REPORT #639

TAX SECTION

New York State Bar Association

Response to the Recommendation of a
National Court of Tax Appeals Made by the
ABA Standing Committee on Federal Judicial
Improvements and the Federal Courts Study Committee

JANUARY 8, 1990

Table of Contents

TAX SECTION
New York State Bar Association

January 9, 1990

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The Honorable Joseph F. Weis, Jr.
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Dear Messrs. Meador and Weis:

Enclosed is a report by the Executive Committee of the Tax Section in response to the recent proposal for the creation of a national court of tax appeals by the ABA Standing Committee on Federal Judicial Improvements and the tentative recommendations, recently released for public discussion by the Federal Courts Study Committee, to restructure the Tax Court into a trial division and appellate division that would have sole jurisdiction over tax cases. The principal draftsman of this report is Michael I. Saltzman.

Our Report opposes both proposals. It is almost 15 years since the Executive Committee opposed a national court of appeals of general jurisdiction and supported a court of tax appeals as a means to reduce tax law complexity. Experience has persuaded us that the current complexity of the tax system is attributable to a large extent to the proliferation of detailed statutory provisions and

related administrative guidance and is not significantly related to any actual or potential conflict in decisions among the circuit courts. We believe that the system can and should permit some room for the expression of conflicting views as an aid to proper development of the tax laws. We also believe that a national court of tax appeals, whether created directly or through restructuring of the Tax Court, would adversely affect the Tax Court's present role in promoting uniformity in the tax system by impairing its prestige and its ability to attract qualified judges. We therefore now support continued regional appellate review of tax cases by non-specialized courts.

Sincerely,

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Tax Report #639

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

REPORT

RESPONSE TO THE RECOMMENDATION OF A NATIONAL COURT OF TAX APPEALS MADE BY THE ABA STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS AND THE FEDERAL COURTS STUDY COMMITTEE

JANUARY 8, 1990

New York State Bar Association

Tax Section

Report

Response to the Recommendation of a National Court of Tax Appeals Made by the ABA Standing Committee on Federal Judicial Improvements and the Federal Courts Study Committee*

This Report by the Executive Committee of the Tax Section responds to two proposals to create a national court of tax appeals. In March, 1989, the American Bar Association's Standing Committee on Federal Judicial Improvements proposed a single National Court of Tax Appeals.[1] On December 22, 1989, the Federal Courts Study Committee published for public comment a tentative recommendation to consolidate all tax case jurisdiction solely in the Tax Court and to restructure the Tax Court into a trial division and an appellate division that would function as a National Court of Tax Appeals.[2]

For the reasons discussed below, the Executive Committee opposes these proposals for eliminating regional appellate review of tax cases by non-specialized courts.

Perspective has a great deal to do with the response one

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[1] ABA Standing Committee on Federal Judicial Improvements, "The United States Court of Appeals: Reexamining Structure and Process After a Century of Growth" (March, 1989) (the "ABA Standing Committee Report").

[2] Federal Courts Study Comm., "Tentative Recommendations for Public Comment" (December 22, 1989). The Federal Courts Study Committee was established by Congress to examine problems facing the federal courts.

* This Report was prepared by Michael I. Saltzman with the assistance of Barbara T. Kaplan. Helpful comments were received from David E. Watts, Arthur A. Feder, William L. Burke, Renato Beghe, and Donald C. Alexander.

gives to proposals to establish a National Court of Tax Appeals. Different answers to the question may well be given depending on whether the question framed is “If one were creating a new tax litigation system and court structure in the United States, what system and court structure would be best?” or whether it is “Does the existing system and structure under the present circumstances require change?” In the early 1970's, as part of a broad consideration of complexity and the income tax, we supported the creation of a National Court of Tax Appeals because such a court could aid in the simplification of the tax system. We also supported a single appellate court for tax appeals because it was preferable to a national court of appeals of general jurisdiction then being considered.[3]

Our reports assumed as a premise that eliminating actual or potential conflicts in decisions of the circuit courts of appeals was a cause of complexity and that eliminating those actual or potential conflicts was a critical necessity. Neither

[3] In May, 1972, members of the Tax Policy Committee filed a report endorsing creation of a National Court of Tax Appeals as one of several recommendations to aid tax simplification. Committee on Tax Policy, “Report on Complexity and the Income Tax” 37-12 (May, 1972), reprinted at 27 Tax L. Rev. 325,351-58(1972). The report was approved by the Executive Committee with a reservation of any judgment on that particular recommendation. It thus represented only the views of the particular members of the Tax Policy Committee. In 1975, the Executive Committee subsequently endorsed that aspect of the report in connection with opposing a national court of appeals of general jurisdiction. See NYSBA Executive Committee, “Report to the Commission on Revision of the Federal Court Appellate System Regarding the Need For a Court of Tax Appeals” (May, 1975).

report was based on any available empirical data concerning the relative number and importance of appellate conflicts. Also, those reports did not consider the potential collateral effects of a proposed national specialized court for tax appeals on the tax system as a whole, particularly as it might affect the role of the Tax Court itself and taxpayer perceptions of appropriate judicial tax procedures.

Since 1972, and indeed since 1975, both complexity in the tax system and problems caused by complexity, have continued to grow enormously. However, current studies of the number of intercircuit conflicts and the experience of members of the Executive Committee indicate that the current complexity of the tax system is not significantly related to any actual or potential conflict in decisions among the circuit courts. Rather, problems of complexity are to a large extent attributable to the proliferation of detailed statutory provisions about which there has often been no or little guidance from administrative or judicial interpretation, or only administrative guidance that is itself highly detailed and complex.

The Executive Committee also believes that a National Court of Tax Appeals would adversely affect the Tax Court's present role in promoting uniformity in the tax system, and, as a consequence, both the prestige of the Tax Court and its ability to attract qualified judges would suffer. For these reasons, we

now doubt that a National Court of Tax Appeals would in fact promote certainty and reduce the complexity of our tax system. Moreover, we believe that the elimination of regional generalist review of tax cases is undesirable for the proper judicial development of tax law, and potentially could seriously impair taxpayer confidence in judicial resolution of tax controversies and adversely affect compliance.

1. The Proposals and the Opposition

The ABA Standing Committee Report recommends the creation of a National Court of Tax Appeals, a new appellate court having Article III status and nationwide jurisdiction. It envisions a National Court of Tax Appeals whose judges could sit in panels in different cities. Appeals to the Court would

> "lie from every case concerned with liability for federal taxes collected by the Internal Revenue Service, including action initiated by the United States, and to actions collateral to civil tax proceedings, such as those to enforce summonses issued by the Internal Revenue Service." Report at 17.

Decisions of the National Court of Tax Appeals would be intended (1) to develop "the federal tax law coherently and effectively," (2) to eliminate conflicts among the courts of appeals and (3) to eliminate conflicts between the courts of appeals and the Tax Court.

The Federal Courts Study Committee's tentative recommendation would consolidate judicial review of most tax

cases by a single court.[4] This tentative proposal was previously described in a paper prepared for the Subcommittee by Professor Larry Kramer of the University of Chicago ("the Kramer proposal"). The Kramer proposal is a variation of the recent restructuring of the Court of Claims special trial judges and judges into a trial division, called the Claims Court, and an appellate court, called the Court of Appeals for the Federal Circuit. In summary, the tentative recommendation of the Federal Courts Study Committee would (1) consolidate all tax cases into a single Article III court -- the U.S. Tax Court, and (2) divide the Tax Court into a trial division and appellate division. The appellate division would function as a national court of tax appeals.

Arrayed against the proposals for a National Court of Tax Appeals are, in addition to us, the Tax Court itself,[5] the Department of Justice's Tax Division,[6] and a Task Force of the ABA's Tax Section.[7]

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[4] Federal Courts Study Comm., Tentative Recommendations for Public Comment (Dec. 22, 1989).

[5] Statement of Chief Judge Arthur L. Nims, III, United States Tax Court, Regarding the Position of the Tax Court on Various Proposals for a National Court of Tax Appeals, September 19, 1989.

[6] Memorandum dated October 16, 1989, from Acting Deputy Attorney General Edward S.G. Dennis, Jr. and Assistant Attorney General, Tax Division, Shirley D. Peterson, to Attorney General Dick Thornburgh re Federal Courts Study Committee ("Department of Justice Memorandum").

[7] ABA Report of Task Force On Civil Tax Litigation Process, October 31, 1989.

We believe it is significant that the proposals for a National Court of Tax Appeals come from outside the community of participants in tax litigation, both judges and lawyers, while the objections to those proposals come from within that community.

2. Background.

a. Tax Cases in the Appellate Process.

Empirical data about appeals of tax cases are limited. Ninety-five percent of all substantive tax cases are commenced in the U.S. Tax Court. The remaining five percent of cases are commenced in the U.S. Claims Court and the district courts. In the fiscal year ended June 30, 1988,293 opinions were handed down by all the courts of appeals in refund suits and Tax Court cases, and, according to the ABA Standing Committee Report:

> In 1987, almost two-thirds of tax appeals were from the Tax Court and, only about a third from the district courts, totalling 750 cases altogether. These cases made up just over 2% of the cases filed in the courts of appeals. (Report at 14, footnote omitted.)

It is worth analyzing some other available statistics. During the fiscal years ended June 30, 1987 and 1988, 436 and 512 cases, respectively, were appealed from Tax Court decisions. For the same periods, 192 and 191 cases, respectively, were appealed from district courts.[8] Using data supplied by the Justice

[8] 1988 Annual Report of the Director of Administrative Office of the United States Courts ("the 1988 Annual Report") at p. 150, Table B-3.

Department's Tax Division, the ABA Tax Section's Task Force observed that appeals of substantive tax issues represented only 35 percent of all appeals of tax cases in 1988.[9] This means that only about 35 percent of the workload of a new National Court of Tax Appeals would involve substantive tax issues. On the basis of the statistics developed in the ABA Standing Committee Report, the balance of the appeals heard by a National Court of Tax Appeals (or 65 percent of its workload) would involve procedural issues such as collection and summons enforcement cases.

If, on the other hand, the Federal Court Study Committee proposal were adopted, these procedural issues would continue to be appealed to the regional courts of appeals, leaving the appeals division of the Tax Court with jurisdiction over appeals representing less than one percent of the total number of new cases now filed in all the courts of appeal.[10]

We discuss below issues raised by intercircuit conflicts in tax cases, but it is worth noting here data about the actual number of those conflicts. The 1988 Annual Report does not include statistics about the number of Tax Court appeals that were terminated by stipulation or without a decision on the merits, but during the fiscal year 1988, 144 cases originating

[9] ABA Task Force Report, supra. at p. 10.

[10] Id.

from the district courts were terminated procedurally. Internal statistics of the Department of Justice showed that of approximately 1,500 appeals handled by the Tax Division in 1987 and 1988, only 47 cases involved potential conflicts between the circuits, with 28 issues presenting actual intercircuit conflict.[11] The Tax Division points out, however, that:

> The Supreme Court has already granted, or is expected to grant, review of cases involving 16 of these issues. Of the remaining 12 conflicts, at least five have been mooted or have declined in importance because of legislative changes. Several other conflicts present issues which lack sufficient administrative importance to warrant Supreme Court review or which the Government has ceased to litigate. Thus, our statistics indicate that, in the last two years, there were only four or five unresolved and currently-significant conflicts. (Footnote omitted; Justice Department Memorandum, supra at 5-6.)

b. Operation of the Tax Court.

The Internal Revenue Code permits taxpayers to contest tax adjustments, called deficiencies, proposed by the Internal Revenue Service in the U.S. Tax Court, a local federal district court or the U.S. Claims Court. The Tax Court is the only court in which payment of the disputed tax deficiency is not a prerequisite to commence a legal action to contest the Service's determination. Before a suit is commenced in either a federal district court or the Claims Court, the taxpayer must pay the full amount of the deficiency.

[11] Department of Justice Memorandum, supra at 5.

Of the three courts, both the Tax Court and the Claims Court are national courts. Both these courts are headquartered in Washington, D.C., but send judges to various locations throughout the country to hear cases. Taxpayers are required to institute refund suits in the federal district court in the judicial district in which they reside or have their principal place of business. In this sense, the federal district court is a local court. While both the Tax Court and the Claims Court are national courts, only the Tax Court specializes in tax cases, all of whose judges have had prior tax experience, either with the government or in private practice.

Criticism has been leveled at the present tax litigation system because it permits taxpayers to choose among three different trial courts. While taxpayers have a choice of three courts to contest tax deficiencies, the Tax Court is the only court that offers taxpayers the opportunity to have their cases heard without first having to pay the full amount of the contested tax deficiency. Not surprisingly, therefore, it is in the Tax Court that approximately 95 percent of all tax cases are filed.

Just what it means to say that 95 percent of tax cases are instituted in the Tax Court is demonstrated by some additional statistical information. In fiscal year 1988, the Tax Court received 31,667 cases, of which 12,249 were small tax cases

involving disputes of $10,000 or less.[12] This was the lowest number of filings in the Tax Court since 1983.[13] During the year, the Tax Court disposed of 48,668 cases, of which 14,731 were small tax cases. In the same year, the total number of refund cases received by the Claims Court was 82, and the district courts throughout the country received 646 refund cases.[14] In the same year, the Claims Court disposed of 265 cases, and the federal district courts, 1,138 cases, and together they disposed of 1,403 cases. It can be seen, therefore, that the Tax Court disposed of 97 percent of the 50,071 case dispositions in the entire tax litigation system in fiscal 1988. Even discounting the Tax Court dispositions by the number of small tax cases disposed of would not change the wide disparity between the numbers of cases handled by the Tax Court and the two refund courts.

To handle its heavy workload, the Tax Court has internal procedures that insure uniformity of decisions.[15]

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[12] Internal Revenue Service Annual Report 1988, p. 38.

[13] Id. at 39.

[14] Id. at 35. Moreover, the number of opinions handed down during the year in refund cases decided by the Claims Court and the district courts (557) versus the Tax Court (1,281) demonstrates that a very high percentage of the tax cases flow into the Tax Court.

[15] Tannenwald, "Tax Court Trials: A View From the Bench," 59 A.B.A.J. 295(1973); Statement of Chief Judge Nims, "Position of the Tax Court on Various Proposals for a National Court of Tax Appeals" (Sept. 18, 1989) (hereafter referred to as "the Tax Court Statement"); Dubroff, The United States Tax Court: An Historical Analysis (CCH1979).

The chief judge of the Court reviews the findings and opinions of the judges before they are issued to avoid inconsistencies between a proposed decision and prior or concurrent decisions of the court. Secondly, the chief judge decides whether a case should be published as an opinion of the Tax Court that has precedential status as such.[16] When the case resolves an issue of fact or merely applies a well-established legal principle, the chief judge may decide to release the opinion as a memorandum decision, having no value as precedent.

A former chief judge described the selection of a case for court review as follows:[17]

> There are many factors that influence the chief judge to direct court review, and he has complete and exclusive discretion. The case may be one of first impression. It may involve a factual pattern of widespread interest because of the probability of recurrence. The trial judge may be proposing to overrule a prior Tax Court decision; he may be refusing to follow a court of appeals decision; he may be distinguishing district court or prior Tax Court decisions on a basis the chief judge considers doubtful; or the chief judge may question the validity of the legal approach the trial judge has adopted. Each of these factors influences, but does not necessarily control the chief judge's action. (Footnote omitted.)

If a case is selected for court review, the Court Conference procedure is similar to the en banc procedures of

[16] IRC §7460(b) provides that "the report of the division [i.e., the trial judge] shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the Chief Judge has directed that such report shall be reviewed by the Tax Court."

[17] Tannenwald, supra.

the courts of appeal:[18]

> The Tax Court meets in conference on most Fridays from September through June and during the summer months as the occasion requires. Proposed opinions are usually circulated a week in advance in order to give each judge an opportunity to do his own independent investigation. Often there is a good deal of discussion among the judges during that period. Sometimes, if a judge thinks he will dissent or concur in result, he will prepare an opinion and circulate it in advance. But his failure to do so will not preclude him from publishing his opinion if and when the trial judge's proposed opinion is adopted.
>
> If the opinion is not adopted, the findings of fact and the opinion are not part of the record and are not available to the parties or others. If this happens, the trial judge may elect to rewrite the opinion the other way (which he may sometimes do if the issue is a close one and he is not certain of his position) or he may request that the case be reassigned to another judge. In either situation the rewritten opinion is submitted to the court conference for another vote. In a controversial case a vote may be so close as to cause the chief judge to hold an opinion until it can be voted on by a full complement of the judges of the court--a process that can sometimes delay final action for a substantial period of time.

Appeals from the Tax Court are to the courts of appeals for the circuits in which the taxpayers reside or have their principal place of business. The Tax Court has adopted a procedure to avoid conflicts between its decision in a case, and the law in the circuit to which appeal will be taken. Under the

[18] Id. There are also differences between the en banc procedure of circuit courts and the Court Conference procedure. See, Dubroff, "Recent Developments in the Business and Procedures of the United States Tax Court," 52 Albany L. Rev. 33 (1987).

Golsen rule,[19] the Tax Court will apply the law in the circuit court to which appeal will lie, even if the Court might otherwise reach a contrary conclusion.

Appeals from decisions of the district courts to the courts of appeals, together with the appeals from the Tax Court make up the appellate tax caseload of the circuit courts. Appeals from the Claims Court are only to the Court of Appeals for the Federal Circuit in Washington, D.C.

In short, the overwhelming number of tax cases are heard by the Tax Court. To insure consistency and conformity of the decisions in its high volume of tax cases, the Tax Court has adopted internal procedures involving chief judge review of proposed opinions, selection for court review and Court Conference procedures. In addition, the Tax Court assures consistency in result by following the law in the circuit court to which appeal will be taken.

3. Reasons for the Proposal Analyzed.

a. Development of a Coherent, i.e., National Body of Tax Law.

There are 13 circuit courts of appeal, if one counts the Courts of Appeal for the District of Columbia and Federal Circuits. While the Supreme Court will resolve conflicts in the results reached by different circuit courts, both a potential for diverse views and uncertainty about the

[19] Golsen v. Comm'r., 54 TC 742 (1970), aff'd on another issue 445 F.2d 985(10th Cir.), cert, denied, 404 US 940 (1971).

state of the law exist until the Supreme Court finally decides the issue. In a body of national law, such as the internal revenue laws, diverse circuit court decisions on an issue are unsatisfactory for taxpayers, tax practitioners and tax administrators alike. Supreme Court resolution of these inter circuit conflicts can take an undue length of time. For example, the treatment of cash meal allowances for State Highway Police was litigated for more than 20 years until it was resolved by the Supreme Court.[20] In short, the prospect of delay in reaching a final, nationally uniform decision on an issue of tax law is not desirable.

Uniformity and speed in the resolution of tax issues are desirable. But the opportunity for different courts of appeal to give their views on an issue assures that the final result will be well-considered and more likely to be the "correct" one. After all, diversity of views is built into our system both politically and judicially, and the theory at least has been that the best result is more likely to emerge from diverse and often competing views. The system is inefficient and unruly, but there is and has been general public satisfaction with it. Moreover, if an issue is controversial enough to have provoked different views by different circuits, then it is the kind of issue that would benefit from delayed decision by the Supreme Court, which, as the result of the delay, would then have the benefit of views of two

[20] Comm'r. v. Kowalski, 434 U.S. 77 (1977).

or more circuit courts. The Supreme Court itself has recognized the benefits of permitting several circuit courts to address an issue.[21]

The premise of the ABA Standing Committee Report is that a coherent national body of tax law can best be administered by tax specialists sitting on a single appellate court. The issues actually presented for decision in tax appeals raise some doubts about this premise. On appeal, taxpayers raise the following general issues:

1. Were the factual findings of the trial court clearly erroneous or were they supported by substantial evidence;
2. Did the trial court correctly apply the applicable law to the established facts; and
3. Was the regulation or other administrative pronouncement of the law applied by the trial court valid?

When appellate courts resolve these issues, however, they may have recourse to tax statutes and the like, but the process does not require appellate judges to be tax specialists.
Appellate review of factual findings is limited by the applicable standard of review — the clearly erroneous

[21] See E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112,135 n. 26(1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling arguments raised by industry, these courts have vastly simplified our task.")

standard. Circuit court judges have vast experience in applying this standard to all sorts of factual issues arising from the trial courts. Tax specialist judges have no particular expertise in evaluating trial records. On the contrary, a tax specialist may reasonably be expected to be less, and certainly no more, sensitive to this aspect of appellate review than a generalist appellate judge with trial experience.

Similarly, circuit court judges review cases involving the application of the entire range of federal law to established facts. Again the process involves identifying the applicable law, determining what it is and reviewing the record below to see whether the applicable law was properly applied by the trial court. It is obvious that given the volume of federal statutory law and precedent, circuit court judges do not "know" the law on many issues coming before them. But they have developed expertise in the process of appellate judging where they do not have experience with the body of law involved. If there are any specialists in statutory interpretation in the federal judicial system, circuit court judges certainly have a right to claim that title.

It has been said that both parties in an appeal are able to make technically correct arguments.[22] It is the appellate

[22] Llewellyn, The Common Law Tradition: Deciding Appeals (Little Brown & Co. 1960), p. 237.

lawyer's role to identify the reason why the decision should be in favor of his or her client. Underlying the premise of the ABA Standing Committee is the apparent belief that only a tax specialist can identify this "reason" so that the body of tax law can develop coherently. But this view ignores the fact that the tax laws are passed by non-specialist legislators, even if they are written by tax specialists on the staffs of the tax law writing committees and the Joint Committee on Taxation. It also adopts a narrow view of what factors should dictate the development of the tax law.

No conclusive argument has been articulated as to why a technical interpretation of the tax law by a tax specialist judge rather than a nontechnical "situation sense" interpretation by a generalist judge should drive the development of the tax law.[23]

Finally, when regulations are involved in a case, the role of the appellate court is limited. If Treasury promulgates a legislative regulation under a specific grant of statutory authority, the regulation has the force and effect of law.[24] While circuit courts have articulated the standard of review in different ways depending on the circumstances of the regulation,

[23] Some members of the Executive Committee would say that tax specialization is obviously of assistance in understanding tax issues.

[24] See Anderson, Clayton & Co. v. United States, 562 F.2d 972 (5th Cir. 1977); see generally Saltzman, IRS Practice & Procedure (Warren, Gorham & Lamont 1981), f 3.02[4].

such as its timing, duration and reenactment of the statute interpreted, the circuit courts have attached great weight to the Treasury's construction of a statute.[25] Moreover, the Supreme Court has said that a regulation must be upheld "unless unreasonable and plainly inconsistent with the revenue statutes"[26] and that "the choice among reasonable alternatives is for the Commissioner, not the courts."[27]

If the process of appellate judging in tax cases is analyzed, therefore, the ability of a tax specialist judge rather than a generalist circuit court judge to effect coherent development of the tax laws has been overstated. Only if a National Court of Tax Appeals were to administer the tax laws and to make policy choices would there be grounds for believing that a tax specialist would be superior to a generalist lawyer. But this is not the case unless the ABA Standing Committee is a proponent of such an activist and nonjudicial role for the national appellate court.

It should also be observed that the Tax Court, which hears about 95% of all substantive tax cases, is a source of uniformity in the interpretation of the tax laws. Many Tax Court

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[25] See Saltzman, IRS Practice and Procedure, supra note 24, at 5 3.02[4][b], p. 3-10.

[26] Comm'r v. South Tex, Lumber Co., 333 U.S. 496, 501 (1948).

[27] Nat, Muffler Dealers Ass'n v. United States, 440 U.S. 472, 488 (1979).

decisions are not appealed with the result that the accompanying opinions published in the Tax Court reports provide national guidelines. In this way, the Tax Court operates as a mechanism for establishing many nationally-applied rules. Consideration of a National Court of Appeals must take into account, therefore, not only the Tax Court's present role in developing uniform rules, but the potential effect a new single appellate court may have on the Tax Court's procedures such as the Court Conference procedure that the Tax Court uses to arrive at these uniform rules.

The Tax Court under the Golsen rule will apply the law of the Court of Appeals to which appeal would lie if the Court of Appeals has spoken specifically and explicitly on a particular issue before the Tax Court. It is true that this rule appears to create a lack of uniformity. As stated in the background section above, however, there are relatively few cases where there are different circuit court views on an issue or where the Tax Court would decide an issue differently from a circuit court. No body of evidence, therefore, supports the conclusion that conflicts in appellate decisions are, in actual practice, a frequent problem in tax cases.

Advocates of a National Court of Tax Appeals also overlook the distinction between uniformity and finality. Even when the Supreme Court interprets the meaning of a statutory term in a particular case, for example, it may modify or even change

its interpretation as the result of the circumstances in a later case. In other words, “The doctrine of finality for the interpretation of a statute is not always followed.”[28] What this means for tax appeals is that a national appellate court will not remove all uncertainty from the system. For a time, a National Court of Tax Appeals may produce a uniform interpretation of a statutory term. But as different cases make their way through the system, the National Court of Tax Appeals, despite the doctrine of finality, may well modify its views on an issue, particularly where differences in the facts of a series of cases involving similar issues suggest the possibility of appropriately different statutory results. Such changes and variations have certainly occurred even where a single court has faced a series of related cases.

b. Eliminating Conflicts.

The ABA Standing Committee Report argues that a national forum for tax appeals will eliminate conflicts among the courts of appeals and conflicts between those courts and the Tax Court. Report at 14. The Report identifies two conflicts: (1) the conflict between the law of the circuit in which the taxpayer resides and could seek review of a Tax Court decision and that of the Federal Circuit where the taxpayer could appeal from an adverse refund

[28] Levi, An Introduction to Legal Reasoning (Univ. Chi. 1948), p. 57.

suit in the Claims Court; and (2) the conflict in Tax Court decisions where the Tax Court must apply different circuit court decisions to identical issues. The Standing Committee believes that although these differences among circuits could be resolved by the Supreme Court, some conflicts on significant issues remain unresolved for decades.

The magnitude of the intercircuit tax conflict problem identified by the ABA Standing Committee Report is small when the statistics identifying the number of conflict situations are studied. As stated above, according to the Tax Division, "... our statistics indicate that, in the last two years, there were only four or five unresolved and currently-significant conflicts." The Department of Justice position is consistent with the results of a 1984 study prepared in conjunction with a review of the Supreme Court's docket.[29] The study concluded that no "significant number of conflicts in the tax area ...are left unresolved by the [Supreme] Court."[30] Unresolved intercircuit conflicts in the tax area, therefore, are infrequent.

Where intercircuit conflicts exist, there is something to be gained by the tax system from the consideration of an issue and the interchange of ideas by

[29] Estreicher fit Sexton, "A Managerial Theory of the Supreme Court's Responsibilities; An Empirical Study," 59 N.Y.U. L. Rev. 681 (1984).

[30] Id . at 810.

multiple courts. Different substantive issues become molded and defined by the successive consideration of the courts, contributing to the emergence of the most desirable analytic result. As pointed out above, both the Supreme Court and commentators have recognized in other areas of the law the benefits derived from resolving intercircuit conflicts in the Supreme Court.[31] They are no less real in tax cases.

In summary, creation of a National Court of Tax Appeals to eliminate intercircuit conflicts in tax cases is not warranted given the infrequency of such conflicts and the benefits derived from judicial refinement of the issues to reach the ultimate correct result. The mere fact that a particular split-circuit issue may take years to resolve is not a sufficient reason to create a court of tax appeals.

c. Specialist Appellate Judges.

Proponents of a National Court of Tax Appeals say that for a body of law as complex as the tax law, it is desirable to have decisions made by judges specializing in tax law, i.e., that only the specialist judge can appreciate the nuance and development of the tax law in a way that is more likely to lead to the best result for purposes of development of the law. Expertise appears to be the basic reason why the ABA Standing Committee recommends a National Court of Tax Appeals. The

[31] Wallace, "The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill," 71 Calif. L. Rev. 913(1983); Posner, The Federal Courts: Crisis and Reform 155-156 (1985); Stevens, "Some Thoughts on Judicial Restraint," 66 Judicature 177, 183 (1982).

rationale is that only judges who are able to see the "whole complex body of tax law" can ensure that the federal tax law will develop "coherently and effectively."[32]

Part of this argument also points out that in quieter time it may have been possible for appellate judges to inform themselves about the issues of a tax appeal, but that the increase in the number of cases of all types being appealed makes that kind of preparation both unlikely and counterproductive in terms of decision-making. This view was expressed in a concurring opinion in a recent tax decision of the Court of Appeals for the First Circuit. Noting that the commodity trading issue had been decided by other circuit courts, the Judge said, "Without disparaging counsel in this nationwide effort, this is a colossal waste, a squandering, of precious judicial energy of at least 18 to 21 judges at a time in which there is great concern over the capacity of the Federal Appellate System to handle the ever-growing caseload."[33] The assumption is that a National Court of Tax Appeals comprised of specialists would assist in resolving this problem of overworked generalist judges.

But the Executive Committee believes that it is worthwhile for generalist judges who have experience in deciding

[32] ABA Report, p. 14.

[33] Dewees v. Comm'r., 870 F.2d 21 (1st Cir. 1989) (Brown, J. concurring).

cases involving other areas of public law to give their attention to a tax issue. As the Department of Justice Memorandum states:

> "Tax disputes do not exist in isolation from the affairs of the communities in which they arise, but grow out of, and reflect the life and law of, those communities. They are appropriately resolved by generalist judges who know and understand the affairs and transactions to which the tax laws are applied." Memorandum at 14.

While the specialist obviously has the advantage of specialized knowledge, the specialist may also have the disadvantage of parochial or narrow experience. On the other hand, a generalist judge may bring to bear on a tax issue a breadth of experience in dealing with other federal agencies and their rule-making, as well as a consideration of local law, and local or regional experience. At least some Tax Court judges welcome this opportunity for a check in their technical expertise which courts of appeals with generalist judges provide.[34]

Seriously undermining the ABA Standing Committee's rationale for a National Court of Tax Appeals with tax specialist judges is the Committee's failure to acknowledge the velocity of fundamental changes in the tax law that have occurred in the Tax Acts enacted from 1976 to 1988. One of the effects of the number and frequency of changes in the law has been to make a quaint relic of the tax specialist who can see the whole complex body of

[34] An Interview with Former Tax Court Chief Judge Sterrett, Tax Notes (Nov. 28, 1988) at 912.

the tax law. A tax specialist undoubtedly will be able more easily to understand changes in the tax law. But with the current rate of change in the tax law, a decision by a tax law specialist rather than one by a generalist judge may no longer assure a coherently developed tax law. This is especially so when that law is subject to such frequent change by generalists in the Congress and the Executive Branches of the government, even when these generalists are assisted by staff tax specialists.

4. Structural and Administration Issues.

a. Where Cases Will be Heard.

Uniformity and a national court go hand in hand, and proposals for a National Court of Tax Appeals have usually meant that there would be a National Court of Tax Appeals headquartered in Washington with judges appointed from the Courts of Appeals. Alternatively, as the ABA Standing Committee suggests what is now the Court of Appeals for the Federal Circuit would serve this purpose. Proponents of a National Court of Tax Appeals say that centralization is necessary if there is to be uniformity. The collegiality of a single court is the way in which the uniform view of the law would be developed.

A vital element in judicial and tax administration systems is the opportunity of taxpayers to have their tax disputes resolved on a local or at least regional level. Localized dispute resolution is important if taxpayers are to

retain their belief that they have access to the courts. Also, the local resolution of a dispute makes it possible for there to be consideration of local law, local practices and local experience with industry issues, for example.

A centralized court in Washington would not only distance taxpayers from the source of appellate review. It would have the tendency at least to create a specialized bar in Washington to whom taxpayers who wish to take appeals would have to go for assistance. The whole thrust of history of tax administration and even judicial review of tax cases has been away from the centralized office or court in Washington to the local office or court. The proposal for a National Court of Tax Appeals would simply reverse this historic process in the name of uniformity.

The “solution” of creating a National Court of Tax Appeals seems out of proportion to the “problems” of the present system especially when that solution is fully capable of producing its own set of problems. For example, the suggestion that appeals be heard by panels of judges travelling on circuit raises several issues. If the number of tax appeals is relatively small, obviously funds would be required to pay for circuit-riding judges and to maintain courts both in Washington, D.C. and in the places where appeals would actually be heard. Moreover, since there is a disparity from region to region in the number of tax cases, there is a likelihood that hearings on appeals would

be delayed in regions with relatively few tax appeals until a full docket would justify dispatching a panel of judges from Washington.

b. Jurisdiction

Appeals to the National Court of Tax Appeals proposed by the ABA Standing Committee Report would include “every case concerned with liability for federal taxes collected by the Internal Revenue Service ....” Report at 17. Thus, the National Court of Tax Appeals would have jurisdiction over

1. Appeals from the Tax Court in cases involving deficiencies in income, gift, estate and certain excise taxes;

2. Appeals from the district courts in tax refund suits (and presumably from the Claims Court);

3. Appeals from actions initiated by the United States -- that is, collection actions commenced in federal district courts? And

4. Appeals in matters collateral to civil tax

proceedings, such as those to enforce summonses. Criminal tax appeals would still be heard by the circuit courts of appeals. Procedural issues in cases in the federal district courts would be resolved according to the rules of the circuit in which the district court was located.

Under the ABA Standing Committee Report, the jurisdiction of the National Court of Tax Appeals would result in

specialist tax judges deciding issues far afield from the tax law. For example, constitutional law involved in appeals of summons enforcement cases would be decided by tax specialists rather than generalist judges on the circuit courts. Much of the recent law on the rights of individuals under the Fifth Amendment has been developed in summons enforcement cases.[35] Similarly, constitutional issues would be involved in appeals of orders under Rule 6(e) of the Federal Rules of Criminal Procedure, involving IRS attorneys' access to grand jury materials in civil tax cases. It is simply inappropriate for a single appellate court comprised of tax specialists to be the only appellate court to decide constitutional issues before they are heard by the Supreme Court solely because they arise in the context of a tax dispute.

Tax cases in which the United States is the plaintiff are usually collection cases. In these cases, the IRS frequently seeks to enforce its lien or levy on property or rights to property of a taxpayer in the hands of a third party, or subject to the claim of a third party. What constitutes “property or

[35] See e.g. Beckwith v. United States, 425 U.S. 341 (1976); Fisher v. United States, 425 U.S. 435 (1976); United States v. Beilis, 417 U.S. 95 (1974); Couch v. United States, 409 U.S. 322 (1973); Donaldson v. United States, 400 U.S. 517 (1971).

rights to property" is a matter of state law.[36] If a National Court of Tax Appeals were to hear appeals in collection cases, therefore, it would be deciding issues of state property law, and applying federal tax law only in the sense that the Code provides procedures where the government, as a creditor, is able to enforce its tax claim. Far from requiring expertise in the tax law, these cases require some knowledge of and experience with state property law and debtor-creditor law.

Finally, if a National Court of Tax Appeals were to hear appeals from district courts in tax refund cases, expertise far afield from tax law may still be required. If the tax refund suit were a jury trial, for example, issues involving the Federal Rules of Evidence, as well as the Federal Rules of Civil Procedure, could be involved. Tax specialist judges have no particular experience in handling issues such as these, although judges in the Tax Court apply the Federal Rules of Evidence and look to the Federal Rules of Civil Procedure where the Tax Court's own rules do not deal with an issue.

In short, under the ABA Standing Committee proposal, the jurisdiction of a National Court of Tax Appeals as proposed would extend to issues having nothing to do with the specialized area of the tax law, except that they arose in cases involving or related to taxes. Without specialized knowledge of these areas,

[36] United States v. Bess, 357 U.S. 51, 55 (1958); Aquilino v. United States, 356 U.S. 509 (1960).

the basic rationale for a single appellate court for tax cases is removed.

c. Court of Appeals for the Federal Circuit

The ABA Standing Committee Report recognizes that a National Court of Tax Appeals might be objectionable because its jurisdiction would be too narrow. In that event, suggests the Report, "jurisdiction over tax appeals could instead be added to that of the Court of Appeals for the Federal Circuit." Report at 17. This restructuring of the tax appeals process the ABA Standing Committee believed would eliminate concerns that appellate judges were too specialized, or might be too biased in favor of the IRS, or that the workload of a single appellate court might be too great or too little depending on the variation in the number of tax appeals.

The Court of Appeals of the Federal Circuit was created by merging the former Court of Claims and the Court of Customs and Patent Appeals.[37] The Federal Circuit thus hears cases involving a wide range of claims against the government not involving taxes, as well as customs and patent cases. Some judges on the Federal Circuit have tax expertise, but other judges have expertise in federal claims, customs and patent law. Even the ABA Standing Committee Report recognized that, as a result, the

[37] 3728 U.S.C. §1294(a), added by the Federal Courts Improvement Act of 1982.

number of judges with tax experience on the only appellate court hearing tax appeals would be limited. This limited number of tax specialists could be expected to create decisions by panels of the court having "a greater tendency to conflict than the decisions of a smaller court with narrower jurisdiction."[38]

If the Federal Circuit were to be the single appellate court in tax cases, therefore, there might well be conflicts in decisions. While the Federal Circuit might use en banc procedures, there nevertheless would be decisions by some judges with little or no tax expertise. Under the circumstances, it is hardly likely that this court could serve as a court of tax specialists able to "administer and develop the federal tax law coherently and effectively."

d. Reorganization of the Tax Court.

The tentative recommendation of the Federal Courts Study Committee is a variation of the proposal to create a National Court of Tax Appeals. We oppose the creation of an appeals division comprised of the present Tax Court judges (with the appointment of five additional judges), in part for the same reasons as those we have already described above for opposing a National Court of Tax Appeals. Division of the present U.S. Tax Court into trial and appeals divisions raises additional problems.

[38] Id.

At the outset, it must be recognized that in aid of at least the debatable premise that a national appellate court is desirable, the Federal Courts Study Committee proposal would radically change the single court handling 95% of all tax trials. When the Court of Claims was divided into the Claims Court and the Court of Appeals for the Federal Circuit, the procedures in the Court of Claims were different from those in the present Tax Court. The trial judges in the Court of Claims presided over all trials in the Court of Claims, and judges of the Court heard what effectively were appeals from the reports of the trial judges. Reorganizing the Tax Court as proposed would be roughly the equivalent of dividing the federal district courts and transforming magistrates into district court judges and the present district court judges into court of appeals judges. Similarly, in a reorganization of the Tax Court, all tax trials would be heard not by the present Tax Court judges, but by the present special trial judges, together with an estimated “one or two more judges.”

While the Tax Court would be transformed into an Article III court, and Tax Court judges would become Article III judges, the proposal is unclear about the status of the trial division judges. Special trial judges are appointed by the Chief Judge of the Tax Court. They have been selected in the main from Internal

Revenue Service or Tax Division, Justice attorneys.[39] At the present time, they are assigned by the Chief Judge (1) declaratory judgment proceedings, (2) small tax cases involving $10,000 or less where the taxpayer elects to be treated under Section 7463 of the Code, (3) other small tax cases, and (4) other proceedings the Chief Judge designates which have included trials of regular Tax Court cases. Tax Court judges, on the other hand, hear the bulk of the Tax Court's regular cases. Consequently, special trial judges have neither been selected in the same manner as Tax Court judges nor, in general, do they preside over the same type of cases as Tax Court judges.

Since in the reorganized Tax Court, the appeals division would be formed for the specific purpose of hearing appeals from the trial division, there would be little reason for the trial division to have the Court Conference procedure the Tax Court presently has to insure uniformity at the trial level. It is not unfair to say, therefore, that the Federal Courts Study Committee proposal would result in an indeterminate number of conflicts at the trial level where the present Tax Court procedure avoids them, while it attempts to create uniformity at an appeals level where the present system has resulted in relatively few conflicts.

Also, the proposed reorganization of the Tax Court would appear to undermine the dignity and status of the Tax Court itself. Judges hearing tax cases at the trial level would not be

[39] IRC § 7443A.

Presidentially-appointed and Senate-confirmed judges. They would be former appointees of the chief judge of the Court. It is one thing, as part of a theoretical proposal, to reorganize a specialized court with a relatively small number of cases in this way. It is quite another to have in actual practice all 30,000-40,000 cases in the tax system heard by judges sitting under such a procedure. Taxpayers might well conclude that their cases are being heard by "government" judges, and that the system debases both the importance and the value of judicial review. It bears repeating, finally, that the most important decision in the judicial system is the decision at the trial level, and the deference paid to the trial court's findings is reflected in the clearly erroneous standard appellate judges apply to findings of fact or mixed findings of law and fact entailing the application of a legal standard to a given factual pattern.[40] Consequently, hearings before a trial division that did not justify or, equally as important, appear to justify the confidence of taxpayers that they will be dealt with fairly can have an adverse affect on voluntary compliance.

In short, the Executive Committee believes that reorganization of the Tax Court to create a national appellate division not only is unwarranted, it may actually adversely

[40] See, e.g., Eli Lilly & Co. v. Comm'r., 856 F.2d 855, 861 (7th Cir. 1988).

affect taxpayer perceptions of the fairness of the tax system and voluntary compliance.

5. Potential for Self-correction.

The tax laws are hardly unique in their possibility for conflicting interpretations arising among the various circuit courts of appeals and the time it may take to resolve those conflicts through either legislative action or a decision by the Supreme Court. Both the ABA Standing Committee Report and the tentative recommendation of the Federal Courts Study Committee are notable for their lack of any discussion of the mechanisms for self-correction that exist within the system today. While a decision of one circuit is not binding on another, it has long been the practice for one circuit to give deference to the conclusions reached by another circuit which has previously considered the issue.[41] The low number of actual conflicts in tax cases suggests that the combination of this policy of judicial deference, in conjunction with the normal judicial analysis, has served well. But if the number or magnitude of unresolved conflicts is felt to be excessive, an appropriate response — and one that should be essayed first — would be to encourage the

[41] The decision of the other circuit is considered persuasive authority even if not binding. See, e.g., Houston Fire & Casualty Ins. Co. v. E.E. Cloer General Contractor, Inc., 217 F.2d 906 (5th Cir. 1954); United States v. Danehy, 680 F.2d 1311 (11th Cir. 1982); Price and Bitner, Effective Legal Research (Little, Brown and Company 3rd ed. 1969), pp. 6-7.

judges themselves at the circuit court level to have greater sensitivity in according deference to prior decisions in other circuits so that conflicts arise only where the importance of the issue warrants. With that would go corresponding encouragement for greater sensitivity on the part of Supreme Court justices in determining when a conflict among the circuits on a tax issue is of sufficient importance to the tax system to be worthy of their time and ripe for their consideration.

In short, before undertaking any of the more radical steps raised in the ABA Standing Committee Report or the tentative recommendations of the Federal Courts Study Committee, we would advocate an effort to deal with the problems through the present mechanisms in the system for self-correction of excessive conflicts among the circuits.