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FOCUS ON THE COURTS

Standing Issues in Tax Litigation

By Steve R. Johnson*

Issues as to standing have appeared in tax cases for generations, but the frequency of their appearance has increased markedly in recent years. In 2014 alone, nearly a dozen opinions in high-profile tax cases plumbed the depths of standing doctrine.

This article summarizes the principal rules governing standing. Then it illustrates standing issues in tax litigation, in both traditional Code and Administrative Procedure Act (APA) contexts.

Standing in Brief

“[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). It reflects the intuition that “[n]ot every disagreement merits a lawsuit.” *Scenic America, Inc. v. U.S. Dep’t of Transportation*, 983 F. Supp. 2d 170, 175 (D.D.C. 2013).

Traditionally, standing is thought to have both constitutional and prudential dimensions. The constitutional dimension emanates from Article III, Section 2, Clause 1, which limits the scope of the federal judicial power to “Cases [or] Controversies.” The “irreducible constitutional minimum of standing” entails three aspects. The plaintiff must show that (1) she suffered a legally cognizable injury, (2) the injury is fairly traceable to the conduct complained of, and (3) a favorable decision would likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Prudential standing embodies “judicially self-imposed limits on the exercise of federal jurisdiction.” *Allen v. Wright*, 468 U.S. 737, 751

(1984). Although “not exhaustively defined,” it was said to reflect at least three broad principles: “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interest protected by the law invoked.” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *id.*).

However, federal courts generally are obligated to hear and decide cases within their jurisdiction. *E.g.*, *Sprint Communs., Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013). Prudential standing (and other doctrines like ripeness and mootness) are “in some tension with” that obligation. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (seeming to convert “zone of interest” analysis from part of standing to part of statutory interpretation). This “has placed the continuing vitality of the prudential aspects of standing ... in doubt.” *Kentucky v. United States ex rel. Hagel*, 759 F.3d 588, 596 n.3 (6th Cir. 2014).

The Tax Court “exercises a portion of the judicial power of the United States.” *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991). Accordingly, “those elements that define and restrict judicial power, such as ‘standing,’ are necessarily applicable to [Tax Court] proceedings.” *Anthony v. Commissioner*, 66 T.C. 367, 371 (1976).

Standing in Traditional Code Cases

“Traditional” cases involve one or a few taxpayers in forms of action prescribed by the Code, including

deficiency actions, refund suits, and eligibility suits under provisions such as sections 7428 and 7476 to 7479. In cases such as these, indeed in most cases, a plaintiff’s “standing to seek review of administrative action is self-evident.” *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002). For discussion of “self-evident standing,” see *American Ins. Ass’n v. U.S. Dep’t of HUD*, 2014 WL 5802283, at *6 (D.D.C. Nov. 7, 2014).

Nonetheless, standing issues can arise even in traditional tax cases. For example, the Service sought to use evidence obtained from a search as to Kersting to support its adjustment against the Dixons. The Dixons alleged that the Service had obtained the evidence from Kersting illegally. The Tax Court, noting that one cannot assert the rights of others, held that the Dixons lacked standing to assert Kersting’s Fourth Amendment rights. *Dixon v. Commissioner*, 90 T.C. 237 (1988).

However, standing often has been invoked in questionable situations. For instance, the courts have relied on lack of standing to hold that a taxpayer may not (1) sue in his individual capacity when the Service issued a notice to him as possessor of unclaimed cash under section 6867, *Matut v. Commissioner*, 84 T.C. 803, 808 n.7 (1985); (2) assert that the U.S. is violating treaties and committing war crimes as a basis for not paying her income taxes, *e.g.*, *Scheide v. Commissioner*, 65 T.C. 455 (1975); (3) defend claimed charitable contribution deductions by arguing that section 170 is unconstitutional, *Kessler v. Commissioner*, 87 T.C. 1285, 1293 (1986); or (4) as the nonrequesting spouse, argue about the amount of tax owed (pre-relief) by the spouse claiming relief under section 6015,

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e.g., *Estate of Ravetti v. Commissioner*, 37 F.3d 1393, 1395 (9th Cir. 1994). The taxpayers lost and should have lost on these issues. However, under *Lexmark, supra*, statutory interpretation (the Code sections at issue did not render consequential the contentions the taxpayers were offering) offers a better ground for rejecting the taxpayers' positions than standing does.

Standing in APA Cases

Although traditional Code forms of action far predominate, increasing numbers of litigants base their suits against Treasury or the Service on the APA. Under the APA, redress is available to anyone "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. The reviewing court may, among other remedies, compel agency action wrongly withheld or set aside agency action that is arbitrary and capricious, in excess of statutory authority, or procedurally improper. 5 U.S.C. § 706 (1) & (2).

An APA challenge may be brought via "any applicable form of legal action" unless a special review scheme is mandated. 5 U.S.C. § 703. Thus, if a deficiency, refund, or other Code-based form of action is available, it must be used instead of suit under the APA. Plaintiffs also must overcome other hurdles in order to proceed under the APA. In addition to standing, these hurdles include such issues as ripeness, exhaustion of remedies, and the Anti-Injunction Act, I.R.C. § 7421.

APA tax suits often pit powerful adversaries against each other: the government defending the regulation or other position against attacks by well-organized and well-funded industrial or ideological interests, often fronted by one or several individual plaintiffs. The government typically argues that the plaintiffs lack standing to seek some or all of the relief sought. Some recent examples are noted below.

In *Florida Bankers Ass'n v. U.S. Dep't of Treasury*, 2014 WL 114519

(D.D.C. Jan. 13, 2014), two bankers associations challenged Treasury regulations requiring reporting of information on U.S. accounts of foreign depositors, which information the Service would share with the revenue authorities of depositors' home countries. The standing issue involved the doctrine of organizational or representational standing, under which an organization may litigate on behalf of its members under certain conditions. Noting that banks in the associations were directly affected by the regulations, the court found that standing was self-evident, without the need for detailed affidavits.

In another recent representational standing case, to fill the gap felt by invalidation of its mandatory program in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), the Service launched an effort to encourage unenrolled return preparers to "voluntarily" enhance their skills. The AICPA sued to invalidate this effort. The court granted the government's motion to dismiss. One of the elements for representative standing is that at least one of the organization's members would have standing to sue in its own right. This element was not met. The AICPA has no members who are unenrolled preparers, and the AICPA's attempts to connect their members to the voluntary program were too speculative, conclusory, or unrelated. *American Inst. of Certified Pub. Accountants v. IRS*, 2014 WL 5585334 (D.D.C. Oct. 27, 2014).

Atheist organizations and associated individuals brought suits seeking invalidation of the section 107 parsonage allowance. In 2013, the Western District of Wisconsin found that the plaintiffs had standing to challenge section 107(2) but not section 107(1). On appeal, the Seventh Circuit vacated the decision on the ground that the plaintiffs lacked standing. *Freedom from Religion Found., Inc. v. Lew*, 2014 WL 5861632 (7th Cir. Nov. 13, 2014), *rev'g* 983 F. Supp. 2d 1051 (W.D. Wis. 2013). Another 2014 decision also rejected, on standing grounds, a challenge to the parsonage

allowance. *American Atheists, Inc. v. Shulman*, 2014 WL 2047911 (E.D. Ky. May 19, 2014).

The section 107 cases are interesting in at least two respects. First, in general, one does not have standing simply as a taxpayer; this interest is insufficiently particularized. There is a narrow exception under *Flast v. Cohen*, 392 U.S. 83 (1968). The cases explored and rejected the applicability of that exception.

Second, the injury claimed by the atheists was that they were barred from receiving the benefit that church officiants were getting. But the atheists never applied to the Service to receive those benefits. The opinions differed sharply as to how likely the Service would have been to approve the applications had they been made. Whether the point is formalistic or not, the atheists' failure to apply counted heavily against them. The causation aspect of constitutional standing is not met when the harm results from the plaintiffs' own voluntary action or inaction.

Despite the upholding of the shared responsibility payment in *National Fed. of Independent Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), challenges to the Affordable Care Act (ACA) remain plentiful—and produce many standing issues. Liberty University and others challenged the validity of the ACA's employer mandate. The government moved to dismiss for lack of standing on the ground that the plaintiffs face no actual or imminent injury. The motion failed. Liberty had the burden of proving standing, but the required showing may change as the case progresses. To defeat a motion to dismiss, Liberty "need not *prove* that the employer mandate will increase its costs of providing health coverage; it need only plausibly allege that it will." *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 90 (4th Cir. 2013)(emphasis in original), *cert. denied*, 134 S. Ct. 683 (2013).

Several cases have challenged the validity of regulation section 1.36B-2(a)(1), which extends the ACA's premium assistance credit to persons enrolled in federal exchanges set up in states which declined to establish medical insurance exchanges. The courts typically have held that the governmental and private plaintiffs have standing.

Even though part of their motivation is ideological, the plaintiffs face additional expenses under the ACA, which suffices to establish standing. *E.g., Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014); *see also King v. Burwell*, 759 F.3d 358 (4th Cir. 2014); *Oklahoma ex rel. Pruitt v. Burwell*, 2014 WL 4854543 (E.D. Okla. Sept. 30, 2014).

Conclusion

Standing issues are not the “meat and potatoes” of federal tax litigation. However, they are of growing importance. The able tax attorney should have at least working knowledge of the intricacies of standing doctrine. ■