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HOW TO HANDLE A FEDERAL INCOME TAX AUDIT*

MORTIMER CAPLIN†

The United States tax system is recognized as the most effective and efficient in the world. Its chief characteristic is the unusually high level of taxpayer compliance which is reflected in the self-assessment of taxes on income tax returns,¹ in withholding of taxes by employers,² and in the advance payment of estimated taxes.³

About ninety-seven percent of the gross collections of the Internal Revenue Service comes from these self-reporting procedures. Some three percent—\$6 billion out of \$196 billion for fiscal 1970—results from IRS enforcement activities and from collection of delinquent taxes. Despite these raw statistics, however, a vigorous and balanced enforcement program—with the emphasis on extensive and professional audits of tax returns—is regarded by the IRS as the keystone to accurate tax reporting and prompt tax collection.⁴ As an essential tool for fulfilling these various responsibilities, Internal Revenue leans heavily on a computer processing system, which not only performs important verification functions but also identifies reporting discrepancies and tax returns which require further examination.

Honest and evenhanded tax administration, it is recognized,

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¹INT. REV. CODE OF 1954, § 6201(a)(1) [hereinafter cited as I.R.C.].

²I.R.C. §§ 3402-04.

³I.R.C. §§ 6015, 6153-54.

⁴Internal Revenue's self-description of its "mission" reflects the close interplay seen between "voluntary compliance" and direct "enforcement" activities:

The mission of the Service is to encourage and achieve the highest possible degree of voluntary compliance with the tax laws and regulations and to maintain the highest degree of public confidence in the integrity and efficiency of the Service. This includes communicating the requirements of the law to the public, determining the extent of compliance and the causes of non-compliance, and doing all things needful to a proper enforcement of the law.

1969 COMM'R OF INT. REV. ANN. REP., introductory material [hereinafter cited as 1969 REPORT].

strengthens our self-assessment system in general and the IRS audit program in particular. Safeguarding of taxpayers' rights, prompt and impartial review of examining officers' decisions, and convenient appeals procedures, are all ingredients of the type of fair play that Congress and the public expect and demand of their tax administrators. Internal Revenue has in the main been highly successful in meeting these standards, despite occasional aberrations which when they occur are disturbing not only to taxpayers and their representatives but to the top IRS officials as well.

While declaratory judgments⁵ and injunctions⁶ are not generally available in tax cases, taxpayers have many other statutory and administrative rights and remedies in the proper determination of their federal tax liabilities. Obviously, they and their representatives should be fully informed on all of these rights and remedies—whether they are before revenue agents or office auditors, before district conferees, in technical advice proceedings, before Appellate conferees, or before the courts.

This article will summarize these various tax procedures; consider the authority granted to the different government officials at each level of appeal; and endeavor to assist taxpayers and their representatives in making optimum decisions in the handling of their particular cases.

The Assessment Process

The action of an IRS examining officer, be he revenue agent or office auditor, is in the nature of a proposal or recommendation. This is fundamental; for generally⁷ no additional income tax can be collected until there is a formal assessment⁸ followed by notice and demand of the amount of unpaid tax due.⁹

An understanding of the statutory assessment process is basic to the IRS appeals process. It may be briefly summarized as follows:

(1) The revenue agent, after examining a tax return, determines there is a "deficiency"—*i.e.*, a difference between the amount of tax shown on the taxpayer's return and the correct tax.¹⁰

(2) Before making a tax assessment, the IRS must send to the

⁵28 U.S.C. § 2201 (1964).

⁶I.R.C. § 7421.

⁷Extraordinary remedies are available where the Commissioner believes the assessment or collection of a deficiency will be jeopardized by delay. See I.R.C. §§ 6861 (jeopardy assessment), 6851 (termination of taxable year).

⁸I.R.C. § 6203.

⁹I.R.C. § 6303.

¹⁰I.R.C. § 6211.

taxpayer by certified or registered mail a statutory notice of a deficiency—referred to as a “90-day letter.”¹¹

(3) IRS is generally prohibited from making an assessment of a deficiency until ninety days after the notice is mailed.¹²

(4) Within the ninety day period, the taxpayer has the right to file a petition with the United States Tax Court for a “redetermination of the deficiency.”¹³

(5) If the taxpayer files the petition, no assessment of the deficiency may be made until the decision of the Tax Court has become “final.”¹⁴

(6) When the Tax Court decision redetermining the deficiency has become final, Internal Revenue may make the assessment and thereafter send a notice and demand for payment.¹⁵

(7) Only then may the IRS commence proceedings for collection of the additional tax due.¹⁶

Between the time of the agent’s examination of a return and the formal assessment of tax, numerous administrative procedures are available to dispose of or settle controversies: conferences at the district office level, hearings before the Appellate Division at the regional office level, and the possibility of technical advice from the national office.¹⁷

Further, as an alternative to testing the deficiency in the Tax Court, the Internal Revenue Code permits taxpayers to institute refund suits in other federal courts. Here the taxpayer takes no steps to thwart the formal assessment. Instead, he awaits receipt of the statutory notice of a deficiency and allows the ninety day period to elapse without filing a Tax Court petition,¹⁸ or he signs a waiver of the statutory notice of a deficiency.¹⁹ And after assessment and payment of the additional tax, he files a claim for refund and thereafter commences his refund suit in the United States District Court or Court of Claims.

It should be kept in mind that, if the Tax Court route is followed, many years may pass before any extra tax is payable; but six percent interest, from the due date of the return, will have to be paid by the taxpayer on any deficiency ultimately found to be due.²⁰ In contrast, the

¹¹I.R.C. § 6212(a).

¹²I.R.C. § 6213(a). If notice of deficiency is sent to a person outside of the United States, the prohibition on assessment is for 150 days.

¹³I.R.C. § 6213(a).

¹⁴I.R.C. § 6213(a). Section 7481 describes when, after exhaustion of appeals, a Tax Court decision becomes “final.”

¹⁵I.R.C. § 6215.

¹⁶I.R.C. § 6215.

¹⁷See generally E. GOODRICH, L. REDMAN & J. QUIGGLE, PROCEDURES BEFORE THE INTERNAL REVENUE SERVICE (1965) [hereinafter cited as GOODRICH].

¹⁸I.R.C. § 6213(c).

¹⁹I.R.C. § 6213(d).

²⁰I.R.C. § 6601.

taxpayer in a refund proceeding is generally paid six percent interest by the government commencing from the date of overpayment.²¹

IRS Policy: "Dispose of Cases at Lowest Level"

In prosecuting his case, the taxpayer should always keep in mind that the basic policy of the IRS is to dispose of cases at the lowest possible administrative level. For if some form of administrative settlement were not available to dispose of the great bulk of millions of tax issues raised each year, our mass tax system could not be conducted with the high degree of success that has been achieved.

An examination of a few statistics brings the IRS settlement policy into sharp focus. The Commissioner's annual report for fiscal 1969 is a good starting point:²²

—Some seventy-six million individual income tax returns were filed, along with 1.7 million corporation income tax returns;

—Although most of these returns were processed through the IRS automatic data processing system—with some computer classification of returns and computer selection of returns for audit—the primary responsibility for auditing these returns rested with some twenty thousand IRS audit employees, including thirteen thousand revenue agents and three thousand office auditors and tax technicians;

—Some 2.5 million returns were examined by field or office audits, with about one-third being accepted as filed;

—Adjustments were proposed for roughly 1.7 million returns;

—Additional taxes and penalties recommended totaled some \$3 billion;

—Over 40,000 cases were taken to district conference staffs;

—Over 25,000 cases were taken to the Appellate Division;

—Approximately 6,100 cases were petitioned to the Tax Court;

—About 1,250 cases were filed in the United States District Courts and the Court of Claims.

To avoid swamping the courts with tax litigation and perhaps breaking down our tax collection system, the IRS recognizes that cases must be moved along rapidly and disposed of whenever possible. The pressures to compromise are built into the system at every administrative level and should be taken into account at each negotiating session. When properly measured, they usually are found to work in the taxpayer's favor.

To take full advantage of this administrative bias toward early settlement, the taxpayer must resist the temptation to make only a perfunctory presentation to the revenue agent, with the idea that if he is

²¹I.R.C. § 6611.

²²See generally 1969 REPORT.

unsuccessful here he can fully develop his case at a higher administrative level. Failure to thoroughly and conscientiously prepare his case at the initial stages is a disservice to the taxpayer, for without such preparation the strength of the government's position cannot be accurately measured. If that position is vulnerable, and can be overcome at the agent level, it is a waste of the taxpayer's and the government's time and money to have it prosecuted further. Conversely, if the taxpayer's position is weak, it is best to know this as soon as possible. Such an early analysis will guide the taxpayer on the best procedural route to follow, and may even suggest that the case is hardly worth appealing at all.

In brief, the tax practitioner must be in a position as soon as possible to advise his client whether, and at what price, to settle his case by carefully assaying the prospects of his prevailing either administratively or in court. Without thorough preparation, an accurate assessment of these prospects is, of course, not possible.²³

Initial Contacts with Revenue Agent

Tax returns are audited either by Internal Revenue agents at the taxpayer's place of business (field audits) or by office auditors or tax technicians who interview or correspond with taxpayers from a Revenue Service office (office audits). Audits conducted by revenue agents usually involve larger, more complex returns, while less complicated returns are assigned for office audit.

The taxpayer's first indication of an office audit will probably be the receipt of a letter informing him that his return has been selected for examination and that additional information is needed. If he chooses, the taxpayer can make an appointment to discuss the matter with the examining officer.²⁴ In a field audit, the revenue agent usually writes or telephones the taxpayer asking for an appointment to see him concerning his tax return. This audit normally involves an examination of the taxpayer's books and records at his place of business.²⁵

But whichever the form of audit, upon initial contact by the agent, the taxpayer does not have to drop everything and hold an immediate conference. Rather, a rule of reason applies and he is entitled to arrange a

²³See generally Bennion, *How and Where to Settle a Federal Income Tax Dispute—A Practicing Lawyer's View*, U. SO. CAL. 1969 TAX INST. 9.

²⁴Treas. Reg. § 601.105(b)(2).

²⁵While it is usually unnecessary for the taxpayer's attorney to be present at the field audit, the client should not be without legal counsel when there is reason to believe that a tax fraud investigation is being conducted. The client should be instructed to ask to see the agent's credentials upon arrival, and to inquire whether the examination is a routine one. If two agents arrive, the taxpayer should be wary. If either or both are from the Intelligence Division, then he can be certain they are investigating for a potential tax fraud prosecution.

mutually convenient time for the examination. The taxpayer need not personally attend the examination, and may have his lawyer or accountant represent him. At some point, however, the revenue agent has the right to request an interview with the taxpayer and to make an examination of the taxpayer's books and records.²⁶ To protect the taxpayer against harassment, the Code provides that the taxpayer is not to be subjected to "unnecessary" examination, and that only one inspection of his "books of account" can be made for any one taxable year, unless he requests it or the Commissioner "notifies the taxpayer in writing that an additional inspection is necessary."²⁷

The official IRS instructions to revenue agents are clear: Get the correct result, make a fair determination of the tax due and avoid strained construction of the law. Issues are to be raised only on their merit, they are told, and not for trading purposes or merely to win cases.²⁸ The better, more professional revenue agents carefully abide by these rules.

The system, however, does not always work smoothly. For one thing, many practitioners believe that some revenue agents tend to resolve all arguable issues against the taxpayer simply from a desire "to pass the buck" to higher echelons.²⁹ And, as is true in any large organization, there are agents who simply fail to abide by the letter and spirit of official directions. At times, a competitive spirit prevails, and a particular agent may become overzealous, adopt a policeman-on-the-beat attitude, and may find his daily satisfaction in raising every conceivable issue.

It should be remembered, however, that the top officials at the district and regional levels, as well as at the national office of Internal Revenue, strongly oppose any deviation from established instructions and procedures.³⁰ They expect the taxpayer to protect his rights and to object to any misconduct.

²⁶I.R.C. § 7602. The Commissioner's powers to summon records and testimony under this section are broad indeed. But the IRS summons is not self-enforcing, and must be enforced by the IRS through the federal district courts. I.R.C. § 7604. The Supreme Court has recently decided a case upholding the use of the summons to establish a criminal case against the taxpayer. *Donaldson v. United States*, 91 S.Ct. 534 (1971). See also Taylor, *The Commissioner's Summons—Its Scope—Who May Object*, N.Y.U. 27TH INST. ON FED. TAX. 1383 (1969).

²⁷I.R.C. § 7605(b). On reopening cases closed after examination in the District Director's office, see Rev. Proc. 68-28, 1968-2 CUM. BULL. 912.

²⁸Cf. Rev. Proc. 64-22, 1964-1 CUM. BULL. 689. See also Caplin, *The Commissioner's Reply: Reasonable Tax Administration and Current Policies of the I.R.S.*, 20 J. TAX. 110 (1964).

²⁹See L. WRIGHT, *NEEDED CHANGES IN INTERNAL REVENUE SERVICE CONFLICT RESOLUTION PROCEDURES* (1970). See also Metz, *Muzzle on the Tax Bite*, N.Y. Times, May 19, 1964, at 49, col. 3.

³⁰An unpublished, fairly imprecise National Office instruction—by depriving the agent of any power to take account of "litigation hazards"—has led many of them to believe

Authority Granted to Revenue Agent

Many of the complaints directed at the IRS—and many of the frustrations experienced by tax practitioners in the negotiating process—are due to a lack of sensitivity to the limits of authority delineated at each IRS administrative level.

The revenue agent, district conferee, and the technical adviser at the Appellate Division are each given a specific grant of authority by the national office of the Internal Revenue Service. They are expected to abide by these instructions; and deviations—whether uncovered by supervisors, reviewers or the IRS Inspection Service—may bring criticism and at times administrative action. These limitations must be kept in mind as the taxpayer approaches his various conferences, and he should not request IRS personnel to exceed their authority or be critical when they refuse to do so.

The revenue agent is instructed to find the facts, analyze the law and carefully weigh the views presented by the taxpayer. He is told to consider each issue on its merits and not to engage in horsetrading. If the government has a substantial position on a particular issue, the agent is directed to rule against the taxpayer. Even if he reaches the conclusion that the taxpayer has slightly the better of the argument, the agent does not have the authority to make a judgment on such a close issue; rather, he must pass it along to the next higher authority for a decision. He is regarded primarily as a factfinder, not a judge.

Furthermore, the revenue agent may not “settle” an issue by allocating a given percentage to the government and the balance to the taxpayer.³¹ True settlement authority is felt to involve special skills which are not part of the revenue agent’s training and experience. However, the revenue agent is permitted to “dispose” of a tax issue, that is, he may agree to abandon a position when he believes it is weak either factually or in the overall context of the case. And as any practitioner knows, there is no better way to dispose of an issue than to persuade the other side not to raise it at all. Thus the agent’s authority, though limited, is far from insignificant.

The “settle-dispose” dichotomy is inherently tenuous and is so subtle at times that, while the taxpayer may believe he is swapping issues, the revenue agent is firmly convinced he is merely disposing of the case in

revenue agents are required to assert any conceivable deficiency. WRIGHT, *supra* note 29, at 9. See also Rev. Proc. 68-30, 1968-2 CUM. BULL. 915, which implicitly imposes very strict limitations on District Conferees in considering such hazards.

³¹See note 29, *supra*. On what to expect at the revenue agent level, see generally Donaldson, *Techniques in Presenting and Settling a Case Before the Internal Revenue Service: The Agent; District Conference; Appellate Division*, N.Y.U. 27TH INST. ON FED. TAX. 1343, 1345-1353 (1969); GOODRICH, *supra* note 17, at 67-106.

accordance with the rule book. This twilight atmosphere frequently leads to free give-and-take negotiations and seems to work satisfactorily for both experienced tax practitioners and revenue agents. The IRS has not been able to articulate its written instructions in a more precise fashion and appears willing to accept the practical interpretation that has evolved over the years.

Finally, it must be kept in mind that the revenue agent merely proposes a deficiency: he does not impose an additional tax. It is his opinion, expressed in a revenue agent's report—known as an RAR—which is transmitted to the taxpayer. Under current IRS practice, his report is examined by the district review staff before delivery to the taxpayer along with a transmittal letter—known as a “30-day letter”—advising him of his available appeal procedures.

“30-Day” Letter and District Conferences

Because the IRS believes that many unagreed cases can still be completely or partially disposed of at the district level, the 30-day letter generally encourages the taxpayer to make use of the district Audit Division Conference Procedures—the first official level of review.³² By contrast, in large, complicated cases the IRS prefers that appeals go directly to the highest administrative level—the regional office Appellate Division. While the Service tries to use the 30-day letter as a traffic policeman to move the more significant issues to Appellate, the taxpayer is not bound by the suggestion contained in the transmittal letter. Rather, he is free to handle his case in any way he desires—to refer it to the district conferee, or to skip all available administrative appeals by taking steps to either docket his case in the Tax Court or follow the claim for refund route.

District Conference

The first official level of administrative review is before the district conference staff.³³ On receipt of the revenue agent's report, the taxpayer will normally appeal his case to the district conferee by filing in the district office a written protest setting forth the facts and legal arguments. If the amount of tax at issue is less than \$2,500, a written protest is not required although it is generally advisable to file one.

³²Rev. Proc. 68-30, 1968-2 CUM. BULL. 915. Only about 12% of the 30-day letters advise direct appeal to the Appellate Division. See Schmidt and Farmer, *Settlement at Revenue Agent Level*, U. SO. CAL. 1969 TAX INST. 23, 27; Donaldson, *supra* note 31, at 1353-1360; GOODRICH, *supra* note 17, at 107-120.

³³The procedure for appealing from an agent's audit determination is set out in Rev. Proc. 68-30, 1968-2 CUM. BULL. 915.

The district conferee is independent of the revenue agent and his supervisor, but he is under the jurisdiction of the same chief of audit in the district director's office. Urged to be impartial, the conferee must consider the facts, law and materials contained in the taxpayer's protest. As he is free of the heat of the audit, the conferee normally possesses a greater degree of objectivity than the revenue agent. By experience and training, he can also be expected to display a greater degree of judiciousness. Like the revenue agent, the district conferee has the authority to reach an agreement with the taxpayer on certain issues, while others remain unresolved. In fact, partial agreements are encouraged both by revenue agents and district conferees as a way of narrowing the areas of controversy and thereby saving the time and money of both the taxpayer and the Revenue Service in subsequent proceedings.³⁴

Contrary to the expectation of many taxpayers and their representatives, the district conferee has no significant additional authority to that possessed by the agent. In most cases, he may "dispose" but not "settle" a case. He, too, is told neither to trade issues nor to consider trial hazards that may be present in the case. What this means in practical effect, however, is that where the factual issue is one susceptible of negotiation—for example, one that turns on the valuation of property or the reasonableness of stockholder-officer salaries—the conferee has de facto settlement authority. Where the resolution of a factual issue would result in an all or nothing disposition of case—as where the question is whether a gift was in contemplation of death—the district conferee may still be persuaded to decide for the taxpayer but only if there is a clear preponderance of evidence in the taxpayer's favor. It is where legal questions, or mixed questions of fact and law, are involved, that the conferee's authority is most severely circumscribed; for he has no authority to consider litigation hazards nor to "split" an issue by allocating a percentage in favor of the government and a percentage in favor of the taxpayer.

Only in an extremely narrow class of non-factual cases—the so-called "pattern type" case with a proposed tax deficiency of under \$2,500 a year—is the conferee permitted to function somewhat like the Appellate Division. A pattern case is one with a particular issue common to a group of taxpayers which previously has been referred to the Appellate Division in a "pilot" case and which has resulted in a guideline settlement by the Appellate Division.³⁵ When a similar issue is later presented to the conferee, he is permitted to follow the pattern and to use the settlement percentage previously agreed upon by the Appellate Division.³⁶

³⁴Rev. Rul. 266, 1953-2 CUM. BULL. 450.

³⁵Rev. Proc. 68-30, 1968-2 CUM. BULL. 915; see generally Wakely, *A Practitioner's Guide to Achieving Favorable Tax Settlements with the IRS*, 29 J. TAX. 220 (1968).

³⁶This authority, widely heralded in Rev. Proc. 67-27, 1967-1 CUM. BULL. 630, has been of but limited utility in strengthening the overall administrative process.

The performance of district conferees has shown marked improvement over recent years. In 1969, for example, over forty thousand cases were closed at the district conference level. Of this total, taxpayers agreed to the conferees' recommendations in sixty-five percent of the cases. Although performance varies among the fifty-eight districts, practitioners are developing greater confidence in the district conferee's role.

If a satisfactory result is not reached at the district conference, the taxpayer has the immediate option of appealing to the Appellate Division or requesting technical advice from the national office. As will be discussed later, if the taxpayer does appeal to the Appellate Division, he will usually not be able to obtain technical advice from the national office.

Where a case has been agreed to, and closed, at the district level—either through negotiations with the agent himself or with the district conferee—post-audit review at the regional level may still occur and there is the possibility that the case will be “reopened” on the basis of that review. As a matter of policy, however, the Service is very reluctant to reopen a closed case³⁷ and in fact will not reopen it to the detriment of the taxpayer unless: (1) there is evidence of fraud, malfeasance, collusion, concealment or material misrepresentation; or (2) the prior closing involved a clearly defined substantial error based on an established Service position; or (3) other circumstances exist which indicate that failure to reopen would be a serious administrative omission.³⁸ The Service is sensitive to criticism for reopening agreed cases and is extremely cautious in exercising this authority. To safeguard taxpayers against undue examination of records or returns, the revenue agent must get written approval from a higher authority. To reopen a case, the required signature is that of the Assistant Regional Commissioner (Audit); to re-examine records, the required signature is that of the Assistant Commissioner (Compliance).³⁹

Technical Advice

The technical advice procedure is being used more frequently today, both through the initiative of the district office as well as the taxpayer. The procedure is a way of getting prompt Washington review of interpretative questions arising during the audit of a tax return or during administrative appeal at the district level.

³⁷A closed case is one which is *agreed* at the district level and the taxpayer has been notified of the results or, if *unagreed*, the taxpayer's time for filing a petition in the Tax Court has expired. See note 55 *infra*. For a discussion of post-review at the regional level, see Alexander, *Conference and Review Procedures in Field Audit Divisions; How New Procedures Affect the Handling of Tax Cases*, N.Y.U. 21ST INST. ON FED. TAX. 95 (1963).

³⁸Rev. Proc. 68-28, 1968-2 CUM. BULL. 912.

³⁹Rev. Proc. 68-28, 1968-2 CUM. BULL. 912.

Technical advice may be requested by the revenue agent in the course of his examination or by the district conferee. The taxpayer may similarly request such advice, either through the revenue agent or conferee, but he is usually denied this privilege when his case is before the Appellate Division. The Appellate Division, with its broad settlement authority, desires maximum flexibility in handling a case; and it does not want to be bound by a national office ruling in settling an issue or in weighing the litigating hazards which may be present. This is, perhaps, one of the weaknesses in the administrative appeal procedure, and it is to be hoped that at some future date the IRS will give taxpayers the same options at the Appellate Division level that it affords them before the revenue agent and district conferee.

A 1969 release of the Internal Revenue Service restates in detail all aspects of the technical advice procedure.⁴⁰ District directors are "encouraged" to request national office advice on a technical or procedural question arising in the consideration of a taxpayer's return or a claim for refund or credit. In turn, the taxpayer is given the opportunity to refine with the district office the pertinent facts and questions proposed; and, if there is any conflict, he may submit in writing the extent to which he does not agree with the district office. Both the original submission and taxpayer's comments are then forwarded to the national office to be considered there by the Assistant Commissioner (Technical).

Either of two grounds provides a basis for a taxpayer's request that the district office refer his issue to the national office for technical advice: (1) a lack of uniformity exists on the disposition of the issue; or (2) the issue is so unusual or complex as to warrant consideration by the national office. While taxpayers may make the request orally, they are encouraged to make it in writing—setting forth the facts, law and argument with respect to the issue, and reasons for requesting national office advice. The taxpayer should include in his submission a request for a conference in the national office in the event an adverse decision is indicated.

If the revenue agent or district conferee rejects his request, the taxpayer is granted a single right of appeal to the chief of the audit division of the district office. In reaching his decision, the chief of audit is required to consider all statements submitted; and, if he determines that technical advice is not warranted, he will inform the taxpayer in writing of the grounds on which he proposes to deny the request. At this point, there is no right of appeal from the decision of the chief of audit. However, if the taxpayer responds in writing (usually within 15 days) that he does not agree with the proposed denial, the entire file—including the taxpayer's written request and statements—will be forwarded to the Director of the

⁴⁰Rev. Proc. 69-2, 1969-1 CUM. BULL. 386.

Audit Division in the national office for final review. During the review period, the district office is normally required to suspend action on the issue, except in unusual cases where the delay would "prejudice the government's interests." The national office strives to respond within thirty days on whether the proposed denial is approved or disapproved.

If technical advice is granted, the taxpayer is not given a Washington conference in cases where the decision is favorable to him. However, if it appears that the advice will be adverse to him—and if he previously requested a conference—the taxpayer will be notified of the time and place of the conference in Washington. As a matter of right, he is entitled to only one conference at the national office. He has no "right" of appeal from an action of a branch to the director of a division or to any other national office official. Nevertheless, the IRS may invite the taxpayer to attend further conferences as a discretionary matter or when the branch's position is being modified by a higher authority.

The final position of the IRS is contained in a "technical memorandum" which is usually furnished to the taxpayer upon his request. This memorandum is given the same effect as a ruling to the taxpayer on a closed and completed transaction. It represents an expression of the views of the IRS on the application of law, regulations and precedents to the facts of the specific case, and the district office is normally required to follow the conclusions reached in Washington.

A taxpayer should be highly selective on the types of issues referred for technical advice. Before making a request, the taxpayer should try to anticipate the probable Washington position by a careful evaluation of both the published authorities and the current ruling policy of the national office. Issues which are essentially factual will not be accepted for technical advice. Only questions of law or mixed questions of law and facts fall within this jurisdiction. By careful analysis, however, the taxpayer may find that certain factual issues may be broken down into mixed law-facts questions. For example, while a pure valuation question will not fall under the technical advice procedure, a determination of the criteria to be applied in a valuation case may well be accepted as a reasonable basis for technical advice.

Greater and greater use is being made today of the technical advice procedure. As the pendulum swings away from the complete decentralization of the 1950's, the national office in Washington appears more willing to consider important and large issues and to strive for a higher level of nationwide uniformity in administering our tax laws.

Appellate Division

If a taxpayer cannot reach a satisfactory agreement at the district level—whether before the revenue agent, the district conferee, or both—he

has an automatic right of appeal to the highest administrative level, the Appellate Division of the regional office. Usually this appeal requires the filing in the district office of a written protest,⁴¹ though if the proposed deficiency is less than \$2,500 and the taxpayer has taken advantage of the district conference procedures, his request may be made orally. If the taxpayer receives a 90-day letter and then files a petition in the Tax Court, his case—referred to as a “docketed case”—is likewise referred to Appellate.

The Appellate Division is the final administrative authority to represent the Commissioner. It functions at the regional level, beyond the reach of the district office, and over eighty percent of its workload consists of “nondocketed cases”—*i.e.*, cases appealed to it from the district conferee or directly following taxpayer’s receipt of a 30-day letter. Each of the seven regions has from four to seven appellate branch divisions, and their authority to settle cases flows from the Commissioner directly through the Regional Commissioners. While the national office provides functional direction, it has no authority to make decisions on, or to settle, any case under the jurisdiction of an Appellate Division branch office. In the overwhelming number of cases, the determination of the Appellate Division is final and may not be reopened except in rare instances of fraud, misrepresentation or an important mathematical error.

As previously indicated, the Appellate Division is the only administrative body with wide-ranging settlement authority. It functions under a broad charter which requires it to reach a sound decision fair to both parties. Instructions to Appellate conferees may be summarized in the following manner:⁴²

- (a) Study the case file and review carefully the taxpayer’s protest;
- (b) Weigh all surrounding facts and the law;
- (c) Conduct a fair and meaningful conference with the taxpayer or his representative;
- (d) Consider the litigating hazards involved in the case—*i.e.*, the respective chances of the parties to prevail in the event of trial;

⁴¹The form which the protest is to take is explained in Internal Revenue Publication No. 5, “Instructions—Unagreed Income, Estate, Gift, Employment and Excise Tax Cases,” and is enclosed with virtually all preliminary notices sent to taxpayers by the district office. Once a satisfactory protest is filed in the district office, that office forwards it to the Regional Appellate Division.

⁴²See the Internal Revenue Service’s *Role of the Appellate Conferee* which was distributed to appellate officials, conferees, and certain professional organizations in June, 1967. See also Treas. Reg. § 601.106(f) Rule II; and see the statement of Arthur Klotz, Director, Appellate Division, CCH 1968 STAND. FED. TAX. REP. ¶ 8116. For a more detailed description of the operations of the Appellate Division see Graham, *Settlement With the Appellate Division—Chief of Appellate Division’s Views*, U. SO. CAL. 1969 TAX INST. 31. See also GOODRICH, *supra* note 17, at 121-150; Donaldson, *supra* note 31, at 1360-1370.

- (e) Value the case at its true worth and strive for a settlement that gives fair weight to both the government's position and that of the taxpayer;
- (f) Settle the case on a proper evaluation of the overall record and the litigating hazards. If necessary to reach this result, trade issues or even split a single issue, part for the taxpayer and part for the government.

There are but two situations where the conferee is instructed to resist the general preference for settlements. First, the conferee is prohibited from either paying or extracting a "nuisance value" in order to reach a settlement.⁴³ Second, an instruction issued in 1964 stressed the need to spot important, unresolved tax issues and to litigate cases which "best present the Internal Revenue position" on them.⁴⁴ Thus, the Appellate Division's mandate to settle remains virtually unbridled.

Possessed of such sweeping powers, the Appellate Division is able to settle most of its cases—over eighty percent of both docketed and nondocketed cases. While there are no magic or tidy criteria at work, various factors contribute to the results reached at the Appellate Division level. One factor is psychological: This is the last point of administrative appeal. Another factor is the finality attaching to its action. If agreement is reached at the Appellate Division level a closing agreement or waiver Form 870-AD will usually be signed.⁴⁵ The signing of such a form—in contrast to the signing of a Form 870 after a district conference—generally precludes the government from later claiming a deficiency greater than the amount contained in the agreement.⁴⁶ Another

⁴³*Role of the Appellate Conferee*, note 42 *supra*. A nuisance value has been defined as a concession by either the government or the taxpayer which is unrelated to the merits of the case and which is made primarily to avoid the inconvenience or cost of trial. See Graham, note 42 *supra*. Where the conferee believes the government's case on an issue to be extremely weak, he should concede it rather than hold out for a token concession. While not all minor concessions are in the nuisance category, probably a 10% or 15% allocation would be a prohibited nuisance settlement except in relatively large cases.

⁴⁴Cohen, *Current Developments in the Chief Counsel's Office*, 42 TAXES 663, 664 (1964). The Appellate Division will not settle also where a criminal prosecution is under consideration, except with the concurrence of the Regional Counsel. Similarly, the Regional Counsel's concurrence is needed to settle a case that has been docketed in the Tax Court but is in "pre-session" status.

⁴⁵The full name of the form is "Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment."

⁴⁶However, the use of a Form 870-AD may not always be to the taxpayer's advantage. To begin with, the Treasury takes the position that the signing of such a form, if accepted by the Commissioner, creates a two way street, and that just as the government is barred from making an additional assessment, so the taxpayer is precluded from later seeking recourse in the courts.

Most courts have not been persuaded that the mere signing of the form entails such a

important factor is the power of the Appellate Division to consider litigating hazards and to split single issues on a percentage basis. All in all, a superb climate prevails in the Appellate Division for give and take on both sides and for settlement of most controversies.

Nevertheless, in many cases the taxpayer may hesitate long before bypassing the District Conference and opting for direct resort to the Appellate Division. Nothing is lost in deviating from the official suggestion in the 30-day letter that he do so. In many instances, for example, the taxpayer may feel that the IRS simply does not appreciate the various facets of his case. In others, the taxpayer may judge that it is advantageous to hold an initial conference at the district level rather than at Appellate, particularly when the taxpayer has not yet made up his mind whether a request for technical advice is desirable. By participating in a district conference, the taxpayer may be successful in disposing of his case at that level; or, if not, he still remains free either to appeal to the Appellate Division or to request that the case be forwarded to Washington for technical advice. In contrast, if he selects the Appellate Division route, the technical advice option will usually be lost.⁴⁷

Following an unsuccessful district conference, the taxpayer may decide to forego the Appellate Division altogether. For one thing, he may recognize that there are controversial issues in his return which the revenue agent has bypassed or has decided not to question. Or, the taxpayer may have reached a favorable agreement at the district level on an issue which he fears the Appellate Division may want to reopen. But while the raising of a new issue⁴⁸ in an open case is far less circumscribed than the reopening

result. See, e.g., *Girard v. Gill*, 261 F.2d 695 (4th Cir. 1958); *Bennett v. United States*, 231 F.2d 465 (7th Cir. 1956). However, the issue is not free from doubt. *Lowe v. United States*, 223 F. Supp. 948 (D. Mont. 1963). Moreover, even where Appellate uses a regular Form 870—for example, when finality is not justified because of lack of mutual concessions—Appellate will not generally reopen the case unless

the prior disposition involved fraud, malfeasance, concealment, or misrepresentation of material facts, an important mistake in mathematical calculation, or such other circumstance that indicates that failure to take such action would be a serious administrative omission, and then only with the approval of the Director of the Appellate Division.

Graham, *supra* note 42, at 47-48. On the finality of settlements with the Internal Revenue Service generally, see Donnelly, *How Binding Are Stipulations with the Commissioner*, N.Y.U. 27TH INST. ON FED. TAX. 1371 (1969).

⁴⁷See Rev. Proc. 69-2, 1969-1 CUM. BULL. 386.

⁴⁸A new issue in a nondocketed case would be one which was not being contested when the case reached Appellate and is raised at that level by the conferee or the taxpayer. In a docketed case a new issue would be one not included in the statutory notice of deficiency, or, if the taxpayer has filed his petition, not raised there. Thus, even if Appellate is bypassed, the government is not precluded from raising a new issue even after a petition is filed in the Tax Court. But while the standards for raising such an issue are presumably the same at this later stage, the likelihood of their being raised is far less, and, if they are raised after docketing in

of a closed case,⁴⁹ Appellate conferees are directed not to raise new issues casually or haphazardly; and under no circumstances are they to raise them for bargaining purposes. Moreover, as a matter of policy, a previously agreed issue will not be reopened, nor a new issue raised to the detriment of the taxpayer, unless "grounds for such action are *substantial* (strong, possessing real merit) and the potential effect on tax liability is *material* (having real importance and great consequence)."⁵⁰

In contrast to the IRS procedure in a closed case, new issues may well be raised in an open case before Appellate when, for instance, there has been a recent decision or subsequent change in the Service's position.⁵¹ Consequently, if a taxpayer has obtained a satisfactory disposition of a large issue in his case at the district level, he may be well advised to resist jeopardizing that disposition by appealing relatively smaller ones.

In other instances, the taxpayer may bypass the Appellate Division simply because he feels that it will not give him the type of settlement he believes he is entitled to. He may conclude that he will have to pay too high a price to settle the case in the Appellate Division. For one thing, an all-or-none settlement is infrequently achieved in Appellate. While this may be possible through technical advice requested at the district or conference level, as we have seen, this procedure is usually not available to him before the Appellate Division.⁵²

Furthermore, the taxpayer may feel that the fine points of his particular case may better be evaluated by a full-fledged government lawyer, who would be available either in a docketed case before the Tax Court or in a refund suit, but not in a nondocketed Appellate Division case. Where fine legal points are involved, such a consideration may often be decisive. In other instances, the taxpayer may be reluctant either to educate the IRS on the niceties of his case or to risk the possibility of new issues being raised. In short, he may not want his case to be overhanded administratively and may thus feel it advisable to skip the administrative hierarchy and proceed directly to the courts.

The "90-Day Letter" and the Tax Court

If agreement cannot be reached with the Internal Revenue Service through its conference procedures, or if the taxpayer elects to forego the administrative steps, a statutory notice of deficiency⁵³ is mailed to the

the Tax Court, the burden of proof rests on the government rather than on the taxpayer. *Cf. Baird v. Commissioner*, 438 F.2d 490 (3d Cir. 1971).

⁴⁹Text accompanying notes 37-39, *supra*.

⁵⁰Schildt, *How the IRS Appellate Division Functions*, 47 TAXES 544, 551 (1969); Graham, *supra* note 42, at 44; Treas. Reg. § 601.106(d).

⁵¹See Graham, *supra* note 42, at 44.

⁵²See Rev. Proc. 69-2, 1969-1 CUM. BULL. 386.

⁵³I.R.C. § 6212.

taxpayer. He then has ninety days (or 150 days if he is outside the United States) from the mailing date to petition the Tax Court for a redetermination of the deficiency.⁵⁴ It is a jurisdictional requirement of the Tax Court that, within the statutory period, the taxpayer file a petition in the office of the Court in Washington, D.C., with a copy of the notice of deficiency appended.⁵⁵ No relief may be granted by the Tax Court if the filing is even one day late.

On receipt of the 90-day letter, therefore, the taxpayer faces the crucial decisions of (1) whether or not to litigate the asserted deficiency, and (2) if so, whether to proceed in the Tax Court before the deficiency is assessed, or to pay the tax and pursue the refund procedure. If the Tax Court petition is not filed in a timely fashion, the Commissioner will proceed to assess and collect the tax, and the taxpayer's only remaining remedy is to file a claim for a refund and commence suit in the District Court or Court of Claims. If he is not financially able to pay the full tax asserted, or if he prefers not satisfying the deficiency before trying his case, then he is confined to litigation in the Tax Court.

In sum, by filing a proper petition in the Tax Court, the taxpayer avoids the need to prepay the tax; for, in such circumstances, the Internal Revenue Code prohibits the assessment or collection of the deficiency until—after exhaustion of all judicial appeals—the Tax Court decision becomes final.⁵⁶

Settlements Prior to Tax Court Trial

Even after the filing of a Tax Court petition, negotiations looking toward a settlement generally continue. During the pre-session status—between the filing of the petition and commencement of the trial session—jurisdiction to settle the case is shared jointly by the IRS Regional Counsel's office and the Appellate Division.⁵⁷ In conferences on these docketed cases, taxpayer will confer with representatives from both offices. They usually are able to reach an accord on proposed settlements, but if they disagree, the matter is forwarded to the Chief Counsel for his final decision.⁵⁸

That this procedure works successfully is evidenced by the high percentage of settlements reached in docketed cases. For example, in 1969, taxpayers filed petitions for hearings before the Tax Court in approximately 6,100 cases; settlement negotiations resulted in the closing

⁵⁴I.R.C. § 6213(a).

⁵⁵See, e.g., *Di Prospero v. Commissioner*, 175 F.2d 76 (9th Cir. 1949); Tax Court Rule 1(d).

⁵⁶I.R.C. § 6213.

⁵⁷Rev. Proc. 60-18, 1960-2 CUM. BULL. 988.

⁵⁸Rev. Proc. 60-18, 1960-2 CUM. BULL. 988.

of about eighty-three percent without trial. Only one thousand cases were tried.⁵⁹ With the shadow of a trial facing all concerned, a more realistic attitude generally prevails and a true evaluation of the conflicting positions is more apt to be made.

When the case reaches the session status—the opening date of the session when the case is calendared for trial—sole settlement jurisdiction shifts to the Regional Counsel's office. Regional Counsel usually takes the position that, absent a substantial change in the facts which would materially affect the trial strength of the government's case, settlement will not be made at this stage unless the taxpayer offers substantially more than he previously did before Appellate.⁶⁰ Nevertheless, a favorable settlement may be obtained if Regional Counsel's office in final trial preparations finds its case not as strong as the government had previously thought.

The fact that only one in ten cases docketed in the Tax Court is ultimately decided by it reflects the substantial administrative pressure on the Regional Counsel to reach a settlement even at the courthouse door.

Refund Suits

When the taxpayer selects the refund route, negotiations prior to trial are undertaken with representatives of the Tax Division of the Department of Justice;⁶¹ for the Justice Department has exclusive jurisdiction to litigate and settle refund suits filed by the taxpayer in either the District Court or Court of Claims.⁶² Of approximately 1,500 refund suits filed each year, over nine hundred are fully or partially settled by the Tax Division prior to trial. These settlement and compromise procedures are not as formal and structured as those of Internal Revenue,⁶³ and the standards for settling are more flexible. In all events, the taxpayer stands a far better chance of achieving a favorable settlement with the Tax Division if his case involves relatively small amounts of money and essentially factual or nonrecurring legal issues.⁶⁴

⁵⁹1969 REPORT, at 31.

⁶⁰Maiden, *Settlement with the Regional Counsel's Office—Assistant Regional Counsel's Views*, U. SO. CAL. 1969 TAX INST. 49, 51.

⁶¹Final authority is vested in the Attorney General, see § 5 of Exec. Order 6166, as amended, set out at XIII-2 CUM. BULL. 448 (1934); and see I.R.C. § 7122. However, this authority has been delegated to subordinate officials within the Tax Division. See 28 C.F.R. § 0.130 (1971). Generally, the level of the official delegated settlement authority corresponds to the amount of the refund sought by the taxpayer.

⁶²Frequently, however, representatives of the Internal Revenue Service participate in settlement conferences.

⁶³See Seidman, *Chief of Review Section Tax Division Department of Justice Views*, U. SO. CALIF. 1969 TAX INST. 57, 63. For a detailed description of Justice Department tax settlement procedures, see Pugh, *Settlement of Refund Suits*, 21 TAX LAW. 27 (1967).

⁶⁴Such cases come within the Department's "settlement option procedure," discussed by Seidman, note 63 *supra*.

To institute a refund proceeding, the taxpayer must first pay the full amount of the proposed deficiency⁶⁵ and then, within two years of payment, file a refund claim setting forth the asserted grounds for recovery.⁶⁶ Before filing his suit, the taxpayer must wait until either his claim is formally rejected or six months elapse from the date he filed his refund claim.⁶⁷ If a formal notice of rejection is sent, the taxpayer must file his suit within two years of its issuance⁶⁸ in the District Court where his business or home is located⁶⁹ or in the Court of Claims in Washington, D.C.

Judicial Appeals

Tax Court decisions as well as those of the District Court are appealable to the United States Court of Appeals for the circuit in which the taxpayer resides or, in the case of a corporation, to the circuit where the corporation's principal place of business is located.⁷⁰ Decisions of the Tax Court are reviewed in the same manner as District Court decisions in civil actions tried without a jury.⁷¹

Appeals from the Courts of Appeals and from the Court of Claims to the United States Supreme Court may be requested through a petition for a writ of certiorari. The writ is almost never granted in tax cases unless a conflict exists among the Courts of Appeals or with the Court of Claims.⁷²

Criteria for Choice of Forum

In choosing between the Tax Court, the District Court and the Court of Claims, the taxpayer will have to consider a broad range of factors, some often quite subtle.⁷³ Frequently his choice of forum will be

⁶⁵I.R.C. § 7422.

⁶⁶I.R.C. § 6511. If the taxpayer pays his tax within one year of the filing of the return, he has until three years from the date of filing to initiate a suit for refund. On the content and form of the claim see Treas. Reg. § 301.6402-2(b).

⁶⁷I.R.C. § 6532.

⁶⁸I.R.C. § 6532.

⁶⁹28 U.S.C. §§ 1346, 1402 (Supp. V 1969).

⁷⁰I.R.C. § 7482.

⁷¹I.R.C. § 7482.

⁷²See generally Note, *Forum Reform: Tax Litigation*, 35 U. CIN. L. REV. 644 (1966).

⁷³The literature analyzing the factors to be considered in selecting the "best" judicial forum is extensive. E.g., Beaman, *When Not to Go to the Tax Court: Advantages and Procedures in Going to the District Court*, 7 J. TAX. 356 (1957); Gannett, *Pre-Trial Strategy in a Tax Case: Choice of Forum: A Checklist of Points to Consider*, N.Y.U. 22D INST. ON FED. TAX. 75 (1964); Garbis & Frome, *Selecting the Court for the Optimum Disposition of a Tax Controversy*, 27 J. TAX. 216 (1967); Miller, *Tax Litigation in the Court of Claims*, 55 GEO. L.J. 454 (1966); Smail, *Traps in Refund Suits*, 39 TAXES 639 (1961).

determined by the particular nuances of his client's case.⁷⁴ There are, however, certain more obvious considerations that should be kept in mind.

To begin with, the taxpayer will have no real choice of forum unless, after receiving the notice of deficiency, he is in a position to pay the proposed tax. Under *Flora v. United States*,⁷⁵ partial payment of the tax due for the period will not establish jurisdiction for refund litigation. Rather the taxpayer must pay the full amount of the assessment in order to test its correctness in the District Court or the Court of Claims.⁷⁶ Consequently, if the taxpayer cannot afford to prepay, his judicial redress is limited to the Tax Court.

If the taxpayer is financially able to pay the tax, the single most important factor in choosing among the Tax Court,⁷⁷ District Court and Court of Claims is usually the differences in the precedents which each of these three courts consider as binding. Until recently, the Tax Court—following its decision in *Arthur L. Lawrence*⁷⁸—considered itself a totally independent national court, not bound by circuit court precedents or even reversals.⁷⁹ In 1970, however, in *Jack E. Golsen*,⁸⁰ the Tax Court changed its position by announcing that, in the interests of “efficient and harmonious judicial administration,” it will “follow a Court of Appeals decision which is squarely in point where appeal from [the Tax Court] lies to that Court of Appeals and to that court alone.”⁸¹ The Tax Court felt that it could still foster uniform application of the internal revenue laws by (a) giving effect to its own views where the relevant Court of Appeals has not spoken, and (b) explaining its rationale for agreement or disagreement even where it regards itself bound by the Court of Appeals' precedent.⁸²

In *Golsen*, the Tax Court was simply “following” a precedent with

⁷⁴For example, if the government is claiming an unreasonable accumulation under I.R.C. § 531, the taxpayer will probably choose the Tax Court since I.R.C. § 534 provides that court alone with the power to enter an order shifting the burden of proof on reasonableness to the government.

⁷⁵362 U.S. 145 (1960), *aff'g* 357 U.S. 63 (1958).

⁷⁶It has not been definitely resolved whether the taxpayer must also prepay interest before suing for a refund. Although one case has squarely held that assessed interest need not be prepaid, *Kell-Strom Tool Co. v. United States*, 205 F. Supp. 190 (D. Conn. 1962), the question is not entirely free from doubt.

⁷⁷Even if the taxpayer chooses the Tax Court, he is still free to prepay, after filing his petition, and in some instances may wish to do so to stop the running of interest on any deficiency that may ultimately be sustained. I.R.C. § 6213(b)(3).

⁷⁸27 T.C. 713 (1957).

⁷⁹*Id.* at 720.

⁸⁰54 T.C. 742 (1970).

⁸¹*Id.* at 757. It is uncertain what the Tax Court will do in a case involving two or more taxpayers that is appealable to two or more circuits which disagree with one another.

⁸²*Id.*

which it agreed; but in *Oddee Smith*⁸³ it proved that it meant what it said in *Golsen* by following a precedent with which it disagreed, while at the same time explaining its disapproval of it. This is a welcome development in the law; for the practice that prevailed under *Lawrence* was not only inefficient and unseemly for the federal judiciary, but unfair to the taxpayer who was unnecessarily obliged to spend extra time and money in seeking reaffirmance of a controlling precedent. Now, the taxpayer can rely on the Tax Court to apply the precedents of the circuit which, in the event of an appeal, will be reviewing the Tax Court decision. This is as it should be.

Unlike the Tax Court, the Court of Claims regularly functions in two stages: as a trial court at the commissioner level, followed by what amounts to an appeal to the full court. No right of appeal lies from the full court decision except by way of certiorari to the Supreme Court; and the Court of Claims considers itself bound only by Supreme Court precedents. Thus, if the taxpayer's research reveals favorable Court of Claims decisions, the threat of reversal is but slight as the Supreme Court reviews only relatively few tax cases. In contrast, where the only favorable precedents are in the Tax Court or District Court, the possibility of reversal by the Court of Appeals is obviously much greater.

Aside from the applicable precedents, another major factor to be considered is the possibility of additional deficiencies being assessed for the tax period at issue. Once the taxpayer files in the Tax Court, the statute of limitations on assessment for the period in suit is suspended for the duration of the proceeding.⁸⁴ Hence, if the Revenue Service should raise new issues in the Tax Court case,⁸⁵ the taxpayer may find himself faced with a larger deficiency than the one he originally chose to contest.

In contrast, prosecution of a tax refund suit does not toll the running of the statute of limitations; and, by virtue of the various limitations statutes, the taxpayer almost invariably can control the timing of his suit so as to avoid further tax assessment. While additional tax issues for the period in suit can always be raised by the government in refund litigation, if the limitations period for assessment has expired the government's counterclaim is available only as an offset against the amount of the refund.⁸⁶ If the statute of limitations on assessment has not run, however, the taxpayer is potentially liable for additional taxes. Consequently, when the taxpayer fears the possibility of a substantial new issue being raised for the tax period in dispute, he normally will time his suit so as to limit any counterclaim to the amount of the refund in question rather than to expose himself to additional tax liability.

⁸³55 T.C. No. 26 (Nov. 3, 1970).

⁸⁴I.R.C. § 6503(a)(1).

⁸⁵See note 48 *supra*.

⁸⁶I.R.C. § 6402(a).

In selecting a forum, many other considerations should be taken into account by the taxpayer. For example, if he thinks a jury trial would be desirable, he will have to sue for a refund in the District Court. If he believes he has the better of a highly technical legal argument, he may prefer the totally specialized Tax Court, or the somewhat specialized Court of Claims. A local tribunal (District Court) may be preferable in one case; a national court (Tax Court and Court of Claims) in another. On some occasions, he may want to continue dealing with representatives of the Revenue Service (Tax Court); in others, he may desire the Tax Division of the Justice Department (District Court and Court of Claims).⁸⁷ If he thinks that liberal discovery rules will be to his disadvantage, he may lean toward the Tax Court; for it generally allows less discovery than is permitted under the more liberal Federal Rules that prevail in the District Court or under the broad discovery rules of the Court of Claims.⁸⁸

No evidence is yet available on whether the 1969 Revenue Act changes in the Tax Court will have much impact on litigation in that tribunal.⁸⁹ As a new legislative court under article I of the Constitution, it may want to bring its practice and procedure closer to that of the District Court, and this tendency may become evident in the near future. In all events, the taxpayer may now elect to use simplified and less formal procedures in the Tax Court when he has a small tax case—*i.e.*, involving deficiencies of not more than \$1,000 for any one taxable year.⁹⁰ But no appeal will be permitted from the small claims part of the Tax Court, and its decisions will have no precedential value.

In the final analysis, the choice of the "right" forum for the taxpayer—like the choice of the most effective administrative strategy—cannot be based on the bare enumeration of a set of factors. Rather, it must be discerned by the tax practitioner's "sense" and "feel" of the overall situation; for no automatic check list of considerations can substitute for the skilled lawyer's trained intuition.⁹¹

⁸⁷See Garbis, *Choosing Your Forum in Civil Tax Litigation*, PRAC. LAW., Jan. 1969, at 41, and sources cited in note 73 *supra*.

⁸⁸While the Court of Claims discovery rules are broad, they have certain peculiarities of which the practitioner before that court must be aware. For example, one Court of Claims discovery rule provides that after the case is scheduled for trial, no discovery measures shall be initiated "without leave of court [or the Commissioner] for good cause shown." Ct. Cl. R. 71(c).

⁸⁹For helpful insight on the trial of a case in the Tax Court, see Judge Tannenwald's article, *How To Try an Estate or Gift Tax Case*, The 4th Annual Institute on Estate Planning, University of Miami Law Center, Ch. 70-14 (1970).

⁹⁰I.R.C. § 7463. Neither the amount of the deficiency placed in dispute, nor the amount of any claimed overpayment, may exceed \$1,000 for the taxable year.

⁹¹For a series of proposals to reform the federal tax litigation system, see *Hearings on S. 1973 Before the Subcomm. on Improvements in Judicial Machinery, of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1970).

Conclusions

It is self-evident that procedure and tactics in tax matters are often just as important as the "law" involved. Cases are at times abandoned which should be pursued vigorously. And then there are those which should be settled at an early stage instead of being litigated. Time, money and effort are wasted by barking up the wrong administrative tree.

No two cases are the same, and no one method is *best* in all cases. Intelligent decisions must be based on the consideration of many factors. What kind of case is it? What are the facts and the state of the law? What are the prevailing judicial decisions—in the Tax Court, District Court, Court of Claims, Court of Appeals? What is the financial ability of the client? Can he finance a claim for refund? In deciding on the route to be followed, it usually is advisable to keep options open as long as possible, until the tax practitioner has a full command of the entire case.

At each level of the administrative process, a careful and close evaluation should be made of the government's representative. His ability should not be underestimated. The chances are that he is highly experienced and competent. An effort should be made to anticipate his attitude and probable reaction to various forms of presentation. Careful consideration should be given to the problems facing him as a government official. Involved are the official authority granted to him, the limitations imposed upon the exercise of that authority, the persons he must report to, the reports he must write, and the various reviews that are made of his work product. In helping the tax official solve his problems, a taxpayer's representative will be going a long way toward solving his own. Table-pounding and a loud voice may sometimes impress a client, but it will not advance his cause before the Internal Revenue Service.

In the final analysis, there is no substitute for good, hard preparation; and such preparation should begin at the revenue agent level. Whether the setting is before a revenue agent, district conferee, Appellate conferee, or before a court, taxpayer's representative should strive to know more about his case than the government. Keen analysis of the entire matter and detailed research of the law are fundamental. Well written protests and other documents make the best possible record for the taxpayer and help him attain favorable settlements at all levels of appeals. A sketchy, skeleton protest may sometimes be appropriate—for example, when emergency time pressures do not permit a fuller presentation, or in the early administrative stages when the facts or legal authorities are uncertain and the theory of the case is not yet clearly developed. But this is the exception; for in most instances, it is the forceful, carefully documented protest—in the nature of a lawyer's brief—that is essential.

If taxpayer's representative proceeds in this manner, and if he has the sound judgment to recognize that the government is not *all* wrong *all* of the time, he should get good results in the tax cases he handles.

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