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Give the Tax Court Transfer Power And Plenary Civil Tax Jurisdiction

To the Editor:

A recent decision again raises questions about the powers that the Tax Court does and should possess. In *Mobley v. Commissioner*, No. 07-2019 (6th Cir. July 8, 2008), Doc 2008-14970, 2008 TNT 132-13, the Sixth Circuit affirmed a procedural decision of the Tax Court. The Tax Court dismissed a petition because it lacked jurisdiction, and it rejected the taxpayers' request to transfer the case to a district court. The Tax Court concluded, and the Sixth Circuit agreed, that the Tax Court lacks transfer power. Under 28 U.S.C. sections 1631 and 610, the power to transfer cases is conferred only upon "courts," as that term is defined in those sections. The Tax Court and the Sixth Circuit concluded that the Tax Court is not a "court" as so defined.

In my view, the *Mobley* case was soundly reasoned as a matter of statutory construction and thus was correctly decided. However, the decision raises three topics, which are discussed below in the order of least significant to most significant. The second and third topics are proposed changes that I hope Congress will consider.

1. Tax Protesters

The IRS, Chief Counsel, and the Department of Justice should brace themselves for a new tax protester argument. It would not be surprising to see protesters start arguing, based on *Mobley*, that the Tax Court is not a court. This would be a distortion of *Mobley*, of course, but torturing and contorting legal texts is one of the chief preoccupations of tax protesters. *Mobley* held only that the Tax Court is not a court for purposes of the power to transfer cases. It made no holding beyond that. Certainly, *Mobley* did not in any way cast doubt on the authority of the Tax Court to render legally binding decisions. Nonetheless, one can almost hear the argument now as it will be made. "It has been held that the Tax Court is not a court. Therefore, its decisions are at best purely advisory. Since it's not a court of law, the Tax Court has no legal authority to uphold IRS determinations against me or anyone else; it has no authority to impose section 6673, Rule 33(b), or any other sanctions; and it has no authority to do anything else." To repeat the obvious, such an interpretation would be a willful distortion of *Mobley*, but the government should expect to hear it.

2. Transfer Power

I've said that *Mobley* was correctly decided under the statutes as they are written. However, as a matter of policy, there seems to me no compelling reason why the Tax Court should not have the power to transfer cases when doing so would be in the interests of justice. As the Sixth Circuit noted in *Mobley*, the transfer power is not

confined under 28 U.S.C. sections 1631 and 610 to only Article III courts. Under section 7441, the Tax Court is an Article I court, but another Article I court (the Court of Federal Claims) possesses the transfer power as do or did three Article IV courts (the former district court of the Canal Zone and the district courts of Guam and of the Virgin Islands). The Tax Court surely should have similar authority. Congress should act to give that power to the Tax Court.

The question then becomes what the best vehicle is for such legislative change. One's first reaction — simply amend 28 U.S.C. sections 1631 and 610 to add the Tax Court to the list of "courts" for transfer power purposes — probably isn't the best approach. As the Sixth Circuit noted, Congress previously rejected including the Tax Court in that list. There is no powerful substantive policy reason for the exclusion, but there is a possible bureaucratic one: Nearly all the "courts" on the list are subject to the supervision of the Administrative Office of the United States Courts while the Tax Court seems not to be.

There's no need to jostle that judicial bureaucratic appletart. The better approach would be to continue to omit the Tax Court from 28 U.S.C. sections 1631 and 610 and instead to confer case transfer power on the Tax Court through the Internal Revenue Code. Sections 7451 through 7465 address Tax Court procedures. There would be room in or after these sections for a new section or subsection conferring transfer power on the Tax Court, the parameters of that power being modeled on 28 U.S.C. sections 1631 and 610.

3. Plenary Civil Tax Jurisdiction for the Tax Court

Going beyond transfer power, I think it's time to reconsider jurisdiction. As an Article I court, the Tax Court has only such jurisdiction as is conferred upon it by statute. Originally, that jurisdiction was limited to deficiency actions. But the Tax Court's jurisdiction has broadened over time. For example, under sections 7476 to 7479, the Tax Court can now hear a variety of declaratory judgment actions. Under sections 6221 to 6231, it hears TEFRA partnership actions. Under section 6015, it hears spousal relief cases. Under section 7430, it hears actions for attorney's fees and costs. Under section 7436, it conducts employment status determination hearings. Under section 6404(h), it can review certain IRS determinations not to abate interest assessments. Most dramatically, the collection due process rules of sections 6320 and 6330 (as well as other provisions such as the jeopardy collection stay rules under section 6863) have enmeshed the Tax Court in a wide swath of post-assessment, tax collection issues.

In for lots of pennies, in for a pound. The Tax Court's jurisdiction has expanded so strikingly beyond its original jurisdiction that we should now ask whether we shouldn't go all the way. Congress should amend the code to give the Tax Court plenary authority over civil

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tax matters. Everything civil, refund as well as deficiency actions, collection as well as assessment issues, etc. I see no need to make that jurisdiction exclusive. The district courts, Bankruptcy Court, and the Court of Federal Claims should retain such jurisdiction as they have over tax matters. In some instances, ordering and coordination rules would be required.

Concern that a generalist perspective should remain in tax has time and again defeated proposals for a single appellate court for tax cases, and I share that perspective in significant degree. However, that concern would be met in our context by the facts that trial courts other than the Tax Court would retain their present tax jurisdiction and that Tax Court decisions would still be reviewed by the generalist circuit courts of appeal.

In short, the historical reasons for limiting the Tax Court's civil tax jurisdiction have little current viability. It's high time to accommodate jurisdictional rules to that policy fact. Congress should give the Tax Court plenary jurisdiction over civil tax matters.

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