Proposed Procedure for Tax Cases

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PROPOSED PROCEDURE FOR TAX CASES

Traynor Plan, dealing with both administrative and judicial procedure for litigation of cases involving federal taxes discussed at ABA Tax Clinic; other problems considered.

A proposed new procedure for the litigation of cases involving federal tax questions was discussed at a "tax clinic" in Washington last week arranged by the American Bar Association's Standing Committee on Federal Taxation.

The so-called "Traynor Plan" was described by Stanley S. Surrey, assistant legislative counsel of the Treasury Department. The Traynor Plan is a proposal put forward by Professor Roger John Traynor, of the University of California Law School, in an article in the December, 1938, issue of the Columbia Law Review.

The plan deals both with administrative and judicial procedure. It calls for the filing by the taxpayer of a formal protest, and the inclusion by the Commissioner of Internal Revenue of specific findings of fact in the final deficiency notice. In subsequent proceedings before the Board of Tax Appeals, both would be limited to facts and contentions stated in these two documents.

OUTLINE OF THE PROPOSAL

It is proposed to transfer refund jurisdiction from the district courts and the Court of Claims to the Board of Tax Appeal. The Board would be decentralized into five divisions. Appeals from a decision of one of these divisions would not lie to the whole
Board, but to a single court in Washington, with certiorari to the Supreme Court. The appellate court would be either a new court, the United States Court of Appeals for the District of Columbia, or the Court of Claims.

Mr. Surrey emphasized that the Traynor Plan is not a proposal of the Treasury Department at the present time and that he was not advocating it personally, but merely describing it as one familiar with it. A practicing attorney in the audience asked, "Are we in danger of this plan?" Mr. Surrey replied, "No."

The tax clinic was attended by more than 200 private and Government attorneys interested in tax questions. Before taking up tax matters, the clinic heard Justice Justin Miller of the United States Court of Appeals for the District of Columbia discuss the presentation of oral arguments to appellate courts and G. Howland Shaw, Chief of the Division of Foreign Service Personnel of the State Department, speak on "A Government Career Service in Operation."

After Mr. Surrey had described the Traynor Plan, it was criticised by E. Parrett Prettyman, former General Counsel of the Internal Revenue Bureau. A number of attorneys in the audience then presented their views on the plan.

Other speakers were J. Louis Monarch, of the Tax Division of the Department of Justice, who spoke on projected new rules of appeal from the Board of Tax Appeals and the Processing Tax Board of Review and J. Emmet Sebree, technical assistant of the Board of Tax Appeals, who endorsed the bill (S. 916, 6 LW 677) now pending in the Senate providing for the creation of a United States Court of Appeals for Administration.
REVIEW OF DECISIONS

Mr. Sebree said that the system of review of administrative decisions in law courts has hindered the development of a body of public law to control public administration and has made possible as many varying decisions on substantially the same questions as there are district and appellate courts. "The points of view of the courts and the dicta of the judges are, to say the least, confusing and certainly encourage litigation," he stated.

DEFECTS IN PROCEDURE

As an introduction to his description of the Traynor Plan, Mr. Surrey mentioned certain defects in the present administrative and judicial procedure which the plan is designed to remedy.

One defect is the present inability of the Commissioner of Internal Revenue to obtain necessary factual information, he said, explaining that "the present procedure, by assuming that the duty of self-assessment is ended when a return is filed, and by substituting thereafter investigation by the Commissioner or cross-examination before the Board, makes impossible a fair and expeditious determination of tax liabilities."

The requirement of the formal protest is intended to eliminate this situation, he said. The protest would not be required, however, until after a preliminary conference had failed. The great bulk of the controversies must be disposed of in the preliminary conferences in the offices of the local revenue agents to make the system workable, he stated.

After the failure of the preliminary conference and the filing of a formal protest, there would be another conference, under the Traynor Plan, this time with the "most capable tax technicians in the Bureau." If this did not settle the dispute, the
Commissioner would issue his final notice of deficiency and the taxpayer could file his petition with the Board of Tax Appeals.

FORCING DISCLOSURE OF FACTS

This procedure, Mr. Surrey said, "would force disclosure of the facts either in the protest itself or in the preliminary conference preceding it, in view of the taxpayer's knowledge that the facts would have to be disclosed later in any event. The findings of fact would force the Commissioner to make a realistic appraisal of his case in the administrative stage. The limitations on proof before the Board would serve to insure the efficacy of both protest and findings of fact. The present decentralization of the Technical Staff (see 6 LW 613) and the Appeals Division will provide a competent force in the field to consider the protests and to prepare the findings of fact.

"It has been said, with particular reference to the findings of fact that this procedure gives complete control to the Commissioner, that the facts would be determined entirely by the Treasury, that the Board would be no check upon the findings of the Commissioner.

"This view of the proposal is completely erroneous. It is definitely not suggested by Professor Traynor that the findings of fact be considered final if supported by evidence. It is not intended to introduce into the tax field the administrative finality that exists with respect to the Interstate Commerce Commission, the Federal Trade Commission and so on.

"The Commission's finding of fact, as far as the taxpayer is concerned, would be no different in their finality than the present notice of deficiency. Their whole purpose is to serve
as a check on the Commissioner, for he and not the taxpayer is limited before the Board to these findings of fact.

"The taxpayer is limited in his proof to the matters in protest - a document prepared by him - and not to the findings of fact. Subject to the limitations in the proof that may be adduced, the Board would continue as it does now to weigh the evidence and to reach its own conclusion."

**UNIFORMITY OF DECISION**

Another defect at which the Traynor Plan is aimed, Mr. Surrey said, is the lack of uniformity of decisions, both in courts of original jurisdiction and appellate courts. This would be remedied by substituting the five decisions of the Board of Tax Appeals for the present 87 tax tribunals of original jurisdiction and the single appellate court for the present 11, he stated.

Because 11 courts review its decisions, the Board is left without authoritative guidance. Mr. Surrey stated, adding that the method by which the Supreme Court selects cases for review adds further confusion.

"While finality is impossible until the Supreme Court considers the issue," he said, "that Court will rarely grant certiorari in the absence of a conflict among the circuit courts of appeals. But a decision of one circuit court of appeals and a denial of certiorari by the Supreme Court together do not settle an issue. If the taxpayer is the defeated party, other taxpayers in other circuits are still free to litigate the same question. If the Commissioner is the defeated party, he cannot abide by the decision but must litigate in other circuits in the hope of developing the requisite conflict. The present system of appellate review is thus an open invitation to litigation and tax law differs from circuit to circuit until the Supreme Court decides the issue."
Conflicts between the five divisions of the Board could be easily resolved by the single court of tax appeals. Mr. Surrey predicted, "Once this court had decreed an issue and certiorari were denied," he added, "the issue would be settled for the entire country and the Commissioner and all taxpayers would necessarily acquiesce."

Mr. Prettyman's principal criticism of the Traynor Plan was that it is concerned solely with procedure, while, in his opinion, it is the policy of the Internal Revenue Bureau which needs overhauling.

The revenue agents in the field are required, or think they are required, to "show a tax" in every case, he said. What is needed, he stated, is the feeling among the agents that they will be supported by their superiors if they find, to the best of their ability, the "right answers" to the questions involved in the tax disputes.

Mr. Prettyman objected to changing the present judicial procedure. The conflicts of decisions are not too great, he said.

Abolition of appeals to the circuit courts of appeals would undermine the confidence of the people, he added, because the single court would not be a local court. People would also object, he said, to taking away the jury trials in refund cases.

The provision for findings of fact by the Commissioner was questioned by Mr. Prettyman. He expressed the fear that the Board of Tax Appeals would give too much weight to the findings.
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