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## **ALTERNATIVE DISPUTE RESOLUTIONS IN THE UNITED STATES ACROSS INTESRISCIPLINARY FIELDS OF LAW: CIVIL LAW (CIVIL AND COMMERCIAL LAW), TAX LAW, TAX FRAUD AND IMMIGRATION LAW<sup>1</sup>**

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**Sumario: I. ALTERNATIVE RESOLUTION OF CIVIL DISPUTES IN FLORIDA. 1. Dispute resolution alternatives available before litigation. 1.1. Negotiation. 1.2. Pursuit Mediation. 1.3. Arbitration. 2. Alternative Dispute resolution after commencement of litigation. 2.1. Negotiation. 2.2. Mediation. 2.3. Arbitration. II. ALTERNATIVE RESOLUTION OF MERCHANT DISPUTES. 1. Pre-Litigation Methods. 2. Once Litigation Commences. 3. The Court System. III. ALTERNATIVE DISPUTE RESOLUTION PROGRAMS BEFORE THE INTERNAL REVENUE SERVICE. 1. Appeal Process (Appeals Office) 1.1 Overview. 1.2. Jurisdiction of Appeals. 1.3. Early Referral Procedures. 1.4. The Collection Appeals Program. 2. Alternative Dispute Resolution Programs. 2.1. Mediation. 2.2. Arbitration. 2.3. Rapid Appeals Process. 2.4. Settlement Practices. 3. Technical Inquiries. 3.1. Revenue Ruling (IRS Tax Resolution). 3.2. Letters Private Rulings (equivalent to the tax inquiries). IV. TAX JURISDICTION. 1. Tax Court. 2. U.S. District Courts and the U.S. Court of Federal Claims. 3. Court of Federal Claims. V. TAX FRAUD. VI. IMMIGRATION LAW AND PROCEDURES. 1. Administrative Review. 2. Judicial Review**

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**RESUMEN:** El presente estudio tiene como finalidad realizar un análisis interdisciplinar sobre los Sistemas de RESOLUCIÓN ALTERNATIVA DE DISPUTAS legislados en Estados Unidos en distintos campos del Derecho.

En este trabajo se analizan los principales sistemas de resolución alternativa de conflictos, tanto en la fase previa a la vía Jurisdiccional como en la propia vía Jurisdiccional, en los siguientes campos del Ordenamiento Jurídico. A saber: Derecho Civil, derecho mercantil, Derecho Tributario, Delito Fiscal y Normativa sobre Inmigración, en particular deportaciones. Se apuesta por los sistemas ADR como fórmula que disminuye la litigiosidad, acelera la justicia, reduce la burocracia y ahorra costes.

**PALABRAS CLAVE:** sistemas de resolución alternativa de litigios, litigación, mediación, arbitraje, Private Ruling, Revenue Ruling, Procedure ruling, oficina de apelaciones, controversias mercantiles, Jurisdicción fiscal, Fraude fiscal, inmigración, cuestiones fiscales.

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**RESUM:** El present estudi té com a finalitat realitzar una anàlisi interdisciplinari sobre els sistemes de RESOLUCIÓ ALTERNATIVA DE DISPUTES legislades en els Estats Units en els diferents camps del Dret.

En aquest treball s'analitzen els principals sistemes de resolució de conflictes, tant en la fase prèvia a la via Jurisdiccional com en la pròpia via Jurisdiccional, en els següents camps del Ordenament Jurídic. A saber: Dret Civil, dret mercantil, Dret Tributari, Delicte Fiscal i Normativa sobre Immigració, en particular deportacions. S'aposta per els sistemes ADR com a fórmula que disminueix la litigiositat, accelera la justícia, redueix la burocràcia estalvia costos.

**PARAULES CLAU:** sistemes de resolució alternativa de litigis, litigació, mediació, arbitratge, Private Ruling, Revenue Ruling, Procedure ruling, oficina d'apel·lacions, controvèrsies mercantils, Jurisdicció fiscal, Frau fiscal, immigració, qüestions fiscals.

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**ABSTRACT:** This paper aims to make an interdisciplinary analysis of the Alternative Dispute Resolution (ADR) methods available in the United States. In this work, we study the main ADR in different areas of Law.

Also analyzed are the main alternative dispute resolution systems, both before submitting the cases to the courts and also within the courts, in the following fields of the legal system, namely: Civil Law, Commercial Law, Tax Law, Tax Crime and Immigration Regulations, including deportations.

This work explores the ADR systems as a way to decrease litigation, accelerate justice, reduce bureaucracy and save litigation costs.

**KEY WORDS:** Alternative Dispute Resolution, Litigation, mediation, arbitration, Private Ruling, Revenue Ruling, Procedure ruling, appeals office, merchant disputes, Tax jurisdiction, tax fraud, Immigration, tax matters.

## INTRODUCTION

Conflicts in the different areas of law may be caused by different factors. In the civil area they are mainly caused by misbehavior of the parties, mistakes or differences in the conception of what is right or wrong, lack of communication between the parties, or lack of information among others.<sup>2</sup> In the fiscal area, they are mainly caused by the opposing interests of the government to collect taxes in order to fund public activities and the tax payer's interest to pay only a fair amount of taxes according to his ability.

In most areas of law where conflicts arise, the parties have alternatives of resolution which allow them to avoid the costly and time consuming manner the courts of justice offer.

Besides that benefit, there are secondary but not less important advantages to these alternatives: as these methods are more flexible, they are less stressful, and have a lower psychological impact on the parties; because the potential harshness of a court proceeding might be avoided through these methods, the parties may be able to maintain their business relationship after the resolution of the dispute. Also, since they take less time to get resolved than a court case would normally take, parties who decide to use these methods can reduce the cost of being away from productive activity, as well as the cost of loss opportunities.<sup>3</sup> Lastly, these alternatives give the parties more control over the procedures and their outcome than the court proceedings would offer.<sup>4</sup>

For that reason, at the end of the 20<sup>th</sup> century, the legal landscape changed dramatically regarding the resolution of legal disputes, as "Courts began to offer procedures that served as alternatives to the then-default trial."<sup>5</sup> Indeed, "disputes are increasingly being transferred from court dockets to mediation, arbitration, or some other alternative dispute resolution ("ADR") procedure..."<sup>6</sup>

The use of these alternatives might keep increasing over time, not only because their satisfactory outcomes would make them keep gaining popularity, but also because in light of the advantages that they present, businessmen might increasingly require in their contracts the exhaustion of these methods before looking to the courts, as suggested by some jurists.<sup>7</sup>

Furthermore, the frequency in which these alternatives are used makes their study very important by lawyers in all disciplines. In this work we present the different alternatives to dispute resolution in civil, commercial, tax, and immigration law in the United States, with a special focus in Florida jurisdiction.

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<sup>2</sup> ABRAHAM P. ORDOVER, ALTERNATIVES TO LITIGATION 3 (1993).

<sup>3</sup> *Id.*

<sup>4</sup> Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 Ohio St. J. on Disp. Resol. 549 (2008).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Mike Christiansen, *Five Compelling Reasons To Build A Presuit Mediation Clause Into Your Business Contracts*, 84 Fla. Bar J. 44 (2010).

## I. ALTERNATIVE RESOLUTION OF CIVIL DISPUTES IN FLORIDA

Florida, as many other states within the United States, greatly favors alternative dispute resolution proceedings because they allow the litigants to resolve their disagreements in a faster and less expensive way, and because they significantly reduce the already crowded court dockets. Indeed, most civil claims in Florida are settled before litigation starts, and it is common practice of the Florida civil courts to order mandatory mediation to civil litigators at the beginning of a court case.

### 1. Dispute resolution alternatives available before litigation

The most common methods of alternative dispute resolution proceedings in Florida are: Negotiations, Mediations and Arbitration. These are applied to diverse areas of civil law, as family law, foreclosures, landlord and tenant, labor law, business, and torts, among others.

#### *1.1 Negotiation*

It is the most common form of alternative dispute resolution. Since it is a private activity between the parties, it usually a very informal process, in which there is little to none court intervention, and it is not tied to the formal rules of civil procedure.

Although the parties do not need to hire a lawyer for a negotiation, it is advisable to do so, and it is common practice to do so. When a lawyer is involved, he must evaluate the case, and establish with his client the minimum requirements to settle, as well as the kind and amount of information that the lawyer would be allowed to disclose during negotiations.<sup>8</sup> With that information, the lawyer can exchange concessions and finally reach a settlement agreement.

If the parties settle, their agreement would be enforceable as any other contract, which gives an extra assurance to the plaintiff because if the defendant breaches it, he can elect to sue for the original claim or for the breach of the agreement.<sup>9</sup> Nevertheless, as any other contract, the agreement may be challenged on grounds of fraud, duress, unconscionability, illegality, misrepresentation, lack of capacity, undue influence, mistake, or violation of public policy.<sup>10</sup> While the parties' interests might be better suited by settling their disputes during negotiations, plaintiff lawyers must be always mindful of the statute of limitation of their clients' claim, because commencement of negotiations does not prevent it from running.<sup>11</sup>

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<sup>8</sup> R. Regulating Fla. Bar 4-1.6(a).

<sup>9</sup> STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* 244 (2d ed. 2007).

<sup>10</sup> JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION* 62 (4th ed. 2013).

<sup>11</sup> *Id.*

## *1.2 Pursuit Mediation*

Florida is considered the leader in mediation in the United States.<sup>12</sup> However, this reputation does not result from voluntary pre-litigation mediation, but from the significant use of court-ordered mediation.

In Florida, mediation is defined as a “process whereby a neutral third person called mediator acts to encourage and facilitate the resolution of a dispute between two or more parties.”<sup>13</sup> “It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement.”<sup>14</sup> Although in a mediation proceeding the parties are not required to reach an agreement, if one is actually reached, it would be binding on the parties, with the same force of a contract.

## *1.3 Arbitration*

It is a “method of dispute resolution in which the parties submit a dispute to an impartial person who has been selected by the parties for a final and binding decision”, which object is to resolve the entire dispute out of court without the formality and expense of the judicial process.”<sup>15</sup>

Before commencement of litigation, “[t]he right or duty to arbitrate normally arises from an agreement to arbitrate future disputes or an agreement providing for the submission of an existing controversy to arbitration.”<sup>16</sup> The agreement should determine which issues would be decided in arbitration, the scope of the arbitrator’s power, as well as the substantive and procedural governing law.<sup>17</sup> In the absence of an agreement by the parties regarding matters related to the arbitration, the default rules of the Revised Florida Arbitration Code should apply. The default rules would also apply if the parties have agreed on a non-waivable provision as per the Code.<sup>18</sup>

According to the Revised Florida Arbitration Code, arbitration starts from the moment that a party to the agreement notifies the other of the arbitration commencement.<sup>19</sup> Then, the parties or the court which would have jurisdiction over the claim should appoint an arbitrator.<sup>20</sup> Once appointed, the arbitrator must schedule a hearing, giving notice to the parties at least 5 days

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<sup>12</sup> Lisa Bench Nieuwveld, *Florida Continues to Lead the Nation in Mediation*, 81 Fla. Bar J. 48 (2007).

<sup>13</sup> Fla. Stat. § 44.1011(2).

<sup>14</sup> *Id.*

<sup>15</sup> *United Steelworkers of Am. V. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960), noted in 1 GRENIG, ALTERNATIVE DISPUTE RESOLUTION 108 (Thomson West 3d ed. 2005).

<sup>16</sup> 1 Grenig *supra* at 148.

<sup>17</sup> *Id.* at 148-50.

<sup>18</sup> Fla. Stat. § 682.014.

<sup>19</sup> *Id.* at § 683.032.

<sup>20</sup> *Id.* at § 682.04.

before the hearing date.<sup>21</sup> Since this is a flexible proceeding, the arbitrator may permit the discovery he considers appropriate in view of the circumstances, as long as the parties are guaranteed to have the right to be heard, to present evidence, and to cross-examine witnesses.<sup>22</sup> The arbitrator can issue subpoenas for witnesses, request production of evidence, issue protective orders for privileged and confidential information, and permit the use of witnesses' depositions at the hearing. These orders can be enforced by the court which would have jurisdiction over the claim.<sup>23</sup>

Then, the arbitrator should make an award, within the time specified by the agreement, or by the court with jurisdiction over the claim.<sup>24</sup> This must include "such remedies as the arbitrator considers just and appropriate under the circumstances", provided that such an award is authorized by law in a civil action involving the same claim.<sup>25</sup> However, the award may be vacated if it was procured by corruption, or fraud, if the arbitrator was not impartial, committed misconduct, exceeded his powers, or there were substantial procedural flaws.<sup>26</sup> Lastly, the award may be corrected or modified upon the motion of a party in court within 90 days, if there is a mistake or imperfection in it which do not affect the merits.<sup>27</sup>

## **2. Alternative Dispute resolution after commencement of litigation**

### *2.1 Negotiation*

Parties in a civil dispute are encouraged by the civil judicial system to negotiate and settle their claims at any time after litigation commences. Indeed, the Florida Rules of Civil Procedure provide incentives to negotiation by way of sanctions to a party who has refused a settlement proposal when the final judgment is less favorable to him than the proposal.<sup>28</sup>

A civil judicial action commences when the plaintiff files his complaint in court. The plaintiff must serve defendant with process within 120 days, and once served, defendant would have 20 calendar to answer the complaint.<sup>29</sup> At any time after the lapse of the time to respond, the judge may order a pre-trial conference in which he will have the first opportunity to "pursuit the possibilities of settlement" between the parties.<sup>30</sup>

Additionally, the litigants can make proposals for settlement to their opposing party. Plaintiff, "no earlier than 90 days after service of process", and defendant "no earlier than 90 days after

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<sup>21</sup> *Id.* at § 682.06.

<sup>22</sup> *Id.* at § 682.08.

<sup>23</sup> Fla. Stat. § 682.08.

<sup>24</sup> Fla. Stat. § 682.09.

<sup>25</sup> *Id.* at § 682.11.

<sup>26</sup> *Id.* at § 682.13.

<sup>27</sup> *Id.* at § 682.14.

<sup>28</sup> Fla. R. Civ. P. 1.442(g).

<sup>29</sup> *Id.* at 1.070.

<sup>30</sup> *Id.* at 1.200.

the action has been commenced.”<sup>31</sup> But proposals cannot be served by any party to the other within 45 days before trial.<sup>32</sup> “A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal.”<sup>33</sup>

## 2.2 Mediation

Even though mediations are independent of the judicial system, Florida judges may order the parties to contested civil matter to attempt to resolve their dispute in a mediation or arbitration proceeding before continuing litigation.<sup>34</sup> And the parties can only require the judge to dispense of this requirement upon show of good cause, e.g. the dispute had previously been mediated, it presents a question of law, or it is prohibited.<sup>35</sup>

Although mediation is an informal and flexible process, some minimum procedures must be followed: The parties should appoint a mediator within 10 days of the order of referral, or the judge would appoint him.<sup>36</sup> The first mediation conference should start within 60 days from the court order.<sup>37</sup> Unless otherwise stipulated, 10 days before the first mediation conference, each party shall identify the person who will be attending mediation as a party representative and confirm that such person have full authority to settle.<sup>38</sup> “The mediator shall at all times be in control of the mediation and the procedures to be followed in the mediation.”<sup>39</sup> And he may meet and consult privately with any party or parties or their counsel.<sup>40</sup> And mediation shall be completed within 45 days of the first mediation conference.<sup>41</sup>

Mediations usually last from three to five hours. The parties share the mediator fee, whose fees are usually \$150 per hour.<sup>42</sup> But, if a party fails to appear at a mediation conference without good cause, he could be sanctioned by the court to pay costs, and both mediator and attorney’s fees.<sup>43</sup>

If during mediation, the parties cannot reach an agreement, the mediator must report the impasse to the court.<sup>44</sup> But, if an agreement is reached, the parties shall write the terms and sign on them, and the mediator shall report the agreement to the court.<sup>45</sup> Additionally, if any party breaches the agreement, the court is empowered to impose sanctions on him, “including

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<sup>31</sup> *Id.* at 1.442(b).

<sup>32</sup> *Id.*

<sup>33</sup> Fla. R. Civ. P. 1.442(f).

<sup>34</sup> *Id.* at 1.700(a).

<sup>35</sup> Fla. R. Civ. P. 1.700(b).

<sup>36</sup> *Id.* at 1.720(j).

<sup>37</sup> *Id.* at 1.700(a)(1).

<sup>38</sup> *Id.* at 1.720(e).

<sup>39</sup> *Id.* at 1.720(h).

<sup>40</sup> Fla. R. Civ. P. 1.720(i).

<sup>41</sup> *Id.* 1.710(a).

<sup>42</sup> 2 GRENIG, ALTERNATIVE DISPUTE RESOLUTION 118 (Thomson West 3d ed. 2005).

<sup>43</sup> Fla. R. Civ. P. 1.720(f).

<sup>44</sup> *Id.* 1.730(a).

<sup>45</sup> *Id.* 1.730(b).

costs, attorneys' fees, or other appropriate remedies including entry of judgment on the agreement."<sup>46</sup>

### 2.3 Arbitration

Even after litigation has commenced, the court can order the parties to submit to arbitration by way of enforcing a prior arbitration agreement between them which has not yet been satisfied.<sup>47</sup>

The court can also order arbitration when it is appropriate that the litigants attempt to arbitrate their disputes before continuing litigation, even if no prior agreement exists. In that case, the parties could move to get the court to dispense with arbitration upon showing of good cause.<sup>48</sup> The same rules apply for both types of arbitration, i.e. court-ordered and voluntary.

## II. ALTERNATIVE RESOLUTION OF MERCHANT DISPUTES

Commercial disputes in the United States are able to be resolved by both alternative dispute resolution methods as well as through traditional litigation just as with civil disputes. The alternative dispute resolution methods used in commercial disputes are mostly the same as are available in civil disputes with a few additional methods.

### 1. Pre-Litigation Methods:

Commercial disputes may be resolved before the formal litigation process through negotiation, mediation, and arbitration as in civil disputes. In addition to these methods Mini-Trial, and Private Judging are also available for commercial disputes.

Negotiation is the consensual bargaining process where the parties attempt to reach an agreement directly without the assistance of a third party.<sup>49</sup> In negotiation the parties experience a high degree of autonomy. Lawyers normally represent the parties during negotiations but they are not required. The parties themselves establish the norms of the negotiation.

Even though negotiations are generally private activities some commercial situations will require court approval before the settlement agreement becomes binding. These situations

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<sup>46</sup> *Id.* 1.730(c).

<sup>47</sup> Fla. Stat. § 682.03.

<sup>48</sup> Fla. R. Civ. P. 1.700(b).

<sup>49</sup> Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, 19, (West Publishing Company 4<sup>th</sup> ed. 2013).

include where public interests may be implicated such as antitrust, patent, or trademark cases.<sup>50</sup>

Mediation in commercial transaction is the same as in civil disputes. Mediation uses a specially trained third party to help the parties present their position and generate and evaluate options to resolve the dispute.<sup>51</sup> Mediation may also be done through lawyers representing the parties or the parties directly. Here the parties also choose the norms that will be followed in the proceeding. The mediator facilitates the communications and negotiations but the parties themselves reach agreement. The mediation agreement is also considered a contract and is enforced under the general principles of contract law and is usually drafted by the parties' lawyers.

In Florida, a civil action shall be ordered to mediation or mediation in conjunction with arbitration upon stipulation of the parties. See civil disputes above. A civil action may be ordered to mediation or mediation in conjunction with arbitration upon motion of any party or by the court, if the judge determines the action to be of such a nature that mediation could be of benefit to the litigants or the court. The following categories of actions cannot be referred to mediation:

- (1) Bond estreatures.
- (2) Habeas corpus and extraordinary writs.
- (3) Bond validations.
- (4) Civil or criminal contempt.
- (5) Other matters as may be specified by administrative order of the chief judge in the circuit.<sup>52</sup>

Arbitration is the most formal alternative to the litigation of disputes and is the preferred method used in the United States.<sup>53</sup> As in civil disputes, arbitration allows disputing parties to present their case to one or more impartial third persons who are empowered to render a binding decision. American arbitration practice is governed by the Federal Arbitration Act (FAA) and by individual state arbitration statutes.<sup>54</sup> Arbitration is usually a voluntary process and the Supreme Court has emphasized this principal.<sup>55</sup> Arbitration under the FAA is not compulsory unless the parties have agreed to arbitrate as part of a previous agreement.

The arbitration award is not self-executing.<sup>56</sup> A party must bring a motion to confirm the award and the appropriate court must confirm it before sanctions may be imposed for a party's failure to comply with it. If not satisfied with the award the parties have two options: refuse to comply with the award in which case the successful party must petition the court for

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<sup>50</sup> *Id.* at 64.

<sup>51</sup> *Id.* at 78.

<sup>52</sup> Fla.R.Civ.P. Rule 1.710

<sup>53</sup> Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, 161, (West Publishing Company 4th ed. 2013).

<sup>54</sup> Federal Arbitration Act, 9 U.S.C.A. § 9-10 (West 2002).

<sup>55</sup> *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, (1989).

<sup>56</sup> Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, 220, (West Publishing Company 4<sup>th</sup> ed. 2013).

confirmation of the award, or request that the appropriate court vacate the award or modify it. There are four grounds for vacating an award under the FAA:

1. Where the award was procured by corruption, fraud, or undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Case law also recognized additional limited grounds for vacating an arbitrators' award including "manifest disregard" of the law and public policy issues.<sup>57</sup>

Mini-Trial allows lawyers for each party to present the case to senior management representatives of each party to a commercial dispute and then the executives may negotiate directly or with a mediator based on the presentations. Parties are normally allowed to engage in limited discovery prior to the presentation. It is an attractive alternative for large corporations involved in commercial disputes with companies with whom they have long-standing and ongoing relationships that they wish to preserve.<sup>58</sup>

Private Judging permits cases to be referred to private judges.<sup>59</sup> The parties select and pay for the private judge who is often retired and in some states the decision has the force and effect of a trial court judgment. Private judging statutes in several states allow for juries to be impaneled and decisions to be appealed. In states without authorizing statutes parties do not have the right to appeal the decision to a state court nor are they assured of the enforceability of the decision reached.

## **2. Once Litigation Commences:**

When litigation has begun parties are still encouraged to settle disputes through any of the alternative dispute resolution methods. As with civil disputes, settlement can be reached at any point during litigation. Upon the commencement of litigation the same methods of dispute resolution can be used and sometimes mandated by the court. See Civil Disputes above.

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<sup>57</sup> *Id.* at 222.

<sup>58</sup> *Id.* at 29.

<sup>59</sup> Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, 277, (West Publishing Company 4<sup>th</sup> ed. 2013).

Commercial parties wishing to solve disputes through traditional litigation may do so through the civil justice system. The civil justice system in the United States is an adversarial, common law system in which a neutral third party normally a jury or a judge decides both questions of law and fact to reach a decision.<sup>60</sup> The civil lawsuit consists of three stages: pretrial, trial, and appeal. It is possible to settle a case informally at any stage of litigation including appeal because there is no obligation to complete the process of litigation once commenced.<sup>61</sup>

Court-Annexed Arbitration also known as judicial arbitration diverts specific categories of civil cases to mandatory arbitration.<sup>62</sup> This type of arbitration operates under the court's supervision. Litigants have the right to a trial de novo if they are not satisfied with the arbitrators' award. See Civil Disputes above.

Summary Jury Trial is a nonbinding process in which the lawyers of both parties present a brief synopsis of their case to a jury, which then renders a nonbinding, advisory decision.<sup>63</sup> It facilitates settlement by giving an assessment of what a jury might do in the case and may motivate parties to reach an agreement. This takes place after discovery has been substantially completed and pending motions have been resolved.

### **3. The Court System:**

There are two systems of courts in the US. The federal court system and the state court system. Either party to the dispute can bring a lawsuit. Both courts only hear real controversies; they do not give advisory opinions nor do they make rulings on hypothetical cases.<sup>64</sup> A court may only hear cases over which it has jurisdiction.

State courts have jurisdiction to hear almost any sort of dispute except those involving federal laws and issues.<sup>65</sup> The state court system includes the trial courts and appeals courts. Trial courts are courts of general jurisdiction. They find the facts, identify the appropriate law, and reach a decision in settlement of the dispute. The state appellate courts hear cases that have been appealed from trial court decisions or state administrative agency rulings. They review the proceedings of the trial court and correct legal errors made by the trial judge. Some states only have one appeals court usually called the supreme court of the state but the majority has two levels of appellate courts, court of appeals and supreme court of the state.

Federal courts hear cases that involve federal question or cases in which there is a diversity of citizenship between the parties.<sup>66</sup> Federal question involves cases in which a federal statute is involved or a violation of a right granted by the Constitution is at issue. Federal courts have

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<sup>60</sup> Lucile M. Ponte & Thomas D. Cavenagh, *Alternative Dispute Resolution in Business*, 6, (1999).

<sup>61</sup> *Id.* at 7.

<sup>62</sup> *Id.* at 173.

<sup>63</sup> *Id.* at 245.

<sup>64</sup> *Id.* at 31.

<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 33.

exclusive jurisdiction over issues pertaining to patents, copyrights, bankruptcy, crimes defined by federal statute, admiralty, tax law, and international trade. There are several specialized courts in the federal court system including the U.S. Court of International Trade, Tax Court, and U.S. Bankruptcy Court.

While litigation provides for a wide range of remedies, it is less consistent and more costly than the alternative dispute resolution methods.<sup>67</sup>

### **III. ALTERNATIVE DISPUTE RESOLUTION PROGRAMS BEFORE THE INTERNAL REVENUE SERVICE.**

#### **Background**

##### a) IRS's Power for Obtaining Information, Examination and Summons

Subtitle F, chapter 78 of the Code grants the IRS the basic authority to examine tax returns and determine taxpayers' liability. Under this authority the IRS is able to: (1) ascertain the correctness of any return; (2) make a return where none was made; (3) determine the liability of any person for any internal revenue tax; (4) collect any internal revenue tax liability. To accomplish these purposes, the IRS is specifically empowered: (1) to examine any books, papers, records or other data which may be relevant or material to the examination and (2) to summon a taxpayer or any other person having possession, custody or care of books, papers, records or other data of the taxpayer, to appear before the IRS for a hearing at a time and place named in the summons, and to introduce such books, papers, records or other data, and give testimony under oath, as may be relevant or material to the examination.

##### b) Penalties

Many penalties are imposed by the IRS. These include, for example, the delinquency penalty for failure to file a return; the accuracy related penalty, which includes among other things, negligent underpayment, substantial underpayment and valuation misstatement; the estimated penalty; and the fraud penalty.

Penalties may be imposed during the examination of returns. Examiners consider the law, facts, and circumstances in determining the disposition of all issues. If the records do not

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<sup>67</sup> Lucile M. Ponte & Thomas D. Cavenagh, Alternative Dispute Resolution in Business, 7, (1999).

support the taxpayers' position, the examiner will propose a change to the tax, and determine whether the taxpayer is liable for any penalties.

In this article we will discuss the three most important systems that the IRS offers to the taxpayer in order to reduce litigation:

## **1. Appeal Process (Appeals Office)**

### *1.1 Overview*

Appeals is the dispute resolution forum of the IRS. Its mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the IRS. Appeals seeks to accomplish this mission by considering protested cases, holding conferences, and negotiating settlements. Appeals generally is the last administrative opportunity for both the taxpayer and the IRS to resolve a dispute without litigation.

The appeals function is usually carried out by an Appeals Officer, although in large multi-issue cases more than one Appeals Technical Employee may be assigned. In general, the Appeals Technical Employee is charged with the responsibility of applying the tax laws reasonably and impartially in an effort to achieve the primary goal of settlement. The Appeals Technical Employee is specifically authorized to enter into settlement with a taxpayer based on the perceived hazards of litigation. Most cases taken to Appeals are resolved there.

### *1.2 Jurisdiction of Appeals*

Appeals' review of a taxpayers' case is neither automatic nor required. Rather a taxpayer must specifically request that its case be considered by Appeals. Appeals may consider two types of cases: non-docketed cases and, subject to certain limitations, docketed cases. In a non-docketed case, either the taxpayer has not yet received a statutory notice of deficiency or the 90-day period for filing a Tax Court petition has not yet expired. In a docketed case, on the other hand, the taxpayer has already filed a Tax Court petition in response to a statutory notice of deficiency.

Appeals has "exclusive and final" jurisdiction over a wide variety of matters, including:

- i. To determine a taxpayer's liability for income, estate, gift, employment and excise taxes;
- ii. To consider post-assessment penalty appeals;

- iii. To evaluate offers in compromise;
- iv. To consider abatement of interest request;
- v. To evaluate taxpayer request for administrative costs;
- vi. To consider jeopardy levies;
- vii. To make recommendations concerning settlement offers in refund suits;
- viii. To review letter dealing with the burden of proof in cases involving the unreasonable accumulation of earnings;
- ix. To analyze refund claims including Joint Committee cases;
- x. To act on overassessments in which a taxpayer appeals the decision, inter alia, of an Area Director or Director, Field Operations; and
- xi. To consider developed and unagreed issues raised during examination under the early referral procedures while Examination continues to develop other issues in the case.

Appeals, however, has no jurisdiction over a number of matters, including:

- i. To negotiate or make a settlement in a docketed case if the notice of deficiency was issued by Appeals itself;
- ii. To negotiate or make a settlement in a docketed case involving public inspection of a written determination or a declaratory judgment relating to certain governmental obligations;
- iii. To eliminate the fraud penalty for a year in which criminal prosecution for tax evasion or failure to file a return has been recommended;
- iv. To act in any case in which a recommendation for criminal prosecution is pending, except with the concurrence of counsel;
- v. To consider the initial or continuing recognition of tax exemption and charitable classification;
- vi. To determine liability for excise taxes on alcohol, tobacco or firearms;
- vii. To consider cases involving the failure or refusal to comply with the tax laws solely because of moral, religious, political, constitutional, conscientious, or similar grounds;
- viii. To resolve any case in which there is an overpayment of tax, including penalties, in excess of \$200,000;
- ix. To settle any case if the taxpayer has filed a petition in the bankruptcy court and has objected to the government's proof of claim and requested that the court determine tax liability.

### *1.3 Early Referral Procedures*

The Code provides that the Secretary must prescribe procedures by which any taxpayer may request an early referral of one or more unresolved issues from Examination or Collection to Appeals. Early referral is a process to resolve cases more expeditiously by Examination and

Appeals working simultaneously. This process is optional and may be requested by any taxpayer. The revenue procedure also describes the method by which a taxpayer may request early referral of one or more unagreed issues with respect to an involuntary change in method of accounting, employment tax, employee plans, or exempt organizations.

Appropriate issues for early referral are limited to those that: (1) if resolved, can reasonably be expected to result in a quicker resolution of the entire case; (2) both the taxpayer and Compliance agree should be referred to Appeals early, (3) are fully developed; and (4) are part of a case where the remaining issues are not expected to be completed before Appeals could resolve the early referral issue.

A request for early referral must be submitted in writing by the taxpayer to the case manager. In addition the early referral request and any supplemental submission, including additional documents, must include the following declaration: “Under penalties of perjury, I declare that I have examined this request including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.”

#### *1.4 The Collection Appeals Program*

In April 1996, the IRS initiated the Collection Appeals Program (CAP) to provide taxpayers with the right to appeal lien, levy and seizure actions. Following enactment of the Taxpayer Bill of Rights 2 on July 30, 1996, the program was expanded to allow taxpayers to appeal the proposed termination of installment agreements. The IRS Restructuring and Reform Act of 1998 further provided taxpayers the right to appeal the rejection of installment agreements.

##### *i. General Procedures*

Before Appeals consideration, the taxpayer must first discuss the particular problem with the IRS employee’s manager. If agreement cannot be reached at this stage, the taxpayer must notify the manager within two business days that a written appeal will be filed or the stay on collection will be lifted. The taxpayer must then file a written appeal using Form 9423, “Collection Appeal Request,” which is postmarked within three business days of the conference with the collection manager. Collection must then send the case to Appeals. It is not necessary that a copy of the entire file be sent to Appeals, and Collection and Appeals will decide, on a case by case basis, what portion of the file should be transmitted to Appeals.

Appeals is expected to close the case within five business days, and will attempt to hold conference with the taxpayer within two days of receipt of the case. A reasonable delay in holding the conference may be warranted but should not exceed five business days. Decisions by Appeals are generally binding on the taxpayer and the Collection function.

The 1998 IRS Restructuring Act required the IRS Commissioner, as part of the plan to reorganize the IRS, to ensure an independent Appeals function, including a prohibition on ex part communications between Appeals Technical Employees and other IRS employees to the extent such communications would appear to compromise the independence of an Appeal Technical Employee. Although, the Appeals Technical Employee does not act as an investigator or examining officer, he or she is not precluded from requesting additional information or evidence if deemed necessary.

#### ii. Period of Limitations

Appeals does not accept cases if less than 180 days remain on the statute for assessment or collection.

As a general matter, Appeals attempts to resolve small penalty cases within 90 days of receipt of the written protest. Largely penalty cases, and cases involving complex issues, however, usually require additional time to resolve. Appeals will also attempt to resolve post-assessment penalty cases within 90 days.

#### iii. Appeals Conferences

Appeals conferences are informal in nature in order to promote a frank discussion between the taxpayer and the Appeals Technical Employee concerning the facts and law at issue.

#### iv. Forms of protest

Generally, relief from penalties falls into four separate categories: (1) reasonable cause; (2) statutory exceptions; (3) administrative waivers; or correction of IRS error.

## **2. Alternative Dispute Resolution Programs**

### *2.1 Mediation*

#### a) General

The IRS's 1998 Announcement set forth procedure for voluntary, nonbinding mediation of factual issues under the Jurisdiction of Appeals, but only after good faith settlement

negotiations between the taxpayer and the Appeals officer proved to be unsuccessful. Mediation is an extension of the Appeals process and will enhance voluntary compliance. Mediation is a nonbinding process, and the mediator will help the parties reach their own negotiated settlement.

The taxpayer may request mediation if you are already in the appeals administrative process with any qualifying issues, and your case is not docketed in any court. If the taxpayer decides to pursue mediation, the first step in the process is to file a formal request for mediation with the Appeals Team Manager. Based on experience, the whole mediation process typically takes about 60-90 days.

Mediation is available:

- i. For legal issues;
- ii. For factual issues;
- iii. For Compliance Coordinated Issues or Appeals Coordinated Issues;
- iv. For an early referral issue when an agreement is not reached, provided the early referral issues meets the requirements for mediation;
- v. For issues for which the taxpayer intends to seek, but has not yet filed a request for, competent authority assistance; and
- vi. After unsuccessful attempts to enter into a closing agreement.

Cases or issues not eligible for mediation include:

- i. An issue that is designated for litigation or docketed in any court;
- ii. Collection cases;
- iii. An issue for which mediation would not be consistent with sound tax administration (for example, issues by controlling Supreme Court precedent);
- iv. A frivolous or groundless issue;
- v. A “whipsaw” issue;
- vi. An issue for which an adverse Technical Advice Memorandum has been issued to the taxpayer; and
- vii. A case where the taxpayer does not act in good faith during the settlement negotiations.

#### b) Fast Track Mediation in Pre-Appeals Cases

The IRS instituted a procedure, Fast Track Mediation (“FTM”), designed to resolve various kinds of factual disputes promptly. The goal of FTM is to help taxpayers resolve disputes arising in examination and collection source work without having to send the case to Appeals.

The taxpayer and the IRS representative must sign an agreement to mediate, Form - 13369, for the case to be considered for mediation. The taxpayers do not have to file a formal protest to request fast track mediation, but they must provide a written position with the request for mediation.

FTM has been generally available for non-docketed cases and collection source work within the jurisdiction; however FTM was not available for issues for which resolution would depend upon an assessment of the hazards of litigation and which required the FTM Appeals Official to use delegated settlement authority.

## *2.2 Arbitration*

The IRS in 2006 established a permanent program of binding arbitration for disputes of all sizes. Under the program, both the taxpayer and the IRS must agree to binding arbitration. Taxpayers may request binding arbitration for factual issues already in the Appeals administrative process (i.e., issues still unresolved at the end of Appeals procedures or after unsuccessful attempts to enter into a closing agreement).

To request arbitration, a taxpayer must send a written request to the appropriate Appeals Team Manager. The Appeals Team Manager will respond to the taxpayer generally within two weeks after receiving the request

Arbitration is available:

- i. Only for factual issues;
- ii. For factual issues for which a request for competent authority assistance has not been filed; and
- iii. For factual issues unresolved at the conclusion of unsuccessful attempts to enter into closing agreement.

Arbitration is not available for:

- i. Legal issues;
- ii. Cases in which arbitration is not appropriate under either 5 USC § 572 or § 575 (which provide the general authority and guidelines for the use of alternative dispute resolution in the administrative process);
- iii. Issues docketed in the court;
- iv. Issues in a taxpayer's case designated for litigation;
- v. Certain Compliance Coordinate Issues and Appeals Coordinated Issues;
- vi. Issues for which a request for competent authority assistance has been filed;
- vii. Collection cases;
- viii. Issues for which arbitration would not be consistent with sound tax administration;
- ix. "Whipsaw" cases;
- x. Frivolous cases; and
- xi. Cases in which the taxpayer did not act in good faith during Appeals settlement negotiations.

### 2.3 Rapid Appeals Process

In May 2014, the IRS established the Rapid Appeals Process (“RAP”). The RAP is an elective alternative dispute resolution method. It is available to taxpayers who appealed certain *Large Business & International* (“LB&I”) cases which are then assigned to an Appeals Team Case Leader (“ACTL”). Generally, all LB&I cases qualify for RAP.

If all parties agree to RAP, the LB&I pre-conference is used as a working conference where RAP techniques are utilized to resolve unagreed issues. Either party may withdraw from RAP at any time. Additionally, the Appeals Officer leading the conference may terminate the process at any point if the RAP is not facilitating the resolution of the unagreed issues. RAP does not eliminate or replace existing dispute resolution options, therefore if the parties cannot resolve their issues in RAP the taxpayer is entitled to the traditional Appeals process.

### 2.4 Settlement Practices

In order to reduce the hazards of litigation, the parties give serious consideration to settlement offers. Taxpayers usually agree to all, or a large portion, of a deficiency in exchange for an IRS concession of the penalties.

#### a) Types of Settlements

Settlement at Appeals can be characterized as mutual concession settlements, split issue settlements, nuisance value settlements (the last of which are not permitted under IRS policy); or partial settlements.

- i. Mutual Concession Settlements. Cases involving concessions by both the government and the taxpayer for the purpose of the settlement, where is substantial uncertainty in event of litigation as to how the courts would interpret and apply the law, or as to what facts the courts would find.
- ii. Split Issue Settlements. Cases involving mutual concession settlement of an issue that, if litigated, would result in a decision totally for or against the taxpayer. A split issue settlement is based on a percentage or stipulated amount of the tax in controversy, and is to be used by Appeals Officers when no other method of settlement is appropriate.
- iii. Nuisance Value Settlements. Nuisance value is any concession made solely to eliminate the inconvenience or cost of further negotiations or litigation and is unrelated to the merits of the issue.

- iv. Partial Settlements. If resolution of all issues in a case cannot be achieved, the Appeals Officer is supposed to reach agreement with taxpayer on any issues susceptible of settlement.

- b) Programs

In 2003, the IRS made permanent the LMSB Fast Track Dispute Resolution Pilot Program instituted in 2001, which was a joint effort between the then LMSB, now LB&I, Operating Division and Appeals. The optional program is available to business under LB&I jurisdiction that have unagreed issues in at least one open year under examination.

One of the options offered by LB&I Fast Track is Fast Track Settlement (“FTS”), in which an Appeals Team Case Leader facilitates communications to help the taxpayer and LB&I resolve factual and legal issues, taking into account Appeals’ assessment of the hazards of litigation. The goal under the program is to reach settlement in 120 days or less, while the case is still under the jurisdiction of LB&I Compliance.

### **3. Technics to avoid litigation in tax matters: technical inquiries**

In the United States the Department of Treasury authorizes the American Tax Agency (Internal Revenue Service) to issue interpretive resolutions of the tax rules. The category of consulting resolutions is included in the tax administration.

#### *3.1 Revenue Ruling (IRS Tax Resolution)*

- a) Concept

A Revenue Ruling is a resolution made by an American Tax Agency (Internal Revenue Service, IRS hereinafter), in which contains an interpretation of the IRS on how to apply the law to specific facts.

It is an instrument of interpretation used by the IRS that has primary value of interpreter of the Law and it has a result an interpretation of the substantive regulations, so that it can be applied to specific situations<sup>68</sup>.

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<sup>68</sup>See as very specific selected biography on the subject:

- GAIL LEVIN RICHMOND, *Federal Tax Research*. Sixth edition. University Text Book Series. New York, Foundation Press, 2002, pp. 135 y ss.

- ROBERT L. GARDNER and DAVE N. STEWART, CPA, *Tax Research Techniques*, Ed. AICPA (American Institute of Certified Public Accounts), 4 ed. 1993, New York, p. 91

From the information previously mentioned, the following should be emphasized:

- i. It is about the resolutions that serve to interpret IRS tax rules, whether it is laws, status, acts or regulations.
- ii. These interpretive resolutions only clarify Substantive Resolutions whose application to a specific case is not clear. Note: In the event of interpretation rules treated on tax procedures and interpretation of adjectives aspects, we referred them as Revenue Procedures.
- iii. The "Revenue Ruling" is designed to resolve situations that have not been adequately addressed by the Code (IRC) and the IRS feels that you need to discuss the problem according to their interpretation of the Code and draw a solution<sup>69</sup>. And so the IRS takes its interpretation so that the tax rules can be applied. In fact, the function of interpreting tax rules to be applied is an obligation that imposes the IRS Tax Code, as we shall see.

In reality, the Revenue Ruling is tax consulting with public interest and therefore can be applied by most taxpayers in the same situation.

Meaning, they are official answers given by the IRS on taxpayers' questions concerning the consequences of a proposed transaction.

If in IRS' opinion the answer is significant to be generally applied, the essence of this can be published in the form of Revenue Ruling, so that may also be apply to a larger number of taxpayers who are also in the same situation. You should be very careful and not disclose the identity of the taxpayer.

## b) Terminological Note

There are three types of inquiries that should be discussed:

1. *Revenue Ruling*: It is when the Tax Agency (authorities) issued a response to the inquiry made by taxpayers, but it is officially published if the IRS believes it has a general interest.

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- RAY M. SOMMERFELD, CPA & G. FRED STREULING, CPA. *Tax Research Techniques*, 2 EDITION, published by the American Institute of Certified Public Accountants, 1981, p, 91;

- WILLIAM A. RAABE, GERALD E., WHITTENBURG, JOHN C. BOST. *West's Federal Tax Research*, 4 ed., South/Western. College Publishing, 1997, St. Paul, MN 55164-0526.

- Douglas A. Kahn, Jeffrey H. Kahn, *Federal Income Tax*, Fifth ed. 2005, ed. Thompons, New York, p. 10 y ss.

- *Research in Federal taxation*, Prentice- Hall, Inc. Englewood Cliffs, NewYersey 07632, 15b ed. USA, 1984, pp.14 y ss.

<sup>69</sup> CHRISTOPHER C. DYKES, *Legal Research Guides*, Volume 55, *Federal Income Tax Law*, Ed. William S. Hein & Co., Inc. Buffalo, New York, 2010, p. 28

2. *Revenue Procedure*: it is also a response from the Tax Agency (authorities) that is published following the same guidelines as the Revenue Ruling, but the content is on procedural issues.
3. *Letters Ruling*: They are also responses to the inquiries made by taxpayers, but in the case that the inquiry only applies to a certain taxpayer.

c) Legal Sources: Primary Rules of tax law and juridical effectiveness<sup>70</sup>.

- a) Constitution
- b) Laws: Act, Statutory. The Internal Revenue Code is a regulatory form of the Congress, but since it is very complex and specific information, it often requires interpretation.
- c) Department of Treasury Regulations

There are two classes of interpretation from the Department of Treasury: Regulations (implementing law regulations) and interpretative rules. Both the legislative and interpretative regulations are two important source of Administrative law (Primary Source), though legislative regulations have a major legal impact<sup>71</sup>. There is a regulation in terms of their level of involvement and legal effect.

c.1. Regulations:

Congress has delegated a part of its “lawmaking authorities” to the Secretary of the Treasury<sup>72</sup>. The regulations are binding as laws. It forces “erga omnes”. sec. 6662 (b) (1) provides that international disregard of any Treasury regulation will entail an additional 20 percent of ay tax not paid, even if there had been no intent to defraud.

In the case of the legislative regulations have been binding force similar to the force of law (statutory or Law Act.)

c.2. IRS Interpretative Regulations

Section 7805 (a) of the IRC expressly provides that the Secretary (Department of Treasury) prescribe all rules and regulations necessary to enforce this title. His pronouncements are called "Interpretative Regulations". In the classification are included the Revenue Ruling, Procedure Ruling and Letter Private Ruling.

In the case of the Revenue Ruling, once published, they are implemented in the event that the act in question that affects the taxpayer is materially identical to the Revenue Ruling. According the Revenue Procedure 89-14, Revenue Rulings have less power than Treasury Regulations<sup>73</sup>, because they are only created to cover specific situations. Therefore, these

<sup>70</sup> GAIL LEVIN RICHMOND, *Federal Tax Research*. Sixth edition, ..., ob., cit., pp. 106 y ss.

<sup>71</sup> C. MARSHALL, KEVIN M. MISIEWICZ, JAMES E. PARKER. *Programmed Guide to Tax Research*, edition I, College Division South-Western Publishing Co, 193, Cincinnati, Ohio, pp. 16 y ss.

<sup>72</sup> Puede consultarse entre otros: C. MARSHALL, KEVIN M. MISIEWICZ, JAMES E. PARKER. *Programmed Guide to Tax Research*, edition I, College Division South-Western Publishing Co, 193, Cincinnati, Ohio, p. 16.

<sup>73</sup> L. GARDNER and DAVE N. STEWART, CPA, *Tax Research Techniques*, Ed. AICPA, ..., ob., cit., p. 95

proven revenue rulings are valid if the precedent case in question is substantially identical<sup>74</sup>. Meaning, the Revenue Ruling is applied if the facts in the taxpayer's case are identical to those of the administrative decision.

If the IRS revokes or modifies a previous Revenue Ruling, it can be applied retroactively to the taxpayer who initially requested the rule. Therefore, it is appropriate to refer to the current RULING Volume of Mertens Law of Federal Income Taxation to know whether a Revenue Ruling is in effect or not.

d) Form of Revenue Ruling and Publication<sup>75</sup>.

They are published in the following matter:

- a) Internal Revenue Bulletin (weekly). It is published weekly. This is a collection of inquiries that are published weekly.
- b) B) Cumulative Bulletin (semiannual). It is published every six months. Such inquiries are published later on the Cumulative Bulletin. A biannual publication of the Government Printing Office.

The following is the usual way of citing Revenue Rulings:

Rev. Rul. 79-194, 1979-26, I.R.B. 13

Or

Rev. Rul. 79-194, 1979-I, C.B. 145

Rev. Rul.: Revenue Ruling (short version)

Release Number: 194 (in reference to the inquiry no. 194)

Publication Year: 1979

Week in which it was published: 26

Bulletin: IRB Internal Revenue Bulletin

Page: 13

<sup>74</sup> ROBERT L. GARDNER, DAVE N. STEWART, *Tax research techniques*, ob., cit., p. 95

<sup>75</sup> - ROBERT L. GARDNER and DAVE N. STEWART, CPA, *Tax Research Techniques*, Ed. AICPA (American Institute of Certified Public Accounts), 4 ed. 1993, New York, p. 91

- RAY M. SOMMERFELD, CPA & G. FRED STREULING, CPA. *Tax Research Techniques*, 2 EDITION, published by the American Institute of Certified Public Accountants, 1981, p. 91-92.

C. MARSHALL, KEVIN M. MISIEWICZ, JAMES E. PARKER. *Programmed Guide to Tax Research*, edition I, College Division South-Western Publishing Co, 193, Cincinnati, Ohio, p. 18.

Rev. Rul.: Revenue Ruling (short version)  
Release Number: 194 (in reference to the inquiry no. 194)  
Publication Year: 1979  
Semester Published: I  
Bulletin: C.B. Cumulative Bulletin  
Page: 145

e) Background<sup>76</sup>

Rulings before 1953, the IRS appeared under different titles such as: -Appeals and Revenue Memorandums (ARM); -Internal Revenue Mimeographs (I.R.-Mim); / Tax Board memoranda (T.B.M.)

While some of these rules still have potential value, the IRS announcement followed a review program "rulings". Currently The Federal Tax Coordinator 2d, published by the Research Institute of America (RIA), provides the main list of Revenue Ruling and Procedures that are effective. Additionally, this fiscal service includes a separate list of inquiries or revoked and also the replaced inquiries and procedures.

f) Revenue Ruling Structures<sup>77</sup>

- a) Issue. Statement of the material that is concerned
- b) Facts. Facts based on the Revenue Ruling
- c) Law and Analysis. The IRS applied the appropriate law on the ruling in questions based on the Ruling Revenue
- d) Holding. How the IRS will address the issue from the resolution

g) Revenue Procedures

They are interpretations of the Department of Treasury that closely resemble the Revenue Ruling but the primary difference is they affect the procedural issues and not the substantive issues.

They seem similar in their format of publication because it is exactly the same.

Contain IRS administrative practice. For example, they cite the depreciation guidelines published in Revenue Ruling 62-21 and 65-13<sup>78</sup>.

<sup>76</sup> ROBERT L. GARDNER, DAVE N. STEWART, *Tax research...*, ob., cit., 94.;

<sup>77</sup> CHRISTOPHER C. DYKES, *Legal Research Guides*, Volume 55, *Federal Income Tax Law*, ob., cit., p. 28; WILLIAM A. RAABE, GERALD E., WHITTENBURG, JOHN C. BOST. *West's Federal Tax Research*, 4 ed.,..., ob., cit., p. 93.

Difference between Revenue Ruling and Procedure Ruling<sup>79</sup>:

- a) Revenue Ruling and Procedure Ruling both are issued only the National Office and both are for the information and guidance of the taxpayer, service personnel and other interested person. Both rulings use numerical series.
- b) Generally, a Revenue Ruling establishes a particular service, while Procedure Ruling establishes rules of tax procedural rules. For example, a Revenue Ruling will determine whether a particular expense is deductible or not, if taxpayers can deduct certain car expenses (substantive law), while Procedure Ruling establishes a system as to how to apply such deductible, on mileage or procedures deductibility rules or objective, rather than determine the actual operating costs.
- c) The Revenue Ruling is used to interpret the law according to a particular tax issue. The Procedure Ruling is used to publish the declaration guidelines or general information.
- d) The Revenue Ruling and the Procedure Ruling included on the bulletin, have no enforcement and effect of the regulations issued by the Department of Treasury, but may be used as precedents.

### 3.2 Letters Private Rulings (equivalent to the tax inquiries).

Its literal translation is difficult. It could be: critical reports, resolutions on private inquiries.

The Private Letters are submitted directly to the taxpayers, which formally requested advice regarding the fiscal consequences on a specific economic transaction<sup>80</sup>.

Such rules are made so that the taxpayers ensure their tax planning before begin a transaction and subsequent self-assessment tax.

Its application and judicial enforcement is limited only to the taxpayer who requested the consultation<sup>81</sup>.

Moreover, the IRS does not use private ruling as a precedent for other cases, but they are used since October 31, 1976 as a reference to avoid fines and penalties substantially<sup>82</sup>.

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<sup>78</sup>RAY M. SOMMERFELD, CPA & G. FRED STREULING, CPA. *Tax Research Techniques*, ob., cit., p. 93.

<sup>79</sup>Guide to Understanding the Differences among Official IRS Documents. <http://www.unclefed.com/Tax-Bulls/OfficialDocsExp.html>

<sup>80</sup>ROBERT L. GARDNER, DAVE N. STEWART, *Tax research techniques*, ob., cit., p. 95.

<sup>81</sup>GAIL LEVIN RICHMOND, *Federal Tax Research*. Sixth edition. University Text Book Series, ob., cit., p. 144; WILLIAM A. RAABE, GERALD E., WHITTENBURG, JOHN C. BOST. *West's Federal Tax Research*, 4 ed.,..., ob., cit., p. 97.

144; WILLIAM A. RAABE, GERALD E., WHITTENBURG, JOHN C. BOST. *West's Federal Tax Research*, 4 ed.,..., ob., cit., p. 97.<sup>82</sup>Ibidem.

Some *Private Letters Ruling* are formally published as Revenue Ruling (those with more general interest), but most are available to the public only pursuant the IRC Section 6110 disclosure procedure<sup>83</sup>.

Meaning, the TRA'76 inserted in Section 6110 on the IRC allows public disclosure of the Private Letters Issue by the IRS as of October 31, 1976<sup>84</sup>.

#### **IV. TAX JURISDICTION (FEDERAL COURTS)**

The annual reporting of income tax by millions of Americans is mandated by the sixteenth amendment adopted in 1913.<sup>85</sup> Unlike many Tax systems throughout the world, ours is based on voluntary compliance through self-assessment. But what happens when April 15 passes and you have a dispute with the Internal Revenue Service (hereinafter IRS) over how much income tax you owe for the previous year? In this scenario taxpayers have several choices regarding which forum they can contest their grievances. This takes place after a post audit tax assessment has been done, the taxpayer has gone through the internal appeal process of the IRS, and the taxpayer has received their Notice of Deficiency also known as the 90-day letter.

This first section will provide a general overview of the differences and advantages between the forums a taxpayer can choose to litigate their tax disputes in: **(I) Tax Court** and **(II) Federal District Courts and the U.S. Court of Federal Claims**.

##### **1. Tax Court**

The first option available is the Tax Court, which is the only forum that provides deficiency. What this means is that the taxpayer is not required to pay the disputed amount before being able to file suit.<sup>86</sup> This results in the Tax Court's having the largest dockets concerning tax disputes.<sup>87</sup> As most indigent taxpayers cannot afford to pay the deficiency along with the attorneys and court fees associated with litigation in the other courts. But, because of this disparity in the amount of cases filed between all three courts and the fact that many litigants in tax court are pro se (taxpayer representing him or herself without counsel) statistics show that taxpayers are more like to lose in Tax Court.<sup>88</sup>

One of the ways to alleviate this large number of litigants in Tax Court is to give the option to those who have deficiencies of \$50,000 or less for any taxable year to go before a special trial

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<sup>83</sup> GAIL LEVIN RICHMOND, *Federal Tax Research*. Sixth edition. University Text Book Series, ob., cit., p. 144.

<sup>84</sup> ROBERT L. GARDNER, DAVE N. STEWART, *Tax research techniques*, ob., cit., p. 96.

<sup>85</sup> U.S. Const. amend. XVI

<sup>86</sup> Camilla E. Watson, *Tax Procedure and Tax Fraud in a Nutshell* 258 (W. Academic 4th ed. 2012).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

judge who handles small tax cases also known as “S” cases.<sup>89</sup> These are very informal procedures with relaxed rules. For example “any evidence deemed “to have probative value would be admissible”.<sup>90</sup> Additionally briefs and oral arguments are not required and the filing fee is only \$60.<sup>91</sup> This provides great incentive to indigent taxpayers who cannot afford any representation and could present their own arguments with little to no legal training. The process is a quick one with trial dates issued generally within six months of filing, and decisions rendered in less than a year.<sup>92</sup>

However, there are some substantial drawbacks such as there is no right to appeal since all decisions are final, these decisions do not create precedent, there are jurisdictional limits, and there is a low chance of winning.<sup>93</sup> If the disputed amount is more than \$50,000.00 than the Tax Court will not assign the case to a special trial judge as a small tax case. Some of the things that differentiate these cases from “S” cases is that they do create precedent and could be appealed to the U.S. Court of Appeals.<sup>94</sup> Because there are no jury trials in Tax Court both the Federal Rules of Civil Procedure and of Evidence differ from other federal courts.<sup>95</sup> One major difference is when it comes to discovery rules. Tax Court has a strict requirement that the parties “attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures.”<sup>96</sup>

## 2. U.S. District Courts and the U.S. Court of Federal Claims

Both U.S. district courts and the U.S. Court of Federal claims share concurrent jurisdiction as they both view refund cases only.<sup>97</sup> This means that the taxpayer must first pay the disputed tax amount in full, also known as the “full payment” rule then file suit against the United States for recovery regardless of the claims size.<sup>98</sup> The case must be filed within three years of filing the original return or within two years of payment, whichever comes later.<sup>99</sup> One major difference found between these two courts is that in Federal Claims Court there is no trial by jury making it similar to Tax Court in that regards.<sup>100</sup> Furthermore, a large number of cases in Federal Claims Courts are tried in Washington D.C. where the sixteen judges reside, but for convenience purposes these judges can travel around the country.<sup>101</sup> If a taxpayer files in Federal District Court he will not have to worry about the venue, as there are district courts

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<sup>89</sup> *Id* at 270.

<sup>90</sup> *Id* at 271.

<sup>91</sup> *Id*.

<sup>92</sup> Robert M. Howard, *Getting a Poor Return* 23 (SUNY Press, 2010).

<sup>93</sup> *Id*.

<sup>94</sup> *Id*.

<sup>95</sup> Camilla E. Watson, *Tax Procedure and Tax Fraud in a Nutshell* 258-259 (W. Academic 4th ed. 2012).

<sup>96</sup> *Id*. TAX CT Rule 70(a)(1)

<sup>97</sup> Camilla E. Watson, *Tax Procedure and Tax Fraud in a Nutshell* 278 (W. Academic 4th ed. 2012).

<sup>98</sup> *Id* at 274-275.

<sup>99</sup> Gerald A. Kafka, *Choice Of Forum In Federal Civil Tax Litigation*, *The Practical Tax Lawyer*, Winter 2011, at 62.

<sup>100</sup> Camilla E. Watson, *Tax Procedure and Tax Fraud in a Nutshell* 275 (W. Academic 4th ed. 2012).

<sup>101</sup> Robert M. Howard, *Getting a Poor Return* 23 (SUNY Press, 2010).

located through out all fifty states. Because the district courts have equity power which means they can order certain behavior the IRS can use its subpoena power in order to get information in the possession of third parties such as a bank.<sup>102</sup>

Since the United States is a common law nation one of the essential factors taxpayers must consider when choosing the forum to litigate tax disputes is precedent or prior rulings. Decisions by the Circuit Court of Appeals are binding to the District courts and to the Tax Court by virtue of the Golsen rule. This rule was established in 1970 where the Tax Court decided to end the uncertainty of which precedent it should follow, stating that from that point forward it would follow Court of Appeal decisions.<sup>103</sup>

### 3. Court of Federal Claims

The Court of Federal Claims follows the appellate decisions from the Federal Circuit Court of Appeals and not the Circuit Court of Appeals.<sup>104</sup> What this means is that parties can look at cases with related fact patterns, questions of law, and or both and choose the forum that is most favorable. There is also the so-called Tax Court Trap where by the IRS can determine the taxpayer owes additional tax identified after the notice of deficiency was issued through the investigation attached to the litigation.<sup>105</sup> There is a famous case where the taxpayer was disputing a \$15,997 deficiency amount in Tax Court and after further investigation the IRS amended its answer in order to raise the underpayment to more than \$1 million.<sup>106</sup> In Federal District Court the government can make a determination that additional deficiencies exist but only to reduce the amount of refund the government may pay to the taxpayer, but never to increase the net amount the taxpayer had to pay in income tax for that taxable year.<sup>107</sup>

## V. TAX FRAUD

Within the IRS there is a specific division referred to as the IRS Criminal Investigation Unit (hereinafter IRS-CID), which is the “only federal agency that can investigate potential criminal violations of the Internal Revenue Code”.<sup>108</sup> Part of the public policy that drives the IRS to have this sort of investigative arm is the deterrence it could provide through famous tax evasion cases such as the one for notorious gangster Al-Capone. There are several ways in which these investigations can begin. Every civil examination or audit could be a potential criminal investigation but historically approximately 15-20% of the cases the IRS-CID unit

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<sup>102</sup> *Id* at 24.

<sup>103</sup> *Golsen v. Commissioner of Internal Revenue Service*, 54 T.C. 742, 757 (1970).

<sup>104</sup> Camilla E. Watson, *Tax Procedure and Tax Fraud in a Nutshell* 280-281 (W. Academic 4th ed. 2012).

<sup>105</sup> *Id* at 285

<sup>106</sup> *Raskob v. Commissioner*, 37 B.T.A. 1283, 1284 (1938).

<sup>107</sup> Camilla E. Watson, *Tax Procedure and Tax Fraud in a Nutshell* 280-281 (W. Academic 4th ed. 2012).

<sup>108</sup> IRS, *Criminal Investigation (CI) At-a-Glance* (Sep. 19, 2014, 2:26 PM), [http://www.irs.gov/uac/Criminal-Investigation-\(CI\)-At-a-Glance](http://www.irs.gov/uac/Criminal-Investigation-(CI)-At-a-Glance)

receives are obtained in this manner.<sup>109</sup> If a revenue agent conducting civil tax audits identifies forms of fraud, such as omitted income, impermissible deductions, and willfulness evasion he may then transfer the case to a special agent from CID.<sup>110</sup> Other methods include the targeting of taxpayer who hold accounts in known offshore tax havens, reports from financial institutions where the taxpayer has had substantial cash activity of over \$10,000 per transaction, and informants.<sup>111</sup>

There are three key methods the IRS-CID uses in order to determine and prove that the taxpayer has wrongly reported or neglected to report his taxable income. First is the simplest one the direct method approach. Here, testimonial or documentary evidence is provided such as payroll records, W-2 and 1099 forms to establish the difference between amounts received and what was actually reported.<sup>112</sup> Second is the more difficult to establish net worth approach. The investigators have to determine the taxpayer's net worth with reasonable certainty and then continue to show how there were increases to his net worth for the year in question that resulted in a substantial excess to his reported taxable income.<sup>113</sup> The third method is expenditures, which are similar to the net worth approach, but it deals primarily with consumer goods. Finally, statements from bank accounts regarding deposits and mandatory reports such as Currency Transaction Reports (CTR) are used in combination with all methods for investigators to be effective.<sup>114</sup>

Prosecution is not sought after as a result of every investigation the IRS-CID conducts. The decision to prosecute must be reviewed by attorneys of the Chief Counsel's Office, Criminal Section of the Justice Department and by the U.S. attorney.<sup>115</sup> Highly profiled officials and celebrities can be principal targets due to the publicity the cases would receive and the opportunity for deterrence. Outrageous conduct and substantial amounts of tax debt can also lead to recommendation for prosecution.<sup>116</sup> Other considerations can include the mental or physical health of the taxpayer along with evidence of how willful was the fraud or evasion.

Similar to other areas of the criminal justice sphere the IRS and the Tax Division of the Justice Department handle many prosecutions through a plea bargain system. The IRS-CID unit works in conjunction with the Chief Counsel Office to expedite plea negotiations with taxpayers who meet a certain criteria.<sup>117</sup> This avoids lengthy investigations that save time, and funding.<sup>118</sup> But not every case qualifies, as there are specific strict standards for this expedited plea program. Those are found in the Internal Revenue Manual<sup>119</sup>

a) Involve legal source income

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109 Center for Continuing Legal Education (American Bar Association) et al., *The 28th Annual National Institute on Criminal Tax Fraud and the First National Institute on Tax Controversy* A3 (2011).

110 *Id.* at A-17.

111 *Id.* at A-3-A-4.

112 *Id.* at A-15.

113 *Id.*

114 *Id.* at A-16.

115 Camilla E. Watson, *Tax Procedure and Tax Fraud in a Nutshell* 323 (W. Academic 4th ed. 2012).

116 *Id.* at 325.

117 *Id.* at 329.

118 *Id.*

119 2007 WL 8444059, 1

- b) Establish culpability for the violations charged;
- c) Include the most significant violation;
- d) Consider the totality of the fraud committed by the taxpayer; and
- e) Not reduce tax return felony counts to misdemeanors.

Because of collateral estoppel reasons *nolo contendere* pleas where the taxpayer does not accept or deny any responsibility are not permitted.<sup>120</sup> This is because nothing can stop the taxpayer from challenging the civil penalties for fraud if he pleads no contest.<sup>121</sup>

## VI. IMMIGRATION LAW AND PROCEDURES

The Immigration Laws in the United States are regulated by the three branches of the Federal government: the legislature, executive, and judiciary. In the legislative area, Congress has plenary authority to control immigration which extends from the control of aliens within the United States borders to the implementation of uniform rules of naturalization.<sup>122</sup> The Congress has also delegated power to the executive branch to act through the Attorney General to regulate immigration.<sup>123</sup> In addition, the executive branch can also bar admission based on foreign policy.<sup>124</sup> However, the authority delegated to the executive branch is subject to judicial review as to avoid abuse of discretion in cases such as deportation.<sup>125</sup>

This section will provide with a general overview of the procedures the United States government has implemented to review unfavorable immigration decisions: **(I) Administrative Review** and **(II) Judicial Review**.

### 1. Administrative Review

Administrative review takes place as a way to review unfavorable immigration decisions made by the officers in the Department of Justice (DOJ) and in the Department of Homeland Security (DHS). The DOJ manages the functions of the Executive Office of Immigration Review (EOIR) and the DHS manages the services and benefit functions of the United States Citizenship and Immigration Services (USCIS) and the two immigration enforcement units: Immigration and Custom Enforcement (ICE) and the Custom and Border Protection (CBP).<sup>126</sup>

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<sup>120</sup> Camilla E. Watson, *Tax Procedure and Tax Fraud in a Nutshell* 331 (W. Academic 4th ed. 2012).

<sup>121</sup> *Id.*

<sup>122</sup> AUSTIN T. FRAGOMEN, JR., & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE* 1-4 (3d ed. 1994).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1-5, 1-6.

<sup>126</sup> KEVIN R. JOHNSON ET AL., *UNDERSTANDING IMMIGRATION LAW* 181 (LEXIS NEXIS 2009).

The USCIS is responsible for the administration of immigration and naturalization functions, and for the decisions of immigration and asylum officers and regional service centers.<sup>127</sup> The USCIS has also an appellate body: the Administrative Appeals (AAO) which reviews decisions of regional officers regarding different types of petitions such as: permanent residence, nonimmigrant status.<sup>128</sup> Other appeals are conducted by Immigration Judges under the EOIR. Certain types of appeals such as aliens in removal proceedings are heard by the Board of Immigration Appeals (BIA).<sup>129</sup>

The BIA has also appellate jurisdiction over decisions by immigration officers on removal and cancellation of removal, waivers of inadmissibility, and asylum cases.<sup>130</sup> For instance, the following is an example of the procedure of how a removal case goes from an immigration officer to the BIA.

a) Case in Removal Proceeding

i. Process Before Administrative Review:

In cases such as removal (deportation) proceedings, immigration officers make the initial determination as to whether an individual from a foreign country (an alien) should be allowed to stay in the United States or deported.<sup>131</sup> These immigration officers are responsible for the court proceedings and have the authority to act independently in deciding cases before them.<sup>132</sup> They can also grant relief from removal.<sup>133</sup>

Therefore, in removal proceedings, the immigration officers can decide on:

- The alien's deportability;<sup>134</sup>
- Whether the alien is inadmissible under the law;
- Whether an alien can avoid deportation by accepting voluntary departure;
- Whether an alien qualifies for asylum, cancellation of removal, adjustment of status or any other form of relief.

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> USCIS POLICY MANUAL, VOLUME 12: CITIZENSHIP & NATURALIZATION, PART B: NATURALIZATION EXAMINATION, CHAPTER 6: USCIS HEARING AND JUDICIAL REVIEW (Jan. 07, 2013), <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter6.html>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

The immigration officers' decision is administratively final; however, an alien can appeal such decision to the Board of Immigration Appeals (BIA).<sup>135</sup>

b) Administrative Review:

The Board of Immigration Appeals (BIA) has appellate jurisdiction over the immigration officers decisions and other decisions made by immigration officers from the Department of Homeland Security (DHS).<sup>136</sup> In addition, the BIA can also hear cases between the United States Government and an alien, a citizen or business firm.<sup>137</sup> The BIA is the highest administrative body for interpreting and applying immigration laws.<sup>138</sup> The BIA decides appeals mainly by reviewing the documents, instead of hearing oral arguments.<sup>139</sup> The majority of the cases presented before the BIA include but are not limited to the following:

- i. Exclusion of aliens seeking admission to the United States.<sup>140</sup>
- ii. Petition to classify the status of alien relative for the issuance of preference immigrant visas.
- iii. Fines imposed upon carriers for the violation of immigration laws
- iv. Motion for reopening and reconsideration of decisions previously rendered.

Once a case is presented for appellate review before the BIA, the BIA can:

- v. Dismiss an appeal.<sup>141</sup>
- vi. Affirm an immigration judge's decision.

However, even when the BIA has final review of a case, the Homeland Security Act of 2002 amendments, give the Attorney General authority to all questions of law in immigration cases.<sup>142</sup> Therefore, the Attorney General can exercise final review over BIA's decisions.

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<sup>135</sup> *Id.*

<sup>136</sup> THE UNITED STATES DEPARTMENT OF JUSTICE. BOARD OF IMMIGRATION APPEAL (Nov. 2011), <http://www.justice.gov/eoir/biainfo.htm>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 188 (LEXIS NEXIS 2009).

<sup>142</sup> *Id.*

## 2. Judicial Review

Judicial review of immigration decisions is not “widely available due to 1996 and 2005 amendments to the INA.”<sup>143</sup> There are a wide variety of immigration cases which are barred from judicial review such as: some specific cases dealing with certain criminal offenses, cases of discretionary decisions by immigration judges regarding waivers of inadmissibility, adjustment of status, and relief from removal.<sup>144</sup> However, federal court have a crucial role in reviewing removal orders among other immigration decisions.

For instance, INA section 242(a)(1), states that the petition for review in the court of appeals is the sole procedure for reviewing removal orders.<sup>145</sup> Section 242(d)(1) also states that “a court may review a final order of removal only if ... the alien has exhausted all administrative remedies available to the alien as of right.”<sup>146</sup>

Aliens who are being lawfully admitted, but have extended their authorized period of stay without permission and non-citizens who are in the United States without being lawfully admitted are subject to removal proceedings and entitled to removal hearing.<sup>147</sup>

### a) Alien in Removal Proceedings

#### i. Process Before Judicial Review:

The process is as follows:

- ii. A Notice of Appear is filed with an immigration court.<sup>148</sup>
- iii. Then, an official must make a prima facie case showing the person’s removability.
- iv. The alien must give his current personal information, including address, and phone number to ICE. The alien is brought before an immigration judge (this judge have the function of an investigator, prosecutor and judge).
- v. The judge will then determine whether the person is in fact removable.
- vi. Lastly, the judge can offer the alien a form of relief.

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<sup>143</sup> *Id.* at 190.

<sup>144</sup> *Id.*

<sup>145</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES. INA: ACT 242 – JUDICIAL REVIEW OF ORDERS OF REMOVAL. Sections 242(a)(1) and 242(d)(1) <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html> (last visited Sep. 15, 2014).

<sup>146</sup> *Id.*

<sup>147</sup> KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 220 (LEXIS NEXIS 2009).

<sup>148</sup> DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE: IN A NUTSHELL 272 (THOMSON & WEST 5<sup>th</sup> ed. 2005).

b) Judicial Review:

The applicant then can appeal his final order of removal by requesting judicial review.

- i. The petition for review for non-citizens must be filed within 30 days after receiving a final administrative order of removal.<sup>149</sup>
- ii. Judicial review of the final order of removal is issued.

There are other cases which are subject to judicial review such as the denial of an alien's application for naturalization. The following is an example of the procedure of how a denial of an alien's application for naturalization case goes from a USCIS hearing to being reviewed by a United States district court.

b) Denial of Naturalization Application

i. Process Before Judicial Review:

If an applicant's naturalization application is denied, that applicant may:

- Request a USCIS hearing before an officer.<sup>150</sup>
- The request with USCIS must be done within 30 days after the applicant's receipt of the denial.
- Once the request is received, USCIS schedules the hearing within 180 days.
- The USCIS hearing officer will then conduct a review of the naturalization application which can be: a *de novo* review (a new and full review) or a review based on the complexity of the issues or the necessity of further examination.

Upon completion of the hearing, the officer has the authority to:

- Affirm and sustained the denial in the original decision.<sup>151</sup>
- Deny the application based on newly discovered evidence of inadmissibility.
- Reverse and deny the original decision and approve the naturalization application.

ii. Judicial Review:

If the USCIS officer denies the applicant's naturalization application following the applicant's hearing, that applicant may:

- Request judicial review before a United States district court to review the denial of his naturalization application.<sup>152</sup>

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<sup>149</sup> U.S. CITIZENSHIP AND IMMIGRATION SERVICES. INA: ACT 242 – JUDICIAL REVIEW OF ORDERS OF REMOVAL. Sections 242 5(b)(1) <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html> (last visited Sep. 15, 2014).

<sup>150</sup> USCIS POLICY MANUAL, VOLUME 12: CITIZENSHIP & NATURALIZATION, PART B: NATURALIZATION EXAMINATION, CHAPTER 6: USCIS HEARING AND JUDICIAL REVIEW (Jan. 07, 2013), <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartB-Chapter6.html>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

- The applicant must file the request before the corresponding United States District Court which is the court having jurisdiction over the applicant's geographical area of residency.

The United States District Court will then review the case *de novo* and will make new findings of facts and conclusions.<sup>153</sup>

In the United States the review of unfavorable immigration decisions is available through Administrative and Judicial Review. Depending on the case, an alien can petition to review the denial of his application, or his deportability order to the BIA. However, there are cases where an alien can petition for judicial review over the BIA's decision.

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<sup>153</sup> *Id.*

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