



**Testimony of Chief Judge L. Paige Marvel
United States Tax Court**

**Subcommittee on Courts, Intellectual Property, and the Internet
of the Committee on the Judiciary
United States House of Representatives**

Hearing on The Judicial Branch and the Efficient Administration of Justice

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Chairman Issa, Ranking Member Nadler, and Members of the Subcommittee, thank you for the opportunity to provide testimony regarding a proposal to protect the ability of taxpayers to obtain judicial review in the United States Tax Court by eliminating a gap in the ability of courts to transfer certain cases to the Tax Court. The proposal simply adds the Tax Court as a transferee court under Title 28 section 1631 of the United States Code (U.S.C.).

The Tax Court is a court of record under Article I of the Constitution and is by statute independent of the Executive Branch under 26 U.S.C. section 7441. In 1991, in *Freytag v. Commissioner*, 501 U.S. 868, 890-891 (1991), the Supreme Court said:

The Tax Court exercises judicial, rather than executive, legislative, or administrative, power. * * * The Tax Court exercises judicial power to the exclusion of any other function. * * * The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." * * * The Tax Court remains independent of the Executive and Legislative Branches. * * *

The Tax Court's governing laws are found in Title 26 U.S.C. (the Internal Revenue Code) whereas the provisions governing most Federal courts are codified in Title 28 U.S.C. (Judiciary and Judicial Procedure).

When justice requires, 28 U.S.C. section 1631 permits a court (as defined in 28 U.S.C. section 610) to transfer a case to another court. However, section 1631 does not permit such a court to transfer to the Tax Court a case over which the Tax Court has jurisdiction but over which the referring court lacks jurisdiction. This gap can cause well-intentioned parties to miss strict filing deadlines governing the Tax Court's jurisdiction.

The United States Court of Federal Claims recently encountered this recurring problem: In an order dated January 2, 2014, in *Clark v. United States*, Fed. Cl. No. 13-845T, the Court of Federal Claims correctly held that it lacks jurisdiction over a tax deficiency suit. The court then attempted to preserve the taxpayer's claim by invoking section 1631 to transfer the case to the Tax Court. However, section 1631 provides:

Whenever a civil action is filed in *a court as defined in section 610* of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or *appeal to any other such court* in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred. [Emphasis added.]

Title 28 U.S.C. section 610 provides:

As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, *the United States Court of Federal Claims*, and the Court of International Trade. [Emphasis added.]

Thus, the Court of Federal Claims is a proper transferor court (because it is listed in section 610), but the Tax Court is not a proper transferee court (because it is not listed). On a motion for reconsideration in *Clark*, the Court of Federal Claims corrected its error by order of February 3, 2014, and appropriately rescinded the transfer order.

When a taxpayer has the right to file suit only in the Tax Court, but he or she files instead in a court that lacks jurisdiction over the claim, it is not currently possible for the court to transfer the case to the Tax Court. Since the time period for filing a Tax Court suit is short – usually 90 days¹ or even as short as 30 days² – it is virtually impossible for the error to be discovered in time for the taxpayer to file a timely suit in the Tax Court. This makes an incorrect choice of court fatal in nearly all cases for which the Tax Court has exclusive jurisdiction.

¹ 26 U.S.C. secs. 6015(e)(1)(A)(ii), 6213(a), 7436(b)(2).

² 26 U.S.C. secs. 6330(d)(1), 7623(b)(4).

Most suits in the Tax Court’s jurisdiction have, as a prerequisite, a written determination by the Internal Revenue Service that explicitly informs the taxpayer that suit must be filed in the Tax Court, and the filing deadline arises only after the issuance of that written determination. However, the option of transferring a case to the Tax Court might be especially important where the type of suit now exclusively with the Tax Court was formerly within the jurisdiction of other courts (such as “collection due process” cases under 26 U.S.C. section 6330(d), formerly brought in the District Courts that are now brought exclusively in the Tax Court), or where the cause of action within the Tax Court’s exclusive jurisdiction (e.g., abatement of interest under 26 U.S.C. section 6404(h)(1)) is a very near neighbor to claims brought elsewhere (e.g., a suit for refund of overpaid interest³).

On March 10, 2015, the Judicial Conference of the United States acted to “support, in concept, a United States Tax Court proposal to amend 28 U.S.C. § 1631 to authorize transfer to the Tax Court of cases within its jurisdiction that are initially filed in the wrong forum.”

I respectfully request support from the Subcommittee on Courts, Intellectual Property, and the Internet for this proposal.

Thank you.

³ *Hinck v. United States*, 64 Fed. Cl. 71, 76 (2005), *aff’d*, 446 F.3d 1307 (Fed. Cir. 2006), *aff’d*, 550 U.S. 501 (2007).