

journals, bar groups, and annual tax conferences. Students of the Internal Revenue Code will agree that, in many difficult and complex areas of the Code, there is not always uniformity of agreement in the interpretation of Code provisions.

An Ombudsman cannot be expected, or even be permitted, to supply the one proper interpretation of either the substantive or procedural provisions of the Code. It is the responsibility of the Internal Revenue Service to administer the tax laws fairly, promptly, and uniformly. The rulings and determinations of the Service are applicable to taxpayers throughout the country in contrast, for example, to the jurisdiction of the several United States Courts of Appeal, whose decisions are binding only on the courts within their respective circuits. Within this context, the question of accepting an adverse decision by the Tax Court, a district court, the Court of Claims, or one or more circuit courts of appeal involves, necessarily, a determination that the litigation has resulted in a rule reasonably consistent with the intent of Congress, that it is one likely to be acceptable to all taxpayers similarly situated and to other courts in which the question may arise, and is thus one calculated to make for certainty and uniformity among taxpayers.

A rule which benefits one taxpayer may be harmful to others or may establish a precedent which is inconsistent with the broad scheme of the statute. Moreover, it is not uncommon for appellate courts to disagree as to the proper interpretation of the tax laws, with some courts upholding the position of the Internal Revenue Service and others rendering adverse decisions on the same question. In general, under firmly established policy, adverse decisions by two circuits (or one circuit and the Court of Claims) are deemed an adequate test of the Internal Revenue Service's position, although, frequently, the Service's position, once it has been fairly tested and rejected by even a single court of appeals or even, in some cases, a district court, will be conformed to such adverse decision, provided it lays down a rule capable of fair and equitable administration on a nation-wide basis. Except for constitutional questions, there is no right of appeal to the United States Supreme Court. Jurisdiction to review, by writ of certiorari, lower court determinations of tax questions is rarely sought or granted except where there is a genuine, positive conflict in the circuits, including the Court of Claims, or where a lower court determination conflicts with a decision of the Supreme Court.

A material factor to be considered in determining whether Supreme Court review should be sought is whether the case in which the decision adverse to the Internal Revenue Service has been rendered may not turn on the particular facts involved and so not provide the direct conflict so essential to resolution of the legal question presented. Therefore, with respect to an issue of continuing importance to taxpayers everywhere and to the administration of the tax laws, the Internal Revenue Service will continue to litigate cases involving such a question with a view toward developing a satisfactory vehicle for Supreme Court clarification of the issue as soon as possible. It should be noted that where consideration of an adverse decision of substantial precedential value has led to the determination that it would be in the public interest not to accept such decision, but to continue to litigate the issue with a view toward clarification of the law, the policy of the Internal Revenue Service is to announce to the public the determination reached as promptly as possible. In the context of the responsibility imposed on the Commissioner of Internal Revenue for administration of tax laws and the care that must be taken to harmonize decisions by many courts with the sound administration of these tax laws, it can readily be seen that it would be inconsistent with the responsibility imposed on the Commissioner if the Internal Revenue Service were to acquiesce in the interpretation in tax matters of an ombudsman where it would not have done so with respect to the adverse decision of a court.

Congress decided as early as 1921, when it enacted section 1313 of the Revenue Act of 1921 (predecessor to section 6406 of the Code), that only the Internal Revenue Service should determine the merits of any claim under the Internal Revenue Code and that no other agency should review that determination. Section 6406 of the Code provides:

"In the absence of fraud or mistake in mathematical calculation, the findings of fact in and the decision of the Secretary or his delegate upon the merits of any claim presented under or authorized by the internal revenue laws and the allowance or nonallowance by the Secretary or his delegate of interest on any credit or refund under the internal revenue laws shall not, except as provided in subchapters C and D of chapter 76 (relating to the Tax Court), be subject to review by any other administrative or accounting officer, employee, or agent of the United States."