ADMINISTRATIVE FINALITY AND THE TAX COURT OF THE UNITED STATES

by

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CHAPTER I

INTRODUCTION TO THE STUDY

The Tax Court of the United States provides a most interesting example of an administrative tribunal at work. In this country, where the administrative tribunal has only recently come into vogue as a tool of government, a close look at such an organization is justified as a part of the continuing attempt to discern its place and use in our governmental system.

The Tax Court, formerly the Board of Tax Appeals,[1] is a particularly rewarding subject of study in this respect, since its history encompasses what might be called a complete cycle and since it is an agency which has affected a considerable body of the citizenry in a most direct manner.

The objectives of this paper are: (1) To review briefly the history of the Board of Tax Appeals and the Tax Court; (2) to trace the increase of its power and influence from its origin in 1924 to its climax in the years 1943-1946; (3) to examine rather thoroughly the dicta of the courts, especially the Supreme Court, on the finality of Tax Court

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[1]Throughout this study the name, Tax Court, will be used wherever possible, even with reference to periods when it existed under its original name.

decisions; and (4) to criticize what passes for a solution of the problem of the Tax Court's finality, namely Public Law 773, which became effective September 1, 1948.

The next chapter will be given over to a short history of the Tax Court and a discussion of its quasi-judicial, somewhat anomalous position in the government. Chapter III presents the main body of the study, Tax Court finality. A brief review of its finality in the years 1924-1943 is followed by a treatment of the leading case in Tax Court history, Dobson v. Commissioner,[2] and of some of the important cases in the years since 1943. Chapter IV, "The Tax Court Today", deals with the most recent Congressional acts affecting the Tax Court and with the measure of finality currently to be found in its decisions.

Source works for this study have been chiefly Supreme Court and other court opinions. Other sources listed in a decreasing order of use have been: (1) law review articles; (2) treatises on administrative law and the administrative process; (3) miscellaneous periodical references; and (4) the current tax services.

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[2]320 U.S. 489 (1943).

CHAPTER II

THE EVOLUTION AND NATURE OF THE TAX COURT

History

The Board of Tax Appeals was created to answer a need and solve a problem. Prior to its creation, the federal income taxpayer wasfaced with a harsh rule, the rule of "pay now and litigate later."[1] Whenever a deficiency in payment was claimed by the Commissioner of Internal Revenue, the taxpayer had no option in the matter. He was required to pay the tax in full and then, after payment, to seek redress in the courts. This situation, while no doubt tolerable in the days before World War I, when only a relative handful of wealthy individuals paid federal income tax, and then only in negligible amounts, became a real burden as it came to affect more individuals who were relatively less able to "pay now and litigate later."

An informal Board of Appeals operated within the Bureau of Internal Revenue for a few months during World War I. It was composed of men from a variety of professions and attempted, in many cases successfully, to forestall litigation by settling tax questions by "gentleman's agreement." In 1922 Congress authorized for a two year period a new agency called the Com-

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[1]This rule still applies to all but income, estate, and gift taxes.

mittee of Appeals and Review. This committee, composed of eleven attorneys, operated under the administration of the Bureau of Internal Revenue and aimed, like its predecessor at settlement by conference. A tendency toward more formal procedure, possibly attributable to the profession of the committee's personnel, was noted, even though the committee had little real authority. Although these agencies were a step in the right direction, Congress and the taxpayer felt a need for something more permanent and more authoritative, and something without the shadow of the Bureau falling so darkly on its work. The Revenue Act of 1924 created the Board of Tax Appeals,[2] now called the Tax Court of the United States.[3]

June 30, 1924, is the date of the first petition filed with the Board. Since that time an average of 5,700 proceedings per year, each with an average of $31,500 tax in question, have been closed. A total of nearly $4 billion was involved in Tax Court litigation prior to September, 1945.[4] Cases have ranged, as might be expected, from the

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[2] 44 Stat. 846.

[3] Name changed by Rev. Act 1942, Sec. 504, 56 Stat. 957.

[4] J.E. Murdock, "Report on the Tax Court of the United States," 23 Taxes 778.

relatively simple to the extremely complex. Several judges have written more than one hundred opinions in a year, and in one case more than a full year was required merely to present the evidence.

The Tax Court has sixteen judges who ride circuit throughout the country, normally hearing cases individually. When, in his discretion, cases are difficult or important enough to justify it, the presiding judge orders several judges to sit on a case, and en banc consideration at his discretion is not unknown to the Court. The judges are appointed by the President with the consent of the Senate for terms of twelve years with annual salaries of $15,000. No provision is made for retirement or pensioning of judges.[5]

The jurisdiction of the Tax Court is strictly limited under Section 1101 of the Internal Revenue Code. It can consider appeals from proposed additional assessments of income, excess profits, estate, and gift taxes, and under Section 732 (a) of the Internal Revenue Code is granted exclusive jurisdiction of disallowed claims for relief of excess profits tax under Section 722 of the Internal Revenue Code. The Court has claimed no jurisdiction of appeals from determination of any other taxes.[6]

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[5] Murdock, op. cit. at 779.

[6] The Alding Club, 1 B.T.A. 710.

Under present law the taxpayer can choose his court. If he wishes to pay the tax, he may do so and then sue for refund in a district court or in the Court of Claims. His chief advantage in Tax Court litigation is release from the requirement to pay until the case is decided. It is to be noted that the Tax Court was conceived as an addition to the pre-existing machinery for handling tax cases which remained substantially unchanged.

Appeal from Tax Court decisions lies to the circuit court of appeals and to the United States Court of Appeals for the District of Columbia.[7]

A few examples of the manner in which this machinery works may be in order. Let us suppose that Taxpayer X discovers that he has overpaid his personal income tax by including as income sums which are exempt from income taxation by statute. He files a claim for refund explaining the type of income erroneously reported on his return and recomputing his tax. He normally receives his refund with interest without further action on his part. But suppose further that the tax exempt status of the income in question is not clear from the statute and the Commissioner,[8] interpreting

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[7]I. R. C. Section 1141.

[8]Throughout this paper the word "Commissioner" refers to the Commissioner of Internal Revenue. Similarly, "Bureau" refers to the Bureau of Internal Revenue.

the statute "in the interest of the government" disallows the claim. Taxpayer X can only sue for his refund in the District Court or in the Court of Claims. His case cannot go to the Tax Court, for its jurisdiction is limited to proposed additional assessments by the Commissioner. In a converse example, Taxpayer Y underpays his tax by not reporting certain similar income on his return. Action originates with the Commissioner, who proposes an additional assessment. Taxpayer Y, who feels that the assessment is unjust, has two alternatives: (1) he can pay the tax and then sue for refund in either the District Court or the Court of Claims; or (2) he can appeal to the Tax Court for a determination of his liability, in which case he does not have to pay the tax until the Tax Court finds him liable.

Court or Executive Agency?

The quasi-judicial status of the Tax Court is in itself not particularly significant. To the litigants the result of the determination is more important than the technical position of the tribunal in the governmental organization. Insofar as the quasi-judicial position of the body affects its procedures and the finality of its decisions it is, however, important both to the litigants and, as a feature of tax administration in general, to the public. As a preliminary, therefore, to the study of finality in tax decisions, let us examine some

of the particulars that will indicate in what respects the Tax Court has been thought to be a judicial body or, conversely, an executive agency.

That the Court is a court in name is obvious. It is, however, more than coincidental that Section 1100 of the Internal Revenue Code, which changes the name of the Board of Tax Appeals to Tax Court, expressly states that the Tax Court "shall be continued as an independent agency in the Executive Branch of the Government." Apparently the Congress wished to make it clear that this organization was to be regarded as something less than, or at least something other than, a full-fledged court.

Early in the history of the Board of Tax Appeals, the Supreme Court had to decide whether a circuit court of appeals in reviewing a B.T.A. decision was exercising its power of review of lower court decisions or whether it was exercising some other function. In Old Colony Trust Co. v. Commissioner the Supreme Court concluded that the B.T.A. was not a court but rather an executive agency.[9]

Shortly after the Board of Tax Appeals became the Tax Court its status as a court was called into question in a case involving substitution of parties where a taxpayer died after an adverse Tax Court decision but before filing a peti-

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[9]279 U. S. 716 (1929).

tion to review with the Circuit Court of Appeals. The petition having been filed by the decedent's personal representative, the Circuit Court decided that no substitution of parties was required because the petition constituted initiation of judicial proceedings, the Tax Court being a court in name only.[10]

The Administrative Procedure Act of 1946 raised anew the question of the position of the Tax Court in the administrative and judicial organization. The Sixth Circuit Court of Appeals in two 1947 cases, Lincoln Electric Co. v. Commissioner[11] and Dawson v. Commissioner[12] has held that the Act, not prior law, governs review of Tax Court decisions, since the Tax Court is an executive agency within the meaning of the Act. The Seventh Circuit Court of Appeals has taken the contrary position.[13]

The question of applicability of the Administrative Procedure Act has become, insofar as it applies to the main consideration of this paper, finality, largely academic in the light of more recent developments. However, it is extremely

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[10] Hutchings-Sealy National Bank v. Commissioner, 141 F(2d) 422 (C.C.A. 5th, 1944).

[11] 162 F(2d) 879 (C.C.A. 6th, 1947).

[12] 163 F (2d) 664 (C.C.A. 6th, 1947).

[13] Anderson v. Commissioner, 164 F(2d) 870 (C.C.A. 7th, 1947).

pertinent to a consideration of Tax Court procedure, a point with which we shall deal in due course.[14]

Another point which illustrates the distinction between the Tax Court and ordinary courts is the legal status of its judges. Judges of the ordinary courts hold office during good behavior and retire with full pay. Tax Court judges, as has previously been mentioned, are appointed for twelve years, and no provision is made for their retirement. They are removable only for inefficiency, neglect of duty, or malfeasance in office.[15]

Although the bulk of Court opinion and statutory interpretation leads one to the inevitable conclusion that the Tax Court is not a court in the complete sense, authoritative opinion seems to agree that it is, to say the least, a very

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[14]It is interesting to note that, prior to passage of the Administrative Procedure Act, the Attorney General expressed the opinion that the judicial exemptions in Section 2 of the Act applied to the Tax Court. In a letter to Senator McCarran, then Chairman of the Senate Judiciary Committee, he said, "'Court' includes the Tax Court, Court of Customs and Patent Appeals, and the Court of Claims, and similar courts. This act does not apply to their procedure nor affect the requirement of resort thereto." (S. Rept., Legislative History, Administrative Procedure Act, Senate Document No. 248, 79th Congress 2d Session, p. 224). All of the aforementioned courts except the Tax Court are courts of record provided for in the judicial code. What considerations led the Attorney General to include the Tax Court in this category must remain a mystery. It may be a clear-cut case of error.

[15]44 Stat. 847.

special agency. "The Tax Court . . . has been characterized by the real judicial demeanor of its members and they have won the respect and approbation of the bench and bar. The procedure of the Court, the taking of evidence, the opportunity to submit briefs and engage in oral argument and its other practices, have been typical of a court."[16] "Fundamentally the Tax Court is an administrative tribunal in name only."[17] "The court exercises no regulatory, investigatory, administrative, or policy-forming power, but merely decides the questions of fact and law in the cases coming before it."[18] "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."[19]

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[16]J. R. Levenson, "Effect of the Administrative Procedure Act on Decisions of the Tax Court," 2 Tax Law Review 103, Oct.-Nov., 1946.

[17]R. E. Paul, "Dobson v. Commissioner: the Strange Ways of Law and Fact," 57 Harvard Law Review 843, July, 1944.

[18]J. E. Murdock, "Report on the Tax Court of the United States," 23 Taxes 778-782, September, 1945.

[19]Dobson v. Commissioner, 320 U.S. 498 (1943).

CHAPTER III

THE DOBSON RULE--A STUDY IN FINALITY

I. Finality in General

A final judgment is one from which there is no appeal. Under the legal system of the United States there are some questions, for example constitutional questions, in which final judgments issue only from the Supreme Court. At the other extreme are questions of undeniable, easily demonstreble, fact to which the lowest court of original jurisdiction can give the final answer. Finality rests at various levels of the judicial hierarchy depending largely on the type of question involved.

The courts have a fairly well developed system of finality which purports to define the type of question to which a particular court can give a final answer. In the executive branch of the government likewise a system of finality is discernible. The plans of organization of most agencies and their procedural habits indicate to the employee the type of problems on which he may render final judgments. Within the agency this finality of decision is most frequen tly not a matter of law but of administrative discretion. When we take the problem from the individual level to the agency level more

complicated issues arise.

By statute and by court interpretation there have come to be recognized various kinds of problems with regard to which the executive agencies can deliver final judgments. This administrative finality is usually justified by looking to the specialization and expert competence found in the agency. It has been found that if all questions, regardless of type, can be appealed from the executive agencies to the courts, the courts will in the last analysis be required to do the very work for which the agencies were created. Therefore, some degree of administrative finality must be recognized as a practical measure. The dilemma lies inpreserving the efficiency of administrative action and at the same time providing for a "rule of law" which will prevent administration from exercising its power in an irresponsible, arbitrary, or discriminatory manner. A narrow path must be trod between over-regulation of agency by court and surrender of too much finality to the agency. The words, reviewable and reversible, are frequently associated with finality. To make clear their relationship it should be pointed out that a judgment without finality is reviewable and, if reviewable, potentially reversible.

II. Background of the Decision

When the Board of Tax Appeals came into existence in 1924

as a successor to the informal groups which had preceded it, its findings had but a small measure of finality. If either party, the Commissioner of Internal Revenue or the taxpayer, objected to the findings of the Board, he was privileged to take his case to the District Court for trial de novo. The only change in the app ellant's position before the District Court resulting from prior proceedings before the Board was that the District Court would accept Board findings of fact as prima facie correct.

The Revenue Act of 1926 changed this situation considerably. By 1926 the Board had succeeded in establishing a reputation for fairness, impartiality, and conscientiousness, and Congress felt justified in providing for direct review of Board decision s in the Circuit Courts of Appeals. The Senate Finance Committee, in reporting on the proposed Revenue Act, indicated that the p rocedure was intended to conform as nearly as possible to the procedure in the case of an original action in a federal district court. At this point, too, the Board was given added finality as to facts. Instead of having its decisions held to be merely prima facie correct, the new act stated, "Upon such review, such courts shall have power to affirm or, if the decision of the board is not in accordance with the law, to modify or reverse the decision of the Board."[1] This section of law remained effective until

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[1]Revenue Act of 1926, Section 1003 (b), 44 Stat. 110.

September 1, 1948. If the degree of finality of Board and Tax Court decisions changed during the intervening years, it changed as a result of court interpretation of the law.

The first case to be decided under the new principle was Avery v. Commissioner.[2] The opinion clearly set forth what was to stand for many years as the authoritative interpretation of the law, "It is clear from the working of the statute that the jurisdiction given to this court is to review only errors of law in a decision of the board."[3] The opinion remarked further that it was not the legislative intent for the appellate court to review the mass of evidentiary detail.

III. Law and Fact

We have now ventured well into the area where questions of fact and law should be identified and distinguished. It should be obvious that anything like a full treatment of this subject is beyond the scope of this paper. However, a few remarks on the point are necessary. In the first place, there are questions which are clearly factual just as there are questions which are clearly legal. Fortunately, most questions will fall into these readily distinguishable categories.[4]

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[2]22 F(2d) 6 (C.C.A. 5th, 1927).

[3]Ibid. at 7.

[4]Randolph Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 Harvard Law Review at 819, July, 1944.

Unfortunately, however, there are many questions in the shadowland between, which should be distinguished with some degree of precision.

The committee reports concerned with the establishment of the Board of Tax Appeals and those concerned with the Revenue Act of 1926 use the terms "law" and "fact" in such a way as to indicate that they have some established meaning. Indeed, the whole literature of the Tax Court and, presumably, of law in general uses them in quite an off-hand manner.

There is, of course, a generally accepted relationship between law and fact, specifically that the former is applied to the latter. This is an oversimplification. It has been said that "matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. The knife of policy alon e effects an artificial cleavage . . ."[5] It would seem, as a generalization, that courts have a tendency to review as expedient.[6] They can use the "knife of policy" to create the cleavage in such a way as to call a question factual when review is inexpedient and, con-

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[5]John Dickinson, Administrative Justice and the Supremacy of the Law (Cambridge: Harvard University Press, 1927), at 55.

[6]Paul, op. cit. at 891: "When courts are set upon a particular result, they are usually sufficiently resourceful to find the necessary formula." And Dickinson, op. cit. at 55: "It would seem that when courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of 'fact', and when otherwise disposed, they say that it is a question of 'law'."

versely, to label it legal when they are inclined to review.

A distinction of some sort, no matter how tenuous, is vitally practical with respect to the matter of judicial review. If some standard, any standard, can be set up, there will follow a measure of uniformity in the types of cases appealed. Appeal will be more predictable, less haphazard. As a rule of thumb a quotation from Professor Morris is offered: "A question of fact usually calls for proof. A question of law usually calls for argument."[7] This rule is probably neither better nor worse than many others that purport to put the answer in concise form. Lengthy and learned books have been written on the subject, and among the Justices of the Supreme Court there is more than a little disagreement in the area.

IV. Review in the Pre-Dobson Era

In the years between Avery v. Commissioner[8] and Dobson v. Commissioner[9] review of Tax Court decisions was not very well standardized. In general the Tax Court was not granted as much finality as were some of the more powerful, although less well established, regulatory agencies and commissions in the government.[10]

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[7]Clarence Morris, "Law and Fact", 55 Harvard Law Review at 1304, June, 1942.

[8]22 F(2d) 6 (C.C.A. 5th, 1927).

[9]320 U.S. 489 (1943).

[10]Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) and Securities & Exchange Commission v. Chernery Corp., 318 U.S.80 (1943) and 332 U.S. 194 (1947).

This reluctance to grant the Tax Court authority was probably not due to any disrespect for its expertise. The distinction in treatment probably lay in the business of the agencies. Some of these agencies were dealing with new matters, or at least new concepts of and attitudes toward older matters. They had, in a general sort of way, exclusive jurisdiction in their fields. The courts were unused to dealing with their problems. A quite different situation was found in the case of the Tax Court. The regular courts had been dealing with its problems since 1913 and, presumably, felt considerably more confidence in this area than they did, for example, in the area of stock market regulation.[11] Then too, cases identical in type to those coming from the Tax Court were coming to the circuit courts from the district courts and Court of Claims. The Tax Court had nothing like exclusive jurisdiction within its field. Furthermore, its decisions had been subject to review even of the facts in the early years of its history. Thus there appear to be in the case of the Tax Court habits of review, long standing precedents which discouraged appellate courts from applying to it the principles of administrative finality which were coming to be applied to other administrative tribunals.

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[11] In the Chenery case Mr. Justice Jackson's dissent argued that judicial deference to administrative specialization had reached the point where "the Commission must be sustained because of the accumulated experience in solving a problem with which it had never before been confronted!" Ibid. at 213.

Mr. Justice Jackson commented on the history of Tax Court review in Dobson v. Commissioner. "However, even 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."[12]

It has been said that Tax Court review was not, during the period under discussion, very standardized, that is to say, that grounds for reversal were not firmly established and that the extent to which the appellate court might go in reviewing a case was unpredictable. What, then, were some of the outstanding characteristics of the situation in this period?

One of the most definite statements of the appellate function in Tax Court cases was delivered by the Supreme Court in 1935. Mr. Justice Brandeis wrote:

> The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact; the function of the court is to decide whether the correct rule of law was applied to the facts found, and whether there was substantial evidence before the Board to support the findings made. If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board.[13]

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[12] 320 U.S. 489 at 494.

[13] Commissioner v. Rankin, 295 U.S. 123 at 131 (1935).

In other words, the Tax Court is "master of the facts"; the appellate court is "master of the law."

The function of the Board was, conversely:

> . . . to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences. The court may not substitute its view of the facts for that of the Board. Where the findings of the Board are supported by substantial evidence they are conclusive.[14]

The foregoing quotations seem reasonably clear when there is a definite distinction between law and fact. The rule handed down in Bogardus v. Commissioner[15] must be invoked in cases of mixed law and fact.

> This . . . 'is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board.'[16]

V. Dobson v. Commissioner

The Dobson case,[17] decided December 20, 1943, is unquestionably the leading case in Tax Court history. It advanced the Tax Court far in the direction of finality and was for nearly five years a storm center around which the winds of

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[14] Wilmington v. Commissioner, 316 U. S. 164 at 168 (1941).

[15] 302 U.S. 34 (1937).

[16] Ibid. at 39, quoting Commissioner v. Tex-Penn Oil Co., 300 U.S. 481 at 491 (1937).

[17] 320 U.S. 489 (1943).

tax discussion raged in force. In view of the importance of this case, and as a prelude to more thorough treatment, an examination of the facts is in order.

Facts

The Dobson case came to the Supreme Court on writ of certiorari from the Eighth Circuit and was decided together with Estate of Collins v. Commissioner and Harwick v. Commissioner also on writs of certiorari from the Eighth Circuit. Although these cases are cited together as the Dobson decision, the Supreme Court opinion used the facts of the Collins case to illustrate the issue in all three. Dobson, the man, is not mentioned in the opinion.

The taxpayer, Collins, had purchased in 1929 certain shares of stock, 300 in number. The transaction occurred in Minnesota. In 1930 Collins sold 100 shares. He sustained, claimed on his return , and was allowed a deductible loss of $41,800.80. During the following year he sold another 100 shares and sustained, claimed, and was allowed a deductible loss of $28,163.78.

In 1936 Collins learned that the stock had not been duly registered under Minnesota law and that the sale to him had been in other respects fraudulent. He filed suit against the vendor, and in 1939 the suit was settled, giving him a recovery of $45,150.83, of which $23,296.45 was allocable to stock sold

in 1930, and $6,454.18 to that sold in 1931. The balance was considered allocable to the 100 shares which Collins retained. Collins reported no income on his 1939 return with respect to the settlement.

The Commissioner adjusted Collins' 1939 return by adding to income that portion of the recovery allocable to the shares sold, which amount was, as a matter of fact, less than Collins' original investment in them. Furthermore, if these amounts could have been restored to income in 1930 and 1931, the taxpayer's liability for these years would have been unchanged due to other losses. This treatment was, of course, barred by the statute of limitations.

In proceedings before the Tax Court, Collins argued that the recovery was not income, but return of capital; or alternatively that the recovery, if income at all, was capital gain, not ordinary gain. Collins no doubt thought that, if he should be required to pay any tax as a result of his recovery, it should be at the favorable capital gains rate, rather than at the full rate levied on ordinary gains. The Tax Court sustained the taxpayer's argument that there was no taxable gain involved. The Tax Court relied on the reasoning of Commissioner v. Sanford and Brooks Co.,[18] and quoted from that opinion, "capital investments, the cost of which, if converted, must

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[18] 282 U.S. 359 (1931).

first be restored from the proceeds before there is a capital gain taxable as income."[19] And then the Tax Court promulgated the well-known "tax benefit theory," an adaptation of the rationale applied to the treatment of bad debts[20] and concluded "that, since the deductions taken by the decedent in 1930 and 1931 did not effect an offset to taxable income, the recovery in 1939 must be treated as a return of capital rather than taxable income."[21]

The Court of Appeals reversed the Tax Court chiefly on two grounds: (1) that the Tax Court "tax benefit theory" was merely a principle of equity unfounded in law,[22] and (2) that the Tax Court had ignored the statute of limitations and the regulation[23] providing that expenses, liabilities, and deficits of one year may not be used to offset income of subsequent years.[24]

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[19] Estate of James N. Collins v. Commissioner, 46 B.T.A. 765 at 769.

[20] Suppose, for example, that an accrual basis taxpayer claims a bad debt loss as a deduction in a given year and that he unexpectedly collects several years later. He is required to report the collection as income in the year of collection. But, if he can show that the original deduction of the bad debt did not reduce his tax in that year, he is not required to report as income the subsequent "windfall" collection.

[21] 46 B.T.A. 769.

[22] Harwick v. Commissioner, 133 F(2d) 732 at 735.

[23] Loc. cit.

[24] Treasury Regulations 103, Section 19, 43-2.

Opinion

The Supreme Court in reviewing these cases disagreed with the Circuit Court of Appeals on these two points and went on to expound its view of the review of Tax Court decisions in general. The opinion was delivered by Mr. Justice Jackson. There were no dissents. In disposing of the Circuit Court's first objection, the Supreme Court admitted that a Tax Court decision could be reversed if "not in accordance with law."[25] It could not agree with the Circuit Court that the law forbade the Tax Court's treatment of the facts. In sustaining the Tax Court on the Circuit Court's second objection, the Supreme Court held that no statute of limitations or principle of annual accounting had been violated and that the Tax Court had followed explicitly its statutory mandate: "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 determine the amount of such deficiency . . ."[26]

It would seem that the opinion might well have ended here but for the apparent determination of Mr. Justice Jackson and the Court to make this case the occasion for a statement of policy which would permanently solve the problem of

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[25]Revenue Act of 1926, Section 1003 (b), 44 Stat. 110.

[26]Revenue Act of 1928, Section 272 (g), 45 Stat. 854.

review of Tax Court decisions. There is no doubt that Mr. Justice Jackson was much concerned with the ever-increasing volume of tax litigation in the courts and was seeking in this opinion to stem the tide. The opinion, therefore, goes on to deplore the lack of respect for Tax Court judgment exhibited in the circuit courts and says that the mere number of cases coming up for review indicates that there are many cases with little value as precedents. This lack of value is attributed to too frequent concern with factual issues.[27]

The opinion then embarks upon a history of review of tax cases differing in no major respect from that previously offered in this paper. The diversity of original jurisdiction and the habits of review formed by the courts prior to 19 26 are emphasized.

There follows an essay on the expertise of the Tax Court. The opinion concludes that:

> ". . . every reason ever advanced in support of administrative finality applies to the Tax Court. . . . It has established a tradition of freedom from bias and pressures. It deals with a subject which is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. . . . The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices. . . and aware of the impact of their decisions on both Treasure and taxpayer . . . Tested by every theoretical and practical reason for administrative finality, no administrative

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27 Dobson at 494.

> decisions are entitled to higher credit in the courts. Consideration of uniform and expeditious tax administration requires that they be given all credit to which they are entitled under the law."[28]

So far in the opinion the Supreme Court has mentioned "fact" and "law" without explanation. At this point, however, Mr. Justice Jackson injects a third element into the discussion, "disputes over proper accounting." These disputes, he says, have been treated as questions of law, and this treatment has accounted in part for the mass of decisions. He views with alarm the ever-increasing time which the appellate courts must spend on tax matters.[29] Admitting the impossibility of laying down rules for distinguishing fact from law in any specific terms, he nevertheless instructs the Tax Court to label clearly its findings in these respects to provide the appellate court with a basis for determining its scope of review. He further indicates that the aforementioned questions of proper accounting belong in the realm of fact, not law. "Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax

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[28] Ibid. at 498.

[29] In a footnote at 499 he quotes Paul, Selected Studies in Federal Taxation (1938): "For the year 1920 a leading tax service catalogued approximately 20,000 court and Board decisions . . . and about 5,000 rulings . . . For the fiscal years 1935, 1936, and 1937, the number of Board dockets appealed to the Circuit Courts of Appeals has amounted, on the average, to 509 each year. The Supreme Court's balance sheet shows that federal taxation was the principal concern of that Court during the 1934 term . . . During the three years, 1935, 1936, and 1937, the Supreme Court rendered decisions in 84 federal tax cases."

purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts."[30] Mr. Justice Jackson then closes the door on this question of finality and nails it shut with the oft-cited, "When the court cannot separate the elements of a decision so as to identify a clearcut mistake of law, the decision of the Tax Court must stand."[31] Not only must they stand, but he recommends that regular courts dealing with similar problems respect them as precedents, although he acknowledges that they are not required to do so.

There is an anomaly in this expression of the Supreme Court, however. Here again one might think that, after proclaiming the finality of the Tax Court so resoundingly, the opinion could logically end. But the Court goes on in five more pages to examine the case on the merits. This action may have been designed to show that, even though the doctrine of finality had not been handed down, the decision would have been no different. It seems to weaken the doctrine, however, to enunciate it so boldly and then fail to place ultimate and complete reliance on it. The Dobson rule was not invariably adhered to in the years which followed, and it might be possible to show that the lower courts saw in this final section on the merits a precedent for their own action in minimizing

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30Ibid. at 502.

31Loc. cit.

Tax Court finality and reviewing on the merits when they were so inclined.

Denouement

Needless to say, the Dobson decision had implications which startled the tax world. Dozens of articles appeared in the law reviews, accountants' periodicals, and tax magazines. It was the subject of heated conversations among attorneys, accountants, and Bureau employees. Taking the opinion at its face value, the Tax Court's finality had been increased to such an extent that taxpayers might be reluctant to have their cases tried before it, especially those taxpayers who were able to pay and sue for refund in the regular courts where a full array of appellate courts lay before them. They would be further encouraged to ignore the Tax Court by the liberal rate of interest they could expect should their refund suit be finally successful. It began to look as if the taxpayer going before the Tax Court was "putting all his eggs in one basket," for he could not be at all sure that his question might not be called a question of proper accounting or one of mixed law and fact in which the appellate court would be unable "to identify a clear-cut mistake of law."

Not only were problems created for the taxpayer, but the Bureau of Internal Revenue had to make new adjustments to the situation. The Commissioner has commonly followed the practice

of announcing his acquiescence or non-acquiescence. Non-acquiescence meant that the Commissioner was not recognizing the decision as a precedent for administrative purposes, and frequently an appeal was involved. Under the Dobson rule the appellate scope was so sharply reduced that with fewer grounds for reversal by the appellate court, the Commissioner could expect fewer Tax Court reversals on his appeals. It follows that his position was weakened in those cases where he did not acquiesce, since taxpayers and their counsel could not be expected to give much weight to a non-acquiescence and appeal which was very likely to lose.[32]

Perhaps the greatest of the new problems created by Dobson v. Commissioner were those created for the courts, including the Tax Court. The Tax Court was faced with the necessity of clearly distinguishing its findings of fact from its findings of law, and this even the Supreme Court had acknowledged was most difficult. More important was the problem created for the circuit courts of appeals. A new type of conflict was possible at this second level. For example, one case might come from the Tax Court and another from the District Court with identical problems involved and with identical

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[32]These consequences to taxpayer and Commissioner are admittedly highly speculative. They seem to be entirely logical; they were anticipated at the time of the decision; they are supposed to have occurred (see note 41, Chapter IV, infra); but they are not statistically or objectively demonstrable.

decisions. The appellate court might conceivably be required by the Dobson rule to sustain the Tax Court, while reversing, by reason of its conviction in the matter and broader powers of review, the District Court decision.[33] To the affected taxpayers "equal justice under the law" could have little meaning in such a situation.[34] Other types of conflict at least partially attributable to the Dobson decision will be discussed later.

Although it would appear that there is little to be said in favor of this decision, such an impression is not altogether accurate. Let us bear in mind that the Supreme Court was endeavoring to lighten the load of tax cases with which the appellate courts were burdened, and it may be assumed that some action toward this end was desirable. The extent of its success in holding back the flood is not susceptible of proof. One would have to examine the motivation of those taxpayers who decided to end their litigation in the Tax Court and from the total of those who were so motivated by the Dobson decision, deduct those who, also Dobson-motivated, litigated in the regular courts instead of the Tax Court. It seems entirely reasonable, however, to grant that appeals from the Tax Court must have been seriously discouraged.

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[33] Cf. Judge Hand's opinion in Brooklyn National. Case quoted at end of the chapter.

[34] Merrill v. Fahs, 324 U.S. 308 (1945).

The decision may be worthy of praise on other grounds also. The opinion departed from the normal exclusive consideration of the situation and at least attempted to make policy. Many, probably most, opinions in tax cases are content to settle the particular issue between Bureau and taxpayer. In the Dobson opinion settlement of the issue is secondary to the policy-making function. This element may be a characteristic of "leading cases" in general. In retrospect, at least, we see large measures of policy-making in them. At any rate Dobson v. Commissioner endeavored to chart a course. That the course was not all that could be desired subsequent events have shown, but several writers have commended the Court for its efforts.[35]

One other positive good to come from the decision was the definite removal from the scope of review of the so-called "mixed question of law and fact." This principle, on which courts had previously felt free to review, dates back to 1937.[36] Under it, court disposed to review did not have to exercise too much ingenuity to find some "mixture" which would justify that disposition. The virtue in removing these mixed questions from the reviewable area is, of course, highly debatable, the position of the debaters being

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[35]Notably Robert E. Nelson; see discussion of Kelley case below.

[36]Bogardus v. Commissioner, 302 U.S. 34 (1937).

dependent on their underlying conceptions of the administrative process. Advancing at this point the tentative thesis that the total area of review is no more important than the clarity of the boundaries which define it, it follows that the positive good of which we speak lies, not in the reduction of the scope of review, but in the sharper markings of the boundary lines. It should be remarked now to avoid misleading that under the present act of Congress this virtue of the decision is no longer effective.

VI. The Dobson Rule in Action

Dobson v. Commissioner was cited, either relied on or distinguished, in nearly every case appealed from the Tax Court subsequent to the Dobson decision and prior to its virtual "repeal" by the Congress in 1948. In the two years immediately following the decision it was cited more than 200 times.[37] A leading tax service cites 120 cases wherein the Tax Court's decision was held to be reviewable under the Dobson rule.[38] The trend needs no comment.[39] The Dobson decis-

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[37] G. T. Altman, "The Dobson Rule," 21 Tulane Law Review 527, June, 1947.

[38] Prentice-Hall, Federal Tax Service 1949, at 21, 820 (j) and (k).

[39] J. Roland Pennock, Administration and the Rule of Law (New York: Farrar and Rinehart, Inc., 1941) at 72 reports that only one per cent of Board of Tax Appeals decisions (not appeals) had been reversed. Although averages should not be applied to such small figures, especially other averages, that percentage would yield average annual reversals of 57, based on 5700 proceedings annually.

ion was working and was being worked. An examination of the nature of these workings is in order.

Heininger v. Commissioner[40]

Heininger v. Commissioner was decided on the same day as the Dobson case. It was concerned with the deductibility of business expenses in an illegal business. The Tax Court had disallowed deduction because of the nature of the business, relying upon an older Circuit Court decision.[41] Upon appeal the Seventh Circuit Court reversed the Tax Court and held that the illegality of the business did not prevent deduction. The Supreme Court upheld the later Circuit Court decision reversing the Tax Court. The sole issue was whether the expenditures were "ordinary and necessary" within the meaning of the law.[42] The Supreme Court admitted that such determinations were ordinarily factual. The fact that the Tax Court had relied, not on its own judgment, but "upon a mistaken conviction that denial was required as a matter of law"[43] inserted a question of law which made review of its decision proper. If one could accept the position that the

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[40]320 U.S. 467 (1943).

[41]National Outdoor Advertising Bureau Inc. v. Commissioner, 89 F(2d) 878 (C.C.A. 2d, 1937).

[42]Section 23 (a) I.R.C.

[43]Op. cit. at 475.

Heininger case involved a question of law, while the Dobson case involved questions of fact, there is no apparent conflict in the decisions.

Dixie Pines Products Co. v. Commissioner[44]

A few weeks later came the case of Dixie Pines Products Co. v. Commissioner, one which reaffirmed the Dobson rule in a most back-handed manner. The taxpayer on the accrual basis had deducted as exp ense taxes the payment of which he was at the time of accrual contesting in the courts of his state. The Tax Court had held that this was an improper deduction and had been sustained by the Circuit Court. The Sup reme Court held that the question involved was a question of law, and "Since the Board applied the correct rule of law, its determination . . . is entitled to the finality indicated by Dobson v. Helvering."[45]

One wonders at "finality" based in rightness alone. Presumably any decision, either by administrative agency or lower court, will be affirmed if and when that decision is right. This "final when right" reasoning may be merely the converse statement of the Dobson position that Tax Court findings must stand unless there is a "clear-cut mistake of

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[44]320 U.S. 516 (1944).

[45]Ibid. at 519.

law," and both statements of the idea are reconcilable when applied as intended only to questions of law. However, in the Dixie Pines case the Court asserts the existence of a legal question but, in describing it, uses much the same phraseology used by Mr. Justice Jackson in the Dobson opinion to describe non-reviewable areas. Says Mr. Justice Roberts in the Dixie Pines opinion: "The applicable principles of accounting on the accrual basis had been adduced and applied by the Board of Tax Appeals in numerou s decisions . . . and the instant decision was in line with earlier rulings as to tax accounting practice."[46] Says Mr. Justice Jackson: "Whatever latitude exists in resolving questions such as these of proper accounting . . . exists in the Tax Court . . . "[47] The Justices do not appear to interpret and classify in exactly the same way the term, "proper accounting."

Security Flour Mills Company v. Commissioner[48]

A strikingly similar situation comes to light in Security Flour Mills Company v. Commissioner, a case which highlights the confusion. In brief, the facts are that the taxpayer, having collected certain processing taxes from custo-

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[46] loc. cit.

[47] Dobson at 502.

[48] 321 U.S. 281 (1944).

mers under the Agricultural Adjustment Act, refunded them after the Act was declared unconstitutional. He contended that his liability to refund was related to the periods of collection and that deduction should be allowed for those periods. He relied on Section 43 which provides for deduction of expenses in the year paid or accrued "unless in order to clearly reflect income the deductions . . . should be taken in a different period."[49] The Tax Court allowed the deduction as claimed but was reversed by the Tenth Circuit. The Supreme Court, in an opinion by Mr. Justice Roberts, agreed with the Circuit Court and held that the annual system of accounting was fundamental and that Section 43 was not intended to apply to a situation such as that under consideration.

This opinion, like the Dobson opinion, dealt with the competence of the Tax Court to relate certain transactions to each other and to certain years. The government's argument in both cases relied on the annual accounting principle. These are the basic similarities, in fact, the almost identical issues. In the Dobson case, however, the Court left the field to the Tax Court judging such determinations to be outside the scope of review, while here the case was examined and decided on the merits. To be sure, the Dobson opinion does consider the merits at some length, but the decision seems

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[49]Section 43 I.R.C.

to be made before that consideration. The difference in rationale between these two opinions is largely a matter of emphasis. Dobson makes much of the virtue of administrative finality, decides the issue on that basis, and elaborates the decision with a discussion of the factual elements. Security Mills has little to say about administrative finality and decides its issue on the merits. Mr. Justice Roberts explains that he is dealing with a question of law, but examination again reveals no criteria for identifying a legal question. "Mr. Justice Douglas and Mr. Justice Jackson are of the opinion that the case is governed by Dobson v. Commissioner, 320 U.S. 489 (1943), and that the judgment should, for the reasons therin stated be reversed,"[50] reads the dissent.

McDonald v. Commissioner[51]

The Heininger, Dixie Pines, and Security Mills decisions seemed to indicate that all was not well with Dobson v. Commissioner, that it might be one of those outposts of thought which are fortuitously advanced, lost in action, and never quite retaken. Any tax practitioner who made such an assumption must have been rudely awakened by the next Supreme Court

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[50]Security Flour Mills Co. v. Commissioner, 321 U.S. 281 (1944) at 287.

[51]323 U.S. 57 (1944).

decision involving the Tax Court, which came in November, 1944, just eight months after the Security Mills case.

McDonald, a judge in the state of Pennsylvania, had been disallowed a deduction of approximately $13,000 of campaign expenditures of which about $5,000 was expended for ordinary campaign costs and $8,000 for a party assessment based on the prospective total salary of the successful candidate. The Tax Court sustained the Commissioner, as did the Circuit Court of Appeals. The Supreme Court took the case in order to "give a definitive judicial answer" to this important problem of campaign expenses. Mr. Justice Frankfurter wrote the opinion. He covered thoroughly every applicable statute and interpretation and found that the judgment of the lower courts was right. And then came the portion of the opinion most pertinent to our subject, Tax Court finality:

> Even if these conclusions . . . derived less easily than they do from the statutory provisions under scrutiny, we should not be inclined to displace the views of the Tax Court with our own. . . . Having regard to the controversies which peculiarly call for this court's adjudication and to the demands for their adequate disposition, as well as the exigencies of litigation generally, relatively few appeals from Tax Court decisions can in any event come here. That court of necessity must be the main agency for nation-wide supervision of tax administration. Whatever the statutory or practical limitations upon the exercise of its authority, Congress has plainly designed that tribunal to serve, as it were, as the exchequer court of the country. Due regard for these considerations is the underlying rationale of Dobson v. Commissioner, 320 U.S. 469.[52]

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[52] Ibid. at 64.

One might conclude from the foregoing quotation that "Dobson rides again." The dissenting opinion, however, written by Mr. Justice Black joined by Justices Douglas, Murphy, and Reed, dampens premature enthusiasm for the Dobson doctrine. It cites the Security Mills case as one where the Court was not loathe to "displace the views of the Tax Court with our own."[53]

Commissioner v. Scottish American Co.[54]

The next appeal from a Tax Court determination to come to the Supreme Court was in the case of Commissioner v. Scottish American Co. It involved directly the issue of Tax Court finality. The unanimous opinion of the Court affirmed the Tax Court judgment and defined more clearly the non-reviewable area. Mr. Justice Murphy delivered the opinion, and his first sentence sets the stage for the remainder of the opinion. "We are confronted here with another aspect of the problem of the judicial reviewability of Tax Court determinations."[55]

The factual issues, if we can for the moment ignore the implications of the adjective, were undisputed. The tax-

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[53] Ibid. at 70.

[54] 323 U.S. 119 (1944).

[55] Ibid. at 120.

payers were two foreign investment trusts maintaining a joint office in the United States. If they were held by the courts to be resident foreign corporations, they would benefit taxwise to some considerable extent under Section 231 (b) of the Revenue Act of 1936 and 1938. The government argued, by inference from the factual data concerning the size and operational scope of the office in the United States, that this office was a sham maintained here for tax and perhaps other minor purposes. The Tax Court held, against the contentions of the government, that the taxpayers maintained "an office or place of business within the United States" and that they were for tax purposes resident foreign corporations. The cases of the two taxpayers were combined in the Supreme Court, one having come from the Fourth Circuit[56] where the Tax Court's decision was affirmed. The other from the Third Circuit[57] where the Tax Court was reversed.

The Supreme Court opinion in the Scottish American case considered in some detail Tax Court finality as to facts. It remarked that no question of law was involved.

> There is no charge here that the Tax Court failed to follow the applicable statues and regulations. No clear cut mistake of law is alleged. Nor are any constitutional issues involved. The sole issue revolves about the propriety of the inferences and

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[56] 139 F(2d) 419 (C.C.A. 4th, 1943).

[57] 142 F(2d) 401 (C.C.A. 3rd, 1944).

conclusions drawn from the evidence by the Tax Court.[56]

The Court then dwells on the distinctive functions of the Tax Court and the Circuit Courts of Appeals. It restates the pre-Dobson concept of "substantial evidence." It designates clearly the Tax Court as the fact finding and inference drawing body. It charges appellate courts not to add to or change the factual findings by reweighing evidence. Appellate courts must look for substantial evidence to support the findings, but, if such a basis is present the process of review is at an end. The Court advises judicial abstinence in cases of this type for two reasons: (1) deference to the Tax Court's skilled judgment, and (2) lack of precedent value in these cases.

At the time of this decision it could not have been considered at all surprising. The Dobson and McDonald cases gave much broader statements of Tax Court finality. They said that, not only facts, but mixed questions and questions of accounting were not reviewable. The Scottish American rule that facts and the inferences drawn therefrom are outside the appellate jurisdiction is tame by comparison. The significance of this decision seems to lie in its clear delineation of this one almost indisputably non-reviewable area. It is also to be commended for its advocacy of judicial restraint in cases without value as precedents. Many tax practitioners have thought that

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[56] Op. cit. at 123

the courts could easily reduce their overload of tax cases by refusing, whenever possible, to review cases with significance only to the parties involved.

Choate v. Commissioner[59]

Choate v. Commissioner presents a concise if uninformative example of the application of the Dobson rule. The question concerned a certain transaction and its classification as a sale. The Court says, ". . . Tax Court found that the parties intended a cash sale of the equipment. That question is argued here as if it were open for redetermination by us. It is not. It is the kind of issue reserved for the Tax Court under Dobson v. Commissioner."[60]

Bingham's Trust v. Commissioner[61]

In June, 1945, a year and a half after the birth of the Dobson rule, the Supreme Court reaffirmed and incidentally emphasized that rule in Bingham's Trust v. Commissioner. This case involved the deduction of legal expenses incurred in litigation with the Commissioner as business expense of a fiduciary. The elemental facts as to organization of the trust

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[59]324 U.S. 1 (1945).

[60]Ibid. at 3.

[61]325 U.S. 365 (1945).

and the amounts of income and expense involved were undisputed. The question was: Are such expenses deductible under Section 23 (a) (2) I.R.C.? This section states the requirements for deductibility of expense, that it be ordinary and necessary and incurred in the production or collection of income or in the management of property held for the production of income. The Tax Court concluded that the expense met the requirements. The Circuit Court agreed that the expenses were ordinary and necessary for the management of the trust property, but held them to be not deductible because they were not for the production of income. The point was made that the trust property was almost ready for distribution.

Supreme Court found the seat of the difficulty in the words, "property held for the production of income," whether or not, on the facts found by the Tax Court, the property was so held. The Supreme Court says of such questions:

> They are 'clear cut' questions of law, decision of which by the Tax Court does not foreclose their decision by appellate courts, as in other cases, Dobson v. Commissioner, supra, 498-98, although their decision by the Tax Court is entitled to great weight.[62]

In other words the decisions of the Tax Court, even in clear cut questions of law, are entitled to great weight, and in all other questions are final.

Thus after reiterating the Dobson rule and in so doing

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[62] Ibid. at 371.

finding it inapplicable to the instant case, the Court continued the examination on the merits and, incidentally, came to the same conclusion as the Tax Court. Mr. Justice Frankfurter agreed with the result, but insisted in a strong dissent that it should have been reached by way of the Dobson doctrine.

John Kelley Co. v. Commissioner[63]

Possibly the greatest weight of Dobson influence was felt in the case of John Kelley Co. v. Commissioner decided together with Talbot Mills v. Commissioner on January 7, 1946. Here the Dobson rule was applied in such a way as to create a direct conflict.

Both cases concerned the classification of corporate debentures as stocks or bonds. The Kelley Co. debentures were assignable twenty-year bonds calling for 8% interest issued only to shareholders in exchange for original preferred stock as part of a corporate reorganization plan. Payment of interest was non-cumulative and was conditioned on sufficiency of net income. Debenture holders were subordinated to all creditors except stock holders. The stockholders, incidentally, were all members of the same family group . Deductibility of the interest on these obligations was the

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[63] 326 U.S. 521 (1946).

main issue in the case. The Talbot Mills debentures were issued as a part of a corporate reorganization plan in the form of registered notes with face value equal to the par value of the stock exchanged for them. Each stockholder, all members of the same family group, turned in four-fifths of his stock. The notes were payable in twenty-five years and bore interest at a rate varying from 2% to 10% depending on corporate net income. Interest obligations were cumulative, and the notes were assignable. Deductibility of interest was the issue before the Tax Court.

Tax Court Judge Turner held that the Kelley debentures were bonds and that the payments were deductible as interest. Tax Court Judge Arundell in the Talbot Mills case held that the debentures were stocks and that the payments in question were dividends and not deductible. The Seventh Circuit Court of Appeals reversed the Tax Court position on the Kelley debentures, thus holding that the debentures were stocks. The First Circuit Court of Appeals affirmed the Tax Court decision in the Talbot Mills case. Accordingly decisions at the appellate level were in harmony. Certiorari was granted because of diversity of approach to the questions in the Tax Court and reviewing courts.

The Supreme Court opinion has been both damned[64] and praised,[65] damned for creating inconsistency and praised for

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[64]Altman, op. cit. at 527.

[65]R.E. Nelson, "The 'Dobson' Rule Reaffirmed by the 'Kelley' Case," 24 Taxes 104, February, 1948.

its bold and realistic approach to the matter of finality. The opinion, written by Mr. Justice Reed, after the usual brief history of the litigation, reviewed rather thoroughly the facts of the cases. Concluding from the facts that there were reasonable grounds for both Tax Court opinions, the Court proceeded to accept both opinions thus recreating the conflict in the Tax Court. Mr. Justice Reed in reaching this conclusion went over much of the ground covered in the Dobson case. He discussed Congressional intent as to Tax Court finality considering the legislative history of Section 1141 (c) I.R.C., which governed review. He quoted in footnotes Paul, Thayer, Holmes, Dickinson, Congressional committee reports, and statutes[66] and, in general, restated in positive terms the Dobson rule of finality. One pitfall he carefully avoided--the definition of interest and dividend--saying, "These cases now under consideration deal with well understood words as used in the tax statutes--'interest' and 'dividends.' They need no further definition."[67]

Mr. Justice Rutledge wrote a dissent which is much concerned with the once resolved inconsistency here recreated by the Supreme Court. He notes that inconsistency between circuits is resolved by the Court and feels that it should take strong position against conflicts within the Tax Court.

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[66] John Kelley Co. v. Commissioner, 326 U.S. at 527, 528, and 530.

[67] Ibid. at 530.

The dissent quarrels with the majority opinion in one other important respect. Mr. Justice Rutledge contends that "bond" and "stock" or "dividend" and "interest" are clear cut terms only in simpler exemplifications, but that they may be just as vague and unreal as "fact" and "law." Indeed, "the border cutting across one set of normally opposing conceptions may be deliberately obscured and made into a no man's land as readily as that involved in the other."[68]

Robert E. Nelson, a former assistant to Judge Minton, who wrote the Seventh Circuit opinion in the Kelley case, answers the dissent's point on consistency within the Tax Court to some satisfaction in an article in Taxes, published about a month after the Supreme Court decision.[69] He compares the divisions of the Tax Court to the divisions within a circuit. He points out that conflicts within a circuit are most rare and are considered unforgiveable. The Tax Court can discipline itself, he suggests, by en banc consideration of differences and achieve the same uniformity that circuits have achieved. In other words, the responsibility for uniformity within the Tax Court should be assumed by that body and not passed on to overburdened appellate courts. Since the Tax Court is unified in much the same sense as the individual circuit courts of

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[68] Ibid. at 535.

[69] Nelson, op. cit. at 108.

appeals, Mr. Nelson's point seems to be well taken.

One is almost forced to conclude that the Kelley decision greatly strengthened the Dobson doctrine. Mr. Nelson, praising the Dobson and Kelley decisions and indicating his belief in their permanence, restated the Dobson rule thus:

> Where no statute or Regulation controls, questions involving merely the weighing of numerous indicia, and/or questions likely to involve repercussions with which only a specialist in tax law and accounting would be thoroughly familiar, are left to the Tax Court.[70]

The conclusion that the Kelley case strengthened the Dobson rule must come more from study of the decision itself than from Mr. Nelson, however, for he weakens his own arguments in favor of Dobson by dismissing as "legal humorists"[71] such eminent tax authorities as Paul, Griswold, Eisenstein, and Bickford.[72]

Circuit Court Opinions of the Dobson Rule

Up to this point we have been chiefly concerned with the Supreme Court's own application of the Dobson rule. However, most of the decisions influenced by Dobson never came before the Supreme Court. Some understanding, then, of Circuit Court of Appeals opinion and application of the rule will not be

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[70] Ibid. at 107.

[71] Ibid. at 108.

[72] See bibliography infra.

amiss. In many cases Dobson was cited in support of a decision which might well have been reached on other grounds, and in many cases Dobson appears to have been distinguished out of an abundance of caution. A judge could easily add to his opinion a paragraph or two showing how his case differed from Dobson and thus eliminate to some extent the risk of reversal under the Dobson principle.

A classic opinion on Tax Court finality, one that has been often cited both by courts and authors on tax subjects, was written by Judge Learned Hand in the case of Brooklyn National Corporation v. Commissioner.[73] In order to affirm the Tax Court in this case, it was necessary for Judge Hand to overrule one of his own previous decisions. A lengthy quotation from this opinion seems pertinent:

> So much taken for granted, the question arises whether we should yield to the Tax Court's ruling that we were wrong, and that it would not follow us. What it said, might of course change our opinion on the point, in which event there would no longer be any conflict; but in the case at bar it chances that this has not happened; and, if the case were an appeal from a district court, we should have no alternative but 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 as a whole; but we must conclude that the Tax Court

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[73] 157 F(2d) 450 (C.C.A. 2d, 1946).

> has been indubitably wrong in its decision of the question which emerges: reasonable differences we are to resolve in its favor . . . and therefore, although personally we are of the same mind as before, we think that we should yield to the insistence of the Tax Court, which within these limits is really the court of last appeal. One question remains. It may be asked why the same reasoning did not apply, when in . . . (the earlier case). . . we reversed the holding of the Board of Tax Appeals. It did; but in August, 1941, the Supreme Court had not yet made clear, as it now has, how straitly our jurisdiction is confined. Our decision was then wrong, not indeed because as an original question it was, but because, by assuming jurisdiction to consider the question at all, we invaded the prerogative of the Tax Court and disregarded the finality of its orders. 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.[74]

This opinion, while it may not have represented an exact consensus of circuit court thought on the Dobson matter, was certainly authoritative. It had great weight, because, if for no other reason, it came from the pen of Judge Learned Hand, a jurist renowned for most of the qualities we look for in a legal giant. The decision came when, in the Administrative Procedure Act of 1946, some tendency toward curbing administrative finality in general was evident. It may be said that it is a description of the Dobson rule at its highest point. Although the rule was to stand for two years more, it was never again to be subjected to serious attack in the courts on the old grounds. When it fell, it fell at the hands of Congress.

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[74] Ibid. at 452.

CHAPTER IV

THE TAX COURT TODAY

Two recent acts of Congress have had a direct bearing on the Tax Court. The first, the Administrative Procedure Act of 1946,[1] may have affected Tax Court procedure and did affect to a lesser extent finality. The Act of June 25, 1948,[2] however, in one of its minor provisions[3] clearly and definitely repealed the Dobson rule of Tax Court finality and substituted a new guide for the appellate courts in the review of tax matters.

Under the Administrative Procedure Act of 1946

Some mention was made in discussing the question whether the Tax Court is actually a court or not, of its status under the Administrative Procedure Act.[4] The Supreme Court has not passed on the points. Against these opinions[5] can be placed

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[1] 60 Stat. 237 (1946).

[2] Public Law 773, 80th Congress, 2d Session.

[3] Ibid., Section 36.

[4] See Chapter 2, supra.

[5] Lincoln Electric Co. v. Commissioner, 162 F (2d) 379 (C.C.A. 6th, 1947), and Dawson v. Commissioner, 163 F(2d) 844 (C.C.A. 6th, 1947).

that of the Attorney General prior to passage of the Act[6] and that of the Tax Court itself.[7] Of course, it is fairly well established that courts are not competent to fix their own jurisdiction. Little can be added to the evidence either for or against the proposition. As the situation stands the only evidence with real authority, the two circuit court opinions, indicates that the Tax Court is covered by the Act.

But the question may be largely academic, for it begins to appear that the courts are not requiring the Tax Court to comply with the Act's procedural requirements even while holding the Tax Court to be an agency within its meaning.

Section 8 (a) of the Act distinguishes between an agency proper and its members,[8] while Section 8 (b) provides for procedure in cases where the initial decision is made by a subordinate officer for subsequent agency approval.[9] To comply with the provisions of Section 8 (b) would involve a complete revision of the Tax Court's method of hearing cases, for that section reads:

> Prior to each recommended, initial, or tentative decision, or decision upon agency review of the

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[6]See Chapter 2, note 14, supra.

[7]MacDonald v. Commissioner, 5 T.C.M. 1098 (1947), 165F(2d) 213 (C.C.A. 6th, 1947).

[8]60 Stat. 242 (1946).

[9]Loc. cit.

> decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions.[10]

The present Tax Court policy of having individual judges hear cases and present their opinions in the name of the agency is certainly inadequate under this section. Something more like the following procedure would be required: After hearing the case, the judge would offer a tentative opinion which along with the adversaries' "exceptions, proposed findings, or conclusions" would be reviewed by the agency as a whole. Reconsideration of each case by the sixteen judges would have to follow the initial determination. A few difficult cases are handled that way now, when in the discretion of the presiding judge it seems necessary, but with the present organization it would be manifestly impossible to handle all cases in such a manner. Therefore, the Tax Court has simply ignored Section 8 (b) of the Administrative Procedure Act and, so far at least, without running into trouble in the appellate courts. Should this procedure be forced upon the Tax Court, it would seem that the inevitable reorganization to follow would have to involve the creation of a hierarchy within the agency, a group of commissioners, perhaps, to hear the evidence and present the initial

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[10] Loc. cit.

report, and the agency itself composed of judges sitting en banc.

Two cases have been specifically concerned with adequacy of Tax Court procedure under the Administrative Procedure Act. The first, MacDonald v. Commissioner,[11] sheds little light on the situation. In its unpublished memorandum opinion, the Tax Court declared that it was not subject to the Act. The taxp ayer appealed to the Sixth Circuit which, by the time of appeal, had determined that the Act applied to the Tax Court.[12] On appeal the taxpayer moved that the Tax Court decision be set aside in view of its inadequate procedure under Section 8 (a) and 8 (b). The appellate court denied the motion without comment and affirmed the Tax Court. Since neither court published a full opinion on the matter, the case really provides scant basis for forming a conclusion. The other case, however, is more informative. In the case of Kennedy Name Plate Co. v. Commissioner[13] the taxpayer asked the Ninth Circuit to set aside the Tax Court findings for the same reason, inadequate procedure under Section 8 (b). The Circuit Court said in part:

> Assuming without deciding that the Tax Court may in some respects be within the scope of the Administra-

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[11] Supra note 7.

[12] Lincoln Electric and Dawson cases, supra.

[13] 170 F(2d) 196 (C.C.A. 9th, 1948).

> tive Procedure Act . . . we think that Section 8 (b) is inapplicable to Tax Court procedure . . . Section 2 of the Act . . . provides that "Nothing in this Act shall be construed to repeal delegations of authority as provided by law"[14]

The opinion goes on to cite statutory authority for the procedure followed by the Tax Court[15] and concludes that the delegations used in Tax Court procedure, since specifically prescribed by law, are not affected by the Administrative Procedure Act. A footnote to the opinion remarks that Congress was aware of the impracticability of applying Section 8 to the Tax Court. It is not made at all clear why, if such awareness existed in Congress, the Tax Court was not specifically exempted from compliance with the Act.[16]

Aside from procedural requirements, the Act to some unmeasured degree affected the finality of Tax Court decisions. Section 10, which treats the subject of judicial review, requires that appellate courts examine the whole record for "substantial evidence." This seems to broaden the scope of review as defined in the Scottish American case where the appellate court was instructed not to let its eye "rove about," but to cast it "directly and primarily upon the evidence in

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[14] Ibid. at 198.

[15] 28 U.S.C.A. Section 1103 (c) and 1118 (a).

[16] This is mere speculation, but Congress, like the Attorney General, may have thought that the Tax Court was not covered by the Act.

support of those (determinations) made by the Tax Court."[17] Something less than an examination of the "whole record" is apparently contemplated there. Whether or not the Administrative Procedure Act really intended to or in practice operated to affect review of Tax Court determinations by emphasizing review of the "whole record" is still a question, with some evidence and authoritative opinion on both sides and nothing conclusive on either side.

In summarizing the effect of the Act on the Tax Court, it can only be said that there is reasonable doubt as to the applicability of the Act in the first place; and in the second place, even if the Act applies in general, the important provisions relative to procedure may or may not. One circuit court opinion hardly gives us the final answer. That final answer will probably have to come from the Supreme Court, and some time may elapse before a decision conflicting with those previously discussed brings the matter to that high tribunal's attention. Section 10 as it affected Tax Court finality has been, in effect, repealed.

Under the Act of June 25, 1948, Public Law 773

The Act of June 25, 1948, was essentially a revision of Title 28, United States Code, Judiciary and Judicial Procedure. This revision became effective September 1, 1948. Only one

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[17] 323 U.S. 119 (1944).

provision in the revision was actively discussed and debated in Congress, and that was the minor provision related to the Tax Court.[18]

The original bill, H. R. 3214, contained a section designed to make the Tax Court a "court of record," to remove it entirely from the executive branch of the government, to place it definitely within the judicial system, and to repeal and erase all effects of the Dobson rule.[19] Many legislators were dissatisfied with the Dobson rule and were concerned about the possible effects of the Administrative Procedure Act on the Tax Court. These were probably the chief considerations in desiring the change in its status. It is suggested in the record, however, that a certain amount of ambition on the part of the Tax Court judges to improve their own position may have been at work.

Representative Sam Hobbs of Alabama, a member of the Judiciary Committee, was an active proponent of H. R. 3214. His remarks on June 30, 1947, are quite illuminating. After

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[18]A reprint of the Act together with its complete legislative history as derived from committee hearings and revisers' reports was published in a separate volume as part of its 1948 Congressional Service by the West Publishing Co. and the Edward Thompson Co. of St. Paul. This volume is cited hereafter as "Legislative History." These firms were employed by the House Judiciary Committee to prepare the revision of Title 28. They worked on the project for five years beginning in 1943.

[19]Ibid. at 1991.

discussing the background of the revision as a whole, he comes to what he calls "the issue," the question of the Tax Court. It appears that the Ways and Means Committee was not at all pleased with the Judiciary Committee's treatment of the Tax Court. The Ways and Means Committee felt that anything connected with tax administration should properly be in its purview, especially since the Tax Court was not a true court at all. Representative Hobbs disavows at length any attempt by the Judiciary Committee to encroach on the preserves of the Committee on Ways and Means, but he comments that all phases of his committee's work touch more or less directly the work of other committees. He then reviews the history and procedure of the Tax Court noting especially the judicial nature of the body and quoting Chief Justice Stone, Senator George, President Coolidge, and even Ways and Means Committee reports to prove that he is dealing with a court--a proper concern of his committee.[20]

Having justified in detail his committee's right to deal with the Tax Court, he then briefly justifies the substantive treatment. He criticizes the then prevailing lack of review of Tax Court decisions, saying that the poor man, who cannot afford to pay the Commissioner's assessment, goes to the Tax Court and gets the near-final decision of one judge. The rich man, on the other hand, can p ay the tax, seek redress

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[20] Ibid. at 1988-89.

in the District courts, appeal, if he is so minded, to the circuit courts, and, perhaps, to the Supreme Court. Representative Hobbs apparently had no objection to the one-man decision of the Tax Court if it could be properly reviewed, but he and, as later events proved, a considerable body of legislators were not pleased with the administrative finality accorded such decisions under Dobson v. Commissioner. The Judiciary Committee was also fearful lest the great virtue of Tax Court procedure, expeditiousness, collapse under the application of Section 8 of the Administrative Procedure Act.[21]

It seems fair to sum up the Judiciary Committee's attitude thus: The Tax Court is in all essentials a court. Therefore it is within our jurisdiction. We have great respect for that body and its record and are afraid that its hitherto successful procedures are in danger. We object to the way the Dobson decision is working to deny equal justice to the poor man and to give the wealthy individual a "better break" in the adjustment of his differences with the Commissioner. Our solution of the problem is to make the Tax Court a court of record in the judicial department and thus, in one act, to remove it from the scope of the Administrative Procedure Act and to remove from its decisions a considerable portion of its administrative finality.

Later on in the debate Representative Doughton epitomized

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[21] Ibid. at 1990.

the disillusionment of the legislator, when he objected to the proposed change on grounds of economy, saying, "Why, they would not be a court if they did not want their own buildings."[22]

The Ways and Means Committee was represented in the debate chiefly by Representative Dingell. He told a sad story of "deceit and misunderstanding"[23] induced by "certain members" of the Board of Tax Appeals to approve the change in name. These members wanted the name changed in order to make it easier for them to get space for hearings in the federal courthouses and to provide a title for counsel to use in addressing them. Mr. Dingell went on to say that his committee feared that the "camel was getting his nose under the tent" and that the Board members were trying surreptitiously to slip on the judicial robe. The Committee was reassured only because one of its members, who had a brother on the Board of Tax Appeals, convinced them that no "delusions of grandeur" were affecting the Board.[24]

A new argument is encountered at this point in the debate, the fear that transfer of the Tax Court to the judicial department will result ultimately in disbarment of accountants and other non-attorneys, who have always been allowed to practice before the Tax Court. Mr. Dingell attributed much of the past

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[22] Ibid. at 2001.

[23] Loc. cit.

[24] Ibid. at 2003.

success of the Tax Court to its informal procedure and expressed some certainty that, once in the judicial department, this feature would be lost. The Ways and Means Committee held no brief for the Dobson rule and most certainly did not desire Tax Court procedure to be restricted under the Administrative Procedure Act. It was therefore suggested that the basic purposes of the Judiciary Committee could be achieved by substituting for its proposal provisions to redefine the scope of review of Tax Court judgments and to exempt it from the Administrative Procedure Act.[25]

The remarks of Representatives Hobbs and Dingell point up the opposing points of view. It was suggested by the Ways and Means Committee that this was a "lawyers' bill" and by the Judiciary Committee that the "accountants' lobby" was the real opposition, developed in the remainder of the debate. When the issue came to a vote the Judiciary Committee won by an overwhelming majority, 342 to 23.

But in the Senate the same story had a different ending. There, those who held the views of the Ways and Means Committee prevailed. The Senate amendments rejected the transfer of the Tax Court to the judiciary, ignored the possible application of the Administrative Procedure Act, and amended Section 1141 (a) of the Internal Revenue Code to read:

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[25] Ibid. at 2005.

> The circuit courts of appeals and the United States Court of Appeals for the District of Columbia 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.[26]

This amendment became the law. The House accepted it in order to avoid jeopardizing the passage of the code revision which was considered to be much more important than the one minor provision relating to the Tax Court,[27] even though there was in the House strong majority support for the proposal of its Judiciary Committee. Furthermore, the House did gain an adjustment of the review situation which was in accord with the majority view. Exactly why the Senate did not specifically exempt the Tax Court from the Administrative Procedure Act is not clear from the record, but it is clear that fears for the right of non-lawyers to practice before the Tax Court was a major, if not a controlling factor, in blocking the Court's transfer to the judiciary.[28]

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[26]Public Law 773, 80th Congress, 2d Session, Section 36.

[27]"Legislative History" at 2033.

[28]Cf. M. Austin, "Report and Summary of Testimony Before Senate Committee on H. R. 3214," 85 Journal of Accountancy 475-480, June, 1948, and "Institute Statement on the Tax Court Before Senate Committee," 85 Journal of Accountancy 511-513, June, 1948.

Section 1141 (a) of the Internal Revenue Code having been amended to provide for review of Tax Court judgments "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." it behooves us to examine that manner and extent. Rule 52 (a) of the Federal Rules of Civil Procedure adopted in 1938 governs such review. It reads:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

This new standard of review applied to the Tax Court is a most definite denial of administrative finality and reversal of the Dobson principle. Under that rule only "clear-cut mistakes of law" justified reversal. Here all questions of law, all mixed questions of law and fact, presumably all "questions of proper accounting" under the law, are reversible. Only questions of fact are finally resolved in the trial court, and even they will be reversed if "clearly erroneous."

This rule is not as sharp and definite as it appears to be at first glance. The old question of law and fact is here in all its vigor. What is a question of law? What is a question of fact? Representative Reed of Illinois in discussing the status of Tax Court decisions under Rule 52 said:

> This bill does not attempt to define what is a question of fact or what is a question of law or

> to answer any of the other complicated questions which would be involved in spelling out de novo the complete scope of review. There is no necessity to do this. It is sufficient that whatever the scope of review over civil actions--whether tax cases or nontax cases--coming from the district courts, the same scope of review should exist over cases coming from the Tax Court.[29]

The formal record of the full Committee of Judiciary adds to the view the statement:

> The distinction between questions of law and questions of fact is one well-established in the law, and one with which lawyers and judges have long been familiar.[30]

Congress seemingly was willing to trust the appellate courts to apply their traditional distinction between fact and law to tax matters without guidance other than "in the same manner and to the same extent as decisions of district courts." That Congress really evaded the basic issue in this connection has been suggested. One could wish that the whole question of reviewability and the artificial distinction between fact and law which is so material to its solution had been reopened and thought and fought through to a satisfactory conclusion. However, there is much to suggest that Congress acted in a most practical and realistic way to accomplish its objective. The present review system as applied to district court decisions works. It may, as Congress suggests, be diffi-

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[29] "Legislative History" at 2037.

[30] Ibid. at 2039.

cult to understand and explain, but it works. Perhaps one should avoid tinkering with the machine as long as it operates.

Can the degree of finality accorded Tax Court decisions under present law be measured? The answer must be a negative. Administrative finality, that deference to a decision resulting from the reviewer's recognition and appreciation of expertise and specialization is gone. Although not yet a court in the most complete sense, the decisions of the Tax Court are treated exactly like those of a court. Practically speaking, the Tax Court, like the district courts, has finality as to facts, unless, of course, the decision is "clearly erroneous." All other finality has been erased.

The phrase, "clearly erroneous," has been interpreted by the courts in scores, probably hundreds, of decisions. A few principles derived from some of these decisions are quoted in order to provide some basis for estimating the degree of finality as to facts accorded district courts and the Tax Court.

> The reviewing court does not review the evidence as an original fact-finding tribunal, nor does it attempt to settle conflicts in evidence or to determine questions of credibility.[31]

> The requirement of this rule that findings of fact by trial judges be accepted on appeal unless clearly wrong does not compel reviewing court to give any specific weight to trial court's conclusions of law, and the questions whether special findings of trial

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[31]Campana Corporation v. Harrison, 114 F(2d) 400 (C.C.A. 7th, 1940).

judge are supported by evidence, and whether special findings give requisite support to conclusions of law rendered thereon, are questions open to consideration on appeal.[32]

This rule does not enlarge discretion of Circuit Court of Appeals in passing upon probative force of evidence, but leaves the court with function of reviewing finding of the lower court without passing on the evidence de novo.[33]

The findings of fact of Federal District Court are presumptively correct, but they are not conclusive on appeal if against clear weight of evidence.[34]

Subsection (a) of this rule contemplates a review by the appellate court of the sufficiency of evidence to sustain the findings.[35]

Where facts are not in dispute, legal deductions and conclusions of law drawn by District Court, while worthy of great consideration, are not binding on Circuit Court of Appeals.[36]

Where record supports the crucial findings of fact by trial judge, reviewing court cannot hold them to be "clearly erroneous" within terms of this rule.[37]

Where evidence relating to alleged contract was documentary, and there was no conflict in the evidence, provision in this rule limiting reviewing court's authority to set aside trial court's findings of fact were inapplicable.[38]

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[32] Loc. cit.

[33] Webb v. Frisch, 111F (2d) 887 (C.C.A. 7th, 1940).

[34] State Farm Mutual Automobile Insurance Co. v. Bonacci, 111F (2d) 412 (C.C.A. 8th, 1940).

[35] Loc. cit.

[36] Chicago & N.W.R.Co., 110F(2d) 425 (C.C.A. 7th, 1940).

[37] Gray, McFawn & Co. v. Hegarty, Conroy & Co., 109 F(2d) 443 (C.C.A.2nd, 1940).

[38] U.S.v. Mitchell, 104 F(2d) 343 (C.C.A. 8th, 1939).

> Requirement of this rule that findings of fact by trial judge be accepted on appeal unless clearly wrong formulates rule long recognized and applied by courts of equity.[39]
>
> The trial court's findings are entitled to great weight, but where there is no dispute in evidence it is the province of the appellate court to draw its own legal conclusions therefrom.[40]

Thus we see that the Tax Court is still "master of the facts" and the appellate court "master of the law." The appellate court may, however, review the lower court's findings of fact to be sure that they are supported by sufficient evidence, sometimes considered to be "substantial evidence," at any rate not "against the clear weight of evidence."

The Chicago and Northwestern, the Crutcher-Joyce, and the Mitchell case quotations (noted 36, 38, and 40) are especially pertinent when they are considered in connection with the Tax Court. There is most frequently little or no conflict in evidence before that body; the facts are commonly undisputed. In the light of these three opinions all phases of the Tax Court's decision in such cases would be reviewable.

We have now reached the point where we can only speculate on the full effect on tax cases of this rule of review. It will probably not have a very dramatic effect, since it has been governing review of tax--along with other--cases coming from the district courts ever since its promulgation. The

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[39]Guilford Const. Co. v. Biggs, 102 F(2d) 46 (C.C.A. 4th, 1939).

[40]Crutcher v. Joyce, 146 F(2d) 518 (C.C.A. 10th, 1945).

tendency of taxpayers to take their cases to the district courts will no doubt be arrested, since they will now have the same review privileges in the Tax Court without the requirement of payment in advance. As Congress intended, there is no longer any discrimination against taxpayers on whom payment is burdensome. The taxpayer may still choose his tribunal, but he now has a choice of tribunals whose decisions have equal weight in the appellate courts. Naturally, the chief objective of the Supreme Court in the Dobson case, elimination of tax case appeals, has been riddled; but that objective appears to have been crumbling already due to the public's increasing use of the district courts.[41]

Although the loss of administrative finality may have de-emphasized the Tax Court's importance as a body, the judges as individuals were moved a step closer to full judicial status. The House Judiciary Committee expressed hope that Congress will soon act to make the Tax Court a court of record and give the judges life tenure and the customary benefits of retirement in the judiciary.[42] Thus demotion of the body paradoxically

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[41]In the earlier discussion of the Dobson rule this trend was pointed out as were some of the difficulties involved in measuring it. There is general agreement in the literature of the subject and in the legislative history of P.L. 773 that many taxpayers avoided the Tax Court in favor of the district courts, but it seems necessary to accept this agreement largely on faith.

[42]"Legislative History" at 2040.

may result in promotion of its members.

The final chapter in this story remains to be written by Congress and by the courts as they begin to apply Rule 52 of the Federal Rules of Civil Procedure to the Tax Court. It is unfortunate for purposes of this study that there are as yet no authoritative cases under the present law to guide one in further conjecture as to the future of the Tax Court.

CHAPTER V

SUMMARY AND CONCLUSIONS

The federal income tax has been an increasingly important facet of American life since 1913. As more and more people have come in contact with the Bureau of Internal Revenue there have been more and more adjustments to be made and grievances to be settled. In the ancient history of the tax the regular courts were quite able to handle these situations, but the growing multitude of taxpayers combined with the growing complexity of the law developed a considerable burden on these courts. During and shortly after World War I informal committees with influence rather than power were able to effect settlements across the table successfully enough to indicate that a permanent, independent body with something more than prestige to back it up would be extremely valuable.

The Tax Court has proved to be that extremely valuable body. The record shows completion of an impressive volume of work, a reputation for fairness and competence, and a gradually increasing prominence on the tax scene. It has always occupied one of those peculiar positions in the governmental framework, a position technically in the executive department, but in the judicial department if function and procedure be the criteria for classification, and as a matter of practice somewhere in the

inadequately charted shadowland between the two. It had most humble beginnings insofar as the finality of its decisions are concerned. At first its findings of fact were only prima facie evidence when litigation was appealed to the lowest federal court. At the age of two years a double promotion came to the Tax Court, then called the Board of Tax Appeals. The appellate ladder was revised so that appeals went from the Tax Court direct to federal circuit courts of appeals where the Tax Court decision could be reversed only if "not in accordance with law."

Succeeding years saw little change in the Tax Court status until 1943. During these years review of Tax Court decisions was not very predictable. Appellate courts inclined to review could almost always find a mixture of law and fact in the issue at bar, and mixed questions were interpreted as being reviewable.

In 1943 came the climactic Dobson decision which effectively squelched the "mixed question" justification for review and interpreted the statutory standard for review, then seventeen years old, to mean that only "clear-cut mistakes of law" on the part of the Tax Court could be reversed. This interpretation, handed down largely in an effort to hold back a part of the flood of tax cases with which the regular courts were burdened, was the authoritative decision on Tax Court finality until 1948 when it was "rep ealed" by Congress. It

gave to the Tax Court a full measure of administrative finality.

The Administrative Procedure Act of 1946 may or may not apply to Tax Court procedure. There are circuit court decisions tending support either view, and the Supreme Court has not as yet seen fit to reconcile them. At any rate, the Tax Court has ignored the Act's procedural requirements without rebuke from the courts, and one circuit has held that, even if the Act affects the Tax Court in a general way, its procedural requirements do not.

Public Law 773, an Act of June 25, 19 48, provided for the "repeal" of the Dobson rule by specifying that Tax Court decisions should be reviewable on the same basis as federal district court decisions. Such decisions have finality only as to facts, and factual determinations of district courts may be reversed if "clearly erroneous." Questions of mixed law and fact are definitely reviewable.

By way of summary then: starting life with little or no finality, the Tax Court progressed to a point where it enjoyed near-complete finality, whence it was returned to a point somewhere between the extremes--perhaps closer to the starting point. The "pendulum of history" school of thought should be able to observe the swing in the story of the Tax Court.

A few questions and perhaps answers, hitherto unmen-

tioned, suggest themselves as a result of this study. The Supreme Court in the Dobson case addressed itself to the solution of a real problem, too many tax cases in the federal courts. Its solution, giving additional finality to the Tax Court, appears to have created new problems without completely solving the old. In the first place, it created inequities between taxpayers, inequities which tended to undermine the solution proposed by Dobson by endouraging litigation in the regular courts where review was relatively unrestricted. In the second place, it worked to preserve conflicts within the Tax Court (conflicts which, of course, should have been resolved within that body to begin with). In the third place, the Dobson solution was based on the shaky fact-law distinction which, as applied in this case, was a pretty unsure foundation for a structure presumably designed for predictability and dependability.

If the Dobson rule did not present a practical answer to the increasing number of tax appeals which worried Mr. Justice Jackson and the Court, what will give us such an answer? Surely Public Law 773 does not. It can at best have but a neutral effect on the volume of cases appealed. Its virtue lies, not in reducing the number of appeals, but in removing inequity and attempting to achieve uniformity in the system. As some Justice once said, "It is more important that it be decided than that it be decided right," and it is believed that

standards of review under the new law will be more consistent than under the Dobson rule.

Another possible solution lies in so-called "judicial restraint," but there is little to suggest that this solution will be more fruitful in the future than in the past. Perhaps, if the problem of tax cases should become intolerable, the judiciary would exercise self-restraint in self-defense.

And time may cure the ill, too. As the inflationary period following the war eases, there may be a general lowering of incomes which will tend to make the individual tax dispute of less consequence both to government and taxpayer. A depression would remove so many taxpayers from the current lists that the problem might vanish. This is only to direct attention to the fact that the problem is accentuated by prosperity and inflation and resumes normal proportions in normal times.

Another solution that has been proposed from time to time is the creation of a Court of Tax Appeals in which all tax litigation regardless of type or original jurisdiction might be canalized. This solution seems in a way to beg the question as it was put here. It would not decrease the number of appeals but might succeed in taking care of them. "Getting the right answer often depends on asking the right questions." Perhaps there should be no effort to dry up the spring, if it can be effectively controlled. However, eval-

uation of this scheme should not be attempted without thorough statistical research in the classified case loads of the various courts which would be involved. It might be possible to organize a special court to draw these special cases from the stream of litigation and treat them with absolute or near-absolute finality, but the planning of such a court is beyond the scope of this paper.

If we are to succeed in keeping large numbers of tax appeals out of the courts, there is another seldom considered method of so doing. Much of this discussion of administrative finality has overlooked the fact that the Bureau of Internal Revenue, not the Tax Court, is the fundamental administrative agency for taxation. The Tax Court could be left in its present status, or, perhaps better still, made a court of record in the judicial branch of government without affecting the contribution which the Bureau of Internal Revenue can make to the elimination of appeals. Making the Bureau effective in this respect would necessitate a grant of finality which in all probability Congress could not be persuaded to consider. This idea, then, is presented as a possible rather than as a practical solution, for, if Congress is inclined to take finality away from such a competent and impartial body as the Tax Court, it will hardly turn around and grant it to the Bureau which would have to act as both prosecutor and judge. The courts have not seen an invariable challenge to fairness and equity in this combination

of duties, but they, and more especially Congress, lean toward a more conservative attitude when property is directly affected.

The direct effects of taxation on property may be the underlying reason for the apparent determination of Congress to keep the appellate structure fully available to the taxpayer. If this were not true, it seems that the doctrine of "legislative grace"--the idea that standards of deductibility, for example, come not as a matter of right, but of privilege--might be more frequently invoked. Whatever the reasons, it seems safe to conclude that Congress is more concerned with keeping the taxpayer happy than with authorizing a situation which might be more pleasing to the accountants, the bar, the Bureau, or the judiciary. Furthermore, the possible existence of constitutional questions should not be ignored. Our traditional concepts of "due process" and the "rule of law" probably require a somewhat broader review process in taxation than some other areas less intimately associated with the institution of private property. Although due process is not always judicial process, the courts will in all likelihood always insist on reviewing questions of jurisdiction and of law.

It is thought, therefore, that we can look for no sweeping changes in the pattern of review of tax cases within the next few years. The Tax Court may be "promoted" to full judicial status, but, if so, that move will be in the nature of a formality and have no important effects on tax administration.

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