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Procedural and Jurisdictional Aspects of Seeking a Tax Refund

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PROCEDURAL AND JURISDICTIONAL ASPECTS OF SEEKING A TAX REFUND

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It is entirely possible for a taxpayer to overpay his income taxes for a particular year but be unable to secure a refund of the overpayment. In order to assert successfully his right to a refund, the taxpayer must follow precisely the statutory procedure established for that purpose. He should be familiar with important decisions bearing on procedural and jurisdictional questions.

There are two procedures available to the taxpayer who believes that he has overpaid his income taxes. He must first proceed administratively by filing a claim for refund[1] with the Internal Revenue Service. If that procedure does not prove successful, he may seek a refund by litigating his case[2] either in the appropriate United States district court or in the United States Court of Claims.[3] Refund suits in these courts are brought against the United States.[4] Three sections of the Internal Revenue Code should be given particular attention.[5]

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1. INT. REV. CODE of 1954, § 7422(a) [hereinafter cited as Code]; Treas. Regs. § 301.6402-2(a)(1).

2. Code § 7422(a).

3. 28 U.S.C. 1346 (1970) provides:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collectd without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; . . . .

28 U.S.C. 1491 (1970) provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive depa tment, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in Tort. . . .

4. Code § 7422(f)(1).

5. Code §§ 6511, 6532, 7422.

Section 7422(a) provides that no suits for a tax refund may be maintained "until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof." Accordingly, a prerequisite to bringing a tax refund suit against the United States is the proper filing of the claim for refund.

Section 6532 of the Internal Revenue Code provides the period of limitations on suits and indicates[6] that no tax refund suits under 7422 "shall be begun before the expiration of 6 months from the date of filing the claim required . . . unless the Secretary or his delegate renders a decision thereon within that time. . . ." In other words, once a claim for refund is disallowed, suit may be instituted immediately. That section also provides that a tax refund suit cannot be instituted after two years have expired from the date the notice of disallowance of the claim is mailed to the taxpayer by certified mail or registered mail. The two year period can be extended by a written agreement between the Secretary or his delegate and the taxpayer or his attorney, or someone else having the authority to act on the taxpayer's behalf.[7] If the taxpayer files a written waiver of the requirement that he be mailed a notice of disallowance, the two year period will begin when the waiver is filed.[8] The regulations specifically provide, however, that the filing of a waiver by the taxpayer prior to the expiration of six months from the date the refund claim was filed will not permit the taxpayer to institute suit against the United States before the six month period has expired.[9] Once a notice of disallowance of a claim for refund has been mailed by the Internal Revenue Service, any subsequent action taken by the Service with respect to the claim will not extend the time for filing suit by the taxpayer.[10]

Section 6511 of the Internal Revenue Code provides limitations for the filing of a claim for credit or refund. The basic rule provided by that section is that a claim for refund or credit must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever gives the taxpayer more time.[11] Section 6511(b)(1) provides that no refund or credit will be allowed after

6. Code § 6532(a)(1).
7. Code § 6532(a)(2); Treas. Reg. § 301.6532-1(b).
8. Code § 6532(a)(3); Treas. Reg. § 301.6532-1(c).
9. Treas. Reg. § 301.6532-1(c)(4).
10. Code § 6532(a)(4); Treas. Reg. § 301.6532-1(d).
11. Code § 6511(a).

the expiration of the limitation period set forth above unless a claim for refund or credit is timely filed.

Even though a claim for refund is timely filed in accordance with the rules set forth above, the Code establishes a limit on the amount which is refundable.[12] Where the claim is filed within the three year period, the amount of the refund cannot exceed the tax paid within a period immediately prior to the filing of the claim equal to three years plus the time covered by any extension for filing the return.[13] If, however, the claim for refund was not filed within the three year period, the amount of the refund or credit cannot exceed the amount of the tax paid during the two years immediately preceding the filing of the claim.[14] This section also contains provisions pertaining to various specific situations.[15] Any taxpayer who seeks to secure a tax refund should be familiar with the provisions of the three sections of the Code referred to above.

In addition to the above sections of the Internal Revenue Code which are extremely important, the provisions of the United States Code granting jurisdiction to the federal district courts and the Court of Claims in refund suits are provisions with which every tax practitioner will be familiar.[16]

Claims for Refund

What constitutes a valid claim for refund? The regulations provide[17] that in seeking a refund of income tax, an individual taxpayer is encouraged to use Form 1040X (amended income tax return). He may also use Form 843 (claim for refund), which is also the proper form to use for a refund of taxes other than income taxes.[18] These are not the only documents which may constitute a claim for refund. An original income tax return may constitute a claim for refund where the return shows an overpayment and the taxpayer has requested the overpayment be returned to him or credited to his estimated taxes for

12. Code § 6511(b)(2)(A).
13. *Id.*
14. Code § 6511(b)(2)(B).
15. Section 6511(d) of the Code provides special limitations rules in the case of bad debts and worthless securities, net operating losses for capital loss carrybacks, the foreign tax credit, investment credit carrybacks, self-employment tax in certain cases, reduction of policy-holders surplus account from life insurance companies and work incentive program carrybacks.
16. Footnote 3 *supra.*
17. Treas. Reg. § 301.6402-3(a)(2).
18. Treas. Reg. § 301.6402-2(c).

the next year.[19] In fact, it is possible for a claim for refund to take many forms. A document can constitute a claim for refund if it notifies the Commissioner of the taxpayer's belief that he has erroneously overpaid his taxes, sets forth precisely the grounds for believing that the tax was overpaid and indicates that the taxpayer is seeking a refund or credit of the overpaid taxes.[20] A Form 870 on which the taxpayer agrees to an overassessment of taxes will constitute a valid claim for refund if it is timely filed. Where the overassessment has been determined by the Service, it is apprised of the taxpayer's desire for a refund together with the grounds on which such desire is based.[21] On the other hand, if the Form 870 was submitted by the taxpayer prior to the assessment of a deficiency against him, *Barenfeld v. United States*[22] demonstrates that the Form 870 will be treated as the mere waiver of the statute of limitations on assessment. In that instance, because the document did not advise the government of the taxpayer's desire to seek a refund of a deficiency which might be assessed for the year in question, it could not be treated as a claim for refund. In that case, the formal claim for refund was filed after the statute of limitations had run.

When thinking in terms of seeking a refund of income taxes, one should realize that the refund will relate either to taxes paid by the taxpayer as part of his liability shown on his original tax return, or to a deficiency of taxes which is subsequently paid by the taxpayer after the Service has determined that an additional amount is due. We are assuming a situation where the taxpayer decided to permit the deficiency to be assessed against him so that he could then file a claim for refund to recover it. If the claim failed, he could institute a suit for refund. If after filing his original tax return, the taxpayer receives a notice of deficiency (ninety-day letter) advising him that the Service has determined that additional taxes are owing, he may, of course, decide to litigate the matter in the United States Tax Court and, in that event, the case will be decided before he is required to pay additional tax.[23] Hence, claims for refund would not be part of that procedure.

The two most important aspects of claims for refund are timeliness and statement of grounds.

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19. Treas. Reg. § 301.6402-3(a)(1).
20. Barenfield v. United States, 442 F.2d 371 (Ct. Cl. 1971); Stuart v. United States, 130 F. Supp. 386 (Ct. Cl. 1955); Cumberland Portland Cement Co. v. United States, 104 F. Supp. 1010 (Ct. Cl. 1952).
21. Rev. Rul. 68-65, 1968-1 CUM. BULL. 555.
22. 442 F.2d 371 (Ct. Cl. 1971).
23. Code § 6213(a).

Timeliness of Claims for Refund

In considering the question of whether or not a properly executed claim for refund is timely filed, as previously indicated, the basic rule is that the claim must be made within three years of the filing of the return or within two years of the payment of the tax, whichever extends the time period longer in the taxpayer's favor.

If the claim for refund is delivered by the United States mail to its destination,[24] the claim will be treated as having been filed on the date of the United States postmark on the envelope containing it.[25] If the postmark date is on or before the final day for filing the claim, it will be treated as timely[26] even though the Internal Revenue Service may not receive the claim until many additional days have elapsed. If a taxpayer sends the claim by registered mail, the date of registration will be considered the date of the postmark.[27] If the taxpayer sends the claim by certified mail and his receipt is postmarked by a postal employee, that postmark will be treated as the date the claim was postmarked.[28] If the last day for filing the claim falls on a Saturday, Sunday or legal holiday, the filing will be timely if it takes place on the next succeeding day which is not a Saturday, Sunday or legal holiday.[29] The last date for filing the claim takes into consideration authorized extensions of time which have been granted.[30]

If the claim is to be filed with reference to the return date, when is the tax return treated as filed? If the return is filed prior to its due date, it will be treated as filed on the due date for purposes of determining the point at which the statute of limitations begins to run. An extension of time for filing the return will not be taken into consideration in this regard.[31] What this rule really means is that if an extension of time has been granted, but the taxpayer files his return prior to the normal statutory date for filing anyway, the return will be treated as filed on the statutory filing date (April 15th) despite the fact that an

24. Treas. Reg. § 301.6402-2(a)(2) provides that as to claims for refund filed after April 14, 1968, except where the claim should be filed with the Director of International Operations or with the assistant regional commissioner if the tax is an alcohol, tobacco or firearms tax, the claim must be filed with the service center serving the internal-revenue district in which the tax was paid.

25. Code § 7502(a)(1).

26. Code § 7501(a)(2)(A).

27. Treas. Reg. § 301.7502-1(c)(2).

28. *Id.*

29. Code § 7503.

30. *Id.*

31. Treas. Reg. § 301.6513-1(a).

extension has been granted. If the return is filed after the normal date for filing, the return will be treated as having been filed on the actual date of filing.[32]

Timeliness with Reference to Payment Date

As indicated above, if a taxpayer's claim for refund is to be filed with reference to the payment date of his taxes, a claim must be filed within two years of the time the tax was paid. When is the tax treated as paid? In the case of withholding tax, tax is withheld from an employee's salary at regular pay periods during the course of the year. The Code provides[33] that as to withholding taxes, the actual amount withheld is treated as paid "on the 15th day of the fourth month following the close of his taxable year. . . ." Estimated tax payments are deemed paid on the last day designated for filing the tax return for the year in question (without regard to any extension of time which may have been granted for filing the return.)

Before the statute read as it presently does, section 322(e) of the Internal Revenue Code of 1939 provided that the estimated tax payments "shall be deemed to have been paid not earlier than the 15th day of the third month following the close of such taxable year."[34] In cases where the income tax return was filed after its due date, and claims for refund were subsequently filed within three years of the actual date on which the return was filed, the claims were held to be timely as to the payments because it was held that the tax could not be deemed "paid" until the liability was defined by a return.[35] If the same factual situations were to arise under the present wording of section 6513 of the Internal Revenue Code of 1954, the taxpayers would lose their argument because payment of the estimated tax would be deemed to be made on the date the return was due. A late filed return would have no bearing on when the estimated taxes were treated as paid.

But the question of when a tax is deemed paid may still be open to question in the case of an asserted deficiency. There have been several key cases involving the question of whether a remittance of a

32. Foster v. United States, 221 F. Supp. 291 (S.D.N.Y. 1963).
33. Code § 6513(b)(1).
34. Act of Oct. 21, 1942, § 172(e), 56 Stat. 893.
35. Plankinton v. United States, 267 F.2d 278 (7th Cir. 1959); Schmidt v. Comm'r, 272 F.2d 423 (9th Cir. 1959); Trevelyan v. United States, 219 F. Supp. 716 (D. Conn. 1963).

particular sum prior to the actual determination of the tax liability, constitutes "payment" of the tax.[36]

In *Rosenman v. United States*, the basic case on this point, the executors of a descedent's estate received an extension of time for filing the estate tax return to February 25, 1935, but could not get an extension of time for paying the tax.

Accordingly, they delivered to the Service on December 24, 1934, a check in the amount of $120,000.00 stating at the time that the check was payment on account of federal estate tax, that it was made under protest since all of it was not due, and that it was being made for the purpose of avoiding penalties and interest. The estate tax return was filed on February 25, 1935, showing estate tax due of $80,224.24. The Commissioner used funds in the suspense account to credit against this liability. Subsequently, it was determined that the total tax due was $128,759.08, and a deficiency of $48,534.84 was assessed in April 1938. The balance ($39,775.76) in the suspense account was applied against the deficiency, and the balance of $10,497.34 was paid by the taxpayer to cover the balance of the deficiency plus interest. On May 20, 1940 the taxpayers filed a claim for refund for $24,717.12. Except as to the $10,497.34 payment, the claim for refund was rejected on the ground that the tax claimed to have been illegally paid was "paid" more than three years prior to the filing of the claim.

But the Supreme Court held that the tax could not have been "paid" before the Commissioner's assessment of April 1938. Rejecting the government's argument that the tax was "paid" on December 24, 1934 when the taxpayer transferred the $120,000.00 check to the collector, the Court stated that on that date, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted." There could not be a payment of the tax until it was formally defined by assessment. Only at that time could the remittance made by the taxpayer be applied against a specific liability and, accordingly, be treated as a payment. The Court also noted that the government had not treated such "deposits" as payments for purposes of fixing the date from which interest would be paid by the government on an amount subsequently assessed. The Court concluded that if the deposit was not

36. Rosenman v. United States, 323 U.S. 658 (1945); Lewyt Corp. v. Comm'r, 215 F.2d 518 (2d Cir. 1954), *aff'd in part, rev'd in part on other grounds*, 349 U.S. 237 (1955); Thomas v. Mercantile Nat'l Bank, 204 F.2d 943 (5th Cir. 1953); United States v. Dubuque Packing Co., 233 F.2d 453 (8th Cir. 1956).

payment for such interest purposes, it could not be payment for purposes of barring suit by the taxpayer for its illegal retention.

One should be careful to note that the *Rosenman* case cannot be interpreted as authority for the proposition that all remittances made prior to assessment will not constitute "payment." The crucial point is that if the taxpayer believes that he is "paying" a tax, and the government has the same understanding, the remittance will be treated as a tax payment. In *Ameel v. United States*,[37] a voluntary remittance of a proposed deficiency was held to be "payment" even though the tax in question had not yet been assessed. In that case, the remittance was made when the taxpayer agreed with the internal revenue agent that the additional amount which he contended was due, was in fact due. The agent had prepared a computation of tax due and presented it to the taxpayer. Distinguishing the case from *Rosenman*, the Court pointed out that in *Rosenman*, the parties had stipulated that the remittance be placed in a suspense account subject to recall by the taxpayer on request any time before the assessment. But in *Ameel*, the taxpayer agreed with the agent that a specific computation of additional tax owing was correct, and he was discharging what he believed to be a liability.[38]

If the taxpayer has filed a Consent (form 872) which has the effect of extending the normal period during which the Commissioner can assess a deficiency, the claim for refund can be filed within six months after the extended period provided in the Consent expires or within two years after the tax is paid, whichever is to the taxpayer's advantage.[39]

SUBSTANCE OF CLAIMS

Importance of Accurate Statement of Grounds

The Code and Regulations clearly specify the requirement that a claim for refund be filed, the time requirements relating to the filing, and requirements relating to the contents of such claims.[40] It, therefore, is clear that a claim for refund cannot be prosecuted successfully in the federal courts unless it has been timely filed and filed in a com-

37. 426 F.2d 1270 (6th Cir. 1970).

38. *See also* Fehrs Finance Co. v. Comm'r, 487 F.2d 184 (8th Cir. 1973) where the concept that "payment" can occur prior to formal assessment was cited with approval.

39. Code § 6511(c)(1).

40. Code §§ 7422(a), 6511(a); Treas. Reg. § 301.6402-2(b)(1).

plete and detailed manner.[41] The reason that the taxpayer is required in his claim for refund to set forth in detail each ground upon which recovery is sought and facts relating to each ground upon which recovery is sought is so that the Internal Revenue Service will know precisely the exact reason why the taxpayer claims a refund together with the factual basis for the claim. In that way, the Commissioner will be able to pass on the claim and be in a position to prevent undue delay and expensive court proceedings.[42] If the taxpayer's claim for refund is inadequate, and he attempts to correct the defect by stating correct grounds for recovery in his complaint filed in the federal courts, the result will be a fatal variance and the court will lack jurisdiction to hear the case. Such a result occurred in *Automated Marketing Systems, Inc. v. United States.*[43] In that case, the controversy related to a determination by the internal revenue agent that the method of accounting used by the taxpayer did not properly reflect income for the years in question. In its claim for refund, the taxpayer set forth as its ground for recovery the contention that its method of accounting did, in fact, clearly reflect income and that, therefore, the deficiency was erroneously assessed and collected. In its suit in the District court, the plaintiff moved for summary judgment arguing that the tax deficiency which was assessed was ultra vires because the government representative who found the taxpayer's accounting methods inadequate had no authority to make such a determination, and even if he did have such authority, he did not make the determination in the manner required. In ruling for the government, the court stated,

> the plaintiff's statement of claim can only be read as contesting whether its method of accounting accurately reflected its income. No other ground than this is discernible in the plaintiff's statement. The fact the Petitioner has contested the determination on the "merits," to use the term loosely, does not focus any attention on whether initial grants of statutory authority to the Secretary of the Treasury have been properly redelegated down to the agent of the IRS who made the determination.

Although conceding that the court might review additional grounds which are inherent in the initial claim for refund, the court found that the taxpayer was not advancing such a "factually-related" ground. The court added,

41. Rothensies v. Electric Storage Battery Co., 329 U.S. 296 (1946); United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269 (1931).

42. Taber v. U.S., 59 F.2d 568 (8th Cir. 1932).

43. AM. FED. TAX R.2d 73-386 (N.D. Ill. 1972).

> To assume that the Commissioner, in considering the merits of the claim directly under the elements of the 446(b) would have ascertained that his legal capacity to make the determination in the first instance was being challenged by the taxpayer, is to go beyond even the most liberal reading of Treasury Regulation 26 C.F.R. 6402-2(b) that a claim should set forth facts to fairly apprise the Commissioner of the basis of his claim.[44]

A taxpayer cannot simply attach a copy of the internal revenue agent's report determining the tax deficiency to a claim for refund form and add a statement that the deficiency set forth in the attached "exhibit" was erroneously and improperly collected.[45] Such a procedure by the taxpayer does not advise the Commissioner of the nature of each ground for recovery being asserted by the taxpayer.

In *Old Dominion Box Co., Inc. v. United States*[46] the taxpayer's claim for refund stated that the disallowance of a charitable contribution was improper where the contribution was made to a foundation which was a qualified charitable entity and the taxpayer innocently made its contributions in good faith in reliance on the donee's charitable status. While the taxpayer's refund suit was pending and after the period of limitations had expired on filing a refund claim, the company amended its complaint to allege that the contribution in question was intended for and received by an art center which was a charitable corporation and that, therefore, the contributions were deductible. The court noted that the original claim for refund stated that the foundation was the charity and the taxpayer an innocent contributor and it contained no mention of the art center and no suggestion that the taxpayer was relying on the theory that the foundation served only as a conduit through which the contribution passed to the art center. The amendment of the complaint was held to raise a new and different ground and, accordingly, the merits of the claim were never reached.[47]

The Court of Claims has taken a rather lenient view with regard to changing the basis for a claim for refund. In *National Forge and Ordnance Co. v. United States*,[48] the taxpayer's original claim for re-

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44. *Id.* at 73-388.

45. John P. Lynch Co. v. United States, 32 AM. FED. TAX R.2d 73-5130 (C.D. Calif. 1973).

46. 477 F.2d 340 (4th Cir. 1973).

47. *See also* United States v. Andrews, 302 U.S. 517 (1938); Sappington v. United States, 408 F.2d 817 (4th Cir. 1969); Campagna v. United States, 290 F.2d 682 (2d Cir. 1961); Commercial Solvents Corp. v. United States, 427 F.2d 749 (Ct. Cl. 1970), *cert. denied*, 400 U.S. 943.

48. 151 F. Supp. 937 (Ct. Cl. 1957).

fund alleged a net operating loss for 1944, part of which was subject to carryback resulting in a refund of taxes for 1942, 1943 and 1944. A subsequent Supreme Court decision defeated the basis of the taxpayer's 1944 net operating loss and, after the statute of limitations on filing a timely claim for refund had run, the taxpayer filed an amendment to its original claim stating that the net operating loss occurred in 1945 rather than 1944. Although the court expressed difficulty with the taxpayer's position, it permitted the amended claim for refund to be a proper basis for the suit. Subsequent Court of Claims decisions have applied this liberal approach to this issue.[49] It has been suggested that a failure to comply with the strict requirements of the Regulations with respect to alleging grounds and supporting facts in detail in a claim for refund should not defeat a taxpayer's suit where the inadequacies of the claim may be corrected without any harm resulting to the government as a result.[50]

Amount of Claim for Refund

As indicated above, it is extremely important for the taxpayer to allege in his claim for refund the precise grounds for recovery and facts underlying those grounds. Is it also essential that the taxpayer compute the precise amount refundable under the theory of his claim for refund? In *Burrell v. Fahs*[51] the government argued that even though the claims for refund in question did properly raise the issue involved, the taxpayers could not recover because they had not established the exact amount which should be refunded to them. In reply to that argument, the court stated: "The statute and the regulation, herein quoted, impose no such burden. It is the *basis of the claim* that must be stated with exactitude."[52] Although it is not necessary for the taxpayer to set forth in a claim for refund the exact amount due under the theories alleged, it is considered good practice for a taxpayer to compute, as best he can, the amount which he believes to be refundable and then add a phrase such as "or such amount as may be properly due in accordance with applicable provisions of law, together with interest."[53]

49. Pearl Assurance Co. v. United States, 324 F.2d 512 (Ct. Cl. 1963); Manufacturers' Hanover Trust Co. v. United States, 312 F.2d 785 (Ct. Cl. 1963); Sparton Corp. v. United States, 279 F.2d 264 (Ct. Cl. 1960).

50. D. Adams, *The Imperfect Claim for Refund*, 22 TAX LAWYER 309, 338 (1968).

51. 232 F.2d 163 (5th Cir. 1956).

52. *Id.* at 166 (emphasis added).

53. In this regard, see the suggestion along these lines by Samuel Brodsky in *What to do about Claims and Suits for Refund*, TAX IDEAS (vol. 2) para. 28,001.

The taxpayer has recovered the proper amount due even though the complaint specifically requested less than what was due.[54] Use of the quoted phrase above has helped the taxpayer in litigation.[55]

Requirement that Tax Be Paid in Full before Suit for Refund Can Be Brought

In the case of income, estate, and gift taxes and the excise tax based on investment income as applied to private foundations, when a taxpayer receives a notice of deficiency indicating that additional tax is due over and above that shown on his return, he has the right to file a petition in the United States Tax Court which has jurisdiction to determine the correct amount of the deficiency which was referred to in the notice of deficiency.[56] The general rule is that if a taxpayer files a petition in the Tax Court, the deficiency cannot be assessed and collection proceedings cannot be begun until the decision of the Tax Court becomes final.[57] An exception to this rule is provided in the case of jeopardy assessments.[58] In the case of a jeopardy assessment, the assessment of the deficiency and the collection of the amount owed can take place before the notice of deficiency has been issued. Section 6861 of the Code provides that the notice of deficiency shall be mailed within sixty days after the assessment is made.[59]

Once the taxpayer receives the notice of deficiency, he is presented with a choice. He may file a petition in the Tax Court and have the correctness of the deficiency determined prior to his paying any amount whatsoever with respect to the proposed deficiency. On the other hand, he may decide to waive his right to petition the Tax Court, permit the proposed deficiency to be assessed, pay the amount of the assessment, file a claim for refund and then eventually file a suit for refund to recover the amount in question. As previously indicated, the timely filing of a proper claim for refund is a prerequisite to a suit for refund. In addition to the problems which have arisen concerning the timeliness and adequacy of claims for refund, questions

54. Pink v. United States, 105 F.2d 183 (2d Cir. 1939).
55. Dixie Margarine Co. v. United States, 12 F. Supp. 543 (Ct. Cl. 1935).
56. Code §§ 6213, 6214.
57. Code § 6213.
58. Code § 6861.
59. Code § 6861(b) provides:
DEFICIENCY LETTERS.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

have arisen concerning the amount which the taxpayer is required to pay in order to maintain a suit for refund.

Section 1346 of title 28 of the Code provides that the United States District Courts and the United States Court of Claims shall have concurrent jurisdiction of

> [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws. . . .[60]

The question which has arisen is whether or not a taxpayer may pay less than the total amount of the assessment made against him and still maintain a suit for refund under section 1346. The landmark case which dealt with this problem is *Flora v. United States.*[61] In that case the deficiency assessment amounted to $28,908.60, including interest. The taxpayer paid only $5,058.54 and then filed a claim for refund of that amount. When the claim was disallowed by the District Director, the taxpayer instituted a suit for refund in the appropriate United States District Court. The government filed a motion to dismiss.[62] The taxpayer argued that the language of the statute indicated that a full payment of the deficiency assessment was not a jurisdictional condition precedent to maintaining the suit for refund in the district court. The Supreme Court, however, after looking into the legislative history and background of section 1346(a)(1) concluded that the assessment had to be paid in full before the suit for refund could be maintained. The court stated: "Reargument has but fortified our view that §1346 (a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court."[63]

The *Flora* decision has continued to require interpretation. In *Kell-Strom Tool Co. v. United States*[64] the total amount of the assess-

60. 28 U.S.C. § 1346(a)(1).

61. 362 U.S. 145 (1960).

62. A motion to dismiss is filed under Rule 12 of the FEDERAL RULES OF CIVIL PROCEDURE. Rule 12(b) provides in part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . .

63. 362 U.S. at 177.

64. 205 F. Supp. 190 (D. Conn. 1962).

ment in question was $25,955.32 which consisted of tax in the amount of $22,943.81 and interest of $3,011.51. The taxpayer paid only the amount of the tax—$22,843.82—and it instituted a suit for refund to recover only the amount of the tax and none of the interest. The district court in *Kell-Strom* concluded that the *Flora* case had not decided that both the tax and the interest assessed had to be paid as a condition precedent for jurisdiction of the district court to attach. It held that only the tax had to be paid in order for the district court to acquire a jurisdiction over a tax refund suit. The effect of the *Kell-Strom* decision was to interpret section 1346(a)(1) as referring to only tax and not interest.

The year after the *Kell-Strom* case was decided, a circuit court holding reached the opposite result.[65] In *Kisting v. Sauber* the taxpayers filed their income tax return for 1954 on April 15, 1955, indicating a tax liability of $27,542.46 of which $10,021.49 had been paid through withholding and estimated tax payments. The balance due of $17,520.77 was due with the tax return. Subsequently, on June 7, 1955, the taxpayers filed an amended return together with a claim for refund in the amount of $2,222.55. The difference between the recomputed tax shown to be due on the amended return and the amount of tax already paid in the form of withholding and estimated taxes with the original return constituted the amount of the claim for refund. Years later, in 1960, the Commissioner made an additional assessment of unpaid income taxes, interest, fraud penalties and estimated tax penalties in the amount of $27,418.19 for the year 1954. The refund suit was instituted by the taxpayers on October 31, 1961, and the government moved to dismiss based on the *Flora* decision. The court noted that before the taxpayer had instituted the refund suit in 1961, it had been served on September 9, 1960 with a notice of deficiency in accordance with the requirements of section 6212(a) of the Internal Revenue Code of 1954. Accordingly, they would have been entitled to litigate the year 1954 in the Tax Court without paying the amount covered by the notice of deficiency. They failed to petition the Tax Court, and the court held that because the total amount of the assessment had not been paid, the district court lacked jurisdiction over the case. The court stated: "Having made their choice, the district court had no jurisdiction except to dismiss their action upon defendant's motion when it appeared that plaintiffs had not paid in full the taxes, inter-

65. Kisting v. Sauber, 325 F.2d 316 (7th Cir. 1963).

est and penalties assessed against them."[66] Accordingly, it seems clear that under the Seventh Circuit's interpretation of the *Flora* case, all of the amounts assessed—taxes, penalties and interest—must be paid in full before a suit for refund can be maintained.

There are exceptions to the rule that the total amount of the assessment must first be paid before a tax refund suit can be maintained. But unfortunately for the average individual taxpayer, these exceptions would not be available in the usual income tax controversy. One of the cases which demonstrates an exception to the rule requiring full payment of a tax assessment is *Jones v. Fox.*[67] That case involved a cabaret excise tax assessment, and the taxpayer sued for a refund after having only partially satisfied the assessment. The government contended that the district court lacked jurisdiction over the case because the assessment had not been paid in full. The court, however, held that it had jurisdiction and pointed out that in the case of an excise tax, the Tax Court has no jurisdiction to settle controversies. Accordingly, if a taxpayer, in the case of an excise tax, were required to pay the total amount of the assessment before he could get a judicial interpretation he would be denied the choice available to taxpayers seeking to contest income, estate or gift tax proposed deficiencies. As indicated above, in the case of those types of taxes, the taxpayer has a choice of either having the Tax Court decide his case before the assessment is paid or paying the assessment first and then suing to recover it in either the appropriate United States District Court or the United States Court of Claims. As authority for its holding that it had jurisdiction, the court relied on *Friebele v. United States*[68] which involved documentary stamp taxes and held that the taxpayer could maintain the suit in question by paying only a partial amount of the entire assessment as long as the amount paid covered taxes due for any one document. The most significant part of the *Jones* decision is the court's indication that an excise tax by its nature is divisible or separable. Having taken that position, the court concluded that the taxpayer could have maintained the suit simply by paying the tax due on the gross receipts from one day's operation or by paying the total amount of tax due with respect to the amount received from any one patron. In either situation, the payment would have constituted full payment of the cabaret tax imposed.

66. *Id.* at 318.
67. 162 F. Supp. 449 (D. Md. 1958).
68. 20 F. Supp. 492 (D.N.J. 1937).

Because *Jones v. Fox* was decided prior to the Supreme Court's decision on *Flora*, one might question whether or not the exception created by the decision is still intact. In *Steele v. United States*[69] certain officers of a corporation were assessed penalties for willfully failing to remit the withholding and social security taxes withheld from employees' wages to the Internal Revenue Service. Each then brought a suit for refund. When the case came before the Court of Appeals for the Eighth Circuit, the government reversed the position that it had taken in the district court and conceded that the amounts withheld as to each employee represented separate taxes and that the penalties asserted with respect to the withholdings from any one individual were entitled to be treated as divisible assessments. Accordingly, the full payment rule established by the *Flora* case was not applicable. The *Steele* case was cited with approval in *Bongiovanni v. United States.*[70] Accordingly, it does seem clear enough that in the case of divisible or separate taxes the *Flora* case does not apply, but because of the nature of individual income taxes (assessed with respect to an entire year and with respect to one taxpayer) the exception would not assist the average taxpayer in an income tax controversy.

Significance of the Termination of Year Cases

It should be remembered that, as to tax liability shown on a taxpayer's return, if a taxpayer believes that he has incorrectly treated a particular item to his detriment, his only remedy would be to file a claim for refund and if that were not successful, a suit for refund in the district court or the Court of Claims. Because a proposed deficiency is not involved in that instance, there would be no right to have the case decided by the Tax Court. Accordingly, it can be seen that the term "deficiency" can have considerable significance.

The term "deficiency," in fact, did have considerable significance in the recent case of *Irving v. Gray.*[71] There, on February 4, 1972, the Service notified the taxpayers that their year 1971 was being terminated and their tax was due. The tax was immediately assessed in a total amount of $512,111.00. On the same date, notices of levy were served on Merrill Lynch to reach the taxpayers' funds in security accounts. The government secured $91,332.92 through these levies, and the taxpayers brought suit alleging that this sum must be returned for

69. 280 F.2d 89 (8th Cir. 1960).
70. 342 F. Supp. 1235 (D. Minn. 1972).
71. 479 F.2d 20 (2d Cir. 1973).

distribution to the taxpayers' other creditors because the government failed to issue a notice of deficiency after the assessment was made.

The taxpayers contended that the Internal Revenue Service, in fact, had assessed a "deficiency" against them under the jeopardy assessment provisions of section 6861 of the Code[72] which requires that the notice of deficiency be issued within sixty days after a jeopardy assessment is made and that a notice of deficiency was not issued. The taxpayers relied on *Schreck v. United States*[73] where the taxpayer was granted injunctive relief when the government terminated his tax year and made a jeopardy assessment without issuing a notice of deficiency. The taxpayers contended that not only would they be denied the right to have their case adjudicated in the Tax Court because a notice of deficiency was not issued but also they would be denied the right to litigate their case in a refund action because under the *Flora* decision the full assessment must be paid before a refund suit can be maintained.

In the *Irving* case the government contended that the year 1971 had been terminated pursuant to section 6851[74] of the Code and that the assessment of tax due was made under section 6201(a)[75] of the

72. Section 6861(a) provides:
Authority for Making.—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

73. 301 F. Supp. 1265 (D. Md. 1969), *aff'd*, 375 F. Supp. 742 (D. Md. 1973).

74. Code § 6851(a)(1) provides:
IN GENERAL.—If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

75. Code § 6201(a)(1) provides in part:
Authority of Secretary or Delegate.—The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the

Code (rather than under section 6861 of the Code).

The court held that taxes declared to be due under section 6851, which involves a taxpayer who is planning to depart from the United States or to remove his property from the country or conceal himself or his property within the country, do not constitute a "deficiency" and, therefore, section 6861 which requires the issuance of a notice of deficiency where a jeopardy assessment is made on a "deficiency" had no applicability. The court cited with approval the definition of a deficiency found in *Williamson v. United States*:[76]

> That section [6211] defines a deficiency as the amount by which the "tax imposed" exceeds the amount shown on the tax return. The assessment in this case was not an imposed tax, but merely an amount which the I.R.S. believed justified the termination of the taxable year. Since no return had been filed at the date of the assessment, no deficiency was determinable.[77]

The court found that section 6201(a) granted authority for the assessment stating, "But 6201(a) is an alternative authorization for IRS assessment which requires no deficiency letter."[78]

The court took the position that it was erroneous to conclude that no court other than the Tax Court could be available to determine partial tax determinations made by the Service under section 6851(a). In a footnote[79] the court countered the taxpayers' argument that the *Flora* case would bar suit if the total amount of the assessment were not paid by indicating that the *Flora* rule is inapplicable in this situation because no "deficiency" existed in this case and *Flora* related to a "deficiency" type of case.

In the second opinion in the *Schreck* case,[80] the court referred to the Second Circuit's statement in *Irving* to the effect that the first *Schreck* opinion was in error insofar as it indicated that the *Flora* case barred the taxpayers from instituting a refund suit. The second opinion in *Schreck* expresses disagreement with the *Irving* case on this point. The court stated: "[T]his Court continues to note the *jurisdic-*

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manner provided by law. Such authority shall extend to and include the following:

> Taxes shown on return.—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title . . . .

76. 31 AM. FED. TAX R.2d 73-800 (7th Cir. 1971).
77. 479 F.2d at 24.
78. *Id.*
79. *Id.* at 24 n.6.
80. 375 F. Supp. 742 (D. Md. 1973).

tional construction of 28 U.S.C. § 1346(a) set forth in the *Flora* decision."[81] As previously indicated, the *Schreck* decision held that where the taxpayer's year was terminated, section 6861 of the Code was the applicable section under which the jeopardy assessment was made (not section 6201), and, accordingly, a notice of deficiency was required. The government has filed an appeal to the Court of Appeals for the Fourth Circuit in the *Schreck* case.[82]

The result in *Schreck* was followed in *Rambo v. United States*[83] where an injunction was granted to the taxpayer for return of his property which was seized after the government terminated his tax year and made an immediate assessment. In *Rambo*, the court rejected the government's position that the assessment was made under section 6201 of the Code and held that the assessment in fact was made under section 6861 of the Code which requires the issuance of a notice of deficiency. The court concluded that a "deficiency" was involved because no return had been filed by the taxpayer and that under section 6211 (a) of the Code a "deficiency" is ordinarily the amount by which the tax imposed exceeds the tax liability shown on the taxpayer's return but that the regulations indicate[84] if no return is filed or if a return is filed which shows no tax, the "deficiency" is the amount of tax properly imposed under the law. The court also indicated that because sections 6851 and 6861 both appear under the heading "jeopardy" in the Internal Revenue Code and because section 6851 does not in itself authorize an assessment, it is reasonable to conclude that the assessment provisions of section 6861 are applicable when a taxpayer's year is terminated under section 6851. Accordingly, section 6201 was held to be inapplicable in this situation.

Another recent case which involved the terminated year problem is *Lewis v. United States.*[85] In that case Lewis was arrested and charged with an offense involving the possession of marijuana. At the time of his arrest, drugs and cash in his possession were seized by the police. Criminal charges against him were dismissed by a state judge. The Internal Revenue Service terminated Lewis' tax year on June 14, 1972 and made an assessment against him in the amount of $27,261.85 for the period January 1 through June 1972. A levy was then made on

81. *Id.* at 744.
82. P-H 1974 FED. TAXES ¶ 61,000.
83. 492 F.2d 1060 (6th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3017 (U.S. July 10, 1974) (No. 73-2005).
84. Treas. Reg. § 301.6211-1(a).
85. 34 AM. FED. TAX R.2d 74-5167 (4th Cir. 1974).

the $467 held by the local police department. Lewis brought a class action against the United States alleging that his property had been seized in violation of due process requirements. After the suit was filed, the government returned the $467 to Lewis and abated the jeopardy assessment. The government explained that the tax had been mistakenly assessed for 1972 when it should have been assessed with respect to 1971, the year in which Lewis was arrested. The court refused to grant injunctive relief because it indicated that neither Lewis nor members of a class would suffer irreparable harm because an adequate remedy for refunds was provided. It then went on to state that although a taxpayer must ordinarily pay the full amount of an assessment before suing for a refund under the *Flora* decision, an exception to that rule exists where the taxpayer's year has been terminated by the Service, citing *Irving* as authority. But the court indicated that Lewis had failed to take the necessary steps to perfect his claim. The court stated, "if a taxpayer does not pay the full assessment for the terminated period, he may nevertheless sue for a refund provided he files returns for the terminated period and the full year. In this event, the returns open the terminated period and serve as an informal claim for refund."[86]

The *Rambo* case was recently followed in *Hall v. United States*[87] where the taxpayer was granted an injunction in connection with property which was seized pursuant to the termination of a tax year before the normal period of the tax year had expired. In that case, the court stated that the assessment which was made by the government although purportedly made under section 6201 was in reality made under section 6861 and, therefore, a notice of deficiency was required. None had been issued. It was indicated that the purpose of the Tax Court is to permit taxpayers, particularly those who do not have the amount of a proposed deficiency, to have their cases heard before their property is levied upon and sold to pay the tax.

On the other hand, an injunction was recently refused the taxpayer in a similar situation in *Laing v. United States.*[88] In that case, the Second Circuit followed its prior decision in the *Irving* case and took the position that although the taxpayer did not have the right to take his case to the Tax Court because a notice of deficiency had not

86. *Id.* at 74-5170.
87. 493 F.2d 1211 (6th Cir. 1974).
88. 496 F.2d 853 (2d Cir. 1974).

been issued, the taxpayer could file a return showing the amount of tax due and then sue to recover it.

The Supreme Court of the United States has recently agreed to grant certiorari in the *Hall* and *Laing* cases,[89] so this important and ambiguous area may be clarified in the near future.

In determining whether or not a notice of deficiency is required in the termination of year cases, it is necessary to inquire as to whether or not a "deficiency" exists. It seems clear that the government is of the view that a deficiency does not exist because it presently is taking the position that its assessment in these cases is made under section 6201 rather than under section 6861. Section 6861 authorizes the jeopardy assessment of a "deficiency," and that section clearly provides that a notice of deficiency must be issued within sixty days after the assessment is made. In contending that the assessment is made under section 6201, the government can take the position that the collection simply involves original taxes shown on a return (rather than a deficiency) and, accordingly, a notice of deficiency is not required.

The question of whether or not a deficiency exists in these cases should be decided with reference to section 6211 of the code and the regulations thereunder. It is noted that the regulations provide,[90] in substance, that a "deficiency" is the excess of the amount of tax due over that shown on the return. If a return is not filed or if no tax is shown on a return that is filed, the amount of tax shown on the return will be zero.

In view of the above, it does appear that the term "deficiency" relates to the filing of a return. It has been contended that a return is not required in the termination of year cases.[91] This argument has been premised on the view that although section 443(a) of the Code requires that a return be filed in termination of year cases, the regulations under section 443 do not indicate when the return should be filed or describe the type of return which should be filed. The regulations simply refer to section 6851 and the regulations under that section.

89. *Cert. granted*, 43 U.S.L.W. 3187 (Oct. 15, 1974).

90. Treas. Reg. § 301.6211-1(a) provides in part:

> [T]he term "deficiency" means the excess of the tax (income, estate, or gift tax, as the case may be) over the sum of the amount shown as such tax by the taxpayer upon his return and the amounts previously assessed (or collected without assessment) as a deficiency; . . . If no return is made, or if the return . . . does not show any tax, for the purpose of the definition 'the amount shown as the tax by the taxpayer upon his return' shall be considered as zero.
>
> . . .

91. *See* Note, *Termination of Taxable Year: Procedures in Jeopardy*, 26 TAX LAW REVIEW 829 (1971).

Once that section is examined, one might conclude that specific requirements for a return are set forth only with respect to departing aliens. For United States citizens, that section would require a return only for the full taxable year. It would then follow that if no return is due for the short period of the year prior to termination, in the case of either a United States citizen or an alien who is not departing the United States, a return could not be filed on his behalf by the District Director under section 6020(b) of the Code. If a return is not required, the argument can be advanced that there might not be authority for computing and imposing the tax.

On the other hand, section 443(a)(3) of the Code itself does require that a return be filed in termination of year cases.[92] But as indicated above, the regulations under section 443 do not indicate the type of return to be filed or when it should be filed.

In a termination of year case, the return is filed by the District Director under section 6020(b)(1) of the Code on behalf of the taxpayer.[93] In stating that the District Director can file a return for a taxpayer who fails to file a required return "at the time prescribed therefor," the Code and Regulations seem to support those who argue that a return is not required in termination of year cases. As indicated above, the Regulations do not prescribe a time for the taxpayer to file a return in these situations. But section 6020 grants the Secretary permission to file a return for a taxpayer who fails to file any return that is required by any internal revenue law *or* regulation.

Assuming that there is a return requirement in these cases, the amount collected by the District Director would be treated as original tax collected with respect to the return. If a return is not due, then the assessment under section 6201 would appear to be incorrect in view of the fact that the termination of year cases do not fall within any of the four categories described under section 6201 as instances under

92. Code § 443(a)(3) provides:
TERMINATION OF TAXABLE YEAR FOR JEOPARDY.—When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy).

93. Treas. Reg. § 301.6020-1(b)(1) provides in part:
Execution of returns—(1) *In general.* If any person required by any internal revenue law or by the regulations prescribed thereunder to make a return (other than a declaration of estimated tax required under section 6015 or 6016) fails to make such return at the time prescribed therefore, or makes willfully or otherwise, a false or fraudulent return, the district director or other authorized internal revenue officer or employee shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

which the Secretary may make assessments of tax.[94]

But even if the return is due and properly filed by the District Director under section 6020 of the Code, although the assessment would then appear proper under section 6201, and ordinarily, collection proceedings may be based on a valid assessment, it is noted that section 6851 appears to contemplate a court proceeding.[95] It should be noted in this regard that the Code refers to acts of the taxpayer tending to render ineffectual "proceedings to collect the income tax." The Code also uses the phrase, "In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section. . . ."[96] In contrast with this language is the language used in section 6331, the section which grants the Secretary authority to levy and distrain on a taxpayer's property. In referring to the administrative collection procedure contemplated by the statute, that section refers to "levy upon all property and rights to property" and it provides that the term "levy" includes "the power of distraint and seizure by any means."[97]

The difference in the wording between section 6851 and 6331 leads one to conclude that a court proceeding is contemplated by section 6851. If, in fact, a court proceeding is required, the result of that requirement would appear to be desirable for two reasons. First, there is no deficiency involved and the taxpayer, therefore, is not able to petition the Tax Court to determine the validity of the tax liability asserted by the government. Second, the taxpayer might not be able to bring a suit for refund because the total amount of liability shown on the return filed on his behalf by the District Director will likely exceed the amount of tax collected by the District Director. Although *Flora* involved a deficiency, the *Flora* doctrine also would appear to apply to original taxes shown on a return.

Requiring the government to institute a suit for collection in these cases should provide the taxpayer with the ability to inquire into the decision of the District Director to terminate the year. If the taxpayer is unable to show that the action of the District Director was arbitrary and without foundation, the procedure would be upheld. When the

94. The four categories enumerated in section 6201(a) are: (1) taxes shown on return; (2) unpaid taxes payable by stamp; (3) erroneous income tax prepayment credits; (4) erroneous credit under section 39.

95. See note 74 *supra.*

96. Code § 6851(a).

97. Code § 6331 grants the Secretary authority to collect by levy upon property and all rights to property. Section 6331(b) provides in part: "The term 'levy' as used in this title includes the power of distraint and seizure by any means."

year ended, the taxpayer could file his tax return for the entire taxable year and if it indicated a liability less than that already collected by the District Director, the taxpayer could file a claim for refund and, ultimately, a suit for refund.

It is believed that in a termination of year case, the return executed by the District Director on behalf of the taxpayer formalizes a specific amount of tax liability on which the "proceedings" contemplated by section 6851 may be based. The entire procedure, in substance, is a collection procedure which seeks to insure collection of the tax where the District Director believes that collection might be prejudiced by acts of the taxpayer. Requiring the government to institute legal proceedings to effect this unusual collection procedure but giving the taxpayer the right to question the propriety of such a proceeding would be a means of insuring collection of the revenue while protecting the rights of the taxpayer against arbitrary action. One might argue that if the taxpayer were able to maintain a suit for refund immediately after collection takes place, his rights would be adequately protected. Such a proceeding would be difficult, however, because of the difficulty in determining the exact amount of tax due for only the terminated part of the year. Although the government makes such a determination, it is done only as part of a collection procedure. It is not done in the sense of finalizing the taxpayer's liability for that period of time.

CONCLUSION

In seeking a tax refund, the taxpayer should be thoroughly familiar with the procedural and substantive rules relating to filing claims for refund and suits for refunds. The rules relating to timeliness and content of claims for refund are particularly important because if these rules are not strictly followed, the district court or the Court of Claims will lack jurisdiction to consider a suit for refund. The rules relating to when taxes are deemed paid and when returns are treated as filed are important. In this connection, the *Rosenman* doctrine is significant where payment is made pursuant to discussions with an internal revenue agent. The rule of the *Flora* case requires the entire tax to be paid before a suit for refund can be maintained. The *Flora* case has come into question in connection with several recent cases involving termination of a taxpayer's year. The Supreme Court is expected to clarify this area in the near future when it decides the *Hall* and *Laing* cases.