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How It Came About

It is safe to say, I think, that when the Sixteenth Amendment was ratified and the first of the Federal income tax statutes was enacted thereunder, there was little comprehension of the many novel problems and questions which were to arise in connection with the determination, assessment and collection of the new tax. Certainly there was no apparent thought of changing, or even modifying, the traditional right and power of the Government to collect the tax speedily and by summary methods where necessary. The collection procedure was generally this: The Commissioner of Internal Revenue, either on the basis of returns filed or upon such audits as were made, entered the amount of tax upon assessment lists and certified them to the various collectors for collection. If the taxes so assessed were not paid on the date or dates specified in the statutes, or on notice and demand, they were collected under warrants for distraint, or by some other summary method. Whether the tax or the amount thereof was right or wrong, there was nothing the taxpayer could do but pay. It was provided, however, that if the tax was paid under protest, a claim for refund might be filed and, upon rejection of the claim, or after the lapse of a specified period of time, suit for the recovery of the tax might be filed in the Court of Claims or, in some instances, in the Federal District Court. In the District Court, the suits were likely to be against the Collector of Internal Revenue in person, since in those cases an award of interest could sometimes be had, the suits being bottomed on an alleged wrongful act of

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an individual. For all practical purposes, however, they were suits against the United States, since the statute provided that if the court certified that the act of collection by the Collector was reasonable, the amount of the judgment should be payable out of the treasury, and I may say I know of no case wherein the court did not so certify.

For a great number of years, the procedure outlined appeared to be adequate, and, so far as I have been able to determine, there was no serious agitation or really great need for revision, until the time of or after the close of the First World War, when Congress had placed on the statute books the first of our very complicated and far-reaching income tax acts. Prosecution of the war had necessitated the imposition and collection of greatly increased revenue, and the incomes resulting from war production had, to some extent, provided a source and means for obtaining that revenue. As a result, we not only found ourselves with a normal tax, at a fixed rate, on the income of individuals, but a surtax, at graduated rates, and in addition to the flat rate tax imposed on the income of corporations, a very complicated war-profits and excess profits tax, at graduated rates, had also been imposed. At that time, however, even the concepts of what constituted income had not been too well settled, to say nothing of the meaning and applicability of the many new and complex provisions of the statute. And in spite of the earnest efforts of most taxpayers to report honestly their income and the tax thereon, there was no great assurance that, upon audit of their returns, they would not be faced with claims for substantial amounts of additional tax.

To carry the heavy burden of processing these returns, the staff of the Bureau of Internal Revenue was wholly inadequate, both in number and experience, and it soon developed that, due to the competition of private business, the Bureau was unable to hold within its ranks many of the more apt of the employees it did have. The result was that, even though Congress had allotted a period of five years within which returns might be audited and the taxes due thereunder might be determined and assessed, the Bureau was unable to complete the job within the time allowed, and unless a waiver was signed by the taxpayer, sometimes year after year, extending the period within which his return might be audited, he was likely to be faced with an assessment and demand for payment of a substantial amount of additional tax on the basis of a superficial examination of his return wherein all doubts were summarily resolved against him and in favor of the Government, leaving the ultimate determination of the correct amount of tax to later action, usually under claims in abatement or claims for refund.

The situation confronting business and industry was unlike anything
which had been experienced before. There had been the difficult job of reconversion to peacetime operations, with no existing pattern therefor, and to further complicate the picture, a business depression had occurred in 1920. Being inexperienced at that time in the matter of making proper provision for the contingency of further tax liability, businessmen and firms had not been generally forewarned of the possibilities that they might be confronted before, during or after reconversion to peacetime pursuits, with claims by the Government that their income, war-profits and excess profits taxes for the war years had been substantially understated and underpaid. During the years 1921, 1922, 1923 and 1924, those things were, in many instances, suddenly brought to their attention in the form of notice and demand to pay very large amounts of additional tax. In some cases the war earnings had been lost through subsequent operations; in other cases they were then represented by non-liquid assets, such as plant and machinery; in the case of some corporations the earnings had been passed on to stockholders in the form of dividends, and altogether too often the application of the doctrine of pay now and litigate later would have brought disaster to a healthy and thriving enterprise. A later showing in a suit for refund that the tax was not due and the collection thereof had been in error could not revive a business which had ceased to exist. Business, Government and Congressional leaders were all in agreement that something should be done.

*What the Treasury recommended and what Congress did.*

By letter dated November 10, 1923, to the Chairman of the Committee on Ways and Means, the Secretary of the Treasury recommended the creation of a Board of Tax Appeals in the Treasury Department, to which a taxpayer might appeal prior to the payment of an additional assessment of income, excess profits, war-profits, or estate taxes. The Board was to be independent of the Bureau of Internal Revenue and, with an informal procedure, to hear and settle tax cases. The Revenue Bill as reported to and passed by the House of Representatives provided for the creation of such a Board, but the Board was to be independent not only of the Bureau of Internal Revenue, but of the Treasury Department as well. As recommended, however, it was to be a case settlement board with an informal procedure.

In the Senate, the Committee on Finance concurred in the recommendation of Treasury and in the action of the House as to the character and procedure of the proposed Board. But on the floor an amendment was offered by Senator Jones, of New Mexico, to provide for a tribunal which should be formal in its procedure and should function judicially. Supporting the proposed amendment and covering its pur-
poses, Senator Jones, in a discussion appearing in the Congressional Record for May 8, 1924, \(^1\) said, in part:

\* \* \* The hearings are for judicial purposes. They are supposed to be conducted along the lines of judicial procedure. \* \* \* They determine controversies between the Government and taxpayers. Evidence is to be submitted bearing upon the question, and a decision is to be reached which, for practical purposes, in most cases at least, is a final decision. \* \* \* I submit that when there is a controversy between the Government and a taxpayer which shall follow through the various lines of procedure and finally reach the board of appeals, when it gets there all the proceedings should be public proceedings, the evidence should be taken down in writing, there should be a finding of fact and the decision of the board should be in writing and filed in the case just the same as in any other judicial proceeding, because that is what the case would be. It would be a judicial proceeding.

Senator Walsh, of Montana, supported the amendment, stating, in part, as follows:

\* \* \* I think that the proceedings ought to approximate as nearly as practicable to proceedings in court. It really is intended in a way as an equity judicial tribunal for the determination of those matters. There is no means that can be devised of making a court decide the cases aright in accordance with sound reason better than by requiring the court to file its opinion, showing to the world how it arrived at the conclusion which it reaches.

The amendment was adopted and subsequently, in a conference between the two Houses, it was accepted by the conferees of the House. This action was over the strenuous objection of Congressman Ogden Mills, a ranking member of the Committee on Ways and Means, and when the conference report was before the House, he took the floor to speak against it.\(^2\) After noting the recommendation of the Treasury Department for the creation of a board, with informal procedure, to settle tax cases, Mr. Mills, in part, said:

\* \* \* this House passed a bill providing for the creation of a board of tax appeals, so that if the taxpayer was notified that his tax would be increased before the tax was assessed he had a right to go before that board of appeals, which was appointed by the President and was not a part of the Treasury Tax Bureau, but was an administrative body nevertheless. He would sit down with them, one member if necessary, and adjust his tax liability expeditiously and justly; and if the Government disagreed with the findings, the Government could go to court; and if the taxpayer was aggrieved, he could go to court. \* \* \*

\* \* \* Now what the Senate did was to change the board of appeals, which was an administrative body sitting informally to adjust tax cases, into a court of record, and the House conferees have agreed to that. \* \* \* the testimony must be taken in writing, the rules of evidence apply, a written opinion is
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to be given, and all of the testimony in the proceedings is to be a public record.

Despite Mr. Mills' objection, the report was adopted and the bill became the Revenue Act of 1924. That the views of President Coolidge as to the character of the tribunal which had been created were in harmony with those of Mr. Mills, is shown by a formal statement made at the time of signing the measure. The statement was, in part, as follows:

The provisions of the bill, however, with reference to the Board, make it in all its essentials practically a court of record. The Board is to be bound by formal rules of evidence and procedure. In each case a formal record must be prepared and all oral testimony * * * must be reduced to writing and an opinion in addition to the findings of fact and a decision must be written. * * *

The Revenue Act of 1924 provided for a permanent Board of seven members, whose tenure was to be for a term of ten years. The original appointments, however, were to be for a period of two years only, and during the two-year interval, the President could appoint up to twenty-eight members. Actually sixteen members were appointed—twelve at first, and four later.

Under the statute, a taxpayer who received a notice from the Commissioner of Internal Revenue that a deficiency in tax had been determined against him had the right, within sixty days, to institute a proceeding with respect thereto and to have a hearing thereon. The hearings were to be before divisions of the Board, on assignment by the Chairman. They were to be open to the public and were to be conducted in accordance with such rules of evidence and procedure as the Board might prescribe. Written reports of the findings of fact and decision were to be made and a copy thereof entered of record. The oral testimony taken at the hearing was to be reduced to writing and all of the evidence, including the transcript of the oral testimony, and all findings of fact and decisions were to constitute public records. The Board was authorized to issue subpoenas and administer oaths, and provision was also made for the taking of depositions. The Board was to provide for the printing of its reports in such form and manner as might best be adapted for public information and use, and the reports as so published were to be competent evidence thereof in all courts of the United States without further proof or authentication. Subject to an exception, which, for the purposes here, is unimportant, the Commissioner was barred from assessing and collecting the tax deficiency until the decision in the case had been entered.

In keeping with the legislative mandate that it should function judi-
cially and that its members were to sit solely as judges, provision was made by the Board in its rules of procedure for the filing of pleadings which would set and limit the issues for determination to the precise questions in respect of which there was a difference or dispute between the parties. Hearing calendars were established and the trials were limited to questions on which there was a joinder of issue. In the course of the trials established rules of evidence were applied.

That the need for such a tribunal was very real to the taxpayers, is indicated by the fact that, even though the Board was new and untried, 9,555 cases had been docketed within seventeen months after its first members were appointed in July of 1924. During the same period 3,398 of the cases so docketed had been closed and the Board had written and published 1,064 opinions, which had done much to settle many of the troublesome questions which had arisen as to the meaning and applicability of numerous provisions of the revenue statutes.

Although the Board, as so created by the Revenue Act of 1924, had no duties, purposes or functions which were not judicial in character, it nevertheless did not have the power to enter a final judgment or decision. A taxpayer was required to pay the amount of the tax as decided by the Board, but, after payment, he was still privileged, under prescribed procedures, to file a suit for refund of the tax so paid and litigate the liability anew in the Court of Claims, or, subject to certain exceptions, in a District Court. Where the decision was against the Government, the Commissioner could not assess the tax and collect it on notice and demand, but he could institute a suit de novo in the District Court for the collection of the full amount of the tax which had been rejected by the Board.

Such was the situation, when Congress began its studies preparatory to the drafting and enactment of the Revenue Act of 1926. At the hearings before the Committee on Ways and Means, representatives of the Treasury Department, the American Bar Association and other organizations were uniformly high in their praise of the manner in which the Board had functioned. The Committee was strongly urged to report a bill which would make the Board a court in name as well as in fact, and to provide for its functioning as such. Mr. A. W. Gregg, Solicitor of Internal Revenue, appearing for the Treasury Department, said, in part:

The Treasury Department originally recommended a board in the Treasury Department with informal procedure to settle tax cases. It was recognized at the time that there were two needs—one for a board to settle tax cases—and I mean settle them in the sense of settling them across the table—and the other a court to establish precedents, the latter not for its value in deciding the cases which would be presented to it, because they
necessarily must be limited in number, but for the purpose of establishing precedents to guide the bureau in the settlement of other cases and to guide the taxpayer in disposing of his case.

The original recommendation of the Treasury Department was for a board to settle tax cases. Congress changed that and gave us the other, which was also much needed—a court to establish precedents for the disposition of other cases pending in the department.

Having done that, it seems to me that Congress should go the whole way and establish it in name and in other respects as they have established it in fact—as a court; * * *

In the enactment of the Revenue Act of 1926, the House and the Senate were in general accord as to what should be done, and though the name Board of Tax Appeals was retained and it was stated in the act that the Board was continued “as an independent agency in the Executive Branch of the Government,” it was, in reality, fitted into the Federal Judiciary. A taxpayer receiving a notice of deficiency could no longer litigate his liability therefor in the Board and, if the result was not satisfactory, pay the tax and have a trial de novo in the Court of Claims or in a District Court, but upon receipt of the deficiency notice, had to elect whether he would have his day in court in the one tribunal or the other. He could no longer have both.

The Congressional Committees, in their reports, made it plain that the hearings before the Board were to follow as nearly as possible those proceedings in a Federal District Court where the court would sit without a jury. It was provided that the admissibility of evidence was to be determined according to the rules of evidence prevailing in the courts of equity in the District of Columbia. And in that connection, when a member of the Senate, during debate on the floor, expressed a fear that ex parte hearings might be conducted and that hearsay evidence might be admissible, Senator George had the following to say:

* * * if the Senator will pardon me, I may suggest that every reasonable effort has been made to bring this board out of the class of a mere administrative body into the status of a court; and I think the rules of evidence to which the Senator refers have been amply cared for in this provision.

It was further provided that the decisions of the Board should be subject to review, upon petition of either the taxpayer or the Government, by the Circuit Court of Appeals for the circuit in which the taxpayer, if an individual, was an inhabitant, or, if the taxpayer was other than an individual, for the circuit in which it had filed its return. But upon such appeal, the review of the Board’s decision was to be limited to the record which had been made in the trial below. Thereafter, the case might go to the Supreme Court by writ of certiorari, in the man-
ner provided in Section 240 of the Judicial Code, now Section 1254 of Title 28 of the United States Code. Subject to those rights of review in the appropriate Court of Appeals and in the Supreme Court, the decision of the Board was to be final. It was the view of the Committees that the decisions of the Board would be "judicial, not legislative or administrative determinations," and that the imposition upon the appellate courts of the duty of reviewing "judicial decisions, such as those of the Board," would not be "the imposition of a non-judicial duty."

Although the name of the Board of Tax Appeals was changed to that of The Tax Court of the United States by the Revenue Act of 1942, the title of its Members to Judges, and that of its Chairman to Presiding Judge, and more recently, in the recodification of Title 28 of the United States Code, to Chief Judge, there has been no substantial change in its character or the method of its operations since the enactment of the Revenue Act of 1926.

The Tax Court of the United States—a Legislative Court.

Where, under the Constitution, a function or power primarily belongs to Congress and is susceptible of, but does not require, judicial determination, it is solely within the province of Congress to select the mode of the exercise thereof, and as stated by the Supreme Court in Ex Parte Bakelite Corporation,5 "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." Thus, in the case of the Tax Court, we have an instance where the Congress has elected and decided that a part of its power granted by Section 861 of Article I of the Constitution "to lay and collect taxes" shall be exercised by a tribunal created solely for that purpose, and which, under the statute of its creation, must proceed judicially in the exercise of the power so granted.

A most striking parallel to the Tax Court in all essentials is the United States Court of Claims. In its opinion in the Bakelite case,7 the Supreme Court pointed out that the Court of Claims was created and has been maintained as a special tribunal to examine and determine claims against the United States, "a function which belongs primarily to Congress as an incident to its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies." It would thus appear that as in the case of the Tax Court the Court of Claims likewise was created to exercise a power granted to Congress under Section 8 of Article I of the Constitution.

As early as American Insurance Company v. Canter,8 questions
were arising as to the status in our scheme of government of tribunals so created by Congress to exercise some one or more of its constitutional powers but as to which Congress in addition had prescribed that the power or powers be exercised judicially, and in the opinion in that case, written by Chief Justice Marshall, they were referred to as legislative courts, as distinguished from constitutional courts created under Section 1 of Article III of the Constitution and exercising jurisdiction conferred by Section 2 of that article.

In *Williams v. United States*, the contention was that the Court of Claims was a constitutional court and that a judge thereof was a judge under Article III of the Constitution. In arriving at its conclusions on the questions raised, the Supreme Court traced the history of the Court of Claims from the date of its creation by the Act of February 24, 1855, 10 Stat. 612. It was pointed out that under that act the Court of Claims was, in reality, administrative or advisory in character, its duties being to examine claims, to keep a record of its proceedings in each case and to make a report to Congress for the action of that body. Attention was then called to the Act of March 3, 1863, which did authorize the Court of Claims to enter "final" judgments from which appeals to the Supreme Court were to be allowed in certain cases, but which, by Section 14 thereof provided that no money was to be paid from the treasury for any claims so passed upon until estimated for by the Secretary of the Treasury. Noting that the appeal under that act in *Gordon v. United States*, had been dismissed for lack of jurisdiction, reference was made to an undelivered opinion therein by Chief Justice Taney, wherein it was said that even though the Court of Claims was called a court and its decisions were called judgments, those decisions being advisory and not final, were not judicial decisions in respect of which a right of appeal would lie to the Supreme Court since the power conferred on the Supreme Court was exclusively judicial and Congress could not require or authorize it "to express an opinion on a case where its judicial power could not be exercised and where its judgment would not be final and conclusive upon the rights of the parties." Pointing next to the repeal in 1865, 14 Stat. 9, of Section 14 of the Act of March 3, 1863, the Court said:

* * * Since that time it never has been doubted that Congress may authorize an appeal to this court from a final judgment or decree of the Court of Claims, *United States v. Jones*, 119 U. S. 477, 478-479; *In re Sanborn*, 148 U. S. 222, 225; *Luckenbach S. S. Co. v. United States*, 272 U. S. 533, 536 et seq., or that the judgment of this court rendered on such appeal constitutes a final determination of the matter. *United States v. O'Grady*, 22 Wall. 641, 647. It is equally certain that the judgments of the Court of Claims, where no appeal is taken, under existing laws are absolutely final and
conclusive of the rights of the parties unless a new trial is granted by that court as provided by law. * * *

Thereafter the Court taking note of the fact that the various acts relating to the Court of Claims had been gathered together in what is called Tucker Act, had the following to say:

By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. * * * The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power * * *

Having thus concluded that the Court of Claims was a court, that it had been given jurisdiction over controversies susceptible of judicial cognizance and that in entertaining and deciding those controversies it exercises judicial powers, the Supreme Court next sought the source of its jurisdiction and power and finding that such jurisdiction was derived by a grant by Congress under its power under Section 8 of Article I of the Constitution "to pay the debts" of the United States and not from Section 2 of Article III, concluded and held that the Court of Claims was a legislative court and not a constitutional court created under Section 1 of Article III.

Thus we have the two tribunals—one the Court of Claims, the other the Tax Court—both having jurisdiction and exercising judicial power over controversies incident to the performance and execution of powers which under the Constitution are vested in Congress with neither at first having the power to enter a final decision but with both, under the reasoning of the Supreme Court in the Williams case, being converted into legislative courts when Congress provided that their decisions should be final, subject to appeal in the one instance to the Supreme Court and in the other first to the appropriate Court of Appeals and then to the Supreme Court, the Court of Appeals also being a constitutional court which may not be required or authorized to exercise a non-judicial function or duty.

It is to be noted, however, that while the Court of Claims is housed in the Judiciary, the Tax Court is housed in the Executive Branch of the Government. To say the least, then, the Tax Court is an anomaly in our scheme of government. It is now, and has been since 1942, denominated a court, and yet, by the words of the statute, it is described as "an independent agency in the Executive Branch of the Government." But even though so described, its decisions and functions during its entire existence have been wholly judicial and at no time has it ever had any discretionary, policy-making, investigatory,
regulatory, advisory, or other comparable functions or duties, which
describe and indicate an administrative or executive body, as con-
trasted with a judicial body.

From time to time, both before and after the change of name from
Board of Tax Appeals to Tax Court, both the Supreme Court and some
of the Courts of Appeals have found it necessary, or have taken the
occasion, to consider and to resolve the status of the Tax Court. Usu-
ally noting the statutory fiat that it is "an independent agency in the
Executive Branch of the Government," the discussion in most of the
opinions has been premised on an assumption, not a demonstration, that
the Tax Court is an administrative, not a judicial body. At that point,
to use a colloquialism, the fun begins.

In a number of the opinions on the point, the courts have cited and
relied on pronouncements in Williamsport Wire Rope Company v.
United States,14 which actually dealt with the status of the Board of
Tax Appeals as it was constituted under the Revenue Act of 1924, and
not with the Board as constituted under the Revenue Act of 1926. The
conclusion in the opinion in that case that the Board was in all of its
aspects an administrative, not a judicial body, was bottomed not only
on the statutory words that it was an agency in the Executive Branch
of the Government, but on the proposition that it was created to per-
form the administrative functions theretofore discharged by the Com-
mittee on Appeals and Review, which had been a review group made
up of Bureau of Internal Revenue personnel and had been adminis-
tratively set up by the Commissioner of Internal Revenue to function
under him, the one difference between the Committee and the Board
noted by the Court being that the Committee was a part of the Bureau,
whereas the Board was independent.

As its authority for the conclusion that the Board had been created
to assume and had assumed the administrative functions of the Commit-
tee on Appeals and Review, the Court cited and relied on the reports
of the Committees on Ways and Means and on Finance in reporting to
their respective houses the bill which became the Revenue Act of 1924
and under which the Board was created. As recounted heretofore, it is,
of course, true that the Treasury Department recommended, and the
bill as reported by the committees to their respective houses did pro-
vide for the setting up on an informal administrative or conference body
along the lines described by the Court in its opinion. Presumably, how-
ever, no one called the Court's attention to the fact that the recom-
mendations of the Treasury Department and of the two committees
had been discarded when the bill reached the floor of the Senate, in
favor of a tribunal which was to function solely along judicial lines in
its hearings on and decisions in the cases which should come to it, and that under the bill as enacted into law the proceedings were in no sense to be an administrative or informal review of prior actions in the Bureau of Internal Revenue, but were to be judicial proceedings in the form of trials de novo, as heretofore noted, even though there was no provision whereby the decisions entered by the Board in the said cases would be final.

In Old Colony Trust Company v. Commissioner, the question, for the purposes of the discussion here, was whether the various Circuit Courts of Appeals, being constitutional courts and limited, therefore, to the exercise of judicial powers, could receive or take jurisdiction on petitions to review the decisions of the Board of Tax Appeals, as provided by the Revenue Act of 1926. Without citation or discussion, the Supreme Court started with a stated conclusion that the Board of Tax Appeals was not a court, but an executive or administrative board, and devoted its opinion to the rationalization of the proposition that a proceeding originating in the Board of Tax Appeals and brought to a Court of Appeals on review would in that court be a case or controversy within the meaning of the Constitution, that the judgment which would be rendered by the Court of Appeals thereon would be a judicial judgment and that, accordingly, the Court of Appeals and thereafter the Supreme Court itself could receive or take jurisdiction therein. It has already been noted above that in their reports to their respective houses of Congress the Committees on Ways and Means and on Finance had expressed the view that the providing for such review would not be the imposition on the Courts of Appeals and the Supreme Court "of a non-judicial duty," the stated basis for the view being that the decisions of the Board which were to be reviewed "would be judicial, not legislative or administrative determinations." In that connection, the reasons given by the Supreme Court for its conclusion that a proceeding in the Court of Appeals for the review of a Board decision is a case or controversy over which a constitutional court may have jurisdiction, are most interesting, and read as follows:

In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. The courts are either the Circuit Court of Appeals or the District of Columbia Court of Appeals. The subject matter of the controversy is the amount of the tax claimed to be due or refundable and its validity, and the judgment to be rendered is a judicial judgment.
At this point, a fair and reasonable observation might seem to be that everything said by the Supreme Court in the matter quoted, may likewise be correctly and properly said of the same proceeding in the Board of Tax Appeals, or, as of now, in the Tax Court.

For reasons which must be regarded as best known to itself, Congress, as late as the enactment of the Internal Revenue Code of 1954, has seen fit to retain in the statute the provisions housing the Tax Court "in the Executive Branch of the Government," but whenever, in the light of some holding or pronouncement of one of the appellate courts, it has deemed legislative action necessary to preserve the judicial character of the Court and to make certain that its decisions continue to be judicial decisions, it has taken such action. Within a reasonably short time after the enactment of the Revenue Act of 1926, which for the first time provided for the appeal of Board decisions, the Court of Appeals for the Seventh Circuit, in Chicago Railway Equipment Company v. Blair,16 indicated the view that evidence which had been presented to the Commissioner of Internal Revenue or his agents, or had otherwise been available to them, should be taken into account in a proceeding before the Board, even though it had not been adduced in the trial. It remanded the proceeding to the Board, with the direction to take further evidence, if necessary, to determine the matter involved. The Committee on Ways and Means was so concerned over the pronouncement that it inserted a clarifying amendment in the bill which was to become the Revenue Act of 1928. The Committee on Finance, in reporting the bill to the Senate, was of the view, however, that the nature and character of the Board was too clearly and definitely established as that of a judicial body to require further legislation.

In Lincoln Electric Company v. Commissioner,17 the view was expressed that the Tax Court, being but "an independent agency in the Executive Branch of the Government," came under the provisions of the Administrative Procedure Act, 60 Stat. 237, which had been enacted the preceding year to prescribe procedures for administrative boards and commissions of the Government. The act itself had excepted courts from its applicability and even a cursory examination of the procedures prescribed should be sufficient, it would seem, to indicate their unsuitability for a tribunal which, as in the case of the Tax Court, exercises judicial functions only. Furthermore, the report of the Judiciary Committee to the Senate had plainly indicated that in excepting the courts from the act the Tax Court was one of the courts excepted. In any event, Congress apparently deemed clarifying legislation unnecessary and when the Internal Revenue Code of 1954 was enacted, the existing procedural provisions of the Internal Revenue Code of 1939
relating to the Tax Court were reenacted without substantial change. It is possible also that the Court of Appeals changed its views on the matter, since shortly thereafter it affirmed the Tax Court per curiam in MacDonald v. Commissioner,¹⁸ wherein one of the assignments of error in the petition for review was the Tax Court's failure or refusal to proceed pursuant to the provision of the Administrative Procedure Act.

One of the most noteworthy examples of determination on the part of Congress to preserve and maintain the judicial status of Tax Court decisions and at the same level with decisions in comparable cases by the Federal District Courts is to be found in the legislation which was occasioned by the pronouncements in the opinion of the Supreme Court in Dobson v. Commissioner.¹⁹ For the purposes of this discussion, the question was as to the proper and permissible scope of review of Tax Court decisions by the Courts of Appeals. Calling attention to the provision of the statute limiting such review to questions of law, it was said that perhaps the chief difficulty in consistent and uniform compliance on the part of the appellate courts with the congressional limitation was the want of a certain standard for distinguishing "questions of law" from "questions of fact," which was reflected by the practice of labeling some questions as "mixed questions of law and fact." It was held that unless the appellate court was able to separate the elements of a Tax Court decision so as to identify a clear-cut mistake of law "the decision of the Tax Court must stand." Reasoning, apparently, from an assumed premise that the Tax Court was an administrative body and its determinations were administrative determinations, the Supreme Court pointed out that in review of such determinations by the Courts of Appeals "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." It expressed the view that it was more difficult to maintain sharp separation of court and administrative functions in tax than in other fields, and that one of the reasons why the Courts of Appeals had deferred less to the Tax Court than other administrative tribunals was that exactly the same questions as those involved in Tax Court decisions were currently reaching the Courts of Appeals from many of the Federal District Courts, wherein the scope of review by the appellate courts was not so limited or restricted. It apparently recognized that particularly in cases where the questions were of the character sometimes labeled as "mixed questions of law and fact" the results might well be conflicting, with the Courts of Appeals, in Tax Court cases, being required to let the decision stand, whereas, in cases reaching them from the District Courts, they were free to reach a contrary result, through either the reversal or affirmance of the District Court.
The very likely probability that as a result there would in some instances be one rule for a taxpayer proceeding through the Tax Court and another for a taxpayer proceeding through a District Court was passed over, with the observation that while the decisions of the Tax Court might "not be binding precedents for courts dealing with similar problems uniform administration would be promoted by conforming to them where possible."

When the situation thus created by the Supreme Court's opinion in the Dobson case was brought to the attention of Congress, it took such action as would make clear that no distinction was to be made between the decisions in the Tax Court and in the Federal District Courts, by amending Section 1114 (a) of the Internal Revenue Code of 1939, at 62 Stat. 991, to provide that the Courts of Appeals "shall have exclusive jurisdiction to review the decisions of the Tax Court * * * in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari * * *.

From the above, it would seem to me that it should be fairly and reasonably clear that by whatever name it may be called, or wherever it may be housed, the Tax Court, by reason of the manner of its functioning, the nature and character and the force and effect of its decisions, is, for all practical purposes, a legislative court. In that connection, attention is called to the opinion written by Judge Maris for the Court of Appeals for the Third Circuit in Stern v. Commissioner, wherein there is a much better statement of the matter than I could possibly make. It reads as follows:

* * * But although Congress in the Internal Revenue Code has continued to call the tribunal "an independent agency in the Executive Branch of the Government" it has at the same time more realistically designated it as a court and its members as judges. And it is the fact that from its inception as the Board of Tax Appeals in 1924 it has operated only as a judicial tribunal in adjudicating controversies as to tax liabilities arising between taxpayers and the Government. Its powers are wholly judicial in character. It has never been given any administrative powers or functions nor has it ever had any investigatory, regulatory or policy-making duties or powers. Since the passage of the Revenue Act of 1926 its decisions have been final and reviewable only on the record by the United States courts of appeals. Since 1948 the scope of that review has been the same as in the case of like decisions of the district courts. The Tax Court is thus for all practical purposes a judicial tribunal operating in the federal judicial system. Whether it is a legislative court created by Congress under Article I, section 8, of the Constitution, like the Customs Court, or some other form of judicial agency placed for convenience of housekeeping in the Executive Branch of
the Government is, therefore, merely a matter of legal semantics since, whatever it may be called, it is an "independent" judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government but only by the federal appellate courts. * * *

Organization, Method of Operations and Work Accomplished.

Probably no discourse on the Tax Court would be complete without some discussion of its organization and the manner in which it carries out the duties which have been assigned to it. As constituted by the Revenue Act of 1926, and as it exists today, it is composed of sixteen judges, who are appointed for terms of twelve years. Pursuant to Section 7444 (b) of the Internal Revenue Code, the Court biennially designates one of it number to serve as Chief Judge. The other fifteen judges devote their full time to the trial of cases and the preparation of findings of fact and opinions therein. The Court is divided into divisions and under Section 7444 (c) a division may consist of one or more judges, as the Chief Judge may direct, but by established custom each judge is a division.

The power to assign cases is vested solely in the Chief Judge and a case is heard and decided by the division to which it has been assigned. A report consisting of written findings of fact and opinion is required, and under Section 7460 (c), the report of the division becomes the report of the Court, unless within thirty days the Chief Judge directs that the report be reviewed by the Court. As a consequence, it is the established practice in the Court that the findings and opinion of each and every division in each case heard and decided is reviewed by the Chief Judge.

Such review by the Chief Judges serves two purposes. One is to make certain, in so far as it is possible, that the reports in all cases which deserve and merit the consideration of the entire Court are referred to the Court for review, while the other is to see that the trial judges are not required to take time from their own cases to study and consider the reports in cases which do not merit or call for such consideration. If this were not done and the judges of the Court had to consider every case decided, the Court could not begin to hear and decide the great number of cases which comes before it. By this procedure, conflicts in the decided cases are reduced to a minimum. Cases dealing with new principles, those which require difficult legal distinctions, and others which for other reasons merit the attention of the Court as a whole are not reviewed by the Chief Judge alone, but, at his direction, are considered by the Court in conference. At the same time, purely fact cases, as well as cases which are clearly within the scope of cases already
decided, are disposed of without the delay which would be occasioned by Court review. Where the opinions are such that it is thought that they may be of value as precedents, they are reported in our printed reports. Where they present nothing new, or because of the peculiar state of the facts or the character of the questions involved, they are considered to be decisive of the instant case only, they are not reported in our printed reports but are released in memorandum form.

By Section 7446, it is provided that the sessions of the Court both as to time and place shall be prescribed by the Chief Judge, with a view to securing reasonable opportunity to taxpayers to appear with as little inconvenience and expense to them as is practicable. As a consequence, the Court sits periodically in all of the major cities of the United States. In New York City and in Chicago, as well as in Washington, it has its own courtrooms. In other cities, it usually is able to obtain the use of the courtroom of a local Federal court.

Discussion of the functioning of the Tax Court should not be concluded without taking note of the part played by the attorneys and technical men representing the Internal Revenue Service, and the members of the tax bar who represent the taxpayers. Under the Court’s rules of procedure, the parties are required to stipulate the facts or to agree upon evidence to the fullest extent to which either complete or qualified agreement can be reached, and if steps to that end have not already been taken, they are directed to confer promptly after receipt of the hearing notice, in an effort to stipulate. Under that rule and by reason of what might be termed almost universal cooperation, a pretrial practice carried on wholly by the representatives of the parties, and without the presence of a judge, has been established throughout the country. And I would venture to say that the results represented by full and complete settlement of cases without trial, the stipulation of facts and agreements upon evidence are not even closely approached in jurisdictions where the judge himself sits in the pretrial conferences. The number of pending cases before the Tax Court at any given time now and always has indicated to the uninitiated an overwhelming or insurmountable workload, and without the above-described cooperation between the counsel for the parties, the caseload would in truth and in fact be insurmountable.

In closing, some figures on the cases decided or otherwise disposed of by the Tax Court during its nearly thirty-one years of existence might be of some interest. At March 31, 1955, 169,997 cases had been docketed, of which 160,060 had been disposed of, leaving 9,937 pending on that date. In 154,743 cases closed between July 1, 1927, and March 31, 1955, the gross deficiencies as determined by the Commis-
sioner of Internal Revenue amounted to $6,078,498,822.32, and the gross deficiencies shown therein by the decisions of the Tax Court amounted to $1,643,977,279.19. Of the 154,743 cases closed during the period stated, 34,064 were closed pursuant to written opinions, 102,675 were closed by agreement of the parties and without trial, while the remaining 18,004 dockets were closed pursuant to mandate and by dismissal for various reasons.

From the enactment of the Revenue Act of 1926, when appeals from Tax Court decisions were first allowed, through March 31, 1955, 7,21524 appeals had been taken. In the cases so appealed, the Tax Court was affirmed in 4,871 and reversed in 1,512. The appeals in 203 cases were disposed of by agreement of the parties, while the Tax Court was affirmed in part and reversed in part in 392. Appeals were still pending in 237 cases.

From its inception through March of this year, the Tax Court has filed or promulgated a total of 25,72028 written opinions. Those which have been printed now fill seventy volumes of reports, and I think it may reasonably be said that in most instances they are accepted as settling the meaning and applicability of the tax statutes. And there is no way of estimating with any degree of accuracy how many thousands of cases are closed each year pursuant to the Tax Court opinions without appearance on the court docket.

Such, to the best of my ability, is the story of The Tax Court of the United States.