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TAXATION-ADMINISTRATIVE LAW-JUDICIAL REVIEW OF DETERMINATIONS OF UNITED STATES TAX COURT-THE RULE OF THE DOBSON CASE

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TAXATION—ADMINISTRATIVE LAW—JUDICIAL REVIEW OF DETERMINATIONS OF UNITED STATES TAX COURT—THE RULE OF THE DOBSON CASE—In the field of administrative tax law there is no more intriguing subject for speculation than the scope of judicial review of decisions of the United States Tax Court as sought to be delineated in *Dobson v. Commissioner*[1] three years ago. The case was a valiant attempt to limit the scope of review of appellate courts by defining the area in which the findings of the Tax Court would be conclusive. The task was an impossible one at the outset because of the lack of standard definition, except at the core, of the flexible and fluid concepts of "findings of fact" and "conclusions of law." For many, the imposition of this undefined standard on the kaleidoscopic problems of taxation created more confusion than it resolved.[2] The purpose of the decision was to inaugurate a new era in appellate review of matters passed upon by the Tax Court. The question remains whether that purpose has been or will be achieved through the application of the *Dobson* case.

The objectives of the court, acting on its own motion, were to alleviate the burden placed on the federal appellate courts in the handling of tax cases[3] and also the hardship on the taxpayer resulting from the expense and delay in exhausting the remedies necessary to a final determination of tax matters.[4] To the extent that the Tax Court, in its capacity as a trial court and staffed by persons who were specialists in

[1] 320 U.S. 489, 64 S.Ct. 239 (1943); rehearing denied 321 U.S. 231, 64 S.Ct. 495 (1944).

[2] Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 (1944).

[3] Principal case at 499.

[4] Principal case at 500.

the complex subject matter, performed the function of determining questions of fact, the federal courts were relieved of a time-consuming task and, to the extent that these findings were conclusive on review, the whole process of appellate review was accelerated. However, whether the policy of restricting review of the Tax Court decisions has promoted justice cannot now be determined, and whether the marked trend toward finality of administrative decisions, of which the *Dobson* case is a part, is justified, is also debatable. But laying aside these two main questions of policy, it is possible to indicate some of the quantitative and qualitative effects of the *Dobson* case to date.

It is easier by far to judge the quantitative results of the decision than to predict its application to multifarious situations within the jurisdiction of the Tax Court. In regard to the latter the patterns are clear only on the fringes. The questions raised by the decision remain. Is there a definitive standard of law and fact in tax matters? To what situations is the doctrine applicable? What is the philosophy of the courts in the application of the doctrine?

1

The *Dobson* decision was handed down in 1943. Since that time the Supreme Court applied the rule of the *Dobson* case once again in 1943, six times in 1944, once in 1945 and six times in 1946 to date. More informative is the application of the rule by the circuit courts of appeals. There it was applied in forty-four instances in 1943, in twenty-four cases in 1944, and in twenty-five cases in 1946 to date. Whatever their significance, the facts show that in cases where it has been argued, the *Dobson* rule has been held inapplicable in only eight cases before the Supreme Court and in six cases before the lower federal courts in 1944 and in only one case since that time in the lower federal courts. No figures are available on the number of cases not appealed because of the *Dobson* rule, but where an appeal has been taken the rule has been applied with liberality in the decreasing number of cases where it has been an issue. This may indicate either that appeal has been effectively foreclosed on matters within the doctrine of the case or that appeals are taken, except in a few cases, only on matters of law.

2

The dichotomy of law and fact is an elusive subject. Development of criteria is difficult. At the time of the decision both judges of the federal courts and other persons confessed that the decision befogged the rule that the Tax Court was the master of the facts and the appellate court the master of the law. Admitting that the definition was incomplete, Justice Jackson borrowed from other areas of administrative law the doctrine that the finding of the Tax Court must have a "warrant in the record and a reasonable basis in law." The Tax

Court was assigned the duty of making the distinction between law and fact. The former guiding standard was abandoned to the extent that (1) when there was no statute or regulation the course of the Tax Court was not any more reviewable than a question of fact and (2) when there was a mixed question of law and fact so that no clear cut mistake of law could be distinguished the finding of the Tax Court on review was conclusive. The result seems to have been to extend the power of the Tax Court farther into the area of ordinary judicial review and to provide a basis for appellate abstinence. Applied to the facts before it in the *Dobson* case the court held non-reviewable the decision of the Tax Court that the tax benefit rule was applicable and took the position that matters of accounting could be definitely determined as a question of fact by the Tax Court.

The actual meaning and import of the decision has been determined by three processes: (1) express definition by the Supreme Court, (2) exclusions of the doctrine in specific cases before the Supreme Court, (3) application to the many situations lying in the wide spectrum between clear questions of fact and clear questions of law.

Numerous confused attempts were made to mark out the boundaries of the *Dobson* theory by express definition during the year following the decision. The first attempt to mark out a passageway in the wilderness came on the same day as the *Dobson* decision when the Court determined in *Commissioner v. Heininger*[5] that the question of whether attorneys' fees were ordinary and necessary expenses was generally a question of fact, but where, as in that case, it was involved with a question of law, the Court was not precluded from review. No other basis of distinction was offered. The second step toward definition occurred in *Commissioner v. Scottish American Investment Co.*[6] in which Justice Murphy, in affirming the Tax Court's classification of the taxpayer as a resident corporation, observed:

> "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or litigants may consider more reasonable or desirable. It must be cast directly and primarily upon evidence in support of those made by the Tax Court. If a substantial basis is lacking, the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings."[7]

Thus, when conflicting inferences could be drawn, a presumption of correctness, similar to that of the commissioner's rulings in nature but not in conclusiveness, attached to the deductions of the Tax Court. In

[5] 320 U.S. 467, 64 S.Ct. 249 (1943).
[6] 323 U.S. 119, 65 S.Ct. 169 (1944).
[7] Id. at 171.

the third place, it was held in *Commissioner v. Wemyss*[8] that these findings were entitled to no less respect than the determination of facts which the Tax Court was always entitled to make. The fourth affirmative attempt to clarify the doctrine was made in Justice Frankfurter's concurring opinion in the decision upholding the Tax Court in the case of *Trust of Bingham v. Commissioner.*[9] His thesis was that the concepts of findings of fact and conclusions of law do not serve in the same way in every legal problem. He contended that many questions could be made issues of law unless review is limited to a clear cut mistake of law. However, the Tax Court is restricted on his hypothesis by the procedural requirements of both Constitution and statute and by a necessity of judicial review on constitutional matters, local law and common law rules of property. Thus, by express definition the Supreme Court indicated its preference for broad exclusive jurisdiction of the Tax Court subject to review only where legal questions of a historical nature are involved.

Through definition by exclusion of instances beyond the range of the doctrine the courts have also indicated the scope of the *Dobson* case. In general, the pattern defined by Justice Frankfurter in *Trust of Bingham v. Commissioner* had been followed. When the Tax Court seeks to announce a rule of general applicability, it is conceded that the very nature of its decision to the extent that it applies to circumstances not before the court is subject to review.[10] The construction of instruments has historically been considered to be subject to review.[11] The legal nature of transactions,[12] the nature of property interests[13] and local law[14] are usually classified as questions of law. The interpretation of statute in fields outside tax law is generally deemed to be a question of law. However, when applied to the fields of administrative law and taxation which are wholly statutory, the distinction is difficult if not impossible to draw because each case involves a question of statutory application and, therefore, direct or indirect statutory interpretation. Review on this ground appears to be based on whether provisions of the Code have any application at all to the facts in question and not upon the manner in which that statute is fitted to those facts. This is presumed to be a question outside the specialized experience of the Tax Court, and therefore, outside the scope and policy of the *Dobson*

[8] 324 U.S. 303, 65 S.Ct. 652 (1945).

[9] 325 U.S. 365, 65 S.Ct. 1232 (1945).

[10] Commissioner v. Heininger, 320 U.S. 467, 64 S.Ct. 249 (1943). Cushman v. Commissioner, (C.C.A. 2d, 1946) 153 F. (2d) 510.

[11] Security Flour Mills v. Commissioner, 321 U.S. 275, 64 S.Ct. 593 (1944).

[12] Thornley v. Commissioner, (C.C.A. 3d, 1945) 147 F. (2d) 416; Harding Glass Co. v. Commissioner, (C.C.A. 8th, 1944) 142 F. (2d) 41.

[13] Commissioner v. Disston, 325 U.S. 442, 65 S.Ct. 1328 (1945).

[14] Commissioner v. Lewis, (C.C.A. 3d, 1944) 141 F. (2d) 221.

case.[15] The Court, on the one hand trying to avoid "the quagmire of particularities" and, on the other, to render a decision consistent with others which it has approved, refuses to ratify "spurious" interpretations of tax provisions[16] or erroneous legal standards.[17] When the Tax Court has exercised its judicial function correctly the appellate court will sustain as correct the Tax Court's application of the law.[18] Once assuming the right to review, however, the court will apply the correct interpretation to the facts found by the Tax Court. By way of dicta, it has been said that the Tax Court cannot determine its own jurisdiction.[19] Aside from these matters of statute, the Tax Court may make a determination binding in effect when there is no applicable statute on the theory that this is analogous to a finding of fact.[20] Complete failure of evidence to substantiate the decision of the Tax Court is conceded to be a question of procedural law subject to review.[21] Guided, therefore, by these historical concepts of questions of law the reviewing courts, in construing taxation problems, have a more stable ground for distinction.

By application of the *Dobson* case and those decisions which elaborate its views, criteria for conclusive findings have been established. Although bordering on pure legal questions, issues of mixed fact and law are subject to final determination by the Tax Court if certain elements are present. The test is whether the alleged mistake of law is identifiable[22] or is "clear-cut."[23] In order to give weight to the opinions of the Tax Court and to preserve its field of operation the area of its conclusive jurisdiction in mixed questions of fact and law will not

[15] Principal case at 499.

[16] Commissioner v. Scottish American Investment Co., 323 U.S. 119, 65 S.Ct. 169 (1944); Choate v. Commissioner, 324 U.S. 1, 65 S.Ct. 469 (1945). Commissioner v. U.S. Trust Co., (C.C.A. 2d, 1944) 143 F. (2d) 243; Commissioner v. Lamont, (C.C.A. 2d, 1946) 156 F. (2d) 800; Brooklyn National Corp. v. Commissioner, (C.C.A. 2d, 1946) 157 F. (2d) 450.

[17] Cooperstown Corp. v. Commissioner, (C.C.A. 3d, 1944) 144 F. (2d) 693, cert. denied, 323 U.S. 772, 65 S.Ct. 131 (1944); Masterson v. Commissioner, (C.C.A. 5th, 1944) 141 F. (2d) 391; Helvering v. Meredith, (C.C.A. 8th, 1944) 140 F. (2d) 973.

[18] Commissioner v. H. P. Hood & Sons, Inc., (C.C.A. 1st, 1944) 141 F. (2d) 467; Zanuck v. Commissioner, (C.C.A. 9th, 1945) 149 F. (2d) 714; West v. Commissioner, (C.C.A. 5th, 1945) 150 F. (2d) 723.

[19] McDonald v. Commissioner, 323 U.S. 57, 65 S.Ct. 51 (1944).

[20] Hunter v. Commissioner, (C.C.A. 5th, 1944) 140 F. (2d) 954.

[21] Webre Steib Co. v. Commissioner, 324 U.S. 164, 65 S.Ct. 578 (1945); Commissioner v. Court Holding Co., 324 U.S. 331, 65 S.Ct. 707 (1945); Angelus Milling Co. v. Commissioner, 325 U.S. 293, 65 S.Ct. 1162 (1945); Philadelphia Record Co. v. Commissioner, (C.C.A. 3d, 1944) 145 F. (2d) 613.

[22] Birch Ranch & Oil Co. v. Commissioner, (C.C.A. 9th, 1946) 152 F. (2d) 874.

[23] Clover v. Commissioner, (C.C.A. 9th, 1944) 143 F. (2d) 570; Helvering v. Meredith, (C.C.A. 8th, 1944) 140 F. (2d) 973.

be whittled away.[24] Therefore, a considerably stricter view has been taken of ultimate findings than was the case in the pre-*Dobson* era.

The standards for inferences of fact may also be ascertained from the application of the *Dobson* case. Primarily there must be a sound rational basis for the conclusion reached[25] and a so-called warrant in the record.[26] The degree of reasonableness required is dependent on the nature of the facts before the court.[27] Therefore, if the findings are warranted they will be affirmed without review even though the appellate court would have reached other conclusions from the facts.[28] Secondly, there must be sufficient evidence to give a solid foundation for the inferences drawn from the facts.[29] Tests of sufficiency are also relative, but the general rule is that there must be more than a scintilla of supporting evidence.[30] Where such is not found the Tax Court decision will be reversed.[31] Here, however, there is a sharp conflict of opinion as to what constitutes the minimum.[32] In the third place, when conflicting inferences are possible from the same set of facts presented to the trier of fact, the appellate courts have followed the admonition

[24] Armstrong v. Commissioner, (C.C.A. 10th, 1944) 143 F. (2d) 700.

[25] Boehm v. Commissioner, (C.C.A. 2d, 1945) 146 F. (2d) 553, (U.S. 1946) 66 S.Ct. 120, 44 MICH. L. REV. 879 (1946); Tyson v. Commissioner, (C.C.A. 8th, 1944) 146 F. (2d) 50; Frazer v. Commissioner, (C.C.A. 6th, 1946) 157 F. (2d) 282.

[26] Commissioner v. George M. Jones Co., (C.C.A. 6th, 1945) 152 F. (2d) 358; Commissioner v. Breyer, (C.C.A. 3d, 1945) 151 F. (2d) 267; Grant v Commissioner, (C.C.A. 10th, 1945) 150 F. (2d) 915; Thermoid Co. v. Commissioner, (C.C.A. 3d, 1946) 155 F. (2d) 589; Reynolds v. Commissioner, (C.C.A. 184, 1946) 155 F. (2d) 620.

[27] Van Suetendael v. Commissioner, (C.C.A. 2d, 1945) 152 F. (2d) 654.

[28] Commissioner v. Sharp, (C.C.A. 9th, 1946) 153 F. (2d) 163; Superior Coal Co. v. Commissioner, (C.C.A. 7th, 1944) 145 F. (2d) 597, cert. denied, 324 U.S. 864, 65 S.Ct. 914 (1945); Okonite Co. v. Commissioner, (C.C.A. 3d, 1946) 155 F. (2d) 248.

[29] Meurer Steel Barrel Co., Inc. v. Commissioner, (C.C.A. 3d, 1944) 144 F. (2d) 282, cert. denied, 324 U.S. 860, 65 S.Ct. 864 (1945), rehearing denied, 325 U.S. 892, 65 S.Ct. 1182 (1945); Repplier Coal Co. v. Commissioner, (C.C.A. 3d, 1944) 140 F. (2d) 554, cert. denied, 323 U.S. 736, 65 S.Ct. 35 (1944); Franklin Peanut Co. v. Commissioner, (C.C.A. 4th, 1944) 144 F. (2d) 979, cert. denied, 324 U.S. 867, 65 S.Ct. 916 (1945); Supplee-Biddle Hardware Co. v. Commissioner, (C.C.A. 3d, 1944) 144 F. (2d) 711; Texas Empire Pipe Line Co. v. Commissioner, (C.C.A. 10th, 1944) 141 F. (2d) 326.

[30] Lusthaus v. Commissioner, (C.C.A. 3d, 1945) 149 F. (2d) 232, (U.S. 1946) 66 S.Ct. 539.

[31] Hash v. Commissioner, (C.C.A. 4th, 1945) 152 F. (2d) 722, appeal pending; Central National Bank v. Commissioner, (C.C.A. 6th, 1944) 141 F. (2d) 352, 153 A.L.R. 542 (1944).

[32] Philadelphia Record Co. v. Commissioner, (C.C.A. 3d, 1944) 145 F. (2d) 613; Bazley v. Commissioner, (C.C.A. 3d, 1946) 155 F. (2d) 237; Knight-Campbell Music Co. v. Commissioner, (C.C.A. 10th, 1946) 155 F. (2d) 837; American Box Shook Export Assn. v. Commissioner, (C.C.A. 9th, 1946) 156 F. (2d) 629.

of the *Scottish American Investment Co.* case and have confined themselves to a consideration of the inferences of the Tax Court.[33] Strong dissents from this position have been voiced by Justice Rutledge when the Tax Court had obtained contrary results from similar sets of facts, relating in one case to the taxability of family partnerships,[34] and in the other to the nature of corporate securities.[35] It seems reasonable for the appellate court to demand consistency in the conclusions of the Tax Court which are not subject to review if the reason for the rule of the *Dobson* case is to provide uniformity of tax administration.[36] How far the courts may inquire into the question of consistency when each case, to a greater or lesser extent, turns on its own facts, without undermining the rule of the *Dobson* case, has not been considered as yet.

Procedural standards are prescribed by statute and, therefore, are subject to review only if the proceeding results in a denial of due process or a violation of statutory requirements. However, determination of evidentiary matters in the Tax Court, as in other trial courts, is conclusive. In a recent body of cases dealing with the question whether the petitioner in applying for refund of the processing taxes paid under the AAA had sustained the statutory burden of proof, the decision of the Tax Court was held not subject to review on the ground that a statutory presumption was involved.[37] Courts have consistently held that evidence presented to the Tax Court will not be reweighed.[38] However, that body cannot arbitrarily disregard evidence before it.[39]

3

The *Dobson* case has been applied to some of the most troublesome tax problems with which the courts have had to deal. Such major

[33] Koch v. Commissioner, (C.C.A. 9th, 1944) 146 F. (2d) 259; Commissioner v. Arnold, (C.C.A. 1st, 1945) 147 F. (2d) 23; Harding Glass Co. v. Commissioner, (C.C.A. 8th, 1944) 142 F. (2d) 41.

[34] Tower v. Commissioner, (C.C.A. 6th, 1945) 148 F. (2d) 388, (U.S. 1946) 66 S.Ct. 532.

[35] Lusthaus v. Commissioner, (C.C.A. 3d, 1945) 149 F. (2d) 232, (U.S. 1946) 66 S.Ct. 539.

[36] Principal case at 500-1.

[37] Blumenthal Print Works v. United States, (C.C.A. 5th, 1944) 141 F. (2d) 211; Helvering v. Insular Sugar Refining Corp., (App. D.C. 1944) 141 F. (2d) 713; Franklin Peanut Co. v. Commissioner, (C.C.A. 4th, 1944) 144 F. (2d) 979, cert. denied, 324 U.S. 867, 65 S.Ct. 916 (1945); De Nobili Cigar Co. v. Commissioner, (C.C.A. 2d, 1946) 153 F. (2d) 404; William Henderson v. Commissioner, (C.C.A. 5th, 1946) 153 F. (2d) 442.

[38] Buckmeister's Estate v. Commissioner, (C.C.A. 2d, 1944) 147 F. (2d) 331; Missouri-Kansas Pipe Line Co. v. Commissioner, (C.C.A. 3d, 1945) 148 F. (2d) 460. 1945).

[39] In re Kroger's Estate, (C.C.A. 6th, 1944) 145 F. (2d) 901, cert. denied, 324 U.S. 866, 55 S.Ct. 915 (1945).

issues include whether an item was income or not, to whom an income item was taxable, when an income item was reportable, matters of valuation, and whether there was a transfer subject to the gift or estate tax. The Court limited its review in cases in which the Tax Court had determined the nature of the item—proceeds from annuities,[40] embezzled funds,[41] guaranteed lease payment[42] and proceeds from income debentures.[43]

The *Dobson* decision has been most frequently applied in cases dealing with the validity of deductions from income. The major issue here is to determine whether the loss or expense occurred in the ordinary course of business.[44] The Tax Court's determination of whether a given loss was an ordinary or capital loss,[45] whether a payment on securities constitutes interest,[46] whether there was a bad debt[47] or a gift to charity,[48] is conclusive. There was a split of authority within the Tax Court on the standard to be employed in determining the worthlessness of stock. Both views were sustained by appellate courts. This anomalous result was resolved on appeal to the Supreme Court[49]

[40] Helvering v. Meredith, (C.C.A. 8th, 1944) 140 F. (2d) 973.

[41] Commissioner v. Wilcox, (C.C.A. 9th, 1945) 148 F. (2d) 933, (U.S. 1946) 66 S.Ct. 546, 44 MICH. L. REV. 885 (1946).

[42] Denholm & McKay Realty Co. v. Commissioner, (C.C.A. 1st, 1944) 139 F. (2d) 545.

[43] Commissioner v. J. P. Hood & Sons, Inc., (C.C.A. 1st, 1944) 141 F. (2d) 467.

[44] Commissioner v. Flowers, (U.S. 1946) 66 S.Ct. 250, 44 MICH. L. REV. 882 (1946); Trust of Bingham v. Commissioner, 325 U.S. 365, 65 S.Ct. 1232 (1945); McDonald v. Commissioner, 323 U.S. 57, 65 S.Ct. 51 (1944); Miller Manufacturing Co. v. Commissioner, (C.C.A. 4th, 1945) 149 F. (2d) 421; Missouri-Kansas Pipe Line Co., (C.C.A. 3d, 1945) 148 F. (2d) 460; Chenango Textile Corp. v. Commissioner, (C.C.A. 2d, 1945) 148 F. (2d) 296; George J. Haenn v. Commissioner, (C.C.A. 3d, 1945) 147 F. (2d) 682.

[45] Van Suetendael v. Commissioner, (C.C.A. 2d, 1945) 152 F. (2d) 654; Clover v. Commissioner, (C.C.A. 9th, 1944) 143 F. (2d) 570; Fuld v. Commissioner, (C.C.A. 2d, 1943) 139 F. (2d) 465; Real Estate Mortgage & Guaranty Co. v. District of Columbia, (D.C. App. 1944) 141 F. (2d) 361; Repplier Coal Co. v. Commissioner, (C.C.A. 3d, 1944) 140 F. (2d) 554, cert. denied, 323 U.S. 736, 65 S.Ct. 35 (1944).

[46] Commissioner v. Breyer, (C.C.A. 3d, 1945) 151 F. (2d) 267; John Kelly v. Commissioner, (U.S. 1946) 66 S.Ct. 299, 44 MICH. L. REV. 827 at 828 (1946); Elliot-Lewis Co. v. Commissioner; (C.C.A. 3d, 1946) 154 F. (2d) 292; Petit Anse Co. v. Commissioner, (C.C.A. 5th, 1946) 155 F. (2d) 797.

[47] In re Rae's Estate, (C.C.A. 3d, 1945) 147 F. (2d) 204; Raffold Process Corp. v. Commissioner, (C.C.A. 1st, 1946) 153 F. (2d) 168; Janeway v. Commissioner, (C.C.A. 2d, 1945) 147 F. (2d) 602; Philadelphia Record Co. v. Commissioner, (C.C.A. 3d, 1944) 145 F. (2d) 613.

[48] Commissioner v. Robertson's Estate, (C.C.A. 4th, 1944) 141 F. (2d) 855.

[49] Boehm v. Commissioner, (U.S. 1946) 66 S.Ct. 120, 44 MICH. L. REV. 879 (1946).

which sustained the objective test[50] over the subjective test.[51] These cases show the extent to which the circuit courts of appeals have felt bound to affirm the findings of the Tax Court.[52]

With respect to income from certain sources, the important question arises, Who is taxable thereon? In the handling of short term trusts under the rule of *Helvering v. Clifford*,[53] the highly important elements of control are weighed solely by the Tax Court.[54] Likewise in cases of family partnerships,[55] family corporations,[56] joint ventures[57] and community property interests[58] the findings as to the receipt of profits and actual control are conclusively made by the administrative agency. The jurisdiction of the Tax Court in these matters is all the more impressive in these areas where the presence or absence of certain facts as found by the Tax Court forecasts the final disposition of the case.

Cutting across the whole subject of tax law is the underlying problem of fixing value for tax purposes. Here the court has been given a wide range for its specialized talents.[59] The nature of the transaction may be conclusively classified by the Tax Court as a sale,[60] exchange,[61]

[50] Commissioner v. Arnold, (C.C.A. 1st, 1945) 147 F. (2d) 23; Superior Coal Co. v. Commissioner, (C.C.A. 7th, 1944) 145 F. (2d) 597, cert. denied, 324 U.S. 864, 65 S.Ct. 913 (1945).

[51] Smith v. Helvering, (App. D.C. 1944) 141 F. (2d) 529.

[52] Hyman v. Nunan, (C.C.A. 2d, 1944) 143 F. (2d) 425; De Nobili Cigar Co. v. Commissioner, (C.C.A. 2d, 1945) 143 F. (2d) 436; Staked Plains Trust v. Commissioner, (C.C.A. 5th, 1944) 143 F. (2d) 421.

[53] 309 U.S. 331, 60 S.Ct. 554 (1940).

[54] Central National Bank v. Commissioner, (C.C.A. 6th, 1944) 141 F. (2d) 352, 153 A.L.R. 542 (1944); Armstrong v. Commissioner, (C.C.A. 10th, 1944) 143 F. (2d) 700; Tyson v. Commissioner, (C.C.A. 8th, 1944) 146 F. (2d) 50; Edison v. Commissioner, (C.C.A. 8th, 1945) 148 F. (2d) 810, cert. denied, (U.S. 1945) 66 S.Ct. 25; Cushman v. Commissioner, (C.C.A. 2d, 1946) 153 F. (2d) 510.

[55] Grant v. Commissioner, (C.C.A. 10th, 1945) 150 F. (2d) 915; Bradshaw v. Commissioner, (C.C.A. 10th, 1945) 150 F. (2d) 918; Lusthaus v. Commissioner, (C.C.A. 3d, 1945) 149 F. (2d) 232, (U.S. 1946) 66 S.Ct. 539; Hash v. Commissioner, (C.C.A. 4th, 1945) 152 F. (2d) 722, appeal pending; Tower v. Commissioner, (C.C.A. 6th, 1945) 148 F. (2d) 388, (U.S. 1946) 66 S.Ct. 532; Barkan, "Family Partnerships Under the Income Tax," 44 MICH. L. REV. 179 (1945).

[56] Paxson v. Commissioner, (C.C.A. 3d, 1944) 144 F. (2d) 772.

[57] Snyder v. Commissioner, (C.C.A. 6th, 1945) 148 F. (2d) 385.

[58] Lazard v. Commissioner, (C.C.A. 5th, 1946) 153 F. (2d) 348.

[59] Zanuck v. Commissioner, (C.C.A. 9th, 1945) 149 F. (2d) 714; Commissioner v. George M. Jones Co., (C.C.A. 6th, 1945) 152 F. (2d) 358; Suppiee-Biddle Hardware Co. v. Commissioner, (C.C.A. 3d, 1944) 144 F. (2d) 711; Texas Empire Pipe Line Co. v. Commissioner, (C.C.A. 10th, 1944) 141 F. (2d) 326.

[60] Stamler v. Commissioner, (C.C.A. 3d, 1944) 145 F. (2d) 37; Philadelphia Record Co. v. Commissioner, (C.C.A. 3d, 1944) 145 F. (2d) 613; West v. Commissioner, (C.C.A. 5th, 1945) 150 F. (2d) 723; Commissioner v. Court Holding Company, (C.C.A. 5th, 1944) 143 F. (2d) 823, 324 U.S. 331, 65 S.Ct. 707 (1945).

[61] Commissioner v. North Shore Bus Co., (C.C.A. 2d, 1944) 143 F. (2d) 114.

reorganization[62] or liquidation.[63] It is here, however, that the courts in some cases have found questions of law arising from the determination of the nature of the transaction[64] or the interpretation of statutes[65] A similar result is to be found in the treatment of accounting questions where the early cases, following the *Security Mills* case,[66] held that such questions were subject to review because in fact they raised questions of law.[67] The tendency, nevertheless, has been to follow the application of the *Dobson* case strictly and to hold that all accounting methods and treatment of specific items are best settled by the Tax Court.[68] The correct solution of an accounting problem, whether by reference to statute or to prevalent accounting practice, may be debatable (from a theoretical point of view) but the appellate courts have been content to adopt the method approved by the Tax Court.

Whether an inter vivos transfer has been so completed as to create gift tax liability is a question within the exclusive control of the Tax Court[69] in much the same fashion as the taxability of income from short term trusts. The Tax Court's determination of a gift tax accounting question has been held conclusive.[70] Inferences from facts showing that

[62] Heller v. Commissioner, (C.C.A. 9th, 1945) 147 F. (2d) 376; Bedford v. Commissioner, (C.C.A. 2d, 1945) 150 F. (2d) 341; Commissioner v. Celanese Corp., (D.C. App. 1944) 140 F. (2d) 339.

[63] Meurer Steel Barrel Co., Inc. v. Commissioner, (C.C.A. 3d, 1944) 144 F. (2d) 282, 324 U.S. 860, 65 S.Ct. 864 (1945); rehearing denied, 325 U.S. 892, 65 S.Ct. 1182 (1945).

[64] Thornley v. Commissioner, (C.C.A. 3d, 1945) 147 F. (2d) 416.

[65] Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 65 S.Ct. 172 (1944); Choate v. Commissioner, 324 U.S. 1, 65 S.Ct. 469 (1945).

[66] 321 U.S. 281, 64 S.Ct. 596 (1944).

[67] Denholm & McKay Realty Co. v. Commissioner, (C.C.A. 1st, 1944) 139 F. (2d) 545; Commissioner v. Blaine, MacKay, Lee Co., (C.C.A. 3d, 1944) 141 F. (2d) 201.

[68] Medical Arts Hospital v. Commissioner, (C.C.A. 5th, 1944) 141 F. (2d) 404; Commissioner v. Lewis, (C.C.A. 3d, 1944) 141 F. (2d) 221; Harding Glass Co. v. Commissioner, (C.C.A. 8th, 1944) 142 F. (2d) 41; W. H. Gunlocke Chair Co. v. Commissioner, (C.C.A. 2d, 1944) 145 F. (2d) 791; Commissioner v. New Hampshire Fire Insurance Co., (C.C.A. 1st, 1945) 146 F. (2d) 697; Birch Ranch & Oil Co. v. Commissioner, (C.C.A. 9th, 1946) 152 F. (2d) 874; Cooperstown Corp. v. Commissioner, (C.C.A. 3d, 1944) 144 F. (2d) 693, cert. denied, 323 U.S. 772, 65 S.Ct. 131 (1944); Hanna v. Commissioner, (C.C.A. 9th, 1946) 156 F. (2d) 135; Commissioner v. American Light and Traction Co., (C.C.A. 7th, 1946) 156 F. (2d) 398.

[69] Commissioner v. Proctor, (C.C.A. 4th, 1944) 142 F. (2d) 824, 154 A.L.R. 1215 (1945), cert. denied, 323 U.S. 756, 65 S.Ct. 90 (1944); Commissioner v. Arnold, (C.C.A. 1st, 1945) 147 F. (2d) 23; Chenango Textile Corp. v. Commissioner, (C.C.A. 2d, 1945) 148 F. (2d) 296; Sewell v. Commissioner, (C.C.A. 5th, 1945) 151 F. (2d) 765; Commissioner v. Wemyss, 324 U.S. 303, 65 S.Ct. 652 (1945).

[70] Commissioner v. Sharp, (C.C.A. 9th, 1946) 153 F. (2d) 163.

the gift was in contemplation of death are final when made by the Tax Court in the course of an estate tax determination.[71]

Unusual applications of the *Dobson* doctrine are found in those cases dealing with AAA processing tax refunds,[72] procedure before the Treasury[73] and findings of district courts.[74]

4

What has been the prevailing philosophy of the courts in the utilization of the *Dobson* doctrine? Certainly, the federal appellate courts have made a fair effort to apply the ambiguous and elusive distinction between law and fact. It is still too early to tell whether Randolph Paul[75] and Louis Eisenstein[76] are correct in predicting that the appellate courts will review by some rationale or other the decisions of the Tax Court which they wish to review.

A more understandable interpretation of the *Dobson* case as applied to date and a more realistic approach to the problem of limiting the scope of judicial review would be to state frankly that the findings of the Tax Court are conclusive on all questions of fact and on questions of law that lie within the specialized field of its technical and expert competence. Decisions as to the constitutional power of the Tax Court, interpretation of statutes, and the determination of questions of local law, are clearly beyond the specialized skill of the Tax Court and should be subject to review by the federal courts. While the burden of tax cases has been materially lightened by the liberal application of the *Dobson* rule to a multitude of tax problems, the tests of law and fact require arbitrary classification which would be obviated if the nature of the Tax Court's function in the trial of cases before it were viewed as the primary consideration.

Rosemary Scott, S.Ed.

[71] In re Kroger's Estate, (C.C.A. 6th, 1944) 145 F. (2d) 901, cert. denied, 324 U.S. 866, 65 S.Ct. 915 (1945); Koch v. Commissioner, (C.C.A. 9th, 1944) 146 F. (2d) 259; Buckminster's Estate v. Commissioner, (C.C.A. 2d, 1944) 147 F. (2d) 331.

[72] See note 37, supra.

[73] Southeastern Finance Co. v. Commissioner, (C.C.A. 5th, 1946) 153 F. (2d) 205; Paymer v. Commissioner, (C.C.A. 2d, 1945) 150 F. (2d) 334.

[74] Fox v. Harrison, (C.C.A. 7th, 1944) 145 F. (2d) 521; Blumenthal Print Works v. United States, (C.C.A. 5th, 1944) 141 F. (2d) 211.

[75] Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 (1944).

[76] Eisenstein, "Some Iconoclastic Reflections on Tax Administration," 58 HARV. L. REV. 477 (1945).