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Administrative Law - Administrative Procedure Act- Status of Tax Court

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RECENT DECISIONS

ADMINISTRATIVE LAW—ADMINISTRATIVE PROCEDURE ACT—STATUS OF TAX COURT—Petitioner instituted this action before the Tax Court for a review of rulings by the Commissioner of Internal Revenue determining deficiencies in the payment of his income taxes. The Tax Court held that it was not subject to the Administrative Procedure Act¹ and had no means whatever of bringing before it the entire record, so called, that was before the Commissioner. On appeal, *held*, affirmed. Judicial review of the "whole record" mentioned in section 10 (e) of the Administrative Procedure Act envisages, in the case of adjudication, a review of the record made in cases governed by sections 5, 7 and 8 of the act. Since these sections have been held inapplicable to the Bureau of Internal Revenue, there is no basis for calling the Tax Court a "reviewing court" within section 10 (e). *O'Dwyer v. Commissioner*, (4th Cir. 1959) 266 F. (2d) 575, cert. den. 361 U.S. 862 (1959).

Although the issue has lain dormant for ten years,² doubt still exists as to the applicability of the Administrative Procedure Act to the Tax Court.³ The principal case holds that the Tax Court is not a "reviewing court" under section 10 (e) of that act. But in dictum the court asserts that ". . . the Tax Court is not subject to the Administrative Procedure Act"⁴ i.e., that it is not an agency either. Although no case as yet has squarely faced the issue, several decisions contain dicta discussing whether the Tax Court is an "agency" as defined by section 2 (a) of the act. The question was first discussed in *Lincoln Electric Co. v. Commissioner*,⁵ in which the petitioner was urging that the Administrative Procedure Act did apply to the Tax Court and that section 10 (e) permitted courts of appeals a broader scope of review than had previously been allowed. The court expressly said that the act did apply to the Tax Court⁶ but, nevertheless, based its decision on the fact that the question presented was clearly one of law and therefore reviewable under either test. The next case of importance was *Kennedy Name Plate Co. v.*

¹ 60 Stat. 237 (1946), 5 U.S.C. (1958) §§1001-1011.

² *Cohen v. Commissioner*, (10th Cir. 1949) 176 F. (2d) 394 was the most recent case to discuss the issue.

³ "Without opening up a discussion of the Tax Court's status—the agency or court dilemma. . . ." Wisconsin Mem. *Park Co. v. Commissioner*, (7th Cir. 1958) 255 F. (2d) 751 at 755. "Two such questions have already been referred to—the scope of review while the *Dobson* case was law, and the applicability of the Administrative Procedure Act to the [Tax] Court. The former has been solved but the latter, while dormant, has not been definitely settled." Gribbon, "Should the Judicial Character of the Tax Court Be Recognized?" 24 GEO. WASH. L. REV. 619 at 626 (1956).

⁴ Principal case at 580.

⁵ (6th Cir. 1947) 162 F. (2d) 379, cert. den. 338 U.S. 949 (1950).

⁶ 162 F. (2d) 379 at 382. See also *Dawson v. Commissioner*, (6th Cir. 1947) 163 F. (2d) 664 at 667. But see *Anderson v. Commissioner*, (7th Cir. 1947) 164 F. (2d) 870 at 874, cert. den. 334 U.S. 819 (1948).

Commissioner,⁷ involving section 8 (b) which provides in part that a petitioner may submit exceptions to the decision of the hearing officer which then must be ruled upon by the agency as a whole. The court stated that it assumed without deciding that the act generally did apply to the Tax Court, but held that section 8 (b) did not.⁸ Reluctance of courts in general to face the issue of the applicability of the Administrative Procedure Act to the Tax Court is indicative of the doubts which judges have had.⁹ Writers who have examined this issue agree that the Tax Court is technically not a court,¹⁰ but they split in their analyses of congressional intent as to whether the Tax Court was intended to be included as an "agency" under section 2 (a).¹¹ Thus, not until the courts or the legislature deal squarely with this issue will it be settled. Practically speaking, even if the act does apply to the Tax Court, few problems arise. The scope of judicial review of action by the Tax Court, discussed in the *Lincoln* case and others, has been settled by legislative action.¹² The court in the principal case looked at the problem of judicial review from the opposite side, holding that the Tax Court was not a "reviewing court" within section 10 (e).¹³ Thus section 10, pertaining to the scope of review, is inapplicable to the Tax Court either as an "agency" or as a "reviewing court." Another area in which problems might be thought to arise is the area of the judicial procedure of the Tax Court.¹⁴ Two courts of appeals have faced this problem.¹⁵ In holding section 8 (b) inapplicable to the Tax Court the courts reasoned that since Congress had specifically stated in sections 2 and 7 that nothing in the Administrative Procedure Act would repeal prior statutory delegations of authority, the taxpayer's argument was invalid because Congress had previously by statute authorized the present pro-

⁷ 9th Cir. 1948) 170 F. (2d) 196.

⁸ 170 F. (2d) 196 at 198, followed in *Cohen v. Commissioner*, note 2 supra.

⁹ For Tax Court cases arising after enactment of the A.P.A. in which the courts have side-stepped the issue of scope of review and the A.P.A., see comment, 37 GEO. L.J. 569 at 571, n. 4 (1949).

¹⁰ For a discussion of the history of the Tax Court, see comments, 37 GEO. L. J. 569 (1949); 42 ILL. L. REV. 794 (1948); 18 OKLA. B.A.J. 1175 (1947).

¹¹ Lack of evidence of congressional intent has led authors to opposite results. See comments, 42 ILL. L. REV. 794 (1948); 56 YALE L.J. 670 at 686 (1947). Compare comment, 37 GEO. L.J. 569 at 573 (1949); Rubin, "The Administrative Procedure Act and the Tax Court," 26 TAXES 255 at 258 (1948).

¹² Congress has now given appellate courts the same power of review over Tax Court decisions as they have over decisions of district courts in cases without juries. 62 Stat. 991 (1948), 26 U.S.C. (1958) §7482 (a).

¹³ Principal case at 580.

¹⁴ Section 3 is at present satisfied by the Tax Court. This section requires the publication of descriptions of its organization and descriptions of available procedures. Publication of statements of substantive rules and statements of general policy for guidance of the public are also required.

¹⁵ *Kennedy Name Plate Co. v. Commissioner*, note 7 supra; *Cohen v. Commissioner*, note 2 supra.

cedure followed by the Tax Court.¹⁶ It would appear that the soundness of this conclusion has put the problem at rest.¹⁷

Despite the possible applicability of the act, and the early judicial indications to this effect, lawyers have not argued this question with any vigor during the past ten years. Although the apparent evolution of the Tax Court from administrative agency to judicial court is not yet complete, the absence of recent litigation as to the general applicability of the Administrative Procedure Act to the Tax Court as an "agency," the sweeping dictum in the principal case, and the petitioner's attempt in the principal case to bring the Tax Court within the meaning of "reviewing court" in section 10 (e) of the act¹⁸ seem to indicate the bar's willingness to accept, without serious question, the general inapplicability of the act to the Tax Court.¹⁹

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¹⁶ See comment, 37 GEO. L.J. 569 (1949).

¹⁷ No cases have arisen on this point since 1949. Present Tax Court procedures also seem to satisfy §§5 and 7. Section 5 guarantees the rights to notice and hearing and prohibits persons engaged in investigative or prosecuting functions from participating in the decision in any adjudication. Section 7 prescribes the powers and duties of officers presiding at hearings and the rules regarding burden of proof and evidence; it also provides what shall constitute the record for decision.

¹⁸ In earlier cases, without exception, the petitioner was urging that the Tax Court was not a court but an "agency" within the meaning of the A.P.A. The shift of emphasis shown in the principal case seems indicative of the present attitude, generally, on the status of the Tax Court.

¹⁹ "Despite some early dictum to the contrary, it seems fairly well accepted that the Tax Court, unlike administrative agencies, is not subject to the provisions of the A.P.A." Groman and Zarky, "Rules of Evidence in the Tax Court of the United States," 10 UNIV. OF SO. CAL. TAX INSTR. 603 at 606 (1958).