

Nos. 14-2279/2280/2282/2283

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULIA R. SWORDS TRUST (No. 14-2279),)
 DAVID P. REYNOLDS TRUST (No. 14-2280),)
 MARGARET R. MACKELL TRUST (No.)
 14-2282), and DOROTHY R. BROTHERTON)
 TRUST (No. 14-2283),)
)
 Petitioners-Appellees,)
)
 v.)
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent-Appellant.)

FILED
 Dec 18, 2014
 DEBORAH S. HUNT, Clerk

ORDER

Before: McKEAGUE and STRANCH, Circuit Judges; ECONOMUS, District Judge.*

In these related appeals involving four separate trusts, the Commissioner of Internal Revenue appeals a decision of the Tax Court holding that the trusts are transferee trusts that are not liable for Davreyn Corporation's unpaid tax, additions, penalties and interest. The co-trustees of the Trusts move to transfer venue to the Fourth Circuit, where all of the Trusts were created. The Commissioner opposes transfer, asserting that venue lies in this court because a co-trustee of each Trust resides in Kentucky, and the co-trustees reply.

Venue in appeals from the Tax Court depends on "the legal residence of the petitioner." 26 U.S.C. § 7482(b)(1)(A). Tax Court Rule 60(a)(1) governs the parties to a deficiency action:

* The Honorable Peter C. Economus, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

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“A case shall be brought by and in the name of the person against whom the Commissioner determined the deficiency (in the case of a notice of deficiency) . . . or by and with the full descriptive name of the fiduciary entitled to institute a case on behalf of such a person.” The definition of a “fiduciary” includes a trustee. 26 U.S.C. § 7701(a)(6).

We have never considered where venue lies when the petitioners are co-trustees, some of whom reside in one circuit and others in another. But we agree with persuasive authority holding that venue may lie in multiple jurisdictions. *See Estate of Israel v. Comm’r of Internal Revenue Serv.*, 159 F.3d 593, 595–96 (D.C. Cir. 1998); *Lamb v. Comm’r of Internal Revenue*, 374 F.2d 256, 258 (2d Cir. 1967).

Here, venue lies in both the Fourth and the Sixth Circuits. The question in this case is which venue is appropriate—the one selected by the Commissioner (and appellant) or the one sought by the petitioners (and taxpayers). Had the petitioners not contested venue, we would have reviewed the appeals without even considering this issue. But they have. The Commissioner seeks to file the appeal here because we have not yet decided the issue at hand adversely to the Commissioner’s position. This is certainly permissible. *See Estate of Israel*, 159 F.3d at 596. But the Commissioner filed the deficiency notice in Virginia. The co-trustees filed their petitions in Virginia, and the tax court in Virginia decided in their favor. The Second Circuit has concluded that the Commissioner can waive venue by filing the deficiency notice in a certain locale. *See Lamb v. Comm’r*, 374 F.2d at 258. In reaching this conclusion, the Second Circuit opined that § 7482(b) was intended to convenience taxpayers, not the Commissioner. *Id.* The D.C. Circuit also agrees that § 7482 conveniences the taxpayer. *See Estate of Israel*, 159 F.3d at 596. And, critical here, the Commissioner stated below that venue lies in the Fourth Circuit. While that statement does not concede that venue could lie in other circuits, this

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representation was relied upon by the petitioners. Under these circumstances, we conclude that the motions to transfer are well taken.

The motions to transfer venue are GRANTED.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

Deborah S. Hunt, Clerk