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[269] *Id.* (internal citations omitted).

[270] 131 T.C. 185 (2008).

[271] *Id.* at 189.

[272] *See* S. REP. NO. 105-174, at 46 (1998) (supplying this example).

[273] On the other hand, if the Government rests on the statistical data in reconstructing the taxpayer's income and the taxpayer offers no evidence in rebuttal, then placement of the burden of proof on the Government pursuant to § 7491(b) will have no practical effect. So long as the statistical data carries any probative weight, the preponderance of the evidence necessarily will tilt in the Government's favor absent evidence to the contrary.

cash-flow analysis). Doing so will preclude the application of § 7491(b) while also strengthening the Government's case under the preponderance-of-evidence standard.

c. Penalties

Section 7491(c) places the "burden of production" on the Commissioner with respect to any penalty or addition to tax imposed on an individual taxpayer. The statute does not define "burden of production" or otherwise attempt to distinguish it from the "burden of proof" addressed in the provisions of subsections (a) and (b) of the statute. Nonetheless, the legislative materials accompanying the enactment of § 7491(a) couch the Government's burden in terms of the burden of going forward: "[T]he Secretary must come forward initially with evidence regarding the appropriateness of applying a particular penalty to the taxpayer."[274] In its first opportunity to interpret § 7491(c), the Tax Court in *Higbee v. Commissioner*[275] announced that, to meet its burden of production, the Commissioner "must come forward with sufficient evidence indicating that it is appropriate to impose the relevant penalty."[276]

With respect to penalties or additions to tax that are implicated by objective standards, such as the accuracy related penalty or the additions to tax for late filing or payment, the Government should find its burden of production under § 7491(c) fairly easy to satisfy. For example, the Tax Court in *Higbee* determined that the Commissioner had satisfied its burden of production with respect to the § 6651(a)(1) addition to tax for late filing by perfunctorily noting the parties' stipulation that the return was filed one year late.[277] However, penalties asserted under § 6662(a) based on negligence or disregard of the rules or regulations could present a more difficult evidentiary challenge, as the Commissioner must make a preliminary showing that the taxpayer's behavior fell within those descriptive categories.[278]

Litigation concerning penalties and additions to tax often reduces to the availability of defenses to those additional levies. In that regard, § 7491(c) does not provide taxpayers any evidentiary comfort. The legislative history accompanying the enactment of § 7491(c) clarifies that the provision does not affect the burden of establishing defenses to penalties and additions to

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274 S. REP. NO. 105-174, at 46 (1998).

275 116 T.C. 438 (2001).

276 *Id.* at 446.

277 *Id.* at 447.

278 *See, e.g.*, Brooks v. Commissioner, T.C. Memo. 2013-141, 105 T.C.M. (CCH) 1832 (noting that the Commissioner introduced evidence showing that petitioner failed to make a reasonable attempt to ascertain the correctness of her reporting positions with respect to various deductions).

tax. Rather, the burden of proof with respect to defenses remains with the taxpayer: "[I]f the taxpayer believes that, because of reasonable cause, substantial authority, or a similar provision, it is inappropriate to impose the penalty, it is the taxpayer's responsibility (and not the Secretary's obligation) to raise those issues."[279] This approach is sensible, as it prevents the Commissioner from being placed in the difficult, if not impossible, position of establishing a negative proposition—that is, the absence of a reasonable justification for the taxpayer's position.

Section 7491(c) places the "burden of production" on the taxpayer, as opposed to the "burden of proof." The Tax Court in *Higbee v. Commissioner* found the distinction in terminology deliberate. Accordingly, the court reasoned that, once the Government carries its burden of production, the ultimate burden of persuasion with respect to penalties and additions to tax remains with the taxpayer.[280]

D. Damages for Frivolous or Groundless Proceedings

1. Pre-TEFRA Damages

A persistent problem for the Tax Court has been the management of the large number of petitions filed by taxpayers challenging Service determinations. Although most Tax Court proceedings are based on bona fide disputes, many taxpayers have brought appeals as a means of delaying the assessment and collection of taxes. In response to an increasing number of groundless appeals,[281] the Revenue Act of 1926 authorized the court to impose damages for frivolous petitions.[282] The 1926 provision (now codified, with amendments described below, as § 6673 of the Internal Revenue Code) provided that:

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[279] *Higbee*, 116 T.C. at 446 (citing H.R. REP. NO. 105-599, at 241 (1998)).

[280] *Id.* at 446–47 ("Congress' use of the phrase 'burden of production' and not the more general phrase 'burden of proof' as used in section 7491(a) indicates to us that Congress did not desire that the burden of proof be placed on the Commissioner with regard to penalties."). *But see* Allison v. United States, 80 Fed. Cl. 568, 582 (2008) (reasoning that the Government bears both the burden of production and burden of persuasion with respect to penalties as a result of the combination of § 7491(a) and (c)).

[281] *Revenue Revision, 1925, Hearings Before the House Comm. on Ways and Means*, 68th Cong., 1st Sess. (1925), in 7 U.S. REVENUE ACTS, 1909–1950 THE LAWS, LEGISLATIVE HISTORIES & ADMIN. DOCUMENTS 892–93, 906, 912 (B. Reams, Jr. ed. 1979).

[282] Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 9, 105, 109 (adding new section 911 to amend Revenue Act of 1924, ch. 234, 43 Stat. 253).

> Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax.[283]

Despite this authority, which continued unchanged until 1982,[284] the Tax Court traditionally had been hesitant to impose damages against taxpayers with groundless claims,[285] presumably because of the concern that it would inhibit those with legitimate disputes with the Service from petitioning the court. Yet, faced with an increasing number of cases advancing specious arguments that crowded the court's already congested docket,[286] it seemed inevitable that the court's tolerance of groundless claims would wear thin.[287]

In 1977, the court expressed its increasing impatience with the volume of tax protest cases in *Hatfield v. Commissioner*,[288] a case involving a petitioner who had written "Object Self Incrimination" in answer to wages and income questions on her income tax return:

> In recent times, this Court has been faced with numerous cases, such as this one, which have been commenced without any legal justification but solely for the purpose of protesting the Federal tax laws. This Court has before it a large number of cases which deserve careful consideration as speedily as possible, and cases of this sort needlessly disrupt our consideration of those genuine controversies. Moreover, by filing cases of this type, the protesters add to the caseload of the Court, which has reached a record size, and such cases increase the expenses of conducting this Court and the

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283 *Id.*

284 See *infra* notes 312–339 and accompanying text for a description of the TEFRA amendments to § 6673.

285 *See, e.g.*, Bateman v. Commissioner, 34 B.T.A. 351, 370–71 (1936); W.E. Beckmann Bakers' & Confectioners' Supply Co. v. Commissioner, 13 B.T.A. 860, 863–64 (1928). The Board of Tax Appeals did not exercise its authority to impose damages until 1933. *See* Coombs v. Commissioner, 28 B.T.A. 1216, 1216–17 (1933).

286 *See* H.R. REP. NO. 98-861, at 985 (1984); Theodore Tannenwald, Jr., *Reflections on the Tax Court*, 36 TAX LAW. 853, 854, 856 (1983).

287 Murray H. Falk, *Damages Against Taxpayers in the Tax Court Under TEFRA*, 61 TAXES 92, 93 (1983).

288 68 T.C. 895 (1977).

> operations of the IRS, which expenses must eventually be borne by all of us.
>
> Many citizens may dislike paying their fair share of taxes; everyone feels that he or she needs the money more than the Government. On the other hand, as Justice Oliver Wendell Holmes so eloquently stated: "Taxes are what we pay for civilized society." The greatness of our nation is in no small part due to the willingness of our citizens to honestly and fairly participate in our tax collection system which depends upon self-assessment. Any citizen may resort to the courts whenever he or she in good faith and with a colorable claim desires to challenge the Commissioner's determination; but that does not mean that a citizen may resort to the courts merely to vent his or her anger and attempt symbolically to throw a wrench at the system. Access to the courts depends upon a real and actual wrong–not an imagined wrong–which is susceptible of judicial resolution. General grievances against the policies of the Government, or against the tax system as a whole, are not the types of controversies to be resolved in the courts; Congress is the appropriate body to which such matters should be referred.[289]

Although the court did not impose damages against the petitioner in *Hatfield*, it did warn that it would give "serious consideration" to imposing damages under § 6673 in future cases involving frivolous claims.[290]

Two years later, in *Wilkinson v. Commissioner*,[291] it became clear that the court's reservoir of patience with frivolous claims had run dry. The taxpayer refused to substantiate various deductions claimed on his income tax return at the audit level and at the subsequent Tax Court trial.[292] The taxpayer also failed to comply with a district court order requiring compliance with an administrative summons; the district court ordered the petitioner to produce records to substantiate his deductions, or to assert some "'*legitimate* constitutional privilege or right.'"[293] The taxpayer argued that producing his books and records would be self-incriminatory and would violate his Fifth Amendment rights.[294] The court stated that this

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[289] *Id.* at 899 (citation omitted).

[290] *Id.* at 900. The Tax Court subsequently repeated its warning in two memorandum opinions. *See* Clippinger v. Commissioner, T.C. Memo. 1978-107, 37 T.C.M. (CCH) 484, 486; Crowder v. Commissioner, T.C. Memo. 1978-273, 37 T.C.M. (CCH) 1173, 1173-3.

[291] 71 T.C. 633 (1979).

[292] *Id.* at 634, 636.

[293] *Id.* at 634 (apparently quoting district court order to enforce administrative summons) (emphasis added by Tax Court).

[294] 71 T.C. at 637–39. Specifically, petitioner argued that: (1) requiring him to produce his books would result in a deprivation of his right to a jury trial and an

argument was "completely without legal merit," citing earlier decisions in which it had rejected the argument.[295] Significantly, the taxpayer was aware that his arguments were frivolous because the Service had sent him copies of Tax Court decisions involving similar constitutional attacks and he had been repeatedly informed at various stages of the audit and Tax Court proceedings that his claim was without merit.[296] The taxpayer nonetheless refused to abandon his claim, and the court imposed damages of $500, the maximum penalty then authorized by § 6673, holding that he had commenced the action merely to delay paying his taxes.[297]

Subsequently, the Tax Court made it clear that a personal warning was not a predicate to the imposition of § 6673 damages when it imposed damages sua sponte in *Sydnes v. Commissioner*.[298] Apparently, the court believed that its warning in earlier cases served to inform the petitioner and others of the possibility of the imposition of damages. Furthermore, the taxpayer in *Sydnes* had previously litigated the same issue,[299] twice in the Tax Court and once on appeal to the United States Court of Appeals for the Eighth Circuit.[300] The Tax Court thus was satisfied that the taxpayer "had no reasonable expectation of receiving a favorable decision" at the time he filed the petition.[301]

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unconstitutional shifting of the burden of proof; (2) the determination of a deficiency, made without access to his books, was arbitrary; (3) there had been an infringement of his right to petition for redress of grievances; (4) the tax was an unlawful taking of property; and (5) the Service was engaged in extortion. *Id.* at 638–39.

[295] *Id.* at 638.

[296] *Id.* at 642–43.

[297] *Id.* at 643.

[298] 74 T.C. 864, 872 (1980), *aff'd per curiam*, 647 F.2d 813 (8th Cir. 1981).

[299] The only issue involved in *Sydnes* was whether mortgage payments made by the taxpayer on "property awarded to his former wife under a divorce decree were support payments or part of a property settlement." *Id.* at 865.

[300] *See* Sydnes v. Commissioner, No. 1889-77 (T.C. Nov. 7, 1979); Sydnes v. Commissioner, 68 T.C. 170 (1977), *aff'd in part and rev'd and rem'd in part*, 577 F.2d 60 (8th Cir. 1978).

[301] *Sydnes*, 74 T.C. at 872. In awarding maximum damages against the taxpayer, the court explained that it would not hesitate to award damages sua sponte in appropriate cases:

> While in the past we have been reluctant to impose damages in cases involving persons other than those who were merely protesting the Federal tax laws, we think the imposition of damages in the circumstances here is fully warranted. Moreover, since the statute does not restrict us to those cases in which a party has requested us to impose damages, we think we should do so, on our own motion, where the facts and circumstances so dictate.

Despite its increased readiness to impose § 6673 damages, the Tax Court was reluctant to extend the damages penalty to cases in which a real possibility existed that the petitioner had a bona fide purpose in maintaining the Tax Court proceeding. An illustration of this reluctance occurred in 1979, when the court considered whether a proceeding instituted by Ms. Hatfield, "the same taxpayer whose earlier case had ushered in this new era,"[302] was instituted merely for delay.[303] The Service's primary argument for imposition of damages was that taxpayer's involvement in earlier proceedings in which the Tax Court called attention to § 6673 was convincing evidence that the present proceedings were instituted merely for delay.[304] The court found that the petition contained "no real indication of the grounds on which petitioner contests the deficiencies determined."[305] The taxpayer's motion to strike the Service's answer did, however, assert that "[w]hat Petitioner has or has not done in this 'court' in the past is of absolutely no consequences [sic] as concerns this Case; . . . this Case should stand or fall on its own merits."[306] In these statements, the court found an "indicat[ion] that petitioner may have intended to contest respondent's determination . . . on grounds other than those raised in her 1974 case."[307] Because the Service's only argument for imposing § 6673 damages was petitioner's prior involvement in a case that involved the issue of § 6673 damages, and because the record contained no details regarding the taxpayer's present claim (the taxpayer did not personally appear at court to tell the court the nature of her objection to the notice of deficiency), the

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Id.; *see* Greenberg v. Commissioner, 73 T.C. 806 (1980) (taxpayer contested the disallowance of deductions taken by him to protest the use of his taxes "to support war" after having previously filed two Tax Court petitions based on same grounds and each time being informed of their lack of merit).

302 Falk, *supra* note 287, at 94.

303 Hatfield v. Commissioner, T.C. Memo. 1979-181, 38 T.C.M. (CCH) 756; *see also* Ritchie v. Commissioner, 72 T.C. 126 (1979). The taxpayer in *Ritchie* offered frivolous arguments; nonetheless, damages were denied because the taxpayer, having not appeared at trial, was not informed that his constitutional objections were without basis. *Id.* at 131. Contrasting *Wilkinson v. Commissioner*, 71 T.C. 633 (1979), the court discussed the significance of the extent to which both the Service and the court had gone to inform the taxpayer that these claims were without merit. Although the Service's memorandum of authorities attached to the Service's motion for damages against Ritchie cited *Hatfield*, the court did not deem this sufficient to provide the petitioner with subjective knowledge of the baselessness of his claim. *Ritchie*, 72 T.C. at 130–31.

304 *Hatfield*, 38 T.C.M. (CCH) at 757.

305 *Id.* at 758.

306 *Id.*

307 *Id.*

court concluded that there was not sufficient evidence to warrant the imposition of § 6673 damages.[308]

Prior to the amendment of § 6673 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[309] the statutory requirement that proceedings be instituted "merely for delay" was interpreted by the Tax Court to preclude the imposition of damages unless the petitioner understood that no genuine grounds existed for resisting the Service's determination.[310] Proof of such understanding could be found in prior unsuccessful litigation of the same issue or in the taxpayer's actual awareness of Tax Court decisions holding the taxpayer's position groundless as a matter of law. In cases in which the taxpayer was unaware of precedent rejecting the position asserted, damages were not imposed, regardless of the total inadequacy of the taxpayer's assertions.[311]

2. Damages Expanded by TEFRA

In TEFRA, Congress both expanded the circumstances in which the Tax Court could impose damages against taxpayers and raised the maximum penalty to $5,000.[312] The purpose of these amendments was to

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308 *Id.* Any doubts under current law regarding whether the Tax Court will impose damages against taxpayers who fail to appear at trial seem to have been resolved. *See, e.g.*, Telemaque v. Commissioner, No. 38490-84 Tax Ct. Memorandum Sur Order (Jan. 3, 1986) (imposing $2,000 damages). For a more recent case imposing the current maximum § 6673 penalty of $25,000 on taxpayer who had a history of filing frivolous proceedings (which subjected the taxpayer to lighter § 6673 penalties) and who then failed to appear at trial, see Precourt v. Commissioner, T.C. Memo. 2010-24, 99 T.C.M. (CCH) 1112.

309 TEFRA, Pub. L. No. 97-248, § 292(b), 96 Stat. 324, 574 (1982) (currently codified at I.R.C. § 6673).

310 The court's restrictive reading of § 6673 stemmed from the statutory requirement that the action must have been instituted "merely for delay," precluding the court from imposing damages when the taxpayers may have had purposes other than delay for petitioning the court. The 1982 amendment of § 6673, however, provides that the Tax Court may now impose damages against taxpayers who file petitions "primarily for delay." *See infra* notes 312–316 and accompanying text.

311 Falk, *supra* note 287, at 94.

312 Pub. L. No. 97-248, § 292(b), 96 Stat. 324, 574 (1982). In *Wilkinson v. Commissioner*, 71 T.C. 633 (1979), the Tax Court noted that "[w]hen the costs incurred by this Court and respondent are considered, the maximum damages authorized by law ($500) do not begin to indemnify the United States for the expenses which petitioner's frivolous position has occasioned." *Id.* at 643. Taxpayers using the "Court as their soapbox" merely had to pay a $500 "toll." Graves v. Commissioner, T.C. Memo. 1981-154, 41 T.C.M. (CCH) 1204, 1207 (taxpayer protesting the use of his taxes for military expenditures), *aff'd without*

assist the court in curbing its "ever-increasing caseload."[313] As amended by TEFRA, § 6673 provided as follows:

> Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceedings is frivolous or groundless, damages in an amount not in excess of $5,000 shall be awarded to the United States by the Tax Court in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the Secretary and shall be collected as a part of the tax.[314]

The former standard for applying damages under § 6673 was thus replaced with a two-prong test. First, the Tax Court may impose damages if the proceedings are commenced "primarily" to delay paying the determined deficiency.[315] The court had interpreted this "subjective" condition to the imposition of damages as requiring a determination that the taxpayer had no bona fide purpose in instituting the Tax Court proceeding. The change from "merely" to "primarily" authorizes the court to impose damages against taxpayers commencing dilatory proceedings, even though delay may not have been the only purpose for commencing the proceeding.[316] Additionally, the 1982 amendment of § 6673 strongly suggests that damages may be imposed if the taxpayer "maintains" a dilatory position, irrespective of his original intent in commencing the proceeding.[317]

Second, the Tax Court may impose damages against a taxpayer whose "position in such proceedings is frivolous or groundless" under the "objective" condition of the statute.[318] This part of § 6673 should authorize the Tax Court to impose damages against a taxpayer whose position is groundless, i.e., a position that conflicts with established precedent, without

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published opinion, 698 F.2d 1219 (6th Cir. 1982). Increasing the maximum damages authorized under § 6673 was necessary to adequately compensate the Government for the dilatory tactics of certain taxpayers and to act as a greater deterrent to frivolous proceedings. *See* Falk, *supra* note 287, at 95.

[313] H.R. REP. NO. 97-404, at 10, 11 (1981).

[314] I.R.C. § 6673, *following amendment by* Pub. L. No. 97-248, § 292(b), 96 Stat. 324, 574 (1982).

[315] *Id.*

[316] *Id.*; *see also* Grimes v. Commissioner, 82 T.C. 235, 238–39 (1984), *aff'd*, 806 F.2d 1451 (9th Cir. 1986).

[317] *See* Grimes v. Commissioner, 82 T.C. 235, 238–39 (1984), *aff'd*, 806 F.2d 1451 (9th Cir. 1986).

[318] I.R.C. § 6673, *following amendment by* Pub. L. No. 97-248, § 292(b), 96 Stat. 324, 574 (1982).

requiring proof that the taxpayer is actually aware that his position is meritless.[319]

In *Abrams v. Commissioner,*[320] the taxpayer contended that he incurred no tax liability for the years 1980 and 1981.[321] His petition stated that "Petitioner's only income was in the form of wages which are personal property and, as such, are not subject to the imposition . . . of a direct tax."[322] Finding that "[i]t is clear beyond doubt that the petition raises *no* justiciable facts respecting any of respondent's determinations,"[323] the Tax Court, sua sponte, imposed damages of $5,000 against the taxpayer.[324] The

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[319] McLaughlin v. Commissioner, 832 F.2d 986 (7th Cir. 1987).

[320] 82 T.C. 403 (1984) (taxpayer asserted that wages are not subject to income tax). For other cases holding as frivolous the claim that wages are not income and imposing § 6673 damages, see Connor v. Commissioner, 770 F.2d 17, 20 (2d Cir. 1985); Stephens v. Commissioner, T.C. Memo. 1987-196, 53 T.C.M. (CCH) 607 (damages of $1,000 imposed), *motion to vacate granted*, 88 T.C. 1529 (imposed additional damages of $1000 for filing a frivolous motion to vacate); McCabe v. Commissioner, T.C. Memo. 1986-533, 52 T.C.M. (CCH) 962; Borders v. Commissioner, T.C. Memo. 1986-466, 52 T.C.M. (CCH) 617. The first Tax Court case awarding higher damages as authorized by TEFRA marked no definitive revision of the standard the Tax Court would follow in imposing damages. The Tax Court warned, however, that the damages penalty would not, in light of the TEFRA amendment, be limited to cases in which the taxpayer was aware prior to filing the petition that the position taken was groundless. Grimes v. Commissioner, 82 T.C. 235, 238–39 (1984). In *Grimes*, the taxpayer argued that his wages were not includable in gross income. Damages of $2,500 were imposed. In a subsequent proceeding, no longer contending that wages were not income, but asserting an equally baseless exemption for living expenses, Mr. Grimes was assessed damages of $5,000 by the Tax Court. When he appealed the Tax Court's decision, the Ninth Circuit affirmed and assessed an additional $1,500 for pursuing a frivolous appeal. Grimes v. Commissioner, 806 F.2d 1451 (9th Cir. 1986).

[321] 82 T.C. at 405.

[322] *Id.*

[323] *Id.* (emphasis in original).

[324] *Id.* at 413. Section 6673 does not require that the Tax Court determine the actual costs incurred by the Government. The "primary purpose of the statute is not to compensate the United States as opposing party but instead to penalize taxpayers who raise frivolous claims in the tax court." Sauers v. Commissioner, 771 F.2d 64, 67 (3d Cir. 1985); *see also* Larsen v. Commissioner, 765 F.2d 939, 941 (9th Cir. 1985) (referring to § 6673 damages as a "penalty"); Crain v. Commissioner, 737 F.2d 1417, 1418 (5th Cir. 1984) (affirming Tax Court's penalty assessment). The Third Circuit held in *Sauers* that the Tax Court neither had to determine the actual damages sustained by the Government nor relate those damages to the § 6673 penalty. 771 F.2d at 67–69. *Cf.* Carter v. Commissioner, 784 F.2d 1006, 1009 (9th Cir. 1986) (Tax Court not authorized to impose double penalty ($10,000) on husband and wife, even though two separate notices of deficiency were issued, because the Tax Court entered only one decision in the

court did so even though it did not appear that the taxpayer had previously litigated the same issue or that he was aware of court precedents holding his position to be frivolous.[325]

> In our view, petitioner is yet another in a seemingly unending parade of tax protesters bent on glutting the docket of this Court and others with frivolous and groundless claims (all of which have been summarily rejected by this Court and others on innumerable occasions), and he has instituted and maintained this proceeding primarily for delay.[326]

The *Abrams* decision is significant because it marked the first occasion on which the Tax Court imposed damages upon a taxpayer without evidence that the taxpayer had personal knowledge of the lack of merit of his action.

Later cases have made it clear that the Tax Court will impose damages against taxpayers who should have been aware that the arguments they presented were previously rejected by the court.[327] Increasingly, the court

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case); Ruberto v. Commissioner, 774 F.2d 61 (2d Cir. 1985) (Tax Court abused its discretion when it did not give taxpayers reasonable time to submit original checks in support of deductions), *rev'g* T.C. Memo. 1984-557.

It has been held that the taxpayer has the burden of proving that the imposition of damages was improper. *See Carter*, 784 F.2d at 1009; *Larsen*, 765 F.2d at 941. The burden of proof analysis in these cases is subject to doubt. Unlike deficiencies in tax, additions to tax, and other assessable penalties, § 6673 damages cannot be determined by the Service as part of the 90-day letter. *Cf.* I.R.C. § 6662. This is so because the application of § 6673 depends on the taxpayer's actions *after* receiving the 90-day letter, *viz.* whether a frivolous or dilatory Tax Court proceeding is brought or maintained. Thus, the normal presumption of correctness attaching to administrative determinations (which is the basis for generally placing the burden of proof on the taxpayer) does not apply to § 6673. These damages are imposed by the Tax Court either pursuant to motion by the Service or sua sponte. The Tax Court has not addressed the issue of the burden of proof in its application of damages. Since the court is, in a real sense, a party to the transaction giving rise to the damages, burden of proof rules may be unnecessary. Insofar as appellate courts are concerned, whether the Tax Court's imposition of damages should be sustained is a matter of the standard of appellate review rather than the burden of proof, i.e. the "clearly erroneous" rule. *See* I.R.C. § 7482(a)(1).

[325] The petitioner also argued for a jury trial and against the validity of the Service's procedures. *Abrams*, 82 T.C. at 405.

[326] *Id.*

[327] *See, e.g.*, Oneal v. Commissioner, 84 T.C. 1235, 1243 (1985) (awarding damages because despite "numerous Court opinions squarely on point, petitioners have forced an already overburdened Court and tax system to unnecessarily consume precious resources"); Smith v. Commissioner, T.C. Memo. 1986-487, 52 T.C.M. (CCH) 691 (imposing damages because numerous Tax Court decisions had previously held the same trust schemes invalid).

has been willing to impose damages against taxpayers raising frivolous arguments in a summary fashion without lengthy opinions.[328] Furthermore, the court has not limited the application of § 6673 to situations involving the spurious arguments denying the legitimacy of the tax system, but has also imposed damages against taxpayers litigating the merits of abusive tax shelters.[329]

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[328] *See, e.g.*, Allen v. Commissioner, T.C. Memo. 1987-242, 53 T.C.M. (CCH) 814; Klimek v. Commissioner, T.C. Memo. 1987-246, 48 T.C.M. (CCH) 50; Ross v. Commissioner, T.C. Memo. 1984-27, 47 T.C.M. (CCH) 920. *Cf.* McLaughlin v. Commissioner, 832 F.2d 986 (7th Cir. 1987) (reducing Tax Court awarded damages from $5,000 to $3,500 because Tax Court did not make findings demonstrating that the egregiousness of taxpayer's conduct warranted maximum damages); May v. Commissioner, 752 F.2d 1301, 1309 (8th Cir. 1985) (urging the Tax Court to make specific findings of fact that support the imposition of damages so that an appellate court can efficiently review the Tax Court's determination). In *McCoy v. Commissioner*, 76 T.C. 1027(1981), *aff'd*, 696 F.2d 1234 (9th Cir. 1983), the court, indicating that it would summarily dispose of frivolous and frequently rejected arguments, stated:

> It may be appropriate to note further that this Court has been flooded with a large number of so-called tax protester cases in which thoroughly meritless issues have been raised in, at best, misguided reliance upon lofty principles. Such cases tend to disrupt the orderly conduct of serious litigation in this Court, and the issues raised therein are of the type that have been consistently decided against such protesters and their contentions often characterized as frivolous. The time has arrived when the Court should deal summarily and decisively with such cases without engaging in scholarly discussion of the issues or attempting to soothe the feelings of the petitioners by referring to the supposed "sincerity" of their wildly espoused positions.

Id. at 1029–30.

[329] *See*, *e.g.*, Oneal v. Commissioner, 84 T.C. 1235 (1985) (taxpayers insisted on litigating merits of coal shelter despite the adverse precedent of previous cases involving similar facts); Hawkins v. Commissioner, T.C. Memo. 1987-233, 53 T.C.M. (CCH) 780 (imposing damages of $5,000 on taxpayer litigating merits of master sound recording tax shelter).

Samuel Sterrett, former Chief Judge of the Tax Court, stated:

> If the lawyer is presenting issues arising out of a tax shelter that is transparently abusive, I don't know why we should absolve the taxpayer from paying the 6673 penalty simply because a shelter is involved rather than a claim that the income tax law is unconstitutional. . . . It certainly is not the goal or purpose of the court to impose an additional penalty on someone for losing a case . . . . [However, a] lawyer who presents arguments with respect to a shelter that has been held to be abusive in prior cases, and those opinions have been sustained by circuit courts, will do well to consider whether or not he has any reasonable expectation of prevailing, or simply is trying to buy time.

If the taxpayer has any legitimate grounds for maintaining the suit, however, it appears that damages will not be imposed.[330] In a memorandum opinion, Judge Featherston stated:

> Section 6673 is no doubt intended . . . to assist the Court in regulating its docket by deterring frivolous filings. It is not intended, however, to be used as a bludgeon to force settlements or a threat against the good faith advocacy of potentially meritorious legal and factual positions. There is a difference between a frivolous proceeding and one ultimately found to be without merit.[331]

Moreover, resolution of novel issues against the taxpayer will not occasion imposition of § 6673 damages, even if the resolution is predictable based upon relevant precedent. Thus, in a case involving taxpayers engaged in a tax straddling scheme utilizing mortgage certificates issued by the Government National Mortgage Association and the Federal Home Loan Mortgage Corporation, damages were not imposed—even though the court

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Marvin J. Garbis, *Interview: Samuel Sterrett on How the Tax Court Sees Its Docket*, 1 TAX TIMES 3, 26 (July 19, 1987).

[330] *See, e.g.*, Fowler v. Commissioner, T.C. Memo. 1987-142, 53 T.C.M. (CCH) 373, 376 (denying damages when Service failed to prove fraud in two of three years at issue); Petersen v. Commissioner, T.C. Memo. 1987-108, 53 T.C.M. (CCH) 235, 241 (denying damages under § 6673 when taxpayer's case was somewhat distinguishable from other tax protester cases); McMains v. Commissioner, T.C. Memo. 1987-85, 53 T.C.M. (CCH) 118, 120 (damages denied when taxpayer prevailed on issue of unreported income); Kellner v. Commissioner, T.C. Memo. 1986-524, 52 T.C.M. (CCH) 875, 880 (damages denied even though it was the taxpayer's fifth appearance before the court, because "some evidence and authority . . . arguably supported her position"); Miller v. Commissioner, T.C. Memo. 1986-278, 51 T.C.M. (CCH) 1378, 1386 (court held it was "tempting to award damages" on sham family trust, but declined to do so "[b]ecause of the now conceded deductions and the extent of disputed facts"); Sampson v. Commissioner, T.C. Memo. 1986-231, 51 T.C.M. (CCH) 1148, 1154 (reluctantly denying damages on sham family trust because case also involved an issue of jurisdiction); Estate of duBois v. Commissioner, T.C. Memo. 1986-160, 51 T.C.M. (CCH) 895, 902 (damages denied because case presented some legitimate issues). *But cf.* McLaughlin v. Commissioner, 832 F.2d 986 (7th Cir. 1987) (court reduced damages awarded by Tax Court because of absence of findings of egregiousness of taxpayer's conduct, but imposed sanctions for taking a frivolous appeal based on taxpayer's grounds for not paying income tax).

[331] Johnson v. Commissioner, T.C. Memo. 1986-488, 52 T.C.M. (CCH) 694, 699; *see also* Marx v. Commissioner, No. 36612-85, Tax Ct. Memorandum Sur Order (Mar. 23, 1986), *reprinted* in 33 TAX NOTES (microfiche Doc. No. 86-7221) (Dec. 1, 1986) (holding that Service's offer to concede fraud penalty in exchange for maximum damages award was improper because the amount of § 6673 damage awards is a matter of judicial discretion).

noted that the petitioners were knowledgeable businessmen who should have been aware, and were aware, that the schemes were "'too good' to be real"—because the law regarding tax straddles was uncertain until after the trial date.[332] The court took the opportunity, however, to serve notice that it would not be reluctant to impose damages in future cases against petitioners who knew or reasonably should have known that the tax shelters they disputed were "factual shams."[333]

Although the 1982 amendment to § 6673 may have eliminated the requirement of subjective knowledge that the taxpayer's position is "frivolous or groundless,"[334] it appears likely that in most cases in which

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[332] Brown v. Commissioner, 85 T.C. 968, 1001 (1985), *aff'd sub nom.* Sochin v. Commissioner, 843 F.2d 351 (9th Cir. 1988).

[333] *Id.* at 1002.

[334] TEFRA, Pub. L. No. 97-248, § 292(b), 96 Stat. 324, 574 (1982). The Seventh Circuit has held that in determining whether the taxpayer has taken a frivolous position under § 6673 "[t]he inquiry is objective. If a person should have known that his position is groundless, a court may and should impose sanctions." Coleman v. Commissioner, 791 F.2d 68, 71 (7th Cir. 1986). According to the Seventh Circuit, the purpose of § 6673

> is to induce litigants to conform their *behavior* to the governing rules regardless of their subjective beliefs. Groundless litigation diverts the time and energies of judges from more serious claims; it imposes needless costs on other litigants. Once the legal system has resolved a claim, judges and lawyers must move on to other things. They cannot endlessly rehear stale arguments. Both appellants say that the penalties stifle their right to petition for redress of grievances. But there is no constitutional right to bring frivolous suits.

Id. at 72. (citation omitted) (emphasis in original). According to the Seventh Circuit, however, whether the petition was filed primarily for delay is a subjective inquiry. *Id.* Under this prong of § 6673, it must be established that the taxpayer intentionally commenced the case to delay paying his taxes before damages may be imposed for delaying the proceedings. In most cases, such a showing will be unnecessary since the court has the authority to impose damages against taxpayers whose positions are frivolous on their face. *Cf.* May v. Commissioner, 752 F.2d 1301 (8th Cir. 1985). In *May*, the court held that sanctions are proper under § 6673 if it is "incontrovertible" that the taxpayer did not pursue his claim "in good faith because he knew or *should have known* that the claim or argument was frivolous or because he sought to delay payment of taxes." *Id.* at 1306 (emphasis added). Nonetheless, the court also stated that when a taxpayer files a claim with no knowledge of its frivolity, "[u]nless th[e] petitioner subsequently becomes aware that his petition is frivolous, . . . he should not be subject to section 6673 damages." *Id.* at 1308. Accordingly, it is not clear whether the Eighth Circuit adheres to the view that § 6673 may appropriately be applied simply if the taxpayer's petition is frivolous.

Confusion regarding the scope of § 6673 as it relates to the state of mind of the taxpayer has been compounded by the Seventh Circuit's subsequent decision in damages are imposed, the taxpayer is aware that his position is frivolous. A number of cases holding taxpayers subject to damages involve petitioners who have had the same or similar arguments rejected in prior suits.[335] In others, the taxpayer's actual knowledge that his position is without merit is apparent, either because the taxpayer admitted awareness of cases in which similar arguments were rejected[336] or because the taxpayer was informed by the Service or the court that damages may be expected.[337]

McLaughlin v. Commissioner, 832 F.2d 986 (1987). In *McLaughlin*, the Seventh Circuit reviewed the Tax Court's imposition of $5,000 in § 6673 damages. Concluding that the Tax Court had not made factual findings demonstrating the egregiousness of the taxpayer's conduct, the Seventh Circuit reduced the § 6673 damages to $3,500. In doing so, the court stated that "meaningful appellate review . . . requires an articulation by the Tax Court of those particular factors, both objective and, in appropriate cases, subjective, upon which it has relied in fixing the sum assessed." *Id.* at 988. The taxpayer's victory in *McLaughlin* was totally eroded by the Seventh Circuit's decision to impose frivolous appeal sanctions of $1,500, thus restoring to $5,000 the taxpayer's total bill for engaging in frivolous litigation.

335 *See, e.g.*, Pollard v. Commissioner, 816 F.2d 603 (11th Cir. 1987) (one prior suit); Lukovsky v. Commissioner, 734 F.2d 1320 (8th Cir. 1984) (one prior suit); Coulter v. Commissioner, 82 T.C. 580 (1984) (one prior suit); Grimes v. Commissioner, 82 T.C. 235 (1984) (one prior suit); Sydnes v. Commissioner, 74 T.C. 864 (1980) (two prior suits), *aff'd per curiam*, 647 F.2d 813 (8th Cir. 1981); Bentson v. Commissioner, T.C. Memo. 1987-172, 53 T.C.M. (CCH) 495 (one prior suit); Jacobs v. Commissioner, T.C. Memo. 1983-490, 46 T.C.M. (CCH) 1119 (four prior suits); *see also* May v. Commissioner, 752 F.2d 1301, 1307 n.7 (8th Cir. 1985) (listing cases that have awarded § 6673 damages when taxpayers brought suit using arguments that had been previously rejected and deemed frivolous by the court).

336 *See, e.g.*, Beard v. Commissioner, 82 T.C. 766, 770 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986) (taxpayer admitted studying cases and statutes); *see also May*, 752 F.2d at 1307 n.8 (listing cases in which § 6673 damages have been assessed against a taxpayer having actual knowledge that the claim was frivolous and asserting it to delay payment).

337 Allen v. Commissioner, T.C. Memo. 1987-242, 53 T.C.M. (CCH) 814, 816 (taxpayer advised during trial of authority of court to impose damages); Weeks v. Commissioner, T.C. Memo. 1987-198, 53 T.C.M. (CCH) 609, 610 (Service provided taxpayer with names of cases rejecting taxpayer's arguments as "legal garbage"); Boaz v. Commissioner, T.C. Memo. 1987-180, 53 T.C.M. (CCH) 512, 514 (Service warned taxpayer repeatedly that the Fifth Amendment claims asserted were frequently rejected); Lawrence v. Commissioner, T.C. Memo. 1987-242, 53 T.C.M. (CCH) 361, 363 (taxpayer advised by Service prior to trial that damages would be requested); Lam v. Commissioner, T.C. Memo. 1987-138, 53 T.C.M. (CCH) 359, 361 (court advised taxpayer not to pursue his case on frequently rejected claims). *Cf.* Graboske v. Commissioner, T.C. Memo. 1987-262, 53 T.C.M. (CCH) 896, 901 (damages denied based on the record and considering that Service did not move for damages until the conclusion of the trial).

Additionally, the taxpayer may be deemed to have constructive knowledge that an argument is frivolous if counsel for the taxpayer had the same argument rejected

Despite the fact that § 6673 does not require the Tax Court to warn the taxpayer personally of its authority to impose damages,[338] the court often has issued a warning before imposing damages in certain types of cases.[339]

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in previous suits. *See* May v. Commissioner, 752 F.2d 1301, 1307 n.9 (8th Cir. 1985); Manley v. Commissioner, T.C. Memo. 1983-558, 46 T.C.M. (CCH) 1359, 1361 (decided under pre-TEFRA version of § 6673).

[338] *See* Carter v. Commissioner, 784 F.2d 1006, 1009 (9th Cir. 1986); *May*, 752 F.2d at 1305.

[339] In *Grace v. Commissioner*, T.C. Memo. 1986-304, 51 T.C.M. (CCH) 1484, a case involving a master sound recording tax shelter, the court warned taxpayers "involved in similar tax avoidance or evasion schemes" of its authority to impose damages. *Id.* at 1491. Subsequently, in *Hawkins v. Commissioner*, T.C. Memo. 1987-233, 53 T.C.M. (CCH) 780, another master sound recording tax shelter case, the court, sua sponte, awarded damages of $5,000 to the Government. *Id.* at 785.

In *Sampson v. Commissioner*, T.C. Memo. 1986-231, 51 T.C.M. (CCH) 1148, the Tax Court "reluctantly" declined to award damages against a petitioner contesting deficiencies stemming from a sham family trust because of a separate jurisdictional issue in the case. *Id.* at 1154. However, the court noted that it did not believe petitioners had a meritorious case and, at least implicitly, indicated that damages might be imposed against taxpayers maintaining similar positions. *Id.* Again, in *Miller v. Commissioner*, T.C. Memo. 1986-278, 51 T.C.M. (CCH) 1378, the court stated that "[i]t is tempting to award damages in view of the groundless contentions of petitioners and our conclusion that the Trust was a sham. Because of the now conceded deductions and the extent of disputed facts, we do not award damages in this case." *Id.* at 1386. In *Smith v. Commissioner*, T.C. Memo. 1986-487, 52 T.C.M. (CCH) 691, however, damages of $2,500 were imposed against a taxpayer arguing the merits of a sham family trust. *Id.* at 694. The court noted that "[p]etitioners herein should have been aware of the numerous decisions of this Court that have declared invalid family trust schemes similar to the Trust employed by petitioners." *Id.*; *accord* Schauer v. Commissioner, T.C. Memo. 1987-237, 53 T.C.M. (CCH) 793, 797 (awarding damages and noting that the court has refused to award damages "in several family trust cases only because of factors separate and apart from the family trust transactions").

In 1983, the Tax Court issued a warning to taxpayers seeking to use the "church" as a means of avoiding the payment of taxes:

> [O]ur tolerance for taxpayers who establish churches solely for tax-avoidance purposes is reaching a breaking point. Not only do these taxpayers use the pretext of a church to avoid paying their fair share of taxes, even when their brazen schemes are uncovered many of them resort to the courts in a shameless attempt to vindicate themselves. When such frivolous cases are brought to this Court, there is a question as to whether damages should be imposed under section 6673. Although we have decided not to impose such damages in the instant case, if taxpayers continue to make frivolous claims with respect to churches established solely for tax-avoidance purposes, serious consideration will be given to imposing such damages in those cases.

3. Subsequent Statutory Developments

   a. Additional Predicate for Imposition of Damages

In 1984, Congress indicated its approval of the increased imposition of the damage penalty by the Tax Court and urged the court to take further action to dispense with lengthy opinions in routine tax protester cases and

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Miedaner v. Commissioner, 81 T.C. 272, 282 (1983) (footnote omitted); *see also* McGahen v. Commissioner, 76 T.C. 468, 484 n.16 (1981) (noting that "[i]n cases of this type [church avoidance schemes], an award of damages under sec. 6673 may be in order under appropriate circumstances"), *aff'd without published opinion*, 720 F.2d 664 (3d Cir. 1983); Adamson v. Commissioner, T.C. Memo. 1986-489, 52 T.C.M. (CCH) 699, 701–02 (awarding $5,000 in damages to the Government in "church" case and warning that damages would be assessed against attorneys who brought frivolous suits); Sigelbaum v. Commissioner, T.C. Memo. 1986-472, 52 T.C.M. (CCH) 630, 632 (rejecting petitioner's first amendment argument and awarding the Government $2,000 in damages); Riggs v. Commissioner, T.C. Memo. 1986-317, 51 T.C.M. (CCH) 1566, 1568 (awarding $1,000 in damages to the Government for basing suit on "church" case arguments previously rejected). *But see* Fowler v. Commissioner, T.C. Memo. 1987-142, 53 T.C.M. (CCH) 373, 376 (denying damages when Service failed to prove fraud in contributions claimed to be made to church in two of three years at issue); Petersen v. Commissioner, T.C. Memo. 1987-108, 53 T.C.M. (CCH) 235, 241 (damages denied because the case was "somewhat unique and capable of distinction from the plethora of cases concerning tax protestor sponsored 'churches' where [the Tax Court] awarded damages without hesitation"); McMains v. Commissioner, T.C. Memo. 1987-85, 53 T.C.M. (CCH) 118, 120 (damages denied when taxpayer prevailed on issue of unreported income); Brown v. Commissioner, T.C. Memo. 1986-268, 51 T.C.M. (CCH) 1321, 1325 (denying damages in "church" case and explaining that taxpayer seemed "somewhat different from most of the taxpayers seeking the benefit of [the Universal Life Church] connection, even though on balance, the scales in our judgment tipped against him"). The Tax Court also issued a warning to taxpayers engaged in abusive tax shelters when it stated that "[t]his case was well tried and skillfully briefed by able counsel, but neither the evidence nor the briefs present anything new. At some point, the arguments in these highly leveraged tax avoidance (or evasion) schemes must be regarded as 'frivolous or groundless.'" Elliot v. Commissioner, 84 T.C. 227 (1985), *aff'd without published opinion*, 782 F.2d 1027 (3d Cir. 1986). The court imposed $5,000 in damages against taxpayers who insisted on litigating the merits of an abusive coal shelter lease despite previously published decisions involving the same material facts. Oneal v. Commissioner, 84 T.C. 1235, 1242–44 (1985). The Tax Court's first warning to taxpayers of its readiness to impose § 6673 damages was in *Hatfield v. Commissioner*, 68 T.C. 895 (1977). *See supra* notes 288–290 and accompanying text.

to consolidate tax shelter cases, "as well as to assert, without hesitancy in appropriate instances, the penalties that the Congress has provided."[340]

In the Tax Reform Act of 1986,[341] Congress again amended § 6673 to extend the circumstances in which the damage penalty may be applied. The damages sanction may now be applied in cases in which a taxpayer "unreasonably failed to pursue available administrative remedies."[342] This amendment reemphasizes congressional concern over the flood of cases then congesting the Tax Court's docket and serves as an important inducement to taxpayers to attempt to resolve their disputes before filing petitions with the Tax Court.

Initially, the House proposed to authorize the Tax Court to impose a penalty of $120, an amount in addition to and twice the fee for filing a Tax Court petition, against taxpayers who unreasonably failed to resolve their disputes administratively.[343] Presumably because Congress believed that a stronger deterrent to dilatory or frivolous proceedings was needed to assist the Tax Court in the management of its congested docket, it concluded that the failure to exhaust administrative remedies was more appropriately included as an additional basis to impose damages under § 6673.

Although the House bill was not enacted in the form originally proposed, the legislative history to the House proposal is helpful in understanding the reasons for the amendment of § 6673:

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[340] H.R. REP. NO. 98-861, at 1673 (1984); *see also* Brown v. Commissioner, 85 T.C. 968, 1002 (1985), *aff'd sub nom.* Sochin v. Commissioner, 843 F.2d 351 (9th Cir. 1988); Oneal v. Commissioner, 84 T.C. 1235, 1243 (1985). In 1987, Chief Judge Sterrett noted that

> [a]s mandated by Congress, we have been liberal in our imposition of the 6673 penalties in the so-called tax protestor area. We are seeing a marked effect, which we think has been very salutory [sic], and we expect to see a continuing diminishment in the number of tax protestor cases filed.

Garbis, *supra* note 329, at 26.

[341] Pub. L. No. 99-514, 100 Stat. 2085.

[342] *Id.* § 1552(a), 100 Stat. at 2753 (codified at I.R.C. § 6673). As amended, § 6673 provided at the time:

> Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay, that the taxpayer's position in such proceeding is frivolous or groundless, *or that the taxpayer unreasonably failed to pursue available administrative remedies*, damages in an amount not in excess of $5,000 shall be awarded to the United States by the Tax Court in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the Secretary and shall be collected as a part of the tax.

I.R.C. § 6673 (1986) (emphasis added).

[343] H.R. REP. NO. 99-426, at 841–42 (1985) (explaining section 1316 of H.R. 3838, 99th Cong. (1985)).

> The Tax Court inventory has risen dramatically over the past ten years. One factor contributing to this increase has been the practice of taxpayers petitioning their cases directly to the Tax Court without attempting to settle the dispute with the Appeals Division of the IRS. The Appeals Division has more authority to settle cases than the Examination Division of IRS does. Appeals regularly settles large numbers of cases based on the hazards of litigation. Many of the cases taken directly to the Tax Court are eventually settled by the Appeals Officers after the case has been opened in the Tax Court with little involvement by the Court.
>
> The committee consequently believes that it is appropriate to provide a penalty for failure to exhaust administrative remedies. This new penalty will allow the Tax Court to penalize taxpayers who needlessly involve the Court in a dispute that should have been resolved in the Appeals Division of the IRS.[344]

b. Statutory Designation as a Penalty

As part of the Omnibus Budget Reconciliation Act of 1989,[345] Congress clarified the nature of the § 6673 charge while also significantly increasing the monetary amount that could be levied under the provision. Seeking to clarify that the Government need not prove specific damages before the Tax Court could impose the § 6673 penalty,[346] Congress eliminated any references to "damages" under the statute. In addition to changing the heading from "Damages Assessable For Instituting Proceedings . . ." to "Sanctions and Costs Awarded by Courts," Congress changed the reference

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[344] *Id.* at 841. The House Report indicates that a taxpayer should not be subject to damages, under the proposed standard, in the following cases: (1) if the taxpayer is challenging a regulation, ruling, or other matter outside the negotiating authority of the Appeals Division; (2) if the taxpayer attended a first level appeals meeting or cannot attend because of the undue burden to the taxpayer; (3) if the Service waives the appeals meeting; or (4) if no action was taken by appeals after having the case for six months or longer. *Id.* at 841–42. The 1986 legislation also included a reporting provision enabling Congress to monitor the Tax Court inventory. The Tax Reform Act of 1986 requires that

> [t]he Secretary of the Treasury or his delegate and the Tax Court shall each prepare a report for 1987 and for each 2-calendar year period thereafter on the inventory of cases in the Tax Court and the measures to close cases more efficiently. Such reports shall be submitted to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate.

Pub. L. No. 99-514, § 1552(c), 100 Stat. 2085, 2753–54.

[345] Pub. L. No. 101-239, 103 Stat. 2106 (1989).

[346] *See* H.R. REP. NO. 101-247, at 1399–1400 (1989).

to "damages" under § 6673(a) to a "penalty."[347] Clarification that the charge imposed under § 6673 constituted a penalty for tax purposes had the further benefit of permitting the Government to employ its administrative collection powers to recover the amount imposed under the provision.[348]

In addition to clarifying what may be considered a technical point, Congress acted to enhance the deterrent effect of the § 6673 penalty. Concerned that the prevailing $5,000 penalty was not effective in deterring taxpayers in "tax shelter cases" from taking frivolous positions, Congress raised the ceiling on the § 6673 penalty to $25,000.[349] In so doing, Congress expressed its intention that the enhanced penalty be applied primarily—but not exclusively—in the tax shelter context.[350] No such limitation was included in the statute, however, and the Tax Court has imposed the $25,000 maximum penalty generally upon taxpayers outside of the tax shelter context who consistently advance frivolous arguments or generally abuse the legal process in the face of prior warnings or prior impositions of lesser § 6673 penalties.[351]

c. Sanctions Against Counsel

Effective July 1, 1986, Tax Court Rule 33(b) was amended to provide for the imposition of sanctions against counsel or parties who sign frivolous pleadings presented to the court.[352] The amendment was derived from a

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[347] Pub. L. No. 101-239, § 7731(a), 103 Stat. 2400.

[348] *See* H.R. REP. NO. 101-447, at 1400.

[349] Pub. L. No. 101-239, § 7731(a), 103 Stat. 2106, 2400 (1989) (amending I.R.C. § 6673(a)).

[350] H.R. REP. NO. 101-247, at 1399.

[351] *See, e.g.*, Nis Family Trust v. Commissioner, 115 T.C. 523 (2000); Powell v. Commissioner, T.C. Memo. 2009-174, 98 T.C.M. (CCH) 56; Precourt v. Commissioner, T.C. Memo. 2010-24, 99 T.C.M. (CCH) 1112; Tinnerman v. Commissioner, T.C. Memo. 2010-150, 100 T.C.M. (CCH) 20, *aff'd*, 111 A.F.T.R.2d 2013-1368 (D.C. Cir. 2012).

[352] TAX CT. R. 33(b), 85 T.C. 1125–26 (1985). The rule provides:

> **(b) Effect of Signature**: The signature of counsel or a party constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The signature of counsel also constitutes a representation by him that he is authorized to represent the party or parties on whose behalf the pleading is filed. If a pleading is not signed, it shall be stricken, unless it is signed promptly after the omission is called to the attention of the pleader. If a pleading is signed in violation of this Rule, the Court, upon motion or upon

1983 revision of Rule 11 of the Federal Rules of Civil Procedure,[353] and the purposes for amending that rule are helpful in explaining the reasons for the amendment of Rule 33(b).[354]

Although prior to its revision, Rule 11 of the Federal Rules of Civil Procedure[355] had provided for the imposition of sanctions against abusive

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> its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable counsel's fees.

Id. Rule 33(b) remains unchanged following the 1985 amendment.

[353] FED. R. CIV. P. 11 (as amended in 1983, but prior to amendments in 1987, 1993, and 2007). The rule then provided as follows:

> **Signing of Pleadings, Motions, and Other Papers; Sanctions**
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> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

[354] *See* TAX CT. R. 33(b), 85 T.C. 1125–26; Versteeg v. Commissioner, 91 T.C. 339, 342 (1988); Memorandum from Judge Simpson to Chief Judge Sterrett, at 4, Sept. 11, 1985, filed at U.S. Tax Court in "Rules Committee: Litigation Costs" (pointing out that Tax Court Rule 33 is one of the rules "taken virtually verbatim from the Federal Rules of Civil Procedure").

[355] Prior to its amendment in 1983, Rule 11 provided as follows:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided

counsel, "experience shows that in practice [the former rule] was not effective in deterring abuses."[356] For example, considerable confusion existed under Rule 11, regarding "the standard of conduct expected of attorneys" and the sanctions available if counsel was found to have delayed the court's processes through abusive actions such as the filing of frivolous pleadings.[357] The amendment of Rule 11 was "intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions."[358] It was believed that "[g]reater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."[359] Rule 11, as amended in 1983, was calculated to remove any doubt regarding the availability of sanctions or the propriety of imposing them against abusive counsel.[360] Tax Court Rule 33(b) was changed for similar reasons. The amendment was "designed to emphasize the responsibilities of counsel and deter dilatory and abusive tactics by imposing effective sanctions therefor."[361] Under Rule 33(b), counsel has a

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> by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similarly action may be taken if scandalous or indecent matter is inserted.

FED. R. CIV. P. 11 (1982).

[356] *See* FED. R. CIV. P. 11, Notes of Adv. Comm. on Rules – 1983 Amendment.

[357] *Id.* at 106–07; *see* ROBERT E. RODES, KENNETH F. RIPPLE & CAROL MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 64–65 (Federal Judicial Center 1981).

[358] *See* FED. R. CIV. P. 11, Notes of Adv. Comm. on Rules – 1983 Amendment (citation omitted).

[359] *Id.* Although Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," it is intended to stress the "affirmative duty" of counsel to reasonably inquire into the facts and law prior to any filing. *Id.* What amounts to a reasonable inquiry will depend on the circumstances surrounding a particular case. *Id.*

[360] *See id.*

[361] Rules Comm. Note, TAX CT. R. 33, 85 T.C. 1126 (1985). The note states that "[a]lthough the Rule as amended also applies to unrepresented parties, the Court has discretion to take into account the special circumstances that may arise in

"duty to make reasonable inquiry as to both the facts and the law prior to the filing of any pleading."[362]

The additional burden of frivolous claims and a crowded Tax Court docket were the impetus behind the amendment of Rule 33(b).[363] "The historic sanctions, such as exclusion of evidence, deeming facts admitted, and dismissal of actions, often penalize the party when the real culprit is the counsel."[364] Now that fair notice has been given, the court has indicated that it "will not hesitate to impose . . . sanction[s] upon offending counsel in appropriate cases in the future."[365]

Rule 33(b) apparently is not restricted to taxpayers and their counsel. In appropriate cases, one may anticipate imposition of sanctions against the Government and its counsel. It is more likely, however, that the Tax Court would use its statutory authority to award reasonable litigation costs to the prevailing taxpayer[366] if the position adhered to by the Service was found to be without grounds.[367]

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pro se situations." *Id.* Pro se taxpayers who are warned that their position is frivolous, yet continue to stick to their guns, may expect imposition of § 6673 damages. *See, e.g.*, Wilcox v. Commissioner, T.C. Memo. 1987-225, 53 T.C.M. (CCH) 741, *aff'd*, 848 F.2d 1007 (9th Cir. 1988). In *Wilcox*, the court imposed $2,000 in damages against a pro se taxpayer who "regurgitates many of the now familiar tax protester arguments that have repeatedly been held to be utterly without merit and frivolous." *Id.* at 742; Weeks v. Commissioner, T.C. Memo. 1987-198, 53 T.C.M. (CCH) 609, 610 (damages of $5,000 determined against a pro se taxpayer who presented frivolous arguments, despite the fact that the Service had provided the taxpayer with cases rejecting the arguments as "legal garbage") (citation omitted).

[362] Rules Comm. Note, TAX CT. R. 33, 85 T.C. 1126 (1985).

[363] *See* Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 354, at 4.

[364] *Id.*

[365] Adamson v. Commissioner, 52 T.C.M. (CCH) 699, 702 (1986) (prior to effective date of amended Rule 33(b)). The Tax Court exercised its authority under Rule 33(b) in Versteeg v. Commissioner, 91 T.C. 339 (1988) (litigation costs of $498.90 awarded against petitioner's counsel for pursuing litigation over which court lacked jurisdiction); *see also* Larsen v. Commissioner, 765 F.2d 939 (9th Cir. 1985); Kalgaard v. Commissioner, 764 F.2d 1322 (9th Cir. 1985); Pittler v. Commissioner, T.C. Memo. 1986-320, 51 T.C.M. (CCH) 1587, 1588 n.1 (noting that "additional sanctions" would be imposed under new Rule 33(b) "against counsel who signs a pleading that he knows is not well founded in fact and warranted in law and/or that is interposed to cause delay").

[366] I.R.C. § 7430.

[367] *See, e.g.*, Powers v. Commissioner, 100 T.C. 457, 494 (1933) (determining the taxpayer's motion for sanctions under Rule 33(b) to be moot in light of award of litigation costs under § 7430), *aff'd in part and rev'd in part on other grounds*, 43 F.3d 172 (5th Cir. 1995).

The application of Rule 33(b) to counsel in connection with the prosecution of frivolous claims has been obviated in large part by the expansion of § 6673 to permit the Tax Court to impose costs on attorneys and others admitted to practice before the Tax Court pursuant to § 6673(a)(2).[368] As part of the 1989 amendment to § 6673, Congress authorized the Tax Court to require any attorney or other non-attorney representative to pay excess costs, expenses, and attorney's fees that are incurred because the representative "multiplied the proceedings in any case unreasonably and vexatiously."[369]

The Tax Court first imposed the sanction under § 6673(a)(2) in *Harper v. Commissioner*.[370] There, the court found that the attorney's tactic of producing documents for copying one at a time violated the court's order compelling document production and prevented discovery from moving forward.[371] The court further found that the attorney's conduct prevented the case from being ready for trial on the last day of the scheduled trial session. Finding that the production of documents was crucial to the substantive issues of whether the taxpayer had adequately substantiated business expenses and itemized deductions, the court concluded that the attorney's conduct with respect to discovery "unreasonably and vexatiously multiplied the proceedings."[372] Additionally, the attorney filed a motion for summary judgment while conceding that the principal issue in the case was a question of fact, and the attorney refused to comply with the pretrial order to stipulate facts and to submit a trial memorandum.[373]

The amount of "excess" attorney's fees to be imposed under § 6673(a)(2) is limited to that attributable to the sanctioned misconduct of the attorney or other representative. Once the amount of time has been determined, the court applies an hourly rate based on the experience level of the opposing attorney and the cost of living in the area where the attorney practices.[374] In making these determinations, the Tax Court looks

[368] In *Gillespie v. Commissioner*, T.C. Memo. 2007-202, 94 T.C.M. (CCH) 91, the Tax Court invoked Rule 33(b) as an alternative basis to § 6673(a)(2) for requiring the taxpayer's counsel to pay the Government's excess attorney's fees attributable to the unreasonable and vexatious multiplication of the proceedings. *Id.* at 101 n.6.

[369] I.R.C. § 6673(a)(2) (as added by Pub. L. No. 101-239, § 7731(a), 103 Stat. 2106, 2400 (1989)). Congress indicated that § 6673(a)(2) was modeled on 28 U.S.C. § 1927, which confers similar authority upon Federal district courts. H.R. REP. NO. 101-247, at 1399-1400 (1989).

[370] 99 T.C. 533 (1992).

[371] *Id.* at 547.

[372] *Id.* at 547–48.

[373] *Id.* at 548.

[374] *See id.* at 549 ("Attorney's fees awarded under section 6673(a)(2) are to be computed by multiplying the excess hour reasonably expended on the litigation by a reasonable hourly rate. The product is known as the 'lodestar' amount.").

to authorities interpreting 28 U.S.C. § 1927, a substantially identical provision applicable in Federal district court.[375]

Section 6673(a)(2) applies to both representatives of the taxpayer and attorneys representing the Government. Nonetheless, an imposition of costs under § 6673(a)(2) most often accompanies the imposition of a § 6673(a)(1) penalty against the taxpayer when the taxpayer's attorney is complicit in the sanctioned conduct.[376]

The prospect of sanctions for pursuing frivolous actions does not end at the trial level. Rule 38 of the Federal Rules of Appellate Procedure provides that "[i]f a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee."[377] Damages and costs under Rule 38 can be imposed on counsel as well as a party in interest.[378]

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[375] *See id.* at 551 (looking to authorities under 28 U.S.C. § 1927 for guidance).

[376] *See, e.g.,* Nis Family Trust v. Commissioner, 115 T.C. 523 (2000); Powell v. Commissioner, T.C. Memo. 2009-174, 98 T.C.M. (CCH) 56, *aff'd sub nom.*, Barringer v. United States Tax Court, 108 A.F.T.R.2d 2011-5368 (D.C. Cir. 2011).

[377] FED. R. APP. P. 38; *see also* 28 U.S.C. § 1912 ("Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.").

[378] *See* 28 U.S.C. § 1927, which provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

PART XI

OPINIONS, DECISIONS, AND APPEALS

A. The Decision Process

Upon the completion of trial and submission of briefs, the Tax Court's decision process begins. This process has been shaped by the court's desire to provide an impartial and expedient judicial review of tax controversies that will serve as a source of uniform precedents for the Service and the public.[1] Accordingly, it is imperative that accurate and well-reasoned written findings of fact and opinions be prepared as quickly as is practicable.[2] The findings of fact and opinion in a case (referred to in the statute as a "report")[3] as well as the decision thereon[4] are prepared by one of the judicial officers of the court. To disseminate effectively these opinions, the statute provides for general publication of the court's reports; however, such publication is not necessary in cases that concern well-settled legal principles.[5]

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[1] *See generally* Lyle T. Alverson, *Has the Board of Tax Appeals Failed?*, 4 NAT'L INC. TAX MAG. 337 (1926); Gerald D. Babbitt & William Morris, *An Introduction to the Tax Court of the United States*, 21 TAX LAW. 615 (1968); Charles D. Hamel, *The United States Board of Tax Appeals*, 2 NAT'L INC. TAX MAG. 293, 308 (1925) [hereinafter cited as Hamel]; John W. Kern, *The Process of Decision in the United States Tax Court*, 8 N.Y.U. ANN. INST. ON FED. TAX'N 1013 (1949) [hereinafter cited as Kern]; J. Gilmer Korner, *Procedure in the Appeal of Tax Cases Under the Revenue Act of 1926*, 4 NAT'L INC. TAX MAG. 413 (1926) [hereinafter cited as Korner]; J. Edgar Murdock, *Tax Court is Fulfilling its Function; No Fundamental Changes Needed*, 8 J. TAX'N 106 (1958) [hereinafter cited as Murdock]; Percy W. Phillips, *Possible Methods of Eliminating Congestion of Tax Appeals*, 5 NAT'L INC. TAX MAG. 243 (1927) [hereinafter cited as Phillips]; Edward N. Polisher, *Tax Court Commissioners*, 28 TAXES 413 (1950); Forest D. Siefkin, *Has the Board of Tax Appeals Failed?*, 5 NAT'L INC. TAX Mag. 45 (1927) [hereinafter cited as Siefkin]; Theodore Tannenwald, Jr., *After Trial—How A Case is Decided*, 27 N.Y.U. ANN. INST. ON FED. TAX'N 1505 (1968); Theodore Tannenwald, Jr., *Tax Court Trials: A View from the Bench*, 59 A.B.A. J. 295 (1973).

[2] I.R.C. § 7459(a)–(b) provides:

> A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. . . . It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion.

[3] I.R.C. § 7459(b).

[4] I.R.C. § 7459(a), (c).

[5] I.R.C. § 7462 provides: "The Tax Court shall provide for the publication . . . in such form and manner as may be best adapted for public information and use."

Since 1924, the division, whether composed of three members or a single member, has been the basic decision-making unit of the court.[6]

Because the danger of inconsistent interpretations made necessary some form of internal review,[7] a conference procedure was authorized by the Revenue Act of 1924 and established by the Board in the same year to make possible the review of division reports prior to their promulgation.[8] Although the objectives of conference review have remained unchanged,[9] difficulties with respect to the selection of cases for review,[10] taxpayer misunderstanding as to the nature of conference review,[11] and the mechanics of conference operation, particularly in voting practices,[12] have confronted the court.

Upon completion of action by the conference, or, if no conference review is directed by the chief judge,[13] the findings of fact and opinion in the controversy are filed and served on the parties.[14] If the entire deficiency has been upheld or the entire deficiency has been rejected, the decision is entered in the records of the court.[15] The date of decision is the date when it is entered in the records of the court indicating the amount of the deficiency.[16] In the event that the deficiency is neither totally approved nor rejected, it is generally necessary to employ the procedures of Rule 155 of the Tax Court Rules of Practice and Procedure to reach a final determination of the precise monetary amount of the tax liability.[17] In these

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6 *See* Section B of this Part.

7 *See* Letter from Chairman Korner to Secretary Mellon, May 24, 1926, at 5, filed at the U.S. Tax Court in "Divisions: Memoranda & Correspondence" [hereinafter cited as Korner Letter].

8 Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337.

9 *Compare* Korner Letter, *supra* note 7, *with* Kern, *supra* note 1 and Murdock, *supra* note 1.

10 Early practice of the Board was to review every division decision. Korner Letter*, supra* note 7, at 5. *See* Section F of this Part for a discussion of the development of the present practice under which the chief judge determines which cases will be reviewed by the court.

11 *E.g.*, United States Bd. of Tax Appeals v. United States *ex rel.* James S. McCandless, 26 F.2d 1000 (D.C. Cir. 1928); *see also* 69 CONG. REC. 10135 (1928).

12 *See* Section F.2 and F.3 of this Part.

13 I.R.C. § 7460(b) provides: "The 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."

14 I.R.C. § 7459.

15 *Id.*

16 I.R.C. § 7459(c) provides: "A decision of the Tax Court . . . shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. . . ."

17 TAX CT. R. 155 (July 6, 2012 ed.).

cases, the responsibility rests with the parties to provide the court with the necessary computations.[18] Upon the filing of a computation, either by agreement of the parties, or by decision of the court when the parties are unable to agree, the court will enter the decision.[19]

B. Development of the Single-Member Division Structure

Under the provisions of the 1924 Revenue Act, the Board was to have not less than seven and not more than twenty-eight members.[20] The Chairman was empowered to divide the Board into divisions,[21] and although no particular number of members per division was dictated specifically,[22] the statutory provisions authorizing division of the Board[23] and its legislative history[24] indicated that Congress intended at least three members per division.[25] The statute required the divisions to hear and determine appeals assigned by the Chairman.[26] Decisions of a division became decisions of the Board upon the expiration of 30 days unless the Chairman directed review by the entire Board.[27] The division concept undoubtedly had its roots in the predecessor to the Board of Tax Appeals, the Committee on Appeals and Review, which also had been divided into groups of three.[28]

Despite the statutory provision of a division structure, in the early months of the Board's operation, the members sat en banc.[29] This was due to a lack of cases ready for trial. By September, 1924, however, the work before the Board had progressed to a point at which it was deemed

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[18] *Id.*

[19] *Id.*

[20] Revenue Act of 1924, ch. 234, § 900(a), 43 Stat. 336 (now codified at I.R.C. § 7443).

[21] Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337 (now codified at I.R.C. § 7444(c)).

[22] *Id.*

[23] *Id.*

[24] *Hearings on Revenue Revision, 1924, Before the Senate Finance Comm.*, 68th Cong., 1st Sess., at 24 (testimony of Mr. Gregg) [hereinafter cited as 1924 Senate Hearings].

[25] Korner Letter, *supra* note 7, at 3.

[26] Revenue Act of 1924, ch. 234, § 900(e)–(f), 43 Stat. 337 (now codified at I.R.C. § 7460(a)).

[27] *Id.* § 900(f) (now codified at I.R.C. § 7460(b)). For a discussion of the court review procedures, see Section F of this Part.

[28] 1924 Senate Hearings, *supra* note 24, at 24.

[29] *See* John H. Parrot, 1 B.T.A. 1 (1924); Everett Knitting Works, 1 B.T.A. 5 (1924). The Revenue Act of 1924 clearly provided that decisions could be made by the full Board. Ch. 234, § 900(f), 43 Stat. 337.

advisable to divide the membership into divisions.[30] At this time, the Board was divided into three divisions, one of three members, two others of four members each.[31] Subsequently, as additional members were appointed to the Board, another division consisting of three members was added.[32] During the initial year and a half of the Board's operation, these divisions sat four days a week for the hearing of appeals.[33] After the hearing, a division conference would be held at which a decision would be reached; thereupon one of the members of the division would be assigned the task of writing the division's findings of fact, opinion, and decision.[34] Board conferences, at which the division decisions were reviewed by the entire Board, occupied two additional days of the week.[35] Accordingly, the only time that individual members had for deciding appeals and writing findings of fact and opinions was in the evening hours, on Sundays or at such times as they could be spared from the hearing of cases.[36] To maximize this time, a practice developed of having only two or three divisions, a total of six to eleven members, sit each week.[37] Because each division could hear only approximately four cases a day,[38] it soon became apparent that the three- or four-member divisional structure was not conducive to a rapid determination of tax appeals.[39] During the first two years of the Board's

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[30] Press Release from the U.S. Board of Tax Appeals, Sept. 4, 1924, filed at the U.S. Court in "Decisions: Memoranda & Correspondence."

[31] Division No. 1 was comprised of Mr. Ivins, Chief, Mr. Korner, and Mr. Marquette. Division No. 2 was comprised of Mr. James, Chief, Mr. Sternhagen, Mr. Trammell, and Mr. Trussell. Division No. 3 was comprised of Mr. Graupner, Chief, Mr. Lansdon, Mr. Littleton, and Mr. Smith. Memorandum from Chairman Hamel, Sept. 3, 1924, filed at the U.S. Tax Court in "Organizing the Board: Memoranda & Correspondence."

[32] Announcement from Chairman Hamel, Mar. 28, 1925, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

[33] Memorandum from Chairman Korner to members of the Board, June 11, 1926, at 8, filed at the U.S. Tax Court in "Divisions: Memoranda & Correspondence" [hereinafter cited as Reorganization Memorandum]; Korner Letter, *supra* note 7, at 3–4.

[34] Reorganization Memorandum, *supra* note 33, at 8.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*; *see also Hearings on Revenue Revision, 1925, Before the House Comm. on Ways and Means*, 69th Cong., 1st Sess., at 860 [hereinafter cited as 1925 House Hearings].

[39] In an effort to alleviate the difficulties attendant upon three-man divisions, the Board informally permitted a single member of a division to hear a case, who would report to the full division. The full division would render a decision that would be subject to Board review. Arguments of counsel at the close of the evidence, were, in each appeal, to be heard by the entire division, so far as practicable. Circular on Internal Administration, Sept. 12, 1924, filed at the U.S.

existence, an unexpected and heavy influx of appeals brought the number of pending appeals to 10,000 by early 1926, which aggravated the problem and provided a strong impetus to find a remedy for the backlog of cases.[40] The cause for the heavy influx of appeals was twofold. First, it was believed that many taxpayers appealed from deficiencies that were clearly proper.[41] Second, the Bureau had sent out many deficiency notices without a sufficient effort on the part of the conferees of its Income Tax Unit to settle disputes.[42]

Various remedies were developed to alleviate the increasing congestion. For example, in the Revenue Act of 1926, Congress authorized the Board to impose a filing fee of up to $10 as a means of discouraging the large number of trivial appeals.[43] Additionally, the Bureau indicated that it would initiate a policy that would encourage conferees to settle with taxpayers more readily, and would expand the process of stipulation so as to shorten the length of hearings.[44] These measures were not, however, believed to be adequate to cure the problem, and the Board proposed to Congress in 1925 that it be empowered to create divisions of one member each.[45] The hearing of a case required far less time than the decision process, but because divisions of three or four members were required to sit and hear

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Tax Court in "Divisions: Memoranda & Correspondence." *See also* 1925 House Hearings, *supra* note 38, at 890.

[40] *See* Reorganization Memorandum, *supra* note 33, at 1; *see also* B.T.A. Conference Minutes, June 23, 1926.

[41] Reorganization Memorandum, *supra* note 33, at 2; Korner Letter, *supra* note 7, at 1–2.

[42] Korner Letter, *supra* note 7, at 2.

[43] Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 106. The adoption of the $10 filing fee resulted in a 25% reduction in the number of appeals brought before the Board. *See* Reorganization Memorandum, *supra* note 33, at 4. *But see* Alverson, *supra* note 1, at 339. Another possibility suggested to reduce the number of appeals before the Board was to set a jurisdictional limitation on the amount of a deficiency that could be appealed to the Board. Letter from A.E. Graupner to J. Gilmer Korner, Aug. 28, 1925, filed at the U.S. Tax Court in "Revenue Act of 1926: Memoranda & Correspondence"; J.S.Y. Ivins, *What Should Congress Do With the Board of Tax Appeals?*, 3 NAT'L INC. TAX MAG. 391, 392 (1925). This alternative was not considered politically expedient and was not seriously advocated. *Cf.* 1925 House Hearings, *supra* note 38, at 887–89 (testimony of Mr. Morris). Another proposal involved the imposition of a penalty against the taxpayer when it appeared that a proceeding was brought merely for delay. *Id.* at 892. Such a proposal was enacted as part of the 1926 legislation and is still effective. *See* I.R.C. § 6673.

[44] Reorganization Memorandum, *supra* note 33, at 6.

[45] 1925 House Hearings, *supra* note 38, at 887 (remarks of Mr. Morris), 912 (remarks of Mr. Ivins). Strong support for one-member divisions was apparent in the tax bar. *See* George Maurice Morris, *American Bar Association Tax Revision Recommendations*, 3 NAT'L INC. TAX MAG. 403, 404 (1925).

each case, a necessary result was the hearing of more cases than the members could decide without frequent intervals of recess from the hearing process.[46] Under a one-member division structure, each division could hear the same number of cases as a three- or four-member division in the same amount of time. More importantly, one-member divisions would provide substantially more time for members to remain off the bench and engage in the decision process.[47] Thus, whereas under the then existing practice two divisions were on the bench and two were off, the new system would create 16 divisions and permit five divisions to be on the bench hearing cases with ten divisions off the bench engaged in the decision process.[48] The remaining division consisted of the Chairman, whose review and administrative duties precluded him from hearing a significant number of cases.[49] The Board was confident that this system would enable it to hear and decide a greater number of cases in a shorter period of time and would serve to reduce the mounting congestion.[50]

The move to permit the Board to have single-member divisions met with some resistance in Congress. First, fears were raised that the risk of pro-Government bias would be greater than with multi-member divisions.[51] Second, the express language of the statute provided for Board review of division decisions only in the discretion of the Chairman,[52] and it was possible that the Board could reverse its established policy of reviewing each division decision.[53] Were such a reversal to come about under a system that would have 16 divisions, the danger of inconsistent opinions would multiply.[54] Accordingly, the Ways and Means Committee in its report proposed that one-member division decisions automatically be reviewed by the entire Board, while division decisions that were made by two or more members be subject to the same statutory provisions established under the 1924 Revenue Act.[55] The Senate, however, rejected these proposals and

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[46] Reorganization Memorandum, *supra* note 33 at 8–9; Korner Letter, *supra* note 7, at 4.

[47] Korner Letter, *supra* note 7, at 4.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 5.

[51] As a result, the House bill provided that one-member division decisions be automatically reviewed by the Board. This proposal was deleted in conference. H.R. REP. No. 356, 69th Cong., 1st Sess. 53 (1926).

[52] Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337.

[53] The Board did in fact reverse its prior policy in the spring of 1927 and henceforth required the Chairman to review each decision to determine if Board review was necessary. *See infra* note 216 accompanying text.

[54] *See* Alverson, *supra* note 1, at 339; J.S.Y. Ivins, *What Should Congress Do With the Board of Tax Appeals?*, 3 NAT'L INC. TAX MAG. 391 (1925).

[55] H.R. REP. NO. 69-1, at 18 (1925).

instead provided that one-member divisions be established and that the statutory direction to the Chairman be left unchanged.[56] In conference, the House receded from its proposal.[57]

Shortly thereafter, the Board was divided into 16 single-member divisions.[58] Although Congress increased the number of Tax Court judges (and hence the number of divisions) from 16 to 19 in 1980 due to the court's increased workload,[59] the procedures employed with respect to the single-member divisions have remained essentially unchanged since 1926.[60] The opinion is prepared by the judge who hears the case.[61] The report (opinion or memorandum opinion) is transmitted to the chief judge who, with the assistance of legal staff, reviews the opinion, notes any comments or suggested revisions, and decides whether to direct that the opinion be reviewed by the Court Conference.[62] Summary opinions authored by special trial judges undergo similar review by a Presidentially-appointed judge assigned to the Small Tax Case Division.

To enhance the goal of consistency of result in the Court's opinions, all opinions are circulated to the judges before they are released to the public. Opinions normally are released to the parties and are available to the public on the court's website at 3 p.m. The Reporter of Decisions telephonically

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[56] S. REP. NO. 69-52, at 35 (1925).

[57] H.R. REP. NO. 69-356, at 53 (1925). The 1926 Act provided that the Chairman was authorized to divide the Board into divisions of one or more members. Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 106, *amending* Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337.

[58] Memorandum from Chairman Korner to members of the Board, June 25, 1926, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence"; Board Conference Minutes, June 23, 1926. As part of Board reorganization in that year, the "part" system was established. The "parts" were composed of three divisions and provided an initial collegial review of a division decision with specific recommendations made as to the necessity of full Board review. This procedure was eliminated in 1932. For a discussion of the part system and conference review, see *infra* notes 211–216 and accompanying text.

[59] *See* Pub. L. No. 96-439, § 1(a), 94 Stat. 1878 (1980); S. REP. NO. 96-933, at 2 (1980) (citing the increased workload of the Tax Court as the basis for the expansion).

[60] *Compare* I.R.C. §§ 7459–7460 *with* Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 105–07, *amending* Revenue Act of 1924, ch. 234, § 900(a)–(h), 43 Stat. 337–38.

[61] I.R.C. §§ 7459(b), 7460(a). *See* Hamlin's Trust v. Commissioner, 209 F.2d 761 (10th Cir. 1954); Hawaiian Freight Forwarders Ltd. v. Commissioner, 196 F.2d 745 (9th Cir. 1952).

[62] I.R.C. § 7460(b). This policy of chief judge discretion was established in 1927. *See infra* note 216 and accompanying text. If review is warranted, the report of the division is reviewed in accordance with the procedures established for the Court Conference. *See* Section F of this Part.

notifies the parties when an opinion is released. Thereafter, a decision is entered in the case in accordance with the opinion.[63]

C. Findings of Fact and Opinion

Under the provisions of the Revenue Act of 1924, the Board was required to make written findings of fact in every case.[64] These findings served as prima facie evidence in any further proceedings between the taxpayer and the Bureau.[65] Although the necessity of providing a written statement of fact findings was clear from the outset, there was a division of views during deliberations on the 1924 Act with respect to the need for a written opinion. The proponents of an opinion requirement argued that it would be impossible to convince a litigant that a case was being decided fairly if a Board member could refuse to give his reasons for a decision.[66] Second, the Board in its opinion might make a serious mistake that the interested party could discover and point out to the Board without the necessity of further action.[67] Finally, the proponents of an opinion requirement believed that Congress was creating a judicial entity, and traditionally courts gave reasons for their decision.[68] On the other hand, an opinion requirement was not viewed as conducive to an expeditious handling of the expected heavy influx of tax appeals.[69] In addition, the lack of direct appeal from the Board's decision in a case obviated the necessity of a written opinion.[70] If either party was dissatisfied with the Board's determination, a de novo action could be instituted. In such a proceeding the court would not be obligated to consider the Board's reasoning.[71] As a compromise between those urging an opinion requirement and those

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[63] *See* Section G of this Part.

[64] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[65] Revenue Act of 1924, ch. 234, § 900(g), 43 Stat. 337, provided that in "any proceeding in court under sections 274, 279, 308, or 312, and in any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board shall be prima facie evidence of the facts therein stated."

[66] 1924 Senate Hearings, *supra* note 24, at 389–90, 392 (testimony of F. Lowsen, American Institute of Accountants).

[67] *Id.*

[68] 65 CONG. REC. 8132-34 (1924).

[69] *See id.* at 2684 (remarks of Mr. Chindblom).

[70] Revenue Act of 1924, ch. 234, § 274(b), 43 Stat. 297; H.R. REP. NO. 68-179, at 8 (1924); S. REP. NO. 68-398, at 42 (1924).

[71] Bolon B. Turner, *The Tax Court of the United States, Its Origin and Function,* THE HISTORY AND PHILOSOPHY OF TAXATION 31, 36 (1955); Memorandum from T. C. Lavery to R. H. Jackson, General Counsel, Internal Revenue Service, c. Aug. 1935, at 19, filed at the U.S. Tax Court in "Evidence: Memoranda & Correspondence" [hereinafter cited as Jackson Memorandum].

doubting the necessity of such a requirement, the 1924 Act required a written opinion only in those cases in which the amount of tax in controversy exceeded $10,000.[72]

Difficulties soon arose in the application of the statutory provisions with respect to the necessity of findings of fact in every case and the situations in which an opinion was required. It had become apparent that numerous cases were brought by taxpayers appealing from obviously correct determinations.[73] Likewise, a substantial number of cases were brought merely for delay, were not prosecuted, or were filed improperly. Such futile appeals resulted in a mounting backlog on the Board's calendar,[74] and the necessity of preparing findings of fact in these cases served only to reduce the amount of available time the members had for preparing the findings of fact in cases that involved bona fide disputes.[75] Accordingly, it was believed appropriate that, in the above types of cases, the Board be permitted to dispense with findings of fact.[76] The House, in the Revenue Bill of 1926, agreed to relieve the Board of the duty in instances in which a case was "not decided upon the merits but was dismissed on motion on the ground that the proof" was clearly insufficient to sustain the allegation of the petition or that there was a failure to prosecute or to conform to the rules of the Board.[77] However, the House was cognizant of the danger of accusations of pro-Government partiality that might be leveled at the Board by disgruntled taxpayers dismissed on motion.[78] Accordingly, the House bill directed automatic Board review of cases dismissed by a division on the ground that the proof was insufficient.[79] The Senate Finance Committee, however, viewed such a requirement as being unnecessary, particularly in view of the provision that permitted the Chairman of the Board to direct review of a division opinion.[80] In conference, the House receded on its proposal to require automatic review.[81]

In addition to difficulties with the requirement of written findings of fact, the Board discovered that the opinion requirement established in the Revenue Act of 1924 was not responsive to actual needs. The basic problem, pointed out by the Board during congressional deliberations on

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72 Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337. Indexed for inflation, the initial $10,000 threshold for the amount in controversy equates to roughly $133,000 in 2012 dollars.

73 Korner Letter, *supra* note 7, at 2.

74 *See* H.R. REP. NO. 69-1, at 18–19 (1925).

75 *See* 1925 House Hearings, *supra* note 38, at 910–12.

76 *See* H.R. REP. NO. 69-1, at 18–19 (1925).

77 *Id.*

78 *Id.*

79 *Id.*

80 S. REP. NO. 69-52, at 35–36 (1925).

81 H.R. REP. NO. 69-356, at 53 (1926).

the 1926 Act, was that cases in which the taxes in controversy exceeded $10,000 sometimes involved no substantial question of law, whereas other cases, in which the disputed amounts were substantially less, frequently involved difficult questions of law that affected many cases.[82] Consistent with this view, the practice of the Board, despite the provisions of the 1924 Act, had been to write opinions in all cases, regardless of the amount in dispute.[83] The Board believed that well-reasoned opinions were important in building public confidence and providing precedents in the interpretation of the tax law.[84] Moreover, other provisions of the 1926 legislation that limited review of Board determinations to direct appeal of its decisions increased the importance of opinions. A reviewing court would be less likely to reverse a decision of the Board in which an opinion setting forth the reasons for a decision was provided.[85] As a result of these considerations, the congressional tax committees recommended that the Board have discretion to determine the cases in which an opinion would be provided.[86] Notwithstanding the fears of certain members of Congress that the Board would abuse the discretion accorded it,[87] and the suggestion that the Commissioner be permitted to request the Board to write an opinion when he deemed it advisable,[88] the recommendations of the committees were adopted without amendment.[89]

The final major statutory change in the requirements for findings of fact and opinion was incorporated in the Revenue Act of 1928, which eliminated the necessity of findings of fact in certain cases decided on the merits. Instead, the Act provided the Board, in promulgating its report, with discretion to include, in the alternative, findings of fact, an opinion, a memorandum opinion, or both a findings of fact and an opinion or memorandum opinion.[90] In view of the availability of a record of the evidence presented to the Board, the requirement of detailed findings of fact in every case was believed to be unnecessary.[91] However, in those

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[82] *See* 67 CONG. REC. 1136–37 (1925).

[83] *Id.*

[84] *See generally* 1925 House Hearings*, supra* note 38.

[85] *See generally* Jackson Memorandum, *supra* note 71, at 30.

[86] *E.g.*, H.R. 1, 69th Cong., 1st Sess. § 907(b) (1925).

[87] 67 CONG. REC. 1136 (1925).

[88] *Id.* at 1137.

[89] Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 107, *amending* Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[90] Revenue Act of 1928, ch. 852, § 601, 45 Stat. 872, *amending* Revenue Act of 1926, ch. 27, § 907(b), 44 Stat. 107 (now codified at I.R.C. § 7459(b)).

[91] H.R. REP. NO. 70-2, at 30 (1928); *Hearings on Revenue Revision, 1928, Before the House Comm. on Ways and Means,* 70th Cong., 1st Sess. at 540, 553–59 (1928) (statement of Special Committee on Federal Taxation of American Bar Association) [hereinafter cited as 1928 House Hearings]; *Hearings on Revenue Revision*,

cases in which a complicated factual setting was presented, the new provision provided necessary flexibility.[92] Concern on the part of some members of Congress that omission of a findings of fact would permit the circuit courts to substitute their judgment on the facts for that of the Board was countered by the fact that the circuit courts were able to reverse or modify decisions of the Board (so far as facts were concerned) only if no substantial evidence existed to support the decision of the Board.[93]

The statutory provisions in respect of the obligation of the Board/Tax Court to prepare findings of fact and opinions remained unchanged from 1928 to 1982.[94] These statutory provisions, however, have never been incorporated into the Tax Court rules. Although it was suggested that such provisions be incorporated into the rules as part of the 1974 rules revision, the court's rules committee rejected the proposal.[95] Rather, the committee referred to the appropriate statutory provisions by footnote in the court's rules.[96]

D. Bench Opinions

1. The Amendment of Section 7459(b)

The requirement of written findings of fact and opinions (collectively referred to as "reports")[97] served several important functions. First, written reports disclosed the court's view of the law in the circumstances before it. Second, written reports kept the general public informed of the court's interpretation of the tax law. Third, written reports assisted the courts of appeals in reviewing Tax Court decisions, which became appealable under the 1926 Act.[98] Finally, because written reports were subject to the court's

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1928, *Before the Senate Finance Comm.*, 70th Cong., 1st Sess. 332 (1928) (remarks of W. A. Staub).

[92] H.R. REP. NO. 70-2, at 30 (1928).

[93] *Id.*

[94] *Compare* Revenue Act of 1928, ch. 852, § 601, 45 Stat. 872 *with* I.R.C. § 7459(b).

[95] *See* Draft of Proposed Rules in Connection With 1974 Rules Revision, §§ 155 and 156 of Title XV entitled "Opinion and Decision," Dec. 3, 1971, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" Tax Court Rules Committee Minutes, Dec. 20, 1971.

[96] TAX CT. R., Title XV, "Decision" (July 6, 2012 ed.).

[97] *See* I.R.C. § 7459(b).

[98] Ch. 27, §§ 1001, 1003(a), 44 Stat. 9, 109–10. *See* I.R.C. § 7482(a) (providing for appellate review in the United States Courts of Appeals).

procedures for review by the chief judge and court conference,[99] they helped to assure the consistency of Tax Court precedents.

Faced with an increasing number of frivolous cases,[100] however, it became apparent that the written report requirement was often needlessly burdensome. Because the court had previously disposed of many groundless claims in similar proceedings, a written report in these cases was of little value.

In 1982, in an effort "to promote the efficient operation of the [Tax] Court,"[101] Congress amended § 7459(b) of the Code to provide that "[s]ubject to such conditions as the Tax Court may by rule provide, the requirements of this subsection and of section 7460 are met if findings of fact or opinion are stated orally and recorded in the transcript of the proceedings."[102]

This amendment prompted concern among some Tax Court members who were apprehensive of the potential adverse effect that the authority to issue oral findings of fact and opinion (hereinafter "bench opinions") could have on the consistency of Tax Court opinions.[103] Accordingly, a prime objective of the Tax Court in implementing its bench opinion authority was the adoption of a rule to assure the continuing consistency of its precedents.[104] In defining and implementing that policy, however, the Tax

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[99] A division report "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." I.R.C. § 7460(b). The court conference procedures are discussed in Section F of this Part.

[100] *See* H.R. REP. NO. 98-861, at 985 (1984); Theodore Tannenwald, Jr., *Reflections on the Tax Court*, 36 TAX LAW. 853, 857 (1983).

[101] 127 CONG. REC. 32078 (1981) (Senate Finance Committee Technical Explanation of the Miscellaneous Revenue Act of 1982).

[102] Miscellaneous Revenue Act of 1982, Pub. L. No. 97-362, § 106, 96 Stat. 1726, 1730. While initially findings of fact and opinion were referred to as "bench decisions," the phrase "bench opinions" is now used.

[103] *See* Memorandum from Judge Simpson to Rules Committee, Nov. 12, 1982, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions" (expressing his concern regarding the maintenance of consistency when bench opinions are rendered); Memorandum from Judge Goffe to the Judges, Jan. 24, 1983, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions" (favoring the adoption of guidelines for use by the judges and special trial judges, but opposing such guidelines in the published rules of the court because published rules would invite motions for written opinions and create an unnecessary vehicle for appellate review of the Tax Court's interpretations of its rules); Memorandum from Judge Sterrett to Chief Judge Tannenwald, Jan. 17, 1983, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions" (expressing fear that uniformity of decision might be weakened by "a proliferation of unguided bench opinions" if the court were to adopt Judge Goffe's suggestion).

[104] *See supra* note 103.

Court could not lose sight of the purpose of the amendment to § 7459(b)—that is, to enable the court to cope with its tremendous workload by disposing expeditiously of cases appropriate for bench opinions.[105] Finally, the Tax Court did not intend to allow these objectives to interfere with the rights of parties by subjecting them to arbitrary actions; it was the intent of the Tax Court that the bench opinion authority be exercised with fairness, consistency, and compatibility with the spirit of court precedents.[106]

A great concern of the Tax Court in considering guidelines for the issuance of bench opinions was the maintenance of consistency in court opinions.[107] Because a bench opinion issued under § 7459(b) would avoid review by the chief judge and the court conference,[108] other safeguards were clearly needed to prevent inconsistencies between the law as applied in bench opinions on the one hand and written precedents on the other. Intricately interwoven with these considerations was whether guidelines for the issuance of bench opinions should be promulgated in the Rules of Practice and Procedure, or whether internal guidelines would be more appropriate.[109] The advantages of a rule would be to inform parties of the court's bench opinion authority, and if general standards were included in the rule, to help assure consistency in the circumstances in which bench opinions were issued.[110] There was fear, however, that the promulgation of a specific rule would restrict the Tax Court's flexibility in exercising its bench decision authority.[111]

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105 *See* Memorandum from Judge Simpson to the Judges, Jan. 27, 1983, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions."

106 *See id.*

107 *See* Memorandum from Chief Judge Tannenwald to Judges and Special Trial Judges, Jan. 1983, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions" (setting forth guidelines for the exercise of discretion granted by Rule 152); Memorandum from Judge Simpson to Rules Committee, *supra* note 103.

108 The amendment to § 7459(b) provides that "the requirements of this subsection and of section 7460 are met if findings of fact or opinion are stated orally and recorded in the transcript of the proceedings." I.R.C. § 7459(b). The court conference procedures are discussed in Section F of this Part.

109 Memorandum from Judge Simpson to the Judges, *supra* note 105; Memorandum from Judge Goffe to the Judges, *supra* note 103; Memorandum from Judge Sterrett to Chief Judge Tannenwald, *supra* note 103; Memorandum from Joanne Hickcox to Judge Simpson, Nov. 10, 1982, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions" (suggesting that a specific rule that delineates certain types of cases in which bench opinions are appropriate may preclude a judge "from rendering a bench decision in an otherwise appropriate case . . . and may invite complaints from parties who believe that a judge has rendered a bench decision in a case not covered by the rule").

110 *See* Memorandum from Judge Simpson to the Judges, *supra* note 105, at 3–4.

111 *See* Memorandum from Judge Goffe to the Judges, *supra* note 103. Judge Goffe was particularly concerned that the inclusion of guidelines in the proposed

Another point of concern to Tax Court members was whether the guidelines controlling the exercise of the bench opinion authority should be general, so as to grant the individual judges a broader range of discretion in determining the cases appropriate for bench opinions, or whether the guidelines should be specific and limited to a few circumscribed cases.[112] Most judges seemed to believe that general standards would best enable a judge to exercise the discretionary authority properly.[113] They also recognized, however, that general, imprecise standards could be interpreted differently by different judges, and the consistency that had historically been a significant feature of Tax Court precedents could be lost.[114]

The Tax Court considered whether to enumerate within a rule the types of cases that could appropriately be disposed of by bench opinions.[115] Although the adoption of a rule specifying the types of cases in which bench opinions could be issued would probably assist in maintaining consistency in court opinions, such a rule also could present problems. First, in drafting the rule, it would be difficult for the court to conceive of every type of case that would be appropriate for a bench opinion.[116] Consequently, a judge might be prevented from issuing a bench opinion in

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rules of the court—particularly the language, "if he is satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear"—could be interpreted by a court of appeals to restrict the court "in circumstances we cannot now anticipate." *Id.* Judge Goffe also pointed out that a specific rule would create a standard of review different from the existing clearly erroneous standard. He saw the phrase "law being clear" as limiting language that could create "another unnecessary vehicle for interpretations of our rules." *Id.*

[112] *See* Memorandum from Chief Judge Tannenwald to Judges and Special Trial Judges, *supra* note 107. Chief Judge Tannenwald listed seven types of cases that "may be particularly appropriate for bench decisions," *see infra* note 158, but he recognized the necessity of allowing judges flexibility in applying such guidelines: "Obviously, not every case of the types enumerated above will be appropriate for bench decision. I also am sure that you will have cases of a type not enumerated above in which a bench decision will be appropriate." Memorandum from Chief Judge Tannenwald to Judges and Special Trial Judges, *supra* note 107, at 4; *see also* Memorandum from Judge Simpson to Rules Committee, *supra* note 103 (expressing his concern that requiring a transcript of each bench decision to be provided to the chief judge would place an undue burden on the chief judge and his staff, as would a provision allowing a losing party to make a motion for reconsideration of a bench decision, which motion would be considered by the chief judge).

[113] *See* Memorandum from Chief Judge Tannenwald to Judges and Special Trial Judges, *supra* note 107; Memorandum from Judge Simpson to Rules Committee, *supra* note 103.

[114] *See* Memorandum from Judge Simpson to Rules Committee, *supra* note 24.

[115] *See* Memorandum from Judge Simpson to the Judges, *supra* note 105; Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 109.

[116] Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 109, at 7.

an otherwise appropriate case simply by the fact that it was not of the type enumerated.[117] Second, a specific rule could give rise to complaints from parties who believed that a bench opinion had been given in a case not specified within the rule.[118] In either event, the goal of increasing the efficiency of the Tax Court would be subverted.

2. The Proposal of Rule 152

Rule 152, as proposed by the Rules Committee in 1982, provided as follows:

> [e]xcept in actions for declaratory judgment or for disclosure . . ., the Judge, or the Special Trial Judge in any case in which he is authorized to make the decision of the Court pursuant to Code section 7456(d)(2) or (3), may, in his discretion, orally state his findings of fact or opinion if he is fully satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear.[119]

Examples of the types of cases in which bench opinions might be rendered were included in the note accompanying the proposed rule, with a specification that the examples were not intended to be all inclusive.[120]

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[117] *Id.*

[118] *Id.*

[119] *See* Letter from Judge Simpson to Kenneth W. Gideon, Chief Counsel to Internal Revenue Service, Dec. 15, 1982, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions" (this letter includes a draft of the proposed rule which was sent to the Service and the tax bar for comment). For the complete text of Proposed Rule 152, see *infra* note 149.

[120] The note accompanying the proposed rule provided in part:

> Examples (which are not intended to be all-inclusive) of the types of cases in which oral findings of fact or opinion might be rendered include: (1) Cases involving substantiation of deductions (e.g., for medical care, charitable contributions, or casualty losses), including cases where the rule in *Cohan v. Commissioner*, 39 F.2d 540, 543–44 (2d Cir. 1930), is applicable; (2) fraud cases in which the deficiencies have been admitted and the only issue is whether there was the requisite intent to evade tax; (3) depreciation cases in which the issue is the useful life or cost of property; and (4) valuation cases.
>
> Under the Rule, the Court's findings will be recorded in the transcript of the proceeding. Those pages of the transcript which record the Court's findings of fact or opinion (or a written summary thereof) will be provided to all parties free of charge.

See Letter from Judge Simpson to Kenneth W. Gideon, *supra* note 119.

a. Opposition to the Proposed Rule

Although Judge Goffe favored the adoption of guidelines for the use of the judges and special trial judges in issuing bench opinions, he opposed setting forth these guidelines in a rule.[121] Specifically, he opposed the clause in proposed Rule 152 that would limit the use of bench opinions to cases in which the facts and law were clear.[122]

Judge Goffe argued that the Tax Court rules did not specify the circumstances in which an opinion would be published or issued as a memorandum, nor was there a rule to inform parties when or whether court review would be directed.[123] Judge Goffe believed that if the general guidelines for issuing bench decisions were included in a rule, a party could pursue an appeal on the grounds that the judge had failed to follow that rule.[124] In this event, a court of appeals could restrict the Tax Court's flexibility in exercising the bench opinion authority through an unanticipated interpretation of the rule.[125]

Moreover, Judge Goffe expressed concern that the language limiting the use of bench opinions to cases in which the facts and law were clear might encourage motions seeking written opinions.[126] Presumably, parties believing they would win would move for the judge to issue a bench opinion. Conversely, losing parties, apprehensive that a bench opinion might result in an additional obstacle to overcome on appeal, could file a motion that the judge issue a written opinion, on the grounds that the facts or law in a particular case were not clear. Judge Goffe asserted that these problems would frustrate the congressional goal of increasing Tax Court efficiency. Judge Goffe argued that Congress had not included such limiting language in its amendment to § 7459(b), and the Tax Court should not so limit itself by a specific rule.[127]

b. The Rule's Proponents

The Rules Committee was convinced that the advantages of setting forth the guidelines for issuing bench opinions within a rule outweighed the

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[121] Memorandum from Judge Goffe to the Judges, *supra* note 103, at 1.

[122] *Id.*; *see supra* note 111 (quoting the language Judge Goffe opposed).

[123] Memorandum from Judge Goffe to the Judges, supra note 103, at 1–2.

[124] *Id.* at 2.

[125] *Id.*

[126] *Id.*; *see also* Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 109, at 8–9 (recommending against the court's granting parties the right to object to a judge's decision to render a bench decision because such a right would be inconsistent with the statutory language and with the congressional purpose of promoting more efficient operation of the court).

[127] Memorandum from Judge Goffe to the Judges, *supra* note 103.

disadvantages.[128] The Chairman of the Rules Committee, Judge Simpson, argued that although the amendment to § 7459(b) had been enacted to enable the Tax Court to cope with its heavy workload, it was important that bench opinions be issued only in appropriate cases.[129] This was particularly important because of the lack of opportunity for review by the chief judge or court conference in cases in which a bench opinion was issued.[130] In addition, because there might be a propensity to consider bench opinions less carefully than written opinions, the record in such cases would tend to make the task of a reviewing court of appeals more difficult.[131] Because of his concern that the authority to issue bench opinions could significantly alter the operation of the Tax Court, Judge Simpson believed that the use of bench opinions should be approached with extreme care.[132]

Judge Simpson pointed out that through its issuance of written opinions and because of the procedures for review by the chief judge and at court conference, Tax Court decisions were consistent in their application of the tax law.[133] Judge Simpson believed that the authority to issue bench opinions should be exercised while keeping the traditions and practices of the Tax Court in perspective.[134] A written opinion should be prepared whenever the facts or law of the case are such that there is reason to advise the Service and the bar of the Tax Court's view of the law in those circumstances.[135] Similarly, in cases in which questions arise as to whether a proposed conclusion is consistent with other decisions of the court, a written opinion should be prepared to avoid circumvention of the review procedures.[136]

The Rules Committee was not convinced that the issuance of internal guidelines regarding the use of bench opinions would, in itself, ensure consistency in the application of the law by Tax Court judges.[137] Including the guidelines within a rule, the Rules Committee believed, would be more effective and would have the additional benefit of informing Congress and the tax bar of the circumstances in which a bench opinion might be made.[138] Moreover, the Rules Committee was concerned that if the guidelines were not specified, Congress and the bar might be curious as to Tax Court policy regarding bench opinions and ask for a specific statement

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128 *See* Memorandum from Judge Simpson to the Judges, *supra* note 105.
129 *Id.* at 1–2.
130 *Id.* at 2.
131 *Id.*
132 *Id.*
133 *Id.* at 3.
134 *Id.*
135 *Id.*
136 *Id.* at 3–4
137 *Id.* at 4.
138 *Id.*

regarding the court's bench opinion policy.[139] If the Tax Court were to issue a statement more specific than a rule, it could restrict the court's range of discretion in exercising the bench opinion authority.

The Rules Committee concluded that there was only a minimal risk that a court of appeals would limit the court's ability to exercise the bench opinion authority with an unnecessarily restrictive interpretation of the rule.[140] The proposed rule left the determination whether to issue a bench opinion to the judge.[141] It was believed that an appellate court would be unlikely to conclude that such a determination was appropriate for review.[142] Furthermore, even if review were to be granted and a court of appeals were to rule that the trial judge had abused his discretion in rendering a bench opinion, the court would merely remand and order the preparation of a written opinion.[143]

c. Comments from the Service and Tax Bar

Although proposed Rule 152 had support from members of the tax bar and the Service,[144] a question was raised whether the last clause of the rule would preclude a judge from giving his factual conclusions orally when the facts of the case were clear but the law was unclear.[145] Often a judge's factual conclusions can be very helpful to counsel in preparing their arguments of law, and there was some concern that proposed Rule 152 might be read to preclude a judge from stating his factual conclusions, if the judge's legal conclusions were not stated simultaneously.[146]

Although Rule 152 had the general support of the Service, the Service recommended amending the rule to allow either party to make a motion for a bench opinion.[147] Presumably because it was intended that the discretion

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139 *Id.*

140 *Id.* at 5.

141 *Id.*

142 *Id.*

143 *Id.*

144 *See* Letter from Tax Practitioner to Judge Simpson, Jan. 11, 1983, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions"; (Letter from Kenneth W. Gideon, Chief Counsel of Internal Revenue Service, to Judge Simpson, Jan. 12, 1983, filed at the U.S. Tax Court in "Rules Committee: Bench Decisions."

145 *See* Letter from Tax Practitioner to Judge Simpson, *supra* note 144. The last clause of the proposed rule provided that the judge could render a bench opinion "if he is fully satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear."

146 *See* Letter from tax practitioner to Judge Simpson, *supra* note 144.

147 *See* Letter from Kenneth W. Gideon, Chief Counsel of Internal Revenue Service, to Judge Simpson, *supra* note 144.

to issue a bench decision would rest entirely with the trial judge, no amendment was made to the rule to address this concern.[148]

3. The Adoption and Employment of Rule 152

Rule 152, in virtually the same form proposed by the Rules Committee, was adopted by the court and went into effect in 1983.[149] The note accompanying Rule 152, however, was revised from its proposed form to exclude enumeration of types of cases in which bench opinions might be expected.[150] The court felt that it would be more appropriate to set forth a

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[148] TAX CT. R. 152, 79 T.C. 1147 (1982).

[149] *Id.* At the time of its adoption, Rule 152 provided as follows:

> **(a) General:** Except in actions for declaratory judgment or for disclosure (see Titles XXI and XXII), the Judge, or the Special Trial Judge in any case in which he is authorized to make the decision of the Court pursuant to Code Section 7456(d)(2) or (3), may, in his discretion, orally state his findings of fact or opinion if he is satisfied as to the factual conclusions to be reached in the case and that the law to be applied thereto is clear.
>
> **(b) Transcript:** Oral findings of fact or opinion shall be recorded in the transcript of the trial. The pages of the transcript that contain such findings of fact or opinion (or a written summary thereof) shall be served by the Clerk upon all parties.
>
> **(c) Citation:** Opinions stated orally in accordance with paragraph (a) of this Rule shall not be cited or relied upon as precedent. However, such opinions (including findings of fact) may be referred to for purposes of the application of the doctrine of res judicata, collateral estoppel, or law of the case.

Id. The only material difference between the rule as proposed and as adopted is that proposed Rule 152(a) required the judge or special trial judge to be "fully" satisfied as to facts and law. *Cf. supra* note 119. Rule 152 remains in material respects the same as when it was introduced. *See* TAX CT. R. 152 (July 6, 2012 ed.).

[150] Rules Comm. Note, TAX CT. R. 152, 79 T.C. 1148 (1982). The note provides:

> Rule 152 permits the presiding Judge or Special Trial Judge to orally state findings of fact or opinion in appropriate cases, pursuant to the authority of section 106(b) of the Miscellaneous Revenue Act of 1982, Pub. L. 97-362 (Oct. 25, 1982). The Rule does not apply in actions for declaratory judgment or for disclosure.
>
> Under the Rule, the Court's findings will be recorded in the transcript of the proceeding. Those pages of the transcript which record the Court's findings of fact or opinion (or a written summary thereof) will be provided to all parties free of charge.
>
> The authority conferred by this Rule may be exercised on and after March 1, 1983, in pending and future cases.

Id.

general standard for issuing bench opinions, rather than designate particular types of cases, and that the broad discretion granted the trial judge by Rule 152 was necessary for the effective employment of the Tax Court's bench opinion authority.[151] It was also recognized, however, that considerable problems could be created by this broad grant of discretion. Shortly after the enactment of Rule 152, Chief Judge Tannenwald issued a set of suggested guidelines to be followed in exercising the bench opinion authority.[152]

Initially, Chief Judge Tannenwald pointed out that the court was required by statute to record "findings of fact or opinion" in the transcript;[153] a mere final pronouncement in favor of the Service or the taxpayer would not be sufficient to meet the requirements of § 7459(b).[154] Accordingly, Chief Judge Tannenwald urged that a bench opinion should not be rendered in any case unless both the relevant facts and the applicable law could be readily summarized from the bench.[155] Additional considerations exist in appealable cases, i.e., cases not governed by the small case procedures.[156] Appellate courts expect complete and detailed findings of fact and a full discussion of the legal issues involved in Tax Court cases. To reduce the possibility of reversal, Chief Judge Tannenwald suggested that bench opinions be rendered in appealable cases only if the expectations of appellate courts could be met, and a statement of the facts and legal issues were recorded clearly in the transcripts.[157]

Chief Judge Tannenwald listed seven types of cases in which bench opinions may be particularly appropriate.[158] He recognized that not every

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[151] *See* Memorandum from Chief Judge Tannenwald to Judges and Special Trial Judges, *supra* note 107.

[152] *Id.* Theodore Tannenwald, Jr. began his tenure as Judge of the United States Tax Court on August 2, 1965. On July 1, 1981, he became Chief Judge and served in that position until July 1, 1983.

[153] *Id.* The legislative history of the amendment to § 7459(b) indicates that transcripts of the proceedings are to be provided to parties free of charge. *See* H.R. REP. NO. 97-929, at 34 (1982).

[154] In 1992, the Court Conference reconfirmed the Court's policy that a bench opinion must be stated on the record at the trial session at which the testimony was concluded in that case.

[155] *See* Memorandum from Chief Judge Tannenwald to Judges and Special Trial Judges, *supra* note 107.

[156] *Cf.* I.R.C. § 7463(b).

[157] Memorandum from Chief Judge Tannenwald to Judges and Special Trial Judges, *supra* note 107.

[158] *Id.* Chief Judge Tannenwald listed the following types of cases as appropriate for bench decisions:

> (1) "Protester" cases involving legal arguments that have been raised and rejected repeatedly in the past.

type of case enumerated would be appropriate for a bench opinion, and that there would be unlisted cases suitable for disposition through bench opinions.[159] Nonetheless, he thought it would be helpful to suggest certain cases in which bench opinions might be appropriate, because pretrial preparation in those cases might aid in the effective use of Rule 152. Chief Judge Tannenwald suggested the judges and special trial judges bring sample opinions to trial in cases that appear appropriate for disposition through bench opinions.[160]

Chief Judge Tannenwald expressed the importance of ensuring that the "consistency and uniformity which have been the hallmark of our opinions are preserved."[161] He reiterated that in cases in which a bench opinion is rendered, the parties are deprived of the opportunity to file briefs, and the opinion is not subject to review by the chief judge or court conference.[162] Chief Judge Tannenwald also noted that in small tax cases, the losing party cannot appeal a decision the party believes to be contrary to established precedent of the Tax Court.[163] Thus, he requested that the transcript of cases in which bench opinions were rendered be forwarded to him, or in small tax cases, to the judge in charge of the small tax division.[164]

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(2) Fraud cases in which the deficiencies have been admitted and the only issue is whether there was the requisite intent to evade tax, particularly where determination of that issue depends upon an evaluation of the petitioner's credibility as a witness.

(3) Substantiation cases in which the taxpayer does not have books and records to support deductions taken (*e.g.,* for medical care, charitable contributions, or casualty losses) and determination of the deductible amount depends on application of the rule in *Cohan v. Commissioner*, 39 F.2d 540, 543–44 (2d Cir. 1930).

(4) Cases in which the Court must determine whether a particular expenditure constitutes an ordinary and necessary business expense deductible under Code section 162(a) or a nondeductible personal, family, or living expense.

(5) Cases in which the Court must determine whether amounts paid to a medical intern or resident are an excludible scholarship or fellowship grant under Code section 117(a).

(6) Depreciation cases in which the only issue to be resolved is the useful life of property.

(7) Valuation cases.

Id. at 3.

159 *Id.* at 4.

160 *Id.*

161 *Id.*

162 *Id.* at 4–5.

163 *Id.* at 5.

164 *Id.*

E. Memorandum Opinions

Although memorandum opinions were not expressly authorized until the Revenue Act of 1928,[165] as early as 1924 the suggestion was made that many decisions published in full in the bound volume reports were of little value as authority and therefore should be promulgated solely in mimeographed form for the parties.[166] Notwithstanding the suggestion, the first use of memorandum opinions was in late 1927.[167] The procedure consisted of preparing findings of fact and a memorandum opinion, which would be included in the file, thereby satisfying the requirement of the Revenue Act of 1924 that the findings of fact and opinion be of public record.[168] The statutory provision requiring publication "in such form and manner as may best be adopted for public information and use"[169] was construed liberally to permit the Board to "publish" memorandum opinions by mere insertion in the Board's bound volume of the date decision was entered, such insertion being considered enough for the limited value such cases had.[170] Consistent with its position that memorandum opinions were not worthy of publication, the Board soon adopted the policy of not citing prior memorandum opinions in its opinions.[171]

Use of the memorandum opinion quickly increased, and by the late 1930's a substantial number of proceedings before the Board were disposed of in this manner.[172] Such practice reflected a growing number of cases that were essentially fact driven, involving routine and well-settled questions of law.[173] The Board had employed this device in an effort to save printing

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[165] Revenue Act of 1928, ch. 852, § 601, 45 Stat. 872, *amending* Revenue Act of 1926, ch. 27, § 907(b), 44 Stat. 107; *see also* 1928 House Hearings*, supra* note 91, at 189, 523, 540.

[166] Memorandum from Charles Gebhardt to Member Sternhagen, c. Jan., 1925, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

[167] Board Conference Minutes, Nov. 11, 1927.

[168] Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 107, *amending* Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 338 (now codified at I.R.C. § 7461).

[169] Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 107, *amending* Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 338 (now codified at I.R.C. § 7462).

[170] *See* Memorandum from Judge Murdock to Judges of the Court, Apr. 6, 1950, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence" [hereinafter cited as Murdock, 1950].

[171] The Tax Court Conference Minutes, Apr. 26, 1946, indicate that prior Board/Tax Court policy had been not to cite memorandum opinions.

[172] *See* Report of the Joint Committee of Board of Tax Appeals and Chief Counsel's Office, Dec. 17, 1937, at 24, filed at the U.S. Tax Court in "Field Divisions: Memoranda & Correspondence" [hereinafter cited as Joint Committee Report].

[173] Preliminary Committee Report of the Joint Committee of Board and Treasury Personnel, c. 1937, at 12, filed at the U.S. Tax Court in "Field Divisions:

costs, but members of the tax bar began to urge a more extensive use of informal memorandum opinions as a panacea for the congestion of cases on the Board's calendar.[174] The Board, however, rejected such use of memorandum opinions.[175] In its experience, the Board had found that little if any time was saved by their use. Each case, regardless of the form of the opinion, still required the same study of the record and preparation time.[176] Additionally, because cases involving memorandum opinions frequently were appealed, the chances for reversal would increase if the quality of workmanship declined as a result of more summary use of the memorandum form.[177]

The policy of neither citing nor publishing memorandum opinions was reevaluated in the 1950's by the court membership.[178] Proponents of publication believed that numerous cases had been promulgated as memorandum opinions without sufficient regard to their possible value as precedent.[179] Such designation had prevented citation in subsequent cases, creating particular difficulty in situations in which the memorandum opinion was the only case on point.[180] In addition, the private publishing services were printing memorandum opinions, the tax bar was buying them, and parties and other courts often relied on memorandum opinions as authority.[181] Finally, the amount of money saved by not publishing the estimated two additional volumes a year did not outweigh the inconvenience to the judges and the disservice to the tax bar.[182]

Despite these criticisms, the court did not change its policy.[183] First, publication was not as inexpensive as the proponents of publication

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Memoranda & Correspondence" [hereinafter cited as Preliminary Committee Report].

[174] *Id.* at 11.

[175] Joint Committee Report, *supra* note 172, at 24; Preliminary Committee Report, *supra* note 173, at 12.

[176] Joint Committee Report, *supra* note 172, at 24.

[177] The Joint Committee Report also pointed out that well drafted findings of fact and a reasonably exhaustive opinion that indicated that the Board had considered all the arguments would tend to satisfy the losing party with the soundness of the Board's decision and, therefore, to reduce the number of appeals. Preliminary Committee Report, *supra* note 173, at 13.

[178] *See* Murdock, 1950, *supra* note 170; see Tax Court Conference Minutes, Feb. 5, 1954 and Mar. 19, 1954.

[179] Murdock, 1950, *supra* note 170; Tax Court Conference Minutes, Feb. 5, 1954.

[180] Tax Court Conference Minutes, Feb. 5, 1954.

[181] Murdock, 1950, *supra* note 170, at 1.

[182] *Id.*

[183] *See* Tax Court Conference Minutes, Mar. 19, 1954.

believed.[184] Second, if publication of all opinions was not established, citation of a memorandum opinion could not be allowed as this would indicate that the court had committed an error in not publishing the opinion in the first instance.[185] However, in those situations in which a citation in an opinion was to a higher court decision that affirmed or reversed a memorandum opinion, it was deemed appropriate to indicate whether it affirmed or reversed the Tax Court's memorandum opinion.[186] In any event, the court's membership agreed to exercise greater care in determining whether an opinion would be released in memorandum form.[187] Further discussions among the court's membership in the early 1970's resulted in an affirmation of the traditional policy.[188]

The Tax Court in more recent times has developed a position with respect to memorandum opinions that can best be described as more embracive. Although memorandum opinions still do not have binding precedential value,[189] the court nonetheless has recognized that memorandum opinions constitute persuasive authority that aid in the disposition of present cases. For instance, in the case of *Convergent Technologies, Inc. v. Commissioner*,[190] the Tax Court—through a memorandum opinion—explained the relevance of a prior memorandum opinion concerning a similar factual scenario as follows:

> *Sun Microsystems, Inc.*, being a memorandum opinion of this Court, is not controlling precedent. *Darby v. Commissioner*, 97 T.C. 51, 67 (1991). . . . However, given the substantial similarity of the factual

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[184] The proponents of publication had asserted that the additional cost would be approximately $10,000, the cost of preparing two additional volumes. Sales of the volumes, the proponents believed, would cover the Government printing expenditures. However, critics of the plan did not believe that $10,000 would cover expenses. Memorandum from Judge Van Fossan, Chairman, Committee on Memorandum Opinions, to Chief Judge Kern, Feb. 25, 1954, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

[185] Tax Court Conference Minutes, Feb. 5, 1954.

[186] Administrative Memorandum No. 153 from Chief Judge Murdock to the Judges of the Court, May 29, 1959, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

[187] Memorandum from Judge Van Fossan, Chairman, Committee on Memorandum Opinions, to Chief Judge Kern, Feb. 25, 1954, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" Tax Court Conference Minutes, Mar. 19, 1954.

[188] Tax Court Conference Minutes, May 5, 1970.

[189] *See* Darby v. Commissioner, 97 T.C. 51, 67 (1991) (citing Newman v. Commissioner, 68 T.C. 494, 502 n.4 (1977)); *see also* Andrews v. Commissioner, 931 F.2d 132, 137 n.9 (5th Cir. 1991) ("We note that prior memorandum decisions of the Tax Court are not treated by that court as binding precedent.").

[190] T.C. Memo. 1995-320, 70 T.C.M. (CCH) 87.

> foundation of this case and *Sun Microsystems, Inc.*, there is no reason why we should not follow the same analytical approach.[191]

Hence, it is now a common albeit non-universal practice of Tax Court judges to support their opinions with citations to prior memorandum opinions. As memorandum opinions are often cited by the court, the court now permits parties to cite memorandum opinions as part of the briefing process. Indeed, the court issued a press release in 2012 articulating a uniform means of spot citing to memorandum opinions given the lack of publication in an official reporter.[192]

The increased citation of memorandum opinions has not eroded the distinction between memorandum opinions and division opinions, as the former give rise to persuasive authority only. Because division opinions make up the body of Tax Court precedent that will be afforded *stare decisis* deference in future cases, the judges of the court have a greater interest in the holding and analysis of a proposed division opinion than that of a memorandum opinion. Accordingly, the decision of whether an opinion should be published as a division opinion or issued as a memorandum opinion continues to carry significance.

That said, emphasizing the technical distinction between the precedential value of memorandum opinion and a division opinion risks understating the degree of deference those opinions are afforded by the court. The Tax Court has a strong institutional interest in maintaining integrity in its decision-making process, and the institutional integrity of the court would be undermined if each judge felt free to issue a decision adopting a holding or analysis that could not be reconciled with that of a prior memorandum opinion. Thus, the court's interest in decisional consistency results in considerable respect being afforded to prior memorandum decisions as a practical matter. What then is the lasting value of the distinction between memorandum opinions and division opinions? Perhaps the best answer is the signaling value of such designations to the tax bar and the public at large. The court releases hundreds of opinions each year, many of which are driven by factual determinations that offer little value to the disposition of future cases. Official publication of an opinion as a division opinion to be included in the Reports of the United States Tax Court signals to the public and to the Government that the court views the opinion as noteworthy in some respect, for reasons described below. The channeling function performed by the Tax Court in designating

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[191] *Id.* at 95.

[192] Press Release, United States Tax Court (June 26, 2012), *available at* http://www.ustaxcourt.gov/press/062612.pdf. The court announced that it would commence embedding page markers in the slip opinions published on its website, anticipating that such pagination would be reproduced by private print and electronic publishers. *Id.*

opinions as memorandum opinions or division opinions thereby facilitates more efficient use of the court's opinion product.

Under current practice, the division that prepares the opinion indicates on the transmittal to the chief judge whether it recommends that the opinion be published by the court or issued as a memorandum opinion. The decision, however, rests within the discretion of the chief judge.[193] Chief Judge Mary Ann Cohen explained the factors that guide the exercise of the chief judge's discretion in this regard as follows:

> [C]ases involving application of familiar legal principles to routine factual situations, nonrecurring or enormously complicated factual situations, obsolete statutes or regulations, straightforward factual determinations, or arguments patently lacking in merit will be classified as memorandum opinions. . . . However, an opinion may be designated for publication if it adopts or rejects a particular methodology or an unusual argument of one of the parties that may recur in other cases. On the other hand, an opinion may be so factually intense that it is not feasible to distill from it useful precedents even if it is one of many similar cases and, therefore, is released as a memorandum opinion.[194]

Similarly, in its press release announcing the uniform means of spot citing to memorandum opinions, the court explained that these opinions "generally address cases which do not involve novel legal issues and in which the law is settled or the result is factually driven."[195] Memorandum opinions therefore carry that designation because the court views these opinions as not contributing in a meaningful way to the body of Tax Court precedent.

F. Court Conference

An especially significant feature of Tax Court procedure is the court conference. During these conferences, the entire court membership of active judges reviews division reports referred to it by the chief judge. The chief judge has considerable discretion in selecting reports for court review, but generally the reports selected are those that either conflict with precedent or that contain issues not previously addressed by the court. Since the court as a whole is involved in reviewing such reports and

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[193] *See* Report Control Card, United States Tax Court, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

[194] Mary Ann Cohen, *How to Read Tax Court Opinions,* 1 HOUS. BUS. & TAX L.J. 1, 6 (2001).

[195] Press Release, United States Tax Court (June 26, 2012), *available at* http://www.ustaxcourt.gov/press/062612.pdf.

determining whether a precedent should be followed or overruled, or determining the proper resolution of issues of first impression, the consistency of Tax Court decisions is preserved. In large part, the court conference procedures justify the assertion that the Tax Court is a single, national court, as opposed to 19 separate courts.[196] Notwithstanding early misunderstandings on the part of observers as to the nature of conference review,[197] the conference procedure generally has been praised for its role in providing uniformity in Tax Court opinions.[198]

The selection of a case for court review rests within the discretion of the chief judge. In a 2001 law review article, then Chief Judge Mary Ann Cohen provided the following insight regarding the principles that guide the exercise of this discretion:

> We use certain rules of thumb. Court review is directed if the report proposes to invalidate a regulation, overrule a published Tax Court case, or reconsider, in a circuit that has not addressed it, an issue on which we have been reversed by a court of appeals. . . .
>
> Court review is also directed in cases of widespread application where the result may be controversial, where the Chief Judge is made aware of differences in opinion among the judges before the opinion in released, or, occasionally, where a procedural issue suggests the desirability of obtaining a consensus of the judges. Court review is <u>not</u> available on motion of the parties, before or after the opinion has been released.[199]

1. Historical Origins

In the early days of the Board, every division opinion was referred to the entire membership for review.[200] Although such extensive review was not

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[196] *See, e.g.* Kern, *supra* note 1, at 1019; Murdock, *supra* note 1, at 108–09.

[197] Early misunderstandings of the review process involved taxpayers who considered Board review the equivalent of a de novo hearing on the merits. *See infra* notes 217–224 and accompanying text. Such misunderstandings were eliminated by amendments in the Revenue Act of 1928, which clearly indicated the internal nature of the review procedure. *See* Revenue Act of 1928, ch. 852, § 601, 45 Stat. 872, *amending* Revenue Act of 1926, ch. 27, § 907(a)–(b), 44 Stat. 107.

[198] *E.g.*, H.R. REP. NO. 69-1, at 18 (1925), wherein it was stated that "the great value of the Board lies in its practice in meeting regularly for common discussion and consideration of opinions prepared and proposed to be issued."

[199] Cohen, supra note 194, at 5–6 (emphasis in original).

[200] Korner Letter, *supra* note 7, at 5–6.

mandated by statute,[201] it was believed that establishment of a uniform body of precedents made such review necessary.[202] In 1926, Chairman Korner proposed to the Board a plan of reorganization that would take advantage of the newly authorized one-member divisions and also would provide for a certain degree of internal review.[203] In the view of the Chairman, the time burden imposed on members by Board review of every division decision was out of proportion to the value of such review in assuring uniformity.[204] Accordingly, Chairman Korner proposed a realignment of the Board into 16 divisions of one member each with a grouping of the divisions into five "parts" composed of three divisions each; the Chairman would not be assigned to a part.[205] The parts would serve the function of providing intermediate review of division decisions prior to their referral to the Chairman.[206] Under the procedure envisioned by Chairman Korner, a one-member division would initially hear the case, study the record and make a decision.[207] Thereafter, a second member of the part would review the record so the fact finding and legal conclusions of the first division be given a further check.[208] Following such review, the three members of the part would consider the report, and if in accord, it would generally be adopted without full Board review.[209] In this manner, consideration by the entire Board would be necessary in only those few cases in which there was a difference of opinion in the part, in which the decision of the part conflicted with an existing precedent of the Board, or in which the Chairman, for other reasons, concluded that review was desirable.[210]

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201 The provisions of the Revenue Act of 1924 clearly gave the discretion to the Board Chairman to order Board review of any division decision. Revenue Act of 1924, ch. 234, § 900(f), 43 Stat. 337.

202 Korner Letter, *supra* note 7, at 6.

203 Memorandum from Chairman Korner to members of the Board, June 11, 1926, at 8, filed at the U.S. Tax Court in "Divisions: Memoranda & Correspondence" [hereinafter cited as Reorganization Memorandum]; Board Conference Minutes, June 23, 1926.

204 Reorganization Memorandum, *supra* note 203, at 13.

205 *Id.* at 11–12. Under the part system, the five parts would be composed of three members each. Memorandum from Chairman Korner to members of the Board, June 25, 1926, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

206 Reorganization Memorandum, *supra* note 203, at 13.

207 *Id.* at 12.

208 *Id.*

209 *Id.*

210 *Id.* Chairman Korner proposed that the system of circulating mimeographed opinions among the Board membership continue. This would enable the other members of the Board to offer criticism on the proposed opinion. *Id.* at 16.

Although Chairman Korner's proposal for single-member divisions and a part system was approved by the Board membership,[211] disagreement arose with respect to allowing the Chairman to make the decision as to whether a division report should be reviewed by the entire Board.[212] Rather, the membership felt constrained to continue the policy of Board review of every division decision, in the interest of uniformity.[213] In an attempt to effect a compromise between the Chairman's belief that many cases did not require Board review and the membership's fear that inconsistent decisions would undermine the Board's theretofore successful work, the Board required the parts to make specific recommendations to the Board conferences as to whether a division report merited in-depth Board review.[214] With such recommendations, substantial time could be saved at the Board conferences.[215]

By 1927, the increased production of cases fostered by the realignment of the Board into 16 divisions and the realization by the Board membership that many division decisions could adequately be decided without the necessity of Board review led to adoption of the current policy that leaves to the discretion of the chief judge the selection of cases to be reviewed by the entire membership.[216]

Despite the intent of Congress that Board review serve as a collegial, albeit internal device,[217] early misconceptions by the tax bar and the judiciary threatened to change its character. Taxpayers, aware that their cases were undergoing Board review, demanded the right to appear before the Board.[218] Although no statutory provision expressly denied the taxpayer the right to appear,[219] the Board adopted a policy that internal review was not the equivalent of an en banc hearing in the Federal courts of appeals.[220] Members of the Board believed that an internal review process was quicker than an en banc hearing that permitted re-argument, and that

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[211] Memorandum from Chairman Korner to members of the Board, June 25, 1926, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" Board Conference Minutes, June 23, 1926.

[212] Board Conference Minutes, June 23, 1926.

[213] *Id.*

[214] Memorandum from Chairman Korner to members of the Board, June 25, 1926, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

[215] *Id.* at 2.

[216] *See* Board Conference Minutes, May 31 and June 3, 1927.

[217] *See* 69 CONG. REC. 704 (1927).

[218] *See id.*

[219] *Compare* Revenue Act of 1926, ch. 27, § 1000, 44 Stat. 107, *amending* Revenue Act of 1924, ch. 234, § 900(e)–(f), 43 Stat. 377 *with* Revenue Act of 1928, ch. 852, § 601, 45 Stat. 872, *amending* Revenue Act of 1926, ch. 27, § 907(a), 44 Stat. 107.

[220] *See* J. Gilmer Korner, *Practice Before The United States Board of Tax Appeals*, 3 NAT'L INC. TAX MAG. 220, 224 (1925); Board Conference Minutes, Feb. 10, 1933.

the taxpayer had the responsibility to present his case adequately in the course of the initial hearing and decision process.[221] The Board position provoked some taxpayers to seek writs of mandamus to compel the Board to adopt division decisions that had been revised at conferences at which the taxpayer had no right to appear.[222] Sensing that adverse judicial rulings would create undue confusion and take years to remedy,[223] Congress enacted specific statutory guidelines in the Revenue Act of 1928 that denied parties the right to appear at the conference if an opportunity for hearing was provided in the first instance at the division level.[224] On the other hand, the Chairman was authorized by statute to permit the parties access to the conference if deemed necessary.[225]

The House Ways and Means Committee adopted another proposal designed to remedy the same problem. In its report on the 1928 Act, the Committee recommended that the right of a division to "decide" a case in the first instance be eliminated and that a preliminary report (containing the findings of fact and opinion in a case) by the division to the Chairman be substituted.[226] The preliminary report of the division would become the Board's decision either by a lapse of 30 days or by adoption at the Board conference.[227] Although the differences, real and apparent, between the words "decision" and "report" appear to be of little significance, members of the tax bar felt that such a procedure would be contrary to traditional judicial practices and would breed mistrust of Board action.[228] As a result, the Senate Finance Committee, in an amendment to the 1928 Revenue Bill, provided that it would be the duty of the division to "hear and make a determination upon" a proceeding assigned to the division and to "make a report of any such determination which constitutes its final disposition of the proceeding."[229] This change, the Committee asserted, would ensure a continuation of the policy that a division determine a case in the first instance.[230]

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221 *See generally* 69 CONG. REC. 704 (1927).

222 *See id.*

223 *Id.*

224 Revenue Act of 1928, ch. 852, § 601, 45 Stat. 872 (amending Revenue Act of 1926, ch. 27, § 907(a), 44 Stat. 107).

225 *Id.*

226 H.R. REP. NO. 70-2, at 31 (1927).

227 *Id.*

228 *E.g.*, Letter from E. Prettyman to Chairman Littleton, Dec. 27, 1927, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence." In this letter, Prettyman complained that the separation of the decision process from the hearing process was an alien concept in judicial entities and would not create an atmosphere of trust on the part of the taxpayer in the actions of the Board.

229 S. REP. NO. 70-960, at 37–38 (1928); H.R. REP. NO. 70-1882, at 21 (1928).

230 S. REP. NO. 70-960, at 37–38 (1928); H.R. REP. NO. 70-1882, at 21 (1928).

Since the statutory changes of 1928, the court conference procedure has undergone little change.[231] The policy of part review, though formally dropped in 1932,[232] has continued throughout the court's history in an informal manner. Current practice indicates that frequent consultation between the judges is the rule, rather than the exception.[233] If the chief judge determines that review is necessary, the division "report"[234] (containing findings of fact and opinion in a case) is placed on the conference calendar. At least a week in advance of the scheduled conference, the report is distributed to the court membership for study.[235] At the conference, the report is discussed and voted upon.[236] If the report is approved, it is released as an opinion of the court. If rejected, the report is reassigned to the original division or to another division for rewriting in accordance with the legal analysis of the majority.[237] Reassignment to a different division usually occurs only if the division that originally wrote the report declines to accept the majority view.[238] If the report of the division fails, by statute it will not be included in the record of the case.[239] Under the court's procedures, the original division has the right to write a dissenting opinion setting forth that division's views.[240] If, however, the judge who prepared the division report agrees to rewrite the report in

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[231] *Compare* Revenue Act of 1928, ch. 852, § 907(a)–(b), 45 Stat. 872 *with* I.R.C. §§ 7459, 7460.

[232] Board Conference Minutes, Apr. 1, 8, 1932.

[233] *See generally* articles cited in *supra* note 1.

[234] I.R.C. § 7460.

[235] Kern, *supra* note 1, at 1019; Murdock, *supra* note 1, at 109.

[236] It is also possible that the judges of the court may decide to remove a case from court review. Although no rule has been adopted in this regard, prior practice has required a majority vote of the conference to override the prerogative of the chief judge that a case be reviewed. Tax Court Conference Minutes, Oct. 4 and Nov. 1, 1968.

[237] Where a report reviewed by the court fails to be adopted and, as a consequence, another judge is assigned the task of writing the report to reflect the views of the majority, the fact that court review was directed, that the report prepared by the judge who presided at trial failed to be adopted, and that another judge has been assigned to write the report in accordance with the views of the majority all constitute confidential matters within the court that are not disclosed to the parties or the public. Administrative Order No. 96, entitled "Reassignment of a Court Reviewed Case," Mar. 23, 1960, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence" [hereinafter cited as Order No. 96].

[238] Tax Court Conference Minutes, Nov. 6, 1959.

[239] I.R.C. § 7460(b). The provision excluding the report of the division from being part of the record in any case in which the chief judge directs court review originally appeared in 1928. Revenue Act of 1928, ch. 852, § 601, 45 Stat. 871 (amending Revenue Act of 1926, ch. 27, § 906(b), 44 Stat. 106).

[240] *See* Order No. 96, *supra* note 237.

accordance with the majority view, the parties cannot determine the original position of the division.[241]

If the division report is adopted by the court, the opinion will be filed, together with any dissenting or concurring opinions, as a court-reviewed case. If the division report has been rejected, the rewritten report usually is filed only if approved by the court.[242] Subsequent to approval, and together with any dissenting or concurring opinions, the report then is filed as a court-reviewed opinion.

2. Voting Procedures

a. Threshold to Prevail

In the development of conference procedures, the Board/Tax Court has formulated rules for the number of members required to be present to take action on a reviewed case and the number of members required to overrule precedent.

From the earliest days of the Board, the adoption or rejection of a division report generally has been based on a majority of those present and voting.[243] Such is not the case, however, in situations in which adoption of a report will result in overruling an existing precedent.[244] Such action requires a majority of the active judges (excluding any judge who has recused himself or herself from participation in the conference) at the time of the vote, and is applicable to any precedent, whether or not the precedent had been reviewed previously by the court.[245] The different requirements reflect a determination on the part of the court to inhibit any tendency towards frequent change in established interpretations.[246]

b. Participation by Recalled Judges

As a general rule, recalled judges are not permitted to vote at court conferences.[247] However, a recalled judge may vote at the conference on all matters relating to a case heard and decided by that judge which has been

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[241] *See* Tax Court Conference Minutes, Nov. 6, 1959.

[242] *See* Kern, *supra* note 1, at 1019. On rare occasion, the court conference will authorize the chief judge to promulgate the rewritten report as a memorandum or regular decision without re-referral to the court. Tax Court Conference Minutes, Sept. 14, 1951.

[243] *See* Board Conference Minutes, Oct. 2, 1931, wherein a reaffirmation of the longstanding practice occurred.

[244] Board Conference Minutes, Nov. 11, 1932.

[245] Board Conference Minutes, Nov. 8, 1935.

[246] *See* Kern, *supra* note 1; Murdock, *supra* note 1.

[247] Tax Court Conference Minutes, Feb. 26, 1954.

referred to the conference by the chief judge.[248] In the court's view, prohibiting retired judge participation in this instance would be contrary to the intent of the statute that gives a recalled judge the powers of a full-time judge.[249] However, the question of whether a recalled judge may vote to overrule a prior decision has not been as clearly answered. Although the recalled judge has the same power as a full-time judge, such power is in the context of the limited matter for which the judge has been recalled, and in one view the power to overrule a precedent is broader in scope than merely deciding an individual case. In addition, the policy of the court has always been to require a majority of the full-time membership to overrule a prior decision.[250] If a recalled judge is permitted to vote in situations in which a precedent might be overruled, this policy could be thwarted in the event of a deadlock among the full-time membership.[251] On the other hand, it may be argued that overruling a precedent is no different than establishing a precedent.[252] A committee established to study the problem recommended that recalled judges not be permitted to vote to overrule precedents.[253] However, no action was taken on the committee's recommendation.[254]

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[248] *Id.*

[249] Report of the Committee on Recalled Judges to the Tax Court, Feb. 26, 1954, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence" [hereinafter cited as Recalled Judges Report]. Section 7447(c) governs the authority of a recalled judge and provides as follows:

> (c) RECALLING OF RETIRED JUDGES.—At or after his retirement, any individual who has elected to receive retired pay under subsection (d) may be called upon by the chief judge of the Tax Court to perform such judicial duties with the Tax Court as may be requested of him for any period or periods specified by the chief judge; except that in the case of any such individual:
>
> (1) the aggregate of such periods in any one calendar year shall not (without his consent) exceed 90 calendar days; and
>
> (2) he shall be relieved of performing such duties during any period in which illness or disability precludes the performance of such duties.
>
> Any act, or failure to act, by an individual performing judicial duties pursuant to this subsection shall have the same force and effect as if it were the act (or failure to act) of a judge of the Tax Court; but any such individual shall not be counted as a judge of the Tax Court for purposes of section 7443(a). Any individual who is performing judicial duties pursuant to this subsection shall be paid the same compensation (in lieu of retired pay) and allowances for travel and other expenses as a judge.

[250] *Id.*

[251] Such a proposal was advanced in 1958. Tax Court Conference Minutes, Dec. 19, 1958. No action was taken by the court.

[252] Recalled Judges Report, *supra* note 249.

[253] *See id.*

[254] Tax Court Conference Minutes, Feb. 26, 1954.

c. Publication of Conference Votes

The publication of conference voting has been the subject of much discussion among the court's membership.[255] Although the court has always indicated in its published reports whether an opinion has been subject to conference review,[256] full publication of the vote of the members has not been required.[257] If a judge writes a concurrence or a dissent, that judge's position, along with that of the author of the majority opinion, obviously is known.[258] Moreover, a judge may note in the published report that judge's concurrence or dissent with an opinion or result, without the necessity of writing a separate opinion.[259] Nonetheless, the position of

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[255] The issue of publication has arisen on several occasions, most notably in 1954 and 1969. *See supra* notes 261–273 and accompanying text.

[256] *But see supra* note 236.

[257] Tax Court Conference Minutes, Dec. 30, 1954.

[258] The practice of the Board, from its earliest years, has been to discourage unpublished dissenting opinions. In 1924, the Board adopted a rule which provided that if a dissent was not published, it could not be filed in the court records. Board Conference Minutes, Dec. 13, 1924.

[259] The Board has adopted a policy that dissenting and concurring opinions are to be circulated prior to the promulgation of the report in an effort to familiarize the membership with the views of their associates. Board Conference Minutes, Apr. 26, 1935. Each judge who casts a "no" vote on a conference report is given the opportunity to indicate whether he wishes his name to appear in approval of a dissenting opinion. *See* Tax Court Conference Minutes, Mar. 17, 1950. To eliminate delays that developed in members signifying their decision to be noted as dissenting, the court in 1950 adopted a procedure of providing a judge with one week in which to indicate his position on a dissenting opinion. Administrative Memorandum No. 1, entitled "Establishment of Time Limit in Obtaining Clearance on Dissenting Opinions," Mar. 30, 1950, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence." Finally, consideration has also been given to the situation in which the author of a majority report is rewriting the opinion solely in deference to the majority view and not because of his agreement therewith. Tax Court Conference Minutes, Nov. 6, 1959. Although the court had established a policy that in cases in which a member wrote the opinion of the court, no published dissent would be permitted to be filed by him, Tax Court Conference Minutes, July 31, 1942, a question arose as to whether a judge who rewrote an opinion in accordance with majority wishes could indicate within the body of the opinion that he did not agree and in fact retained a view different from that of the majority, Tax Court Conference Minutes, Nov. 6, 1959. In conference, the court rejected such a proposition, on the premise that it represented an opportunity to express a minority view in a majority opinion and would appear to weaken the presentation of the majority position. *Id.* Rather, it was believed that the majority opinion should be written by someone in agreement with the majority position and that judges who personally disagreed should present their views in dissenting opinions. *Id.* *But see* Haserot v. Commissioner, 46 T.C. 864, 872 (1966) (Judge

those not attending the conference, those who vote "pass," and those who concur or dissent without wishing to signify their vote in the published report is not made known to the public.[260]

The first major criticism of these practices occurred in 1954, when Judge Maris, in *Stern v. Commissioner*,[261] suggested that the Tax Court "follow accepted forms of judicial procedure by indicating in some appropriate way on its record in each case . . . the names of the judges who participate in the decision ultimately rendered."[262] Shortly thereafter, in a memorandum to the court, Chief Judge Kern advocated that the names of those judges not participating (absent *and* not voting by proxy) be supplied to those who request such information and be made a part of the record in each appeal. Such an approach, Judge Kern believed, would leave undisturbed the court policy of voting by proxy and permitting pass votes and was preferable to affirmatively listing the names of all the judges agreeing with the majority opinion.[263] Because Judge Kern's approach would lead to the names of those not participating becoming public as a result of their notation in the record, it was suggested that publication of those not participating in the reports also was advisable.[264] An alternative to the Kern proposal was advanced by Judge Murdock, who suggested that certification be made as to the number of judges who adopted the position of the court. Such an approach, he believed, would more nearly answer the criticism of Judge Maris.[265] None of these proposals was adopted. Rather, the court concluded that further study of the problem was necessary. A special committee established for this purpose subsequently reported that no compelling reasons existed to change prior practices; nonetheless, the committee recommended a limited form of identification.[266] Under the recommendation, the only judges to be identified would be those who did not participate in the discussion, and, in addition, did not vote.[267] For purposes of the rule, a judge who voted a "pass" would not be identified. The recommendation was not approved and the prior practice of the court

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Tannenwald, author of the majority opinion, wrote a separate opinion "speaking separately"), *aff'd*, 399 F.2d 828 (6th Cir. 1968).

260 *See* Kern, *supra* note 1.

261 215 F.2d 701 (3d Cir. 1954).

262 *Id.* at 708.

263 Memorandum from Chief Judge Kern to Judges of the Court, Dec. 17, 1954, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

264 Tax Court Conference Minutes, Dec. 30, 1954.

265 *Id.*

266 Tax Court Conference Minutes, Dec. 30, 1954 and Feb. 4, 1955.

267 Memorandum from the Committee on Publication to the Chief Judge, Feb. 9, 1955, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

continued.[268] Varying reasons were given for the court's rejection of the recommendation. First, objections to exposing the internal operations were raised, and notwithstanding the interest of the bar and others in the views of the various judges on questions before the court, it was believed that practice by the court should not be affected by such interest or speculation.[269] Second, the problem of judges conducting trial sessions in the field who did not wish to be identified as non-participating would arise. Although an absent judge would have been permitted to vote by proxy under the recommendation, such encouragement of proxy voting was viewed as potentially dangerous and not within the spirit of the conference's purpose.[270] Third, identification of non-participants might encourage the parties to request reconsideration by the full court if the number of non-participants was great and the decision close.[271]

Reconsideration of the publication issue occurred in 1969.[272] Arguments similar to those raised 15 years earlier were offered in opposition to any change in pre-existing court policy and continuation of the prior policy was approved.[273]

3. 1985 Amendments to Conference Procedures

In 1985, Chief Judge Samuel Sterrett requested the Tax Court Rules Committee to consider how a court conference quorum should be determined when some judges are disqualified.[274] During consideration of this matter, the Rules Committee undertook to propose internal guidelines that would resolve this and other questions concerning court conference procedures.[275] The result was a formulation of the conference procedures of the Tax Court.[276]

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[268] *Id.* at 1.

[269] Tax Court Conference Minutes, Mar. 11, 1955.

[270] Tax Court Conference Minutes, Dec. 30, 1954 and Mar. 11, 1955.

[271] Tax Court Conference Minutes, Mar. 11, 1955.

[272] Memorandum from Judge Simpson to the judges, Feb. 24, 1969, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" Tax Court Conference Minutes, Feb. 28, and May 2, 1969.

[273] Tax Court Conference Minutes, May 2, 1969.

[274] *See* Memorandum from Judge Simpson to Chief Judge Sterrett, Sept. 11, 1985, filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)."

[275] *Id.* The proposed procedures generally formalized existing practices and provide for some situations in which there was no established practice. *Id.* at 1. Judge Simpson's memorandum stated that "[i]n no case does a proposed procedure change an established practice." *Id.*

[276] The procedures, approved by the court conference on October 25, 1985, were adopted by the court for its internal use and have not been published. A copy of the procedures are filed at the U.S. Tax Court in "Rules Committee: Court

a. Effect of Disqualification on Quorum

Although the Internal Revenue Code does not directly address the question,[277] § 7444(d) provides useful guidance for the formulation of a rule governing the effect of disqualification on the court conference quorum:

> A majority of the judges of the Tax Court or of any division thereof shall constitute a quorum for the transaction of the business of the Tax Court or of the division, respectively. A vacancy in the Tax Court or in any division thereof shall not impair the powers nor affect the duties of the Tax Court or division nor of the remaining judges of the Tax Court or division, respectively.[278]

The Rules Committee was particularly concerned that disqualification of members of the court conference could create a situation in which a minority of the court could adopt a position in conflict with the majority view.[279] For example, if two of the 19 judges were disqualified from taking

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Conference Procedures (1985)." [hereinafter cited as Tax Court Procedures for Court Conferences].

[277] I.R.C. § 7444(d).

[278] Section 455(a) of title 28 of the United States Code requires self-disqualification by a "judge . . . of the United States" in any case "in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Section 451 provides that reference to a judge of the United States includes "judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior." 28 U.S.C. § 451. Tax Court judges serve 15-year terms. I.R.C. § 7443(e). Thus, the disqualification statute is inapplicable to the Tax Court. The Tax Court, however, has voluntarily adopted the rule that Tax Court judges who would be disqualified from a particular case under section 455 of title 28, must disqualify themselves from a case and refrain from engaging in any discussion of the case with their colleagues. *See* Tax Court Procedures for Court Conferences, *supra* note 13, RULE 276 (quoted *infra* note 316).

[279] The question of how to determine a quorum when some judges are disqualified arose in anticipation of *Dunn Trust v. Commissioner*, 86 T.C. 745 (1986) (involving the tax consequences of the divestiture of AT&T). *See* Letter from Judge Simpson to Harold Dubroff, Aug. 27, 1987, at 1–2, filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)." The parties in *Dunn Trust* filed a joint motion requesting treatment of the case under the "expedited procedures that the court had recently announced it was introducing for handling especially significant cases." *See* Eric S. Kracov, *AT&T Case Offers Hope for Swift Resolution of Important Tax Disputes*, 31 TAX NOTES 657 (May 19, 1986). The *Dunn Trust* case was assigned to Judge Theodore Tannenwald, Jr., and his report was referred to the conference for review because of its significance. At the conference, only ten judges participated, in addition to Judge Tannenwald (then a

part in a decision, nine of the remaining 17 judges might vote to overrule Tax Court precedent that the majority of active judges believed should be followed. Similarly, were an issue of first impression involved in such a case, the nine judges might reach a conclusion with which the majority of Tax Court judges disagreed.[280]

The Rules Committee also was concerned that if a majority of the court membership was required to review division reports, the court would be unable to do so if ten or more of the 19 judges were disqualified.[281] The Rules Committee reviewed the different approaches taken by the appellate courts for the federal circuits in considering the effect of judicial disqualification on their power to act en banc.[282] After observing a fairly

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recalled senior judge). Letter from Judge Simpson to Harold Dubroff, *supra* note 279, at 1–2. Nine judges disqualified themselves and did not participate. Because all of the participating judges agreed with Judge Tannenwald's opinion, the court was not confronted with a situation in which an opinion was approved by a minority of the court. *Id.* at 1–2. *Dunn Trust* is, however, illustrative of the problem that might arise when a substantial number of judges are forced to disqualify themselves from a particular case. *Id.*

[280] *See* Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 274, at 4; Memorandum from Joanne Hickcox, Deputy Counsel to the Chief Judge, to Judge Simpson, May 22, 1985, at 7, filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)."

[281] *See* Memorandum from Joanne Hickcox, Deputy Counsel to the Chief Judge, to Judge Simpson, *supra* note 280, at 8.

[282] *See id.* at 4–8; Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 274, at 2–3.

Rule 35(a) of the Federal Rules of Appellate Procedure provides that "[a] majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal . . . be . . . reheard by the court of appeals in banc." FED. R. APP. P. 35(a). The purpose of the en banc procedure is to help assure the uniformity of decisions within a circuit and to enable a majority of the judges of a circuit to control the resolution of important issues. *See* United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689–90, *reh'g denied*, 364 U.S. 854 (1960); Peter Michael Madden, *In Banc Procedures in the United States Courts of Appeals*, 43 FORDHAM L. REV. 401, 407–08 (1974) (discussing the en banc procedures of the United States Circuit Courts of Appeals in light of the *American-Foreign Steamship Corp.* decision). The court conference procedure is not the equivalent of an en banc hearing in the courts of appeals. Neither party is entitled to a hearing before the Tax Court reviewing a division report, except upon order of the chief judge. Oral arguments have never been presented during the court conference. Moreover, although the court conference and en banc procedures share a similar major purpose, assuring uniformity of precedent, the court conference procedure, unlike the en banc procedure, is not designed to afford parties an opportunity to reargue a case. 2A LAURENCE F. CASEY, FEDERAL TAX PRACTICE, § 8.37, at 284 (1981).

In Green Spring Dairy, Inc. v. Commissioner, 208 F.2d 471 (4th Cir. 1953), *aff'g* 18 T.C. 217 (1952) and 18 T.C. 929 (1952), the court stated:

pronounced split among the circuit courts of appeals,[283] the Tax Court unanimously agreed to adopt the rule that disqualified judges are to be disregarded in determining whether a quorum exists for conference review.[284] The Rules Committee believed that the result of judicial disqualification was similar to a vacancy on the court[285] and pointed out that the statute clearly provides "that a vacancy is not to impair the ability of the Court to function."[286] If the court were presented with a situation in which there were ten vacancies, the statute would allow the remaining nine judges

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> It is of course arguable that when Congress modified the conclusive effect to be given to a decision of the Tax Court in these cases by the Act of 1941 and provided for a review of decisions by a special division in 1942, it had in mind the procedure followed by the courts of appeals in reviewing ordinary decisions of the Tax Court; but it is more reasonable to construe the statute in the framework of the legislation relating to the taxation of incomes. In these statutes, as they appear today in the Code, we find [the predecessor of I.R.C. § 7444], which empowers the Tax Court to designate a presiding judge who may from time to time divide the court into divisions of one or more judges; [the predecessor of I.R.C. § 7460] which directs that a division shall hear and determine any proceeding before the Tax Court which is assigned to it and shall make a report thereof, and that the report shall become the report of the Tax Court within thirty days unless the presiding judge directs that it shall be reviewed by the Tax Court; and [the predecessor of I.R.C. § 7458] which provides that notice and opportunity to be heard upon any proceeding instituted before the Tax Court shall be given to the parties, and that if an opportunity to be heard is given before a division of the Tax Court, neither party shall be entitled to notice and opportunity to be heard before the Tax Court upon review, except upon a specific order of the presiding judge. In our opinion it was this kind of review without additional opportunity to the parties to be heard which Congress had in mind in enacting section 732(d). The purpose of the review was not to secure a reargument of the case but to assure a consistent and uniform application of the principles of the excess profits tax statute by a group familiar with the problems involved.

Id. at 475–76. *Accord* A.B. Frank Co. v. Commissioner, 211 F.2d 497 (5th Cir. 1954).

[283] For discussion of the prevailing circuit split, see Harold Dubroff & Charles M. Greene, *Recent Developments in the Business and Procedures of the United States Tax Court; Part Five: Court Conferences*, 52 ALB. L. REV. 147, 151–53 (1987).

[284] *See* Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 274, at 3–4.

[285] *Id.* at 4.

[286] *Id.* (stating that when a judge disqualifies himself, it is similar to a vacancy on the court). Section 7444(d) provides that "[a] vacancy in the Tax Court or in any division thereof shall not impair the powers nor affect the duties of the Tax Court or division nor of the remaining judges of the Tax Court or division, respectively." I.R.C. § 7444(d).

to continue carrying on the business of the court.[287] Similarly, the Rules Committee believed that the remaining nine judges should have the authority to carry on the business of the court were it ever faced with a situation in which ten judges were forced to disqualify themselves.[288] Although five judges could make the decision of the entire court in this situation, such a possibility was believed better than placing the court in a position in which it simply could not function.[289]

b. Representation by Proxy

Although the Rules Committee unanimously agreed that judges disqualified from a particular case should be disregarded in determining a conference quorum, there was disagreement regarding the effect of representation by proxy at the court conference.[290] Prior Tax Court practice had permitted unrestricted proxies, and members of the Rules Committee who favored counting proxies in determining a quorum argued that court members are often unavoidably absent at conference time due to their demanding travel schedules.[291] Proxy representation would allow participation by absent judges and would prevent undue interference with the operations of the court. The proponents of proxy representation noted that such a practice would be in accordance with general principles of corporate governance.[292]

Those opposed to counting proxies in determining a conference quorum, however, believed that a majority of the court's members who were not disqualified from a particular case should be present to carry on the business of the court; otherwise, important decisions could be made with only a few judges present,[293] and an important purpose of the court conference would be thwarted. The practices of corporations were argued

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[287] *See* Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 274, at 4.

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.* at 4–5.

[292] Memorandum from Joanne Hickcox, Deputy Counsel to the Chief Judge, to Judge Simpson, *supra* note 280, at 2. The memorandum quoted, as an example, Delaware law governing shareholder voting standards: "A majority of the shares entitled to vote, present in person or represented by proxy, shall constitute a quorum at a meeting of stockholders." *Id.* (quoting DEL. CODE ANN. tit. 8, § 216(1) (1983)).

[293] Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 274, at 5.

to be of little relevance to Tax Court procedure.[294] Private corporations often have thousands of shareholders who may live anywhere in the world, and because their primary concerns are financial, they may feel no major need to be physically present at a shareholders' meeting.[295] The Tax Court, however, is a governmental body of only 19 members who have a duty to meet and discuss before acting. Of far more relevance to Tax Court procedures than corporate practices, it was argued, were the operations of other governmental bodies whose members are required to travel extensively.[296] An example of such a body is the United States Congress, where a majority of committee members must be present for a quorum and where proxies are not allowed for any purpose during deliberations on the floor.[297]

The question of conference voting had occasioned some controversy. The Rules Committee considered proposals that would require absent judges to be precluded from voting, or would provide that conference debates be transcribed, so that absent judges could be informed of the various positions at conference before casting their votes.

Those who questioned unrestricted use of proxies also recognized, however, that often some judges were unavoidably absent at conference time, and sometimes *many* judges were unavoidably absent. Nonetheless, prior research often gave these judges a well-informed opinion of the issues being discussed at conference. Thus, in fairness to the judges and the purposes of court review, their votes should not be precluded.

To address the conflicting concerns of the Rules Committee, Judge Chabot proposed a rule that would require a majority of the judges not disqualified from a particular case to be present in person to determine a conference quorum; but once a quorum was established, the votes of absent members could be cast by proxy.[298] Judge Chabot's proposal was adopted by the court.[299]

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[294] Memorandum from Judge Chabot to Judge Simpson, May 23, 1985, filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)."

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] Rule 2 of the Tax Court Procedures for Court Conferences provides: "*Quorum*. A majority of the judges entitled to vote on a case, present in person, shall constitute a quorum for the transaction of business with respect to that case." Tax Court Procedures for Court Conferences, *supra* note 276, RULE 2; *see also* Tax Court Procedures for Court Conferences, *supra* note 276, RULE 3 (quoted *infra* note 300).

c. Voting Requirement and Votes Cast After Conference

In adopting the Procedures for Court Conference, the Tax Court continued its established practices with respect to the vote required to adopt a division report. Generally, a report approved by a majority of the judges voting by proxy or in person will be considered adopted.[300] If the report overrules a prior decision of the court, however, the vote of a majority of the judges entitled to vote on the case is required to adopt it.[301] Judges entitled to vote include all those not disqualified from a particular case, as well as any senior judge who may have authored the report.[302] Rule 1 of the Procedures for Court Conferences makes it clear that even if the report of a senior judge is not adopted in conference and the case is reassigned, the senior judge who authored the report will remain "entitled to vote on all matters relating to the case."[303]

The significance of the controversy over the use of proxies is somewhat diminished by Rule 4 of the Procedures for Court Conferences, which allows judges who are not present at conference to later cast a vote and which permits those who are present to change their vote within a limited period.[304] There was concern, however, that Rule 3 of the conference

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[300] Rule 3 of the Tax Court Procedures for Court Conferences provides:

> 3. *Vote required*. A quorum being present, the affirmative vote of the majority of the judges present in person or represented by proxy at the Court Conference and entitled to vote on the case shall be sufficient to adopt the report in that case, except that the affirmative vote of a majority of the judges entitled to vote on the case shall be required to overrule a prior Tax Court opinion. If the votes cast at the Court Conference are sufficient to decide the outcome of a case, the Chief Judge shall have the authority to declare at the Conference whether the report in the case is adopted or not adopted, even though votes cast after the Court Conference could alter the outcome.

Tax Court Procedure for Court Conferences, *supra* note 276, RULE 3.

[301] *Id.*

[302] Rule 1 of the Tax Court Procedures for Court Conferences provides:

> 1. *Voting rights*. Any active judge who is not disqualified in a particular case shall be entitled to vote on all matters relating to that case. Any senior judge shall be entitled to vote on all matters relating to any case in which he is the author of the report. Where the report of a senior judge is not adopted by the Court Conference and the case is reassigned, the senior judge who was the author of the initial report shall continue to be entitled to vote on all matters relating to the case.

Tax Court Procedures for Court Conferences, *supra* note 276, RULE 1.

[303] *Id.*

[304] Rule 4 of the Tax Court Procedures for Court Conferences provides:

> 4. *Submission of Separate Opinions and Voting After Conference*. All separate opinions, including concurring and dissenting opinions concerning a

procedures (authorizing the chief judge to declare at the time of the conference whether a report is adopted or not) might reverse the pre-existing Tax Court practice requiring the chief judge to resubmit to conference any case the outcome of which is altered by votes cast after the conference.[305] Rule 4 of the conference procedures, however, clarifies that the case must again be scheduled for conference consideration in all situations in which the outcome of the case is changed, including changes resulting from votes by absent judges.[306]

Allowing absent judges to vote was believed necessary because some cases may involve issues so thoroughly familiar to a judge that the conference discussion may be of little importance to that judge in deciding how to vote.[307] Whether a judge will vote with or without the benefit of conference discussion is, therefore, left to the discretion of each individual judge.

The court was concerned that conference cases be processed as expeditiously as possible.[308] Accordingly, rules were adopted setting forth

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> conference case, shall be submitted to the Chief Judge's office within 14 days after the conference at which such case was acted upon. Any judge entitled to vote on the case may vote, or may change his vote, within 14 days after such conference, or within 7 days after the distribution of a separate opinion, whichever period expires later. However, if the votes by absent Judges or the changes in votes would result in a change in the outcome of a case, the case will again be scheduled for conference consideration. The Chief Judge may, for good cause, extend the period for the submission of separate opinions and the period for voting, and he may, for cause, shorten such periods on giving the Judges adequate notice of his intention to do so.

Tax Court Procedures for Court Conferences, *supra* note 276, RULE 4.

[305] *See* Tax Court Procedures for Court Conferences, *supra* note 276, RULE 3 (quoted *supra* note 300); *see also* Memorandum from Judge Whitaker to Chief Judge Sterrett , Oct. 1, 1985, filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)" (expressing his understanding that under Rule 4 "any judge, whether attending a conference or absent, [could] join in any separate opinion within 7 days after distribution and . . . could change his or her vote without consent of the conference"); Memorandum from Judge Chabot to Judge Simpson, June 25, 1985, filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)" (stating that he was troubled by the proposed changes to Rule 4 that would allow the chief judge to poll conference absentees to reach a result inconsistent with a majority of those who voted at conference).

[306] *See* Tax Court Procedures for Court Conferences, *supra* note 276, RULE 4 (quoted *supra* note 304).

[307] *See* Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 274.

[308] *See* Memorandum from Judge Simpson to Judges and Senior Judges, Sept. 26, 1985, filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)."

reasonably definite limits with respect to voting on and adoption of conference cases. If the number of votes at conference are enough to decide a case, the chief judge is authorized to declare that the report has been adopted, even though votes cast after the conference could alter the outcome.[309] Absent judges, or judges who voted in conference and wish to change their vote, generally must cast their vote within 14 days after the conference, or within seven days after the distribution of a separate opinion, whichever period expires later.[310] The chief judge is given discretion, for cause, to extend the period for voting or shorten the period within which a late vote may be cast, provided the judges are given adequate notice of the shortened time period.[311]

d. Participation by Disqualified Judges

As stated previously, judges of the United States subject to title 28 are required to disqualify themselves from any case in which their "impartiality might reasonably be questioned."[312] The extent to which a disqualified judge is allowed to participate in the discussion of a case with his colleagues, however, was not totally clear.[313]

An opinion of the Advisory Committee on the Code of Judicial Conduct[314] deals with a situation in which a panel of three judges have discussed but not decided a case, and one judge subsequently finds it necessary to disqualify himself. The question presented is whether the other two judges should also disqualify themselves. In concluding that the other two judges are not disqualified, the opinion notes that judges often must disregard important facts of which they are aware, as in the case of evidence inadmissible at trial.[315] The mere fact that a judge is recused after oral argument or conference on the case is not, according to the opinion, a

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309 *See* Tax Court Procedures for Court Conferences, *supra* note 276, RULE 3 (quoted *supra* note 300).

310 *See* Tax Court Procedures for Court Conferences, *supra* note 276, RULE 4 (quoted *supra* note 304).

311 *Id.*

312 *See supra* note 278; 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT, Canon 3, Rule 2.11(A) (2011).

313 *See* Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 274.

314 GUIDE TO JUDICIARY POLICY, vol. 2, pt. B, Adv. Opinion 71 (July 20, 2012); *see also* Memorandum from Joanne Hickcox, Deputy Counsel to the Chief Judge, to Judge Simpson, *supra* note 280. The language of 28 U.S.C. § 455 is largely repeated in the Model Code of Judicial Conduct. MODEL CODE OF JUDICIAL CONDUCT, Canon 3, Rule 2.11(A) (2011).

315 GUIDE TO JUDICIARY POLICY, vol. 2, pt. B, Adv. Opinion 71 (July 20, 2012).

sufficient basis to question the impartiality of the remaining judges. A clear inference from the opinion is that the remaining judges should disregard potentially prejudicial statements made by the judge who is recused. As a further refinement of this issue, the Tax Court conference procedures provide that disqualified judges shall refrain from participating in any discussion of the case from which they are disqualified.[316]

e. Motions for Court Review

In 1985, the Tax Court considered the feasibility of adopting a rule that would authorize the chief judge to consider and grant motions for court review.[317] Historically, the efforts of taxpayers to appear before the Board of Tax Appeals when their cases were undergoing review and to compel the adoption of division reports revised in conference had been denied, first by the Board, and later by statute.[318] Tax Court conference procedures and applicable statutes have undergone little change since 1928.[319] Still, it appears that the court has regularly received motions, usually after the expiration of the 30-day period referred to in § 7460(b), for the chief judge to direct court review of a division report.[320] Accordingly, Chief Judge Sterrett suggested that the Chairman of the Rules Committee, Judge Simpson, examine the possibility of authorizing the chief judge to order

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[316] Rule 5 of the Tax Court Procedures for Court Conferences provides: "5. *Participation by disqualified judge*. A judge who is disqualified in a particular case shall not participate in the discussion of that case. *See* 28 U.S.C. sec. 455 and Canon 3(C) of the Code of Judicial Conduct, relating to the reasons for a judge to disqualify himself." Tax Court Procedures for Court Conferences, *supra* note 276, RULE 5.

[317] Two internal memoranda of the Tax Court address the adoption of a rule allowing the chief judge to grant motions for court review: Memorandum from Judge Simpson to Chief Judge Sterrett, Nov. 4, 1985, and Memorandum from Joanne Hickcox to Judge Simpson, Oct. 31, 1985, both filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)."

[318] Revenue Act of 1928, ch. 852, § 601, 45 Stat. 791, 872 (amending Revenue Act of 1926, ch. 27, § 907(a), 44 Stat. 9, 107).

[319] *See* I.R.C. §§ 7458–7460. Two post-trial motions are available to bring a case before the Tax Court for a second hearing: the motion for reconsideration and the motion to vacate. *See* TAX CT. R. 161 (July 6, 2012 ed.) (motion for reconsideration of opinion); TAX CT. R. 162 (July 6, 2012 ed.) (motion to vacate or revise decision).

[320] *See* Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 317 (stating that the purpose of the memorandum was to address the court's concern with motions for review after the 30-day period under § 7460(b) had expired).

court review in appropriate cases, even though the statutory period has expired.[321]

The first question to be resolved in considering the adoption of a rule authorizing the chief judge to grant motions for review of opinions after expiration of the 30-day period was whether such a rule would be contrary to § 7460(b), which formed the basis of the court's historic position that the chief judge does not have the authority to order review of a report more than 30 days after its submission:

> **(b) Effect of Action by a Division.**—The 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. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Tax Court except in accordance with such rules as the Tax Court may prescribe. The report of a division shall not be a part of the record in any case in which the chief judge directs that such report shall be reviewed by the Tax Court.[322]

An internal Tax Court memorandum on this issue concludes that the statutory language does not appear to preclude the court from adopting a rule that would grant the chief judge the power to direct review after the 30-day period expires.[323] Closely analogous to this situation, the memorandum notes, is the undisputed authority of a judge to vacate an opinion which the judge has authored.[324] Presumably, Tax Court judges acting collectively could adopt a rule authorizing the chief judge to vacate an opinion and direct that the report in the case be reviewed by the court.[325]

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[321] *See* Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 317, at 1; Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 317, at 1.

[322] I.R.C. § 7460(b).

[323] *See* Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 317, at 2–3.

[324] *Id.*

[325] On occasion, the Tax Court has withdrawn a published opinion and published a superseding revised opinion. In *Larson v. Commissioner*, 66 T.C. 159 (1976), the court stated: "[P]etitioners filed a 'Motion for Reconsideration by the Full Court' which was denied. The motion was referred to the trial judge as a motion for reconsideration of the opinion. The trial judge granted this motion and the Court's opinion was withdrawn . . . ." *Id.* at 160; *see also* Cruttenden v. Commissioner, 70 T.C. 191 (1978), *superseding* T.C. Memo. 1978-4, *aff'd*, 644 F.2d 1368 (9th Cir. 1981); Estate of Henning v. Commissioner, 68 T.C. 374 (1977), *opinion withdrawn* Dec. 27, 1977.

An argument against the authority of the Tax Court to adopt a rule allowing review of an opinion after the expiration of the 30-day period can be found in the second sentence of § 7460(b), which provides that preliminary action of a division shall not be subject to court review "except in accordance with such rules as the Tax Court may prescribe."[326] Based on the fact that Congress has, in some circumstances, provided explicitly for court-made exceptions to statutory general rules, it may be inferred that in the absence of such an express grant of rule-making authority, the court is left without the power to prescribe rules. Thus, since Congress was silent as to post-adoption action by the Tax Court, it may be argued that the Tax Court does not have the authority to prescribe rules that would extend the power beyond the statutory period.

Nevertheless, those on the court who considered the question apparently concluded that, although the 30-day rule might implicitly preclude the chief judge from ordering review of an opinion after the 30 days has expired, nothing in the statute precludes the court from conferring this authority, by rule, upon the chief judge.[327] The legislative history of the predecessor to § 7460(b) is not at odds with this conclusion. The 30-day rule was originally enacted, it appears, to thwart taxpayer efforts to personally appear at court conferences or to alter the results of conference consideration.[328] Thus, although a rule authorizing the chief judge to vacate an opinion to grant review after the 30-day period has expired is not entirely consistent with the statute's legislative history, it would not seem to conflict with its principal purpose of precluding taxpayer interference with the Tax Court's procedures for review. Despite the fact that court members reviewing the situation apparently concluded that the chief judge could, by the promulgation of a court rule, be given the authority to direct review of an opinion after the 30-day period, problems implicit in such a rule precluded its adoption.

The third sentence of § 7460(b) states that "[t]he report of a division shall not be a part of the record in any case in which the chief judge directs that such report shall be reviewed by the Tax Court."[329] In *Estate of Varian v. Commissioner*,[330] the United States Court of Appeals for the Ninth Circuit rejected petitioner's claims that the court-reviewed case should include the findings of fact and opinion of the division that originally issued the report, and held that the purpose of the third sentence of § 7460(b) "is to preclude

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326 I.R.C. § 7460(b).

327 *See* Memorandum from Judge Simpson to Chief Judge Sterrett, *supra* note 317; Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 317, at 3.

328 *See* I.R.C. § 7458 (parties not entitled to notice and opportunity to be heard upon Tax Court review except as so ordered by chief judge).

329 I.R.C. § 7460(b).

330 396 F.2d 753 (9th Cir. 1968), *aff'g per curiam* 47 T.C. 34 (1966); *see also* Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 317.

a two-tier 'appellate' relationship between the full court and its divisions."[331] At least to some extent, a rule authorizing the chief judge to consider and grant motions for court review would establish an appellate-type relationship because, in effect, parties making such a motion would be appealing the opinion of a division to the full court.[332]

Additionally, adoption of such a rule could undermine the authority of the chief judge to direct court review. Currently, this power rests solely with the chief judge and is not subject to appellate review.[333] A rule authorizing motions for court review might set forth the circumstances in which such motions should be granted. Appellate courts could then review the decision of the chief judge under such a rule and determine whether it had been applied correctly. This could lead to an unexpected and undesired interpretation of the rule, thus restricting the Tax Court's flexibility under its own rules of procedure.

Finally, allowing parties to file motions for court review would undoubtedly increase the number of motions received by the Tax Court, since a non-prevailing party would have little to lose by filing a motion for review.[334] Although the court currently may deny such motions without explanation, if the circumstances in which the motions might be granted were established by a rule, summary disposition of these motions might become impossible. Thus, the court would be faced with an unwarranted increase in its workload.

As an alternative to a rule authorizing motions for court review, it was suggested that the court might wish to adopt an internal procedure for disposing of the motions it continues to receive.[335] For example, the judge conducting the trial in a particular case could agree to vacate a report in a case in which the court has received what appears to be a meritorious motion for review and resubmit it to the chief judge as a new report of the division.[336] Although such a procedure would enable the court to avoid the problems it might face in adopting a rule, the chief judge would be forced to rely on the power of persuasion to convince the author of the opinion of the merits of the motion for court review. Chief Judge Sterrett, after hearing the various arguments, was convinced that the matter was "not

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[331] 396 F.2d at 755 n.2.

[332] *See* Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 317.

[333] Sisto Fin. Corp. v. Commissioner, 149 F.2d 268, 269–70 (2d Cir. 1945).

[334] *See* Memorandum from Joanne Hickcox to Judge Simpson, *supra* note 317.

[335] *Id.*

[336] *See* Memorandum from Judge Simpson to Judges and Senior Judges, *supra* note 308.

worth pursuing,"[337] and, apparently, the policy of denying such motions for court review without explanation continues.

G. Rule 155

The promulgation of a "report,"[338] containing the findings of fact and/or opinion in a case, whether by division or conference, does not necessarily complete all Tax Court action. The report only decides the legal and factual questions that have been placed in issue by the parties.[339] The statutory responsibility of the court, however, is to redetermine deficiency assertions by the Commissioner.[340] Since its inception as the Board of Tax Appeals, the court has interpreted this responsibility to require a decision expressed in monetary terms.[341]

In some cases, quantifying the decision involves no additional action. This occurs in those cases in which the court finds that the deficiency notice is entirely correct, or, alternatively, that it is completely erroneous. In those situations, the court in its report simply directs entry of a decision for the full deficiency claimed or for no deficiency.[342]

In many cases, however, multiple issues are raised by the parties, and the court may find for the Commissioner on some and the taxpayer on others.[343] Even in cases in which a single issue is involved, the court may

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[337] Memorandum from Chief Judge Sterrett to Judge Simpson, Nov 18, 1985, filed at the U.S. Tax Court in "Rules Committee: Court Conference Procedures (1985)."

[338] Section 7459 provides that

> [A] report upon any proceedings instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. . . . It shall be the duty of the Tax Court and of each division to include in its report upon any proceedings its findings of fact or opinion or memorandum opinion.

I.R.C. § 7459(a).

[339] MARVIN JOSEPH GARBIS & ROBERT L. FROME, PROCEDURES IN FEDERAL TAX CONTROVERSIES § 9 (1968) [hereinafter cited as GARBIS & FROME].

[340] I.R.C. § 6213(a).

[341] *See generally* 2 LAURENCE F. CASEY, FEDERAL TAX PRACTICE § 8.40 (1955) [hereinafter cited as L. CASEY]; HAMEL, *supra* note 1, at 160; Laurence F. Casey, *Tax Court Procedure: Some Current Problems*, 5 TAX L. REV. 57, 58–63 (1949) [hereinafter cited as Casey]; Greenberger, *Scope of Rule 50 Computations*, 12 N.Y.U. ANN. INST. ON FED. TAX'N 963 (1954) [hereinafter cited as Greenberger]; Kern, *supra* note 1, at 1020; Robert N. Miller, *Tax Court Pleadings and Rule 50 Settlements: Points to be Considered in the Petitioner's Behalf*, 5 N.Y.U. ANN. INST. ON FED. TAX'N 158, 178 (1946) [hereinafter cited as Miller].

[342] *E.g.*, Florida Publishing Co. v. Commissioner, 64 T.C. 269, 282 (1976); Leslie Co. v. Commissioner, 64 T.C. 247, 255 (1976).

[343] *E.g.*, Estate of Fawcett v. Commissioner, 64 T.C. 889, 901 (1976).

conclude that neither party is entirely correct.[344] Finally, although the court may find the Commissioner's determination of a deficiency entirely erroneous, difficulties in quantifying the decision may arise if the court concludes that the taxpayer overpaid his taxes for the applicable year.[345] These findings require the court to recompute tax liability on corrections to gross income, taxable income, or credits necessitated by the findings of fact and opinion to formulate a monetary decision.[346] In some instances, this procedure may be time consuming, as one adjustment may require changes in seemingly unrelated items. For example, the disallowance of a taxpayer's business deduction may result in an increased adjusted gross income, which in turn may require an adjustment in those deductions based on, or limited by, adjusted gross income, as is the case with medical and charitable deductions.[347]

In its earliest reports, the Board frequently incorporated a monetary decision on tax liability in its findings on substantive issues.[348] The early days of the Board were among its busiest, and the burden of making these ministerial, though involved, computations must have been immediately felt.[349] Apparently for this reason some of the early reports of the Board did not include a monetary decision but rather required the decision to be settled by "consent or on seven days' notice."[350] Soon the Board concluded that a formal rule of practice would be desirable to handle cases in which the decision of the Board was neither completely in favor of the taxpayer nor the Commissioner. In December 1924, four months after the Board issued its first report, it promulgated Rule 50 of its rules of practice.[351] Entitled "Settlement of Final Determination," the rule placed the principal burden of quantifying the decision on the parties.[352] Among the most recognizable of rules to readers of the Board/Tax Court reports, the most noticeable change in the rule did not appear until 1974, when, as part of a major rules revision, it was renumbered Rule 155.[353]

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344 *E.g.*, Wolman v. Commissioner, 64 T.C. 883, 889 (1976).

345 I.R.C. § 6512(b); Huntington Nat'l Bank, 13 T.C. 760, 774 (1949).

346 L. CASEY, *supra* note 341; GARBIS & FROME, *supra* note 339; Greenberger, *supra* note 341.

347 I.R.C. §§ 213, 170.

348 *E.g.*, The Hotel De France Co., 1 B.T.A. 28, 32 (1924).

349 *See generally* J.S.Y. Ivins, *What Should Congress Do with the Board of Tax Appeals?*, 3 NAT'L INC. TAX MAG. 391, 394 (1925).

350 *E.g.*, Robert P. Hyaims Coal Co., 1 B.T.A. 217, 220 (1924).

351 Press release from U.S. Board of Tax Appeals, Dec. 17, 1924, filed at the U.S. Tax Court in "Rule 155: Memoranda & Correspondence."

352 B.T.A. RULE 50 (Jan. 1, 1925 ed.).

353 TAX CT. R. 155 (Jan. 1, 1974 ed.). Although the rule was renumbered, there were no major changes in the substance or form of the rule. *Compare* TAX CT. R. 155 (Jan. 1, 1974 ed.) *with* TAX CT. R. 50 (Jan. 25, 1971 ed.).

The original rule provided for recomputation by either stipulation, if the parties were in agreement, or by submission of alternative proposals to the Board, if the parties did not agree.[354] If disagreement occurred, either party could file a proposed computation, and the opposing party would be required to show cause before the Board, either by personal appearance or by filing an alternative proposal, as to why the initial proposal was incorrect. Upon the opposing party's appearance or his submission of an alternative proposal, the Board would assign the contested computation proposals to an available division for either a hearing or a disposition on the papers filed.

The Board's early experience with the rule yielded two substantive modifications to the provision.[355] The first, an amendment promulgated in November 1925, required all contested computation arguments to be heard by the division that had issued the report in the particular case involved.[356] The purpose of this revision was to ensure that the determination of tax liability would be in conformity with the intent of the division from which the report originated.[357]

Early experience with the rule presaged what was to be the principal problem in its application and resulted in the second modification. In cases in which the computation was contested, one party was usually heard to complain that his adversary was attempting in the computation proceeding either to relitigate substantive issues that the Board had already decided or to raise new issues of law or fact.[358] The early versions of the rule did not expressly indicate the position of the Board on this question, but the Board soon adopted the view that the computation proceeding could not be employed for any purpose other than the quantification of tax liability based solely on issues properly raised and decided in its prior report.[359] This policy was recognized explicitly in 1928 by an amendment which provided that

> [a]ny hearing under this rule will be confined strictly to the consideration of the correct computation . . . resulting from the determination already made. . . . [T]his rule is not to be regarded as affording an opportunity for rehearing or reconsideration.[360]

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354 B.T.A. RULE 50 (Jan. 1, 1925 ed.).

355 *Compare* B.T.A. RULE 50 (Jan. 1, 1925 ed.) *with* B.T.A. RULE 50 (Nov. 1, 1925 ed.) *and* B.T.A. RULE 50 (May 1, 1928 ed.).

356 B.T.A. RULE 50 (Nov. 1, 1925 ed.).

357 *See* Memorandum from Chairman Hamel to members of the Board, Feb. 25, 1925, filed at the U.S. Tax Court in "Rule 155: Memoranda & Correspondence."

358 *See* Forest D. Siefkin, *Procedural Methods of the Board of Tax Appeals*, 6 NAT'L INC. TAX MAG. 334, 337, 349 (1928) [hereinafter cited as Siefkin].

359 Automatic Sprinkler Co. v. Commissioner, 7 B.T.A. 674, 675–76 (1927).

360 B.T.A. RULE 50 (May 1, 1928 ed.).

Since 1928, the rule has been renamed,[361] renumbered,[362] and broken down into component paragraphs.[363] Nonetheless, the procedural guidelines under the rule and the usual practices followed thereunder have remained essentially unchanged.[364] Customary practice under the rule is for the Commissioner to prepare a computation in accordance with the court's report and submit it to the taxpayer or his counsel.[365] If the petitioner agrees with the computation, it is signed by the taxpayer and filed with the Tax Court whereupon decision is entered.[366] If the parties are in disagreement over the amount of the computation and stipulation is not possible, the rule provides that the parties may submit alternative proposals that they believe to be in accordance with the court's report.[367] Because the court experienced "inordinate delay" in the parties' filing their computations, the court amended Rule 155 in 2011 to require the parties to submit their proposed computations within 90 days of service of the opinion in the case, unless otherwise directed by the court.[368]

In cases where the parties fail to agree on the computation, the procedure for resolving the disagreement is initiated when one of the

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[361] B.T.A. RULE 50 (Jan. 1, 1938 ed.). The rule was renamed "Computation by Parties for Entry of Decision." It was believed that such a name would further clarify the purpose of the rule. Memorandum from Rules Committee to Members of the Board, Nov. 12, 1937, at 35, filed at the U.S. Tax Court in "Rule 155: Memoranda & Correspondence."

[362] TAX CT. R. 155 (Jan. 1, 1974 ed.).

[363] TAX CT. R. 50 (Aug. 15. 1955 ed.); Memorandum from Judge Harron to V. Mersh, Clerk of the Court, May 6, 1955, filed at the U.S. Tax Court in "Rule 155: Memoranda & Correspondence."

[364] *Compare* HAMEL, *supra* note 1 *with* GARBIS & FROME, *supra* note 339. The amendments to Rule 155 since its introduction have been minor in scope. The discussion below notes the subsequent amendments that are of most import.

[365] GARBIS & FROME, *supra* note 339; Greenberger, *supra* note 341, at 964–65.

[366] The agreement by the taxpayer to the computation figure submitted by the Commissioner, in accordance with the Tax Court's report, does not bar further appeal by the taxpayer. The merits of the case are not fixed by such agreement. The taxpayer is merely agreeing that if, upon appeal, the opinion of the Tax Court is sustained, then the computation figure submitted by the Commissioner is proper. GARBIS & FROME, *supra* note 339; Miller, *supra* note 341, at 179.

[367] TAX CT. R. 155(b) (July 6, 2012 ed.).

[368] *See* Rules Comm. Note, TAX CT. R. 155(a), (b), 136 T.C. 635–36 (2011). Additionally, if the computation concerns an overpayment, every computation for entry of decision is required to include the amount and date of each payment of tax by the taxpayer. TAX CT. R. 155(a), (b), 93 T.C. 963–64 (1989). This information is required to supply the court with the requisite factual record to resolve any later dispute concerning the Commissioner's failure to refund the determined overpayment with interest. Rules Comm. Note, TAX CT. R. 155(a), (b), 93 T.C. at 964.

parties submits a computation to the court. In its original form, Rule 155 required the clerk of court to serve a copy of the computation on the opposing party and to place the matter on the motion calendar for argument. Over time, the court relaxed these requirements. The clerk no longer is obligated to serve the computation on the opposing party; rather, the clerk need only serve notice of the computation's filing.[369] More significantly, unagreed cases are no longer automatically calendared for argument.[370] Fairly early in the operation of the rule, the court noted that the opposing party failed to make an appearance at the automatically calendared motion "in the overwhelming majority of cases."[371] Seeking to avoid this inefficiency, the court amended the rule to retain discretion to schedule a hearing only in those instances in which the differing computations appeared to involve a genuine dispute.[372]

If the opposing party fails to file an objection or an alternative computation within the period specified in the notice from the clerk, the court has the discretion to accept the submitted computation as correct. If computations have been submitted by both parties, the matter will be resolved by the division that issued the report.[373] Any permitted argument on the matter does not constitute a retrial of the underlying issue, and, as stated in the express prohibition contained in the rule, the court will not reconsider the determination of facts and law contained in the report.[374]

Notwithstanding the express prohibition against relitigation of issues, contested computations under the rule have usually involved the question of whether an issue included in the computation properly was raised and resolved at trial.[375] The court has adopted a very restrictive view as to what constitutes a proper computation issue and has held that issues raised in a petition but not proven,[376] issues raised in a brief for the first time,[377] and

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369 The Tax Court amended Rule 155(b) in 2010 to eliminate the requirement that the Clerk serve an unagreed computation on the opposite party. TAX CT. R. 155(b), 134 T.C. 367–68 (2010). The Rules Committee did not provide an explanation for this change. Rules Comm. Note, TAX CT. R. 155(b), 134 T.C. at 368.

370 *See* TAX CT. R. 155(b), 71 T.C. 1209 (1979).

371 Rules Comm. Note, TAX CT. R. 155(b), 71 T.C. at 1209–10.

372 *Id.*

373 TAX CT. R. 155(b) (July 6, 2012 ed.).

374 TAX CT. R. 155(c) (July 6, 2012 ed.).

375 *E.g.*, Nemmo v. Commissioner, 24 T.C. 583, 592 (1955), *rev'd and rem'd sub nom.* Polizzi v. Commissioner, 247 F.2d 875 (6th Cir. 1957); Zimmermann v. Commissioner, 36 B.T.A. 618, 620 (1937), *rev'd on other grounds*, 100 F.2d 1023 (3d Cir. 1939); Great N. Ry. v. Commissioner, 10 B.T.A. 1347, 1356 (1928), *aff'd*, 40 F.2d 372 (8th Cir. 1930).

376 *See* Hens & Kelly, Inc. v. Commissioner, 19 T.C. 305, 328 (1952).

377 Sussman v. Commissioner, 34 B.T.A. 1314 (1936), *aff'd*, 102 F.2d 919 (2d Cir. 1939).

issues not in the petition or answer but raised at trial[378] have not been properly raised and disposed of and therefore cannot be considered in the computation process.[379] Additionally, a finding of fact by the court that is neither in issue nor material to the conclusions of law cannot be raised in the computation.[380] In more recent times, the court has explained that the prohibition against raising a "new issue" in the Rule 155 computation setting generally precludes consideration of issues that would require the introduction of evidence not already contained in the record.[381] On the other hand, the new issue prohibition does not apply to an adjustment, which, although not specifically dealt with in the report, necessarily results from the application of such report.[382] Thus, an adjustment of the taxpayer's charitable contribution, the allowance of which is limited by adjusted gross income, is not a new issue, although the necessity of such an adjustment was not raised at trial.[383]

Although a decision in a case may be entered only after the computation has been arrived at, the findings of fact and the opinion that precede the computation process conclude all judicial consideration of the legal and factual issues in the case.[384] The underlying policy for the court's restrictive view has been to prevent the computation procedure from becoming an extension of trial.[385] The court's rigid limitation on the function of the recomputation procedure derives from the view that the trial and decision process that precedes that procedure is the only appropriate forum in which to decide contested issues, and that the credibility of the court would

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378 *See*, *e.g.*, John Gerber Co. v. Commissioner, 44 B.T.A. 26, 31 (1941).

379 Bankers Pocahantas Coal v. Commissioner, 287 U.S. 308, 312–13 (1932), *aff'g* 55 F.2d 626 (4th Cir. 1930), *aff'g* 18 B.T.A. 901 (1929); Welsh Homes, Inc. v. Commissioner, 279 F.2d 391 (4th Cir. 1960), *aff'g* 32 T.C. 239 (1959); Polizzi v. Commissioner, 247 F.2d 875, 877 (6th Cir. 1957), *rev'g and rem'g* Nemmo v. Commissioner, 24 T.C. 583 (1955); *see also* Estate of Stein v. Commissioner, 40 T.C. 275, 277–80 (1963); Baird v. Commissioner, 43 B.T.A. 415, 416 (1941); Fifth Ave. Bank of New York v. Commissioner, 32 B.T.A. 701, 705 (1935), *aff'd*, 84 F.2d 787 (3d Cir. 1936).

380 Meyers v. Commissioner, 12 T.C. 648, 649 (1949).

381 *See* Harris v. Commissioner, 99 T.C. 121, 124 (1992); Cloes v. Commissioner, 79 T.C. 933, 935 (1982); Rubenstein v. Commissioner, T.C. Memo. 2010-274, 100 T.C.M. (CCH) 542.

382 Zimmermann Commissioner, 36 B.T.A. 618, 620 (1937), *rev'd on other grounds*, 100 F.2d 1023 (3d Cir. 1939).

383 *Id.* at 620.

384 George Craven, *Pre-Trial and Post-Trial Tax Court Practice*, 4 N.Y.U. ANN. INST. ON FED. TAX'N 260, 268 (1946).

385 *See* Bankers Pocahantas Coal Co. v. Commissioner, 287 U.S. 308 (1932), *aff'g* 55 F.2d 626 (4th Cir. 1930), *aff'g* 18 B.T.A. 901 (1929); Estate of Stein v. Commissioner, 40 T.C. 275, 277–80 (1963).

seriously be diminished if its published reports could not be relied upon with certainty.[386]

An interesting assault on the relitigation prohibition came in *Commissioner v. Erie Forge,*[387] in which the Commissioner argued that he should be privileged to assert additional deficiencies or penalties at any time prior to formal entry of decision by the court.[388] The Commissioner's argument was predicated on a jurisdictional provision according power to the court to allow such increases when claim for the increase was advanced by the Commissioner "at or before the hearing or rehearing."[389] In the Commissioner's view, the statutory provision barred the Tax Court from refusing to consider an asserted increase at any time, up to and including the recomputation procedure, and provisions in the court's rules to the contrary had to yield to the express language of the statute.[390] Had the Commissioner's position been accepted, a serious threat would have been posed to the procedural protections afforded the taxpayer. Cases that had been fully tried would have been subject to retrial at the wish of the Commissioner any time before entry of decision.[391] The Commissioner's position, although based on ostensible statutory authority, was rejected on appeal.[392] In the view of the Third Circuit, the right of the Commissioner to claim an increased deficiency was subject to the Tax Court's Rules of Practice and Procedure, themselves based on statutory authority,[393] which reserved to the court discretion to reject a party's attempt to change his litigating position during the course of the proceedings.[394]

Despite the difficulties the Tax Court has encountered concerning the prohibition against relitigation within the framework of the computation procedure, most applications of the procedure are concluded without controversy. Accordingly, the court has had no reason to alter the basic requirements of the rule since its promulgation in 1924. Designed to afford

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386 Siefkin, *supra* note 358, at 338. If a party is concerned that a matter may not be properly raised in the Rule 155 context, a conservative approach is to move for leave to amend the pleadings in the underlying case and to seek reconsideration of the court's opinion. *See, e.g.*, Pinson v. Commissioner, T.C. Memo. 2000-393, 80 T.C.M. (CCH) 393 (following opinion disallowing claimed foreign tax credits, taxpayers amended pleadings to claim deductions for foreign tax payments in lieu of credits; court granted leave to amend).

387 167 F.2d 71 (3d Cir. 1948), *aff'g* 4 T.C.M. (CCH) 1127 (1945).

388 *Id.* at 76.

389 Int. Rev. Code of 1939, ch. 1, § 272(e), 53 Stat. 83 (now codified at I.R.C. § 6214(a)).

390 *See* TAX CT. R. 17, 19 (Jan. 1, 1944 ed.).

391 Casey, *supra* note 341, at 58–63.

392 167 F.2d 71 (3d Cir. 1948).

393 Int. Rev. Code of 1939, ch. 1, § 1111, 53 Stat. 160 (now codified at I.R.C. § 7453).

394 167 F.2d at 76.

the court relief from the time-consuming process of converting its legal conclusions into a precise monetary equivalent, the rule has served its intended purpose well.[395]

H. Appeals

Since 1926, decisions of the Board/Tax Court have been reviewable initially by the Federal courts of appeals.[396] Either party may invoke such review as a matter of right.[397] Appeal from the courts of appeals to the Supreme Court is available either on certiorari or certification.[398] Treatment of the formulation of this review structure in the Revenue Act of 1926 appears in Part III of the text.[399] The present discussion will focus on some of the more significant formal aspects of the appeal procedure, such as time to appeal and venue, and some of the special policy problems associated with the unusual appellate structure for tax cases, such as scope of review on appeal and whether a national trial court should follow the precedents of the several courts of appeals.

1. Federal Rules of Appellate Procedure

The Revenue Act of 1926 authorized the court of appeals for each circuit to adopt rules governing the procedure for appellate review of Board decisions.[400] Soon after the enactment of the 1926 legislation, however, the Board urged the adoption of uniform rules applicable to all appeals from its decisions.[401] Although there existed considerable support for this goal,[402] the appellate rules that were adopted by each of the courts of appeals, while similar in many respects, were not identical.[403]

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[395] *See generally* CHARLES D. HAMEL, PRACTICE AND EVIDENCE BEFORE THE U.S. BOARD OF TAX APPEALS 168 (1938); Greenberger, *supra* note 341, at 963; Miller, *supra* note 341, at 158.

[396] Revenue Act of 1926, ch. 27, §§ 1001(a), 1003(a), 44 Stat. 109 (now codified at I.R.C. § 7482(a)).

[397] *Id.* § 1001(a), 44 Stat. 109 (now codified at I.R.C. § 7482(a)).

[398] *Id.* § 1003(a), 44 Stat. 109 (now codified at I.R.C. § 7482(a)).

[399] *See* Part III, notes 57–87 and accompanying text.

[400] Revenue Act of 1926, ch. 27, § 1001(b), 44 Stat. 109.

[401] *See* U.S. Board of Tax Appeals, Proposed Rules Governing Appeals to the United States Circuit Courts of Appeals (1926), filed at the U.S. Tax Court in "Appeals: Rules of Procedure."

[402] Memorandum entitled "Rules Governing Appeals from the Board of Tax Appeals to the U.S. Circuit Courts of Appeals," Oct. 8, 1926, filed at the U.S. Tax Court in "Appeals: Rules of Procedure."

[403] *See* Memorandum to members of the Board describing the appellate rules of practice theretofore adopted, Dec. 7, 1927, filed at the U.S. Tax Court in "Appeals: Rules of Procedure."

Some years later, after the successful adoption of various uniform rules governing procedure in the Federal district courts, Congress concluded that the cause of judicial administration also would be furthered if the procedural rules governing appeals from the Tax Court were uniform throughout the circuits.[404] Accordingly in 1954, section 2074 was added to title 28 authorizing the Supreme Court to prescribe such uniform rules of appellate procedure.[405] Before any rules were promulgated pursuant to this authority, the movement for uniform appellate rules was broadened to encompass appellate procedure in general, and legislation was adopted authorizing the drafting and adoption of rules of appellate procedure applicable to all civil actions in the courts of appeals.[406] These rules, known as the Federal Rules of Appellate Procedure, were drafted over a seven-year period by the Advisory Committee on Appellate Rules of the United States Judicial Conference. The rules were promulgated by the Supreme Court on December 4, 1967, with a prospective effective date of July 1, 1968.[407] Under these rules, appeals from decisions of the Tax Court are treated similarly with appeals from civil actions in the district courts.[408]

2. Time for Filing Appeal

Prior to July 1, 1968, when the Federal Rules of Appellate Procedure became effective, statutory rules had governed the time within which a petition for review of a Tax Court decision had to be filed. Under the 1926 Act, this period was set at six months from the time the Board's decision was rendered.[409] In 1932, the period was reduced to three months to conform to the practice governing appeals from decisions of Federal district courts.[410] In 1954, the provision again was amended to provide a

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[404] *See* H.R. REP. NO. 83-1262, at 2 (1954); S. REP. NO. 83-1074, at 1 (1954).

[405] Act of July 27, 1954, ch. 583, 68 Stat. 567. The Supreme Court opposed enactment of § 2074 since it felt the courts of appeals were "better adapted to determine, upon the basis of actual experience, the particular procedural problems in this field, and to fashion rules designed to meet those problems." Letter from Chief Justice Fred M. Vinson to Chauncey W. Reed, Apr. 28, 1953, *reprinted* in H.R. REP. NO. 83-1262, at 4 (1954).

[406] Act of Nov. 6, 1966, Pub. L. No. 89-733, §§ 1–2, 80 Stat. 1323, *amending* 28 U.S.C. § 2072 (1948) and *repealing* 28 U.S.C. § 2074 (1954).

[407] The history of the development of the Federal Rules of Appellate Procedure is described in 9 JAMES WILLIAM MOORE, FEDERAL PRACTICE ¶ 201.05 (2d ed. 1948) [hereinafter cited as J. MOORE].

[408] FED. R. APP. P. 14.

[409] Revenue Act of 1926, ch. 27, § 1001(a), 44 Stat. 109.

[410] Revenue Act of 1932, ch. 209, § 1101, 47 Stat. 286; H.R. REP. NO. 72-708, at 52 (1932); S. REP. NO. 72-665, at 56 (1932).

party with an appeal period of four months when another party to the proceeding filed a timely appeal within the three-month period.[411]

As amended in 1966 to authorize the promulgation of the appellate rules, section 2072 of title 28 provided as follows:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, *and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States* and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.
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> . . .
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.
>
> *All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.* Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.[412]

Thus, applicable statutory authority empowered the Supreme Court, with certain limitations, to promulgate appellate rules that would supersede conflicting statutes. Although Congress substantially modified section 2072 of title 28 in 1988,[413] the ability of the Supreme Court to override an otherwise governing statute through the rules enabling process remains intact.[414] Pursuant to this authority, the rules of appellate procedure provide that a petition for review of a Tax Court decision must be filed with the clerk of the Tax Court within 90 days of the entry of the Tax Court decision, or within 120 days of such entry when a timely notice of appeal has been filed by another party.[415] That the power to promulgate these rules was seen as permitting the modification of statutory restrictions on appeal time is indicated by the fact that at the time of their adoption, these rules changed existing practice which theretofore had been prescribed by statute. Under the statute, appeals were commenced by a petition for review rather

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411 I.R.C. § 7483, *as amended* by Tax Reform Act of 1969, Pub. L. No. 91-172, § 959(a), 83 Stat. 734.

412 Act of Nov. 6, 1966, Pub. L. No. 89-773, § 1, 80 Stat. 1323 (emphasis added).

413 *See* Pub. L. No. 100-702, §§ 401(a), 407, (1988), 102 Stat. 4648, 4652.

414 *See* 28 U.S.C. § 2072(c).

415 FED. R. APP. P. 13(a).

than a notice of appeal and the time limits for filing were three months and four months from entry of decision, rather than 90 days and 120 days.[416] The statute subsequently was amended to conform to the Federal Rules of Appellate Procedure,[417] but presumably this was unnecessary to validate the change and should not preclude future changes in the court-made rules that will supersede currently existing statutes.[418]

3. Effect of Motion to Vacate

The period for filing a notice of appeal is deferred if a party files a motion to vacate or revise the Tax Court's decision.[419] In that case, the 90-day period runs from the entry of the order denying the motion or from the entry of the revised decision.[420] Such a motion must be filed within 30 days after the decision has been entered, unless the court permits otherwise.[421] However, the Tax Court may allow a motion to vacate to be filed after the 30-day period only if the party files for leave to file the motion before the decision becomes final as a result of the expiration of the 90-day period for filing a notice of appeal.[422] With respect to an untimely motion to vacate, the 90-day period for appealing the Tax Court's decision is extended only if the court grant's the motion for leave to file the motion.[423]

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416 I.R.C. § 7483, *as amended* by Tax Reform Act of 1969, Pub. L. No. 91-172, § 959(a), 83 Stat. 734.

417 Tax Reform Act of 1969, Pub. L. No. 91-172, § 959(a), 83 Stat. 734 (amending I.R.C. § 7483); *see also* TAX CT. R. 190(a) (July 6, 2012 ed.) (reflecting conditions for filing appeal contained in Federal Rule of Appellate procedure 13(a) and § 7483).

418 *See* Advisory Committee Note, FED. R. APP. P. 13.

419 *See* FED. R. APP. P. 13(a)(2) ("If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later."); *see also* TAX CT. R. 162 (July 6, 2012 ed.) (governing motions to vacate or revise).

420 FED. R. APP. P. 13(a)(2). A subsequent motion with respect to an original motion to vacate, however, does not commence a 90-day period for filing the notice of appeal. *See* Okon v. Commissioner, 26 F.3d 1025, 1026 (10th Cir. 1994) (noting general principle that "tolling motions may not be tacked together to perpetuate the prescribed time for appeal").

421 *Id.*

422 *See* Manchester Group v. Commissioner, 113 F.3d 1087 (9th Cir. 1997).

423 *See* Nordvik v. Commissioner, 67 F.3d 1489, 1492 (9th Cir. 1995); Simon v. Commissioner, 176 F.2d 230, 232 (2d Cir. 1949). *But see* Denholm and McKay Co. v. Commissioner, 132 F.2d 243, 248 (1st Cir. 1942) (concluding that the Tax Court retains jurisdiction to consider an untimely motion to vacation only if the court acts on the motion before the end of the 90-day period for filing an appeal).

A motion for reconsideration of the court's opinion or findings of fact[424] typically is filed prior to the entry of the court's decision, and the motion likely will be acted upon prior to the decision being entered as well. The effect of a motion to reconsideration filed after the entry of the Tax Court's decision is not entirely clear. Such motions do not enjoy the express tolling effect afforded to motions to vacate provided in the Federal Rules of Appellate Procedure. Nonetheless, the Ninth Circuit in *Nordvick v. Commissioner*[425] overturned prior precedent to hold that such a motion fell within the broad category of motions that challenge the substance of the Tax Court's decision and that are entitled to the tolling effect provided under the federal appellate procedure rules.[426] However, the safer and more certain approach is to properly style the motion as one to vacate or revise the court's decision.

4. Finality of Tax Court Decisions

Because the time limits for seeking review of a Tax Court decision are established by statute and therefore could be considered jurisdictional, it is arguable that no circumstance would permit review of a Tax Court decision after the statutory period had elapsed and the decision had, under the statute, become final.[427] Although this interpretation originally reflected the conventional wisdom,[428] some decisions prior to 1957 had indicated that under certain circumstances such as mutual mistake or excusable neglect in filing an appeal, a final decision of the Tax Court might be reopened.[429] The reopened case, in turn, would permit a second appeal period to commence when a subsequent decision of the Tax Court was rendered. However, the Supreme Court in 1957 affirmed per curiam the Ninth Circuit

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[424] *See* TAX CT. R. 161 (July 6, 2012 ed.) (governing motions for reconsideration).

[425] 67 F.3d 1489 (9th Cir. 1995) (overruling Trohimovich v. Commissioner, 776 F.2d 873 (9th Cir. 1985)).

[426] *Id.* at 1493–94 (relying in part on the advisory committee notes to Rule 13(a) of the Federal Rules of Appellate Procedure).

[427] Revenue Act of 1926, ch. 27, § l005(a), 44 Stat. 110 (now codified at I.R.C. § 7481(a)(1)), provided that Board decisions became final upon the expiration of the statutory time for appeal if no timely appeal was filed.

[428] *See* White's Will v. Commissioner, 142 F.2d 746 (3d Cir. 1944); Monjar v. Commissioner, 140 F.2d 263 (2d Cir. 1944); Denholm & McKay Co. v. Commissioner, 132 F.2d 243 (1st Cir. 1942); Swall v. Commissioner, 122 F.2d 324 (9th Cir. 1941); Sweet v. Commissioner, 120 F.2d 77 (1st Cir. 1941); Commissioner v. Realty Operators, Inc., 118 F.2d 286 (5th Cir. 1941).

[429] Reo Motors, Inc. v. Commissioner, 219 F.2d 610 (6th Cir. 1955); La Floridienne J. Buttgenbach & Co. v. Commissioner, 63 F.2d 630 (5th Cir. 1933); *see also* Lentin v. Commissioner, 237 F.2d 5 (7th Cir. 1956).

decision in *Lasky v. Commissioner*,[430] which held that the Tax Court (then an independent agency in the executive branch of Government) had no inherent power to vacate a decision that had become final under the statute on the ground of excusable neglect. Such a power, the Ninth Circuit stated, could be exercised only by a federal court and not by a body that was "merely an administrative agency."[431] The Supreme Court did not issue an opinion in *Lasky*; thus it was not clear whether the case was affirmed on the ground of the Tax Court's technical status as an agency in the executive branch (a ground which figured in the decision of the Ninth Circuit), or the ground that the statute provided a definite period in which the petition for review had to be filed, and, in the absence thereof, the decision of the Tax Court became final (the position of the Government in urging affirmance of the Ninth Circuit[432]). In any event, it appears settled that a decision of the Tax Court becomes final after the statutory period for appeal has elapsed with no review sought.[433] Only two narrow exceptions exist to this rule. The Tax Court may vacate an otherwise final decision if the decision was procured by a fraud on the court[434] or if the court lacked jurisdiction to enter the decision in the first instance.[435]

5. Reviewable Decisions

The "decision" of the Tax Court that may be reviewed on appeal pursuant to § 7482(a) is interpreted more broadly than the definition of the term contained in § 7459.[436] Rather, a decision for purposes of § 7482 includes, among other things, an order resolving a motion for the Tax

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430 352 U.S. 1027 (1957), *aff'g* 235 F.2d 97 (9th Cir. 1956).

431 235 F.2d at 98.

432 Brief for Respondent at 15, Lasky v. Commissioner, 352 U.S. 1027 (1957).

433 *See e.g.,* Harbold v. Commissioner, 51 F.3d 618, 621–22 (6th Cir. 1995) (following the Ninth Circuit's decision in *Lasky*); Tascano v. Commissioner, 441 F.2d 930, 932–33 (9th Cir. 1971) (same).

434 *See* Drobny v. Commissioner, 113 F.3d 670 (7th Cir. 1997) (detailing fraud on the court as the single narrow instance in which an otherwise final decision of the Tax Court could be set aside); Dixon v. Commissioner, 316 F.3d 1041 (9th Cir. 2003) (affirming Tax Court's decision to modify otherwise final decision based on intentional fraud perpetrated on court); *see also* Flood v. Commissioner, 468 F.2d 904 (9th Cir. 1972); Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971); Kenner v. Commissioner, 387 F.2d 689 (7th Cir. 1968).

435 *See* Billingsley v. Commissioner, 868 F.2d 1081 (9th Cir. 1989); Abeles v. Commissioner, 90 T.C. 103 (1988); Brannon's of Shawnee, Inc. v. Commissioner, 69 T.C. 999 (1978).

436 *See* Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333, 337 (6th Cir. 1961) (explaining that "the words 'decisions of the Tax Court' as contained in Section 7482(a) should not be construed to have meaning only as such meaning may be found within the narrow confines of Section 7459(c)").

Court to restrain assessment pursuant to § 6213(a),[437] an order resolving a motion to review a proposed sale of seized property pursuant to § 6863(b)(3)(C),[438] an order denying a motion to intervene,[439] and any other order disposing of the proceeding before the court.[440]

Prior to 1986, interlocutory orders of the Tax Court were not subject to appeal.[441] Congress reversed this prohibition through the enactment of § 7482(a)(2) in connection with the Tax Reform Act of 1986.[442] This provision, appearing in neither the House nor Senate versions of the legislation but instead first appearing in the conference agreement, authorizes an appeal from an interlocutory order of the Tax Court provided the presiding Tax Court judge includes in an interlocutory order (1) a statement that the order involves a controlling question of law, (2) a substantial ground for difference of opinion exists with respect to the question of law, and (3) an immediate appeal from the order might materially advance the ultimate termination of the litigation.[443] An application for an appeal of the order must be made within ten days of the court issuing this statement, and the court of appeals may take the appeal in its discretion.[444] The appeal is made to the court of appeals that would hear the appeal from a final decision in the matter,[445] and if the appellate court accepts the appeal, it will have jurisdiction over any subsequent appeal of a decision by the Tax Court in the matter.[446]

The Tax Court proceeding generally does not pause as a result of an appeal of an interlocutory order. Neither the application of an appeal nor its acceptance by the appellate court operates to stay the Tax Court

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[437] *See* I.R.C. § 7482(a)(3); Tax Ct. R. 190(b) (July 6, 2012 ed.).

[438] Tax Ct. R. 190(b) (July 6, 2012 ed.).

[439] *See* Sampson v. Commissioner, 710 F.2d 262, 263–64 (6th Cir. 1983) (following Estate of Smith v. Commissioner, 638 F.2d 665 (3d Cir. 1981), and Dixon v. Commissioner, 666 F.2d 386 (9th Cir. 1982)).

[440] Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333, 339 (6th Cir. 1961) (Tax Court order requiring the taking of a deposition reviewable as a decision of the court on grounds that the order "granted all relief sought and disposed of the entire proceeding pending before it"); Ryan v. Commissioner, 680 F.2d 324, 326 (3d Cir. 1982) (noting that "a court of appeals may consider an appeal as long as it arises out of a final decision of the Tax Court").

[441] *See* Shapiro v. Commissioner, 632 F.2d 170 (2d Cir. 1980) (cited in H.R. REP. NO. 99-841, at 80 (1986)); *see also* Ryan v. Commissioner, 680 F.2d 324, 327 (3d Cir. 1982).

[442] Pub. L. No. 99-514 (1986), § 1558(a), 98 Stat. 494.

[443] I.R.C. § 7482(a)(2)(A); TAX CT. R. 193(a) (July 6, 2012 ed.); *see also* H.R. REP. NO. 99-841, at 80 (1986).

[444] I.R.C. § 7482(a)(2)(A).

[445] I.R.C. § 7482(a)(2)(B); TAX CT. R. 193(b) (July 6, 2012 ed.).

[446] I.R.C. § 7482(a)(2)(C).

proceeding unless ordered by the Tax Court or the Court of Appeals accepting the appeal.[447]

A particular issue concerning the ripeness of Tax Court decisions for appellate review arises in the context of proceedings relating to multiple tax years. Specifically, if an order of the Tax Court dismisses some, but not all, of the disputed tax years at issue in a petition for redetermination, can the appellate court entertain an appeal concerning the tax years that have been disposed of by the Tax Court? The issue has created an interesting split among the circuit courts of appeals. As explained by the Third Circuit in *N.Y. Football Giants v. Commissioner*,[448] three approaches exist. The permissive approach, endorsed only by the D.C. Circuit, is to allow the appeal of orders that finally dispose of particular claims.[449] The middle ground, adopted by the Fifth, Seventh, and Ninth Circuits, is to permit the appeal to go forward only if the Tax Court makes a Rule 54(b) determination that its judgment pertaining to those claims is final and immediately appealable.[450] This approach may appear curious at first glance, as there exists no Rule 54 in the Tax Court Rules of Practice and Procedure. Rather, Rule 54 appears in the Federal Rules of Civil Procedure, and it permits a court to direct entry of a judgment as to fewer than all claims raised if the court determines that there exists "no just reason for delay."[451] Despite the absence of this provision in the Tax Court rules, the court may prescribe its own procedure in the absence of a governing rule, giving particular weight to the Federal Rules of Civil Procedure to the extent they are suitable.[452] In this manner, the Tax Court can issue a Rule 54(b) determination in the same manner as a Federal district court. The third approach, endorsed by the Second and Sixth Circuits, is to not permit appellate review of an order that does not dispose of the entire case, notwithstanding any Rule 54(b) certification.[453] For its part, the Third Circuit in *N.Y. Football Giants* endorsed the middle ground permitting an appeal provided the Tax Court issues a Rule 54(b) statement, finding this approach to be more in keeping with the statutory directive under

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[447] I.R.C. § 7482(a)(2)(A); TAX CT. R. 193(c) (July 6, 2012 ed.).

[448] 349 F.3d 102 (3d Cir. 2003).

[449] InverWorld v. Commissioner, 979 F.2d 868 (D.C. Cir. 1992).

[450] Nixon v. Commissioner, 167 F.3d 920 (5th Cir. 1999); Brookes v. Commissioner, 163 F.3d 1124 (9th Cir. 1998); Shepherd v. Commissioner, 147 F.3d 633 (7th Cir. 1998).

[451] FED. R. CIV. P. 54(b).

[452] TAX CT. R. 1(b) (July 6, 2012 ed.).

[453] Schrader v. Commissioner, 916 F.2d 361 (6th Cir. 1990); Estate of Yaeger v. Commissioner, 801 F.2d 96 (2d Cir. 1986).

§ 7482(a)(1) to review decisions of the Tax Court in the same manner and the to the same extent as those of Federal district courts.[454]

6. Venue

From 1926 until the present, appeals from Board of Tax Appeals and Tax Court decisions have gone to the Federal circuit courts of appeals. This structure, which can be graphically conceptualized as an inverted pyramid, as opposed to the standard court structure in which lower court decisions are funneled into less numerous appellate courts, has been described as "an anomalous and topsy-turvy appellate system."[455] One of the complexities created by this unusual format[456] has involved venue, the question of the location of the proper court to hear a litigation.

Although venue is not strictly a jurisdictional matter,[457] a faulty venue choice by an appealing party may have drastic results. Thus, if a party choosing to appeal a Tax Court decision files a notice of appeal to the wrong court of appeals and the appeal is dismissed for that reason, it may be too late to appeal to the proper court inasmuch as the time for filing a notice of appeal may have expired.[458] Nonetheless, courts have generally proven forgiving in permitting transfer of venue when the taxpayer files the appeal with an improper court.[459] Since 1926, proper venue for appeals from the Board/Tax Court has been determined under statutory rules contained in the tax laws.[460] The rules have undergone changes in 1934[461]

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[454] N.Y. Football Giants v. Commissioner, 349 F.3d 102, 106–07 (3d Cir. 2003).

[455] James Craig Peacock, *An Anomalous and Topsy-Turvy Appellate System*, 19 A.B.A. J. 11 (1933) [hereinafter cited as Peacock].

[456] Although unusual, the structure is not unique. Judicial review of administrative determinations generally involve appeals fanning out across the country from the findings of a single agency. *See* 9 J. MOORE, *supra* note 407, at ¶ 215.03.

[457] 1 J. MOORE, *supra* note 407, at ¶¶ 0.140[1.-1], [1.-2]. Nonetheless, the courts sometimes refer to incorrect venue as a jurisdictional deficiency. *Compare* Nash-Breyer Motor Co. v. Burnet, 283 U.S. 483 (1931) *with* Industrial Addition Ass'n v. Commissioner, 323 U.S. 310 (1945).

[458] For example, under the 1926 Act, unless a petition for review was "duly" filed within six months after the Board decision was rendered, the Board decision became final, and therefore unreviewable. Revenue Act of 1926, ch. 27, §§ l001(a), 1005(a), 44 Stat. 109 (now codified at I.R.C. § 7481(a)(1)).

[459] *See, e.g.,* Dornbusch v. Commissioner, 860 F.2d 611 (5th Cir. 1988).

[460] For the venue rules enacted in 1926, see Revenue Act of 1926, ch. 27, § 1002, 44 Stat. 110.

[461] Revenue Act of 1934, ch. 277, § 519, 48 Stat. 760, *amending* Revenue Act of 1926, ch. 27, § 1002. 44 Stat. 110.

and 1966,[462] but whether an ideal has been achieved is subject to some question.

The 1926 Act provided, in effect, four separate venue rules depending principally on the nature of the taxpayer. First, in the case of an individual, proper venue was in the court of appeals for the circuit in which the individual was an inhabitant, or if the individual was not an inhabitant of any circuit, in the Court of Appeals for the District of Columbia.[463] Second, in the case of a person other than an individual or a corporation, *i.e.*, a trust or estate, proper venue was in the circuit court for the circuit in which was located the collector of the tax to whom such person made the return, or, if no return were made, in the Court of Appeals for the District of Columbia.[464] Third, in the case of a corporation, venue was determined according to a three-tier rule: if the corporation had no principal place of business or principal office or agency in the United States, venue was in the Court of Appeals for the District of Columbia; if the corporation had such a place of business, office or agency, venue was determined under the same two-tier rule applicable to trusts and estates.[465] Finally, the statute provided that "in the case of an agreement between the Commissioner and the taxpayer, [proper venue would be in] . . . the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."[466]

Although these rules may, at first impression, have appeared both comprehensive and comprehensible, problems soon emerged in their interpretation. For example, in the case of the venue by agreement provision, the question arose whether the parties could stipulate a venue in any court of appeals. While some thought this was the clear import of the statutory language,[467] the Supreme Court held that an agreement was improper if it stipulated a venue other than the Court of Appeals for the District of Columbia, or alternatively, a circuit that would otherwise be proper under the general venue rules.[468]

In addition, a more troublesome question arose as to what venue would be proper in a case involving the liability of a transferee of assets for a tax

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462 Act of Nov. 2, 1966, Pub. L. No. 89-713, § 3(c), 80 Stat. 1109 (amending I.R.C. § 7482(b)).

463 Revenue Act of 1926, ch. 27, § 1002(a), 44 Stat. 110.

464 *Id.* § 1002(b).

465 *Id.* § 1002(b)–(c).

466 *Id.* § 1002(d).

467 *E.g.*, Peacock, *supra* note 455, at 14.

468 Nash-Breyer Motor Co. v. Burnet, 283 U.S. 483 (1931). Evidently, Congress also disagreed with the Supreme Court's interpretation, for in the Revenue Act of 1934, the law was changed to make clear that any court of appeals could be the stipulated venue. Revenue Act of 1934, ch. 277, § 519(a), 48 Stat. 760 (now codified at I.R.C. § 7482(b)(2)).

deficiency of his transferor. The rules worked reasonably well if the transferee was an individual—venue would depend on his inhabitance. But if the transferee was not an individual, venue could depend on where the "person made the return."[469] There not being any such thing as a transferee return, it might be argued that venue would depend on where the transferor made his return. But if the transferor was not a party to the litigation, why should the venue rules, which are essentially rules for the convenience of the litigants,[470] force a party to litigate in a circuit with which he has no nexus?[471]

The most serious venue questions under the 1926 Act involved individuals. Where was an individual an inhabitant? Was it his residence, his domicile, or did some other rule govern? When was inhabitance to be tested if the individual was an inhabitant of different circuits when he filed the disputed return, the petition to the Board, and the petition for review of the Board's decision? Problems also existed with respect to parties who were representatives of an individual. Thus, in the case of a deficiency asserted against a taxpayer who had died before the applicable date for determining inhabitance, would venue be determined by reference to the decedent's last inhabitance, the inhabitance (if any) of his estate, or the inhabitance of the executor(s) of the estate?

In the years following the enactment of the Revenue Act of 1926, courts and commentators began to explore these and other venue questions.[472] It

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[469] Revenue Act of 1926, ch. 27, § 1002(b)–(c), 44 Stat. 110. If the corporate transferee had no principal place of business or principal office or agency within the United States, there was no problem—venue was in the Court of Appeals of the District of Columbia. *Id.* § 1002(c).

[470] 1 J. MOORE, *supra* note 407, at ¶ 0.140[1.-1].

[471] According to Peacock, *supra* note 455, at 13, such a case actually occurred. The appellant filed a petition for review in the circuit where the transferor made its return and also filed a petition in the circuit where the transferee made its return. In Peacock's view, neither venue was proper and the petition should have been filed to the Court of Appeals for the District of Columbia, since the "person" to whom the venue statute referred was the transferee and no return relative to the tax in dispute had been filed by such person.

[472] Nash-Breyer Motor Co. v. Burnet, 283 U.S. 483 (1931) (stipulation of venue limited to either Court of Appeals of District of Columbia or circuit court otherwise proper under general venue rules); Turner's Estate v. Helvering, 68 F.2d 759 (D.C. Cir. 1934) (taxpayer, an inhabitant of the Third Circuit, died the day before the Board hearing and his estate was substituted as party; Court of Appeals of District of Columbia held to be improper venue—appeal (in absence of stipulation) could only be taken to the Third Circuit since that was decedent's inhabitance); Ayer v. Commissioner, 63 F.2d 231 (2d Cir. 1933); Burnet v. White Eagle Oil & Refining Co., 58 F.2d 141 (8th Cir. 1932) (in transferee liability case in which both transferor and transferee were corporations, appellate venue depends on location where transferor, not transferee, filed return); Rusk v. Commissioner,

appeared that the determination of proper venue, which ideally should be mechanical and result in the choice of a convenient forum,[473] should not present as many difficulties as were encountered.

In testimony before the Senate Finance Committee in connection with the Revenue Act of 1934, a representative of the American Bar Association Committee on Federal Taxation criticized the situation:

> In at least nine cases, appeals have been improperly taken because of the existing confusion in the statutes. In at least 100 cases or more, now, it has been necessary to appeal to 2 circuit courts at the same time, in order to be protected against a misconstruction or against the construction of the court to which you first appeal. . . .[474]

With this prompting from the ABA, and with the support of the Treasury, the venue rules were amended by Congress in the 1934 Act to provide a simplified rule for appeals from decisions of the Board.[475] The revised rule,[476] which was to stand until revised in 1966, provided that venue should be in the "Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises, or if no return was made, then [in] the Court of Appeals of the District of Columbia." The Act also amended the venue by stipulation provision to make clear that the parties on appeal could validly agree to venue in any court of appeals they chose.[477]

Thus, the rule that formerly had been applied to trusts and estates was applied to all appeals. The new provision eliminated much of the old uncertainty, and the most significant controversies that arose under the new provision were whether a "return" was "made,"[478] and whether the Government would be deemed to have waived its objections to the venue

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53 F.2d 428 (7th Cir. 1931); Matheson v. Commissioner, 54 F.2d 537 (2d Cir. 1931) (executors of taxpayer decedent were real parties in interest and their inhabitance determines venue, even though they were substituted as parties after petition was filed with Board); *see also* Peacock, *supra* note 455.

[473] 1 J. MOORE, *supra* note 407, at ¶ 0.140[1.-1].

[474] *Hearings on H.R. 7835 Before the Senate Comm. on Finance*, 73d Cong., 2d Sess. 67 (1934).

[475] 78 CONG. REC. 6325 (1934).

[476] Revenue Act of 1934, ch. 277, § 519(a), 48 Stat. 760.

[477] *Id.* § 519(b).

[478] Commissioner v. Roosevelt & Son Inv. Fund, 89 F.2d 706, 708 (2d Cir. 1937); *see also* Commissioner v. Clarion Oil Co., 148 F.2d 671, 673 (D.C. Cir. 1945); Commissioner v. Germantown Trust Co., 106 F.2d 139, 140 (3d Cir. 1939), *rev'd*, 309 U.S. 304 (1940).

selection of the taxpayer.[479] It may be observed that the 1934 rules, although fairly certain, did not always result in a forum that was convenient. Thus, if the taxpayer moved after filing his return, or if the party to the litigation was contesting transferee liability in respect of a transferor who had filed his return in a distant collector's office, proper venue might be geographically distant from the location of the party or his attorney at the time the appeal was taken.[480] Nonetheless, these rules did not arouse any noticeable dissatisfaction. First, the rules were easily applied. Moreover, in those cases in which application of the rule resulted in genuine hardship to the taxpayer, the Government generally would agree to a satisfactory change in venue.[481]

As a result of the increasing use of computers in tax collection, Congress, in 1966, authorized the Internal Revenue Service to divide the country into broad geographical regions for return filing purposes, and to require residents of each of these regions to file their return in one central location.[482] The legislation contemplated that there would be seven filing regions.[483] Since some judicial circuits included more than one regional filing center and other circuits included no regional centers, a change in the venue rules enacted in 1934 was necessary if disproportionate concentrations of appeals in some of the circuits were to be avoided.[484] Accordingly, as part of the same 1966 legislation, Congress adopted new venue rules that in some respects are similar to those contained in the

[479] In *Lamb v. Commissioner*, 374 F.2d 256 (2d Cir. 1967), the court held that the Commissioner had waived his objections to an improper venue selection by the taxpayer. The waiver was found in the Commissioner's action in transferring the audit to, and issuing the deficiency notice from, the District Director's office located in the circuit to which the taxpayer ultimately appealed; *see also* Industrial Addition Ass'n v. Commissioner, 323 U.S. 310 (1945); Wegener v. Commissioner, 119 F.2d 49 (5th Cir. 1941).

[480] Under the 1934 rules, it was apparent that an appeal in a transferee liability case should be venued, absent an agreement or a waiver, in the circuit in which the transferor filed his return, since that was the return involving the "tax in respect of which the liability arises." Revenue Act of 1934, ch. 277, § 519, 48 Stat. 760.

[481] *See* Peacock, *supra* note 455, at 16, wherein he states: "It is only right to say, however, that the General Counsel of the Bureau of Internal Revenue has been very reasonable and obliging in entering into . . . a stipulation when requested by a taxpayer." Nothing indicates that this policy has changed in any significant respect since the time it was noted by Peacock in 1933. However, a taxpayer would probably be excessively optimistic to request a stipulation for a venue that has already ruled in accordance with the position he is maintaining.

[482] Act of Nov. 2, 1966, Pub. L. No. 89-713, § 1, 80 Stat. 1107 (amending I.R.C. §§ 6091(b), 6151(a)).

[483] H.R. REP. NO. 89-1915, at 1 (1966); S. REP. NO. 89-1625, at 1 (1966).

[484] H.R. REP. No. 89-1915, at 1 (1966); S. REP. NO. 89-1625, at 1 (1966).

Revenue Act of 1926.[485] The 1966 rules determine venue in the case of any person, other than a corporation, on the basis of his residence, with venue being provided in the circuit court of appeals for the circuit in which such person resided at the time his petition was filed with the Tax Court. If the person does not have a residence within any circuit, venue is provided in the Court of Appeals for the District of Columbia. In the case of a corporation, venue is to be in the circuit court of appeals for the circuit in which the corporation has its principal place of business or principal office or agency, or if it has no principal place of business or principal office or agency within a judicial circuit, appellate venue is in the circuit court for the circuit in which is located the office to which the corporation made the disputed return. If the corporation has no principal place of business, office or agency within a judicial circuit and has not filed a return with respect to the disputed tax, venue is in the Court of Appeals for the District of Columbia. The revised rules made no change in the venue by agreement provision as modified by the 1934 Act.[486]

It should be apparent that some of the same problems which existed under the 1926 venue rules were reintroduced with the 1966 amendments. Thus, the mechanical rule based on return filing was almost completely abandoned, and inquiry must now be made to such decidedly non-mechanical concepts as "residence," (in the case of persons other than corporations) and "principal place of business or principal agency or office" (in the case of corporations). Moreover, some of the same issues that arose with respect to fiduciary representatives of the taxpayer also arise under the new provisions. For example, if the taxpayer dies before the filing of the petition to the Tax Court, will appellate venue vary depending on whether his estate or his executor is the named party in the Tax Court petition?[487]

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[485] Act of Nov. 2, 1966, Pub. L. No. 89-713, § 3(c), 80 Stat. 1109 (amending I.R.C. § 7482(b)(1)).

[486] *See supra* note 477 and accompanying text.

[487] *Cf.* Turner's Estate v. Helvering, 68 F.2d 759 (D.C. Cir. 1934) (for purposes of 1926 Act venue rules, the executors and not the estate would be regarded as the real party in interest). The Tax Court periodically faces this question in determining the circuit court precedent that governs the proceeding before it under the *Golsen* rule (discussed in Section H.9 below), but the court has not yet definitively resolved the matter. The most extensive treatment is found in separate opinions in the court-reviewed opinion in *Estate of Clack v. Commissioner*, 106 T.C. 131 (1996). Drawing on the § 7482 and the legislative history accompanying the 1966 amendments thereto, as well as cases addressing the venue for refunds suits brought by estates, Judge Parr concluded that the determination of appellate venue should be based on the residence of the executor (or the principal place of business of a corporate executor). *Id.* at 167 (Parker, J., dissenting). Judge Parker's separate opinion was joined by Judge Cohen. This approach was endorsed by the D.C. Circuit Court of Appeals in *Estate of Israel v. Commissioner*, 159 F.3d 593, 595 (D.C. Cir. 1998), which characterized the conclusion that the executor, rather than the

In addition to these uncertainties, the new rules introduced more opportunity for discretionary forum selection than existed under the filing location standard. Thus, if the principal place of business of a corporation is located in a different judicial circuit than its principal office or agency, presumably the corporation could file its appeal petition with either circuit. Additionally, if the same decision involves more than one petitioner, the possibility for forum selection also will exist. Thus, if the petitioners in a case involving an estate are fiduciaries residing in different circuits, an appeal to the circuit in which any fiduciary resides probably would be proper.[488] Since different substantive rules may obtain in different circuits,[489] appellate venue selection occasionally can be determinative of the outcome of the controversy.[490]

Congress has periodically updated the venue provisions of § 7482(b) in an attempt to keep up with the expanded range of matters over which the Tax Court possesses jurisdiction. Appellate venue for review of a declaratory judgment relating to the qualification of retirement plans under § 7476 is determined by reference to the principal place of business of the employer;[491] appellate venue for review of a declaratory judgment concerning the tax-exempt status of an organization under § 7428 is determined by reference to the location of the organization's principal office or agency;[492] appellate venue for review of decisions arising under the TEFRA partnership proceedings is determined by reference to the principal place of business of the partnership;[493] and a declaratory judgment relating to an over-sheltered return pursuant to § 6234 is determined by the legal

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estate, should be viewed as the petitioner for purposes of § 7842(b) as "hardly open to dispute."

Judge Gerber, in a concurring opinion in *Estate of Clack*, addressed the issue raised by Judge Parker, and came to the opposite conclusion. He found it more logical to regard the estate as the petitioner in the proceeding, and he noted that this approach minimized the prospect of forum shopping because a decedent's domicile becomes fixed at death. 106 T.C. at 146–47 (Gerber, J., concurring). [On the other hand, fiduciaries could move to or perhaps be selected in a jurisdiction with favorable circuit court precedent.] Judge Gerber's concurring opinion was joined by five other judges of the court.

In light of the uncertainty regarding the venue for appeals in cases involving an estate, the court has adopted a policy to avoid identifying the petitioner as the estate.

488 See discussion in *supra* note 487.

489 *See infra* notes 573–574 and accompanying text.

490 *See* Peacock, *supra* note 455, at 15–16.

491 I.R.C. § 7482(b)(1)(C).

492 I.R.C. § 7482(b)(1)(D).

493 I.R.C. § 7482(b)(1)(E)

residence of a non-corporate petitioner or the principal place of business of a corporate taxpayer.[494]

However, § 7482(b) does not address every type of case the Tax Court has jurisdiction to hear. In cases not expressly addressed by the enumerated provisions of § 7482(b), which include decisions emanating from a variety of areas of the Tax Court's expanded jurisdiction, the D.C. Circuit Court of Appeals serves as the default appellate venue.[495] As one example, an appeal of a Tax Court decision concerning a petitioner's right to a whistleblower award pursuant to § 7623 would rest with the D.C. Circuit under the default provision. The Tax Court, however, has not been overly exacting in its reference to appellate venue in cases arising under its expanded jurisdiction. For instance, in *Murphy v. Commissioner*,[496] the taxpayer petitioned for review of an adverse collection due process hearing pursuant to § 6330(d). In addressing the controlling precedent in the case, the Tax Court observed by footnote that an appeal of the case would lie with the First Circuit Court of Appeals—apparently based on the residence of the taxpayer.[497] However, § 7482(b)(1)(A) references the individual appellant's residence only in cases involving a "redetermination of a deficiency." As the validity of the underlying tax liability often is not at issue in a collection due process proceeding and was not at issue in *Murphy*, the Tax Court's determination of appellate venue appeared incorrect.[498] Nonetheless, the case was appealed to the First Circuit, which accepted the appeal and affirmed the Tax Court's decision with no discussion of its appellate jurisdiction.[499]

The apparent imprecision in the determination of appellate venue for cases arising under aspects of the Tax Court's jurisdiction of more recent vintage may be characterized as harmless error if no party objects to the broad use of an individual's residence as the determining factor for appellate venue in a wide variety of cases. On the other hand, one can expect the issue to be analyzed in greater detail as commentary increasingly highlights the matter. An appropriate response would be for Congress to expand § 7482(b)(1)(A) to encompass cases other than redeterminations of deficiencies.

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494 I.R.C. § 7482(b)(1)(F).

495 I.R.C. § 7482(b)(1) (flush language); *see also* James Bamberg, *A Different Point of Venue: The Plainer Meaning of Section 7482(b)(1)*, 61 TAX LAW. 445 (2008) (detailing how many cases arising under the Tax Court's expanded jurisdiction are not specifically addressed in § 7482(b) and that, as a result, the D.C. Circuit Court of Appeals provides the venue for appeal).

496 125 T.C. 301 (2005).

497 *Id.* at 313 n.6.

498 *See* Bamberg, *supra* note 495, at 467 (making this point).

499 469 F.3d 27 (1st Cir. 2006).

7. The Appellate Process in Operation—Problems and Controversies

Under the appellate structure established in 1926 (and still applicable today), appeals can be taken from a forum of national jurisdiction, the Tax Court, to one of 12 different intermediate courts of appeals, and finally to the Supreme Court. Given the complexity of the tax laws and the multiplicity of approaches that can be taken in the judicial resolution of many tax problems, this appellate system occasionally has created conflicting rules at the intermediate appellate level.

Most would agree that geographic uniformity is a desirable goal in tax administration and that the particular tax rule applied should not vary with appellate venue. However, under the existing system, the prevailing rule in a tax controversy may be determined by the taxpayer's residence or place of business.

Besides creating a lack of geographic uniformity, the appellate system as it has evolved in tax cases may also tend to encourage litigation in tax matters. Thus, even though the Service, the Tax Court, and one or more courts of appeals may have ruled unfavorably on an issue, taxpayers often continue to litigate the question in the hope of securing a favorable ruling in their particular circuit or from the Supreme Court.[500] This same phenomenon may also work in reverse with the Government being reluctant to give up on an issue until the weight of authority is overwhelming.[501]

For these reasons, the Supreme Court traditionally has been under significant pressure to pass on many more tax cases than it would like to and to pass on cases solely for the purpose of achieving a uniform rule, even though the issues involved may be trivial and not otherwise deserving of consideration at the ultimate appellate level.[502] In fact, the primary reason for the grant of certiorari in tax cases is to resolve conflicts among the courts of appeals.[503]

It may be argued that a genius of our judicial system is that it affords the opportunity for a full ventilation of a particular issue by several courts before its ultimate resolution by the Supreme Court. It also may be argued

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[500] *See, e.g.*, examples cited in Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1156–57 (1944) [hereinafter cited as Griswold].

[501] The experience under the former entity-classification regulations (the so-called *Kintner* regulations) in determining the tax status of professional corporations provides one such historic example. *See* BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 2.06 (3d ed. 1971).

[502] *See* Griswold, *supra* note 500, at 1163–64; *see also* Laing v. United States, 423 U.S. 161 (1976) (example of the Supreme Court hearing a tax controversy in which a conflict existed between the circuits).

[503] Griswold, *supra* note 500, at 1163.

that any law, tax or otherwise, is subject to the same vagaries of divergent interpretation by different courts, yet the Republic has managed to survive. Nevertheless, it is beyond dispute that the issue of multiple jurisdiction of tax appeals has aroused a good deal of comment—much of it critical of the existing system.[504]

With respect to the role of the Tax Court, the issue has surfaced in two different contexts. First, with reference to the role of appellate courts in tax litigation, there was a brief period of time in which the Supreme Court

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[504] "If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 courts with original jurisdiction, 11 appellate bodies of coordinate rank, and only a discretionary review of relatively few cases by the Supreme Court." ROSWELL FOSTER MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1934).

"Few tax questions are ever put at rest until they have been interred in the United States Supreme Court Reports. . . . In the meantime, the issue is usually obscured by a mass of conflicting decisions." Robert B. Eichholz, *Should the Federal Income Tax be Simplified?*, 48 YALE L.J. 1200, 1216 (1939).

"We are getting too much law, and too many kinds of law, and from too many sources, for tax administration to be simple, or the law clear. Should we reserve to the Supreme Court only constitutional questions in tax matters? Should matters of statutory construction be settled by a tax court, instead of by the twelve Circuit Courts of Appeals, with their frequent conflict of viewpoint?" Robert H. Jackson, *Equity in the Administration of Federal Taxes*, 13 TAXES 641, 686 (1935); *see also* Montgomery B. Angell, *Procedural Reform in the Judicial Review of Controversies Under the Internal Revenue Statutes: An Answer to a Proposal*, 34 ILL. L. REV. 151 (1939); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Griswold, *supra* note 500; John M. Maguire, *Federal Revenue—Internal or Infernal?*, 21 TAXES 77 (1943); Federick L. Pearce, *Trends in Federal Tax Procedure*, 69 J. ACCOUNTANCY 369 (1940); Program and Committee Reports, ABA TAXATION SECTION 64 (1940); Sidney I. Roberts, Wilbur H. Friedman, Martin D. Ginsburg & Carter T. Louthan, *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325 (1972); J.S. Seidman, *Proposed Procedural Changes in Federal Tax Practice*, 67 J. ACCOUNTANCY 221 (1939); Stanley S. Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U. L.Q. 399 (1940); Stanley S. Surrey, *The Traynor Plan–What It Is?*, 17 TAXES 393 (1939); William A. Sutherland, *New Roads to the Settlement of Tax Controversies: A Critical Comment*, 7 LAW & CONTEMP. PROB. 359 (1940); Roger John Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes–A Criticism and A Proposal*, 38 COLUM. L. REV. 1393 (1938); Roger John Traynor & Stanley S. Surrey, *New Roads Toward the Settlement of Federal Income, Estate, and Gift Tax Controversies*, 7 LAW & CONTEMP. PROB. 336 (1940); G. Aaron Younquist, *Proposed Radical Changes in the Federal Tax Machinery*, 25 A.B.A. J. 291 (1939); Comment, *The National Court of Appeals: Composition, Constitutionality and Desirability*, 41 FORDHAM L. REV. 863 (1973); Note, *Controversy Between the Tax Court and Court of Appeals: Is the Tax Court Bound by the Precedent of Reviewing Courts?,* 7 DUKE L.J. 45 (1957); Note, *The Old Tax Court Blues: The Need for Uniformity in Tax Litigation*, 46 N.Y.U. L. REV. 970 (1971).

believed it had found at least a partial answer to the vexing problems of lack of uniformity and burgeoning tax litigation. This answer proceeded from a special interpretation of the scope of appellate review to be accorded decisions of the Tax Court. This period of judicial history is related in the following section.

Second, from the vantage point of the Tax Court, the appellate review structure also has produced an unusual problem with respect to the court's perception of its own role as a national trial court, the decisions of which are subject to review by multiple appellate courts. This problem is traced in the section following discussion of the scope and standard of appellate review.

8. Scope and Standard of Review

Historically, the factual findings of a federal equity court, and more recently the findings of a law court sitting without a jury, have been reviewable under the "clearly erroneous" standard,[505] which permits reversal on the facts, even if evidence exists to support the trial court's findings, "if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[506] On the other hand, in cases tried before a jury, courts generally have only asserted power to modify factual determinations of the jury if not supported by "substantial evidence," which has been construed as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[507]

These standards have been recognized as being quite different, with the former permitting greater flexibility to the reviewing court than the latter. Thus, in *District of Columbia v. Pace*,[508] which involved a statute providing that findings of the Board of Tax Appeals of the District of Columbia "shall have the same effect as a finding of fact by an equity court or a verdict of a jury,"[509] the Supreme Court stated that "findings of fact by an equity court and the verdict of a jury have from time immemorial been subject to different rules of finality in that findings of a judge are accepted unless

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[505] 5A J. MOORE, *supra* note 407, at ¶ 52.03[1]; *see also* FED. R. CIV. P. 52(a).

[506] United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

[507] Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938); *see also* N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 29.02 (3d ed. 1972) [hereinafter cited as K. DAVIS]; LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 596 (1965) [hereinafter cited as L. JAFFE]; 5A J. MOORE, *supra* note 407, at ¶¶ 50.02[1], 50.07[2]; Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 73 (1944).

[508] 320 U.S. 698 (1944).

[509] Act of May 16, 1938, ch. 223, § 4(a), 52 Stat. 371.

'clearly wrong' and that the review of a jury verdict is much more restricted."[510]

Although the extent to which factual determinations of agencies of the executive branch can be reviewed is largely a matter of legislative discretion[511] (for example, in the case of the Tax Court's former renegotiation jurisdiction, the statute specifically precluded appellate review of Tax Court findings[512]), the general practice and the common law view have been that such action should be reviewable under the same standard applicable to jury verdicts.[513] The feeling seems to be that the expertise of the agency and the interest of uniform administration dictate a more limited judicial review of administrative action than in the case of the factual finding of a judge sitting without a jury.[514]

The only provision in the 1926 Act dealing with the scope of appellate review of Board determinations, § 1003(b), provided: "Upon . . . review . . . [of Board decisions, the appellate] courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."[515]

A strict textual analysis of this language does not indicate clearly the scope of review to be accorded factual determinations of the Board. By not providing for any review of factual matters, the provision could be interpreted as precluding such review entirely; on the other hand, the absence of a specific standard could be viewed as leaving the matter to the courts as guided by the common law experience.[516] Nevertheless, the 1926 committee reports indicate that a restrictive appellate review was contemplated. The report states that "[i]n view of the grant of exclusive power to the Board finally to determine the facts upon which tax liability is based, subdivision (b) of section 1003 limits the review on appeal to what

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[510] 320 U.S. at 701; *see also* Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 88–89 (1944). *Contra*, Arthur T. Vanderbilt, *Introduction*, 30 N.Y.U. L. REV. 1267, 1268 (1955).

[511] K. DAVIS, *supra* note 507, at § 29.01.

[512] Renegotiation Act of 1951, ch. 15, § 108, 65 Stat. 21.

[513] N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939); K. DAVIS, *supra* note 507, at § 29.02.

[514] N.L.R.B. v. Southland Mfg. Co., 201 F.2d 244, 246 (4th Cir. 1952).

[515] Revenue Act of 1926, ch. 27, § 1003(b), 44 Stat. 110 (now codified at I.R.C. § 7482(c)(1)).

[516] That this language is not inconsistent with review of factual determinations is indicated by the fact that this provision still appears in the statute, *see* I.R.C. § 7482(c)(1), even though it is now clear that appellate courts can review factual determinations of the Tax Court, *see* I.R.C. § 7482(a). General statutory standards of the scope of review of administrative determinations were not provided until the enactment of the Administrative Procedure Act in 1946. Administrative Procedure Act, ch. 324, § 10(e), 60 Stat. 243 (1946) (now codified at 5 U.S.C. § 706).

are commonly known as questions of law."[517] The reports, however, moderate this apparent bar on review of factual determinations by including within the definition of "questions of law" the issue of "the existence of at least some evidence to support the findings of fact."[518]

In the years following 1926, the appellate courts were faced with the problem of giving effect to the restricted appellate review of Board factual determinations. Inasmuch as no precise line defines the boundary between questions of law and those of fact, the results of the cases were not always consistent.[519] Moreover, in the view of the Supreme Court in the 1943 landmark decision in *Dobson v. Commissioner,*[520] many courts were simply ignoring the limitations on appellate review of Board decisions. "[E]ven a casual survey of decisions in tax cases, now over 5,000 in number, will demonstrate that courts, including this Court, have not paid the scrupulous deference to the tax laws' admonitions of finality which they have to similar provisions in statutes relating to other tribunals."[521]

Although this practice, the Court believed, was erroneous, it was understandable in view of the history of appellate tax practice.[522] Prior to 1926, most tax cases came up to the appellate courts from district court proceedings either at common law against the collector of the tax, or under the Tucker Act against the United States.[523] Traditional notions of scope of review applied to these appeals, and the reviewing court could review factual as well as legal determinations of the court below.[524] Moreover, litigation originating in the Board during the 1924–26 period that ultimately found its way to the appellate courts by way of a trial de novo in district court or the Court of Claims was also subject to this scope of review.[525] For these reasons, according to the Supreme Court, the appellate courts had grown accustomed to treating tax cases in the same manner as other appeals.[526]

Dobson represented an effort by the Supreme Court to require appellate courts to observe more closely the statutory limitation on the scope of

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[517] S. REP. NO. 69-52, at 36 (926); *see also* H.R. REP. NO. 69-1, at 19 (1925).

[518] H.R. REP. NO. 69-1, at 20 (1925); S. REP. NO. 69-52, at 36 (1926).

[519] *See* Wm. Cutler Thompson, *Comments Upon the Nature and Scope of Appellate Review of Cases Originating in the U.S. Board of Tax Appeals*, 9 TEMP. L.Q. 25 (1934).

[520] 320 U.S. 489 (1943).

[521] *Id.* at 494.

[522] *Id.* at 495–98.

[523] *Id.* at 495–96

[524] *Id.*

[525] *Id.* at 496–97.

[526] *Id.* at 497–98. This reasoning seems specious since the federal appellate courts when reviewing factual findings of juries were presumably doing so on the substantial evidence rule—the same scope of review generally applicable to administrative determinations.

review. The case involved taxpayers who, some years after selling stock at a loss, successfully sued the persons from whom they originally had purchased the stock on the grounds of fraud and securities act violations. The main question was whether the taxpayers' recoveries should be excluded from income, because the recoveries plus the proceeds from the sale of the stock were less than the purchase price of the stock, and because the taxpayers had obtained no tax reduction from their losses on the stock sale as their deductions exceeded their income for the years of sale.

The *Dobson* case was submitted to the Board for decision on stipulated facts;[527] the arguments of the parties before the Board, the Court of Appeals for the Eighth Circuit, and the Supreme Court centered on whether the total economic effect of all the transactions relating to the stock purchase and sale should be given determinative weight for tax purposes. The Board ruled on this question in the affirmative, in favor of the taxpayers, by applying the "tax benefit" doctrine.[528] The circuit court reversed the Board, holding that each tax year must stand on its own and reasoning that a subversion of the statute of limitations would result unless the taxpayers were required to treat their recoveries as income in the year of receipt.[529]

In reversing the Eighth Circuit and approving the Tax Court decision (by the time *Dobson* reached the Supreme Court, the Board had been renamed the Tax Court), the Supreme Court evidenced its exasperation with the volume and nature of the tax cases it was called on to decide, the growing complexity of tax laws, the substantial volume of tax litigation generally, and the delays and lack of uniformity in such litigation.[530] In its view, the Tax Court was constituted as a panel of experts and was equipped by virtue of the qualifications of its judges and staff to deal competently and independently with questions of tax law.[531] The Court perceived the 1926 Act and its legislative history as clearly limiting the scope of review of Tax Court decisions to questions of law. So long as there was "warrant in the record" for the findings of the Tax Court, the finality of its decisions should not be disturbed.[532] According to the Supreme Court, a strict observance of these principles would substantially ease the regrettable state into which the administration of the tax laws had fallen.[533]

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[527] Estate of Collins v. Commissioner, 46 B.T.A. 765, 765–66 (1942).

[528] *Id.* at 769–70.

[529] Harwick v. Commissioner, 133 F.2d 732, 735–37 (8th Cir. 1943).

[530] 320 U.S. at 494–95, 499–500 ¶ n.25.

[531] *Id.* at 498–99.

[532] *Id.* at 501.

[533] *Id.* at 494–95, 499–502. The Court was later to state that "Congress has plainly designed . . . [the Tax Court] to serve, as it were, as the exchequer court of the country." McDonald v. Commissioner, 323 U.S. 57, 64 (1944).

The difficult problem that had to be faced by the Court in *Dobson* was how to separate questions of law from fact.[534] The distinction had been given some meaning in other contexts, but always had been somewhat obscure.[535] Some help was offered by the committee reports on the 1926 Act which stated that the reviewing court could consider

> the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence. . . .[536]

However, the helpfulness of this language in distinguishing fact from law was more apparent than real, and the Supreme Court conceded that the distinction was a difficult one, especially in cases involving mixed questions of fact and law.[537]

A close reading of *Dobson* does not reveal any specific tests that the Supreme Court believed should be applied in making the distinction. Rather, the Court concluded that the application of the tax benefit doctrine was essentially an accounting question of whether related transactions should be integrated. Since the Tax Court had found as a matter of fact that the taxpayers had no economic or tax gain on the integrated transaction, and since no statute or regulation explicitly required a different result, the Supreme Court held that it was error for the court of appeals to reverse the Tax Court's decision.[538]

Although the fact that the Supreme Court implied that accounting matters were factual questions was of some significance, the truly startling aspect of the case was the promulgation by the Court of what amounted to a rule of construction in applying the fact-law distinction. Recognizing the difficulties inherent in categorizing the tax benefit rule as a question of fact, and the general difficulties in distinguishing legal questions from factual matters, the Court stated, "when the [reviewing] court cannot separate the

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[534] 320 U.S. at 500–0l.

[535] *Id. Compare* N.L.R.B. v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) *with* L. JAFFE, *supra* note 507, at 549–50; *see also* Kenneth Culp Davis, *Judicial Control of Administrative Action*; *A Review*, 66 COLUM. L. REV. 635, 669–72 (1966).

[536] H.R. REP. NO. 69-1, at 20 (1925); S. REP. NO. 69-52, at 36 (1926).

[537] 320 U.S. at 499–500.

[538] *Id.* at 501–03, 506–07. The Court had, in the past, noted the special expertise of the Board of Tax Appeals in accounting matters. Lucas v. American Code Co., 280 U.S. 445, 449–50 (1930).

elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."[539]

The *Dobson* rule was not well received by commentators[540] or the bar.[541] In the first place, the applicable statute provided that a reviewing court had power to modify or reverse a Tax Court decision if it were "not in accordance with law."[542] *Dobson*, however, forbade appellate review of legal matters in the absence of a "clear-cut mistake of law."[543] Although this rule may have been suited to according finality to Tax Court decisions and avoiding the necessity of prolonged inquiry into whether a question was one of law or fact, there were those who believed that the rule represented a short cut wholly unauthorized by governing law.[544]

Another remarkable aspect of *Dobson* was its strong inference that accounting matters were questions of fact. Many provisions of the tax laws deal with accounting matters; did *Dobson* require that all these matters be treated as questions of fact?[545] There was some indication that the Court was influenced in categorizing the question as one of fact by reason of the nonexistence of specific statutory or regulatory authority on the point in issue. However, to distinguish law from fact using this criteria was certainly a novel approach.[546]

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[539] 320 U.S. at 502.

[540] George T. Altman, *The Dobson Rule*, 21 TUL. L. REV. 527 (1947); Louis Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 539–43 (1945); Griswold, *supra* note 500, at 1170–73; Robert E. Nelson, *The "Dobson" Rule Reaffirmed by the "Kelley" Case*, 24 TAXES 104 (1946); Randolph E. Paul, *Dobson v. Commissioner*, 23 TAXES 83 (1945); Randolph E. Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944) [hereinafter cited as Paul]; Note, *The Dobson Rule in the Circuit Courts*, 60 HARV. L. REV. 448 (1947); *Judicial Review of Tax Court Decisions*, 94 U. PA. L. REV. 339 (1946).

[541] *Hearings on H.R. 3214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. 167–73 (1948).

[542] Revenue Act of 1926, ch. 27, § 1003(b), 44 Stat. 110.

[543] 320 U.S. at 502.

[544] In a statement supporting legislative overruling of *Dobson*, the American Bar Association complained that:

> In our opinion the Dobson decision represents an utterly unwarranted invasion by the United States Supreme Court of the legislative field, and in addition, as legislation it is thoroughly unsound. . . . [I]t is our hope that the committee will see fit to call attention to the great damage and confusion which always results from the invasion by the courts of the fields of policy which have been entrusted by the Constitution solely to the legislative branch of the Government.

Hearings on H.R. 3214 Before a Subcomm. of the Senate Comm. on the Judiciary, 80th Cong., 2d Sess. 171 (1948).

[545] Paul, *supra* note 540; *see also* L. JAFFE, *supra* note 507, at 579–82.

[546] 320 U.S. at 502–03.

Moreover, although the impact that *Dobson* had on the volume of tax litigation is subject to some question,[547] it seems clear that the decision in

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[547] Set forth below is a table detailing the number of tax cases decided by the federal courts (including the Board/Tax Court) for the period 1935–1953.

Year	Supreme Court	Court of Appeals	Court of Claims	District Courts	Tax Court*
1935	29	382	54	240	1,405
1936	45	382	58	128	1,496
1937	25	232	79	222	965
1938		UNAVAILABLE			1,113
1939	33	137	125	203	1,312
1940	43	351	53	405	1,322
1941	58	531	46	447	1,328
1942	37	522	31	469	1,418
1943	21	443	32	335	1,317
1944	25	416	95	242	1,013
1945	32	340	30	242	928
1946	21	273	29	281	801
1947	13	242	15	207	827
1948	6	243	24	183	807
1949	12	264	30	315	838
1950	12	261	12	226	868
1951	6	289	27	324	1,040
1952	9	292	20	501	956
1953	14	339	58	439	996

* Number of dockets disposed of by decisions in which there was written opinion.

These figures indicate a general decrease in tax litigation starting in the early 1940's and extending into the early 1950's. A *Dobson* defender might well argue that this decrease was a result of that case's limitation on the scope of appellate review. However, problems exist with such an argument. In the first place, one would expect *Dobson* to have its major impact in the appellate courts. Yet the most dramatic decrease in cases occurred in the district courts where decisions declined from 469 in 1942 to 183 in 1948, a decrease of 61 percent. It is true that courts of appeals decisions also declined dramatically, from 531 in 1941 to 242 in 1947, a drop of 54 percent, but so did Tax Court cases, which declined from 1,418 in 1942 to 807 in 1948, a drop of 43 percent. Decline in Supreme Court cases, although relatively the greatest of all from 58 in 1941 to six in 1948, a drop of 90 percent, are not very meaningful since the Court can control the number of tax cases it hears.

If *Dobson* accounted for a decrease in tax litigation, one would expect the smallest decline (or even an increase) in district court cases, since taxpayers would that case did not have a salutary effect on the complexity of tax law. If anything, appellate cases became further complicated by the requirement of considering whether the Tax Court decision was reviewable.[548]

The Supreme Court was called upon several times to determine the applicability of *Dobson*, and the resulting decisions did not seem wholly consistent. In a leading debt-equity decision, *John Kelley Co. v. Commissioner*,[549] the Court refused to review the arguably contradictory conclusions of the Tax Court on whether certain purported interest payments should be treated as such for purposes of the tax laws, or whether they should be treated as distributions with respect to stock. Since the case dealt with the meaning of the "well understood words . . . 'interest' and "dividends,"' the Court concluded, over three dissents, that the determination of the Tax Court must be dispositive. Yet in *Trust of Bingham v. Commissioner*,[550] the Court refused to apply *Dobson* in a case involving the question of whether certain legal fees were deductible because paid in connection with "property held for the production of income."[551] The Tax Court had ruled that the fees qualified for deduction under this test;[552] the Court of Appeals for the Second Circuit reversed on the ground that the Tax Court had erred in application of the law.[553] Observing that decision turned on "the meaning of the words . . . 'property held for the production of income,'"[554] the Supreme Court concluded that the Second Circuit was

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tend to increase their appearances in those courts in order to preserve their rights of appellate review. Paul, *supra* note 540, at 798.

Rather, it seems probable that the general decline in tax litigation during this period was due to a combination of two factors. First, it is at least arguable that World War II contributed to the decline by attracting manpower that might otherwise have been engaged in tax disputes. Additionally, taxpayers may have been less inclined to contest a tax that was helping to support a popular war. A second possible cause for the decrease can be traced to 1938 when the Bureau "inaugurated a definite program looking to the decentralization of the appellate procedure for the administrative settlement of income, profits, estate, and gift tax controversies." 1939 COMM'R OF INT. REV. ANN. REP. 39 (1939). Writing in 1942, the Chief Counsel for the Bureau asserted that the decentralization program was the reason for the decline in tax disputes. John Philip Wenchell, 13 PA. BAR ASSOC. Q. 110, 110–16 (1942); *see also* Milton E. Carter, *Decentralization of the Bureau of Internal Revenue,* 17 TAXES 403 (1939).

548 *See* Paul, *supra* note 540, at 798–801; 93 CONG. REC. A3281 (1947) (remarks of Mr. Hobbs).

549 326 U.S. 521 (1946).

550 325 U.S. 365 (1945).

551 Int. Rev. Code of 1939, ch. 1, § 23(a)(2), 53 Stat. 12 (now codified at I.R.C. § 212(1)).

552 2 T.C. 853 (1943).

553 Commissioner v. Kenan, 145 F.2d 568 (2d Cir. 1944).

554 325 U.S. 365, 371 (1945).

correct in not applying *Dobson* as a bar to appellate review.[555] Thus, the meaning of "interest" and "dividend" were questions of fact, but the meaning of "property held for the production of income" was a question of law.[556]

As distinctions necessary for the application of *Dobson* became finer, and the doctrine of limited review became sometimes as difficult of application as the solution of the underlying case, some members of the Court sought refinements of *Dobson* in the hope that the original purpose of the decision could be preserved. In *Bingham's Trust*, Justice Frankfurter in a concurrence joined by Justices Roberts and Jackson (the latter being the author of *Dobson*), argued that the *Dobson* principle would be subverted if appellate courts were required to "make an independent examination of the meaning of every word in tax legislation."[557] In his view, the thorny distinction between mixed questions of fact and law and pure questions of law should be discarded; if the decision of the Tax Court were reasonable, it must stand, even if the appellate court disagreed either on the law or the facts.[558] In view of the not wholly consistent interpretation given to *Dobson* by the Supreme Court, it is not surprising that many concluded that the doctrine, if anything, spawned rather than subdued litigation.[559]

Finally, *Dobson* was criticized as creating multiple standards of appellate review in tax cases. Since tax cases originating in the district courts and the Court of Claims remained fully subject to appellate review for legal error, it was possible that the same appellate court might be required to apply different substantive rules of law depending on the court in which the case was commenced. One can easily detect a note of frustration in the following excerpt from an opinion of Judge Learned Hand:

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[555] Nevertheless, the Court concluded that on the merits the Tax Court decision was correct. 325 U.S. 365 (1945), *rev'g* 145 F.2d 568 (2d Cir. 1944).

[556] In *Helvering v. American Dental Co.*, 318 U.S. 322 (1943), decided in the same term as *Dobson* and nine months prior thereto, the Court held that the meaning of the word "gift" was a legal question and that the Board of Tax Appeals had erred in finding that donative intent was a requisite element of the definition. In *Dobson v. Commissioner*, 320 U.S. 489 (1943), there was some intimation that the Court considered the application of the phrase "sale or exchange" to be a nonreviewable question of fact.

In *Commissioner v. Scottish American Inv. Co.*, 323 U.S. 119 (1944), the Court held that the existence of an "office or place of business" within the United States was a question of fact the determination of which by the Tax Court was unreviewable if supported by substantial evidence.

[557] 325 U.S. 365, 380 (1945).

[558] *Id.* at 381–82.

[559] For a discussion of the interpretative problems that arose following *Dobson*, see Note, *The Dobson Rule in the Circuit Courts*, 60 HARV. L. REV. 448 (1947)

> [I]f the case were an appeal from a district court, we should have no alternative but to reverse. But the Supreme Court has repeatedly admonished us (in so many decisions that it would be idle to repeat them), that our power to review a ruling of the Tax Court is very much more limited than in the case of a district court. As we understand it, before we may substitute our own interpretation of a provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; but we must conclude that the Tax Court has been indubitably wrong in its decision of the question which emerges: reasonable differences in legal opinion we are to resolve in its favor. . . .
>
> That finality depends, as we understand, upon the added competency which inevitably follows from concentration in a special field. Why, if that be so, we—or indeed even the Supreme Court itself—should be competent to fix the measure of the Tax Court's competence, and why we should ever declare that it is wrong, is indeed an interesting inquiry, which happily it is not necessary for us to pursue.[560]

As a result of these deficiencies, the *Dobson* doctrine had few adherents. In 1948, it died an apparent quiet death as a result of efforts of the American Bar Association.[561] The overruling of *Dobson* was, at that point, so uncontroversial that it was accomplished in a bill, the movement of which through Congress depended on its acceptability to all.[562] Since then,

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560 Brooklyn Nat'l Corp. v. Commissioner, 157 F.2d 450, 452–53 (2d Cir. 1946). For other cases in which the Second Circuit indicated it would apply different substantive rules depending on whether the trial was in the Tax Court or a district court, see Kirschenbaum v. Commissioner, 155 F.2d 23 (2d Cir. 1946); Kohnstamm v. Pedrick, 153 F.2d 506 (2d Cir. 1946).

Adherents of the *Dobson* doctrine recognized this difficulty, but their suggestion was to repose all tax jurisdiction in the Tax Court. *See* Trust of Bingham v. Commissioner, 325 U.S. 365, 378 n.l (1945) (Frankfurter, J., concurring).

561 Act of June 25, 1948, ch. 646, § 36, 62 Stat. 991 (now codified at I.R.C. § 7482(a)). Curiously, although this provision specifically made the scope of review in appeals from Tax Court decisions the same as in the case of appeals from district court decisions, no modification was made in the original statutory language of the 1926 Act into which the Supreme Court read the *Dobson* rule. This language still appears in § 7482(c)(1), and provides as follows:

> Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

562 The primary purpose of the legislation was to codify and enact into positive law title 28 of the United States Code. The bill, H.R. 3214, as passed by the House provided for the removal of the Tax Court from title 26 to title 28 and would have clarified the status of the court as a legislative court. This proved to be

controversial in that it raised the question whether non-lawyers would or should be permitted to continue to practice before the court, and whether legislative jurisdiction over the court should be in the tax committees or the judiciary committees. *See Hearings on H.R. 3214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. (1948); 93 CONG. REC. A3279-8l (1947) (remarks of Mr. Hobbs); *id.* 8384–93 (1947); Part IV, notes 140–258 and accompanying text. To eliminate this controversy, and thus insure the passage of the bill that was otherwise universally supported, all provisions relating to the Tax Court were eliminated save the overruling of *Dobson*. S. REP. NO. 80-1559, at 2 (1948); 94 CONG. REC. 7927–31, 8498–501 (1948).

The passing of *Dobson* was not completely unlamented. Witness the following ditty performed at the twenty-fifth anniversary dinner in honor of the Tax Court, on June 3, 1949. Lyrics by Edgar J. Goodrich, Esq., who had been a member of the Board of Tax Appeals from 1931 to 1935.

AIR: MY BONNIE LIES OVER THE OCEAN

1. There once was a time on the Tax Court
When the loser would sadly give up,
But Congress has ruined our standing
Now every decision goes up!
Chorus: Bring back, bring back,
Oh, bring back dear Dobson, T.C., T.C.,
(Repeat).
2. Old Dobson tied up all appeal courts,
They had to accept what we found
But now each one does as it pleases
Turns our facts and figures around.
Chorus: Bring back, etc.
3. Sing, HO, for the Wisdom of Jackson,
Who gave us that beautiful rule,
Sing, FIE, on a troublesome Congress
That throws us all back in the pool.

Additionally, it is clear that at least some Justices of the Supreme Court were not happily reconciled to the 1948 legislation:

> In spite of the gelding of *Dobson* . . . by the recent revision of the Judicial Code . . . I still think the Tax Court is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs. I should reverse in reliance upon the Tax Court's judgment more, perhaps, than my own.

Arrowsmith v. Commissioner, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting).

That *Dobson* may be gone but not forgotten is further illustrated by *Lustman v. Commissioner*, 322 F.2d 253 (3d Cir. 1963), a 1963 case in which the *Dobson* rule evidently was applied.

the scope of review in appeals from Tax Court decisions has been the same as in the case of appeals from district court decisions tried without a jury.[563]

Although the death of *Dobson* as a result of the enactment of § 7482(a) was well understood with respect to the scope of appellate review of Tax Court decisions, this is not to say that *Dobson* was universally understood to have no lasting value. Rather, the ghost of *Dobson* continued to hover in cases suggesting that the Tax Court's conclusions of law were entitled to a heightened measure of deference above the standard de novo review. In *Vukasovich, Inc. v. Commissioner*,[564] the Ninth Circuit Court of Appeals observed the existence of these cases and explained that the source of confusion appeared to rest in an internal inconsistency in § 7482.[565] Section 7482(a), requiring Tax Court decisions to be reviewed in the same manner as decisions from Federal district courts, suggests de novo review.[566] On the other hand, § 7482(c)(1), the predecessor of which the Supreme Court interpreted in *Dobson*, allows a reviewing court to modify or reverse a Tax Court decision "not in accordance with law." This provision, suggests a heighted standard of review applied to decisions of administrative agencies.[567] Because Congress failed to alter this standard as part of the 1948 legislation, an argument can be made that a heightened standard of review for the Tax Court's jurisdiction remained appropriate. Although this interpretation enjoyed support among some commentators,[568] it has not taken hold to date. For instance, after noting the varying interpretations of § 7482 with respect to the standard of review to be afforded to Tax Court

563 I.R.C. § 7482(a); *see also* Banks v. Commissioner, 322 F.2d 530 (8th Cir. 1963); Hirsch v. Commissioner, 315 F.2d 731 (9th Cir. 1963).

564 790 F.2d 1409 (9th Cir. 1986).

565 *Id.* at 1412.

566 *See id.*

567 *See id.* (citing 5 U.S.C. § 706(2)(A)).

568 *See* David F. Shores, *Deferential Review of Tax Court Decisions:* Dobson *Revisited*, 49 TAX LAW. 629, 646–53 (1996) (detailing the legislative history of the 1948 statutory revision and arguing that the legislation did not overturn the deferential standard of review to be afforded to Tax Court decisions pursuant to *Dobson*). Professor Shores contended that deferential review of Tax Court decisions not only was warranted under § 7482, but also desirable as a matter of policy. *See id.* at 671–73; *see also* Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 TAX LAW. 361 (2005) (concluding that deferential review of Tax Court decisions provides the best option for the future of tax adjudication). *But see* Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 64 DUKE L.J. 1835 (2014) (contending that *Dobson* has been legislatively abrogated as a doctrinal matter, and that this interpretation comports with sound policy); Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable*, 77 OR. L. REV. 235 (1998) (exploring adverse consequences of heightened deference to the Tax Court's legal conclusions).

decisions, the Ninth Circuit in *Vukasovich* concluded that affording a special level of deference to Tax Court decisions was inappropriate.[569]

9. Precedential Value of Decisions of Other Courts

Very shortly after the enactment of the Revenue Act of 1926, the Board became aware that its status as a national trial tribunal presented it with an unusual problem regarding the role of precedent in its decisions. On October 13, 1926, A. W. Gregg, General Counsel for the Bureau of Internal Revenue met with Chairman Korner of the Board to discuss several recent decisions of the Board involving a specific point in the excess profits tax.[570] Although the Board had accepted the Government's position in each of these cases,[571] several decisions of other courts had adopted a contrary view.[572] The situation of the Treasury in these circumstances was difficult. It could adhere to the position that it had taken in the past, but the choice of the litigating forum was largely discretionary with the taxpayer and it seemed that further defeats were inevitable because sensible taxpayers simply would avoid taking their cases upon this point to the Board. On the other hand, it did not seem to be an entirely satisfactory solution to the problem for Treasury to change its position in reliance on the court decisions. In its view, the decisions of the Board were technically correct and ought to be followed by Treasury in the administration of the tax laws absent a contrary determination by the Supreme Court. At his meeting with Chairman Korner, Mr. Gregg requested an indication from the Board as to whether it would continue to adhere to its original position; if so, Treasury also would adhere to that position in the hope of ultimately obtaining a conflict among the circuit court decisions thereby gaining entry to the Supreme Court. That the problem was sorely troubling to the Treasury is indicated by the mere fact of the ex parte communication from the General Counsel to the Chairman of the Board. The matter was raised three days later at a Board conference, but the Board, quite properly, did not take any action with respect to Mr. Gregg's request.[573]

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[569] *Vukasovich*, 790 F.2d at 1413. However, the court did note that Tax Court judgments "in its field of expertise are always accorded a presumption that they correctly apply the law." *Id.*

[570] The circumstances and scope of the meeting are described in a memorandum from Chairman Korner, Oct. 14, 1926, filed at the U.S. Tax Court in "Appeals: Precedent of Appellate Courts."

[571] Phoenix Seed & Feed Co., 2 B.T.A. 909 (1925); Mesa Milling Co., 2 B.T.A. 770 (1925); St. Louis Screw Co., 2 B.T.A. 649 (1925); F. J. Thompson, Inc., 1 B.T.A. 535 (1925).

[572] Curtis Mfg. Co. v. United States, 62 Ct. Cl. 115 (1926); John B. Semple & Co. v. Lewellyn, 1 F.2d 745 (W.D. Pa. 1924), *aff'd*, 10 F.2d 1023 (3d Cir. 1926).

[573] Board Conference Minutes, Oct. 16, 1926.

Most tribunals have little difficulty in identifying governing precedent. In the case of a trial court, for example, controlling precedent generally includes the pronouncements of courts having appellate jurisdiction over its decisions. On the other hand, courts do not regard themselves bound by the rulings of other courts of equal rank, or even by the rulings of courts of higher rank if such courts do not have jurisdiction to review the decisions of the lower court.

The position of the Tax Court with respect to the courts of appeals has always been anomalous. Since the courts of appeals have jurisdiction to review Tax Court decisions, it can be argued that the Tax Court is not free to ignore the precedents of these appellate courts. Yet each of the circuit courts is of coordinate rank and is therefore free not to follow the precedents of the others. Thus, the Tax Court has 12 overseers who may, and sometimes do, differ among themselves. The question necessarily presented in these circumstances is when, if at all, the Tax Court should be bound by the precedent of a court of appeals ruling.

Until 1970, the Tax Court consistently had taken the position that it was not bound to follow the precedent of any of the courts of appeals. Although this was the policy of the court since its inception, it was neither explicitly stated nor rationalized until the 1957 decision in *Lawrence v. Commissioner*,[574] a court-reviewed opinion in which no dissents were noted. In *Lawrence*, the taxpayers had filed their return for the year in issue with a collector of internal revenue located in the Ninth Circuit. Under the rules then applicable, appellate venue would be in that circuit unless the parties stipulated otherwise.[575] Such a stipulation was unlikely since a previously decided Ninth Circuit decision seemed to favor the position adopted by the taxpayers.[576] Nevertheless, the Tax Court refused to follow that precedent and instead held for the Government. The court recognized that it had the obligation to consider seriously all adverse precedents in the appellate courts and to follow such precedents if it concluded that they were correct, even if such a conclusion would require the overruling of previously decided Tax Court decisions.[577] However, principally for three reasons, the court believed itself justified, and indeed obligated, to refuse to follow decisions of the courts of appeals that in the view of the Tax Court were decided wrongly.

First, it was clear that Congress perceived one of the functions of the Tax Court to be the creation of a uniform body of precedents to govern the

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[574] Lawrence v. Commissioner, 27 T.C. 713 (1957), *rev'd per curiam*, 258 F.2d 562 (9th Cir. 1958).

[575] *See supra* notes 485–487 and accompanying text.

[576] Slaff v. Commissioner, 220 F.2d 65 (9th Cir. 1955).

[577] 27 T.C. 713, 716 (1957).

interpretation of the tax laws.[578] For this reason, Congress placed considerable emphasis on the importance of the court conferences at which the judges could exchange views and prevent the promulgation of conflicting decisions.[579] In the opinion of the court, uniformity of application of the tax laws was of prime concern in its creation, and it believed that this objective would be compromised if it were constrained to adhere to authority with which it disagreed simply because of the vagaries of appellate venue.[580]

Second, the court in *Lawrence* found support for its conclusion in the problems that could arise with respect to identifying the applicable circuit. Under venue rules, the parties could stipulate venue in any court of appeals they desired.[581] Additionally, even though at the time *Lawrence* was decided appellate venue generally was determined under the objective standard of where the disputed return was filed,[582] in some cases appellate venue might lie in multiple circuits with respect to identical issues. Such multiple venue problems could exist in the case of partners in the same partnership who filed their returns in different circuits.[583] The cases might be heard together in the Tax Court but could be appealed to different appellate courts. Moreover, a similar venue problem could exist with respect to the same taxpayer if the Tax Court proceeding involved a single issue spanning more than one tax year and the returns for those years were filed in different circuits.[584]

Finally, the Tax Court also believed its result in *Lawrence* was demanded by the difficulty sometimes encountered in determining precisely what rule of law applied in a particular circuit.[585] Sometimes precedents were not as clearly stated as might be hoped and other times seemingly conflicting lines of authority existed within the same circuit.

For these reasons, the Tax Court concluded that the cause of tax administration would best be served by its continuing to apply its own view

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[578] *Hearings on Revenue Revision, 1925, before the House Comm. on Ways and Means*, 69th Cong., 1st Sess. 953 (1925) (testimony of A. W. Gregg, Solicitor of Internal Revenue).

[579] H.R. REP. NO. 69-1, at 18 (1925); S. REP. NO. 69-52, at 35 (1926).

[580] 27 T.C. at 718. Unquestionably, some legislators did regard the promotion of uniformity as a vital function of the Board. 65 CONG. REC. 2621 (1924) (remarks of Mr. Young). Nevertheless, it is difficult to understand how this uniformity was to be achieved under either the 1924 or the 1926 legislation, in view of the fact that the Board was not the final arbiter of tax disputes.

[581] I.R.C. § 7482(b)(2).

[582] *See supra* notes 482–499 and accompanying text.

[583] 27 T.C. at 719.

[584] *Id.*

[585] *Id.*

of the law regardless of adverse precedents in the courts of appeals, even in circuits that would most likely hear an appeal from the Tax Court decision.

The *Lawrence* and *Dobson* rules were similar in at least one respect—the particular court promulgating each rule was virtually alone in perceiving its merits. The *Lawrence* rule attracted almost unanimous unfavorable criticism,[586] and a serious, although unsuccessful, effort was made to have it legislatively overruled.[587] Additionally, three circuit courts that addressed the issue manifested varying degrees of displeasure with the Tax Court's practice of not following applicable precedent of higher courts.[588] Perhaps for these reasons *Lawrence* was applied sparingly,[589] at least explicitly, and few were surprised when, in 1970, the Tax Court announced in *Golsen v. Commissioner* that "[n]otwithstanding a number of considerations which originally led [to *Lawrence*] . . . it is our best judgment that better judicial administration requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone."[590]

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586 Louis A. Del Cotto, *The Need for a Court of Tax Appeals: An Argument and a Study*, 12 BUFFALO L. REV. 5, 8–10 (1962); Jack Lee Orkin, *The Finality of the Court of Appeals Decisions in the Tax Court: A Dichotomy of Opinion*, 43 A.B.A. J. 945 (1957); F. Trowbridge Vom Baur & George M. Coburn, *Tax Court Wrong in Denying Taxpayer the Rule Laid Down in His Circuit*, 8 J. TAX'N 228 (1958); Note, *Status of a Controversy: The Tax Court, the Courts of Appeals and Judicial Review*, 32 OHIO ST. L.J. 164 (1971); 57 COLUM. L. REV. 717 (1957); 7 DUKE L.J. 45 (1957); 70 HARV. L. REV. 1313, 1315 (1957). The *Lawrence* opinion did, however, have at least one defender: the Commissioner of Internal Revenue, who believed the decision to be sound as encouraging uniformity. *Hearings on S. 2041 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pt. 2, 158 (1968) (testimony of Sheldon Cohen).

587 H.R. 11450, 89th Cong., 2d Sess. (1966), introduced by Chairman Mills of the Ways and Means Committee, at the request of the American Bar Association, would have added I.R.C. § 7459(g):

> A decision of a United States Court of Appeals shall be given effect by the Tax Court in the same manner and to the same extent in all cases reviewable by such United States Court of Appeals under section 7482(b)(1) as it would be given effect by a district court in such circuit.

588 Sullivan v. Commissioner, 241 F.2d 46, 47 (7th Cir. 1957) ("a decision by one judge of the Tax Court, which, in effect, overrules a decision of the court of appeals in the circuit in which both cases arose, is not consonant with the responsibilities of the respective tribunals involved"); Stacey Mfg. Co. v. Commissioner, 237 F.2d 605, 606 (6th Cir. 1956) ("the Tax Court . . . is not lawfully privileged to disregard and refuse to follow . . . the settled law of the circuit"); Holt v. Commissioner, 226 F.2d 757, 758 (2d Cir. 1955) ("We seem to play at hide-and-go-seek with the Tax Court in these cases.").

589 *See* John J. Charles, *Status of a Controversy: The Tax Court, the Courts of Appeals, and Judicial Review*, 32 OHIO ST. L.J. 164, 168 (1971).

590 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

The *Lawrence* rule was not only defensible but clearly correct when the appeal from the Tax Court reasonably could be considered to be taken to a circuit that had not had occasion to consider the particular issue involved. In such circumstances, more harm than good would be done by requiring the Tax Court to adopt a view with which it did not agree simply because authority for such view existed in one or more other circuits. Since courts of appeals are free to disagree with each other, reversal by the appellate court would be just as likely whether the Tax Court adopted its own view or the view of another circuit. Accordingly, *Golsen* has no application to cases involving questions on which there is no precedent in the appropriate court of appeals.[591] In this regard, the Tax Court has held that a circuit court bench decision, not having precedential value within the circuit, will not be regarded as precedent for purposes of *Golsen*.[592]

In addition to those cases in which the question has not been addressed properly by the appropriate court of appeals, *Golsen* is inapplicable in at least two other situations. First, a seemingly controlling circuit decision may not be followed if the court believes that decision to be distinguishable on its facts[593] or in the issues presented.[594] In addition, the court may refuse to adhere to a precedent if it views the precedent as stale because of some intervening event, such as new enactments, new regulations or a well-considered line of cases in other circuits.[595] In both instances, the precedential value of the earlier decision is dubious and the teaching of *Golsen* that decisions "squarely in point" must be given effect is not offended.[596]

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591 Webb v. Commissioner, 67 T.C. 1008 (l977); Lewis v. Commissioner, 65 T.C. 625 (l975); Patman, Young & Kirk, P.C. v. Commissioner, T.C. Memo. 1975-185, 34 T.C.M. (CCH) 798, *aff'd*, 536 F.2d 142 (6th Cir. 1976).

592 Ruegsegger v. Commissioner, 68 T.C. 463 (1977).

593 *E.g.*, Focht v. Commissioner, 68 T.C. 223 (1977); Allen v. Commissioner, 66 T.C. 340 (1976); Bridges v. Commissioner, 64 T.C. 968 (1974).

594 Thompson v. Commissioner, 66 T.C. 737 (1976); Richmond, Fredericksburg & Potomac R.R. v. Commissioner, 62 T.C. 174 (1974), *aff'd*, 528 F.2d 917 (4th Cir. 1975); Page v. Commissioner, 33 T.C.M. (CCH) 64 (1974), *aff'd*, 524 F.2d 1149 (9th Cir. 1975).

595 Kent v. Commissioner, 61 T.C. 133 (1973); *see also* Kowalski v. Commissioner, 65 T.C. 44 (1975) (finding *Golsen* not controlling with regard to a Third Circuit decision as that case had been decided under the 1939 Code).

596 *See* Thompson v. Commissioner, 66 T.C. 737, 742 n.6 (1976); Spalding v. Commissioner, T.C. Memo. 1975-250, 34 T.C.M. (CCH) 1074, 1076; Page v. Commissioner, T.C. Memo. 1975-15, 33 T.C.M. (CCH) 64, 65, *aff'd,* 524 F.2d 1149 (9th Cir. 1975).

Within these limitations, *Golsen* has been applied consistently.[597] If the venue for an appeal is in a court that has clearly expressed an opinion on the issue involved, good reason exists for requiring the Tax Court to follow the applicable precedent whether it is in agreement. The appellate court presumably would follow its own precedent on an appeal from a Tax Court decision and a contrary ruling by the Tax Court would simply put the losing party in the Tax Court to the hardship of appealing to gain a reversal. Moreover, as a matter of sound judicial administration it would seem that a lower court should not have discretion to refuse to follow the precedent of a court to which its cases must be appealed, and in this regard, it seems reasonable that the Tax Court should be viewed as a lower court in relation to the appellate court to which a particular decision is appealable.

The reasons given in *Lawrence* for not applying these policies were not compelling. The fact that the applicable precedent within a particular circuit may be hard to discern either because of cryptic or conflicting decisions should not obviate a lower court's duty to apply such precedent. Certainly such a problem would not relieve a district court from following precedent within its circuit, nor, even under *Lawrence*, would it relieve the Tax Court from following Supreme Court precedent. The problem is a routine one for any court.

The second justification for *Lawrence*, that appellate venue may be in doubt in some cases, also was not weighty. In the great bulk of cases there is no problem in determining the court to which an appeal will lie. This was particularly true at the time *Lawrence* was decided when venue was determined by the location of the return filing.[598] Although the parties theoretically had (and still have) the option of jointly stipulating any venue they desire,[599] the possibility of the exercise of such an option would be remote if the court that would hear the appeal in the absence of a stipulation had ruled in favor of one of the parties.[600] Moreover, even at the present time, when appellate venue is predicated principally on either the residence of the taxpayer or its principal place of business,[601] the determination of proper venue will not present a problem in most cases; in those few cases in which it does, the Tax Court need not feel constrained to follow the precedent of any particular court of appeals. As to those cases in which multiple appellate venues exist because there are multiple taxpayers

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597 *E.g.*, McCormac v. Commissioner, 67 T.C. 955 (1977); Collins Electrical Co. v. Commissioner, 67 T.C. 911 (1977); Capri, Inc. v. Commissioner, 65 T.C. 162 (1975).

598 *See supra* notes 485–487 and accompanying text.

599 I.R.C. § 7482(b)(2).

600 This fact was taken into account in *Golsen*. 54 T.C. at 757 n.15.

601 I.R.C. § 7482(b)(1).

involved,[602] there may be more than one reasonable policy that could be pursued by the Tax Court.[603] However, the fact that these cases may present difficulties or that appellate venue may not be determinable in a few cases, is not justification for refusing to follow applicable precedent in a circuit when it is virtually certain that the appeal, if any, will be venued there.

Finally, *Lawrence* was not defensible on the ground that the Tax Court is a national court, the formation of which was intended to promote uniformity of tax decisions. It is true that the Tax Court's jurisdiction is national, and it is also true that an important purpose of the Tax Court is the promulgation of precedents to aid in the administration of the tax laws.[604] But it does not follow that these considerations justify ignoring applicable precedent in the courts of appeals. The courts of appeals are legally free to refuse to follow Tax Court precedents, and it thus can be concluded that Congress, although it may have regarded uniformity as desirable, did not view the Tax Court as the instrument for accomplishing this goal. If it did, it would have provided for no review of Tax Court decisions (except possibly by the Supreme Court) or, less drastically, it would have provided review in only a single appellate court instead of 12

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[602] At the time *Lawrence* was decided, multiple appellate venues as to the same taxpayer could exist because different tax years were involved and the taxpayer filed returns for those years within different circuits. However, under present law, appellate venue is based on the residence or principal place of business of the taxpayer at the time the petition to the Tax Court was filed. I.R.C. § 7482(b)(1). Thus, it will be unusual for a single Tax Court case, involving a single taxpayer, to be appealable to more than one court of appeals. Such a situation could arise if a single taxpayer files multiple petitions which are later consolidated in a single case, and the taxpayer was a resident in different circuits when the petitions were filed. *Compare* Fausner v. Commissioner, T.C. Memo. 1971-277, 30 T.C.M. (CCH) 1187, *aff'd,* 472 F.2d 561 (5th Cir.), *aff'd per curiam*, 413 U.S. 838 (1973) *with* Fausner v. Commissioner, 55 T.C. 620 (1971).

[603] If, for example, a single Tax Court case involves several shareholders of the same corporation who reside in different circuits, it might seem unfair for the Tax Court to treat the taxpayers differently depending on their residence. Nevertheless, although it would be reasonable to reach a uniform result in such a case, it is believed that the sounder result would be to apply *Golsen*. The uneven application of the law in such a case would be dramatic, but not essentially any more illogical than that reached in separate cases involving different taxpayers but the same issue. *Compare* Fausner v. Commissioner, T.C. Memo. 1971-277, 30 T.C.M. (CCH) 1187, *aff'd*, 472 F.2d 561 (5th Cir.), *aff'd per curiam*, 413 U.S. 838 (1973) *with* Fausner v. Commissioner, 55 T.C. 620 (1971) (applying different rules to the identical taxpayer on the basis of *Golsen*).

[604] *See supra* note 578.

courts of appeals.[605] Moreover, even if it is accepted that uniformity is an important and congressionally desired goal, it cannot be said that the *Lawrence* rule did anything to further this end. *Lawrence* did not and could not bind the courts of appeals to follow a uniform precedent espoused by the Tax Court. Nothing was accomplished by the Tax Court's adhering to its views except requiring the losing party in the Tax Court to take an appeal to achieve a more or less forgone result. The Tax Court could exercise the same persuasive authority by deciding its cases in accordance with controlling precedent while at the same time expressing any reservations that it might have about the correctness of such precedent. In fact, that is now the practice under *Golsen*.[606]

It has been suggested that the decision in *Golsen* was a consequence of the Tax Court's 1969 change in status from an independent agency of the executive branch to a court of record established under article I of the Constitution.[607] In this view, prior to the 1969 changes the Tax Court saw its administrative role as preeminent and therefore strove to promote uniformity through the *Lawrence* rule; however, in *Golsen,* the court recognized its new judicial status and thereby subordinated its opinions to those of a reviewing court in the interest of efficient dispute adjudication. The fact that *Golsen* was announced less than a year after the 1969 legislative changes lends some support to this theory, and it is not unlikely that some Tax Court judges were led to their decision in *Golsen* by their heightened sensitivity to the Tax Court's judicial role. Nevertheless, since the effect of the 1969 Act on the function and powers of the court were minimal, it probably would be erroneous to place a great deal of emphasis on this explanation of *Golsen*. Rather, the decision seems primarily explainable in terms of a recognition that, regardless of the benefits of uniform application of the tax laws, an adjudicative body must realistically take account of its power to achieve such a goal. Even the Service, an administrative agency responsible for uniform administration of the tax laws, has recognized this fact in a ruling in which it states that it will follow precedent within a particular circuit even though it disagrees with the decision, while following a different rule in other areas of the country.[608]

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605 An illustration of such a technique may be found in the Emergency Price Control Act of 1942, under which judicial review of determinations of the Price Administrator could only be had in a single Emergency Court of Appeals and the Supreme Court. Act of Jan. 30, 1942, ch. 26, § 204(c)–(d), 56 Stat. 32.

606 *See* Of Course, Inc. v. Commissioner, 59 T.C. 146, 148 (1972); Smith v. Commissioner, 55 T.C. 260, 269–70 (1970), *vacated and rem'd*, 457 F.2d 797 (5th Cir. 1972).

607 John J. Charles, *Status of a Controversy: The Tax Court, the Courts of Appeals, and Judicial Review*, 32 OHIO ST. L.J. 164, 170 (1971).

608 Rev. Rul. 72-583, 1972-2 C.B. 534 (dealing with the gift taxation consequences of political contributions). The similarity of the ruling to *Golsen* was

noted in RICHARD B. STEPHENS, GUY B. MAXFIELD & STEPHEN A. LIND, FEDERAL ESTATE AND GIFT TAXATION § 9-5 n.21 (3d ed. 1974).

PART XII

SPECIAL TRIAL JUDGES

A. Historical Origins

A persistent problem in the development of the Board/Tax Court has been the management of its heavy workload. Its division structure and many of its procedures, such as pleadings and stipulations, have been shaped largely by the statutory directive that decisions "be made as quickly as practicable."[1] Soon after the creation of the Board, a controversy developed with regard to the use of personnel, other than members of the Board, to assist in the hearing and decision process. In connection with the Revenue Act of 1928, the American Bar Association, concerned over the Board's developing backlog of cases, recommended to Congress that special masters similar to those then employed in the Court of Claims be used to relieve the divisions of the necessity of taking evidence in cases in which lengthy evidentiary hearings would be likely.[2] As part of their duties, the masters would prepare detailed findings of fact, thereby reducing the burden on the divisions.[3]

Although the recommendation of the ABA was not incorporated into the provisions of the 1928 Revenue Act, renewed support for the use of such commissioners was advanced in the report of a joint committee of Board and Treasury personnel in 1937.[4] The committee proposed that use of commissioners should be limited to cases that were likely to involve lengthy hearings and voluminous records.[5] Although it was suggested that the broad language of the 1926 Act permitted the use of commissioners

[1] I.R.C. § 7459(a).

[2] *Hearings on Revenue Revision, 1928, Before the House Comm. on Ways and Means,* 70th Cong., 1st Sess. at 539–41 (1928) (statement of ABA) [hereinafter cited as 1928 House Hearings]; *see also* Phillips, *supra* note 242; *American Bar Association Tax Revision Recommendations*, 3 NAT'L INC. TAX MAG. 403 (1925).

[3] 1928 House Hearings*, supra* note 2, at 540.

[4] Report of the Joint Committee of Board of Tax Appeals and Chief Counsel's Office, Dec. 17, 1937, at 28, filed at the U.S. Tax Court in "Field Divisions: Memoranda & Correspondence" [hereinafter cited as Joint Committee Report]. In the Joint Committee Report, the commissioner was referred to as an "examiner." The purpose of such an examiner was to assist the Board in the taking of testimony, receiving other evidence and preparing proposed findings of fact.

[5] *Id.*

without the necessity of a statutory amendment,[6] the committee felt otherwise and stated that legislation would be necessary to permit the Chairman of the Board to appoint, use, and remove such commissioners.[7] Subsequently, in the Revenue Act of 1943, the Tax Court's Presiding Judge was given the authority to designate attorneys from the legal staff of the court to act as commissioners in particular cases.[8] In response to the newly authorized power, the court promulgated a procedure under which the commissioner would conduct the hearing in accordance with the court's rules of practice, the parties would have 30 days in which to file proposed findings of fact, and the commissioner would prepare and submit to the court or division a report of such findings with service made on both parties.[9] The parties could then file exceptions to the commissioner's findings within 20 days.[10] Thus, the parties would have an opportunity to express views on the proposed findings of fact in advance of the issuance of the opinion, an opportunity that was not available in cases in which the hearing took place before a judge of the court.[11]

The commissioner procedure was used sparingly in its infancy.[12] In fact, the first designation of a commissioner occurred in 1948.[13] In the resulting

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[6] *See* Memorandum from T.W.S. to Mr. Logan Morris, Member, Board of Tax Appeals, Apr. 5, 1937, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

[7] *See* Joint Committee Report, *supra* note 4, at 28.

[8] Revenue Act of 1943, ch. 63, § 503(b), 58 Stat. 72, *amending* Int. Rev. Code of 1939, ch. 5, § 1114, 53 Stat. 160. Legislative history of the provision is found in H.R. REP. No. 78-871, at 71 (1943), and S. REP. No. 78-627, at 94 (1943). The reports indicate that commissioners were to be attorneys from the legal staff of the court, designated to act in particular cases, by written order of the presiding judge. The Tax Court was given the power to promulgate rules for the use of commissioners.

[9] TAX CT. R. 48 (July 1, 1944 ed.). A commissioner, in cases under the 1944 Tax Court Rule 48 and present Rule 182, has no power to enter decision in a case. Germain v. Commissioner, 11 T.C.M. (CCH) 226 (1952).

[10] TAX CT. R. 48(c) (July 1, 1944 ed.).

[11] *Compare* TAX CT. R. 48(c) (July 1, 1944 ed.) *with* Int. Rev. Code of 1939, ch. 5, §§ 1117(a)(b), 53 Stat. 162 (now codified at I.R.C. § 7459). Eight years later, the Tax Court amended Rule 48, in an effort to streamline the exception procedure. Whereas earlier the parties had to file exceptions to the commissioner's proposed findings of fact within 20 days of service, the court merged the filing of exceptions into the requirement of filing briefs. TAX CT. R. 48(d) (Sept. 5, 1952 ed.). The time for filing initial briefs, including exceptions to the proposed findings of fact, was later extended to 60 days. TAX CT. R. 182(a) (Jan. 1, 1974 ed.).

[12] *See* Memorandum from Chief Judge Murdock to Judges of the Tax Court, Nov. 15, 1956, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence" [hereinafter cited as Murdock, 1956]; *see also* Edward N. Polisher, *Tax Court Commissioners*, 28 TAXES 413 (1950).

opinion, the court emphasized that only the findings of fact were the commissioner's,[14] and that the commissioner did not decide any of the legal issues involved.[15]

The infrequent use of the commissioner procedure and the clear demarcation of the commissioner's role were indicative of broader questions that faced the court: Would the use of commissioners be beneficial to the status of the court in the long run, and would it be effective in reducing the amount of time spent by a judge in a particular case? Diverging views with respect to these questions existed on the court. Most judges apparently opposed any substantial use of commissioners, and in practice, their view prevailed.[16] However, others believed that the commissioner system should be expanded. In their view, the opponents of the commissioner procedure had improperly placed too much emphasis on the quantitative results of each commissioner. Rather, the important consideration was how much additional work a judge would be able to produce, freed from the burden of those cases assigned to commissioners for hearing and preparation of findings of fact.[17]

Those opposed to the commissioner procedure argued that extensive use of the commissioners would not result in any substantial savings of time because the judges were still required to study the record to reach a decision and prepare an opinion.[18] In this regard, critics also contended that a commissioner would not be able to convey accurately the "sense" of the witnesses to the judge charged with the writing of the opinion.[19] Additionally, the use of commissioners was viewed as not befitting a judicial tribunal, although this viewpoint ignored the fact that the court was not technically a full judicial body at the time and that the Court of Claims used commissioners extensively during this period.[20] The opponents suggested that such a process might create an unfavorable public impression since those hearing the case would not be judges and might thereby prejudice the court's efforts to be accepted as a judicial tribunal in fact if not in form.[21] Finally, they noted that the actual case production by the commissioners over a seven-year period from 1948 to 1955 had been slow, and that

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[13] The first case in which the court used a commissioner was decided in 1948. *See* Bibb Mfg. Co. v. Commissioner, 12 T.C. 665 (1949).

[14] *Id.* at 672.

[15] *Id.*

[16] Tax Court Conference Minutes, Apr. 24, 1959.

[17] *Id.* (remarks of Judge Fisher).

[18] *See* Murdock, 1956, *supra* note 12, at 5.

[19] *Id.*

[20] *Id.* at 4–5.

[21] *Id.* at 5.

reassignment of certain cases from the commissioners to the judges probably was necessary to dispose of them.[22]

Contrary to the prevalent view on the court opposing extensive use of commissioners, the American Bar Association, in its 1957 proposal to remove the Tax Court from the executive to the judicial branch of Government, recommended a broad expansion in both the use and powers of the commissioners.[23] Under the proposal, the Tax Court would be authorized to appoint not more than ten commissioners, who would be paid at the same rate as commissioners of the Court of Claims.[24] In addition to reporting findings of fact, the commissioners also would make recommendations for conclusions of law and decisions. The parties would have an opportunity to file exceptions to the findings and recommendations, and hearings would be provided by the court within a reasonable time. If no exceptions were filed, the findings of fact and the conclusions of law and decisions would become the decisions of the court. Finally, the court would not be permitted to consider issues not raised by exception to the commissioners' reports.[25] These recommendations were incorporated unchanged as part of the proposed legislation, submitted to Congress in 1958 and 1959, to give the court article III status.[26]

Although the court welcomed the move toward judicial status, it opposed the proposed statutory provisions concerning the procedures to be employed in proceedings before a commissioner.[27] The court indicated that the proposed procedures, if employed, would result in both a fundamental alteration of the court's nature and a disruption of its operations.[28] For example, the requirement of a hearing provided "by the court," if interpreted to mean review by the full court, would result in greater delays in rendering decision in a case.[29] Moreover, the court would not be permitted to consider any issue of fact not raised by exception to the

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[22] *Id.* at 5–6.

[23] *See* Tax Court Act, Feb. 1957, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence" [hereinafter cited as Tax Court Act]. For a discussion of the American Bar Association proposals in respect of article III status for the court, see Part IV.B.2.

[24] Tax Court Act, *supra* note 23, at 9.

[25] *Id.* at 14.

[26] *Compare* Tax Court Act, *supra* note 23, §§ 913, 2651 *with* S. 3796, 85th Cong., 2d Sess. §§ 913, 2651 (1958) *and* S. 1274, 86th Cong., 1st Sess. §§ 913, 2651 (1959).

[27] *E.g.*, Letter from Chief Judge Murdock to Senator Eastland, July 17, 1959, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" Letter from Judge Murdock to H. Kilpatrick, Jan. 22, 1957, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence."

[28] Memorandum from Judge Train to Chief Judge Murdock, July 17, 1959, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence" [hereinafter cited as Train].

[29] *Id.* at 1.

commissioner's report. Such a format, the court concluded, would change the Tax Court from a trial court to a court of review.[30] Rather, the court concluded, if it was considered necessary to include a provision with respect to proceedings before commissioners, the language of the then-present law should be retained.[31] The ABA proposal for new court status and a change in the commissioner procedure was not enacted, and the procedures employed in proceedings before commissioners remained subject to court determination.[32]

Although the commissioner system was proposed originally as a means of handling lengthy evidentiary cases, it emerged as an important aspect of Tax Court procedure in connection with small tax cases.[33] The small tax case procedure was the result of congressional concern over the failure to provide a readily available means of impartial review of modest deficiency disputes.[34] In response to this concern, the court, in 1968, adopted a procedure for small tax cases that provided for a simplified petition, early assignment to trial calendar, informal trial procedures and waiver of briefs.[35] However, Congress believed that the then-existing statutory provisions, with their requirement of technical rules of evidence, precluded such a procedure from achieving its greatest potential.[36] Accordingly, the 1969

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[30] *Id.* Note that this argument later would be advanced (unsuccessfully) by the taxpayers in *Freytag v. Commissioner*, 904 F.2d 1011 (5th Cir. 1990), as a basis for challenging the propriety of the assignment of their case to the special trial judge. See text accompanying *infra* notes 121–124.

[31] Letter from Chief Judge Murdock to Senator Eastland, July 17, 1959, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" Train, *supra* note 28.

[32] *Compare* TAX CT. R. 48 (Sept. 1, 1965 ed.) *with* TAX CT. R. 48 (Nov. 15, 1952 ed.).

[33] I.R.C. § 7463.

[34] S. REP. No. 91-552, at 302 (1969).

[35] During the fall of 1968, the Tax Court "in recognition of the apparent demand for a procedure for handling small tax claims simply and expeditiously" drafted a separate set of rules to accomplish these objectives. These new procedures became effective Jan. 1, 1969. Memorandum from Chief Judge Drennen to Tax Court Judges, Nov. 26, 1968, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" *see also* Tax Court Conference Minutes, Nov. 1, 15, 29, 1968.

[36] At this time the Internal Revenue Code required that all proceedings begun in the Tax Court, irrespective of dollar amount, be conducted with equal formality. Laurence Goldfein and Michael I. Saltzman, *The New Tax Court Small Claims Division: How It Will Operate*, 34 J. TAX'N 2 (1971). Section 7453 provides that every hearing must be conducted in accordance with the rules of evidence applicable to trials without a jury in the District Court for the District of Columbia. Section 7458 requires every proceeding to be stenographically transcribed. At the conclusion of

Tax Reform Act authorized a simplified and relatively informal procedure for deficiency disputes involving not more than $1,000.[37] This amount has been periodically raised over time to $1,500, $5,000, $10,000, and, most recently, to $50,000.[38]

Legislative history indicates that Congress intended the Tax Court to make extensive use of commissioners in small tax cases,[39] and certain statutory modifications with respect to commissioners were designed to facilitate this objective. Of importance in this regard was authorization for the court to appoint full-time commissioners who would be compensated at the same rate as commissioners of the Court of Claims.[40] Prior to this statutory revision, the court had been authorized only to appoint an attorney from the legal staff of the court to act as a commissioner on a case-specific basis.

Pursuant to the 1969 amendment, the court established a small tax case division under the supervision of a judge of the court.[41] The majority of the

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each of these proceedings the court is compelled to report all of its findings of fact, opinions and memorandum opinions. I.R.C. § 7459(b).

[37] Tax Reform Act of 1969, Pub. L. No. 91-172, § 957(a), 83 Stat. 733 (enacting I.R.C. § 7463). If neither the amount of the deficiency placed in dispute, nor the amount of any claimed overpayment exceeded $1,000 for any taxable year in the case of income and gift tax or $1,000 for estate tax, the taxpayer was given the option to request that the proceeding be conducted under a small case procedure. In addition, the Act provided that notwithstanding statutory limitations which require certain formal rules of evidence, publication, hearings, etc., the small case procedure would be conducted in accordance with such rules of evidence, practice and procedure as the Tax Court might prescribe.

[38] The State and Local Fiscal Assistance Act of 1972 increased the limit to $1,500. Pub. L. No. 92-512, § 203(b)(2), 86 Stat. 919, 945 (1972). The Revenue Act of 1978 increased the jurisdictional amount to $5,000. Pub. L. No. 95-600, § 502(a)(1), 92 Stat. 2763, 2879 (1978). The Tax Reform Act of 1984 increased the jurisdictional amount to $10,000. Pub. L. No. 98-369, § 461 (a), 98 Stat. 494, 823. Lastly, Congress increased the ceiling amount on small tax cases to $50,000 as part of the Internal Revenue Service Restructuring and Reform Act of 1998. Pub. L. No. 105-206, § 3103, 112 Stat. 685, 731 (1998).

[39] S. REP. No. 91-552, at 304 (1969).

[40] Tax Reform Act of 1969, Pub. L. No. 91-172, § 958, 83 Stat. 734. In 1986, Congress set the compensation of special trial judges to equal 90 percent of the salary paid to a presidentially appointed judge of the court. Tax Reform Act of 1986, Pub. L. No. 99-514. § 1556(a), 100 Stat. 2754 (adding I.R.C. § 7443A(d)(1)).

[41] *See* Memorandum from the Ad Hoc Committee on Small Tax Cases to the Chief Judge, Apr. 2, 1970, at 2, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence," wherein it was recommended that the Chief Judge assign one of the judges of the court as the judge in charge of such division. Judge Howard A. Dawson, Jr. was designated as the first judge in charge of the Small Tax Case Division. *See* Tax Court Conference Minutes, Apr. 17, 1970; General Order No. 2, U.S. Tax Court, Sept. 1, 1970.

small tax case sessions are assigned to special trial judges (the official designation since 1984[42]) for hearing and the preparation of summary findings of fact and opinion.[43] The report of the special trial judge is then submitted to the chief judge, or if the chief judge so directs, to a judge or division of the court for review.[44] This review is conducted by the judge heading the small tax case division. To expedite the resolution of small tax cases, which generally involve well-settled legal questions, such opinions generally are not subsequently reviewed by the chief judge if authored by a special trial judge.[45]

Although the Tax Reform Act of 1969 authorized commissioners and later special trial judges to issue summary opinions in small tax cases, the commissioner/special trial judge lacked authority to enter the decision in such cases.[46] Congress corrected this shortcoming in 1980, granting special trial judges the authority to make the decision of the court in small tax cases.[47]

The small tax case procedure has proved to be remarkably popular with taxpayers who invoke the Tax Court's jurisdiction, the majority of whom chose to prosecute their cases on a self-represented basis. Given the large number of small tax cases filed in the Tax Court, the small tax case procedure is detailed in Part XIII in connection with a discussion of the Tax Court's institutional support for self-represented litigants.

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[42] In 1975, the court issued a General Order which provided that a "commissioner" should be referred to as a "special trial judge" except when in conflict with statute. General Order No. 4, 65 T.C. IV (1975). The Tax Reform Act of 1984 changed the statutory designation of a "commissioner" to "special trial judge." Pub. L. No. 98-369, § 464, 98 Stat. 494, 824–25.

[43] In more recent years, as the number of special trial judges has declined and the number of cases being tried under the small tax case procedures has increased (due in large part to the increase in the limitation on the amount in controversy), judges of the court have presided over a substantial share of small tax cases.

[44] The Tax Court Rules of Practice and Procedure provide that a special trial judge presiding over trial of a small tax case shall "prepare a summary of the facts and reasons for the proposed disposition of the case" as soon as practicable after trial. TAX CT. R. 182(a) (July 6, 2012 ed.). The summary opinion is to be submitted to the chief judge, or if the chief judge so directs, to a judge or division of the court. *Id.*

[45] Tax Court Conference Minutes, Apr. 17, 1970.

[46] *See* Memorandum from the Ad Hoc Committee on Small Tax Cases to the Chief Judge, Apr. 2, 1970, at 3 n.6, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" Tax Court Conference Minutes, Apr. 17, 1970. The language of § 7463, as then in effect, permitted a brief summary of reasons to satisfy the requirements of a decision as defined in § 7459(b). However, Congress made no change to § 7459(a), which required that such a decision be made by a judge.

[47] Pub. L. No. 96-222, § 105(a)(1)(B), 94 Stat. 194, 218 (1980).

B. Early Expansion in Use of Special Trial Judges

Rules promulgated by the Tax Court following the 1969 Act generally retained the pre-existing limitations on the authority of special trial judges. Thus, except in small tax cases, special trial judges were authorized only to prepare findings of fact and were not authorized to prepare an opinion in the case.[48] Reports containing the special trial judge's findings of fact were submitted for review to the chief judge or a judge designated by the chief judge. The report of a special trial judge thus differed significantly from a judge's report, which usually contains both findings of fact and opinion.

Prior to the 1974 revision of the Tax Court Rule of Practice and Procedure, special trial judge reports were served on the parties.[49] After service of the reports, the parties had a limited time in which to file exceptions to the proposed findings of fact, in advance of the issuance of an opinion.[50] Upon receiving any exceptions filed by the parties, the judge was authorized to direct the parties to file additional briefs or order that an oral argument be held so as to better enable the judge to determine whether the special trial judge's report should be adopted, rejected, or modified.[51]

The Tax Court's Rules of Practice and Procedure were revised in 1974 to expand the special trial judges' function to include preparation of proposed opinions.[52] However, the procedures for filing exceptions to the reports of special trial judges[53] were elaborate and could unnecessarily consume judicial resources. Accordingly, in 1976, the Tax Court further expanded the use of special trial judges.[54] From the inception of the small tax case procedure, special trial judges had been authorized to prepare a preliminary findings of fact and opinion in a report submitted for review directly to the judge in charge of the small tax case division.[55] As a result, the managerial capabilities of special trial judges in small tax cases were not hampered by the procedures for parties filing exceptions to their reports which applied in other cases. Recognizing that the procedures for objecting to the special trial judge reports could adversely affect the efficient disposition of regular cases involving small amounts of tax, the court authorized the submission of cases involving deficiencies of $2,500 or less to special trial judges; the reports prepared in these cases were submitted

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[48] TAX CT. R. 48 (Jan. 25, 1971 ed.).
[49] *See* TAX CT. R. 48 (Sept. 1, 1965 ed.).
[50] *Id.*
[51] *Id.*.
[52] *See* Former TAX CT. R. 182(b), 60 T.C. 1149 (1973).
[53] *See* Former TAX CT. R. 182(c), 60 T.C. 1149 (1973).
[54] General Order No. 5, 67 T.C. XXI (1976).
[55] *See* Part XIII.A., text accompanying notes 8–14.

directly to the chief judge, or to a judge designated by him.[56] By providing for submission of special trial judge reports in such cases directly to the chief judge or a judge designated by him, the court eliminated the unnecessary restraints on judicial time and attention that could arise if one or both parties objected to the report of a special trial judge in a case involving a small amount of tax. Moreover, by eliminating the time consuming procedures in cases not exceeding the $2,500 limitation, the authority of special trial judges was made consistent in cases involving small amounts of tax, regardless of whether the case was conducted under the small tax case procedure. In cases involving amounts exceeding the $2,500 limitation, however, the procedures for service on the parties and for filing party exceptions continued to apply.

The 1976 changes in the Tax Court's use of special trial judges served as the foundation for current § 7443A(b)(3), which permits the chief judge to assign to a special trial judge any case in which the deficiency placed in dispute does not exceed $50,000. Accordingly, all cases concerning a statutorily determined small amount of tax—regardless of whether the taxpayer elects the small tax case procedures of § 7463—may be heard by a special trial judge. In cases in which the taxpayer does not proceed under § 7463, the special trial judge submits the report in the case to the chief judge (as opposed to the head of the small tax case division) for review.[57]

C. Authority to Make Decisions in Certain Cases

In the Miscellaneous Revenue Act of 1982,[58] Congress provided that special trial judges could make the decision of the court in any declaratory judgment case,[59] small tax case, or any other case in which the amount in dispute did not exceed the jurisdictional limit applicable to small tax cases. The Tax Court rules make it clear that a special trial judge may make the decision in the case even if it does not go to trial.[60] Moreover, as a result of the 1982 legislation, special trial judges have the authority to render "bench decisions" in those cases, other than declaratory judgment proceedings, in which they have decision-making authority and in which the facts and law

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[56] General Order No. 5, 67 T.C. XXII (1976). It is not clear why the court chose the $2,500 amount.

[57] TAX CT. R. 182(b) (July 6, 2012 ed.).

[58] Pub. L. No. 97-362, § l06(c)(1), 96 Stat. 1726, 1730 (adding I.R.C. § 7456(d) (1982) (codified as amended at I.R.C. § 7443A(c)).

[59] In the Revenue Act of 1978, Congress provided that, subject to the discretion of the Tax Court, special trial judges could make the decisions of the court in declaratory judgment proceedings. Pub. L. No. 95-600, § 336(b)(1), 92 Stat. 2763, 2841–42 (1978); former Tax Ct. R. 218, 68 T.C. 1051 (1977).

[60] *See* Rules Comm. Note, TAX CT. R. 182, 85 T.C. 1138 (1985).

are clear.[61] The difference between authority to make a "decision" and the authority to make a "report" is significant, because the decision authority more directly involves the application of judicial power.[62]

In the Tax Reform Act of 1984,[63] Congress clarified that the authority of special trial judges to preside over a case extends to any proceeding to which they are assigned by the chief judge. However, except to the extent specifically authorized by statute, special trial judges were not authorized by Congress to make a decision of the court. Hence, in those cases in which the special trial judge could not enter the decision, the special trial judge was required to submit a report containing findings of fact and opinion to the chief judge, who would then assign the case to a division of the court for disposition.[64]

As part of the Tax Reform Act of 1986, Congress moved the jurisdictional limits of special trial judges from § 7456(d) to its current location in § 7743A(b).[65] At that time, the chief judge of the court was permitted to assign to a special trial judge any declaratory judgment proceeding, any proceeding governed by the small tax case procedures of § 7463, any proceeding in which the amount in dispute did not exceed the jurisdictional limits of the small tax proceedings, and "any other proceeding which the chief judge may designate."[66] When the catch-all category was added in as part of the Tax Reform Act of 1984,[67] Congress also enacted the predecessor of §7443A(c), authorizing the special trial judge to enter decision in any case assigned to him *other than* cases assigned under the catch-all category. For those cases, a decision on behalf of the court had to

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61 *See* TAX CT. R. 152, 79 T.C. 1147–48 (1982); TAX CT. R. 182(a)–(b), 81 T.C. 1068 (1983), 82 T.C. 1073 (1984), 85 T.C. 1138 (1985); Tax Ct. R. 182(b), (c) (July 6, 2012 ed.); *see also* Part XI.D., addressing the Tax Court's authority to issue bench decisions.

62 *See* I.R.C. § 7459.

63 Pub. L. No. 98-369, § 463(a), 98 Stat. 494, 824 (1984) (amending I.R.C. § 7456(d)(1982) (codified as amended at I.R.C. § 7443A(b)(4) (Supp. IV 1986))).

64 TAX CT. R. 183(b), 81 T.C. 1068 (1983). The division to which the case was assigned could modify or reject the report. TAX CT. R. 183(c), 81 T.C. at 1068. However, at the time, service of the special trial judge's report was not required to be made on the parties, and the parties did not have a right to further brief the case. TAX CT. R. 183(a), (c), 81 T.C. at 1068. The division could, in addition to directing the filing of additional briefs, receive further evidence, direct oral argument, or recommit the report to the special trial judge with instructions. TAX CT. R. 183(c), 81 T.C. at 1068. The provisions for reviewing reports of special trial judges have since been significantly modified. The development of the Tax Court's procedures for reviewing reports of special trial judges is discussed below in Section D of this Part.

65 Pub. L. No. 99-514, § 1556(a), 100 Stat. 2754 (1986).

66 I.R.C. § 7443A(b)(1)–(4) (as enacted in 1986).

67 Pub. L. No. 98-369, §§ 463(a), 464(b), 98 Stat. 494, 824.

be entered by a presidentially appointed judge of the court.

Whether the text of the § 7443A(b)(4) catch-all category meant what it actually said—that is, that the chief judge of the Tax Court could assign *any* proceeding to special trial judge for hearing and preparation of a preliminary report, provided the decision in the case is entered by a presidentially appointed Tax Court judge—was challenged by the taxpayers in *First Western Securities Inc. v. Commissioner*.[68] This case emanated the same straddle investment strategy that served as the subject of the *Freytag* litigation previously analyzed in Part V. Stressing the complexity of the underlying case at hand, the taxpayers in *First Western* contended § 7443A(b)(4) did not permit the assignment of a case involving complex financial transactions with deficiencies measured in the billions at stake to a special trial judge. Conceding that the text of § 7443A(b)(4), interpreted literally, did not impose any limitations on the cases that could be assigned to a special trial judge pursuant to that provision, the taxpayers claimed that § 7443A(b)(4), interpreted in context, was limited to the sort of cases enumerated in the preceding provisions of § 7443A(b)(1)-(3) of the statute (which generally concerned cases involving declaratory judgments or relatively minor deficiencies).[69] The taxpayers relied principally on the Supreme Court's then recent decision in *Gomez v. United States*[70] to support their narrow interpretation of the statute. The Court in *Gomez* addressed the scope of a provision in the Federal Magistrates Act permitting magistrates to be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States,"[71] a provision that preceded a list of specific delegable duties. Specifically, the Court examined whether the general grant of authority permitted a magistrate to conduct juror *voir dire* in a criminal case. The Supreme Court found the general grant of authority insufficient for this purpose. Instead, the Court explained that the specific list of delegable duties "outline[d] the attributes of the office," and that additional duties encompassed by a general grant of

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[68] 94 T.C. 549 (1990).

[69] During the relevant period, § 7443A(b) provided as follows:

(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 . . . 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 Judge of the court.

[70] 490 U.S. 858 (1989).

[71] 28 U.S.C. § 636(b)(3).

authority "reasonably should bear some relation to the specified duties."[72] Given the Court's contextual interpretation of the Magistrate's Act in *Gomez*, the taxpayers' statutory argument in *First Western* was not as specious as it appeared at first glance.

The Tax Court in *First Western* rejected the taxpayers' interpretation of § 7443A(b)(4) as not only inconsistent with the literal text of the provision but also with congressional intent. The court grounded its explanation in the broader legislative change concerning the authority of special trial judges in the Tax Reform Act of 1984. The legislative history accompanying the statutory change described the genesis for the amendment and its effect as follows:

> Reasons for Change
>
> The 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.
>
> Explanation of Provision
>
> A technical change is made 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 the 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 the latter category of cases.[73]

Accordingly, in contrast to the statute at issue in *Gomez*, the Tax Court recognized that Congress did not intend § 7443A(b)(4) to provide an overarching general grant of authority that rounded out the specific delegations of authority under § 7443A(b)(1)-(3). Instead, Congress intended § 7443A(b)(4) to supply an independent source of authority concerning cases that could be assigned to special trial judges subject to a separate procedural regime—namely, the requirement that the decision in the assigned case be entered by a presidentially appointed judge of the court. Accordingly, no context was to be gleaned by reference to § 7443A(b)(1)–(3), leaving assignment of the case permissible pursuant to

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[72] *Gomez*, 490 U.S. at 864.

[73] H.R. REP. NO. 98-432, at 1568 (1984) (quoted in *First Western*, 94 T.C. at 555). The legislation therefore amended § 7443A(c), precluding the special trial judges from entering a decision in cases assigned to them pursuant to § 7443A(b)(4).

the terms of § 7443A(b)(4).[74] The Tax Court's rejection of the taxpayer's narrow interpretation of § 7443A(b)(4) was repeated in similar terms by the Second Circuit Court of Appeals in the case,[75] as well as by the Supreme Court in resolving the related case of *Freytag v. Commissioner*.[76]

The range of cases that may be assigned by the chief judge to a special trial judge for hearing and decision has expanded over the years, beyond the expansion in the scope of cases that may be tried by a special trial judge under the small tax case procedures of § 7463. In 1998, Congress authorized special trial judges to hear and issue a decision in any review of a collection due process determination pursuant to § 6330(d).[77] Most recently, in 2006, Congress authorized special trial judges to hear and decide an appeal of an adverse whistleblower award determination pursuant to § 7326(b)(4).[78] Following these expansions of the authority, the catch-all category of cases over which a special trial judge may preside but not make the decision of the court has been redesignated as § 7443A(b)(7).

D. Review of Special Trial Judge Reports

Prior to 1983, Tax Court Rule 182 provided the procedural guidelines governing the Tax Court's review of reports submitted by special trial judges.[79] The prior post-trial procedure for cases tried before a special trial judge (then referred to as a commissioner), housed in Tax Court Rule 182, provided for a copy of the commissioner's report, containing proposed findings of fact and opinion, to be served the parties.[80] The procedures

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[74] *See First Western*, 94 T.C. at 555–56. As later explained by the Second Circuit Court of Appeals, the taxpayers in *First Western* attempted to use the legislative history accompanying § 7443A(b)(4) to their advantage, noting that Congress characterized the addition of the provision as a "technical change." The argument was that a mere technical change would not have permitted a special trial judge to hear any type of case the chief judge of the court determined to assign, with the discretion of the chief judge serving as the sole limitation. *See* Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975, 982 (2d Cir. 1991). The Supreme Court in *Freytag* ultimately dispensed with this argument on its terms, noting that Congress regarded the amendment as technical only because it confirmed the Tax Court's longstanding use of commissioners as evidentiary referees. *See* Freytag v. Commissioner, 501 U.S. 868, 875 (1991).

[75] *See* Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975, 979–82 (2d Cir. 1991).

[76] 501 U.S. 868, 873–77 (1991).

[77] Internal Revenue Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401(c)(1), 112 Stat. 731, 749 (adding current I.R.C. § 7443A(b)(4)).

[78] Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406(a)(2), 120 Stat. 2959 (adding current I.R.C. § 7443(b)(6)).

[79] TAX CT. R. 182, 60 T.C. 1149 (1973).

[80] TAX CT. R. 182(b), 60 T.C. 1149 (1973).

afforded the parties an opportunity to file exceptions to the commissioner's report, and the reviewing judge could schedule oral argument on those exceptions in the judge's discretion. The reviewing judge thereafter possessed a number of options concerning action on the commissioner's report. The judge could (a) adopt the report in full, (b) modify the report or reject the report in whole or in part, (c) receive additional evidence from the parties, or (d) recommit the report to the commissioner with instructions.[81] The procedures required the reviewing judge to afford a degree of deference to the commissioner's factual findings, as reflected in the closing sentence in Rule 182:

> 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.[82]

The explanatory note to Rule 182 provided that the rule was intended to align the Tax Court's procedures in this setting with those of the Court of Claims, and the note specifically referenced Court of Claims Rule 147(b) (which served as a practical verbatim template for Rule 182) with respect to the "special weight" to be accorded the findings of the commissioner who heard the case.[83]

The degree of deference with which the Tax Court judge responsible for entering the decision in the case was to review the findings of the commissioner under Rule 182(d) proved to be a central issue in *Rosenbaum v. Commissioner*.[84] There, the reviewing judge noted that he had given "due regard" to the circumstance that the special trial judge had the opportunity to see and evaluation the credibility of the witnesses. Nevertheless, the judge reversed certain findings of the special trial judge, explaining that the presumption of correctness "does not impair nor dilute our duty of bearing the ultimate responsibility for determining matters before us."[85]

On appeal, the D.C. Circuit Court of Appeals in *Stone v. Commissioner*[86] reversed and remanded the case based on the level of deference the reviewing Tax Court judge accorded the findings of the hearing officer. Describing the level of deference employed by the reviewing Tax Court judge as "somewhere between de novo review and a mild presumption in favor of correctness," the court explained that Rule 182(d) required a

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[81] TAX CT. R. 182(d), 60 T.C. 1150 (1973).
[82] *Id.*
[83] Rules Comm. Note, TAX CT. R. 182(d), 60 T.C. 1150 (1973).
[84] T.C. Memo. 1983-113, 45 T.C.M. (CCH) 825.
[85] *Id.* at 827.
[86] 865 F.2d 342 (D.C. Cir. 1989).

"relatively high level of deference" embodied in clearly erroneous review.[87]

The D.C. Circuit based its decision on Rule 182(d)'s emulation of Court of Claims Rule 147(b). At the time of Rule 182's adoption, the Court of Claims reviewed the credibility determinations of its hearing officers under a clearly erroneous standard.[88] While the court explained that the Tax Court was free to establish a different set of rules to govern the relation between it and its special trial judges, the court determined that the Tax Court, in adopting Rule 182(d), had chosen language with a well-established meaning that it could not later disavow.[89]

The Tax Court significantly modified the post-trial procedures governing cases referred to special trial judges for trial but not for final decision in 1983. The amended procedures, moved to Tax Court Rule 183,[90] no longer required a copy of the special trial judge's report to be

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[87] *Id.* at 344.

[88] *Id.* at 345 (citing Elmers v. United States, 172 Ct. Cl. 226 (1965)).

[89] *Id.* at 347. The D.C. Circuit concluded its analysis with the following:

> If a simple preponderance of the evidence—half plus a little bit—suffices to overturn the factual findings of a Special Trial Judge, then it is difficult to see what value or force attaches to the presumptive correctness of that judge's factual determinations, much less the "due regard" owed "to the circumstance that the [Special Trial Judge] had the opportunity to evaluate the credibility of the witnesses."

Id.

[90] 81 T.C. 1069 (1983). Rule 183, as amended in 1983, is reproduced below:

> **Rule 183. Cases Involving More Than $5,000**
>
> Except in cases subject to the provisions of Ru1e 182 or as otherwise provided, the following procedure shall be observed in cases tried before a Special Trial Judge:
>
> **(a) Trial and Briefs:** A Special Trial Judge shall conduct the trial of any such case assigned to him for such purpose. After such trial, the parties shall submit their briefs in accordance with the provisions of Rule 151. Unless otherwise directed, no further briefs shall be filed.
>
> **(b) Special Trial Judge's Report:** After all the briefs have been filed by all the parties or the time for doing so has expired, 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.
>
> **(c) Action on the Report:** 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 the witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

served on the parties. Additionally, the amended procedures eliminated the round of briefing following submission of the special trial judge's report that permitted the parties to record their objections thereto. Instead, Rule 183(b) simply required the special trial judge to submit a report containing the judge's proposed findings of fact and opinion to the chief judge of the Tax Court, who would in turn assign the case to a judge of the court for disposition. However, the options available to the reviewing judge under the streamlined procedures remained largely the same. The reviewing judge could adopt the report, reject or modify the report in whole or in part, direct the filing of additional briefs, receive additional evidence, schedule oral argument, or recommit the report to the special trial judge with instructions. Importantly, the reviewing Tax Court judge remained obligated under Rule 183(c) to afford "due regard" to the circumstance that the special trial judge had the opportunity to evaluate the credibility of the witnesses, and the factual findings of the special trial judge continued to enjoy a presumption of correctness.

The explanatory note that accompanied the Tax Court's changes to these procedures did not provide a rationale for the court's movement to the streamlined approach. Years later, in its briefing before the Supreme Court in *Ballard v. Commissioner*,[91] the Commissioner suggested that the Tax Court eliminated the disclosure of the special trial judge's report and the round of briefing that followed out of a desire to expedite the resolution of cases. The Commissioner cited statements made by Chief Judge Tannenwald in 1983 warning of an increased number of tax shelter and tax protestor cases attributable to newly enacted provisions of the Code, [92] a prediction that later was borne out in the Tax Court's docket. [93] Additionally, the modification of the Tax Court's rules in this context were consistent with modifications the court made in 1976 to its procedures governing cases that fell outside of the small tax case category but involved deficiencies less than $2,500. The court eliminated the requirement that the parties receive the special trial judge's report with an opportunity to object in this setting, explaining that the change was made "to dispose of pending cases more promptly and efficiently."[94]

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[91] 544 U.S. 40 (2005). The *Ballard* litigation is analyzed below in Section E of this Part.

[92] Brief for Respondent at 35, Ballard v. Commissioner, 544 U.S. 40 (2005) (citing *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1984: Hearings Before the Subcomm. of the House Comm. on Appropriations,* 99th Cong., 1st Sess. pt. 4, at 8 (1983)).

[93] *Id.* (citing *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1987: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 99th Cong., 2d Sess. Pt. 4, at 355, 380 (1986)).

[94] Tax Ct. General Order No. 5, at 1 (Oct. 1, 1976) (cited in Brief for Respondent, Ballard v. Commissioner, 544 U.S. 40 (2005), at 36). For a discussion

The Tax Court's burgeoning docket during the late 1970's and early 1980's suggests that similar considerations of expediency motivated the court to adopt the streamlined Rule 183 procedures in 1983. The court's docket increased from approximately 12,000 pending cases in fiscal year 1970, to 35,000 in 1980, and to more than 58,000 in 1983. Approximately 34,000 new cases were filed in fiscal year 1983 alone. Making matters more pressing, the court was forced to cancel all trial calendars in the spring of 1982 due to appropriations issues. The court therefore was faced with an increasing backlog of cases. Many of the cases filed during this period involved complex tax shelters that had been assigned to special trial judges and were subject to the former Rule 182 adoption procedures. In response to the influx of cases, the chief judge significantly increased the number of special trial judges, from 7 to 17. The decision to no longer serve the special trial judge's report on the parties and to eliminate the extra round of briefing on such report reflected in Rule 183 is best understood as an additional measure taken by the court to promote the expeditious disposition of the cases before it.[95]

The Tax Court's practice of reviewing the reports of special trial judges came under examination in the cases of *Freytag v. Commissioner*[96] and *Ballard v. Commissioner*,[97] both of which are discussed extensively below.[98] The Supreme Court in *Ballard* concluded that the Tax Court had adopted a practice of "quasi-collaborative" judicial deliberation between the special trial judge and the reviewing Tax Court judge under Rule 183, one through which the Tax Court treated the initial report submitted by the special trial judge as an "in-house draft to be worked over collaboratively by the regular judge and the special trial judge."[99] The Supreme Court in *Ballard* determined this "novel" and "anomalous" practice to represent an unreasonable interpretation of Rule 183.[100] The Supreme Court determined that the rule instead required the initial (but later withdrawn) report submitted by the special trial judge to the chief judge to be included in the

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of the expansion in the authority of special trial judges occasioned by the 1976 alteration of the Tax Court's procedures, see text accompanying *supra* notes 54–56.

[95] In a speech before the American Bar Association Section of Taxation Court Procedure Committee following the issuance of the Supreme Court's decision in *Ballard v. Commissioner* (discussed below in Section E), Chief Judge Gerber of the Tax Court described the motivation for the rule change in these terms, describing the Tax Court's desire to avoid the previously cumbersome Rule 182 procedures in the face of a burgeoning caseload. *See* Chief Judge Joel Gerber, Speech to ABA Tax Section Court Procedure Committee, at 1–2 (Sept. 16, 2005).

[96] 501 U.S. 868 (1991).

[97] 544 U.S. 40 (2005).

[98] *See* Section E of this Part.

[99] *Id.* at 57.

[100] *Id.* at 57, 59–62.

appellate record.[101]

In response to the Supreme Court's decision in *Ballard*, the Tax Court amended Rules 182 and 183 in 2005.[102] The 2005 amendments reinstated the procedure of serving the parties with the report of the special trial judge pursuant to Rule 183(b), and the parties once again were provided the opportunity to submit written objections to the findings and conclusions contained in the special trial judge's report pursuant to Rule 183(c). However, the stated level of deference to the special trial judge's findings remained unchanged. Newly designated Rule 183(d) continues to provide that "due regard" is to be given to the circumstance that the special trial judge had the opportunity to evaluate the credibility of the witnesses, and that the special trial judge's findings of fact are to be presumed correct.[103]

Additionally, the 2005 revision of the Tax Court rules also added a paragraph to Rule 182 which addresses cases in which the special trial judge is statutorily authorized to make the decision of the court. Pursuant to Rule 182(e), if the chief judge decides to assign any such case (other than a small tax case) to a presidentially appointed judge of the court to prepare the opinion and make the decision, the court would follow the procedures set forth in Rule 183.[104] Hence, the proposed findings of fact and opinion prepared by the special trial judge in such instances would be filed as the recommended findings of fact and conclusions of law of the special trial judge as contemplated by Rule 183(b).[105] The 2005 modifications of Tax Court Rules 182 and 183 were intended to align the Tax Court's practice in this area with the procedures employed by Federal district courts to review the findings and recommendations of a Magistrate Judge.[106]

E. Examining the Tax Court's Procedures for Reviewing Special Trial Judge Reports: The Saga of *Ballard v. Commissioner*

The Tax Court's procedures for reviewing reports submitted by special trial judges in cases requiring final decision to be entered by a presidentially appointed judge of the Tax Court have been the subject of considerable controversy. The controversy emanated from the Tax Court's 1983 decision to modify its procedural rules to no longer provide litigants with a copy of the special trial judge's report as it was assigned to the reviewing

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101 *Id.* at 52.

102 *See* Rules Comm. Note, TAX CT. R. 183, 125 T.C. 343–47 (2005).

103 Newly designated Rule 183(d) added one element not included in its pre-1983 predecessor: the requirement that the reviewing judge's action on the special trial judge's report be separately noted by appropriate order or in the judge's report.

104 TAX CT. R. 182(e), 125 T.C. 342 (2005).

105 *Id.*

106 Rules Comm. Note, TAX CT. R. 183, 125 T.C. 345–46 (2005).

Tax Court judge.[107] Despite the absence of the special trial judge's report in the case record, the modified procedures continued to obligate the reviewing judge to afford deference to the factual determinations made by the special trial judge in the undisclosed report. The manner in which the Tax Court reviewed special trial judge reports under this framework culminated in the Supreme Court decision in *Ballard v. Commissioner*.[108]

The *Ballard* litigation concerned the Commissioner's assertion of income tax deficiencies and a civil tax fraud penalty against two real estate executives and a prominent tax attorney. The case centered on allegations that these three individuals participated in a kickback scheme that generated income the parties failed to report. Several years after a lengthy trial, the Tax Court issued an opinion that adopted the opinion of the special trial judge who had presided over trial of the case. The adopted opinion represented a considerable victory for the Commissioner, as it upheld the Commissioner's deficiency determinations and sustained the imposition of the civil fraud penalty. However, counsel for one of the taxpayers had reason to believe that the special trial judge had, at some prior stage, drafted an opinion in favor of the taxpayers—not only on the issue of civil tax fraud, but on the majority of the underlying deficiency determinations as well. The taxpayers in the case therefore sought disclosure of what they referred to as the special trial judge's original report. The Tax Court declined, stating that the taxpayers had been provided the special trial judge's only report in the case—the one that was adopted by the reviewing judge. Orders issued by the Tax Court in response to the taxpayers' motions appeared to acknowledge the existence of prior drafts of the special trial judge's report, but the court refused to disclose any such draft on grounds that disclosure would represent an intrusion into its internal deliberative process. The dispute between the taxpayers and the Tax Court therefore appeared to turn on a definitional matter—that is, what document constituted the report of the special trial judge.

All three taxpayers in the *Ballard* litigation appealed the decision against them to the Court of Appeals for the circuit in which they resided. In addition to contesting the decision on the merits, the taxpayers sought an order compelling the Tax Court to release the purported original report of the special trial judge. After the Circuit Courts of Appeals declined to do so, two of the taxpayers petitioned the Supreme Court for a writ of certiorari on the disclosure issue alone. Specifically, the taxpayers contended that the alleged practice of the reviewing Tax Court judge working with the special trial judge to modify the special trial judge's initial

[107] The Tax Court's Rules of Practice and Procedure governing review of a report submitted by a special trial judge, including the 1983 revisions to such rules, are discussed above in Section D of this Part.

[108] 544 U.S. 40 (2005).

report in the case—to yield a final report that the reviewing Tax Court judge then would adopt in full—violated the taxpayers' due process rights as well as the statute governing appellate review of Tax Court decisions.

Notwithstanding the universal rejection of these claims at the Circuit Court level, the Supreme Court granted the taxpayers' certiorari petition. In its opinion in *Ballard,* the Supreme Court examined the assumed but unconfirmed practice of Tax Court judges working with special trial judges on the content of the final report to be issued by the special trial judge. The Court held that the Tax Court could not exclude from the record on appeal the special trial judge's report as it was first conveyed to the chief judge of the court for assignment. While the result of the case may have been predicted given the circumstances leading up to the grant of certiorari, the rationale for the Court's decision was somewhat surprising. The Court did not rule in favor of the taxpayers on the constitutional or statutory grounds raised by the parties in their certiorari petitions; rather, the Court determined that the Tax Court failed to follow its published procedures governing the case.

Following the Supreme Court's decision in *Ballard*, the Tax Court released the original report issued by the special trial judge, a report that the special trial judge had withdrawn prior to any official action being taken upon it by the reviewing Tax Court judge. As previously claimed by the taxpayers, this report had determined that the taxpayers were not liable for the majority of the asserted income tax deficiencies, much less the civil fraud penalty. The release of this report ultimately led to decisions in favor of the taxpayers on the merits.

The *Ballard* litigation represents one of the more challenging chapters in the Tax Court's history. In addition to the Supreme Court's determination that the Tax Court had failed to adhere to its procedural rules governing the case, fallout from the release of the special trial judge's original but later withdrawn report in the case led some to question the Tax Court's integrity. Even though the Tax Court has since amended the procedural rule that spawned the *Ballard* litigation,[109] the story of the *Ballard* litigation warrants expanded discussion given the effect of the case on public perception of the court.[110] In doing so, this Section endeavors to convey the story from a chronologically accurate standpoint, recounting factual aspects of the proceedings as they became publicly available.

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[109] *See* text accompanying *supra* notes 102–106.

[110] The proceedings in the *Ballard* litigation and the conduct of the Tax Court therein received extensive coverage in tax-related periodicals. Coverage of the Tax Court's procedures in the case even spilled into the popular press. *See, e.g.,* Louise Story, *A Glimpse Inside U.S. Tax Court and How It Made a Decision*, N.Y. TIMES, July 23, 2005, at C4; Maurice Possley, *Tax Court Case Stirs Multiple Questions: Request for Judge's Trial Findings Rebuffed*, CHI. TRIB., July 10, 2005, at C1.

In many respects, the central dispute in the *Ballard* litigation was foreshadowed in the Supreme Court case of *Freytag v. Commissioner*.[111] Although *Freytag* is most noted for its determination that the appointment of special trial judges does not contravene the Appointments Clause of the Constitution,[112] the taxpayer's statutory argument in *Freytag* turned on the extent of the Tax Court's review of the special trial judge's report. The Supreme Court managed to sidestep the procedural issues in *Freytag*, but the case highlighted shortcomings in the Tax Court's procedures in this setting—shortcomings the Tax Court failed to address at the time. The often overlooked procedural aspect of *Freytag* provides a critical backdrop to the *Ballard* litigation.

1. Analysis of Rule 183 Procedures in *Freytag v. Commissioner*

The Tax Court's modified procedures under Rule 183 for reviewing the reports of special trial judges first were examined in litigation that culminated in the Supreme Court's decision in *Freytag v. Commissioner*.[113] Because the particulars of the Tax Court's review of the special trial judge's report proved central to this aspect of the case, they are recounted below.

a. Developments at the Tax Court

The *Freytag* litigation concerned ten test cases relating to a tax shelter based on straddle derivative transactions that were consolidated for discovery, briefing, trial, and decision. Trial of the cases began before Judge Richard C. Wilbur in November of 1984, but the trial was periodically postponed on account of Judge Wilbur's illness. In November of 1985, Chief Judge Samuel Sterrett of the Tax Court assigned Special Trial Judge Carlton D. Powell to preside over the trial as an evidentiary referee. The proceedings were videotaped for the benefit of Judge Wilbur, permitting him to observe the proceedings from his home. At this point in the case, Judge Wilbur anticipated that he would prepare his factual findings and opinion in the case when he recovered. However, Judge Wilbur's continued illness eventually forced him to retire from his full-time position as judge in April of 1986, whereupon he assumed senior status. In July of 1986, Chief Judge Sterrett notified the parties that he intended to assign the case to Special Trial Judge Powell pursuant to what was then § 7443A(b)(4) for the preparation of findings of fact and opinion,[114] unless the parties

[111] 501 U.S. 868 (1991).

[112] This aspect of the *Freytag* case is addressed in Part V.

[113] 501 U.S. 868 (1991).

[114] At that time, § 7443A(b)(4) permitted the Chief Judge of the Tax Court to assign "any other proceeding which the chief judge may designate" to a special trial judge, in addition to the types of cases enumerated in prior portions of § 7443A(b).

objected. All but one of the taxpayers (whose case was severed) consented to the assignment, on the condition that either Judge Wilbur or Chief Judge Sterrett bear responsibility for entering the decision in the case.[115]

Trial of the consolidated cases before the Tax Court in *Freytag* was fairly complex. The trial consumed 14 weeks of evidence, 9,000 pages of transcripts, and over 3,000 exhibits.[116] Special Trial Judge Powell, who already had presided over nine weeks of the trial in his capacity as evidentiary referee before being formally assigned the case, prepared a report sustaining the Commissioner's position on all fronts, including the imposition of a negligence penalty.[117] On October 21, 1987, Chief Judge Sterrett issued an order assigning the case to himself for disposition. On the same day, Chief Judge Sterrett adopted the report of Special Trial Judge Powell in full.

b. Appeal to the Fifth Circuit

On appeal of their case to the Fifth Circuit Court of Appeals, the taxpayers challenged the Tax Court's compliance with the relevant statutory procedure. Specifically, the taxpayers contended that Chief Judge Sterrett's wholesale adoption of Special Trial Judge Powell's report on the same day that Chief Judge Sterrett assigned the case to himself effectively permitted Special Trial Judge Powell to enter the final decision in the case—contrary to the limitation posed by § 7443A(c).[118] The Fifth Circuit treated the taxpayer's contention as a challenge to the subject matter jurisdiction of the Tax Court, and therefore determined the issue appropriate to hear for the first time on appeal.

The Fifth Circuit accepted the taxpayers' contention that Special Trial Judge Powell submitted his report in the case on the date Chief Judge Sterrett assigned the case to himself, even though the precise date of such submission was not reflected in the record. However, the court curtly rejected the taxpayers' challenge on the merits: "Our analysis begins and ends with the simple fact that the opinion in this case was issued by the Tax Court in the name of the chief judge."[119] The court found no evidence that Chief Judge Sterrett failed in his obligation to maintain full responsibility

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However, pursuant to § 7443A(c), the special trial judge lacked authority to enter the final decision in a § 7443A(b)(4) case. Hence, the special trial judge's report had to be submitted to a regular judge of the Tax Court for proposed adoption.

115 *See* Freytag v. Commissioner, 904 F.2d 1011, 1014 (5th Cir. 1990); Brief for Petitioner, Freytag v. Commissioner, 501 U.S. 868 (1991), at 8.

116 Freytag v. Commissioner, 501 U.S. 868, 871 n.1 (1991) (citing statements of taxpayers' counsel at oral argument).

117 *See id.* at 887–89.

118 *See Freytag*, 904 F.2d at 1015.

119 *Id.*

for the decision in the case,[120] and the court was not willing to infer impropriety based on the (presumed) short time span between the filing of the special trial judge's report and the issuance of the Tax Court opinion adopting it.

In addition to stressing the alleged brief amount of time Chief Judge Sterrett devoted to reviewing the report of Special Trial Judge Powell prior to adopting it, the taxpayers argued that the Tax Court's procedures as written could not be reconciled with § 7443A(c). Rule 183(c) obligated the reviewing Tax Court judge to regard the factual findings of the special trial judge as presumptively correct. With respect to the level of deference that presumption entailed, the District of Columbia Circuit Court of Appeals in *Stone v. Commissioner*[121] had interpreted the rule as permitting the reviewing Tax Court judge to overturn the factual findings of the special trial judge only if they proved "clearly erroneous."[122] The taxpayers in *Freytag* characterized the Tax Court procedures contained in Rule 183(c), as interpreted in *Stone*, as establishing a regime of appellate-like review by the Tax Court judge. The taxpayers then contended that effective appellate review of special trial judge reports by the Tax Court violated the statutory directive under § 7443A(c) that a regular Tax Court judge bear primary responsibility for the entry of the decision in the case.[123]

The Fifth Circuit flatly rejected the taxpayers' structural argument under Rule 183(c) as well. The court noted that the Tax Court judge to whom a § 7443A(b)(4) case was assigned possessed "full responsibility" for the decision in the case, rejecting the assertion that the Tax Court judge conducted his review of the special trial judge's report from an appellate posture. The Fifth Circuit justified its position in part by pointing to the changes to the Tax Court's procedures as reflected in Rule 183. The elimination of the parties' entitlement to a copy of the special trial judge's report as it was conveyed to the reviewing Tax Court judge along with the ability of the parties to file exceptions to such report undermined any characterization of the reviewing Tax Court judge operating in an appellate capacity in this context.[124]

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[120] *See id.* ("We will assume that the judge [acted] in good faith. The record before us is devoid of any evidence that even remotely suggests otherwise.").

[121] 865 F.2d 342 (D.C. Cir. 1989).

[122] *Id.* at 345–47.

[123] Brief for Petitioners at 22–23, Freytag v. Commissioner, 501 U.S. 868 (1991).

[124] Freytag v. Commissioner, 904 F.2d 1011, 1015 n.8 (5th Cir. 1990).

c. The Supreme Court's Resolution

The taxpayers in *Freytag* pressed their objection to the application of the Tax Court's procedures in the case before the Supreme Court following the grant of their certiorari petition. The taxpayers contended that "[t]he special trial judge's filing of his report and its verbatim adoption by Chief Judge Sterrett appear from the record to have been virtually simultaneous."[125] The taxpayers buttressed their interpretation of the record with the Fifth Circuit's observation that Special Trial Judge Powell filed his report on the same day as its adoption,[126] an observation the Fifth Circuit had dismissed as irrelevant.[127] Claiming that "[n]o presumption of administrative regularity [could] convert this into meaningful review," the taxpayers characterized the Tax Court's application of § 7443A(b)(4) in the case as effectively permitting the special trial judge to enter the final decision in the case.[128]

The taxpayers in *Freytag* understandably were pleased to cite the Fifth Circuit's finding that Special Trial Judge Powell had issued his report in the case on the same day it was adopted by Chief Judge Sterrett. Yet that characterization overstated the case. As noted by the Commissioner, the record on this issue consisted of two documents: an order by Chief Judge Sterrett formally reassigning the case to himself for disposition and the entry by Judge Sterrett of his decision adopting the report of Special Trial Judge Powell on the same day. Neither of these address the date on which Special Trial Judge Powell first submitted his report to the Chief Judge for assignment.[129] Indeed, at oral argument, counsel for the taxpayers acknowledged that Special Trial Judge Powell "sometime in the preceding 4 months had filed a report with the Chief Judge of the tax court."[130] This concession, coupled with the complexity of the case, suggested that Chief Judge Sterrett received Special Trial Judge Powell's report a considerable period prior to the day he adopted it as his own.

The taxpayers' challenge to the application of § 7443A(b)(4) consumed a considerable portion of the parties' oral argument before the Court, a

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[125] Brief for Petitioners at 8, Freytag v. Commissioner, 501 U.S. 868 (1991).

[126] *Id.* at 23–24.

[127] *See Freytag*, 904 F.2d at 1015.

[128] Brief for Petitioners at 24, Freytag v. Commissioner, 501 U.S. 868 (1991).

[129] *See* Brief for Respondent at 18 n.9, Freytag v. Commissioner, 501 U.S. 868 (1991). The Commissioner noted that it was the apparent practice of the Tax Court to formally reassign the case to a regular Tax Court judge only when the reviewing judge was prepared to enter decision in the case. *See id.* (citing various decisions adopting reports of special trial judges and the attendant orders assigning cases to Tax Court judges).

[130] Transcript of Oral Argument at 11, Freytag v. Commissioner, 501 U.S. 868 (1991).

surprising fact given that the Tax Court's application of § 7443A(b)(4) was of dubious relevance to the questions presented in the taxpayers' petition for certiorari. At argument, counsel for the taxpayers did not mince words concerning the alleged failure of Chief Judge Sterrett to adequately review the report of the special trial judge: "[T]here is no basis to suppose there was meaningful review or therefore meaningful supervision that would enable us to accept this as the decision of the Tax Court rather than that of the special trial judge himself."[131] Moments later, counsel for taxpayers reiterated the point in even stronger terms: "We do think that there is nothing—absolutely nothing in this record to suggest that the regular tax court judge actually reviewed the case."[132] When pressed about the number of days that would have been sufficient for review of the special trial judge's report, counsel for taxpayers returned to the lack of transparency in the proceedings by noting the Tax Court's failure to serve the parties with the special trial judge's report:

> The Government simply tries to suggest that perhaps it was 5 days or 2 days or 14 days – who knows? The parties can't know, because they have no opportunity to see the special trial judge's report or know when it is filed or object to it, unlike the procedure in the Magistrate's court.[133]

As these excerpts indicate, the conduct of the Tax Court and, specifically, Chief Judge Sterrett, was being called into question. Making matters interesting, Chief Judge Sterrett was present in the courtroom as a spectator. The colloquy below provides some indication of the awkwardness of the situation. Additionally, the exchange reflects both the taxpayers' frustration at not being provided with the special trial judge's report as it was submitted to the chief judge for assignment and the Court's reluctance to assume that Chief Judge Sterrett lacked familiarity with the case until he formally assigned it to himself:

> QUESTION: The first -- Judge Sterrett was chief judge.
>
> MS. SULLIVAN: That's right.
>
> QUESTION: He knew what was going on.
>
> MS. SULLIVAN: Well --

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[131] Transcript of Oral Argument at 11, Freytag v. Commissioner, 501 U.S. 868 (1991).

[132] *Id.* at 12–13.

[133] *Id.* at 12.

QUESTION: He must have known what was going on.

MS. SULLIVAN: Actually, Your Honor --

QUESTION: I'd like to ask him. He's present in the courtroom --

(Laughter.)

MS. SULLIVAN: Like the line in Annie Hall where Woody Allen says, I just happen to have Marshall McLuhan right here.

(Laughter.)

MS. SULLIVAN: I won't ask him, Your Honor. What I would like to point out not that -- we cast no aspersion on Chief Judge Sterrett personally in the least. What we are doing here in the absence of any evidence that there was meaningful review is arguing about what we should presume from the regular procedures of the tax court that Chief Judge Sterrett can be expected faithfully to adhere to. And the published rules of the tax court say you reassign the special trial judge's case to a judge of the tax court and then that judge reviews it.

QUESTION: Ms. Sullivan.

MS. SULLIVAN: Yes, Justice?

QUESTION: Would you be satisfied with the usual expression that I think you and I have seen of an appellate court judge who says, I have reviewed all of the objections of appellate [sic] and find no merit in any of them? Is that what you want?

MS. SULLIVAN: I believe we might accept that, Justice Marshall. But the fact is under the tax court's rules, the chief judge of the tax court could not review all of the objections of the parties to the special trial judge's findings because they never got to see them.

Up until 1984, the tax court had provided by its rules for exceptions by the parties to the special trial judge's report and an opportunity to try to get the tax court judge to reject some of those findings. That opportunity was eliminated in 1984.[134]

[134] Transcript of Oral Argument at 13-15, Freytag v. Commissioner, 501 U.S. 868 (1991).

Following the lengthy discussion of the Tax Court's procedures in the case, the Court questioned whether these matters were properly subsumed in the questions presented in the taxpayers' certiorari petition. Only then did counsel conclude her argument of the case on statutory grounds, spending the few remaining minutes of oral argument addressing the Appointments Clause issue.

Notwithstanding the Court's apparent uneasiness concerning the relevance of the Tax Court's application of § 7443A(b)(4) to the appeal before it, the Court pressed the Commissioner's counsel at oral argument concerning the presumption of correctness afforded to the special trial judge's findings of fact under Tax Court Rule 183(c). After noting that the taxpayers failed to raise the issue before the Tax Court—the body best equipped to resolve issues concerning the application of its procedural rules—counsel for the Commissioner contended that Rule 183(c) did not contravene the statutory requirement that a regular Tax Court judge enter decision in § 7443A(b)(4) cases. Conceding on brief that the presumption of correctness contained in Rule 183(c) was "not ideal,"[135] counsel contended that the presumption merely provided a starting point for the consideration of the case by the regular Tax Court judge. Accordingly, the benefit of the presumption of correctness was confined to its resulting inertia. In the Commissioner's view, this process fell far short of an effective abdication of the Tax Court judge's responsibility to enter the decision in the case.[136]

Later in the argument, counsel for the Commissioner addressed the relevance of the Tax Court's failure to serve the parties with the special trial judge's report. In short, the Commissioner found no fault with the procedure, given that the special trial judge possessed no statutory authority with respect to cases assigned under § 7443A(b)(4):

> And again to get back to the relationship between the regular tax court judge and the special trial judge, it is internal. Petitioners object, we never had a chance to review the report. We never had a chance to object to it. And they say that's very different than the procedure that applies with respect to magistrates. That's our point exactly. A magistrate decides a matter that he is -- he is hearing -- a civil trial. And therefore, the parties need to be able to review that decision to determine if they want to object and seek further review.

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[135] Brief for Respondent at 19, Freytag v. Commissioner, 501 U.S. 868 (1991). Counsel for the Commissioner at oral argument conceded that if the presumption of correctness necessitated the application of a "clearly erroneous" standard of review, then the Tax Court rule "might well" violate the statute. Transcript of Oral Argument at 40, Freytag v. Commissioner, 501 U.S. 868 (1991).

[136] *Id.* at 34–35.

> Special trial judge under subsection (b)(4) decides nothing, and therefore, it's perfectly appropriate that there is no opportunity for review and objection, just as there is not an opportunity for a party to review and object to a law clerk's draft that is -- that is submitted to a judge. A law clerk acts as an aide and assistant to the judge, just as a special trial judge does to a regular judge under this provision.[137]

Despite the portion of the parties' briefs and oral arguments devoted to the issue of whether the Tax Court procedures effectively enabled the special trial judge to enter the Tax Court's decision in contravention of the statutory structure set out in § 7443A(b)(4) and (c), the Supreme Court barely touched on these issues when it issued its decision in the *Freytag* case. The Court did not address at all the compatibility of the presumption of correctness to be afforded to the special trial judge's findings of fact under Rule 183(c) with the statutory scheme. Concerning the taxpayers' contentions regarding the alleged failure of Chief Judge Sterrett to meaningfully review Special Trial Judge Powell's report, the Court dispensed with the matter by footnote. In doing so, the Court followed the Fifth Circuit's lead in refusing to infer impropriety on the basis of a thin record alone:

> In any event, this chronology does not appear to us to be at all significant. The Chief Judge had the duty to review the work of the Special Trial Judge, and there is nothing in the record disclosing how much time he devoted to the task. As Chief Judge, he was aware of the presence of the several cases in the court and the magnitude of the litigation. The burden of proof as to any negative inference to be drawn from the time facts rests on petitioners. We are not inclined to assume "rubber stamp" activity on the part of the Chief Judge.[138]

Even though the Supreme Court in *Freytag* rejected the taxpayers' argument that the Rule 183 procedures could not be reconciled with § 7443A(c), the case served to highlight shortcomings in the streamlined procedures. The points raised concerning the length of Chief Judge Sterrett's review of Special Trial Judge Powell's report suggested the need to clarify the reviewing Tax Court judge's right to access to the workings of the special trial judge prior to the submission of the special trial judge's formal report. The procedures could have been modified further to acknowledge expressly the reviewing Tax Court judge's ability to consult with the special trial judge in the preparation of the special trial judge's report. Additionally, the *Freytag* litigation highlighted the potential

[137] *Id.* at 36–37.
[138] Freytag v. Commissioner, 501 U.S. 868, 872 n.2 (1991).

problems stemming from the presumption of correctness afforded to the factual findings of the special trial judge. To reinforce the reviewing judge's responsibility for the case, Rule 183(c) could have been revised to eliminate this presumption in favor of de novo review,[139] while maintaining the requirement that "due regard" be provided to the presiding judge's ability to evaluate the credibility of the witnesses' testimony. However, Rule 183(c) was not revised in the aftermath of *Freytag*, leaving many of these issues to be raised once again in the course of the litigation in *Ballard*.

2. The Initial Tax Court Opinion in *Ballard*

The litigation that culminated in the Supreme Court's decision in *Ballard v. Commissioner* had its origins in an alleged kickback scheme involving three individuals: Claude M. Ballard, Robert W. Lisle, and Burton W. Kanter. Ballard and Lisle served as senior real estate executives with Prudential Life Insurance Company of America (Prudential), which during the relevant time period held one of the largest commercial real estate portfolios in the country. Their senior status within the company enabled Ballard and Lisle to exert considerable influence over Prudential real estate transactions and lending operations. Kanter was a prominent Chicago tax attorney who counseled a number of high-profile clients, including the Pritzker family, owners of the Hyatt Corporation. In addition to his legal practice, Kanter taught at his alma mater, the University of Chicago Law School, and he originated the renowned "Shop Talk" column in the *Journal of Taxation*. Kanter was known for his aggressive tax planning techniques, including those he employed to help finance the production of movies during the 1960's and 1970's, including "One Flew Over the Cuckoo's Nest." Kanter's aggressive tax planning apparently carried over to his personal finances, leading the Seventh Circuit Court of Appeals to note that "from 1979 to 1989 Kanter, who hobnobbed with Pritzkers and Hollywood producers and who participated in countless extremely large and lucrative business ventures, reported a negative adjusted gross income each year on his federal tax return and paid no federal income taxes."[140] Kanter's activities drew the attention of the IRS, to put it mildly. He and various of

[139] De novo review of a hearing officer's findings in the civil context does not implicate due process concerns. As explained by Judge Cudahy in his separate opinion in the Seventh Circuit's initial consideration of the *Estate of Kanter* case, "the Fifth Amendment does not require that the Tax Court review STJ findings using any particular degree of deference. . . . [T]here is no constitutional requirement that the Tax Court use an appellate-style review of its STJ reports." Estate of Kanter v. Commissioner, 337 F.3d 833, 882 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part).

[140] *Id.* at 838.

his closely held entities were audited by the Service "virtually, if not literally, every year since Richard Nixon was President."[141]

In the early 1970's, Kanter met Lisle and Ballard at the grand opening of the Hyatt Regency Hotel in Houston, Texas. The three became friends, and, according to the IRS, their friendship led to an arrangement whereby Kanter assisted Ballard and Lisle in collecting fees in exchange for exercising their influence over Prudential's real estate investment decisions. These fees were paid into an entity controlled by Kanter, Investment Research Associates, Ltd., or one of its subsidiaries. The fee income, totaling approximately $5 million by the end of 1983, later was distributed in a 45-45-10 ratio to corporations controlled by Ballard, Lisle, and Kanter, respectively.

After discovering and investigating this arrangement, the Service issued deficiencies notices to Ballard, Lisle, and Kanter, for 1975 through 1982, 1984, and 1987 through 1989 alleging that the three individuals received millions of dollars of income from the arrangement that they failed to report. The individuals and their related entities petitioned the Tax Court for review. On January 7, 1994, Chief Judge Lapsley W. Hamblen assigned the consolidated cases to Special Trial Judge D. Irwin Couvillion for trial pursuant to § 7443A(b)(4).[142]

The notices of deficiency issued by the Commissioner in the case failed to assert the civil fraud penalty. The Commissioner thereafter sought to amend its answers in the cases to raise the fraud penalty, and the parties and the Court agreed that the amended answers would not be filed until the trial commenced in June 1994.[143] Hence, the case did not raise the prospect of fraud when it was assigned to Special Trial Judge Couvillion for trial.

The trial took place largely over the summer of 1994, consuming five weeks of actual trial time. Over 50 witnesses testified at the trial, and the resulting transcript of the proceeding spanned approximately 6,000 pages. In addition, the parties introduced thousands of exhibits into evidence, and these exhibits consumed hundreds of thousands of pages.

The parties concluded their post-trial briefing in the case in March 1996. The next communication from the Tax Court came on December 15, 1999, the day on which Chief Judge Mary Ann Cohen issued an order by which

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141 *Id.*

142 At the time, § 7443A(b)(4) permitted a special trial judge to hear any assigned case. However, the special trial judge could not enter the decision in a case assigned under this provision; rather, the decision had to be entered by a presidentially appointed judge of the court. *See* IRC § 7443A(c). Given the expansion of the types of cases a special trial judge may hear, former § 7443A(b)(4) now is contained in § 7443A(b)(7).

143 *See* Investment Research Assocs., Ltd. v. Commissioner, T.C. Memo. 1999-407, 78 T.C.M. (CCH) 951, 1076.

she "reassigned" the case to Judge Howard A. Dawson, Jr. [144] for disposition. The order provided that Judge Dawson had been assigned the case on September 2, 1998, suggesting that Special Trial Judge Couvillion had submitted his report to Chief Judge Cohen on or before that date. On the same day the order reassigning the case to Judge Dawson was entered, Judge Dawson issued a memorandum opinion that "agree[d] with and adopt[ed] the opinion of the Special Trial Judge."[145] The decision then reproduced the opinion of Special Trial Judge Couvillion in full.

The incorporated opinion, over 600 pages in length, represented a considerable victory for the Service. The opinion upheld substantially all of the Commissioner's deficiency determinations. Most notably, the opinion sustained the Commissioner's imposition of the penalty for civil tax fraud.

3. Post-Trial Developments

Counsel for the taxpayers in *Investment Research Associates* came away from the case anticipating a decision in their favor based on comments made by Judge Couvillion at trial.[146] According to one of Kanter's attorneys, Randall G. Dick, he had occasion to speak with one or more judges of the Tax Court about the case. These judges reportedly informed him that Special Trial Judge Couvillion had initially submitted a report holding in favor of the taxpayers. Pursuant to these conversations, Dick became convinced that Judge Couvillion's findings had been reversed in a manner not reflected in the record.[147]

Thereafter, in April 2000, the taxpayers filed a motion with the Tax Court seeking access to "all reports, draft opinions, or similar documents prepared and delivered to the Court pursuant to Rule 183(b)."[148] Judge Dawson denied the motion by order dated April 26, 2000, explaining as follows:

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[144] At the time, Judge Dawson had assumed senior status, having served two full terms as a Tax Court judge from 1962 to 1985.

[145] Investment Research Assocs., Ltd. v. Commissioner, T.C. Memo. 1999-407, 78 T.C.M. 951, 963.

[146] *See* Brief for Petitioner at 5–6, Ballard v. Commissioner, 544 U.S. 40 (2005). According to counsel for Kanter, Special Trial Judge Couvillion stated "I'm waiting to hear the fraud case," when the Government rested at trial. Sam Young, Kanter *Plaintiffs Call for Investigation of Tax Court Judges*, 126 TAX NOTES 1181, 1182 (Mar. 8, 2010).

[147] These conversations were later recounted by Dick in an affidavit filed in August 2000. The details of the affidavit are discussed in text accompanying *infra* notes 152–154.

[148] *See* Tax Court Order dated August 30, 2000 (describing the contents of the taxpayers' initial request).

> [P]etitioners' motion requesting access to any internal Court documents, including any preliminary drafts of reports or opinions, documents, memorandums or notes by judges, special trial judges or employees of the Court, will be denied. In any event such materials are confidential and not subject to production because they relate to the internal deliberative processes of the Court.[149]

As part of the order, Judge Dawson stated that he gave due regard to the fact that Special Trial Judge Couvillion evaluated the credibility of the witnesses, and that he regarded the findings of fact recommended by the Judge Couvillion to be presumptively correct.[150]

A month later, the taxpayers moved to place Special Trial Judge Couvillion's initial post-trial report under seal and to include it in the record, thereby making it available for appellate review. The Tax Court denied this order as well.[151]

Having been twice rebuffed in their efforts to gain access to what they believed to be Special Trial Judge Couvillion's original report in the case or, at a minimum, cause such report to be included in the record under seal, Mr. Dick swore out an affidavit detailing the particulars of his informal communications with judges of the Tax Court concerning the case. Mr. Dick declared that he had been informed by two judges of the court that Special Trial Judge Couvillion, in his original report that he submitted to the Chief Judge, had concluded that the taxpayers did not realize unreported income from the transactions at issue and that the civil fraud penalty was not applicable.[152] According to the affidavit, these judges told Mr. Dick that "substantial sections of the opinion were not written by Judge Couvillion," and that the portions of the opinion relating to the finding of fraud "were wholly contrary to the findings made by Judge Couvillion in his report."[153] Mr. Dick testified that he had confirmed these events with a third judge of the Tax Court.[154]

Armed with Mr. Dick's declaration, the taxpayers on August 22, 2000, filed a motion seeking reconsideration of the court's previous denial of the

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[149] Tax Court Order dated April 26, 2000.

[150] *Id.*

[151] Tax Court Order dated May 30, 2000.

[152] Affidavit of Randall G. Dick, Aug. 21, 2000, at ¶ 4.

[153] *Id.* ¶ 5. The amicus brief filed by the Estate of Burton Kanter—represented in part by Randall Dick—in support of the certiorari petition filed by Ballard explains that Mr. Dick believed that his legal obligations to his client required testifying to the statements made to him by unnamed judges of the court. Brief of Joshua S. Kanter, as Executor of the Estate of Burton W. Kanter, as Amicus Curiae in Support of Petitioners, *Ballard v. Commissioner*, Docket No. 03-184, at 7 n.2 (Oct. 6, 2003).

[154] *Id.* ¶ 7.

taxpayers' motion for access to what they believed to be Special Trial Judge Couvillion's initial report in the case. In the alternative, this last motion requested a new trial—before someone other than Judge Dawson. On August 30, 2000, the Tax Court denied the taxpayers' motion once again. However, at this point, the court provided a more thorough explanation of its position:

> In the present motion . . . Randall G. Dick, . . . for the first time in the motion and in his declaration attached thereto, has made general assertions, without specificity, that two or three judges of the Court informed him that an original report of Special Trial Judge Couvillion "concluded that payments made [by those seeking Prudential's business] were not taxable to the individual Petitioners and that the fraud penalty was not applicable." Although Mr. Dick states in his declaration that some judges commented about the procedures involved in handling these cases, whatever may have been said to Mr. Dick is irrelevant and immaterial.
>
> The only official Memorandum Findings of Fact and Opinion by the Court in these cases is T.C. Memo. 1999-407, filed on December 15, 1999, by Special Trial Judge Couvillion, reviewed and adopted by Judge Dawson, and reviewed and approved by former Chief Judge Cohen.
>
> Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, that Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and that Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of the witnesses.

The order was signed by Chief Judge Thomas B. Wells, Judge Dawson, and Special Trial Judge Couvillion.

After this final rejection by the Tax Court, the taxpayers petitioned the appropriate Circuit Courts of Appeals seeking for a writ of mandamus ordering the Tax Court to release the initial post-trial report issued by Special Trial Judge Couvillion in the case. All such petitions were denied.[155] The taxpayers thereafter appealed the decision against them on the merits.

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[155] *See* In re Estate of Lisle, No. 00-60637 (5th Cir. Sept. 18, 2000); In re Ballard, No. 00-14762-H (11th Cir. Oct. 23, 2000); In re Investment Research Assocs., No. 00-3369 (7th Cir. Dec. 15, 2000).

However, as part of the taxpayers' appeal on the merits, each taxpayer continued to seek access to the special trial judge's initial post-trial report in the case. Lisle's appeal was prosecuted by his estate, which was subject to administration in Texas. Kanter died during the period of appeal of his decision, and his estate was subject to administration in Illinois. Ballard had since moved to Florida. Accordingly, appeals from the case rested in three different Circuit Courts of Appeals: the Fifth Circuit, the Seventh Circuit, and the Eleventh Circuit, respectively.

4. Treatment at the Circuit Courts of Appeals

a. The Eleventh Circuit in *Ballard*

The Eleventh Circuit Court of Appeals issued the first appellate decision in the litigation, resolving the appeal prosecuted by Ballard.[156] In addition to contesting the sufficiency of the evidence supporting the Tax Court's findings, Ballard argued that the Tax Court's procedures denying access to the initial post-trial report issued by the special trial judge in the case violated his due process rights. Ballard's due process argument proceeded from a number of angles. First, he analogized the use of special trial judges by the Tax Court to the use of magistrate judges and special masters by a Federal district court, noting that the Tax Court provided the lone example of a federal court that required the official presiding over trial to submit a report of proposed findings of fact and opinion to the court for adoption, modification, or rejection *before* making the report available to the parties. In Ballard's view, the Tax Court's departure from this universally accepted practice through Rule 183 led to a presumptive denial of due process. Apart from this broader objection, Ballard contended that the Tax Court's failure to include the initial report of Special Trial Judge Couvillion in the record made it impossible to determine if Judge Dawson afforded his factual findings the requisite presumption of correctness. Lastly, Ballard contended that the absence of the initial report precluded meaningful appellate review of the Tax Court's actions.[157]

The Eleventh Circuit noted that Ballard's arguments all were premised on the assertion that "the underlying report adopted by the Tax Court [was] not, in fact, Special Trial Judge Couvillion's report."[158] In the court's view, Ballard's assertion was belied by the record before it, which "clearly reveal[ed]" that the report adopted by Judge Dawson was that of Special Trial Judge Couvillion.[159] The Eleventh Circuit relied heavily on the August

156 *See* Ballard v. Commissioner, 321 F.3d 1037 (11th Cir. 2003).
157 *See id.* at 1042 (summarizing Ballard's due process arguments).
158 *Id.*
159 *Id.*

30, 2000 order signed by Special Trial Judge Couvillion along with Chief Judge Wells and Judge Dawson.[160]

However, the Eleventh Circuit did not rest its rejection of Ballard's due process contentions on the record alone. After assuming the truth of the allegations contained in Mr. Dick's affidavit, the court nonetheless found Ballard's due process claim wanting:

> While the procedures used in the Tax Court may be unique to that court, there is nothing unusual about judges conferring with one another about cases assigned to them. These conferences are an essential part of the judicial process when, by statute, more than one judge is charged with the responsibility of deciding the case. And, as a result of such conferences, judges sometimes change their original position or thoughts. Whether Special Trial Judge Couvillion prepared drafts of his report or subsequently changed his opinion entirely is without import insofar as our analysis of the alleged due process violation pertaining to the application of Rule 183 is concerned.[161]

After disposing with Ballard's due process claim, the Eleventh Circuit proceeded to affirm the Tax Court decision on the merits.

b. The Seventh Circuit Majority in *Estate of Kanter*

The Seventh Circuit Court of Appeals was next to weigh in, hearing the appeal prosecuted by Kanter's estate.[162] During argument before the Seventh Circuit, the taxpayers' counsel was pointedly asked which Tax Court judges had spoken informally with Mr. Dick.[163] Counsel identified those judges as Judge Julian I. Jacobs, and Chief Special Trial Judge Peter J. Panuthos.[164]

The Seventh Circuit, in a divided opinion, followed the lead of the Eleventh Circuit in rejecting the taxpayers' due process claims. As an initial matter, the court determined that all of the taxpayers' claims were rendered

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160 Perhaps obviously, the Eleventh Circuit was most persuaded by the participation of Special Trial Judge Couvillion in the order: "[W]e . . . save for another day the more troubling question of what would have occurred had Special Trial Judge Couvillion not indicated that the report adopted by the Tax Court accurately reflected his findings and opinion." *Id.* at 1043.

161 *Id.*

162 *See* Estate of Kanter, 337 F.3d 833 (7th Cir. 2003).

163 *See id.* at 875–76 n.1 (Cudahy, J., concurring in part and dissenting in part).

164 *Id.* at 875. Counsel was not asked for the name of the third Tax Court judge alleged to have confirmed the contents of Mr. Dick's conversations with the two named individuals.

moot because the underlying report adopted by the Tax Court was, in fact, the report authored by Special Trial Judge Couvillion, as recited in the opinion itself.[165] The court observed that any preliminary recommendations of Special Trial Judge Couvillion—"if they ever existed"—would lack relevance as having been abandoned.[166]

The court was not troubled by the allegation that the facially straightforward statement by Judge Dawson in the opinion—that he agreed with and adopted the report of the special trial judge—may have masked a "quasi-collaborative judicial deliberation" between the two. Even if this process rendered the factual determinations of the special trial judge "malleable,"[167] the court determined that such a practice would not offend its notions of fundamental fairness, much less rise to the level of a due process violation. The Seventh Circuit grounded its rejection of the taxpayers' due process claims in the statutory regime governing the assignment of cases to special trial judges under § 7443A(b)(4). Because the Tax Court maintains sole authority to enter the decisions in these cases, the reviewing Tax Court judge serves as the original finder of fact. As such, the deference the Tax Court judge had to afford the preliminary factual findings of the special trial judge was necessarily limited. While the Tax Court procedures obligated the reviewing judge to afford due regard to the special trial judge's ability to evaluate the credibility of the witnesses while presuming the preliminary factual findings to be correct, the Seventh Circuit explained that the presumption operated as a mere starting point. The Tax Court could overcome the presumption by finding evidence that suggested the preliminary findings were incorrect. The Seventh Circuit flatly rejected the taxpayers' contention that the factual findings of the special trial judge could be overturned only if clearly erroneous, finding that such an approach would "all but abdicate the Tax Court's original decisionmaking authority."[168] From this perspective, the special trial judge's report lacked little if any independent significance. The Seventh Circuit therefore regarded suppression of the report pursuant to Tax Court procedures to be inconsequential.[169]

The taxpayers in *Estate of Kanter* contended that inclusion of the special trial judge's initial report in the case was necessary to facilitate effective appellate review by an article III court. Not only did the Seventh Circuit reject this argument, it turned the argument on its head. Citing its jurisdiction to review "decisions" of the Tax Court pursuant to § 7482(a)(1)

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[165] *Id.* at 840–41.

[166] *Id.* at 844.

[167] *Id.* at 841.

[168] *Id.* at 841. In this regard, the Seventh Circuit's opinion in *Estate of Kanter* mirrors the position taken by the Commissioner at oral argument in the *Freytag* case. *See* Section E.1.c. of this Part.

[169] *Id.* at 841–42.

as opposed to "reports," the court concluded that the special trial judge's report was not reviewable on appeal. The Seventh Circuit observed that the scope of its appellate jurisdiction lent credence to the Commissioner's view that the reports of special trial judges were properly regarded as preliminary factual findings that arise in the course of the Tax Court's internal deliberative process.[170] Indeed, the court analogized the review of a special trial judge's report by a Tax Court judge to the occasional review of the report of a Tax Court judge by the full Tax Court. Citing § 7460(b), the Seventh Circuit observed that portions of the report issued by the Tax Court judge presiding over the case that were not adopted in the final opinion emanating from court conference were not preserved in the record for later review. Accordingly, not all "reports" of the Tax Court necessitated publication or even inclusion in the record.

c. The *Estate of Kanter* Dissent

As mentioned above, the Seventh Circuit in *Estate of Kanter* did not issue a unanimous decision. Through a separate 24-page opinion in the case, Judge Cudahy explained his belief that the Tax Court's failure to include the initial post-trial report issued by the special trial judge in the record on appeal constituted a violation of the taxpayers' Fifth Amendment due process rights. Given the considerable influence of Judge Cudahy's dissent in the Supreme Court's later resolution of the case, Judge Cudahy's rationale is discussed at length below.

Judge Cudahy devoted considerable attention to the Tax Court's practice of reviewing the reports of special trial judges before turning to his legal analysis. While Judge Cudahy did not necessarily accept Kanter's alleged version of events as fact, he agreed with the taxpayers that the Tax Court's routine declaration in this setting that it "agrees with and adopts the opinion of the Special Trial Judge" did not mean that the Tax Court's opinion represented a verbatim adoption of the special trial judge's *original* report in the case.[171] Rather, Judge Cudahy found that the record supported the view that the Tax Court engaged in a "quasi-collaborative process of review" of the special trial judge's initial report from which a new and frequently revised report emerged to be adopted in full by the Tax Court judge.[172] Judge Cudahy based this determination primarily on the extraordinary consistency with which Tax Court judges adopted the reports of special trial judges without objection or modification. Having reviewed 880 decisions involving a special trial judge report since the then-current Rule 183 procedures had been adopted, Judge Cudahy observed that the

[170] *Id.* at 842.
[171] *Id.* at 875 (Cudahy, J., concurring in part and dissenting in part).
[172] *Id.* at 876.

Tax Court never once failed to adopt the proposed opinion of the special trial judge. He regarded this degree of unanimity "impossible" among all of the judicial officers of the Tax Court. [173] Judge Cudahy's legal analysis therefore presumed some degree of a collaborative process between a special trial judge and the reviewing Tax Court judge from the time the special trial judge issued his initial post-trial report in the case to the time the Tax Court issued the ultimate opinion in the case.

Judge Cudahy did not regard the alleged collaborative process between the special trial judge and the reviewing Tax Court judge as per se objectionable; rather, he recognized that the opportunity of the special trial judge to receive additional input into the decision making process may enhance the quality of the final product.[174] From this standpoint, Judge Cudahy proceeded to note the various grounds on which he agreed with the majority opinion, albeit reluctantly at times. First, he agreed that Rule 183(c) did not require the report of the special trial judge to be reviewed under a clearly erroneous standard, rejecting the taxpayers' invocation of the D.C. Circuit's holding in *Stone v. Commissioner*.[175] Second, even though he acknowledged that the Tax Court's application of Rule 183 necessitated the existence of two reports (that is, the initial report conveyed to the chief judge and the final opinion reviewed and adopted by the Tax Court), Judge Cudahy did not find that the Tax Court had violated its procedure under Rule 183.[176] He noted that the Tax Court enjoys a considerable level of deference in interpreting its procedural rules;[177] hence, he accepted the Tax Court's position that Rule 183 no longer required the production of special trial judge reports even while lamenting the movement away from transparency reflected in the amended procedure. Last, Judge Cudahy acknowledged that although the statutory regime governing the publication of Tax Court reports created a strong presumption in favor of public dissemination of Tax Court documents, nothing in those statutes specifically required the Tax Court to make the initial report of the special trial judge public.[178]

Turning to the taxpayers' due process claims, Judge Cudahy again found a number of points of agreement with the majority opinion. Reviewing

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[173] *Id.*

[174] *Id.* at 883, 887.

[175] *See id.* at 887–88. Judge Cudahy found the holding of the D.C. Circuit in *Stone v. Commissioner*, 865 F.2d 342 (D.C. Cir. 1989) (that the presumption of correctness provided under former Rule 182 necessitated a clearly erroneous level of deference to the special trial judge's findings), to have been superseded by the Tax Court's adoption of new procedures that eliminated production of the special trial judge's report. *See id.* at 878.

[176] *Id.* at 878.

[177] *Id.*

[178] *See id.* at 881.

relevant Supreme Court precedent, Judge Cudahy concluded that, outside of the criminal setting, due process does not require the ultimate finder of fact to be constrained by a formal degree of deference to the hearing officer. As appellate-style review of special trial reports was not constitutionally required, the Tax Court's presumed quasi-collaborative model in this setting was not constitutionally precluded.[179] Consistent with this approach, Judge Cudahy concluded that any reversal of the special trial judge's initial factual findings by the Tax Court judge as a result of the collaborative process did not offend a taxpayer's due process rights—even if the reviewing Tax Court judge did not first rehear the testimony of the relevant witness.[180]

This discussion led to the one due process point on which Judge Cudahy differed from the majority: the taxpayer's due process right to appellate review of the Tax Court's decision. Judge Cudahy viewed the appellate court's access to the initial findings of the special trial judge as indispensable to its task of evaluating the findings in the final Tax Court opinion under the requisite clearly erroneous standard of § 7482(a). In explaining his conclusion, Judge Cudahy parsed the operation of clear-error review. Specifically, he explained that clear error standard of review did not yield a uniform level of deference to be afforded to all factual findings. Rather, the greater a factual finding turned on the ability of the hearing officer to evaluate the credibility of the witness, the greater a degree of deference was owed.[181] From this standpoint, an appellate court would not be able to know the degree of deference to be afforded to the findings of fact in the Tax Court's opinion unless it were aware of the extent to which those findings differed from those of the special trial judge.[182] Judge Cudahy found the need for the special trial judge's initial findings particularly pressing in the "quasi-criminal" context of civil tax fraud: "I can think of no single item of more significance in evaluating a Tax Court's decision on fraud than the unfiltered findings of the STJ who stood watch over the trial."[183]

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179 *See id.* at 882.

180 *Id.* at 883–84.

181 *See id.* at 884 (citing Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985)).

182 *See id.* at 885 ("If we are to give 'even greater deference' to the findings of a judge who has heard the witness whose credibility is at stake, we must inevitably give less deference to the judge who subsequently reverses those findings.").

183 *Id.* at 886. The dissent ultimately reached the conclusion that the failure of the Tax Court to include the initial report of the special trial judge in the record on appeal constituted a due process violation based on a three-part balancing test suggested by Supreme Court precedent. Judge Cudahy found that the quasi-criminal nature of a civil fraud determination gave rise to a more significant private interest on the part of the taxpayer than a simple civil determination. The risk of

To his credit, Judge Cudahy addressed the most glaring and difficult retort to his position: The special trial judge signs the final report that is adopted by the Tax Court, thereby certifying the correctness of any factual findings that may have been modified in the process of the collaborative review. Judge Cudahy observed that the alleged quasi-collaborative process could yield such a result, whereby the "original impressions of the STJ are tempered through the collaborative process with the Tax Court, and . . . the Tax Court's opinions would be molded and informed by the first-hand impressions of the STJ."[184] However, Judge Cudahy was not willing to accept this "utopian" characterization of the Tax Court's procedures. Citing the subordinate status of special trial judges and the resulting absence of judicial independence,[185] Judge Cudahy refused to ascribe binding effect to the special trial judge's subsequent assent to the findings contained in the final Tax Court opinion.

d. The Fifth Circuit in *Estate of Lisle*

Appeal of the Tax Court's decision in *Investment Research Associates* on behalf of Lisle was prosecuted by his estate before the Fifth Circuit.[186] The court disposed of the taxpayers' due process challenge to the Tax Court's application of its Rule 183 procedures in short order. Finding the prior analysis of the issue by the Eleventh Circuit in *Ballard* and by the Seventh Circuit in *Estate of Kanter* as "direct and persuasive," the Fifth Circuit in *Estate of Lisle* adopted it as its own.[187] The Fifth Circuit devoted the bulk of its opinion to addressing the merits of the Tax Court's determination, which yielded a considerable victory for the taxpayers. While it upheld the Tax Court's determination that the Commissioner had established Lisle's income tax deficiencies by a preponderance of the evidence, the Fifth Circuit determined that the evidentiary record failed to support a finding that Lisle had engaged in tax fraud by clear and convincing evidence.[188] Hence, the Fifth Circuit overturned the imposition of the civil fraud penalty against Lisle, and this determination also affected the tax years that

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error in the setting was heightened as well. Without the special trial judge's report, the appellate court would be reviewing, on the basis of a cold record, the Tax Court judge's determination of fraud, which also was made on the basis of a cold record. Finally, Judge Cudahy viewed the additional cost and administrative burden of avoiding the risk of error—that is, publication of the special trial judge's initial report—as de minimis. *See id.* at 887.

184 *Id.* at 887.

185 *Id.*

186 *See* Estate of Lisle v. Commissioner, 341 F.3d 364 (5th Cir. 2003).

187 *Id.* at 384.

188 *Id.* at 382–83.

remained open to the Commissioner under the statute of limitations on assessment.

5. Supreme Court Review

Following their defeats at the Circuit Court level, Ballard and the Estate of Kanter petitioned the Supreme Court for certiorari.[189] Ballard's petition presented the following questions for review: (1) whether the alleged off-the-record collaborative process between Special Trial Judge Couvillion and Tax Court Judge Dawson was consistent with the due process clause or the right to effective article III review; and (2) whether § 7482(a), which requires Tax Court decisions to be reviewed in the same manner as decisions of a U.S. District Court, is consistent with the alleged secretive collaboration between the special trial judge and the reviewing Tax Court judge in this setting. The petition filed on behalf of Kanter's estate raised two questions for review: (1) whether the due process clause or governing federal statutes require the court of appeals to review the decision of the Tax Court on the basis of a complete record that included the special trial judge's findings of fact, and (2) whether Rule 183 required the Tax Court to uphold factual findings of special trial judges unless clearly erroneous. The Supreme Court granted the parties certiorari petitions on April 26, 2004.

Although the parties did not raise the Tax Court's compliance with the Rule 183 procedures (apart from the appropriate degree of deference to be afforded to the special trial judge's factual findings) as part of their certiorari petitions or in their briefs, Justices Ginsburg and Souter injected this as a possible issue in the taxpayers' favor early in the taxpayers' argument of the case:

> JUSTICE GINSBURG: Mr. Shapiro, why don't you simply read the text of 183(b) --
>
> MR. SHAPIRO: Yes.
>
> JUSTIFICE GINSBURG: . . . It says, special trial judge's report. It is the only report to which the Tax Court rules refer.
>
> MR. SHAPIRO: That's correct, Your Honor. And it's --
>
> JUSTICE SOUTER: And -- and if in fact --

[189] The Estate of Lisle likely declined to continue its appeal to the Supreme Court because the Fifth Circuit's reversal of the civil fraud determination eliminated a large portion of the estate's liability.

> MR. SHAPIRO: -- it is presumed correct.
>
> JUSTICE SOUTER: -- you rely on the rule, do we even have to resolve the issue on the meaning of report in the statute? Can't we simply, from your position, rely on the rule and say you've got to follow your own rules?
>
> MR. SHAPIRO: Absolutely. This is a report that must be submitted. It is presumed correct under this rule. It's an independent evaluation of credibility from the only judge who heard the witnesses, and of course, it's part of the record. And it doesn't --
>
> JUSTICE SOUTER: So you've really got three arguments. You've got the rule. You've got the statute, and you have due process.
>
> MR. SHAPIRO: And it doesn't make the slightest difference that the superior judge caused the subordinate judge to say, I have changed my mind at a later stage in the proceeding, because it is the original report that is presumed correct under the rules.[190]

An exchange between the Court and counsel for the Commissioner on the same topic highlighted the critical procedural question in the case: Does a post-trial report submitted by a special trial judge in a § 7443A(b)(4) proceeding but later withdrawn by the authoring judge in favor of a substitute report continue to have significance under the Tax Court's procedures, or is the withdrawn report treated as a nullity?

> JUSTICE SOUTER: . . . The rule presumes that some original document, which you are treating as provisional, enjoys a presumption of correctness, and I don't see the consistency between provisionality and deliberate character on the one hand and presumption on the other.
>
> MR. HUNGAR: If I may, Your Honor, the rule does not state that the, quote, original report shall receive a presumption of correctness. It doesn't even say that -- that any report shall receive a presumption of correctness. It says the findings of fact recommended by the special trial judge.

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[190] Transcript of Oral Argument at 7–9, Ballard v. Commissioner, 544 U.S. 40 (2005).

JUSTICE SOUTER: And aren't those findings of fact the findings of fact that are delivered to the chief judge in the report that is made to the chief judge before it is even assigned to a Tax Court judge?

MR. HUNGAR: Not if -- not if the tax -- if the special trial judge has abandoned those recommendations, withdrawn those recommendations, and replaced them.

JUSTICE SOUTER: But he hasn't abandoned them at the point he delivers them to the chief judge, and if that's what this is referring to, then the presumption of the -- of -- of correctness necessarily has to apply to whatever the document is that's delivered to the chief judge.

MR. HUNGAR: Well, it applies to the report, but I submit that if the special trial judge withdraws in order to correct an error in the report, what he submits as the corrected report is then the, quote, report.[191]

After members of the Court continued to press counsel for the Commissioner on the application of Rule 183 in the case, counsel appropriately noted that the ability of the special trial to change his initial report under Rule 183 was not among the questions presented in the case.[192] Rather, Rule 183 had been raised by Kanter's estate only in connection with the level of deference owed to the factual findings of the special trial judge as a result of the rule's treatment of such findings as presumptively correct.

Although predicting the result and rationale of a Supreme Court decision based on the content of oral argument is an approach fraught with

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[191] *Id.* at 38–39. Earlier in the argument, counsel for the Commissioner and Justice Souter engaged in a similar exchange:

MR. HUNGAR: . . . the important thing to understand, Your Honor, is that nothing in the rule precludes, during the course of the deliberative process that then follows, the special trial judge from concluding that he has made a mistake, that he no longer agrees with the -- the stated findings of fact in that -- in that original report, from withdrawing and submitting a corrected report.

JUSTICE SOUTER: But that is not the way the rule reads. The rule reads, as I understand it, under (c) that the court itself may accept, reject, or modify. It doesn't say anything about the special trial judge reconsidering and rewriting his report.

Id. at 29–30.

[192] *Id.* at 46.

peril, the tenor and content of the oral argument in *Ballard* strongly resonated in the Court's resolution of the case.[193] Justice Ginsburg, writing for a seven-justice majority, reversed the decisions of the Eleventh Circuit and Seventh Circuit. The grounds for reversal did not rest in the due process clause or any statute governing the appeal of Tax Court decisions or the publication of Tax Court documents. Rather, the Supreme Court grounded its decision in the Tax Court's failure to follow its published procedure governing the proceeding under Rule 183.[194]

The Supreme Court began its analysis of the case by tracing the development of the Tax Court's procedures for reviewing the reports of special trial judges is cases assigned to them for trial pursuant to § 7443A(b)(4). In the course of this discussion, the Court accepted the taxpayers' premise that, following the 1983 amendments to Rule 183, the Tax Court adopted the following novel practice regarding the post-trial report issued by the special trial judge to the chief judge:

> No longer does the Tax Court judge assigned the case alone review the report and issue a decision adopting it, modifying it, or rejecting it in whole or in part. Instead, the Tax Court judge treats the special trial judge's report essentially as an in-house draft to be worked over collaboratively by the regular judge and the special trial judge.[195]

In reaching this understanding, the Court cited the declaration by Mr. Dick concerning his informal conversations with members of the Tax Court, quoting from his affidavit. Additionally, the Court observed the remarkable degree of unanimity between special trial judges and their reviewing Tax Court judge peers noted by Judge Cudahy in his dissent to the Seventh Circuit's decision in *Estate of Kanter*.

Unlike the appellate courts below, the Supreme Court was not indifferent to the presumed collaborative process between the special trial judge and the reviewing Tax Court. Rather, in the Court's view, the anomalous practice represented an "unreasonable" and "arbitrary" interpretation of Rule 183.[196] The Court thereafter explained its interpretation of the procedural rule: Rule 183(b) referred to the report initially communicated by the presiding special trial judge to the chief judge of the Tax Court—not some later report representing the collaborative work of the special trial judge and the reviewing Tax Court judge. Furthermore, this initial report (which the Court referred to as the "Rule 183(b) report" for clarity) served as the subject of Rule 183(c), a provision

193 *See* Ballard v. Commissioner, 544 U.S. 40 (2005).
194 *Id.* at 58–59.
195 *Id.* at 57.
196 *Id.* at 59, 61.

the Court observed was captioned "Action on the Report." Noting that Rule 183(c) required the Tax Court to accord the factual findings of the presiding special trial judge deference when conducting the review process, the Court highlighted the anomaly that would result if Rule 183(c) were interpreted as referring to a subsequent report submitted by the special trial judge with the aid of the reviewing judge:

> One would be hard put to explain . . . how a final decisionmaker, here the Tax Court judge, would give "due regard" to, and "presum[e] to be correct," an opinion the judge himself collaborated in producing.[197]

Unmoved by any purported efficiencies generated by the Tax Court's assumed practice, the Court found that the practice was not warranted by the Tax Court's published procedures. The Court's rationale can therefore be summed up through the following blunt observation: "The Tax Court, like all other decisionmaking tribunals, is obligated to follow its own Rules."[198]

The Court's disposition of the case in *Ballard* undoubtedly was colored by its displeasure with the lack of transparency in the Tax Court's alleged practice of reviewing special trial judge reports. The Court noted the routine practice in federal judicial and administrative decision making tribunals to disclose the initial report of the hearing officer to the parties and to include the hearing officer's report in the appellate record.[199] The Court viewed the assumed "concealment" of the special trial judge's initial report by the Tax Court as representing a "departure of . . . bold character" from the prevailing norm.[200] Given this perspective, the Court was not inclined to afford the Tax Court considerable leniency in the interpretation and application of its procedural rules.

The Court in *Ballard* noted that the Tax Court's assumed practice of failing to disclose the original report issued by the special trial judge and of "obscuring" the procedure by which the Tax Court judge reviewed such report impeded "fully informed" appellate review."[201] While this point appeared to channel the rationale of Judge Cudahy in his dissent in the Seventh Circuit's decision in *Estate of Kanter*, the Supreme Court was not similarly willing to resolve the case on constitutional grounds. Indeed, the Court likely was reluctant to invoke notions of due process to achieve the

197 *Id.* at 59.

198 *Id.*

199 *See id.* at 46.

200 *Id.*; *see also id.* at 61 ("We are all the more resistant to the Tax Court's concealment of the only special trial judge report its Rules authorize given the generally prevailing practice regarding a tribunal's use of hearing officers.").

201 *Id.* at 59–60.

result it desired in the case, concerned over the ramifications of a decision on those grounds. Justice Breyer remarked at oral argument as follows: "If we have to go to the Constitution, I don't see exactly the implications. So I'm nervous." [202] Accordingly, the Court did not resolve the case on the basis of due process violations alleged by the taxpayers or, for that matter, the myriad claimed statutory violations. Instead, the Court merely warned that if the Tax Court were to modify its procedural rules to expressly condone its assumed practice in this context, any such change would be subject to review on constitutional and statutory grounds at that time.

The result of the Supreme Court's decision in *Ballard* may not have been surprising, given the lack of transparency embodied in the Tax Court's assumed practice of reviewing special trial judge reports. Yet the Court's rationale proved exceedingly weak. As the body that promulgated the procedural rule the Court thrust to the forefront of the resolution of the case, one would expect the Tax Court to be afforded wide deference in determining the proper application of the Rule.[203]

In that regard, reconciling the assumed practice of the Tax Court with the terms of Rule 183 did not present an overwhelming task. Rule 183(b) referred to the report submitted by the special trial judge to the chief judge for assignment, and Rule 183(c) was captioned "Action on the Report." As the majority explained, these two provisions presumably referred to the same document. However, if the special trial judge were to withdraw that report and substitute an amended report in its place,[204] the withdrawn report would be rendered a nullity. Only one report would remain—the later submitted substitute—to be governed by the Rule 183 procedures. Chief Justice Rehnquist, writing in dissent, explained this interpretation of Rule 183 more succinctly:

> Paragraph (c)'s use of the possessive "Special Trial Judge's report" is most naturally read to refer to the report authored and ascribed to by the special trial judge. If the special trial judge changes his report,

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[202] Transcript of Oral Argument at 60, Ballard v. Commissioner, 544 U.S. 40 (2005).

[203] This point essentially summarizes the dissent authored by Chief Justice Rehnquist in the case, which was joined by Justice Thomas: "The Tax Court's compliance with its own Rules is a matter on which we should defer to the interpretation of that court." Ballard v. Commissioner, 544 U.S. 40, 68 (2005) (Rehnquist, C.J., dissenting).

[204] How the special trial judge would arrive at the decision to withdraw the report initially submitted to the chief judge in this manner—whether through further independent research or contemplation, or through input received from the reviewing judge—would be irrelevant, as no prohibition existed on collaboration between the special trial judge and the reviewing Tax Court judge (or, for that matter, any other judge of the Tax Court).

> then the new version becomes "the Special Trial Judge's report." It is the special trial judge's signature that makes the report attributable to him.[205]

Under this approach, the withdrawn and superseded initial report of the special trial judge would have no lasting significance. Rather, it would amount to a prior draft of the final report submitted in the name of the special trial judge. And no party claimed entitlement to discovery of prior drafts of Tax Court opinions or reports as such. Hence, the reasonableness of the Tax Court's interpretation of Rule 183 turned on the reasonableness of treating a report, initially submitted by the special trial judge but later withdrawn by the same judge, as an internal draft.[206] Views on this question may differ, but treating the withdrawn report as a nullity certainly is not unreasonable or arbitrary as characterized by the Supreme Court majority in *Ballard*.[207]

The Supreme Court's invocation of Rule 183 as the basis for its decision in favor of the taxpayers in *Ballard* represented something of a path of least resistance for the Court to achieve its desired result. The Court clearly was not enamored with the assumed practice of the Tax Court, as evidenced by its repeated characterization of the Tax Court's "concealment" of the special trial judge's initial report. By basing its decision on the Tax Court's

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[205] *Id.* at 71.

[206] Another way of framing the same issue is whether, after having submitted the initial draft of his post-trial report to the chief judge, the presiding special trial judge had any standing to participate in the case going forward.

[207] *See id.* ("At the very least, it is not unreasonable or arbitrary for the Tax Court to construe the Rule as not requiring the disclosure of preliminary drafts or reports."). Regarding the Court's rhetorical question concerning how a reviewing Tax Court judge could afford deference to factual findings that judge helped prepare, *see id.* at 59, the question does not highlight a logical obstacle. In fact, the answer is simple: the reviewing judge would be affording deference to the substituted factual findings of the special trial judge with which the reviewing judge likely agrees. The rhetorical question becomes problematic only if the substituted findings of fact do not actually represent those of the special trial judge, but instead only those of the reviewing Tax Court judge, notwithstanding the special trial judge's issuance of the substituted report. This approach assumes the existence of reviewing Tax Court judges who routinely impose their views on consistently compliant special trial judges. It ignores the prospect of (a) a reviewing Tax Court judge who does not desire to participate in the "quasi-collaborative" deliberative process in the first place, (b) a special trial judge who resists suggestions of the reviewing Tax Court judge that contravene his own, and (c) a special trial judge who simply wishes to be rid of the case after submitting his post-trial report to the Chief Judge. Hence, the Tax Court's interpretation of Rule 183(c) did not necessarily produce illogical results as the majority suggested.

"arbitrary construction" of Rule 183,[208] at the Tax Court's expense, the Supreme Court was able to avoid broaching the Fifth Amendment's due process protections—a critical but evolving constitutional doctrine—to dispose of the case before it.[209] However, it is worth noting that the dissent authored by Judge Cudahy in *Estate of Kanter*, which appeared to influence the majority's decision in *Ballard*, determined that the Tax Court's assumed practice of quasi-collaborative decision making was not precluded by Rule 183. Rather, Judge Cudahy's point of contention rested in the Tax Court's refusal to include the initial findings of the special trial judge in the appellate record—an issue that has nothing to do with Rule 183.[210] Judge Cudahy viewed the initial report as indispensable to meaningful review of the Tax Court's ultimate factual findings, and he was willing to invoke the litigants' constitutional rights to due process of law as a means of assuring its inclusion. The Supreme Court in *Ballard*, however, did not see the need to follow Judge Cudahy down this sobering legal path to achieve essentially the same result.

Typically, the Supreme Court's resolution of the case triggers a denouement of sorts in the legal proceedings. Not in this instance. Rather, the decision in *Ballard* pointed to a crescendo: production of the elusive initial report of Special Trial Judge Couvillion in *Investment Research Associates*, if indeed the claimed prior report even existed. However, obtaining access to this report involved additional procedural maneuvering, as the Supreme Court in *Ballard* did not order its production. The Court reversed the judgments of the Eleventh Circuit in *Ballard* and the Seventh Circuit in *Estate of Kanter* to the extent those judgments upheld the Tax Court's exclusion of the special trial judge's initial post-trial report from the record on appeal, and remanded the cases for "further proceedings consistent with this opinion."[211]

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[208] *Id.* at 61.

[209] Basing its decision on the variety of narrow statutory grounds raised by the parties and their amici would have similarly permitted the Court to limit ramifications of its holding. Presumably, either the Court found the statutory avenues for ruling in the taxpayers' favor less meritorious than the Rule 183 rationale, or the Court determined the Rule 183 approach to present the preferred narrow basis for its decision.

[210] *See* Estate of Kanter v. Commissioner, 337 F.3d 833, 878 (7th Cir. 2003) (Cudahy, J., concurring in part and dissenting in part) ("[T]he Tax Court's interpretation of its own rules of procedure receives a great deal of deference. Therefore, the 1983 amendment to the Tax Court rules had the effect of no longer requiring that the parties (or the general public or a reviewing court, for that matter) have access to the STJ's report.").

[211] *Ballard*, 544 U.S. at 65.

6. Release of the Initial Report of the Special Trial Judge

The Seventh Circuit was the first court to grabble with the Court's decision in *Ballard* on remand.[212] In a per curiam opinion issued on May 9, 2005, the majority in *Estate of Kanter II* declined the estate's request for the initial report of Special Trial Judge Couvillion to be produced on the parties and included in the record on appeal.[213] Instead, the Seventh Circuit remanded the case to the Tax Court for further proceedings consistent with the Supreme Court's decision. Judge Cudahy, however, expressed his displeasure at protracting the proceedings in this manner: "This report must be included in the record, and I see no reason why it cannot be produced without further delay. It was improperly withheld, and its nondisclosure ought to cease—now."[214]

The next court to act on the Supreme Court's decision in *Ballard* was the Eleventh Circuit. On May 17, 2005, it granted Ballard's motion to include the initial report submitted by Special Trial Judge Couvillion in the appellate record, directing the Tax Court to transmit the appellate record as supplemented within 14 days.[215] The Tax Court complied, producing the report for the first time on May 26, 2005.

The release of Special Trial Judge Couvillion's initial post-trial report in *Investment Research Associates* confirmed the suspicions of the taxpayers' attorneys. In the initial report, spanning some 300 pages, Special Trial Judge Couvillion unqualifiedly rejected the Commissioner's central theory of the case:

> Respondent has not demonstrated that there was an underpayment tax by any of the petitioners arising out of what respondent derisively described throughout the trial as "kickback schemes" wherein moneys were exacted as a condition for doing business, and that such moneys constituted income that was nor [sic] reported by petitioners.
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> . . .
>
> [T]here were no "kickback schemes", and none of the alleged "kickback schemes" payments by "the Five" represented unreported

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[212] *See* Estate of Kanter v. Commissioner, 406 F.3d 933 (7th Cir. 2005).

[213] *See id.* at 934.

[214] *Id.* (Cudahy, J., dissenting).

[215] *See* Order of Eleventh Circuit Court of Appeals in *Ballard v. Commissioner*, Docket 01-17249-GG (May 17, 2005), *reprinted in* Crystal Tandon, *Eleventh Circuit in Ballard Orders Special Trial Judge Report Included in Record*, TAX NOTES TODAY, May 24, 2005, *available at* 2005 TNT 99-2.

> taxable income of Kanter, Ballard, and Lisle. There was, therefore, no underpayment of tax.[216]

Having rejected the Commissioner's deficiency determinations, the Commissioner's assertion of a civil fraud penalty quickly fell by the wayside:

> [I]n the Court's view, certain transactions that respondent cited . . . in asserting petitioners are liable for these additions to tax for fraud, at best, amount to only respondent's suspicions of fraud. The Court, however, does not consider these transactions as even rising to the level of suspicion of fraud. Consequently, the Court holds that petitioners are not liable for additions to tax for fraud under section 6653(b).[217]

The initial report submitted by Special Judge Couvillion in *Investment Research Associates* is difficult to reconcile with his subsequent report, to put it mildly. The incompatibility of the two is even more striking when one considers that a penalty for civil tax fraud—the imposition of which the subsequent report of Special Trial Judge Couvillion affirmed—requires the Government to establish fraudulent conduct by clear and convincing evidence.[218] The disclosure of Judge Couvillion's initial report in the case therefore left the Tax Court to face considerable challenges on the public relations front.

Through a July 19, 2005 order issued in the *Estate of Lisle* proceeding that remained before the Tax Court, Chief Judge Gerber referred to the observation by Justice Kennedy in his concurring opinion in *Ballard* that "we do not know what happened in the Tax Court, a point that is important to underscore here."[219] Chief Judge Gerber therefore sought to clarify the record in the case by serving the parties with separate statements

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[216] Initial Report of Special Trial Judge Couvillion, Investment Research Assocs., Ltd. v. Commissioner, at 84–85. This report is reproduced as an attachment to a June 16, 2005 order issued by Chief Judge Gerber ordering the service of the report on the parties and its inclusion in the record. The order, with attachments, is accessible on the Tax Court's website at: https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=4197532.

[217] *Id.* at 85–86.

[218] The change in the two reports is stark. Whereas the initial report found that the events in question did not give rise to a suspicion of fraud, the subsequent report declared that "what we have here, purely and simply, is a concerted effort by an experienced tax lawyer and two corporate executives to defeat and evade the payment of taxes and to cover up their illegal acts." Investment Research Assocs., Ltd. v. Commissioner, T.C. Memo. 1999-407, 78 T.C.M. (CCH) 951, 1083.

[219] Ballard v. Commissioner, 544 U.S. 40, 67 (2005) (Kennedy, J., concurring).

provided by former Chief Judge Mary Ann Cohen, Judge Dawson, and Special Trial Judge Couvillion, each describing the procedures that were followed in the proceedings that culminated in the Tax Court's memorandum decision in *Investment Research Associates*. Together, the three statements largely confirmed the "quasi-collaborative" judicial deliberation process assumed by the Seventh Circuit in *Estate of Kanter* and by the Supreme Court in *Ballard*. A summary follows.

On June 23, 1998, Special Trial Judge Couvillion transmitted his recommended findings and opinion in the case to Chief Judge Cohen. On July 14, 1998, Chief Judge Cohen referred the document to Judge Dawson, for review and possible adoption.

On August 20, 1998, Judge Dawson telephoned Chief Judge Cohen to inform her that he disagreed with Judge Couvillion's report and could not adopt it. Chief Judge Cohen next contacted Judge Julian I. Jacobs to determine if he could review the report for potential adoption. Judge Jacobs declined, however, citing his personal friendship with Randall Dick, counsel for Kanter. Chief Judge Cohen thereafter reviewed Judge Couvillion's report to determine if perhaps she could adopt it. Viewing the facts as not supporting the opinion, she concluded that she could not.

Chief Judge Cohen thereafter scheduled a meeting with Judge Couvillion and Judge Dawson to discuss how to best proceed with the case. On September 1, 1998, the day prior to their scheduled meeting, Judge Couvillion informed Chief Judge Cohen that he was withdrawing his report. In Judge Couvillion's words, "I requested that the report I submitted be withdrawn for further consideration." The withdrawn report was returned to Judge Couvillion on that date and regarded by those involved as nullity.

The judges thereafter agreed that Judge Couvillion and Judge Dawson would collaborate on the preparation of a revised report to be submitted by Judge Couvillion for adoption. Judge Dawson's statement indicates that this arrangement was requested by Special Trial Judge Couvillion, and that Judge Dawson agreed with the arrangement following the approval of Chief Judge Cohen. This process yielded a revised report submitted by Judge Couvillion to Chief Judge Cohen on September 2, 1999. Judge Dawson described the arrangement leading to the revised report as "a collaborative judicial deliberation" of the sort indicated by the Supreme Court and the Courts of Appeals. For his part, Judge Couvillion described that he and Judge Dawson worked together on each of the many issues raised in the case, and that findings and conclusions on each were "based on the concurrence of the two of us." Chief Judge Cohen described the arrangement between Judge Couvillion and Judge Dawson as consistent with the collegial process that pervaded the Tax Court, citing the customary practice of proposed opinions being reviewed by the Chief Judge and all judicial officers of the court prior to their release.

Chief Judge Cohen referred Special Trial Judge Couvillion's substituted report to Judge Dawson on September 2, 1999, for his final review. On October 25, 1999, Judge Dawson adopted the revised report and submitted it to Chief Judge Cohen. On November 4, 1999, Chief Judge Cohen approved the report with some modifications and directed that it be filed as a Memorandum Opinion. On December 15, 1999, Chief Judge Cohen issued an order reassigning the cases to Judge Dawson for decision, and the opinion was filed as T.C. Memo. 1999-407 on that date.

In her statement, Chief Judge Cohen specifically addressed the allegation that Special Trial Judge Couvillion had been "reversed" by Judge Dawson or, for that matter, anyone else. She viewed this as a mischaracterization of events, explaining that "Judge Couvillion reconsidered the cases and reversed himself."

In an appearance before the Court Procedure Committee of the America Bar Association Section of Taxation meeting in September of 2005, then Chief Judge Gerber sought to clarify the Tax Court's procedures with respect to the review of special trial judge reports prior to the issuance of the Supreme Court's decision in *Ballard*. In particular, Chief Judge Gerber placed the review of special trial judge reports in the larger context of the Tax Court's traditional practices:

> Judges prepare proposed opinions and submit them to the Chief Judge for review. The Chief Judge, with the assistance of legal staff, reviews the opinions and notes changes in the text and margins. On occasion, a proposed opinion may disagree with a prior opinion or several judges may have the same legal issue and the Chief Judge may arrange an informal discussion among the Judges to try to resolve any disagreements. If a matter is sufficiently important, the Chief Judge may refer it to the Court Conference for consideration and review by all 19 presidentially appointed Judges. A majority of the Court Conference may reach a result different from that proposed by the initial authoring judge, who may also have been the trial Judge. In that event, the opinion issued by the Court would differ from the report initially offered by the trial Judge. That collegial process has served to provide a generally uniform body of law and precedent.
>
> Special Trial Judges' proposed opinions under Rule 183 were reviewed and treated in the same manner as opinions of regular judges. The Special Trial Judges' proposed opinions were first sent to the Office of the Chief Judge where [they were] reviewed for quality and uniformity with prior precedent. At this juncture, the Chief Judge did not decide how the opinion was to be published or whether it required full court review. The Chief Judge's staff made suggestions, both in the text and in the margins. After that review, the proposed opinion was sent to a presidentially appointed judge for

review and adoption. The adopting judge would also perform a review for quality and uniformity with prior precedent, likewise placing suggestions in the text and margins. Finally, the opinion with editorial markings was returned to the Special Trial Judge, who decided whether or not to change the original proposed opinion. If there was disagreement, there could be deliberations between the adopting judge and Special Trial Judge. Ultimately, the Special Trial Judge would craft and forward an opinion which was adopted by a regular judge and, in turn, forwarded for the Chief Judge's consideration and issuance.

Judges and Special Trial Judges considered the draft of their opinion that was submitted to the Chief Judge to be part of the deliberative process. Accordingly, each Judge or Special Trial Judge was permitted to set [his] own retention policy with respect to [his] own deliberative materials. It is important to recognize that the Judges and Special Trial Judges understood that deliberative materials, which include draft opinions, are not made part of the public record. As far as I am aware, that is the practice of all federal courts with respect to draft opinions.[220]

7. Corrective Action

On the heels of releasing Special Trial Judge Couvillion's initial report, the Tax Court on July 7, 2005, proposed amendments to its Rules of Practice and Procedure governing cases assigned to a Special Trial Judge for hearing but not decision.[221] As explained above,[222] the amendments largely returned to the transparent review process embodied in former Rule 182 prior to its amendment in 1983. The proposed modifications were intended to align the Tax Court's practice in this area with the procedures employed by Federal district courts to review the findings and recommendations of a Magistrate Judge.[223] The amendments to Rule 183 proposed an effective date of September 20, 2005, and amendments later

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[220] Chief Judge Joel Gerber, Speech to ABA Tax Section Court Procedure Committee, at 3–4 (Sept. 16, 2005); *see also* Sheryl Stratton, *In* Ballard's *Wake, Tax Court Releases Initial Reports*, 108 TAX NOTES 1230, 1230–31 (Sept. 12, 2005) (reporting similar description provided by Chief Judge Gerber through interview).

[221] *See* Press Release, United States Tax Court, July 7, 2005.

[222] For an analysis of the 2005 amendments to Tax Court Rules 182 and 183, see text accompanying *supra* notes 102–106.

[223] Rules Comm. Note, TAX CT. R. 183, 125 T.C. 342, 345–46 (2005). In addition to the amendments to Rule 183, the Tax Court revised its procedures under Rule 182 to incorporate the Rule 183 procedures when reviewing reports of special trial judges in cases concerning small amounts of tax that were not subject to the special small tax case procedures. TAX CT. R. 182(e), 125 T.C. 342 (2005).

were adopted as of that date.[224] Accordingly, the procedural environment that created the prospect of the *Ballard* litigation has been rectified.[225]

In addition to rectifying its procedures going forward in the manner suggested by the Supreme Court, the Tax Court conducted a search for retained copies of initial opinions submitted by special trial judges to the chief judge pursuant to Rule 183(b). The search involved reviewing over 900 cases in which a report of a special trial judge had been adopted under the post-1983 streamlined procedures of Rule 183. Of these cases, the court was able to identify 117 initial reports that had been preserved by the Court.[226] "For purposes of transparency and in the spirit of the Supreme Court's opinion,"[227] Chief Judge Gerber ordered these initial reports to be served on the parties on August 19, 2005. However, each order reminded the parties that the decisions in the cases were final under § 7481 and would not be re-opened.

Responding to a request of a reporter from the *Chicago Tribune*, the Tax Court matched the 117 identified reports to the final opinions for review at the court. This review identified four other cases in which the outcome of the final opinion differed from that of the initial report of the special trial judge; three were changed in favor of the taxpayer, one in favor of the Government.[228] In this manner, the Tax Court attempted to eliminate any remaining shroud of secrecy surrounding its prior practices for reviewing the reports of special trial judges, to the extent possible.

8. Remand of the Proceedings to the Tax Court

Returning to the proceedings in the litigation, the Eleventh Circuit Court of Appeals in *Ballard*, like the Seventh Circuit in *Estate of Kanter*, vacated the Tax Court's decision in *Investment Research Associates* and

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[224] *See* Press Release, United States Tax Court, Sept. 21, 2005. The amendments as adopted are reported in 125 T.C. 342–43 (2005).

[225] However, the potential incompatibility of the presumption of correctness afforded to the findings of the special trial judge under Rule 183 with the requirement that the decision in the case be entered by a regular Tax Court judge pursuant to § 7443A(c)—as raised in the *Freytag* litigation—remains.

[226] Sheryl Stratton, *In* Ballard's *Wake, Tax Court Releases Initial Reports*, 108 TAX NOTES 1230, 1230–31 (Sept. 12, 2005). Chief Judge Gerber later explained that the search included inquiries of retired judges and a search of the court's computers for electronic copies. Chief Judge Joel Gerber, Speech to ABA Tax Section Court Procedure Committee, at 5 (Sept. 16, 2005).

[227] *Id.*

[228] *See* Maurice Possley, *Tax Court Findings Secretly Changed in at Least 5 Cases*, Chi. Trib., Sept. 5, 2005, at C1; Sheryl Stratton, *In* Ballard's *Wake, Tax Court Releases Initial Reports*, 108 TAX NOTES 1230, 1230–31 (Sept. 12, 2005); *see also* Chief Judge Joel Gerber, Speech to ABA Tax Section Court Procedure Committee, at 5 (Sept. 16, 2005).

remanded the case to the Tax Court.[229] Yet the Eleventh Circuit had the benefit of the Special Trial Judge Couvillion's initial report in the case and the Tax Court's clarifying statements at the time of its decision. The Eleventh Circuit evidently was not mollified by the Tax Court's explanation. If anything, the court appeared perturbed. The court commented on the recently-disclosed details of behind-the-scene events at the Tax Court as follows:

> Altering the original credibility determinations and findings of Judge Couvillion without explanation was not only contrary to the requirements of the law but also misleading. It is obvious now that the withholding of Special Trial Judge Couvillion's original report did, in fact, impede the process of appellate review.[230]

The Eleventh Circuit therefore adorned its remand of the case with a detailed set of instructions: (1) the "collaborative report" that served as the basis for the Tax Court's decision in the case was to be stricken from the record; (2) the initial post-trial report submitted by Special Trial Judge Couvillion was to be reinstated; (3) the reinstated report was to be referred to a judge of the Tax Court who had no involvement in the preparation of the collaborative report; (4) the reviewing Tax Court judge was to give "due regard" to Special Trial Judge Couvillion's credibility determinations, and Special Trial Judge Couvillion's findings were to be presumed correct unless "manifestly unreasonable;" and (5) the Tax Court was to adhere strictly to its recently amended Rule 183(b) procedures.[231] By footnote, the Eleventh Circuit specifically instructed that former Chief Judge Cohen, Judge Dawson, and Judge Couvillion were to have no involvement in the Tax Court's review of the reinstated report.[232] Reflecting its ongoing interest in the resolution of the case, the panel retained jurisdiction of any subsequent appeal of the Tax Court's decision to be issued on remand.[233]

The directive from the Eleventh Circuit left the unmistakable impression that it expected the Tax Court to adopt the initial report of Special Trial Judge Couvillion in full. Yet the Eleventh Circuit could not order this result expressly, lest it usurp the role of the Tax Court as the body responsible for entering the trial decision in the case.

A few weeks after the Eleventh Circuit remanded the *Ballard* case to the Tax Court on a restricted basis, the Fifth Circuit followed suit in *Estate of Lisle*.[234] Although Lisle's estate had not appealed the Fifth Circuit's decision

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[229] *See* Ballard v. Commissioner, 429 F.3d 1026 (11th Cir. 2005).
[230] *Id.* at 1032.
[231] *Id.*
[232] *Id.* at 1032 n.7.
[233] *Id.* at 1027.
[234] *See* Estate of Lisle v. Commissioner, 431 F.3d 439 (5th Cir. 2005).

in the case, the court nonetheless recalled its earlier mandate to the Tax Court to recalculate the remaining deficiency in the case "in the interest of fairness" and to prevent "possible injustice."[235] The Fifth Circuit subjected its remand of the case to the same terms and conditions mandated by the Eleventh Circuit.

9. The Tax Court's Resolution of the Case on Remand

As directed by the Courts of Appeal, the initial post-trial report of Special Trial Judge Couvillion was reinstated in the record and assigned to Tax Court Judge Harry A. Haines for review. Judge Haines clearly satisfied the requirement of having no involvement in the "collaborative report" produced by Special Trial Judge Couvillion and Judge Dawson, as Judge Haines was not a member of the Tax Court when those events transpired. To accommodate the recently revised procedures under Rule 183, the parties were afforded an opportunity to file written objections to Special Trial Judge Couvillion's reinstated report. The Commissioner and Kanter's estate availed themselves of this procedural opportunity; Ballard and Lisle's estate did not. All three taxpayers responded to the Commissioner's objections, and the Commissioner responded to the objections raised by Kanter's estate.

Judge Haines issued his decision in the case, captioned *Estate of Kanter v. Commissioner*,[236] on February 1, 2007. At the outset of the opinion, Judge Haines clarified that he would accept the factual findings of Special Trial Judge Couvillion unless "manifestly unreasonable" as directed. Judge Haines wrestled with the precise contours of this standard of review at the outset of the opinion, concluding that the standard required Judge Couvillion's findings to be accepted unless the finding was (1) internally inconsistent or so implausible that a reasonable fact finder would not believe it, or (2) directly contradicted by documentary or objective evidence.[237] Judge Haines interpreted the remand instructions from the Courts of Appeals to have imposed this same level of deference to the credibility determinations reached by Special Trial Judge Couvillion, rather than directing those credibility determinations to have binding effect.[238]

In his opinion, spanning over 400 pages and addressing 24 identified issues, Judge Haines went to painstaking lengths to segregate the findings of fact incorporated from Special Trial Judge Couvillion's initial report from those that reflected departures from the initial report. In the course of the decision, Judge Haines determined that certain findings of fact warranted

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[235] *Id.* at 439.
[236] T.C. Memo. 2007-21, 93 T.C.M. (CCH) 721.
[237] *Id.* at 735.
[238] *Id.*

rejection even under the manifestly unreasonable standard, and he supplemented other original findings that he viewed as incomplete. Most notably, Judge Haines determined that the ultimate holding recommended in Special Trial Judge Couvillion's original report—that Kanter, Ballard, and Lisle did not participate in the alleged kickback scheme—was "directly contradicted by the overwhelming objective evidence" in the case.[239] Additionally, Judge Haines rejected a number of credibility determinations reflected in the initial report under the manifestly unreasonable standard. Ultimately, Judge Haines, like Judge Dawson before him, found that Ballard and Kanter had engaged in civil tax fraud[240] and that all three taxpayers were liable for income tax deficiencies on unreported income.[241]

10. The Unwelcomed Return to the Courts of Appeals

In light of the second round of appellate review in the *Ballard* litigation, Judge Haines' thorough review of Special Trial Judge Couvillion's initial post-trial report in the case proved to be an exercise in futility. The Eleventh Circuit determined that none of Special Trial Judge Couvillion's findings of fact were clearly erroneous;[242] rather, in the court's view, the record fully supported Judge Couvillion's initial findings and conclusions.[243] The error rested with Judge Haines. According to the Eleventh Circuit, he failed to accord the findings of fact and credibility determinations of Judge Couvillion the appropriate level of deference,[244] conducting instead a "nearly *de novo* review of the facts."[245] Accordingly, the Eleventh Circuit remanded the case to the Tax Court once again, this time with an even more restrictive instruction: to vacate Judge Haines' opinion and to enter an order approving and adopting Judge Couvillion's report as the opinion of the Tax Court.[246]

At this stage, it is worth recalling the taxpayer's procedural argument in *Freytag*: that the level of deference required to be accorded the findings of the special trial judge under Rule 183(c) effectively permitted the special trial judge to enter the decision in the case, contrary to the limitation imposed § 7443A(c). Following the Eleventh Circuit's second decision in *Ballard*, the argument gained newfound persuasiveness.

The Fifth Circuit was the next circuit court to follow suit. After conducting an independent review of the record, it agreed with the decision

239 *Id.* at 787.
240 *Id.* at 802.
241 *Id.* at 805.
242 Ballard v. Commissioner, 522 F.3d 1229, 1249 (11th Cir. 2008).
243 *Id.* at 1254.
244 *Id.* at 1249.
245 *Id.* at 1254.
246 *Id.* at 1255.

of the Eleventh Circuit as it applied to Lisle.[247] Specifically, the court determined that the trial record adequately supported Judge Couvillion's initial determination that Lisle had no deficiency in tax.[248]

The Seventh Circuit rounded out the trio, following the two circuit courts before it in concluding that Judge Haines' review of Judge Couvillion's report amounted to an inappropriate de novo evaluation of the evidence.[249] The court acknowledged that the evidence in the case was not one-sided: "This is not to say that there is not plenty of evidence in the record that supports the Tax Court's decision."[250] Accordingly, either interpretation of the facts likely would have survived clear error review. However, because Special Trial Judge Couvillion was the initial trier of fact whose findings were entitled to deferential review, they were to be upheld unless clearly erroneous.[251] The Seventh Circuit was satisfied that Judge Couvillion did not clearly err.

In the end, Judge Haines' review of Judge Couvillion's initial report in *Investment Research Associates* did not suffer the potential inconsistent results of being appealed to three different courts. All of them ordered the decision to be vacated in its entirety.[252] In its place, the appellate courts ordered the Tax Court to enter an order adopting Special Trial Judge Couvillion's initial report as the opinion of the Tax Court.[253]

The last gasp in the *Ballard* litigation concerned the manner in which the Tax Court complied with the directive to issue an order adopting the initial report of Special Trial Judge Couvillion as its opinion in the case. On October 15, 2010, the Tax Court in the *Estate of Kanter* case issued an order

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247 Estate of Lisle v. Commissioner, 541 F.3d 595, 602 (5th Cir. 2008).

248 *Id.* at 597.

249 Estate of Kanter v. Commissioner, 590 F.3d 410, 420 (7th Cir. 2009).

250 *Id.*

251 *See id.* at 421(identifying Special Trial Judge Couvillion's initial report as the one entitled to deferential review).

252 An observation by Professor Carlton Smith appears particularly apt: "As I read the appellate court judges, they are in effect saying that they will ignore the Tax Court judge reviews of the special trial judge and substitute themselves as the reviewers of the special trial judge opinions." Sam Young, Kanter *Plaintiffs Call for Investigation of Tax Court Judges*, 126 TAX NOTES 181 (Mar. 8, 2010) (quoting Professor Smith).

253 *See* Ballard v. Commissioner, 522 F.3d 1229, 1255 (11th Cir. 2008) (instructing the Tax Court to "enter an order approving and adopting Judge Couvillion's original report as the opinion of the Tax Court"); Estate of Lisle v. Commissioner, 541 F.3d 595, 605 (5th Cir. 2008) (instructing the Tax Court to "enter an order adopting Judge Couvillion's original report as the opinion of the Tax Court and to enter judgment consistent with that report and this opinion"); Estate of Kanter v. Commissioner, 590 F.3d 410, 427 (7th Cir. 2009) (instructing the Tax Court to "enter an order adopting the special trial judge's report as the decision of the Tax Court").

providing that "the Special Trial Judge's report, made part of the record in this case on June 16, 2005, shall be treated as the Court's opinion in the case."[254] The estate thereafter sought publication of the Special Trial Judge's report, as adopted by the Tax Court, as an independent opinion of the court—one that would be indexed under the "Opinions" tab of the court's website. The court granted the motion to publish, but did so by uploading the special trial judge's report as an attachment to the June 16, 2005 order that was available under the "Docket Inquiry" tab of the court's website. This resolution led to yet another appeal to the Seventh Circuit by the Estate of Kanter, in which the estate sought publication of the Special Trial Judge's initial report as a stand-alone opinion. Finding that the Tax Court had fully complied with its directive to issue an order adopting Special Trial Judge Couvillion's initial report as its opinion in the case, the Seventh Circuit dismissed the appeal for lack of a justiciable controversy.[255]

11. Conclusion

By all accounts, the saga of *Ballard*, *Kanter*, and *Lisle* represented a bruising affair for all involved—the parties and the Tax Court alike. In published decisions, two separate judges of the Tax Court affirmed the Commissioner's allegations that the taxpayers had engaged in a kickback scheme generating income that they fraudulently failed to report. To avoid not only the serious financial consequences of this determination but also the personal and professional reputational damage it carried, the taxpayers (in certain cases represented by their estates) engaged in multiple rounds of litigation that spanned well over a decade. The taxpayers ultimately proved successful on the merits, and they received a healthy dose of vindication along the way. However, it is doubtful that the taxpayers found the resulting path equivalent to the elusive un-ringing of a bell.

From the Tax Court's perspective, the institution by no means emerged from the litigation unscathed. Several judges, among them titans of the institution, saw their integrity publicly impugned with little if any ability to

[254] *See* Estate of Kanter v. Commissioner, 432 Fed. Appx. 618 (7th Cir. 2011) (recounting the procedural posture of this aspect of the litigation). The order issued on June 16, 2005, which includes Special Trial Judge Couvillion's initial report as an attachment, is available on the Tax Court's website at https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=4197532.

[255] *Estate of Kanter*, 432 Fed. Appx. at 620 ("We cannot find a justiciable controversy in the details of the Tax Court's website design."). Perhaps not surprisingly, Judge Cudahy issued a separate opinion reluctantly concurring. *See id. at* 620–21 (Cudahy, J., concurring in part) ("From all appearances, the Tax Court is not a graceful loser and I can appreciate the dissatisfaction of the prevailing litigant with the Tax Court's response to correction.").

defend themselves directly.[256] And for a brief period, the conduct of the Tax Court in this and similar proceedings was the subject of Congressional inquiry.[257] These were surely uncomfortable positions, ones with which the court and its judges were not familiar.

The circumstances that gave rise to the *Ballard* litigation have been eliminated through the Tax Court's return to its prior transparent process of reviewing the reports of special trial judges. Hence, the *Ballard* saga should be of minimal practical relevance in the future. The lasting value of the proceedings may rest in their lesson concerning the potential costs of non-transparency in the adjudicative process.

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[256] *See*, *e.g.,* Sheryl Stratton, *Original Tax Court Report Found No Fraud Against Kanter, Ballard*, 107 TAX NOTES 1216 (June 6, 2005); Sam Young, Kanter *Plaintiffs Call for Investigation of Tax Court Judges*, 126 TAX NOTES 181 (Mar. 8, 2010).

[257] *See* Crystal Tandon & Karla L. Miller, *Judge's Statements on* Kanter, Ballard *Provoke Dismay*, 108 TAX NOTES 394, 395 (July 25, 2005) (reporting on investigation conducted by the House Ways and Means Oversight Subcommittee); Louise Story, *A Glimpse Inside U.S. Tax Court and How It Made a Decision*, N.Y. TIMES, July 23, 2005, at C4 (same).

PART XIII

THE SMALL TAX CASE PROCEDURE AND SUPPORT FOR SELF-REPRESENTED LITIGANTS

As of 2012, 68 percent of cases filed in the Tax Court were prosecuted by taxpayers without the benefit of representation.[1] While this percentage varies, in modern times, the percentage of cases filed by taxpayers on a pro se basis has consistently exceeded half of the Tax Court's docket.[2] In light of these figures, the court has undertaken a number of measures to render the forum more accessible and its proceedings less intimidating to taxpayers who navigate the process on their own, likely due to the inability to afford representation. Before discussing the Tax Court's institutional outreach on this front, this chapter will begin by exploring the single most important legislative development aimed at accommodating self-represented litigants before the court—the small tax case procedure of § 7463.

A. Small Tax Cases

The small tax case procedure currently reflected in § 7463 arose out of congressional concern over the failure to provide a readily available means of impartial review of modest deficiency disputes.[3] In response to this concern, the court, in 1968, adopted a procedure for small tax cases which provided for a simplified petition, early assignment to trial calendar, informal trial procedures and waiver of briefs.[4] However, Congress believed that the then existing statutory provisions, with their requirement of technical rules of evidence, precluded such a procedure from achieving its greatest potential.[5] Accordingly, the 1969 Tax Reform Act authorized a

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[1] Statistics provided by the Clerk of Court, United States Tax Court.

[2] *Id.*

[3] S. REP. NO. 91-552, at 302 (1969).

[4] During the fall of 1968, the Tax Court "in recognition of the apparent demand for a procedure for handling small tax claims simply and expeditiously" drafted a separate set of rules to accomplish these objectives. These new procedures became effective Jan. 1, 1969. Memorandum from Chief Judge Drennen to Tax Court Judges, Nov. 26, 1968, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" *see also* Tax Court Conference Minutes, Nov. 1, 15, 29, 1968.

[5] At this time the Internal Revenue Code required that all proceedings begun in the Tax Court, irrespective of dollar amount, be conducted with equal formality. Laurence Goldfein and Michael I. Saltzman, *The New Tax Court Small Claims Division: How It Will Operate*, 34 J. TAX'N 2 (1971). Section 7453 provides that every hearing must be conducted in accordance with the rules of evidence applicable to

simplified and relatively informal procedure for deficiency disputes involving not more than $1,000.[6] This amount has been periodically raised over time to $1,500, $5,000, $10,000, and, most recently, to $50,000.[7]

Legislative history indicates Congress intended that the Tax Court make extensive use of commissioners in small tax cases,[8] and certain statutory modifications with respect to commissioners were designed to facilitate this objective. Of importance in this regard was authorization for the court to appoint full-time commissioners who would be compensated at the same rate as commissioners of the Court of Claims.[9] Prior to this statutory revision, the court had been authorized only to appoint an attorney from the legal staff of the court to act as a commissioner on a case-specific basis.

Pursuant to the 1969 amendment, the court established a small tax case division under the supervision of a judge of the court.[10] The majority of

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trials without a jury in the District Court for the District of Columbia. Section 7458 requires every proceeding to be stenographically transcribed. At the conclusion of each of these proceedings the court is compelled to report all of its findings of fact, opinions, and memorandum opinions. I.R.C. § 7459(b).

[6] Tax Reform Act of 1969, Pub. L. No. 91-172, § 957(a), 83 Stat. 733 (enacting I.R.C. § 7463). If neither the amount of the deficiency placed in dispute, nor the amount of any claimed overpayment exceeded $1,000 for any taxable year in the case of income and gift tax or $1,000 for estate tax, the taxpayer was given the option to request that the proceeding be conducted under a small case procedure. In addition, the Act provided that notwithstanding statutory limitations that require certain formal rules of evidence, publication, hearings, etc., the small case procedure would be conducted in accordance with such rules of evidence, practice and procedure as the Tax Court might prescribe.

[7] The State and Local Fiscal Assistance Act of 1972 increased the limit to $1,500. Pub. L. No. 92-512, § 203(b)(2), 86 Stat. 919, 945 (1972). The Revenue Act of 1978 increased the jurisdictional amount to $5,000. Pub. L. No. 95-600, § 502(a)(1), 92 Stat. 2763, 2879 (1978). The Tax Reform Act of 1984 increased the jurisdictional amount to $10,000. Pub. L. No. 98-369, § 461 (a), 98 Stat. 494, 823. Most recently, Congress increased the ceiling amount on small tax cases to $50,000 as part of the Internal Revenue Service Restructuring and Reform Act of 1998. Pub. L. No. 105-206, § 3103, 112 Stat. 685, 731 (1998).

[8] S. REP. NO. 91-552, at 304 (1969).

[9] Tax Reform Act of 1969, Pub. L. No. 91-172, § 958, 83 Stat. 734. In 1986, Congress set the compensation of special trial judges to equal 90 percent of the salary paid to a presidentially appointed judge of the court. Tax Reform Act of 1986, Pub. L. No. 99-514. § 1556(a), 100 Stat. 2754 (adding I.R.C. § 7443A(d)(1)).

[10] *See* Memorandum from the Ad Hoc Committee on Small Tax Cases to the Chief Judge, Apr. 2, 1970, at 2, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence," wherein it was recommended that the Chief Judge assign one of the judges of the court as the judge in charge of such division. Judge Howard A. Dawson, Jr. was designated as the first judge in charge of the Small Tax Case Division. *See* Tax Court Conference Minutes, Apr. 17, 1970; General Order No. 2, U.S. Tax Court, Sept. 1, 1970. Although other judges of the

small tax cases are assigned to special trial judges (the official designation since 1984)[11] for hearing and the preparation of summary findings of fact and opinion.[12] The report of the special trial judge is then submitted to the chief judge, or if the chief judge so directs, to a judge or division of the court for review.[13] This review is conducted by the judge heading the small tax case division. To expedite the resolution of small tax cases, such opinions, if authored by a special trial judge, generally are not subsequently reviewed by the chief judge.[14]

Although the Tax Reform Act of 1969 authorized commissioners and later special trial judges to issue summary opinions in small tax cases, the commissioner/special trial judge lacked authority to enter the decision in such cases.[15] Congress corrected this shortcoming in 1980, granting special trial judges the authority to make the decision of the court in small tax cases.[16]

An important purpose of the small case procedure was to expedite the court's workload by providing it with greater capability to manage many of the smaller cases conducted before it.[17] Because all Tax Court decisions (other than stipulated decisions) prior to 1969 were subject to appellate review, a complete record of the court's factual and legal findings had to be prepared in all cases to provide an adequate record for the courts of

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Tax Court have been in charge of the Small Tax Case Division in the intervening years, Judge Dawson has now resumed those duties.

[11] In 1975, the court issued a General Order which provided that a "commissioner" should be referred to as a "special trial judge" except when in conflict with statute. General Order No. 4, 65 T.C. IV (1975). The Tax Reform Act of 1984 changed the statutory designation of a "commissioner" to "special trial judge." Pub. L. No. 98-369, § 464, 98 Stat. 494, 824–25.

[12] In more recent years, as the number of special trial judges has declined and the number of cases being tried under the small tax case procedure has increased (due in large part to the increase in the limitation on the amount in controversy), judges of the court have presided over approximately one-half of small tax cases.

[13] The Tax Court Rules of Practice and Procedure provide that a special trial judge presiding over trial of a small tax case shall "prepare a summary of the facts and reasons for the proposed disposition of the case" as soon as practicable after trial. TAX CT. R. 182(a) (July 6, 2012 ed.).

[14] Tax Court Conference Minutes, Apr. 17, 1970.

[15] *See* Memorandum from the Ad Hoc Committee on Small Tax Cases to the Chief Judge, Apr. 2, 1970, at 3 n.6, filed at the U.S. Tax Court in "Decisions: Memoranda & Correspondence;" Tax Court Conference Minutes, Apr. 17, 1970. The language of § 7463, as then in effect, permitted a brief summary of reasons to satisfy the requirements of a decision as defined in § 7459(b). However, Congress made no change to § 7459(a), which required that such a decision be made by a judge.

[16] Pub. L. No. 96-222, § 105(a)(1)(B), 94 Stat. 194, 218 (1980).

[17] *See* S. REP. NO. 91-552, at 303 (1969).

appeals. Aimed at relieving what was perceived to be an unnecessary burden in many cases, § 7463 provides that small tax cases are not subject to appeal by either party, that they may not serve as legal precedent, and that a decision with a brief summary of the reasons for the decision are sufficient in such cases.[18] Accordingly, summary opinions issued in small tax proceedings are accompanied by the following legend: "[The] case was heard pursuant to the provisions of section 7463 of the Internal Revenue Code in effect at the time that the petition was filed. The decision to be entered is not reviewable by any other court, and this opinion should not be cited as precedent for any other case." However, this is not to say that decisions in summary opinions have no lasting effect whatsoever. In *Gilanski v. Commissioner*,[19] the taxpayer unsuccessfully contested the Commissioner's deficiency determination through a small tax case proceeding. The taxpayer later attempted to contest the underlying tax liability through a collection due process hearing, contending that § 7463(b) precluded the decision in the small tax case from having any binding effect. The Tax Court disagreed, noting that § 7463(b) does not preclude a decision in a small tax case from having res judicata effect.[20]

Because summary opinions issued in small tax cases have no precedential value, they are not officially published by the Tax Court or, for that matter, by any commercial publisher. However, since January 1, 2001, the Tax Court has made summary opinions available to the public in a searchable format through the court's website.

The small tax case procedure assists the court in managing its heavy workload and also allows taxpayers with small tax disputes to litigate without a long delay. The procedure has been well received by the public, and small tax cases constitute approximately half of the Tax Court's docket in modern times.[21] The scope and details of the small tax case procedure are discussed below.

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[18] I.R.C. § 7463(a), (b). In 1982, the Tax Court was given additional flexibility to manage its workload when it was granted the authority to decide cases by bench opinion. I.R.C. § 7459(b), *as amended* by Pub. L. No. 97-362, § l06(b), 96 Stat. 1726, 1730 (1982). Accordingly, the Tax Court rules were amended to provide that judges and special trial judges could issue a bench opinion in small tax cases when appropriate. *See* TAX CT. R. 152, 79 T.C. 1147–48 (1982); *see also* TAX CT. R. 182(a) (July 6, 2012 ed.) (accommodating the prospect of a bench decision in a small tax case).

[19] T.C. Memo. 2004-104, 87 T.C.M. (CCH) 1249.

[20] *Id.* at 1249–50; *see also* Koprowski v. Commissioner, 138 T.C. 54, 58–64 (2012) (explaining that decisions entered in small tax cases litigated under § 7463 have res judicata effect).

[21] According to statistics provided by the Tax Court Clerk of Court, the percentage of Tax Court filings in which taxpayers elected to prosecute their cases under the small tax case procedure in recent years is as follows:

1. Amount in Dispute

The small tax case procedure originally was limited to the Tax Court's traditional deficiency and overpayment jurisdiction. In this setting, the threshold requirement for application of the small tax case procedure is that the amount in dispute (both the deficiency and any claimed overpayment) does not exceed $50,000.[22] The 1969 Act limited the small case procedure to cases in which the amount in dispute did not exceed $1,000.[23] This limitation has been increased several times since.[24] Most recently, in 1998, believing that use of the small tax case procedure should be expanded,[25] Congress raised the dollar limitation significantly from $10,000 to $50,000.[26] The deficiency placed in dispute includes not only the underlying tax, but also any additions to tax, additional amounts, and penalties.[27] In the case of income taxes, the $50,000 limitation applies to each taxable year in dispute.[28] If the taxpayer's gift tax liability is being contested, the dollar

Year	*Percentage of Small Tax Cases*
2006	52%
2007	51%
2008	50%
2009	48%
2010	48%
2011	50%
2012	50%
2013	51%

22 I.R.C. § 7463(a).

23 Pub. L. No. 91-172, § 957(a), 83 Stat. 487, 733 (adding 26 U.S.C. § 7463(a)).

24 For a recitation of the various statutory increases in the ceiling of the amount in dispute in small tax cases, see *supra* note 7.

25 *See* S. REP. NO. 105-174, at 50 (1998).

26 Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3103, 112 Stat. 685, 731. In increasing the ceiling on the small tax case procedure by such a sizeable amount, Congress recognized that the procedure could encompass cases of significant precedential value. *See* H.R. REP. NO. 105-599, at 245 (1998). Accordingly, Congress signaled its intention that the Tax Court carefully consider the Service's objections to the taxpayer invocations of the procedure. *Id.* At the same time, Congress directed the Tax Court to consider the financial effect on the taxpayer of not using the procedure, *see id.*, presumably as a factor to be balanced against any objection raised by the Service.

27 I.R.C. § 7463(e).

28 I.R.C. § 7463(a)(1).

limitation applies to each calendar year.[29] If the dispute between the Service and the taxpayer concerns estate taxes, the amount in dispute cannot exceed $50,000 overall.[30]

Congress has periodically expanded the scope of disputes that are subject to the small tax case procedure of § 7463. In 1982, the small tax case procedure was amended to include excise taxes relating to public charities, private foundations, qualified pension plans, qualified investment entities, and crude oil windfall profits.[31] If these taxes are at issue, the amount in dispute cannot exceed $50,000 for any taxable period, or if there is no taxable period, for any taxable event.[32]

In cases in which the small tax case procedure is elected, the court may not enter a decision redetermining a deficiency or determining an overpayment, except with respect to amounts placed in dispute within the jurisdictional limitations applicable to small tax cases, and amounts conceded by the parties.[33] For example, if the Service determines a deficiency of $45,000 and the taxpayer elects to use the small tax case procedure and contests the entire deficiency, the Tax Court may not determine a total deficiency of more than $50,000 (assuming the Service asserts an increase in the amount of deficiency it earlier determined).[34] However, if the taxpayer were to concede a deficiency of $3,000, the Tax Court is authorized to determine a total deficiency of $53,000.

In *Kallich v. Commissioner*,[35] the Tax Court considered whether a taxpayer could concede a monetary portion of a deficiency without conceding the underlying issue in order to bring the taxpayer's case within the jurisdictional limitation of the small tax case procedure. In *Kallich*, the deficiencies determined against the petitioners exceeded $10,000 (the then-applicable jurisdictional limit) for each taxable year in issue.[36] The petitioners conceded a portion of the deficiencies so that the amount in dispute fell within the small tax case jurisdictional boundaries, and they requested that their case be tried under the small case procedures.[37] The Service argued that since only one issue was in dispute, the petitioners could not "concede a monetary portion of the deficiency without conceding the entire issue which created the deficiency."[38] The Tax Court disagreed.

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[29] I.R.C. § 7463(a)(3).

[30] I.R.C. § 7463(a)(2).

[31] Miscellaneous Revenue Act of 1982, Pub. L. No. 97-362, § 106(a), 96 Stat. 1726, 1730 (adding I.R.C. § 7463(a)(4)).

[32] I.R.C. § 7463(a)(4).

[33] I.R.C. § 7463(c).

[34] *See* S. REP. NO. 91-552, at 303 n.2 (1969).

[35] 89 T.C. 676 (1987).

[36] *Id.* at 677.

[37] *Id.* at 677–78.

[38] *Id.* at 678.

The court's decision was in large part based on the legislative history of § 7463.[39] The Senate Finance Committee report provided:

> The Court would not be permitted to determine a deficiency more than $1,000 [the then-applicable limit] above the undisputed amount in the notice of deficiency. For example, if a deficiency of $1,200 were determined by the Internal Revenue Service and the taxpayer put in issue in the Tax Court only $300 of that deficiency, then the remaining $900 of the deficiency would have been conceded . . . . [In any event], once the taxpayer invoked the small claims procedure and the Tax Court concurred, he could not have the deficiency reduced below $200.[40]

This example, in the court's view, made it clear that a taxpayer could concede a monetary portion of a deficiency without conceding the underlying issue. "There is nothing in the Senate Finance Committee report which would indicate that the example was intended to illustrate the concession of an issue in a multi-issue case. The example refers only to monetary amounts of a deficiency."[41] The court thus saw "no reason why a taxpayer should not be able to concede a portion of the deficiency so as to qualify for small tax case status."[42] Nonetheless, the court noted that the approach of conceding a portion of the asserted deficiency in a single-issue case may prove less than satisfying:

> [A] taxpayer may be at a significant disadvantage to the extent that he does concede a portion of the deficiency in a single issue case. In such instance, even if the taxpayer were to win 100 percent of the issue before the Court, he could ultimately be assessed a tax on the portion of the deficiency conceded and not placed in dispute. In seeking the election for small tax case status, a taxpayer would presumably weigh this disadvantage with other factors.[43]

2. Expansion in Scope of Small Tax Cases

In 1997, when it expanded the Tax Court's jurisdiction to review the Commissioner's determination concerning the employment status of a service provider pursuant to § 7436, Congress created a small tax case

[39] *See id.* at 680.
[40] S. REP. NO. 91-552, at 303 n.2 (1969) (quoted in 89 T.C. at 680).
[41] 89 T.C. at 680.
[42] *Id.*
[43] *Id.* at 680 n.6.

procedure for such disputes within § 7436 itself.[44] Pursuant to § 7436(c), special trial judges are authorized to hear and decide employment status determinations where the amount of employment taxes in dispute do not exceed $50,000 for any calendar quarter involved. While this jurisdiction technically falls outside the scope of the global small tax case procedure of § 7463 (and thus requires a separate provision authorizing the special trial judge to make the decision of the court),[45] it functionally serves as an expansion of that statute. If the taxpayer so elects, the small tax case procedure applicable to proceedings under § 7463 applies to cases prosecuted under § 7436(c).[46] Additionally, the decision in the case is not subject to appeal and the decision does not serve as precedent.[47]

More recently, in 2000, Congress extended the availability of the small case procedure to petitions for innocent spouse relief under § 6015(e) in cases where the relief sought does not exceed $50,000.[48] In determining whether the innocent spouse relief sought does not exceed the $50,000 jurisdictional ceiling, the point of reference is the date on which the petition is filed.[49] Hence, post-petition interest charges that cause the relief sought to exceed $50,000 will not preclude use of the small tax case procedure in this setting.[50] As part of the same 2000 legislation, Congress added appeals of collection due process hearings under § 6330(d)(1)(A) to the scope of cases that could be tried as a small tax case.[51] In this setting, the unpaid tax cannot exceed $50,000. The $50,000 ceiling applies to the total amount of unpaid tax liability, rather than to the amount of any unpaid tax liability for a given year.[52]

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[44] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1454(a), 111 Stat. 1055 (enacting I.R.C. § 7436).

[45] *See* I.R.C. § 7443A(b)(5). Interestingly, the authority of the special trial judge to enter a decision in these cases was not added until 2006. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 857(a), 120 Stat. 1020 (adding current I.R.C. § 7443(b)(5)).

[46] I.R.C. § 7436(c)(1).

[47] I.R.C. § 7436(c)(2).

[48] Community Tax Renewal Tax Relief Act of 2000, H.R. 5662, § 313(b)(1), enacted into law by the Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(7), 114 Stat. 2763, 2763A-642 (adding I.R.C. § 7463(f)(1)).

[49] *See* Petrane v. Commissioner, 129 T.C. 1, 6–7 (2007).

[50] *Id.*

[51] Community Tax Renewal Tax Relief Act of 2000, H.R. 5662, § 313(b)(1), enacted into law by the Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(7), 114 Stat. 2763, 2763A-642 (adding I.R.C. § 7463(f)(2)).

[52] *See* Schwartz v. Commissioner, 128 T.C. 6 (2007). Additionally, the fact that a taxpayer may contest less than the $50,000 amount does not permit the case to be tried under the small tax case procedure where the total unpaid tax exceeds the $50,000 threshold. *See* Leahy v. Commissioner, 129 T.C. 71 (2007).

3. Election by the Taxpayer

The small tax case procedure may be elected by the taxpayer when the petition is filed or at any time prior to trial.[53] Although the statute requires that the Tax Court concur in the election, such concurrence is deemed given unless the Tax Court orders that the small tax case designation be removed.[54] If the Service opposes the case being tried under the small tax case procedure, it must do so by motion filed with its answer in the case.[55]

In 1978, in connection with amending § 7463 to increase the jurisdictional limitation in small tax cases to $5,000,[56] Congress indicated its concern that the small tax case procedure not be used to impede judicial administration by trying cases under the small case procedure that would more appropriately be tried as regular cases.

> In view of the proposed increase in the small case jurisdictional amount to $5,000 it is contemplated that, the Tax Court will give careful consideration to a request by the Commissioner of Internal Revenue to remove a case from the small case procedures when the orderly conduct of the work of the Court or the administration of the tax laws would be better served by a regular trial of the case. Thus, in some situations, proper Court management may require the removal of a case from the small case procedures so that it can be consolidated with a regular case involving common facts or a common issue of law. Similarly, removal of the case from the small case category may be appropriate where a decision in the case will provide a precedent for the disposition of a substantial number of other cases or where an appellate court decision is needed on a significant issue.[57]

Thus, taxpayers do not have an absolute right to have the small case procedures apply whenever their deficiency disputes fall within the jurisdictional amount.[58]

If the court concludes that a case involves an important issue, it may order that the case be tried under the regular Rules of Practice and Procedure sua sponte or on the motion of either party at any time prior to

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53 I.R.C. §§ 7436(c), 7463(a); TAX CT. R. 171(a), (c) (July 6, 2012 ed.).

54 TAX CT. R. 171(d) (July 6, 2012 ed.).

55 TAX CT. R. 171(b) (July 6, 2012 ed.). If the taxpayer makes the small tax case election after the filing of the answer in the case, the Service may move without leave of the court for the case to be tried under the regular procedures. TAX CT. R. 171(c) (July 6, 2012 ed.).

56 Revenue Act of 1978, Pub. L. No. 95-600, § 502(a)(1), 92 Stat. 2763, 2879.

57 H.R. REP. NO. 95-1800, at 277–78 (1978).

58 *See* Kallich v. Commissioner, 89 T.C. 676, 661 (1987).

trial.[59] Such a motion is to be distinguished from a motion for discontinuance, which may be filed at any time after the commencement of trial, and which is decided according to specific statutory criteria.[60] In cases in which the taxpayer's election to have his case tried under the small tax case procedure is denied prior to trial, the court is not bound to limit its consideration to the factors set forth in § 7463(d).[61] The statutory requirement that the Tax Court concur in the taxpayer's election to utilize the small tax case procedure provides the court with authority to exercise such discretion.[62]

Three categories of cases have been identified as presenting situations in which the court may decline to concur in the taxpayer's election to have the small case procedure apply: (1) cases involving an important issue;[63] (2) cases involving an issue common to other cases before the court;[64] and (3) cases involving an issue that will establish a principle of law important to other cases.[65]

In *Dressler v. Commissioner*,[66] the Service moved to deny the petitioner's request to apply the small tax case procedure on the ground that the issue involved was of such importance that it merited regular case treatment. Petitioners resisted the motion, contending that the only statutory basis for discontinuance of small tax case proceedings would be a finding of reasonable grounds to believe that the amount in dispute would exceed the applicable jurisdictional limit, a basis specifically set forth in § 7463(d). Alternatively, the taxpayers argued that the case was not of sufficient legal or factual importance to warrant shifting it to the more expensive regular case procedures.

The Tax Court disagreed with the taxpayer that the denial of an election to use the small tax case procedure is dependent on a showing of the grounds enumerated in § 7463(d).[67] The court rejected this argument, noting that a showing of these grounds is only required *after* the commencement of trial.[68] The Tax Court agreed, however, that

> a taxpayer should be entitled to have his case tried as a small tax case where the jurisdictional amount of the deficiency brings it within the

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[59] *See id.*; TAX CT. R. 171(d) (July 6, 2012 ed.).

[60] *See* Section A.4 of this Part.

[61] *See* TAX CT. R. 171(d) (July 6, 2012 ed.) (providing no grounds for the exercise of the court's discretion to remove the small tax case designation).

[62] *See* I.R.C. § 7463(a).

[63] Earl v. Commissioner, 78 T.C. 1014, 1020 (1982).

[64] Page v. Commissioner, 86 T.C. 1, 13 (1986).

[65] Dressler v. Commissioner, 56 T.C. 210, 212 (1971).

[66] *Id.*

[67] *Id.*

[68] *Id.*

> provisions of section 7463 unless respondent shows that the issue involved is an issue of importance which will establish a principle of law applicable to other tax cases.[69]

In *Dressler*, the court found that the Service had failed to make such a showing. The issue was whether the taxpayer, a "minister of music" was entitled to an exclusion as a "minister of the gospel." In previous cases, the Tax Court had concluded that a taxpayer had to be "ordained, commissioned, or licensed as such or must perform sacerdotal duties" to be entitled to the exclusion as a minister of the gospel.[70] Because prior Tax Court decisions had addressed the legal issue involved in the case, only questions of fact remained to be resolved.[71]

In *Earl v. Commissioner*,[72] the Service's motion to pursue the case using regular procedures was granted because it involved an important issue. The issue presented in *Earl* was whether the Treaty of Medicine Creek of 1854 required the exemption of income obtained by the Puyallup Indians from fishing in waters covered by the treaty. The court held that the treaty did not require the exemption.[73] Although the court did not explain why the issue was of sufficient importance to justify a transfer to the regular procedure, its decision to grant the Service's motion to deny the small tax case election may have been grounded in the fact that the interpretation of a United States treaty was at issue.

In *Page v. Commissioner*,[74] the Service determined a deficiency attributable to the taxpayer's windfall profit tax liability for calendar year 1980. The taxpayer petitioned the Tax Court for a redetermination and then moved to dismiss for lack of jurisdiction, alleging that the period for the determination of windfall profit tax deficiencies was each quarter of a calendar year.[75] The Tax Court disagreed, holding that the proper period for determining a windfall profit tax liability is a calendar year.[76] Moreover, the court denied the petitioner's election for small tax case treatment because the substantive issues in the case were common to other cases docketed in the court.[77] Treating the case under § 7463 would deny the court's decision of precedential effect and thus would unduly burden the

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[69] *Id.*
[70] *Id.* at 213.
[71] *Id.*
[72] 78 T.C. 1014 (1982).
[73] *Id.* at 1017–18.
[74] 86 T.C. 1 (1986).
[75] *Id.*
[76] *Id.* at 7.
[77] *Id.* at 12–13.

court and taxpayers by requiring de novo consideration of the issues involved.[78]

4. Discontinuance

At any time after the commencement of trial, but before a final decision, the Tax Court may discontinue the small tax case procedure and order that the case be tried under the regular Rules of Practice and Procedure.[79] As noted above, the order for discontinuance is to be distinguished from the motion to deny a taxpayer's small tax case election. The former involves the consideration of specific statutory criteria, and such an order may only be issued if (1) there are reasonable grounds for believing that the jurisdictional dollar limit will be exceeded and (2) the court finds that justice requires such discontinuance, taking into consideration the inconvenience and expense that could result from such an order.[80]

The Tax Court has held that the deficiency limitations of § 7463 do not apply once a case has been discontinued under the small tax case procedure. In *Bruno v. Commissioner*,[81] the Service moved to discontinue the matter as a small tax case and claimed an increased deficiency. The motions were uncontested by the taxpayer and granted by the court. Later, the taxpayer objected to the increased deficiency on the grounds that it exceeded the jurisdictional limit applicable to small tax cases. In its decision for the

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[78] *Id.* at 13. Similarly, in *Hubbard v. Commissioner*, T.C. Memo. 1987-575, 54 T.C.M. (CCH) 1121, the Tax Court rejected the taxpayer's invocation of the small tax procedures on grounds that the issue in the case was pending on appeal before various courts of appeals (including to the circuit to which the instant case otherwise would be appealable) and that the issue was common to other cases before the court.

[79] I.R.C. § 7463(d). The Tax Court Rules of Practice and Procedure formerly addressed the prospect of discontinuance of a small tax case as follows:

> After the commencement of a trial of a small tax case, but before the decision in the case becomes final, the Court may order that the proceedings be discontinued under Code Section 7463, and that the case be tried under the rules of practice other than the Small Tax Case Rules, but such order will be issued only if (1) there are reasonable grounds for believing that the amount of the deficiency, or the claimed overpayment, in dispute will exceed $10,000 and (2) the Court finds that justice requires the discontinuance of the proceedings under Code Section 7463, taking into consideration the convenience and expenses for both parties that would result from the order.

Former TAX CT. R. 173, 82 T.C. 1072 (1984). In 2003, the court deleted this version of Rule 173 on grounds that the provision was merely duplicative of § 7463(d). *See* Rules Comm. Note, TAX CT. R. 172, 120 T.C. 606 (2003).

[80] I.R.C. § 7463(d); TAX CT. R. 173 (July 6, 2012 ed.).

[81] 72 T.C. 443 (1979).

Service, the court noted that the dollar limitation would only apply if the case were tried as a small tax case. Once small tax case proceedings are discontinued, § 7463 makes it clear that the case becomes a regular tax case.

5. Answers in Small Tax Cases

In 1978, the Tax Court amended its rules to provide that the Service need not file an answer in small tax cases unless the case involved an issue on which the Service carries the burden of proof or unless otherwise directed by the court.[82] The note accompanying Rule 175 as then amended provided as follows:

> The experience of the Court under its preexisting procedure has shown that the filing of answers in all small tax cases has not been helpful in the disposition of such cases and has resulted generally in merely calling for unnecessary additional paperwork, particularly in the light of the fact that most of these cases are actually disposed of without trial. Furthermore, the Commissioner has assured the Court that, in the relatively small number of cases expected to be tried, he will file with the Court and serve upon the petitioner an informative statement amplifying the matters in dispute that are to be adjudicated.[83]

However, in 2007, the Tax Court reversed course by amending its rules to require the filing of an answer by the Service in every case tried under the small tax case procedure. The court cited several justifications for the change. First, partly as a result of the considerable increase in the amount in dispute to $50,000, small tax cases came to represent approximately half of the Tax Court's docket.[84] Additionally, the court observed that taxpayers and the low-income taxpayer clinics that increasingly represented them in small tax cases often faced difficulty in contacting the attorney representing the Service due to the absence of a responsive filing. Answers filed in small tax cases would provide this information and, as a result, facilitate essential pretrial communication between the parties.[85] Lastly, the court observed that the filing of answers in small tax cases may promote the identification of novel legal issues at any earlier stage in the litigation, permitting the court to make informed decisions concerning whether discontinuance of the small tax procedure pursuant to § 7463(d) was appropriate.[86]

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[82] Former TAX CT. R. 175(b), 71 T.C. 1212 (1975).
[83] Rules Comm. Note, TAX CT. R. 175, 71 T.C. 1212 (1978).
[84] Rules Comm. Note, TAX CT. R. 173(b), 128 T.C. 231 (2007).
[85] *Id.*
[86] *Id.*

6. Pretrial Procedures

Small tax case trials are held in a greater number of locations around the country than are regular tax cases.[87] Taxpayers may at the time of filing the petition request a place of trial, and the court will make every effort to conduct it at a location convenient to the one requested.[88]

Approximately five months prior to the designated trial session, the court issues to taxpayers who have elected the small tax case procedure a Notice of Trial and a Standing Pretrial Notice.[89] In addition to providing taxpayers information about the trial process, the Standing Pretrial Notice reminds the parties of their obligation to stipulate to all relevant facts and documents that are not in dispute. Attached to the Standing Pretrial Notice is a form Pretrial Memorandum, which directs the parties to provide the following information about the case: the amount(s) in dispute, the status of the case (probable settlement, probable trial, definite trial), current estimate of trial time, motions expected to be made, status of the stipulation of facts (completed, in process), issues in the case, witnesses the parties expect to call, a summary of facts, a brief synopsis of legal authorities, and evidentiary problems. Unlike regular Tax Court proceedings, the taxpayer in a small tax case procedure is not required to file the Pretrial Memorandum; rather, the Standing Pretrial Notice merely states that the taxpayer should do so. If the taxpayer does so, the Notice states that the Pretrial Memorandum should be sent so as to be received by the court at least seven days prior to the start of the trial session.

7. Informal Procedures

Although taxpayers electing the small tax case procedure may represent themselves or obtain representation by any individual admitted to practice before the Tax Court,[90] approximately 90 percent of all small tax cases are litigated on a pro se basis.[91] The cost of representation likely constitutes the primary reason for the substantial degree of self-representation in the small tax case arena. The fact that small tax cases are conducted under informal procedures, designed not to penalize taxpayers lacking litigation skills, may also encourage self-representation.[92] The presiding judge or special trial judge usually will assist the taxpayer in eliciting relevant testimony from

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[87] Currently, small tax cases may be heard at 15 additional locations. *See* Appendix D; *see also* TAX CT. R. APP. I, Form 5.

[88] I.R.C. § 7446; TAX CT. R. 174(a) (July 6, 2012 ed.).

[89] The Standing Pretrial Notice is available on the Tax Court's website at http://www.ustaxcourt.gov/video/stpn.pdf.

[90] TAX CT. R. 174 (July 12, 2012 ed.).

[91] *See* Sterrett, *supra* note 32, at 121.

[92] *Id.*

witnesses.[93] Moreover, any evidence having probative value typically is admitted.[94] The court has made every effort to assure that taxpayers electing the small case procedure are not intimidated by the formal rules of evidence and procedure applicable to regular tax cases.[95]

B. Court Measures to Support Self-Represented Taxpayers

1. Taxpayer Information

The Tax Court provides considerable institutional support for taxpayers who prosecute their cases before the court without the benefit of representation. As previously discussed, the court essentially frames the contours of the proceedings before the court through the Standing Pretrial Order and Standing Pretrial Notice.[96] The latter, issued to taxpayers who elect to prosecute their case under the small tax case procedure, provides a checklist of items the taxpayer should consider in preparing for the trial proceeding.[97] However, the support provided by the Tax Court commences well before the correspondence that follows the filing of a petition. Beginning in 2006, the Tax Court website contains a prominent tab captioned "Taxpayer Information."[98] This tab contains a number of frequently asked questions, organized under the following four headings: (1) Starting a Case; (2) Before Trial; (3) During Trial; and (4) After Trial. Additionally, the tab contains a glossary of technical terms that a taxpayer may encounter. Each of the frequently asked questions consists of a hyperlink that directs the reader to a concise explanation of the question

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[93] *Id.*

[94] TAX CT. R. 174(b) (July 6, 2012 ed.); *see also* William C. Whitford, *The Small-Case Procedures of the United States Tax Court: A Small Claims Court that Works*, 1984 AM. B. FOUND. RESEARCH J. 797, 814 (1984) ("evidentiary principles were generally ignored, and the pro se litigants . . . were permitted to tell their 'stories' as they preferred").

[95] Section 7475(b), as amended by the sec. 860A of the Pension Protection Act of 2006, Pub. L. No. 109-280, provides that the Tax Court's periodic registration fee is available to the court to provide services to pro se taxpayers. In accordance with this authority, the court assists low income taxpayers by paying (1) transcript fees in appropriate circumstances, and (2) the fees necessary to hire a translator to provide assistance at trial to a taxpayer who does not speak English as a primary language. For an explanation of the circumstances in which the court will assist low-income taxpayers in this manner, see the Taxpayer Information section on the court's website at http://www.ustaxcourt.gov/taxpayer_info_start.htm #STARTING.

[96] *See* Part IX.H.

[97] *See* Pretrial Notice, ¶ 8, captioned "Petitioner (Taxpayer) Getting Ready for Court Check List." A copy of the Pretrial Notice is provided in Appendix F.

[98] *See* http://www.ustaxcourt.gov/taxpayer_info_intro.htm

couched in layman's terms. The material in the question and answer section encompasses a wide variety of questions, ranging from specific questions, such as "How do I delete or redact my Social Security number or other private numbers from documents?" to more general questions such as "What happens at Trial?" The information is aimed at a taxpayer who is not familiar with the Tax Court or the judicial process in general. Through this question and answer format, the Tax Court has attempted to anticipate the areas of confusion encountered by unrepresented parties and to provide guidance in a clear, readily understandable format. The website's explanations permit taxpayers to digest the guidance at their own pace in a non-threatening setting.

In 2009, the court augmented the question-and-answer feature with a professionally produced video that walks the viewer through the lifecycle of a Tax Court proceeding.[99] As the video runs, links appear on the side of the screen that the taxpayer can click to see more information about the topic that is then being addressed. The video explanation is provided in nontechnical terms that an average person would understand. The video explanation is careful to highlight critical procedural requirements of proceedings before the Tax Court, often warning the viewer of the repercussions of not complying with those procedures.

The video begins by explaining the circumstances that may trigger an examination by the Service and how this examination may lead to the issuance of a notice of deficiency. The video addresses the critical time period for filing a petition with the court for independent review of the deficiency determination. After providing background information on the Court, the video describes how to access and complete the forms necessary to petition the Tax Court for review. In the process, the video highlights the potential for the taxpayer to litigate the case under the less formal small tax case procedure.

After explaining how to invoke the court's jurisdiction, the video focuses on the pretrial matters and options that are available to the taxpayer. In particular, the video explanation addresses settlements, the pretrial order, and stipulations of facts. Following this explanation, the video devotes nearly 20 minutes to familiarizing the taxpayer with every aspect of the actual trial. To do so, the video includes a realistic example of a court hearing concerning an imaginary taxpayer. Using this example, the video highlights how to prepare for trial, the evidence that can be used, how to subpoena witnesses, what to bring the day of trial, the calendar call, testifying at trial, and the manner that the taxpayer should follow in the courtroom. After the video has guided the taxpayer through the entire trial, the video continues with a brief section on what is going to happen after the trial. While this section is not as in depth, the video explains bench

[99] *See* https://www.ustaxcourt.gov/ustc_video_welcome.htm.

decisions, full opinions, and the taxpayer's right to appeal (highlighting that neither party may appeal a decision entered in a case litigated under the small tax case procedure).

Overall, the Taxpayer Information tab of the Tax Court website provides invaluable information to a taxpayer who navigates the proceeding on her own. While this information may be available through other sources, the Tax Court has provided sanctioned guidance in a readily accessible location. This aspect of the Tax Court's website illustrates the court's continuing effort to better prepare unrepresented taxpayers to litigate before the court. This effort can be characterized in broader terms as the Tax Court promoting access to justice, as well informed self-represented litigants are more likely to present their contentions to the court in a manner that will allow the court to properly resolve their cases on the merits.

2. Low-Income Taxpayer Clinics

Along with the support that taxpayers can obtain from the Tax Court's website, the court has provided institutional support for a number of other programs, including Low-Income Taxpayer Clinics (LITCs). LITCs represent qualifying taxpayers in proceedings before the Service and the Tax Court on such matters as audits, collection disputes, and appeals of adverse administrative determinations. To date, 144 clinics are recognized by the Taxpayer Advocate Service, consisting of clinics organized as stand-alone non-profit organizations and clinics housed at law schools.[100] The Tax Court supports LITCs through a variety of measures, including links to the clinics on the Tax Court website, meeting space for clinics and their clients on the day of calendar calls, and, since 2007, annual meetings to update clinicians and representatives of the Office of IRS Chief Counsel on developments at the court.

Although the Tax Court currently supports the assistance provided by LITCs, the court initially opposed the idea of student representation through such clinics when it was first introduced in the 1970s.[101] Stuart Filler, who organized a clinic originally affiliated with Hofstra Law School, made the initial attempt to allow students to represent taxpayers before the Tax Court on essentially the same terms those students could appear before the United States District Court for the Eastern District of New York.[102] As part of its consideration of the application, the Tax Court sought the

[100] Internal Revenue Service, Low Income Taxpayer Clinic List, *available at* http://www.irs.gov/pub/irs-pdf/p4134.pdf.

[101] *See* Keith Fogg, *Taxation with Representation: The Creation and Development of Low Income Taxpayer Clinics*, 67 TAX LAW. 3, 47–51 (2013). (providing a history of the Tax Court's support for tax clinics providing student representation).

[102] *See id.* at 47–48.

input of the ABA Section on Taxation. The Tax Section, in turn, adopted the report of the Committee on Small Taxpayer Assistance opposing student representation.[103] The position of the ABA proved influential, as the Tax Court subsequently declined to permit the students from the Hofstra clinic to represent taxpayers in proceedings before it.[104] The Service, however, had a different view on the matter. In early 1978, the Advisory Committee to the Commissioner recommended that students be permitted to practice in front of the Tax Court under the supervision of an attorney.[105] The Tax Court thereafter dropped its opposition to the academic LITC model, instead embracing the assistance these clinics offered to taxpayers who otherwise would lack representation.

In 2007, the Tax Court expanded its policy of encouraging representation of pro se taxpayers by LITCs. The number of participating LITCs increased from 55 in 2007 to 105 in 2013. The court provides significant support to LITCs through the court's referral program. The referral program connects low-income taxpayers with tax clinics through "stuffer" notices that provide contact information for LITCs to all self-represented taxpayers. LITCs are required to provide a stuffer notice for their clinic to the Tax Court that tracks the sample letter provided by the court.[106] Until 2013, stuffer notices were sent twice: once with the letter from the Court to the taxpayer acknowledging filing of the petition, and again with the notice calendaring the case for trial sent five months prior to the trial session.

In August of 2013, the Tax Court issued a press release announcing a simplified stuffer notice designed to make it easier for self-represented taxpayers to take advantage of the services offered by LITCs.[107] The stuffer notice states in bold print "Do You Need Help With Your Tax Court Case?" and goes on to list the local clinics that can assist the taxpayer.[108] In addition to providing the simplified stuffer notice, the August 2013 press release announced that the Tax Court would begin sending a third stuffer notice to taxpayers 30 days prior to trial. The issuance of the stuffer notices

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[103] *Id.*

[104] *Id.* at 48 (referencing a letter issued by the Tax Court on November 21, 1977).

[105] *Id.*

[106] United States Tax Court, "Requirements for Participation in the United States Tax Court Clinics, Student Practice & Calendar Call Program by Academic Clinics," *available at* http://www.ustaxcourt.gov/clinics_academic.htm. The Tax Court permits all LITCs to prepare stuffer notices written in both English and Spanish.

[107] United States Tax Court, Press Release, "Clinic Program Changes," Aug. 16, 2013, *available at* http://www.ustaxcourt.gov/clinics/clinic_program_changes.pdf.

[108] The sample stuffer notice is available on the Tax Court's website at http://www.ustaxcourt.gov/clinics/stuffer_notice.pdf.

yields a large number of referrals to LITCs, which in turn allows many otherwise unrepresented taxpayers to secure counsel.

In addition to the stuffer notices, the Tax Court refers taxpayers to the LITCs through links and answers to questions on the Tax Court website. The instructional video discussed earlier includes several links to the list of LITCs that are currently operating and directs taxpayers to seek assistance if they think it would be helpful. While the Tax Court does not endorse or support any particular clinic, the Tax Court's wide referral program illustrates the Court's continued effort to assist pro se taxpayers.

Beyond providing taxpayers with LITC contact information, the Tax Court works to make the process of advocating for the taxpayer easier by providing space for clinicians to meet their clients. Since 2013, LITCs have been provided access to the Counsel Room of the Tax Court in selected cities to meet their clients on the day of the calendar call.[109]

The Tax Court not only devotes considerable effort to connecting pro se taxpayers with LITCs, the court also strives to keep the clinicians informed of the changes in the Tax Court that are most relevant to low income taxpayers. Each year, a representative of the court provides a presentation to the Pro Bono and Tax Clinic Committee of the American Bar Association Section of Taxation on changes at the Tax Court that affect low income taxpayers. Chief Special Trial Judge Peter Panuthos, who has spearheaded the court's efforts to better serve low-income taxpayers, has contributed perennially to this programming. In this manner, the Tax Court supports the work of LITCs by ensuring that clinical advocates are current on matters that will affect the representation of their clients.

3. Bar Sponsored Calendar Call Programs

In recognition of the significant percentage of self-represented taxpayers that appear before it, the Tax Court has encouraged participation in trial sessions by less formal Bar Sponsored Calendar Call Programs. These programs provide taxpayers with an opportunity to meet with a tax professional free of charge when they appear before court at the call of the trial calendar. This approach to providing assistance to self-represented taxpayers took root in the Los Angeles and San Francisco communities. In 1992, with the assistance of Judge Stephen Swift of the Tax Court and the support of the IRS District Counsel's office in San Francisco, Karen Hawkins designed and implemented a "Pro Se Pro Bono" project on behalf

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[109] The cities include, Atlanta, Chicago, Cleveland, Columbia, Dallas, Denver, Detroit, Jacksonville, Las Vegas, Los Angeles, Louisville, Miami, Nashville, New York, Oklahoma City, Phoenix, Pittsburgh, Salt Lake City, San Francisco, Seattle, St. Louis, St. Paul, Tampa, Winston-Salem, and Washington, D.C. United States Tax Court, Press Release, "Clinic Program Changes," Aug. 16, 2013, *available at* http://www.ustaxcourt.gov/clinics/clinic_program_changes.pdf.

of the Executive Committee of the Taxation Section of the California State Bar.[110] Ms. Hawkins recognized the high number of taxpayers who were self-represented, and without LITCs being funded at the time, believed some other form of assistance was needed.[111] Since 2008, the Tax Court has facilitated bar sponsored calendar call programs by registering the programs with the court in an effort to ensure that the volunteers are qualified to provide the necessary counseling. The number of cities in which these programs appear has grown considerably over the years. In 2008, three cities in which the Tax Court holds trial sessions were supported by the calendar call programs. In 2013, that number stood at 24.

To participate, the Tax Court requires that bar sponsored calendar call programs be registered with the Tax Court and include volunteers who are admitted to practice and in good standing with the Tax Court.[112] To volunteer with a bar sponsored calendar call program, an attorney can simply register with the local program and then attend the calendar call to determine if any taxpayers are in need of advice. The assistance provided by the attorney through the program does not constitute formal legal advice, and the arrangement alone does not give rise to an attorney-client relationship. Rather, the program is designed to provide support to self-represented taxpayers, often by enabling them to make more well-informed decisions with respect to prosecution of their case.

In addition to the Tax Court's requirements of calendar call programs, most programs impose additional requirements on participating attorneys. Oftentimes attorneys are required to be familiar with practice before the Tax Court, to be member in good standing of the Tax Court bar, to carry malpractice insurance, and to agree not to accept payment or to refer the taxpayer to another attorney for paid representation.[113] While these conditions vary by program, they are required by most.

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[110] Interview with Karen Hawkins, Director of Office of IRS Office of Responsibility, *available at* http://www.americanbar.org/content/dam/aba/publishing/newsquarterly/04sum/pbar.authcheckdam.pdf.

[111] *Id.*

[112] *See* United States Tax Court, "Requirements for Participation in the United States Tax Court Clinics, Student Practice & Calendar Call Program by Academic Clinics," *available at* http://www.ustaxcourt.gov/clinics_calendar_call.htm (listing the requirements to register with the Tax Court for the calendar call program). Registration with the court consists of an annual letter sent to the chief judge acknowledging the program's intention to provide the service for the coming year. The Tax Court supplies a sample form letter for this purpose. *See* United States Tax Court, "Letter to Chief Judge (sample)," *available at* http://www.ustaxcourt.gov/clinics/letter_to_cj_calendar_call.pdf.

[113] For an example of the requirements imposed by one such bar sponsored calendar call program, see http://www.americanbar.org/content/dam/aba/migrated/tax/probono/losangeles1.authcheckdam.pdf (providing requirements for

Once a calendar call program is registered with the court, the court may "announce at the beginning of a calendar call that volunteer practitioners participating in the calendar call program are available to consult with and assist self-represented petitioners."[114] This allows any self-represented taxpayer to meet with a volunteer while they are at court for their calendar call. While there is not a guarantee that the volunteer will enter an appearance for the petitioner, the volunteer will attempt to provide as much advice as possible to the taxpayer during their initial meeting. Some bar associations even prohibit the volunteer attorney from entering an appearance for the taxpayer, limiting the assistance to the advice provided in the one-on-one consultation.[115]

Calendar call programs have improved access to justice for self-represented taxpayers. Because the advice is available on the day of the taxpayer's trial calendar, there is a better chance that pro se taxpayers will be able to use the resource because of the convenience of immediately meeting with an attorney. Presenting a case before the Tax Court can be confusing for any taxpayer attempting to navigate the process alone, but the Tax Court supports the efforts of local bar organizations to make the process less intimidating and more manageable.

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the Tax Court Pro Se Program sponsored by the Los Angeles County Bar Association and Beverly Hills Bar Association).

[114] United States Tax Court, "Clinical, Student Practice & Calendar Call Program: Bar Sponsored Calendar Call Programs," *available at* https://www.ustaxcourt.gov/clinics_calendar_call.htm.

[115] *See, e.g.*, Colorado Bar Association, "U.S. Tax Court Pro Bono Opportunities," *available at* http://www.cobar.org/index.cfm/ID/139/subID/11040/TAX/ ("An attorney volunteer does not, and under the guidelines established for the program, cannot, enter an appearance in any of the cases in which he or she advises. Assistance is limited to meeting informally with the litigants.").

APPENDIX A

WORKLOAD OF BOARD OF TAX APPEALS AND TAX COURT 1925–2012

Fiscal year ending June 30	*Docketed*	*Closed*	*Pending*
1925	5,220	1,702	3,518
1926	12,867	3,936	12,473
1927	11,338	5,361	18,481
1928	10,165	7,090	21,639
1929	5,458	8,969	18,301
1930	4,369	6,849	16,035
1931	9,736	7,229	18,849
1932	7,635	7,920	18,937
1933	5,964	8,683	16,502
1934	4,023	10,393	10,493
1935	3,888	5,587	9,134
1936	4,941	5,477	8,858
1937	4,050	5,043	8,107
1938	4,912	5,799	7,414
1939	4,854	5,885	6,574
1940	4,240	5,126	5,909
1941	4,366	4,770	5,724
1942	3,676	4,292	5,357
1943	3,436	4,403	4,592
1944	3,220	3,342	4,658
1945	3,375	3,051	5,146
1946	3,077	2,854	5,469
1947	3,820	3,223	6,185
1948	4,498	3,973	6,823
1949	4,622	4,567	7,020
1950	5,387	4,241	8,310
1951	6,142	5,105	9,507
1952	6,870	5,045	11,487

Fiscal year ending June 30	*Docketed*	*Closed*	*Pending*
1953	7,122	5,880	12,889
1954	4,200	6,913	10,347
1955	4,981	5,333	10,164
1956	4,591	4,922	9,908
1957	5,259	4,645	10,666
1958	6,220	4,627	12,403
1959	6,774	5,855	13,434
1960	6,369	6,743	13,171
1961	5,385	6,966	11,712
1962	4,775	6,102	10,483
1963	5,362	5,786	10,188
1964	5,661	6,295	9,654
1965	6,887	5,864	10,765
1966	7,025	6,358	11,523
1967	6,224	7,362	10,501
1968	6,326	5,920	10,997
1969	6,075	5,987	11,154
1970	7,390	6,610	12,040
1971	8,335	7,801	12,660
1972	9,245	8,531	13,388
1973	9,181	8,893	13,792
1974	8,757	8,917	13,727
1975	11,213*	8,616	16,448
1976	11,483	9,739	18,396
1977	12,339	10,374	21,298
1978	13,740	12,062	23,140
1979	17,126	13,382	27,043
1980	22,009	14,470	34,865

*In 1975, approximately 950 were cases filed by I.T.T. stockholders.
Source: United States Tax Court, Statistics and Reports Section.

WORKLOAD OF BOARD OF TAX APPEALS AND TAX COURT 1925–2012

Fiscal year ending Sept. 30	*Docketed*	*Closed*	*Pending*
1981	29,720	18,906	45,921
1982	30,776	24,204	52,773
1983	34,221	28,945	58,333
1984	42,024	37,098	63,598
1985	45,295	36,436	72,836
1986	48,398	37,937	83,686
1987	42,623	45,082	81,549
1988	32,701	47,165	67,491
1989	31,453	40,100	59,194
1990	28,507	36,325	51,709
1991	29,636	33,331	48,374
1992	30,345	34,823	44,376
1993	28,007	33,035	39,644
1994	24,066	33,345	30,346
1995	25,909	26,787	29,696
1996	28,777	29,392	19,067
1997	26,322	28,256	27,441
1998	21,222	25,903	22,973
1999	20,345	23,525	19,965
2000	13,705	18,626	15,201
2001	15,475	14,113	16,708
2002	17,815	16,802	17,645
2003	21,521	19,045	20,536
2004	24,092	22,487	22,244
2005	24,551	23,674	23,349
2006	26,177	24,925	24,722
2007	29,248	26,544	27,431
2008	32,110	29,594	30,047
2009	30,379	31,878	29,244
2010	29,402	30,890	27,756

Fiscal year ending Sept. 30	*Docketed*	*Closed*	*Pending*
2011	28,900	29,786	28,550
2012	30,801	31,434	29,025
2013	27,039	31,983	26,517

APPENDIX B

TAX COURT CASELOAD BY TYPE (IN MODERN TIMES)

Year	Deficiency	Collection Due Process	Innocent Spouse Stand-Alone	Partnership Actions	Other
1990	27,883	---	---	1,126	81
1991	30,162	---	---	486	82
1992	28,334	---	---	410	35
1993	27,071	---	---	241	29
1994	23,726	---	---	377	25
1995	26,746	---	---	310	42
1996	27,591	---	---	197	40
1997	24,753	---	---	176	55
1998	20,351	---	---	258	209
1999	18,683	97	6	295	146
2000	13,112	277	137	74	127
2001	13,908	414	406	55	158
2002	19,011	1,173	870	77	139
2003	21,104	654	813	60	86
2004	23,497	604	713	103	75
2005	23,551	700	587	133	73
2006	25,810	831	513	136	115
2007	29,272	1,075	463	144	77
2008	30,216	1,023	448	264	73
2009	29,970	1,094	577	198	92
2010	27,977	1,486	599	153	82
2011	29,118	1,786	530	134	85
2012	30,703	1,811	173	136	98
2013	30,046	1,486	342	143	84

APPENDIX C

AREAS OF FORMER TAX COURT JURISDICTION

This Appendix details two aspects of the Tax Court's historical jurisdiction that have since been transferred or have become obsolete. The court previously was afforded jurisdiction to review agency determinations of excess profits in connection with the renegotiation of defense related contracts. The court's jurisdiction in this arena ended when judicial review was transferred from the Tax Court to the Court of Claims in 1971. Additionally, the court possessed jurisdiction to review refunds of the former processing tax after the Supreme Court declared such tax unconstitutional. The Tax Court's jurisdiction in this area naturally wound down once the underlying refund claims were resolved. These two aspects of the Tax Court's former jurisdiction are detailed below.

A. Renegotiation Cases

Renegotiation of defense contracts originally was authorized in the Renegotiation Act of 1942 to prevent excessive wartime profiteering by private contractors.[1] Initially, renegotiation was limited to certain contracts and subcontracts made by the War Department, the Navy Department and the Maritime Commission.[2] Such renegotiation was to be conducted by the Secretary of the respective departments.[3] If the Secretary believed that excessive profits had been realized or were to be realized, he was directed to engage in negotiations with the contractor or subcontractor to adjust the contract price.[4] The structure of the renegotiation process was left flexible; moreover, no explicit standards for determining what would be considered excess profits were promulgated.[5] If excessive profits were determined, either by voluntary agreement or by unilateral order in situations in which the parties did not agree, the Secretary was directed to recover them.[6]

The original legislation did not provide for any form of subsequent review, judicial or administrative, of unilateral determinations of excessive

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[1] Sixth Supplemental National Defense Appropriation Act of 1942, ch. 247, § 403, 56 Stat. 245–46.

[2] *Id.* § 403(a), 56 Stat. 245.

[3] *Id.* § 403(b).

[4] *Id.* § 403(c)–(f), 56 Stat. 245–46. This contract by contract approach was changed by the Revenue Act of 1942, ch. 619, § 801, 56 Stat. 982–85, which required renegotiation to be conducted with regard to all renegotiable contracts during the company's fiscal year.

[5] Sixth Supplemental National Defense Appropriation Act of 1942, ch. 247, § 403(d), 56 Stat. 245.

[6] *Id.* § 403(c)(3), 56 Stat. 245.

profits by the Secretary.[7] The absence of such review and the lack of explicit standards for determining excessive profits posed problems of due process.[8] To remedy what most considered a defect in the initial act, the House, in 1943, proposed legislation that would permit a contractor or subcontractor aggrieved by a unilateral determination of excessive profits to petition the Tax Court for a de novo redetermination.[9]

The House proposal was not generally endorsed by the Bar,[10] was strongly opposed by the Treasury,[11] and was received with misgivings by the court.[12] The opponents of renegotiation jurisdiction for the Tax Court advanced several arguments.[13] First, the critics expressed the fear that the addition of renegotiation cases would severely hamper the court's ability to deal with its major source of workload, deficiency cases.[14] Second the limited number of judges on the court was believed insufficient to handle an expected large influx of renegotiation cases.[15] In this connection, it was noted that renegotiation would require lengthy hearings and result in voluminous records, further adding to the potential burden.[16] Finally, the relationship between excessive profits and taxes, coupled with the court's familiarity with the latter, might lead to improper consideration of consequential tax treatment in a renegotiation proceeding.[17] The argument was made that the Court of Claims, with its staff of commissioners and smaller caseload, was a more appropriate forum to receive the new jurisdiction.[18]

As a result of this opposition, the Senate Finance Committee amended the House bill and substituted the Court of Claims as the forum for judicial

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[7] *Id.* § 403.

[8] *See* S. REP. NO. 79-927, at 32–34 (1943); H.R. REP. NO. 79-871, at 76 (1943); *see also* Lichter v. United States, 334 U.S. 742, 791 (1947).

[9] *See* H.R. REP. NO. 78-871, at 37 (1943).

[10] *See*, *e.g.,* Letter from E. Griswold to R. Paul, Nov. 24, 1943, filed at the U.S. Tax Court in "Renegotiation Jurisdiction;" Letter from L. Lecher to R. Paul, Nov. 26, 1943, filed at the U.S. Tax Court in "Renegotiation Jurisdiction."

[11] Memorandum from R. Paul, General Counsel of the Treasury, to Judge Murdock, Presiding Judge, Nov. 17, 1943, filed at the U.S. Tax Court in "Renegotiation Jurisdiction" [hereinafter cited as Treasury Memo].

[12] Letter from Judge Murdock, Presiding Judge, to C. Stam, Chief of Staff, Joint Committee on Internal Revenue Taxation, Oct. 15, 1943, filed at the U.S. Tax Court in "Renegotiation Jurisdiction."

[13] Treasury Memo, *supra* note 11, at 1.

[14] *Id.* at 2.

[15] *Id.*

[16] Memorandum from H. Reiling to Mr. Wenchel, Nov. 16, 1943, filed at the U.S. Tax Court in "Renegotiation Jurisdiction;" Treasury Memo, *supra* note 11, at 3.

[17] Treasury Memo, *supra* note 11, at 3.

[18] *See* S. REP. NO. 78-927, at 37 (1943).

review.[19] Nevertheless, in conference, the Senate receded and jurisdiction was given to the Tax Court.[20] Notwithstanding the strenuous opposition, Congress believed that the expertise of the court membership made the forum a logical choice.[21]

As enacted, the Revenue Act of 1943[22] amended the Renegotiation Act of 1942 to provide that Tax Court jurisdiction would be invoked by the filing of a petition within 90 days of the mailing of a unilateral determination of excessive profits by the newly established War Contracts Price Adjustment Board.[23] The War Contracts Price Adjustment Board was created to provide a single reviewing body that would replace the former practice of each procuring agency reviewing the profits of its own contractors.[24] The proceeding before the Tax Court was de novo and not merely to review the prior determination.[25] Thus, the findings of the prior determination were not accorded evidentiary weight.[26] In keeping with its de novo function, the court was permitted to increase, decrease, or affirm the amount previously determined.[27] Moreover, its jurisdiction was to extend to all questions of fact and law in its determination of whether excessive profits existed.[28] The statute provided the court with generally the same powers and duties as it had in connection with deficiency proceedings.[29] However, unlike the case with deficiency jurisdiction, petitioning the court would not operate to stay collection of the disputed amount.[30]

The jurisdiction of the Tax Court was exclusive; no other relief was provided by the statute to a contractor or subcontractor aggrieved by a unilateral order.[31] If the aggrieved party failed to petition the Tax Court, the unilateral order was final and not subject to review.[32] If the aggrieved party petitioned the court, the amount determined by the Tax Court was not subject to review.[33]

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[19] *Id.*

[20] H.R. REP. NO. 78-1079, at 83 (1944).

[21] H.R. REP. NO. 78-871, at 76–77 (1943).

[22] Revenue Act of 1943, ch. 63, § 701, 58 Stat. 78, *amending* Sixth Supplemental National Defense Appropriation Act of 1942, ch. 247, § 403, 56 Stat. 245.

[23] *Id.* § 701(e)(1), 58 Stat. 86.

[24] *Id.* § 701(d)(1), 58 Stat. 85.

[25] *Id.* § 701(e)(1), 58 Stat. 86.

[26] *Id.*

[27] *Id.*

[28] 89 CONG. REC. 9930 (1943); 90 CONG. REC. 1355 (1944).

[29] Revenue Act of 1943, ch. 63, § 701(e)(1), 58 Stat. 86–87.

[30] *Id.*

[31] *Id.*

[32] *Id.* § 701(c)(1), 58 Stat. 83.

[33] *Id.* § 701(e)(1), 58 Stat. 86.

The conclusion of World War II terminated the original reason for renegotiation.[34] Accordingly, the Renegotiation Act of 1942, which expired in 1945, was not extended. In 1948, however, Congress reinstituted renegotiation, primarily in respect of government contracts involving the construction of air-craft.[35] Thereafter, in 1951, Congress enacted the Renegotiation Act of 1951,[36] which represented a change in the application of renegotiation from solely a wartime measure to an ongoing and permanent part of the defense contracting process.[37] Although the 1951 Act largely paralleled earlier legislation,[38] three important changes were made. First, coverage was extended to a greater number of defense and collateral agencies having a direct connection with national defense.[39] Second, a Renegotiation Board, entirely independent of the procuring agencies, was established.[40] Third, if Tax Court jurisdiction was invoked, the contractor or subcontractor could forestall collection of excessive profits during the pendency of the court proceeding by posting an adequate bond.[41]

Apart from the addition of bond procedures and expanded coverage, the jurisdictional grant to the Tax Court remained essentially unchanged from prior legislation.[42] As a result, the controversies which arose under the Revenue Act of 1943 continued under the 1951 Act. These controversies, which included the nature of Tax Court review, the burden of proof in such proceedings, and the appellate review of Tax Court determinations, were sometimes difficult to resolve. Ultimately, the source

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[34] *See* Lichter v. United States, 334 U.S. 742, 757–65 (1948).

[35] Renegotiation Act of 1948, ch. 333, § 3, 62 Stat. 259.

[36] Renegotiation Act of 1951, ch. 15, 64 Stat. 7 (previously codified at 50 U.S.C. app. §§ 1211–1233 (1970 and Supp. V 1975)).

[37] *See generally* Charles M. Bruce, *Reform of the Renegotiation Process in Government Contracting*, 39 GEO. WASH. L. REV. 1141 (1971).

[38] *Compare* Renegotiation Act of 1951, ch. 15, 65 Stat. 7 *with* Sixth Supplemental National Defense Appropriation Act of 1942, ch. 247, § 403, 56 Stat. 245 (as amended by Revenue Act of 1942, ch. 619, § 801(a)–(c), 56 Stat. 982); Military Appropriations Act of 1944, ch. 185, § 1, 57 Stat. 348 (1943); Renegotiation of War Contracts, ch. 239, § 104, 57 Stat. 564 (1943); Revenue Act of 1943, ch. 63, § 701, 58 Stat. 78 (1944).

[39] Renegotiation Act of 1951, ch. 15, §§ 102, 103, 65 Stat. 7, 8 (previously codified at 50 U.S.C. app. §§ 1212–1213 (1970 and Supp. V 1975)).

[40] *Id.* § 107(a)–(f), 65 Stat. 19 (previously codified at 50 U.S.C. app. § 1217(a)–(f)(1970)).

[41] *Id.* § 108, 65 Stat. 21 (previously codified at 50 U.S.C. app. § 1218 (1970 and Supp. V 1975)).

[42] *Compare id.* § 108, 65 Stat. 21 *with* Revenue Act of 1943, ch. 63, § 701, 58 Stat. 78, *amending* Sixth Supplemental National Defense Appropriation Act of 1942, ch. 247, 56 Stat. 245.

of controversy, at least with regard to the Tax Court, was eliminated by 1971 legislation shifting renegotiation jurisdiction to the Court of Claims.[43]

1. Nature of Remedy

Two problems arose with respect to the nature of Tax Court review: (1) the exclusivity of the Tax Court remedy, and (2) the scope of review in the Tax Court proceeding.

The first issue, that of exclusivity, was addressed in a number of early Supreme Court cases.[44] As a group, these cases held that the only remedy of a party aggrieved by a unilateral administrative determination of excessive profits lay in the Tax Court, in which all issues of fact and law, including such questions as coverage under the Act, time limitations, and amount could be raised.[45] Thus, the district courts were without power to enjoin collection until such time as the Tax Court had been resorted to and had rendered a decision.[46] The failure to pursue a Tax Court remedy precluded the contractor from challenging an administrative order in any subsequent action by the Government to collect upon the order.[47]

With respect to the scope of review, the 1943 and 1951 Acts provided that the proceeding was to be conducted de novo and not merely as a review of the prior determination.[48] Thus, no issue as to the arbitrary or capricious manner by which the Renegotiation Board conducted its investigation could be raised in Tax Court pleadings as such issues would be irrelevant.[49]

The decision by Congress to provide de novo redetermination was based on a desire to provide the contractor with a fresh start; only evidence presented to the Tax Court could be considered and the statement of reasons and findings of fact promulgated by the Renegotiation Board would be of no evidentiary value.[50] Difficulties arose, however, as to whether the Tax Court was truly providing a de novo proceeding or merely reviewing

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[43] Pub. L. No. 92-41, §§ 2(b), 3(a), 85 Stat. 97, 98 (1971).

[44] Lichter v. United States, 334 U.S. 742 (1948); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947); Macauley v. Waterman S.S. Corp., 327 U.S. 540 (1946).

[45] Lichter v. United States, 334 U.S. 742, 789–92 (1948); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 764–81 (1947); Macauley v. Waterman S.S. Corp., 327 U.S. 540, 544–45 (1946).

[46] Macauley v. Waterman S.S. Corp., 327 U.S. 540, 543 (1946).

[47] Lichter v. United States, 334 U.S. 742, 790–92 (1948).

[48] Revenue Act of 1943, ch. 63, § 701(e)(1), 58 Stat. 86, *amending* Sixth Supplemental National Defense Appropriation Act of 1942, ch. 247, § 403, 56 Stat. 245; Renegotiation Act of 1951, ch. 15, § 108, 65 Stat. 21.

[49] Grumman Aircraft Eng'r Corp. v. Commissioner, 52 T.C. 152 (1969).

[50] *See* H.R. REP. NO. 78-871, at 37, 76–78 (1943).

the Board's determination. Such difficulties arose as a result of imprecise language in court decisions[51] and certain provisions of the court rules dealing with renegotiation cases. For example, court rules required the aggrieved party, in preparing his petition, to assign "each and every error which the petitioner alleges to have been committed by the Board or the Secretary in the determination of excessive profits."[52] The petitioner was also required to submit with his petition a copy of the unilateral determination, and if available, a copy of the statement of reasons prepared by the Renegotiation Board.[53] These factors, critics urged, indicated that the court was ignoring its duty to redetermine the excessive profits afresh and merely was reviewing the previous determination.[54]

The court, however, maintained that nothing in its rules or decisions in any way indicated that it was not providing de novo review.[55] The court noted that it did not consider or rely on the Board statement, and decided renegotiation cases solely on the evidence presented.[56] With regard to its rules, the court believed that it was necessary, in order to narrow the issues, that the petitioner be required to assign as error the differences in excess profit computation between itself and the Government.[57]

2. Burden of Proof

Closely akin to the criticism of the way in which the court appeared to be conducting its renegotiation trial proceedings was the issue over who would bear the burden of proof in such proceedings. In the initial grant of renegotiation jurisdiction, Congress had authorized the Tax Court to provide for the burden of proof as it believed appropriate.[58] In this connection, the legislation also required the court to conform its renegotiation procedures, insofar as possible, to those employed in tax

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[51] *See*, *e.g.*, Vaughn Mach. Co. v. Commissioner, 30 T.C. 949, 960 (1958) (stating that "having carefully and painstakingly reviewed the entire record, we do not find error in the determination of the Board").

[52] TAX CT. R. 64 (promulgated Mar. 28, 1944).

[53] *Id.*

[54] *See Extension of the Renegotiation Act: Hearings Before the Comm. on Ways and Means*, 86th Cong., 1st Sess. 262–63 (1959) [hereinafter cited as 1959 House Hearings].

[55] Letter from Judge Murdock, Chief Judge, to Sen. Byrd, Chairman, Comm. on Finance, June 1, 1959, filed at the U.S. Tax Court in "Renegotiation Jurisdiction" [hereinafter cited as Murdock].

[56] *Id.*

[57] Memorandum from Judge Turner to Judge Murdock, Chief Judge, c. 1959, at 1, filed at the U.S. Tax Court in "Renegotiation Jurisdiction" [hereinafter cited as Turner Memo].

[58] *See* H.R. REP. NO. 78-871, at 77 (1943).

deficiency cases.[59] Shortly thereafter the Tax Court imposed on the petitioner both the burden of proof and the burden of coming forward with the evidence.[60]

In light of the requirement that the proceeding be de novo, many critics urged that the petitioner should not bear the burden of proof, but that the court should redetermine the excessive profits from the evidence presented as if no previous determination had been made.[61] Other complaints were grounded in the belief that the court placed a presumption of correctness on the previous determination.[62] It was pointed out that in some decisions which affirmed the exact amount of the prior determination,[63] the only evidence presented to the court was by the petitioner. This presumption, critics believed, was not consonant with legislative intent that the proceeding be de novo.[64]

In the view of the court, however, the burden of proof belonged on the contractor; additionally, it rejected the argument that it accorded a presumption of correctness to the previous determination.[65] In respect of the former issue, the court pointed out that the moving party traditionally had to prove his allegations.[66] Additionally, the congressional grant of Tax Court discretion to determine the burden of proof, in conjunction with the legislative history of the Revenue Act of 1943, provided implicit support for its decision to place the burden of proof on the petitioner.[67] The court

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[59] Section 701(e)(1) of the Revenue Act of 1943 provided as follows:

> For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, subcontractor, and the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a),1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency.

[60] *See* Cohen v. Commissioner, 7 T.C. 1002 (1946).

[61] *See, e.g.*, H.R. 5123, 86th Cong., 1st Sess. § 5(a)–(b) (1959); H.R. 7086, 86th Cong., 1st Sess. § 5 (1959); 1959 House Hearings, *supra* note 54.

[62] See authorities cited in *supra* note 61.

[63] *See*, *e.g.*, Vaughn Mach. Co. v. Commissioner, 30 T.C. 949 (1958).

[64] *See* 1959 House Hearings, *supra* note 54.

[65] Murdock, *supra* note 55, at 2; Unsigned Memorandum, c. 1959, at 1, filed at the U.S. Tax Court in "Renegotiation Jurisdiction;" Memorandum from Judge Withey to Judge Murdock, Chief Judge, May 21, 1959, at 2, filed at the U.S. Tax Court in "Renegotiation Jurisdiction."

[66] Murdock, *supra* note 55, at 2.

[67] *See* Cohen v. Commissioner, 7 T.C. 1002 (1946) (tracing the legislative grants and companion history of the 1943 Act in an attempt to show that its decision to

noted, however, that in situations in which the Government asked for affirmative relief, the burden of proof with respect to such affirmative relief would be shifted.[68] As to the alleged application of a presumption of correctness, the Tax Court stated that it did not give the Government's determination any indicia of correctness or any probative value.[69]

Finally, the court believed that one of the parties had to go forward with the evidence, and that the rules of practice had placed that burden on the petitioner.[70] The court noted that the burden of going forward many times would shift depending on the quality of the evidence presented.[71] If the petitioner failed to introduce sufficient credible evidence, the court was bound to leave the parties as it found them. In its view, this required that the previous determination be upheld.[72]

Many of the critics were not persuaded by the court's arguments, and in 1959, two legislative proposals dealing with these issues were advanced.[73] The first of these sought explicit statutory directives to (1) prohibit any use of a presumption of correctness, and (2) remove the entire burden of proof from the petitioner.[74] The second proposal was similar but provided that the petitioner bear the burden of going forward.[75] The major objective of both proposals was the same—to remove the burden of persuasion from the petitioner.[76] The second proposal was adopted in 1959 as part of the House bill to extend the Renegotiation Act of 1951.[77] The Senate deleted the provision and in conference the House receded.[78] It is interesting to note that the Court of Claims, after the transfer of renegotiation jurisdiction to it from the Tax Court by Congress in 1971, changed the Tax Court rule in respect of the burden of proof. In *Lykes Bros. Steamship Co.* v. *United States*,[79] the Court of Claims held that:

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place the burden of proof on the contractor was consistent with congressional intent).

[68] *See* Beeley v. Commissioner, 12 T.C. 61 (1949).

[69] *See* Finnie Co. v. Commissioner, 31 T.C. 1182, 1188 (1959).

[70] *See* Cohen v. Commissioner, 7 T.C. 1002, 1010–14 (1946).

[71] Letter from Judge Murdock to Comm. on Ways & Means, c. Apr. 1959, at 3, filed at the U.S. Tax Court in "Renegotiation Jurisdiction."

[72] Turner Memo, *supra* note 57, at 1–2.

[73] H.R. 5123. 86th Cong., 1st Sess. § 5 (1959); H.R. 7086, 86th Cong., 1st Sess. § 5 (1959).

[74] H.R. 5123, 86th Cong., 1st Sess. § 5(b) (1959).

[75] H.R. 7086, 86th Cong., 1st Sess. § 5 (1959).

[76] 1959 House Hearings, *supra* note 54.

[77] H.R. REP. NO. 86-364, at 5–6 (1959).

[78] H.R. REP. NO. 86-619, at 5–6 (1959).

[79] 459 F.2d 1393 (1972).

> the contractor has the initial burden of going forward with proof as to the statutory factors upon which it relies to the extent that the facts pertaining thereto are within its knowledge or possession, are accessible to the public generally in the form of published reports, or are *actually made available to the contractor* by the Government, voluntarily through a request made in pre-trial proceedings, or by discovery under the rules of the court. . . .[W]hen the contractor does this, it will have made a prima facie case, i.e., a showing which, unless rebutted, would justify a judgment in accord with the contractor's contentions. . . . [W]hen plaintiff has met the requirements stated above, the burden shifts to the Government to prove that plaintiffs profits were excessive and the extent thereof. This encompasses not only the burden of going forward with evidence after plaintiff's case in chief is closed, but also the burden of persuasion.[80]

3. Appellate Review

The issue of appellate review of Tax Court decisions in renegotiation cases was not addressed by the Supreme Court until 1955.[81] Prior to that time, two conflicting interpretations had been advanced. One viewpoint was expressed by the Circuit Court of Appeals for the District of Columbia in *United States Electrical Motors v. Jones*, decided in 1946.[82] The court, in examining the legislative history of the 1943 Act, the relevant statutory language of the Act, and the provisions of the Internal Revenue Code which authorized appellate review and provided venue rules, believed that appellate review was precluded only with respect to the amount of excessive profits finally determined by the Tax Court.[83] Jurisdictional and constitutional issues were not, however, subject to such a limitation, as they did not reflect on the amount of excessive profits.[84] Two years later, in *Blanchard Mach. Co. v. Reconstruction Finance Corp. Price Adjustment Board,*[85] the D.C. Circuit reaffirmed its earlier decision in *United States Electrical Motors* and held that the question of whether renegotiation was commenced timely by the Government was within the jurisdictional area reviewable by an appellate court.[86]

The Ninth Circuit, however, in its 1950 decision *French v. War Contracts Price Adjustment Board*,[87] disagreed with the approach of its sister circuit and

[80] *Id.* at 1401–02.
[81] United States v. California E. Line, Inc., 348 U.S. 351 (1955).
[82] 153 F.2d 134 (D.C. Cir. 1946).
[83] *Id.* at 136–37.
[84] *Id.*
[85] 177 F.2d 727 (D.C. Cir. 1949).
[86] *Id.* at 728–29.
[87] 182 F.2d 560 (9th Cir. 1950).

concluded that the 1943 Act withheld the power of review from any court or agency as to both "the accuracy of the figure found as the total of the excessive profits . . . [as well as] the determination as a judgment. . . ."[88] The Ninth Circuit found support for its view in the legislative history of the 1943 Act, which indicated that the issue of providing appellate review had been considered, but had been rejected.[89] Additionally, the provisions of the Internal Revenue Code for appellate review were enacted solely for appeal of tax cases and could not be read as supplying appellate jurisdiction.[90] In this connection, the court noted that the "lack of appropriate venue provisions in the Act adds weight to the view that the affirmative provision in the Renegotiation Act prohibiting review applies to all that the Tax Court does in arriving at its judgment."[91]

Thereafter, the D.C. Circuit, although continuing in theory its differences with the Ninth Circuit, moved closer in practice towards the *French* view. In two later decisions,[92] the D.C. Circuit held that the issues of timely commencement of renegotiation and coverage under the Act, although jurisdictional, were unreviewable by an appellate court.[93] This reversal of the earlier decision in *Blanchard* was accompanied by an explanation that such aspects of jurisdiction were "inherent" in the final determination of whether any excess profits existed and thus would of necessity, be unreviewable.[94] In the later of these cases, *United States v. California Eastern Lines*, the Supreme Court granted certiorari and adopted the original view of the D.C. Circuit.[95] Although the provisions of the Internal Revenue Code dealing with appeals from the Tax Court originally were intended to apply only to tax cases, the Court believed that they were broad enough to encompass jurisdictional and constitutional issues in renegotiation decisions.[96] Accordingly, the Court reversed the D.C. Circuit decision that the issue of coverage was not reviewable.[97] In the Court's view, two separate questions were always presented in Tax Court renegotiation cases: (1) whether a renegotiation contract was involved, and

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88 *Id.* at 561.

89 *Id.* at 563.

90 *Id.* at 562.

91 *Id.*

92 United States v. Martin Wunderlich Co., 211 F.2d 433 (D.C. Cir. 1954); United States v. California E. Line, Inc., 211 F.2d 635 (D.C. Cir. 1954).

93 United States v. Martin Wunderlich Co., 211 F.2d 433 (D.C. Cir. 1954) (timeliness not reviewable); United States v. California E. Line, Inc., 211 F.2d 635 (D.C. Cir. 1954) (coverage not reviewable).

94 United States v. Martin Wunderlich Co., 211 F.2d 433 (D.C. Cir. 1954).

95 348 U.S. 351 (1955).

96 *Id.* at 353–54.

97 *Id.* at 355.

(2) the amount, if any, of excessive profits.[98] The first issue, the Court believed, was not directly involved in the amount of excessive profits and hence would be reviewable.[99] Following the Supreme Court decision, Congress amended the Renegotiation Act of 1951 to provide venue rules for such appeals.[100]

In 1959, a more fundamental change was proposed to expand appellate review of Tax Court decisions in renegotiation cases.[101] Under the proposal, an appellate court could either affirm the decision of the Tax Court or reverse and remand if not in accordance with the law. In no event would mere reversal or modification of the court decision be permitted.[102] Although this proposal was not enacted,[103] in 1962, a similar provision was adopted to provide for a more expansive appellate review.[104] With certain limitations, appellate review of renegotiation cases was to be the same as review of tax cases.[105] The first limitation was that in no case was the question of the extent of excessive profits to be reviewed.[106] Second, the findings of fact by the court were to be conclusive unless such findings were found to be arbitrary and capricious.[107] Finally, the appellate court could only reverse and remand on questions of law or affirm the decision.[108] As with the 1959 proposal, no modification or reversal without remand was permissible.[109]

In 1971, Congress transferred jurisdiction over renegotiation cases from the Tax Court to the Court of Claims.[110] The decision by Congress to transfer jurisdiction was based on a number of reasons. First, it was believed that the subject matter of renegotiation cases was similar to the types of cases handled by the Court of Claims.[111] Second, the procedures normally employed in the Court of Claims were believed to be better suited

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[98] *Id.* at 354.

[99] *Id.* at 355.

[100] Act of Aug. 1, 1956, ch. 821, § 12, 70 Stat. 791, *amending* Renegotiation Act of 1951, ch. 15, § 108, 65 Stat. 21. *See* S. REP. NO. 84-2624, at 11 (1956).

[101] H.R. 7086, 86th Cong., 1st Sess. § 5(b)(1959).

[102] *Id.*

[103] H.R. REP. NO. 86-619, at 3–6 (1959).

[104] Act of July 3, 1962, Pub. L. 87-520, § 2(a), 76 Stat. 134, *amending* Renegotiation Act of 1951, ch. 15, § 108, 65 Stat. 21.

[105] *See* S. REP. NO. 87-1669, at 5 (1962).

[106] Act of July 3, 1962, Pub. L. 87-520, § 2(a), 76 Stat. 134, *amending* Renegotiation Act of 1951, ch. 15, § 108, 65 Stat. 21 (previously codified at 50 U.S.C. app. § 1218 (1970 & Supp. V 1975)).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] Pub. L. No. 92-41, §§ 2(b), 3(a), 85 Stat. 97, 98 (1971).

[111] S. REP. NO. 92-245 (1971), *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 1132, 1135.

to renegotiation cases than Tax Court procedure. In this connection, it was noted that "it is not unusual for the Court of Claims to handle cases extending over a long period of time [while]. . . a Tax Court judge has a calendar of cases which must be disposed of as expeditiously as possible."[112] Third, the Tax Court's deficiency caseload had grown so large as to make its continued handling of renegotiation cases burdensome.[113] Finally, it was noted that the Tax Court and the Court of Claims were both in favor of the transfer.[114]

B. Refunds of Processing Tax

A minor area of Tax Court jurisdiction was that involving processing tax refunds.[115] The processing tax had been enacted in 1933 as part of the Agriculture Adjustment Act,[116] and subsequently was declared unconstitutional by the Supreme Court in *United States v. Butler* in 1936.[117] In response to the *Butler* decision, the Revenue Act of 1936[118] provided both substantive and procedural rules governing refund of processing taxes. To secure a refund of processing taxes was not simply a matter of proving payment of the taxes; refunds could be secured only to the extent that the persons who paid the taxes could "establish that they bore the burden of such taxes and did not shift such burden to others."[119] The refund procedure authorized by the 1936 Act did not involve the Board of Tax Appeals, but rather provided for a specially created Board of Review, a nine member agency of the Treasury Department,[120] to review the allowance or disallowance by the Commissioner of claims for refund, and to determine the amount of refund due claimants with respect to such claims.[121] Generally, the procedures employed by the Board of Review followed those of the Board of Tax Appeals.[122]

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[112] *Id.* at 1136.

[113] *Id.*

[114] *Id.*

[115] Sixth Supplemental National Defense Appropriation Act of 1942, ch. 619, §§ 504(a), (c), 510(b),(f)(1),(g)–(j), 56 Stat. 957, 967. Eight cases were docketed with the court as of May 2, 1945. Letter from Judge Murdock, Presiding Judge, to J. O'Connell, General Counsel of the Treasury, May 2, 1945, filed at the U.S. Tax Court in "Processing Tax" [hereinafter cited as Murdock, 1945].

[116] Act of May 12, 1933, ch. 25, §§ 14–19, 48 Stat. 39.

[117] 297 U.S. 1 (1936).

[118] Revenue Act of 1936, ch. 690, § 906, 49 Stat. 1748.

[119] S. REP. NO. 77-1631, at 258 (1942).

[120] Revenue Act of 1936, ch. 690, § 906, 49 Stat. 1748.

[121] *Id.* § 906(a)–(e).

[122] *Compare* Revenue Act of 1936, ch. 690, § 906, 49 Stat. 1748 *with* Revenue Act of 1926, ch. 27, § 907, 44 Stat. 107. There were, however, certain differences. First, the Government and the claimant were permitted to file briefs to the

By 1942, it had become apparent that the Board of Review's function could be handled by the Board of Tax Appeals.[123] A transfer of such function, it was believed, would be consistent with economy and efficiency.[124] First, the number of cases pending before the Board of Review were few and easily could be absorbed by the Board of Tax Appeals.[125] Second, many taxpayers who had a claim for refund of processing taxes were concomitantly involved in related litigation before the Board of Tax Appeals.[126] In both types of cases, the evidence to be presented was much the same and the principles to be decided were similar.[127]

In light of these considerations and the support exhibited by the tax bar,[128] Congress in the Revenue Act of 1942, abolished the Board of Review and transferred its functions to the Board of Tax Appeals (renamed the Tax Court in the same Act).[129] In transferring jurisdiction to the court, Congress provided that the procedure in such cases would conform as nearly as possible to the procedures then employed in regular deficiency cases.[130] When the Tax Court took over jurisdiction, 53 cases were pending before the Processing Board of Review.[131] Thereafter, only eight new cases were docketed with the court.[132] By 1945, the court indicated that only 33

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recommendations of a division. Revenue Act of 1936, ch. 690, § 690(e), 49 Stat. 1749. Second, upon review of the Board's decision in a Circuit Court of Appeals, it was possible to put in additional evidence. *Id.* § 906(g), 49 Stat. 1750.

[123] *See*, *e.g.*, Letter from P. Phillips to T. Tarleau, Legislative Counsel, Treasury Department, Aug. 28, 1942, filed at the U.S. Tax Court in "Processing Tax" [hereinafter cited as Phillips].

[124] *Id.* at 2.

[125] *Id.* As of Jan. 1, 1943, 53 cases were pending before the Board of Review. Letter from J. Murdock, Presiding Judge, to J. O'Connell, General Counsel of the Treasury, May 2, 1945, filed at the U.S. Tax Court in "Processing Tax."

[126] Phillips, *supra* note 123, at 2.

[127] *Id.* at 1. The letter explained this point in the following terms:

> The effect of the split jurisdiction is that frequently the same taxpayer has to prosecute the two cases in the two tribunals, producing practically the same evidence before each. There is unnecessary trouble and expense involved to the taxpayer and a wholly unnecessary expense to the Government, since the Board of Tax Appeals could decide the two cases as expeditiously as one.

Id.

[128] Letter from L. Lecher to H. Morgenthau, Secretary of the Treasury, Sept. 4, 1942, filed at the U.S. Tax Court in "Processing Tax."

[129] Sixth Supplemental National Defense Appropriation Act of 1942, ch. 619, §§ 504, 510(b), 56 Stat. 957, 967.

[130] *Id.* § 510(a)–(b).

[131] Murdock, 1945, *supra* note 115.

[132] *Id.*

cases were still pending.[133] The majority of these cases, the court noted, would be settled by stipulation.[134]

133 *Id.*
134 *Id.*

APPENDIX D

LOCATIONS OF TAX COURT HEARINGS

All types of cases:

Birmingham, AL	Louisville, KY	Oklahoma City, OK
Mobile, AL	New Orleans, LA	Portland, OR
Anchorage, AK	Baltimore, MD	Philadelphia, PA
Phoenix, AZ	Boston, MA	Pittsburgh, PA
Little Rock, AR	Detroit, MI	Columbia, SC
Los Angeles, CA	St. Paul, MN	Knoxville, TN
San Diego, CA	Jackson, MS	Memphis, TN
San Francisco, CA	Kansas City, MO	Nashville, TN
Denver, CO	St. Louis, MO	Dallas, TX
Hartford, CT	Helena, MT	El Paso, TX
Washington, DC	Omaha, NE	Houston, TX
Jacksonville, FL	Las Vegas, NV	Lubbock, TX
Miami, FL	Reno, NV	San Antonio, TX
Tampa, FL	Albuquerque, NM	Salt Lake City, UT
Atlanta, GA	Buffalo, NY	Richmond, VA
Honolulu, HI	New York, NY	Seattle, WA
Boise, ID	Winston-Salem, NC	Spokane, WA
Chicago, IL	Cincinnati, OH	Charleston, WV
Indianapolis, IN	Cleveland, OH	Milwaukee, WI
Des Moines, IA	Columbus, OH	

Cases tried under Small Case Procedures Only:

Fresno, CA	Shreveport, LA	Bismarck, ND
Tallahassee, FL	Portland, ME	Aberdeen, SD
Pocatello, ID	Billings, MT	Roanoke, VA
Peoria, IL	Albany, NY	Burlington, VT
Wichita, KA	Syracuse, NY	Cheyenne, WY

APPENDIX E

STANDING PRETRIAL ORDER

UNITED STATES TAX COURT
WASHINGTON, DC
www.ustaxcourt.gov

STANDING PRETRIAL ORDER

The attached Notice Setting Case for Trial notifies the parties that this case is calendared for trial at the trial session beginning on [day, date]

Communication Between the Parties. The parties shall begin discussing settlement and/or preparation of a stipulation of facts as soon as practicable. Valuation cases and reasonable compensation cases are generally susceptible of settlement, and the Court expects the parties to negotiate in good faith with this goal in mind. All minor issues should be settled so that the Court can focus on the issue(s) needing a Court decision. If a party has trouble communicating with another party or complying with this Order, the affected party should promptly advise the Court in writing, with a copy to each other party, or request a conference call for the parties and the trial Judge.

Continuances. Continuances (i.e., postponements of trial) will be granted only in exceptional circumstances. See Rule 133, Tax Court Rules of Practice and Procedure. (The Court's Rules are available at www.ustaxcourt.gov.) Even joint motions for continuance are not granted automatically.

Sanctions. The Court may impose appropriate sanctions, including dismissal, for any unexcused failure to comply with this Order. See Rule 131(b). Such failure may also be considered in relation to sanctions against and disciplinary proceedings involving counsel. See Rule 202(a).

Electronic Filing (eFiling). eFiling is required for most documents **(except the petition)** filed by parties represented by counsel in cases in which the petition is filed on or after July 1, 2010. Petitioners not represented by counsel may, but are not required to, eFile. For more information about eFiling and the Court's other electronic services, see www.ustaxcourt.gov.

To help the efficient disposition of all cases on the trial calendar:

1. **Stipulation.** It is ORDERED that all facts shall be stipulated (agreed upon in writing) to the maximum extent possible. All documents and written evidence shall be marked and stipulated in accordance with Rule 91(b), unless the evidence is to be used only to impeach (discredit) a witness. Either party may preserve objections by noting them in the stipulation. If a complete stipulation of facts is not ready for submission at the start of the trial or when otherwise ordered by the Court, and if the Court determines that this is due to lack of cooperation by either party, the Court may order sanctions against the uncooperative party.

2. **Trial Exhibits**. It is ORDERED that any documents or materials which a party expects to use (except solely for impeachment) if the case is tried, but which are not stipulated, shall be identified in writing and exchanged by the parties at least 14 days before the first day of the trial session. The Court may refuse to receive in evidence any document or material that is not so stipulated or exchanged, unless the parties have agreed otherwise or the Court so allows for good cause shown.

3. **Pretrial Memoranda.** It is ORDERED that, unless a basis of settlement (resolution of the issues) has been reached, each party shall prepare a Pretrial Memorandum containing the information in the attached form. Each party shall serve on the other party and file the Pretrial Memorandum not less than 14 days before the first day of the trial session.

4. **Final Status Reports.** It is ORDERED that, if the status of the case changes from that reported in a party's Pretrial Memorandum, the party shall submit to the undersigned and to the other party a Final Status Report containing the information in the attached form. A Final Status Report may be submitted to the Court in paper format, electronically by following the procedures in the "Final Status Report" tab on the Court's Web site or by fax sent to 202-521-3378. (Only the Final Status Report may be sent to this fax number; any other documents will be discarded.) The report must be received by the Court no later than 3 p.m. eastern time on the last business day (normally Friday) before the calendar call. The Final Status Report must be promptly submitted to the opposing party by mail, email, or fax, and a copy of the report must be given to the opposing party at the calendar call if the opposing party is present.

5. **Witnesses**. It is ORDERED that witnesses shall be identified in the Pretrial Memorandum with a brief summary of their anticipated testimony. Witnesses who are not identified will not be permitted to testify at the trial without a showing of good cause.

6. **Expert Witnesses**. It is ORDERED that unless otherwise permitted by the Court, expert witnesses shall prepare a written report which shall be submitted directly to the undersigned and served upon each other party at least 30 days before the first day of the trial session. An expert witness's testimony may be excluded for failure to comply with this Order and Rule 143(g).

7. **Settlements.** It is ORDERED that if the parties have reached a basis of settlement, a stipulated decision shall be submitted to the Court prior to or at the call of the calendar on the first day of the trial session. Additional time for submitting a stipulated decision will be granted only where it is clear that all parties have approved the settlement. The parties shall be prepared to state for the record the basis of settlement and the reasons for delay. The Court will specify the date by which the stipulated decision and any related settlement documents will be due.

8. **Time of Trial.** It is ORDERED that all parties shall be prepared for trial at any time during the trial session unless a specific date has been previously set by the Court. Your case may or may not be tried on the same date as the calendar call, and you may need to return to Court on a later date during the trial session. Thus, it may be beneficial to contact the Court in advance. Within 2 weeks before the start of the trial session, the parties may jointly contact the Judge's chambers to request a time and date certain for the trial. If practicable, the Court will attempt to accommodate the request, keeping in mind other scheduling requirements and the anticipated length of the session. Parties should jointly inform the Judge as early as possible if they expect trial to require 3 days or more.

9. **Service of Documents.** It is ORDERED that every pleading, motion, letter, or other document (with the exception of the petition and the posttrial briefs, see Rule 151(c)) submitted to the Court shall contain a certificate of service as specified in Rule 21(b), which shows that the party has given a copy of that pleading, motion, letter or other document to all other parties.

[Judge's name]
Judge

Dated:

Trial Calendar: [city, State]
Date: [day, date]

PRETRIAL MEMORANDUM FOR (Petitioner/Respondent)
Please type or print legibly
(This form may be expanded as necessary)

NAME OF CASE: **DOCKET NO(S).:**

ATTORNEYS:
Petitioner: ______________________________ Respondent: ______________________________
Tel. No.: ______________________________ Tel. No.: ______________________________

AMOUNTS IN DISPUTE:

Year(s)/Period(s)	Deficiencies/Liabilities	Additions/Penalties

STATUS OF CASE:
Probable Settlement_____ Probable Trial_____ Definite Trial_____

CURRENT ESTIMATE OF TRIAL TIME: __________________________

MOTIONS YOU EXPECT TO MAKE: (Title and brief description)

STATUS OF STIPULATION OF FACTS: Completed _______ In Process _______

ISSUES:

<u>WITNESS(ES) YOU EXPECT TO CALL</u>:
(Name and brief summary of expected testimony)

<u>SUMMARY OF FACTS:</u>
(Attach separate pages, if necessary, to inform the Court of facts in chronological narrative form)

<u>BRIEF SYNOPSIS OF LEGAL AUTHORITIES</u>:
(Attach separate pages, if necessary, to discuss fully your legal position)

<u>EVIDENTIARY PROBLEMS:</u>

<u>DATE</u>: ________________________ ____
Petitioner/Respondent

Trial Judge: [**Judge's name**]
United States Tax Court, [room no.]
400 Second Street, N.W.
Washington, D.C. 20217
[Judge's chambers phone no.]

APPENDIX F

STANDING PRETRIAL NOTICE

UNITED STATES TAX COURT
WASHINGTON, DC 20217
www.ustaxcourt.gov

STANDING PRETRIAL NOTICE

To the parties: The attached Notice Setting Case For Trial provides that this case is calendared for trial at the trial session commencing on <DATE>.

If this is your first time appearing before the Tax Court **please pay special attention to paragraph number 8** of this notice.

1. **Status of the Court**. The U.S. Tax Court hears disputes between taxpayers and the IRS. The Court is not a part of the IRS.

2. **Settlement Conferences**. Before the calendar call date, the parties should meet and try to settle the case. "Settle" means that all matters in dispute in the case have been resolved. Settlement documents should be signed by all parties or counsel and submitted to the Court before or at the call of the calendar.

3. **Readiness for Trial**. If the parties have not submitted to the Court signed settlement documents, the case will be called at the calendar call on the date and time set forth in the notice setting case for trial. The Court may excuse a party from appearance at the calendar call if the Court concludes that a basis of settlement has been reached. Unless otherwise excused, the parties must appear at the calendar call and be ready for trial at any time during the session, which may last as little as 1 day or as long as 2 weeks.

   a. Cases will not be continued other than under exceptional circumstances.

   b. Failure to appear may result in a dismissal of the case and a decision against the non-appearing party.

   c. Within 2 weeks before the start of the trial session, the parties may jointly contact the judge's chambers to request a time and date certain for the trial. If practicable, the Court will attempt to accommodate the request.

4. **Stipulation Agreement**. The parties should agree in writing (stipulate) about all relevant facts and documents that are not in dispute. Failure or refusal by a party to stipulate may result in a finding against that party.

5. **Pretrial Memorandum**. If a party concludes that a trial is probable, then the party should submit to the Court and to the opposing party a pretrial memorandum substantially in the form attached hereto. The pretrial memorandum should be sent to the Court so as to be received at least seven calendar days before the first date of the trial session.

6. **Final Status Report**. If there has been a last-minute settlement or change in the status of a case, a party should submit a Final Status Report to the Court. The parties may access an electronic version of the Final Status Report on the Court's internet web site at www.ustaxcourt.gov

(Continued on back...)

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by clicking on the "Final Status Report" tab from the menu of options. A Final Status Report may be submitted to the Court electronically or by fax sent to 202-521-3378 and the report must be received by the Court no later than 3 p.m. eastern time on the last business day (normally Friday) before the calendar call. The Final Status Report must be promptly submitted to the opposing party by mail, e-mail, or fax, and a copy of the report must be given to the opposing party at the calendar call if the opposing party is present.

7. **The Trial**. The parties are responsible for presenting all evidence to the Court at the time of trial. Evidence consists of the stipulation, sworn testimony at trial, and any documentary evidence accepted by the Court as exhibits at the trial. Accordingly, the parties should bring to court all documents on which they intend to rely.

   The only opportunity for the parties to present their evidence to the Court is at the trial. Information or documents previously presented to the IRS are not before this Court. Therefore, at trial, the parties must present all documents and the testimony of all witnesses that they want the Court to consider in deciding the case, even though this evidence may have previously been presented to the IRS.

8. **Petitioner (Taxpayer) Getting Ready For Court Check List**

Before you come to Court:

☐ Think about what facts you want to tell the Judge.

☐ Organize your facts and argument so you can tell your side of the story.

☐ Meet and talk to people at the IRS who call or write to you after you get this notice.

☐ Organize any documents you have to support your case.

☐ Provide copies of documents to the IRS.

☐ Agree in writing to facts and documents that are not in dispute.

☐ If the IRS will not agree with your documents (stipulation), bring three copies of the documents to Court.

☐ Consider whether you need any witnesses to support your case.

☐ If you need a witness, make sure the witness is available and present for trial at the trial session. (See 3.c. above).

☐ Come to Court early so you will be ready when your case is called at the calendar call.

☐ Learn more about the Tax Court at www.ustaxcourt.gov

Clerk of the Court

Dated:

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Trial Calendar: <CITY & STATE>
Date: <DATE>

PRETRIAL MEMORANDUM FOR (Petitioner/Respondent)
Please type or print legibly
(This form may be expanded as necessary)

NAME OF CASE: **DOCKET NO.(S):**

ATTORNEYS:
Petitioner: ______________________ Respondent: ______________________
Tel. No.: ______________________ Tel. No.: ______________________

AMOUNTS IN DISPUTE:

Year(s)/Period(s)	Deficiencies/Liabilities	Additions/Penalties

STATUS OF CASE:
Probable Settlement_____ Probable Trial_____ Definite Trial_____

CURRENT ESTIMATE OF TRIAL TIME: ____________________________

MOTIONS YOU EXPECT TO MAKE: (Title and brief description)

STATUS OF STIPULATION OF FACTS: Completed _______ In Process _______

ISSUES:

(Continued on back...)

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WITNESS(ES) YOU EXPECT TO CALL: (Name and brief summary of expected testimony)

SUMMARY OF FACTS: (Attach separate pages, if necessary, to inform Court of facts in chronological narrative form)

BRIEF SYNOPSIS OF LEGAL AUTHORITIES: (Attach separate pages, if necessary, to discuss fully your legal position)

EVIDENTIARY PROBLEMS:

DATE: _____________________ ____________________________
Petitioner/Respondent

Return to:
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

APPENDIX G

TECHNOLOGICAL DEVELOPMENTS AT THE COURT

A. The Tax Court Website

The Tax Court first launched its website, www.ustaxcourt.gov, on January 1, 1999. The website provides a wealth of information to the public concerning the court, its operations, and its work product. As discussed in Part XIII, the Tax Court utilizes its website to familiarize self-represented taxpayers with the nature of proceedings before the Tax Court through the frequently asked questions feature and the professionally produced instructional video located under the "Taxpayer Information" tab on the website's header. Through the "Docket Inquiry" tab of the website's header, the public may search and view court orders, docket records, and decisions in any case originating after 2004. Additionally, the most recent version of the Tax Court's Rules of Practice and Procedure are made available under the "Rules" tab. In addition to this material, the Tax Court has made available its opinions and orders on the website in a searchable format, as described below.

When the court launched the website, it began posting its opinions on a prospective basis. The court thereafter made available all division and memorandum opinions dating from September 25, 1995 under the "Opinions Search" tab of the website header. This database later was expanded to include summary opinions dating from January 1, 2001. These opinions may be searched through various means, including by date, case name, authoring judge, keyword, text, and opinion type (division, memorandum, or summary).

In an effort to make the court's orders available to the public, the court announced on June 17, 2011 the addition of two features to its website: "Today's Designated Orders" and "Orders Search," both of which are located under the "Orders" tab on the website's header. Orders appearing under "Today's Designated Orders" are those designated for posting by the issuing judge or special trial judge; nonsubstantive orders such as scheduling orders or rulings on motions for extension of time typically are excluded. As the designation practices of judges vary, the orders that are posted in this manner do not represent a complete inventory of issued orders nor do these daily posted versions constitute official documents of record.

The "Orders Search" option, on the other hand, searches a database of all orders issued by the Tax Court on or after June 17, 2011, apart from computer-generated mailings of certain orders, such as standing pretrial orders and orders for amended petition and filing fee. The orders in the "Orders Search" database are searchable through the same terms as the

Court Opinions – by date, case name, keywords, authoring judge, and text search.

B. Electronic Case Filing

In 2005, the Tax Court began electronically scanning most documents in cases filed on or after January 1 of that year. In December of 2005, the court announced a proposed amendment to the Tax Court Rules of Practice and Procedure regarding the establishment of an electronic filing ("eFiling") pilot program. Under the proposed pilot program, electronic filing of documents with the court would be implemented in specific geographic areas only. In those regions, the pilot program would be limited to taxpayers who had the benefit of representation. Those participating in the pilot program would be permitted to file, sign, and verify case documents by electronic means. While the court was crafting the pilot program, it announced that it was also considering whether and to what extent to provide public access to its electronic records online.

In December of 2007, the court began mailing "Practitioner Services" letters encouraging practitioners to register for remote electronic access of documents. In September of 2008, the court began mailing "Petitioner Access Registration" letters to taxpayers to allow them to register for remote eAccess as well. At this time, the Tax Court introduced an electronic document access system to its website called "eAccess," through which taxpayers and persons admitted to practice before the court can register to electronically view documents relating to their case (in addition to the orders, docket records, and decisions generally available under the "Docket Inquiry" tab).

In January of 2009, the court began to provide electronic service (or "eService") of court documents through the eAccess system. The eService system encompasses the service of petitions, orders, and opinions. On May 7, 2009, the court commenced the eFiling pilot program. On November 20, 2009, Chief Judge John O. Colvin announced the court's adoption of Rule 26 authorizing the eFiling of case documents in all Tax Court cases—not just those in which the taxpayer was represented. The Internal Revenue Service formally consented to receive eService of documents on June 16, 2010.

Electronic filing ("eFiling") became mandatory for all cases initiated as of July 1, 2010 if the parties involved were represented by counsel. Taxpayers who are represented by pro bono programs or low-income taxpayer clinics are exempt from the eFiling regime. Though not mandated to participate, pro se petitioners are permitted to eFile their case documents and many have opted to do so.

The eFiling regime does not extend to every type of court document. Filings that commence a Tax Court case, such as a petition in a deficiency proceeding, must be filed in paper form. The Tax Court provides a detailed set of instructions concerning its eFiling program, and these instructions are available on the court's website at http://www.ustaxcourt.gov/eaccess/eFiling_Instructions_Practitioners.pdf

On April 25, 2011, the Internal Revenue Service started eFiling in all of its cases, even those in which eFiling was not mandatory, such as the cases in which the petition was filed prior to July 1, 2010.

C. Electronic Courtroom

The Tax Court made its first electronic courtroom available for court proceedings on June 1, 2004. The "e-courtroom" is housed in the North Courtroom of the court's headquarters building in Washington, D.C. The room is available to all Tax Court judicial officers for use in conducting a range of proceedings pursuant to a joint request by the parties. The e-courtroom has been used, for example, in trials, hearings, conferences, and oral status reports. The proceedings are all recorded and transcribed.

The technology available in the electronic courtroom includes an evidence presentation system, videoconferencing equipment, and wireless headsets used for enhanced listening assistance for hearing-impaired parties and any interpreter used by the parties. The electronic courtroom is available for any type of Tax Court case, provided the available technology is appropriate for the proceedings in the matter.

D. Security and Privacy Protections

As the court has implemented its eFiling and eAccess programs, the court has been attentive to privacy concerns and the sensitive nature of many of the documents that are filed in the record of a Tax Court case.[1] In an effort to protect a taxpayer's taxpayer identification number (TIN), and consistent with the privacy policy adopted by the Judicial Conference of the United States, the court adopted Form 4, Statement of Taxpayer Identification Number, to permit the taxpayer to provide identifying

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[1] TAX CT. R. 20(b) (July 6, 2012 ed.); *see also* Rules Comm. Note, TAX CT. R. 20, 130 T.C. 382 (2008) ("Privacy concerns regarding personal information contained in Tax Court case files came to the Court's attention with the consideration by the Court of the E-Government Act of 2002, Pub. L. 107-347, sec. 205, 116 Stat. 2913, and its own electronic filing pilot program, and through requests by individual taxpayers to redact from Court documents their Social Security numbers."). The Court issued a press release regarding amendments to its Rules related to privacy matters and public access to case files on its website at http://ustaxcourt.gov/press/011508.pdf.

information to the court in a secure manner.[2] Along these same lines, pursuant to Rule 27(a), all persons making an electronic or paper filing with the court are encouraged to refrain from including (or should take appropriate steps to redact) sensitive information such as taxpayer identification numbers, dates of birth, names of minor children, and financial account numbers.[3]

In formulating its policy regarding remote electronic access to case files, the court initially reviewed certain policies applicable to analogous situations in other federal courts. For example, the Judicial Conference of the United States decided to exclude Social Security appeals and, subsequently, immigration cases, from electronic access because of the inherently personal nature of the information contained in the case files.[4] Although there is no indication that they were specifically discussed, tax cases were not excepted from electronic access by the Judicial Conference. However, Congress recognized the importance of protecting tax information received by Bankruptcy Courts. On April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was enacted.[5] Section 315 of the act amended the Bankruptcy Code to require debtors in bankruptcy cases to provide tax returns and other tax

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[2] *Id.* at 382–83. Form 4 is filed when a taxpayer files a petition with the court and is provided to the Internal Revenue Service with the copy of the petition, but the court does not make Form 4 part of the Court's file in the case. In adopting Form 4, the court eliminated the requirement of providing any part of the taxpayer identification number on the petition and extended the protection to any party or nonparty.

[3] *See* Rules Comm. Note, TAX CT. R. 27, 130 T.C. 395–401 (2008) (explaining that Rule 27 is modeled after Rule 5.2 of the Federal Rules of Civil Procedure).

[4] The Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files (available at http://www.privacy.uscourts.gov/Policy.htm), explains as follows:

> After much debate, the consensus of the Committee was that Social Security cases warrant such treatment because they are of an inherently different nature from other civil cases. They are the continuation of an administrative proceeding, the files of which are confidential until the jurisdiction of the district court is invoked, by an individual to enforce his or her rights under a government program. Further, all Social Security disability claims, which are the majority of Social Security cases filed in district court, contain extremely detailed medical records and other personal information which an applicant must submit in an effort to establish disability. Such medical and personal information is critical to the court and is of little or no legitimate use to anyone not a party to the case. Thus, making such information available on the Internet would be of little public benefit and would present a substantial intrusion into the privacy of the claimant.

[5] Pub. L. No. 109-8, 119 Stat. 23 (2005).

information to the Bankruptcy Court, trustee, and creditors.[6] On September 20, 2005, in accordance with the act, the Director of the Administrative Office of the United States Courts issued interim guidance providing that no tax information filed with a Bankruptcy Court will be available to the public electronically.[7] The interim guidance defines tax information to include tax returns, transcripts of returns, amendments to returns, and any other document containing tax information provided by the debtor.

In the light of these policies, the court decided to limit electronic access to information in its records in a manner consistent with the treatment of tax information in bankruptcy cases, and with Social Security appeals and immigration cases as prescribed in Rule 5.2 of the Federal Rules of Civil Procedure and rule 9037 of the Federal Rules of Bankruptcy.[8] Specifically, in accordance with Tax Court Rule 27(b), the parties and their counsel have remote electronic access to any part of the case file that the court maintains in electronic form, but limits public online access to the court's electronic records to the docket records maintained by the court, and to opinions (including bench opinions) and orders of the court. Approximately 75 percent of the docket of the Tax Court consists of self-represented petitioners, and the court believed it would be unrealistic to expect them to file case documents in a manner that adequately protects their privacy and security interests. The court, however, provides full public access to its electronic records at the Clerk's Office during the court's regular business hours.

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[6] 119 Stat. 88.

[7] *See* http://www.uscourts.gov/bankruptcycourts/DirTaxGuidanceJCUS approved905.pdf.

[8] *See* Rules Comm. Note, TAX CT. R. 27, 130 T.C. 395, 400 (2008). The Advisory Committee Note to Rule 5.2(c) of the Federal Rules of Civil Procedure explains:

> Those actions [Social security cases and immigration cases] are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise.

http://www.uscourts.gov/rules/Appendix F.pdf, at Rules App. F-6.