CHAPTER III

ASSESSMENT AND ADMINISTRATIVE APPEAL PROCEDURES

Section A. Analytic Comparison of the "Six": Requirements of a Tax Administration's Own Conflict Resolution Procedures, Viewed in Aggregate

3.1 Introduction: Comparative profiles of the entire conflict resolution process

Because the character of the tax administration's own conflict resolution process should depend upon the relative role it is expected to play in a country's entire tax dispute resolving process, certain of the latter's essential attributes and the relative roles each of the "Six" assigns to independent tribunals must first be mentioned.2

Viewed as a whole, the dispute resolving process of a country should be designed to insure it has a reasonable chance to be both fair and efficient. For that process to be fair, at some point taxpayers must have a readily realizable right, as they do have in the six countries covered by this study,3 to lay their sides of disputes before a tribunal wholly independent of the tax administration. However, it is relatively inefficient to rely on such tribunals to resolve large numbers of tax controversies. Further, their use for such purpose either results in an expensive drain on talented and rare manpower or invites reliance on inexpert personnel. This is because increased reliance on this method of disposition brings an inevitable increase in the required degree of decentralization;

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2 See Chap. IV infra regarding details of the conflict resolution process at the judicial level.

3 See Chaps. IV, VIII, XII, XVI, XX, and XXIV infra.
otherwise, the inconvenience of the forum to taxpayers creates an unfair arrangement. It is this requisite multiplication of such tribunals, if they are expertly staffed, that eats into a country's most talented and expensive manpower. When this consumption is balanced against a country's other needs, the probably resulting insufficient, albeit expert, staffing will create crowded dockets and delay as disputes await their turn. And those who represent the parties, though once intimately acquainted with all the niceties pertaining to a given dispute, must later—after the period of delay and just before the case comes to trial—take additional time to become reacquainted with those niceties and then devote yet further time, plus the time of the qualified judge, to educate that judge in all the ramifications.

At least less costly to such a country is the alternative device of staffing its host of decentralized, outside, independent tribunals—operating at the lowest level—with unremunerated and inexpert citizens. Great Britain has long followed the practice of deflecting directly to just such tribunals income tax disputes which a local assessment office is unable to resolve. Now 700 such tribunals (General Commissioners), with two part-time lay citizens constituting a quorum for each case, are spread geographically throughout that island. Only the clerk is paid and has legal training. This arrangement, however convenient, invites three obvious risks if transplanted elsewhere. Except where appointment is deemed a distinct honor, unpaid lay members may not give adequate time and thought to their demanding function. Second, even if they do, problems of any complexity may still baffle them. Finally, given the large number of such tribunals, their lack of expertise, and the fact their decisions are not published, a high level of uniformity cannot be anticipated. Apparently these were the risks the British Parliament sought to avoid when, as distinct from income tax questions, jurisdiction over surtax matters was lodged in a separate body of Special

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4 See Chap. XIX, §3.3 and Chap. XX, §4.1 infra.
5 See Chap. XX, §4.1 infra.
6 According to a new but yet unpublished study of Michigan tax procedures, all three consequences resulted from that state's use of approximately 1800 such tribunals to hear appeals of property tax assessments. Also see the earlier legislatively sponsored Michigan Tax Study Staff Papers 214 et seq. (1958).
7 See Chap. XX, §4.1 infra.
Commissioners composed of eight full-time, paid professionals who ride circuit to the major metropolitan centers.\(^8\) Further, by giving these two distinct types of tribunals concurrent jurisdiction over many but not all income tax questions,\(^9\) some taxpayers were granted what is tantamount to an election between them. Nevertheless, the widely scattered, uncoordinated General Commissioners decide from 7,000 to 8,000 cases annually, compared with approximately 1,000 decided by the Special Commissioners.\(^10\) In either case, further appeal to the regular courts is available only with respect to questions of law.\(^11\)

In contrast, because relatively few German taxpayers invoked a previously existing option to lay their cases before local lay committees, Germany recently abandoned that arrangement.\(^12\) Now a taxpayer who is unable to resolve a dispute with local examining officials carries the case directly to one of the specialized fiscal courts staffed predominantly with professionals.\(^13\) These necessarily are decentralized to accommodate the yearly volume of 20,000 tax disputes, of which from 6,000 to 8,000 involve individual and corporate income tax matters.\(^14\) The Netherlands follows a similar practice, utilizing specialized chambers within their regularly decentralized court system\(^15\) to accommodate an annually recurring 2,000 tax disputes which their local assessment offices are unable to resolve. Approximately seventy percent of these involve individual and corporate income tax matters.\(^16\)

Belgium and France, however, like Britain, make some use of decentralized independent tribunals staffed, predominantly but not exclusively, with outside laymen, to hear disputes between taxpayers and local assessment officials, though in these two countries these particular tribunals function solely in an

\(^8\) *Id.* at §4.2b *infra.*  
\(^9\) *Id.* at §4.1 *infra.*  
\(^10\) Apart from so-called "delay" cases. *Id.* at §§ 4.3a and 4.3b *infra.*  
\(^11\) *Id.* at §4.1 *infra.*  
\(^12\) See Chap. XV, §3.4a *infra.*  
\(^13\) See Chap. XVI, §4.1 *infra.* However, before such action is taken, on filing a protest (in the case of substantive issues) with the local office, the individual taxpayer does obtain a hearing with the assessment official. See Chap. XV, §3.4a *infra.*  
\(^14\) See Chap. XVI, §4.3 *infra.*  
\(^15\) See Chap. XXIV, §4.1 *infra.*  
\(^16\) *Id.* at §4.3 *infra.*
advisory capacity. The lack of expertise on the part of the lay members presumably is responsible for denying to these advisory tribunals, in contrast to the British arrangement, any jurisdiction over questions of law. And to assure some expertise regarding factual matters pertaining to a particular taxpayer's profession or business, each tribunal consists of a large panel, and the lay members for any given case are drawn from those having familiarity with the petitioning taxpayer's vocation. A final contrast to British practice is most important. Taxpayers in Belgium and France may bypass these lay tribunals, carrying their disputes with local assessment offices directly to a higher in-service administrative appeal office (regional level), the jurisdiction of which must be exhausted in any event before the taxpayer can lay his case before an outside professionally staffed independent tribunal. In one recent year, compared with the 135,312 Belgians who carried their disputes with a local assessment office to one of the higher but decentralized offices handling administrative appeals, only 1107 required a final decision from a professionally staffed independent tribunal. Corresponding numbers in France were, respectively, 365,000 and less than 5,000.

The in-service appeal arrangement in the United States is similar to that of Belgium and France in that the apex is also at a higher regional level, rather than at the local district level. However, to handle its administrative appeals, the United States actually maintains formally constituted appeal offices at both levels, each of which has decentralized suboffices. When a dispute cannot be resolved by a local

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17 See Chap. VII, § 3.2a infra and Chap. XI, §§ 3.3 and 3.4a infra.
18 Ibid.
19 Ibid.
20 Ibid. In Belgium, the assessor also can refuse to refer the case to the lay group if he believes the referral will not contribute to a proper determination of income. See Chap. VII, § 3.2a infra.
21 See Chap. VII, § 3.4, Chap. VIII, § 4.1, and Chap. XI, § 3.4b infra.
22 See Chap. VII, § 3.4 and Chap. VIII, § 4.3 infra.
23 See Chap. XI, § 3.4b and Chap. XII, § 4.3 infra.
24 Each of the 58 districts has a District Conference Office. Suboffices actually are maintained only in the larger districts. Each of the seven regions, among which the 58 districts are divided, maintains an office known as the Appellate Division and, together, the seven of these have about 40 geographically spread suboffices.
examining official, the taxpayer is encouraged by letter from the internal review staff to take the dispute to one or the other of the administrative appeal offices, the review staff's choice in a given case being determined by the character of the underlying issue and by the amount involved.

Typically, small cases and cases which can be resolved without special compromise authority (e.g., valuation questions) are encouraged to move to the lower of the two offices, i.e., to the appeal office operating at the district level. However, any taxpayer may avail himself of both offices on a seriatum basis before entering the litigation stage, or if encouraged to go to the district level appeal office, he may bypass it, going straightaway to the higher office, or—contrary to the Belgian and French practices—he may, bypassing both, carry his case directly into the litigation stage. At this latter point, whether reached either after going through one or both of the

25 Basically, these fall into two categories. Revenue agents are the more highly trained of the two (see § 3.6 infra) and in each district are assigned to the Field Audit Branch of the local Audit Division. In fiscal 1966, these branches examined 767,000 returns of which 590,000 were income tax returns and of these 166,000 were filed by corporations, 411,000 by individuals and fiduciaries, and 13,000 by exempt organizations. Including supervisory personnel, this field force expended 12,473 man-years in fulfilling this mission. The second category, composed of tax technicians or office auditors, is situated in the Office Audit Branch of each local Audit Division. Together these consumed 3,093 man-years in examining 2,681,000 of the less complicated individual returns. Much of this work was accomplished by correspondence. See Commissioner of Internal Revenue, Annual Report 1966, 23 and 68.

The 58 district Audit Divisions spread personnel among 800 different posts of duty.

26 Rev. Proc. 67-27, I.R.B. 1967-20, 45. See § 3.7 infra. The taxpayer simultaneously receives a written report, prepared by the examining officer but internally reviewed by a separate review staff, explaining the adjustments which the examining official proposed. In cases handled by examiners in the Field Audit Branch, these adjustments will have been orally discussed with the taxpayer at an earlier point when the examiner sought to get the taxpayer to accept the adjustments by executing Form 870. See U.S. Treas. Reg. § 601.105(c)(2). In the smaller cases handled by the Office Audit Branch, at least half the cases are dealt with by correspondence, and the taxpayer's first chance to indicate his acceptance of an adjustment may be at that point when, by letter, he is invited to appeal to a given office and he does not accept the adjustment. See U.S. Treas. Reg. § 601.105(c)(1).


28 See Chap. IV infra.
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administrative appeal levels or after bypassing both, U.S. practice differs on two principal counts from that of the other countries described above.

First, at the moment a case is docketed initially with an outside independent tribunal, the United States is the only country to shift substantial administrative control and the litigation-representation function to yet different government offices, composed entirely of lawyers. Since these separate offices (legal staffs) settle, before trial, over eighty percent of all tax cases docketed with the independent tribunals, they properly should be considered as a third level of administrative appeal. Second, the taxpayer at the litigation stage has three choices, two of which are substantially different. By paying the contested amount and suing for refund, the taxpayer may take his case into a nonspecialist federal district court of general jurisdiction. Only here—that is, subsequent to administrative appeals and in the course of trial before this one tribunal—are outside laymen used: in U.S. district court tax cases, either party may ask that a jury find the facts, though the judge will resolve all questions of law. As an alternative to the district court route, the taxpayer, before paying the contested amount, may docket his case with a specialized court (Tax Court of the United States) which rides circuit, with the judges finding the facts and deciding all questions of law.

29 In cases docketed with the Tax Court, the Chief Counsel of the Internal Revenue Service performs the litigation-representation function through his several Regional Counsels who maintain approximately 40 suboffices. Should the taxpayer, instead of taking the case to the Tax Court, pay the contested amount and sue for refund before either a federal district court or the Court of Claims, the litigation-representation function will be performed by the legal staff of the centralized Tax Division of the Justice Department.

30 In cases docketed with the Tax Court, settlement authority actually is shared jointly by the Regional Counsels and Regional Appellate Division's suboffices. Exclusive settlement jurisdiction passes to the Regional Counsels' offices only when the court calls the calendar. Rev. Proc. 60-18, C.B. 1960-2, 988. In cases filed either with a federal district court or the Court of Claims, the centralized Tax Division of the Justice Department has settlement authority but it consults with the centralized Refund Litigation Division of the Service's Chief Counsel's Office before settling important cases. See Chap. IV infra.

31 Commissioner of Internal Revenue, op. cit. supra note 25, Tables 17 and 20 at 134 and 135.

32 The third alternative is to pay the contested amount and sue for refund in the Court of Claims. This court uses legally trained Commissioners to find the facts.
In one recent year, approximately 60,000 cases were appealed to at least one of the three administrative appeal levels described above. Of this number, approximately 42,000 were routed by the district review staffs to the District Conference Offices. Cases not agreed to there (13,792) represented about half the 27,994 disputes which were appealed to the higher regional conference offices (Appellate Divisions). The other half of that 27,994 went to those regional offices in the first instance, either on recommendation of the district review staffs or at the election of the taxpayer. Cases in which agreement was not reached at the regional level, together with the somewhat fewer than 5,000 which bypassed that same level, made up the approximately 8,400 cases which were docketed with independent tribunals (courts). These outside tribunals, however, actually decided fewer than 1,300 cases; practically all the others were settled, before trial, by the government's legal staffs, which for that reason were characterized heretofore as the third administrative appeal level.

In summary, it is at least clear from the foregoing that income tax laws of small countries as well as large can generate a large number of disputes between taxpayers and local examining officials. Further, should a now developing country decide, for the first time, to resolve this entire mass of expected conflicts by forcing taxpayer reliance on a host of new outside or independent decentralized tribunals, that type of country in particular invites serious risks and problems whether it tries to staff those tribunals with professionals or inexpert laymen. Thus, there would be a distinct advantage in relying instead on properly designed internal administrative appeal procedures and, only where need be, on outside professionally staffed tribunals. However, even this arrangement will not be efficient unless the administrative machinery itself actually

33 Commissioner of Internal Revenue, *op. cit. supra* note 25, at 25.
34 Ibid.
35 *Id.*, Tables 15 and 16 at 133.
36 *Id.*, Table 17 at 134. These were based on final statutory notices of deficiency issued at the district level.
37 Of these 6,874 were docketed with the Tax Court, 1,383 with federal district courts, and 125 with the Court of Claims. *Id.*, Tables 17 and 20, at 134 and 135.
38 Of these, the Tax Court decided 726, district courts 488, and the Court of Claims 58. *Ibid.*
39 Ibid.
40 See note 30 *supra.*
has a reasonable chance to dispose, by bilateral agreement, of the great preponderance of these disputes. And it will have that reasonable chance only if it simultaneously possesses a reasonable chance both to be and appear to be fair. In those circumstances alone will taxpayers in sufficient numbers be willing, on a bilateral basis, to accept results achieved at that level. The administrative machinery itself also should have a reasonable chance to accomplish these dispositions efficiently; this, after all, is the primary aim in trying to reach agreement in as many disputes as possible without resort to an outside tribunal.

The administrative process, viewed in aggregate, will have a more reasonable chance both to be and appear to be fair, and also to be efficient in disposing of these disputes, if all parties know that at some point a specific office (i) is required to look at each dispute with a proper degree of impartiality, (ii) has a reasonable chance to become fully acquainted with the taxpayer's side of the story, and (iii) can assure "justice," which prior to litigation means that some such office is endowed with "complete settlement" authority. Each of these matters is separately discussed below.

3.2 Assuring impartiality of administrative conflict resolution machinery

If the administration's own conflict resolution machinery is to have a reasonable chance both to be and appear to be fair, it should be freed from the conflict of interest which almost inherently exists where the same person bears the two-fold responsibility: to resolve tax disputes impartially and to produce revenue. One device alone will tend to eliminate, at least from the vantage point of ordinary taxpayers, both the appearance and actual existence of this conflict. However, sophisticated practitioners should acknowledge that a second device at the least will minimize the adverse effect of that conflict.

The first and preferred device is to separate, organizationally, personnel who hear at least the final administrative appeal from personnel immediately responsible for the original examination and assessment function.\footnote{It would logically follow from this that appeal personnel—while trying to resolve an existing dispute—would not then be expected to look for new affirmative issues. To do so invites both the fact and appearance of the previously mentioned conflict, for raising issues is} 41 Obviously also, the
form former should be free of the latter's control. Belgium, France, and the United States do divorce these two groups of personnel. While local district offices carry on the basic examination function, the apex of the administrative-appeal function is at a higher regional office. As previously noted, however, the United States, by a published procedure, also makes possible an administrative appeal within the local district

(footnote continued)

an examination or revenue producing function. So complete a bill of divorcement within the administration itself becomes less logical, however, if the administration otherwise extends the examination function right up to the courthouse steps, by raising new issues at that yet later point when a controversy regarding old issues is laid before a completely independent quasi-judicial or judicial body. In other words, if at the litigation stage the administration both can and does follow the practice of raising new issues, the argument for foregoing that practice at the earlier point when the case reached the apex of the administrative conflict resolution procedure is drained of much of its vitality.

In the United States, a deficiency asserted by the government is presumptively correct at that point when a taxpayer takes that issue to the Tax Court of the United States. While the government's answer to a petition filed by a taxpayer with that court can raise a new issue, the burden of proof regarding that new issue is borne by the government, not by the taxpayer. Rule 32, Tax Court of the United States. It is widely believed in the United States that this shift tends to dampen the likelihood that the legal staff (Regional Counsel) will raise new affirmative issues after the case has been docketed. This belief, coupled with the fact that the case still can be administratively "settled" before trial leads many taxpayers to bypass yet another regional settlement office (Appellate Division) until after the case is docketed. Relevant is the fact that if the taxpayer had gone to the Appellate Division first, but been unable to reach agreement there, the doctrine of presumptive correctness would have attached to any new issues that division raised and included in its statutory notice of deficiency.

42 Also at least the appearance of impartiality on the part of the administrative appeal official will be prejudiced if the original examining official attends the hearing and, indeed, sits at the same conference table. To avoid this prejudice as well as to save the time of the original examining official and to put pressure on him in the first instance to prepare an adequate written explanation of his adjustments (see note 26 supra), U.S. procedures properly provide that ordinarily the examiner himself will not attend the hearing. Rev. Proc. 67-27, I.R.B. 1967-20,45.


itself (District Conference Office). In the early 1950's, these appeals were heard by the immediate supervisor of the particular examining officer who had proposed the contested deficiency adjustment to the taxpayer's return. Most practitioners, however, pointedly objected to this arrangement. They believed the relationship and resulting daily contact between the supervisor and the examining officer prejudiced the likelihood the former would be impartial. For this reason, many practitioners elected to bypass this particular appeal, taking their disputes with examining officers directly to the higher regional level. The administration responded to this bypass pattern by a series of steps taken in the late 1950's and early 1960's. Among other things, it divorced the district appeal function from the district examination function by shifting jurisdiction over appeals at the district level from the immediate supervisors of examining officers to a separate intra-district office created and staffed solely to carry on this function.

In contrast to the foregoing, the one administrative appeal allowed in Germany and the Netherlands is heard by the same office which originally proposed the assessment from which the dispute emerged. In most cases, a similar but not

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46 For another reason why so many practitioners bypassed the district office, see § 3.7 infra.
48 The head of this office (Chief, Conference Staff) is not under the control or supervision of the chiefs of the two separate branches which conduct field and office audits. While all three do report to the Chief of the district's Audit Division, in theory the latter does not become involved in the appeal process. In other words, the Chief of the Conference Staff reports to the Chief of the Audit Division only for administrative purposes. Appeal from a district Conference Staff's determination goes to the higher regional Appellate Division.
49 The United States also finally reversed its attitude toward the bypass problem. In 1964, it actively began to encourage taxpayers to bypass the District Conference Office in certain types of cases and to take them directly to the higher regional office. Rev. Proc. 64-38, C.B. 1964-2, 965, superseded by, but to the same effect, Rev. Proc. 67-27, I.R.B., 1967-20, 45. See §§ 3.7 infra for the reasons which led to this change and for a description of the types of cases to which the changed attitude was applied.
50 See §§ 3.3 and 3.4 in Chaps. XV and XXIII infra.
formally constituted practice prevails in Britain.\textsuperscript{51} In these countries a taxpayer, who understandably might prefer not to discuss the issue again with the same person who actually proposed the original assessment, at best ordinarily can expect to discuss the issue only with an official in that same office who is senior to the examiner.\textsuperscript{52}

However, each of these three European countries, in further contrast to U.S. practice, does employ a second but less effective device which tends at least to reduce the adverse effect of the underlying conflict between the hearing-officer's appeal and revenue-producing responsibilities. The likelihood that the office will view appeals with a proper degree of impartiality is enhanced by the fact that it—that is, one of its inspectors—also actually must fulfill the trial litigation-representation function for the government if agreement is not reached and if the taxpayer docket the dispute with an outside independent trial tribunal.\textsuperscript{53} Human nature being what it is, no local inspector wants to build up a record of losses in fulfilling his litigation function. This inevitable concern at the minimum puts some pressure on the local office, during the earlier administrative appeal, to conform to a proper degree of impartiality. Indeed, many practitioners in the United States believe that the absence of just this type of pressure on the two U.S. offices constituted solely to hear administrative appeals (District Conference Office and Regional Appellate Division) detracts from the prospect they will exercise an adequate degree of impartiality.\textsuperscript{54} As previously noted, once a tax case in the

\textsuperscript{51} Because not formally provided for and because the reconsideration is by the examiner's own senior, the arrangement actually is deemed to be a mere extension of the examination, rather than an appeal. See Chap. XIX, §§ 3.3 and 3.4 \textit{infra}. Also because the procedure is not formally provided for, some dissatisfied taxpayers write directly to the national office and it intervenes.

\textsuperscript{52} In support of an argument that this procedure does provide a fair re-examination in Germany, see Chap. XV, § 3.4 \textit{infra}. Also, as to an alternative possibility in Britain, see note 51.

\textsuperscript{53} See § 4.3 in Chaps. XVI and XXIV \textit{infra}. In Britain, however, this is consistently so only as to income or profits taxes appealed to the independent General Commissioners. In the case of appeals to the Special Commissioners, a local inspector may and often does represent the government if the question involves income or profits taxes, but never if it involves the surtax. A separate Solicitors' Office represents the government in all surtax cases. See Chap. XX, §§ 4.3a and b \textit{infra}.

United States is docketed, say, with the Tax Court, the litigation-representation function is handled by a third office (Regional Counsel). Because this third office also shares the power to settle cases administratively once they are docketed with the Tax Court,\textsuperscript{55} many practitioners believe it desirable to bypass the first two offices and seek an administrative settlement only after their cases have been docketed.\textsuperscript{56} One reason is that these particular practitioners believe the third office's litigation-representation responsibility leads it to be more "realistic" than the first two in considering possible administrative settlements.\textsuperscript{57}

Implicit in this is the suggestion that a tax administration, to enhance both the fact and appearance of impartiality on the part of its administrative appeal process, should implement both of the arrangements considered here.\textsuperscript{58} In short, personnel who hear the final administrative appeal should be separated, organizationally, from those immediately responsible for the initial examination and assessment function, and should fulfill the litigation-representation function at the trial level if agreement is not reached. Certainly the second of these, standing alone, would contribute little to impartiality in any case where the relatively small amount in dispute leads the official to conclude that it would be against the given taxpayer's economic self-interest to assume the direct and indirect costs associated with litigation.\textsuperscript{59} Not one of the countries covered

\textsuperscript{55} See note 30 \textit{supra}.
\textsuperscript{56} See Hobbet and Donaldson, \textit{op. cit. supra} note 54. Also see U.S. Treasury Department, "Tax Practitioner Attitude Survey," 17 Bull. Tax. Section, A.B.A. 29 at 52, questions 17 and 18 (Oct. 1964). For another factor contributing to the bypass problem, see note 41 \textit{supra}. In fiscal 1966, 4,489 cases were docketed by taxpayers before any effort was made to settle with the higher regional offices. However, in some of these cases, the taxpayer had no choice. For the district director himself, because the statute of limitations was about to run on the case, may have issued a final statutory notice of deficiency, thus forcing the taxpayer to docket his case with the Tax Court before trying to arrange an administrative settlement at the regional level.\textsuperscript{57} \textit{Id.} Where the first two offices had the opportunity but were unable to achieve agreement with the taxpayer and the case then is tried and lost, they at least unconsciously can take refuge in the possibility that the loss resulted, not from overreaching on their part, but rather from the failure of the third office to perform its representation function skillfully.

\textsuperscript{58} See § 3.4 \textit{infra} for discussion of a third arrangement which will contribute substantially to this same end.
\textsuperscript{59} See note 74 \textit{infra} for an arrangement designed at least to cushion this prospect.
by this study employs both of the previously described devices. France, however, comes close. It maintains a regional office to which a taxpayer can appeal a local office's determination, and that higher office is responsible at least for final preparation of the government's memorandum of law if litigation ensues. However, in such event, it appoints an inspector from the particular local office where the outside tribunal sits, to appear for the government at the hearing.60

3.3 Assuring administrative machinery a reasonable chance to become fully acquainted with the taxpayer's side

An inherent conflict exists also between the need to give the administrative appeal procedure a reasonable chance to dispose of most disputes by bilateral agreement and the competing need to avoid laying undue formal burdens on taxpayers. On the one hand, a typical taxpayer understandably wants to spend only the minimum time, effort, and money he considers necessary to convince the administration his position is correct. On the other hand, in theory, the chance of an administrative appeal office to be fair will be as good as that of an outside tribunal only if, before the former office hears an appeal, the taxpayer devotes as much time, effort, and money in developing his case (marshaling evidence regarding facts and arguments regarding legal issues) as he would if the matter were to be heard instead by the outside tribunal. At the administrative level, however, many taxpayers will not devote that amount of energy to developing their cases. There is an obvious reason: at this level, a taxpayer is not yet "up against the gun"; recourse to an outside tribunal remains available if need be, and only then will he suffer the felt pressure to "button up" his side of the case from top to bottom. In consequence, an administrative office just does not have as good a chance to reach the truly correct result as does an outside tribunal, and this reduces the former's ability to obtain taxpayer acceptance of its determinations.

Merely to require the taxpayer, as do certain European countries,61 but not the United States,62 to exhaust the

60 See Chap. XII, §4.3 infra.
61 For example, Belgium (see Chap. VII, §4.1 infra) and France (see Chap. XI, §3.4b infra).
62 A U.S. taxpayer who disagrees with the adjustments an examiner proposes to make in the taxpayer's return can bypass the administrative appeal offices en route to litigation in either of two ways.
administrative remedy before invoking the jurisdiction of an outside tribunal, will not assure the administrative office's exposure to a fully developed case on the taxpayer's side. "Hit-and-run" tactics could satisfy this formal requirement. Comprehensively Development and indoctrination at the administrative level can be assured absolutely only by a requirement that puts each taxpayer "up against the gun" prior at least to completing his administrative hearing before the highest in-service office to which he can appeal. In effect, it would be necessary to provide that a taxpayer could introduce later as evidence—in litigation before an outside independent tribunal—only that evidence which he had submitted to the highest

(footnote continued)

First, the initial letter he receives explaining the adjustment (or, in small cases, a second letter, if the initial letter invited him to a district conference) will invite him, should he reject the adjustments, to enter an administrative appeal to the regional Appellate Division by filing a written protest. His default on this invitation will lead the district director to issue a statutorily required "notice of deficiency" (so-called 90-day letter). This informs the taxpayer that the deficiency will be assessed in 90 days should the taxpayer fail to file a petition during that period with the Tax Court of the United States. By filing such a petition within that time, the taxpayer postpones the assessment and the need to pay the asserted deficiency, though interest will run if the government ultimately prevails.

Second, taxpayers who plan to bypass the administrative appeal offices but prefer to litigate before a federal district court or the Court of Claims, may accomplish this by agreeing with the examiner's proposed adjustment (executing Form 870) and by paying the entire asserted deficiency. Flora v. U.S., 362 U.S. 145 (1960). The taxpayer then files a claim for refund. In theory, the administrative appeal procedures applicable to refund claims disallowed by an examiner ordinarily conform to those applied to disputed deficiencies, the prime exception being that an administrative refund exceeding $100,000 must be reviewed by the congressional Joint Committee on Internal Revenue Taxation. See I.R.C. §§ 6405(a); U.S. Treas. Reg. §§ 601.105(e)(2) and 601.108; Woodworth, "The New Joint Committee Refund Procedure," 19 Bull. Tax. Section, A.B.A. 9 (Oct. 1965). However, the hypothetical taxpayer in this case does not intend to take advantage of the available administrative appeals and, upon final rejection of his claim, may sue for refund before either of the two previously mentioned courts.

To illustrate, before 1964, when all U.S. taxpayers were encouraged to take their disputes first to the lower of the two administrative appeal offices (District Conference Office), officials working at that level indicated they often encountered this "hit-and-run" tactic from taxpayers who invoked their jurisdiction but intended from the outset to take their cases to the higher regional appeal office the moment they determined that, to obtain a satisfactory disposition, they would have to develop their cases fully. Also see note 64 infra.
in-service echelon. Logically, he further would be required to submit the same brief on the law.

Unquestionably, these formal requirements could be imposed in a manner that would achieve their aim without depriving taxpayers of a preliminary chance to reach agreement at a more informal hearing before that same high level in-service office. Proceedings there could be divided into two successive stages. The formal requirements would apply solely to the second stage. This itself would encourage taxpayers to develop their cases at least to a reasonable point prior to the first and more informal stage, for those who reached agreement there would be completely freed from the burdens and risks associated with the formal requirements. Only those unable to achieve agreement in that first stage would have to assume these burdens in preparation for the second stage.

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64 The United States does not impose any such requirement. See note 62 supra. In consequence, some administrative officials working in the regional Appellate Divisions have indicated that some taxpayers who did appeal to that office and, on failing to achieve agreement there, then did docket their cases with the Tax Court, fully developed their cases only at the latter point. In effect, it was said that the complexion of the taxpayer's case actually changed between the two different stages. This was said to be at least one reason why many disputes, though not resolved by bilateral agreement during the first administrative appeal to the Appellate Division, were administratively settled to the satisfaction of both sides after the case had been docketed with the court but before it was tried. Indeed, for this and other reasons, well over a majority of the docketed cases are administratively settled before trial. See Commissioner of Internal Revenue, op. cit. supra note 25, Table 17B at 134.

For a detailed explanation regarding the proposal, see Traynor, "Administrative and Judicial Procedure for Federal Income, Estate, and Gift Tax Cases," 38 Colum. L. Rev. 1393 (1938); Surrey, "The Traynor Plan—What It Is," 17 Taxes 393 (1939). Mr. Traynor properly suggests that the independent tribunal itself would need some latitude in providing for exceptions to accommodate situations where the taxpayer actually was not at fault in failing, at the earlier administrative hearing, to submit certain evidence.

65 With provision for the same type of exception as that suggested in note 64 supra regarding evidence.

66 See Traynor, op. cit. supra note 64. Absent the two-stage division, the formal requirements would rob the entire procedure before that office of its informality. If there is but a single stage, with these formal requirements applying to it, many taxpayers would believe at the outset that they could afford to do no less than the perfect job and actually would expend more time, effort, and money than was necessary in arriving at a satisfactory disposition.
Just as unquestionably, even with this division, many taxpayers—required to go through the second stage—would deem these formal requirements to be in their cases both onerous and superfluous. From the beginning, they had expected the administrative appeal office (local or regional) to react adversely in resolving the debatable questions in their cases if only because the national office itself had previously published its own adverse position. Thus, these taxpayers, if given a free choice and if guided by self-interest, might prefer to bypass completely the administrative appeal machinery, and place their cases before an outside tribunal as quickly as possible. Their situation also illustrates the principal yet distinctly different reason why these formal requirements, without more, would not achieve their ultimate purpose in the case of many other taxpayers whose need to resort to an outside tribunal would remain. An adverse administrative determination in any case really open to serious doubt will not convince any given taxpayer that an outside tribunal necessarily would reach the same adverse result even though exposed to the same evidence and the same brief. In all such truly debatable cases, a taxpayer's incentive to duplicate his effort by resorting to an outside tribunal would remain high.

But this incentive could be dramatically reduced in the type of truly debatable cases which a court necessarily would decide entirely for one side or the other if a country adopts the policy of having the administrative office in question compromise such cases by reference to the litigation hazards, test cases aside. This practice alone, without the above formal requirements, would tend to induce these taxpayers, prior to such administrative hearings, to expend the time and effort essential to proper development of their cases if only because, at that point, they would be "up against the gun" with respect to this type of justice (compromise). Because—absent this practice—the previously discussed formal requirements would be onerous to so many, because the compromise practice alone will go a long way in achieving the aims of those formal requirements, and because this compromise practice is otherwise intrinsically justified for the reasons explained in the next subtopic, the formal requirements themselves should not be imposed by any country until it has determined from its own experience that they are indispensable in maintaining an orderly administrative process and in keeping outside tribunals from being inundated with tax disputes.
3.4 Assuring justice: Need for complete "settlement" authority

The nature of the question appealed to an administrative office can affect adversely its ability to be fair and, thus, its opportunity to dispose of the issues by bilateral agreement. This is not a problem if the controversy involves, say, the valuation of property. In such a case, the office, in fairness, may find that the original examiner's proposed valuation actually was too high though the taxpayer's was too low. Officials hearing this type of appeal in any one of the six countries covered by this study possess adequate authority to reach an agreement with the taxpayer on the basis of what the officials believe to be an appropriate intermediate figure. This, after all, is the result a court might reach if the matter were litigated.

But these administrative officials also often encounter the type of issue which, if litigated, a court—to conform to the statute—necessarily must decide entirely for one side or the other.\footnote{67 In determining the frequency with which these arise, vis-à-vis disputes regarding a mere amount, it must be remembered that a given subtotal on a return actually may cover many of the former. The fact that a court would find the taxpayer right as to some, but wrong as to others, and thus in effect require a change in the subtotal, does not mean that the dispute concerned a mere amount. To illustrate, consider a country which allows a current deduction for true "repair" expenses, but requires capitalization of expenditures for "improvements" in the nature of capital expenditures. The subtotal on a return reflecting so-called "repair expenses" actually may include a number of separate projects and, as to each of these, a court—viewing the projects separately—necessarily may have to decide the issue of deductibility entirely for one side or the other. The fact that the taxpayer might win as to three projects, with the government winning on five, hardly means that there was but one issue involving merely an amount. There were eight issues. One or more of many separate items hidden in a subtotal may raise both types of questions. For example, there may be an issue as to whether a given trip was primarily a deductible business trip or primarily a nondeductible personal trip, and even if it is the former, there may be an additional issue regarding the amount actually expended for business purposes.} At the prelitigation point of an administrative appeal, however, the right answer, albeit yes or no, actually may be open to serious doubt. This is because, at that point, the truly "correct" answer can be nothing more than a prediction of the likely decision by an outside independent tribunal if litigation actually ensued. If the official at the administrative hearing believes that, if litigation ensues, the odds regarding the
government's chance of success are roughly fifty-fifty, presumably the real worth or value of the government's equity in the case is, as of that moment, only fifty percent of the previously proposed adjustment. However, in only three of the six countries (France, the Netherlands, and the United States) is it ever possible at the administrative level to compromise, by reference to these litigation hazards, this type of issue.68

In the United States, appeal offices now situated at the regional level received initial authority to exercise this complete type of settlement authority69 four decades ago, in the 1920's. By then, policy-making officials had learned, the "hard way," the first of five reasons which cumulatively justify this practice. They had found it was fruitless to expect a well-represented taxpayer to make an outright concession if he believed he had, say, anything approaching a fifty percent chance to succeed in litigation. Indeed, by the time the administration decided to permit appeal offices now situated at the regional level to exercise complete settlement authority, the then fairly new Tax Court70 already had become inundated with petitions from unsatisfied taxpayers and, in consequence, struggled with a tremendous backlog of unresolved tax disputes.71

Second, U.S. policy-making officials believed it actually was unfair for an administrative office to expect the particular taxpayer described above voluntarily to pay one hundred percent and thereby forfeit his valuable possibility (say, fifty percent) to prevail in litigation. A compromise, based on

68 See Chap. XI, §§ 3.2a and 3.4b, and Chap. XXIII, §§ 3.2a and 3.4a infra. Also U.S. Treas. Reg. § 601.106(f), Rule II. That such is not permitted in Belgium, see Chap. VII, § 3.4 infra; in Germany, see Chap. XV, § 3.4a infra; or in Great Britain, see Chap. XIX, §§ 3.2 and 3.4 infra. It is widely recognized among U.S. practitioners that these compromises may be effected by splitting a single issue, by trading issues—sometimes subtly, sometimes otherwise, or by a package settlement. In the United States, the basic delegation is from the Commissioner directly to certain officials in the regional Appellate Division, not to the Regional Commissioner who otherwise exercises administrative jurisdiction over the latter officials. U.S. Treas. Reg. § 601.106(a).

69 For limitations on this authority, see U.S. Treas. Reg. §601.106(a) (2)(iii), (iv), and (v); and notes 73 and 74 infra. Regarding the extent this authority is shared with the legal staff once a case is docketed in court, see note 30 supra.

70 But at that time called the Board of Tax Appeals.

71 Its docket included 22,000 cases. See Mills, "Federal Administration of Tax Law," 52 N.Y. State Bar Assoc. Proc. 495 at 500 (1929).
bilateral concessions suitably responsive to the competing weaknesses and strengths of the two opposing sides, was thought to achieve the most appropriate measure of "justice" if the parties agreed to forego litigation.

Third, it was recognized that, in many such disputes, actual litigation would not really help the tax system, i.e., would not contribute to needed clarification of the law.\textsuperscript{72} For example, some purely legal issues are unlikely to recur with any frequency, if at all. Again, other more frequently recurring issues, though of a type which a court necessarily would decide entirely for one side or the other, actually may involve mixed questions of law and fact and too many decisions by diverse decentralized trial tribunals may serve to confuse, not to clarify, the area. Finally, litigation of purely factual questions of this type would have little, if any, precedent value.

On the other hand, the U.S. tax administration recently has made it exceedingly clear that a legal issue expected to recur frequently should not be compromised, for in this circumstance early litigation of a test case would contribute to needed clarification of the law.\textsuperscript{73} Otherwise, however, a U.S. taxpayer enjoys what is tantamount to an election. On appealing to the regional level, he can seek to compromise a debatable issue by reference to the litigation hazards. If he does not agree with the official's supposedly impartial appraisal of those hazards, he can force the matter to litigation, in which event—in the type of case under discussion here—a court will decide entirely for one side or the other.

Fourth, to authorize an administrative appeal office to exercise complete settlement authority over issues a court

\textsuperscript{72} See Mills, \textit{op. cit. supra} note 71, at 497 and 501.

\textsuperscript{73} See Cohen, "Current Developments in the Chief Counsel's Office," 42 \textit{Taxes} 663 (1964). These test cases will be chosen by the National Office through a more-or-less computerized information retrieval system which ultimately will cover all cases reaching the regional level. Also, implicit in the fact that the National Office previously has published a revenue ruling on a given issue is the supposition that this issue is sufficiently important to warrant being tested in court, though this hardly could mean that every case touching that issue would be a good test case. By way of contrast, not every private ruling involves a matter sufficiently important to the tax system to warrant litigation. Thus, some adverse private rulings, issued at a point when a transaction was prospective, should be subject to compromise by reference to the litigation hazards if the taxpayer actually consummates the transaction.
would decide entirely for one side or the other tends also, as to those issues, to satisfy an important need of that office. The delegation increases that office's opportunity to become fully acquainted with the taxpayer's side. In many such cases, of course, the official still may conclude that the issue is not open to any real doubt and will refuse to compromise in the belief that the government almost certainly would win if litigation ensues. But taxpayers will not necessarily know this in advance. Thus, at least those who initially believe they have a significant argument but prefer, if possible, to avoid expensive, time-consuming litigation which also exposes their financial affairs to public view, will be induced by the possible chance to compromise—available if at all only at the administrative level—to develop their cases fully before the hearing at that level. And this increases the likelihood administrative officials will be able to appraise all cases fairly and, consequently, to secure more bilateral agreements.

Fifth and finally, the compromises so achieved no doubt will produce more genuine uniformity among taxpayers concerned

74 In the United States, the authority of the regional Appellate Divisions to compromise by reference to the litigation hazards is subject to the limitation that "no settlement will be countenanced based upon nuisance value of the case to either party." U.S. Treas. Reg. § 601.106(f), Rule II. Italics added. A former senior official of the Appellate Division in New York has suggested that offers of 20 percent of the asserted deficiency, if truly responsive to the litigation hazards, should not be deemed a mere nuisance value, but that offers below that figure should be so treated. Rosenweig, "Pre-Trial Strategy in a Tax Case: Techniques and Limitations in Dealing with the Appellate Division," N.Y.U. 22d Inst. on Fed. Tax 109, 123 (1964). In other words, as to a doubtful issue which a court necessarily would decide entirely for one side or the other, if the taxpayer holds what the government's settlement official believes to be less than a one out of five chance to prevail if the matter were litigated but refuses to concede, the government should force the matter to litigation rather than accept less than the full amount. And if the government is the party holding such a small chance, the general instructions to its settlement official should contemplate that he would concede the issue.

However, as to small doubtful cases of the type under consideration here, it is believed that the government's instructions to its settlement officials regarding its own concession policy should take into account the cost of litigation to the taxpayer. In short, it ought not expect any payment unless the settlement official believes it has a better than even chance to prevail should litigation ensue. To expect a 20 percent payment, for a one out of five chance, in a case where, solely because of the cost of litigation, it is against the taxpayer's economic self-interest to litigate, is tantamount to extortion.
with the type of debatable issues under discussion here than would an attempt, by the substantial number of widely scattered administrative officials necessarily involved, to decide each such case entirely for one side or the other. Some would abandon an issue which others would force to litigation.

Section B. **Analytic Comparison of Additional Requirements: Echelon by Echelon View of Assessment and Administrative Conflict Resolution Procedures**

3.5 *Examing officer level*

In both self- and non-self-assessment systems, practically all tax disputes are triggered at the examining officer level. It is imperative, therefore, that each administration identify the precise role of examining officials in the conflict resolution process.

This presents no problem at all for certain types of potential disputes, such as those involving a valuation question. Each country obviously should instruct its examiners to approach this type of inherently disputable question with the impartiality of a judge. Nor should there be any doubt about an examiner's function where he is at least fairly clear that the government is in the right regarding the distinctly different type of question which, if litigated, a court necessarily would decide entirely for one side or the other. But if, after objective and careful analysis, he concludes the correct answer to this type of question is open to serious doubt, delimitation of his function becomes somewhat more complex. His function should vary, depending on whether his country, as to these debatable cases, has adopted compromise as its ultimate standard of administrative justice, test cases aside.

While a country's adoption of this practice should affect the function of these lower level examiners, this is not to say that they themselves should be empowered to exercise compromise authority. Typically, they are far too numerous, too lacking in sophistication, too far removed from the litigation process itself and thus know too little about it, to be able to compromise wisely by reference to the litigation hazards. But where more experienced or higher officials have been so empowered, an examiner at the lowest level should be instructed, if in substantial doubt regarding the correct answer to this
type of substantive question, to do *simultaneously* two things: to set up an assessment and to acknowledge his doubt to the taxpayer. 75 This acknowledgment will make it clear that he actually is *not* trying to resolve definitively the difficult question in the impartial manner of a judge. Judge-like resolution of these apparently marginal questions would cause, all too often, one examiner to set up an assessment which, as to a similar dispute with a different taxpayer, another examiner would abandon. To avoid this, *and* further to facilitate a chance for both cases to be uniformly treated by reference to this country's hypothetical ultimate standard of *administrative* justice (compromise), assessments should be set up for the entire amount in both cases,76 but only to set the stage for an administrative appeal by the taxpayer, eventually to an official possessing complete settlement authority. The latter, *if* convinced also that the correct answer is open to serious doubt, then *either* should compromise the issue by reference to his appraisal of litigation hazards *or* ask the national office for technical advice.77 Should he think it likely that the central office will wish to litigate a test case on this substantive issue, his choice should be for the technical advice route.

Where a country empowers *no* official to exercise compromise authority over the particular types of truly debatable issue under discussion here, a different procedural pattern should be employed. To be fair, each such official of such country, including those who examine returns, should be instructed to resolve all such debatable questions in the impartial manner of a judge. Since each of these questions, by

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75 Unless specifically instructed to acknowledge openly his doubts, if any, the felt pressure to obtain a bilateral agreement is likely to lead many examiners to propose adjustments without indicating their own doubts, if any.

76 Presumably this is the intention of U.S. procedures. On the negative side, examining officers themselves are denied the right, in doubtful situations, to attempt to resolve cases by reference to the litigation hazards, this being reserved exclusively to the administrative appeal offices. See §3.7 *infra*: U.S. Treas. Reg. §601.106(f), Rule II; and Rev. Proc. 67-27, I.R.B. 1967-20, 45. On the affirmative side, examiners are instructed as follows: "Issues should only be raised by examining officers when they have merit, never arbitrarily or for trading purposes. At the same time, the examining officer should never hesitate to raise a meritorious issue." Rev. Proc. 64-22, C.B. 1964-1, 689.

77 For details regarding a centrally administered technical advice program, see Chap. II, §2.16 *supra*. As to cases covered by previous central office rulings, see note 73 *supra*. 
definition, will have to be decided entirely for one side or the other, the administration hardly can anticipate uniform decisions by the large host of examiners who work at the lowest level. But that is a price the country must pay for choosing to rely exclusively on a type of administrative justice comparable to the approach of the judiciary itself. Having exercised this preference, apart from administrative appeals initiated by dissatisfied taxpayers, there are only two further procedures whereby such countries can increase the prospect of uniformity at the examination level. A comparison of these follows.

3.6 Mandatory internal review v. self-initiated requests for technical advice

Whether, in theory, a given country ought to provide for internal review of all determinations made by its large examining force should turn on the cumulative effect of several considerations. However, whether it realistically can afford to meet that talent-absorbing need, assuming that need exists, turns on a yet different factor.

Maintenance of integrity is a relevant but not the most important consideration in appraising the need for an all-embracing review program. If this were the prime aim, a sampling procedure would suffice. Further, an internal review—relying as it does on the administrative file—will not necessarily indicate that the original examiner was or was not honest. Particularly in the case of business returns, such a review necessarily focuses primarily on the examiner's own written report. While this report should disclose all matters he thought at all questionable—whether ultimately resolved by him in favor of the taxpayer or the government—the file itself may leave no "tell-tale" tracks should he, in a given case, omit reference to those decided favorably to the taxpayer. This is why, in addition to its regular internal review program, the United States maintains a completely separate Inspection Service which typically probes behind and beyond the administrative file in attempting to expose in-service dishonesty.78 The very existence of internal reviews does tend, however, to put some pressure on examiners to be honest. And if this were the sole consideration, countries such as England and the Netherlands, given their civil services' long

and widely recognized tradition of integrity, could justify easily their practice of not automatically reviewing internally the determinations made by their examining forces.  

Nevertheless, the fact remains that, in measuring the need for internal review, the most important consideration involves the frequency with which the examining force is likely—in utter innocence—to commit technical errors. This likelihood inevitably is affected by the quality of personnel recruited for this force and of the in-service technical training program conducted for its benefit. On these counts, the United States compares favorably with both England and the Netherlands, as well as with the other European countries, though it alone maintains a fairly broad-ranging, automatic, internal review program. Recruits to its revenue-agent classification (and they constitute approximately eighty percent of the entire examining force) must be college graduates with a substantial major in accounting. Further, practically all will have had at least one college-level course in federal tax law. Finally, at the point of recruitment, each also must attend on a full-time basis comprehensive in-service classroom courses covering not only federal tax law but other subjects as well. Given these standards, however, any comparison of error-incidence by this force with that of its European counterparts, must take account of the relative complexity of the different tax laws these various groups apply. Looking at this factor alone, the relative chance for error would be greatest in the United States. Its law, as noted earlier, is by all odds the most complex. Moreover, the thousands of built-in deviations obviously are capable of spawning a multitude of interpretative difficulties. But a further factor tends at least to mitigate the apparent relative difficulty of the U.S. examiner's task.

The United States, in implementing the notion of justice it deems most appropriate at the administrative level, has delegated to high level regional officials complete "settlement" (or compromise) authority over all truly debatable issues, test cases aside. In consequence, whatever the difficulties of an

79 However, in both countries, inspectors who visit local offices may sample previously examined returns; but as in many other countries, this is to enable the higher official to appraise the overall quality of the work done, rather than to detect errors as such. See §3.2, Chaps. XIX and XXIII infra.

80 See §1.5, Chaps. V, IX, XIII, XVII, and XXI infra.

81 See note 25 infra.

82 See the comparison in Chap. II, §2.5 supra.
examiner at the lowest level, an escape-hatch exists. The examiner is not expected to make a refined judgment in the impartial manner of a judge if he concludes there is substantial doubt regarding the correct answer to an issue of the type which, if litigated, a court necessarily would decide entirely for one side or the other. In effect, it is enough for the examiner to recognize that the answer is open to serious doubt. That doubt in itself, at his level, is enough to trigger a tentative decision against the taxpayer\textsuperscript{83} who, by an administrative appeal, can lay the case before a higher official possessing complete settlement authority. In contrast, performance of a more demanding task should be expected of examiners in a country such as Britain, which denies this type of compromise authority to all officials. The consequence of this denial should be the expectation that its examiners will make impartial decisions, i.e., refined predictions regarding the "correct" answer, with the consequent greater likelihood of error.

Nevertheless, a further overriding question exists: can any given administration afford to allocate sufficient personnel to permit internal review of all determinations made by its examining force? So sweeping an effort obviously would absorb a tremendous amount of talent. And on this score, the European countries, all of which utilize the non-self-assessment system, are in a situation quite different from that of the United States, which relies on the self-assessment system. These countries necessarily use vast amounts of talent in the examination function itself, though not one actually makes a complete examination of every return.\textsuperscript{84} Their coverage, however, does extend far beyond that of the United States, which annually only examines about three and a half million returns out of the sixty-seven million annually filed.\textsuperscript{85} This comparison suggests that the difference in basic assessment systems is the prime reason why, relatively speaking, the United States finds it easier to spare the talent required to review internally its examiners' determinations. In summary, the non-self-assessment countries tend to expend their technical personnel in achieving wide coverage at the examination level, whereas the United States tends to concentrate much more talent on each return included in the relatively small sample actually subjected to examination. That few administrations are likely

\textsuperscript{83} See note 76 supra.

\textsuperscript{84} See § 3.2, Chaps. VII, XI, XV, XIX, and XXIII infra.

\textsuperscript{85} See note 25 supra.
to be able to afford both is evidenced by the fact that even the United States is able to allocate to the automatic review function only enough personnel to review somewhat less than one million of the three and a half million returns annually examined, despite an obvious chance for error in many of the other examined returns. The unreviewed category, consisting only of "agreed" adjustments to small returns, is examined by the administration's least talented technicians. Though the asserted deficiencies were agreed to by the affected taxpayers, the fact they are even less knowledgeable obviously leaves room for mistakes, no doubt to the detriment of the affected taxpayers in many cases. Nevertheless, only a small sample of the adjustments to these returns are reviewed, and then only for quality-control purposes.

Far less costly in talented manpower than the automatic and fairly broad-ranging internal review program maintained in the United States is the non-automatic and selective type of arrangement used by most European countries. Examiners themselves are permitted to decide when they will request the technical advice of a higher, more able, and experienced official. No doubt this practice does contribute to the prospect of uniform correctness at the examination level; however, the incidence of error is deterred in reality only if the examiner himself recognized the difficulty. Moreover, this arrangement can contribute little, if anything, to the maintenance of integrity.

3.7 Jurisdictional screening function re administrative appeals

For reasons previously noted, authority to compromise administratively a debatable issue of the type which, if litigated, a court would decide entirely for one side or the other, should be reserved to a relatively small but fairly decentralized cadre of able and experienced officials who understand and, therefore, can appraise properly the litigation hazards.

86 Typically, the number of reviewers on a district review staff will equal about 10 percent of the number of revenue agents (examiners) in the district's Field Audit Branch.

87 Small cases not agreed to at that level are reviewed.

88 As to legal issues deemed open to serious doubt, such countries would be well-advised to maintain a single centralized technical advice office at the national level, as described in Chapter II supra, and as is maintained in the United States. Reliance should be placed on local senior officials, however, if the examiner's doubt concerns a question of fact or mixed questions of law and fact of the type which must be decided entirely for one side or the other.

89 See §3.5 supra.
Moreover, where a dispute between an examiner and taxpayer involves to a significant degree an issue of this type, much time and effort will be saved by routing the whole case directly to a member of that cadre.90

Their unique power and particular competence are not essential, however, to the proper resolution of many types of questions about which examiners and taxpayers will be in dispute. Illustrative are those issues involving a mere amount, such as the valuation of property. These fall within the competence of any fact finder. Again even as to a legal issue which a court would decide entirely for one side or the other, a given taxpayer may be unquestionably in the wrong though his particular examiner could not convince him of this. Nevertheless, there is nothing to compromise. In such cases as these, an official more experienced and able than the examiner, though lacking true compromise authority, frequently can persuade the taxpayer to accept a proper disposition of the matter. Because, proportionately, so many disputes will be of this type, they should be routed directly from the examiner to just such an official. Otherwise, either the more talented small cadre possessing complete compromise authority will become overloaded—though only because it receives cases not requiring special authority or competence—or that cadre must be expanded in size and, thus, include less experienced and talented officials.91

The foregoing suggests that a country which contemplates empowering at least some officials with true compromise authority may well find, as did the United States, that its administrative appeal process can make effective use, whether a given appeal is formal or informal, of two different sets of

90 This is so whether the case raises either a single issue of this type or multiple issues of which only one or more of the significant ones are of this type. In the latter circumstance, since the one issue of this type cannot be accommodated properly by lower levels, both parties should reserve disposition of the other issues to facilitate a proper overall disposition.

91 In the United States, during fiscal year 1966, this cadre (regional Appellate Divisions, consisting of 717 technically trained conferees) obtained agreements in 27,428 cases. Tremendous expansion would have been required had not a lower administrative appeal office (District Conference Offices, staffed with about half as many technically trained conferees) reached an agreed result in another 25,231 cases which usually were less complex and did not require "settlement" authority. See Commissioner of Internal Revenue, op. cit. supra note 25, at 25, 68, 133, and 134.
officials, with only the higher ranking set, in contrast to the less restrictive practice in France and the Netherlands,\(^{92}\) exercising true compromise authority.

While United States practice has long employed these two levels of officials,\(^{93}\) at one time all U.S. taxpayers who disagreed with their examiners were systematically encouraged, though not compelled, to take the dispute, first, to the lower ranking appeal office (District Conference Office) which lacked true compromise authority.\(^{94}\) However, where the case which went through this lower office involved at least one significant debatable issue of the type a court would have decided entirely for one side or the other, substantial duplication of administrative and taxpayer effort took place. True, in many of these cases the lower ranking appeal official did help sharpen the issues. But this gain did not offset the cost of an ensuing wasteful and predictable duplication. For it was inevitable, in view of the lower appeal office’s lack of compromise authority, that a substantial proportion of its adverse decisions would be

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\(^{92}\) There, in practice, the inspector who heads the local office, as well as officials at the regional level, may exercise such authority. See infra Chap. XI, §§3.2a and 3.4b, and Chap. XXIII, §§3.2a and 3.4a. However, in the Netherlands the inspector in charge of each local office does understand, and presumably can appraise properly, the litigation hazards, for he has at least the equivalent of a law degree and performs the representation function at the trial level if litigation ensues. In France the law degree possessed by each inspector and the two years of intensive training at the National School for Taxes likewise gives him a basis with which to appraise litigation hazards. All French inspectors, however, do not perform the representation function at the trial level. To represent the government in litigation before an administrative tribunal, an inspector must be located in one of the cities where an administrative tribunal sits. No inspectors from outside such a city are brought in for this purpose. See §1.5 of Chaps. IX and XXI, and §4.3 in Chaps. XII and XXIV, infra.

\(^{93}\) In a realistic sense, however, as before noted, the United States actually has three sets of administrative appeal offices, for the legal staff which performs the litigation-representation function also shares authority administratively to compromise cases. See §3.1 supra, note 30. This function is performed by Regional Counsel (part of the Chief Counsel’s Office) in Tax Court cases and by the Tax Division of the Justice Department in refund cases before federal district courts or the Court of Claims.

\(^{94}\) See §3.2 supra regarding a reorganization completed in the early 1960’s, hopefully to discourage the tendency of some practitioners to bypass that office.
appealed to the yet higher office (Regional Appellate Division) possessing that special authority.

Recently, the United States reversed this earlier practice. It now seeks to avoid predictable *seriatum* use of two officials to hear successive administrative appeals of the same case. To this end, distinctly different officials, who internally review the administrative file in all cases not agreed to at the examiner's level, perform the necessary screening function. They determine the type of office\(^95\) to which the taxpayer should be *encouraged*\(^96\) to take the dispute in the first instance.\(^97\) If a given taxpayer is urged, because of the nature of his dispute, to take it first to the District Conference Office, he still is able, if agreement is not achieved there, to invoke the jurisdiction of the higher administrative appeal office.\(^98\)

Other countries which do not provide for internal review of cases unagreed at the examiner level, but do propose to use two sets of appeal officials in the manner described above, can assign the screening function to the examiners themselves, imposing on them the responsibility to choose the type of official to whom the taxpayer should be encouraged to appeal initially.

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95 If their initial determination is to the effect that the taxpayer should be encouraged to bypass the lower administrative appeal office, the Chief of the latter office does review that determination before the invitation letter goes out. U.S. Treas. Reg. § 601.105(c)(2)(iv).

96 This encouragement is reflected in a letter which advises the taxpayer that he has 30 days in which to enter the appeal. Rev. Proc. 64-38, C.B. 1964-2, 965, superseded by Rev. Proc. 67-27, I.R.B. 1967-20, 45. For an argument that a taxpayer, in his own interest, always should process the case first through the district procedure, see Carey, "Choosing Tax Procedures for Tactical Advantage," 40 Notre Dame Law. 363 (1965).

97 Even so, in fiscal 1966, of the 39,023 cases dealt with by the lower administrative appeal office because encouraged to go there first, 13,792 ended in disagreement and most of these then were appealed to the higher office. See Commissioner of Internal Revenue, *op. cit.* supra note 25, at 25.

98 *Ibid.* U.S. Treas. Reg. § 601.106(b). Indeed, that taxpayer could have disregarded the advice of the screening office and taken the dispute to the higher office in the first instance. The important point, however, is that no taxpayer should be denied the right to take his dispute, at some point, to an official possessing true compromise authority—assuming that there is such an official. The taxpayer, rather than the screening office, may be right in believing the dispute properly is compromisable though, to repeat, this can be done only by an official having the special authority.
The use of two sets of appeal officials, with only the higher set being given complete settlement authority, may generate a peculiar burden for small cases. Many such cases do involve a debatable issue of the type a court necessarily would decide entirely for one side or the other. And in fairness, these small taxpayers should be granted the same measure of justice as large taxpayers. This includes, if equally available to large taxpayers, a convenient opportunity—test cases aside—to compromise truly debatable questions by reference to an impartial appraisal of the litigation hazards. Because there are so many disputes of this type, it may be necessary to give the lower ranking appeal officials, to whom complete compromise authority otherwise is denied, authority to compromise small cases, a ceiling limitation being fixed by reference to a given amount of tax in dispute. Indeed, fairness may render this essential if the higher ranking appeal officials to whom that special authority otherwise is reserved, are assigned, as in the United States, to the regional level and hold conferences only in widely separated metropolitan centers.\footnote{99}{These regional offices maintain only about forty geographically spread posts of duty in the United States and ride circuit to approximately twenty other metropolitan centers.} Otherwise, small taxpayers may find it is against their economic self-interest to hold a conference with the one set of officials to whom the government has reserved total settlement authority. While the United States, in disputes not involving more than $2,500 in tax for any one year, recently extended true compromise authority to its lower ranking and more conveniently located set of appeal officials, this authority is limited to "selected issues," where the higher regional office previously had worked out a compromise covering a "substantially identical issue."\footnote{100}{See Rev. Proc. 67-27, I.R.B. 1967-20, 45.}

3.8 Requiring written protests

For reasons previously noted, ordinarily a country ought not require a taxpayer to submit at the administrative-hearing stage all evidence and arguments he later formally would submit if the dispute is taken to court.\footnote{101}{See § 3.3 supra.} On the other hand, two considerations will render the administrative procedure grossly inefficient unless a taxpayer is required to submit an appropriate written document prior to the oral conference held with the appeal official.
The first consideration relates to the conferee himself. If he is not forewarned regarding the grounds of the taxpayer's objections and the rationale upon which the latter relies, he is deprived of a chance, in advance, to read all the relevant legal data (decisions, regulations, rulings, etc.), and to think through their implications and the questions he should ask regarding both the legal and the factual sides of the controversy. Lacking such preparation, in too many cases the first conference will be only exploratory, and an otherwise unnecessary and wasteful second conference will be required to enable the parties to discuss the refinements of the matter at issue. This need for a second conference leads also to a frequently unrecognized waste in that the conferee, at the first conference, must prepare a more detailed record of the points developed there than otherwise would be necessary. Further, because he inevitably will deal with many other cases during the interim between the two conferences, he must take yet further time, before that second conference, just to re-orient himself with respect to the earlier exploratory discussion.

The second consideration relates to the taxpayer. If not required to submit a written document before the conference, he will tend to handle his side of the dispute less efficiently and thereby contribute directly to the official's own inefficiency. This is particularly true where a taxpayer brings in a practitioner for the first time at the point of the first administrative appeal. Under such circumstances—if no advance document is required—there is the great risk that the practitioner actually will use the first conference as his starting point, i.e., to orient himself regarding the nature of the controversy and the type of showing required if the conferee is to sustain his client's position.

In spite of these considerations, throughout most of the 1950's, no advance written document was required by the United States in the case of those taxpayers who elected to appeal first to—and hold an oral conference with—the District Conference Office. Such a document ("protest") was required, however, of taxpayers who elected to bypass that office and appeal directly to the higher Regional Appellate Division, or

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102 See e.g., Rev. Proc. 56-34, C.B. 1956-2, 1396, ultimately superseded by Rev. Proc. 67-27, I.R.B. 1967-20, 45. The objective of that procedure was to surround that conference arrangement with as few formalities as possible in the belief this would facilitate resolution of issues at the earliest possible moment.
who appealed to the latter office after failing to achieve agreement with the district's appeal office. In 1964, the administration extended this requirement, with an exception noted below, to all appeals lodged initially with the district office. Presumably it believed this would tend to force taxpayers and their representatives to become more fully informed before that first district office conference and simultaneously enable the officials at that level to accommodate more efficiently the thousands of appeals they received.

Exempted from this general requirement were cases falling in the so-called small category—i.e., where the disputed amount for any one year did not exceed $1,000. In early 1967 this ceiling was revised upward—to $2,500—a revision which probably would have exempted more than half of the 42,381 cases those district offices received in the preceding fiscal year.

Such an exemption is unnecessary where, as in Germany and the Netherlands, the taxpayer's document need do nothing more than protest the examiner's determination. No arguments in support of the protest need be set out. That type of document, however, does not achieve the purposes heretofore described. Contrariwise, if a country actually intends to enforce a more demanding and informative type of requirement, such as that now imposed in the United States, as a practical matter some small-case category, however defined, must be exempted. Small taxpayers would find it against their economic self-interest to incur the expense necessary if the U.S. requirement were imposed on them; it calls for a written statement outlining "the facts, law, and arguments upon which the taxpayer relies."

103 Ibid.
105 Under the 1964 procedure, the immunity also automatically extended to so-called office-audit cases which, collectively, made up about 40 percent of the appeals to the District Conference Offices and typically involved substantially less than $1,000.
106 Rev. Proc. 67-27, I.R.B. 1967-20, 45. The new dividing line ($2,500) apparently applies alike to office audit and the typically larger field-audit cases.
107 See Commissioner of Internal Revenue, op. cit. supra note 25, at 25.
108 See § 3.4a, Chaps. XV and XXIII infra.
109 At most it merely alerts the office to the fact of appeal.