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Some Reflections on Trifurcation of the Government's Handling of Civil Tax Litigation

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COMMENTS

SOME REFLECTIONS ON TRIFURCATION OF THE GOVERNMENT'S HANDLING OF CIVIL TAX LITIGATION†

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The proposal to convert the Tax Court (now an administrative agency within the Executive Branch) into an Article III Constitutional Court and the hearings that the Senate Subcommittee on Improvements of Judicial Machinery under the chairmanship of Senator Joseph Tydings has held on that proposal[1] have focussed considerable public attention on our trifurcated system for the adjudication of civil tax cases. Under this system tax cases can be decided at the trial level by the Tax Court, by a federal district court, or by the Court of Claims. Clearly, if we were starting from scratch, this trifurcated system is not the one we would adopt. Among its drawbacks are complexity, encouragement of forum-shopping for procedural and substantive law advantages — shopping, incidentally, that is available to the taxpayer but not to the Government — and finally discrimination against the taxpayer who is not in a position to prepay the disputed tax,[2] prepayment being the price of admission to either a district court or the Court of Claims. In introducing a series of bills embodying alternative methods for restructuring tax litigation, Senator Tydings commented:

> [T]here can perhaps be found a justification for the complexities of our substantive tax law in the complexities of the society which we have developed. But, no similar justification exists for the inequities in our present judicial system of resolving tax disputes between our citizens and the Government.
>
> At present, our judicial system for tax litigation discriminates not only against the poor, but against those far from poor

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1. *Hearings on S.* 2041 *Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968).

2. The defects are discussed in a report prepared by the Tax Division of the Department of Justice for the Senate Sub-Committee on Improvements in Judicial Machinery, reprinted in 22 TAX LAWYER 96 (1968).

who become embroiled in a tax dispute but cannot pay in advance the full amount the Internal Revenue Service claims is due. . . .

Trifurcation breeds diverse interpretation and application of the tax laws, causes great delay in the resolution of conflicts, encourages forum shopping, and contributes significantly to the strain on our overburdened judicial system.

Among the most significant difficulties created by the three court system is a broad lack of uniformity in interpretation and application of the federal tax statutes at the trial court level, which may take years to resolve. This problem is compounded by the fact that the Supreme Court is the only body whose decision is binding on all of the trial level courts which can determine tax questions.

As a result as much as a decade may pass before a dispute among the courts as to the meaning of a section of the Internal Revenue Code is ultimately resolved; in the interim, whether it is determined in favor of the taxpayer or the Government in any particular instance will depend on the forum in which the case is brought. The protracted conflict not only undermines taxpayer confidence in the system, but also encourages a multiplicity of suits. . . .[3]

I. Trifurcation in Representation of the Government in Civil Tax Cases

There is another, somewhat less celebrated, trifurcation in the agencies involved in handling civil tax litigation. Responsibility for representing the Government in civil tax cases is divided among three different offices. This trifurcation impedes the Government's efforts to make efficient use of tax litigation in developing tax law through the courts. It also makes it difficult to insure consistency in the positions the Government takes when litigating with various similary-situated taxpayers and, indeed, even to insure consistency when the Government is litigating a single case up through the three levels of our adjudicative institutions. At times it also results in delays in processing settlement offers and in handling other aspects of litigation that require the Government to decide what its litigating position on a particular issue is to be. One consequence is occasional confusion and annoyance on the

3. 114 Cong. Rec. S 12117-20 (daily ed. Oct. 6, 1968).

part of taxpayers who, not without reason, find it difficult to grasp why three or more governmental units have to be consulted before the Government can accept a settlement offer. The consequences of this trifurcation are difficult to justify in terms of the obvious public interest in seeing that the courts are used as effectively as possible in developing and clarifying our tax law, and they may well have an adverse effect on taxpayer confidence in the fairness and efficiency of our tax administration.

The three offices of the Executive Branch that are directly involved in handling tax litigation are the office of the Chief Counsel of the Internal Revenue Service, the Tax Division of the Department of Justice, headed by an Assistant Attorney General, and the Office of the Solicitor General. The Chief Counsel is directly responsible for representing the Commissioner of Internal Revenue before the Tax Court. The Department of Justice, on the other hand, represents the Commissioner in all of the federal courts.[4] The Department therefore serves as the Commissioner's counsel in the district courts, the Court of Claims, the courts of appeals, and the Supreme Court. The Tax Division within the Department of Justice is directly responsible for handling of all tax refund suits. The Division has some sixty-five attorneys assigned to three Refund Trial Sections who defend refund suits in the district courts. There are another twenty attorneys who defend suits in the Court of Claims. About forty attorneys in the Division's General Litigation Section handle all other tax-related civil litigation, whether the cases arise in the federal district courts or in state courts. The Criminal Section of the Tax Division handles criminal tax proceedings, all of which are conducted in federal district courts. The sixty attorneys in the Division's Appellate Section brief all taxpayer and Government appeals in tax cases, whether the cases were originally tried in the Tax Court or in a federal district court. These attorneys also make all of the arguments in the appellate courts except for the Supreme Court, where arguments are made by the Solicitor General, one of his staff, or someone from the Tax Division, as the Solicitor General may designate.

Since the Solicitor General is responsible for representing the Government in the Supreme Court, he has the duty of filing all Government petitions for certiorari and briefs in opposition to the taxpayer petitions and Supreme Court briefs on the merits. Drafts of these documents are prepared by the Appellate Section of the Tax Division, but they are reviewed and revised by one or two members of the

4. The split in representation in the Tax Court and the federal courts is related historically to the fact that the Tax Court is an administrative agency within the Executive Branch. It functions, however, in all respects (with a couple of minor qualifications) like a court.

Solicitor's staff and by the Solicitor General himself. Perhaps the most pervasive and important responsibility of the Solicitor General in tax litigation lies in his responsibility for making the final decision as to whether the Government should prosecute an appeal from an adverse decision of a trial court, whether a federal or a state court. The Solicitor makes the decision to appeal or not to appeal after receiving recommendations from the Tax Division, the Chief Counsel and members of his own staff.

Probably the most striking feature of the Government's handling of tax litigation is that when a case originates in the Tax Court, and ultimately goes all the way to the Supreme Court, each of the three offices involved in tax litigation on the Government side has been directly responsible for handling the litigation at one of the three stages —the Chief Counsel in the Tax Court, the Tax Division in the courts of appeals, and the Solicitor General in the Supreme Court.

II. Coordination Between the Chief Counsel and the Tax Division in Handling Refund Suits

In addition to being directly responsible for representing the Government in the Tax Court, the Chief Counsel also co-ordinates with and advises the Department of Justice in developing litigating positions in all the tax cases the Department handles. Attorneys of the Chief Counsel's Refund Litigation Division are assigned to follow each refund suit handled by the Tax Division throughout the trial and appellate stages. Attorneys of the General Litigation Division in the Chief Counsel's Office do the same with respect to cases tried in state or federal courts by the General Litigation Section of the Tax Division, and attorneys of the Chief Counsel's Tax Court Division follow the progress of Tax Court cases that are on appeal in the court of appeals or the Supreme Court.

After a refund suit is filed by the taxpayer, the Chief Counsel sends a "defense letter" prepared by the Refund Litigation Division to the Tax Division. This letter indicates the Chief Counsel's views as to whether the case ought to be defended and, if so, what position or positions the Government ought to take. If, as trial preparation progresses, the Tax Division Trial Section decides that the Government ought to take a different position than the one set forth in the defense letter, consultations are held with the Refund Litigation Section of the Chief Counsel's Office to be sure that the position ultimately urged on behalf of the Government is sound and is consistent with positions taken by the Commissioner in other cases.

The defense letter also classifies the case as either "SOP" (which stands for settlement option procedure), "standard" or "prime." This classification system has two principal functions, and is based on the significance of the issues a case presents.

This categorization is first a necessary foundation for the Government's efforts[5] to concentrate special attention on the cases that are potential vehicles for developing important tax law principles. A case is classified as prime only if it involves a prime issue. Issues so classified are set forth on a so-called prime issue list maintained by the Chief Counsel. Roughly six to seven per cent of pending refund suits are classified prime.

The other purpose of the classification system is to simplify the processing of settlements of cases that do not involve important issues. Cases classified as SOP typically involve purely factual issues, legal issues which have little impact on revenues or the application of legal principles already established through prior litigation. Cases so classified (about forty per cent of all refund suits) can be settled by the Department of Justice without receiving the recommendation of the Chief Counsel. If the case is classified as prime or standard, the Department of Justice will not settle the case without first obtaining the recommendation of the Chief Counsel with respect to settlement.

III. Coordination Among the Solicitor General, the Tax Division and the Chief Counsel in Connection With Cases on Appeal

If the Government loses a case at the trial level in a federal district court or in a state court, the Chief Counsel makes a recommendation to the Assistant Attorney General in charge of the Tax Division as to whether an appeal ought to be taken. The Tax Division, in turn, makes its own recommendation to the Solicitor General, who makes the final decision as to whether an appeal should be prosecuted. With respect to cases decided against the Government in the Tax Court, however, neither the Tax Division nor the Solicitor General has a look at the case unless the Chief Counsel decides to forward it to the Department of Justice with a recommendation that a petition for review be prosecuted in the appropriate court of appeals. Indeed, in one instance a Tax Court case was received by the Tax Division from Chief Counsel with his recommendation for appeal. The Tax Division sent the case to the Solicitor General's Office with a recommendation of no appeal. On the basis of further discussion and consultation, the Chief Counsel was persuaded to

5. See discussion *infra*.

change his position and withdraw the case from the Department. The Solicitor General regarded his jurisdiction over the case as terminated by this withdrawal. Such a disposition, through unusual, highlights the capacity of the Chief Counsel to foreclose consideration by the Solicitor General of a case the Government loses in the Tax Court by not sending it to the Department with a recommendation for appeal or even by withdrawing it from the Department before action is taken by the Solicitor General.

IV. Coordination in Settlement of Cases on Appeal

After a trial court has handed down its decision, settlement of the case may involve the Solicitor General, in addition to the Tax Division and the Chief Counsel. If the Government has lost below and the Solicitor General has already authorized the Government's prosecution of an appeal, the case may be settled only after the Solicitor General has indicated that the case does not involve significant issues of law requiring appellate review. If, however, the case is on taxpayer's appeal, it may be settled without consulting the Solicitor General. If the Government has lost in the district court and the case has not yet reached the Solicitor General for his action on appeal, the case may be settled by the Tax Division and the Chief Counsel without consulting the Solicitor. Moreover, a case lost by the Government in the Tax Court may be settled by the Chief Counsel without consultation with the Tax Division or the Solicitor General.

V. The Role of the Joint Committee in Settlements

Most proposals of settlement involving refunds of over 100,000 dollars are reported to the Joint Committee on Internal Revenue Taxation.[6] The Department awaits the views of the Committee before authorizing the refund and reserves the right to withdraw its acceptance in the light of those views. In order to permit evaluation of the proposed settlement, the Tax Division prepares a detailed supporting memorandum, which is transmitted to the Joint Committee. Reported settlements are given a careful review by the Joint Committee Staff and from time to time questions and objections are raised by the Staff that may have a

6. Under Section 6405(a) of the Internal Revenue Code of 1954, all refunds of income, gift and estate taxes proposed by the Commissioner in excess of 100,000 dollars must be reported to the Joint Committee, and the Commissioner must wait thirty days (presumably in order to receive the Committee's views) before making such refunds. While the statute does not specifically refer to refunds authorized by the Department of Justice, shortly after the organization of the Tax Division, the Assistant Attorney General agreed to report all settlements covered by the Section 6405(a) description to the Joint Committee through the Service.

bearing on whether the settlement is ultimately approved. Thus, in settlement of these cases a total of four offices may be involved in determining what the Government's litigating position is to be. A recent survey indicated that it takes roughly five to six weeks longer to process settlements that must be reported to the Joint Committee than other cases.

On one occasion the Chief Counsel, the Tax Division and the Solicitor General initially supported a full administrative refund and a confession of error by the Government. But the Joint Committee Staff was opposed. The issue — on which reasonable men could easily differ — was essentially where the line should be drawn across a spectrum of transactions, at one end of which capital gain treatment was clearly appropriate and at the other end of which ordinary income treatment was clearly called for. After an exchange of memoranda and conferences, the view of the Joint Committee Staff ultimately prevailed.

As a practical matter, the Department will rarely, if ever, accept offers in cases requiring reference to the Joint Committee unless the Chief Counsel, the Tax Division, and the Solicitor General (in cases within his jurisdiction) are unanimous in recommending acceptance and it is understood that no refund has ever been made in the face of the Joint Committee Staff's objection.

VI. Evaluation of the Trifurcated System

How well does the trifurcated system for representing the Government in civil tax cases work? The answer, as might be expected, turns primarily on how one defines the goals of that representation. If the goal is to insure that the Government is ably represented in particular cases and that it takes consistent and sound positions, the system does surprisingly well, especially in view of the more than 9,000 substantive tax cases that flow into the judicial stream for resolution every year. If, however, the goal is to use the litigation as effectively as possible to develop tax law in unsettled areas, the performance of the existing institutions falls far enough short to cause some concern.

A major source of difficulty is the diffusion of responsibility that inevitably flows from trifurcation. The problems this diffusion produces are likely to increase with future increases in the volume of tax litigation unless some remedial steps are taken soon. Even if trifurcation be accepted as immutable—and certainly there is a lot of history on its side — there are some anomalies and weaknesses in the existing system that could usefully be re-examined and eliminated.

An evaluation of our trifurcated system and changes that might improve it should probably begin by outlining the requirements of the

system that should be adopted if it were possible to write on a clean slate. In my view, in order to achieve the goal of making litigation as effective a tool as possible, the Government needs, at a minimum, to do the following:

First, it must be able to identify areas in which development of the law through litigation is needed.

Second, Internal Revenue Service field personnel, in conjunction with the Chief Counsel's attorneys, should actively seek cases that would be good vehicles for litigating issues identified as important and should set up deficiencies in order to start the judicial process in motion. In addition, refund suits arising out of overpayment with the returns should be reviewed with this objective in mind.

Third, the cases identified as presenting key issues ought to be handled by a team of trial and appellate experts knowledgeable in the area concerned. Such a team will be fully effective only if it is involved at the earliest stage of the trial preparation. Too often a case does not prove to be a good vehicle for the development of a legal principle in the appellate courts because a stipulation of facts or the record made at the trial is deficient in some respect. This problem could be minimized by focussing the attention of the experts on the case at the earliest possible stage.

Finally, there should be unified, or at least closely co-ordinated, control of important litigation throughout the lives of the cases involved. This would reduce, if not eliminate, the possibility of the Government presenting its position differently at each stage of the litigation.[7]

VII. Identification and Development of Key Issues and Cases

The Government is now taking steps aimed at improving its handling of the cases that really count. With respect to identifying the issues and the cases that ought to be given special attention, substantial progress has been made. The Chief Counsel, in consultation with the Commissioner and the Department of Justice, has developed the prime issue list referred to above. This list, which is subject to continuing review, sets forth important issues on which judicial clarification or elaboration appears to be needed. The list recently contained about sixty-five issues.

But identification of important issues is not enough; all the cases presenting these issues and all the pertinent special projects carried on by the Interpretative Division of the Chief Counsel's Office involving

7. See, *e.g.*, Commissioner v. Clay B. Brown, 380 U.S. 563 (1965), where the Government articulated its position differently in the Tax Court, in the Court of Appeals for the Ninth Circuit, and finally in the Supreme Court, and the end result was not a very happy one for the Government.

them must also be identified. One of the problems is sheer numbers. Over 7,000 cases are filed in the Tax Court, over 1,500 refund suits are filed in the district courts and the Court of Claims, and some 20,000 matters are submitted to the Appellate Division of the Service annually. It is therefore no mean undertaking to pinpoint all cases and controversies that involve a particular issue. Litigation planning efforts can be quickly frustrated if cases slip through the identification net and are tried without proper thought and care.

Without a computerized data retrieval system, identification would be unmanageable, but the development by the Chief Counsel's Office of the Reports and Information Retrieval Activity (RIRA) System has provided the Government with a basic tool for this identification process.[8] Cases pending in courts and all matters (including rulings) pending in the Interpretative Division of the Chief Counsel's Office are indexed according to issue under a Code section breakdown and are digested in the RIRA System. At any point in time RIRA should be able to give a Government trial attorney the names and print-out digests of all the cases and projects involving the issue with which he is concerned. A parallel system is being set up with respect to matters pending in the Appellate Division of the Internal Revenue Service. At the end of each month a print-out can be obtained which lists all of the matters pending before the Appellate Division, classified according to issue and Code section.

Turning to the second objective suggested above, the Government has not moved very far as yet in developing effective procedures for taking the offensive in tax litigation by seeking out factual situations that will present prime tax issues in an appropriate factual framework. Special audit guidelines are presently provided examining agents with respect to various key issues, but there is now no effective capability either for describing in adequate detail to examining agents the kind of cases needed to test a particular issue or for selecting in the field good test vehicles for those issues.

The Government also lacks at this point effective procedures for reviewing all controversies now pending with respect to a particular issue with a view to settling out the cases that would not appear to be good litigation vehicles. Too frequently the Government, which is basically on the defensive in civil tax litigation (since it is the taxpayers who must initiate judicial proceedings), finds itself involved in an appellate test of an important issue in a relatively unfavorable circuit

8. Cohen & Uretz, *RIRA: Storage and Retrieval of Tax Law Data*, 1 LAW AND COMPUTER TECHNOLOGY, Sept. 1968, at 2-5.

or on a relatively unfavorable record. The best means of preventing this is to settle or concede the poor case.[9]

VIII. Special Handling of Key Cases

Once the appropriate test cases involving important issues have been identified, the problem is to insure that an appropriate measure of experience, talent and judgment is brought to bear on the planning and trial of the case at the earliest possible time. Those who will ultimately be involved at the appellate level should work with the trial people from the beginning. All prime cases need not be handled in this way, but those of special complexity and importance ought to be. For example, it makes little sense for cases involving key issues under the Life Insurance Companies Act of 1959 to be handled by trial attorneys lacking special knowledge of the life insurance industry and the intricacies of the Act and the regulations promulgated under it.

In the Tax Division some progress has been made in this direction. A Prime Case Committee, consisting of representatives of the Trial, Review and Appellate Sections, the Assistant for Civil Trials and the Deputy Assistant Attorney General, reviews prime cases periodically and designates certain categories of those cases to be handled by a special team of trial and appellate attorneys who work together planning the case from the outset on through the appellate stages. The Chief Counsel has designated corresponding teams, including representatives of the Refund Litigation, Tax Court and Interpretative Divisions, to consult and co-ordinate with the Tax Division in developing litigation policy for these categories of cases.

Another useful step would be to set up some mechanism for insuring that key cases in the Tax Court are identified and tried by attorneys having appropriate expertise. At present, all Tax Court cases are tried by about 150 attorneys attached to thirty-five branch offices of Regional Counsel throughout the country. One could scarcely expect field personnel who must deal with a great variety of issues to be competent to handle the highly complex cases involving the taxation of life insurance companies. At stake in this area are very large amounts of revenue and development of the tax pattern for an entire industry.

It is true that briefs prepared by Regional Counsel attorneys are reviewed by the Chief Counsel in Washington before being filed in the

9. See, *e.g.*, Commissioner v. Berghash, 361 F.2d 257 (2d Cir. 1966). With the benefit of hindsight, it seems clear that the factual setting of that case made it a relatively unattractive vehicle through which to attempt to persuade the courts to take a dynamic approach to meet the tax avoidance challenge posed by the liquidation-reincorporation device.

Tax Court, but this review allows little time for thorough-going revision. More important are the procedures recently developed by the Chief Counsel under which Tax Court cases involving certain prime issues of overriding importance cannot be tried or settled by Regional Counsel without co-ordination and consultation with the National Office. This enables the National Office to play a significant role from the earliest stage of the litigation.

These procedures, however, while helpful, do not appear to be an adequate substitute for having attorneys experienced in the particular area handle the case from the outset. One means of securing such handling would be to centralize in Washington representation in the most important prime cases—presumably quite limited in number—pending in the Tax Court. Only in Washington does the trial attorney have direct, continuing and simultaneous access to the experts of the Treasury, the Commissioner's Office, the Interpretative and Refund Litigation Divisions of the Chief Counsel's Office, and the representatives of the Tax Division and the Solicitor General's Office. In my view, only by centralizing the handling of key cases in Washington can the Government hope to provide the kind of planning and co-ordination that is needed.

IX. Suggestions for Changes in Government's Overall Handling of Civil Tax Cases

If we were starting from scratch, a case could be made for the proposition that the most direct and efficient way of achieving co-ordinated control of the Government's civil tax litigation policy would be to vest responsibility for representing the Government in all courts in a single office. However, our experience with placing final responsibility for all Supreme Court litigation in the hands of the Solicitor General bears strong witness to the advantages of having the Government represented before the court of final resort by an independent advocate who represents the entire federal establishment, rather than the more limited interests of a particular agency.

This experience argues strongly for continuing at least a bifurcation in representation of the Government in civil tax cases to the extent of retaining the Solicitor General's responsibility for Supreme Court matters. I am somewhat troubled, however, by the rare case in which the Solicitor General refuses to take a position advocated by the Commissioner with the result that the Commissioner's position may not be presented to the Court at all or may not be presented as fully and force-

fully as possible. In *Ithaca Trust Co. v. United States,*[10] the Solicitor General rejected the position of the Bureau of Internal Revenue, reflected in its regulations, that no deduction for estate tax purposes with respect to a charitable remainder was allowable if a possibility of diversion of the corpus through exercise of a power of invasion in favor of an income beneficiary existed. The Solicitor General rather urged the view, accepted by the Court, that if the power were limited by a standard fixed with reference to the income beneficiary's accustomed standard of living, the value of the remainder could be computed and a deduction taken for that value. A flood of litigation over whether the standard in particular trust instruments and wills is ascertainable and "capable of being stated in definite terms of money,"[11] and whether the likelihood that the charity will not take is so remote as to be negligible has burdened the courts ever since.[12]

More recently in *Commissioner v. Tellier,*[13] the Acting Solicitor General expressed doubt as to the correctness of the Commissioner's position that legal fees incurred in an unsuccessful defense to criminal charges were not deductible because a deduction would tend to violate the public policy reflected in the criminal statute. These doubts provided powerful support for the taxpayer (already supported by a unanimous Court of Appeals for the second Circuit sitting *en banc*) in urging rejection of the long-standing position of the Service which, until *Tellier,* had been uniformly sustained by the courts. It was not until the Secretary of the Treasury personally requested that a petition for certiorari be filed that the Solicitor General agreed to do so. While the Supreme Court ultimately agreed with the Solicitor, it was understandable that the Service felt that it could not abandon its long-standing and judically-approved position without a Supreme Court test. The Government brief is an interesting document. First, the Commissioner's position was presented; then the Acting Solicitor General indicated his doubts as to its soundness and elaborated his reasons for these doubts. With the Government's counsel virtually wearing two hats, the oral orgument in support of the Commissioner was an unusual one, to say the least.

In extraordinary cases like these, perhaps the Commissioner should be allowed to seek the Court's permission to file his own brief (to accompany that of the Solicitor General) and to present his own argument.

The possibility of occasional conflict between the administrator and

10. 279 U.S. 151 (1929).
11. *Id.* at 154.
12. See Taggart, *Charitable Deductions for Transfers of Remainder Interests Subject to Invasion,* 21 TAX. L. REV. 535 (1966).
13. 383 U.S. 687 (1966).

the litigator does not undercut, in my view, the importance of having the Government represented in the appellate courts by counsel who is independent of the Internal Revenue Service. Since the Supreme Court decides very few substantive tax cases, the principal judicial matrix for tax law is now the court of appeals, which can be expected to decide between 300 and 400 substantive tax cases each year. At this level there is a division of function and diffusion of responsibility between the Solicitor General and the Tax Division that renders the Solicitor General's control of tax litigation policy much less direct and effective than at the Supreme Court level. Although the Solicitor General makes the final decision in cases that reach him as to whether the Government should appeal an adverse trial court decision, he does not usually review, revise or even see the Government's briefs, which are prepared by the Tax Division before they are filed. Therefore, although the ultimate litigation policy decision to appeal or not is clearly the Solicitor's, the implementation of it is largely out of his hands. Furthermore, logic would dictate that the official with final authority with respect to appellate litigation should be directly involved in the entire universe of actual and potential appellate cases. In fact, however, he has no role in how the Government responds to taxpayer appeals. Here again the briefing is handled exclusively by the Tax Division in consultation with the Chief Counsel. Perhaps the strangest aspect of all is that the Solicitor General does not even have an opportunity to review all the cases the Government loses at the trial level. If the Government loses in the Tax Court, neither the Solicitor General nor the Tax Division sees the case unless the Chief Counsel decides to recommend appeal and to send the case over to the Department.[14] And if the Tax Division settles or makes an administrative refund in a refund suit lost at the trial level before it is forwarded to the Solicitor General, the Solicitor General, under existing Department of Justice delegations, need not be consulted.[15]

It would make more sense to combine the responsibility for deciding whether the Government should take an appeal with the responsibility for briefing and arguing the Government's position and for approving settlement or confession of error both in Government and taxpayer appeals. Certainly, at the very least, the office charged with deciding whether the Government should prosecute an appeal should see all the cases the Government loses at the trial level that involve legal, as opposed to purely factual, issues, and it should probably also be involved in the settlement of all such cases because the settlement of the case can

14. See discussion *supra.*
15. See discussion *supra.*

also involve a basic litigation policy decision and can be an important step in insuring that an important issue is litigated in a good test vehicle.

At the trial level, I find it very difficult to rationalize the present split of responsibility and function between the Chief Counsel's Office and the Tax Division. For one thing, it results in a considerable amount of duplication between the work of Tax Division trial attorneys and their counterparts in the Chief Counsel's Refund Litigation Division. Eighty-five attorneys trying refund suits in the Department of Justice are backstopped by about fifty-five attorneys in the Refund Litigation Division of the Chief Counsel's Office. But more important, the split of the trial work impedes effective co-ordination and supervision of the vast volume of tax litigation which is so important if litigation is to play as effectively as possible the large role thrust upon it by the relative inactivity of Congress in dealing on a regular basis with the constant flow of interpretative and technical problems that result from ambiguities or gaps in the Internal Revenue Code. Improving qualitatively the handling of key cases, which should be the most immediate goal, would also be served by combining the trial activity in one office.

Even if history and tradition render unification of trial work in one office impractiable, as a bare minimum, important categories of cases should be handled by teams of experienced trial and appellate attorneys (drawn from both the Chief Counsel's Office and the Tax Division) headquartered in Washington and working closely together. In my view, this kind of co-operation is not likely to be fully effective unless and until the Chief Counsel's Office elects to put responsibility for the handling of such key cases pending in the Tax Court in the hands of experienced personnel headquartered in Washington. As long as such cases are handled by Regional Counsel personnel throughout the country, unified or even closely co-ordinated, control of civil tax trials by the Chief Counsel and the Tax Division will face substantial obstacles.

Finally, it may be appropriate to take another look at the one category of cases in which a fourth Government agency, the Joint Committee, plays a role in the Government's handling of litigation. The only cases affected are those to be settled through a refund of over 100,000 dollars. Thus, the Joint Committee Staff does not normally review settlements of Tax Court cases or cases handled by the Tax Division's General Litigation Section, however important the issues presented or large the tax liability involved. Conceding that Congress should be fully informed as to the Government's handling of tax admin-

istration, this objective might be met in a way more in keeping with the constitutional roles of the legislative and executive branches and in a way less productive of delay in the processing of settlements if Congress were not injected into the disposition of particular cases. Perhaps it would be preferable for the Joint Committee's Staff to be advised in detail through periodic reports concerning settlements effected by the executive branch during the preceding period covered by the report. Possibly also settlements of all important civil tax litigation (not just refund suits) should be covered so that the Committee can review a sampling of the entire universe of civil tax cases in which important litigation policy decisions are being made through settlements.

Conclusion

The intended thrust of these comments has been to suggest that the public pays a certain price for the fragmentation and diffusion of responsibility in the Government's handling of tax litigation as well as for the trifurcation in the institutions for adjudicating tax disputes and that there is much to be said for a re-examination of the entire picture. The expected increase in tax litigation in the years ahead suggests that it is none too soon to start.