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THE ROLE OF THE DEPARTMENT OF JUSTICE IN TAX LITIGATION

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The Department of Justice represents the United States in court both as litigant and as prosecutor. Accordingly, the Department of Justice represents the United States and its officers in both civil and criminal litigation arising under the internal revenue laws.[1] The functions of the Department of Justice in representing the United States in internal revenue matters, both civil and criminal, are performed by its Tax Division. The purpose of this article is to describe and explain the role of the Department of Justice in the overall administration and enforcement of the internal revenue laws.

THE ORIGIN OF THE TAX DIVISION

On June 10, 1933, President Franklin D. Roosevelt, by Executive Order,[2] transferred to the Department of Justice the function of prosecuting in the courts of the United States all claims and demands by, and offenses against, the Federal Government, defending claims against the Government, and supervising the work of the United States Attorneys in connection with all such matters. This Executive Order was designed to place all litigation to which the Government is a party under the authority of the Attorney General, the Government's highest ranking legal officer, and to end the divided responsibility which previously existed in the conduct of the Government's legal affairs.[3]

On January 1, 1934, the Attorney General created the Tax Division which began representing the Government in tax cases in the

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1. The Chief Counsel of the Internal Revenue Service represents the Government in proceedings before the Tax Court, which, until 1970, was an independent agency in the executive branch of the Government. Pursuant to the Tax Reform Act of 1969, the Tax Court became an Article I court. INT. REV. CODE of 1954, § 7441.

2. Executive Order No. 6166, June 10, 1933. The Executive Order was issued under The Act of March 3, 1933, ch. 212, 47 Stat. 1489, 1517, amending the "Economy Act" of June 30, 1932, ch. 314, 47 Stat. 382, 413.

3. For a discussion of the Government's prior representation in tax litigation and the results of divided responsibility in representing the United States in court, *see* Buck, *Federal Tax Litigation and the Tax Division of the Department of Justice*, 27 VA. L. REV. 873 (1941).

district courts, Court of Claims, courts of appeals and state courts. The Solicitor General continued to represent the Government in tax cases in the Supreme Court and the General Counsel of the Internal Revenue Service continued to represent the Government in proceedings before the board of Tax Appeals, subsequently renamed the Tax Court, which, until 1970, was an independent agency in the executive branch not having the status of a court. Thus, since 1934, the Tax Division of the Department of Justice has represented the United States in both civil and criminal tax cases in all courts except the Tax Court and the Supreme Court.

THE FUNCTIONS OF THE TAX DIVISION

The Tax Division, in conducting tax litigation, acts principally as counsel for the Internal Revenue Service.[4] Undoubtedly, there is both efficiency and inefficiency in a procedure which divides responsibility for the conduct of the Government's tax affairs by placing responsibility for administrative determination in the Internal Revenue Service and for litigation in the Department of Justice. This division of responsibility between administrative determination and judicial representation, however, has a more important role: It promotes a highly professional administration of the tax laws because it automatically provides for re-examination of the Government's position as a controversy passes from the administrative processing by the Internal Revenue Service to litigation processing by the Justice Department and the courts. This assures taxpayers of an independent review of their claims by Justice Department lawyers dissociated from the original administrative determination; and it affords the Internal Revenue Service the advice of independent counsel. This litigation procedure, which requires an independent review of the Government's position, has served the country well and has provided taxpayers assurance of uniform application of basic tax principles. Such assurance is absolutely necessary for our self-assessment system.

The Tax Division's work, trial and appellate litigation, can be accurately described as administering the tax laws through litigation. It is a commonplace that judicial decisions shape our tax laws with greater finality than administrative decisions by the Internal Revenue

4. The Tax Division also represents other Government agencies in dealings with state and local tax authorities.

Service. Unless a court decision is overruled by Congress or by a subsequent decision, it remains as an irrevocable part of our tax law. The Tax Division is known primarily as advocate for the Government; yet because over-emphasis on advocacy might result in unequal administration of the tax laws, the Tax Division also serves an administrative role. In litigation, the Tax Division seeks an equitable solution for each controversy and, in general, urges the adoption of uniform principles which can be applied administratively as well as in other litigated cases. Effective administration requires centralized control of tax litigation in both trial and appellate courts. For this reason, the Tax Division conducts tax litigation, with limited exceptions, from Washington in order to correlate tax problems in the various courts and thereby insure uniformity in emphasis and position.

A rough measure of the difficulty of this task is the volume of the Division's caseload. In fiscal year 1970, the Tax Division received 3,946 new court cases, the highest number in its history, and closed 3,561 pending court cases. Court decisions disposed of 937 cases in fiscal year 1970. Of these cases, the Supreme Court decided 7, the courts of appeals 380, the district courts 422, the Court of Claims 42, and the state courts 86. Also during fiscal year 1970, the Division received 5,889 miscellaneous cases and matters (miscellaneous bankruptcy and insolvency proceedings, liens, foreclosures, motions, etc.) and disposed of 5,830 miscellaneous cases and matters. At the end of fiscal year 1970, the Division had pending 6,268 regular court cases and miscellaneous cases and matters. The Tax Division handles this volume with about 250 lawyers and a supporting staff of about 200.

ASSISTANT ATTORNEY GENERAL AND HIS STAFF

The Tax Division operates under the direction of an Assistant Attorney General, who reports directly to the Attorney General. The Assistant Attorney General has overall responsibility for the operation of the Division and the conduct of litigation under its jurisdiction. In order to direct the prosecution of Government tax policy through litigation, he and his immediate staff maintain close contact with Internal Revenue Service and Treasury Department officials.

The Assistant Attorney General's immediate staff consists of three Deputy Assistant Attorneys General and an Executive Assistant. One of the Deputies is senior. He is principally responsible for appellate

matters, and assists in the management of the Division. Another Deputy is principally responsible for criminal and general litigation matters; and the third is principally responsible for civil refund litigation. The Executive Assistant is principally responsible for the administrative functions of the Division, including personnel matters, although he is a senior attorney and participates in the legal functions of the Division.

The Tax Division is organized internally on a functional basis in a manner which promotes administrative convenience in performing its work. The Division is divided into eight legal sections and one administrative section.

CRIMINAL LITIGATION

The Department of Justice, through its Tax Division, is responsible for prosecuting criminal offenses under the internal revenue laws. The cases primarily involve tax evasion, failure to file returns, subscribing to false returns, and assisting in the preparation or presentation of false returns. Investigations in cases of suspected criminal violation of the internal revenue laws are made by Special Agents of the Intelligence Division of the Internal Revenue Service. If, after investigation, the Intelligence Division considers prosecution to be warranted, a recommendation to that effect is transmitted to the Internal Revenue Service's Regional Counsel, who, if he agrees, forwards the case to the Tax Division where it is assigned to the Criminal Section.

The Criminal Section of the Tax Division reviews the Intelligence Division's report and exhibits and submits a recommendation to the Assistant Attorney General, who decides whether to prosecute. This independent review procedure mitigates against a too lienient or too harsh approach, conforms criminal tax prosecutions to national standards and policies, and coordinates criminal tax prosecutions with law enforcement activities of other branches of the Department of Justice. Since the Internal Revenue Service generally does not review prosecution recommendations at its Washington office, the review by the Tax Division provides the only national standards and policies, and coordinates criminal tax prosecutions with law enforcement activities of other branches of the Department of Justice. Since the Internal Revenue Service generally does not review prosecution

recommendations at its Washington office, the review by the Tax Division provides the only national control of criminal tax matters in the pre-prosecution stage, the review by the Internal Revenue Service's Regional Counsel being on a regional basis.

During the Tax Division's consideration of a case, the taxpayer is given an opportunity for a conference to present whatever facts and explantions he desires. The principal considerations in the decision whether to prosecute are the probable guilt or innocence of the alleged tax evader and the probability of conviction upon trial. If all the relevant circumstances and evidence indicate the probable guilt of the taxpayer, and there is reasonable probability of conviction, the Division then authorizes prosecution. The Division does not compromise such a case on the payment of money, regardless of the amount. Further, the Tax Division opposes *nolo contendere* pleas.

After a decision for prosecution is made, the Tax Division forwards the case to the appropriate United States Attorney to proceed with the prosecution.[5] In general, the Tax Division expects the United States Attorney to prosecute the case with the Division continuing to act as a supervisory and servicing agency pending ultimate disposition. Nevertheless, Criminal Section attorneys often make presentments to grand juries and actually try cases, or assist United States Attorneys in doing so. This occurs for a variety of reasons, sometimes at the request of the United States Attorney and sometimes at the Tax Division's request. While the number of trials in which the Criminal Section participates is not large in relation to the number of cases in which indictments are obtained, it is substantial (15 to 20 percent) in relation to the number of cases which are actually tried.

The Tax Division will not authorize prosecution if, after careful consideration, the guilt of the taxpayer does not appear evident or there is lacking a reasonable probability of conviction. In these circumstances, the Division returns the case to the Internal Revenue Service for further processing to determine and collect the civil liability.

In fiscal year 1970, the Tax Division received 1,077 recommendations for prosecution from the Internal Revenue Service and, after review, authorized prosecution in 948, or 88 percent, of those cases. In fiscal year 1970, 612 defendants were convicted or entered

5. 18 U.S.C. § 3237 (1969).

pleas (guilty or *nolo contendere*); that was 95 percent of the cases prosecuted. In the 98 cases tried in fiscal year 1970, 69 were convicted for a trial conviction rate of 70 percent.

CIVIL LITIGATION

The conjunction of several thousand new court cases a year with a legal staff of 250 lawyers makes it essential that the Tax Division classify its cases and allocate its resources. For several years the Tax Division, in cooperation with the Office of the Chief Counsel of the Internal Revenue Service, has tried to identify the cases which are of particular importance to the administration of the internal revenue laws and those which are routine, and therefore suitable for settlement. Approximately 6 percent of the Division's cases are classified as of prime importance because of their prospective impact as interpretations of the tax laws. Such cases must receive the most careful attention and the positions urged cannot be formulated solely with a view towards winning, but must be formulated with a view towards the overall administration of the tax laws. To these cases the Tax Division devotes a substantial portion of its resources. Ordinarily these cases are not susceptible of settlement.

Significantly, approximately 45 percent of civil refund cases received (about 60% of total cases) fall in a category of lesser importance. These cases are susceptible of settlement; a large number of these cases are settled without a trial. It is preferable that they be settled administratively as court dockets are seriously overloaded. Because of this, both taxpayers and the Government should consider seriously all opportunities of settling issues administratively when they are susceptible of settlement, thereby decreasing the number of cases now being filed in and tried by the courts.

SETTLEMENT OF LITIGATION

In many cases, both the taxpayer and the Tax Division prefer to settle, thus fixing the tax liability without the risk, delay, and expense of litigation. Normally the Division settles about 50 percent of its civil refund cases. Authority to compromise cases in litigation is vested in the Attorney General.[6] The Attorney General has delegated to the

6. INT. REV. CODE of 1954, § 7122.

Assistant Attorney General in charge of the Tax Division authority to reject any offer in settlement unless a question is presented which he believes should receive the personal attention of the Attorney General, and to accept any offer within certain dollar limits unless he thinks it should receive the Attorney General's consideration.

Given the alternatives to litigate or to settle, it is the Tax Division's settlement policy to dispose of cases, which are of limited precedential value, by accepting offers commensurate with the litigation possibilities of the case. Only occasionally must an otherwise acceptable offer be declined because it is considered desirable that the question be litigated to obtain an authoritative decision for guidance in future cases. Other than this special circumstance, the only impediment to a settlement is agreement on the litigation possibilities of the case. Obviously, the Tax Division must litigate cases, which it overwise might prefer to settle, if the taxpayer is unwilling to accept what the Division considers a fair proportion of the amount claimed. Failure to litigate such a case simply would encourage taxpayers to file suits in the federal courts in order to negotiate their tax bill, and this the Tax Division could not permit.

Each year a substantial proportion of civil tax cases in the federal courts are disposed of by compromise. In fiscal year 1970, 856 compromise settlements accounted for 39 percent of the 2,182 civil tax cases subject to settlement closed out by the Tax Division.[7] Of the 1,083 offers in compromise acted on in fiscal year 1970, 856 or 79 percent were accepted and 227 or 21 percent were rejected.

The Attorney General or Assistant Attorney General, Tax Division, took final action on approximately 170 or 16 percent of the settlement offers acted on in fiscal year 1970. The Review Section took final action on 643 or 59 percent of the settlement offers acted on in fiscal year 1970. In the settlement of cases by the Tax Division, the Review Section plays a principal role. It has a primary responsibility for processing settlement offers. Since March, 1970, the chiefs of the civil trial sections have had authority to accept offers in compromise where the amount of the concession by the United States does not exceed $20,000. This redelegation of authority to settle cases was intended to expedite settlements and to free the Review Section of

7. Settlements from fiscal year 1964 through fiscal year 1969 averaged 50 percent of the civil tax cases subject to settlement.

numerous small cases so that it could concentrate on the cases requiring its consideration. The Section Chiefs took final action on 270, or 25 percent, of the settlement offers acted on in fiscal 1970.

TRIAL LITIGATION

Five Trial Sections, including the General Litigation Section, have charge of all civil tax cases in the federal district courts, the Court of Claims, and also of cases in the state courts of first instance to which the Government is a party or in which it is interested. Approximately 60 percent of all federal civil tax cases are suits for refund of taxes paid. The balance consists principally of collection suits, tax claims in bankruptcy proceedings, disputes concerning the liability of the United States and its agencies and instrumentalities to pay taxes to the states and their political subdivisions, and miscellaneous matters. Because of the specialized nature of tax problems and the necessity of coordination in the handling of tax cases, the Tax Division maintains a staff of trial attorneys in Washington who try about 85 percent of all the tax cases to which the Government is a party, including both refund and collection suits. The local United States Attorneys try the remaining 15 percent of the cases.

In fiscal year 1970, Tax Division attorneys tried 586 civil cases in the lower courts. Of the total, 488 were before the federal district courts, 52 before state courts, and 46 before the Court of Claims. The Government's position was upheld in 80 percent of the trial court decisions.

APPELLATE LITIGATION

The Appellate Section of the Tax Division is responsible for all cases in the appellate courts, including all appeals from decisions of the Tax Court, and appeals to State appellate courts in cases within the Division's jurisdiction. The Division also assists the Solicitor General with tax cases in the Supreme Court.

The Solicitor General decides whether the Government will appeal a lower court decision adverse to the Government. Under established procedures, the Solicitor General receives and considers the written views of the Chief Counsel of the Internal Revenue Service and of the Assistant Attorney General, Tax Division. If an appeal is authorized by the Solicitor General, the Tax Division assigns the case to an

attorney in its Appellate Section for briefing and argument. If the Government has won in a lower court and the taxpayer appeals, the Tax Division simply assigns the case to an attorney in its Appellate Section for preparation of the Government's brief. In the course of preparing the Government's brief, the Appellate Section considers whether the Government's position or the lower court's decision should be defended. Despite a natural reluctance to repudiate a view successfully urged upon a lower court, the Tax Division infrequently does recommend to the Solicitor General that the Government confess error.[8]

The Solicitor General decides whether the Government will petition for certiorari after he receives and considers the written views of the Chief Counsel of the Internal Revenue Service and the Assistant Attorney General, Tax Division. The Tax Division's Appellate Section drafts and submits to the Solicitor General, who is directly responsible for all Supreme Court litigation, petitions to the Supreme Court for writs of certiorari in tax cases, briefs in opposition to taxpayer's petitions, and briefs on the merits after certiorari has been granted. Ordinarily, the Government files only 8 to 10 petitions for certiorari each year, with 5 or 6 ordinarily granted. Taxpayers, on the other hand, ordinarily file 80 to 100 petitions, with 5 or 6 ordinarily granted.

In fiscal year 1970, the Tax Division handled 537 civil tax appeals from decisions of the Federal District Courts (338), Tax Court (176), and state courts (23). In addition, the Tax Division handled 124 criminal tax appeals. The Government prevailed in 314 or 82 percent of the 380 cases decided by the courts of appeals in fiscal year 1970. In the Supreme Court, the Government prevailed in 6 of the 7 tax cases decided in fiscal 1970.

CONCLUSION

The Tax Division's role is to perform its functions and responsibilities fairly and soundly, thereby clarifying and establishing, through litigation, principles of tax law that enhance and support our self-assessment system. The criteria pertinent to evaluating the Tax Division's work are, for the most part, not subject to quantitative measurement. While the professional skill and resourcefullness with

8. *See, e.g.*, Crest Finance Co. v. United States, 368 U.S. 347 (1961).

which Tax Division attorneys try cases, the clarity and vigor with which positions are presented in briefs and arguments, and the degree to which all relevant considerations are taken into account in forming litigating positions, are all crucial to performance of the Tax Division's work, none of these criteria can be judged by reference to numbers. Collectively, these criteria are evident in the high quality of the Division's work and attributable in large part to the ability and dedication of the Division's exceptionally well-qualified staff of attorneys.

Some aspects of the Division's work, such as success in litigation, can be measured quantitatively and in recent years the Tax Division has won 80 percent of its civil litigation which is not settled, and 95 percent of its criminal prosecutions. The Division's primary purpose is not to win every case tried, but to present the case to the court in such a way as to insure a fair decision. In our opinion, the Division's success in litigation clearly demonstrates a responsible and sound approach by the Tax Division in litigation undertaken under the internal revenue laws.

Some other areas of success are less apparent—but, in our opinion, quite meaningful. With the ever-increasing volume of litigation, the time required to process cases to a conclusion or settlement becomes increasingly critical. The Division is more than ever aware of the necessity for expeditious handling of cases. Current efforts in this respect indicate what can be done with continuing attention: markedly shorter periods consumed in processing criminal tax cases and settlement offers, and the smallest number of requests by the Government for continuances and extensions of time within which to file pleadings or other documents. With continued attention in these areas by the Tax Division and the cooperation of taxpayers and their counsel, further significant improvements can be achieved.

In closing, one factor which profoundly influences litigation within the Division's jurisdiction deserves comment. The administration of our internal revenue laws and the accompanying litigation must be accomplished within a pattern of court organization unchanged since 1943 when Roswell Magill wrote:

> If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 courts with original jurisdiction, 11 appellate bodies of coordinate

> rank, and only a discretionary review of relatively few cases by the Supreme Court.[9]

Recently, the Chief Justice of the United States stated, "In the supermarket age we are trying to operate the courts with crackerbarrel corner grocer methods and equipment—vintage 1900."[10] While the Chief Justice's remarks were intended to apply to the judicial system generally, in some aspects they are applicable to our system for handling tax litigation.

For tax litigation, there are three trial courts—the federal district courts, the Tax Court, and the Court of Claims. The subject matter jurisdiction of each of these forums varies and each has its own procedural rules.[11] The federal district courts and the Tax Court are presided over by eleven courts of appeals, while the eleven courts of appeals and the Court of Claims are in turn presided over by the Supreme Court. There is no satisfactorily effective apex, and this produces unsatisfactory results for both taxpayers and the Government. Tax questions are litigated two, three, or four times, and often remain unsettled for several years before a conflict develops as a means of securing Supreme Court review and the answer. The effect of all this on tax administration through litigation at times is difficult for the Division, and puzzling to taxpayers. Lacking authoritative decisions of general application, the Tax Division may continue to press points which have been decided against the Government by several courts and similarly taxpayers press points which have been decided against taxpayers by several courts. The wait for the requisite conflict can be a long one and in any case is beyond the control of the taxpayer or the Division. In addition, the emphasis on resolving conflicts frequently leaves major questions in the administration of the tax laws unresolved.[12]

Over the years, many suggestions have been advanced and considered to improve our system for litigating tax cases. In general, most of these suggestions were embodied in bills introduced in Congress in 1969 by Senator Tydings.[13] Those bills proposed

9. MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1943).

10. Chief Justice Burger, *The State of the Judiciary-1970*, 56 A.B.A.J. 929 (1970).

11. *See generally*, U.S. Dept. of Justice, Tax Division, *Study of the Trial Court System for Federal Civil Tax Disputes*, 22 TAX LAWYER 95 (1968).

12. *See* Lowndes, *Federal Taxation and the Supreme Court*, 1960 SUP. CT. REV. 222, 224-257.

13. S. 1973—S. 1979, 91st Cong., 1st Sess. (1969).

alternative reforms in the federal tax litigation structure and system. The bills resulted from earlier consideration by the Senate Judiciary Committee's Subcommittee on Improvements in the Judiciary Machinery, in connection with a proposal to transform the Tax Court from an independent executive agency to an Article III constitutional court.[14] While the Subcommittee held some hearings in connection with all of these bills, the Subcommittee never carried its consideration forward to the point of producing recommendations for effective improvements in the system and structure for litigating tax cases. One of the suggestions that has been proposed many times—a Court of Tax Appeals with appellate jurisdiction over all civil tax controversies—has been considered and discussed for almost 40 years.[15] A Court of Tax Appeals, reviewable only by the Supreme Court on a writ of certiorari, would provide an early and substantially final authority on tax questions which are now repeatedly litigated or compromised. The question of whether substantial reform is needed in the federal system for litigating tax controversies indeed is a serious one—one deserving the most serious consideration of taxpayers, tax counsel, legal scholars, and the Government.

14. S. 2041, 90th Cong., 1st Sess. (1967).

15. Griswold, *The Need for a Court of Tax Appeals,* 57 HARV. L. REV. 1153 (1944); Pope, *A Court of Tax Appeals: A Call for Re-examination,* 39 A.B.A.J. 275 (1953).