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Special Comment

By DANIEL L. GINSBERG* AND STEVEN M. STEIN

DUE PROCESS AND THE TAX COURT

I. THE "CHOICE" OF FORUMS

Whatever happened to the doctrine of the separation of powers? It is no secret that in modern times there has been an increased fusion of judicial, legislative and executive powers in the "headless fourth branch of government"—the administrative agencies. We are told that this has come about through necessity—civilization is increasingly complex and there is an increasing need for a large but efficient government. That statement has been mouthed so often, by so many people, that it has almost become a shibboleth.

Well, there is at least one instance of fusion of powers for which the standard "justification" could not be more inapposite. If that particular organization does not exist in violation of the constitutional theory of separation of powers, then there is no such theory. That organization is the United States Tax Court. It performs the same functions and exists for the same reason as the regular district courts. It is called an "independent agency within the executive branch of government." The only thing that makes it an agency in the executive branch of the government is the fact that it is not independent.

A taxpayer, if he wishes to contest a determination of the Commissioner of Internal Revenue, may bring his action in a court or an agency. There is, however, one difference: if he wants to go into court *he must first pay the entire amount which the Commissioner alleges to be due.*¹ Theoretically, the taxpayer gets the same kind of hearing whether he sues in the District Court or the Tax "Court". But what are the facts?

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¹ *Flora v. United States*, 362 U.S. 145 (1960).

The first fact is that in the Tax Court the government wins approximately four cases out of five; in the district courts (and the Court of Claims) it wins one case out of two.² In addition, the Tax Court follows the District Court Rules of District of Columbia, whereas the district courts follow the Federal Rules of Civil Procedure. No discovery procedure as a matter of right is available in the Tax Court; discovery procedures are available in the district courts. The Tax Court permits no jury trial; the district courts do. The rules of the Tax Court permit oral argument only at the discretion of the judge; oral argument is permitted freely in the district courts.³ The Tax Court is a tribunal of limited jurisdiction; the district courts are possessed of broad "unwritten" or common law powers.⁴

If the federal government could not afford to allow people to sue in regular Article III courts before paying the alleged tax, there might be some justification for the present establishment. In fact, however, litigation in the Tax Court takes the same length of time as litigation in the district courts. One is led to believe that it is the Tax Court's decisions, themselves, not the time it takes to get those decisions, that provides the pressure for keeping the Tax Court in the executive branch of government.

Few would argue that there is an inequity here. The question is whether this inequity can be resolved by the courts. Congress has established a vast network of procedural obstacles in the path of one who would challenge the constitutionality of the Tax Court. At least, the administrative gloss which has been put on these congressional enactments has that effect. Furthermore, even if these obstacles could be surmounted, the taxpayer is faced with an obsolescent or misapplied theory that one does not have a constitutional right to a judicial hearing before the tax has been paid. That theory is "misapplied" because, even if it were correct, it would provide no justification for the present system, which

² See Report of the Commissioner of Internal Revenue, 1962 and 1963. United States Government Printing Office.

³ Section 7435, Internal Revenue Code of 1954 provides:

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without jury in the District Court of the District of Columbia.

⁴ See *Lasky v. Commissioner*, 235 F.2d 97 (9th Cir. 1956), *aff'd per curiam*, 352 U.S. 1027 (1957).

has the effect of discriminating between the rich and the poor. (The wealthy taxpayer is much more likely to be in a position to pay first and litigate later than is the poor taxpayer.)

Even if the government is not absolutely required to afford the populace a certain remedy, it does not follow that the government may extend that remedy to some and arbitrarily withhold it from others. Moreover, it also does not follow that the procedure which has been established is a permissible breach of the doctrine of separation of powers. Let us take for example a hypothetical analogy:

Once an indictment, charging a criminal offense, has been returned against an individual he has an undeniable right to a judicial hearing on the questions of his innocence or guilt. Let us assume, however, that Congress has attempted to establish the following procedure. First it creates an elaborate apparatus called "pre-indictment procedure." If the Attorney General (or his delegate) believes that an indictment should issue, he issues it—but not in final form. He gives the person charged ninety days to petition to a "Court of Justice", an independent agency within the executive branch of government. No one is forced to petition to the Justice Court in any case; it is merely an additional administrative remedy.

Of course, for one to take this remedy there must be some financial inducement, as there is in the Tax Court situation. So let us further assume that in the "Court of Justice" all counsel fees and all other costs are paid by the government. (In regular courts only the indigent are entitled to counsel free of charge; thus the proposed system would be an "advantage" to the person for whom paying an attorney is not an absolute impossibility, but only a great inconvenience.) And—oh, yes—there is one condition upon all this. If a person accepts the new remedy he waives his right to a hearing in an Article III court.⁵

One recognizes immediately that there is a serious constitutional vice in all this, but superficially it is difficult to put one's finger on it. After all, the choice is completely voluntarily. Every one who wants it may still have his Article III hearing.

⁵ In the case of the Tax Court, Section 7482 of the Internal Revenue Code provides that the Courts of Appeals have sole review of the decisions of the Tax Court.

To come to the heart of the matter, the evil is this. The body politic becomes lulled into a false sense of security. Assume that for twenty or thirty years this "Court of Justice" had a record that was exemplary. The government had no better or no worse chance than it did in the regular courts. At the end of this thirty-year period the general attitude of the public, and even of the Bar, will have overcome an almost imperceptible but nevertheless substantial change. Courts are no universal boon to mankind; they are expensive; they follow outmoded procedures; their judges hear all manner of cases and generally lack expertise in criminal matters.

In the meantime, there has also been a perhaps imperceptible change in current criminal jurisprudence. The "Court of Justice" has been carefully "integrating" the criminal law in order to make a more "coherent" policy. Since it is a "national" court it is not obligated to follow the law declared by the various circuits.⁶ It establishes its own rules of decision, and coincidentally, the government finds it easier and still easier to win cases.

What happens next? Well, one possibility is that attorneys will be wise enough to see what is happening and courageous enough to advise their clients that, in spite of the additional expense, they should stand for trial in the district courts. We say "courageous enough" because if it happens that the client wins he may be firmly convinced that he would have won anyway; and if he loses in the district court he may well blame his attorney for the additional and apparently wasted expenditures.

Another possibility is that attorneys will not be that wise or that courageous. A third possibility is that some one may find his way through the procedural quagmire and governmental arrogance (which says, "If you don't like our Court, don't use it.") and attack the whole thing at its roots.

Which brings us up to date. There is one major difference, however, between the actual Tax Court and the hypothetical "Court of Justice." In the latter case the only remedy would be to disestablish the whole thing, since the government could not be expected to foot the legal fees for everyone. As for the Tax

⁶ This is the parallel position taken by the Tax Court. See A. L. Lawrence, 27 T.C. 713 (1957).

Court the solution would be much simpler, since it is entirely within the realm of possibility for the government to allow those who so desire, to litigate their tax claims before payment is made. In a recent year the total volume of litigation before the Tax Court was approximately \$900,000,000.00. That before all the district courts and the Court of Claims was approximately \$450,000,000.00.⁷ The total revenue for that year was in the neighborhood of \$80,000,000,000.00. Thus, if everyone were allowed to litigate his tax claim prior to payment it would have meant a "delay" in obtaining revenue for that year of less than one-half of one percent of the total amount taken in. Needless to say, frivolous claims which were obviously interposed solely for the purpose of delay could be summarily dismissed in any event. This procedure has been used in the Federal Courts for many years.

Thus, while we will assume, *arguendo*, that one does not have an absolute right to a judicial hearing before the full tax has been paid, nevertheless that right, such as it is, may not be withheld on an arbitrary basis. In the case of *United States, ex rel Accardi v. Shaughnessy*,⁸ the Supreme Court held that although one does not have a constitutional right to a hearing on a revocation of the suspension of a deportation order, the revocation can nevertheless not be made arbitrarily. We assert that in the instant case the withholding of a right to a judicial hearing is an arbitrary refusal. The stated ground for the refusal is the government's need for a speedy revenue collection procedure. First of all, there is doubt as to the reality of that need. Secondly, it is quite clear that the Tax Court could not fulfill it in any case.

The parallel between the Tax Court and the hypothetical "Court of Justice" is not contrived. The Tax Court offers a different financial inducement but it is every bit as real. And the irony is this: the more unexpected the government's additional assessment, the more difficult it is likely to be for the taxpayer to obtain the money and sue in the district court. Furthermore, it is not unreasonable to assume that a totally unexpected additional demand on the part of the Commissioner is the one that is most likely to be without sound legal basis. After all, if the taxpayer

⁷ See *Flora v. United States*, *supra* note 1 at 175.

⁸ 347 U.S. 260 (1954).

were anticipating an additional assessment he probably knew he had been acting pursuant to a provision of the Internal Revenue Code susceptible of more than one interpretation. But the unanticipated deficiency is quite likely to be based on a novel reading of the statute.

One might object to the above analogy on the ground that the "Court of Justice" dealt with matters of liberty rather than property. In fact, we assumed such a tribunal for precisely that reason. The distinction between liberty and property is one of the most unfortunate aspects of mid-century jurisprudence. There is still a tendency to over-react to the excesses of the 1920's and 1930's. That certain rights should have a "preferred position" sounds very nice, superficially, but there cannot be preferred positions unless there are also subordinate ones. There was no such distinction in the Declaration of Independence—the point was simply that:

He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

The charge levelled here against the Tax Court is by no means an indictment of all administrative agencies. The Tax Court should never have been an administrative agency. It does not do the work of administrative agencies. It has no deliberately broad legislative mandate to make policy. As the Tax Court itself has stated:

Whatever label might be used to characterize this Court for various purposes, its procedures are and were intended by Congress to be in every sense of the word, judicial. . . . We hear and decide only real controversies between adverse parties, following procedures which are inherently judicial. We make no independent investigation of the facts as do some agencies labeled "administrative," either upon our own motion or upon the motion of one of the parties; our findings of fact are based solely on evidence submitted to us by the parties in accordance with prescribed rules.

We do not appear as parties in Court to enforce our orders or the law as do so-called administrative agencies. Our findings of fact carry the same weight as made by a District Court sitting without a jury.⁹

⁹ Fairmont Aluminum Co. v. Commissioner, 22 T.C. 1377, 1384-85 (1954).

In a sense the Tax Court's position is something of an overstatement. The Tax Court is not really a judicial body since it lacks the essential safeguards pertaining thereto. But the negative aspect of the Tax Court's remarks is well taken. This tribunal is certainly no administrative agency—in the normal sense of the term. Indeed, if the Tax Court were to be taken out of the executive branch it would in the long run strengthen that branch of government as much as it would strengthen the judicial branch. That which clarifies the nature of the judicial power must, since it is the opposite side of the coin, clarify and strengthen the administrative power—but strengthen it for the good of the nation, not for some small group.

II. THE PROCEDURAL QUAGMIRE ..

Basically, there are two ways in which a taxpayer could attempt to raise the constitutional questions referred to above. He could bring an action to enjoin a Tax Court proceeding or he could bring a suit in the district court without first paying the tax.

A. *The Injunction Route*

If he seeks an injunction, the taxpayer is, at the outset, in the unenviable position of appearing to be enjoining himself. After all, the government would claim, it was the taxpayer who instituted the action in the Tax Court in the first place. Shouldn't he be estopped from enjoining the procedure which he himself set in motion? The answer, of course, is no. Only one who is naive or disingenuous could argue that the taxpayer has in any realistic sense initiated the proceeding. What choice had he? If the taxpayer had failed to petition to the Tax Court then he had not "exhausted his administrative remedies." Yet here is the irony of the situation: while he is in the process of exhausting his administrative remedies, he is, by statute, forfeiting his *judicial* remedies!

But if this application of the doctrine of "exhausting administrative remedies" proves unacceptable, the government has, perhaps, other offerings. It may contest the jurisdiction of the district court (wherein the injunction suit is brought) on these grounds:

1. The anti-injunction statute—Section 7421(a) of the Internal Revenue Code.

2. The anti-declaratory judgment statute—Section 2201 of the Judicial Code.

3. The Doctrine of Sovereign Immunity.

4. The exclusivity of the Tax Court's jurisdiction once a petition has been filed—Section 6512 of the Internal Revenue Code.

We will demonstrate the weaknesses of these contentions in the following paragraphs.

1. The Anti-Injunction Statute

Section 7421(a) of the Internal Revenue Code provides:

Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Though superficially this provision creates difficulty, a close examination of this statute shows that it is not applicable. A suit to enjoin the Tax Court would not in actuality have the effect of restraining an assessment of any tax. The assessment could be finalized, constitutionally, by an administrative procedure; the Tax Court suit does more than finalize the assessment. In addition, it bars the taxpayer from litigating *de novo* in a district court.¹⁰ Thus, the taxpayer's injunction suit could merely seek to bar the entry of a Tax Court decree that would have *res judicata* effect.

There is a more fundamental reason, however, why Section 7421(a) would not apply. The statute was designed originally to prevent the remedy of injunction against the assessment of taxes, so that litigation over tax disputes could be channeled into a particular agency. But here, the taxpayer would be attacking the very validity of that agency. Therefore, any statute which was a part of the entire scheme of channeling tax disputes into the Tax Court could become subject to the same attack. To put the matter another way, the purpose of Section 7421(a) is to prevent the circumvention of constitutional channels. But here the allegation is that the very channel itself is unconstitutional.

But, it should not be necessary for the taxpayer to go so far as to contest the constitutionality of Section 7421(a). It is true that the congressional purpose included the prevention of re-

¹⁰ See, note 5 *supra*.

straining assessments even of those taxes about which there might be a constitutional question.¹¹ However, if it is clear that what is involved is not a tax but rather a penalty or something else in the guise of a tax, the statute does not apply.¹² *A fortiori*, if the suit raises questions involving not taxes but the constitutionality of certain procedures, the statute is not intended to apply. And here, it is evident that the constitutional questions being raised involve taxation only incidentally. As the analogy in Part I relating to a "Court of Justice" has shown, the constitutional evil involved here would arise whatever the actual subject matter of the "administrative suits" happened to be.

2. *The Anti-Declaratory Judgment Statute*

In general, the same factors that prevent the applicability of Section 7421(a) also render inapplicable Section 2201. Once again the congressional purpose in withholding declaratory relief with respect to federal taxes was to prevent the circumvention of the Tax Court. Once again this is the very tribunal which is under attack. There would be no intention in the injunction suit to merely avoid Tax Court litigation in *this particular case*. If the taxpayer's contention is correct, then the principal purpose of Section 2201 no longer exists; if the taxpayer's contention is incorrect, then Section 2201 continues as an effective bar to the circumvention of the Tax Court.

In the situation wherein declaratory relief would normally be sought, it is evident that Congress has established an adequate alternative remedy. The classic situation wherein Section 2201 would be invoked is the case in which a taxpayer claims a particular tax is not constitutional. Congress has deemed that such a claim is more properly adjudicated in the context of the entire tax suit. In the instant case the question which is being raised has nothing to do with substantive tax matters. In short, whatever purpose one logically imputes to Congress in enacting Section 2201, it should not be held as a bar to this kind of case.

It is doubtful that the taxpayer would be seeking declaratory relief in any event. It may be true that on a purely semantic level

¹¹ *Enochs v. Williams Packing Company*, 370 U.S. 1 (1962).

¹² *Hill v. Wallace*, 259 U.S. 44 (1922); *Miller v. Standard Nut Margerine*, 284 U.S. 498 (1932).

he seeks a "declaration" that the Tax Court in its present form is unconstitutional, but the suit is really instituted to discontinue a proceeding that is already taking place. Some might argue that if the district court's decree were entered before final action had been taken by the Tax Court, the effect of the district court's action would be to render a "declaratory" judgment. But it is a very novel theory of law to identify the nature of relief sought by the time of the entry of a decree. In fine, if the government were to claim the applicability of Section 2201, it would be introducing a red herring.

3. *The Doctrine of Sovereign Immunity*

In all probability, the Commissioner of Internal Revenue would, additionally, claim that the taxpayer's suit is barred by the doctrine of sovereign immunity. It is, after all, not unusual to run into this claim in any kind of litigation against the government.

However, there are several defects in such a claim. In the first place all of the taxpayer's contentions would be based on claims of unconstitutionality. In the leading case on the subject of sovereign immunity, *Larson v. Domestic & Foreign Corporation*,¹³ the Supreme Court clearly implied that cases claiming unconstitutionality raised separate considerations:

But in the *absence of a claim of constitutional limitation* the necessity of permitting the government to carry out its functions . . . outweigh the possible disadvantage to the citizen. . . .¹⁴ [Emphasis added]

More specifically, the doctrine of sovereign immunity has had principal application to two areas of dispute—neither of which is involved in this kind of law suit. Those areas are enforcement of contract and equitable claims against government property. Moreover, governmental immunity has been held to be properly pleaded where an individual has sought affirmative action against an individual in his official, rather than his personal, capacity. That part of the doctrine of sovereign immunity may be a bit metaphysical; if there is any valid generalization it would be more along the lines of footnote 11 in the *Larson* opinion:

¹³ 337 U.S. 682 (1949).

¹⁴ *Ibid.*

Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory power, if the relief cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign. . . .¹⁵

The differentiation between affirmative action and mere cessation is, in itself, somewhat conceptualistic. (The "affirmative action" is generally some kind of payment or relinquishment.) But at least insofar as the injunction suit in the district court is concerned, it is evident that applying the "affirmative-mere cessation" distinction would result in a defeat of the government's claim of sovereign immunity. This is as it should be. The crux of the taxpayer's complaint is that a portion of the revenue collection procedure is unconstitutional. If claims of unconstitutionality could be raised only at the will of the Department of Justice or the Commissioner of Internal Revenue, the doctrine of judicial review would have lost most of its vitality.

4. *The Exclusivity of the Tax Court's Jurisdiction*

Section 6512 of the Internal Revenue Code provides that once a petition has been filed with the Tax Court, no suit for the refund of any income tax may be maintained for the same taxable year in the district court. In truth, this provision ought to have no bearing on this kind of law suit whatsoever. Once again, the government's theory in asserting this position would be that the district court injunction suit has a direct effect on the substantive tax matters at issue. Of course, the suit would have no such effect, since the only points at issue would involve the legality of certain revenue collecting procedures.

B. *The Original Suit in the District Court*

Another approach would be for the taxpayer to bring an action, without having first paid his tax, in the district court. His theory would be that he is without other constitutional remedy for contesting the legality of the tax in question.

In a sense there would be fewer procedural entanglements in such an approach. But the direct bar of Section 7422(a) of the

¹⁵ *Id.* at 691. See also Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 29-36 (1963).

Internal Revenue Code would be immediately asserted. In *Flora v. United States* this provision was held to mean that *all* of the tax in question for that year must be first paid. Thus, the Court held in that case an individual who had paid as much of the tax as he could (approximately four-fifths of it) was not allowed to sue for a refund of that amount. Not having petitioned to the Tax Court in the required time, the taxpayer was also unable to pursue that remedy. This harsh result, a 5-4 decision, was based on a long history of requiring taxpayers to first pay the amount in question before instituting litigation. Even so, there were many cases in which it was not insisted that the entire tax be paid; in fact, the government's erroneous statement to the contrary afforded a basis for a rehearing of the *Flora* case. But in the rehearing the majority maintained its original position.

That, then, is the background with which the taxpayer would be faced were he to institute an original suit in the district court. The new matter that the taxpayer could add would be the constitutional dimension. He could make a broadside attack on the entire theory of "pay first, sue later" or he could adopt one of several more restrictive theories which will be examined below. The point which we wanted to make here is that while the taxpayer has an easier procedural route in an original action in the district court, at the same time his substantive problems may be greater. In the injunction suit the taxpayer could at least argue that while there may be no automatic right to a suit in the district court, nevertheless the Tax Court is unconstitutional as being in violation of the separation of powers. In the original district court action he must show some kind of a right to a hearing before the tax has been paid.

III. THE REMEDIES

As suggested above, this problem comes dangerously near to being one of those cases in which there is a clear cut constitutional evil with no means of raising the issue. We say it comes dangerously near to being that kind of a case, but in fact there are several theories available to the taxpayer.

A. *An Administrative Agency Holding Itself Out as a Court*

Consider the matter first from the standpoint of the taxpayer seeking to enjoin the Tax Court. Certainly it is true that the

taxpayer was not absolutely forced to go into the Tax Court in the first place. Yet, at the same time, it ill lies in the Commissioner's mouth to say that the taxpayer had complete freedom of choice. If the taxpayer really knew all along that his entire purpose in petitioning to the Tax Court was only to later seek to enjoin that same proceeding, it still does not follow that his rights were not infringed. After all, when a taxpayer institutes a refund suit the government hardly could argue, "You can't sue for a refund—you shouldn't have paid the tax in the first place." It is true that the refund suit is specifically provided by statute. However, this procedure was also known at the common law.

Moreover, it is not correct to assume that the taxpayer's petition to the Tax Court was merely a matter of going through the motions. It is equally consistent with reality to assume that a taxpayer petitioned to the Tax Court under a mistaken belief that he was going to receive a full judicial hearing. After all, he would not be the first to be somewhat confused as to the nature of this tribunal:

The Tax Court of the United States is already a court in both name and fact. . . .¹⁶

2. Harold M. Stephens, former Chief Judge of the United States Court of Appeals, D.C. Circuit:

The Tax Court has become a Court in every proper sense of the term.¹⁷

3. Albert B. Maris, Chief Judge of the United States Court of Appeals, 3rd Circuit:

The Tax Court for many years has been conducted in all practical respects as a Court.¹⁸

4. The Tax Court:

Whatever label might be used to characterize this Court for various purposes its procedures are and were intended by Congress to be in every sense of the word, judicial. . . .¹⁹

5. Judge Murdock, Chief Judge of the Tax Court:

¹⁶ 80 Cong. Rec. 8679 (1934).

¹⁷ Hearings before Senate Subcommittee, see 24 Geo. Wash. L. Rev. 619 (1956).

¹⁸ *Ibid.*

¹⁹ Fairmont Aluminum Co. v. Commissioner, *supra* note 9.

I think we should get away from the tag of 'independent agency in the executive branch of government' because that is misleading. I think we have risen above it. It is misleading and at times it is embarrassing.²⁰

6. Notice sent by United States Treasury Department with the ninety-day letter:

The Tax Court of the United States is in no way connected with the Internal Revenue Service or the Treasury Department.

7. Attorney General's Committee on Administrative Procedure:

. . . a court in all but name.²¹

Of course, a taxpayer can blame only himself if he is unaware of the fact that Tax Court judges are not appointed to serve during good behavior.²² But he could hardly be expected to know that the government's record is considerably better in the Tax Court than it is in the district courts. Similarly he could hardly be expected to know that the Tax Court does not believe itself to be bound by the decisions of the courts of appeals. On the contrary, everything possible is done to convince the taxpayer that the Tax Court is in all respects the equivalent of the district courts. In the notice of appeal referred to above, the phrase "Tax Court" is mentioned seven times in three short sentences. Nowhere in any of the letters put out by the Treasury Department is there a suggestion that some difference exists between the Tax Court and the district court remedies. Certainly the government is well aware that a hearing before an Article III judge can be an important advantage and one that it will be the first to protect if it can do so. In the recent case of *Wells v. United States*,²³ the government successfully challenged the jurisdiction of a district court in the Canal Zone in a tax refund suit. It was held that jurisdiction did not lie because the Canal Zone court is not an Article III Court and hence was not authorized by statute to hear this kind of case.

²⁰ Hearings before House Subcommittee on Appropriations, 1959.

²¹ See 24 Geo. Wash. L. Rev. 619 (1956).

²² INTERNAL REVENUE CODE OF 1954, § 7443.

²³ 214 F.2d 380 (1954).

In part, what has happened is this: the labels "Court" and "judges", through a long history of constitutional practice, have acquired a certain aura—an aura which suggests independence. (The Court of Claims—even when it was still considered a non-Article III court—was certainly not considered to be within the executive branch of government. Finally the Supreme Court held that it really was an Article III court, in any event.²⁴ Indeed, to do otherwise would have suggested a power in Congress to establish permanent judicial bodies with no guarantees of independence. That power does not appear, expressly or impliedly, in the Constitution.) These labels have now been ascribed to an institution which does not deserve them.

The taxpayer is further misled into accepting the Tax Court remedy. He may well be unaware that the remedy is substitutive rather than additional. In other words if he is under the impression that the Tax Court is an administrative agency he will very likely assume that the courts of appeals exercise considerable control over the Tax Court. In fact, however, the Tax Court may well decline to follow the rule of law established in the taxpayer's circuit. Had the taxpayer gone into a district court he could have expected a decision in his favor (assuming the applicable law was in his favor) without having to take an appeal. If instead he goes into the Tax Court he then loses his right to go to the district court and is indeed forced to appeal the decision.

Admittedly the last mentioned situation involved two separate factors: (1) the *res judicata* effect of a Tax Court decision, and (2) the Tax Court's attitude toward the courts of appeals. But this is a realistic presentation of the problem. The various disadvantages involved in Tax Court litigation do not present themselves singly and do not stand out. It is not necessary to determine which of the various disadvantages to the taxpayer who is forced to go into the Tax Court would be enough to create a constitutional vice. It is sufficient to say that all these factors in the *aggregate* add up to a discrimination between those taxpayers who can afford to first pay the tax and those who cannot.

Nor is it merely a question of the taxpayer's being misled. In a sense he may realize that the Tax Court remedy is an inferior

²⁴ Glidden v. Zdanok, 370 U.S. 530 (1962).

one. At the same time, however, if he neither has the money to pay the tax nor any reasonable prospect of obtaining the money (and he needs every cent of the alleged deficiency), it is highly unlikely that he will not grasp at every straw. In other words, there is tremendous power in the hands of the government in this situation. There is great psychological pressure upon the taxpayer to use a designated channel.

In spite of all this the government would still claim that the existence of the Tax Court deprives no one of any rights. Are the pressures referred to above too nebulous to be made the basis of a law suit? Here, it becomes impossible not to look at the other side of the coin. Just what are the constitutional rights of the aggrieved taxpayer?

B. The Right to an Available Judicial Remedy

The classical remedies were the suit for a refund *and* the suit to enjoin in assessment. When refund suits were barred by act of Congress, that act was held constitutional because the other remedy presumably still existed, *Cary v. Curtis*.²⁵ Later the refund suit was reinstated and the injunction suit was barred. Since that time, the refund suit has always existed; Congress has never attempted to bar both that and the injunction suit. Well, then, what is the status of the refund suit—is it really an *available* alternative remedy? It would be an understatement to say that the situation has changed radically since the decision of *Cary v. Curtis*. Consider these differences:

1. Today, taxes take a much higher *proportion* of the individual's income. (Indeed, most taxes a century ago were property taxes, and were comparatively small.) Thus there is a greater likelihood that regardless of his status—the individual will find himself unable to pay.

2. Today by far the most important tax is the income tax. In other words, the tax bears a proportion to an individual's income for a particular period. Thus, even though he may be making more money at a particular time it will be at that same time that he would be faced with a large tax assessment.

3. If the Commissioner does contest the taxpayer's own assess-

²⁵ 3 How. 236 (1845).

ment, he is very likely to actually overstate the amount due, in order to counter the taxpayer's presumed understatement. This would make it that much more difficult to first pay the tax.

4. Today fraud penalties are assessed. These amount to fifty percent of the alleged deficiency.

5. The length of time necessary to litigate the average tax case has increased significantly in the last 100 years (especially when it must be taken into account the time necessary to get the case into Court. In urban areas there are frequently backlogs of three to five years in the federal district courts.)

6. There has also been a vast increase in the expense of litigating tax suits. (Thus even if one could pay the additional assessment it is that much more unlikely that he would also have funds left over to contest the claim and get his money back.)

The above factors indicate that the post-payment remedy is not nearly so accessible to the individual taxpayer as it once was. On the other hand there are also factors which indicate a decrease in the government's need to limit taxpayers to a post-payment remedy.

1. The income tax is premised on a self-assessment system. The basic assumption of such a system is that the majority of taxpayers will state their tax with a fair degree of objectivity. Thus it is reasonable to assume that the proportion of disputed claims would be less under such a system than in the case where revenue agents made the original assessment.

2. Such a vast proportion of the national income is in the public sector that the government cannot be hurt by minor delays in obtaining revenue.

3. Modern economic science has developed to such a degree that any harm caused by delays in obtaining revenue can be easily foreseen. Such harm can be offset by adjusting the interest rates on taxes allegedly due. (If it were true that the interest rate on unpaid taxes would have to go up then what it means is this: the poor are forced to forego a judicial remedy entirely, so that the wealthy can pay six percent instead of seven percent interest, should they ultimately lose their tax cases!)

In short, the refund suit used to be a fairly practical remedy and one which the government could reasonably insist upon. Today it is a practical remedy only for the wealthy man. This

situation calls for a re-examination of the constitutionality barring all suits before the tax has been paid. Such a re-examination is warranted not because the Constitution has been changed but because the facts, upon which a particular interpretation was premised, have changed.

It is not necessary to go so far as to argue that the government just always allow the taxpayer to litigate his prepayment claim in an Article III court. Perhaps a compromise position is available. It may be constitutionally permissible for the government to insist on payment first provided that it extends an adequate administrative remedy *that does not involve a forfeiture of the right to a refund suit*. Just as in the case of a hearing before the Appellate Division of the Internal Revenue Service, a hearing before the Tax Court could be a further administrative action. It is even conceivable that either the Commissioner or the taxpayer could institute a proceeding *de novo* in the district court if unsatisfied with the decision. At first glance, this procedure would have the effect of complicating the revenue collection system. But it ought not to work out that way. It is logical to assume, if the Tax Court followed the same statutory modes of proceeding that it does today, that the realization that its rulings were subject to the most extensive kind of review would have a healthy effect.

C. *Special Situations*

Furthermore, even if it be assumed that all taxpayers need not be given the right to prepayment litigation, there are two specific situations to which such a doctrine should surely apply. These are civil fraud cases and cases involving insolvent taxpayers.

1. *Civil Fraud Cases*

At the outset one should note this peculiarity relating to civil fraud cases. Unlike other tax disputes, the burden of proving civil fraud is on the Commissioner, not the taxpayer. This fact assumes particular importance for the following reason: one of the primary bases for the doctrine that the government did not have to all prepayment suits was the fact that it had the power of summary distraint. The power of summary distraint rests on the theory that once a tax has been assessed it has the effect of a judgment. There is, in other words, an automatic presumption

that the Commissioner's determination is correct. Were this assumption otherwise, then the notion of an assessment being the same as a judgment makes very little sense, either in logic or in law.

Thus, consider the matter in the posture of the normal civil fraud case. Frequently these cases are instituted after the statute of limitations would have run, but for the allegation of fraud. So the only way that the Commissioner can get into Court is on the basis of the fraud itself and, as stated, there is no presumption that any fraud took place.

The constitutionality of the summary procedure was originally upheld in 1856 in the case of *Murray's Lessee v. Hoboken Land and Improvement Company*.²⁶ That case, of course, involved no questions of fraud. Its rationale depended on the presumption of correctness doctrine. In its opinion the Court even went out of its way to say:

To avoid misconstruction upon so grave a subject we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law or in equity or admiralty. . . .²⁷

Secondly, the fraud case is unique in that it is the only business before the Tax Court which involves punitive action. By using the term "punitive" we don't mean to be putting the rabbit in the hat. Whether or not the civil fraud penalty is punitive in the constitutional sense—and hence requires a determination by an Article III court—is the question now to be examined.

Whether a particular action is "punitive" or remedial has long been a vexing question and one to which the answers have not always been uniform. There is a trend, however, toward concentrating more on the substance of the matter than on any formal doctrinal basis. In a recent case, *Kennedy v. Mendoza-Martinez*,²⁸ the Court states these factors as indicating whether a particular action is a punishment or not:

1. Whether the sanction involves an affirmative disability or restraint.

²⁶ 18 How. 272 (1855).

²⁷ *Id.* at 284.

²⁸ 372 U.S. 144 (1963).

2. Whether it has historically been regarded as a punishment.
3. Whether it comes into play only on a finding of *scienter*.
4. Whether its operation will promote the traditional aims of punishment—retribution and deterrence.

5. Whether the behavior to which it applies is already a crime.

6. Whether an alternative purpose to which it may rationally be connected is assignable for it.²⁹ Of the six factors which Justice Goldberg listed in the *Mendoza-Martinez* case, four indisputably point to the civil fraud action as being punitive. Number two, the historical view, is not decisive either way, the remedy being so unique. Number six, the alternative purpose, raises a factual question. The Commissioner has argued that the fifty percent additional assessment is rationally designed to cover the added expense in litigating such cases. No statistics have been made available to prove this point. However, it seems a rather tenuous basis when one considers that tax cases frequently involve difficult valuation problems, arcane points of cost accounting, and extensive factual inquiry. That there might be some extra expense involved in fraud cases seems plausible; that such an expense would come to anything like this fifty percent figure seems grossly extravagant.

It must also be remembered that whether a particular action is punitive in the constitutional sense must depend upon the specific issue raised. What is punitive for one purpose certainly may or may not be for another. Here, the term “punitive” is being defined for the purpose of determining a litigant’s right to a hearing in an Article III court. Thus, a case like *Helvering v. Mitchell*³⁰ would have very little precedential value. In that case the Court held that an additional fraud assessment was not barred by the fact that the defendant had already been acquitted on a criminal indictment. In other words, the defendant could not plead former jeopardy or *res judicata*. Specifically that case turned on the fact that there were different burdens of proof involved in the two proceedings. Certainly that is true. It is a giant step to reason from this that the civil fraud proceeding is constitutionally valid from an Article III standpoint. It is true,

²⁹ *Id.* at 168, 169.

³⁰ 303 U.S. 391 (1938).

as the court stated in the *Mitchell* case, that "determination of the facts upon which liability is based may be by an administrative agency. . . ."³¹ It by no means follows that the kind of factual inquiry which could be handled by an Article III court across the street can necessarily be the basis of a finding of fraud liability. Once again, we want to stress the admixture of considerations which are involved here. An administrative finding of fraud in itself certainly can raise constitutional problems. An administrative finding of fraud which can be avoided by the wealthy but not the poor involves far more serious constitutional questions.

2. *Insolvency or Inability to Pay*

We referred earlier to the *Flora* case, wherein the aggrieved taxpayer was unable to pay the entire assessment. This is by no means an unusual situation. Indeed, the stated reason for creating the Tax Court in the first place was to relieve the hardship caused by the pay first-litigate later doctrine. In other words, a great many taxpayers are unable to avail themselves of the district court remedy. In this posture let us look once again briefly at some of the constitutional doctrine wherein the anti-injunction statutes were upheld. Summary distraint in order to compel payment was deemed to be proper, *Springer v. United States*,³² *Phillips v. Commissioner*,³³ injunctions against the collection of a tax can be forbidden, *Snyder v. Marks*.³⁴ *But all these decisions were based on the assumption that the taxpayer had other remedies.*³⁵ In *Cary v. Curtis* wherein the Court upheld the barring of refund suits, the Court specifically states that:

He [the taxpayer] might have asserted his possession of the goods . . . by replevin, . . . detinue . . . or trover. . . . The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry.³⁶

It was never clear when any of these cases were decided exactly what the taxpayer's alternative remedies were. Before

³¹ *Ibid.*

³² 102 U.S. 586 (1881).

³³ 283 U.S. 589 (1931).

³⁴ 109 U.S. 189 (1883).

³⁵ See Hart and Wechsler, *The Federal Courts and the Federal System*, 314-15.

³⁶ 3 How. at 250.

the time of *Flora*, in fact, there were several cases wherein taxpayers were allowed to sue after having paid only part of the tax. From a statutory standpoint in other words, it was not until 1961 that all alternative judicial remedies had effectively been taken away. In the decision which created this situation the constitutionality of this was not raised.

Of course, we are not dealing here with the situation regarding jeopardy assessments or the like. Their constitutional validity could depend easily enough on a concept of threatened wrongdoing by the taxpayer. Even more neutrally, it could depend on the mere danger to the government of a loss of revenue that can be shown *clearly and convincingly*. But the case of jeopardy assessment involves no performance on solely judicial acts by administrative agencies and no "bribe" to the taxpayer to give up his right to a judicial hearing. In the normal insolvency case it is quite apparent that the taxpayer, having lost his ability to pay and sue for a refund, has no alternative remedy. This might not be so bad if he were protected in pursuing his administrative remedies by at least having the possibility should he obtain funds to later sue in a regular court. This choice is, of course, not open to him.

IV. CONCLUSION

The development of the Tax Court and the asserted grounds for its legitimacy show the danger in a static approach toward constitutional law. (An approach, we might add, which is quite untypical of the higher federal courts today.) Historically, there is no constitutional right to litigate before paying the tax. This was a good and a necessary rule. But look at what the rule has produced. Today (long after the need for the government to immediately obtain every last cent of its alleged revenue has disappeared), the government has used this old rule as a lever—a lever forcing people to litigate the majority of tax claims under conditions favorable to the Commissioner and unfavorable to the taxpayer. To make matters worse, it is the impecunious taxpayer who bears the brunt of this abuse of power.

The difficult aspect of this problem is that it involves so many separate points. Taken individually, one can seek to justify the present existence of the Tax Court by invoking a number of small rules and principles. Together these rules and principles simply

do not add up. For example, nowhere can it be shown that the government's need to obtain revenue can justify its establishing a so-called independent tribunal which can say as follows:

The Commissioner of Internal Revenue who has the duty of administering the statutes of the United States throughout the nation is required to apply these statutes uniformly as he construes them. The Tax Court being a tribunal with national jurisdiction over litigations involving the interpretation of federal taxing statutes which may come to it from all parts of the country has a *similar obligation*. . . .³⁷ [Emphasis added]

It is this sort of unconscious identification with the executive department that has led the Tax Court to liken its duties to those of the Commissioner, and adopt a cavalier attitude toward the courts of appeals. (The above quote is from a case wherein the Tax Court did not follow the rule of decision within that circuit.) Were the Tax Court not within the executive department, then almost surely it would identify not with the Commissioner but with the district courts and follow the rules of decision which were laid down.

If any one fundamental objection to the present procedure had to be named it would be deprivation of due process of law. As we have stressed, there are also questions here of the taxing power, the requirements of Article III, and the principles of administrative law.³⁸ But the principal question is one of fairness. A constitutional rule that was applicable in 1845 or 1883 is not applicable today. In 1845 there was great concern lest the executive branch of government would be too weak. Today the danger is that it be too strong. It is not likely that those who laid down the rule that the taxpayer be required to first pay the tax envisioned the present development—i.e., a situation where over two-thirds of all income tax litigation is handled solely by the executive department. We are not talking here about disputes that are settled at the administrative level, the Appellate Division of the Internal Revenue office. We are talking about law suits, disputes which, once decided, are subject only to the review of the Courts of Appeals.

³⁷ A. L. Lawrence, *supra* note 6.

³⁸ See Ginsberg, *Is the Tax Court Constitutional?*, 35 Miss. L. J., 382 (1964).

This procedure tends toward an erosion of the independent judiciary (for if a Tax Court, then why not a "Court of Justice"); it discriminates between the wealthy and the poor; and it deprives a large segment of the population of an *effective* means of seeking judicial redress. This procedure should be changed.

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