

# Creation of National Appellate Tax Court Will Improve Tax Law

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In consideration of President Obama's tax reform task force, Tax Analysts has asked for suggestions on ways to reduce the budget gap not just by raising rates, but by reducing tax evasion and loopholes, simplifying the code, and reducing corporate welfare.

I will not join the many others who properly will call for broadening the base and lowering rates, eliminating the alternative minimum tax, increasing IRS funding, and the multitude of other good and obvious proposals; the panel is already aware of those and won't care what I think. Rather, I will offer less obvious suggestions.

## Tax Controversy Proposals

Two of the most astute observers of the federal tax system, Robert H. Jackson and Randolph Paul, said over half a century ago that the federal tax controversy system had too much litigation and too many sources of authority (Jackson counted 13). Those characteristics produce maximum flexibility in all directions for taxpayers. Taxpayer pressure for such flexibility explains why Congress overruled the Dobson<sup>1</sup> rule in 1948 and why the many proposals to create a court of tax appeals have gone nowhere: Taxpayers don't want their flexibility constrained. If the Tax Court is unlikely to rule in a taxpayer's favor, an individual can consider his local district court and its related court of appeals. If that venue is not conducive to victory, he can consider the claims court and its related court of appeals.

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<sup>1</sup>*Dobson v. Commissioner*, 312 U.S. 231 (1944).

Perhaps the time has come when we can no longer afford so much taxpayer flexibility.

I propose reinstating the Dobson rule by statute (which is where it started), meaning that a high threshold would have to be surmounted to reverse fact-findings by the Tax Court. I also join others who have proposed creating a national court of tax appeals to which all federal tax decisions of the Tax Court, the district courts, and the claims courts would be appealed. Further appeal to the Supreme Court would remain the same.

The national court of tax appeals would unify the interpretation of the tax laws in all parts of the country. Research has shown that such a specialty court may be expected to interpret the code so as to try to enforce the purposes of Congress, in contrast with the current tendency of the courts of appeal to read the code literally. (See David F. Shores, "Textualism and Intentionalism in Tax Litigation," 61 *Tax Law*. 53 (Fall 2007).)

Shores isolated 10 Tax Court cases decided between 2000 and 2006 in which the law was clear but its application produced results contrary to congressional purpose. In all 10 cases, the Tax Court ruled contrary to the literal meaning of the code, and in all 10 cases the appeals court reversed based on the plain language of the statute. I believe the Tax Court's approach is more desirable from the viewpoint of the fisc and would be shared by the court of tax appeals.

### **Antiabuse Proposals**

The code's principal antiabuse rules are sections 269, 482, and various rules targeting specific related-party transactions such as section 267. Sections 269 and 482 have fallen into disuse (except in the international area). Rather than create new and untried antiabuse rules, Congress should beef up those sections and direct Treasury to issue additional regulations, particularly under section 269.

If Congress wants to create another statutory antiabuse rule, it should focus on allowance of losses and deductions, which are by far the main components of tax shelters. The courts already strictly construe deductions, and section 165(a) requires that losses be sustained, a term that has never been fully defined. Congress should expand on those concepts.

### Regulatory Authority

There is a fair amount of confusion about Treasury's authority to issue regulations and their effect on litigation, under the *Chevron* doctrine. For example, Treasury capitulated to an ill-considered appellate court decision in *Rite Aid*, which invalidated a consolidated return regulation (which Treasury now has spent over 20 years on), leading to legislation Congress used to address the problem created by that case by gingerly amending section 1502 in 2004.

Congress can cut through that confusion by enhancing Treasury's authority in section 7805(a) to issue binding regulations, including upgrading the status of existing interpretive regulations.

### Conclusion

These proposals are not taxpayer friendly, but that was not the goal. Their unifying theme is that better tax law is made not in the courts, but by Treasury and Congress. Dean Griswold observed long ago that tax law is principally a matter of administration, not litigation. Although he was a great tax litigator, presumably he was speaking from the viewpoint of what was best for the system. ■