1990

IRS Controversies at Audit and Beyond

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Houston, Texas
December 1, 1990
1990 William and Mary Tax Conference
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INTRODUCTION

Dealing with the IRS can be fraught with controversy. It can occur as early as the audit phase of a taxpayer's return, during which the IRS and taxpayer disagree on the amount owed, and can continue on through eventual resolution in litigation. A tax professional can best handle controversy if he knows something of the process of the audit and the appeal. He must also understand the considerations in choosing whether or not to appeal administratively before going to court and whether or not to settle with District Counsel. There are also forum choices in going to court which must be considered. This paper will describe the audit process, consider some of the controversies that can arise in the audit and beyond, and discuss factors that must be considered in making decisions during the controversy.

I. PROCESSING AND AUDIT OF TAX RETURNS.

A. Processing and Selection of Returns for Examination.


   a. The IRS processes all returns at IRS Service Centers. It generally selects returns for examination on the basis of National Office examination guidelines.

   b. The IRS makes an initial selection of returns for audit on the basis of a formula that scores the returns. If returns deviate substantially from the norm of similar taxpayers, the IRS will make an initial selection for examination.

   c. The IRS's Returns Program Manager makes final selection of the formula-selected returns, choosing those that the Returns Program Manager thinks have the greatest potential for adjustment.
d. In recent years, the IRS has selected fewer returns based on the formula in many IRS Districts because of the need to commit the IRS's limited examination resources to special compliance programs (e.g., the abusive tax shelter program). However, that situation is changing, and every indication is that the attention of the IRS is turning to the traditional tax issues. Several officials have stated that audits of large corporations and wealthy individuals will increase, that the Industry Specialization Program ("ISP") system will be emphasized and expanded, and that valuation issues (including actuarial analysis of pension plans) and international issues will expand.

2. The Industry Specialization Program ("ISP").

a. The Industry Specialization Program is designed to develop specialists in specific industries in Chief Counsel, the National Office, and Appeals as well as Examination. The goal is to identify important industry issues and to assure uniform and consistent treatment nationwide in auditing taxpayers engaged in those industries. The following industry groups have been established:

Aerospace
Commercial Banking
Commodities and Financial Products
Construction
Data Processing
Electronic Components
Farmers' Cooperatives
Financial Services
Food
Forest Products
Health Care
Leveraged Buy-Outs
Life Insurance
Media/Communications
Mining
Motor Vehicles
Petroleum
Property and Casualty Insurance
Railroad Industry
Retail Industry
Savings and Loans
Utilities

A listing of the IRS groups and the members and addresses of the members of each group appears in "The Tax Directory" (Summer 1989), pp. 223-225.

b. The ISP focuses on coordinated industry issues. These issues are of such importance to a particular industry that they have been designated for special treatment. In deciding to make an issue a coordinated industry issue, the industry specialist surveys case managers involved in the examination of taxpayers in that particular industry. From the issues identified in the survey, the industry specialist selects issues that are unusual or complex and deserve coordination due to their wide geographic impact. After selection of an issue, the industry specialist prepares a position paper which includes a description of the general manner in which industry taxpayers are treating the issue.

c. Early recognition of the presence of industry coordinated issues, and understanding the IRS examination and appeal procedures in connection with these matters, can help to deflect or resolve these issues. Industry coordinated issue papers may be obtained from the designated industry specialist or, if necessary, under the Freedom of Information Act.

d. With respect to a coordinated examination program ("CEP") case in one of the specified industries, the case manager must include coordinated issues in the examination and inform the taxpayers that they are part of the ISP.

3. Coordinated Examination Program ("CEP").

a. The Decision to Make Changes to the Coordinated Examination Program.
On December 1, 1989, the IRS Quality Improvement Program (QIP) Team issued its report on the Coordinated Examination Program (CEP). The QIP team's overall conclusions were that potential tax dollars are lost because issues are not being raised and the sustention rate needs improvement. The team identified problems in numerous areas and recommended a new organization structure to solve these problems. In view of the QIP team's recommendations, the IRS Board of Directors during the January 1990 meeting requested that the Assistant Commissioner (Examination) and Acting Chief Counsel develop a proposal for changes to the CEP.

The QIP team developed the proposed objectives to improve program efficiency and effectiveness, thereby increasing revenue to the Treasury, improving sustention rates, and increasing timeliness (reduce lapse time and improve currency of examination cycles).

b. Overview of Proposal Recommendations.

(1) Establish a multi-functional National Policy Board.

(2) Establish a National Director for CEP, and Regional CEP Managers with support organizations.

(3) Bring top IRS management officials into the planning process and improve the manner in which IRS monitors and controls examinations.

(4) Increase managerial oversight and the use of available procedures to ensure taxpayer cooperation.

(5) Expand/create industry and issue specialization and establish experts for examination of highly complex issue areas.

(6) Establish a training program.
(7) Develop effective communication systems to move technical information to front line examination personnel.

(8) Establish a program to provide legal and technical assistance to examination personnel on an expedited basis.

(9) Implement and carry out a quality assurance and quality measurement system using the "peer review" concept.

(10) Improve sustention rates and reduce lapse time on unagreed cases by early settlement offers and coordination between examination, Appeals and counsel.


1. The cost of implementing the above proposals for examination is approximately $4.6 million.

2. For FY 1991 a large revenue increase is projected as a result of the proposals delegating settlement authority to case managers, strengthening specialization programs, improving the use of outside experts, increasing legal and technical assistance to examination personnel and strengthening management controls and accountability.

3. Specific goals for FY 1991 and beyond are improvements to yield, timeliness, sustention rates, taxpayer cooperation and other critical success factors. These will be developed with input from IRS and taxpayers. During FY 1991, baselines will be established for measuring and assessing quality efficiency and timelines.
B. Audit Procedure.

1. Types of Audits

   a. Correspondence - an examination conducted exclusively by correspondence.

   b. Office - an examination in the agent's office.

   c. Field - an examination at the taxpayer's home or at his (or his representative's) office. In many cases a field audit may be preferable, because field auditors have more experience. However, field audits are generally more thorough and involve greater burdens on the taxpayer than office audits.

2. Scope of Audit.

   a. The agent has the statutory power to summons all books and records and compel the attendance and testimony under oath of witnesses. § 7602.

   b. Every figure on the return is potentially subject to audit and, therefore, to substantiation both in fact and in law. Ordinarily, in the examination of an individual's return an agent will look into unusually large items, items such as casualty losses and other losses, large charitable contributions (especially gifts in kind like art objects), and substantial travel and entertainment expenses. Agents are also likely to want to see cancelled checks or other substantiation of deductions, and documents regarding income items.

3. Technical Advice and Other Assistance Available to Agents.

   a. Engineering and Valuation.

      When any engineering or valuation item (e.g. useful life of machinery and equipment or
valuation of property) appears questionable the examining agent is supposed to request assistance from an engineer agent. Both revenue agents and Appeals Officers can also get assistance on such matters from the Engineering and Evaluation Branch in the National Office.

b. Advice from the National Office.

(1) Request By Agent.

The decision to request technical advice is substantially within the agent's discretion, but the agent is encouraged to seek advice from the National Office on any problem not covered by the law or any clearly applicable precedent. Corporate reorganizations, exchanges, and other distributions are frequent subjects of technical advice.

(2) Request By Taxpayer.

A taxpayer may request that an issue be referred to the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue, or that the issue is unusual or complex. If the examining agent finds that such referral is not warranted, the taxpayer may appeal the decision by submitting to the agent a statement of supporting facts, law, and arguments. The agent then should submit taxpayer's statement to the Chief, Examination Division, accompanied by a statement of the agent's reasons against referral. If the taxpayer still disagrees with the proposed denial, all data relating to the issue should be submitted to the National Office for approval or disapproval.

4. Conferences with the Agent.

a. Because the taxpayer may in an interview supply the IRS unnecessary and
possible harmful facts, it is best for the taxpayer to consult his representative at an early stage. Then an informed decision may be made concerning the timing of the representative's appearance in the case. Occasionally, it may be desirable to "low key" the situation and have the taxpayer deal with the agent.

b. A letter to the agent may be helpful in providing an overall picture of the situation and answers to the agent's questions.

c. Absent such an introductory letter, in some cases the agent may be misled by impressions gained at the conference and by the agent's own investigation. Considerable care must be exercised with any written submission to the agent, because the taxpayer will generally be bound by his statements.

d. Consider meeting with the agent to establish the "ground rules" for the audit.

(1) Attempt to establish a "timetable" with the agent.

(a) In general, it is in the taxpayer's interest to encourage the agent to work quickly to complete the examination. A quick conclusion to the examination will reduce the likelihood of the agent becoming aware of all possible issues and exposure areas.

(b) Concluding the examination quickly will also limit the taxpayer's financial exposure to the time sensitive penalties, other penalties where interest "runs" from the date the return is due (rather than from the date of assessment, notice, and demand), and from interest on any tax deficiencies. The civil penalty structure and the interest provisions have been substantially revised in recent years, and the
changes have a major impact on the way taxpayers should approach civil tax disputes. While previously it was frequently in the taxpayer's interest to delay resolution of a civil tax dispute (at least where all issues likely to produce liability had been identified), that is frequently no longer the case.

(2) Consider the agent's need for information and whether, how, and when the taxpayer can meet them.

(a) It may be advisable in the case of an examination involving multiple requests from the agent for information to require that the agent provide the taxpayer with written requests (i.e., through information document requests or "IDR's"). Some audits may call for less formality, but always document submission of information to the agent by use of transmittal letters, and always retain file copies of the transmittal letters and the documents submitted to the agent. Always consider sending the agent a confirming letter stating your understanding of the agent's oral commitments and yours, e.g., a commitment by the agent to review information and respond by a certain date, or your commitment to submit to the agent information, documents, or a legal analysis relevant to an issue.

(b) Discuss information needs with the agent to provide the opportunity for negotiation with the agent concerning the scope of the request, thus lessening the burden on the taxpayer and the representative.
(3) In general, to the extent you can do so in a manner consistent with assuring the accuracy of the response, attempt to be prompt in responding to the agent's requests.

(4) The statute of limitations on assessment is one of the few "clubs" the taxpayer has to avoid undue delays in completing the examination. Yet there is a real exposure for taxpayers in resisting extensions of the statute: the agent may simply issue a 30-day letter (or a 90-day letter) resolving all issues identified to that point against the taxpayer.

As an almost inviolate rule, refuse to execute a Special Consent to Extend the Time to Assess Tax, Form 872-A, which extends the period of assessment until 90 days after (i) the IRS receives a Notice of Termination of Special Consent to Extend the Time to Assess Tax, Form 872-T from the taxpayer, (ii) the IRS mails Form 872-T to the taxpayer, or (iii) the IRS sends the taxpayer a Notice of Deficiency.

Instead of Form 872-A, provide the agent a Consent to Extend the Time to Assess Tax, Form 872, extending the period of assessment for a reasonable time to a specified date certain.

(5) Consider suggesting a timetable for completing the examination within the statute of limitations and indicating to the agent that no extensions will be granted unless the taxpayer is responsible for delays or unless the request for extension is solely to permit Appeals Office consideration of the case.

(6) Consider also limiting extensions to particular issues that the IRS feels are not yet
adequately developed. The IRS is supposed to consider so limiting consents, except when it may jeopardize the revenue. IRM 8233.(12).

(7) Determine, as early as possible, the areas of likely inquiry and become familiar with the factual and legal merits, as well as the significance of the issue in both the years in issue and other open tax years.

5. Settlement with the Agent.

a. The agent's examination provides the first opportunity to dispose of the case and is the best level at which to settle any tax issue. With regard to the year or years under examination, the agent is the original fact finder. There is no record against the taxpayer, and no one with the IRS would have already suggested that any disallowance or other adjustment be made or that any deficiency be proposed. The examination is the taxpayer's opportunity to convince the fact finder that the facts are accurately and completely reported on the return. The agent does not have a written record made by someone else and does not have the problem of justifying a change in someone else's recommendation. If the agent is convinced by the taxpayer's argument, the point is won.

b. Also, the next level of IRS review may discover areas of adjustments that the agent either did not see or believed were properly reported on the return. The longer the history of a case in the IRS, the greater the chance that issues will be developed. This is a risk common to a number of tactical decisions faced by the taxpayer and the taxpayer's representative; e.g., whether to seek review by the Appeals Office, whether to recommend that the agent request technical advice, whether to suggest informal assistance from Chief Counsel, and whether to seek a Closing Agreement in lieu of a Form 870 or 870-AD.
6. Procedure If the Case Is Settled.

a. If agreement is reached with the agent, the agent may prepare a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Proposed Overassessment.

The Form 870 is required because of the prohibition under § 6213(a) against the assessment and collection of tax without first sending the taxpayer a formal Statutory Notice of Deficiency and allowing him 90 days within which to file a Petition in the Tax Court. By Form 870, the taxpayer waives his right to (i) a Notice of Deficiency (and therefore his right to litigate the deficiency in the Tax Court), and (ii) the 90-day period before the deficiency may be assessed.

The Form 870 generally used for settlements is not legally binding on either the government or the taxpayer. The taxpayer who has paid a deficiency pursuant to a Form 870 may sue for refund of the same money at a later time (within the period of the statute of limitations), and a taxpayer who has accepted an overassessment in an agreed amount following execution of a Form 870 may sue for an additional refund arising out of the same year's return. The government is also free (within the statutory period of assessment) to assess an additional deficiency, and to sue for repayment of an overassessment despite the execution of a Form 870.

b. In lieu of a Form 870, the agent could prepare an Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment, Form 870-AD. The Form 870-AD states that:

If this offer is accepted for the Commissioner, the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, an important mistake in mathematical calculation, deficiencies or overassessments
resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and Subchapter S items determined at the partnership and corporate level, or excessive tentative allowances of carrybacks provided by law; and no claim for refund or credit shall be filed or prosecuted for the year(s) stated above other than for amounts attributed to carrybacks provided by law. (Emphasis added.)

If a taxpayer executes a Form 870-AD, the IRS takes the position that the taxpayer's agreement not to file and prosecute a refund claim is binding, even if there is a retroactive change in the Code or a subsequent court decision favorable to the taxpayer. There is a split in the circuits as to whether a Form 870-AD is so binding. Compare Uinta Livestock Corp. v. United States, 355 F.2d 761 (10th Cir. 1966) and Whitney v. United States, 60 AFTR 2d ¶ 875148 (9th Cir. 1987) (not binding), with Kretchmar v. United States, 57 AFTR 2d ¶ 86-306 (Ct. Cl. 1985) and Cain v. United States, 255 F.2d 193 (8th Cir. 1958) (binding). The courts have applied principles of equitable estoppel to determine whether the Form 870-AD is binding.

c. When the issue carries over to future years for which returns are not yet filed, a comprehensive settlement may be reached by use of a Closing Agreement. Under § 7121, the IRS and a taxpayer may agree to close a matter, and the case will not be reopened concerning the agreed upon matters "except upon a showing of fraud or malfeasance, or misrepresentation of a material fact." § 7121(b).

In general, the use of a Closing Agreement will cause the settlement to be reviewed by District Counsel, because it is a binding contractual agreement between the taxpayer and the IRS. Even if the Supreme Court of the United States declares a section of the Code unconstitutional or interprets the section favorably to the taxpayer after a
Closing Agreement based upon the Code section has been executed, the Closing Agreement stands. *Wolverine Petroleum Corp. v. Commissioner*, 75 F.2d 593 (8th Cir. 1935), cert. denied, 295 U.S. 743 (1935); *Aetna Life Insurance Company v. Eaton*, 43 F.2d 711 (2d Cir. 1930), cert. denied, 282 U.S. 887 (1930); *Bankers Reserve Life Co. v. United States*, 42 F.2d 313 (Ct. Cl. 1930), cert. denied, 282 U.S. 871 (1930).

7. Revenue Agent's Report (''RAR'').

Whether or not agreement is reached with the agent, the agent must write a two-part report regarding the case. The first is sent to the taxpayer and consists of (1) computations showing how the proposed deficiencies were determined, and (2) a brief explanation of the agent's basis for the proposed adjustments that result in the deficiency. The second part of the report is a memorandum that in unagreed cases is designed to transmit to the next level in the IRS the part of the report sent to the taxpayer.

The agent's transmittal letter is not privileged and may be obtained in discovery if the case winds up in court.


a. The RAR is reviewed first by the agent's immediate superior, the group supervisor. From the group supervisor, the entire RAR is sent to the Review Staff, to check it for completeness and accuracy. In unagreed cases, the Review Staff also must compare the RAR with the taxpayer's Protest to check the issues raised in the RAR addressed by the Protest and to check for discrepancies in the facts as stated in the RAR and the facts per the Protest.

b. Special rules are established by § 6405 in the case of refunds of more than $200,000 of income, estate, gift, and certain other taxes. The procedure requires special handling and ultimate reporting by the Chief Counsel to the Joint Committee on Taxation.
The report must state the person to whom the refund is to be made, the amount of the refund, a summary of the relevant facts, a legal analysis of the issues, and the IRS's decision. The Joint Committee on Taxation is composed of ten members of Congress, five selected from the House Ways and Means Committee and five from the Senate Finance Committee, and it employs a full-time staff. When the Joint Committee has a question concerning the proposed refund or advises the IRS that it does not approve the refund, the case is sent back to the IRS, further investigation is made, and no refund is actually paid until agreement with the Joint Committee is reached.


a. Post-audit review consists of a review by the IRS at the regional level.

b. Regional analysts are permitted to reverse field settlements only in specified instances, e.g., in the event of substantial error, fraud, malfeasance, collusion, concealment or misrepresentation of a material fact, or other such circumstances.

II. A STRATEGIC DECISION -- WHETHER OR NOT TO VISIT APPEALS BEFORE GOING TO COURT.

A. Nature of the IRS Appeals Function.

1. The appeals function is a nonstatutory alternative dispute resolution mechanism for resolving tax controversies.

2. It was created and developed by the IRS and is offered as a service to taxpayers.

3. For FY 1988, Appeals closed 93,000 cases, of which 90% were agreed.
4. If the IRS did not have the appeals function, court dockets would be overwhelmed by a huge flow of unresolved tax cases.

B. The Options Available to the Taxpayer Upon Conclusion of the Audit.

1. The 30-day letter.

   a. The beginning of any tax appeal process, whether administrative or judicial is triggered by a "30-day letter." This is a form letter to the taxpayer from the District Director enclosing a copy of the RAR and repeating the agent's offer to settle the case on the basis of the adjustments proposed in the RAR. Form 870 is enclosed in case the taxpayer changes his mind and agrees to settle the case on that basis. The letter states that if a taxpayer does not agree to the adjustments, he may file a protest and request a conference with the Appeals Office. This letter ordinarily allows the taxpayer 30 days to file his protest. Extensions of the 30-day period may sometimes but not always be obtained.

   b. The letter states that if the taxpayer does not either sign the Form 870 or file a protest, a Notice of Deficiency will be issued.

2. Options of the Taxpayer Upon Receipt of the 30-day letter. At this point the taxpayer can:

   a. Protest the 30-day letter and ask for further administrative proceedings in the hope of settling the case with the Appeals Office.

   b. Ignore the letter and petition the Tax Court following the issuance of a Statutory Notice of Deficiency, or

   c. Bypass the appeals process by paying the deficiency and later contesting the determination in a district court or the Claims Court;
3. Factors that Favor Filing a Written Protest.

a. A protest may avoid the expense of litigation through settlement. Appeals Officers will weigh the hazards of litigation even when no case is actually pending. Hazards of litigation include costs involved both in financial terms and in manpower and the possibility of setting unfavorable precedent.

b. The appeals process allows the taxpayer to keep open the option of filing a Tax Court petition, or seeking district court or Claims Court review. This permits the taxpayer to determine the relevant authority in the different forums so that the most favorable route can be followed.

c. Protesting a 30-day letter allows for extended negotiations. When a case is docketed, and a trial status order has been issued by the Tax Court, Appeals sometimes may not consider the case without the District Counsel's consent.

d. Protesting allows the taxpayer to defer payment of the deficiency for a longer time.

e. The taxpayer may use the appeals process to assess the IRS's position on a matter. The taxpayer may be able to prove the agent was wrong, and avoid a court case entirely.

f. An informal opportunity for discovery is inherent in the appeals process, which might not be available under the limited discovery rules of the Tax Court. But this may be a two edged sword.

g. Protesting allows the taxpayer more time to prepare a case before the suit is started, and provides an opportunity to judge the reactions of the Appeals Officer to evaluate which arguments are strongest.

h. In whipsaw cases there is more flexibility in resolving the issue with the Appeals Officer if none of the taxpayers is in court.
i. Section 7430 may preclude a taxpayer from receiving attorney's fees if the taxpayer has failed to exhaust his administrative appeals.

j. Bypassing Appeals may subject a taxpayer to the risk of a penalty of as much as $5,000 if it appears to the tax court "that the taxpayer unreasonably failed to pursue available administrative remedies." § 6673.

4. Factors That Favor Bypassing Appeals.

a. New issues and grounds are less likely to be raised if the taxpayer goes directly to court. Appeals Officers have more tax expertise than revenue agents and an administrative appeal gives the IRS more time to find new arguments.

b. If new issues are raised after the 90-day letter has been issued, the burden is on the IRS to prove those issues. Therefore, if there is substantial likelihood that new issues may be raised, the taxpayer may want to go to Tax Court where the IRS bears the burden on new issues or, instead, pursue refund litigation where new issues cannot be used affirmatively to collect additional tax but only to offset.

c. Delay in closing administrative consideration of the case may increase the taxpayer's exposure to civil tax liabilities even if no additional tax issues are identified, particularly if the taxpayer (1) is potentially subject to civil penalties (including the substantial understatement penalty) on which interest runs from the due date of the return (2) has a large potential deficiency on which interest will be due (particularly if computed at the special interest rate for tax motivated transactions), or (3) is potentially subject to the time sensitive negligence and fraud penalties. However, consideration by Appeals may offer the taxpayer an opportunity to mitigate or eliminate exposure to civil penalties.
d. In smaller cases, the fact that a taxpayer has filed in Tax Court may indicate to the Appeals Officer that the taxpayer is convinced he is right. Psychologically, this may facilitate settlement. In cases involving larger amounts, however, this is more questionable.

e. The taxpayer may wish to speed the disposition of the case. IRS procedures seem to encourage more expedited case hearings for docketed cases.

f. Settlements in docketed cases may have more finality than settlements in nondocketed cases. Docketed case agreements are reflected in a Tax Court decision. Nondocketed settlement agreements are not.

g. Taxpayers should also be aware of possible trends that may arise by virtue of who is representing them in their appeals. Accountants sometimes settle with less expense than attorneys. Attorneys may be more prone to consider litigation.

h. When the IRS is locked into a position on a particular matter that might preclude settlement, it may be better to fight the issue out in court if the practitioner believes the IRS's position is incorrect.

i. The Appeals Officer's settlement authority may be constrained on issues designated as "Appeals Coordinated Issues," cases designated as "key" or "coordinated cases," or cases which involve IRS-wide litigation positions.

III. DEALING WITH THE APPEALS OFFICE.

A. Authority to Settle in Non-Docketed and Docketed Cases.

In 1978, the IRS amended its procedures to provide that if a taxpayer cannot settle his case with the

B. The Purpose of Appeals.

1. Appeals' objective is to resolve tax controversies without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the IRS. IRM 8631(1).

2. A fair and impartial resolution is one which reflects on an issue-by-issue basis the probable result in the event of litigation, or one which reflects mutual concessions for the purpose of settlement based on the relative strength of opposing positions where there is substantial uncertainty of the result in event of litigation. IRM 8631(2).

C. Before Suit Filed -- The Non-Docketed Case in Appeals.

1. When Protest is Required to Request a Conference in Appeals.

   a. If the adjustments arise as a consequence of either an office audit or correspondence with the taxpayer, or if the amount at issue does not exceed $2,500, the taxpayer need only notify the District Director that a conference in Appeals is desired. If the audit was a field audit and the amount at issue exceeds $2,500 but does not exceed $10,000 only a brief written statement of the issues need be submitted to the district office. In other circumstances, a written "protest" must be filed with the District Director.
b. The purpose of the protest is to communicate to Appeals the grounds upon which the taxpayer contests the adjustments.

c. The protest is in the form of a letter to the District Director and should include:

(1) A statement that consideration of the case by the Appeals Office is requested,
(2) The taxpayer's name and address,
(3) The identification symbols and date of the 30-day letter,
(4) The tax periods involved,
(5) The adjustments that are not accepted,
(6) A statement of facts for each issue, and
(7) A statement of law for each issue.

d. The protest will be more persuasive if the statement of facts is supported by affidavits, documentary exhibits, and the like.

e. The more the Appeals Officer considering the protest knows about the nature of the taxpayer's argument, the greater the likelihood, if the protest is sound, that he will be persuaded the taxpayer's position is correct.

f. The protest must be prepared with extreme care. It contains a signed declaration under penalties of perjury that the stated facts are true.

g. The protest should be written with the Appeals Officer (and government attorneys, if the case is not settled with Appeals) in mind. The Appeals Officer will appreciate short, clear arguments. Often, the Appeals Officer is not an attorney, and lengthy quotations and repetitive citations of authority may not be persuasive. If the protest can be written in a readable, convincing manner, the taxpayer will gain
the advantage of a favorable first impression.

h. Since Appeals Officers are employees of the IRS, they may be more impressed by IRS positions than by court opinions, especially when the court opinion is not one that should be viewed as controlling. Controlling opinions are those decided by the Supreme Court or the Appeals Court to which the taxpayer's case would be appealed.

2. The Appeals Conference.

a. It is ordinarily not helpful to have an individual taxpayer attend the Appeals Conference. Taxpayers may not understand the legal ramifications of certain arguments, and because of self-interest may be overly contentious.

b. Under some circumstances, however, the taxpayer's presence may be helpful, particularly if the facts are especially complex or if the issue involves knowledge or intentions solely within the province of the taxpayer. Usually, however, the best decision is to permit the taxpayer to answer questions in writing. An exception may be cases in which conduct-based civil penalties have been proposed and the taxpayer's statements would be more credible if made in person.

c. The Appeals Officer has the authority to settle substantially all of the cases before him, either on his own authority or with the agreement of his supervisor. However, there are a number of circumstances in which District Counsel can require that the proposed disposition by Appeals of a case (such as concession of a fraud penalty) be reviewed by District Counsel. A list of the circumstances in which Counsel review is required in statutory notice cases appears at IRM 8294.(10) and includes:
(1) Cases in which there is a substantial chance that a regulation, revenue ruling, or revenue procedure will be invalidated,

(2) Cases in which the IRS has not won the issue in any circuit and has lost the issue in one or more circuits,

(3) Cases presenting unique issues,

(4) Cases in which Appeals proposes to reduce a recommended fraud penalty,

(5) Cases in which there is a substantial risk that attorney's fees will be awarded, and

(6) Any case in which the government has the burden of proof on any issue.

In the case of proposed settlements, Section 2.08 of Rev. Proc. 87-24 provides the Assistant Chief Counsel for Tax Litigation (or the Deputy Associate Chief Counsel (International) with respect to international issues) with authority, after consultation with the Director of the Appeals Division and Regional Counsel, to determine issues or cases which Appeals should not consider.

d. It is usually not desirable for the taxpayer's representative to agree to settle the case by himself. Even if he has settlement authority, it is usually better not to exercise it. What strikes the representative as a good settlement may not be acceptable to his client.

D. After Suit Filed in the Tax Court -- A Docketed Case.

1. The IRS procedural rules with respect to settlement authority in docketed Tax Court cases are stated in Rev. Proc. 87-24:
a. After a case is docketed in the Tax Court, District Counsel will transfer the case to Appeals for settlement consideration, unless Appeals issued the Notice of Deficiency. However, District Counsel may refer the case to Appeals even if the Notice of Deficiency was issued by Appeals, unless District Counsel decides that there is little likelihood the case can be settled.

b. If the case involves a tax deficiency of more than $10,000, counting tax and penalties, Appeals will return the case to District Counsel (unless District Counsel agrees to extend the period of Appeal's consideration of the case):

(1) If no progress toward settling all or part of the case is made, or

(2) When the case appears on a trial calendar (unless District Counsel agrees to extend the period for Appeals consideration).

c. If the case involves a tax deficiency of $10,000 or less (including a case classified as an "S case" by the Tax Court), counting tax and penalties, the case will be referred to Appeals:

(1) For a period of six months, or

(2) Until one month before the call of the trial calendar if the case was classified by the Tax Court as a regular case or in an "S case," 15 days before the call of the trial calendar. At the end of the applicable period, the case will be returned to District Counsel unless both Appeals and District Counsel agree that the period of Appeals consideration should be extended.

d. When a case is in Appeals or in the District Counsel's office, that office has sole settlement authority. However, if District Counsel requests the case file to prepare
for trial, or if the case file has been returned under the above time rules, District Counsel and Appeals may agree that Appeals should continue to attempt to settle the case while trial preparation is taking place.

e. District Counsel and Appeals may agree that a case should be transferred from one to the other, despite the fact that the transferee office has already considered the case.

f. After an Answer has been filed, District Counsel and Appeals may agree to work on the case jointly, with Appeals having settlement jurisdiction and District Counsel acting as advisor, which may entail attending conferences. This "joint consultation" can take place in appropriate cases, such as those involving "significant issues or large deficiencies."

g. At the request of District Counsel and with the agreement of Appeals, when District Counsel has jurisdiction over a case, Appeals is permitted to assist District Counsel in settlement negotiations, trial preparation, or even at the trial of the case.

h. Appeals settlement authority over a case or certain issues in a case may be revoked if the Director of the Tax Litigation Division (or the Deputy Associate Chief Counsel, International) so decides after consulting with the Director of the Appeals Division and Regional Counsel.

i. When a case is received by either District Counsel or Appeals, the taxpayer, the representative, or both are to be notified "promptly." The notice should state that the office in possession of the case has sole authority to settle the case and, when District Counsel sends the notice, to try the case as well. If a case is going to be prepared for trial or if Appeals settlement authority has been revoked, the notice should so state.
E. Achieving Settlement in Appeals.

1. Types of Settlements.
   a. A "mutual concession" settlement occurs when both parties make concessions to reflect uncertainty in event of litigation as to the likely outcome on the law or facts. IRM 8632.
   b. A "split-issue" settlement occurs when it is not likely that, in event of litigation, the decision would go completely in favor of one party. The basis for a split issue settlement is an agreed percentage of the amount at issue. IRM 8633.
   c. A "nuisance value" settlement will not be accepted by Appeals because "Appeals neither exacts a concession nor grants a concession to relieve either party of inconvenience or cost." IRM 8634.
   d. The term "partial settlement" is used to refer to the settlement of some but not all of the issues in dispute. While Appeals attempts to achieve resolution of all issues, that frequently is not possible. IRM 8643.

2. The Raising of New Issues or Reopening Closed Issues.
   a. The IRS's stated policy is not to reopen an issue on which the taxpayer and the district are in agreement, and not to raise a new issue, unless the grounds for the action are "substantial" and the potential effect upon tax liability is "material."
   b. This policy does not apply to new issues raised by or for taxpayers. If a new issue is raised by a taxpayer, the evidence is to be considered and, if necessary, referred to the district for verification.
   c. A new issue is anything new to the return, statutory notice, or RAR which was not covered in the protest or petition and which is being discussed by Appeals. IRM 8652(4).
d. The grounds for raising the new issue must be substantial and the potential effect on revenue must be material. "Substantial" means that the Appeals Officer should be "quite certain" that the IRS would prevail in litigation. "Material" refers to the amount of tax at issue, viewed from the IRS perspective. IRM 8653(6).

e. Although these rules tend to limit the raising of new issues, in the last analysis, the Appeals Officer determines whether the criteria are satisfied, and the taxpayer may have no effective way to counter that decision.

3. Offers in Compromise.

a. The source of the IRS authority to compromise a tax is § 7122. The compromise of a tax liability rests upon either doubt as to liability, doubt as to collectibility, or both.

b. Hardship in paying a delinquent tax assessment is not a basis for compromise in the IRS's eyes. A type of insolvency is generally required by the IRS to compromise a tax based upon doubt as to collectibility.

c. The doubt as to liability or collectibility must be supported by evidence. When doubt exists, the amount acceptable will depend upon the degree of doubt found in the particular case.

d. § 7122 imposes the following limitations and requirements for a compromise of a tax case by the IRS:

(1) The IRS may compromise a tax case only if it has not already been referred to the Department of Justice for prosecution or defense. § 7122(a). After a case has been referred to the Department of Justice, the Attorney General (or his delegate)
has authority to compromise.

(2) Only an official of the IRS who has been "duly authorized by the Secretary of the Treasury directly or indirectly by one or more delegations or redelegations of authority" may compromise a tax case. § 7122(a); § 7701(a)(12). For example, an Offer in Compromise based upon doubt as to liability of tax of $100,000 or more must be executed by a Regional Commissioner, while a Service Center Director or Assistant Director may execute an Offer in Compromise based upon doubt as to liability of tax less than $100,000.

(3) In all cases where the assessed tax, interest, additions to tax, and assessable penalties are $500 or more a legal opinion must be obtained from the District Counsel stating (a) the reasons for the settlement, (b) the amount of the assessed tax, additional amounts, and assessable penalties, and (c) the amount actually to be paid under the terms of the compromise. § 7122(b). These statutory requirements are jurisdictional prerequisites to a valid compromise. Botany Worsted Mills v. United States, 278 U.S. 282 (1939).

e. The IRS authority to enter into a valid compromise agreement only exists when § 7122 has been strictly complied with and, in the event of a failure to comply, neither the taxpayer nor the IRS is bound. A revenue agent has no authority to bind the IRS to a Compromise Agreement. Reimer v. United States, 441 F.2d 1129 (5th Cir. 1971); Country Gas Service, Inc. v. United States, 405 F.2d 1417 (1st Cir. 1969).
f. An Offer in Compromise is accepted only when the taxpayer is notified of the acceptance in writing. Treas. Reg. § 301.7122-1(d)(3).

g. Once the compromise is entered into, neither the taxpayer nor the IRS may re-open the case, except where grounds for rescission of a contract between the parties exist—that is, where there has been either (1) a misrepresentation of the assets of the taxpayer by falsification or concealment, or (2) mutual mistake of a material fact sufficient to cause a contract to be set aside. Treas. Reg. § 301.7122-1(c); Ely & Walker Dry Goods Co. v. United States, 34 F.2d 429 (8th Cir. 1929), cert. denied, 281 U.S. 755 (1930).

IV. SETTLEMENT NEGOTIATIONS WITH DISTRICT COUNSEL.

A. Litigation Philosophy of Counsel.

1. Counsel's position is that the importance of litigation to the administration of the tax law is not measured by the amount of taxes collected through litigation, but rather by the effect that a position taken by the IRS in litigation has on the shape and development of the tax law. Accordingly, it is Counsel's position that the position taken in a case must be one that is reasonable on the facts in the case and one which makes the maximum contribution to a sound tax system. A secondary consideration in the minds of many Counsel attorneys is the encouragement of compliance by other taxpayers.

2. Line attorneys, as well as their supervisors, are aware that a position taken solely to win a case against one taxpayer may in the future be used by other taxpayers against the IRS. The development of the litigation position of Counsel is, therefore, intended to take into consideration a broad effect of that position as it affects all taxpayers in the administration of the tax laws.
3. It is the litigation and settlement policy of Counsel, unless there are compelling reasons otherwise, to settle or eliminate as many issues as is feasible and justifiable before the submission of the case for decision by the Court. In particular, Counsel attorneys are instructed to make every effort to settle the issue or issues on which there are no real basic differences between the parties, especially where the amounts involved are small. Moreover, it is Counsel's policy that no issue should be raised in a case solely or primarily for settlement negotiation purposes when there is no substantial basis in fact and in law to support it, or which, if the government is sustained, would result in "bad law."

B. Request for Technical Advice.

1. Field attorneys are encouraged to request technical advice from the Assistant Chief Counsel (Tax Litigation) if, after having fully researched an issue through all regional source material, there remains a substantial question as to what the IRS position is or should be. The request for technical advice may be oral or written.

2. The National Office, Tax Litigation Division, has supplied each region with a list of tax litigation experts in the national office, relative to most issues, from whom the field attorney can receive oral technical advice. Such a request is particularly encouraged if the field attorney has some questions which arise at the last minute or if the attorney has any uncertainty as to the current litigation position. Also, if the field attorney intends to request written technical advice, as will be discussed later, it may be advisable orally to contact the national office attorney, since the latter may be aware of some development which would obviate the necessity for a written technical advice request.

3. Counsel attorneys are advised that the taxpayer or taxpayer's counsel should not be advised of the request for advice from the National Office, since
conferences with the taxpayer are generally not held in the National Office.

4. Requests for technical advice are often used during settlement negotiations. However, field attorneys are requested to make such requests as far in advance of settlement conferences as feasible, and not later than the issuance by the Court of the trial status request.

C. **General Principles of Settlement.**

1. Counsel is supposed to settle cases and issues on the merits. Lump sum or blanket settlements which include tax, penalty, and interest are to be avoided, and generally should not be entertained or accepted. In particular, the IRS has a policy against settlements without statutory interest on the deficiency. In extraordinary circumstances, a lump sum settlement may be justified; but in such cases there is to be an allocation between tax, penalty, and interest.

2. No case is to be settled on a so-called "nuisance basis," either for or against the IRS. As a rule of thumb, 10% for either side is considered a "nuisance settlement" and would be rejected by the government.

3. It is Counsel's general attitude to settle only the years and parties before the Tax Court, and not to tie-in either the settlement of other years or a settlement with respect to related taxpayers as a part of the settlement of the docketed case. If such a tie-in is necessary, Counsel will try to confine the expansion of the settlement documents to include only a collateral agreement. If such an agreement is executed, it is expected to speak for itself, with no commitment by the field office as to the position of the IRS for future years.
D. Collection Aspects.

1. The collection aspects of an agreed deficiency are normally not considered in the disposal of the case. Even though there may be a substantial basis for concluding that the taxpayer may not be able to pay the agreed deficiency, the case is still settled on its merits. If the taxpayer is unable to pay the deficiency, the offer in compromise procedure may be used.

2. If an agreement on a settlement stipulation cannot be reached due to the taxpayer's intent to file an offer in compromise, and it is concluded by Counsel that due to unusual circumstances the offer in compromise should be processed before the filing of the settlement stipulation, escrow procedures are followed. However, unreasonable delay is not permitted to occur due to filing by the petitioner of a series of offers in compromise, and judgment must be used in agreeing to a continuance of the calendared case due to the filing of an offer.

E. Other Years of Other Taxpayers.

1. A settlement of a pending case is not necessarily determinative of the action the IRS may take on similar issues for years not before the Court or with respect to related taxpayers. However, there are issues and factual situations which are classified as continuing issues, and the disposition of the Court years may have a direct effect upon the disposition of other years.

2. The IRS normally will follow a settlement effectuated by Counsel and the basis thereof when appropriate with respect to non-docketed years of the same taxpayer or related taxpayers. Where feasible, an overall settlement of all pending cases, both docketed and non-docketed, should be accomplished at the same time.
F. Tax Court Cases Having Criminal (Fraud) Aspects.

1. It is IRS policy not to hold settlement conferences in Tax Court cases which have open criminal aspects, except at the request of or with the concurrence of the Department of Justice. The basic principle involved is that in criminal cases referred to the Department of Justice for prosecution, Chief Counsel, or his delegate, should not, without a basis in the facts or law, recommend criminal prosecution on the one hand while on the other hand admit or concede there is no civil fraud penalty. Nor should Counsel allow evidence to be prematurely discovered in the civil proceeding that would not be readily available in a criminal case. As a practical matter, if Counsel has sufficient evidence to recommend criminal prosecution, or the Department of Justice determines that there is sufficient evidence to warrant an indictment, there should be sufficient evidence to support the IRS burden on the civil fraud penalty. This attitude prevails even if prosecution was declined in the strongest terms by the U.S. Attorney's office, a problem exacerbated by the lack of access to the U.S. Attorney's report to the Department of Justice, Tax Division.

2. If settlement discussions are to be entertained in an extraordinary case, the flexibility of Counsel depends on several factors, including whether the taxpayer is a fugitive, the status of the criminal case, and the existence of facts not previously known to the IRS or the Department of Justice.

G. Settlement Memoranda.

1. If, after receiving jurisdiction of a docketed case, Counsel proposes to settle or concede an issue or issues, Counsel immediately prepares a Counsel settlement memorandum setting forth the issues and the basis for the settlement or concession. The memorandum is intended to be concise, but is required to set forth sufficient facts and law to make clear the basis of settlement on each issue settled.
2. If the action taken by Counsel is on an issue not previously considered by Appeals, the memorandum must set forth the essential facts and the applicable law. If the issue was previously considered by Appeals, the memorandum is to include at least the following:

a. A brief summary of the essential facts upon which the decision is based, including any new facts not previously considered by Appeals.

b. An appraisal of facts previously considered if it differs from that of Appeals.

c. A discussion of the applicable law.

d. An enumeration and explanation of litigation hazards if the hazards are an essential factor in the settlement.

3. If the settlement will affect other years of the same taxpayer not before the Court, or the tax liabilities of other taxpayers, the memorandum must discuss the effect on those related matters.

H. Settlement After Trial.

1. After the trial of the case and receipt of the transcript, and before briefs are filed, Counsel is required to examine the transcripts and the exhibits in evidence to determine whether the case, or any issue litigated, should be conceded, or whether upon the basis of the record before the Court further settlement conferences should be held with the taxpayer, or taxpayer's counsel. This is considered particularly important in cases in which the IRS was not aware of all of the facts or evidence to be introduced before the trial of the case. Another reason to examine the record is to determine whether, in winning the issues, the IRS would create "bad law," or whether there is some other reason the issues ought not to be further litigated.

2. If the field office concludes, after trial and before briefs are filed, that one or more of the
issues should be settled or conceded, but not the whole case, such settlement or concession will be disclosed in the IRS brief or other appropriate document to be filed with the Court. In such an instance, Counsel is required to prepare a post-trial action memorandum on the settlement or concession. This memorandum, approved by District Counsel, will set forth the issues to be settled or conceded, the terms or the settlement or concession, and the facts and law in support. If the issue is one on which briefs are to be reviewed in the National Office, care will be taken to make the taxpayer aware that the settlement or concession is subject to review and final approval in the National Office.

3. District Counsel, or his delegate, still has authority to settle or concede issues in a case even after briefs have been filed, as long as an opinion has not yet been issued by the Court. However, if briefs in the case were reviewed in the National Office, the field office will not exercise this authority without first inquiring of the National Office whether there is any objection to the proposed settlement or concession. Settlements or concessions at this stage are carefully monitored to avoid conflict with the Court, which may have already done substantial work on an opinion.

I. Collateral and Closing Agreements.

1. It occasionally is necessary as a part of the settlement of the case either to obtain a collateral agreement from the taxpayer or to enter into a closing agreement to cover aspects of the settlement which will not be disposed of by the decision entered by the Court. A collateral agreement is a unilateral agreement on the part of the taxpayer in consideration of the IRS acceptance of the settlement offered. The case law is divided as to whether a collateral agreement legally binds the parties. A closing agreement and a compromise are absolutely binding upon both the taxpayer and the IRS for years not in litigation.
2. A closing agreement is normally prepared by either the District Director or Appeals. However, in settlements by Counsel, the closing agreement normally will be prepared by the trial attorney since he is in a better position to know the intent and effect of the settlement. Since the open years to which the agreement will apply may be pending investigation by the District Director, appropriate coordination is required to be made with that office and Appeals.

3. Counsel are encouraged to make settlements without closing agreements whenever a collateral agreement will be sufficient. If closing agreements are to be used, every effort is to be made to expedite the processing of the agreement so that the time necessarily involved in the additional review and consideration will result in as little delay as possible in the disposition of the case.

4. A closing agreement must be specific in its terms and not contain collateral matters which are not a part of the agreement. Matters outside of the agreement itself, or which pertain to a taxpayer not a party to the agreement, but which should be considered in review of the agreement, are to be contained in an accompanying memorandum. The closing agreement will not include an agreement as to the amount of tax liability or deficiency for any year over which the Tax Court has jurisdiction, since the liability for the docketed year will be fixed by the decision of the Tax Court.

J. Administrative Processing.

1. Appeals prepares all necessary computations and settlements or concessions.

2. In addition to the preparation of necessary computations, Appeals processes necessary collateral agreements, closing agreements, joint committee memoranda, the rejection or approval of outstanding claims for refunds of related taxes, and any other matters affected by the settlement.
K. Practical Suggestions/Discussion Points.

1. Find out early if the issues or case can be settled at all. For example, an issue may be a "litigation issue", which will preclude any settlement except concession on the part of the taxpayer. In addition, one may not be obtaining a fresh look at settlement if the case has been previously considered by Appeals and the dynamics between the Counsel attorney and Appeals Officer are such as to foreclose a change in IRS position.

2. Start settlement negotiations early -- the shorter the time period before trial, the more time and money has been spent on the IRS case, building up some momentum and "sunk costs".

3. Know your case and the dollars riding on each issue for all open years, not just the years that are docketed. Computations are frequently not done by the IRS until very late in the process, and the bottom line for the taxpayer will almost always be measured by dollars.

4. Narrow the issues as early as possible, making sure that there really is a disagreement on each adjustment or ground raised in the petition. After narrowing the issues, determine what facts would lead to a settlement or concession by Counsel, and then set out to obtain proof of those facts.

5. If technical issues are involved, requiring the use of experts, consider getting the taxpayer's expert and the IRS's expert in a room by themselves to discuss the technical aspects of the case. Of course, you should ensure that the "settlement privilege" applies to all such discussions.

V. CONSIDERATIONS IN SELECTING THE CHOICE OF FORUM

A. The Taxpayer's Alternatives in Contesting a Federal Tax Deficiency.

1. The taxpayer may contest the deficiency by filing a petition in the United States Tax Court. The Tax Court is available as a forum for a deficiency proposed in income taxes, estate
taxes, gift taxes, or some excise taxes.

2. The taxpayer may pay the amount stated in the deficiency notice, file a claim for a refund, and if the claim is not allowed, sue for a refund in a district court or the Claims Court.

B. Jurisdictional Prerequisites to Access Among the Forums:

1. Access to the Tax Court.
   a. Jurisdiction is dependent upon the issuance of a statutory notice of deficiency. § 6212.
   b. A notice of deficiency must be issued within three years after an income tax return is filed. § 6501(a). However, the period of limitation may be extended by mutual written consent of the taxpayer and the IRS. § 6501(c)(4).
   c. A notice of deficiency need not be in any particular form but must be sent to the taxpayer's last known address.
   d. Petitions to the Tax Court requesting a redetermination of deficiencies must be filed with the court within ninety days (150 days if the notice of deficiency is addressed to a person outside of the United States) after the notice of deficiency is mailed.
   e. Timely mailing of a petition or other document is treated as timely filing so long as mailing is by the United States Postal Service. § 7502. Postal delivery services other than the United States Post Office do not fall under this rule, and in those cases filing is the date of receipt.
   f. At the time of filing of a petition a fee of $60.00 shall be paid unless the taxpayer has elected to have the case treated as a "small tax case" as defined in Rule 171, in which event the fee is $10.00. The Tax Court may waive any filing fee if, based
on an affidavit containing specific financial information filed by a taxpayer, it concludes that he is unable to make such payment. § 7451; T. C. Rule 20 (b).

2. Prerequisites to the Commencement of a Tax Refund Suit.

a. Full payment of the tax assessed.


(2) Payments in anticipation of tax liability become tax payments only when the tax liability is assessed by the IRS.

b. Filing a timely claim for refund.

(1) No suit for refund of tax or penalties may be maintained in any court until a claim for refund has been filed. I.R.C. § 7422(a).

(2) When filing a claim for refund, an individual taxpayer is required to use amended return Form 1040X and a corporation, amended return Form 1120X. Claims for other taxes must be filed on Form 843.

(3) A claim must set forth in detail, verified under penalties of perjury, each ground upon which a credit or refund is claimed, and the facts sufficient to apprise the IRS of the exact basis thereof. A taxpayer may not assert grounds for recovery in his refund suit different from those which were asserted in his claim for refund.

(4) A claim is filed with the service center serving the Internal Revenue District in which the tax is paid.
(5) A claim must be filed within three years from the time the return was filed or within two years from the time the tax was paid, whichever is later. If no return is filed, the claim must be filed within two years from the time the tax was paid. I.R.C. § 6511(a).

(6) If the taxpayer executes a waiver extending the time for assessment of the tax (Form 872 or Form 872-A), this extends the period for filing refund claims until six months after the extended assessment period has terminated.

c. Timely Commencement of a Tax Refund Suit.

(1) No suit may be commenced within six months of the filing of the claim for refund unless the IRS has rendered a decision on the claim within that time. § 6532(a).

(2) A suit is barred unless it is commenced within two years from the date of mailing of a notice of disallowance. § 6532(a)(1). When a person files a written waiver of the requirement of a notice of disallowance, the two-year period begins on the date the waiver is filed.

(3) A suit for refund is commenced by filing a complaint in the district court or the Claims Court. F.R.C.P. 3.

(4) The district courts have original jurisdiction, concurrent with the Claims Court, of suits to recover internal revenue taxes alleged to have been erroneously or illegally assessed or collected. 28 U.S.C. §§ 1346(a)(1); 1491. Note that a prior claim for refund is a condition precedent to suit.
C. Preemptive and Predominant Factors to be Considered in Selecting the Choice of Forum.

1. Jurisdictional Prerequisites. The inability to satisfy the jurisdictional prerequisites of a particular class of action preempts the opportunity to choose among the forums. For example, a taxpayer who is unable to satisfy the Flora prior payment doctrine will have no choice but to litigate in the Tax Court in a redetermination proceeding, if the tax in question is otherwise within the Tax Court's jurisdiction. Similarly, a taxpayer who has not received a statutory notice of deficiency because of express waiver or payment of the tax before such notice can be issued has no choice but to pursue refund litigation.

2. Applicable Precedent. The existence of precedent is one of the more important factors in choosing a forum and necessitates thorough research of the legal issues before instituting suit. Any evaluation of precedent must take into consideration the decisions of the Court of Appeals to which an appeal may lie from the decisions of the district court or Tax Court. A decision by the Claims Court may be appealed to the Federal Circuit.

In the absence of clear precedent at the appellate court level, precedent at the trial court level becomes controlling. However, if there is a split of trial court authorities, then the precedents must be weighted in terms of probable outcome from an appeal. In this regard, some practitioners view an unappealed "regular" Tax Court decision as stronger precedent than an unappealed district court decision, and an unappealed Claims Court decision falls somewhere in between.
D. Other Factors For Consideration In Selecting A Redetermination Action In Tax Court Versus A Refund Proceeding.

1. Payment of Tax Deficiency. The taxpayer's financial situation will influence the choice of forum. If he is not in a position to pay the full amount of the tax deficiency proposed by the IRS, he can sue only in the Tax Court.

2. Jury Trial. A jury trial is not available in the Tax Court or the Claims Court. A taxpayer who wants a jury trial must bring suit in a district court. Many practitioners favor a jury trial when a nontechnical issue involves questions of intent or equitable considerations.

3. Judges. The Tax Court judges are tax specialists who come from a background of tax practice and hear only federal tax cases, giving them an expertise and technical outlook rarely found among district court and Claims Court judges. The district court judges are the generalists presiding at criminal trials as well as the widest range of civil jury and non-jury cases. Claims Court judges are experts in claims against the government and may be most sympathetic to the taxpayer in instances of IRS overreaching. Claims Court judges tend to be more tolerant of inexperienced trial counsel and more flexible than their district court counterparts.

4. Burden of Proof. The taxpayer's burden of proof is substantially the same in any of the three forums. In a suit for refund, the taxpayer must prove that the tax was overpaid and the amount of the overpayment. In a Tax Court proceeding, the taxpayer must prove that the Commissioner's deficiency determination was erroneous.

5. Government Counsel. In the Tax Court, the government is represented by attorneys in 49 District Counsel offices located in major cities throughout the country. In the district courts and the Claims Court, the government is generally represented by attorneys in the Tax Division of the Department of Justice. Some practitioners feel the Justice Department defense attorneys have less of the institutional loyalty which is often felt by District Counsel attorneys, and so
they may be more willing to concede a weak case or evaluate the case differently for purposes of settlement.

6. Availability of Discovery. In the Tax Court discovery is more restricted than that in the district court and the Claims Court. The Tax Court rules normally permit use of discovery tools only upon a showing that the parties attempted to exchange facts, documents, or information through informal consultation or communication. T.C. Rule 70(a)(1). There is a new rule concerning the nonconsensual deposition of an expert - Rule 76. Extraordinary circumstances must be involved before these depositions are taken. These depositions are within the Court's discretion and will be allowed only within a discretionary period after the case is assigned to a trial calendar. The rule allows the Court 15 days to resolve the motion to take deposition and also allows the opposing party to respond to the motion in writing. A hearing may be allowed at the Court's discretion. The deposition questions may be written or oral. The Court may order a deposition on its own motion. The transcript may be used for impeachment, and maybe instead of (or in addition to) an expert's report. The deposing party bears the costs unless the parties agree to share the costs. Parties must now exchange expert's reports 30 days before trial. These changes should encourage attorneys to obtain experts early and may increase settlements. The bench and bar are both waiting to see the impact of this new rule. In the Claims Court, discovery is allowed within the discretion of the court. In the district court, it is allowed as a matter of right.

7. Limitations. Filing a Tax Court petition tolls the statute of limitations for years at issue. Thus, through additional issues in answer and limited types of additional statutory notices of deficiency, the IRS can raise the taxpayer's monetary exposure. Filing of a refund action after the expiration of the statute of limitations limits the IRS to offsetting additional tax liability against refund otherwise
due. The Claims Court's broad offset counterclaim jurisdiction exposes the taxpayer against whom the government has an unliquidated or unsatisfied non-tax claim to defense of that claim and to monetary exposure in the event the amount of the government claim exceeds tax overpayment.

8. Service of Process. The Tax Court has similar power to a district court and the Claims Court in regard to punishment for contempt and enforcement of subpoenas, orders, and writs. The Tax Court and the Claims Court may authorize service nationwide. A district court, on the other hand, may issue a subpoena only to a witness within the district or within 100 miles of the courtroom if outside the district. The Claims Court may authorize service nationwide upon proper application and showing of good cause. Otherwise, service must be within 100 miles of the hearing or trial.

9. Pretrial Conference. In the Tax Court, a comprehensive pretrial conference is unusual, while it is routine in the district court and the Claims Court. The prospects for judicial intervention to narrow the issues and streamline the trial may thus be greater in a district court and the Claims Court, but the Tax Court is now paying more attention to pretrial.

10. Place of Trial. In the Tax Court, a taxpayer may request a convenient place of trial. District court trials are held in local district courts. Claims Court trials are held before trial judges in virtually any location convenient to the parties. However, note that sometimes a final decision necessitates a hearing in Washington, D.C.

11. Time of and to Trial. Tax Court stipulation process and Claims Court pretrial order procedures may tend to lessen time required for trial in many cases as compared to comparable trial in district court. The Tax Court is making major effort to bring trial calendars current, resulting in the possibility of trial within 12 months after the petition is filed. District court calendars are backlogged with criminal cases, thus increasing the delay in hearing civil cases.
12. Settlement. Settlement in the Tax Court will involve the Appeals Division, initially, unless the case was previously fully considered by Appeals before docketing in the Tax Court. District Counsel is not bound by the Appeals offer and may not be inclined to settle. Settlement in refund cases is usually not seriously considered by the trial attorney until after discovery is substantially complete, and then the trial attorney is subject to review. The Justice Department in Washington controls the final decision to settle.

13. Costs. A case can be litigated in the Tax Court at a cost which generally is less than would be incurred in a district court or Claims Court.

14. Publicity. Avoidance of publicity through the news media is sometimes sought by a taxpayer. The requirement that the taxpayer file a petition with the Tax Court or the Claims Court in Washington, D.C. minimizes the possibility of local publicity. The trial of a Tax Court case generally receives less publicity in a local newspaper than a district court trial.

15. Finality of Decisions. All three courts' decisions may be reviewed by a Court of Appeals as a matter of right. Supreme Court review is available only upon the granting of a petition for certiorari.
E. **Factors to Consider in Selecting a Choice of Refund Forum:**

1. **Jurisdiction.** The district courts have original jurisdiction, concurrent with the Claims Court, of refund suits. The difference between the two courts is that the district Court has jurisdiction to hear offset counterclaims, whereas the Claims Court has broader jurisdiction and may hear and determine any counterclaim.

2. **Venue.** Refund suits in district courts must be brought in the judicial district where the taxpayer resides. 28 U.S.C. § 1402(a)(1). Such venue requirement is not applicable to actions brought in the Claims Court.

3. **Jury Trial.** A jury trial is only available in a district court.

4. **Judges.** District court judges hear the broad range of diversity and Federal question cases and may or may not have a background in tax. As such, they may or may not be less inclined to hear complex tax arguments. District court judges tend to be extremely impatient with inexperienced trial counsel. The Claims Court sometimes has few, if any, judges with tax practice backgrounds. Claims Court judges seem to be more tolerant of inexperienced trial counsel and more sympathetic to "equity" issues.

5. **Place of Trial.** District court trials are held in the local district court. The Claims Court frequently sits anywhere necessary in the interests of resolution of the controversy and is very flexible in this regard.

6. **Taxpayer Counsel.** In district court, local counsel may be required, but this is not a requirement to an action in Claims Court.

7. **Government Counsel.** In the district courts and the Claims Court, the government is generally represented by attorneys in the Tax Division of the Department of Justice. Tax cases in the Southern District of New York and the Central and Northern Districts of California are handled by attorneys in the office of the U.S. Attorney. Tax cases in the southwestern part of the United States are handled by the Dallas field office of the Tax Division.
8. **Service of Process.** The Claims Court may authorize service nationwide. A district court is geographically limited to the applicable district, or within 100 miles of the courtroom if outside the district.

9. **Trial Time.** Claims Court pretrial order procedures tend to lessen time required for trial in many cases as compared to comparable trial in district court. District court calendars become backlogged with criminal cases, delaying trial settings in many areas.

10. **Appeals.** Appeals in the district court are to the local circuit. Claims Court appeals are to the Federal Circuit.