

## CHAPTER XII

### RESOLUTION OF TAX QUESTIONS BY INDEPENDENT TRIBUNALS

#### 4.1 *Introduction*

Litigation in France is conducted in two distinct types of forums, the judicial and the administrative. The judicial forums have jurisdiction over disputes between private persons; the administrative over disputes between the government and private persons.

The original jurisdiction of the administrative tribunals—from which appeal lies to the Council of State—covers three types of actions, of which one is the *contentieux fiscale*, wherein a claimant asks that his tax obligation be determined.<sup>1</sup> In addition to jurisdiction over actions of this type, the departmental Director may appeal to the administrative tribunal any taxpayer claim as to which he believes the tribunal should hand down a decision.

Procedures followed by the administrative tribunals are somewhat less formal than those followed by the regular judiciary. For example, the use of an attorney is optional.

A request, that the taxpayer be permitted to postpone payment of the tax until the administrative tribunal hands down its decision, cannot be made for the first time in a petition submitted to it. Such suspension, however, is automatic if the taxpayer, on invocation of an earlier administrative appeal to the departmental Director, secured his permission to postpone payment pending that appeal, the conditions imposed being the same in both cases. But this suspension will not carry over automatically during a yet further appeal to the Council of State. However, if such a taxpayer can show that payment prior to the Council's determination would result in serious

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<sup>1</sup>A claimant also may bring a *recours pour excès de pouvoir*, and thereby challenge the legality of the administrative act—i.e., ministerial decree, decree of a *prefecture* or of a mayor, etc.—by alleging this act has violated a general and widespread rule of law. In effect, the tribunal is requested to nullify the administrative act. To protect citizens against arbitrary administrative actions, few formalities are involved in bringing a *recours pour excès de pouvoir*. A lawyer is not necessary.

detriment, the Council has discretion, on special petition, to grant a yet further delay.

### Section A. *Organization and Procedures:* *Trial Level*

#### 4.2 *Organization of the tribunals*

There are 24 administrative tribunals for the 90 departments in metropolitan France. Thus their jurisdiction necessarily extends beyond departmental boundaries, with the exception of the Paris tribunal, which exercises jurisdiction only over the department of the Seine.

An appeal to the Council of State is not limited to questions of law. Questions of fact may be raised as well. Since the Council of State functions as an appellate tribunal, it can consider only those questions which previously were presented to an administrative tribunal. While the taxpayer is free to present new grounds of fact and of law, he cannot enlarge on the conclusions set out in his original claim addressed to the Director. Illustratively, a taxpayer who based his petition for the discharge of a tax on the ground that the sums taxed constituted capital assets may not allege upon appeal a procedural irregularity in the assessment itself; such a conclusion would constitute a new demand.

The typical administrative tribunal has a president and four members, of which one is vice-president and another is the *Commissaire du Gouvernement*.<sup>2</sup> The Paris and Strasbourg tribunals, however, because of their work load, are larger, and are divided into sections—Paris has four—with a president for each section.

To hold court, a tribunal must have at least three members present, but it can request that a deputy serve when a quorum is absent.<sup>3</sup>

The presidents of the tribunals are drawn from the tri-

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<sup>2</sup> The third type of action, a *recours de pleine juridiction* rests on assertion of an individual claim arising out of some action or non-action on the part of the government. Illustratively, the claimant may allege a right derived from a government contract, with the government contesting the amount claimed, the method of payment, or even the very existence of the contract.

<sup>2</sup> The *commissaire* is appointed from among the *conseillers* for a one-year term, with the prospect of reappointment.

<sup>3</sup> The deputies can be drawn from the members of a neighboring administrative tribunal or from advocates or solicitors. If the latter category is drawn upon, the oldest advocate available must be utilized.

bunal members, the *conseillers* or justices,<sup>4</sup> whose qualifications are governed by statute to insure their competence and independence. Theoretically, all are supposed to have graduated from the National School of Administration. These graduates are not necessarily lawyers since they are not required to have their degrees in law. Their careers will have begun with a training period in that section of the Council of State which deals with judicial business.<sup>5</sup> Other officials will be appointed also, but these men must have graduated in law before appointment. They will have been appointed to the tribunals directly from either the Ministry of Interior or the Ministry of Justice, never from the tax administration.<sup>6</sup>

#### 4.3 Processing cases through the trial tribunals

As explained earlier,<sup>7</sup> a taxpayer cannot invoke the jurisdiction of an administrative tribunal until his claim has been laid before the departmental Director of Taxes and the Director either has rejected it or allowed six months to elapse from the time the claim was filed without communicating with the taxpayer. Upon receiving such a rejection, the taxpayer has two months,<sup>8</sup> in which to file a petition with the clerk of the appropriate administrative tribunal.

Typically, the taxpayer lays his case before the administrative tribunal because he has been unable to work out a settlement or compromise earlier. He is aware that settlement, as such, henceforward is most unusual.

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<sup>4</sup>Ranked in a descending order, the hierarchy of the judges of these administrative tribunals is as follows: president of the administrative tribunal of Paris, president of a provincial administrative tribunal or *conseiller* of the administrative tribunal of Paris, *conseiller* of a provincial administrative tribunal.

<sup>5</sup>Thus they receive the same training as the *auditeurs* of the Council of State. See 4.4 *infra*. Both informal and formal contacts exist between the administrative tribunals and the Council of State. The tribunal members commenced their training with the Council of State. Also, tribunal members sometimes are appointed to the Council of State, and some members of the Council of State have been appointed to the Paris administrative tribunal. Finally, the Council of State inspects the tribunals through a three-member commission, not to check on case-by-case decisions of the tribunals but rather to appraise and bring some uniformity to their general operations.

<sup>6</sup>This practice assures their independence as well as the independence of the tax administration.

<sup>7</sup>See Chap. XI, 3.4b *supra*.

<sup>8</sup>Upon receipt a petition is registered and marked with the date of arrival, to help police this limitation.

Formal requirements pertaining to the petition itself are similar to those which applied earlier when the claim was submitted to the Director. A petition, however, must be on stamped paper<sup>9</sup> and be accompanied by a copy of the Director's decision and a transcript on unstamped paper. As was true of the earlier claim, the petition should contain a summary of the facts, a statement of the arguments, the legal bases thereof, and the conclusions which set out the relief requested. The taxpayer cannot claim a reduction greater than that previously claimed but he is not precluded from asserting a different line of reasoning. Should he desire to use expert witnesses or present oral arguments, he may request such either in the petition or at a later date. But a request to the tribunal, seeking permission to postpone payment of the heretofore assessed tax, would be misdirected. This request must have been made earlier to the Director and, if granted, no additional request is necessary and the taxpayer may continue to postpone payment.

The administrative tribunal's clerk sends by registered mail to the Director a copy of the petition and any amplifying memoranda. After a cursory examination for form, the Director sends the petition to the inspector who made the original assessment and who examined the same taxpayer's earlier claim addressed to the Director.<sup>10</sup>

The inspector examines the petition for form, and tries to determine if any matter relevant to substance (factual or legal) was overlooked earlier. To this end, he re-examines the law (statutes, cases, and instructions) and may request further information from the taxpayer or even re-examine his books.

His investigation completed, the inspector prepares a report, analyzing the petition and the problem. After noting any defect of form in the claimant's petition, the report sets out the relief requested, the facts as found by the inspector, his analysis of each legal argument advanced by the taxpayer, and closes with a brief statement of his conclusion, indicating, if necessary, the amount of tax due or the reduction or reimbursement believed justified.

This report is due in the departmental Director's office

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<sup>9</sup> For each sheet of paper 21 x 27 cm, there is a charge of two and a half francs.

<sup>10</sup> Where the disagreement arises from an assessment established by an agent who specializes in the examination of accounts, it is this agent who will examine the petition.

within three months from the date the inspector receives the petition. In light of the report, the Director carefully re-examines the case and this may result in a request for supplementary information from the inspector. While this same claim was rejected earlier by the Director, the re-examination sometimes causes him to revise his decision and to declare justified the claim for reduction. Should this occur, the taxpayer is notified and a summary memorandum prepared, informing the administrative tribunal that the case no longer requires consideration.

More typically, however, the Director prepares a memorandum of law, submitting four copies to the administrative tribunal—in theory, within six months from his receipt of the petition, though an extension may be granted by the president of the tribunal.<sup>11</sup> While this memorandum carefully considers the statute and case law, it does not cite instructions though their rationale may be used to justify his interpretation of the statutes and decisions.

Prior to the time the director prepares the memorandum, the taxpayer on occasion will request (a request which will be granted) an opportunity to confer with the departmental Director. Occasionally, the departmental Director at his discretion will ask the taxpayer to come into his office for an oral discussion of the matter. Typically, there is no settlement of issues at this point as any such adjustment will have taken place before invoking the court's jurisdiction. The one exception to the general rule that these pretrial negotiations only provide opportunities for the correction of errors—in addition, of course, to the clarification of issues—lies in the situation where a case was docketed to prevent the running of the statute of limitations. In such circumstances, discussions can lead to the settlement of issues.

In four circumstances, however, before submitting such a memorandum, indeed, before arriving at his own conclusion, the departmental Director will consult the office of the Director General.<sup>12</sup> This occurs, in the interest of uniformity,

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<sup>11</sup> The president of the tribunal first extends the time limit by another three months. Should this added three months be insufficient, the Director can request another extension, setting out the reasons therefor.

<sup>12</sup> The taxpayer is not informed formally of such consultation by the departmental Director with the Director General. The departmental Director has no specific obligation to acquaint him with this fact. Unofficially, however, the taxpayer may be told but this is a matter entirely within the discretion of the departmental Director.

where he believes the petition rested on a sound legal principle although such principle was not stated specifically in either case law or administrative instructions; where he is uncertain as to the interpretation of an international convention or of the constitution and bylaws of an international organization; and where the petition cites decisions which are contrary to administrative regulations but as yet are unpublished in either the compilations or the administration's official bulletin. Consultation also occurs for an obvious reason whenever he expects the decision would be against a pending petition presented in the name of the state by another administrative branch or by a division subject to the Minister of Finance's authority.

The administrative tribunal, upon receiving the Director's memorandum, forwards a copy to the taxpayer or his authorized agents, setting a time limit for reply. The taxpayer may file one or more memoranda in response to the Director's and the Director, in turn, may respond with yet another memorandum. Or, in the interim, the Director may have consulted with the inspector who made the original assessment and then modified his original conclusions. Otherwise, however, these memoranda are exchanged until one of the parties either does not reply at all to the memorandum of the other or does not reply within the time limit specified by the president of the tribunal. At that point the case is considered ripe for judgment although, in practice, memoranda can be deposited with the clerk of the administrative tribunal until the date set for hearing. The aim of this repeated exchange of memoranda is to enable the parties to refine the issues and their respective arguments. However, if these preliminary exchanges are continued unnecessarily, the president of the tribunal can terminate this stage of the proceeding by deliberately refusing to forward memoranda which merely reiterate the grounds or arguments presented earlier.

While memoranda deposited with the administrative tribunal otherwise are always forwarded to the opposing party, supporting documents submitted by the administration remain on file in the clerk's office, but are available to the taxpayer or his authorized agent. That file, for example, may include comparative data on third-party income or profits, and the taxpayer can check this material to determine whether the other situations or enterprises are truly comparable.<sup>13</sup>

<sup>13</sup>To preserve secrecy regarding the affairs of others, third-party information accumulated by the administration should deal only with the averages, whether of business turnover or of income.

In spite of this free exchange of memoranda and the opportunity for oral argument, the tribunal may find that additional facts are needed, and request supplementary information. But if the taxpayer, in response to this or on his own initiative, asserts at the hearing what in effect is a new ground, the tribunal must require him to develop this in a written memoranda, which then is forwarded to the tax administration to enable it to respond in writing. Also, if the tribunal believes, for verification purposes, that an inspection of the taxpayer's site is necessary, all, several, or only one of its members, may be directed to make the inspection. But in any case, an official written report of the inspection will be prepared and made available to the parties for their comments.

The tribunal may also call upon expert witnesses on its own initiative or by request of either party,<sup>14</sup> to determine doubtful or contested facts relevant to a final resolution of the case.<sup>15</sup> Illustratively, such experts may be requested to determine the value of a corporation's inventory at a given date.<sup>16</sup>

Although the normal number of experts utilized is three, if the parties agree, one will fulfill all requirements. Where three are used, one is appointed by the tribunal and one by each party, though their cost will be borne by the losing party. While each must be placed under oath, there are no specific qualification requirements, except that appointments cannot be made from either of two groups: officials subordinate to the defending departmental Director of Taxes and authorized agents of the taxpayer. However, the departmental Director may appoint an inspector to accompany or observe the work of the experts where necessary. The taxpayer can do likewise, using either an authorized agent or an attorney. In either event, the experts will submit a full written report, individually or jointly. The official report, however, is drafted by the expert appointed by the tribunal; it describes the way in which they approached the problem, contents of documents examined by them, and their findings of fact.

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<sup>14</sup>The request may be made at any time during the proceedings. While the tribunal can refuse the request, the refusal should be accompanied by a full explanation.

<sup>15</sup>Questions of law or theory do not fall within the competence of such experts.

<sup>16</sup>The tribunal has no power to order an inquiry or an interrogation or consultation of persons. It cannot hear witnesses. But it can, for example, have experts determine the authenticity of documents if such is put in question.

When the case is considered ripe for a hearing, that *conseiller* of the tribunal who has been appointed *rapporteur* for this case studies the complete file and prepares a report, setting out a resumé of the facts, and the legal arguments and conclusions reached by each party. The *conseiller-rapporteur* reads his report at the hearing, to point up the issues of fact or law to be resolved by the tribunal which consists of at least two other *conseillers* including the president.<sup>17</sup>

The public is barred from hearings relating to taxes on income.<sup>18</sup> The administration is represented not by an attorney, but by an inspector who is appointed by the departmental Director from among those residing in the city where the tribunal is sitting.<sup>19</sup> While the taxpayer's agent may also attend and may present written memoranda during the hearing, he can participate in oral argument only if he is an attorney.

At the final hearing of the case, the *commissaire* of the government presents the factual and legal conclusions he has reached independently and, presumably, impartially. To these, the parties cannot reply; the tribunal takes them under advisement and usually will hand down its decision within the fortnight following. Its written decision should state the reasons, legal arguments, and supporting authorities for the conclusion reached as to each issue, to facilitate review in the event of an appeal.

The decision may, of course, reduce the amount of the assessment as originally established. But the tribunal may also increase the tax, as compensation for delay in payment, should it find that an earlier petition for postponement was entirely unwarranted.

Approximately 13,400 judgments a year are handed down by these tribunals. In 1960, 4,578 dealt with direct taxes—i.e., taxes on income and taxes levied for the state or the units of

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<sup>17</sup> The tribunal should be made up of an unequal number of *conseillers* at every hearing.

<sup>18</sup> Indeed, if deemed desirable, the tribunal may request that it receive for private inspection in the court chambers, a full presentation of all evidence or documents concerning the income of other persons or enterprises to which the taxpayer's alleged income is being compared.

<sup>19</sup> While the administration's representative can be heard and should answer questions posed by the tribunal, if the taxpayer's representative alleges new facts or new legal arguments, or deposits a written memorandum, the administration's agent is expected *not* to answer. Instead, he should request a continuance until he has had an opportunity to respond in writing.

local government. Decisions in 3,580 or 78.2 percent upheld the decision of the tax administration and 998 or 21.8 percent were in favor of the taxpayer.

Unless such a judgment contains a new interpretation of the statute or administrative regulations, it will not be published. In part, this is because it would lack precedent value and in part because each such judgment is appealable and many feel that case *law*, as such, should be evolved only by the Council of State, not by an administrative tribunal.

## Section B. *Organization and Procedures:* *Appellate Tribunals*

### 4.4 *Organization of the appellate system*

Decisions of administrative tribunals may be appealed by either the taxpayer or the Minister of Finance, to the Council of State,<sup>20</sup> a body which fulfills a dual role. It furnishes the government its opinion on a variety of matters: drafts of proposed statutes, administrative regulations,<sup>21</sup> points of law.<sup>22</sup> It also is the supreme appellate tribunal for the administrative tribunals, and is the only body with jurisdiction over actions which challenge the legality of administrative acts and seek to set them aside—*les recours pour excès de pouvoir*.<sup>23</sup>

The Council of State is made up of the vice-president and the presidents of the five sections, 53 *conseillers en service ordinaire*, 69 *maîtres des requêtes*, and 44 *auditeurs*.<sup>24</sup>

The *auditeurs* are graduates of the National School of Administration who have chosen this branch of government service.<sup>25</sup> From their ranks are drawn the *maîtres des requêtes*; and from the latter are drawn the *conseillers*. The one exception to this is that the government may appoint up to a third

<sup>20</sup> Created by Napoleon I, the role of the Council of State has evolved in response to the current political climate.

<sup>21</sup> The Council of State *must* be asked for its opinion with respect to regulations of the public administration; for all other types of regulations it *may* be asked for its opinion.

<sup>22</sup> When the government requests the opinion of the Council of State upon a point of law, it is comparable to consulting a lawyer for a legal opinion.

<sup>23</sup> *Les recours pour excès de pouvoir* may be utilized with respect to decrees or revenues stemming from administrative acts which have an area of application extending beyond the jurisdiction of a single administrative tribunal. See note 1 *supra*.

<sup>24</sup> This diversity in seniority causes a wide age range among the members of the Council of State, typically 26 to 70.

<sup>25</sup> The graduates of the National School of Administration who select the Council of State usually ranked at the top of their class.

of the *conseillers* and up to a quarter of the *maîtres des requêtes* from outside the civil service hierarchy.

The *auditeurs* and the *maîtres des requêtes* prepare material for discussion. From these two groups are chosen the government *commissaires* who present to the Council of State their own independent and impartial view as to the legal conclusions which should be reached in contested cases. The questions will be heard and decided by the *conseillers*.

The administrative or consultative function of the Council of State has been more or less completely separated from its judicial function. Four of its five sections are charged with administrative matters;<sup>26</sup> the fifth handles the judicial function. The latter, the *section du contentieux*, is divided into eleven subsections, three of which specialize in tax litigation. Beyond this, the eleven presidents of these subsections (each of whom is a *Conseiller d'État*)<sup>27</sup> together with four *conseillers* from the consultative sections,<sup>28</sup> make up the plenary assembly of the *section du contentieux*, which is presided over by the vice-president of the Council of State. The plenary assembly considers only matters posing new important questions which may lead the Council of State to alter its position or take a new position as to some legal principle.

A *Conseiller d'État* presides over each subsection of the *section du contentieux*. He is assisted by two associate *Conseillers d'État*, and about ten *maîtres des requêtes* and *auditeurs* who function as *rapporteurs*. Chosen from the *maîtres des requêtes* is the previously mentioned *commissaire* who presents his own conclusions—presumably impartial—as to the facts, legal principles, and the decision he deems appropriate in each case.<sup>29</sup> His report is of substantial importance to the judicial process and the most significant are published in the specialized legal periodicals.

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<sup>26</sup> The administrative sections—Finances, Public Works, Interior, Social—provide opinions in their respective areas of competence. In fulfilling its administrative functions, the Council of State will deliberate, sometimes in a single section, sometimes in two or more sections united for this purpose, and sometimes in a general assembly. In the latter situation, some *conseillers* from the judicial section will be present.

<sup>27</sup> A *Conseiller d'État* is so designated by a decree of the first Minister upon recommendation of the Ministry of Justice after his name has been presented by the vice-president of the Council of State.

<sup>28</sup> These are elected by their colleagues.

<sup>29</sup> The *commissaire* is designated in the same manner as a *Conseiller d'État*. See note 26 *supra*.

The fact that the *section du contentieux* has three subsections which deal with tax matters facilitates reasonably prompt decisions. But it does not facilitate uniformity of decisions. Nor is this difficulty completely mitigated by the close relation existing between the president of the *section du contentieux* and the members of the three subsections. However, three other devices, none entirely successful, tend at least to cushion the magnitude of the problem. The *commissaire* rotates among the subsections, and questions of prime importance or questions upon which the subsections disagree can be—but not too frequently are—examined by more than one subsection.<sup>30</sup> Also, on very rare occasions, where an issue of legality is involved, the matter may be put to the entire *section du contentieux*. Finally, any interpretative conflict over the meaning of a statute or regulatory text, arising between a tax subsection and the earlier expressed opinion of the Council of State, must be laid before the plenary assembly.<sup>31</sup>

#### 4.5 *Processing a case through the appellate tribunal*

Taxpayer and tax administration alike have two months,<sup>32</sup> from the date notice is received of the administrative tribunal's decision, within which to lodge an appeal to the Council of State.

Any decision by the tax administration to appeal must pass through a fairly complicated process. First, the departmental Director prepares a report on the administrative tribunal's decision, explaining—in the case of adverse decisions—why he believes the decision for the taxpayer was incorrect (i.e., whether it arose from an erroneous interpretation of applicable statutes or from an incorrect appraisal of the facts). Or, if he believes the adverse decision would be sustained on appeal, perhaps because of an intervening judicial decision, this is set forth.

This report, together with the complete file, is forwarded to the office of the Director General where it is carefully examined by senior civil servants, assisted by inspectors who

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<sup>30</sup>This will occur on a very few occasions in the course of a single year.

<sup>31</sup>The Council of State will have given its opinion as to the interpretation of the statute or regulatory text at an earlier point in time when its opinion was requested.

<sup>32</sup>For the Minister of Finance the two-month time limit runs from the day the file is received at the office of the Director General of Taxes or from the day on which he is notified by the bailiff's writ of the administrative tribunal's judgment.

come in from the field, to determine if an appeal should be lodged.<sup>33</sup> These officials may decide not to appeal. If they favor an appeal, the report from the departmental Director may serve as the petition,<sup>34</sup> or another will be prepared if a different line of argument or method of presentation seems appropriate. The petition is signed by the Director General of Taxes or a senior civil servant to whom this power has been delegated.

Petitions filed by taxpayers must comply with certain formal requirements which essentially are the same as those imposed by the administrative tribunals. Most are prepared by experienced lawyers,<sup>35</sup> though the taxpayer may prepare his own. In fact, an attorney need not be used at all unless the taxpayer wishes to make an oral argument or comments during the hearing.<sup>36</sup> In practice, twenty-six percent of all income tax petitions are prepared by a particular group—the *avocats aux conseils*. This group of lawyers, limited in number, are appointed by the state. They are permitted to handle private cases and have a monopoly on the right to make oral argument before the Council of State and the Court of Cassation.

The petition itself, and any supporting documents later supplied, can be filed, either with the secretariat of the *section du contentieux* or with the prefecture of the department where the taxpayer is domiciled, but in either case is forwarded to the office of the Director General of Taxes which, in turn, sends it to the appropriate departmental Director. There the petition is examined, both as to formal requirements and the merits, and a full report prepared for submission—together with a complete record of the administrative tribunal's proceedings—to the Director General of Taxes.<sup>37</sup> The report will

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<sup>33</sup> The examination takes place in the office responsible for litigation before the Council of State, the *service du contentieux*.

<sup>34</sup> If the office of the Director General does utilize the departmental Director's report, it is likely to make modifications or observations in the margin.

<sup>35</sup> I.e., attorneys, tax counselors, members of the legal staffs of trust companies. Petitions which are prepared by taxpayers relate principally to local taxes and are limited almost entirely to uncomplicated matters, posing few technical difficulties.

<sup>36</sup> The presentation of oral arguments or statements is an exception to the typical hearing.

<sup>37</sup> By preparing the petition at two distinct levels, having both levels work on the petition, the best possible defense is assured. The departmental service is better situated to deal with issues of fact, and the

carefully analyze the facts, legal arguments, and the conclusions which should be drawn. The inspector responsible for the original assessment normally will have been contacted only if the departmental Director determined either that the case has been inadequately examined prior to the administrative tribunal's decision or that the taxpayer is now relying on facts or legal arguments not heretofore raised.

Whether the taxpayer or the Director General entered the appeal, the parties exchange memoranda, just as they did in the tribunal below, until the case is considered ripe for judgment.

Occasionally the taxpayer's adviser will request the opportunity to elaborate orally on the pleadings, but this is the exception rather than the rule. When such oral elaboration does occur, it is limited to developing the contents of the written pleadings and, thus, can add little to properly prepared memoranda. The government never requests such an opportunity.<sup>38</sup> Even more rarely, indeed in less than one percent of the cases, will expert witnesses be used at this appellate level. Presumably all facts have been established at the lower court level and, if necessary, additional documentation from witnesses will be submitted during the exchange of pleadings. Hence there is no particular need for their use at this level. Moreover, the lack of impartiality too often exhibited by the taxpayer's expert witnesses has diminished their value in the eyes of the Council of State.

When the case is considered ready for judgment, it is turned over to a *rapporteur*<sup>39</sup> who analyzes it for the purpose of preparing two documents. The first is a memorandum which states the facts, analyzes the applicable statutes and case law, and concludes with a proposed decision. The second (*visas* of final judgment) summarizes the contention advanced by the respective parties, the principal documents, and the applicable law and sets forth a proposed final decree.

These documents, together with the entire file, are sent through the office of the president of the subsection to the *commissaire* of the government, who prepares his independent

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(footnote continued)

office of the Director General is better prepared to handle the legal arguments. In addition, this arrangement reduces the work of the office of the Director General, for usually the report of the departmental Director contains all pivotal elements for the administration's defense.

<sup>38</sup> The government takes the position that the submission and interchange of pleadings serves to clarify the issues and provide the judiciary with all necessary insights.

<sup>39</sup> Drawn from the ranks of *auditeurs* or the *maîtres des requêtes*.

and impartial conclusions. The *commissaire* views the case from a point which goes beyond that of the *rapporteur*. The latter considered only the particular case and file before him. The *commissaire* goes on to consider how this particular case fits into the totality of case law, the proposed decision's possible repercussions, in practice and on the law's future direction, and whether it would be wise to abandon the rationale of previous cases—however abrupt.

Submission of his written conclusions is followed by the hearing before the subsection, from which the public is barred. Typically, five members are present: the president, two *Conseillers d'État*, the *rapporteur* for this particular case, and a *maître des requêtes*. After the *visas*, as prepared by the *rapporteur*, are read, the attorneys, if they wish, are permitted to make an oral argument. The hearing concludes with the *commissaire's* presentation.

The deliberation which follows, from which the public and parties are barred, is participated in by the *commissaire* though he cannot vote. If either he or the president disagrees with the majority's view, however, either can demand that the case be submitted to the combined subsections.

The decree, which is prepared by the *rapporteur* and read at a public session, typically recites the names of the parties, their respective contentions, a summary of principal documents presented, and in concise form the legal reasoning which led to the decision. While such decrees of the Council of State are conclusive, in very limited circumstances involving formal defects, a decree can be vacated or modified.<sup>40</sup> All of that body's decrees are published in a review; also tax journals reprint the more important tax decisions, sometimes together with the *commissaire's* conclusions and other comments. In addition, the administration's weekly bulletin prints those decrees which reflect important legal principles, typically with a commentary relating the decree to existing case law.

In general, a decision constitutes a precedent for similar situations arising in the future. Occasionally, however, the administration indicates that it will distinguish a particular decree from a given line of decisions for reasons not immediately apparent upon reading the decree.

In 1960-61, of the 4,883 judgments handed down by the lower administrative tribunals, 3,848 favored the administration. Nevertheless, the actual number of appeals from the ad-

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<sup>40</sup> Such formal defects include a judgment rendered by default in absentia, a defect in the procedure, correction of a material error.

ministrative tribunals to the Council of State is spread almost equally between taxpayers and the government. This results from the fact that only about 10 percent of those taxpayers who initially suffered an adverse decision do appeal, whereas the government appeals between 30 percent and 40 percent of decisions unfavorable to it.

In 1960-61 the Council of State judged 815 tax cases, 724 of which were appeals from decisions of administrative tribunals. The tax administration submitted 94 cases.

Out of the 724 appeals, 608 dealt with direct taxes levied for the benefit of the state and of the communes, and of these, 316 dealt with taxes on income—with the majority (211) involving taxes on industrial and commercial profits.<sup>41</sup>

An analysis of decisions by the Council of State shows that in 1960-61 the government was completely sustained in 62 percent of all taxpayer appeals although almost a fourth of these resulted from defects in form. Of the administration's own appeals, 41 percent were decided completely adverse to it, another 41 percent confirmed the contested taxes, and 11.5 percent were abandoned by the administration.

While the administration was completely successful in only 41 percent of its own appeals, this is in sharp contrast to taxpayers who were completely successful in only 9 percent of their appeals.<sup>42</sup> Several considerations contribute to this difference. On the one hand, taxpayers are not always knowledgeable, tend to view their own cases subjectively, can litigate at little cost (no attorney being required), and thus are willing to take a chance. On the other hand, the administration usually is more knowledgeable, attempts to be objective, employs successive levels to weed out errors made by lower echelons, tends to abandon the weaker issues in a case—submitting only the stronger ones to the tribunal—and, in general, exercises considerable restraint regarding the number of cases it will appeal.

<sup>41</sup> This is understandable in light of the difficulty in determining such profits and the monetary interests involved.

<sup>42</sup> An overall breakdown of Council of State decisions on tax appeals for 1960-1961 shows the following:

Taxpayer in error to appeal . . . . .	37.0%
Appeal by taxpayer badly taken . . . . .	14.0
Taxpayer became discouraged . . . . .	14.0
Taxpayer right in whole or in part . . . . .	11.5
Administration in error to appeal . . . . .	9.5
Intermediate position . . . . .	6.0
Return to administrative tribunal . . . . .	5.3
Use of expert witnesses . . . . .	0.6