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THE FEDERAL COURTS STUDY COMMITTEE HAS NOT MADE THE CASE FOR ITS PROPOSED OVERHAUL OF THE TAX LITIGATION PROCESS

*James P. Holden**

If I had been asked to evaluate the existing system for the litigation of federal tax issues, I would respond that it works well. I would argue that it efficiently disposes of a very large volume of cases, employs the skills of specialized judges in resolving the great bulk of those cases, and blends into the process an important contribution by generalist article III judges. Further, it imposes no significant burden on the article III courts and enjoys the confidence and respect of taxpayers and their representatives. An objective observer might say, "Not bad, few other things seem to work so well today," and he would be right.

Nevertheless, the Federal Courts Study Committee¹ (Committee) apparently does not subscribe to the adage that the proof lies in the pudding. This fifteen-member panel that Congress created to study "problems" facing the federal courts has identified the tax litigation system as one of those problems.² Essentially, it proposes, over a dissent in which five members joined, to extract all tax cases from the federal district courts, the United States courts of appeals, the United States Claims Court, and the United States Court of Appeals for the Federal Circuit.³ It would allow only the United States Tax Court to hear tax cases and would restrict review to the proposed appellate division of the Tax Court.⁴ The Tax Court would become a judicial hermaphrodite, with both an article I trial division and an article III appellate division.⁵

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1. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 31-33 (Apr. 2, 1990) [hereinafter FEDERAL COURTS REPORT]; Ginsburg, *Commentary: The Federal Courts Study Committee on Claims Court Tax Jurisdiction*, 40 CATH. U.L. REV. 631, 631 n.1 (1991). This Commentary is a reply to Professor Ginsburg and to the FEDERAL COURTS REPORT.

2. FEDERAL COURTS REPORT, *supra* note 1, at 69.

3. *Id.* at 70.

4. *Id.*

5. *Id.* at 70-71 & fig. 2.

This proposal is all the more surprising because the Committee goes out of its way to condemn, as a general proposition, the concept of specialized courts. In the "Overview" portion of its report, the Committee catalogues the deficiencies of specialized courts: "the danger of tunnel vision, the danger of 'capture' . . . [by] interest group[s],"⁶ the risk of political imbalance, the need to resolve cases that cross lines of specialization, the premature suppression of the diverse views that arise from intercourt conflicts, and, finally, the fact that "most American lawyers find the idea of specialized courts repugnant."⁷ This is an impressive list of concerns, but, in the end, the Committee majority disregards them when it comes to tax law.

The Committee's first sentence in justification of its sweeping tax proposal states: "The present system of federal tax adjudication is irrational, fosters conflict in the interpretation of the tax laws, can be unfair to some taxpayers, encourages forum shopping, and provides additional incentives for taxpayers to play the 'audit lottery.'"⁸ To the uninformed this sounds strong, but when one considers these assertions on the merits, they fall well short of their intended mark.

The charge of irrationality is an extravagant overstatement. Congress, acting within the scope of its authority, created the existing system for appropriate purposes.⁹ The system is not the unreasoned product of incompetence. The contention that the present tax litigation system "fosters conflict"¹⁰ is also hyperbole. The existing tax litigation system produces no more conflict than the federal court system generally, whether the subject is labor law, criminal law, civil rights law, or any other equally significant field.¹¹ All such litigation generates intercourt conflicts. But, as noted

6. *Id.* at 11.

7. *Id.*

8. *Id.* at 69.

9. See generally H. DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* (1979).

10. FEDERAL COURTS REPORT, *supra* note 1, at 69.

11. See, e.g., Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 810 (1984) ("Moreover, our study does not identify any significant number of conflicts in the tax area that are left unresolved by the Court . . ."); Special Project, *An Empirical Study of Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 138-39 (1989) (study of 618 appellate court cases for 1983 through 1987 identified only "thirty five explicit conflicts, sixteen implicit conflicts, and five side swipes The Supreme Court had the opportunity to hear thirty-eight of the cases involved in a conflict. It denied certiorari to twenty-six and granted certiorari to two that it has not yet decided. The Court affirmed another six cases and reversed four.") (footnote omitted); Saltzman, *Should There be a National Court of Tax Appeals?*, 8 A.B.A. SEC. TAX NEWSL., No. 4, at 61, 77 (Summer 1989) ("There simply is no data to support the notion that diverse appellate decisions are a frequent problem in tax cases."); Memorandum from Acting Deputy Attorney General Edward S.G. Dennis, Jr. and Assistant Attorney General (Tax Divi-

above, the Committee generally welcomes the "diverse views" that arise from intercourt conflicts.¹² This is not so, however, where the diverse views relate to tax law.¹³

Further, the Committee's allegation that the system is unfair to some taxpayers is suspect. Congress created the Tax Court to provide all taxpayers with the opportunity for a preassessment judicial review of deficiencies asserted by the Internal Revenue Service.¹⁴ It is difficult to characterize this action as fundamentally unfair to any taxpayer, rich or poor. If the contention is that all taxpayers should have equal judicial access regardless of their economic circumstances, the straightforward way to do that is to make the jurisdiction of the Tax Court and the article III courts fully concurrent. In contrast, the Committee's proposal would deny all taxpayers the right to litigate before a jury, the right to select a court in their district, and the right to have their case decided by a generalist article III judge.¹⁵ It is difficult to accept the proposition that the Committee's recommendations create greater fairness.

By listing "forum shopping" as a negative feature of the current system, the Committee's report simply adopts a pejorative term where a more neutral one, such as "choice of forum," would suffice.¹⁶ The report, however, is silent on this point. If the Committee favors change on this ground, it should explain why choice of forum detracts from the effectiveness of the existing system, or why denying taxpayers that choice would result in a better system. Finally, the report adds the questionable charge that the current system "provides additional incentives for taxpayers to play the 'audit lottery.'" ¹⁷ The audit lottery is a product of federal unwillingness to commit adequate resources to the audit of tax returns.¹⁸ It has little, if anything, to

sion) Shirley D. Peterson to Attorney General Dick Thornburgh 7 (Oct. 16, 1989) (attached to ABA SECTION OF TAXATION, REPORT TO THE HOUSE OF DELEGATES (Feb. 1990)) ("it appears that unresolved intercourt conflicts are rare and that their impact on tax administration is *de minimus*").

12. FEDERAL COURTS REPORT, *supra* note 1, at 11. The Committee stated that specialization might create "the danger of premature suppression of diverse views (intercourt conflicts enable experimentation with competing solutions to the same problems—while at the same time making law more complex and creating problems of compliance for institutions and individuals that do business or conduct activity in more than one circuit)." *Id.*

13. *Id.* at 70. The proposed tax adjudication structure "would increase the quality and uniformity of tax adjudication by shifting it from overworked judges sitting in a large number of diverse courts to a single court of highly trained specialists." *Id.* (emphasis added).

14. See H. DUBROFF, *supra* note 9, at 1-46.

15. FEDERAL COURTS REPORT, *supra* note 1, at 70.

16. *Id.* at 69.

17. *Id.*

18. See Portuondo, *Abusive Tax Shelters, Legal Malpractice, and Revised Formal Ethics Opinion 346: Does Revised 346 Enable Third Party Investors to Recover from Tax Attorneys*

do with the structure of the tax litigation system, a system that generally comes into play only after an audit has produced proposed adjustments in liability.

It is my impression, after thirty years of tax practice, that most tax lawyers would concede that the current tax litigation system is not tidy. It might even be considered ungainly. But we should not lightly discard systems that work well on these grounds. If ungainly products should be discarded, the Internal Revenue Code itself would surely be at high risk. Tax lawyers have learned to live in an untidy and ungainly world and can endure a tax litigation system that reflects these characteristics. If housecleaning is in order, there are better places to start.

As we might expect, Professor Ginsburg does not rely only on these slender reeds that the Committee has advanced to support its proposal.¹⁹ But, he does appear to subscribe to the Committee's irrationality claim when he confesses an inability to shake the conviction that the current system is "crazy."²⁰ If by this he means "untidy," we do not disagree on characterization. We differ, however, on the consequences of that characterization.

Professor Ginsburg's other objections are more substantive. I do not, however, find them persuasive. Take the cases of Donald W. Fausner²¹ and Robert A. Hitt²² and their burdensome bags. Professor Ginsburg objects to the fact that, because each of them chose ultimately to reside in a different circuit, each winds up subject to the appellate court interpretation applicable within his circuit.²³ While that is true, it is hardly reason to overhaul the system. If Donald and Robert each had commenced his own burdensome bag litigation in the federal district court of his ultimate residence, the same conclusion would likely have resulted. The fact that they instead commenced their litigation in a single court of national jurisdiction does not make the result unacceptably burdensome. Those who say otherwise seem to believe that one must view intercircuit conflicts in the tax law differently from intercircuit conflicts in other areas of the law. Why an early need for certainty and uniformity overcomes the acknowledged benefits of diverse views and the considered development of the tax law through the same robust process that governs other federal litigation is not immediately appar-

Who Violate its Standards?, 61 NOTRE DAME L. REV. 220, 223 n.30 (1986) (stating that "'audit lottery' refers to the ability of a taxpayer to take undisclosed aggressive positions in his return with little fear of an audit and less fear of the imposition of penalties because the IRS reviews relatively few tax returns and assesses even fewer deficiencies").

19. Ginsburg, *supra* note 1, at 633-37.

20. *Id.* at 633.

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

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

23. Ginsburg, *supra* note 1, at 634.

ent. The proponents may be right, but they have yet to make their case persuasively.

Toward the end of his discussion, Professor Ginsburg focuses on a major concern relating to the Committee's proposal that all tax appeals be concentrated in a new appellate division of the Tax Court.²⁴ Professor Ginsburg's concern relates to the quality of decision-making to be expected from that relatively final tribunal. If taxpayers can take their appeals only to such a court, a court in which the government appears as a party in every case, there are clear risks of "tunnel vision" and government orientation, risks of the kind that cause the Committee to reject generally the concept of specialized courts.²⁵ These risks could in turn produce taxpayer distrust and doubt as to fairness—an atmosphere in sharp contrast to the widespread taxpayer acceptance enjoyed by the current system.

Where Professor Ginsburg and I differ is in our reaction to that risk. He is content to rest on the conclusion that "if the [appellate judges] 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."²⁶ I would prefer that Professor Ginsburg exhibit more skepticism here, as I have known him to do in other contexts where substantially less has been at risk. His conclusion is a little bit like telling me that if the weather is *fair* tomorrow, I can stop worrying about *bad* weather tomorrow. I have no control over the weather. Accordingly, if bad weather will prejudice my activities, my worry about the weather is reality-based. Similarly, I have no control over the judicial selection process and yet expect to be adversely impacted by anything less than the selection of the finest judges. Thus, my worry on this score is also reality-based. I know, however, that the higher the number of citizens who have an interest in a particular judicial selection, the more careful the selection process is likely to be. For that reason, it is preferable to leave the tax appellate jurisdiction in the existing courts of appeals.

In short, it seems that those who advocate change in the existing system have the burden of establishing that it does not work, or at the minimum that the proposed system will work significantly better. In this regard, the Committee has failed. The inadequacies that the Committee ascribes to the present system are either inaccurate or insignificant. The more substantive point raised by Professor Ginsburg, regarding Donald and Robert, does not distinguish tax law from other litigation areas. We are thus left with the

24. *Id.* at 635-36.

25. FEDERAL COURTS REPORT, *supra* note 1, at 11.

26. Ginsburg, *supra* note 1, at 636.

proposition that we should abandon a very effective litigation structure simply because its architecture is not elegant. I have no problem in rejecting that proposition.

In addressing the Committee's alternative contention that the Claims Court and the Federal Circuit should be excluded from this area of the law, however, the question remains: "Why?" Those who propose the change bear the burden of explaining why it will result in a better life for all. The Committee says nothing on this score, and the answer is not self-evident. By exercising jurisdiction over tax trials, the Claims Court does not seem to be creating any problems for any other court, for any taxpayer, or for the government, and neither the Committee nor Professor Ginsburg has identified any. With respect to the tax appellate jurisdiction of the Federal Circuit, Professor Ginsburg argues that a taxpayer victory in that court leads all other taxpayers to follow the piper to the same forum.²⁷ While that may be true, he does not state why the result is bad. If the government is aggrieved by the favorable taxpayer result, the government exercises a far more persuasive voice than do taxpayers in seeking Supreme Court review (even where there is no intercircuit conflict) or in seeking legislative correction. Taxpayers of moderate means rarely experience difficulty in financing litigation that has a high probability of success. Consequently, the advance payment requirement is unlikely to bar access to the court in the postulated situation of a favorable Federal Circuit precedent.

Nevertheless, if someone were to make the case successfully that the relative finality of Federal Circuit decisions is intolerable, that problem could be abrogated without depriving the Claims Court of tax trial jurisdiction. In tax cases, appeals from the Claims Court could be routed to the taxpayer's circuit of residence, as is the case with appeals from the Tax Court. I do not raise this point to advocate such a change, but simply to illustrate that adjustments can be made to the present system without resort to the dramatic surgery that the Committee proposed.

In short, I submit that abandoning efforts to beautify the tax litigation system will better serve taxpayers, the federal government, and the tax profession. The tax litigation system should be left alone to dispose of huge volumes of tax controversies in its quick and efficient manner.

27. *Id.* at 633.