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PROCEDURES AND PRACTICES IN THE ADMINISTRATIVE AND JUDICIAL SETTLEMENT OF FEDERAL TAX DISPUTES

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INTRODUCTION

Frequently, the need for a greater lawyer understanding of the substantive law of income, excess profits, estate and gift taxes is emphasized. It seems equally important that the practitioner should know something of the procedural steps involved in the settlement of such tax cases. A thorough understanding of both administrative and judicial procedure is essential to the lawyer representing clients disputing their tax liability. While this article does not attempt an exhaustive analysis of all the problems, it does set forth the basic administrative and judicial procedures essential to an understanding of this important phase of tax law.

Initially, attention must be directed to administrative procedures. In the first place, all tax cases arise administratively in the sense that a court action does not accrue until some form of administrative action gives rise to a cause of action. Second, the large majority of tax cases never reach the courtroom. Approximately eighty-five per cent of all disputed cases are concluded within the jurisdiction of the Internal Revenue Service, while only about fifteen per cent are ever docketed in one or the other of the courts having jurisdiction. An even smaller percentage are actually tried. Third, from purely a strategic point of view, a thorough understanding of administrative procedure enables counsel to process a tax case efficiently and gain future advantages for his client in possible subsequent administrative and judicial proceedings.

GENERAL TYPES OF TAX CASES AND HOW THEY ARISE

Since tax disputes arise administratively it seems important to emphasize at the outset that admission to practice before the Treasury Department is a prerequisite to the handling of cases before the Internal Revenue Service. Attorneys, lawfully admitted to practice in the state of their residence and regularly engaged in the pri-

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vate practice of law, are eligible for enrollment to practice before the Treasury Department and are designated as attorneys or counsel.[1] Every enrolled attorney is subject to the regulations promulgated by the Secretary of the Treasury governing the practice of agents and attorneys representing claimants before the Treasury Department or any of its offices.

The most important of these regulations provide that counsel, as a prerequisite to the representation of any taxpayer, must receive from his client a power of attorney and file a fee statement. The power of attorney is in form quite like any other power of attorney except that it specifies that counsel may act in the name and place of the taxpayer in matters pending before the Internal Revenue Service and designates the particular years involved. An example of such a power of attorney will be found in the Appendix.[2]

The regulations further provide that no counsel shall exact from a client a manifestly unreasonable fee, contingent or otherwise. Contingent fees are not prohibited but the particulars thereof must be disclosed to the Internal evenue Service so that they may be reviewed by the Director of Practice to determine their reasonableness. Such fees are permissible when the financial status of the taxpayer is such that he would otherwise be unable to obtain counsel. Partially contingent fees are permissible when provision is made for a minimum fee substantial in its relation to the possible maximum fee and which minimum fee is to be paid regardless of the outcome of the case. Consequently, each power of attorney should be accompanied by a fee statement which simply declares either that counsel has not entered into a contingent fee arrangement with his client or, if he has, the statement should disclose the details.[3] The Appendix contains an illustrative fee statement.[4]

Tax cases can arise in many different ways but in the main they can be grouped into three general classifications: requests for rulings; claims for refund; and the assessment of tax deficiencies. While the latter involves a far more complex procedure than the first two, these should still receive some consideration here.

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1. U. S. Treas. Cir. #230, § 10.3(a) (1) (i), revised, December 7, 1951. The Circular also provides for the enrollment of certified public accountants if they are lawfully engaged in the private practice of their profession and enrolled accountants are designated as "agents".

Lawyers and accountants who are employed on a full-time basis and who do not maintain offices apart from such employment with their services available to the general public are not eligible for enrollment.

Applications for enrollment may be secured from the Committee on Practice, Treasury Department, Washington, D. C.

2. See page 179 *infra*.

3. U. S. Treas. Cir. #230, § 10.2(y) (1), (2), (3) & (4).

4. See page 180 *infra*.

Requests for Rulings. A request for ruling is a formal request to the Commissioner of Internal Revenue for an interpretation of a provision-or provisions-of the *Internal Revenue Code* involving its application to a particular transaction. Such requests are made to the Commissioner, except where a request is made for a ruling regarding the application of the *Code* to a pension trust plan, profit sharing or stock bonus plan. In these latter instances, the Commissioner has designated the District Director of Internal Revenue for the various collection districts as the official to issue rulings pertaining to pension trusts and similar plans.[5] An organization or agricultural cooperative claiming tax exemption under the *Code* obtains its rulings as to its exempt status by filing an application for exemption with the District Director of Internal Revenue for its district.[6]

With the exception of pension trusts and similar plans and applications for exempt status, there are certain requirements in the preparation of a request for ruling. These requirements, quoting from the regulations, are:

> "(f) *Instruction with respect to submission of requests for rulings of determination letters.*
>
> (1) Requests for determination letters and rulings should be submitted in duplicate if more than one issue is presented in the request. Requests relating to prospective transactions should not contain alternative plans. Each request for a determination letter or a ruling on either a prospective transaction or a completed transaction must include the following:
>
> (i) A complete statement of the facts regarding the transaction, including the names and addresses of all interested parties, together with a copy of each contract or other document necessary to present such facts. (inasmuch as exhibits and documents will be retained in the Service files, original documents should not be furnished.) If the subject matter is a corporate reorganization distribution, or similar related transaction, there should also be submitted the corporate balance sheet nearest the date of the transaction (the most recent balance sheet if the transaction is prospective).
>
> (ii) A full and precise statement of the business reasons, if any, for the transaction.
>
> (iii) If the taxpayer is contending for a particular determination, an explanation of the ground for such contention together with a memorandum of relevant authority."[7]

The request for ruling must be signed by the taxpayer or his

5. These requests for rulings usually pertain to the qualification of a pension trust, stock bonus or profit sharing plan under Section 401 of the Internal Revenue Code.
6. U. S. Treas. Reg., § 601.201(k) (1955).
7. *Id.* at § 601.201(f) (1).

duly authorized representative. If by the latter, the necessary power of attorney and fee statement must accompany the request.

The request for ruling is sent to the Commissioner of Internal Revenue, Washington 25, D. C., with the following exceptions.[8]

Requests with relation to the exempt status of corporations and requests as to the qualifications of pension trusts or related plans under Section 401 of the *Code* are sent to the office of the District Director in the district where the particular taxpayer resides.[9]

The Internal Revenue Service will not issue rulings on theoretical or hypothetical questions nor will they issue a ruling upon an oral request of a taxpayer,[10] nor will a ruling be issued if the Commissioner knows or has reason to believe the issue is before the District Director in an active examination or audit of the taxpayer's liability for a particular year.[11]

Rulings will not be issued on certain types of questions where the determination requested is primarily one of fact, for example, (1) market value of property, (2) whether the compensation is reasonable in amount, (3) whether a transfer is one in contemplation of death, (4) whether retention of earnings and profits by a corporation is for the purpose of avoiding surtax on its shareholders, or (5) whether a transfer or acquisition is within Sec. 1551 or Sec. 269 of the *Code* which relate to the disallowance of surtax exemption, accumulated earnings credit, and acquisitions made to evade or avoid income tax.[12]

Rulings, when made, are not rulings of law. They represent the opinion of the Commissioner as to the application of the provisions of the *Internal Revenue Code* on specific transactions. A ruling which has been supplanted by case law, or is no longer in accord with the position of the Commissioner may be modified or revoked. However, it is the general policy of the Internal Revenue Service to limit the revocation or modification of a ruling issued to, or with respect to, a particular taxpayer to a prospective application only, if (1) there has been no misstatement or omission of material facts, (2) the facts subsequently developed are not materially different from the facts upon which the ruling was based, (3) there has been no change in the applicable law, and (4) such taxpayer acted in

8. *Id.* at §§ 601.201(f) (1) and 601.201(a) (1) and (2).
9. *Id.* at §§ 601.201(l) (2) and 601.201(k) (1).
10. Prospective transactions may be submitted for rulings. See U. S. Treas. Reg., § 601.201(f) (1) (1955). The Commissioner will not give advice on questions which do not concern an actual case, present or prospective. Regarding oral requests, see U. S. Treas. Reg., § 601.201(h) (1955).
11. U. S. Treas. Reg., § 601.201(b) (2) (1955).
12. *Id.* at § 601.201(e).

good faith in reliance upon such ruling and a retroactive revocation would be to his detriment.[13]

Claims for Refund. A claim for refund is a request directed to the Internal Revenue Service for the repayment of taxes overpaid. It is made by filing with the District Director a Treasury Department Form No. 843, an example of which is found in the Appendix.[14] In the case of a claim for refund of income taxes by an individual, claim can also be made by filing a properly executed amended income tax return.[15] Claims for the refund of excess inheritance taxes, gift taxes, and corporation and fiduciary income taxes *must* be made on the refund claim form. A separate claim must be filed for each taxable year or period.

When a claim for the refund of excess income taxes paid by an individual is made by filing an amended return, the return is prepared to show the corrected figures used to compute the income of the taxpayer and the corrected computation of the tax with the correct tax shown in its proper place on the return. Below these computations the amount of tax originally paid and the difference between the two representing the amount of the refund claimed should be shown. The amount of refund should be designated on the return as "amount to be refunded", or by some other appropriate language. A statement should be attached to the amended return explaining the reasons for the erroneous overpayment which supports the taxpayer's request for the refund of taxes overpaid. If the individual taxpayer uses Form 843, a space is provided for the statement of reasons upon which he relies for making the claim.

Each refund claim, whether made in an amended return or on Form 843, should be signed by the taxpayer or by his counsel. If counsel has prepared the claim on a Form 843, it is required that a statement be attached thereto stating that fact. If he has not prepared the claim, this fact should be stated. He should also state whether he knows the facts stated therein, of his own knowledge, to be true. If he does not, he should so state. He may state that he believes those facts to be true.[16]

Claims for refund should be filed with the office of the District Director to whom the original return for the year in question was filed, or if the claim is made for additional taxes assessed upon an

13. *Id.* at § 601.201(i) (4).
14. See page 181 *infra.*
15. U. S. Treas. Reg., § 601.105(e) (1) (1955).
16. U. S. Treas. Cir. #230, § 10.2(g) (1951).

audit of a return, the claim should be filed with the Director from whose office the assessment was made.[17]

When a claim for refund is filed, the District Director refers it to the Audit Division of his office which is that section of the office charged with responsibility for auditing tax returns and determining deficiencies. This Division reviews the claim and if necessary investigates the original tax return of the taxpayer to determine whether he has, in fact, overpaid his tax or whether or not there are other corrections required in the return which affect his tax liability. As a practical matter, the filing of a claim for refund is an invitation to the District Director to audit your client's return for the particular year for which the claim is filed. Thus, it is recommended that you make sure that your client's tax return for the year in question is otherwise invulnerable to an audit before you recommend the filing of a claim for refund. All too often a taxpayer who believes he has overstated his allowable expenses on his return files a claim for refund only to discover he has forgotten to declare items of gross income on the original return which not only wipes out his claim for refund but also results in an additional deficiency.[18]

Generally speaking claims for refund must be filed within three years after the return was filed or within two years after the tax was paid, whichever period expires later.[19] If estate or gift taxes are involved, the period of limitations is within three years after the payment of the tax.[20] In cases of refund of estate or gift taxes, recovery is limited to that portion of the tax paid within three years immediaely preceding the filing of the claim.[21]

If the claim is disallowed the taxpayer will receive a registered mail notice of disallowance by the Director. Such action paves the way for the taxpayer to commence a civil suit for refund.[22] Aside from this judicial remedy, at this point the taxpayer may take advantage of certain administrative procedures to settle the dispute such as the informal conference, protest and so on which will be considered later in connection with deficiency assessments. As a practical matter, however, it is unlikely that the administrative procedure within the Internal Revenue Service will prove effective after the disallowance of a claim, unless there are facts which have

17. U. S. Treas. Reg., § 601.105(e) (1955).
18. See page 165 *infra*.
19. 26 U. S. C. § 6511(a).
20. *Id.* at § 5601(a).
21. *Id.* at § 6511(b) (2) (a).
22. See page 165 *et seq. infra*.

developed or become known after the agent's examination, or unless the original disallowance is based on clearly apparent errors of the agent upon which the disallowance is based.

If the claim for refund is allowed, the taxpayer is notified and the amount is specified. The claim may be allowed in a reduced or an increased amount from that originally claimed depending upon the agent's examination. On rare occasions when the claim is increased, the taxpayer is asked to file an amended claim or an additional claim for the extra amount, assuming of course the time for filing the claim has not expired. This is because the regulations provide that no refund or credit will be allowed except on the grounds set forth in the claim filed before the expiration of the period of limitations.[23] Thus if the taxpayer files a claim for refund, for example, on the theory that certain deductions were understated on his return, and upon audit by the revenue agent, it develops that he erroneously overstated his gross income, if the time for filing the claims for the particular period has not expired, an additional or amended claim can be filed and the taxpayer's refund allowed in an increased amount from that originally claimed. If the time for filing claims for a particular period has expired, the Commissioner does not have power to consider an amended claim for that period based on different grounds from those stated in the original claim.[24]

Assessment of Tax Deficiencies. The greatest number of tax cases arise from the examination of the tax return involving either income, estate or gift taxes by an Internal Revenue agent which results in the assessment of a tax deficiency following the examination. The examination of individual, corporate or fiduciary income tax returns is conducted by the Audit Division of the District Director's office. Estate and gift tax returns are examined by an agent assigned to the Estate and Gift Tax Section of the Audit Division of the District Director's office.

An audit is usually initiated by the sending of a letter to the taxpayer informing him that his tax return for a particular year has

23. U. S. Treas. Reg., § 301.6402-2(b) (1) (1954).

24. United States v. Garbutt Oil Co., 302 U. S. 528 (1938); United States v. Andrews, 302 U. S. 517 (1938). Hankison v. United States, 154 F.2d 1019 (6th Cir. 1946), *affirming*, 66 F. Supp. 239 (N. D. Ohio 1945); Mesta v. United States, 137 F.2d 426 (3rd Cir. 1943); Combination Gold Mining Co. v. Crooks, 95 F.2d 885 (8th Cir. 1938).

In this connection, it should be noted that Section 1311 of the Internal Revenue Code deals with the relaxation of the statute of limitations to relieve hardship cases. It is possible that under certain circumstances, this section may be invoked where the time for filing the claim for refund has expired and it becomes apparent to the taxpayer that additional grounds for the claim should have been included in the claim. However, the scope of this paper does not permit excursions into the tremendously complex problems that could conceivably arise in applying Section 1311 to this situation.

been referred to an agent for examination. It is suggested that the taxpayer call at the agent's office at an appointed time bringing with him his books and records, checks and bank statements and any other relevant material so that the audit of the return can commence. If, for any reason, the audit cannot be conducted at the office of the Internal Revenue agent, then the agent is usually accommodating and will agree to do his work at the taxpayer's place of business or some other convenient place.

The internal revenue agent has certain subpoena powers, he may:

> "(1) . . . Examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax or required to perform the acts, or any other person, the secretary or his delegate may deem proper, to appear before the secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data and to give such testimony, under oath, as may be relevant to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."[25]

This section of the law has resulted in some litigation arising principally out of the efforts to require attorneys, accountants and doctors to produce records or give information involving privileged communcations. One of the landmark cases is *Shapiro v. United States*,[26] which involved a subpoena issued by the price administrator under the authority of the Emergency Price Control Act. In a five to four decision the Supreme Court held that the constitutional privilege against self-incrimination did not extend to the production, whether by a corporate officer or one engaged in a non-corporate business, of records and documents which were required to be kept by a valid regulation issued under a valid act, and that they thereby became public documents as to which no constitutional privilege against self-incrimination attached. Although not involving a tax question, the *Shapiro Case* has been used as a precedent by the courts in upholding the power of agents to subpoena books and records. The theory of the decision's application is that inasmuch as the *Code* requires taxpayers to keep records for purposes of examination, the Commissioner, acting through the agents, is

25. 26 U. S. C. § 7602(1), (2) and (3).
26. 335 U. S. 1 (1948).

also authorized to examine the books and records required to be kept.

Thus, in *Falsone v. United States*,[27] the Fifth Circuit considered a case involving a certified public accountant who had been subpoenaed to produce the books of one of his clients. This case arose in Flordia where communcations between accountant and client are privileged by statute. The court held that the federal law dealing with the examination of the taxpayer's books and witnessed by the Commissioner would prevail over the state law. In keeping with the *Shapiro* doctrine, they held that the taxpayer was required to keep records and since the Commissioner was empowered to subpoena the records and examine persons concerning them, the claim by Falsone of privileged communcations between himself and his client was to no avail. The action of the United States Supreme Court in denying certiorari gives added stature to the rule in the *Falsone case*. However, other courts have held to the contrary. In *Chapman v .Goodman*,[28] the court held that an attorney properly subpoenaed to appear before a special agent of the Internal Revenue Service to give testimony on the matter of the tax liability of a client under investigation could refuse to answer any specific question which might violate the confidential relationship of attorney and client.

The great area of danger to taxpayers insofar as the *Shapiro* and *Falsone* doctrines are concerned is in the field of possible criminal prosecutions for fraud. These problems will be dealt with later in this article. However, it should be noted that the government has not in practice pushed the *Falsone* and *Shapiro* doctrines to their logical extreme.[29]

If in the examination of the taxpayer's return the agent finds errors or corrections he will then file a report of his examination with his immediate superior, an official known as the "group chief", who may either approve the report or return it for further work. Assuming the group chief approves the report, the taxpayer, may then request an informal conference with the agent and the group chief. The informal conference is simply a discussion between the agent, his counsel, if desired, the agent and the group chief involving the findings of the agent. If the taxpayer has any reasons, factually or legally, why any or all of the agents recommendations

27. 205 F.2d 734 (5th Cir. 1953), *cert. denied*, 346 U.S. 864 (1953).
28. 219 F.2d 802 (9th Cir. 1955).
29. See *New Developments in Fraud and Negligence*, 5 J. TAXATION 357 (1956). See also, Barker, *Accountant in Fraud Cases*, 6 J. TAXATION 20 (1957). For other cases on this problem, see *In re* House, 144 F. Supp. 95 (N. D. Calif. 1956); United States v. O'Connor, 53-2 CCH U. S. T. C. § 9591 (D. C. Mass. 1953).

should be overruled, he can present them at that time. It is not limited solely to the issues raised by the agent's audit. All possible issues bearing on the taxpayer's liability for the year or years involved may be considered. There are no formal procedural requirements involved in the informal conference.

Following the informal conference, or if none is had, the taxpayer will receive a letter notifying him that the examination of his return resulted in a proposal by the agent to make certain corrections in his return giving the taxpayer 30 days to file a formal protest. This is the so-called "30-day letter", an example of which is in the Appendix.[30] The 30-day letter will have attached to it a statement of the proposed changes in the taxpayer's return as recommended by the agent. Upon receipt of the letter and appended statement the taxpayer has 30 days in which to file a protest with the District Director. A protest is a formal written document much in the nature of a pleading setting forth the taxpayer's position with respect to each of the issues involved. See the Appendix for an example.[31] From the information contained in the 30-day letter the taxpayer will be able to prepare his protest.

Protests, together with any statement or exhibits attached to them, must be executed under oath, and if prepared by an attorney, the requirement of a power of attorney and fee statement already discussed, must be observed. There is no required form for a protest. But is must contain the following information:[32]

1. The name and address of the taxpayer, individual or corporation.
2. If a corporation, the state wherein corporated must be given.
3. Designation by date and symbol of the 30-day letter must be given.
4. The years involved, the amount of tax liability and the penalty, if any, must be stated.
5. An itemized schedule of the findings that are excepted to by the taxpayer must be set forth.
6. A statement of the grounds upon which the taxpayer relies and upon which the protest is based.
7. If a hearing on the protest is desired, a statement requesting it must be added.

Protests are usually prepared in the form of a letter to the District Director to which a verification is added, not unlike the verification of a pleading in the usual civil action. The protest may take

30. See page 182 *infra.*
31. See page 183 *infra.*
32. U. S. Treas. Reg., § 601.105(d((3) (1955).

the form of an affidavit. It must be signed by the taxpayer and filed in triplicate.[33] However, no fee is payable on the filing of the protest.

If desired, exhibits may be attached to the protest such as financial statements or documents relevant to the points involved. A brief may also be submitted setting forth the taxpayer's position. At this point in the development of a tax case facts are all important and should receive the greater emphasis in the brief. This is not to say that the *Code*, regulations and case law should be ignored; rather, the focal point of the controversy at this stage is the facts and they should be emphasized accordingly.

After the protest is filed with the District Director's office, it is referred to the Appellate Division of the Office of the Regional Commissioner for further study and hearing. The Regional Commissioner's office for this area is located in Omaha, Nebraska, with an area or branch office located at St. Paul, Minnesota. This office handles the appellate work for North Dakota.

When the protest has been referred to the Appellate Division the case is assigned to one of the members of that office who is known as a conferee. He studies the report of the examining agent, together with the protest and other relevant documentary material and arranges for a hearing. For this area hearings are usually held at the St. Paul office.

At the formal conference, both the taxpayer and the District Director may be represented by counsel.[34] If he wishes, the taxpayer may present his case either in the form of witnesses whom he may bring in person to state what they know about the issues or he may present their testimony in the form of statements or affidavits. The latter is the usual practice. In addition, the testimonial evidence may be supported by all relevant documentary material.

A formal conference differs from the informal conference between the agent, group chief and taxpayer at the District Director's level in that the formal conference considers only those issues determined in the 30-day letter and raised by the taxpayer in the protest. Any material matter of fact pertaining to an issue first raised by the taxpayer in the formal conference will be referred back to the District Director for investigation and report.[35]

At the conclusion of the formal conference before the Appellate Division and after the issues are fully discussed by both sides, the

33. *Ibid.*
34. U. S. Treas. Reg., § 601.106(c) (1955).
35. *Ibid.*

taxpayer is given an opportunity to present an offer of settlement. It is a long established policy of the Service that the taxpayer must initiate settlement offers. The Service will not make an offer to settle a case. Furthermore, the Appellate Division will refuse to consider an offer which is based upon a nuisance value of the case to either of the parties. Serious consideration will be given to an offer of settlement which fairly reflects the strength or weakness of the opposing views.[36]

If at any of the foregoing stages in the proceedings, it appears that the statutory period for assessing a deficiency is about to expire, the disputed issue is one which at that particular stage cannot be settled administratively due to a position taken by the Commissioner with respect to the issue, or if at the hearing on the protest no offer of settlement is made or the offer is rejected, the statutory notice of deficiency will be issued to the taxpayer.[37] This is the so-called "90-day letter", an example of which is set forth in the Appendix.[38] It is so designated because it notifies the taxpayer of the formal assessment of a deficiency in taxes against him and gives notice that within 90 days from the date of the letter the deficiency assessment will become final. Within the ninety day period, the taxpayer may then file a petition in the United States Tax Court. His failure to file a petition in the Tax Court within the alloted time will result in the tax becoming due and payable in which event his remedy is payment of the tax and suit for a refund in the Federal courts. These matters of judicial relief are considered in more detail later.[39]

RESOLVING THE TAX DISPUTE

I. Settlement within the Internal Revenue Service

A tax case can be settled at any of the levels previously discussed. A taxpayer can make an offer of settlement to the examining agent at the time of the audit, at the time of the informal conference, to the conferee at the time of the formal hearing on the protest, or at subsequent stages. A discussion of settlement procedures at these levels can be considered more conveniently by resorting to the distinction between non-docketed and docketed cases. A non-docketed case may be defined as one pending at any stage of the admin-

36. U. S. Treas. Reg., § 601.106(f) (2) (1955).
37. 26 U. S. C. §§ 6212-6213. *Id.* at § 601.106(d) (1) (ii).
38. See page 184 *infra*.
39. See page 165 *et seq. infra*.

istrative process prior to the filing of a petition in the Tax Court.[40] A docketed case is one in which the ninety day letter has been issued and pursuant thereto the taxpayer has filed a petition in the Tax Court.[41]

Non-Docketed Cases. Since the Commissioner is prohibited from assessing a tax for a period of ninety days from the date of the mailing of the formal deficiency notice,[42] the amount of the agreed tax liability cannot be assessed against the taxpayer and the case settled unless he waives the ninety day period and consents to the immediate assessment of tax without the mailing of the formal notice of deficiency as provided by law.[43]

If a tax case is settled below the Appellate Division level, the settlement is accomplished by the execution of a document entitled "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax". This is also designated as Treasury Department Form #870, a copy of which is reproduced in the Appendix.[44]

After the execution of the Form #870, the District Director's office will make the formal assessment of tax, if any, and notify the taxpayer of the amount thereof. The taxpayer is then obliged to pay the amount of the tax determined. However, it should not be assumed that this closes the case or that the Commissioner's or taxpayer's rights are thus terminated. The Form #870, by its own terms, says that it is for the purpose of expediting the adjustment of the tax liability. Thereafter, the Commissioner may assert a further tax deficiency for the year involved if he does so within the statutory period and the taxpayer may take advantage of a civil suit for refund to further determine the question of his tax liability.[45] The right of the taxpayer to later litigate questions involving his tax liability in a refund suit, either in the United States District Court or the Court of Claims following the execution of a Form #870 has been sustained in a number of cases.[46] These cases hold that the execution of the Form #870 is binding upon neither the taxpayer or the government because it is not a final closing agreement,

40. U. S. Treas. Reg., § 601.106(d) (1). It is to be noted that the distinction made in the Regulations between non-docketed and docketed cases applies only at the Appellate Division level. However, the distinction is equally applicable at stages of the dispute below the Appellate Division.

41. *Id.* § 601.106(d) (2).

42. 26 U. S. C. § 6213(a).

43. *Id.* at § 6213(d).

44. See page 185 *infra.*

45. See page 165 *et seq. infra.*

46. John v. United States, 138 F. Supp 89 (E. D. Wis. 1956); Cabin Creek Consolidated Coal v. United States, 137 F.2d 948 (4th Cir. 1943); Hamil v. Fahs, 129 F. Supp. 837 (D. C. Fla. 1955); Steiden Stores, Inc. v. Glenn, 94 F. Supp. 712 (W. D. Kyn. 1950); Payson v. Commissioner, 166 F.2d 1008 (2nd Cir. 1948); Whayne v. Glenn, 107 F. Supp. 308 (W. D. Kyn. 1952).

signed or approved by the Secretary of Treasury as is otherwise provided for under Section 7121 of the *Internal Revenue Code.*[47]

Settlement of a non-docketed tax case at the Appellate Division level is effected by the execution of a document known as the "Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax". This is designated as Treasury Department Form #870 AD, a copy of which is set forth in the Appendix.[48] From a comparison of Form #870 and Form #870 AD, it will be noted that the latter is an offer of wavier and has no effect until it is accepted on behalf of the Commissioner of Internal Revenue. Further, the Form #870 AD provides that if the proposal or "offer" is accepted by, or on behalf of, the Commissioner, "the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material facts, or an important mistake in mathematical calculations; and no claim for refund shall be filed or prosecuted for the year(s) . . . stated other than for the amounts of over-assessments shown . . ." At the bottom of the form — as in form #870 — there is a note which informs the taxpayer that the Form #870 AD is not a final closing agreement under Section 7121 and does not extend the statutory period of limitations of refund assessment or collection of tax.

Notwithstanding the restrictive language in Form #870 AD, it has been held that the taxpayer is not precluded from repudiating the agreement, filing a claim for refund and bringing a suit thereon.[49] This is based upon two grounds. First, it has been held that Congress provided an exclusive method through Section 7121 of the *Code* by which tax cases could be finally settled and in consequence, Congress did not intend to intrust final settlements to subordinate officials in the Service.[50] Second, that since the offer of waiver did not purport to bind the government in that its execution did not preclude the assertion of a further tax deficiency for the year involved, the taxpayer himself was not bound by the terms of the agreement.[51] Therefore, an execution of Form #870 AD which has not been — and in practice, is not — concurred in by the Secretary of the Treasury or his delegate and declares by its

47. A discussion of the ramifications of final closing agreements under Section 7121 of the Internal Revenue Code are not considered in this paper. These agreements are almost never employed in the average tax case.

48. See page 186 *infra.*

49. Botany Worsted Mills v. United States, 278 U. S. 282 (1929); Joyce v. Gentsch, 141 F.2d 891 (6th Cir. 1944); Cuba Railroad Co. v. United States, 124 F. Supp. 182 (S. D. N. Y. 1954). See also, cases cited at note 46 *supra.*

50. Botany Worsted Mills v. United States, *supra* note 49.

51. *Ibid.*

terms that it is not a final closing agreement and does not purport to bind the government pursuant to Section 7121 is not effective to estop the taxpayer from filing a claim for refund and bringing suit thereon.

One change in the language of Form #870 AD subsequent to the decisions upon which the foregoing analysis is based might provide the government with a defense in taxpayer's suits for refund subsequent to the execution of the form. The modification of Form #870 AD as of March, 1955, eliminates the provision to the effect that the assertion of a further deficiency in tax for the years involved is not precluded. Hence, the Government may argue that its right to assert a deficiency is foreclosed by a signing of the offer of settlement, and that the taxpayer's right to repudiate the agreement is also foreclosed.[52] However, it is suggested that this recent modification in the Form #870 AD and the possible argument suggested here cannot overcome the basic rationale of the decisions holding that the final settlement method provided in Section 7121 is exclusive. In other words, the modified Form #870 AD cannot, by its terms, be substituted for the final closing agreement provided for in Section 7121.

Docketed Cases. Settlement jurisdiction in a docketed case is retained by the Appellate Division, but in this status it is subject to the approval of the Office of the Chief Counsel — or, if in the area offices, the Regional Counsel's office — who are the attorneys for the Commissioner, and who represent him before the United States Tax Court.[53] Since a docketed case is one pending before the Tax Court, settlement can only be effected by a written stipulation between the parties which may be signed by their respective counsel agreeing to the amount of the tax liability, if any, for the year involved with the approval of the Tax Court. A suggested form of this stipulation is reproduced in the Appendix.[54] The stipulation is then filed with the Tax Court and an appropriate order is entered which accepts and makes final the agreement of the parties. The Appendix contains an example.[55] This constitutes an adjudica-

52. This was the point upon which Guggenheim v. United States, 77 F. Supp. 186 (Ct. of Cl. 1948), *cert. denied*, 335 U.S. 908 (1949) was decided. In this case the language in Form #870 TS (now Form #870 AD) giving the right of the Commissioner to assert a further deficiency was struck out at the time of the execution of the offer of waiver. Hence, the Court found that since the Commissioner's right to assert a further deficiency had been foreclosed, the taxpayer did not have a correlative right to bring a refund suit. See also W. J. Voit Rubber Corp. v. United States, 110 F. Supp. 277 (S. D. Calif. 1953).

53. U. S. Treas. Reg., § 601.106(a) (2) (i) (1955).

54. See page 187 *infra.*

55. See page 188 *infra.*

tion of the taxpayer's liability for the year or years involved and terminates the rights of the taxpayer accordingly.

To conclude the discussion of settlement within the Internal Revenue Service, it is important to note that careful use of administrative proceedings will forestall future problems in litigation should the case develop to that point. For example, as will be observed later, there are many instances when a tax case might be litigated more effectively in the District Court where a jury can be obtained. A case settled in a non-docketed-status can be made the subject of a refund suit in the District Court. However, if counsel permits the case to develop into a docketed status where settlement can only be effected by a stipulation and order of the Tax Court, his right to later sue in the District Court and obtain a jury trial is foreclosed. In these and similar instances, a sound analysis of the tax case and a good knowledge of administrative procedures is essential.

II. Settlement or Litigation

In the settlement of tax controversies the taxpayer may be faced with the eventuality of litigation for any number of reasons. However, before this last and controlling step is taken, two questions should be answered. First, is there anything to be gained by going to court? After considering with some particularity the relative advantages of settlement or litigation, perhaps it will be found that a few concessions necessary to settling the dispute within the administrative framework may be more to the taxpayer's advantage than embarking upon an expensive and time consuming law suit. Or, perhaps it is to the best interests of the taxpayer to proceed with the litigation. If so, in which one of the three courts having jurisdiction of tax cases is he likely to obtain the best possible adjudication of the controversy which may result in a favorable decision on his tax liability? The factors which determine these questions should never be overlooked when faced with the possibility of tax litigation.

We can divide our discussion of the first question into (1) assessing the probabilities of success in court; (2) the expenses of litigation; and (3) the danger of increased liability. The first and most important step is to assess the probabilities of success in court. This depends to a large extent upon (1) the ability to prove your factual assertions and (2) the court to which you take your case.

As to proving your factual assertion, you should first turn your attention to a consideration of those facts which will be believed

by the Commissioner or agent and those which will not. During the settlement negotiations many reasonable assertions made by the taxpayer or his counsel will often be believed without the degree of proof required in court.

Consider a case where two principal issues are involved: first, the reasonableness of a corporation officer's salary; and second, the basis for depreciating a capital asset of the corporation. The Commissioner has probably determined that a lesser amount in salary than that claimed on the return is a reasonable salary and has declared that the excess is not deductible by the corporation. Assume that the Commissioner has also determined that the capital asset has a smaller cost basis and a longer useful life than those claimed in the depreciation schedule. If the taxpayer's proof on the depreciation item is weak or questionable and his evidence on the reasonableness of the executive's salary is more persuasive, a concession as to the basis and useful life of the capital asset may be followed by a concession of the Commissioner on the salary question. The taxpayer will probably then avoid the necessity of establishing the reasonableness of the executive's salary, as well as the cost basis and useful life of the capital asset in subsequent litigation.

It is true that even though a case may go to court the Government's counsel and counsel for the taxpayer may cover many disputed points by stipulations and thus relieve the taxpayer of the burden of proof.[56] It has been pointed out that Government counsel will stipulate a fact, but not unless he is satisfied that it is a fact.[57] Therefore, taxpayer may still have to prove the fact. Again, it can become hazardous, burdensome and expensive. Probably the most important point to remember is the change in complexion that takes place in going from the settlement table to court. The give and take atmosphere in negotiation and settlement is likely to disappear in the courtroom.

Second, do not fail to consider what proof is available in considering whether to settle or file a law suit. Most tax cases involve business records. Common types of evidence such as books of account, checks and bank statements, deposit slips, and so on, are the usual exhibits in a tax case. Are these records complete and adequate? Do they include records of all of the transactions for the period involved? Do they support the factual assertions made? If they are deficient in any respect, can you support the factual asser-

56. Tax Court Rules of Practice, rule 31(b) (1) (1957).
57. Lore, *When Should a Tax Case Be Taken to Court: The Many Costs of Litigation*, 3 J. TAXATION 2, 3 (1955).

tions with competent testimony? Many times an available witness is a reluctant or timid individual and will make a poor impression. Can you risk putting him on the stand? Is there another means of proof of the fact which you are relying upon him for? Is there another available witness? If not, what about the possibilities of a stipulation? If all of these avenues are closed then perhaps the advantages are in the direction of a concession on the disputed point.

As to the expenses of litigation, it should be remembered that even though the taxpayer wins his case in the Tax Court, he is not awarded court costs,[58] witness fees,[59] attorney's fees, or other expenses incident to the litigation. He has to pay for these out of his own pocket. While the government indirectly bears part of these costs through the income tax deduction in appropriate circumstances, in the case of the small taxpayer who is forced to substantiate a claim, the expenses do not result in a tax benefit to him.[60] The costs of litigation should bear some reasonable relationship to the total amount involved in the controversy. Otherwise, the taxpayer is really awarded nothing but vindication.

Another important consideration relating to expenses involves major and minor issues in the controversy. This also re-emphasizes the importance of conceding some issues willingly at the negotiation and settlement table.

> * * * "Take, for example, a controversy over the reasonableness of an officer's salary and a deduction for a bad debt. Let us suppose that both questions are reasonably debatable, but a substantial disallowance of the officer's salary will result in a much larger deficiency than the disallowance of the bad debt. Of course, you should vigorously urge you are right on both points. However, once you are met with equally vigorous objections on the government's side, it may prove fruitful to concede the bad debt issue if the government will concede the reasonableness of the officer's salary. You will thereby avoid the expenses of trial as well as the possibility of losing on the main issue."[61]

Also related to the question of expenses of litigation is the right of the Commissioner to enforce a maximum penalty of $500 for the filing of a petition whenever it appears to the Tax Court that the proceedings were instituted by the taxpayer merely for delay.[62]

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58. See 26 U. S. C. §§ 7451 and 7474 relating to filing fees and costs of transcripts and other papers.
59. 26 U. S. C. § 7457(a) (2).
60. *Id. at* § 212(3). See also, Commack, 5 T. C. 467; Greene Motor., 5 T. C. 314.
61. See note 57 *supra* at p. 5.
62. 26 U. S. C. § 6673.

Apparently this provision has not been invoked very frequently, but it should not be overlooked.

Third, what is your danger of increased liability if you go to court? Once the Tax Court has acquired jurisdiction of the controversy, it may redetermine the correct amount of the deficiency even though it is greater than that stated in the notice of deficiency.[63] For example, in one case the taxpayer filed a petition in the Tax Court on the asserted deficiency of $15,977.61. The Commissioner later amended his answer, contending that a stock loss of $4,375,523.61 had been erroneously allowed and the proper deficiency was $1,026,340.40. The Board of Tax Appeals — now the Tax Court — sustained this contention.[64] Thus, it is well to evaluate your position carefully before filing a petition in the Tax Court.

The same is true in the District Court and Court of Claims. Paying the tax and filing a claim for a refund with the idea of later suing in one of these courts may be dangerous. In the first place, the claim for the refund may not be summarily denied. On the other hand, as emphasized previously, it may provoke a further and more intensive examination of the return ultimately resulting in not only a denial of the claim for a refund, but the assertion of further deficiency for the year in question.[65] In addition, the claim for refund may provoke a field audit and result in the subsequent assertion of additional deficiencies for other years. Counsel should not place himself in the position of inviting the government to audit his client's tax return without first ascertaining the dangers involved.

If, after considering the various foregoing factors, you decide that the only sound course of action is to challenge the tax liability in court, what courts are available and what are your rights therein?

III. Litigation in the Courts

The Courts and Their Jurisdiction. Generally speaking, the jurisdiction of one of three courts can be invoked to litigate a tax controversy involving income excess profits, estate and gift taxes. These are the United States District Court, the Court of Claims, and the Tax Court.

Basic to an understanding of the triform jurisdiction of tax controversies are two important — and fundamental — rules established by early decisions of the Supreme Court of the United States.

63. *Id.* at § 6214(a).
64. John J. Raskob, 37 B. T. A. 1283.
65. See page 152 *supra.*

The first is, that in the absence of statute, the courts cannot interfere with the executive branch of the government in the assessment and collection of taxes before these taxes have been paid.[66] However, once the revenues of the government have been assured by the collection of the tax, the taxpayer has the right, even independent of statute, to bring suit for the recovery of the tax on the ground that its collection was illegally asserted.[67] This second rule has long been recognized as giving a right of action to the taxpayer to bring suit against the person who has erroneously received or collected the tax.[68]

> "[This result has been] drawn from the conception of a suit against a collector [director] as 'personal' since he was personally responsible for illegally exacting monies under the claim that they were due as taxes." * * *[69]

Although fictional in nature, the principle is still very much a part of the law. In such a case, the action is brought against the Director to whom the tax was paid in the United States District Court for the district in which the Director resides.

In addition to this common law right, Congress, by statute, has also authorized a suit by the taxpayer directly against the United States in the United States District Court to recover taxes erroneously paid or collected. The taxpayer may bring the suit in the district in which he resides[70] ". . . for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected or any penalty claimed to have been collected without authority or any sum alleged to have been excessively or wrongfully collected under the internal revenue laws."[71]

The latest amendment to the statute removes prior limitations on the amount of money for which the United States could be sued directly for taxes illegally or erroneously collected. Formerly, the United States could not be sued directly for an amount in excess of $10,000 unless the collector or director for whom the tax was paid was dead or out of office at the time the action was brought.[72] It is possible that the Supreme Court will now treat the present statute as conferring an exclusive remedy since it is now a complete remedy and thus amounts to a statutory repeal of the common law right of action. At least until the Supreme Court rules otherwise,

66. State Railroad Cases, 92 U. S. 575 (1875).
67. Elliott v. Swartout, 10 Pet. 137 (1863).
68. Sage v. United States, 250 U. S. 33 (1919).
69. See United States v. Nunnally Investment Co., 316 U.S. 258, 262 (1942).
70. 28 U. S. C. § 1402(a).
71. *Id.* at § 1346(a) (1).
72. 63 STAT. 101 (1949), (amended by 68 STAT. 589 [1954]), 28 U. S. C. 1346 (1954).

the common law right of action may still have significance in tax controversies. If due to the reputation of the client, or for some other reason, you do not prefer to bring suit in the district of the taxpayer's residence — as is the case in connection with the statutory right — and the Director or Collector to whom the tax was paid resides in another district you may bring the common law action in the district of his residence.[73]

Congress has also vested jurisdiction in the Court of Claims to render judgment upon any claim against the United States founded upon the Constitution, any act of Congress, any regulation of an executive department, or any express or implied contract with the United States.[74] While it was not originally created to determine tax controversies and while there was some judicial doubt for a time as to its jurisdiction in this respect,[75] it is now accepted law that the Court has jurisdiction to adjudicate controversies — irrespective of the amount involved — for the recovery of internal revenue taxes that have been illegally collected.[76]

The effect of these statutory grants of jurisdiction to the United States District Court and the Court of Claims has been to authorize suits directly against the United States without resorting to the common law fiction of bringing suit against the collector of the tax. The important thing to remember is that the generally accepted condition precedent to suing in these courts is that the disputed taxes due must have been paid in their entirety. One case from the 8th Circuit has recently held that part-payment of a disputed tax liability followed by a claim for refund for the amount paid is sufficient to invoke the jurisdiction of the District Court.[77] However, the case has received criticism in at least one other decision and is by no means generally accepted law.[78]

We can then summarize the jurisdiction of the District Courts and Court of Claims as follows:

(1) The Taxpayer may bring a common law action against the Director to whom the tax was paid in the United States District Court for the district in which the Director resides.[79]

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73. See Ash, *Procedures Effective Under 1954 Code Which Affect Tax Settlement or Litigation*, 3 J. TAXATION 204, 205 (1955).
74. 28 U. S. C. § 1491.
75. BICKFORD, SUCCESSFUL TAX PRACTICE 386-387 (2d ed. 1952).
76. United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28 (1915).
77. Bushmiaer v. United States, 230 F.2d 146 (8th Cir. 1955). *Contra*, Suhr v. United States, 18 F.2d 81 (3rd Cir. 1927).
78. Flora v. United States, 142 F. Supp. 602 (D. C. Wyo. 1956). See also, Suhr v. United States, *supra* note 67.
79. See page 166 *supra*.

(2) The Taxpayer may sue the United States directly in the United States District Court in the district in which he resides.

(3) The Taxpayer may sue the United States directly in the Court of Claims in the District of Columbia.[80]

The *Internal Revenue Code* contains the prerequisites to bringing suit in any one of the foregoing ways. (1) The tax must have been paid; (2) after payment, the taxpayer must have filed with the Commissioner — witihn the statutory period of limitations — a sufficient claim for the refund of the taxes sued for;[81] (3) unless rejected, six months must have elapsed after the filing of the claim; and (4) the suit must be brought within two years after the claim has been rejected.[82]

The procedures for the initiation and handling of a tax case before the United States District Court and Court of Claims are no different than the procedures involved in any other types of cases before these tribunals.[83] Therefore, no special treatment of these procedures are included here.

Congress, in the Revenue Act of 1924, provided for an additional means of securing judicial review of tax determinations by the Commissioner without first having to pay the tax. It created the United States Board of Tax Appeals, an independent agency in the executive department, with a procedure similar to that prevailing in the United States District Court. In 1942, the name was changed to the Tax Court of the United States. Among other things, it has jurisdiction over the redetermination of deficiencies relating to income, excess profits, estate and gift taxes. Thus, as compared to the two previous tribunals, the Tax Court is a court of limited jurisdiction both in the scope of subject matter and in what it may adjudicate. As to the latter, it may only redetermine the amount of the deficiencies fixed by the Commissioner even if the amount is greater than the tax deficiency first proposed.[84] Subject to some exceptions,[85] the Commissioner does not have authority to collect any deficiencies in tax on incomes, excess profits, estates or gifts until he has, by registered mail, sent the "ninety-day letter" to the taxpayer to permit him to file a petition in the Tax Court challenging the

80. The Court is required to hold an annual term in the District of Columbia (28 U. S. C. § 174), but this does not prohibit the taking of evidence at any place within the United States (28 U. S. C. § 2505).

81. 26 U. S. C. § 7422(a). For the form of claim for refund, see page 181 *infra*. See also, the text discussion at page 151 *et seq. supra*.

82. 26 U. S. C. § 6532(a) (1).

83. FED. R. CIV. P., 28 U. S. C. A.; R. CT. OF CLAIMS, 28 U. S. C. A.

84. 26 U. S. C. § 6214(a).

85. *Id.* at § 6213(b).

Commissioner's determination of the tax.[86] Consequently, the taxpayer may seek judicial review of the alleged tax deficiency without paying the tax.

The prerequisites of jurisdiction are: (1) the Commissioner must determine a deficiency; (2) he must mail the ninety-day letter; (3) within ninety days — 150 if addressed to a person outside of the States and the District of Columbia — after the notice is mailed a petition must be filed for the redetermination of the deficiency; and (4) the petitioner must be the taxpayer.

A proceeding in the Tax Court is commenced by filing with the clerk of the Court in Washington, D. C. an original and four conformed copies of a petition together with the payment of a filing fee of $10.00.[87] The petition, an illustration of which will be found in the Appendix,[88] must be filed within ninety days of the date of mailing of the statutory notice of deficiency, commonly known as the ninety-day letter.[89] The proceeding must be brought by and in the name of the taxpayer and against the Commissioner of Internal Revenue.[90] The Commissioner then has sixty days within which to file his answer, or forty-five days within which to file a motion with respect to the petition.[91] The answer must be prepared so as to advise the petitioner and the court fully of the nature of the defense and contain a specific admission or denial of each material allegation of fact and a statement of any facts upon which the Commissioner relies either for defense or affirmative relief or to sustain any issue with respect to which he has the burden of proof.[92] A reply may be filed by the taxpayer if the answer contains specific allegations or affirmative defenses with which he takes issue.[93]

The Tax Court's principal office is in Washington, D. C. However, cases are heard at various cities throughout the United States and the Court, if the taxpayer does not request a specific place for the hearing, will designate the time and place of hearing with as little inconvenience and expense to the taxpayer as practicable.[94] A trial before the Tax Court is conducted similarly to any other trial. One judge presides and there is no jury. The Tax Court has

86. *Id.* at §§ 6212-6213. See page ??? *infra*. See also, page ??? *supra*.
87. Tax Court Rules of Practice, rule 7 (1957).
88. See page 189 *infra*.
89. 26 U. S. C. § 6213(2).
90. Tax Court Rules of Practice, rule 6 (1957).
91. *Id.* at rule 14.
92. *Id.* at rule 14.
93. *Id.* at rule 15.
94. *Id.* at rule 26.

promulgated "Rules of Practice" and these should be carefully studied prior to proceeding therein.

Selecting the Court. It has been said that most cases arise when the Commissioner attempts to collect a deficiency in tax. In many cases it is difficult, if not impossible, for the taxpayer to pay the asserted tax. Thus, by invoking the jurisdiction of the Tax Court he can at least postpone the day of payment. In some cases there are taxpayers who are in a position to pay the alleged deficiency. In this event, a most important right of election exists. Which of the three courts should be selected to adjudicate the deficiency? We must now turn to a consideration of the factors governing this decision.

The hazard of increased liability due to a further examination of the return can be avoided under certain conditions if a proper election of remedy — and court — is made. The Commissioner has three years from the date of the filing of the return to assess a deficiency,[95] except in those cases involving fraud or a 25% error in the taxpayer's gross income.[96] A taxpayer has two years from the date of the payment of tax to file a claim for refund. It is not uncommon for the Commissioner to assess a deficiency shortly before the expiration of the three year period. Instead of electing the Tax Court, the taxpayer can pay this deficiency and have two years within which to file a claim for refund as a preliminary to a civil suit to recover the tax paid. The taxpayer would then wait for the expiration of the three years period and commence his suit before the expiration of the two year period. Under this situation the Commissioner could no longer assert an additional deficiency for the year involved. Such action would be barred by the statute of limitations. The taxpayer is then able to litigate the issue without fear of subjecting himself to an increased deficiency. The Commissioner may claim additional tax liability in the form of a set-off as a defense to the taxpayer's suit and to that extent could recover unpaid taxes after the bar of statute of limitations has fallen, but the danger of increased liability to the taxpayer is non-existent.[97]

A second consideration involved in the right of election relates to the question of concurrent jurisdiction. The jurisdiction of the Tax Court is often thought of as complimentary to that of the United States District Court and the Court of Claims in the sense that the

95. 26 U. S. C. § 6501(a).
96. *Id.* at §§ 6501(c) (1), 6501(e) (1) (A).
97. Lewis v. Reynolds, 284 U. S. 281 (1932); Helvering v. Taylor, 293 U. S. 507 (1935); United States v. Phister, 205 F.2d 538 (8th Cir. 1953).

former deals with adjudicating liability for unpaid taxes while the latter adjudicates liability for paid taxes. However, there are two important exceptions wherein the jurisdiction of the Tax Court is concurrent with that of the other two courts. Suppose the taxpayer has paid his tax for a particular year, made a claim for a refund, had it rejected either expressly or by a lapse of time and then filed suit in the District Court or Court of Claims to recover it. If under Section 7422(e) of the *Code*, a notice of deficiency is mailed to the taxpayer" . . . that a deficiency has been determnied in respect to the tax which is the subject matter of the taxpayer's suit, the proceedings in the taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for sixty days thereafter. If the taxpayer files a petition with the Tax Court, the District Court or Court of Claims, as the case may be, shall lose jurisdiction of the taxpayer's suit for refund" * * * In the event that the taxpayer does not file a petition, the government is given the opportunity of counterclaiming or intervening in the pending refund suit.

Another exception relates to the question of interest on the disputed tax liability. Under the *Internal Revenue Code*, the party who has the tax money in hand is treated as a debtor pending the outcome of the litigation. Thus, if you elect the Tax Court and ultimately lose, you must pay the government six per cent interest on the deficiency.[98] On the other hand, if you elect the District Court or Court of Claims and win, you will recover six per cent on the tax payment refunded.[99] Under the *Internal Revenue Code of 1954*, a taxpayer may pay the deficiency after the mailing of the ninety-day letter without forfeiting his right to sue in the Tax Court.[100] If the tax is paid, it will stop the running of the interest and a six per cent investment in the controversy is secured. That is, if the taxpayer wins he will recover six per cent on the tax refunded just as he would in the District Court or Court of Claims. Under this provision, as well as under Section 7422(e), there is no substantial difference between the Tax Court and the District Court or Court of Claims.

Third, you should also determine what the various court rulings have been on your problem. Many times research will disclose that decisions of the Tax Court oppose the taxpayer, while the District

98. 26 U. S. C. § 6601.
99. *Id.* at § 5611.
100. *Id.* at § 6213(b) (3).

Court or Court of Claims decisions are favorable. Where a court has previously passed upon a question, the taxpayer should litigate in the tribunal which has indicated a position most favorable to him.

Fourth, are technical and non-technical considerations involved in the controversy? The Tax Court judges are a trained body of experts. It is important to take advantage of this expertise when there are few equitable considerations involved and the outcome of the case depends upon an accurate technical interpretation of the *Code* and its relationship to the facts of the case. On the other hand, the judges of the District Courts and the Court of Claims are likely to take a less technical approach. They do not apply the law as rigidly. Their opinions reflect an equitable approach to tax cases. If the government theory is technical and there are strong equities in favor of the taxpayer, the Court of Claims — or the District Court — may be the ideal forum.

Also, in this connection, it is important to observe that you mav obtain a trial by jury in the District Court. When the facts are likely to impress a jury of laymen rather than a judge trained in the law, you should take advantage of this procedural avenue. In all cases involving a question of intent, you are likely to obtain better results before a jury than a judge. Cases involving the existence of a family partnership, transfers in contemplation of death and the accumulation of surplus beyond reasonable needs of the business for the purpose of surtax savings by the stockholders are examples. In these and similar instances, juries take a less critical view than the Tax Court and often resolve the issues in favor of the taxpayer. However, do not be unduly mislead. If your case involves much more than one or two rather simple fact issues, the jury may have difficulty in understanding the nature of the controversy. Some caution should be exercised in trying complicated tax cases before juries.[101]

Fifth, some believe that the personality of the judge is an important consideration in making the election. Many also believe implicitly in the adage that this is "a government of laws and not of men." Without attempting to deprecate this bit of American political philosophy in the slightest, in application, ". . . a government without men is as visionary as a government of men without

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101. Ash, *Procedures Effective Under 1954 Code Which Affect Tax Settlement or Litigation*, 3 J. TAXATION 204 (1955).

laws."[102] Therefore, we cannot completely discount the human element in determining where the tax dispute should be litigated. It has been suggested that the chances of success in the Tax Court is dependent, to some extent at least, upon the judge who may hear the case.[103] Among the sixteen judges of the court there are decided differences of philosophy.

> * * * "Good examples of this variance in philosophy are the many family partnership cases, and cases involving the sale of defense housing built under Title VI of the National Housing Act. Several of the Tax Court Judges seem utterly unable to recognize the validity of family partnerships. Likewise, some seem unable to believe that any sale of defense housing could be subject to capital gains tax. On the other hand, others of the Tax Court Judges realize that the primary ambition of many people is to provide for their children and that family partnerships are perfectly proper from every viewpoint, including a tax viewpoint. In the same manner, certain Judges think that it is possible to sell defense housing and be entitled to capital gain treatment."[104]

The same sort of analysis is equally applicable to judges in the District Court and the Court of Claims. However, it is not always as easy. The judges of these courts often have not passed upon as large a variety of tax problems as those of the Tax Court. Also, in the District Court in the larger districts where there is more than one judge, it is impossible to know which judge will hear the case. These factors make prediction difficult in these courts on the basis of the personality of the judges.

Sixth, there has been some criticism of the pleadings in the Tax Court.[105] It is said that it is extremely difficult to narrow and define the issues involved. This results in undue expense and difficulty proving unnecessary facts. This is to be distinguished from conditions which prevail in the other two courts. Defining issues under the *Federal Rules of Civil Procedures* which are applicable to the District Court and under the rules applicable to the Court of Claims is much easier.

Seventh, you should also consider the relative advantages of the settlement machinery in the three courts. In the Tax Courts "(t)he Assistant Regional Commissioner, Appellate, in each region, with the concurrence of appellate counsel, has authority to settle any Tax Court case. Generally speaking, this excellent settlement

102. Hand, *Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 101-102 (1926).
103. See note 101 *supra* at 208.
104. *Ibid.*
105. See note 101 *supra* at p. 206.

machinery is an important factor to consider if the case is susceptible of settlement. However, the personalities of the Bureau officials in the various regions differ considerably. In some regions, it is more difficult to settle particular types of cases than it is in other regions. Also, due to difference in personnel, a larger percentage of cases is settled in some regions than in others."[106]

In the District Court and Court of Claims the Attorney General is authorized to settle any suit. Although the Attorney General will consult the Commissioner on the question, he will exercise his independent judgment and settle if he believes it should be done. It has been suggested that this may be due to the fact that there is more of an awareness on the part of the Attorney General's office as to the hazards of trial than of a technical advisor in the Appellate division who will turn the case over to a Bureau attorney to try.[107] Therefore, the Attorney General may take a more realistic view of the question of settlement.

Eighth, it may be well to consider the time required to obtain either a settlement or judicial determination of the controversy. So far as settlement is concerned, in the Tax Court, the possibility will not normally arise for about a year. In the District Court or Court of Claims it will probably be from one to two years. Litigating a case in the Tax Court consumes anywhere from one and one-half years to three years. In the District Court it will vary from six months to four years depending upon the District involved. One attorney has commented that there is little time advantage in any one of the three courts providing counsel diligently pursues the case and endeavors to secure a expeditious disposition.[108]

Finally, what about the possibility of an appeal? The decisions of both the Tax Court and the District Court are appealed to the Court of Appeals. If the Court of Appeals has passed on a particular question, a District Court within its jurisdiction — that is, in the Circuit — will follow the law as set down by the Court of Appeals. This is not necessarily true of the Tax Court. Therefore, the taxpayer will sometimes have to appeal the decision of the Tax Court to the "friendly" appellate court to get a favorable decision. Only the Supreme Court of the United States can review decisions of the Court of Claims by certiorari. Since this is a discretionary procedure and since the Supreme Court grants it sparingly in tax cases, the Court of Claims decisions are usually final. The Com-

106. See not 101 *supra* at p. 209.
107. *Ibid.*
108. See note 101 *supra* at p. 209.

missioner system in this Court gives the taxpayer two chances to prevail and the decisions are usually satisfactory.[109]

SPECIAL PROCEDURES IN FRAUD CASES

The *Internal Revenue Code* provides for a number of penalties, both civil and criminal in nature. There are three important civil penalties which involve the payment of a fine. A penalty not to exceed 25% of the total tax liability is assessed for any one year in which the taxpayer fails to file a tax return.[110] If a taxpayer underpays his tax and the underpayment is the result of negligence or intentional disregard of rules and regulations, but without intent to defraud, a 5% negligence penalty is assessed on the underpayment.[111] If any underpayment of tax liability for any one year is due to fraud with intent to evade the payment of tax, there may be added to the tax liability an amount equal to 50% of the underpayment.[112]

Crimial penalties are provided for any person who willfully attempts in any manner to evade or defeat any tax imposed or the payment thereof, and in addition to the 50% penalty referred to above, is guilty of a felony and upon conviction may be fined not more than $10,000.00 nor imprisoned for more than five years or both, together with the costs of prosecution.[113]

Fraud investigations usually begin very inauspiciously. The revenue agent in a routine examination may uncover facts which to him indicate fraudulent concealment of income. At this point he may then inform the Intelligence Division of the Director's Office which has jurisdiction over fraud investigations. A special agent is then assigned to the case to conduct a thorough investigation for possible criminal violations.

It is not unusual for fraud investigations to be initiated by reports from informers, former employees or unscrupulous competitors. Even a former boy friend or girl friend may write a letter to the District Director's Office suggesting that a taxpayer may be guilty of fraud. The Service will usually follow up every such report. If, in fact, a deficiency is discovered as the result of such information, the taxpayer and his counsel can be sure that every transaction for the period will be scrutinized with care.

The revenue agent is primarily concerned with the determina-

109. Rules Ct. of Clms., Title 28 U. S. C., Rule 37 et seq.
110. 26 U. S. C. § 6651.
111. *Id.* at § 6653(a).
112. *Id.* at § 6653(b).
113. *Id.* at § 7201.

tion of tax liability, how much the taxpayer owes. The special agent's primary concern is the existence or absence of an intent to defraud. As long as a special agent is investigating the case, and until the chances of a criminal prosecution are removed, the agent will not discuss the case with the taxpayer, no informal conference opportunity will be afforded, and no discussion pertaining to settlement of the tax liability will be entered into. The effect is to leave taxpayer and his counsel completely in the dark as to the particular issues involved.[114]

While many tax fraud investigations are conducted independently of the taxpayer's books and records, there are occasions when the special agent will wish to see some of these materials and he must approach the taxpayer and request that they be handed over to him for examination. We have already discussed the power of the Internal Revenue agent to subpoena books and records, as well as witnesses, to aid them in their investigation.[115] The authorities are relevant here as well.

Every counsel representing a taxpayer who is undergoing an examination by the special agents must take care that his client's privileges under the Fourth and Fifth Amendments to the Constitution prohibiting unreasonable searches and seizures and self-incrimination are observed. The time may come in any tax fraud investigation when the special agent desires to talk to the taxpayer. Compulsory production of an individual's private books and paper for use in a criminal or penal proceeding is equivalent to compelling the taxpayer to be a witness against himself and is in violation of the Fourth and Fifth Amendments. Compulsory production of an individual's records for use in a civil proceeding does not violate the Fourth Amendment. Since corporations are not protected by the privilege against self-incrimination, production of their books and records can be compelled even in a criminal case.[116]

We have already discussed the doctine of the *Shapiro* and *Falsone* cases.[117] The application of the doctrine of these two cases to criminal fraud investigations can be seen easily. It is noted elsewhere in this article that to date the Government has not pushed the doctrine of these cases to their logical extreme.[118] However,

114. See *Avakian, Rights and Remedies of Taxpayers Suspected of Fraud,* 33 Taxes 878 (1955).
115. See pages 154-155 *supra.*
116. Boyd v. United States, 116 U. S. 616 (1886); Wilson v. United States, 221 U. S. 361 (1911); Lipton, *Safeguarding Constitutional Rights in Tax Fraud Investigations,* 32 Taxes 263 (1954).
117. See pages 154-155 *supra.*
118. See pages 154-155 *supra.*

since many fraud cases arise through a routine audit, the taxpayer may have delivered records, books of account and other documents to the agent voluntarily to aid him in his investigation prior to the initiation of the fraud investigation. Since this evidence usually comprises the essential portion of the prosecution's case, the taxpayer may find himself in the uncomfortable position of having actually aided the Government in compiling a case against himself. When such books and records are obtained, the Government is under no obligation to inform the taxpayer of the dangers involved in turning over such documents to the internal revenue agents if in fact the taxpayer was not charged with an offense and prosecution contemplated, providing he was not threatened or coerced and there was no suspicion or suggestion that he was guilty of any fraudulent practices.[119]

> "Cooperation is solicited in all fraud cases. The real purpose of the investigation — namely, the discovery of evidence warranting criminal prosecution — is rarely disclosed to the taxpayer. On the contrary, the special agent's initial contact is usually disarming, and the taxpayer is questioned 'informally' concerning 'routine or historical' information. Throughout the investigation the agent stress 'fact finding' function and the necessity of determining the tax liability. The latter aspect is emphasized despite the fact that *settlement* of the civil liability is never undertaken if prosecution is contemplated. Taxpayers and their representatives, however, frequently misinterpret the tenor of the investigation and furnish incriminating records and information while criminal prosecution is still under consideration."[120]

Following the completion of the special agent's investigation, he will usually ask the taxpayer to submit to an interrogation at which time the taxpayer will be sworn and his questions and answers transcribed. The taxpayer may refuse and if he does, the special agent then prepares his report and recommends either a criminal prosecution or that the case be processed as a civil matter. If the prosecution is recommended, the recommendation is directed to the Regional Commissioner's Office. The taxpayer will then be notified that a recommendation for criminal prosecution has been made and he and his counsel will be given an opportunity to discuss the matter with an attorney in the Regional Counsel's Office. At that time the taxpayer may produce any evidence, documentary or otherwise, to support his reasons why the prosecution should not be initiated. In some instances the special agent's recommendation

119. See Hansen v. United States, 186 F.2d 61 (8th Cir. 1951).
120. See Lipton, *supra*, note 116 at p. 271.

is reversed with or without a conference with the taxpayer. In this event the matter is again processed as a routine tax case which may result in civil fraud penalties under the provisions of the *Internal Revenue Code* which we have already mentioned.

If the prosecution recommendation is sustained at the Regional Office level, the case is forwarded to the Chief Counsel's Office in Washington and then it is transferred to the Justice Department who will in turn forward the case back to the District Attorney for the district in which the taxpayer resides for prosecution.

If the taxpayer's constitutional rights have been violated his counsel should not hesitate to raise such questions at every level, administrative or judicial, where he has an opportunity. Whenever it reasonably appears that the taxpayer's rights have been violated the Internal Revenue Service will recommend that the proposed prosecution be dropped.[121] After the taxpayer has been indicted the constitutional question may be raised by a motion to suppress the evidence which is often blended or combined with a motion to dismiss the indictment.

Tax fraud investigations are hazardous cases because of the number of circumstances under which the taxpayer's constitutional rights may be violated. For this reason counsel should be alert and cautious at all stages of the proceeding. The decision to cooperate with the special agent or not to cooperate with the special agent, to disclose records or to decline to do so should be made with care. Any decision that is made should be made only after counsel is reasonably sure that such action will benefit and not harm his client's rights.

121. See Lipton, *supra*, note 116 at p. 277.

APPENDIX OF FORMS

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that the undersigned, Richard Roe, of the City of Far Valley, County of Grand Plains and State of North Dakota, has made, constituted and appointed, and by these presents do make, constitute and appoint John J. Advocate of the City of Far Valley, County of Grand Plains and State of North Dakota, as his true and lawful attorney, for him, and in his name, place and stead to represent the undersigned in all income tax matters, and proceedings now pending or to be commenced by the Commissioner of Internal Revenue, or his delegates, for the years 1955 and 1956; giving and granting unto said attorney full power and authority to do and perform all and everything whatsoever requisite and necessary to be done in and about the premises, including the right to receive but not to endorse checks and payments of refunds of taxes for the years above set forth, as fully to all intents and purposes as he might or could do, if personally present, hereby ratifying and confirming all that said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF the undersigned has hereunto executed this power of attorney as of this 5th day of February, A. D. 1957.

State of North Dakota }
} ss
County of Grand Plains }

On this 5th day of February, A. D. 1957, before me personally appeared Richard Roe known to me to be the person who is described in and who executed the within and foregoing power of attorney and he acknowledged to me that he executed the same.

Notary Public, North Dakota
My Commission expires:

(SEAL)

STATEMENT RELATIVE TO FEES

Date:

This is to certify that I (have) (have not) entered into a contingent or partially contingent fee agreement for the representation of ———————————————, before the United States Treasury Department, in the matter of ———————— ———————————————— under the terms of a Power of Attorney filed with the Treasury Department on or about the —— day of ————————————, 19——, and that a report of such fee agreement (has) (has not) been made to the Committee on Practice.

———————————————

Attorney for Taxpayer

FORM 843

FORM 843 REV. JAN. 1955	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE **CLAIM** TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID	District Director's Stamp (Date received)

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps

Number and street | City, town, postal zone, State

1. District in which return (if any) was filed	2. Name and address shown on return, if different from above	
3. Period - If for tax reported on annual basis, prepare separate form for each taxable year From 19 To 19		4. Kind of tax
5. Amount of assessment $	Dates of payment	
6. Date stamps were purchased from the Government	7. Amount to be refunded $	8. Amount to be abated (not applicable to income, estate, or gift taxes) $

9. The claimant believes that this claim should be allowed for the following reasons:

Use reverse if space is not sufficient.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed _____

Dated _____, 19___ _____

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

*GPO: 1955 O - 331338

30-DAY LETTER

Form 1209
(Rev. May 1964)

OFFICE OF
DISTRICT DIRECTOR OF INTERNAL REVENUE

COPY

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

Fargo, North Dakota

Mr. Richard Roe
1111 Apex Street
Far Valley, North Dakota

Dear Sir;

The attached report, which has been carefully reviewed by this office, discloses certain adjustments or conclusions resulting from the examination of the return(s) for the taxable year(s) indicated therein.

If you accept the findings, please execute the enclosed agreement form and return it to this office promptly. If you do not accept the findings, you may, WITHIN 30 DAYS from the date of this letter, file a protest in accordance with the enclosed instructions. Any protest filed will be given careful consideration and, if requested, a conference will be granted by the Appellate Division of the Regional Commissioner's office.

Submission of the agreement form will expedite assessment of the proposed deficiency and stop the running of interest thereon 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier. If desired, payment of the proposed deficiency may be made without awaiting assessment by making remittance therefor payable to the DISTRICT DIRECTOR OF INTERNAL REVENUE, Fargo, North Dakota. at the address shown above, enclosing this letter or a copy thereof. The remittance should include interest on the additional tax (exclusive of penalties, if any) computed at 6% per annum from the due date of the return to the date of the payment.

This is not a statutory notice of deficiency. If, however, upon the expiration of the 30-day period you have not submitted the agreement form, or a written protest, or you have not advised that the deficiency has been paid or will be paid upon notice and demand, a statutory notice will then be sent you as provided by law.

Prompt execution and return of the enclosed receipt form indicating your position with respect to the findings disclosed by the report will be greatly appreciated.

IMPORTANT: It is essential that communications transmitting protests or agreements relative to this letter be addressed to the District Director of Internal Revenue, Audit Division, Fargo, North Dakota.

Very truly yours,

District Director of Internal Revenue.

Enclosures:
Report of Examination
Agreement Form
Receipt Form
Instructions

☆ U. S. GOVERNMENT PRINTING OFFICE : 1965—O-3401 42

PROTEST

To: District Director of Internal Revenue
Fargo, North Dakota

Re: John Doe and Mary Doe
222 Ajax Drive
Far Valley, North Dakota

Dear Sir:

In accordance with permission granted in your letter of February 1, 1957, advising that an examination of the report of the Internal Revenue Agent assigned as examining officer discloses a deficiency of tax for the year ending December 31, 1955, in the amount of $0,000.00, with respect to the above captioned taxpayers, protest is hereby made against such determination and the following is submitted thereof:

(a) *Name and Address of Taxpayer*:
(Here insert the correct name and address of the taxpayer)
(b) *Date and Symbols of 30 Day Letter*:
(Here insert date and correct symbols)
(c) *Year involved and tax disputed*:
(Here insert the year, the type of tax, and the amount of tax in controversy)
(d) *Findings to which Taxpayers take exception*:
(Here set forth each finding or determination to which exception is taken)
(e) *Summary statement of the grounds upon which Taxpayers rely*:
(Here itemize the specific grounds that are relied upon in in protesting the specific findings)
(f) *The facts upon which the Taxpayers rely*:
(Itemize and number each fact statement relied upon in protesting the findings, and which support the grounds states in (e) above)

It is requested that taxpayers be granted a hearing on this protest at which time they will be represented by counsel.

Respectfully submitted,
s/ John Doe
s/ Mary Doe
(Here add a verification form)

COUNSEL'S STATEMENT

The above protest was prepared by the undersigned John J. Advocate, of Far Valley, North Dakota, counsel for the above named taxpayers, who is informed and believes the facts stated therein are true, although he does not know the facts of his own knowledge.

s/ John J. Advocate,
Counsel for Taxpayer.

90-DAY LETTER

U. S. TREASURY DEPARTMENT
OFFICE OF THE DISTRICT COMMISSIONER
INTERNAL REVENUE SERVICE

IN REPLYING REFER TO:

Mr. Richard Roe
111 Apex Street
Westview, Minnesota

Dear Sir;

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1952 discloses a deficiency of $ 0,000.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, WASHINGTON 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise, Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, W-1681 First National Bank Bldg. St. Paul, Minnesota The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

Commissioner,

Enclosures:
Statement
Form 1276
Agreement Form

FORM 870

Form 870 (Rev. Aug. 1954)
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

(Date Received)

WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY IN TAX AND ACCEPTANCE OF OVERASSESSMENT

Pursuant to section 6213 (d) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws, the restrictions provided in sections 6212 (a) and (b) (2) and 6213 (a) of the Internal Revenue Code of 1954 or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

DEFICIENCIES

TYPE OF TAX	YEAR ENDED	TAX	PENALTY	TOTAL

OVERASSESSMENTS

TYPE OF TAX	YEAR ENDED	TAX	PENALTY	TOTAL

.....
(Taxpayer)

.....
(Taxpayer)

.....
(Address)

(SEAL) By ....
(Date)

NOTE.—The execution and filing of this form at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 7121 of the Internal Revenue Code of 1954, and does not, therefore, preclude the assertion of a deficiency or a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this form must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

Where the taxpayer is a corporation, the form shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

U. S. GOVERNMENT PRINTING OFFICE 1954—O—315841

FORM 870-AD

FORM 870-AD REV. MAR. 1955	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE OFFER OF WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY IN TAX AND OF ACCEPTANCE OF OVERASSESSMENT

NAME OF TAXPAYER

ADDRESS *(Number, Street, City, Zone, State)*

FOR INTERNAL REVENUE USE ONLY

DATE ACCEPTED FOR COMMISSIONER	SIGNATURE

TITLE

OFFICE

Pursuant to the provisions of section 6213(d) of the Internal Revenue Code of 1954, or corresponding provisions of prior internal revenue laws, the undersigned offers to waive the restrictions provided in section 6213(a) of the Internal Revenue Code of 1954, or corresponding provisions of prior internal revenue laws, and to consent to the assessment and collection of the following deficiencies with interest as provided by law. The undersigned offers also to accept the following overassessments as correct:

DEFICIENCIES

TYPE OF TAX	YEAR ENDED	TAX	PENALTY	TOTAL

OVERASSESSMENTS

TYPE OF TAX	YEAR ENDED	TAX	PENALTY	TOTAL

This offer is subject to acceptance by or on behalf of the Commissioner of Internal Revenue. It shall take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it shall have no force or effect.

If this proposal is accepted by or on behalf of the Commissioner, the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or an important mistake in mathematical calculation; and no claim for refund shall be filed or prosecuted for the year(s) above stated other than for the amounts of overassessments shown above. The taxpayer also agrees to make payment of the above deficiencies, together with interest, as provided by law, promptly upon receipt of notice and demand from the District Director of Internal Revenue.

_____
(Taxpayer)

_____
(Taxpayer)

CORPORATE SEAL

By_____ _____
(Date)

NOTE.—The execution and filing of this offer will expedite the adjustment of your tax liability. It is not, however, a final closing agreement under section 7121 of the Internal Revenue Code of 1954, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this offer is executed with respect to a year for which a **JOINT RETURN OF A HUSBAND AND WIFE** was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the offer shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

GPO 889310

THE TAX COURT OF THE UNITED STATES

Richard Roe, Petitioner v. Commissioner of Internal Revenue Respondent	Docket No. 12345678

STIPULATION

It is hereby stipulated that there are deficiencies in income tax due from the petitioner for the calendar years 1947, 1948, 1949 and 1950, in the respective amounts of $1,000.00, $2,000.00, $3,000.00 and $4,000.00.

Effective upon entry of a decision pursuant to this stipulation the above named petitioner waives the restrictions, if any, which may be contained in the Internal Revenue Code on the assessment an dcollection of the above agreed deficiencies plus statutory interest.

_____

Counsel for Petitioner

_____

Chief Counsel
Internal Revenue Service
Counsel for Respondent

TAX COURT ORDER ON A STIPULATION

THE TAX COURT OF THE UNITED STATES
WASHINGTON

Richard Roe Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 0000000000000

DECISION

Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Court on July 6, 1953 at St. Paul, Minn, it is

ORDERED and DECIDED: That there are deficiencies in income tax for the taxable years 1947 and 1948 in the respective amounts of $0,000.00 and $0,000.00

Enter: (Signed).
Judge.

clj

Form No. 937
Revised Oct. 1942

TAX COURT PETITION

THE TAX COURT OF THE UNITED STATES

John Doe and Mary Doe, Petitioners v. Commissioner of Internal Revenue, Respondent	Docket No. 000000

PETITION

The above named hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (here insert symbols) dated ———— 19——, and as a basis of this proceeding avers and alleges as follows:

1. The petitioner is (here state whether a corporation, individual, fiduciary, etc.) with his residence (or principal office) at ————————————. The return for the period here involved was filed with the District Director of Internal Revenue for the ——— District of ————.
2. The notice of deficiency (a copy of which is hereto attached and marked Exhibit A) was mailed to the petitioner on the ———— day of ———————————— 19——.
3. The deficiencies as determined by the Commissioner are income (or excess profits, estate or gift) taxes for the calendar (or fiscal) year ending ———————— 19——, in the amount of $———————— dollars, of which approximately ———————————— dollars is in dispute.
4. The determination of tax set forth in said notice of deficiency is based upon the following errors: (Here set forth specifically in lettered subparagraphs the assignments of error as concisely as possible, avoid the pleading of facts properly includible in the following paragraph).
5. The facts upon which the petitioner relies as a basis of this proceeding are as follows: (Here set forth the allegations of fact relied upon, so as to fully state the facts and enable the Commissioner to admit or deny each allegation. Each statement of fact must be lettered).

WHEREFORE, the petitioner prays that the Court may hear the proceeding and (here state the relief desired).

Dated:

———————————————

(Petitioner or Counsel)
(Post office address here)

(Here Add a Verification Form)