The Unique World of Tax Litigation

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Overview of Tax Litigation

Tax litigation is a highly technical and unique area of the law. Unlike other litigation, a tax dispute always involves the same opposing party—the Internal Revenue Service or the IRS. The substantive issues, however, can involve income, gift, estate, or employment taxes that are governed by thousands of pages in the Internal Revenue Code and other tax law. As a result, a tax litigator must have the combined ability to analyze the technical tax laws and to defend the client's position through written and oral advocacy. Tax litigation is further complicated by a tangled web of procedural options throughout the unusual life of a tax dispute, which can last from a few months to more than ten years. To fully understand the intricacies of tax litigation, it is necessary to be familiar with the potential phases in the life of a tax dispute. A flowchart of the life of a tax dispute is attached as Appendix Q. The role of counsel is critical in strategizing with the client on the best approach for a successful resolution of the tax dispute.

Audit Phase

A tax dispute begins with an audit, which is the process by which the IRS examines a taxpayer's federal tax return to determine if the IRS agrees with the items of income and expense as reported on the return and the resulting amount of taxes paid. Unlike individuals, many large corporations are subject to audits on a routine audit cycle basis, with each cycle including one or more tax years.

As part of an audit, an IRS Revenue Agent will routinely issue one or more Forms 4564, Information Document Request, to obtain documents and other factual information from the taxpayer with respect to items on the return that are being examined by the agent. These requests must be answered truthfully, but it also is important to respond to these requests in a way that best reflects the merits of the taxpayer's return position and that preserves the attorney-client, work product, and other applicable privileges. Some corporate clients prepare the responses to the requests in-house, but frequently counsel is engaged to assist with this task.

As a general rule, an audit can have one of four outcomes: (i) a no-change case, in which the agent proposes no adjustments to the taxpayer's return, (ii) an agreed case, in which the agent proposes adjustments to the taxpayer's return and the taxpayer agrees to all of these adjustments, (iii) a partially agreed case, in which the agent proposes adjustments to the taxpayer's return and the taxpayer agrees to some but not all of these adjustments, and (iv) an unagreed case, in which the agent proposes adjustments to the taxpayer's return and the taxpayer disagrees with all of these adjustments. The type of outcome will determine the documentation prepared by the agent at the end of audit. For example, the agent will issue a Letter 3401, No-Change Report Transmittal Letter, to advise the taxpayer that no changes have been proposed but that this result is subject to review. Once the case is officially closed, a no change letter (e.g., Letter 590) will be issued to the taxpayer. On the other hand, if the agent has proposed adjustments to the return, the audit report will include a recalculation of the tax liability based on the proposed adjustments and a Form 886-A, Explanation of Items, which explains the legal merits of these adjustments on an issue by issue basis. To the extent there are agreed issues, the agent and the taxpayer will document these issues through a closing agreement, and these issues will no longer be a part of the dispute. If the unagreed issues result in a proposed tax deficiency, the agent will issue a thirty-day letter, which will include the audit report.

With corporate clients, it is very common to settle some but not all issues. This is especially true where the audit cycle includes multiple tax years. During the audit, the agent may provide the taxpayer with a draft Form 886-A and allow the taxpayer to respond to the proposed audit report. The primary purpose of this draft is to allow the taxpayer the opportunity to correct errors or omissions of key facts. Counsel should be involved in responding to the draft Form 886-A because, although it may not be an extensive response, it can be the first statement of the taxpayer's position.

As a general rule, the statute of limitations for the IRS's examination of a federal return is three years after the date the return is filed unless certain exceptions apply or the statute of limitations is extended by agreement. Because an audit may not begin for a couple of years after the return is filed, the IRS will almost always request an agreement to extend the statute of limitations. During the audit phase, the taxpayer generally consents to

these agreements but, as the tax dispute progresses, the willingness to extend the statute can become a strategic decision that should involve counsel.

The audit phase of a tax dispute may last from a few months to a couple of years, depending on whether the taxpayer is an individual or a corporation and whether there are substantive issues that are required to be coordinated through higher channels of the IRS, such as IRS Technical Guidance.

Appeals Phase

The taxpayer has the right to protest the proposed adjustments made by the IRS Revenue Agent and to request that the IRS Appeals Office complete an administrative review of these adjustments. This is accomplished by filing a protest letter, which is an extensive legal analysis that defends the merits of the taxpayer's position on an issue by issue basis. The filing of this protest letter formally begins the appeals phase of a dispute. The mission of IRS Appeals is to resolve tax disputes, without litigation, on a basis that is fair and impartial to both the IRS and the taxpayer while taking into account the hazards of litigation. As a result, the IRS Appeals Office is tasked with the responsibility of completing an independent review of the merits of the case.

Because the goal of the appeals phase is to resolve cases without litigation, counsel should be engaged to prepare the protest letter and to conduct the negotiations. After the protest letter is filed, an IRS Appeals Officer will meet with the taxpayer's counsel during an appeals conference, at which each party has the opportunity to advocate its position and to discuss any perceived weaknesses and strengths of these positions. After this conference, a taxpayer frequently makes additional submissions of facts or legal arguments to address any weaknesses perceived by the IRS in the taxpayer's case. The parties will actively negotiate a settlement of the issues. Importantly, the negotiations must take into account a multitude of factors including the number and type of substantive issues, the amount of additional taxes and interest that would have to be paid, the financial statement impact of any settlement, and the hazards of litigation. It is not uncommon for the IRS and the taxpayer to "trade" issues. In other words, a taxpayer may be willing to concede a lower percentage of one issue in

order to get the IRS to concede a higher percentage on a second issue. A significant amount of strategy and oral and written advocacy is involved in the appeals process.

Frequently, taxpayers successfully settle their disputes during the appeals phase. In this instance, the parties may execute a closing agreement and, if there is a tax deficiency, the taxpayer will pay any outstanding taxes plus interest. If the taxpayer does not obtain a resolution of its tax dispute with the IRS Appeals Office, the taxpayer must proceed to litigation or, possibly, mediation or arbitration. The documentation to close the appeals phase will depend on whether there is a tax deficiency or a tax overpayment, which will affect a taxpayer's choice of forum for litigation. For example, if there is a tax deficiency, the IRS will issue a Notice of Deficiency, which is the ticket to litigation in the U.S. Tax Court. As an alternative, it is possible to make a payment of tax at the appeals phase and seek refund litigation. This strategic decision is discussed in detail below, but it is critical that counsel begin discussing the forum issue during the appeals phase of a dispute.

The appeals phase of a tax dispute generally lasts one to two years, depending on the number and complexity of the issues and the involvement of IRS Technical Guidance on coordinated issues. However, an appeals case can be stayed, pending the outcome of the litigation of an early audit cycle for the same taxpayer involving the same substantive issue.

Trial Phase

If a taxpayer chooses to litigate a tax dispute, there are two types of tax litigation and three forums. First, there is deficiency litigation, which is a procedure whereby the merits of the substantive issues and ultimate tax liability are litigated without the payment of the disputed tax. This type of litigation can occur only in the U.S. Tax Court. Second, there is refund litigation, which is where the disputed tax is paid under protest and the taxpayer files a refund of these taxes. This type of litigation can occur in either the U.S. Court of Federal Claims or a U.S. District Court. As discussed below, there is a significant amount of strategy involved in choosing the best forum for a particular taxpayer and its tax dispute.

Counsel is always involved in the trial phase of a tax dispute, which generally lasts from one to three years depending on the forum selected.

Appellate Litigation Phase

After a tax dispute is resolved at the trial court level, the unsuccessful party may appeal the trial court's decision to the appropriate Circuit Court of Appeals, as discussed below. After the Court of Appeals' decision, a similar appeal can be made to the U.S. Supreme Court but the Supreme Court rarely hears tax cases. As with the trial phase, counsel is always involved in the appellate litigation phase, which may last from one to two years, depending on the timing of the appellate court's decision.

Deficiency vs. Refund Litigation

Deficiency Litigation

The Tax Court is an Article I court, that is, it is established pursuant to Article I of the U.S. Constitution, with nationwide jurisdiction. As of August 1, 2007, the Tax Court had seventeen judges, each of whom was appointed by the President of the United States with the consent of the U.S. Senate to serve a fifteen-year term. Unlike with the Court of Federal Claims and the District Court, all of the Tax Court judges had tax expertise prior to joining the Tax Court and, as members of this court, they hear only tax cases.

The Tax Court has jurisdiction over a taxpayer if (i) the IRS has issued a Notice of Deficiency, which sets forth the IRS's proposed adjustments and amount of additional taxes, and (ii) a petition has been filed with the Tax Court in a timely manner. Upon receipt of the Notice of Deficiency, the taxpayer has ninety days to file a petition in the Tax Court if it wants to continue to dispute the IRS's adjustments. Once this petition is filed, the Tax Court's jurisdiction is exclusive and, therefore, the taxpayer cannot dismiss the petition and maintain a refund action for the same tax year and the same tax in the Court of Federal Claims or in a District Court.

At the time the petition is filed, the taxpayer also must file a Designation of Place of Trial showing the place of trial preference. The times and places of

the sessions of the Tax Court are established by the Chief Judge in order to secure a reasonable opportunity for the taxpayer to appear before the Tax Court with as little inconvenience and expense to the taxpayer as practicable. Regular sessions of the Tax Court are held in multiple cities around the country. The clerk's office schedules a sufficient number of trial sessions for a particular city to satisfy the requests for trial at that location within a reasonable period of time. In some cities, a trial session may be held only once a year whereas, in other cities, trial sessions may be held at multiple times during a year.

Once the trial sessions are set, the chief judge assigns a judge to each session. Cases are calendared for trial only after they are at issue. Cases are at issue only after the Commissioner of the IRS has filed his answer, which is due sixty days after the date that the petition was served. In most cities, cases can be calendared for trial as soon as five months after the answer has been filed.

Refund Litigation

As an alternative to deficiency litigation in the Tax Court, the taxpayer may pursue refund litigation. Once the taxpayer decides to pursue this sort of litigation, it must decide whether its choice of forum is the Court of Federal Claims or the District Court. Both tribunals have concurrent original jurisdiction and many aspects of the proceedings are the same. For example, there are three jurisdictional prerequisites for both refund forums. First, the taxpayer must make a full payment of tax. Second, the taxpayer must file an administrative claim for refund with the IRS on Form 1120X or Form 1040X, depending on whether the taxpayer is a corporation or an individual. Third, the taxpayer must file a formal complaint in court. Because of the limitations period on filing the claim for refund and the lawsuit, choosing a refund forum can be used to significantly delay the ultimate disposition of the case.

The administrative claim for refund (Form 1120X or Form 1040X) must be filed either three years from the time the return was filed or two years from the time the tax was paid, whichever comes later. The refund claim is limited to the amount of tax paid during this limitations period. The refund claim can provide the taxpayer with a second opportunity for a review by

the IRS Appeals Office. However, if the case was already considered by the IRS Appeals Office, it is unlikely that the second review will result in a more favorable settlement unless there has been a development in the law. If the IRS Appeals Office rejects the refund claim, the IRS will issue a Notice of Disallowance. To accelerate the case, the taxpayer can file the Form 1120X or Form 1040X immediately upon paying the asserted tax deficiency. Whether to delay or accelerate a case is a strategy decision based on multiple factors, such as the number of pending cases on the same substantive issue.

Once the refund claim is filed, there is an additional limitations period for filing a lawsuit. The refund suit can be filed six months after the date on which the refund claim is filed or, if earlier, the date on which the IRS issues a Notice of Disallowance. The limitations period for filing a refund suit expires two years after the date on which the IRS issues the Notice of Disallowance. If no such notice is issued, the statute of limitations for filing a lawsuit remains open. A lawsuit is commenced when the complaint is filed with the Clerk of the Court.

Choice of Tax Litigation Forums

Although the taxpayer cannot engage in forum shopping, the taxpayer is free to choose the forum that has the most favorable precedent and that offers the greatest tactical advantage. Once a forum is chosen, however, the taxpayer cannot revise its decision and file a second lawsuit in another forum for the same taxable period. As a result, it is critical for the taxpayer to consider all the advantages and disadvantages of each forum based on the specific facts and circumstances of the case. Counsel should provide the client with an understandable discussion of the options, a time line for each of the alternatives, and biographies of the judges in the alternative forums. In selecting between the three forums, the facts of the specific case as well as a wide array of other factors must be considered.

Payment of Tax

A significant advantage to a Tax Court proceeding is that there is no requirement that the taxpayer make a payment of tax to obtain jurisdiction. The taxpayer, however, can mitigate interest accrual without losing Tax

Court jurisdiction by making (i) a deposit of tax under Section 6603 of the Internal Revenue Code before receipt of the Notice of Deficiency or (ii) a payment of tax under Section 6213(b)(4) of the Internal Revenue Code after the receipt of the Notice of Deficiency. In contrast to the Tax Court, the Court of Federal Claims and the District Court require full payment of the disputed tax liability as a jurisdictional prerequisite.

Trial Location

Because the Tax Court hears cases in multiple cities around the country, the taxpayer is permitted to request trial in any of these cities. Similar to the Tax Court, the Court of Federal Claims has national jurisdiction. It, however, hears cases only in Washington D.C. Unlike the Tax Court and the Court of Federal Claims, a District Court does not have national jurisdiction, and any complaint must be filed in the judicial district where the taxpayer's principal place of business is located at the date the complaint is filed.

Judges

As noted above, the Tax Court judges all have prior tax expertise before joining the court. This is a very significant advantage in a case that requires a detailed analysis of the Internal Revenue Code, the Treasury Regulations, or the legislative history. Unlike with the Tax Court, the judges in the Court of Federal Claims are not required to have a prior orientation in the tax law. However, many of these judges have tax or other technical expertise, which is a significant distinction from those judges in the District Courts that generally have no prior orientation with tax law.

In Tax Court, the chief judge has complete discretion to assign judges to cases, including the ability to assign a special trial judge or a retired senior judge to any proceeding. In the Court of Federal Claims, a judge or senior judge is assigned after the complaint is filed and that judge will handle all aspects of the case, including any dispositive motions. In District Court, local practices may delegate pretrial matters or trial responsibilities to magistrate judges.

Government Attorneys

In Tax Court, the Commissioner of the IRS is represented by the IRS's Office of Chief Counsel, who may have more knowledge of the substantive tax law than courtroom practice and evidentiary issues. The Office of Chief Counsel may show more deference to the position of the IRS Examination Division and Appeals Division. In refund litigation, which may take place in the Court of Federal Claims or the District Court, the Commissioner of the IRS is represented by the Department of Justice, which assigns attorneys from its Tax Division to the case. These attorneys tend to be more familiar with courtroom practice and evidentiary issues than with the substantive tax law, but frequently the IRS's Office of Chief Counsel has researched the substantive issues before the case is referred to the Department of Justice. Because the Department of Justice and the Office of Chief Counsel are technically separate, the Department of Justice is expected to analyze the case more objectively than the Office of Chief Counsel.

Timing and Nature of the Trial

Generally, the District Courts have greater backlogs than the Tax Court or the Court of Federal Claims. The Tax Court, however, can take up to one year or more to issue its opinion. Jury trials are not available in the Tax Court or the Court of Federal Claims. However, they are available in the District Court. Even if the taxpayer does not request a jury trial in District Court, the government is permitted to make that request in its answer to the taxpayer's complaint.

New Issues

In the Tax Court, the filing of a petition suspends the statute of limitation until the entry of the final decision and sixty days thereafter. The effect of this suspension is that the proper amount of the taxpayer's tax liability for the taxable year is in question and the Commissioner of the IRS can raise any new or alternative issue, even if it increases the amount of the deficiency. The Commissioner will have to obtain permission of the Tax Court to amend the pleadings to raise new issues and will bear the burden of proof on those issues. Typically, permission for this is granted.

In refund litigation, the filing of a refund suit does not suspend the statute of limitations for assessment. If the suit is filed prior to the expiration of the assessment period, the Department of Justice can raise new issues and recover additional taxes. If the suit is filed after the expiration of the assessment period, the government is barred from any affirmative recovery, i.e., the Department of Justice cannot assert new issues that result in additional taxes. Any new theories, however, can be used to offset the amount of the taxpayer's refund.

Settlement Authority and Opportunities

Settlement procedures in deficiency litigation are significantly different from settlement procedures applicable to tax refund litigation. In the Tax Court, the IRS Appeals Office is generally involved in the settlement process for a period of time after the filing of the petition. Thereafter, the IRS Office of Chief Counsel will have the authority to approve a compromise and agree to a deficiency. Where a case has been referred to the Department of Justice, however, the Attorney General, or his delegate, is authorized to settle the case. A prior settlement proposal made at IRS Appeals may or may not be accepted by the Department of Justice.

It is possible to settle a case with a favorable outcome for the taxpayer on the eve of trial. For strategic reasons, it may be desirable to skip the appeals phase of a case and proceed with docketing a case. In certain circumstances, this approach may accelerate the resolution of a case because, once docketed, the government may be more willing to settle on favorable terms to avoid having to try the case on its merits.

Publicity of Proceedings

As a general rule, all reports, evidence, and proceedings in all three tax litigation forums are public information. In Tax Court and the Court of Federal Claims, all pleadings are filed with the Clerk of the Court in Washington, D.C. and, therefore, the case may be less likely to receive local publicity than if the case were filed in District Court. As noted above, this publicity risk might be minimized for a Tax Court proceeding by designating the place of trial as a city other than the city of the taxpayer's corporate headquarters. In recent years, however, it has been very common

for Tax Court petitions and hearings to be reported in certain tax publications that have wide circulation among the tax legal community. As a result, the favorable reputation of a taxpayer in a particular city may need to weighed against the possibility of publicity.

Evidentiary Rules

All three tax litigation forums apply the Federal Rules of Civil Procedure. The District Court, however, is more likely to enforce strict conformity with these rules.

Procedural Rules

Each tax litigation forum has its own set of procedural rules. The Tax Court is governed by the Tax Court Rules. The Court of Federal Claims is governed by the Court of Federal Claims Rules. The District Court is governed by the Federal Rules of Civil Procedure. Even in the Tax Court and the Court of Federal Claims, the rules are patterned after the Federal Rules of Civil Procedure but there are several important differences—discovery and subpoena power. The discovery rules in Tax Court are restrictive, usually to the IRS's detriment because the taxpayer has superior knowledge of the relevant facts. For example, the Tax Court requires the parties to obtain information through informal discovery before using the Tax Court's discovery rules, and depositions are not permitted except in very limited circumstances. The Tax Court also is unique in that it mandates that the parties use a pre-trial stipulation process, pursuant to which the parties are required to stipulate all matters that are not privileged and that are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. This stipulation of facts is a conclusive admission that is binding on all parties.

On the other hand, in the Court of Federal Claims and the District Court, the Department of Justice attorneys can be expected to use discovery as broadly as possible, including depositions and extensive requests for admissions and other discovery. Therefore, discovery may delay the length of a case in refund forums and increase the expense of litigation. In the Tax Court, a subpoena may be issued for testimony or documents at any designated place of hearing. In the District Court, a trial subpoena may be

issued for a witness only if that witness resides within the district or can be found within a hundred mile radius of a courtroom outside the district. Similarly, the Court of Federal Claims follows the hundred mile rule but, for good cause, the court will authorize a subpoena outside of the hundred mile radius of the place of trial.

Appellate Jurisdiction

A decision of the Tax Court or the District Court can be appealed to the U.S. Court of Appeals where the corporate taxpayer has its principal place of business. A decision of the Court of Federal Claims can be appealed to the Court of Appeals for the Federal Circuit. Neither the Court of Federal Claims nor the Federal Circuit Court of Appeals is bound by a decision rendered by another Court of Appeals.

Judicial Precedent

Another critical factor is the judicial precedent that may affect the outcome of the case. Here, it is important to consider every issue in the case.

The Success of Client Relationships

Because of the life of a tax dispute and the routine nature of corporate audits, counsel's engagement to represent a corporate client on a tax dispute could be the beginning of a long-term relationship as litigation counsel on the current dispute as well as on future disputes. This unique aspect of litigation relates directly to the fact that it is not uncommon for corporate clients to have multiple audit cycles at various phases. For example, a client may have the tax year 1999 in the trial phase of the dispute while at the same time have several subsequent audit cycles at the audit or appeals phases of disputes. In addition, the substantive issues involved in a corporate audit frequently are reoccurring issues or they otherwise impact future years' returns. As a result, counsel may ultimately represent the client on multiple issues for multiple tax years.

Because of this unique feature of tax litigation, the selection of tax litigation counsel is an important business decision for the client. It is critical that counsel understand the client's business, the procedural history of all the

client's tax disputes, the substantive nature of the tax issues involved in those disputes, the substantive nature of reoccurring issues in the client's industry, and the accounting impact of the tax issues. If the issue is an industry-wide issue or an issue that is coordinated at the IRS National Office, it is important to be familiar with any IRS rulings or other guidance reflecting the IRS's legal position and to have contacts with senior IRS officials.

Overall, a successful client relationship requires expertise, professionalism, responsiveness, and a dedication to the client and its tax disputes. However, success in any given tax dispute cannot be measured by a single standard. Success varies by client and by dispute, and it necessarily must take into account the client's goals, amount of financial statement tax reserves, the merits of the substantive issues, hazards of litigation, the impact on future years, and the ability to resolve a dispute without litigation. A good tax litigator recognizes that many clients have a goal of settling early, and a successful case can be the result of trading issues to reach an overall bottom-line tax adjustment that is consistent with the client's internal targets.

Even if settlement is likely, counsel should never ignore the possibility of litigation and, therefore, should keep a litigation strategy in mind during the entirety of the representation. There are strategic decisions to be made throughout the life of a tax dispute that can impact the outcome of the disputed issues and, therefore, the client's overall success.

Documentation Pitfalls in Today's Environment

The role of a tax director has changed drastically in the last five years. This change has been driven by three significant developments: (i) the Sarbanes-Oxley Act of 2002, (ii) the IRS's tax shelter initiative, and (iii) FIN 48, *Accounting for Income Taxes*. By way of example, under FIN 48, tax directors are required to complete an inventory of highly uncertain tax positions, a litigation risk assessment, and a matrix of the probabilities of success on the merits and to disclose changes in the reserves. As a result, one of the most significant issues faced by today's tax directors is the protection of the company's FIN 48 and other tax accrual workpapers, which can provide a road map for the IRS's audit of the company's tax returns. Historically, the

IRS has requested the production of these workpapers only in unusual circumstances. In today's environment, companies around the country are concerned about the potential for a change in policy and an aggressive effort to more broadly seek the production of FIN 48 and other tax accrual workpapers, as well as audit workpapers, tax reconciliation workpapers, tax opinions, and other tax-sensitive documentation. In connection with the audit of financial statements, accounting firms also are seeking complete transparency to a company's documentation in order to comply with the requirements of Sarbanes-Oxley and FIN 48.

As a result, tax directors must now evaluate the risk of a qualified audit opinion if the auditors are not granted complete transparency, as opposed to the risk that such disclosure waives all existing privilege, creating significant hazards for existing or potential litigation. Because of the mandatory litigation risk assessment, an important part of the client service provided by a tax litigator is the ability to understand the accounting aspects of FIN 48, to assist in preparing the litigation risk assessment, and to maximize privilege protection for all tax-sensitive documentation. In today's environment, one of the most significant pitfalls relates to documentation and the resulting preservation of privileges, which include:

(i) The attorney-client privilege protects a communication made between a client and an attorney (or an agent of the attorney) in confidence for the purpose of obtaining or providing legal advice to the client.

(ii) The federal tax practitioner privilege under Section 7525 of the Internal Revenue Code protects a communication made between a client and a federally authorized tax practitioner in confidence for the purpose of obtaining or providing tax advice to the client.

(iii) The work product doctrine under Fed. R. Civ. Proc. 26(b)(3) protects documents prepared in anticipation of litigation by or for another party or by or for that other party's representative.

The production of documents to a third party, which is not serving as an agent to the attorney, clearly waives the attorney-client and federal tax practitioner privileges. But this type of production does not necessarily

waive the work product doctrine. This doctrine is waived when documents are shared with an adverse party or are disclosed in a manner that substantially increases the opportunity for potential adversaries to obtain the information. A company's auditors are not necessarily adverse parties. It, therefore, is critical to prepare, control, and distribute documentation in a way that maximizes a client's chances of preserving privilege several years down the road when the client's tax return is audited. For example, documentation guidelines and procedures for the preparation of future documents should address the initiation of document preparation, the physical control over documents, the labeling of appropriate documents as privileged, the segregation of documents relating to individual reserve items from aggregate reserve workpapers, and the segregation of tax return workpapers from other tax advice.

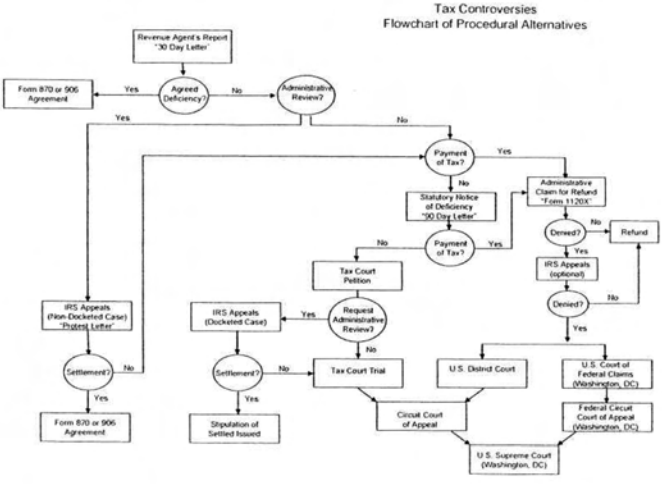
Staying Current

On a daily basis, I read the advance sheets to identify recent developments such as legislation, regulations, case law, IRS rulings, or other developments that impact my clients' particular tax disputes or my litigation practice as a whole. To further enhance my expertise, I am an active member of the Taxation Section of the American Bar Association ("ABA Tax Section"). Currently, I am the 2007-2009 Chair of the Banking and Savings Institutions Committee of the ABA Tax Section. This involvement provides a unique forum to exchange ideas with leading tax practitioners around the country and with senior IRS officials and, in some instances, to impact the development of the law. This working relationship with senior IRS officials is an invaluable benefit to my clients with tax issues that require access to these officials. I also stay current by lecturing and authoring on various litigation related topics, including tax shelters, attorney-client and work product privileges and, more recently, the consequences of FIN 48. Because of the overlap between tax and accounting issues, I attempt to stay current on accounting developments. I previously practiced as a certified public accountant, and I continue to be a member of the American Institute of Certified Public Accountants. I also am the primary author of the BNA/TM Accounting & Practice Series Portfolio on Sarbanes-Oxley: Auditor Independence, which is a topic that is critical to all of my clients.

Michelle M. Henkel is a partner at Alston & Bird specializing in federal tax litigation. As a tax litigator, she represents taxpayers in a wide array of disputes against the Internal Revenue Service involving income, gift, estate, and employment taxes. Most frequently, she handles corporate tax issues in the financial services and insurance industries. Her clients are located around the country, and she represents them at all phases of a tax dispute—audit, administrative appeals, trial, and appellate litigation. Currently, she is counsel to financial institutions and insurance companies on industry-wide issues and issues of first impression involving the tax consequences of leasing and REIT transactions and the deductibility of settlement payments from the reorganization of insurance companies. Her clients are faced with strict requirements under the Sarbanes-Oxley Act of 2002 and FIN 48, Accounting for Income Taxes. *Her ability to provide high quality service to her corporate clients is enhanced by her prior experience as a certified public accountant. She was elected as one of the Georgia Super Lawyers for the years 2005 and 2006.*

Appendix Q

TAX CONTROVERSIES FLOWCHART



Courtesy of Michelle M. Henkel, Alston & Bird LLP