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The Small-Case Procedure of the United States Tax Court: A Small Claims Court That Works

William C. Whitford

Professor Whitford finds that the small-case procedure of the United States Tax Court, unlike most other small claims courts, provides a meaningful avenue of redress for taxpayers contesting small amounts and appearing pro se. The success of this procedure is attributed to the unique dispute "posture" of the Tax Court petitioner and to the extensive resources assigned to the small-case procedure by both the Tax Court and the chief counsel to the IRS. This special Tax Court invention is not likely to be replicated in courts of more general jurisdiction. Lack of political support will prevent allocation of resources sufficient to make pro se litigation work. The expenditure of such resources in the Tax Court apparently reflects a felt need to legitimate the tax system by providing fair disputing procedures.

I. INTRODUCTION

A viable pro se court has been a persistent dream of court reformers and consumer protection activists. The underlying concern is access to justice for the ordinary citizen with a small claim.¹ Retaining legal counsel is economically impractical in such circumstances, yet the complexities of pleading, discovery, and courtroom procedure commonly make litigation ineffective unless conducted with professional assistance. Many remedies for these problems have been suggested and attempted; the most frequent and best known is the establishment of small claims courts. By minimizing courtroom formality, prohibiting discovery, relaxing pleading requirements, and generally

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1. On the history and purposes of the small claims court movement, see generally Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 *Law & Soc'y Rev.* 219, 221-28 (1975); Reginald Heber Smith, *Justice and the Poor* (memorial ed. Chicago: National Legal Aid and Defender Association, [1919] 1967).

expediting proceedings, small claims courts are supposed to facilitate pro se litigation while preserving the essence of an adversarial dispute-settlement system.

The many published empirical studies of small claims courts reach varying conclusions about the effects of establishing such courts.² Some articles claim that these courts can and often do provide an effective means for the ordinary citizen to initiate a claim as a plaintiff without professional assistance.³ Nearly all studies agree, however, that where businesses are permitted to use small claims courts, they dominate the plaintiffs' rolls. Most of these business-initiated suits, often conducted by attorneys, concern overdue consumer debts. There is also widespread agreement in the studies that consumer defendants do not fare well in business-initiated small claims court suits. They are rarely represented, commonly default, present their cases ineffectively when they do appear, and almost always lose.⁴ The thrust of studies reporting these findings is best indicated by the title of one of the better known articles: "The Persecution and Intimidation of the Low Income Litigant as Performed by the Small Claims Courts of California."⁵

In the following article I report on a study of the small-case procedure of the United States Tax Court. The small-case procedure was established in 1969 with the explicit purpose of facilitating the pro se litigation of federal tax disputes involving small amounts.⁶ The taxpayer always appears in Tax Court litigation to resist a claim by the Internal Revenue Service (IRS) that further taxes are owed. In this litigation the government is always represented by an attorney. From this perspective, therefore, litigation under the small-case procedure of the Tax Court resembles a small claims court case in

2. Yngvesson & Hennessey, *supra* note 1, is a very good summary of studies published before 1975. Among noteworthy studies published since then are John C. Ruhnka & Steven Weller with John A. Martin, *Small Claims Courts: A National Examination* (Williamsburg, Va.: National Center for State Court, 1978); Thomas L. Eovaldi & Peter R. Meyers, *The Pro Se Small Claims Court in Chicago: Justice for the "Little Guy"?* 72 Nw. U.L. Rev. 947 (1978); Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 Law & Soc'y Rev. 339 (1976).

3. E.g., Ruhnka & Weller, *supra* note 2, at 46-47; Nat'l Institute for Consumer Justice, *Redress of Consumer Grievances*, 13-14 ([Washington, D.C.]: National Institute for Consumer Justice, n.d.); John Montague Steadman & Richard S. Rosenstein, "Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. Pa. L. Rev. 1309 (1973).

4. The best-documented study of the plight of unrepresented consumer defendants is David Caplovitz, *Consumer in Trouble: A Study of Debtors in Default* (New York: Free Press, 1974). That study concerns litigation in the regular courts, but conclusions drawn about litigation in small claims courts are similar. E.g., Yngvesson & Hennessey, *supra* note 1, at 228-56.

5. Note, 21 Stan. L. Rev. 1657 (1969).

6. 26 U.S.C. § 7463 (1982). As originally enacted, jurisdiction was limited to cases in which no more than \$1,500 in taxes was in dispute. The jurisdictional amount was increased to \$5,000 on November 6, 1978, Revenue Act of 1978, Pub. L. No. 95-600, § 502 (a)(20)(A), 92 Stat. 2763, and to \$10,000 on July 18, 1984, Tax Reform Act of 1984, Pub. L. No. 98-369, § 461 (a)(1), 98 Stat. 494, 823. Further details of the small-case procedure will be described at notes 20-30 *infra* and accompanying text. The legislative history of the original authorization of the small-case procedure, showing that the legislative purposes for the action were the same as those associated with the establishment of small claims courts, is in S. Rep. 552, 91st Cong., 1st Sess. 301 (1969), *reprinted in* 1969 U.S. Code Cong. & Ad. News 2027, 2340. See also Samuel B. Sterrett, *Small Tax Cases*, 50 Taxes 624 (1972).

which a business is collecting a debt from an unrepresented consumer. Although the small-case procedure has not been studied much, the few previously published studies suggest that this court has been much more successful than other small claims courts in facilitating meaningful pro se litigation by the ordinary citizen.⁷

The purpose of this study is to determine whether those preliminary suggestions are correct. I will conclude that they are and will then speculate about the reasons for this greater success. I will suggest that the prevailing strategies for tax administration and collection in this country specially motivate the IRS to maintain a viable pro se procedure. Without analogous incentives to develop effective pro se courts in other contexts (including the debt-collection cases usually brought before small claims courts), there is little likelihood that the success of the small tax case procedure will prompt development of similarly effective pro se courts for disputes of other types.

II. ALTERNATIVE PROCEDURES FOR TAX DISPUTES

The formal tax-dispute process typically begins with an IRS examiner determining in audit that additional taxes are owed. If agreement with the taxpayer cannot be reached at that stage, what is called a "30-day letter" is sent, informing the taxpayer of the proposed deficiency.⁸ In response to the 30-day letter, the taxpayer may seek an administrative appeal of the auditor's determination. This review is conducted by the appeals office, a part of the IRS administrative structure, and there further settlement negotiations usually occur.⁹ If these negotiations fail, or if the taxpayer does not request administrative review, then a statutory notice of deficiency, a "90-day letter," is sent to the taxpayer.¹⁰

The 90-day letter gives three choices to a taxpayer unwilling to pay the amount claimed. First, the taxpayer can do nothing, in which event the proposed deficiency will become legally due and owing at the end of 90 days, and the IRS can resort to formal creditor remedies in an effort to collect.¹¹ Second, the taxpayer can pay the proposed deficiency but continue to dispute the

7. See Michael J. Whiteman, *The Advantages of Litigating in the Small Case Division of the Tax Court*, *Prac. Law.*, Jan. 15, 1983, at 41; Note, *The Small Tax Case Procedure: How Does It Work—Does It Work?* 4 *Fordham Urb. L.J.* 385 (1976); Note, *Litigation in the Small Tax Case Division of the United States Tax Court—The Taxpayer's Dream?* 41 *Geo. Wash. L. Rev.* 538 (1973).

8. 26 C.F.R. § 601.105(d). For a brief summary of IRS procedures, see James J. Freeland, Stephen A. Lind, & Richard B. Stephens, *Fundamentals of Federal Income Taxation* 959-69 (4th ed. Mineola, N.Y.: Foundation Press, 1982).

9. Settlement negotiations with an appeals office differ from those with the auditor because, for the first time, an IRS employee is authorized to consider what are called the "hazards of litigation" in formulating a settlement position. See 4 Boris I. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 112.1.4 (Boston: Warren, Gorham & Lamont, 1981); Richard A. Osserman, *Settlement Negotiations After the Agent*, 39 *Inst. on Fed. Tax'n* ch. 39 (1981).

10. 26 U.S.C. § 6212 (1982). See 4 Bittker, *supra* note 9, at ¶ 112.1.6.

11. To be precise, when the 90-day period expires, the proposed deficiency can be "assessed." 26 U.S.C. § 6213(a) (1982). Assessment creates an automatic lien on much of a taxpayer's property and makes available to IRS a variety of creditor remedies. 26 U.S.C. § 6321 et seq. (1982).

amount claimed by immediately filing for a refund.¹² Assuming the refund claim is denied by the IRS, the taxpayer can sue for a refund in either the United States Claims Court or a United States district court of appropriate venue.¹³ Third, which is the course most frequently taken, the taxpayer can, without paying the deficiency, file a petition for review with the United States Tax Court. To give the Tax Court jurisdiction, this petition must be filed within 90 days of the mailing of the statutory notice of deficiency. If this time condition is satisfied, the IRS cannot resort to coercive collection remedies while the Tax Court proceedings are pending.¹⁴ When filing a Tax Court petition, a taxpayer disputing less than \$10,000 in taxes must also choose between the regular Tax Court procedure and the special small-case procedure that is the subject of this article.¹⁵

A. Regular Procedure in Tax Court

If the taxpayer did not protest the 30-day letter that preceded the statutory notice of deficiency, the appeals office of the IRS will not have had the opportunity to review the taxpayer's case. In that situation the Tax Court petition will initially be referred to the appeals office, and that office will normally have exclusive settlement authority for six months after the petition is filed. Thereafter, as in cases previously reviewed by an appeals office, settlement authority rests with the Office of the Chief Counsel for the Internal Revenue Service.¹⁶ The Office of the Chief Counsel has both regional and district offices,¹⁷ and in practice it is usually a lawyer working at a district counsel's of-

12. The refund claim will be processed within IRS much as a proposed deficiency would, and if denied initially, taxpayer can seek administrative review in the appeals office. 4 Bittker, *supra* note 9, at ¶ 112.3.4.

13. 28 U.S.C. § 1346(a)(1)(1982). See 4 Bittker, *supra* note 9, at ¶ 115.7. The availability of alternative forums for tax litigation has generated many practitioner-oriented articles on how to choose the proper forum. E.g., Loyal E. Keir, Douglas W. Argue, & Brian J. Seery, *Tax Court Practice* 23-30 (6th ed. Philadelphia: American Law Institute-American Bar Association Committee on Continuing Professional Education, 1981); John B. Jones, Jr., *Choice of Forum in Tax Litigation Revisited*, 35 *Inst. on Fed. Tax'n* 373 (1977). Because refund procedures require payment of tax before litigation can occur, however, the vast majority of tax cases are initiated in the Tax Court.

14. 26 U.S.C. § 6213(a) (1982). If the taxpayer is outside the United States when the notice is mailed, the appropriate time frame is 150 days. *Id.*

15. This study was done before the summer of 1984, however, when the jurisdictional amount was still \$5,000.

16. Rev. Proc. 82-42, 1982-2 C.B. 761. If the case is called for trial before expiration of the six-month period during which an appeals office has exclusive settlement authority, district counsel will have settlement authority for a 15-day period before trial-calendar call. The district counsel's office, in its discretion, can refer a case to the appeals office, even though it has previously been reviewed there, if it believes further settlement negotiations with that office may be fruitful.

Coordinating the settlement positions of the chief counsel's staff and the appeals office is a major administrative problem for the tax system. During recent years there have been several changes in the rules about when district counsel must consult with or obtain the approval of the appeals office before settling a case. The revenue procedure cited above expanded the district counsel's unfettered discretion to settle cases. This divided settlement authority can affect the strategy of tax practitioners, of course, as they maneuver to arrange a settlement with the office likely to adopt the most sympathetic stance to the taxpayer.

17. The chief counsel's office is not directly under the commissioner of the Internal Revenue Service, though still located in the Department of the Treasury. The chief counsel's office is in turn divided into regional and district offices, which are located in most cities and towns where the Tax Court hears cases. The appeals division is also part of the Office of the Chief Counsel.

office in the taxpayer's area who will conduct these settlement negotiations. In the absence of settlement, there will be a full trial before a judge of the Tax Court.

The Tax Court is based in Washington, D.C. There are 19 regular judges appointed to 15-year terms by the president.¹⁸ The judges "ride circuit," hearing cases in locations convenient to the taxpayer. Cases are tried by one judge, who writes a decision that in most circumstances becomes the decision of the court. The sitting judge's recommended decision is reviewed by the chief judge, however, who can refer the case to the whole court. The whole court usually reviews the case record only, without further argument or briefing by the parties.¹⁹ Appeals from the Tax Court go to the United States court of appeals for the circuit in which the taxpayer resides.

B. Small-Case Procedure in Tax Court

A taxpayer elects the small-case procedure when filing a petition with the Tax Court. The IRS directly encourages the use of small-case procedure in several ways. The 90-day letter to taxpayers whose proposed deficiencies are within the jurisdictional limits for the small-case procedure provides the first notice. The letter includes a special paragraph advising of "a simplified procedure . . . provided by the Tax Court for small tax cases" and gives an address—the Tax Court's address in Washington—to write for a form petition. In response to such a request, the Tax Court sends not only a form petition but also detailed instructions, written in simple language, about all important aspects of small-case procedure.²⁰ Moreover, the filing fee for a small case is \$10, considerably less than the \$60 required for a regular Tax Court case.²¹

The statute establishing the small-case procedure specifically provides that cases heard under this procedure cannot be appealed and that the decision is not to be precedent in any other case.²² In order to protect its ability to appeal or to ensure that the decision has precedential effect, the IRS may request transfer to the regular Tax Court docket of any case in which the small-case procedure has been elected, but such requests are rare.²³

Settlement procedures for a small-case petition are the same as for a regular case. Thus, if there was no protest of the 30-day letter, the case is referred to the appeals office for review and possible settlement. Cases in which there was a protest are assigned immediately to a district counsel's office, which will make one more attempt at settlement. If there is no settlement, small

18. 26 U.S.C. § 7443 (1982). There are also five senior judges who can hear cases.

19. 26 U.S.C. § 7460(b) (1982). See 9 Stand. Fed. Tax Rep. (CCH) ¶ 5801.315; Harold Dubroff, *The United States Tax Court: An Historical Analysis* 354–56 (Chicago: Commerce Clearinghouse, 1979).

20. These instructions are reproduced in 9 Stand. Fed. Tax Rep. (CCH) ¶ 5801.19.

21. Tax Ct. R. 175(a)(2), 20(b).

22. 26 U.S.C. § 7463(b) (1982).

23. Tax Ct. R. 172(c). The Tax Court, on its own initiative, can also transfer a case to the regular docket, as can taxpayers who, subsequent to filing, change their minds and request transfer. Tax Ct. R. 172(b), (c). See also Tax Ct. R. 173. Such transfers are also rare.

cases can be heard by any judge of the Tax Court, but usually they are heard by *special trial judges*, formerly called *commissioners*, who are appointed and assigned by the chief judge.²⁴ There are presently 13 special trial judges altogether. Each is a lawyer with a background in tax law prior to appointment.²⁵ The judges are based in Washington and travel throughout the country to hear cases. Special trial judges hear motions and try some regular tax cases, but small tax cases constitute the vast bulk of their workload.²⁶ At the conclusion of a small-case trial these special trial judges usually prepare written findings and conclusions, which are reviewed by the chief judge or a designate before issuance.²⁷

The tax court rules provide for simplified pleadings in small cases. The IRS is not required to file an answer, except with respect to affirmative defenses.²⁸ Discovery, while possible, is rare. As a result, small cases are typically ready for trial soon after they are filed and are usually tried more quickly than they would be if filed under the regular procedure. The rules specifically direct that trials be conducted "as informally as possible consistent with orderly procedure."²⁹ The Tax Court tries to be as convenient as possible to litigants by hearing small cases in more cities than it hears regular cases.³⁰

The various routes by which tax disputes may be litigated and settled are described graphically in figure 1.

III. DESCRIPTION OF STUDY AND FINDINGS

I have collected information about the small-case procedure by several different processes. One source of information has been the annual reports of the general counsel for the IRS, which include national statistics on litigation under both the small-case and regular procedures in the Tax Court. From government records made available to me by the district counsel to the IRS for

24. 26 U.S.C. § 7456(c) (1982). Tax Ct. R. 3(d) provides that *commissioners* shall be called *special trial judges*, and this result was confirmed statutorily in the recent Tax Reform Act of 1984, Pub. L. No. 98-369, § 463(a), 98 Stat. 494, 824.

25. Brief biographies of the special trial judges appear in 9 Stand. Fed. Tax Rep. (CCH), at 66,016-019. The biographies given suggest that prior to appointment all special trial judges had extensive experience in the practice of tax law, either for the government, in private practice, or both.

26. See General Order No. 8, 81 T. C. XXIII (1983). Although there are no specific limits on the kinds of cases special trial judges can hear, this order states: "It is anticipated that, in general [regular] cases assigned [to special trial judges] . . . will be those involving primarily factual issues and where the taxpayer is not represented by counsel." Special trial judges also sometimes hear pretrial motions in connection with a regular case to be tried later by a regular judge.

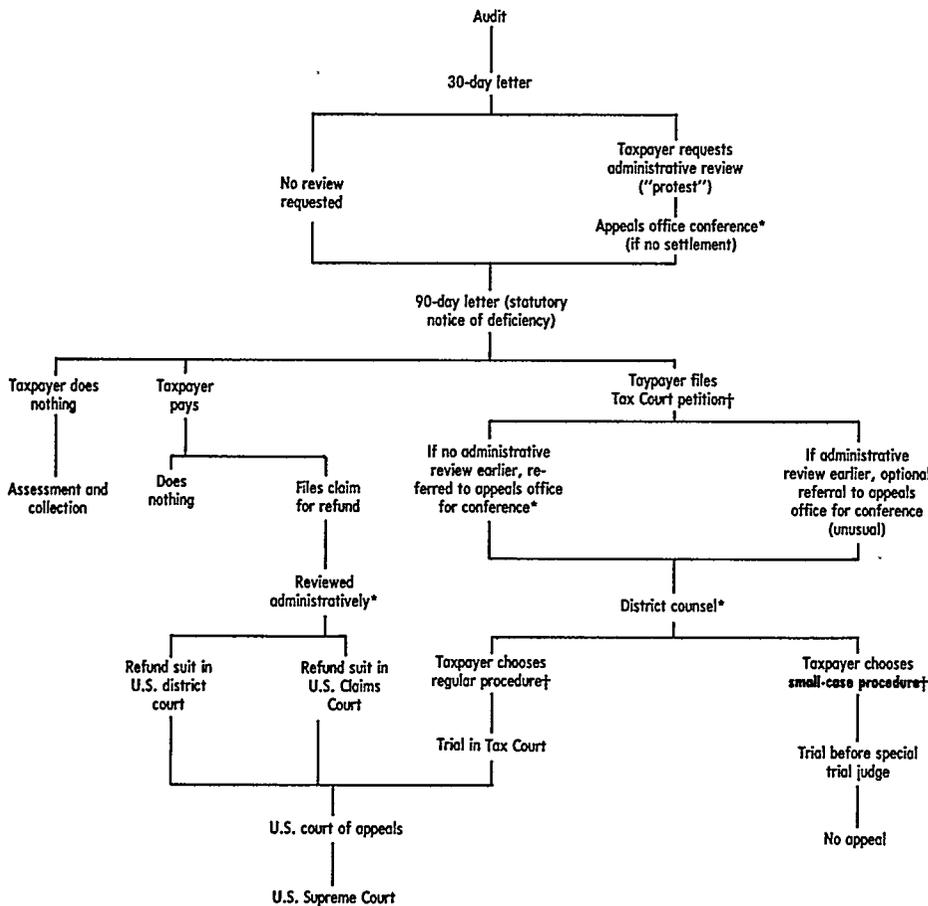
27. Tax Ct. R. 183. The rules provide that small-case hearings are to be recorded, though they need not be transcribed. Tax Ct. R. 178. In my observations the judge always ordered a transcript. Until recently all Tax Court decisions had to be written. A recent amendment authorizes oral decisions. 26 U.S.C. § 7459(b) (1982). See notes 99-100 *infra* and accompanying text.

28. Tax Ct. R. 175(b). Posttrial briefs, which are usual in regular Tax Court litigation, are also not required in small cases. Tax Ct. R. 177(c). As a matter of practice, IRS counsel will commonly submit a memorandum or stipulation of facts at trial, but no pleading beyond the petition is usually required of the taxpayer.

29. Tax Ct. R. 177(b).

30. Petitioners to the Tax Court can request a place for the hearing when they file the petition. Tax Ct. R. 140(a). The places where small cases will be heard are listed in 9 Stand. Fed. Tax Rep. (CCH) ¶ 5801.19.

the Milwaukee district, I obtained more detailed information about 1,119 Tax Court cases closed under the small-case procedure between 1979 and 1982 in the Milwaukee and Chicago districts.³¹ I also conducted a limited



*Typical settlement points.

†The selection of small-case procedure is made when the a Tax Court petition is filed, but is shown later in this diagram because the procedures used are the same until the time of trial.

Fig. 1. The paths of tax disputes

31. The Office of Chief Counsel for the IRS keeps computerized records on all cases assigned to it, partly to keep track of its caseload and partly to help evaluate the work of individual attorneys on the chief counsel's staff. Mr. Nelson Shafer, district counsel for Milwaukee, generously made these records available to me for all cases closed by the Milwaukee and Chicago district counsel's offices between October 1979 and February 1982. These cases, if tried, were heard primarily in Milwaukee and Chicago, though a few were heard in smaller, nearby cities, such as Green Bay, Wisconsin. The records included much useful information, including a coding of the issues involved, the amount of delinquent taxes stated in the 90-day letter, and the amount ultimately determined, whether by settlement or by judicial decision.

There is no way to be certain how representative the experience of the Milwaukee and Chicago districts is. One indication of representativeness is the 55% government recovery rate for these 1,119 cases. Comparable national statistics for small-case filings during the same period ranged from 48.1% to 54.7% (gov-

mail survey of a random sample of 150 of those 1,119 taxpayers whose cases I had examined; 65 responses were received and tabulated.³² I have also personally observed two days of small-case hearings, one in Milwaukee and one in Chicago. Finally, I have interviewed five present or former IRS attorneys, three special trial judges, two private attorneys with tax practices, and assorted others familiar with small-case procedure.

A. Use of Small-Case Procedure

Taxpayers now elect the small-case procedure in approximately 10,000 cases annually. The number of filings under small-case procedure grew rapidly after it became available in 1969 and now represents about one-third of all Tax Court filings. Table 1 shows this trend.

A review of table 1 indicates that the percentage of small-case filings has declined during the 1980s. I can only speculate about the reasons, but I do not think it indicates long-term trends concerning use of the small-case procedure. Most important, in 1984 Congress increased the jurisdictional limit for small cases from \$5,000 to \$10,000 of taxes in dispute.³³ Even more frequent use of small-case procedure should be anticipated as a consequence. Second, a close look at table 1 suggests that 1980 and 1981 may have been aberrational years. If those years are omitted, the percentage of small-case filings has been remarkably steady over the past five or six years. Finally, Tax Court caseload was affected during the 1980s by an IRS policy of refusing to compromise its original position if the case concerned what the Service con-

TABLE 1
Small-Case Filings in the Tax Court, Nationwide

	1971	1973	1975	1977	1979	1980	1981	1982	1983
No. of small-case filings	1,070	2,650	3,203	3,692	5,195	7,949	10,486	9,814	10,036
Percentage of total Tax Court filings	12.9	27.5	28.6	30.1	30.6	38.5	35.5	31.9	30.8

SOURCE: Annual Reports of the Chief Counsel of the Internal Revenue Service, table entitled "Tax Court Cases Received."

ernment recovery as a percentage of amount claimed). See table 7. Also suggesting the representativeness of the Chicago and Milwaukee sample is the settlement rate for the sample, which approximated the national settlement rate provided by the Tax Court. See text accompanying notes 49-50 *infra*. On the other hand, taxpayers may have been represented in a slightly higher percentage of the sample cases than they are nationally. See text accompanying notes 40-41 *infra*. And in tried cases in the sample the government completely won a slightly lower proportion than they did nationally. See table 6 and note 67 *infra*.

32. Seventy-five Tax Court petitioners were selected randomly from the list of cases closed by the Chicago district counsel's office, and another 75 were selected from the list of the Milwaukee office. All the petitioners selected had small cases closed within the year preceding the mailing of the questionnaires. To increase the response rate, many nonrespondents were telephoned and asked to return their questionnaires. In some instances responses were taken over the telephone. The overall response rate was 43 1/2%. The response rate was higher for Milwaukee petitioners (53%) than for Chicago petitioners (33%). Not all respondents answered all questions, of course. The results of the survey are reported as appropriate throughout the article.

33. Tax Reform Act of 1984, Pub. L. No. 98-369, § 461(a)(1), 98 Stat. 494, 823.

sidered an "abusive" tax shelter. As a consequence, most of these cases had to be litigated, and they generally involved amounts exceeding the jurisdictional limit for small-case procedure. Moreover, because of concern for the resulting Tax Court backlog, the IRS has made a special effort in the past few years to reach administrative settlement of small-case controversies before issuing statutory notice of deficiency.³⁴ This combination of policies probably partly accounts for the relative decline in small-case filings in the past two or three years.

There are no national data indicating how often a petitioner who is eligible for small-case procedure actually elects it. From records provided by the IRS pertaining to Tax Court cases heard in Milwaukee and Chicago, I determined that during the 1979-82 period studied, Chicago Tax Court petitioners elected the small-case procedure in 71.1% of the cases in which the amount in dispute was within the \$5,000 jurisdictional limit then current for small-case procedure. The comparable figure for Milwaukee was 46%.³⁵ These figures confirm my conclusion that the small-case procedure is used extensively, but the figures also raise the interesting question of what accounts for the difference between jurisdictions. The only explanation offered by the local IRS officials whom I interviewed was the relatively greater incidence in Milwaukee of Tax Court filings by tax protesters. Tax protesters are persons who refuse to pay taxes for various ethical and religious reasons. Protesters commonly assert constitutional arguments that the IRS considers spurious in defense of their position, and they also use a wide variety of delaying tactics. In order to preserve their rights of appeal, tax protesters tend not to select small-case procedure.

B. Demographics of Small-Case Users

There is almost no information available in case records or other sources about the demographics of small-case users. My limited mail survey of users asked about occupation, race, and income range. Of the 55 responses to the

34. See Treasury, Postal Service, and Government Appropriations for Fiscal Year 1983, Hearings Before Subcomm. on Treasury, Postal Service, and General Government Appropriations of the House Comm. on Appropriations, 97th Cong., 2d Sess., pt. 3, at 245 (1982) (testimony of Tax Court's Chief Judge Tannenwald); Wall St. J., Oct. 20, 1982, at p. 1, col. 5.

35. These data are broken down by more discrete time limits in the table below, suggesting that this variation between Milwaukee and Chicago is stable over time.

	<i>No. of Cases Within \$5,000 Limit</i>	<i>Small Cases</i>		<i>Regular Procedure</i>	
		<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>
<i>Chicago</i>					
Oct. 1979-Sept. 1980	479	309	64.5	170	35.5
Oct. 1980-Sept. 1981	585	438	74.9	147	25.1
Oct. 1981-Feb. 1982	<u>288</u>	<u>214</u>	74.3	<u>74</u>	25.7
Total	1,352	961	71.1	391	28.9
<i>Milwaukee</i>					
Oct. 1979-Sept. 1980	110	50	45.5	60	54.5
Oct. 1980-Sept. 1981	164	70	42.7	94	57.3
Oct. 1981-Feb. 1982	<u>93</u>	<u>49</u>	52.7	<u>44</u>	47.3
Total	367	169	46.0	198	54.0

occupation question, 15 listed blue collar occupations. Of 58 respondents, 9 were nonwhite, and of 60 respondents, 16 listed incomes of less than \$20,000. These data are very limited but do suggest that some members of less elite social classes are using the small-case procedure.³⁶ It remains probable, of course, that the procedure is used disproportionately by members of more elite social classes. They are in general more knowledgeable and assertive with respect to their legal rights and, furthermore, are more likely to encounter debatable issues in preparing their tax returns.

C. Issues Raised in Small Cases

The records provided by the IRS on Milwaukee and Chicago cases included a classification of issues raised in the cases. The classification was made by the IRS attorney who handled the case. Table 2 reports these classifications in categories I designed and shows that the vast majority of issues raised in small cases concern deductions. Issues concerning the nonreporting or understating of income appeared less frequently and accounted for only 8% of issues raised. Issues concerning the capital gains deduction or the character of corporate distributions to shareholders were raised even less often.

Several practitioners I interviewed suggested that the small-case procedure is most appropriate for a case with only factual issues or one with a legal issue

TABLE 2
Issues Raised in Small Tax Cases, Chicago and Milwaukee, 1979-82

	Number ^a	% of Total Issues
<i>Deductions—allowability</i>		
Losses and bad debts (including casualty losses)	205	10
Employee and travel expenses	247	12
Other business-related expenses	281	13
Medical and taxes	131	6
Personal dependency exemptions	189	9
Other	<u>111</u>	<u>5</u>
Subtotal	1,164	55
<i>Deductions—substantiation</i>		
Business related	121	6
Personal related	<u>268</u>	<u>13</u>
Subtotal	389	19
<i>Other issues:</i>		
Unreported or understated income	179	8
Penalties	124	6
Other (including procedural issues)	<u>258</u>	<u>12</u>
Total	2,110	100

^aBecause more than one issue was raised in many cases, the total number of issues exceeds the total number of cases. There were 1,119 cases examined altogether.

36. In general, members of the wealthier social classes are more likely to respond to a mail survey. Consequently it is likely that the proportion of responses I received from lower demographic classes is less than their actual rate of participation in small tax cases.

that is not likely to recur with respect to the same taxpayer. These attorneys thought that if a legal issue is likely to recur in several years' returns, the regular procedure is more appropriate, since by specific statutory direction a decision under small-case procedure is not precedent.³⁷ I frankly doubt that concern about the precedential effect of small-case decisions is realistic. The statute notwithstanding, I would be quite surprised if the IRS often refuses to follow a small-case decision when the same issue arises again with respect to the same taxpayer, but in a different tax year.³⁸ Nonetheless, the belief that small-case decisions have less precedential status may influence the cautious tax advisor's recommendations about whether to use the small-case procedure.

D. Use of Attorneys in Small Cases

Although a taxpayer may be represented by attorney or other expert qualified to represent parties before the Tax Court,³⁹ the small-case procedure was designed principally to facilitate pro se taxpayer litigation. Available evidence suggests that when operating under small-case procedure, the Tax Court is principally a pro se court. Tax Court statistics for 1983 indicate that the taxpayer was represented in approximately 10% of the cases filed under the small-case procedure.⁴⁰ In the sample 1,119 Milwaukee and Chicago small cases, I was only able to determine whether the taxpayer was represented in 776 cases.⁴¹ In 13.5% of these cases (105), an attorney or other representative filed an appearance.

Private tax practitioners have told me that in appropriate circumstances they advise clients to pursue their tax matters pro se through the small-case procedure. My mail survey of small-case users provided further evidence that

37. 26 U.S.C. § 7463(b)(1982).

38. Small-case decisions are reviewed by the chief judge of the Tax Court or the chief judge's delegate before issuance. See note 27 *supra*. The primary purpose of the review process is to ensure uniform decisions. The review process, therefore, should enhance the reliability of a small-case decision, the statute notwithstanding.

39. Nonattorneys may also represent parties before the Tax Court, but to obtain permission to practice before the court, they must pass a written examination administered by the court. Tax Ct. R. 200. Thus, some petitioners under the small-case procedure may be represented by accountants or by other tax advisors. I use the term *attorneys* to include all professional representatives of taxpayer petitioners, unless the context clearly indicates otherwise.

40. These data, which are not published, were provided to me by Chief Judge Dawson by telephone conversation (Aug. 27, 1984). The data are collected by the Tax Court for internal management purposes. Chief Judge Dawson indicated that the percentage of represented cases had been creeping upward in recent years and was 12% for the first six months of 1984. With the recent increase in the jurisdictional amount for the small-case procedure, the percentage of represented cases can be expected to increase further.

41. The computer records of 1,119 cases supplied by the district counsel's office did not indicate whether the taxpayer was represented. I was able to obtain this information for many but not all of these cases from the Chicago and Milwaukee trial calendars over the period covered. Cases for which information is not available are primarily those settled soon after filing and that therefore did not appear on a trial calendar. There is very likely bias in this subsample of cases for which I know whether an attorney appeared; this may account for the somewhat higher percentage of represented cases in the subsample as compared to the national data.

such advice is given. Of the 63 respondents who answered the relevant survey question, 14 indicated they had contacted an attorney before filing a Tax Court petition. Of these 14, 9 had been advised to proceed pro se, and 6 had actually done so.

As rationales for giving such advice, the attorneys I interviewed usually said that there were not enough taxes in dispute to justify the cost of an attorney.⁴² Thus, one could conclude that the small-case procedure provides an opportunity to litigate matters that would not be litigated without a viable forum for pro se litigation.⁴³ A few attorneys said that pro se litigation was also desirable because the trial judge was more likely to view sympathetically the case of a taxpayer appearing pro se. I cannot verify that in fact judges are partial to pro se litigants in their decisions, though it seems unlikely. It is beyond doubt, however, that the judges hearing small tax cases are sensitive to the courtroom difficulties faced by the pro se litigant.⁴⁴ Believing that this sensitivity reflects a bias in favor of such litigants, some attorneys may recommend pro se litigation to clients whose chances for success would be small unless the judge bends the facts or law in the client's favor.

E. Issues Raised and Representation

I examined the Chicago and Milwaukee cases in my sample to determine whether there was any pattern in issues raised that might help predict when representation is probable. The results are presented in table 3.⁴⁵

Attorneys were most likely to be present when issues were raised about imposition of penalties for the negligent or intentional filing of false tax returns and when issues of unreported income were present, though even in these cases only about 16% of the taxpayers were represented. I anticipated that

42. I attempted to use my data on Chicago and Milwaukee cases to test the hypothesis that representation became more likely as the amount in dispute increased. Of the cases in which I could determine whether the taxpayer was represented, the amount of deficiency asserted by the IRS was higher for cases in which there was representation (\$1,502) than for cases in which there was none (\$1,263). Though this difference is in the direction I had anticipated, it is not large enough to be statistically significant by the standard measures for testing the significance of a difference between means. Moreover, the average deficiency asserted in cases for which I could not determine whether there was representation was \$1,497, nearly identical to the mean for cases in which I know there was representation. It is highly unlikely that representation existed in a large percentage of this indeterminate group, since most were settled shortly after filing. Consequently, I must conclude that the Chicago and Milwaukee data failed to confirm a hypothesis that representation will be more likely as the amount claimed by the IRS increases.

43. In my mail survey I asked whether respondents would have filed in the Tax Court if the small-case procedure had not been available. Of 65 responding, 40 said they would have filed, 17 indicated they would not have, and 8 were unsure. It is permissible to file pro se under the regular procedure, of course. I have made no systematic attempt to determine how feasible pro se representation is under regular procedure. The procedural rules are clearly not designed to facilitate pro se litigation as they are under the small-case procedure. In interviews, I have received conflicting reports about the practicality of pro se litigation under the regular-case procedure.

44. See sec. III.H of text.

45. A majority of cases presented more than one issue, and I have no way of knowing which issues in multi-issue cases were deemed most important. Conclusions from table 3 respecting possible causal relationships between issues presented and taxpayer representation are especially tenuous as a consequence.

taxpayers would be likely to contact attorneys when civil penalties were at issue because the potential liability can be great, including possible criminal sanctions. Penalties are much more likely to be imposed in instances of unreported incomes than in cases of inappropriate deductions. Taxpayer concealment of relevant information must usually be shown by the IRS to justify imposition of the more serious penalties, and in deduction cases taxpayers usually disclose all relevant information but make a legal mistake in assuming that information entitles them to a deduction.⁴⁶

One IRS attorney opined that representation would be more likely if the taxpayer had an attorney in connection with other legal difficulties when the tax dispute became ripe. For example, the tax dispute might concern the tax consequences of transfers between a recently divorced couple, and the attorney representing the taxpayer in the divorce might take on the tax case as well. Many personal-exemption issues are litigated in small tax cases—the issue being whether the requisite relationship and/or financial dependency existed—and this attorney suggested that perhaps these taxpayers are involved

TABLE 3
Issues Raised and Taxpayers Represented, Small Tax Cases, Chicago and Milwaukee, 1979–82

Issue	No. of Cases ^a	Represented Taxpayers	Unrepresented Taxpayers	Representation Unknown
<i>Deductions—allowability</i>				
Losses and bad debts (including casualty losses)	205	20 (10%)	128 (62%)	57 (28%)
Employee and travel expenses	247	14 (6%)	157 (64%)	76 (31%)
Other business-related expenses	281	22 (8%)	175 (63%)	84 (30%)
Medical and taxes	131	18 (14%)	81 (62%)	32 (25%)
Personal dependency exemptions	189	23 (12%)	114 (59%)	52 (28%)
Other	<u>111</u>	<u>13 (12%)</u>	<u>74 (67%)</u>	<u>24 (22%)</u>
Subtotal	1,164	110 (9%)	729 (63%)	325 (28%)
<i>Deductions—substantiation</i>				
Business related	121	12 (10%)	75 (63%)	34 (28%)
Personal related	<u>268</u>	<u>19 (7%)</u>	<u>173 (65%)</u>	<u>76 (28%)</u>
Subtotal	389	31 (8%)	248 (64%)	110 (28%)
<i>Other issues:</i>				
Unreported or understated income	179	28 (16%)	102 (57%)	49 (27%)
Penalties	124	21 (17%)	71 (57%)	32 (26%)
Other (including procedural issues)	<u>258</u>	<u>28 (11%)</u>	<u>131 (51%)</u>	<u>99 (38%)</u>
Total	2,110	218 (10%)	1,281 (61%)	615 (29%)

^aBecause more than one issue was raised in many cases, the total number of issues exceeds the total number of cases. There were 1,119 cases examined altogether.

46. See 4 Bittker, *supra* note 9, at ¶ 114.3.4. The decision by IRS to pursue penalties is normally made before the statutory notice of deficiency (90-day letter) is issued, and when the IRS pursues major penalties, the cases are unlikely to be eligible for small-case procedure. Still I hypothesized that if penalties were a real possibility, taxpayers would be more likely to retain attorneys during the administrative stages of the proceeding, with those attorneys continuing to represent the taxpayers even if the cases were ultimately litigated under the small-case procedure. The data support that hypothesis.

in immigration cases raising similar issues. He speculated that such taxpayers often retain attorneys in their immigration cases who then also handle the related tax cases. The data in table 3 tend to bear out this speculation as well, as the representation rate for cases with dependency-exemption issues (12%) is somewhat higher than for most other issue categories.

F. Settlement Processes and Frequency

Settlement processes are the same for small-case and regular procedures. Cases are handled differently, however, depending on whether there was an administrative appeal (a "protest") of the auditor's determination to the appeals office before the Tax Court petition was filed.⁴⁷ If there was no protest, an appropriate branch of the appeals office will have exclusive settlement authority for a six-month period. Thereafter, settlement authority lies with the district counsel's staff. If there was a protest, and consequently a representative of the appeals office attempted to settle the case before the statutory notice of deficiency was issued, the case is assigned to a district counsel's office for settlement purposes as soon as the Tax Court petition is filed. The district counsel then has discretion to refer the case to the appeals office if there is reason to believe that productive settlement negotiations could still occur there.⁴⁸ Within the district counsel's office, small cases are likely to be assigned to a younger staff member, commonly a recent law graduate in a first law job. Settlement agreements are likely to be subject to the approval of a more experienced staff member, however.

The only national data available to me indicate that settlement occurs in 70 to 75% of all Tax Court cases (regular and small-case procedure combined).⁴⁹ Table 4 reports the settlement frequency for the small tax cases filed in my Chicago and Milwaukee samples. These data suggest a similar settlement frequency; in all, 73% of the small cases were settled, while only 19% were tried.⁵⁰

47. See note 16 *supra* and accompanying text.

48. My interviews revealed considerable variation between different district counsel's offices with respect to how often they exercised this discretion to refer cases to the appeals office. Many district counsel's offices rarely refer a case to an appeals office if that appeals office had reviewed the case before the statutory deficiency notice was issued, but others may refer such cases, particularly if new issues not previously considered by an appeals office appear. Until 1982 the appeals division had no formal authority over a case which it had considered after a protest of a 30-day notice. Rev. Proc. 79-59, 1979-2 C.B. 573. Compare Rev. Proc. 82-42, 1982-2 C.B. 761.

49. In testimony supporting a budget request, the chief judge of the Tax Court revealed the following data. In fiscal year 1980, 14,470 Tax Court cases were closed, of which 10,723 (74%) were settled. For fiscal year 1981, the comparable figures were 18,906 cases closed, of which 13,647 (72%) were settled. Testimony of Tannenwald, in Hearings, *supra* note 34, at 248. The testimony does not indicate whether cases that were dismissed for failure of the taxpayer to prosecute them were included as "settled" cases. Neither the Tax Court nor the IRS regularly publishes settlement statistics. Recent studies indicate that about 70% of cases filed in general civil courts are disposed of by settlement. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. Rev. 72, 89 (1983). Tax Court experience seems comparable.

50. In the past year or two, responding to increased concern about Tax Court case backlog, the IRS and the chief counsel's office have placed great emphasis on case settlement. See Commissioner and Chief Counsel IRS, 1983 Annual Report 29. This emphasis has resulted in an increased settlement rate for all

One of the more remarkable findings revealed by table 4 is that 60% of the cases were settled by the appeals office. It is reasonable to assume that most Tax Court cases were not referred to an appeals office if the taxpayer had asked for an administrative review by the appeals office in response to the 30-day letter.⁵¹ The implication is that many taxpayers passed up their first opportunity for appeals office review, only later to reach a settlement agreement with that same office. Though these taxpayers technically filed petitions in Tax Court, their contact with the court was purely ministerial, and they had no contact with the district counsel.⁵²

There are several possible explanations for this phenomenon. It is widely believed that many taxpayers feel angry and abused after an auditor's initial determination of deficiency. Respondents to my mail survey often reported that they had not been treated "fairly and courteously" by the auditor. Such

TABLE 4
Disposition of Small Tax Cases, Chicago and Milwaukee,
1979-82

Disposition	Number	% of Total
Settled by appeals office	668	60
Settled by district counsel	149	13
Taxpayer default	91	8
Tried and decided	211	19
Total	1,119	100

Tax Court cases (regular and small-case procedure combined) by the appeals division, as revealed by the table in note 52 *infra*. It is likely, therefore, that the findings from my sample understate the current settlement rate for small tax cases.

51. Indeed, during this study the appeals division did not appear to have jurisdiction over a case that it had considered before the statutory deficiency notice was issued. A few referrals from district counsel to an appeals office may nonetheless have been made. See note 48 *supra*.

52. If under established settlement procedures a Tax Court petition should be referred to the appeals division for settlement, the referral will be made by the clerks filing the petition. District counsel staff will not see the case until the period of appeals division's exclusive settlement authority expires or the case is set on a trial calendar, whichever first occurs. There are also many regular Tax Court cases referred to and settled by an appeals office, but this pattern appears much more often in small-case procedure matters. Data supporting this conclusion are contained in the appendixes to the annual reports of the commissioner of IRS. Each year, statistics appear there on the receipt and disposition of cases by the appeals office, distinguishing for these purposes the cases that were already docketed in Tax Court. The following table, constructed from these data, shows the percentage of all Tax Court filings that were referred to an appeals office and the percentage of cases that an appeals office settled (referral back to district counsel is the appeals office's other method of disposition). The product of the two percentages should be an estimate of total Tax Court filings that are settled by an appeals office. The data indicate that the percentage of all Tax Court cases settled by an appeals office has increased sharply in recent years, but remains well below the 60% rate in my sample of small-case filings.

Appeals Office Receipt and Disposition of Tax Court Cases

	1979	1980	1981	1982	1983
1. Percentage of Tax Court filings referred to appeals office	61.4	54.0	52.0	71.7	79.9
2. Percentage of Tax Court cases referred to appeals office that are settled	45.8	51.1	49.5	56.7	56.4
3. Percentage of Tax Court filings settled by appeals office (row 1 × row 2)	28.1	27.6	25.7	40.7	45.1

SOURCE: Annual Reports of Commissioner and Chief Counsel for the Internal Revenue Service, appendix table 16. To calculate percentages reported in row 1, total Tax Court filings were obtained from table entitled "Tax Court Cases Received," *id.*

feelings may lead to a response, on receipt of the 30-day letter, that administrative appeal to simply another IRS employee would be pointless, that it is time to "tell it to the judge." It is also possible, of course, that taxpayers do not understand or appreciate that they need to request administrative review promptly after receiving a 30-day letter if they wish to avoid a statutory notice of deficiency. In addition, taxpayers may believe there are tactical advantages to passing up their first opportunity for administrative review. Perhaps they believe their bargaining power is enhanced, in negotiating with the appeals office, if they have demonstrated their willingness to litigate by filing a Tax Court petition. The appeals office, unlike the auditor, is authorized to consider the "hazards of litigation" in considering settlement,⁵³ and since the filing fee for the small-case procedure is only \$10 (as compared to \$60 for a regular case),⁵⁴ the extra bargaining leverage, if any, is not expensive to obtain. Finally, passing up the first opportunity for appeals office review probably delays the time of settlement—and therefore payment—even if settlement with the appeals office has all along been the likely outcome. For taxpayers hard pressed for cash, this delay may be an important consideration.⁵⁵

G. Frequency of Trials and Settlements

Nineteen percent of my sample of Chicago and Milwaukee small tax cases went to trial. If representative of general small-case experience, this finding suggests that small tax cases are much more likely to go to trial than are small claims court cases involving consumers. Caplovitz, in his study of consumers against whom judgments had been entered, found that a trial had been held in less than 1% of the cases.⁵⁶ He suggested that the courts he studied made it nearly as difficult as possible to try a matter pro se. The frequency of trials under the small-case procedure is evidence, therefore, that this procedure has succeeded in making pro se litigation more feasible than it normally is. Moreover, as table 5 indicates, in my sample of Chicago and Milwaukee cases, taxpayers proceeding pro se were even more likely to go to trial than were represented parties.

H. Courtroom Atmosphere in Tried Cases

Small-case hearings are almost always conducted by a special trial judge in an ordinary courtroom, in a federal courthouse if the locality has one. The usual courtroom formalities are observed. For example, a court reporter and a court clerk are always present. In the hearings I observed, the special trial judge wore a robe and was addressed as "Your Honor." Everybody in the

53. See 4 Bittker, *supra* note 9, at ¶ 112.1.4.

54. Tax Ct. R. 175(a)(2).

55. To discourage such behavior, the interest rate on deficiencies was increased in 1982. 26 U.S.C. § 6621 (1982). As recently amended, this section now provides for redetermination of the interest rate every six months so that it equals the prime rate.

56. See Caplovitz, *supra* note 4, at 221.

courtroom was asked to rise when the judge entered and left the courtroom, and the judge sat on a raised podium. The taxpayer and the IRS attorney spoke to the judge, rather than directly to each other. The judge often helped pro se litigants develop their points, but with one exception in the cases I observed, the judge did not try to mediate settlements. Decisions were always reserved in the cases I observed, and the parties were informed of the result after the judge had returned to Washington and prepared a written opinion.⁵⁷ This commonly takes six to nine months. In the cases I observed, the judge always asked the court reporter to prepare a transcript of the proceedings for use in writing the decision.⁵⁸

While small-case hearings were impressively formal in these ways, there was also obvious and extensive effort to be solicitous of the concerns and anxieties of the pro se litigant. One of the most remarkable features of small-case trial practice is the extent to which cases are scheduled for the convenience of the litigant. First, the taxpayer for all practical purposes is permitted to select the place of hearing from a list of over 100 available places.⁵⁹ The number of places where the Tax Court will hear small cases considerably exceeds the number of places where regular cases are heard,⁶⁰ and IRS counsel often must travel in order to try a case.⁶¹ Second, considerable effort is made to schedule cases at an hour convenient to the taxpayer. When I observed the court procedure, cases were scheduled at one-hour intervals, at a time the taxpayer had agreed in advance would be convenient.⁶² No effort was made,

TABLE 5
Case Disposition and Taxpayer Representation, Small Tax Cases, Chicago and Milwaukee, 1979-82

Disposition	Represented Cases	Unrepresented Cases	Representation Unknown	Total
Settled by appeals division . . .	64 (61.0%)	377 (56.2%)	227 (66.2%)	668 (60%)
Settled by district counsel . . .	21 (20.0%)	102 (15.2%)	26 (17.4%)	149 (13%)
Taxpayer default	3 (2.9%)	32 (4.8%)	56 (16.3%)	91 (8%)
Trial	17 (16.2%)	160 (23.8%)	34 (9.9%)	211 (19%)
Total	105 (9.4%)	671 (60%)	343 (30.6%)	1,119 (100%)

57. Until recently, statute required that Tax Court decisions be written; a recent amendment authorizes oral decisions. 26 U.S.C. § 7459(b) (1982). It now appears that no more than 20% of the cases are being decided this way. See note 100 *infra* and accompanying text.

58. The rules do not require a transcription. Tax Ct. R. 178.

59. The taxpayer designates a place of trial at the time the Tax Court petition is filed. The IRS can move to change the place of trial but in small cases almost never does. Tax Ct. R. 140(c).

60. See note 30 *supra* and authorities cited therein.

61. I observed one small-case trial in which the young IRS attorney assigned to the matter had traveled over 60 miles for the hearing. The hearing lasted approximately ten minutes. In an informal interview after the trial, the IRS attorney said that in her opinion the whole event had been largely a waste of time. She believed the taxpayer's case was without substantial merit and could have been decided on the pleadings, which would have obviated her need to devote an entire workday to a needless hearing.

62. When a special trial judge travels to a locality to hear small cases, the first courtroom proceeding is a "calendar call." All cases are called that have been listed by the clerk's office for trial during that trip by the special trial judge. In the calendar calls I observed, attorneys on the district counsel's staff report which

as is so often the case in trial courts, to have several cases ready for hearing at one time so that the judge's time is not wasted. If a trial ended in less than an hour (usually the case), or was not held because of a last-minute settlement or nonappearance, the judge, who had traveled from Washington, simply waited in chambers for the next scheduled trial time. I have been told, however, that this scheduling practice does not exist everywhere small tax cases are heard.⁶³

In the small-case hearings I observed, great respect and understanding were shown for the difficulties of pro se litigation. The judges were very careful to ensure the pro se litigant understood what was happening. Government counsel, whom the taxpayer usually knew from prior settlement negotiations, was also solicitous of the taxpayer's inexperience. Sometimes counsel interjected to help the judge understand the point the taxpayer was making, and never did I see IRS attorneys interpose evidentiary objections or act in other stereotypically adversarial manners. Evidentiary principles were generally ignored, and the pro se litigants, after being put under oath, were permitted to tell their "stories" as they preferred. If there were gaps in this story, the judge asked appropriate questions. Evidence and argument were commonly intermixed. Rarely were there witnesses other than the taxpayer. Although the parties are entitled to file posttrial briefs, the judges I observed discouraged them. IRS counsel often came to trial with a written memorandum of authorities, however, which was given to the judge.⁶⁴

This sense that the courtroom process was solicitous of the taxpayer's feelings was reflected in my mail survey of users of small-case procedure. A considerable majority of those responding did not believe they had been treated "fairly and courteously" by either the IRS auditor or the appeals officer. But the vast majority of those who took their cases to trial had positive reactions to the courtroom proceedings and to the attitude of the judge. Auditors were commonly described as accusatory and curt, whereas Tax Court judges were described as helping the taxpayers to explain their positions.

As solicitous and informal as judges are in small-case hearings, the style of decision making in these hearings remains formal. As noted, decisions are al-

cases had been settled on the eve of trial, and in many of the other cases reported an agreement on a trial time. The judge accepted these agreements, and the taxpayer did not appear at calendar call. In the remaining cases the taxpayer or a representative usually responded when the case was called. The judge inquired as to the status of settlement negotiations and, if appropriate, set a specific time for trial during his stay in that locality. Considerable effort was made to find a convenient time for the taxpayer and any witnesses. Evening hearings were not scheduled, however, meaning the taxpayer usually had to miss work for the hearing.

63. Letter to author from Special Trial Judge Buckley (May 24, 1984). In the small-case hearings I observed, when a taxpayer failed to respond at calendar call or sent a last-minute request for a continuance, the judge usually refused to dismiss the case for nonprosecution unless there had been a similar occurrence earlier. A similar reluctance to dismiss cases on procedural grounds was observed in an earlier study of the small-case division. Note, *The Small Tax Case Procedure*, *supra* note 7. I have been informed by Judge Buckley, however, that other judges take a less liberal attitude toward the granting of continuances.

64. Similar descriptions of the courtroom process are given in earlier accounts of the workings of small-case procedure. E.g., Notes, *supra* note 7.

most always taken under advisement and a written decision issued, usually several months later.⁶⁵ Though the statute specifically states that decisions in small cases shall not set precedent,⁶⁶ opinions take the customary form and style of written trial-court decisions. There are findings of fact and conclusions of law; rarely, if ever, is there explicit discussion of the fairness of the result. The emphasis in the opinions is on the proper application of legal rules, which appear to control the outcome. In several hearings I observed, the taxpayer made arguments based on fairness that were not phrased in terms of any recognized doctrine. The judge, in concluding remarks, expressed sympathy with the taxpayer's concerns but reminded the taxpayer that the case had to be decided according to the law. It sometimes seemed the judge regretted not having greater decisional flexibility.

I. Taxpayer Success in Small Cases

The evidence presented so far shows that the small-case procedure of the United States Tax Court is used extensively, primarily by taxpayers appearing pro se, and provides a practical means by which these taxpayers can litigate their disputes and be treated courteously while doing so. The important question remains whether taxpayers who take this route fare well in substantive outcome. Available evidence suggests they do.

The best evidence comes from two statistical breakdowns published annually in the reports of the chief counsel for the IRS. One set of statistics gives the percentage of Tax Court decisions fully in favor of the government, fully in favor of the taxpayer, or mixed—each category broken down between matters litigated under small-case procedure and those litigated under regular procedure. As table 6 indicates, the percentages are almost the same regardless of the procedure used. Roughly 55% of the tried cases are completely won by the government, roughly 10% are completely won by taxpayers, and roughly 35% involve a mixed outcome in which the government's original claim is compromised somewhat.⁶⁷ Moreover, these percentages have remained quite stable over time for both the small-case and regular procedures.

The data in table 6 include only the cases tried to judgment (not those ending in settlement or default). Most small tax cases are settled.⁶⁸ Since settled cases usually have mixed outcomes, the test of taxpayer success becomes the degree to which the taxpayer or the IRS prevails with regard to the amount in dispute. A measure of relative outcome in all cases, settled as well as tried, is provided in a second set of statistics reported in the chief counsel's annual reports—the percentage of dollars claimed in the statutory notices of deficien-

65. See note 57 *supra* and accompanying text.

66. 26 U.S.C. § 7463(b) (1982).

67. The comparable data from my sample of Chicago and Milwaukee small tax cases are 43% of tried cases decided entirely for the government and 16% decided entirely for the taxpayer. The results were mixed in the remaining 41% of the cases.

68. See table 4 *supra*.

cy that is determined as owing to the government, either by settlement or by judicial decision, whether collected or not. With respect to this statistic, however—as table 7 indicates—taxpayers electing the regular procedure did considerably better on the average than those opting for the small-case procedure, though the recovery rate in small cases was still only about half of what the government claimed in the statutory notice of deficiency. Again it is noteworthy that the rates for each procedure have remained stable over time.

It is not clear why the government recovery rate is higher for small cases. However, knowing that a dispute will be taken to Tax Court by a represented party may sometimes prompt IRS personnel to inflate the taxes claimed in the notice of deficiency to provide more room for compromise. In my interviews I received conflicting information about whether such a practice existed.⁶⁹

TABLE 6
Outcomes of Tried Tax Cases, Small-Case and Regular Procedure, Nationwide

	1975	1977	1979	Percent			1983
				1980	1981	1982	
Tax Court Decisions Fully for Government							
Small-case procedure	61.7	55.1	52.2	53.4	53.3	48.6	56.3
Regular procedure	54.7	54.4	49.8	51.0	50.8	51.0	63.6
Tax Court Decisions Fully for Taxpayer							
Small-case procedure	11.3	10.0	9.9	9.5	12.8	11.3	7.8
Regular procedure	10.5	11.0	10.0	11.0	11.1	9.5	4.7
Mixed Tax Court Decisions							
Small-case procedure	27.0	34.8	34.9	37.1	33.9	40.1	35.9
Regular procedure	34.8	34.6	40.2	38.0	38.1	39.5	31.7

SOURCE: Annual Reports of the Chief Counsel of the Internal Revenue Service, table entitled "Trial Court Case Record."

TABLE 7
Government Recovery Rate,^a All Tax Court Cases, Nationwide

	1975	1977	1979	1980	1981	1982	1983
Small-case procedure	53.9	55.4	54.7	51.4	49.3	48.1	51.4
Regular procedure	32.6	30.6	30.6	31.4	33.5	19.0	34.8

SOURCE: Annual Reports of the Chief Counsel of the Internal Revenue Service, table entitled "Tax in Litigation—Tax Court Cases."

NOTE: The annual reports provide two sets of report data: one for all Tax Court cases, the other for cases under the small-case procedure. By subtracting the latter from the former and computing the appropriate percentage, I determined the reported data for the regular-procedure cases.

^aThe government recovery rate measures the proportion of the amount claimed in the statutory deficiency notice that is determined as owing to the government. It does not measure the proportion that is ultimately collected.

69. One IRS informant gave still another reason for a lower government recovery rate in regular cases. He suggested that parties represented by attorneys in Tax Court were more likely than pro se small-case procedure litigants to have been represented both when the tax return was filed and when the underlying transactions in question were planned. An attorney who has been involved throughout the process can structure the transaction and return so that the taxpayer has a plausible argument for whatever tax benefit is claimed. My informant suggested that careful tax planning of this nature increases the likelihood of a favorable settlement.

Since taxpayers are not represented in most small cases, this practice could account for much of the difference in recovery rates found in table 7.⁷⁰

A comparison of tables 6 and 7 suggests that possibly the small-case petitioner fares poorly in settlement negotiations, though not at trial, when compared with a regular-procedure counterpart. However, a detailed analysis of my data on Chicago and Milwaukee small tax cases tends to counter this explanation. Table 8 shows that in my sample the government recovery rate was considerably less for settled cases than for tried cases.

Table 8 strongly suggests that taxpayers using the small-case procedure can effectively negotiate settlements for themselves. The most likely explanation for higher government recovery rate in tried cases is that the IRS was willing to significantly compromise its claims in settlements when there were substantial weaknesses to the government's case. Matters brought to trial, under this view, tended to be matters in which the IRS, rightfully, had considerable confidence in its position and was unwilling to offer significant concessions in settlement negotiations. An alternative possibility is that taxpayers were not able to fend for themselves as well in the courtroom as in settlement negotiations. I discount this explanation, however, on the basis of the hearings I observed and interviews I have conducted, as reported in the preceding section.

The higher government recovery rate in small tax cases (table 7) could be attributed to the much greater frequency of taxpayers appearing pro se in small-case matters. In the Chicago and Milwaukee cases for which I could

TABLE 8
Government Recovery Rate^a by Disposition, Small
Tax Cases, Chicago and Milwaukee, 1979-82

Disposition	Government Recovery Rate
Settled by appeals division	45%
Settled by district counsel	49%
Taxpayer default ^b	91%
Tried	66%

^aThe government recovery rate measures the proportion of the amount claimed in the statutory deficiency notice that is determined as owing to the government. It does not measure the proportion that is ultimately collected.

^bThe IRS sometimes concedes a matter even though the taxpayer defaults, which is why this figure is less than 100%.

70. The government recovery rate for 1982 regular-procedure cases is curiously low. A congressional assistant who asked Treasury personnel to explain this figure was told that it did not reflect a general change in settlement policy, but rather a very low settlement in one large case for reasons peculiar to that case. Interview with Stuart Applebaum, legislative assistant to U.S. Rep. Robert W. Kastenmeier. The return in 1983 of the government's recovery rate in regular cases to historically prevailing levels supports this explanation.

determine whether an attorney had appeared, however, the overall government recovery rate in settled and tried cases combined was higher when an attorney appeared (58%) than when the taxpayer appeared pro se (53%). In tried cases alone, taxpayers with attorneys fared slightly better (government recovery rate still 58%) than their pro se counterparts (government recovery rate was 68%). The differences reported in the preceding two sentences are not statistically significant, however. Furthermore, great care must be taken in drawing conclusions from these percentages, since taxpayers may be more likely to retain attorneys when the government's case is stronger, perhaps because of wrongdoing by the taxpayer.⁷¹ Still, if the government recovery rate had been far less for small-case procedure disputes handled by attorneys than for those handled pro se, when coupled with the data in table 7, great doubt would have been cast on my conclusion that pro se taxpayers fare reasonably well under the small-case procedure.

In conclusion, the variety of data presented in this section suggest that a user of the small-case procedure may not fare as well as a user of the regular procedure who is represented by an attorney. Yet, the degree of success of the small-case procedure user contrasts sharply with the success of pro se users of small claims courts opposing large institutional parties claiming to be owed money. For the latter group, the literature suggests that a "creditor recovery rate" in excess of 90% should be assumed.⁷²

IV. SPECULATIONS

My general conclusion is that the Tax Court's small-case procedure has provided a forum in which it is practical to dispute alleged tax deficiencies pro se and that there are reasonable prospects of success for the taxpayer whose cause has merit.⁷³ This conclusion is sharply at variance with usual assumptions about the failure of small claims courts to provide pro se litigants a viable forum for contesting the claims of large institutional opponents. What possibly accounts for this variance?

My speculations fall into two general categories. One set of speculations focuses on differences between the dispute-settling "posture" of the Tax Court petitioner and that of the defendant in a collection suit maintained by

71. Moreover, there were only 15 cases in my sample in which a represented case went to trial. As still further evidence of the pro se taxpayer's ability to cope successfully, 20% of pro se users of small-case procedure in my sample won complete victories—i.e., the government claim was abandoned or, at trial, the decision was that the taxpayer owed no further taxes. Only 23% of represented users of small-case procedure in my sample won complete victories.

72. See authorities cited in notes 4-5 *supra*.

73. In labeling the small-case procedure a success, I am not asserting that it rectifies all or even most injustice in the collection of disputed taxes from individuals. Most obviously, the small-case procedure does nothing for taxpayers who are not assertive enough to challenge an auditor's finding of a deficiency. Studies from other dispute-settlement contexts suggest that many such taxpayers must exist. See, e.g., Trubek et al., *supra* note 49, at 85-87; David M. Trubek, *The Construction and Deconstruction of a Disputes-focused Approach: An Afterword*, 15 *Law & Soc'y Rev.* 727 (1980-81); William C. Whitford, *Law and Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 *Wis. L. Rev.* 1006, 1045.

a large institution. My second set of speculations focuses on the tax-collection strategies of the IRS, which I will argue make it important that the government maintain viable pro se litigation opportunities with respect to tax disputes.

A. Dispute Posture of the Tax Court Petitioner

The Tax Court petitioner looks like a defendant in a debt-collection suit because fundamentally the dispute concerns a claim that the taxpayer owes more taxes. If the taxpayer is unsuccessful, or fails to pursue relief in the Tax Court, the IRS can resort to coercive collection remedies. In other respects, however, the Tax Court petitioner resembles a plaintiff in a civil suit. Most importantly, there are no proceedings in the Tax Court unless the petitioner initiates them. Undoubtedly many taxpayers are unwilling to litigate pro se—because of feelings of inadequacy, a general lack of assertiveness, or a lack of conviction in the merit of their cause—and simply do not file petitions.⁷⁴ By way of contrast, debtors are sued in collection suits simply because they have not paid, whether or not they are prepared to litigate. To be sure, many private debtors pay simply to avoid the threat of a lawsuit. It remains likely, however, that the pool of defendants in debt-collection suits contains many persons insufficiently assertive to overcome the anxieties that plague so many lay people contemplating pro se litigation—and hence the high rate of default in such suits. Most Tax Court petitioners, of course, have overcome those anxieties.

Before filing a Tax Court petition, a taxpayer receives a statutory notice of deficiency detailing the amounts claimed by IRS and the reasons the taxpayer's return has been judged deficient. This notice defines the issues in the dispute in legal terms. Though the taxpayer must take the initiative if there is to be a Tax Court proceeding, the taxpayer does not have the burden of extracting and defining the legal issues. Furthermore, in pre-petition meetings with an auditor, and perhaps with an appeals office representative, the taxpayer may in effect receive instruction about the factual evidence that must be presented to prevail on the legal issues in the case.

The defendant in a collection suit also receives a document (the complaint), stating the dispute in legal terms. Nonetheless, in private collection suits, successful defenses almost always have to be initiated and articulated by the defendant. The complaint typically states only that a contract was made but that payments were not. Defendants rarely contest those facts.

74. Filing a petition in Tax Court postpones the time when the IRS can resort to coercive collection remedies, for there can be no coercive collection without an assessment, and there can usually be no assessment while a Tax Court proceeding is pending. 26 U.S.C. § 6213(a) (1982). No doubt, therefore, some small-case petitioners are merely seeking the benefits of delay—the filing fee, after all, is only \$10—and have no intention of going to trial. One should not assume, therefore, that all Tax Court petitioners have put aside feelings of inadequacy about litigating pro se.

When they wish to raise defenses, they are likely to claim that the contract was unfair or that the goods or services delivered were inadequate; or they may raise a technical defense such as violation of a disclosure statute. The burden of articulating these claims in a manner suggesting the existence of a legal issue rests with the defendant.⁷⁵ This need to articulate legal issues does not necessarily bar effective pro se litigation if court personnel, both clerks and judges, will help defendants rephrase their concerns in legal terms, and no doubt court personnel frequently do so. Nonetheless, this problem is not faced to the same degree by the Tax Court petitioner.

The small claims court literature supports the suggestion that the dispute posture of the Tax Court petitioner contributes to the success of the small-case procedure in facilitating pro se litigation. Though most of that literature laments the situation of the pro se defendant, various studies have suggested that pro se plaintiffs do quite well in small claims courts, indeed nearly as well as the more numerous business plaintiffs, who are usually represented.⁷⁶ The most evident explanation for the success of the pro se small claims court plaintiffs is that they have the self-confidence and assertiveness needed to file pro se suits. Those same personality characteristics, demonstrated as well by the Tax Court petitioner, probably serve them well later in the litigation.

B. Tax Policy and Small-Case Litigation

Clearly a major reason for the small-case procedure's success in facilitating pro se litigation is that the Tax Court and the IRS chief counsel's office have devoted so many resources to making it successful. The Tax Court assigns to each case a special trial judge, experienced and skilled in tax law, together with a court clerk and a reporter.⁷⁷ Scheduling hearings for the convenience of the taxpayer greatly increases the Tax Court's costs. The judge, with some staff, must travel from Washington to the place of hearing. Perhaps most unusual (given practices in most other pro se courts), at the time of my study, cases were scheduled at fixed intervals to minimize the time tax-

75. One important article identified the complexity of consumer disputes and the inability of consumers to articulate their grievances in legal terms as probably the two most important reasons that small claims courts have failed to become viable forums for pro se litigation. Yngvesson & Hennessey, *supra* note 1.

76. Ruhnka & Weller, *supra* note 2, at 46-47 (1978); Eovaldi & Meyers, *supra* note 2; Yngvesson & Hennessey, *supra* note 1, at 253-54; Steadman & Rosenstein, *supra* note 3.

77. No separate budget is kept for the operation of the small-case procedure. The salary of a special trial judge in 1983 was \$57,500. Hearings, *supra* note 34, at 299. Each special trial judge has a secretary and a law clerk. Thus, for salaries and fringe benefits alone it must have cost at least \$100,000 to fund a special trial judge position in 1983. Special trial judges hear matters other than small cases, though that is the bulk of their workload. In 1983 there were ten special trial judges, and it has been estimated that there would be 1,820 written opinions issued in small tax cases in that year. *Id.* at 289. That means, on average, each judge prepared 182 opinions. If I conservatively estimate that only one-half the workload of a special trial judge is occupied by hearing and deciding small tax cases—the other half being occupied by cases that are dismissed or settled or by matters other than small tax cases—then the cost in salaries alone for the special trial judge and personal staff is about \$275 per written opinion in a small tax case. When overhead, travel costs, and costs of a court clerk and reporter are included, the cost per opinion to the Tax Court alone must be over \$500. For comparison, in my sample of 1,119 small tax cases from Milwaukee and Chicago, the average deficiency asserted by IRS was \$1,370.

payers waited for their cases to be heard. As a result, the judges and their staffs often sat around waiting for the next scheduled hearing. Finally, cases were usually decided by written judicial opinion⁷⁸—in contrast with the more usual trial court practice of a bench decision.

Not only does the Tax Court devote considerable resources to the small-case procedure, the attitudes of court personnel and IRS attorneys also reflect a concern for making the small-case procedure work. In neither interviews nor personal observation did I detect evidence of burnout among special trial judges, even though there must be a great deal of repetition in the issues raised. In my observations, IRS counsel, perhaps influenced by the attitude of the Tax Court, also exhibited solicitude for the pro se litigant, which one might not expect given the amount of taxes in dispute and the frequent lack of complexity and merit in the legal issues raised.⁷⁹ Most importantly, although IRS counsel certainly endeavor to settle small tax controversies, I believe they are less likely than their private counterparts to either seek unreasonable settlements or play on the pro se litigant's bargaining disadvantages, such as fear of the courtroom or fear of appearing foolish in negotiations, to obtain a favorable settlement. In contrast, unequal bargaining power and resulting unfairness in settlement negotiations have been cited as difficulties with small claims court litigation when only one party is represented.⁸⁰

Why do the Tax Court and IRS personnel apparently attach such priority to maintaining a successful pro se litigation mechanism? Publicly the court, which is plagued by a large case backlog, has emphasized the case-management advantages of maintaining and nurturing the small-case division.⁸¹ The court's assumption is that cases now filed under the small-case procedure would be filed under the regular procedure if the former did not exist or was less attentive to the needs of the pro se litigant. Regular tax cases, particularly if the taxpayer is represented,⁸² can take much more of the court's time than a small case because of the availability of discovery, extra pleadings, and so forth. It is likely, however, that if the small-case procedure ceased to exist, fewer taxpayers would petition the Tax Court at all.⁸³ Perhaps the resulting reduction in total caseload would more than compensate for the increased workload associated with increased regular-case filings.

78. Recent legislation authorizes oral bench decisions in small tax cases. Note 100 *infra* and accompanying text.

79. As might be expected, this public solicitude did not always reflect private feelings. See note 61 *supra*.

80. For a perceptive account, see Tim Murphy, D.C. Small Claims Court—the Forgotten Court, D.C. B.J., Feb. 1967, at 14.

81. Testimony of Tannenwald, in Hearings, *supra* note 34, at 248–49.

82. A taxpayer can choose to appear pro se in a regular Tax Court proceeding, of course. Special trial judges customarily hear pro se regular cases as well. Cf. General Order No. 8, 81 T.C. XXIII (1983).

83. In my mailing I asked the respondents whether they would have filed a Tax Court petition if the small-case procedure were unavailable. Of 65 respondents, 17 said they would not have, and another 8 were unsure. The filing fee under the regular procedure is \$60, but only \$10 under the small-case procedure.

Even if case-management concerns can justify maintaining a small-case procedure, they less adequately explain the level of resources the Tax Court and the IRS commit to the small-case procedure in an apparent effort to make it a forum for meaningful pro se litigation. This point is highlighted by a General Accounting Office (GAO) study of the Tax Court published in May 1984. The study was prompted by concerns about the Tax Court's backlog and requests for increased appropriations. The GAO concluded that a considerable reduction in the Tax Court backlog could be achieved through "administrative improvements," chief among which was increasing the number of cases scheduled for hearing each time a special trial judge visits a city.⁸⁴ If implemented—and the Tax Court has promised to experiment in the suggested ways⁸⁵—the GAO's recommendations could alter the unique tradition of scheduling cases to minimize the time taxpayers must wait in court to have their cases heard. The recommendations could also increase the caseload of each special trial judge, reducing the time judges could devote to the preparation of written opinions.⁸⁶ Thus, while the GAO's recommendations could increase the Tax Court's efficiency in disposing of cases, they could also eliminate some features of small-case procedure that make it a unique system for facilitating pro se litigation.

The General Accounting Office study casts doubt that case-management concerns alone can explain the current commitment of resources to the small-case procedure by the Tax Court and the IRS. There are other partial explanations for this commitment. One draws on prevailing societal beliefs about what is proper in government-citizen interactions. The income-tax debtor can be distinguished from the usual small claims court defendant on the ground that the tax debtor's obligation is not based on a contractual obligation voluntarily undertaken. The tax obligation can even be analogized to a fine—it is a payment to government, not measured by harms caused or benefits received—albeit not one imposed for conduct deemed wrongful. Our inherited legal culture justifies special consideration for a person resisting a unilaterally imposed obligation of the government,⁸⁷ and it would not be surprising if IRS and Tax Court personnel held and respected that value. The cooperative attitude of IRS attorneys may also partly reflect the inherently am-

84. U.S. General Accounting Office, Pub. No. GAO/GGD-84-25, Report to the Chief Judge, United States Tax Court, Tax Court Can Reduce Growing Case Backlog and Expenses Through Administrative Improvements (1984). The report estimates that without increasing the number of trial days, in 1981 the Tax Court could have more than doubled the number of cases it in fact scheduled for trial. The extra cases could have been heard when the special trial judge was not otherwise occupied because a trial finished early or was mooted by settlement. *Id.* at 9-11.

85. The chief judge's responses to the GAO recommendations are included in the published report. They include a commitment to increased scheduling of small cases. *Id.* at 41-63.

86. In turn, judges may begin to rely more on bench opinions than on written opinions. The implications of this change are discussed in the text accompanying note 100-102 *infra*.

87. Cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Provision of free counsel to one "accused" of non-payment of a private debt has never been deemed necessary.

bivalent role of government attorneys in their interactions with citizens. Members of the legal profession are supposed to act in the best interests of their clients, but in our culture there is no ready benchmark, such as maximization of self-interest, for determining the government's best interests. Faced with a consequent ambiguity about what their objective should be, it should not be surprising if government attorneys sometimes choose a less adversarial stance in litigation than do their private sector counterparts. I have suggested above that in small tax cases, IRS attorneys seem to take a partly bureaucratic or judge-like approach to the litigation.

An explanation for the nurturing of the small-case procedure may derive from basic IRS strategies for administering the federal income tax system. In this country the income tax is self-assessed, and the enforcement system depends heavily on substantial voluntary compliance. Recently there has been a good deal of concern that the self-assessment system is breaking down and that the incidence of tax evasion has surpassed the capacities of IRS's enforcement mechanisms.⁸⁸

The increased tax evasion is partly attributed to the burgeoning tax protestor movement, which the IRS and the Tax Court have responded to with deterrence measures. Penalties have been increased, sought with greater regularity, and frivolous court actions have been dismissed summarily.⁸⁹ Increased tax evasion is also attributed by scholars and commentators to reduced taxpayer confidence in the equity of the tax system.⁹⁰ Partly, it is said, the complexity of the tax system, with its many tax subsidies, persuades some taxpayers that they are not getting a pro rata share of legislated tax breaks. It is also reported that many taxpayers believe other taxpayers are, undetected, claiming unjustified deductions, not reporting income,⁹¹ and the like. In either case, taxpayers may attempt to evade taxes simply to appropriate an equitable share of tax breaks.

There are two ways a successful pro se litigation system can potentially combat loss of taxpayer confidence in the equity of the tax system. First, it can "cool out" a disgruntled taxpayer.⁹² Faced with the auditor's determi-

88. In his testimony in favor of the Tax Court's 1983 budget, Chief Judge Tannenwald stated: "I think we must recognize that there seems to be such widespread dissatisfaction with the tax system on the part of tax-payers that, even with the most flexible settlement policy, our case load will continue to increase." Testimony of Tannenwald, in Hearings, *supra* note 34, at 252. See also Elizabeth F. Loftus, To File, Perchance to Cheat, *Psychology Today*, Apr. 1985, at 35.

89. Comptroller General of the United States, U.S. General Accounting Office, Pub. No. GGD-81-83, *Illegal Tax Protestors Threaten System* (1981). The Tax Court itself has begun handling tax-protestor cases in a summary way. See *McCoy v. Commissioner*, 76 T.C. 1027 (1981). Few small cases involve tax protestors, since the latter usually wish to preserve their right to appeal.

90. See, e.g., Ann D. Witte & Diane F. Woodbury, *What We Know About the Factors Affecting Compliance with the Tax Laws*, ed. Phillip Sawicki, 1983 A.B.A. Sec. of Tax'n, *Income Tax Compliance* 133, 142.

91. Herein lie the many current concerns about the "underground economy." See, e.g., Terri Schultz, *The Untaxed Millions*, N.Y. Times, Mar. 16, 1980 (magazine), at 42.

92. See Richard L. Abel, *Introduction in id.*, ed., 1 *The Politics of Informal Justice* 1-13 (New York: Academic Press, 1982).

nation that the attempted tax evasion was not lawful, a taxpayer's frustration might be directed toward protest, perhaps generating publicity and convincing others of the inequity of the tax system. A viable pro se litigation system can channel such activities toward appeal, which even if lost, may not end until after anger and energy have subsided. Maintaining a viable pro se litigation system can also contribute to taxpayer confidence by making the IRS appear willing to submit to the judgment of a disinterested third party. Here the effort is to buttress the tax system with the inherent legitimacy that the judicial decision has in our culture.⁹³ Of course, in facilitating the taxpayer's appeal to the Tax Court, the IRS ensures that it will lose sometimes, as is shown by the approximately 50% government recovery rate for cases filed under the small-case procedure. But it is precisely those IRS losses—many in lawsuits that would not even occur without the small-case procedure—that encourage belief in the equity of the tax system.

I identify "cooling out" and legitimation as objectives of both the Tax Court and the IRS. The IRS is charged with successful administration of the tax system, and hence, its motives for adopting these objectives are evident. The Tax Court is independent of the IRS, however, and formally it is charged only with dispute-settlement responsibilities. Tax Court judges have all made tax law a career,⁹⁴ and hear nothing but tax cases. It should not be surprising then if consciously or unconsciously the members of the Tax Court share with the IRS a principal concern for maintaining the basic legitimacy of the tax system. Normal socialization processes would tend to produce such attitudes.

Cooling out and legitimation may be the objectives behind developing other low cost dispute-settlement mechanisms.⁹⁵ Interestingly, many of these other mechanisms have emphasized informality, both in procedure and in overall atmosphere, as a way of making the mechanism more credible and less alienating to the ordinary person. While there is informality in the procedures used in small tax cases, the courtroom atmosphere is quite formal. The tradition of written decisions prepared by the judge contributes both to the formality of the entire process and to the cost of the small-case procedure.⁹⁶ I can only speculate why these trappings of formality have continued under

93. The relationship between the perceived fairness of judicial procedure and the acceptability of case outcomes to the participants has been the subject of a series of recent applied psychology experiments and articles. The results tend to confirm my speculations. E.g., Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 *Law & Soc'y Rev.* 51 (1984). For an article by a tax lawyer exhibiting deep respect for the ability of a perceived fairness in the dispute-settlement mechanism to legitimate the tax system, see Douglas H. Walter, *Changes in Strategic Positions Between the IRS and Tax Practitioners: Impact of the Disclosure of Information*, 58 *Taxes* 815 (1980).

94. See note 25 *supra*.

95. See Abel, *supra* note 92.

96. The Tax Court estimates that ten special trial judges will issue 1,820 small-case written opinions in 1983, an average of 182 opinions per judge. See note 77 *supra*. This is not the entire workload of special trial judges, though it is the bulk. I have no counterpart figures for small claims court judges, but I would be very much surprised if they decided only 182 cases annually.

the small-case procedure. Perhaps the formality helps maintain the morale of special trial judges, whose jobs in many respects must seem routine and beneath their capabilities. It may also be that the formalities better enable the small-case procedure to fulfill its legitimating functions. Excessive informality may make a low cost dispute-settlement mechanism look less courtlike. Formality, on the other hand, calls attention to the authority of the Tax Court. This authority may help legitimate small-case outcomes.⁹⁷

V. CONCLUSIONS

This study has tended to confirm the prevailing impression that the small-case procedure represents a viable mechanism for pro se litigation even though the pro se litigant's opponent is the IRS, a large institution that is essentially attempting to collect a debt. The study has been too limited to permit me to suggest improvements on existing small-case procedure with confidence. I was surprised at the high percentage of cases in my Chicago and Milwaukee sample that were settled by the appeals office. It is likely that the vast majority of these cases did not go to an appeals office until after a Tax Court petition had been filed because the taxpayer did not protest the 30-day letter. Perhaps there would be more appeals-office settlements and fewer petitions filed if extra efforts were made to encourage taxpayers who are disputing deficiencies to file protests to the 30-day letters. However, the sound tactical reasons for preferring to file a Tax Court petition before negotiating with an appeals office would work against any effort to encourage pre-petition settlement.⁹⁸ Moreover, the possibly unnecessary Tax Court filings in cases later settled by an appeals office impose no great burden on the system, since Tax Court cases not previously considered by an appeals office are routinely routed there upon filing. Consequently, high priority need not be given to efforts to encourage earlier negotiations with an appeals office.

Recent legislation authorized oral bench decisions in the Tax Court.⁹⁹ The best evidence available to me suggests that special trial judges are currently exercising this authority in no more than 20% of the cases in which decisions are entered by the court.¹⁰⁰ Certainly this procedure, as well as GAO's suggested scheduling changes,¹⁰¹ may allow special trial judges to handle greater case-

97. Much work remains to be done on what aspects of a judicial procedure contribute to a perceived legitimacy. The psychological literature suggests that perceived fairness of procedure contributes to the legitimacy of the outcome but does not fully explore what accounts for a perceived fairness of the procedure. Perhaps a modest degree of formality contributes to such a perception. See generally Tyler, *supra* note 93, and the authorities he cites.

98. See text accompanying notes 53-55 *supra*.

99. Miscellaneous Revenue Act of 1982, Pub. L. No. 97-362, § 106(b), 96 Stat. 1726, 1730, amending 26 U.S.C. § 7459(b).

100. Telephone interview with Mr. Casazza, chief clerk to the United States Tax Court (Feb. 6, 1984). Mr. Casazza's estimate is based on his statistics for the first nine months of experience under the legislation authorizing bench decisions. That legislation (amending 26 U.S.C. § 7459(b)) became effective on March 1, 1983. It is possible, of course, that over time the frequency of bench decisions will increase.

101. Text accompanying notes 84-86 *supra*.

loads. On the other hand, by forcing taxpayers to wait longer at the courthouse before their cases are heard, the scheduling changes could cause taxpayers to feel that small-case procedure is not as sensitive to their interests, and widespread use of oral bench decisions would reduce the formality of small tax procedures. Both changes could detract significantly from the ability of small-case procedure to legitimate the fairness of the tax system and cool out disgruntled taxpayers. Taxpayers who have waited several hours to have their cases heard, and who then immediately receive oral decisions that partly or completely side with the IRS, may be less likely to believe their just interests are being fairly considered. Contrast the impression of those taxpayers with that of taxpayers who believe the cases were scheduled with their convenience in mind, who receive the same substantive decision as in the first example, but written in legal terminology, citing precedent, and prepared after transcription of the hearing, albeit six to nine months later.¹⁰²

Probably the most interesting question suggested by this study is whether the success of the small-case procedure in the Tax Court can be reproduced in small claims courts in other contexts. Research has shown that in a majority of civil cases in state courts, the amount in bona fide dispute is less than \$5,000,¹⁰³ the jurisdictional limit for small tax cases at the time of this study. Consequently, transferability of small-case procedure to other contexts could have radical implications for the practice of litigation and the role of lawyers in it.

My speculations about why the small-case procedure in the Tax Court facilitates pro se litigation so much more effectively than do small claims courts in analogous circumstances suggest that transferring the small-case procedure to other contexts will be difficult. The Tax Court petitioner's dispute posture is a unique blend of the attributes of a plaintiff and a defendant, not readily reproducible in an ordinary civil suit, especially in the collection suits that dominate the dockets of small claims courts. At a minimum, pro se defendants in collection suits would need some substitute for the instruction small-case litigants receive through the statutory deficiency notice and in meetings with auditors and other IRS officials.¹⁰⁴ Small claims court could be usefully reformed in that direction with an often-suggested but rarely implemented practice—having lay advocates assist pro se litigants.¹⁰⁵

Reproducing the success of the small tax case procedure in other contexts

102. I would not be surprised to see bench decisions delivered principally in cases where the cooling out and legitimating functions of the small-case procedure cannot practically be achieved. This would include cases in which the taxpayer has petitioned the Tax Court largely to delay, motivated either by an instrumental desire to postpone the inevitable date of payment or by an ideologically based conviction to resist the tax system in every possible way (i.e., a tax protestor). The prevailing custom of written decisions would be reserved for taxpayers filing in Tax Court with a good-faith belief they might win.

103. Trubek et al., *supra* note 51, at 90.

104. As noted earlier, pro se plaintiffs already do reasonably well in small claims courts. Sources cited note 76 *supra* and accompanying text.

105. E.g., National Institute for Consumer Justice, *supra* note 3, at 19.

(such as small claims court) requires more money. Only with increased spending can judges afford to give the careful consideration to each case that characterizes small tax cases. I have speculated that substantial resources are devoted to small tax cases because the Tax Court and the IRS hope to cool out disgruntled taxpayers and legitimate the fairness of the tax system by establishing fair procedures. The beneficiaries of the current small claims court system, largely creditors seeking to collect debts, are also interested in cooling out their disgruntled customers. Even these private institutions must maintain a political legitimacy if they are to survive or to avoid undesired regulation of their activities.

In the present political climate it seems unlikely that creditor interests will seek to achieve these objectives by promoting viable pro se litigation mechanisms in small claims court. In the first place, the relationship between creditor institutions and the courts is not as close as that between the IRS and the Tax Court. Consequently creditor institutions have less reason to trust that the courts will share their more vital objectives and not subject them to extensive injury through adverse court decisions. Perhaps partly for this reason creditor institutions concerned with achieving cooling out and legitimation objectives through informal dispute-settlement institutions have turned mostly to mechanisms within their own companies or administered by a trade association or a Better Business Bureau.¹⁰⁶ Decisions reached this way are presumably more predictable than those of courts, where judges do not necessarily have a background in the credit business.¹⁰⁷ Second, there is little reason for creditor institutions to believe that they are presently facing a legitimacy crisis. The small tax case procedure has grown precisely as public confidence in the fairness of the tax system has seemed to decline.

Of course, even without the political support of creditor interests it would be possible for states and localities to increase the resources of small claims courts enough to make meaningful pro se litigation possible. The realities of interest-group politics, however, make such action seem unlikely. The beneficiaries of improved opportunities for pro se litigation are diffuse and not likely to match the influence of creditor interests in the legislative process.¹⁰⁸

106. The Better Business Bureaus of the country, affiliated generally with chambers of commerce, run many consumer complaint mediation and arbitration programs, and they receive a good deal of support, both financial and vocal, in these endeavors. Sometimes trade associations have established seemingly independent arbitration panels to hear consumer complaints, but with the industry retaining substantial authority over the appointment of panel members. A good example is the Major Appliance Consumer Action Panel (MACAP), which arbitrates complaints against cooperating appliance manufacturers. Quite often, large manufacturers establish internal complaint-handling divisions and advertise their existence. The message is that a company that welcomes complaints and sets up special procedures for handling them must be trying to deal fairly with its customers. See generally National Institute for Consumer Justice, Staff Studies on Business Sponsored Mechanism for Redress ([Washington, D.C.]: National Institute for Consumer Justice, n.d.); Whitford, *supra* note 73, at 1015-24.

107. See Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3.

108. The organized bar might also be expected to oppose vastly expanded opportunities for pro se litigation of civil cases, given the implications such a development could have on the financial interests of many attorneys.

Moreover, the small-case procedure works so well partly because the IRS refrains from reaping the short-run advantages of taking a highly adversarial stance against an unrepresented opponent. I have speculated that the IRS behaves this way to gain the more fundamental benefits (legitimacy, etc.) available if the dispute-settling mechanism is perceived to be fair. If creditors do not feel the need to gain these more general benefits through nurturing pro se dispute-settlement mechanisms, the judges of small claims courts might have to restrain creditor adversarialness in order to make the system work. Given the will, judges have the power to do so. They can, as examples, overrule objections to the relevancy of evidence or to the mixing of argument and evidence; they can insist on reviewing any proposed settlement to ensure its fairness to the pro se litigant. But such actions are often perceived as inconsistent with the traditional expectation that judges will be neutral and passive, evaluating cases on the basis of the information brought to them. For this reason also, therefore, one can doubt that the success of small tax case procedure will be reproduced in courts of more general jurisdiction.

Review Section

Edited by Howard S. Erlanger

REVIEW ESSAYS

- Rebecca Dresser
**Respecting and Protecting Nonhuman Animals: Regan's
*The Case for Animal Rights*** 831
- Hendrik Hartog
The Politics of *The Politics of Law* 851
- Steven Spitzer
**The Embeddedness of Law: Reflections on Lukes and Scull's
*Durkheim and the Law*** 859
- Richard McGahey
**Crime, Criminal Justice, and Economics: Phillips & Votey,
Schmidt & Witte** 869
- John A. Flood
Saints and Sinners: On Gandhi's *Lawyers and Touts* 889

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