September 24, 2015

The Honorable Orrin G. Hatch
Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

Re: Comments on S. 903

Dear Chairman Hatch:

Enclosed please find comments in connection with legislative proposals for reforming the administration of tax law affecting the United States Tax Court as outlined in S. 903 and the Senate Finance Committee’s February 11, 2015, markup of an original bill on such matters (“Comments”). These Comments are respectfully submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

cc: Hon. Ron Wyden, Ranking Member, Senate Committee on Finance
    Hon. Paul Ryan, Chairman, House Committee on Ways and Means
    Hon. Sander Levin, Ranking Member, House Committee on Ways and Means
    Dr. Thomas Barthold, Chief of Staff, Joint Committee on Taxation
These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by the Section’s Committee on Court Procedure and Practice (“CPP”) Chair Juan F. Vasquez, Jr. and Vice Chair Joshua D. Odintz. Substantive contributions were made by Jeremiah Coder of CPP and former CPP chair Peter A. Lowy. The Comments were reviewed by CPP’s immediate past chair Mark Allison; Mary A. McNulty, the Section’s Council Director for CPP; Julian Y. Kim, of the Section’s Committee on Government Submissions; and Peter Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date:  September 24, 2015
DISCUSSION

As discussed below, we agree with the vast majority of S. 903’s proposed legislative steps to increase taxpayer access to courts and to bring clarity in the outlined areas, and thank the Senate Committee on Finance and its staff (the “Committee”) for its proposal and the opportunity to comment on it.

Increased Judicial Review for Interest Abatement Claims

The American Bar Association Section of Taxation (“Section”) endorses S. 903’s allowance for Tax Court review of interest abatement cases where the Internal Revenue Service (the “Service”) has delayed longer than six months in responding to a taxpayer’s claim for abatement. The current statutory language of section 6404(h),\(^1\) which gives the Tax Court jurisdiction to review a taxpayer’s claim that the Service abused its discretion in disallowing a request for abatement, only provides judicial review after the Service has issued a final determination on such a request.

Significant delays by the Service in making a determination, or the failure to make any determination, can produce substantial harm to a taxpayer if interest continues to accrue during the pendency of the IRS administrative process without a timely determination. The Section believes it is fitting to increase the scope of the Tax Court’s jurisdiction under section 6404(h) to provide for judicial review where a taxpayer’s abatement claim has sat with the Service for longer than 180 days without a final determination.

“S” Case Election for Interest Abatement Claims

An additional burden can be removed in interest abatement cases by allowing taxpayers to proceed under the small tax case procedures in Tax Court. The election of a taxpayer to designate a case as a small (“S”) tax case where the amount in dispute is less than $50,000 can provide benefits unavailable in a regular tax case in Tax Court. For example, “S” case trials are held in roughly 15 more cities throughout the U.S., giving some taxpayers easier access to the Tax Court in certain geographic areas. In addition, the pretrial and trial procedures are less formal in S cases than regular tax trials, and the application of Federal Rules of Evidence is more relaxed in S cases by allowing the Tax Court judge to consider any relevant evidence. It is important to note that the Tax Court publishes S cases on its website so that taxpayers can understand how the Tax Court applies the law to specific facts, thereby providing an opportunity for taxpayers to understand how their cases may be resolved.

The Committee proposes to add interest abatement claims under section 6404(h) to the list of tax matters that can be designated as S cases under section 7463(f). The Section believes that this expansion of section 7463 to include interest abatement claims where the amount in dispute is less than $50,000 is a positive step in giving taxpayers greater access to the Tax Court’s simplified resolution procedures to resolve tax disputes more quickly with the Service.

\(^1\) References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.
Appealing Innocent Spouse and Collection Due Process Cases

S. 903 proposes to amend section 7482(b) in order to specify where two types of cases—innocent spouse cases and lien or levy collection cases—may be appealed following a decision by the Tax Court. In both circumstances, the changes to section 7482(b) would dictate that appeal would lie with the circuit of the U.S. Court of Appeals in which the petitioner lives, or where the business is headquartered if a business entity. On the whole, these proposed statutory changes would create certainty that would benefit taxpayers and the government by avoiding disputes and questions over appellate venue and over which circuit’s precedent controls.

In the case of claims of innocent spouse relief from joint and several tax liability under section 6015(e) that are reviewed by the Tax Court, the current language of section 7482 does not directly indicate to which circuit court an appeal of a section 6015 claim should go. Likewise, for Tax Court review of collection cases involving liens or levies under sections 6320 and 6330, no specific appellate venue is articulated in section 7482(b). The practice of most taxpayers has generally been to seek appellate review in the circuit in which the taxpayer resides, and most courts have accepted such appeals. Nonetheless, a specific enumeration of the appropriate appellate venue in section 7482 as the circuit in which the taxpayer (or spouse in the case of section 6015(e) relief) resides would give clarity and certainty to the judicial process.

Because the proposed legislation clarifies the appeal of collection due process cases, we believe this is an appropriate opportunity for the Committee to also add clarity to the provisions that bear on having meaningful access to the courts—specifically, the extent to which a taxpayer in a collection due process case can present evidence at trial that is not part of the administrative record. To that end, the Section recommends that S. 903 be revised to include a provision amending section 6330 to provide explicitly that the Tax Court’s review of collection due process cases is not limited to the administrative record. Such an amendment would create national uniformity in the Tax Court’s review of taxpayer cases.

Suspension of Filing Period For Certain Claims Subject to Bankruptcy Proceedings

The Section supports S. 903’s proposal to enlarge the time to seek judicial review where a taxpayer with an innocent spouse or collection claim is prevented from seeking Tax Court review because of bankruptcy rules prescribed in Title 11 of the U.S. Code that prevent such filings.

S. 903 would amend section 6015(e) so that the time for filing a petition in Tax Court is suspended during the time in which a Title 11 action is ongoing, and remains suspended for 60 days after the Title 11 action is concluded. S. 903 would similarly amend section 6330 for collection cases, except that the suspension would be for 30 days, not 60 days. A suspension of

2 In Robinette v. Commissioner, 123 T.C. 85 (2004), a divided Tax Court held that its review under section 6330 was not limited to the administrative record. The majority opinion followed the Ninth Circuit’s decision in Holliday v. Commissioner, 57 Fed. Appx. 774 [ 91 A.F.T.R.2d 2003 -1338] (9th Cir. 2003), cert. denied, 540 U.S. 1112, 124 S. Ct. 1038 (2004). However, the Tax Court’s ruling in Robinette was overturned by the Eighth Circuit (439 F.3d 455 (2006)), and the Eighth Circuit’s legal analysis was joined later by the First Circuit (Murphy v. Commissioner, 469 F.3d 27 (2006)) and the Ninth Circuit (Keller v. Commissioner, 568 F.3d 710, 103 A.F.T.R.2d 2009-2470).
the time for filing during a bankruptcy proceeding will improve access to the Tax Court in cases where taxpayers seeking innocent spouse relief or due process prior to an IRS lien or levy would otherwise be barred from filing timely petitions due to the operation of Title 11’s bankruptcy rules.3

**Application of the Federal Rules of Evidence**

S. 903 proposes to amend section 7453 in order to adopt the Federal Rules of Evidence as the applicable evidentiary rules in all Tax Court proceedings, without specifying which court or courts’ interpretations of the rules apply. This change departs from the current language of section 7453, which requires the Tax Court to apply the evidentiary precedent of the D.C. Circuit.

The Committee states the intent of S. 903 is to align the laws on evidence with the Tax Court’s general approach under *Golsen v. Commissioner*4 of applying the circuit court precedent to which its decision is appealable. The proposed change would conform the Tax Court’s use of evidentiary rules to its practice under *Golsen* in all other applications of specific circuit precedent. However, the Section respectfully requests that the Committee give due regard to the views of the Tax Court and the Service as to whether such rules would unduly burden the Tax Court or Service trial attorneys (most of whom practice exclusively in Tax Court) with developing a command over the evidentiary nuances in twelve Circuits. Although such an undue burden with respect to substantive tax issues under application of *Golsen* does not appear to exist, evidentiary rulings outside the Tax Court are far greater in volume than interpretations of substantive tax issues.

**Judicial Conduct and Disability Procedures**

Currently, there is no statutory authorization for the U.S. Tax Court, as an Article I court, to prescribe rules for the filing of complaints with respect to the conduct or disability of any of its judges or the investigation and resolution of any such complaints. The Section endorses the express authorization in S. 903 for the U.S. Tax Court to adopt rules similar to those adopted by its sister Article I courts under Title 28 of the U.S. Code, in order to create a judicial council vested with specific powers to investigate and take action with respect to such complaints concerning a Tax Court judge, senior judge, or special trial judge.

**Administration, Judicial Conference, and Fees**

The Section supports providing the U.S. Tax Court with specific authorization to conduct judicial conferences and charge a reasonable registration fee for such an event, as the absence of legislative authority is inconsistent with the same permission granted to all Article III courts as

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3 These amendments parallel section 6213(f), which provides, “In any case under title 11 of the United States Code, the running of the time prescribed by subsection (a) for filing a petition in the Tax Court with respect to any deficiency shall be suspended for the period during which the debtor is prohibited by reason of such case from filing a petition in the Tax Court with respect to such deficiency, and for 60 days thereafter.”

well as other Article I courts, such as the Court of Appeals for Veterans Claims. The Tax Court has held judicial conferences attended by members of the tax bar, including tax practitioners from both the Service and private practice, as a means to discuss improving the administration of justice within the court’s jurisdiction. A specific legislative grant would bring consistency with the authority given sister courts of law and promote the Tax Court’s ongoing efforts to improve its administration of justice by receiving input from interested parties on its processes and procedures.

Clarification That the U.S. Tax Court Is Not an Executive Agency

The first iteration of the present U.S. Tax Court was created in 1924 as the Board of Tax Appeals (“BTA”). The BTA was originally an independent agency of the Executive Branch organized to handle administrative appeals arising from the tax code. The BTA was eventually renamed the Tax Court of the United States in 1942, even though it kept its executive branch status. In 1969, Congress created the U.S. Tax Court as a court of record established under Article I of the U.S. Constitution with jurisdiction over tax matters as described in Title 26. In *Freytag v. Commissioner*, the Supreme Court observed that the Tax Court “exercises judicial, rather than executive, legislative, or administrative power”, and stands “independent of the Executive and Legislative branches”.\(^5\) As an Article I court, Tax Court judges do not have the constitutional protections guaranteed under Article III of lifetime tenure and salary protections. Pursuant to Code section 7443, the President may remove Tax Court judges for cause. This Presidential removal power was challenged by taxpayers as unconstitutional, allowing the executive branch to interfere with the exercise of judicial powers. However, in *Kuretski*\(^6\) the Court of Appeals for the D.C. Circuit upheld the validity of section 7443, in part because of its determination that the Tax Court exercises “Executive authority as part of the Executive Branch.”\(^7\)

The Committee’s legislation proposes to clarify that the U.S. Tax Court is not an executive agency, thus overriding the reasoning of the D.C. Circuit. Given the abiding public interest in the role of the Tax Court, the Section supports the bill’s effort to provide complete independence of the Tax Court from the Executive Branch and to eliminate the numerous questions about the Court’s legal status caused by *Kuretski*.\(^8\)


\(^7\) 755 F.3d at 932. However, the D.C. Circuit acknowledged that the Tax Court is a “court of law” for Appointments Clause purposes of the Constitution, following *Freytag*, supra note 5.

\(^8\) The American Bar Association has long supported Article III status for the Tax Court as it is presently constituted. 96 ABA Repts. 459 (1970); see also 22 THE TAX LAWYER 675 (“the [American Bar Association] Board of Governors authorized and directed the Section to support legislation directed toward removal of the Tax Court from the Executive to the Judicial branch...with the authority of the Section thus clarified, the officers of the Section will continue to cooperate with the Tax Court in its effort to achieve judicial status.”) Consistent with this position, another approach would be to amend to section 7443 to completely strike the President’s authority to remove Tax Court judges.
**Amendment to the Penalty Under Section 6695(g) to Provide for Tax Court Jurisdiction**

We recommend adding a provision to S. 903 to address another tax administration issue. Section 6695(g) provides for a penalty of $500 per instance where a tax return preparer fails to comply with the due diligence requirements for the section 32 credit (earned income credit) specified by the Secretary with respect to a return or claim for refund.

We recommend giving the Tax Court jurisdiction over this penalty before payment is required and amending the statute to provide for a good faith and reasonable cause exception to the penalty. Many return preparers who serve the communities in which claims and qualifications for the earned income credit generally occur are in impoverished neighborhoods, frequently in minority communities. There are many instances where the Service imposes this penalty without actually checking to determine if the taxpayer actually qualifies for such credit. The Service does not consider whether any type of reasonable cause was present (e.g., if the return preparer relied on his or her return preparation software or other return preparers). Return preparers in these communities may charge $100-$150 per return, and a $500 per return penalty can greatly exceed the fees the return preparer received. This may result in a penalty of more than 100% of the compensation received for the return, and it can have the unintended consequence of reducing the number of return preparers serving impoverished communities. Under current law, the penalty is assessable and the tax return preparer must pay the penalty and then file a refund suit in a district court. Costs related to the refund suit may greatly outweigh the penalty (e.g., the cost of a prolonged discovery battle could greatly exceed the penalty amount). The result is that return preparers will effectively be unable to challenge such penalties. Accordingly, we recommend giving the Tax Court jurisdiction over this penalty and amending section 6695(g) to include a clear good faith and reasonable cause exception.

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The Section believes that many of the proposed changes outlined in the bill approved by the Committee regarding taxpayer access to judicial review are commendable and should be enacted and greatly appreciates the Committee’s consideration of the revisions to the bill we have proposed. Thank you for the opportunity to offer our input.