IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMANDA N. VU,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 17-9007
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent-Appellee.	)	

APPELLANT'S REPLY TO APPELLEE'S MEMORANDUM CONCERNING APPELLATE JURISDICTION

Amanda N. Vu herewith replies to the government's November 30, 2017 memorandum concerning appellate jurisdiction. On November 30, 2017, this Court entered an order so permitting, providing the reply did not exceed 2,600 words.

Ms. Vu disagrees with the portion of the government's response that argues that even procedural rulings in small tax cases under § 7463[1] cannot be appealed. But, this reply adds nothing further to Ms. Vu's arguments on that score, which she feels are already fully-persuasive.

This reply focuses on the unprecedented argument made by the Department of Justice on behalf of the IRS (at pp. 16-19 of its

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code, Title 26.

memorandum) that § 7463(d) does not permit the Tax Court to remove small tax case designations, except in cases where the court finds that the small tax case amount in dispute threshold has been exceeded. The government cites no case law directly supporting its argument under § 7463(d), but argues that this Court should ignore the legislative history indicating that Congress intended other circumstances (such as to create precedent) that should be grounds for the Tax Court to remove a small tax case designation. The government writes: "Here, the language of I.R.C. § 7463(d) is clear in providing that once small tax case status has been granted, there is but one instance where it can be removed – when the amount involved exceeds $50,000. Because taxpayer does not contend that she met this criteria, the Tax Court correctly denied taxpayer's motion." *Id*. at 19.

The Department of Justice seeks to upend almost 50 years of practice under § 7463(d) on which the Tax Court, taxpayers, and, especially, the IRS have relied. To win the instant appeal, the government seeks to cut off its nose to spite its face. Since it is the IRS' reasonable desire to administer the Tax Code uniformly over all 50 states, it is usually the IRS that is most concerned with precedent on recurring legal issues in the Tax Court and the courts of appeals. Thus, many motions to remove small tax case designations are made to the Tax Court by the IRS in order to assure that

there will be adequate Tax Court and appellate authority by which the IRS can administer the tax law. The Department of Justice's argument in its appellate jurisdictional memorandum will, if accepted by this Court, eliminate taxpayers' ability to routinely change from small tax case status to regular status (often done after filing the petition once the taxpayer comes to a full realization of the choice's consequences), restrict Tax Court authority, and hamstring the IRS in the cases in which it seeks a precedential opinion where a novel legal issue is presented.

Section 7463(d) provides, in relevant part:

> At any time before a decision entered in a case in which the proceedings are conducted under this section becomes final, the taxpayer or the Secretary may request that further proceedings under this section in such case be discontinued. The Tax Court, or the division thereof hearing such case, may, if it finds that (1) there are reasonable grounds for believing that the amount of the deficiency placed in dispute, or the amount of an overpayment, exceeds the applicable jurisdictional amount described in subsection (a), and (2) the amount of such excess is large enough to justify granting such request, discontinue further proceedings in such case under this section.

Initially, the government's plain meaning interpretation of this text is illogical. The government argues that the second sentence quoted above provides the only reason that the Tax Court may remove the small tax case designation. Ms. Vu disagrees. Beyond a temporal limitation, the first sentence does not indicate any limitation on the circumstances under which

the designation may be removed. The second sentence merely provides an example of one of the situations under which the court "may" remove the designation – i.e., where the amount in dispute threshold has been exceeded. This second sentence would literally support the government's argument if it included the word "only" before the word "if" therein (i.e., the court "may, only if it finds that . . . ."). But, there is no "only" in the sentence.

At page 17 of her own memorandum on appellate jurisdiction, Ms. Vu noted that legislative history from 1969 (when § 7463 was first enacted) and from 1978 (when § 7463's amount threshold was significantly increased to $5,000)[2] provides other reasons than exceeding the amount in dispute threshold for removing the small tax case designation. In her response, Ms. Vu quoted from the 1978 legislative history, but she did not also quote significantly from the 1969 legislative history. To aid this Court in deciding this issue, here is a pertinent quote from the 1969 legislative history also showing that the need for appellate court precedent was a factor that Congress expected the Tax Court to consider before allowing a case to proceed as a small tax case:

[2] Congress increased the threshold again in 1984 to $10,000 by Pub. L. 98-369, § 461(a)(1), and again in 1998 to $50,000 by Pub. L. 105-206, § 3103(a), but when doing so did not again discuss in its Committee reports the kinds of cases that Congress did not want the Tax Court to hear as small tax cases.

> Use of this procedure would be optional with the taxpayer unless the Tax Court (presumably upon the request of the Internal Revenue Service) decided before the hearing that the case involved an important tax policy issue which should be heard under normal procedures and should be subject to appeal.

S. Rep. 91-552 at 303-304. Congress' assumption that the IRS would normally be the party seeking to oppose small tax case designation is obviously because the IRS is far more concerned with country-wide precedents than particular taxpayers usually are.

Because she did not expect the government to make the argument herein that this Court should ignore the legislative history, Ms. Vu did not refer in her memorandum to more than a single pertinent opinion, *Hubbard v. Commissioner*, T.C. Memo. 1987-575, at *7-*9, *revd. and remanded on other issue*, 872 F.2d 183 (6th Cir. 1989), where the Tax Court decided whether to allow a small tax designation to start or continue based on criteria other than the amount in dispute threshold involved (i.e., based on criteria set out in the 1978 legislative history). But, there are many such other Tax Court opinions or unpublished orders that this Court should be aware of that would be upended by the government's argument that only the amount in dispute threshold matters in removing small tax case designations. As the Tax Court stated in *Kallich v. Commissioner*, 89 T.C. 676, 681 (1987) (relying on the 1978 legislative history that the government here repudiates):

> Petitioners' option to elect the small tax case procedure is not unlimited, even when the jurisdictional maximum for a small tax case has not been exceeded, as the election must be concurred in by the Court. *Page v. Commissioner*, 86 T.C. 1, 13 (1986). Respondent therefore could attempt to show the Court that the case should not be tried as a small tax case due to the importance of the issue to be determined (*Earl v. Commissioner*, 78 T.C. 1014, 1020 (1982)); or because the issue is common to other cases before the Court (*Page v. Commissioner*, *supra* at 13); or because determination of the issue will establish a principle of law applicable to other cases (*Dressler v. Commissioner*, 56 T.C. 210, 212 (1971)). See also H. Rept. 95-1800 (1978), 1978-3 C.B. (Vol. 1) 521, 612.

Another example of the IRS seeking to create appellate precedent through a motion under § 7463(d) to remove a small tax case designation is *Iljazi v. Commissioner*, T.C. Summary Op. 2010-59. There, the taxpayer lived in the Second Circuit, and the IRS argued that he had requested § 6015(f) innocent spouse relief too late under a regulation's filing deadline that the Tax Court had recently held invalid. Although the government was pursuing an appeal in the Seventh Circuit of the opinion that had overturned the regulation, the IRS desired to create a Second Circuit precedent upholding the regulation's filing deadline's validity, as well. Instead, the Tax Court in *Iljazi* gave the taxpayer the benefit of its recent holding and denied the government's motion to remove the small tax case designation, writing (at p.*4 n.1):

> Respondent sought to have the small tax case designation removed from this case in an attempt to be able to appeal any adverse decision for the purpose of overturning our holding in *Lantz v. Commissioner*,

> 132 T.C. 131 (2009). Petitioner objected to the removal. Under sec. 7463(a), the small tax case designation is made "at the option of the taxpayer concurred in by the Tax Court". The Court denied respondent's motion.

Unlike in *Hubbard*, *Iljazi* reflects an unsuccessful IRS attempt to use § 7463(d)'s removal authority purely to create appellate precedent (consistent with the 1978 legislative history). The lack of IRS success shown in cases like *Iljazi*, in part, reflects the Tax Court's natural reluctance to overburden taxpayers who did not want to incur the costs of potentially being dragged into courts of appeal. The Tax Court has no similar concern when the taxpayer (like Ms. Vu) is the one making the motion under § 7463(d). The government employs a raft of lawyers who regularly appear in courts of appeals.

As evidence that the IRS has, at other times, often been successful in its motions to remove small tax case designations in order to create Tax Court or appellate precedents, see IRS Chief Counsel Memorandum 200115033, 2001 IRS CCA LEXIS 13 (Feb. 14, 2001) ("While the small tax case designation turns chiefly on the amount in dispute, the government has succeeded in having the small tax case designation removed in cases where a decision in the case will provide a precedent for the disposition of a substantial number of other cases or where an appellate court decision is needed on a significant issue.")

Taxpayers often make motions to remove the small tax case designation on the eve of trial (usually at or around the trial calendar call). Before granting such motions, the Tax Court does not even usually ask the taxpayer why the taxpayer wants to remove the small tax case designation (not really caring, since it is the taxpayer's option). However, it is certain that those taxpayers are not the ones seeking to become regular cases because they just noticed that the amount in dispute exceeds $50,000. It is always the IRS or Tax Court that tries to enforce the jurisdictional amount threshold.

Most rulings of the Tax Court on taxpayer motions under § 7463(d), however, are in unpublished orders. (Ms. Vu is aware that unpublished orders lack precedential effect. Tax Court Rule 50(f).) Such orders have been searchable on the Tax Court's website since mid-2011. At page 26 of Ms. Vu's prior response regarding appellate jurisdiction, she noted finding 44 instances of orders of the Tax Court granting taxpayer motions to remove small tax case designations, but only one instance (Ms. Vu's) of an order denying such a motion. But, Ms. Vu did not cite any of those 44 orders.

For this Court's background as to Tax Court practice, here is a small sampling of those 44 orders that granted the motions – albeit for unstated reasons:

Scott v. Commissioner, Tax Court Docket No. 4013-12S (order dated March 7, 2013) (https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=5973488);

McHugh v. Commissioner, Tax Court Docket No. 24888-12S (order dated September 13, 2013) (https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=6101515);

Lussy v. Commissioner, Tax Court Docket No. 20898-13S (order dated October 27, 2014) (https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=6414822) (motion granted over objection of IRS; opinion in case at *Lussy v. Commissioner*, T.C. Memo. 2015-35, shows that amounts in dispute were below $50,000 threshold; case later appealed); and

Safakish v. Commissioner, Tax Court Docket No. 8032-10S (order dated November 24, 2014) (https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=6429309) (after trial and issuance of T.C. Summary Op. 2013-107 ruling against taxpayer on the merits, taxpayer moved for reconsideration and to remove small tax case designation, pointing out that before the trial, he had

orally moved to remove the small tax case designation so he could appeal the case; court denied motion for reconsideration, but removed small tax case designation, conceding that it had overlooked request, but would have granted request before trial if it had then considered the request; opinion reissued as T.C. Memo. 2014-242 and later appealed).

One final order showing the novelty of the government's argument herein is *Ohde v. Commissioner*, Tax Court Docket No. 11688-15S (order dated January 18, 2017) (https://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=7028400). There, the IRS moved to remove the small tax case designation in a case involving less tax than the threshold amount. The IRS argued that, since this case primarily involved the valuation of charitable contribution property, expert testimony would be required and other years of the taxpayer might be affected. Thus, "trial of this case under regular procedures would better serve the orderly conduct of the Court's work and the efficient administration of the tax laws." Over the taxpayers' objection, the court granted the IRS motion, observing: "A common reason for removing the S case designation is that the actual amount in dispute exceeds $50,000. See sec. 7463(a); Rule 170. However, the statute's legislative history expresses Congress's understanding that other reasons may also suffice."

In sum, by accepting the government argument in this case that the only situation in which the Tax Court may properly remove a small tax case designation is where the amount in dispute threshold is exceeded, this Court would overturn nearly 50 years of Tax Court, IRS, and taxpayer litigation precedent and litigation strategy to the contrary. Since there is no case law directly accepting the government's novel construction of § 7463(d) in this case, this Court should assume that Congress, as it has gradually increased the § 7463 amount in dispute threshold to the current $50,000 level without amending § 7463(d), has expected this consistent Tax Court precedent to continue. *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language.").

The government's construction of § 7463(d) here represents a shift from the way it has interpreted the statute for nearly 50 years and has significant adverse consequences on all parties and the system of taxation. About 30,000 Tax Court cases were filed in the fiscal year ended September 30, 2016. IRS Data Book, 2016 at 62 (Table 27) (available on the IRS' website). Typically, in recent years, about 70% of Tax Court petitions are filed pro se, and just under half of all petitions elect small tax cases status.

David van den Berg, "ABA Meeting: Tax Court Encouraging Use of Low-Income Clinics, Judge Says", 2013 TNT 185-16 (Sept. 24, 2013); attached page from IRS Chief Counsel Statistics handed out at an ABA Tax Section meeting on September 25, 2010. The Tax Court and the IRS need the ability under § 7463(d) to remove from the small tax case docket those cases that should not be there (1) on account of important, novel legal issues that those cases sometimes, unexpectedly, present and (2) because of the need for creating Tax Court and/or appellate precedent.

CONCLUSION

This Court should hold that it has appellate jurisdiction in this case.

Respectfully submitted,

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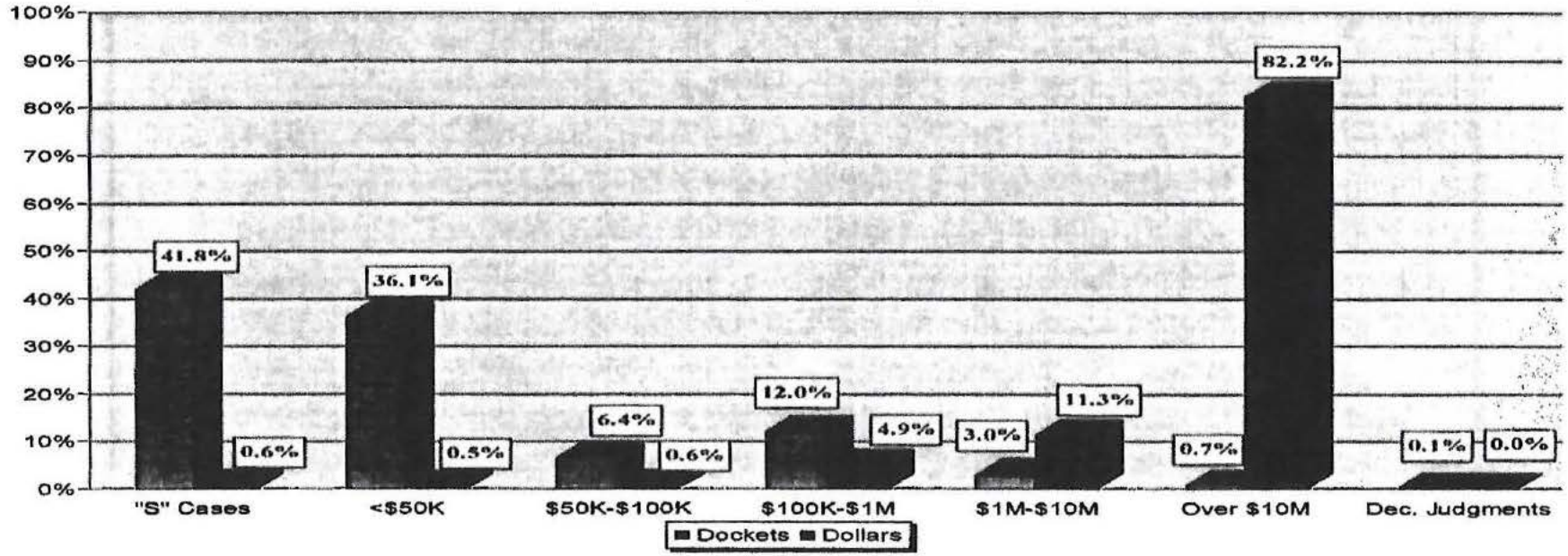
December 7, 2017

Tax Court Inventory

Percentage of Dollars in Dispute and Total Dockets By Dollar Category

As of September 30, 2009



FY09	Dockets	Percent of Dockets	Dollars	Percent of Dollars
"S" Cases	12,908	41.8%	$146,042,413	0.6%
<$50K	11,142	36.1%	$112,691,076	0.5%
$50K -$100K	1,980	6.4%	$142,476,330	0.6%
$100K-$1M	3,695	12.0%	$1,157,784,518	4.9%
$1M-$10M	913	3.0%	$2,682,247,371	11.3%
>$10M	218	0.7%	$19,530,173,947	82.2%
Dec. Judgments	39	0.1%	$0	0.0%
Total	30,895	100.0%	$23,771,415,655	100.0%

Does not include cases on appeal.
Source: Counsel Automated Tracking System, TL-711
Prepared by: CC:FM:PF:PMO

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CERTIFICATE OF SERVICE

This is to certify that a copy of this reply was served on counsel for the appellee, Regina S. Moriarty and Bruce R. Ellisen, Esqs., by filing it with the CM/ECF system on December 7, 2017, of which they are both members. All counsel in the case are members of the CM/ECF system.

s/ Carlton M. Smith
Carlton M. Smith
Counsel for Appellant

Dated: December 7, 2017

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, version 1.257.539.0, updated December 7, 2017, and according to the program are free of viruses.

s/ Carlton M. Smith
Carlton M. Smith
Counsel for Appellant

Dated: December 7, 2017