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# Litigating Tax Cases in the Court of Federal Claims

Judge Mary Ellen Coster Williams (Moderator)

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# Agenda

- The Court's jurisdiction over tax cases
- Alternative tribunals and choice-of-forum considerations
- Advantages offered by the Court of Federal Claims
- Tax issues well suited for the Court
- Procedural peculiarities

# Jurisdiction of the Court of Federal Claims

- Tax refund suits
  - Jurisdictional grant: 28 USC § 1346(a) (concurrent with District Courts)
  - Timely filed administrative claim for refund and full payment of tax are required
  - Window for filing suit: from 6 months after administrative claim filed until 2 years after administrative claim is denied
  - Statutes of limitations not subject to equitable tolling
  - Variance doctrine

# Jurisdiction of the Court of Federal Claims (Cont'd)

- Claims against United States founded on the Constitution, federal statute, or contract (e.g., a claim for additional overpayment interest, a claim for an energy subsidy under § 1603 Treasury program)
  - Jurisdictional grant: 28 USC § 1491 (Tucker Act) (concurrent with District Courts if amount in controversy is \$10,000 or less)
  - Governed by 6-year statute of limitations in 28 USC § 2501
  - Statute of limitations not subject to equitable tolling.
  - *E.g., Ford Motor Co. v. United States* (Fed. Cir. Nov. 9, 2018)

# Jurisdiction of the Court of Federal Claims (Cont'd)

- Interest cases
  - Tucker Act claims – *Alexander Proudfoot* (Ct. Cl.); *Paresky* (Fed. Cl.)
  - Refund claims – *Scripps* (6<sup>th</sup> Cir.); *Pfizer* (SDNY)
  - Does statute of limitations track jurisdictional basis of suit?

# Other Forums for Adjudicating Tax Disputes

- United States Tax Court
  - 15 judges specializing in tax law
  - Nationwide jurisdiction
  - Traveling court – trials and hearings in 74 cities
- United States District Court for the judicial district in which the taxpayer resides or has its principal place of business
  - Adjudicate civil and criminal federal laws including but not limited to the Internal Revenue Code
  - Judges are not tax law specialists

# Choice of Forum: Court of Federal Claims versus Tax Court

- The Tax Court is the only “prepayment forum.”
  - The IRS’s notice of deficiency (“the bill”) = ticket to Tax Court
  - Option not to pay the asserted tax is often the decisive factor
- The Tax Court has exclusive jurisdiction over some high-volume and particularized issues. E.g.:
  - Review of IRS collection due process (CDP) determinations
  - Review of IRS innocent spouse determinations
  - Review of IRS refusal to abate interest
  - Review of IRS decision on an award for administrative costs
- Special relaxed procedures for small cases (<\$50K) usually with pro se litigants
- For the above reasons, the Tax Court hears 95%+ of tax cases.
  - 2015: 30,353 pending Tax Court cases versus 845 pending refund suits

# Choice of Forum: Court of Federal Claims versus Tax Court (Cont'd)

- Conversely, where the taxpayer's claim is predicated on an amended tax return (i.e., a refund), the Tax Court is unavailable absent a deficiency in tax for the same tax period.
- Relevant similarities
  - Both courts have nationwide jurisdiction and subpoena power
  - Both courts will travel to accommodate parties and witnesses
  - Jury trials are not available in either court
- Relevant differences
  - Body of precedent – thorough analysis of Tax Court / relevant circuit vs. Court of Federal Claims / Federal Circuit is required
    - Key choice-of-forum criterion
  - Formal vs. informal discovery procedures / use of depositions
  - Stipulation practice
  - Judges and government counsel

# Choice of Forum: Court of Federal Claims versus District Court

- District courts have exclusive jurisdiction over some types of tax cases. E.g.:
  - Summons enforcement and collection actions by the United States
  - Wrongful levy and civil disclosure cases filed by taxpayers
- Body of precedent (again, very important)
- Perceived “home court advantage” for businesses with good local reputations
- Jury trial availability
- Subpoena range
- Relative expertise in tax law
- Potential judges and government counsel

# Advantages of Litigating in the Court of Federal Claims

- Experience and sophistication of judges
- Nationwide jurisdiction and subpoena power
- Flexibility in pretrial scheduling and procedures where appropriate (e.g., bifurcation)
- Professionalism of the bar
- Convenience of the court / e-filing system

# Tax Cases Well Suited for the Court of Federal Claims

- § 1603 Treasury program – cash payments in lieu of investment tax credits (ITC) for renewable energy project developers
  - Time-limited program for cash payments
  - CFC exclusive jurisdiction
  - Treasury, not IRS
  - De novo review, similar to tax refund suits
  - Complex tax concepts involved, e.g., placed-in-service date, property basis analysis, valuation

# Tax Cases Well Suited for the Court of Federal Claims (Cont'd)

- FBAR penalties
  - Shared jurisdiction with district courts
  - Title 31, not IRC Title 26
  - Willful and Non-willful
  - Full payment not required
  - De novo review, except for point below
  - Administrative record review as to determination of amount of penalty

# Tax Cases Well Suited for the Court of Federal Claims (Cont'd)

- Interest netting
  - IRC § 6621 “nets” interest on tax underpayments and overpayments by the “same taxpayer” from different tax periods – eliminating the interest rate differential for corporations – when there is no net tax liability
  - Raises complicated “same taxpayer” tracing issues when there have been mergers, consolidations, and other corporate changes
  - The Federal Circuit and Court of Federal Claims have the most well-developed body of law in this area (*Wells Fargo*, *Magma Power*, and *Energy East*)
  - Same-taxpayer rule most recently addressed in *Ford Motor Co. v. United States* (Fed. Cir. Nov. 9, 2018)

# Tax Cases Well Suited for the Court of Federal Claims (Cont'd)

- Challenges to tax regulations
  - *Dominion Resources, Inc. v. United States* (Fed Cir. 2012) (invalidating capitalization regulation for failure to articulate a satisfactory or cogent explanation)
- R&D tax credits
  - Specifically, allocation of the tax credit between a researcher and customer where R&D is performed under a contract
  - *Fairchild Indus., Inc. v. United States* (Fed. Cir. 1995) remains the seminal case on this issue (*see also Dynetics, Inc. and Subs. v. United States*)
- Section 6672 trust-fund recovery cases
  - Other circuit case law can be very unfavorable to taxpayers.
  - Government may not be able to join other potentially responsible persons.

# Procedural Peculiarities

- RCFC 9(m) special pleading requirements for tax refund suit complaints
- RCFC Appendix A case management procedures
- DOJ Tax Division settlement delegations and procedures
- Government claims of deliberative process privilege

# Thank You

- We would be happy to answer any questions.