Catholic University Law Review

Volume 40
Issue 3 *Spring 1991*

Article 10

1991

The Federal Courts Study Committee on Claims Court Tax Jurisdiction

Martin D. Ginsberg

COMMENTARIES

THE FEDERAL COURTS STUDY COMMITTEE ON CLAIMS COURT TAX JURISDICTION

*Martin D. Ginsburg**

The April 2, 1990, report of the Federal Courts Study Committee[1] (Committee) announced:

> Congress should rationalize the structure of federal tax adjudication by (1) creating an Article III appellate division of the United States Tax Court with exclusive jurisdiction over appeals in federal income, estate, and gift tax cases and (2) restricting initial tax litigation to the trial division of the Tax Court (staffed by the current article I judges).[2]

---

* Professor of Law, Georgetown University Law Center. This Article is adapted from a lecture delivered on May 31, 1990, before the Claims Court Section of the Federal Circuit Judicial Conference. Footnotes were added where the Law Review editors and staff deemed them essential.

1. Congress created the Federal Courts Study Committee in 1988 to "make a complete study of the courts of the United States and of the several States and transmit a report to the President, the Chief Justice of the United States, the Congress, the Judicial Conference of the United States, the Conference of Chief Justices, and the State Justice Institute." Federal Courts Study Act, Pub. L. No. 100-702, § 105, 102 Stat. 4642, 4645 (1988). Congress directed the Committee to:

> (1) examine problems and issues currently facing the courts of the United States;
>
> (2) develop a long-range plan for the future of the Federal judiciary, including assessments involving—
>
> (A) alternative methods of dispute resolution;
>
> (B) the structure and administration of the Federal court system;
>
> (C) methods of resolving intracircuit and intercircuit conflicts in the courts of appeals; and
>
> (D) the types of disputes resolved by the Federal courts; . . . .

Id. at § 102(b), 102 Stat. at 4644. Chief Justice Rehnquist appointed the Committee participants, who were "members of the federal executive, legislative and judicial branches and representatives from state governments, universities and private practice." JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 31 (Apr. 2, 1990) [hereinafter FEDERAL COURTS REPORT].

2. FEDERAL COURTS REPORT, *supra* note 1, at 69. Under the proposed adjudication structure, the Trial Division of the United States Tax Court would have exclusive jurisdiction over all tax litigation not reserved for the federal district courts. *Id.* at 69-71. Claimants in the trial division would have an appeal as of right to the Appellate Division of the United States

Federal district courts would "retain jurisdiction over criminal tax cases, enforcement actions to fix jeopardy assessments, and actions to enforce federal tax liens," according to the Committee's proposed adjudication structure.[3] As the proposal currently stands, appeals from district court determinations would be taken of right to the twelve regional courts of appeals. The United States Supreme Court would retain discretionary review, the familiar certiorari procedure, over both those regional courts of appeals and over the new article III appellate division of the United States Tax Court, which one might call the United States Court of Tax Appeals.[4]

The Claims Court and the Federal Circuit would no longer play in the game. Indeed, the Committee urges the retirement of the Claims Court and the Federal Circuit from tax matters even if district court jurisdiction is not circumscribed: "Should Congress elect not to adopt this recommendation in full, we recommend that it establish the Article III appellate division in the Tax Court, with exclusive appellate tax jurisdiction, but provide taxpayers two fora for initial tax litigation: the Tax Court and the federal district court."[5]

Under current law, when disputing with her government, the taxpayer may elect not to pay the asserted deficiency, and by that refusal gains access to the United States Tax Court.[6] Alternatively, if she pays up front, claims a refund, and does not promptly get it, she has a choice. She can sue the United States in her home district court, claiming a jury if she wishes, or in the Claims Court.[7] The Committee gently terms this system of tax adjudication "a crazy quilt,"[8] and threw in "irrational"[9] as well. Lawyers, Mr. Buchwald would remind us, have an addiction to steamy rhetoric.

A strong endorsement of continued tax jurisdiction in the Claims Court was tendered to the Committee on January 31, 1990.[10] In it, the proposal to divest the Claims Court of tax refund jurisdiction was condemned, surely more in sorrow than in anger, as "shortsighted and unsound."[11] The dispas-

---

Tax Court. *Id.* United States Supreme Court review of appellate division decisions would remain discretionary. *Id.*

3. *Id.* at 70.

4. *Id.*

5. *Id.*

6. 26 U.S.C. § 6213 (1988).

7. 28 U.S.C. § 1346 (1988).

8. FEDERAL COURTS REPORT, *supra* note 1, at 21.

9. *Id.* at 69.

10. Statement of Chief Judge Loren A. Smith, United States Claims Court, Before the Federal Courts Study Committee (Jan. 31, 1990) [hereinafter Smith Statement].

11. *Id.* at 1, 6.

sionate author of the piece was United States Claims Court Chief Judge Loren A. Smith.

As one would expect, Chief Judge Smith wrote with both style and conviction, and perhaps with a touch of humor as well, in pointing out various tax issues in which the United States Supreme Court agreed with the Claims Court and disagreed with other tribunals.[12] Chief Judge Smith selected a disproportionate number of cases in which the Federal Circuit had reversed the Claims Court, only to be reversed in turn by the high court.[13] One wonders with some delight if Chief Judge Smith looks toward a world in which the Claims Court retains, while the Federal Circuit loses, jurisdiction over tax cases.

Chief Judge Smith is not blind to the forum shopping concern.[14] Nevertheless, he deftly stakes out a rather different position and among other things argues that, in the current system of tax adjudication, the Claims Court checks and balances the other first instance fora, the Tax Court and the district courts, while the Federal Circuit provides a nationwide viewpoint additional to, and at times opposite to, the precedent of the various regional circuits.[15] In his testimony, Chief Judge Smith finds what I would call "systemic advantage" in this adjudicatory structure and rather forthrightly states the case for Claims Court and district court tax refund jurisdiction as well, I think, as it can be propounded.

Sadly, I find myself siding with the Committee's majority. In the Committee, there were five dissenting members on this issue[16] whose opinion was thoughtful but, to me, in the end not persuasive. Simply put, I cannot shake the conviction that the present system of tax adjudication is crazy. Currently, the taxpayer who elects the Claims Court has thereby elected the Federal Circuit as her appellate tribunal, dispossessing her home court of appeals.[17] This is a marvelous piece of business because if a taxpayer gets the Federal Circuit to agree with her on a tax issue, then anybody who can afford it and has the same issue will pay attention. The initial winner is the Pied Piper who pipes the tune, and hoards of similarly situated folk will follow her to the Federal Circuit. Of course, if she loses that first case, then no taxpayer will thereafter take the issue to the Federal Circuit.

12. *Id.* at 4-6 (citing United States v. Goodyear Tire & Rubber Co., 493 U.S. 132 (1989); United States v. American Bar Endowment, 477 U.S. 105 (1986); Commissioner v. Southwest Exploration Co., 350 U.S. 308 (1956); United States v. Anderson, Clayton & Co., 350 U.S. 55 (1955); Lober v. United States, 346 U.S. 335 (1953)).

13. *Id.* at 5-6.

14. *Id.* at 2-3.

15. *Id.*

16. FEDERAL COURTS REPORT, *supra* note 1, at 71-72.

17. 28 U.S.C. § 1295(a)(3) (1988).

The present system in the Tax Court is not terrifically sane either. Under a 1970 rule adopted by the Tax Court, the so-called Golsen Rule,[18] the Tax Court follows a decision of the regional court of appeals to which the taxpayer's appeal will lie, provided that there is an appellate decision and it is viewed as being squarely on point.[19] In other words, under the Golsen Rule a taxpayer's tax law is the same in the Tax Court as it would be in the district court. It is, on the other hand, potentially different than the tax law in the Claims Court and the Federal Circuit.

Inevitably, in the Tax Court the tax law proves to be different for different taxpayers. All tax lawyers treasure marvelous examples of this. A favorite is embodied in the Tax Court petitions of Donald W. Fausner[20] and Robert A. Hitt.[21] Both cases were decided by the Tax Court on the same day.

Donald and Robert were commercial airline pilots. They both began the taxable year resident in the same Hudson Valley, New York, community. Both were obliged to cart heavy bags stuffed with flight manuals and what have you from home to airport. Because commutation expenses are not deductible, Donald and Robert, clever fellows, alleged the need to use their personal automobiles, not to transport themselves, but to transport their heavy bags. They claimed the deduction for that.[22]

There was one small difference between these two gentlemen. Donald stayed put, but in late September foolish Robert moved to Florida. The Second Circuit earlier had held in favor of the encumbered pilots;[23] the Fifth Circuit, in which Florida then fell, had not spoken on the matter. Under the Golsen Rule, the Tax Court held for Donald, the New Yorker, following the Second Circuit.[24] Facing no Fifth Circuit precedent, the Tax Court on the same day held against Robert, the brand new Floridian.[25]

Ultimately, the Supreme Court did take and resolve, not too badly as it happens, what came to be called the burdensome bag controversy.[26] Realistically, however, practitioners cannot expect, and surely, as rational men and women, practitioners ought not hope, that the Supreme Court will take too

18. Golsen v. Commissioner, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

19. *Id.* at 757.

20. Fausner v. Commissioner, 55 T.C. 620 (1971).

21. Hitt v. Commissioner, 55 T.C. 628 (1971).

22. *Fausner*, 55 T.C. at 625-26; *Hitt*, 55 T.C. at 630.

23. Sullivan v. Commissioner, 368 F.2d 1007 (2d Cir. 1966), *cert. denied*, 396 U.S. 827 (1969).

24. *Fausner*, 55 T.C. at 626.

25. *Hitt*, 55 T.C. at 633.

26. Fausner v. Commissioner, 413 U.S. 838 (1973).

many tax cases. It is, history teaches, not a job the high court performs superbly.

All nontax lawyers are regularly subjected to the tax lawyer's lament concerning the Supreme Court, and are by now justly sick of it. Nontax lawyers, if they are not Supreme Court Justices, will be delighted to learn that nearly two decades ago in his Oliver Wendell Holmes Lecture on the fourth amendment, Professor Anthony Amsterdam delivered in a single swipe the ultimate putdown of both tax lawyers and the Supreme Court:

> Over the years, when I have heard tax lawyers complain that the Supreme Court should be relieved of jurisdiction over tax cases because the Court has never understood the tax laws, I have especially relished my standing as a fourth amendment buff. It is seldom given to mortal man to feel superior to a tax lawyer. With what gratifying condescension, then—how like Captain Ahab's ghost hearing trout fisherman prattle of the big one that got away—have I listened to the tax lawyers' criticisms of the Supreme Court![27]

That pleasant digression to the side, surely it ought to be clear that the present system of tax adjudication does promote uncertainty, incoherence, and, comparing the position of wealthy and less wealthy taxpayers, perceptible unfairness as well.

Is there then nothing but the parochial to be said in defense of the current system and in opposition to the Committee's proposal for an exclusive article I Tax Court and an exclusive article III Court of Tax Appeals division? The American Bar Association's Tax Section, one of the many opponents of the Committee's proposal,[28] summarized its objections in a rather interesting way: "[O]ne can hardly think of a judicial structure better designed to produce taxpayer distrust and doubts of fairness than one that centers exclusive control over civil tax disputes throughout the nation in a single court of 27 tax specialists before whom the government appears in every case."[29]

This fear of taxpayer distrust and doubts really is the crux of the concern. It is not the argument heard often a decade ago, and more than occasionally still, that we must not deprive tax litigants or the tax law of the leavening influence of generalist judges. Generalist judges live in mortal fear of tax cases, and rightly so. In truth, experienced tax lawyers—a class that includes full time tax judges—are the ultimate generalists in today's complex specialized legal world. It is not the argument, with all deference to Chief

27. Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 349-50 (1974).

28. ABA SECTION ON TAXATION, REPORT TO THE HOUSE OF DELEGATES (Feb. 1990).

29. *Id.* at 9.

Judge Smith and his neatly crafted submission, that the checks and balances of one court versus another is healthy for the tax system. Rather, as the American Bar Association's Tax Section contends, it is the fear that a single tax adjudicatory structure, staffed by a handful of trial judges and appellate judges, may fall captive to the government, or be so perceived, and thereby do great and perhaps irredeemable injury to whatever faith in this tax system taxpayers still retain. The notion is akin to but ultimately distinguishable from the often voiced concern: who will serve as the tax judges if and when these jurists wield the awesome power of exclusivity?

As you will have gathered, I am one of the minority. I fear the small minority, of tax lawyers who agree with the Committee's tax adjudication proposal. Who will serve as the judges of the new appellate tribunal does concern me. But if the appointees are fair, experienced, expert tax lawyers, in short order their panel decisions will dispel the taxpayer distrust and doubts of fairness that so concern the American Bar Association's Tax Section.

The United States Tax Court, currently our nation's only specialist federal tax tribunal, has functioned well. In no sense has it been a captive of the government that appears before it in every case. We have no legitimate basis to fear that a specialist appellate tax tribunal, populated by judges of article III stature, will do one bit worse.

Regardless of the merits of the Committee's tax recommendations, it does not seem likely that change will occur near term. Too many have lined up in opposition. Neither a Court of Tax Appeals, nor the withdrawal of substantive tax disputes from the jurisdiction of the federal district courts, appears to be on the horizon.

What about the ultimate compromise, initial tax jurisdiction in the Tax Court and the district courts, appellate jurisdiction in the twelve regional courts of appeals, but no more tax disputes in the Claims Court or the Federal Circuit? The chances of that are somewhat better, if only because there are fewer people who will argue about it. In the end, however, I suspect this tailored change will not occur either.

As Chief Judge Smith pointed out in his presentation to the Committee last January, while the number of Claims Court tax disputes is not large relative to the number of tax disputes in the Tax Court, the dollar volume of Claims Court tax cases is significant indeed.[30] There is a general view, both in the government and in the tax bar, that the Claims Court today handles tax cases with professionalism and with dispatch, and affords both sides a

30. *See* Smith Statement, *supra* note 10, at 2 and text accompanying note 10.

fair shake. Relative to the Committee's proposal, in the final reckoning that is the perception that will carry the day.