ADVANCED TAX PROCEDURE

INSTRUCTIONS FOR PAPERS

A paper on the topics included on the attached list is required for this course. Any topic other than one of those on the list must have my prior approval. Because the paper is required in place of an examination, it is expected that the paper demonstrate substantial work and scholarship of a high order. But most of all, I expect a thoughtful product. Here are some suggestions for producing the kind of paper I am looking for, and you can be proud of:

1. Think about where you can find information relevant to your topic. Because most of the topics require looking at nontax sources, you will need to find out treatises and other materials in those areas.

2. Do not – repeat do not – succumb to the temptation of using large portions of other materials, even with attribution. I am looking for your work, your views, and your insights after reflection. Remember I have more than a little familiarity with the literature in these areas. On the other hand, I do not suggest that you cannot use sources to confirm or support your views. But there is a difference between support and mere repetition.

3. Organization is the foundation of every and any written product. Use an outline to organize your research and thoughts. Then put it aside, and come back to it. Consider whether it results in your paper having an introduction, a statement of overall purpose, an exposition (which, of course, will have parts and subparts), and an end. It may take you (indeed, it should take you) some time to work out an outline. And you may find that after beginning your writing, you will revise your outline.

4. Use statutes, regulations, rules and cases. Do not string cite as though clumps of cases will show me how much work you have done. It is not how many citations you have but how you have used the cases and other materials you have found. You must understand the facts of the cases and how they relate to and compare with other cases. If you have any questions about what I have in mind, read Karl Llewellyn's Bamble Bush. It is in the law school library and in the bookstore.

5. There is no such activity as writing – only rewriting. You can be very certain that I can tell the difference between a first draft and a revised product. Writing is thinking, and most of us do not think in a linear form. As a result, your first product will not take either you or me through your paper in an orderly and understandable fashion.

6. It seems to me that a minimum length for your papers should be 25 typed pages without imaginative spacing and margins. While there is no limit on length, remember the words of the wise man who said not entirely in jest, "Verbosity breeds animosity".

Michael I. Saltzman
TOPICS FOR PAPERS


2. Abuse of discretion standard: When do Courts Consider the IRS to the Abusing its Discretion?

3. Transferee Liability in Corporate Transactions: Case Studies and Planning/

4. A Comparison of Estoppel in Tax Cases and Other Administrative Agency Cases: What are the Elements that Make a Winning & Losing Case?

5. The Variance Problem – Claims for Refund: History and Rationale; Case Studies; Practice Recommendations.

6. Access to IRS Information and Litigation – A Comparison with Other Government Litigation: What Information Can Be Obtained; When; and What are the Best Methods?

7. When Will the IRS Be Bound by Its Own Administrative Rules – Caceres Applied: Case Studies and Practical Application.


12. The Changing Focus of the Examination Function: How Large Case Examinations, the Industry Specialization Program and the Coordinated Examination Program Operate, and the Effect of the Role of IRS Counsel.


15. The Duty of Consistency: A Comparison of Its Application to Taxpayers and the IRS.


17. Alternative Dispute Resolution in the Context of Tax Controversy.


ADVANCED TAX PROCEDURE AND TAX LITIGATION

Cases and Materials

Available in Tax Office

Rules of Courts

Tax Court Rules
Court of Federal Claims Rules

Available on-line at court web-site

Text


I. The IRS's Status as an Administrative Agency and the Effect on Tax Litigation

A. The IRS as an Administrative Agency

Review the Administrative Procedure Act, 5 U.S.C. Section 551 (Tab 1)

Read IRS P&P, Chapter 1, especially ¶1.03, pp. 1-22, 1-24 – 1-26, as well as Supplement. References are to IRS P&P (unless otherwise indicated).

B. FOIA and the Privacy Act

Read the 5 U.S.C. Section 552 (the Freedom of Information Act) and 5 U.S.C. 552a (the Privacy Act).

See also, IRC Sections 6103 and 6110(j).

C. The Rulemaking Process

Read 5 U.S.C. 553 (Rule making)

IRC Section 7805(b)

Scan Chapter 3 of IRS P&P.
D. Judicial Review under the APA and Statutory Judicial Review under the Code


Read and compare Code Sections 7804(a), 7801(a) and (b), 7802(a) and (b). Compare § 7805.

Code deficiency procedures and refund procedures:

See IRC Sections: Code Sections 6211-6213, 7421 (deficiency procedures); Sections 7422, 6511, 28 U.S.C. Section 1346

E. Alternative Dispute Resolution and the IRS


II. Legislative and Executive Control of the IRS

A. Legislative Control of IRS Authority

Suggested Reading: ¶ 1.04[1], pp. 1-26 – 1-28.

B. Executive Control of IRS Authority


III. Judicial Doctrines of Administrative Law that Apply to the IRS

A. The IRS Must Adhere to Precedent

Read ¶ 1.06[1], pp. 1-49 – 1-49.

B. The IRS Must Treat Similarly-Situated Taxpayers Equally

Read ¶ 1.06[2], pp. 1-49 – 1-51.

IBM Corp. v. United States

Bornstein v. United States

Black & Decker v. United States

C. The IRS Must Comply with Published Procedural Rules

United States v. Caceres

Luhring v. Glotzbach

Collins v. Comm’r

Read ¶ 1.06[3], pp. 1-51 – 1-54 and Supplement.
D. When the IRS May Be Estopped

Read ¶ 1.06[4], pp. 1-54 – 1-55 and Supplement.

E. Due Process and Tax Cases

Shapiro v. United States

IV. The Statutory Judicial Review

A. The Foundation of Tax Court & Refund Court Review

Suggested Reading: ¶ 1.05[1], ¶ 1.05[4], pp. 1-28 - 1-41 and Supplement.

B. The Key Cases Establishing the Foundations of Judicial Review

Bull v. United States

Flora v. United States

Helvering v. Taylor

C. Statutory review of IRS Determinations in General


Re-read Flora v. United States

Philadelphia & Reading Corp. v. United States

D. Nonstatutory Review: Injunctions and Declaratory Judgments

Suggested Reading: ¶ 1.05[5], pp. 1-41 - 1-48 and Supplement.

1. When Injunctions Available Against the IRS Are Permitted

Review Code §§ 7421, 6015(e), 6212(a) and (c), 6213(a), 6225(b),
6246(b), 6331(i), 6672(b), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436.

Miller v. Standard Nut Margarine

Enochs v. Williams Packing Co.

Bob Jones Univ. v. Simon

Alexander v. “Americans United” Inc.

2. Declaratory Judgments

and 1146.

Bob Jones Univ. v. Simon
V. Litigation and the Examination Process

A. Authorization to Practice Before the IRS

1. Practice Requirements

United States v. Pappas

Problem 1: Preparation of Power of Attorney

Suggested Reading: ¶ 1.08, pp. 1-59 – 1-80 and Supplement.

2. Practice Standards

The Amended Circular 230

Other Code statutes affecting practice
IRC Section 6694; and the accuracy–related penalty, IRC Section 6664

Job Creation Act of 2004 and Enforcement by the Office of Professional Responsibility

Review ¶¶ 1.09 - 1.12, pp. 1-80 - 1-90 and Supplement.

B. Examination Procedures

1. Types of Agents and Examinations

Review ¶ 8.04, ¶ 8.05 and ¶ 8.06[1] and [2]; 8.06[6][a][d].

Handout re: IRS Field Organization

2. Scope of Examination

Selection of Returns for Examination

Review ¶ 8.03.

Suggested Reading: ¶ 8.06.

C. The IRS’s Summons Authority

Code §§ 7603, 7604, 7605 7609 and 7610.

Powell v. United States


1. Relevance and audit workpapers
United States v. Arthur Young & Co.

Suggested Reading: Review ¶ 8.06 [3] [b] and Supplement.

2. Reopening or second inspections

Re-read Powell v. United States

Suggested Reading: ¶ 8.06 [3][d].

3. Other Limitations

United States v. Frederick

4. Fraud Referrals

U.S. v. Peters and U.S. v. McKee

Suggested Reading: ¶ 8.06[7], pp. 8-73 - 8-77 and Supplement.

D. Alternative Dispute Resolution in the Examinations Process: The Procedures of the Large and Mid-Size Business Operating Division

Fast-Track Settlement and Fast-Track Mediation

E. Taxpayer Controls in Examinations

1. Technical Expedited Advice Memorandum (TEAM)

Suggested Reading: ¶ 3.04[2][a]; ¶ 8.06 [4][d].

2. Extensions of the assessment period

Forms 872 and 872-A
Review Philadelphia & Reading Corp. v. United States

Suggested Reading: ¶ 8.06 [5].

F. Conclusion of the Examination: Negotiation, Report and Agreed Cases Procedures

Suggested Reading: ¶ 8.06 [41 [a]-[c], ¶ 8.08.

VI. Litigation in the Office of Appeals

Suggested Reading: Chapter 9, The Appeals Function and Supplement

A. The Office of Appeals as the Service’s ADR Office

Suggested Reading: ¶ 9.01, ¶ 9.02, and ¶ 9.03; Supplement.

B. Is an Appeals Conference an Administrative Right?
Luhring v. Glotzbach

United States v. Caceres

C. Preparation for, Negotiation at, and Conference Procedure

Settlement Practice and Procedure

Suggested Reading: ¶ 9.05; ¶ 9.07.

D. Settlement Practice and Procedure

1. Agreement Forms

   Forms 870 and 870-AD

   Code §§ 7121 and 7122 and regulations

   Re-read Philadelphia & Reading Corp. v. United States

2. Closing Agreements

   Section 7121

   Forms 906 and 866

   Suggested Reading: ¶ 9.10.

   Bethlehem Steel v. United States

   Suggested Reading: ¶ 9.10[2].

E. Unagreed Cases: Choice of Forum Options and the Protest Requirement

   Unagreed Cases Options

   Problem 2: Preparation of Protest

   Suggested Reading: ¶ 9.04.

   Handout re: Comparison of Courts

VII. Litigation in the U.S. Tax Court

A. Tax Court Jurisdiction

   Summary of Tax Court Jurisdiction

   Suggested Reading: ¶ 1.05 and Supplement
B. **Scope of Tax Court Jurisdiction.**

Freytag v. Comm'r
Comm'r v. Lundy
Branson v. Comm'r

C. **Jurisdictional Prerequisites**

IRC §§ 6211, 6212, 6213.

Suggested Reading: ¶ 10.03 [2] [a], pp. 10-13 - 10-21 and Supplement.

1. The last-known address problem, compare the service of a complaint in the refund courts

   See IRS P&P10.03 [2][a]; Regs. § 301.6212

2. What must the notice of deficiency disclose?

   Scar v. Comm'r
   Weimerskirsch v. Comm'r

D. **The Tax Court and Deficiency Actions – Key Rules**

1. The Petition

   See Tax Court Rules, Form 1.

   Tax Court Rule 34; Review also Tax Court Rules 20-24, 30-33.

   Problem 3: Preparation of Petition

2. The timely-mailing, timely-filing rule.

   IRC § 7502; see recent regulations.

   Suggested Reading: ¶ 4.03 [2] and Supplement.

3. The Stipulation Process and Discovery

   The stipulation process, Tax Court Rule 91.

   Tax Court Rules, Titles VII (Discovery) and VIII (Depositions)

   Branerton v. Comm’r I and II

   Schneider Interests v. Comm’r
4. Trial


Mock Trial Class

5. Appeal of Tax Court Cases

Golsen v. Comm’r
Handout re: Summary of Appeal Procedures.

VIII. The District Court and the Court of Federal Claims Refund Procedures

Refund Claim Diagrams

Suggested Reading: Chapter 11, Overpayments, Refund, Credit and Abatement

A. Jurisdictional Prerequisite to a Refund Suit- The Requirements of a Claim

IRC §§ 6402, 6511, 7422; Reg. § 301.6402-3.

Suggested Reading: ¶ 11.02, ¶ 11.05, Supplement.

1. Proper person to file claim

United States v. Williams

Suggested Reading: ¶ 11.07

2. Limitations on filing refund claims

Jones v. Liberty Glass

Rosenman v. United States

Suggested Reading: ¶ 11.05, and Supplement.

3. Problem 4: Preparation of Refund Claim

4. Waiver of Requirements

Tucker v. Alexander


Angelus Milling Co. v. Comm’r

5. Informal claims

United States v. Kales
American Radiator & Standard Sanitary Corp. v. United States

6. Amendment of claims

United States v. Andrews
United States v. Garbutt Oil Co.
United States v. Ideal Basic Industries, Inc.

IX. The Suit for Refund

A. The Full Payment Rule
   Re-read Flora v. United States

B. Jurisdictional and Other Requirements of Complaint
   28 U.S.C. 1346
   Review F.R. Civ. P., Rule 8, but read also Rule 4.
   Problem 5: Preparation of Complaint

C. Administrative Procedures
   Claims for refund and the 6-month waiting period – See IRC Section 7422.

D. Burden of Proof
   Reread Helvering v. Taylor

E. Discovery and Related Procedures Court of Federal Claims Rules

F. Decisions, Appeals, and Related Issues

X. Collection - Nature of the Collection Process
   Suggested Reading: Chapters 14-16, and Supplement.

A. Nature of Tax Lien and Tax Levy
   Reread Bull v. United States

B. Due Process Review Procedures.
   See Chapter 14.