In the Supreme Court of the United States

LARRY E. TUCKER,

Petitioner.

٧.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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As Required by Rule 33.1(h)

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Dated: October 26, 2012

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In The Supreme Court of the United States



LARRY E. TUCKER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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1. This Court does not limit itself to reviewing important tax procedure issues only where there is a Circuit split or the government requests review.

The government correctly notes "that the decision below does not conflict with any decision of another circuit." Br. Opp. 7. But, this Court should follow its tradition of hearing important tax procedure cases, even without a Circuit split and over government opposition.

In *Freytag v. Commissioner*, 501 U.S. 868 (1991), this Court granted the taxpayer's petition to review an important Appointments Clause issue, even though there was no Circuit split and no judges below held that there was a constitutional defect in appointing Tax Court Special Trial Judges ("STJs").

More recently, in *Ballard v. Commissioner*, 544 U.S. 40 (2005), taxpayers argued that, in a fairly rare case (like one involved in *Freytag*), where a Presidentially-appointed Tax Court judge reviews an STJ's proposed opinion, it was improper for the Tax Court to omit that proposed opinion from the appellate record. Though only one of nine Circuit judges found the practice objectionable; see, *id.*, at 52; this Court granted review, and seven Justices of this Court reversed, finding the practice -- unique among all courts -- not in accordance with Tax Court rules or proper procedure.

The Appointments Clause issue herein involves over 50,000 Collection Due Process ("CDP") hearings annually. It affects multiple times more people -- and accordingly deserves even more

scrutiny -- than the issues dealt with by this Court in *Freytag* and *Ballard*.

2. Allowing Congress to assign "significant authority" to existing IRS employees would allow Congress to evade the Appointments Clause.

The government argues that "the record here does not show that the positions of any Appeals Office personnel were 'created' to conduct CDP proceedings." Br. Opp. 9 n. 3. This argument misses the mark. A commentator who severely criticized the Tax Court's opinion herein wrote:

All of these factors -- whether a position is set out expressly in statute, whether a position is preexisting, and whether Congress manifests an intent to create an office -inappropriate to test whether an office exists because they are subject to congressional manipulation. Tucker itself recognizes that a position need not be created explicitly by statute as Congress could skip this step intentionally to avoid the Appointments Clause. But excluding government actors with preexisting positions involves the same danger. Congress could assign duties to a preexisting nonofficer and thereby retain control over appointments or allow a more diffuse appointment method than the process that would otherwise be constitutionally required . . . Thus, *Tucker*'s established-bylaw analysis gives Congress a blueprint to avoid the Appointments Clause -- create what would otherwise be an office by assigning significant authority to a preexisting nonofficer and add the words "or employee" to destroy any presumption of officer status.

Stacy M. Lindstedt, "Developing the Duffy Defect: Identifying Which Government Workers Are Constitutionally Required to Be Appointed", 76 *Mo. L. Rev.* 1143, 1172-1173 (2011).

3. There is little that cabins the large discretion exercised by Appeals personnel in a CDP hearing.

The the government and court incorrectly describe the discretion of Appeals personnel in CDP as "circumscribed"; Br. Opp. 10; and "highly constrained". Br. Opp. 11; Pet. App. 9a. While there are some limits on Appeals personnel's discretion, there is hardly any constraint on their (1) ability to find facts -- such as in determining a allowability while deduction's determining "underlying tax liability" under 26U.S.C. 6330(c)(2)(B) -- or (2) weighing collection alternatives under 26 U.S.C. § 6330(c)(3)(C).

The government ignores the fact finding and discretionary weighing powers, instead citing rare instances in CDP where outside input may be sought or is statutorily required – particularly as to offers-in-compromise ("OICs") and novel or complex legal issues. But, most CDP hearings do not involve proposed OICs or novel or complex legal issues.¹

¹ The government describes "the paradigmatic resolution of a CDP hearing [as] – a policy decision about whether to accept a settlement proposal." Br. Opp. 14. This is the paradigmatic resolution of the usual non-CDP case involves settling a tax

Many involve (1) substantiation of deductions (say, for rent or medical expenses), (2) after reviewing information and documents placed into administrative record by the taxpayer (including through a completed, 6-page Form 433-A financial disclosure statement, accompanied by back-up proof), determining how damaging a proposed levy would be on the taxpaver's life or business, or (3) whether withdrawal of a filed tax lien will "facilitate the collection of the tax liability" or "be in the best interests of the taxpayer . . . and the United States." 26 U.S.C. § 6323(j). These are inherently factual questions and judgment calls as to which no one else the IRS reviews the hearing employees' determinations.

A better view of how the Office of Appeals and IRS Counsel's Office interact was that given just days ago, as reported in a tax publication:

While it is vital that taxpayers have full confidence in Appeals' independence, Appeals employees are entitled to obtain legal advice from chief counsel, Gary Gray, IRS deputy associate chief counsel (procedure and administration), said at the UCLA Tax Controversy Institute in Beverly Hills, Calif. Appeals employees are ultimately responsible for independently evaluating facts and law in each case and quantifying hazards of litigation, he said....

[&]quot;deficiency" dispute, but in CDP, the hearings usually do not involve OICs – as is evident from reading the hundreds of Tax Court CDP opinions, only a small minority of which involve a proposed OIC.

Christopher Wagner, IRS Appeals chief, . . . said that he has initiated a special project within Appeals to clarify the office's quasijudicial approach to its role. The so-called Appeals judicial approach and culture project is designed to refine the appeals process to better focus on and remove impediments to achieving its mission, he said. Appeals wants to "ensure that employees are able to focus on our mission of fair and impartial decision-making, free from undue influence from the other service functions," he said.

Jeremiah Coder, "Appeals *Ex Parte* Rules Are No Impediment to Legal Advice", *Tax Notes Today*, Oct. 18, 2012, 2012 TNT 202-3.

Both the court below and the government note that for OICs where less than \$50,000 is being compromised (the situation in this case), the statute mandates "continuing quality review by the Secretary". 26 U.S.C. § 7122(b). Br. Opp. 11; Pet. App. 10a. But what is that "quality review"? The Internal Revenue Manual ("IRM") provides that quality review happens only in "randomly selected cases"; IRM 5.8.8.4(1) (3-15-2011); but its extent is not described. It appears to be simply making sure all forms are in place.

For OICs settling \$50,000 or more, the statute requires obtaining an opinion of Counsel; 26 U.S.C. § 7122(b); but, even there, IRS Counsel is not told to do a *de novo* review of the Appeals personnel's conclusions. Rather,

In making each of the foregoing determinations. Counsel must rely upon factual determinations made by the Service. These determinations should ordinarily not be reexamined bv Counsel unless patently erroneous. Asset valuations and necessary expense determinations are largely matters of administrative discretion and judgment and should not be questioned by Counsel.

IRM 33.3.2.2(3) (8-11-2004). IRS Counsel review seems extremely similar to the review given by the Registrar of Copyrights to holdings of Copyright Royalty Board Judges ("CRJs"). The Registrar reviews CRJ final rulings only for legal error. 17 U.S.C. § 802(f)(1). In Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board, 684 F.3d 1332 (D.C. Cir. 2012), the D.C. Circuit recently held that CRJs were principal officers under the Appointments Clause – at least until the court altered certain removal restrictions, making them inferior officers, but still not mere employees. It is difficult to reconcile the D.C. Circuit's ruling in Intercollegiate with its ruling in Tucker. Although the same judge wrote both opinions, it appears merely that he thinks determining royalty rates is more important than determining taxes - a proposition with which Mr.Tucker strongly disagrees.

Finally, in a baffling sentence, the government states: "For example, in compromising cases under 26 U.S.C. 7122 based on doubt as to liability [-- a rare kind of OIC, since most are based on doubt as to collectability, not liability --], an

employee of the Appeals Office can accept an offer only if it is commensurate with the hazards of litigation. 26 C.F.R. 601.106(f)(2)." Br. Opp. 11. But, only the Appeals person determines those hazards, so only she has the discretion. See Rev. Proc. 87-24, 1987-1 C.B. 720, giving Appeals "sole settlement authority" of Tax Court cases (i.e., exclusive of IRS attorneys) at a certain time pretrial. Further, the cited regulation predates CDP and describes Appeals personnel acting outside CDP and not necessarily entering into OICs (OICs require more cumbersome procedures unneeded for most cases), but usually simply settling, for example, a Tax Court "deficiency" case or getting the taxpayer to settle a proposed deficiency pre-Tax Court by signing an informal Form 870-AD consent. See Stair v. United States, 516 F.2d 560 (2d Cir. 1975).

4. CDP hearing officers render sufficiently "final" determinations to have to be appointed.

Although the D.C. Circuit termed determinations of CDP hearing officers "effective[ly] final[]"; Pet. App. 9a; for purposes of Appointments Clause analysis, the government tries to revive the Tax Court's argument that such determinations are not "final". Br. Opp. 11-13.

First, it is unclear that, in order for adjudicative employees to be officers under the Appointments Clause, they must issue "final" rulings. It is also unclear exactly what the meaning of "final" is - e.g., never being able to revisit that ruling or the ruling just being the last word in the agency before judicial review. As Judge Williams

(the author of *Intercollegiate* and *Tucker*) himself has said, "It is, to be sure, uncertain just what role the STJs' power to make final decisions played in Freytag." Landry v. FDIC, 204 F.3d 1125, 1133 (D.C. Cir. 2000). In Landry, Judge Randolph disagreed with the majority and held that certain FDIC ALJs were constitutional officers despite their proposed opinions being subject to de novo review by the FDIC, stating: "The fact that an ALJ cannot render a final decision and is subject to the ultimate supervision of the FDIC shows only that the ALJ shares the common characteristic of an 'inferior Officer." Id., at 1142 (Randolph, J. concurring). Of the paragraph in Freytag mentioning the finality of STJ rulings in certain types of Tax Court cases, Judge Randolph wrote:

> What the majority neglects to mention is that the [Supreme] Court [in Freytag] clearly designated this as an alternative holding. The Court introduced its alternative holding thus: "Even if the duties of special trial judges [just described were not as significant as we and the two courts have found them to be, our conclusion would be unchanged." 501 U.S. at 882 (italics added). What "conclusion" did the Court have in mind? The conclusion it had reached in the preceding paragraphs namely, that although special trial judges may not render final decisions, they nevertheless inferior officers of the United States within the meaning of Article II, § 2, cl. The same conclusion, the same holding, had also been rendered in Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975,986 (2d

Cir. 1991), a decision the Supreme Court cited and expressly approved. See 501 U.S. at 881. There the Second Circuit held that a special trial judge performing the same advisory function as the judge in Freytag was an inferior officer; the court of appeals did not mention the fact that in other types of cases, the judge could issue final judgments.

Id. (footnote omitted).

Judge Randolph's view seems preferable – and more consistent with *Edmond v. United States*, 520 U.S. 651 (1997). In *Edmond*, Coast Guard Court of Criminal Appeals judges were held principal, rather than inferior, officers when they (1) were supervised by superiors, (2) could not enter the final decisions, and (3) were subject to deferential review by appeal to the Court of Appeals for the Armed Forces. The parties conceded that the judges were at least inferior officers. *Edmond* stated, in part:

The scope of review is narrower than that exercised by the Court of Criminal Appeals: so long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt, the Court of Appeals for the Armed Forces will not reevaluate the facts. This limitation upon review does not in our opinion render the judges of the Court of Criminal Appeals principal officers. What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers.

Id., at 665 (citations omitted). Thus, judges entering non-final, but appealable, decisions were held constitutional officers. Since CDP hearing officers similarly enter appealable "notices of determination" subject, in most cases, to Tax Court abuse of discretion review; Goza v. Commissioner, 114 T.C. 176, 182-183 (2000); they should also be held inferior officers.

But, even if, to be constitutional officers, CDP hearing officers must issue rulings that can never be altered by the agency, that happens sometimes in CDP. The examples given by the Tax Court and the government; Br. Opp. 11-12; of instances where the agency might on its own later revisit determinations are simply irrelevant under *Freytag* if employees, in other instances, can perform duties that must only be performed by officers.

The following hypothetical illustrates how important and final at least some rulings by CDP personnel can be – even under the Tax Court's overly-rigid definition of "final":

Several high executives of a Detroit-based auto company undergoing financial problems decide they can only keep the company in business by not paying over to the IRS \$1 billion of taxes withheld from employee first quarter wages. The President of the United States and the IRS are furious, and the IRS issues to the company a notice of intention to levy and a notice of filing of a tax lien. The company requests a CDP hearing to contest both notices. A Settlement Officer ("SO") and her Team Manager in Detroit hold the hearing. The IRS also assesses \$1 billion responsible person penalties against 15

executives in the company under 26 U.S.C. § 6672, and then threatens levy. These executives end up before the same SO with their personal CDP hearings challenging liability for, or collectability of, the penalties. The company presents a huge amount of financial information to the SO, and all of its high executives and some of its suppliers come to meet with the SO and tell their stories about either the wisdom of the IRS' actions and/or their involvement in the decision not to pay over the withheld taxes.

The SO balances the needs of the company's continued existence as greater than the IRS' need for immediate levy and determines that having the tax lien on file against the company is neither in the best interests of the company nor the United States -- including its many citizens employed by the company and its suppliers. The suppliers won't deal with the company if there is a lien on file. As a result, the SO determines not to let the levy go forward, and she withdraws the lien. The SO also determines that five of the executives should have their penalties abated, since they were not "responsible officers", as they did not know of the decision not to pay. The SO settles the penalty with another executive for \$1 million under an OIC based on doubt as to collectability, but refuses a similar OIC proposed by a second executive.

The IRS cannot appeal any one of the taxpayer-favorable determinations to the Tax Court – particularly removing all penalty liability for five executives. Only if there is a change in circumstances can the IRS go back to the SO or another SO concerning the company and ask that a

levy then be permitted or a lien then be allowed to be filed under the so-called CDP retained jurisdiction provision of 26 U.S.C. § 6330(d)(2). If the executive denied a proposed OIC appeals to the Tax Court and lives in the Eighth Circuit, the Tax Court, at the urging of the government, will limit its appeal to consideration only of the administrative record created with the SO – following *Robinette v. Commissioner*, 439 F.3d 455, 458-462 (8th Cir. 2006) ("That the collection due process hearings are informal does not suggest that the scope of judicial review should exceed the record created before the agency.").

The SO and her Team Manager have effectively become the Car Czar. Can it really be said that the Framers would have thought that employees who could hold such government hearings, create such unsupplementable administrative records, wield such great discretion, and make such final rulings on such momentous issues -- even defying the President -- were not even inferior officers under the Appointments Clause? This Court should hear this case to create some political accountability for the appointment of such powerful government actors.

5. Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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