the executive departments providing for judicial determination of the applicability of evidentiary privileges.

INTERPRETATION OF THE INTERNAL REVENUE CODE: COURTS v. COMMISSIONER

The Commissioner of Internal Revenue is vested with the responsibility of interpreting and enforcing tax laws,[1] and is normally bound to follow his own interpretation. However, the federal courts also are interpreters of the tax laws. Thus the Commissioner is in a quandary when faced with a court of appeals decision which conflicts with his own interpretation or application of the tax code.[2] The path of direct appeal from the initial adverse decision is practically blocked by the Supreme Court's policy of limited certiorari. Normally the Supreme Court will review a tax case only when it is in conflict with a case previously decided in another circuit.[3] Therefore the Commissioner has a Hobson's choice between accepting the interpretation of the court of appeals, which, in view of the improbability of a contrary decision then arising in another circuit, has the effect of abandoning all hope of a Supreme Court decision, and continuing to apply his own interpretation in the face of a contrary judicial holding.[4] If the Commissioner can, through the latter course, acquire a conflicting decision in another circuit he may be able to receive Supreme Court review of the question, but in the meantime

1. INT. REV. CODE OF 1954, § 7802.

2. See, *e.g.*, Pollak v. Commissioner, 209 F.2d 57 (3rd Cir. 1954); Mutch v. Commissioner, 209 F.2d 390 (3rd Cir. 1954); Abernethy v. Commissioner, 211 F.2d 651 (D.C. Cir. 1954); Kavanagh v. Hershman, 210 F.2d 654 (6th Cir. 1954); United States v. Bennett, 186 F.2d 407 (5th Cir. 1951); Fox v. Commissioner, 190 F.2d 101 (2nd Cir. 1951); Commissioner v. Switlik, 184 F.2d 299 (3rd Cir. 1950); Albright v. United States, 173 F.2d 339 (8th Cir. 1949); Schall v. Commissioner, 174 F.2d 893 (5th Cir. 1949); McDermott v. Commissioner, 150 F.2d 585 (D.C. Cir. 1945).

3. See Rule 19 of RULES OF THE SUP. CT., as revised in 1954, 74 Sup. Ct. 945 (1954).

4. There are several reasons why acquiescing in certain court of appeals decisions may be contrary to the public's interest:

(1) Decisions may unconsciously favor one group of taxpayers. Since taxation must produce a total amount of revenue for government requirements, other taxpayers must bear the increased burden.

(2) The Commissioner may be better able to evaluate the effect of a certain decision on other taxpayers and the country as a whole than can a single court of appeals. See notes 6-10 *infra* and accompanying text.

(3) A taxpayer is not estopped by res judicata or other legal doctrines from litigating a point which he feels has been determined erroneously, merely because another taxpayer litigated the identical point and lost. Nor would it be in the public interest to estop the Commissioner from subsequently re-litigating a point, since the Commissioner is in a better position to evaluate a decision than a single taxpayer.

taxpayers must remain highly uncertain as to the state of disputed sections of the tax laws.

Consideration must be given to the position of the Internal Revenue Service and the Commissioner of Internal Revenue. It is the Internal Revenue Service's task to oversee the collection of revenue.[5] This requires the enforcement of the tax law as it has been legislated. The Internal Revenue Service must determine if the opinion handed down by th court of appeals is one that can be applied on a nation-wide basis and one that will not lead to confusion and unfairness in future cases. A case illustrating the situation where a tax interpretation appears presently to be advantageous to the taxpayer, but which is adverse in the long run is *Commissioner* v. *Eccles,*[6] which held that a couple were not legally separated under an interlocutory decree of divorce. This holding was advantageous to the particular taxpayers before the court, since they wished to file a joint return. However, it would be a distinct disadvantage to those separated couples who did not want to file jointly. The effect of this decision would be to deny persons filing separately a deduction for alimony payments,[7] expenses for the care of certain dependents,[8] and would prevent the opportunity to qualify as the head of the household.[9] In a case such as this the Commissioner must look beyond the immediate result of the decision, if he is to maintain the goodwill of the public which is vital to a system of self-assessed taxation.[10] Many cases similarly have vast administrative and revenue implications[11] which effect

5. For the fiscal year ending June 30, 1952, the Internal Revenue Service collected more than sixty-five billion dollars, received ninety million tax returns, handled over two hundred million other related information documents and audited and investigated more than four million returns. ANN. REP. OF COMM'R OF INT. REV. 83 (1952).

6. 208 F.2d 796 (4th Cir. 1953).

7. Int. Rev. Code of 1939, § 23(u), added by 56 STAT. 817 (1942) (now INT. REV. CODE OF 1954, § 215).

8. INT. REV. CODE OF 1954, § 214.

9. Int. Rev. Code of 1939, § 12(c)(3), added by 65 STAT. 480 (1942) (now INT. REV. CODE OF 1954, § 1(b)).

10. The Commissioner maintains that he cannot follow all of the courts of appeals' decisions, for some eannot be applied on a nation-wide basis without confusion and unfairness. *Hearing before the House Subcommittee on Appropriation,* 84th Cong., 2nd Sess., Jan. 26 (1956) 5 CCH 1956 STAND. FED. TAX REP. ¶ 11978. An analysis of the cases which the Commissioner has refused to follow, fails to disclose any pattern of consistency or any criteria which the Commissioner uses in determinating those cases which cannot be applied fairly on a nation-wide basis.

11. See United States v. Allen-Bradley Co., 134 Ct. Cl. 800, ——F. Supp.—— (1956), *Rev'd,* 352 U.S. 306 (1957); United States v. Ohio Power Co., 131 Ct. Cl. 95, 129 F. Supp. 215 (1955), petition for rehearing continued 351 U.S. 980 (1956); Wickes Corp. v. United States, 123 Ct. Cl. 741, 108 F. Supp. 616 (1952); these cases held that accelerated amortization under § 124 of the 1939 Code was not necessarily limited to the amount certified as necessary to the national defense. A conflict was created by National Lead Co. v. Commissioner, 230 F.2d 161 (2nd Cir. 1956), *Aff'd* 352 U.S. 313 (1957). See, *e.g.,* Carpenter v. Commissioner, 219 F.2d 635 (5th Cir. 1955), which dealt

federal tax policy. It is desirable that issues such as those involved in tax which have a widespread impact on the public interest be finally settled at an early date; however, the creation of a conflict among the circuits is usually a time consuming process.[12] One questions the merit of delay and conflict in regard to tax law, which has extremely broad application and which is constantly being amended.[13]

A review of a few cases demonstrates the effects of the Commissioner's policy, of not following court of appeals decisions, on various groups of taxpayers. For example, it was held in the case of *Shall* v. *Commissioner*,[14] that retirement grants to ministers were not includable in gross income. The Commissioner refused to accept this proposition until it had been substantiated in three other circuits.[15] In another situation adverse rulings in four circuits were required in cases involving surety collections before the Commissioner saw fit to change his posi-

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with the taxability of patronage dividends and was decided adversely to the Commissioner; United States v. Cherokee Brick & Tile Co., 218 F.2d 424 (5th Cir. 1953), raised the question of percentage depletion on finished brick and tile and was decided in favor of the taxpayer. See also Gallo Winery v. Commissioner, 227 F.2d 699 (9th Cir. 1955) which is in conflict with Libson Shops, Inc. v. Koehler, 229 F.2d 220 (8th Cir. 1955), *cert. granted*, 351 U.S. 961 (1956); these cases involve the carryover and carryback of net operating losses and excess-profits credits following statutory mergers. See Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Tax—A Criticism and a Proposal*, 38 COL. L. REV. 1393, 1409 n. 35 (1938).

12. "Often a decade may pass before uniformity is restored through a decision of the Supreme Court. For example, in 1930 the Board of Tax Appeals decided that a loss realized by a taxpayer on a sale of property to a corporation wholly owned by him was not a deductable loss. In 1934 this decision was reversed by the Court of Appeals for the District of Columbia. The Supreme Court denied certiorari. Thereafter the ninth, eighth and second circuit courts of appeals rendered similar decisions. The Board bowed before these authorities and likewise allowed such losses. But the Commissioner persisted in his view that the losses were not deductible. In 1939 his persistence bore fruit when the circuit court of appeals for the seventh circuit decided a case on a theory contrary to the other decisions. The Supreme Court consequently granted certiorari to review the question, and in 1940 rewarded the Commissioner's tenacity with a decision denying the deductibility of such losses. But between the consideration of the issue by the Board and its final determination by the Supreme Court was a decade of uncertainty and litigation." Surrey, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U.L.Q. 399, 416, 417 (1940).

13. Professor Surrey's words of some sixteen years ago are still very true:

> "Many a tax question is no nearer a 'right' decision after four or five circuit courts of appeals have battled over it than when the first court pronounced its judgment. All that has happened is that each of the several reasonable but contradictory positions has been given a stamp of judicial approval. Meanwhile a confused Bureau and a bewildered taxpayer, who would be quite content to adjust themselves to the first decision if it were left unchallenged, are forced to struggle along as best they can until the Supreme Court selects one of the available alternatives and it becomes the 'right' answer, at least until Congress acts. . . ." *Id.* at 419. Also see note 61 *infra*.

14. 174 F.2d 893 (5th Cir. 1949).

15. Abernethy v. Commissioner, 211 F.2d 651 (D.C. Cir. 1954); Mutch v. Commissioner, 209 F.2d 390 (3rd Cir. 1954); Kavanagh v. Hershman, 210 F.2d 654 (6th Cir. 1954).

tion.[16] Farmers were subjected to the adverse effects of the policy when the Commissioner was slow in accepting the proposition, as determined in two circuits, that proceeds from the sales of certain livestock were to be given capital gains treatment.[17] In another instance, the Commissioner took the position that loss as a guarantor was a non-business bad debt rather than an ordinary loss. In cases involving this issue four court of appeals ruled adversely to this position.[18] The first of these cases was decided in 1951 and the last in 1955; thus for four years the law remained unsettled. In each of the above cases a taxpayer was unable to rely on reported cases in making business decisions and eventually was forced to litigate to avoid payment of additional taxes.[19]

A taxpayer may be placed in a better bargaining position once a court of appeals has held on an issue, since he can threaten to appeal the Commissioner's interpretation if it is contrary to the court's interpretation.[20] However, in order to attain this superior bargaining position, the taxpayer or his counsel must first be aware of those court of appeals' decisions which are contrary to the Commissioner's interpretation. The deficiency notice sent by the Commissioner of Internal Revenue to the taxpayer does not inform him of an interpretation of a court of appeals that is contrary to the interpretation of the Commissioner, which has given rise to the asserted deficiency.[21] It seems improper that a taxpayer cannot rely that a deficiency asserted by the Internal Revenue Service

16. United States v. Zschach Construction, 209 F.2d 347 (10th Cir. 1954); Firemen's Fund Indemnity Co. v. United States, 210 F.2d 472 (9th Cir. 1954); Westover v. Simpson Construction Co., 209 F.2d 908 (9th Cir. 1954); United States v. Crosland Construction Co., 217 F.2d 275 (4th Cir. 1954); General Casualty Co. of America v. United States, 205 F.2d 753 (5th Cir. 1953); United States Fidelity and Guaranty Co. v. United States, 201 F.2d 118 (10th Cir. 1952).

17. United States v. Bennett, 186 F.2d 407 (5th Cir. 1951); Albright v. United States, 173 F.2d 339 (8th Cir. 1949). Favorable treatment was subsequently provided by Congress. Int. Rev. Code of 1939, § 117(j)(1), as amended, 65 STAT. 501 (1951) (NOW INT. REV. CODE OF 1954, § 1231(b)(3)).

18. Cudlip v. Commissioner, 220 F.2d 565 (6th Cir. 1955); Pollak v. Commissioner, 209 F.2d 57 (3rd Cir. 1954); Edwards v. Allen, 216 F.2d 794 (5th Cir. 1954); Fox v. Commissioner, 190 F.2d 101 (2nd Cir. 1951). A conflict was created by Putnam v. Commissioner, 224 F.2d 947 (8th Cir. 1955), *aff'd*, 352 U.S. 82 (1956).

19. See note 12 *supra*.

20. The majority of deficiency cases are settled before litigation by revenue agents in the field or by stipulation. Of some 72,000 cases docketed in the fiscal years 1940 through 1955, approximately 48,000 were disposed of by stipulation. ANN. REP. OF COMM'R OF INT. REV. 111 (1955). District directors now process a large majority of tax and penalty offers in compromise before they are docketed. Offers accepted for fiscal year 1954 and 1955 totaled 47,313 and those rejected totaled 13,593. *Id.* at 38.

21. In some instances the Commissioner issues an announcement that he will not follow a court of appeals decision. See, *e.g.*, Rev. Rul. 13121, 1949-2 CUM. BULL. 13; this stated the Commissioner would not follow McDermott v. Commissioner, 150 F.2d 585 (D.C. Cir. 1945); Rev. Rul. 13366, 1950-1 CUM. BULL. 33; this was an announcement by the Commissioner not to follow Motch v. Commissioner, 180 F.2d 859 (6th Cir. 1950).

represents settled law rather than law which is decidedly questionable owing to a contrary court interpretation. Rather a taxpayer in certain instances has the burden of discovering contrary cases and must threaten litigation to avail himself of the courts' rulings.

The effect of the Commissioner's refusal to follow certain court of appeals' decisions is to deny some taxpayers uniform treatment. Initially, all taxpayers are treated alike; however, if a taxpayer litigates an issue and wins, the Commissioner will generally not appeal if the taxpayer's court of appeals has previously ruled adversely to the Commissioner's position on the same point.[22] For instance, the Eighth Circuit in *Albright* v. *United States*[23] determined that sales of certain livestock were to be allowed capital gains treatment. A revenue bulletin indicated that certiorari would not be sought in the *Albright* case, "but petitions for review of Tax Court cases will be filed outside the Eighth Circuit."[24] Thus in those circuits where the court of appeals has rendered a decision favorable to the interpretation of the taxpayer, the taxpayer is spared the expense of defending his interpretation in the court of appeals. On the other hand, a taxpayer of a circuit where no court of appeals decision has been rendered favorable to his position may be forced to defend his interpretation in the appellate court as well as the lower court.

Furthermore, there will not be a uniform treatment of taxpayers in the Tax Court, if the holding of the Sixth Circuit in *Stacey Manufacturing Company* v. *Commissioner*[25] is accepted. The court of appeals held that the Tax Court has no authority to decline to follow a court of appeals decision on a question of law in passing on the tax liability of a resident of the court's circuit. Under this rule, the Tax Court is required to apply different rules to taxpayers living in the several circuits when there is a conflict in the decisions of the various circuits. The Court of Appeals stated that the desire of the Tax Court to establish a uniform rule does not empower it to disregard the various decisions of the courts of appeals. Finally the court said "until the Supreme Court reverses a rule by the court of appeals for its circuit that rule must be followed."[26] If carried a step further this reasoning might force the Commissioner to follow the interpretations of the court of appeals in determining whether

22. See, *e.g.*, Miller v. United States, 98 F. Supp. 948 (D.C. Neb. 1951), which followed and was in the same circuit as Albright v. United States, 173 F.2d 339 (8th Cir. 1949). The government lost in the Miller case; however no appeal was made for the Eighth Circuit Court of Appeals had previously decided the issue adversely to the government's position in the Albright case.

23. 173 F.2d 339 (8th Cir. 1949).

24. 4 P-H 1949 FED. TAX SERV. ¶ 70,480, Sept. 15, 1949.

25. 237 F.2d 605 (1956). There will be no petition for certiorari filed. 4 P-H 1957 FED. TAX SERV. ¶ 71,035.

26. Stacey Manufacturing Company v. Commissioner 237 F.2d 605, 606 (1956).

to assert a deficiency within that circuit. Such a policy would have to be initiated to prevent the inevitable reversal in the Tax Court of an interpretation by the Commissioner that is contrary to that of the taxpayer's circuit, for the Tax Court is compelled to follow the interpretation of the taxpayer's court of appeals.[27] Thus under a single national tax code taxpayers would not receive uniform treatment even in the initial application of the code.

It would seem logical to assume that when a court of appeals interpretates the tax code, the law should move forward. If the system of common law jurisprudence is to be effective, then decided cases on a given point should have the tendency to settle the point and forestall and prevent the need to further litigate the same point. However, in a number of instances, decided cases are neither furthering the law nor settling a point.[28] Rather it seems the taxpayer breeds litigation by following the decision, since the Commissioner appears to be looking for an opportunity to relitigate the point in an attempt to create a conflict and thus obtain Supreme Court review. This is not to say that any single taxpayer receives unique injury. Rather, the entire taxpaying community is hurt by the fact that the law is neither being moved forward nor being clarified by judicial decision. A single tax code applies to all the people, yet the courts of appeals are not able to settle the law and give a single answer which will insure uniform treatment of taxpayers. Even though several courts of appeals have rendered similar decisions on an issue, the law remains clouded if the Commissioner refuses to accept the courts' interpretation. Under the present system the Commissioner is free to disregard courts of appeals' decisions; this is a detriment to all taxpayers who must base their decisions as to tax consequences on reported holdings of the courts of appeals. For example, before the recent case of *Putnam* v. *Commissioner*,[29] four courts of appeals[30] had held a loss sustained as a guarantor of a corporate note was deductible by the guarantor as a business loss.[31] However, the Commissioner refused to accept this position and continued to interpret such a loss as a non-

27. *Ibid.*

28. See notes 14-18 *supra* and accompanying text.

29. 224 F.2d 947 (8th Cir. 1955), *aff'd*, 352 U.S. 82 (1956).

30. Cudlip v. Commissioner, 220 F.2d 565 (6th Cir. 1955); Edwards v. Allen, 216 F.2d 794 (5th Cir. 1954); Pollak v. Commissioner, 209 F.2d 57 (3rd Cir. 1954); Fox v. Commissioner, 190 F.2d 101 (2nd Cir. 1951).

31. Business losses are deductable as ordinary losses from gross income in the year they are incurred, but non-business bad debts are treated as short term capital losses. Int. Rev. Code of 1939, §§ 23(e)(2), 23(k)(4), 53 STAT. 13 (now INT. REV. CODE OF 1954, §§ 165,166).

business bad debt.[32] Thus a taxpayer who owned a large majority of the stock of a closely owned corporation which was in need of funds was in a quandary as to the method of obtaining the loan. Once he decided to aid the corporation personally, there were two alternatives. He might make a personal loan directly to the corporation, thus saving the additional expense of interest, but at the same time denying himself the advantage of treating a potential loss as a business loss for tax purposes.[33] Or he might be willing to forgo the interest saving, and personally guarantee a loan from a third party to the corporation, if he were certain that a loss as surety would be treated as a business loss. Even after four courts of appeals had rendered like decisions on the point,[34] within a circuit which had not litigated the question the potential tax treatment of such a loss was anything but clear. And even in a circuit which had decided the issue, the taxpayer could hardly rest easy in secure knowledge that his decision was founded on legal bedrock. The Commissioner's persistence in hewing to a contrary interpretation in other jurisdictions was obviously designed to present eventually the issue to the Supreme Court for review, and was likely to result in a final reversal of the earlier court of appeals cases.[35]

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32. That the Commissioner refused to accept the business loss interpretation is illustrated by Putnam v. Commissioner, 224 F.2d 947 (8th Cir. 1955), *aff'd*, 352 U.S. 82 (1956).

33. Int. Rev. Code of 1939, § 23(k), 53 STAT. 13 (now INT. REV. CODE OF 1954, § 166).

34. See note 30 *supra*.

35. The commissioner's interpretation that such a loss was a non-business bad debt was upheld by the Supreme Court. Putnam v. Commissioner, 352 U.S. 82 (1956).

The Commissioner's interpretation of the code is vindicated by the Supreme Court in the majority of cases. An analysis of Supreme Court tax decisions for the past six years shows the government's position sustained in twenty cases, while the position of the taxpayer was accepted in sixteen cases. With a few exceptions, these cases all involved a conflict of circuits. The government's position was accepted in the cases as follows: Commissioner v. Southwest Exploration Co., 350 U.S. 308 (1956); Corn Products Refining Co. v. Commissioner, 350 U.S. 46 (1956); Millinery Center Bldg. Corp. v. Commissioner, 350 U.S. 456 (1956); Commissioner v. LoBue, 351 U.S. 243 (1956); Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); General American Investors v. Commissioner, 348 U.S. 434 (1955); United States v. Olympic Radio & Television Inc., 349 U.S. 232 (1955); Lewyt Corp. v. Commissioner, 349 U.S. 237 (1955); Commissioner v. Estate of Louis Sternberger, 348 U.S. 187 (1955); United States v. Koppers Co., 348 U.S. 254 (1955); Premier Oil Refining Co. of Texas v. United States, 348 U.S. 254 (1955); Lober v. United States, 346 U.S. 335 (1953); Commissioner v. Smith, 345 U.S. 278 (1953); United States v. International Bldg. Co., 345 U.S. 502 (1953); Watson v. Commissioner, 345 U.S. 544 (1953); Arrowsmith v. Commissioner, 344 U.S. 6 (1952); Rutkin v. United States, 343 U.S. 130 (1952); Lykes v. United States, 343 U.S. 118 (1952); Robertson v. United States, 343 U.S. 711 (1952); United States v. Lewis, 340 U.S. 590 (1951). The cases decided contrary to the Commissioner's position were as follow: United States v. Leslie Salt Co., 350 U.S. 383 (1956); United States v. Huntington Beach Co., 350 U.S. 308 (1956); Murdock Acceptance Corp. v. United States, 350 U.S. 488 (1956); Squire v. Capoeman, 351 U.S. 1 (1956); Marcelle v. Tupia, 348 U.S. 956 (1955); United States v. Anderson Clayton & Co., 350 U.S. 55 (1955); Central Bank v. United States, 345 U.S. 639 (1953); United States v. Edens & Cory,

Certainly, it is in the public interest for the Commissioner to attempt to obtain Supreme Court review of those judicial interpretations of the code which he feels do not carry out congressional tax policies.[36] Within the present system the policy of the Commissioner not to acquiesce in certain decisions of the courts of appeals appears to be the only practical method of obtaining Supreme Court review,[37] yet this policy not only inevitably involves further delays in settling tax implications of transactions which, insofar as they are elements in business planning, cry for certainty; it also contributes additional uncertainty to tax planning for business purposes.

One possible solution would be to limit the scope of judicial review of Tax Court decisions.[38] At present the lack of administrative finality afforded Tax Court cases is causing many of them to be reversed on appeal. During the past four years the Tax Court has been reversed in approximately one third of the cases appealed from it.[39] This is partly

342 U.S. 912 (1952); United States v. General Engineering Mfg. Co., 342 U.S. 912 (1952); United States v. Bloom, 342 U.S. 912 (1952); Alison v. United States, 344 U.S. 167 (1952); United States v. Stevenson, 344 U.S. 167 (1952); Lilly v. Commissioner, 343 U.S. 90 (1952); Brown Shoe Company v. Commissioner, 339 U.S. 583 (1950); Commissioner v. Korell, 339 U.S. 619 (1950); Harris v. Commissioner, 340 U.S. 106 (1950).

This compilation does not include criminal cases, cases involving priority of federal tax liens, and cases questioning the constitutionality of the various taxes. In these cases the government's position is consistently upheld.

36. See note 4 *supra*.

37. See Rule 19 of RULES OF THE SUP. CT, as revised 1954, 74 Sup. Ct. 945 (1954). The 1954 October term of the Supreme Court was typical. The government applied for certiorari in ten cases involving federal taxation. Certiorari was granted in five, and of these, four had clear conflicts between circuits. Squire v. Capoeman, 220 F.2d 349 (9th Cir. 1955), *cert. granted*, 350 U.S. 816 (1955), *aff'd*, 351 U.S. 1 (1956); United States v. Huntington Beach Co., 132 Ct. Cl. 427, 132 F. Supp. 718 (1955), *cert. granted*, 350 U.S. 818 (1955), *aff'd*, 350 U.S. 308 (1956); United States v. Leslie Salt Co., 218 F.2d 91 (9th Cir. 1954), *cert. granted*, 349 U.S. 951 (1955), *aff'd*, 350 U.S. 383 (1956); Commissioner v. Southwest Exploration Co., 220 F.2d 58 (9th Cir. 1955), *cert. granted*, 350 U.S. 818 (1955), *rev'd*, 350 U.S. 308 (1956). The fifth case involved a constitutional question of interpreting income. Commissioner v. LoBue, 223 F.2d 367 (3rd Cir. 1955), *cert. granted*, 350 U.S. 893 (1955), *rev'd*, 351 U.S. 243 (1956). In the five eases denied certiorari, there were no clear conflicts between the circuits. United States v. General Motors Corp., 128 Ct. Cl. 465, 121 F.Supp. 932 (1954), *cert. denied*, 348 U.S. 942 (1955); Commissioner v. Goff, 212 F.2d 875 (3rd Cir. 1954), *cert. denied*, 348 U.S. 829 (1954); Commissioner v. McCue Bros., 210 F.2d 752 (2nd Cir. 1954), *cert. denied*, 348 U.S. 829 (1954); Commissioner v. Ray, 210 F.2d 390 (5th Cir. 1954), *cert. denied*, 348 U.S. 829 (1954); Commissioner v. Swaney & Sons, Inc., 212 F.2d 52 (4th Cir. 1954), *cert. denied*, 348 U.S. 828 (1954).

An exception to the rule that a clear conflict must exist is where a constitutional question is involved. See 28 U.S.C. § 1252.

38. By act of Congress this court is "an independent agency in the Executive Branch of the Government." INT. REV. CODE OF 1954, § 7441. The present provision was derived from Int. Rev. Code of 1939, § 1100, 53 STAT. 158 (1939), which in turn was derived from 44 STAT. 105 (1926).

39. Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311 (1956).

attributable to the broad review granted by the courts of appeals. Consequently the Tax Court and various courts of appeals often interpret the tax code differently.[40] If the various courts of appeals were consistent in their application of a limited standard of judicial review, then it would appear that the basis for the Commissioner's refusal to follow court of appeals decisions would be largely removed. This conclusion is premised on the assumption that the Tax Court in a subsequent case on a disputed point would follow its former decision and that a second court of appeals in reviewing the point and applying a uniform standard of limited review would dispose of the case in the same manner as did a prior court of appeals. In theory this solution would to a large extent alter the Commissioner's present policy of non-acquiescence in court of appeals decisions and would tend to settle the law at an early date in accordance with the views of an expert administrative tribunal—the Tax Court. An additional means of settling the law would be a requirement that the Commissioner follow the first court of appeals decision on a disputed point, unless he were successful in obtaining Supreme Court review. This requirement would take care of the rare cases where a court of appeals, even under its limited standard of judicial review, reversed the Tax Court. Thus even in those cases where the Tax Court was on the Commissioner's side of a proposition, the Commissioner would be precluded from attempting to get a more favorable treatment before another court of appeals in order to create a conflict and receive Supreme Court review.

The proposed solution is partially premised on the theory that the Supreme Court would recognize that the Commissioner was, either practically or coercively, required to follow the interpretation of a court of appeals even though that interpretation was contrary to his own, and that therefore the Court would be more willing to examine the issues involved than at present. The constant increase in the workload of the Supreme Court makes this a questionable assumption.[41]

The obvious advantage of the proposed solution would be the settling of the tax law at an early date. Two theoretical objections may be raised: first, judicial review of Tax Court decisions would be seriously

40. For example the Tax Court rendered like decisions in two similar situations in favor of the taxpayers. The government appealed the cases and the Second Circuit reversed, but the Tax Court was affirmed in the Sixth Circuit. Healy v. Commissioner, 16 T.C. 200 (1951), *rev'd*, 194 F.2d 662 (2nd Cir. 1952), *aff'd*, 345 U.S. 278 (1953); Commissioner v. Smith, 11 T.C. 174 (1948), *aff'd*, 194 F.2d 536 (6th Cir. 1952), *rev'd*, 345 U.S. 278 (1953). See also McCoy v. Commissioner, 15 T.C. 828 (1950), *rev'd*, 192 F.2d 486 (10th Cir. 1951); Arrowsmith v. Commissioner, 15 T.C. 876 (1950), *rev'd*, 193 F.2d 734 (2nd Cir. 1952). See Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311 (1956).

41. See ANN. REP. OF THE DIR. OF THE ADM. OFF. OF THE U.S. CTS. p. 149-151 (1955).

limited—the courts of appeals being relegated almost to a rubber-stamp role; second, that the Commissioner would be removed from his function of interpreting the tax laws at an early stage. A practical objection to the proposed solution may also be made, in that it is extremely difficult to discover a workable standard for limiting the scope of judicial review by the courts of appeals.

One method of giving more administrative finality to Tax Court decisions would be to return to the Revenue Act of 1926 which limited review of those decisions to "questions of law."[42] However, owing to the inherent vagueness of such a rule the courts initially gave this section of the tax code little attention. It was not until *Dobson* v. *Commissioner*[43] that any real attempt was made to limit review to "clear cut mistakes of law."[44] In this case the Supreme Court attempted to establish guiding standards which would restrict review within narrow bounds. In general the Court held that: (1) the Tax Court's determination of a purely factual issue is conclusive if supported by substantial evidence and not arbitrary; (2) mixed questions of law and fact are reviewable only if they have general application—if the question is peculiar to the case under review, the Tax Court's decision is conclusive if reasonable and not arbitrary; (3) the Tax Court's decision on questions of law is reviewable, but it must stand unless clearly erroneous. This policy of review did not result in complete uniformity because, then, as now, tax cases could be tried in the district courts and the Court of Claims, and review of these cases was not subject to the *Dobson* rule.[45] The *Dobson* rule met with poor reception owing to the difficulty of separating questions of accounting, which were supposedly questions of fact and not generally reviewable, from questions of law, which were reviewable.[46] Consequently, in 1948 Congress rejected the rule. Legislation was then enacted requiring the courts of appeals to review decisions of the Tax Court "in the same manner and to the same extent as decisions of District Courts in civil actions without a jury."[47] In the 1954 Revenue Act this was again adopted.[48] Thus under present law a court of appeals will

42. Revenue Act of 1926, § 1103(b), 44 STAT. 846.
43. 320 U.S. 489 (1943).
44. See Paul, *Dobson v. Commissioner: The Strange Ways of Law and Facts,* 57 HARV. L. REV. 753 (1944).
45. The basis of the Dobson rule is that the highly specialized character of the Tax Court entitles its decisions to a high degree of finality in the courts. This rationale is lacking for the district courts and the Courts of Claims.
46. See Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact,* 57 HARV. L. REV. 753, 764 (1944).
47. Int. Rev. Code of 1939, § 1141(a), added by 62 STAT. 991 (1948).
48. INT. REV. CODE OF 1954, § 7482(a).

not set aside the Tax Court's findings of fact unless "clearly erroneous."[49] However, in practice it appears that the courts of appeals have tended to grant unusually broad review to cases appealed from the Tax Court.[50] This has led to reversals of one-third of the cases appealed from the Tax Court by the taxpayer.[51]

There are two principal factors which would make the granting of more administrative finality to Tax Court decisions a sterile solution. First, vital in arguing for this solution is the proposition that accounting as related to tax matters is not a science with definite rules; therefore, the Tax Court as an expert tribunal can best decide accounting problems as questions of fact. A review of the reception given the *Dobson* case shows that the courts of appeals are not ready to accept this proposition.[52] The second and more fundamental factor which makes more Tax Court finality an unworkable solution is the fact that there will never be complete uniformity among the courts of appeals. The existing system of appellate review makes it impossible. Most of the decisions appealed are from one court, the Tax Court,[53] yet these decisions are subject to review by eleven tribunals.[54] The fact that one circuit has ruled on a question does not prevent a taxpayer in another circuit from subsequently litigating the issue. A contrary opinion may result on the same section of the revenue code.[55]

Several authorities advocate the creation of a Tax Court of Appeals as a practical solution to the problem.[56] The increased number of con-

49. The Supreme Court has stated that a finding of fact is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

50. See Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311, 314-15, n. 18 (1956).

51. *Id.* at 311.

52. See 93 CONG. REC. A3279-A3281 (1947).

53. Almost eighty per cent of tax controversies that go to court are filed in the Tax Court. During fiscal 1955, 4639 cases were docketed in the Tax Court; in the Court of Claims and in the district courts 1017 were filed. ANN. REP. OF COMM'R OF INT. REV. 113, 114 (1955).

54. INT. REV. CODE OF 1954, § 7482.

55. See *e.g.*, the cases cited in note 35 *supra*.

56. Griswold, *The Need for a Tax Court of Appeals*, 57 HARV. L. REV. 1153 (1944). See Surry, *Some Suggested Topics in the Field of Tax Administration*, 25 WASH. U. L. Q. 399 (1940); Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Tax—A Criticism and a Proposal*, 38 COL. L. REV. 1393 (1938). This presents a solution not only to the problem created by the refusal of the Commissioner to accept decisions of the courts of appeals in certain cases, but also to the problem of lack of uniformity among the circuits even when the Commissioner has accepted the decisions handed down. The latter problem arises when the reasoning of a prior case, which was advantageous to the taxpayer, is not beneficial when applied to another taxpayer in a different fact situation. See note 6 *supra*, and accompanying text.

stitutional and administrative cases handled by the Supreme Court[57] decreases the available time for tax cases and emphasizes the need for a Tax Court of Appeals. Ideally this court would have exclusive jurisdiction to review civil, federal tax decisions of district courts, the Court of Claims, and the Tax Court. The Court of Tax Appeals, in replacing the courts of appeals as courts of review of federal tax issues, would, by its uniform treatment of tax problems, eliminate the present uncertainty which has been produced by the Commissioner's refusal to follow certain courts of appeals decisions.[58] In co-ordination with the new court, legislation would have to be adopted requiring the Commissioner to follow those decisions of the lower courts which he did not appeal to the Court of Tax Appeals. Thus non-acquiescence by the Commissioner would be limited to those cases pending appellate review. Appeals from the Court of Tax Appeals would be handled by the Supreme Court, and it is probable that the Supreme Court would continue its policy of limiting itself to "substantial" constitutional questions.[59] Review by the Supreme Court on certiorari would still exist; however, this would not affect the finality of the decisions of the Court of Tax Appeals to any great extent.[60] A denial of certiorari would conclusively settle the point in question and the Commissioner would be bound to follow the Tax Court of Appeals' decision. Although this solution would vest a great deal of finality in decisions of the proposed court, any decision would still be subject to legislative correction.[61] Under the present system Congress usually does not enact legislation until the Supreme Court has rendered a decision on the issue.[62] Before an issue is settled by the Supreme Court, the Commissioner is free to battle out his interpretation in the courts of appeals and Congress is generally content to await the result.

57. ANN. REP. OF THE DIV. OF THE ADM. OFF. OF THE U.S. CTS. 149-151 (1955).

58. See notes 29-34 *supra* and accompanying text.

59. See Rule 15(f) of the RULES OF THE SUP. CT., as revised 1954, 74 Sup. Ct. 942 (1954).

60. The Commissioner would not be bound immediately to implement a decision if he had applied for certiorari, or if it had been granted. See Griswold, *The Need for a Court of Tax Appeals,* 57 HARV. L. REV. 1153, 1166-69 (1944).

61. See, *e.g.,* Revenue Act of 1951, § 117(j), 65 STAT. 500, (result of Watson v. Commissioner, 197 F.2d 56 (9th Cir. 1951), *aff'd,* 345 U.S. 544 (1953)); Revenue Act of 1951, § 117(j)(1), 65 STAT. 501, (derived from Albright v. United States, 173 F.2d 339 (8th Cir. 1949)). See Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact,* 57 HARV. L. REV. 753, 760, n. 29 (1944). Little time need be lost in legislative correction. In Burnet v. Northern Trust Co., 283 U.S. 782 (1931), a decision was delivered by the Supreme Court and the next day Congress overruled the holding. 46 STAT. 1516.

62. See, *e.g.,* Technical Changes Act of 1949, § 811(c), 63 STAT. 894 (result of Spiegel v. Commissioner, 335 U.S. 701 (1949)); Technical Changes Act of 1949, § 811(c), 63 STAT. 894, (result of Commissioner v. Church, 335 U. S. 632 (1949)). See Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact,* 57 HARV. L. REV. 753, 760, n. 29 (1944).

However, if the Commissioner were bound by a decision of the Court of Tax Appeals, Congress would be more prone to act at this stage. Congress, through the Joint Committee on Internal Revenue Taxation, whose task is "to investigate the operation and effects of the Federal system of internal revenue taxes,"[63] should find it relatively easy to watch one court on tax matters rather than the eleven courts of appeals and the Court of Claims.

The argument which is consistently voiced against such a court is that it would be too specialized.[64] First of all, it would be a congressionally created court with the same stature as the present courts of appeals, its judges having the full privileges of federal judges;[65] therefore, a judgeship would be a position demanding the appointment of the most capable men. These judges would hardly lose all contact with other fields of law and social order. Tax cases embrace many phases of law, and therefore demand and foster judicial intimacy with the entire spectrum of legal scholarship. Moreover, the court would be in a better position to determine how various issues relate to the interests of the entire country than would a single court of appeals.[66] The general acceptance of the present Tax Court demonstrates that little public animosity exists toward an expert tribunal in the federal tax area.

A problem inherent in any centralized court, is the inconvenience and expense of travel to Washington, D. C., for an appeal. This could be overcome by requiring the proposed court, en banc, to hold regular sessions at several convenient, geographic locations in the country. Another problem is whether one court could handle the amount of litigation which would be thrust upon it. In the last few years the annual number of tax cases handled by all the courts of appeals has averaged 325.[67] On the average a court of appeals annually disposes of a total of about 300 cases in all fields of law after hearing or submission.[68] Therefore, the volume of litigation before a Court of Tax Appeals would not be significantly greater than the litigation handled yearly by an average court of appeals. Furthermore, there is likelihood that the volume of tax litigation at the appellate level would decline once an appellate decision is

63. Int. Rev. Code of 1939, § 5001, 53 STAT. 503 (now INT. REV. CODE OF 1954, § 8002).

64. See Angell, *Procedural Reform in the Judicial Review of Controversies under the Internal Revenue Statutes: An Answer to a Proposal,* 34 ILL. L. REV. 151 (1939); Prettyman, *A Comment on the Traynor Plan for Revision of Federal Tax Procedure,* 27 GEO. L. J. 1038 (1939).

65. This would include freedom from diminution of compensation, pensions on retirement and appointments terminable only for cause.

66. See notes 6-9 *supra* and accompanying text.

67. Survey of ANN. REP. OF COMM'R OF INT. REV., vols. 1951-1955.

68. See ANN. REP. OF THE DIR. OF THE ADM. OFF. OF THE U.S. CTS. 152-154 (1955).

given the effect of stare decisis. No reason would exist for litigation of identical issues in several appellate circuits.[69]

A more theoretical criticism which might be offered against the adoption of the court is the sacrifice of appellate review of a regional, geographic nature. The argument would point out that federal taxes touch all the people and their everyday living; therefore, appeal should lie with judges of their own circuit.[70] Judges who reside in a region are assumed to be aware of its needs. There are two counter arguments. First, if a decision of the Court of Tax Appeals had an adverse effect on a geographic region, the congressmen from those districts would be in a position to start legislative action to correct the evil.[71] The issue would thus be resolved in terms of what is best for the whole country, and there would be uniformity of its application. Secondly, a comparable court, the Tax Court, has been effective and has met with little public animosity. The Tax Court hands down approximately 1100 decisions a year.[72] During the last four years approximately 530 cases have been appealed by the taxpayer from the some 4500 decisions made by the Tax Court.[73] Furthermore, some of these cases were appealed because contrary court of appeals decisions made appeal appear profitable. During the past four years there have been approximately 1350 decisions in district courts concerning tax issues and of these approximately 400 have been appealed.[74] These facts indicate that there has been no great public dissatisfaction with a court which is not regional in nature.[75] And finally, the federal tax laws should not, in theory, reflect geographic discrimination; they are designed for nation wide uniformity in application.

In conclusion it appears that the Court of Tax Appeals ultimately is the only solution which lends itself to three essentials of federal tax law—uniformity, stability, and publicity. This court could provide a

69. Under our present system there is litigation by the taxpayer when the Commissioner will not follow a court of appeals decision. Also some cases naturally arise at the same time in different circuits, and these could be consolidated for appeal before the new court.

70. Query whether a decision local in flavor is good for a whole country. See, *e.g.*, Watson v. Commissioner, 197 F.2d 56 (9th Cir. 1952), *aff'd*, 345 U.S. 544 (1953).

71. See note 61 *supra*.

72. Survey of ANN. REP. OF COMM'R OF INT. REV., vols. 1951-1955.

73. Nevitt, *Achieving Uniformity Among the 11 Courts of Last Resort*, 34 TAXES 311 (1956).

74. These figures exclude bankruptcy, receivership, insolvency, compromise and liquor cases. Survey of ANN. REP. OF COMM'R OF INT. REV., vols. 1951-1955.

75. Mr. Griswold draws the analogy of the Court of Customs Appeals to the Court of Tax Appeals. The former has been successful since its establishment in 1909, but prior to that date the customs field had many problems similar to the present field of tax law. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1174-76 (1944).

basis for equal treatment to small and large taxpayers.[76] On the other hand, solutions to administrative and revenue issues, vital to the Internal Revenue Service in carrying out its functions, would be more quickly determined. These results are both desirable and practical.

76. Initially some taxpayer would be forced to bear the costs of litigation in going before the Court of Tax Appeals; however, after the ruling of the Court, all taxpayers would be treated alike on the point decided. Subsequent litigation of the point would seldom arise since it would be unprofitable for taxpayers to re-litigate a settled question.