# PRACTICE MADE PERFECT: LESSONS FROM THE TAX COURT JUDICIARY, THE IRS, AND PRIVATE PRACTICE

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## I. BUILDING YOUR FORTRESS UPON A STRONG FOUNDATION.

**A.** **Conduct the Audit with Litigation in Mind**. Immediately after receiving the notice of audit, the advocate should begin developing his or her overall strategy:

1. Classify the issues and where they are best resolved; audit, appeals, and trial.

2. Decide who is best suited to deal directly with the IRS examining agent.

3. Narrow the issues when possible, and avoid pointing out additional issues.

4. Keep alive trade-off issues, once identified.

5. Educate the agent on the facts favorable to your case and assist him in writing his report (thereby laying the foundation for later obtaining an admission in either the Answer, Request for Admissions, or Stipulations).

6. Preserve your opponent's error until the most advantageous moment for disclosure. Remember that audit is generally about defense, and trial is generally about offense.

7. Avoid inadvertent admissions by you or your client.

8. Remain ever sensitive to statute of limitations and other time pressures.

**B.** **Know Your Opponent's Case**. As administrative efforts are drawing to an unresolved close, obtain as much information as possible about the government's case:

1. Hold an informal conference with agent and supervisor.

2. Request a copy of the IRS's files under the Freedom of Information Act (FOIA) and Privacy Act.

   a. Where the type of tax involved (i.e., income, estate, gift and certain other specified taxes) is subject to the deficiency procedures of the I.R.C., the FOIA request should generally be made shortly after the issuance of the statutory notice of deficiency.

   b. Making a FOIA request nearly immediately after issuance of the notice of deficiency should require the IRS to produce the requested documents prior to the taxpayer's filing of a Petition in Tax Court or Claims Court, or Complaint in Federal District Court. Otherwise, the IRS may argue that the taxpayer must rely on

judicial discovery (*i.e.*, two-edged discovery) rather than one-edged FOIA discovery.

c. Making a FOIA request during audit may offend the agent, who is accustomed to one-edged discovery in his or her favor.

d. Under FOIA, the IRS has ten days to respond to a formal request, but the IRS Disclosure Office is typically forced to ask for a thirty-day extension. The taxpayer should agree to the extension, absent extraordinary circumstances, such as refusal by the IRS to waive its "judicial discovery" objection.

e. The IRS may raise a number of objections to a formal request, such as disclosure may jeopardize tax investigation, governmental privilege against disclosure of internal thought processes, I.R.C. § 6103 violation, etc.

f. Nonetheless, the IRS must produce partially privileged documents, albeit in redacted form, and should produce a *Vaughn* list itemizing the documents withheld and the claimed exemptions.

**C. <u>Carefully Decide When to Go to the Appellate Division</u>**.

1. Except in rare situations, you will always have at least one opportunity to settle your case with the IRS Appellate Division.

2. You should always pursue this opportunity. Focusing primarily on "hazards of litigation," the Appellate Division reaches compromises on approximately 85% of its cases and it is rare indeed that a case, handled properly, does not present some litigation hazards for the government.

3. The tough issue lies in whether you go directly to Appeals by protesting the Revenue Agent's Report, or wait until after (i) you petition the Tax Court or (ii) you file a claim for refund following expiration of the limitations period on the assessment of additional taxes.

   a. The exposure in filing a Protest is that any new issues raised by the Appellate Conferee can be included in the Notice of Deficiency. While the Appellate Division does not often raise new issues, the results may be severe when it does:

      (i) The taxpayer may face a higher amount of tax than he otherwise would have.

      (ii) The taxpayer who intends to go to Tax Court now must bear the burden of persuasion on the additional issue – a burden that would have been imposed upon the government had the taxpayer filed a Petition in Tax Court first. Indeed,

under the IRS's internal procedures, only the clearest and strongest of "new issues" may be raised after the case is in court. In short, a new issue may be raised by Appeals in a pre-petition case that, even if discovered, would never be raised by Appeals in a post-petition case.

Consequently, your ability to negotiate forcefully may well be undermined.

b. On the other hand, the IRS has unsuccessfully raised at least two potential adverse consequences in response to "bypassing" appeals on the front-end:

(i) To the extent that the strength of your case is sufficient to justify imposing your litigation costs upon the IRS (i.e., after substantially prevailing, you are able to establish that the position of the United States was not substantially justified), I.R.C. §§ 7430(a) and (b)(1) may bar your collection of costs. The government will likely argue that (i) you failed to "exhaust the administrative remedies available" to you and/or (ii) you have therefore "unreasonably protracted such proceeding." You could argue (i) Section 7430 does not say that you must exhaust your administrative remedies before you file suit; (ii) your timing is relevant, if at all, only to the reasonableness of the costs; and (iii) the existence of any administrative remedy was meaningless as evidenced by the fact that the IRS refused to settle/concede a position that was not substantially justified.

(ii) Because of the IRS's new push to discourage bypassing Appeals on the front end, the IRS will assert the $5,000 penalty provided by I.R.C. § 6673 for "Instituting Proceedings Before the Tax Court Primarily for Delay, Etc." As amended by the 1986 Tax Reform Act, that section provides:

> Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay, that the taxpayer's position in such proceedings is frivolous or groundless, or that the taxpayer unreasonably failed to pursue available administrative remedies, damages in an amount not in excess of $5,000 shall be awarded to the United States by the Tax Court in its decision. Damages

so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the Secretary and shall be collected as a part of the tax.

Note that only the unreasonable failure to pursue available administrative remedies is punishable. The taxpayer should argue reasonableness in addition to the three points previously mentioned. Where the penalty is asserted, the IRS will likely argue the converse and that, in contrast to § 7430, § 6673 does contemplate that the "exhaustion" should occur prior to the "institution" of the litigation. This latter argument is grammatically flawed and has been rejected by the Tax Court.

(iii) Cure.

(a) If you intend to file suit in either District Court or the Court of Federal Claims, agree to pay the amount set forth in the examination report, file a claim for refund after the limitations period for assessment of additional deficiencies has expired but before the two-year anniversary of your payment, and request a pre-litigation Appellate Conference upon the disallowance of your claim.

(b) If you intend to file suit in the Tax Court, the more aggressive approach is to recognize, where appropriate, that: (i) the prospects of the Court now refusing to grant costs because of the timing of the Appeals Conference may pale in comparison to the risk of raising new issues; and (ii) the § 6673 penalty was designed for "failure to provide the IRS with substantiation" cases and is not likely to be imposed in cases involving legitimate disputes over the facts or the law. In short, it may be advisable to petition the Court first.

**D.** **File Your Suit Where It Best Serves Your Interests**. At least conceptually, you can file your suit in any one of three trial court systems. Consider, among others, the following factors:

1. Do you really have a choice – can your client afford to pay the asserted taxes, and penalties (and perhaps interest) required as a condition to filing suit in the Federal District Court or the Court of Federal Claims? If not, the Tax Court, which has no such jurisdictional requirement, is generally the only alternative.

a. Depending on the court, the payment of interest may not be required as a jurisdictional prerequisite for a tax refund suit. *See Flora v. United States*, 362 U.S. 145 (1960). *Compare also* Treas. Reg. § 301.6201-1(a) and *Arnold v. United States*, 50 AFTR 2d 82-6167 (N.D. Ohio 1982) *with Kell-Strom Tool Co. v. United States*, 205 F. Supp. 190 (D. Conn. 1967).

b. In peculiar circumstances, the TEFRA Partnership Rules may provide an opportunity to get into District Court or the Court of Federal Claims.

2. Assuming that you really do have a choice, which forum contains the most favorable precedent for your case and what is the strength of that precedent? For example, a favorable factual finding in one decision may indicate a predisposition or slant in your favor but it will not be controlling in your case. In theory, a Tax Court Memorandum opinion is not precedential (though it may be argued that a point of law in a TCM opinion is so well established as not to require a Tax Court opinion). On the other hand, a decision recently reviewed by the full court in either the Tax Court or Court of Federal Claims (*i.e.*, courts of national jurisdiction) will be very persuasive in those courts and often beyond. A Federal District Court judge is not bound (but may be persuaded) by the decision of a judge in another district and, depending upon the local rules, he may not be bound by the decision of a judge in his same district.

3. Similarly, which of the two appellate courts available to you has the most favorable precedent? While, for instance, the precedent of the Court of Appeals for the Fourth Circuit is controlling upon the Federal District Courts in South Carolina, North Carolina, and Virginia, it is also controlling upon the Tax Court in a case involving an individual who resides or a corporation which maintains its principal place of business in this geographical area at the time of the filing of the Tax Court petition. *See Golsen v. Comm'r*, 54 T.C. 742, 756-758 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1970). Adverse precedent from a given Circuit Court can be escaped by filing suit in the Court of Federal Claims where appeals are taken to the Circuit Court of Appeals for the Federal Circuit.

4. If the taxpayers in related cases will not be able to pay the tax, penalties, and (maybe) interest necessary to get into the Court of Federal Claims, suit would normally be filed in the Tax Court.

5. Do you need to consolidate your tax dispute with a non-tax dispute? In such situations, District Court is your only hope. Even there, the government often resists consolidation. Nonetheless, this factor may well be controlling where, for example, the taxpayer needs to interplead the promoter on a tax deficiency that is based upon the promoter's alleged

misconduct. Consolidation should be appealing to the government where there is some question about the taxpayer's ability to pay and the effect of the consolidation would be to add another deep pocket. Some ingenuity may be needed to satisfy the *Flora* prepayment rule: consider small years, carryover years, gain years, etc.

6. Where can you find the most receptive audience for the peculiarities of your case?

   a. If your case turns upon application of a complex, technical point of law, serious consideration should be given to the Tax Court, where the judge acts as both finder of fact and arbiter of law *and* is a tax specialist. In contrast, trial in the Federal District Court may involve a jury that could be offended by technicalities; where no jury is requested, trial will be held before the Federal District Court judge, typically a legal generalist, who is also likely to feel less bound by tax technicalities. The Court of Federal Claims may provide a middle ground where trial is held before a judge who likely spends some, but not all, of his time dealing with tax matters.

   b. If your case turns upon sympathetic facts, the analysis can be more complex. The standard initial reaction is to take such a case to the Federal District Court and get a jury, particularly in light of the concept of "jury appeal." The population from which you would draw a jury may, however, bear a bias in favor of the government or against your client. For example, venue in your case may only lie in a large metropolitan area where the federal government is a major employer or it may lie in a place where economic, social, or other bias is either against your client or your issues. In significant cases, serious consideration should be given to conducting a private survey, and in all cases, the typical jury composition should be a matter of inquiry.

      On the other hand, you have no idea at the time you institute suit which judge you will draw in either the Tax Court or the Claims Court while, in some cities, you will know which District Court judge will be assigned to your case. In all events, you must recognize that there is a broad range of attitudes and sensitivities among the individual members of each of these courts.

7. What are the statistical prospects for winning in each forum?

   The statistics, published each year by the IRS should be discounted by the following factors:

   a. More than 60% of the cases filed in the Tax Court are *pro se – i.e.*, the taxpayer stands alone against the government attorneys. Very few District Court and almost no Court of Federal Claims tax cases are handled *pro se,* and those are generally tax protester cases.

   b. A disproportionate segment of the Tax Court's docket consists of "shoe box/failure to substantiate" cases. Indeed, the recent trend has been in the direction of Collection Due Process and Innocent Spouse cases, and away from substantive disputes.

   c. Other than tax-advantaged investments (dubbed "shelters" by the IRS), taxpayers have been winning more than 80% of the total amounts in the large cases (cases involving deficiencies of more than $10 million) handled by the Tax Court.

   d. Many taxpayers are now taking "tax-advantaged investment" cases to the District Court or the Court of Federal Claims, rather than the Tax Court.

8. Which adversary would you prefer? While refund suits are going to be handled by the Trial Section of the Department of Justice, the Tax Division assigned to that region or by the Court of Federal Claims Section of the Tax Division, a taxpayer can exercise some control (through his request for place of trial) on the particular IRS District Counsel office assigned to his Tax Court case. The government can move to change the place of trial but rarely does so absent a consolidation of cases or a conspicuous lack of any connection with the location requested. However, in cases involving substantial amounts or broad issues, the government may assign either a special trial attorney or the lawyer responsible for that special project.

9. Do you wish to seek or to avoid extensive discovery? Litigation in the District Courts and the Claim Courts is notorious for its extensive depositions, while formal discovery in the Tax Court is the exception rather than the rule.

10. Does your case involve an unwieldy volume of documents? Trial in Tax Court is founded upon the stipulation process and both parties will be instructed to put all documents into evidence through a stipulation, save those reserved for impeachment purposes. Hence, one can often avoid the problems associated with separately authenticating every document at trial as is often required in refund litigation.

11. Does your case depend upon showing the asserted deficiency is erroneous rather than showing the actual tax due? At least in theory, the taxpayer only has the burden of proving in Tax Court that the Commissioner's assertion is erroneous (at which time, the burden shifts to the Commissioner to prove the correct tax). Moreover, the IRS may bear the burden of going forward with the evidence under § 7491. In contrast, the taxpayer has traditionally borne the burden in refund litigation of proving not only the error of the Commissioner's ways but also the correct amount of tax. This distinction can be critical where affirmative evidence is unavailable (*e.g.*, the bank has destroyed the records, witnesses have passed away or are now claiming various testimonial privileges, etc.).

12. Will your case be benefited by the finder of fact possessing an awareness of local sites, conditions, and reputations? Where your client, or perhaps your expert witness, is well respected in the community for his integrity or your issues may be helped by the local economic conditions, serious consideration should be given to filing suit in District Court where, unlike Tax Court and Court of Federal Claims, the judge (and the jury) are residents of that vicinity.

13. Does your client wish to minimize local press coverage? District Court trials clearly draw more local coverage than trials in either Tax Court or Claims Court, where any coverage is extremely rare, and Washington, D.C. can always be requested as the place of trial. Beware the freelance journalist who has, in times past, haunted the Tax Court beat.

## II. WAGING THE CONTEST IN TAX COURT.

### A. Plead the Case Consistent With Your Overall Strategy.

1. Formulate your themes and theories early.

2. The pleadings can be used as an instrument of persuasion.

   a. When most cases are set on a trial calendar, all the Court will have had a chance to review is the Petition and the Answer. The Answer, except in fraud and certain other affirmative pleading cases, rarely contains any information other than general denials. Hence, when you are fairly confident of your trial strategy, you can start the persuasion process with the Petition without any serious competition.

   b. This choice, however, runs several risks:

      (i) It may educate or excite your opponent.

      (ii) If not properly drawn, it may reduce your flexibility in shifting theories.

(iii) If irresponsibly drawn, it may result in admission of facts that later prove to be detrimental or in loss of credibility when you attempt to retract those facts.

3. The pleadings may serve to narrow the issues. Because the IRS is obligated by Tax Court Rule 33 (counterpart to Fed. R. Civ. P. 11) and Rule 36 (counterpart to Fed. R. Civ. P. 8) to specifically admit or deny following a reasonable inquiry, the Respondent should admit those allegations set forth in the Petition that are not truly in dispute.

4. The pleading may serve as the foundation for motions and discovery. In the exceptional case where the taxpayer wants to pursue motions and discovery, the IRS pleadings practice of disregarding Tax Court Rules 33 and 36 can be pursued through a motion to strike under Rule 52 or a motion to dismiss (or impose lesser sanctions) under Rule 123. While the Tax Court currently questions its power to dismiss the government and is reticent to prejudice the Respondent's case on a procedural matter, these motions can provide both a point for appeal and the groundwork for a more persuasive argument when the IRS makes the same general denial of your Request for Admissions.

5. Frequently, the better part of valor lies in maintaining a low visibility until trial time.

**B. Try to Pursue Discovery Through the Stipulation Process and, Failing that, Prepare for a Long and Expensive Process**.

1. While discovery and the stipulation process are both designed to narrow the issues through the exchange of information, discovery, when conducted by itself, has the effect of polarizing the parties.

2. Seek information and concessions from the government through the stipulation process. Normally, the parties will proceed on the principle of providing the information that would otherwise be available through discovery.

3. Note that the most recent version of the standard pre-trial order requires that all documents (save only those used exclusively for impeachment purposes) must be exchanged at least 15 days in advance of the trial calendar and should be stipulated.

4. If you feel your opponent has been less than forthright, you can always resort to formal discovery following an unsatisfactory response to informal/*Branerton* requests. Keep in mind, however, that all discovery must be completed 45 days before the trial calendar. Most Tax Court judges interpret this rule to mean that the motion to compel proper responses must be filed more than 45 days prior to the calendar call.

5. If you are unexpectedly served with objectionable discovery, service of thorough discovery requests upon your opponent often makes your opponent more receptive to mutual accommodations.

6. Typically, the most effective formal discovery narrows the issues through a Request for Admissions that itemizes the essential elements of those issues and is accompanied by a complimentary set of Interrogatories and Request for Production of Documents.

7. Each discovery request should contain an explicit set of instructions and definitions to minimize evasive responses and to strengthen any later motion to compel.

8. The responses to discovery should be incorporated into the Stipulation of Facts, as should all documents on which you intend to rely. While you may withhold those documents on which you intend to rely for impeachment purposes, there is a line of cases which suggests that impeachment is the only purpose for which you can use the withheld items – you cannot rely on them as affirmative proof of any fact.

9. In drafting the Stipulation of Facts, one must balance the value of having as many as possible of your facts undisputed (clearly, the most authoritative source for the factual findings you will request in your brief) against educating your opponent.

**C. <u>Always Submit a Trial Memorandum</u>**.

1. The Standard Pre-Trial Order contemplates a skeletal Trial Memorandum. However, this is your best shot at persuasion so don't waste it.

2. In most cases, the tone should be clinical but tell the story your way.

3. The Trial Memorandum should include:

   a. The years, the type of tax, and the amounts involved;

   b. The number of witnesses expected to be called and the time projected for trial;

   c. A favorable statement of the issues;

   d. A clear but favorable description of the facts, perhaps with charts of the transaction and parties attached as an exhibit;

   e. A clear but favorable description of the law;

   f. An open-ended list of the witnesses you intend to call with a general description of their testimony;

g. A brief discussion of any anticipated procedural or evidentiary problems; and

h. A conclusion summarizing the essence of your case.

4. Let's be candid: your job is to impress the Court and intimidate your adversary with your preparation.

5. To the extent you submit the Trial Memorandum prior to the date required, you may request that a copy not be served upon your opponent until the date required.

6. The Trial Memorandum is your first real chance to capture the imagination and the favor of the judge. After reading a properly prepared Trial Memorandum, the judge should be acutely aware of your strengths and your opponent's weaknesses – an awareness that can make the trial far more enjoyable.

**D. <u>Make Sure That Your Expert Prepares a Polished Report and That it is Timely Served at Least Thirty Days in Advance of the Trial Calendar</u>.**

1. Expert witness reports are required by the Tax Court Rules and, absent their timely service, the Court typically will not allow the witness to take the stand.

2. Absent a specific order to the contrary, that report needs to be provided to the Court and your adversary 30 days in advance of the trial calendar.

3. Ensure that the report contains all elements required by Tax Court Rule 143(c).

4. The report should contain a detailed description of the facts upon which the expert relied.

5. Depending upon the Judge, the report may be deemed to be the totality of your expert's testimony. Before cross-examination begins, you may wish to invoke Rule 143(f). ("Your Honor, we seek leave of the Court under Rule 143(f) to ask this witness to clarify and emphasize certain aspects of her report and to comment on a few matters that have arisen since she tendered her report.")

6. Keep in mind that an expert witness may rely upon documents and information that may not be otherwise admissible into evidence, so long as the documents and information are of a type normally relied upon by experts in that field.

**E.** **Consider Conducting Mock Trials Before Trial**.

1. A mock trial should be presided over by a tax lawyer with trial experience who has no prior exposure to the case.

2. He should be provided with the pleadings, the motions, the stipulations, and the trial memoranda of both parties.

3. In the role of the judge, he should be encouraged to grill your witnesses unmercifully.

4. You should prepare your witnesses as if it were the real trial – explaining the issues, reviewing their testimony, and fortifying them for cross-examination. Every contact with a witness should be prefaced by a polite admonition to tell the truth and to share that admonition when asked. Every witness should also know what he needs to gut an aggressive cross-examination.

5. Filming of the mock trial so that the individual witness's demeanor can be critiqued is helpful, particularly when the witness comes across as arrogant, evasive, or hostile.

6. Remember that arrogance is the antithesis of credibility.

7. Test alternative trial strategies for effectiveness.

8. After all adjustments have been made, run the dress rehearsal.

**F.** **Try the Case**.

1. Your opening statement (when allowed by the Judge) should start with a theme and end with that same theme. At least in the beginning, it should be clinically stated. It should provide the Court with the road map of how and why the decision should be written in your favor. Any ridicule of the government's position should be gentle and understated. Above all else, the opening statement should contain a spark that distinguishes it from the tedium of most statements.

2. The practice of requiring a Trial Memorandum has diminished the perceived need for opening statements. Consider the Supreme Court numbered-points method for buying time.

3. Personalize your client: it is more difficult for the Court and the government lawyer to hurt Billy, who was a postman when his father died and left him $20,000 which Billy used to start this company that employs (and, if we win this case, will continue to employ) Charlie, Sue, John, and three hundred other people in this community.

4. Before the start of the trial, introduce yourself to the courtroom personnel, give the reporter a list of names and a glossary of the technical terms, and offer to help them in any way that you can. The court personnel contribute to the aura of emotion in the courtroom and are sometimes asked their reactions by the judge.

5. Witness sequence can be very important. The general rule is that you want to start strong and end strong. Equally important is remaining flexible. For instance, you may want to squeeze a witness in before lunch and you may want to end the first day's testimony with a particularly strong witness so that testimony will be the last statement on the judge's mind over the evening.

6. Demonstrative evidence is relatively rare in the Tax Court and, therefore, has a heightened impact upon the poor judge who is accustomed to listening to nothing but testimony all day. Consideration should be given to films, courtroom demonstrations, and the like. The most effective demonstration is one that appeals to the largest number of the senses – sight, hearing, touch, taste, and smell – and gives the judge the feeling of participating in the event or transaction in the shoes of the taxpayer.

7. Know the government's affirmative case better than your opponent does. Map out in advance not only the vulnerability of the IRS's witnesses but the evidentiary flaws in his proof.

8. Have a separate Memorandum of Authority on each one of those flaws (as well as on your evidentiary soft spots) and be prepared to argue each point aggressively. While many Tax Court judges are prone to let all information into evidence "for whatever it is worth," you will be earning credibility and shaking the Court's confidence in your opponent as well as in the vitality of whatever decision the Court might consider entering in favor of your opponent.

9. Traditionally, the Tax Court has not encouraged closing statements, but you should be prepared with a closing statement and should request an opportunity to present it. Consider requesting a daily transcript and read back to the court any promises your opponent may have made in his opening statement and has not kept. Frequently, advantage can be gained over an unprepared opponent. The closing statement should follow the same rules of primacy and recency applicable to all stages of trial. This is your last chance to communicate with the judge face to face and to read his or her reactions. Moreover, the judge is likely to leave the trial favoring one side or the other and is likely to communicate that slant to the law clerk, who then summarizes the record, the briefs, and the law for decision.

**G. Prepare a Thorough Post-Trial Brief**. A thing of beauty is a joy forever.

1. The "Points Relied Upon" section is literally and figuratively the centerpiece of the brief – if one is not persuaded after reading this section, then either the section needs to be rewritten or settlement solicited.

2. Second in importance is the "Requested Findings of Fact." If they are written correctly from a properly tried case, the Argument section is all but superfluous. They should be viewed as the building one detailed brick at a time. They should be drawn from the record with very little poetic license and should always be followed by one or more record references.

3. The Argument section should be carefully structured, easy to follow, and precisely researched. It should provide the Court with the materials to draft a scholarly opinion in your favor. You should provide the Court with powerful quotes or literary allusions. Your citations must be precise, and you should avoid citing memorandum opinions where regular opinions are available. Your arguments should always start with your affirmative contentions and leave the rebuttal material to the end or the reply brief. Form and neatness are important. Careful thought should be given to how the argument appears on the page – are there visual breaks, critical elements broken into subsections and underscored, and the like? Tempo is also important – do your arguments start strong and end strong; do they blur and drag?

4. Your reply brief should be drawn only after you have outlined the structure of your opponent's argument. Your argument in rebuttal should then focus upon those critical points in your opponent's structure which, if broken, will cause the structure to fall. The remainder of your argument is simply designed to undermine the Court's confidence in your opponent.

## III. WAGING THE WAR THROUGH REFUND LITIGATION.

### A. Above all Else, File a Proper Claim for Refund.

1. The failure to file a proper claim (or protective claim) may result in a barred claim since the limitations period often expires before the error is discovered.

2. Typically, the contents of the claim present the greatest challenge since the government can, via the "variance" doctrine, bar you from raising any issue at trial that was not properly raised by the claim. Treas. Reg. §301.6402-2(b)(1) provides:

> The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is

made under penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

3. Every claim should include a demand for previously paid and accruing interest so that the dispute in *Brandt and Brandt Printers v. United States*, 300 F.2d 457 (Ct. Cl. 1962), can be avoided.

4. In addition to a description satisfying the regulation noted above, every claim should contain the clause "or such other greater amount as is legally refundable."

5. Where you have submitted a claim that has not been disallowed and you fear is too general, you may be able to inject the needed specificity by amendment even after the expiration of the limitations period. *See, e.g., United States v. Memphis Oil Co.*, 288 U.S. 62 (1933); *United States v. Andrews*, 302 U.S. 517 (1977).

**B. Make Sure You Have Satisfied the Other Prerequisites for Suit**.

1. Full payment of assessed indivisible taxes and preferably of penalties and interest. *See* I,D,1. *supra*.

2. No prior suits filed against officers of the United States or filed in Tax Court relative to the tax sought by the claim for refund. I.R.C. §§ 6512, 7422.

3. Suit filed within two years of notice of the claim disallowance or waiver of the right to such notice. I.R.C. § 6532.

**C. In Addition to the General Suggestions Relating to Tax Court Pleadings and Motions, Be Sensitive to Peculiarities of Refund Litigation**.

1. Regardless of whether you are filing a Complaint in District Court or a Petition in the Court of Federal Claims, the claim should be attached and the conditions precedent pled.

2. In contrast to service of Petitions in Tax Court and the Court of Federal Claims, the taxpayer in district court is responsible for properly serving the government with a summons and copy of the District Court Complaint. *See* Fed. R. Civ. P. 4.

3. The level of detail required in the pleadings varies among the three tax fora: the District Court requires mere notice pleading, while the Tax Court requires some undefined higher standard, and the Court of Federal Claims requires fact pleading.

4. The Court of Federal Claims has a unique procedure that permits a taxpayer who lacks the documents needed to plead specifically to file a "Petition Pending Motion." A motion for discovery (the Court of Federal Claims generally must approve discovery requests) must be filed within thirty days seeking the documents needed to satisfy the fact pleading standard of the Court.

**D. <u>As in Tax Court, Develop and Use a Well-Organized Trial Notebook</u>.**

1. The trial notebook should be tailored to you, the case, and the Court.

2. Nonetheless, it frequently will contain the following tabbed sections:

   a. Timeline;

   b. Chart of elements of proof;

   c. Trial:

      (i) Jury selection, voir dire;

      (ii) Opening Statement;

      (iii) Witnesses, case in chief;

      (iv) Witnesses, cross-examination;

      (v) Witnesses, rebuttal;

      (vi) Jury Instructions;

      (vii) Closing Argument;

   d. Exhibits:

      (i) List (with column for offered and admitted);

      (ii) Critical documents;

   e. Court Papers:

      (i) Petition;

      (ii) Answer;

      (iii) Stipulations of Fact;

      (iv) Stipulations of Settlement Issues;

f. Tax Returns;

g. Instruments:

(i) Transfer documents;

(ii) Entity formation documents.

h. Appraisals; and

i. Relevant state statutes.

3. If needed, pare materials down so that everything fits in one notebook.

4. Consider having a file on each witness that contains the exhibits (and an appropriate number of copies) you intend to introduce through or discuss with that witness. Incidentally, you should have the original exhibit, a copy for the Court (more where required by local practice), a copy for your opponent, a copy for you, and a copy for every other juror. (Jurors tend to pay more attention to a document they have to share with their neighbor.)

## IV. ALWAYS WAGE YOUR WAR WITH A PEACEFUL EYE ON SETTLEMENT.

### A. Settlement, if Pursued at the Right Moment and With the Right Strategy, Can Often Offer Results Unobtainable at Trial.

1. Almost all successful settlements are the product of identifying, emphasizing, and sometimes creating the needs of your adversary.

2. Attractive settlements are rarely available unless the time is ripe. Many cases settle on the courthouse steps because the parties can no longer avoid making a decision.

3. Because the IRS possesses restricted resources and a largely unrestricted flow of cases, a premium may be available where settlement is offered prior to the IRS attorney or conferee devoting a great deal of time to the case.

4. Recognize that the price of settlement discussions is educating your opponent, and sometimes that price is too high.

### B. While There are Few, if Any, Magic Formulas, Certain Truisms and Techniques Have Developed in the Realm of Tax Settlement Strategy.

1. Negotiate from a position of strength or apparent strength – talk about most of your strengths and his weaknesses (but save some of his weaknesses for trial).

2. Tactfully demonstrate a genuine interest and ability "to go to the mat" – to make the IRS's worst litigation hazard a reality.

3. Emphasize the disparity in exposure: if the taxpayer loses, he loses only one case but, if the government loses, it loses this case and the thousands like it. In short, the government should exercise the good judgment to get rid of this case and find a litigating vehicle that has weaker facts and weaker representation for the taxpayer.

4. Always start out in a friendly but firm, non-adversarial appeal to reason. If that fails, consider strengthening tempo and emphasis.

5. Respect your opponent enough to allow him to acknowledge the weaknesses in his case and to note what he believes to be his strengths.

6. Don't make a frontal assault on his analysis: use the "but" technique (*e.g.*, "I can easily understand how you may have drawn that conclusion but . . ."). Good settlements can be obtained through vehement attacks but, more often than not, they simply entrench the parties.

7. Your explanation of why his contentions do not withstand analysis should be short and sweet to avoid escalating the importance of his contentions in his mind.

8. Subtly undermine confidence in the agent's conclusions or the government's witnesses. Be careful in dealing with evidentiary matters since most of these defects can be cured prior to trial.

9. Act as a lightning rod: personally accept blame where the IRS's hostility would otherwise operate to the detriment of the client.

10. Secure undisputed concessions first.

11. When possible, concede to your advantage. The IRS attorney or appellate conferee is most concerned, if not exclusively concerned, with the tax years and issues assigned to him. You want to trade those issues that operate to your advantage in other years.

## V. CONCLUSION.

Judgment and instinct dictate when and how to apply the principles discussed in this outline. Depending upon the circumstances, those principles should be used individually, or in tandem, or in a given sequence, or abandoned altogether. But above all else, the decision must be made with a view towards all the opportunities available over the life of a case.