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Taxation—Tax Court—Power to Vacate a Final Decision, Lasky v. Commissioner, 235 F.2d 97 (9th Cir. 1956)

prosecution is precluded by the rule of comity.[20] Such an analysis eliminates the "objection rule" and renders the rule of comity inapplicable. Thus, the same results will be reached as are now being attained in the great majority of cases.[21] In addition, *S-1* will be precluded from objecting to *S-2's* exercise of jurisdiction in the few instances where, as in the principal case, habeas corpus is sought in a court of *S-1*. On the other hand, where the party is on *bail* from *S-1*, it is submitted that there should be a strict adherence to the rule of comity in the absence of a "real" consent by *S-1*. In this situation *S-1* is actively engaged in prosecuting the individual on bail, and it would seem that in the interest of comity and the due administration of justice, *S-1* should be able to proceed without interference from another sovereignty.

TAXATION—TAX COURT—POWER TO VACATE A FINAL DECISION

Lasky v. Commissioner, 235 F.2d 97 (9th Cir. 1956), cert. granted, 25 U.S.L. Week 3133 (U.S. Aug. 31, 1956) (No. 371)

Four months after a decision[1] had been rendered, the taxpayer filed a motion in the tax court to vacate the decision and to grant a rehearing, on the ground of excusable neglect of counsel. Although the Internal Revenue Code provides that a decision of the tax court becomes *final* after expiration of the three-month period allowed for filing a petition for review,[2] the tax court concluded that extraordinary circumstances existed which warranted granting the motion. On rehearing the tax court again held for the Commissioner[3] and the taxpayer filed a timely petition for review in the court of appeals. The court, in dismissing the petition for review, held that since the first decision of the tax court had become final under the statute, the tax court as an administrative agency had no inherent power to vacate such a decision; and hence, the court of appeals was without jurisdiction to review the second decision.[4]

The result in the principal case is consistent with the majority of cases dealing with the power of the tax court to vacate a decision after the expiration of the period for review.[5] These cases, however, in

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20. See Strand v. Schmittroth, 233 F.2d 598, 610 (9th Cir. 1956) (dissenting opinion) ("One can be subject to a court's orders without being in the full 'custody of the law,' without having a protective casing of immunity.").

21. See text supported by notes 7-8 *supra*.

1. Bessie Lasky, 22 T.C. 13 (1954).

2. INT. REV. CODE OF 1954, §§ 7481(1), 7483.

3. Bessie Lasky, P-H 1955 T.C. Mem. Dec. ¶ 55254-A.

4. Lasky v. Comm'r, 235 F.2d 97 (9th Cir. 1956), *cert. granted*, 25 U.S.L. WEEK 3133 (U.S. Aug. 31, 1956) (No. 371).

5. White's Will v. Comm'r, 142 F.2d 746 (3d Cir. 1944); Monjar v. Comm'r, 140 F.2d 263 (2d Cir. 1944); McCarthy v. Comm'r, 139 F.2d 20 (7th Cir. 1943); Denholm & McKay Co. v. Comm'r, 132 F.2d 243 (1st Cir. 1942); Swall v. Comm'r,

denying the tax court the power to vacate, do not consider whether the nature of the tax court is administrative or judicial. The basis of the majority view is that the statute applies not only to the permissible period for review, but also to the length of time during which the tax court has the power to vacate, amend, or modify.[6] In several of these cases the courts have referred to a senate committee report[7] which points out that the purpose of the statute is to provide a definite date for tax court decisions to become final so that the Commissioner can initiate suits for collection and the statute of limitations can begin to run. The majority also rely upon a Supreme Court decision[8] that construed the effect of the word "final" under another sub-section of the statute involved in the principal case. That sub-section provides that a decision of the tax court becomes final upon the expiration of thirty days from the date of issuance of a Supreme Court mandate affirming the tax court decision or dismissing the petition for review.[9] The Court held that it could not grant a petition for rehearing after the thirty-day period.[10] The courts adhering to the majority view draw the analogy that if the Supreme Court does not have the power to reconsider a tax court decision after the thirty-day period, then the tax court has no such power after the three-month period.[11]

The minority view is composed of two decisions. First, an early fifth circuit decision[12] held that the tax court could vacate a decision final under the statute and compared tax court decisions to decisions of the Departments of Labor and Interior, which although declared to be final by statute are subject to further inquiry by the department and the courts. Second, a recent sixth circuit decision[13] stated that as a practical matter the tax court is a judicial tribunal, and therefore it has the inherent judicial powers of a court. Thus, it was held that the tax court could vacate a final decision because it could exercise a power similar to the inherent power of a court to grant a writ of error coram nobis.

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122 F.2d 324 (9th Cir. 1941); Sweet v. Comm'r, 120 F.2d 77 (1st Cir. 1941); Jacob Bros. Co. v. Comm'r, 64 F.2d 107 (2d Cir. 1933); J. S. Rippel & Co., 36 B.T.A. 789 (1937); St. Petersburg Land & Loan Co., 26 B.T.A. 530 (1932).

6. *Ibid.*

7. S. Rep. No. 52, 69th Cong., 1st Sess. 37 (1926), quoted in the principal case, 235 F.2d at 100.

8. Helvering v. Northern Coal Co., 293 U.S. 191 (1934).

9. Revenue Act of 1926, § 1005(a)(4), 44 STAT. 111 (now INT. REV. CODE OF 1954, § 7481(2)(C)).

10. See also R. Simpson & Co. v. Comm'r, 321 U.S. 225 (1944), where the Supreme Court held it was without jurisdiction to grant a petition for rehearing since the tax court decision was final under Int. Rev. Code of 1939, § 1140(b)(2), 53 STAT. 163 (now INT. REV. CODE OF 1954, § 7481(2)(B)).

11. See, *e.g.*, Sweet v. Comm'r, 120 F.2d 77 (1st Cir. 1941).

12. La Floridienne J. Buttgenbach & Co. v. Comm'r, 63 F.2d 630 (5th Cir. 1933).

13. Reo Motors, Inc. v. Comm'r, 219 F.2d 610 (6th Cir. 1955). This decision has been commented on in the following reviews: 24 GEO. WASH. L. REV. 606 (1956); 69 HARV. L. REV. 577 (1956); 40 MINN. L. REV. 624 (1956); 41 VA. L. REV. 671 (1955).

The court in the principal case did not consider the analogy employed in the fifth circuit opinion. However, it expressly rejected the reasoning of the sixth circuit and stated that since the tax court is by statute not a court at all, but merely an administrative agency,[14] it does not have the inherent power to vacate a final decision. Further, the principal case points out that while such power is provided for in the Federal Rules of Civil Procedure,[15] the federal rules do not apply to administrative agencies.

Although the principal case is consistent with the majority of decisions with respect to the power of the tax court to vacate a final decision, its view of the tax court as a mere administrative agency conflicts with other decisions where the problem of the nature of the tax court has arisen in connection with other issues. For example, it has been pointed out that the tax court operates solely as a judicial tribunal adjudicating tax liabilities;[16] its function is not administrative, investigatory, or regulatory;[17] its proceedings are entirely de novo;[18] its scope of review is identical with like decisions of federal district courts;[19] and it can compel attendance of witnesses and production of documents.[20] In many decisions it has been stated that the tax court is judicial in character and exercises judicial powers.[21] However, Congress has refused to act on the recommendations of the Hoover Commission and bills which have been proposed to remove the tax court from the executive branch of the government.[22]

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14. The tax court is "an independent agency in the Executive Branch of the Government . . . ." INT. REV. CODE OF 1954, § 7441.

15. A federal district court has the power to vacate a final judgment for one year after judgment is entered. FED. R. CIV. P. 60(b).

16. See Stern v. Comm'r, 215 F.2d 701 (3d Cir. 1954).

17. *Ibid.*

18. See SURREY & WARREN, FEDERAL INCOME TAXATION 48 (1955).

19. INT. REV. CODE OF 1954, § 7482(a).

20. *Id.* at § 7456(a).

21. See Kay v. Comm'r, 178 F.2d 772 (3d Cir. 1950); Pelham Hall Co. v. Hassett, 147 F.2d 63, 66 (1st Cir. 1945); Helvering v. Continental Oil Co., 68 F.2d 750 (D.C. Cir. 1933); Underwood v. Comm'r, 56 F.2d 67 (4th Cir. 1932) (executive board exercising judicial powers); Uncasville Mfg. Co. v. Comm'r, 55 F.2d 893 (2d Cir.), *cert. denied,* 286 U.S. 545 (1932). In the eighth circuit, see Garden City Feeder Co. v. Comm'r, 75 F.2d 804, 806 (8th Cir. 1935) (administrative board exercising judicial powers) (dictum). *But see* Helvering v. Ward, 79 F.2d 381, 382 (8th Cir. 1935) (executive board, not a court).

The fifth and ninth circuits hold that the tax court is purely administrative in nature. See Hutchings-Sealy Nat'l Bank v. Comm'r, 141 F.2d 422 (5th Cir. 1944); Jones v. Comm'r, 103 F.2d 681 (9th Cir. 1939); note 4 *supra.*

The Supreme Court has not been uniform in its interpretation of the nature of the tax court. See Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 725 (1929) (administrative); Goldsmith v. B.T.A., 270 U.S. 117, 121 (1926) (quasi-judicial); Blair v. Oesterlein Mach. Co., 275 U.S. 220, 227 (1927) (judicial).

22. See Gribbon, *Should the Judicial Character of the Tax Court Be Recognized?* 24 GEO. WASH. L. REV. 619 (1956). Apparently the bills failed because of resistance from the Internal Revenue Service and certified public accountants, *i.e.,* Internal Revenue counsel would not represent the government since Department of Justice counsel handle federal court litigation, and C.P.A.'s would not be able to represent taxpayers. *Id.* at 621.

It is submitted that the view of the sixth circuit decision—that the tax court is a judicial tribunal—is consistent with the intended impartial character of the tax court as a tribunal hearing controversies involving large sums of money and with an apparent trend toward recognizing the tax court as a part of our judicial system. However, the *holding* of the principal case—that the tax court does not have the power to vacate a final decision—conforms to the sound statutory purpose of fixing a date after which payment of taxes cannot be deferred. Neither the sixth circuit decision nor the principal case recognize that *both* judicial and administrative tribunals have the power to vacate, amend, or modify their decisions.[23] Thus, both the sixth circuit decision and the principal case would seem to have made an unnecessary distinction in basing their results on the nature of the tax court. Regardless of the nature of the tax court, it would appear that the legislative intent in setting a definite date for amounts due the government should control. Therefore, when deciding the principal case, it should be unnecessary for the Supreme Court to consider the nature of the tax court. In the light of the desirability of the statutory purpose, should the Supreme Court reverse the principal case, it is submitted that Congress ought to declare specifically the duration of the tax court's power to vacate.

23. See DAVIS, ADMINISTRATIVE LAW § 178 (1951).