CHAPTER XVI

RESOLUTION OF INTERPRETATIVE INCOME TAX QUESTIONS BY INDEPENDENT TRIBUNALS

4.1 Introduction

Jurisdiction over tax cases is conferred only on special courts designed for that sole purpose: Fiscal Courts Finanzgerichte of the several states, Laenders, which deal with both questions of fact and law, and the Federal Fiscal Court, Bundesfinanzhof, which deals only with questions of law.

An act of October 6, 1965, effective January 1, 1966, made substantial changes in the procedures employed in the Fiscal Courts, changes so dramatic that they have been said to institute a new era in tax litigation. The statute provided that every taxpayer may have any decision of the tax administration—including the ministries—reviewed by an independent tribunal. Judicial procedures in tax cases also were conformed to those utilized in other types of litigation. Further to emphasize the judicial character of its proceedings, the governing statutory provisions were removed from the Fiscal Code and placed in a separate statute. In consequence, no longer—as a mere incident to resolution of a dispute—may a Fiscal Court usurp the administrator's function on a de novo basis. More specifically, taxpayers who institute proceedings against either the local or regional Finance Office, through a remedy termed a revision, do not now run the risk that a judgment favoring the government might be entered for an amount exceeding that in dispute.

The taxpayer is free to sue the tax authorities for any benefit to which he believes himself legally entitled, the only requirement being that he set out facts which at least suggest

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1 Including refund cases.
2 The Basic Law (Constitution) provides that any person who believes that a public authority has infringed his rights can seek redress from an independent tribunal.
3 See note 4 infra.
4 Previously, the Fiscal Courts were not limited to the adjudicative function of an independent tribunal. In cases coming before them, they could operate as if they were finance offices. No earlier finding of a finance office was binding; a Fiscal Court could substitute its own judgment as to the proper total assessment, in the manner of an administrative agency.
detrimental impairment of his rights by application of law. The suit is based upon the act or, very rarely, the refusal to act of the tax authorities. Typically the taxpayer directs his claim against the assessment as it stands after the decision on his protest, either seeking cancellation of the assessment as a whole or requesting a mere reduction in his assessment. Occasionally, a taxpayer institutes proceedings to obtain from the local finance office a decision which that office either refused or failed to render. A taxpayer also may seek a declaratory judgment that a certain act of the tax authorities is a nullity and void.

Except in small cases, with respect to which certain additional restrictions are imposed, either the taxpayer or the local finance office has one month in which to appeal the decision of the Fiscal Court. Appeal lies to the Federal Fiscal Court, normally by revision. However, complaint is the proper remedy to secure review of a Fiscal Court decision on procedural questions—such as the admission of parties to a proceeding, wherever such decisions can be contested separately.

Ordinary tax litigation cannot be carried beyond the Federal Fiscal Court. However, a constitutional complaint can be taken within one month to the Federal Constitutional Court. This remedy is available when a taxpayer believes that his basic rights, as laid down in the Constitution, have been impaired by statute, administrative act, or a decision of the Fiscal Courts (e.g., on the ground that there has been a violation of the principle of equality before the law). A procedural requirement is to the effect that a taxpayer must exhaust his remedies in both the Fiscal Court and the Federal Fiscal Courts before lodging a constitutional complaint with the Federal Constitutional Court; it is waived only where an established practice in the Fiscal Courts precludes any likelihood of a decision favorable to the taxpayer.

A decision by the Federal Constitutional Court, holding a statute, or decisions of the tax administration or of the Fiscal Courts, incompatible with the Basic Law, renders the offending statute or decision void. Within recent years, this Court has declared unconstitutional a number of tax provisions, some of a fundamental nature—such as one which treated husband and wife as a unit for income tax purposes. In consequence, its decisions have become of increasing significance to the daily work of the tax authorities.
Section A. Organization and Procedures: Trial Level

4.2 Organization of the trial tribunals

The fifteen Fiscal Courts are completely independent state tribunals, empowered to decide questions both of fact and law, with appeal on questions of law alone lying to a federal tribunal, the Federal Fiscal Court.

Prior to the act of October 6, 1965, there was considerable variation from state to state in the organization of the Fiscal Courts. The new law, however, sets out uniform provisions, in force throughout the Federal Republic. It also upgraded the Fiscal Courts: they have been raised to the higher of the two echelons of state courts and are the equal of the Regional Appeal Courts which handle ordinary non-tax litigation.

Each Fiscal Court is divided into so-called Senates, from two to eight for each court, depending upon local requirements.5 The jurisdiction of each Senate may be fixed by reference to any one of several criteria: (1) geographical boundaries, (2) categories of taxable objects, such as real property or business enterprises, or (3) types of taxes, that is, the individual income tax, the corporate income tax, etc. In each Senate, five members form a quorum, three members of which must be professional judges. The other two are honorary associate lay judges.6

Each Fiscal Court is headed by a professional judge—the President of that particular court, who is appointed for life by the state finance ministry. As President, he bears the administrative responsibility for the overall functioning of the court. In his capacity as a judge, he acts as presiding judge of one or more Senates. His deputy is that President of a Senate who has the highest seniority among the court members.

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5 Prior to the upgrading of the Fiscal Courts, these several intracourt divisions were termed chambers.

6 By increasing the professional judges from two to three, and reducing the lay judges from three to two, the preponderance of laymen sitting on the Fiscal Courts has been eliminated. The earlier requirement, that there be three lay judges, was designed to counterbalance the tendency of Fiscal Courts to side with the finance offices. The change was made to more closely conform these courts to comparable courts in other areas of law and in the belief that other structural changes would preclude finance offices from exercising undue influence.
Senates not headed by the President of the Court are headed by professional judges with the rank of "President of Senate." They, like the associate judges of the several senates, are appointed for life\(^7\) by the state finance minister. The Senate associate judges possessing legal training\(^8\) and carrying the title of Fiscal Court Counselor,\(^9\) are drawn from the tax administration. However, once a senior tax official is appointed professional judge on a Fiscal Court, his connection with the tax administration is completely severed. His new role requires that he be completely independent of the tax administration. But neither this, nor the fact that judges of the Fiscal Court are drawn from the senior tax officials, means that service as a judge is considered superior to that of the senior officials. The two are deemed equal in importance and are under the same salary pattern.

As stated previously, the new statute requires that a Senate quorum be composed of three professional and two lay judges. Each Fiscal Court has a committee which elects the lay judges for four-year terms. This nine-member selection committee, whose chairman is the President of the Senate, includes one official from the state tax administration and seven citizens "of confidence" selected by the legislative body of that state.

The lay judges are chosen by the committee from a list of candidates proposed by the President of the Court after consultation with professional and trade organizations. The number

\(^7\) According to the federal statutes, a judge may be appointed "on probation."

\(^8\) Senior tax officials who are appointed to the lowest rank of the tax judiciary typically will have passed the government's senior level legal examination which made them eligible at least to serve in legal capacities or as senior civil servants. While individuals who have passed qualifying examinations in areas other than law—specifically, economics—are appointed to senior administrative posts, and theoretically become eligible for appointment to the judiciary, such appointments are very rare.

\(^9\) It is not yet clear what the Laender will do in supplementing the new federal statute. Until the revision of the federal law, the following state of affairs existed. Fiscal Court Counselor was the lowest rank in the judicial hierarchy. An associate judge might be promoted from that rank to that of Senior Fiscal Court Counselor without any change in duties. The next higher rank was that of a Fiscal Court Director with the highest rank that of Fiscal Court President. Typically, the senior posts were filled through promotion of judges, although in the early years of the Fiscal Court, senior tax officials were appointed directly to the higher ranks if they occupied comparable posts in the tax administration.
of names on the proposed list is expected to be three times the number of persons to be appointed, and the number appointed is sufficiently large that no one will have to sit on the Fiscal Court more than twelve days in any one year.

4.3 Processing cases through the trial tribunal

Every attempt is made to dispose of disputes at the administrative level and it now resolves 96 percent of the total. In keeping with this principle, a taxpayer—to invoke the jurisdiction of a Fiscal Court—must show that he has exhausted the administrative remedy. The one exception permitting the administrative procedures\(^\text{10}\) to be bypassed, requires agreement of the local finance office and this usually occurs only when both parties recognize that administrative re-examination of the case would be futile. Such a conclusion might be reached, for example, where pre-assessment examination of the facts was so thorough that it is unrealistic to expect new factual developments, leaving for resolution only questions of law as to which neither party is prepared to yield. Direct appeal to the Fiscal Court in such cases saves administrative time\(^\text{11}\) and also accelerates the point of time when a yet further appeal can be made, if desired, to the Federal Fiscal Court.

Once the administrative process has ended, the taxpayer has a month in which he may bring an action challenging the assessment as it stands after the decision rendered on his protest. But even where this is done, in theory the disputed tax must be paid on the due date stated in the assessment notice, for the latter retains its vitality until altered or set aside. However, under the new law the local finance office may postpone payment by suspending implementation of the assessment notice. Moreover, that office is required to grant the taxpayer's application for postponement whenever serious doubt exists as to the assessment's correctness or where payment would have an unnecessarily harsh effect on the taxpayer. The Fiscal Court, even before an action is brought, also may order a postponement under these circumstances.

While a case, once brought, will be defended by the local finance office unless convinced its own position is untenable,

\(^{10}\) The new law refers to the administrative procedure as a "pre- cursory procedure," i.e., precursory to the court proceedings proper.

\(^{11}\) Since the head of the finance office has the power to refuse or to consent to such a direct appeal, he determines whether or not additional effort will be made to settle at the administrative level.
invocation of the Fiscal Court's jurisdiction does not prevent either party or both from changing its position. However, this in no way alters the obligation of the tax administration to resolve the issue in that manner which under the law seems to be the right solution. Consequently, should the taxpayer offer to concede more than appears justified to the administration, such a concession could not be accepted. Obviously, then, the taxpayer cannot hope to secure as a concession from the tax administration any treatment to which, from the administration's point of view, he is not entitled under the law. Further, on the basis of its own re-examination, the finance office may modify or replace the old assessment notice. In such event, the taxpayer may proceed with his action in the Fiscal Court under the new notice without having to re-process the case through the administrative procedures. The taxpayer also may withdraw his action at any time before the Fiscal Court's decision becomes final but, once the oral hearing has been held, only if the finance office agrees.

The higher levels within the tax administration are not routinely informed of all cases moving from local finance offices to the Fiscal Courts. Only if a case has substantial significance are the higher echelons alerted. They also keep abreast of important Fiscal Court decisions; these are published by legal journals. Thus such officials are in a position to make general suggestions to finance offices regarding the way in which similar cases should be handled in the future.

In hearings before the Fiscal Courts, the tax administration is represented by the local finance office, customarily by its head or by his nominee who usually is a so-called senior class official with legal training.

The taxpayer usually is represented at the hearing though rarely by a lawyer. Typically, his representative is the tax consultant or agent in tax matters who either assisted the taxpayer in preparing his return or first represented him at the point discussions were held with the finance office. While taxpayers are entirely free to represent themselves before the Fiscal Court, should the court conclude a given taxpayer is incapable of protecting his own interests, the new law permits it to require him to secure counsel.

Proceedings are as informal and flexible as possible, to insure maximum expedition consistent with full protection of the party's rights. However, strict adherence is required with

12 Under the old law, once a case had been carried to the Fiscal Court, the Fiscal Court assumed control and direction of the case.
respect to the one requirement that actions be brought within one month from receipt of the protest (or if the protest procedure is waived, the assessment notice) which must advise the taxpayer of (1) his right to bring an action, (2) the competent court, and (3) the time limit to be observed.\textsuperscript{13}

As long as the one-month time limit is met, considerable latitude is allowed with respect to the written statement which the taxpayer must file with the Fiscal Court, regarding both its form and the agency with which it is filed. Illustratively, the requirement has been deemed fulfilled by (1) a telegram sent to the Fiscal Court, (2) a statement of claim filed with the local finance office, or (3) an oral statement made by a taxpayer to a competent official, either of the Fiscal Court or the local finance office, who will make a formal record of the taxpayer's statement and see that it is properly filed.

Whatever the initial form of the statement, it must include the names of the plaintiff and defendant, the administrative notice which he disputes, and the subject at issue. The taxpayer, though not required to do so at this earlier stage, will also expedite matters if he identifies the specific relief sought and sets forth the facts and evidence supporting his claim, to the end of making it obvious that his rights were in fact impaired. In turn, the local finance office has no option but to submit all available records, even those received after commencement of the suit. Failure to do so is ground for reversal of revision. In practice, the documents submitted by both the finance office and the taxpayer are equivalent to briefs.

Apart from the foregoing, the new law itself permits, but does not require, other pleadings or statements prior to the oral hearing which that law made an integral part of Fiscal Court proceedings,\textsuperscript{14} though such can be waived by agreement of the parties. It also is possible for the court to issue a preliminary determination before an oral hearing if it also informs the taxpayer that (a) he may request such a hearing, and (b) that if he fails to do so the decision set out in the preliminary

\textsuperscript{13} Should the taxpayer decide to sue the finance office for failure to issue such a notice, he must wait six months after he has filed a protest.

\textsuperscript{14} Under the old law, the Fiscal Court had full discretion whether to grant a taxpayer's request for an oral hearing, although in practice the request was granted. Under the new law, to prevent oral hearings from becoming an undue burden on the parties and the tribunal, the latter seeks to dispose in advance of all preliminaries so that one hearing is sufficient.
notice will become final. Should an oral hearing then be applied for within the prescribed time limit, the decision set out in the preliminary notice becomes inoperative. At the hearing, and prior to the final decision, the parties themselves are free to introduce—and the court must take into account—new facts or evidence now considered relevant though previously not brought out during the administrative process—whether from ignorance, accident, or a mistaken belief in their irrelevance. Witness-es may be used at the option of the parties or under the direction of the court. Neither party bears the burden of proof as the prime concern of the court is to ascertain the true situation.

Whether or not the parties introduce new facts or evidence, or waive an oral hearing, the court itself, in fulfilling its responsibility to examine all relevant factual and legal aspects of the case, must make its own inquiry, and in so doing is not limited to matters of record. Indeed, it is expected to conduct such an inquiry even if the parties agree as to the facts. In consequence, the parties are not allowed to file formal stipulations of fact. To illustrate the practice: if the taxpayer, on instituting the proceeding, filed only an abbreviated statement regarding his claim, the court, through the presiding judge, may request, for example, that he furnish additional explanation to clarify apparent vagueness or to supplement the insufficient factual data, to facilitate either determination of the facts or appreciation of their significance. The court also may ask either side to prepare a statement in response to matters stated by the other side.

The court may base its judgment only on facts or evidence presented in the course of the hearing. Thus, in those rare instances where, to avoid delay, evidence is taken by a member of the court prior to the hearing, such evidence must be laid before the court during the hearing itself.

The particular relief which the taxpayer requests limits the relief the Fiscal Court may grant. Thus, without further ado,

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15Facts or evidence not introduced by the time the court hands down its decision cannot later be relied upon to justify a correction in the assessment.

16Under the old statute, the Fiscal Court and the finance office approached the case in the same manner: each reached its decision on its appraisal of the taxpayer's entire situation, ignoring his particular claim for relief. Thus before January 1, 1966, the Fiscal Court was authorized to hand down a decision granting more than he had requested or it could change the decision of the finance office and place the taxpayer in a worse position than he was before bringing his case to the Fiscal Court.
it may not accord more favorable treatment than he requested. But if the court believes the taxpayer actually is entitled to additional relief, he must be so advised and at that point may modify his petition. On the other hand, the court may not increase the contested tax beyond the total amount originally set by the finance office. In other words, at worst his action will be dismissed and the assessment of the finance office upheld. Then if the finance office concludes it treated the taxpayer too liberally, it may issue a new assessment notice which the taxpayer then may contest. Finally, it is possible for the court to conclude that, as to the question at issue, there are sound reasons for reducing the tax as originally determined but that other circumstances involving this taxpayer do justify a larger amount. In such circumstances, the court confirms the original amount.

Every effort is made to minimize the time lag between the date of the oral hearing and the date of judgment. The bare decision itself may be read in court at the end of the hearing or delivered in writing to the parties at a later date, usually within a two-week period. In any event, within two weeks after that bare decision is rendered, a complete written judgment must be forwarded to the parties. This judgment, in addition to the decision, sets forth the facts as determined by the court, an analysis of the legal rationale on which the decision is based, and information regarding further remedies available to the parties. The statement regarding the facts includes also an explanation of the weight attached to the several matters put in evidence. The legal analysis also explains why the court rejected any given arguments advanced by the parties. In short, the parties receive an exhaustive analysis of the facts and relevant law. To minimize the burden on the court, however, a statement of facts need not be included in the judgment where the amount in controversy is less than DM 100. It need only identify the points as to which the court differs from the result reached in the administrative procedures.

Approximately 20,000 appeals are decided annually by the fifteen Fiscal Courts in the Federal Republic. Between six and eight thousand such appeals involve individual or corporate income tax cases.

Not all Fiscal Court decisions are published. The several courts themselves select for publication in the Collection of Fiscal Court Decisions the particular decisions they consider of prime importance.
In theory, a Fiscal Court decision has no precedent value whatsoever, either as to the court which decided it or any other court. However, as a practical matter, attention is given to previous decisions, by both the court of decision and other courts. Indeed, the judgments of the Fiscal Courts increasingly tend to discover prior decisions in developing the rationale in support of the judgment.

Since the courts themselves independently select the decisions to be included in the *Collection of Fiscal Court Decisions*, the mere fact of inclusion indicates that the court of decision believes this particular case is likely to influence future interpretations of the law. Understandably, these decisions are widely studied, further facilitating their use as precedents.

The tax administration itself provides no published clue as to its reaction to an adverse decision. Though it may decide not to appeal a particular judgment, it does not publish any indication of whether, in the future, it will follow the thrust of that decision or continue to press for its original position.

Since a decision of a Fiscal Court, in theory at least, has no precedent value in subsequent judicial proceedings, the defending local finance office, on encountering a substantially similar case, is wholly free to ignore the Fiscal Court decision and proceed as if it were dealing with a case of first impression. In practice, however, the local finance office tends, when faced with a doubtful issue covered by an earlier decision, to follow the court's reasoning and adopt a similar position.

Section B. *Organization and Procedures: Appellate Tribunals*

4.4 *Organization of the appellate court system*

The highest court for tax matters is the Federal Fiscal Court, located in Munich. Normally, its decisions are final; they can be reversed only by the Federal Constitutional Court if a taxpayer establishes that his constitutionally guaranteed basic rights have been violated. The most usual case involves a claim by the taxpayers of an impingement on his right to equal treatment before the law.

The Federal Fiscal Court consists of a President, Vice-President, five presiding judges of the Senates, and about thirty-five judges. Members of the court must be at least thirty-five
years of age. In practice, almost every member is qualified to hold a judicial post.\textsuperscript{17}

Persons appointed are thoroughly familiar with tax law and business economics, having had substantial practical experience in tax matters. They will have served in the federal or state tax administrations,\textsuperscript{18} on lower Fiscal Courts, or as tax consultants or tax lawyers. Occasionally, however, judges from other branches of the judiciary are appointed to the Federal Fiscal Court, thus enriching it with their knowledge of other legal areas.

All Federal Fiscal Court judges are appointed for life by the Federal President after election by a special committee. The Federal Minister of Finance appoints the other officials of the court: clerks, registrars, and about ten junior legal officers. Appointments as President, Vice-President, or presiding judge of a Senate are made from judges previously appointed.

The committee which elects the judges of the Federal Fiscal Court consists of twenty-three members: the Federal Minister of Finance, the eleven State Finance Ministers, and eleven others appointed by the Bundestag, Parliament. These latter eleven are recommended by the political parties represented in the Bundestag. The Committee's election of judges takes place in secret and is presided over by the Federal Minister of Finance. Although he does not vote, he does exercise a veto power.

The Federal Fiscal Court, for operating purposes, is divided into Senates, the number at any one time depending upon current requirements as determined by the Federal Minister of Finance. At present there are seven Senates, in addition to the so-called Great Senate. Six members of the latter are chosen by the court's governing board which is made up of the President of the Court, the presiding judges of the several Senates, and the two judges with the highest seniority. Decisions are reached by majority vote, with the President casting the deciding vote in case of a tie.

\textsuperscript{17} The relatively rare judicial appointee who does not possess the requisite formal qualification will have the qualification necessary for a senior administrative post or will have been for at least three years a professional judge of a Fiscal Court.

\textsuperscript{18} Once appointed to the bench, a judge may not serve the tax administration in any capacity. In an earlier period, it was feared that judges with a tax administration background might be prejudiced against taxpayers. This fear has proved groundless.
The court's governing board also designates the members and their deputies of the other several Senates, though on occasion one judge may be a member of several Senates. Further, a year in advance each Senate is assigned responsibility for a particular group of taxes—though this assignment tends to continue year after year—and the scope of the responsibility is not changed during the year except where necessary to equalize the work load among the several Senates or to accommodate a particular Senate, the work of which has been adversely affected by illness, etc., of one or more judges.

Before each year begins, the President of the Court selects the Senate over which he intends to preside. The President and the presiding judges determine by majority vote which judges will preside over which Senates. Within each Senate, the presiding judge allocates all business before the year begins. As in the case of the inter-Senate allocations, no change is permitted except where required by work pressures or personnel changes.

The statute requires that five judges sit in every case. Three judges decide on those questions which raise preliminary or peripheral questions, normally of a procedural nature.

The seven-member Great Senate, made up of the President of the Senate and the six judges elected by the court's governing board, must render the decision whenever one Senate does not wish to follow any decision of another Senate. Moreover, any Senate may refer to the Great Senate a case involving an important question of law, considered significant to the development of either a legal principle or consistency in judicial decisions. Where a Senate does refer a case to the Great Senate, which happens about five times a year, one of its own members sits with the latter, participates in the discussion, and votes on the disposition of that particular case. Should a tie develop, the President of the Court casts the deciding vote.

4.5 Processing a case through the appellate tribunal

An appeal—termed a revision—to the Federal Fiscal Court may be entered by either the taxpayer or the local finance

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19 The law formerly in force required that a *minimum* of five judges sit in each case.

20 Under the old law, the number of members of the Great Senate depended upon the number of Senates. Now the number is fixed permanently.

21 The old law required only that the Great Senate decide all cases where a Senate did not wish to follow a *published* decision of another Senate.
office, but only with respect to questions of law. The Federal Court must accept the facts as determined by the lower tribunal; new facts or new evidence cannot be introduced. The court is bound by the facts as found by the lower court unless the error of fact is so dreadful and enormous that in the finding of the facts, the law itself was violated. Thus, it is possible to support a revision on the ground that the trial tribunal did not comply with the law when it determined the facts of the case. Illustratively, a taxpayer may request a revision, alleging that the lower Fiscal Court violated the law in not investigating the facts for itself as required.

The Federal Fiscal Court is not restricted to those issues of law specifically pleaded by the taxpayer. It is free to consider, at its discretion, any issues of law it believes emerge from the facts. Procedural defects, however, must be specifically pleaded.

A taxpayer may bring an action of revision if the amount in controversy exceeds DM 1,000 or if the trial tribunal granted permission to apply for a revision. And that tribunal is to grant such permission if:

(1) The legal issue raised is of fundamental importance;

(2) The judgment does not follow a previous decision handed down by the Federal Fiscal Court, or

(3) It is alleged that the judgment was bottomed on a procedural defect.\(^22\)

If the trial tribunal concludes that a taxpayer's application for a revision, which in practice contains a careful analysis of the rationale underlying his claim, does not fall in any one of these three categories and denies his request, the taxpayer is entitled to have the Federal Fiscal Court review that procedural determination. The Federal Fiscal Court, in then deciding whether or not to grant the request for a revision, need not explain its decision, even if adverse to the taxpayer, so long as (1) all participating judges agree and (2) the taxpayer had an opportunity to state his views as to why he should be permitted to file a revision.

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\(^{22}\) The new statute reduced the discretion of the Fiscal Court. Previously, the Fiscal Court was supposed to grant permission to file an application if the matter was considered to be of fundamental importance. This single but relatively demanding standard was imposed in an effort to reduce the volume of work handled by the Federal Fiscal Court in the belief that minor cases lacking any legal significance were dealt with satisfactorily by the lower-level Fiscal Courts.
The Federal Fiscal Court can decide a case brought before it on revision only if it concludes that all of the essential facts were determined by the court below. Should it conclude further fact finding is necessary, the case must be sent back to the lower Fiscal Court for a new trial and decision, for the Federal Fiscal Court may decide only questions of law. Also, should it disagree with the rationale on which a lower court rested but conclude that the decision itself was sound for other reasons, it must refer the matter back to the lower court. This requirement is designed to safeguard the taxpayer's interests, by assuring him of an opportunity to discuss before a trial court all aspects relevant to the different reasons which influenced the Federal Fiscal Court.

Except for the foregoing, the procedural rules which governed the lower Fiscal Courts apply also to the Federal Fiscal Court. For example, though taxpayers typically use lawyers expert in tax matters to represent them in revision proceedings, in theory every taxpayer is free to appear and represent himself. Here too, however, the court may order the taxpayer to employ a representative if it believes he is unable to defend properly his own interests.

On the government's side, the question of whether to appeal an adverse lower court decision rests with the head of the local finance office which originally issued the contested assessment notice. Typically, the individual who makes such a decision is a senior class tax official with legal training. Occasionally, those who supervise a local finance office may instruct it to seek a revision, but this is unusual. Even less frequently will the state finance ministry or the Federal Finance Ministry join the proceedings on their own initiative. If they do join, they are in the same position as the local finance office and the taxpayer: they are separate parties to the proceedings. In some instances, the Federal Fiscal Court itself

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23 Under the old law, the Federal Fiscal Court had the power in theory to conduct its own fact-finding investigation. In practice, however, this power was rarely utilized.

24 It is no longer possible, as it was in the past, to refer the case back to the finance office.

25 Prior to January 1, 1966, a taxpayer's freedom to appear pro se was unlimited. The modification incorporated into the new statute was a compromise following extensive debates in the Bundestag. Some argued that taxpayers should be required to have representatives before this tribunal, and that such representation be restricted to certain groups of experts. These arguments were rejected.
may seek the views of either ministry by inviting either or both to join the proceedings. Such an invitation usually is extended when the court is faced with a question of far-reaching or fundamental importance to the development of the tax law. Rather frequently, the state finance ministers decline to join such proceedings. The Federal Finance Ministry is much more likely to accept the invitation, particularly if it appears that the final decision may affect future legislation or administrative regulations.

Should either ministry join the revision proceedings, the head of the appropriate section represents it. However, he will not interfere with the presentation of the case by the local finance office; but he will focus primarily on the ministry's estimate regarding the overall importance of the issues.

The local finance office usually is represented either by its head or by an official designated by him. Typically, this is the same person who handled the matter before the trial court and who continues to handle the case for the finance office until a final decision has been reached.

The parties have one month, from the date they received notice of the trial court's final judgment, within which to file a request for revision with the Federal Fiscal Court. They then have another month in which to file supporting statements. 26

The request for revision must identify the specific relief sought, the statutory provision or legal rule which the party believes to have been infringed, and procedural defects, if any, on which he relies. Noncompliance with these rules will cause the court to reject the revision.

Provisions regarding oral hearings before the lower Fiscal Courts apply also to the Federal Fiscal Court. Thus there must be such a hearing, unless the parties agree to waive it. But, like the lower court, the Federal Fiscal Court retains the power to issue a preliminary notice without an oral hearing, provided the taxpayer is given one month before the notice becomes final within which to request an oral hearing.

In 1964 the Federal Fiscal Court dealt with almost 2,000 legal complaints, of which 39 percent (780) dealt with individual and corporate income tax questions. Of the 2,000, approximately 8 percent (160) were quashed because the amount in controversy was too small, 50 percent (1,000) were dismissed

26 Upon application, the presiding judge of the Senate may extend these time limits.
for being unfounded, that is dismissed on the merits,\textsuperscript{27} 25 percent (500) were referred back to the lower courts, and final decisions were rendered in 17 percent (340).

Theoretically, decisions handed down by one Senate do not constitute precedents even for future cases which may come before it. However, the court itself classifies certain decisions as having fundamental importance. This includes any Senate's decision believed to be important and so well founded that it may be considered as a guide in pending or future cases. In practice, other Senates must respect these precedents. One Senate cannot deviate from such a decision coming from another Senate unless consent is given by the deciding Senate. Should consent be refused, the Senate seeking to overrule the earlier decision must refer the question of law, together with its own legal opinions, to the Great Senate. The Great Senate decides the matter, and its decision binds all the Senates.

The Federal Fiscal Court publishes two groups of decisions: (1) the previously mentioned decisions of fundamental importance, and (2) other decisions believed to be of general interest. However, it will postpone publication of a decision of fundamental importance if it expects in the near future (1) that other Senates will deal with comparable cases or (2) that authoritative discussions of the problem by legal writers will appear. Delay of publication in these circumstances makes it easier for the particular decision-making Senate later to change its position if such a change seems to be warranted.

Published decisions appear in a special section of the \textit{Federal Tax Gazette, Bundessteuerblatt}. This is issued as the need arises—three or four times a month—and is available to the public. Decisions of fundamental importance are marked, and to facilitate reference, all published decisions appear under subject matter headings.

In practice, all lower courts, whatever their formal obligation to rely upon and follow their own legal opinions almost invariably are guided by the published decisions of the Federal Fiscal Court, absent circumstances which suggest that the

\textsuperscript{27}The question may be raised as to why taxpayers—when approximately 50\% of all complaints brought to the Federal Fiscal Court were dismissed on the merits—take the trouble to process a complaint. Basically, taxpayers feel it is worth the chance. The court costs are low. The Federal Fiscal Court is accessible. Attorneys' costs on the whole are low and depend entirely on the complexity of the case. Moreover, taxpayers tend to feel that taxes should be contested wherever there is any reason for so doing.
Federal Fiscal Court will overrule its earlier decision. Obviously, this will not be anticipated where an earlier position has been reaffirmed recently by the Federal Fiscal Court, particularly if such reaffirmation occurs when either the earlier decision or the trend of thought it reflects has been attacked by legal writers.

In theory, the tax authorities, like the courts, are free to ignore the decisions of the Federal Fiscal Court but in practice tend to follow them. Understandably, again like the courts, greater weight is accorded published decisions, especially those considered to be of fundamental importance.

Interpretations the tax administration sets out in administrative instructions and regulations pertaining to individual or corporate income taxes (or to the wage tax) are frequently followed by the phrase, "subject to contrary appellate opinion." This is intended only to remind tax officials that they are expected to take into account any subsequent contrary decision handed down by the Federal Fiscal Court. Indeed, the regulations themselves are based in large part on Federal Fiscal Court decisions. By incorporating the principles of selected decisions, the tax administration indirectly indicates which judicial pronouncements the tax administration believes should henceforth control points heretofore in dispute. Otherwise, however, the tax administration does not publish its view regarding any court decision. On occasion, however, the administration does decide to relitigate an adverse Federal Fiscal Court decision in a similar fact situation. In such event, local finance offices are told to act on the basis of administrative pronouncements, not on the basis of the contrary decision.