

REMEDY PROBLEMS IN FEDERAL CIVIL TAX LITIGATION

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On occasion even the most casual observer of developments in the field of federal tax practice has probably felt that the number of substantive problems in the Code is nevertheless exceeded by the number of articles, books and pamphlets attempting to explain these problems. A less casual observation is required to reach what appears to be an equally correct conclusion that relatively few people have chosen to set out for the average practitioner just how these substantive tax rights can be vindicated. By and large, legal literature has emphasized the taxpayer's rights, and soft-pedaled his remedies.¹

There may be several reasons for this inattention to the adjective law. First of all, most laymen and virtually all businessmen are interested in substantive tax law. Capital gain, preferred stock bail-out, thin capitalization, subchapter S and similar terms are almost as much a part of the business vocabulary as "mark up" or "loss leader" used to be. No one can blame the business man for ignoring procedure—after all that's a lawyer's affair—and pretty dull stuff anyway. But lawyers themselves have tended to have the same attitude. In some cases it is probably because the lawyer does not consider himself to be a "tax lawyer" but in other instances it seems that the disinterest stems more from firm belief, even by "tax lawyers" that available remedies in federal taxation are both obvious and limited. (Or perhaps most tax practitioners feel that their careful planning

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¹ The statement in the text can easily be substantiated by reference to the tax services. See, for example, Prentice Hall's "Index to Tax Articles" or Commerce Clearing House's list of "Special Articles Relating To Federal Taxes." As an example, in the latter list, there are far more articles listed under the narrow heading of corporate reorganization than there are articles even remotely dealing with civil tax litigation. And, much "procedural" material is limited to describing the negotiation procedure (as opposed to litigation) with the Internal Revenue Service. See, e.g., *Tax Procedure for General Practitioners*, PRAC. LAW. 11 (March 1962); *A Practitioner's Guide to Making a Good Settlement Within the IRS*, 15 J. TAXATION 230 (1961).

There are, of course, exceptions where procedural law is treated in some detail. See, for example, the outstanding article in the field of collection and lien law, Plumb, *Federal Tax Collection and Lien Problems*, 13 TAX. L. REV. 247 (1958). Moreover, the tax services have generally done a good job of detailing Tax Court procedures.

will avoid litigation, so they need not be concerned with remedies). Whatever the cause, the attitude is to be deplored not only because tax problems may be encountered by any lawyer, but because conceivable remedies are often far from limited and if ignored may result in a denial of substantive rights.² No lawyer should forget that his first contact with a tax problem may be long after either the Tax Court or refund route can be followed. In taxes as in any other area of the law, the problem may be one of salvaging the derelict, rather than launching the new ship.

The typical attorney's view of the law of tax remedies is often distorted by one or more of the following unconscious attitudes which come to mind upon the hearing of the words "tax case":

1. It is an *income* tax case.
2. It concerns only two parties, a taxpayer and the government. (It is almost as if by definition no other people can ever be involved in a "tax case.")

It is conceded that much of the time both assumptions are true. However, when either assumption is not, consideration of possible remedies takes on a new complexity. And, even in the case involving only an aggrieved income taxpayer and the government, things are probably not as cut and dried as is generally thought.

The purpose of this article is therefore twofold:

1. To survey broadly for the general practitioner all possible remedies, usual and unusual; and
2. To discuss in somewhat greater depth the unusual ones.

² Cases in which substantive rights have been lost because of procedural errors are legion. Especially prevalent are the cases in which the claim for refund was not timely filed. See, e.g., *Tobin v. Tomlinson*, 192 F. Supp. 159 (S.D. Fla. 1960), *aff'd*, 310 F.2d 648 (5th Cir. 1962); *Kearney v. A'hearn*, 210 F. Supp. 10 (S.D.N.Y. 1962), *aff'd*, 309 F.2d 487 (2d Cir. 1962); *United States v. Ball*, 10 A.F.T.R.2d 6000 (N.D. Cal. 1962); *Havekost v. United States*, 10 A.F.T.R.2d 5921 (E.D. Wash. 1962); *Stepka v. United States*, 196 F. Supp. 184 (E.D.N.Y. 1961) (time period for filing refund claim not extended because of taxpayer's mental incompetency); *Williamson v. United States*, 292 F.2d 524 (Ct. Cl. 1961) (alternative claim set forth in amended petition filed more than two years after payment of deficiency not timely). See also *Hunt v. United States*, 309 F.2d 146 (5th Cir. 1962) (holding second suit by taxpayer barred by her failure to include all her claims in prior suit). In *Grafer v. United States*, 206 F. Supp. 173 (E.D. Wis. 1962) a suit was barred by application of the rule that tax owed for different years is a separate liability as to each year, the court holding that the statute of limitations did not begin running from the date of the last installment paid on an aggregate liability for several years.

The treatment here will be neither detailed nor comprehensive³—instead it is hoped that what appears in the following pages will serve as an outline and a guideline for lawyers who are not confronted with federal tax problems every day.

REFUND SUITS

This is probably the best garden-variety remedy for the ordinary tax case, for it is the only "routine" way that the taxpayer can get a jury.⁴ Moreover, in contrast to Tax Court litigation where the taxes are not paid until after the suit is tried, payment before trial can stop the running of interest. Jurisdiction to try refund cases is vested in the federal district courts or the Court of Claims.⁵ Proper venue for a district court suit is the judicial district where the plaintiff resides.⁶ For reasons that are more fully set forth below, the refund suit should be brought against the United States and is available only to the taxpayer.⁷ And, although it should be obvious, it must be borne in mind that a money judgment is all that is obtainable.⁸

One may not file a refund suit without careful attention to detail beforehand.⁹ A claim for refund must have been timely filed,¹⁰ and

³ Several civil tax areas have been omitted entirely. This has been done in instances where it is thought that the literature is adequate, such as in the fraud area, or in cases where the problems which arise are procedurally of little moment. Thus, erroneous refund suits by the government have not been considered. One real problem area, that of administrative summons procedure, has been omitted as much because of space considerations as any other factor. The reader may note other holes in the article. If the reader will pardon a pun, the occurrence of this in a survey type treatment appears wholly inevitable.

⁴ 28 U.S.C. § 2402 (1948), provides for trial without a jury, but either party may request one. There must be a timely demand in accordance with rule 38(b). *But see* Ohlanger v. United States, 135 F. Supp. 40 (D. Idaho 1955).

⁵ 28 U.S.C. § 1346 (1946).

⁶ 28 U.S.C. § 1402(a) (1948).

⁷ See, e.g., *J. A. Peterson-Tomahawk Hills v. United States*, 194 F. Supp. 858 (D. Kan. 1961); *Rutledge v. Riddell*, 186 F. Supp. 552 (S.D. Cal. 1960); *First Nat'l Bank v. United States*, 175 F. Supp. 192 (D. Minn. 1959). *But see* *Royal Indem. Co. v. Board of Educ.*, 137 F. Supp. 890, and 143 F. Supp. 782 (M.D.N.C. 1956), in which the United States was impleaded as a third-party defendant. See also *White v. Hopkins*, 51 F.2d 159 (5th Cir. 1931). Section 6402 of the 1954 Code provides for refunds to "the person who made the overpayment." This is a change from the 1939 Code requirement that payment be made to the taxpayer.

⁸ Frequently the refund action is joined with several claims for other forms of relief. If the fact situation permits other recovery, then the statement in the text is too broad and is wrong. However, most of the time it would be improper to pray for anything but a recovery of taxes and a prayer for abatement, for example, would be of no value. *Etheridge v. United States*, 300 F.2d 906 (D.C. Cir. 1962) (in which plaintiff alleged jurisdiction under § 1346(a)(1), and §§ 1402 & 2402 of the Judicial Code); *General Mut. Ins. Co. v. United States*, 119 F.Supp. 352 (N.D.N.Y. 1953).

⁹ See *Maas & Waldstein Co. v. United States*, 283 U.S. 583, 589 (1931), referring to the necessity of "meticulous compliance" with the statutes.

¹⁰ The claim must be filed within the statutory period even if it is sure to be denied. *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269 (1931). This is now three years from the time the return was required to be filed or two years from the time the tax is paid. INT. REV. CODE OF 1954, § 6511(a).

this timely filing must be alleged in the complaint.¹¹ Even if the government has conceded the substantive merit of the claim, the taxpayer cannot maintain a refund suit if his claim was tardy.¹² This requirement applies not only to suits initially filed by the taxpayer, but to counterclaims for refund filed when the government has commenced a collection action.¹³ It should be noted that in the usual case in which a taxpayer has settled with the Appellate Division he executes a Waiver of Restrictions on Assessment known as a Form 870-AD which contains a printed waiver of his rights to file a claim for refund. Therefore, if the taxpayer wants to retain his full remedial rights he should refuse to sign the form until it is modified.¹⁴

The Claim for Refund

The claim for refund must meet certain requirements both as to content and time for filing. The purpose of the claim, apart from the obvious one of getting the taxes back, is to make the government aware of what the taxpayer's position is in order that, if the position is valid, litigation can be avoided.¹⁵ Roughly speaking, a claim may be defined as a document, filed within the statutory period, in which the taxpayer has indicated with reasonable clarity that he is demanding a return of overpaid taxes and the ground upon which he is making his demand.¹⁶ The ground which he advances must be one which actually supports the overpayment.

Counsel is well-advised to prepare the claim for refund with utmost care, for the refund suit itself will be limited to the grounds

¹¹ *United States v. Chicago Golf Club*, 84 F.2d 914 (7th Cir. 1935). INT. REV. CODE OF 1954, § 7422. Justice Holmes' succinct observation regarding this legal area is often quoted: "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued, those conditions must be complied with." *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920).

¹² *Long v. United States*, 127 F. Supp. 623 (Ct. Cl. 1955).

¹³ INT. REV. CODE OF 1954, § 7422.

¹⁴ In the usual case the Appellate Division should agree to any modification, unless it in some way affects the issue which has been settled. *But see* the case of *Arthur V. Davis*, 29 T.C. 878, 894-97 (1958) holding a taxpayer was not barred from the Tax Court passing on his claim for refund, although he had executed a modified Form 870-TS for the years in question. The court said that the point raised by the taxpayer's claim did "relate to a matter never considered by the parties in connection with negotiations leading to the execution of Form 870-TS and [taxpayer's contentions] are concededly correct." *Id.* at 897. The court went on to hold that there was no estoppel against the taxpayer and said that the Commissioner could not and did not rely on the taxpayer's undertaking not to file or prosecute a claim for refund.

¹⁵ This is another example of the policy of forcing settlement of tax disputes outside of the courts. The reason for such a policy is obviously legitimate. All of the rules which have grown up surrounding refund claim procedures do not seem so legitimate, however, in light of the avowed purpose of the rule. After numerous conferences, discussions and informal requests, the government may be well aware of what the taxpayer contends for and yet unwilling to permit recovery.

¹⁶ *Julia A. Forhan*, 45 B.T.A. 799, 802 (1941).

set out in the claim,¹⁷ despite occasional judicial utterances to the contrary.¹⁸ The claim is generally filed in the name of the taxpayer and it can be taken as a rough rule-of-thumb that it will be invalid if filed by anyone else save a legal successor.¹⁹ The place for filing the claim, "with appropriate supporting evidence," is in the office of the District Director of Internal Revenue for the district in which the tax was paid.²⁰

The rigidity of the rule confining the refund suit to the grounds in the claim is tempered somewhat by permitting alternative and inconsistent grounds in the claim and by the judicial recognition of

¹⁷ *Real Estate-Land Title & Trust Co. v. United States*, 309 U.S. 13, 18 (1940) (absent waiver or amendment); *United States v. Garbutt Oil Co.*, 302 U.S. 528 (1938); *Alabama By-Products Corp. v. Patterson*, 258 F.2d 892 (5th Cir. 1958); *Daley v. United States*, 243 F.2d 466 (9th Cir. 1957); *Carmack v. Scofield*, 201 F.2d 360 (5th Cir. 1953); *Weagant v. Bowers*, 57 F.2d 679 (2d Cir. 1932); *J. P. Stephens Engraving Co. v. United States*, 53 F.2d 1 (5th Cir. 1931), *cert. denied*, 284 U.S. 687 (1932). *But see* *Mayer v. United States*, 285 F.2d 683, 686 (9th Cir. 1960) in which the court held for the taxpayer, saying to apply the rule on the facts of the case would "revive the evils of common law pleading."

On occasion, equitable considerations such as waiver or estoppel may enable a taxpayer to recover on a ground different from that asserted in the claim. *Angelus Milling Co. v. Commissioner*, 325 U.S. 296 (1945); *Schartf v. United States*, 157 F. Supp. 434 (D. Ore. 1956), *aff'd per curiam*, 250 F.2d 744 (9th Cir. 1957). But generally equitable factors will not aid a technically insufficient claim. *Nemours Corp. v. United States*, 188 F.2d 745 (3d Cir.), *cert. denied*, 342 U.S. 834 (1951); *Treas. Reg. § 301.6402-2(b)(2)* (1954).

¹⁸ *Lorenz v. United States*, 296 F.2d 746 (Ct. Cl. 1961) (no claim for refund needed where retroactive law gave taxpayer a cause of action he formerly lacked and statutory period for refund had expired prior to law's enactment. Taxpayer had filed claim shortly after the law was passed); *H. B. Zachary Co. v. United States*, 168 F. Supp. 777 (Ct. Cl. 1958) (permitting taxpayer to change theory because of intervening Supreme Court holding).

¹⁹ See note 7 *supra*. There are several decisions not in accord with this rule. In *McMahon v. United States*, 172 F. Supp. 490 (D.R.I. 1959) a widow was permitted to file a claim for and recover income taxes owed by her deceased husband. See also *Dayton Eng'r Labs. Co. v. United States*, 3 F. Supp. 351 (S.D. Ohio 1933) (claim executed in name of dissolved corporation and assigned by its treasurer held as a valid basis for suit); *Lesoine v. United States*, 32 A.F.T.R. 1686, *appeal dismissed*, 32 A.F.T.R. 1688 (9th Cir. 1943) (individual partners permitted to file claim for refund of partnership tax); *Signal Gasoline Corp. v. United States*, 46 F. Supp. 276 (S.D. Cal. 1942) (statutory trustees of dissolved corporation made claim). In spite of such holdings, only the taxpayer is usually in a position to maintain the action successfully. See, e.g., *Herman v. United States*, 81 F. Supp. 963 (W.D. Mo. 1949); *Upchurch Packing Co. v. United States*, 53 F. Supp. 791 (N.D. Ga. 1943), *aff'd*, 151 F.2d 983 (5th Cir. 1945); *C.C.M. 6197*, VIII CUM. BULL. 113 (1929).

Claim for a decedent is filed by the executor or the administrator. *Treas. Reg. § 301.6402-2(e)* (1954). If a husband and wife have filed a joint return, both must sign the claim for refund. In the case of a minor, the proper party to file is determined by state law.

²⁰ *Treas. Reg. § 301.6402-2(a)(2)* (1954). Before enactment of the 1954 Code, a refund claim was not considered filed until delivered to the District Director. Section 7502 now provides that if a claim is mailed and postmarked on or before due date, the postmark date will be deemed to be delivery date even though delivery does not actually occur at that time. Section 7503 provides that if due date falls on Saturday, Sunday or a legal holiday it is extended until the next succeeding business day.

the "informal" claim, that is, one not filed on Form 843.²¹ An oral claim is no claim at all.²² In preparing the claim, the attorney should remember that modern pleading rules definitely have no application—it is not enough to state facts which support the grounds relied upon, in addition the grounds themselves must be alleged.²³ Whether such a "theory of the case" approach is justified is debatable, but whether the rule is a wise one or not, it is clearly the law.²⁴ Where the grounds have been alleged fully, but the supporting facts are incomplete, the courts are not in accord as to the proper result.²⁵ The Second Circuit, in an old case involving Agricultural Adjustment Act taxes,²⁶ reasoned that all necessary facts had to be set forth in the claim. Other circuits have held that at trial a taxpayer may introduce evidence of any facts in support of the grounds stated in the claim.²⁷ However, it is not disputed that only the basis for, and not the amount of, recovery must be established in the claim.²⁸

As might be expected, amendment is permitted but only under certain circumstances. The amendment must be made before the Commissioner has acted on the claim,²⁹ unless he subsequently reconsiders. If the Commissioner has not acted upon the claim, but the date for filing claims is barred by the statute of limitations, the problem is somewhat more complicated. It is clear that new and ad-

²¹ *United States v. Kales*, 314 U.S. 186, 196 (1941); *United States v. Pierotti*, 154 F.2d 758, 761 (9th Cir. 1946). Usually a letter is not enough to meet the requirements of the statute but it may be if found to be more than "a protest or statement of an intention to file claim later. . . ." *Kales v. United States*, 115 F.2d 497 (6th Cir. 1940); *A. G. Rushlight & Co. v. United States*, 146 F. Supp. 838 (D. Ore. 1956) (involving an informal claim filed with the Tax Court); *Newton v. United States*, 163 F. Supp. 614 (Ct. Cl. 1958) (claim asserted future right depending upon outcome of pending litigation). Probably the leading case denying an informal claim is *Maas & Waldstein Co. v. United States*, 283 U.S. 583 (1931).

²² *Ritter v. United States*, 28 F.2d 265 (3d Cir. 1928); *Hansen-Sturm v. United States*, 201 F. Supp. 392 (S.D.N.Y. 1962); *Mohawk Rubber Co. v. United States*, 25 F. Supp. 228 (Ct. Cl. 1938), *cert. denied*, 307 U.S. 645 (1939).

²³ *Treas. Reg. § 301.6402-2(b)* (1954). See *May Broadcasting Co. v. Commissioner*, 299 F.2d 84 (8th Cir. 1962).

²⁴ *But see Mayer v. United States*, 285 F.2d 683, 686 (9th Cir. 1960).

²⁵ See notes 26 and 27 *infra*.

²⁶ *Samara v. United States*, 129 F.2d 594 (2d Cir. 1942).

²⁷ *Ragan v. Ferry*, 154 F.2d 974 (9th Cir. 1946); *Bethlehem Baking Co. v. United States*, 129 F.2d 490 (3d Cir. 1942); *Snead v. Elmore*, 59 F.2d 312 (5th Cir. 1932).

²⁸ *St. Joseph Lead Co. v. United States*, 299 F.2d 348 (2d Cir. 1962); *Burrell v. Fahs*, 232 F.2d 163 (5th Cir. 1956); *Electric Storage Battery Co. v. McCaughn*, 54 F.2d 814 (E.D. Pa. 1931).

²⁹ It is of course legally permissible to file an entirely new claim before the Commissioner has acted, so long as the statute of limitations has not expired. Additional claims supplementing the initial claim may be filed, so long as it is within the statutory period. A second claim may be filed even after the first has been disallowed by the Commissioner. *Pacific Mills v. Nichols*, 72 F.2d 103 (1st Cir. 1934). See also *New York Trust Co. v. United States*, 87 F.2d 889 (2d Cir.), *cert. denied*, 301 U.S. 704 (1937).

ditional grounds cannot be stated³⁰ but more detailed statements of the same grounds are permissible.³¹

There must be a separate claim for each taxable year or period in each separate type of tax.³² Finally, there must be set out in addition to the grounds and supporting facts a statement that the claim is made under pains of perjury.³³

Generally speaking, the statute of limitations for filing claims for refund is the later of three years from the time the tax return is filed or two years from the time the tax was paid,³⁴ but a return filed early is deemed filed on the last day allowable by law,³⁵ while a late return starts the three year period as of the actual filing date.³⁶ Different rules apply in cases where no return has been filed,³⁷ or where the taxpayer has executed a waiver,³⁸ or if a net operating loss carryback is involved,³⁹ or the claim involves a bad debt or worthless security,⁴⁰ or where certain other circumstances occur.⁴¹ Timely mailing is considered timely filing.⁴²

The Suit

Assuming that the proper preliminaries have been disposed of—a timely claim for refund has been duly filed and (1) it has been disallowed, or (2) six months have passed since filing without any

³⁰ *United States v. Garbutt Oil Co.*, 302 U.S. 528 (1938); *United States v. Andrews*, 302 U.S. 517 (1938); *Sicanoff Vegetable Oil Corp. v. United States*, 181 F. Supp. 265 (Ct. Cl. 1960).

³¹ *United States v. Richards*, 79 F.2d 797 (6th Cir. 1935), *cert. denied*, 297 U.S. 718 (1936); *DeHaven v. Fahs*, 176 F. Supp. 316 (S.D. Fla. 1959) (defect in signature corrected); *Westchester Fire Ins. Co. v. United States*, 138 F. Supp. 788 (S.D.N.Y. 1955) (correcting error in computation). As indicated, the Commissioner may have reconsidered the refund claim he has previously disallowed but this alone will not extend the time for bringing suit. See *INT. REV. CODE OF 1954*, § 6532(a)(4). Of course the taxpayer may always argue that the Commissioner has waived his procedural objections, but although the courts have recognized the possibility of waiver, its application is decidedly limited. See *Tucker v. Alexander*, 275 U.S. 228 (1927); *Dale Distrib. Co. v. Commissioner*, 269 F.2d 444 (2d Cir. 1959). The waiver may be on the part of the Commissioner while the claim is before him or on the part of the government trial attorney during litigation.

³² *INT. REV. CODE OF 1954*, §§ 6511 & 6513(a).

³³ *Treas. Reg.* § 301.6402-2(b)(1) (1954).

³⁴ *INT. REV. CODE OF 1954*, § 6511(a).

³⁵ *INT. REV. CODE OF 1954*, § 6513(a).

³⁶ *INT. REV. CODE OF 1954*, § 6511(a).

³⁷ *INT. REV. CODE OF 1954*, § 6511(a).

³⁸ *INT. REV. CODE OF 1954*, § 6511(c).

³⁹ *INT. REV. CODE OF 1954*, § 6511(d)(2).

⁴⁰ *INT. REV. CODE OF 1954*, § 6511(d)(1). This provision was first introduced in 1942 to prevent the hardship occurring when a taxpayer, upon claiming worthlessness in a given year, being met with the contention that the loss really occurred in an earlier year already barred by the statute of limitations.

⁴¹ For example, if a foreign tax credit is involved. The Code grants a special ten year period of limitation for refunds resulting from foreign taxes paid or accrued which may be claimed as a credit against the Internal Revenue tax imposed. *INT. REV. CODE OF 1954*, § 6511(d)(3).

⁴² *INT. REV. CODE OF 1954*, § 7502. The restrictions therein should be noted, however.

action being taken⁴³—the next step is the suit itself. The suit must be filed within two years from the date of *mailing* by the Commissioner⁴⁴ (and not from the date of receipt by the taxpayer) of the Notice of Disallowance of the claim. The practitioner should remember at this point that all claims for refund for a given type of tax which a taxpayer has for a single taxable period constitute one claim for relief.⁴⁵ Thus, although there is no limit to the number of refund claims which may be filed with the Internal Revenue Service for a taxable period, only one *suit* may be prosecuted to judgment for a given tax in a given period.⁴⁶

Unless a lawyer is willing to ride the jurisdictional merry-go-round, he should name the United States as a party defendant.⁴⁷ He should not name the District Director⁴⁸ and he should not name the District Director and the United States, although both practices often occur.⁴⁹ Suing the District Director is inviting needless venue

⁴³ See Register Pub. Co. v. United States, 189 F. Supp. 626 (D. Conn. 1960) (holding that sending a 30 day letter to taxpayer ends the six month limitation period because it is in effect a disallowance).

⁴⁴ A registered letter from the Commissioner is not necessary. Skopil v. United States, 51 A.F.T.R. 1673 (D. Ore. 1956).

⁴⁵ This is but another facet of the rule against splitting a cause of action. Sometimes this rule may work quite harshly against the taxpayer. For instance, in *Guetel v. United States*, 95 F.2d 229 (8th Cir.), *cert. denied*, 305 U.S. 603 (1938), the taxpayers in arguing that their second refund suit should be maintained, contended that at the time of the first suit in the Court of Claims they could not have urged their position because they had filed no claim for refund based on this position. The court, in holding against the taxpayers stated simply (and probably too simply) "The existence of the appellants' cause of action was in no way dependent upon their claims for refund, and a single cause of action for the recovery of a tax cannot be split up by the filing of separate claims for refunds based upon different grounds." *Id.* at 231.

⁴⁶ *Bowe-Burke Mining Co. v. Wilcuts*, 45 F.2d 394 (D. Minn. 1930); *Chicago Junction Ry. v. United States*, 10 F. Supp. 156 (Ct. Cl. 1935). It has been held that dismissal of an action by agreement, unless expressly said to be without prejudice, amounts to a judgment upon the merits and constitutes a defense to another suit brought upon the same cause of action. *Bertelsen v. White*, 58 F.2d 792 (D. Mass. 1932), *aff'd*, 65 F.2d 719 (1st Cir. 1933).

⁴⁷ The "refund statute," § 1346(a) of Title 28 refers to "any civil action against the United States . . ." Before 1954, district court jurisdiction over suits against the United States for tax refunds was limited to \$10,000, unless the collector by whom the tax was collected was dead or not in office at the commencement of the action. The statute as now written expressly refers to the United States and does not inferentially or expressly indicate that it provides for any remedy against the District Director. Any suits against the District Director are, therefore, properly grounded on another jurisdictional base.

⁴⁸ It might be noted, however, that costs are recoverable against the District Director but not the United States. *Allis v. LaBudde*, 131 F.2d 78 (7th Cir. 1942); *Blampton Willen Co. v. Commissioner*, 45 F.2d 327 (1st Cir. 1930); *Lazier v. United States*, 77 F. Supp. 211 (D.N.D. 1948). *But see, e.g.*, *Gerth v. United States*, 132 F. Supp. 894 (S.D. Cal. 1955) in which both the District Director and the government were parties even though there was properly no jurisdiction over the government at all. The point apparently was not raised and the cases cited at 132 F. Supp. 896 all involved suits naming the Collector.

⁴⁹ The only statutory authority for suing the District Director in a federal court, except in a diversity situation where over \$10,000 is involved, is 28 U.S.C. § 1340 (1948).

problems,⁵⁰ possible problems of jurisdiction over the subject matter,⁵¹ real party in interest difficulties⁵² and arguments over the availability of a jury⁵³ and jurisdiction of the court to hear such action. An attempt to name both the District Director and the United States may run afoul of a strict application of the doctrine of sovereign immunity—several courts have held the United States cannot be joined with any other party defendant.⁵⁴ Beyond question, it is improper

⁵⁰ Venue for suing the District Director is under 28 U.S.C. § 1391 (1948). The governmental statute is 28 U.S.C. § 1402 (1948). A case filed in the wrong district may be dismissed, but if justice requires may be transferred to any district in which it could have been brought. *Stevenson v. United States*, 197 F. Supp. 355 (N.D. Tenn. 1961).

⁵¹ See, e.g., *First Nat'l Bank v. United States*, 265 F.2d 297 (3d Cir. 1959).

⁵² An action against the District Director is personal in nature and does not abate when the Director's term expires, or upon his death. In *Wolinsky v. United States*, 271 F.2d 865 (2d Cir. 1959) the taxpayer sued the incumbent District Director rather than the one to whom the tax had been paid. An attempt was then made to name the United States, but the court held there could be no substitution because more than two years had passed since the filing of the refund claims. A director remains liable to suit for taxes wrongfully collected while in office even if he is no longer serving and his successor who has received the money is not answerable for the acts of his predecessor. *Smietanka v. Indiana Steel Co.*, 257 U.S. 1 (1921); *Buhl v. Menninger*, 251 F.2d 659 (6th Cir. 1958). With a mobile population, an important point to remember is that the suit should be brought against the District Director collecting the tax, even though when the taxpayer moves, his file is transferred and mailing of the deficiency notice will be by the District Director where he is now living. *Hoffman v. Machiz*, 184 F. Supp. 669 (D. Md. 1960). And it has been held that if a tax was paid because of compromise, the United States is the only proper party defendant. *Snyder v. Routzahn*, 55 F.2d 396 (N.D. Ohio 1931). And see a very recent court case reaching a thoroughly equitable result on what appears to the writer to be legally untenable grounds. In *Machinery Center, Inc. v. Kelly*, 11 A.F.T.R.2d 506 (E.D. Mo. 1962) the court permitted suit to be maintained for seizure of the plaintiff's monies against the incumbent District Director, although the seizure had been made by a previous Director, stating "the suit is brought against the office and not the person of the Director of Internal Revenue." This does not appear to be legally true. See, e.g., the discussion in *Wolinsky v. United States*, 271 F.2d 865, 869 (2d Cir. 1959). The court in the *Machinery Center* case, *supra*, cited rule 25 of the Federal Rules of Civil Procedure to support the result reached. That rule, even as recently amended, applied only to pending actions in which the defendant public officer "dies, resigns, or otherwise ceases to hold office. . . ." It is not germane to the substantive legal problem which was faced in *Machinery Center*. See a discussion of the inadequacies of rule 25 as it relates to public officers in 4 MOORE, FEDERAL PRACTICE ¶ 25.01, at 511 (2d ed. 1962). The discussion is still pertinent even though the 1961 amendment has made substitution automatic.

⁵³ Apparently only custom gives plaintiff a "right" to a jury trial against the District Director. There is no express statute bestowing this right, although the 1954 amendment to the Judicial Code which granted a right to trial by jury in refund suits against the United States was admittedly adopted to equalize the taxpayer's rights against the United States with those he already had against a District Director. There is no right to a jury trial in all tax matters as a constitutional requirement. *Wickwire v. Reinecke*, 275 U.S. 101 (1927); *Cheatham v. United States*, 92 U.S. 85 (1895). The "right" to a jury in suing the District Director "arises by implication from the provisions of section 3226, Revised Statutes. . . ." *Wickwire v. Reinecke*, *supra*, at 105.

⁵⁴ See note 49 *supra*. The basis of such holdings is that the United States as sovereign may be sued only under conditions prescribed by Congress. *United States v. Sherwood*, 312 U.S. 584 (1941).

to sue the "U. S. Treasury Department, Internal Revenue Service"⁵⁵ or the Commissioner.⁵⁶

Since the sovereign is involved, the taxpayer's attorney must pay meticulous attention to compliance with the statutory waiver of immunity.⁵⁷ The taxpayer in any refund case has the burden of proof (except for fraud assessments)⁵⁸ to show not only that the Commissioner was wrong but to make a further showing of facts from which the amount of recovery may be determined.⁵⁹ In the case of excise taxes, the taxpayer has the added requirement of showing he has a better right to the funds than the government. He must show he has not "passed on" the tax to his customers.⁶⁰

As has been indicated, the judicial code permits maintenance of a refund suit in either the Court of Claims or the district court.⁶¹ Which court to sue in will generally depend upon the flavor of the case as much as the law, although there are some instances in which it is clear that the Court of Claims will be pro taxpayer and the

⁵⁵ *Baumohl v. Columbia Jewelry Co.*, 127 F. Supp. 865 (D. Md. 1955).

⁵⁶ *Laughlin v. Harrington*, 256 F.2d 893 (D.C. Cir. 1958).

⁵⁷ See, e.g., *Sherwood v. United States*, 312 U.S. 584, 590 (1941); *Lynch v. United States*, 292 U.S. 571, 581 (1934); *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927); *United States v. Babcock*, 250 U.S. 328, 331 (1919).

⁵⁸ The government reluctantly yielded after many unsuccessful circuit court of appeals efforts to place the burden of proof on the taxpayer even as to fraud. See, e.g., *Klassie v. United States*, 289 F.2d 96 (8th Cir. 1961); *Paddock v. United States*, 280 F.2d 563 (2d Cir. 1960); *Thomson v. United States*, 279 F.2d 165 (10th Cir. 1960); *Carter v. Campbell*, 264 F.2d 930 (5th Cir. 1959); *Ohlenger v. United States*, 219 F.2d 310 (9th Cir. 1955).

⁵⁹ See, e.g., *Burnet v. Houston*, 283 U.S. 223 (1931); *United States v. Anderson*, 269 U.S. 422 (1926); *Alvary v. United States*, 302 F.2d 790 (2d Cir. 1962); *Commissioner v. R. J. Reynolds Tobacco Co.*, 260 F.2d 9 (4th Cir. 1958). Moreover, even if the assessment was procedurally invalid, the taxpayer cannot recover unless he can prove that the payment, in whole or in part, exceeds his true tax liability. *Blansett v. United States*, 181 F. Supp. 637 (W.D. Mo.), *rev'd on other grounds*, 283 F.2d 474 (8th Cir. 1960). But the government may be required to prove "new matter" not relied on in the 90 day letter. *Service Ins. Co. v. United States*, 189 F. Supp. 282 (D. Neb. 1960), *aff'd*, 293 F.2d 72 (9th Cir. 1961); *Massingale v. United States*, 3 A.F.T.R.2d 995 (D. Ariz. 1959).

⁶⁰ *Etheridge v. United States*, 300 F.2d 906 (D.C. Cir. 1962); *McGowan v. United States*, 296 F.2d 252 (5th Cir. 1961); *United States v. Standard Oil Co.*, 158 F.2d 126 (6th Cir. 1946); *Gay Games Inc. v. Smith*, 132 F.2d 930 (7th Cir. 1943); *Andrew Jergens Co. v. Conner*, 125 F.2d 636 (6th Cir. 1942); *Luzier's, Inc. v. Nee*, 106 F.2d 130 (8th Cir. 1939); *L. P. Piver, Inc. v. Hoey*, 101 F.2d 69 (2d Cir. 1939); *Tysdale v. United States*, 191 F. Supp. 442 (D. Minn. 1961); *Etalissements Rigaud v. Hoey*, 50 F. Supp. 598 (S.D.N.Y. 1942), *aff'd per curiam*, 136 F.2d 1000 (2d Cir. 1943). And one must plead in his complaint that he has not included the excise tax in the price charged. *D. Gottlieb & Co. v. Harrison*, 27 F. Supp. 424 (N.D. Ill. 1938).

⁶¹ 28 U.S.C. § 1491 (1948). The Court of Claims obviously could not entertain a suit against anyone save the United States by the express wording of the law. The jurisdiction of the Court of Claims is not limited by the amendments of the Tucker Act covering the jurisdiction of district courts. See *New Eng. Mut. Life Ins. Co. v. United States*, 52 F.2d 1006 (Ct. Cl. 1931).

district court pro government or vice versa.⁶² Assuming that one cannot say categorically how either court will rule as a matter of law, the most obvious advantage to the federal district court is the chance for a jury.⁶³ Available figures seem to indicate that a juror will look kindly upon the taxpayer in instances where a Tax Court judge or Court of Claims Commissioner might not.⁶⁴ Surprisingly, figures also indicate that the bar has not availed itself of the right to trial by jury in most cases where it may be used.⁶⁵ Another pointer in favor of the refund route is that the taxpayer stops the running of interest upon payment, and if a sizable sum is involved and the taxpayer eventually loses, the saving by going into the district court rather than the Tax Court can be considerable. Next to the jury facet, probably the greatest appeal in the district court lies because there is a trial before a local judge in a local court who will in all likelihood be something of a known quantity to any practitioner—not just those of the tax bar.

Another consideration in determining the proper forum is the nature of the adversary's representative. Tax Court cases are tried by Internal Revenue Service attorneys in the Regional Counsel's office.⁶⁶ Most district court tax cases are tried by Department of Justice attorneys based in Washington,⁶⁷ while Court of Claims cases

⁶² See the excellent articles by Pavenstedt, *The United States Court of Claims as a Forum for Tax Cases*, 15 TAX L. REV. 1, 201 (1960). At pages 8, 9 and 10, he sets out the various specific tax areas in which the Court of Claims is more favorable than other courts.

⁶³ Not only does counsel not have his familiar jury trial procedure in the Court of Claims, the hearings are held before Commissioners under procedure distinctly unfamiliar to the average attorney.

⁶⁴ Walston, *The Use of Juries in Federal Civil Income Tax Cases*, 16 TAXES 144 (1961). Although the article deals only with income tax cases it is submitted that the advantage of a jury would be the same in regard to other taxes.

⁶⁵ In the five years between 1954 and 1959 there were only 117 jury verdicts in civil income tax cases reported. During that period there were no jury trials in 16 of the 48 states, and only 1 each in 14 of the remaining 32 states. Eighteen of the states had 103, or 88% of all the jury trials for the entire country. Seventy-four of the 103 were in 8 southern states. Walston, *supra* note 64, at 147. The author indicates that the 117 cases involved a total of 131 substantive tax issues of which 83 were decided in favor of the taxpayer and 48 for the government. More startling than the low number of jury trials in the 1950's is the report that in 1936 there were only 4 jury trials in the country, and in 1937 only 2 in income tax cases. Traynor, *Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393, 1426 (1938).

⁶⁶ There are nine regional counsels, each under a regional Commissioner. In addition, an unofficial region has been set up for taxpayers outside of the United States, under jurisdiction of the Director of International Operations in Washington. On March 5, 1963, Commissioner Caplin proposed a reduction in the number of regions from 9 to 7; Arizona would be unaffected by the regional reshuffling.

⁶⁷ Virtually all refund cases will be tried out of Washington. However, in New York, Los Angeles, San Francisco and a few other localities, staff members of the United States Attorney's office handle all tax matters. Generally speaking, collection and lien foreclosure suits, bankruptcies, receiverships, and probate actions are handled locally, although in given cases an attorney from the Justice Depart-

are tried by another section of the Tax Division in the Department of Justice. Whether these differences are significant is a question usually resolved upon the basis of the tax practitioner's own experience and prejudices. The involvement of the Department of Justice may, however, be something of an inconvenience in trial settings, correspondence, offers in compromise and the like.⁶⁸

There is a growing feeling among many attorneys that the Court of Claims is being overlooked by taxpayer's counsel. Many tax practitioners favor the Court of Claims because of the following reasons:⁶⁹ (1) It is highly probable that a favorable decision will not be reviewed—the only review is by the Supreme Court;⁷⁰ (2) The court is less technical than even the district courts and will give a break to a taxpayer who is perhaps technically in error;⁷¹ (3) The Court of Claims is willing to make “new law” to benefit taxpayers.⁷²

ment may actively participate. In 1961, the Department of Justice reorganized what had been its Trial Section, dividing it into four sections. There were created three Refund Trial Sections (No. 1 for the northeast, No. 2 for the south and No. 3 for the west and a section for the Court of Claims). At the same time, what had been the Claims Section became the General Litigation Section, which as a general matter handles all civil tax litigation except for the standard refund suit. A new level of supervisor was created within the Tax Division, having a rank immediately above the Section Chiefs of the Trial Refund Section, General Litigation Section, Review Section, Appellate Section and Court of Claims Section. The position is called Assistant for Civil Trials.

⁶⁸ The Department of Justice is aware of the problems of centralization, and has taken a number of steps to ameliorate them. However, the procedural machinery within the Department is such that added delay appears inevitable. For example, in consideration of compromises, the non-tax practitioner should not assume that he is dealing with the Department of Justice *instead of* the Internal Revenue Service. It is true he will direct his correspondence to the Department of Justice, but all compromises are considered by both agencies. The Internal Revenue Service never totally leaves the picture in any tax matter, and the fact that there are additional sections, persons and units within the tax division of the Department of Justice in addition to the Internal Revenue Service obviously makes for added delays and slower decisions.

⁶⁹ Pavenstedt, *supra* note 62, at 228.

⁷⁰ In the decade 1949-1958, the government filed only 11 petitions for certiorari, 9 of which were granted. In 3 of these cases the decision of the Court of Claims was affirmed, with the other 6 reversed. In only 1 case did a taxpayer successfully get Supreme Court review. *Lober v. United States*, 346 U.S. 335 (1953). The figures are cited by Pavenstedt, *supra* note 62, at 20. Obviously the finality of a Court of Claims decision is a two-edged sword, so it behooves the taxpayer to win.

⁷¹ A recent example of this may be found in *Lorenz v. United States*, 296 F.2d 746 (Ct. Cl. 1961), permitting recovery although no claim for refund had been filed within the statutory period. See also *Texaco Inc. v. United States*, 293 F.2d 675 (Ct. Cl. 1961) permitting a suit after the statute of limitations because of an agreement by the government pending a decision in a test case. See, e.g., *Tuttle v. United States*, 101 F. Supp. 532 (1951); *Perry v. United States*, 160 F. Supp. 370 (Ct. Cl. 1958), both cases applying a liberal tax benefit theory.

⁷² *Ibid.* See also *Shibly Constr. & Supply Co. v. United States*, 7 F. Supp. 492 (Ct. Cl. 1934) discussed *infra* under the heading “Suits on Accounts Stated.”

The Partial Payment Problem

*Flora v. United States*⁷³ decided once and for all that full payment is a condition precedent to recovery by the taxpayer in a suit for income, estate or gift taxes. However, the government never succeeded in convincing the courts that the full payment rationale was applicable to excise taxes,⁷⁴ and it is clear that it is not. The government has in fact now conceded this point.⁷⁵ The justification for the differentiation is said to be that excise taxes are "divisible" whereas income taxes for example are "indivisible." Thus, an income tax assessment is for an entire year's income, whereas an excise tax is levied against each taxable transaction which can be considered apart from all other transactions in a given year. Whether or not the reasoning is altogether sound is really unimportant, for the importance which has resulted from this distinction is that an excise taxpayer, who cannot go to the Tax Court, can get "Tax Court treatment" in the district court.⁷⁶ In effect, you may litigate first and pay later by means of a token payment on one or two transactions. It has not been generally recognized, though, that the excise taxpayer is getting more than "Tax Court treatment" for he is getting the right to a jury trial, the more liberal discovery rules of the federal courts as opposed to the Tax Court, the more liberal pleading rules and a local judge.

TAX COURT SUITS

For poor people who have income, estate or gift tax problems, the Tax Court is the answer when administrative settlement of differences fail.⁷⁷ Skipping over the administrative phase (a highly

⁷³ 357 U.S. 63 (1958), *petition for rehearing granted*, 360 U.S. 922 (1959), *aff'd on rehearing*, 362 U.S. 145 (1960). The opinion contains a lengthy discussion of § 7422(a) of the Internal Revenue Code of 1954, and its predecessors.

⁷⁴ O'Neill v. United States, 172 F. Supp. 904 (E.D.N.Y. 1959); Jones v. Fox, 162 F. Supp. 449 (D. Md. 1958).

⁷⁵ Steele v. United States, 280 F.2d 89 (8th Cir. 1960). Cases subsequent to Steele have recognized the inapplicability of the full payment rule to excise taxes. Etheridge v. United States, 300 F.2d 906 (D.C. Cir. 1962); Botta v. Scanlon, 288 F.2d 504 (2d Cir. 1961); Heller v. Scanlon, 196 F. Supp. 832 (E.D.N.Y. 1961); Ruby v. Mayer, 194 F. Supp. 594 (D.N.J. 1961); Tisdale v. United States, 191 F. Supp. 442 (D. Minn. 1961).

⁷⁶ But the very availability of "Tax Court treatment" may preclude injunctive relief for the taxpayer which he otherwise could have obtained. This is because he is now held to have an adequate legal remedy. Sherwood v. Scanlon, 9 A.F.T.R.2d 1824 (E.D.N.Y. 1962). *But see* Falik v. United States, 206 F. Supp. 181 (E.D.N.Y. 1962).

⁷⁷ Rich people with income, estate or gift tax problems may go the refund route. Excise taxes and the like are not within the jurisdiction of the Tax Court. Without attempting to add fuel to the fire of unauthorized practice disputes it should also be noted that for the taxpayer who has retained an accountant rather than a lawyer, the Tax Court is always the only answer, unless legal help is called in. It does not seem unfair to point out that accountants understandably tend to be

important phase and important in a refund suit as well, prior to the decision to pay and litigate) the wheels begin to turn with the determination of a "deficiency"⁷⁸ and mailing of the statutory notice (90 day letter).⁷⁹ Putting aside at this time a possible "unusual" remedy, once the 90 day letter is mailed and the taxpayer has determined not to pay, basically he has the "choice" between inaction and filing a petition with the Tax Court. If the petition is filed within the time prescribed by law, the Commissioner generally has no right at a later date to determine any additional deficiency in respect to the same taxable year unless fraud is involved.⁸⁰ However, the Tax Court has jurisdiction to determine a deficiency in an amount greater than the Commissioner asserts so long as the Commissioner's claim is made at or before the hearing or rehearing. Usually such a claim is made in the answer.⁸¹

Tax Court oriented and naturally influenced by their own experiences. Looking at the tax law solely from the standpoint of remedies leads to the conclusion that an accountant is definitely in a second-best position. An analogy for the sports-minded might be posited—in the football game between government and taxpayer, government can more easily defend against taxpayer's stellar halfback (regardless of how fleet of foot) who only can run to his right.

⁷⁸ Deficiency is a technical term defined by INT. REV. CODE OF 1954, § 6211. In addition to the existence of a deficiency, the Secretary of Treasury orders delegate must "determine" it before § 6212(a), requiring the statutory Notice of Deficiency, comes into play. This determination is treated by the Tax Court as a question of fact. See Terminal Wine Co., 1 B.T.A. 697 (1925); Ormsby McKnight & Mitchell, 1 B.T.A. 143 (1924).

⁷⁹ There is considerable writing on the problems incident to negotiations with the Internal Revenue Service. See note 1 *supra*, and INT. REV. CODE OF 1954, § 6212. The statutory Notice of Deficiency is the so-called ticket to the Tax Court. However, that it is not always a Tax Court ticket is illustrated by Bromberg v. Ingling, 300 F.2d 859 (9th Cir. 1962) in which a resident of Guam, who in 1958 was not eligible for Tax Court review, was still entitled to the 90 day period between the sending of the letter and the assessment. The court held invalid an assessment made on the same day the letter was sent. See also, to the same effect, Jones v. Ingling, 9 A.F.T.R.2d 1743 (9th Cir. 1962). The statutory Notice of Deficiency is usually referred to as a 90 day letter because of the provision of § 6213 that persons within the United States must petition the Tax Court within 90 days to prevent the assessment of the proposed deficiency. Except for jeopardy assessments, the Code specifically allows the taxpayer to enjoin any assessment or the beginning of any proceeding or levy until the expiration of the 90 day period. INT. REV. CODE OF 1954, § 6213(a). If the taxpayer has paid his tax and received a refund which the government later contends is erroneous, it is not required that a 90 day letter be issued as a condition precedent to a suit by the government to recover the erroneous refund. United States v. A. F. Smith Chevrolet Co., 192 F. Supp. 106 (N.D. Ga. 1961).

⁸⁰ If a 90 day letter is mailed and the taxpayer files with the Tax Court in time there can be no further determination of additional deficiency of income tax for the same taxable period or gift tax for the same taxable year or estate tax in respect to the same decedent, except for fraud and certain other minor exceptions. INT. REV. CODE OF 1954, § 6212(c).

⁸¹ Once the court has jurisdiction of a deficiency notice, the taxpayer's entire liability for the year at issue is under review and the court may find an added deficiency or an overpayment. See *id.* at § 6512(b). Jurisdiction to increase the size of the deficiency is expressly conferred on the Tax Court by INT. REV. CODE OF 1954, § 6214(a). And, the court may find additional deficiency on grounds not raised by the Commissioner. James R. Fleming, 33 T.C. 336 (1959).

The determinations of fact in a Notice of Deficiency are prima facie correct. As to these, the taxpayer has the burden of refuting the Commissioner's case.⁸² In contrast, if the Commissioner raises new matter in his answer, the burden of proof shifts to him as to the new matter raised.⁸³

The importance of the 90 day letter cannot be overstated. Not only does it delineate those items on which the taxpayer will have the burden of proof, it is jurisdictional⁸⁴ in the sense that unless the Commissioner has made a determination that there is a deficiency and mailed the 90 day letter to the taxpayer, the Tax Court has no power to hear any dispute.⁸⁵ The date the notice is mailed rather than the date it is received determines the right of the taxpayer to go to the Tax Court.⁸⁶ If the notice is improperly addressed it is no good unless the taxpayer receives it, accepts it and uses it as a basis for filing a petition with the Tax Court.⁸⁷ An added factor of

⁸² TAX CT. R. 32.

⁸³ *Ibid.* Because the burden is on the petitioner unless statute otherwise provides, it has often been necessary to determine whether any special statutes have placed the burden on the Commissioner. See, e.g., § 6902(a) dealing with transferee liability. See also *Pelton Steel Casting Co.*, 28 T.C. 153 (1957), *aff'd*, 251 F.2d 278 (7th Cir.), *cert. denied*, 356 U.S. 958 (1958). In the *Pelton Steel* case, involving § 534 of the 1954 Code relating to accumulated earnings tax, it was ruled the petitioner still had the burden of showing that it had not been availed of to avoid the imposition of tax upon its shareholders.

There is of course a substantial problem as to what constitutes new matter. In *Sheldon Tauber*, 24 T.C. 179, 185 (1955) the court held that the "Commissioner must properly plead and prove any such alternative issue as the one he has in mind, which is upon a new theory different from and inconsistent with his determination of the deficiencies." Moreover, the burden will shift even if the Commissioner's change in theory will reduce his tax recovery. *Estate of Harry Schneider*, 29 T.C. 940 (1958).

⁸⁴ See INT. REV. CODE OF 1954, § 7442.

⁸⁵ The Tax Court is of definitely limited jurisdiction, as an independent agency of the executive branch of the government. It is not a court in the judicial sense. See *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943); *Tyson v. Commissioner*, 66 F.2d 160 (7th Cir. 1933). Until 1942 it was known as the Board of Tax Appeals, but the change in name to the Tax Court had no effect upon its jurisdiction. Jurisdiction cannot be granted by the parties or acquired by their failure to object to the lack of it. *National Builders Inc.*, 16 T.C. 1220 (1951); *First Nat'l Bank of Wichita Falls*, 3 T.C. 203 (1944).

⁸⁶ INT. REV. CODE OF 1954, § 6212. Because the mailing date is crucial, the Commissioner will be required to submit evidence of such date when a motion is made by him to dismiss on the jurisdictional ground that petitioner has failed to file his appeal within the statutory time limit. See *Southern Calif. Loan Ass'n*, 4 B.T.A. 223 (1926).

⁸⁷ Although the statute calls for registered or certified mail to be used in mailing the statutory Notice of Deficiency, it has been held that ordinary mail will suffice if the taxpayer actually receives it. See *Boren v. Riddell*, 241 F.2d 640 (9th Cir. 1957). But in *Rosewood Hotel, Inc. v. Commissioner*, 275 F.2d 786 (9th Cir. 1960) the court held that personal service after mailing of a properly addressed Notice of Deficiency started a new 90 day period. The notice must be sent to the "last known address" of taxpayer, which is usually the address appearing on the return filed in the investigating district. Absent notice to the contrary, the government may mail to this address. *Joseph Marcus*, 12 T.C. 1071 (1949). The taxpayer may waive the defect of an improperly addressed notice

importance, which may be overlooked by one not accustomed to Tax Court practice, is that the taxpayer's Tax Court petition must state his name just as it appears in the notice.⁸⁸

If the Commissioner has issued a Notice of Deficiency for two or more years and the taxpayer has initially appealed only one of the years, he may still file an amended petition which includes the other years for which deficiencies were determined in the notice.⁸⁹ However, prudence would seem to indicate that appeal should be taken as to all years for which deficiencies are determined.

The Tax Court is given jurisdiction to redetermine only those deficiencies in tax which the Commissioner has asserted, but if a Notice of Deficiency has been issued and an appeal has been filed, the Tax Court will retain jurisdiction even if the taxpayer pays the asserted deficiency after he receives the notice.⁹⁰ In such a case, if the taxpayer prevails a refund is made.

There is one other notable instance in which the Tax Court has jurisdiction of a tax paid prior to issuance of the 90 day letter. This is in the case of a jeopardy assessment, so called because it is made upon a determination that "the assessment or collection of a deficiency . . . will be jeopardized by delay. . . ."⁹¹ Such an assessment is payable upon notice and demand unless a bond is filed in the amount of assessment. However, even if a bond is not filed, the

by filing his petition with the Tax Court. See *Commissioner v. Stewart*, 186 F.2d 329 (6th Cir. 1951); *Wright v. Commissioner*, 101 F.2d 309 (4th Cir. 1939). For a case showing clearly that a taxpayer may save himself a tidy sum by showing that the 90 day letter was not mailed to his last known address, see *United States v. Lehigh*, 201 F. Supp. 224 (D. Ark. 1961).

⁸⁸ See TAX CT. R. 6. In the event of a variance between the name set forth in the Notice of Deficiency and the correct name, a statement of reasons for the variance must be made in the petition.

⁸⁹ Of course the Tax Court has no jurisdiction for a year with respect to which the Commissioner has not found a deficiency and sent a notice. *Crown Ironworks Co.*, T.C. Memo. 1956-199, *aff'd*, 245 F.2d 357 (8th Cir. 1957). There may be problems, if the period covered by the deficiency is not clear. See *Commissioner v. Forest Glen Creamery Co.*, 33 B.T.A. 564, *rev'd*, 98 F.2d 968 (7th Cir. 1938), *cert. denied*, 306 U.S. 639 (1939).

⁹⁰ Recent amendment to § 6512(d) permits a refund or credit of any portion of the tax determined by the Tax Court to have been paid within the time periods prescribed by § 6511(b)(2), (c) or (d) and for which a timely refund claim has been filed before the date of mailing of a Notice of Deficiency. However, the claim for refund must not have been disallowed before the date of the mailing of the deficiency notice, or if it was, it must have been possible for a timely suit for refund to have been commenced on that date or it must be the subject for a suit for refund which had been commenced before that date. See generally the Committee Report to Public Law 87-870.

⁹¹ See INT. REV. CODE OF 1954, §§ 6213(a) & 6861(a). Within 10 days after notice and demand from the Director the taxpayer may obtain a stay of execution on the assessment by posting a bond with the Director in a sum equal to the amount of the tax which he is trying to stay. INT. REV. CODE OF 1954, § 6863(a). If the taxpayer waives the stay as to part of the amount, the bond may be reduced. *Ibid.*

Tax Court still has jurisdiction.⁹²

Tax Court rules call for the filing of all documents in the office of the Clerk of Court in Washington,⁹³ and it is improper to file with the Commissioner of Internal Revenue, who will receive his copy of the petition from the Clerk. In addition to filings with the Clerk, a division which hears a proceeding may permit documents relating to the proceeding to be filed at the hearing.⁹⁴ An original and four conformed copies of all papers must be filed⁹⁵ and failure to file a sufficient number of copies is grounds for dismissal.⁹⁶ The petition must contain a caption, jurisdictional statement, statement of the amount of deficiency or liability which the Commissioner has determined, the nature of the tax, the period for which it has been determined, the amount in controversy as nearly as may be computed and the collection district in which the return was filed.⁹⁷ Each and every error complained of must be alleged clearly and concisely with each assignment of error numbered.⁹⁸ There must be set out numbered concise statements of fact which the taxpayer relies upon (except those upon which the Commissioner has the burden of proof).⁹⁹ There must be a prayer for relief,¹⁰⁰ the signature of the taxpayer or his counsel and a verification by the taxpayer.¹⁰¹ Finally, a copy of the Notice of Deficiency must be appended to the petition and to each copy filed.¹⁰² A ten dollar filing fee should be paid when the petition is

⁹² The taxpayer is not compelled to file a bond, but if he does not, his property may be distrained upon. The Tax Court is not concerned one way or other with the actions by the District Director or his agents. It is clear that the Tax Court cannot determine whether the Commissioner acted reasonably in making a jeopardy assessment. See *Commissioner v. Veeder*, 36 F.2d 432 (7th Cir. 1929).

⁹³ TAX CT. R. 5. All mail sent to the Court should be addressed to: Tax Court of the United States, Box 70, Washington 4, D.C. TAX CT. R. 1(b).

⁹⁴ TAX CT. R. 5.

⁹⁵ TAX CT. R. 7(a)(1).

⁹⁶ TAX CT. R. 7(a)(2).

⁹⁷ See generally TAX CT. R. 7.

⁹⁸ This of course does not apply to assignments of error in respect of which the burden of proof is by statute placed upon the Commissioner.

⁹⁹ Pleading of facts is highly important in the Tax Court. It is well to plead facts in such a manner that the Commissioner will admit as many of them as possible. Short paragraphs are useful in this regard. The petition should bring out all points which show the taxpayer is not liable for the deficiency and should not be limited to the facts shown in the return or the adjustment made by the Internal Revenue Service. *J. T. Dorminey*, 26 T.C. 940 (1956). If essential material is omitted from this fact statement the Tax Court will not be able to remedy the defect. See *Evans v. Commissioner*, 222 F.2d 922 (6th Cir. 1955); *Buffalo Wills Saint Clare Corp.*, 2 B.T.A. 364 (1925).

¹⁰⁰ The relief demanded is determined by the prayer. See the quotation from the dissenting opinion of the lower court of Van Fossan in *Moise v. Commissioner*, 52 F.2d 1071, 1073 (9th Cir.), *reversing* 13 B.T.A. 525 (1931).

¹⁰¹ Although the petition must be verified, if the petitioner "is sojourning outside the United States or is a non-resident alien, the petition can be verified by a duly appointed attorney-in-fact. . . ." TAX CT. R. 6. But a husband may not verify a petition for his wife without a showing that she was outside the United States or was a non-resident alien. *Greenan v. Commissioner*, 145 F.2d 134 (9th Cir. 1944), *cert. denied*, 324 U.S. 848 (1945).

¹⁰² TAX CT. R. 7(c)(4)(E).

filed although it has been held that non-payment of the fee is not jurisdictional, so long as payment is made within a reasonable time after notice that it must be paid.¹⁰³

As in district court cases, the government has 60 days to answer, but unlike the district court, has 45 days within which to move in respect to the petition.¹⁰⁴ A practitioner accustomed to modern code pleading should guard against lulling himself into the belief that the petition and answer are all the formal pleadings required.¹⁰⁵ For, if the Commissioner's answer alleges material facts, the taxpayer must, within 45 days after service of the answer, file a reply.¹⁰⁶ Alternatively, he has 30 days to move in regard to the answer.¹⁰⁷ The reply, like the petition, must be submitted in an original and four copies.¹⁰⁸

Among the more salient differences between the Tax Court and the district court are the following: Fact pleading is required,¹⁰⁹ discovery is limited,¹¹⁰ stipulations of fact between opposing counsel are strongly encouraged¹¹¹ and continuances when the case is called for trial are not lightly granted.¹¹² By express Code provision, the proceedings of the Tax Court are governed by the rules of evidence which obtain in trials without a jury in the United States District Court for the District of Columbia.¹¹³

Particularly in the area of discovery,¹¹⁴ taxpayer's counsel may

¹⁰³ See *Reliance Mfg. Co. v. Blair*, 19 F.2d 789 (7th Cir. 1927); *Weaver v. Blair*, 19 F.2d 16 (3d Cir. 1927).

¹⁰⁴ TAX CT. R. 14(a).

¹⁰⁵ Of course, the Commissioner's answer may not contain material facts, in which event the case is at issue upon the filing of the answer. Because every material allegation of fact in the petition which is not denied in the answer is deemed admitted, the Commissioner usually as a matter of form closes with a general denial in his answer.

¹⁰⁶ TAX CT. R. 15(a).

¹⁰⁷ *Ibid.*

¹⁰⁸ TAX CT. R. 15(c). If no reply is filed, the material facts set out in the answer are deemed to be denied unless the Commissioner moves, within 45 days after the time for filing a reply has expired for an order that specified allegations of fact in the answer shall be deemed admitted. See TAX CT. R. 18(c)(1).

¹⁰⁹ See 9 MERTENS, *LAW OF FEDERAL INCOME TAXATION* § 50.38 (1958), stating that "pleading of facts is perhaps the most important part of the petition. . . ."

¹¹⁰ For example, in order to take a deposition the consent of the other party by stipulation must be secured or the court must, upon application, order the taking. See TAX CT. R. 45(d) & 45(e). See also the recent case of *Estate of Marx*, 40 T.C. No. 1 (1963), in which it was held that the Tax Court lacks authority to order taking the deposition of an ill witness where the estate had not received a 90-day letter or filed a petition with the Tax Court.

¹¹¹ TAX CT. R. 31(b)(1) provides as follows: "The Court expects the parties to stipulate evidence to the fullest extent so complete or qualified agreement can be reached including all material facts that are not or fairly should not be in dispute."

¹¹² See TAX CT. R. 27(c)(2) providing that conflicting engagements of counsel or the employment of new counsel are not good grounds for a continuance unless set forth in a motion filed promptly after the Notice of Hearing has been mailed or unless there are other extenuating circumstances.

¹¹³ INT. REV. CODE OF 1954, § 7453.

¹¹⁴ For authority indicating there is no such thing as "discovery jurisdiction" in the Tax Court see *Louisville Builders Supply Co. v. Commissioner*, 294 F.2d 333 (6th Cir. 1961).

find Tax Court procedures disadvantageous. Overall, it may be conceded that the need for discovery in tax cases is less acute than in other areas of the law simply because the prolonged negotiations with the agent, group chief and appellate staff have made the position of both parties reasonably well known to the other. However, if discovery proves necessary, the limitations on it in the Tax Court can prove particularly vexing. If the taxpayer does not understand the government's claim and the basis for the deficiency he should move under rule 17(C)(1) for the Tax Court equivalent of a motion for more definite statement. Or, he may, if he wishes, request a pre-trial hearing.¹¹⁵ Taxpayer's counsel also may run afoul of the limitations on subpoena.¹¹⁶ For the Tax Court has no power to compel obedience of its subpoenas, nor punish contempt for disobedience.¹¹⁷ In lieu of this power, however, it may assume that a refusal to testify or produce documents implies that the testimony or documents would be adverse.¹¹⁸

If the Tax Court finds a deficiency, the taxpayer must either pay up or appeal,¹¹⁹ and if he appeals he must either file a bond or pay the tax.¹²⁰ If he does not appeal, he may not relitigate the

¹¹⁵ See Grace Licavoli, 15 T.C.M. 862, *aff'd*, 252 F.2d 268 (6th Cir. 1958) in which the Commissioner after a rule 17(C)(1) motion was required to file an amended answer setting forth the items making up the net worth alleged by a total asset and liability figure in the original answer. The Tax Court has recently changed its rules so that after June 1, 1963, new rule 28 will provide for pre-trial conferences. Once a case is on the trial calendar the trial judge has the authority to order a pre-trial conference on his motion or at the request of either party. Before a case is on the calendar, the chief judge has this authority. Time and place are at the discretion of the judge in either event.

¹¹⁶ See TAX CT. R. 44.

¹¹⁷ See, e.g., *Commissioner v. Kerbaugh*, 74 F.2d 749 (1st Cir. 1935); *Board of Tax Appeals v. United States ex rel. Shults Bread Co.*, 37 F.2d 442 (D.C. Cir. 1929), *cert. denied*, 281 U.S. 731 (1930).

¹¹⁸ See *Pelham G. Wodehouse*, 8 T.C. 637, 642 (1948), *remanded*, 177 F.2d 881 (2d Cir. 1949), *aff'd, rev'd and remanded in part*, 178 F.2d 987 (4th Cir. 1949), *on remand*, 15 T.C. 799 (1950).

¹¹⁹ The Tax Court may grant a rehearing and may entertain a motion to vacate a proceeding and to reconsider its previous opinion. See William R. Coleman, T.C. Memo. 1954-24. The disposition of a petition for rehearing is a discretionary matter. *Reis v. Commissioner*, 142 F.2d 900 (6th Cir. 1944). The report and findings of fact of a division of the Tax Court become the decision and findings of the entire court within 30 days after the division report, "unless within such period the Chief Judge has directed that such report shall be reviewed by the Tax Court." See INT. REV. CODE OF 1954, § 7460(b). See also § 7481 providing when the decision of the Tax Court becomes final. After it is final, it may not be reopened. *Sweet v. Commissioner*, 120 F.2d 77 (1st Cir. 1941).

¹²⁰ INT. REV. CODE OF 1954, § 7483, provides that Tax Court decisions may be reviewed by the appropriate circuit court of appeals if a petition for review is filed by the Commissioner or the taxpayer within three months after the decision is rendered, but if a petition for review is filed by but one party, a petition may be filed by any other party to the proceeding within four months after the decision is rendered. Section 7485(a) provides that the appeal may not operate as a stay of assessment or collection unless the taxpayer files a bond. See, e.g., *Long v. Wood*, 9 A.F.T.R.2d 1807 (D. Ariz. 1961) denying a motion for preliminary injunction to restrain collection of tax where taxpayer had failed to file the bond provided for by § 7485(a).

matter by refund suit.¹²¹ Frequently the decision of the Tax Court requires a recomputation of the final deficiency pursuant to rule 50.¹²² In this connection it should be noted that the Tax Court does not give judgments in the common law sense of the word.¹²³

It is submitted that an attorney should always keep in mind the very limited nature of Tax Court jurisdiction.¹²⁴ It lacks supervisory authority over the Revenue Service.¹²⁵ It will not decide questions of law in the abstract, even with the consent of the parties.¹²⁶ It has no jurisdiction to grant equitable relief.¹²⁷ From the standpoint of the government, its decision does nothing more than afford a basis for a collection suit. And, even though the petition in the Tax Court is referred to as an "appeal" the Tax Court tries *de novo* the narrow question of the deficiency upon the evidence produced before it.¹²⁸ While, after consideration of all these factors, it may nonetheless appear desirable to litigate in the Tax Court, it seems clear beyond a quibble that the Tax Court should not be the forum automatically chosen by taxpayer's counsel.

SUITS ON ACCOUNTS STATED

In what might be described as a triumph of resourcefulness

¹²¹ The familiar principles of *res judicata* and collateral estoppel apply with equal force to tax law. See *Commissioner v. Sunnen*, 333 U.S. 591 (1948). Under § 7422(c), the nominal difference between the Commissioner and the United States is made legally inconsequential. A finding of fact may not be *res judicata*, if it is only unnecessary to the earlier decision. See *Gensinger v. Commissioner*, 208 F.2d 576 (9th Cir. 1953). And, the point at issue may be subject to change from year to year so that collateral estoppel will not apply. See, *e.g.*, *Corrigan v. Commissioner*, 155 F.2d 164 (6th Cir. 1946); *Henricksen v. Seward*, 135 F.2d 986 (9th Cir. 1943).

¹²² Tax Court rule 50 permits the parties to submit computations to the court based upon its determination of the issues. If the parties cannot agree, either party may file with the court a computation of the deficiency believed by him to accord with the report of the court. A copy is then served on the opposite party and may be opposed. Any argument on the computation of the deficiency must be confined strictly to the consideration of the figures based on the issues already determined and old issues cannot be re-raised or new issues interjected.

¹²³ If the Tax Court finds a deficiency, and the taxpayer refuses to pay it, the government must sue him in the federal district court in a collection action. Except for issues which are *res judicata* or subject to collateral estoppel, the taxpayer may relitigate the merits. The Tax Court may find an "overpayment"; however, and the sum so found, when the decision becomes final, must be credited or refunded to the taxpayer. *INT. REV. CODE OF 1954*, § 6512.

¹²⁴ It is important to observe Tax Court rule 7(c) requiring proper allegation showing jurisdiction in the court. The court will raise jurisdictional questions on its own volition. See *Coca Cola Bottling Co.*, 22 B.T.A. 686 (1931).

¹²⁵ See *Crowther v. Commissioner*, 269 F.2d 292 (9th Cir. 1959), *affirming* 28 T.C. 1293 (1957).

¹²⁶ See, *e.g.*, *National Builders, Inc.*, 16 T.C. 1220 (1951); *First Nat'l Bank of Wichita Falls*, 3 T.C. 203 (1944).

¹²⁷ *Lorain Avenue Clinic*, 31 T.C. 141 (1958).

¹²⁸ It should be noted that the court is required to make findings of fact and in important cases, at least, will write a formally published opinion. It is not necessary that the judge who hears the case write the opinion. *Halle v. Commissioner*, 175 F.2d 500 (2d Cir. 1949), *cert. denied*, 338 U.S. 949 (1950).

over dogma, some taxpayers have been fortunate enough to escape the morass of problems resulting from irregular refund procedure and have recovered against the government on the theory of "account stated." As might be expected, government attorneys are not overly enamored with the theory and can usually be relied upon to come forward with numerous reasons why such a suit cannot be maintained. The theoretical common law basis for such a suit is simple — if one party owes another a stated balance, he is held by the law to have implied a promise to repay that balance.¹²⁹

Although such a suit itself comes within the general statute of limitations provisions instead of those which relate to tax refund suits,¹³⁰ it is not clear whether or not a suit to recover on the theory of account stated may be maintained at all unless a timely claim for refund has been filed.¹³¹ Section 7422(a) of the Internal Revenue Code of 1954 provides that "no suit or proceeding shall be maintained in any Court for the recovery of any Internal Revenue tax . . . until a claim for refund has been duly filed. . . ." Under this approach, the *right* to recover the money is conceded, but the taxpayer is held to have no remedy. As a makeweight to support this proposition, the government has argued that because it is authorized to sue to recover taxes it has refunded after the statute of limitations has run, it would be absurd to permit a taxpayer to recover on an account stated theory after the statute had run, for the government would thereupon turn around and sue the taxpayer to recover back the recovery.¹³²

Going in favor of the taxpayer and against the government argument are at least two Court of Claims decisions which appear to be fair,¹³³ although they may somewhat mar the geometrical symmetry of the tax statutes. In one case the court stated very simply that if there was a valid promise to pay an amount admitted to be due "a claim for refund was not necessary."¹³⁴

¹²⁹ See RESTATEMENT, CONTRACTS § 422 (1932). See also *Hart Glass Mfg. Co. v. United States*, 118 F.2d 828 (7th Cir. 1941).

¹³⁰ See *Maddox v. Jones*, 48 A.F.T.R. 2010 (D. Okla. 1955).

¹³¹ Cases indicating a refund claim is necessary include *Tolerton & Warfield Co. v. United States*, 285 F.2d 124 (Ct. Cl. 1961); *Guantanamo Sugar Co. v. United States*, 38 F. Supp. 252 (Ct. Cl. 1941); *Morrell v. United States*, 29 F. Supp. 981 (Ct. Cl. 1939); *Carver v. United States*, 27 F. Supp. 608 (Ct. Cl. 1939); *National Fire Ins. Co. v. United States*, 52 F.2d 1011 (Ct. Cl. 1931). *But see Williams v. Friday & Co. v. United States*, 61 F.2d 370 (3d Cir. 1932).

¹³² INT. REV. CODE OF 1954 § 6514(a)(1) permits the government to recover taxes refunded by it after the statute of limitations has run, unless a valid claim for refund has been filed before the running of the statute. See also § 7405 permitting erroneous refund suits by the government generally.

¹³³ *Midpoint Realty Co. v. United States*, 30 F. Supp. 691 (Ct. Cl. 1940); *Shipley Constr. & Supply Co. v. United States*, 7 F. Supp. 492 (Ct. Cl. 1934). Neither of these opinions indicates any awareness of the government's position.

¹³⁴ *Shipley Constr. & Supply Co. v. United States*, *supra* note 133, at 495.

If a taxpayer is relying on a theory of implied promise it of course behooves him to show that a promise was in fact made¹³⁵—and when it was made.¹³⁶ In accordance with the common law rule, if any part of the claim is disputed or the stated amount is not admitted, there is no account stated.¹³⁷ The date of the promise is of utmost importance because it determines when the statute of limitations will run. It has been held that a promise is made when the Commissioner approves the report of the District Director of credits and refunds and his certificate to that effect is delivered to the taxpayer.¹³⁸ The certificate must be delivered to the taxpayer and a letter from the District Director stating that the taxpayer does not owe the tax is not an account stated, a result hardly explainable on common law grounds.¹³⁹ In a recent case, the Fourth Circuit has held that receipt of a jeopardy assessment notice with a 90 day letter did not result in an account stated for the amount of taxes in the notice.¹⁴⁰

Although the account stated arises from the Certificate of Over-assessment which is issued by the Commissioner, he is, as in a refund case not the proper party defendant. In all cases where recovery on account stated has been allowed, the United States has been named defendant. It is even arguable that the suit must be brought in the Court of Claims,¹⁴¹ although this is probably not the law.

There remains for consideration the problem arising when the Tax Court has determined that the taxpayer has overpaid his tax. In this event, a suit on an account stated should be maintainable without filing a refund claim, but will not usually be necessary because the Code requires the Commissioner to credit or refund the amount determined as an overpayment.¹⁴² Therefore, if the Commissioner fails to make such a refund or credit, the taxpayer may bring an action for mandatory injunction against him.

OTHER REMEDIES

Having alluded to the common varieties of taxpayer remedies, attention is directed to the non-taxpayer and the uncommon rem-

¹³⁵ For example, if the Commissioner only suggests the filing of a refund claim based upon an overassessment, there can be no recovery on the theory of account stated. *Schubring v. United States*, 46 F. Supp. 1006 (Ct. Cl. 1942). Nor is a settlement agreement on Treasury Form 870-TS an account stated. *Cuba R.R. v. United States*, 135 F. Supp. 847 (S.D.N.Y. 1955).

¹³⁶ The action must, of course, be brought within six years after the promise. See, e.g., *Friday & Co. v. United States*, 61 F.2d 370 (3d Cir. 1932).

¹³⁷ See *Daube v. United States*, 59 F.2d 842 (Ct. Cl. 1932), *aff'd*, 289 U.S. 367 (1933).

¹³⁸ *Zachary v. United States*, 126 F. Supp. 726 (D. Conn. 1954), *aff'd per curiam*, 220 F.2d 749 (2d Cir. 1955).

¹³⁹ *Schulhoff v. United States*, 161 F. Supp. 411 (Ct. Cl. 1958).

¹⁴⁰ *United States v. Hardy*, 299 F.2d 600 (4th Cir. 1962).

¹⁴¹ See *United States v. Elgin Nat'l Watch Co.*, 66 F.2d 344 (7th Cir. 1933); *Dodge v. United States*, 8 F. Supp. 606 (Ct. Cl. 1934).

¹⁴² See INT. REV. CODE OF 1954, § 6512(b)(1).

edy.¹⁴³ While the refund suit, Tax Court case and even the suit on account stated involve only the taxpayer and the government (with a few exceptions) cases involving other remedies more often than not involve other parties. So, if a "non-taxpayer" attempts to file a claim for refund and brings a suit thereon under 28 U.S.C. section 1346, he is barred because the courts have held that the statutory tax remedies deal only with taxpayers. However, by the same logic, the courts have concluded that the statutory barriers to suit contained in the Internal Revenue Code, most notably section 7421 which denies injunctive relief to taxpayers, do not apply to non-taxpayers.¹⁴⁴ Declaratory judgment is still unavailable, however, because the federal courts have not been granted jurisdiction to give declaratory relief in matters relating to internal revenue.¹⁴⁵ The declaratory judgment bar, furthermore, is contained in the Judicial Code which presumably applies to everybody.

Initially disregarding the question of who is and who is not a "taxpayer," serious problems are still present and a non-taxpayer should not usually expect anything but a motion to dismiss upon filing his complaint. However, every time a district court permits redress of a revenue wrong outside of the narrow confines of a refund suit, it is a victory for ingenuity and a defeat for the strict letter of the law—for the plain words of the Internal Revenue and Judicial Codes, viewed against a background of sovereign immunity, would seem to bar any action except under section 1346(a). Fortunately, lawyers

¹⁴³ The reader should note that there is no textual discussion relating to the doctrine of estoppel or recoupment. Both of these doctrines are founded upon equitable considerations which have come to mitigate in some measures the rigors of arbitrarily assigning taxable events to a given unit of time, bringing with them the artificial doctrines of constructive receipt and cash equivalency. The doctrines were probably of more importance prior to any statutory recognition of them. Such recognition first occurred in 1938 when Congress adopted § 820 of the Revenue Act of 1938, which now appears in §§ 1311 through 1314 of the Code. The premise of these sections is that, although a correct result must always be reached in a later year, adjustment has to be made for an earlier year. Thus, suppose the simple case in which a taxpayer acquires property in an earlier year in which he fails to report, the property being worth \$5,000.00. If in a later year he sells the property for \$10,000.00 and tries to report only a \$5,000.00 gain, the question is whether the gain should be \$10,000.00 in the later year or \$5,000.00 in the later year with the prior year reconsidered. This latter approach is followed now in the Code. The doctrine of recoupment applies only to situations in which a single event constitutes the cause for imposition of tax. Accordingly, there may be recoupment of the estate tax against income tax if the two taxes arise out of the same transaction. See *Bull v. United States*, 295 U.S. 247 (1935). For an interesting case in which the government tried and failed to apply such a theory, see *Ford v. United States*, 276 F.2d 17 (Ct. Cl. 1960) involving an action by the sole beneficiaries of an estate for refund of income taxes based upon the fair market value of certain property which had been valued for estate tax purposes at a lower value.

¹⁴⁴ *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952); *Glenn v. American Sur. Co.*, 160 F.2d 977 (6th Cir. 1947); *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942). See also note 7 *supra*.

¹⁴⁵ 28 U.S.C. § 2201 (1948).

have never made a fetish out of the statutes and continue to file complaints which fly into the face of express prohibitions. Sometimes the complaint can be supported by the "common law" of tax injunctive relief, but often it cannot. There are, in fact, a number of Department of Justice attorneys who devote a substantial amount of time to pointing out to the bench and bar that injunctions are not lightly granted in matters of the exchequer. Most of the time the efforts of these lawyers are successful. Sometimes they are not and in such cases another chink in the armor of the Internal Revenue Service appears.

One Not a Taxpayer

Case law indicates that the Internal Revenue Code applies only to taxpayers.¹⁴⁶ According to that Code, a taxpayer means "any person subject to any Internal Revenue tax."¹⁴⁷ So, logically, in a given case the question is whether the plaintiff is subject to the particular tax. If he is, he is subject to all the limitations placed upon taxpayers, including for example the requirement to file a claim for refund as a condition precedent to suit and the prohibition against suits to enjoin the assessment or collection of taxes. It should be noted that all procedural results caused by this taxpayer, non-taxpayer dichotomy arise from case law and cannot be gleaned from a reading of the statute itself. However, just as the case law has settled the question that the Code relates only to taxpayers, so it has unsettled the question of who is a taxpayer. A recent district court case held that a widow who paid her husband's income taxes from the proceeds of his life insurance policies was a taxpayer.¹⁴⁸ This is hardly reconcilable with the view that the taxpayer is the person against whom the taxes are assessed.

One who has concluded he is not a taxpayer is well advised to forget about suing the government. He should instead bring suit against the District Director who collected, or who is threatening to collect the tax, relying for federal jurisdiction on section 1340 of the Judicial Code.¹⁴⁹

By invoking section 1346(a), the refund statute, a plaintiff may reasonably be required to follow the twisting trail through the entire refund procedure. Often, plaintiff in such a case has neglected to file a timely claim and he thus finds himself out of court before he is in. Although numerous refund suits under section 1346(a) are filed when both the District Director and the United States are named

¹⁴⁶ See note 144 *supra*.

¹⁴⁷ INT. REV. CODE OF 1954, § 7701(a)(14).

¹⁴⁸ *McMahon v. United States*, 172 F. Supp. 490 (D.R.I. 1959).

¹⁴⁹ See note 47 *supra*.

defendants¹⁵⁰ (sometimes the Commissioner and one or more agents who have proved especially vexatious are named as well) that section is nonetheless not applicable except when the United States alone is the defendant (and of course would be no good anyway for any relief other than recovery of a money judgment).¹⁵¹

In many instances, taxpayers cite both sections 1340 and 1346 for jurisdiction, as well as other sections. This "kitchen sink" approach, so common to the law generally, seems entirely sensible but there are cases not overruled which say the United States cannot be joined with any party¹⁵² and cases which say specifically that it cannot be joined with the District Director.¹⁵³ Government attorneys, being reasonable men by and large, generally ignore improper joinder—but it is nonetheless improper. Unless there is some real enigma concerning the proper party defendant, it should be the District Director and not the United States if a non-taxpayer is doing the suing.¹⁵⁴ When this occurs, the proper venue is the residence of the defendant District Director, and the refund venue provision should be disregarded.¹⁵⁵

Having properly named the District Director, problems for the non-taxpayer still remain. First of all, the District Director must be the one who collected the tax.¹⁵⁶ Second, payment must not have been "voluntary."¹⁵⁷ Lovers of plain language would no doubt be chagrined to read of the many cases in which a very recalcitrant individual has been told that his grudging payment was voluntary.¹⁵⁸

¹⁵⁰ See, e.g., *Gerth v. United States*, 132 F. Supp. 894 (S.D. Cal. 1955).

¹⁵¹ Under § 1346, only a refund is possible. Facts may permit additional relief, but in the usual situation this will not be true. See, e.g., *Ethridge v. United States*, 300 F.2d 906 (D.C. Cir. 1962); *Tysdale v. United States*, 191 F. Supp. 442 (D. Minn. 1961).

¹⁵² See, e.g., *Sherwood v. United States*, 312 U.S. 584 (1941) discussing the narrow exceptions to sovereign immunity and citing earlier cases.

¹⁵³ *Lazier v. United States*, 77 F. Supp. 211 (D.N.D. 1948).

¹⁵⁴ See, e.g., *First Nat'l Bank of Emlenton v. United States*, 265 F.2d 297 (3d Cir. 1959); *J. A. Peterson-Tomahawk Hills v. United States*, 195 F. Supp. 859 (D. Kan. 1961). And see for a later development in the *Bank of Emlenton* case, *Oil City Nat'l Bank v. Dudley*, 8 A.F.T.R.2d 5781 (W.D. Pa. 1961).

¹⁵⁵ 28 U.S.C. § 1402(d) (1958) relates only to suits against the United States. The venue statute for the District Director is 28 U.S.C. § 1391 (1948).

¹⁵⁶ *Smietanka v. Indiana Steel Co.*, 257 U.S. 1 (1921).

¹⁵⁷ *Ohio Locomotive Crane Co. v. Nauts*, 73 F.2d 408 (6th Cir. 1934); *Aaron v. Hopkins*, 63 F.2d 804 (5th Cir. 1933); *Wourdock v. Becker*, 55 F.2d 840 (8th Cir. 1932). But see *United States v. Halton Tractor Co.*, 258 F.2d 612 (9th Cir. 1958) holding mortgagee and conditional vendor was coerced into payment of third party's tax by government's threat of seizure. Note also that the United States is the party defendant. This appears to be the only circuit court case where this is true. Two district court decisions apparently have permitted the government to be named as defendant. *McMahon v. United States*, 172 F. Supp. 490 (D.R.I. 1959); *Fecarotta v. United States*, 154 F. Supp. 592 (D. Ariz. 1956).

¹⁵⁸ See, e.g., *Naus v. Brodrick*, 103 F. Supp. 233 (D. Kan. 1951) in which a husband paid his wife's taxes in order to clear title on jointly held property. *Contra*, *Parsons v. Anglin*, 143 F.2d 534 (9th Cir. 1944). The *Parsons* case and the *Halton Tractor* case, note 157 *supra*, seem to indicate the 9th Circuit is prob-

Third, the money paid over must not have been paid into the Treasury of the United States.¹⁵⁹ For the man who pays someone else's taxes and permits them to be paid into the Treasury, probably the only recourse is to the Court of Claims.¹⁶⁰

In the situation where collection has not yet occurred, but is merely threatened, the aggrieved third party indeed has a difficult task. Assume that John Upright, a man of impeccable character who has never owed any taxes in his life owns some very valuable property which he wants to sell. The United States government, through its District Director and Internal Revenue agents thinks that Tom Taxpayer, a wastrel and deadbeat owns the property. The government is in fact so convinced of this that they intend to sell the property the next day. Needless to say, their tax lien on the property is about to scare away the buyer. So John comes to you for advice. You tell him that he may sue the United States to quiet title under 28 U.S.C. section 2410; however, you candidly add that the suit will be heard long after the property has been sold. He says he wants an injunction, a reasonable request, especially since you know that injunctive relief is available to third persons like John. So you file John's injunction suit, knowledgeably refraining from naming the United States as defendant. The District Director files his answer, pointing out that the tax lien is still up in the air because it is the property of the United States and not the Director,¹⁶¹ so that the United States should be joined as a party defendant. However, the United States cannot be joined as a party defendant.¹⁶² The court may enjoin the sale, but most probably will refuse to adjudicate the status of title to the property because the government is not a party.¹⁶³ Even if the court proceeded to attempt to quiet title in John, this would scarcely be binding upon the government.¹⁶⁴ The court might feel that in telling the District Director he had no business bothering the

ably the least technical circuit in regard to permitting recovery by non-taxpayers and in permitting the United States to be named a party defendant.

¹⁵⁹ *Pennsylvania Turnpike Comm'n v. McGinnes*, 268 F.2d 65 (3d Cir.), *cert. denied*, 361 U.S. 829 (1959).

¹⁶⁰ *Kirkendall v. United States*, 31 F. Supp. 766 (Ct. Cl. 1940).

¹⁶¹ See *Sidbury v. Gill*, 102 F. Supp. 483 (E.D.N.C. 1952); *American Alliance Ins. Co. v. Mitchell*, 299 S.W.2d 536 (Mo. App. 1957).

¹⁶² See *Lazier v. United States*, 77 F. Supp. 211 (D.N.D. 1948).

¹⁶³ See *Jones v. Tower Prod. Co.*, 138 F.2d 675 (10th Cir. 1943). "In an action to force the removal of tax liens filed by the Collector of Internal Revenue, the Collector is not the proper person to be sued. The Collector has no proprietary interest in the disputed tax liens . . . and having no interest he is without power to act in their disposition." *Sidbury v. Gill*, 102 F. Supp. 483, 485 (E.D.N.C. 1952). See also *Czieslik v. Burret*, 57 F.2d 715 (E.D.N.Y. 1932); *Stafford Mills v. White*, 41 F.2d 58 (D. Mass. 1930); *Maryland Cas. Co. v. Charleston Lead Works*, 24 F.2d 836 (E.D.S.C. 1928).

¹⁶⁴ See *Clay v. Bookholt*, 6 A.F.T.R.2d 5830 (N.D. Ga. 1960) in which the court held that the failure to join the government as a party prevented cancellation of the tax liens.

property he was in effect concluding the government's claim, but if this were the case there would be no need for the enactment of the amendment to 28 U.S.C. section 2410 which permitted the bringing of quiet title actions when government liens are involved.¹⁶⁵ It is submitted that in this type of situation anything a court might do is technically wrong.¹⁶⁶ It is further submitted that the only thing which has prevented this, and similar situations, from being intolerable, is the common-sense approach of the Internal Revenue Service which will usually pay attention to what a federal judge says even if it thinks he cannot say it, and the judicious ignoring of some of the limitations which hedge the available remedy to non-taxpayers.

These remedies may have been limited somewhat by the Supreme Court of the United States in a recent case of *New Hampshire Fire Ins. Co. v. Scanlon*.¹⁶⁷ That case (involving 28 U.S.C. section 2463¹⁶⁸ which provides that property seized by the Internal Revenue Service is in the custody of the federal courts) held there is no jurisdictional basis for a summary action by a third person to determine the ownership of property seized by Internal Revenue. Broad and seemingly well documented dictum also indicated that section 2463 did not grant any jurisdiction to the federal courts to adjudicate tax disputes.¹⁶⁹ Inasmuch as this section has been the basis for many of the holdings permitting third parties to circumvent section 7421 and thereby get injunctive relief the exact effect of the holding of the case upon non-taxpayer suits is difficult to determine.¹⁷⁰ Probably it has done nothing more than narrow the statutory base for third party suits (by

¹⁶⁵ Prior to 1942, the government could under § 2410 be named defendant only in actions to foreclose liens. It should be noted that it has usually been the position that even in a suit to quiet title, a judicial sale is necessary to dispose of the government's interest. Case law gives the government position little support. See *United States v. Morrison*, 247 F.2d 285 (5th Cir. 1957); *Seattle Ass'n of Credit Men v. United States*, 240 F.2d 906 (9th Cir. 1957).

¹⁶⁶ As a result, the courts often do nothing. See, e.g., *Viviano v. United States*, 105 F. Supp. 312 (E.D. Mich. 1952) in which the court held it lacked jurisdiction of a quiet title suit brought pursuant to 28 U.S.C. § 2410 because it was actually a complaint for the injunction of tax collection. The action had been brought by a wife who had signed the joint return. She was seeking to remove a tax lien from property owned by the entireties and to enjoin a sale of the property. She claimed her signature was obtained by fraud but the court apparently felt this was not sufficient for a showing of jurisdiction or for relief. Contrast with *Shelton v. Gill*, 202 F.2d 503 (4th Cir. 1953) in which a transferee successfully enjoined a jeopardy assessment.

¹⁶⁷ *New Hampshire Fire Ins. Co. v. Scanlon*, 262 U.S. 404 (1960).

¹⁶⁸ Section 2463 provides as follows: "All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

¹⁶⁹ The law arose out of state interference experienced under the so-called Ordinance of Nullification in South Carolina in 1834.

¹⁷⁰ See, e.g., *Rothensies v. Ullman*, 110 F.2d 590 (3d Cir. 1940). Now all cases which have permitted third parties to enjoin taxes have been based on § 2463. *Long v. Rasmussen*, 281 Fed. 238 (D. Mont. 1922).

forcing a third party to rely solely upon section 1340)¹⁷¹ and has not affected the factual situations when relief is available.

Injunction for Taxpayers

Probably the most usual unusual remedy (and the most effective) is that of injunction.¹⁷² While historically courts of equity have not lightly granted injunction in tax matters,¹⁷³ the principal stumbling block to the general use of injunctions in this regard has been section 7421 of the Internal Revenue Code of 1954 and its predecessors. Apart from recognition of injunctions when there exist certain errors in procedure in the mailing of a 90 day letter, the statute simply provides "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in a court." This wording is substantially that which has been on the statute books since 1867. The wording is simple, straightforward, and broad. Unfortunately, it does not mean what it says.

Several critical questions must be answered in order to determine whether or not the statute applies. Although the statute says "no suit . . . shall be maintained," as we have seen it is now settled that a suit may be maintained, provided the one maintaining it is not a taxpayer, for only taxpayers are within the scope of the act.¹⁷⁴ Other than this exception, the following factors may be important: (1) The identity of the defendant. Is he a government official, or a private citizen? (2) The nature of the act being enjoined. The statute refers to restraining "assessment or collection. . . ." Assessment is a word of art in the tax law,¹⁷⁵ while collection is not. Even so, both words

¹⁷¹ Section 1340 is, however, not a waiver of sovereign immunity, but merely bestows jurisdiction on the court for suits against the District Director. See *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961). There is some judicial reluctance to find that § 1340 is even an independent grant of jurisdiction to the federal courts. See *Remis v. United States*, 273 F.2d 293 (1st Cir. 1960).

¹⁷² For a very scholarly treatment of federal tax injunction suits, see Lenoir, *Congressional Control Over Suits to Restrain the Assessment or Collection of Federal Taxes*, 3 ARIZ. L. REV. 177 (1961). That article discusses tax injunctions and restrictions thereon as they fit into the overall picture by which Congress controls the jurisdiction of federal courts.

¹⁷³ See for example the John Marshall opinion in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 326 (1824). He speaks of "total destruction of franchise" and "irreparable injury" as possible factors permitting the injunction of state taxes. *Id.* at 369, 371. See also *State R.R. Tax Cases*, 92 U.S. 575 (1875) stating as follows: "[T]here is no place in this (complete) system (of collective justice) for an application to a court of justice until after the money is paid. . . .

[A]ny grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax." *Id.* at 613-14.

¹⁷⁴ It should be emphasized that the ability of a third person to attack collection or assessment by injunction does not mean that he may collaterally attack the merits of the assessment. *Graham v. United States*, 243 F.2d 919 (9th Cir. 1957).

¹⁷⁵ See INT. REV. CODE OF 1954, § 6201. The fact and time of assessment are critical in lien and collection problems, inasmuch as after notice and demand

have their outer limits, although courts have not universally seen fit to recognize this.¹⁷⁶ (3) A determination of whether the measure is a tax, within the meaning of the statute. Disagreement here usually arises from the "penalty" provisions of the Code.¹⁷⁷

Additional complications are presented because of judicial exceptions to the class of cases which are admittedly within the scope of the act. Thus, in a certain narrow and extreme type of fact pattern, a taxpayer may enjoin a District Director from assessment or collection of what is nothing more than a tax in a federal district court. The Supreme Court has so held, in opinions worded in such a manner that one cannot safely say the real reason for their holdings.¹⁷⁸

(a) *Judicial Exceptions*

Before examining the class of cases falling outside the limits of section 7421, such as a true penalty case, some discussion is in order about that class of case which, though within the limits, holds that injunctive relief is available to the taxpayer. Here is the area of real struggle between the sovereign on the one hand and the citizen on the other. As indicated, Supreme Court utterances are of no real value except insofar as they show that a taxpayer is not totally foreclosed by section 7421.

Indeed, most of the cases in the circuit courts of appeal and district courts have been long on vituperative epithets and short on analysis.¹⁷⁹ Phrases like "extraordinary circumstance,"¹⁸⁰ "unusual and extraordinary circumstances,"¹⁸¹ "extraordinary and exceptional circum-

the federal tax lien relates back to assessment and is valid against everyone without recordation except for mortgagees, pledgees, judgment creditors or purchasers. INT. REV. CODE OF 1954, § 6323(2). The notice and demand must be proved before the lien is valid. INT. REV. CODE OF 1954, § 6321. *United States v. O'Connor*, 291 F.2d 520 (2d Cir. 1961).

¹⁷⁶ See for example the rather unusual problem presented in *Campbell v. Guetersloh*, 287 F.2d 878 (5th Cir. 1961) in which the 5th Circuit reversed a district court determination that the taxpayer could enjoin the government's method of computing taxpayer's deficiency.

¹⁷⁷ See, e.g., *United States v. Metropolitan Life Ins. Co.*, 130 F.2d 149 (2d Cir. 1942) involving § 3710(b) of the 1939 INT. REV. CODE which imposed a "penalty" for failure to honor a levy. Judge Learned Hand, in recognizing that the penalty could not be greater than the lesser of the tax owed or the property possessed by the defendant, stated that the provision, although called a "penalty," "was not really that. . ." 130 F.2d at 151. See also *Helvering v. Mitchell*, 301 U.S. 391, 405 (1938) in which the Supreme Court held that the 50% additional penalty for tax fraud was "intended by Congress as civil incidence of the assessment and collection of the income tax."

¹⁷⁸ *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932); *Bailey v. George*, 259 U.S. 16 (1922). The latter case did not grant the injunction, but recognized that there might be exceptional or extraordinary circumstances to make the section barring injunctive relief inapplicable.

¹⁷⁹ Not discussed in the text is the rare case in which an injunction may be granted because of fraudulent or coercive practices by the Internal Revenue Service. *Yoshimura v. Alsop*, 167 F.2d 104 (9th Cir. 1948).

¹⁸⁰ *Wheeler v. Holland*, 120 F. Supp. 383 (N.D. Ga. 1954), *aff'd*, 218 F.2d 482 (5th Cir. 1955).

¹⁸¹ *Monge v. Smyth*, 229 F.2d 301 (9th Cir.), *cert. denied*, 351 U.S. 976 (1956).

stances,"¹⁸² "special and extraordinary circumstances,"¹⁸³ and "extraordinary and entirely exceptional circumstances,"¹⁸⁴ are sprinkled about liberally prior to the announcement of a conclusion which may go either way. In addition to these factors, some courts have hinted at what may be a relevant consideration — whether the taxpayer can, if the injunction is denied, still determine the merits of the controversy prior to payment.¹⁸⁵ In other words, it may be easier to get an injunction if income, estate or gift taxes are not involved.

The injunction area was sufficiently indefinite prior to the recent decision of the Supreme Court in *Enochs v. Williams Packing & Nav. Co.*¹⁸⁶ It is submitted that this holding has far-reaching implications which may prove satisfactory only to the government. The case seems to reverse an anti-government drift evidenced by recent circuit courts of appeal.¹⁸⁷ Whether the new standard announced by the *Enochs* case will supplement or replace the older standards is difficult to say. If calculated guesses are of any value, it would seem that the *Enochs* case, in spite of its talk, will in the long run not materially change the standards of the courts historically imposed in this type of case.¹⁸⁸ Prior to *Enochs*, the government placed considerable reliance upon *Mensik v. Long*,¹⁸⁹ a Seventh Circuit case which held that before an injunction would be permitted in a tax case there must be "special and extraordinary circumstances" and (in the conjunctive) an illegal tax. This case may state the proper law for the Seventh Circuit but is hard to support on historical grounds.¹⁹⁰ Interestingly enough, in a Sixth Circuit case decided the same year as *Mensik*, the court, after talking of illegality said it must be "coupled with *other* special and extraordinary circumstances. . . ."¹⁹¹ (Emphasis added.) Such a statement of course suggests that illegality itself is a special circumstance

¹⁸² *Smith v. Flinn*, 261 F.2d 781 (8th Cir. 1959). And see *Concentrate Mfg. Corp. v. Higgins*, 90 F.2d 439, 441 (2d Cir. 1937) referring to "gross and indisputable oppression, without adequate remedy at law."

¹⁸³ *Peele v. Glotzbach*, 170 F. Supp. 88 (E.D. Va. 1959).

¹⁸⁴ *Milliken v. Gill*, 211 F.2d 869 (4th Cir.), cert. denied, 348 U.S. 827 (1954).

¹⁸⁵ *Lassoff v. Gray*, 266 F.2d 745, 747 (6th Cir. 1959). However, it must be remembered that *Lassoff* was decided before *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1 (1962). In *Turner v. Burton*, 213 F. Supp. 267 (N.D. Ohio 1962), a District Court in the Sixth Circuit pointedly refused to follow *Lassoff* because of the *Enochs* case.

¹⁸⁶ 370 U.S. 1 (1962).

¹⁸⁷ See, e.g., *Botta v. Scanlon*, 288 F.2d 504 (2d Cir. 1961).

¹⁸⁸ Perhaps this statement is overly optimistic. In *Turner v. Burton*, 213 F. Supp. 267 (N.D. Ohio 1962), the court said the test to apply to determine whether the government could establish its claim is "analogous to the test invoked in determining the propriety of granting judgment on the pleadings or summary judgment." *Id.* at 269. It can only be hoped that in the future other courts will not apply the *Enochs* doctrine so remorselessly.

¹⁸⁹ 261 F.2d 45 (7th Cir. 1958).

¹⁹⁰ The case has been followed in other circuits, however. See, e.g., *Singleton v. Mathis*, 284 F.2d 616 (8th Cir. 1960).

¹⁹¹ *Lassoff v. Gray*, 266 F.2d 745, 747 (6th Cir. 1958).

which need not be present in all cases before an injunction may properly issue.

Between the time of the *Mensik* and *Enochs* decisions, other courts of appeal indicated they would not require the double-barreled extraordinary-illegality standard of *Mensik*. Outstanding among these cases is *Botta v. Scanlon*,¹⁹² in which the Second Circuit remanded a district court reversal of the taxpayers' suits for injunctive relief, holding that they should be permitted to amend their complaints to show facts which would indicate that they could in no manner be obligated to pay the tax liability the government was asserting. The court intimated that since the tax was one levied against responsible corporate officers, plaintiffs might succeed upon a mere showing that they were not the responsible officers.

Botta v. Scanlon points up another requirement of a successful injunction suit, regardless of what standards the court applies. Facts must be pleaded with a higher degree of particularity than is necessary generally under the federal rules.¹⁹³ Since it is settled that mere financial hardship is not enough,¹⁹⁴ facts must be set out which show that the taxpayer could not possibly be made whole even if he were successful upon a subsequent refund suit.¹⁹⁵ Furthermore, facts should be pleaded showing that the government is acting totally without legal foundation.¹⁹⁶

Left for consideration is the effects of the *Enochs* decision by the Supreme Court.¹⁹⁷ In that case the plaintiff-taxpayer provided ships to shrimp fishermen off the Louisiana and Mississippi coasts. The government claimed the fishermen were employees subject to social security and unemployment taxes, while plaintiffs said they were independent contractors. Plaintiff corporation claimed it would be thrown into bankruptcy if required to pay the entire assessment of better than \$41,000, and it was undisputed that it lacked funds in this amount. (The government however contended the taxpayer stripped

¹⁹² 288 F.2d 504 (2d Cir. 1961). The case was thereupon remanded to the district court which dismissed the taxpayers' complaint. *Botta v. Scanlon*, 198 F. Supp. 899 (E.D.N.Y. 1962). This dismissal was affirmed on a second appeal, in which the court said that since the case was last before it, the "Supreme Court has made it clear in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), that a showing of irreparable injury is insufficient to overcome the barrier of Section 421(a)." 11 A.F.T.R.2d 908 (2d Cir. 1963).

¹⁹³ *Missouri Valley Intercollegiate Athletic Ass'n v. Bookwalter*, 276 F.2d 365 (8th Cir. 1960); *Dyer v. Gallagher*, 203 F.2d 477 (6th Cir. 1953).

¹⁹⁴ *Huston v. Iowa Soap Co.*, 85 F.2d 649 (8th Cir.), *cert. denied*, 299 U.S. 594 (1936); *Red Star Yeast & Prods. Co. v. Labudde*, 83 F.2d 394 (7th Cir. 1936).

¹⁹⁵ See, e.g., *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932); *John M. Hirst & Co. v. Gentsch*, 133 F.2d 247 (6th Cir. 1943).

¹⁹⁶ Illegality and even unconstitutionality alone is not enough. This was true even prior to the *Enochs* case. See *Tomlinson v. Poller*, 220 F.2d 308 (5th Cir.), *cert. denied*, 350 U.S. 832 (1955).

¹⁹⁷ See note 186 *supra*.

itself of assets in anticipation of the suit.) In reversing the Fifth Circuit and holding that the taxpayer could not maintain the suit, the Supreme Court said that it must be apparent *when the suit is filed* that under the most liberal view of the law and the facts the government cannot establish its claim, before an injunction suit may be maintained. The Court reasoned that if under no circumstances could the government ultimately prevail, the central purpose of section 7421 would be inapplicable and if there was otherwise equity jurisdiction (*i.e.*, no adequate legal remedy) the tax could be enjoined.

The implications of this case are so far-reaching that it should be examined in some detail. First, in *Enochs*, the crucial issue was whether the shrimp fishermen were independent contractors or employees subject to tax. Seemingly, since the trial court had found facts showing that they were independent contractors the tax should not have applied and its imposition was "illegal." Also, it was not denied that the taxpayer could not pay the assessment and would have been financially ruined. Thus, it is arguable that under the *Mensik* criteria the permanent injunction was properly issued by the district court upon a finding that the taxpayer was wholly without a right to control the alleged employees. The Fifth Circuit Court of Appeals, apparently thinking along these lines, affirmed the district court.¹⁹⁸ So, the Supreme Court was presented with an affirmed trial court fact holding from which the only legal conclusion which could be reached was that the tax had been illegally applied.

In deciding against the taxpayer, the Supreme Court stated that the *record* clearly revealed that the government's claim of liability was not without foundation. Inasmuch as the "test" set out by the Supreme Court dealt with facts appearing when the suit is filed, it is difficult to see why the Supreme Court consulted the record. What should be the proper result, for example, if the government's claim upon filing of the suit appears totally insupportable but, through unique circumstances, the trial shows that there is a slim possibility that the tax might be sustained? *Enochs* presented the strong taxpayer case in which the district judge apparently thought, when the claim was filed, that the government could not prevail. This though was bolstered by the record which seemed to show conclusively that because no employees were involved there could be no tax. Still, the Supreme Court found for the government.

Enochs may well represent the birth of a "scintilla rule" in procedural tax law. In other words, if there is a scintilla of evidence that the government has any sort of tax claim, there may be no injunction. If such a rule is strictly applied, then there will be few, if any,

¹⁹⁸ 291 F.2d 402 (5th Cir. 1961), *affirming* 176 F. Supp. 168 (1959).

injunctions granted to taxpayers. It seems likely that this will not be the result, but only time will tell.¹⁹⁹ In the interim, a taxpayer wishing to get an injunction must be prepared to clear an imposing array of hurdles. Accordingly, the following procedure is recommended regardless of how the courts ultimately interpret the *Enochs* holding: 1. Muster all available facts in taxpayer's favor prior to filing the injunction suit. 2. Plead all of these facts in the complaint with particularity. Affidavits supporting the facts might help. 3. Draw conclusions from the facts showing that the tax is illegal and plead that the taxpayer will be irreparably injured if the injunction is not granted. 4. Plead additional facts, and necessary conclusions therefrom, which show that the government can under no circumstances legally recover the tax. 5. If applicable, show that there is no Tax Court remedy available. Remember that generally speaking the courts are more likely to find hardship if the tax must be paid before the taxpayer has a remedy.

(b) *Fact Situations Outside the Statutory Bar*

One exception to the general rule barring injunctive relief occurs when the defendant is not a government official. Thus, a corporate shareholder should successfully be able to enjoin an officer of the corporation from paying a tax not due, without running afoul of the statutory injunction prohibition. This should be true even though such a suit quite obviously would interfere with the "collection" of the tax claimed by the government. A leading case in this regard is *Hill v. Wallace*,²⁰⁰ in which eight members of the Chicago Board of

¹⁹⁹ The statement in the text is probably exuberantly overoptimistic. Early indication from the cases are that the taxpayer will have a much tougher road to hoe in the area of injunction suits. See *Turner v. Burton*, 213 F. Supp. 267 (N.D. Ohio 1962), discussed note 188 *supra*; *Abel v. Campbell*, 11 A.F.T.R.2d 362 (5th Cir. 1962) (denying an injunction); *Reale v. Church*, 10 A.F.T.R.2d 6148 (S.D.N.Y. 1962) (denying an injunction of assessment for wilful failure to pay over a penalty). The most recent appellate court case involving any discussion of the matter employs some extremely strong anti-taxpayer language and overrules two earlier cases which the court recognizes could have been construed as authorizing an injunction under circumstances less exacting than those required under the test in the *Enochs* case. *Licavoli v. Nixon*, 312 F.2d 200 (6th Cir. 1963).

²⁰⁰ 259 U.S. 44 (1922). It is arguable that a corporate shareholder alleging a breach of a fiduciary duty by a director or officer, in attempting to pay a tax not due, may get injunctive relief without showing there is no adequate legal remedy, inasmuch as the fiduciary obligation gives the court of equity jurisdiction. In this connection see a case decided prior to enactment of any statute limiting tax injunction suits, involving a state tax, which permitted a bank stockholder to sue the collector, the directors and the bank. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855). *But cf.* *Antrum v. United States*, 127 F. Supp. 54 (D. Conn. 1954) (cannot enjoin employer from honoring a levy on wages). See also the recent case of *Reisman v. Caplin*, 11 A.F.T.R.2d 675 (D.C. Cir. 1963), in which the plaintiffs were attorneys seeking, among other things, an injunction to prevent an accounting firm retained by them from complying with an administrative summons. The court said that the normal defendants were in reality plaintiffs and the suit could not be maintained. Interestingly enough, the basis of the holding was that because the Commissioner was a defendant also, the relief suit was barred by sovereign immunity.

Trade brought a class action against the Secretary of Agriculture, Commissioner of Internal Revenue, United States Attorney for the Northern District of Illinois, Collector, and the Board of Trade and its officers. The purpose of the suit was to compel the officers to sue to have the Future Trading Act adjudged unconstitutional. The district court had originally dismissed the complaint. The Supreme Court, in an opinion by Justice Taft held that there was no jurisdiction over the Commissioner and the Secretary of Agriculture, but granted the injunction as to the others.

A fertile source of litigation in regard to whether or not section 7421 applies arises in the case of a penalty action. It is submitted that the "penalty exception" is not as broad as is generally assumed.²⁰¹ It is only in the case where an assessment in the form of a tax really amounts to a punishment for a crime that the statute may be avoided.²⁰²

Thus in the leading cases which held a penalty suit enjoined, the courts were faced with a flagrant attempt to impose criminal punishment under the prohibition law by calling the measure a tax. In both cases the Supreme Court explicitly recognized that "evidence of a crime [was] essential to assessment."²⁰³

Taxpayers' counsel frequently rely on these cases, but none too successfully.²⁰⁴ The question is really what is a penalty in the guise of a tax.²⁰⁵ It is now uniformly held that a civil penalty section of the Internal Revenue Code is not a true penalty in the guise of a tax.²⁰⁶

This is illustrated in the recent case of *Enochs v. Green*²⁰⁷ which

²⁰¹ See cases cited note 177 *supra*. For other cases holding that the statutory bar against tax injunction suits applies to penalty actions as well, see *Stanton v. Machiz*, 183 F. Supp. 719 (D. Md. 1960); *Rosner v. McGinnes*, 167 F. Supp. 44 (E.D. Pa. 1958); *McAllister v. Dudley*, 148 F. Supp. 548 (W.D. Pa. 1956); *Headley v. Knox*, 133 F. Supp. 36 (D. Minn. 1955); *Barker v. Wheeler*, 48 A.F.T.R. 1945 (D. Me. 1955).

²⁰² In *Tovar v. Jarecki*, 173 F.2d 449 (7th Cir. 1949), the court held that the marijuana tax was a penal statute and granted a temporary injunction against collection. *But see Wells v. Campbell*, 113 F. Supp. 928 (N.D. Tex. 1953) dismissing a suit to enjoin collection of the marijuana tax.

²⁰³ *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922). There are a number of district court decisions in which the enjoining of a so-called liquor tax has been permitted. See, e.g., *The Senate Club, Inc. v. Viley*, 12 F. Supp. 932 (D. Idaho 1935); *Brabham v. Cooper*, 9 F. Supp. 904 (E.D.S.C. 1935); *Green v. Page*, 9 F. Supp. 844 (S.D. Ga. 1935); *Cleveland v. Davis*, 9 F. Supp. 337 (S.D. Ala. 1934). More recent cases involving liquor taxes have generally held them to be valid taxes and not penalties. *Hudson v. Crenshaw*, 224 F.2d 324 (4th Cir. 1955); *Burke v. Mingori*, 128 F.2d 996 (10th Cir.), *cert. denied*, 317 U.S. 662 (1942); *Peele v. Glotzbech*, 170 F. Supp. 88 (E.D. Va. 1958).

²⁰⁴ See cases cited note 201 *supra*.

²⁰⁵ See the dissenting position of Judge Rives in the Fifth Circuit opinion in the *Enochs* case. 291 F.2d 402, 408. Judge Rives' position was that § 7421 flatly barred any injunction suits involving taxes. The only exception apparently, in his view, would be for exacting a penalty in the guise of a tax.

²⁰⁶ See note 201 *supra*.

²⁰⁷ *Enochs v. Green*, 270 F.2d 558 (5th Cir. 1959).

involved an attempt to enjoin the collection of the 100% penalty for willful failure to pay over the tax imposed by Internal Revenue Code of 1939, section 2700(a). The court stated the proper rule in denying the injunction to be that "unless some equitable ground is shown for staying the collection, an injunction should not issue."²⁰⁸

Declaratory Judgments

Very shortly after Congress first permitted the maintenance of declaratory judgment suits in the federal court it acted so as to prevent such suits from being maintained "with respect to federal taxes. . . ."²⁰⁹ By and large the courts have construed the section to mean what it says.²¹⁰ The major policy reason for denial of declaratory relief in tax matters is the supposition that such procedure will "control (the Commissioner and the District Director) . . . in the discharge of their official duties" and would in effect be "a suit against the United States with respect to a matter as to which it has not consented to be sued."²¹¹ Even before the Congressional amendment explicitly removing federal tax matters from the ambit of the declaratory judgment act, the Ninth Circuit had held that courts would, under no circumstances, have jurisdiction for declaratory judgment in tax matters anyway.²¹²

However, the taxpayer is not completely foreclosed from declaratory relief. First of all, there appears to be no legitimate objection to using declaratory relief to settle property rights which may have a bearing on ultimate tax liability. A recent district court opinion in a similar fashion permitted declaratory judgment as to the effect of a reorganization plan on a tax lien, in spite of the government's contention that the court lacked jurisdiction.²¹³

²⁰⁸ *Id.* at 561.

²⁰⁹ Section 405 of the Revenue Act of 1935.

²¹⁰ See, e.g., *Martin v. Andrews*, 238 F.2d 552 (9th Cir. 1956); *Taylor v. Allan*, 204 F.2d 485 (10th Cir. 1953); *Noland v. Westover*, 172 F.2d 614 (9th Cir.), *cert. denied*, 337 U.S. 938 (1949); *Wilson v. Wilson*, 141 F.2d 599 (4th Cir. 1944); *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942); *Murphy v. Graves*, 120 F.2d 243 (6th Cir.), *cert. denied*, 314 U.S. 661 (1941).

²¹¹ *Wilson v. Wilson*, *supra* note 210, at 600.

²¹² See *Los Angeles Soap Co. v. Rogan*, 90 F.2d 1012 (9th Cir. 1937) dismissing appeal from a district court holding that under the original declaratory judgment statute there was nonetheless no jurisdiction as to tax matters. 114 F. Supp. 112 (S.D. Cal. 1936).

²¹³ *In re Merchants Distilling Corp.*, 3 A.F.T.R.2d 853 (N.D. Ind.), *reversed on other grounds*, 272 F.2d 80 (7th Cir. 1959). *But see* *Pilip v. United States*, 186 F. Supp. 397 (1960), *supplemented in* 191 F. Supp. 943 (1961), in which plaintiff sought a declaratory judgment that she was owner of some real property as a tenant by the entirety and that a federal tax lien did not attach to the property. The court denied recovery saying that it was "clear that under the provisions of Sec. 2201 Title 28 U.S.C.A., relief to plaintiff by way of declaratory judgment cannot be had. . . ." See also *Filipowicz v. Rothensies*, 81 F. Supp. 716 (E.D. Pa. 1939) in which the court indicated that a determination of rights of various claimants to specific property was not precluded even though a specific ruling on the tax consequences of these rights would be.

But just as the private practitioner is attempting to narrow the restriction of the Declaratory Judgment Act,²¹⁴ so are the government attorneys attempting to stretch it as far as possible. The government will often take the position that any relief prayed for in a refund suit except for a money judgment is subject to the Declaratory Judgment Act.²¹⁵ This is one objection to a partial payment refund suit. The objection will almost most assuredly be raised should the taxpayer pray for an abatement of taxes.²¹⁶

A recent opinion rendered by the United States District Court for the Eastern District of New York seems to represent a significant procedural victory for the taxpayer in this area, if it is upheld.²¹⁷ There the government had filed a tax lien against plaintiff because of an alleged liability for willful failure to pay over withholding and social security taxes. The suit, pursuant to 28 U.S.C. section 2410, was to quiet title and remove the government's lien from the property involved. The government made the usual contentions that this amounted to declaratory relief, that the government had not consented to be sued and finally that the taxpayer had an adequate remedy at law, partial payment of the divisible type of tax imposed. The court struck down all three contentions, reasoning that the propriety of an assessment could be attacked in a 2410 action, and that this would not constitute declaratory relief for "every adjudication implies a declaration of rights; if that declaration be mediate to granting familiar and unforbidden judicial relief, as here, 28 U.S.C.A. section 2201 opposes no bar." The court also said the partial payment argument was invalid because it did not meet plaintiff's particular problem, stating that "she was not required to seek an unwanted relief in the hope of getting the desired relief as a byproduct. . . ."

The reasoning of the court seems to bridge the gap between the proscribed relief of section 2201 and the available relief of section 2410, which is discussed below.

Section 2410

Section 2410 of the Judicial Code is the only clear-cut waiver of sovereign immunity by which a citizen may foreclose the government's lien interest in property, or by which he may quiet title. Theoretically, one might proceed under section 7424 of the 1954 Internal Reve-

²¹⁴ Recently taxpayers have met with disappointment in determining whether there existed an exempt corporation, *Jolles Foundation, Inc. v. Moysey*, 250 F.2d 166 (2d Cir. 1957); in determining for the trustees in bankruptcy the tax liability under a reorganization plan, *In re Inland Gas Co.*, 241 F.2d 374 (6th Cir. 1957); and in determining whether a taxpayer was self employed, *Carmichael v. United States*, 245 F.2d 676 (5th Cir. 1957). See also *Reisman v. Caplin*, 11 A.F.T.R.2d 675 (D.C. Cir. 1963).

²¹⁵ See, e.g., *Tysdale v. United States*, 191 F. Supp. 442 (D. Minn. 1961).

²¹⁶ *Ibid.* See also *Falik v. United States*, 206 F. Supp. 181 (E.D.N.Y. 1962).

²¹⁷ *Falik v. United States*, *supra* note 216.

nue Code, but this is available only for real property and only if the claimant's interest was recorded before the federal tax lien was filed, or if the claimant purchased at a sale to satisfy a prior interest. In addition, section 7424 requires that the government be requested to foreclose and no civil action may be maintained thereunder until six months after this request, or until the Commissioner refuses, whichever first occurs.²¹⁸

It is recommended that the section 2410 action be brought initially in the federal court, although it may be maintained in the state court.²¹⁹ If the latter procedure is followed, the government may remove²²⁰ and the end result will be the same. Until very recently the government had been able to ward off maintenance of section 2410 actions in the district courts. Their reasoning was that there was no federal jurisdictional grant in the statute, but merely a sovereign immunity waiver. Therefore, it was argued, unless some independent jurisdictional ground such as diversity existed, the case would have to be brought in the court of general jurisdiction. In *United States v. Coson*,²²¹ the Ninth Circuit did not refuse to follow this argument, but held that by relying on section 2410 for a waiver of immunity and section 1340 for a grant of jurisdiction the action could be maintained in the federal court initially.

Although the statute is reasonably clear as to what must be done to proceed thereunder, the following items might be pointed out because they are often slighted in one or more particulars.²²²

1. The United States of America is the proper party defendant and the District Director, Commissioner or anyone else need not and should not be named.

2. The government's interest must be stated with particularity. Filed liens should be indicated as to date of filing, amount, type of tax, and name of taxpayer. In the case of an estate tax lien, it is

²¹⁸ All the statutory requirements must be proved in order to prevail. *Jones v. Tower Prod. Co.*, 120 F.2d 779 (10th Cir. 1941). It should also be noted that if state law permits the divestment of a junior lienor without joining him in a judicial action, then the government's lien may be extinguished because, since the government is not a party and does not have to be a party, sovereign immunity is not involved. See *United States v. Brosnan*, 363 U.S. 239 (1960). See also 5 U.S.C. § 317 under which it has been held that a state court has jurisdiction to settle a priority contest between an attorney's lien and a tax lien. *In re Washington Slum Clearance*, 5 N.Y.2d 300, 157 N.E.2d 587, cert. denied *sub nom.*, *United States v. Coblenz*, 363 U.S. 841 (1960).

²¹⁹ The government will probably argue that there is no jurisdiction initially in the federal court. See *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961) in which such an argument was made unsuccessfully.

²²⁰ 28 U.S.C. § 1444 (1948).

²²¹ 286 F.2d 453 (9th Cir. 1961).

²²² The deficiencies mentioned here occur so frequently that the Department of Justice has prepared a form "defect letter" for use when served with a pleading involving one or more of the deficiencies indicated. The appropriate deficiency need only be checked and the address typed in.

enough to state the name of the taxpayer and the date and place of death.

3. Either registered or certified mail must be used.

4. The United States Attorney and the Attorney General must be served pursuant to federal rule of procedure 4(d)(4).

The state courts in New York have quite liberally construed section 2410 to permit naming the government in an interpleader action.²²³ For reasons which will be set out more fully below, it appears that such a view lacks a sound legal base, at least unless the interpleading party has an adverse interest to the government's claim and is not a disinterested stakeholder.²²⁴

Interpleader

Generally, it is agreed that the United States may not be named defendant in an interpleader suit because there is no statute specifically waiving sovereign immunity for such actions. Although other sovereign immunity waiving statutes such as section 2410 may give some relief in certain limited fact situations, usually the courts will dismiss interpleader suits naming the United States as defendant.²²⁵

Whether sovereign immunity really extends to interpleader suits has not ever been passed upon by the Supreme Court. There is, in fact, an amazing lack of case law on the subject. The precedent invariably relied upon by the government to support its contention, consists of one district court case.²²⁶ However, although there are no district court cases holding expressly to the contrary,²²⁷ it is submitted that there have been many cases in which the government's motion to dismiss an interpleader suit naming it as defendant has not been granted, and the case has proceeded to trial on the merits without any real discussion of the matter.²²⁸

The government's hyper-technical position towards interpleader suits seems all the more absurd when it is standard practice for the

²²³ See *Lemar Paint Prods. Co. v. DiMiceli*, 3 Misc. 2d 705, 155 N.Y.S.2d 534 (Sup. Ct. 1956); *Rosenberg v. Tishman Co.*, 118 N.Y.S.2d 337 (Sup. Ct. 1952).

²²⁴ If the party bringing the interpleader claims an interest in the property, then the action resembles one to quiet title, and it is arguable that the United States may properly be named defendant. See *John A. Johnson & Sons v. National City Bank*, 129 N.Y.S.2d 86 (Sup. Ct. 1954). *But see VanValkenburgh Co. v. Randolph*, 7 A.F.T.R.2d 1237 (S.D. Cal. 1961) in which it is not clear whether the interpleading party had an adverse interest, but in which it is clear that the government was summarily dismissed from the action.

²²⁵ See, e.g., *Fasig-Tipton Co. v. Schultz*, 2 A.F.T.R.2d 6105 (N.D. Cal. 1958).

²²⁶ The case usually relied upon is *Herter v. Helmsley-Spear, Inc.*, 149 F. Supp. 713 (S.D.N.Y. 1957). See also *Hoye v. United States*, 172 F. Supp. 532 (S.D. Cal. 1959). In *Jacobs v. District Director*, 11 A.F.T.R.2d 1170 (S.D.N.Y. 1963), the District Director was dismissed from an interpleader action, but on the grounds that he was not the party with an interest in the lien.

²²⁷ *But see Smith v. United States*, 254 F.2d 865 (6th Cir. 1958); *Gordon v. Feldman*, 152 F. Supp. 257 (S.D.N.Y. 1957).

²²⁸ *United States ex rel. Home Indem. Co. v. American Employers' Ins. Co.*, 192 F. Supp. 873 (D.N.D. 1961).

government to intervene in all interpleader actions contemporaneous with its dismissal as defendant.²²⁹ There are relatively few occasions in which the government will flatly want to be let out of the law suit, so that in the run-of-the-mill cases the only actual effect of the government's procedural maneuverings is that they may avoid the necessity of pleading until well after the 60 day time and an additional hearing may be necessary (not to mention extra paper work for government counsel).

Defense of Collection Suit

As was pointed out initially in this article, the attorney may find himself called upon not for the launching of the ship but for the salvaging of the derelict. Therefore, a lawyer may be in the position of defending a collection suit²³⁰ brought by the government, even though he would scarcely advise a client that his best litigation chance was to wait to be sued. For the collection suit usually represents the last effort by the government to make the taxpayer pay up. In fact, it is often brought when the taxpayer has nothing left that he can pay up, its sole purpose then being to establish a judgment lien (which lasts in perpetuity)²³¹ to replace the tax lien which is limited in time.²³² Or, it may be because the government figures that a title through judicial sale is more marketable than title through a distraint sale resulting from administrative revenue action.

²²⁹ See, e.g., *Washington Constr. Co. v. United States*, 183 A.2d 496 (N.J. Ch. 1962). See *First Nat'l Bank v. United States*, 172 F. Supp. 757 (S.D. Cal. 1959) in which the government's motion for leave to intervene in an interpleader suit was denied because the court was without jurisdiction of the subject matter at action.

²³⁰ Authority for the government to sue to collect taxes is contained in INT. REV. CODE OF 1954, § 7401. It should be noted that the Secretary of Treasury or his delegate must authorize or sanction the proceeding, and the Attorney General or his delegate direct that the action be commenced. Such acts should be alleged in the government's complaint. Action to enforce a lien is brought under INT. REV. CODE OF 1954, § 7403. Although federal law therefore governs the maintenance of a collection suit, state law may be determinative of issues of liability in instances where the government is suing to set aside a fraudulent conveyance or to in some other way enforce transferee liability. See, e.g., *Commissioner v. Stern*, 357 U.S. 39 (1958).

²³¹ *Investment & Sec. Co. v. United States*, 140 F.2d 894 (9th Cir. 1944). Cf. *United States v. Ettleson*, 159 F.2d 193 (7th Cir. 1947), in which the court apparently felt that the *tax lien* continued after the period of limitations by virtue of the entry of judgment. See also 28 U.S.C. § 1962 (1956), which provides in part that "every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent, and under the same conditions as a judgment of a court of general jurisdiction in such State . . ." The government is not, however, subject to state statutes of limitation dealing with revival of judgments, *United States v. Jenkins*, 141 F. Supp. 499 (S.D. Ga.), *aff'd*, 238 F.2d 83 (5th Cir. 1956).

²³² INT. REV. CODE OF 1954, § 6322, provides that the lien continues until "satisfied or . . . unenforceable by reason of lapse of time." Under INT. REV. CODE OF 1954, § 6502, the tax may be collected by levy or a court proceeding only if the levy is made or the proceeding begun within six years after the assessment of the tax unless the time has been extended. Reasons for extension are many and common, the most usual being because of submission of offers of compromise.

In any event, until very recently, the taxpayer's chances in collection suit were virtually nil. The Second Circuit in *Pipola v. Chicco*,²³³ had ruled that the tax assessment was conclusive as far as the substantive tax questions underlying it were concerned. Only if procedurally invalid could a taxpayer attack it. The government's collection suit was, under this view, likened to a suit on a judgment.²³⁴

One year later, in *United States v. O'Connor*,²³⁵ the Second Circuit reversed itself. In the time intervening between *Pipola* and *O'Connor* the government apparently concluded that its earlier position, which the Second Circuit had followed, was erroneous. In retrospect, it seems amazing that such an extreme view could have been followed without substantial statutory or case precedent.²³⁶ The result now is that in a collection suit the assessment is not conclusive and the tax questions may be litigated. Another recent Second Circuit case cleared up another problem in regard to collection suits. In *Damsky v. Zavatt*²³⁷ it was held that under section 7403 Internal Revenue Code of 1954, the taxpayer against whom a personal judgment is sought, has a right to a trial by jury. If, however, the suit is one to foreclose liens on his property, with the personal judgment being only incidental, there is no such right.²³⁸

By the time the taxpayer is hit with a collection suit, he is apt to be well ground down by the government mill. Usually the suit will concern a year some time in the past (often more than the six year statutory period, because of various events which have tolled the running of the statute)²³⁹ and the taxpayer may have been through

²³³ *Pipola v. Chicco*, 274 F.2d 909 (2d Cir. 1960).

²³⁴ See dictum in *Bull v. United States*, 295 U.S. 247 (1935). Apart from the Supreme Court dictum, there was little support for the *Pipola* holding. But see *United States v. Briglia*, 182 F. Supp. 271 (S.D.N.Y. 1960); *United States v. Hauser*, 25 F. Supp. 689 (S.D. Cal. 1938). In both cases the assessment had been held conclusive. Generally the courts have held an assessment only prima facie correct and subject to a judicial redetermination. *United States v. Rindskopf*, 105 U.S. 418 (1881); *Clinkenbeard v. United States*, 88 U.S. (21 Wall.) 65 (1874); *Paschal v. Blieden*, 127 F.2d 398 (8th Cir. 1942); *United States v. Pusey*, 47 F.2d 22 (9th Cir. 1931); *Crock v. United States*, 30 F.2d 917 (5th Cir. 1929).

²³⁵ 291 F.2d 520 (2d Cir. 1961).

²³⁶ The Second Circuit, in the *O'Connor* case noted that in *Pipola* it had remarked that the lack of authority on the subject was surprising and further noted that later developments had proved that the court's intuition in *Pipola* "has proved sounder than our belief that, on a question of tax collection procedure, the Government could be expected to have known of it." *Id.* at 526.

²³⁷ 289 F.2d 46 (2d Cir. 1961).

²³⁸ The opinion of Judge Friendly contains a very scholarly inquiry into the differences between common law and equitable remedies and actions by the English crown in the old Court of Exchequer. The court determined that a suit to collect a personal judgment, when not ancillary to a lien foreclosure, was essentially an action for debt, for which a jury trial historically was available.

²³⁹ See note 232 *supra*. Apart from a voluntary waiver which a taxpayer may execute, probably the most common example of a suspension of the statute of limitations occurs when a petition is filed in the Tax Court. The suspension lasts until 60 days after termination of the Tax Court proceedings. See, e.g., *United States v. Covel*, 7 A.F.T.R.2d 1246 (S.D. Cal. 1961).

one or more trials. If fraud has been involved he may have been tried and convicted criminally.²⁴⁰ While the temptation may be great in such cases to give up (based on the assumption that the taxpayer has nothing left for the government to take) such a temptation should be resisted. Often, the government may have great difficulty in proving its case.²⁴¹ In the shuttling of files between the Internal Revenue Service, the Department of Justice and the United States Attorney, or between members of the same government office over a period of time, important documents tend to become misplaced and in some cases inadvertently destroyed.²⁴² Witnesses may have died or forgotten important facts. Even if the taxpayer has been convicted on one or two specific items, the government may be totally unable to prove the entire civil liability which may conceivably involve thousands of items. In such a case it is the duty of taxpayer's attorney to make the government prove its case. This is not to say that the taxpayer's counsel should become an obstructionist antagonizing both government counsel and the court, but he should most assuredly not yield merely because of awe of the sovereign.

Other Forums

Often in receiverships, probates and the like the government may have submitted to the jurisdiction of the state court by filing a claim.²⁴³ Having done so, the government is bound by the state court action unless it has been permitted to withdraw.²⁴⁴ By urging its claim in the state court, the federal government is in effect bringing its own state court collection action.

²⁴⁰ It is the policy of the Department of Justice to proceed criminally before proceeding civilly in tax cases.

²⁴¹ This statement may be true even if the taxpayer has been convicted criminally, although on first blush it would appear that since the government has been able to prove guilt beyond a reasonable doubt, it should certainly be able to prove the tax by a preponderance of the evidence. However, fraud may be shown by several specific items, which from a civil standpoint will often add up to very few dollars out of the total assessment. The government may be completely unable to prove many other specific items if for no other reason than because of the passage of time, the death of witnesses and the like.

²⁴² The Internal Revenue Service often follows its record control schedules as contained in the Internal Revenue manual with great rigidity and after six years disposes of all the evidence. This is true even though the manual also provides that records are never to be disposed of while they are involved in unsettled claims or actions by or against the Service.

²⁴³ G.C.M. 9991, X-1 CUM. BULL. 135 (1932).

²⁴⁴ Of course, even though the taxpayer's property is in the possession of a state court, the district court may still determine the priority of the tax lien since the determination is in personam. *Hart v. United States*, 207 F.2d 813 (8th Cir. 1953), *cert. denied*, 347 U.S. 919 (1954). Among the court of appeals cases recognizing that state courts may bind the government's tax claims see *United States v. Hoper*, 242 F.2d 468 (7th Cir. 1957); *United States v. Ettelson*, 159 F.2d 193 (7th Cir. 1947). See also *Smith v. United States*, 254 F.2d 865 (6th Cir. 1958) vacating a judgment rendered for the United States by the district court on the grounds that a state court had prior jurisdiction by virtue of a § 2410 quiet title action brought by the taxpayer's wife.

There are many times, however, when the government will not want to go into the state court, in which case it may sue the receiver or executor in the federal court for an adjudication of its rights against him. This technically is not a proceeding against the property which is in the jurisdiction of another sovereign's court system, and enables the government if successful to sue in the state court on the judgment obtained in the federal court.²⁴⁵

Other state court proceedings may have important tax consequences even if the government is not named and does not appear in the suit.²⁴⁶ There have been recent indications in the tax literature of an increasing awareness of the possibilities of favorable tax determinations by using state courts to fix property rights to which federal law must attach.²⁴⁷

It has been stated that there are three types of state court decrees which may arise in later tax litigation.²⁴⁸ In the first type of state case an issue of fact or law ancillary to the federal tax questions is decided, but the decision does not determine property rights or other standards upon which the federal tax is imposed.²⁴⁹ A case of this nature fairly clearly has no binding effect upon the government. In the second type of case the state court makes a legal conclusion regarding a set of facts which has no federal validity.²⁵⁰ The best example is probably the type of case in which the state court has determined a gift has been made (and as far as the state law is concerned a gift *has* been made) while federal criteria for gift are

²⁴⁵ See *United States v. People's Trust & Savings Co.*, 97 F.2d 771 (7th Cir. 1938); *United States v. Acri*, 109 F. Supp. 943 (N.D. Ohio 1952), *aff'd*, 209 F.2d 258 (6th Cir. 1953), *rev'd on other grounds*, 348 U.S. 211 (1955).

²⁴⁶ The most striking example of this is probably *United States v. Brosnan*, 363 U.S. 237 (1960), in which a federal tax lien was extinguished although the government was not made a party defendant. In *United States v. Bleasby*, 257 F.2d 273 (3d Cir. 1958), it was held that the government could not challenge the state's title to contraband funds after a state court had entered an order forfeiting the fund to the county treasury. See also *Barr v. United States*, 11 A.F.T.R.2d 722 (E.D. Mich. 1963), in which a state court had decreed in an earlier suit that the plaintiff must pay federal taxes. The refund suit was treated as a collateral attack against the state court determination and the plaintiff was denied recovery.

²⁴⁷ See *Estate of Darlington v. Commissioner*, 302 F.2d 693 (10th Cir. 1962) (holding state court determination that all tax savings inured to benefit of charities was binding over the government's argument that it was an advisory opinion.) Contrast *Estate of Faulkerson v. Commissioner*, 301 F.2d 231 (7th Cir. 1962) (holding state decree entered *ex parte* without notice, holding widow a life tenant, did not bind federal court in determining whether her interest could qualify for marital deduction; court held state decree had been contrary to state law and treasury regulations.) See also Braverman & Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 Tax L. Rev. 545 (1962). Of course, recently it has become increasingly obvious that state law is the crucial factor in the lien and collection field. For it is only when it is found that "the tax lien has attached to the taxpayer's state-created interests" is the "province of federal law" entered. *Aquilino v. United States*, 363 U.S. 509, 513-14 (1960).

²⁴⁸ Braverman & Gerson, *supra* note 247.

²⁴⁹ See, e.g., *Austin v. Helvering*, 77 F.2d 373 (D.C. Cir. 1935).

²⁵⁰ See, e.g., *Sewell v. Commissioner*, 151 F.2d 765 (5th Cir. 1945).

not met. Here again, the state decree is of no value — not because it is wrong, but because its holding simply does not apply to the particular problem, that is, what is a gift under the tax laws.

The third category of case is the most important. It determines property rights²⁵¹ of parties — whether a trust is revocable or irrevocable, whether a transfer occurred, whether an assignment is valid and the like. These questions may be extremely important in any tax field and particularly in the fields of income, estate and gift taxation.

The law seems to be reasonably settled that although a state court decree may bind the government²⁵² a collusive decree in such a matter is not binding. The law is not at all settled, however, as to what is a "collusive" decree.²⁵³ Moreover, there is considerable divergence of opinion as to who has the burden of showing whether or not there was collusion.

The leading pro taxpayer case in this field is *Gallagher v. Smith*²⁵⁴ which seems to hold that if the state action was procedurally regular, the decree is not collusive. The vitality of this case outside of the Third Circuit is somewhat doubtful. Older decisions in the Sixth and Eighth Circuits seem to follow the *Gallagher* approach,²⁵⁵ but recently the circuit court cases have taken a more jaundiced look at non-adversary state action. The position of the Ninth Circuit is something of an unknown quantity. In *Newman v. Commissioner*,²⁵⁶ the court held the state decree was not binding — but it should be noted that the decree was absolutely unnecessary except to resolve a tax problem, and by any standard except perhaps that enunciated in the *Gallagher* opinion, could have properly been disregarded by the court. Just what the Ninth Circuit would do if faced with a situation where there were some non-tax results flowing from a decree in a non-adversary proceeding is conjectural.

²⁵¹ The important thing is that the state-created right exist, not what it is called under state law. For example, in *Gauvey v. United States*, 291 F.2d 42 (8th Cir. 1961), the seller under a conditional sales contract was able to prevail against the government's tax lien on the buyer. This result occurred only because the court found there was a right in the seller, and also found that although that right was denominated that of a conditional vendor, for federal tax lien purposes it was that of a mortgagee. INT. REV. CODE OF 1954, § 6323. In other cases, a court may hold that a taxpayer under state law has a property right, although the state law may clearly indicate that the right is not called a property right. Thus, the federal government may have a tax lien on the taxpayer's liquor license, which is obviously a valuable right, even if it is not a "property right" under state law. See *Deitsch v. Board of Liquor License Commissioners*, 1 A.F.T.R.2d 1680 (Baltimore City Ct. 1958). Cf. *United States v. Blackett*, 220 F.2d 21 (9th Cir. 1955).

²⁵² *Lyeth v. Hoey*, 305 U.S. 188 (1938); *Blair v. Commissioner*, 300 U.S. 5 (1937).

²⁵³ Compare, e.g., *Gallagher v. Smith*, 223 F.2d 218 (3d Cir. 1955) and *Helvering v. Rhodes' Estate*, 117 F.2d 509 (8th Cir. 1941) with *Saulsbury v. United States*, 199 F.2d 578 (5th Cir. 1952) and *Estate of Stallworth v. Commissioner*, 260 F.2d 760 (5th Cir. 1958).

²⁵⁴ 223 F.2d 218 (3d Cir. 1955).

²⁵⁵ See note 253 *supra*.

²⁵⁶ 222 F.2d 131 (9th Cir. 1955).

One factor complicating a determination of what law is really being followed in the cases is the tendency of the courts to conduct an independent examination of the state law prior to going along with the state decree.²⁵⁷ By this action the courts seemingly are not following the state decision but are merely arriving at the same result independently of the state adjudication.

Finally, it appears that at least one circuit has taken the opinion that by appealing the state case, the litigation automatically becomes non-adversary,²⁵⁸ and therefore binding upon the government as a valid determination of applicable state law.

SUMMARY

If any one point should be made in conclusion, it is that the choice of forum and type of action often is as critical to a taxpayer as is the state of the substantive law. There is more than one way to skin a cat and there is more than one way to prevent the taxpayer from being skinned. Different taxes, different forums, different actions all involve different considerations. In the development of any kind of tax case there are usually at any given time several alternatives for the taxpayer. Over the time span in which his particular tax problem is being disputed with the government, there are many more procedural options available.

Just as every practitioner should in a general way be acquainted with the more commonly encountered sections of the Internal Revenue Code, so should he be generally familiar with the various procedural devices available in settling a tax dispute. For it is only when the procedural as well as the substantive side of the law is considered that there is a complete opportunity for a vindication of the rights of the taxpayer-citizen.

²⁵⁷ See *Northwestern Sec. Nat'l Bank v. Welsh*, 203 F. Supp. 263 (D.S.D. 1962).

²⁵⁸ *Kelly's Trust v. Commissioner*, 168 F.2d 198 (2d Cir. 1948).