SURVEY OF TAX PROCEDURE  
Fall 2017  
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COURSE DESCRIPTION

This short course will survey the procedural rules that govern U.S. taxpayers’ interactions with the tax system, from the time a tax return is filed until the time the IRS can no longer collect a liability. Understanding these rules is useful to tax practitioners and policymakers alike. Topics we will cover include voluntary compliance, deficiency assessments, administrative appeals, statutes of limitations, litigation in U.S. Tax Court and U.S. District Court, and tax interest and penalties.

Schedule and Attendance

This is a seven-week course that runs August 30 – October 18 at 8:50AM in VH206. The following is a list of each class date:

Class 1 – Wed. Aug. 30 
(NO CLASS ON SEPT 6!)
Class 2 – Wed. Sept. 13
Class 3 – Wed. Sept. 20
Class 4 – Wed. Sept. 27
Class 5 – Wed. Oct. 4
Class 6 – Wed. Oct. 11
Class 7 – Wed. Oct. 18
Exam – Fri. October 20, 9:30am to 12:00pm

Attendance in this class is required. If you are unable to attend class on a particular day, please e-mail me in advance. Absences are excused for medical, emergency, religious, or similar reasons. Unexcused absences will adversely affect your grade. Whether an absence is excused or unexcused, you are responsible for all material covered during any class that you miss.

Syllabus & Assignments

A list of the topics that we will cover in this class is included on Page 3 of this course description. Assignments and materials for each topic will be posted on NYU Classes under “Resources.” I will announce the assignment for the following week at the end of each class. Assignments will include practice problems and discussion questions, which we will address in class.

The assignment for our first class is to prepare the materials for Unit I, Introduction and Audit Practice.
Course Materials
The required reading materials for this course are:

- Internal Revenue Code and Treasury Regulations (any current copy, or online version);
- Readings contained in Unit Packets, which will be available on NYU Classes.

Please bring your Internal Revenue Code, Treasury Regulations, and Unit Packets to each class. You will find it difficult to follow the class discussion without these materials.

Exam & Assessment
Assessment will be based on an in-class examination. The exam will be open book, and will last for two and one-half hours. It will consist of essay questions.

Discussion
You are expected to attend class prepared to discuss the readings and practice problems. Your preparation and active engagement in class will help make the class more enjoyable for everyone.

No Video or Audio Recording
Please do not video or audio record any class or part of a class using any type of device. If you have a need for a class to be recorded as a result of a medical or family emergency, please contact me to discuss your situation.

Contact Information
I will hold office hours on Wednesday afternoons from 2:30-4:30pm. My office is located in Vanderbilt Hall, Room 430M (walk through the Tax Law Review library to find it).

Additional Sources
Listed below is a selection of optional secondary materials on tax procedure if you are interested in pursuing the topics in this course in greater detail.

- Michael Saltzman & Leslie Book, IRS Practice and Procedure
- Ann Murphy, et al., Federal Tax Practice and Procedure
- Camilia Watson, Tax Procedure and Tax Fraud in a Nutshell (4th ed.)
SYLLABUS

I. Introduction and Audit Practice
   a. Voluntary Taxpayer Compliance
   b. Audit Practice Basics

II. Getting to Assessment
   a. Filing and Paying Requirements
   b. Restrictions on Assessment

III. Choice of Forum

IV. Tax Court Litigation

V. Overpayments and Refund Litigation

VI. Tax Penalties

VII. Tax Shelter Penalties and Disclosure Rules

VIII. Interest (if time permits)
Survey of Tax Procedure
Professor Bearer-Friend

Unit I: Introduction and Audit Practice

Readings
Internal Revenue Code
§§ 6001; 6103(a)-(b)(3); 6213(a), (c); 7430(a), (b), (c)(4)(A)-(B), (E), (g)

Treasury Regulations
§ 601.105(d)(1)

Additional Materials
• Definition of “Voluntary Compliance” (from IRS website)
• IRS Publication 1, Your Rights as a Taxpayer
• I.R.M. 8.1.1.1
• Chart: The (Long) Road to Tax Court
• IRS Publication 5, Your Appeal Rights and How to Prepare a Protest if you Don’t Agree
• Sample Documents: 30-day letter; 90-day letter; Forms 870 and 870-AD

Problems
1. What do we mean when we say that the United States income tax system is a system of “voluntary” compliance? What factors influence taxpayers’ compliance?

2. Gertrude is a dentist living in Los Angeles, California. In 2014, Gertrude purchased a “tax reduction product” from an accountant that allowed her to reduce her current income tax liability by investing in a partnership that leased and bred competitive racing mules.

The IRS audited Gertrude’s 2014 tax return. In July 2016, Gertrude received a 30-day letter from the IRS. The 30-day letter contained a Notice of Proposed Adjustment stating that Gertrude’s investment in the racing mule leasing partnership was a “tax shelter” and that Gertrude had underpaid her 2014 income tax liability as a result.

(a) What are Gertrude’s options for responding to the 30-day letter? What are the advantages and disadvantages of these options?

Assume that the IRS subsequently makes Gertrude a settlement offer, which would allow her to avoid the imposition of civil fraud penalties—although it continued to disallow all deductions, and imposed other penalties. The IRS instructed Gertrude that to accept its settlement offer, she must sign the enclosed Form 870-AD.
(b) Assuming Gertrude signs the Form 870-AD, may she petition the Tax Court regarding the IRS’s deficiency finding?

(c) Assuming Gertrude signs the Form 870-AD, may she file a refund suit in U.S. District Court regarding the IRS’s deficiency finding?

(d) In August 2016, Gertrude learns that Mark, another dentist in her practice that invested in the same racing mule leasing partnership, settled with the IRS for 25% of the disallowed deductions, with no civil penalties at all. Can Gertrude demand that the IRS revise the terms of her executed Form 870-AD to match Mark’s settlement terms?
IRS Definition of “Voluntary Compliance”
**vertical equity**
The concept that people in different income groups should pay different rates of taxes or different percentages of their incomes as taxes. "Unequals should be taxed unequally."

**voluntary compliance**
A system of compliance that relies on individual citizens to report their income freely and voluntarily, calculate their tax liability correctly, and file a tax return on time.

**Volunteer Income Tax Assistance (VITA)**
This provides free income tax return preparation for certain taxpayers. The VITA program assists taxpayers who have limited or moderate incomes, have limited English skills, or are elderly or disabled. Many VITA sites offer electronic preparation and transmission of income tax returns.

**wages**
Compensation received by employees for services performed. Usually, wages are computed by multiplying an hourly pay rate by the number of hours worked.

**withholding ("pay-as-you-earn" taxation)**
Money, for example, that employers withhold from employees paychecks. This money is deposited for the government. (It will be credited against the employees' tax liability when they file their returns.) Employers withhold money for federal income taxes, Social Security taxes and state and local income taxes in some states and localities.
II. A MODEL OF TAX COMPLIANCE

A. The Setup

Imagine a society consisting of some number of people with fairly uniform endowments but with varying preferences. Every individual's preferences are private information. Each individual periodically matches up with some other individual in order to engage in a "cooperative relationship." A cooperative relationship, which may be commercial, social, or intimate, has the structure of a repeated prisoner's dilemma ("PD"). Each relationship lasts at least one round, and thereafter ends in any given round with some small probability. From the individual's perspective, then, the relationships have an indefinite length; they may end soon or last for a very long time. We might imagine that each person enjoys multiple relationships at any given time, but for simplicity, we will suppose that a player has no more than one relationship during any round of play.

During a cooperative relationship, a player chooses to cooperate or cheat. The PD structure means that if players know that the current round, t, is the last round, they will cheat. However, because the players know that they may meet again in a later round, they have an incentive not to cheat. If one player cheats in round t, then the other player might retaliate by refusing to cooperate in round t+1 and future rounds as well, and the first player will lose the possibility of obtaining returns from future cooperation with the second player. In addition, we will suppose that future partners know (or have some information about) whether a player has cheated in past relationships. Thus, players may refrain from cheating in the hope that they will develop a reputation for not cheating—both within an existing relationship and generally among others in the society.

We assume that players have different time preferences. "Bad types" have high discount rates, meaning that they value future payoffs relatively little compared to current payoffs. "Good types"

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20 For a more detailed description of this model, with citations, see generally Eric A. Posner, Law and Social Norms 13–35 (2000) (describing a signaling model of social norms). The central concept—that of signaling—is due to A. Michael Spence, Market Signaling: Informational Transfer in Hiring and Related Screening Processes (1974), and is discussed in standard economics and game theory textbooks, for example, David M. Kreps, A Course in Microeconomic Theory 629–50 (1990).
have low discount rates. The standard result in the repeated PD model is that a necessary condition of cooperation is that both players have a sufficiently low discount rate. Thus, those who consistently cooperate are more likely to develop reputations for being good types, and those who cheat are more likely to develop reputations for being bad types. To see why, suppose that observers start with the belief that everyone has the same discount rate. When observers see that some players cheat, they will assume that those players have above-average discount rates, and thus are more likely to be bad types. It follows that those who do not cheat have below-average discount rates, and thus are more likely to be good types. (Although it is possible that even good types will adopt strategies of noncooperation, it seems plausible that they will cooperate.)

The setup has one more piece. As noted above, individuals have private information about their preferences, including their discount rates. Everyone wants others to believe that he has a low discount rate, because people prefer to cooperate with those who have low discount rates, knowing that the latter are least likely to cheat. A good type wants partners because he values the long-term payoff from cooperation over many rounds. A bad type wants partners because he values the high first round payoff from cheating someone who attempts to cooperate. Everyone will therefore spend resources trying to persuade others that he belongs to the good type. This activity involves sending “signals.”

Signals are costly actions that are recognized as such by those who observe them, and they have the function of disclosing information about the person who sends the signal. An action is not a signal if the actor intrinsically enjoys the action (like eating ice cream) or obtains some benefit from it (like selling goods) independent of the information benefit. When a good type sends a signal to potential cooperative partners, he is, in effect, saying:

I can afford to send this signal only because I expect to receive a high discounted payoff from cooperating with you, but I can receive a high discounted payoff only if I have a low discount rate; therefore, you should match up with me and expect me to cooperate every round (unless you cheat me).
If the signal is properly chosen, a bad type will not be able to mimic the good type, and in the resulting equilibrium (known as a "separating equilibrium"), only good types send the signal, and only good types match up with other good types. Bad types do not send the signal, and they do not match up with anyone, or at best match up with each other. Of course, in the real world, good types often send signals that are too cheap, so bad types can mimic them, sowing confusion about who belongs to which type. In the resulting equilibrium (a "pooling" or "semi-pooling" equilibrium), people may match up with good and bad types; they are cheated by the bad types, but the loss is offset by the gains when they match up with good types. Alternatively, everyone avoids everyone else. Whether the equilibrium will involve everyone matching up, no one matching up, or something in between depends on the proportion of good and bad types in the population and the various payoffs from cooperation, cheating, and being cheated.

A "social norm" is defined as equilibrium-signaling behavior. When people shake hands, wear ties or high heels, eat with forks, give money to charities, exchange gifts with family members, and engage in similar ritualized activities, they are sending signals. Signals, once started, tend to repeat themselves. The first signals will generally establish separating equilibriums that benefit the good types who invented them. These good types attract all the best partners. In order to compete for these partners, other good types mimic the signal. If technologies change over time and the cost of the signal declines, bad types may be able to mimic the good types, converting a separating equilibrium into a pooling equilibrium. At this point, all types may become stuck in a costly equilibrium. No one wants to be the first to deviate, because he fears that others might infer that he belongs to the bad type and can no longer afford the signal. Over time, deviation may occur as a result of experiment or mistake, and the norm may crumble, but many norms persist long after they stop distinguishing people by type.

Again, social norms describe equilibrium signaling. What distinguishes this view from the view of many other writers in this area is the idea that social norms are endogenous. They are labels we attach to behavior in which people engage as they attempt to maximize the satisfaction of their preferences, broadly defined. Norms do not cause anything. Men do not, for example, wear ties
because they have internalized a norm of tie-wearing. Men wear ties because they fear that they will lose potential cooperative partners if they fail to wear ties.\textsuperscript{21} Calling this behavior "conformity to a social norm" comes after the fact.

This view should also be distinguished from the theory, held by Robert Ellickson among others, that social norms are those patterns of behavior that emerge when people cooperate in an \textit{n}-player PD.\textsuperscript{22} If Ellickson's view were correct, social norms would exist even if everyone had complete information about everyone else. Under my view, social norms exist only because of the existence of private information.

The particular signal that is relevant in the present context is that of compliance with the law. In a given community, it may be the case that compliance with the law, or with some laws but not others, serves as a signal of one's type.\textsuperscript{23} For this to be true, it is not necessary that everyone observe whether a particular person actually complies with the tax law at any given time. Such observation can come about indirectly. If a person does not comply with the tax laws, and he is subsequently detected and prosecuted, his failure to follow the tax laws becomes known. Tax compliance, then, is observable in a stochastic sense. The person who fails to comply is revealed (by the state) to be a bad type, and he is accordingly stigmatized.

It is because detection of violation is so infrequent—it must involve a public prosecution following an audit, which, as we have already noted, is rare—that the response of potential cooperative partners is so severe. In mainstream society, the ex-convict is meticulously avoided. People know that many other people might be bad types and that they cannot avoid dealing with them sometimes even though they prefer not to, because the identities of the bad

\textsuperscript{21} I should stress that this view is a methodological commitment. It is possible that psychological processes are at work as well. For example, wearing a tie becomes a habit so that one feels uncomfortable, physically or psychologically, if one fails to wear a tie even in a setting where no one else is wearing a tie. But I do not think that habit explains very much. People acquire habits easily and drop them when they are no longer useful. Habituation may make behavior slightly insensitive to underlying payoffs, but it drops out of descriptions of aggregate or long-term behavior.

\textsuperscript{22} See generally Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 123–35 (1991) (describing a model where social control is achieved through social norms in a prisoner's dilemma situation).

\textsuperscript{23} See Posner, supra note 20, at 88–90.
types are unknown. Once a person has been identified as a bad type, however, others have every reason to confine their dealings to those who remain in the (large) pool of the unstigmatized. If 50% of the population violated tax laws and were detected and punished, then employers (for example) would not avoid, by firing or refusing to hire, these people, because their criminality would not reveal much information about them and the population of nonviolators would be so small that a policy of hiring only nonviolators would be very expensive. This policy would be like firing or refusing to hire people who have received speeding tickets. If 1% of the population is caught, then employers do gain by firing or refusing to hire these people; in this case, their criminality is good evidence that they belong to the bad type, and it is not costly for the employer to seek other employees from the remaining 99%.\textsuperscript{24} Stigma arises only when a behavior or its detection is rare. The fear of such stigma is the source of compliance.

Because there is sometimes confusion about this, I should emphasize that stigmatizing or ostracizing does not necessarily come about through coordinated collective action. A person avoids a tax cheat because the tax cheat has shown that he has a high discount rate and is therefore a bad cooperative partner. It is not necessary that observers cooperate in order to stigmatize the tax cheat, because no observer has an incentive to deal with someone whom he cannot trust. To be sure, stigmatizing behavior itself may become a signal, and so people may signal by punishing those who violate norms, but this behavior is not necessary to explain the existence of norms, and indeed might be pathological.\textsuperscript{25} This is an important distinction between the signaling model and other models of social norms.\textsuperscript{26}

If this theory is true, it turns the basic model on its head. Suppose that at a given time a law is underenforced. Some people violate the law because the benefits of the illegal activity exceed

\textsuperscript{24} See Eric Rasmusen, Stigma and Self-Fulfilling Expectations of Criminality, 39 J.L. & Econ. 519, 522 (1996).
\textsuperscript{25} See Posner, supra note 20, at 92–94 (discussing witch hunts, charivari, and other enforcement pathologies).
\textsuperscript{26} In Ellickson's model, for example, order is maintained because individuals retaliate when others deviate. See Ellickson, supra note 22, at 124. As he realizes, this is not realistic for large groups, and that is why he confines his welfare maximization thesis to small, closely-knit groups. See infra Conclusion.
the expected sanction. Other people, however, do not violate the law, and the reason is that by incurring the cost of not violating the law (which equals the benefit minus the expected sanction), they reveal that they belong to the good type—or, what is the same thing, they avoid the risk of being identified as a bad type. Now the government increases the expected sanction. Marginal members of the first group start obeying the law because the expected sanction rises above the benefit of the illegal activity. But marginal members of the second group start violating the law because the signal (compliance with the law) becomes weaker, so it becomes less effective at revealing type, and these people substitute to some other signal, such as wearing expensive clothes or making philanthropic gifts.

This modification of the basic model might seem perverse, because it converts a simple model with nice predictions into a messy model with ambiguous predictions. But recall that the basic model’s nice predictions are wrong. And observe that the modification of the model was slight. All we did was add the realistic assumption that people have private information about their time preferences. And we did this as a way of capturing a very important part of social life—the fact that people care about their reputations, and will take steps to protect them.

B. The Role of the Government

One of the interesting questions raised by articles on law and norms is whether the government can exploit social norms in a useful way. The motivation for this inquiry is compelling: If people can be made to act properly because of social norms, rather than because of fear of legal sanction, then the desired behavior can be obtained at less cost. Judges, lawyers, courthouses, and the rest of the apparatus of the legal system are expensive. If people conformed to desirable social norms, then these costs could be avoided.

But a policy of strengthening desirable social norms faces complex problems. It is difficult to predict the effect of laws on social norms. Self-conscious attempts by government officials to manipulate social norms may backfire. And, though often overlooked, the system of norm-driven or nonlegal coordination may be as expensive as the legal system. Conformity to social norms means not
IRS Publication 1, *Your Rights as a Taxpayer*
Your Rights as a Taxpayer

This publication explains your rights as a taxpayer and the processes for examination, appeal, collection, and refunds. Also available in Spanish.

Publication 1

The Taxpayer Bill of Rights

1. The Right to Be Informed
   Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.

2. The Right to Quality Service
   Taxpayers have the right to receive prompt, courteous, and professional assistance in their dealings with the IRS, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from the IRS, and to speak to a supervisor about inadequate service.

3. The Right to Pay No More than the Correct Amount of Tax
   Taxpayers have the right to pay only the amount of tax legally due, including interest and penalties, and to have the IRS apply all tax payments properly.

4. The Right to Challenge the IRS’s Position and Be Heard
   Taxpayers have the right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions, to expect that the IRS will consider their timely objections and documentation promptly and fairly, and to receive a response if the IRS does not agree with their position.

5. The Right to Appeal an IRS Decision in an Independent Forum
   Taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties, and have the right to receive a written response regarding the Office of Appeals’ decision. Taxpayers generally have the right to take their cases to court.

6. The Right to Finality
   Taxpayers have the right to know the maximum amount of time they have to challenge the IRS’s position as well as the maximum amount of time the IRS has to audit a particular tax year or collect a tax debt. Taxpayers have the right to know when the IRS has finished an audit.

7. The Right to Privacy
   Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing.

8. The Right to Confidentiality
   Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information.

9. The Right to Retain Representation
   Taxpayers have the right to retain an authorized representative of their choice to represent them in their dealings with the IRS. Taxpayers have the right to seek assistance from a Low Income Taxpayer Clinic if they cannot afford representation.

10. The Right to a Fair and Just Tax System
    Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.

The IRS Mission
Provide America’s taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.
Examinations (Audits)
We accept most taxpayers’ returns as filed. If we inquire about your return or select it for examination, it does not suggest that you are dishonest. The inquiry or examination may or may not result in more tax. We may close your case without change; or, you may receive a refund.

The process of selecting a return for examination usually begins in one of two ways. First, we use computer programs to identify returns that may have incorrect amounts. These programs may be based on information returns, such as Forms 1099 and W-2, on studies of past examinations, or on certain issues identified by compliance projects. Second, we use information from outside sources that indicates that a return may have incorrect amounts. These sources may include records of other returns, IRS records, and individuals. If we determine that the information is accurate and reliable, we may use it to select a return for examination.

Publication 556, Examination of Returns, Appeal Rights, and Claims for Refund, explains the rules and procedures that we follow in examinations. The following sections give an overview of how we conduct examinations.

By Mail
We handle many examinations and inquiries by mail. We will send you a letter with either a request for more information or a reason why we believe a change to your return may be needed. You can respond by mail or you can request a personal interview with an examiner. If you mail us the requested information or provide an explanation, we may or may not agree with you, and we will explain the reasons for any changes. Please do not hesitate to write to us about anything you do not understand.

By Interview
If we notify you that we will conduct your examination through a personal interview, or you request such an interview, you have the right to ask that the examination take place at a reasonable time and place that is convenient for both you and the IRS. If our examiner proposes any changes to your return, he or she will explain the reasons for the changes. If you do not agree with these changes, you can meet with the examiner’s supervisor.

Repeat Examinations
If we examined your return for the same items in either of the 2 previous years and proposed no change to your tax liability, please contact us as soon as possible so we can see if we should discontinue the examination.

Appeals
If you do not agree with the examiner’s proposed changes, you can appeal them to the Appeals Office of IRS. Most differences can be settled without expensive and time-consuming court trials. Your appeal rights are explained in detail in both Publication 5, Your Appeal Rights and How To Prepare a Protest If You Don’t Agree, and Publication 556, Examination of Returns, Appeal Rights, and Claims for Refund.

If you do not wish to use the Appeals Office or disagree with its findings, you may be able to take your case to the U.S. Tax Court, U.S. Court of Federal Claims, or the U.S. District Court where you live. If you take your case to court, the IRS will have the burden of proving certain facts if you kept adequate records to show your tax liability, cooperated with the IRS, and meet certain other conditions. If the court agrees with you on most issues in your case and finds that our position was largely unjustified, you may be able to recover some of your administrative and litigation costs. You will not be eligible to recover these costs unless you tried to resolve your case administratively, including going through the appeals system, and you gave us the information necessary to resolve the case.

Collections
Publication 594, The IRS Collection Process, explains your rights and responsibilities regarding payment of federal taxes. It describes:

- What to do when you owe taxes. It describes what to do if you get a tax bill and what to do if you think your bill is wrong. It also covers making installment payments, delaying collection action, and submitting an offer in compromise.
- IRS collection actions. It covers liens, releasing a lien, levies, releasing a levy, seizures and sales, and release of property.

Your collection appeal rights are explained in detail in Publication 1860, Collection Appeal Rights.

Innocent Spouse Relief
Generally, both you and your spouse are each responsible for paying the full amount of tax, interest, and penalties due on your joint return. However, if you qualify for innocent spouse relief, you may be relieved of part or all of the joint liability. To request relief, you must file Form 8857, Request for Innocent Spouse Relief. For more information on innocent spouse relief, see Publication 971, Innocent Spouse Relief, and Form 8857.

Potential Third Party Contacts
Generally, the IRS will deal directly with you or your duly authorized representative.

However, we sometimes talk with other persons if we need information that you have been unable to provide, or to verify information we have received. If we do contact other persons, such as a neighbor, bank, employer, or employees, we will generally need to tell them limited information, such as your name. The law prohibits us from disclosing any more information than is necessary to obtain or verify the information we are seeking. Our need to contact other persons may continue as long as there is activity in your case. If we do contact other persons, you have a right to request a list of those contacted.

Refunds
You may file a claim for refund if you think you paid too much tax. You must generally file the claim within 3 years from the date you filed your original return or 2 years from the date you paid the tax, whichever is later. The law generally provides for interest on your refund if it is not paid within 45 days of the date you filed your return or claim for refund. Publication 556, Examination of Returns, Appeal Rights, and Claims for Refund, has more information on refunds.

If you were due a refund but you did not file a return, you generally must file your return within 3 years from the date the return was due (including extensions) to get that refund.

Taxpayer Advocate Service
TAS is an independent organization within the IRS that can help protect your taxpayer rights. We can offer you help if your tax problem is causing a hardship, or you’ve tried but haven’t been able to resolve your problem with the IRS. If you qualify for our assistance, which is always free, we will do everything possible to help you. Visit taxpayeradvocate.irs.gov or call 1-877-777-4778.

Tax Information
The IRS provides the following sources for forms, publications, and additional information.

- **Tax Questions**: 1-800-829-1040 (1-800-829-4059 for TTY/TDD)
- **Forms and Publications**: 1-800-829-3676 (1-800-829-4059 for TTY/TDD)
- **Internet**: www.irs.gov
- **Small Business Ombudsman**: A small business entity can participate in the regulatory process and comment on enforcement actions of IRS by calling 1-888-REG-FAIR.
- **Treasury Inspector General for Tax Administration**: You can confidentially report misconduct, waste, fraud, or abuse by an IRS employee by calling 1-800-366-4484 (1-800-877-8339 for TTY/TDD). You can remain anonymous.
Internal Revenue Manual 8.1.1.1
Accomplishing the Appeals Mission

1. The Appeals Mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.

2. Appeals accomplishes this mission by considering protested cases, holding conferences, and negotiating settlements in a manner which ensures the following:
   
   A. A prompt conference and a prompt decision in each case. A prompt conference and decision enable the taxpayer to know with the least amount of delay, the final decision of the Service as to the amount of tax liability, or other issue in contention, and results in getting into the Treasury additional revenue involved at the earliest practicable date.

   B. A high-quality decision in each case. A decision of high quality is required in each case and should represent judicious application of Service policy and sound legal principles.

   C. A satisfactory number of agreed settlements. It is a fundamental purpose of the Appeals function to effect settlement of contested cases - on a basis fair to both the Government and the taxpayer - to the end that the greatest possible number of nondocketed cases are closed in that status and the greatest possible number of docketed cases are closed without trial.

3. Appeals often conducts conferences by telephone or correspondence. However, if the taxpayer and/or representative prefer a face-to-face conference, Appeals will schedule such conferences on dates and/or at locations that are reasonably convenient to taxpayers, representatives and Appeals in accordance with the Appeals conference techniques and guidelines for specific workstreams as outlined in their related IRM sections.

4. Appeals provides multilingual services to taxpayers who speak limited English, especially Spanish, to resolve tax controversies in an effective and informative manner, in accordance with IRM 22.31.1, Multilingual Initiative. Generally, bilingual employees provide the services, either those on a bilingual position description or those who volunteer.

5. Generally, definitions of terms used in the Manual are with the material where the term is discussed. See Exhibit 8.1.1-1. for a list and the definitions of common terms used in Appeals.
6. In furtherance of the Appeals Mission, it is expected that Appeals personnel provide a
unified Appeals position to taxpayers and/or practitioners in the settlement of an issue.
This extends to all members of Appeals involved in the case. While there may be
differing positions and/or opinions during the discussion of an issue, the ultimate
resolution of the issue should be based upon the conclusions reached by the Appeals
employee with ultimate responsibility for the case.
Chart: The (Long) Road to Tax Court
IRS Publication 5, *Your Appeal Rights and How to Prepare a Protest if you Don’t Agree*
Your Appeal Rights and How To Prepare a Protest If You Don’t Agree

Introduction
This Publication tells you how to appeal your tax case if you don’t agree with the Internal Revenue Service (IRS) findings.

If You Don’t Agree
If you don’t agree with any or all of the IRS findings given you, you may request a meeting or a telephone conference with the supervisor of the person who issued the findings. If you still don’t agree, you may appeal your case to the Appeals Office of IRS.

If you decide to do nothing and your case involves an examination of your income, estate, gift, and certain excise taxes or penalties, you will receive a formal Notice of Deficiency. The Notice of Deficiency allows you to go to the Tax Court and tells you the procedure to follow. If you do not go to the Tax Court, we will send you a bill for the amount due.

If you decide to do nothing and your case involves a trust fund recovery penalty, or certain employment tax liabilities, the IRS will send you a bill for the penalty. If you do not appeal a denial of an offer in compromise or a denial of a penalty abatement, the IRS will continue collection action.

If you don’t agree, we urge you to appeal your case to the Appeals Office of IRS. The Office of Appeals can settle most differences without expensive and time-consuming court trials. [Note: Appeals cannot consider your reasons for not agreeing if they don’t come within the scope of the tax laws (for example, if you disagree solely on moral, religious, political, constitutional, conscientious, or similar grounds.)]

The following general rules tell you how to appeal your case.

Appeals Within the IRS
Appeals is the administrative appeals office for the IRS. You may appeal most IRS decisions with your local Appeals Office. The Appeals Office is separate from - and independent of - the IRS Office taking the action you disagree with. The Appeals Office is the only level of administrative appeal within the IRS.

Conferences with Appeals Office personnel are held in an informal manner by correspondence, by telephone or at a personal conference. There is no need for you to have representation for an Appeals conference, but if you choose to have a representative, see the requirements under Representation.

If you want an Appeals conference, follow the instructions in our letter to you. Your request will be sent to the Appeals Office to arrange a conference at a convenient time and place. You or your representative should prepare to discuss all issues you don’t agree with at the conference. Most differences are settled at this level.

In most instances, you may be eligible to take your case to court if you don’t reach an agreement at your Appeals conference, or if you don’t want to appeal your case to the IRS Office of Appeals. See the later section Appeals To The Courts.

Protests
When you request an appeals conference, you may also need to file a formal written protest or a small case request with the office named in our letter to you. Also, see the special appeal request procedures in Publication 1660, Collection Appeal Rights, If you disagree with lien, levy, seizure, or denial or termination of an installment agreement.

You need to file a written protest:
- In all employee plan and exempt organization cases without regard to the dollar amount at issue.
- In all partnership and S corporation cases without regard to the dollar amount at issue.
- In all other cases, unless you qualify for the small case request procedure, or other special appeal procedures such as requesting Appeals consideration of liens, levies, seizures, or installment agreements. See Publication 1660.

How to prepare a protest:
When a protest is required, send it within the time limit specified in the letter you received. Include in your protest:
1) Your name and address, and a daytime telephone number,
2) A statement that you want to appeal the IRS findings to the Appeals Office,
3) A copy of the letter showing the proposed changes and findings you don’t agree with (or the date and symbols from the letter),
4) The tax periods or years involved,
5) A list of the changes that you don’t agree with, and why you don’t agree.
6) The facts supporting your position on any issue that you don’t agree with,
7) The law or authority, if any, on which you are relying.
8) You must sign the written protest, stating that it is true, under the penalties of perjury as follows:

"Under the penalties of perjury, I declare that I examined the facts stated in this protest, including any accompanying documents, and, to the best of my knowledge and belief, they are true, correct, and complete."

If your representative prepares and signs the protest for you, he or she must substitute a declaration stating:
1) That he or she submitted the protest and accompanying documents and
2) Whether he or she knows personally that the facts stated in the protest and accompanying documents are true and correct.

We urge you to provide as much information as you can, as this will help us speed up your appeal. This will save you both time and money.

Small Case Request:
If the total amount for any tax period is not more than $25,000, you may make a small case request instead of filing a formal written protest. In computing the total amount, include a proposed increase or decrease in tax (including penalties), or claimed refund. For an offer in compromise, in calculating the total amount, include total unpaid tax, penalty and interest due. For a small case request, follow the instructions in our letter to you by: sending a letter requesting Appeals consideration, indicating the changes you don’t agree with, and the reasons why you don’t agree.

Representation
You may represent yourself at your appeals conference, or you may have an attorney, certified public accountant, or an individual enrolled to practice before the IRS represent you. Your representative must be qualified to practice before the IRS. If you want your representative to appear without you, you must provide a properly completed power of attorney to the IRS before the representative can receive or inspect confidential information. Form 2848, Power of Attorney and Declaration of Representative, or any other properly written power of attorney or authorization may be used for this
purpose. You can get copies of Form 2848 from an IRS office, or by calling 1-800-TAX-FORM (1-800-829-3676).

You may also bring another person(s) with you to support your position.

Appeals To The Courts
If you and Appeals don’t agree on some or all of the issues after your Appeals conference, or if you skipped our appeals system, you may take your case to the United States Tax Court, the United States Court of Federal Claims, or your United States District Court, after satisfying certain procedural and jurisdictional requirements as described below under each court. (However, if you are a nonresident alien, you cannot take your case to a United States District Court.) These courts are independent judicial bodies and have no connection with the IRS.

Tax Court
If your disagreement with the IRS is over whether you owe additional income tax, estate tax, gift tax, certain excise taxes or penalties related to these proposed liabilities, you can go to the United States Tax Court. (Other types of tax controversies, such as those involving some employment tax issues or manufacturers’ excise taxes, cannot be heard by the Tax Court.) You can do this after the IRS issues a formal letter, stating the amounts that the IRS believes you owe. This letter is called a notice of deficiency. You have 90 days from the date this notice is mailed to you to file a petition with the Tax Court (or 150 days if the notice is addressed to you outside the United States). The last date to file your petition will be entered on the notice of deficiency issued to you by the IRS. If you don’t file the petition within the 90-day period (or 150 days, as the case may be), we will assess the proposed liability and send you a bill. You may also have the right to take your case to the Tax Court in some other situations, for example, following collection action by the IRS in certain cases. See Publication 1660.

If you discuss your case with the IRS during the 90-day period (150-day period), the discussion will not extend the period in which you may file a petition with the Tax Court.

The court will schedule your case for trial at a location convenient to you. You may represent yourself before the Tax Court, or you may be represented by anyone permitted to practice before that court.

Note: If you don’t choose to go to the IRS Appeals Office before going to court, normally you will have an opportunity to attempt settlement with Appeals before your trial date.

If you dispute not more than $50,000 for any one tax year, there are simplified procedures. You can get information about these procedures and other matters from the Clerk of the Tax Court, 400 Second St. NW, Washington, DC 20217.

Frivolous Filing Penalty
Caution: If the Tax Court determines that your case is intended primarily to cause a delay, or that your position is frivolous or groundless, the Tax Court may award a penalty of up to $25,000 to the United States in its decision.

District Court and Court of Federal Claims
If your claim is for a refund of any type of tax, you may take your case to your United States District Court or to the United States Court of Federal Claims. Certain types of cases, such as those involving some employment tax issues or manufacturers’ excise taxes, can be heard only by these courts.

Generally, your District Court and the Court of Federal Claims hear tax cases only after you have paid the tax and filed a claim for refund with the IRS. You can get information about procedures for filing suit in either court by contacting the Clerk of your District Court or the Clerk of the Court of Federal Claims.

If you file a formal refund claim with the IRS, and we haven’t responded to you on your claim within 6 months from the date you filed it, you may file suit for a refund immediately in your District Court or the Court of Federal Claims. If we send you a letter that proposes disallowing or disallows your claim, you may request Appeals review of the disallowance. If you wish to file a refund suit, you must file your suit no later than 2 years from the date of our notice of claim disallowance letter.

Note: Appeals review of a disallowed claim doesn’t extend the 2 year period for filing suit. However, it may be extended by mutual agreement.

Recovering Administrative and Litigation Costs
You may be able to recover your reasonable litigation and administrative costs if you are the prevailing party, and if you meet the other requirements. You must exhaust your administrative remedies within the IRS to receive reasonable litigation costs. You must not unreasonably delay the administrative or court proceedings.

Administrative costs include costs incurred on or after the date you receive the Appeals decision letter, the date of the first letter of proposed deficiency, or the date of the notice of deficiency, whichever is earliest.

Recoverable litigation or administrative costs may include:

- Attorney fees that generally do not exceed $125 per hour. This amount will be indexed for a cost of living adjustment.
- Reasonable amounts for court costs or any administrative fees or similar charges by the IRS.
- Reasonable expenses of expert witnesses.
- Reasonable costs of studies, analyses, tests, or engineering reports that are necessary to prepare your case.

You are the prevailing party if you meet all the following requirements:

- You substantially prevailed on the amount in controversy, or on the most significant tax issue or issues in question.
- You meet the net worth requirement. For individuals or estates, the net worth cannot exceed $2,000,000 on the date from which costs are recoverable. Charities and certain cooperatives must not have more than 500 employees on the date from which costs are recoverable. And taxpayers other than the two categories listed above must not have net worth exceeding $7,000,000 and cannot have more than 500 employees on the date from which costs are recoverable.

You are not the prevailing party if:

- The United States establishes that its position was substantially justified. If the IRS does not follow applicable published guidance, the United States is presumed to not be substantially justified. This presumption is rebuttable. Applicable published guidance means regulations, revenue rulings, revenue procedures, information releases, notices, announcements, and, if they are issued to you, private letter rulings, technical advice memoranda and determination letters. The court will also take into account whether the Government has won or lost in the courts of appeals for other courts on substantially similar issues, in determining if the United States is substantially justified.

You are also the prevailing party if:

- The final judgment on your case is less than or equal to a “qualified offer” which the IRS rejected, and if you meet the net worth requirements referred to above.

A court will generally decide who is the prevailing party, but the IRS makes a final determination of liability at the administrative level. This means you may receive administrative costs from the IRS without going to court. You must file your claim for administrative costs no later than the 90th day after the final determination of tax, penalty or interest is mailed to you. The Appeals Office makes determinations for the IRS on administrative costs. A denial of administrative costs may be appealed to the Tax Court no later than the 90th day after the denial.
SLOVACEK v. U.S., Cite as 81 AFTR 2d 98-1859 (40 Fed.Cl. 828),
5/06/1998, Code Sec(s) 6224

Edward J. SLOVACEK and Frankie J. SLOVACEK, PLAINTIFFS v. THE UNITED STATES, DEFENDANT.

Case Information:

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HEADNOTE

1. Partnership items—settlements—refund jurisdiction. Taxpayers-partners weren't entitled to more favorable settlement that IRS and Justice Dept. offered to other partnership investors: taxpayers entered binding settlement agreement under Code Sec. 6224(c) by signing Form 870-L(AD); neither IRS nor Justice Dept. were required to offer consistent settlements; and taxpayers weren't similarly situated to other investors who filed in federal district court. And, taxpayers' claim that partnership assessment was invalid due to expired limitations period was already decided in prior case and converted to nonpartnership item, so didn't provide grounds for new settlement or require consistency in treatment of partnership items under TEFRA. Also, Court of Federal Claims had no jurisdiction to order injunctive relief and denied taxpayers' motion for leave to amend complaint because it would serve no purpose absent an order compelling consistent treatment.

Reference(s): ¶ 62,215 Code Sec. 6224

OPINION

In the United States Court of Federal Claims

Opinion and Order

Judge: WEINSTEIN, Judge:

On November 26, 1997, plaintiffs filed a motion to compel consistent treatment ("Motion") seeking (1) to require defendant to settle this case on the same terms offered to other partners of Nupath Development III ("Nupath") by the Internal Revenue Service ("IRS") and the Department of Justice's (DOJ) tax division office in Dallas or,
alternatively, (2) leave to amend their complaint to add a new cause of action based on defendant's abuse of
discretion for DOJ's refusal to so settle.

Defendant's response to plaintiffs' Motion was filed on February 27, 1998. Plaintiffs' reply was filed March 23, 1998.
Defendant, by leave of court, responded to the reply on March 30, 1998. For the reasons discussed below, the court
concludes that it has no authority to award the non- monetary injunctive relief requested and that, even if it did,
defendant would not be required to settle this case on the same terms offered to other Nupath partners by the IRS
or DOJ's Dallas office. The court therefore denies the Motion and also denies the motion for leave to amend the
complaint to add this cause of action as moot.

This case is governed by the provisions of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-
248, 96 Stat. 324, codified at I.R.C. sections 6221-33, effective for partnership years beginning after
September 3, 1982. Under TEFRA, all administrative and judicial proceedings regarding partnership items are required
to be conducted at the partnership level. The principal purpose of TEFRA is to provide consistency and reduce
duplication in the treatment of partnership items by requiring that they be determined in a single unified proceeding

TEFRA distinguishes between tax determinations and items that affect the entire partnership ("partnership items")
and those that depend, instead, upon the unique circumstances of a partner, or some other nonpartnership-wide
variable ("nonpartnership items"). See I.R.C. section 6231(a)(3), (4). Partnership items receive the same
treatment in the hands of a partner as at the partnership level. The amount of the item, however, is proportional to
the partner's share in the partnership item.

When a taxpayer enters into a settlement with the IRS with respect to his share of a partnership item, that share
becomes a [pg. 98-1861] nonpartnership item. I.R.C. section 6231(b)(1)(C). That is because the value or
treatment of the item in the hands of the individual partner is determined solely by the terms of the settlement
agreement and the taxpayer's own circumstances, and not by any subsequent tax determination with respect to the
partnership.

On March 22, 1991 plaintiffs executed Part I (partnership items) of a Form 870- L(AD), Settlement Agreement for
Partnership Adjustments and Affected Items. This settlement concerned the treatment of a partnership item, namely
a loss claimed on Nupath's 1982 partnership return, of which plaintiffs claimed their allocable share as a loss
deduction in their individual tax return for 1982. The settlement disallowed the entire loss reported on Nupath's 1982
return, totaling $602,667, of which plaintiffs' share was $22,600, and imposed penalties under section 6661 for
substantial understatement and under section 6621(c) for a tax motivated interest. In exchange, the IRS agreed to
forego any negligence penalties under I.R.C. section 6653(a).

In this refund suit, plaintiffs sought a refund of "overpayment" of the taxes they paid pursuant to the settlement
agreement, under I.R.C. sections 6401-02, which defines "overpayment" to include the payment of any tax
assessed or collected after the expiration of the period of limitation, on the basis that the three-year statute of
limitations, I.R.C. section 6229(a), was not validly extended by the partnership and therefore had expired before
their settlement was executed. Defendant moved to dismiss the complaint in part or, in the alternative, for partial
summary judgment, which was granted by this court, after briefing and oral argument, in its published order filed on
August 2, 1996. See Slovacek, 36 Fed. Cl. at 250 [78 AFTR 2d 96-5876].

The August 2, 1996 order concluded that the partnership's three-year statute of limitations was a partnership item,
because the issue of whether limitations period has been validly extended so as to permit the assessment of
additional taxes against the partnership as a whole affects all partners alike (to the extent of their proportionate
share). Id. at 254-255. The court therefore held that the portion of plaintiffs' claim that seeks a refund of the tax
and interest assessed pursuant to the settlement agreement is barred by I.R.C. section 7422(h), which provides,
"No action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except
as provided in section 6228(b) [(claims relating to items the taxpayer deems to be partnership items, but the IRS
deems to be nonpartnership items)] or section 6230(c) [(claims arising out of erroneous computations)]." Id.

The court also held that this portion of plaintiffs' refund claim was barred by the terms of their settlement
agreement, in which they waived any claims based on partnership items. Concluding that the partnership statute of
limitations was a partnership item, the court held that plaintiffs thereby waived their right to a refund. Id. at 256.

Discussion
As previously stated, the settlement agreement executed by plaintiffs in March 1991 disallowed all partnership losses, and imposed penalties under section 6661 for substantial understatement, and under section 6621(c) for a tax motivated interest. The new, more favorable, settlement agreement allowed the deduction of seventeen percent of the partnership losses, and abated the section 6661 penalty and the penalty portion of the section 6621(c) interest. The Slovaceks made a formal request for settlement of their case on the same terms the IRS extended to the other Nupath partners, but the government rejected the offer and has refused to settle.

Plaintiffs contend that DOJ's refusal to treat plaintiffs consistently with other Nupath partners (1) violates the general principle requiring that similarly-situated taxpayers receive equal and consistent treatment and (2) constitutes an abuse of discretion. Plaintiffs claim that the Department of Justice has singled out for discriminatory treatment those Nupath partners, such as the Slovaceks, who filed suit in this court.

Defendant makes three arguments in opposition to plaintiffs' Motion. First, defendant argues that, by signing the Form 870-L(AD), Part I, which conceded the nondeductibility of the Nupath loss reported on their 1982 return, plaintiffs entered into a statutorily-binding contract under TEFRA, section 6224(c).

Second, defendant notes that I.R.C. section 6224(c)(2) and Treas. Reg. section 301.6224(c)-3T(c)(3) do not require the IRS (or DOJ) to offer plaintiffs a consistent settlement with other Nupath partners, because those provisions apply only to partnership items and do not apply to affected items (such as the section 6621(c) interest and the section 6661 penalty) or to partnership items (such as plaintiffs' allocable share of the Nupath loss) that, as this court has already held in this case, have been converted to nonpartnership items by means of a prior settlement.

Third, defendant argues that plaintiffs are not similarly situated to the other Nupath partners who received new settlement agreements from the IRS. Once plaintiffs filed their refund suit, DOJ became responsible for the government's defense and was entitled to defend the claim on any ground for which there is a factual or legal basis and to settle the claim upon whatever terms it deemed suitable. The government attorney — DOJ — contends that its authority to settle (or not) cannot be defeated by a settlement between the IRS and another Nupath partner who is not a party to this case.

DOJ Settlement Authority

The court agrees with all three of defendant's arguments. Plaintiffs concede that the Form 870-L(AD) is binding, but argue that its terms were not comprehensive because it did not settle the issue of whether the statute of limitations had already expired before the form was executed. They claim that this was the reason the IRS entered into the new settlements and suggest that DOJ is required to do the same in this case. Plaintiffs' argument ignores the court's holding, in its August 2, 1996 order, that plaintiffs' refund claim, based on the alleged invalidity of the partnership assessment due to the expiration of the statute of limitations for assessments against the partnership, was barred by I.R.C. section 7422(h) and by plaintiffs' settlement agreement. See Slovacek, 36 Fed. Cl. at 254-256. Since the statute of limitations issue has been decided, it would not provide grounds for DOJ to enter a new settlement and ignore the Form 870-L(AD) signed by plaintiffs.

Plaintiffs concede that I.R.C. section 6224(c)(2) and Treas. Reg. section 301.6224(c)-3T(c)(3) do not require DOJ to offer them a consistent settlement. They cite the legislative history of TEFRA; United States v. Kaiser, 363 U.S. 299 [5 AFTR 2d 1611] (1960) (Frankfurter, J. concurring); IBM Corp. v. United States, 343 F.2d 914 [15 AFTR 2d 1526] (Ct. Cl. 1965); and Bunce v. United States, 28 Fed. Cl. 500 [72 AFTR 2d 93-5116] (1993), aff'd, 26 F.3d 138 [73 AFTR 2d 94-1735] (Fed. Cir. 1994) for the proposition that similarly-situated taxpayers are entitled to equal and consistent treatment. The cases cited by plaintiffs do not support their argument. As defendant correctly notes, neither Kaiser nor IBM involved a compromise of tax liability. Moreover, while Justice Frankfurter's concurrence in Kaiser articulated the general principle cited by plaintiffs — that the Commissioner is required to apply the tax laws uniformly — it also clarified that "only if there is no...rational basis [for the non-uniformity] can the Commissioner be said to be denying...
In IBM, the IRS retrospectively applied a ruling making computers subject to a 10% excise tax to IBM's computers, while applying it only prospectively to virtually identical computers manufactured by IBM's main competitor. 343 F.2d at 921-922. The Court of Claims held that the IRS abused its discretion in levying the tax on IBM and not on its competitor, noting that such disparate treatment gave IBM's competitor a significant competitive advantage in the computer field. Id. at 923. IBM therefore merely stands for the proposition that, once the IRS determines that an item is taxable, the tax must be applied equally to all taxpayers. Here, of course, no such determination or ruling is involved.

Bunce undermines, rather than supports, plaintiffs' argument. In Bunce, the Court of Federal Claims held that the IRS did not abuse its settlement discretion when it refused to enter a settlement with the plaintiffs on the same terms as with another similarly-situated taxpayer, because the plaintiffs had not shown that the IRS had intentionally discriminated against them for arbitrary or irrational reasons, nor that the IRS had discriminated "based upon impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights."

Bunce, 28 Fed. Cl. at 509-510 (citing Penn-Field Indus., Inc. v. Commissioner, 74 T.C. 720, 723, 1980 WL 4468 (1980)). The court explained that "the discretion vested in the IRS to settle tax cases is by its very nature a discretion to treat similarly situated taxpayers differently," and, quoting Op. A.G. 7, 13-2 C.B. 445, 446 (1934), that the "power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection." 28 Fed. Cl. at 511. The court noted that "there is not even an obligation on the part of the IRS to treat co-investors in the same venture equally for settlement purposes." Id. at 509.

As the preceding cases illustrate, there is a fundamental difference between the IRS's (or DOJ's) discretion in interpreting and applying the tax laws (interpretive discretion) and its discretion to compromise tax cases (settlement discretion). See Bunce, 28 Fed. Cl. at 508-509. The Bunce court explained the distinction as follows:

In exercising its interpretive discretion, the IRS might have the discretion to decide whether or not an item is taxable, but once that decision is made, it must be applied equally to all taxpayers....Settlement discretion, on the other hand, is at its heart a discretion to treat similarly situated taxpayers differently...[and] includes discretion to weigh the cases of similarly situated taxpayers individually.

Id. at 509. 4

In order to prevail on an abuse of settlement discretion claim, plaintiffs must show both (1) that other similarly-situated taxpayers have received more favorable settlements and (2) that the IRS (or DOJ) intentionally singled out plaintiffs for arbitrary or irrational reasons. Id. at 510. However, plaintiffs here base their allegations of irrational and arbitrary discrimination solely on DOJ's refusal to settle the Court of Federal Claims cases on the same terms as those of other Nupath partners (or allegedly similarly-situated partners of other partnerships) who have either not filed refund suits or have filed in federal district court (mostly within the Fifth Circuit). As defendant correctly contends, this clearly constitutes a rational basis for disparate treatment.

The federal district courts in Texas are bound by the Fifth Circuit's decision in Alexander v. United States, 44 F.3d 328, 332 [75 AFTR 2d 95-1064] (5th Cir. 1995), which held that a settlement agreement with the IRS regarding the treatment of partnership items did not preclude a refund action based on the expiration of the partnership statute of limitations. This court however, declined to follow Alexander and concluded that plaintiffs' refund action based on the expiration of the statute of limitations was barred by I.R.C. section 7422(h) and by the settlement agreement. 36 Fed. Cl. at 254-256. Therefore it is not irrational or arbitrary for DOJ to refuse to settle cases in this court on the same terms as those pending in federal district courts bound by Alexander, where defendant's litigating risks are greater.

Moreover, the Nupath partners who have been offered the more favorable settlements by the IRS are not similarly situated to plaintiffs. As defendant correctly argues, once plaintiffs filed their refund action in court, their case was referred to DOJ, and the authority to settle their case shifted from the IRS to the Attorney General, or her delegate. See I.R.C. section 7122(a). This authority cannot be defeated by a settlement made by the IRS with another taxpayer, since the IRS can no more settle this case indirectly by binding DOJ to settlement terms the IRS negotiated with other taxpayers, than the IRS can settle the case directly. See Bergh v. Department of Transp., 794 F.2d 1575, 1577 (Fed.Cir. 1986) (settlement decision is "within the discretion of the agency conducting the litigation."). See also United States v. Forma, 784 F. Supp. 1132, 1139 [69 AFTR 2d 92-943] (S.D.N.Y. 1992) ("Once a tax matter is referred to the [DOJ] only the Attorney General...may settle the matter.") Moreover, DOJ is not required to give detailed reasons for its settlement decisions in each case. Bergh, 794 F.2d at 1577.

Plaintiffs also argue that the legislative intent behind TEFRA was to unify tax proceedings regarding partnerships and to treat individual partners consistently. They argue that this legislative history requires DOJ to treat plaintiffs
consistently with other Nupath partners, who obtained a more favorable settlement from the IRS. Although they concede that I.R.C. section 6224(c) is inapplicable in this case, they cite it as an analogy supporting their argument.

Both the legislative history and the plain language of TEFRA only require consistency in the treatment of partnership items. Once partnership items are converted into nonpartnership items, the TEFRA provisions requiring consistent treatment of partnership items no longer apply. See Wall v. United States, 133 F.3d 1188, 1190 [81 AFTR 2d 98-459] (9th Cir. 1998) (since partnership items on partner's return became nonpartnership items when the individual partner filed suit under section 6228(b), partner could no longer base his entitlement to a refund on section 6230(c)(4), which provides that the treatment of partnership items on the partnership return shall be conclusive, but was required to establish that he had overpaid his taxes.) In this case, the partnership items on plaintiffs' return were converted into nonpartnership items by plaintiffs' settlement of those items, and therefore consistent treatment of those items is no longer required under TEFRA.

In fact, requiring DOJ to offer a consistent settlement with respect to items that have been converted by settlement to non-partnership items, would be contrary to the plain language of I.R.C. section 6224(c)(2), which requires the IRS to offer a consistent settlement only with respect to partnership items. The plain language of a statute governs over any contrary intent expressed in the legislative history. See City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 337 (1994). There is nothing in the plain language of the statutory provisions of TEFRA that requires the government to offer partners consistent settlements with respect to non-partnership items. [pg. 98-1865]

Jurisdiction to Award Injunctive Relief

A more fundamental reason to deny plaintiffs' motion is that it fails to request relief within the authority of this court to provide.

The Court of Federal Claims is an Article I court of limited jurisdiction created by Congress as a forum where private parties could sue the government for non-tort money claims, where the claims would otherwise be barred by sovereign immunity. See Kanemoto v. Reno, 41 F.3d 641, 644-645 (Fed. Cir. 1994) ("The remedies available in [this] court extend only to those affording monetary relief; the court cannot entertain claims for injunctive relief or specific performance, except in narrowly defined, statutorily provided circumstances...."). E.g. Brown v. United States, 105 F.3d 621, 624 [79 AFTR 2d 97-599] (Fed. Cir. 1997) (taxpayers' claims for declaratory and injunctive relief were outside jurisdiction of Court of Federal Claims). See also United States v. King, 395 U.S. 1, 2-3 [23 AFTR 2d 69-1358] (1969) (jurisdiction of Court of Claims is limited to money claims and does not extend to equitable matters); Beck v. Secretary of Dep't of HHS, 924 F.2d 1029, 1036 (Fed. Cir. 1991) ("Claims Court has no general equitable power to issue injunctions in cases other than those in which such power has explicitly been granted.")

Plaintiffs have not, and cannot, identify any statutory provision that authorizes this court to compel DOJ, or any party, to settle a case, never mind to dictate the particular terms of a settlement. Absent such statutory authority, this court is without jurisdiction to grant the requested injunctive relief.

Motion to Amend Complaint

Although Rule 15(a) of the Rules of the Court of Federal Claims (RCFC) provides that "leave [to amend] shall be freely given," a court may deny a motion to amend a complaint if the amendment would be futile, because, for example, the claim added by the amendment could not withstand a motion to dismiss. See Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988) (discussing identical F.R.C.P. 15(a) and affirming district court's denial of motion to amend where proposed amendment would have alleged a claim that was barred by the applicable statute of limitations). In this case, plaintiffs' proposed amendment would be futile because, absent an order compelling consistent treatment, the amendment would serve no purpose.

In their reply, plaintiffs inappropriately characterized defendant's refusal to settle the Court of Federal Claims cases as "the lowest form of forum shopping." However, it is plaintiffs, not defendant, who selected this forum. As defendant correctly notes, if plaintiffs had prevailed on their motion for partial summary judgment seeking a deduction of the entire amount of their allocable share of the reported 1982 Nupath loss, it is doubtful that they would be seeking a settlement calling, in part, for allowance of their allocable share of only 17% of the reported loss. They cannot have it both ways: seeking the fruits of victory but not accepting the consequences of defeat.

For the foregoing reasons, plaintiffs' motion for leave to amend the complaint or, in the alternative, to compel consistent treatment, is denied. The parties shall file a joint status report on or before May 22, 1998 proposing a schedule for further proceedings.
Unless otherwise indicated, section references are to the Internal Revenue Code of 1954, as amended ("I.R.C."), codified at Title 26, United States Code, and to the Treasury Regulations ("Treas. Reg.") found at Title 26, Code of Federal Regulations, as in effect during the years at issue.

The facts of this case are set out in more detail in the court's August 2, 1996 published order.

The three cases are: (1) Affleck v. United States, Docket No. 94-437T; (2) McLeod v. United States, Docket No. 94-409T; and (3) Raines v. United States, Docket No. 94-771T.

Whether equal protection grounds are a proper basis for the award of non-monetary or injunctive relief by this court, absent specific statutory authority to do so, is not decided here.

The court notes that, while defendant is not required to settle this case on particular terms, defendant apparently seriously considered a settlement offer for several months last summer. Thus, the parties may wish to consider reactivating discussions to settle the remainder, if not all, of this case.
Sample 30-Day Letter
APPENDIX - IRS LETTERS AND NOTICES

Letter 915(DO) - 30-Day Letter from District Office

Internal Revenue Service
District Director

Department of the Treasury

Date:

Taxpayer Identification Number:

Form:

Tax Period(s) Ended:

Person to Contact:

Contact Telephone Number:

Employee Identification Number:

Refer Reply to:

Last Date to Respond to this Letter:

Dear

We have enclosed two copies of our examination report showing the changes we made to your tax for the period(s) shown above. Please read the report and let us know whether you agree or disagree with the changes. (Our report may not reflect the results of later examinations of partnerships, S Corporations, trusts, etc., in which you have an interest. Changes made to their tax returns could affect your tax.

IF YOU AGREE with the changes in the report, please sign, date, and return one copy to us by the response date shown above. If you filed a joint return, both taxpayers must sign the report. If you owe more tax, please include payment for the full amount to limit penalty and interest charges.

IF YOU CAN’T PAY the full amount you owe now, pay as much as you can. If you want us to consider an installment agreement, please complete and return the enclosed Form 9465, Installment Agreement Request. If we approve your request, we will charge a $43 fee to help offset the cost of providing this service. We will continue to charge penalties and interest until you pay the full amount you owe.

IF YOU DON’T AGREE with the changes shown in the report, you should do one of the following by the response date shown above:

• Mail us any additional information you’d like us to consider
• Discuss the report with the examiner
• Discuss your position with the examiner’s supervisor
• Request a conference with an Appeals Officer, as explained in the enclosed Publication 5, Your Appeal Rights and How to Prepare a Protest If You Don’t Agree

Letter 915 (DO) (Rev. 4-2000)
Catalog Number 67712V

Chapter 6 – Administratively Appealing Adverse IRS Determinations
Appendix IRS Letters and Notices – Letter 915(DO) – 30-Day Letter From District Office
APPENDIX - IRS FORMS, LETTERS AND NOTICES

Letter 915(DO) - 30-Day Letter from District Office

IF YOU DON’T TAKE ANY ACTION by the response date shown above, we will process your case based on the information shown in the report. We will send you a statutory notice of deficiency that allows you 90 days to petition the United States Tax Court. If you allow the 90-day period to expire without petitioning the tax court, we will bill you for any additional tax, interest, and penalties.

We have enclosed Publication 1, Your Rights as a Taxpayer. If additional tax is due, we have also enclosed Publication 594, The IRS Collection Process, for your information.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter. If you write, please include your telephone number and the best time for us to call in case we need more information. We have enclosed an envelope for your convenience.

Thank you for your cooperation.

Sincerely yours,

District Director

Enclosures:
Examination Report (2)
☐ Form 9465
Publication 1
Publication 5
☐ Publication 594
Envelope
Sample 90-Day Letter/
Notice of Deficiency
APPENDIX – IRS LETTERS AND NOTICES

Letter 894(RO) – Notice of Deficiency from Appeals Office (with Waiver Form 4089-A)

Department of the Treasury
Internal Revenue Service

Letter Number: 894 (RO)
Letter Date:

Taxpayer Identifying Number:

Form:

Person to Contact:

Telephone Numbers:

Contact Person Identification Number:

Refer Reply To:

In Re:

Last Day to File a Petition With
the United States Tax Court:

NOTICE OF DEFICIENCY

Tax Year(s) Ended

Tax

Dear

We have determined that you owe additional tax or other amounts, or both, for the tax year(s) identified above. This letter is your NOTICE OF DEFICIENCY as required by law. The enclosed statement shows how we figured the deficiency.

If you want to contest this determination in court before making any payment, you have 90 days from the date of this letter (150 days if this letter is addressed to you outside of the United States) to file a petition with the United States (U.S.) Tax Court for a redetermination of the deficiency. You can get a copy of the rules for filing a petition and a petition form you can use by writing to the address below:

United States Tax Court
400 Second Street, NW
Washington, DC 20217

The Tax Court has a simplified procedure for small cases when the amount in dispute is $50,000 or less for any one tax year. You also can get information about this procedure by writing to the Tax Court. You should write promptly if you intend to file a petition with the Tax Court.

(over)
APPENDIX – IRS LETTERS AND NOTICES

Letter 894(RO) – Notice of Deficiency from Appeals Office (with Waiver Form 4089-A) (p. 2)

Send the completed petition form, a copy of this letter, and copies of all statements and/or schedules you received with this letter to the Tax Court at the above address. The court cannot consider your case if you file the petition late. The petition is considered timely filed if the postmark date falls within the prescribed 90 or 150 day period and the envelope containing the petition is properly addressed with the correct postage.

The time you have to file a petition with the court is set by law and cannot be extended or suspended. Thus, contacting the Internal Revenue Service (IRS) for more information, or receiving other correspondence from the IRS won’t change the allowable period for filing a petition with the Tax Court.

As required by law, separate notices are sent to husbands and wives. If this letter is addressed to both husband and wife, and both want to petition the Tax Court, both must sign and file the petition or each must file a separate, signed petition. If only one spouse petitions the Tax Court, the full amount of the deficiency will be assessed against the non-petitioning spouse. If more than one tax year is shown above, you may file one petition form showing all of the years you are contesting.

You may represent yourself before the Tax Court, or you may be represented by anyone admitted to practice before the Tax Court.

If you decide not to file a petition with the Tax Court, please sign the enclosed waiver form and return it to us at the IRS address on the top of the front of this letter. This will permit us to assess the deficiency quickly and can help limit the accumulation of interest. The enclosed envelope is for your convenience.

If you decide not to sign and return the waiver, and you don’t file a petition with the Tax Court within the time limit, the law requires us to assess and bill you for the deficiency after 90 days from the date of this letter (150 days if this letter is addressed to you outside the United States).

If you are a C corporation, under Internal Revenue Code Section 6621 ©, large corporate underpayments may be subject to a higher rate of interest than the normal rate of interest for underpayments.

If you have questions about this letter, you may write to or call the contact person whose name, telephone number, and IRS address are shown on the front of this letter. If you write, please include your telephone number, the best time for us to call you if we need more information, and a copy of this letter to help us identify your account. Keep the original letter for your records. If you prefer to call and the telephone number is outside your local calling area, there will be a long distance charge to you.

Thank you for your cooperation.

Sincerely,

Commissioner

By

Enclosures:

Letter 894 (RO) (Rev. 3-1999)
Cat. No. 40056H

Chapter 6 – Administratively Appealing Adverse IRS Determinations

Appendix IRS Letters and Notices – Letter 894(R) – Notice of Deficiency from Appeals
## Notice of Deficiency Statement

<table>
<thead>
<tr>
<th>Kind of Tax</th>
<th>Deficiency</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Increase in Tax and Penalties)</td>
</tr>
</tbody>
</table>

Form 4089-A (Rev. April 1982)
Sample Forms 870 and 870-AD
Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment

Names and address of taxpayers (Number, street, city or town, State, ZIP code)  
Mr. John Smith  
123 Main Street  
Anywhere, USA 12345

Social security or employer identification number  
123-45-6789

Increase (Decrease) in Tax and Penalties

<table>
<thead>
<tr>
<th>Tax year ended</th>
<th>Tax</th>
<th>Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec. 31, 20xx</td>
<td>$ Income</td>
<td>$24,500</td>
</tr>
<tr>
<td>Dec. 31, 20xx</td>
<td>$ Income</td>
<td>$7,250</td>
</tr>
<tr>
<td></td>
<td>$</td>
<td>$</td>
</tr>
<tr>
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<td></td>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

(For instructions, see back of form)

Consent to Assessment and Collection

I consent to the immediate assessment and collection of any deficiencies (increase in tax and penalties) and accept any overassessment (decrease in tax and penalties) shown above, plus any interest provided by law. I understand that by signing this waiver, I will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

YOUR SIGNATURE HERE  
/s/ John Smith  
Date  
July 1, 20xx

SPouse'S SIGNATURE  
Date

TAXPAYERS REPRESENTATIVE HERE  
Date

CORPORATE NAME  
Title  
Date

CORPORATE OFFICER(S) SIGN HERE  
Title  
Date  
44
General Information

If you consent to the assessment of the deficiencies shown in this waiver, please sign and return the form in order to limit any interest charge and expedite the adjustment to your account. Your consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are so entitled. It will not prevent us from later determining, if necessary, that you owe additional tax; nor extend the time provided by law for either action.

We have agreements with State tax agencies under which information about Federal tax, including increases or decreases, is exchanged with the States. If this change affects the amount of your State income tax, you should file the required State form.

If you later file a claim and the Service disallows it, you may file suit for refund in a district court or in the United States Claims Court, but you may not file a petition with the United States Tax Court.

Instructions

We will consider this waiver a valid claim for refund or credit of any overpayment due you resulting from any decrease in tax and penalties shown above, provided you sign and file it within the period established by law for making such a claim.

Who Must Sign

If you filed jointly, both you and your spouse must sign. If this waiver is for a corporation, it should be signed with the corporation name, followed by the signatures and titles of the corporate officers authorized to sign. An attorney or agent may sign this waiver provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

If this waiver is signed by a person acting in a fiduciary capacity (for example, an executor, administrator, or a trustee) Form 56, Notice Concerning Fiduciary Relationship, should, unless previously filed, accompany this form.
**Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment**

<table>
<thead>
<tr>
<th>Year Ended</th>
<th>Kind of Tax</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/31/20xx</td>
<td>Income</td>
<td>$24,500</td>
</tr>
<tr>
<td>12/31/20xx</td>
<td>Income</td>
<td>$7,375</td>
</tr>
</tbody>
</table>

This statement does not include interest.

Signature of Taxpayer: /s/ John Smith
Date: May 1, 20xx

Signature of Taxpayer:
Date:

Signature of Taxpayer's Representative:
Date:

Corporate Name:
Date:

By Corporate Officer
Title
Date:

For Internal Revenue Use Only
Date Accepted for Commissioner: May 8, 20xx
Signature: /s/ Joe Brown
Title:

(See Reverse Side)
This offer must be accepted for the Commissioner of Internal Revenue and will take effect on the date it is accepted. Unless and until it is accepted, it will have no force or effect.

If this offer is accepted, the case will not be reopened by the Commissioner unless there was:

- fraud, malfeasance, concealment or misrepresentation of a material fact
- an important mistake in mathematical calculation
- a deficiency or overassessment resulting from adjustments made under Subchapters C and D of Chapter 63 concerning the tax treatment of partnership and subchapter S items determined at the partnership and corporate level
- an excessive tentative allowance of a carryback provided by law

No claim for refund or credit will be filed or prosecuted by the taxpayer for the years stated on this form, other than for amounts attributed to carrybacks provided by law.

The proper filing of this offer, when accepted, will expedite assessment and billing (or overassessment, credit or refund) by adjusting the tax liability. This offer, when executed and timely submitted, will be considered a claim for refund for the above overassessment(s), if any.

This offer may be executed by the taxpayer's attorney, certified public accountant, or agent provided this is specifically authorized by a power of attorney which, if not previously filed, must accompany this form. If this offer is signed by a person acting in a fiduciary capacity (for example: an executor, administrator, or a trustee) Form 56, Notice Concerning Fiduciary Relationship, must accompany this form, unless previously filed.

If this offer is executed for a year for which a joint return was filed, it must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

If this offer is executed by a corporation, it must be signed with the corporate name followed by the signature and title of the officer(s) authorized to sign. If the offer is accepted, as a condition of acceptance, any signature by or for a corporate officer will be considered a representation by that person and the corporation, to induce reliance, that such signature is binding under law for the corporation to be assessed the deficiencies or receive credit or refund under this agreement. If the corporation later contests the signature as being unauthorized on its behalf, the person who signed may be subject to criminal penalties for representing that he or she had authority to sign this agreement on behalf of the corporation.