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THE SMALL TAX CASE PROCEDURE: HOW IT WORKS—DOES IT WORK?

I. Introduction

In 1968 the Section of Taxation of the American Bar Association proposed an amendment to the Internal Revenue Code of 1954 to provide for a small claims division in the United States Tax Court.¹ Such a division was thought to be a necessary alternative² to the often expensive and time consuming tax litigation procedure in the Tax Court, the Court of Claims, and the district court. Congress adopted the proposal⁴ and it was incorporated into the Tax Reform Act of 1969.⁵

II. Traditional Remedies

Prior to the enactment of this legislation a taxpayer who was unable to settle a tax dispute with the Internal Revenue Service through internal procedures possessed limited remedies.⁶ He could have sued in the Tax Court,⁷ the Court of Claims,⁸ or in his local district court.⁹

Faced with these alternatives, the taxpayer has to consider several factors in choosing a forum.¹⁰ If he decides to sue in the Tax

1. See Committee on Court Procedure, *Revised Recommendations for a Small Claims Division Within the Tax Court*, 22 TAX LAW. 231 (1968).

2. *Id.* at 237. The Association said:

After several years of study the Section of Taxation has concluded that present judicial procedures are not adequate to deal properly with civil tax disputes which involve a relatively small amount of dollars. Too often the amount of tax in dispute does not warrant the expenditure of funds and time presently necessary for a taxpayer to litigate his case at the judicial level. The result . . . often creates an unhealthy climate of dissatisfaction among taxpayers having small claims. Accordingly, the Section has concluded that a new procedure is necessary

Id.

3. B. BITTKER & L. STONE, *FEDERAL INCOME, ESTATE & GIFT TAXATION* 940-44 (4th ed. 1972).

4. Naveen & Eisenberg, *Small Cases in the Tax Court*, 57 A.B.A.J. 1235 (1971).

5. INT. REV. CODE OF 1954, § 7463.

6. See INT. REV. CODE OF 1954, § 6211.

7. *Id.* §§ 6212-13, 7421.

8. 28 U.S.C. §§ 1346, 1491 (1970), *as amended*, (Supp. III, 1973).

9. 28 U.S.C. §§ 1346, 1396 (1970). For a comparison of jurisdiction and procedures governing tax cases in the Tax Court, the Court of Claims, and the district courts, see Dep't of Justice, *Study of the Trial Court System for the Federal Civil Tax Disputes*, 22 TAX LAW. 95, 98-106 (1968).

10. A study of the effects of bringing suit in the different forums available in tax litigation showed that decisions of the Tax Court on appeal are revised less frequently than are decisions

Court, he need not pay in advance the amount of tax allegedly due. However, he is not precluded from doing so.¹¹ Indeed, he may wish to do so in order to avoid any interest payment should he lose his case. The taxpayer may sue in the district court or Court of Claims only if he pays the tax allegedly due.¹²

The availability of a jury trial must also be considered. A taxpayer may request a jury trial in a district court as a matter of right,¹³ while proceedings in the Tax Court or Court of Claims are before a judge.¹⁴

The location of the court is another factor relevant to the choice of forum. The Court of Claims sits only in Washington, D.C., while there are numerous Tax Courts and district courts throughout the country which may be more accessible.¹⁵ The taxpayer may bring his action in the Tax Court that he requests at the time of the filing of his petition.¹⁶ He also has the alternative of bringing the action in a district court where he and any co-plaintiff, or all defendants, reside.¹⁷ In addition, different forums may have decided similar prior cases differently, depending on their interpretation of the Internal Revenue Code.¹⁸ While one court may decide in favor of the taxpayer on a particular problem, another court may reach a different conclusion.¹⁹

in the district courts. In addition, the settlement ratio is higher in the Tax Court than in the district courts. The study also showed that, in dollars contested, the taxpayer won at twice the ratio of the IRS when his suit was brought in the Tax Court as opposed to the district courts and Courts of Claims. See Worthy, *The Tax Litigation Structure*, 5 GA. L. REV. 248, 249, 263 (1971).

11. INT. REV. CODE OF 1954, § 6213(b)(3). The Tax Court will, however, lose jurisdiction over the dispute if the taxpayer does not file a petition within 90 days of the date the notice of deficiency was issued to him. *Id.* § 6213(a). If this happens the case is dismissed and the taxpayer owes the amount of the deficiency. *Id.* § 6213(c).

12. See *Flora v. United States*, 362 U.S. 145 (1960). A litigant is limited to using only one court, i.e., simultaneous litigation in the Tax Court and the district court or Court of Claims is prohibited. INT. REV. CODE OF 1954, § 7422(e).

13. *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961).

14. 28 U.S.C. § 240(2) (1974). The Government may also request a jury trial. *Id.*

15. Gannet, *Pre-trial Strategy in a Tax Case: Choice of Forum*, N.Y.U. 22ND INST. ON FED. TAX. 75, 91 (1964).

16. The Tax Court is given broad discretion to fix the place of trial so as to minimize inconvenience and expense of the taxpayer. INT. REV. CODE OF 1954, § 7446; U.S. TAX CT. R. 140.

17. 28 U.S.C. § 1391(a) (1970). See also *id.* § 1402(a).

18. *Rosenspan v. United States*, 438 F.2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971). See also Note, *Status of a Controversy: The Tax Court, The Courts of Appeals and Judicial Review*, 32 OHIO ST. L.J. 164 (1971).

19. For example, under § 162(a)(2) of the Code, a person may deduct travelling expenses

Lastly, the choice of forum may depend on the type of appeal available in case of a decision against the taxpayer. The taxpayer may appeal as a matter of right to the court of appeals from the tax court²⁰ or a district court.²¹ However, since the Court of Claims is reviewed only by the Supreme Court upon a writ of certiorari, an appeal from that court is less likely.²²

In many instances, however, each of these forums may be inadequate because litigation often entails substantial time, cost, and inconvenience. If the disputed amount is relatively small it may be unprofitable for the taxpayer to litigate. In effect, then he is forced to pay the tax.²³

Thus, in 1967, before the small tax case procedure went into effect, there were two million tax return disputes,²⁴ but only 7,700 were taken to court by the taxpayer.²⁵ It was evident that a small tax case procedure was necessary to make the court system easily accessible and inexpensive to the small taxpayer.²⁶

III. Bringing Suit Under The Small Tax Case Procedure

Under section 7463 of the Internal Revenue Code, income or gift tax suits may be brought in the Tax Court under the small tax case procedure where neither the amount of the deficiency placed in dispute, nor the amount of any refund claimed, exceeds \$1500 for

while away from home when in the pursuit of a trade or business. The condition that the taxpayer be away from home is absolutely necessary to qualify for the deduction. But, the term "home" is not uniformly interpreted. The Tax Court and the IRS interpret home as the taxpayer's principal place of business. *Rosenspan v. United States*, 438 F.2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971). However, the 2nd, 6th, and 9th Circuits interpret "home" as the taxpayer's residence. See *Commissioner v. Stidger*, 386 U.S. 287 (1967); *Peurifoy v. Commissioner*, 358 U.S. 59 (1958); *Commissioner v. Flowers*, 326 U.S. 465 (1946). The outcome of any suit with this term as a point of dispute could therefore differ depending upon the court that hears the case.

20. 28 U.S.C. § 2072 (1970).

21. *Id.* § 1291.

22. *Id.* § 1255.

23. Garbis, *Improving the Procedural System Under Which Tax Controversies Are Resolved*, 33 J. TAX. 278, 279 (1970).

24. *Hearings on S. 2401 Before the Subcomm. on Improvements in Judicial Machinery*, 91st Cong., 1st Sess., 112 (1968).

25. *Id.*

26. Generally, the system of annual federal tax collection is regarded as a voluntary self-assessment system. This means that each taxpayer must bear the responsibility of determining and paying his own tax liability. H.R. REP. No. 413 (pt. I), 91st Cong., 1st Sess. 1 (1969); S. REP. No. 552, 91st Cong., 1st Sess. 1 (1969).

any one taxable year.²⁷ This section is also applicable to cases involving estate taxes not exceeding \$1500.²⁸ The actual amount of the alleged deficiency is immaterial. Only the disputed portion of the deficiency amount counts toward the \$1500 limit.²⁹ To determine the deficiency placed in dispute, additional amounts and penalties asserted in connection with the deficiency must be added to the income, estate, and gift taxes themselves. However, the interest charged for late payment is not included.³⁰

To qualify for the small tax case procedure,³¹ the taxpayer must file a petition with the Tax Court after the Commissioner of the IRS has sent him a deficiency notice, often called a 90 day letter.³² The notice will state the amount and year of the deficiency.³³ The petition must be received³⁴ by the court within 90 days³⁵ of the date the deficiency notice was issued.³⁶ Although this rule appears to be the

27. INT. REV. CODE OF 1954, § 7463(a). The dollar limitation was originally \$1,000. It was raised to its present figure of \$1,500 by the Federal-State Tax Collection Act of 1972, Pub. L. No. 92-512, § 203, 86 Stat. 944-45, amending INT. REV. CODE OF 1954, § 7463(a).

28. In addition, the jurisdictional amount of \$1,500 applies separately to each taxable year in dispute, not to each deficiency notice. INT. REV. CODE OF 1954, § 7463(a).

29. *Id.*

30. Section 6601(f)(1) of the Code provides that interest on late payment of tax shall be assessed, collected, and paid in the same manner as tax, except that the deficiency procedures as provided in §§ 6211-16 do not apply to such interest. Since amounts in dispute under § 7463 are limited to those amounts subject to the deficiency procedures, statutory interest must be excluded.

31. Initially, it should be stated that the proceedings under § 7463 in the U.S. Tax Court are of a nature similar to the informality and finality of the New York Small Claims Court. See generally Driscoll, *De Minimis Curat Lex—Small Claims Courts in New York City*, 2 FORDHAM URBAN L.J. 479 (1974).

32. The letter must be answered within 90 days. INT. REV. CODE OF 1954, § 6213(a). If it is not, the Tax Court loses its jurisdiction and the asserted deficiency will be immediately assessed. *Id.* § 6213(c).

33. U.S. TAX COURT, ELECTION OF SMALL TAX CASE PROCEDURES AND PREPARATIONS 2 (1974) [hereinafter cited as TAX COURT PROCEDURE]. This pamphlet is a summary of § 7463 of the Internal Revenue Code and the Rules of Practice and Procedure of the U.S. Tax Court that apply to small tax cases. See U.S. TAX CT. R. 175.

34. Receipt by the court means actual receipt or a U.S. postmark with a legible date within the 90 day period. Saturdays, Sundays, and holidays are not counted as the last day. INT. REV. CODE OF 1954, § 6213(a).

35. Ninety days means 90 days and not three months. For example, if the date of the deficiency notice was August 10, 1975, the last date for delivery or mailing would be November 8, 1975 and not November 10, 1975. TAX COURT PROCEDURE 2.

36. Although this does not apply to taxpayers who live outside of the United States, this rule is strictly followed. One taxpayer was even denied access to the Tax Court because his petition had no postmark on it even though it was mailed within the 90 day period. The court strictly followed the law requiring that the envelope mailed must bear a legible United States

one adhered to most stringently by the court, even it is relaxed in order to assure the taxpayer his day in court.³⁷

To have his case handled under the small tax case procedure, the taxpayer must leave unchecked the appropriate box on the petition form he receives from the Tax Court.³⁸ In addition, he must also indicate the year of the alleged tax deficiency, the amount of the deficiency for each year, the amount of any overpayment that the taxpayer wants refunded and a short statement explaining the reasons for his dispute with the IRS.³⁹

If husband and wife are disputing a deficiency as to a joint return, both names should be listed on the petition.⁴⁰ Enclosed with the petition is a list of the cities where small tax cases are heard.⁴¹ The taxpayer should choose the most convenient city and return the place of trial form with the petition.⁴² The petition should also be accompanied by payment of ten dollars to the Clerk of the United States Tax Court,⁴³ as well as a copy of the deficiency notice.⁴⁴

postmark within the 90 day period. Wall Street Journal, Feb. 10, 1971, at 1, col. 5.

37. For example, one judge held that a petition received without a legible postmark five days after the 90 day return period expired was sufficient to warrant the dismissal of the taxpayer's petition. Yet, another judge held that a petition without a legible postmark and received seven days late was not a sufficient reason to dismiss the petition for the judge stated that the mail was often delayed and it wasn't uncommon for him to receive mail that had been postmarked two weeks earlier. Interviews with legal representatives of the Internal Revenue Service, set up by the public relations office of the Regional Counsel for the City of New York, Aug., Sept., 1975 [hereinafter cited as Interview with the IRS].

38. INT. REV. CODE OF 1954, § 7463(a). Even after the petition is filed the taxpayer may demand that his case be handled as a small tax case, if his petition does not indicate this, as long as the trial stage has not been reached. U.S. TAX CT. R. 172(c).

39. U.S. TAX CT. R. 175; TAX COURT PROCEDURE 3.

40. TAX COURT PROCEDURE 3. In an instance when the petition was signed only by the husband and the income tax return was a joint return requiring the signatures of both husband and wife the commissioner allowed the petitioner 30 days to mail to the court a copy of his petition signed by his wife. This was necessary before a judgment could be rendered. Frederick & Barbara Sweeting, No. 8598-74S U.S. Tax Ct.; Small Tax Case Division (Sept. 9, 1975).

41. TAX COURT PROCEDURE 4. Since the passage of Internal Revenue Code § 7463 the number of cities hearing small tax cases has been increased from the original three, New York, Chicago and Los Angeles, to over 100 cities in all 50 states. TAX COURT PROCEDURE 4-5.

42. For example, in New York State, small tax cases are heard in Albany, Buffalo, New York City, and Syracuse even though regular tax cases are heard only in Buffalo and New York City. In cities where there are no regular Tax Courts, commissioners from Washington, D.C. will ride circuit. *Id.*

43. TAX COURT PROCEDURE 6. The address of the court is United States Tax Court, 400 Second Street, N.W., Washington, D.C., 20217.

44. *Id.* at 3. After filing the petition, the court clerk will give it a docket number. This number will be followed by the letter "s" to indicate that the taxpayer has requested the small

A trial date will be set for as soon as possible and notice thereof will be sent to the petitioner at least 60 days before trial.⁴⁵

To carry out Congress' intent of having a simplified procedure⁴⁶ for small tax cases,⁴⁷ a number of rules have been adopted to implement section 7463.⁴⁸ The trial is carried out as informally as possible in an orderly fashion.⁴⁹ The petitioner may have counsel⁵⁰ or he may represent himself,⁵¹ as most taxpayers do.

Any evidence which the court considers to be of probative value will be admitted.⁵² If the taxpayer has given the IRS documents that he wishes to put into evidence at the trial, he should request that the government's attorney bring them to the trial.⁵³ If the original documents or papers are lost, copies may be admitted into evidence.⁵⁴ Written briefs and oral arguments are not required by the court, but they may be permitted if a party so requests.⁵⁵

tax case procedure. *Id.* at 4. The docket number should be used on all subsequent correspondence with the tax court.

45. *Id.* at 6.

46. S. REP. NO. 552, 91st Cong., 1st Sess. 302-03 (1969).

47. U.S. TAX CT. R. 170-79. These rules replace rule 36 of the Tax Court rules effective through December 31, 1973. Rule 36 of the Rules of Practice of the U.S. Tax Court had already been established when section 7463 came into effect on December 30, 1970. This rule in conjunction with Rule 48 which permitted commissioners to handle small tax cases with simplified procedures was used in the interim period before the new law. Drennen, *Procedural Changes Affecting United States Tax Court*, 4 IND. LEGAL F. 53 (1970).

48. Section 7463 is silent on the effect of an election of the small tax case procedure. It merely states that the "proceedings shall be conducted in accordance with such rules of evidence, practice, and procedure as the Tax Court may prescribe." INT. REV. CODE OF 1954, § 7463(a).

49. U.S. TAX CT. R. 177(b); TAX COURT PROCEDURE 7.

50. TAX COURT PROCEDURE 7.

51. *Id.*

52. The court usually allows any type of related evidence regardless of the fact that it be objected to on the ground of immateriality, irrelevancy, or unsubstantiation, when these objections might very well have held up in regular tax court proceedings. Observations made at the small tax case trials in the U.S. Tax Court in New York, New York, Sept. 8-10, 1975 [hereinafter cited as Trial Observations].

53. TAX COURT PROCEDURE 7.

54. *Id.* In one case petitioner claimed that he had mailed two copies of an affidavit to the IRS proving that he had been the sole support of his mother. The issue was the allowance of this support as an expense deduction. At the trial petitioner did not have a copy of the affidavit. Counsel for the IRS said he never received a copy. The court allowed petitioner 30 days to mail to the court a new affidavit stating the support. Frederick & Barbara Sweeting, No. 8598-74S U.S. Tax Ct.; Small Tax Case Division (Sept. 9, 1975).

55. U.S. TAX CT. R. 177 (c). Briefs were not offered by either party in any of the cases in the last small tax case session in New York. The petitioner would usually file an argument supporting his petition and counsel for the IRS would usually file a memorandum of authority

The petitioner or the Commissioner of the IRS may remove the case from the small tax case procedure into regular Tax Court upon a showing of good cause.⁵⁶ That is, if there are reasonable grounds for believing that the contested amount will exceed \$1500⁵⁷ or the court finds that justice requires a removal.⁵⁸ The procedure for transferring a case from the Small Tax Case Division to the regular Tax Court and the dollar limitation on the jurisdiction of the small claims division appear to eliminate the possibility that novel or major cases will be decided without any opportunity for review by the courts of appeal.

The Small Tax Division is under the general supervision of the Chief Judge of the Tax Court and under the direct supervision of a particular judge of the court. The judge in charge of the division supervises commissioners⁵⁹ of the court who actually preside over the trial.⁶⁰ After the trial, the commissioner submits to the judge in charge of the Small Tax Case Division his summary of the facts and reasons for his decision. After review and approval by the judge, the commissioner's summary opinion is issued.⁶¹

Decisions by the Tax Court under Section 7463(b) of the Internal Revenue Code are final and non-appealable, and cannot serve as precedent for subsequent cases.⁶²

IV. Proceedings In The Small Tax Case Division

The proceedings in the Small Tax Case Division are begun, as in regular Tax Court, with the calling of the calendar.⁶³ At this stage it is apparent that only a few cases will be tried, since most have

which is, in effect, a mini-brief; stating the facts of the case and the issues statutes, and case law involved. Trial Observations. In small tax cases, the trial will be stenographically recorded. A transcript need not be made as part of the record unless the court so directs. U.S. TAX CT. R. 178. However, either party may order a transcript for himself.

56. U.S. TAX CT. R. 173.

57. U.S. TAX CT. R. 173(1).

58. U.S. TAX CT. R. 173(2).

59. U.S. TAX CT. R. 180-81.

60. The Tax Reform Act of 1969 also added section 7456(c) which authorized the Chief Judge to appoint commissioners to handle the small case. 26 U.S.C. § 7456 (1970).

61. The summary opinion does not contain formal findings of fact as in regular Tax Court opinions. U.S. TAX CT. R. 173; TAX COURT PROCEDURE 6. See text accompanying notes 110-12 *infra*.

62. INT. REV. CODE OF 1954, § 7463(b).

63. Trial Observations.

already been settled by agreement between the petitioner and the IRS. As each case is called the petitioner or his counsel and the counsel for the IRS approach the bench. There, a short statement of facts and the issues in dispute are read aloud by the attorney for the IRS.⁶⁴ This allows the commissioner to schedule his calendar according to his estimate of the difficulty and length of each case. The short and easy cases are scheduled for the first day of trial, thereby affording as many petitioners as possible an expeditious proceeding. Also at this point, motions are made for dismissal by counsel for the IRS in cases where the petitioner has not appeared. The commissioner is very reluctant to grant such a motion and thereby deny a taxpayer his day in court; he will do so only after it is made clear that the petitioner has been contacted several times and his case has already been continued.⁶⁵ Even then, the court will allow the petitioner to re-open the case within 60 days of the dismissal.⁶⁶ If the taxpayer takes this action, the court will vacate the order for dismissal and set a new calendar date for the trial.⁶⁷

When a petitioner appears pro se the role of the commissioner as the petitioner's advocate is clearly displayed.⁶⁸ The commissioner often advises the taxpayer on the legal and factual problems involved in his case.⁶⁹ He assures the taxpayer that his case will not be treated lightly even though there is only a small amount of money involved, since Congress has set up this procedure for the taxpayer's benefit. The commissioner also questions the petitioner to better understand the relief he seeks.⁷⁰

64. *Id.*

65. As proof of contact between the petitioner and the IRS the Commissioner will require the stubs from a "registered return receipt requested" letter or something of similar proof that petitioner is deliberately avoiding the proceedings. Trial Observations.

66. *Id.*; see U.S. Tax Ct. R. 50(b).

67. In one case petitioner was in Puerto Rico at the time of the trial. He had taken up permanent residence in Puerto Rico since the filing of his tax return in which the dispute arose. The issue in the case was whether the taxpayer was allowed a uniform expense deduction on his return. The IRS made a motion to dismiss the case and the commissioner denied it. He said that the great expense that a courtroom appearance would have on the taxpayer made it unnecessary that petitioner leave Puerto Rico. The commissioner instructed the IRS to contact the taxpayer and inform him that he had the burden of proof in showing that this was a legitimate deduction. The case was continued. Juan M. Medina, No. 8721-73S U.S. Tax Ct.; Small Tax Case Division (Sept. 8, 1975).

68. Trial Observations.

69. *Id.* The commissioner often used the phrase, "If I were your attorney I would advise you to"

70. Trial Observations. In one situation a couple had received a deficiency notice for

V. Analysis

The small tax procedure was heralded as a taxpayer's dream come true,⁷¹ for when a small taxpayer disagreed with the IRS he had "little real choice but to pay up He paid because he could not afford to fight the virtually unlimited resources of the IRS and its myriad of expert tax lawyers."⁷² Furthermore, for the taxpayer who cannot afford an attorney and who wished to present his case pro se, the rules and procedures of the Tax Court are often too complex to comprehend. He is barraged with legal terms with which he is unfamiliar.⁷³ Yet, before praising this relatively new small tax case procedure, the rights the litigant forfeits and proposals that might improve this procedure should be examined.

A taxpayer suing under the small case procedure has no right of appeal.⁷⁴ In *Luckenbach S.S. Co. v. United States*,⁷⁵ the Supreme Court found it to be a "well settled rule" that "an appellate review is not essential to due process of law, but is a matter of grace."⁷⁶ The mere lack of an appeal does not violate due process so long as there is a fair trial.⁷⁷ It would therefore seem that the small tax case procedure does not violate due process rights.

This loss of appeal does not, however, seem so great when two factors are taken into consideration. First, since the cost of an appeal is expensive and time consuming and the amount of money at issue in the small claims division is relatively small, it would seem impractical for a petitioner to appeal the decision. Second, the lack

failing to pay a self-employment tax. They were doing odd jobs in various places in order to make a living until the husband, who had been laid off from his job, could find permanent employment. *Victor & Linda Macchio*, No. 2295-75S (Sept. 8, 1975). The couple apparently was self employed, but the Commissioner was asking them questions that might put them in the "casual employment" classification thereby disposing of the tax. *Trial Observations*.

71. *Wall Street Journal*, Feb. 4, 1971, at 1, col. 1.

72. 114 CONG. REC. H. 25848 (daily ed. Sept. 5, 1968) (Remarks of Rep. Dole).

73. An example of this is a case of a man who had a dispute with the IRS in the amount of \$312. His petition, assignment of errors, and statement of the facts supporting his argument were all in the proper format. However, he lost his case, for where the rules call for "a prayer setting forth the relief that is sought," the taxpayer wrote "The Lord's Prayer." *Wall Street Journal*, April 15, 1968, at 22, col. 1.

74. INT. REV. CODE OF 1954, § 7463(b).

75. 272 U.S. 533 (1926).

76. *Id.* at 536.

77. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 329 (1796).

of appeal disadvantages the IRS as well, for a decision against it is also final.⁷⁸

The small tax case procedure offers several advantages. The taxpayer can represent himself and save the cost of an attorney.⁷⁹ Because of the informal atmosphere under which the proceedings are conducted, he need not concern himself with the technicalities of the rules of evidence⁸⁰ or the writing of a formal brief.⁸¹ This relaxed, informal *pro se* representation is regarded as the most important feature of the procedure. One of the tasks of the commissioner presiding over the case is to see that this benefit is secured by aiding the taxpayer whenever possible.

Another advantage to electing section 7463 is that of geographical convenience. The Tax Court sits in only 65 cities, while small tax case trials are heard in over 100 locations.⁸² This conforms to the Congressional desire of making access to the Tax Court easy and convenient for the small taxpayer.

The expeditious treatment of the small tax case is another advantage; it takes far longer to have a case heard in regular Tax Court than in the small Tax Case Division.⁸³

Although the taxpayer runs the risk of having his case removed to the regular Tax Court⁸⁴ upon motion of the IRS, it is almost never done.⁸⁵ The commissioner is reluctant to grant such a motion, since

78. An example of this is the case of a man who received a sizeable amount of interest on capital held by a corporation. Because the corporation was going through a merger the capital was tied up causing a delay in payment of capital to the petitioner and resulting in the payment of interest. The IRS issued the taxpayer a deficiency notice for failure to pay tax on this interest income. The taxpayer sought relief in the small claims division of the U.S. Tax Court and the Commissioner ruled against the IRS. The Commissioner stated that the petitioner should not have to pay tax on this money and he adjudged the interest as being more as a penalty payment due to the delay. Interview with IRS. Here it is clear the court is acting as a court of equity even though it sits as a court of law (for a regular tax court proceeding would probably have been decided in favor of the IRS), trying to give the taxpayer the best break possible.

79. Though the taxpayer can represent himself in regular tax court proceedings, it seems more practical for him to do so in a small tax case and about 95% of litigants electing § 7463 do represent themselves *pro se*. U.S. TAX COURT, FIRST REPORT OF THE SMALL TAX DIVISION 10-11 (1972).

80. U.S. TAX CT. R. 177(b).

81. U.S. TAX CT. R. 177(c).

82. U.S. TAX CT. R. App. IV.

83. Dawson, *Small Tax Case Procedure in the United States Tax Court*, TAX ADVISER 132, 136 (1972).

84. U.S. TAX CT. R. 173; TAX COURT PROCEDURE 6.

85. Trial Observations.

the taxpayer would then have to hire an attorney to represent him.

Section 7463 also states that decisions by the commissioners will set no precedent, and therefore will carry no weight in future cases tried before them or in any other court. This too, can work in the taxpayer's favor, for a commissioner is more likely to decide a close case in favor of the taxpayer since there is no danger that his ruling will open the floodgates as precedent to similar cases which might deprive the IRS of millions of dollars annually.

The success of the small tax case procedure as a convenient means of settling small tax disputes depends upon the taxpayer knowing such a procedure exists. This is assured by the IRS when the deficiency notice is sent to the taxpayer and before any legal proceedings begin.⁸⁶ Since the option to elect section 7463 is conspicuously noted on the deficiency notice itself, there is little chance of the taxpayer overlooking it.⁸⁷ However, only about 2400 cases are litigated in the Small Tax Case Division each year.⁸⁸ Since there are thousands of tax disputes annually,⁸⁹ this figure presents only a portion of the picture.⁹⁰

Many potential small tax cases are settled before the trial stage

86. IRS, No. 556, *Audit of Returns, Appeal Rights, and Claims for Refund*. This publication is available to the taxpayer at all times and is provided by the IRS to help resolve tax disputes. It mentions that a special procedure is available to taxpayers with a claim of \$1,500 or less and gives the Tax Court's address to write to for further information. *Id.* at 5.

87. INT. REV. CODE OF 1954, § 6214 (a).

88. COMMISSIONER OF INTERNAL REVENUE, ANNUAL REPORT 39 (1974). Table 1 shows the number of small tax cases received by the Tax Court.

Table 1
Tax Court Cases Received 1970-74

Year	1971	1972	1973	1974
Tax Court	8299	8949	9624	8799
Small Tax Case Div.	1070	2277	2650	2380

89. See note 24 *supra*.

90. COMMISSIONER OF INTERNAL REVENUE, ANNUAL REPORT 40 (1974). Table 2 shows the monetary outcome of decisions in the Tax Court.

by voluntary agreement between the parties.⁹¹ Before trial, the taxpayer has a district conference to attempt a compromise with the IRS. If this fails, a regional conference is called. As a last resort, the taxpayer brings his case to court.⁹² However, because the IRS is quite eager to settle small tax cases out of court, yet another conference is held within 60 days of filing the suit.⁹³ A large number of cases are settled while the calendar is being called on the day of the trial.⁹⁴

In addition, the commissioners are eager to find grounds for a compromise. If such grounds appear at trial, or even after trial, the commissioner will call the parties into his chambers to discuss a settlement.⁹⁵

Statistics show that when a full trial is had, few cases are decided in favor of the taxpayer.⁹⁶ This is not simply because the taxpayer

Table 2

Tax in Litigation—Tax Court¹

Small Tax Cases

	Number of cases	Taxes & Penalties		Overpayments	
		Asserted	Determined	Claimed	Determined
Pending 7-1-73	1678	955		45	
Received	2380	1347		48	
Disposed of ²	2420	1294	704	52	25
Recovery Rate ³			54.4%		48.1%
Pending 6-30-74	1638			40	

1) Figures are in thousands of dollars: numbers do not include proposed assessments agreed to by taxpayers in District or Appellate Conferences.

2) Disposals include cases tried, settled, and dismissed.

3) The amount determined expressed as a percentage of amount asserted or claimed. These amounts do not include proposed assessments which are agreed to by the taxpayer at District or Appellate Conferences.

91. Interview with the IRS.

92. To illustrate this high percentage of settlement outside the courtroom it should be stated that of the 75 cases scheduled for trial on the calendar for small tax cases at New York nine cases were continued to the next calendar, three cases were dismissed and only nine cases were tried. Trial Observations.

93. Interview with the IRS.

94. *Id.*

95. Trial Observations.

96. COMMISSIONER OF INTERNAL REVENUE, ANNUAL REPORT 42 (1974). Table 3 shows the outcome of litigation in the Tax Court.

representing himself lacks the knowledge and skill of his adversary, an attorney from the IRS.⁹⁷ Rather, it is due to the fact that during all the preliminary conferences the IRS has conceded or compromised on many of the cases it considers weak.⁹⁸

Although the percentage of cases won by the taxpayer at the trial stage is small, there is often a split decision where the taxpayer and the IRS prevail on different issues.⁹⁹ More than 38 percent of the cases were so decided last year.¹⁰⁰

It is noteworthy that even at trial the IRS does not act as a true adversary in certain cases. For example, a very large number of cases in the Small Tax Case Division involve alimony and/or child support where the husband or wife argue that a certain payment is deductible as an expense or exempted from income.¹⁰¹ Here, regardless of who wins at trial, the IRS is satisfied, for if it is not taxable to one spouse it is probably taxable to the other.

Table 3
Trial Court Case Record
(Opinions rendered—refund litigation and Tax Court cases.)

Year	Small Tax Cases ¹	
	1973	1974
Action:		
Decided in favor of the government — #	126	170
Decided in favor of the government — %	52.5	54.5
Decided in favor of the taxpayer — #	29	23
Decided in favor of the taxpayer—%	12.1	7.4
Decided partially for the government and partially for the taxpayer—#	85	119
Decided partially for the government and partially for the taxpayer — %	35.4	38.1

1) 312 Tax Court opinions involving 337 small tax cases. Related cases are reflected as one opinion.

97. The taxpayer often has difficulty in understanding the law and distinguishing facts relative to it and to his case. However, the commissioner acts as his advocate in such cases to clear up ambiguities in the law. Trial Observations.

98. *Id.*

99. See text accompanying note 95 *supra*.

100. It is interesting to note that the very first case decided by the small case division on January 4, 1971 was such a split decision where a business related expense was allowed but an educational expense was not. U.S. NEWS AND WORLD REPORT, Feb. 22, 1971, at 49.

101. Interview with the IRS.

It is important to the taxpayer that he have an independent forum wherein he might prevail against the IRS¹⁰² in matters that involve sums insufficient to justify protracted proceedings. The Small Tax Case Division appears to satisfy this need. To instill such a feeling of confidence was a major factor behind the passage of section 7463.¹⁰³

VI. Proposals

The willingness of the Small Tax Case Division to listen to the taxpayer's arguments, no matter how farfetched,¹⁰⁴ is apparent. Furthermore, many cases are won by the taxpayer because of his arguments. But there is still room for improvement in this new and commendable procedure.

The Small Tax Case Division of the Tax Court sits as a court of law. It can dismiss or uphold any deficiency, but the amount of money involved cannot exceed the amount placed in controversy.¹⁰⁵ Therefore, in some cases it may still be a financial burden for a taxpayer to bring his dispute to court, even with the small tax case procedure. The cost of missing work while trying to settle with the IRS at district and regional conferences is in many cases unrecoverable. In addition, the taxpayer must be present at both the calendar call¹⁰⁶ and the trial,¹⁰⁷ another financial loss he must bear. Such expenses may ultimately cost the taxpayer more than he would

102. One taxpayer who had been audited every year since 1969, and had always settled with the IRS in the early conferences with them, told the Commissioner that he was tired of being audited for the same reason every year. He wanted to know why this was being done to him and he wanted it stopped. What is more important is that he thought that if he went to court, his problems, other than that of the deficiency notice, would be solved. Trial Observations.

Another taxpayer used the small tax case procedure as a means of attacking the validity of a Code section allowing taxpayers to deduct charitable contributions to legitimate charitable organizations while a like contribution to a needy family would be disallowed as a deduction. The taxpayer came to court without any documents or proof of his donation and only asked that the court interpret the Internal Revenue Code to do equity and justice. Trial Observations.

103. See, e.g., H.R. REP. NO. 413 (pt. I), 91st Cong., 1st Sess. 9 (1969); Barr, *Tax Reform: The Time is Now*, SATURDAY REVIEW, Mar. 22, 1969, at 22.

104. One petitioner read a ten minute statement of how the Social Security Act violated the Constitution and was leading the country down the path to Communism. Victor & Linda Macchio No. 2295-755 U.S. Tax Ct.; Small Tax Case Division (Sept. 8, 1975).

105. INT. REV. CODE OF 1954, § 7463.

106. U.S. TAX CT. R. 132(b).

107. U.S. TAX CT. R. 149.

recover if he prevailed against the IRS in court. To remedy this, the Small Tax Case Division could hold court in the evening as do most small claims courts.¹⁰⁸ This would eliminate the obvious advantage the IRS has when it tries to settle out of court with the taxpayer. The pressure put on the taxpayer to settle early in order to avoid the expense of continuing his actions would be alleviated.¹⁰⁹ Furthermore, the power of the commissioner presiding over the case as a trial judge might be expanded to include the awarding of treble damages, as in the New York Small Claims Court,¹¹⁰ in special instances when the IRS is uncooperative or clearly in error in issuing the deficiency notice in the first place. This would exert some pressure on the IRS to settle early and might lessen the number of deficiency notices issued in situations where the petitioner is likely to prevail and thus save him the initial expense of district and regional conferences. In short, the petitioner and the IRS would be on more equal grounds, especially since the expenses the taxpayer incurs in early settlement proceedings act as punitive expenses because he wishes to dispute the deficiency notice and challenge the IRS.

It is also suggested that the Small Tax Case Division be made into a separate court of law. A separate court having its own tenured judges would eliminate another weakness in the present procedure. This weakness is that each decision of a commissioner is subject to review and revision by the judge in charge of the Small Tax Case Division and by the Chief Judge of the Tax Court.¹¹¹ It is they who enter the final decision. This review procedure tends to create a uniformity and consistency in the decision making that would normally be desirable in the Tax Court. But, the question raised is whether this review structure is consistent with the special needs and objectives of the Small Tax Case Division. This type of review restricts the flexibility of the commissioner in making a decision based on the individual merits and peculiarities of each case. In-

108. Driscoll, *supra* note 31, at 496.

109. Furthermore, when the trial stage is reached, the attorneys for the IRS, when requesting a dismissal, often try to attach an onus to the taxpayer for not settling out of court or satisfying requests made upon the taxpayer by the IRS during the conference preceding the trial. The commissioner usually sets aside such accusations. It is the right of the taxpayer to sue and no onus should be attached for exercising this right. Trial Observations.

110. Driscoll, *supra* note 31, at 489.

111. U.S. Tax Ct. R. 183.

deed, one of the reasons for the "no precedent" provision in these cases indicates Congress' intent that there be flexibility in decision making, thereby allowing each commissioner to decide each case without fear of having his decision reversed by a reviewing judge. Since the post of the commissioner is without tenure, and since he can be relieved from his post at any time,¹¹² there is an obvious pressure to decide cases as he believes the reviewing judge would and not necessarily the way he thinks they should be decided.

Furthermore, a separate court with its own rules and procedures, and its own tenured judges with expertise on the problems of the small taxpayer could awaken Congress to the inequities of the Code and their effect on the small taxpayer. Before Congress includes a new section in the Code which would affect large corporations, hearings are held, lobbying takes place; as a result the bad side effects that the section might have on corporations are eliminated, without obliterating Congress' original intent.¹¹³ The proposed new court could result in a group of experts who would be able to advise the Congress as to how a proposed section would affect the small taxpayer. A separate small tax court would be an ideal way to suggest and advocate the needed corrections.

A major reason for the lack of success of the pro se litigant is his inability to determine what evidence is necessary to support his claim. This is partially caused by his propensity to argue his case on the basis of what he thinks the law should be and not on the basis of what the law is.¹¹⁴ An effort should be made to inform the taxpayer of those materials that the court requires from him to support his claim. The booklet furnished by the Tax Court, informing the petitioner of the small tax case procedure, should also include exam-

112. INT. REV. CODE OF 1954, § 7471(a).

113. J. DEAKIN, *THE LOBBYISTS* 81-83 (1966). Tax legislation is generally regarded as special interest legislation. It attracts little public attention, possibly because it is very technical in nature, but affects the public enormously.

When tax advantages are handed out, the individual lobbyist working for a special interest group comes into his own. No where else is direct lobbying so concentrated and so intense. No where else is the competition more fierce. The tax loopholes for which the lobbyists fight so hard— the 27½ percent oil depletion allowance and the multitude of other mineral depletion allowances, the "structural changes" benefiting utilities, the lower capital gains rate, the dividend exclusion and all the rest—cost the taxpayer 40 billion dollars a year. This loss is borne by citizens who do not retain lobbyists.

Id. at 83. See also P. HERRING, *GROUP REPRESENTATION BEFORE CONGRESS* (1967).

114. Trial Observations.

ples of the most frequently litigated cases and the necessary evidentiary materials required to support each case. This would help eliminate taxpayer defeats where the claim is valid but the proof is unacceptable.

The advantages of the small tax case procedure are obvious. It provides the taxpayer with access to the court system where there had not been access. However, it is Congress' duty to buttress this procedure with additional legislation to increase its effectiveness in providing the taxpayer with his day in court.

Christopher J. Badum

