CHAPTER IV

CONFLICT RESOLUTION BY INDEPENDENT TRIBUNALS\(^1\)

Section A. Analytic Comparison: Judicial Structures of the "Six"

4.1 Introduction: The goals

An administrator who examines returns cannot avoid taking some position on a given issue even though he may believe the truly "correct" substantive answer is open to substantial doubt. In consequence, errors inevitably will be made even by administrators who strive to be objective—and not all will or can be. And some such erroneous results inevitably will be adverse to the affected taxpayers, whether due to the laws of chance or to an administrative belief that the government's interest in cases deemed marginal should not be conceded since separate tribunals exist to resolve just such cases. However, whether any given administrative determination actually is erroneous cannot be known at that stage. The administrator may hold one view and the taxpayer another, but in essence both views are mere predictions regarding the result an independent tribunal would reach if the matter were litigated.

The only feasible method of ascertaining precisely which of the many administrative determinations actually are erroneous is to assure all taxpayers who disagree with the administration, either as to the facts or the law, that they then can submit the case to a tribunal which is completely impartial. This is the essence of "living under law." Moreover, escape valves of this type are the only means of assuring an equally essential byproduct. The mere existence of that type of tribunal provides the best possible guarantee that the administration itself, during the earlier administrative stage, at least will try to be fair in resolving conflicts.

This right of taxpayers, to invoke the jurisdiction of impartial tribunals, will be meaningful in practice, however, only

\(^1\) For a recent comparative treatment of this subject in the setting of countries now developing, see Liker, "The Legal and Institutional Framework of Tax Administration in Developing Countries," 14 U.C.L.A.L. Rev. 240, 325-45 (1966).
if structural arrangements enable the latter to provide convenient forums. Also, in the interest of the whole tax system, those arrangements should facilitate decisions of high quality and interpretations having fairly lasting effect. Finally, they should permit efficient fulfillment of all these criteria—thereby avoiding undue drain on the totality of a nation's resources and talented manpower.

Unfortunately, no structural arrangement can assure, though it can foster, impartiality on the part of a tribunal. Further, neither this impartiality nor decisions of high and durable quality can be promoted in the fullest sense if efficiency becomes so much an end in itself that man-hours expended per case must be held to the bare minimum, or if the forum must provide convenient access in an absolute sense. These competing criteria are in inherent conflict, and arrangements which tend to stress one tend to slight another. Consequently any given structural arrangement can hope only to achieve some reasonable balance among these competing interests. Because this presents a problem of degree, it is not surprising that, among the six countries covered by this study, differences exist regarding the relative emphasis placed on each of these criteria. Reflections of these differences appear throughout the judicial structures: in the appointing procedures; in the types of persons who fulfill the decision-making function at the trial and appellate levels; in the extent decisions are made not by single persons but instead—as to the law, facts, or both—by a deliberative body; in the scope of review at the appellate level; in the arrangements which affect uniformity and certainty, including the role of precedent; and finally in the degree convenient access is accorded both small and large taxpayers.

4.2 Trial tribunals: Impartiality and the relevance of a specialized bench's perspectives

Looking solely at the standard of impartiality, tradition in any one of these countries actually may compensate for particular excessive deficiencies in its structural arrangements. But these structural shortcomings should be shunned by other countries, for the structure, on transplant, will not be accompanied automatically by the compensating tradition. Further, a mere image of impartiality, whatever be the fact, in itself is important to taxpayer morale, and structural deficiencies
can impair that image. For both these reasons, countries now evolving or reconsidering their structural arrangements should adopt plans which at a minimum tend to preclude the tax administration itself from having any control over the appointment, tenure, or future promotions of those named to such tribunals. Other methods of appointment, less likely to impinge on the tribunal's impartiality, are numerous, too obvious to recite, and have been invoked by four of the six countries covered here. And as to a fifth, though Britain's Treasury does make the appointments to one of that country's two primary trial level tax tribunals, the Lord Chancellor (Minister of Justice) controls appointments to the other. Only in Germany do finance officials appoint all of the technically trained trial judges who sit on tax cases.

Bias does not spring, however, solely from self-interest. The sum of a prospective appointee's past experiences inescapably affects the perspective he brings to such a tribunal and, consequently, his attitude toward the interpretative process. Thus, it could be argued, to the extent professionals are used, that individuals who have devoted their lives almost exclusively to the tax administration itself should be rendered ineligible for appointment to the separate trial tribunals. But this

\[2\] Indeed, proponents of a bill to shift the otherwise independent U.S. Tax Court from the executive branch to the judicial branch rely upon the above argument as one reason justifying the change. See remarks of Senator Long, 113 Cong. Rec. S9035 (daily ed. June 28, 1967). Also, Gribbon, "Should the Judicial Character of the Tax Court Be Recognized?" 24 Geo. Wash. L. Rev. 619, 626 (1956).

\[3\] In Belgium, where the courts of appeal sit as trial forums in tax cases, the King makes the appointment from two lists of nominees submitted respectively by the courts of appeal themselves and by the conseillers provinciaux. See Belgium Constitution, Art. 99. In France, most judges on its trial tribunals are drawn from the civil service. See Chap. XII, §4.2 infra. As to the Netherlands, see Chap. XXIV, §4.2 infra. The U.S. Declaration of Independence criticized King George III because he had "made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Not surprisingly, therefore, while the President appoints the judges on all U.S. trial forums, the nominations must be approved by the Senate. See U.S. Constitution Art. II, §2.

\[4\] See Chap. XX, §4.2b infra.

\[5\] Except in Scotland, where a city or county council makes the appointment. See Chap. XX, §4.2a infra.

\[6\] See Chap. XVI, §4.2 infra. Finance officials there also exercise a veto over possible promotion of these same judges to the appellate fiscal court. Id. §4.4 infra.
argument, if valid, cuts two ways, for there are two parties to every tax controversy. Thus, a reasonable application of the same standard would render ineligible any professional who consistently had opposed the administration, always having represented taxpayers. And in practice, as to a given country, the two prohibitions together could preclude appointment of any professional possessed of tax expertise, thereby rendering the tribunals less efficient and in the view of some—given the complexities of tax law—less capable of handing down high quality decisions. Certain critics take issue on this latter count; indeed, believing that specialization makes it more difficult to maintain an "impartial" perspective and to reach decisions of "proper" quality, they also oppose granting exclusive jurisdiction over tax affairs to specialized tribunals. Otherwise, so one argument goes, the professionals appointed, whatever be their backgrounds, will become too far removed from the general law, will become overly devoted to the tax code itself and to its perfection, and—for judges—will become too zealous in trying, through the interpretative process, to give the whole code a somewhat more symmetrical impact by reference to the substance of transactions than the legislatively inspired language of the code's diverse parts deserve, usually to the advantage of the tax administration.

It is one thing to contend, as do these critics, that professionals on a specialized tribunal, if not otherwise restrained, ultimately would tend to go too far in this particular direction. It is quite another to acknowledge that these professionals would have the opportunity, in contrast to those on courts of general jurisdiction, to develop a more complete understanding and a deeper "concern" for the total implications of the tax code. In consequence, professionals on specialized tribunals, as a group but not necessarily so in any single instance,

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should be more inclined than judges on the other type of tribunal to interpret the diverse substantive provisions of the code to achieve results responsive—from a policy standpoint—to the multiple but often competing purposes of the whole code and, to that end, be more inclined to consider the substance of transactions, not just their mere legal form.

These modest projections do not indicate that professionals on specialized tribunals are likely to go too far, or conversely not far enough, in this direction. They indicate only a mere "probability," not otherwise measurable on any count, that as between the two types of tribunals, specialized types at least will tend to go somewhat further in that direction. As so defined, this "probability" should be viewed by a legislature as one of the positive factors supporting assignment of some significant tax role to a professionally staffed specialized trial tribunal.

Relevant to the positive quality of this one factor is the awesome function of a tax code. These codes, alone among all public laws, must respond, one way or another, to almost the whole factual terrain covered by the entire private law. Given this all encompassing quality and the inherent limitations of the legislative process, a legislature's own substantive efforts all too often will fall far short of achieving equity in a timely fashion if the interpretative machinery, because lacking in tax expertise, does not have the capacity, in individual cases, to take account of the multiple but often competing purposes of the whole tax code and, in consequence, gives scant attention to the substance of transactions. Avoidance of this latter consequence should be of real concern to the legislature itself, for taxation is peculiarly and essentially a legislative function. Unfortunately, however, apart from careful use of substantive language, there is only one practical way in which a legislature can attack that consequence, namely, by assigning some significant role to a professionally staffed special tribunal.

A further alternative does exist but only in theory. The legislature could try to complement its substantive language by indicating, as has been done in legislation much more limited in thrust, its own expectations regarding the standards of judicial construction to be applied. But it would be extremely

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unwise to undertake such a delineation of standards in the setting of a comprehensive tax code. Such a code contains countless competing substantive ideas. No one standard of construction could suffice. To help sharpen understanding regarding the relative vitalities of each single competing idea, the legislature would have to indicate the particular standard to be applied in each single instance. The resulting product would be appallingly cumbersome. Further, the legislature's human inability to anticipate the shape of countless factual situations means, to this extent, that however carefully it sought, by enacting standards of construction, to clarify the relative vitality of its competing tax ideas, it actually would be trying to respond to the unknown. Finally, since the weight which the legislature might want to attach to substance will vary depending upon the competing tax ideas in issue, the imprecision of the type of language associated with standards of construction suggests that appropriate substantive language actually could define the legislature's intention more precisely, though not so precisely as to eliminate the need for technically competent, concerned, and efficient interpretative machinery.

Whether or not the countries covered by this study actually looked upon the above discussed "probability" as a positive factor, each one in fact has chosen, at least at the trial level, to make some use of the potentially greater competence, concern, and efficiency of a specialized or semi-specialized tribunal, composed entirely or predominantly of persons having some type of professional training or experience. Britain has its Special Commissioners, Germany its fiscal courts, and the United States its Tax Court. Belgium and the Netherlands differ only slightly; they use specialized chambers in their regular courts of appeal as trial forums. And France

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10See Chap. XX, §4.2b infra.

11See Chap. XVI, §4.2 infra.

12I.R.C., §§7441-87. Of the three different types of trial forums used by the United States, a second—the Court of Claims—should be put in the semi-specialized category. About one-third of its docket concerns federal tax cases. See Kipps, "A Unique National Court: The United States Court of Claims," 53 A.B.A.J. 1025, 1026 (1967).

13See Chap. VIII, §4.2 infra.

14See Chap. XXIV, §4.2 infra.
assigns to special administrative tribunals three types of actions to which the government is a party; included are fiscal cases.15

Relevant also to the perspectives of these tribunals are differences in the backgrounds of their more or less permanent personnel. In contrast to Belgium, Germany, and the United States, not all of Britain's eight Special Commissioners possess legal training.16 The latter are drawn in roughly equal proportions from practising barristers and from non-legally trained but senior Inland Revenue officials who on appointment sever their connections with the administration.17 As to this matter of prior association with the tax administration, both the Netherlands and the United States tend to maintain a somewhat similar balance on their specialized tribunals. About half the sixteen legally trained persons on the U.S. Tax Court usually will have had some prior connection with the tax administration's legal staff, oftentimes in addition to outside experience as a practitioner. In the Netherlands, of the three judges who serve each of the specialized tax chambers, typically one previously served as a tax inspector, another first gained tax expertise on the outside, and the third served as a jurist on a yet lower nonspecialized tribunal.18 No such balance exists, however, in Germany or France. These two illustrate the competing extremes. All permanent German appointees, though legally trained, are drawn from the various state finance ministries from which they too sever their connection.19 French administrative tribunals, on the other hand, include no conseillors who possessed tax expertise at the time of appointment. The great majority, however, will have received legal training. This follows because most appointments are made from graduates of the National School of Administration, and only a relatively small minority of these did not obtain a law degree before being admitted to that school. Moreover, while nongraduates of that school who are appointed to the administrative tribunals must have a law degree, in the interest of impartiality and independence these are drawn

15 See Chap. XII, § 4.1 infra.
16 That the Netherlands' departure from this requirement is temporary, see Chap. XXIV, § 4.2 infra.
17 See note 10 supra.
18 See note 14 supra.
19 See note 6 supra.
from the Ministries of Interior or Justice, not from the tax administration.20

4.3 Trial tribunals: Other factors relevant to the goals

The potentially greater technical competence, concern, and efficiency of specialized tribunals are not the only considerations to which a nation properly might accord weight in deciding whether, how, or the degree to which it will utilize such tribunals.

Involved also is the matter of convenience and factors which compete with it. A practical dilemma may arise. If such a tribunal is available to the more complex and larger cases, where geographical convenience is a relatively minor problem, equitably speaking it should be equally available in fact to the host of smaller cases certain to arise, where geographical convenience is a major problem. However, such a wholesale requirement of convenience, with the consequent expense and drain on a nation's reservoir of able professionals, may present insurmountable difficulties to some countries, particularly those now developing. A professionally staffed specialized trial tribunal, nevertheless, is relevant to the needs of a small case—though admittedly the peculiar nature of such a tribunal's contribution in this circumstance does differ from that associated with complex cases. In the setting of a small case, the tribunal itself should assume the duty of assuring a fair deal for the taxpayer. In all cases, the government itself will be represented by a person expert in tax affairs. In a small case, however, the taxpayer simply cannot afford that type of representation. The consequent unreliability of the adversary system to promote justice in this circumstance requires that the tribunal be sufficiently expert to assist the taxpayer in presenting his case effectively and efficiently.21 For a government not to accommodate this need is peculiarly unbecoming in tax cases, for the government itself always is a party and, as before noted, typically is well represented. To grant small taxpayers access to such a tribunal will have little practical meaning, however, if they are required to travel a substantial distance to have their cases heard. In the absence

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20 See Chap. XII, §4.2 n. 6 infra.

21 This consideration, while relevant here and actually responsible for introduction of a bill in the U.S. Senate to establish a Small Tax Division within the U.S. Tax Court, relates primarily to practices and procedures and is, therefore, dealt with more fully in §4.9 infra.
of geographical convenience, the small taxpayer, previously having taken time away from his job to process the case through the administrative stage, may find it is against his economic self-interest to spend additional time on the road.

The expense and drain in providing genuinely convenient access to a specialized tribunal will be multiplied further if, pursuant to the otherwise justified belief that a deliberative body provides the best means of reaching decisions of proper quality, a given country also prefers to use more than one judge in each case be it large or small.

Of concern also is the type of person who should be empowered to find the facts and the related question of whether the deliberative process should be extended to this function. Some believe, relevant to this, that there is an important difference between a full-time tax-case jurist and a judge who sits on a court of general jurisdiction where tax cases constitute only a small part of the docket. The full-time tax jurist, so the argument goes, is more likely, because he will more frequently encounter somewhat similar fact patterns, to develop preconceptions about these and, in consequence, more frequently will prejudge the facts of a particular case. Some also argue that even judges on courts of general jurisdiction tend, on hearing case after case, year after year, to become somewhat bored and thus less attentive than persons who hear only a few cases and for whom each such case is an interesting new venture. These two suppositions argue for ad hoc infusion of ordinary laymen into the fact finding process. This position gains further support if the comparison is between a panel of lay fact finders and a single judge who alone would decide questions both of fact and law. The panel arrangement itself creates the additional prospect, at least as to the fact finding process, that preconceptions of one man will tend to be neutralized through the interchange arising from the panel's deliberative process. Further, a panel of laymen, if at all representative of the community, may be more sensitive than any judge or panel of judges to the community's sense of what is reasonable, and factual controversies in tax cases—as in other cases—often turn on just that. Further, from any

24 See Joiner, op. cit. supra note 22, at 66.
25 See id. at 65.
such division of power between judges and laymen emerges a system of checks and balances which alone may inspire taxpayer confidence in the fairness of the system.\textsuperscript{26}

Finally, a given legislature, though impressed by the potentially greater technical competence and concern of a specialized tribunal, may fear, as do the previously mentioned critics, that such a tribunal, absent some checkrein, might become too far removed from the general law and indulge "too much" in what some call judicial legislation. And this fear of the unknown may lead that legislature to cast about for suitable restraints, to be applied at either the trial or appellate levels or at both.

Each of the countries dealt with here, while making some use of a specialized or semi-specialized trial tribunal staffed entirely or predominantly with persons of professional training or experience, has responded also, though in diverse ways and degrees, to most of the additional considerations recited above.

Presumably to assure convenient access with a minimum of taxpayer travel, four of the Six (Belgium, France, Germany, and the Netherlands) have decentralized their specialized trial tribunals.\textsuperscript{27} The Netherlands located these courts in five different cities, Belgium in three, France in twenty-four, and Germany in fifteen.\textsuperscript{28} Each court in the Netherlands, on the average, accommodates 2,570 square miles which, if the court were located in the center of that hypothetical square, would place it only twenty-six miles from taxpayers residing in the remote corners of the square. The comparable number of miles in Belgium would be forty-five, in Germany fifty-seven, and in France sixty-seven. In contrast to this decentralized approach, Special Commissioners in Great Britain\textsuperscript{29} and judges who sit on the U.S. Tax Court are centrally located, but mitigate the taxpayer's travel burden by riding circuit. The U.S. court has the more serious problem, for the territory it must

\begin{itemize}
\item \textsuperscript{27} For consideration of convenience as affected by procedural requirements and use of counsel, see §§4.9 and 4.10 \textit{infra}.
\item \textsuperscript{28} See § 4.2, Chaps. XXIV, VIII, XII, and XVI \textit{infra}.
\item \textsuperscript{29} See Chap. XX, §4.2b \textit{infra}.
\end{itemize}
cover is fifteen times as great as the entire territory of the largest of the Western European countries. Further, because it holds hearings in only fifty cities, geographically speaking it is a substantially less convenient forum than any of its European counterparts.

The United States taxpayer, however, is not limited to the Tax Court. Two other alternative types of trial forum are provided, one of which is highly accessible. In fact, this country, compared to the other five, offers taxpayers the widest choice of forums from among the most varied types of trial tribunals. Their differences go beyond ordinary procedures to include important structural differences which affect much more than mere convenience of access. These structural differences run the gamut, for they evidence extreme forms of both specialization and reliance on the deliberative process.

The Tax Court is the most specialized of these tribunals; there typically one judge alone decides questions both of fact and law. However, about one-third of the officially published decisions, because they involve peculiarly important or marginal questions of law, are subjected to the deliberative process through internal review by the whole court. But this practice is triggered internally, usually on order of the Chief Judge, not upon request by the taxpayer.

A geographically more convenient hearing is available to the U.S. taxpayer if he elects to utilize a regular federal district court of general jurisdiction where his case will be tried before a single nonspecialized legally trained judge. These courts are spread across the country and sit in over three hundred and eighty cities, seven times the number visited

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30 See Appendix to Tax Court Rules, implementing the broad directive in I.R.C. §7446.
31 The figure for this court, comparable to those cited above regarding other countries, is 192 miles.
32 As to these, see Ferguson, op. cit. supra note 26, and Brown & Whitmire, "Forum Reform: Tax Litigation," 35 U. Cinc. L. Rev. 644 (1966). Also see §4.10 infra.
34 28 U.S.C. §§1346, 1491, and I.R.C. §7402(a). For a summary of all the features peculiar to these courts, see Brown & Whitmire, op. cit. supra note 32; Ferguson, op. cit. supra note 26.
by the Tax Court. 35 Peculiar to this election is the complementary right of either party to have the facts found by a deliberative body, a jury of laymen impanelled on an ad hoc basis for this purpose. To invoke the jurisdiction of a district court, however, the taxpayer suffers an encumbrance—often times at very great inconvenience—not encountered in litigation before the Tax Court. 36 He must pay the asserted deficiency in advance, for a tax can be challenged in a district court only through a suit for refund. 37

By invoking a yet third alternative, which again is available only if payment is made in advance, a U.S. taxpayer can be sure that questions of law also will be decided by a deliberative body—the multijudge Court of Claims. 38 This is a semi-specialized tribunal. Despite the sweep of its jurisdiction—covering any claim running against the United States except those founded on tort—it has developed considerable tax expertise if only because a significant part of its docket (34 percent in one recent year) concerns federal tax questions. 39 One of fifteen legally trained, circuit-riding commissioners 40 will make preliminary findings of fact and submit recommendations regarding the legal questions. The actual decision, however, will be rendered by legally trained judges of whom there are seven, concurrence by four being required in cases where the court sits en banc, though recent legislation permits it to sit in divisions composed of two or three judges. 41

35 Register, Department of Justice and the Courts of the United States 21-111 (1966).
36 The latter court acquires jurisdiction after a deficiency has been proposed, but prior to assessment, provided the taxpayer files a petition with the court within 90 days after receiving a formal notice of deficiency. I.R.C. §§ 6212 and 6213. In general, therefore, it has no jurisdiction over refund suits.
39 Kipps, op. cit. supra note 12, at n. 10.
40 Even so, the bar in Washington, D.C., where the judges sit, tends to dominate litigation before this court. See Pavenstedt, op. cit. supra note 38, at 12.
41 28 U.S.C. § 175(d) and (e). Many practitioners before that court are urging it to continue to sit en banc. Kipps, op. cit. supra note 12, at 1025 n. 5.
That the specialized Tax Court's jurisdiction is shared both with the semi-specialized multijudge Court of Claims, and with the regular nonspecialized single-judge district courts where a deliberative body of laymen may be invoked to find the facts, inevitably gives rise to forum shopping. This practice is further stimulated by other differences in their ordinary procedures and also by the subsequently discussed absence, for all practical purposes, of a common or centralized court of appeal. And from this forum-shopping opportunity, certain unfortunate effects, examined later in § 4.6, admittedly do follow. As noted there, however, it is the absence of a common court of appeal, not the opportunity to choose from among different types of trial tribunals, that is the pivotal defect. No one trial judge or jury (or set of such) can hear every case. Therefore, except for the difficulty noted at the appellate level, spreading litigation through these different types of trial tribunals, instead of forcing resort to a common type, has great merit. By offering Americans a choice (subject to the unfortunate previously noted encumbrance regarding prior payment) from among all of what many deem to be really meaningful alternatives, this structure has the advantage of building confidence in the system. Further, this trial-level structure enables the tax system itself to benefit from the potentially greater technical competence, concern, and efficiency of a specialized tribunal, while incorporating also what some view to be the first of two worthwhile restraints on that tribunal of specialists. At least the proponents of this view argue that the Tax Court's own awareness of the right of taxpayers to choose other forums tends to place a subtle and meaningful, though quite unmeasurable, restraint on that tribunal. Whether this be an actual restraint or simply a

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42 As to these, see Ferguson, op. cit. supra note 26, and Brown & Whitmire, op. cit. supra note 32. Also see §4.10 infra.
43 See §4.6 infra.
44 The second is at the appellate level and relates to the fact that the judges there are generalists. See §4.5 infra.
45 See Sutherland, op. cit. supra note 7, at 360. For a conflicting view, to the effect that only specialized tribunals should be used at the trial level, the one restraint being that "judges of general outlook" should sit on appeal, see Miller, "Can Tax Appeals Be Centralized?" 23 Taxes 303, 306 (1945). To the effect that both should be specialized, see Traynor, "Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes—A Criticism and a Proposal," 38 Colum. L. Rev. 1393 (1938). To the effect that the present choice of forum should be left intact at the trial level, with appeals from all
belief of taxpayers, the fact is—given this structure with its alternative choices—a large proportion of litigants do choose the specialized tribunal. It decides over one and a half times as many substantive tax cases as all the other trial tribunals combined.46 This might suggest that taxpayers have a relatively high degree of confidence in that one tribunal. Their choice, of it, however, may be due in part to their opportunity, peculiar to that one court, to litigate before paying the amount in contest. And to this must be added the fact that taxpayers now know also, should they lose, that they can appeal as a matter of right to nonspecialized appellate courts.47

Both of these latter considerations, however, are presently under attack. An important group of American practitioners believe it is unfair to confine the litigate-first-pay-later privilege to those taxpayers willing to submit their cases to this specialized body. This group favors extending the same privilege to those taxpayers who prefer to try their cases before generalists who sit on the federal district courts.48 Yet

(footnote continued)
three to go to a specialized Court of Tax Appeals, see Griswold, "The Need for a Court of Tax Appeals," 57 Harv. L. Rev. 1153 (1944). Each of these writers is aware that a decision as to whether the appellate function should be centralized in a specialized court, or left to judges with a "generalist's outlook," involves much more than the question of whether the latter is needed as a restraint on lower specialized trial tribunals. As observed in the discussion of appellate tribunals in §4.6 infra, central to the issue is the problem of obtaining reliable interpretative guidelines having uniform significance across the nation. In general, see Ferguson, op. cit. supra note 26.

46 In fiscal 1966, for example, the Tax Court decided 726 cases on the merits, the district courts 448, and the Court of Claims 58. See Commissioner of Internal Revenue, Annual Report 1966, 134 (Table 17B) and 135 (Table 20 n. 1).

47 In the same year in which the Tax Court decided 726 cases on the merits, of which the government won outright or in part a substantial majority, taxpayers alone filed appeals in 257 and were joined by the government in appealing another 34 cases, a total of 291. The government alone initiated only 41 appeals. However, of all the tax cases originating with the Tax Court and finally decided on appeal in that year (total, 250), taxpayers prevailed entirely or in part in only 47, or in 18.8%. See Commissioner of Internal Revenue, op. cit. supra note 46, at 44, 134 (Table 17B), and 135 (Tables 19 and 21).

others have proposed that appellate jurisdiction be shifted from courts having general jurisdiction to a specialized court of tax appeals,\textsuperscript{49} a matter dealt with more fully in §§ 4.5 and 4.6 \textit{infra}. Be that as it may, given the large number of American taxpayers, the aggregate number of substantive tax cases actually decided by all three types of trial tribunals is relatively—and in absolute terms is among—the smallest of the six countries. In no recent year has the total reached 1,300 cases.\textsuperscript{50}

Britain's volume of decided cases at the trial level is at the other extreme, on the high side—with the caseload being from 8,000 to 9,000 a year.\textsuperscript{51} It is, however, the only other country among the Six which provides even a limited choice of forum. Given the heavy caseload, not surprisingly most decided cases involve relatively small amounts and concern Britain's standard income tax, not its surtax. To provide convenient access for this large volume of small cases, Britain maintains 700 different geographically dispersed sets of General Commissioners.\textsuperscript{52} This far exceeds, of course, the number of tribunals maintained by any one of the other five countries. Necessarily it involves a substantial sacrifice in professional quality. Indeed, two unpaid laymen, domiciled in the local finance district in which the taxpayer lives, constitute a deliberative quorum for any given case, though frequently more than two sit and a paid clerk—often legally trained—is always there to assist.\textsuperscript{53} Given their background, they obviously are not well equipped to resolve questions of law,\textsuperscript{54} as occasionally they must. However, the great preponderence of these small cases actually turn on questions of fact and to this extent the use of such personnel is as commendable, or at least can be as easily defended, as the American jury.

For the typically larger and more complex surtax cases, the British Parliament created the earlier mentioned circuit-

\textsuperscript{49}See articles by Traynor and Griswold, \textit{op. cit. supra} note 26.
\textsuperscript{50}For example, see text accompanying note 121 \textit{infra}.
\textsuperscript{51}Excluding so-called "delay" cases. See Chap. XX, §§ 4.3a and 4.3b.
\textsuperscript{52}For a full description of these tribunals, see Chap. XX, §§ 4.1, 4.2a-d, and 4.3a.
\textsuperscript{53}See \textit{id.}, §4.2a.
\textsuperscript{54}The writer's belief that every practice has its exceptions was borne out here when he learned by mere happenstance that one of the world's great lawyers, Professor Otto Kahn-Freund, serves as a lay Commissioner for the district which includes Oxford University.
riding, professionally trained or experienced Special Commissioners. While these Special Commissioners alone exercise exclusive jurisdiction over surtax cases, a quorum of two again being a minimum for each case, this is not their sole responsibility. They share with the lay General Commissioners concurrent jurisdiction over a fairly wide range of income tax questions. In this respect, the British taxpayer enjoys a privilege similar to that of an American: he may elect between alternative types of trial tribunals. This right in Britain to choose between generalists and specialists is not burdened, however, as it is in the United States, by any encumbrance: in neither case need the British taxpayer pay the disputed amount in advance of the tribunal's determination. Also in contrast to U.S. practice, far more cases are taken to the generalists than to the specialists. Out of the total large volume of tax cases decided annually by British trial tribunals, 8,000 to 9,000, the Special Commissioners decide less than 1,000.

Presumably, therefore, taxpayer willingness to resort to the General Commissioners has not been affected adversely by the fact that every such election alerts at least two ordinary locally domiciled citizens to that taxpayer's financial affairs. The community at large is not alerted, however; rules prohibiting administrative disclosure of a taxpayer's financial affairs extend both to the General and Special Commissioners. It is otherwise in the United States: the findings of fact and decisions of all its trial tribunals are published.

Germany's experience with disclosure of private financial affairs, even to a small group of local private citizens, appears to differ from Britain's. Until recently, a German taxpayer had an election somewhat similar to that existing in Britain. As he now can, he could have his protest heard first by local assessing officials and, if dissatisfied, could appeal de novo

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55 For a full description, see id., §§ 4.1, 4.2b, and 4.3b.
56 See id., § 4.1 infra.
57 See id., § 4.2b infra.
58 See id., § 4.1.
59 For a description of two other types of trial tribunals (Board of Referees and the 1960 Act Tribunal), the jurisdiction of which is very narrow, see id., §§ 4.2c, 4.2d, 4.3c, and 4.3d infra.
60 See id., §§ 4.3a and 4.3b.
61 Excluding delay cases. See id., § 4.3b infra.
62 See id., §§ 4.3a and 4.3b infra.
63 See Chap. XV, § 3.4a infra.
to one of the specialized fiscal courts. Alternatively, instead of having the protest heard by a local assessing official, he could have had the dispute referred to a tax committee composed predominantly of private citizens drawn from the local finance office's district. While the local assessor served as chairman, the presence of at least two private citizens was required to constitute a quorum, and all members voted on questions both of fact and law. Should the taxpayer have been dissatisfied with the result reached by the tax committee, he still could have appealed de novo to the appropriate fiscal court.

Proportionately, only about one percent of those German taxpayers who filed protests elected to have their disputes heard first by the appropriate lay committee; the remainder chose local assessing officials. Apparently it was not enough, in the eyes of German taxpayers, that the rule of secrecy at the administrative level extended, like the British rule, to these lay bodies. And because jurisdiction of the latter was invoked by so few taxpayers, Germany recently ceased using these committees in the conflict resolution process. Lay citizens nevertheless, do continue to play a role, albeit reduced, in resolving tax conflicts.

Laymen involved now, however, typically are less likely to reside close to the taxpayer. They are drawn from a previously selected panel to sit on the fifteen fiscal courts, although no one citizen will sit for more than twelve days in any given year. In contrast to the U.S. jury, these laymen help decide questions of law as well as of fact, constituting two of a deliberative quorum of five, the other three being legally trained with specialized experience—having been appointed from the state's finance ministry from which they then severed connection. As before noted, these fiscal courts are spread geographically, being divided among and maintained by the individual German states. Because of different case-load levels,

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64 See Chap. XVI, §§ 4.2 and 4.3 infra.
65 See Chap. XV, § 3.4a n. 23 infra.
66 See ibid.
67 See id., § 3.4a infra.
68 See ibid.
69 See id., § 3.4a n. 24.
70 For a full description of these courts, see Chap. XVI, §§ 4.2 and 4.3 infra.
71 Until recently, the ratio was reversed, with lay members making up a majority. See Chap. XVI, § 4.2 n. 6 infra.
the courts themselves range in size. Each has two to eight Senates, the respective jurisdictions of which are fixed by various criteria, including geography as well as types or subjects of tax. These courts decide a volume of income cases far exceeding their counterparts in the United States, the number being almost equal to the total decided in Britain. Their yearly work-load of 20,000 tax disputes of all types includes from 6,000 to 8,000 involving individual and corporate income tax matters.72

Belgium, France, and the Netherlands are similar to Germany in one respect: in the litigation stage, the taxpayer is not given a choice between different types of tribunals. These three countries differ from Germany, however, and also from Britain and the United States, in that at this stage ordinary lay citizens have no participation whatsoever in the decision-making process. Each assigns exclusive trial jurisdiction to a specialized or semi-specialized tribunal composed of persons possessing some type of professional training or experience. While these judges ordinarily are generalists at the time of appointment, they develop tax expertise in the course of their work. In two of these three countries (Belgium and France), ordinary laymen may be allocated a limited responsibility during the earlier administrative stage.73 Midpoint in that stage, i.e., before a dispute is taken by the taxpayer to the tax administration's own regional echelon, the dispute could be referred to an outside body staffed primarily with laymen.74 But even here, those panels act in an advisory capacity alone, with the further limitation that, like the American jury and unlike Britain's General Commissioners, they decide only questions of fact and never questions of law. As before noted, once the litigation stage is reached, both Belgium and the Netherlands rely on specialized tax chambers in their regular courts of appeal to perform the trial function.75 Belgium has three such geographically dispersed courts, each having either one, two, or three tax chambers composed respectively of three legally trained judges who deliberate in each case. While they decide, in aggregate, far fewer income tax cases than do their counterparts in England or Germany, they do render almost

72 See id., § 4.3.
73 For a full description of their role, see Chap. VII, § 3.2a infra and Chap. XII, §§ 3.3 and 3.4a infra.
74 See Chap. VII, § 3.2a infra, and Chap. XI, §§ 3.3 and 3.4a infra.
75 For a full description, see § 4.2 in Chaps. VIII and XXIV infra.
as many income tax decisions (1107 in one recent year) as do all of the federal trial tribunals in the United States, the population of which is 18 times as large. In the Netherlands, aggregating income, profits and wage tax cases, a roughly comparable total number of trial decisions is handed down by the special tax chambers included in each of its five geographically dispersed courts of appeal, two of which have two such chambers. In contrast to Belgium, however, the majority of all cases in the Netherlands are heard by a single judge, though ordinarily each chamber will honor a request that all three members sit on a given case. France's twenty-four geographically dispersed administrative tribunals, of which two have been sectionalized, bear a much heavier tax caseload. Each of these tribunals or sections is composed of five members, with three sitting as a deliberative body in each case. In one recent year, they decided an overall total of 4,578 income tax cases.

4.4 Appellate tribunals: The right and scope of review

The multiplicity of trial tribunals in each of these countries requires some unifying means to correct their errors. The aim should be to provide an impartial review body which will limit itself to those corrective efforts it can carry out effectively and efficiently, through high quality decisions likely to produce fairly durable interpretations. However, if these
latter purposes do not coincide perfectly with a given country's practice in non-tax cases, such fact will make their implementation in tax cases more difficult and well-nigh impossible if the country's regular appellate structure is used.

To give aggrieved parties an absolute right to appeal is the only effective, feasible, and efficient method of ferreting out errors at the trial level. Laying aside subsequently considered limitations relating to the scope of review, this right is accorded taxpayers with respect to decisions of all but one of the previously discussed trial tribunals, specifically the U.S. Court of Claims. Its decisions are reviewable by the Supreme Court, but only upon the latter's seldom-granted leave. And over the last twenty years, leave actually was obtained in less than twenty cases. Indeed, during, the most recent five-and-one-half years of that period, it was allowed in only three of the approximately two hundred tax cases decided by the Court of Claims.

This one apparent exception to the otherwise prevailing practice of granting review as a matter of right is less real, however, than it appears. In part, this is because, when a U.S. taxpayer decides to invoke the jurisdiction of the Court of Claims, he elects, voluntarily, not to have his case tried by either of two other trial forums (the Tax Court or a regular federal district court) from which there would have been an absolute right to appeal. Of even more significance, the Court of Claims itself actually has the dual characteristics of both a trial and a review tribunal. As previously noted, legally trained trial commissioners make preliminary findings of fact and submit recommendations regarding questions of law. Either party may file exceptions thereto, and these always are reviewed internally by a panel of the court's legally trained judges. In practice, this panel is larger, and in theory,
never less, than regular appellate tribunal panels to which appeals would lie from the other two trial forums. And many practitioners choose the Court of Claims precisely because they can telescope the whole conflict into one proceeding and still be assured that the legal issue will be dealt with by a legally trained deliberative body, rather than by a single judge who typically would render the trial decision in cases filed with the Tax Court or a federal district court.

Both efficiency and quality of the total conflict-resolution effort will be enhanced if a reviewing body restricts its corrective efforts to those it can carry out effectively. Assuming that body is properly constituted, this limitation would permit it to substitute freely its judgment for that of the trial tribunal

(footnote continued)

who feels aggrieved. The difference in this instance, however, is largely theoretical; little real waste actually ensues from the automatic review by the judges of the Court of Claims. The fact is that exceptions to their trial commissioners' determinations are filed in the great preponderance of cases, the proportion in 1966 being 82.5% of the decided cases. Moreover the judges of that court undoubtedly devote much more energy per case to cases where an exception has been filed than to the others. In the latter, the court typically hands down a short per curiam decision adopting the Commissioner's determination, explaining that it does so because "it agrees with the trial commissioner's findings, opinion, and recommended conclusion of law, as hereinafter set forth." For example, see Dodge v. U.S., 362 F.2d 810 (Ct. Cl. 1966). No doubt also, taxpayers who invoke this court's jurisdiction realistically anticipate at the outset that the side adversely affected by a trial commissioner's determination probably will file exceptions thereto, if only because the average amount involved in cases which are filed with this court involves a far larger sum than the average in cases filed with the other two trial forums. See Kipps, op. cit. supra note 12, at 1026.

As noted elsewhere, because the third trial forum (Tax Court) is a multijudge court but employs only a single judge to hear a case, it too has developed an internal review procedure. In contrast to the Court of Claims, however, not every case is subjected to an internal review. Prior to release of a decision, the Chief Judge is empowered to refer it to the whole court. And for thirty days after release, any judge on the Tax Court can request such a referral. See Kern, op. cit., Murdock, op. cit., and Raum, op. cit. supra note 33. Typically, about one-third of the decisions are reviewed.

88 That the court traditionally has sat en banc, all seven participating, see § 4.3 supra.

89 Typically a division of three sit, though a majority of a court's judges on regular active service can require the court to sit en banc. 28 U.S.C. § 46(c).

90 See Kipps, op. cit. supra note 12, at 1026; Miller, op. cit. supra note 38, at 459.
with respect to all questions of law, though most certainly not as to all questions of fact.

Completely at odds with this latter limitation is the review arrangement within the U.S. Court of Claims. True, that court does treat its own commissioners' factual findings as "prima facie correct ... in the absence of exceptions thereto." However, in case of an exception, that court believes "the law casts the ultimate burden of making findings on the judges of the court, and wherever we are convinced that the weight of the testimony is contrary to the finding of the [trial] commissioner, it is our duty to substitute for the commissioner's finding what we consider to be the correct finding."

This all embracing view has led the judges on that court, in the face of conflicting evidence, to reverse the finding of a trial commissioner even with respect to a subjective factual matter where the credibility of the taxpayer-witness was at issue and where no one but the trial commissioner had occasion to observe him. In that particular case, the question, involving only the taxpayer's initial intention, was whether he had "purchased land for the purpose of farming it." Perhaps less open to criticism was the judges' action in the case of a given officer-stockholder. There in the face of conflicting evidence, they reversed a commissioner's finding regarding the precise amount of salary deemed "reasonable" for deduction purposes. At least this action is defensible if limitations on the scope of review actually are imposed only because of the inherent difficulty of a review body confined to a written record. But even in this type of case, free substitution of judgment is a questionable practice if overall efficiency also is to be stressed, to the end of enabling the review body to focus primarily on significant and relatively durable interpretations.

Surveying all the trial tribunals covered by this study, there is wide variation in the scope of review severally available on appeal. The sweeping character of review applied within the Court of Claims is at one extreme, shared only by France. Though the latter's appellate tribunal is physically

92 Id. at 662. Italics added.
93 Id. at 662. Cf. the dissent of Davis, J., at 664 and the cases cited therein. Italics added.
distinct from the trial echelon, questions of fact may be raised on appeal and even new evidence may be presented.\textsuperscript{95} In short, both bodies approach the case anew, though the nature of the question submitted originally to the trial tribunal cannot be changed on appeal.\textsuperscript{96}

At mid-point between that position and the other extreme are the fairly restrictive standards applied to the regular U.S. courts of appeal on reviewing cases originating in the other two U.S. trial forums. If a jury of laymen, after being instructed correctly by the trial judge regarding questions of law, decides a federal district court case, an appellate tribunal cannot reverse if "reasonable men could reach differing conclusions on the issue."\textsuperscript{97} And if a trial is conducted by a federal district court judge without a jury, or by a judge of the Tax Court which never uses a jury, the lower court's findings of fact must stand on appeal unless "clearly erroneous."\textsuperscript{98} Unquestionably these standards, when compared to those applied within the U.S. Court of Claims, do gauge more accurately the limited capability of a review body confined to a written record. Hopefully, they also have some restraining effect on the number of appeals—thereby, enabling the regular U.S. appellate tribunals to spend more of their time on legal questions which are better suited to their peculiar competence. But even these restrictive standards can accomplish their aim only if the types of determinations to which they apply are clearly defined. In the United States, they obviously apply to pure questions of fact which are readily discernible. Also covered are "factual inferences from undisputed basic facts."\textsuperscript{99}

\textsuperscript{95}See Chap. XII, § 4.5 \textit{infra}.
\textsuperscript{96}Ibid.
\textsuperscript{98}Ibid. Fed. Rules Civ. Proc. 52(a); I.R.C. § 7482(a). A "finding is clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." U.S. v. United States Gypsum Co., 333 U.S. 364, 395 (1948), quoted with approval in the Duberstein case, \textit{id.} at 291. Italics added.

Appeals \textit{from} Tax Court decisions are to be distinguished from the internal review that court may choose to give its own trial judge's decision. See note 87 \textit{supra}. There are instances, for example, where the Tax Court reversed its own trial judge's findings of fact and was sustained on appeal because its findings were not deemed clearly erroneous. See Latchis Theatres of Keene, Inc. v. Commissioner, 214 F.2d 834 (1st Cir. 1954).
\textsuperscript{99}\textit{Id.}, note 97 \textit{supra}.
though, as before noted, not legal conclusions. Here difficulty
does arise because, in a statutory tax setting, the line be-
tween the latter two categories is not always easily discerni-
ble. In consequence, courts of appeal occasionally disagree
as to whether a given situation turns on a "factual inference
from undisputed basic facts" (subject to the "clearly erroneous"
limitation) or instead involves an indivisible mixed ques-
tion of law and fact (where a court feels entirely free to sub-
stitute its judgment). 100

Finally, at the opposite pole from the sweeping review
conducted within the U.S. Court of Claims and by the French
Conseil d'État is the Belgian practice. There the Appellate
Court may not consider anything other than a pure question of
law; appeal of a so-called mixed question of law and fact
would be dismissed. 101 The same is true in Great Britain.
There, however, the concept of a pure question of law is broad
enough to permit an appellate tribunal to reverse if it appears
that the trial tribunal could not have drawn from the evidence
before it the inferences of fact upon which it relied in reach-
ing its final decision. 102

4.5 Appellate tribunals: Quality of review

Obviously bearing on the quality of appellate decisions is
the quality of the bench itself. In practice, neither of the only
two countries (England and Germany) which make some use of
ordinary lay citizens as judges at the trial level utilizes such
persons on the appellate courts which hear tax cases. 103 In-
deed, only in France and Germany is it even likely that pro-
fessional persons without legal training might be appointed. 104
In the rare circumstance where this occurs in France, the
appointee would have been at least one of the top graduates of
the National School of Administration. 105 In Germany, the

100 For example, compare Mathews v. Commissioner, 315 F.2d 101
(6th Cir. 1963) and Rubino v. Commissioner, 186 F.2d 304 (9th Cir.
1951), cert. den. 342 U.S. 814 (1951) with Fahs v. Taylor, 239 F.2d
224 (5th Cir. 1956), cert. den. 353 U.S. 936 (1957), and Goldberg v.
Commissioner, 223 F.2d 709 (5th Cir. 1955).
101 See Chap. VIII, § 4.5 infra.
102 See Chap. XX, § 4.5 infra and Ferguson, op. cit. supra note 26, at
364 n. 273. As to the Netherlands, see Chap. XXIV, § 4.4 infra.
103 See § 4.3 supra and § 4.4 of Chaps. XVI and XX infra.
104 As to Belgium and the Netherlands, see § 4.4 of Chaps. VIII and
XXIV infra.
105 See Chap. XII, § 4.4 infra.
exceptional nonlegally trained appointee typically has had previ­
ous experience in tax affairs and has sat for a minimum of three years on one of the specialized trial tribunals.\textsuperscript{106}

As a further quality control device, all six countries uti­
lize the deliberative process. Typically, the number of appel­late judges who sit on a given case equals or exceeds the number who sat on the trial tribunal.\textsuperscript{107} The two exceptions to this are Great Britain, though only for cases arising in England and Wales, and the United States, but only in the case of appeals from certain Tax Court decisions. With respect to the former, the exception is more shadow than substance: it pertains only to the first appeal, and England and Wales stand alone in allowing as a matter of right appeals to two different appellate levels. There,\textsuperscript{108} decisions of both the General Commissioners (where two ordinary laymen constitute a quorum) and the Special Commissioners (where a minimum of two persons with professional training or experience is required), are appealed first to the High Court of Judicature, where one legally trained judge of the Chancery Division, sitting alone, will decide the case. Further appeal may then be taken to the Court of Appeals, where typically three legally trained jurists constitute a panel, though from two to five may sit. Also, by leave of that court or of the House of Lords, the trial tribunal's decision may be reviewed a third time, before a bench of up to five legally trained Lords of Appeal. The United States, as an exception, is such only in a very limited sense, since most appeals are heard by a larger bench than was involved at the trial level. This follows from the fact that the great preponderance of trial decisions are rendered by judges sitting alone, either on the Tax Court or a federal district court,\textsuperscript{109} and appeals from both courts go to a court of appeal, where typically three judges hear the case.\textsuperscript{110} This latter number, however, is substantially exceeded by the number of

\textsuperscript{106}See Chap. XVI, §4.4 infra.
\textsuperscript{107}See text accompanying notes 128, 130, 132, and 135 infra.
\textsuperscript{109}See note 46 supra.
\textsuperscript{110}The eleven courts of appeal have a varying number of judges, de­
pending on workload, and each does have the power, by order of a majority of a court in regular active service, to order that the court sit en banc on a particular case. 28 U.S.C. §46(c). It was anticipated, however, that this practice would be invoked only in rare cases. See H. Rep. No. 1246, 77th Cong., 1st sess. 1 (1941).
trial judges involved in those Tax Court cases where, prior to any appeal, the decisions of single Tax Court judges are reviewed internally by that sixteen member court—as about one-third are. Following an appeal to a court of appeal, it also is possible in the United States to secure an additional hearing before the nine-member Supreme Court, but only by its leave which seldom is granted.112

Germany is the third and final country among the six to permit two appellate reviews of a trial tribunal's decision, with the second—like Great Britain and the United States—being to its High Court, but only in the case of constitutional issues.113 While France and the Netherlands, and perhaps as a practical matter Belgium also, permit only one such review, two of these three, further to promote high quality decisions, do make use of an additional procedural device unique among the Six. Belgium requires its Attorney General to submit to the appellate body (as well as to the trial tribunal) his own impartial view of the case, arrived at independently and presented separately from the view pressed on the court by the tax administration's representative. For the same purpose, France uses an official attached to its appellate body.118

The perspectives of the appellate bench itself, and in this limited sense the character of its decisions, will be affected, of course, by the degree of its specialization in tax affairs—as was indicated more fully in the earlier discussion regarding trial tribunals.119 There it also was suggested that, if a legislature fears—as do some critics—that a newly created specialized trial tribunal might lose touch with the general law or indulge too freely in what some characterize as judicial legislation, establishment of concurrent trial jurisdiction in

111See text accompanying note 33 supra.
112See text accompanying note 123 infra.
113See Chap. XVI, §4.1 infra.
114See §4.4 of Chaps. XII and XXIV infra.
115While Belgium, in tax cases, employs only two layers of courts, the fact that its appellate court (Court of Cassation), should it disagree with a trial tribunal, always remands the case to a yet different lower court for re-trial, does give rise to more than one appellate review. See note 143 infra. However, unless the Court of Cassation itself changes its mind on a yet second appeal to it, the view it took on the first appeal ultimately prevails.
116Chap. VIII, §4.4.
117Id., §4.2.
118Chap. XII, §4.4.
119See §4.2 supra.
both a specialized tribunal and a general court might reduce this risk without forfeiting completely the benefit of the specialized tribunal's potentially greater competence, concern, and efficiency. This has been done, as before noted, by two of the countries covered here, the United States and, though to a lesser degree, Britain. Alternatively, or as an additional more direct restraint on the specialized trial tribunals, appeals therefrom can be lodged, as in Britain and the United States, in appellate courts of general jurisdiction. The latter, on reviewing cases, hardly would ignore completely the expertise of the lower specialized tribunal and, in any event, would benefit substantially from exposure to its views. Hence, the peculiar contribution this type of trial tribunal can make to a tax system would not be totally dissipated.\(^{120}\)

In deciding upon the type of appellate court to be used, however, legislators cannot cater just to their own peculiar preferences as between the perspective and competence which an appellate court would acquire from constant exercise of general jurisdiction and those which it would derive from specializing in tax cases. Relevant also to their choice are the interrelated factors of workload and the question of whether the requisite certainty and uniformity can be achieved if jurisdiction is lodged in other than a single court.

The significance of the relationship between these two factors is best illustrated by the contrasting circumstances in the United States and Britain. These two countries, it will be recalled, were at opposite ends of the six-country spectrum with respect to the actual number of trial decisions handed down each year with Britain on the high side. Their relative positions are just the reverse, however, with respect to the proportion of trial determinations appealed. For example, the various U.S. trial forums together resolved by decision only 1,232 substantive tax cases in fiscal 1966.\(^{121}\) During that same period, the eleven geographically spread U.S. appellate courts of general jurisdiction had to decide 373 civil tax

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120 Even in reversing the U.S. Tax Court on a question of law, one American court of appeals said: "Indeed, the only thing which would give us pause is the unanimous decision of the Tax Court, whose expert view is always entitled to respectful consideration." Commissioner v. Whitney, 169 F.2d 562, 565 (2d Cir. 1948), cert. den. 335 U.S. 892 (1948).

121 See Commissioner of Internal Revenue, op. cit. supra note 46, at 134 and 135 (Tables 17B and 20).
cases. This was the highest proportion (approximately 30 percent) among the Six. Numerically, it was great enough, if all these cases were assigned to one appellate court, to restrict that court to the role of a specialized tribunal operating under the U.S. Supreme Court which, in that same year, decided only 10 tax cases—all of which reached it with its individually-granted consent (writ of certiorari).

Britain is a complete contrast. Its General and Special Commissioners annually decide from 8,000 to 9,000 tax cases at the trial level. However, in 1965, the first appellate level for England and Wales (High Court of Judicature) issued decisions in only 14 such cases. Also in that year, the second such level (Court of Appeal)—even if account is taken of decisions by the distinct but single levels to which appeal could be taken as a matter of right in Scotland (Court of Sessions) and Northern Ireland (Court of Appeal)—decided only 7. The House of Lords—on the basis of discretionary jurisdiction exercised over the whole of the United Kingdom—resolved 8. Appeals to the intermediate British courts represent by far the smallest proportion of trial determinations among the Six. Numerically, they obviously are not sufficient to keep one court occupied even if all such appeals were assigned to it. Since a large proportion of its docket would have to come from outside the income tax field, centralization, if otherwise justified, would not be accompanied, by either expectation or fear that the centralized court would develop the peculiar competence or perspective of a specialized tribunal.

122 Id. at 135 (Table 21). Little variance appears between the proportion of cases appealed from the district courts and from the Tax Court. In fiscal 1966, during which the district courts handed down 448 substantive tax decisions, the appellate courts decided 123 cases originating with district courts. Corresponding figures for the Tax Court were, respectively, 726 and 250. Ibid. As previously noted, however, none of the 57 cases resolved by the third trial forum (Court of Claims) could be appealed as a matter of right, though all decisions recommended by that court's trial commissioners were reviewed by the judges of that court. See note 87 supra.

123 Of these, 4 originated with the Tax Court and 6 with the district courts. Op. cit. supra note 122.

124 Of these, 4 originated with the General Commissioners and 10 with the Special Commissioners.

125 As to this one court, it was necessary to use figures for 1964. Of these, 6 were decided by the Court of Appeal for England and Wales, 1 by the Court of Appeal for Northern Ireland, and none by the Court of Sessions in Scotland.

126 All figures based on the writer's count. Cf. Chap. XX, §4.5 infra.
In each of the other four countries, the proportion of appellate decisions to trial determinations falls far short of the U.S. 30 percent figure—always being nearer 10 percent. Yet the proportion is far larger than in Britain and numerically speaking would permit some degree of specialization if those countries were so minded. All four are. In three (Belgium, France, and the Netherlands), the appellate tribunal which hears tax cases also hears other types of cases. However, these tribunals are multi-chambered with one or more assuming prime responsibility for tax cases. In Belgium, one of the two chambers into which its highest court (Court of Cassation) is divided performs this function, with five Conseillers sitting on each case.\(^{128}\) In 1965, 57 of its decisions involved *impôts sur les revenus*.\(^ {129}\) The Netherlands Supreme Court has three chambers of five judges each. Here too one chamber is responsible for tax appeals.\(^ {130}\) Over a fairly recent two-year period, this chamber handed down 486 decisions involving various types of taxes and of these, 340 involved the wage tax and corporate and individual income taxes.\(^ {131}\) The French government has entrusted to its Council of State a judicial as well as a consultative function. One of its five sections handles appeals from decisions in the various types of cases against the government originating in the 24 so-called administrative tribunals. This *section du contentieux* has nine subsections,\(^ {132}\) each having three Conseillers. Three of these subsections specialize in tax cases.\(^ {133}\) In one recent year, they decided 608 cases involving direct taxes, and of these 316 involved corporate and individual income taxes.\(^ {134}\) Germany alone among the Six utilizes a physically distinct specialized court for tax appeals. In 1964, with five judges sitting on each case, seven different chambers (Senates) of its Federal Fiscal Court\(^ {135}\) dealt with a total of 2,000 tax cases of which 780

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128 See Chap. VIII, § 4.4 infra.
129 By the writer's count of cases published in the *Pacifrisie Belge*.
130 See Chap. XXIV, § 4.4.
131 *Id.*, § 4.5.
132 Décret 63-766, Art. 38 (July 30, 1963). Formerly there were 11. See Chap. XII, § 4.4 infra.
133 While these sit separately, a reorganization decree (*id.*, note 132 supra) apparently anticipates that at some future time they will begin to sit together in tax cases. See Drago, "Some Recent Reforms of the French Conseill D 'Etat," 13 *Int. & Comp. L.* Q. 1282, 1296 (1964).
134 See Chap. XII, § 4.5 infra.
135 See Chap. XVI, § 4.4.
concerned corporate and individual income taxes. However, out of the 2,000 tax cases of all types, final decisions were rendered in only 380.\textsuperscript{136} The largest proportion of the balance was dismissed, being deemed without merit.

4.6 Appellate tribunals: Unifying interpretations

The final consideration in shaping the appellate structure to be used in tax cases involves the need that it be capable of producing unifying and fairly durable interpretations. Such capability markedly affects the fairness and efficiency with which thousands of administrators can be expected to administer a tax system. Also, especially in self-assessment systems, it affects the extent to which taxpayers themselves can be expected to respond with an acceptable degree of uniformity. The ultimate question is whether interpretations of the requisite quality can be achieved adequately at the judicial level without vesting appellate jurisdiction in a single appellate court—or chamber, i.e., a division. Such a court would tend to become specialized should the anticipated appellate workload in a given country equal that in any one of five of these six countries.

Observe preliminarily that, whether the appellate tribunal be specialized or generalist, publication of its decisions (facts, conclusion, and supporting rationale) is an absolute prerequisite if taxpayers and administrations alike hope to possess guides for the future or any chance to question the applicability of past decisions in the context of other factual situations.\textsuperscript{137} This initial requirement is completely satisfied, however, in four of the six countries covered here (Belgium, France, Great Britain,\textsuperscript{138} and the United States) through publication of all appellate decisions. And, in the other two (Germany and the Netherlands), at least those appellate decisions deemed important or of general interest\textsuperscript{139} are published.\textsuperscript{140}

\textsuperscript{136} \textit{Id.}, § 4.5.

\textsuperscript{137} Publication also helps preserve integrity and enhances the discipline with which the court approaches its work, for only by publication can a court be subject to the critical views of writers.

\textsuperscript{138} See § 4.5, Chaps. VIII, XII, and XX infra.

\textsuperscript{139} See § 4.5 of Chaps. XVI and XXIV infra.

\textsuperscript{140} Publication of \textit{trial} decisions in these six countries ranges, however, from none in Britain to practically all such decisions in the United States. In between, a few are published in France and, in the three other continental countries, those deemed important are published. See § 4.3 of Chaps. VIII, XII, XVI, XX and XXIV infra.
Publication in itself, however, does not bring unification unless appellate court decisions bind lower courts for the future. Nor will the desired degree of certainty follow unless, in practice, appellate courts themselves tend to follow their own decisions. Since final decisions of appellate tribunals in the four continental countries covered here bind formally neither the lower courts nor the appellate tribunals themselves, theoretically their decisions have no precedent value.\textsuperscript{141} In theory, they bind neither the administration nor taxpayers with respect to future situations. Fortunately, however, practice and theory differ somewhat.\textsuperscript{142} It is generally recognized that, in fact, these appellate tribunals ordinarily do follow their own prior decisions. And the lower tribunals, therefore, do tend to treat the appellate decisions as precedents—though a fairly complicated procedure is required in Belgium to accomplish this.\textsuperscript{143} A further practical consequence is that the tax administrations in these continental countries ordinarily do adhere to the principles decided at the appellate level and seldom force relitigation of an issue in a yet different case.\textsuperscript{144}

But this, no doubt, is due in substantial part to one particular structural feature of their appellate courts not shared by the United States and, in theory, not by Britain. And this difference is one of the prime causes for the not insubstantial degree of uncertainty which does exist in the United States. Whereas each of the four continental countries lodges ordinary tax appeals in one tribunal,\textsuperscript{145} the United States employs eleven

\textsuperscript{141}See § 4.5 of Chaps. VIII, XII, XVI, and XXIV, \textit{infra}.

\textsuperscript{142}Ibid.

\textsuperscript{143}The Belgian difficulty actually relates to the doctrine of \textit{res judicata}. In theory, its High Court (Court of Cassation) does not hand down a final decision on appeals to it. If the chamber which handles tax appeals concludes that the lower court erred in law, the latter's decision is quashed and the case is referred to another lower court for retrial on both the facts and law. That court is completely free to differ with the chamber of the High Court. But should it do so as to the legal question, on a second appeal by the aggrieved party, both chambers of the Court of Cassation sit in judgment. If the two chambers together agree with the single chamber which dealt with the earlier appeal, the case again is referred to another lower court which now, however, is bound to enter judgment in accordance with the views of the High Court. See Chapter VII, § 4.5.

\textsuperscript{144}Op. cit. \textit{supra} note 141.

\textsuperscript{145}See § 4.4 of Chaps. VIII, XII, XVI, and XXIV \textit{infra}. Constitutional issues in Germany, however, may be carried yet another step, i.e., to its Supreme Court. See Chap. XVI, §§ 4.4 and 4.5 \textit{infra}.
coordinate courts of appeal. Each has jurisdiction over a given geographical area, with its decisions reviewable by a single High Court only with its leave. Because of the latter's heavy non-tax docket, over a recent ten-year period, it granted such leave and rendered a full opinion in only 78 cases (averaging 7.8 a year). Moreover, far more typically than not, such leave was granted only after a conflict had emerged between two or more of the intermediate appellate courts. Before such a conflict emerges, however, i.e., where only one intermediate court has passed on an issue, uncertainty continues. The possibility always exists that in some future case, on petition either of the commissioner or another taxpayer, a second appellate court might reach a contrary view which the Supreme Court might then adopt as it often has—proportionately speaking—after granting certiorari. Because the geographically spread intermediate appellate courts are coordinate, the precedents of one do not bind the other, though each does treat the decisions of the others with respect—apparently in lesser degree, however, than do Britain's three intermediate courts of appeal.

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146 That, in effect, there is a twelfth which actually is coordinate on a nationwide basis, see text accompanying note infra.

147 See Brown and Whitmire, op. cit. supra note 32, at 658. In fiscal 1966, the High Court approved only 4 of the government’s 8 petitions for certiorari and only 8 of the 82 requested by taxpayers. See Attorney General of the U.S., Annual Report 1966, 335.

148 See Brown and Whitmire, op. cit. supra note 32. That study indicates that over a ten-year period, in two-thirds (52) of the federal civil tax cases decided by a full opinion of the High Court, a conflict between courts of appeal was cited as a reason for hearing the case. In 6 of the remaining 26, such a conflict existed though it was not referred to by the High Court. Thus, on the average, only in 2 civil tax cases a year was the Court able, in view of the demands of other areas, to assume jurisdiction merely because an issue was important to the tax system.

149 A study, Brown and Whitmire, op. cit. supra note 32, at 659, indicated that in one-half of the High Court opinions involving conflicts between the lower appellate courts, the first appellate decision was found to be incorrect.

150 It is precisely because of this that the Supreme Court views, as one of its important functions, resolution of conflicts that arise among these appellate courts. As to the frequency with which this does serve as a ground for Supreme Court review, see Brown and Whitmire, op. cit. supra note 32.

151 Cf. Chap. XX, § 4.5 with the results of the U.S. study reflected in Brown and Whitmire, op. cit. supra note 32. The chance that conflicts will emerge in the U.S. is relatively greater also because, compared to
France and Germany, though employing only one appellate tribunal for ordinary tax litigation, could have encountered the same difficulty as the United States, because their tax decisions are handed down by each of several coordinate divisions (three in France, seven in Germany) within their respective tribunals. These two countries, however, faced up to the obvious problem generated by this structure; they established compensatory and somewhat similar internal referral arrangements. In Germany, when one Senate (a division) of the Federal Fiscal Court encounters an appeal deemed to involve one or more important new issues of law, it may refer the case, in advance of a decision, to the Great Senate, a body composed of representatives from the separate Senates and presided over by the President of the Court. About five such referrals occur each year. Further, should a given Senate, in considering a case, tentatively decide against following an earlier decision of another Senate, it must refer that case to the Great Senate for decision. In France, though tax cases are dealt with by only three of the nine subsections which make up the judicial section of the Council of State, the Presidents of all nine subsections together with representatives of the consultative sections of the Council, sit as a plenary assembly, to which problems can be referred. So constituted, this plenary assembly considers important new tax questions as well as cases which may lead the Council to alter its position regarding an earlier enunciated tax principle.

(footnote continued)
Britain, it has four times as many intermediate appellate courts and far more cases reach that level. See text accompanying notes 122 and 127 supra. U.S. district courts (trial tribunals) in the geographical circuit of a given intermediate appellate court are expected, however, to follow the decisions of the latter. But, that the other two trial forums do not feel bound by prior decisions of any particular court of appeals, see text accompanying notes 161 and 162 infra.
152 That constitutional issues in Germany may be further appealed, however, to its Supreme Court, see Chap. XVI, § 4.4 infra.
153 See § 4.4 of Chaps. XII and XVI infra.
154 See Chap. XVI, §§ 4.4 and 4.5 infra.
155 A similar internal referral system is employed at the trial level by the U.S. Tax Court. See text accompanying note 33 supra. As noted there, however, the Tax Court internally reviews a much larger share of its cases, no doubt because of a tradition that the Chief Judge is expected to resolve "doubts in favor of court review." See Murdock, op. cit. supra note 33, at 298.
156 See Chap. XII, §§ 4.4 and 4.5 infra, and note 132 supra.
157 For other devices used to secure uniformity in France, see Chapter XII, § 4.4. Also, see note 123 supra.
Obviously, such referral arrangements can neither eliminate uncertainty completely nor guarantee absolute uniformity among divisions. For example, not all important issues of first impression will be recognized as such and be referred in advance of a decision. Further, a given division may decide improperly that an earlier decision by another division is not in point and, quite logically though incorrectly, conclude referral to be unwarranted.

Far less perfect, however, is the device which links together the various intermediate U.S. courts of appeal. No arrangement exists enabling one such separate court to consult with the others before rendering a decision. Nor, as before noted, do the decisions of one bind the other. Further, it is unlikely the Supreme Court will involve itself, to the end of fixing a nationwide rule, until at least two circuits are in conflict. Consequently, the Commissioner of Internal Revenue, having nationwide responsibility for tax administration, feels that he must be free, on losing before one court of appeals, to test the issue before yet another.\footnote{His decision not to conform to a given court of appeals decision is often reflected in a published Technical Information Release.}

In the interval, which can run to several years,\footnote{A study of Supreme Court decisions from 1955 to 1959 shows, as to these cases, that the median time involved in the development of conflicts between the circuits was 50 months. See Del Cotto, "The Need for a Court of Tax Appeals: An Argument and a Study," 12 Buffalo L. Rev. 5, 29-30 (1962). For a survey of other studies, see Brown and Whitmire, op. cit. supra note 32, at 669.} uncertainty reigns. But the ultimate fault is not that of the Commissioner. It is inherent in the courts-of-appeals structure itself. The above mentioned second taxpayer also would have been free, had the theory of the court in the other circuit favored the Commissioner, to require his own court of appeals to address itself to the matter as one of first impression.\footnote{For a statistical analysis, based on one assumption and to the effect that history indicates the courts of appeal will not agree on 25% of the cases involving a difficult substantive issue, see Brown and Whitmire, op. cit. supra note 32,} This particular consequence of the multi-courts-of-appeals arrangement takes on a yet different dimension when account is taken of one further feature of the appellate structure. One of the alternative trial forums having nationwide jurisdiction—the Court of Claims—has no allegiance to the decisions of any particular court of appeals.\footnote{The significant degree to which it has exhibited independence is analyzed in Pavenstedt, op. cit. supra note 38. See also note 166 infra.}
It considers itself coordinate to the regular courts of appeal because it too is reviewable only by leave of the Supreme Court. In consequence, a taxpayer who believes a previous decision of *his own* court of appeals is unfavorable to his cause, from the very beginning has the option, if the Court of Claims has not considered the issue, to invoke the latter's jurisdiction. And where the Court of Claims alone has spoken on an issue, no one—whether taxpayers or the Commissioner—is bound as to future situations. After all, this tribunal is only one of twelve coordinate courts. It has nationwide jurisdiction but the *entire* nation is subdivided geographically among the other eleven coordinates.

In further aggravation, though *not* attributable to the appellate structure itself, is the fact that another trial forum, the Tax Court, essentially just because of its nationwide jurisdiction, also denies allegiance to *any* particular court of appeals. And this is so, though in contrast to the Court of Claims, Tax Court decisions are appealable, illustratively in the case of an individual, to the particular court of appeals having jurisdiction over the area where the particular taxpayer resides. Precisely because of this, neither the Commissioner nor other taxpayers, as to future situations, feel bound by Tax Court decisions.

In summary, neither the Commissioner, nor any of these tribunals, nor taxpayers themselves accord binding precedent to any decisions other than those of the Supreme Court. Yet that Court seldom involves itself until one court of appeals differs from the previous decision of another. To some extent, however, the problem is mitigated by the Commissioner's usual practice of conceding an issue should he lose before two courts of appeal. For the uncertainty which prevails in the interim, however, the appellate structure bears the prime

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162 Other reasons are also advanced in Lawrence v. Commissioner, 27 T.C. 713 (1957), *rev'd* 258 F.2d 562 (9th Cir. 1958). For an extended analysis, see Ferguson, *op. cit. supra* note 26, at 366. As noted there, at 367 n. 285, a federal district court, on the other hand, is expected not only to follow decisions of the court of appeals for its circuit but, in the absence of any such controlling decision, tends also to attach great weight to appellate decisions of other circuits.

163 Typically, his reaction to adverse decisions is published, either as an acquiescence or non-acquiescence in the *Internal Revenue Bulletin* which is available to taxpayers.

164 That the one exception is a federal district court, see note 162 *supra*. 
blame, though the above mentioned Tax Court practice at the trial level is a significant aggravation. Together, these two circumstances lead (i) taxpayers to shop for the most "appropriate" forum and (ii) the Commissioner to test an adverse result in yet another coordinate forum. Both the "shopping" and period of uncertainty are affected also by the prospect that a second coordinate court, perhaps because of slight factual variations, may be willing to distinguish the previous decision of another and thus avoid even the appearance of a conflict. If it does distinguish, and if the forums are alternatives, yet other taxpayers will be affected in their choice of a forum by what then are deemed to be differences in judicial attitude—if only in degree.

Certain individuals propose, through legislation, to handle the problem by requiring the Commissioner to follow the decisions of courts according to a given sequence. Others would establish a centralized court of tax appeals, with some of these proponents content to leave the tribunal subordinate to the Supreme Court, while some would make its decisions final. Other reformers would start at the bottom, at the trial level, by eliminating the existing right of taxpayers to choose between a specialized court and courts of general jurisdiction. They would put exclusive trial jurisdiction in specialized courts, thereby also removing the right of jury trial, with appeals from these courts going to a single specialized court. A completely opposite approach is taken by those who would eliminate at the trial level the encumbrance

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165 Literally dozens of articles have been published to educate practitioners regarding the considerations they should take into account in choosing a forum. For collection of a large sample, see Brown and Whitmire, op. cit. supra note 32, at 650 n. 52.

166 Pavenstedt, in op. cit. supra note 38, identified 17 areas where the Court of Claims was the more favorable forum and 7 where it was less favorable.


170 For example, see Traynor, op. cit. supra note 45, at 1425. But cf. text following note 43 supra.

171 Id., at 1426. However, the architect of this proposal would preserve the deliberative process by having decisions of a single judge internally reviewed by the other judges on a court.

172 Id., at 1426.
taxpayers now suffer should they prefer to try the case before a federal district court of general jurisdiction, perhaps with a jury, rather than before the specialized Tax Court. This group would establish true concurrent jurisdiction by enabling a taxpayer who prefers the former type of court to litigate there before paying the amount in dispute, as he now can do should he choose the Tax Court.173

The ultimate controversy is between two groups. One places a high premium on efficiency, certainty, uniformity, and the peculiar competence and concern of specialized tribunals. The other values more highly both the perspective associated with courts of general jurisdiction (including juries) and the wholesome effect of permitting intermediate coordinate courts of this type to examine the same issue to the end, should they differ, of placing before the Supreme Court well reasoned but competing views of objectively oriented appellate court judges. The whole matter, as it relates to the United States, is now the subject of a comprehensive study by a colleague174 of this writer.

Section B. Analytic Comparison: Litigation Practices of the "Six"

4.7 Introduction
In conducting trial litigation, each party has certain legitimate concerns peculiar to it. Practices particularly important to the tax administration, and those primarily of interest to taxpayers, are considered separately in the succeeding two subtopics. Thereafter the focus shifts to yet other practices—of common concern and basic to the entire conflict resolution process.

4.8 Practices peculiarly important to the tax administration
Each of the six tax administrations covered here must deal individually with thousands of suits initiated at many different locations across each nation.175 In consequence,

174 Professor Alan Polasky, under the auspices of the American Bar Foundation.
175 As to the number of suits actually tried, see §4.3 supra. However, in most of these countries many other docketed cases required
their most important administrative problems emerge from an inherent conflict between two competing administrative needs: to handle this extremely burdensome effort efficiently, and to preserve for top policy makers the opportunity to formulate litigation policy. Whereas the latter necessitates at least some degree of centralization, maximum efficiency in handling the litigation function requires decentralization. The problem is to strike a proper balance between the two.

Considering only efficiency, the aims should be to avoid (i) duplicating, in the litigation stage, work that had to be done during the last administrative stage, and (ii) duplication of effort within the litigation process itself.

The first of these two ends obviously is best served by holding litigation to the necessary minimum, i.e., by closing out through reasonable settlements as many controversies as possible during the administrative stage itself. Practices most likely to achieve this were fully considered in Chapter III supra. As explained there, the foregoing objective cannot be reached merely by requiring taxpayers to exhaust their administrative remedies before invoking the jurisdiction of an independent tribunal. Far more important is the imperative of maintaining an image of impartiality at the administrative level. And, as further explained in an earlier chapter, this image of impartiality ultimately is enhanced inter alia by imposing on the person who hears the final administrative appeal the further responsibility of representing the government at the trial level should litigation ensue.\(^{176}\) This potential responsibility would remind him during the earlier administrative phase that it is he (in a representative capacity) who faces the risk of loss if the dispute is not settled administratively. Such a reminder should contribute to his sense of reasonableness and facilitate administrative settlement. And as to any cases not so settled, the proposed arrangement would

\(^{(footnote\ continued)}\)

attention but were settled before trial. For example, of the 6,234 U.S. Tax Court cases disposed of in fiscal 1966, 5,195 were settled before trial, and only 726 actually were tried on the merits. The remaining 313 were withdrawn or dismissed. See Commissioner of Internal Revenue, \textit{op. cit. supra} note 46, at 134 (Table 17B). Of the 1,504 refund suits filed that same year with the district courts and the Court of Claims (Attorney General, \textit{Annual Report 1966}, 326 and 339 n. 20), previous experience would indicate that at least 1,000 will be settled before trial.

\(^{176}\) See Chap. III, §3.2 \textit{supra}. 
further the cause of efficiency. It avoids the expensive duplication of effort which otherwise follows when, at the point of litigation, one more professional employee must master complexities and nuances of a controversy. Implementation of this plan demands as a corollary that the official who hears the final administrative appeal possess the requisite skill to represent the government properly before the appropriate independent tribunal. This skill, however, is not irrelevant to the task he performed during the earlier administrative phase. His actions at that time should have been affected, in the interest of administrative fairness, by a careful appraisal of the anticipated litigation hazards. And assuming proper training, personal experience of such hazards provides the best possible preparation for making such appraisals.

The Netherlands actually utilizes the arrangement proposed here. The local inspector who dealt with the taxpayer in the last administrative stage ordinarily represents the government before the trial tribunal.\textsuperscript{177} His training, formerly in the administration's own academy but now entrusted on a subsidized basis to law faculties, is intended to equip him for this responsibility.\textsuperscript{178} Likewise the British Inland Revenue, in those cases—typically small—tried before General Commissioners, is represented by the inspector who heads the local office or by his assistant.\textsuperscript{179} For surtax cases tried before Special Commissioners, however, the responsibility for the representation ordinarily does not remain with the Surtax Office but shifts to the centralized Solicitor's Office.\textsuperscript{180} France uses yet another device to save, for the benefit of the litigation stage, much of the effort that went into the administrative stage. There the taxpayer's final administrative appeal is at the regional level (Departmental Director's Office), not the local level. If litigation ensues, the responsible official at that higher office typically prepares the memorandum of law which will be filed with the independent tribunal, though the administration actually is represented in court by an ordinary inspector residing in the city where the tribunal sits.\textsuperscript{181}

\textsuperscript{177} See Chap. XXIV, § 4.3 \textit{infra}.
\textsuperscript{178} See Chap. XXI, § 1.5 \textit{infra}.
\textsuperscript{179} See Chap. XX, § 4.3a \textit{infra}.
\textsuperscript{180} Id., § 4.3b \textit{infra}.
\textsuperscript{181} See Chap. XII, § 4.3 \textit{infra}. Its inspectors typically do have legal training. See Chap. IX, § 1.5 \textit{infra}.
In contrast, Belgium and the United States, though in inverse order, probably suffer the greatest duplication of professional effort when a controversy shifts from the final administrative phase to the litigation phase. Belgium, alone among the Six, shifts trial responsibility outside the government, turning it over to a regular practicing member of the bar to whom the Minister of Finance has given a permanent part-time appointment to defend the government at this level. In the United States, the shift takes place within the government. Trial responsibility moves to the government's own full-time legal staffs. But the resulting duplication of effort is further compounded, irrespective of whether the taxpayer invokes the jurisdiction of the Tax Court or one of the other two trial forums.

When a case is docketed with the Tax Court, the administrative official (Appellate Division) who heard what in theory was the final administrative appeal continues, after docketing, to share jointly—with an attorney from the separate Chief Counsel's office—the responsibility to seek an administrative settlement of the case before the Court convenes for the session during which the case otherwise would be tried. Where settlement is not achieved, that same attorney will represent the government in the Tax Court. However, because almost

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182 See Chap. VIII, § 4.3 infra.
183 Rev. Rul. 60-18, C.B. 1960-2, 988. Once the court convenes and the calendar is called, settlement authority then vests exclusively in the Chief Counsel's office. Typically, as in fiscal 1966, about 70% of all docketed cases actually bypass the last administrative stage. See Commissioner of Internal Revenue, op. cit. supra note 46, at 134 (Table 17A). However, as to these cases also, the two separate offices (Appellate Division and Chief Counsel) continue, as above, to share joint settlement responsibility.
184 Under present conditions it would not be feasible to avoid his duplication of the study and analysis previously put into the problem by the administrative official who heard the last administrative appeal.

Too frequently, the latter official is not in a position to handle the trial if one ensues. Many of these officials are not legally trained. Because of the procedures followed by the Tax Court, typically only persons with legal training appear before it. See §4.9 infra.

Nor at the moment would it be feasible to avoid the consequent duplication by having the attorneys in the Chief Counsel's office take over the entire settlement function. A substantial proportion of those attorneys are recent law school graduates who stay with that office only during the four years for which they make a moral commitment. While there is no doubt about the quality of their work, not having the long experience enjoyed by the technically oriented administrative officials in
85 percent of all docketed cases are settled during the *pretrial* period,\(^{185}\) this phase of the litigation process should be, and in practice is, viewed as yet another administrative appeal, though now with *two* quite separate government offices—each having its own internal review arrangement—sharing the responsibility for settlement.

When a refund case is filed, whether with a U.S. federal district court or the Court of Claims, responsibility shifts from the administrative officials, *not* to the office of the administration's own Chief Counsel, but to other lawyers in the even more separate Tax Division of the Justice Department.\(^{186}\)

Here too, of the cases filed, well over a majority will be settled before trial.\(^{187}\) But once again, as to a significant proportion of these, yet another office becomes involved. To help preserve a uniform litigation policy, many but not nearly all of the proposed settlements are cleared by the Justice Department with the tax administration's own Chief Counsel's Office.\(^{188}\) Consequently, this latter office also must acquaint itself with the details of these cases.

Germany, among the Six, probably achieves the maximum degree of efficiency, by giving local finance offices the greatest possible autonomy. It even avoids duplicating in the appellate

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the Appellate Division, they would not be nearly as *efficient* in settling the far greater number of cases which are and must be resolved administratively even *before* petitions are filed with a court. There were over 22,000 such dispositions at the Appellate Division level in fiscal 1966. See Commissioner of Internal Revenue, *op. cit. supra* note 46, at 133 (Tables 15B and 16B). In short, to consolidate the two functions in one office would require very different staffing arrangements than those now utilized by either office.

\(^{185}\) See Commissioner of Internal Revenue, *op. cit. supra* note 46, at 134 (Table 17B).

\(^{186}\) While this shift took place pursuant to an executive order issued under the *Economy Act* of 1932, the Justice Department itself defends it on *substantive* merit. See note 208 *infra* and Statement of Honorable Mitchell Rogovin, Assistant Attorney General, Tax Division, Department of Justice, on S. 2041. Before the Subcommittee on Improvements of the Senate Judiciary Committee, 90th Cong., 1st sess. (1967).

\(^{187}\) See note 175 *supra*.

\(^{188}\) And for this purpose, the Chief Counsel's office maintains a special division—the Refund Litigation Division. A "Settlement Option Procedure" instituted in 1964 permits the Justice Department to settle many of the less important cases without this referral. See Attorney General, *Annual Report 1964*, 320. By fiscal 1965, this covered 43% of the cases. See Attorney General, *Annual Report 1965*, 307.
phase of the litigation stage the professional effort invested in the earlier or trial phase of that stage. If litigation does take place, the inspector who heads the local office or a senior subordinate who had dealt with the dispute typically continues to handle the case; he represents the government before both the trial and appellate tribunals. Further, ordinarily he alone decides whether to appeal an adverse decision of the trial tribunal. Indeed, should either the state or Federal Finance Ministry or both decide to intervene in the appeal, whether voluntarily or at the invitation of the appellate tribunal, a Ministry-intervenor appears as a separate independent party to the action, using its own representatives and not interfering with the local office's presentation of its case.

If feasible, it is desirable, of course, to minimize duplication of effort by having the same professional appear before both tribunals. It is quite another matter to stress efficiency or a local office's autonomy to a point that precludes National Office involvement and, thus, some duplication of effort regarding the question of whether to appeal a trial determination. Most countries covered here, however, actually experience duplication on both counts, i.e., the representation function does shift to a yet different professional at the point of appeal, and the National Office does involve itself in the question of whether to appeal.

As to the matter of representation, Belgium, for example, instead of having the trial attorney handle any subsequent appeal, employs a regular member of the Court of Cassation's own bar. In the United States, at the point of appeal the representation function shifts from the government's own trial attorney to appellate attorneys who work full time in the Justice Department's Appellate Section.

Much more easily defended is that duplication required of the National Office in trying to control litigation policies actually carried out at lower levels. In the last analysis, formulation of litigation policy is another form of administrative

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189 See Chap. XVI, §§ 4.3 and 4.5 infra. Ordinarily this senior class local official does have legal training. *Ibid.* Also see Chap. XIII, § 1.5 infra.

190 See Chap. XVI, § 4.5 infra.

191 The prime problem here is that some persons who make excellent trial advocates are less able in the appellate setting, and *vice versa.*

192 See Chap. VIII, § 4.5 infra.

193 If the case goes to the Supreme Court, the representation function understandably shifts again to a high official—the Solicitor General.
rule making. Where the latter is accomplished through more typical forms, such as rulings, Chapter II *supra* argued that the tax administration's own central office should assume final responsibility, primarily to achieve uniformity and to assure that the more important policy choices required by the interpretative process actually are made by senior officials having some policy orientation, not by technically oriented personnel who staff the lower echelons. The same rationale applies to litigation policy. Consequently, generally speaking, the central office itself should have at least the opportunity to decide whether or not a given trial determination should be appealed. Britain adheres to this practice, even though its central office otherwise does not carry on a major, published interpretative rule-making program. The Board of Inland Revenue itself decides whether a trial decision will be appealed, but only after its secretariat has consulted with administrative experts in the affected substantive area and, if need be, its Solicitor's Office. Roughly similar practices are followed in Belgium, France, and the Netherlands.

In sharp theoretical contrast, the U.S. tax administration's own central-office officials do not decide the question of whether to appeal. Ultimate authority rests with lawyers in the centralized but wholly separate Justice Department. Any assessment of this arrangement must take into consideration the fact that U.S. appellate courts are courts of general jurisdiction. They must be able to accommodate all types of cases. A department with concerns extending far beyond the tax area is better able to take appropriate account of overcrowded appellate court dockets—if any. Moreover in practice, the Justice Department does try to be sensitive to policy concerns expressed by the office of the tax administration's own Chief Counsel. And the latter's subordinates normally are

194 See §§2.6 and 2.7.
195 See Chap. XVIII *infra* and, for comparative purposes, Chap. II, §2.5 *supra*.
196 See Chap. XX, §4.5 *infra*.
197 See §4.5 in Chaps. VIII, XII, and XXIV *infra*.
198 This is a function of the Solicitor General. See Attorney General, *Annual Report 1965*, 300.
199 Typically, the file which reaches the Justice Department's Tax Division includes a memorandum from the Chief Counsel's office explaining why an adverse lower court decision should be appealed. Before forwarding the file to the Solicitor General for a final decision, a reviewer in the Tax Division's Appellate Section will add a memorandum reflecting
expected to try to preserve the administration's own interpre-
tative policies as reflected in its administrative regulations,
rulings, and other official pronouncements.200

In some of the countries covered here, central-office con-
trol over litigation policy begins not at the point of appeal but
earlier, at the inception of the trial stage. In Belgium, for
example, three centralized administrative branches are re-
sponsible for tax litigation. The appropriate one works closely
with the appointed private practitioner who actually represents
the government before the trial court.201 In France, while
both control and conduct of trial litigation ordinarily are de-
centralized, exceptions as to the former do exist. The regional
Departmental Director whose office prepares the memorandum
of law to be filed with the trial tribunal is expected, prior to
the preparation thereof, to consult with the Director General
of Direct Taxes at the national office in any one of four cir-
cumstances. And these circumstances include the situation
where an issue is not covered either by case law or adminis-
trative instructions.202

The United States, which likewise decentralizes the actual
representation function in trial litigation before the Tax Court,
goes beyond France in centralizing policy control at the incep-
tion of that stage. To this end, the administration's Chief
Counsel maintains a mechanized two-way reporting system
(Reports and Information Retrieval Activity) between his central
office and his 40 field offices which handle those cases eventu-
ally to be tried before the circuit-riding Tax Court. This
system, known as RIRA, provides his central office with an
indexed inventory of issues involved in all pending Tax Court
litigation complemented by an abstract of the facts in each
case. RIRA performs two functions vital to central office con-
tral of litigation policy, and a third purpose important to effi-
cient exercise of such control.203

(footnote continued)

his own views. While officials in the Tax Division are expected to make
an "independent review" of the litigation possibilities, they also are
expected by the head of that Division to be as "fully responsive as possi-
able to the policy direction of the Internal Revenue Service." See Attorney
200 See Cohen, "Current Developments in the Chief Counsel's Office,"
42 Taxes 663 (1964).
201 See Chap. VIII, § 4.3 infra.
202 See Chap. XII, § 4.3 infra.
203 See note 200 supra, and Link, "RIRA—A Legal Information System
in the Internal Revenue Service," 43 Taxes 231 (1965).
The first two functions coincide with those of the above mentioned but less sweeping reporting requirements imposed by the French administration. RIRA enables the central office to assure that geographically spread trial counsel take consistent positions across the nation. Further, it assures that any position thus taken is sound from a policy standpoint.

Assurance that policywise-sound positions will be adopted even at this early trial stage has long-run significance not always recognized. The at least defensible technical position which technically oriented local offices can develop as to a disputable issue may in fact be indefensible in terms of tax policy. To urge such a position even at the trial stage can have unfortunate long-range consequences. A given trial judge may adopt that position and the taxpayer then may lodge an appeal. If it is not until this stage that the central office becomes involved, the likelihood is reduced that it will give the full policy implications of that technical position their just due. This is understandable. Once a trial court "has approved the Government's position in a case, the reconsideration of that position at the national office level is complicated by a natural reluctance to repudiate a view successfully urged upon a court." 204 Not irrelevant is the risk of affecting the future attitude of the trial bench toward the government's local trial representatives. Confidence the trial bench otherwise might have in future arguments advanced by those representatives may be shaken should a central office, making its first appraisal of a question at the belated point of appeal, confess error before the appellate court regarding a position the local trial representative had urged successfully upon that trial bench. Trial judges are human. Both the foregoing risks as they relate to U.S. Tax Court cases are avoided, in large part because RIRA permits the central office to trigger its policy consideration of a case prior to the trial. Further, to this same end, all briefs prepared by field offices are reviewed in the Chief Counsel's central office before submission to the Tax Court. And subordinates conducting that review are instructed, as before noted, to maintain positions consistent with the regulations, rulings, and other official pronouncements previously approved by the Service's senior administrative officials. 205

204 Attorney General, Annual Report 1965, 301. Italics added.
205 See note 200 supra.
RIRA, by enabling the central office to identify at an early point important or frequently recurring issues, also contributes to efficient and effective implementation of litigation policy. From the cases raising such an issue, the central office can select the test case best suited to clarify the law. The others can be settled or "put on ice" until the test case has been resolved.

Central office control over trial litigation pending in the wide-flung U.S. district courts and in the Court of Claims is accomplished through a yet different system. Almost all lawyers who represent the government in these cases are based at the office of the Justice Department in Washington. To accommodate the geographically dispersed trials, they ride circuit. Thus it is easy for the Justice Department to raise— with the administration's Chief Counsel—questions pertaining to the desirability or undesirability of maintaining a given position. In theory, however, the former—rather than the tax administration or its Chief Counsel—makes the ultimate decision.

206 Ibid. RIRA also contributes in a yet different way to the efficiency of decentralized trial counsel. The latter are fed information regarding the status of similar cases pending in other offices. Thus, should a given local office find that a similar case, pending elsewhere, has reached a more advanced stage, it can minimize duplication of effort by soliciting the relevant memoranda, briefs, etc.

207 Of the 202 attorneys in the Justice Department's Tax Division at the close of fiscal 1966, only 6 were based elsewhere in a field office subject to central control. See Attorney General, Annual Report 1966, 367.

208 One who headed this activity for the Justice Department described the actual practice as follows: "Separation of responsibility has proved successful because it affords an opportunity for a fresh, intensive, and intelligent reexamination of the Government's position in each tax controversy at the point in time when that controversy emerges from the administrative level into full public view in Federal court. The Internal Revenue Service has a responsibility to examine tax returns with a view to developing arguments which maximize the Government's revenue in the specific cases at hand along with its responsibility to establish rules and policy without regard to their dollar impact in a particular case. While the Internal Revenue Service leadership has made great strides toward encouraging a balanced even-handed judgment by its agents, the administration of justice and the tax laws are well served by the independent review and direction given by the Tax Division to the tax cases going into Federal courts. The Tax Division of the Department of Justice is not free to direct revenue policy. But, when its examination convinces it that it would be a mistake to argue the position advanced by Internal Revenue, the matter is taken up with the Chief Counsel and through a process of conference and persuasion, a mutually acceptable position is
A final problem confronting an administration relates to adverse trial determinations not appealed. Any number of reasons, in a given case, might cause an administration to decide against appeal. If formulation of litigation policy as to a given issue is another form of administrative rule making, for the reasons earlier set forth with respect to rulings themselves, the government should state openly, at least as to the more important unappealed trial decisions that are published, whether it will conform to such published decisions. A similar statement of intent should be made, where a country utilizes an intermediate layer of appellate courts, with respect to their adverse decisions if published and allowed to become final without further appeal. In both instances, by publishing such statements, the central office (i) can contribute to uniformity—efficiently and fairly, (ii) can assure that administrative reactions to such decisions are fixed by senior policy-oriented officials rather than by technically-oriented local officials, and (iii) can neutralize risks regarding prospective transactions. Accomplishment of these goals, however, requires two complementary practices.

The first such practice relates to the special care that must be taken to guard against the possibility that the administration's published reaction will be misleading. This presents a problem quite distinct from that encountered in publishing an ordinary ruling. In the latter circumstance, the administration itself can and should identify the facts it deems pivotal and supply its own rationale. In short, by these means an administration controls the dimensions of the ruling. In the case of an adverse trial court decision, however, the administration may be willing to accept the result but not the totality of the court's rationale. Or a fact the administration deemed

(footnote continued)
sought. From its independent vantage point the Division is able to persuade Internal Revenue that, viewed from the standpoint of litigation, certain positions should not be pursued in court.

"If this prior examination were not carried out, the resulting responsibility placed on the Federal courts, of making an extensive investigation into the long-range implications of each Government position urged before them, would be too great. If the courts can be satisfied that only carefully considered positions are presented in court, they will have greater confidence in the Government’s presentation." Attorney General, Annual Report 1965, 300.

essential in accepting the result may not have been explicitly treated as such by the tribunal. In consequence, published administrative reactions to some adverse trial determinations either must state that the acquiescences or non-acquiescences relate only to the results themselves or must become what are at least abbreviated versions of complete published rulings.

The second practice relates to reliability. The announcement of administrative intent will not achieve all three of the previously enumerated purposes unless it is as reliable as published rulings should be. Absent this, it cannot be depended upon to neutralize risks regarding prospective transactions. However, if an administration is to assign to these announcements the high degree of reliability it should attach to ordinary published rulings, the two should be processed approximately in the same manner.

Among the six countries covered here, only the United States carries on an official publication program providing administrative reactions to adverse but unappealed trial decisions, though in the Netherlands something roughly equivalent to an unofficial program does exist.

As to the United States, in the case of unappealed adverse Tax Court decisions published by the court itself, the administration typically publishes in its own weekly bulletin a bare acquiescence or non-acquiescence, often with a footnote stating that the announcement relates only to the result reached. However, while these acquiescences and non-acquiescences are intended to serve the first two of the three previously enumerated vital purposes, the administration

211 See Chap. II, §§ 2.3, 2.4, 2.8, and 2.17 supra.
212 Id. §§ 2.12 and 2.17.
213 See Chap. XXIV, § 4.3 infra.
214 For example, see C.B. 1967-1, 1. The Administration does not publish its reactions to the court's so-called memorandum decisions. This may be due to the fact that these decisions are not published by the court itself, but by private publishing houses, and until recently the Tax Court itself never cited its own prior memorandum decisions as precedents.
215 For example, see id., at 3 n. 7.
216 However, even those previously enumerated and vital purposes actually were not the original reasons why this program was instituted. Because of the long period the government once had (one year) in which to decide whether to appeal an adverse trial decision by what now is the Tax Court, an acquiescence was issued as a means of informing the taxpayer as to whether the government intended to appeal. See Rogovin, "The Four R's: Regulations, Rulings, Reliance and Retroactivity," 43
presently is unwilling to assign to them the high degree of reliability it accords regular published rulings. As to a given decision, the administration not only reserves the right to change its published reaction by substituting, for example, a belated non-acquiescence for a previously published acquiescence.\textsuperscript{217} It ordinarily actually does so, in contrast to the practice followed as to published rulings, without exercising the discretion it also has\textsuperscript{218} to give the change prospective effect only.\textsuperscript{219} In consequence, in contrast to an ordinary published ruling, an acquiescence in itself cannot be relied upon to neutralize the tax risk associated with an important prospective transaction.\textsuperscript{220} The bare quality of these announcements, and the fact they are not processed in the same painstaking manner as published rulings, are at the root of the difficulty. And, as observed by a former Chief Counsel while still in office, to do that which is necessary to upgrade the degree of reliability would require such substantial manpower that, as a practical matter, only the more important adverse Tax Court decisions could be so processed.\textsuperscript{221}

Indeed, the tax administration has not even extended the present program in any comprehensive way to the other two trial forums (district courts and Court of Claims). However, on an ever-increasing scale it is tending to publish its reaction to adverse intermediate appellate court decisions (including Court of Claims decisions), using for this purpose

\textsuperscript{(footnote continued)}

\textit{Taxes} 756, 771 (1965). However, the government's allowable "cogitation" period was reduced many years ago to three months. Rev. Act. of 1932, 1101. Since then, it generally has been recognized that the program was maintained to serve the first two of the previously enumerated purposes. See Rogovin, \textit{supra}, at 772 and 773.


\textsuperscript{218}Under I.R.C. §7805(b).

\textsuperscript{219}See Rogovin, \textit{op. cit. supra} note 216, at 772 and 773. It applied the change retroactively in one case though eleven years elapsed before the previously published acquiescence was withdrawn and a non-acquiescence substituted. See Acq. to Caulkins v. Commissioner in C.B. 1944, 5 and the subsequent non-Acq. in C.B. 1955-1, 7. In another case involving an interim of twenty years, the change was given prospective effect only. However, this was characterized by the then Chief Counsel as an "unusual circumstance" because the substantive issue was of widespread importance and, during the interval, the Service had issued a number of private rulings relying on the earlier acquiescence. See Rogovin, \textit{supra}, at 773.

\textsuperscript{220}See Rogovin, \textit{op. cit. supra} note 216, at 773.

\textsuperscript{221}\textit{Ibid}. 
Technical Information Releases (so-called TIR's) which typically do resemble exceedingly abbreviated published rulings. It even follows this practice for a very few district court cases.

4.9 Practices peculiarly important to taxpayers

Taxpayers in irreconcilable conflict with a tax administration also have peculiar concerns extending beyond the independent tribunals' structural arrangements. These pertain primarily to practices affecting the convenience of litigating a dispute.

Insofar as affected by geography, the convenience of taxpayer access to a trial tribunal was discussed earlier in connection with structural arrangements. Relevant also, however, to convenient access are other practices relating to (i) the point in time when the disputed amount must be paid and (ii) the matter of representation.

If it were true that a "king can do no wrong,"\(^\text{222}\) i.e., if the sovereign never forced to litigation issues other than those it was sure to win, there would be scant reason to object if payment of the amount in actual dispute were required before according access to a trial tribunal. Governments, however, like private citizens, often are adjudged wrong by trial tribunals. For example, of those U.S. Tax Court decisions which, in fiscal 1966, became final because not appealed, taxpayers were held to be wholly right in 18 percent and partially right in another 34 percent, for a total of 52 percent.\(^\text{223}\) In similar circumstances involving suits between private parties, no government would dare have the temerity to enact a law which presumed an alleged debt was owing and which required payment before a trial court had spoken. Is it not then unbecoming for that same government to establish a different norm for cases where it is a party, solely for its benefit? There is, moreover, a second consideration: requirement of such prior payment can seriously inconvenience many taxpayers. Do not these reasons suggest that no prior payment should be required? Until an independent tribunal has spoken, it is enough that—as in the case of private litigation—(i) interest continue to run against the taxpayer should he lose and


\(^{223}\) This meant the government was wholly right in 48% and partially right in 34%, for a total of 82%. See Commissioner of Internal Revenue, op. cit. supra note 46, at 44.
(ii) remedies be available to safeguard the government's chance to collect if there is reason to believe it otherwise would be in jeopardy.

The Belgians apparently think this is not enough. As a matter of law at least, there the duty to pay is not suspended pending resolution of the controversy by a trial tribunal.\textsuperscript{224} The exact contrary is true in Britain: there payment is postponed when a dispute is carried to either the General or Special Commissioners.\textsuperscript{225}

The United States, as to substantive income tax disputes, has never decided which of the two competing practices is correct. Though it is entitled to interest on unpaid amounts owing\textsuperscript{226} and does possess remedies to safeguard its chance to collect,\textsuperscript{227} it follows the Belgian practice (prior payment) if the taxpayer prefers to litigate before either the appropriate district court or the Court of Claims. But it is content with the British practice (postponement) if a taxpayer tries his suit before the U.S. Tax Court.\textsuperscript{228} Germany\textsuperscript{229} and France,\textsuperscript{230} while less equivocal, adopted a yet different practice which falls between the Belgian and British usages. In Germany, for example, the local finance office itself generally has discretion in the matter. However, postponement must be authorized in either of two circumstances, both of which can be tested by summary judicial review even before an action on the substantive issue is filed. The two circumstances involve cases where either genuine doubt exists regarding the merits of the government's position or prior payment would have an unnecessarily harsh effect on the taxpayer.

Representation requirements also can affect adversely the convenience of taxpayer-access to a trial forum. In small

\begin{itemize}
\item \textsuperscript{224}See Chap. VII, §3.4 and Chap. VIII, §4.3 infra.
\item \textsuperscript{225}See Chap. XX, §§4.3a and 4.3b infra.
\item \textsuperscript{226}See I.R.C. §6601.
\item \textsuperscript{227}Perhaps the most important is the jeopardy assessment. See I.R.C. §6861 et seq.
\item \textsuperscript{228}This is because by statute—absent a jeopardy assessment—the disputed amount cannot be assessed until the government serves notice of the taxpayer's right to appeal to the Tax Court and, assuming a timely appeal, until the decision of that court becomes final. I.R.C. §6213. However, should the taxpayer appeal the Tax Court's decision, payment will not be further postponed unless the taxpayer files an appropriate bond. I.R.C. §7485. The Tax Court is an available forum, however, only as to income, estate, and gift taxes.
\item \textsuperscript{229}See Chap. XVI, §4.3 infra.
\item \textsuperscript{230}See Chap. XI, §3.4b, and Chap. XII, §4.1 infra.
\end{itemize}
cases particularly, it actually may be against taxpayer economic self-interest to employ the particular type of representative required or, for that matter, any representative at all. However, given the adversary system, every such taxpayer has a conflicting concern, namely, that his case be presented effectively. Trial tribunals themselves have a stake in that concern. First, in the interest of their own efficiency, they would prefer not to waste any time on cases obviously and completely devoid of merit, but instituted because completely unknowledgeable taxpayers sought to represent themselves. Second, it is difficult for a tribunal to wear two hats, to try to serve as an advocate for the taxpayer and be also an objective judge.

In resolving these conflicting concerns, all six of the countries covered here permit a taxpayer to represent himself. However, in Germany, should the trial tribunal conclude that a given taxpayer is incapable of this, a new law permits the court to require him to secure counsel though, as later observed, not necessarily a lawyer. In France, the difficulties which so-called pro-se cases pose for the tribunal are mitigated by a yet different practice, actually applicable to all cases. A subordinate of the tribunal itself is required to submit to it his own objective analysis of a case. This analysis is in addition to and independent of those submitted by the two competing parties. In the United States, it has been proposed that a small claims division, with simplified procedures, be added to the Tax Court. In effect, an independent Commissioner would serve as judge, and often also as the advocate for taxpayers subjected to small (less than $2,500) proposed deficiencies.

Closely related to the foregoing problem is the question of whether taxpayers who do desire representation should be barred from employing non-lawyers. In the case of general (non-tax) legal matters, tradition, society's interest, and affected tribunals are served where a country maintains, for the benefit of those who seek representation or mere legal advice,

231 See §4.3, Chaps. VIII, XII, XVI, XX, and XXIV; and 28 U.S.C. § 1654.

232 See Chap. XVI, §4.3 infra.

233 See Chap. XII, §4.3 infra. Belgium, in "public interest" cases, follows a similar practice though the role is performed by a member of the Attorney General's staff. See Chap. VIII, §4.2 infra.

a class of professionals (lawyers) whose prescribed training tends to assure a minimum level of competence. In a given country, however, circumstances may deprive the legal profession of any justifiable claim to a monopoly over certain matters that otherwise might be deemed to involve lawyer-like activity. For example, even in several of the highly developed European countries covered here, law schools have almost entirely ignored fiscal law. In consequence, given the complexity of the subject, lawyers as a class did not have the preparation necessary to pre-empt the advisory role in tax affairs. As legally trained individuals were unable to meet an obvious societal need, the resulting partial vacuum was filled by graduates of other disciplines (accountants or economists), by persons formerly employed and trained by the tax administration, or by self-educated and self-styled "experts."235 These persons not only prepared returns but, as disputes arose, also represented taxpayers in their dealings with the tax administration itself.

All the European countries covered here except France responded to this extensive use of non-law trained counsel by permitting non-lawyers who work in this field to represent taxpayers fully before their respective trial tribunals. And France imposes only one limitation.236 No doubt factors contributing to their decision included taxpayer convenience and the supposition that subject-matter knowledge—not just the skill qua skill of an advocate—counted for something.

According these considerations special weight and effect in the tax setting doubtless was facilitated in Germany, the Netherlands, and Great Britain by one further fact. Since these countries utilize separate specialized tribunals or chambers for the trial of tax cases, it was possible, without disrupting normal judicial procedures elsewhere, to develop informal procedures for these cases. The decidedly informal petitions and procedures utilized in Germany and the Netherlands237 make it possible to carry on a conflict resolution process though German and Dutch lawyers rarely appear at this level.238 It also is very unusual for a British barrister to appear before England's General Commissioners. Taxpayers represented there typically employ accountants or solicitors; and the government itself is represented by a non-legally

235 See §§ 1.5 and 1.6 in Chap. V, IX, XIII, XVII, and XXI infra.
236 See text accompanying note 242 infra.
237 See § 4.3 in Chaps. XVI and XXIV infra.
238 Ibid. Also see § 1.6, Chaps. XIV and XXI infra.
trained inspector.\textsuperscript{239} Not surprisingly, the procedures followed there are not as formal as those adhered to by the Special Commissioners before whom typically only solicitors and barristers appear for taxpayers, with the government usually being represented by its Solicitor's Office.\textsuperscript{240} Comparably in Belgium, though non-lawyers are permitted in tax cases to perform the same function as lawyers, the fairly formal procedures followed taken in conjunction with the fact that the government itself is represented by a regular practicing member of the bar probably help explain why a lawyer customarily serves as the taxpayer's representative.\textsuperscript{241}

France, the only European country of the five to subject taxpayers to a formal detriment should they employ non-lawyers at the trial stage, does permit such a representative to prepare petition, brief, or any other essential document. The only restriction: he may not participate in oral argument before the tribunal.\textsuperscript{242} In actuality, however, French taxpayers most frequently are represented by persons who do hold a law degree and who, earlier in their careers, served as government inspectors. And their adversaries are of like quality, i.e., come from the legally trained inspectors presently employed by the government.\textsuperscript{243}

Practice at the trial level in the United States differs from every one of the foregoing usages, though it most nearly approximates that of Belgium. Prior to World War II, U.S. law schools—like so many of their present European counterparts—tended to ignore tax law. In consequence, at an early point in time accountants began to perform a substantial advisory role in tax affairs, prepared returns, and—as disputes arose—represented taxpayers in dealing with administrative officials. Even in that period, however, the heavy turnover suffered by the tax administration's legal staffs supplied the bar with a significant number of practitioners trained in tax matters. Since the war, this continuing reservoir has been complemented by graduates of law schools, practically all of which have instituted substantial course programs in taxation. In consequence of these two facts, though the bar never has monopolized either the giving of tax advice or taxpayer

\textsuperscript{239} See Chap. XX, § 4.3a infra.
\textsuperscript{240} Id., § 4.3b. Also see Chap. XVII, § 1.6 infra.
\textsuperscript{241} See Chap. VIII, § 4.3 infra. Also see Chap. VI, § 1.6 infra.
\textsuperscript{242} See Chap. XII, § 4.3 infra. Also see Chap. IX, § 1.6 infra.
\textsuperscript{243} Ibid.
representation at the administrative level, it has been able to maintain in fact, if not in law, a virtual monopoly in representing taxpayers before trial tribunals. Indeed, before two of the three alternative trial forums (district courts and Court of Claims), lawyers alone may appear in a representative capacity, and each tribunal follows the formal procedural rules it otherwise applies to non-tax cases. Only before the Tax Court are non-lawyers permitted to appear in a representative capacity. While its procedures, in practice, are not quite as well calculated as those of a district court to assist the parties in refining the issues and discovering evidence, these same procedures mirror those of a judicial proceeding, not those of informal administrative hearing. Partly in consequence of this, appearance even there of a non-legally trained representative rarely occurs. Even taxpayers who were represented by large accounting firms during the administrative phase of the conflict resolution process typically employ a lawyer when moving into the litigation stage. In fact, were it otherwise, the accounting firms themselves would become entangled in the forum selection process and in what then becomes tantamount to a conflict of interest. Only a lawyer lacks self-interest when advising a taxpayer as to which of the three alternative trial forums would be most appropriate for his case.

At the appellate level, both Britain and the United States utilize courts of general jurisdiction to hear tax cases. While Belgium utilizes a semi-specialized chamber in its Court of Cassation, there, as in the United States, even those taxpayers who employ counsel at the trial level almost always hire attorneys. Hence, it is not surprising that all three countries permit only lawyers to serve in a representative capacity at the appellate level. France and the Netherlands, on the other hand, permit others to fulfill this

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244 Federal Rules of Civil Procedure, Rule 11; Court of Claims Rules, Rule 2.
245 For a comparison of their respective rules, see Ferguson, op. cit. supra note 26, at 339 and 348, and § 4.10 infra.
246 Tax Court Rule 2.
247 See Ferguson, op. cit. supra note 26, at 356, and § 4.10 infra.
248 Only a lawyer may act in a representative capacity before all three alternative forums.
249 See § 4.5 supra and Chap. XX, § 4.4 infra.
250 See § 4.5 supra and Chap. VIII, § 4.4 infra.
251 See § 4.5 in Chaps. VIII and XX infra.
function—subject to the limitation that they may not make an oral argument.\textsuperscript{252} Germany does not even impose this restriction.\textsuperscript{253}

4.10 \textit{Practices of common concern}

Of the three parties associated with tax litigation at the trial level (taxpayer, administration, and tribunal), at least two have a common stake in three different goals. Each party shares an interest in fostering practices which efficiently and \textit{in a timely manner} strip down the issues to the absolute essentials. Then, as to any issues remaining in dispute, practices which assure one party of the opportunity to obtain evidence under the control of the other become equally important, most often to the government but sometimes to the taxpayer. Finally, all three would appear to be benefited, should bilateral agreement then become possible, by permitting the two contesting parties themselves to terminate the proceedings. On balance, however, a practice of entering into agreements at this belated stage may be against the long-range procedural interests of the administration and of the tribunal, and of net benefit only to the particular taxpayer.

Timely refinement of issues is calculated to avoid both waste and surprise. The central need is to complete the process well before either party is "up against the gun." Most illustrative is the situation where a tribunal schedules oral hearings quite far in advance with consideration of evidence limited to that introduced at the hearing itself. Only if the issues are refined well before that hearing can the parties avoid the burdensome waste of collecting evidence affecting matters not actually in dispute, and prepare adequately to deal with all issues that actually will be put in conflict.

In France,\textsuperscript{254} the need for advance warning is less serious than in most of the other countries. In the adversary sense, oral hearings in France, as in Belgium,\textsuperscript{255} are of less significance.\textsuperscript{256} Further, typically the evidence is in \textit{before} the parties are put "up against the gun." Before the hearing is

\begin{itemize}
\item \textsuperscript{252}See § 4.5 in Chaps. XII and XXIV \textit{infra}.
\item \textsuperscript{253}See Chap. XVI, § 4.5 n. 25 \textit{infra}.
\item \textsuperscript{254}See Chap. XII, § 4.3 \textit{infra}. Some parallel between French practice and that of the U.S. Court of Claims is noted in Ferguson, \textit{op. cit. supra} note 26, at 348.
\item \textsuperscript{255}See Chap. VIII, § 4.3 \textit{supra}.
\item \textsuperscript{256}Cf. § 4.3 in Chaps. XVI, XX, and XXIV \textit{supra}.
\end{itemize}
scheduled but after the petition and answer have been filed, the parties continue to sharpen the issues and arguments and to introduce evidence, by exchanging repeatedly through the tribunal further memoranda and supporting documents. They continue this process until one party fails to reply in a timely manner to the last memorandum submitted by the other.257

The hearing which then follows consists of little more than oral argument. Ordinary witnesses do not appear.258 And should the tribunal itself inquire into a matter which leads a party to invoke a yet new ground, it must allow the other party time to prepare a responsive written memorandum and supporting documents.

The extent of responsibility a tribunal itself assumes necessarily affects all three of the previously mentioned common concerns. This is best illustrated by the contrasting experiences in Germany and the United States, two countries which do permit oral hearings with witnesses, etc.

The German fiscal courts reserve a more dominant role for themselves than do their U.S. counterparts.259 Neither contestant bears the burden of proof. The fiscal court itself has the ultimate responsibility to unearth the truth and to decide the case in accordance with law. In consequence, the court does not accept formal agreed stipulations of fact. Further, if either party files a statement lacking sufficient specificity, the court—to satisfy its own need—may require submission of another, addressed more precisely to the issues in controversy. To that same end, it may require a party to submit evidence in response to matters introduced by the other. Finally, because it is the court's responsibility to decide the case in accordance with law, the parties themselves cannot terminate the proceedings on reaching a bilateral agreement. Only if the court deems the latter to accord with the tax law, will it be approved and the proceedings terminated. Thus, even if the parties were so-minded, the proceedings would not be dismissed should such an agreement attempt to

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257 If these exchanges are continued unnecessarily, the tribunal can terminate this stage. See note 26 supra.

258 While the parties may agree upon a nonpartisan "expert" witness to determine a question of fact, or have the tribunal appoint such a person as head of a three-man panel, findings of fact by the expert also are submitted in writing. See note 26 supra.

259 See Chap. XVI, § 4.3 infra.
split an issue which the tribunal itself necessarily would have had to decide entirely for one side or the other. 260

A trial in the United States, on the other hand, tends to be more adversary in character, as distinguished from the inquisitorial type of proceeding.

In litigation before the Tax Court, for example, one of the parties always has the burden of proof. Generally, it is the taxpayer. 261 At the least he bears the burden of proving that the deficiency asserted by the Commissioner was "arbitrary and excessive." 262 This, taken in conjunction with two facts, that the date of the session at which the trial will take place typically is set three months in advance 263 and that the court frowns on continuances, 264 emphasizes his need to have the issues sharpened well in advance.

Ideally, he should have been informed of the administration's precise position before he filed his petition. The final notice he received from the administration, 265 rejecting his contention as to a disputed item, should have indicated the specific ground for so doing. This is not always possible, however, and is not a requirement. One recurring reason why the administration cannot be specific at that point is attributable to the taxpayer himself, and grows out of the fact he need not exhaust his administrative remedies before filing a petition with the Tax Court. A taxpayer, who does not invoke the last administrative appeal (regional Appellate Division) available before a petition must be filed, in effect forces the administration to issue the notice before its most trusted field officials have had a reasonable chance to work out the specific grounds upon which it ultimately would want to rely. That these officials are bypassed at this point in approximately

260 That the German tax administration itself would not be so-minded, see Chap. XV, § 3.4a infra.

261 With respect to matters belatedly raised (see text accompanying note 268 infra) and the issues of fraud and transferee liability, the government bears the burden. I.R.C. §§ 7454 and 6902(a).

262 Helvering v. Taylor, 293 U.S. 507, 513 (1934). However, once the taxpayer satisfies this burden, the Commissioner has the burden of establishing the correct but lesser deficiency owing. Ibid. It is otherwise in the case of a deduction. Mahler v. Commissioner, 119 F.2d 869 (2d Cir. 1941), cert. den. 314 U.S. 660 (1941).

263 Tax Court Rule 27(c).

264 Tax Court Rule 27(d).

265 This is a statutorily required notice of deficiency. I.R.C. §§ 6212 and 6213.
two-thirds of all cases petitioned to the Tax Court\textsuperscript{266} indicates the dimensions of the government's difficulty. Be that as it may, the final administrative notice is legally sufficient if it indicates the amount of the asserted deficiency and the years involved.\textsuperscript{267} Indeed, there is a complementary principle which tends to deter specificity: should the notice set forth a specific ground, later adoption—in the government's answer to the taxpayer's petition—of a yet different inconsistent ground will shift the burden of proof as to that ground from the taxpayer to the administration.\textsuperscript{268}

While the petition the taxpayer subsequently files must contain "Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner," and "Clear and concise . . . statements of the facts upon which the petitioner relies as sustaining the assignments of error,"\textsuperscript{269} it includes neither evidence nor legal arguments. Once filed, the petition of course can be amended.\textsuperscript{270}

\textsuperscript{266} Commissioner of Internal Revenue, \textit{op. cit. supra} note 46, at 134 (Table 17A). The problem of reviewing statutory notices which then must be issued by lower echelons (District Director) is further complicated by the fact that approximately 200,000 taxpayers annually receive such final administrative notices only because they defaulted on all mail received from the tax administration.


\textsuperscript{269} Tax Court Rule 7.

\textsuperscript{270} Tax Court Rule 17. Indeed, should the taxpayer, at the subsequent hearing, introduce testimony bearing on an ultimate fact not pleaded, he can make a motion to be permitted to conform the pleadings to the proof (Tax Court Rule 17(d)), in which case, to avoid surprise, the government can request an extension of time within which to reply. Tax Court Rule 20. But in contrast to practice before the district courts, should the taxpayer introduce such testimony without amending his pleading, thereby creating the possibility of misleading the government, that testimony will not be considered by the court. Factor v. Commissioner, 17 TCM 459 (1958), \textit{aff'd} 281 F.2d 100 (9th Cir. 1960), \textit{cert. den.} 364 U.S. 933 (1961).
Again to avoid surprise, the government's answer to the petition must indicate "fully . . . the nature of the defense." Further, it must contain a "specific admission or denial of each material allegation of fact . . . and a statement of any facts upon which the Commissioner relies for defense . . . ."\(^\text{271}\) Finally, if the government desires to raise a new issue not covered by the previously mentioned final administrative notice, the facts pertaining thereto must be stated.\(^\text{272}\) As to these, as before noted, it assumes the burden of proof.

Either party can test the degree of factual specificity actually necessary for either the petition or the answer by a motion that the other party be required to file "a further and better statement of the nature of his claim, of his defense, or of any matter stated in any pleading."\(^\text{273}\) No doubt the court's attitude toward such a motion in any given case is and should be affected by two considerations: (i) the extent to which the non-moving party could be expected at this early point to know the facts in more specific detail, and (ii) the fact that, by the time the case is ready for trial, the court "expects," in contrast to German practice, that the parties will have stipulated formally "evidence to the fullest extent to which complete or qualified agreement can be reached including all material facts that are not or fairly should not be in dispute."\(^\text{274}\) To this latter end, the court expects the parties to commence to discuss stipulation possibilities not later than that point when they receive the typical three months' advance notice setting the date when the trial session will begin.\(^\text{275}\) Until recently, however, this expectation was toothless. Not until the trial began was it necessary for a non-moving party to answer a motion to show cause why he should not stipulate facts and evidence contained in the moving party's proposed stipulation.\(^\text{276}\)

\(^{271}\) Tax Court Rule 14.  
\(^{272}\) Ibid. Thus if a new ground is asserted for the first time in the legal brief which the government files after the hearing is over, it will not be considered by the court. Welsner v. Commissioner, 20 TCM 1150 (1961). Cf. Commissioner v. Licavoli, 252 F.2d 268 (6th Cir. 1958). But cf. Luke v. Commissioner, 23 TCM 1022 (1964) where surprise was not involved.  
\(^{273}\) Tax Court Rule 17(c).  
\(^{274}\) Tax Court Rule 31(b)(1). Italics added. See Commissioner v. Licavoli, note 272 supra.  
\(^{275}\) Tax Court Rule 37(b)(2).  
By amending its rules in two respects, however, the Tax Court put teeth into its expectation. The non-moving party now must answer the show-cause order not later than ten days before the session begins. 277 More importantly, the Tax Court has instituted a pretorial conference procedure 278 somewhat similar to that district courts have long followed. 279 Upon request of either side, a judge will sit with the parties to facilitate the process of "narrowing issues, stipulating facts, simplifying the presentation of evidence, or otherwise assisting in the preparation for trial or possible disposition of the case in whole or in part without trial." 280

With respect to one matter, however, the Tax Court has not caught up with the district courts. The latters' procedures are considerably more helpful in discovering evidence, i.e., in assisting a given party, in advance of the trial, to obtain evidence which is under the control of the other party. District court and the Tax Court procedures alike enable a party to take pretorial depositions alone or on written interrogatories. 281 District court procedures also enable a party before trial to request admissions or inspection of documents controlled by the other party. 282

Because it is the taxpayer who usually controls most evidence pertaining to his case, comprehensive discovery procedures are of greatest benefit to the government. That it can be served in two respects, not just one, is best illustrated by the effect of a change made in the way the Justice Department deals with tax cases pending in district courts. Until 1961, when a taxpayer filed his complaint in court, the department tended "to await further moves by the plaintiff." 283 Since 1961, however, it has taken the offensive. Well before trial, it has used the comprehensive discovery procedures available in district courts not only to unearth the truth in

277 Ibid. Tax Court Rule 31(b)(5). Even so, because Tax Court judges ride circuit and do not arrive in a city until the day before a session is to commence, it is still inconvenient to obtain a hearing on the show-cause order until the first day of the session.
278 Tax Court Rule 28. See Epstein, op. cit. supra note 276
280 Id., note 278 supra.
preparing for trial should such ensue but also to stimulate more and better settlement offers from taxpayer-adversaries who began to realize that discovered evidence increased their hazards of litigation.

This raises the question of whether the government, at this belated stage, should encourage bilateral settlements. That the United States does just this is apparent from the fact that the bulk of all docketed district court and Tax Court cases are settled before trial—as in the Netherlands and in sharp contrast to France where few cases are settled after docketing. Also, there is no doubt but that the effect in the United States benefits immediately both contestants. Avoidance of a given trial there, as would be true elsewhere, conserves the contestants' time and reduces their costs. Further, in contrast to the situation in France, Britain and the Netherlands, where even trials in tax cases are not open to the public, only if a bilateral agreement is reached can the U.S. taxpayer avoid exposing his financial affairs to public view. Finally and of imperative importance, the U.S. Tax Court itself is freed of a caseload it could not possibly decide on the merits. In fiscal 1966, of the 6,234 docketed cases closed out, it was able to decide on the merits only 726. Practically all the rest were settled. This fact—that the Tax Court otherwise could not accommodate the case load—is the precise reason why the U.S. tax administration now actually has no choice but to encourage bilateral settlements even at this belated stage. The same reason explains why the Tax Court, in contrast to the German courts, has no choice but to accept each such settlement whether or not it is in strict accordance with the tax law itself. However, given the propriety of

285 See note 175 supra, and Chap. III, §§ 3.1 and 3.4 supra.
286 See Chap. XXIV, § 4.3 infra.
287 See Chap. XII, § 4.3 infra.
288 See Chap. XII, § 4.3 infra.
289 See Chap. XX, § 4.3a infra.
290 See Chap. XXIV, § 4.3 infra.
291 Commissioner of Internal Revenue, op. cit. supra note 46. At year's end, 10,024 cases were still pending and, of course, most of these will be settled by agreement.
292 For all practical purposes, the settlements reached at this stage, including those which split a single issue, conform to the same policies as those which are reached during the earlier administrative stage. See Chap. III, § 3.4 supra.
the aggressive settlement policy the U.S. tax administration pursues during the earlier administrative phase, the pivotal question facing a country just now evolving its procedures is this: Over the long haul, would the U.S. tax system have worked more smoothly had its administrators—on first formulating its procedures years ago—treated the inception of the litigation stage as a cut-off point, after which cases would not be settled bilaterally?

As things now stand, the United States has neutralized the otherwise existing taxpayer incentive to make an all out attempt to settle a case before docketing it with a court.

Partly in consequence of this, only after a case has been docketed do many U.S. taxpayer-representatives (4,489 in fiscal 1966)\(^{293}\) make their first attempt at settlement. While certain advantages in so doing are peculiar to the United States,\(^{294}\) an additional advantage would be equally operative elsewhere. By delaying discussions until just before the trial date,\(^{295}\) the taxpayer’s representative can prepare simultaneously for settlement discussions and the trial—should one actually ensue.

For a variety of reasons, a second group of taxpayer-representatives will make two tries at settlement, one before a case is docketed and, if unsuccessful, one afterward.\(^{296}\) But

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\(^{293}\) Commissioner of Internal Revenue, op. cit. supra note 46, at 134 (Table 17A). Some actually had no other choice, for the District Director had issued a final statutory notice before giving the taxpayer a chance to enter settlement discussions at the regional level. This circumstance may arise, for example, where the statute of limitations was about to run on the proposed deficiency.

\(^{294}\) Most such advantages are discussed in Chap. III, § 3.3 supra. Further, since the requisite statutory notice of deficiency will have been issued prior to settlement discussions, these taxpayers—should a trial actually ensue—are freed of the burden of proof regarding any new affirmative issues raised by the government during the settlement discussions. See text accompanying note 268 supra. It would have been otherwise if the affirmative issue had been raised in settlement discussions which preceded issuance of the statutory notice. See text accompanying notes 261 and 262 supra.

\(^{295}\) While the U.S. tax administration has tried, as to docketed cases, to induce taxpayers to hold their settlement discussions before cases actually are scheduled on a trial calendar (Rev. Proc. 60-18, C.B. 1960-2, 988), the fact is that a majority of all docketed settlements occur thereafter.

\(^{296}\) The great preponderance of those who follow this route actually achieve a settlement during the first of the two stages. In fiscal 1966, this was true for 21,475. However, 4,251 failed to reach agreement at that point. See Commissioner of Internal Revenue, op. cit. supra note 46, at 133 (Table 15B).
because they know, at the point of the initial attempt, that a second opportunity is available, many do not make an all out attempt to prepare their cases for the first try.\footnote{297}{See Chap. III, note 64 \textit{supra}.} In consequence of this, their first effort did not achieve the type of settlement which they were willing to accept. Hence, a second belated try.

Repetitious time drain on the administration's personnel is the peculiar consequence of this second practice.\footnote{298}{Indeed, even a yet different office becomes involved. See §4.8 \textit{supra}.} The practices of both groups, however, contribute to delay in settling old disputes and create, for the administration, an unbecoming image, akin to that of a private litigant "negotiating right up the courthouse steps."

A now developing country will have a chance to avoid the dilemma in which the U.S. tax administration finds itself only by deciding \textit{at the outset} whether the foregoing consequences are sufficiently adverse to warrant terminating settlement activities at the point a petition is filed with a court. Once such a country extends its settlement activity beyond that point, retrenchment may become impossible. Taxpayers who otherwise might have settled prior to the litigation stage will begin to delay serious attempts at settlement until after the litigation stage is reached. In due time, this number will be so great that the practice cannot be ended without overwhelming the trial tribunals.