

Two Tax Codes, Two Tax Systems

Center for Taxpayer Rights Presentation

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“Admin Law and the Crisis of Tax Administration”

- Article by Professor Brian Galle (Georgetown Law) and Professor Stephen Shay (Harvard Law), forthcoming in North Carolina Law Review
- Argument in favor of why administrative law should “tilt towards revenue” in rule-making and why it presently tilts heavily against it
- My Conceit: Comparing the issues raised as applied to wealthy taxpayers versus low-income taxpayers
- My Conclusion: Two Tax Codes and Two Tax Systems

Issue One: Gamesmanship in Comments

- The Problem:
 - Treasury must respond to (essentially) every substantive comment received when promulgating regulations
 - Failure to do so could lead to procedural invalidation of the regulation
 - Gamesmanship: “inundate” the Treasury with comments so that they potentially fail on procedural grounds
- As Applied to Low-Income:
 - Lack of opportunity to comment (often sub-regulatory issues, or non-priority)
 - Lack of organizational capacity to comment (no real lobbying base)
 - Lack of forum to challenge regulations (Tax Court as pre-pay forum)

Issue One: Gamesmanship in Comments

- Wealthy: Inundating Treasury with comments can lead to successful procedural challenges under the APA and admin law
- Low-Income: Much less opportunity to comment, much less cohesion for commenting, and much less opportunity to challenge thereafter
- Outcome: More comments likely on issues that affect relatively smaller number of taxpayers, and those regulations are more likely to suffer procedural challenge/defeat

Issue Two: Overly “Friendly” Regulations

- The Problem:
 - Overly friendly regulations are those that a court would not likely uphold as a valid interpretation of the underlying statute
 - Standing doctrine has come to make such challenges virtually impossible if the regulation only “helps” taxpayers
 - Further, overly “unfriendly” regulations necessarily get challenged and invalidated
- As Applied to Low-Income:
 - Theoretically, overly unfriendly regulations should still be challenged and taken off the books. But let’s take a look at how that’s played out...

Unfriendly Guidance Examples

- IRS Rev. Proc. 99-21 (“financial disability” under IRC 6511(h))
 - Very unfriendly definition of “doctor”
 - Good luck finding a client that gets you in the door... Jurisdiction trap
- IRS Notice 2016-48 (ITIN renewal under IRC 6109(i))
 - Notice specifically said that it ignored the statute
 - Literally no cases found in Westlaw... again, tough to find clients
- Treas. Reg. 301.7430-3 (Fees shifting under IRC 7430)
 - 9th Circuit Judge raised issue sua sponte of how regulation was nonsense
 - Yet still on books, because of the difficult posture to challenge it (collection)
- IRS Notice 2006-68 (Offer provisions under IRC 7122)
 - Very unfriendly definitions of “rejected” Offer and refundable payments
 - Courts *have* upheld it, but it has never been properly challenged

Why Would Treasury Be Overly “Unfriendly?”

- Issue:
 - Treasury should want to faithfully interpret the law and be neither overly “friendly” or “unfriendly.”
 - Lobbying and standing doctrine help explain genesis of overly *friendly* guidance, but not of overly *unfriendly* guidance
- Theories and Case Studies:
 - Enforcement mentality when tasked with equitable statutes
 - Failure to communicate with low-income communities or recognize spill-over effects of otherwise “friendly” guidance

Enforcement Mentality Case Study: IRC 6015(f) “Equitable Relief”

- Statutory Language: Equitable relief available for “any portion of any liability”
- Regulation: But not things like the Shared Responsibility Penalty
- Inherently equitable statute (even uses the word “equitable”) but Treasury decides to (seemingly) curtail otherwise available forms of relief for taxpayers in need
- Anecdotally, have heard practitioners challenge this and win on case-by-case basis, but still otherwise on the books

Failure to Communicate Case Study: IRS Notice 2014-7

- Statutory Language: Exclusion from income for qualified foster care payments.
- Notice Language: Also, we're going to say that biological or adopted kids count as foster children. Everyone gets an exclusion!
- But wait! Isn't this always a win (i.e. *overly friendly*)???
- Not for certain low-income taxpayers that otherwise qualify for the EITC/CTC

“The Banality of ~~Evil~~ Inequitable Tax Administration”

- Case Study in the Making: IRC 6751 Proposed Regulations
- Genesis of the Problem: Walquist v. Commissioner and the Banality of Inequitable Tax Administration
- Opportunity to Right a Wrong:
 - Proposed regulations have received numerous comments from low-income community
 - Note Brand X Doctrine and the leeway the Treasury may have to undo Walquist