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Scope of Judicial Review of Decisions of the United States Tax Court

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The increasing volume of tax litigation has made the Tax Court of the United States one of the most important federal administrative tribunals.[1] Although its decisions have not been given a great deal of finality by courts of review, the trend of more recent decisions, especially by the United States Supreme Court, is to make the Tax Court a very important tribunal of last resort. Thus, it will be seen that the right to appeal to the Tax Court from deficiencies asserted by the Commissioner of Internal Revenue is one of real consequence and not of a temporary nature as a step to be taken to get to the Circuit Courts of Appeals or the United States Court of Appeals for the District of Columbia. The scope of review possessed by these courts is being restricted in an effort to solve many problems involved therewith.

But before we consider some of these problems involved in the scope of review of Tax Court decisions and the judicial solutions of them, it would be well first to consider briefly the nature of the Tax Court and the power of the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia to change, modify, or reverse its decisions.[2] The Tax Court was created by the Revenue Act of 1924,[3] with the purpose of creating an independent tribunal having original jurisdiction to review asserted tax deficiencies as determined by the Commissioner before the taxpayer makes any payment of the contested amount. Although it was originally intended to be merely another executive or ad-

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[1]This tribunal was originally called the United States Board of Tax Appeals but was changed to the Tax Court of the United States by the Revenue Act of 1942, c. 619, Title IV, section 504(a), 56 Stat. 957, 26 U. S. C. A. 1100.

[2]For a complete historical discussion see, Law of Federal Income Taxation by Jacob Bertens, Jr., Vol. 9, c. 10; and Practice and Evidence before the U. S. Board of Tax Appeals by Charles D. Hamel, c. 1. See also recent case of Dobson v. Commissioner, (1943) 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. adv. ops. 179.

[3]Section 900(k), 43 Stat. 253, 26 U. S. C. A. Int. Rev. Acts. P. 112.

ministrative agency,[4] the Tax Court has been said to possess judicial, or at least quasi-judicial, powers,[5] and that due respect should be given to decisions of this administrative tribunal.[6] The Revenue Act of 1926 provided several changes in the procedure of the Tax Court including changes in judicial review of its decisions. It was this act which provided for a direct appeal from the Tax Court to the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia.[7] This system of appellate procedure has been criticized because many of the decisions rendered by the various Circuit Courts have been conflicting,[8] but it will be seen that the trend of the decisions is likely to solve this difficulty.

Although the Tax Court is the sole tribunal having original jurisdiction of tax cases where no payment of the contested amount of tax has been made, where a payment has been made the United States District Courts are authorized to sit as courts of claims to hear suits for recovery of the contested taxes.[9] These United States District Courts also have jurisdiction in common law of suits against the collectors of internal revenue for a refund of taxes which were erroneously collected or paid under protest, with the right of both parties to consent to a waiver of the jury.[10] But the right to this type of suit is lost when a peition for review is filed with the Tax Court.[11] The Tax Court exercises functions similar

[4]In one of the very early Supreme Court cases dealing procedurally with the Tax Court (then the Board of Tax Appeals), it was said: "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after administrative inquiry of the Board has been had and decided." Old Colony Trust Company v. Commissioner, (1929) 279 U. S. 716, 725, 49 S. Ct. 499.

[5]Commissioner v. Liberty Bank & Trust Co., (1932 C.C.A. 6) 59 F. (2d) 320; Am. S. S. Co. v. Wickwire Spencer Steel Co., (1934 S. D., N. Y.) 8 F. Supp. 562. However, in Louisville Property Co. v. Commissioner, (1944 C.C.A. 6) 140 F. (2d) 547, it was stated that the Tax Court is still an administrative agency since it was referred to as such by the Supreme Court in Helvering v. Gooch Milling & Elevator Co., (1943) 320 U. S. 418, 64 S. Ct. 184, 88 L. Ed. adv. ops. 140.

[6]Commissioner v. McCarthy, (1942 C.C.A. 8) 128 F. (2d) 84; Helvering v. Rebsamen Motors, (1942 C.C.A. 8) 128 F. (2d) 584.

[7]Revenue Act of 1926, section 1001(a), 44 Stat. 9, 109, 26 U. S. C. A. Int. Rev. Acts. P. 311.

[8]Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—A Criticism and a Proposal, (1938) 38 Columbia Law Review 1393.

[9]28 U. S. C. A. section 41(20); Reuter v. United States, (Ct. Cls. 1940) 34 F. Supp. 1014.

[10]28 U. S. C. A. section 773, 46 Stat. 486. Also see, Federal Rules of Civil Procedure, rules 38, 52, 28 U. S. C. A. following section 723c.

[11]26 U. S. C. A., (1940 ed. section 322(c); Brooks v. Driscoll, (1940 C.C.A. 3) 114 F. (2d) 426.

to those exercised by the United States District Court without a jury.[12] The problems involved in the scope of review of Tax Court decisions are also applicable to the review of decisions of the United States District Court. This system of dual litigation by the Tax Court and the United States District Courts over cases which essentially comprise the same issues also has been criticized because it creates conflict in tax decisions.[13] But it appears from statistics that taxpayers have resorted to the Tax Court much more than to the United States District Courts.[14]

Before the reviewing court can take jurisdiction of an appeal from a decision of the Tax Court, it is necessary that the appeal be from a final order; otherwise, if it is from an interlocutory order, the Circuit Court of Appeals has no jurisdiction to review. An example of a final decision was recently given in *Monjar v. Commissioner*,[15] wherein it was held that the Tax Court's order, on a taxpayer's motion to open a default, containing only the word "denied" was reviewable as a "decision" dismissing a proceeding for lack of jurisdiction. Also it is not permissible for the reviewing court to give advisory opinions.[16] After jurisdiction over the appeal from the Tax Court is assumed, the Circuit Courts of Appeals, in suits in which the taxpayer is the petitioner, are aided by certain presumptions that the action of the Commissioner is correct,[17] and that findings of fact by the Tax Court are correct.[18]

When the Tax Court was first established, its findings were only "prima facie" evidence of the facts therein stated.[19] As we have seen the power of the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia to

[12]Commissioner v. Liberty Bank & Trust Co., supra, footnote 5; Gooch Milling & Elevator Co. v. Commissioner, (1943 C.C.A. 8) 133 F. (2d) 131.

[13]Supra, footnote 8.

[14]For the calendar year 1943, there was a total of 1262 tax cases decided by the various courts: 21 by the Supreme Court, 286 by the Circuit Courts of Appeals, 17 by the Court of Claims, 124 by the District Courts, and 814 by the Tax Court, A Review of Important Federal Tax Decisions of 1943, by S. J. Sherman, 22 Taxes 118 (1944).

[15](1944 C.C.A. 2) 140 F. (2d) 263.

[16]Retailers Credit Association v. Commissioner, (1937) 90 F. (2d) 47; Peak v. Commissioner, (1936 C.C.A. 8) 80 F. (2d) 761, cert. den. (1936) 298 U. S. 666, 56 S. Ct. 749, 80 L. Ed. 1390.

[17]Bennett v. Commissioner, (1944 C.C.A. 8) 139 F. (2d) 961.

[18]Leicht v. Commissioner, (1943 C.C.A. 8) 137 F. (2d) 433, petitioner has to establish the Tax Court's redetermination was "unwarranted, either in point of fact or in point of law"; Helvering v. Ward, (1935 C.C.A. 8) 79 F. (2d) 381.

[19]Revenue Act of 1924, section 900(g), 43 Stat. 253, 26 U. S. C. A. Int. Rev. Acts. P. 112.

review decisions of the Tax Court is statutory,[20] it being within the scope of review "to affirm or, if the decision of the Board (now the Tax Court) is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."[21] The purpose of this article will be to consider the various problems connected with this statutory provision.

Issues Not Raised in the Lower Tribunal

At the outset, in considering the scope of review by the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia of Tax Court decisions, it would be appropriate first to consider the rather varying but consistent rule that when so reviewing these administrative decisions, the Circuit Courts will not consider new issues presented to them which were not presented to or decided by the Tax Court.[22] The reasoning behind this judicial limitation upon review is that each party may know the basis in law and fact upon which the other seeks to support his case by preventing a change in position from that taken upon the claim as originally presented to the Tax Court.[23] Therefore, when either party seasonably urges his views before the trial tribunal, he can present them to the reviewing court even though the Tax Court disregarded them and based its decision on a different ground, since the other party was given the opportunity to reply to these contentions and was put to no disadvantage of surprise.[24]

One of the first important tax cases on this problem was *General*

[20]Supra, footnote 7. Commissioner v. Boeing, (1939 C.C.A. 9) 106 F. (2d) 305.

[21]Revenue Act of 1926, section 1003(b), 44 Stat. 9, 110, c. 27, 26 U. S. C. A. Int. Rev. Code, section 1141(c)(1), 6 F. C. A. title 6, section 1141(c)(1).

[22]Helvering v. Minnesota Tea Co., (1935) 296 U. S. 378, 380, 56 S. Ct. 269, 80 L. Ed. 284; Helvering v. Tex-Penn Oil Co., (1937) 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755; Helvering v. Wood, (1940) 309 U. S. 344, 60 S. Ct. 551, 84 L. Ed. 796; Bank of Calif. v. Commissioner, (1942 C.C.A. 9) 133 F. (2d) 428; Commissioner v. Fortney Oil Co., (1942 C.C.A. 6) 125 F. (2d) 995.

[23]Thus, in Helvering v. Rubenstein, (1942 C.C.A. 8) 124 F. (2d) 969, the Court in discussing the rule stated: "It requires them to deal fairly and frankly with each other and with the trial tribunal with respect to their controversies. It prevents the trial of cases piecemeal or in installments. It tends to put an end to litigation."

[24]Bell v. Commissioner, (1943 C.C.A. 3) 139 F. (2d) 147; Commissioner v. Stimson Mill Co., (1943 C.C.A. 9) 137 F. (2d) 286; Commissioner v. Washer, (1942 C.C.A. 6) 127 F. (2d) 446.

Utilities Co. v. Helvering.[25] In this case the Commissioner appealed from the Tax Court and stated only one ground in his petition for review. Later the Commissioner urged reversal on another ground. The Circuit Court of Appeals sustained the Tax Court on the first ground and, although the second ground had not been raised before the Tax Court, the Circuit Court of Appeals thought this point should be ruled upon. The Supreme Court reversed the lower court since the second ground was neither in the petition for review nor ruled upon by the Tax Court for "always a taxpayer is entitled to know with fair certainty the basis of the claim against him."[26] Another reason for the application of this general rule is the fact that in federal appellate procedure it has been settled that procedure of review must be orderly in order that there may be an efficient final disposition of the case.[27]

Although this rule is settled by judicial precedent, it is not strictly applied where the facts and justice of the case demand a contrary result. Therefore, in many cases where the decision of the Tax Court is asked to be sustained on a new ground not decided by the Tax Court, such new issues will be considered for the first time by the reviewing court where the decision of the Tax Court is correct when based on the new reasons assigned.[28] Thus in *Helvering v. Gowran,* the Supreme Court held that the government could argue its "basis of zero" theory for the first time in the Circuit Court of Appeals in considering the taxability of a stock dividend and of the proceeds when later sold, for "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."[29]

Another exception to the general rule is that a change in the interpretation of the controlling law by the Supreme Court can be

[25](1935) 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 154.

[26]296 U. S. 200 at P. 206. This case was followed in Helvering v. Salvage, (1936) 297 U. S. 106, 56 S. Ct. 375, 80 L. Ed. 511, where the court said that as to a point not raised below, the Circuit Court of Appeals should have passed it, and that the rule in the General Utilities case is regarded "as the correct practice."

[27]For a complete discussion of the rule see, Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved (1932) 7 Wisconsin Law Review 160, (1933) 8 Wisconsin Law Review 147.

[28]Helvering v. Rankin, (1935) 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343; Helvering v. Gowran, (1937) 302 U. S. 238, 58 S. Ct. 154, 82 L. Ed. 224; Cushman Motor Works v. Commissioner, (1942 C.C.A. 8) 130 F. (2d) 977; Irish v. Commissioner, (1942 C.C.A. 3) 129 F. (2d) 468; and White v. Higgins, (1940 C.C.A. 1) 116 F. (2d) 312, where appeal was from the U. S. District Court.

[29]Supra, footnote 28, 302 U. S. 238 at 246.

relied upon in the Circuit Court of Appeals where the change came after the decision of the Tax Court and before the review by the Circuit Court of Appeals.[30] Although it is believed that a newer and broader exception was promulgated by the Supreme Court in the important case of *Hormel v. Helvering*,[31] it appears that such was not the case since a change in the interpretation of the controlling law was involved.[32] In this case the taxpayer declared three separate trusts in each of which the taxpayer and his wife, as guardian of their children, were named as beneficiaries. A co-trustee who could be removed at any time by the joint action of the taxpayer and his wife was appointed with the taxpayer. All the income was distributed to the wife as guardianship income and so reported by her. The taxpayer did not include it in his individual returns. The Commissioner claimed a deficiency asserting the income was the taxpayer's within sections 166 and 167 of the Revenue Act of 1934. The Tax Court held that it was not taxable to him under sections 166 or 167. In the Circuit Court of Appeals the Commissioner relied on section 167 and also argued that in any event the income was taxable to the petitioner under section 22(a). Although the taxpayer argued that section 22(a) could not be considered since it was not relied on before the Tax Court, the Circuit Court of Appeals held the trust income taxable to the petitioner under that section. In the Supreme Court the petitioner challenged the power of the Circuit Court of Appeals to pass upon questions other than those directly presented to the Tax Court.

The Supreme Court, in reliance upon the power of the Circuit Court of Appeals to modify or reverse a decision of the Tax Court with or without remanding the cause to the Tax Court "as justice may require," held that it was consistent with this principle that the Circuit Court of Appeals considered section 22(a) in determining the petitioner's tax liability. The Court also held that since the taxpayer retained sufficient control of the trusts, the

[30]Commissioner v. Montague, (1942 C.C.A. 6) 126 F. (2d) 948. This situation was also present in Hormel v. Helvering, infra, footnote 31.

[31](1941) 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037. It was indicated by the Supreme Court that the appellate courts should review new issues "as justice may require." For a good discussion of the theory that this statement meant to promulgate a new exception see, (1941) 50 Yale Law Journal 1460.

[32]Since the Tax Court's decision, the Supreme Court had decided the case of Helvering v. Clifford, (1940) 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788, which held that section 22(a) of the Revenue Act was applicable in determining tax liability under a trust.

trust income was properly taxable to him.[33] The Supreme Court recognized the general rule that it is the function of the Tax Court to determine the facts of a tax controversy on issues raised before it and to apply the law to those facts; and that it is the function of the reviewing court to decide whether the Tax Court has applied the correct rule of law. Also in recognition of the general principle that an appellate court ordinarily does not give consideration to issues not raised below, the Court recalled that on a number of occasions it said the reviewing court should not decide questions not urged before the Tax Court. However, the Supreme Court said since "rules of practice and procedure are devised to promote the ends of justice, not to defeat them," the reviewing court could not always follow an undeviating declared practice without doing an injustice in many exceptional cases. The Court then distinguished cases relied upon by the petitioner in which the Court followed the general principle. Thus, in *Helvering v. Wood*[34] the Court held that the Commissioner, having invoked before the Tax Court the narrow provision of section 166 of the Revenue Act of 1934, could not resort for the first time to section 22(a). In so holding the Supreme Court said: "To open here for the first time and in the face of the express disclaimer an inquiry into the broader field is . . . to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation."[35] The Court in the *Hormel Case* distinguished this case by saying: "But we there especially relied upon the fact that the government, when the case was before the Circuit Court of Appeals, had made an express waiver of any reliance upon 22(a)."[36] In *Helvering v. Tex-Penn Oil Co.*[37] the Court held it would not consider for the first time construction of section 202(b) of the Revenue Act of 1918 which was never mentioned by the Commissioner in the proceedings under review. The Supreme Court also distinguished this decision in the *Hormel Case* by saying that in that case the Commissioner neither presented the issue in his notice of tax deficiency, in his appearances before

[33]The Hormel case was immediately followed in Helvering v. Richter, (1941) 312 U. S. 561, 61 S. Ct. 723, 85 L. Ed. 1043; other cases expressly following the Hormel case are: Williamson v. Commissioner, (1942 C.C.A. 7) 132 F. (2d) 489; Commissioner v. Hapkinson, (1942 C.C.A. 2) 126 F. (2d) 407; Black Motor Co. v. Commissioner, (1942 C.C.A. 6) 125 F. (2d) 977; Commissioner v. Goulder, (1941 C.C.A. 6) 123 F. (2d) 686.

[34]Supra, footnote 22.

[35]Helvering v. Wood, supra, footnote 22, 309 U. S. 344, at 349.

[36]Hormel v. Helvering, 312 U. S. 552, at p. 557.

[37]Supra, footnote 22.

the Tax Court or the Circuit Court of Appeals, nor in his petition for certiorari to this Court. Finally the Supreme Court in the *Hormel Case* justified the decision in *General Utilities Co. v. Helvering*[38] on the ground that the Circuit Court of Appeals made an inference of fact directly contra to the stipulation of the parties and that that case would have been remanded to the Tax Court had the new issues been of sufficient merit.[39] In explaining these cases the Supreme Court in the *Hormel Case* held that such appellate practice applying the general principle should not be followed where it would result in an obvious injustice, since a change was made in the interpretation of the controlling law involved. However, the original doctrine has been still followed by the United States Supreme Court,[40] and it has been indicated by other cases since the decision in the *Hormel Case* that it has not been abandoned.[41] The above rules as to presenting to the reviewing court new issues or theories which have neither been presented to nor decided by the Tax Court is also applicable to appeals to the Circuit Courts of Appeals from the United States District Courts.[42]

Findings of Fact Made by the Tax Court

Since the beginning of judicial review of Tax Court decisions, it has become a general rule that its findings of fact, if supported by substantial evidence, shall be conclusive upon the reviewing court.[43] In *Helvering v. National Grocery Company*,[44] the Supreme Court in reversing the Circuit Court of Appeals, said that "the Court of Appeals, instead of limiting its review to ascertaining whether there was evidence, made as upon a trial de novo, in effect,

[38]Supra, footnote 25.

[39]A case can be remanded to the Tax Court for the limited purpose of considering evidence on new issues, Smith's Estate v. Commissioner, (1944 C.C.A. 3) 140 F. (2d) 759; Richardson v. Commissioner, (1942 C.C.A. 2) 126 F. (2d) 562; Helvering v. Rubenstein, supra, footnote 23.

[40]Helvering v. Cement Investors, (1942) 316 U. S. 527, 62 S. Ct. 1125, 86 L. Ed. 164.

[41]Thus, in Athens Roller Mills v. Commissioner, (1943 C.C.A. 6) 136 F. (2d) 125, the Court said: "When disentangled from technicalities that formerly plagued courts in the administration of justice, the rule that appellate courts confine themselves to issues raised below in reviewing a decision of the Board of Tax Appeals still has some vitality and the rule should only be cast aside where in exceptional cases this is necesary. . . ."

[42]For example see, Hopkins v. Magruder, (1942 C.C.A. 4) 122 F. (2d) 693; White v. Higgins, supra, footnote 28.

[43]Helvering v. Rankin, supra, footnote 28; Helvering v. Kehoe, (1940) 309 U. S. 277, 60 S. Ct. 549, 84 L. Ed. 751; Colorado Bank v. Commissioner, (1938) 305 U. S. 23, 59 S. Ct. 48, 83 L. Ed. 20; Helvering v. Tex-Penn Oil Co., supra, footnote 22.

[44](1938) 304 U. S. 282, 58 S. Ct. 932, 82 L. Ed. 1346.

an independent determination of the matters which had been in issue before the Board. The Court was without power to do so."[45] Consequently, it is the function of the Tax Court, not the Circuit Courts of Appeals, to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences, since the court may not substitute its view of the facts for that of the Tax Court,[46] no matter how clearly they may be disclosed by the record.[47] The determination by the Circuit Courts of Appeals in reviewing decisions of the Tax Court as to whether its findings are supported by substantial evidence involves a full examination of the record in many cases.[48] But the Court's function of searching the record to make this determination does not give it the power to weigh such evidence.[49] And even though the court of review might have drawn an inference different from that of the Tax Court, the Circuit Courts of Appeals must nevertheless accept the findings of these facts by the Tax Court as final.[50] It is also generally followed that the Tax Court's interpretation of the facts, if based on substantial evidence, will be accepted as final where the evidence is conflicting, unless clearly erroneous.[51] Furthermore, it has been

[45]304 U. S. 282 at p. 294.

[46]Wilmington Trust Co. v. Helvering, (1942) 316 U. S. 164, 62 S. Ct. 984, 86 L. Ed. 1352; Helvering v. National Grocery Co., supra, footnote 44; Helvering v. Prentice, (1943 C.C.A. 3) 139 F. (2d) 691; Bell v. Commissioner, (1943 C.C.A. 3) 139 F. (2d) 147; Thomas v. Commissioner, (1943 C.C.A. 5) 135 F. (2d) 378.

[47]General Utilities Co. v. Helvering, supra, footnote 25; Hormel v. Helvering, supra, footnote 31; Commissioner v. Goulder, supra, footnote 33; Lenox Clothes Shops v. Commissioner, (1943 C.C.A. 6) 139 F. (2d) 56.

[48]Welsbach Engineering Corporation v. Commissioner, (1944 C.C.A. 3) 140 F. (2d) 584; Lenox Clothes Shops v. Commissioner, supra, footnote 47; Hoboken Land Co. v. Commissioner, (1943 C.C.A. 3) 138 F. (2d) 104.

[49]Supra, footnote 48.

[50]Equitable Life Assurance Company v. Commissioner, (1944) 321 U. S. 560, 64 S. Ct. 722, 88 L. Ed. adv. ops. 603; Wilmington Trust Co. v. Helvering, supra, footnote 46; Palmer v. Commissioner, (1937) 302 U. S. 63 at p. 70, 58 S. Ct. 67, 80 L. Ed. 50, where the court said: "The findings are inferences which the board (Tax Court) was free to draw from all the facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court even if upon examination of the evidence it might draw a different inference." See also, Poorman v. Commissioner, (1942 C.C.A. 9) 131 F. (2d) 946, if from the supported findings of fact, an inference is drawable in support of the Tax Court's conclusions, the court on review has no alternative except to affirm the order based thereon; Commissioner v. Boeing, (1940 C.C.A. 9) 106 F. (2d) 305.

[51]Helvering v. Lazarus & Co., (1939) 308 U. S. 252, 60 S. Ct. 209, 84 L. Ed. 226. In Regals Realty v. Commissioner, (1942 C.C.A. 2) 127 F. (2d) 931, the Court said: "We cannot grant a trial de novo merely because there was evidence on which it (the Tax Court) might have based a contrary conclusion." Claridge Apartments Co. v. Commissioner, (1943 C.C.A. 7) 138 F. (2d) 962, where a finding of the Tax Court has evidence to support it, it will not be set aside because the evidence was conflicting. See also, Farmer v. Commissioner, (1942 C.C.A. 10) 126 F. (2d) 542.

seen that the findings of fact made by the Tax Court are affirmed even where the reasoning given to support them is erroneous, if such findings, governed by the correct rule of law or correct reasoning, are sufficient to uphold the Tax Court's decision.[52]

Although in most cases the record is fairly complete as to the findings of fact made by the Tax Court, it sometimes happens that the Tax Court has failed to make one or more essential findings, thus making the record on review insufficient to provide the basis for a final determination. The proper procedure then is for the Circuit Courts of Appeals to remand the case to the Tax Court for further proceedings.[53] This same procedure is followed even when such omitted finding by the Tax Court might be supplied from a review of the record.[54] However, it has been more than intimated that where the Tax Court does not make any finding, but there is a sufficient basis for such finding, it will be made by the Circuit Court of Appeals.[55] It has been seen that if the findings of the Tax Court are not substantially supported by the evidence, the Circuit Court of Appeals may reverse the Tax Court's decision; but this power of the Circuit Court is rarely used except when it is very clear that the findings are not so substantially supported,[56] and except when such findings are arbitrary or unreasonable.[57]

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[52]Supra, footnotes 28 and 29.

[53]Equitable Life Assurance Co. v. Commissioner, supra, footnote 50; Helvering v. Rankin, supra, footnote 28. In Bell v. Commissioner, (1943) supra, footnote 46, the cause was remanded to the Tax Court where each party had different contentions as to what should be the relevant finding on the basis of the facts as set out in the record. However, in Commissioner v. McCarthy, supra, footnote 6, the Court held it was not bound by a decision when essential facts were not found and it was based on errors of law.

[54]Helvering v. Rankin, supra, footnote 28.

[55]Plimpton v. Commissioner, (1943 C.C.A. 1) 135 F. (2d) 482, where the Circuit Court of Appeals of the first circuit said: "Taxability under this section (167) must depend upon a finding that petitioner was, at least to some extent, a grantor, but since we find nothing in the evidence to so indicate, there is a sufficient basis for us to make a final determination on this point."

[56]Bogardus v. Commissioner, (1937) 302 U. S. 34, 56 S. Ct. 61, 82 L. Ed. 32; Helvering v. Tex-Penn Oil Co., supra, footnote 22; Helvering v. Salvage, supra, footnote 26; Mahaffy v. Helvering, (1944 C.C.A. 8) 140 F. (2d) 879; Thomas v. Commissioner; supra, footnote 46, ". . . findings of fact by the Board will not be overturned unless they are clearly contrary to the weight of the evidence." See also, Andrews v. Commissioner, (1943 C.C.A. 2) 135 F. (2d) 314 and Jacob v. Commissioner, (1943 C.C.A.) 139 F. (2d) 277, where decisions of the Tax Court were also held unsupported by the evidence.

[57]Fritizinger Co., Inc. v. Commissioner, (1943 C.C.A. 3) 139 F. (2d) 486; Trico Products Corporation v. Commissioner, (1943 C.C.A. 2) 137 F. (2d) 424, where the result reached by the Tax Court is reasonable and arrived at with "due regard for the right of the parties to be heard fully and fairly upon all issues," the result will not be changed. See also, Capital-Barg Dry Cleaning Co. v. Commissioner, (1942 C.C.A. 6) 131 F. (2d) 712.

We have just considered most of the important rules of procedure followed by the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia on appeals from the Tax Court as to treatment given to findings of fact made by this tax tribunal. Now, it is important and necessary to attempt an analysis of what are considered "Findings of Fact" conclusive upon the Circuit Courts of Appeals in reviewing decisions of the Tax Court. This problem has been a difficult one not only on review of tax decisions but also in judicial review of decisions of other administrative agencies. It is important that findings of fact be clearly distinguished from "conclusions of law" since it is the purpose in the creation of administrative agencies that their findings be given conclusiveness when reviewed by the courts. They are composed of experts in the special situations which come before them for decision; therefore, their determination of facts should be conclusive so that the courts will be relieved of intricate fact problems which such agencies are better adapted to solve. Findings of fact by the Tax Court have been said to be comparable to those made by a jury with the guiding instructions of the Court.[58]

In considering what kind of findings by the Tax Court are of pure fact and therefore conclusive upon the Circuit Court of Appeals, it is clear that all findings of primary facts, sometimes called evidentiary facts, are within this rule. They have been defined as determinations without reference to any rule or standard promulgated by the government as its body of law. Thus, questions of fact are said not to be dependent upon any of the rules of law emanating from the separate branches of government, the legislative, executive, or judicial.[59] Therefore, where the administrative tribunal determines the existence of facts with no regard for consequences which the government may give to the findings, they are conclusive upon a reviewing court. These findings involve the events of the case as they actually happened such as in what year certain incidents occurred to make a debt worthless and whether it was so ascertained to be worthless in the year in which the taxpayer took the deduction,[60] the determination of the fair

[58]Helvering v. Johnson, (1939 C.C.A. 8) 104 F. (2d) 140, 144, affirmed per curiam, (1939) 308 U. S. 523, 60 S. Ct. 293, 84 L. Ed. 443.

[59]Law and Fact in Judicial Review, (1943) 55 Harv. L. Rev. 899.

[60]Green v. Commissioner, (1943 C.C.A. 10) 133 F. (2d) 76, findings by the Tax Court that the taxpayer knew bonds held by him had matured with principal and interest not paid, that the corporation was in receivership, and that delinquent taxes stood against the corporation's property before the year in which he took the deduction; held, findings of fact. San Joaquin Brick Co. v. Commissioner, (1942 C.C.A. 9) 130 F. (2d) 220,

market value or lack of it of stock and in what year incidents occurred making the stock worthless,[61] whether a corporation was "availed of" for the purpose of preventing imposition of a surtax on its stockholders through a medium of accumulating profits,[62] and whether certain events occurred permitting a deduction under the applicable statutory provision.[63]

Findings of ultimate facts are distinguished from findings of primary facts by many courts since the ultimate facts are arrived at from evaluating the primary facts. The distinction is complicated by the use of the terms "ultimate findings" interchangeably with or in place of "ultimate facts."[65] Although it appears from some decisions that ultimate "facts" or "findings" are judicially reviewable in a tax case, in the sense that such court can substi-

held, no substantial evidence to support the Tax Court's finding that the taxpayer ascertained the worthlessness of mortgage bonds before the year in which he took the deduction. Malden Trust Co. v. Commissioner, (1940 C.C.A. 1) 110 F. (2d) 751, involved a Tax Court's finding as to the year in which incidents of worthlessness of certain promissory notes occurred and in what year these incidents were discovered by the taxpayer. See also, Harris v. Commissioner, infra, footnote 142.

[61]Mott v. Commissioner, (1943 C.C.A. 6) 139 F. (2d) 317, finding by the Tax Court of market value of stock based on the average of the high and low quotation of sales of similar stock on the New York Stock Exchange; held, finding of fact. In U. S. v. State Street Trust Co., (1942 C.C.A. 1) 124 F. (2d) 948, a finding of the District Court that certain stock had no market value because it was highly speculative, subject to violent fluctuations, the earnings covering it were thin, and because it could not be sold for a year was upheld. San Joaquin Brick Co. v. Commissioner, supra, footnote 60, finding in what year incidents of worthlessness occurred; held, one of fact.

[62]Helvering v. National Grocery Co., supra, footnote 44; Helvering v. Chicago Stockyards Co., (1943) 318 U. S. 693, 63 S. Ct. 843, 87 L. Ed. 1086; Becton, Dickinson & Co. v. Commissioner, (1943 C.C.A. 3) 134 F. (2d) 354; Olin Corporation v. Commissioner, (1942 C.C.A. 7) 128 F. (2d) 185, applied to common law trust; Commissioner v. DeMille Productions, Inc., (1937 C.C.A. 9) 90 F. (2d) 12.

[63]Lenox Clothes Shops v. Commissioner, supra, footnote 47, to allow salary deductions, it must be decided whether the payment was salary or other compensation, whether personal services were actually rendered, and whether the payment was reasonable. Leicht v. Commissionr, supra, footnote 18, to allow worthless debt deductions, findings of fact must be made as to the year when the incidents of worthlessness occurred and when the taxpayer actually ascertained the worthlessness. See also cases in footnotes 60 and 61.

[64]In Dobson v. Commissioner, supra, footnote 2, the Supreme Court states this complicates the use of a standard for distinguishing what decisions of the Tax Court are reviewable. In U. S. v. State Street Trust Co., supra, footnote 61, the distinction between ultimate and primary facts is called a "baffling problem."

[65]Helvering v. Tex-Penn Oil Co., supra, footnote 22; Commissioner v. Meridan and Thirteenth Realty Co., (1942 C.C.A. 7) 132 F. (2d) 182; San Joaquin Brick Co. v. Commissioner, supra, footnote 60; Commissioner v. Boeing, supra, footnote 20.

tute its judgment of these facts for that of the Tax Court,[66] this statement is not always applicable. True, some findings of ultimate facts by the Tax Court are not conclusive upon appeal, but this is because such findings are in reality "conclusions of law" and, therefore, the Circuit Court of Appeals has statutory authority to reverse the Tax Court when such findings are erroneous in law.[67] Nor can it be stated unqualifiedly that all ultimate facts are conclusive upon the Circuit Courts of Appeals as findings of fact,[68] since they may be conclusions of law as stated or a mere determination of fact.[69]

Although most courts are in agreement that findings as to motive or intent,[70] as well as the happening of events, are primary facts findings, they are not in agreement as to other types of findings. One such finding is as to whether the petitioner has conducted a trade or business within the applicable tax statute. For example, in *Fuld v. Commissioner*[71] the issue was whether taxpayers who changed their system of dealing in securities from one of investment before October 9, 1930 to one of speculation after that time, could offset losses incurred in 1933 through the sale of securities which were held before October 9, 1930, as investments, against profits realized in 1933 from the sale of securities held for speculation. The Tax Court held that the taxpayers were engaged in a business on and after October 9, 1930, but that the securities purchased prior to that time and sold in 1933 were capital assets as defined in section 101(c)(8) of the Revenue Act of 1932, held only for liquidation and not for sale in the course of trade or business. Thus, the losses in respect to these securities were not allowed to be set off against the profits on the sale of securities

[66]Commissioner v. Meridan & Thirteenth Realty Co., supra, footnote 65; Sitterding v. Commissioner, (1936 C.C.A. 4) 80 F. (2d) 939; U. S. v. State Street Trust Co., supra, footnote 61, where appeal was from the U. S. District Court.

[67]Helvering v. Tex-Penn Oil Co., supra, footnote 22; Commissioner v. Meridan & Thirteenth Realty Co., supra, footnote 65; San Joaquin Brick Co. v. Commissioner, supra, footnote 60; Commissioner v. Boeing, supra, footnote 20; Helvering v. Johnson, supra, footnote 58.

[68]Fackler v. Commissioner, (1943 C.C.A. 6) 133 F. (2d) 509; Anderson v. Commissioner, (1935 C.C.A. 9) 78 F. (2d) 636.

[69]Thomas v. Commissioner, (1943 C.C.A. 5) 135 F. (2d) 378.

[70]Welsbach Engineering v. Commissioner, (1944 C.C.A. 3) 140 F. (2d) 584, as to intentions of parties to a contract; Hoboken Land & Improvement Co. v. Commissioner, (1943 C.C.A. 3) 138 F. (2d) 104, as to whether revenue agent was misled; MacManus et al v. Commissioner, (1942 C.C.A. 6) 131 F. (2d) 670, as to grantor's intention; Helvering v. Superior Wines & Liquors, Inc. (1943 C.C.A. 8) 134 F. (2d) 373, as to reasonableness of salaries.

[71](1943 C.C.A. 2) 139 F. (2d) 465.

held for speculation only. The Circuit Court of Appeals affirmed the order of the Tax Court and held that the decision of the Tax Court might be reviewed only as to questions of law. This Court said the inference to be drawn from the various transactions was one of fact so the findings of the Tax Court that the securities were not held for sale in the course of business must prevail, and "if the activities of either taxpayer were of the sort that would constitute a trade or business, the extent sufficient to bring them within the category of 'capital assets' as defined in section 101(c)(8), supra, was a question for the Tax Court."[72] However, whether a certain enterprise was the conduct of a trade or business within the Internal Revenue Code has also been held to be a conclusion of law or at least one of mixed law and fact and reviewable.[73] It has been held that whether or not the settlor of a trust retained sufficient incidents of control over the trust to make him its owner was a question of fact for the Tax Court to determine.[74] But again, it also has been held that determinations of ownership of the principal of the trust and title to the income therefrom are conclusions of law or at least of mixed law and fact.[75]

Another type of finding by the Tax Court which sometimes has been held conclusive as a finding of fact and sometimes as a conclusion of law is the effect of a transfer of property or money between or by corporations or persons. For example, in *Wilmington Trust Company v. Helvering,*[76] a finding by the Tax Court that

[72]See also, Deputy v. DuPont, (1940) 308 U. S. 488, 60 S. Ct. 363, 84 L. Ed. 416; Helvering v. Prentice, (1943 C.C.A. 3) 139 F. (2d) 691; Waldburger v. Commissioner, (1942 C.C.A. 2) 131 F. (2d) 598; Mead v. Commissioner, (1942 C.C.A. 5) 131 F. (2d) 323, whether a partnership existed; Commissioner v. Vandergrift Realty & Investment Company, (1936 C.C.A. 9) 82 F. (2d) 387, whether a trust was engaged in business during a specified period.

[73]For example see, Cecil v. Commissioner, (1939 C.C.A. 4) 100 F. (2d) 896 and Washburn v. Commissioner, (1931 C.C.A. 8) 51 F. (2d) 949. Whether a trust be classified as such or as an association for tax purposes, held, a question of law, Commissioner v. Vandergrift Realty & Inv. Co., supra, footnote 72. Also question whether a partnership existed, held, one of fact, Wickham v. Commissioner, (1933 C.C.A. 8) 65 F. (2d) 527; compare Waldburger v. Commissioner and Mead v. Commissioner, supra, footnote 72. Also see, Underwriters Lab., Inc. v. Commissioner, (1943 C.C.A. 7) 135 F. (2d) 371, where question was whether taxpayer was a charitable organization within exemption, held, one of fact.

[74]Helvering v. Stuart, (1942) 317 U. S. 154, 63 S. Ct. 140, 87 L. Ed. 154, where case was remanded to Tax Court for finding whether grantor retained control; Katz v. Commissioner, (1943 C.C.A. 7) 139 F. (2d) 107; Bush v. Commissioner, (1942 C.C.A. 2) 133 F. (2d) 1005; Williamson v. Commissioner, (1942 C.C.A. 7) 132 F. (2d) 489.

[75]Infra, footnotes 119, 122, and 123.

[76](1942) 316 U. S. 164, 62 S. Ct. 984, 86 L. Ed. 1352.

certain sales of stock by the taxpayer were ordinary sales and not "short" sales was treated as a finding of fact. Also whether distributions made by a corporation to its stockholders were of corporate earnings taxable as a dividend to the stockholders was treated as a question of fact for the Tax Court to determine.[77] Disagreement among the courts also has resulted over the problem of whether a finding by the Tax Court that a certain payment or distribution was a gift is a finding of fact or law. In a few cases it has been held one of fact.[78]

Finality of Tax Court findings has been more recently considered by the United States Supreme Court in *Dobson v. Commissioner*[79] which has been regarded as the most important of all 1943 tax decisions,[80] not because of any decision regarding the tax law itself, but because of the clarification by the Supreme Court of the status of the Tax Court in the field of tax litigation. Although this case was a consolidation of four cases, the Supreme Court set forth the issues of one as common to all. The taxpayer bought three hundred shares of stock in 1929; in 1930, he sold one hundred shares, with a deductible loss of $41,600.80 which was allowed in that year. In 1931, he sold another one hundred shares, with a deductible loss of $28,163.78 which was allowed in that year. Later in 1936 he discovered that he had been induced by fraudulent representations to purchase the stock. He then sued for a rescission of the entire sale. The suit was settled in 1939, and he received $23,296.45 for the loss of 1930 and $6,454.18 for the 1931 loss. The taxpayer did not report this as income in 1939. The statute of limitations had barred any adjustment of the 1930 and 1931 returns, but even if this recovery by settlement had been added to the proceeds of that received in 1930 and 1931, the returns for those years still would have showed net losses. The Commissioner added this sum to his 1939 return as ordinary gain at-

[77]Palmer v. Commissioner, (1937) 302 U. S. 63, 58 S. Ct. 67, 80 L. Ed. 50; Commissioner v. Cohen, (1941 C.C.A. 5) 121 F. (2d) 348, whether payments to the taxpayer were dividends or advances, held, a question of fact; Helvering v. Lazarus & Co., supra, footnote 51, whether transaction was a sale or lease, held, question for Tax Court.

[78]For example see, Thomas v. Commissioner, supra, footnote 69, a finding that a $25,000.00 payment was compensation for services and not a gift, regarded as one of fact. See also, Poorman v. Commissioner, (1942 C.C.A. 9) 131 F. (2d) 946. However, see infra, footnotes 130, 131, and 132.

[79](1944) 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. adv. ops. 179. For a thorough and searching analysis of the Dobson case see, Dobson v. Commissioner: The Strange Ways of Law and Fact by Randolph E. Paul, (1944) 57 Harv. L. Rev. 753.

[80]A Review of Important Federal Tax Decisions of 1943, by S. J. Sherman, (1944) 22 Taxes 118.

tributable only to the shares sold. The taxpayer contended it was a capital return with no tax benefit from the 1930 and 1931 deductions. The Tax Court sustained the taxpayer and held he received no taxable gain from the settlement.[81] The Circuit Court of Appeals held the reasoning of the Tax Court in applying the "tax benefit" theory to be contrary to law and reversed the Tax Court.[82] It held that the recoveries were neither capital return nor capital gain, but ordinary income in the year received. The Supreme Court, after setting forth the history of the Tax Court and the reasons why the courts had not given its decisions the degree of finality other administrative decisions had been given by the courts, reversed the Circuit Court of Appeals, holding no statute or regulation compelled the Tax Court "to find taxable income in a transaction where as a matter of fact it found no economic gain and no use of the transaction to gain tax benefit."[83] The Supreme Court goes on to hold that the Circuit Court of Appeals erred when it treated this problem as involving a rule of law whereas it involved "only a question of proper tax accounting," that the Tax Court could go to prior years to determine this fact, and that in doing so, it did not reopen any closed transaction.

The importance of the *Dobson Case* is in its effort to settle the problem of inconsistency and non-uniformity in the field of tax litigation as a result of the Circuit Courts of Appeals deciding questions which should finally be decided by the Tax Court, and therefore, to give to the Tax Court a prestige enjoyed by other administrative tribunals.[84] The decision emphasizes that in considering questions of fact the Tax Court has primary authority, and that "conflicts are multiplied by treating as questions of law what are really disputes over proper accounting."[85]

A case decided by the Supreme Court the same day as the *Dobson Case* was *Commissioner v. Heininger*.[86] In this case the Court held that since the Tax Court wrongly believed it was

[81] 46 B.T.A. 765.

[82] (1943 C.C.A. 8) 133 F. (2d) 732.

[83] 320 U.S. 489 at 506, 64 S. Ct. 239 at 247.

[84] The Supreme Court states: "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." 320 U. S. 489 at 495, 64 S. Ct. 239 at 243.

[85] The effect of the Dobson case is given by S. J. Sherman, supra, footnote 80, as follows: "In plain parlance, it means that, in most cases, the taxpayer will have to convince the Tax Court of the merits of his case and not count too heavily on securing a reversal of an unfavorable Tax Court decision, through the avenues of appeal."

[86] (1943) 320 U. S. 467, 64 S. Ct. 249, 88 L. Ed. adv. ops. 197.

compelled by law to disallow a deduction as an ordinary and necessary business expense, the cause should be remanded to it to decide this question as one of pure fact.

Other Supreme Court opinions on the procedural problem of finality of Tax Court decisions also have been rendered since the *Dobson Case.* One of these cases was *Dixie Pine Products Co. v. Commissioner,*[87] wherein the Supreme Court upheld the Tax Court in disallowing a deduction for a contingent liability in a taxable year, where the taxpayer was on an accrual basis, since the Tax Court applied the correct rule of law in its determination and since it was in line with proper tax accounting practice; therefore, the Tax Court's determination was entitled to the finality indicated by the *Dobson Case.*

The next Supreme Court decision after the *Dobson Case* was in *Equitable Life Assurance Society of U. S. v. Commissioner,*[88] wherein the issue was whether the petitioner, a mutual life insurance company, was entitled to deduct from its gross income certain excess interest dividends paid within the taxable year. Such payments were deductible if they were within the term "interest" paid on indebtedness as set forth in the applicable Revenue Act.[89] The Court held the question was one of fact for the Tax Court to determine and that it could not say as a matter of law that the payments here involved were within the term "interest" as commonly understood.

The Circuit Courts of Appeals also have rendered several important decisions since the *Dobson Case.* In these cases they are now treating numerous and diverse questions of proper tax accounting as involving questions of fact. For example in *Hunter v. Commissioner,*[90] the character of payments received on an option agreement for purchase of stock was involved. The Court held that under the statute the question for determination was not one of law but one of proper tax accounting. Again, in *Repplier Coal Co. v. Commissioner*[91] the question before the Court was whether an expense in constructing a mining tunnel was a capital expenditure as the Tax Court held or whether the cost was an ordinary and necessary business expense as the taxpayer contended. The Court held that "in so far as the problem at hand involves rules of

[87](1944) 320 U. S. 516, 64 S. Ct. 364, 88 L. Ed. adv. ops. 209.
[88](1944) 321 U. S. 560, 64 S. Ct. 722, 88 L. Ed. adv. ops. 603.
[89]Revenue Act of 1932, 47 Stat. 169, 225, c. 209, U. S. C. A. Int. Rev. Acts, (1940 ed., p. 548).
[90](1944 C.C.A. 5) 140 F. (2d) 954.
[91](1944 C.C.A. 3) 140 F. (2d) 554.

accounting, the determination of the appropriate rule of accounting is a matter solely within the Tax Court's competence under the Dobson decision. The amount of the expenditure, the nature of the improvement, its effect on the value of the mine, these and others are factors for the Tax Court to weigh in determining the accounting rule to be applied."[92]

In *Denholm & McKay Realty Co. v. Commissioner*[93] the Circuit Court of Appeals for the first circuit dealt with the *Dobson Case* but was very outspoken in expressing its doubt as to just what was decided by the Supreme Court in that case. The Court admitted in this case that the Tax Court's decision might have been wrong in view of the *Dobson Case* but did not know if that case meant to "introduce a revolutionary limitation" upon the courts in reviewing decisions of the Tax Court or if it meant merely to reemphasize that according to the statute decisions of the Tax Court could be reversed only if not in accordance with law. This question, said the Court, is one "which will no doubt perplex the Circuit Courts of Appeals until further light is shed upon the *Dobson Case* by later decisions of the Supreme Court." Consequently, it seems that although the Supreme Court has made a sincere effort to clear up these perplexing problems, some of the Circuit Courts of Appeals have not been enlightened to any great degree.

Conclusions of Law and Mixed Questions of Law and Fact

In considering a distinction between the terms "fact" and "law" as the dividing line of judicial review, one must do so "knowing how tenuous the distinction between them is."[94] Some have rejected the distinction completely.[95] But it is still generally contended that questions of law should be reviewed by the courts since it is in this that lawyers and judges are expert.[96] Questions of law usually involve determination of whether the government through its legislative, executive, or judicial departments has

[92] 140 F. (2d) 554 at 556. Still another such case is Commissioner v. Capento, (1944 C.C.A. 1) 140 F. (2d) 382, where a corporate reorganization was involved. The Court said "This would seem to be 'only a question of proper tax accounting.'"

[93] (1944 C.C.A. 1) 139 F. (2d) 545.

[94] Landis, The Administrative Process, p. 145.

[95] Dickinson, Administrative Justice and the Supremacy of the Law in the United States, (1927) p. 45.

[96] "Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions. It is from that very desire that the nature of questions of law emerges." Landis, The Administrative Process, p. 152.

promulgated any standard or rule governing a certain fact situation and whether such rule as interpreted is conformed with or violated.[97]

The distinction between "law" and "fact" is a difficult judicial limitation to apply when a court is endeavoring to decide whether it may substitute its findings for that of the Tax Court or must accept the Tax Court finding as conclusive. This we have seen in considering the cases in which the courts have held that the findings of the Tax Court were those of fact. Before discussing the cases in which this difficulty has been more apparent and in which the courts have held that the finding of the Tax Court involved a conclusion of law, let us consider some of the cases in which the reviewing court has been rather certain that it could substitute its judgment for that of the Tax Court. It is settled that the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia can reverse the Tax Court and substitute their own judgment for a Tax Court decision which is a "conclusion of law."[98] This is because as to questions of law it is the judiciary which is the expert and not the administrative agency. Thus, where the question is whether the rule against perpetuities is violated according to the law of the State involved, it is clear that the determination turns on an unmistakable question of law as defined by the recent *Dobson* and *Heininger Cases.*[99] As we have seen, the determination of fair market value of property or stock is a question of fact;[100] but just as settled is the rule that the determination of the standard to be invoked in measuring this market value is a question of law. Thus, in *Powers v. Commissioner*,[101] wherein the Commissioner claimed the value of insurance policies for gift tax purposes was the cost of duplicating them at the dates

[97]But when the question involves merely consideration of whether the facts in the particular case conform to the "law" as previously defined and interpreted without further elaboration as to the extent of the rule to meet facts not in issue, then, such determination can be made by the Tax Court as the fact-finding agency. Supra, footnotes 60, 61, 62 and 63. For other discussions of what are questions of law see: Law and Fact in Judicial Review, (1943) 56 Harv. L. Rev. 899; Rosenberry, Power of the Courts to Set Aside Administrative Rules and Orders, (1938) 24 Am. Bar Assn. Jr. 279. Dickinson, Administrative Justice and the Supremacy of the Law in the United States.

[98]One of the earlier cases on this is Avery v. Commissioner, (1927 C.C.A. 6) 22 F. (2d) 6, where the appeal was from a U. S. District Court. Most recent important decision reemphasizing this statutory rule is the Dobson case, supra, footnote 79.

[99]Smith's Estate v. Commissioner, (1944 C.C.A. 3) 140 F. (2d) 759, where the rule against perpetuities of the law of Pennsylvania was involved.

[100]Supra, footnote 61.

[101](1941) 312 U. S. 259, 61 S. Ct. 509, 85 L. Ed. 817.

of the gifts, the Tax Court took a different position and held the value was their cash surrender. The Supreme Court upheld a reversal by the Cricuit Court of Appeals of the Tax Court's decision on the basis that the question of what criterion should be employed for determining the value of the gifts is a question of law.[102]

It is equally well settled that construction to be given to written documents involves a determination based on law.[103] One of the recent cases holding this is *Welsbach Engineering Corporation v. Commissioner*[104] wherein the legal construction to be given to a contract was involved.[105] It is also rather generally agreed that where the facts require interpretation of a statute, the conclusion is one of law and for the final adjudication by the reviewing court.[106] This was reiterated recently in *Repplier Coal Co. v. Commissioner*[107] wherein interpretation of the word "allowed" was involved in considering depreciation under a section of the tax law.[108] It was held in that case that this is a legal point within the recent *Heininger Case* and that the meaning given the term by the Supreme Court must be followed as the ultimate authority.

Another similar judicial proposition commonly applied by the courts is that the legal effect to be given to the facts as found by the Tax Court is a question of law and one properly within the scope of review by the Circuit Courts of Appeals. Thus, in *Helvering v. Price*[109] the issue was whether payment by a promissory note, replacing a previous one, to remove a liability on a guaranty was a loss sustained during the taxable year. The Supreme Court

[102]See also: Helvering v. Maytag, (1942 C.C.A. 8) 125 F. (2d) 55; U. S. v. State Street Trust Co., supra, footnote 61; and Becker v. Anheuser-Busch, Inc., (1941 C.C.A. 8) 120 F. (2d) 403, where appeal was from the U. S. District Court.

[103]MacManus et al v. Commissioner, supra, footnote 70, where the Court assumed interpretation of a trust declaration was a question of law; Commissioner v. Buck, (1941 C.C.A. 2) 120 F. (2d) 775; Midwood Associates v. Commissioner, (1940 C.C.A. 2) 115 F. (2d) 871; Union Trust Co. v. Commissioner, (1936 C.C.A. 3) 84 F. (2d) 386.

[104](1944 C.C.A. 3) 140 F. (2d) 584.

[105]See also, Crabb v. Commissioner, (1941 C.C.A. 5) 121 F. (2d) 1015.

[106]Eljer v. Commissioner, (1943 C.C.A. 3) 134 F. (2d) 251, where Court applied proper rules of law to allow deduction for worthless debt; Busser v. U. S., (1942 C.C.A. 3) 130 (2d) 537, whether overpayment of taxes was one within meaning of statute providing for interest on overpayments, held, question of law. See also, Black Motor Co., Inc. v. Commissioner, supra, footnote 33; Marsh v. Commissioner, (1940 C.C.A. 7) 110 F. (2d) 423.

[107]Supra, footnote 91. However, compare Equitable Life Assurance Society of U. S. v. Commissioner, supra, footnote 88.

[108]Section 113(b)(1)(B) of the Revenue Acts of 1934 and 1936; 26 U. S. C. A. Int. Rev. Acts, pp. 700 and 865, made applicable in this case by sections 23(n), 114(a) and 113(a).

[109](1940) 309 U. S. 409, 60 S. Ct. 673, 84 L. Ed. 836.

held, in affirming the Tax Court and reversing the Circuit Court of Appeals, that it was not such a loss and said that where payment is found as a fact by the Tax Court, disclosing the entire transaction, its legal effect in the application of section 23(e) of the Revenue Act of 1932, as to deduction of losses sustained during the taxable year, was reviewable in the Circuit Court of Appeals and in the Supreme Court.[110] As we have seen, it is within the province of the Tax Court to make findings of fact; however, where there is no dispute regarding the evidence, it is held that the Circuit Courts of Appeals can determine the legal effect of such facts upon review.[111] In most of these situations the problem for the Circuit Courts of Appeals is one of construction.[112]

A judicial principle frequently set forth by the courts in reviewing decisions of the Tax Court is that whether the findings of fact are supported by substantial evidence is a question of law and for the determination by the reviewing court. Thus, it was held in a rather early case on judicial review of decisions of the Board of Tax Appeals that such an inquiry "touches matters of law."[113] Although this rule is also well settled, it has been pointed out that even if the result of this procedure is correct, the reasoning is not, since the character of questions as fact does not change because there is no substantial evidence to support the finding and that it would be better to say frankly the question remains one of fact but because of judicial policy it is reserved for judicial determination.[114]

The judicial considerations set forth thus far as to what find-

[110]See also, Commissioner v. Giannini, (1942 C.C.A. 9) 129 F. (2d) 638, effect of taxpayer's refusal to accept compensation, held, a question of law; Dugesne Club v. Bell, (1942 C.C.A. 3) 127 F. (2d) 363, whether club was a social club within statute, held, a question of law on appeal from the U. S. District Court; Commissioner v. Boeing, supra, footnote 20.

[111]Farmer v. Commissioner, supra, footnote 51; Ross v. Commissioner, (1942 C.C.A. 5) 129 F. (2d) 310; Bynum v. Commissioner, (1940 C.C.A. 5) 113 F. (2d) 1. However, where the ultimate finding by the Tax Court is of plain fact, the reviewing Court will accept it as conclusive, Helvering v. Johnson, supra, footnote 58.

[112]Shilkret v. Helvering, (1943 U. S. App. D. C.) 138 F. (2d) 125; Eastern Fuel Associates v. Commissioner, (1942 C. C. A. 1) 128 F. (2d) 369, where the Court said: "There is no disagreement as to the facts before us and since a determination of the issue depends upon the construction of documentary evidence, we are free to disregard the reasoning of the Board and place our own interpretation upon the evidence in question." See also, Exmoor Country Club v. U. S., (1941 C.C.A. 7), where appeal was from the U. S. District Court.

[113]Bishoff v. Commissioner, (1928 C.C.A. 3) 27 F. (2d) 91. See also, Folk v. Commissioner, (1933 C.C.A. 10) 67 F. (2d) 779; Lucas v. Mercantile Trust Co., (1930 C.C.A. 8) 43 F. (2d) 39.

[114]Law and Fact in Judicial Review, (1943) 56 Harv. L. Rev. 899.

ings of the Tax Court are reviewable conclusions of law are fairly well settled and are not the ones which give the reviewing courts difficulty. Since many of the findings of the Tax Court involve both law and fact together, the reviewing courts have had great difficulty which has caused much of the lack of uniformity that the Supreme Court tried to solve in the *Dobson Case*. Thus, since many cases involved determinations by the Tax Court which could not be separated as to law and fact, a judicial principle that such determinations were of mixed law and fact and therefore reviewable, used by reviewing courts as to decisions of other administrative agencies, had been applied to decisions of the Tax Court.[115] A good illustration of this type of finding is a determination of domicile involved in a case. In order to determine a person's domicile, his actual presence and present intention must be considered according to the appropriate state law; this is a finding of mixed law and fact.[116] Most of the courts using this type of procedural device in reviewing Tax Court decisions do not hold them to be definitely involving law or fact but hold they are conclusions of law or, as an afterthought, at least a determination of a mixed question of law and fact.[117] Where this "way out" for the courts had not been used, there was conflict between various decisions of the Circuit Courts of Appeals. Some Circuit Courts have held certain findings of the Tax Court conclusive upon them, whereas others have held the same type of findings reviewable conclusions of law.

Findings with regard to the taxation of income from trusts have been treated differently by the courts. It has been seen that in some cases findings by the Tax Court taxing the settlor of the trust on its income have been held findings of fact.[118] But as pointed out, they also have been considered as conclusions of law. In *Phipps v. Commissioner*,[119] wherein the income beneficiary had an adverse interest to the grantor making the grantor not taxable

[115]Helvering v. Rankin, supra, footnote 28; Helvering v. Tex-Penn Oil Co., supra, footnote 22; Bogardus v. Commissioner, supra, footnote 56; Lohman v. Commissioner, (1943 C.C.A. 8) 133 F. (2d) 977; Ross v. Commissioner, supra, footnote 111.

[116]Shilkret v. Helvering, supra, footnote 112; Pace v. District of Columbia, (1943 U. S. App. D. C.) 135 F. (2d) 249; Sweeney v. District of Columbia, (1940 U. S. App. D. C.) 113 F. (2d) 25.

[117]Helvering v. Tex-Penn Oil Co., supra, footnote 22; Bogardus v. Commissioner, supra, footnote 56; Commissioner v. Boeing, supra, footnote 20; Becker v. Anheuser-Busch, Inc., supra, footnote 102.

[118]Supra, footnote 74.

[119](1943 C.C.A. 2) 137 F. (2d) 141.

on the income under section 166 of the Internal Revenue Code and wherein the Tax Court did not reach its decision upon this section, the Court held the decision of the Tax Court was erroneous and that it was not obliged to follow it. However, the Court recognized that the decision of *Helvering v. Stuart*[120] indicates that in such a case as this the views of the Tax Court are to be given considerable weight even as to questions of law. Most of the conflict in these trust cases centers around the problem of whether the settlor retained sufficient incidents of control to make him the owner of the trust res. Although findings by the Tax Court on this question have been held to be those of fact,[121] many other Circuit Courts of Appeals have held them to be conclusions of law.[122] They sustain this view on the theory that the issue almost invariably turns on an interpretation of a written document which is a question of law that the reviewing Court is free to determine for itself.[123]

A further conflict between the courts arises over Tax Court decisions regarding the classification of a transfer of property either as a sale, a special type of exchange, or a reorganization. Many of such findings have been regarded as conclusive upon the Court.[124] But they have equally been treated as reviewable conclusions of law.[125] In the leading case of *Helvering v. Tex-Penn Oil Company*,[126] the question was whether a certain reorganization came within the non-recognition of gains section of the tax law as a tax-free exchange. The Tax Court's "ultimate findings" that the exchange was taxable had been reversed by the Circuit Court of Appeals. The Supreme Court affirmed the Circuit Court and held that the Tax Court's "ultimate findings" were conclusions of law

[120](1942) 317 U. S. 154, 63 S. Ct. 140, 87 L. Ed. 154.

[121]Supra, footnote 74. See also, Commissioner v. Armour, (1942 C.C.A. 7) 125 F. (2d) 467; Commissioner v. Goulder, (1941 C.C.A. 6) 123 F. (2d) 686.

[122]Helvering v. Bok, (1942 C.C.A. 3) 132 F. (2d) 365; Brown v. Commissioner, (1942 C.C.A. 3) 131 F. (2d) 640, where the Court strongly contends a determination of ownership is a conclusion of law; Commissioner v. Wilson, (1942 C.C.A. 7) 125 F. (2d) 307; U. S. v. Anderson, (1942 C.C.A. 2) 132 F. (2d) 98, where appeal was from U. S. District Court.

[123]Commissioner v. Buck, (1941 C.C.A. 2) 120 F. (2d) 775.

[124]Supra, footnotes 76 and 77.

[125]For example, Commissioner v. Meridan & Thirteenth Realty Co., (1942 C.C.A. 7) 132 F. (2d) 192, whether a corporate distribution was a dividend or an interest payment, held, a conclusion of law. Thurber v. Commissioner, (1936 C.C.A. 1) 84 F. (2d) 815, whether a sale or merger, held, a question of law.

[126](1937) 300 U. S. 481, 57 S. Ct. 569, 81 L. Ed. 755.

or at least determinations of mixed law and fact.[127] However, a more recent case, *Commissioner v. Capento,*[128] has held that where the taxpayer exchanged bonds of one corporation for preferred stock in the same corporation, the Tax Court's finding of a recapitalization, which under the applicable tax law was a reorganization, was a question only of proper accounting according to the *Dobson Case.* Consequently, the trend of decisions appears to regard such Tax Court findings on corporate reorganization as conclusive upon the Circuit Courts of Appeals.

Finally, conflict between the courts in reviewing Tax Court decisions is apparent from consideration of the cases dealing with findings by the Tax Court as to whether certain distributions or payments were taxable or exempt gifts. It has been noted that these findings have been held to be those of fact.[129] But like the findings just discussed, they also have been held to be reviewable and not conclusive upon the reviewing court. In the leading case of *Bogardus v. Commissioner*[130] it was held that whether certain distributions made by stockholders of one corporation to employees of another company were compensation and taxable or an exempt gift was a reviewable question of law, or at least one of mixed law and fact.[131] But the Supreme Court in a more recent case again took up this question in *Helvering v. American Dental Company*[132] wherein the taxpayer was forgiven by his creditor certain sums due for rent and interest. The taxpayer claimed these were not taxable as income because they were exempt gifts under section 22(b)(3) of the Revenue Act of 1936. The Tax Court held that the forgiveness did not constitute any gift and that no evidence was introduced to show a donative intent upon the part of any creditor; but instead, the creditor acted for purely business reasons and did not forgive the debts for altruistic reasons or out of pure generosity.[133] The Supreme Court, however, held that the forgiveness was a gift and said: "We do not feel

[127] See also, Commissioner v. Segall, (1940 C.C.A. 6) 114 F. (2d) 706; Commissioner v. So. Bell T. & T. Company, (1939 C.C.A. 6) 102 F. (2d) 397; Helvering v. Elkhorn Coal Co., (1938 C.C.A. 4) 95 F. (2d) 732; Schuh Trading Co. et al v. Commissioner, (1938 C.C.A. 7) 95 F. (2d) 404.

[128] (1944 C.C.A. 1) 140 F. (2d) 382.

[129] Supra, footnote 78.

[130] (1937) 302 U. S. 34, 56 S. Ct. 61, 62 L. Ed. 32.

[131] See also, Poorman v. Commissioner, (1942 C.C.A. 9) 131 F. (2d) 946; Wilkie v. Commissioner, (1942 C.C.A. 6) 127 F. (2d) 953; Commissioner v. Montague, (1942 C.C.A. 6) 126 F. (2d) 948; Hawke v. Commissioner, (1940 C.C.A. 9) 109 F. (2d) 946.

[132] (1943) 318 U. S. 322, 63 S. Ct. 577, 87 L. Ed. 785.

[133] 44 B. T. A. 425.

bound by the finding of the Board (Tax Court) because it reached its conclusions, in our opinion, upon an application of erroneous legal standards. Section 22(b)(3) exempts gifts. This does not leave the Tax Court of the United States free to determine at will or upon evidence and without judicial review the tests to be applied to facts to determine whether the result is or is not a gift. The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute"[134] However, the dissenting judges took the position that, in the absence of a specific provision in the statute exempting something from income. it is within the powers of the Tax Court to find whether an item is income by determining the controverted facts and the reasonable inferences therefrom, and that the Tax Court knew the difference between taxable income and gifts.

The problem of mixed law and fact which has caused most of the difficulty in the above cases would seem one which could be solved if the lower tribunals stated the issues specifically, setting out the facts and the particular law involved. The Supreme Court indicated its approval of such a procedure when it stated in the *Dobson Case* that "it is the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law."[135]

Although the *Dobson Case* has been fully discussed as to its facts elsewhere,[136] it would be appropriate here to state the views of the Supreme Court in this important case as to when a court can substitute its judgment for the decision of the Tax Court. As we have seen, this case restricted this power of the Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia because of the confusion and conflict which has been discussed herein and in order to make the tax decisions more uniform.[137] The Supreme Court's solution of this

[134]318 U. S. 322 at 330 and 331.

[135]320 U. S. 489 at 502.

[136]Supra, pages 200 and following.

[137]The Supreme Court in the Dobson case states: "After thirty years of income tax history the volume of tax litigation necessary merely for statutory interpretation would seem due to subside. That it shows no sign of diminution suggests that many decisions have no value as precedents because they determine only fact questions peculiar to particular cases . . . increase of potential tax litigation . . . lends new importance to observance of statutory limitations on review of tax decisions." 320 U. S. 489 at 494.

problem is to grant a greater finality to decisions of the Tax Court where its decisions are reasonable in law. The Supreme Court's view of the problem is best expressed when it said: "Tax Court decisions are characterized by substantial uniformity. Appeals fan out into courts of appeal of ten circuits and the District of Columbia. This diversification of appellate authority inevitably produces conflict of decision, even if review is limited to questions of law."[138] Thus, the Supreme Court holds that when the court cannot separate the elements of a decision so as to identify a clear mistake of law, the decision of the Tax Court must stand.[139] Since the Tax Court is informed by experience with the newly developing tax laws, the indications are that even when its decision is one involving conclusions of law it should be given much consideration; for, this would promote uniform administration of the tax laws. A petition for a rehearing of the *Dobson Case* on the ground that a question of law was involved was denied by the Supreme Court.[140]

Although the effect of the *Dobson Case* has been to regard the decisions of the Tax Court as conclusive in most cases, it is still settled that where the Tax Court decision is based on an erroneous rule of law, the Circuit Courts of Appeals can reverse the Tax Courts.[141] For example, in *Harris v. Commissioner*[142] wherein the Tax Court applied the so-called objective test to determine whether the taxpayer had ascertained the worthlessness of a debt during the year in which he took the deduction, the Circuit Court of Appeals held this to be erroneous in that the proper year to make the deduction was in the year the taxpayer actually determined the worthlessness of the debt.

Conclusion

In conclusion it is necessary to state that the problems discussed herein are not unique with regard to judicial review of Tax Court decisions but are equally present as to judicial review of decisions

[138] 320 U. S. 489 at 499, 64 S. Ct. 239 at 245.

[139] 320 U. S. 489 at 502, 64 S. Ct. 239 at 247. This statement was followed in Helvering v. Meredith, (1944 C.C.A. 8) 140 F. (2d) 973, where three contracts were involved, the Court said it was "unable to separate the elements of the decisions." See also, Cole's Estate v. Commissioner, (1944 C.C.A. 8) 140 F. (2d) 636.

[140] Dobson v. Commissioner, (1944) 321 S. Ct. 231, 64 S. Ct. 495, 88 L. Ed. adv. ops. 459.

[141] Denholm & McKay Realty Co. v. Commissioner, (1944 C.C.A. 1) 139 F. (2d) 545.

[142] (1944 C.C.A. 2) 140 F. (2d) 809.

of other federal administrative agencies; and within the field of tax litigation itself, the problems are applicable to judicial review of United States District Court decisions.

We have seen from the discussion herein that separation of the judicial and administrative functions has been difficult to maintain in the field of taxation. This has been due to several factors. First, and foremost, is the fact that a proper standard for distinguishing "questions of law" from "questions of fact" has been lacking; consequently, the Circuit Courts of Appeals have been reviewing questions of fact which should have been finally decided by the Tax Court. Second, as a by-product of this lack of a standard has been the use of the phrase "mixed question of law and fact" to enable the Circuit Courts of Appeals to review Tax Court decisions. This has been properly abrogated by the Supreme Court in the *Dobson Case*. Now when the reviewing court cannot separate a clear mistake of law from the finding of fact made by the Tax Court, the decision of the Tax Court will stand. The reason for this change by the Supreme Court in the procedural law of judicial review was because uniform and expeditious tax administration made it necessary that the decisions of the Tax Court be given all credit to which they are entitled under the law. A third factor producing the difficulty in consistent and uniform separation between the judicial and administrative functions within the field of tax litigation has been the fact that appeals can come from both the Tax Court and the United States District Courts. Consequently, two cases presenting the same type of fact situation and the same issues can be decided by different tribunals but with appellate jurisdiction in the same Court. The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia as the appellate courts are supposed to reverse the decision below only if it is not in accordance with the law. We have seen that the reasoning behind this statutory restriction as recently set forth by the Supreme Court was that the finding as to the facts by the trial tribunal was rendered by a group composed of specialists in the tax field whose opinions were entitled to be accepted as authoritative. But this is applicable only to the Tax Court. The problem of where to draw the line on judicial review is still with the Circuit Court of Appeals so far as appeals from the United States District Courts are concerned. The inadequate standard of what is "fact" and what is "law" will still be the determining factor when the Circuit Courts of Appeals are en-

deavoring to discover if the findings of the District Courts are conclusive upon them.

From what has been said the only solution to the problem of obtaining uniformity in the field of tax litigation is to follow the advice of the Supreme Court in the *Dobson Case* and also to make the Tax Court the sole tribunal with original jurisdiction over federal tax litigation whether payment of the tax has been made or not.