

CHAPTER XV

ASSESSMENT, REFUND, AND ADMINISTRATIVE APPEAL PROCEDURES

Section A. *Assessment and Audit Procedures*

3.1 *Introductory note*

The assessment procedure begins with the filing of the tax return by the taxpayer, and concludes when the local office issues the formal notice of assessment which establishes the tax due. In computing the amount, credit is given for the quarterly installment payments made by taxpayers during the assessment year. In addition to stating the tax due, the assessment notice sets out the factors making up the tax base, such as profits from business, income from other sources, personal deductions, etc. The notice states where, when, and how the tax is to be paid. Further, it specifies the points where the assessment differs from the information return filed by the taxpayer.

Since the tax depends upon the tax base, a taxpayer cannot challenge one and not the other.¹ Should a taxpayer dispute the assessed tax, he must protest the assessment notice as a whole.

¹ There is one exception to the general rule, i.e., that the assessment notice constitutes the final determination of the tax on income and that any challenge to either the tax base or the amount of tax must be made to the entire assessment notice. This exception arises when two or more persons jointly, most usually in the setting of a partnership or jointly owned property, carry on a business or are engaged in any other income-producing activity. It is unlikely that such individuals will have identical income from other sources or identical personal deductions. Moreover, their shares of the jointly derived income may differ. Under such circumstances, a preliminary notice dealing with such jointly derived income is sent to each of the participants, setting out the amount of tax each one owes on this particular income. As the law requires, such tax base and such amount are established "separately and uniformly." This notice may be contested separately by each taxpayer. It must be contested if the taxpayer does not want the amounts set out in the notice to be incorporated into the subsequent assessment notice determining his total income tax base and total tax liability. Moreover, if not contested on the basis of the preliminary notice, it may not be contested when the final assessment notice is received.

If a taxpayer does disagree with the assessment, he must make known his disagreement within a month. Failure to act within that month renders the assessment incontestable unless the taxpayer qualifies for a so-called correcting assessment because new facts or new evidence is discovered.² Generally, even this type of correction is not possible after the period of limitations (normally five years) has elapsed. Prior to the expiration of the five-year period, if the Regional Office should discover on examination—which in practice may be stimulated by a request from the taxpayer himself—that the taxpayer received a higher assessment than was justified, the error will be corrected. However, if upon such an examination an error is discovered showing the taxpayer should have received a higher assessment, no correction can be made.

The same assessment procedure is used for individuals and juridical persons, such as corporations.³ However, where wages are withheld at the source, a simplified procedure is used.⁴

Tax assessments are signed by the head of the appropriate branch at the local office, but the tax assessors within that office do all the assessment work. Since the head is kept fully informed, the final signature represents not mere acquiescence but participating responsibility.

To insure maximum uniformity in assessment and audit procedures, within a local district and through the several units

²Certain safeguards have been thrown up around the use of the correcting assessment device. Absent the discovery of new facts or new evidence, a correcting assessment exceeding the original one is unenforceable unless accepted by the taxpayer—most unlikely circumstance. Moreover, the local office cannot claim facts or evidence were newly discovered if they were in its own files but their relevance went unrecognized. Should new facts or evidence in favor of the government develop, the local office may reconsider the entire assessment but the tax may not be decreased below the original amount. Comparably, a decreased assessment is possible if new facts or evidence in favor of the taxpayer are discovered in the course of an audit or if mistakes are discovered in the course of a review by the local office's supervising authority. Thus, where an audit reveals facts or evidence, partly in favor of the taxpayer and partly in favor of the government—the situation which in point of fact is the most usual one—the legal aspects of the entire assessment are reconsidered, with the result that there is a redetermination of the tax base and the amount of the tax, irrespective of the previous assessment. However, should the matter have been appealed, decisions rendered in the course of such appeal procedures must be reckoned with.

³See 3.2a *infra*.

⁴See 3.2b *infra*.

of government, there is continuing supervision at several levels. Over and above the assessing officials is the head of the local office. In cases of particular complexity, he handles the assessment personally, thus insuring maximum uniformity within his jurisdiction. The entire assessment procedure is supervised by the head of the office, who himself participates in the discussion of complex questions with the taxpayer, and both instructs and coordinates the work of his subordinates. The Regional Finance Office, in the course of its supervision of local office activity, examines individual cases. State and Federal audit authorities, technically separate but actually working together with a high degree of cooperation, review the work of local offices.

3.2a *Details of assessment and audit procedures: In general*

The formal assessment procedure, sketched in the preceding paragraphs, makes no provision for taxpayer self-assessment.⁵ The taxpayer merely files an information return. The local office determines whether the taxpayer is liable for tax and, if liable, the amount of tax due. In making such a determination, assessing authorities investigate all relevant factual and legal aspects, taking account of all factors whether favorable to the government or to the taxpayer.

Return forms are sent by local offices to known taxpayers, and others are reminded through public notices of their obligation to file.⁶ Failure to file a return renders a taxpayer liable to a fine up to a maximum of DM 5,000.⁷ Also, in the event

⁵ Consideration has been given to the introduction of self-assessment procedures in the Federal Republic of Germany. On an experimental basis, certain localities temporarily introduced the system. Reactions varied. Tax consultants, on the whole, were unenthusiastic. Local tax administration offices reported favorable comments, if only for the reason that self-assessment released qualified staff members from assessment work to auditing. However, there were more unfavorable than favorable comments. The complexity of the tax law argued against computation by taxpayers of their own tax liabilities. Moreover, it was pointed out that with the introduction of automatic data processing, self-assessment would be obsolete. If electronic computers could compute the majority of the liabilities for all taxpayers, there was no need for taxpayers to compute their own taxes.

⁶ The Ordinance Regulating the Income Tax Law lists all cases where income tax liability appears likely, and adds a requirement that returns be filed by all such individuals. This list, however, is not of major practical significance, as every individual requested to file a tax return by the tax administration must do so.

⁷ Theoretically, failure to file is subject also to a prison term.

of a definite refusal to file, the appropriate local office is authorized to make an assessment based on an estimate.

The official form which a taxpayer must use, if properly completed, should contain sufficient information to enable the local office to determine the correct tax liability.⁸ That office is free, however, to seek additional data and, if it proposes to rely thereon, the taxpayer must be informed and given opportunity to present his arguments.

Where a taxpayer derives profit from a business or income from rental properties, a supplementary return is required, listing receipts, expenditures, deductions for depreciation, etc.⁹ Also a balance sheet,¹⁰ prepared from business records, must accompany the return where—as in the case of business, agricultural or forestry pursuits, or service enterprises—net worth comparisons are used to determine income. Where a commercial balance-sheet is submitted by the taxpayer, the figures shown on it, though acceptable from an accounting point of view and correct from the standpoint of commercial law, do not always conform to tax law requirements. Additional data and annotations must be supplied to adapt these figures for tax purposes. Alternatively—and in practice, customarily—the taxpayer may submit a separate balance sheet prepared in accordance with tax law requirements. In any event, if the records are based on double entry bookkeeping, a profit and loss account must accompany the balance sheet. Finally, if deemed necessary, the local office may require the taxpayer to submit a principal account statement, *Hauptabschluss Bübersicht*—i.e., a horizontal breakdown of all accounts.¹¹ In theory, any available business reports, including reports prepared by certified public accountants, must accompany the return though, in practice, only larger firms, particularly corporations, comply with the requirement—not waiting for a special request from the office.

⁸Where the taxpayer submits only estimates, necessary supporting information must be supplied.

⁹Taxpayers themselves often add clarifying data relative to certain balance sheet items: for example, depreciation tables for individual assets, detailed breakdown of transitory balance sheet items, lists of new receivables and net payables, calculations concerning the revaluation of assets and reserves, and explanatory notes.

¹⁰This balance sheet may not be abbreviated, that is, the individual items must be shown separately and may not be grouped together or set off against each other.

¹¹It shows for each account the initial balances, accruals, and withdrawals, as well as the effect of each account on the profit and loss account.

Where a taxpayer used a licensed professional tax consultant to prepare the return or the attached information, the return must state the consultant's name and address. While the local office generally can rely on the accuracy of the figures reflected in such a return, and can assume the return conforms to clearly established legal principles, it also recognizes that sophisticated advisors will have resolved in favor of the client any interpretative tax questions the answer to which may not be wholly clear. Hence, returns prepared with professional assistance are examined as thoroughly and carefully as any other returns and inquiries are made whenever considered necessary.

In examining a filed return,¹² a local office makes use not only of the required supplementary data but also of the permanent file it keeps on each taxpayer. These files are extremely important, for they contain his prior years' returns,¹³ the results of earlier audits, and the so-called cross-check memoranda, *Kontrollmitteilungen*. Some cross-check memoranda are obtained, on request, directly from firms which make extensive fee payments to other taxpayers, e.g., from broadcasting companies. The bulk of such memoranda, however, come from the government's own tax audit of enterprises which transacted business with such other taxpayer. Illustratively, the books of a business may show intermittent payments to a payee who could indulge in tax avoidance through failure to report. An auditor, on noting such intermittent payments, prepares cross-check memoranda to place in the files of the taxpayer-payees, thereby enabling the latter's local offices, as a matter of routine, to check to be sure such payments were included in income.

Should questions arise concerning the accuracy of statements made in the return, the local office, in seeking additional information from the taxpayer,¹⁴ usually requests an oral

¹²Very rarely, the local office decides before the return is filed to take emergency measures designed to insure proper collection of the tax, i.e., it may order that the inventories be checked during the first few weeks of each year.

¹³Thus the assessing official has before him the full tax history of this particular taxpayer.

¹⁴Circumstances creating such requests for additional data can include situations where the basis for valuation of balance sheet items is not clear or where the profit rate varies from the typical rate for the particular trade or business. Such differences are apparent to the assessor upon referring to the tables of standard profit rates published

conference rather than a written explanatory statement. The former is preferred, experience having shown that written replies are often so vague and incomplete as to be almost useless, and the oral conference enables tax officials to gain an understanding of the actual facts as well as some impression of the taxpayer's reliability.

However, the local office may not request information or records other than those the taxpayer can reasonably be expected to furnish. Further, where it is necessary to look into extensive business records and documents, this normally will be accomplished on the taxpayer's premises unless he himself desires otherwise.

Since the taxpayer must declare in his return that the information therein is correct and complete to the best of his knowledge and belief, assessing officials commence their own work on the assumption that the return itself and accompanying documents are correct. Though the assessment process itself involves at least some examination of the taxpayer's return, accompanying documents, and permanent file, and oral discussions with the taxpayer if necessary, the assessing official is confronted with the necessity of completing his share of the total assessments of a district within a given time. Hence, other than in exceptional cases, the assessing official himself does not have time to examine the books and accounts of those taxpayers who submitted what appeared to be proper returns and adequate supplementary statements. Nor in such cases would he request third persons to supply information. In consequence of these practices, however, much of the assessment work in the local office is supplemented by later audits, i.e., extensive examinations of books and records, conducted on the taxpayer's business premises, by other tax officials. Where such a later tax audit is customary because of the size of the business or where the assessing official deems such an audit to be necessary,¹⁵ the assessor—if certain questions remain open—will make a provisional assessment, postponing final decision until completion of the audit. Modification of such provisional assessments is not subject to the restrictions applicable to final assessments.

(footnote continued)

annually for a number of trades and occupations. These tables indicate the typical mark-up and the rates of gross and net profits computed on the basis of turnover.

¹⁵In rare instances, he alternatively may ask the so-called tax committee, discussed in 3.3 *infra*, to handle the matter, rather than the regular audit officials.

The larger local offices maintain special audit sections which audit both the large industrial enterprises in their districts and comparable enterprises situated in nearby districts if the local office there does not have similar specialized personnel. Other specialists in these same larger local offices audit agriculture and forestry operations.

Medium and small enterprises¹⁶ are audited by the regular audit section, *Betriebsprüfung*, in the typical local office, and this staff audits similar enterprises in districts where the local office does not maintain an audit section. Such an audit section, subordinate to the head of the local office, is staffed with men of a rank equivalent to those performing assessment functions, the personnel of both sections being interchangeable.¹⁷

As a general matter, audits cover only taxpayers who by law are required to keep books and records (though such audits may extend to such taxpayer's employees—wage and salary earners—past or present, particularly if there is some question concerning proper withholding of the wage tax).¹⁸ In practice, this means that the audits are restricted to industrial or commercial enterprises, independent professional offices, and the larger agricultural and forestry establishments. In all other cases, examination of returns is considered completed after the investigation by the assessing official and his superior, the head of the branch who signs all assessments which exceed DM 500.

Every large enterprise according to the law should be audited at three-year intervals. In practice, however, because of the shortage of personnel, these audits actually are conducted at about four-year intervals, but the fact that each such audit commences where the prior one ended, means that all transactions of each large enterprise are subjected to audit on a continuing basis. By way of contrast, audits of medium and small firms usually cover only the preceding three years, and are made only after considerably longer intervals, the law not

¹⁶ Classification of enterprises as "small," "medium-sized," and "large" is governed by specific criteria. Any business which falls short of the standards required of a "small" business is classed as a "very small" business.

¹⁷ Under an experimental program, designed to increase the scope of audit coverage, assessors in some districts not only made the assessment, but also audited small enterprises. The results were generally unsatisfactory, primarily because of the heavy burden of the assessment work itself.

¹⁸ In addition, the wage tax staff of the local office conducts wage tax field audits.

specifying any particular period. Medium-sized firms, again taking the actual practice, are audited about every six and a half years and small firms about every seventeen years. Consequently, at least 50 percent of the returns filed by medium-sized businesses and at least 80 percent of those filed by small businesses are not audited. Note the following data for 1962:

<i>Type of enterprise</i>	<i>Total number</i>	<i>Number audited</i>	<i>Number audited as a percent of total</i>
Large Enterprises	48,441	11,911	24.59%
Medium-Sized Enterprises	314,360	51,166	16.28%
Small Enterprises	737,576	42,814	5.81%

Though tax audits normally follow a regular schedule, audits also are made out of turn, especially when the period of limitations is about to expire, though even here account will be taken of the probable amount of tax involved. Sometimes they take place where the assessor, on examining a particular return, questions a taxpayer's statements, with verification requiring thorough examinations of the books and records and, perhaps, inspection of the business premises.

The auditor's functions are strictly limited. He only investigates the taxpayer's books and records. It is the assessor who draws the final conclusions from such an investigation, by deciding all questions of law and fact in order to determine the proper tax liability. The very nature of the task—i.e., deciding whether or not certain facts are to be regarded as having been proved sufficiently or deciding between competing legal arguments as applied to a given set of facts—clearly makes it imperative that the assessor exercise his own judgment in fulfilling his responsibilities. Since the assessor has the ultimate responsibility for the assessment, he usually is present at the final discussion which concludes the audit, where the taxpayer (and, perhaps, his consultant) confers with the auditing official and his superior. If the case is an important one, the assessor is accompanied by his superior or even by the head of the local office. If a particularly difficult question is involved, the audit officials from the Regional Finance Office may participate.

This meeting is designed to explain to the taxpayer the result of the audit, not to work out a compromise. The assessor has absolutely no power to settle in the sense of splitting or trading of issues; the judgment of the assessor includes only the power to determine what is or is not taxable. It does not include the power to compromise. The assessor, however,

may see fit to state his views during the meeting so that the taxpayer will know what changes the local office will make in his assessment (a correcting assessment) and the rationale in support of the change.

3.2b *Details of assessment and audit procedures where taxes withheld at source*

While taxes on several types of income are withheld at the source, wage and salary earners constitute the largest single group of individuals subject to such withholding.¹⁹ Their tax payments are deducted by their employers on the basis of wage tax cards issued by the municipal authorities. The cards carry all relevant personal data needed to compute the withholding tax, being amended where circumstances change.²⁰ Each employer must forward the proper amount to the local office at proper intervals.²¹ While the wage or salary earner is the actual taxpayer, he can be held liable only if proper deductions were not made or if he is aware of his employer's failure to forward the correct amounts to the appropriate office.

Should the tax withheld exceed the amount due,²² the excess is refunded to the wage or salary earner under a special

¹⁹Other types of income subject to withholding include dividends and directors' fees. Also withholding is applied to royalties and interest paid nonresidents, the amount withheld being the final tax thereby rendering a formal assessment unnecessary. The same is true of wages earned and, by a recent amendment, interest received by a non-resident. Earnings of foreign entities or of noncitizens, are subject to unlimited tax liability if they are residents of Germany, and tax is withheld on their earnings. If the earnings are attributable to a permanent establishment situated in the Federal Republic, a formal assessment will take account of the amounts withheld.

²⁰Where an individual expects his deductible expenses to exceed the standard deduction, he may apply for an amendment of his wage tax card reflecting the additional expenses. Should the circumstances causing these additional expenses change, the taxpayer must have the entries amended. Should he neglect to do this, any resulting underpayment subsequently discovered is claimed by way of a special notice. This notice, however, has no relationship to the assessment notice issued after a regular assessment.

²¹To insure proper computation and retention, wage tax audits in the field are carried out at regular intervals. Under the withholding procedure the tax is computed and retained in respect to the actual pay period—month, week, day—with special wage tax tables having been drawn up on the basis of the income tax table.

²²This can occur for a number of reasons. For example, the wage or salary earner may become entitled to higher allowances in the course of the year because of changes in his family status. His wage or salary may not be constant for all pay periods throughout the year.

wage tax adjustment procedure, *Lohnsteuer-Jahresausgleich*. If the wage tax cards supply all necessary information, the local office then credits the employers. Millions of refunds are handled in this way.

Where wage tax cards do not supply all the necessary data, wage and salary earners entitled to refunds must make applications for such to the appropriate local office. In 1963, of the 23.8 million wage earners subjected to this withholding tax, 10 million or 42 percent obtained some refund from their local offices on the basis of such applications.

The fact that tax is withheld from an individual's wage does not always neutralize the need to make a formal assessment. Sometimes this is required simply because the salary exceeds a certain amount, or because the taxpayer had more than a *de minimus* amount of income from other sources. Under other circumstances, taxpayers themselves may request assessment, e.g., where they have suffered net losses from other sources of income. Should assessment be made under either type of circumstance, the amount withheld is credited against the amount declared due in the formal assessment notice. In 1961, out of the 3.277 million persons assessed for income tax, 43 percent were wage or salary earners, having been subject to withholding at the source by their employers.

Section B. *Administrative Appeals*

3.3 *Introductory note*

German tax law provides two distinct types of administrative appeal for all income taxpayers, whether individual or corporate. The protest, *Einspruch*, is used for substantive issues, the complaint, *Beschwerde*, for discretionary matters which in practice raise procedural issues. The taxpayer does not choose between the remedies; the type of issue determines the appeal to be employed.

Once a taxpayer has exhausted the protest unsuccessfully at the local office level, he must turn to the courts for relief. Where he must utilize the complaint, however, should the local office deny relief, the taxpayer may have the whole matter referred to the Regional Finance Office for a decision. Should he be dissatisfied with that office's decision, he then must proceed through the courts.

3.4a *Protest*

The prime use of the protest is to challenge an assessment, that is, to question whether tax liability exists at all or to raise specific questions involving the tax base or the amount of the tax. Its timely use prevents an assessment notice from becoming final or, where there is jointly earned income as in the case of a partnership, prevents the preliminary determination notice from being incorporated in an unchallengeable assessment notice.

Wage tax questions also may be raised through the protest. For example, a taxpayer may conclude he is entitled to a refund exceeding that fixed by the local office, believing that office erred in refusing to enter certain deductible amounts on his wage tax card. Or he may feel that office was wrong in contending that a deduction was entered incorrectly on the wage tax card and consequently was wrong in asserting a tax deficiency.

Every effort has been made to simplify administrative procedures, keeping them as flexible and uncomplicated as possible, with formalities at a minimum. The one undeviating requirement is that the protest be filed within one month, but the filing may be effected in a variety of ways. Though it may not be telephoned, it may be written, in the form of a telegram, or lodged orally with a local office official.

The law requires only that the protest state that the taxpayer disagrees with the local office's assessment. As a practical matter, however, the taxpayer should state the facts and supporting evidence he proposes to use; otherwise the local office will not know the basis for his objection. In preparing this protest, the taxpayer may use a consultant, who may have assisted him earlier in the preparation of his return. However, very frequently a tax consultant is called in only after the taxpayer has decided to file a protest.

Once filed, the protests are handled at the local office. Prior to January 1, 1966, taxpayers could choose to have the protest laid before the tax committee, attached to the local finance office.²³ However, only one percent utilized this

(footnote continued)

The taxpayer's deductible expenses in excess of his standard deduction may not have been fully entered on his wage tax card.

²³One or more of these tax committees is attached to each local office, with the head of the local office or his authorized agent acting as chairman. Otherwise, the membership consists of private citizens. Each of the communities located in the district of the finance office

procedure, and this limited use caused the procedure itself to be abolished.²⁴

While in some local offices it has been felt convenient to establish special staffs to handle administrative appeals, the great majority of protests are handled by the same officials who prepared the original assessments, with a detailed review by the same superior who bears the ultimate responsibility. It is true that this superior approved the original assessment, but his scrutiny of the assessor's report on the protest goes far beyond his somewhat routine check of the normal assessment work.

The obvious question is how the taxpayer can hope to benefit from a protest if the decision on that protest and the review are made by the same officials who reached the original

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is represented by one member nominated for a six-year term by the elected governing body of his community. These members participate in deliberations and decisions of the committee with reference to taxpayers who have their residence or their business in the particular community. In addition, the committee comprises two to four members who must be familiar with the specific conditions of the region and experienced in business matters. They, too, are nominated for a term of six years by the elected body of the self-governing political subdivision representative of the communities located in the district of the local office concerned. The head of the local office also is entitled to name suitable persons after considering candidates proposed by industrial, commercial, professional, or vocational associations, trade unions, farmers' unions, and the like.

The composition of the tax committee was one of the prime deterrents to its use for the protest. Most taxpayers were reluctant to let the tax committee know the details of their personal and financial transactions because of the nonofficial character of its members.

To constitute, for the purpose of the protest, a quorum of the tax committee, at least two members in addition to the chairman must have been present. Decisions were taken by majority vote, with the chairman entitled to vote. In the event of a tie, he cast the deciding vote. Decisions were not subject to instructions by the local office, but higher authorities—i.e., the Regional Finance Office and the State Finance Ministry—were entitled to be informed of cases before the tax committee and to be heard in an advisory capacity. A taxpayer dissatisfied with the committee's decision could then appeal to the courts.

In arriving at its conclusions, the tax committee had the same authority and was subject to the same limitations as the local finance office dealing with a protest.

²⁴Although the tax committee has lost the power to decide on a protest, it remains in existence because of the remaining function—to give advice in some rare instances of minor importance where the local office should take advantage of the members' practical experience.

decision now being protested. The explanation lies in part in the fact that the taxpayer knows that pressures of time and shortages of personnel may have caused assessments to be prepared on the basis of a relatively routine examination. Moreover, the original assessment notice gave only the briefest explanation of the local office's refusal to accept the taxpayer's statements. By protesting the conclusions of this notice, the taxpayer, when the matter comes up for discussion, can give the local office a detailed explanation of the facts, set out the supporting evidence, and explore legal considerations. Both parties are fully aware of how the original assessment is handled and the device of the protest provides an opportunity for a full discussion of every possible relevant matter. Further, when the local office renders its decision on the protest, it evaluates all the taxpayer's objections, whether relating to law or to fact. Thus the taxpayer obtains a very detailed explanation of the considerations which led the local office to reach its conclusions. Should he decide to contest the decision further—which only occurs in about four percent of the cases protested, he can anticipate the arguments which the government will advance in court.

Once the protest has been filed, the local office has full jurisdiction, irrespective of whether the taxpayer has raised a question of law, a question of fact, or a mixed question of law and fact. It is not required to clear its decision with the Regional Finance Office. Merely because the taxpayer protests one part of the assessment notice does not restrict the local office to a consideration of that point alone. The local office may raise other issues not previously considered, or revise its own former conclusions—giving the taxpayer more relief than he requested or, contrariwise, asserting a higher tax than that reflected in the original assessment.

The finance office is required to decide the case in conformity with the law. It is not authorized to render a decision which would depart from what it thinks is appropriate both from the factual and the legal points of view, merely because it is in doubt as to the outcome of litigation. Thus, as to the type of issue which a court necessarily would decide entirely for one side or the other, the local office may not split the issue on the basis of mutual concessions responsive to the litigation hazards. Furthermore, it must render its decision in conformity with its own convictions even if it fears that the courts may hold different views on the subject matter, thus unfavorably prejudicing later cases where the facts are perhaps

more in the government's favor. But in practice there are many questions of fact which by their nature cannot be precisely answered, or where complete substantiation is unavailable, leaving room for the assessor to reach a decision which he believes most closely approximates the actual facts of the case and which at the same time will secure the consent of the taxpayer who himself recognizes that he is unable to give a more precise or more complete substantiation.

The annual number of all protests filed in the local offices of the Federal Republic total between 450,000 and 500,000 and about 40 percent of this total relate to individual and corporate tax matters,²⁵ though the way in which the 40 percent breaks down as between those two types of taxpayers is not known.

3.4b *Complaint*

Taxpayers must utilize another remedy, the complaint as distinct from the protest, when the matter challenged involves procedural rather than substantive questions.

Typical of the situations giving rise to the filing of a complaint is the case where a local office imposed a penalty (which may be as high as ten percent of the tax) on the ground the tax return was not filed within the prescribed period, and the taxpayer argues the delay was excusable. Again, the complaint would be used to contest a penalty imposed for late payment of the tax (one percent for every month or fraction thereof); or where a taxpayer and the local office disagree as to the sufficiency of the installment payments an individual or corporation makes—the taxpayer's income estimate for the current year being somewhat less than the amount of income he received from such sources during the preceding year.

Like the protest, a complaint must be filed with the appropriate office within a one-month period. The absence of formality with regard to the method of filing, the uncomplicated and loose standards bearing on statements supporting the complaint, the freedom to use tax consultants, which characterize the use of the protest, also characterize the use of the complaint. Also, upon the filing of complaint, it again is the local office which sits as the reviewing agency. However, contrary to the situation regarding protests, the issues covered by the complaint procedure allow a certain discretion, for example, as to the matter of penalties—the area where the most important

²⁵ The remaining 60% relate to such other taxes as the capital tax, trade tax, turnover tax, inheritance tax, real estate tax, etc.

complaints originate. Should the local office deny the complaint, another distinctive feature is that the whole case—with the local office's comments thereon—is sent up to the Regional Finance Office for a decision. Should the Regional Finance Office deny the complaint in whole or in part, its formal decision may be appealed by the taxpayer to the Fiscal Court. The number of complaints filed annually, relating to income taxes, is not known.

Section C. Extent Administrative Processing of Refund Claims Departs from Administrative Processing of Assessments

3.5 Introductory note

In the United States, a taxpayer himself may initiate a re-evaluation of a finally assessed tax of an earlier year, provided only he files a claim for refund within a three-year period. No such procedure exists in Germany. German income tax law is based exclusively on the assessment procedure. The amount of tax payable is formally stated in an assessment notice, after having been computed on the basis of the local finance office's investigations which took account of evidence and arguments both favorable and unfavorable to the taxpayer. Normally, once the assessment notice has become final (within one month, absent an administrative appeal), the tax is definitively fixed even if an actual error was committed. Only in three instances does Germany have a procedure which bears any resemblance to the much more sweeping refund procedures available in the United States. These are described below.

3.6 Details regarding refund procedures

The first exception to the rule that, once an assessment notice becomes final, corrections cannot be made, relates to mere mechanical errors. For example, errors attributable to typographical or arithmetical mistakes must be corrected by the authorities automatically upon detection. However, the government is subject to the five-year statute of limitations even if the arithmetical error is to the government's detriment.

Second, an assessment notice which has become final can be modified by a so-called correcting assessment. But this means only that a change favoring the taxpayer is made if a tax audit (initiated by the government) reveals new facts or evidence in that taxpayer's favor.²⁶ Most audits are conducted

²⁶ See note 2 *supra*.

in accordance with the overall audit program of the tax administration or the local office. Occasionally, a taxpayer himself will request that an audit be made—a request which the tax administration or local office may or may not honor—but this does not mean that the taxpayer himself can initiate a re-evaluation of the case by filing a refund claim.

The third situation involves the procedure, discussed in 3.2b *supra*, relating to refunds owed wage and salary earners who have been subjected to withholding at the source. For example, a given taxpayer may not have requested that the deductions shown on his wage card be adjusted in accordance with the facts or he may have made such a request and the request been erroneously denied. Under either set of circumstances, at the end of the year, under this procedure, the taxpayer may file a claim requesting a refund. The local tax office is in no way bound by its earlier decision, which in fact only established the probable pattern of deductions and which both parties recognized was subject to subsequent change. Should the wage or salary earner be entitled to a refund, he receives one. Thus, in one sense, the annual wage tax refund permits a second independent review of decisions reached earlier—albeit by the same local office—with the possibility of a change in its conclusion.

Since the annual wage tax refund procedure involves only tax *refunds* and not collection of unpaid taxes, it might appear to resemble the sweeping refund procedure followed in the United States. However there is only a superficial similarity. The wage tax refund procedure is actually deemed to be just a part of a simplified method of *collecting* taxes from a restricted group—wage and salary earners. Whereas the standard assessment process results in the taxpayer's being informed of the amount he owes, this wage tax refund procedure simply informs him that he paid, through withholding, more than what is finally due. And, as pointed out earlier, once a taxpayer receives the assessment, he has only one month to request administrative reconsideration. Should he fail to file either a timely protest or a complaint either as an end in itself or as a prelude to court action, the amount of the tax—absent later correcting assessment—is considered fixed. No administrative appeal is possible simply by filing a claim for refund.

Finally, should a taxpayer secure a readjustment of his tax liability through timely invocation of the administrative or judicial process, no formal application for a refund is necessary; repayment of any sum owing is automatic.