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FEDERAL TAX CASES UPON APPEAL: THE RISE AND DEMISE OF THE DOBSON RULE

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Certain of the principles governing the scope of the review of federal tax cases in the higher federal courts have changed significantly during the last twenty years. The more obvious changes have been effected by act of Congress or by decision of the Supreme Court. Upon occasion an intermediate appellate court, a United States Circuit Court of Appeals, has seemed to pay scarcely more than lip-service to the principles supposed to guide it. At times the guiding principle itself has been imperfect and its application has produced anomalous results. Sometimes the intermediate court is at fault.

The search for principles which, as far as humanly possible, would insure perfection of decision upon appeal in federal tax cases has followed a tortuous course in recent years. In one respect it has gone almost full circle during the last two decades. In the process many federal tax cases have from the point of view of perfect justice been decided incorrectly upon appeal, either through affirmance or through reversal of the decision below. Thus a case decided one way upon appeal in recent years very probably, sometimes almost certainly, would have been decided in exactly opposite fashion by the same court a few years before, and this though no significant change of substantive law occurred in the meantime. This vagary of decision has produced confusion and has been particularly noticeable in some of the decisions of the federal appellate courts in cases which came to them upon appeal from the Tax Court of the United States, known from 1924 to October 21, 1942, as the United States Board of Tax Appeals. It is the purpose of this article to discuss an important phase of the evolution of principles governing the scope of the review of federal tax cases by the higher federal courts, including changes in those principles in recent years.

Taxes have ever been the life-blood of government. Without revenue government perishes, and taxes are the great source of public revenue. Hence from motives of self-preservation governments have traditionally

collected their revenue first, under some pattern of exaction, and thereafter have heard the complaint of the taxpayer and made restitution where the latter seemed proper.[1] Thus for more than a century taxpayers could not obtain a judicial determination of their liability for federal taxes in any court of this country, save in most rare and exceptional circumstances, until after they had paid their tax, filed claim for refund with the proper authorities, and waited a certain period of time; then they might file suit. The suit would lie either in the United States District Court or in the Court of Claims after that court was established.[2]

Such a system of corrective justice left much to be desired. The payment of a tax not owed, as a condition to litigating one's liability, was a serious matter and even ruined some taxpayers and some businesses. In this setting Congress passed the Revenue Act of 1924[3] establishing a Board of Tax Appeals as "an independent agency in the executive branch of the government,"[4] the members of the Board to be appointed by the President, by and with the consent of the Senate, to hear federal income and estate tax cases, upon petition by the taxpayer, in instances where the taxpayer wished to litigate his liability before making payment. The statute provided that either party, upon losing before the Board, might bring a proceeding in court, the Government to collect the amount of the deficiency disallowed by the Board, the taxpayer to recover any amounts paid in pursuance of a decision by the Board. Thus proceedings before the Board, under the Revenue Act of 1924, were somewhat experimental in nature and tentative in result.[5]

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[1]Miller v. Standard Nut Margarine Co., 284 U. S. 498, 509, 52 Sup. Ct. 260, 263, 76 L. Ed. 422, 429 (1932); Phillips v. Commissioner, 283 U. S. 589, 593 n.5, 51 Sup. Ct. 608, 610, 75 L. Ed. 1289, 1295 (1931); Cheatham v. United States, 92 U. S. 85, 89, 23 L. Ed. 561 (1875); see also State Railroad Tax Cases, 92 U. S. 575, 613-614, 23 L. Ed. 663, 673 (1875).

[2]36 STAT. 1091, 1100 (1911), as amended, 28 U. S. C. §§41(1), 105 (1946), as revised by Act of June 25, 1948, c. 646, 62 STAT. ——, H. R 3214, 28 U. S. C §§1331, 1340, 1345, 1346, 1396 (6 CONG. REC. SERV.), effective Sept. 1, 1948; 36 STAT. 1136 (1911), as amended, 28 U. S. C. §250(1) (1946), as revised by Act of June 25, 1948, c. 646, 62 STAT. ——, H. R. 3214, 28 U. S. C. §1491 (6 CONG. REC. SERV.), effective Sept. 1, 1948.

[3]43 STAT. 253-355.

[4]Revenue Act of 1924, §900(k), 43 STAT. 338 (1924).

[5]In Blair v. Curran, 24 F.2d 390, 392 (C. C. A. 1st 1928), the court described them thus: "The hearing before the Board was at that time [under the 1924 Act] little more than a preliminary skirmish, a run for luck. For either party, if dissatisfied with the decision, could bring a court action and try the matter de novo . . . the Board's findings being prima facie evidence against the losing party."

The Revenue Act of 1926[6] gave greater status to decisions of the Board of Tax Appeals rendered in cases heard after the passage of that Act. A trial *de novo* could no longer be obtained in the Court of Claims or in a district court, by a proceeding instituted there, after the decision by the Board.[7] The aggrieved party's only remedy was by appeal to the circuit court of appeals or to the Court of Appeals of the District of Columbia,[8] whose judgment in turn was subject to review by the Supreme Court of the United States upon certiorari in the manner provided in the Judicial Code.

The power of the intermediate federal court, i.e., of the circuit court of appeals or the Court of Appeals of the District of Columbia, to review decisions of the Board of Tax Appeals was thus defined by the 1926 Act:[9]

> "Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."[10]

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[6]44 STAT. 9-131.

[7]The earlier remedy of a *de novo* proceeding was preserved in cases in which the hearing had been held but the Board did not decide the issue until after the passage of the Act of 1926. Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 727-728, 49 Sup. Ct. 499, 503, 73 L. Ed. 918, 927 (1929).

[8]The review in the case of an individual was by the circuit court of appeals for the circuit whereof he was an inhabitant, or, if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia. The review in the case of an association or a corporation or of an estate or trust was by the circuit in which was located the office of the collector to whom such person made the return, or, in case such person made no return, then by the Court of Appeals of the District of Columbia. Revenue Act of 1926, §§1001, 1002, 44 STAT. 109, 110 (1926).

[9]§1003(b), 44 STAT. 110 (1926).

[10]The power of the circuit courts of appeals to review decisions of United States district courts is found in Act of June 25, 1948, c. 646, 62 STAT. ——, H. R. 3214, 28 U. S. C. §1291 (6 CONG. REC. SERV.), effective Sept. 1, 1948, as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Cf. 28 U. S. C. §§225, 226 (1946).

The language just quoted was carried forward without change into the Internal Revenue Code when that was adopted on February 10, 1939, and remains in the Internal Revenue Code today.[11] Meantime the appellate courts have variously interpreted and exercised their power of review of decisions of the Tax Court, the same court upon some occasions interpreting its power narrowly and strictly and, upon other occasions, broadly. The results in terms of decisions—and judicial dispositions of cases upon review—have been so divergent that, encouraged by both the general tax bar and the Treasury, Congress at length took a hand. In June, 1948, Congress passed and on June 25, 1948, the President signed H. R. 3214, effective September 1, 1948, which—in addition to revising and codifying the Judicial Code—amended Section 1141(a) of the Internal Revenue Code to read as follows:[12]

> "The circuit courts of appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, *in the same manner and to the same extent as decisions of the district courts in civil actions tried without jury;* and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of title 28 of the United States Code."

The words in italics are the important new words in Section 1141(a), as amended, being the words added by H. R. 3214. By them the Congress made specific what the earlier Congress intended and thought it had clearly provided by section 1003(b) of the Revenue Act of 1926.[13] Meantime the federal appellate courts had during the intervening years reviewed many decisions of the Tax Court with perceptibly less respect than the same courts accorded to decisions of federal district courts, and

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[11] INT. REV. CODE §1141(c)(1).

[12] Pub. L. No. 773, 80th Cong., 2d Sess., §36 (Sept. 1, 1948). Italics supplied.

[13] *Supra* p. 335. Both the House and Senate reports upon the Revenue Act of 1926 (H. R. REP. No. 1 and SEN. REP. No. 52, 69th Cong., 1st Sess. (1926), I. R. B. 19, 1939-1 CUM. BULL. pt. 2, 328, 359 (1939)) contain the following concerning the procedure provided for review by the circuit courts of appeals and the Court of Appeals of the District of Columbia of decisions of the Board of Tax Appeals: "The procedure is made to conform as nearly as may be to the procedure [upon review] in the case of an original action in a Federal district court."

then others with greater or professedly greater respect or caution after *Dobson v. Commissioner.*[14] It is scarcely surprising that the first occurred.

It is less understood that the liberality of review and of reversing Tax Court decisions which the circuit courts of appeals practiced did much to provoke the *Dobson* rule. Once that is appreciated and note taken of the varied and inconsistent reactions of the several circuit courts of appeals to the *Dobson* rule during its four years, eight months and twelve days of life,[15] the profession may reasonably entertain some modest expectations as to the scope of future reviews of tax cases and as to the limitations upon the power of review which the appellate courts may observe.

No purpose can be served now by collecting and analyzing the many pre-*Dobson* cases which circuit courts of appeals decided with little deference, whatever the rationalization of their opinion, to the decision of the Tax Court below. More than once the reveiwing court decided a fact question or a mixed question of fact and law, essentially as if the appellate court were the trial court and the Tax Court but a panel of special masters. All the federal appellate courts at various times before *Dobson v. Commissioner* carefully set forth the limitations upon their power to review fact questions and mixed questions of fact and law.[16] But they did not always observe those limitations.

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[14]320 U. S. 489, 64 Sup. Ct. 239, 88 L. Ed. 248 (1943); see also 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION 492 *et. seq.* (Supp. 1946); Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact,* 57 HARV. L. REV. 753 (1944); Notes, 29 CORN. L. Q. 515 (1944), 60 HARV. L. REV. 448 (1947), 61 L. Q. REV. 15 (1945).

[15]The Supreme Court decided *Dobson v. Commissioner, supra* note 14, Dec. 20, 1943. The committee reports accompanying H. R. 3214 are specific that the purpose of Sec. 36 of the Act is to overrule the principle enunciated by the Supreme Court in the *Dobson* case. See also the statement of Mr. Reed of Illinois on behalf of the House Committee, 94 CONG. REC. 8677-8678 (June 16, 1948).

[16]Helvering v. National Groc. Co., 304 U. S. 282, 295, 58 Sup. Ct. 932, 938, 82 L. Ed. 1346, 1356 (1938): "The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon a trial *de novo,* in effect, an independent determination of the matters which had been in issue before the Board. The court was without power to do so"; Hulburd v. Commissioner, 296 U. S. 300, 306, 56 Sup. Ct. 197, 200, 80 L. Ed. 242, 247 (1935), holding that the circuit court of appeals "was without power to choose between conflicting inferences unless only one was possible, or to try the case *de novo*"; see also Helvering v. Chicago Stock Yards Co., 318 U. S. 693, 702, 83 Sup. Ct. 843, 847, 87 L. Ed. 1086, 1091 (1943); Helvering v. Kehoe, 309 U. S. 277, 279, 60 Sup. Ct. 549, 550, 84 L. Ed. 751, 753 (1940); Helvering

Then two years to a month after Pearl Harbor came *Dobson v. Commissioner, supra.* The decision was a shock to the bar, for by it the Supreme Court appeared to renounce—upon behalf of the circuit courts of appeals as well as of itself—an important area of the judicial function of reviewing decisions of the Tax Court. To be sure, the Supreme Court was not without provocation for its strictures[17] anent the freedom with which reviewing courts, including the Supreme Court, had reversed well considered Tax Court decisions of fact questions and of mixed questions of fact and law.[18]

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v. Lazarus, 308 U. S. 252, 255, 60 Sup. Ct. 209, 210, 89 L. Ed. 226, 230 (1939); Colorado Natl. Bank v. Commissioner, 305 U. S. 23, 26, 59 Sup. Ct. 48, 49, 83 L. Ed. 20, 22 (1938); Palmer v. Commissioner, 302 U. S. 63, 70, 58 Sup. Ct 67, 70, 82 L. Ed. 50, 51 (1937); Old Mission Portland Cement Co. v. Helvering, 293 U. S. 289, 294, 55 Sup. Ct. 158, 161, 79 L. Ed. 367, 371 (1934); Hartford-Empire Co. v. Commissioner, 137 F.2d 540, 542 (C. C. A. 2nd), *cert. denied,* 320 U. S. 787, 64 Sup. Ct. 196, 88 L. Ed. 473 (1943); McGrew's Est. v. Commissioner, 135 F.2d 158, 161-162 (C. C. A. 6th 1943); Olin Corp. v. Commissioner, 128 F.2d 185, 187 (C. C. A 7th 1942); Gump v. Commissioner, 124 F.2d 540, 543 (C. C. A. 9th 1941), *cert denied,* 316 U. S. 697, 62 Sup. Ct. 1292, 86 L. Ed. 1766 (1942); Snyder & Berman v. Commissioner, 116 F.2d 165, 168 (C. C. A. 4th 1940); Roerich v. Helvering, 115 F.2d 39 (App. D. C. 1940), *cert. denied,* 312 U. S. 700, 61 Sup. Ct. 740, 85 L. Ed. 1134 (1941); Maddas v. Commissioner, 114 F.2d 548, 549 (C. C. A. 3rd 1940); Foster v. Commissioner, 112 F.2d 109, 113 (C. C. A. 1st 1940); Commissioner v. Horseshoe L. Syndicate, 110 F.2d 748, 750 (C. C. A. 5th 1940); Jones v. Commissioner, 103 F.2d 681, 685 (C. C. A. 9th 1939); Continental Oil Co. v. Commissioner, 100 F.2d 101, 111 (App. D. C. 1938); Brush-Moore Newspapers v. Commissioner, 95 F.2d 900, 902 (C. C. A. 6th 1938), *cert. denied,* 305 U. S. 615, 59 Sup. Ct. 74, 83 L. Ed. 392 (1938); Wiese v. Commissioner, 93 F.2d 921, 923 (C. C. A. 8th) *cert. denied,* 304 U. S. 562, 58 Sup. Ct. 944, 82 L. Ed. 1529 (1938); Stuart v. Commissioner, 84 F.2d 368 (C. C. A. 1st 1936); Southern Power & Mfg. Co. v. Commissioner, 82 F.2d 104, 105 (C. C. A. 5th 1936); Beech v. Commissioner, 82 F.2d 42, 44-45 (C. C. A. 3rd 1936); Helvering v. Edison Securities Corp., 78 F.2d 85, 87 (C. C. A. 4th 1935); Commissioner v. Hales, 76 F.2d 916 (C. C. A. 7th 1935); Wilson v. Commissioner, 76 F.2d 476, 478 (C. C. A. 10th 1935); Randolph v. Helvering, 76 F.2d 472, 476 (C. C. A. 8th 1935), *cert. denied,* 296 U. S. 599, 56 Sup. Ct. 116, 80 L. Ed. 425 (1938); Patterson v. Commissioner, 42 F.2d 148, 149 (C. C. A. 2nd 1930).

[17]Dobson v. Commissioner, 320 U. S. 489, 494, 64 Sup. Ct. 239, 243. 88 L. Ed 248, 252 (1943): "However, even a casual survey of decisions in tax cases, now over 5,000 in number, will demonstrate that courts including this Court have not paid the scrupulous deference to the tax laws' admonitions of finality which they have to similar provisions in statutes relating to other tribunals. . . ."

[18]It is noteworthy that the Court's opinion in the *Dobson* case was written by Justice Jackson, whose unusual experience as General Counsel of the Bureau of Internal Revenue, as Assistant Attorney General in charge of the Tax Division of

Attempted adherence to the *Dobson* rule soon taxed the talents of the learned justices, if it did not involve the Supreme Court in inconsistencies.[19] Nevertheless the rule was reiterated[20] and even embellished.[21]

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the Department of Justice, as Solicitor General, and as Attorney General had made him sensitive to the current of appellate court decisions, reviewing and overruling decisions of the Tax Court. Later cases, particularly, show that his views were shared by Justice Frankfurter, who arrived at the same conclusion by long study and work in the field of administrative law and procedures. A motive with all the justices may have been an apprehension of a burdensome increase in the amount of tax litigation brought to the appellate courts as a result of World War II. See Dobson v. Commissioner, 320 U. S. 489, 494, 64 Sup. Ct. 239, 243, 88 L. Ed. 248, 252 (1943): "Increase of potential tax litigation due to more taxpayers and higher rates lends new importance to observance of statutory limitations on review of tax decisions."

[19]*Cf.* John Kelley Co. v. Commissioner and Talbot Mills v. Commissioner, 326 U. S. 521, 533 & 536, 66 Sup. Ct. 299, 305 & 307, 90 L. Ed. 278, 285 & 287 (1946), each of which was decided by only one tax court judge, a different judge in each case. Substantially all of the evidentiary facts were stipulated in both cases and the facts were substantially the same. One tax court judge decided one case for the taxpayer; the other tax court judge decided the other case for the Commissioner. The circuit court of appeals reversed in the one case and decided for the Commissioner; another circuit court of appeals affirmed the tax court decision for the Commissioner. The Supreme Court in a single opinion covering both cases reversed in the case in which the circuit of court appeals had reversed the tax court and affirmed the other, thus affirming the two decisions of the tax court. One of the dissenting justices commented on this as follows:

> "One might entertain the view that in a close situation the Tax Court's judgment should be accepted whatever way the die were cast, although reviewing courts might differ on the direction. But it would not follow, and in my judgment should not, that they are powerless when the throw is in opposite directions at the same time. . . . If the ultimate conclusion of the Tax Court or its divisions can be made in exactly opposing ways, and must be left undisturbed, without substantial differentiating facts, or when hybrid arrangements bear tax indicia equally with marks of non-taxability, not only is the statutory review nullified. The right of taxpayers to be treated with equal justice before the law is denied."

[20]Commissioner v. Sunnen, 333 U. S. 591, 607-608, 68 Sup. Ct. 715, 92 L. Ed. 673 (1948); Commissioner v. Tower, 327 U. S. 280, 287, 66 Sup. Ct. 532, 535, 90 L. Ed. 670, 675 (1946); Commissioner v. Wemyss, 324 U. S. 303, 307, 65 Sup. Ct. 652, 654, 89 L. Ed. 958, 962 (1945).

[21]*See* Trust of Bingham v. Commissioner, 325 U. S. 365, 384, 65 Sup. Ct. 1232, 1241, 89 L. Ed. 1670, 1682 (1945) (concurring opinion). "If the issue presents *a difficulty* which it is peculiarly within the competence of the Tax Court to resolve and that court has given a fair answer, every consideration which led to the pronouncement in the Dobson case should preclude independent re-examination of the

The response of circuit courts of appeals to the *Dobson* rule was varied. The circuit court of appeals which had been reversed in the *Dobson* case soon rendered a decision which, upon grant of certiorari, might have been made the occasion for a clarification and a sensible modification of the *Dobson* doctrine.[22] But the chief counsel for the Bureau of Internal Revenue and the Department of Justice chose not to seek certiorari in the case.

The Circuit Court of Appeals for the Second Circuit after a few reversals[23] in cases where it had reversed the Tax Court candidly acknowledged and sought to conform to the limitations upon its power of review imposed by the *Dobson* rule.[24] It even affirmed a Tax Court decision where it would have reversed a like decision of a district court.[25] In inimitably ironical language, however, which none who read might miss, it paid its respects to the *Dobson* doctrine.[26]

Tax Court's disposition" Italics supplied. *Cf.* Merrill v. Fahs, 324 U. S. 308, 310, 65 Sup. Ct. 655, 656, 89 L. Ed. 963, 965 (1945), a suit against a Collector of Internal Revenue, in which the Court significantly observed: "This case, unlike the *Wemyss* case, does not come here by way of the Tax Court. No aid can therefore be drawn from a prior determination by the tribunal specially entrusted with tax adjudications."

[22]Helvering v. Meredith, 140 F.2d 973 (C. C. A. 9th 1944), affirming *per curiam* on authority of the *Dobson* doctrine a memorandum opinion of the Tax Court which held that life insurance and guaranteed annuity contracts separate in form but simultaneously issued by an insurance company for a single consideration, without physical examination of the insured and no matter what the age of the insured, should not be treated for federal tax purposes as a single investment transaction. *But cf.* Keller v. Commissioner, 312 U. S. 543, 61 Sup. Ct. 651, 85 L. Ed. 1032 (1941); Helvering v. Le Gierse, 312 U. S. 531, 61 Sup. Ct. 646, 85 L. Ed. 996 (1941); Helvering v. Tyler, 111 F.2d 422 (C. C. A. 8th 1940), *aff'd per curiam*, 312 U. S. 657, 61 Sup. Ct. 729, 85 L. Ed. 1105 (1941), all to the contrary

[23]Trust of Bingham v. Commissioner, 325 U. S. 365, 65 Sup. Ct. 1232, 89 L. Ed. 1670 (1945); Commissioner v. Bedford, 325 U. S. 283, 65 Sup. Ct. 1157, 89 L. Ed. 1611 (1945)

[24]Seifert v. Commissioner, 157 F.2d 719 (C. C. A. 2nd 1946); Brooklyn Natl. Corp. v. Commissioner, 157 F.2d 450, 452 (C. C. A. 2nd), *cert. denied*, 329 U. S. 733, 67 Sup. Ct. 96, 91 L. Ed. 634 (1946).

[25]Brooklyn Natl. Corp. v. Commissioner, 157 F.2d 450, 452 (C. C. A. 2nd 1946), ". . . if the case were an appeal from a district court, we should have no alternative but to reverse" See also Kirschenbaum v. Commissioner, 155 F.2d 23, 25 (C. C. A. 2nd), *cert. denied*, 329 U. S. 726, 67 Sup. Ct. 75, 91 L. Ed. 628 (1946); *cf.* Kohnstamm v. Pedrick, 153 F.2d 506, 508-509 (C. C. A. 2nd 1945).

[26]American Coast Line, Inc., v. Commissioner, 159 F.2d 665, 668-669 (C. C. A. 1st 1947). See also Commissioner v. Natural Carbide Corp., 167 F.2d 304, 307-308 (C. C. A. 2d 1948) Italics supplied.

> "Finally, so far as concerns our review of the Tax Court, as distinct from its own decisions as to its jurisdiction, the case seems to us especially proper for the application of the doctrine that, even as to matters of law unmixed with fact, we are to yield unless our conviction to the contrary is strong. . . . It is of course not our province to fix the distribution of judicial power; least of all are we in a position to measure the *higher authority* which the Tax Court's constant occupation in its special field should give to its rulings, as distinct from ours in our sprawling jurisdiction. We can think of no legal question as to which we ought more readily yield than that at bar; in that thicket of verbiage, through which we have been forced to cut a way, it must surely be an advantage to have been familiar with other tangles of the same general sort; and, while it is the pleasure of Congress to express itself so apocalyptically, *we may well be grateful that we are permitted to put our hand into those of accredited pathfinders.*"

Other circuit courts of appeals reacted somewhat differently. They did not noticeably imitate the Second Circuit's *reductio ad absurdum* campaign anent the *Dobson* doctrine. Instead they pursued the even tenor of their ways, reversing the Tax Court when they believed the inhibitions of the *Dobson* doctrine not too trammeling and the occasion appropriate. Some continued to reverse the Tax Court with considerable frequency.[27]

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[27]Viz., the Fifth Circuit, as follows: Howell Turpentine Co. v. Commissioner, 162 F.2d 319 (C. C. A. 5th 1947), wherein the appellate court reweighed the evidence and gave credence to testimony which had failed to convince the Tax Court; Commissioner v. Greenspun, 156 F.2d 917 (C. C. A. 5th 1946) (upon the taxpayer's cross-appeal); Hughes v. Commissioner, 153 F.2d 712 (C. C. A. 5th 1946); Hawkins v. Commissioner, 152 F.2d 221 (C. C. A. 5th 1945); Flowers v. Commissioner, 148 F.2d 163 (C. C. A. 5th 1945), *rev'd,* 326 U. S. 465, 66 Sup. Ct. 250, 90 L. Ed. 203 (1946); Court Holding Co. v. Commissioner, 143 F.2d 823 (C. C. A. 5th (1944), *rev'd,* 324 U. S. 331, 65 Sup. Ct. 707, 89 L. Ed. 981 (1945); Express Pub. Co. v. Commissioner, 143 F.2d 386 (C. C. A. 5th 1944); *cf.* Flick's Estate v. Commissioner, 166 F.2d 733 (C. C. A. 5th 1948); Foran v. Commissioner, 165 F.2d 705 (C. C. A. 5th 1948); Culbertson v. Commissioner, 168 F.2d 979 (C. C. A. 5th 1948); also the Sixth Circuit, with such reversals of the Tax Court as Woosley v. Commissioner, 168 F.2d 330 (C. C. A. 6th 1948); Cleveland Allerton Hotel v. Commissioner, 166 F.2d 805 (C. C. A. 6th 1948); Weizer v. Commissioner, 165 F.2d 772 (C. C. A. 6th 1948); Cronin v. Commissioner, 164 F.2d 561 (C. C. A. 6th

Obviously, the *Dobson* rule was not functioning as its architects seem to have planned. It may well be granted that the circuit courts of appeals did much to invite and provoke the *Dobson* ruling, by reweighing the evidence and drawing a different inference from that of the Tax Court in many cases where the inference which that tribunal drew was a possible one.[28] The "mischief" was, indeed, there, but the remedy was not practicable. Even the Supreme Court could not effectively confer upon decisions of the Tax Court "greater immunity from review than the decisions of other courts."[29] Confusion, uncertainty and lack of uniformity in the application of the tax laws rapidly followed from the attempt. And *Dobson* steadily shredded away.[30]

Congress has now taken a hand by amending section 1141(a) of the Internal Revenue Code. It thereby has made specific what it thought it had clearly enough provided by section 1003(b) of the Revenue Act of 1926.[31] In a sense we are back where we started when appeals were first authorized from the Board of Tax Appeals to the circuit courts of appeals over two decades ago, but enlightened by experience. It now lies with the circuit courts of appeals and the Supreme Court to give effect to the legislative direction.

1947); Lawton v. Commissioner, 164 F.2d 380 (C. C. A. 6th 1947); Tower v. Commissioner, 148 F.2d 388 (C. C. A. 6th 1945); Central Natl. Bank v. Commissioner, 141 F.2d 352 (1944); 1 U. OF FLA. L. REV. 106.

[28]This is not to imply that the inferences and conclusions of fact which the Tax Court drew were always correct. Far from it. The Tax Court probably did as well in that respect as most United States district courts.

[29]Commissioner v. National Carbide Corp, 167 F.2d 304, 307 (C. C A. 2nd 1948).

[30]See Frankel & Smith v. Commissioner, 167 F 2d 94, 96 (C. C. A. 2nd 1948): "As we agree with the Tax Court, we do not consider whether its decision is within so much of the doctrine of *Dobson v. Commissioner*, 320 U S. 489, 64 Sup. Ct. 239, 88 L. Ed. 248, as still remains intact."

[31]See note 13 *supra*.