Disposing of Federal Litigation—Extra-Judicially

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DISPOSING OF FEDERAL TAX LITIGATION—
EXTRA-JUDICIALLY *

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The ancient hostility of the common law courts to extra-judicial settlements has long since disappeared. This antagonism grew out of the early rivalry between the Kings’ courts and private tribunals for judicial business. ¹ Before the Norman Conquest the local courts were scarcely more than arbitration tribunals, since submission to their jurisdiction was purely voluntary. ² Following the Conquest and the establishment of the Kings’ courts, and even after the contract was recognized, these common law courts manifested hostility to arbitration proceedings. ³ Apparently by virtue of simple inertia this antagonism persisted through the centuries, and it was not until 1856 that the House of Lords first held that contracting parties might validly bind themselves to resort to arbitration as a condition precedent to suit. ⁴

The American courts have so long and steadfastly championed compromise and arbitration ⁵ that these processes constitute a major factor in disposing of present-day litigation. And since so much of the business of the federal courts today arises out of the internal revenue laws, it is to be expected that the Government and individual taxpayers are resorting with undiminishing frequency to out-of-court settlements as a means of bringing their prolific controversies to rest.

Of no concern here are the various measures available to

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2. Page on Contracts, Sec. 2526; Pollock, English Law Before the Norman Conquest, 14 Law Quar. Rev. 291.
3. 5 C. J. 20.
a taxpayer for bringing to an end his dispute with the Bureau of Internal Revenue. Effective as those measures may be, they differ in many minor details and some important aspects from the processes through which a tax case under the jurisdiction of the Department of Justice may be disposed of extra-judicially.

By Executive Order tax litigation was, for the first time, brought under unified control and supervision some fifteen years ago. Since 1934 the Tax Division of the Department of Justice has represented the Government in the defense or prosecution of tax cases in all courts, except the Tax Court. While the functions of the Tax Division and of the Chief Counsel, Bureau of Internal Revenue, do not overlap, there is a considerable amount of collaboration between the two offices in conducting this important class of litigation. But as a former head of the Tax Division stated some years ago—

There is a large body of cases where litigation to the bitter end is unnecessary, where a conclusion fair to both parties may be reached through mutual concessions without benefit of the final authoritative voice of the court. In view of the inevitable complexity of the tax law, the uncertainty which is a necessary adjunct of that complexity, and the multitude of tax disputes which fill our court calendars, the desirability of there being readily available an administrative as opposed to a judicial process for the disposition of cases is clear.

This situation is equally true today; in fact, in the past decade

8. Appeals from the Tax Court are under the jurisdiction of the Tax Commission.
9. The organization and functions of the Tax Division, and its relationship to the Bureau, are described in Locke, Tax Division, 25 Taxes, Tax Magazine 305 (1947).
the proportion of cases disposed of administratively has increased some forty percent. 11 The importance of this administrative process has long been of great concern to the Department, with the result that today a separate section of the Tax Division specializes in this function.

Compromise Power and Procedure

The creation of the Tax Division in 1934 to handle the large volume of tax litigation placed under his charge soon offered the occasion for the Attorney General to declare that his power to compromise such matters—12

is a power, whether attaching to the office or conferred by statute or Executive order, to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts; nor does it end with the entry of judgment, but embraces execution.

While this is not the occasion to delimit the Attorney General's authority in this regard, suffice it to say that for many years the policies and practices which have been framed around that power have enabled him to dispose of thousands of cases that promised to be time-consuming and costly out of proportion to the prospects of success. For in practical tax litigation, as in other fields, the truism "a bird in the hand is worth two in the bush" is not a mere empty phrase.

Despite the scope of the Attorney General's compromise power, which is generally characterized as "plenary", "broad"

11. In the fiscal year ending July 1, 1947, slightly more than one-third of the civil cases disposed of by the Tax Division were settled out of court. Offers were considered in cases involving over $27,000,000. Annual Report of the Attorney General (1947).
12. 38 Op. A. G. 98, 102 (1934). Section 3761, Internal Revenue Code, is supplemental to and declaratory of that power.
or "untrammeled"; due consideration is given to the realities attending its application. For example, before action is taken on any proposal the Tax Division invariably solicits the views of the Bureau of Internal Revenue, which occupies a relationship to the Justice Department akin to that of client to attorney. It is not often that a firm recommendation by the Bureau will be overridden; much importance is attributed to the views of its experienced staff of attorneys, investigating agents, engineers and accountants.

Where other agencies of the Government are interested in the subject matter involved, the views of the appropriate offices also are invited before action is taken on compromise proposals. Thus, during recent months such requests have been made of the Army, the Navy, and the Labor Departments, the Federal Security Agency, and the General Accounting Office. And when the various United States Attorneys have become identified with cases in which offers are under consideration, or when their experience with the law or knowledge of local conditions might assist the Department in reaching the most informed decision, their views are solicited and carefully weighed.

Section 3777 of the Internal Revenue Code requires that refunds or credits of certain kinds of taxes in excess of $75,000 shall be reported to the Joint Committee on Internal Revenue Taxation thirty days prior to the making of such refunds or credits. While this provision expressly refers only to "the decision of the Commissioner [of Internal Revenue]", it has long been the practice of the Attorney General in accepting offers involving such refunds or credits to reserve the right to withdraw his approval in the event objection is raised by the Joint Committee. It should be noted that Section 3777 does not give the Joint Committee a veto power.

The question as to whether a matter not in litigation, and therefore not before the Attorney General in its own right,
may be included in the settlement of a case in litigation, has seldom been raised. Although the Attorney General has ruled that his power to compromise tax litigation embraces "any other matter germane to the case [before him which he] * * * may find it necessary or proper to consider before he invokes the aid of the courts", 16 no hard and fast rule of general application to such situations has been evolved. It has been suggested that if the principle or principles of law decisive of the compromise of an internal revenue case referred to the Department control the disposition of a similar case of the same taxpayer not so referred, it would be proper for the Attorney General to exercise jurisdiction over the latter case for settlement purposes. Another standard which has been considered is applicable only in compromises based on the taxpayer's inability to respond to the full liability, i. e., whether the payment in compromise of a case in litigation would jeopardize the collection of an additional claim against the same taxpayer pending in the Treasury Department.

Questions of jurisdiction to compromise as between the two Departments, however, have been largely academic. As a general rule proponents need not concern themselves on this score. In practice, questions of this nature are solved by severance of the offer in compromise into separate proposals, by the joint action of both Departments on the offer, or by similar arrangements.

Every settlement proposal acted on in the Tax Division is considered by at least six attorneys, including the Assistant Attorney General in charge of the Division. In cases of unusual importance or novelty the amount of review is even greater, but in no case is that review perfunctory in nature. Compromises involving funds exceeding $10,000, or involving collections of any amount in suits by the Government to collect over $50,000, are referred to the Attorney General for action. All other compromises are acted on finally by the Assistant Attorney General.

Upon his request at any stage in the consideration of an offer, taxpayer's counsel will be afforded the opportunity to discuss his proposal informally with one or more attorneys in the Tax Division. Generally, it is advisable to make such requests by letter to the Assistant Attorney General, but on

occasion impromptu discussions are held. Needless to say, on such occasions counsel for neither side is expected to disclose the details of his evidence, or even the full merits of his case. Frequently, however, a frank face-to-face exchange of views will result in the ultimate settlement of what might otherwise be lengthy and expensive litigation in which even the winner would gain little. 17 Similarly, the pretrial procedure in District Court cases, 18 which is now nearing its tenth anniversary, tends to encourage compromise.

Unlike the Bureau of Internal Revenue, the Tax Division has no field offices, and all of its work is done in Washington, except when its attorneys go to various parts of the country to try cases. However, much tax litigation, especially in the District Courts, is carried on in collaboration with the offices of the United States Attorneys, and compromise matters may be taken up with the latter in appropriate cases. Otherwise, these matters may be handled by corresponding directly with the Tax Division, so that no litigant need feel that he necessarily must come to Washington in order to obtain the complete advantages of the compromise machinery.

It is readily apparent from a recital of the steps through which an offer proceeds to final action 19 that this procedure is time-consuming. Considering the delays and other vexations often attendant on litigation, however, the compromise route does not suffer by comparison. Too, the Tax Division is prepared to meet all reasonable deadlines imposed by the proponents or the courts. But whenever it is practicable it is well to submit offers at such a stage that time is afforded to process them normally. In short, it is logical to regard the time consumed in the various compromise steps as a safeguard consistent with the substitution of administrative judgment for that of the court.

Compromise Standards

There is no precise formula for determining whether in a given case the Attorney General may properly exercise his

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19. These steps are graphically illustrated in Locke, supra, note 17, p. 312.
power to compromise. There are, however, two primary standards applicable to civil cases; one relates to the merits and the other to the taxpayer's financial condition. For example, if there is a reasonable doubt as to legal liability or as to collectibility, the case normally will be considered a proper one for compromise. On the other hand, where there is no bona fide doubt as to the merits and the taxpayer cannot establish that he is unable to pay the full liability, compromise is foreclosed as a general rule.

Where collectibility is in issue the Tax Division requests the Bureau of Internal Revenue to conduct an investigation of the taxpayer's financial condition. In such cases the taxpayer is normally required to submit a sworn statement of his assets and liabilities and this forms the starting point of the investigation. As a general rule, the results of the investigation determine the disposition to be made of the offer. In some cases of this nature the views of the United States Attorney are invited, especially where his familiarity with local conditions is material, or where he has taken an active part in the litigation.

In compromises based upon the taxpayer's inability to pay the full liability the general practice is to accept an amount equivalent to the present forced-sale value of the taxpayer's property within the Government's reach. There are exceptions in those cases in which the Department has reason to conclude that the taxpayer might be concealing property or otherwise is not acting in good faith. As a general rule an offer will not be rejected merely because of a possibility that the taxpayer's property might increase in value in the future; however, the proponent's estimated financial condition at the end of anticipated litigation has been considered as a determining factor.

When a proposal of this type is acceptable in other re-

20. Treasury Form 433, or its equivalent.
21. In a recent case the proponent submitted an elaborate statement of assets and liabilities on Treasury Form 433. The offer was receiving favorable consideration until it was noted that in an inconspicuous part of the form the taxpayer had written that his statement of assets "is subject to any additions or subtractions that any examination may show." The offer was summarily rejected.
pects, installment payments sometimes are approved. In such cases offers containing interest and default clauses similar to those found in Treasury Form 656-C are required. Also, where appropriate, provision is made for collateral to insure full payment.

Many taxpayers, relying on the Attorney General's power to compromise "to prevent flagrant injustice," urge approval of their proposals on the ground of inequity or hardship. Settlements based solely on this ground are rare. The taking of private wealth for public use results in a certain degree of hardship in numerous instances. But obviously a process of so wide and vital an application does not ordinarily bring about injustice; seldom is the injustice flagrant.

One illustration of "flagrant injustice" as the basis for a compromise is the general type of situation now covered by Section 3801 of the Internal Revenue Code. Before the antecedent of that statute was enacted in 1938, compromises were effected which closely resembled the relief it affords.

It should be noted that the Attorney General's compromise power "is to be resorted to only to promote the Government's best interests or to prevent flagrant injustice." The prevention of flagrant injustice generally serves also to promote the Government's best interests in one way or another, as, for example, situations in which the enforced collection of the full liability would close down a business which employs a large number of persons, some of whom thereupon would become charges on the community. Former Solicitor General Lehmann might well have had such situations in mind when he is reputed to have said, "The Government wins whenever justice is done a citizen."

In considering compromises in which equity is relied upon by the proponents, the Department recognizes that the courts generally do not favor technical defenses interposed.

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22. An example of the type of settlement that both the Treasury and Justice Departments approve in a collectibility case is found in Carlisle Tire & Rubber Co. v. Commissioner (C. C. A.-3d), 1948 C. C. H., par 9318.
24. A number of compromises were approved after the Supreme Court's decision in Helvering v. Butterworth, 290 U. S. 365 (1933); otherwise, in many of these situations both the widow and the trustee would have been taxed on the same income.
25. Supra, note 23.
by the Government which would unjustly enrich the sovereign at the expense of the taxpayer. A taxpayer's suit for recovery of taxes paid, though a statutory procedure demanding a certain strictness in compliance with legislative provisions, is nevertheless a suit for money had and received and is governed by equitable principles. When confronted with situations in which the Government should not in good conscience be entitled to retain money it has collected, the Department sometimes is induced to compromise by the realization that "hard cases make bad law." Considered in this light it will be seen that some settlements based on the prevention of flagrant injustice are in fact grounded on a bona fide doubt as to the merits.

In considering the question whether it would be proper to exercise the power to compromise in a given case the Tax Division resorts in appropriate cases to certain compromise policies of long standing. For example, where it would be to the Government's advantage in other cases to obtain a judicial determination of a legal question, the compromise offer sometimes will be rejected even though it might otherwise be considered a fair if not a generous proposal. Nominal or frivolous offers generally will be rejected, as will offers submitted by fugitives from justice, and by persons who have misrepresented facts or otherwise conducted themselves improperly in negotiating with the Government's representatives. Proposals which obviously constitute "fishing expeditions", or which are designed merely to delay litigation, are not favorably considered. For example, in one case the taxpayer submitted seven offers, none of which was acceptable. Offers which are based entirely on the nuisance value of the proponent's case are similarly treated. While the Tax Division sometimes considers the Government's expense of litigation as a ground for settlement, cases in which this is the sole

28. An example of the lengths to which the courts sometimes go to sweep aside bars to recovery of admitted overpayments is found in Roe v. United States (C. Cls.), 1948 C. C. H., par. 9283. "Every good doctrine or principle of law has sometimes been unduly stretched to encompass injustice." Magruder v. Safe Deposit & Trust Co., 169 F. 2d 913, 917 (C. C. A. 4th, 1947).
basis for acceptance are rare and in such instances the anticipated expense of litigation is disproportionate to the amount involved. As a general rule the taxpayer's court costs are not included in amounts paid out pursuant to a settlement. And the Division does not favor proposals requiring the entry of stipulated judgments.

Criminal Cases

By express provision of Section 3761 of the Internal Revenue Code the Attorney General "may compromise any civil or criminal case arising under the internal revenue laws * * * after reference to the Department of Justice for prosecution or defense." It is clear that this authority is broad enough to include both civil and criminal features of a case even though only one phase of the case has been referred to the Department.29

The exercise of the authority to compromise criminal liabilities in tax cases has been restricted by reason of this policy. The keynote of this policy is that prosecution in such cases is not approved by the Department unless it concludes that the proposed defendant is guilty and that there is a reasonable probability of obtaining a conviction. If no prosecution is to be undertaken, the case is referred back to the Bureau of Internal Revenue, without action on any offer that might be pending. On the other hand, if the Tax Division concludes that the case is an appropriate one for prosecution, it cannot be compromised solely in consideration for the payment of money alone. Many such cases may be disposed of by a plea of guilty 30 to one or more counts of the indictment, 31 and by the payment of the full civil liability for taxes, penalties and interest, or such part of the full liability as the defendant's financial condition will permit. This method of disposing of the case is classed as a compromise; 32 it requires

30. As a general policy the Department will not approve a compromise calling for a plea of nolo contendere. Entry of such a plea is subject to the consent of the court. Rule 11, Federal Rules of Criminal Procedure.
31. Under Rule 48, Federal Rules of Criminal Procedure, the court has discretion to approve the dismissal of indictments. In this respect the compromising of criminal cases by a plea to only one count is subject to the court's control.
the same approval by the Department as any other offer in settlement.

In disposing of the civil and criminal features in this manner no amount in excess of the full civil liability for taxes, penalties and interest will be accepted. In such cases the taxpayer may be afforded a reasonable opportunity to demonstrate that the amount determined by the Bureau of Internal Revenue is excessive. In general, the same standards are applied to the determination of the adequacy of the amounts offered as are applied in civil cases having no related criminal features; the taxpayer's financial condition is carefully considered.

In compromising criminal tax cases the Tax Division invariably declines to include any provisions with respect to recommendations as to severity or leniency of punishment. The policy of not making recommendations with respect to sentence in criminal tax cases is of long standing. On the other hand, the general policy in accepting offers involving pleas of guilty is to so condition the acceptance that the Government may make a statement of facts to the court at the time of entry of the plea. Normally such statements, if the Department chooses to make them, are drafted in the Tax Division and transmitted to the United States Attorney for submission to the court.

The Tax Division undertakes criminal prosecutions in tax cases upon the recommendation of the Commissioner of Internal Revenue. Before a case has been referred to the Department of Justice for prosecution it has undergone a painstaking process of investigation and legal analysis of both the factual and legal issues. At practically every stage full opportunity for a conference with the Government's representatives is afforded the taxpayer and his counsel. Conferences in the Tax Division are informal in character and counsel who have meritorious defenses owe it to their clients to present them to the Department of Justice notwithstanding all efforts made at earlier stages of the case. It is not the intent of the Government to entrap prospective defendants on such occasions, but the constitutional privilege against self-

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33. The steps through which a case passes up to the indictment stage are set forth in Wallace, Penalties and Prosecutions for Evasion of the Federal Income Tax, 1 Tax Law Review 329.
incrimination should be kept in mind by all those who take advantage of these opportunities to explain allegedly fraudulent items.\footnote{34. The protection of this privilege can be easily dissipated. See Weiner, A Note on the Privilege Against Self-Incrimination, 6 Fed. Bar J. 442, 444-445 (1945).}

It is well to make requests for conferences in the Tax Division immediately after the cases have been referred out of the Bureau of Internal Revenue. Such requests invariably are granted, when timely made; dilatory tactics are not countenanced by the Department.

Obviously, there is a close relationship between the disposition of offers in compromise and the Department’s prosecution policy in criminal tax cases. Many elements enter into the determination of whether in a given case there is both guilt and a reasonable probability of conviction.\footnote{35. A number of articles have been published on this general subject recently. Avakian, Fraud in Federal Income Tax Returns, 21 Cal. Bar J. 430 (1946); Gutkin, Tax Law Violations and Enforcement, the Handling of Penalty Cases, Sixth Annual Institute on Federal Taxation, New York University, 189 (1948); Platt, Fraud in Tax Cases, 6 Ohio Certified Public Accountant, No. 4; Wallace, supra, note 33.} Despite the screening process through which cases referred to the Department for prosecution have undergone in the Bureau of Internal Revenue, each one is carefully analyzed anew in the Tax Division. Frequently the views of the United States Attorneys are invited before the decision with respect to prosecution is reached. In some cases the Bureau of Internal Revenue is requested to conduct further investigations of particular items or transactions prior to the making of a final conclusion.

It should be borne in mind that disposing of the criminal features of a case does not preclude the assertion of civil penalties arising out of the same transactions. This is true since neither acquittal nor conviction in the criminal case is \textit{res judicata} with respect to the civil phase.\footnote{36. Commissioner \textit{v.} Mitchell, 303 U. S. 391 (1937); Hanby \textit{v.} Commissioner, 67 F. 2d 125 (C. C. A. 4th, 1933).} The converse also holds,\footnote{37. Spies \textit{v.} United States, 317 U. S. 492 (1942); Slick \textit{v.} United States, 1 F. 2d (C. C. A. 7th, 1924).} but as a practical matter the Bureau of Internal Revenue rarely asserts the civil liability until the criminal feature of the case has been concluded.

Frequently the prospective defendants in criminal tax
cases, being unable to undermine the Government's charges on the merits, urge a variety of reasons why the Department should either compromise or decline to prosecute. In recent years, many taxpayers have relied upon voluntary disclosure as a bar to prosecution. Originally promulgated in 1934, the policy that "the man who makes a disclosure before investiga-
tion is under way protects himself and his family from the stigma of a felony conviction" 38 has been reiterated from time to time by high Treasury Department officials. Much has been written on this subject. 39 Suffice it to say here that in the final analysis the policy constitutes a self-imposed administrative limitation on the part of the Treasury Department. But whatever the effect a voluntary disclosure might have on a case pending in the Bureau of Internal Revenue, that defense apparently is rendered impotent when the case is referred to the Department of Justice. 40

Mention should be made of what might appropriately be called "imponderables" in connection with criminal cases. Frequently counsel contend that a case should be compromised, or not prosecuted, because the taxpayer has no criminal record, because he has a large number of dependents, because his incarceration would close his business and put a number of people out of employment, because he is ill, and so on. A few, such as black market operators, even argue that tax evasion was merely incidental to another crime committed by the taxpayer. 41 The only proper way in which

41. Cf. Summerill Tubing Co. v. Commissioner, 36 B. T. A. 347 (1937), concerning the imposition of civil penalties in such a situation. If the other crime were embezzlement or theft of the money upon which the tax evasion is based, the latter charge apparently could not be maintained in view of Wilcox v. Commissioner, 327 U. S. 4040 (1945). But cf. Akers v. Scofield, 167 F. 2d 718 (C. C. A. 1st, 1948), holding that proceeds of a swindle are income.
such matters may be considered while the question of prosecution is pending in the Department is to attempt to evaluate their effect on the probability of obtaining a conviction. If it is concluded that they might influence a court or jury to such an extent that there is not a reasonable probability of conviction, then these "imponderables" are given some weight, to be considered with all the other circumstances. On the other hand, if it is concluded that irrespective of these matters there is a reasonable probability of conviction, the "imponderables" are left to the court to be considered when and if sentence is imposed.

It is sometimes contended before the Tax Division that a case should be compromised or not prosecuted since tax evasion is malum prohibitum 42 and not malum in se. However, this argument has not been effective in forestalling prosecution, although seemingly some courts have been influenced by it in passing sentence. Be that as it may, during the first four months of 1948 prison sentences, varying from three year to thirty days, were imposed in more than one-third of the approximately one hundred cases presented to the courts during that period.

Where a plea of guilty has been entered pursuant to a compromise of civil and criminal liabilities, the courts apparently are not impressed by the argument that pleas entered under such circumstances do not justify the imposition of criminal penalties. The Court of Appeals for the Second Circuit has said that such a plea of guilty "is more than an extra-judicial confession; 'it is itself a conviction'"; the trial court's sentence of nine months' imprisonment was allowed to stand. 43

Fines imposed in criminal tax cases cannot be compromised. 44 Death of the fine debtor, however, abates the fine judgment. 45 Also, in meritorious instances a fine may be re-


mitted by the President; such matters are handled by the Pardon Attorney of the Department of Justice. And where a fine judgment clouds the title to land the Attorney General in meritorious cases, executes quitclaim releases of the judgment lien to third parties, in return for some consideration. 46

Form and Content of Offer

The Tax Division normally does not require any printed forms to be used in connection with offers in compromises of either civil or criminal cases under its jurisdiction; 47 however, there is no objection to the use of Treasury Forms 656 (Offer of Compromise) and 656-C (Offer in Compromise—Deferred Installment Payments). In rare cases, especially those in which installment offers are involved, certain provisions of the Treasury forms are incorporated in the proposals, at the Tax Division’s insistence. As a general rule, however, the Department’s only requirements are that the offer must be in writing, be definite and unambiguous, 48 and set forth clearly the proposed basis of compromise.

It is scarcely necessary to mention that Section 3762, Internal Revenue Code, imposes severe criminal penalties on any person who willfully conceals property or makes under oath any false statement of financial condition, in connection with any compromise under Section 3761. Even more drastic penalties are imposed by Section 35 (A) of the Criminal Code, the so-called “false statement” statute. These provisions should give pause to any person who has filed a fraudulent return, and who contemplates compromising his liabilities without revealing the fraud. He may find that in making such an attempt to compromise he has committed another crime. 49

Proponents should keep in mind the distinction between compromises effected under Section 3761 and closing agree-

47. Fed. Register No. 177, Par. II, Sec. 52.3, P. 108.
48. The difficulties that may result from an ambiguous offer are illustrated by Carlisle Tire & Rubber Co. v. Commissioner (C. C. A. 3d), 1948 C. C. H., par 9318.
ments entered into between taxpayers and the Commissioner of Internal Revenue under Section 3760. Since a closing agreement is purely statutory, the absence of consideration does not affect its conclusiveness. On the other hand, the rule as to compromises is different and invokes the law of contracts. By statute, a closing agreement procured through fraud, malfeasance or misrepresentation of a material fact is not binding on the parties. On the other hand, a compromise is subject to rescission on the grounds applicable to contracts generally. Thus, a compromise made under a mutual mistake of fact may be rescinded; and while the rule is generally announced that a mutual mistake of law will not afford relief from performance, there is some authority to the contrary. In practice, however, there has been surprisingly little litigation involving attempts by either the Government or taxpayers to set aside settlement agreements on the ground of a mutual mistake, but the courts do not hesitate to rescind when an adequate basis is presented. But ordinarily where substantial doubt has arisen as to the binding effect of settlement agreements negotiated by the Department, the parties have voluntarily abrogated the contract and either entered into a new one, or litigated the case.

The decisions are now unanimous in requiring that in order to effect a binding compromise of a tax case the provisions of Section 3761 must be strictly followed. As a practical matter, however, this requirement need be of no great


51. A compromise is a contract, and * * * requires * * * parties capable of making and authorized to make the contract, a subject matter, and a consideration." Big Diamond Mills Co. v. United States, 51 F. 2d 721, 724 (C. C. A. 8th, 1931).


concern to the proponents in cases pending before the Department since the statute merely provides that "the Attorney General may compromise any such case." On the other hand, there has been a considerable amount of litigation involving the binding effect of settlements entered into between taxpayers and various field officials of the Bureau of Internal Revenue. This is not surprising in view of the particularized wording of the statute authorizing the Treasury Department to compromise cases pending before it, and also in view of the great volume of cases handled by the decentralized offices of the Bureau.

Closing Out Cases

The form and method of payment of amounts offered in compromise of cases under the cognizance of the Tax Division differ somewhat from the procedure in matters pending before the Bureau of Internal Revenue. In cases in the former category payment should be made by cashier's or certified check, or money order, payable to the Treasurer of the United States, and transmitted directly to the Department. When the offer has been submitted to a United States Attorney, payment may be made to him. While payment in such cases may be made to the Collector, this is not the usual practice. In the ordinary case it is not necessary to tender the amount offered at the time the proposal is submitted to the Department. When checks accompany the offers they are kept in the Department, uncashed, until the offers are acted upon; checks covering accepted offers are sent to the Bureau of Internal Revenue, and those accompanying rejected offers are returned to the proponents.

The closing out of cases which have been settled presents few difficulties. If the compromise calls for repayment to the taxpayer the Bureau of Internal Revenue is authorized to make the refund; the taxpayer need not file a judgment claim. Refunds in such cases normally are made within sixty days after notice of acceptance of the offer has been given. By statute, interest on such refunds, where the compromise contemplates the payment of interest, is computed and paid up to

within thirty days of the date of the check, such date to be determined by the Commissioner. The General Accounting Office verifies that the recipients of the refunds are not indebted to the Government. When the refund checks have been issued in Washington they are transmitted to the appropriate collector for delivery to the taxpayer. Counsel holding a proper power of attorney can make arrangements with the collector to receive the check. Upon payment of the refund, the suit is dismissed upon the taxpayer's motion which meanwhile has been deposited in escrow in the United States Attorney's office.

Cases pending in the appellate courts at the time of compromise are closed out by stipulation, the form and content varying somewhat according to the different rules of court. The stipulation normally is prepared in the Tax Division and after it has been scrutinized by the Chief Counsel, Bureau of Internal Revenue, it is sent to the taxpayer's counsel for approval and filing in court.

Administrative Settlements

The Attorney General "may dismiss a suit or abandon defense at any stage when in his sound professional discretion it is meet and proper to do so." This authority is wholly distinct from his power to compromise, and should not be confused therewith. Whereas a compromise is based upon mutuality of consideration, there is no mutuality of consideration when the Department simply dismisses or abandons defense of a suit.

When the Tax Division does abandon defense of a taxpayer's suit for refund, a so-called "administrative settlement" results. Such a settlement is in recognition of the fact that the Government has no substantial defense to the taxpayer's claim. The result of the Government's abandonment of the defense is that the taxpayer gets virtually the same benefits he would have received had he won his case in court; a refund of all but the amount that is barred by limitations is made to him.

Recommendations for administrative settlements are processed in the Tax Division in the same manner as are compromise offers. However, the final decision to make an ad-

58. Section 3771 (b) (2), Internal Revenue Code.
ministrative settlement, irrespective of amount, normally rests with the Assistant Attorney General in charge of the Division. The views of the Bureau of Internal Revenue invariably are obtained before the defense of a suit is abandoned; where appropriate, the recommendation of the United States Attorney is sought. When the decision to make an administrative settlement has been reached the procedures employed in closing out compromise cases are followed.

Conclusion

From merely a casual consideration of the procedures employed by the Department of Justice in settling federal tax litigation it is readily apparent that there are inherent differences between those procedures and the methods normally resorted to by private parties in settling their controversies. One important distinction is that in the nature of things the Tax Division cannot make the offers; but it does maintain a receptive attitude toward any bona fide proposals to dispose of tax cases out of court.