which they did not have a "reasonable, good faith" belief that the positions would prevail on audit or in litigation. In the summer of 2007, Congress went a step further. While leaving the standards for taxpayers the same, it enacted legislation precluding attorneys and other tax preparers from advising clients to take positions on their returns unless the advisers believed that it was "more likely than not" that the positions would be sustained on audit or in litigation.

The efforts of Congress and OPR to control the tax bar through the imposition of ever stricter standards of tax practice are highly controversial at the moment, and further developments will no doubt be forthcoming.

2. Tax proceedings, administrative and judicial review, collection proceedings

2.1. Tax examinations and administrative appeal procedures

The IRS employs a nationwide staff of tax examiners (Revenue Agents) who are located in the IRS Field Offices and who are responsible for selecting returns for audit and conducting examinations. Examinations can be conducted by telephone, by correspondence, by the taxpayer visiting the IRS or by the Revenue Agent making an onsite examination of the taxpayer. Revenue Agents have broad powers to request information from taxpayers and can, if necessary, seek enforcement of their requests by the United States Federal District Courts. Revenue Agents can also contact third parties seeking information about the taxpayer, but they must give the taxpayer reasonable notice before doing so. The IRS National Office maintains a large staff of specialists who are available to assist Revenue Agents in the performance of their examination functions.

At the conclusion of the Revenue Agent's examination, the Revenue Agent prepares a report generally called a Revenue Agent's Report (RAR or "30-Day-Letter"). If the taxpayer agrees with the RAR, he or she signs a document agreeing to the assessment of the deficiency and pays the tax. If the taxpayer does not agree with the RAR, he or she has 30 days (which may be extended upon request of the taxpayer) to file a "Protest" requesting that the case be heard by the IRS Appeals Office (an agency within the IRS staffed by IRS Appeals Officers located in the IRS Field Offices). While an examining agent is empowered to determine the relevant facts, he or she is bound to apply the law as enunciated by the legal staff of the IRS National Office. An Appeals Officer, by contrast, is empowered to take into account the "hazards of litigation," that is, the likelihood that the IRS position will prevail in litigation. Traditionally, the vast majority of cases that are not resolved at the examination level are resolved by negotiation between the taxpayer's representatives and the IRS Appeals Officer.

During the course of the consideration of a case by the IRS, taxpayers have access to a number of additional dispute resolution mechanisms. On the formal side, the taxpayer can request that the Revenue Agent or Appeals Officer seek "technical advice" on issues of tax law from the IRS National Office. On the informal side, the taxpayer can frequently request mediation or arbitration, in which case trained mediators or arbitrators will be brought in to help obtain a resolution of the case acceptable to both the IRS and the taxpayer.

Congress has enacted two legislative reforms together known as the Taxpayers' Bill of Rights and the Internal Revenue Service has promulgated its own Declaration of Taxpayer Rights. The IRS Declaration sets out the following broad guidelines governing all IRS employees in their dealings with taxpayers:

- IRS employees will explain and protect each taxpayer's rights throughout his or her contact with the IRS.
- Each taxpayer has the right to know why the IRS is requesting information from him or her. The IRS will not disclose to anyone the information that a taxpayer submits to the IRS.
- A taxpayer who believes that an IRS employee has not treated him or her in a professional, fair, and courteous manner should tell that employee's supervisor and, if necessary, should write to the IRS area director.
- A taxpayer may represent himself or herself or may have someone else represent him or her.
- A taxpayer is responsible for paying only the correct amount of tax due under the law – no more, no less.
- The Taxpayer Advocate Service (a special agency within the IRS) can help a taxpayer if he or she has tried unsuccessfully to resolve a problem with the IRS.

- A taxpayer has the right to ask the Appeals Office to review his or her case if he or she disagrees with the Revenue Agent about the amount of the tax liability or the methods of collection.
- The IRS will waive penalties when allowed by law if the taxpayer can show he or she acted in good faith or relied on the incorrect advice of an IRS employee.

2.2. Judicial review of Statutory Notices

If a taxpayer and the IRS are unable to resolve an income, estate or gift tax case within the IRS, the IRS issues a Statutory Notice of Deficiency (a Statutory Notice or "90-Day Letter") setting forth the amount of tax due. The taxpayer has 90 days from the issuance of the Statutory Notice in which to file a petition with the United States Tax Court seeking review of the IRS' determinations. The 90-day period for filing a petition in the Tax Court is jurisdictional and cannot be extended under any circumstances.

The Tax Court is a specialized Federal trial court with nationwide jurisdiction dealing solely with Federal tax matters. It is headquartered in Washington, DC, but holds trial sessions in major cities throughout the country. The Tax Court is the only court in which a taxpayer can obtain judicial review of a deficiency asserted by the IRS without first paying the disputed tax. The Tax Court issues formal opinions in every case it decides, although it distinguishes between "published" opinions (in cases which involve novel issues of law) and "memorandum" opinions (in cases which involve only the application of established law to a particular set of facts). Both types of opinions are readily available to the public.

In addition to the Tax Court, a taxpayer has access to three other trial-level courts in which to litigate a case that has not been resolved within the IRS: the United States Court of Federal Claims (a specialized Federal trial court dealing solely with claims against the Federal government, including claims for tax refunds), the appropriate United States Federal District Court (the Federal trial court with general jurisdiction over the taxpayer based upon his or her place of residence) and the appropriate United States Bankruptcy Court. The Federal District Courts, unlike the Tax Court or the Claims Court, give the taxpayer (or the IRS) the option of requesting a jury trial.

With limited exceptions, the taxpayer has an automatic right of appeal from the decision of the Tax Court, the Claims Court or the Federal District Court to the United States Court of Appeals. Appeals from the Tax Court and the Federal District Courts go to the Federal Court of Appeals for the Federal judicial circuit in which the taxpayer resides; appeals from the Claims Court go to the Court of Appeals for the Federal Circuit. Decisions of the United States Courts of Appeals can be appealed to the United States Supreme Court, but there is no automatic right of appeal unless a constitutional issue is involved, and the Supreme Court agrees to accept only a small number of non-constitutional tax cases each year.

2.2.1. Suspension of enforcement

As noted above, the taxpayer is not required to pay the disputed tax in order to seek review by the Tax Court. So long as the taxpayer files a timely petition to the Tax Court, the IRS is barred from assessing and collecting the disputed tax until the final resolution of the case (whether in the Tax Court or on appeal). By contrast, a taxpayer who wishes to litigate in the Claims Court or the appropriate Federal District Court must first pay the disputed tax and then seek a refund from the IRS.

2.2.2. Burden of proof

From a procedural point of view, the taxpayer is the plaintiff in any of the available tax tribunals and, as plaintiff, bears the burden of proving that the IRS' determinations are erroneous. In 1998, however, Congress added a new provision to the Code that shifts the burden of proof to the government under certain circumstances. Under this new rule, the burden of proof with respect to any factual issue relevant to the determination of the taxpayer's correct tax liability shifts to the IRS if:

- the taxpayer introduces credible evidence with respect to the factual issue;
- the taxpayer has complied with any statutory requirements with regard to the proper substantiation of the factual issue; and
- the taxpayer has maintained all records required to be maintained by the Code and has cooperated with reasonable requests from the IRS for witnesses, information, documents, meetings, and interviews.

2.2.3. Procedural rules and appellate courts' review

All of the courts in which a taxpayer may dispute the tax determined by the IRS in a Statutory Notice are Federal courts subject to Federal rules of evidence, civil procedure and other matters. Under general principles of U.S. civil procedure, which apply equally to tax matters, the determination of a trial court with respect to purely factual matters will be overturned by an appellate court only if "clearly erroneous." On the other hand, most legal issues are reviewed by the appellate court *"de novo"* – that is, without particular deference to the trial court.

2.2.4. Costs

The Federal courts generally follow the rule that each party to a court proceeding pays its own expenses, including attorneys' fees. The Code does, however, require the IRS to pay the reasonable litigating costs of the taxpayer (including limited amounts of attorneys' fees) in limited circumstances where the taxpayer has "substantially prevailed" in the litigation and the IRS cannot establish that its position in the litigation was "substantially justified." As a practical matter, however, it is rare for a Court to award costs and attorneys in tax litigation.

2.3. Collection due process

In general, the IRS assesses income taxes when it receives returns from taxpayers showing the amounts of taxes due. Except in response to such taxpayer's "self-assessment," the IRS is not entitled to assess income taxes without either obtaining the taxpayer's consent (including the "self-assessment; or issuing a Statutory Notice setting out the proposed assessment. If the taxpayer contests the Statutory Notice by filing a timely petition in the Tax Court, the IRS cannot assess the disputed tax until the conclusion of the judicial proceedings. Once the IRS has obtained the taxpayer's consent, or the time for filing a Tax Court petition has expired, or the Tax Court proceeding has run its course, however, the IRS can assess. Once tax is assessed, the IRS can collect the tax at any time over a period of ten years. Traditionally, the IRS has very broad powers to collect taxes due by any legal means, including direct seizure, levy by judicial procedures and other means. In the collection context, unlike the regular audit process, the IRS can also seek information and assistance from third parties without consulting the taxpayer.

While the IRS is entitled to collect taxes immediately and by any legal means, the IRS has established a number of procedures intended to assure the full payment of taxes owed even if payment is delayed. Thus, for example, the IRS can agree to defer payment of overdue taxes or enter into installment agreements under which taxpayers pay their overdue taxes in installments over a period of years. Moreover, the IRS has the authority to entertain and accept offers in compromise under which the taxpayer agrees to pay a portion of the tax due in exchange for release from any further liability. The following are the grounds on which the IRS can agree to an offer in compromise:

- doubt as to liability – meaning doubt that the tax was properly assessed, not doubt that the tax was properly computed;
- doubt as to collectability – meaning doubt that the taxpayer could ever pay the full amount of the liability; and
- promotion of effective tax administration – meaning that there are reasons of economic hardship or other special circumstances which may justify the IRS accepting less than the full amount of the liability.

There are a number of procedural restrictions on collection activities by the IRS, although generally taxpayers facing collection activities do not enjoy the same protections enjoyed by taxpayers undergoing tax examinations. In 1998, however, Congress became concerned over the broad powers of the IRS in collection matters and required the IRS to make Appeals Office consideration available in collection matters. Under the new Collection Due Process rules enacted in 1998, a taxpayer may at any time request consideration of a collection matter by the IRS Appeals Office under either of two different programs:

- Under the Collection Due Process (CDP) program, a taxpayer who has received a Notice of Federal Tax Lien or who is (or is about to be) subjected to a first tax levy (i.e., seizure) may request a CDP Hearing with the IRS Appeals Office. If the taxpayer does not agree with the ultimate determination of the Appeals Office, he or she may appeal to the Tax Court.
- Under the Collection Appeals Program (CAP), a taxpayer may request a hearing with the IRS Appeals Office on a broader range of

matters than under the CDP program but is not entitled to appeal the ultimate determination of the Appeals Office.

Traditionally, the IRS is the sole body entitled to collect Federal taxes. In recent years, however, Congress has enacted legislation permitting the IRS to employ private collection agencies to conduct certain collection activities. The resulting Federal private tax collection program has become politically controversial and may not survive.

3. Statute of limitations

Generally speaking, the statute of limitations on tax claims is three years from the date of the filing of the return (or, if later, the due date of the return without extensions). The general rule applies both to the IRS and to the taxpayer; that is, the IRS must issue a Statutory Notice within the three-year limitations period and the taxpayer must file a claim for refund with the IRS within the three-year limitations period.

The Code provides for a longer statute of limitations on Statutory Notices in several circumstances, two of which are particularly notable:

- the IRS has six years, rather than three years, in which to issue a Statutory Notice if the taxpayer files a return on which he or she fails to report an amount of gross income equal to or greater than 25% of the gross income actually reported on the return;
- the IRS has an unlimited period of time in which to issue a Statutory Notice if the taxpayer files a return which is false or fraudulent or if the taxpayer does not file a return at all;
- special rules also apply in a number of other situations, such as when the taxpayer is outside the United States.

4. Tax refund

A taxpayer who believes that he or she has overpaid his or her tax may file a claim for refund with the IRS. A separate claim must be filed with respect to each taxable year. Each claim must include an explanation of each item of income, deduction or credit on which the claim for refund is based. A taxpayer must generally file a claim for refund within years from the date of filing of the original return or, if later, two years from the date of payment of the tax.